SPORT RESOLUTIONS (UK)

SPECIALIST INDEPENDENT DISPUTE SERVICE

SR/0000120110

NATIONAL ANTI-DOPING PANEL

IN THE MATTER OF PROCEEDINGS BROUGHT UNDER THE ANTI-DOPING RULES OF THE UNION CYCLISTE INTERNATIONALE

Before:

William Norris QC (Chairman)

Dr Kitrina Douglas

Colin Murdock

BETWEEN:

UK Anti-Doping

National Anti-Doping Organisation

---and---

Bruce Croall

Respondent

FINAL DECISION OF THE ANTI-DOPING TRIBUNAL

Date of Hearing:	Wednesday 9th April 2014
Date of Decision:	24th April 2014
Summary of Decision:	Anti-Doping Violation proved
Sanctions:	(1) A period of ineligibility which commenced on 9th October 2013 and ended on 9th April 2014 (2) Disqualification of results obtained in competition on 6th and 9th October 2013 and all subsequent results up to and including the date of voluntary suspension on 7th November 2013.

1.0 INTRODUCTION AND SUMMARY

1.1 This is the unanimous decision of the Anti-Doping Tribunal arising out of Mr Bruce Croall's competition in the UCI World Track Masters in Manchester in October 2013 when he was placed first in the two races in which he competed, the Men's Time Trial (ages 35 to 39) on 6th October 2013 and the Men's Sprint (ages 35 to 39) on 9th October 2013.

1.2 On each occasion, Mr Croall provided urine samples and these tested positive for Oxilofrine, a 'specified substance'[1] under the UCI's Anti-Doping Rules, particularly Articles 21.1 and 21.2 of those Regulations. It is listed in the *2013 Prohibited List* maintained by the World Anti-Doping Agency (WADA) and adopted by the UCI. In short, it is an amphetamine and so an illegal stimulant.[2]

1.3 Following notification of his possible Anti-Doping Rule violations, Mr Croall obtained an independent analysis of a supplement, Dorian Yates Nox Pump, which he had admitted having taken and which he suspected of being the source of Oxiliofrine, having heard it referred to as unsafe at a Scottish Cycling presentation on 27th October 2013.

1.4 It is noteworthy that he had declared his use of that supplement on 6th and 9th October 2013 and on both previous occasions that he underwent in-competition testing.[3]

1.5 As will be apparent from what follows, we have decided (though not without reservations) to deal with this case – as both parties submitted we should – under UCI ADR Article 295[4]. We find that both doping violations have been proved. We find that Oxilofrine must have been present in the supplement that Mr Croall admittedly took (and declared on the Doping Control forms), namely, Dorian Yates Nox Pump.

1.6 That means that, according to the approach taken jointly by the parties, we accept that Mr Croall did not intend to enhance his performance by taking *that specified substance* and that this is the appropriate interpretation of Art 295 which we should therefore apply to

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[1] Which we, like the Appeal Tribunal of NADP in UKAD v Llewellyn [SR/0000120083], treat as, effectively, synonymous with 'prohibited'

[2] See the details of the Adverse Analytical Findings set out at B/51-60. We comment in passing that Oxilofrine is the banned drug for which the Jamaican sprinters, Asafa Powell and Sherone Simpson, also tested positive in June 2013. A BBC Sport report, published under 'News' by Sport Resolutions, provides further details of those cases. Each Athlete was banned for 18 months and it is reported Mr Powell intends to appeal to CAS. He blamed his positive test on what he understood was a 'legal' supplement, Epiphany D1, which he argued must have become contaminated.

[3] The relevant documents are at B/47 to 50 of the Agreed Bundle.

[4] The equivalent of Article 10.4 of the World Anti-Doping Code

determine the sanction applicable. We nevertheless explain why we have reservations as to the correctness of that legal analysis.

1.7 We make no finding as to *how* such Oxilofrine came to be present in the supplement, Dorian Yates Nox Pump. We note that the list of ingredients that appears on the supplement's packaging contains no reference to Oxilofrine nor is there any listed ingredient that has been proved to contain it. We know that Mr Croall had tested negative at least twice before notwithstanding he had regularly taken the supplement. We also know that the boxer, Brian Magee, tested positive in December 2012[5], having taken a supplement of the same name. We know the concentrations present on analysis[6] but can deduce nothing from that. We also know that Mr Croall's own independent testing in November 2013 from another sachet in the same batch confirmed the presence of Oxilofrine in that sample[7].

1.8 Art. 295 is directed to cases in which "a *Rider* …… 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 *Rider's* performance or mask the use of a performance-enhancing substance" [original emphasis]. This places the burden of proof on the Rider and it follows, in our view, that if the Rider wishes to establish contamination by some outside agency beyond the manufacturing process then it is for him to do so.

1.9 As we have said, Mr Croall has certainly proved to our comfortable satisfaction that Oxilofrine entered his body through his ingestion of Dorian Yates Nox Pump. But that is as far as the evidence goes, in our judgment. We simply cannot say whether Oxilofrine is ordinarily or regularly present in the supplement or whether a particular batch or batches came to be contaminated in the course of manufacture[8] or by some external agency. It is established only that it was present in Mr Croall's system when these positive tests were returned.

1.10 We therefore make it clear that we do not accept that it has been established that such supplement became contaminated other than in the course of manufacture. We just do not know. Nevertheless, it must be abundantly clear to other athletes that there is at least a risk that any product bearing that name or description may be similarly contaminated.

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[5] See UKAD's 'issued decision' dated 28th June 2013 against Mr Magee (para 15)
[6] See C/53
[7] Section C of Mr Croall's written submissions at D/89
[8] In Supplementary Submissions filed on 15th April 2014, it was submitted on behalf of Mr Croall that contamination 'most likely' occurred 'in the manufacturing process'.

1.11 Although we are prepared to deal with this case under Art. 295 on the basis of the parties' joint submission that Mr Croall did not intend to enhance his performance by taking that particular substance, we do consider that he was at a significant degree of fault. We say that notwithstanding that he declared his use of the substance openly and admitted the violations at the first available opportunity after the positive results had been established.

1.12 Accordingly, we disqualify him from those competitions and the subsequent competitions in which he participated before he agreed to a voluntary suspension on 7th November 2013 having been notified of the potential anti-doping rule violation the previous day.

1.13 The other principal sanction we impose is that Mr Croall will serve a period of 6 months ineligibility from 9th October 2013 to 9th April 2014. Applying UCI ADR Art. 316, he must serve (and has served) half of that period from 9th January 2104 when his solicitors accepted the imposition of sanction on his behalf. Coincidentally, that takes the end of his suspension to the same date, 9th April 2014.

2.0 JURISDICTION

2.1 For completeness, we record that the UCI is the International Olympic Committee's recognised International Federation for the Sport of Cycling and, as such, the UCI is required by the Olympic Charter to implement and apply the provisions of the World Anti-Doping Code which it does by formulating its own Anti-Doping Rules.

2.2 It is unnecessary to set out the detailed provision of those Rules in this decision but the relevant materials, and the World Anti-Doping Code itself, can be found in full in Tab.F of our bundle.

2.3 It is common ground that Mr Croall is bound by and required to comply with the UCI ADRs.

2.4 Because the 2013 UCI Track Masters was an "International Event" as defined by those Rules, the UCI itself took initial results management responsibility. In accordance with Article 234 of the UCI ADR, the UCI requested the National Federation of the Licence-Holder to instigate these disciplinary proceedings. Since the British Cycling Federation has adopted the UK Anti-Doping Rules as their own Rules, the matter was referred by the UCI to the BCF requesting the instigation of disciplinary proceedings.[9]

[9] Request made by letter 27th January 2014.

2.5 Article 7.1.2 of the BCF's ADRs provide that responsibility for results management in such circumstances is to be undertaken by the National Anti-Doping Organisation which, in the present case, is UK Anti-Doping (UKAD) which therefore bears the responsibility for charging and prosecuting Mr Croall in accordance with the Rules.

3.0 PROCEDURAL HISTORY

3.1 As we have noted in our summary above, Mr Croall was notified of the potential Anti-Doping Rule violation on 6th November 2013, he having already been alerted to the probable cause of his failed drug tests by a presentation on 27th October 2013 which included an update on banned substances. As we noted in our summary and introduction, he says[10] that it was then that he heard for the first time that Dorian Yates Nox Pump was regarded as unsafe.

3.2 On 9th January 2014, through his representative Mr Roddy MacLeod of Anderson Strathern LLP, Mr Croall accepted that:

3.2.1 Oxilofrine was present in the samples on 6th and 9th October 2013;

3.2.2 the same was explained by the fact that Mr Croall had taken a supplement, Dorian Yates Nox Pump;

3.2.3 Oxilofrine was not listed as an ingredient amongst those ingredients and/or other information which were provided in the sachets/containers which Mr Croall had used;

3.2.4 that he had regularly used the supplement over the previous years during which he had been tested[11];

3.2.5 that accordingly, he had not knowingly ingested Oxilofrine and, in all the circumstances;

3.2.6 invited the decision maker to modify any sanction to nil.

[10] Para 30 of his written submissions – D/89
[11] As in fact he had been on two previous occasions, in September 2010 and February 2013, on each occasion with negative results.

3.3 Because the UCI did not agree with Mr Croall that so lenient a sanction should be imposed, he was informed by letter of the 27th January 2014 that the matter would be referred to the BCF and to UK Anti-Doping.

3.4 Following such reference, on 19th February 2014, UKAD charged Mr Croall with the presence of a prohibited substance (Oxilofrine) in sample nos. 2677177 and 2677869 in violation of UCI ADR Art. 21.1 and/or Use of a Prohibited Substance in violation of Art. 21.2.

3.5 It is convenient to set out the terms of Article 21 as follows:

> "The following shall constitute anti-doping rule violations.
>
> 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 or Markers found to be present in their bodily specimens. Accordingly, it is not necessary that intent, fault, negligence or knowing Use on Rider's part be demonstrated in order to establish an Anti-Doping Rule Violation under Article 21.1.
>
> Warning:
>
> 1) Riders must refrain from using any substance, foodstuff, food supplement or drink of which they do not know the composition. It must be emphasised that the composition indicated on a product is not always complete. The product may contain Prohibited Substances not listed in the composition.'
>
> ...
>
> 1.2 Sufficient proof of an anti-doping rule violation under Article 21.1 is established by either of the following: presence of a Prohibited Substance or its Metabolites or Markers in the Rider's A Sample where the Rider waives analysis of the B sample and the B sample is not analysed; or

where the Rider's B Sample is analysed and the analysis of the Rider's B Sample confirms the presence of the Prohibited Substance or its Metabolites or Markers found in the Athlete's A Sample.

1.3 [....] the presence of any quantity of a Prohibited Substance or its Metabolites or Markers in an Athlete's Sample shall constitute an anti-doping rule violation."

And UCI ADR Article 21.2 states:

21.2.1 It is each Rider's personal duty to ensure that no Prohibited Substance enters his or her body and that he does not Use any Prohibited Method. 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 rule violation for Use of a Prohibited Substance or a Prohibited Method.

21.2.2 The success or failure of the Use of a Prohibited Substance or Prohibited Method is not material. It is sufficient that the Prohibited Substance or Prohibited Method was Used or Attempted to be Used for an anti-doping violation to be committed."

3.6 We have already noted that Mr Croall entered into a voluntary suspension on the 7th November 2013.This was superseded by UKAD's decision to impose a formal provisional suspension pursuant to UCI ADR Art.247.

3.7 On 11th March 2014, UKAD formally referred this matter to the NADP, requesting expedited proceedings specifically to determine the matter of sanctions. The urgency arises because of the selection procedures leading towards this year's Commonwealth Games in which Mr Croall hopes to represent Scotland. Although it is <u>not</u> put forward as a reason why we should treat Mr Croall with leniency, the need to have an early decision is certainly a good reason for having an expedited hearing and decision. As a matter of fact, we were told that unless any period of ineligibility imposed has been served and is exhausted by the end of April 2014, then Mr Croall would be ineligible for selection for the Commonwealth Games.

4.0 EVIDENCE BEFORE THE TRIBUNAL

4.1 Following a directions hearing conducted by telephone on 14th March 2014, the parties co-operated and provided us with written submissions, a Joint Minute of Agreed Facts,[12] an agreed bundle of documents containing submissions and statements of case, relevant paperwork, other evidence, rules and regulations and various authorities.

4.2 We also invited UKAD to disclose and advance any written material about which it would wish to cross-examine Mr Croall. We shall refer to that bundle as the Supplementary Bundle (SB). In addition, we had a witness statement from Mr Croall himself and he gave oral evidence, supplementing that witness statement in chief and being cross-examined and re-examined.

4.3 Mr Croall was represented by Mr MacLeod of Anderson Strathern Solicitors. UKAD was represented by Mr Jamie Herbert of Bird & Bird.

4.4 The Panel would wish to record its appreciation of the co-operation between the parties which, in conjunction with Sport Resolutions' administration, meant that we could convene an early hearing and concentrate on the real issues that the Panel has to resolve.

4.5 Because of the reservations that the Panel had as to the parties' proposed approach to the issue of intent to enhance performance under Art. 295, which were outlined at the beginning of the hearing, we gave the parties the opportunity to supplement their written and oral submissions at the hearing by later written submissions. That they have done and we take account of those submissions also.

5.0 MR CROALL'S USE OF DORIAN YATES NOX PUMP AND THE PRESENCE OF A PROHIBITED SUBSTANCE

5.1 Mr Croall is and has always been an amateur cyclist but he has always been at the very highest level of such competitors. His own "rider profile" (SB1) describes him as a member of the City of Edinburgh Racing Club who had started racing at the age of 14 and who had trained continuously for many years with very considerable success in competition including "to date 27 Scottish Championship medals, 18 British Championship medals and 4 European Championship medals.

[12] There was a minor issue about some qualifications that UKAD wished to introduce into what had been previously been understood to be an agreed first draft. We took the view that none of those qualifications was of any real significance to the decision making process and so any issue ceased to be an issue at all.

5.2 Like many riders, he consumes "energy drinks" in order[13] to "rehydrate, maintain stimulation and maintain energy levels".

5.3 In paragraph 6 of his Witness Statement, he said that in early 2010 he was looking for a product that would not cause him stitches or other adverse side effects. He had no particular product in mind, but visited a branch of Powerhouse Fitness in Edinburgh. A shop assistant – who he does not suggest was a qualified nutritionist or someone with any particular expertise in what supplements are safe and suitable for people such as Mr Croall – recommended he tried a product called Dorian Yates Nox Pump and gave him a sachet to try. He said he asked the assistant whether there was any prohibited substance in it and was told that there was not.

5.4 We accept Mr Croall's evidence that, when he got home, he checked through the list of ingredients and compared them with prohibited substances on the list maintained by WADA. He found nothing to suggest that any was illegitimate. Then, finding the product satisfactory in the sense that it seemed to be an energy drink with no adverse side-effects (albeit having used but a single sachet from which he can only have made up a maximum of two drinks), he began to order further quantities of the material over the internet.

5.5 Disclosure has been given of a number of orders he placed between May 2010 and May 2013. They appear at D/96-107. It is conspicuous that these orders were placed via Ebay with various different suppliers, about whom Mr Croall can have had no possible knowledge and which he selected via an internet search (he said) as the first ones to be thrown up by his search terms and/or because the price looked good. As a comment, we note that of the six PayPal invoices, the name of one supplier appears twice and otherwise each supplier is different and some appear to be no more than private individuals.

5.6 As a further comment, we observe that, whilst this may be the cheapest and a convenient way to acquire one's supplements, the dangers of getting something which is not what it purports to be, even if the "real" product is legitimate, are blindingly obvious. It is exactly the kind of risk one runs when dealing with unregulated distributors of unknown pedigree and reputation. As has been said on many previous occasions[14], the risks of contamination and mis-labelling are very well known.

[13] According to para.7 of written submissions (D/86) sent under cover of a letter of 28th February 2014.
[14] For example, in CAS 2010/A/2107 *Flavia Oliviera v USADA* ('*Oliviera*') at 9.28

5.7 Be that as it may, Mr Croall explained that he continued to take the product regularly over the next months and years. Because he trained and/or competed throughout the year, he says that he maintained more or less the same degree of intake in which he used, on average, a couple of sachets a week without any particular increase or decrease in his use as a competition approached.

5.8 He had no ill-effects and, presumably, found the product beneficial both in and out of competition. He competed in the Kilo TT event at the British Track Cycling Championships on 23rd September 2010, where he ended up as British Champion. There he was subject to doping control and provided a urine sample which was negative. He says – and we accept – that on the Doping Control Form he listed Dorian Yates Nox Pump as a product that he was using.

5.9 The fact that the test came back negative provided him, he says, with considerable reassurance that Dorian Yates Nox Pump was, as he believed, a supplement he could legally use. As a comment, it would seem to follow logically that he must have been concerned about the *potential* that, whatever it purported to be, Dorian Yates Nox Pump might not be the entirely benign product he hoped it was.

5.10 He would certainly have been wise to have had his reservations. We say that because he told us that he did go onto the internet to investigate "Nox Pump". We have a print-out of the kind of website or information that he would have found when he looked at SB12. Anybody reading this promotional material would have seen it characterised as a "dietary supplement" targeted at bodybuilders. To any athlete, that should have rung loud alarm bells to the extent that further enquiries would have been well advised.

5.11 Mr Croall told us that his enquiries were in fact relatively limited. We have already said that he searched the list of ingredients against prohibited substances on the WADA website. Finding none, he was reassured, as he was further reassured by his first negative test. He continued to use the product.

5.12 Over the following months and years, Mr Croall did not seek further specialist advice from medical practitioners or from specialist nutritionists. He did not take any steps to have the supplement that he was using independently analysed. He told us that he did not have ready access to such facilities, but he did know that the elite cyclists in British cycling regularly had the supplements with which they were provided batch tested.

5.13 To any intelligent and sensible person – and Mr Croall certainly struck us as such – that would indicate that, even at the highest level, it was not felt safe just to rely on the list of ingredients that appears on the side of a packet or sachet. Rather, those responsible for elite cyclists evidently regarded it as necessary, from time to time, to have batches tested to make sure that there were no prohibited substances within what was *actually* supplied.

5.14 Mr Croall also told us that, whilst he mixed with fellow cyclists both in and out of competition, he did not in fact discuss his use of this particular supplement with others, nor even with a friend based in Manchester who was a member of the British Squad. He said he had never been party to such discussions, even though he began his competitive cycling career as a teenager.

5.15 We are not going to make any finding of fact as to whether that is true or false, but we have to say that we found that part of his evidence extremely surprising. We would have thought that an athlete would engage in an exchange of views with others if they are taking a particular supplement and it seems to be useful as well as legal. All athletes should be vigilant in informing themselves as to the nature (and legality) of such supplements by all available means.

5.16 Thus far, Mr Croall said – and we accept – that he thought that the substance that he was taking was not prohibited: that is, he had heard and knew nothing that cast any shadow over it. But the question which arises is whether he might, by further enquiries or investigations, have established that there were actually positive reasons to be suspicious.

5.17 Within the cross-examination material supplied (SB14 to 19) we see the fruits of a recent Google search identifying Dorian Yates Nox Pump in various different search terms. Even fairly basic lines of enquiry in preparation for the hearing – as in April 2014 – threw up a whole series of doubts about Dorian Yates Nox Pump being possibly banned and/or under suspicion. The earliest of those postings would appear to be March/April 2010 and so, it was suggested, one might infer that had Mr Croall made enquiries even during 2010 by form of an internet search on, say, Google, he would very quickly have found that there were (at least) large shadows of doubt cast over the integrity of the product.

5.18 We do not accept that it is fair to criticise Mr Croall on this basis. We do not feel, in the absence of any expert or other corroborative evidence, that we can infer from the results thrown up by a search in 2014 what might have been thrown up by a search in 2010 to 2012. We simply do not know. Nevertheless, it is a point against Mr Croall that, as we

have already explained, those enquiries that he did make seem to have been basic at best: perfunctory might be a more appropriate description.

5.19 To return to the narrative, Mr Croall explained that he continued to take the product and continued to keep up to date with general developments including developments as regards ADR issues via the British Cycling website and via WADA.

5.20 He says – and we accept – that whatever suspicions the world may now have about Dorian Yates Nox Pump, nothing whatsoever was published on those websites which would have alerted him to what is now the known risk. Hence he continued to take the supplement and his confidence in it was, he says, yet "further affirmed in February 2013" when he was subject to a further doping test which again provided a negative result and in respect of which he had once more declared his use of Dorian Yates Nox Pump.

5.21 The fact that Mr Croall had – as we accept – been using this product at more or less the same level continuously for some 2 to 3 years and that there had twice been negative results (September 2010/February 2013) gave rise to a concern that we mentioned to the parties at the beginning of the hearing. Might it be, we asked, that the supplement, Dorian Yates Nox Pump, is ordinarily free of prohibited contaminants but, in relation to this batch or perhaps this supplier, it somehow came to be contaminated?

5.22 The answer was and is that nobody knows. But, given that the athlete is responsible for what goes into his body and that it is he who has the burden of establishing how it got there, in the absence of intent and no significant fault or negligence[15], we do not think we need to speculate, as we explained in our introduction and summary above.

5.23 We say that notwithstanding the fact that Mr Croall has twice tested negative. As we said already, we can deduce nothing from the concentrations that were established[16] on testing. The explanation for the previous negative tests may be something to do with the quantity and/or the timing of the latest ingestion relative to the date of testing. But we do not know and, as we say, there is no point wondering.

5.24 There is one further issue which is raised as a possible allegation of fault in relation to the adequacy or otherwise of Mr Croall's enquiries. It concerns the *Magee* case. Mr Magee was a boxer who tested positive following doping control in December 2012. His sample

[15] See UCI Art.295 to 297 or Art.10.4, 10.5 of the World Anti-Doping Code.
[16] See C/53.

also tested positive for Oxilofrine which he had taken, apparently, because he had been suffering from a heavy cold and found that coffee and/or Red Bull caused his discomfort, so he took Dorian Yates Nox Pump instead.

5.25 It was a case dealt with by UKAD itself and on the 28th June 2013 it issued its decision. UKAD's point against Mr Croall, therefore, is that an internet search in the subsequent months (and before the Manchester competition) would/might well have thrown up the results of that decision on UKAD's website.

5.26 It might, but Mr Croall has already explained that he did no such detailed internet searches (and did not go onto UKAD's site) during that period. We have seen no evidence that the decision and information was widely disseminated to or by, for example, Scottish Cycling.

5.27 It is not therefore fair, in our opinion, to criticise Mr Croall for being unaware of the implications of that decision during the ensuing 3 months. The only further observation we would make is that if decisions like the *Magee* case are really intended by UKAD to be lessons for all those engaged in competitive sport, UKAD would be well advised to ensure that they are systematically disseminated to relevant sporting bodies such as (in this case) Scottish Cycling with encouragement that such bodies should give their members advice accordingly.[17]

5.28 We return to where we started on the point which is to say that, however the prohibited substance got into the product, it is, in the end, Mr Croall who is responsible for what went into his body. We find that the steps he took to check the integrity, true ingredients and nature of what he was in fact taking were very limited and to that extent he was at fault. Nevertheless, we acknowledge that he was undoubtedly entitled to be reassured by the negative results on two previous tests. Equally important is the fact that he did declare openly on each of those occasions as well as in October 2013, exactly what supplement he had taken. Somebody who knew or had reason to suspect that he was taking a substance which in fact contained a prohibited stimulant would be unlikely to act in that way.

6.0 **CONCLUSIONS ON FAULT**

6.1 For reasons more fully explained in the foregoing analysis of the factual history, we think that Mr MacLeod was entirely right to recognise that Mr Croall cannot say he acted entirely

[17] It is a point that Mr Croall makes that as an amateur – albeit it one that who is more or less at the "elite" level, - that there is not much, if anything, in the way of "classroom" education about doping issues such as this available to him.

without fault or negligence. The degree of fault is something to which we shall return when we look at the issue of sanctions. But, for present purposes, our view is that:

(1) He should have made more extensive enquiries when first he purchased the supplement.

(2) He was taking a risk by not having his supplement tested at any stage or by not seeking more specialist advice.

(3) He would have been very well advised to have asked more generally amongst fellow athletes and/or have posed a question directly to one of the cycling bodies about this particular product.

(4) His lines of enquiry via the internet were perfunctory at best. What he did admittedly see (SB12) should have raised alarm bells.

(5) It may have been understandable that he took comfort from having tested negative twice, but he should not entirely have depended upon that outcome especially since he was using so many different suppliers.

(6) He was taking a major risk in purchasing the product over the internet from different, unregulated, suppliers of unknown reputation so that the provenance of what was supplied was always uncertain. All he can have known was that the product looked and, presumably, had the same apparent effect as that which he had previously used.

7.0 **INTENT**

7.1 Before we turn to the analysis of intent in the context of Article 295/Article 10.4, we shall set out what we find to have been Mr Croall's actual intent when he took the supplement.

7.2 Mr Croall took this supplement in order to enhance his performance in and out of competition. Not only is that perfectly obvious to any sensible person, but Mr Croall very frankly admitted as much in Section C[4] of his Written Submissions. Particularly, he says (via his advocate) that his

"Use of the product was as an energy drink which he consumed in order to maximise his performance legally. At no time did Mr Croall seek to enhance his performance by using a banned substance."

7.3 As apparent from the analysis that follows, the interpretation which Mr MacLeod commends to us in relation to Art.295/10.4 is whether the athlete intended *illegally* to enhance his performance[18]. However, we see no basis for implying such word or meaning into those provisions. Indeed, it would make nonsense of the power provided in the last part of Art. 295 whereby we might *eliminate* any period of ineligibility notwithstanding that we would first have had to find (according to Mr MacLeod's approach) that the athlete had intended to cheat.

7.4 It is clear that the main/dominant/primary purpose for Mr Croall taking the supplement was to enhance his performance generally. The present case, therefore, is nothing like the kind of case where any such enhancement is at the very most indirect, such as where one might be taking a particular substance in order to help get over a cold, sleep or recover from jetlag.

7.5 Obviously, in such cases there is likely to be an *indirect* intention as regards overall performance but it is not the main or dominant purpose of doing so.[19] However, it is clear that in the present case, the 'dominant purpose' of Mr Croall taking the supplement was indeed to enhance performance, in and out of competition. On the other hand, he can have had no intent whatsoever as regards the '*specified substance* ' - Oxilofrine - because (as we accept) he believed that the supplement was free of any prohibited substance and had no idea that Oxilofrine was in fact any part of the substance that he consumed.

7.6 If, therefore, what is in issue under Article 295/Article 10.4.1 is knowledge and intent *as regards the specific substance* then Mr Croall's intent to enhance performance thereby was manifestly lacking. If a broader definition – intent as regards the *product* – is what matters then, equally clearly, it has been proved that Mr Croall did intend to enhance his performance by taking it.

[18] Mr Herbert, on the other hand, argues that what is required under Article 195/10.4.1 is an intent to enhance performance by reference to the "specified substance": that is, one might be intending to enhance one's performance legally, but once one intends it in relation to the specific substance, it is caught by Article 295.
[19] A test that the Appeal Panel of NADP favoured in *UK Anti-Doping v. Ryan Llewellyn*. We agree with it.

7.7 The competing interpretations have exercised a number of distinguished jurists in both CAS and NADP. We shall return to that debate shortly. The real relevance, of course, is to sanction.

8.0 SANCTION UNDER ARTICLE 293 AND THE PARTIES APPROACH TO INTENT UNDER ARTICLE 295

8.1 UCI ADR 293 mandates the imposition of a period of ineligibility of 2 years "unless the conditions for eliminating or reducing the period of ineligibility as provided in Articles 295 to 304 or the conditions for increasing the period of ineligibility as provided in Article 305 are met".

8.2 Both parties agree here that what is in issue is Article 295 and that the question of sanction depends on his degree of fault. That presupposes that we should apply what the Panel characterises as the narrow/literal interpretation of the wording of Article 295/Article 10.4 rather than a broader interpretation. That is, the parties jointly favour the approach of CAS in *Oliviera* (albeit with some material differences in the way they analyse the narrower/literal test) as against that to be found in *Foggo v NRL* CAS 2010/A/2107.

8.3 We turn to a discussion of the different interpretations of this 'intent issue' and explain how far (if at all) we feel the need to resolve them in the instant case.

9.0 ARTICLE 295/ARTICLE 10.4.1/ARTICLE 10.4

> "Where a Rider or Rider Support Personnel 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 Rider's sport performance or mask the use of a performance-enhancing substance, the period of Ineligibility for a first violation found in article 293 shall be replaced with the following:
>
> > at a minimum, a reprimand and no period of Ineligibility from future Events, and at a maximum, two (2) years of Ineligibility.
>
> To justify any elimination or reduction, the License-Holder must produce corroborating evidence in addition to his word which establishes to the comfortable satisfaction of the hearing panel the absence of an intent to enhance sport performance or mask the use of a performance-enhancing substance. The License-

Holder's degree of fault shall be the criterion considered in assessing any reduction of the period of Ineligibility*."*

9.1 This provision for all practical purposes is exactly the same as Art.10.4 of the WADA Code which reads:

> "**Elimination or Reduction of the Period of *Ineligibility* for Specified Substances under Specific Circumstances**
>
> Where an *Athlete* or other *Person* can establish how a Specified Substance entered his or her body or came into his or her *possession* and that such Specified Substance was not intended to enhance the *Athlete* sport performance or mask the *use of a performance-enhancing substance*, the period of *ineligibility* found in Article 10.2 shall be replaced with the following:
>
> > First violation: at a minimum, a reprimand and no period of *ineligibility from future events*, and at a maximum, two [2] years of *ineligibility*
> >
> > To justify any elimination or reduction, the *Athlete* or any other *Person* 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 or mask the *Use* of a performance-enhancing substance. The *Athletes* or other *Persons* degree of fault shall be *the* criterion[20] considered in assessing any reduction of the period of *ineligibility*".

10.0 DISCUSSION AND CONCLUSION ON THE INTENT ISSUE

10.1 As we have explained already, the broad interpretation of those provisions - in which what is in issue is intent in relation to the *product* - was favoured by CAS in *Foggo*. The narrower/literal interpretation focuses on intention *as regards the specified substance* and it is that which was favoured in *Oliviera.* Given the approach we are taking, which is to apply the narrower/literal test because it is that test which both parties urge us to adopt, it is not necessary for us to cite all the other authorities in which the same issue has been considered.

[20] Our emphasis.

10.2 We take that course only because both parties have resolved that the narrow interpretation is appropriate, albeit they take slightly different ways of reaching the same result[21]. That being so, we do not think it appropriate to substitute a different, broader, interpretation of the provision (albeit it is that which we prefer[22]).

10.3 That is not to say that this issue might not fall to be revisited in other cases at any level, particularly where the prosecuting authority (UKAD, in the instant case) felt able to commend the broader interpretation to the decision maker so that the issue could be fully argued. To that extent, the fact that we have adopted the narrower interpretation means that our decision should have no value whatsoever as a future precedent.

10.4 Rather, what we have done in what is, after all, an arbitral process, is no more than to decide that, in the light of the parties' agreed approach before and at the hearing, justice can be done by acceding to and applying their interpretation. Had we felt that their approach was obviously wrong, in the sense of being unsustainable or unarguable, then we would have felt free to depart from it, just as the Appeal Panel felt able to reject UKAD's approach in the *Llewellyn* case. But, as we have acknowledged, there are conflicting lines of authority in the case law. That being so, and given that the parties' joint position is respectably arguable, we shall apply Article 295. We do, however, express the hope that in another case in the future UKAD will look again at the alternative interpretation and will give another panel the opportunity to revisit this matter, bearing in mind this panel's view that the broader interpretation is to be preferred.

10.5 Of course, if the broader interpretation were to prevail, we would be looking at Article 296 or Article 297. If it were an Article 296 case, it would follow from what we have already said that we could not conceivably see this as being a case of "no fault or negligence"; and, very sensibly, Mr MacLeod recognises that.

10.6 Under Art. 297, we would then have to consider whether or not there was "no significant fault or negligence". In that case, the reduced period of ineligibility would be "not less than one half of the period of ineligibility otherwise applicable": that is, one year being half of two years. Under Art.295, of course, our discretion is not so restricted.

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[21] Mr MacLeod for Mr Croall submits that we should, in effect, interpret the provision as requiring proof that the athlete intended to act *illegally*. We have already said that we see no basis for such an inference even if the narrower/literal interpretation prevails. The intent that must be provedon that test is no more and no less than an intention *in relation to the specified substance*.

[22] For the avoidance of doubt, this Panel unanimously favours the *Foggo* line of reasoning and analysis. But we acknowledge that we have not heard full argument on the issue.

11.0 **OUR DECISION ON SANCTION**

11.1 It is, we acknowledge, important that tribunals act consistently in imposing sanctions on cases that are comparable or which fit into the same bracket in respect of which there is previous case law or other authoritative guidance. Nevertheless, it is also important to recognise that it may be very difficult to say that Case A is just like – or better or worse – than Case B. The facts of each case and the circumstances of those who commit doping offences are infinitely variable. The decision in Case A may be at the lenient end of a permissible bracket and that in Case B may seem harsh. And so forth.

11.2 We begin with that introductory observation because a number of cases have been drawn to our attention so as to inform our decision on sanction. They include[23] *UKAD v Wallader* [NADP award 29th October 2010], *ITF v Cilic*[24], the *Magee* case and *FINA v Cielo* [CAS 2011/A/2495].

11.3. The starting point is Art. 293 which mandates the imposition of a two year ban for a first violation "unless the conditions for eliminating or reducing the period of ineligibility as provided in articles 295 to 304 or the conditions for increasing the period of ineligibility as provided in article 305 are met".

11.4 No-one suggests that Art. 305 applies and we agree. The question, then, is whether this case falls under Art. 295 where the range of available sanction extends from reprimand and no period of ineligibility up to the 2 year maximum. If it does, then any reduction in the 2 year period depends on the rider establishing absence of intent (see above) and the "License-Holder's degree of fault".

11.5 If the case were not to fall under Art .295 then, as we have said, we would have to consider either Art. 296 or Art. 297. The former would arise only if we were satisfied that the Rider was guilty of "No fault or Negligence". The commentary to Art.10.5 of WADC and cases such as *Cielo* explain how very difficult – if not impossible – it would be for an athlete to demonstrate absence of all fault or negligence in cases of contamination or mislabelling

[23] See UKAD's skeleton at A/21-23 and Supplementary Closing Submissions
[24] CAS 23rd September 2013

by third parties. Be that as it may, we have already indicated why we find at least some degree of actual or direct fault so this provision does not apply.

11.6 As we have already explained, Art. 297 deals with cases of 'No *Significant* fault or Negligence' (added emphasis). That, we find, would be a fair – perhaps even generous – description of Mr Croall's conduct in the instant case. But, even so, the consequence would be that, were the broader interpretation of the necessary intent under Art.295 to prevail, Art. 297 would apply so that the maximum reduction in sanction we would be able to make would be to reduce the period of ineligibility to one year.

11.7 We have already explained why we find Mr Croall to have been at actual fault. We think that he took a real risk by buying this supplement, described as it was, from unregulated suppliers over the internet without making very many more inquiries than he did. We recognise that he did not have access to the same level of anti-doping advice and education as a full-time professional athlete but he could and should have done much more than he did.

11.8 On the other hand, he has powerful mitigation[25] to advance. He declared his use of the substance openly. He was not (we find) trying to cheat. He had tested negative at least twice before the positive tests in October 2013. When he learnt of his positive test, he admitted his guilt promptly, accepted his suspension and thereafter has continued to co-operate with the regulatory authority.

11.9 For reasons we have already explained, we are not going to engage in any analysis in which we find that this case is worse or better than say, *Magee, Wallader* or *Cielo.* Taking all matters into account, we regard the appropriate sanction as one of six months ineligibility from the date on which Mr Croall returned the second positive sample, as UKAD has submitted: that is, we reduce the standard sanction by (at least) three-quarters. However, we should explain why we rule that the 6 month period should begin on 9th October 2013 and end on 9th April 2014.

11.10 UCI ADR Art. 316 provides that "*Where the License-Holder* promptly (which, in all events, for a *Rider* means before he competes again[26]) admits the anti-doping rule violation, the period of *Ineligibility* may start as early as the date of *Sample* collection on the date on

[25] As a comment, we note that it is – quite correctly – common ground that Mr Croall's personal circumstances and his wish to compete in this year's Commonwealth Games are *not* relevant to the sanction and do not amount to true mitigation.
[26] To make sense of this provision, we imply the qualification 'having been given notice of his positive test'.

which the anti-doping violation last occurred. In each case, however, where this article is applied, the *License-Holder* shall serve at least one-half of the period of *Ineligibility* going forward from the date on which the *Licence-Holder* accepted the imposition of a sanction, the date of a hearing decision imposing a sanction, or the date the sanction is otherwise imposed".

11.11 Articles 317 to 319 deal with giving credit for Provisional Suspension. We do not need to set them out in detail here.

11.12 The relevant dates are as follows: On 6th and 9th October 2013, Mr Croall provided sample for collection which later proved positive for Oxilofrine. He was notified of the results on 6th November 2013 [C/55-60]. His email of 7th November 2013 [C/61] was, for all practical purposes, an admission of the offence and he signed a form accepting a voluntary suspension [C/63]. He was not sent a formal Notice of Charge by UKAD until 19th February 2104 [C/71]. However, his solicitors had already made a formal admission accepting the imposition of sanction (and addressing the issue of the appropriate sanction[27]) on 9th January 2014 [C75-77].

11.13 As regards *Ineligibility,* we are therefore satisfied that we can and should begin the 6 month period at the date of collection of the samples on 9th October 2013 and that, as per UCI ADR Art. 316, Mr Croall, having made a timely admission and having accepted the imposition of some form of sanction by 9th January 2014 (at the latest), he will have served the whole six months by 9th April 2014, alternatively, half that sanction since 9th January to expire on the same day.

11.14 Pursuant to UCI ADR Art 288, Mr Croall's results on 6th and 9th October 2014 (respectively, Men's 35-39 Time Trial race and Men's 35-39 Sprint) are *disqualified.* Pursuant to Art. 289.3, his later results (prior to his acceptance of the voluntary suspension on 7th November) also fall to be *disqualified*. All prizes, titles, medals and other rewards at such events are also to be forfeited.

11.15 As regards the issue of *Costs*, pursuant to UCI ADR Art.275.2, Mr Croall will have to bear the "costs of results management by the UCI in the amount of CHF 2,500".

[27] They argued the sanction should be nil

11.16 In their written submissions, UKAD reserved the right to apply for an order for *costs* in these proceedings pursuant to Art, 275.1. We shall determine that application on paper if it is pursued.

11.17 In accordance with the Rules, UCI, WADA, UKAD or Mr Croall may file a Notice of Appeal against this decision within 21 days.

Signed by the Chairman on behalf of the Tribunal:

William Norris QC (Chairman)

Dr Kitrina Douglas (Specialist Member)

Colin Murdock (Specialist Member)

Dated 24 April 2014

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