INTERNATIONAL TENNIS FEDERATION

INDEPENDENT ANTI-DOPING TRIBUNAL

DECISION IN THE CASE OF JAMIE BURDEKIN

Tim Kerr QC, Chairman
Dr José Antonio Pascual Esteban
Dr Barry O'Driscoll

ITF note: Certain personal information has been deleted for reasons of confidentiality.

Introduction

1. This is the unanimous decision of the independent Anti-Doping Tribunal ("the Tribunal") appointed by the Executive Consultant, Medical of the International Tennis Federation ("the ITF") under Article K.1.1 of the ITF Tennis Programme 2004 ("the Programme") to determine a charge brought against Mr Jamie Burdekin ("the player") following an adverse analytical finding in respect of a urine sample no. 382129 provided by the player on 20 July 2004 at the wheelchair British Open in Nottingham. The player was represented by Mr Rod Findlay and Ms Leslie Ross, solicitors. The ITF was represented by Mr Jonathan Taylor of Hammonds, the ITF's solicitors in London.

2. The player's A and B samples both tested positive for cocaine and metabolites of cocaine, a prohibited substance. The player did not dispute (though he did not formally admit) the presence of the drug in his urine sample, but contended that he was innocent of any intention to use a prohibited substance, that he did not knowingly take cocaine and that the drug must have entered his body by means of illicit administration ("spiking") by a person or persons who were present with him in a bar in Liverpool during the evening of 17 July 2004.

3. The player asserted that he bore "No Fault or Negligence" for the offence, within the meaning of Article M.5.1 of the Programme; alternatively that he bore "No Significant Fault or Neglience for the offence, within the meaning of Article M.5.2 of the Programme. The player also complained that documents were provided to him in French, and submitted that the charge against him should be dismissed by reason of unjustified delay and on the ground that the mandatory two year disqualification, where it applies, is disproportionate and therefore invalid. The player sought an oral hearing, which took place at the offices of the ITF's solicitors, Hammonds, in London on 10 March 2005.

4. By Article S.3 of the Programme, the proceedings before the Tribunal are governed by English law, subject to Article S.1, which requires the Tribunal to interpret the Programme in a manner that is consistent with applicable provisions of the World Anti-Doping Code ("the Code").

The Facts

5. The player was born in Liverpool on 10 December 1979 and is from the Bootle area. He is now aged 25, and was aged 24 when he gave his urine sample on 20 July 2004. He has always been a keen sportsman, playing football and swimming regularly. In about February 2000, at the age of 20, he began training with the Royal Marines. During the training course he was subjected to a test which he thought at the time was a drugs test, but which appears to have been a hydration test. He was required to give a urine sample.

6. He was close to completing the training and becoming a Royal Marine when he suffered a tragic car accident, while on leave from the Marines in 2000, and became a tetraplegic as a result. He is mainly confined to a wheelchair. While in rehabilitation following his accident the player met Mr Eccleston at the Southport Spinal Injuries Unit. As a result he took up tennis for the first time, attended a wheelchair tennis beginners' camp in early 2002 and rapidly

progressed up the rankings, achieving the rank, as at October 2004, of 17th in the world at singles and 13th at doubles.

7. In 2002 the player received compensation of about [redacted] for his accident. He has now moved to a more upmarket part of Liverpool, away from the deprived area where he grew up, but he still retains acquaintances from that area. He started to use his compensation money to fund his tennis career, and also to purchase cars and property in Liverpool and Marbella. He began to take part in tennis competitions in various countries, enjoyed it very much and had considerable success.

8. By Article A.5 of the Programme, it entered into force on 1 January 2004. By Article B.1 it applies to events organised, sanctioned or recognised by the ITF. By Article B.2 events recognised by the ITF include wheelchair events. Article B.1 obliges players to "comply with all the provisions of this Programme", including submitting to in-competition and out-of-competition testing as part of the doping control process. The player accepted that he was bound by the Programme when taking part in the British Open at Nottingham in July 2004 and at all other material times since 1 January 2004.

9. The player has not received any formal training in relation to anti-doping matters but was well aware that his sporting régime included a responsibility to ensure that he did not, accidentally or otherwise, allow any prohibited substance to enter his body. He had not been drug tested under any ITF anti-doping programme before July 2004.

10. The player gave evidence, which we accept, that prior to his accident he had drifted apart from many of his old acquaintances from the Bootle area. He [redacted] said that by 2004 he was no longer close to them and did not wish to be, though he was still acquainted with them. However he retained

two close friends from his time in Bootle, Mr Robert Naylor and Mr James Spofforth, who supported him through the trauma of his accident.

11. After the accident the player's spending of his compensation money on cars and property and his new lifestyle involving travelling the world and taking part in prestigious tournaments became known to his old acquaintances and, we accept, probably aroused some hostility among them. A car he owned was scratched and he strongly suspects one or more of his old acquaintances was responsible.

12. During the first half of July 2004 the player took part in tournaments in the Netherlands and France. On his return to Liverpool he was in the mood to relax with his friends over the weekend of 17-18 July before taking part in the British Open at Nottingham due to start at the beginning of the following week. He arranged to meet Mr Naylor and Mr Spofforth for a social evening of drinking and recreation on Saturday 17 July 2004.

13. The three men began by meeting at the player's apartment, where they drank about two bottles of beer each. They then went by taxi into Liverpool and had some food, though not a full meal, at a restaurant where one of them knew the manager. There the player and one of his friends shared a bottle of wine and all three drank some beer. They then set off for the Pan American bar, an exclusive upmarket bar at the Albert Dock, Liverpool. As one would expect on a Saturday evening in summer, the bar was busy. They had arranged to meet a Mr Johnny Gallagher there, a friend of Mr Spofforth.

14. The three men continued drinking at the Pan American bar. During the four hours or so while they were at the bar, the player drank three or four more beers and three or four cocktails consisting of vodka and cranberry juice. The friends noticed that some of their old acquaintances from the Bootle area were present in considerable numbers. They estimated that there were about 20 of them.

The three friends formed the strong impression from the boisterous and erratic behaviour, manner and language of their old acquaintances that the latter had been taking drugs.

15. The player and his two friends did not find this particularly surprising, since they were aware that most of their old acquaintances present that evening were in the habit of taking cocaine and ecstasy at weekends, and the player had seen them do so. However the player and his two witnesses all deny ever having taken any recreational drug, and they specifically deny that they, or any of them, knowingly took cocaine that evening. The ITF does not specifically assert that the player knowingly took cocaine that evening.

16. The player is unable to carry a glass and wheel his wheelchair at the same time; wheeling his wheelchair occupies both his hands. Therefore when he needs to move his wheelchair he has to give his drink to someone else or leave it on a table. He left his drink unattended on at least three or four occasions while visiting the toilet in his wheelchair, accompanied by Mr Naylor. The player became progressively more intoxicated as the evening wore on, but not to the point where he became incoherent or lost control. He was able to understand what was going on throughout the evening. He does not remember any strange taste in his mouth when drinking in the bar.

17. The player and his two witnesses say, and we accept, that after talking to the old acquaintances for a while in order not to be rude he, his two friends and the fourth man, Johnny Gallagher, whom they had arranged to meet at the bar and who had by then arrived, moved down the bar so as to distance themselves from the old acquaintances. Mr Spofforth estimated that they detached themselves from the group about two hours or so after arriving, i.e. at about 11pm. He suggested that they should go for a meal, but that suggestion was no taken up. He accepted that it was unlikely that a drink would have been spiked after they

had moved away, but thought there was plenty of opportunity to do so before they did so.

18. There is no evidence before us that any person actually saw anyone spike the player's drink. The player's evidence is that his drink must have been spiked by one of the old acquaintances because there is no other explanation for the presence of cocaine and metabolites in his body some 60 hours later. The player invited us to accept his word that he did not knowingly take cocaine that evening, and to infer that his drink must therefore have been spiked.

19. The player states his belief that the old acquaintances would have known from general knowledge and from newspaper reports about the then imminent Olympics that he was liable to be drug tested, and that he would without doubt have told them very clearly that he was due to take part in the British Open the following week. The player's case is that the envy and hostility he encountered even before the accident, when he joined the Marines and moved on from his old Bootle acquaintances, heightened by his receipt of compensation and subsequent expenditure on cars and property and frequent travel, must have induced someone in the bar that evening to spike his drink maliciously, in the hope that he would be drug tested and his career damaged.

20. Mr Naylor and Mr Spofforth said they believed the player's drink was spiked that evening. Mr Naylor said he had witnessed an actual instance of a drink being spiked with ecstasy some two years earlier, though not by one of the old acquaintances present in the bar that night. He did not advance the theory that the motive would be malice as the player thought, but rather that the motive would be as "a laugh to get you on their wavelength". He also speculated that a drink may have been spiked and that the player may have not been the intended victim but may have accidentally drunk from a bottle intended for someone else.

21. The player left the bar at 1.30am or 2am, returned home. He had no difficulty falling asleep; in fact he fell asleep in front of the television. He felt hung over when he woke the next day, Sunday 18 July 2004.

22. We do not make any positive finding either that the player knowingly took cocaine during the evening of 17 July 2004, or at any other time before he gave his urine sample on 20 July. Nor do we make any positive finding that he did not do so. In view of the ITF's stance, we do not need to make a positive finding one way or the other. We confine our findings to the issues that strictly arise on application of the rules. We find that cocaine entered the player's body during the three or four days prior to 20 July 2004 and that we do not have a clear and convincing explanation, on the balance of probabilities, as to how it did so. The expert report from Mr Atha is equally consistent both with deliberate use and with spiking, and therefore takes the issue no further.

23. The player travelled to Nottingham and competed in the British Open, losing in the singles competition in the first round to Sarah Hunter on Tuesday 20 July 2004. He gained one ranking point and prize money of US $70. The player also competed in the doubles competition at the British Open and lost in the quarter finals, gaining one ranking point and prize money of US $10. After his singles match he was asked to provide a urine sample. He did so just after 5pm. It was this sample which subsequently led to the adverse analytical finding. The player omitted to provide his address on the doping control form, and the doping control officer signed the form without the player's address on it.

24. The A sample was forwarded to the Laboratoire de Contrôle du Dopage INRS-Institut Armand-Frappier, the WADA accredited laboratory in Quebec, Canada, for testing, along with other samples. Staff at the laboratory detected the presence of cocaine and metabolites on 3 August 2004, and the detection was verified the following day, 4 August, by the director of the laboratory.

25. The certificate of analysis was sent by fax to Mr Sahlström at IDTM. The fax was dated 11 August 2004 but was not, according to Mr Sahlström's unchallenged evidence, sent until 1723 Swedish time on 13 August 2004, which was a Friday. Mr Sahlström was short staffed because of the holiday period, and he himself was performing duties at the Athens Olympics. As a result of these difficulties, it was not until 23 August 2004 that a full analytical report was requested by IDTM from the laboratory and a Review Board convened and informed. That request was then overlooked by the laboratory, which was in the throes of its inspection for the purpose of ISO 17025 accreditation by the national accreditation body.

26. Meanwhile the player, ignorant of the adverse analytical finding weeks earlier, took part in a competition known as the OSD Trophy at Citta di Livorno, Italy, from 31 August to 5 September 2004. In the singles event he gained one ranking point and 85 euros in prize money. In the doubles event he gained 20 ranking points and a further 85 euros in prize money.

27. By 17 September 2004 the laboratory had not provided the required full analytical report. Consequently IDTM sent a reminder on that date. The report was then sent to IDTM on 24 September 2004. It was sent on to the Review Board members on 27 September 2004. The three members of the Review Board each responded that there was a case to answer; the last such response was made on 5 October 2004.

28. Still ignorant of the positive test result, the player travelled to the USA at about the same time, to take part in two successive competitions. First, he took part in the Tahoe Donner International championships, which he won, from 7 to 10 October 2004. He gained 50 ranking points and prize money of US $681. He then took part in the Quickie US Open from 12 to 17 October 2004, gaining 25 ranking points and prize money of US $95 in the singles event, and 100 ranking points and prize money of US $95 in the doubles event.

29. Back in Sweden, a letter was prepared by Mr Sahlström to the player and dated 8 October 2004, in order to inform him of the adverse test result. IDTM then discovered that the doping control form omitted the player's address and sent a request to the ITF for contact details. That was done on 12 October 2004. The address was provided by the ITF and the letter despatched to the player by courier on 13 October 2004. Mr Sahlström's record of events states that the player received the letter on 15 October 2004, but the player was not at home to receive it; as already noted, he was in the USA playing tennis.

30. The player received it on his return from the USA on 19 October 2004, some two and a half months after the laboratory first detected the presence of cocaine and metabolites in his A sample. The player then did two things: first, he voluntarily abstained from playing in any competitions, withdrawing from competitions scheduled for November 2004 in Nottingham and December 2004 in Prague and subsequent events in Australia. Secondly, on 29 October 2004 he requested that the B sample be analysed. The B sample was analysed and tested positive. The certificate of analysis was sent to IDTM on 11 November 2004.

31. We find that the player would have stopped taking part in any ITF competitions as soon as notified of the positive test result. He did so as soon as he was notified of it. He would not, we find, have taken part in the competitions in Livorno and the USA in September and October 2004 if he had then been aware of the positive test result first detected by the laboratory in Quebec on 3 August 2004.

The Proceedings

32. By letter dated 6 December 2004, the player was charged with a doping offence under Article C.1 of the Programme. On 10 December the player replied, stating that he wished to exercise his right to defend the charge. In accordance

with Article K.1.7 of the Programme, a telephone directions hearing took place on 10 January 2005, attended by the Chairman of the Tribunal and the representatives of the parties.

33. The ITF was represented by Mr Iain Higgins of Hammonds, the ITF's solicitors. Mr Findlay represented the player and confirmed that he had no objection to any of the members of the Anti-Doping Tribunal and that he did not wish to have the matter determined by the Chairman sitting alone. A timetable was set for the submission of briefs in accordance with Article K.1.7 of the Programme, and the oral hearing fixed for 10 March 2005 in London.

34. The ITF submitted its written brief on 17 January 2005, arguing that a doping offence under Article C.1 had incontestably been committed, and that the real issues in the case concerned the question of sanctions, in particular under Article M.5 of the Programme, in the event that Mr Burdekin should rely on Article M.5.

35. On or about 7 February 2005 the player produced a report by a drug abuse research consultant, Matthew John Atha, stating that the laboratory documents showing the test results in respect of the A and B samples were consistent with the player's drink having been spiked as well as with voluntary ingestion of cocaine by the player.

36. The player submitted his (updated) answering brief on 15 February 2005, arguing that the charge against him should be dismissed by reason of unjustified delay up to the date the charge was brought and in particular delay in notifying the player of the adverse analytical finding; and on the ground that the mandatory two year ban for a first offence, where it applies, is disproportionate and should be disregarded by the Tribunal. The player also submitted that the ITF had acted in breach of natural justice by providing most

of the laboratory test result documents in French, which is not the player's mother tongue.

37. As to the substance of the charge, the player submitted that he had not knowingly taken cocaine and that his drink must have been spiked during the evening of 17 July 2004; that he bore no fault or negligence, alternatively no significant fault or negligence, within the meaning of Article M.5.1 and M.5.2 respectively of the Programme; and that any period of ineligibility imposed should commence on the sample collection date, i.e. 20 July 2004.

38. The ITF submitted its written reply brief on 21 February 2005, taking issue with the player in detail on all the points raised by the player in his updated answering brief, and submitting in particular that the player could not establish the applicability of Article M.5.1 or M.5.2 because he could not surmount the initial hurdle of showing on the balance of probabilities how the prohibited substance entered his system; and further because on his own case he could not show no fault or negligence, or no significant fault or negligence.

39. Accordingly the ITF submitted that the Tribunal had no discretion but to impose a two year period of ineligibility, reserved to the oral hearing its arguments in respect of results obtained in competitions subsequent to the British Open, and submitted that the player's ban should commence on the date he was notified of the positive test result or, at the most, a short time before that date to take account of delay by the laboratory in producing the full copy of the analytical report in respect of the A sample.

40. At the request of the Tribunal, the parties produced an agreed list of issues dated 4 March 2005. In this document the player added his contention that the service on him of laboratory documents in the French language must "affect" the "burden of proof" on him to establish no fault or negligence, or no significant fault or negligence, within the meaning of the relevant rules. It

subsequently became clear at the oral hearing that the player's submission was that the delay between the positive test result and the bringing of the charge disentitled the ITF from relying on the burden of proof on the player under Article K.3.2 of the Programme to establish no fault or negligence, or no significant fault or negligence, on the balance of probabilities.

41. On the question of delay, the ITF relied on a written statement dated 4 March 2005 from Mr Staffan Sahlström, the managing director of International Doping Tests & Management ("IDTM") in Lindigö, Sweden. Mr Sahlström explained the chronology of events from 20 July 2004 onwards and produced a table showing in chronological format the various events in the case from that date, when the player's urine sample was given, down to 23 November 2004 when IDTM's functions in the matter were completed. He was not required to give oral evidence.

42. The player made a written statement himself, produced shortly before the hearing. He also produced written statements from the two friends with whom he spent the evening of 17 July 2004, Mr Naylor and Mr Spofforth. These statements had been prepared in or about the third week of January 2005. The player and these two witnesses gave oral evidence at the hearing.

43. The player also produced written statements testifying to his character and professionalism from Mr Martin McElhatton, Chairman of the National Wheelchair Tennis Association (dated 26 January 2005), Mr James Cochrane, a former President of the Lawn Tennis Association and former Chairman of the ITF Medical Commission with long experience of working with players (dated 31 January 2005); and Mr Mark Eccleston, a very eminent wheelchair tennis player (dated 14 February 2005). These witnesses were not required to give oral evidence. Nor was Mr Atha, on whose expert report the player relied.

44. The Tribunal heard the matter in London on 10 March 2005. The hearing lasted from 11.10am until about 5.15pm. Mr Taylor, for the ITF, produced a written skeleton argument which had previously been sent to Mr Findlay and the Tribunal members. Mr Findlay did not object to its use. After a brief opening statement from Mr Taylor on behalf of the ITF, the player gave oral evidence. Mr Spofforth then gave oral evidence, followed by Mr Naylor. The player's witnesses were examined by Ms Ross and further questioned by Mr Taylor and the Tribunal. We then heard closing submissions from Mr Taylor on behalf of the ITF and from Mr Findlay on behalf of the player, before finally deliberating in private.

The Tribunal's Conclusions, With Reasons

45. The player has effectively admitted the commission of a doping offence under Article C.1 of the Programme, subject to his contention that the charge should be dismissed on the ground of delay and/or disproportionality of the mandatory two year ban. It is therefore necessary to examine that latter contention first. In the Tribunal's judgment, the contention is manifestly unfounded, for the following reasons.

46. First, as to delay, the player argues that "the time taken … between collection of the sample and bringing of the charge … renders the proceedings substantively unfair, requiring the case to be dismissed" (list of issues, paragraph 2). He points to the obligation under Article J.2.1 of the ITF's Anti-Doping Programme Administrator ("APA"), in this case Mr Sahlström, "without delay" to identify three Review Board members and to send them the entire A sample laboratory documentation. He further relies on the APA's obligation "promptly [to] notify the ITF" of relevant matters on receipt of the Review Board's determination that there is a case to answer.

47. The player submits that the ITF's agents did not fulfil those obligations and that as a result he has suffered prejudice through lapse of time leading to impaired

ability to gather evidence, for example of signs of a drink being spiked on the evening of 17 July 2004. He submits correctly that the greater the time lag between an alleged doping offence and notification of the allegation to the player concerned, the greater the likelihood of witnesses' recollection having faded. Consequently the more difficult it may be for the player to exculpate himself by establishing factual defences such as that of no fault or negligence.

48. The player goes on to submit as a corollary that if after a certain time the player has not been notified of an adverse test result, he acquires a "reasonable expectation, in light of other cases, that he was not under suspicion" (list of issues paragraph 2) and that in consequence he is entitled to have the charge dismissed. In oral submissions Mr Findlay said that period expired here in mid to late August 2004. He points to the timetable of events in a number of other cases. A comparison with those cases does indeed show that in the present case events proceeded more slowly than is usual in sport generally and in the sport of tennis in particular.

49. The player criticises the time taken by the ITF's agents to notify the player of the A sample adverse test result, and subsequently of the time taken between notification of that result and the bringing of the charge. He does not accept that IDTM's staff shortages during the summer holiday period, nor the duties of Mr Sahlström at the Athens Olympics, constitute good reason for delay. He further says that the ITF should have informed the player of the adverse test result in the USA and should not have merely written to his home address, as it must or should have known as at 8-9 October 2004 that he was playing in an ITF competition away from home.

50. He protests that he should not be prejudiced because the laboratory in Quebec appeared to have accorded greater priority to its ISO inspection than to processing the test results in this case. He also points to the considerable expenditure incurred by the player in funding his participation in three ITF

tournaments after the British Open, all of which took place after the ITF's agents knew of the adverse test result but before the player did.

51. The player submits in the alternative (as the Tribunal understands his oral submission through Mr Findlay) that if the delays that occurred do not persuade the Tribunal to dismiss the charge outright, the Tribunal should regard the onus of proof on the player to prove no fault or negligence, or no significant fault or negligence, as being effectively reversed by reason of the player's impaired ability to discharge that onus resulting from the delays (see paragraph 9.2 of the list of issues, as developed in oral submissions). Mr Findlay submitted that the player had advanced an explanation for the positive test result, namely the spiking of his drink, and that it should be incumbent on the ITF to disprove that.

52. Mr Findlay went on to submit that the player had done more than just speculate that his drink had been spiked; he had produced evidence to support that contention, albeit not direct evidence: namely, evidence of the player's good character and the consequent improbability that he would use cocaine voluntarily and then falsely deny having done so; circumstantial evidence of motive and opportunity on the part of the player's old acquaintances who were ill-disposed towards the player to the point where they or one of them had scratched his car.

53. Secondly, the player submits that if we were otherwise persuaded to impose a two year ban on the player notwithstanding the delay that occurred in this case, and notwithstanding the player's contentions under Article M.5.1 and M.5.2 of the Programme, we should nevertheless dismiss the charge outright on the ground that the provision for a two year mandatory ban is "disproportionate to the offence" (list of issues paragraph 14).

54. In oral submissions Mr Findlay made it clear that his submission was an attack on the validity of the rule itself, not just its application to his client in the

factual circumstances of the present case. He relied on lesser penalties applicable in other sports for the same or similar offences, albeit governed by different rules, and submitted that a mandatory two year ban went beyond the purposes of the Programme, which were to protect the health of tennis players and the integrity of tennis. The juridical basis of Mr Findlay's attack on the validity of the rule was not clear; he expressly disavowed any argument founded on restraint of trade. We take it that his submission must be that the rule itself is void on public policy grounds.

55. The ITF, through Mr Taylor, dismissed all those submissions and argued that the Tribunal has no discretion under the Programme to do other than impose a two year period of ineligibility where a doping offence of the type under consideration in this case is committed, except where the specific defences provided for under Article M.5 of the Programme are established. He accepted that the process took longer than it might have done, but disputed the proposition that the delays were abnormal or seriously culpable.

56. He pointed to the need for the chain of evidence to be rigorous, noted that this necessarily entails some delay and that this is inherent in the structure of the rules and necessary for the player's own protection. He submitted that the antidote to any serious or culpable delay would be an adjustment to the start date of any ban, pursuant to the Tribunal's discretion under Article M.8.3(b) of the Programme.

57. Mr Taylor went on to reject any suggestion that the mandatory two year ban was a disproportionate measure, either as a general proposition or in the circumstances of this case, and submitted that the Programme is modelled on the Code which represents something approaching a global consensus in sport on the appropriate response to a doping offence such as this. He pointed to the protection afforded to players and athletes by Article M.5.1 and M.5.2, and

(though not in this case) Article M.3, all of which could operate to reduce or eliminate the two year ban otherwise applicable.

58. The Tribunal has no difficulty in accepting the ITF's submissions on all these points, and in rejecting the submissions of the player, for the following brief reasons.

59. First, the obligation of the APA to act "without delay" under Article J.2.1 commences on receipt of the "Adverse Analytical Finding". That expression is defined in Appendix One as "a report from the laboratory …". The obligation is not triggered by receipt of the certificate of analysis. Unless the APA is in possession of the full laboratory report, he is not able to "send the entire A Sample laboratory documentation package" to the three Review Board members, as provided by Article J.2.1(b). Consequently Mr Sahlström was not obliged until 24 September 2004 to act without delay in identifying the Review Board members and sending them the laboratory "documentation package".

60. Secondly, the only period of relevance to the player's ability to gather evidence is the period from 20 July 2004 to 19 October 2004, when he was notified of the adverse analytical finding . The period from 19 October to 6 December when the charge letter was sent, is not relevant because the player was already on notice throughout that period that he was likely to be charged with a doping offence, subject to analysis of the B sample. He could therefore confidently be expected to begin gathering evidence in his defence from 19 October 2004, not 7 or 8 December 2004. It is his responsibility, not the ITF's, if he did not do so.

61. Thirdly, as to the period from 20 July to 19 October 2004, the delays that occurred were longer than usual because of the summer holiday period, the Athens Olympics and the ISO inspection of the laboratory in Quebec. The player says he should have been notified of the adverse analytical finding by mid to late August 2004, i.e. about two months earlier than he was notified of it.

The Tribunal is prepared to accept that he should have been notified of the adverse test result by about the last week of August 2004.

62. It does not follow that the entire charge should be dismissed. The Tribunal, having heard and weighed all the evidence, does not accept that the player suffered any real rather than theoretical prejudice through lapse of time. We regard it as unlikely in the extreme, to the point of being fanciful, that there was some critical loss of memory, between late August and 19 October 2004, of an event relevant to the likelihood of the player's drink being spiked.

63. We therefore do not need to consider the broader question as to whether a doping charge could ever, in principle, fall to be dismissed by reason of protracted, grave and culpable delay leading to serious prejudice to a player, for example through the death or incapacity of a crucial defence witness. This is not such a case. At least in the absence of such extreme circumstances, the Tribunal considers that any culpable delay can be met by adjustment of the starting date of any period of ineligibility, through exercise of the Tribunal's discretion under Article M.8.3(b) of the Programme.

64. As to the argument that the rule providing for a two year ban infringes the principle of proportionality, we are confident that the argument is manifestly bad. It would require us to condemn much of the rationale for the Code, which embodies a broad international consensus in the sporting community in support of the principle of deterrence against doping through the imposition of strict liability and uniform penalties, subject to consideration of uniform specific defences. We see no legal vice in the provision for a mandatory two year ban in cases where those defences do not apply.

65. Mr Findlay took a further preliminary point. He submitted that the ITF had acted in breach of natural justice by failing to provide the laboratory documents in English, rather than in French. Much of the laboratory documentation was

provided in French. Mr Atha did not say in his report that this caused him any particular difficulty. Nor did the player request a translation. In those circumstances, there is nothing in the point that the player was prejudiced by linguistic difficulty. If he had been, the Tribunal is confident that his advisers would have requested a translation, and that the ITF would have provided one. The player's advisers could not, without professional incompetence, have done otherwise.

66. Having thus disposed of the preliminary arguments in favour of the ITF and against the player, it follows that pursuant to Article K.1.3 of the Programme we are required to confirm the commission of the doping offence specified in the notice of charge set out in the ITF's letter to the player dated 6 December 2004. We therefore do so confirm. Irrespective of questions of fault or negligence under Article M.5 of the Programme, the Tribunal is obliged by Article K.1.3 to apply the mandatory sanctions provided for in Articles L.1 and (unless we determine that fairness requires otherwise) M.7 of the Programme.

67. It follows, further, that pursuant to Article L.1, the player's individual result must be disqualified in respect of the singles event in the British Open, and in consequence the ranking points and the prize money obtained by the player by taking part in that event, must be forfeited. By his participation in the singles event at the British Open, the player gained one ranking point and US $70 in prize money. That point and that prize money must be forfeited.

68. We turn next to the question whether Article M.5 of the Programme can be successfully invoked by the player. Articles M.5.1 and M.5.2 provide, so far as material, that the otherwise applicable period of ineligibility shall be eliminated (Article M.5.1) or reduced by up to half the otherwise applicable minimum (Article M.5.2), if the player establishes (on the balance of probabilities, see Article K.3.2), that he bears "No Fault or Negligence" (Article M.5.1) or "No Significant Fault or Negligence" (Article M.5.2) for the offence. Where, as in

the present case, the offence is committed under Article C.1 (presence of a prohibited substance in the body), the player has to establish also how the prohibited substance entered his system.

69. In order to establish "No Fault or Negligence" for the purpose of eliminating the otherwise applicable period of ineligibility, the player must establish (according to the definitions in Appendix One to the Programme) that he did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he had used or been administered with the prohibited substance. In order to establish "No Significant Fault or Negligence" for the purpose of achieving a reduction of up to half of the otherwise applicable minimum period of ineligibility, the player must establish that his fault or negligence, when viewed in the totality of the circumstances and taking into account the criteria for "No Fault or Negligence", was not significant in relation to the offence.

70. The player submitted that he bore no fault or negligence, or alternatively no significant fault or negligence, in relation to the presence of cocaine in his body. He submitted first that he had established how the cocaine entered his system: the Tribunal should accept his explanation that this occurred through spiking of his drink during the evening of 17 July 2004. He went on to contend that this was a simple case of sabotage by a person or persons unknown and noted that sabotage by a competitor is one of the examples specifically cited in the commentary to the corresponding provisions in the Code. He submitted that there is no material distinction between a competitor who deliberately seeks to dope another player, and any other person actuated by malice who seeks to do so.

71. Mr Findlay pointed out that the player should not be penalised by reason of his disability, which required him to leave his drink unattended when going to the toilet, because of the need to use both hands to wheel his chair. He submitted

that more latitude should therefore be allowed to him than would be allowable to an able-bodied athlete. He submitted that the player had taken specific steps to distance himself from his old acquaintances whom he did not expect or intend to encounter at the Pan American bar on 17 July 2004. He was not, submitted Mr Findlay, at fault for taking too much drink, since his faculties were not, on the evidence, impaired and he was well able to hold his drink.

72. Mr Taylor, for the ITF, submitted first that the player could not succeed in invoking either of the defences under Article M.5 because he could not show how the prohibited substance entered his system. He contended that this requirement meant not only that the player must show the route of administration – in this case probably oral ingestion – but that he must be able to prove the factual circumstances in which administration occurred.

73. Drawing upon the reasoning in *K v. ITF*, CAS 99/A/223 and *Ulihrach* (ATP Anti-Doping Tribunal decision dated 1 May 2003), he submitted that it was quite insufficient merely to suggest innocent explanations coupled with a denial of deliberate doping. Similarly, here the player could not surmount the initial hurdle merely by denying deliberate ingestion and reasoning by a process of elimination that spiking was the only rational alternative. He pointed out that the purpose of what he termed the "threshold requirement" of showing how the substance entered the player's system was to enable the Tribunal to determine the issue of fault on the basis of fact and not mere speculation.

74. Mr Taylor went on to submit that in any event the player could not begin to show that he bore no fault, or no significant fault (in the sense of the provisions in the Programme) for the offence. Mr Taylor too relied on the commentary to the equivalent provisions in the Code and noted that according to that commentary those provisions place responsibility on the athlete for sabotage by a person within his "circle of associates", on the basis that the athlete is

responsible for "the conduct of those persons to whom they entrust access to their food and drink".

75. He pointed out that the player had voluntarily allowed himself to be in the company of persons whom he knew were drug takers for upwards of an hour at least, while in a state of some intoxication himself. Mr Taylor did not accept that the player had fully disengaged himself from those people, either on 17 July 2004 or since, and argued that the player's own case was that he and his two friends regarded these people as capable of spiking someone's drink, and that the player's evidence was that they bore a grudge against him because of his wealth and success and the glamour of his lifestyle, and that they knew he was shortly due to take part in a major wheelchair tennis event. None of that was remotely consistent with exercise of the utmost caution.

76. The Tribunal has no difficulty in accepting the ITF's submissions on the above points. We find, first, that the player, not the ITF, bears the burden of proving how the prohibited substance entered his system; that he has signally failed to discharge that burden on the balance of probabilities. He cannot discharge it by merely denying wrongdoing and advancing an innocent explanation. He must go on to show that the innocent explanation is more likely than not to be the correct explanation, and to do so he must show what the factual circumstances were in which the substance entered his system, not merely the route by which it entered his system.

77. Next, we find that the player does not come close to establishing that he bore "No Fault or Negligence", or "No Significant Fault or Negligence" in relation to his ingestion of cocaine, whether he ingested it knowingly or otherwise. The ITF did not positively submit that the player knowingly took cocaine. The Tribunal does not find either that he did or that he did not. But we do find that he was significantly at fault in the following respects: first, by consuming alcohol to an extent that materially reduced his ability to police his situation and

the conduct of those with whom he kept company during the night of 17-18 July 2004; and secondly, by placing himself in a situation where there was a risk that he would be doped with cocaine, whether by himself or by his old acquaintances whom he regarded as capable of doping him without his knowledge.

78. It follows that the defences under Articles M.5.1 and M.5.2 of the Programme fail. Therefore we have no discretion but to impose a mandatory two year period of ineligibility. We will consider in a moment the starting date of that period. It follows also that pursuant to Article M.1 of the Programme the player's result must be disqualified in respect of the doubles event in the British Open, and in consequence the ranking points and the prize money obtained by the player by taking part in that event, must be forfeited. By his participation in the doubles event at the British Open, the player gained one ranking point and US $10 in prize money. That point and that prize money must be forfeited.

79. The two further issues that remain to be considered are the starting date of the two year period of ineligibility, and the question whether the results of competitions in which the player took part after the British Open should remain undisturbed or should be annulled. These two questions are linked.

80. Under Article M.7 of the Programme, unless the Tribunal considers that fairness requires otherwise, the player's individual result must be disqualified in respect of his participation in competitions subsequent to the British Open. Under Article M.8.3(a) the period from 19 October 2004 onwards, during which he voluntarily refrained from participation in ITF competitions, must be credited against the period of ineligibility. Under Article M.8.3(b) the ban may start as early as the date of sample collection where fairness so requires, for example because of delays in the process.

81. The ITF accepted after cross-examination that the player's non-participation from 19 October 2004 onwards was voluntary and not caused by, for example, injury. Mr Taylor submitted that the period of ineligibility should start on 19 October 2004, or at the most a few weeks before that to take account of delays at the laboratory in Quebec, and that the player's results in the three competitions in which he took part after the British Open, should be annulled, and the prize money and ranking points forfeited.

82. The player submitted that the period of ineligibility should start on 20 July 2004, the date of sample collection, but that the results of the three post-British Open competitions in which the player took part, should stand even though on that basis they would have taken place during the period of ineligibility. Alternatively, Mr Findlay informed us that the player would prefer the period of ineligibility to commence at the earliest possible date, so that it would end at the earliest possible date, even if that meant the Tribunal annulling the player's results in post-British Open competitions.

83. The Tribunal finds that the player ought to have been notified of the positive test result by about 23 August 2004. That would have been over a month after the sample collection date and nearly three weeks after the laboratory first detected a prohibited substance, on 3 August 2004. The period from 20 July to 23 August represents, in the Tribunal's view, a reasonable period within which to carry out the testing procedure, produce the necessary documentation and notify the player of the adverse test result. Although we fully recognise the need for formality in the procedure and the need for the safeguard of a Review Board, we do not exclude the possibility of informal notification to a player even before the full laboratory report is obtained and provided to the Review Board. There is nothing in the Programme to prevent this.

84. The Tribunal does not criticise the professionalism of the laboratory or IDTM and is sympathetic to the difficulties that they had by reason of the summer

holiday period, the Olympics and the ISO inspection of the laboratory. The Tribunal also takes into account that some delay is inherent in the system and is indeed necessary for the protection of players. However in the present case the reasons for the delay, although they are up to a point normal and legitimate, are not reasons that ought to prejudice the player in our view.

85. We have no doubt that the player would have stopped playing competitive tennis at once had he been notified of the adverse test result in about late August 2004, just as he did as soon as he was notified in October 2004. Had he been notified of the adverse test result in August, he would not have taken part in the three competitions in September and October 2004 to which we have referred. He would not have incurred the resulting expenditure and, more importantly, the period of voluntary abstention from competition would have been credited against his period of ineligibility under Article M.8.3(a). Accordingly we find that fairness requires a period starting on 23 August 2004 be credited against the period of ineligibility under Article M.8.3(b).

86. The player accepts, on that footing, that the three competitions in which he took part after the British Open, all fall within his period of ineligibility. In those circumstances we have no hesitation in deciding that the player's results in those competitions must be annulled and the ranking points and prize money he obtained must be forfeited, and we so decide. Had we decided that the player's ban should start on 19 October 2004, the question as to whether the results of those three competitions should stand, would have been more difficult. In the event, we have no difficulty in declining to uphold the validity of results obtained during a period of ineligibility.

The Tribunal's Ruling

87. Accordingly, for the reasons given above, the Tribunal:

(1) confirms the commission of the doping offence specified in the notice of charge set out in the ITF's letter to the player dated 6 December 2004: namely that a prohibited substance, cocaine and metabolites of cocaine, has been found to be present in the urine sample that the player provided at the British Open in Nottingham on 20 July 2004;

(2) orders that the player's individual result in both the singles and doubles competition must be disqualified in respect of the British Open held at Nottingham, and in consequence rules that the ranking points and prize money obtained by the player through his participation in the singles and doubles competitions in that event, must be forfeited;

(3) orders, further, that the player's individual results in competitions in which he participated subsequent to the British Open – namely the OSD Trophy, Citta di Livorno in August and September 2004; the Tahoe Donner International in the USA in October 2004; and the Quickie US Open in October 2004 - shall be disqualified and in consequence rules that the ranking points and prize money obtained by the player through his participation in those events, must be forfeited;

(4) declares that the player is ineligible for a period of two years from 23 August 2004 to 22 August 2006 to participate in any capacity in any event or activity (other than authorised anti-doping education or rehabilitation programmes) authorised by the ITF or any national or regional entity which is a member of or is recognised by the ITF as the entity governing the sport of tennis in that nation or region.

Tim Kerr QC, Chairman
Dr José Antonio Pascual Esteban
Dr Barry O'Driscoll
4 April 2005