

FINAL AWARD ON COSTS

rendered by the

**COURT OF ARBITRATION FOR SPORT**

sitting in the following composition

**Panel**

President: The Hon Justice Tricia **Kavanagh**, Sydney, Australia

Arbitrators: The Hon John **Winneke** QC, Melbourne, Australia

Alan J. **Sullivan** QC, Sydney, Australia

Clerk: Tim Holden, Sydney, Australia

between

**SEVDALIN MARINOV**

represented by Mr Paul Hayes, Barrister instructed by John McMullan of McMullans Solicitors, Melbourne, Australia

- Appellant -

and

**AUSTRALIAN SPORTS ANTI-DOPING AUTHORITY**

Represented by Mr Anthony Nolan, SC, Melbourne instructed by Mr Ian Fullagar of Lander & Rogers Lawyers, Melbourne, Australia

- Respondent -

Date of award: 20 December 2007

## AS TO COSTS

1. The Appellant successfully appealed an Award of the Court of Arbitration for Sport (CAS), Ordinary Division, published on 9 June 2007 (which incorporated two Partial Awards made by the Tribunal on 9 May 2007 and 1 May 2007). The Appellant's conviction for an Anti-Doping Rule Violation under the 2002 Australian Weightlifting Federation (AWF) Anti-Doping Policy, namely, "possession of prohibited substances, being anabolic and androgenic steroidal agents" was set aside (see *Sevdalin Marinov v Australian Sports Anti-Doping Authority*, CAS 2007/A/1311, 26 September 2007).
  
2. The Appellant makes two applications: the first, for costs of the appeal and, in the second, the Appellant appeals the costs order given against him in the primary hearing held before the CAS Ordinary Division and asks for Costs.
  - (a) As to Costs on Appeal:

The Appellant has succeeded on appeal.

The CAS Court Office notified the Appellant on 6 July 2007 relevantly as follows:

Pursuant to art.R64.2 of the Code of Sports-related Arbitration (Edition 2004) . . .

The estimate includes the CAS administrative costs and the costs and fees of the Sole arbitrator.

Accordingly, the first advance of costs in the arbitration **CAS 2007/A/1311 Sevdalin Marinov v/ASADA** shall be fixed at AUD 16,000 (sixteen thousand Australian Dollars).

The total amount shall be paid in equal shares by the Appellant on one hand and the Respondent on the other hand.

    - AUD 8'000 (eight thousand Australian Dollars) by Sevdalin Marinov
    - AUD 8'000 (eight thousand Australian Dollars) by ASADA.

The Appellant paid the \$8000 to advance his appeal and claims a reimbursement of these costs.
  - (b) As to the Cost Award of the CAS Ordinary Division, the Appellant received the following Costs order:
    4. The appellant is to contribute the sum of \$7000 towards . . . (ADASA's) costs to be paid within 60 days of this Award unless the parties come to an arrangement for payment to be made on terms suitable to them.
    5. The costs of the arbitration, to be determined by the CAS Court Office and served on the parties in due course, shall be borne by the parties in the following proportions: 50% of the costs by (the Appellant) and 50% of the costs by (the Respondent).
  
3. The Appellant also makes application for his filing costs before the CAS.
  
4. There are three documents affecting these two costs applications before the Panel:
  - (1) The Orders of Procedure for the CAS Ordinary Division and the CAS Appeal Division;
  - (2) the CAS Rules; and

(3) the AWF Anti-Doping Policy.

5. The effect of each of the relevant provisions contained in these documents has been raised in submissions. The relevant provisions are as follows.

## **THE ORDERS OF PROCEDURE OF CAS**

6. Both Arbitrations were conducted under CAS Orders of Procedure. By agreement, the parties contracted in the following terms:

### **The Code**

. . . the parties agree that the arbitration will be conducted by CAS according to the Code of Sports-related Arbitration, **(the Code)**, . . .

(Clause 3 of both Orders of Procedure).

### **Law Applicable to the Merits**

The law of the merits, being the substantive law of the dispute, shall be the law of the State of Victoria.

The parties agree that the 2002 Anti-Doping Policy of the Australian Weightlifting Federation is the relevant policy which applies in this dispute.

(Clauses 7.1 and 7.2 of both Orders of Procedure).

### **Costs**

The parties acknowledge Rule 64 of the Code and reserve their position on costs.

(Clause 15 of the Order of Procedure, for Ordinary Division hearing; Clause 16 of the Order of Procedure, Appeals Division.)

## **THE CAS RULES AS TO COSTS**

7. Under the Procedural Rules of the CAS Code, the relevant rules as to costs are Rules 38, 64 and 65.

### **Part B - Special Provisions Applicable**

#### **R38 Request for Arbitration**

The party intending to submit a reference to arbitration under these Procedural Rules shall file a request with the CAS containing:

- the name and address of the Respondent;
- a brief statement of the facts and legal argument, including a statement of the issue to be submitted to the CAS for determination;
- the Claimant's request for relief;

- a copy of the contract containing the arbitration agreement or of any document providing for arbitration in accordance with these Procedural Rules;
- any relevant information about the number and choice of the arbitrator(s), in particular if the arbitration agreement provides for three arbitrators, the names and addresses of the arbitrator chosen by the claimant from the CAS list of names.

*Upon filing its request, the Claimant shall pay the Court Office fee provided in Article 64.1. (emphasis added)*

...

## **Part F - Costs of the Arbitration Proceedings:**

### **R64 In general**

**R64.1** Upon filing of the request/statement of appeal, the Claimant shall pay a minimum Court Office fee of Swiss francs 500. -, without which the CAS shall not proceed. The CAS shall in any event keep this fee. The Panel shall take it into account when assessing the final amount of the fees.

**R64.2** Upon formation of the Panel, the Court office shall fix, subject to later changes, amount and the method of payment of the advance of costs. The filing of a counterclaim or a new claim shall result in the calculation of separate advances.

To determine the amount to be paid in advance, the Court Office shall fix an estimate of the costs of arbitration, which shall be borne by the parties in accordance with Article 64.4. The advance shall be paid in equal shares by the Claimant and the Respondent. If a party fails to pay its share, the other may substitute for it; in case of non-payment, the request/appeal shall be deemed withdrawn; this provision shall also apply to any counterclaim.

**R64.3** Each party shall advance the cost of its own witnesses, experts and interpreters.

If the Panel appoints an expert or an interpreter or orders the examination of a witness, it shall issue directions with respect to an advance of costs, if appropriate.

**R64.4** At the end of the proceedings, the Court Office shall determine the final amount of the cost of arbitration, which shall include the CAS Court Office fee, the administrative costs of the CAS calculated in accordance with the CAS scale, the costs and fees of the arbitrators calculated in accordance with the CAS fee scale, a contribution towards the expenses of the CAS, and the costs of witnesses, experts and interpreters. The final account of the arbitration costs may either be included in the award or communicated separately to the parties.

**R64.5** 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 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.

**R65 Disciplinary Cases of an International Nature Ruled in Appeal**

**R65.1** Subject to Articles R65.2 and R65.4, the proceedings shall be free.

The fees and costs of the arbitrators, calculated in accordance with the CAS fee scale, together with the costs of the CAS are borne by the CAS.

**R65.2** Upon submission of the statement of appeal, the Appellant shall pay a minimum Court Office fee of Swiss francs 500. - without which the CAS shall not proceed and the appeal shall be deemed withdrawn. The CAS shall in any event keep this fee.

**R65.3** The costs of the parties, witnesses, experts and interpreters shall be advanced by the parties. In the award, the Panel shall decide which party shall bear them, or in what proportion the party's shall share them, taking into account the outcome of the proceedings, as well as the conduct and financial resources of the parties.

**R65.4** If all circumstances so warrant, the President of the Appeals Arbitration Division may decide to apply Articles 64.4 and 64.5, 1<sup>ST</sup> sentence, to an appeals arbitration, either ex officio or upon request of the President of the Panel.

**THE AWF ANTI-DOPING POLICY**

8. Clause 10 of the AWF Anti-Doping Policy states:

10.1 A person (including the AWF) aggrieved by a decision under this Policy may appeal to the CAS Appeals Division.

10.2 The CAS Appeals Division will rehear the matters appealed against as set out in Code of Sport-related Arbitration.

10.3 A party to the appeal may:

(a) appeared in person (a body corporate may be represented by any of its officers), or

(b) be represented by a legal or other representative.

10.4 The decision of the CAS Appeals Division will be final and binding on the parties to the appeal. No person (including the AWF) may institute or maintain proceedings in relation to the appeal in any court or tribunal other than the CAS Appeals Division.

- 10.5 The sanction will remain in force during the appeal unless the CAS Appeals Division decided otherwise.
- 10.6 Where the CAS upholds the appeal (on any ground), the person who brought the appeal shall not be entitled to costs incurred by reason of the hearing before the Hearing Committee or the CAS or any compensation of any kind from the AWF, its officers or members.
- 10.7 Any person who appeals to the CAS shall be liable for the costs and related expenses of the CAS Appeals Division.

9. The Respondent in its submission on costs before the Ordinary Division opined that CAS Rule 65 applied and now submits that Clause 10 of AWF Anti-Doping Policy is applicable.

## HISTORY

10. Prior to January 2004, the rules of the CAS Code differentiated not only between the costs of the proceedings (administrative costs) and the costs of the parties (legal costs) but also in terms of ordinary arbitrations and appeal arbitrations. Effective 1 January 2004, the CAS Code was amended by the International Council of Arbitration for Sport (ICAS) to remove the costs differentiation between arbitration proceedings in the Ordinary Division and the Appeals Division. The amendments also allowed for first instance domestic disputes to be submitted to CAS.
11. In *King v Australian Canoeing* (CAS 2004/A/585), Jolson QC made the following comments about the change of the CAS Code relating to costs:

Toward the end of 2003, the International Council of Arbitration for Sport adopted a new addition to 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 CAS Arbitrators and of the CAS court office and to eliminate existing gaps in the previous code. The new addition to the code replaced the earlier version (2000 code). Rule 64.5 of the 2004 code was identical to rule 64.5 in the 2000 code however, the change was to apply rule 64.5 to both the ordinary arbitration division of the court and the appeals arbitration division of the court.
12. The CAS Code is silent on the distinction between appeals of a national and international nature. However, the distinction has a significant effect on the determination of costs to be awarded in CAS procedures.
13. The World Anti-Doping Code (the **WADA Code**) provides for a distinction between national level athletes and international level athletes. The WADA Code defines an international level athlete as an athlete who is registered in an International Federation's drug testing pool. The distinction is difficult and it is necessary to make it on a case by case basis.

14. Rule 65 is applicable only to costs of an appeal of disciplinary matters which has an international nature. There are several determinations which would give guidance to a panel who has to determine if the matter is of an international nature such as whether the athlete is on an International Federation (*IF*) list of athletes subject to out-of-competition doping control; whether the dispute is governed by the regulations of an IF; whether the competition organised under the auspices of an IF; the nationalities of the parties.
15. ASADA in its submission to the Ordinary Division relied upon Rule 65. The arbitrator did not apply this provision. If the arbitration is to be characterised as a "disciplinary case of an international nature ruled in appeal" the parties are to advance their own costs for witnesses, experts and interpreters and those costs can be the subject of an order in the Award. However, the fees and costs of the Arbitrators together with the costs of the CAS shall be borne by CAS. An exception to this will be the CAS Court office fee which the CAS holds. The first sentence of R64.5, however, gives provision for the costs of a disciplinary dispute of an international nature to be made subject to R64.4.
16. On the facts before us, the Panel determines this is a dispute of a domestic nature and Rule 65 is not applicable. The dispute was governed by rules of the national federation; there was no relevant competition related to an international event involved; the case involved a coach rather than a competing athlete (although acknowledging the coach is bound by both national and international federation rules). Further, the prosecutor was the Australian domestic doping authority not acting on behalf of any international authority such as WADA or for the domestic Federation (such as in conducting a drug test). The ASADA, in prosecuting, used its enforcement powers arising out of events brought to its attention. It is a charge brought re-active to information rather than arising from ASADA's pro-active drug testing regime.
17. We accept the AWF by a letter dated 13 March 2006 referred to ASADA all of its functions and powers related to the issuing of an infraction notice, the convening of a hearing, the presentation of allegations of a violation of the anti-doping rules and other incidental matters. In other circumstances, the prosecuting authority may well have been the sporting organisation, in this case, the AWF. However, ASADA agreed, in taking over the AWF powers, that "any investigation taken by ASADA would be at no cost to the AWF".
18. Both parties agree that under Rule 64 of the CAS Rules, the CAS Panel in any application for costs is required to take into account:
  - the outcome of the proceedings;
  - the conduct between the parties; and
  - the financial resources of the parties.

## THE SUBMISSIONS

19. The Appellant seeks indemnity legal costs for the first instance hearing before the CAS Ordinary Division and for the hearing of the appeal before the Appeal Division of CAS. In the alternative, it seeks costs on a party-party basis for both hearings. Further, the Appellant seeks the costs expended be re-reimbursed - such as filing costs and advances paid to CAS for appeal costs.
20. As to the outcome of proceedings, the Appellant contended the Respondent carried the onus and failed to establish the following necessary facts: the drugs were in the possession of the Appellant; the drugs belonged to the Appellant; if the Appellant could see the drugs in the bedroom. Further, the Appellant submitted another had pleaded guilty to the possession and this was within the knowledge of the prosecution and the Appellant had argued those facts in the no-case application at first instance and failed. Much of the Appellant's submissions succeeded on appeal. Therefore, the Appellant contended the outcome of the proceedings support the Appellant's application for legal and filing costs.
21. As to conduct of the proceedings, the Appellant submitted the Respondent mounted a case that was legally and factually groundless and in such a circumstance, the Panel would give the "special" order of indemnity costs. The Appellant further submitted in a "non-analytical positive" doping case such as that advanced against the Appellant, there will always be complex evidence which requires legal interpretation and therefore each such case will generally attract significant legal expense. In such a circumstance, the "conduct" provision of Rule 64.5 becomes a significant element in any costs application at first instance and on appeal and, in the application for costs, a reading of Rule 64.5 would support the Appellant's application.
22. As to the financial status of the parties, the Appellant contended the fact that there was pro bono assistance provided to the Appellant should not influence a decision as to costs. The Appellant is a man of no means. The financial resources of the Respondent through its enforcement programme supported by the Commonwealth Government are significant, the Appellant contended.
23. The Respondent, however, submitted that even in a circumstance where the CAS has upheld the appeal, the Appellant, an AWF member, is nonetheless not entitled to costs at first instance nor costs of the appeal. In support of this proposition, the Respondent relies on the effect of the AWF Policy Clause 10, and particularly, 10.6 and 10.7.
24. The Respondent submitted, generally under clause 10.6, the Appellant is not entitled to costs of the CAS (cl 10.6). The clause it was submitted had the following effect:
  - the Appellant was not entitled to costs of the Hearing Committee (that Hearing Committee under the AWF Agreement passed to the CAS Ordinary Division).

- the Appellant, under clause 10.7 as a member of the AWF, is also liable for “costs and related expenses” of the CAS Appeals Division. The effect of the words “costs and related expenses” it was submitted is that fees and the costs incurred by the parties and the fees paid or payable to the CAS relating to the appeal hearing cannot be diminished by an Order of the Tribunal.

25. Reliance was placed on the judgment of Holmes QC as Arbitrator in *Beaton and Scholes v Equestrian Federation of Australia Ltd* (CAS, 28 September 2004) at [16]:

The jurisdiction of CAS must arise from an agreement between the parties. These arbitral proceedings are to determine the dispute which existed between the two disputing parties. The formulation of the rights, duties and powers of the arbitral tribunal and the mutual obligations of the parties in relation to the conduct of the arbitral proceedings, are created and regulated by the private bargain between those disputing parties... The terms of R65.3 of the Code must be read and construed in light of the terms of the parties’ agreement... On a literal reading of these provisions, the discretion of the CAS Panel when deciding which party shall bear the costs of the appeal in accordance with R65.3 of the Code would be limited and the Panel would be bound to give effect to the parties’ prior agreement.

26. In the alternative, ASADA submitted, if the Appeal Panel found that the Tribunal was entitled to make a general award for costs, then reliance was placed upon the following submissions:

- The claim for indemnity costs (or a higher level of costs than would otherwise be made) was not justified on the facts nor appropriate in the case.
- ASADA under its terms was obliged to launch an investigation of the matter as it could not ignore the prospect that an anti-doping rule violation had occurred.
- Any award of costs against it should be reduced because ASADA was successful on several issues in the appeal and the Appeal Panel declined to make findings on certain aspects of the appeal which went to validate ASADA's position.
- As to its conduct of the case it had assumed it is its responsibility and obligation to prosecute, through the transfer of the AWF power to it. Under Clause 4 of the AWF policy, therefore, it stood in the shoes of the AWF and was bound by the philosophy of Clause 4, Investigation of a doping offence and referral to hearing, states:

4.1 Where the AWF receives information that a person may have committed a doping offence, the Anti-Doping Control Officer ("ADCO") will investigate the matter.

4.2 The ADCO will refer the matter to a hearing under clause 4.6 if the ADCO . . . (a) reasonably believes a person may have committed an anti-doping offence.

- 4.3 . . .
- 4.4 . . .
- 4.5 . . .
- 4.6 The ADCO will wait 14 days (or a shorter period agreed between the ADCO and the person) after sending a letter under clause 4.5 and then will request the President of the AWF, or a nominated representative, to appoint a Hearing Committee of three to hear and determine the allegation. The members of the Hearing Committee appointed by the President, or a nominated representative, need not be members of the AWF. The ADCO may withdraw the referral to a hearing under clause 4.6 at any time until the hearing commences if the person gives a written waiver under clause 4.3
- 4.7 The ADCO may:
- (a) suspend financial or other assistance to the person, and
  - (b) suspend the person from competition in events and competitions conducted by or under the auspices of the AWF
- until the determination of the hearing.
- 4.8 The Hearing Committee will determine:
- (a) whether the person has committed a doping offence, and if so
  - (b) what sanction will apply, and
  - (c) how long the sanction will apply.

ASADA was obliged to prosecute as it stood in the shoes of the ADCO and the Hearing Panels of the AWF (Clause 4).

- As to its financial status it was an independent authority with a budget and associated obligations and did not present with the significant financial resources of the Commonwealth.

27. Further, ASADA submitted under the *Australian Sports Anti-Doping Authority Act 2000* (Cth), it had a duty to protect and preserve the value of sport in Australia through an enforcement policy.

28. ASADA, therefore, contended it was obliged to bring the charge; it conducted the case in a fair and reasonable manner as a prosecutor; it succeeded to establish some, if not all, of the necessary facts; the legal interpretation accepted by the tribunal on appeal was that proffered in

the hearings by ASADA. The Respondent therefore makes an application for a contribution to its costs.

## CONSIDERATION

29. Some general principles of law are applicable to any consideration of the CAS as to an application for costs, be it costs in the Ordinary or Appeal Divisions. The general rule that costs follow the event applies equally to arbitration proceedings (*Dauids Distribution (Vic) Pty Limited v Dance* [1999] VSC 468 per McDonald J at [21]).

30. McHugh J (with Brennan CJ, Gaudron, Gummow and Kirby JJ in agreement) considered the compensatory nature of an award of costs in *Oshlack v Richmond River Council* (1998) 193 CLR 72 (at [67] and [68]):

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 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.

As a matter of policy, one beneficial by-product of this compensatory purpose may well be to instill in a party contemplating commencing or defending litigation a sober realisation of the potential financial expense involved.

31. While under CAS Rule 64.5, a successful party is entitled to costs, the general law is varied in that the rule allows a "contribution" to such costs. In *Cassells v Australian Shooting Association* (CAS 2004/A/614), the Tribunal held under its Rules:

. . . the Court retains a wide and unfettered discretion as to whether, in all of the circumstances, an order should be made in a particular case and if so, the amount of such order.

Therefore, CAS has a wide discretion when considering an award of costs, and that discretion ought to be exercised judicially and in the interests of justice between the parties.

32. The effect of Rule 64 was also considered in *Austin v Australian Canoeing* (CAS Oceania Award, 6 June 2004 at [5-6]) and on appeal in *Austin v Australian Canoeing* (CAS Oceania Award, 15 June 2004 at [5]) and it was reiterated that costs orders were not to punish the unsuccessful party but to compensate the successful party against the expense to which that party had been put by reason of the legal proceedings.

33. Relevantly, in *French v Australian Sports Commission and Cycling Australia* CAS 2004/A/651, the role of CAS in hearing sports disputes was commented upon at [14]-[15]:

14. The Panel needs to be mindful of the role of CAS in hearing and determining sports related disciplinary disputes. The Secretary General of TAS/CAS in the preface to the third volume of the Digest of Awards [Mattheiu Reeb, ed., Digest of CAS Awards, Vol III, (The Hague: Kluwer Law International).] states at p.xxvi that:

. . . an international court like the CAS, which can offer specialist knowledge, low cost and rapid action, provides a means of resolving sports disputes adapted to the specific needs of the international sporting community.

15. The failure to maintain a low cost and rapid procedure could become the undoing of many positive developments associated with CAS. . .

34. As to the Respondent's submission that the Appellant is not entitled to any costs for either hearing under Clause 10 of the AWF Anti-Doping Policy, we reject this contention. Reliance was placed by the Respondent on the reasoning of Holmes QC in *Beaton and Scholes*. However, while we adopt the reasoning in that authority (see [28],[29],[34]), it leads us to the alternative conclusion.

35. *Beaton and Scholes* considered a costs application in an international appeal where the relevant Rule of the Sporting Organisation was recited in the Arbitration Agreement. It advances the following relevant propositions:

- where the law of Victoria applies to an arbitration agreement (generally a domestic Victorian agreement) the *Commercial Arbitration Act* 1984 (Victoria) (as amended) (the Act) applies (see [28]);
- the terms of section 34(3) of the Act, as to costs is restricted in its application to an arbitration agreement that provides for the reference of "future disputes" to arbitration not to agreements after the dispute arose; (see [34]);
- the section may apply to a sporting body's Rules so as to have the effect of voiding such a clause (see [29]); and
- the present dispute under the Act is bound by the terms of the Arbitration Agreement signed by both parties to the dispute (see [38]).

36. We accept the applicable law in this dispute is that of Victoria as the arbitrations have an overwhelming nexus to Victoria. These Arbitration Agreements therefore come under the provisions of the Victorian Arbitration Act. The principle behind the provision, s34(3) of the Act is that access to costs for a future arbitration should not be pre concluded by a contract. However, we do not need to determine if the AWF Clause 10 could be voided under the Act as we find the clause has not been incorporated into the Arbitration Agreements (the Orders of Procedure) covering this dispute for the following reasons.

37. The Orders of Procedure, on their face, are "an agreed set of steps for the conduct of an arbitration" (*Raguz v Sullivan & Ors* (2000) 50 NSWLR 236).
38. In an arbitration agreement there must be a positive provision to give efficacy to an award of an arbitrator when made (*Dobbs v National Bank of Australasia Ltd* (1935) 53 CLR 643 at 652).
39. An agreement will only be construed as limiting the right of parties to pursue remedies if it clearly appears that is what was agreed (*PMT Partners Pty Ltd (in Liquidation) v Australian National Parks and Wildlife Service* 184 CLR 301) while a clause limiting access (such as to costs) in an agreement will be strictly construed.
40. Two clauses of the Orders of Procedure are relevant. The first clause is headed "Laws Applicable to the Merits". The parties agreed in the clause that the applicable law is that of the State of the Victoria and further the clause states:
- The parties agree that the 2002 Anti-Doping Policy of the Australian Weightlifting Federation is the relevant policy which applies in this dispute.
41. However, in a following clause of the Agreement, under the heading "Costs", the parties each "acknowledged" Rule 64 of the CAS Code and reserved their position on costs.
42. We do not accept on a reading of both terms agreed to by the parties (as recited in the Orders), it can be inferred the specific clause 10 of the AWF Anti-Doping Policy was incorporated into each Arbitration Agreement such as to limit the right to Costs of either party. Had it been so incorporated into each Agreement, there would have been no necessity to have the "Costs" clause in either agreement. In the relevant agreements as to "Costs", the parties "acknowledged", Rule 64 of the CAS was relevant.
43. This dispute is therefore distinguished from that in *Beaton and Scholes* where the parties incorporated the relevant sporting rule into the Arbitration Agreement and that Rule, as incorporated, was recited as an agreed clause as to costs. There was no other mention in that Agreement as to Costs.
44. Further, this sports dispute, on appeal, has a particular history as to costs. The Lausanne office by letter dated 6 July 2007 communicated to the parties directly that it required both parties pursuant to Rule 64.2 of the CAS Code to pay a first advance as to the costs of the Appeal arbitration in the sum of \$AUD16,000 (each to pay \$8,000). The Order of Procedure was not signed until 3 August 2007.

45. In setting that amount, the Lausanne CAS office quoted to each party to the dispute the purpose of the payment was to:

. . . fix an estimate of the cost of arbitration, which shall be borne by the parties in accordance with Article R64.4.

The letter stated if there was non-payment of the amount the request/appeal was deemed withdrawn. Each party paid the \$8,000 advance payment. When the pre-payment was raised as an issue at the directions hearing, it was agreed to be addressed at the hearing.

46. In such circumstances, we accept the parties had a clear belief and knowledge as to the application of the CAS costs rule to the arbitration (certainly on appeal).

47. We find, therefore, it cannot be inferred by the reasonable person that an "acknowledgment" of the AWF policy under "Laws applicable to the Merits" by agreement incorporated specifically clause 10 of the AWF policy into the "Costs" clause, which clause in the Agreement especially acknowledges Rule 64 (the "Costs" Clause of the CAS Code). We do not accept the parties agreed to a positive clause which makes clause 10 of the AWF policy an agreed term of the Arbitrations as to the cost of each hearing. We are further satisfied as to this conclusion given the Respondent did not rely upon this contention in the cost submissions made in the primary hearing.

48. We therefore apply the provision of Rule 64 of the CAS Code to these Awards.

49. As to the hearing at first instance, the AWF, under the relevant code, was able to conduct a hearing of the dispute. However, it passed those powers over to ASADA. Under the terms of its agreement with ASADA, the AWF is not to be liable for costs generally.

50. We accept ASADA was successful on several issues in the appeal including the finding there was an offence of trafficking for possession under the AWF policy; that the appropriate standard of proof (that of the Panel's comfortable satisfaction) was properly applied; and that no adverse finding could be made from the failure of either party to call Mr Murphy.

51. We do not accept that the conduct of either party in the primary litigation is open to criticism. We accept, however, a non-analytical positive doping case will raise issues of an evidentiary nature which are often of legal complexity. We do not accept that in the ordinary conduct of litigation an application of a "no case to answer" nature could be titled a "special or unusual feature" such as to attract an indemnity costs order.

52. Further, we accept the Appellant is a person of limited means. Since his removal as a coach in his sport he has been employed casually as a warehouse operator. He has a wife and child dependent upon him. He earns little.

53. The Appellant calculates its costs, at first instance on an indemnity basis at \$72,015 (a similar sum to that submitted by the Respondent) and on appeal at \$53,632.50, in total \$125,647.50. On a party-party basis, this is reduced to \$83,765. On a fair break-up of these figures, the party-party costs of the hearing at first instance would be \$50,000, the appeal costs would be \$33,700. These costs are in addition to costs also claimed of filing fees and/or the cash advance required to be paid on appeal to CAS Lausanne by each party.
54. The Appellant makes a significant claim for costs. The Appellant earned his livelihood as a coach and the effect of the allegations were he lost his right to earn a living through his skill set for a period of time and suffered a public loss of reputation. There has been a significant expenditure of funds to challenge the allegations brought against him. He succeeded on appeal. The costs, as detailed, appear reasonable costs given the litigation involved legal and factual issues. It was conducted, in all, over four days. The claim represents the fair cost of litigation.
55. This is a case which brings to the fore the necessity of the CAS to have an Original Division. The Weightlifting Federation has, on the record, had some disciplinary difficulties. It passed its powers related to the anti-doping policy to ASADA for enforcement. It always adopted the CAS code for appeals. It accepts the CAS provides for it, as an active sporting body within the Olympic Family, a speedy dispute resolution system. It is also necessary for the proper administration of any sport for an athlete (such as this impecunious weightlifting coach) to have access also to a tribunal with specialist knowledge, at low-cost.
56. The changes to the CAS Costs procedure are now having a significant impact on the role of CAS. The CAS has provided athletes and sporting organisations worldwide with a flexible, quick and inexpensive dispute resolution procedure, devoted to resolving disputes directly or indirectly related to sports. Now the CAS Code has changed and the arbitration costs are to be paid by the parties involved in a domestic dispute, the jurisdiction of CAS as a first instance body is less attractive. This domestic dispute (submitted also to CAS on appeal) reveals the burden of costs carried by both the sporting body and the athlete. (In this case, the government's Anti-Doping Authority stands in the shoes of sporting body.)
57. In the Oceania Region, the CAS Ordinary Division became the first instance tribunal for many national sporting bodies, most of which were small organisations and impecunious. The effect of the Costs Rules now is that organisations and athletes may be unable to use CAS for costs reasons. First instance matters before CAS now attract costs. Sports may have to go back to their internal sporting panels which, in the application of the anti-doping policies needed assistance from CAS arbitrations when their own, often voluntary Tribunals, were unable to ensure the implementation of the anti-doping policies. If the small sporting bodies do not reconvene their own Tribunals, it is possible the Government through their Anti Doping agencies will have to create their own Dispute Resolution systems at significant cost to the government. Such systems would raise conflict of interest issues. Alternatively, the Government could,

through their Anti Doping agencies, choose to contribute to the parties CAS costs in a domestic dispute.

58. If it is the intention of the sporting organisation that a particular rule of the sporting organisation (as to costs) is to apply to a CAS arbitration, agreement must be reached with the relevant athlete and the terms of that agreement (as to costs) be incorporated into the Order of Procedure.
59. In accordance with the application of Rule 64.5 of the CAS Code and considering the outcome of each hearing, the conduct of the proceedings and the resources of both parties, we make the following determination: a contribution to the Appellant's legal costs for the primary hearing will be paid by the Respondent as the decision was set aside on appeal and, as the Appellant was successful on appeal, the Respondent will pay a contribution to the Appellant's costs on appeal.
60. In accordance with Rule 64.4 of the CAS Code, as the appeal is upheld and the first instance ruling annulled, the Panel determines that the CAS costs sitting in its Ordinary Division and the costs of the present appeals procedure shall be borne by the Respondent in full. The final assessment of the arbitration costs, both in the Ordinary Division and in the Appeals Division, will be served by the CAS Court Office after the communication of the present award.

## ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. Orders 4 and 5 of the CAS sitting in its Ordinary Division in this matter are set aside.
2. The Respondent shall pay 70 per cent contribution of the Appellant's legal costs before the CAS Ordinary Division on a party-party (with no reimbursement of the CAS filing fee). The Respondent shall therefore pay the Appellant the sum of \$35,000 by way of contribution to his costs to be paid within 30 days.
3. The Respondent shall pay 70 per cent contribution of the Appellant's legal costs on a party-party basis before the CAS Appeal Division (with no reimbursement of the CAS filing fees). The Respondent shall therefore pay the Appellant the sum of \$23,900 by way of contribution to his costs to be paid within 30 days.
4. There shall be a reimbursement to the Appellant by the Respondent for the \$8,000.00 advance payment made to CAS (less the CAS filing fee). No interest shall be paid to the Appellant.
5. We dismiss the Respondent's application to costs.
6. The Respondent shall pay the CAS costs (aside from filing fees). The costs of the CAS sitting in its Ordinary Division in this matter amounts to \$23,655. The costs of the CAS sitting in its Appeals Division in this matter amounts to \$7,150.
7. This being an Appeal procedure, the Award is made public under the CAS Rule 59.

Sydney, 20 December 2007

## THE COURT OF ARBITRATION FOR SPORT

The Hon Justice Tricia **Kavanagh**  
President of the Panel

The Hon John **Winneke** QC  
Arbitrator

Alan J **Sullivan** QC  
Arbitrator