



**Arbitration CAS 2008/A/1561 Luke Michael v. Australian Canoeing, award of 29 September 2008**

Panel: The Hon. Justice Tricia Kavanagh (Australia), President; Mr Henry Jolson QC (Australia); Mr Alan Sullivan QC (Australia)

*Canoeing*

*Selection dispute for the 2008 Olympic Games*

*Procedural condition of the appeal provided by the AOC By-Law not fulfilled*

*CAS lack of jurisdiction*

- 1. Under clause 11.6 and clause 11.9 of the AOC By-Law, it is a condition of any appellate jurisdiction, including an appeal to the CAS, that the Appellant give written notice of the appeal to the National Federation within 48 hours of the announcement of the decision against which the appeal is made.**
- 2. In accordance with clause 11.9 of the AOC By-Law and Rule 32 of the CAS Code, the CAS has no power to extend the time limit. The CAS has therefore no jurisdiction when written notice is given by the Appellant after the deadline for the appeal and when there is no evidence of any contractual variation of the time limit between the parties supported by consideration.**

The Appellant, Mr Luke Michael, is an Australian flatwater kayak paddler who has represented Australia on an international level.

The Respondent, Australian Canoeing, is the National Federation responsible for the management, coordination, development and promotion of paddle sports in Australia.

Mr Jacob Clear, Mr Clint Robinson, Mr Tony Schumacher, Mr David Smith and Mr Tate Smith are Australian flatwater kayak paddlers who were listed by the Appellant as Affected Parties in this appeal to the Court of Arbitration for Sport (CAS).

The details of the factual background to this matter, involving two separate appeals to the Australian Canoeing Appeals Tribunal against two separate decisions of the Australian Canoeing Selection Panel, are set out in the Final Arbitral Award of the Appellant's first appeal to the CAS (CAS 2008/A/1549; the "Appellant's First CAS Appeal"), made by the Hon Justice Roger Gyles as Sole Arbitrator on 4 June 2008, and need not be repeated here.

That Final Arbitral Award represents the reasons for the Operative Award delivered by His Honour on 13 May 2008, in the following terms:

- (1) *The appeal is allowed.*
- (2) *The Second Tribunal Decision of the A[ustralian] C[anoeing] Appeals Tribunal dated 23 April 2008 is set aside.*
- (3) *In lieu thereof:*
  - (a) *the Second Panel Decision of the A[ustralian] C[anoeing] Selection Panel of 16 April 2008 is set aside; and*
  - (b) *the question of re-nomination to the [Australian Olympic Committee (AOC)] for selection in the 2008 Australian Olympic Team in the Men's Kayak Flatwater Category [the Team] is referred back to a newly constituted A[ustralian] C[anoeing] Selection Panel for determination in accordance with the [2008 Australian Olympic Team Australian Canoeing] Nomination Criteria.*
- (4) *There is no order as to costs.*

On 21 May 2008, a new Australian Canoeing Selection Panel, constituted by Mr John Boulton AM, Ms Margi Böhm, Mr Martin Finn, Mr Andrew Trim and Mr Brett Worth, announced its decision that the Appellant not be nominated to the AOC for selection in the Team (the “Australian Canoeing Panel Decision”).

It is against this Australian Canoeing Panel Decision that the Appellant now appeals.

The pre-hearing activity was organised on a timetable that took account of the urgent nature of the appeal.

On 18 June 2008, conference call directions were held at which the Respondent indicated that it challenged the jurisdiction of the CAS to hear the appeal. The parties agreed that the issue of jurisdiction would be determined at a hearing prior to the commencement of a hearing, if any, on the merits.

The Appellant, in addition to relying upon the documents filed by the Appellant in the Appellant's First CAS Appeal, filed written submissions on 17 June 2008 and statements on 18 June 2008.

The Respondent, in addition to relying upon the documents filed by the Respondent in the Appellant's First CAS Appeal, filed written submissions, statements and other documents on 20 June 2008 and 22 June 2008.

The Affected Parties were first made aware by the CAS Oceania Registry Court Office of this appeal on 28 May 2008. They were thereafter provided copies of some of the correspondence between the Court Office and the parties. Following a request to the Court Office on 19 June 2008 from one of the Affected Parties, Mr Schumacher, copies of documents filed by the Appellant and the Respondent were provided to Mr Schumacher. The Affected Parties, together with the Team's coach, Mr Ben Hutchings, jointly filed a statement on 23 June 2008 (dated 22 June 2008).

On 23 June 2008, the hearing on the issue of jurisdiction took place in Sydney, Australia.

In accordance with the procedure agreed by the parties during the conference call directions on 18 June 2008, the Arbitral Panel first heard submissions on the question of jurisdiction.

The Arbitral Panel delivered an oral decision at the hearing on 23 June 2008.

This is the Written Decision setting out the reasons for the finding of 23 June 2008 that the CAS has no jurisdiction to hear the appeal.

The Appellant and the Respondent each made submissions in respect of the following clauses of the AOC Olympic Team Selection By-Law (the “AOC By-Law”):

*11.1 Subject to clause 11.13, any dispute regarding an Athlete’s nomination or non-nomination by a [National Federation] to the AOC will be addressed according to the following appeal procedure:*

- (1) the appeal will be first heard by the Appeal Tribunal established by the [National Federation] controlling the relevant sport pursuant to clause 10; and*
- (2) any subsequent appeal will be heard by the Appeals Arbitration Division of CAS.*

...

*11.6 Subject to clause 11.9 any appeal by an Athlete against non-nomination to the AOC must be made to the Appeals Tribunal. Any appeal must accord with the following procedure:*

- (1) the appellant must give written notice of his appeal to the chief executive officer of the relevant [National Federation] within 48 hours of the announcement of the decision against which the appeal is made*

...

The Appellant contended that clause 11.6 of the AOC By-Law was not applicable because:

- a) this was a subsequent appeal within the meaning of clause 11.1(2) of the AOC By-Law and therefore the relevant time limit is that set out in Rule 49 of the Code of Sports-related Arbitration (the “CAS Code”), namely 21 days; and
- b) on his version of events which occurred after the expiry of the time limit, there was a variation of the contract in which the time limit for the lodging of the appeal was extended to 5:00pm on 23 May 2008.

The Respondent:

- a) submitted that this appeal is not a “subsequent appeal” under clause 11.1 of the AOC By-Law, as it is an appeal from a decision of an Australian Canoeing Selection Panel, not a decision of the Australian Canoeing Appeals Tribunal; and
- b) disputed the Appellant’s version of events purporting to vary the time limit in the contract and argued, in any event, that a multi-party contract cannot be varied by the consent of only two of the parties to that contract.

## LAW

1. Under clause 11.6 of the AOC By-Law, it is a condition of any appeal jurisdiction, including an appeal to the CAS, that the Appellant give written notice of the appeal to the National Federation within 48 hours of the announcement of the decision against which the appeal is made.
2. It is common ground that the Australian Canoeing Panel Decision was announced by Australian Canoeing to the Appellant and other athletes by email sent at 10.01am on 21 May 2008. Thus notice of appeal by the Appellant was required to be given by written notice to the Chief Executive Officer of Australian Canoeing by 10:00am on 23 May 2008. It is common ground that written notice was given by the Appellant at 2.44pm on 23 May 2008, some four and a half hours after the deadline for the appeal.
3. In accordance with clause 11.9 of the AOC By-Law and Rule 32 of the CAS Code, as set out below, the CAS has no power to extend the time limit.

*11.9 Where an Athlete wishing to appeal a decision concerning his or her nomination or non-nomination and the relevant N[ational] F[ederation] so agrees in writing, the appeal to the Appeals Tribunal may be directly referred to Appeals Arbitration Division of CAS and in which instance the grounds of appeal must be one or more of the grounds described in clause 11.5 and the CAS panel will be vested with the powers of the Appeals Tribunal.*

*In such instance,*

- (1) *the appeal will be solely and exclusively resolved by CAS according to the Code of Sports-related Arbitration save that CAS will not have the power to vary the time limits pursuant to clause 11.6;*
- (2) *the provisions of clause 11.12 will apply to any such appeal in so far as they are relevant and clause 11.17 will not apply; and*
- (3) *there will be no subsequent appeal from the decision of CAS.*

### R32 Time limits

...

*Upon application on justified grounds, either the President of the Panel or, if he has not yet been appointed, the President of the relevant Division, may extend the time limits provided in these Procedural Rules, with the exception of the time limit for the filing of the statement of appeal, if the circumstances so warrant.*

*[underlined added]*

4. The Appellant through his Counsel conceded the time limit in the AOC By-Law required strict compliance but sought to avoid the consequences by his two particular submissions outlined above.
5. The Arbitral Panel does not accept the Appellant's first submission. Properly construed, clause 11.6 of the AOC By-Law operates in circumstances where the National Federation Selection Panel has made a decision not to nominate the athlete and the appeal is the first appeal from the decision of that Selection Panel. That first appeal may be heard either by the National Federation Appeals Tribunal or, subject to the agreement of the parties, by the CAS (see clause 11.9 of the AOC By-Law). It is in respect of this first appeal that the 48-hour time limit applies.
6. Clause 11.1 of the AOC By-Law allows a second ("subsequent") appeal after the first appeal. It provides for an appeal to the CAS from a decision of the National Federation Appeals Tribunal.
7. The present matter is intended to be the first appeal from the Australian Canoeing Panel Decision and clause 11.1 of the AOC By-Law has no operation because there has been no appeal to the National Federation Appeals Tribunal from the Australian Canoeing Panel Decision.
8. Thus, if the CAS was to have jurisdiction to hear the appeal in this matter, it would be by way of a direct reference pursuant to clause 11.9 of the AOC By-Law with the CAS Panel sitting, in effect, as the National Federation Appeals Tribunal. The present appeal therefore has to comply with the 48-hour time limit.
9. For at least two reasons, the Appellant's second submission should be rejected.
10. Firstly, because it would be a variation of a multi-party contract and in order for there to be a valid variation to a multi-party contract, it must be agreed to by all parties to that contract (see *Raguz v Sullivan* (2000) 50 NSWLR 236).
11. Even if the Appellant's version of the events is accepted (and the Respondent disputes that version), there was no consent by all parties to the contract and we would not infer the Respondent had authority to consent to the variation by or on behalf of all other parties to the contract, the Affected Parties (the selected athletes) being some only but not all of them. Indeed, we have been provided with a statement dated 22 June 2008 from the Affected Parties supporting the Australian Canoeing Panel Decision. We cannot infer from that document that those athletes have consented to varying the time limit on appeal imposed by their contract.
12. Further, a contractual variation has to be supported by consideration especially since the conduct said to support the variation occurred after the passing of the 48-hour deadline. There is no evidence of any such consideration.

13. We therefore find the Arbitral Panel has no jurisdiction to hear this appeal.

**The Court of Arbitration for Sport rules:**

1. The CAS does not have jurisdiction to hear this appeal.
2. (...).