Arbitration CAS 2011/A/2590 Daniel Walker v. Australian Biathlon Association, award of 13 December 2011

Panel: Mr Alan Sullivan QC (Australia), Sole Arbitrator

Biathlon
Nomination criteria for the 2012 Winter Youth Olympic Games
Interpretation of the word "competitor" through extrinsic evidence
Purpose of the Nomination Criteria
General restrictions to the extent to which the length of a race may be changed

1. **In the context of a race or event which doubles as an Australian Championship and as a Selection Race for the 2012 Winter Youth Olympic Games (WYOG) and where there are two distinct and different sets of competitors, namely those who are eligible for selection for the WYOG and those who are ineligible for such selection, the word "competitor" is ambiguous or susceptible of more than one meaning. In any event, even absent ambiguity, extrinsic evidence is admissible to identify the subject matter of an expression used in a contract such as "your wool" or "existing clients". Thus, one should have regard to the surrounding circumstances and the object or purpose of the Nomination Criteria for the WYOG.**

2. **The purpose or object of a Nomination Criteria is to compare eligible athletes with each other and to rank them by reference to their performances against each other. The purpose or object is to seek to compare "apples with apples" not "apples with oranges". Whilst it is a fundamental rule that words in the contract should be given the natural meaning that they bear that does not mean they must necessarily be given their literal or dictionary meaning. Contractual words must be considered not in isolation but in the context of the contract as a whole.**

3. **There is no express limitation placed upon the extent to which the length of a race may be changed. Although the discretion so conferred is not expressly fettered, it is clear that, as a matter of law, it is subject to two restrictions: first it must be exercised in good faith and not arbitrarily or capriciously or unreasonably in the sense that it cannot be exercised in a way that no reasonable person in the position of the decision-maker could have made that decision; secondly no legal discretion, however widely worded, can be exercised for purposes contrary to those of the instrument by which it is conferred.**

The Appellant is an Australian biathlon athlete seeking to gain selection to represent Australia in the men's biathlon event at the 2012 Winter Youth Olympic Games. Mr Lachlan Porter is currently

nominated for selection in the event and, if this appeal is successful, the Appellant will be entitled to nomination instead of Mr Porter.

The Respondent is the Australian National Federation governing disciplines relating to biathlon in Australia and is the body which nominates athletes for selection to the Australian team for the 2012 Winter Youth Olympic Games ("the 2012 WYOG").

The Interested Party is the peak organisation in Australia governing participation by Australian athletes in the 2012 WYOG and is responsible for the selection of members of the 2012 Australian WYOG Team. It is a pre-condition of such selection that an athlete must have been nominated by the Respondent.

Biathlon is an event which combines the disciplines of cross country skiing with rifle shooting. Depending on the particular event, competitors in the biathlon ski a number of loops or laps of a particular course, stopping at the end of each lap (except the final one) to shoot at a target from varying shooting positions. The winner of the biathlon event is the competitor who completes the race in the shortest time. The way the shortest time is calculated depends upon the nature of the biathlon event. The present case is concerned with two types of biathlon event, the individual event and the sprint event. In the individual event (sometimes called the distance event) the shortest time is calculated by the actual time it takes the competitor to complete the race to which is added a time penalty for each target missed. In the sprint event, the time penalty for missed targets is replaced by the imposition of a penalty of having to ski an additional loop of a specified distance in respect of each missed target. The winner of the event is the athlete who completes the course in the shortest time including the time taken to ski any of the penalty laps for missed targets. As the difference in the names of the two events suggest, the sprint event is the shorter one.

It was common ground between the parties that the essential characteristics of an individual biathlon event were as follows:

(a) five laps or loops of a specified course;

(b) four shooting positions (ie. one at the end of each of the first four laps); and

(c) the imposition of a time penalty for each missed target.

It was also common ground between the parties that the essential characteristics of a sprint biathlon event were:

(a) three loops or laps of a specified course;

(b) two shooting positions (that is at the end of each of the first two laps); and

(c) a penalty loop or lap of a specified distance for each missed target.

What is in dispute between the parties is whether it is an essential characteristic of either type of event that it be of a certain length. More particularly, an issue in this case is whether an event which purports to be an individual biathlon event can be so characterised when the distance of that event is considerably shorter than the distance over which that event is intended to be conducted or is usually conducted (in this case for men's youth events that usual distance is 12.5 kilometres).

Biathlon events are necessarily affected by weather and ground conditions. If there is no or little skiable snow then obviously that will affect both the nature and distance of the course which can be chosen for conducting the relevant event.

At some time in 2011, the Respondent and the Interested Party published jointly a document entitled

"2012 Australian Winter Youth Olympic Team

Australian/Victorian Biathlon Association Inc (ABA)

Nomination and Selection Criteria – Biathlon"

('the Nomination Criteria').

The Nomination Criteria had two objectives:

(a) first to set out the rules for nomination for selection to the Australian team for the 2012 WYOG in the biathlon event; and

(b) secondly to set out the rules to be applied by the Interested Party in selecting nominated athletes for the 2012 Australian WYOG team in the biathlon event.

This appeal is only concerned with the first aspect of the Nomination Criteria. However, it is pertinent to observe that the Respondent must nominate athletes for selection to the Interested Party by no later than 5.00pm on 12 December 2011 although, in this case, because of this appeal, the Interested Party is prepared to extend that deadline until 15 December 2011. Hence the urgency of this matter.

In order to be eligible to compete at the 2012 WYOG in biathlon, the athlete must have been born within a limited time period, namely 1 January 1994 to 31 December 1995 (Rule 1(a) of the Nomination Criteria). There is no dispute that the Appellant was born within the required time range.

Rule 2 of the Nomination Criteria so far as it is relevant to the present appeal, obliges the Respondent to nominate for selection only those eligible athletes:

"(1) who have competed in the State and National Biathlon Selection Races held between 12 June and 5 September 2011 at Mount Hotham, Victoria; and

(2) … The Athletes to be nominated for selection to participate in the sprint and pursuit events at the 2012 WYOG will be the athlete(s) with the highest ranking, calculated in accordance with paragraphs (a) – (f):

(a) Athlete rankings will be determined by taking the average of each athlete's best three Percentage Results from the Selection Races of the 2011 Australian Biathlon Winter Season. These selection races will take place at Whisky Flat Biathlon Range – Mt Hotham in 2011 and are as follows:

Sat 30 July 2011 Victorian Individual Championships;

Sun 31 July 2011 Victorian Spring Championships;

Sat 13 August 2011 Australian Individual Championships

Sun 14 August 2011 Australian Sprint Championships

…

(b) An athlete's best three Percentage Results used to determine the best overall average may be achieved by any combination of Sprint or Individual Events;

(c) The athlete with the lowest Percentage Result will be ranked first, the next lowest Percentage Result will be ranked second and so on until all eligible athletes are ranked;

(d) …

(e) …

(f) An Athlete will not receive a ranking under this clause, or will be considered for nomination, unless they have (sic) completed a minimum of three (3) Selection Race events in the 2011 season".

Rule 6 of the Nomination Criteria defines the expression "Percentage Results". That expression is defined as meaning *"The percentage behind the time of the first place (sic)* ***competitor*** *in that event"* (emphasis added).

The Nomination Criteria do not define the word "Competitor" and nor is that word used elsewhere in the Nomination Criteria although Rule 2 uses the cognate expression *"athletes … who have competed …".*

As will be seen, an important issue in this appeal is what is meant by the expression "competitor" in the Nomination Criteria.

It appears to be common ground, or at least beyond dispute on the evidence, that athletes intending to participate in each of the four events specified in Rule 2(a) of the Nomination Criteria have to complete, in respect of each event, a Participation Agreement which was clearly intended to have contractual effect between the Respondent on the one hand and the Athlete seeking to participate in the event on the other. The participation agreements for each of the four stipulated events were in common form with such changes as were necessary to effect the particular circumstances of the specific event. Relevantly, each of the participation agreements contained a set of common terms on the first page and, on the second page, set out details of the particular event.

In respect of the first of the events referred to in Rule 2(2)(a), namely the Victorian Individual Championships to be held on Saturday 30 July 2011, the event details contained in the relevant Participation Agreement included an express notation that this was an Australian selection race and, in respect of the details given for the men's youth event indicated that although those eligible to compete were those who had birth years of between 1993 and 1995 nevertheless the Winter Youth Olympics Selection Race was only applicable or open to athletes born in 1994 and 1995. Further, the event details indicated that the **approximate** distance of the men's youth event was 12.5 kilometres.

Although the relevant Participation Agreement for the 2011 Australian Individual Championships to be held on Saturday 13 August 2011 was not in evidence before me, no party submitted that it was in any materially different form to that Participation Agreement which has just been referred to. The irresistible inference from the evidence is that it was in materially identical form and I infer that the

Participation Agreement for the event to be held on Saturday 13 August 2011 contained substantially identical details to those set out in [2.15] above.

By signing a Participation Agreement in respect of each of the four events specified in Rule 2(2)(a) of the Nomination Criteria, the athlete expressly agreed to be bound by the Rules of the Respondent.

The Appellant and other athletes, including Mr Lachlan Porter, competed in each of the events specified in Rule 2(2)(a) of the Nomination Criteria. Mr Lachlan Porter was nominated by the Respondent for selection in the 2012 WYOG team. If this appeal succeeds, a consequence will be that the Appellant is nominated instead of Mr Porter who will thus lose his opportunity to be selected for the team.

Mr Porter is overseas training at the moment. He gave evidence, by way of a witness statement, for the Respondent and thus is well aware of these proceedings. He made no application to be joined as an interested or affected party. This matter was raised with the parties at the beginning of the hearing of the appeal and, after hearing submissions from the parties, I am satisfied that the appeal can properly be heard and determined without Mr Porter being joined as an affected party because the Respondent, who is well represented legally, was seeking to defend its nomination of Mr Porter and thus it was inherently unlikely that Mr Porter, even if he chose to be joined as a party and to be separately represented, would put forward any further or additional submissions of significance to those made on behalf of the Respondent.

Although the four selection races specified in Rule 2(2)(a) of the Nomination Criteria were only open to athletes born between 1993 and 1995 and although those races would only be regarded as a selection race for athletes born in 1994 or 1995, the star competitor in each of those races was an athlete who was born in 1996 and thus ineligible to be nominated for selection to the team for the WYOG. The evidence reveals that Damon Morton is a very promising young biathlon competitor. In order to foster his development as an athlete in this sport, on the application of Mr Morton's father, the Respondent permitted Damon Morton to "race up" by competing in the men's youth event rather than in the men's under 16 event. No one suggested there was anything wrong or improper or unusual with this course and, with respect, it appears to be sensible to permit a promising young athlete who would not get the proper competition in his or her own age event to participate in a higher age group where his or her skills will be more appropriately challenged.

Mr Morton's promise as a biathlon competitor is revealed by the results he obtained in each of the four events specified in Rule 2(2)(a) of the Nomination Criteria. He won them all very convincingly beating his older opponents including the Appellant and Mr Porter by large margins. His dominance gives rise, as will be seen below, to another important issue in this appeal. If Mr Morton's results are ignored or discarded for the purposes of applying the Nomination Criteria, as in fact the Respondent did, then, provided it is legitimate to take into account the results of the Australian Individual Championships held on Saturday 13 August 2011, Mr Porter would be entitled to retain his nomination for selection.

However, if Mr Morton's results are not ignored or discarded for the purposes of applying the Nomination Criteria, then it is common ground that the Appellant would be entitled to nomination ahead of Mr Porter.

Whether or not Mr Morton's results should be ignored or discarded for the purposes of the Nomination Criteria depends upon whether Mr Morton, in participating in the level of events, is to be regarded as a "competitor" as that term is used in the Nomination Criteria.
So far as the four selection races themselves are concerned, there is no issue in this appeal about three of them. The only issue in this appeal concerns the event on Saturday 13 August 2011, being the Australian Individual Championship. The relevant facts in respect of that event appear to be as follows:

(a) the weather was not kind in the week leading up to the event. At Mt Hotham there were very warm conditions, no freezing at night and the snow was rapidly melting;

(b) although conditions improved slightly on 10 August 2011 competitors and their coaches were notified that the courses may still have to be modified as the snow falls were still not sufficient to enable proper grooming of the courses;

(c) on Thursday 11 August the weather at Mt Hotham took a sudden and dramatic change for the worse with forty millimetres of rain falling onto the fresh snow. This made it impossible to groom much of the potential courses for the biathlon events to be held over the forthcoming weekend;

(d) on the morning of Friday 12 August 2011 the Chief of Race, Mr Paul Connor, in consultation with the Mt Hotham grooming staff, determined the most reliable snow to groom to form a course for the pending biathlon events. Mr Connor was advised by the grooming staff that some of the potential course could not be groomed owing to the thin cover and potential damage to equipment whilst other parts simply had insufficient snow to groom;

(e) by lunchtime on Friday 12 August 2011, Mr Connor, in consultation with Mr Cranage, an experienced biathlon coach and an official of the Respondent and Ms Stopar who is also a biathlon coach and who was a member of the race jury, determined the course loops to be used for the individual event in each of its categories (open men's, open women's, men's youth, women's youth etc.).;

(f) the course loops or laps for the individual event were drawn on a not to scale map headed "Australian Distance Championship Loops 12 August 2011" with the loops or laps for each of the respective events (men's, women's, men's youth, women's youth etc.) marked in a different colour. The loop or lap for the men's youth event was marked on that map in red whilst the loop or lap for the open men's was marked in blue. The loop or lap for the open men's event was clearly longer than the loop or lap for the men's youth event as the open men not only had to ski over the same areas the men's youth participants but also had to ski, each lap, over an additional portion of groomed snow which, on the map, resembles what was described by counsel as a "knob";

(g) the map showing the loops or laps for each of the respective individual events was displayed inside the official hut at the course. I am satisfied that all potential participants

in the selection races, officials and coaches had an adequate opportunity to examine that map and to know the precise course the athletes were to ski over the following day. In his evidence, the Appellant effectively conceded this;

(h) the race jury for the individual event comprised Mr Connor, Ms Stopar and two others, Mr Nick Almoukov and Mr Cameron Morton. On the morning of the race two of the jury members, Mr Almoukov and Mr Morton expressed concerns that the course for the youth men's event appeared to be shorter than 12.5 kilometres. It is common ground that the course was shorter. Indeed there was no real challenge to evidence called on behalf of the Appellant from Mr Cali, a qualified surveyor, to the effect that, in total, the five loops employed for the youth men's event combined for a total length of course of a little over 8 kilometres;

(i) when Mr Almoukov and Mr Morton raised their concerns as to the length of the course with Mr Connor, Mr Connor acknowledged that it was correct that the course was shorter than 12.5 kilometres. There is some dispute as to whether Mr Connor advised those two jury members that the course was 10 kilometres in total or 11 kilometres in total. It is unnecessary, in my view, to resolve that difference. The course as skied was considerably shorter than 12.5 kilometres or either 10 kilometres or 11 kilometres for that matter;

(j) the jury members considered a number of ways of compensating for the shorter distance of the course. There was no unanimity of thought between the jury members as to how other conditions might be changed to compensate for the shorter distance of the course;

(k) ultimately, I am satisfied, that the jury did agree on a compromise. The compromise, to compensate for the effect of the shortened course, was to reduce the one-minute penalty for missed targets from one minute per miss to 45 seconds per miss;

(l) ultimately, the race was conducted on 13 August over the shorter distance and with the shorter time penalties;

(m) Mr Damon Morton won that event handsomely. He was not only the fastest skier but also the best shot on the day and his overall time was more than 7 minutes better than the second place getter. Mr Porter finished third almost 8 minutes behind Mr Morton and the Appellant finished fifth almost 9 minutes behind Mr Morton. The Appellant's skiing time was slightly faster than that of Mr Porter but their respective finishing places were reversed because Mr Walker missed two more targets than Mr Porter thus incurring an extra 90 seconds in time penalties;

(n) there were only 6 participants in the youth men's event with the "worst" shooting performance on the day being that of Mr Walker. As pointed out by counsel for the Respondent, even if Mr Morton had been the "worst" shooter on the day instead of the best (that is that he too missed 14 targets) he would still have won the event notwithstanding the additional time penalties. I mention this fact because it is one of the matters relied upon by the Appellant in his submissions concerning unfairness which shall be discussed below.

As will be seen from what follows, one of the Appellant's submissions is that the results of the 13 August 2011 event should be ignored for the purposes of the Nomination Criteria. It is common

ground that if that submission was successful (even if all other submissions on behalf of the Appellant were unsuccessful) then this appeal should succeed because, if only the events of the other three selection races are taken into account then, when the results in those three events are considered in the light of the Nomination Criteria, the Appellant was entitled to nomination ahead of Mr Porter.

It is in this factual context that the appeal needs to be determined.

As stated, due to the fact that nominations for selection need to be submitted to the AOC by mid December, this appeal came on before CAS on an urgent basis.

A preliminary conference was held between the arbitrator and the parties on 8 November 2011 and, consequently upon that, each of the parties signed an Order of Procedure whereby agreement was reached on various jurisdictional and procedural matters and a timetable set out for the filing of evidence and submissions. As provided for in the Order of Procedure, the hearing of the appeal took place on Tuesday 6 December 2011 at the offices of Allens Arthur Robinson in Sydney. The parties were represented in the manner indicated on the first page of this Award.

At the conclusion of the hearing, I indicated that I would deliver an Award by no later than 15 December 2011. This is that Award.

LAW

CAS Jurisdiction

1. The jurisdiction of CAS does not arise in the usual way in this appeal. The Nomination Criteria do not provide for an appeal to CAS nor, as I understand it, do any relevant rules of the Respondent.

2. However, the parties have agreed, as witnessed by the signed versions of the Order of Procedure, to confer jurisdiction upon CAS to determine this dispute. The parties have agreed that this appeal is one filed in the Appeals Division of CAS and that I am to sit as sole arbitrator in accordance with Rule 50 of the Code of Sports-Related Arbitration ("the Code").

3. The parties have also agreed that the decision of CAS will be final and binding on all parties and that no party will institute or maintain proceedings in any court or tribunal in relation to the dispute.

4. The parties have also agreed that no party including any affected or third party will have the right of appeal under s.38 of the *Commercial Arbitration Act* of any of the Australian States or to apply for the determination of a question of law under s.39(1)(a) of any such Act.

5. Moreover, the parties have agreed that this appeal will be conducted by me according to the Code and, in particular, in accordance with the provisions relating to the Appeals Division of CAS set out in Rule 47 and following of the Code.

6. For complete certainty about jurisdiction and other matters, the Order of Procedure signed by the parties is incorporated by reference into this Award.

Applicable Law

7. Rule 58 of the Code provides for a CAS panel to determine a dispute according to the applicable regulations and rules of law chosen by the parties. As evidenced by the signed Order of Procedure, the parties have agreed that the law applicable to the merits in this appeal shall be the law of New South Wales.

8. Moreover, again as evidenced by the signing of the Order of Procedure, the parties have agreed that the Nomination Criteria are the relevant policy which applies to this dispute for the purposes of Rule 58 of the Code.

The Submissions

9. In his original grounds of appeal, the Appellant raised a number of issues which are not now pressed. Ultimately, the Appellant confined his challenge to his non-nomination by the Respondent to three grounds as follows:

   (a) in calculating the "percentage results" for the purposes of applying them to the Nomination Criteria, the Respondent failed to include the results of Damon Morton who was the first-placed competitor in each of the selection races and thus failed to properly apply the Nomination Criteria ("the Construction Issue");

   (b) the race conducted on 13 August 2011 was not an "Individual Championship" for the purposes of the Nomination Criteria with the result that the Nomination Criteria were improperly applied by reason of taking into account the results from that race ("the Characterization Issue");

   (c) the Appellant was not afforded a reasonable opportunity to satisfy the Nomination Criteria by having to compete on a substantially shortened course on 13 August 2011 ("the Reasonable Opportunity Issue").

10. In support of his case, the Appellant advanced the following submissions in respect of these three grounds of appeal:

The Construction Issue

   (a) The definition of "percentage results" in paragraph 6 of the Nomination Criteria defined that term to mean "the percentage behind the time of the first-place competitor in that event";

(b) In each of the relevant selection races, Damon Morton was the first-placed competitor;

(c) Therefore, Damon Morton's results had to be taken into account for the purposes of applying the Nomination Criteria;

(d) If those results of Damon Morton were taken into account, the Appellant would have been the highest ranking athlete for the purposes of the Nomination Criteria and thus entitled to nomination.

The Characterization Issue

(e) In the sport of biathlon, there is a clear distinction between sprints events and individual events. A sprint event is conducted over a distance of 7.5 kilometres while an individual event is conducted over a distance of 12.5 kilometres;

(f) The course on which the athletes competed on 13 August 2011 covered a distance of 8 kilometres not 12.5 kilometres. It was, in distance terms, akin to a sprint event not an individual event. The disparity in distance was so significant that the race no longer had the character of an Individual Event and thus no longer answered the description of Selection Race for the purposes of the Nomination Criteria;

(g) Therefore, the Respondent erred by taking the results from that race into account for the purposes of considering who was the highest ranked athlete.

The Reasonable Opportunity Issue

(h) By reducing the length of the course so significantly for the event of 13 August 2011, the Respondent changed the very nature of the race. The shortened course materially altered the ability of an athlete to make up time for penalties imposed for missed shots. Athletes who were superior/faster skiers were disadvantaged and athletes who were better shooters but slower skiers were given an advantage;

(i) The reduction in the time penalty did not solve the problem – the reduction in the penalty of 25% did not fully offset the impact of a 37.5% reduction in the length of the course and, further, the reduction in the time penalty was based on a misconceived rationale in that the jury calculated the reduction on the basis of the representations of the Chief of Race that the course was 11 kilometres in length when, in fact, it was only 8 kilometres in length;

(j) Further, the athletes were not adequately notified of the extent of the reduction in the length of the course prior to the race and therefore they did not have any opportunity to adjust their approach to the race.

11. The Respondent's Submissions

The Construction Issue

The Respondent submits that it correctly excluded the "ineligible" athlete Damon Morton from the compilation of the Percentage Results under the Nomination Criteria because the proper construction of the Nomination Criteria requires that only "eligible athletes" be compared with each other in the determination of the nomination/selection. Put another way, the Respondent

submits that the word "competitor" in the Nomination Criteria means *"an eligible athlete who competes"* in the relevant selection races.

The Characterization Issue

The Respondent submits that the true character of the Individual Race held on 13 August 2011 (ski 5 loops and shoot 4 times with a reduced time penalty for each missed shot) was not in any material way changed due to the reduced race distance, which reduction in distance was properly determined by the Chief of Race under the Respondent's Rules and accepted by the jury pre-race. According to the Respondent, the Race consensually proceeded on this basis, with all competitors equally subjected to its conditions.

The Reasonable Opportunity Issue

The Respondent submits that the Appellant had exactly the same opportunity to satisfy the Nomination Criteria as every other athlete. Conditions were the same for everyone.

12. The AOC did not advance any submissions on any of these grounds of appeal.

Disposition

A. The Construction Issue

13. In my view, the construction proffered by the Respondent should be preferred to the literal construction argument urged by the Appellant.

14. In the context of a race or event which doubles as an Australian Championship and as a Selection Race for the WYOG and where there are two distinct and different sets of competitors, namely those who are eligible for selection for the WYOG and those who are ineligible for such selection I consider that the word "competitor" is ambiguous or susceptible of more than one meaning. Thus, even if ambiguity is necessary before one can have regard to surrounding circumstances or the object and purpose of the Nomination Criteria for the purposes of construction, I think that pre-condition has been satisfied.

15. Further, and in any event, even absent ambiguity, extrinsic evidence is admissible to identify the subject matter of an expression used in a contract such as "your wool" or "existing clients" (see, eg, *Codelfa Construction Pty Ltd v. State Rail Authority of New South Wales* (1982) 149 CLR 337 at 349 – 350, *Branir Pty Ltd v. Owston Nominees (No.2) Pty Ltd* (2001) 117 FCR 424 at [417]).

16. Thus, notwithstanding the influential comments made by GUMMOW, HAYDEN AND BELL JJ recently in rejecting an application for special leave to appeal to the High Court (see *Western Export Services Inc v. Jireh International Pty Ltd* [2011] HCA 45 at [2]) I am entitled, in undertaking the construction exercise, to have regard to the surrounding circumstances and the object or purpose of the Nomination Criteria.

17. Further, or alternatively, I do not think that anything said in *Western Export Services Inc v. Jireh International Pty Ltd* does, or could, impinge upon the statements of principle expressed by the High Court deciding appeals (as opposed to applications for leave to appeal) in cases such as *Pacific Carriers Limited v. BNP Paribas* (2004) 218 CLR 451 and *Toll (FGCT) Pty Ltd v. Alphapharm Pty Ltd* (2004) 219 CLR 165. Those cases make it plain that the construction exercises requires consideration not only of the text but also, at least, of the purpose and object of the transaction at least as apparent from the contractual document itself (see, eg, *Toll* at 179 [40]).

18. In my view, the purpose or object of a Nomination Criteria is clear. It is to compare eligible athletes with each other and to rank them by reference to their performances against each other. The purpose or object is, as the Respondent put it rather colloquially, to seek to compare "apples with apples" not "apples with oranges".

19. The evidence purpose or object of the Nomination Criteria thus strongly supports the submission advanced by the Respondent. However, even if that purpose or object is ignored and attention is focused exclusively on the text of the Nomination Criteria in my opinion the construction proffered by the Respondent is the preferable one.

20. Whilst it is a fundamental rule that words in the contract should be given the natural meaning that they bear (see, eg, *McCann v. Switzerland Insurance Australia Limited* (2000) 203 CLR 579 at 600 – 601 [74]) that does not mean they must necessarily be given their literal or dictionary meaning (see, eg, *House of Peace Pty Ltd v. Bankstown City Council* (2000) 48 NSWLR 498 at 504 – 506 [25] – [33]). Contractual words must be considered not in isolation but in the context of the contract as a whole (as stated by GIBBS J in *Australian Broadcasting Commission v. Australasian Performing Rights Association Limited* (1973) 129 CLR 99 at 109:

"The whole of the instrument has to be considered, since the meaning of any one part of it may be revealed by other parts, and the words of every clause must if possible be construed so as to render them all harmonious one with another".

(see also per BRENNAN J in *Codelfa* at 401);

21. As stated by the eminent American jurist, Oliver WENDELL HOLMES:

"A word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in colour and content according to the circumstances".

(Towne v. Eisner 245 US 418 (1918) at 425 approved in Provincial Insurance Australia Ltd v. Consolidated Wood Products Pty Ltd (1991) 25 NSWLR 541 at 560).

22. A colourful illustration of the principle was given by Lord Steyn writing extra-judicially as follows:

"Adopting one of Wittgenstein's memorable examples, one can imagine parents telling a babysitter, who agreed to look after their 5 year old twins for some hours, that if the children become troublesome "teach them a game". The parents return home to find the babysitter playing poker with the children. Poker is a game. Did the context give a more restrictive colour to the word "game"? Wittgenstein thought the answer was "yes"".

(see STEYN, "The Intractable Problem of the Interpretation of Legal Texts" [2003] Sydney Law Review 1 at 2)

23. The Nomination Criteria, when viewed as a whole, make it plain that the document is only concerned with one class or category of athlete or competitor namely the competitors who are eligible to compete at the 2012 WYOG. It would be curious, in such a context, if the word "competitor" was intended to mean an athlete who was ineligible to compete at the WYOG.

24. Further, although the word "competitor" is not used elsewhere in the Nomination Criteria other than in the definition clause, the cognate expression "competed" is used in the Nomination Criteria. That cognate expression is used in clause 2 where the Nomination Criteria relevantly state that the Respondent *"will only nominate those Athletes … who have* ***competed*** *in the state and national Biathlon Selection Races …"*. The Nomination Criteria had already stated in Rule 1(a) that the only Athletes eligible for nomination were those born in 1994 and 1995. Thus the word "Athletes" where used in Rule 2 must be qualified by the adjective "eligible".

25. In my view, the word "competitor" in clause 6 of the Nomination Criteria must be construed in this context. Harmony should be achieved between the expression *"(eligible) athletes who have competed"* in Rule 2 and the word "competitor" in Rule 6. The search is, in my view, for the first placed eligible athlete who competed in the relevant events.

26. Therefore, whether regard is had only to the text of the Nomination Criteria or whether regard is had not only to the text but also to the evident purpose or object of the Nomination Criteria, in my opinion the proper construction of the word "competitor" in clause 6 of the Nomination Criteria is that it means an athlete who meets the eligibility requirements for selection in the team for the 2012 WYOG and who competes in the relevant Selection Race.

27. It follows, in my view, that since the winner of each of the Selection Races was ineligible for nomination or selection, his results were properly discarded for the purposes of determining the highest ranked athlete under the Nomination Criteria.

28. Thus, in my view, the Appellant's first ground of appeal cannot be sustained.

B. The Characterization Issue

29. As stated, by signing a Participation Agreement, a competitor in the 13 August 2011 event bound himself to comply with the Respondent's Rules. The relevant rules for consideration are contained in a document entitled "Race Procedure and Rule Outlines". That document commences by stating the policy of the Respondent to run championship events *"as closely as possible in accordance with the IBU Event and Competition Rules"*. However, it makes it plain that *"while the IBU Rules are generally followed"* some rules cannot be applied in Australia or need to be *"modified to meet Australian conditions or requirements"*.

30. One such Australian condition is the fickleness or inconsistency of snow conditions as noted by Mr Connor in his evidence. Moreover, as further noted by Mr Connor in his evidence, the IBU Rules relating to particular types of events cannot be directly applied to Australian events. According to Mr Connor's unchallenged evidence the IBU Rules are pertinent for IBU sanctioned events known as class A, B or C events and the Respondent did not have a class A, B or C licence to conduct such events. Hence the Respondent's events were not ones of the type referred to in the IBU Rules.

31. Whether this be strictly correct or not, it is plain, in my view, that the IBU Rules are not binding on the Respondent and do not apply where there is any inconsistency between those Rules and the Rules of the Respondent.

32. The Respondent's Rules, as contained in the "Race Procedure and Rule Outlines" document contains a specific provision relating to the changes to the length of a race. That provision is as follows:

"Changes to the length of a race may be made at the discretion of the Chief of Race or Jury when taking into consideration mitigating circumstances such as time of season and snow availability, snow grooming performed or extreme weather conditions".

33. It is to be noted that there is no express limitation placed upon the extent to which the length of the race may be changed.

34. Although the discretion so conferred is not expressly fettered, it is clear that, as a matter of law, it is subject to two restrictions:

(a) first it must be exercised in good faith and not arbitrarily or capriciously or unreasonably in the sense that it cannot be exercised in a way that no reasonable person in the position of the decision-maker could have made that decision (see, eg, *Socimer International Bank Limited v. Standard Bank Limited* [2008] 1 Lloyd's Reports 558 at 577; *Australian Football League v. Carlton Football Club Limited* [1998] 2 VR 546 at 557; *Aerial Taxi Cabs Co-operative Society Limited v. Lee* (2000) 178 ALR 73 at [76]);

(b) secondly no legal discretion, however widely worded, can be exercised for purposes contrary to those of the instrument by which it is conferred (see, eg, *Equitable Life Assurance Society v. Hyman* [2002] 1 AC 408 at 460; see also *Dawson v. The Commonwealth* (1946) 73 CLR 157 at 181 – 182).

35. Although the evidence clearly establishes that it was Mr Connor who made the initial decision, in consultation with the grooming staff, that the length of the course (for all biathlon events on 13 August 2011) needed to be shortened that was a decision which was ultimately agreed by the other members of the Jury albeit with reservations. As stated, a compromise was reached by reducing the time penalty for missed shots in an apparent attempt to compensate for the effects of the shorter distance of the event.

36. There is no doubt in my mind that, whether the decision is viewed as one by Mr Connor alone or by the Jury as a group, the decision was one which was made in good faith and which took

into account the circumstances mentioned in the Rule creating the discretion. Moreover, it was not put, nor could it have been in my view, that the discretion was exercised for a purpose contrary to the purposes of the Rules conferring the discretion. The discretion was clearly exercised for the purpose of enabling some races to be held (in particular an Australian championship) rather than having to postpone or cancel the race altogether. It took account of snow availability and the snow grooming performed.

37. Nor, in my view, could it be said that the decision to reduce the length of the event was capricious or unreasonable in the relevant sense.

38. The Appellant submits that the discretion could have been exercised in a different way which would have meant that the men's youth event was conducted over a distance closer to the normal distance of 12.5 kilometres. That was by permitting the men's youth participants to compete over the same loop as the open men. There seems little doubt that if the men's youth had competed on the same course as the open men then the length of the men's youth event would have been closer to the "normal" 12.5 km distance than the distance actually raced on 13 August 2011.

39. However, the Respondent's evidence was to the effect that it was not possible to have the men's youth participate on the same course or at the same distance as the open men because the men's youth event **had** to be shorter than the men's open event.

40. There is nothing in writing which stipulates that the men's youth event **must** be conducted over a shorter distance than the men's open event. However, all of the evidence suggests that it is the expectation of every one that the open men will participate over longer courses than the youth men. The Participation Agreements which contain details of the approximate distances of the various biathlon events makes this plain as do the tables set out in the Respondent's "Race Procedure and Rule Outlines" document. For instance, in that document the distance for the men's open event is stated to be 18.27 kilometres where the distance for the youth men's event is stated to be 12.5 kilometres. Given the fundamental feature of an individual event that there be 5 loops, the Appellant's submission effectively amounts to one that the only appropriate exercise of the discretion was for the men's youth event to be run over precisely the same distance as the open men's event, notwithstanding the apparent contemplation gleaned from the documents I have referred to that the men's youth event would be approximately one third shorter than the men's open event.

41. Since the 13 August 2011 event was a 2012 WYOG selection race, a case could be mounted for saying that it would have been better to permit, on this occasion, the men's youth event to be conducted over the same distance as the men's open event. But even if such a case was persuasive, that is not the relevant test.

41. It is impermissible for me to review the merits of the exercise of a discretion under the guise of considering whether the discretion has been properly exercised.

42. In my opinion, in all the circumstances, the discretion to change the length of the event could not be said to have been exercised arbitrarily, capriciously or unreasonably in the relevant sense even though others charged with the decision might have exercised the discretion in a different way.

43. These conclusions, however, do not resolve the characterization issue. Accepting that the change to the distance was one which was properly able to be made does not necessarily mean that the change did not so affect the character of the event that it no longer had the character contemplated by the Nomination Criteria.

44. However, in my opinion, the change to the distance of the event did not sufficiently change the character of the event so as to make it one which was ineligible to be considered for the purposes of the Nomination Criteria.

45. The essential differences between a sprint event and an individual event have already been noted (see above). All of the basic characteristics of an individual event were maintained for the 13 August 2011 event with the exception that the normal distance of the event was considerably shortened.

46. I do not consider that the material shortening of the distance of the event, by itself, sufficiently changes the character of the event so that it could not be taken into account as a selection race. Sporting events are frequently truncated or shortened because of rain or other weather conditions. Golf championships and one day cricket matches afford ready illustrations of this phenomenon. A golf championship reduced from 72 holes to, say, 54 holes because of weather conditions is still essentially the same golf championship as one conducted over the full 72 holes. A one day cricket match reduced from 50 overs to, say, 38 overs because of rain still retains the essential characteristic of a one day cricket match provided the other "rules" are applied with such adjustments as are necessary.

47. Likewise, in my view, with the 13 August 2011 individual event. The Chief of Race and Jury, with the exception of the distance, made every effort to keep the rules and conditions of the race as close as possible to those of an individual event conducted in better weather conditions. They recognised the impact of the shortened distance by adjusting the "rule" concerning the duration of the time penalty for missed shots.

48. In short, in my view, although it is unfortunate that, because of weather conditions, the 13 August 2011 event was so considerably shortened, that factor, by itself, did not so change the character of the event as to bring it outside the contemplation of the Nomination Criteria.

49. Accordingly, in my view, the Appellant's second ground of appeal cannot be sustained.

C. The Reasonable Opportunity Issue

50. This issue overlaps somewhat with the Characterization Issue. To the extent that it has independent life, I do not see any substance in this contention.

51. The Appellant had as much opportunity as any other participant in the 13 August 2011 race to appraise himself of the course and the conditions. To use a very worn but still apt cliché, he competed on the same level playing field as all other participants. All other participants also had to adjust and cope with the changes to the course from those which they may have envisaged prior to the race. There was nothing in the changes which discriminated against the Appellant.

52. It may be true that by shortening the distance of the race so considerably those competitors who were better marksmen but poorer skiers gained an advantage over participants who had the opposite blend of skills but not only is there no evidence as to which particular category the Appellant, or for that matter, Mr Porter or other participants fitted into but also, in my view, such evidence would be irrelevant.

53. The simple fact remains that the change brought on by the weather conditions was one which applied equally to, and affected equally, all participants in the event. I do not think, in those circumstances, it can be said that, somehow or other, the Appellant was not afforded a reasonable opportunity to satisfy the Nomination Criteria. He was afforded the same opportunity as everyone else.

54. This conclusion is sufficient to reject the Appellant's third ground of appeal. However, I should add that in any event I am not persuaded that even if the contention had been made out on the facts it would necessarily have been a valid ground for interfering with the nomination. The submission of the Appellant appears to rest upon some implied term in the Nomination Criteria to the effect that participants would be given a "reasonable opportunity" to comply with the Nomination Criteria. Absent such an implied term it is difficult to see how the submission could be made. Yet neither the Appellant nor the Respondent addressed the question whether the requirements usually considered necessary for the implication a term had been made out. In the absence of such submissions, it is unnecessary for me to determine whether or not there the Nomination Criteria contained an implied term of the type and content which would be necessary to found a proper basis for the Appellant's third ground of appeal.

55. However, assuming the Nomination Criteria did contain such an implied term, then for the reasons I have given in my opinion there was no breach of that implied term.

56. Therefore, in my view the Appellant's third ground of appeal must fail.

D. Conclusion on the Merits of the Appeal

57. For the reasons given, this appeal must fail.

The Court of Arbitration for Sport rules:

1. The Appeal is dismissed.

2. The nomination of Mr Lachlan Porter for selection in the 2012 Australian Winter Youth Olympic Team in the Men's Youth Biathlon Event is confirmed.

3. (…).

4. (…).