BEFORE THE SPORTS TRIBUNAL
OF NEW ZEALAND **ST 08/13**

BETWEEN **DRUG FREE SPORT NEW ZEALAND**

Applicant

AND **KRIS GEMMELL**

Respondent

AND **TRIATHLON NEW ZEALAND**

Interested Party

DECISION OF TRIBUNAL
DATED 12 February 2014

Hearing: 7 February 2014

Tribunal: Sir Bruce Robertson (Chair)
Alan Galbraith QC (Deputy Chair)
Dr Jim Farmer QC (Deputy Chair)

Present: Kris Gemmell, respondent
Ian Hunt, counsel for respondent
Paul David, counsel for Drug Free Sport New Zealand
Graeme Steel, Drug Free Sport New Zealand
Jude Ellis, Drug Free Sport New Zealand

Registrar: Brent Ellis

1. Drug Free Sport New Zealand (DFS) filed an application for Anti-Doping Rule Violation Proceedings under Rule 3.4 of the Sports Anti-Doping Rules 2013 (SADR) against Kris Gemmell in respect of two missed tests and a filing failure and, as a result, DFS allege Mr Gemmell has committed a "whereabouts" anti-doping rule violation.

2. Rule 3.4 of the SADR states:

> *Violation of the requirements regarding Athlete availability for Out-of-Competition Testing including failure to provide whereabouts information required by DFS or any other Anti-Doping Organisation and missed tests which are declared by DFS under the Rules. Any combination of three missed tests and/or filing failures within an eighteen-month period as determined by DFS (or any other Anti-Doping Organisation with jurisdiction over the Athlete) shall constitute an Anti-Doping Rule Violation.*
>
> *[Comment to Rule 3.4: Separate whereabouts filing failures and missed tests declared under the rules of the Athlete's International Federation or any other Anti-Doping Organisation with authority to declare whereabouts filing failures and missed tests in accordance with the International Standard for Testing shall be combined in applying this Rule. In appropriate circumstances, missed tests or filing failures may also constitute an Anti-Doping Rule Violation under Rule 3.3 or Rule 3.5.]*

3. DFS also filed an application for provisional suspension under Rule 12.8 of the SADR.

4. The Tribunal was satisfied in the unique circumstances of the case that determining the provisional suspension was not appropriate and on 17 December 2013 ordered that the provisional suspension hearing be adjourned for an early substantive hearing. This was held on 7 February 2014, the first reasonably available opportunity after the vacation.

5. The heart of a violation under this provision is that it must be established that there were three missed tests and/or filing failures within an 18 month period.

6. The factual assertions made by DFS are:

    - a missed test on 28 August 2012
    - a filing failure on 16 July 2013 and
    - a missed test on 13 September 2013.

7. The respondent denies he committed a whereabouts breach on 28 August 2012 and says that he was at the address given for his whereabouts in his relevant quarterly filing. In respect of the breaches on 16 July and 13 September 2013, he asserts no negligence on his part.

8. Over and above these factual challenges it was asserted on his behalf that the principle of "lex mitior" should be applied as follows:

    (i) The principle of lex mitior means that where the law relevant to what constitutes a violation, and to any sanction, has been amended and is less severe/more favourable to an athlete than those applicable at the date of events giving rise to the alleged violation.

    (ii) The 2015 WADA Code has amended the provisions of Article 2.4 in a manner which is favourable to the athlete, and which if applied would mean no ADVR would be established even if three Whereabouts violations were found to have occurred, by reducing the period within which three failures must occur from eighteen months to twelve months.

    (iii) That the relevant amendment to Article 2.4 was first proposed in May 2012, and was adopted without opposition in November 2013.

    (iv) The relevant amendment will take effect on 1 January 2015, over 30 months after it was proposed, and over 13 months since its approval and adoption.

    (v) The world anti-doping community, including the World Anti-Doping Authority, now consider the constituent elements of

Article 2.4 should not lead to an ADVR unless three whereabouts failures occur within 12 months, rather than 18 months.

(vi) *The World Anti-Doping Authority (WADA) has not clarified how the doctrine of lex mitior is to apply between the adoption of the 2015 Code in November 2013, and 1 January 2015 when it is to take effect.*

(vii) *There is no explanation as to the reason for the adoption of an Effective Date in respect of Article 2.4, and an urgent amendment should be made to the Effective Date to ensure that Article 2.4 takes effect prior to 1 January 2015.*

(viii) *The provisions of Article 25.3 of the 2009 Code, and the 2015 Code, together with clause 22.1.3 of the SADR (2013), are relevant.*

9. This was strenuously challenged by DFS which initially argued that the principle could only apply to a new and lesser penalty regime. Correspondence from WADA was less constricting in its approach but maintained, as did Mr David at the hearing, that the principle can only have application where there has been a change of regime between the time of the alleged offending and the hearing of the allegations.

10. For completeness we should note that there is no dispute that Mr Gemmell was part of the registered testing pool and as part of that he was required to, and did, provide quarterly returns. There was evidence that he had not been competing as a triathlete since November 2012 and there had been discussions from time to time as to whether he should retire and then not be included in this programme. But whatever the reasons (and different slants that were placed on this) that had not occurred and can be left to one side.

11. The starting point for our consideration must be the three historical events which are the foundation of the allegation.

12. Richard Brooks, who has been a doping control officer of the US Anti-Doping Agency (USADA) for over a decade, went to 49 Cliffhanger Drive

which is in the mountains near Boulder, Colorado on 28 August 2012 around 9.45 pm. 10 pm to 11 pm was the time slot at that address which had been designated by Mr Gemmell. Mr Brooks was accompanied by Mr Randolph (Randy) Caswell, a designated blood collection officer. Each parked cars outside this property and noted there were no lights on inside or outside and no cars in the driveway. It is of some relevance that Mr Brooks had previously conducted tests at the property in respect to Nikki and Tyler Butterfield, who own the property, and possibly Mr Gemmell. Certainly Mr Gemmell had been present on other occasions when Mr Brooks had called at Cliffhanger Drive to conduct testing.

13. Mr Brooks' critical evidence was:

> *At 10:00 pm, I commenced the attempt by ringing the doorbell at the front door. I could hear it ring inside from where I was standing. When no one came to the door, I double rang the doorbell and knocked soundly on the door. After approximately 15 minutes, I went around to the back of the house and looked through the windows that were under the deck to see if anyone was inside, then I looked through the windows on the main level, and didn't see anyone.*
>
> *I went to the front door of the house and rang the doorbell, and knocked on the door again. We remained at the front of the residence, and waited to see if anyone would drive up, or if someone would answer the door. I would ring the doorbell and knock on the door every 10 minutes. Before concluding the attempt, I checked at the back of the house once again, and then knocked on the front door and rang the doorbell at 11:00 pm, then concluded the attempt.*
>
> *I did not attempt to call the athlete during this attempt, since it was not in accordance with the instructions from DFSNZ. I don't think a telephone number for the athlete was provided.*

We should immediately note that we are satisfied on the evidence that Mr Gemmell's mobile number was provided in the whereabouts documentation which accompanied the Testing Mission Order.

14. In his evidence before us Mr Gemmell says he was at that address between 10 pm and 11 pm. Mr Gemmell says:

> *About two weeks after the London Olympics, I went to Stockholm, the next event of the World Triathlon Series, on 25 August 2012. There was a sprint distance event on the 25th of August, followed by the World Teams Championship on the 26th of August.*
>
> *On 27 August I flew from Stockholm to Denver, via Frankfurt. My ticket details show that my flight from Stockholm to Frankfurt left at 10.15 am and arrived in Frankfurt at 12.30 pm. I then left Frankfurt at 1.30 pm, arriving at 4 pm.*
>
> *Following the arrival of my flight from Frankfurt to Denver on the afternoon of 27 August 2012 I spent the evening of 27 August with my then partner Mary Miller at her home at 1000 Maxwell Apt 23, Boulder, Colorado.*
>
> *The following day I returned to 49 Cliffhanger Drive and I was there for the whole of that evening, and overnight. When I left Colorado to compete at the London Olympics, I had left my time trial bike, my time trial helmet, my time trial wheels and other belongings at 49 Cliffhanger Drive. That is why, having spent the night of 27 of August at Mary's house after the long travelling, I returned to Cliffhanger Drive the following day and stayed there overnight before returning to Mary's house for the following evening (29 August). Mary also stayed the evening of 28 August.*
>
> *I recall that I was extremely tired due to jet lag, and the previous week's competition. My recollection is that we went to bed early. I had been away from Colorado and Mary for about a month and for that reason too I am quite sure that we would have gone to bed early – irrespective of the fact that I was jet lagged from competing and travelling.*
>
> *The circumstances of my participation in the Stockholm event and my return to Colorado were reviewed by me in a race report I posted on*

my website some weeks later, after the Stockholm event and after I had competed in the HyVee triathlon event in Des Moines, Iowa, on 2 September 2012. That report speaks for itself in relation to the events of that period, the heavy physical toll that competing and travelling had taken on me, and what I did between returning to Colorado and then going to Des Moines a week later.

I also refer to blogs I placed on my Twitter account on 27 and 28 August 2012. The last tweet I posted on 27 August was 7.42 am when I posted a tweet regarding the death of the late Jack Ralston, a triathlon coach and mentor of mine. I would have done this while I was in Stockholm, a little time before I boarded the flight to Frankfurt en route to Denver.

The next tweet I posted was not until 28 August 2012 at 14.34 pm in the afternoon. I then posted a series of further tweets 15.16 pm, 16.53 pm and 6.21 pm all of which I posted after I had returned to Colorado and was in Boulder.

The property at 49 Cliffhanger Drive is a three bedroom property, owned by a triathlon colleague of mine, Tyler Butterfield and his wife Nikki who is also a triathlete. My bedroom was in the basement, in what was actually the office, and Tyler and Nikki had the three upstairs bedrooms. The bedrooms face out onto decks below of which there are two, both on the other side of the house from the main entrance to which any visitors would come. The general layout of the house is as shown in a real estate agency photograph.

The aerial location photograph I have attached shows where, relative to the entranceway, my bedroom was. It is in the basement, the most distant point away from the front door. When Tyler and Nikki are home, both of whom were at that time themselves members of RTP's, they would hear the door if I didn't.

I do not recall having a heard a door bell that evening, or any knock on the door either. I simply did not hear the tester at the door, but I

was at that location. If I had heard the doorbell or a knock at the door, I would have answered it.

15. This sequence of events is supported by Mary Miller who was at the time the partner of Mr Gemmell. She says:

I lived in a property at 1000 Maxwell Apartment 23, Boulder Colorado for most of the time Kris and I were together. He lived at the property: 49 Cliffhanger Drive, Boulder Colorado. However he moved to live with me in August 2012 as I shall explain.

Prior to the London Olympics in July 2012 Kris was living at the address: 49 Cliffhanger Drive, Boulder Colorado. Although he frequently visited and stayed with me at my apartment, all of his belongings were there. I often stayed at Cliffhanger Drive with him.

After the Olympic Games and some other competitions Kris was involved in had finished, he returned to Boulder. He arrived on the afternoon of 27 August 2012 in Boulder, and I am quite clear that on that evening, he returned to my apartment and we spent the night together. Also to note: it was his intention to move in to stay with me thereafter.

However, the next evening, we went to go and pick up his time trial bike and other equipment and belongings which had been left at the Cliffhanger Drive property.

I remember at this time that Kris was extremely tired due to jet lag and the competitions he had been in. I also remember that we were very pleased to see each other because we had been apart for some time.

My recollection is that we went together to his apartment at Cliffhanger Drive to pick up his gear and that we ended up staying there that evening, in his bedroom, which is downstairs in the basement in the property.

I can remember because at that stage I was in the process of keeping up a picture blog for a continuous year, that I was updating virtually every day. On the night of the 28th of August I can remember that I uploaded a previously taken photo (from a photoshoot) – not the usual kind of candid photo update I would do. The link can be found on the internet…The day prior and post, Kris had taken the daily pics for me.

I can remember that Kris had another race to go to the following weekend which was in Iowa. After he had picked up his TT bike, helmet and other gear from the Cliffhanger Drive property, we went back to my place and that is where he stayed until he left for Des Moines and where he returned to and stayed until late September 2012 before flying to Yokohama and Auckland.

16. There was also support from Nikki Butterfield the owner of 49 Cliffhanger Drive. She says:

Until August 2012 Kris Gemmell boarded/was a flatmate of myself and Tyler. He lived in the downstairs of the four bedrooms in the property.

The property itself is on a number of levels. It is approached from the street via a main doorway. The bedrooms are on the top floor, which is where Tyler and I live, and there is a further bedroom down below in the basement which is where Kris Gemmell used to live.

His bedroom is on the basement level. The house generally stretches downwards, giving a good view of the countryside to the north. The lower basement level has no deck and is mostly underground and cut into the land.

Kris left Boulder in July 2012 to go to the London Olympics where he was competing along with Tyler. From memory he left in late July.

Prior to that, he was living at the Cliffhanger Drive property, and his then partner Mary Miller would on occasions stay overnight with him also.

We flew to Bermuda after the Olympics where Tyler represents and was still there on 28 August 2012, so I was not at Cliffhanger Drive. I do recall Kris returning to the house after the Olympic Games, in late August 2012. When he left Colorado, he left many of his belongings in the house including his TT bicycle, TT helmet, TT wheels, and other belongings for another race he was competing in. Although he did not return to live at the house permanently after the Olympics, he did come back to the house and stay there before moving to live with his partner Mary, in another property in town in Boulder. He again returned for a short stay in 2013 and is an easy helpful housemate.

I understand that on the evening of 28 August 2012 a person from the US Anti-Doping Authority visited 49 Cliffhanger Drive in order to undertake a random drug test of Kris.

I understand from a report given to the USADA, that this person rang a doorbell on the property and knocked on the front door as well.

Because of the configuration of the property and the fact that there is a lower basement level which is not adjacent to the front door, it's quite possible you may not necessarily hear everything downstairs in the basement, and even more difficult if door was closed. The weather could also be a factor in strong winds which occur often at the property as it's in the mountains. I know the Anti-Doping Authority has been to our house on numerous other occasions to test Tyler, myself, and on a previous occasion Kris Gemmell as I remember Tyler waking him up for testing.

17. At the hearing Jude Ellis who had provided the background evidence before us was subject to cross examination. Richard Brooks the doping control officer was made available and was cross examined on the telephone. The respondent Kris Gemmell was cross examined at the hearing and Mary Miller answered questions in a further telephone link.

18. Into this mix of written and oral sworn evidence must also be added the fact that Mr Gemmell was emailed a letter by Jayne Kernohan of DFS on 30 August 2012. Her letter said:

Notice of Possible Missed Test Failure

This is to notify you that a Doping Control Officer acting on instructions from Drug Free Sport New Zealand ("DFS") attempted to Notify you to carry out a doping control test on 28 August 2012 at 10.00 pm according to the whereabouts you provided on your Whereabouts Filing for the current quarter as required under the ***Sports Anti-Doping Rules Articles 6.4.2 to 6.4.5****.*

As you were not present at the venue and time you provided, and no Change of Plan had been submitted by you prior to our attempt, DFS needs to consider whether to issue a Whereabouts Failure (strike) against you for a Missed Test. To enable DFS to make a fair decision, we would ask that you submit an explanation for not being present at the time and venue; and not providing DFS with a new venue and/or time slot prior to the commencement of the 60-minute time slot you had submitted. Your explanation must be received by DFS within 14 (fourteen) days of receipt of this Notice or ***Friday 14 September 2012****.*

If DFS considers your explanation justifies you not being present and/or not advising DFS of your Change of Plan prior to our attempt to test you, you will be so notified and no Whereabouts failure (strike) will be applied against you.

If DFS considers your explanation does not justify not being present and/or not having lodged a Change of Plan regarding the change in your location; or if you do not reply to this request by the date indicated above, you will be notified and a Whereabouts Failure (strike) will be applied against you.

Note: *Three (3) alleged Whereabouts Failures made up of Filing Failures or Missed Tests ("strikes") or any combination amounting to three (3) Whereabouts Failure allegations within an 18-month period constitute an anti-doping rule violation and sanctions will apply. The three (3) Filing Failures or Missed Tests (strikes) constituting an anti-*

doping violation can be issued by DFS, your International Federation or any combination of both amounting to three (3) warnings (strikes).

We look forward to receiving your response. Should you require any further clarification, please contact me.

19. Mr Gemmell replied by email the following day and said:

I'm actually here in Boulder as my whereabouts proclaims. However, due to unforeseen circumstances I had to move to another address upon arriving on the 27th. My apologies for this. I'm not about to make an excuse, I just forgot to do it when I arrived and found I had to find some other accom without knowing. I have filled in a change of plan form for this now and the upcoming weekend in Des Moines.

20. Although it was contended by DFS that this was a clear admission of a missed test, we are satisfied that there was a miscommunication and that Mr Gemmell was rather responding to what he perceived to be an allegation about a filing failure. It is of little probative value in the total context.

21. Reference was also made to a letter written by Mr Hunt on behalf of Mr Gemmell on 21 November 2013. It was an attempt to persuade DFS not to file proceedings against his client. Mr Hunt had not met his client at that stage and in fact did not meet him in person until 7 February 2014. However, Mr Hunt could only have obtained information from Mr Gemmell but there clearly was a degree of miscommunication, not least in respect of the date of the Boulder incident, because the relevant paragraph said:

As regard the test in July 2012, this took place shortly after the London Olympics. Mr Gemmell was out one evening, lost track of the time and did not return to the location he had identified in his whereabouts filing. He does not seek to excuse himself from that except to note that the period following the London Olympics was a major down time after the biggest event of his life in the previous 4 years. He attributes his oversight to simple carelessness.

Mr Hunt agreed at the hearing that he had made a mistake.

22. We do not find that this paragraph has the force or effect argued for by Mr David and does little to assist us. Mr Hunt was not entirely on top of the facts when he wrote and an error slipped in.

23. In a similar vein we note that Richard Brooks' unsuccessful attempt report filed in this matter notes that a phone call was placed on 28 August. In evidence he says that was not the case and this was a further error in transcription.

24. The fundamental issue is therefore whether the explanation now provided together with the supporting material could in all of the circumstances reasonably be true. If it could, the allegation is not sustained. But if the Tribunal were to reject that evidence as a reasonable possibility, the necessary evidential foundations would exist.

25. Mr David submitted that this of itself would not be the end of the case and in his written materials said:

> *Even if the Respondent was at the location specified, DFSNZ submits that the DCO attempted to test the Respondent at the specified location during the specified 60 minute time slot and did what was reasonable to locate the athlete. Where this is the case and accordingly the requirements under 11.4.3 (b) and (c) have been met, ((d) is not relevant because it is the first breach) and the athlete is presumed to have been negligent. It is submitted that, even if the Respondent's evidence was accepted, he could not establish that no negligent behaviour on his part caused or contributed to him being unavailable for the test at the location in the nominated time slot. The Respondent had the responsibility to make himself available for testing but, according to the evidence now submitted, he chose to occupy with his partner, a basement bedroom where he and the home owner say that hearing the front door might have been difficult. The Respondent may have been asleep. An athlete who puts himself in a position where he cannot hear the ringing of the doorbell and knocking at the door at the location he has specified cannot rebut the presumption of negligence.*

26. Both Mr Gemmell and Ms Miller were adamant that they were present at the premises between 10 pm and 11 pm on the 28th August. Neither was budged in cross examination. Having heard both witnesses and seen Mr Gemmell we are satisfied that they were truthful, reliable and straightforward in their evidence. We accept that it is not uncommon for witnesses in a situation like this to hold a clear perspective of matters which they honestly believe but which is not credible. That is not this case. Joint reconstruction had not, and in the circumstances could not have, occurred. Each of them by reference to issues of particular importance to themselves was able to identify time and circumstance. Accordingly we have no difficulty in reaching the conclusion that they were each at Cliffhanger Drive at the relevant time. In light of their evidence together with that of Nikki Butterfield, we find the explanation that they did not hear any knocking from the downstairs bedroom at the furthest point away from the front door is believable.

27. However, as Mr David contended, the fact that they were there is not the end of the inquiry. Mr Gemmell's obligation was to be available and the question was whether the steps taken by the officer in all the circumstances were reasonable.

28. The critical issue is whether, in the circumstances which unfolded, to cover all bases there should have been an endeavour to contact Mr Gemmell on his mobile phone, the number of which was available. Mr Brooks was not specifically asked to do so. DFS took the view that a phone call should not occur because of its potential to breach the element of surprise in such a testing regime. Specifically DFS referred to paragraph 4.16 of "The World Anti-Doping Program Guidelines for Implementing An Effective Athletes Whereabouts Program, Version 2.0, December 2008" which provides:

> *If the specified location is the Athlete's house or other place of residence, the DCO should ring any entry bell and knock on the door as soon as he/she arrives. If the Athlete does not answer, the DCO should not telephone the Athlete to advise him/her of the attempt. Instead, the DCO should wait somewhere close by (e.g., in his/her*

car) in a place where he/she can observe the (main) entrance to the residence. He/she should then knock/ring again a short time later (e.g., 15 minutes), and should keep doing so periodically until the end of the 60 minutes. At that point, he/she should try one last time at the end of the 60 minutes before leaving the location and completing an Unsuccessful Attempt Report.

This is a guide and not absolutely conclusive.

29. It is instructive to note that this approach is not adopted in the United States of America where it is USADA practice to attempt to make a telephone contact in the last five minutes or so of a stipulated hour. Further Mr Steel advised us that new international guidelines which are to be promulgated will recognise greater flexibility in this regard.

30. From the telephone cross-examination of Mr Brooks it became clear that Mr Brooks himself thought that he should do more than simply knock and ring at the front door. On what he agreed was a dark night he scrambled down a steep bank at the side of the house and under a low deck on broken ground to attempt to look in through a lower floor window. The attempt failed in the sense that the night was dark and the positioning of the window under a low deck made it doubly dark so that he was unable to see anything. It is to state the obvious to say that it would have been much simpler and likely much more effective to have called Mr Gemmell's mobile number, which as we understand the evidence is most likely what he would have done under USADA procedures. We appreciate that he did not do so because of his interpretation of the instructions he had from DFS but, while instructions may be a relevant factor in determining reasonableness, they are not the absolute determinant of what is objectively reasonable in a particular fact situation.

31. We are satisfied that it was necessary in light of what Mr Brooks had observed, to make a call which would have had the potential to confirm exactly where Mr Gemmell was and if he was sleeping, as his evidence suggests, to have woken him. To make or not make a phone call will

always depend on the particular facts of an individual case but it would have been of crucial value here.

32. Although there must be a clear and simple arrangement, its focus should be upon getting a sample. A laboured approach to process should not deflect the task away from practical reality and common sense.

33. Article 11.4.3 of the International Standard for Testing, January 2012 provides:

> *An athlete may only be declared to have committed a Missed Test where the Responsible ADO, following the results management procedure set out in Clause 11.6.3, can establish each of the following:*
>
> *a. that when the Athlete was given notice that he/she had been designated for inclusion in a Registered Testing Pool, he/she was advised of his/her liability for a Missed Test if he/she was unavailable for Testing during the 60-minute time slot specified in his/her Whereabouts Filing at the location specified for that time slot;*
>
> *b. that a DCO attempted to test the Athlete on a given day in the quarter, during the 60-minute time slot specified in the Athlete's Whereabouts Filing for that day, by visiting the location specified for that time slot;*
>
> *[11.4.3(b) Comment: If the Athlete is not available for Testing at the beginning of the 60-minute time slot, but becomes available for testing later on in the 60-minute time slot, the DCO should collect the Sample and should not process the attempt as an unsuccessful attempt to test, but should include full details of the delay in the availability of the Athlete in the DCO's Sample collection report. Any pattern of behaviour of this type should be investigated by the Responsible ADO as a possible anti-doping rule violation of evading Sample collection under Code Article 2.3 or Code Article 2.5. It may also prompt Target Testing of the Athlete. If located for Testing, the Athlete must remain with the DCO until the Sample collection has*

been completed, even if this takes longer than the 60-minute time slot. If the Athlete is not available for Testing during his/her specified 60-minute time slot at the location specified for that time slot for that day, he/she will be liable for a Missed Test even if he/she is located later that day and a Sample is successfully collected from him/her.]

c. that during the specified 60-minute time slot, the DCO did what was reasonable in the circumstances (i.e. given the nature of the specified location) to try to locate the Athlete, short of giving the Athlete any advanced notice of the test;

[11.4.3(c) Comment: Once the DCO has arrived at the location specified for the 60-minute time slot, if the Athlete cannot be located immediately then the DCO should remain at that location for whatever time is left of the 60-minute time slot and during that remaining time he/she should do what is reasonable in the circumstances to try to locate the Athlete.]

d. that the provisions of Clause 11.4.4 (if applicable) have been met; and

e. that the Athlete's failure to be available for Testing at the specified location during the specified 60-minute time slot was at least negligent. For these purposes, the Athlete will be presumed to have been negligent upon proof of the matters set out in sub-Clauses 11.4.3(a) to (d). That presumption may only be rebutted by the Athlete establishing that no negligent behaviour on his/her part caused or contributed to him/her (i) being unavailable for Testing at such location during such time slot; and (ii) failing to update his/her most recent Whereabouts Filing to give notice of a different location where he/she would instead be available for Testing during a specified 60-minute time slot on the relevant day.

[11.4.3(e) Comment: In the event that a Code Article 2.4 anti-doping rule violation is established, the actual degree of fault involved on the part of the Athlete (i.e. whether negligence or greater) will be relevant

to the assessment, under Code Article 10.3.3, of the period of Ineligibility to be imposed.]

34. We are of the view that the DCO did not do all that was reasonable in the particular circumstances, which include Mr Brooks' previous experience of successfully undertaking tests at the property, to locate Mr Gemmell. We reject the suggestion that a phone call would have been giving him advance notice. It would merely have clarified whether he was at the premises and the potential for interference with a drug test result would have been no greater than if a third party had answered the knocking at the door and had gone down to wake and fetch Mr Gemmell.

35. We need not engage with an interpretation and application of 11.4.3(e) as we are not persuaded that in all the circumstances 11.4.3(c) was fulfilled.

36. Accordingly we hold that a missed test violation on 28 August 2012 is not established. There are two other incidents raised but even if we were to conclude that each of them is established there has still not been a violation of the provisions of the Sports Anti-Doping Rules. It is inappropriate in a fact specific case for us to consider and reach conclusions about matters which are effectively moot as there is no potential to establish three lapses, which is the essential foundation for a violation.

37. We heard extensive submissions about lex mitior and how and when it can or cannot apply. There are difficult questions with regard to the metes and bounds of the doctrine but they do not arise. We purposely avoid providing gratuitous advice on what are purely theoretical questions in the determination of this case.

38. It is fair to say that after he effectively stopped training and actively competing Mr Gemmell was not as careful as he should have been in respect to whereabouts reporting. This Tribunal agrees without any reservation with Mr David's submission that the whereabouts regime, while onerous, is a fundamental part of the control process to deter or detect cheats. However, it is important to note that it was quite properly no part of Drug Free Sport's case that Mr Gemmell was other than

careless in respect to his whereabouts obligations. That case depended on establishing the specific facts to establish such a breach. On the evidence we have decided that the facts do not sufficiently establish a breach in respect to the 28 August charge including that the officer did not do all that was reasonable to make contact.

39. The application is accordingly dismissed.

Dated 12 February 2014

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Sir Bruce Robertson (Chair)