BEFORE THE SPORTS DISPUTES TRIBUNAL
OF NEW ZEALAND

SDT/09/06

APPEAL

BETWEEN	**Daisy Thomas**
	Applicant
AND	**Surfing New Zealand**
	Respondent

INTERIM DECISION OF TRIBUNAL
19 APRIL 2006

Tribunal:	Nicholas Davidson QC (Presiding Member) Dr Farah Palmer Ron Cheatley
Representation:	Ian Hunt – counsel for Daisy Thomas Stephen Thomas (father of Daisy Thomas) Greg Townsend - Surfing New Zealand Anthony Lines – counsel for Surfing New Zealand
Registrar:	Brent Ellis

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Introduction

1. This is an appeal by Daisy Thomas against a selection decision of Surfing New Zealand dated 14 February 2006. She was not selected to compete in the Under 18 Women's team at the World Junior Surfing Championships in Brazil in May 2006, although selected as a non-travelling reserve.

2. The appeal was founded on procedural grounds, as it had to be, and sought to set aside the selection decision. This would affect other surfers, and in particular Wini Paul, whose selection was put in issue.

Hearing

3. A hearing was convened in Wellington on Wednesday 11 April 2006. Wini Paul was not present, nor represented. She had been advised of the hearing and invited to take part.

Relief sought

4. The relief sought in the Notice of Appeal was:

    i. That Surfing New Zealand reconstitute a selection panel for the purposes of reviewing, and if appropriate amending, the selection of New Zealand representatives for the Under 18 Women's Team for the World Junior Surfing Championships in Brazil in May 2006.

    ii. That Surfing New Zealand revise the team selection policy as distributed to athletes wishing to compete for the New Zealand team and its selection appeals policy.

    iii. That Surfing New Zealand review their procedures for communicating formally with athletes in line for international selection both before, during and after the process.

5. At the hearing the relief sought was extended, in the alternative, to ask that **this** Tribunal make the selection decision, while acknowledging that setting aside the decision of Surfing New Zealand would in principle leave selection open to athletes other than Wini Paul.

Some factual issues

6. Daisy Thomas lives in Christchurch and (was at the date of appeal) 17 years, 3 months old. She has competed in shortboard surf riding in New Zealand and overseas over the past 3 years. She won three consecutive New Zealand national titles being Under 16 Rip Curl Grom Search Circuit Champion 2004, Under 18 Surfing New Zealand Secondary Schools Champion in Taranaki 2005, and Under 18 Surfing New Zealand Nationals Champion in Kaitaia 2006. In surf lifesaving she achieved a national silver medal in the Multi-Sport Swim/Paddleboard Event, 9 Canterbury titles and numerous South Island titles and was a finalist in the SPARC Future Champions Award in 2004 and 2005.

7. On January 14, 2006 she became the National Junior Champion and thus a double national title holder in the one year. She had won both available junior titles for her age group in the 11 months between April 2005 and January 2006. She has signed a 2 year professional contract with Roxy, Australia.

8. The notice of appeal records that on January 12, 2006 at the National Championships, there was a discussion between Daisy Thomas, Steve (her father) and Ben Kennings, National Convenor of Selectors. Daisy and Steve Thomas say that Mr Kennings told them that the team for the World Junior Surfing Championships in Brazil would be announced on 10 February 2006, and the likely cost involved.

9. Daisy Thomas aimed to make the team. She says this was the only advice given to her regarding the date of selection.

10. On 14 February 2006 the New Zealand Junior Surfing Team for Brazil was announced by email media release, some four days **after** the date first indicated to her. Daisy was included as a non travelling reserve in the Under 18 girl's event, for which she holds the national title.

11. The notice of appeal records that the date change from 10 February to 14 February was explained as based on the opportunity to consider performance at the Raglan event. This intent was not communicated to Daisy. She did not therefore take the Raglan event as an opportunity to press for selection. She could have returned from Australia to compete had she known it would assume importance.

12. Surfing New Zealand ("*SNZ*") has made various statements to explain the selection. The Statement of Defence records that Mr Kennings told Mr Thomas that the date was extended until 14th February because of difficulty in making some selections. Because Daisy was not present at Raglan, competing in Australia, the statement records that a "*strong performance*" there would have assisted Daisy, but her results were "*not judged to be significant" and therefore "did not contribute strongly to her bid for selection*". "*At the same time, her closest competitor Wini Paul did produce an excellent result in the Open Women's where she placed fourth*". SNZ says that when it was told that Daisy would be going to Australia, it told Mr Thomas that "*we will keep an eye on her results*" and not attending the Rip Curl Pro "*would not count against her*". The statement goes on to record that the "*selectors determined that both surfers offered the team similar capability*" but the younger athlete would provide more "*development potential"* for SNZ in preparation for the 2007 World Junior Championships. In the case of two surfers with similar ability, a younger surfer offers greater development options for the team. Acknowledging that this is not "*specifically outlined*" under the selection criteria, it is "*nonetheless a consideration that a selector is expected to use as part of their assessment*". Because, "*after the final analysis of the performance of the two surfers there was a clear difference*", age was a contributing rather than the determining factor. SNZ brings "*age*" into play relevant to development potential.

13. Surfing New Zealand acknowledged in its reply that Mr Bruce Scott's recommendation that Daisy be included was "*not able to be supported by her place in the ratings*", and states squarely that *"… to satisfy our selection criteria the surfer placed fourth on the ratings table, Wini Paul, was selected ahead of a surfer placed eighth on the table Daisy Thomas*".

14. It is clear that a "*ratings table*", drawn from seven events, ranks the surfers by taking the best five results. SNZ has acknowledged that the fact that Daisy competed in four events only "*has affected her position (eighth) on the table*", and acknowledges that she has other interests, (e.g., surf life saving) which clashed with surfing contests. SNZ says it cannot "*speculate*" as to how she might have performed had she attended all contests. SNZ goes on to say "*similarly we cannot pick and choose results to compensate her non-attendance. This would be unfair on those surfers who chose to compete at every event."* It was clear that the ratings table did have application in the decision made.

15. Another statement made by SNZ is relevant. On 19 February 2006 Mr Kennings wrote to Mr Thomas, recording that Airini Mason, Mischa Davis, and Paige Hareb

were "*certainties*" for this team going on past performance in New Zealand, Australia and their previous encounters at the World Junior Championship. Therefore the decision "*came down to Daisy and Wini*". Mr Kennings said "***We have analysed all of the results, not only from this year but from last year. We feel that the girls are on a very similar level, results wise*"** (emphasis added).

16. Because Daisy's three national titles had been referred to by Mr Thomas (in correspondence), Mr Kennings said that was understood, but that Wini Paul had won the Billabong Grom Series in 2005, was second in the SNZ Grommet series over nine events in 2005, second on the Lion Red Pro Surfing Tour for Open Women in 2005, and ranked fourth on the same tour in 2006. Hence *"it is easy to make a valid argument for both surfers going on the results that they have had*". Then because Daisy and Wini were "*in our minds on a very level pegging…"* the selectors "*opted to go with Wini*". This is under the "*presumption that she will learn from this experience and hopefully make the team in 2007 where she will have an improved awareness on what it takes to succeed at that level. We see this as being part of our junior development and a logical way of thinking long term for this event*". This puts the development potential as a distinguishing factor.

17. **At the hearing** we asked Mr Kennings to give evidence about these matters. He acknowledged that some of the more "*subjective*" assessments meant that reference to results was needed. The selection policy says contest results are relevant. It seemed on the evidence that the ratings table was specifically brought to account, and this was acknowledged by Mr Kennings. He said this provided a further tangible measure of assessment, going beyond subjective analysis. Mr Kennings gave evidence that age is a factor in the sense that it allows an opportunity for a younger athlete, with further training and experience, to become "*more consistent*". He said that the performance of surfers is discussed with other "*selectors*" at events. He is aware of the involvement of Mr Fisher as coach at the Raglan Surfing Academy. Some other surfers selected are in the Academy. He thought Wini Paul was "*technically better*" but because the athletes are "*close*" in ability then results including the ratings were brought into play.

18. Mr Kennings said that Wini Paul's age means that she has the potential to get good results in the next year, but it is not a factor which is determinative. He was quite clear that "*technically*" he thought that Wini Paul was ahead of Daisy Thomas without reverting to his assessment sheets, which were produced in March, and the ratings table. When questioned by the Tribunal he said that the "*real fact*" is that Wini Paul is the better surfer. She is also ahead on the ratings table with the qualification

attaching to that statement identified and discussed by the Tribunal in this Interim Decision. He said that there was a '*consensus'* that Wini Paul had the better natural ability. He also said that the selection process does not "*ignore*" the fact that Daisy has performed better "*head to head*" in competition while not necessarily surfing one against the other. He said that even in a "*head to head*" assessment there are other factors which may go beyond the results on paper, e.g. the particular surfing conditions and that is why as many events as possible are brought to account. It is not a "*first past the post*" situation.

19. We return to the relevant facts as we consider the grounds of appeal.

Jurisdiction and Approach of this Tribunal

20. The jurisdiction of this Tribunal is contained within the "*Selection Appeals*" provisions of Surfing New Zealand ("*SNZ's*") internal regulations, and the Rules of this Tribunal.

21. Under "*Selection Appeals*", a surfer eligible, who fails to obtain selection "…. **may *appeal against the failure of the selectors to comply with the procedures set down in this policy. That is, an appeal may only be made on procedural grounds, not on the merits of a particular selection decision."*** – and - *"the appeal to (this) Tribunal shall be heard and determined in accordance with the Rules of the Tribunal".*

22. We agree with Mr Hunt for the appellant that reference to "*procedures*" is uncertain. There are no "*procedures*" set down in the "*policy*" as we find it to exist (see further). Mr Hunt contends that the appeal therefore lies against the failure to comply with the selection criteria, not to consider the merits of selection once the criteria are followed. However his position changed to submit that we should make the selection decision if the decision of Surfing New Zealand is impugned.

23. The "*Rules of (this) Tribunal*" include a section under the heading "*Appeals Proceedings (includes selection appeals)".* Rule 12.1.2 provides for selection appeals, where the rules or policies of (Surfing New Zealand) allow, (or it is otherwise agreed), and internal appeal rights have been exhausted. The Rules so allow and the appeal rights have been exhausted.

24. By Rule 12.1.3 it is provided:

> *"An Appeal under Rules 12.1.1 or 12.1.2 shall be **limited** to the grounds set out in the applicable rules or policies of the National Sports Organisation or the New Zealand Olympic Committee (if applicable in Selection cases), or in the absence of such grounds, one or more of the following grounds."*

25. Reference to the "*procedures*" under "*Selection Appeals*", tells us little. There are no "*procedures*" as such beyond the composition of the Selectors. The most that can be said is that the "*grounds*" are broad and procedural in nature. Rule 12.1.3(e) is expressly directed to the application of the selection criteria and process. There are four grounds stated, as follows:

> *"In respect of a decision relating to the Selection or Non-Selection of the Appellant, that there were no applicable Selection Criteria followed, or where there are applicable Selection Criteria, that:*
> *(i) the criteria have not been properly followed and/or implemented;*
> *(ii) the person seeking selection was not afforded a reasonable opportunity by the National Sports Organisation to satisfy the applicable Selection Criteria;*
> *(iii) the Selection decision was affected by actual bias; or*
> *(iv) there was no material on which the Selection decision could reasonably be based."*

26. None of these provisions go to the **merits** of selection. The appeal is limited to the **process** on which the selection decision was founded. The broad phraseology of clause 1 of SNZ's "*selection appeals*" may embrace procedural grounds beyond those identified in the rules. We conclude that the "*procedural*" grounds will include the specific provisions of Rule 12.1.3(e), going to process; and include a breach of the principles of natural justice.

27. This Tribunal's Rule 12.10 provides that the onus lies on the appellant to prove that (in this case) Surfing New Zealand erred in one or more of the respects identified in the grounds of Appeal.

28. Mr Hunt referred to the paper presented by Allan Sullivan QC in November 2001, at the ANSLA Conference in Perth. This refers to the court's reluctance to interfere in decisions of sporting bodies, other than on a strictly limited basis. This Tribunal is part of the appellate structure within the sport, and as such there is a point of distinction.

29. Rule 12.11.1(b) reflects the point of principle. This Tribunal may allow an appeal "*and as a matter of usual practice, but in the discretion of the Tribunal, refer the question of selection back… for determination in accordance with the applicable Selection Criteria*". The usual practice may be altered, and this Tribunal may "*conclusively determine*" the issue of selection if it would be "*impractical*" to refer the question back in the time available, or there has been "*such disregard of the selection criteria*" that a "*reasonable person could reasonably conclude*" that it is **unlikely** that the selection criteria will be properly followed and/implemented".

30. The Tribunal must address this appeal on procedural grounds and should refer back only where it is established that there has been sufficient error made by SNZ that it warrants such, and should only retain jurisdiction to make the selection if there is a basis to conclude that the selection decision will not be properly addressed, if sent back.

31. The reluctance of a specialist sporting Tribunal, even such as the Court of Arbitration for Sport, to interfere with decisions, especially selection decisions, is referred to in Mr Sullivan's article, and he cites a passage from **Watt v Australian Cycling Federation** (Digest of CAS Awards/1986-1998 p. 335-349 comp.) where Mr John Winneke QC (as he then was) observed –

> "*I am conscious of the caution held out to me… that I should be careful not to readily trespass into the selection processes of a professional cycling organisation which processes clearly embrace a wealth of experience and expertise that I cannot hope to share."*

32. The selection policy must be interpreted pursuant to ordinary principles of contractual construction – see **Royal Botanic Gardens & Domain Trust v South Sydney City Council** (2002) HCA5. In the case of sporting bodies where there is, as here, less precision than in a formal commercial contract, a commonsense approach to interpretation must be taken.

33. Mr Sullivan addresses what has been controversial, namely the extent to which public law principles intrude into these deliberations. We do not need to consider that point as such having regard to the provisions of Rule 12.1.3(e)(iv) "*there is no material on which the selection decision could reasonably be based,*". and Rule 12.1.3(e)(i) "*the criteria have not been properly followed and/or implemented".* It is those "*procedural*" considerations that apply, although 12.1.3(e)(iv) touches the public law principle that a decision may be struck down where it is so unreasonable that no reasonable authority could have formed the view taken.

34. This Tribunal considers that the test under Rule 12.1.3(e)(iv) is pitched at a high level, because it must be satisfied, with the onus on the appellant, that there was "***no material***" on which the selection decision could reasonably be based. There is significant authority that the substitution of the Court's own opinion should only be made if the Tribunal's decision is so aberrant that it cannot be classed as rational. The "*unreasonableness*" must be obvious or self-evident – seen ***Bornecrantz v Queensland Bridge Association*** – unreported decision of Queensland Supreme Court – Chesterman J 24 March 1999 BC9901032.

35. In more general terms, if it can be shown that the criteria have not been properly followed and/or implemented, or there was **no material** on which the decision could reasonably be based then this Tribunal may intervene. Where there has been a proper and realistic consideration of relevant factors, that is sufficient, and the weighting of such factors is for the selectors.

36. Mr Sullivan at paragraph 86 makes a general comment about the expert knowledge generally held by selectors. He says "*in the absence of an express contractual provision to the contrary, it would seem that the selectors in their deliberation processes may bring to their deliberations whatever expert knowledge they have about the sport in question… indeed one would expect them to do that*."

37. With these thoughts in mind we address the grounds of appeal.

First ground of appeal, "*the selection criteria have not been properly followed and/or implemented*".

38. A point which occupied a good deal of hearing time can be disposed of. Through a misunderstanding, a previous selection "*process*", was sent out by Mr Kennings when this issue arose. The Tribunal is satisfied that in or about February 2005 there was a "*Surfing New Zealand Team Selection Policy*" adopted, against which this appeal should be determined.

39. Selection processes within Surfing New Zealand are informal. This should not be taken as a criticism in itself, but this appeal demonstrates that there is a need for sporting organisations, given the contractual nature of relationships, to ensure clarity of rules, policies and process.

The Selectors

40. The policy provides for the appointment of a convenor of selectors and a national team selection committee of two, by the Surfing New Zealand Committee. Mr Kennings was appointed national selector, and the Tribunal accepts that he was in substance "*Convenor*", as of 7 April 2005. The team manager and team coach were the two assistant selectors. That committee was appointed for the purpose of the World Junior Championships in California, in October 2005. There appears to have been no further appointment of a selection committee.

41. Mr Kennings advised Mr Thomas on 10 February 2006 that he was the national selector, and team management of Bruce Scott, James Fowell and Larry Fisher *"… are also assistant selectors for want of a better title*".

42. A discussion took place, according to Mr Kennings, whereby team management would have a say in the selection of national teams, because they are "*management*" and would have to deal with the athletes, and coach them on tour. Mr Scott sent an email to Mr Thomas on 15 February 2006 acknowledging his involvement with Mr Kennings, Mr Fisher, and Mr Fowell in the selection process. Mr Scott was team manager and he emphasised that he was involved only as to "*potential behaviour*" aspects of selection. He is not qualified to select individual surfers but competent enough at "*assessing general ability and skill".* If there was nothing to distinguish between Wini and Daisy for selection, he thought that a South Island representative should be chosen. He left Raglan on the Saturday afternoon leaving Mr Kennings, Mr Fisher and Mr Fowell to finalise the selection after the contest on the Sunday. Mr Scott said that having spoken with Mr Kennings the view was taken that "*Wini was the preferred performing surfer based on past and present positions and had two years left in the U.18 division*". He also acknowledged that he was not "*fully conversant with the points/results, etc*".

43. The appellant made something of the involvement of Mr Fowell, who was assistant manager and coach of the 2006 junior team, in that his input was requested by the national convenor. The Tribunal does not take anything from this point. On the evidence Mr Fowell contributed to the selection decision. While Mr Kennings and Mr Fisher may have taken the final decision this came with input from Mr Fowell, and to a more limited extent Mr Scott, and refer to our conclusions at paragraph 48 hereunder.

The Selection Criteria

44. A second head of this first ground of appeal relates to the selection criteria said to have been applied. The selection policy is annexed to the hard copy of this Interim Decision. Clause 3 of the Policy emphasises selection on a "*case by case*" basis.

45. The generality of clause 2 does make focus on the selection **process** more difficult but Mr Hunt for the appellant is aided by the way SNZ has explained its position both in writing, and at the hearing. The policy refers to "*contest results*". It is unclear exactly what is contemplated, but this gives the selectors more latitude, rather than less. He is correct to say that these criteria do not indicate what results are to have

any particular emphasis placed on them. Nor is there any reference to the time period over which results are assessed. This generality makes attack on the selection process more difficult.

46. Mr Hunt refers to Surfing New Zealand's position and its reference that a relevant consideration to distinguish two surfers of similar ability is that a younger surfer clearly offers greater development options for the team. This is said in the context that the performance of the two surfers showed a clear difference, and that age was therefore a "*contributing*" rather than a "*determining*" factor, as the younger athlete has a longer opportunity with training to become "*more consistent*".

47. There is an affirmation by SNZ that surfing is very subjective and it can be difficult to judge between two surfers. Against these considerations, the appellant submits that it is essential that there be integrity in and adherence in the process of selection from the appointment of selectors through to decision making.

48. Of the matters raised by the appellant under this First Ground the Tribunal concludes that there was no substantial invalidity in the selection panel appointment or process. There was a "*panel*", somewhat informal, but there was nothing of substance in that regard to invalidate the process. The decision was contributed to, but finally made by two persons who had been previously appointed, and one who was effectively co-opted, and there was a contribution from Mr Scott. That too does not invalidate the decision, because the "*four corners*" of the selection panel is not inviolate. The decision must finally be made by those who should be taken as qualified to make the selection. It is not as if there are others outside the process who were not consulted, who should have been.

49. The Tribunal rejects the contention that the decision made is a nullity because of the failure to follow the "*stated procedures*". This clause should not be read down to a restrictive approach, given the need to make the best selection possible.

50. Mr Hunt's submissions are summarised and determined under this first ground as follows:

- No validly selection appointed selection panel existed – a selection panel carried over from 2005, and in substance this panel made the decision.

- The selection panel responsible for the decision did not comply with the policy – the provisions of the policy were complied with, given a broad construction of the

policy, in particular with reference to "*natural ability*" and "*results*". Reference to the ratings table was in itself permissible.

- The decision was not made by those who even informally were permitted to do so – the Tribunal does not consider that the contributions of Mr Fowell and Mr Scott, and the determination finally made by in essence Mr Kennings and Mr Fisher, invalidated the decision making process.

- The selections made were not endorsed by the committee of SNZ – there has been de-facto endorsement. This is a technical ground of submission which does not undo the substance of selection on behalf of Surfing New Zealand.

- The criteria were not applied as other irrelevant factors were taken into consideration – while there is no express reference to "*age*", in the policy the Tribunal does not conclude that it is simply an "*age*" issue. Rather, when the appellant and Wini Paul were under consideration, separating their respective merits became a difficult issue. There was reference to results (see below), but there was also consideration of the fact that Wini Paul would have longer within the age grade, and experience would assist her cause and thus that of SNZ. This is not an easy matter to determine, because this element is not reflected directly in the selection policy. It would also be contrary to principle, and quite probably law, to choose a younger competitor simply for that reason alone. But age, strictly defined, is not a contributing factor, indeed is not the determining factor, but simply a consideration in the context described above. The Tribunal is not prepared to treat this as an irrelevant consideration so tainting the decision making process that it should be set aside as a nullity.

Second Ground of Appeal - that the appellant was not afforded a reasonable opportunity to "*satisfy the applicable selection criteria*".

51. This ground has particularly troubled the Tribunal.

52. This ground of appeal turns on advice of the date of team selection on 10 February 2006. This was informal. On that date an email from Mr Kennings recorded that the selection date had "*since pushed out to next week*" with "*Monday (13th February) being the earliest to make the call*", "*to allow selectors to primarily look further at the under 16 boys*". An email of 14 February 2006 said that the decision to name the team was left as long as possible "*to allow selectors to see the surfers and get a good gauge on their results both in New Zealand and overseas*" **and expressly refers to the Under 18 girls**. It is inherent in the appellant's case that she

understood the selections were to be made **by** 10 February 2006. She chose to compete in Australia. Had she been aware that the date for selection was being extended, and that the event was significant, or might be, to selection, then she would have returned to New Zealand to participate. It would only have real significance if the ratings table had a particular emphasis, otherwise simply another event to assess prowess.

53. When she said that she was going to compete in Australia, through her father, it was indicated that her Australian performance would be brought to account. Going to Australia would not jeopardise her chances as such. The appellant is correct, when Counsel submits that there was no notification of the way in which the particular events or contest might be brought to account.

54. Mr Hunt examines the explanation for the selection decision under this ground as well as under the fourth ground discussed below. The ratings table from which Surfing New Zealand "*drew part of the assessment*" was compiled over seven events, with the ranking decided by taking the best five results into account. Some surfers competed in very few events. Their accumulated points over five events was affected by this. The ability to drop off the "*poorer*" performances obviously enhances the ability to accrue points. Daisy Thomas competed in four events, and this may have affected her position. We consider the table further under the Fourth Ground of Appeal. It is speculative as to how she might have performed in other events including the Raglan event. Surfing New Zealand's stance is that it cannot "*pick and choose*" the results to "*compensate*" for non attendance, as that would be "*unfair*" on those who chose to compete at every event. This warrants closer consideration together with its other statements we have identified. The ratings table is not an absolute measure of performance, because of the accumulative nature of the table, the fact that some surfers for one reason or another may not be able to, or choose not, to compete in as many events as others. The Surfing New Zealand stance is that where the choice is available to compete, then not to bring the table to account would in some way penalise those who do compete more often.

55. There are athletes who have the "*X*" factor and are regarded as outside the necessary purview of the ratings table. The superior ability of these athletes gains them selection. That puts the rating table in a context that it is not an absolute measure of performance, but having regard to the fact that athletes will compete in a different number of events, reflects involvement in the stated events, and performance in those. It is a kind of 'league' table, with entry in events left up to the individual surfer.

56. It is clear that the selectors have looked well beyond the league table to select certain athletes, because they have the "*X*" factor, and are competing overseas. The appellant points to the selection criteria, clause 8 "*the surfer must show commitment to attend and compete in Surfing New Zealand sanctioned events*". It appears clear that there is an override in this regard. The ratings table does not disadvantage "*X*" factor surfers.

57. The question reduces to whether in her case the ratings table has been employed in a way which invalidates the decision, when coupled with her understanding that the selection process would be completed by the Raglan event.

58. Mr Hunt emphasised that selection or non selection was not to be assessed by reference to Wini Paul alone but includes those selected, namely Paige Hareb, Mischa Davis and Airini Mason and others not selected. Later, as the reality of the choices facing the Tribunal were more closely examined, the "*choice*" between Wini Paul and Daisy Thomas led to the submission that this is where the true determination must lie. The Tribunal agrees.

59. We recognise the unfairness which Daisy feels. She may have come back to New Zealand, and may have aquitted herself well. If the ratings table became the determinative factor then she may have been selected.

60. We conclude that this becomes speculative. There is no doubt the ratings table was considered, as it could be, and Daisy in effect "*lost*" the opportunity to contest Raglan. But it is a matter of weight. Her Australian performance was noted. She may or may not have gained ground in Raglan. We conclude on all the evidence that other factors than Raglan and the ratings table were considered. The question is whether the weight attaching to the ratings has moved to the point of affording her no reasonable opportunity for selection. We cannot say that. It assumed weight but other considerations were brought to account.

Third Ground of Appeal - Actual Bias

61. This Tribunal has considerable difficulty with the argument that "*apparent bias*" has any application in this case. Where the rules of this Tribunal provide that only "*actual bias*" is to be brought to account, one must look for some strong counter indication in the rules of Surfing New Zealand. There is none. There is reference to a "*failure of the selectors to comply with the procedures set down in this policy*". Those procedures do not include "*apparent bias*". Actual bias requires proof that the decision maker has prejudged the case against the athlete or has acted with

partisanship or hostility to show the decision maker has a mind made up against the athlete, and is not open to persuasion. There is no rule of law which provides that a body which has adjudicated on issues cannot afford natural justice on a second hearing of the same issues.

62. The Tribunal's rules have been drafted to require proof of **actual bias**, a relatively rare event, which could not possibly be established in respect of Mr Fisher. The appellant submits that we should consider issues of "*apparent bias*" because an appeal may be based on "*procedural*" grounds which are not limited to those stated in this Tribunal's Rules. Mr Lines for SNZ acceded to this proposition. We have strong reservations about that. This Tribunal is part of Surfing New Zealand's appellate structure. There is, at this level, a clear statement of the restricted test of "*actual bias*". The reasons can be understood. Sport has such close personal connections that there will often be perceived associations. If this Tribunal is concerned expressly with "*actual bias*", then to revert to the broader "*procedural*" deficiencies anticipated or contemplated by the Surfing New Zealand Rules must first be based on recognition that these provisions must be read together, and the SNZ Rules apply to broaden the test under our Rules to "*apparent bias*".

63. Mr Fisher is coach at the Raglan Surf Academy, so he has direct association with Wini Paul as he has with some other surfers eligible for selection. In essence the submission turns on the proposition that where subjective evaluations are to be brought to account, the proximity of association meets the "*apparent bias*" test.

64. The law in New Zealand is that "*apparent bias*" is a principle of application to domestic Tribunals. We need refer only to the test adopted by the Court of Appeal in ***Riverside Casino v Moxon*** [2001] 2NZLR 78, and The House of Lords' judgment in ***R v Gough*** (1993) AC646 p. 670. The Court addresses the test of apparent bias through the eyes of the "*reasonable man*", that there is "***real danger***" of bias affecting the decision rather than "*real likelihood*". This puts the test as one of "*possibility*" rather than "*probability*". The Court or Tribunal must ascertain the relevant circumstances and ask the question whether *"… there is a real danger of bias on the part of the relevant member of the Tribunal in question, in the sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavour the case of a party to the issue under consideration by him*".

65. All we know is the involvement of coach and athlete. In a sport with such few numbers as surfing, the associations at a personal level are likely to be significant. Associations will cut across events, training, social occasions, awards ceremonies,

and a host of informal contacts. The simple fact of association through coaching in our opinion does not meet the test of '*apparent bias'* required by law.

Fourth Ground of Appeal - There was no material on which the selection decision could reasonably be based.

66. Quite rightly Mr Hunt accepts this has a high threshold, and says that we have the advantage of knowing what Surfing New Zealand has said about the **reasons** for the decision and as to whether the decision could reasonably be based.

67. Mr Hunt submits that the selection committee seems to have had relatively limited regard to the criteria. However Mr Kennings did indicate that the policy's criteria were brought to account, if not in a systematic way

68. Surfing New Zealand refers to the rating tables, and "*assessment sheets*", for the two athletes were prepared by Mr Kennings in March, a month after the selection was made, and when the appeal was anticipated. The Surfing New Zealand Statement of Defence says that the selection criteria take into consideration results in New Zealand and overseas, but that the appellant did not attend "*three key events*". Mr Hunt focused on these statements to ask just what were the *"key events*", the relationship between New Zealand and overseas results, the time period under consideration and whether Open events carried greater weight that restricted age events. He noted that Wini Paul could compete in under 16 events which Daisy Thomas could not do. Mr Hunt is correct, on Mr Kennings evidence, that real significance was attached to the results in the table, being New Zealand results only.

69. The Tribunal has referred to this aspect of the selectorial reasoning. The evidence given by Mr Kennings, who struck the Tribunal as frank and straightforward, is that he considers that Wini Paul is the "*better surfer*". His March assessment sheets record that view on a point by point basis, on what may be described as a "*technical*" analysis. There is not much else between them. Because that sort of assessment can never dictate selection, and because results "*on the water*" must be brought to account, the ratings table provides something more "*concrete*". There is no doubt that the selectors are entitled to look at the ratings table. We now consider Mr Hunt's detailed submission.

70. Where the two surfers competed in the same event, Daisy Thomas finished ahead except for one occasion when their scores were equal. Going "*head to head*" on the ratings table, Daisy Thomas scored 5,000 points as against Wini Paul's 4,423 points. At the National Under 18 contest in January 2006 Daisy beat both Paige Harreb and

Wini Paul, and Wini Paul would have needed a substantial total to have gained first place in the event. In the National Scholastic final Daisy Thomas beat Mischa Davis.

71. The assessment sheets for Wini Paul do not refer to her third place behind Daisy Thomas in the National Under 18 contest. Nor, says Mr Hunt, was the cut-off date for age group events brought to account. These included the Billabong Grom Series 05, the Surfing New Zealand Grom Series 05, the Billabong Occy Grom Comp Australia 05, and the Rusty GromFest Australia 2005. In 2004 events the appellant competed in and won, or in which she was successful were not mentioned in the results sheets. Mr Hunt is pointing to events of some antiquity (in sporting terms) simply to demonstrate the need for an even handed analysis of what should be included in the selection decision.

72. Mr Hunt reduces his submission to saying that when assessing the Under 18 results only, on an "*apples and apples basis*", the appellant was ahead of Wini Paul. Further, she has won three consecutive New Zealand titles, so "*all other things being equal,* ***it is impossible to reconcile the selection of Wini Paul ahead of the appellant unless factors other than those identified in the selection criteria themselves were taken into account*.**"

73. Surfing New Zealand says selectors have to use a range of assessments to make decisions, and they refer to the selection criteria discussed below. These are made up of, **but not limited to**, results, natural ability, commitment, attitude, etc.

74. The ratings table from which part of the assessment was made was compiled from results in 7 events and the ranking is decided by taking the best five results. Of the 7 events "*available*" Daisy competed in 4 only. That affected her position (eighth) (theoretically). Surfing New Zealand recognises that Daisy has other interests which at times have clashed with surfing contests but it maintains that - "*We cannot speculate as to how she might have performed had she attended all contests. Similarly we cannot pick and choose the results to compensate her non-attendance. This would be unfair on those surfers who chose to compete at every event*."

75. The final total is made up from results from 7 events and the ranking is calculated by taking the top 5 results across all contests. Taking the top 5 events, automatically disadvantaging Daisy, the respective scores are as follows:

- Wini Paul 6,723
- Daisy Thomas 5,000

Prior to the last event:

- Wini Paul 5,948

- Daisy Thomas 5,000

76. If the four best results were taken the scores were:

- Wini Paul 5,808
- Daisy Thomas 5,000

77. Had Daisy achieved a good result in Australia on 10/12 February, this would have "*boded well*" for her selection.

78. We do not enter the merits as such. We conclude on the evidence that the selectors brought to account the ability of the two surfers, and as Mr Kennings conceded, there was not much in it, but in his view "*Wini is the better surfer*". It may be hard to explain exactly why that is the case, but those expert in different disciplines will recognise the difference between competitors much more easily than us. Indeed we have no ability to bring to account these factors except by adopting another person's opinion. Whether this is called "*natural ability*" as the selection policy states, or whether it is also a skill set, we could not conclude that those considerations were irrelevant and for this ground are matters which properly go to selection.

79. It does not end there because Mr Kennings acknowledged that specific resort was had to contest results, to make the final decision. There are factors other than the natural ability and skill sets known to the selectors.

80. All that can be concluded from that table is that Wini was ahead on points over five events (having competed in five of course assisted), was ahead in four events and behind 'head to head' but that of itself may not provide a comprehensive match-up between the two surfers.

81. Other factors which Mr Hunt has identified must have relevance in terms of contest results and fall for consideration, in addition to the ratings table and even within the events on the ratings table. The matters he relies on seem to us proper considerations, which have been brought to account in a general way, as we have understood it. While we do not consider the ratings table an irrelevant consideration, it is a table which requires analysis in itself, and it must be brought to account with other factors. If the athletes are so close together that resort needs to be had to contest results then the other matters referred to by Mr Hunt have application. This finally is a question of weight and while we sympathise with Daisy Thomas, this is for the selectors. We cannot say that there is **no material** on which the decision could reasonably be based. Daisy's performance in Australia was considered. It may have made a difference had she performed better there.

82. This ground of appeal is difficult to establish. There must be no evidence to reasonably support the selection decision. That cannot be said. There was ample evidence on which this decision could have been taken even discounting the ratings table to another, but not determinative factor. On the facts, we conclude that other results were considered, including Daisy's result in Australia, and there was material on which the selection decision could reasonably be based.

Disposition

83. The appeal is dismissed as the grounds of appeal are not made out. Yet we have considerable sympathy for Daisy Thomas. Two other heads of relief sought remain before the Tribunal. It is clear to us, and we suspect Surfing New Zealand, that much needs to be done to regularize its processes. For example, the selection criteria could be amplified although we recognise that is a matter of judgment. They should be disseminated and explained to all athletes. There certainly needs to be a better understanding held by competitors of what will be brought to account in the selection process. That would give competitive surfers a chance to identify what will best advance their case for selection. They are entitled to program themselves in this regard. It must be an easy matter for Surfing New Zealand to formally record the appointment of selectors from time to time.

84. The Tribunal has issued an Interim Decision, so that either party may ask us to continue, and consider the other two heads of relief sought. The appeal in this respect has very clearly identified the need for reform of process.

85. We conclude by saying something about Mr Thomas and Daisy. The case he presented on behalf of Daisy was thorough and fair, and the correspondence that preceded the appeal demonstrated an attention to detail, and a thoughtfulness which does him and Daisy great credit. She has considerable potential. Mr Hunt conducted Daisy's appeal with considerable skill and his submissions have given us considerable pause for thought. It was clear to us that while advancing Daisy’s interests, Mr Thomas was also conscious of the position of Surfing New Zealand as a whole, including the position of other competitors, and Mr Hunt's submissions reflected that. We were grateful for the way the appeal was presented, and to Mr Lines for the clarity of the approach adopted by Surfing New Zealand.

Costs

86. Reserved.

For the Tribunal

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Nicholas Davidson, QC (Presiding Member)
19 April 2006