CAS A2/2011 Kurt Foggo v National Rugby League

ARBITRAL AWARD

rendered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

President: The Hon Justice Henric **Nicholas**, Sydney, Australia

Arbitrators: The Hon Justice Tricia **Kavanagh**, Sydney, Australia

Mr Malcolm **Holmes** QC, Sydney, Australia

CAS Clerk: Mr Chris Dalton, Sydney, Australia

between

MR KURT FOGGO, Tweed Heads, Australia

represented by Mr Christopher D. Watters, Barrister, Brisbane, Australia

- Appellant -

and

NATIONAL RUGBY LEAGUE (NRL), Sydney, Australia

represented by Mr Matthew Walton SC, Barrister, Sydney, Australia

instructed by Mr Darren Mullaly, Australian Sports Anti-Doping Authority, Canberra, Australia

- Respondent -

Date of Award: 3rd **May 2011**

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A. INTRODUCTION

1. This is an appeal by Mr Kurt Foggo (the ***Appellant***), a contracted Rugby League player, against a decision made by the National Rugby League's Anti-Doping Tribunal (the ***NRL Tribunal***) on 15 November 2010. The Respondent, the National Rugby League (the ***NRL***) was assisted in this appeal by the Australian Sports Anti-Doping Authority (***ASADA***).

2. The NRL Tribunal found that the Appellant, who was bound by the National Rugby League's Anti Doping Policy (the ***Policy***), had consumed 1, 3-dimethylpentylamine, a prohibited substance recorded on the World Anti-Doping Code Prohibited List (the ***WADC Prohibited List***). The Appellant received a penalty of two years' ineligibility. The period of ineligibility commenced on the date of provisional suspension which was 11 October 2010.

3. The Appellant seeks from the Court of Arbitration for Sport (***CAS***) an Award reducing the period of ineligibility from two years to three months from the initial date of ineligibility of 11 October 2010.

The Arbitral Proceedings

4. On 15 February 2011, the Appellant filed a statement of appeal with the CAS, pursuant to the Code of Sports-related Arbitration (the ***Code***), to challenge the decision rendered by the NRL Tribunal with respect to the Appellant.

5. The statement of appeal named the NRL as the Respondent and ASADA as an Affected Party. The arbitration proceedings were registered by the CAS Court Office as CAS A2/2011.

6. The NRL subsequently informed the CAS Court Office that all correspondence should be directed to ASADA and that all relevant aspects of the Appeal would be handled by ASADA.

7. By communication dated 23 February 2011, the CAS Court Office informed the parties, on behalf of the President of the CAS Appeals Arbitration Division, that the Panel had been constituted by the Hon Justice Henric Nicholas, President of the Panel and the Hon Justice Tricia Kavanagh and Mr Malcolm Holmes QC, Arbitrators.

   On 23 February 2011 the Appellant communicated a request to the CAS Court Office for an extension of the date for the filing of the Appeal Brief. Under Rule 51 of the Code the Appeal Brief is to be filed within 10 days of

the expiry of the time limit for the appeal. That time limit lapsed on 25 February 2011. The President of the Panel being satisfied that circumstances existed which justified an extension being granted for the filing of the Appeal Brief by the Appellant, ordered that such time be extended until 5:00 pm on Friday 4 March 2011.

8. Following a teleconference on 3 March 2011 an Order of Procedure was determined by the Panel. It was agreed that the hearing would commence on Wednesday 23 March 2011 at 5:00 pm.

9. Pursuant to the Order of Procedure the Appellant filed the Appeal Brief containing all written submissions and other material to be relied upon in relation to the dispute with the CAS Court Office on 4 March 2011.

10. Pursuant to the Order of Procedure the Respondent filed all written submissions and other material to be relied upon in relation to the dispute with the CAS Court Office by 5:00 pm on Friday 18 March 2011.

11. Pursuant to the general liberty to apply contained in the Order of Procedure, a further teleconference was held on Tuesday 22 March 2011 at the request of both parties. At this teleconference, leave was granted for the Appellant to amend his Grounds for Appeal and Submissions related thereto. The Appellant subsequently filed an Amended Grounds for Appeal and Submissions with the CAS Court Office on 22 March 2011.

12. In response to the Amended Grounds for Appeal and Submissions lodged by the Appellant, the Respondent filed a Short Submission in Reply to the Amended Grounds for Appeal and Submissions with the CAS Court Office on 23 March 2011.

The Scope of the Panel's Review

13. In the days preceding the Appeal there was some discussion between the parties as to whether or not any fresh evidence (that is, evidence not tendered at the NRL Hearing on 15 November 2011) may be brought before the Panel. In particular, the Appellant was concerned that fresh evidence in the form of two statutory declarations filed by the Respondent on 18 March 2011 would be highly prejudicial to the Appellants case.

14. At the commencement of the hearing on 23 March 2011, the Panel referred to Rule 57 of the Code and noted that the Panel has full power to review the facts and the law of the case. With Rule 57 in mind, and consistently with well established CAS case-law (see for example CAS 2009/A/1817 *WADA*

& FIFA v. Cyprus Football Association (CFA), Carlos Marques, Leonel Medeiros, Edward Eranosian, Angelos Efthymiou, Yiannis Sfakianakis, Dmytro Mykhailenko, Samir Bengeloun, Bernardo Vasconcelos and CAS 2009/A/1844 *FIFA v. Cyprus Football Association and Edward Eranosian*), the Panel noted that the hearing was a hearing *de novo*, that is, a rehearing of the merits of the case. The Panel noted that the scope of the Panel's review was not limited to consideration of the evidence that was adduced before the NRL Tribunal on 15 October November 2010, but would extend to all evidence produced before the Panel.

15. In the present case the parties agreed that the matter would be heard afresh, or *de novo*, and the Panel and the parties proceeded on this basis. The Appellant, followed by the Respondent, then placed all the material on which they relied before the Panel. Mr Ferris , the Assistant Strength and Conditioning Coach for the club was then cross-examined by telephone. The parties then made oral submissions following which the Panel reserved its decision.

The Hearing

16. At the hearing before the Panel on 23 March 2011, the Appellant tendered Transcript of evidence in the proceedings before the NRL Tribunal and various other documents.

B. FACTS RELATING TO THE ANTI-DOPING RULE VIOLATION

17. The Appellant is a 20 year old Rugby League player from Tweed Heads, New South Wales, Australia.

18. The Respondent is a signatory to the World Anti-Doping Code (***WADC***). The Policy is adopted from the WADC.

19. Part 7 of the Policy provides for the establishment and function of a tribunal to hear allegations of anti-doping rule violations against a person who participates in Rugby League, as defined in the Policy, and for the tribunal to impose appropriate sanctions. In the case of the Appellant, the NRL Tribunal was comprised of Sir Laurence Street, Dr Jeff Steinweg and Mr Sean Garlick. The hearing before the NRL Tribunal took place on 15 November 2010.

20. The case against the Appellant was that:

(a) at 19:00 on 10 September 2010 after playing a match for the Gold Cost Titans under 20s Rugby League team the Appellant was given a Doping Control Notification;

(b) the Appellant completed a Doping Control Test form and at 19:40 on that day he was tested by way of providing two urine samples (an A sample and a B sample) to an ASADA officer;

(c) on the form the Appellant recorded a number of medications and vitamin supplements he was taking, but not the product known as 'Jack3d';

(d) the A sample recorded the presence of 1,3-dimethylpentylamine;

(e) the B sample also recorded the presence of 1,3-dimethylpentylamine;

(f) 1,3-dimethylpentylamine is a prohibited substance recorded on the WADC Prohibited List as a non-specified prohibited in-competition stimulant;

(g) 1,3-dimethylpentylamine has since been recorded on the Prohibited List as a specified stimulant and the proceedings before the NRL Tribunal were conducted on the basis of 1,3-dimethylpentylamine being a specified substance;

(h) a notice of provisional suspension of the Appellant was issued by the NRL on 11 October 2010 under rule 113 of the Policy; and

(i) on 28 October 2010 the NRL issued a notice of an alleged Anti-Doping Rule Violation to the Appellant.

21. The NRL Tribunal gave a decision in the matter with reasons. The NRL Tribunal found that there had been an Anti-Doping Rule Violation by the Appellant by reason of the presence of a stimulant in his urine sample.

22. The NRL Tribunal rejected submissions that had been made on behalf of the Appellant in reliance on rules 154 and 156 of the Policy which are set out below.

23. The Appellant received a penalty under Rule 149 of the Policy of a period of two years' ineligibility on and from the date of provisional suspension, which was 11 October 2010.

C. AGREED FACTS

24. The Appellant recognised that he was at the relevant time an athlete responsible under the WADC and under the Policy. The Appellant further recognized that this was a strict liability violation and accepted the results of the A and B samples taken by ASADA on 10 September 2010 which showed a positive test to the substance 1,3-dimethylpentylamine.

25. The parties agreed that the substance 1,3-dimethylpentylamine entered the Appellant's body by the ingestion of the supplement product known as 'Jack3d' which was purchased on at least one occasion by the Appellant from a supplement store called Mass Nutrition.

D. THE ANTI-DOPING POLICY

26. The Policy adopts the WADC and is relevantly identical for the purposes of the matters to be decided by the Panel.

27. Part 9 "Sanctions" of the Policy expressly adopts Article 10 of the WADC The relevant provisions of the Policy are found in Rules 149, 154 and 156 of the Policy.

28. Rule 149 states:

> WADC 10.2: The period of *Ineligibility* imposed for a violation of Article 2.1 (Presence of *Prohibited Substance* or its *Metabolites* or *Markers*), Article 2.2 (*Use or Attempted Use of Prohibited Substance or Prohibited Method*) or Article 2.6 (*Possession of Prohibited Substances and Methods*) shall be as follows, unless the conditions for eliminating or reducing the period of *Ineligibility*, as provided in Articles 10.4 and 10.5, or the conditions for increasing the period of *Ineligibility*, as provided in Article 10.6, are met:
>
> First violation: Two (2) years' *Ineligibility.*

29. The effect of Rule 149 is that the appropriate sanction for the Appellant's use of a prohibited substance is two years Ineligibility unless the Appellant can establish the matters required by Rules 154, 155 or 156 of the Policy.

30. Rule 154 states:

> WADC 10.4: Where an *Athlete* or other *Person* can establish how a Specified Substance entered his or her body or came into his or her *Possession* and that such Specified Substance was not intended to enhance the *Athlete's* sport performance or mask the Use of a

performance-enhancing substance, the period of *Ineligibility* found in Article 10.2 shall be replaced with the following:

First violation: At a minimum, a reprimand and no period of *Ineligibility* from future *Events,* and at a maximum, two (2) years' *Ineligibility*.

To justify any elimination or reduction, the *Athlete* or other *Person* must produce corroborating evidence in addition to his or her word which establishes to the comfortable satisfaction of the hearing panel the absence of an intent to enhance sport performance or mask the use of a performance enhancing substance. The Athlete or other Person's degree of fault shall be the criteria considered in assessing any reduction of the period of *Ineligibility*.

31. Rule 155 states:

> WADC 10.5.1: If an *Athlete* establishes in an individual case that he or she bears *No Fault or Negligence*, the otherwise applicable period of *Ineligibility* shall be eliminated. When a *Prohibited Substance* or its *Markers* or *Metabolites* is detected in an *Athlete's Sample* in violation of Article 2.1 (presence of *Prohibited Substance*), the *Athlete* must also establish how the *Prohibited Substance* entered his or her system in order to have the period of *Ineligibility* eliminated. In the event this Article is applied and the period of *Ineligibility* otherwise applicable is eliminated, the anti-doping rule violation shall not be considered a violation for the limited purpose of determining the period of *Ineligibility* for multiple violations under Article 10.7.

32. Rule 156 states:

> WADC 10.5.2: If an Athlete or other Person establishes in an individual case that he or she bears *No Significant Fault or Negligence*, then the period of *Ineligibility* may be reduced, but the reduced period of Ineligibility may not be less than one-half of the period of *Ineligibility* otherwise applicable. If the otherwise applicable period of *Ineligibility* is a lifetime, the reduced period under this section may be no less than 8 years. When a *Prohibited Substance* or its *Markers* or *Metabolites* is detected in an *Athlete's Sample* in violation of Article 2.1 (presence of *Prohibited Substance*), the *Athlete* must also establish how the *Prohibited Substance* entered his or her system in order to have the period of *Ineligibility* reduced.

33. As noted above, the Policy is in the same terms as the WADC and includes the same "Comments" except that the Policy adds as a further note in respect of Rule 154 (Article 10.4 of the WADC) the following:

> *Our note*: A precedent has been established to the effect that for a cannabinoid ADRV the sanction for a 1st violation is Ineligibility for not less than 3 months or 12 Competitions (whichever is the greater) but that such sanction may be suspended on conditions that extensive community service is performed and there is no other ADRV for the following 2 years. We consider that is a suitable precedent and hope it will be applied in our sport in the future if the circumstances are reasonably similar.

E. THE DISPUTE

34. The Appellant's submissions raised three main issues for the Panel to consider. These are summarized briefly here and discussed in detail below.

30(1) The first question relates to the Appellant's intention. Has the Appellant established that the "Specified Substance was not intended to enhance [the Appellant's] sport performance" as required by Rule 154 and "the absence of an intent to enhance sport performance" as required by Rule 154?

30(2) The second question relates to the necessity for "corroborating evidence." Has the Appellant produced "corroborating evidence in addition to his … word which established to the comfortable satisfaction of the [Panel] the absence of an intent to enhance sport performance" as required by Rule 154?

30(3) The third question relates to "no significant fault". Has the Appellant established that he "bears *No Significant Fault or Negligence*" as required by Rule 156.? This raises the question whether or not a different test with a lesser standard applies to the provisions of Article 10.5.2 of the WADC (No Significant Fault or Negligence), which is contained in Rule 156 of the Policy, as opposed to the test and standard under Article 10.4 of the WADC, which is contained in Rule 154 of the Policy.

Ground 1: The Appellant's Intention to Enhance Sports Performance

35. *The Appellant submitted that:*

According to the Rules in the Policy, the Appellant is required to show that he did not intend to enhance performance in his sport by ingesting the 'substance' 1,3-dimethylpentylamine, also known as methylhexaneamine (MHA), not the 'substance' Jack 3d. It was submitted on behalf of the Appellant that his intention to enhance sport performance must directly relate to the specified substance 1,3-dimethylpentylamine. In this regard, the Appellant and others made searches on the ASADA website in relation to the ingredients of Jack 3d, resulting in no prohibited, specified or related banned substances being identified. Accordingly if 1 ,3-dimethylpentylamine, also known as methylhexaneamine could not be identified as a constituent ingredient in Jack 3d, then the Appellant could not have possessed the prerequisite intention in relation to the specified substance. The Appellant relied on the reasoning in the CAS decision in *CAS 2010/A/2107 Flavia Oliveira v. United States Anti-Doping Agency.*

36. In response the Respondent submitted that:

The decision of *Oliveira v USADA* is a non-binding decision of another panel of this court which should not be followed. The Respondent submitted that the decision wrongly construed rule 154/WADC 10.4. Briefly, it was submitted that this admittedly ambiguous provision (a fact acknowledged by the panel in *Oliveira*[1]) is to be construed with regard to the policy of the WADC. That policy is to prevent the taking by athletes of prohibited substances and to put the onus firmly on the athlete to prove that his or her taking of the substance by whatever means (for example by ingesting a so called dietary supplement) was not with the intention of enhancing the athlete's sport performance. This policy would be defeated if the athlete could avoid the consequences of the Code by simply refraining, deliberately or otherwise, from making enquiries as to the content of the supplement and so claiming ignorance of the offence.

Ground 2: The Existence of Corroborating Evidence

37. The Appellant submitted that;

The corroborating evidence was supplied by the evidence which demonstrated that the Appellant sought advice from the store-owner when first purchasing the product, including searching the ASADA website; conducted further searches with his mother, as a result of her caution

[1] At [9.13]

against using such products; and consulted with one of the team training and conditioning coaches about these types of product. It was submitted that the uncontested evidence of his mother (Attachment 6 pp 107-9), the signed letter from Mr McNally (Attachment 7) and the signed letter from his mentor and former Manly and representative NRL player, Mr Eadie (Attachment 8) was evidence in corroboration of the extent to which the Appellant went to ensure that he was not purchasing and/or consuming a prohibited, specified or banned substance. It was submitted that the Appellant received poor, inaccurate, unreliable and outdated advice from the ASADA website.

38. In response the Respondent submitted that;

The evidence from the store owner in the undated letter from Mr McNally (who was not called) was completely unreliable and that they looked only at the ASADA web site. Mrs Foggo's evidence was merely that she said only that she would discuss with her son "if he had heard of something new or if the boys were taking something new ... or what the trainers had said and things like that" and that together they looked at the ASADA web site. The letter from Mr Eadie said no more than the Appellant would never knowingly do anything to harm his career. It was submitted that none of this evidence provided the necessary corroboration of the Appellant's own evidence that by taking the supplement known as Jack3d he did not intend to enhance his sport performance, or that in taking it he acted with "no significant fault or negligence". It was also submitted that the reference to consulting with "one of the team training and condition coaches" is not corroborating evidence at all. In the absence of any evidence of the coach being proffered by the Appellant, it was submitted that this is merely evidence from the Appellant's own mouth and should be completely disregarded by the Panel on this issue.

Ground 3: The Relevant Tests under Rules 154 and 156 of the Policy/ Article 10.4 and Article 10.5.2 of the World Anti-Doping Code

39. The Appellant submitted that it did not follow that if a case is not sufficiently made out under rule 154 that there was no intention to enhance sport performance, that a case under Rule 156 automatically fails. It was submitted that Rule 156 requires a completely different test, namely that the breach occurred through no **significant** [emphasis added] fault or negligence on the part of the appellant. This requires a lesser standard, as

supported by the fact that the Rules provide that while mitigation under Rule 154 may result in a reduction of the 2 year ban to a reprimand, in the case of Rule 156, a minimum 1 year ban must be served.

40. In response, the Respondent submitted that the Appellant was "misguided' in making this submission and that the Panel, as with the Tribunal below, was entitled to find that the Appellant had not demonstrated that he exercised the utmost care to ensure that there was no prohibited substance in his body.

F. DISCUSSION AND ANALYSIS

41. The Panel is satisfied that the CAS has jurisdiction to hear this Appeal. Part 10 of the Policy allows for decisions under the WADC (or rules adopted pursuant to the WADC) to be appealed to the CAS by an athlete adversely affected by the decision within three months from the date of receipt of the decision. The Appellant satisfied this requirement by filing an appeal of the NRL Tribunal's decision of 15 November 2010 with the CAS Oceania registry on 15 February 2011.

42. As to the first ground relating to intention. The NRL relied upon the anti-doping rule violation specified in Rule 31 of the Policy (WADC 2.1), namely the presence of a prohibited substance in the athlete's sample. The NRL noted that Rule 32 (WADC 2.1.1) emphasised that it was an athlete's personal duty to ensure that no prohibited substance enters his or her body and that it is not necessary that intent, fault, negligence or knowing use on the athlete's part be demonstrated in order to establish an anti-doping rule violation. There had been sufficient proof of the anti-doping rule violation by the analysis of the athlete's sample which confirmed the presence of the prohibited substance. Further, this was a case where there was no requirement for a quantitative threshold and accordingly the presence of "any quantity of" the prohibited substance constituted the anti-doping rule violation in accordance with Rule 34 (WADC 2.1.3).

43. In the present case, a violation of Rule 31 (WADC 2.1 – Presence of a prohibited substance) having been established, under Rule 149 (WADC 10.2) the automatic period of ineligibility for a first violation is 2 years.

44. At the time of the anti-doping rule violation, the drug, 1,3-dimethylpentylamine, was a prohibited substance and was noted on the

2010 Prohibited List for the World Anti-Doping Code as a "Non-Specified Stimulant" in paragraph S6.a. The note on cover page of the 2010 Prohibited List stated that all prohibited substances shall be "Specified Substances" except (inter alia) those in Class S6.a. As the drug was in paragraph S6.a it was not a Specified Substance. The drug has, since the time of the anti-doping rule violation, been relocated out of paragraph S6.a and moved to paragraph S6.b. Hence as a result of this change, it is no longer excluded from the list of prohibited substances and is now regarded on that list as a "Specified Substance". Accordingly, whereas at the time of the anti-doping rule violation, the drug was a "Prohibited Substance" and thus subject to a mandatory two year sanction under Rule 149(WADC10.2) with no power to reduce the sanction, currently there is power to reduce the mandatory two year eligibility found in Rule 154(WADC10.4) as it is a "Specified Substance". Hence the power to ameliorate the sanction only came about subsequent to the time of the anti-doping rule violation when WADA relocated the drug from paragraph S6.a to S6.b. Thus, the doctrine of *lex mitior* applies. That doctrine permits a disciplinary tribunal to apply current sanctions to the case before it if those sanctions are less severe than those which existed at the time of the offence (see *Arbitration CAS 96/149 A.C. / Fédération Internationale de Natation Amateur (FINA),* award of 13 March 1997 at [25] to [28]; *Arbitration CAS 2002/A/378 S. / Union Cycliste Internationale (UCI) and Federazione Ciclista Italiana (FCI),* award of 8 August 2002 at [6]; *Arbitration CAS 2009/A/1870 World Anti-Doping Agency (WADA) v. Jessica Hardy & United States Anti-Doping Agency (USADA),* award of 21 May 2010 at [16]).

45. The issue which then arises for determination is whether or not the Appellant has established how the "Specified Substance" entered his body and that such "Specified Substance" was not intended to enhance his "sport performance" within the meaning of Rule 154 so that the mandatory sanction for a first violation of 2 years ineligibility may be replaced with "at a minimum, a reprimand and no period of ineligibility from future events, and at a maximum, two (2) years ineligibility". Both parties proceeded on the basis that the first element, how the substance entered his body, was established by the drug being an ingredient of the supplement Jack 3d.

46. The next issue is the issue of intent, the determination of which depends upon the proper construction of the phrase in Rule 154 (WADC 10.4); "that such specified substance was not intended to enhance the Athlete's sport

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

47. With respect, we do not agree with the approach taken by the Panel in *CAS 2010/A/2107 Flavia Oliveira v. United States Anti-Doping Agency*, award dated 6 December 2010. In our view Rule 154 (WADC 10.4) would not be satisfied if an athlete believes that the ingestion of the substance will enhance his or her sport performance although the athlete does not know that the substance contains a banned ingredient. The athlete must demonstrate that the substance "was not intended to enhance" the athlete's performance. The mere fact that the athlete did not know that the substance contained a prohibited ingredient does not establish absence of intent. We accept the Respondent's submissions that *Oliveira* should not be followed.

48. Rule 154 (WADC 10.4) also requires the production of corroboration evidence in addition to the athlete's word which establishes "...the absence of an intent to enhance sport performance". Accordingly, the corroborating evidence must be sufficient to demonstrate the absence of intent, e.g. conduct inconsistent with intent at the relevant time. This is to be determined by the Panel undertaking an objective evaluation of the evidence as to the facts and circumstances relevant to the issue of intention.

49. It is necessary to establish an anti-doping rule violation to the "comfortable satisfaction of the hearing panel bearing in mind the seriousness of the allegation which is made" (Rule 46/WADC 3.1). This standard of proof is greater than a mere balance of probabilities but less than proof beyond a reasonable doubt. On the other hand, where the Policy or the WADC places the burden of proof upon the athlete to rebut a presumption or to establish specified facts or circumstances, the standard of proof borne by

the athlete is a balance of probability. But the athlete must satisfy "a higher burden of proof" when the athlete seeks an elimination or reduction in the period of ineligibility under Rule 154 or WADC 10.4. Bearing these provisions in mind, we are satisfied, on the prescribed higher standard of proof in this case, that, in all the circumstances and on the evidence, the Appellant did not intend to enhance his sport performance when he ingested the product which contained the specified substance.

50. Both parties relied on the evidence of the Appellant and his mother as recorded in the transcript of the proceedings before the Tribunal which became an exhibit in the appeal. The transcript shows that the Appellant's mother was not cross-examined or challenged on her evidence. Hence, no basis was established for not accepting her evidence.

51. As the exhibited transcript shows, the Appellant was subject to limited cross-examination before the Tribunal below. It appears on the Panel's reading of this transcript that his answers were accepted and he was not pursued or further tested on the veracity or otherwise of his denials or assertions critically as to intention and purpose. Doubtless, this approach was taken with regard to forensic considerations. Had the Panel been asked to reject or discount the weight to be given to the evidence by either the Appellant or his mother, it was necessary for the Respondent to establish a rational basis upon which the Panel should do so but in our view it did not. Relevantly, it was not put to the Appellant the proposition to the effect that by taking what he understood to be a pre-workout powder for gym work that he intended to enhance his performance or ability as a rugby league player. In his testimony, he denied that his consumption of the product was intended to enhance his performance as a rugby league player. The Panel accepts that denial.

52. The additional requirement of corroborating evidence has been met. We note that the Respondent submitted to the Panel that (at T90) the real flaw in the Appellant's case was that there was no corroboration and therefore Rule 154 had not been made out. It was submitted (at T91) "that even if you accept at its highest Mr Foggo's evidence, that is not enough". The Panel does accept Mr Foggo's evidence and finds corroborating evidence in Exhibit C, Mr McNally's letter, Exhibit E, Mr Kerr's statement and Exhibit F, Mr Bloomfield's statement which show the open use of supplements by the players at the Club, a situation consistent with and corroborating the Appellant's understanding that the supplements that he, and others, were

using were legal. The Appellant's mother's evidence also corroborated his belief that the product that he was taking was legal. The label of the product confirms his intent to use it as a pre workout drink. The label itself stated "The beauty of Jack3d is its LACK of ingredients – it is purely based on the most important components that make a great pre-workout nitric oxide drink, and nothing more…"

53. When considering the appropriate sanction, it is necessary to bear in mind the words in the comment in the WADC to Article 10.4 which are reproduced in the comment to Rule 154. It is a relevant factor in the exercise of the discretion to consider the extent to which there was an attempt to verify that none of the constituent ingredients in the supplements to be consumed were on the prohibited list. The evidence establishes that whilst it was not on the ASADA website, had more exhaustive inquiries been made the athlete may have been able to locate information about the product which would have alerted him to the risk of violation if he used it.

54. The evidence shows that athletes were encouraged to take pre workout substances for gym training sessions, a practice which the Club condoned. It also shows that the appellant, a young professional player, was given very limited formal drug education by the Club. Nonetheless, the Panel is conscious of the provisions of Rules 32, 37, 45 and 233 of the Policy which provide, in effect, that the athlete is under a personal duty to ensure that there is no violation, and that ignorance is no excuse. In our opinion it cannot be too strongly emphasised that there is imposed a continuing personal duty to ensure that ingestion of a product will not be in violation of the Code. To guard against unwitting or unintended consumption of a prohibited or specified substance, it would always be prudent for the athlete to make reasonable inquiries on an ongoing basis while ever the athlete uses the product. There is a salutary lesson in this respect to be learned from the circumstances of *CAS OG06/001, WADA & Ors v. Lund* where the athlete tested positive to a banned substance at the World Cup in November 2005. The athlete freely admitted that he had been taking the banned substance since 1999 for medical reasons and that he had checked the prohibited list on the USADA website every year for the 5 years from 1999 to 2004. In each such year the substance was not on the banned list but he failed to check in 2005 when it was. The Panel in that case found that the athlete had not exercised "the utmost caution" in 2005.

55. As to the period of ineligibility, the Panel is conscious of the desirability of "harmonisation of sanctions" (WADC 10.2 and Rule 149) in international sport and international sporting disputes. The Panel's attention has been drawn to decisions of the National Anti-Doping Panel Appeal Tribunal in the UK in the matter of *Rachel Wallader* dated 29 October 2010, *Matthew Duckworth* dated 10 January 2011 and *Steven Dooler* dated 24 November 2010. Nevertheless, each case must be decided on its own facts. The Panel is conscious of the efforts made by the Appellant and the support and assistance given to him by his mother.

56. In all the circumstances the Panel is satisfied that a reduction of the period of ineligibility is justified and is of the view that the appropriate period is 6 months. As the athlete has been suspended since 11 October 2010, the period of ineligibility is to run from that date..

57. As to the question of costs, the Panel is conscious of provisions of Rule 145 of the Policy which states "Costs of all hearings in our sport are to be borne by each party respectively and under no circumstances may costs orders be made which would have the effect of ordering one party to pay the costs of another party save only where one party has caused another party to incur costs in circumstances that amount to a deliberate abuse".

58. Having regard to the provisions of Rule 145, of article R64 of the Code of sports-related arbitration and the particular circumstances of the case, the Panel determines that it is not appropriate to make any order as to the payment of costs other than each party bear one half of the arbitration costs, to be determined by the CAS Court Office and communicated to the parties by separate letter.

ON THESE GROUNDS

The Court of Arbitration for Sport Rules, for the reasons given, that:

1. The appeal filed on 15 February 2011 by Kurt Foggo against the decision of the National Rugby League (NRL) Tribunal of 15 November 2010 is declared admissible and is partially upheld.
2. The decision of the NRL Tribunal is amended as follows: The period of ineligibility of Kurt Foggo shall be 6 months from 11 October 2010.
3. Each party shall bear one half of the arbitration costs, to be determined by the CAS Court Office.
4. Both parties shall bear their own legal and other costs.
5. All other motions or prayers for relief are dismissed.

Delivered in Sydney, 3rd May 2011

THE COURT OF ARBITRATION FOR SPORT

The Hon Justice Henric **Nicholas**
President of the Panel

The Hon Justice Tricia **Kavanagh**
Arbitrator

Mr Malcolm **Holmes** QC
Arbitrator