BEFORE THE SPORTS DISPUTES TRIBUNAL
OF NEW ZEALAND

SDT/01/04
SDT/02/04
SDT/03/04

In the matter	of an appeal against nomination under the New Zealand Olympic Committee Nomination Criteria and Selection Criteria
And	
In the matter	of an appeal under Rule 12.1.2 of the Tribunal's Rules
Between	**Andrew Murdoch**
	Applicant
And	**Yachting New Zealand**
	Respondent
And Between	**Simon Cooke and Alastair Gair**
	Appellants
And Between	**Jan Shearer and Melinda Henshaw**
	Appellants
And	**Yachting New Zealand**
	Respondent
Tribunal:	Rt Hon E W Thomas DCNZM PC QC C H Toogood QC Carol Quirk Ron Cheatley
Counsel:	Richard Brabant for Andrew Murdoch and Simon Cooke & Alastair Gair Iain Thain and Gillian Weir for Jan Shearer and Melinda Henshaw, and for Interested Parties, Andrew Brown and Jamie Hunt Paul David and Julia Carlyon for Yachting New Zealand Inc Edwin Telle for Interested Parties, Shelley Hesson and Linda Dickson
Interested Parties:	Bruce Cameron representing the NZOC Stephen Keen in person, and representing Phillip Keen

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WRITTEN DECISION(S) OF THE TRIBUNAL

The Appeals

1. Three appellants have appealed against the decisions of Yachting New Zealand's Nomination Panel relating to the nomination of sailors to the New Zealand Olympic Committee under Yachting New Zealand's Athens Olympic Games 2004 Nomination Criteria Regulations, effective as from 1 November 2003.

2. The Nomination Panel appointed by Yachting New Zealand comprised Mr Glen Sowry, Mr Grant Beck and Mr Terry Nicholas.

3. The appellants, and the class to which their appeal relates, are:

    a. Andrew Murdoch, in the Laser class;

    b. Simon Cooke and Alastair Gair, in the 470 Men's class;

    c. Melinda Henshaw and Jan Shearer, in the 470 Women's class.

4. The sailors who were nominated in the Laser and 470 Men's Class are:

    a. Hamish Pepper in the Laser class;

    b. Andrew Brown and Jamie Hunt in the 470 Men's class.

5. In short, the grounds of Andrew Murdoch and Simon Cooke and Alastair Gair's appeals are that the nomination panel acted contrary to the rules or unreasonably in determining that Hamish Pepper in the Laser class, and Andrew Brown and Jamie Hunt in the 470 Men's class, would achieve a top ten placing in their classes in the Olympic Games, as required by the appropriate rule.

6. The grounds of Melissa Henshaw and Jan Shearer's appeal is that the nomination panel acted contrary to the rules and were unreasonable in not determining that they would achieve a top 10 placing in the 470 Women's class.

7. The interested parties may also be identified:

    a. Nicholas Burfoot;

    b. Stephen and Phillip Keen;

    c. Shelly Hesson and Linda Dickson;

d. Mr Bruce Cameron appearing for the NZ Olympic Committee; and

e. Mr Stephen Keen, Mr Pepper, and Ms Dickson and Ms Hesson.

Pre-Hearing Conference

8. A Pre-hearing Conference pursuant to Rule 12.7.1 of the Rules of the Sports Disputes Tribunal of New Zealand was held on Tuesday, 24 February 2004, shortly after the appeals had been lodged. The Conference was presided over by myself, as the Chairperson of the Tribunal, and Mr Toogood QC, a Deputy Chairperson.

9. The Tribunal directed, by consent, that all three appeals be heard together.

10. Urgency was sought by all parties, and the Tribunal accommodated that request. It directed that the appeals be accorded the utmost urgency.

11. A strict timetable for the filing of appeals and other steps in the proceedings was then fixed. The Tribunal's Minute of the Conference reads as follows:

"**Minute of Conference; Tuesday, 24th February, 2004**

1. All three appeals, numbered SDT/01/04, SDT/02/04, SDT/03/04, will be heard together.

2. The Tribunal directs that the appeals be accorded the utmost urgency.

3. All persons named as "Interested Parties" in the three appeals are joined as Interested Parties pursuant to Rule 19.1 of the Tribunal's Rules. As such, they shall have the rights and obligations specified in Rule 19.2 of the Tribunal's Rules.

4. The following timetable is affixed:

(1) Yachting new Zealand will file and serve affidavits of such evidence as it proposes to adduce by 5pm on **Friday, 27 February**, next;
(2) Appellants and Interested Parties will file and serve the affidavits of evidence they propose to adduce by 5pm on **Friday, 5 March 2004**.
(3) Yachting New Zealand will file any affidavits it proposes to adduce in reply by 5pm on **Wednesday, 10 March**.
(4) Any party wishing to cross-examine a deponent will file and serve a notice of their request to do so by 5pm on **Thursday, 11 March**. The notice shall specify the matter or matters on which the applicant wishes to cross-examine the deponent and the reasons why such cross-examination is necessary or desirable. Cross-examination will be permitted by leave of the Tribunal only. Such leave will be granted, if it is to be granted, at the hearing, or will be otherwise notified to the parties in writing.
(5) Written submissions need not be filed in advance of the hearing, if there is to be a hearing, unless a party wishes to do so. Written or oral submissions will be received at the hearing. If there is no hearing, the Tribunal will give the parties the opportunity to file and serve written submissions before reading its decision.
(6) Leave to apply is reserved.

5. A hearing date is set down for **Monday, 15 March commencing at 10am**. The hearing date is tentative in that it will be vacated if the Tribunal decides, after consultation with the parties, that no hearing is required.

6. Any question or questions of jurisdiction will be raised and heard at the hearing. If there is no hearing, the question or questions will be ruled on by the Tribunal in its decision.

7. The Tribunal will advise parties of the composition of the Tribunal as soon as possible.

8. The Tribunal will also advise the parties within two days whether the proceedings or any hearing will be open to the public pursuant to Rule 20 of its Rules.

DATED: 24 February, 2004"

12. Since that date the Tribunal has issued several further Minutes directed to achieving a speedy and efficient disposition of these appeals.

13. In a Minute dated 26 February, 2004, the Tribunal directed that the appeals should be heard in public.

Jurisdiction

14. The Tribunal's jurisdiction to hear and determine these appeals is contained in Clause 10.1 and Schedule D of Yachting New Zealand's Nomination Criteria. Apart from the point to be addressed under the heading "Yachting New Zealand's Objection to Jurisdiction", the jurisdiction of the Tribunal has not been contested.

15. Under Rule 24.1 of the Tribunal's Rules, the decisions of the Tribunal are final and binding (apart from an appeal to the Court of Arbitration for Sport) and not to be questioned in any court of law by the parties, including interested parties. This provision is essential in order to provide the parties with the certainty of knowing where they stand and to bring the nomination process to a close so that those nominated can proceed with their preparation for the Games without the distraction of further proceedings. Finality in these appeals is imperative. All parties acknowledge the desirability of achieving this finality and expressly accepted that the Tribunal's decision in these appeals will be final and binding and not to be questioned in any court of law.

Yachting New Zealand's objection to jurisdiction

16. Mr David, senior counsel for YNZ, raised the question whether the Tribunal has jurisdiction to hear the appeals of Andrew Murdoch, and Simon Cooke and Alastair Gair because of the wording of Clause 10.1 and Clause 6.3 of Schedule D. Under those provisions an appeal by a sailor is against "the nomination or non-nomination"

to the New Zealand Olympic Committee. Mr David submitted that the appeals in question are not against the appellants' "nomination or non-nomination".

17. Mr David pointed out that the appellants, who did not win the Olympic trial, had no right to be nominated. Their claims, he argued, appeared to be that the trial winners should not have been nominated by the nomination panel but, rather, that they should have been asked to participate in a further regatta, and that the panel should also, in exercising its discretion, have asked the appellants to participate in that regatta. On this approach, he claimed, the appellants seek to be given a further chance to be nominated under clause 4.3.2A of the Nomination Criteria. The appeals cannot properly be described as being against *their* nomination or against a *non*-nomination. In substance and effect, Mr David argued, the appeals are against the nomination of others, namely Mr Hamish Pepper in Andrew Murdoch's case and Mr Andrew Brown and Jamie Hunt in Simon Cooke and Alastair Gair's appeal.

18. The Tribunal does not agree. It is fundamental that only one sailor or crew may represent New Zealand in any class at the Olympics. In the Tribunal's view the words "against their nomination or non-nomination" must be construed broadly and include a sailor who has not been nominated because another competitor has in fact obtained the nomination. It is true that the appellants in question do not have a right to be nominated, and if they are to be nominated, will need to be given the opportunity to participate in another regatta. But the fact remains that they are sailors who have **not** been nominated. Mr Brabant gave added force to this view by placing the argument in the context of the ground of appeal contained in Rule 6.3 (b) of Schedule D, that is, that the appellants were not afforded a reasonable opportunity to satisfy the applicable Nomination Criteria.

19. We are also fortified in this view, however, by the wording of paragraphs (a), (c) and (d) of Clause 6.3 as well. Paragraph (a) makes it clear that an appellant's appeal lies where the applicable Nomination Criteria was not properly followed or implemented. In such circumstances, another sailor will have been nominated. An appeal under this paragraph is not against that nomination, but against the Nomination Panel's failure to follow or implement the Nomination Criteria. It is difficult to envisage how appeals could arise under this paragraph if they were restricted in the manner suggested by Mr David.

20. Similarly, paragraph (c), although not in point in these appeals, refers to the "nomination decision". The Tribunal believes that the use of the words "nomination decision" points to the correct intent to be attributed to the phrase "nomination or non-nomination". Finally, paragraph (d) also refers to the "nomination decision". It would be anomalous if the allegation that there were no material on which the decision to nominate another sailor could reasonably be based could only be challenged if, at the same time, the Nomination Panel had chosen to specifically reject the nomination of the sailor who was dissatisfied at the outcome.

21. The construction contended for by Mr David would effectively deprive the appeal provisions of significant effect. Appeal rights would be restricted in a manner which cannot have been contemplated by YNZ and would run counter to the clear intention of that body to provide disaffected sailors with a prompt, effective and fair right of appeal.

22. For these reasons we are not prepared to adopt the narrow construction urged upon us by Mr David. To all intents and purposes, the words "against the nomination or non-nomination" are to be construed as referring to the Nomination Panel's decision. If that construction requires a large and liberal interpretation, so be it. The Tribunal is satisfied that it has jurisdiction.

Grounds of appeal

23. Clause 6.3 of Schedule D of the NZOC's Nomination Criteria and Selection Criteria may be repeated. An appeal may only be made on any one or more of the following grounds:

    a. The applicable Nomination Criteria was not properly followed and/or implemented; or

    b. The athlete was not afforded a reasonable opportunity by the NF to satisfy the applicable Nomination Criteria; or

    c. The nomination decision was effected by actual bias; or

    d. There was no material on which the nomination decision could reasonably be based.

24. There is no suggestion that paragraph (c), which refers to actual bias, is invoked in these appeals. The objectivity of the Nomination Panel has not been challenged. Rather, the appeals have been pursued under paragraphs (a), (b) and (d).

25. The grounds of appeal specified by Andrew Murdoch and Simon Cooke and Alastair Gair are substantially the same and read as follow:

"**Grounds of appeal** (the grounds of appeal being limited to any one or more of those specified in Clause 6.3 of the NZOC Nomination Criteria):

a. The Nomination Panel were required to be satisfied that the crew who obtained the highest placing in the 470 Mens Class Nomination Trial met the Overall Criteria specified in Clause 4.7 of the YNZ Nomination Criteria.

b. The Overall Criteria provision was not properly followed and/or implemented

Particulars

(i) The Nomination Panel did not properly understand and apply the requirement of 4.7.1 of the Overall Criteria which stated that the Nomination Panel *must be satisfied* that each Participant and/or Crew *will*, in its opinion achieve a top 10 placing in their class at the Games or, if less than 20 competitors in that class at the Games, a place in the top half of the fleet in their class.

(ii) A correct interpretation and/or implementation of the Overall Criteria restricts the consideration of results of the crew being considered for nomination to only the regattas set out in Schedule 8 to the YNZ Nomination Criteria, unless (as this appeal requests) the Nomination Panel invoked Clause 4.3.2A.

(iii) A correct interpretation and/or implementation of the Overall Criteria in Clause 4.7, required the Nomination Panel to use all of the results of the regattas set out in Schedule B when deciding if they were satisfied a top 10 (or top half of the fleet) placed will be achieved at Athens by the nominated athletes, rather than basing that assessment on some of those regatta results being regattas where places within or close to the top 10 placings were achieved by Andrew Brown and Jamie Hunt.

(iv) The provisions of the Overall Criteria do not allow for the Nomination Panel to have regard to individual races within one or more of the regattas, only the overall regatta result.

c. The Appellants have not been afforded a reasonable opportunity by YNZ to satisfy the applicable nomination criteria.

Particulars

(i) The YNZ Nominations Criteria provided that if the Nomination Panel was not satisfied that the crew which obtained the highest placing in the 470 Men's Class Nomination Trial met the overall criteria specified in Clause 4.7, Clause 4.3.2A and Clause 4.7 (to the extent applicable) would apply in determining the nomination for the 470 Men's Class.

(ii) Clause 4.3.2A provides that the Nomination Panel, if invoking that clause, shall request the 1st crew in the 470 Men's Class to participate in the 2004 ISAF Qualification Regatta and may also request the 2nd and 3rd placed crews in that Nomination Trial to participate in the 2004 ISAF Qualification Regatta. The decision whether or not to nominate athletes to NZOC from the 470 Men's Class for the Athens Olympics would then be made after consideration of the results achieved at that regatta and application of the Overall Criteria in Clause 4.7.

(iii) By erroneously determining that the 1st placed crew in the Nomination Trial achieved the Overall Criteria in Clause 4.7, the Appellants (being the 3rd placed crew in the Nomination Trial) has been prevented from securing nomination in accordance with the procedures set out in Clause 4.3.2A.

d. There was no material available to the Nomination Panel on which the nomination decision could reasonably be based.

Particulars

(i) If the Nomination Panel had correctly applied the provisions of Clause 4.7 of the YNZ Nomination Criteria, it should have considered the regatta results only and not the results of individual races in the regatta.

(ii) Only the regatta results of regattas listed in Schedule B could be considered.

(iii) In considering whether the Overall Criteria could be satisfied, the Nomination Panel was required to consider all of the results attained in those Schedule B regattas the 1st placed crew competed in, and in so doing could not discount or put to one side those results which did not show the capability of a finishing result at the Athens Olympics of 10th better (or in the top half of the fleet) and consider only those regatta results which in the Panel's opinion showed that capability.

(iv) In considering (overall) the material available as to the 1st crew's results in those Schedule B regattas, the Panel was required in order to be satisfied that the Overall Criteria could be met, to have regard to:

- the size of the fleet taking part in each particular regatta
- the quality of the fleet (by reference to ISAF World Rankings and recent performances of participants in the Class World Championships) and the crew's relative performance in the regatta to other crews ISAF ranked 10th or better or otherwise by virtue of a top 10 finish in the most recent World Championships for the Class, within the top 10 crews in the regatta.

e. The results attained by the crew that has been nominated in all of those Schedule B regattas they nominated in all of those Schedule B regattas they competed in, giving appropriate weighting to regatta results to recognise the size and quality of the fleet, are such that no reasonable Nomination Panel could have concluded that the Overall Criteria set out in Clause 4.7 of the YNZ Nomination Criteria were met."

26. The relief sought by these appellants is as follows:

a. Cancellation of the decisions of the nomination panel; and

b. A direction to the Nomination Panel that the provisions of Clause 4.3.2A are to be invoked, and the Nomination Panel is to request the first, second and third placed participants in the Laser Class nomination trial and in the 470 Mens competition trial to participate in the 2004 ISAF qualifications regatta.

27. The grounds of appeal have not been elaborated to the same extent in the Application for Appeal filed on behalf of Melinda Henshaw and Jan Shearer. In summary, their grounds of appeal are, first, that the Nomination Criteria have not been followed and/or that there was no material on which the nomination decision could be reasonably based. In respect of that ground, it is argued that the Nomination Panel construed the matters which it could take into consideration under

clause 4.7 far too narrowly thereby failing to determine that the appellants would achieve a top10 placing in their class at the Games. The second ground is that the appellants were deprived of an opportunity to sail in a Schedule B regatta because the Nomination Panel (and YNZ) failed to delay the decision to give them the opportunity to do so.

28. The relief which the appellants seek is that the Tribunal conclusively determine and direct that they are nominated by YNZ for selection to the New Zealand team for the Olympic Games in Athens.

The Hearing

29. The hearing of the appeals commenced at 10.00 am on Monday 15 March 2004 and concluded at 1pm on Tuesday, the following day. The Tribunal considered its decisions overnight and delivered its decision orally on Wednesday, 17 March 2004. The written decision is provided pursuant to rule 22.3 of the Tribunal's Rules which require the written decision to be completed and sent to the parties within 10 working days.

30. Leave for Mr Thain, who appeared for Ms Henshaw and Ms Shearer, and Mr Brabant, who appeared for Mr Murdoch, and Mr Simon Cooke and Mr Gair, application for leave to cross-examine all members of the Nomination Panel was granted by the Tribunal. Mr Sowry was not available for cross-examination on 15 March and, for that reason, his evidence on cross-examination was taken in advance on Friday 12 March 2004, at 2.15 pm. The cross-examination was conducted before me, as the Chairperson of the Tribunal, as if the evidence were being taken on commission. The transcript of the cross-examination was read into the record at the commencement of the hearing.

31. Mr Nicholas and Mr Beck were cross-examined at the hearing. Mr Simon Wickham, the Chief Executive Officer of YNZ, was also cross-examined. The cross-examinations were followed by counsel's submissions and the submissions of Mr Keen and Mr Pepper.

32. The Tribunal is grateful for the responsible and restrained manner in which the cross-examinations were conducted by counsel. The Tribunal has been considerably assisted in its task of reaching the decisions it has reached by seeing and hearing the members of the Nomination Panel.

The Role of the Tribunal

33. It was common ground between all parties that it was not the role of the Tribunal to substitute its views for those of the Nomination Panel on the merits of the decision as to whether the nominees will or will not achieve a top 10 placing in their class at the Olympics. The limited grounds of appeal set out in the NZOC Nomination Criteria and Selection Criteria are constructed in such a way as to direct the Tribunal's attention to matters of process and procedure. This approach is reinforced by the remedies which may be provided by the Tribunal if it allows an appeal. The relevant parts of rule 12.11.1 of the Tribunal's Rules provide:

> "After hearing the Appeal … the Tribunal may make such orders as are consistent with the applicable rules or policies of the National Sports Organisation . . . , or in the absence of any such orders [as is the case here], any of the following orders –
>
> …
>
> (b) in Appeals relating to Selection or Non-Selection:
>
> (i) allow the appeal and as a matter of usual practice, but in the discretion of the Tribunal, refer the question of Selection back to the National Sports Organisation . . . for determination in accordance with the applicable Selection Criteria;
>
> (ii) allow the Appeal and conclusively determine the issue of Selection of the Appellant if:
>
> (a) it would be impractical to refer the question of Selection back to the National Sports Organisation . . . in the time available in which entries to the relevant event or competition are to be submitted; or
>
> (b) there has been such disregard of the Selection Criteria by or on behalf of the National Sports Organisation . . . that a reasonable person could reasonably conclude that it is unlikely that the Selection Criteria will be properly followed and/or implemented."

34. Mr David submitted that the members of the Nomination Panel were appointed by reason of their experience and expertise and for the purpose of bringing those qualities to bear on the nomination issue. It is fully accepted by the members of the Tribunal that they do not have the necessary expertise to "second-guess" the views of those who have this experience and expertise.

35. In this regard, the approach reflected in the appeal provisions and in the Tribunal's Rules is consistent with the approach consistently adopted in the Court of Arbitration for Sport (to which a limited right of appeal lies from this Tribunal) as demonstrated in such cases as CAS 96/153, *Watt/Australian Cycling Federation and Tyler-Sharman*;

CAS 2000/A/260, *Beashel and Czislowski/Australian Yachting Federation Inc*; and CAS 2000/A/284, *Sullivan/The Judo Federation of Australia Inc, The Judo Federation Inc Appeal Tribunal and Raguz*, to which we were referred. To adopt a similar observation in the *Watt/Tyler-Sharman* case, a tribunal such as this should be careful not to readily trespass into the selection process of a nomination panel which clearly embraces a wealth of experience and expertise it cannot possibly share.

The Tribunal's decision(s)

36. The Tribunal's decisions in respect of each of the appeals are unanimous.

Some preliminary observations

37. The Tribunal has found the resolution of all three appeals extremely trying. It is conscious that the sailors who are involved have spent long hours striving for the chance to represent New Zealand at the Olympic Games. They have made considerable sacrifices. Their commitment can be said to reflect a passion. They have had to struggle for funding. Without exception they are confident of their ability to participate in their class in the Olympic Games, not only with distinction, but also with every prospect of achieving a medal. In all cases, accomplishing that goal represents a long held ambition, an ambition merging into a dream. The opportunity to represent one's country and achieve a high placing, or better, a medal, is one that may never be repeated. In the circumstances, the disappointment to those who do not obtain nomination cannot be other than acute and that is fully appreciated by the Tribunal.

38. We believe that all sailors who have been involved in these appeals are first rate sailors who are a credit to themselves and to the country they seek to represent. The calibre of the sailors is not an issue. The hard reality, however, is whatever selection process is adopted, the final decisions will bear harshly on deserving contestants. The Tribunal can only repeat that it is thoroughly conscious of the disappointment that its decisions in these appeals will cause and reiterate its belief that those sailors who are unsuccessful deserve both credit and recognition for what they have achieved, and it is to be hoped, what they will continue to achieve in sailing regattas around the world.

39. Finally, and still by way of a preliminary observation, the Tribunal would observe that it is sympathetic to YNZ's attempt to provide a nomination process which is effective

and fair to those sailors bent on securing nomination for the Games. However, while YNZ has endeavoured, and no doubt will continue to endeavour, to provide a process which is effective and fair, grievances are inevitable. Because we are dealing with a human activity it is equally inevitable that some of those grievances will prove to be justified. Such grievances cannot in fairness be ignored. The nomination decisions are too critical to those that are affected by them. If they are not vented before this Tribunal, those grievances, or at least some of them, will no doubt be pursued in review proceedings in the High Court. The resulting delay and high costs would be prohibitive and in no one's interest. YNZ is therefore to be commended for promoting an appeal process which is relatively accessible to interested parties and which will ensure that nomination decisions are made as promptly as possible and with fidelity to the applicable Nomination Criteria.

Nomination Criteria

40. The Tribunal proposes to advance its decision by first considering the correct interpretation of the relevant provisions in clause 4, that is, the Nomination Criteria. Having stipulated the correct interpretation, it will then determine whether the Nomination Panel properly followed the Criteria and whether there was material on which the Panel's nomination decisions could be reasonably based.

41. Clause 4.2.1 provides that where a participant or crew in any class obtains an overall placing of 5th or better at the 2003 World Sailing Championships in Cadiz held from 11 to 24 September last, and no other participant or crew obtained an overall placing of 10th or better in those championships, then the participant or crew who were placed 5th or better are to be nominated by the Nomination Panel, unless that panel considers extenuating circumstances apply. No further Class Nomination trial is held for that class. Barbara Kendall, of course, was nominated under this provision.

42. Clause 4.3.1 then provides for the second class nomination trial to be held at Torbay by Yachting New Zealand on 16 to 26 January 2004. That clause reads as follows:

> 4.3.1 If:
>
> (a) in any Class there is no Participant or Crew nominated under clause 4.2 (2003 World Championships); and
>
> (b) that Class has qualified or qualifies at the 2003 World Championships for an Olympic entry under ISAF's Olympic Qualification System to compete in the Games, then

the second Class Nomination Trial for that Class (except Inactive Classes) shall be the Olympic Trials Regatta to be held Torbay Auckland by Yachting NZ on 16-26 January 2004 ("the NZ Class Nomination Trial).

43. The following clause, clause 4.3.2 then covers the nomination of participants or crews to the NZOC. It reads:

> 4.3.2 Following the NZ Class Nomination Trial in clause 4.3.1, the Nomination Panel will nominate to the NZOC the Participant or Crew which obtains the highest placing in the NZ Class Nomination Trial in that Class, **unless**
>
> (a) the Nomination Panel considers Extenuating Circumstances applied to any Participant or Crew in connection with this NZ Class Nomination Trial, in which case clause 4.6 shall apply in determining the nominations for that Class; and/or
>
> (b) the Nomination Panel considers that the Participant or Crew would not achieve the Overall Criteria specified in clause 4.7, in which case clause 4.3.2A and clause 4.7 (to the extent applicable) shall apply in determining the nominations for that Class.
>
> This clause is also subject to clause 4.8 (crew changes).

44. Clause 4.3.2A was added to the Nomination Criteria by an amendment which was effective from 1 November 2003. The first part of the clause and paragraphs (a) and (b) cover the contingency where the participant or crew who obtained the highest placing at the Nomination Trial would not achieve the Overall Criteria specified in clause 4.7.1, to be set out shortly. That part of clause 4.3.2A which is particularly relevant reads:

> 4.3.2A If the Nomination Panel considers that the Participant or Crew ("the First Participant or Crew") who or which obtained the highest placing in the NZ Class Nomination Trial in that Class in clause 4.3.2, would not achieve the Overall Criteria specified in clause 4.7 as at the date nominations are due to be determined after such Trial (see clause 6.1), the following shall apply:
>
> (a) The Nomination Panel shall request the First Participant or Crew to participate in the 2004 ISAF Qualification Regatta; and
>
> (b) The Nomination Panel may also request the Participants or Crews who or which were placed second ("Second Participant or Crew") and/or third ("Third Participant or Crew") in the NZ Class Nomination Trial in that Class, to participate in the 2004 ISAF Qualification Regatta; and,
>
> …….

45. A procedure then follows in which the first participant or crew obtains priority in being considered for nomination. That participant or crew are to be nominated if the

nomination panel considers that they would achieve the Overall Criteria in clause 4.7. If the first participant or crew do not obtain nomination, the Nomination Panel considers the second participant or crew. If they do not obtain nomination, the third participant or crew are considered. In both cases, compliance with the Overall Criteria in clause 4.7 is required before any nomination can be made.

46. Throughout these clauses, reference is from time to time made to the Nomination Panel's ability to consider Extenuating Circumstances. Such circumstances are dealt with in clause 4.6, which will be referred to later.

47. Consideration then moves to the Overall Criteria. Clauses 4.7.1 and 4.7.2 may be set out in full. The critical wording which falls for interpretation has been stressed.

> 4.7.1 In considering nominations for all Classes specified in clauses 4.3 to 4.5 inclusive, the Nomination Panel **must be satisfied** that each Participant and/or Crew **will**, **in its opinion**,:
>
> (a) **achieve a top 10 placing** in their Class at the Games, or,
>
> (b) if less than 20 competitors or crews (as the case may be) in that Class at the Games, will achieve a place in the top half of the fleet in their Class at the Games.
>
> 4.7.2 Subject to clause 4.3.2A, the assessment as to whether the placing in clause 4.7.1 can be achieved, **will be determined** by the Nomination Panel **considering** the results of Participants and Crews in their relevant Classes at:
>
> (a) **the regattas set out in Schedule B** and,
>
> (b) if the Nomination Panel considers necessary, or as set out in clause 4.3.2A, requesting the participation of the relevant Participants and/or Crews in the 2004 ISAF Qualification Regatta, and assessing their results at such regatta.

Consideration of the Overall Criteria

48. The first point which calls for clarification is the reconciliation of the wording of clause 4.3.2(b) and the wording of clause 4.7.1. Mr Thain pointed out that under clause 4.3.2(b) the Nomination Panel is obliged to appoint the participant or crew who obtains the highest placing, **unless** it considers that they " would not achieve the Overall Criteria" specified in clause 4.7. The latter clause, on the other hand, requires the Nomination Panel to be satisfied that the participant or crew will, in its opinion, achieve a top 10 placing in their class at the Games. Essentially, Mr Thain's point is that the negative wording of clause 4.3.2(b) is less stringent than clause 4.7.1

and, if met, does not require or permit the Nomination Panel to proceed to consider clause 7.1 at all. That then is the end of the matter.

49. The Tribunal considers that this construction is untenable. Clause 4.7 provides the Overall Criteria and must be referred to "in considering nominations for all Classes specified in clauses 4.3 to 4.5 inclusive". The negative wording in clause 4.3.2(b) is an effective way of incorporating a consideration of clause 4.7.1. In other words, if having applied that clause, the Nomination Panel is not satisfied that the participant or crew will achieve a top 10 placing in their class at the Games, the Nomination Panel has at the same time considered that the participant or crew would not achieve the Overall Criteria spelt out in clause 4.7. The two clauses are to be read sensibly together.

50. The Tribunal entertains no doubt about the critical function of clause 4.7. It is described as the "Overall Criteria" and is repeatedly referred to in the other clauses setting out the Nomination Criteria. It is a dominant provision, and for that reason the Tribunal has given close attention to its meaning. We believe that the requirement that the Nomination Panel must be satisfied that the participant or crew will, in its opinion, achieve a top 10 placing at the Games can fairly be described as a stringent requirement. The words "must be satisfied" and "will achieve" indicate this stringency. In context, the insertion of the words "in its opinion" does not add a great deal, if anything, to the requirement that the Panel "must be satisfied". It cannot legitimately be anyone else's opinion, and the standard is still a level of conviction which would meet the requirement that the Panel "must be satisfied" that the sailor "will achieve" the top 10.

51. Clause 4.7.2 then sets out how the Nomination Panel is to assess whether the top 10 placing will be achieved. The clause confirms that the criteria in clause 4.7 is circumscribed, as we will point out in more detail shortly.

52. The Tribunal considers that the stringency of this requirement is intended. It both defines and constrains the scope and extent of the subjective evaluation which is introduced into the Nomination Criteria. Regarding the nomination regime as "essentially a first past the post" system, YNZ would not have wished to broaden the Nomination Panel's discretion beyond that necessary to determine that the participant or crew who had won the Nomination Trials in any particular class would achieve a top 10 placing in their class at the Olympics. Participants and crews whom the

Nomination Panel could not be satisfied would achieve this standard would not to be nominated to go forward to what is the pinnacle of world class competition.

53. It follows from this perception that the Nomination Panel cannot neglect or depart from the terms or stringency of the requirement of clause 4.7. We would stress that the Tribunal does not contend for a mechanical approach. The Nomination Panel must by implication be vested with a latitude as to what it may properly consider under the clause. But that latitude is necessarily bound by the terms and stringency of the requirement that the Panel is to be satisfied that the sailors concerned will be placed in the top 10 at Athens. It cannot be so satisfied without recourse to hard evidence; that is, a proper consideration of the results of the regattas set out in Schedule B.

54. We are, of course, fully aware from Mr Wickham's evidence that YNZ places considerable stock on the fact that the Nomination Criteria is "essentially a first past the post" system. That may well be so in the sense that the winner of the Trials retains preference throughout the criteria, but the notion that the Nomination Criteria are essentially a first past the post system cannot be permitted to dilute the terms or stringency of the requirement under clause 4.7. Speculation, unverified assumptions, and optimism, are excluded. Only hard evidence of the kind contemplated in clause 4.7.2 can support the Nomination Panel's conviction that the sailors concerned will, not may, finish in the top 10. Their experience and expertise is to be brought to bear in that context.

55. The Tribunal's acknowledgment that the Nomination Panel possesses a degree of latitude in applying clause 4.7 follows from the fact that the Panel's opinion is necessarily predictive. It purports to predict the participant or crew's standing at a future date. There is obviously scope for the exercise of judgement based on the Panel's expertise and experience in making this prediction. What the Panel cannot do, however, is depart from the terms of clause 4.7 or lower the stringent standard specified in that clause.

56. It may be helpful to refer to certain of the concepts or notions averted to during the course of the hearing in order to bring out the essential meaning of clause 4.7.

57. Take first the notion that the participant or crew are "capable" of being placed in the top 10, or are "capable" of being placed in the top 10 subject to certain future events or conditions occurring. Such an approach is not permissible. Capability is not the

test prescribed by the clause. It invokes a speculative element as to a yet unproven capability. A person may hold the firm view that a particular sailor is capable of being placed in the top 10, but decline to venture the view that he or she **will** achieve that placing.

58. Nor will the "potential" of a participant or crew ordinarily be a valid consideration. We say "ordinarily" because there may be some circumstances where a sailors potential has been so conclusively demonstrated that it would be artificial to ignore it, but it would need to be compelling. For the most part, consideration of a participant or crew's potential would be outside the scope of the Nomination Panel's task under clause 4.7. To speak of a sailor's potential to finish in the top 10 is at once to admit of the possibility that this potential may never be realised. It implies a speculative element. In other words, to believe that a sailor has the potential to be placed among the top 10 falls short of a belief that the sailor **will** be placed in the top 10. Generally speaking, of course, the potential of an athlete seeking Olympic selection should have been demonstrated already, especially in a sport where consistency is a recognised virtue.

59. Take next, the consideration that the participant or crew can be expected to improve their performance by the date of the Olympics. Again we would not rule out the possibility that there may be cases where this may be a valid consideration, but it needs to be resorted to with care. It is to be borne in mind that other international sailors who are contenders for the Olympics will also be improving their performances over the same period. Among these overseas contenders are professional sailors who are not funding themselves out of their "back pocket" and receiving only limited outside resources. To take into account, and then rely on, a participant or crew's capacity to improve in order to be satisfied that they will finish in the top 10 is therefore likely to be inappropriate unless the Nomination Panel can reasonably conclude that their rate of improvement would be more rapid than the improvement that can be taken as a given among top international competitors generally. In this context, it is permissible to note that Mr Beck's frank statement in evidence that it could not be said that any of the appellants will finish in the top 10 without improvement is worrying.

60. What these examples confirm is that any factor which involves an element of speculation, or is based on an unverified assumption, or which reflects a benign measure of confidence or optimism in the sailor's ability is clearly outside the latitude

which the Nomination Panel possesses. While the members of the Panel may, of course, utilise their experience and expertise, that experience and expertise, and any judgement or opinion arising out of that experience and expertise, cannot be permitted to displace the need for the Panel's decision to accord with the terms of clause 4.7.

Clause 4.7.2

61. We return to clause 4.7.2. Clause 4.7.2, it will be recollected, spells out how the assessment under clause 4.7.1 is to be "determined". Whether or not the participant or crew will achieve a top 10 placing at the Games is to be determined by the Panel considering the results of the participant and crew in the regattas set out in Schedule B. One would think that the direction is specific and plain, but one would reach that thought without regard to the boundless ingenuity of lawyers.

62. Clause 4.7.2 confirms the stringency of the criterion in clause 4.7.1. In reaching its determination, the Nomination Panel's consideration is channeled into a consideration of the results of regattas in Schedule B. The Panel's experience and expertise must be exercised or brought to bear in that framework.

63. The first question which needs to be resolved is whether the Nomination Panel can have regard to the World Championships. Those Championships are not expressly mentioned in Schedule B. It is common ground, however, that the World Championships provide, or can provide, a better guide to the question whether a participant or crew will obtain a top 10 placing at the Games than the regattas actually referred to in the Schedule. It would seem absurd to exclude reference to the World Championships, more particularly as those Championships form the core of clause 4.3.2A. The Tribunal is reluctant to be even mildly absurd. Whether the basis for a purposive interpretation is filling in an obvious gap in the drafting or importing a necessary implication, we take the view that, in considering the results of the regattas specified in Schedule B, the Nomination Panel is entitled to have regard to the World Championships.

64. A more vexed question is whether the Nomination Panel can look beyond the participant's and crew's overall result in a regatta and have regard to the results of individual races in those regattas. We would certainly not preclude the Nomination Panel having regard to individual races in certain circumstances. For example, as

explained to us, a participant's or crew's ability to finish in, say, the first three places while not achieving a commendable overall result, may establish that the participant or crew has the capacity to emerge from the fleet. But in itself a favourable individual result or results would generally fall short of meeting the terms and stringency of clause 4.7. There is something decidedly uncomfortable about a process which selects favourable individual results in an effort to discharge those terms and the stringent test they convey, but which fails to offset those results with the unfavourable results. Generally speaking, the ability to discard one or two bad race results, as permitted in a particular regatta, will point to the overall result being a more sure guide to the question whether the participant or crew will finish in the top 10.

65. The Tribunal therefore takes the view that, in the context of the Nomination Criteria and clause 4.7 itself, the primary requirement is for the Panel to have regard to the results of the regattas rather than the results of individual races. Individual results can be taken into account, but cannot to the point where the Panel effectively loses sight of this primary requirement and the necessity to be satisfied that the participant or crew will appear in the top 10 at Athens.

66. Further, when considering the results of the regattas set out in Schedule B, including the World Championships, we consider that it is implicit that a distinction be drawn between qualifying races and Gold or final fleet races. The Nomination Panel's task is to be satisfied that the participant or crew will finish in the top 10 of an international fleet at the Olympics, and it would be inappropriate to give the result of qualifying races the same weighting, or much the same weighting, as the more competitive final races when determining that question. Again, therefore, while we would not exclude consideration of qualifying races altogether, we believe that the use made of them in determining whether the participant or crew will figure in the top 10 of the world's best sailors must necessarily be circumspect.

67. Finally, the Tribunal does not consider that clause 4.7 mandates any particular method or approach to the question of determining whether the Nomination Panel is satisfied that the participant or crew will achieve a top 10 placing. Clearly the methodology adopted must be sound and consistent with the Panel's task under clause 4.7. It must be sufficient to enable the Panel to discharge its responsibilities under that clause. In some cases, such as that of Sarah Macky, little in the way of analysis or methodology would be required. Yet in other cases the Nomination Panel

may need to undertake a closer analysis and adopt a more sophisticated methodology in order to ensure that it can properly determine whether the criteria in clause 4.7 will be met.

Extenuating Circumstances

68. In reaching its decision on Mr Pepper's nomination, the Nomination Panel took into account the fact that he had been injured during the 2003 World Championships in Cadiz and had withdrawn before completing the regatta. This incident brought Mr Pepper within the definition of "Extenuating Circumstances" in Yachting New Zealand's Regulations. The term is defined in clause 2.1 to mean:

> "circumstances outside of the control of the Participant or Crew which resulted in either their performance being adversely affected in the Class Nomination Trial or the 2003 World Sailing Championships or them not competing in the 2003 World Sailing Championships, or the relevant Class Nomination Trial, resulting from injury or illness of the Participant or Crew, travel delays, bereavement or other such circumstance as the Nomination Panel reasonably considers constitutes extenuating circumstances."

69. It is significant that the phrase is defined in such a way as to limit its application to the named regattas; the term is not intended to apply to circumstances arising in connection with other Schedule B regattas to which no specific reference is made in the definition in clause 2.1.

70. The question arose whether, in considering the Overall Criteria under clause 4.7, the Nomination Panel is permitted to make allowances for illness or injury or other problems coming within the definition of Extenuating Circumstances, unless the procedure in clause 4.6 (and in clause 4.6.3, in particular) has been followed. We can take that clause as read in this decision.

71. In our view, but not without some hesitation, clause 4.6 has no application to this case. The purpose of clause 4.6 can be inferred from the other clauses which refer to it, namely clauses 4.2.1, 4.3.2, and 4.5. Those provisions require the Nomination Panel to nominate sailors who meet the relevant criteria at the particular Class Nomination Trials described (including the World Championships) unless **another** participant or crew suffers Extenuating Circumstances in connection with those regattas. In other words, the procedure in clause 4.6 is designed to provide relief for a potential nominee in circumstances where another sailor would be nominated in the absence of the Extenuating Circumstances. To take the Laser nomination as an

example, clause 4.6 might have assisted Mr Pepper to prevent Mr Murdoch's nomination under clause 4.2.1 if Mr Murdoch had gained a top 5 placing at the World Championships and Mr Pepper had followed the procedure in clause 4.6.3.

72. Consequently, although the application of the Extenuating Circumstances regime as described in clause 4.6.1 appears to be worded generally, the specific references to the clause in the earlier provisions referred to; its limited definition and purpose; and the absence of any reference to it in clause 4.7, indicate that the provision must sensibly be interpreted so as not to impose any fetter on the Nomination Panel's discretion in considering the Overall Criteria under clause 4.7. As Mr David argued, it would make no sense to interpret clause 4.6 in a way which meant that the Nomination Panel was precluded from considering the implications of Mr Pepper's injury at the World Championships when there would be no limitation on it considering any injury suffered by him at some other regatta.

The Appeal of Jan Shearer and Melinda Henshaw

73. The appeal of Ms Shearer and Ms Henshaw can be quickly disposed of. In the first place the Tribunal's interpretation of the nomination criteria and, in particular, clause 4.7 does not assist the appellants. Mr Thain contended on their behalf that the Nomination Panel has a wide discretion and can look beyond the Schedule B regattas specified in clause 4.7.2. He would seek to include among the relevant factors their general sailing ability, their potential, their likely improvement, and other such general factors. We consider that the panel would have been in error to extend the scope of clause 4.7 in this manner.

74. While the Tribunal may not have been inclined to treat the presence of one result in the Schedule B regattas as a "threshold" requirement, the absence of such regatta results created a dearth of evidence on which the Nomination Panel could have been satisfied that the crew would obtain a top 10 placing in the 470 Women's class at the Olympics. The notion of a threshold requirement as invoked by the Panel creates the impression that just one regatta result would suffice to permit the Panel to have regard to, not only that result, but other factors as well. Cross the threshold and the Panel's discretion, previously precluded, becomes unlimited! We remain skeptical that such a formalistic approach is contemplated by clause 4.7. Further, we share the

doubt that one regatta sailed by the appellants would have added a great deal to the Nomination Panel's appreciation of the prospect of the pair finishing in the final 10 at the Games.

75. In the second place, Ms Henshaw and Ms Shearer entered the trials knowing that they had not raced in a regatta listed in Schedule B. They knew the Nomination Criteria, they had agreed to those Criteria and they had accepted that the winner of the trial would be assessed in accordance with those Criteria.

76. Further we consider that the appellants would, or should, have been aware of the importance of racing in international regattas. As Mr Telle pointed out, past criteria have permitted YNZ to consider crews' performances in other regattas for the purpose of nomination. We therefore decline to accept that Ms Shearer and Ms Henshaw would not have been fully alert to the advantages of a favourable record in one or more of the regattas contained in Schedule B, more particularly as they knew that the Nomination Panel would have to be satisfied as to their international prowess.

77. In the third place, we do not accept that the appellants were not afforded a reasonable opportunity to satisfy the applicable Nomination Criteria, within the meaning of those words in clause 6.3 of Schedule D. Having reached the conclusion that they could not be satisfied that Ms Shearer and Ms Henshaw would obtain a top 10 placing, the Nomination Panel were under no obligation to defer their decision in order to give the pair an opportunity to compete in a Schedule B regatta. This point is reinforced by the fact, already referred to, that the result of one regatta would have added little to the evidence required by the Panel to determine whether they would finish in the top 10 at the Games.

78. Finally, even if the appellant's contentions were correct, the Tribunal could not grant any effective relief. The regattas in Schedule B are now historical. They cannot be raced, or raced again. In the result, a failure to afford the appellants a reasonable opportunity to satisfy the Nomination Criteria, if established, does not mean that clause 4.3.2A should not be invoked.

79. Mr Thain presented a further argument, based on submissions prepared by Ms Henshaw and Ms Shearer, which relied upon an alleged inconsistency between the NZOC Nomination Criteria and Selection Criteria; the summary of the NZOC

Nomination Criteria and Selection Criteria which were produced as an attachment to Ms Browne's affidavit; and Yachting New Zealand Nomination Criteria Regulations. The point related to the extent to which the Panel was entitled to look at factors other than the Schedule B regatta results in determining the overall criteria under clause 4.7, and was advanced in support of a broad view of the discretion invested in the Nomination Panel.

80. As was established through the exchanges of counsel and the helpful contribution of Mr Cameron on behalf of NZOC, this submission was based on a misunderstanding of the factual position. It was made clear to us that the documents upon which the argument of inconsistency was based were either drafts or earlier versions of criteria which were subsequently superseded. YNZ's Regulations were ratified by NZOC after the amendment to the Nomination Criteria was promulgated with effect from 1 November 2003. The effect of that ratification was that no tenable inconsistency could be alleged between the NZOC document and YNZ's Regulations. We are more than ready to accept this view as it would be unsatisfactory for sailors to have to look beyond YNZ's Regulations, one, to determine, whether there was an inconsistency and, two, in order to know what their obligations and rights might be.

81. The Tribunal does not believe that the Nomination Panel was in error and Ms Shearer and Ms Henshaw's appeal is therefore dismissed.

82. Costs will lie where they fall.

The Appeal by Andrew Murdoch

83. The Tribunal believes that it is impossible to reconcile the Nomination Panel's decision to nominate Hamish Pepper in the Laser class with the correct interpretation and application of the Nomination Criteria. Evidence on which the Nomination Panel could base its judgment, or be satisfied that Mr Pepper will achieve a placing in the top 10 in the Laser class at the Olympics, is minimal. The hard facts available under clause 4.7.2 leave little, if any, scope for the exercise of the Panel's experience and expertise.

84. Of the four regattas available to the Nomination Panel, two were, to use Mr Sowry's phase "virtually worthless". The results achieved by Mr Pepper in the World

Championships could not support a conviction that he would finish in the top 10. His results in the European Grade One regatta were hardly impressive; nor was his performance in the SIRS regatta late last year. The Nomination Panel could not properly pretend, and indeed did not openly contend, that this record demonstrated the degree of consistency that might be expected of a sailor expected to finish in the top 10 in the world. It is no doubt for this reason that the Nomination Panel focused on Mr Pepper's performance in the New Zealand National regatta. But an analysis of this regatta also falls short of establishing with any degree of certainty that Mr Pepper will obtain a top 10 placing.

85. As if conscious of the dearth of pertinent evidence on which to bring its experience and expertise to bear, and be satisfied that Mr Pepper achieve the requisite placing, the Panel resorted to results in individual races to the point, we believe, where they lost sight of the primary requirement to consider the overall result of the Schedule B regattas. As we have said, a proper interpretation of clause 4.7 precludes an excessive reliance on individual results. The Nomination Panel were also clearly influenced by Mr Pepper's potential and their expectation that he would improve significantly by the time of the Olympics. We have already commented on the improper use of factors such as these in determining the criteria in clause 4.7. In the result, the Tribunal are at a loss to know how the Panel, acting with fidelity to the Nomination Criteria, could be satisfied Mr Pepper will achieve a top 10 placing at the Games.

86. This is **not** to say, and we emphasise that this is **not** to say, that should Mr Pepper ultimately be nominated, he may not finish in the top 10 and even win a medal. He is undoubtedly a talented sailor. But confidence in Mr Pepper's ability does not displace the requirements of clause 4.7. What the Tribunal is saying is that at the time of their decision, the Nomination Panel could not reasonably be satisfied on the material available that Mr Pepper will - not may, possibly or probably - finish in the top 10 in accordance with the requirements of that clause.

87. Obviously the appeal must be allowed.

88. As stated above, the Tribunal's usual course in a situation such as this would be to remit the matter back to the Nomination Panel to reconsider in accordance with the interpretation of clause 4.7 which must now prevail. But all such situations are a

matter of fact and degree. The facts in this case and the degree of the departure from the Nomination Criteria are exceptional and, we believe, warrant a direction. It will also bring this matter to finality. We therefore propose to invoke the power contained in clause 12.11.1(b)(ii)(b) of the Tribunal's Rules and issue a direction. We wish to emphasis that the Tribunal is **not** exercising a power of nomination or selection. Mr Pepper won the trial and remains the front runner under the YNZ's Regulations. The Tribunal's sole concern is to ensure that these Regulations are adhered to in fairness, not only to the nominated sailor, but also to other contenders who have also agreed to, and abided by, the Regulations.

89. The Tribunal therefore cancels the Nomination Panel's decision and directs that the Panel and/or Yachting New Zealand invoke the provisions of clause 4.3.2A and request the first, second and third placed participants in the Olympic Trials of the Laser class to participate in the 2004 World Championships, and then to consider the nomination in terms of that clause.

90. Although it is usual practice to allow costs to rest where they fall as stated in the Tribunal's Rules, Rule 25 allows the Tribunal to award costs to a party in certain circumstances. We should hear counsel on the question of costs in this appeal following the completion of the decision.

The Appeal by Simon Cooke and Alastair Gair.

91. The Tribunal has found the appeal by Simon Cooke and Alastair Gair more difficult. The fact remains however, that the analysis of Mr Brown and Mr Hunt's performances traversed at the hearing has revealed a number of shortcomings in the justification put forward by the Nomination Panel for their conclusion that they will finish in the top 10 at Athens. Further, individual races were taken into account in a way which again suggests that the panel lost sight of the primary focus of clause 4.7.2. Qualifying results were also, in our view, overused having regard to the fact of the objective of referring to regatta results is to determine whether the crew will achieve a top 10 placing among the best sailors in the world. Much the same shortcomings in applying clause 4.7 as beset the Panel in assessing Mr Pepper as a place getter in the top 10 are present in this case, although clearly not so marked.

92. The Tribunal is left with the impression that the Nomination Panel was possibly overwhelmed by the notion that the Nomination Criteria was essentially a first past the post system of nomination. As we have said when addressing the interpretation of clause 4.7, that may be so in so far as the winners of the Olympic Trials are given preference throughout the Nomination Criteria, but it is not a reason to dilute the terms and stringency of the specific criteria prescribed in clause 4.7. Those criteria cannot be strained in order to maintain the perceived integrity of the first past the post system. Nor can the merits of a winner at the Trials be stretched to bring the sailor within that criteria for the same purpose.

93. In the result, the Tribunal are not satisfied that the Nomination Panel has determined whether Mr Brown and Mr Hunt would achieve a placing in the top 10 at the Games in accordance with clause 4.7 properly interpreted. But the Tribunal does not consider that this is a case where it should take the extreme step of issuing a direction. Rather, the Tribunal will allow the appeal and cancel the Nomination Panel's decision. The matter is remitted back to the panel for reconsideration in the light of the interpretation contained in this decision and having regard to any new material that has emerged in the course of this hearing. While it is a matter for the Nomination Panel to decide, the Tribunal would assume that, if clause 4.3.2A is invoked, the Tribunal would request the first, second and third place-getters at the Trials to also participate in the World Championships.

94. Having regard to the fact that Mr Nicholas excused himself from the Nomination Panel in respect of the original decision, the Tribunal would suggest that YNZ might like to consider appointing a further member to the Panel so that the matter will be reconsidered by a panel with the full compliment of three members.

95. Costs in this appeal will lie where they fall.

[The Tribunal heard counsel for Mr Murdoch and YNZ on the question of an award of costs under Rule 25.2. It ordered YNZ to pay $500.00 to Mr Murdoch, that being a sum equivalent to his filing fee on the appeal. It declined to award any further costs on the basis that it had already commended YNZ for adopting an appeal procedure which was effective and fair to all sailors, and one which would bring the dispute to a speedy and final close.]