

CAS 2008/A/1591 Appeal by ASADA v Mr Nathan O'Neill

CAS 2008/A/1592 Appeal by WADA v Mr Nathan O'Neill & CA & ASADA

CAS 2008/A/1616 Appeal by UCI v Mr Nathan O'Neill

FINAL ARBITRAL DECISION

delivered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

President: The Hon Tricia **Kavanagh**, Sydney, Australia
Arbitrators: Mr Alan **Sullivan** QC, Sydney, Australia
Mr David **Grace** QC, Melbourne, Australia
CAS Clerk: Miss Katharine Lee, Sydney, Australia

between

Australian Sports Anti-Doping Authority (ASADA) on behalf of Cycling Australia,
Canberra, Australia

represented by Mr John Marshall SC & Ms Penny Sibtain, instructed by Mr Richard Redman, ASADA,
Canberra, Australia

World Anti-Doping Agency (WADA), Montreal, Quebec, Canada

represented by Mr Francois Kaiser, Carrard & Associes, Lausanne, Switzerland

International Cycling Union (UCI), Aigle, Switzerland

represented by Mr Phillip Verbiest, UCI, Aigle, Switzerland

- Appellants -

and

Mr Nathan O'Neill, Brisbane, Australia

represented by Mr Peter Baston, Barrister, Brisbane, Australia

- Respondent -

Date of Award: **January 2009**

A. INTRODUCTION

The Parties

1. The Australian Sports Anti-Doping Authority (**ASADA**), on behalf of Cycling Australia (**CA**), appeals to the Court of Arbitration for Sport (**CAS**), Oceania registry, an award of the CAS at first instance, dated 13 June 2008 in matter of Nathan O'Neill (CAS2008/A/1591). ASADA has the right to appeal to CAS, on behalf of CA, by virtue of a referral power from CA to ASADA dated 26 July 2006.
2. The World Anti-Doping Agency (**WADA**) also filed an appeal against the same CAS decision at first instance, but with the CAS head office in Lausanne, Switzerland (**the WADA appeal**, CAS 2/A/1592). This matter was referred to the CAS Oceania registry to be joined to ASADA's appeal.
3. The International Cycling Federation (**UCI**) also filed an appeal against the CAS decision with the CAS Oceania registry (**the UCI appeal**, CAS 2008/A/1616).

The Background to the Appeal

4. Mr Nathan O'Neill is an Australian professional cyclist who is affiliated with CA. Mr O'Neill was issued with an infraction notice on 31 March 2007 for a positive finding of a prohibited substance in-competition. The matter was referred to CAS on ASADA's application, on behalf of CA, on 14 April 2007.
5. The Hon Justice Jeffery Spender was appointed sole Arbitrator and an Order of Procedure was agreed between ASADA (on behalf of CA) and Mr O'Neill. A hearing took place on 11 June 2008. The athlete admitted to an anti-doping rule violation of CA. The Arbitrator rendered his award dated 13 June 2008. He issued the award in accordance with the anti-doping policy of CA.
6. ASADA, UCI and WADA each challenged the award on the following grounds:
 - (a) Having found the athlete had committed an anti-doping rule violation under the CA anti-doping policy, the Arbitrator was in error in then finding that Mr O'Neill had established that there had been, in relation to his CA anti-doping rule violation "No Significant Fault or Negligence" on his part thereby reducing his ineligibility to compete from the general sanction of a two years period of ineligibility to a 15 month period of ineligibility.

(b) That if there is to be any backdating of the sanction, the earliest possible date for the sanction is 23 September 2007 (not 12 August 2007, the date of the sample collection).

7. Each appeal therefore challenged the determination of the Arbitrator in the application of the "No Significant Fault or Negligence" provision in the anti-doping policy of CA (Art. 13.6.2). The CA policy allows, in such a circumstance, for a reduction in the period of ineligibility from two years.

The Nature of the Appeal

8. WADA and the UCI raised two preliminary issues. They asserted the relevant law for the appeal was Swiss law and the relevant rules for the consideration on appeal were the rules of the international federation, UCI, of which CA was a member.

9. It is necessary, in considering their submissions as to the applicable law and the applicable rules, to consider the CAS code (as referenced in the Order of Procedure), and the relevant rules of the national organisation (CA) and of the international federation (UCI).

10. The Order of Procedure, as issued by the panel, was signed by ASADA and by Mr O'Neill. WADA also signed the Order of Procedure but struck out clause 7 and inserted the following words:

"The law of the Merits shall be by the panel in accordance with article R58 in the code of sports related arbitration and article 290 of the UCI RAD."

11. The UCI have not returned a signed Order of Procedure.

12. Clause 3 of the Order of Procedure provides as follows:

"The parties agree that the arbitration will be conducted by CAS according to the Code of Sports-related Arbitration, (the Code), and in particular the provisions relating to the Appeals Division, R47 and following."

13. Rule 47 of the CAS Code provides as follows:

"An appeal may be filed with the CAS against an award rendered by the CAS acting as a first instance tribunal if such appeal has been expressly provided by the rules applicable to the procedure of first instance."

14. Rule 58 of the CAS Code provides as follows:

"The Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision."

15. Article 16.2 of the CA Anti-Doping Policy provides as follows:

"Appeals from Decisions Regarding Anti-Doping Rule Violations, Consequences, and Provisional Suspensions.

A decision that an Anti-Doping Rule Violation was committed, a decision imposing Consequences of an Anti-Doping Rule Violation, ... may be appealed exclusively as provided in this Article 16.2..."

16. Article 16.2.1 of the CA Anti-Doping Policy provides as follows:

"In cases arising from Competition in an International Event or in cases involving International-Level Athletes, the decision may be appealed exclusively to CAS in accordance with the provisions applicable before such court. Any such appeal will apply Articles 4, 5, 6, 7, 12 and 13 of this Anti-Doping Policy."

17. Article 16.2.1.2 of the CA Anti-Doping Policy provides as follows:

"Any appeal from a determination of the relevant hearing body must be solely and exclusively resolved by the CAS Appeals Division."

18. Article 280, Chapter XI of the UCI Anti-Doping Regulations provides as follows:

"The following decisions may be appealed to the Court of Arbitration for Sport:

- a) *the decisions of the hearing body of the National Federation under article 242;*
- b) *a decision that a Rider shall be banned from participating in Events under article 217 if the ban is for more than 1 (one) month;*
- c) *...*
- d) *the final decision at the level of the National Federation regarding a License-Holder that was referred to his National Federation according to article 183."*

19. Article 289, Chapter XI of the UCI Anti-Doping Regulations provides as follows:

"The CAS shall have full power to review the facts and the law. The CAS may increase the sanctions that were imposed on the appellant in the contested decision."

20. Article 290, Chapter XI of the UCI Anti-Doping Regulations provides as follows:

"The CAS shall decide the dispute according to these Anti-Doping Rules and the rules of law chosen by the parties or, in the absence of such a choice, according to Swiss law."

21. As to the applicable law, Mr O'Neill and ASADA contended the appeal is to be determined according to the law of Australia (NSW), the country in which CA and the athlete are domiciled and under which the decision at first instance was issued. WADA and UCI submitted the law should be Swiss law as the parties have not chosen any other law. WADA and UCI both rely on Art. 290 of the UCI anti-doping regulations. However, the WADA appeal and the appeal of the UCI both acknowledge the CA anti-doping policy.

The Panel notes the UCI Art. 290 does not acknowledge, as does the CAS Code, "the law of the country in which the sports related body which has issued the challenged decision is domiciled."

22. Further, as to the applicable regulations, WADA and UCI both contended the UCI rules were paramount. UCI submitted, as the sample testing of Mr O'Neill was conducted in an international event and, as the national federation Cycling Australia, is a member of the UCI, it is bound by Art. 3 of UCI's anti-doping regulations, which state in-competition, international events shall be governed by its (UCI's) anti-doping regulations "exclusively". Further, the extent that CA's anti-doping policy applies is governed by Art. 6.3 of UCI's constitution which states UCI takes precedence:

"The constitution and regulations of the federations shall not run counter to the Constitution and Regulations of the UCI. In case of divergence, only the constitution and Regulations of the UCI shall apply. The constitution and the regulations of the federations must contain an express clause that in case of divergence with the Constitution and Regulations of the UCI, only the latter shall apply."

23. Therefore the appeal, UCI submits, is governed by UCI's anti-doping regulations exclusively. UCI contends, while its regulations acknowledge CA's anti-doping regulations (UCI Art. 290), a national federation's rules are only applicable at first instance. On appeal the UCI rule has precedence it was submitted.

24. While the UCI regulations are governed by Swiss Law and WADA, as a private association, is incorporated in Switzerland, so it also is governed by Swiss law, nonetheless, the panel determined to adopt the view expressed in *FIFA v WADA v CBF, STJD* (CAS 2007/A/1870) where it was held:

"In the Panel's view, Brazilian law may be applied on a subsidiary basis as the law of the country in which the body which has issued the challenged decision is domiciled. Taking into account Article 60, para. 2, of the FIFA Statutes, Swiss law may also be additionally applied, particularly in reference to the interpretation and application of FIFA rules, which are rules issued by a private association incorporated in Switzerland."

25. In accordance with the law applicable to the sporting body which issued the challenged decision (CA) and the rules of the body chosen by the parties to the appeal, CAS Rule 58,

the Panel determined to hear the matter under Australian (NSW) law but with reference to the relevant rules of CA, UCI and the relevant sections of the WADA Code.

26. Other procedural matters had also to be determined by the panel. ASADA made an application to further cross-examine Mr O'Neill in the appeal hearing. The application was opposed by Mr O'Neill who contended both parties were legally represented at the CAS first instance hearing; he had travelled from the USA to give evidence in the first instance hearing and was cross-examined; there were no time restrictions placed upon the parties by the Arbitrator. Mr O'Neill stated he did not intend to travel to Australia for the appeal hearing nor make himself available via a video link from the USA for the purpose of further cross-examination. Further, he contended, by virtue of the Order of Procedure signed in the CAS case at first instance, there was no right of appeal on the merits or otherwise.
27. The panel determined Mr O'Neill misapprehended the effect of the Order of Procedure under which the arbitration at first instance was conducted. Under CAS Rule 47, there is a right of appeal from a CAS award at first instance "in so far as the regulations of the body so provide". Under the anti-doping policy of CA (the body), "Appeals", Art. 16.2.1, allows "exclusively" an appeal to CAS. The Order of Procedure issued at first instance, therefore, did not deny the panel jurisdiction to hear the appeal.
28. As there was no application from either party to call fresh evidence the application to cross-examine Mr O'Neill was rejected and the matter was set down for hearing. At short notice, however, Mr O'Neill then made application to have the first hearing date vacated. Conditional upon the granting of the vacation of the hearing date, Mr O'Neill agreed to an extension of his period of ineligibility to compete from 11 November 2007 to the date of this determination.
29. In circumstances where the athlete vacated the hearing date and had notified he did not intend to make himself available for the appeal but would be legally represented, the panel determined it was sufficiently well informed to decide the matter on the papers (CAS Rule 57). The panel, for its consideration on appeal, then received the following:
 - (a) award of CAS at first instance dated 13 June 2008;
 - (b) transcript of hearing;
 - (c) the 2007 CA Anti-Doping Policy;
 - (d) infraction noticed dated 31 March 2008;
 - (e) two experts reports:
 - (i) Professor R Weatherby, Associate Professor, School of Health and Human Sciences, Southern Cross University, New South Wales, 2 June 2008; and

- (ii) G Kyle a consultant clinical pharmacist, school of Pharmacy, University of Queensland including a record of medication use by Mr O'Neill, 10 June 2008;
 - (f) Cycling Australia Anti-Doping Policy, January 2008; and
 - (g) UCI Cycling Regulations, 13 August 2004.
30. Reliance was placed by WADA on Rule 57 of the Code of Sports-related Arbitration and the view expressed in *WADA v Swiss Olympic & Daubney* (CAS 2008/A/1515) to contend the scope of the review by the panel is unrestricted:
- "The unlimited scope of review is especially justified and fundamental as the WADA has not been able to be a party before the previous instance"*

The Panel determined to a joinder of all the appeals.

31. Under the CAS Rules, and in accordance with the Order of Procedure, the panel noted the appeal was in the nature of a rehearing (CAS rule 47, see also *French* (CAS 2004) a-651, 30 March 2005 and *D'Arcy v Australian Olympic Committee (No 2)* (CAS 2008/A/1574)) and, under rule 57 of the CAS Code, in such an appeal the panel has the power to review the facts and the law.

B. THE FACTUAL BACKGROUND

32. On the occasion of an in-competition test performed on a bodily sample provided by Mr Nathan O'Neill on August 12, 2007, UCI informed CA that Mr Nathan O'Neill returned an adverse analytical finding for the stimulant Phentermine in a sample collected at the *Tour of Elk Grove* event in the USA. UCI further informed CA of Mr Nathan O'Neill's right to request the analysis of the B-sample.
33. By a letter dated September 20, 2007, UCI informed CA that Mr Nathan O'Neill returned an adverse analytical finding for the stimulant Phentermine in a sample collected at the *Tour of Elk Grove*. UCI further informed CA of Mr Nathan O'Neill's right to request the analysis of the B-sample.
34. At the request of Mr Nathan O'Neill, the B-sample was opened and analysed by UCLA, a WADA-accredited laboratory.
35. The B-sample analysis confirmed the presence of Phentermine in the urine sample of Mr Nathan O'Neill.

36. In a decision dated June 13, 2008, the CAS at first instance imposed on Mr Nathan O'Neill a 15-month period of ineligibility starting as of the date of the sample collection (August 12, 2007) for his violation of the CA anti-doping policy.

The Anti-Doping Rule Violation

37. The Arbitrator at first instance found a rule violation was established but accepted Mr O'Neill's evidence as to the circumstance leading up to the violation was sufficient to establish that, as there was "no significant fault or negligence" on the part of Mr O'Neill, his sanction could be reduced. Some facts were found proven on the balance of probabilities. However, some of those facts, as found proven and on which the Arbitrator relied, were challenged on appeal, especially as to their effect on assessing the nature of the rule violation. ASADA, WADA and UCI each contended the athlete's evidence was self serving, was not corroborated and revealed he did not meet the required standard of care for an elite athlete.
38. The presence of a banned substance in an athlete's sample is an anti-doping rules violation within the WADC 2.1. The relevant provisions of the WADC are however similar in the anti-doping policy of CA at Art. 5 and the international anti-doping rules of the UCI at Art. 15.1. Relevantly they state:
- CA Art. 5: Anti Doping Rule Violation**
- "5.1 *The presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's bodily Specimen.*
- 5.1.1 *It is each Athlete's personal duty to ensure that no Prohibited Substance enters his or her body. Athletes are responsible for any Prohibited Substance or its Metabolites or Markers found to be present in their bodily Specimens. Accordingly, it is not necessary that intent, fault, negligence or knowing Use on the Athlete's part be demonstrated in Order to establish an anti-doping violation under Article 5.1."*
- UCI Art. 5: Anti-Doping Rule Violation**
15. *The following constitute anti-doping rule violations:*
- 15.1. *The presence of a Prohibited Substance or its Metabolites or markers in a Rider's bodily specimen.*
- 1.1 *It is each Rider's personal duty to ensure that no Prohibited Substance enters his body. Riders are responsible for any Prohibited Substance or its Metabolites of Markers found to be present in their bodily Specimens. Accordingly, it is not necessary that intent, fault, negligence or knowing Use on the Rider's part be demonstrated in order to establish an anti-doping violation under article 15.1.*
39. We are satisfied the evidence establishes the following facts, creating foundation for a finding that it was a CA anti-doping rule violation by Mr O'Neill (and an anti-doping rule violation of UCI's anti-doping regulations):
- (a) Mr O'Neill conceded he ingested Phentermine.

- (b) Mr O'Neill knew that Phentermine was a substance banned and on the prohibited list because it is a stimulant (and is still) [WADA 2007 list; CA art 5.1-5.2 UCI].
 - (c) Mr O'Neill tested positive in the A and B sample to the presence of Phentermine in his bodily fluid after in-competition testing.
 - (d) Mr O'Neill was bound by the CA anti-doping policy and UCI anti-doping rules.
40. Therefore Mr Nathan O'Neill, under Art 5.1 of the anti-doping policy of CA, had the presence of the prohibited substance in his body whilst in-competition and thereby breached the policy. We are also satisfied there was a breach of UCI's anti-doping rule, Art. 15.1. We find, therefore, there has been, by Mr O'Neill, an anti-doping rule violation.

The Period of Ineligibility

41. The sanctions for a positive finding are found in Art. 13.6.2 of the CA's anti-doping policy and in the definitions section which defines, separately, "No Fault or Negligence" and "No Significant Fault or Negligence" as follows:

CA Art. 13: Sanctions on Individuals

"13.6.2

This Article 13.6.2 applies only to Anti-Doping Rule Violations involving Article 5.1 (presence of Prohibited Substance or its Metabolites or Markers). Use of a Prohibited Substance or Prohibited Method under Article 5.2 ... If an Athlete establishes in an individual case involving such violations that he or she bears No Significant Fault or Negligence, then the period of Ineligibility may be reduced, but the reduced period of Ineligibility may not be less than one-half of the minimum period of Ineligibility otherwise applicable. ... When a Prohibited Substance or its Marker or Metabolites is detected in an Athlete's Specimen in violation of Article 5.1 ... (presence of Prohibited Substance), the athlete must also establish how the Prohibited Substance entered his or her system in Order to have the period of Ineligibility reduced."

Appendix 1: Definitions

"No Fault or Negligence. *The Athlete's establishing that he or she did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he or she had Used or been administered the Prohibited Substance or Prohibited Method."*

"No Significant Fault or Negligence. *The Athlete's establishing that his or her 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 relationship to the Anti-Doping Regulation Violation."*

42. UCI's anti-doping rules are in similar terms though the "defence" or the "qualification" "no fault or negligence" is enunciated in a separate regulation to the "no significant fault or negligence" provision. They are as follows:

Elimination or Reduction of Period of Ineligibility

264. *If the Rider establishes in an individual case involving an anti-doping rule violation under article 15.1 (presence of Prohibited Substance or its Metabolites or Markers) ... that he bears No Fault or Negligence for the violation, the otherwise applicable period of ineligibility shall be eliminated. When a Prohibited Substance or its Markers or Metabolites is detected in a Rider's Specimen in violation of article 15.1 (presence of a Prohibited Substance), the Rider must also establish how the Prohibited Substance entered his system in order to have the period of Ineligibility eliminated. In the event this article is applied and the period of Ineligibility otherwise applicable is eliminated, the anti-doping rule violation shall not be considered a violation for the limited purpose of determining the period of Ineligibility for multiple violations under articles 261, 262 and 269-271.*

265. *This article 265 applies to anti-doping rule violations involving article 15.1 (presence of a Prohibited Substance or its Metabolites or Markers), ... If a License-Holder establishes in an individual case involving such violations that he bears No Significant Fault or Negligence, then the period of Ineligibility may be reduced, but the reduced period of Ineligibility may not be less than one-half of the minimum period of Ineligibility otherwise applicable. ... When a Prohibited Substance or its Markers or Metabolites is detected in a Rider's Specimen in violation of article 15.1 (presence of Prohibited Substance), the Rider must also establish how the Prohibited Substance entered his system in order to have the period of Ineligibility reduced.*

43. The WADA Code at Art. 2 recites the same prohibition on an athlete for the use of a prohibited substance and at Art. 10 recites the possible defences to a rule violation. The definitions in WADC Art. 10.5.2 and UCI definitions, Appendix 1, are also similar. The WADA code also provides "comments" in relation to the interpretation of its Art. 10.5.2, which (as noted) is identical to Art 13.6.2 of the CA anti-doping policy and similar to UCI anti-doping regulations, Arts. 264 and 265. The relevant commentary summary is as follows:

"Article 10.5 is meant to have an impact only in cases where the circumstances are truly exceptional and not in the vast majority of cases."

44. The effect of WADA Code was considered in *Knauss v FIS* CAS 2005/A/847 at [7.3.4] (as adopted in *AWF v Myers* CAS A2/2006 at [37] and [44]-[45] per Grace QC). In *Knauss v FIS* the appeal division of CAS said at [7.3.4]:

"However, the question in the present case remains whether the Appellant's fault or negligence is "significant" pursuant to Article 10.5.2 FIS-Rules. The (official) comments on the WADC][. 30 et. seq.) can be viewed as laying down an initial guideline as to how this qualifying element should be interpreted. Although these comments are not binding upon the Panel in formulating its decision, they form a body of information which can be taken into account when interpreting the rules and regulations in the WADC. The content of the WADC is, in turn, significant for interpreting the FIS-Rules (which are largely identical in content); pursuant to Article 18.5 FIS-Rules, the latter are to be interpreted in the light of and in compliance with the WADC (see also CAS 2004/A/690 Hipperdinger v/ ATP Tour Inc [24.3.2005] marg. no. 71)..."

45. As to the application of the "no significant fault or negligence" defence, in *Puerta v ITF* (CAS 2006/A/1025, 12 July 2006 at 11.5.4) it was held:

"This defence involves measuring the degree of fault or negligence of the athlete with respect to the analytical positive result. If the fault or negligence is not significant, then the CAS . . . has the opportunity to reduce the sanction that would otherwise arise by strict liability."

46. We adopt the view the WADA commentary serves as a useful guide in the Panel's consideration of the Appeal. The Panel will consider to what degree was the breach due to the fault or negligence of Mr O'Neill in the particular circumstances before us.
47. Therefore, in accordance with Art. 13.2 of CA's anti-doping policy (Art. 261 of UCI anti-doping rule) Mr O'Neill would incur a 2 year period of ineligibility for his doping offence. However, pursuant to Art. 13.6 of CA's anti-doping policy (see also Art. 264 UCI regulations) if an athlete can establish that there are "exceptional circumstances" in his individual case, the otherwise applicable period of ineligibility can be eliminated (in a case of no fault or negligence) or be reduced in the case of no significant fault or negligence (Art. 13.6.2 the anti doping policy of CA and Art 265 of UCI's anti-doping Regulation).
48. The sole Arbitrator at first instance, having found a violation by Mr O'Neill under Art. 5.1 of CA's anti-doping policy, reasoned at [75]:
"In my view, the opinion of Associate Professor Weatherby corroborates the honesty and reasonableness of Mr O'Neill's stated view that "I honestly believed that I had allowed enough time for it to clear my system". I am satisfied, on the balance of probability, that Mr O'Neill's positive Phentermine result occurred without significant fault or negligence, within the meaning of that phrase as defined in Appendix 1 to the Policy."
49. He then ordered at [3]:
"Nathan O'Neill has established that he bears no significant fault or negligence, within the meaning of article 13.6.2 of the Anti-Doping policy of Cycling Australia in respect of the violation referred to ..."
50. The Arbitrator then reduced the period of ineligibility in respect of that violation to a sanction of 15 months, commencing on 12 August 2007 (the date of the testing) and expiring at midnight on 11 November 2008.
51. CAS, therefore, at first instance, accepted the explanation of Mr O'Neill, that the origin of the prohibited substance was phentermine pills taken by him as an appetite suppressant; that he bought the substance from an internet pharmacy; that he was aware that phentermine was a stimulant prohibited in competition; that he took the substance for five consecutive days ending on August 4 2007 with the aim of losing 1 or 2 kilos. The Arbitrator also accepted that Mr O'Neill was of the view that the time frame between 4 August and 11 August (that is, 7 days) was sufficient to clear the drug from his system. He accepted that Mr O'Neill had conducted internet research and spoke to other cyclists and that conduct was "reasonable".
52. In the knowledge the substance was prohibited, Mr O'Neill had explained he thought the substance would not be detectable in his bodily fluids on the occasion of the tour of Elk

Grove from August 11, 2007, because he had ceased taking the substance some 7 days before. In support of his submission that his fault or negligence was not "significant", Mr O'Neill placed reliance on the opinion of an expert, Professor Weatherby.

53. Professor Weatherby, in his evidence, created a distinction between "clearance" time and "detection" time of the substance Phentermine saying:
- "The **clearance** time of a substance is the length of time it takes a human body to eliminate a substance from the body. For Phentermine, the clearance time can be as short as 3 days but as long as 6-7 days" (at 10 of the opinion of Professor Weatherby).*
- On the other hand, "Phentermine will not be able to be detected for the complete time of elimination as the amounts being excreted after about 4 half-lives are very small and usually below the limit of detection of the methods" (at 13).*
- It is my opinion that Phentermine should be able to be **detected** by a laboratory up to 5 days after ingestion (at 14)."*
54. From this evidence the Arbitrator at first instance was satisfied Mr O'Neill "could not reasonably have apprehended that Phentermine could remain in his system for some 7 days" (CAS, first instance, at [26]).
55. Even in a circumstance where the clearance time of a prohibited substance is longer than the detection time, it remains the responsibility of the athlete, at the time of competition, to ensure the prohibited substance has cleared from his body. Every athlete has a responsibility to ensure, under the standard of care expected from an elite athlete, when an athlete takes a substance which is prohibited in in-competition, at the time of competition, the substance has cleared from his system.
56. Further, Mr O'Neill agreed he was aware that the clearance time of such a substance as Phentermine varied from individual to individual and in such a circumstance, as a well educated, elite athlete and part of a team, it was open to him to seek the team's professional medical advice. Evidence before us indicates he did, on other occasions, seek permission for substance usage. The advice of other cyclists from other teams, which Mr O'Neill purported he had sought, cannot be held to be the advice of a medical professional. He did not consult the team doctor or anyone from his own cycling team. Also of import is the evidence from Mr O'Neill that he took the risk because he was of the view that without Phentermine he was not going to be competitive. Mr O'Neill therefore self medicated with a view to gaining a competitive advantage.
57. Mr O'Neill provided no corroborative evidence as to his asserted research on the substance Phentermine. We do not accept, without such corroborating evidence, that Mr O'Neill has established he conducted adequate research into the clearance time of the substance or if he conducted any research at all. In any event we would have to be satisfied that such research would have allowed the conclusion sought to be drawn. Further, Mr O'Neill asserted he relied upon advice from his father, a qualified pharmacist.

The father should have been made available to corroborate Mr O'Neill's assertion he relied upon such informed advice. No statement, nor record of opinion, was tendered by the athlete to give credence to his assertion.

58. This rule violation and the circumstances surrounding the breach bring into focus once again the rigorous standard of care required from an athlete competing at national and international levels. Athletes have to ensure that no prohibited substance is in his/her body in-competition. An athlete must exercise the utmost care to that end.
59. Upon examining the evidence at first instance we find there is no persuasive evidence to establish the last date the prohibited substance was consumed by the athlete. Mr Kyle, another expert relied upon, was given a document by Mr O'Neill asserting it recorded the dates on which he ingested the substance, but questioning revealed it was not a contemporaneous record. Furthermore, as was said in *WADA v Coni, FPI & Comastri* [CAS 2008/A/1479], the fact that an athlete was prepared to take a risk with respect to the detection period of a substance, which was prohibited in-competition, constitutes a significant negligence on the part of the athlete who is bound by a duty of care to ensure that no prohibited substance enters his body (Art. 5.1.1 of CA, UCI Art 15.1.1).
60. Mr O'Neill deliberately ingested a prohibited substance. He knew the substance was prohibited. He therefore took a very high risk. We reject the proposition that such a circumstance, including taking a risk, could constitute the required "exceptional" circumstances which could justify a "no significant fault or negligence" finding and thereby give the athlete the benefit of a reduced sanction. Mr O'Neill, we find, has failed to demonstrate he exercised reasonable caution to avoid that the substance Phentermine, voluntarily taken by him, was present in his system in-competition. Athletes who have used a prohibited substance out of competition have a personal duty to ensure a substance prohibited for in-competition is not found in his/her system on the occasion of an in-competition sample collection testing.
61. We find there was a significant fault and negligence on the part of Mr O'Neill in ingesting the Phentermine before competition and competing while the substance remained in his system. We find in the application of Art. 13.6.2 by the Arbitrator in the Award at first instance there was error.
62. Therefore the decision of CAS at first instance, dated June 13, 2008, in the matter of Mr Nathan O'Neill is set aside. The appeal from ASADA for CA, WADA and UCI is upheld.
63. In accordance with Art. 13.9 of the CA anti-doping policy and Art. 264 of UCI anti-doping regulations the panel determines, the period of ineligibility to compete shall start at the date of the hearing decision which ruled on Mr O'Neill's ineligibility, namely, 13 June 2008. Any

period of professional suspension, as imposed before the entry into force of the CAS award, shall be credited against the total period of ineligibility to be served.

C. Costs

64. In accordance with the Order of Procedure for the Appeal, Mr O'Neill, ASADA (CA) and WADA agreed:

16. Costs

The parties acknowledge the R64.4 of the Code and Rule 64.5 of the Code confers on the arbitral tribunal the power to determine by the award which party shall bear the arbitration costs or in which proportion the Parties shall share them. The Parties wish to enter into, and do by their signing of this Order of Procedure hereby enter into, a fresh and binding agreement in relation to the costs of this arbitration in the same terms as are found in Article 11.1 and Article 11.10 of the CA Policy namely:

11.1 All hearings will be conducted on the principle of the right to be represented by counsel at the Person's own expense ...

11.10 CA will bear the costs of the relevant hearing body (including any appeal under Article 16.2) but each party will bear their own costs of any hearing.

65. Mr O'Neill, WADA and ASADA (for CA) each agreed to this provision, however, in submissions UCI and WADA asked for costs.

66. The evidence reveals Mr O'Neill suffers severe financial constraints. He has pursued his rights on appeal and accepted the intervention of other inter-related parties on appeal. In the circumstances we order Costs in terms of the Order of Procedure.

ON THESE GROUNDS

The Court of Arbitration for Sport Rules:

1. In matter No. CAS 2008/A/1591 & 1592 & 1616, the appeals are upheld.
2. The decision of the CAS at first instance dated 13 June 2008 is set aside.
3. The period of ineligibility of Nathan O'Neill shall be two years from 13 June 2008.
4. Cycling Australia shall bear the costs of the CAS procedure on Appeal.
5. Each party shall bear their own costs of the appeal procedure.

Done in Sydney, January 2009

THE COURT OF ARBITRATION FOR SPORT

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

Mr Alan **Sullivan** QC
Arbitrator

Mr David **Grace** QC
Arbitrator