BEFORE THE SPORTS DISPUTES TRIBUNAL
OF NEW ZEALAND

ST 02/07
ST 03/07

BETWEEN	**PETER CRAVEN**
	Appellant
AND	**TABLE TENNIS NEW ZEALAND INC**
	Respondent
BETWEEN	**SIMON WALLACE**
	Appellant
AND	**TABLE TENNIS NEW ZEALAND INC**
	Respondent

Date of Hearing (in person and by teleconference): 23 April 2007

Date of decision: 25 May 2007

DECISION OF TRIBUNAL AS TO JURISDICTION TO HEAR APPEALS AND AS TO WAIVER OF FILING FEES

Appearances:	Michael Smyth for the Appellants Paul David and Isaac Hikaka for the Respondent
Tribunal Members:	Kit Toogood QC (Deputy Chairperson) Dr Farah Palmer Tim Castle
Registrar:	Brent Ellis

Orders

1. The Tribunal determines that it has no jurisdiction to hear these appeals and they are dismissed accordingly.

2. The filing fees payable in respect of these appeals are waived under Rule 12.3.2.

Reasons for decision

Introduction

[1] Peter Craven and Simon Wallace ("the appellants") are elite table tennis players. They are members of the Men's Senior Squad of Table Tennis New Zealand Incorporated ("TTNZ") and were applicants for PM's Athlete Scholarships ("PM's Scholarships") to assist them with tertiary study in 2007.

[2] The PM's Scholarship programme is a government initiative managed by the New Zealand Academy of Sport ("the Academy"), which is a component of Sport and Recreation New Zealand ("SPARC"). According to the Academy's Policy Document, the goal of the programme is "to assist talented and elite athletes [to] achieve tertiary and vocational qualifications while pursuing excellence in sport."

[3] The scholarships are valuable. They allow athletes to have their academic fees paid to a maximum of $10,000 per annum and to receive a living allowance of up to $6,000 if undertaking the requisite study programme. Eligibility criteria for a scholarship are negotiated by the Academy with the National Sports Organisation ("NSO") for each sport. For the 2007 scholarships, Table Tennis New Zealand Incorporated ("TTNZ") was allocated places in the programme for five athletes.

[4] Five athletes were the final nominees to the Academy/SPARC from TTNZ. They were all subsequently awarded scholarships for 2007; the appellants were not nominated. As a result, the appellants have now sought to exercise a right of appeal to this Tribunal against the failure of their applications for nomination.

TTNZ raises issue as to jurisdiction

[5] TTNZ has raised a preliminary jurisdictional argument, submitting that the appellants have no right of appeal. If TTNZ's arguments about jurisdiction are upheld, the proceedings will be brought to an end without more, so the parties and the Tribunal

agreed that it would be sensible to deal with the issue of jurisdiction as a discrete preliminary point. After a pre-hearing telephone conference on 29 March, the Tribunal directed that the jurisdictional points should be argued by counsel for the parties in Auckland on 23 April 2007. The parties co-operated by filing and exchanging memoranda of their submissions in advance.

[6] The helpful submissions received by the Tribunal in this manner, and the oral submissions made by the experienced counsel representing the parties, have assisted the members of the Tribunal to come to a view on the matters at issue.

Background

[7] Because we have heard no evidence in relation to the substantive issues in this case, we make no findings of fact and do not express any view as to the merits of the intended appeals. The following account of the factual background is taken solely from the appeal briefs filed by the athletes filed in support of the appeals and some of the relevant documents and is given only to explain how the appeals came about.

[8] The appellants made their applications for PM's Scholarships in November 2006. On 4 December 2006, Mr Wallace received a letter from TTNZ informing him that his scholarship application had been unsuccessful. The nominated candidates were: Peter Craven, Ryan Zhu, Sarah Ho, Sophie Shu and Michelle McCarthy. On 6 December 2006, Mr Wallace received an email from Mike Loftus, TTNZ's Chief Executive Officer, describing the reasons for the non-nomination as being a policy decision to reverse the gender split which occurred in 2006 and Mr Wallace not having made himself available for selection for appropriate events.

[9] On 5 December 2006, Mr Craven received an email from Mike Loftus informing him that he had initially been nominated for a scholarship (and would shortly receive a letter to this effect) but that the nomination had been reviewed due to new information received surrounding his availability for selection during 2006. The outcome of this review was that Mr Craven was no longer considered eligible to receive the scholarship. Mr Craven says that Mr. Loftus told him that Mr Craven's availability for the Commonwealth Games did not count because that team was selected by the NZOC and not TTNZ.

[10] On 18 December 2006, the appellants and the other applicants received an email indicating that the initial decisions on the nominations had been the subject of informal appeals about eligibility criteria and that, following a review, the nominees were Sophie Shu, Sarah Ho, Michelle McCarthy, Hannah Squire and Ryan Zhu who were the only applicants who met the criteria for the 2007 Scholarships. Subsequently, the appellants received letters dated 20 December 2006 to similar effect. They were advised:

> The process for appeal of [sic] our decision is to write to the TTNZ Board, by 31 January 2007, requesting they consider your appeal at their 11 February Board meeting. Should you still be unhappy with a decision at this stage, you have the right to appeal the Board decision to the Sports Disputes Tribunal (SDT).

[11] The appellants lodged their appeals for a further review of the decision by the Board. Mr Wallace made an inquiry on 19 February 2007 and was advised that the review of the nomination decisions had been postponed and was to take place on 5 March 2007. On 23 February 2007, however, the appellants were informed that the final nominees were Sophie Shu, Sarah Ho, Michelle McCarthy, Nathan Lowe (replacing Hannah Squire) and Ryan Zhu. It seems that these nominations were confirmed in a Board meeting on 5 March 2007. Mr Wallace says that it was around that time he found out that another factor considered in the decision was the "potential of players".

[12] There were further exchanges between the appellants, their counsel and TTNZ and these appeals were subsequently filed with the Tribunal on 14 March 2007. In essence, the appellants complain about unfair alteration of the criteria for eligibility; failure to apply published criteria; lack of transparency in the nomination process; and denial of natural justice.

The basis for the appeals

[13] Clause 10 of TTNZ's constitution contains its appeal rights and procedures. The appellants rely upon clause 10(b) which reads:

> There shall be a right of appeal against decisions of the Board to the Sports Disputes Tribunal of New Zealand. Any such appeal shall be filed within 28 days of the Board's decision and in all other respects shall be dealt with in accordance with the Rules of the Sports Disputes Tribunal of New Zealand (copies of which are available from TTNZ). The decision of

> the Sports Disputes Tribunal of New Zealand shall be final and there shall be no further right of appeal.

[14] The "Board" is the Board of TTNZ constituted under clauses 13, 14 and 15 of the Constitution. It is not disputed that the decision not to nominate the appellants for PM's Scholarships in 2007 was a decision "of the Board" in terms of clause 10(b) of the Constitution.

[15] The relevant rules of the Tribunal are:

(a) Rule 6.1 which provides:

> Subject to Rules 6.2 to 6.5 inclusive, the Tribunal shall have jurisdiction to hear and determine the following sports related disputes: ...
>
> (c) **Appeals**: Where a person or organisation has a right of appeal to the Tribunal from a decision of a National Sports Organisation regarding any sports related matter, in circumstances where such person or organisation has exhausted there other rights of appeal within the rules of the National Sports Organisation.

(b) Rule 6.5(a) which provides:

> The Tribunal may not hear or determine any dispute in which Sport and Recreation New Zealand is a party to the Proceedings. Notwithstanding this Rule, Sport and Recreation New Zealand, or anyone on its behalf, may make submissions, or provide evidence, in any Proceeding in the discretion of the Tribunal, pursuant to leave under Rule 6.5(b) or of the Tribunal's own motion.

(c) Rule 12.1.3, which sets out the available grounds of appeal. These are the grounds set out in the applicable rules or policies of the NSO or, in the absence of such grounds, a number of specific grounds which are related, essentially, to matters of fair process.

(d) Clause 12.11, which sets out the determinations or orders which the Tribunal may make on the appeal.

Challenge to prior decision of Tribunal on jurisdictional point

[16] An argument as to the Tribunal's jurisdiction to hear appeals against the failure of TTNZ to nominate athletes for PM's Scholarships for 2006 was raised by TTNZ in

proceedings which were before the Tribunal last year: *Zhu v Table Tennis New Zealand Inc*, SDT 15/06, 4 August 2006. In the Tribunal's decision as to jurisdiction, the members of the Tribunal (none of whom comprised the panel of Tribunal members hearing this case) noted that the Constitution of TTNZ appeared to provide for a right to appeal against decisions of the TTNZ Board over applications for PM's Scholarships, but held that the Tribunal lacked jurisdiction to hear the particular case because it had been brought out of time.

[17] The present applications do not suffer from any time bar. Nevertheless, TTNZ has sought to re-argue the point about jurisdiction in these proceedings, and has invited this panel to find that the decision of the Tribunal in *Zhu* was wrong to the extent that it held that decisions of the Board on recommendations for PM's Scholarships are susceptible to appeal to the Tribunal.

[18] In looking at these matters, we have been considerably assisted by the fact that counsel who appeared before us in these proceedings were also counsel in the previous case.

TTNZ's arguments as to jurisdiction

[19] The submissions made on behalf of TTNZ in support of its argument that the Tribunal has no jurisdiction to hear these appeals may be summarised briefly:

(a) The question of jurisdiction turns upon the true meaning of clause 10(b) and in particular the meaning to be given to the expression "decisions of the Board".

(b) In the context of an appeal which is required by clause 10(b) to be "dealt with in accordance with the Rules of the Sports Disputes Tribunal of New Zealand", the scope of the substantive and remedial jurisdiction of the Tribunal is relevant in determining whether all or only some (and if only some, which) decisions of the Board are susceptible to appeal.

(c) It is apparent from the Tribunal's rules that the Tribunal was set up to deal with specific disputes, especially focussing on three areas – doping, national selection and appeals in disciplinary matters; it was not the intention that all disputes involving national sports bodies should be heard by the Tribunal.

(d) The decision as to who to nominate for a PM's Scholarship is not "a sports related matter"; the scholarships are available primarily as educational scholarships as is reflected by the scholarship policies.

(e) In the Tribunal's core matters, a decision adverse to an athlete will directly impact upon that athlete's ability to participate in the sport, whereas in the present case a decision adverse to an athlete will not impact upon the athlete's ability to participate in the sport but may have an adverse impact upon the ability to undertake tertiary education at the same time.

(f) The Tribunal has no power to grant the relief sought which would require action by SPARC either through the awarding of a new scholarship or the revocation and reassignment of existing scholarships.

(g) Granting the relief sought would be an unlawful interference with the existing property rights of those who had been awarded PM's Scholarships for 2007 and the Tribunal has no power, in the absence of express agreement between the parties, to remove such property rights.

[20] In supplementary submissions presented at the hearing of the jurisdictional argument, counsel for TTNZ emphasised the circumstances in which clause 10(b) was inserted into the Constitution (namely, it was said, "at the behest of SPARC"), and the limited substantive and remedial jurisdiction of the Tribunal. Counsel suggested that the best approach was to ask the question: would reasonable contracting parties have intended by clause 10(b) to include within the range of decisions from which an appeal can lie an appeal in a matter which relates to an academic scholarship granted by a third party which is expressly not within the jurisdiction of the Tribunal?

[21] Although we have not received any evidence on the point, the Tribunal is aware that NSOs who receive funding from SPARC were encouraged by SPARC to provide the Tribunal with jurisdiction, through amendments to their constitutions, to hear appeals and other cases involving the NSO. Further, we are aware that many such NSOs were assisted in the drafting of their constitution and rules by lawyers whose fees were paid by SPARC. We do not understand that to be in dispute, but we think it is going too far to say that TTNZ's particular constitutional provisions (notably rule 10(b)), were adopted by TTNZ at SPARC's "behest". In the end, TTNZ alone must

accept responsibility for the formulation of its constitutional rules and for the way in which the rights of appeal in clause 10 are expressed.

[22] Mr David referred to the provisions of Rule 6.5 of the Tribunal's rules which precludes the Tribunal from hearing or determining any dispute in which SPARC is a party to the proceeding. Acknowledging that SPARC is not currently a party to the proceedings, counsel referred to the relief sought and submitted that, since it was SPARC and not the Board of TTNZ which awarded the scholarships, it would be necessary to join SPARC as a party to the proceedings in order for any effective relief to be given. However, the Tribunal would then be prevented by Rule 6.5 from granting the relief sought.

[23] Referring to the *Zhu* decision, counsel for TTNZ argued that it was not clear from the decision whether the Tribunal regarded the appeal rights under clause 10(b) as being limited in any way. Counsel submitted that it appeared that the Tribunal had failed to consider the background (ie the limited nature of the Tribunal's jurisdiction and the relief which it could provide) in determining the range of decisions from which an appeal may lie under the clause. Counsel for TTNZ acknowledged, and Mr Smyth for the appellants fairly conceded, that the limitation of the Tribunal's jurisdiction to deal only with "sports related matters" on appeal was not directly argued in the *Zhu* case and was not put at the forefront of TTNZ's submissions. This may be contrasted with the present case where the central theme of TTNZ's submissions is that the Board's decision was related to the issue of funding academic study and was not a "sports related matter" as required for the Tribunal to have jurisdiction under Rule 6.1(c).

Submissions on behalf of the appellants as to jurisdiction

[24] The appellants argue that the meaning of Rule 10(b) is plain and unrestricted and that if any limitation on the phrase "the decisions of the Board" was intended such limitation would have been expressly stated. They say that the requirement that the appeal be dealt with in accordance with the rules of the Tribunal does not impose a restriction but merely prescribes the procedure to be applied in any such appeal. In any event, it is said, the Tribunal's rules do not themselves impose a restriction since Rules 6.1 and 12.1 specifically leave the matter open for regulation by a national sports organisation.

[25] The appellants reject any broad policy basis for limiting their rights of appeal. Mr Smyth pointed to the report of the Ministerial Taskforce which led to the establishment of the Tribunal (quoted in the background statement in the Tribunal's Rules) in support of an argument that the Tribunal's purposes are:

(a) To assist NSOs to avoid lengthy and costly legal battles;

(b) To ensure quality and consistent decision making for athletes in New Zealand sport;

(c) To add credibility to the operation of elite sport in New Zealand; and

(d) To provide for appeals to the Court of Arbitration for Sport.

[26] It is at least arguable that the Taskforce's report is as relevant to the interpretation of the Tribunal's Rules as is the report of a Parliamentary Select Committee to the interpretation of a statute. Mr Smyth submitted on behalf of the appellants that hearing appeals of this kind will meet three of the four purposes expressly stated by the Taskforce. But construing the wording of TTNZ's constitution and the rules of the Tribunal which are incorporated into it is an exercise in the nature of contractual interpretation in which the primary consideration is the actual wording of the applicable provisions. In this regard, Rule 3 (which sets out the objects of the Rules) is likely to be of greater assistance to us than the views of the Taskforce. More significantly, we consider that it is the wording of the substantive provisions of the rules (Rule 6.1(c) in particular) which is of the greatest importance and, in our view, determines the outcome of this case.

[27] Dealing with TTNZ's argument that limitations on the relief which could be provided by the Tribunal were relevant to determining the scope of appeal rights, the appellants point to the observations of the Tribunal in *Zhu* that it was not open to the Tribunal in that case (and would not be open to the Tribunal in this) to determine that the Tribunal could give no effective relief. If the Tribunal considered it appropriate to make a declaratory order that the appellants should have been nominated for scholarships, there may be a basis upon which scholarships can be awarded by the Academy/SPARC without a direction to that effect from the Tribunal.

[28] Mr Smyth also argued a point which he conceded had not been considered by the Tribunal in *Zhu*. This was his argument that under Rule 12.11.1(e) the Tribunal may "recommend that changes be made to any applicable rules, policies, or procedures of the relevant National Sports Organisation". It was argued that the making of such a recommendation in this case may be of tangible benefit to the appellants and others in respect of future decisions of this kind.

[29] It was also argued for the appellants that they had altered their positions by relying on statements by TTNZ's Chief Executive Officer that they had rights of appeal to this Tribunal and that TTNZ was estopped from now asserting that the Tribunal lacks jurisdiction. This submission relied upon the statements made in correspondence dated 14 December 2006 (to Mr Craven) and 18 December 2006 (to both of the appellants and others) quoted at paragraph [11] above. We do not think this argument is sound. Mr Loftus's December statements about jurisdiction indicate that he was simply reflecting the legal position which pertained after the Tribunal's decision in *Zhu*. Having regard to the fact that the statements as to the legal position were right at the time they were made, it cannot assist the appellants now to claim that if they had doubted that there was a right of appeal to the Tribunal they would have engaged a lawyer earlier and taken the review by the Board more seriously. Whether the Tribunal has jurisdiction under clause 10(b) and Rule 6.1(c) is a matter of law to be determined by this Tribunal. The estoppel argument fails on that basis.

[30] An alternative to this argument was a claim that a right of appeal may exist under Rule 12.1.1(b) by reason of the parties to the appeal having agreed to the appeal in writing. This submission also relied upon the statements made by Mr Loftus in the December correspondence. In reply to this argument, Mr David referred the Tribunal to an email sent by Mr Loftus on 9 March 2007 to Mr Smyth who was then representing the appellants. In it, Mr Loftus indicated that TTNZ did not intend to stand by its earlier comment about rights of appeal to the Tribunal. By that stage, the Board had reviewed the earlier decisions on the 2007 Scholarships and confirmed the initial nominations. Referring to an indication from Mr Smyth that the appellants were contemplating further appeals, Mr Loftus said that in the event that the appellants chose to bring proceedings he "must reserve all TTNZ's rights in relation to any appeal to the Tribunal including its rights in relation to the jurisdiction of the Tribunal and in respect of costs." Although appeals to this Tribunal had been signalled by that time, the appeal proceedings had not been commenced.

[31] We agree with counsel for TTNZ that the kind of agreement contemplated by Rule 12.1.1(b) must be an agreement which leads to the bringing of the appeal. In the present case, it is clear that by the time any appeal rights arose and the athletes commenced their appeals there was no such agreement with TTNZ as to their ability to do so. For this reason, the argument based on jurisdiction by agreement must also fail.

Discussion of the Tribunal's decision in Zhu v Table Tennis New Zealand Inc

[32] Binbin Zhu was an unsuccessful applicant for a PM's Scholarship in 2006. He sought to appeal against the decision of the Board of TTNZ that it would not nominate him for a scholarship for that year. The appeal was brought pursuant to clause 10(b) of TTNZ's Constitution. TTNZ argued in that case that the Tribunal had no jurisdiction to hear the appeal. It submitted that:

(a) Clause 10(b) contemplated that appeals would lie only from decisions of the TTNZ Board in relation to matters over which the Tribunal had jurisdiction under its Rules;

(b) If there was an appeal under the Constitution, it was time barred under clause 10(b) by reason of the appeal having been filed later than 28 days of the Board's decision; and

(c) The Tribunal could not grant the relief sought.

[33] In respect of the argument that there was no right of appeal against decisions related to nominations for PM's Scholarships, the Tribunal said this:

> 36. If Binbin has a right of appeal to this Tribunal, that right must be conferred by the constitution of TTNZ. Rights of appeal in such circumstances are contractual rights founded in this case by the constitution of TTNZ and Binbin's nexus with TTNZ through the constitution.
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> . . .
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> 39. Although there is no evidence on this point, it seems very likely that the only appeal right in the constitution when it was initially adopted was that contained in rule 10(a). The constitution was revised in December 2003 and at that time the appeal right contained in rule 10(b) was probably adopted. The Tribunal was

not in existence when the constitution was originally adopted, but came into existence in early 2003.

40. The Tribunal accepts that if given its normal and natural meaning, rule 10(b) gives a right of appeal against any decision made by the Board of TTNZ even if the decision applies to a very trivial matter. In Mr David's submissions, this can not be so as it would open the flood gates to all sorts of unmeritorious appeals. There is however, nothing in the rule itself which limits the right to only certain decisions of the Board. The Tribunal sees no reason to give the rule the restricted meaning contended for by Mr David. It may be, as submitted by Mr Smyth, that the filing fee of $500 payable to this Tribunal on lodging an appeal is a deterrent to the flood gates principle suggested. Another matter which will tell against widespread use of the provision is that an appeal must be from a decision "regarding a sports related matter including a decision of an official, committee, judicial tribunal or similar body of a national sports organisation".

41. While the Tribunal is not determining at this stage whether there may not be a limit to the type of appeal which can be brought under rule 10(b), it is of the view that there was such a right available to Binbin in respect of the decision in this case. It was a decision in which Binbin had an interest. There were economic implications for him. It was an important decision for him. Thus, on the face of it, there was a right of appeal if a "decision of the Board" was involved and the matter is one on which the Tribunal can give appropriate relief.

42. In the Tribunal's view, the decision to nominate five candidates to the Academy was "a decision of the Board". TTNZ is an incorporated society. Under its constitution, the Board is responsible for the governance of table tennis at the national level. It has the power to appoint an executive director "and to adopt clearly defined delegations of authority from the Board to the Executive Director" (rule 15(d)). It also has the power to appoint any subcommittee and to delegate such powers and responsibilities as the Board deems appropriate to such subcommittees. It has the power to determine the process to apply in respect of the appointment of selectors. In this case, the selection criteria was [sic] determined in consultation with SPARC. Successful applicants were selected by the TTNZ selectors in consultation with the Executive Director (termed CEO in the criteria). The selectors and the Executive Director acted under delegated powers from the Board. As such, they were the alter ego of the Board in selecting and recommending the five successful candidates. They did so with the approval and on the authority of the Board. For the purposes of rule 10(d) their decision was a Board decision.

[34] The Tribunal then considered the third limb of TTNZ's argument which was that the Tribunal was not in a position to grant the relief sought. It concluded that at the very least the Tribunal was empowered to make declaratory orders which might result in some scholarship being granted to Binbin Zhu.

[35] The Tribunal went on to conclude, however, that what was fatal to Mr Zhu's appeal was the time limit provided by rule 10(b). The Tribunal held that the requirement that any appeal against the Board's decision should be made "within 28 days" was mandatory and that there was no provision under the constitution or under the Tribunal's Rules giving the Tribunal power to extend the time limit. Accordingly, the Tribunal held that it had no jurisdiction to hear the appeal and dismissed it.

[36] It is true that, in the *Zhu* case, TTNZ drew the Tribunal's attention to the relevance, in interpreting the scope of clause 10(b), of the nature of the Tribunal's jurisdiction as proscribed by its Rules. But it is clear from the Tribunal's account of the arguments submitted to it that TTNZ did not focus the Tribunal's attention on whether the Board's decision concerned "a sports related matter". Certainly, as was acknowledged by both Mr David and Mr Smyth before us, the Tribunal in *Zhu* did not have the benefit of submissions as to what that phrase meant in the context of the Tribunal's jurisdictional rules. In *Zhu,* therefore, the Tribunal was not fully drawn into a discussion and consideration of that point which, in the end, we consider to be the central issue in this case.

[37] It can be seen from the passages in the Tribunal's decision quoted above that the Tribunal focussed its attention on the very broad wording of clause 10(b) which, on its face, is apt to describe any decision whatsoever of the Board of TTNZ and certainly would appear to include a decision regarding nominations for the PM's Scholarships.

[38] While the Tribunal left open (at paragraph 41 of its decision) the prospect that there may be limits " ... to the type of appeal which can be brought under rule 10(b)", the Tribunal's attention was plainly diverted from the significance of the limitation of the Tribunal's jurisdiction to "sports related matters" by the obvious difficulties for the appellant with regard to the timing of his appeal. As the Tribunal noted at paragraph 45, the failure to bring the appeal within time was "fatal" to the appeal. The timing point was the real reason for the decision or, as lawyers say, the *ratio decidendi* of the case.

[39] Since the Tribunal's decision was based on the timing point, the Tribunal's comments about the broad scope of clause 10(b) amounted to *obiter dicta*; that is, observations by the Tribunal that had only an incidental bearing on the outcome of the case and did not constitute a binding precedent for future cases.

[40] Because of the way the *Zhu* case was argued, and because the Tribunal's decision in that case did not turn on the point, we consider that it is appropriate to examine afresh the more detailed arguments we heard about whether clause 10(b) of TTNZ's constitution confers a right of appeal from decisions about PM's Scholarships, without regarding the Tribunal's brief *obiter* comment on the matter in *Zhu* as binding upon us.

Are the nomination decisions "decisions of the Board" of TTNZ which are appealable to this Tribunal?

[41] We agree with TTNZ's submission that the apparently broad scope of the expression "the decisions of the Board" in clause 10(b) is limited by the requirement that in all respects other than the time limit for filing, any appeal "shall be dealt with in accordance with the Rules of the Sports Disputes Tribunal of New Zealand". As a simple matter of construction, the Tribunal's Rules are incorporated into the Constitution so that the scope of decisions from which appeals lie is limited by the ability of the Tribunal to hear them, as determined by reference to its Rules.

[42] The Tribunal was not established to provide judicial oversight of every decision made by a national sports organisation which adopts its jurisdiction. That much is clear from the objects set out in paragraphs (a) to (g) inclusive and paragraph (k) of Rule 3, all of which refer to "sports related disputes". In addition, Rules 5 and 6 expressly confine the scope of the Rules and the Tribunal's jurisdiction to sports related disputes: see Rules 5.1(a) and (b); the preamble to Rule 6.1; and Rules 6.1(c), (d), (e) and (f). We do not think there is any significance to be attached in this case to the use of the alternative expression "sports related matter" in Rule 6.1(c) relating to appeals.

[43] The expressions "sports related dispute" or "sports related matter" are not defined in the Rules. No doubt this is because it was considered desirable that there should be some flexibility for the Tribunal to determine the meaning of the expressions in particular cases.

[44] Further, it cannot be said that the expressions are terms of art having well known meanings in international sports law jurisprudence. Although equivalent tribunals or dispute resolution agencies which have been established in other countries universally regard their jurisdiction as being confined to sports related matters, few definitions of the expression can be found. The Canadian Sport Dispute Resolution

Code, which establishes the Sport Dispute Resolution Centre of Canada ("SDRCC") provides a definition of "sports related matter" which is entirely circular by confining it to those matters which are described in the Code as being within the SDRCC's jurisdiction: Canadian Sport Dispute Resolution Code, Article 1.

[45] In the United Kingdom, the Sports Disputes Resolution Panel ("SDRP") gives no definition but describes its jurisdiction as assisting "with any dispute related to sport, whether discipline, doping, eligibility, selection, child welfare, funding, commercial contracts or any other sports related matter." The breadth of the service provided by the SDRP is demonstrated by the explanation that "wherever there is a need SDRP will provide or facilitate a frame work to achieve a resolution of the dispute" and that the service becomes involved in a dispute where all parties have given their consent. It seems clear that the SDRP Service, which includes the provision of an expert panel of arbitrators and mediators, is intended to provide to sport a wider range of dispute resolution options than are contemplated by the Rules of this Tribunal[1].

[46] The Court of Arbitration for Sport takes a similarly expansive view of its jurisdiction under the Code of Sports-Related Arbitration. Apart from its jurisdiction in anti-doping and selection matters, the CAS appears to be available to act in an arbitral capacity in any commercial dispute which the parties agree shall be referred to it, no matter how tenuous the connection to sport[2]. Article R27 of the Code reads as follows:

> **Application of the Rules**
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> These Procedural Rules apply whenever the parties have agreed to refer a sports-related dispute to the CAS. Such disputes may arise out of an arbitration clause inserted in a contract or regulations or of a later arbitration agreement (ordinary arbitration proceedings) or involve an appeal against a decision rendered by a federation, association or sports-related body where the statutes or regulations of such bodies, or a specific agreement provides for an appeal to the CAS (appeal arbitration proceedings).
>
> Such disputes may involve matters of principle relating to sport or matters of pecuniary or other interests brought into play in the practice or the development of sport and, generally speaking, any activity related or connected to sport.

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[1] Information about the SDRP may be found online at http://www.sportsdisputes.co.uk.

[2] See, for example, *TAS 92/81*, Digest of CAS Awards 1986-1998, 47 where the CAS accepted jurisdiction to arbitrate a dispute between commercial organisations over the design of a fleet of catamaran yachts (regrettably not translated from French)

> These Procedural Rules also apply where the CAS is called upon to give an advisory opinion (consultation proceedings).[3]

[47] These examples demonstrate that the meaning of "sports related matter" or "sports related dispute" must be derived from the wording of the documents in which they appear and the context, an approach consistent with the approach to the interpretation of contracts which, in effect, is what TTNZ's Constitution and the Tribunal's Rule constitute.

[48] We do not think it is correct so say, as was submitted by TTNZ, that the Tribunal was set up to deal with disputes with a focus on the areas of anti-doping, national selection and appeals in disciplinary matters. Rules 6.1(d) (National Significance), 6.1(e) (Interpretation), and 6.1(f) (Other Matters in Special Cases) demonstrate that the Tribunal is intended to have jurisdiction in respect of issues outside those three categories. Nor do we think it would be right to confine the Tribunal's jurisdiction to matters impacting directly upon an athlete's ability to participate in sport.

[49] There is force, however, in the submission that the Board's decisions in relation to nomination for PM's Scholarships were not decisions related to sport in the sense required by Rule 6.1(c) but were decisions related to the funding of tertiary education for persons who happen to be elite athletes.

[50] The Prime Minister's Athlete Scholarship Policy document describes the goal of the Scholarship programme as being "to assist talented and elite athletes achieve tertiary and vocational qualifications while pursuing excellence in sport". Although an athlete's eligibility for the programme is determined in part by the athlete's meeting their NSO's performance standards, the purpose of the support provided to athletes through the programme is said to be based on providing:

- Advice to assist recipients to effectively manage their lives in the pursuit of excellence;
- Financial contribution to academic fees; and
- Financial contribution to living costs which may include study expenses, books and equipment.

[51] Further support for the view that the funding is essentially funding for academic rather than sporting purposes may be obtained from the requirements imposed on athletes by the policy, non-compliance with which may result in disqualification or

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[3] See the Digest of CAS Awards III 2001-2003 at page xxxiii for a further discussion of the wide view as to what constitutes sport-related disputes under the Code.

suspension from the programme. Apart from the requirement to attend anti-doping seminars and abide by the anti-doping rules of sport, the requirements are entirely academic and relate to the withdrawals from or failure to pass academic courses.

[52] TTNZ has argued that the Tribunal cannot give effective relief in this case because it is expressly prohibited by Rule 6.5(a) from hearing or determining any dispute in which SPARC is a party to the proceedings. Although we do not think the rule applies in this case, it does indicate a policy intention as to the limits of the Tribunal's jurisdiction. One of SPARC's principal functions is to "allocate funds to organisations and regional bodies in line with its policies and strategies": s8(b) Sport and Recreation New Zealand Act 2002. No doubt the Board of SPARC, in promulgating the Tribunal's Rules, considered it inappropriate for the Tribunal to have jurisdiction to review funding decisions made by the agency.

[53] As the approach taken by the Court of Arbitration for Sport indicates, the expression "sports related matter" is capable of bearing a very wide meaning. In its broadest sense, almost any decision made by a national sports organisation such as TTNZ can be described as sports related. To use an example discussed with counsel during the oral argument, a decision by the Board of TTNZ to enter into a lease of office premises is arguably sports related. But we do not think it likely that the framers of the Tribunal's Rules intended that there should be rights of appeal to this Tribunal about such matters. So the key question is, Where should the line be drawn? We think the answer in any case will depend on the particular circumstances of the case.

[54] In reaching our conclusion, we have considered whether it could be said that the matter is sports related because the particular grounds of challenge have to do with the sporting qualifications of the unsuccessful applicants. But that argument focuses on the grounds and not the general subject-matter of the decision. Looked at in context, the matter at issue is a decision on nomination for funding for academic and not sporting purposes. There is also the point that regarding the alleged grounds as determinative of jurisdiction in that way would mean that there may be a right of appeal against decisions about PM's Scholarships for some unsuccessful applicants and not others, depending on the nature of the complaint.

[55] Looking at the nature of the Board's decision, we regard it as part of a process of decision-making related to the awarding of grants to athletes for academic purposes.

In our view, it is not sufficiently related to sport to come within the Tribunal's appellate jurisdiction under Rule 6.1(c). Because of the incorporation of the Tribunal's Rules into the right of appeal under clause 10(b) of TTNZ's constitution, it follows that the appellants have no right of appeal under that clause.

[56] The view we have taken in this case should not be taken to mean that the Tribunal would never consider itself as having jurisdiction to hear an appeal relating to a funding matter. If the funding at issue was related to an athlete's participation in sport, it is possible that a right of appeal worded as apparently broadly as TTNZ's might confer jurisdiction on the Tribunal under its current Rules. The essence of the view we have taken in this case is that the subject matter of the decision under challenge was not sufficiently related to sport to confer a right of appeal.

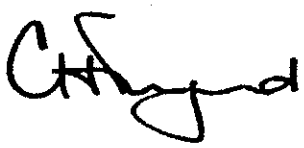
[57] Although the Tribunal has come to a view on these matters, it does not give us any satisfaction to deny the appellants a right to air their grievances. Plainly they were greatly disappointed not to receive the substantial funding assistance available through the Scholarship programme and they appear to be genuinely aggrieved by the process which they say TTNZ followed in making its nomination decisions. In Mr Craven's case, in particular, considering that he was initially listed for nomination, this view is understandable. We are not in a position, however, to make any comment about the merits of their complaints and do not do so.

Waiver of filing fee

[58] The appellants have applied under Rule 12.3.2 for the waiver of the filing fees of $500 which are payable under Rule 12.3.1. The Tribunal has a discretion to waive all or part of the appeal fee in cases of hardship and we have received evidence of the difficult financial circumstances in which these young athletes find themselves. The failure of the appellants to obtain PM's Scholarships will have compounded their financial difficulties if they wish to continue with their academic study, as we hope they will. For those reasons, and consistently with the approach which the Tribunal has taken in other cases where it has declined jurisdiction (such as *NZ Powerlifting Federation Inc v Doyle*, SDT/1/03, 30 October 2003 and *Weallans v Basketball NZ* ST/01/07, 27 March 2007), we direct that the filing fees be waived in respect of these two appeals.

Comment

[59] This decision has turned on the interpretation of the Rules of the Tribunal promulgated by the Board of SPARC under s8(i) Sport and Recreation Act 2002. From 1 July 2007, however, the Tribunal will be constituted under Part 3 Sports Anti-Doping Act 2006. By virtue of s38(c) of that Act, the Tribunal will have jurisdiction to "hear an appeal against a decision of a national sporting organisation ... if the constitution, rules, or regulations of that body specifically provide for an appeal to the Tribunal in relation to that matter". The question of whether the subject matter of an appeal is sports related will not arise under that section and, since that jurisdiction is conferred by statute, it will not be open to the Tribunal to limit it by its own rules of practice or procedure established under s39(1). It follows that this decision is unlikely to be determinative of the scope of rights of appeal under clause 10(b) of TTNZ's constitution after 30 June 2007.



Kit Toogood QC
Deputy Chairperson (for the Tribunal)

25 May 2007

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