

INTERNATIONAL RUGBY BOARD

IN THE MATTER OF THE REGULATIONS RELATING TO THE GAME

AND IN THE MATTER OF ALLEGED DOPING OFFENCES BY **DUNCAN MURRAY**
(UNITED ARAB EMIRATES) CONTRARY TO REGULATION 21

AND IN THE MATTER OF A DECISION OF A BOARD JUDICIAL COMMITTEE
DATED 29 AUGUST 2011

AND IN THE MATTER OF A REFERRAL TO A POST-HEARING REVIEW BODY
APPOINTED PURSUANT TO REGULATION 21.24 CONSISTING OF:

Post-Hearing Review Body:

Mr. Tim Gresson (New Zealand)

Dr. Barry O'Driscoll (Ireland)

Graeme Mew (Canada – Chair)

Appearances

Ben Rutherford (Counsel for the International Rugby Board)

Duncan Murray (the Player)

Ian Bremner (Chief Executive Officer, United Arab Emirates Rugby Association)

Tim Ricketts (Anti-Doping Manager, International Rugby Board)

Heard: 22 December 2011 by way of telephone conference

DECISION

1. Duncan Murray (the "Player") is an experienced thirty year old rugby player. After leaving school he joined Gloucester RFC (2000-2001) in England and subsequently he played for Worcester RFC. More recently he has lived and played his rugby in Dubai. He has represented the United Arab Emirates ("UAE") at the international level.

2. On 29 April 2011, following a match in the Asian 5 Nations Tournament (the "Tournament") between the UAE and Kazakhstan, in which he played, the Player provided a urine sample for doping control purposes. Following analysis, the Player's sample (A Sample 2270027) was found to contain a methylhexaneamine ("MHA"), a prohibited substance listed in the *2011 Prohibited List* under the *World Anti-Doping Code* under S6 (Stimulants).

3. The Player accepted that, by testing positive for MHA he had committed an anti-doping rule violation. He waived his right to have the B Sample of his urine specimen tested. He was provisionally suspended from participating in rugby activities with effect from 28 May 2011.

Procedural History

4. The Player's case was referred under the Tournament's Anti-Doping Programme ("TADP") to a Board Judicial Committee ("BJC") of the International Rugby Board ("IRB"). A hearing took place by telephone conference call on 15, 16 and 17 August 2011. The BJC reserved its decision. On 29 August 2011 the BJC issued a written, reasoned decision (the "Decision"). A majority of the members of the BJC found that the Player had failed to establish any basis for the elimination or reduction of the presumptive period of ineligibility of two years for a first anti-doping rule violation involving the Presence of Prohibited Substance in a Player's Sample.¹ Accordingly, the BJC imposed a period of ineligibility of two years, commencing on the date the Player's provisional suspension took effect, namely 28 May 2011.
5. The Decision was notified to the Player via the United Arab Emirates Rugby Association (the "Union") on 5 September. On 8 September the Player and the Union gave notice that, pursuant to Clause 24 of the TADP, they were seeking a review of the Decision by a Post-Hearing Review Body ("PHRB"). This PHRB was appointed on 10 September 2011 by the Chairman of the IRB's Anti-Doping Judicial Panel to conduct that review.
6. On 5 October 2011 an organisational telephone conference took place in which members of the PHRB participated, along with counsel for the IRB, the IRB's Anti-Doping Manager and the Player. The purpose of the meeting was to discuss the format of the hearing, the evidence at the hearing and any other directions that might be required.
7. Following the organisational telephone conference, the PHRB provided certain directions (Minute No. 1 dated 10 October 2011). A hearing date of 18 October 2011 (with the Player and the Union participating by telephone) was set.
8. During the organisational telephone conference, the Player had advised that he wished the PHRB to hear from two witnesses from whom evidence was not provided to the BJC. He explained that neither witness was available at the time of the hearing before the BJC. Accordingly, one of the directions given by the PHRB provided:

Prior to the hearing, the Player will submit to the PHRB (via Mr. Ricketts) statements of the evidence of the two additional witnesses identified by the Player and a written explanation of the reason(s) why the evidence of those witnesses was not available at the hearing before the BJC. The PHRB will consider as a preliminary matter at the hearing whether to admit the evidence of one or both of these witnesses. If the PHRB decides to admit further

¹ IRB Regulation 21.22.1 provides that the period of Ineligibility imposed for a violation of Regulation 21.2.1 (Presence of Prohibited Substance or its Metabolites or Markers) shall be two years for a first violation, unless the conditions for eliminating or reducing the period of Ineligibility, as provided for in Regulations 21.22.3, 21.22.4, 21.22.5, 21.22.6, 21.22.7 and/or 21.22.8 or the conditions for increasing the period of Ineligibility, as provided in Regulation 21.22.9, are met.

evidence, the witness(es) should be available to answer questions arising from their statements.

9. The Player failed to submit the statements, as directed, and failed to respond to communications from the Anti-Doping Manager. The PHRB therefore adjourned the hearing on its own initiative. When he did make contact, the Player indicated that he had erroneously thought that the hearing had been scheduled for a different date. The Player has asked that a new hearing date be set.

10. It had been the intention of the PHRB to complete the hearing while all members of the PHRB were physically located in New Zealand at the 2011 Rugby World Cup, thus overcoming the logistical problems attendant on the participation of panel members and participants located on four continents. It was not, however, possible to find another mutually convenient date before the end of the Rugby World Cup. Accordingly, the hearing was set for Tuesday 5 December. This was subsequently changed to Friday 2 December 2011.

11. Following a series of e-mail exchanges in the days leading up to the scheduled hearing date, the Player requested a further adjournment of the hearing to enable him to obtain witness statements.

12. Furthermore, in agreeing to a hearing date of 2 December, it transpired that the Player had failed to take into account that the Dubai 7s would be going on at that time, thereby rendering unavailable the Union's representative and the potential witnesses.

13. In the circumstances, the hearing on 2 December was a brief one. The PHRB agreed to further reschedule the hearing date in this matter to 22 December 2011 at 6:00 AM (GMT) by way of telephone conference. It was directed that the date and time would be peremptory to the Player. It was further directed that the Player would submit the statements of the evidence of the two additional witnesses identified by the Player and a written explanation of the reason(s) why the evidence of those witnesses was not available at the hearing before the BJC by no later than 15 December 2011 at 5:00 p.m. GMT.

14. The Player did not provide any further witness statements. Accordingly the hearing proceeded on the basis of the evidentiary record that was before the BJC. In addition to the papers that were lodged with the BJC, an audio recording of the hearing before the BJC was provided to the PHRB.

The BJC Proceedings

15. In light of the Player's admission, and other relevant evidence, the BJC was comfortably satisfied that the IRB had discharged its evidentiary burden of showing that the Player had committed an anti-doping rule violation pursuant to Clause 2.1 of the TADP (IRB Regulation 21.2.1). The principal issue to be determined was therefore the applicable sanction.

16. As already noted, the presumptive sanction for a first anti-doping rule violation involving the Presence of Prohibited Substance in a Player's Sample is a period of Ineligibility of two years. However, MHA is a "Specified Substance"². Clause 22.3 of the TADP (Regulation 21.22.3) provides for the elimination or reduction of the period of Ineligibility for Specified Substances in specific circumstances:

Where a Player or other Person can establish how a Specified Substance entered his body or came into his Possession and that such Specified Substance was not intended to enhance the Player's sport performance or mask the Use of a performance-enhancing substance, the period of Ineligibility found in Regulation 21.22.1 shall be replaced with the following:

First violation: At a minimum, a reprimand and no period of Ineligibility; and at a maximum, two years.

To justify any elimination or reduction from the maximum period of ineligibility set out above, the Player or other Person must produce corroborating evidence in addition to his word which establishes to the comfortable satisfaction of the Judicial Committee the absence of intent to enhance sport performance or mask the Use of a performance-enhancing substance. The Player's or other Person's degree of fault shall be the criterion considered in assessing any reduction of the period of Ineligibility.

17. The BJC noted that Regulation 21.22.3 requires the player to establish:

- a) The anti-doping violation involved a Specified Substance; and
- b) How the Specified Substance entered his body (or came his possession); and
- c) There was no intention to enhance sport performance or to mask the use of a performance enhancing substance.

18. The Player's burden in respect of the first of these two elements is to establish them on a balance of probabilities. However, an absence of intention to enhance sport performance must be established, with corroborating evidence, to the "comfortable satisfaction" of the tribunal. This is a higher standard of proof than a balance of probabilities.

19. If the Player succeeds in establishing these elements, his degree of fault shall be the criterion by which any reduction in penalty is assessed.

² Regulation 21.4.5 provides:

For purposes of the application of Regulation 21.22 (Sanctions on Individuals), all Prohibited Substances shall be "Specified Substances" except substances in the classes of anabolic agents and hormones and those stimulants and hormone antagonists and modulators so identified on the Prohibited List. Prohibited Methods shall not be Specified Substances.

20. The Player relied in the alternative on Regulation 21.22.4 and 21.22.5. These provide for the reduction or elimination of the period of Ineligibility where the Player can establish that the anti-doping rule violation occurred through no significant fault or negligence, or no fault or negligence on his part.

The Player's Evidence

21. The Player tendered into evidence:

- a) Player's undated single page statement emailed to the IRB on 3 August 2011 together with two photographs one of a tub of "Jack3d" and the other of such a tub (and others) on a box marked "Lifestyle Nutrition";
- b) Undated statement from Ian Bremner, emailed to the IRB on 5 August 2011; and
- c) Email from Stuart Quinn to the Player sent by him on 14 August and forwarded by the Player to Mr Ricketts on 14 August 2011.

22. The BJC also heard oral testimony from the Player and Stuart Quinn.

23. The BJC's decision comprehensively sets out the evidence provided by the Player and by Mr. Quinn. Suffice it to say at this juncture that the BJC expressed doubts about the reliability of the evidence given by both of them. The BJC noted inconsistencies between the written statements and the oral testimony on a number of important elements and attempts to explain those inconsistencies unpersuasive.

24. In essence, the Player's case was that the MHA had entered his body through his taking three or four sips of a drink containing the supplement Jack3d. The drink was taken shortly before the match, from a bottle that belonged to another (Quinn) and was mixed by Quinn. His ingestion of MHA was inadvertent in that he did not know at the time of consumption (1) what supplement was used to mix the drink nor (2) that the supplement, and therefore the drink, contained MHA.

25. Evidence provided by the IRB demonstrated that the Player had signed a Player Consent Form prior to the Tournament in which he acknowledged having "*had an opportunity to read and hav[ing] read and understood*" the Terms of Participation for the Tournament which includes the TADP. There was also evidence that the Player had participated in the IRB Sevens World Series in 2009-2010 that further demonstrated his admitted knowledge of his anti-doping obligations and experience of anti-doping regimes.

26. The IRB also tendered into evidence a copy of a Circular dated 6 April 2011 sent by Mr Ricketts to all CEOs, Team Managers and Medical Managers of the Unions participating in the Tournament. It is entitled "HSBC Asian 5 Nations – Anti-Doping Programme 2011 – Education Resources". That circular contained a section as follows:

SUPPLEMENTS

The IRB's position on nutritional supplements is enclosed in your Union's package.

Methylhexaneamine:

Member Unions and Players are advised to carefully check any supplements they may be using as to whether any products may contain Methylhexaneamine. This is a result of this substance being added to the WADA Prohibited List in 2010 which has resulted in a large number of cases in sport including Rugby. This substance may frequently be referred to as "geranium oil" or "geranium root extract"

Methylhexaneamine Related Substances

Methylhexaneamine has many different variants (listed below) which Players should check if using or considering to use any dietary or nutritional supplements. If a product contains any of the following ingredients on the label, the Player should immediately stop using the product and report it to his Union. A failure to do this may result in an Adverse Analytical Finding being reported for Methylhexaneamine.

Methylhexaneamine; Methylhexanamine; DMAA (dimethylamylamine); Geranamine; Forthane; Forthan; Floradrene; 2-hexanamine, 4-methyl-; 2-hexanamine, 4-methyl- (9CI); 4-methyl-2-hexanamine; 1,3-dimethylamylamine; 4-Methylhexan-2-amine; 1,3-dimethylpentylamine; 2-amino-4-methylhexane; Pentylamine, 1, 3-dimethyl-; Geranium oil, Geranium root extract.

27. Extracts from the www.jack-3d.com website were also introduced. The BJC noted that:

Using the link to ingredients, there is a specific, obvious and not insignificant passage under the heading – "Germanium (1,3 Dimethylamylamine). Put another way, the specific substance MHA appears as a listed ingredient. It also appears in the list of ingredients printed on the label stuck to every tub of Jack3d: "1,3 Dimethylamylamine (Germanium [stem])." The label also had a "Black Box Warning" stating that the product "allows for rapid increases in strength, power and endurance"

28. A photograph of a tub of Jack3d with a corresponding label apparently taken by Mr. Bremner in a shop called "Lifestyle Nutrition" was also filed.

29. After assessing all of the evidence, the BJC was not satisfied with the explanations as to how and in what circumstances the supplement drink was mixed and by whom.

30. The BJC made the following findings:

- a) There was no issue about the substance involved (MHA) being a "Specified Substance".

- b) On the question of how the MHA entered the Player's body, the BJC concluded that the MHA in his urine sample entered his body through his taking a drink which was made from a supplement containing MHA, which drink he consumed shortly before the Kazakhstan match.
- c) On the issue of whether the Player met the burden of establishing that he did not intend to enhance his sport performance, the BJC found as follows:

53. The Player's explanation for why he drank the liquid in the bottle was simple: to "quench [his] thirst". He explained that it was very hot and water, when consumed endlessly, was boring. To him the drink "could quite easily have been Ribena" (a popular cordial). But it wasn't and on his own admission he knew it was not: he knew at the time he drank from the bottle that it contained a drink mixed from a supplement and water.

54. Approaching the case on the basis most favourable to the Player (he simply took the bottle from another player and drank from it – and we emphasise the Player did not satisfy us that that was probably the case), the BJC unanimously rejected the Player's explanation of his intent when he drank from the bottle. The BJC did not accept that he drank from the bottle because, and only because, he was thirsty. He offered no other explanation but that he was thirsty and bored of water. He knew it was a drink made from a supplement. His attempt to explain his expression "I used this drink as one would use any other energy drink" as meaning something other than what it clearly does (namely, to provide energy), was, in our judgment, unpersuasive. The timing of ingestion is material: it was an "energy drink" (his expression) consumed not only on the day of, but very shortly before, the match.

55. Accordingly we concluded that the Player did not demonstrate to our comfortable satisfaction (on the basis of his own word let alone corroborating evidence) that at the time he consumed the drink he did not intend to enhance sport performance.

56. However, that is not the end of matters. The material part of TADPC 22.3 reads: "that such Specified Substance was not intended to enhance the Player's sport performance...". As to the construction of those words the BJC was not ad idem. The majority view (respectfully) agreed with the approach adopted by the CAS Panel in Foggo v NRL, namely that the "effect of the rule is to require the athlete to show that the ingestion of the product which contained the specified substance was not intended to enhance his sport performance" (para. 46).

57. The Foggo CAS Panel did "not agree" with the approach taken by the Panel in CAS 2010/A/2107 Oliveira v USADA. In Oliveira the Panel opined that the said words did not require the athlete to "...to prove that she did not take the product...with the intent to enhance sport performance" (para. 9.14) and concluded that they require "[the athlete] only to prove her ingestion of [the specified substance] was not intended to enhance sport performance"

(para.9.17). *The effect of that approach is that the intent must relate to the specific substance and not to the product in which it is contained.*

58. *With respect, the majority of the BJC preferred and adopted the Foggo interpretation. In our view, the intent relates not to the Specified Substance but to the ‘product’ which contained the Specified Substance:*

a. *That interpretation is supported by TADPC 2.1(a), namely that each Player “has a personal duty to ensure no Prohibited Substance enters his body” and “...it is not necessary that intent, fault, negligence or knowing use on the Player’s part be demonstrated in order to establish an anti-doping violation...” [emphasis added]. An athlete is personally responsible and strictly liable for ingesting any Prohibited Substance. He takes the risk if he does not read or reads and ignores an ingredient list or the risk that a supplement may be mislabelled or contaminated [1,3 Dimethylamylamine is a listed ingredient on the Jack3d label].*

b. *If an athlete takes a supplement intending to enhance sport performance then it is reasonable to conclude the athlete intends to use it and whatever is in it for that purpose.*

c. *Further, personal responsibility is not to be determined by reference to the athlete’s knowledge or ignorance of the ingredients of the product he is ingesting.*

d. *That interpretation and approach accords, in the opinion of the majority, with the policy of the WADA Code.*

59. *At his express wish, this Decision records that Mr Nicholson held the dissenting and opposing view. By reference to the exact wording of TADPC 22.3, “that such Specified Substance was not intended to enhance the Player’s sport performance...” [emphasis added] he favoured the Oliveira interpretation, namely that an athlete cannot intend to enhance sporting performance unless he knows the supplement he ingests contains the Specified Substance. Since the Player asserted he did not know the drink contained MHA, Mr Nicholson was comfortably satisfied that the Player’s ingestion of MHA was inadvertent and in itself was not intended to enhance sport performance*

60. *Accordingly, the majority of the BJC was not comfortably satisfied that the Player had demonstrated an absence of an intent to enhance sport performance.*

31. The BJC rejected the Player’s alternative submissions that there was either (a) no fault or negligence; or (b) no significant fault or negligence on his part. In assessing the degree of the Player’s fault, the BJC had regard to the following:

- a) The Player had received education about anti-doping and was familiar through his own experience with anti-doping regulations and regimes and had been tested on four previous occasions.
- b) The Player was a mature man who had played at a high level, including professionally and internationally, in both fifteens and sevens (including in the IRB Sevens World Series). He was playing at International level when he provided the sample.
- c) On his own case, he drank a supplement-based drink from an unmarked bottle. Before doing so, he made no inquiries as to who made the drink, when, in what circumstances and what it contained. Even if he knew (at that time) that it had been mixed by a fellow player and would have contained only a supplement available over the counter, that provides absolutely no warranty against it containing a Prohibited Substance. There is an obvious difference between a product that is lawfully available and one that does not contain a Prohibited Substance or a substance that is not on the WADA Prohibited List.

32. In light of its findings, the BJC was bound to, and did, impose a sanction of two years Ineligibility.

The Player's Request for Review

33. The Player's grounds for seeking a review by this PHRB were set out in these terms:

I admit that there was a discrepancy between my written and oral evidence. The reason for this was me being naive in my responses based on the fact that I thought that this matter- taking a Specified Substance- would be treated as a genuine error which I firmly believe it was. My initial letter was not meant to be evasive or misleading. I agree I misunderstood the gravity of the matter.

I am also requesting further consideration of the evidence provided by Stuart Quinn. It is my contention that the initial evidence offered by Mr Quinn was deliberately vague as he did not wish to implicate himself. The second interview however when Mr Quinn was encouraged by the statement made from Mr Rutherford that he would in all probability be free from any punishment, was much more precise and in my view provided the corroborating evidence I was looking for- that I was not aware of what I was ingesting. My further contention is that the two almost contrasting statements made by Mr Quinn seemed to label him as unreliable and I would like the PHRB to reconsider this.

I would also like the opportunity to reaffirm my position with reference to paragraph 59 and to prove that my action was 'inadvertent and in itself was not intended to enhance performance.

34. The Player was asked to provide specific grounds for his request, but did not do so.

Jurisdiction of the PHRB

35. IRB Regulation 21.24 provides that a Player who has been found by a Judicial Committee to have committed an anti-doping rule violation shall be entitled to have the finding and/or sanction referred to the Post-Hearing Review Body. The referral must be made within seven days of the notification of the decision of the BJC. The specific grounds for the referral request should be stated.

36. The PHRB is entitled to determine the basis upon which any review will proceed. It may, in its discretion, rehear the whole or any part of the evidence given before the Judicial Committee as it considers appropriate. Pending the decision of the PHRB the decision of the BJC remains in full force and effect³. The PHRB may also in some circumstances admit additional evidence.⁴

37. The Player's burden is to prove that the BJC decision should be overturned or varied.⁵ If he can do so, the PHRB has the power to quash, suspend, vary or increase the decision and/or sanction reviewed, subject always to the provisions of Regulation 21.22.⁶

Standard of Review

38. Consistent with analogous principles of law, findings of fact made by a BJC should only be overturned or varied if they were clearly wrong. By contrast, the standard of review of the BJC's application of legal principles is whether the decision was correct.

Position of the Parties

39. The Player was not legally represented at the hearing. In his submissions he reiterated that he had consumed the drink which gave rise to his positive test because he was thirsty. He argued that the BJC was in error in not recognising that the terms "energy drink" and "sports drink" were synonymous, and that this misapprehension of the evidence had led the BJC to the erroneous conclusion that he had consumed the drink to enhance his sport performance.

40. The Player recognised that if the BJC had applied the *Oliveira* approach to the issue of determining his lack of intention to enhance sport performance that a different finding could have been made on that issue. Although he did not articulate this submission in legalistic terms, we understood that the essence of the Player's

³ IRB Regulation 21.25.3

⁴ IRB Regulation 21.5.4 and 21.5.7 (new evidence must not, on reasonable enquiry, have been available at the time of the original hearing)

⁵ IRB Regulation 21.5.9

⁶ IRB Regulation 21.5.13

submission on this point was the contention that the BJC had applied an incorrect test.

41. Counsel for the IRB acknowledged the PHRB could conclude that the *Foggo* approach should not be followed. If the PHRB did so, and, consequently, preferred the *Oliveira* approach, counsel conceded that it was open to the PHRB, on the record, to find that there was evidence to support a conclusion that the Specified Substance was not intended to enhance the Player's sport performance.

Discussion

42. The Player was unable to adduce further evidence concerning the circumstances under which he used an energy drink, or as he would term it, a "sports" drink, immediately before the UAE v Kazakhstan match. Accordingly, the PHRB must work from the same record that was available to the BJC, including the oral testimony of the Player and Mr. Quinn.

43. Although the BJC did not have the same advantage of having seen the witnesses and observed their demeanour that most first instance tribunals have over an appellate or review body, we nevertheless consider it appropriate to defer to the BJC's findings of fact unless any of those findings were clearly wrong. Appellate and review bodies should not interfere with a first instance tribunal's findings of fact merely because the PHRB might have made different findings if it had heard the case presented to the first instance tribunal.

Positive Test Resulted From the Player Taking a Drink Shortly before the Game

44. Despite its many concerns about the quality of the evidence and the contradictions in the evidence of the Player and Mr. Quinn, the BJC was able to conclude that the MHA in the Player's urine sample entered his body through taking a drink which was made from a supplement containing MHA, which drink he consumed shortly before the Kazakhstan match.

No Special Circumstances

45. As noted above, the Player submitted to the BJC that there was no fault or negligence on his part, or if there was, that there was no significant fault or negligence and, as such, that there were exceptional circumstances that would warrant the elimination or reduction of the otherwise applicable period of Ineligibility. The BJC rejected these submissions. We agree with the BJC's reasons for doing so and see no basis for interfering with its decision in that regard.

No Intent to Enhance Sport Performance

46. The remaining issue to be reviewed is whether the BJC applied the correct test in determining whether the Player met the burden of establishing to the comfortable satisfaction of the BJC the absence of an intent to enhance sport performance.

47. For the reasons set out in the following paragraphs, we have concluded that the BJC did not apply the correct test, as a result of which its finding that the Player had not demonstrated an absence of intent to enhance sport performance should be set aside.

48. As noted by the BJC, two recent decisions by panels of the Court of Arbitration for Sport (“CAS”) have taken different approaches to the determination of intent (or lack thereof) to enhance sport performance.

49. The first of these cases is *Oliveira v USADA* (CAS 2010/A/2107). The athlete was an elite cyclist who tested positive for a Specified Substance, oxilofrine. The CAS panel found that the oxilofrine had entered the athlete’s body as a result of her consumption of a dietary supplement.

50. The product used by the athlete was marketed as a stimulant that would increase energy and which the athlete acknowledged that she used to help combat fatigue caused by medications that she was using to treat allergies and to maintain her stamina during cycling training sessions and competitions. The United States Anti-Doping Agency submitted that this proved the athlete’s intent to enhance her sport performance, even if she did not know that the product contained a banned substance when she took it.

51. The CAS panel rejected this argument. While acknowledging that Article 10.4 of the 2009 WADA Code (which corresponds with Regulation 21.22.3) was ambiguous, the CAS panel declined to resolve that ambiguity against the athlete. The panel stated:

9.13 The Panel notes that Article 10.3 of the 2003 WADC (Specified Substances) requires the athlete to establish that the use of “a specified substance was not intended to enhance sport performance” in order to justify a reduction in the otherwise applicable period of ineligibility. Article 10.4, the corresponding provision of the 2009 WADC, incorporates this requirement in clause one. In clause two, Article 10.4 adds the following new requirement:

“the Athlete ... must produce corroborating evidence in addition to his or her word which establishes to the comfortable satisfaction of the hearing panel the absence of an intent to enhance sport performance...”

Clause two does not explicitly require the athlete to prove no intent to enhance sport performance through the use of a product itself rather than a specified substance therein. Rather, the express language of this clause is ambiguous and susceptible to more than one interpretation.

9.14 The Panel does not read clause two of Article 10.4 as requiring Oliveira to prove that she did not take the product ... with the intent to enhance sport performance. If the Panel adopted that construction, an athlete’s usage of nutritional supplements, which are generally taken for

performance-enhancing purposes, but which is not per se prohibited by the WADC, would render Article 10.4 inapplicable even if the particular supplement that is the source of a positive test result contained only a specified substance. Although an athlete assumes the risk that a nutritional supplement may be mislabelled or contaminated and is strictly liable for ingesting any banned substance, Article 10.4 of the WADC distinguishes between specified and prohibited substances for purposes of determining an athlete's period of ineligibility. Article 10.4 provides a broader range of flexibility (i.e., zero to two years ineligibility) in determining the appropriate sanction for an athlete's use of a specified substance because "there is a greater likelihood that Specified Substances, as opposed to other Prohibited Substances, could be susceptible to a credible, non-doping explanation." See Comment to Article 10.4.

9.15 If the Panel adopted USADA's proposed construction of clause two of Article 10.4, the only potential basis for an athlete to eliminate or reduce the presumptive two-year period of ineligibility for ingestion of a specified substance in a nutritional supplement would be satisfying the requirements of Article 10.5, which requires proof of "no fault or negligence" or "no significant fault or negligence" for any reduction. Unless an athlete could satisfy the very exacting requirement for proving "no fault or negligence," the maximum possible reduction for use of nutritional supplement containing a banned substance would be one year. This consequence would be contrary to the WADC's objective of distinguishing between a specified substance and a prohibited substance in determining whether elimination or reduction of an athlete's period of ineligibility is appropriate under the circumstances.

....

9.17 The Panel finds that Article 10.4 requires Oliveira only to prove her ingestion of oxilofrine was not intended to enhance her sport performance. This construction of Article 10.4 harmonises the clear language in clause one with the differing and ambiguous language of clause two, and is consistent with its explanatory Comment, which uses the term "Specified Substance" in providing "[e]xamples of the type of objective circumstances which in combination might lead a hearing panel to be comfortably satisfied of no performance-enhancing intent.

52. The CAS panel was satisfied that the athlete had met the requirements necessary to justify an elimination or reduction in the presumptive two-year period of ineligibility. Having thus satisfied itself, the panel examined the athlete's "degree of fault" to determine whether any reduction in the period of ineligibility was appropriate. After considering all of the circumstances, the panel concluded that she should receive an 18 month sanction.

53. In *Foggo v National Rugby League* (CAS A2/2011), the athlete, a professional rugby league player, tested positive for 1, 3-dimethylpentylamine – i.e. MHA. The source of the positive test result was the athlete's use of Jack3d, which the athlete had purchased on at least one occasion from a store called "Mass Nutrition"

54. On the issue of the athlete's intent, the panel in *Foggo* stated (at paragraph 46):

We are of the view that the task of the Panel is to give effect to the natural and ordinary meaning of these words having regard to the context of the rules as a whole. The effect of the rule is to require the athlete to show that the ingestion of the product which contained the specified substance was not intended to enhance his sport performance. The time at which the absence of intent is to be shown is the time of ingestion of the substance. The athlete must negate an intention at that time to enhance his or her performance in the relevant sport, in this case rugby league, by the taking of the substance. The rule focuses on the nexus or link between the taking of the substance and the performance as a player of the sport. Whether or not the link will be established will depend on the particular circumstances of the case.

55. The panel in *Foggo* expressly declined to follow the approach taken in *Oliveira*:

In our view Rule 154 (WADC 10.4) would not be satisfied if an athlete believes that the ingestion of the substance will enhance his or her sport performance although the athlete does not know that the substance contains a banned ingredient. The athlete must demonstrate that the substance 'was not intended to enhance' the athlete's performance. The mere fact that the athlete did not know that the substance contained a prohibited ingredient does not establish absence of intent. We accept the Respondent's submissions that Oliveira should not be followed.

56. In the result, the athlete in the *Foggo* case had the two year sanction initially imposed by the Australian National Rugby League's Anti-Doping Tribunal reduced to six months. There appear to have been two principal reasons for this. First, at the time of the initial Tribunal hearing, MHA was a Prohibited Substance, but not a Specified Substance, so that the discretion to impose a lesser sanction provided for by Article 10.4 of the World Anti-Doping Code (and its equivalent provisions including IRB Regulation 21.22.3) was not available. However, prior to the athlete's appeal to CAS, MHA had been included in the list of Specified Substances, so that the discretion to impose a lesser sanction by virtue of Article 10.4 was available to the CAS panel by application of the *lex mitior* principle. Second, and no doubt related to the fact that the issue of intent to enhance sport performance was not prominent at the first instance hearing, the record considered by the CAS panel was of limited assistance in divining the athlete's intent, or lack thereof, to enhance sport performance. Thus the CAS panel wrote (starting at paragraph 49):

... we are satisfied, on the prescribed higher standard of proof in this case, that, in all the circumstances and on the evidence, the Appellant did not intend to enhance his sport performance when he ingested the product which contained the specified substance.

And continuing at paragraph 51:

As the exhibited transcript shows, the Appellant was subject to limited cross-examination before the Tribunal below. It appears on the Panel's reading of this transcript that his answers were accepted and he was not pursued or further tested on the veracity or otherwise of his denials or assertions critically as to intention and purpose. Doubtless, this approach was taken with regard

to forensic considerations. Had the Panel been asked to reject or discount the weight to be given to the evidence by either the Appellant or his mother, it was necessary for the Respondent to establish a rational basis upon which the Panel should do so but in our view it did not. Relevantly, it was not put to the Appellant the proposition to the effect that by taking what he understood to be a pre-workout powder for gym work that he intended to enhance his performance or ability as a rugby league player. In his testimony, he denied that his consumption of the product was intended to enhance his performance in a rugby league player. The Panel accepts that denial.

57. As a result, the athlete's period of ineligibility in *Foggo* was cut to six months by the CAS panel after his degree of fault was evaluated.

58. We agree with the CAS panel in *Foggo* that we are required to give effect to the natural and ordinary meaning of these words having regard to the context of the rules as a whole. However, for the reasons that follow, we have concluded that the *Oliveira* decision reflects a correct application of that approach and, as a result, that the BJC, by following *Foggo*, based its decision on what we have concluded to be the wrong principle.

59. Another principle of interpretation that is commonly followed is that where words may bear two constructions, the more reasonable one, that which produces a fair result, should be preferred.

60. IRB Regulation 21.22.3 (WADC 10.4) provides for the elimination or reduction of the period of Ineligibility for Specified Substances under specific circumstances. In the first sentence, those circumstances are described with specific reference to the Specified Substance itself:

Where a Player or other Person can establish how a Specified Substance entered his body or came into his Possession and that such Specified Substance was not intended to enhance the Player's sport performance or mask the Use of a performance-enhancing substance, the period of Ineligibility found in Regulation 21.22.1 shall be replaced with the following... [emphasis added]

61. However, further on in the same rule, the Player's is required to:

... produce corroborating evidence in addition to his word which establishes to the comfortable satisfaction of the Judicial Committee the absence of intent to enhance sport performance or mask the Use of a performance-enhancing substance.

62. As the annotations to the WADC acknowledge, using intent to enhance sport performance as the sole criterion for determining whether a substance should be added to the Prohibited List would be unsatisfactory:

Using the potential to enhance performance as the sole criterion would include, for example, physical and mental training, red meat, carbohydrate loading and training at altitude.⁷

63. Nutrition, diet and supplementation are all widely recognised as factors that bear on an athlete's health, conditioning and, hence athletic performance. The use of "energy" drinks by athletes is ubiquitous.

64. When an athlete follows a nutrition regimen or consumes an energy drink, he or she is likely doing so with the intent to enhance sport performance, or at least benefit the athlete's physical condition. This is not problematic, from an anti-doping standpoint, as long as the food, or supplements, or energy drinks being consumed by the athlete do not contain a Prohibited Substance.

65. If the athlete knows that a product or preparation which he or she is consuming as part of a nutrition programme or training regimen contains a Specified Substance, it is unlikely that he or she will be able to persuade a tribunal that there was no intent to enhance sport performance.

66. On the other hand, an athlete who uses a Specified Substance (cannabis for example) for recreational purposes is likely to know that he or she is using a Specified Substance, but the circumstances of such use may lead a tribunal to conclude that there was no intent to enhance sport performance by doing so.

67. It seems to us that in every case, a Player seeking to rely on IRB Regulation 21.22.3 (WADC 10.4) will, as a practical matter, have to satisfy the tribunal either:

- a) that he or she did not know that he or she was consuming a Specified Substance and, hence, could not be said to by the use of the Specified Substance to have intended to enhance sport performance, or
- b) that if he or she did know that a Specified Substance was used, that there was no nexus or link between such use and his or her performance as a player of the Game. Whether or not that link will be established will depend on the particular circumstances of the case.

68. Such an approach is entirely consistent with WADA's policy of providing for greater flexibility in the sanctioning regime where the athlete can clearly demonstrate that he or she did not intend to enhance sport performance. Thus, the 2009 revisions to the WADC changed Article 4.2 and Article 10 to provide such additional flexibility for violations involving many Prohibited Substances.⁸ If the object of the "intent to enhance sport performance" was to be applied to the vehicle for ingestion of the Specified Substance, rather than the Specified Substance itself, the result would be an emasculation of the more flexible approach that the WADC revisions were intended to achieve.

⁷ Commentary to WADC Article 4.3.2

⁸ WADC, Comment to Article 4.2.2

69. The concern that the policy of the WADC would be defeated if the athlete could avoid the consequences of the Code by simply refraining, deliberately or otherwise, from making enquiries as to the content of the supplement and so claiming ignorance of the offence is misplaced.⁹ First, it overlooks the fact that even if the athlete can meet the burden of showing no intent to enhance sport performance, the athlete's degree of fault shall be the criterion considered in assessing any reduction of the period of Ineligibility. An athlete who is wilfully blind, or worse, is likely to be assessed as having a high degree of fault. This will then be reflected in the sanction. At the upper end, that sanction could be the same two year period of Ineligibility that would have applied if the athlete could not establish a lack of intent to enhance sport performance. Second, it fails to take account of the guidance, provided in the Commentary to Article 10.4 of the WADC, which equates the burden placed on the athlete to establish a lack of intent to enhance sport performance with the performance-enhancing potential of the substance involved:

Generally, the greater the potential performance-enhancing benefit, the higher the burden on the Athlete to prove lack of an intent to enhance sport performance.

70. The *Oliveira* approach has found favour with at least one other CAS panel, in *WADA v FIV & Berrios* CAS 2010/A/2229 (at §83).

71. And in *UKAD v Dooler*, UKNADP (2010), the UK National Anti-Doping Panel observed (at §6.8):

That the intent relates to the Prohibited Substance which is, or is to be treated as, a Specified Substance is apparent from the words used in article 10.4.1. The intent is explicitly referenced to the Specified Substance as opposed to any product, supplement, material or the like, such as Xtreme Nox Pump, of which the Specified Substance was a component.

72. Having concluded that the BJC should have considered the question of the Player's intention to enhance sport performance by reference to the Specified Substance itself, rather than the fact that he consumed an "energy" (or "sports") drink, we have reviewed the evidentiary record, including the BJC's findings of fact, with a view to determining:

- a) Did the Player know that the drink he consumed contained MHA?
- b) Having regard to (a) and to the need for corroborating evidence, has the Player established to standard of comfortable satisfaction that he did not intend to enhance sport performance?

⁹ In *Foggo*, on behalf of the responding national federation:

... it was submitted that this admittedly ambiguous provision (a fact acknowledged by the panel in Oliveira) is to be construed with regard to the policy of the WADC. That policy is to prevent the taking by athletes of prohibited substances and to put the onus firmly on the athlete to prove that his or her taking of the substance by whatever means (for example by ingesting a so called dietary supplement) was not with the intention of enhancing the athlete's sport performance. This policy would be defeated if the athlete could avoid the consequences of the Code by simply refraining, deliberately or otherwise, from making enquiries as to the content of the supplement and so claiming ignorance of the offence.

- c) If the PHRB is comfortably satisfied that the Player did not intend to enhance his sport performance, what is his degree of fault and what sanction should be imposed on him?

73. Because of its adherence to the approach favoured by the *Foggo* decision, the BJC did not record a definitive finding on whether or not it accepted the Player's evidence that he did not know what the drink he consumed contained. The BJC's decision does, however, record the dissenting view of one of the BJC panel members (at §59):

Since the Player asserted he did not know the drink contained MHA, Mr Nicholson was comfortably satisfied that the Player's ingestion of MHA was inadvertent and in itself was not intended to enhance sport performance.

74. In a hot climate a drink – whether it is an energy drink or not – consumed immediately before running out on the pitch to play an international rugby match will clearly and obviously be beneficial to a Player. The BJC was not satisfied, however, that the only reason the Player consumed the drink which resulted in his positive test was to quench his thirst.

75. Ultimately, in the absence of a definitive finding by the BJC that the Player did know that the drink he consumed contained MHA, we are satisfied that there was sufficient evidence on the record to support the conclusion of (at least) the dissenting member of the BJC that the Player did not know that the drink contained MHA and, thus, that the Player's ingestion of MHA was not intended to enhance his sport performance.

Corroboration

76. The BJC did not directly address the issue of corroboration (presumably because it was unnecessary to do so given the view of the majority that the Player had failed to establish that his consumption of an "energy" drink containing MHA was not intended to enhance his sport performance).

77. It is not sufficient merely for the Player to say that he did not intend to enhance his sport performance when, shortly before the Kazakhstan match, he took the drink which (as found by the BJC) was made from a supplement containing MHA. The Player must produce corroborating evidence in addition to his word which establishes to the comfortable satisfaction of the Judicial Committee the absence of intent to enhance sport performance or mask the Use of a performance-enhancing substance.

78. In a statement dated 15 August 2011, Stuart Quinn said:

During the 2011 Asian 5 Nations (specifically the Kazakhstan game) I changed next to you as I regularly did. I witnessed on more than one account [sic] (along with the rest of the team) that you were passed what was presumed NO Explode [sic] or a similar pre-game drink. You were under no impression it would be anything else.

79. In oral testimony, Mr. Quinn initially said that he could recall the Player taking three or four sips from a shaker bottle before the game. He could not recall who passed the bottle to the Player. He could not recall whether it contained Jack3d or “NO-Xplode”. Questioned further, Mr. Quinn said that the supplements available in the UAE changing room on match days or during training sessions had included “Rocked”, “NO-Xplode”, “Super Pump 250” and Jack3d. As he put it, if you were consuming a supplement in the UAE changing room he would “presume” it would be one of those four. Such drinks were passed around but were pre-prepared by players. Mr Quinn then acknowledged that he had used Jack3d during the Tournament but was not sure he did so before the Kazakhstan match. He then said that there was about a “70% chance” it would have been NO-Xplode and a “30% chance” it was Jack3d. When subsequently recalled as a witness, Mr. Quinn said he was 99% sure that the drink used at the Kazakhstan game was Jack3d and that he had passed the bottle to the Player from which he sipped before the game started. Having so stated, when questioned further by the BJC, Mr. Quinn said he had no recollection of giving the Player his bottle but had a “vague recollection” of the Player drinking from his (Quinn’s) bottle. His bottle was marked with a protein brand label.

80. Mr. Quinn acknowledged that the inconsistencies in his evidence arose “in part” from an initial concern that he could incriminate himself, which concern had been allayed, somewhat, by the time he was recalled.

81. The BJC concluded (at §50):

In light of our assessment of all the evidence (written and oral) from the Player and Stuart Quinn we were not satisfied that the explanations before us as to how and in what circumstances the supplement drink was mixed and by whom, were probably right. The BJC was not satisfied that Stuart Quinn probably mixed the drink.

82. What does emerge from the record, however, is ample evidence to support the conclusions that drinks containing one or more supplements would have been present in, and passed around, the UAE dressing room before games and practice sessions.

83. As noted by a BJC in *IRB v Chkhikvadze* (2009)(at §28)

Corroborating evidence ... is evidence of other surrounding circumstances that are consistent with, or supportive of, what the Player says his intent was.

84. Despite the BJC’s reservations about the quality of Mr. Quinn’s evidence, the record provides sufficient corroboration of the Player’s evidence to enable the PHRB to be comfortably satisfied that the Player did not intend to enhance his sport performance. Our finding is reinforced by the fact that the dissenting member of the BJC is recorded as also having come to that conclusion.

The Player’s Degree of Fault

85. In each case, an athlete’s fault is measured against the fundamental duty which he or she owes under the IRB Regulation 21 and the WADC to do everything in his

or her power to avoid ingesting any Prohibited Substance. In *Vencill v. USADA*, CAS 2003/A/484 at §57, the panel stated:

We begin with the basic principle, so critical to anti-doping efforts in international sport...that “[i]t is each Competitor’s personal duty to ensure that no Prohibited Substance enters his or her body” and that “Competitors are responsible for any Prohibited Substance or its Metabolites or Markers found to be present their bodily Specimens”. The essential question is whether [the athlete] has lived up to this duty...

In *FIFA & WADA*, CAS 2005/C/976 & 986 a panel offered the following opinion at §§73 and 74:

The WADC imposes on the athlete a duty of utmost caution to avoid that a prohibited substance enters his or her body...The Panel underlines that this standard is rigorous, and must be rigorous, especially in the interest of all other competitors in a fair competition...It is this standard of utmost care against which the behaviour of an athlete is measured if an anti-doping violation has been identified. “No fault” means that the athlete has fully complied with the duty of care.

86. Any mitigating circumstances put forward on behalf of an athlete should be considered in the context of the standards which are expected of the Player.

87. The record contains publicly available information about MHA. According to the website geranamine.org:

DMAA (also known as geranamine, methylhexanamine, dimethylamylamine, 1,3-dimethylamylamine) is a natural CNS stimulant ... The substance was originally patented as a nasal decongestant. The stimulant effects on the CNS are said to be less than amphetamine and ephedra. DMAA can induce euphoria, elevated mood, intense energy, adrenaline rush, mental clarity and increased confidence. The chemical structure shows resemblances to that of amphetamines and ephedrine.

The same website notes:

Geranamine is mostly used as a pre-workout supplement by bodybuilders. However, it is also increasingly used by partygoers, for its stimulating effects. The fact that it is legal in most countries is a contributing factor to this increased popularity.

88. The potential for MHA to be used as a performance enhancer has been recognised. In *ITU v Smurov* (ITU Anti-Doping Hearing Panel, 15 November 2011), the panel noted:

The advantages of MHEA include powerful energy stimulation, increased metabolic rate, triggering of fat release and capacity to reduce weight, apart from ephedrine-like properties and that of stimulants that act on the central nervous system.

The use of Methylhexaneamine in training and during competition can therefore be quite beneficial to all types of athletes, specifically triathletes.

89. As noted, in a circular from the IRB's Anti-Doping Manager to "CEO's, Team Managers, Medical Officers of Participating Unions in the HSBC Asian 5 Nations", an express warning was given about the presence of MHA related substances in dietary and nutritional supplements. The Player denied having seen, read or been aware of the content of this IRB directive.

90. It was not established to the BJC's satisfaction whether the drink consumed by the Player was Jack3d or another product. Working on the assumption that Jack3d was indeed the culprit, the Union, writing in support of the Player, noted that the

... product in question Jack3d is readily available over the counter in UAE and ironically is marketed as:

"The beauty of Jack3d is its LACK of ingredients – it is purely based on the most important components that make a great pre-workout nitric oxide drink and nothing more..."

91. If the source was Jack3d, it is noteworthy that in an extract from the www.jack-3d.com website there is (to quote the BJC) a "specific, obvious and not insignificant passage under the heading – "Germanium (1,3 Dimethylamylamine)". A list of ingredients printed on the label stuck to every tub of Jack3d includes "1,3 Dimethylamylamine (Germanium [stem])." The label also has a "Black Box Warning" stating that the product "allows for rapid increases in strength, power and endurance".

92. Another product referred to in evidence was "Rocked". A reference to this product on the website www.sportsfuel.co.nz lists Rocked as a "pre-workout powder". It is taken as a drink when dissolved in water. The listed ingredients listed include "1,3 Dimethylamylamine" (MHA).

93. Both the player and the Union seem to have put undue stock in the assumption that, because of the regulatory climate in the UAE and its strict stance against illegal drugs and narcotics, the products they obtained in health food stores would be "legitimate". There was no evidence that the Player made any effort to check the ingredients of the "sport" drinks he consumed. And this despite the Player having played professionally in England and having been tested five times before.

94. A number of authorities were referred to by counsel and/or raised by the PHRB involving Specified Substances:

- *Oliveira v. USADA* (CAS 2010/A/2107) – cycling – oxilofrine – 15 months Ineligibility
- *Foggo v. NRL* (CAS A2/2011) – rugby league – MHA – 6 months Ineligibility
- *UKAD v. Wallader* (NADP, 29 October 2010) – track and field – MHA – 4 months Ineligibility
- *Duckworth v. UKAD* (CAS NADP, 10 January 2011) – rugby league – MHA – 6 months Ineligibility

- *UKAD v. Dooler* (NADP , 24 November 2010) – rugby league – MHA – 4 months Ineligibility
- *RFU v. Wihongi* (RFU Disciplinary Panel, 16 March 2011) – rugby union – MHA – 4 months Ineligibility
- *RFU v. Steenkamp* (RFU Disciplinary Panel, 22 March 2011) – rugby union – 3 months Ineligibility.
- *FA v Touré* (FA Regulatory Commission, 28 May 2011) – football (soccer) – bendroflumethiazide – 6 months Ineligibility
- *IRB v Gurusinghe, Swarnathilake and Kumara* (IRB Judicial Committee, 16 September 2011) – rugby union – MHA – 9 months Ineligibility
- *FIBA v Chávez* (FIBA Disciplinary Panel) – basketball – MHA – 12 months Ineligibility
- *IRB v Slimani* (IRB Judicial Committee, 14 October 2008) – rugby union – tuaminoheptane – reprimand and warning
- *Robert Kendrick v. ITF* (CAS 2011/A/2518) – tennis – MHA – 8 months Ineligibility
- *DFSNZ v Jacobs* (STNZ, 22 June 2011) – swimming – MHA – 12 months Ineligibility
- *ITU v Smurov* (ITU Anti-Doping Hearing Panel, 15 November 2011) – triathlon – MHA – 2 years (athlete failed to establish how MHA entered his system)

95. The obvious caveat applicable to the use of any of these other cases is that each case will turn on its own facts – the commentary to WADC Article 10.4 states:

... the circumstances considered must be specific and relevant to explain the Athlete or other Person's departure from the expected standard of behavior.

96. As can be seen, there have been a plethora of MHA cases in a variety of sports. A common denominator in many of these cases is the use of sport drinks or supplements by athletes which leads to a positive test. These drinks or supplements are commonly purchased from mainstream sources.

97. In *IRB v Gurusinghe, Swarnathilake and Kumara* (2011), a case involving three rugby players from Sri Lanka, there was evidence that various supplements were “freely available in the dressing room” or “openly kept on top of a table in the team dressing room”. One of these supplements yielded positive tests for three players from the same team for MHA. The Players, who had limited or no doping education, made no apparent effort to make even the most rudimentary effort to check the ingredients of the drinks they were consuming. Each player was given a sanction of nine months Ineligibility.

98. *RFU v Stenkamp* (2011) involved a semi-professional rugby player with a punishing work and training schedule, who had received very little anti-doping education. He used a product on the recommendation of a qualified fitness instructor who said it was “a high energy drink like Red Bull but stronger” in order to combat drowsiness and to avoid falling asleep while driving on his job or to and from training. MHA was not listed as an ingredient of the energy drink. The case appears to have been one of contamination. Despite the good faith efforts of the Player to leave no unreasonable stone unturned, he was found to be at fault for failing to

consult a doctor or anti-doping specialist, or to have the substance analysed, prior to using it. The degree of fault of the player (who received a three month ban) would seem to be considerably less than that of Mr. Murray in the instant case.

99. Similarly, in *UKAD v Dooler*, a rugby league player had checked the ingredients of the supplement he was using against the Prohibited List and found nothing amiss. His girlfriend had checked Global DRO (an anti-doping database maintained by UK Anti-Doping) to the same effect (the Dimethylpentylamine in the supplement was not listed as such, or as MHA, but instead as “geranium root extract”). A sanction of four months was imposed.

100. *UKAD v Wallader* (2010) involved a female shot putter. She received a four month ban for testing positive for MHA caused by her use of a supplement called “Endure”. The athlete was 21, a student, and was given the supplement by her very experienced coach, who had received specific assurances from the supplier that it was “legal”. The athlete had, herself, both checked the ingredients against the 2009 Prohibited List and found no matches (because neither MHA nor Dimethylpentylamine was included by name on the Prohibited List at that point), and checked against the Global DRO, again without any red flags appearing (this time because the name MHA was used in the database, but not the synonym Dimethylpentylamine). The athlete, who it was accepted by the Tribunal did not have ready access to specialist medical assistance – was found to have exercised “considerable diligence”. The tribunal assessed her fault as significantly less than that of a English footballer (Kenny) who had received a nine month ban for a Specified Substance (not MHA) that was an ingredient in a cold remedy.

101. As already discussed, in *Foggo v NRL* (2011), a professional rugby league player purchased and used Jack3d which had resulted in an adverse analytical finding from MHA. The use of pre-workout supplements was encouraged by the athlete’s club. The athlete himself was young and had received very limited formal anti-doping education. However the athlete had been assured by the store owner that the product was clean and had consulted his conditioning coach and undertaken research on the ASADA website in respect of the ingredients of Jack3d which had not resulted in the identification of any specified substances. A sanction of six months ineligibility was imposed.

102. In *UKAD v Duckworth* (2011), a 21 year old semi-professional rugby league player used Jack3d, which he had seen advertised for sportsmen. He was considered by the tribunal to be a young man to whom medical advice was not easily available. He had taken “reasonable (but not sufficient) steps to satisfy himself that the Jack3d could be taken safely”. In particular he had an e-mail from the supplier giving him assurances that the supplement was clean and he had again checked every ingredient of the supplement against the Global DRO. An appeal panel of the UKNADP imposed a sanction of six months Ineligibility.

103. In *RFU v Wihongi* (2011), a professional rugby union player picked up a green bottle in the team dressing room at half-time during a match, believing it to contain water. He started to drink the contents but quickly realised that it contained a sport drink that had been prepared by team coaching personnel for another player and

stopped drinking. He subsequently tested positive for MHA. A sanction of four months Ineligibility was imposed.

104. The athlete in *Kendrick v ITF* (2011) was an experienced professional tennis player who was given some pills in an unmarked wrapper by a coach who told him the product was “safe”. He was told that the pills would help him counteract the effects of jet lag. The athlete did some “inadequate” internet research on what he believed the pills to be, failing to find or heed information that would have disclosed that the product contained dimethylpentylamine. His “serious lack of due diligence” and his failure to recognise at the time the risk of using an unfamiliar product contained in an unmarked wrapper was somewhat mitigated by stressful personal circumstances that he found himself in at the time of the anti-doping rule violation. An eight month sanction was imposed.

105. *DFSNZ v Jacobs* (2011) involved a club level swimmer who had never been part of any high performance programme (and who had, consequently, never participated in any anti-doping education) who ingested MHA as an ingredient of the Jack3d and another supplement called “Super Space Pump”. He had checked the labelling and believed from them that the supplements were energy drinks containing creatine and caffeine that would assist him in getting over the tiring effects of a working day and give him energy for training. He did nothing else to check for Prohibited Substances. He accepted that he had been wrong in relying upon informal assurances rather than making proper inquiry. The tribunal imposed a period of twelve months Ineligibility.

106. Considered with the benefit of the guidance provided by these cases, the Player’s departure from the expected standard of behaviour is significant. In that regard, the following features are particularly noteworthy:

- a) He is an experienced Player who has played both professionally and at the international level.
- b) He had signed a Player Consent Form thereby agreeing to be bound by TADP (and acknowledging that he had read it).
- c) He had received anti-doping education.
- d) He made no attempt to ascertain what it was that he drank immediately before the Kazakhstan match. Instead he made unwarranted assumptions about what he was drinking and that the liquid did not contain any Prohibited Substance (as the BJC noted, “*he drank a supplement-based drink from an unmarked bottle. Before doing so, he made no inquires as to who made the drink, when, in what circumstances and what it contained. Even if he knew (at that time) that it had been mixed by a fellow player and would have contained only a supplement available over the counter, that provides absolutely no warranty against it containing a Prohibited Substance*”).
- e) He was by his own admission “thoughtless and stupid”.

107. There are a number of similarities between the circumstances in *IRB v Gurusinghe, Swarnathilake and Kumara* and the present case. But an obvious distinction is the fact that the Player had received anti-doping education and was well

aware of doping issues, whereas the players in *IRB v Gurusinghe, Swarnathilake and Kumara* were not. Nor were there any language barriers present which would have had a bearing on the provision of doping information or a comprehension of information concerning the products which were apparently being used by UAE players. Indeed, there was a need for heightened vigilance particularly given the evidence of the Player and Mr. Quinn (if true) that UAE players, without any supervision were sharing supplement drinks.

108. In those MHA cases in which the sanction imposed ranged between three and eight months' Ineligibility, a common denominator is that some tangible (although often insufficient) efforts had been made by or on behalf of the athlete to check the contents of the supplement or drink being used. The Player, by contrast, exercised no due diligence whatever.

Sanction

109. In our view a sanction of twelve months Ineligibility would, in all of the circumstances, be appropriate, running from the date that his provisional suspension took effect, namely 28 May 2011.

110. The Player's attention is drawn to IRB Regulation 21.22.13 which provides, *inter alia*, that:

No Player...who has been declared Ineligible may, during the period of Ineligibility, participate in any capacity in a match and/or tournament (international or otherwise) or activity (other than authorised anti-doping education or rehabilitation programmes) authorised or organised by the Board or any Union or Tournament Organiser. Such participation includes but is limited to coaching, officiating, selection, team management, administration or promotion of the Game, playing, training as part of a team or squad, or involvement in the Game in any other capacity in any Union in membership of the IRB.

The full text of Regulation 21.22.13 concerning status during Ineligibility should be consulted.

Postscript

111. We emphatically concur with the following comments of the BJC, which are replicated in full:

70. First, the evidence before the BJC was to the effect that supplement drinks were being widely used by players in the UEA national squad. On the basis of what the Player and Stuart Quinn said, players, who regularly shared the drinks with each other, prepared the supplement drinks individually. The bottles and so drinks were not labelled or apparently identified in any way. Two of the four supplements that the BJC was told were being used contained (and obviously so – the fact is apparent from the ingredient lists) MHA. The process was apparently not overseen, monitored or in anyway supervised by the UAE management team or any member thereof. The practice extended to

the changing room before games. If that is right, it is a staggering state of affairs. Mr Bremner informed us that the UAERA intends to conduct its own investigation. The BJC commends that course.

71. Second, this is but yet another example of the growing number of cases that demonstrate the perils of using supplements. The risks should be well-known. The fact that supplements are provided by a player's club, Union, or teammate will not absolve the player of his responsibility for an adverse analytical finding resulting from his ingestion thereof. Further, the fact that the supplement is freely and legally available over the counter in any country in the world provides absolutely no warranty that it does not contain a Prohibited Substance. A "legal" supplement may still contain a Prohibited Substance, whether listed as an ingredient or not.

Decision

112. The PHRB directs that the decision of the BJC on the sanction applicable to the finding, that the Player committed an anti-doping rule violation on 29 April 2011 by reason of the presence in his urine of methylhexaneamine, should be set aside and replaced with a sanction of 12 months Ineligibility, commencing on 28 May 2011 and concluding on (but inclusive of) 27 May 2012.

Appeal

113. TADPC Clause 26 sets out the circumstance under which an appeal of this decision can be taken to the Court of Arbitration for Sport (CAS) and the time limits for doing so.

Costs

114. If the Board or the Player wish us to exercise our discretion under TADPC Clause 25.12, written submissions should be submitted to the PHRB via Mr. Ricketts by 5:00 p.m. GMT on 10 February 2012, with any response thereto to be provided to Mr. Ricketts by 5:00 p.m. GMT on 17 February 2012.



Graeme Mew
Chairman
Toronto, Ontario, Canada
27 January 2012