

INTERNATIONAL COURT OF APPEAL (I.C.A.)

of the

FEDERATION INTERNATIONALE DE L'AUTOMOBILE

**Appeal brought by the
Motor Sports Association (MSA)
on behalf of the British Automobile Racing Club (BARC) in its capacity of
Organiser of the 2009 Formula BMW Europe Series
against the Decision of the Spanish National Court of Appeal
of 21 September 2009,
concerning the 2009 Formula BMW Europe Series**

Case 23/2009

Hearing of Thursday 5 November 2009 in Paris

The FIA INTERNATIONAL COURT OF APPEAL (“the Court”), comprised of Mr Thierry JULLIARD, who was elected President, Mr Erich SEDELMAYER (Austria), and Mr Philippe ROBERTI DE WINGHE (Belgium), met in Paris on Thursday 5 November 2009 at the Fédération Internationale de l'Automobile, 8 place de la Concorde, 75008 Paris.

Ruling on the appeal brought by the Motor Sports Association (MSA) on behalf of the British Automobile Racing Club (BARC) in its capacity as Organiser of the 2009 Formula BMW Europe Series (“the Appellant”), against the Decision of the National Court of Appeal of the Real Federación Española de Automovilismo (RFEA) of 21 September 2009 setting aside the Decision of the Panel of Stewards dated 20 August 2009, which had excluded competitor Mücke Motorsport GmbH (cars N° 15, 16, and 17) from the next meeting in the 2009 Formula BMW Europe Series (held in Valencia on 21-23 August 2009), imposed a fine of €1,000 for each of its three cars, and requested the matter to be considered by the Organising Committee, the Court has heard the statements and examined the arguments of the MSA, of Mücke Motorsport, of the RFEA and of the FIA.

Attending the above hearing were:

on behalf of the MSA and BARC:

Mr Simon Taylor (Solicitor)
Mr Tony Scott-Andrews (Permanent and Chief Steward,
Formula BMW Europe 2009 Series)
Mr Trevor Johnson (Chief Scrutineer, Formula BMW
Europe 2009 Series)
Ms Adrienne Watson (Chairperson of the Organising
Committee, Formula BMW Europe 2009 Series)

on behalf of the DMSB and Mücke Motorsport:

Mr Matthias Feltz (Lawyer)
Mr Peter Mücke (Team Manager, Mücke Motorsports)

on behalf of the FIA:

Mr Sébastien Bernard (Head of Legal Department, FIA
Sport)

The parties presented written submissions and, at the hearing of 5 November 2009, set out oral arguments and replied to the questions put to them by the Court. The hearing took place in accordance with the adversarial principle, with the aid of simultaneous translation; no objection to any element of the simultaneous translation was raised by anyone.

REMINDER OF THE FACTS

1. Post-competition engine checks following the second race of the Formula BMW Europe Series run at the Hungaroring Circuit (Hungary) on 26 July 2009, revealed that the oil pressure of cars No. 15, 16, and 17 of competitor Mücke Motorsport was lower than normal. Upon investigation, the Chief Scrutineer found that the oil pressure relief valves of the cars in question contained springs that were not standard parts. This finding was confirmed by Klaus Neuber, Technical Manager at BMW Motorsport, who declared in a report to the Chief Scrutineer dated 3 August 2009 that testing by BMW confirmed that the springs presented different characteristics from standard springs for this engine.
2. On 5 August 2009, the Chief Scrutineer reported to the Stewards of the Meeting that the springs of cars No. 15, 16 and 17 were found not to comply with Article 5.3.1 of the Formula BMW Europe 2009 Technical Regulations, which stipulates that:

Anything that is not explicitly and expressly authorised within the documents listed within Regulation 5.2. shall be deemed a breach of the Technical Regulations. Modifications, additions, variation, tuning, or removals are only permitted if expressly allowed by these Regulations and/or approved by the Chief Scrutineer.
3. The Scrutineer's report was considered by Stewards Tony Scott-Andrews, Francisco Rodrigo Monago and Pedro Jimenez Mengod at a meeting on 20 August 2009 in Valencia in presence of the competitor's Team Manager, Mr. Lucke, and the drivers of the three cars, Messrs Christensen, Hansen and Te Braak. At the conclusion of this meeting, the Stewards decided that cars N° 15, 16, and 17 were ineligible under the Technical Regulations and were therefore excluded from the second race held at the Hungaroring. The Stewards moreover found that the competitor's behaviour had been unsporting and did not respect the spirit of the Championship and therefore imposed additional penalties by virtue of Article 3.36.5, namely: a fine of €1,000 in respect of each car, and the exclusion of Mücke Motorsport from the next event in the Series held in Valencia on 21-23 August 2009. The Stewards further requested the matter to be considered by the Organising Committee.
4. On 20 August 2009, the Organising Committee decided also to suspend competitor Mücke Motorsport from the event held in Spa-Francorchamps on 28-

30 August 2009, pursuant to Article 3.36.3 of the Formula BMW Europe 2009 Series.

5. Mücke Motorsport brought an appeal against the aforementioned Decision of the Stewards before the National Court of Appeal of the Real Federación Española de Automovilismo (RFEA), which allowed the appeal on the grounds that the Stewards lacked the required powers to take their decision (the “Contested Decision”).

PROCEDURE AND FORMS OF DECISIONS REQUESTED BY THE PARTIES

6. The Appellant lodged an appeal with the Secretariat of the ICA on 28 September 2009.
7. In its Grounds of Appeal, the Appellant contended that the Court should:
 - set aside the Contested Decision;
 - uphold the Stewards’ Decision of 20 August 2009 in its entirety;
 - in the alternative, remit the matter of technical non-conformity to the original Stewards appointed for the race at the Hungaroring.
8. The RFEA, in its submission dated 28 October 2009, requested that the Court:
 - confirm the Contested Decision;
9. The FIA, in its submission dated 30 October 2009, suggested that the Court:
 - declare the appeal admissible;
 - confirm both the Contested Decision and the Stewards’ Decision of 20 August 2009.

ADMISSIBILITY

a) Arguments of the parties

10. The Appellant and the FIA both submit that the ICA has jurisdiction in the present matter, on the grounds that organisers may bring appeals before the ICA through their ASN pursuant to Article 1, second paragraph of the ICA Rules of Procedure.
11. Mücke Motorsport argues that this Article does not grant the Appellant a right to appeal, as this provision regulates only the manner in which appeals can be filed and not the right to appeal.

12. The RFEA argues that the present appeal is not admissible given that the Appellant was not a party to case heard before its national court.

b) Conclusions of the Court

13. The Court finds that the Appellant has a direct interest in the present case, as its authority and capacity as an organiser is directly affected by the decision of the Spanish Court of Appeal. Therefore, the Appellant must be considered as sufficiently interested in this proceeding to take this appeal to the ICA.

14. Therefore, the Appellant must be granted a right of appeal in accordance with Article 1, second paragraph of the ICA Rules of Procedure (appeal lodged by an organiser, brought on its behalf by its ASN).

15. The Court further acknowledges that the appeal was filed in a timely manner and that it is in conformity with the ICA Rules of Procedure.

16. Consequently, the appeal is declared admissible.

ON THE PROCEDURE

First Plea – The Contested Decision was made outside of the time limit prescribed at Article 182 ISC

a) Arguments of the parties

17. The Appellant argues that the decision of the Spanish National Court of Appeal has been made in breach of Article 182, second paragraph of the International Sporting Code (ISC), which requires an ASN's national appeal Court to render its decision within a maximum of 30 days. The Appellant submits that this time limit was exceeded considering that the Stewards Decision was made on 20 August 2009 and the decision of the Spanish National Court of Appeal was rendered on 21 September 2009 and notified on 22 September 2009.

18. The RFEA states that the date of 21 September 2009, which appears on the judgment, is due to a simple typing error, and that the correct date of the hearing (at which the Appellant was present) and of the decision was in fact 15 September 2009.

b) Conclusions of the Court

19. The Court, ruling on the evidence before it, is convinced by the explanation given by the RFEA with regard to the date of its decision, namely that it was taken immediately after the hearing of 15 September 2009 and that the written sentence was mailed to the parties a few days later. The 30-day deadline must therefore be considered as being respected in this case.

20. Therefore, the Court dismisses the First Plea.

Second Plea – The Spanish National Court of Appeal was not competent to take the Contested Decision

a) Arguments of the parties

21. The Appellant argues that the Contested Decision should be annulled as the Spanish National Court of Appeal did not have jurisdiction to review the Contested Decision given that the Stewards' Decision of 20 August 2009 was made by the Stewards of the Hungarian meeting. Therefore, the competent court was in fact the Hungarian National Court of Appeal.

22. The RFEA argues that the Stewards' Decision of 20 August, was taken in Valencia, and that therefore this decision falls under the jurisdiction of the Spanish National Court of Appeal.

23. The FIA observes that national courts can validly rule only on decisions made in their country, by virtue of their competence set out at Article 182 ISC.

b) Conclusions of the Court

24. The Court observes that Article 182 ISC states that competitors shall have the right to appeal decisions pronounced on them by the stewards of the meeting "before the ASN of the country in which that decision has been given". The ISC therefore determines jurisdiction by reference to the location at which the decision is taken, rather than the nationality of the Stewards or any other criteria. As the decision of 20 August was made in Valencia, Spain, the Court finds it did fall within the jurisdiction of the Spanish National Court of Appeal.

25. The Court therefore dismisses the Second Plea.

ON THE SUBSTANCE

Third Plea – The Stewards who made the decision of 20 August 2009 had the power to do so

a) Arguments of the parties

26. The Appellant submits that two of the three Stewards at the meeting held in Valencia on 20 August 2009 were of Spanish origin. Nonetheless, the Appellant argues that this was a reconvened meeting of the Stewards of the Hungarian meeting. The Appellant argues that Mr Scott-Andrews, the permanent Chairman of the Stewards, validly used the powers conferred upon him by Article 141 ISC to appoint one or more substitute Stewards to replace the original Stewards of the Hungarian meeting for the reconvened meeting held

in Valencia. This was done with the written consent of the Hungarian ASN and the two Hungarian Stewards, and with the full knowledge and agreement of the Spanish ASN. Therefore, it is the Appellant's submission that the Stewards' meeting of 20 August was a properly convened meeting of the Stewards for the event held at the Hungaroring on 26 July 2009, which had the power to make the decision of 20 August.

27. The Appellant notes that no reason or explanation has been given to state which procedural rules have been breached, and that there is no basis in the ISC for finding that decisions cannot be delegated from an earlier meeting to a later meeting in the same series. The Appellant notes that such delegations are in fact common practice in international motor sports where an investigation cannot be concluded by the end of the first race meeting – this is particularly the case where technical investigations need to be completed.
28. The Appellant further argues that the fact that the hearing of 20 August was not a meeting of Spanish Stewards but of Hungarian Stewards is further evidenced by the fact that this hearing took place on the morning of 20 August 2009, before the Valencia meeting had even commenced and the body of Valencia Stewards had been formed. The Stewards Francisco Rodrigo Monago and Pedro Jimenez Mengod did not sit in their capacity as Stewards for the Valencia event, which only commenced on 21 August 2009, but in their capacity of Stewards for the Hungarian event. This is recognised by the competitor Mücke Motorsport itself in its notice of appeal, which refers to the decision of “the Stewards Formula BMW Europe 2009 Hungarian Event, circuit Budapest, race 2”.
29. The Appellant further submits that the competitor, who had full prior knowledge of the constitution of the Panel of Stewards and who fully participated in the hearing, made no representations about the Stewards' jurisdiction either before or at the meeting, in spite of having been invited to do so on two occasions. It argues that a person who submits to the jurisdiction of a decision making body (in this case the Stewards) cannot later complain that such body has no jurisdiction. In addition, the appointment of substitute Stewards did not cause any prejudice against the rights of the competitor or create any legal uncertainty, and that no allegation of such prejudice was made by Mücke Motorsport or its drivers. The Appellant adds that the degree of care taken by the Chairman of the Stewards in appointing substitutes was such that no lack of fairness could arise.
30. The RFEA claims that the Stewards' Decision was made in breach of the established procedural rules, as the natural panel of first instance, the Panel of Stewards at the Hungary meeting, was replaced by an “alien” panel (the Valencia Panel of Stewards). It states that such replacement is a violation of the basic rules of international process and common sense and constitutes an inappropriate application of Article 141 ISC, which only permits the

replacement of one or more members of a Panel of Stewards in its jurisdiction, but not of the Panel itself as a sovereign entity. According to the RFEA, this Article does not allow a Panel of a meeting to be replaced by a Panel of a different meeting.

31. The RFEA further argues that such a replacement breaches the right of an interested licence holder to know without any doubt which panel will have jurisdiction to make decisions affecting it. Third parties may not replace one panel for another merely for their convenience.
32. The RFEA notes that the organiser of a competition such as the Applicant should assume a neutral attitude with regard to decisions made by a Panel of Stewards.
33. The FIA supports the position of the Spanish National Court of Appeal with respect to its view that the Stewards lacked the powers to take their decision.

b) Conclusions of the Court

34. Article 141 ISC provides that “in the event of the absence of one or several of the stewards of the meeting, they may appoint one, or, if necessary, several substitutes [...]”. The Court finds that pursuant to this provision the Chairman of the Stewards had the right to substitute the Hungarian members of the panel of Stewards by other Stewards.
35. Given that, in his letter dated 12 August 2009, the Secretary General of the Hungarian ASN authorized “the stewards of the next round at Valencia on 21-23.08.2009 for making the necessary decisions and for sealing (signing) the final results” on behalf of the two Hungarian Stewards initially assigned, in keeping with Article 135, which requires stewards to be nominated by the ASN promoting the race, the Court finds that this written nomination constitutes a valid replacement procedure.
36. Therefore, the Court finds that, as Messrs Francisco Rodrigo Monago and Pedro Jimenez Mengod must be held to have made their decision of 20 August 2009 in the name of the original Hungarian Stewards, that decision must effectively be considered as a decision by the Stewards for the Hungarian Meeting. This interpretation is further confirmed by the notification of the intention of appeal signed by Mr Lucke on behalf of Muecke Motorsport at the end of the Stewards’ meeting.
37. In light of the above, the Court finds that the Stewards’ Decision of 20 August 2009 was validly made and reverses the Decision of the Spanish National Court of Appeal to overturn the Stewards’ Decision on the basis of a lack of competence.

Fourth Plea – The Stewards were justified in finding that Mücke Motorsport committed a serious infringement and in applying a penalty

a) Arguments of the parties

38. The Appellant claims that the Stewards were justified in finding that Mücke Motorsport committed a serious infringement and in applying a penalty. It argues that there is overwhelming evidence that Mücke Motorsport breached Articles 5.2 and 5.3 of the BMW Regulations by using springs that were not in compliance with the regulations. It notes that this fact was recognised by Mücke Motorsport at the Stewards' meeting of 20 August.
39. The Appellant alleges that Mücke Motorsport did not make the efforts it could and should have made to obtain the standard springs, as all of the contacts (and in particular Mygale) mentioned in the Contact List available to competitors seeking assistance at Appendix B of the BMW Technical Regulations confirmed that Mücke Motorsport did not approach them regarding the purchase of oil pressure relief valve springs.
40. Moreover, the Appellant claims that Mücke Motorsport gained a performance advantage by using the disputed springs, as they allowed the engines to run at a reduced oil pressure. This was also confirmed by BMW Motorsport in its technical report, which states that the impact of the springs was a lower oil pressure which in turn “will very likely allow an increase in horsepower for the engine”.
41. Mücke Motorsport argues that it did not commit an infringement by replacing the springs of the cars in question with “non-standard” springs. It notes that the springs in question were not listed in the spare parts catalogue mentioned at Article 5.3.3. of the BMW Regulations, and therefore could not be obtained from the Series tenderer. In addition, the springs could not be delivered by the Series authorised spare parts trader Mygale. Therefore, it had no other option but to obtain the parts in question from a BMW motor bike trader.
42. Mücke Motorsport submits that the replacement of springs constitutes work on the car permitted by Article 5.4.1, which authorizes parts which are damaged and/or destroyed by wear, abrasion or accident to be replaced.
43. In these circumstances, Mücke Motorsport argues that it must be assumed that it had the right to acquire the used parts. To arrive at another conclusion would lead to the absurdity that, once a spring is worn out or destroyed, the engine could no longer be used due to the fact that a replacement part cannot be obtained from the spare parts catalogue. Mücke Motorsport adds that it cannot be held responsible for the failure of the Organising Committee to produce a complete spare parts catalogue.

44. Mücke Motorsport further notes that the acquired springs were springs of the 124 EA engine type, and therefore complied with the requirement set out in Article 5.12.1 that the engine be of type 124 EA.
45. Mücke Motorsport refutes the allegation that it modified or machined the springs used, which is further evidenced by the fact that the subsequent processing of a completed and hardened spring is technically impossible.
46. Mücke Motorsport also contests the argument that it gained any noticeable performance advantage by using the contentious springs. Therefore the Stewards were wrong in holding that the competitor had committed a serious infringement against the technical regulations.

b) Conclusions of the Court

47. The Court concludes that the springs used by the competitor Mücke Motorsport were not standard springs. This was admitted by Mücke's Team Manager, Mr Lucke, at the Stewards' meeting of 20 August 2009, and was confirmed by the careful investigations conducted by the Scrutineers, the Stewards and the experts of BMW Motorsport and Schnitzer. Consequently, the Court finds that Mücke Motorsport's cars were not in compliance with Article 5.4.1 of the BMW Regulations, which provides that "parts damaged by wear and tear or accident must be replaced by original parts" and that "it is forbidden to add or omit material, or modify in any manner, unless expressly permitted to do so by these Regulations".
48. The Court furthermore finds that Mücke Motorsport has not demonstrated that it has done everything it could have done to obtain the standard parts from the official engine service partner or the authorized spare parts supplier. Moreover, Mücke Motorsport did not give a consistent account regarding the source of the springs before the Stewards on the one hand and this Court on the other. The Court therefore prefers the evidence of the Appellant on this point.
49. Upon the evidence before the Court, it appears unlikely that the springs in question, which are considered to be lifetime parts, had to be replaced by Mücke Motorsport in each of Mücke Motorsport's three cars due to damage or destruction. It seems more likely to the Court that the replacement occurred in pursuit of performance advantage.
50. In light of the above, the Court notes that Mücke Motorsport was liable for the non-compliance of its three cars. As this infringement in effect constituted a triple infringement, the Court finds that the Stewards were right in considering the infringement at hand to be a serious breach of the technical regulations, meriting an appropriate sanction.
51. The Court therefore upholds the Fourth Plea and confirms the Stewards' Decision of 20 August 2009.

ON THESE GROUNDS,

THE FIA INTERNATIONAL COURT OF APPEAL:

- 1. Declares the appeal admissible;**
- 2. Reverses the Decision of the Spanish National Court of Appeal of 21 September 2009;**
- 3. Confirms the Decision of the Stewards of 20 August 2009 to exclude Mücke Motorsport from the second race run at the Hungaroring on 26 July 2009 and from the race run in Valencia on 21-23 August 2009, both counting towards the 2009 Formula BMW Europe Series, and to impose a fine of €1,000 in respect of each of the competitor's three cars.**
- 4. Leaves it to the Organisers of Formula BMW Europe Series to draw the consequences of the present decision;**
- 5. Orders the return of the appeal fee paid by the Appellant to the International Court of Appeal and to the National Court of Appeal of the RFEA, pursuant to Article 190 of the International Sporting Code.**

Paris, 5 November 2009

The President