COURT OF ARBITRATION FOR SPORT
APPEALS DIVISION
SYDNEY

Nathan Baggaley Appellant

AND

International Canoe Federation Respondent

Surf Lifesaving Australia
Australian Canoeing Inc
Australian Sports Commission Affected Parties

CAS 2006/A/1168

Appeal against the decision of the Respondent of 15 March 2005

CAS sole arbitrator – Doping violation with penalty – Review by IF with increased penalty – No written reasons – Appeal-Time limits – No discretion under CAS Rules – Appeal deemed inadmissible as out of time

The Appellant was a member of Surf Lifesaving Australia, Australian Canoeing and a scholarship holder at the Australian Institute of Sport, part of the Australian Sports Commission (together the "Affected Parties"). He was bound by the Anti-Doping Rules of each of the Affected Parties. He had been issued an Infraction Notice under those Rules in October 2005. At a CAS hearing before a sole arbitrator, the Appellant had conceded that he was guilty of an Anti-Doping Rule violation, but was found to bear no significant fault or negligence in relation to the infraction. The sole arbitrator set a period of ineligibility of 15 months.

The Respondent, the International Canoe Federation, was the International Federation responsible for canoeing. It did not appeal that decision (as it was entitled to do) but notified Australian Canoeing Inc. on 15 March 2006 that it had suspended the Appellant for two years from all international competitions commencing 13 September 2005. It provided no reasons for the decision.

By Application Form of 11 October 2006 the Appellant lodged an appeal seeking relief including declarations and an order setting aside the two-year suspension. The arbitration was conducted by the Court of Arbitration for Sport

("CAS") Appeals Division in Lausanne. The Respondent's lawyers argued that the appeal was time barred under the CAS Code of Sports-Related Arbitration ("CAS Rules") and this issue was determined as a preliminary issue.

Held, by Williams P, Sullivan and Hober AA, that the appeal against the Respondent's decision was inadmissible on the ground that it was out of time.

Solicitors for the Appellant had written to the CAS Oceania Registry on 31 March 2006 seeking reasons for the decision and stating that it was not possible to file an appeal brief within the specified time without them. The letter was copied to the Respondent, with wording seeking preservation of appeal rights. The Respondent in reply noted that there may be delay in forwarding further information. Reasons for the Decision were finally forwarded on 16 May 2006 by the Respondent. Another letter was sent by solicitors for the Appellant seeking information. There was no further correspondence between the parties.

Rules 47 and 49 of the CAS Rules deal with the initiation of appeals. Rule 49 states that in the absence of a time limit set out in the relevant Rules (here the Doping Control Rules) the time limit for appeal shall be 21 days from the receipt of the decision appealed against. R49 also states that the Division President, after having consulted the parties, may refuse to entertain an appeal if it is manifestly late. The decision of the Respondent notifying of the ineligibility was received on 16 March 2006, which meant that the 21-day limit referred to in R49 of the CAS Rules expired on or about 6 April 2006. The Appeal referred to in Rules 32 and 47 contemplated that the "Appeal" referred to there is the Statement of Appeal. Therefore the Statement of Appeal should have been filed within 10 days of the expiry of the time limit. The Rule was not complied with, so by virtue of R49 of the CAS Rules the Appeal was deemed to be withdrawn.

The Panel noted that while R32 of the CAS Rules affords some discretion to extend time limits, this discretion expressly does not apply to the time limit for filing of a Statement of Appeal. To construe the Rules otherwise, the Panel decided, would make a nonsense of the exception in R32, and this conclusion was confirmed by the closing words of R48.

The decision for the purposes of the CAS rules was the decision of 15 March 2006. The ICF Doping Control Rules ("Doping Rules") provided that decisions of the relevant Disciplinary Panel made where the Rules have been violated must be made in "a timely, written reasoned decision". This had been complied with by the single CAS Panel. The Doping Rules also provided for review of the decisions of National Federations by the Respondent's Doping Control Panel and ICF Executive "…who are responsible for the final decision in each case" (R8.6 ICF Doping Rules). The CAS Panel considered whether the

decision of 15 March 2006 needed also to be a timely, written, reasoned decision, despite the fact that this was not expressly stated in the relevant rule. The Panel was prepared to imply a term to this effect into the Rules under either Australian or Swiss law

(*B.P. Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266 at p 283 applied; Kötz, *European Contract Law* Volume 1, Clarendon Press (1992) pp 118–119, Tercier, *Le Droit des Obligations,* 3rd ed., Schulthess (Zurich 2004) pp 176–177 referred to.)

The decision of 15 March 2006 did not comply with the implied term. The Panel stated, however, that if time only ran when a decision was timely, written and reasoned it would make it difficult for a potential appellant to determine objectively when time did start to run. The underlying theme of the CAS Code is certainty, and a Panel has broad powers once its jurisdiction has been invoked in a timely fashion, for example, to order that reasons be provided or to annul a decision being appealed and refer the case back. For that reason, the Panel found that the time for filing a Statement of Appeal began to run from 16 March 2006 and the Appellant was out of time. Matters such as whether the relevant decision was a nullity because the reasons were inadequate or because they were provided well after the original decision was communicated to the athlete could be examined by the CAS in the context of the substantive hearing of the appeal.

Issues based on estoppel, waiver and good faith raised by the Appellant were also dismissed by the Panel.

[Headnote by Deborah Healey]

CAS 2006/A/1168 Baggaley v International Canoe Federation

PARTIAL FINAL AWARD

rendered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

President: Mr David A.R. **Williams** QC, Barrister, Auckland, New Zealand

Arbitrators: Mr Alan **Sullivan** QC, Barrister, Sydney, Australia
Mr Kaj **Hobér**, Attorney-at-Law, Stockholm, Sweden

between

NATHAN BAGGALEY
represented by Mr Tony O'Reilly of Kennedys Lawyers in Sydney, Australia and Mr Dominic Villa, Barrister in Sydney, Australia

– Appellant –

and

INTERNATIONAL CANOE FEDERATION, Lausanne, Switzerland
represented by Dr Dirk-Reiner Martens & Ms Julia Feldhoff of Beiten Burkhardt Attorneys-at-Law in Munich, Germany

– Respondent –

SURF LIFE SAVING AUSTRALIA, Sydney, Australia
AUSTRALIAN CANOEING INC., Sydney, Australia
AUSTRALIAN SPORTS COMMISSION, Canberra, Australia
represented by Mr Ian Fullagar of Lander & Rogers Lawyers in Melbourne, Australia

– Affected Parties –

INTRODUCTION

1. By an Application Form dated 11 October 2006 the Appellant, Mr Nathan Baggaley lodged an appeal against a decision of the Respondent, the International Canoeing Federation ('ICF'), handed down on or shortly before 15 March 2006 whereby the ICF decided to suspend the Appellant for a 2-year period from all International Competitions in the sport of canoeing, commencing on 13 September 2005. The ICF is the peak world body controlling or administering the sport of canoeing.

2. The relief which the Appellant seeks includes certain declarations and an order setting aside the 2 year period of ineligibility imposed upon the Appellant by the ICF. It will be necessary to briefly refer to the factual background which led to the bringing of this Application below. However, before doing so, it is necessary to record some formal aspects of this Appeal.

PROCEDURAL MATTERS

3. The Application which was assigned to the Appeals Division of the Court of Arbitration for Sport (CAS) was originally filed in the CAS Oceania Registry. By letter dated 17 October 2006 the ICF's lawyers objected to the assignment of the matter to the Oceania Registry and also foreshadowed an argument that the ICF regarded this Appeal as being 'time-barred' by reason of the provisions of the CAS's Code of Sports-Related Arbitration (2004 Edition) ('the *CAS Rules*').

4. On or about 24 October 2006, the CAS informed the parties that the arbitration procedure would be conducted by the CAS Court Office in Lausanne, Switzerland. Subsequently, the CAS Panel appointed to hear the Appeal was determined as being Mr David Williams QC (as President), Mr Alan Sullivan QC and Mr Kaj Hobér.

5. All parties to this Appeal (including the Affected Parties) have agreed and consented to the jurisdiction of the CAS, in accordance with the *CAS Rules*, to hear and determine this Appeal. In any event, the jurisdiction of the CAS to hear this Appeal is clear from *Rules 8.7* and *13.2.1* of the ICF *Doping Control Rules.*

Parties to the Appeal

6. The Appellant, in the Application form, named the ICF as the sole Respondent. However, for reasons explained below, he also named Surf Life Saving Australia Limited ('SLSA'), Australian Canoeing Inc ('ACI') and the Australian Sports Commission as Affected Parties.

7. Each of the Parties has been legally represented at the various telephone conferences and the telephone hearing, which have culminated in the making of this Partial Award. The Affected Parties were also represented at the telephone hearing.

The circumstances leading to the making of this Partial Award

8. As indicated, following the filing of the formal Application, the ICF indicated that it may challenge the Appeal on the basis that it was time-barred by the *CAS Rules*. Following telephone conferences, at which the Parties were represented, the Panel determined that it was appropriate to determine the issue as to whether the Appeal was time-barred as a preliminary issue and directed that the parties file and serve written submissions in respect of this preliminary issue.

9. The Panel also determined that it would hear further oral argument in respect of the preliminary issue, by international telephone hook-up, on Friday 15 December 2006.

10. The oral hearing took place over several hours on Friday, 15 December 2006. In addition to the Panel members and Mr Casserly of the CAS Court Office in Lausanne, those participating in the hearing of the preliminary point on 15 December 2006 were:

(a) Mr Dominic Villa of Counsel, instructed by Kennedys Lawyers representing the Appellant;

(b) Dr Reiner Martens and Ms Julia Feldhoff of Beiten Burkhardt, an international law firm representing the ICF; and

(c) Mr Ian Fullagar of Lander & Rogers Lawyers representing each of the Affected Parties.

11. Each of the Appellant and Respondent filed written submissions in respect of the preliminary issue. Understandably, the Affected Parties did not do so and although they appeared, through Mr Fullagar, at the telephone hearing on Friday 15 December 2006, the Affected Parties made no substantive submissions. However, they did indicate that their preference was that the Appellant's Appeal be heard on the merits rather than being dismissed as timebarred.

12. It will be necessary to discuss the various submissions made on behalf of the Appellant and the Respondent in respect of the preliminary issue later in this

Partial Award. However, before so doing, it is necessary and convenient to set out the factual circumstances leading up to the lodgement of the Appellant's formal Application in October this year.

BACKGROUND

13. The Appellant is a well-known Australian canoeist of high quality. He was a member of Surf Life Saving Australia and Australian Canoeing and, in addition, a scholarship holder with the Australian Institute of Sport ('AIS').

14. As such, the Appellant was subject to and bound by the *Anti-Doping Rules* of each of the Affected Parties, including the *Anti-Doping Policy* of the Australian Sports Commission.

15. In accordance with the provisions of these *Policies* and *Rules*, the Appellant was subject to an out of competition advance notice doping control conducted by the Australian Sports Drug Agency ('ASDA') on 13 September 2005.

16. On or about 24 October 2005 the Appellant was issued an Infraction Notice by SLSA, ACI and the Australian Sports Commission. The Infraction Notice informed the Appellant of his rights to go to a hearing on the issue of whether or not the Appellant had committed *Anti-Doping Rule Violation* and what sanction should apply. The Infraction Notice also pointed out that any hearing would be heard under Article 11 of the respective *Anti-Doping Policies* of the SLSA, ACI and ASC and that each of those bodies proposed that a CAS Panel be appointed to arbitrate the dispute.

17. On 7 November 2005 the athlete's legal representatives advised Lander & Rogers, acting on behalf of the Affected Parties, that the Appellant wished to have the matter referred to a hearing and was content for the matter to be heard by a Panel appointed by the CAS.

18. On 20 December 2005, the matter was heard by a CAS Panel comprised of Mr David Grace QC, acting as Sole Arbitrator. SLSA, ACI and the Australian Sports Commission all appeared as Applicants, and ASDA appeared as an Affected Party.

19. In the course of the contested hearing before the CAS Panel:

(a) The Appellant conceded that he was guilty of an *Anti-Doping Rule Violation*;

(b) The Appellant contended that the sanction should be eliminated or reduced on account of him bearing no fault or negligence, or no significant fault or negligence; and

(c) Evidence was adduced from the Appellant, the Appellant's brother, the Appellant's father and from a doctor as to the circumstances by which the prohibited substances came to be present in the Appellant's system.

20. Having considered all of the evidence and the submissions of the legal representatives appearing for the parties Mr Grace QC, in his capacity as a CAS Arbitrator, made the following findings:

(a) The Appellant had established that he bore no significant fault or negligence; and

(b) The period of ineligibility should be reduced to 15 months.

21. Although the ICF was entitled under Article 16.2.2.3 of the ACI *Anti-Doping By-Law* to appeal from Mr Grace's Award it did not do so. Rather, purportedly pursuant to its own *Rules*, the ICF decided to deal with the matter itself.

22. By letter dated 15 March 2006 the ICF notified the ACI that it had decided to suspend the Appellant for a 2 year period from all international competitions. The Appellant, in his formal Application, seeks to challenge this decision of the ICF on at least two bases:

(a) The ICF denied the Appellant procedural fairness in coming to that decision because it failed to afford the Appellant the opportunity to be heard pursuant to Article 10.2 of the ICF's *Doping Control Rules* as to why the period of ineligibility should be reduced pursuant to Article 10.5 of those ICF *Rules*; and

(b) The ICF was bound by Article 15 of the ICF's *Doping Control Rules* to recognise and respect the hearing results pronounced by Mr Grace QC in the forementioned CAS Arbitration.

23. The Panel points out at the outset that it is not necessary for it to form any concluded view whatsoever as to the merits of each of these two contentions by the Appellant. Nor does it purport to do so. The Panel has had no submissions directed to it as to the efficacy of the Appellant's allegations in this regard and has not considered the merits or otherwise of these contentions by the Appellant.

24. When the ICF informed ACI, and subsequently the Appellant, of its March 2006 decision to suspend the Appellant for 2 years it did not provide any reasons for its decision.

25. By letter dated 31 March 2006 Minter Ellison, on behalf of the Appellant, wrote to Mr Redman of the CAS Oceania Registry. That letter:

(a) indicated that the decision of the ICF was conveyed to the Appellant on 16 March 2006;

(b) pointed out that the ICF letter of 15 March 2006 neither disclosed the reasoning upon which the ICF had relied nor the material upon which it had relied when making its decision;

(c) stated that given the lack of information, it was not possible for Minter Ellison to file a formal Statement of Appeal as it did not understand what decision had been made by the ICF and therefore what relief the Athlete should request;

(d) asserted that even if Minter Ellison "was able to file a holding statement of appeal [it] could not file an appeal brief within the time specified that dealt in any meaningful way with the issues that might arise on appeal given the paucity of information presently available to my client";

(e) indicated, attaching a copy, that Minter Ellison had written a letter in similar form to the ICF; and

(f) concluded as follows:

> *"Once I [Minter Ellison] have this information, I will be in a position to file a formal Statement of Appeal. In order to preserve the rights of my client to bring an appeal against the decision of the ICF, I request that in the interim you take this letter as notice of the appeal of my client. I will today also send to the ICF a copy of this letter to ensure that they are on notice of the position of my client.*
>
> *Please let me know as soon as possible if the sending of this letter is not sufficient to protect the appeal rights of my client, in which case I will file a holding Statement of Appeal."*

26. On 31 March 2006 Minter Ellison also wrote to Mr Antoine Goetschy, the ICF Secretary General. The terms of that letter are somewhat similar to the terms of the letter, written on the same day, to the CAS. The letter requested provision of materials which the ICF relied upon for its decision of 15 March 2006 together with other information relating to the making of that decision. It also attached a copy of the letter of 31 March 2006 to the CAS. The letter stated as follows:

> *"You will note from this letter [the letter to CAS] that it is my view that my client does not currently have sufficient information to enable him to file a formal Statement of Appeal in accordance with the procedural rules of CAS. In these circumstances, in order to preserve his appeal rights I have asked CAS to take my letter as notice of his appeal.*
>
> *Please let me know immediately if you do not accept this as preserving his appeal rights and I will arrange to file a Statement of Appeal on a holding basis."*

27. The letter then went on to point out that the ICF decision did not disclose the reasoning or material upon which the ICF relied when making its decision and said:

> *"In these circumstances, it is simply not possible for my client to file a considered Statement of Appeal or to prepare an appeal brief which deals in any meaningful way with the issues that are likely to arise on appeal."*

28. Mr Goetschy responded to Minter Ellison by an e-mail dated 5 April 2006. In that e-mail Mr Goetschy pointed out that he was overseas and needed to contact various people in order to answer the questions raised in the Minter Ellison letter. He indicated that there may be some delay before Minter Ellison would receive his answer.

29. After a lapse of time of almost 1 month, Mr O'Reilly of Minter Ellison sent an e-mail to Mr Goetschy dated 2 May 2006. He referred to Mr Goetschy's email of 5 April 2006 and noted the delay in the response. The e-mail concluded with the expression of hope that Mr Goetschy would respond 'as soon as possible'.

30. Mr Goetschy, on behalf of the ICF, responded to Mr O'Reilly by an e-mail dated 4 May 2008. In that e-mail Mr Goetschy sought to explain the delay in responding to Mr O'Reilly and concluded by saying:-

> *"I think that I will be able to answer your letter within the next 2 weeks as I will have to request advice from some people as I am a novice about all these law things."*

31. Subsequently on or about 16 May 2006 the lawyers representing the ICF wrote to the lawyers representing the Appellant setting out, albeit in a very CAS abbreviated form, the ICF's reasons for its decision. The letter dated 16 May 2006 from Beiten Burkhardt to Minter Ellison Lawyers (being the lawyers then acting for the Appellant) stated, relevantly, as follows:

> *"We are acting for ICF in the matter of Mr Nathan Baggaley.*
>
> *With respect to your 31 March 2006 letter to ICF we are pleased to inform you that the 15 March 2006 ICF Decision is based on the (uncontested) finding of a prohibited substance in your client's bodily specimen and on Rule 10.2 of the ICF Doping Control Rules which provides for a 2 year sanction. The ICF is of the view that on the occasion of the proceedings in Australia Mr Baggaley was unable to establish the basis for eliminating or reducing this sanction.*
>
> *We understand that you have filed an appeal against this decision with CAS and we look forward to hearing from them on this appeal."*

The Beiten Burkhardt letter of 16 May 2006 refers to the letter written, on behalf of the Appellant, to the ICF on 31 March 2006 which is summarised above at paragraph 25.

32. Minter Ellison responded to this letter by letter dated 29 May 2006. That letter complained that the Beiten Burkhardt letter did not address in any substantive way the matters raised in the Minter Ellison letter to the ICF dated 31 March 2006 and pointed out the difficulties that that entailed for the Appellant. The letter went on to assert that in those circumstances:

> *"It is simply not possible for my client to comply with his obligations under the Procedural Rules of CAS in filing an appeal."*

33. The letter concluded by again repeating the requests for materials and information and indicating that certain relief may be sought from the CAS in the event that the information materials were not provided. Unlike the letter of 31 March 2006 this letter did not request acknowledgment by the Respondent that the Appellant's Appeal rights would be preserved pending receipt of the further information which the Appellant sought.

34. There the correspondence trail ends until the filing of the Application by the Appellant on 11 October 2006.

35. By letter dated 16 October 2006 (received in the CAS Oceania Registry on 17 October 2006) Beiten Burkhardt, on behalf of the ICF, specifically raised the time bar issue. The letter stated that Beiten Burkhardt wished *"to point out that the Appeal is time barred in that the appealed decision dates 15 March and the Appeal has been way beyond the 21-day deadline of Rule 49 of the [CAS Rules]."*

36. After various further communications between the parties and the CAS and the making of various procedural directions which the Panel does not feel it necessary to set out herein, the Panel determined that the time-bar issue be determined as a preliminary issue as already stated. All parties consented to this course, although the Appellant contended that part of the substantive appeal should also be heard at this time.

SUBMISSIONS BEFORE THE PANEL

37. On the preliminary time bar issue, the Panel has before it and has considered the following submissions of the parties:-

(a) The submissions contained in the Beiten Burkhardt letter dated 4 December 2006;

(b) The submissions, on behalf of the Appellant, attached to the letter dated 7 December 2006 from Kennedys to Mr Casserly of the CAS;

(c) The Appellant's submissions regarding the timeliness of the Appeal sent to Mr Casserly under cover of letter dated 11 December 2006;

(d) The ICF's submissions sent under cover of letter to the CAS dated 13 December 2006;

(e) The Appellant's 'surrejoinder' dated 14 December 2006 (although this document only comprises e-mails between the parties, the content of which have already been set out above);

(f) The oral submissions made by Mr Villa on behalf of the Appellant on Friday 15 December 2006 and the oral submissions made by Dr Martens and Ms Feldhoff, on behalf of the ICF, on 15 December 2006.

(g) The Appellant's Further Submissions made by Mr Villa on or around 19 December 2006.

DISPOSITION

Interpretation of the CAS Rules

38. It is first necessary to consider and interpret the relevant *CAS Rules* relating to the filing of appeals. All parties agree that the *CAS Rules* are contractually binding upon them in respect of this Appeal. It goes without saying that the *CAS Rules* bind not only the parties but also the CAS and, in particular, this Panel.

39. This Panel has no power to dispense with the provisions of the *CAS Rules* or alter or vary them or to extend time limits except as expressly provided in the *CAS Rules* or except as arises by necessary implication from those *Rules.* The CAS is an arbitral body not a court of law. The CAS does not possess any inherent powers nor any discretion, afforded by Rules of Court, to control its own processes or to unilaterally vary, adjust or waive the requirements of the contract by which the parties and the CAS have agreed to be bound and which relevantly finds expression in the *CAS Rules*.

40. The general provision of the *CAS Rules* dealing with initiation of appeals is *R47*. *R47*, on its face, does not provide for any time limit within which an appeal must be filed with the CAS.

41. However, *R49* states that, in the absence of a time limit set out in, relevantly, the *ICF Doping Control Rules*, the time limit for appeal shall be 21 days from the receipt of the decision appealed against. *R49* goes on to say that the Division President, after having consulted the parties, may refuse to entertain an appeal if it is manifestly late.

42. As is apparent from the Minter Ellison letters dated 31 March 2006, the Appellant received notification of the ICF "decision" on 16 March 2006. Prima facie, therefore, if the "decision" of 16 March 2006 is regarded as a "decision" for the purposes of the *CAS Rules*, the 21 day limit referred to in *R49* of the *CAS Rules* expired on or about 6 April 2006.

43. *R51* of the *CAS Rules* provides that the Appellant is to file with the CAS his or its appeal brief (the contents of which are specified) within 10 days following the expiry of the time limit for an appeal. *R51* goes on to state that should the *Rule* not be complied with then that Appeal shall be deemed withdrawn.

44. The *CAS Rule* specifically dealing with time limits is *R32*. Relevantly it states as follows:-

> *"The time limits fixed under the present Code shall begin from the day after that on which notification by the CAS is received. Official holidays and non-working days are included in the calculation of time limits…If the last day of the time limit is an official holiday or a nonbusiness day in the country where the notification has been made, the time limit shall expire at the end of the first subsequent business day.*
>
> *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." (Emphasis added.)*

45. Apart from the closing words of *R49*, it is clear that the only provision of the *CAS Rules* affording any discretion to extend time limits is *R32* as set out above.

46. *R32* contains an important exception to any such discretion. Neither the President of the relevant Division nor the President of this Panel has any discretion to extend the time limit for the filing of the Statement of Appeal.

47. The circumstances in which a Statement of Appeal should be filed or submitted and its required contents are specifically dealt with in *R48* of the *CAS Rules*. That rule provides for the Appellant to submit to the CAS a CAS Statement of Appeal containing various information and requires the Appellant, upon filing the Statement of Appeal, to pay the prescribed fee.

48. The formal Application filed by the Appellant on 11 October 2006 is in the standard form CAS Application. It is evident, from the contents of that Application Form that this document is the Statement of Appeal intended by *R48* as it is designed to ensure provision of each of the various pieces of information specified in *R48* of the *CAS Rules*.

49. On its face, *R48* does not provide for any time within which the Statement of Appeal must be filed. However, it is obvious that all of the *CAS Rules*, and each individual *Rule* must be construed in their context and, in particular, in the context of the *Rules* as a whole. Furthermore, the *CAS Rules* must be construed in a practical, sensible and reasonable fashion to give practical effect to them and no provision should be regarded as otiose, redundant or superfluous unless such a conclusion is rendered necessary by a consideration of the *Rules* as a whole.

50. Therefore, we feel compelled, in the light of the language of *R32* and of *R47*, to reach the conclusion that what the *Rules* contemplate is that the 'Appeal' referred to in *R47* and *R49* of the *CAS Rules* is the Statement of Appeal referred to in *R48*.

51. To construe the *Rules* otherwise would be to make a nonsense of the exception set out in *R32* or at least render it otiose or superfluous. It appears to us that the expressions 'Appeal' and 'Statement of Appeal' in *Rules 47 – 49* are intended to be read as synonyms and as interchangeable expressions. That is the only way to make sense of the reference in *R49* to the 'time limit for appeal' and the reference in *R32* to the 'time limit for the filing of the Statement of Appeal' and the absence of any express time in *R48* which deals specifically with Statements of Appeal.

52. Moreover, this conclusion is confirmed, in the Panel's view, by the contents of the proposed Statement of Appeal as provided for by *Rule 48*. It is the very sort of material one would expect to find in an initiating process commencing an appeal.

53. We therefore conclude that the *CAS Rules* require that in the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or of a previous agreement, a Statement of Appeal shall be lodged by an appellant within 21 days of the receipt of the decision appealed against. As has been said, that time limit, in the present case, expired on or about 6 April 2006 if the ICF's "decision" of 15 March 2006, received by the Appellant on 16 March 2006, is regarded as a decision for the purposes of the *CAS Rules*.

54. In light the *R49* time limit and the express lack of power to extend that time limit provided by *R32* of the *CAS Rules* (as discussed above at para 46), since the Appellant's Statement of Appeal was not lodged until October 2006, the ICF submits that it is time-barred.

55. The lack of power to extend or waive the time limit is confirmed by the closing words of *R48*. Those closing words contemplate that, for one reason or other, the Appellant may not be able to provide, at the time of submitting his or her Statement of Appeal, all of the contemplated material. To cater for that situation, *R48* enables the CAS Court Office to 'grant once only a **short deadline** to the appellant to complete his statement.' (emphasis added) The *Rule* goes on to say that failing the appellant completing his or her statement within that short deadline the appeal 'shall be deemed withdrawn'.

56. To summarise the foregoing, the scheme provided by the *Rules* gives an appellant 21 days in which to file his or her Statement of Appeal from the date

upon which the appellant receives notification of the decision appealed against and must lodge that Statement of Appeal within the 21 days even if he or she is not able to provide, in its entirety, the information contemplated by *R48*. If that is the case then the CAS Court Office has a limited discretion to grant, once only, 'a short deadline' to the appellant to complete the Statement with all relevant information. The sanction for not filing a complete Statement of Appeal within the 21 days and/or within the further 'short deadline' is that the appeal is deemed withdrawn.

57. The importance the *CAS Rules* attach to the time limits is further emphasised by *R51* dealing with the Appeal Brief. Once more, according to that *Rule*, the appeal is deemed to be withdrawn if the appeal brief is not filed within 10 days of the expiry of the time limit for the appeal (in this case, therefore, on the ICF's primary case, within 10 days of 6 April 2006). Of course, it is common ground here that the appeal brief was not filed within that time limit (indeed it has yet to be filed). But the President of this Panel does have a discretion to extend the time for filing the Appeal Brief pursuant to *R32*.

Meaning of "decision" for the purposes of R49

58. As already noted, the first question which needs to be determined is whether the ICF's "decision" of 15 March 2006 is to be regarded as a decision for the purposes of the *CAS Rules*. For the reasons which follow, we think that is the case, although, in the event that this is the wrong view, we go on to analyse the time bar issue on an alternative basis.

The scheme of the ICF Doping Control Rules

59. *Rule 8.1* of the ICF *Doping Control Rules* is contained under Article 8 which is headed "Right to a Fair Hearing". It provides, amongst other things, that where it appears that the *Anti-Doping Rules* have been violated the athlete shall be brought before a disciplinary Panel of that athlete's National Federation for a hearing to adjudicate whether a Violation of the *Anti-Doping Rules* has occurred and, if so, what consequences should be imposed. As already mentioned, the parties chose a CAS-appointed Panel, and in particular Mr David Grace QC, to constitute the "Disciplinary Panel' of the … National Federation" for the purposes of the alleged *Anti-Doping Rule Violation* by the Appellant.

60. *Rule 8.1* then goes on to state that the hearing process before the Disciplinary Panel shall respect various principles which are intended to afford procedural fairness to a person such as the Appellant. In particular, one of the principles which the Disciplinary Panel must respect is expressly stated to be '*a*

timely, written, reasoned decision". It is indisputable that Mr Grace's Award is such a decision.

61. *Rule 8.6* of the ICF *Doping Control Rules* provides as follows:

> *"Decisions by National Federations, whether as a result of hearing or the Athlete or other Persons acceptance of Consequences, will be reviewed by the ICF Doping Control Panel and the ICF Executive who are responsible for the final decision in each case."*

62. It is, as we understand it, pursuant to this *Rule* that the ICF has purported to make "its decision" of 15 March 2006. The question is whether, like the Disciplinary Panel decision which is reviewed by the ICF pursuant to *Rule 8.6*, the ICF's 'final decision' must also be 'a timely, written, reasoned decision'.

63. The ICF *Doping Control Rules* do not expressly state that a decision made by the ICF under Clause 8.6 must be "a timely, written, reasoned decision". Thus any such conclusion must be based upon implying a term into the contract, constituted by the ICF *Doping Control Rules*, which effectively adds to the end of Clause 8.6 the words *"which decision shall be a timely, written, reasoned decision."*

Implication of Terms

64. A preliminary and vital question is what is the law applicable to the determination of this issue (see *CAS Rule 58*). The only two candidates for the applicable law appear to be Australian law or Swiss law being the law in force in the domicile of the ICF. The ICF headquarters is currently domiciled in Lausanne, Switzerland. On the materials and submissions made to us we are unable to determine with any confidence what law applies for the purposes of *R58*. However, for the reasons which follow, we do not regard this as preventing us reaching a conclusion on this particular issue.

65. Under arbitration law, for a term to be implied, the following conditions (which may overlap) must be satisfied:

(1) It must be reasonable and equitable;

(2) It must be necessary to give business efficacy to the contract so that no term will be implied if the contract is effective without it;

(3) It must be so obvious that 'it goes without saying';

(4) It must be capable of clear expression; and

(5) It must not contradict any express term of the contract.

(See, e.g. *B P Refinery (Westernport) Pty Limited v Shire of Hastings* (1977) 180 CLR 266 at 283).

66. Under Swiss law, as we understand it, judges would ask if a gap in the contract can be filled by 'constructive interpretation' and frequently use the following formula:

> *"Where the parties have omitted to say something the judge must 'discover and take into account what, in the light of the whole purpose of the contract, they would have said if they had regulated the point in practice, acting pursuant to the requirements of good faith and sound business practice'."*

(See, e.g. Kötz, *European Contract Law* Volume 1, Clarendon Press (1992) pp 118–119, also, Tercier, *Le Droit des Obligations*, 3rd ed., Schulthess, (Zurich 2004) pp. 176–177).

67. For present purposes, we do not see any substantial difference between these two tests particularly when applied to the circumstances of the present case.

68. Given the importance of an ICF Executive decision under *Rule 8.6*, its potential consequences for the athlete and the express indications in Article 8 of the ICF *Doping Control Rules* that it is concerned to afford procedural fairness to the athlete the context is ripe for the implication of a term. This is particularly so where the ICF has stipulated that the Disciplinary Panel of the National Federation must give a timely, written and reasoned decision. If the Disciplinary Panel of the National Federation is so obliged why, it may be asked rhetorically, should not the ICF be under a similar obligation?

69. In the context of the ICF *Doping Control Rules* viewed as a whole, and, in particular, in the context of Article 8 as a whole, it is the Panel's view that both the common law and civil law tests for implying a term are satisfied. Accordingly, the Panel construes Clause 8.6 of the ICF *Anti-Doping Control Rules* as if it reads that the 'final decision in each case' is one which is 'a timely, written, reasoned decision'.

70. It is apparent that the decision of the ICF dated 15 March 2006 as communicated to the Appellant and to the CAS does not satisfy this description. It was not a reasoned decision. It is therefore arguable that this 15 March 2006 decision was a nullity. However, in order for a Tribunal to be able to determine

whether or not the previous instance decision is reasoned, written or timely, the appeal itself must be timely. So, when should time start running? When a previous decision is "timely, written and reasoned" or when a decision, regardless of the form, is communicated to the Appellant?

When did time start to run for the purposes of R49?

71. If this Panel were to hold that time only starts to run when a decision is timely, written and reasoned, such criteria would make it impossible for a potential Appellant to objectively determine when time starts to run. An underlying theme of the CAS Code is certainty. In that respect, the Code provides a Panel with broad powers, once its jurisdiction is invoked in a timely fashion. Indeed, at that point, the CAS Panel can, in its discretion, provide interim measures and, e.g. order a Respondent to immediately provide reasons. Under *R57* of the *CAS Code* the CAS Panel can also annul the decision that is being appealed and refer the case back. Regardless of what steps a CAS Panel subsequently takes, at the very least, the Appellant's case will be timely.

72. It follows, in the Panel's view, that time for filing a Statement of Appeal by the Appellant did begin to run as and from 16 March 2006 and the Appellant is out of time. Thus, for the purposes of the *CAS Rules*, in the Panel's view the following factual situation arises:-

(a)	Date of receipt of decision:	Thursday, 16 March 2006
(b)	Time limit for filing Statement of Appeal:	Thursday, 6 April 2006 (21 days after receipt of decision)
(c)	Time limit for filing Appeal Brief:	Monday 17 April (i.e. within 10 days following the expiry of the 21 day time limit for filing of the Statement of Appeal, on the subsequent business day).

73. Beiten Burkhardt supplied the reasons for the ICF decision by its letter to the Appellant's lawyers dated 16 May 2006. As at that date, the ICF had provided a "reasoned decision". Had the Appellant submitted its appeal in time, it could have argued that such a decision was a nullity because the reasons were inadequate or because they were provided well after the original decision was communicated to the Athlete. On the former point, in the Panel's view it is irrelevant whether or not the reasons for the decision are perceived as being good or bad, adequate or inadequate. Such matters, doubtless, would require examination in the context of a substantive hearing on any appeal which might

be lodged but are irrelevant as to whether or not there has in fact been a reasoned decision so as to start time running for the purposes of the *CAS Rules*.

74. However, in the alternative, even if the operative date of decision is taken as 16 May 2006, it does not avail the Appellant as the Appellant's Statement of Appeal was not filed until October 2006. Moreover, its Appeal Brief, to date, has not been filed. It is therefore apparent that, prima facie, the time limits in respect of the filing of each of these documents, as imposed by the *CAS Rules*, have not been met, irrespective of whether the date of the decision was 15 March 2006 or 16 May 2006.

75. Subject to the Appellant's other submissions, which shall be dealt with below, the consequence of this is that in the case of the breach of the time limit in respect of the Statement of Appeal the Appeal 'shall be inadmissible' (*R49*). Likewise, although *R32* affords to the President of this Panel a discretion in this regard, the prima facie position in respect of the Appeal Brief is that the Appeal 'shall be deemed withdrawn' (*R51*).

76. The Panel would be disposed to extend the time limit for the filing of the Appeal Brief so as to enable the Appellant to present its substantive case to the Panel if it was otherwise able to do so. The insuperable hurdle, however, in the Panel's view (unless the Appellant succeeds in the submissions to which we are about to come) is the fact that the exercise of such a discretion would be futile since the Statement of Appeal has not been filed within the specified time limit (there being no power to extend that time limit).

Issues of Estoppel, Waiver and Good Faith

77. The Appellant seeks to meet the time limitation difficulties with three legal arguments, namely that having regard to the conduct of the ICF in relation to the timeliness of the Appeal and the failure to take any issue with the 31 March 2006 notification then the Appeal should be taken to be 'admissible' on the basis of:

(a) the principle of waiver;

(b) the principle of estoppel;

(c) the principle of good faith.

78. *R58* of the *CAS Rules* provides for a determination of the law applicable to this dispute. The Panel has received no detailed submissions from the parties as to what is the applicable law nor have any submissions be made to the Panel about differences in the principles relied upon by the Appellant according to

what is determined to be the applicable law. In such circumstances we proceed upon the basis that there is no substantive difference in the relevant legal principles irrespective of which of the competing possibilities for the applicable law is chosen.

Waiver

79. Counsel for the Appellant did not elaborate upon how the 'principle of waiver' assisted the Appellant's case. 'Waiver' is an indefinite and nebulous concept in the law. It is doubtful whether, truly, it is more than a generic description embracing principles of election between inconsistent rights on the one hand and estoppel on the other hand. As estoppel is the subject of a separate submission by the Appellants, it is thus necessary only to consider the concept of election between inconsistent rights.

80. So far as election is concerned, the fatal flaw in the Appellant's position is that the ICF has not elected between any rights which it has. As has been explained above, the *Rules* provide an automatic consequence for the Statement of Appeal not being filed within the 21 day period specified by *R48*. That consequence is that the Appeal shall be inadmissible. In other words, the consequence is an automatic, self-executing one. The Respondent's silence, inactivity or even acquiescence cannot change that consequence.

81. Moreover even if the Respondent had 'rights' to choose between, what are those 'rights'? Presumably, they are the 'right', on the one hand, to rely upon the time limits set out in the *Rules* or the right, on the other hand, to proceed to the CAS arbitration notwithstanding the Appeal was time-barred.

82. But, if these rights arose, they only arose when the Statement of Appeal was filed in October 2006. Within a few days of that occurring, the Respondent indicated it may be relying upon the time-bar (see paragraph 3 above). Thus, there can be no real suggestion that the Respondent elected not to rely on the time-limit provisions of the *CAS Rules*.

Estoppel

83. Similar considerations apply in respect of reliance upon the principle of estoppel. Once more, apart from orally asserting that detriment can be inferred, the Appellant, in his submissions, did not seek to explain in detail how the principles of estoppel assisted him in this case. But there are several answers, we think, to the Appellant's reliance upon the principles of estoppel.

84. First, there is the 'deemed withdrawal' point we have already noted (see paragraphs 75 and 80 above). That comes about without any conduct or

inactivity on the part of the Respondent. Moreover, since this is at least a tripartite contract any representation made by one only of the parties to it does not have the effect of creating an estoppel in respect of the other parties (including the CAS) to it.

85. Secondly, estoppel requires evidence of detrimental reliance upon the alleged representation or conduct. Here, there is no evidence from the Appellant that had either the Respondent or the CAS informed him that his letters of 31 March 2006 would not be regarded as amounting to the lodging of an appeal and that he must lodge a Statement of Appeal, he would have done so within the specified time limit. Even if it can be inferred, from the terms of the letters of 31 March 2006, that the Appellant would have done this nevertheless that is not sufficient.

86. Estoppels are generally suspensory rather than permanent in nature. They are founded on matters which affect the conscience of the party said to be estopped. Here the relevant estoppel is said to be founded upon the failure by the ICF to provide reasons for its decision. In light of our primary finding that the Appellant should have filed its submissions on or before 6 April 2006, this type of estoppel is irrelevant. However on the alternative finding that time started to run as at the date of giving reasons, reasons the Panel has found the ICF was obliged to give (see paragraphs 67 – 69 above), once the Respondent provided those Reasons, any 'detriment' which the Appellant may have been suffering from ceased. Any 'estoppel' arising as a result of such detriment would also, from that time, cease. Therefore, on this alternative finding, following receipt of the ICF's Reasons on 16 May 2006 (irrespective of the adequacy of those Reasons) there was nothing to stop the Appellant thereafter lodging a Statement of Appeal in accordance with the *Rules*. It failed to do so.

87. Accordingly, we do not think the Appellant can succeed on the basis of estoppel.

Good Faith

88. Counsel for the Appellant provided further submissions on the issue of good faith following the 15 December Telephone Hearing. He contended that the Tribunal should have regard to Article 2 of the Swiss Civil Code which provides that everyone must exercise his or her rights and fulfil his or her obligations in accordance with the principle of good faith. At paragraph 2 of those submissions, the Appellant argued that:

> *"… The principle of good faith implies a number of duties of loyalty and honesty in dealing between the parties which may be implied by a judge even if these are not expressly provided, for example, in a*

> *contract between the parties. This rule basically means that no-one should be able to use his or her rights to harm someone else. The provision is applicable in cases where there is a discrepancy between apparent rights and justice."*

89. The Appellant concluded that these principles of Swiss Law could be applied in the present case "to achieve the same result as the application of the principles of estoppel, waiver and good faith relied upon by the appellant in its primary submissions". This submission was advanced notwithstanding that the citation referred to implication of the principle of good faith by a Judge not an arbitral tribunal.

90. Even if it be assumed that the ICF, in administering its *Rules*, has an obligation to act in good faith towards the Appellant, we nevertheless see no possible argument for a breach of good faith in the present case. The Appellant' argument has to be that, as an exercise of good faith, the ICF should have consented to varying the contract constituted by the *CAS Rules* so as to extend the time limits for lodging an appeal imposed by the *CAS Rules*. The Appellant referred us to no authority, and we know of none, to the effect that it is a breach of good faith for a party to a contract to refuse to agree to vary the contract. We think that, however wide the notion of good faith may be, it cannot extend to an obligation to vary the contract.

CONCLUSION AND FINDINGS

91. For the above reasons, the Panel is of the view that this Appeal was filed out of time and must be deemed inadmissible by reason of *R48* and *R49* of the *CAS Rules*. It gives the Panel no pleasure in deciding this matter on such a technical basis. As we have said, we do not think it appropriate to express any concluded view at all on the merits of the substantive decisions but it would have been far preferable that this Appeal had been determined on such merits.

92. In reaching the decision which it has, the Panel does not wish in any way to suggest that it is in any way giving its seal of approval to the ICF's decision of March 2006 or the circumstances in which it is made. Neither the ICF nor any similar organisation should regard this Award as supporting the notion that it can make decisions such as the one made here in March 2006 without giving the relevant Athlete a fair hearing and without providing a timely and reasoned decision.

93. The Panel has not heard the parties on the question of costs. As this is a disciplinary case of an international nature ruled in appeal, the provisions of R65 will apply. However, given the fact that the effect of this Award is that the Appeal will not go ahead but is deemed inadmissible, evidence will need to be

considered. Accordingly, in the event that either party wishes to apply for costs, it will be necessary for the parties to file evidence and prepare submissions in that regard. In the event that either party notifies the President of this Panel that it wishes to pursue the question of costs within 14 days of the date of publication of this Award, the Panel proposes that the President of the Panel have the power to issue a timetable to the parties in respect of the filing and service of evidence and submissions in respect of the question of costs. The Panel would then propose to determine the question of costs on the Papers unless the parties submit to the contrary.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Mr Nathan Baggaley on 11 October 2006 against a decision of the International Canoe Federation is inadmissible.

2. The question of costs is reserved.

Lausanne, 29 December 2006

THE COURT OF ARBITRATION FOR SPORT

David A. R. Williams QC	President of the Panel
Alan Sullivan QC	Arbitrator
Kaj Hobér	Arbitrator