Arbitration CAS 2012/A/2828 Amy Graham v. Equestrian Australia, award of 18 July 2012

Panel: Judge Arthur Emmett (Australia), Sole Arbitrator

Equestrian (jumping)
Nomination for selection to the 2012 Australian Olympic Jumping Team
CAS jurisdiction
Construction of the Nomination Criteria adopted by Equestrian Australia
Validity of the decision issued by Equestrian Australia Appeals Tribunal
Validity of the decision of Equestrian Australia Selection Panel regarding the non-nomination of the appellant

1. **According to the Olympic Team Selection By-law, there is a right of appeal to the Court of Arbitration for Sports (CAS) from the decision of the Appeals Tribunal established by Equestrian Australia to refer the question of re-nomination (for selection for the national Olympic team) back to the national federation for determination in accordance with the applicable nomination criteria.**

2. **According to a proper construction of Clause 2 Part C of the Nomination Criteria, where the Automatic Nomination provision cannot be satisfied, by reason of there being equal second place getters, or, indeed, more than two first place getters, the nomination process simply moves to the Discretionary Nomination provision. Although the Automatic Nomination provision represents a higher tier in the nomination process, which may be used to nominate up to two combinations (athlete - horse), the Discretionary Nomination process is not used to nominate a specified number of combinations, but rather the remainder of the team, once the Early and Automatic Nominations are made. That would cover the situation where consideration of the Automatic Nomination criteria necessarily resulted in the automatic nomination of fewer than two combinations.**

3. **There is no error of law in connection with the conclusion of the Appeals Tribunal which considered that, in choosing between the two second place combinations, and granting Automatic Nomination to one of them, the Selection Panel did not properly follow or implement the Automatic Nomination provision. Neither could be granted Automatic Nomination. Consequently the appellant's combination was not entitled to Automatic Nomination.**

4. **Where the sole grounds available to the appellant regarding the Selection Panel decision in applying the Discretionary Nomination are that the decision was affected by actual bias, or obviously or self-evidently so unreasonable or perverse that it can be said to be irrational and that those grounds are not demonstrated, the decision by the Selection Panel regarding the non-nomination of the appellant is valid. Further, there is no basis for concluding that the relevant provisions of the Nomination Criteria were not properly**

followed or were not properly implemented and that there was no material on which the nomination decision could reasonably be based.

A dispute has arisen concerning the nomination by Equestrian Australia of athlete and horse combinations for selection to the 2012 Australian Olympic Jumping Team. On 5 June 2012, the appellant, Ms Amy Graham, was informed by the National Selection Panel of Equestrian Australia (**the Panel**) that she and her horse *Bella Baloubet* (**the Graham Combination**) had not been selected for nomination to the Australian Olympic Committee as one of the combinations for the Jumping Team. Ms Graham lodged an appeal to an appeals tribunal established by Equestrian Australia, consisting of Mr Stephen McEwen QC, Ms Zali Steggall and Mr Nigel Nicholls (**the Tribunal**). On 15 June 2012, the Tribunal decided to allow the appeal on the basis of one of several arguments advanced on behalf of Ms Graham. The Tribunal referred the matter back to Equestrian Australia for further consideration.

On 21 June 2012, Ms Graham lodged an appeal from the decision of the Tribunal with the Court of Arbitration for Sport (**the Court**). On the same day, the Panel made a second nomination decision for the Jumping Team pursuant to the Tribunal's decision. The Graham Combination was again not selected for nomination. The second nomination decision was circulated on 26 June 2012. On 28 June 2012, Ms Graham lodged an appeal to the Court from the Panel's second nomination decision. I shall explain below the inter-relationship between the two appeals and the procedural technicalities that are raised by them.

By Order of Procedure signed on behalf of Ms Graham and Equestrian Australia, those parties agreed that the Court has jurisdiction to determine, by arbitration, the dispute that is the subject of the appeals and agreed to refer the dispute to the Court for determination by arbitration. The parties agreed that, for the purposes of the arbitration, the Court would be constituted by me as a sole arbitrator, with the object of arbitrating on the dispute, and rendering an award in conformity with the agreement between the parties to submit their dispute for arbitration before the Court according to the Code of Sports-related Arbitration published by the Court (**the Code**). Because of the imminence of the 2012 Olympic Games in London, there is considerable urgency in having the dispute resolved.

On 3 July 2012, I received evidence in the form of documentary material. I have also received written submissions from Ms Graham and from Equestrian Australia and have heard oral argument from counsel on behalf of those parties. Before dealing with the grounds of the appeals, it is necessary to say something about the regulatory framework within which the arbitration is conducted.

The Olympic Team Selection By-Law

The manner in which athletes are nominated for selection in the Australian Olympic Team is regulated by the Olympic Team Selection By-law dated 23 November 2011 (**the Selection By-law**). The Selection By-law applies to athletes, officials, national federations and the Australian Olympic

Committee. Equestrian Australia is a national federation for the purposes of the Selection By-law. The Selection By-law consists of 14 clauses, as follows:

1. Definitions and Interpretation
2. Application of the By-law
3. Shadow Team
4. Selection Criteria
5. Nomination Criteria
6. Nomination of Athletes
7. Selection of Athletes
8. Selection of Officials
9. Olympic Appeals Consultants
10. National Federation Appeals Tribunals
11. Appeals Process for Athletes
12. Costs and Expenses of Appeal Process
13. Indemnity
14. Application of Laws

Clause 4.1 provides that, in respect of each sport on the Olympic Games programme, the Australian Olympic Committee will adopt selection criteria and will forward a copy of the criteria to the relevant national federation. The Australian Olympic Committee has adopted selection criteria in respect of the selection of athlete and horse combinations as nominated by Equestrian Australia. In order to be selected as a member of the 2012 Australian Olympic Equestrian Team, each athlete must have met the requirements prescribed in the qualifying system of *Fédération Equestre Internationale* (**FEI**) for the 2012 Olympic Games (**the Qualifying System**). In addition, relevantly, each athlete must have been nominated by Equestrian Australia.

Clause 5 of the Selection By-law provides that, subject to the prior written approval of the Australian Olympic Committee, each national federation must adopt nomination criteria. Under clause 5.3, a national federation must not alter or amend any nomination criteria without **the prior written approval** of the Australian Olympic Committee. Under clause 5.4, each national federation must apply its nomination criteria fairly so as to ensure that no athlete is nominated to the Australian Olympic Committee where another athlete is or other athletes are entitled to be nominated in priority.

Equestrian Australia has adopted nomination criteria as contemplated by clause 5.1 (**the Nomination Criteria**). A question has arisen as to whether or not the Nomination Criteria, as adopted by Equestrian Australia, were altered or amended with the prior written approval of the Australian Olympic Committee. I shall return to that question below, when describing the relevant provisions of the Nomination Criteria.

Clause 6.2 of the Selection By-law provides that each national federation will only nominate those athletes who have, relevantly, met the applicable nomination criteria and, in the case of team events or disciplines, whose team has qualified under the applicable participation and qualification criteria for a particular sport, in the present case, the Qualifying System. Under clause 7.1 of the Selection By-law, selection of athletes will be conducted solely by the Australian Olympic Committee according to the applicable selection criteria. Under clause 7.2, selection of each athlete to a particular team may be conditional upon the Australian Olympic Committee confirming to its satisfaction that the athlete has met the nomination criteria and the selection criteria.

Clause 10.1 of the Selection By-law provides that each national federation must establish an appeals tribunal consisting of a barrister or solicitor or other legally qualified person who is to act as Chairman, a person with a thorough knowledge of the relevant sport, and one other person of experience and skills suitable to the function of the appeals tribunal. Each appeals tribunal is to be bound by a number of requirements set out in clause 10.4. Accordingly, an appeals tribunal must observe the principles of natural justice. However, an appeals tribunal is not bound by the rules of evidence and may inform itself as to any matter in such manner as it thinks fit.

Under clause 11.1 of the Selection By-law, any appeal or dispute regarding an athlete's nomination or non-nomination by a national federation is to be first determined by the appeals tribunal established under clause 10 by that national federation. Under clause 11.5, the sole grounds for any appeal to an appeals tribunal are that:

- the applicable nomination criteria have not been properly followed and/or implemented;
- the appellant was not afforded a reasonable opportunity by the national federation to satisfy the applicable nomination criteria;
- the nomination decision was affected by actual bias; or
- there was no material on which the nomination decision could reasonably be based.

Under clause 11.8, the decision of an appeals tribunal will be binding on the parties, subject only to an appeal to the Court pursuant to clause 11.11. Under clause 11.11, any appeal from a decision of an appeals tribunal must be solely and exclusively resolved by the Appeals Arbitration Division of the Court. Under clause 11.10, the sole grounds for any appeal against a decision of an appeals tribunal are that:

- there was a breach of the rules of natural justice by the appeals tribunal; or
- the decision of the appeals tribunal was in error on a question of law.

Clause 11.9 provides that, despite clause 11.1, where an athlete wishes to appeal from a decision against non-nomination, and the relevant national federation so agrees in writing, the appeal to the appeals tribunal may be directly referred to the Appeals Arbitration Division of the Court. In that instance, the grounds of appeal must be one or more of the grounds described in clause 11.5, and the Court will be vested with the powers of the appeals tribunal. In such instance, the appeal will be solely and exclusively resolved by the Court, and there can be no further appeal from the decision of the Court.

Under clause 10.4(10), where an appeals tribunal refers the question of renomination back to the relevant national federation for determination, the national federation's determination will be final and binding, subject to any appeal to the Court from that determination, as provided for in clause 11.14. Under clause 11.14, any appeal or dispute regarding renomination under clause 10.4(10) is to be solely and exclusively resolved by the Appeals Arbitration Division of the Court, the decision of which will be final and binding on the parties.

Under clause 11.15, an athlete wishing to appeal to the Court against a renomination decision must serve a written notice of appeal to the Court upon the Secretary-General or Director of Sport of the Australian Olympic Committee. Clause 11.16 provides that the sole grounds of appeal against a renomination decision are that the decision was:

- affected by actual bias, or
- obviously or self-evidently so unreasonable or perverse that it can be said to be irrational.

Under clause 11.19, if the Court determines to uphold any appeal against non-nomination of an athlete, it will as a matter of usual practice refer the question of renomination back to the National Federation selection panel for determination in accordance with the applicable nomination criteria. However, the Court may itself conclusively determine the issue of renomination where the Court has determined that it would be impractical to refer the issue of renomination back to the relevant national federation in the time available within which entries to the Games must be submitted by the Australian Olympic Committee.

Equestrian Australia Nomination Criteria

Clause 2 of the Nomination Criteria provides that, for the purposes of nomination to the Australian Olympic Committee for selection to the 2012 Australian Olympic Team, Equestrian Australia will only nominate those horse and athlete combinations who, to the satisfaction of Equestrian Australia, have competed in the events or trials, completed the training regime and fulfilled other attendance and team participation requirements, as set out in Part A, Part B or Part C of the Nomination Criteria. Part A is for Dressage, Part B is for Eventing and Part C is for Jumping. Equestrian Australia must only nominate those horse and athlete combinations who have met the relevant FEI minimum eligibility standard (**MES**), which is referred to as **attaining an MES**. Equestrian Australia must not nominate more horse and athlete combinations, including reserves, than the maximum number permitted under the Qualification System. Clause 7 of the Nomination Criteria provides that the Nomination Criteria may be amended by Equestrian Australia with **the prior written approval** of the Australian Olympic Committee.

Only Part C of the Nomination Criteria is presently relevant. Part C of the Nomination Criteria deals with Jumping. Clause 2 of Part C provides that the objective of the Nomination Criteria was to nominate horse and athlete combinations that the Panel believes will achieve the best possible results at the 2012 Olympic Games. It provides that Equestrian Australia would conduct nomination events in Western Europe during the period 1 May 2012 to 4 June 2012 (**the Nomination Events**). As at 16 February 2012, clause 2 stated that, to be eligible for the Nomination Events, Australian horse and athlete combinations must have attained an MES by 23 April 2012 and be in Europe at the time of

the nomination process. The principal question in the present appeal is whether or not that provision was amended with the prior written approval of the Australian Olympic Committee. I shall return below to that question.

Clause 2 of Part C then specified that the nomination process would be conducted in two phases. Phase 1, the first Nomination Event, was to be conducted at Lummen, Belgium from 2 to 6 May 2012 and at Linz, Austria from 10 to 13 May 2012. Each eligible horse and athlete combination was to be invited to nominate to participate in either the Lummen event or the Linz event. Phase 2, the second Nomination Event, was to be conducted at Bourg en Bresse, France from 31 May 2012 to 3 June 2012. The Panel was to select up to eight horse and athlete combinations to compete in the second Nomination Event, in accordance with FEI entry requirements.

Clause 2 further provided that horse and athlete combinations could be nominated to the Australian Olympic Team in one of three ways:

- Early Nomination;
- Automatic Nomination; or
- Discretionary Nomination.

In relation to Early Nomination, the Panel was empowered, in its discretion, to nominate combinations to the Australian Olympic Committee for nomination to the Australian Olympic Team before the Nomination Events. In exercising that discretion, the Panel was to consider the demonstrated ability of the horse and athlete combinations to meet the objectives of the Nomination Criteria, together with outstanding performances in competitions held between 1 January 2011 and 1 May 2012.

The requirements for Automatic Nomination were that the combinations must:

- be eligible and compete at the two Nomination Events, as outlined above;
- be one of the two Australian horse and athlete combinations to have the least total faults accumulated during the first round of the designated qualifying round of the grand prix, and the grand prix competition of the Nomination Events; and
- be certified fit to compete.

Following the Early Nomination and the Automatic Nomination of horse and athlete combinations, the Panel was then required to nominate the remainder of the Jumping Team based on applying the following Discretionary Nomination criteria to each horse and athlete combination:

1. eligibility and competition at the Nomination Events, as outlined above,
2. degree of ability to contribute to the 2012 Olympic Jumping Team achieving the best possible result at the 2012 Olympic Games, to be demonstrated by seven specific criteria, to which I shall return below,
3. consistency of performance and the likelihood of a suitable performance to contribute towards a team score: if, in the opinion of the Panel, a consistent horse and athlete

combination will contribute towards an effective team score, that combination may be nominated ahead of another combination that has performed well but which, in the opinion of the panel, has the potential to be inconsistent, and

4. certification of fitness to compete.

Clause 4 of Part C provides that the Panel may, in its discretion, excuse a horse and athlete combination from compliance with **the requirements of competing in the Nomination Events** on the basis of **extenuating circumstances**, as defined in clause 4 of the Nomination Criteria. Under clause 4, **extenuating circumstances** is defined as an inability to compete in and/or attend events, trials, training camps or other attendances arising from:

1. injury or illness;
2. travel delays;
   - bereavement or disability arising from death or serious illness of an immediate family member; or
   - any other facts reasonably considered by Equestrian Australia to constitute extenuating circumstances.

It is significant that clause 4 authorises the Panel only to excuse a combination from the requirements of competing in the Nomination Events. It does not authorise the Panel to overlook other matters, such as ineligibility to compete in those events.

The decisions under appeal

In accordance with the requirements of clause 11.7 of the Selection By-law, the Panel provided a written statement as to the reasons for its decision of 5 June 2012 regarding the nomination of athlete and horse combinations for selection to the Australian Olympic Team. The combination of Edwina Tops-Alexander and Cevo Itot du Château had previously been nominated under the Early Nomination provision. There has been no challenge to that decision.

After setting out the results of participation in the Nomination Events, the Panel observed that, at the conclusion of the Nomination Events, the horse and athlete combination with the least total faults accumulated during the first round of the designated qualifying round of the grand prix and the grand prix competition was Julia Hargreaves and Vedor, with 23 total faults. That combination was therefore automatically nominated to the Jumping Team.

There was a subsequent equality between the Graham Combination and the combination of James Paterson-Robinson and Lanosso (the Paterson-Robinson Combination), both of whom finished with 24 faults. The Panel expressed the view that, since Automatic Nomination was for two combinations, the Panel had to determine which of the the Paterson-Robinson Combination and the Graham Combination was entitled to Automatic Nomination. The Panel considered the results of the two grand prix competitions in the Nomination Events, as it regarded these rounds as more aligned with an Olympic Games standard than the qualifying round events. The Panel considered that, in those

competitions, the Paterson-Robinson Combination was clearly the better combination, with a total of 12 faults, compared with the total of 20 faults recorded by the Graham Combination.

The Panel referred to the performances of the Graham Combination at the first Nomination Event in Lummen and the final Nomination Event at Bourg en Bresse. While the Graham Combination was positioned at the top of the leader board going into the final grand prix at Bourg en Bresse, its performance in the grand prix competition did not live up to expectations. The Panel characterised the result as a disappointing conclusion to a solid build up. The Panel then referred to the performance of the Paterson-Robinson Combination at the 2010 Kentucky World Equestrian Games, where it delivered a clear round, and noted that the combination came into the final grand prix at Bourg en Bresse having to deliver a clear round, which it did.

The Panel, for the reasons outlined above, nominated the Paterson-Robinson Combination under the Automatic Nomination provision.

The Panel then dealt with Discretionary Nomination. The Panel considered that there were four combinations remaining in contention for one single Discretionary Nomination, including the Graham Combination and the combination of Matt Williams and Watch Me vd Mangelaar (the Williams Combination). The other two combinations were not considered further because of their inconsistent results over the course of the nomination process. That left the Panel to choose between the Williams Combination and the Graham Combination. The Panel dealt with the specific criteria for Discretionary Nomination and concluded that the Williams Combination should be nominated under the Discretionary Nomination provision.

Ms Graham appealed to the Tribunal against the Panel's decision. The grounds of appeal relied on by Ms Graham were two of the grounds in clause 11.5, as follows:

- The applicable nomination criteria had not been properly followed and/or implemented.
- There was no material on which the nomination decision could reasonably be based.

Ms Graham advanced three arguments in relation to the decision of the Panel not to nominate her under the Automatic Nomination provision. She also advanced a fourth argument in relation to the Panel's decision not to nominate her under the Discretionary Nomination provision.

The three arguments in relation to Automatic Nomination were that:

- the Paterson-Robinson Combination was not eligible for Automatic Nomination;
- the Panel erred in purporting to conduct a "count back" in order to determine which of the two second placed combinations should be granted Automatic Nomination; and
- if a count back was permitted under the Automatic Nomination provision, there was no material upon which the Paterson-Robinson Combination could have been preferred to the Graham Combination.

The first argument advanced to the Tribunal by Ms Graham was that the Paterson-Robinson Combination was not eligible for the Nomination Events, notwithstanding that it competed in them,

and hence had not satisfied the first prerequisite for Automatic Nomination. This was because, as at 23 April 2012, the Paterson-Robinson Combination had not attained an MES.

The Tribunal found, however, that the Australian Olympic Committee had given prior written approval to the amendment of clause 2 of Part C of the Nomination Criteria to delete the requirement that, to be eligible, a combination must have attained an MES by 23 April 2012. The amended requirement was simply that to be eligible to compete in the second Nomination Event, at Bourg en Bresse, the combinations must have attained an MES. The effect was that, so long as a combination had attained an MES before 31 May 2012, when the Bourg en Bresse competition was to commence, that combination would be eligible.

The Tribunal also concluded that there was a second answer to Ms Graham's argument, based on the extenuating circumstances provision. The Panel had not given consideration to applying the extenuating circumstances provision to the question of whether the Paterson-Robinson Combination had obtained an MES by 23 April 2012. That was because all parties had proceeded on the understanding that the amendment had been made. Curiously, the Panel had regard to an assurance given to it by Mr Peter Cooke, the chair of the Panel, that, had the extenuating circumstances clause been considered at the time, the Panel would have applied the clause. The Tribunal therefore concluded that, if it were wrong about there being prior written approval of the amendment to clause 2 of Part C of the Nomination Criteria, the extenuating circumstances provision would have been and should now be applied.

While the Tribunal thus rejected Ms Graham's first argument, based on the eligibility of the Paterson-Robinson Combination, the Tribunal accepted the second argument relating to the choice between the two second placed combinations for Automatic Nomination. The Tribunal considered that the Nomination Criteria had not been properly followed or implemented by the Panel. In the light of that conclusion, the Tribunal considered that the remaining argument in relation to the Automatic Nomination provision and the argument in relation to Discretionary Nomination did not directly arise. While the Tribunal noted that it was open to it to consider those arguments as alternative contentions, it considered that it would be inappropriate and unhelpful to do so. The Tribunal therefore referred the three combinations, being the Paterson-Robinson Combination, the Williams Combination and the Graham Combination, back to the Panel for consideration under the Discretionary Nomination provision. Ms Graham appealed to the Court from that decision.

Following the remitter, the Panel considered the three combinations for Discretionary Nomination. The Panel concluded that the Paterson-Robinson Combination had been the outstanding improvers of the Olympic preparation program and had peaked at the right time. The Panel considered that the Williams Combination was on an improving performance plane and had the potential to deliver a four fault or better round at the Olympic Games. However, the Panel considered that the Graham Combination had plateaued in its performances and was most unlikely to have the scope or capacity to deliver less than an eight fault round at the Olympic level. The Panel considered that the Graham Combination was not yet ready for the step to the Olympic level. Accordingly, the Panel nominated the Paterson-Robinson Combination and the Williams Combination under the Discretionary Nomination provision. Ms Graham appeals to the Court from that decision.

LAW

The first appeal

1. In the first appeal, Ms Graham seeks a declaration that her combination was entitled to Automatic Nomination. There may be a question as to whether the Court can make such a declaration, in the light of clause 11.19 of the Selection By-law.

2. The grounds of appeal in the first appeal are limited to those specified in clause 11.10 of the Selection By-law. Ms Graham does not contend that the Tribunal breached the rules of natural justice. Rather, she says that the Tribunal's decision was in error on a question of law in so far as it determined that:

   - the Australian Olympic Committee had provided prior written approval for the amendment to the Nomination Criteria;
   - the Paterson-Robinson Combination was eligible for the nomination events and therefore eligible for Automatic Selection;
   - the Paterson-Robinson Combination was eligible for nomination under the extenuating circumstances provisions of the Nomination Criteria; and
   - the three combinations should be referred back to the Panel for consideration under the Discretionary Nomination provision.

3. Equestrian Australia contends that the first appeal is incompetent because it is, in effect, an appeal against the **reasons** for the Tribunal's decision rather than from the **decision**. It says that, whether or not the Tribunal accepted Ms Graham's contentions relating to the eligibility of the Paterson-Robinson Combination, and whether or not it accepted the contentions concerning choosing between the two second placed combinations for Automatic Nomination, the decision of the Tribunal was that the appeal be allowed and that the matter be remitted for further consideration by the Panel. It is clear enough that the Tribunal's decision was that **the three combinations** be referred back to the Panel for consideration under the Discretionary Nomination provision.

4. Clause 10.4(9) of the Selection By-law provides that the Tribunal will, as a matter of usual practice, refer the question of renomination back to the national federation for determination in accordance with the applicable nomination criteria. However, clause 10.4(10) contemplates that, on referral back to the national federation, in this case Equestrian Australia, renomination is to be determined in accordance with the reasons of the Tribunal. In the present circumstances, that would entail that the determination be made on the basis that the Paterson-Robinson Combination was eligible for nomination. Ms Graham contends that the Tribunal erred in reaching the conclusion that the Paterson-Robinson Combination was eligible for nomination. Accordingly, she says, the Tribunal erred in referring all three combinations back to the Panel, rather than only the Graham Combination and the Williams Combination.

5. In those circumstances, I do not consider that Ms Graham has appealed against the Tribunal's reasons. The Tribunal's decision was to refer all three combinations back to the Panel for consideration. That is the decision from which she appeals. That appeal is competent. There is a right of appeal to the Court from the decision of the Tribunal that all three combinations be referred back to the Panel for consideration under the Discretionary Nomination provision. Accordingly, it is necessary to consider the question of whether there was an error of law made by the Tribunal in concluding that the Paterson-Robinson Combination was eligible under clause 2 of Part C of the Nomination Criteria.

6. The Tribunal had before it a document lodged by the Panel in response to Ms Graham's appeal to the Tribunal (**the Response**). It also had before it several email communications that were referred to in the Response. It is necessary to say something about that material.

7. On 3 April 2012, Mr Brett Mace of Equestrian Australia sent an email to Ms Caylie Saunders of the Australian Olympic Committee. Mr Mace said, relevantly, that, because of situations outside the control of Equestrian Australia regarding events in Europe, he needed to request a change to the Jumping nomination policy and to the Dressage nomination policy. In relation to Jumping, Mr Mace said that, due to the cancellation of some events, there had been an issue with opportunities for Australian riders in Europe to gain qualification prior to the Nomination Events, which, he said, were very early in the season. The proposed change was that Equestrian Australia would not require the combinations to have an MES until the final Nomination Event, thereby allowing riders to gain an MES in the first and second Nomination Events. It was proposed that an MES would be required to qualify for the final Nomination Event. Mr Mace said that the change would not disadvantage or prevent any presently qualified combinations from competing in a Nomination Event.

8. Attached to Mr Mace's email was a digital copy of the Nomination Criteria with the provision intended to be amended highlighted in yellow. The email explained that the suggested replacement provision would appear when the cursor was placed on the highlighted area of the digital copy. The provision that was highlighted in yellow was as follows:

   "To be eligible for the Nomination Events, Australian horse and Athlete combinations must have attained an MES by 23 April 2012, and be in Europe at the time of the Nomination Process".

9. When the cursor was placed on the highlighted area, the following appeared:

   "To be eligible to compete in the Second Nomination Event at Bourg en Bresse, Australian horse and Athlete combinations must have attained a MES".

10. In the Response, the Panel stated that the Australian Olympic Committee had responded verbally (*sic*; *scilicet* orally) to Mr Mace's email in the affirmative. Mr Cooke also made an oral statement to the Tribunal indicating that Ms Fiona de Jong of the Australian Olympic Committee had had oral communications with Mr Mace to the effect that Equestrian Australia should immediately communicate the amendments to all **Shadow Team** members. The Nomination Criteria provide for Equestrian Australia to choose athletes to be members of the Australian Olympic Committee's Shadow Team, and provide that only members of the Shadow Team are to receive nominations for selection in the Olympic team.

11. On 12 April 2012, Mr Cooke sent an email to Ms Graham. The same email was sent to all riders individually. The email to Ms Graham relevantly said:

"1. The Nomination Policy

Due to some key events being cancelled and the shortness of the outdoor season, Equestrian Australia (EA) has been able to recommend a change to the timing of the MES requirements which will allow all riders every opportunity to secure their MES, and make sure we give Australia the best options to perform well at the Olympics.

The final Nomination Policy with recent changes is not yet available, however the key element says "To be eligible to compete in the Second Nomination Event at Bourg en Bresse, Australian horse and Athlete combinations must have attained a MES". This means that all riders who are currently in Europe and with an Australian horse has the opportunity to participate in Phase 1 of the Nomination events, and will have to secure their MES before Bourg-en-Bresse on 30 May. Also attached is a one page summary of the nomination process. The Final Nomination Policy document is waiting for ratification from the AOC and will be forwarded as soon as practical"

(Emphasis in original).

12. On 13 April 2012, Ms Saunders sent an email to Mr Mace in the following terms:

"Please find below a recommended amendment to your proposed changes:

Dressage:

If a rider has additional MES qualified horses that did not participate in the Nomination Events due to Nomination Event Organising Committee entry restrictions, these additional horses may be considered for nomination where the horse that participated in the Nomination Event must withdraw due to injury or illness.

The decision on whether the horse is replaced by the additional qualified horse or a new horse and Athlete combination would be made by the Dressage Selection Panel, in its absolute discretion, and subject to meeting performance standards as outlined in the Dressage Nomination Criteria.

I have no recommended changes to the proposed Jumping amendments, including those to the timeline.

If you are happy with the proposed amendments above, I will make the necessary amendments and will re-submit to the AOC Selection Committee for approval.

Many thanks Brett, and please do not hesitate to give me a call should you have any questions or concerns".

13. Ms Graham contends that, on its face, the email of 13 April 2012 could not constitute approval of the proposed amendment to clause 2 of Part C. She contends that, on its face, the email contemplates that the amendment be submitted to the Australian Olympic Committee Selection Committee for approval.

14. However, that is not how the email should be construed. The email of 3 April 2012, to which the email of 13 April 2012 was a response, raised two matters. One concerned the Dressage criteria. The other concerned the Jumping criteria. The response of 13 April 2012 recommended alterations to the proposed amendment in relation to Dressage. Ms Saunders was saying that, if Equestrian Australia was happy with the alterations to the proposed amendment of the Dressage criteria, the altered amendments would be resubmitted to the Australian Olympic

Committee Selection Committee for approval. However, there were no recommended alterations to the proposed amendment to the Jumping criteria.

15. That suggests that both sets of amendments, being the amendment to the Dressage criteria and the amendment to the Jumping criteria, had already been submitted to the Australian Olympic Committee Selection Committee for approval. There were no alterations recommended to the proposed amendments to the Jumping criteria, although there were alterations recommended to the proposed amendments to the Dressage criteria. While it was therefore necessary to resubmit the altered amendment to the Dressage criteria to the Selection Committee, it was not necessary for the amendments to the Jumping criteria to be resubmitted.

16. The Tribunal found that, in all of the circumstances outlined to it, the email of 13 April 2012 amounted to written approval of the amendment that had been submitted. However, the Tribunal did not fully explain the reasoning process that led to that finding. Since the email does not, on its face, state that the Australia Olympic Committee had approved the amendment to the Jumping criteria, the finding must depend upon inferences. The inferences are that both the proposed Dressage amendments and the proposed Jumping amendments had been submitted to the Australian Olympic Committee selection committee for approval before 13 April 2012 and that the Australian Olympic Committee had approved the amendments to the Jumping criteria.

17. Those inferences are supported by several matters. First, the email refers to **resubmission**, indicating that there had already been a submission. There is no suggestion in the email that there was any interdependence between approval of the amendments to the Dressage criteria and approval of the amendments to the Jumping criteria. The email states specifically that no further amendments were proposed in relation to the Jumping criteria. Finally, the email does not foreshadow any further formal confirmation being required in respect of approval of the amendment to the Jumping criteria. Indeed, the Australian Olympic Committee had requested Equestrian Australia to inform all members of the shadow team of the amendments.

18. I consider that those inferences were available on the material before the Tribunal. The statements by Mr Cooke that oral approval had been given to the proposed amendments tends to be corroborated by the email of 12 April 2012 that was sent to all riders, which, while noting that the final nomination policy document was awaiting ratification from the Australian Olympic Committee, set out the amended provision. While that suggests that the amendment had not been formalised, it supports an inference that the Australian Olympic Committee had considered and approved the amendment.

19. While there is no suggestion that Ms Saunders had authority to give approval, an inference can be drawn that Ms Saunders had authority to communicate to Equestrian Australia approval that had been given by the Australian Olympic Committee. It was not disputed that written approval could be communicated by way of email. On its proper construction, the email is capable of conveying the fact that, while the proposed amendments to the Dressage criteria had not yet been finally approved, the proposed amendments to the Jumping criteria had been. That, coupled with the oral statement by Mr Cooke, constitutes material upon which a finding could

be made by the Tribunal that the email constituted approval in writing by the Australian Olympic Committee to the amendment to clause 2 of Part C which removed the requirement that a rider had to have an MES prior to 23 April 2012.

20. I do not consider that there was an error of law on the part of the Tribunal in concluding that the email of 13 April 2012 constituted written approval to the amendment to the jumping criteria proposed by the email of 3 April 2012. That ground of appeal should be dismissed.

21. Ms Graham also provisionally advanced a contention that the email of 3 April 2012 was misleading insofar as it suggested that the amendment to the Jumping criteria was required due to the cancellation of events in Europe that thereby deprived Australian riders of the opportunity to qualify. As I understand the position, the contention was not maintained. In any event, that is not a matter that could be the subject of enquiry by the Court.

22. It is unnecessary to consider the alternative conclusion reached by the Tribunal concerning the application of the extenuating circumstances provision. Nevertheless, some comment should be made about it. It is difficult to support the Tribunal's conclusion that, if it was wrong about the question of prior written approval to the amendment, the extenuating circumstances provision could have been applied by the Tribunal. It was not for the Tribunal to make such a decision. If the Tribunal was to uphold the appeal, it was required to refer the matter back to the Panel. It would be a matter for the Panel to apply the extenuating circumstances provision, if applicable.

23. However, it is equally difficult to support the conclusion that the extenuating circumstances provision could have been applied by the Panel. Clause 4 of Part C would enable the Panel to excuse a combination from the obligation of taking part in the Nomination Events. The difficulty that confronted the Paterson-Robinson Combination was not that it had failed to compete in the Nomination Events. The difficulty was that it could not satisfy the requirement that an MES be achieved by 23 April 2012. Clause 4 could only excuse a combination from compliance with the requirements of competing in the Nomination Events, not from compliance with the requirement of attaining an MES by 23 April 2012. The extenuating circumstances provision could not have excused that failure.

24. Ms Graham also contended that the Tribunal erred in concluding that, where two athlete and horse combinations tied for second in the Nomination Events, neither was entitled to Automatic Nomination. She contended that, properly construed, the relevant provision entitled the combinations that come first and second to receive Automatic Nomination. By analogy with the situation where two athletes come equal second, and both are awarded a silver medal, she contends that, as both the Graham Combination and the Paterson-Robinson Combination came equal second, both were entitled to Automatic Nomination.

25. However, that construction is not available on the language of clause 2 of Part C. Such a construction would make the Nomination Criteria quite unworkable in some circumstances, for example, where there are not enough places in the team to enable all of the place getters to be nominated. For instance, if there were three equally placed combinations, but only two places

to be filled, the provision could not work. Further, such a construction would contradict the express words of clause 2, which specifies that a mandatory criterion for Automatic Nomination is that a horse and athlete combination **be one of the two** Australian horse and athlete combinations to have the least total faults accumulated during the relevant events. As the Tribunal noted in its reasons, the best that could be said about the Graham Combination and the Paterson-Robinson Combination is that each of those combinations was one of the **three** combinations with the least total faults in those events.

26. The preferable construction is that adopted by the Tribunal, namely, that where the Automatic Nomination provision cannot be satisfied, by reason of there being equal second place getters, or, indeed, more than two first place getters, the nomination process simply moves to the Discretionary Nomination provision. Although the Automatic Nomination provision represents a higher tier in the nomination process, which may be used to nominate up to two combinations, the Discretionary Nomination process is not used to nominate a specified number of combinations, but rather the **remainder** of the team, once the Early and Automatic Nominations are made. That would cover the situation where consideration of the Automatic Nomination criteria necessarily resulted in the automatic nomination of fewer than two combination.

27. The Tribunal, in its reasons, suggested that the Panel was neither required nor permitted to make a determination of which of the two equal second combinations would be granted Automatic Nomination. It concluded that the criteria should not be interpreted as implicitly requiring or permitting a count back, or choice, between two second place combinations. The Tribunal considered that, in choosing between the two second place combinations, and granting Automatic Nomination to one of them, the Panel did not properly follow or implement the Automatic Nomination provision. Rather, it concluded that neither could be granted Automatic Nomination. There was no error of law in that conclusion.

28. The first appeal should be dismissed.

The second appeal

29. In relation to the second appeal, Ms Graham contends that the grounds of appeal on which she is entitled to rely are those specified in clause 11.5, rather than clause 11.16. The contention is based on the failure by the Tribunal to deal with her fourth argument, namely, that there was no material upon which the Panel could reasonably have preferred the Williams Combination over the Graham Combination in considering Discretionary Nomination after giving Automatic Nomination to the Paterson-Robinson Combination. Under clause 10.4(10), renomination arises only where the question has been referred back to a national federation for determination in accordance with the reasons of the Tribunal for upholding an appeal. She says that, as the Tribunal did not give consideration to the question of Discretionary Nomination, the decision by the Panel of 21 June 2012 was not a determination of renomination. Rather, she says, it was a primary decision of nomination, in accordance with the decision of the Tribunal that the three combinations be referred back to the Panel for consideration under the Discretionary

Nomination provision. That is to say, the Panel had not previously considered the application of the Discretionary Nomination provision to the three combinations. It had previously only considered the application of the Discretionary Nomination provision as between the Williams Combination and the Graham Combination. Therefore, she says, the second appeal must be taken to be an appeal directly to the Court under clause 11.9 of the Selection By-law. On that basis, under clause 11.5, the grounds of appeal include that that there was no material on which the nomination decision could reasonably be based and that the applicable nomination criteria have not been properly followed or implemented.

30. There may be some substance in the contention that the decision of the Panel of 21 June 2012 was a primary nomination rather than a renomination. However, on balance, I consider that, having regard to the overall scheme of the Selection By-law, it is the intention that, once a decision has been remitted by an appeals tribunal to a national federation, the decision that is then made is a renomination in accordance with clause 10.4(10), and clause 11.16 is attracted. If that were not so, it is unclear what work could be done by the concept of **renomination**, which, though not defined, is used throughout the Selection By-law. On that basis, the only relevant ground available to Ms Graham would be that in clause 11.16, namely, that the decision was obviously or self-evidently so unreasonable or perverse that it can be said to be irrational. She has not suggested that the decision was affected by actual bias.

31. In her submissions in support of the second appeal, Ms Graham invites the Court to examine critically the reasons given by the Panel for its decision on the question of Discretionary Nomination. Thus, Ms Graham says that the results for the Nomination Events show that her combination achieved the same results as the Paterson-Robinson Combination and that she outperformed the Williams Combination. She complains that while the selection criteria do not distinguish between the various Nomination Events, the Panel sought to water down her achievements by relying on only the grand prix results. She says that, even if the Panel were entitled to consider only grand prix results, it was not possible to prefer the performance of the Williams Combination or the Paterson-Robinson Combination over her combination.

32. The seven specific criteria referred to in the Nomination Criteria are as follows:

- performances at the Nomination Events;
- ability and experience to compete successfully at high level of international competition;
- ability of the athlete to prepare his or her horse to peak condition;
- ability of the athlete to contribute to a positive team environment;
- the age, soundness and fitness of the horse;
- ability or potential ability of the combination to perform under the stress and pressure of Olympic Games; and
- any other factors that the Panel in its sole discretion considers relevant in the circumstances.

33. In addition, consistency of performance and the likelihood of a suitable performance to contribute towards a team score may be considered. If in the opinion of the Panel a consistent combination will contribute towards an effective team score, that combination may be nominated ahead of another combination that has performed well but which, in the opinion of the Panel, has the potential to be inconsistent.

34. In its reasons of 21 June 2012, the Panel addressed each of those criteria explicitly. First, it described the performances of the Paterson-Robinson Combination and the Graham Combination at the first Nomination Event at Lummen, then the performance of the Williams Combination at the second Nomination Event at Linz and finally the performances of the three combinations at the final Nomination Event in Bourg en Bresse. The Panel considered that the Paterson-Robinson Combination was clearly the better performing combination as compared with the Graham Combination. The Williams Combination did not register a score at the grand prix round in Linz because of injury, but outperformed the Graham Combination in the grand prix round at Bourg en Bresse.

35. The Panel extracted the performance results of all combinations in contention and set out tables with their respective detailed results. The Panel considered that Mr Paterson-Robinson had demonstrated capability to compete at the highest level. The Panel referred to a particular set-back for the Graham Combination and observed that simply participating in European competitions for the past 3 years did not automatically qualify a combination as being ready and eligible for the Olympic Games. The Panel considered that the Williams Combination was on an improving performance plane and that Mr Williams was clearly the more experienced rider, having represented Australia at the 2008 Olympics and the 2010 Kentucky World Equestrian Games.

36. The Panel considered that all three riders in contention had the ability to prepare their horses to peak condition, proven in the case of Mr Paterson-Robinson and Mr Williams and developing in the case of Ms Graham. The Panel considered that Mr Williams had the ability to compete at the highest level on different horses in a relatively short time frame.

37. The Panel considered that Mr Williams had shown himself to be an outstanding team member and offered advice and experience to other riders. The Panel observed that it had seen at first hand how Mr Williams and Mr Paterson-Robinson worked particularly well together, bouncing ideas off each other.

38. The Panel considered that Mr Paterson-Robinson had demonstrated time and again his ability to perform under pressure. It considered that Mr Williams had demonstrated a very real capacity to *"fight to the very end"* and were of the view that the Williams Combination had the potential to improve further and deliver a required score at the Olympic Games. By contrast, the Graham Combination recorded a disappointing result at Bourg en Bresse, where *"the pressure clearly took its toll"*. Her horse was found wanting under pressure.

39. The Panel considered that the FEI rankings were a good measure for riders competing regularly on the international circuit in Europe. However, the Panel considered that those rankings did

not provide a global comparison when riders are based in continents outside the FEI domain. While Ms Graham had made good progress over the past two years, the Panel did not consider that that served as a comparison with Mr Williams, who had been based in America for the past 12 months. It observed that Mr Paterson-Robinson, following a break in the latter half of 2011 due to injury, was nominated by the FEI as the Rising Star for the month of June, moving up some two hundred places in the rankings.

40. The Panel referred to the fact that the Williams Combination competed in but did not complete both Nomination Events, because of injury at Linz. It considered that the Williams Combination had demonstrated an ability to compete at the Olympic Games as a team member in both the 2008 Olympics and the Kentucky World Equestrian Games in 2010. The Panel considered that, while the Graham Combination finished in a sound position following the Nomination Events, the combination did not deliver sufficient high level performances to warrant nomination over the Williams Combination. While the Graham Combination consistently performed well in the qualifying events, it consistently failed to deliver in the higher level grand prix class. When the Panel looked at the overall position and considered the final results, both the Paterson-Robinson Combination and the Graham Combination had faced pressure positions. While the Paterson-Robinson Combination *"came through with flying colours"*, the Graham Combination, disappointingly, failed the test at the grand prix level.

41. The Panel observed that it was not anticipated that Ms Graham would be anything less than supportive and a contributor to the team environment, she having developed into a highly professional athlete and having fitted into the European jumping scene very well. However, the Panel expressed concern regarding Ms Graham's hesitation about starting at Bourg en Bresse in what she perceived to be adverse weather conditions. It referred to an incident several years earlier when she was said to have lobbied heavily against anyone starting in an event. She takes exception to a comment by the Panel in that context that the Olympic Games is no place for *"fair weather competitors!"*.

42. Ms Graham's complaint is that the Panel made judgments about the various combinations that she contends were unjustified or unfair. Ms Graham also takes exception to comments made by the Panel that she had a disappointing result in the first round of the grand prix at Bourg en Bresse, which it considered to be far more akin to an Olympic Games competition and where the pressure *"clearly took its toll on her"*.

43. It may be that a stranger to Jumping might see anomalies in the Panel's decision in applying the Discretionary Nomination provision. Ms Graham advanced reasonably compelling arguments along those lines. Indeed, a decision in her favour may not have been perverse or irrational. However, that is not the question. The question is whether the decision that was made was obviously or self-evidently so unreasonable or perverse that it could be said to be irrational. I do not consider that the reasons of 21 June 2012 demonstrate that the decision was obviously or self-evidently unreasonable or perverse. It cannot be said to be irrational. The relevant ground in 11.16 is certainly not made out.

44. Further, I am not persuaded that there was no material on which the Discretionary Nomination decision could reasonably be based. The Panel set out in some detail its reasoning and the results on which it based its conclusion. I do not consider there is any basis for concluding that the relevant provisions of the Nomination Criteria were not properly followed or were not properly implemented. Accordingly, even if the grounds in clause 11.5 relied on by Ms Graham were applicable, I am not persuaded that either of them has been established.

45. The second appeal should be dismissed.

Conclusion

46. I do not consider that Ms Graham has made out any relevant ground in relation to either of the appeals. It follows that both appeals should be dismissed. Accordingly, the nominations proposed by Equestrian Australia would stand.

47. The Court's decision to dismiss both appeals was communicated to the parties via email on 6 July 2012. This step was taken in order to allow the relevant athletes to be entered into the relevant events for the Olympic Games within the time specified by the International Olympic Committee.

48. Each party has agreed to bear its own costs of the proceeding. The Australian Olympic Committee has agreed to cover the costs of the Court, pursuant to clause 12.1 of the Selection By-law.

The Court of Arbitration for Sport rules:

1. The appeal by Amy Graham against the decision of Equestrian Australia Appeals Tribunal given on 15 June 2012 regarding the non-nomination of Amy Graham to the Australian Olympic Committee for selection to the Australian team for the 2012 Olympic Games be dismissed.

2. The appeal by Amy Graham against the decision of Equestrian Australia Selection Panel given on 21 June 2012 regarding the non-nomination of Amy Graham to the Australian Olympic Committee for selection to the Australian team for the 2012 Olympic Games be dismissed.

3. (…).