

**IRISH SPORTS COUNCIL ANTI-DOPING DISCIPLINARY PANNEL**

**IN THE MATTER OF  
THE IRISH SPORTS COUNCIL**

**AND**

**ATHLETE IS- 3765**

**RULING OF THE IRISH SPORT ANTI-DOPING DISCIPLINARY PANEL**

**1. Introduction**

1. At the request of the Irish Sports Anti-Doping Disciplinary Panel (“the Panel”) the Secretary to the Panel communicated the result in this matter to the parties by a letter of the 6<sup>th</sup> November 2015 since the Panel had by then reached its conclusions. That letter pointed out that a fully reasoned decision would be issued shortly which would constitute the formal decision of the Panel. This document is such reasoned decision.
  
2. Mr. IS-3765 is a [...] -year old man who participates as an amateur in the sport of Irish Touring Car racing much of which takes place in [...] . The Irish Touring Car Championship started around 2010 when Mr. IS-3765 became involved in the sport. There are different classes within the sport depending on the technical specification of the cars and the experience of the driver. Mr. IS-3765 has, on his own account, been quite a successful competitor in the sport over the past .. years.
  
3. Motor Sport Ireland is the National Governing Body for four-wheeled motorsport in Ireland and has under its umbrella 34 affiliated clubs that are the actual organisers of all sporting events. According to the Motor Sport Ireland website, there are approximately 230 events listed in the official calendar and these cover 11 different branches of the sport including Touring Car racing. Every person wishing to compete in one of these motorsport events must be the holder of a

Competition Licence issued by Motor Sport Ireland.<sup>1</sup> The Motor Sport Ireland website contains advice for competitors on anti-doping rules.

4. On the [...] 2015 Mr. IS-3765 was competing in a [...] in [...] . He and certain other competitors were selected for a doping test by way of a urine sample. No issue arises as to the manner in which the sample was taken or the subsequent analysis of the sample. Suffice to say that, following the normal procedures, the Irish Sports Council sent the sample to a laboratory in Cologne, Germany, the Deutsche Sportoshschule Köln Institute Für Biochemie. The analytical report dated the 24<sup>th</sup> June 2015 from the laboratory made an Adverse Analytical Finding of the presence of the substance Benzoylcegonine. Detection of Benzoylcegonine is consistent with the administration of the prohibited substance cocaine. This finding was made on foot of an analysis of the “A” sample. On receipt of this Adverse Analytical Finding, the Irish Sports Council, as it was required to do under Article 7.2 of the Irish Sports Council Anti Doping Rules, conducted a review and on the 3<sup>rd</sup> July 2014 concluded that there was no therapeutic use exemption granted to Mr. IS-3765 .

5. By letter of the 6<sup>th</sup> July 2015, the Irish Sports Council wrote to Mr. IS-3765 outlining the findings of the laboratory and formally charging him with the following Anti-Doping Rule Violation (“ADRV”):

*“Article 2.1 – The presence of a Prohibited Substance or its Metabolites or Markers in your Sample.”*

6. The letter went on to explain the relevant provisions of Article 10 of the Rules and the various potential outcomes that might result depending on the circumstances.

7. Cocaine is a Prohibited Substance listed as a stimulant under the Prohibited List under S6.a of the Prohibited List published as an International Standard by the World Anti Doping Association (“WADA”). Accordingly, Mr IS-3765 was automatically Provisionally Suspended pursuant to Article 7.8.1 of the Rules from the 6<sup>th</sup> July 2015. This meant that he was barred temporarily from participating in

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<sup>1</sup> Or by another National Governing Body affiliated to the Federation Internationale de L’Automobile (“the FIA”).

any competition or activity prior to the final decision at a hearing to be conducted under Article 8. Mr. IS-3765 did not appeal the provisional suspension. A copy of the Irish Sports Council's letter was sent to Motorsport Ireland, the FIA and WADA. Mr. IS-3765 was asked to provide a response to the charges by the 24<sup>th</sup> July 2015 and his rights in that regard and the options open to him under the Rules were outlined in the letter.

8. Under Article 7.8.4 of the Rules, because Mr. IS-3765 was provisionally suspended, he had a right to an expedited hearing before the Disciplinary Panel.
9. Following certain conversations between Mr. IS-3765 and the Irish Sports Council on the 6<sup>th</sup> and 10<sup>th</sup> July 2015, the Irish Sports Council wrote to Mr. IS-3765 by way of two letters on the 10<sup>th</sup> July 2015, outlining the form of consultation which can take place under Article 7.6.4 of the Rules and explaining the procedure under which an athlete can provide "*substantial assistance*" to the Irish Sports Council in relation to anti-doping rule violations by another person. Mr. IS-3765 did not avail of either of these procedures.
10. On the 15<sup>th</sup> July 2015 a firm of solicitors, R [...] , acting for Mr. IS-3765 , wrote to the Irish Sports Council seeking certain information including information with regard to the "B" sample. Correspondence then ensued between Mr. IS-3765's solicitors and the solicitors retained by the Irish Sports Council, DAC Beachcroft. The detail of that correspondence is not relevant for present purposes but, in essence, Mr. IS-3765's solicitors requested that a "B" sample analysis be carried out, the outcome of which was that the Adverse Analytical Finding consistent with the administration of the Prohibited Substance cocaine was confirmed in a report from the laboratory dated the 31<sup>st</sup> July 2015.
11. In order to preserve Mr. IS-3765's rights prior to the "B" sample analysis, Mr. IS-3765's solicitors stated in a letter of the 24<sup>th</sup> July 2015 to the Irish Sports Council's solicitors that he had "*no option but to deny the alleged ADRF pursuant to paragraph 7 on the basis of innocent and/or inadvertent ingestion.*" In a letter of the 4<sup>th</sup> August 2015, the Irish Sports Council's solicitors requested that Mr. IS-3765 "*consider his position in relation to his denial of the alleged Anti-Doping*

*Rule Violation*” and stated their intention to refer the matter to the Disciplinary Panel. They made a further request to Mr. IS-3765’s solicitors that he should consider his position in relation to the denial of the alleged Anti-Doping Rule Violation in a letter of the 18<sup>th</sup> August 2015.

12. By letter of the 26<sup>th</sup> August 2015, the Irish Sports Council wrote to the Secretary to the Disciplinary Panel referring the alleged violation of the Rules to the Disciplinary Panel in accordance with Article 8.2 of the Rules. The Secretary to the Panel wrote to both solicitors by a letter of the 2<sup>nd</sup> September 2015 notifying them that the Chairperson of the Disciplinary Panel, Michael M. Collins SC, had appointed himself, Dr. Rachel Cullivan-Elliott (medical practitioner) and Ms. Elizabeth Howard (sports administrator) as the Panel to consider the case. The letter provided an outline of the procedures to be followed and stated that the Disciplinary Panel had provisionally decided to hold a hearing to consider the case on Thursday the 1<sup>st</sup> October 2015 at 6pm. The Disciplinary Panel directed that the Irish Sports Council should deliver to Mr. IS-3765 and his solicitors before the 11<sup>th</sup> September 2015 a written submission on the facts, the applicable legal principles and what the Irish Sports Council contended was the appropriate sanction so that Mr. IS-3765 would understand the case against him. The Disciplinary Panel also directed that any replying written submission from Mr. IS-3765 should be delivered to the Secretary of the Disciplinary Panel before the 25<sup>th</sup> September 2015 although it was made clear that Mr. IS-3765 was not obliged to furnish such a replying written submission. Mr. IS-3765 was invited to inform the Secretary of the Disciplinary Panel if he required a more expedited hearing than the 1<sup>st</sup> October 2015. No such application was made on behalf of Mr. IS-3765 .

13. It was agreed between the Irish Sports Council and Motorsport Ireland that the Irish Sports Council would present the case against Mr. IS-3765 and Motorsport Ireland indicated their intention to attend the hearing on the 1<sup>st</sup> October.

14. DAC Beachcroft on behalf of the Irish Sports Council furnished a written submission to the Secretary to the Disciplinary Panel by way of a letter of the 10<sup>th</sup> September 2015 referring to the findings of the laboratory and submitting that the

Irish Sports Council had established the ADRV under Article 2.1. They pointed out that under Article 10.1.1 the period of ineligibility to be applied was 4 years unless Mr. IS-3765 could establish that the ADRV was not intentional and they referred to the meaning of the term "*intentional*" in Article 10.1.3 of the Rules.<sup>2</sup>

15. By virtue of Article 10.1.2 of the Rules, if the athlete could establish that the ADRV was not intentional, the period of ineligibility would be 2 years. As cocaine is a Non Specified Substance, the violation would not be considered "*intentional*" if the athlete could establish that the cocaine was used out of competition in a context unrelated to sport performance (Article 10.1.3.2). The submission from the Irish Sports Council pointed out that in the absence of any evidence or submissions from the athlete, the period of ineligibility should be 4 years. However, the submission very fairly noted that the period of ineligibility could be eliminated completely if the athlete could establish No Fault or Negligence. Alternatively, if he could establish that the ADRV was not intentional and that there was No Significant Fault or Negligence, then the period of ineligibility otherwise applicable (two years) could be reduced by up to a maximum of one half of such period. The Irish Sports Council's submissions pointed out that the burden of proof was on the athlete to establish either No Fault or Negligence or No Significant Fault or Negligence (both of which are defined terms) and suggested that it was very unlikely that the athlete would be able to establish this where the Prohibited Substance is cocaine. The submission also referred to other consequences apart from ineligibility which would flow from a finding of a rule violation such as disqualification of the result obtained by the athlete in the competition, the forfeiture of medals, points and prizes and the fact that the reasoned decision of the Disciplinary Panel would be published.

16. Finally, the Irish Sports Council pointed out that depending on what submissions might be made on behalf of Mr. IS-3765, the Irish Sports Council might have to

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<sup>2</sup> "As used in Articles 10.1 and 10.2, the term "*intentional*" is used to identify those Athletes who cheat. The term, therefore, requires that the Athlete or other Person engaged in conduct which he or she knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk." The Article goes on to deal with certain presumptions for a substance which is only prohibited In-Competition.

seek an adjournment of the hearing if it needed to adduce evidence or submissions to challenge the athlete's evidence or submissions.

17. In a letter of the 25<sup>th</sup> September 2015, R [REDACTED] on behalf of Mr. IS-3765 confirmed that they were not availing of his entitlement to make a replying written statement "*at this time*" but said that the hearing would be attended by Mr. IS-3765, his solicitor (Mr. R [REDACTED]), [REDACTED]. DAC Beachcroft noted in a letter of the 25<sup>th</sup> September 2015 that no submissions had been received on behalf of Mr. IS-3765 "*and we assume that none will be forthcoming at this stage.*"
18. By a letter of the 29<sup>th</sup> September 2015 to the Disciplinary Panel, DAC Beachcroft on behalf of the Irish Sports Council requested an adjournment of the hearing on the basis that while Mr. IS-3765's solicitors had indicated that two witnesses (apart from Mr. IS-3765) would be attending, no indication was given as to what their evidence was likely to be. The Disciplinary Panel directed the Secretary to the Panel to respond by a letter of the 30<sup>th</sup> September 2015 to the effect that Mr. IS-3765 had chosen not to make a written submission "*and while it would have been preferable if he done so, he is entitled to take that position.*" Nonetheless, the letter pointed out that if Mr. IS-3765 produced evidence which the Irish Sports Council could not deal with or needed time to deal with, then the Council could apply for an adjournment and if the interest of justice and fairness so required, "*no doubt such an adjournment application would be granted.*"
19. On the same date, the Disciplinary Panel through its Secretary wrote to Mr. IS-3765's solicitor pointing out that it would be helpful if he could furnish the Disciplinary Panel and the Irish Sports Council with an outline of the evidence he proposed to call and the defence he proposed to make. Mr. IS-3765's solicitor responded to DAC Beachcroft on the 30<sup>th</sup> September 2015 in a letter stating that "*Our client's position is that [REDACTED], his drink was interfered with by a third party [REDACTED], which interference has led to the positive testing herein.*"

## 2. The hearing on the 1<sup>st</sup> October 2015

20. At the hearing on the 1<sup>st</sup> October 2015, it became clear from some initial questioning by the Panel that Mr. IS-3765 did not dispute the ADRV so that the issue was only one of the appropriate sanction. Mr. Gary Rice, solicitor from DAC Beachcroft for the Irish Sports Council, applied for an adjournment of the hearing on the grounds that it appeared that Mr. IS-3765 was going to defend the matter by seeking to establish No Fault or No Significant Fault by reason of a third party having put cocaine in his drink and that in the absence of seeing witness statements from the witnesses who might be called by Mr. IS-3765 or without knowing any of the details of who the witnesses were and what they would say, it was not possible to properly cross-examine the witnesses. He indicated that the Irish Sports Council wished to consider whether it was appropriate to call pharmacological evidence to establish facts in relation to the effect of the ingestion of cocaine. While Mr. Rice did not elaborate on this point for the obvious reason that he did not yet have any pharmacological evidence, it was apparent to the Panel that the credibility of the evidence of the witnesses who might be called by Mr. IS-3765 could be tested by measuring their accounts of the effect of the cocaine on Mr. IS-3765 with the pharmacological evidence as to the likely effects and by reference to the length of time cocaine in the amount suggested would be expected to remain in the body. Mr. Rice further pointed out that on the authorities a third party interference with an athlete's drink did not constitute No Fault and therefore even if the evidence called on behalf of Mr. IS-3765 was accepted, it was virtually certain that Mr. IS-3765 would be suspended for at least one year. Accordingly, Mr. Rice submitted that there would be no prejudice to Mr. IS-3765 in a short adjournment.

21. Mr R pointed to the fact that Mr. IS-3765 had not been obliged to put in a submission or statements of evidence, that he had outlined the key nature of the defence (third party interference with Mr. IS-3765's drink), that the witnesses had come at some personal inconvenience to the hearing and that the matter was one of anxiety for his client which he wanted to have dealt with.

22. After some questioning from the Panel, the Panel briefly adjourned to consider the request for an adjournment. When the hearing resumed, the Panel asked Mr. R to give an outline of what the evidence from the witnesses would be so that the Panel would be in a better position to assess the extent to which the Irish Sports Council would be disadvantaged if it had to cross-examine such witnesses there and then. Mr. R gave an outline of the likely evidence which the Panel rose briefly to consider. The Panel then ruled that it was going to grant a short adjournment of the matter. While Mr. IS-3765 had the option rather than the obligation to put in a written submission or witness statement outlining his defence, the failure to do so carried an obvious risk that the hearing might have to be adjourned in the interests of fairness. The Panel directed that Mr. R submit detailed statements of the evidence that his witnesses were going to give and a written legal submission insofar as Mr. R intended to rely upon any significant legal points of interpretation or caselaw. The Panel directed that the witness statements be delivered by the 6<sup>th</sup> October and the written legal submission by the 8<sup>th</sup> October. The adjourned hearing was re-fixed for the 9<sup>th</sup> October 2015.
23. Mr. R subsequently submitted statements of evidence and a legal submission in accordance with this timetable. By letter of the 7<sup>th</sup> October, DAC Beachcroft complained that the witness statements were not sufficiently detailed and requested a further adjournment. Alternatively, they suggested that the matter would proceed on the 9<sup>th</sup> October on the basis that the Irish Sports Council could subsequently call a pharmacokinetic and/or medical evidence at a subsequent adjourned hearing.
24. Following a telephone conference call between the Chairman of the Panel and the parties' solicitors, the Chairman directed that the hearing should proceed on the 9<sup>th</sup> October 2015 but that the Irish Sports Council could renew their application for an adjournment if they considered they were at a disadvantage in light of how matters might develop at the hearing.



### 3. The hearing on the 9<sup>th</sup> October 2015

25. As was apparent from the first hearing, no issue was taken by Mr. IS-3765 with the Adverse Analytical Finding that there was cocaine in the sample taken immediately after the competition.

26. Article 2.1.1 of the Rules provides:

*“It is each Athlete’s personal duty to ensure that no Prohibited Substance enters his or her body. An Athlete is responsible for any Prohibited Substance or any of its Metabolites or Markers found to be present in his or her Sample. Accordingly, it is not necessary that Intent, Fault, Negligence or knowing Use on the Athlete’s part be demonstrated in order to demonstrate an Anti-Doping Rule Violation under Article 2.1.”*

27. The presence of a prohibited substance in the athlete’s “A” sample or the confirmation of this in the analysis of the “B” sample is treated under Article 2.1.2 as establishing an Anti-Doping Rule Violation. Accordingly, there was no dispute but that Mr. IS-3765 was guilty of the Anti-Doping Rule Violation alleged.

28. What is at issue is the question of the appropriate sanction. The steps by which the Panel must approach this issue are set out in the opening words of Article 10:

*“The appropriate sanction shall be determined in a sequence of four steps. First, the Irish Sport Anti-Doping Disciplinary Panel shall determine which of the basic Ineligibility sanctions (Article 10.1 or 10.2) apply to the particular anti-doping rule violation. Second, if the basic Ineligibility sanction provides for a range of sanctions, the Irish Sport Anti-Doping Disciplinary Panel shall determine the applicable sanction within that range according to the Athlete or other Person’s degree of Fault (Article 10.3 or 10.4). In a third step, the Irish Sport Anti-Doping Disciplinary Panel shall establish whether there is a basis for elimination, suspension, or a reduction of the sanction (Article 10.5). Finally, the Irish Sport Anti-Doping Disciplinary Panel shall decide on the commencement of the period of Ineligibility under Article 10.7.”*

29. The default period of Ineligibility for a violation of Article 2.1 is 4 years since cocaine, although a Prohibited Substance, is not a Specified Substance. However,

if the Athlete can establish that the Anti-Doping Rule Violation was not intentional then, the combination of Article 10.1.1 and Article 10.1.2 means that the period of ineligibility shall be 2 years. The meaning of “*intentional*” as defined in Article 10.1.3 has been referred to above. In particular, Article 10.1.3 also provides:

*“An Anti-Doping Rule Violation resulting from an Adverse Analytical Finding for a substance which is only prohibited In-Competition ...*

*10.1.3.2 shall not be considered “intentional” if the substance is not a Specified Substance [which cocaine is not] and the Athlete can establish that the Prohibited Substance was used out of competition in a context unrelated to sport performance.”*

30. Thus, if Mr. IS-3765 can establish that the cocaine was used out of competition in a context unrelated to sport performance, the Anti-Doping Rule Violation is not considered intentional and the period of ineligibility is 2 years.

31. However, there is scope for a potential further reduction in the period of Ineligibility under Article 10.3 or Article 10.4. These Articles draw a distinction between “*No Fault or Negligence*” and “*No Significant Fault or Negligence.*” If the athlete establishes No Fault or Negligence, then pursuant to Article 10.3 “*the otherwise applicable period of Ineligibility shall be eliminated.*” Mr. R relied on this and submitted that the circumstances were such as to amount to No Fault or Negligence on Mr. IS-3765’s part.

32. In the alternative, if the athlete establishes No Significant Fault or Negligence, then pursuant to Article 10.4.2, “*The otherwise applicable period of Ineligibility may be reduced based on the Athlete’s or other Person’s degree of fault, but the reduced period of Ineligibility may not be less than one half of the period of Ineligibility otherwise applicable.*” This means that if Mr. IS-3765 establishes No Significant Fault or Negligence, then the Panel could reduce the 2-year period of Ineligibility to something between 1 year and 2 years but not less than 1 year. Mr. R also relied on this provision in the event that he did not satisfy the Panel that Mr. IS-3765 bore No Fault or Negligence under Article 10.3.

33. There are other grounds upon which a period of Ineligibility may be eliminated, reduced or suspended under Article 10.5 but none of those applied on the facts of this case and were, perfectly correctly, not relied upon by Mr. R .
34. Before considering the evidence, the issue of the potential elimination of the period of Ineligibility by reason of No Fault or Negligence under Article 10.3 can be dealt with briefly.
35. Article 18.2.4 of the Rules provides:

*“The comments annotating various provisions of the Code [i.e. the World Anti-Doping Code, the current version of which is effective as of the 1<sup>st</sup> January 2015 as published by the World Anti-Doping Agency]<sup>3</sup> and Appendix 2 of the Code are incorporated by reference into these Rules, and shall be treated as if set out in full herein, and shall be used to interpret these Rules.”*

36. The provision of the WADA Code which corresponds to Article 10.3 of the Rules is Article 10.4, the wording of which is identical to the first sentence of Article 10.3 of the Rules. The comment to this Article in the Code points out that this Article only applies *“in exceptional circumstances, for example, where an Athlete could prove that, despite all due care, he or she was sabotaged by a competitor. Conversely, No Fault or Negligence would not apply in the following circumstances ... (c) sabotage of the Athlete’s food or drink by a spouse, coach or other Person within the Athlete’s circle of associates [Athletes are responsible for what they ingest and for the conduct of those Persons to whom they entrust access to their food and drink].”*
37. The comment goes on to note that *“Depending on the unique facts of a particular case, any of the referenced illustrations could result in a reduced sanction ... based on No Significant Fault or Negligence.”*

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<sup>3</sup> The Irish Anti-Doping Rules are adopted and implemented by the Irish Sports Council in discharge of its statutory functions under the Irish Sports Council Act 1999 and in accordance with its obligations under the Code.

38. Thus, even if the Panel accepts the evidence given in relation to the circumstances in which [REDACTED] put cocaine in his drink, the Panel is satisfied that this does not amount to No Fault or Negligence on the part of Mr. IS-3765 . As will appear from a discussion of the evidence below, it is said that [REDACTED] [REDACTED], put cocaine in Mr. IS-3765 's beer. Mr. R argued that [REDACTED] in such circumstances should not be regarded as a person to whom Mr. IS-3765 had entrusted access to his drink within the meaning of that phrase as used in the comment to Article 10.4 of the WADA Code. However it appears to the Panel that the concept of "*entrusting access*" does not depend on some formal arrangement by the athlete that somebody else should look after his drink or even an informal request that someone should look after his drink. If an athlete has food or drink, and then leaves a room in circumstances where it is apparent to the athlete that somebody else has access to that food or drink, that is entrusting access to the food or drink to that person. Thus, even if the evidence called on behalf of Mr. IS-3765 is accepted by the Panel, it cannot be said that Mr. IS-3765 bore No Fault or Negligence for the way in which he ingested the cocaine. Accordingly, Mr. IS-3765 will be subject to a period of Ineligibility which will be one year at minimum.

39. The real issue in the case was whether the Panel should accept the evidence called on behalf of Mr. IS-3765 as to the circumstances under which the cocaine was put in his drink and thereby entered his body. If that evidence is accepted, then the cocaine was used out of competition in a context unrelated to sport performance and therefore should not be considered "*intentional*" within the meaning of Article 10.1.1 and Article 10.1.3.2. That would reduce the period of ineligibility from 4 years to 2 years. There is then the further and separate question as to whether the same factual circumstances establish No Significant Fault or Negligence on Mr. IS-3765's part, in which case the Panel has a discretion to reduce the two year period to something not less than one year based on the Panel's assessment of Mr. IS-3765's degree of fault.

40. If, of course, the Panel does not accept the evidence called on behalf of Mr. IS-3765 as to how the cocaine got into his drink and therefore into his body, he would not in those circumstances have established that the anti-doping rule violation was not intentional and would be subject to an automatic period of Ineligibility of 4 years.<sup>4</sup>

41. It is clear from the reference to what the athlete must “*establish*” in Article 10.1.3.2 in relation to the question of intention and in Article 10.4.2 in relation to the question of No Significant Fault or Negligence that the burden of establishing these matters rests on the athlete. It is also clear from Article 8.4.2 that the athlete has to establish the necessary facts on the balance of probabilities.<sup>5</sup> It is thus necessary to consider the evidence called on behalf of Mr. IS-3765 in this case.

#### 4. The Evidence

42. Three witnesses were called. The first was Mr. IS-3765 himself. The second was [REDACTED]. The third was [REDACTED]. It was [REDACTED] who allegedly put the cocaine in Mr. IS-3765’s drink and was the only person who claimed direct knowledge of this.

43. There were some differences in detail between the version of events given by each of the witnesses but in broad terms the story is as follows.

44. [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

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<sup>4</sup> There are provisions under Article 10.5 for the reduction of the 4-year period where the athlete promptly admits the anti-doping rule violation in certain circumstances.

<sup>5</sup> By contrast, an anti-doping rule violation must be established “*to the comfortable satisfaction of the hearing panel bearing in mind the seriousness of the allegation that is made*” which under Article 8.4.1 is a standard somewhere between the balance of probabilities and beyond a reasonable doubt.

[REDACTED]  
[REDACTED]

45. [REDACTED]  
[REDACTED]  
[REDACTED] Mr. IS-3765 was due to race in a Touring Car competition the following Sunday morning. [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED] Mr. IS-3765 stayed until around 1am when he went home. His evidence was that he was drinking Budweiser which was not chilled and therefore he had it in a glass with ice in it.

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED] He did not notice anything wrong with his drink and felt no effects from the cocaine which was allegedly put into his drink.

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED] It was also somewhat curious that Mr. IS-3765 said that the Budweiser was in bottles and not chilled which is why he put it in a glass with ice whereas [REDACTED] said that the Budweiser was chilled in cans in the fridge. [REDACTED] did not notice any change in Mr. IS-3765's behaviour over the course of the evening.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] So far as he could remember both [REDACTED] and Mr. IS-3765 were drinking cans of Budweiser (not bottles) but he later said that Mr. IS-3765 was drinking out of a glass meaning that he had poured the beer from the can into the glass. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

48. Since neither [REDACTED] nor Mr. IS-3765 noticed [REDACTED] putting cocaine in Mr. IS-3765's drink, the only evidence as to the actual interference with the drink came from [REDACTED].

49. [REDACTED] evidence was that he had got a bit of cocaine "off a friend" [REDACTED]. [REDACTED] The friend "had a bit left over from the week before, he was after being at a party and he had a bit left over and he gave me a bit. And then I knew I was going [REDACTED] and he says "Do you want a bit?" so I says "Yeah.""

[REDACTED] said that it was a very small amount, that he took it because he was being given it for free and that he had done this once before. He described the amount of cocaine as a "small little tiny bit." [REDACTED] demonstrated the amount by tearing a very small piece of a corner of a page and screwing it up into a small ball. He said it was in a little plastic bag and that he had to untie the knot on the bag. When pressed by the Panel as to size and nature of the bag, he said it was a bit ripped off the sort of plastic bag one carries one's groceries in. When he opened it, the plastic was flat with the powder sitting on the plastic and he tilted the plastic to shake a small amount into Mr. IS-3765's drink. When the Panel

pointed out that this was a delicate operation he was conducting after having had 8 or 10 bottles of beer and there might have been a danger of shaking the whole lot into the drink he said *"No, I just shook it in. I didn't really think. I just opened the bag up and shook it in."* After he did this, he said he retied the piece of plastic containing the remaining piece of cocaine and put it in his pocket. He said that when he left [REDACTED], he went [REDACTED] and that he took the remaining cocaine himself by putting it on a CD case and sniffing it.

51. His explanation as to why he put the cocaine in Mr. IS-3765's drink was that Mr. IS-3765 was talking about going home around 11pm and that [REDACTED] wanted him to stay and put the cocaine in his drink *"just to try to keep him going so he would stay out a bit longer."* He agreed that the spiked drink did not seem to have any effect on Mr. IS-3765.

52. He said that he put the cocaine in Mr. IS-3765's drink when [REDACTED]. He was not sure whether [REDACTED] was in the room when he interfered with the drink but he didn't think he was in the room. He accepted that it was a foolish and stupid thing to have done.

53. Mr. IS-3765 competed in the Irish Touring Car event at [...] the following Sunday when he was selected for testing. [REDACTED]  
[REDACTED]  
[REDACTED]

54. In early Mr. IS-3765 was notified by telephone by Dr. Una May of the Irish Sports Council of the Adverse Analytical Finding. Mr. IS-3765's evidence was that he rang [REDACTED] the day after he received the phone call from Dr. May and that [REDACTED] advised him to ring Motorsport Ireland. He rang Mr. Alex Sinclair in Motorsport Ireland who advised him to get a solicitor. [REDACTED]  
[REDACTED]  
[REDACTED]



[REDACTED]

[REDACTED]

[REDACTED]

57. [REDACTED] rang Mr. IS-3765 about a week after [REDACTED] conversation with [REDACTED] to tell Mr. IS-3765 what he had done. Mr. IS-3765 said that he was in his van on his way home from work when he received the call and that when [REDACTED] explained what he had done, Mr. IS-3765 became angry and started shouting at him. He did not ask [REDACTED] where he got the cocaine and didn't

really care about this. He said: *"I was just, because my brain was rattled for a long time as to how it happened. Like, I thought somebody down the track had done it to me, you know. Like, the things that ran through my head. I actually know a lot about cocaine now that I didn't know before from reading up about it after I got the phone call. So I didn't, I didn't get into that with him."* He said he was not interested in whether [REDACTED] was a regular cocaine user, did not ask him anything about why [REDACTED] had cocaine with him that night or whether [REDACTED] was using it himself that night.

58. In response to a question from the Panel, [REDACTED] said that he thought he put about  $\frac{3}{4}$  of the amount of the cocaine in the bag into Mr. IS-3765's drink. He had got the cocaine for free and said he never had to pay for cocaine but he knew enough to think that the amount he had was worth about €50. [REDACTED] had seen other people both snorting cocaine and putting cocaine in a drink. In both cases, he said he noticed the same effect. However, he thought that nobody noticed later on in the evening that he had taken cocaine.

59. [REDACTED] acknowledged that he was aware of rules about taking drugs in sport and was aware that Mr. IS-3765 was going to compete in a race the following Sunday [REDACTED]. He said he would not have put the cocaine in Mr. IS-3765's drink if he ([REDACTED]) had been sober *"but I wouldn't really see him as an athlete. I didn't know that he would be getting drug tested and everything ... I wouldn't have imagined it would be affecting him, like the 2 days later. I wouldn't have thought it would have been affecting him at all ... I didn't think of any consequences at all."*

60. All of the witnesses were cross-examined by Mr. Rice on behalf of the Irish Sports Council to the effect that the story of [REDACTED] putting the cocaine in Mr. IS-3765's drink was a fabrication, invented to provide Mr. IS-3765 with an excuse as to how the cocaine got into his system. He put it to the witnesses that the reality may have been that [REDACTED] were using cocaine recreationally but did not want to admit this, [REDACTED]. All of the witnesses denied that this was so and maintained that their evidence was true.

61. Mr. Rice drew attention to the fact that on the 14<sup>th</sup> September 2015, being around the time when the Disciplinary Panel had been constituted and Mr. IS-3765 was facing a serious hearing, UK Anti-Doping confirmed that a footballer, Jordan MacMillan, in the Scottish premiership had tested positive for the presence of cocaine following an in-competition test after a Scottish premiership match and had been suspended from all sport for 2 years. Mr. McMillan had put forward a defence to the effect that when he was at the house of his girlfriend's parents, he had taken alcohol. One of the people in the house who prepared the drinks was allegedly consuming cocaine as a recreational substance and allegedly poured it into a drink intended for himself. He allegedly gave the drink in error to Mr. McMillan who drank it allegedly without knowing anything about the cocaine in the drink. When Mr. McMillan tested positive, the other guest realised that he must have given Mr. McMillan the wrong drink and admitted the mistake.

62. The National Anti-Doping Tribunal in the UK in a decision of the 21<sup>st</sup> April 2015 did not accept the evidence as to how the cocaine entered the footballer's body and imposed a 2-year suspension on him. The footballer's appeal against this decision to the National Anti-Doping Panel was dismissed in a decision of the 14<sup>th</sup> September 2015. This decision received some coverage in the popular press by virtue of Mr. McMillan being a footballer in the Scottish premiership with Partick Thistle. [REDACTED]. Mr. Rice suggested to each of the witnesses that they had become aware of the explanation relied upon by Mr. McMillan and had decided to concoct a version of a similar story to provide a version of events which would, they hoped, exonerate Mr. IS-3765 from any fault or any significant fault thus eliminating or reducing the period of suspension. All of the witnesses denied this.

## **5. The Relevant Caselaw**

63. Mr. Rice for the Irish Sports Council relied on a number of cases. It is not necessary to review them all for the purposes of this decision. In particular, while there are a number of cases in which the defence was that the athlete's drink was "*spiked*" unbeknownst to him, all of these cases ultimately turn on their own facts and the relevant Panel's assessment of the credibility of the witnesses.

Nonetheless, there are some useful statements concerning the interpretation and application of the Rules which are helpful.

64. As noted above, the burden of proof rests on the athlete to establish the factual circumstances which he says justifies the Panel in reducing the period of ineligibility. In *IWBF –v- UK Anti-Doping and Gibbs*, CAS 2010/2230, 22<sup>nd</sup> February 2011, the Court of Arbitration for Sport (Michael J. Beloff QC) stated:

*“If the Athlete fails to provide an explanation, with supporting evidence, that satisfies the Tribunal, then it cannot guess, or speculate, but must proceed on the basis that there is no “credible non-doping explanation” for the presence of the stimulant in his system ... Where (as here) Mr. Gibbs’ claim that his drink was spiked has not been established, then he has fallen at the crucial first hurdle and his claim to innocent use cannot be considered any further, he has simply not laid the ground for an intelligible assessment of his degree of fault.”<sup>6</sup>*

65. Mr. Gibbs, a paralympic basketball player, had contended that his drink was “spiked” for one of two reasons. First, a number of witnesses said Mr. Gibbs never used cocaine and therefore the only possible explanation was that somebody had added it to his drink on an occasion when he was in a pub; and second, there was evidence from a Mr. Henderson that he had in fact added it to Mr. Gibbs’ drink. However, the First Tier Tribunal did not find Mr. Henderson’s evidence to be reliable or credible and it seems he subsequently disappeared prior to the appeal before the Court of Arbitration for Sport. Accordingly, the CAS held that Mr. Gibbs had not established how the cocaine entered his body.

66. The reference to the necessity to establish how the prohibited substance entered the athlete’s system derives, in the Irish context, from the definition of “No Significant Fault or Negligence” in the Appendix to the Rules which states that “In order to establish No Significant Fault or Negligence for any violation of Article 2.1, the Athlete must also establish how the Prohibited Substance entered his or her system.” This is sometimes referred to as the threshold requirement in

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<sup>6</sup> Paragraphs 12.19-12.20.

that this must be established by the athlete first before the Panel can go on to consider the question of fault.

67. In the present case, the question of establishing intention under Article 10.1.3.2, the question of establishing the threshold requirement of showing how the cocaine entered Mr. IS-3765's body and the question of whether No Significant Fault or Negligence has been established all turn on the single issue of whether the evidence from the witnesses is credible so that that Panel can be satisfied that, as a matter of probability, ██████████ did indeed spike Mr. IS-3765's drink.

68. In *IRB –v- Keyter*, CAS 2006/A/1067, 13<sup>th</sup> October 2006, a professional rugby player said that when in a nightclub, he accepted a few drinks from strangers sitting next to his table and that they must have put the cocaine into one of his drinks. Given the record of his good character, the Disciplinary Panel concluded that on the balance of probabilities, the prohibited substance entered his body through a “spiked” drink. The Court of Arbitration for Sport reversed this decision pointing out that there was no evidence of any drink offered to him or that he was even in the nightclub in question and that the explanation that he must have been given the cocaine in a “spiked” drink was only a speculative guess uncorroborated in any manner. The Court went on to hold that even if his version of events was accepted, the fact that he was very drunk on the night meant that he failed to exercise any caution and thereby failed the No Significant Fault or Negligence test, a point of potential relevance to the present case.

69. It should be noted however that the present case is different from the *Keyter* case in that there is direct evidence from the person who allegedly spiked the athlete's drink. There are cases where such evidence has been given but has been rejected. Thus, for example, in *Rybka –v- UEFA*, CAS 2012/A/2759, a decision of the Court of Arbitration for Sport delivered on the 18<sup>th</sup> May 2012, a Ukrainian footballer who was found to have a prohibited and performance-enhancing substance in his body claimed that his wife put it in a glass of water which she gave him as medicine for a swelling on his face. His wife gave evidence that she added the medicine to the glass of water and offered it to her husband. There were however inconsistencies in accounts given at different times by the player.

He originally claimed he took the drug on the advice of his wife without thinking of its content; he later claimed that she offered him a glass of water without telling him that there was medicine in it; another version was that he asked his wife for a glass of water. The CAS stated:

*“The chain of events testified to by the Player and his wife can only be as strong as its weakest link; in this instance there was a series of links all of whose strengths were highly suspect. The variety of versions proffered as to how Furosemide entered the Player’s body itself discouraged belief that can surmount this critical initial hurdle.”<sup>7</sup>*

70. Other difficulties arose on the evidence as to whether his wife had the medicine at all; the circumstances of the wife’s swelling which the medicine was alleged to have been initially prescribed for; whether the player was suffering from any swelling of the face at all on which proposition medical evidence called cast a doubt and so forth. The Court concluded that the likelihood was that the substance was taken by the player for its perceived function in assisting in weight loss in circumstances where he acknowledged he had a weight problem and where there was medical evidence that the substance could be used to assist with this.

71. Similarly, in *FINA –v- Tagliaferri*, CAS 2008/A/1471, a decision given on the 19<sup>th</sup> December 2008, the Court did not accept the evidence of the athlete’s father that he had secretly added the prohibited substance to his son’s vitamins to assist him with depression. The Panel found that there were a number of inconsistencies in the evidence of the father. In different statements, he used two entirely different brand names for the medicine (which had the same active ingredient) but which were produced by two different manufacturers. The father had been using one brand himself for 10 years so it was surprising that he referred to the other brand name. Furthermore, the father admitted that the medication which he allegedly bought to give to his son was not suitable for treating depression but was touted on the internet as of assistance in building up muscles. There were other inconsistencies also which led the Panel to conclude that it had not been established how the substance came to be present in the athlete’s body.

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<sup>7</sup> Paragraph 11.17.

72. In *UK Anti-Doping Limited –v- Anderson*, SR/120082, a decision of the UK National Anti-Doping Panel of the 16<sup>th</sup> May 2013, the Panel referred to the potential for collusion between the athlete and the alleged spiker. In that case, the girlfriend of the athlete, a boxer, said that she had put speed in his coffee the night before a fight because she was angry with him for being a bad father and for seeing another woman. However, her original statement made no mention of spiking any drink of Mr. Anderson's. She did however say this to the police on foot of a complaint made by the boxer to the police. The Tribunal agreed with the following submission made on behalf of UK Anti-Doping Limited:

*“The requirement [that the athlete must show not only the route of administration but also the factual circumstances in which administration occurred] should be strictly applied, since without clear knowledge of the manner in which a substance entered an athlete's system, it is logically difficult for a tribunal to determine whether the athlete has taken precautions against accidental ingestion or sabotage. [Counsel] reminded us that in alleged spiking cases, particularly where the substance ingested has clear performance enhancing potential, the tribunal must be especially cautious before accepting an athlete's case because of the obvious potential for collusion, even where the alleged spiker is said to have admitted the spiking.”*

73. There were a number of inconsistencies in the accounts given by the boxer and certain inherent improbabilities in the sequence of events alleged by him including an allegation that his girlfriend had acknowledged spiking his drink in a text but that the boxer had inadvertently deleted the text. The surrounding circumstances were important because the boxer's (now ex) girlfriend did not give evidence. The Tribunal stated as follows:

*“4.7 We have come to the conclusion that the athlete's evidence is not strong enough to prove on the balance of probabilities the case advanced by him, namely that amphetamine entered his system by drinking a cup of coffee deliberately laced with speed by Ms. McMullan ... We do not rule out the possibility that this may have happened, but we are clear that it is not proved by a balance of probability.”*

*4.8 We find the points made by [counsel for UK Anti-Doping Limited] to be considerably more persuasive than those deployed by the athlete, notwithstanding the eloquence with which [counsel] advanced his counter arguments. We are particularly troubled, also, by the absence of any convincing explanation for the alleged inadvertent deletion of the text messages which, if they could have been authenticated, would have provided direct evidence of a confession. We are not satisfied with Mr. Anderson's explanation on this important point.*

*4.9 If we had had direct evidence that a confession was made in the terms of the text messages, and that the text messages had been sent from Ms. McMullan's telephone, we might well have been inclined to reach the further conclusion that the confession was true. As it is, we are strongly influenced by the absence of any evidence from any witness which corroborates the truth of Ms. McMullan's confession, assuming it was made.*

*4.10 It should be clearly understood that we are not required to make any positive finding that the athlete deliberately doped himself; nor that he conspired to fabricate false evidence and provide it to the police and this tribunal. It is not necessary for us to make those findings in order to determine the issue as to whether the onus of proof imposed by Article 8.3.2 of the Anti-Doping Rules is discharged or not. We find that it is not discharged."*

74. It is clear from a consideration of the authorities that the mere assertion by the athlete that he did not take and never has or never would take the prohibited substance is insufficient to show how the substance entered his body; speculations based on an assumption that the character of the athlete is such that somebody else must have covertly given it to him or explanations proffered which are uncorroborated by evidence are likewise insufficient. There must be some independent corroborating evidence offered as to how the substance entered the athlete's body. Where there is independent corroborating evidence (as in the present case through the evidence of [REDACTED]), it then falls to the Panel to assess the credibility of that evidence in light of all the surrounding circumstances with a view to deciding whether or not that version of events is, as a matter of probability, true. It is not necessary that the version of events be established to the "comfortable satisfaction" of the Panel, still less beyond a reasonable doubt. However there is a stringent requirement to adduce specific and competent evidence that is sufficient to persuade the hearing Panel that the explanation



advanced is more likely than not to be correct (*IRB –v- Keyer*, CAS 2006/A/1067, paragraph 6.11).

## 5. The Panel's assessment of the evidence

75. The case was put squarely to each witness by Mr. Rice that they were lying; that the probability is that they had all been using cocaine; that they each had reasons to try to keep this fact from ██████████; and that they had colluded in inventing the story that ██████████ had put the cocaine in Mr. IS-3765's drink.

76. It should be noted that it is not necessary for the Irish Sports Council to establish these propositions as true as a matter of probability. The burden rests on the athlete to establish that his version of events is true on the balance of probabilities. Nonetheless, Mr. Rice clearly recognised that in the face of direct evidence given by ██████████ as to how the spiking occurred, the assessment of the credibility of that evidence might be usefully assessed by reference to considering what motive ██████████ and the other witnesses might have for telling a lie.

77. All of the witnesses struck the Panel as nervous. While this might have been because they were not telling the truth, it is also, in fairness, explicable by virtue of their participation in a formal and serious hearing.

78. There were a number of inconsistencies in the evidence as noted in the summary of the evidence set out above. This was particularly noticeable in terms of the question of what beer was available ██████████, whether it was chilled or not, and whether the absence of chilled beer was the reason why Mr. IS-3765 poured the beer into a glass and put ice in it. Each witness was excluded from the hearing room until he had given evidence ██████████

██████████  
██████████  
██████████  
██████████

However, it is also easy to overstate the significance of differences in the accounts of the night in question given by different witnesses. It is a feature of human memory that recollections can differ even a short time after a particular event and this evidence was given some months after the night in question.

If the witnesses told identical stories down to the last detail, that in turn might have given rise to a suspicion of collusion.

79. The evidence of [REDACTED] is clearly critical. [REDACTED] came across as very nervous but that in itself is not decisive since it is consistent with either [REDACTED] not being a truthful witness or [REDACTED] having to acknowledge his use of cocaine and the stupidity of an act which, if he did it, created very significant trouble [REDACTED], Mr. IS-3765.

80. [REDACTED] account of how he poured about three quarters of the very small amount of cocaine which he had on a piece of plastic was somewhat troubling. In particular, the Panel was struck by the delicacy that would have been needed to ensure that not all of the cocaine was tipped into the drink, particularly where [REDACTED] had already consumed 8 or 10 bottles of beer.

81. On the other hand, if [REDACTED] was inventing the story, it is puzzling as to why he would have bothered to say that he kept back some of the cocaine and that he used it subsequently himself that evening. It would have been simpler, and arguably more plausible to have said that he tipped all of the cocaine into the drink and not to have embellished the story with an account of keeping some of it for later use.

82. A point put by Mr. Rice to [REDACTED] was that if he had intended it merely as a joke and/or to liven Mr. IS-3765 up t [REDACTED], it was surprising that [REDACTED] never disclosed to Mr. IS-3765 the trick he had played on him [REDACTED]. It is, however, equally possible

that [REDACTED] recognised the stupidity of what he had done and did not wish to disclose it.

83. The Panel has carefully considered all of the evidence. It is a feature of the case which distinguishes it from many of the authorities relied upon by the Irish Sports Council, that Mr. IS-3765 is not relying upon mere speculation or uncorroborated assertion but has produced direct evidence from the person who say he put the cocaine in his drink. While there are some inconsistencies in the evidence, as noted, they do not, for the most part, bear directly on the central evidence given by [REDACTED] as to the circumstances under which he put the cocaine in Mr. IS-3765's drink. At its height, the inconsistencies might suggest that it should be doubted as to whether Mr. IS-3765 was drinking out of a glass at all and might perhaps have been drinking directly from the cans. But all [REDACTED] witnesses have confirmed that Mr. IS-3765 was drinking from a glass and the Panel is, on balance, prepared to accept this as established as a matter of probability.

84. Although the burden of proof rests upon the athlete to establish his version of events as a matter of probability, the fact that the witnesses gave evidence in support of this account which was not contradicted by any direct evidence goes towards establishing those facts as a matter of probability unless there is some good reason to doubt the testimony. Mr. Rice sought to create such doubt by suggesting the witnesses had a motive for collusion in that they wanted to keep secret their alleged use of cocaine. However, apart from the fact that there was no evidence at all that either Mr. IS-3765 or [REDACTED] had ever used cocaine (and nothing in this decision should be taken as suggesting that they did), there is the fact that the suggested motive of "keeping it secret" does not apply to the critical witness, [REDACTED] who has acknowledged that he used cocaine on the night and previously. [REDACTED]  
[REDACTED]  
[REDACTED]

85. The question therefore arises as to why [REDACTED] would either invent the story himself or, if requested to tell a false story by either Mr. IS-3765 or [REDACTED] or both, go along with such a suggestion. While it is to [REDACTED] credit that if the

circumstances were as he has described them, he ultimately came forward and gave evidence of what had occurred, his evidence was in other respects discreditable to him, particularly in terms of his use of cocaine and the spiking of Mr. IS-3765 's drink. [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED]. Overall therefore, unless [REDACTED] is somehow obligated to Mr. IS-3765 or [REDACTED] in some way which was not apparent on the evidence that was given, there seems to the Panel to be a significant degree of implausibility about the proposition that [REDACTED] would have been prepared to give false evidence which placed himself in such a discreditable light.

86. Another feature of some significance is the absence of any pharmacological evidence from either side as to the effects of cocaine taken in the quantity and circumstances described by [REDACTED]. Either side might have sought to make something of this depending on the nature of the pharmacological evidence, either by seeking to contradict the evidence from the witnesses that Mr. IS-3765 neither felt nor manifested any effect from taking the cocaine or, from Mr. IS-3765 's perspective, verifying that even a small amount of cocaine taken on a Friday evening could still be detectable in his body on the afternoon of the following Sunday.

87. Looking at the decision concerning the Scottish footballer, which, it was suggested, might have prompted the witnesses to invent the evidence which they gave which bore some similarities to the version of events relied upon by the footballer, pharmacological evidence was given to the effect that cocaine taken in a drink would quickly produce some numbness of the mouth in that it would function somewhat like an anaesthetic and would produce some feelings of elation. If the witnesses had read that decision and decided to falsify evidence by inventing a story somewhat similar to the story alleged in that case, it would be very surprising that Mr. IS-3765 would say that he felt no effects at all after having taken the cocaine or that the other witnesses would say that they noticed no

change in his behaviour. Of course, it may be the case that the witnesses only read about the case in newspapers and did not download the decision itself (despite it being readily available on the internet). However, this is speculation and the fact remains that no pharmacological evidence from either side was adduced before us.

88. Having considered all of these matters, the Panel is of the view that it is more probable than not that ██████ put cocaine in Mr. IS-3765's drink as he described. The inconsistencies in the versions of events given by the witnesses did not seem to us to be ultimately of critical importance and in some respects were the sort of differences one would expect to see when people are asked to recollect the events of a particular night some months later, when, at the time, they had no particular reason to attribute importance to the events of the night in question. In fairness, Mr. Rice did not place any great emphasis on the inconsistencies as demonstrating the untruthfulness of the evidence and we think Mr. Rice was correct in taking this approach. The uneasiness manifested by each of the witnesses is not, in our view, sufficient to cause us to disbelieve their evidence as a matter of probability. Accordingly, the Panel is satisfied as a matter of probability that the cocaine entered Mr. IS-3765's body by virtue of his drink having been spiked by ██████ and that the Anti-Doping Rule Violation was not intentional. Therefore, subject to any potential reduction under Article 10.4.2 of the Rules, the period of Ineligibility shall be 2 years pursuant to Article 10.1.2 of the Rules.

89. As already noted, the Panel is satisfied that even accepting these circumstances, it cannot be said that Mr. IS-3765 was guilty of No Fault or Negligence. The caselaw is quite clear that such a finding can only be made in very exceptional circumstances and spiking a drink is not generally regarded as such a circumstance.

90. The question remains therefore whether it can be said that Mr. IS-3765, though guilty of some fault, was guilty of No Significant Fault, and if so, whether the two year sanction should be reduced to the minimum permissible in those circumstances (one year) or should be reduced by some lesser amount.

## 7. Whether Mr. IS-3765 bears No Significant Fault or Negligence

91. We have already concluded that it cannot be said that Mr. IS-3765 bore No Fault or Negligence. Nonetheless, if he can establish that he bears No Significant Fault or Negligence, then the 2-year period of Ineligibility may be reduced to not less than 1 year based on the degree of fault involved. *“No Significant Fault or Negligence”* is defined in the definitions in Appendix 1 to the Rules as:

*“The Athlete ... establishing that his or her Fault or Negligence, when viewed in the totality of the circumstances and taking into account the criteria for No Fault or Negligence, was not significant in relationship to the Anti-Doping Rule Violation ...”*

92. The criteria referred to in the definition of No Fault or Negligence are that the athlete *“did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he or she had Used or been administered the prohibited substance ...”*

93. In assessing No Significant Fault or Negligence, the Panel has to look at all the circumstances *“but the fault must be assessed in relation to the Anti-Doping Rule Violation. The Article and definition do not bring a wide range of mitigating factors relating to the person facing the allegation, or to the violation itself, into consideration. Such matters are irrelevant to the assessment under [the WADA Code equivalent of Article 10.4].”* (Paul David, *A Guide to the World Anti-Doping Code* (2008 citing *Knauss –v- FIS CAS 2005/A/847*)).

94. A reduction in the 2-year period on the grounds of No Significant Fault or Negligence

*“will only be available where the circumstances are exceptional, and where the degree of fault relating to the violation, when considered in the context of the athlete under the Code, can truly be said to be insignificant. A decision on the application of the Article involves a close examination of the level of fault or negligence in the circumstances of the particular case. The tribunal must assess the conduct of the*

*athlete by reference to the conduct of a reasonable athlete in the particular circumstances prevailing at the time of the violation. Where the circumstances reveal a situation where there was a more obvious risk of committing a violation, the more care will be expected of a reasonable athlete. An athlete who failed to take the clear and obvious precautions that a reasonable athlete would take would not be able to rely on the Article.*

*Article [10.4.2] potentially involves a consideration of the level of fault of the athlete at two stages. The degree of fault of the athlete must be considered in deciding whether Article [10.4.2] applies, then further considered, if the tribunal finds that Article [10.4.2] is applicable, in determining the period of ineligibility to be imposed. The first decision is whether the fault is significant or not in the context of the athlete's obligations under the Code. If it is not, the degree of fault must be closely examined to arrive at the period of ineligibility between 1 and 2 years which reflects the level of fault. The threshold for the application of Article [10.4.2] must not be set too high or too low, if the Article is to have an effective role.*

*While matters which would be relevant by way of general mitigation or not relevant under Article [... 10.4.2], some personal characteristics of the athlete may be relevant in assessing the degree of fault in connection with a violation and the particular circumstances of the case. The age and experience of the athlete and his or her mental capacity may be relevant, it is submitted, in considering the degree of fault in particular circumstances" (David, op. cit., page 180).*

95. Thus, in *Hipperdinger –v- ATP Tour Inc*, CAS 2004/A/690, a tennis player had drunk cocoa tea and eaten cocoa leaves for 3 or 4 days to alleviate altitude sickness while in South America at 3,000 metres. He was not aware that these substances were sources of cocaine and did not know that he was chewing cocoa leaves. The Panel considered that it could not be said that the player was at no fault because he had not been careful enough in assessing the risks of drinking cocoa tea and eating cocoa leaves. Had it only been a case of drinking cocoa tea, the Panel was of the view that there would have been no significant negligence in drinking the tea offered to him without inquiry about its nature or source. However, chewing cocoa leaves of unknown origin, purpose and effect for a number of days did not amount to the caution expected from a player and so the Panel held that the player had acted with Significant Fault or Negligence.

96. In *Squizzato –v- FINA CAS 2005/A/830*, a 17-year old swimmer had applied a cream containing a banned substance without the advice of a doctor but relying on her mother’s advice. In these circumstances and where the substance had no performance-enhancing effect and the quantity detected was very low, the Court found that No Significant Fault or Negligence had been established.

97. An important consideration is the obligation on an athlete to make sure that he does not place himself in circumstances where his food or drink can be interfered with. The question on the facts of the present case is the extent of any lack of care on the part of Mr. IS-3765 to ensure that no prohibited substance entered his body. Mr. IS-3765 had consumed 8 or 9 bottles of beer and so inevitably his judgement was impaired to some degree and perhaps to a significant degree. This was less than [REDACTED] before he was due to take part in the competition. However, Mr. [REDACTED]. There is no evidence that anybody was using cocaine. Mr. [REDACTED] and it was then that the spiking probably occurred. In the Panel’s view, while it cannot be said that Mr. IS-3765 bears No Fault for what occurred, the Panel considers that he bears No Significant Fault or Negligence. The question remains therefore to assess what degree of fault should be attributed to Mr. IS-3765.

98. The Panel accepts as a matter of probability Mr. IS-3765’s evidence that he did not know that [REDACTED] had used cocaine but [REDACTED] obviously socialised with people who did not see anything wrong with using cocaine, [REDACTED]. There was an obligation on Mr. IS-3765 to be particularly careful about his food and drink and the Panel considers that in leaving his drink on the table [REDACTED] and in circumstances where Mr. IS-3765’s own judgement was somewhat impaired by the alcohol he had consumed, there was some degree of fault on Mr. IS-3765’s part above the very lowest level of fault.

99. The possible sanction lies between 12 and 24 months. While the Panel considers that the sanction should be greater than 12 months to reflect some appreciable lack



of care on Mr. IS-3765 's part, the Panel considers that the sanction should be at the lower end of the available scale. Mr. IS-3765 had no direct knowledge that ██████ used cocaine or had cocaine with him. He would not have been expected therefore to anticipate that there was any significant risk that ██████ would spike his drink, at least with cocaine. That risk (or, at least, the risk that his drink would be spiked with something prohibited) in a social situation ██████ and where all of them had taken a certain amount of drink, was by no means a negligible risk but it was a lesser risk than, say, an athlete leaving a drink on a table in a nightclub to go to the bathroom where many strangers would then have access to his drink.

100. In all the circumstances, the Panel considers that the appropriate sanction is a period of Ineligibility of 15 months which will run from the date Mr. IS-3765 's provisional suspension commenced i.e. from the 6<sup>th</sup> July 2015.

## **7. Conclusion**

101. Accordingly, the Panel makes the following findings and orders:

- (1) Mr. IS-3765 committed an Anti-Doping Rule Violation being the presence of a Prohibited Substance (cocaine) in his body contrary to Article 2.1.1 of the Irish Sports Council Anti-Doping Rules.
- (2) The Anti-Doping Rule Violation did not involve a Specified Substance and was not intentional on Mr. IS-3765 's part.
- (3) Mr. IS-3765 is prohibited on account of this Anti-Doping Rule Violation for a period of 15 months from the 6<sup>th</sup> July 2015 from participating in any Competition or other activity as provided other activity as provided for in Article 10.8 of the Irish Sports Council Anti-Doping Rules. Accordingly, the period of Ineligibility expires at midnight on the 5<sup>th</sup> October 2016.

- (4) Since the Anti-Doping Rule Violation occurred in connection with an In-Competition test, the individual result obtained by Mr. IS-3765 in the Competition on the [...] 2015 is forfeited including forfeiture of any medals, titles, points and prizes obtained by virtue of the purported result on that day.
- (5) The Panel draws attention to the provisions of Article 9.2 of the Irish Sports Council Anti-Doping Rules. Since the Anti-Doping Rule Violation occurred in connection with an Event (i.e. a series of individual competitions conducted together under one ruling body, in this case Motorsport Ireland), the finding of an Anti-Doping Rule Violation may, if Motorsport Ireland so decide, lead to Disqualification of all of Mr. IS-3765's individual results obtained in that Event with all Consequences, including forfeiture of all medals, points and prizes.
- (6) In the exercise of its discretion under Article 10.10, the Panel has decided not to make any award of costs in respect of the hearing against Mr. IS-3765 or any other person.
- (7) The question of publication of this decision is a matter for the Irish Sports Council.
102. The Panel draws Mr. IS-3765's attention to his rights of appeal, if he so wishes, under Article 13 of the Irish Sports Council Anti-Doping Rules.

Michael M. Collins SC  
Ms. Elizabeth Howard  
Dr. Rachel Cullivan-Elliott  
4<sup>th</sup> day of December 2015