



Arbitration CAS 2009/A/2001 Australian Sports Anti-Doping Authority (ASADA) v. Lyle Clark, Glen Williams, Randall Martin and Nick Parr, award of 22 March 2010

Panel: The Hon. Jerrold Cripps QC (Australia), President; The Hon. Justice Henric Nicholas (Australia); Mr Alan Sullivan QC (Australia)

Surf Boat

Disqualification of a team due to the anti-doping rule violation of one team member

Scope of articles 9 and 11 of the 2009 WADC

Application of article 9 WADC to teams

- 1. Articles 9 and 11 of the 2009 World Anti-Doping Code (WADC) are intended, between them, to exhaustively cover the situation of all sporting activities in which “individuals” or “teams” compete with no gap or *lacuna* so that if the relevant participant or participants do not fit within Article 11 then they fit within Article 9. Put colloquially, in other words, the two articles are intended to cover the “universe” of all relevant sporting endeavours. No room is left for something to be other than a team sport on the one hand or an individual sport on the other.**
- 2. Article 9 of the 2009 WADC does not apply merely to individuals. It also applies to “teams” as commonly understood where the rules of the relevant competition do not permit substitution during the competition. It is only if substitution is permitted that the consequences for the team are to be determined by the application of Article 11 rather than Article 9.**

This an appeal from part of the Award of Mr David Grace QC of 4 November 2009 which was handed down by Mr Grace following a hearing conducted by him pursuant to Article 16 of Surf Life Saving Australia (SLSA) Anti-Doping Policy dated December 2008 (“the Policy”).

By reason of Article 16 of the Policy, the hearing came before Mr Grace in his capacity as a member of the Court of Arbitration for Sport (CAS) and was heard by him in the Ordinary Division of CAS.

The matter came before Mr Grace pursuant to a positive test for a Prohibited Substance, namely Stanazolol by one of the five members of the Currumbin Barbarians Surf Life Saving Club Men’s Open Surf Boat Team (“the Currumbin Crew”) following the final of the Open Men’s Surf Boat Crew Race held in the 2009 Australian Surf Life Saving Championships at Scarborough Beach, Western Australia on 22 March 2009 (“the Race”). The Currumbin Crew won that race. Following the race, on 22 March 2009, the Currumbin Crew Members were asked to provide a urine sample for the purposes of doping control. Analysis of the sample provided by one member of the Currumbin Crew,

Mr Atkins, indicated the presence of the Prohibited Substance. None of the other members of the Currumbin Crew, who are the present respondents to this appeal, tested positive for any prohibited substance and it is common ground between the parties that none of the respondents was aware of the use by Mr Atkins of the Prohibited Substance or bear any blame whatsoever in respect of this unfortunate episode.

On 30 June 2009 ASADA, on behalf of SLSA, issued an Infraction Notice to Mr Atkins pursuant to clause 15 of the Policy. Mr Atkins elected to have the matter referred to a hearing by CAS under the Policy.

An Order of Procedure (“O of P”) was agreed to by the parties in respect of the original CAS hearing.

This O of P was subsequently amended due to the fact that ASADA filed a second Application against the other members of the Currumbin Crew, namely the present respondents to this appeal seeking similar relief to that which it seeks in this Appeal. Mr Grace heard both applications simultaneously and ruled, relevantly, as follows:

- (a) CAS had jurisdiction to determine the substantive dispute by Arbitration;
- (b) Mr Atkins is found to have committed two Anti-Doping Rule Violations (ADRV’s) in breach of clause 7 of the Policy and Article 2 of the World Anti-Doping Code (WADC);
- (c) the result obtained by Mr Atkins in the race is disqualified and any medals, points and prizes awarded to him are forfeited;
- (d) Mr Atkins is ineligible to compete during the period commencing on 5 May 2009 and expiring at midnight on 4 May 2011;
- (e) the result of the Currumbin Crew in the race remains unchanged and the crew members Lyle Clark, Glen Williams, Randall Martin and Nick Parr are deemed to comprise the winning team.

The determinations or rulings which Mr Grace made in respect of the current respondents to this Appeal were made pursuant to the separate Application brought by ASADA against the current respondents and were the subject of a Supplementary Order of Procedure dated 14 September 2009 (“the SOP”). Relevantly, clause 2.1 of the SOP provided as follows:

“2. *Jurisdiction*

2.1 *The parties agree that the [CAS] has jurisdiction to determine, by arbitration, whether CAS has jurisdiction to determine the substantive dispute which is the subject of:*

- (i) *the application brought by ASADA ... dated 16 July 2009 against Mr Peter Atkins ... pursuant to clause 16 of the [Policy] and*
- (ii) *the Application brought by the [ASADA] dated 9 September 2009 against [Mr Atkins] and Mr Lyle Clark, Mr Glen Williams, Mr Randall Martin, and Mr Nick Parr (the Affected Parties), pursuant to clause 16 of the [Policy] ...,*

and the parties agree to refer the dispute as to jurisdiction to CAS for determination by arbitration, and thereafter if CAS determines that it does have jurisdiction, then the parties agree to refer the substantive dispute to CAS for determination by arbitration”.

Article 19 of the Policy provides for appeals to the Appeals Division of CAS. Mr Atkins did not choose to exercise that right of appeal in respect of Mr Grace’s findings against him. However, ASADA lodged an Application on 24 November 2009 seeking to appeal from that part of Mr Grace’s award which held that the result of the Currumbin Crew in the 2009 Championships remained unchanged and that the current respondents are deemed to comprise the winning team.

ASADA seeks the following determinations in this Appeal:

- “1) *Overtake Part 5 (page 17) of the decision of the CAS First Instance Tribunal dated 4 November 2009, namely: ‘The result of the Currumbin Barbarians Surf Lifesaving Club Men’s Open Surf Boat Team in the 2009 Australian Championships race remains unchanged and the crew members Lyle Clark, Glen Williams, Randall Martin and Nick Parr are deemed to comprise the winning team’.*
- 2) *Hold that the Currumbin Barbarians Surf Lifesaving Club Open Surf Boat team comprising Lyle Clark, Glen Williams, Randall Martin and Nick Parr are disqualified from the 2009 Australian Championships Men’s Open Surf Boat race, and any points, medals or other prizes won are forfeited.*
- 3) *Hold that each other Open Surf Boat team which competed in, and finished legitimately, the 2009 Australian Championships Men’s Open Surf Boat race be moved one place forward (such that the team who finished 2nd is now deemed the winner, the team who finished 3rd is now deemed to have finished 2nd, and so forth).*
- 4) *Not disturb any other finding of the decision of the CAS First Instance Tribunal dated 4 November 2009.*
- 5) *That the award be made public.*
- 6) *Each party bear their own costs”.*

Article 19 of the Policy provides for appeals to the CAS Appeals Division from decisions made under Article 16 of the Policy. As will be discussed more fully below, the appellant asserts that this is such an appeal but the respondents dispute that Article 19 confers upon this Panel the right to entertain the appeal and grant the relief which the appellant seeks. The parties have agreed to an Order of Procedure dated 23 December 2009 and, as contemplated by that Order of Procedure, the hearing of this appeal took place on Monday 22 February 2010. During that hearing, the Panel had the benefit of detailed and thoughtful written submissions filed on behalf of each of the parties and was also greatly assisted by the oral submissions made by Mr Marshall SC on behalf of the appellant and Mr Gyles SC on behalf of the respondents.

The Panel also had the benefit of written submissions filed on behalf of the crews which finished second, third and fourth in the race. The Panel did not require representatives of those crews to make oral submissions before it at the hearing because it took the view that, in the light of their written material, their interests coincided with those of the appellant and could be advanced, to the extent thought appropriate, by senior counsel for the appellant.

At the conclusion of the hearing, the President informed the parties that the Panel wished to have time to consider the matter and would publish its Award in due course. This is that Award.

LAW

Issues on the Appeal

1. There are two substantive issues to be resolved on this appeal. First, whether the Panel has jurisdiction to hear the appeal and grant the relief sought by the appellant and, secondly, if it has that jurisdiction, should the Panel grant some or all of the relief sought by the appellant.
2. Although the jurisdiction issue was raised by the respondents in their Answer dated 24 December 2009 to the Appellant's claim, it seems sensible to resolve that issue first especially since some of the issues and submissions going to jurisdiction are also relevant to the determination of the appeal on the merits.

The Jurisdiction Issue

3. On behalf of the respondents, Mr Gyles SC submitted that the Appeals Division of CAS had no power to overturn the "orders" made in favour of the respondents by Mr Grace or otherwise to grant the relief sought by the appellant.
4. As we understood Mr Gyles' attractive and thoughtful argument, this submission was put on the following bases:
 - (a) the Award made by Mr Grace was a final and binding one (R46 of the CAS Rules) and, therefore, there is only a very limited right of appeal as contemplated by R47 of the CAS Rules. R47 of the CAS Rules requires an express right of appeal in the Policy;
 - (b) the only express right of appeal contained in the Policy is contained in Article 19 and that right of appeal is confined to decisions made under Article 16 of the Policy;
 - (c) Article 16 of the Policy is directed against the recipient of the Infraction Notice (in this case Mr Atkins) and, thus, it is only decisions affecting that person (Mr Atkins) which can properly be the subject of an appeal pursuant to Article 19;
 - (d) the appellant is not seeking to appeal against any decisions made against Mr Atkins. Rather it is seeking to appeal the "orders" or decisions made in favour of the respondents. Article 19 does not confer the right to appeal against such decisions or orders and even if Mr Grace had made decisions or orders adverse to the current respondents, those current respondents would not have had a right of appeal;
 - (e) therefore, the appeal fails at the threshold;

- (f) further, or alternatively even if this jurisdiction argument fails there is another basis upon which CAS has no jurisdiction to grant the relief sought by the appellant; viz, to the extent to which the Policy incorporates sanctions or consequences against “teams” by reference to the provisions of the 2009 World Anti-Doping Code (the 2009 WADC) by incorporating Article 9 of the 2009 WADC into the Policy (see Article 17.1 of the Policy), properly construed Article 9 does not confer a right on CAS to disqualify results or otherwise impose sanctions on anyone other than the individual athlete who has committed the ADRV.
5. For the reasons which follow, the Panel is of the view that each of these jurisdiction arguments should be rejected and the Panel finds that it does have jurisdiction to entertain this appeal and to grant, if it considers it appropriate in all the circumstances of the case, the relief sought by the Appellant.
 6. Dealing with the first way in which jurisdiction is challenged, there is no doubt, by reason of the separate application brought by ASADA against the current respondents and the SOP pursuant to which the arbitral proceedings before Mr Grace QC were conducted, that all of the parties to the present appeal agreed to Mr Grace having the jurisdiction to hear ASADA’s application in respect of the current respondents and to determine whether there should be consequences or sanctions imposed against them or the Currumbin Crew as a collective and to make determinations in that regard.
 7. The respondents, whilst acknowledging that they so agreed for the purposes of the hearing before Mr Grace, submit that it is one thing to agree to have an issue determined by Mr Grace sitting in the Ordinary Division of CAS but that does not mean that the respondents were agreeing to have that decision subject to a right of appeal.
 8. When regard is had to the provisions of Articles 16 and 19 of the Policy, which the respondents agree binds them, the Panel cannot accept this submission.
 9. Article 16.3 of the Policy provides that CAS will determine:
“...
(d) *any other issues properly brought before it for determination*”.
 10. There can be no doubt that by the agreement of the parties to which we have referred, and as recorded in the SOP, the issue of whether or not the Currumbin Crew, apart from Mr Atkins, should be the subject of adverse consequences in respect of the result of the race was properly brought before Mr Grace for determination.
 11. Accordingly, those issues were ones which fell within the ambit of Article 16.3(d) of the Policy. Article 19.1 of the Policy expressly makes all decisions made under Article 16 of the Policy appealable to the Appeals Division of CAS. In our view, that right of appeal includes an appeal in respect of issues which fall within the ambit of Article 16.3(d) of the Policy. In this regard we note that Article 19.1 expressly confers a right of appeal in respect of Article 16 decisions in respect of “Affected Parties” and this tells against the construction urged upon us by the

respondents. Indeed, as the respondents were forced to acknowledge, if their primary submission on jurisdiction was correct it would mean that had Mr Grace decided that there should be adverse consequences for the current respondents then they would have had no right of appeal under Article 19.

12. It would take very clear language before we would be prepared to construe the relevant provisions of Articles 16 and 19 of the Policy to produce such a manifestly unfair and unexpected outcome. There is no such clear language and, indeed, as we have said, on an ordinary and natural meaning of the language used in Articles 16 and 19 of the Policy we have no doubt that those Articles do confer upon us the jurisdiction to hear this appeal.
13. The other way in which the jurisdiction argument was put turns upon the proper construction of Article 9 of the 2009 WADC. We doubt whether this is truly a jurisdiction issue but we will treat it as such for the purposes of this Award. This argument is relevant not only to the jurisdiction issue but also to the determination of the appeal on the merits and what follows constitutes part of our reasoning not only on the jurisdiction issue but also in respect of the appeal on the merits.

Article 9

14. It is necessary to explain briefly how Article 9 has relevance in the present Appeal. SLSA is a signatory to the 2009 WADC. As such it is bound to implement in its Policy **without substantive change** various specified essential provisions of the 2009 WADC including, relevantly, Article 9 of the WADC and the Definition Section of the 2009 WADC (which is Appendix 1 to the that Code) – see Article 23.2.2 of the 2009 WADC.
15. The Policy reflects SLSA’s commitment to honour its promise to implement the relevant provisions of the 2009 WADC.
16. The Policy states:
“SLSA has amended its [Policy] to reflect the roles and responsibilities under the referral. The [Policy] adopts and reflects the World Anti-Doping Code (Code) which is annexed to and forms part of this [Policy]”.
17. Article 17.1 of the Policy expressly provides that Articles 9 and 10 of the 2009 WADC apply. Moreover, Article 22 of the Policy expressly provides that Article 24 of the 2009 WADC Code applies.
18. Article 9 of the 2009 WADC is headed “Automatic Disqualification of Individual Results” and reads as follows:
*“An anti-doping rule violation in **Individual Sports** in connection with an **In-Competition** test automatically leads to **Disqualification** of the result obtained in that **Competition** with all resulting **Consequences**, including forfeiture of any medals, points and prizes”.*
The words in bold in this quotation are all defined terms.

19. Article 24 of the 2009 WADC which is headed “Interpretation of the Code” is too lengthy to quote in full but relevantly it provides:-
 - (a) that the comments annotating various provisions of the Code shall be used to interpret the Code (Article 24.2);
 - (b) the headings used for various Parts and Articles of the Code are for convenience only and shall not be deemed part of the substance of the Code or to affect in any way the language of the provisions to which they refer (Article 24.4);
 - (c) that the Purpose, Scope and Organisation of the World Anti-Doping Programme and the Code and APPENDIX 1 – DEFINITIONS shall be considered integral parts of the Code (Article 24.6).
20. Moreover, Article 23.2.2 of the 2009 WADC obliged the Policy to include without substantive change the same definitions as contained in APPENDIX 1 – DEFINITIONS of the Code.
21. Both the 2009 WADC, and anti-doping policies of signatories to it such as SLSA, envisage that there will be a number of sports or activities in which a combined group of athletes participate together to achieve an outcome or win a prize or medal. These “teams” may be multi-member ones such as football teams, rowing eights or the like or they may comprise as few as two members such as the doubles tennis competition at the Olympic Games, a double sculling race in a rowing regatta or, say, ice dancing at Winter Olympics. The 2009 WADC and, derivatively, anti-doping policies such as the Policy, seek to deal with what should be the consequences for participants in these “teams” when one or more of them is found, in pursuit of the common objective of winning a medal or prize, to have committed an ADRV. The 2009 WADC seeks to deal with these issues in Articles 9 and 11. The Policy expressly incorporates those Articles in Articles 17 and 18.
22. As the respondents correctly acknowledged, Article 9 of the 2009 WADC cannot be construed in a vacuum. It must be construed in the light of the provisions of the WADC as a whole and, in particular, in the context of its counterpart dealing with “teams”, namely Article 11. This is all the more so when one considers the mechanism adopted within the 2009 WADC to determine which particular circumstances fall within Article 11 on the one hand and which ones fall within Article 9 on the other, being a topic we shall return to shortly.
23. However, it is important to observe that Article 11.2 of the 2009 WADC makes it mandatory to impose a sanction on the team in addition to any consequences imposed upon the individual athlete committing an ADRV if more than two members of the relevant team have committed an ADRV.
24. A curious, indeed, incongruous consequence of accepting the respondents’ submission as to the effect of Article 9 would be that in a multi-member team sport such as football or field hockey where there are eleven or more members of a team then if only a small percentage of that team (three out of eleven or more) commit an ADRV all members of the team **must** have a sanction imposed upon them as a team whereas if the “team” comprises just two members

and the consequences to it are to be viewed in the light of Article 9 (because of the lack of ability to substitute) then if one-half of the team (one member) commits an ADRV there is neither a mandatory nor a discretionary power to impose a sanction on the other member of the team. Once more, it would take very clear wording in the 2009 WADC for us to conclude that this was the proper construction of the relevant provisions.

25. It is our view that Articles 9 and 11 of the 2009 WADC are intended, between them, to exhaustively cover the situation of all sporting activities in which “individuals” or “teams” compete with no gap or *lacuna* so that if the relevant participant or participants do not fit within Article 11 then they fit within Article 9. Put colloquially, in other words, the two articles are intended to cover the “universe” of all relevant sporting endeavours. Principally, this result is achieved by means of the definitions employed in the 2009 WADC as set out in Appendix 1, particularly the definition of “individual sport” and “team sport”.
26. Although the respondents place some reliance on the heading to Article 9, that reliance is misplaced. As we have stated, the 2009 WADC expressly provides that headings cannot be used to construe its provisions. Rather, whether an activity falls within Article 9 on the one hand or Article 11 on the other depends upon whether it is an “individual sport” as defined (in which case it falls within Article 9) or a “team sport” as defined (in which case it falls within Article 11).
27. “Individual Sport” is defined to mean “*any sport that is not a team sport*”. “Team Sport” is defined to mean “*a sport in which the **substitution** of players is permitted during a Competition*”. Thus, it is clear that what was intended was that all sports were covered by either Article 9 or Article 11. No room is left for something to be other than a team sport on the one hand or an individual sport on the other.
28. The definition of “Team Sport” itself contains the defined term “Competition” which is stated to mean:
*“A **single** race, match, game or **singular** athletic contest. For example, a basketball game or the **finals** of the Olympic 100-metre in athletics ...”.*
29. The language employed thus makes it clear something may be an “individual sport” even though the participants in the “sport” are not solitary individuals but rather are “teams” or “crews” as commonly understood. Such “teams” or “crews” will, for the purposes of the 2009 WADC and the Policy, be competing in an “individual sport” if the relevant rules of the competition do not permit substitution.
30. In these circumstances, we are of the firm view that Article 9 of the 2009 WADC does not apply merely to individuals. It also applies to “teams” as commonly understood where the rules of the relevant competition do not permit substitution during the competition. It is only if substitution is permitted that the consequences for the team are to be determined by the application of Article 11 rather than Article 9.

31. Furthermore, where a “team” or “crew” is competing within a competition or event which falls within the definition of an “individual sport”, the **result** obtained in that individual sport is the result the team achieves not that of an individual member of that team. It is an unnatural use of language to say in a team sport that an individual member of the team won the relevant event. Rather it is the team that wins and that is the “result” of the particular event.
32. Article 9 of the 2009 WADC specifies that an ADRV in a sport to which the article applies **automatically** leads to disqualification of the **result** obtained. That “result” must be the “result” obtained by the team. As we have said, the individual within such a team does not himself or herself have such a “result”.
33. That the word “result” is used in Article 9 in this way is supported by an examination of Article 10 of the 2009 WADC which, by way of contrast to Article 9, expressly talks of disqualification of an athlete’s “individual” results.
34. It follows, in this Panel’s view, that Article 9 does confer upon CAS power to invoke consequences for members of teams who otherwise fall within its provisions in addition to the consequences or sanctions which may be imposed upon the team member who has committed the ADRV.
35. Accordingly, the Panel concludes that it has jurisdiction to hear this appeal and, if the case otherwise merits it, to grant the relief sought by the appellant.

Consideration of the Merits of the Appeal

36. In the light of what we have so far said, it remains to be determined whether the respondents were, in fact, competing in an “individual sport” as that term was defined in the 2009 WADC so as to fall within the ambit of Article 9. In turn, this issue is to be determined by whether or not substitution was permitted in the relevant “competition”.
37. We have set out above the definition of “competition” (see [28] above). It is plain from that definition that it is satisfied by a single race including the final of some overall event or competition. The open surf boat race final was such a single race.
38. Accordingly, the necessary enquiry is whether substitution was permitted during the final of the surf boat racing competition.
39. The respondents say that it was, relying upon clause 2.18 of the SLSA Surf Sports Manual. They give the example of a false start in the final. They assert that under clause 2.18 of the manual there would be nothing to stop the substitution of a competitor in the relevant crew between the time of the false start and the actual, legitimate start. The Panel does not disagree but regards that as irrelevant.

40. In the Panel's view, the "single" race which constitutes the relevant "competition" commences with the legitimate start of the race not with some false start. A false start is no start at all. The respondents concede correctly that once the final was legitimately started there could be no substitution of any member of the crew until it finished.
41. In those circumstances, the Panel is firmly of the view that substitution was not permitted during the final of the open surf boat race with the result that the Currumbin Crew were participating in an "individual sport" for the purposes of Article 9.
42. Article 9 of the 2009 WADC thus applies. It is common ground that there was an ADRV in the final by Mr Atkins in connection with an in-competition test conducted upon him. In such circumstances Article 9 affords this Panel no discretion. Article 9 requires the **automatic** disqualification of **the result** obtained in that final. That result was the win by the Currumbin team. Article 9 also requires that **any** medals or prizes awarded to the team (or individual members of it) by virtue of the "result" obtained are to be forfeited.
55. It follows that not only must this appeal be allowed but that the relief sought by the appellant must be granted. Our formal Award which follows will reflect those consequences.

The Court of Arbitration for Sport rules:

1. The Court of Arbitration for Sport has jurisdiction to hear this Appeal.
2. The Appeal is allowed.
3. The decision of the CAS First Instance Tribunal dated 4 November 2009, namely:
"The result of the Currumbin Barbarians Surf Life Saving Club Men's Open Surf Boat Team in the 2009 Australian Championship remains unchanged and the crew members Lyle Clark, Glen Williams, Randall Martin and Nick Parr are deemed to comprise the winning team"
be overturned.
4. That the Currumbin Barbarians Surf Life Saving Club Men's Open Surf Boat Team comprising Lyle Clark, Glen Williams, Randall Martin and Nick Parr are disqualified from the 2009 Australian Championships Men's Open Surf Boat race, and any points, medals or other prizes won by the team or those members are forfeited.

5. That each other open surf boat team which competed in, and finished legitimately, the 2009 Australian Championships Men's Open Surf Boat race be moved one place forward (such that the team who finished second is now deemed to be the winner, the team who finished third is now deemed to have finished second, and so forth).
6. That this Award be made public.
7. (...).