

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

of the

FEDERATION INTERNATIONALE DE L'AUTOMOBILE

**Appeal brought by the
Royal Automobile Club of Belgium (RACB)
on behalf of its competitor, Prospeed Competition,
against Decision N° 10
taken by the Panel of Stewards on 23 July 2009
concerning the event held at Oschersleben, counting towards
the 2009 FIA GT Championship**

Case 19/2009

Hearing of Thursday 17 September 2009 in Paris

The FIA INTERNATIONAL COURT OF APPEAL (“the Court”), comprised of Mr Francesco DE BEAUMONT (Italy), who was elected President, Mr Vassilis KOUSSIS (Greece), Mr Jan STOVICEK (Czech Republic) and Mr José MACEDO E CUNHA (Portugal), met in Paris on Thursday 17 September 2009 at the Fédération Internationale de l'Automobile, 8 place de la Concorde, 75008 Paris.

Ruling on the appeal brought by the Royal Automobile Club of Belgium (RACB) on behalf of its licence-holder Prospeed Competition (“the Appellant”) against decision N° 10 taken by the Panel of Stewards on 23 July 2009 to exclude car N° 61 of competitor Prospeed Competition from the 2009 FIA GT Championship event run at Oschersleben, on the grounds that its engine was not in conformity with its homologation form, in breach of Article 257.5.2 of Appendix J to the International Sporting Code (“the Contested Decision”), the Court has heard the statements and examined the arguments of the RACB and of the FIA (“the Defendant”).

Attending the above hearing were:

on behalf of the RACB and Prospeed Competition:

Mr Geoffroy Theunis (RACB Director General)
Mr Gérard Martin (RACB Legal Reporter)
Mr Pascal Nelissen Grade (Lawyer for Prospeed Competition)
Mr Rudi Penders (Team Manager, Prospeed Competition)
Mr Jürgen Klauke (Manager Regulations & Homologation, Porsche Motorsport)
Mr Matthias Feltz (Lawyer for Porsche Motorsport)

for the FIA:

Mr Pierre de Coninck (Secretary General, FIA Sport)
Mr Jacques Berger (Head of the Technical Department, FIA Sport)

The parties presented written submissions and, at the hearing of 17 September 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. During post-competition checks following the third event of the 2009 FIA GT Championship, run at Oschersleben on 21 June 2009, certain engine components (including the cylinder sleeves) of car N° 61 of competitor PROSPEED were removed for inspection.
2. The seized components were examined on 15 July 2009 at the premises of Porsche Motorsport at Weissach (Germany) by the Scrutineers Mr Vinatier and Mr Leal, in the presence of Mr Klauke, and compared with the original series sleeves. On the same day, Mr Vinatier and Mr Leal drew up a report (*Scrutineer's Report N°008*), which states the following:

The engine is not in conformity with Article 257-5.2 of Appendix J to the International Sporting Code.

5.2.1 – The replacement of the cylinder block (or part of it) is not authorised.

Art. 251-2.3.3. Definition of the cylinder block: the crankcase and the cylinders.

5.2.3 – The bore of the cylinders of this engine has been increased by changing, inside the cylinder block, the aluminium cylinders (wet sleeves) of the homologated engine for other cylinders made of steel with an increased bore. To realize this modification of the bore, the cylinder block was not modified by machining.

Engine not in conformity.

3. On the basis of the above-mentioned technical report, the Stewards decided on 23 July 2009 that the engine of car 61, belonging to competitor Prospeed Competition, was not in conformity with its homologation form and that car 61 should therefore be excluded from the results of the Oschersleben event.
4. The Contested Decision was notified to the Appellant on 23 July 2009.

PROCEDURE AND FORMS OF DECISIONS REQUESTED BY THE PARTIES

5. The Appellant lodged an appeal with the Secretariat of the ICA on 24 July 2009.
6. The Appellant contends that the Court should:
 - declare the appeal admissible and perfectly well founded;
 - consequently, declare the Stewards' decision N° 10 of 23 July 2009, as well as technical report n° 008 dated 15 July 2009 on which that decision was founded, null and void, or at least unfounded;
 - and thus, invalidate it and reinstate car 61 in the classification, in the position it had held before being excluded from the race;
 - Consequently:
Charge to the FIA all the costs as evaluated by the secretariat of the International Court of Appeal, in accordance with Article 24 of the Code of

Procedure and Rules of the International Court of Appeal;
- Refund the appeal deposit of 6,000.00 EUR paid by Prospeed.

7. The FIA, in its submission dated 7 September 2009, requests that the Court:
 - nonsuit the appellant of its demands, purposes and submissions, as in any case they are unfounded according to the terms of Article 22 of the Code of Procedure and Rules of the Court;
 - judge and declare that the decision taken by the Stewards must in no way be modified or cancelled and that it is confirmed in its entirety.

ADMISSIBILITY

8. The Court acknowledges that this appeal was filed in a timely manner and that it is in conformity with the Rules of Procedure of the FIA International Court of Appeal.
9. The Court also finds that it has jurisdiction in the matter.
10. Therefore, the Court declares the appeal admissible.

ON THE PROCEDURE

First Plea – The rights of the parties and the adversarial principle

a) Arguments of the parties

11. The Appellant claims that it had not been invited to attend the technical inspection of the engine which took place at Weissach, and that, as a consequence, the adversarial principle had not been respected. Moreover, the Appellant notes that the general practice at GT Championships is for the competitor to be present during a check on his car, in accordance with Article 10(F)(b) of the General Prescriptions for Circuit events, which provides that the car may be dismantled by the competitor for a technical check. The Appellant submits that, consequently, the inspection must be considered invalid; and that a decision based on an invalid control must be considered invalid. Therefore, the Contested Decision must be considered null and void.
12. The Appellant acknowledges that it signed a document stating that it was not formally invited to the technical inspection but that it was represented by Mr Jürgen Klauke of Porsche Motorsport during that inspection. However, the Appellant argues that it signed this document *a posteriori* on 23 July, after having been formally invited to do so by the FIA, as a sign of goodwill and in order to ensure the participation of Porsche in the Spa Francorchamps event. Further, the Appellant alleges that the simple fact that the FIA had asked

Prospect to sign this document *a posteriori* constitutes an implicit acknowledgment by the FIA of their mistake in not having invited Prospect to the inspection. The Appellant stresses that, in any case, a mandate cannot validly be granted *a posteriori*.

13. The FIA considers that the Scrutineers' report constitutes a working document internal to the FIA, and that no provision obliges the officials to draw up this type of report in the presence of the competitor concerned (Article 145 of the International Sporting Code). The FIA thus rejects any allegation that the adversarial principle was not respected.
14. Moreover, the FIA submits that the Appellant has admitted to having given Mr Klauke a mandate to represent it at all inspections carried out on the sealed components of car n° 61.

b) Conclusions of the Court

15. The Court holds that no provision states that the competitor must mandatorily be present during the technical checks. Article 10(F)(b) of the General Prescriptions for Circuit events, to which the Appellant refers, stipulates that the Scrutineers *may* require a car to be dismantled by the competitor, but does not oblige them to do so.
16. The Court also considers that the absence of a competitor during an inspection by the Scrutineers does not constitute a violation of the rights of the defence, given that the decision-making power lies not with the Scrutineers but with the Stewards of the Meeting. Indeed, the procedure before the Stewards of the Meeting provides an occasion for the competitor to express his point of view and defend himself, and therefore respects the rights of defence.
17. Furthermore, in the present case, the Appellant recognized that it was represented by Mr Klauke during the inspection and failed to convince the Court that this representation is invalidated by the fact that it was only confirmed *a posteriori*.
18. In addition, the Appellant did not contest the inspected components in any way and made no mention of any damage suffered due to an alleged procedural error.

ON THE SUBSTANCE

Second Plea – Upon a proper construction of Articles 257-5.2.1, 257-5.2.3 and 251-2.3.3, the Appellant committed no infringement

a) Arguments of the parties

19. The Appellant claims that the interpretation and application of Articles 257-5.2.1 and 251-2.3.3 of Appendix J to the International Sporting Code by the Scrutineers are incorrect.

20. Article 257-5.2.1 states:

Cylinder block, cylinder head(s), valve angles, firing order, number and location of camshafts: these must remain original, as fitted on the series vehicle.

21. The Appellant claims that the above-mentioned article requires the *cylinder block* to be original. The cylinder block is defined in Article 251-2.3.3 as being “the crankcase and the cylinders” – which implies that these two parts are cast in a single piece. However, in their report, the Scrutineers indicate that “the replacement of the cylinder block (*or part of it*) is not authorised”. The Appellant submits that, while it is mandatory for the cylinder block to remain original, the regulations do not state anywhere that “part” of the cylinder block cannot be replaced.

22. While the Appellant confirms that the cylinder sleeves, which are placed inside the housing of the cylinder block and are fixed on the latter, have been replaced, it claims that these parts are free and do not have to be original because they do not form part of the cylinder block. The Appellant refers to Article 257-5.2.5 of Appendix J, which states:

The elements fixed on the cylinder block and cylinder head(s) (crankshaft, connecting rods, pistons, camshafts, intake manifold, etc.) are free but they must be in compliance with Articles 257-5.2.1 to 257-5.2.4 above.

The Appellant contends that the list of components mentioned in the cited article is non-exhaustive and includes the sleeves, as they too are “elements fixed on the cylinder block”. The Appellant also claims that the absence of sleeves on the photographs of the cylinder block in the homologation form confirms that the sleeves did not require homologation (and have not been homologated) and were free.

23. This interpretation of the definition of the cylinder block is contested by the FIA, which considers that the sleeves form an integral part of the cylinder block. It bases its argument *inter alia* on a note by the FIA Technical Department which provides explanations concerning the definition of the cylinder block.

24. The FIA claims that the replacement of the sleeves is prohibited by the provisions that apply to the cylinder block, and recalls that according to Article 257-2.11.1 “anything that is not authorised by the regulations is prohibited.”. The FIA further claims that if it had meant to authorise the replacement of aluminium sleeves with steel sleeves, this would have been explicitly stated in Appendix J, as is the case for the Group A category, the regulations of which contain a specific provision (Article 255.5.1.1) on the subject.

25. The Appellant also argues that the Scrutineers’ report is incomplete and inaccurate with regard to the modification of the bore.

26. The Scrutineers note that the bore of the cylinders has been increased by replacing the aluminium sleeves with steel sleeves, without machining the cylinder block, which constitutes an infringement of Article 257-5.2.3 (which stipulates that “the cylinder block may be modified by machining for the modification of the bore or for sleeving if the original block is not fitted with sleeves”). The Appellant claims that this observation does not take into account the different changes that the engine has undergone as regards bore and stroke; furthermore, no provision prescribes which material must be used for the sleeving.
27. The Appellant contends that, even if the bore of the racing engine was indeed modified in 2007 without machining, no rule prevents the Appellant from changing the sleeves (as set out above), and, consequently, from replacing them with sleeves with an augmented bore. This modification does not require machining (as the new sleeves could be placed in the sleeve housings without having to machine the latter), and has never been the subject of non-conformity decisions by the Scrutineers. Moreover, the new sleeves were replaced in 2008 with sleeves with an unmodified bore, but with a different stroke (length). The effect of these modifications was to increase the cylinder capacity of the engine from 3.8L to 4.0L. The Appellant claims that there is no provision that prohibits increasing the cylinder capacity of an engine.
28. The Appellant concludes that it therefore follows from the correct interpretation of Articles 257-5.2.1 and 251-2.3.3 (as set out above) that the Appellant’s car respects the regulations, given that the cylinder block, *i.e.* the crankcase and the cylinders, is in conformity with the definition given in Article 257-2.3.3, and that it has been neither modified nor replaced, as required by Article 257-5.2.1.
29. The FIA claims that, when the cylinder block is fitted with sleeves, which is the case here, the only modification authorised by Article 257-5.2.3 is boring. However, the engine of car no. 61 did not undergo boring, but rather the replacement of the original aluminium sleeves with steel sleeves. The FIA adds that this replacement is acknowledged by the Appellant as well as by the manufacturer Porsche.
30. The FIA claims that the fact that Porsche requested a waiver from the Bureau of the FIA GT Commission to allow the use of steel sleeves for the rest of the 2009 season – a request made after the contested decision – shows that the manufacturer knows that the present situation is not in accordance with the applicable regulations.
31. The FIA concludes that the non-conformity of the engine is the foundation of the sanction imposed by the contested Decision. The imposed sanction of exclusion is therefore justified, considering that the engine is a determining factor in the performance of a car and that a fair level of technical competition and equal chances between the competitors should be maintained.

b) Conclusions of the Court

32. The Court notes that the FIA GT2 Championship is governed by Article 257 of Appendix J, of which Article 257-2.11.1 stipulates that “anything that is not authorised by the regulations is prohibited”. Also, Article 257-5.2.1 (Modifications) specifies that the cylinder block must be “original, as fitted on the series vehicle”, and Article 257-5.2.3 adds that this cylinder block may be modified by machining for the modification of the bore or for sleeving if the original block is not fitted with sleeves.
33. As a preliminary matter, the Court finds that the fact that these cars have contained steel sleeves since 2007, without the FIA having ever taken a prohibition decision in this respect, is not a relevant factor in assessing the legality of the Contested Decision.
34. The Appellant and the FIA agree that the original aluminium sleeves as described at item 313(b) of the homologation form have been altered. However, they dispute whether the sleeves form part of the cylinder block (in which case Article 257-5.2.1 requires them to be original, i.e. to correspond to the description given in the homologation form) or whether these sleeves are merely elements fixed onto the cylinder block (in which case the Appellant claims the benefit of Article 257-5.2.5 which provides that such elements are free). Despite these two opposing interpretations, the Court observes that neither side has produced compelling evidence that would allow it to determine conclusively whether the sleeves form part of the cylinder block or whether they are merely affixed to it within the meaning of the regulations. The Court therefore considers that this question remains one of burden of proof.
35. The basic principle of the GT discipline is that the cars competing are standardised, series production cars. All parts are therefore presumed to be original, unless specific authorisation is granted to alter that part– this explains why the regulations state that “anything that is not authorised is prohibited”. The Court therefore takes as its starting presumption the reasoning that all modifications are prohibited unless a strong case can be made that the modification is authorised by some exception. That being so, it is for the party claiming the benefit of such an exception to demonstrate the existence and applicability of that exception. In this particular case, the burden of proof with regard to an exception therefore falls on the Appellant.
36. The Court concludes that in the present case, the Appellant has identified no provision expressly permitting the use of steel sleeves or the replacement of aluminium with steel. Instead, the Appellant claims that the list of examples set out in Article 257-5.2.5 (which identifies different types of elements fixed on the cylinder block and cylinder head: “crankshaft, connecting rods, pistons, camshafts, intake manifold, etc.”) must be interpreted as including sleeves and that, consequently, the sleeves must be considered as being “free”. Nevertheless, the Court deems that the Appellant has not demonstrated with

sufficient evidence or offered compelling reasons justifying such a reading of Article 257-5.2.5.

37. Also, the Court finds that Article 257-5.2.3 does not apply in this case, since the original cylinder block was fitted with sleeves and therefore did not require sleeving, and since the bore was not increased by machining.
38. For all the above reasons, the Court is not in a position to conclude that the use of steel sleeves is authorised by the regulations. Article 257-2.11.1 must thus apply by virtue of the regulations, stipulating that everything that is not authorised by the regulations remains prohibited.
39. Therefore, the appeal is rejected.

ON THESE GROUNDS,

THE FIA INTERNATIONAL COURT OF APPEAL:

- 1. Declares the appeal admissible but unfounded;**
- 2. Confirms the Contested Decision,**
- 3. Leaves it to the Sporting Authority to draw the consequences of the present decision;**
- 4. Leaves it to the Appellant to pay the costs, in accordance with Article 24 of the Rules of the International Court of Appeal.**

Paris, 17 September 2009

The President