# THE AMERICA'S CUP CASE 1989

Supreme Court of the State of New York
The Mercury Bay Boating Club Inc
Plantiff
Against
San Diego Yacht Club and
Royal Perth Yacht Club
of Western Australia
Defendants
In the matter of application of
San Diego Yacht Club,
Petitioner

for an order pursuant to EPTL Section 8.1.1 (ax1) or otherwise, interpreting the Deed of Gift of the America's Cup, or in the alternative amending the terms of the said Deed of Gift.

Carmen Beauchamp Ciparick J:
In the wake of the September 1988 San Diego Yacht Club ("San Diego") defense of the America's Cup, both the challenger, the Mercury Bay Boating Club Inc ("Mercury Bay") and the defender call upon this court to determine the lawful holder of the Cup.

The parties initially appeared before this court in a dispute over the validity of the underlying July 1987 challenger by Mercury Bay to sail a match for the America's Cup with a yacht measuring ninety feet on the load water-line. The court found the challenge to be valid and declined to amend the Deed of Gift to bar such a challenger as sought by San Diego The parties where then directed in the December 21, 1987 judgement of this court to sail a match for the America's Cup in accordance with the terms of the Deed of Gift.

Thereafter, Mercury Bay sought to hold San Diego in civil contempt threatening to defend the America's Cup in a catamaran. This court's decision of July 16 1988, determined that there was, at that juncture, no basis for a finding of contempt nor for rendering an advisory opinion. The court further stated that "Nothing in this decision should be interpreted as indicating that multihulled boats are either permitted or barred under the America's Cup Deed of Gift". The parties were expressly advised therein of the risk of forfeiture under the Deed.

San Diego's subsequent September 1988 defense of the America's Cup with a catamaran and victory in races held on September 7th and 9th in the genesis of the current motion by both parties to determine the lawful holder of the Cup.

The court notes that despite the urgings of the court and the global yachting community, San Diego and Mercury Bay were unable to reach an agreement as to acceptable terms of the race so as to conduct the competition under the "mutual

consent" provisions of the Deed of Gift for what is apparently the first time since the original conveyance of the America's Cup to the New York Yacht Club in July 1857.

The Deed of Gift as amended on 1887 uniquely designed to permit the holder of the Cup and a challenger to agree on virtually all of terms of the race, including type of vessel with certain limitations. Through their unprecedented intransigence, San Diego and Mercury Bay have charted a course that has inextricably lad them to the courthouse for a determination as to the lawful holder of the America's Cup.

The nature of the issue facing this court is not in controversy. This court must determine whether, under the Deed of Gift, San Diego was permitted to defend the Mercury Bay challenger for the America's Cup with a multihulled vessel, specifically a catamaran. This issue is unique as this is the first time in America's Cup history that resort to litigation has been necessary to determine the Cup victor In addition, this is the first time in the over one hundred and thirty year history of the world's most prestigious yachting competition that a yacht has chosen to compete with a multihulled vessel to which the challenger has objected throughout.

To determine the disqualification the court must look to the Deed of Gift which sets forth the race conditions and the basis specifications of the vessels. San Diego argues that, other than the following express limitations to the Deed requiring that the competing vessels be:

> "propelled by sails only.... and if of one mast, shall not be less than forty-four nor more than ninety feet on the load water-line"

the defending club may choose any type of vessel without regard to the nature of the challenging vessel or its specifications. Mercury Bay, on the other hand, contends that the Deed of Gift, read as a whole, limits the defender beyond the foregoing express terms of the Deed of Gift as to require the defender to compete in a match on equal terms with a "like or similar vessel".

The Deed of Gift is a compact two page statement of the terms under which the Cup is to be held and competed for. Both Mercury Bay and San Diego, as well as the Attorney General of the State of New York and the New York Yacht Club, are in agreement that the forfeiture issue must be determined by resort to the Deed of Gift and the donor's intent as expressed therein. No external rules of yachting competition apply.

It is axiomatic that the impact of the trust instrument and the grantor's intent must be gleaned from the four corners of the instrument. Therefore, by extension, the issue of disqualification should be determined by resort to the Deed of Gift (see Matter of Jones 38 NY 2d 189: Matter of Kosek 31 NY 2d 475).

The Deed of Gift is devoid of references to multihulled vessels. Nor does the Deed state in specific terms the type of vessel or restrictions as to specifications of the defending vessel. The Deed provides that the competing vessels, "if of one mast shall be not less than forty-four nor more than ninety feet on the load water line" (as amended in 1956 to permit twelve meter boats). It is only in the challenge provision that specifications are fixed. The relevant provision provides in pertinent part:

> "The challenging Club shall give ten months notice in writing, naming the days for the proposed races... Accompanying the ten month's notice of challenge there must be sent the name of the owner and a certificate of the name, rig and following dimensions of the challenging vessel, namely length on load water line, beam at load water line and extreme beam; draught of water; which dimensions shall be not be exceeded".

Mercury Bay aptly argues that in context of an instrument drafted with an economy of words, there would be little logic in providing for the tender of specifications by the challenger ten months in advance if the defender could then construct any vessel meeting the bare minimum specifications of a .... vessel propelled by a sail only" not exceeding ninety feet on the load water line".

San Diego has, in the context of prior motions before this court, acknowledged the significance of the water line specification. The trust instrument points to the importance of this key specification by couching the minimum and maximum size vessel limitations in terms of load water line measurement. It is generally conceded that in most sailing events a monohulled vessel with a long load water line would have a distinct advantage over a shorter monohull, as would a multihulled vessel over a monohull.

When considering the Deed's basic specifications and the challenge notice requirements, the conclusion is inescapable that the donor contemplated the defending vessel to relate in some way to the specifications of the challenger. The requirement that the challenging vessel not exceed the dimensions given in the notice of challenge further supports the proposition that the Cup defender would rely on these specifications. Conversely, if the defender was free and therefore encouraged to build to the absolute specifications of the Deed without regard to the contents of the challenger, there would be not need for the challenger to reveal the specifications of its craft.

The Deed of Gift further provides:

> "Centre-board or sliding keel vessels shall always be allowed to compete in any race for the this Cup, and no restrictions nor limitation whatever shall be placed upon the use of such centre-board or sliding keel be considered a part of the vessel for any purpose of measurement"

The use of the terms "centre-board or sliding keel" in the singular would tend to indicate that the donor did not contemplate multihulled vessels competing for the Cup. Catamarans were in existence in racing at the time of the Third Deed of Gift and the donor could have provided for their participation by specifying dimensions permissible for catamarans.

The court further notes that the basis minimum-maximum load water-line specification, while of great significance in monohulled races, lose significance in "mixed" races between multihulled and monohulled vessels, therefore the nature of the basic specifications of the vessels set out in the Deed of gift supports the conclusion that a race limited to monohulled vessels was contemplated by the donor.

Perhaps the most significant sentence of the Deed is the one setting forth the trust purpose. The pertinent provision states:

> "This Cup is donated upon the condition that it shall be preserved as a perpetual Challenger Cup for friendly competition between foreign countries".

The emphasis of the America's Cup is on competition and sportsmanship. The intention of the donor was to foster racing between yachts or vessels on somewhat competitive terms. The Deed of Gift, when read as a whole, expresses the intent of the donor that the defender of the America's Cup operating within the limitations of the challenger provision, select a vessel that is competitive with that of the challenger. While this may not rise to the level of a "like or similar" standard, the import is clear from the provisions of the Deed of Gift that although design variations are permitted, the vessels should be somewhat evenly matched.

The court finds that the intent of the donor, as expressed in the Deed of Gift, was to exclude a defense of the America's Cup in a multihulled vessel by a defender faced with a monohull challenge. The challenger provision would be rendered meaningless if the defender was provided with the specifications of the challenging vessel and the afforded ten months to produce a vessel with an insurmountable competitive advantage. To sail a multihulled vessel against a monohulled yacht over the type of course contemplated by the donor is, in the opinion of most boating authorities, to create a gross mismatch and, therefore, is violative of the donor's primary purpose of fostering friendly competition.

Notwithstanding the foregoing, if the Deed of Gift were determined to be ambiguous or uncertain as to the defending catamaran's eligibility, it is a basic rule of trust construction that the court wold then necessarily resort to extrinsic evidence and surrounding circumstances to ascertain the intent of the donor (see Matter of Martin 255 NY 248; Matter of Smith 254 NY 283, Matter of Neil 238 NY 135).

While both parties have resorted to extensive analysis of the correspondence and statements of George Schuyler as well as to

the history of the America's Cup in general, the balance of extrinsic evidence points to the conclusion that a genuine competition was of paramount importance to the donor, and that the defender is bound to produce a vessel on the starting line in keeping with that intent.

Very early in the history of the Cup, prior to the drafting of the Second Deed of Gift in 1882, George Schuyler was critical on the decidedly unfair practice of sailing a fleet or defending vessels against one challenger over a "club course" (the course used in the defender's annual regatta). In a letter published in the Spirit of the Times dated April 15th, 1871, Schuyler set forth his definition of the term "match"

..." A match means one party contending with another party upon equal terms as regards the task or feat to be accomplished".

Schuyler went on the express his interpretation of the spirit of the America's Cup when he stated that:

> "It seems to me that the present ruling of the club renders the America's trophy useless as "a Challenge Cup" and that for all sporting purposes it might as well be laid aside as family plate. I cannot conceive of any yachtsman giving six month's notice that he will cross the ocean for the sole purpose of entering into an almost hopeless contest for this Cup, when a challenge for love or money to meet any one yacht of the New York Yacht Squadron in any fair race would give him as great a triumph, if successful, or if his challenger were not accepted, as his heart could desire".

Schuyler was well-known for his overriding concern that the terms of the Deed of Gift foster a fair competition without either side holding a built-in advantage. To that end the Deed was amended on two occasions: the current Deed being the Third Deed of Gift.

The 1887 challenge of the Thistle points to the significance of the challenger's specifications in framing the defender's response. As recounted in "The Lawson History of the America's Cup" title challenge sent by the Thistle specified a load water-line length of 85 feet. The yacht was officially measured prior to the race and found to be 86.46 feet at the water-line. This discrepancy was found to serious in that the defender, Volunteer, was designed with the specifications of the Thistle in mind and was 85 feet 10 inches at the water-line. Due to the discrepancy between the specifications of the written challenge and the measured load water-line of the challenger, a question was raised as to disqualification of the challenger. Mr Schuyler's opinion was sought by the Chairman of the America's Cup Committee of the New York Yacht Club. Schuyler suggested that the Thistle be permitted to race since the discrepancy was not intentional and was due to an error in projection by the designer Schuyler went on to state in correspondence (The Lawson History of the America's Cup, Thompson Lawson p 121).

> "The clause in the Deed of Gift which required, besides Custom House measurement, a statement of the dimensions of the vessel is intended to convey a just idea of the capacity of the same without reference to any rule for racing tonnage which may be in force at the time the challenge is given.
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> "The length of the load water-line is an essential element. It was furnished by both Genesta and Galatea and had it not been given by Thistle, the Committee should have demanded it before closing the terms of the match".

The races were completed with the defending Volunteer victorious and the Deed of Gift was subsequently amended to require that the challenger not exceed the specifications in the challenge, to eliminate time allowances and to provide a fairer ocean water course.

The Thistle episode and the drafting of the Third Deed of Gift indicate the donor's overriding intent that the race be fair and competitive.

A trustee's administration of a trust may also be instructive as to the way in which a trust should be construed (see Rice V Halsey 156 AD 802 aff'd 215 NY 656). Therefore the practice of the trustee-defenders in the implementing of the Deed and the America's Cup competition over the past one hundred and thirty years may be construed by the court when addressing the viability of San Diego's defense with a catamaran.

As the court has already noted, no participant has ever utilized a multihulled vessel in America's Cup competition. Additionally, notwithstanding the arguments proffered by San Diego as to design variations between past Cup competitors, it is distinctly significant that defenders have virtually always met contenders with vessels of closely comparable (or shorter) load water-line length. This is obviously true of the twelve meter competitions held over the past thirty years. The early history of the Cup bears this out as well. San Diego make much of the early correspondence between the New York Yacht Club and the English challenger Lord Dunraven, to indicate that the defender New York Yacht Club reserved its right to sail any size vessel against Lord Dunraven's yacht Valkyrie. However when the famous race was sailed, Lord Dunraven's Valkyrie II challenged in a vessel measuring 86.80 feet on the water-line against the defender Vigilant's 86.19 load water-line length. The Cup history points to remarkably matched vessels when gauged by the significant load water-line specification. San Diego does point to the disparate dimensions in the Magic v Cambria competition of 1871. However, it is relevant to note that the smaller vessel Magic was the defender's choice to compete against the larger vessel Cambria rather than an attempt at a mismatch. Also, time allowances were afforded in early America's Cup competition.

While the history of the America's Cup indicates that variations of design were not precluded, there appears to be virtually no instance where the challenger was not met with

comparable or smaller vessel in terms of load water-line length. To allow the use of a multihulled vessel is more than to countenance mere design variations. To permit a race between a monohull and a multihull would be to countenance a mismatch comparable to a race between monohull vessels with one having a substantial advantage in load water-line.

A resort to extrinsic evidence and the practice of implementation of the Deed of Gift further establishes that the Deed does not permit the defense of the America's Cup against a monohulled yacht by a catamaran.

While a competitive standard such as the "like or similar vessels" standard offered by Mercury Bay may not always be easily implemented, there is no doubt that San Diego's defense of the America's Cip in a catamaran against Mercury Bay's monohull challenge clearly deviated from the intent of the donor.

Therefore, whether this court limits its inquiry to the trust instrument or accepts extrinsic evidence, it is clear that a catamaran may not defend in America's Cup competition against a monohull. Accordingly, San Diego shall be disqualified in the September 1988 competition.

The court is mindful that forfeiture is a drastic remedy in the instance of a competition such as the America's Cup with large economic significance and prestige. Nonetheless the parties neither seek nor suggest any alternative relief upon the disqualification of a competitor, nor is any alternative relief feasible under the circumstances. San Diego was well aware of the risk it ran when it chose to follow the unprecedented course of defending in a catamaran. Barely paying lip service to the significance of the competition, its clear goal was to retain the Cup at all costs so that is could host a competition on its own terms. San Diego thus violated the spirit of the Deed. In contrast, The New York Yacht Club in its tenure as a trustee for over one hundred years was able to conduct numerous defenses without the need for judicial intervention to ensure conformity with Deed terms.

The defender of the America's Cup is more than the current champion yacht club. The yacht club winning the America's Cup becomes the sole trustee under the Deed of Gift and has an obligation thereunder to ensure a fair competition. The holder of the America's Cup is bound to a higher obligation than the victor of the Stanley Cup or the Superbowl. In organised sports such as hockey or football there is a central authority for the development and enforcement of competition rules. The defender of the America's Cup, as trustee, is charged with the responsibility of ensuring that a subsequent defense is carried out in accordance with the letter and spirit of the Deed of Gift. San Diego clearly fell short of its obligations as trustee of the Deed of Gift.

It is in the best interests of the America's Cup competition that this episode be overcome and that the global yachting community by afforded a fair opportunity to participate in this prestigious event. It is hoped that further defender-

trustees will place the interests of the Cup and its spirit in a paramount position. The court urges Mercury Bay to fulfil its obligations as trustee in the spirit of friendly competition that George L Schuyler intended.

The application by Mercury Bay for disqualification of San Diego Yacht Club is granted. The application by San Diego is denied.

Settle order.

JSC

Dated 28th march 1989

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* [The text of this judgement was provided by Emeritus Professor D.H.N. Johnson, sometime Professor of International and Air Law at the University of London and Challis Professor of International Law at the University of Sydney].