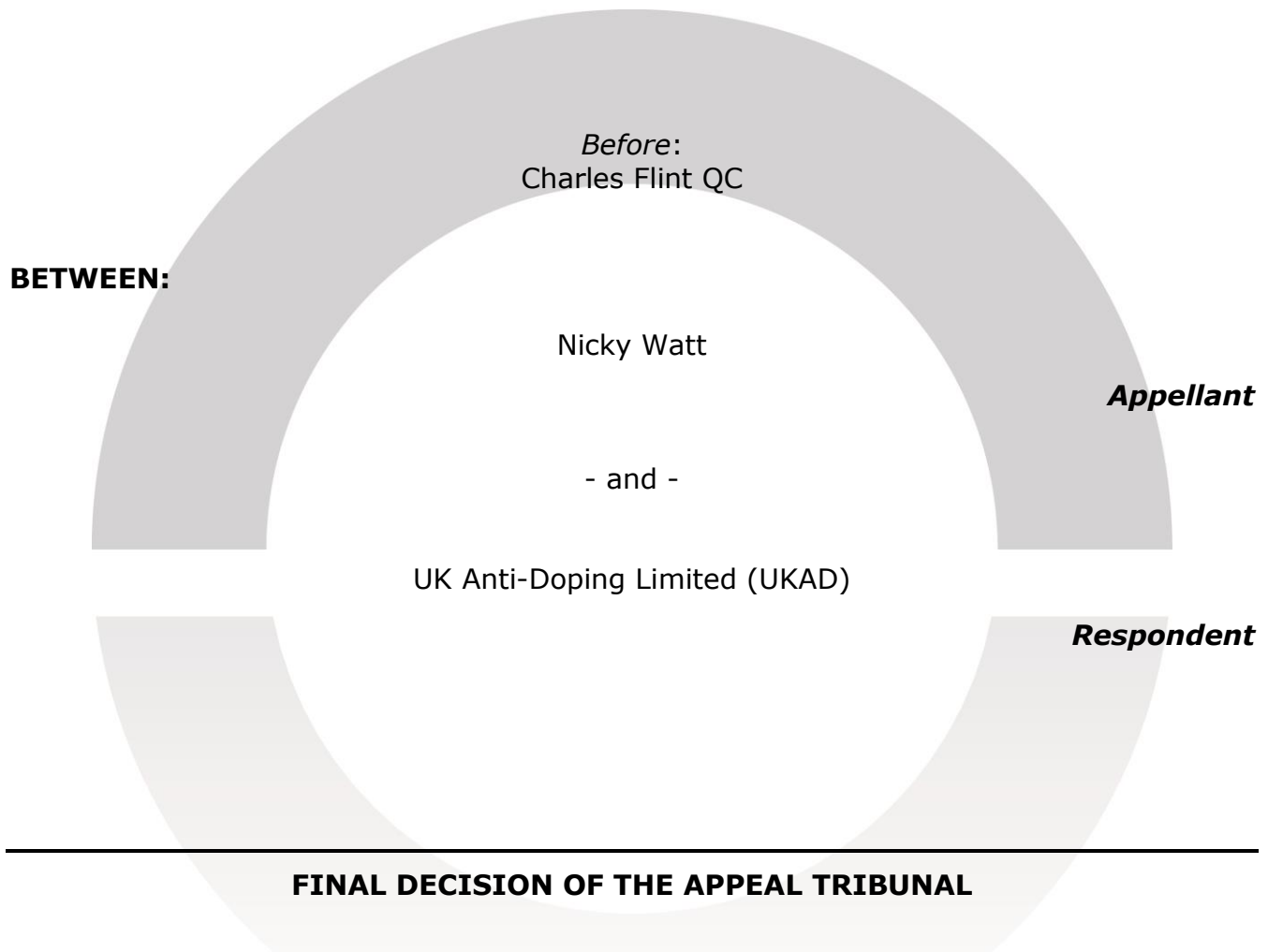


**NATIONAL ANTI-DOPING PANEL  
APPEAL TRIBUNAL**



1. This is an appeal against the decision of the NADP tribunal made on 6 November 2014 which determined that Mr. Watt had committed two anti-doping rule violations and should be ineligible for participation in competition, and other activity, in sport for a period of 8 years.

2. Article 5.3 of the NADP rules provides that the President shall appoint an appeal tribunal made up of three arbitrators to hear and determine any appeal under Article 5.3. In this case the parties have agreed that the appeal should be decided on the papers alone, without a hearing, and that I should be the sole arbitrator.
3. Mr. Watt has been a semi-professional ice hockey player who played for 10 years in the English Premier Ice Hockey League, a competition organised by the English Ice Hockey Association. The association is an affiliate of Ice Hockey UK which has adopted the UK anti-doping rules ("the Rules").
4. Mr. Watt was found by the tribunal to have contravened the Rules in:
  - (i) refusing to provide a urine sample in an out of competition test on 27 May 2014, contrary to article 2.3, and
  - (ii) the presence of a Prohibited Substance, the anabolic steroid stanozolol, in a sample provided on 17 June 2014, contrary to article 2.1.
5. There was no dispute before the tribunal that those two rule violations had occurred. The issues related to sanction and principally whether the violations should be considered to be a single rule violation under Rule 10.7.4, or multiple violations attracting an increased period of ineligibility of 8 years under article 10.7.1. The tribunal decided that the rules required a period of ineligibility of 8 years to be imposed.
6. The facts are clearly set out in the decision under appeal and need not be repeated in this decision.
7. There are four issues raised on this appeal:
  - (1) Whether Mr. Watt was subject to the Rules at the material time;
  - (2) Whether Mr. Watt should be treated under article 10.5.2 as bearing no significant fault or negligence, so that the period of ineligibility should be reduced;

(3) Whether the two violations should be treated as a single violation under article 10.7.4, or as two violations for which the period of ineligibility is a minimum of 8 years under article 10.7.1;

(4) Whether the imposition of a period of ineligibility was, in the circumstances of this case, disproportionate so that a lesser period should be imposed.

### Jurisdiction

8. Before the tribunal the contraventions were not disputed, but on this appeal the argument is advanced that Mr. Watt was not subject to the Rules because he was not at the material time actively participating in the sport and he had not intended to play in the league in the following season.
9. In order to play in the English Ice Hockey League registration is necessary. The national governing body for the sport is Ice Hockey UK Limited which has adopted the Rules. The English Ice Hockey Association is an affiliate organisation which has accepted that the Rules apply to events and competitions which it organises. The English Ice Hockey Association organises the Premier League and registers players to teams which play in the league for a season, which runs from 1 August to the following 31 July. Mr. Watt had been registered to play for a number of seasons. For the 2013/14 season he was registered to play for Peterborough Phantoms from 1 August 2013, and played for that team in the league. On 2 January 2014 he was registered to play for Guildford Flames and he played for that team until 5 April, when it failed to reach the playoffs. Mr. Watt did not sign a contract with either club, but he was paid for the games in which he played. Mr. Watt does not contend that he did not know of the anti-doping rules nor dispute that they applied to him at the time when he was playing in the league.
10. On those facts there can be no doubt that Mr. Watt became subject to the Rules when he played in the league as a registered player. Under article 1.2 he was an athlete competing in the sport under the jurisdiction of Ice Hockey UK Limited, which is the officially registered governing body of the sport of ice hockey in the UK, or its affiliate English Ice Hockey Association. A player is deemed to accept the rules of the league in participating in competition, including the applicable anti-doping rules, so that the principles set out by Mance LJ in *Modahl v British Athletic*

*Federation [2001] EWCA Civ 1447* at paragraph 105 apply so as to create an implied contract incorporating the Rules.

11. The submission for Mr. Watt, as set out at paragraph 16 of the submissions, is that “Mr. Watt was not actively participating in the sport at all when the purported violations occurred and did not intend to do so for the coming season”. That submission may to some extent overstate the factual position. Mr. Watt remained registered not only as a player but also as a Level 2 coach. On the doping control supplementary report form Mr. Watt stated that he was not under any form of contract and was not even sure if he was going to play in the 2014/15 season. He stated that he needed to know if the Rules applied to players who have not signed contracts and if they did he was happy to take a test.
12. However the application of the Rules cannot depend on the subjective intention of the athlete, nor the extent to which he is actively participating in the sport at the time when he is required to give a sample. By becoming subject to the Rules an athlete is subject, by virtue of article 1.3.1 b. iii, both to in-competition and to out-of-competition testing. There is no provision in the Rules that the testing regime terminates when a player ceases actively to participate in matches. To the contrary article 1.4.1 states that the athlete continues to be bound by and required to comply with the Rules unless and until he has given written notice of retirement to the national governing body. Accordingly by participating in the league, by playing first for Peterborough Phantoms and then for Guildford Flames, Mr. Watt became subject to the Rules, at least until the end of the 2013/14 season for which he was registered. The fact that he was not under contract to play any further games that season, or for the following season, did not relieve him from his duty to submit to out-of-competition testing. At the material times, when he was required to give a sample, he remained subject to the Rules.

#### No significant fault or negligence

13. The essence of the argument on appeal, as set out in paragraphs 19 and 20 of the written submissions, is that Mr. Watt was under a mistaken but reasonable belief that he had been banned from competition for refusing to give a sample and thus

that he would not be subject to further out-of-competition testing, so that it was not prejudicial to his position to take a substance containing steroids.

14. At paragraph 33 of its decision the tribunal noted that it is a pre-condition for the application of article 10.5.2 that an athlete establishes how the prohibited substance entered his body. The evidence given by Mr. Watt, as set out at paragraphs 19 and 20 of the decision, was that he took the "fat-burner" Anavar, which he knew to contain one prohibited steroid Oxandrolone, but that it must have been contaminated with another prohibited substance Stanozolol. The tribunal decided that this assertion was pure speculation so that article 10.5.2 could not apply. That point is not answered on this appeal, either by further evidence or by submission.
15. At paragraph 34 the tribunal also decided that on the facts this was not an exceptional case which could fall within article 10.5.2. In my view the conduct of the athlete, in deliberately taking a prohibited substance during a period when he mistakenly believed that he would not be subject to out of competition testing, is the antithesis of the exercise of the utmost caution which is required of athletes. Under article 2.1.1 it is the personal duty of the athlete to ensure that no prohibited substance enters his body. The definition of No Fault or Negligence refers to the exercise of utmost caution, and that criterion is incorporated into the definition of No Significant Fault or Negligence. The purpose of article 10.5.2 is not to relieve an athlete from the consequences of a deliberate decision to ingest a prohibited substance under the mistaken belief that he would not be subject to further out-of-competition testing.

#### Single or multiple violations

16. This issue depends on the effect of article 10.7.4 a which so far as material reads:

*"A second Anti-Doping Rule Violation may only be considered for the purposes of imposing sanctions under article 10.7 if the NADO can establish that the Participant committed the second Anti-Doping Rule Violation after he/she received notice ... of the first Anti-Doping Rule Violation ..."*

17. The argument for Mr. Watt, as set out at paragraphs 24 to 27 of the written submissions, is that he ingested the prohibited substance prior to having received formal notice of the charge of refusing to provide a sample. The submission is that he refused to give a sample on 17 May, ingested Anavar between 3 and 13 June, and was notified of the first charge on 14 June. There is a convenience about that chronology, particularly as the first witness statement of Mr. Watt, at paragraph 8, did not state on what date he started or ceased to take Anavar. However the burden of proof under article 10.7.4 lies on UKAD and at paragraph 19 of its decision the tribunal recorded Mr. Watt's evidence that he took two tablets of Anavar a day between 2 and 12 June, without recording any rejection of that evidence. The argument on this issue before the tribunal appears to have proceeded on the basis that Mr. Watt's evidence should be accepted. I reject the submission of UKAD, at paragraph 3.11.1 of its submissions, that the argument should fail on the facts because Mr. Watt has not proved how, and when, the prohibited substance entered his body.
18. On that basis the issue is the point of time at which a contravention of article 2.1 is deemed to occur. The argument for Mr. Watt is that the core element of article 2.1.1 is the personal duty of the athlete to ensure that no prohibited substance enters his body. Once the prohibited substance enters the body then the offence is committed. The presence of a prohibited substance is the means of proof of the violation, not in itself a violation. An athlete may admit the presence of a prohibited substance.
19. The admission point does not take the argument any further; the question is whether the offence which is admitted lies only in the athlete allowing a prohibited substance to enter his body. However the literal argument does derive some support from the language of article 2.1.2 which describes the presence of a prohibited substance in an A or B sample, as appropriate, as "Proof ... sufficient to establish an Anti-Doping Rule Violation under Article 2.1". Read in isolation that would tend to suggest that the presence of a prohibited substance is not in itself the violation.
20. The submissions for UKAD at paragraph 3.11 make a number of points on the construction of article 2.1 in the context of the Rules as a whole. The point is

correctly made that the only way in which a violation of article 2.1 can be proved is by analysis, but that does not resolve this issue. The commentary to the WADA Code at article 2.1, which refers to the strict liability principle, is consistent with either party's submissions. Nor is the date on which a violation is deemed to have taken place under articles 10.8 and 10.9 of much persuasive force.

21. The heading to article 2.1 is explicit in identifying the violation as the presence of a prohibited substance, or its metabolites or markers, in an athlete's sample. As the tribunal correctly pointed out, at paragraph 35 of its decision, metabolites are not ingested, so the violation must lie in the presence of the metabolites in the athlete's sample. The same point can be made in respect of markers, which are compounds which indicate the use of a prohibited substance or method. As UKAD correctly points out certain substances, such as cannabis, may be ingested out of competition without any offence being committed, but the finding of such a substance in a sample taken in competition would constitute a violation. So in the case of those substances the only violation is the presence of the prohibited substance in the sample taken.
22. The language and purpose of article 2.1 is in my view clear. Article 2.1.1 establishes the strict liability principle for any prohibited substance "found to be present in his/her sample". Article 2.1.2 establishes what shall be proof of that violation. Article 2.1.3 reaffirms the point that presence of any quantity of a prohibited substance "shall constitute an Anti-Doping Rule violation". Under article 2.1 evidence as to whether or how or when the athlete used or ingested a prohibited substance is irrelevant; the fact which constitutes the contravention is the presence of a prohibited substance in the sample. Use or attempted use, by ingestion or otherwise, is a separate offence under article 2.2.
23. For those reasons, in agreement with the tribunal, I conclude that Mr. Watt must be treated as having committed a second violation at the time when required to give a sample for the purpose of an out of competition test on 17 June 2014.

#### Proportionality

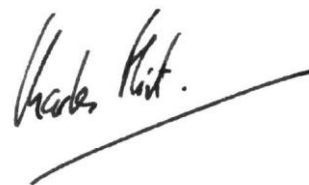
24. It is submitted for Mr. Watt that the tribunal has a discretion, under article 17.3, to achieve a fairness of outcome and proportionality. The argument is made easier,

at paragraph 30 of the written submissions, by describing the sanction provisions as guidelines, when they are not. Article 10.7 prescribes a mandatory scale of periods of ineligibility for multiple rule violations, from which the tribunal has no discretion to depart.

25. The argument based on *Puerta v ITF CAS 2006/A/1025* is similarly flawed. In that case the CAS found a lacuna in the rules where an athlete was found to have no significant fault or negligence in relation to either of the offences which he had been found to have committed. In contrast in this case the athlete is not entitled to have either offence treated as committed with no significant fault or negligence. He made a deliberate decision to refuse to give a sample, to conceal the fact that he had taken cannabis, and then deliberately ingested Anavar which he knew to contain a prohibited steroid. This case is exceptional but not in a way which indicates that a mandatory imposition of 8 years' ineligibility is disproportionate.

#### Decision

26. For the reasons given above this appeal is dismissed. The decision made by the tribunal dated 6 November 2014 that there were two anti-doping rule violations and that the period of ineligibility must run for 8 years from 17 June 2014 must stand.
27. There is no further right of appeal conferred by the Rules.

A handwritten signature in black ink, appearing to read "Charles Flint", with a horizontal line underneath it.

Charles Flint QC

10 March 2014







Sport Resolutions (UK)  
1 Salisbury Square  
London EC4Y 8AE

T: +44 (0)20 7036 1966  
F: +44 (0)20 7936 2602

Email: [resolve@sportresolutions.co.uk](mailto:resolve@sportresolutions.co.uk)  
Website: [www.sportresolutions.co.uk](http://www.sportresolutions.co.uk)

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