Arbitration CAS 2006/A/1028 Melissa Martin v. Squash Australia, award of 25 February 2006

Panel: The Hon. Justice Tricia Kavanagh (Australia), President; the Hon. Justice Henric Nicholas (Australia); Mr Alan John Sullivan QC (Australia)

Squash
Selection criteria for the 2006 Commonwealth Games
Extent of the duty for the Selection Committee to give the reasons of its decision
Contestation of the merits of the Selection Committee's decision

1. **It would be unreal and artificial to impose upon Selectors working on behalf of a sporting organisation a duty to give better or more extensive reasons than a Court would expect of public officials exercising statutory powers. It follows, for instance, that even if Selectors do give reasons for their decision, no great significance should be attached to the fact that they have not mentioned every single item of material that they have considered or which might have conflicted with their ultimate decision because there is no obligation upon them to mention every such item.**

2. **The Selectors are an expert body chosen because of their expertise and experience to determine which players in their opinion, best fulfil the Selection Criteria. If the Selectors have complied with the Selection Criteria, the fact that others, in their position, would have made different selections is irrelevant. Provided the Selectors' decision is not capricious or irrational there is no basis for interference. It would be wrong for a CAS panel, under the guise of considering whether the Selection Committee properly followed the Selection Criteria, to seek to substitute its own decision on the merits.**

The Appellant, Melissa Martin, is a leading Australian squash player. The Respondent, Squash Australia Limited, is a company limited by guarantee and the administration of the sport of squash in Australia is vested in it. The First Affected Party, Kasey Brown, is also a leading Australian squash player who has been selected to represent Australia in squash at the forthcoming Commonwealth Games to held in Melbourne in March 2006. The Second Affected party, Dianne Desira, is also a leading Australian squash player who has been selected to represent Australia in squash at the forthcoming Commonwealth Games to held in Melbourne in March 2006.

It is to be noted that there were five women chosen in the Australian 2006 Commonwealth Games Squash Team (namely the First Affected Party, the Second Affected Party, Natalie Grinham, Rachael Grinham and Amelia Pittock). However, in her application, the Appellant has only nominated the First Affected party and the Second Affected Party as Affected Parties. From this, and indeed from

her submissions generally, we conclude that the Appellant does not seek, in this Appeal to displace any of Natalie Grinham, Rachael Grinham or Amelia Pittock from the Commonwealth Games Team.

After having met on Thursday 12 January 2006 and again the next day on Friday 13 January 2006 the Respondent's Selection Committee recommended to the Board of the Respondent that the women players to be selected in the Australian Squash Team for the Commonwealth Games be the First Affected Party, the Second Affected Party, Natalie Grinham, Rachael Grinham and Amelia Pittock. The Selection Committee also recommended that the Appellant be the reserve for the Team. The Board was informed that the decision of the Selection Committee was unanimous.

At a meeting of the Board of the Respondent held on 14 January 2006 the Board of the Respondent found no cause why any of the athletes nominated would not be suitable, and the Board unanimously resolved to prove the Selection Committee's recommendations for selection. Thus the First Affected Party, the Second Affected Party, Natalie Grinham, Rachael Grinham and Amelia Pittock were selected as the women members in the Squash Team with the Appellant being selected as the Reserve for that Team.

On 17 January 2006 the Appellant was notified by the Respondent by telephone that she had not been selected in the team but had been named as a Reserve. Later that day, the Respondent publicly announced details of the Team which had been selected.

On 17 January 2006 the Appellant lodged an Appeal in respect of her non-selection for the Commonwealth Games Team. That Appeal was lodged by means of a six (6) page document in which the Appellant set out her reasons for appealing against her non-selection. The Appeal was to the Appeal Committee of the Respondent.

On 30 January 2006 the Appellant was notified by e-mail from Mr Norman Fry, the Chief Executive Officer of the Respondent that the Appeal Committee had dismissed her Appeal and upheld the original selection. An announcement of the decision of the Appeal Committee was published on the website of the Respondent on 31 January 2006.

The Appellant had a discussion by telephone with Mr Fry on 1 February 2006. During that telephone conversation she was advised by Mr Fry that, if she consented, the Court of Arbitration for Sport, could hear an Appeal against her non-selection for the Commonwealth Games Team.

By facsimile transmission dated 2 February 2006 on the letterhead of the Respondent the information communicated by Mr Fry to the Appellant over the telephone the previous day was confirmed and that document went on to inform the Appellant as follows:

> *"If you agree to use the CAS to hear your appeal against the decision made by the Squash Australia's Appeals Committee (sic) please sign the agreement below and return to the CEO Squash Australia".*

On 3 February 2006 the Appellant signed the Agreement referred to in the Respondent's facsimile transmission dated 2 February 2006. Her Agreement was in the following form:

> *"I agree to using the Court of Arbitration for Sport to hear my appeal against the decision of the Squash Australia's Appeals Committee in relation to my non-selection for the Australian Squash Team for the 2006*

Commonwealth Games. I understand that the CAS would be used in place of the National Sports Disputes Centre as detailed in Squash Australia's Regulation 24 and the rest of paragraph 28 would stand unchanged".

By application dated 7 February 2006 the Appellant formally instituted her Appeal to the Appellate Division of CAS.

LAW

Jurisdiction

1. All parties have agreed that CAS has jurisdiction to hear this Appeal. However, because of the somewhat unusual manner in which that jurisdiction arises it is desirable to briefly record the circumstances in which CAS has had jurisdiction conferred upon it.

2. It is common ground that the Respondent's Regulation 24 governs the nomination and selection process for the Australian Squash Team to participate at the 2006 Commonwealth Games to be held in Melbourne next month.

3. The selection criteria are set out in Regulation 24 in Clauses 18 – 20 inclusive under the heading 'Selection Criteria'. Under the heading 'Appeals' in Regulation 24 are contained Clauses 21 – 26 which deal with an appeal by an athlete against his or her non-selection in the Commonwealth Games team to the Appeal Committee of the Respondent. Clause 31 is also relevant in respect of any appeal to the Appeal Committee.

4. Clauses 27 – 30 of Regulation 24 deal with appeals against the decisions of the Appeal Committee. Clause 27 gives an athlete a right to lodge an appeal against a decision of the Appeal Committee. Clause 28 is in the following terms:

   "Any appeal against a decision handed down by the Appeal Committee must be solely and exclusively resolved by the National Disputes Centre whose decision will be final and binding on the parties and neither party will be entitled to institute or maintain any court or tribunal other than the said court".

5. At some unspecified time the National Sports Dispute Centre 'became defunct' or was wound up thereby frustrating the right of final appeal contemplated by Clauses 27 – 30 of Regulation 24.

6. Regulation 24 and the procedures which are specified within it have contractual force between the appellant and the respondent (see *Raguz v. Sullivan* (2000) 50 NSWLR 236). It was open to the appellant and the respondent to vary their contract by agreeing to substitute CAS for the National Disputes Centre as their final avenue of appeal. This they did between 2 February and 3 February 2006 in the circumstances outlined above.

7. Further, and alternatively, the parties to this Appeal have signed the Order of Procedure dated 10 February 2006 whereby they have expressly agreed to CAS having jurisdiction in this matter and have further expressly agreed that the decision of CAS will be final and binding on all parties and that no party shall institute or maintain any proceedings in any court or tribunal in relation to the Appeal.

8. Accordingly, we are satisfied that we have jurisdiction to hear this matter.

Consideration

9. The relevant Selection Policy for the Australian Squash Team Athletes 2006 Commonwealth Games is contained in Clause 20 of Regulation 24 which provides as follows:

> *Phase 3 - Commonwealth Games Squash Team (CGST)*
>
> *Athletes will be selected for the CGST based upon the following criteria:*
>
> *a. Criteria 1. The players will be selected for the team on the basis of performances in:*
>
> *(1) singles competitions including events on the Men's (PSA) and Women's (WISPA), WFS and Squash Australian calendars; and*
>
> *(2) doubles on international courts in WSF and Squash Australia sanctioned competitions and camps.*
>
> *b. in making these selections the CGST selections committee shall consider the following:*
>
> *(1) the Australian and World Rankings which are current at the time the team is selected;*
>
> *(2) performances in singles competitions in the previous six months prior to the selection date;*
>
> *(3) the past record of players in major events and in pressure situations in international tournaments;*
>
> *(4) outcomes of doubles competitions/campus conducted in the 12 months prior to the selection date.*
>
> *(5) the outcome of any medical examination pursuant to paragraphs 14 to 17 of this regulation.*
>
> *c. Criteria 2. (Determination of doubles combinations). The pair considered by the CGST selection committee to have the best prospects of winning gold in the Men's, Women's and Mixed doubles competition respectively will be selected. Other doubles combinations will be selected on the basis of achieving the best possible medal result. In making this selection, the CGST selection committee shall consider the following:*
>
> *(1) performances including official doubles competitions during the 12 months prior to the selection date played on international doubles courts; and*
>
> *(2) outcomes of performances during squad competitions during the period December 2003 to January 2006".*

10. The Appellant made the following Written Submissions:

- The Appellant submitted the decision of both the Selection Committee and the Appeal Committee were wrong in law because they involved a misapplication and/or misinterpretation of the relevant nomination criteria which amounted to a

failure to properly follow the nomination criteria and they did not give proper, genuine and realistic application to the selection criteria;

- The Appellant submitted the Selection Committee was bound to make its selections for the CGST based on the criteria set out in clause 20(a) alone and the Selection Committee had to be satisfied in relation to each of the criteria set out after considering each of the elements in clause 20(b).
- The Appellant contended the Selection Committee should not have considered the matter in clause 20(c) until after the CGST had been selected, as this clause is limited to the determination of doubles pairings from the selected items. Reliance was placed on the words of clause 20 which it was asserted acknowledges the CGST is selected having regard to both singles and doubles performances after which Criteria 2 is applied for the limited purpose of "(Determination of doubles combinations)" from within the team.
- The Appellant asserted this construction arises from the use of the terms:

  [20(a)] "The players will be selected for the team on the basis of performances in ..."

  and

  [20(b)] "in making these selections the CGST selection committee shall consider the following ...".
- The Appellant further submitted that clause 20 provides for a mandatory regime for selection mandating the CGST will be selected on the basis of performances in:
  - *(i) any singles competitions but that the performances must include performances in events in the PSA, WISPA, WSF, and SA Calendars; and*
  - *(ii) only in the specified doubles competitions, namely WSF and SA sanctioned competitions.*
- Clause 20(b)(1) to (5) are matters which the Selection Committee is mandated to consider in the selection process set out in clause 20(a). When applying clause 20(a) the Selection Committee must consider each of the five elements in 20(b).
- The Appellant asserts on the proper construction of clause 20 the Selection Committee:
  - *(i) must consider the specified events for both singles and doubles; and*
  - *(ii) for doubles, may not consider any events outside those listed in clause 20(a).*
- In addition the Selection Committee must consider each of the mandated criteria set out in 20(b) and it cannot exclude any one or all of them.

11. At the conclusion of the cross-examination of Mr Hunt, Mr Todd, on behalf of the Appellant, made the following additional oral submissions:
    - That the Panel could safely conclude that the Selection Committee did not properly consider all relevant performances in relation to the Appellant and in particular those set out in paragraph 34 of the Appellant's Submissions (being the Appellant's Submissions in singles events in WISPA, WSF and Squash Australia events at 9 specified 2005 Squash Tournaments);
    - In amplification of the Submission referred to in (a) above, Mr Todd submitted that Mr Hunt's evidence demonstrated that the Selection Committee had only general knowledge of the Appellant's performance in those events but not the knowledge of her actual specific performances as required by the Criteria;

- Additionally, by reference to paragraph 16 of Annexure 'A' to Mr Hunt's Affidavit, and in the light of Mr Hunt's evidence in cross-examination, that the Selection Committee had erroneously chosen the Second Affected Party solely on her doubles performances and not on both her singles and doubles performances as required by the Selection Criteria;
- That, since the Respondent had relied solely on the evidence of Mr Hunt as to the selection process, a *Jones v. Dunkel* inference was available in respect of the failure by the Respondent to have the other members of the Selection Committee give evidence.

12. After discussion with the Panel, when it was pointed out that the Appellant had given no written notice of its intention to make a submission of the kind referred to in paragraph 11(d) above and that, therefore, the Respondent had had no opportunity to consider the calling of such evidence from other selectors Mr Todd, on behalf of the Appellant, properly withdrew that Submission.

13. For its part, the Respondent made the following Submissions:
    - The respondent asserts that the selection process encompasses the combination of matters listed in the two criteria and submits that had Criteria 1 been the only basis upon which the team was to be selected, then para (c) of Clause 20 of Regulation 24 would not have included the words "Criteria 2";
    - The wording of Criteria 1 is not exclusive of Criteria 2 and, it is submitted by the respondent, the working of Criteria 1 includes the words:

      "on the basis of performances in Doubles ..." and *"outcomes of Doubles competitions/camps ..."*.

      invites the conclusion the selection process logically includes the further requirements of Criteria 2.
    - Reliance is placed on the affidavit of Normal Fry who the respondent asserts told the appellant of the significance of Doubles in the selection process;
    - As at the Commonwealth Games only two Gold Medals are involved in the Singles competition and three Gold Medals in the Doubles competition these facts support the respondent's interpretation of the selection criteria. If the narrow interpretation argued by the Appellant is accepted the respondent asserted it would be contrary to the outcomes sought by the sport.
    - The criteria requires the selectors to consider the players "performances" in various competitions and it was submitted the word "performance" includes not only the outcome of the performance but the process and/or peripheral matters relating to that performance. In addition, Criteria 1(b)(iii) requires the Selectors to consider the record of players "in pressure situations in international tournaments". Mr Todd, on behalf of the Appellant, ultimately accepted the correctness of this Submission.
    - Further, the respondent contends the principles of fairness and natural justice have been applied in all respects in the selection process. The selection was confirmed by the Board of the Respondent and the appeal should be dismissed together with an Order for costs in favour of the respondent.

14. The First Affected Party made the following Submissions:

- That the Appellant's case is based solely on Criterion 1 and has not Criterion 2 in consideration. In the First Affected Party' Submission, the Selectors reviewed all relevant facts from the Set Criteria to make an informed decision;
- The First Affected Party submits Ms Martin has based her appeal on Criteria 1 section (i) and (ii), her singles rankings and results in the last six months. Criteria 2 of the policy states that:

  "Other doubles combinations will be selected on the basis of achieving the best possible medal result".

  The selectors have taken the singles rankings and results into consideration, but due to other factors in accordance to the criteria, including Ms Martin's doubles performances and her inability to handle pressure;
- The First Affected Party, Ms K. Brown, asserts Criteria 1(iii) states:

  "The past record of players in major events and on pressure situations in international tournaments"

  This was considered by the selectors in making their decision for the Commonwealth Games Team. The criteria requires further the results in major events are relevant to the selection of the team and does not contain any time limitation frame. This contradicts Ms Martin's claims that irrelevant information was taken into account by the selectors and warrants an endorsement of the decision on selection of the team;
- While Ms Martin claimed that Criteria 1(iii) was not properly applied as she competed in more international singles tournaments than the First Affected Party, this is not an elements in the criteria or assists in demonstrating an ability to handling pressure the First Affected Party submitted;
- The selector's reasons for their decision reveal they properly applied both criteria consistent with Criteria 1(iii) of the selection policy;
- In Ms Martin's appeal, she has failed to address Criteria 2 of the selection policy, 'Determination of Doubles Combinations'. The selectors noted that Ms Martin struggled in her performances during squad competitions. This consideration was in accordance to Criteria 2(ii).

15. The other affected party, Ms Dianne Desira also put in some submissions. Those submissions however were confined to the 'merits' of the selections actually made and are of no real assistance to the Panel in determining this Appeal.

16. According to the oral evidence of Mr Hunt (which we accept) the Selection Committee provided a copy of its Reasons for its selections to the Board of the Respondent a couple of days after the final decision was made (that is on or about 15 January 2006). Mr Hunt, following the deliberations of the Selection Committee, prepared that document (which is Annexure 'G' to the Application) and e-mailed it to the other Selectors. After feedback from those Selectors, mostly by e-mail but, in some cases, verbally, the settled form of those Reasons was provided to the Board of the Respondent. In his oral Submissions, Mr Todd, on behalf of the Appellant,

sought to rely upon another document prepared by Mr Hunt being Annexure 'A' to his Affidavit which also discussed the selection process. That document, however, upon Mr Hunt's unchallenged evidence, was prepared solely for the purposes of the Appeal to CAS and sets out the Selectors' deliberations in a somewhat different form to the document which is Annexure 'G' to the Application. However, in our mind, there is no significant difference between the two documents and, given Mr Hunt's unchallenged evidence as to the provenance of the earlier document (being Annexure 'G') and the fact that it appears to have the endorsement of all Selectors, in the event of any discrepancy we would regard Annexure 'G' to the Application as being the more accurate and reliable record of the Selectors' deliberations. In any event, it seems that only one of the Appellant's Submissions is based upon a suggested difference between the two documents. That Submission is that when one looks at paragraph 16 of Annexure 'A' to Mr Hunt's Affidavit it is clear that the Second Affected Party was selected solely on the basis of doubles performances without her singles performances being taken into account.

17. Even if we were of the view that it would be contrary to the Selection Criteria to select the Second Affected Party solely on the basis of her doubles performances or potential (which is a Submission we do not accept for the reasons which we shall set out below) we would reject this Submission as a matter of fact not only in the light of Mr Hunt's oral evidence but also in the light of paragraph 11 of Annexure 'A' to Mr Hunt's Affidavit which states:

"The Selection Committee considered each athlete in turn against the Selection Criteria in Regulation 24 including their potential to win a medal in the singles and in the doubles competition" (emphasis added).

18. Further, Annexure 'G' to the Application demonstrates that the Selectors did take into account the First Affected Party's singles performances in making their selections (see the first paragraph under the heading 'Dianne Desira' in that document).

19. Thus we reject this Submission, which was one of the oral Submissions the Appellant made.

20. The other oral Submission the Appellant made was that the evidence of Mr Hunt established that, contrary to the Selection Criteria, the Selectors failed to consider the Appellant's specific and actual results in the singles tournaments mentioned in paragraph 34 of the Appellant's Submissions. Mr Hunt, in his oral evidence, candidly conceded that the Selectors did not have in front of them, at the selection discussions, actual print-outs of all specific results but said that the Selectors did have the world rankings of the players which the results fed into and further said that the Selectors got all of the results from the various websites and were generally aware of those results. He said that the Selectors did take into account their knowledge of those results. We think that is sufficient and there is nothing on our reading of Regulation 24, which requires the Selectors to have before them, at the time of making their decision, the specific results in those singles competitions. It is sufficient, that they are generally aware of those results (or, more accurately, performances as was ultimately conceded by Mr Todd) and take account of those performances in the selection process. We are satisfied they did.

21. As stated by Sir Laurence Street in *Kalil v. Bray* (1977) 1 NSWLR 256 at 261 in the analogous context of an expert disciplinary tribunal:

"The Tribunal was, in my view, entitled to draw upon its own expert resources from within its membership in identifying the evidence relevant to the forming of an opinion …. and in the further step of actually forming such an opinion

It would be unreal to expect the members of the Tribunal …. to fail to use their expert knowledge in resolving any matter (which falls within their expertise) arising in proceedings before the Tribunal. The Tribunal is in truth an expert panel and as such needs no expert evidence on the matters of its particular field of expertise…"

(See also *Hall v. The New South Wales Trotting Club* (1977) 1 NSWLR 378 at 386 – 387 and the decision of the Court of Arbitration for Sport in *Carney v. Triathlon Australia* 4 December 2000 at para 64).

22. This leaves the Written Submissions of the Appellant to consider. Before discussing those in detail it is desirable to deal with the issue of the proper construction of Regulation 24 and the factual matters relevant to that issue.

23. In construing Regulation 24 it must be borne in mind that the meaning of the terms of a contractual document (as this is) is to be determined by what a reasonable person in the position of the parties would have understood them to mean. That requires consideration of not only the text, but also the surrounding circumstances which are either known to the parties or ought reasonably be known to them and also of the purpose and object of the Regulation (see, for example *Toll (FGCT) Pty Limited v. Alphapharm Pty Limited* [2004] HCA 52 at [40]; *Zhu v. The Treasurer of the State of New South Wales* [2004] HCA 56 at [83]; *Maggbury Pty Limited v. Hafele Australia Pty Limited* (2001) 210 CLR 181 at 188 [11]).

24. Moreover, Clause 20 of Regulation 24 cannot be construed in isolation. Rather it must be construed in the context of Regulation 24 as a whole (*Re Media Entertainment & Arts Alliance; Ex parte Hoyts Corporation Pty Limited* (1993) 178 CLR 379 at 386 – 387; *Associated Alloys Pty Limited v. CAN 001 452 106 Pty Limited* (2000) 74 ALJR 862 at 872).

25. Sitting in the Hong Kong Court of Final Appeal, Lord Hoffman succinctly summarised the correct approach to construction in these terms (*Jumbo King Limited v. Faithful Properties Limited* (1999) HKLRD 757 at 773 – 774):

"The construction of a document is not a game with words. It is an attempt to discover what a reasonable person would have understood the parties to mean. And this involves having regard, not merely to the individual words they have used, but to the agreement as a whole, the factual and legal background against which it was concluded and the practical objects which it was intended to achieve. Quite often this exercise will lead to the conclusion that although there is no reasonable doubt about what the parties meant, they have not expressed themselves very well. Their language may sometimes be careless and they have may have said things which, if taken literally, means something different from what they obviously intended. In ordinary life people often express themselves infelicitously without leaving any doubt about what they meant. Of course in serious utterances such as legal documents, in which people may be supposed to have chosen their words with care, one does not readily accept that they have used the wrong words. If the ordinary meaning of the words makes sense in relation to the rest of the document and the factual background, then the court will give effect to that language, even though the consequences may appear hard for one side or the other. The court is not privy to the negotiation of the agreement – evidence of such negotiations is inadmissible – and has no way of knowing whether a clause which appears to have an onerous

affect was a quid pro quo for some other concession. Or one of the parties may simply have made a bad bargain. The only escape from the language is an action for rectification, in which the previous negotiations can be examined. But the overriding objective in construction is to give effect to what a reasonable person rather than a pedantic lawyer would have understood the parties to mean. Therefore, if in spite of linguistic problems the meaning is clear, it is that meaning which must prevail".

26. We propose to approach the construction of Clause 20 of Regulation 24 with these principles in mind.

27. Clause 20 of Regulation 24 must be construed in the light of the whole of Regulation 24 and especially Clauses 1 and 2 thereof which reveal the object and purpose of the Regulation and the restrictions upon team size. Those clauses make it plain that the goal is to win a minimum of 3 gold, 3 silver and 2 bronze medals at the Games from a team comprising 10 players (5 men and 5 women).

28. This goal was to be achieved in a context known to all parties, namely that there were only a total of 15 medals to be awarded at the Games – being gold, silver and bronze in each of women's singles, men's singles, women's doubles, men's doubles and mixed doubles.

29. Of the 15 medals available to be won, the women members of the Team, in theory, were able to win or contribute to the winning of 9 (3 in singles, 3 in women's doubles and 3 in mixed doubles).

30. Moreover, as known to all parties, the task of selecting a team to achieve the team goal of medals was one which had to be undertaken in the light of restrictions on the number of competitors each country can have in each event. Each country appears to have been restricted to:
    - 2 players in the women's singles;
    - 2 women's doubles teams;
    - 2 men's doubles teams;
    - 2 mixed doubles teams.

31. A further background circumstance known to all parties is that squash is basically a singles game. Very rarely are doubles matches played. There is only one international doubles event played per year at elite level and the only other time doubles is played at elite level is at the Commonwealth Games which occur every 4 years.

32. Moreover, as the Appellant herself acknowledged, unlike singles, doubles can be affected by many factors, including pairings. Also, because of the rarity of doubles matches, there appears to be no world ranking system for doubles which could provide some objective guide to relative standings or qualities of players as doubles players.

33. The Appellant does not complain about the selection of the Grinham sisters or that of Ms Pittock. No suggestion is made that the Selection Criteria were not followed in the making of those selections.

34. A selection process has to start somewhere. In this case, as revealed by the Selectors' Reasons (Annexure 'G' to the Application confirmed, in this respect, by Annexure 'A' to Mr Hunt's Affidavit), the Grinham sisters were obvious selections for the 2 singles places. They held world rankings of 3 and 4 for singles and were the first and second ranked Australian players. The selectors regarded each a serious medal prospect in the singles event. The other relevant contenders for the singles event (Ms Pittock, Ms Martin, Ms Brown and Ms Desira) held world singles rankings of 29, 31, 35 and 41 respectively and were not rated serious medal prospects in singles. It is not suggested by the Appellant that the Selectors erred in coming to this view.

35. That left 4 women seeking selection for 3 places – all in doubles events. Once more the Selectors determined that the Grinham sisters were the best doubles players and selected them as a pair for the women's doubles event and as the female player in each of the two mixed doubles combinations. Moreover, also, the Selectors determined that Ms Pittock was the third best women's doubles player and selected her for 1 spot in the remaining women's doubles pair leaving 1 doubles spot to be filled but, since 5 women were to be selected, 2 places were left on the Team. Once more no suggestion is made that the Selectors erred in reaching these decisions.

36. There were, relevantly, thus 3 players, the Appellant, the First Affected Party and the Second Affected Party vying for selection for the remaining place in the second women's doubles pairing and for the additional fifth place in the Team. Given the fact that none of those players was rated a serious medal prospect in the singles events it follows that the selection of the remaining 2 places, if the Selection Criteria permitted it, should be dictated by the Selectors' assessment of which 2 players were likely to enhance the Team's medal prospects in the doubles events. To view the position otherwise would be to ignore or overlook the team goal stipulated in Clause 1 of Regulation 24.

37. It is in this context that the Appellant's Submissions must be viewed. Criterion 2 is a specific Criterion relating to doubles selection and, ordinarily, one would think it would be desirable to have regard to it without restraint in determining which of the 3 remaining candidates were to be selected for the 2 remaining doubles spots.

38. The Appellant, however, submits that Criterion 2 can only be considered by the Selection Committee after the Team of 5 players has been selected in accordance with Criterion 1 so that it has no part to play in the actual selection of the 5 women players in the Team. Rather, according to the Appellant, its only role is to determine which of the 5 selected players is chosen for the doubles.

39. Of course, if the Appellant's Submission accords with the ordinary and natural meaning of Clause 20, properly construed, that meaning must prevail even if the result seems unreasonable, illogical or not best designed to achieve the Team goal specified in Clause 1 of Regulation 24. If, however, there is another interpretation reasonably open of Clause 20 which avoids such an unreasonable conclusion then it is that interpretation which is to be preferred (*Australian Broadcasting Commission v. Australasian Performing Rights Association Limited* (1973) 129 CLR 99 at 109).

40. We do not think that the ordinary natural meaning of Clause 20, ascertained in accordance with the principles we have discussed in paragraphs 23 – 25 above, is as contended by the Appellant.

41. Before proceeding to give our view as to the ordinary natural meaning of Clause 20 in the light of the established principles of construction, we should note that it is evident that something has gone wrong with the numbering and lettering of the various sub-paragraphs or parts of Clause 20. Although there is the numeral '1' beside the words 'Criteria 1' there is no corresponding numeral '2' beside Criteria 2, rather the letter 'c' appears beside 'Criteria 2' suggesting, viewed literally, that it is a component of Criteria 1. If that is literally correct, of course, it tells strongly against the Appellant's Submission. But, even when that obvious error is corrected (which it has to be for the reasons given below) nevertheless the Clause as corrected does not also, in our view, assist the Appellant's Submission.

42. Moreover, there are other grammatical or layout errors apparent within Clause 20. Whilst there are sub-paragraphs starting with '(b)' and '(c)' there is no subparagraph starting with (a). These obvious grammatical mistakes and the one referred to in the preceding paragraph are ones which may be corrected as part of the construction exercise by a Tribunal considering the construction of the Clause (*Fitzgerald v. Masters* (1956) 95 CLR 420 at 426 – 427; *Westpac Banking Corporation v. Tanzone Pty Limited* (2000) NSWCA 25 at [18] – [21], [37]; *North v. Marina* [2003] NSWSC 64 at [44]).

43. Plainly, in our view, the numeral 'ii' should be substituted for the letter 'c' beside the expression 'Criteria 2' and, although of less significance, the letter '(a)' should be inserted after the words 'Criteria 1' in the second line of Clause 20. Such alterations give effect, in our view, to the obvious intention of the draftsperson.

44. These corrections make the natural meaning of Clause 20 more readily apparent although even without making those changes we think the meaning of the Clause is tolerably clear.

45. Clause 20 begins by stating:

> *"Athletes **will** be selected on the **following** Criteria"* (emphasis added).

The use of the word 'following' suggests more than one Criterion is to be used for the selection of the 5 women players. Ordinarily, so would the use of the word 'Criteria' as it is a plural expression. However later in Clause 20 the word 'Criteria' is used when plainly it was meant to be used in the singular sense and where the appropriate word would have been 'Criterion'. Thus, we are reluctant to place much store on the use of the plural expression in the first sentence. The subsequent use of that expression in a different way renders the use of the word in the first line ambiguous.

46. That ambiguity is, however, in our view clarified by the use of the word 'following' and the fact that the two 'Criteria' are set out in the body of the Clause. Further, the context, especially the object and purpose of Regulation 24 as already discussed and the obvious reasonableness of taking into account Criterion 2 for the selection of the Team all overwhelmingly suggest to us that the ordinary natural meaning of the opening line of Clause 20 is that both Criterion 1 and Criterion 2 are to be taken into account in selecting the 5 female members of the Team.

47. We therefore do not accept the Appellant's Submission to the contrary.

48. The Appellant next submits that upon the basis of the language employed in the line of Clause 20 starting "1. Criteria 1 …" and in the next two lines of Clause 20 that, in making any selection for the Team, whether it be for a singles spot, doubles spot or both, each candidate for selection must be considered on the basis of both her singles and doubles performances so that if the Selectors ignore, say, the singles performances of a player in considering whether to select that player in a doubles team then they have erred in failing to take into account a relevant consideration. A necessary corollary of the Appellant's Submission, which we are entitled to take into account in determining its validity, is that if a player is being selected as a singles player then her performances in doubles must also be taken into account. That appears to us to be a very unlikely and unreasonable construction. However, it is one which must prevail if the ordinary natural meaning of the Clause read in its context demands it.

49. We do not think, however, that that is the ordinary and natural meaning of Clause 20.

50. As there are 5 women players to be selected and only 2 singles places to be filled it follows that, at least, 2 – 3 players have to be selected purely to compete in doubles events. Thus the opening words of Criteria 1 should be read on the basis that the Team is to comprise players selected to play singles and, at least some other players selected only to play doubles. The Selection Criteria needed to set out which singles events were to be taken into account in determining the selections for the singles places and which doubles events were to be taken into account when selecting the doubles players.

51. We think that this is the proper construction of the opening words of Clause 20. They are to be read distributively so that the reference to selection in the Team on the basis of performance in the stipulated singles events is confined to the selection of singles players and the reference to selection based on performances in doubles events is to be confined to selection for the doubles players.

52. If the construction advanced by the Appellant is also a reasonably open one so as to render the Clause ambiguous then that construction produces such capricious and unreasonable results (viz. taking into account doubles performance for singles selection) that we would reject it. Accordingly, as a matter of law, we reject this Submission.

53. However, even if the Appellant's construction was the proper one then, as a matter of fact, we would also reject the Appellant's contention.

54. As we have already discussed (paragraphs 16 – 19 above) the Appellant contends that, at least in the case of the Second Affected Party, Mr Hunt's oral evidence together with Annexure 'A' to his Affidavit showed that the Selectors did not take into account the Second Affected Party's singles performances in deciding to select her. Particular reliance was placed upon the layout of Annexure 'A' to Mr Hunt's Affidavit and the fact that the Second Affected Party's name first appears in paragraph 16 of Annexure 'A'. For the reasons given in paragraphs 16 – 18 above we think, as a matter of fact, there is no substance in this Submission.

55. It follows that, as a matter of fact, the Selectors did consider the singles performances of the Second Affected Party. The weight they attached to those performances, particularly in the context that they were considering her only as a doubles player was a matter for them provided they gave realistic and genuine consideration to those performances (*Minister for Aboriginal Affairs v. Peko-Wallsend Limited* (1986) 162 CLR 24 at 40 – 42; *Zhang v. Canterbury City Council* (2001) 51 NSWLR 589 at 601 [62]). We see nothing to suggest they did not give such consideration to those performances from the evidence of Mr Hunt and Annexure 'G' to the Application.

56. Moreover, the Appellant's Submission in this respect appears to us to attach undue emphasis to the nature of the reasons given by the Selection Committee. The Appellant's Submissions seemed to be premised upon the basis that the Selectors, in giving their Reasons, had to give reasons like a Court would in giving a Judgment. This, in our view, is an erroneous approach.

57. Even in the case of public officials making administrative decisions Courts do not expect the reasons given by such officials to conform with those which a Court would give in making its decision. With administrative decisions, a Court will not be concerned with 'looseness in the language nor with unhappy phrasing of the reasons'. The reasons of such administrators will 'not be construed minutely and finely with an eye keenly attuned to the perception of error'. Rather, the Court will recognise the reality that the reasons of people in such a position are meant to inform and not to be scrutinised upon over-zealous judicial review by seeking to discern whether some inadequacy may be gleaned from the way in which the reasons are expressed (cf. *Minister for Immigration & Ethnic Affairs v. Wu Shan Liang* (1996) 185 CLR 259 at 272; *Darling Casino Limited v.NSW Casino Control Authority* (1997) 191 CLR 602 at 628; see also *Minister for Immigration & Ethnic Affairs v. Guo* (1997) 191 CLR 559 at 585 – 586, 592; *Minister for Immigration v. SGLB* (2004) 207 ALR 12 at 30 [70(2)]).

58. It would be unreal and artificial to impose upon Selectors working on behalf of a sporting organisation a duty to give better or more extensive reasons than a Court would expect of public officials exercising statutory powers. We are not prepared to do so and note that a similar approach was taken by CAS in *Kearney v. Triathlon Australia* at paragraphs 58 – 64.

59. It follows, for instance, that even if Selectors do give reasons for their decision, no great significance should be attached to the fact that they have not mentioned every single item of material that they have considered or which might have conflicted with their ultimate decision because there is no obligation upon them to mention every such item (cf. for example, *Riordan v. ASDA* [2002] FCA 858 at [58]).

60. Finally, the Appellant submitted that, in considering each and every selection in the Team, be it for singles, doubles or both, then in respect of the player being considered each of the matters set out in sub-paragraph (b) of Clause 20 had to be properly considered by the Selectors.

61. For reasons substantially similar to those set out in paragraphs 49 – 52 above we do not accept this Submission. We think the provision is to be read distributively so that the factors there listed obviously relevant to singles selection must be considered for that selection (being Factors i, ii, iii, and v) whilst the factors obviously relevant for doubles selection must be taken into

account in respect of doubles selection (being Factors (iii), (iv) and (v)). It would be fanciful to suggest that a singles selection should be based on the outcome/performances of doubles competitions.

62. On our reading of Annexure 'G' to the Application and Annexure 'A' to Mr Hunt's Affidavit and upon our view of Mr Hunt's oral evidence we see no evidence to suggest that the Selectors did not take the relevant factors into account for the respective singles and doubles selection. On the contrary, we are satisfied that they did.

63. Alternatively, even if, contrary to the view we have expressed, the Selectors were bound to take into account all factors listed in sub-paragraph (b) irrespective of whether the particular player was being considered for singles or doubles then obviously the weight to be given to those matters was a matter for the Selectors and the Selectors alone. That weight would, obviously, vary for any given factor depending on the nature of the selection involved. Plainly, Selectors would be entitled to give little or virtually no weight to a consideration such as that set out in b.iv.in determining whether to select a player for the singles event.

64. On the evidence before us, as a matter of fact, we consider that the Selectors did take into account in respect of the First Affected Party, the Second Affected Party and the Appellant each of the matters referred to in Clause 20b. As we have stated, as an expert body, they were entitled to give such weight to those factors as they saw fit bearing in mind the particular selection involved.

65. Further, it has to be said that much of the Appellant's criticism of the Selection Committee in this regard appears to relate to the merits of the decisions the Selection Committee made. Understandably, subjectively, the Appellant and, perhaps, others such as Ms Pittock think that the Appellant better met the Selection Criteria than others did and so should have been selected. But that is not the test. The Selectors are an expert body chosen because of their expertise and experience to determine which players in their opinion, best fulfil the Selection Criteria and who would best promote the Team goal set out in Clause 1 of Regulation 24. If, as we believe, the Selectors have complied with the Selection Criteria the fact that others, in their position, would have made different selections is irrelevant. Provided the Selectors' decision is not capricious or irrational there is no basis for interference (cf. *Australian Football League v. Carlton Football Club Limited* [1998] 2 VR 546 at 549 – 550, 552, 557, 564 – 565, 566 – 569, 579; *Mitchell v. Royal NSW Canine Council Limited* (2001) 52 NSWLR 242 at 247 [39] and the CAS Decision in *Yachting New Zealand v. Murdoch* 2 April 2004 at paragraphs 6.42 – 6.47).

66. For the Reasons expressed by the CAS Panel in the Yachting New Zealand case (which both parties before us accepted as being a correct statement of the principles) it would be wrong for us, under the guise of considering whether the Selection Committee properly followed the Selection Criteria, to seek to substitute our own decision on the merits (see the *Yachting New Zealand* case at paragraph 6.34 and the cases referred to in that paragraph).

67. It is for these Reasons that we dismissed the Appeal.

The Court of Arbitration for Sport rules that:

1. The appeal is dismissed.