

10-1-1989

The America's Cup Race 1988: A Competition for Sailors or Solicitors? *Mercury Bay Boating Club v. San Diego Yacht Club*, 150 A.D.2d 82, 545 N.Y.S.2d 693 (N.Y. App. Div. 1989).

Karen Katonah

Follow this and additional works at: <http://repository.law.miami.edu/umeslr>

 Part of the [Entertainment and Sports Law Commons](#)

Recommended Citation

Karen Katonah, *The America's Cup Race 1988: A Competition for Sailors or Solicitors? Mercury Bay Boating Club v. San Diego Yacht Club*, 150 A.D.2d 82, 545 N.Y.S.2d 693 (N.Y. App. Div. 1989), 7 U. Miami Ent. & Sports L. Rev. 177 (1989)
Available at: <http://repository.law.miami.edu/umeslr/vol7/iss1/11>

This Recent Developments (Corrected) is brought to you for free and open access by Institutional Repository. It has been accepted for inclusion in University of Miami Entertainment & Sports Law Review by an authorized administrator of Institutional Repository. For more information, please contact library@law.miami.edu.

The America's Cup Race 1988: A Competition for Sailors or Solicitors?

Mercury Bay Boating Club v. San Diego Yacht Club, 150 A.D.2d 82, 545 N.Y.S.2d 693 (N.Y. App. Div. 1989).

I. INTRODUCTION

Conventional wisdom says, "It's an ill wind that blows no good." But even good winds can blow ill will in the most sportsmanlike circumstances. This was especially true in the legal battle for the America's Cup.¹ The skirmish began when Dennis Connor, sailing for the San Diego Yacht Club (SDYC), recaptured the Cup from Australia in February of 1987. Later, after SDYC rejected its first challenge as unacceptable, the challenger, Mercury Bay Boating Club of New Zealand (Mercury Bay), shocked the yachting world by changing the nautical venue to a New York State Supreme Court. SDYC eventually won the battle with litigation skills instead of seamanship. This Note discusses the history of the America's Cup litigation, focusing on the New York Supreme Court Appellate Division's recent decision reversing a trial court's order which had set aside SDYC's latest victory over Mercury Bay.

According to America's Cup tradition, SDYC, as trustee of the Cup after its 1987 victory, would host a 12-meter yacht defense in 1990.² However, because of disputes over the site of the defense,

1. *Mercury Bay Boating Club, Inc. v. San Diego Yacht Club*, 150 A.D.2d 82, 545 N.Y.S.2d 693 (N.Y. App. Div. 1989). The yacht *America* won the first America's Cup race by defeating the British in 1851. *Id.* at 694. The six original owners later donated the Cup to the New York Yacht Club to be held in trust "as a perpetual challenge cup for friendly competition between foreign countries." *Id.* Subsequent to the conveyance, the Cup was returned twice to George Schuyler, as sole surviving donor, for clarifications regarding the terms of the trust. *Id.* George Schuyler reconveyed the trust to New York pursuant to a deed of gift executed on October 24, 1887. *Id.* Under the terms of the Deed, "the holder of the Cup acts as sole trustee of the charitable trust, and is succeeded by whomever successfully challenges the trustee in a race for the Cup." *Id.*

2. *Id.* at 696. SDYC fully intended to conduct a 12-meter competition using the traditional multiple-challenge format. *Id.* All post-war races have been conducted in yachts of the international 12-meter class. *Id.* at 695. This class was created to alleviate the high costs of constructing large racing yachts. *Id.* As the event became more popular, provisions were agreed upon to allow more than one challenger. In 1964, New York issued a memorandum providing for simultaneous challenges in the 12-meter yachts; for a two year notice of a change in class, and limiting the frequency of the competition to once every three years. *Id.* To ensure conformity, New York consistently has issued similar memoranda before each race. *Id.* at 696.

SDYC delayed announcing the format for the 1990 competition.³ As a result, Michael Fay, representing Mercury Bay, took advantage of SDYC's predicament and, on July 15, 1987, challenged the SDYC to an unorthodox race in June of 1988—on Fay's terms.⁴

SDYC declared the challenge unacceptable.⁵ Mercury Bay then filed an action in a New York Supreme Court seeking "a declaration of validity of its challenge, and for a preliminary injunction prohibiting San Diego from considering any other challenges before its own."⁶ SDYC responded by filing a separate action seeking interpretation or amendment of the Deed of Gift to permit the continuation of the traditional 12-meter yacht race.⁷ The two actions were consolidated. On November 25, 1987, the trial court rejected SDYC's petition to interpret or amend the Deed and granted Mercury Bay's motion for a preliminary injunction. The ruling required SDYC to defend against Mercury Bay.⁸

In late January of 1988, in an attempt to comply with the court order, SDYC announced it would race, but would do so in a multihull catamaran.⁹ Mercury Bay responded by seeking civil contempt sanctions against SDYC for its failure to defend in a "like or similar" vessel.¹⁰ The trial court denied Mercury Bay's motion, holding that "neither this court's order, nor the terms of the deed of gift incorporated therein, so unequivocally state that the multihull boats are prohibited or that a defender must [meet] the

3. Safian, *Rough Sailing*, AMERICAN LAWYER, March 1988, at 93.

4. *Id.* at 92-93. The "unorthodox" challenge was to race in a 90 foot water-load length yacht which was substantially larger than the traditional 12-meter yachts normally used. *Id.* A yacht's speed is directly related to its size; the larger the yacht, the faster it goes. Wallace, *America's Cup Litigation—New Zealand Beating U.S. at Its Own Game?*, N.Y.L.J., Aug. 22, 1988, at 2, col. 2.

5. *Mercury Bay*, 545 N.Y.S.2d at 696.

6. *Id.*

7. *Id.*

8. *Id.* at 697.

9. *Id.* Prior to the race, the trial court concluded that the Deed of Gift is silent as to the requirements for the defender's yacht. *Id.* Therefore, the trial court expressed its belief that the Deed neither explicitly bars the use of a multihulled vessel nor requires the defender to select a vessel with an equal number of hulls as the challenger. In essence, before the race the trial judge felt there was no express mandate in the Deed requiring conformity or even substantial similarity. The issue rarely has been raised because all previous Cup competitions have been conducted under the Deed's mutual consent provision. *Id.*

10. *Id.* Mercury Bay argued that SDYC's intention to meet Mercury Bay's challenge in a catamaran would deny Mercury Bay the "match" to which it was entitled under the Deed of Gift. *Id.* Mercury Bay claimed that the Deed's use of the word "match" required the defending vessel to be "like or similar" to the challenging vessel. *Id.* SDYC "responded that the court's prior decision had construed the Deed literally, that nothing in the Deed required similarity of vessels, and that the degree of similarity demanded by Mercury Bay was available only by consent." *Id.*

challenger in a 'like or similar' yacht, so as to constitute contempt by San Diego if it chooses to defend in such a boat."¹¹

On September 9, 1988, SDYC successfully defended the Cup by defeating Mercury Bay in two races.¹² After its defeat, Mercury Bay again returned to court seeking to disqualify SDYC's catamaran because, Mercury Bay claimed, SDYC's use of a catamaran violated the intent of the Deed.¹³ SDYC cross-moved for a declaration that its defense complied with the Deed.¹⁴ Both motions addressed the legality of a multihull defense in the absence of mutual consent.¹⁵ In a March 28, 1989 order, the trial court concluded that SDYC violated "the spirit of the Deed" by deviating from the donor's intention that the competing boats be "somewhat evenly matched" and held the Cup should be forfeited to Mercury Bay.¹⁶ SDYC filed an appeal. The main issue on appeal was whether the trial court improperly construed the trust by imposing a requirement that the yachts be "somewhat evenly matched" when it held that SDYC's defense of the Cup in a multihull catamaran violated the provisions of the Deed of Gift. On September 19, 1989, the Appellate Division, First Department, of the New York Supreme Court reversed in a 4-1 opinion, returning the Cup to SDYC.¹⁷

II. DISCUSSION

The American yachting community viewed Mercury Bay's challenge as an affront to the America's Cup race. In fact, SDYC alleged in its pre-race pleadings that the terms Mercury Bay demanded would eliminate virtually all foreign competition.¹⁸ Mercury Bay's challenge, SDYC claimed, threatened to return the competition for the Cup to an earlier form in which the yachts were much larger and more expensive, restricting entry in the race to those challengers with the funds to construct these larger boats.¹⁹ In the trial court, SDYC initially pleaded the statutory cy

11. *Id.* The trial court noted, however, that "[n]othing in this decision should be interpreted as indicating that multihulled boats are either permitted or barred under the America's Cup deed of gift." *Id.* The trial court instructed the parties "to proceed with the races and to reserve their protests, if any, until after completion of the America's Cup races." *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.* at 696.

19. *Id.*

pres doctrine:²⁰ strict compliance with the Deed would prevent achieving the donor's original intent. In contrast, Mercury Bay insisted upon a literal interpretation, declaring the Deed was clear and unambiguous.²¹ Although some felt its opinion fostered unsportsmanlike conduct, the trial court at first upheld a literal construction of the Deed.²²

Ironically, the parties switched arguments after the race.²³ SDYC began to advocate a literal reading of the Deed to allow for a multihull catamaran defense of the Cup, while Mercury Bay, in opposing a multi-hull defense, contended that a court should look at the original donor's intentions to provide for "friendly competition between foreign countries."²⁴ The trial court, in its post-race decision, relied largely on those words when it determined that the Deed requires the defender and the challenger to be "somewhat evenly matched."²⁵ However, the Appellate Division reversed, holding that the lower court "improperly relied on extrinsic evidence to construe an unambiguous instrument" and, in so doing,

20. Brief of Plaintiff-Respondent The Mercury Bay Boating Club Inc. at 8, *Mercury Bay Boating Club, Inc. v. San Diego Yacht Club*, No. 37382/89 (N.Y. App. Div. May 24, 1989) [hereinafter *Brief of Mercury Bay*]. The Cy pres doctrine was "developed to modify charitable trusts whose purpose had become obsolete as a result of changed conditions not taken into account by the original settlor or donor." Johnson and Taylor, *Revolutionizing Judicial Interpretation of Charitable Trusts: Applying Relational Contracts and Dynamic Interpretation to Cy Pres and America's Cup Litigation*, 74 IOWA L. REV. 544, 561 (1989). Courts rely on a three-prong test to determine if cy pres modification is appropriate. *Id.* Under this test, the applicant has the burden to demonstrate: "first, there is a valid charitable trust; second, the [donor's] specific charitable objective is frustrated, necessitating cy pres modification to carry out the [donor's] wishes; and third, the [donor's] 'general charitable intent' is not restricted to the precise purpose identified in the trust instrument." *Id.* at 561-62.

21. *Mercury Bay*, 545 N.Y.S.2d at 696.

22. *See id.* at 697.

23. Recent Development, *International Sports Competition: The America's Cup 1988—The Legal Battle*, 30 HARV. INT'L L.J. 264, 276 (1989). The Royal Perth Yacht Club of Western Australia was named as a defendant and filed a brief advocating the position of Mercury Bay. *See* Brief of Defendant Royal Perth Yacht Club of Western Australia (Inc.), *Mercury Bay Boating Club, Inc. v. San Diego Yacht Club*, No. 37382/89 (N.Y. App. Div. May 24, 1989). Similarly, the New York Yacht Club filed a brief as an intervenor advocating the disqualification of the SDYC. *See* Brief of Intervenor New York Yacht Club, *Mercury Bay Boating Club, Inc. v. San Diego Yacht Club*, No. 37382/89 (N.Y. App. Div. May 24, 1989). Finally, the Attorney General of the State of New York, pursuant to a New York law seeking to protect the beneficiaries of charitable trusts, filed a brief as an appellant advocating the position of the SDYC. *See* Brief of the Appellant Attorney General of the State of New York at 10, *Mercury Bay Boating Club, Inc. v. San Diego Yacht Club*, No. 37382/89 (N.Y. App. Div. May 24, 1989).

24. Recent Development, *supra* note 23, at 276.

25. *Mercury Bay*, 545 N.Y.S.2d at 698.

had created "a totally new and unworkable eligibility rule" ²⁶ Further, the Appellate Division noted, in dicta, that "even if the Deed of Gift were to be construed so as to bar the use of a catamaran in defense of the Cup against a monohull, the drastic remedy of forfeiture was unwarranted." ²⁷

A. The Language of the Deed Did Not Prohibit a Catamaran Defense

The Deed of Gift of the America's Cup simply established a charitable trust. ²⁸ The trial court, in its post-race decision interpreting the Deed of Gift, had held that SDYC's use of a catamaran in defending the Cup against Mercury Bay's monohull challenge deviated from the intent of the settlor of this charitable trust who, according to the trial court, desired that the vessels competing for the Cup be "somewhat evenly matched." ²⁹ Hence, the primary issue before the Appellate Division was the propriety of the trial courts's interpretation.

As the Appellate Division indicated, New York law clearly provides direction for a court interpreting a trust instrument. Primarily, a court must look to the intent of the settlor as the intent is expressed in the language of the trust instrument. ³⁰ Where the settlor's intent is articulated in clear and unambiguous terms, a court is prohibited from looking elsewhere for extrinsic evidence of intent. ³¹ Moreover, "[a]bsent ambiguity, a court may not read new terms into a trust instrument." ³² In essence, a court must look first to the language of the instrument for evidence of intent and only if that language is unclear or equivocal may the court rely on extrinsic evidence to ascertain the settlor's intent.

Pursuant to the clear mandate of New York trust law, the Appellate Division, in an opinion authored by Judge Sullivan, initially inspected the *language* of the Deed of Gift and assessed whether it clearly revealed the intent of the settlor with respect to the type of vessel eligible to compete for the Cup, and the required degree of similarity between the competing vessels. Stating its conclusion at

26. *Id.* at 704.

27. *Id.* at 702.

28. *Id.* at 697.

29. *Id.*

30. *Matter of Jones*, 38 N.Y.2d 189, 193, 341 N.E.2d 565, 379 N.Y.S.2d 55 (N.Y. 1975).

31. *Loch Sheldrake Associates, Inc. v. Evans*, 306 N.Y. 297, 304, 118 N.E.2d 444 (N.Y. 1954).

32. *Mercury Bay*, 545 N.Y.S.2d at 698 (citing *Gross v. Cizanskas*, 53 A.D.2d 969, 970, 385 N.Y.S.2d 832 (N.Y. App. Div. 1976)).

the outset, the Appellate Division determined that the language of the Deed of Gift expressly and specifically indicates what types of boats will be eligible, as well as the requisite degree of similarity needed between the competing vessels.³³ The court summarily rejected the lower court's imposition of a requirement that the vessels be "somewhat evenly matched" as a rule which is not expressed in, nor even inferable from, the clear language of the Deed of Gift.³⁴

The Appellate Division noted that the Deed of Gift requires only that the notification of a Cup challenge provide the defending club with ten months notice of the challenge and that it include "the name, rig, owner, and four specified dimensions of the challenging vessel—load water-line, water-line beam, maximum beam and draft."³⁵ In contrast to the lower court, the Appellate Division felt that the language of the Deed was completely void of any indication that the defending vessel was to be limited by the foregoing parameters.³⁶ Instead, the Appellate Division claimed, the terms of the Deed of Gift grant "broad latitude" to the defender when choosing its vessel, especially the Deed's provision that a defending club may "field 'any one yacht or vessel constructed in the country of the Club holding the Cup.'"³⁷ The court was convinced that the language of the Deed did not restrict the type of boat eligible for Cup competition solely to monohulled crafts.

The Appellate Division similarly felt that the language of the Deed of Gift clearly establishes the degree of similarity required between competing vessels. In fact, the court quoted what it felt to be the only design constraints imposed by the Deed of Gift:

The competing yachts or vessels, if of one mast, shall be not less than forty-four feet nor more than ninety feet on the load water-line; if of more than one mast they shall be not less than eighty feet nor more than one-hundred and fifteen feet on the load water-line.

* * * * *

Centre-board or sliding keel vessels shall always be allowed to compete in any race for this Cup, and no restriction nor limitation whatever shall be placed upon the use of such centre-board or sliding keel³⁸

33. *Mercury Bay*, 545 N.Y.S.2d at 698.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.* (quoting the Deed of Gift of the America's Cup).

This language, the Appellate Division reasoned, clearly reveals the degree of similarity required between competing vessels. All boats, they claimed, need only be "yachts or vessels," "propelled by sails only," and "if single masted, they must measure between forty-four and ninety feet on the load water line."³⁹ Beyond these requirements, the court believed that the Deed of Gift left the design of the vessel completely to the discretion of the competitor.

After concluding that the language of the Deed of Gift unequivocally revealed the settlor's intent with respect to the type of boats eligible to race for the Cup and the degree of similarity necessary among the eligible vessels, the Appellate Division moved on to assail the reasoning which the trial court used to reach its conclusion that the competing boats be "somewhat evenly matched." The Appellate Division noted that the trial court had relied on two provisions of the Deed in reaching its conclusion.⁴⁰ First, the Appellate Division claimed, the trial court had reasoned that the requirement of "somewhat evenly matched vessels" was warranted by the language in the Deed which stated that the Cup was established "to foster 'friendly competition between foreign countries.'"⁴¹ The Appellate Division found reliance on this statement erroneous because the statement was merely precatory and, as a result, "impose[d] no affirmative obligation on the trustee to use any particular type of vessel in its defense of the Cup."⁴²

The Appellate Division believed that the trial court also relied upon the Deed of Gift's notification provision—which requires a challenger to notify the defending club of four specified dimensions of the challenger's boat—as evidence that the competing boats be evenly matched.⁴³ Specifically, the reviewing court asserted, the trial court had reasoned that the inclusion of a notice provision revealed the settlor's desire to require the defender to conform its boat to that of the challenger.⁴⁴

The Appellate Division rejected the trial court's reasoning because the majority was unable to find such intent inferable from the inclusion of the notification provision in the Deed.⁴⁵ Specifically, the court rejected the inference because of the ease with which the "author of the Deed could have stated the rule in a few

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

words, had he so desired."⁴⁶ The Appellate Division claimed that because "the donor could have spelled out a similarity rule, but did not, it was error for the court to supply one, absent a clearly expressed intention to impose such a requirement."⁴⁷ In the court's eyes, it would have been extremely simple for the settlor to add a short phrase to the boat type requirements—for example, a clear statement that the defender's boat be "somewhat evenly matched to that of the challenger."⁴⁸ However, as the Appellate Division noted, "no such phrase appears."⁴⁹

Instead, the court posited, the notice provision was included as a mechanism which would afford the defending club adequate time to build a vessel in which to defend.⁵⁰ Thus, the only plausible inference from the inclusion of the provision, the Appellate Division argued, was that the settlor intended to provide the defending club with a slight initial advantage.⁵¹

The Appellate Division concluded that the language of the Deed of Gift does not support the trial court's conclusion that the Deed requires the competing vessels to be "somewhat evenly matched." In fact, the Appellate Division expressed its belief that "other than a water-line limitation, the Deed does not contain any design restraints."⁵² The appellate court reasoned that the Deed's language was indicative of an intent to allow expansive eligibility.⁵³ Specifically, the Appellate Division found the deed's clause permitting a defending club to race "any one yacht or vessel constructed in the country of the Club holding the Cup . . ." to be dispositive.⁵⁴ With that statement in the Deed, the court noted, Mercury Bay had the burden to point out express language in the Deed, or at

46. *Id.*

47. *Id.* at 699.

48. *Id.* at 698.

49. *Id.*

50. *Id.* at 698-99.

51. *Id.* at 699. The Appellate Division also was troubled by the inconsistency of the trial court. *Id.* In its pre-race decision, the trial court concluded that the language of the Deed does not require similarity in competing vessels. *Id.* In light of this absence of a clear similarity requirement, the trial court refused to find SDYC in contempt for intending to race Mercury Bay in a vessel dissimilar to the one Mercury Bay described in its challenge notice. *Id.* In its post-race decision, the trial court, in contrast to its previous holding, suddenly felt that the language of the Deed was indicative of the settlor's intent and that San Diego's defense in a catamaran would be in violation of that intent. *Id.* The Appellate Division poignantly stated that the trial court's flip-flop reduced its credibility: "We have difficulty in accepting the court's post-match holding as to the clarity of a rule which before the match, was less than clear." *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

least a clearly expressed intent inferable from the Deed's language, seeking to exclude multihulls.⁵⁶ In the end, the Appellate Division concluded that Mercury Bay failed to make this showing.⁵⁶

Although the Appellate Division's determination that the express terms of the Deed of Gift specifically addressed the type and similarity requirements of the competing vessels was sufficient to reverse the lower court's decision,⁵⁷ the majority opinion went on to examine the trial court's use of extrinsic evidence to support its post-race ruling.⁵⁸ The trial court had resorted to a letter written by the settlor Schulyer in 1871 to support its claim that Schulyer intended that the competing vessels be evenly matched.⁵⁹ The Deed had used the word "match" and, according to the trial court, Schulyer's use of the word in the 1871 letter indicated that by "match" he meant competition on equal terms.⁶⁰ The Appellate Division rejected this conclusion on various grounds, noting first that the trial court ignored the limiting language which appeared immediately before the definition in Schulyer's letter.⁶¹ Second, the Appellate Division felt that the trial court had ignored Schulyer's explanations in the same letter revealing why he used the term "match," explanations which would have illuminated clearly that the use of the word "match" did not bring with it a rule that the competing vessels be *evenly* matched.⁶² The Appellate Division believed that the sole reason Schulyer wrote the letter was "to respond to [the New York Yacht Club's] initial position that the defender was free to send an entire fleet against a lone challenger."⁶³ Thus, the Appellate Division reasoned, Schulyer "defined 'match' only in the sense of a competition between two contestants; there is no hint of any intention on his part to require

55. *Id.*

56. *Id.*

57. As noted above, a court need not look beyond the four corners of a trust instrument where the language of the instrument expresses the donor's intent in clear and unambiguous terms. See *supra* note 32 and accompanying text. Because the Appellate Division found the instrument's language clearly revealed the donor's intent, it was unnecessary for the court to assess the extrinsic evidence used by the trial court.

58. *Mercury Bay*, 545 N.Y.S.2d at 699.

59. *Id.*

60. *Id.*

61. *Id.* As quoted by the majority, Schulyer's actual words were: "A match between two cricket or base-ball clubs means one side against the other side; but the cardinal principle is that in the absence of all qualifying expressions, a 'match' means one party contending with another party upon equal terms as regards the task or feat to be accomplished." *Id.*

62. *Id.* at 699-700.

63. *Id.* at 700.

likeness or similarity between the competing vessels."⁶⁴ Finally, the court felt that, overall, Schulyer's own references to the Deed abounded with instances where he used the word "match" to describe competitions between dissimilar vessels.⁶⁵

Additionally, the Appellate Division found that the trial court completely ignored extrinsic evidence that is even more probative of Schulyer's intent with respect to the similarity issue: Schulyer's specific explanation of the dimensions clause.⁶⁶ According to the Appellate Division, Schulyer squarely addressed the notification provision when he responded to a claim that the provision inequitably required the challenger to announce the dimensions of its vessel ten months in advance of the race date while allowing the defender to announce as late as the day of the first race.⁶⁷ Schulyer specifically stated:

"The main reason we ask for the [dimensions] is to know what kind of vessel we have to meet. I believe the challenged party has a right to know what the challenging yacht is like, so that it can meet her with a yacht of her own type if it is to be desired."⁶⁸

The Appellate Division found Schulyer's statement to be the clearest possible expression of his intent not to require the defender to meet the challenger in a similar vessel.⁶⁹ In essence, the court concluded that even if the requirement of similarity were inferable from the language of the Deed, the extrinsic statements of the settlor himself point away from a finding that the Deed requires a defender to meet the challenger in a "somewhat evenly matched" vessel.⁷⁰

The Appellate Division stated further that if extrinsic evidence were to be considered, it would have been proper for the trial court to examine actions and interpretations of prior trustees as persuasive evidence in construing the instrument.⁷¹ The trial court apparently recognized as much, but, the Appellate Division claimed, it completely ignored prior trustee decisions on the question at issue.⁷² On two occasions, in 1907 and 1913, Sir Thomas

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

Lipton, on behalf of the Royal Irish Yacht Club, challenged the New York Yacht Club, the reigning trustee, and demanded that New York defend in a similar vessel.⁷³ Lipton, in fact, made the same argument as Mercury Bay—that fairness required similarity between the boats.⁷⁴ On both occasions, New York rejected the challenge and issued resolutions expressing its belief that the challenger may not impose any design limitations on a defender, beyond the broad limitations expressly enunciated in the Deed of Gift.⁷⁵ Hence, the Appellate Division reasoned, if the interpretations of past trustees are to be considered, they would militate against imposing a similarity requirement upon the defending club.

Further, the Appellate Division recognized that, beyond the issue concerning the Deed of Gift's ambiguity, the trial court's creation of a rule that the competing vessels be "somewhat evenly matched" establishes a completely unworkable standard.⁷⁶ Yachting competition, the Appellate Division noted, is governed by a rather elaborate set of rules which regulate the degree of similarity required of competing yachts.⁷⁷ Some of the rules are quite restrictive and detailed; others are relatively unrestrictive.⁷⁸ Still, the court claimed, traditional standards applied by the yachting world all are "set forth in specific, objective terms, and compliance can be determined by physical measurement of the competing yachts."⁷⁹ In contrast, they noted, vague, subjective standards like "somewhat evenly matched" create countless compliance problems.⁸⁰ As a result, the Appellate Division concluded, the trial court's "somewhat evenly matched" standard undoubtedly will "foster judicial involvement in the question of boat eligibility, a matter which . . . is best left to those charged with the responsibility for judging the match."⁸¹

B. The Forfeiture Penalty Was Too Severe

Finally, the Appellate Division continued its dictum by claiming that even if the trial court had been correct in interpreting the Deed of Gift to bar a catamaran defense, the trial court was unrea-

73. *Id.* at 700-01.

74. *Id.* at 701.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.* at 702.

80. *Id.*

81. *Id.*

sonable in imposing the severe remedy of forfeiture.⁸² The appellate court noted that forfeiture, as an extreme remedy, "should be applied only where absolutely necessary to preserve the object or purpose of a trust."⁸³ Essentially, the Appellate Division continued, a court only should impose forfeiture where "the parties' conduct merits the ultimate penalty."⁸⁴ The Appellate Division concluded that, in light of the facts of this case, especially the fact that SDYC had relied on the trial court's prior decision refusing to infer from the Deed a rule requiring vessel similarity, forfeiture was unwarranted.⁸⁵ Instead, the court suggested, "[a]t the very least, San Diego should have been permitted to rerun the race with a monohull."⁸⁶

C. *The Concurrence*

Judge Rubin concurred in the majority opinion. Essentially, Judge Rubin argued that the America's Cup litigation had been plagued by the failure of the litigants and the trial court to draw the critical distinction between conduct that is unsportsmanlike but legal and conduct which is completely outside the letter of the law.⁸⁷ Judge Rubin claimed that the failure to distinguish these concepts leads to confusing "what is actually stated in the deed of trust and the meaning sought to be attributed to it by reference to practices which are presently the custom of yacht racing."⁸⁸ Citing *Pierson v. Post*,⁸⁹ Rubin admonished the trial court for ruling in favor of Mercury Bay because the trial court believed SDYC's conduct unsportsmanlike; instead, he argued, the trial court should have confined its ruling to the legal construction of the Deed. In fact, Judge Rubin concluded, the America's Cup never has been a paradigm of good sportsmanship.⁹⁰ Consequently, he continued, were the court to rule solely on the basis of sportsmanship, it

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* at 703.

87. *Id.* at 704-05 (Rubin, J., concurring).

88. *Id.* at 705.

89. 3 Cai. R. 175 (N.Y. Sup. Ct. 1805).

90. *Mercury Bay*, 545 N.Y.S.2d at 708-09 (Rubin, J., concurring). See generally D. RIGGS, KEELHAULED: THE HISTORY OF UNSPORTSMANLIKE CONDUCT AND THE AMERICA'S CUP (1986) (noting that the Cup competitors over the years have been very unsportsmanlike in their participation). Even the yacht *America's* victory over the British in the first Cup race was shrouded with rumors of cheating. *Id.* at 9-11.

would be required to find both parties *in pari delicto*.⁹¹ Since the America's Cup is a "perpetual challenge cup," Judge Rubin emphasized that the terms of the Deed should be construed broadly to allow for technical innovations of ship design.⁹²

F. *The Dissent*

In dissent, Judge Kassal deemed the race a "gross mismatch" and criticized the majority for dismissing the donors' intentions to foster friendly competition as mere precatory language.⁹³ In fact, Judge Kassal claimed, "[t]he goal of fostering friendly competition is the condition upon which the Cup was donated."⁹⁴ As a result, he continued, the language calling for friendly competition "expresses an intent of the donor . . . which may not be measured solely through reference to physical dimensions."⁹⁵ In stark contrast to this expressed intent, he concluded, "[t]he 1988 America's Cup races were manifestly unfair in every sense."⁹⁶ Because of this unfairness, Judge Kassal dissented.

III. CONCLUSION

As a result of the childish behavior of the competitors in the 1988 Cup challenge, one of the world's top sporting events has jumped from the sports pages to the headlines. What was once an honorable competition among sportsmen has become a legal battle in the courts where sportsmanship, seamanship, and fair winds filling billowing sails have no influence on the outcome. It must be remembered, unfortunately, that money is a prime motivator of the litigants.⁹⁷ One report estimates that approximately two billion dollars in revenue may flow into the coffers of the city that hosts the race.⁹⁸

Ultimately the New York Court of Appeals will decide the merits of the case, guided by its interpretation of the intent of the

91. *Mercury Bay*, 545 N.Y.S.2d at 708 (Rubin, J., concurring).

92. *Id.* at 710. See generally Mason, *The Judge, The Tortoise and The Hare*, *SAIL*, August 1988, at 51 ("Legal questions aside, everyone agrees that both boats push technology, especially carbon-fiber technology, forward to new limits.").

93. *Mercury Bay*, 545 N.Y.S.2d at 710 (Kassal, J., dissenting).

94. *Id.*

95. *Id.*

96. *Id.*

97. See Safian, *supra* note 3, at 91-92.

98. Lloyd, *On Appeal*, *San Diego Club Recovers the America's Cup*, *N.Y. Times*, Sept. 20, 1989, at 24, col 4.

donor.⁹⁹ Nonetheless, although it was awarded "preeminently for speed," the 1988 America's Cup unfortunately will be remembered "preeminently for litigation."¹⁰⁰

*Karen Katonah**

99. The New York Court of Appeals heard oral argument on Mercury Bay's appeal in February of 1990. Their decision is expected in the Spring of that year.

100. See Wallance, *supra* note 4, at 22, col 6.

* J.D. Candidate, 1991, University of Miami School of Law.