IN THE COURT OF ARBITRATION FOR SPORT

IN THE MATTER	of an appeal against the decision of the New Zealand Sports Tribunal
BETWEEN	**YACHTING NEW ZEALAND**
	Appellant
AND	**ANDREW MURDOCH**
	Respondent
AND BETWEEN	**YACHTING NEW ZEALAND**
	Appellant
AND	**SIMON COOKE & ALASTAIR GAIR**
	Respondents

Panel: Mr Alan Sullivan QC (Australia) President,
Sir Thomas Eichelbaum (New Zealand), and
Mr David A.R. Williams QC (New Zealand)

Counsel: R J Craddock QC, P W David and Ms J Carlyon for Appellant
R Brabant and K Littlejohn for Respondents
Ms G F Weir for interested parties Brown and Hunt

AWARD NO.2 (COSTS)

INTRODUCTION – PROCEDURAL BACKGROUND

1. On 2 April 2004 we issued the operative part of our Award and, subsequently, we provided Reasons for the Award dated 27 April 2004. At the time of issuing the operative part of our Award we expressly reserved the issue of costs and fixed a timetable for the parties to provide us with submissions on costs.

2. We have received and considered the following written submissions from the parties:-

   (a) Submissions on behalf of YNZ dated 17 May 2004 in which it claimed costs as the successful appellant.

   (b) A further brief Memorandum of Counsel on behalf of YNZ dated 31 May 2004 correcting certain figures mentioned in the previously filed submissions on behalf of YNZ. The effect of this correction was to quantify the YNZ claim for costs as follows:

Senior Counsel's fee	$40,000.00
Solicitor's fee	$21,000.00
Disbursements	$ 1,097.05
	$62,097.05

   (c) A Further Memorandum of Counsel dated 31 May 2004 relating to a presently irrelevant matter;

   (d) Submissions on behalf of Mr Andrew Murdoch, Simon Cooke and Alastair Gair dated 2 June 2004 opposing the YNZ application for costs.

   (e) Submissions of YNZ in reply to the submissions of Messrs Murdoch, Cooke and Gair dated 10 June 2004 opposing the YNZ application for costs.

3. Having considered those submissions we believe that it is unnecessary to hear the parties further, either orally or in writing, in respect of the costs issue.

4. Pursuant to Rule 64.5 of the Procedural Rules of CAS we are given a broad discretion to determine which parties shall bear the Arbitration costs and the proportion in which the parties shall share those costs. That discretion is not, however, completely untrammelled. Rule 64.5 provides that:-

> "The arbitral award shall determine which party shall bear the arbitration costs or in which proportion the parties shall share them. As a general rule, the award shall grant the prevailing party a contribution towards its legal fees and the other expenses incurred in connection with the proceedings and, in particular, the costs of witnesses and interpreters. When granting such contribution, the Panel shall take into account the outcome of the proceedings, as well as the conduct and the financial resources of the parties."

5. Thus, the Rule obliges us, when granting such contribution, to take into account the outcome of the proceedings, as well as the conduct and the financial resources of the parties.

THE GROUNDS OF OPPOSITION TO THE YNZ CLAIM FOR COSTS

6. The submissions on behalf of Messrs Murdoch, Cooke and Gair, opposed any award of costs to YNZ and argued that YNZ should meet its own costs. Five reasons were advanced in support:

   (a) The appeal to CAS from the Sports Disputes Tribunal decision was brought in order that YNZ could obtain guidance as to the athletes' appeal rights following nomination decisions being made for the Athens Olympics, and in order that the selectors had guidance as to the discretion that they had in reaching those nomination decisions;

   (b) The representation of the Respondents at the hearing enabled the Panel to hear argument opposing the YNZ appeal;

   (c) The financial circumstances of the three Respondents were such that they had no ability to meet an award of costs;

   (d) The costs claimed by YNZ were excessive for a one day hearing, even acknowledging a reasonable allowance for the time taken in preparation and filing of an appeal and of the written submissions;

(e) The assertion by YNZ that the Respondents knew that their appeals would significantly affect YNZ and it would have to expend money which it would prefer to allocate to fund athletes should be given no weight especially since any depletion of the YNZ High Performance Fund by way of legal costs YNZ had incurred would also impact on the Respondents as potential recipients of grants from this fund.

THE APPROACH TO RULE 64.5

7. Since this is the first occasion when the question of costs has arisen in relation to a New Zealand CAS appeal it is appropriate to offer some general observations on the question of costs in CAS appeals and to refer to two relevant awards of CAS panels sitting in Australia. We do so because they helpfully consider aspects of the Rule 64.5 discretion and also because, as stated in our Reasons of 2 April 2004, paragraph 4.5, there is every reason to harmonise legal principles and practices in the sports field within Australasia.

8. The first decision *Beashel and Czislowski (Appellants) v Australian Yachting Federation (Respondent) and Nicholson and Phillips (Intervenors)* was decided under Rule 65.3, now superseded by Rule 64.5. Rule 65.3 did not contain the general rule now included in Rule 64.5. Nevertheless the CAS Panel (Mr Malcolm Holmes QC) expressed the view that the costs would usually "follow the event" in that the prevailing party would usually be entitled to recover a contribution to legal fees and expenses.

9. In his award the arbitrator said at paragraphs 6-7:

> "6. The Appellants submitted that it "is settled practice that a successful party will receive his or her costs unless there are special circumstances which would indicate that a contrary result is warranted". The authorities for this proposition are found in 'Commercial Arbitration Law and Practice' by M. Jacobs, at paras [32.100] – [32.160]. These Australian authorities are not directly apposite to proceedings in the Court of Arbitration for Sport which are governed by the Code. It is difficult to apply common law principles and practices to proceedings under the Code. Such proceedings can take place in both common law and civil law countries throughout the world and may involve parties and systems of law which follow a different practice. Subject always to the provisions of the Code, the approach to costs in the authorities referred to by the Appellants including *Oshlack v Richmond River Council* (1998) 193 CLR 72 per McHugh J. at 97-98 is a useful guide in these particular proceedings. In this case all parties are resident in Australia. The dispute and the hearing occurred in Australia. As such the approach reflects the

> usual expectation of parties in Australia. It also accords with the description by the AYF of the proceedings in its submissions (para10(3)) as "effectively full scale commercial litigation". In view of the importance of the decision to the Appellants and the matters of principle involved for the AYF, I do not agree with the criticisms made about the level of representation used in the proceedings.
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> 7. Nevertheless the principles applicable to questions of costs are those stated in R63.3. Further, as the AYF has pointed out, in proceedings before the CAS even where a party is successful costs do not always follow the event, see *USA Shooting and Q v. International Shooting*, CAS Award 94/129, award made 23 May 1995. In a more recent decision of the CAS in the matter of *Union Cycliste Internationale v Hartwell* CAS 99/A/232, award made on 29 February 2000, it was stated following a review of the provisions of the code relating to costs, that those provisions "suggest that a prevailing party will receive a contribution towards its legal fees and other expenses (and).. (t)hat notion appears to have been implicitly accepted in some appeal cost orders...".

10. The change to the relevant CAS costs rules was discussed in the recent CAS costs award (Henry Jolson QC) in *King (Appellant) v Australian Canoeing Inc (Respondent) and Wilkie (Affected Party)* 20 April 2004. On April 14, 2004 CAS dismissed Mr King's Appeal from the decision of the Australian Canoeing Tribunal dated 18 March 2004. That Tribunal had upheld the decision of the Australian Canoeing Selection Panel to omit Mr King from the 2004 Australian Canoeing Team in favour of another athlete, Mr John Wilkie. Australian Canoeing and Mr Wilkie were represented by lawyers. Mr King had the assistance of an Olympic Appeals Consultant to assist him in the selection and appeals process to Australian Canoeing's Appeal Tribunal and then to CAS. The Consultant was a Queen's Counsel experienced in sporting appeals.

11. Australian Canoeing relied on Rule 64.5 in submitting that costs must follow the Award in its favour. Australian Canoeing claimed costs of $6,000 almost entirely made up of a fee based on time spent by Australian Canoeing lawyers in the appeal. It submitted it did not have discretionary funds to fight appeals and that the payment of legal costs would more likely be taken from AC's high performance programme budget. This would result in increasing other AC's athletes' monetary contributions to future tours. It was submitted that Mr King should not have appealed to CAS on the basis that the selectors decision and the reasons of the appeal tribunal were very clear.

12. Counsel for Mr King had mistakenly based his written submissions on Rule 65.3. This led the arbitrator to state:

> "Towards the end of 2003, the International Council of Arbitration for Sport adopted a new edition of the Code that came into force on 1 January 2004 ('the 2004 Code'). The majority of the amendments in the 2004 Code were made in order to codify the regular practice of the CAS Arbitrators and of the CAS Court office and to eliminate existing gaps in the previous Code. The new edition of the Code replaced the earlier edition ('the 2000 Code').
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> R. 64.5 of the 2004 Code was identical to R. 64.5 in the 2000 Code. However, the change was to apply R. 64.5 to both the Ordinary Arbitration Division of the Court and the Appeals Arbitration Division of the Court. Importantly, it meant that in determining the costs of an appeal, other than in Disciplinary Cases of an International Nature (R. 65 of the 2004 Code), the general rule is that the successful party should obtain a contribution to its costs from the unsuccessful party after taking the prescribed matters into account whether the appeal is in CAS's Ordinary or Appellant jurisdiction."

13. Having explained the change to the CAS Rules the arbitrator continued as follows:

> "The costs in this Appeal are to be determined under R. 64.5 of the 2004 Code and the 'general rule' that the successful party should get a contribution to its costs should be applied by taking into account the matters identified in that rule. Even under R. 65.3 of the 2000 Code the Court would still have a discretion to decide which party should bear the costs and in what proportion after taking into account the outcome of the proceedings as well as the conduct and the financial resources of the parties. ...
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> ... the award of costs to a successful party in civil litigation is made not to punish the unsuccessful party but to compensate the successful party against the expense to which that party has been put by reason of the legal proceedings: *Oshlack v Richmond River Council* [1993] HCA 11. It is appropriate for that principle to apply in this jurisdiction."

14. It may be noted in passing that in the *Oshlack* case McHugh J said at 1993 HCA 11, 67-69:

> "<u>The usual order as to costs</u>
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> 67. The expression the "usual order as to costs" embodies the important principle that, subject to certain limited exceptions, a successful party in litigation is entitled to an award of costs in its favour. The principle is grounded in reasons of fairness and policy and operates whether the successful party is the plaintiff or the defendant. Costs are not awarded to punish an unsuccessful party. The primary purpose of an award of costs is to indemnify the successful party. If the litigation had not been brought, or defended, by the unsuccessful party the successful party would not have incurred the expense which it did. As between the parties, fairness dictates that the unsuccessful party typically bears the liability for the costs of the unsuccessful litigation.

> 68. As a matter of policy, one beneficial by-product of this compensatory purpose may well be to instil in a party contemplating commencing, or defending, litigation a sober realisation of the potential financial expense involved. Large scale disregard of the principle of the usual order as to costs would inevitably lead to an increase in litigation with an increased, and often unnecessary, burden on the scarce resources of the publicly funded system of justice.
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> 69. The traditional exceptions to the usual order as to costs focus on the conduct of the successful party which disentitles it to the beneficial exercise of the discretion. In *Anglo-Cyprian Trade Agencies Ltd v Paphos Wine Industries Ltd*, Devlin J formulated the relevant principle as follows:
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> > 'No doubt, the ordinary rule is that, where a plaintiff has been successful, he ought not to be deprived of his costs, or, at any rate, made to pay the costs of the other side, unless he has been guilty of some sort of misconduct.'
>
> "Misconduct" in this context means misconduct relating to the litigation, or the circumstances leading up to the litigation. Thus, the court may properly depart from the usual order as to costs when the successful party by its lax conduct effectively invites the litigation; unnecessarily protracts the proceedings; succeeds on a point not argued before a lower court; prosecutes the matter solely for the purpose of increasing the costs recoverable; or obtains relief which the unsuccessful party had already offered in settlement of the dispute."

15. It can be seen that Rule 64.5 is precisely in line with the traditional Australian approach to court costs. Moreover, the general rule stated in Rule 64.5 is exactly the same as that which applies in court proceedings in New Zealand and before New Zealand arbitral tribunals. As to costs in High Court proceedings, as from 1 January 2000 the position has been governed by Rule 47 of the High Court Rules which states in material part:

> "Principles applying to determination of costs-
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> The following general principles apply to the determination of costs:
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> (a) The party who fails with respect to a proceeding or an interlocutory application should pay costs to the party who succeeds:
> ...
>
> (g) So far as possible the determination of costs should be predictable and expeditious."

16. As to the New Zealand position with arbitration tribunals, it is sufficient to refer to the judgment of Robertson J in *The Marble & Granite Centre Limited v R & Y Emery & Others*, High Court Auckland M 1384/98, 30 September 1998. At p 7 of his judgment Robertson J said in, relation to the costs provisions of clause 6(a) of the Second Schedule to the Arbitration Act 1996, that:

> "The primary principle in New Zealand Courts is that costs follow the event, which means, the successful party is entitled to a reasonable contribution towards costs unless there are special circumstances making it fair to depart from this principle."

The learned judge followed for New Zealand English law as summarised in the judgment of Mocatta J in *The Eric Schroder* [1974] 1 Lloyd's Rep 192, 193. There that judge had referred to the primary principle guiding courts and arbitral tribunals in the exercise of their discretion in relation to costs, namely that costs follow the event unless there are special circumstances making it fair to depart from the basic principle.

17. Only one other general observation is necessary. To the extent that it might be argued that in the sporting area in New Zealand the traditional approach to costs, as manifested in Rule 64.5, is inappropriate and there should never be any awards for costs, it is to be remembered that, as with any arbitral regime, the principle of party autonomy operates. As we pointed out in our reasons, paragraphs 4.6 - 4.7 the underlying basis of CAS arbitration in this case is a series of interlocking contracts. It is permissible under Swiss law and under New Zealand law for the parties to make agreements as to costs which will override or eliminate any general rules about costs which would otherwise operate. For example, it would be possible for the New Zealand Olympic Committee to suggest to its constituent sporting members that, in relation to Olympic Games matters, the appeals provisions of Clause 6.6 of Schedule D of the Nomination Criteria Regulation could be changed to explicitly provide that in appeals taken pursuant to that provision the parties agree that neither would claim costs against the other in relation to such appeals. Whether such an approach would be desirable is another matter and is a policy issue for the New Zealand sporting bodies. It does not call for comment from this Panel. The matter has been mentioned merely to signify that if sporting organisations in New Zealand regard the CAS Rule 65.4 on costs as inappropriate they have the power to contract out of it.

THE APPLICATION OF RULE 64.5 IN THIS CASE

18. Having carefully considered the submissions lodged by each of the parties, we see no reason to depart from the 'general rule' referred to in Rule 64.5 of the CAS Rules. Messrs Murdoch, Cooke and Gair (whom we shall refer to collectively as 'the respondents' for the purposes of this Award) had the

benefit of legal representation. They initiated a process which they knew carried the risk of a further Appeal if they succeeded before the Sports Dispute Tribunal of New Zealand, that further Appeal being one which was presumptively likely to bring an award of costs against them if they failed (R 64.5 of the CAS Rules). The risk was heightened in this case since, from the outset, the Respondents were aware that their very right to bring an appeal was disputed.

19. Having been unsuccessful, the Respondents, prima facie in accordance with the Rule, should make a contribution to costs. Nothing we have seen in the submissions which have been filed persuades us to depart from that prima facie position. Therefore, in our opinion, the Respondents should make a contribution to YNZ's costs of the Appeal to CAS.

20. In determining the amount of such a contribution, we must take into account the fact that YNZ was completely successful in the Appeal before us but, also, we must take into account the conduct and the financial resources of the parties.

21. We consider that all parties conducted themselves in an entirely appropriate fashion before us and we recognise the very modest financial resources of each of the Respondents.

22. YNZ's legal costs were significant but we do not consider that they were either excessive or unreasonable. But we do not believe it is appropriate that the Respondents should pay the whole amount of those costs. That would be quite inappropriate in view of the very limited financial means of the Respondents.

23. Taking into account all these circumstances we award by way of a contribution towards costs to YNZ the total sum of $NZ10,000 for the two appeals. In other words, we determine that Mr Murdoch should contribute $NZ5,000 towards the legal costs of YNZ of the Appeal, and Messrs Cooke and Gair should contribute $NZ5,000 towards such legal costs . This means that Messrs Cooke and Gair are each liable for the $5,000 award of costs but the total for which they are jointly liable is $5,000.

24. In paragraph 9 of its submissions in Reply dated 10 June 2004 YNZ indicated that it was 'prepared to consider a scheme for the payment of costs over time with the Respondents'.

25. We consider that this is a reasonable and proper approach for which YNZ is to be commended. However, rather than leave a possible matter of contention outstanding between the parties we believe we should specify the time for payment.

26. Accordingly, we determine that the Respondents should pay the contributions towards YNZ's costs to YNZ within 6 months of the date of this Award.

FORMAL AWARD

27. It follows that our formal Award in respect of costs is as follows:-

(f) That Mr Andrew Murdoch pay to YNZ within 6 months of the date of this Award the sum of $NZ5,000 towards YNZ's costs of the Appeal, and

(g) That Mr Simon Cooke and Mr Alastair Gair pay to YNZ within 6 months of the date of this Award the sum of $NZ 5,000 towards YNZ's costs of the Appeal.

DATED at Sydney this 2nd day of August 2004

Made as at Lausanne for and on behalf of the Panel

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Alan Sullivan QC
President