

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

of the

FEDERATION INTERNATIONALE DE L'AUTOMOBILE

**Appeal brought by the
Deutscher Motor Sport Bund e.V. (DMSB)
on behalf of its competitor Mücke Motorsport GmbH
against the Decision of the Organising Committee of the
2009 Formula BMW Europe Series,
dated 20 August 2009**

Case 22/2009

Hearing of Thursday 5 November 2009 in Paris

The FIA INTERNATIONAL COURT OF APPEAL (“the Court”), comprised of Mr Thierry JULLIARD (Switzerland), 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 Deutscher Motor Sport Bund e.V. (DMSB) on behalf of its competitor Mücke Motorsport GmbH (“the Appellant”), against the Decision of 20 August 2009 taken by the Organising Committee of the 2009 Formula BMW Europe Series to exclude Mücke Motorsport GmbH (cars N° 15, 16, and 17) from the race run in Spa-Francorchamps (Belgium) on 28-30 August 2009 counting towards the Formula BMW Europe 2009 Series (the “Contested Decision”), the Court has heard the statements and examined the arguments of the Appellant and of the Organising Committee of the 2009 Formula BMW Europe Series (“the Defendant”).

Attending the above hearing were:

on behalf of the DMSB and Mücke Motorsport:

Mr Matthias Feltz (Lawyer for DMSB and Mücke Motorsports GmbH)

Mr Peter Mücke (Team Manager, Mücke Motorsports)

on behalf of the MSA and the Organising Committee:

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)

for 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. 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. An appeal against the decision of the National Court of Appeal is also before this Court in a parallel case.
5. In response to the Stewards' request to examine the matter, 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 (the

“Contested Decision”).

PROCEDURE AND FORMS OF DECISIONS REQUESTED BY THE PARTIES

6. After having notified their intention to appeal on 20 August 2009, the Appellant formally submitted its appeal to the Court on 21 August 2009, together with the payment of the appeal fee of € 6,000.
7. In its Grounds of Appeal, the Appellant contended that the Court should:
 - set aside the Decision of the Organizing Committee of 20 August 2009 to suspend competitor Mücke Motorsport from the event held in Spa-Francorchamps on 28-30 August 2009;
 - instruct the Organising Committee to reinstate the Appellant in the classification of the event held in Spa-Francorchamps on 28-30 August 2009;
 - leave the costs of this appeal to the Defendant.
8. The Organising Committee, in its submission dated 28 October 2009, requested that the Court:
 - dismiss the appeal;
 - in the alternative, apply the penalty of suspension applied by the Organising Committee on the grounds that it is proportionate in the circumstances and exclude the competitor Mücke Motorsport and its drivers from the results of the event run at Spa-Francorchamps;
 - consider imposing an increased penalty upon the competitor Mücke Motorsport.
9. The FIA, in its submission dated 30 October 2009, suggested that the Court:
 - declare the appeal inadmissible.

ADMISSIBILITY

a) Arguments of the parties

10. The Appellant argues that the ICA is competent to hear the present case and refers to Article 3.37.4 of the Formula BMW Europe 2009 Regulations (the “BMW Regulations”), which requires appeals against decisions of the Organising Committee to be lodged “in accordance with the rules and deadlines set down in the FIA International Sporting Code, accompanied by the required fee of €6,000- in cash in the form of Euro’s (€)”. The Appellant holds that the International Sporting Code (ISC) and Article 1 of the ICA Rules of Procedure give the ICA the jurisdiction to arbitrate any dispute of a sporting nature arising

between members of the FIA, competitors or drivers. In addition, the Appellant notes that the appeal fee of €6,000 corresponds to the appeal fee required by the ICA under Article 15 of the ICA Rules of Procedure.

11. The Appellant further claims that it was instructed to bring its appeal before the ICA by the President of the Organising Committee, Ms. Adrienne Watson.
12. In light of the above, and given that its appeal was submitted in due form and before the relevant deadline and that the appeal fee was paid on time, the Appellant claims that its appeal should be declared admissible.
13. The Defendant argues that the Appellant has not established any jurisdiction for bringing its appeal before the ICA pursuant to Article 1 of the ICA Rules of Procedure. The Defendant states that the Appellant's reference to Article 1 is defective, given that this article refers to disputes which arise "between members of the FIA, competitors or drivers", whereas the present appeal concerns a dispute between a competitor and an organiser. The fact that the amount of the appeal fee corresponds is irrelevant for the purposes of establishing the competence of the ICA to hear an appeal.
14. The FIA argues that the appeal should be declared inadmissible, as the Contested Decision could only be appealed before the national Court of the place in which the decision was taken. The FIA also argues that the ISC does not foresee appeals to the ICA from decisions of organs such as the Organising Committee and the fact that the BMW regulations may be construed to refer to such a possibility does not itself create an appeal right.

b) Conclusions of the Court

15. According to the Appellant, Article 3.37.4 of the BMW Regulations must be interpreted as meaning that decisions taken by the Organising Committee can be appealed before the ICA. This interpretation was agreed to by the Defendant during the hearing (though the Defendant maintained that the Appellant had not used the correct procedure in this case).
16. Moreover, the Court notes that the BMW Regulations which refer to an appeal right were not only accepted by the parties, but were also expressly approved by the FIA.
17. The Court notes that Article 1 of the ICA Rules of Procedure gives it broad competence to settle sporting disputes and therefore it accepts jurisdiction in the particular and unusual circumstances of this case.
18. The Court further acknowledges that this appeal was filed in a timely manner and that it is in conformity with the Rules of Procedure the FIA International Court of Appeal.

19. In light of the above, the Court finds that it has jurisdiction in the matter and declares the appeal admissible.

ON THE PROCEDURE

First Plea – On the Power of the Organising Committee to Impose Penalties

b) Arguments of the parties

20. The Appellant claims that Article 3.36.3 of the BMW Regulations, which empowers the Organising Committee to “take action if they deem it necessary and punish Competitors...”, is in breach of the ISC, which reserves the authority to impose punishment to the Stewards, national sporting associations (ASNs) and the FIA. Since the Organising Committee is not a body formed by Stewards, it does not have the competence to impose penalties upon competitors. Moreover, the Appellant holds that, by virtue of Article 159 ISC, “suspension” penalties may only be pronounced by an ASN, which the Organising Committee is not. Consequently, in view of the Appellant, the Organising Committee did not have authority to take the Contested Decision and acted illegally upon the sole responsibility of the FIA to enforce sporting rules.
21. The Appellant further argues that the Contested Decision is an unauthorised encroachment on the stages of appeal prescribed by the ISC, as the jurisdiction of the national courts of appeal of the relevant ASNs are bypassed without any authorisation.
22. The Defendant accepts the authority of the FIA as the sole international sporting authority for motor sports and acknowledges that the ISC applies to the Formula BMW Europe Series, as stated at Article 1.2 of the BMW Regulations: “*The following Regulations shall apply in Formula BMW Europe: - the FIA International Sporting Code, [...]*”.
23. However, while the Defendant recognizes that the ISC grants Stewards, the ASNs and appeal courts the powers to impose penalties, it claims that the Organising Committee’s power to impose penalties does not conflict with the powers under the ISC, but rather constitutes an *additional* power granted to the Organising Committee in order to enable it ensure a level playing field between competitors throughout the Series. The Appellant argues that these additional powers are in keeping with Article 25 ISC, which allows organisers to carry all necessary powers for the organisation of a sporting competition and for “the enforcement of Supplementary Regulations”. The Defendant adds that such powers of the Organising Committee do not replace the powers under the ISC because the authority of the Stewards and the rights of appeal under the ISC are

preserved. Therefore, the Defendant submits that the powers of the Organising Committee and the BMW Regulations in general do not undermine or usurp any powers, but rather constitute additional powers.

24. The Defendant further notes that it is commonplace for organisers to have such powers for enforcing championship regulations and applying additional penalties, and refers to the 2009 Formula Renault 3.5 Series Regulations and the 2009 Formula Renault 2.0 Series Regulations.
25. The Defendant submits that the Organising Committee acted under the authority of the FIA, as the BMW Regulations were sent to the FIA by the MSA in October 2008 for approval prior to them being issued to competitors in December 2008.
26. The Defendant further argues that the penalty of suspension imposed in the present case under Article 3.36.3 of the BMW Regulations has a different nature from the suspension penalty mentioned under Article 159 ISC, which is reserved for grave offences and may only be issued by an ASN. Whereas the latter constitutes the removal of the right to take part in any capacity in any competition within the territory of the ASN, the former merely refers to a “suspension from the Formula BMW Europe from the next meeting”. Therefore, there is no conflict between the sanction of suspension referred to at Article 159 ISC and the exclusion penalty imposed in the case at hand.
27. Lastly, the Defendant submits that, as confirmed by Article 68 ISC, when registering for the competition, competitors effectively enter into a legal contract with the Organising Committee, and as such accept the BMW Regulations, which include a description of the powers and functions of the Organising Committee. The BMW Regulations were distributed to entrants, teams and drivers prior to registration on 16 December 2008, and contain several provisions which confirm that by entering the competition, the entrant agrees to be bound by these regulations and by the ISC. A signed registration and entry form was received from the Appellant on 31 January 2009.
28. The FIA argues that the Organising Committee did not have the authority to assume the role of a panel of Stewards to exercise disciplinary prerogatives vis-à-vis competitors, and refers to Article 141 ISC, which stipulates that the Stewards have “supreme authority”. The FIA confirmed that the BMW Regulations had been approved but submits that any clause contained in the regulations of a competition on the international calendar, that departs from the exclusive nature of the Stewards’ competence, constitutes an infringement of the ISC. The Contested Decision was therefore taken in breach of the ISC and the BMW Regulations should, in this limited regard, not be followed.

b) Conclusions of the Court

29. The Court notes that the BMW Regulations, which specify at Article 3.36.3 that the Organising Committee has the power to impose penalties, had obtained (rightly or not) the prior approval of the FIA. It also observes that these regulations were accepted as a binding contract by all entrants upon registration – this acceptance is evidenced by the fact the BMW Regulations contained various provisions clearly indicating their binding nature: Article 1.2.3 states that “each competitor confirms their acceptance to abide by these legal provisions with their signatures on the Registration Form”; Article 3.39.4 contains a statement that “by registering to participate in Formula BMW Europe, each Driver undertakes and warrants as follows: they have read these Regulations and agree to be bound by them and by the FIA International Sporting Code”; and Article 3.43.1 contains a provisions that “each entrant, Team [...] and Driver confirm their acceptance of the present Regulations (Sporting and Technical), the FIA International Sporting Code (including Appendices) and the registration conditions of the BARC with their signature on the Registration Form”. In addition, the Registration and Entry form contained a declaration that the drivers “confirm that we have read and understand the provisions of the FIA International Sporting Code and the Regulations for Formula BMW Europe 2009. We agree to be bound by them (as supplemented or amended) and further agree on our own behalf and on behalf of everyone associated with our participation in Formula BMW Europe 2009 to observe them”. Such an entry and registration form was signed and submitted by the Appellant.
30. The Court finds that the overlap between the organisational powers and the exercise of sporting authority that existed in the present case was approved by the FIA itself and made known to all the parties prior to entry to the competition.
31. On these grounds, the Court concludes that the mentioned Regulations must be upheld on the principle of good faith, as it considers that, in the present case, it would be inequitable not to uphold the Regulations which all competitors agreed to be bound by and, which, moreover, were assumed by all competitors to constitute the applicable regulations at the time of participation in the race. Moreover, failing to uphold the regulations would deprive the competitors of legal certainty.
32. Furthermore, the Court does not find any applicable provision in the ISC that explicitly prohibits an Organizing Committee in these circumstances from having some limited disciplinary powers to supplement the power of the Stewards, especially if this disciplinary power is exercised at the request of the Stewards. Moreover, the organising committee in this case was appointed by the MSA (the ASN which proposed the series under Article 24(b) of the ISC) and invested with the functions set out in Article 25 ISC. These functions include “the enforcement of Supplementary Regulations”. It is therefore foreseen by

the ISC that organising committees may play some role in the enforcement of regulations. Particularly in this case, where the BMW Regulations have been explicitly approved, the Court regards the ability to impose disciplinary sanctions, including exclusions, as a competence which is part of the Organising Committee's "ability to enforce supplementary regulations", and therefore finds that the ability of the Organising Committee to impose such a sanction should be confirmed.

33. In light of the above, the Court dismisses the First Plea.

ON THE SUBSTANCE

Second Plea - The Replacement of the Springs Did Not Constitute an Infringement

a) Arguments of the parties

34. The Appellant 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 supplier. In addition, the springs could not be delivered by the Series authorised spare parts supplier Mygale. Therefore, the Appellant had no other option but to obtain the parts in question from another source, in this case a BMW motorbike dealer.
35. The Appellant 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.
36. In these circumstances, the Appellant 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. The Appellant adds that it cannot be held responsible for the failure of the Organising Committee to produce a complete spare parts catalogue.
37. The Appellant further notes that the springs used 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.
38. The Appellant argues that it did not modify or machine the springs used. It also argues that the subsequent processing of a completed and hardened spring is technically impossible.

39. The Appellant also states that it did not gain any noticeable performance advantage by using the springs in question, and that therefore the Organising Committee was wrong to hold that the competitor had committed a serious infringement of the technical regulations.
40. Lastly, the Appellant argues that, if it is considered that an infringement was committed, such infringement was not committed knowingly. The Appellant notes the parts in question are not recognisable as original BMW spare parts, as the oil pressure springs of this type of engine have no stamped identification or part number. The Appellant was therefore not in a position to know whether or not the part supplied to it by the BMW trader as an original engine part was compliant.
41. The Defendant claims that it was justified in finding that the Appellant committed a serious infringement and in applying a penalty.
42. The Defendant argues that there is overwhelming evidence that the Appellant 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 even recognised by the Appellant during the Stewards' meeting of 20 August.
43. The Defendant acknowledges that the springs were not mentioned in the spare parts catalogue, and claims that the reason for this absence is that they are only provided with a new engine or in the course of repair by the BMW authorized engine service partner, Schnitzer, and that they affect performance. However, it contests the Appellant's claim that it was impossible to obtain standard replacement springs, and submits that the Appellant could have raised the issue with Schnitzer when the engines were sent for repair. Moreover, the manufacturer of the standard springs, Isringhausen, confirms that it has been supplying springs unchanged since 1997. The Defendant further alleges that the Appellant did not make efforts 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 the Appellant did not approach them regarding the purchase of oil pressure relief valve springs.
44. The Defendant further notes that the arguments of the Appellant are inconsistent with the statements it made during the Stewards' meeting, when the Appellant claimed that it did not know the source of the springs in question.
45. Moreover, the Defendant claims that the Appellant's arguments concerning a lack of performance advantage are unsubstantiated, and refers to the Stewards' decision which states that the effect of using the contentious springs within the oil pressure relief valve was that the engine could run at a reduced oil pressure and that less work was required from the engine to generate an effective oil supply. This was also confirmed by BMW Motosport 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”.

46. Finally, the Defendant contests the argument that the spring parts are not distinguishable from original BMW parts and submits that there are visible differences between the standard parts and those fitted in the Appellant’s cars. It refers to the report of the Stewards which mentions discolouration indicative of possible machining.

b) Conclusions of the Court

47. The Court concludes that the springs used by the Appellant were not standard springs. This was admitted by the Appellant’s Team Manager, Mr Lucke, at the Stewards’s 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 the Appellant’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 argument according to which the regular springs were not available from the spare parts catalogue cannot be accepted, as the Appellant 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, the Appellant has not given 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 Defendant 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 the Appellant in each of Appellant’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 finds the Appellant to be liable for the non-compliance of its three cars. As this infringement in effect constituted a triple infringement, the Court finds that the Stewards and the Organising Committee were right to consider the infringement at hand to be a serious breach of the technical regulations, meriting an appropriate sanction.
51. The Court therefore rejects the Second Plea and confirms the decision of the Organizing Committee to exclude the Applicant from the race held at Spa-Francorchamps.

ON THESE GROUNDS,

THE FIA INTERNATIONAL COURT OF APPEAL:

- 1. Declares the appeal admissible;**
- 2. Dismisses the appeal;**
- 3. Leaves it to the Appellant to pay the costs.**

Paris, 5 November 2009

The President