SR/NADP/898/2017

IN THE MATTER OF PROCEEDINGS BROUGHT UNDER THE ANTI-DOPING REGULATIONS OF THE SCOTTISH FOOTBALL ASSOCIATION (2014-2015)

Before:
Rod McKenzie (Arbitrator)

BETWEEN:

UK Anti-Doping

("Applicant")

- and -

Mr Jamie Insall

("Respondent")

FINAL DECISION OF THE ARBITRAL TRIBUNAL ("the Tribunal")

Introduction

1 This is the decision of the Tribunal, comprising of a sole arbitrator ("the Arbitrator") appointed by the President of the National Anti-Doping Panel, convened pursuant to Article 5.1 of the National Anti-Doping Panel Procedural

Rules 2015 (“the Rules") to determine a Charge brought against Mr Jamie Insall ("the Respondent") for an alleged violation of Article 2.1 of the Scottish Football Association Anti-Doping Regulations (2014-2015).

2 This final decision comprises the factual findings of the Tribunal based on its consideration of all of the oral evidence of the Respondent, written evidence in the form of statements, documents exhibited and submissions made by and on behalf of parties. All of this material has been carefully considered but only that evidence and those submissions directly concerned with the factual findings set out below are explicitly mentioned.

3 The Scottish Football Association ("Scottish FA") is the national governing body for the sport of football in Scotland. The Scottish FA has adopted UK Anti-Doping Rules as its Anti-Doping Rules (“ADR”). Article 8.1 ADR confers jurisdiction on the National Anti-Doping Panel ("NADP") to determine Charges arising under the ADR. The parties in this matter raised no objection to the jurisdiction of the NADP to determine the Charge brought against the Respondent, the composition of the Tribunal by a sole arbitrator or the identity of that Arbitrator.

4 On 11 March 2017, Mr Insall played (as described below) for the club with which he was registered, East Fife FC, against Livingston FC in a Scottish League One Match (‘the Match’); League One being a Competition owned and operated by the Scottish Professional Football League.

5 Scottish League One is a Division of the Scottish Professional Football League ("SPFL"), a competition which is authorised by the Scottish FA. Mr Insall has not disputed that as a player registered with East Fife by the Scottish FA and the SPFL he is bound by the ADR.

6 Following the match, Mr Insall was notified of the requirement to submit a urine Sample for Analytical Testing. All requisite documentation relating to the provision of the Samples provided and their Analytical Testing were provided to the Tribunal and no issue arises in this case as regards to any aspect of Testing or Analytical Testing.

7 Mr Insall provided three Samples and split each part of the Sample into two separate bottles which were given reference numbers as follows:

- A1130927 (the 'First A Sample') and B1130927 ('the First B Sample') sealed at 17:03hrs;
- A1130934 (the 'Second A Sample') and B1130934 (the 'Second B Sample') sealed at 17:48hrs; and
- A1130948 (the 'Third A Sample') and B1130948 (the 'Third B Sample') sealed at 20:36hrs (together the "Samples").

8 Three Samples were collected as the First A Sample, First B Sample, Second A Sample and Second B Sample did not have requisite specific gravity for analysis pursuant to clause D.4.16 of the WADA 2017 International Standard for Testing and Investigations ('ISTI').

9 All Samples were transported to the World Anti-Doping Agency ('WADA') accredited laboratory in London, the Drug Control Centre, King's College London (the 'Laboratory'). The Laboratory analysed the First A Sample and the Third A Sample in accordance with the procedures set out in WADA's International Standard for Laboratories.

10 Only the First A Sample and the Third A Sample were analysed pursuant to clause G.4.11 ISTI which specifies that where three or more Samples are collected during the same Sample Collection Session, the Laboratory shall prioritise and analyse the first and last Samples collected.

11 Analysis of the First A Sample and the Third A Sample each returned an Adverse Analytical Finding ('AAF') for benzoylecgonine. Benzoylecgonine is a Metabolite of cocaine. Cocaine, and its respective metabolite, is classified as a Non-Specified Stimulant under section S6a of the 2017 WADA Prohibited List. Cocaine is a Prohibited Substance that is prohibited In-Competition only. Mr Insall does not have a Therapeutic Use Exemption ('TUE') to justify the presence of benzoylecgonine in Samples provided by him.

12 Acting pursuant to the ADR, the Applicant charged Mr Insall with a violation of ADR 2.1 (Presence of a Prohibited Substance) by way of a letter dated 31 March 2017 ('the Notice of Charge'). He has been Provisionally Suspended since that date.

13 Mr Insall responded to the Charge by way of a number of emails between 10 and 12 April 2017, requesting that the B Samples be analysed. Subsequent analysis of the B samples conducted on 11 May 2017 confirmed the presence of benzoylecgonine.

14 Mr Insall responded further by email dated 17 May 2017, admitting the Anti-Doping Rule Violation ("ADRV") alleged in the Notice of Charge; stating that the cocaine was not ingested intentionally but inadvertently in a social situation out of competition; and stating that he would seek to establish that he had acted with No Significant Fault or Negligence. The Applicant understands this to be Mr Insall's first ADRV.

15 By email dated 13 June 2017, Mr Insall, through his representative Mr Matthew Phillips QC, provided a further response by way of a signed statement together with written evidence from other witnesses of both fact and character.

16 In summary, Mr Insall's account is that on Friday 10 March 2017 (the day before the match) a group comprising of four of his close friends and himself came together in Edinburgh, a number of them had travelled up from England, to visit him and celebrate his birthday. His friends arrived around 10:00am and they spent the day together in a variety of social pursuits, including the consumption of alcohol, returning to his flat at around 18:00 to watch a football match on the television. During the course of the evening, Mr Insall and his friends drank Budweiser beer from 48 bottles. Mr Insall went to bed at between 00:00 and 00:30 hours on 11 March. Mr Insall thought nothing more of the events of 10 March until he was informed by the Applicant that he had tested positive for a Prohibited Substance as described above. He contacted his friends and admissions were made to having dissolved cocaine in bottles of beer during the evening of 10 March in order to ingest it without his knowledge. He asserts that the cocaine must have entered his system as a consequence of him inadvertently

drinking from a bottle, or bottles, of contaminated beer during the evening of 10 March, i.e. the day prior to the Match.

17 By email dated 17 July 2017, Mr Insall confirmed his intention to seek an elimination or reduction of the period of Ineligibility on the basis of No Fault or Negligence or No Significant Fault or Negligence.

18 The charge was referred to the National Anti-Doping Panel ('the NADP') for resolution on 19 July 2017.

19 This was an admitted 'presence' ADRV as set out in the Notice of Charge. The ADRV concerns the presence of a metabolite of cocaine in the Respondent's system in violation of ADR 2.1. The ADRV was discussed at a Hearing on Directions held on 28 July 2017 and at that Hearing Mr Phillips QC, on behalf of the Respondent, re-iterated that the Respondent accepted that he had committed the ADRV charged and explained that it was the Respondent's intention to argue that the commission of the ADRV had been without intent to improve sport performance and that the period of Ineligibility which would otherwise be imposed should be eliminated or restricted on the grounds that there was, in the circumstances, respectively No Fault or Negligence, failing which, No Significant Fault or Negligence on the part of the Respondent in the commission of the admitted ADRV.

20 At the Hearing on Directions the Applicant accepted that the cocaine ingested by Mr Insall was consumed Out-of-Competition in a context unrelated to sporting performance. Accordingly, the Applicant did not contest that Mr Insall would establish that the ADRV was not intentional (as defined in ADR 10.2.3) for the purposes of ADR 10.2.1(a), and that the period of Ineligibility should, subject to any other relevant considerations, be two years pursuant to ADR 10.2.2.

21 Mr Phillips QC for the Respondent also accepted that, in light of the acceptance of the commission of the ADRV and the basis on which the Respondent intended to argue for elimination failing which restriction of the period of Ineligibility, it was appropriate that the Respondent led his evidence first at the Hearing since he was under the burden of proving on the balance of probabilities that there was No

Fault or Negligence failing which No Significant Fault or Negligence in the commission by him of the admitted ADRV.

22 Following the Hearing on Directions a First Note of Directions was issued and agreed by the parties specifying a Hearing date of 11 September 2017, commencing 12 noon, at the offices of Sport Resolutions in London. Directions were also given of the dates of lodging of statements of witnesses, documents and skeleton arguments together with other matters.

The Hearing

23 The hearing duly commenced at the specified date, time and place. Present were, the Arbitrator, Mr Dario Giovannelli, counsel, representing the Applicant, Mr Matthew Phillips QC, counsel, representing the Respondent on a *pro bono* basis, the Respondent, the Respondent's fiancé Ms Amy Harris (not a witness), Mr Matthew Berry (NADP Secretariat) and Ms Laura McCallum (solicitor, clerking for the Arbitrator).

24 The Arbitrator asked parties whether there were any preliminary issues. Mr Phillips advised that he was seeking to lodge two original signed statements. He advised that these statements are already in the possession of the Applicant in copy form albeit in a not signed format. There was no objection on behalf of the Applicant and the signed statements were admitted into evidence.

25 Mr Phillips advised that it had been his intention to call two witnesses to give oral evidence, Mr Callum Melnyk and Mr Sam Mogford; however, those witnesses are now no longer able to attend. The reasons advised by Mr Phillips for their non-attendance is that they both work full-time and were unable to travel down to London for the hearing.

26 The Arbitrator enquired of Mr Phillips regarding the circumstances in which the statements of the witnesses which were before the Arbitrator were provided. Mr Phillips advised that he had received initial drafts made by each of Mr Melnyk and Mr Mogford. Thereafter, suggestions had been made by him in relation to changes regarding form and grammar and final drafts were then sent to him for review before being signed by the witnesses. Mr Phillips confirmed that he had

not spoken to either of the individuals who had given a statement either by telephone or met with them in person. Neither had he had any contact with any of the other persons who were said to have been with the Respondent on 10 March. The Arbitrator asked whether a third friend had been present that day. Mr Phillips advised that there were actually four friends in total who had spent the day with and in addition to the Respondent. The Arbitrator asked whether the other two friends were intending to provide evidence. Mr Phillips advised that it was not his intention to adduce evidence of the events from any other witness.

27 Turning his attention to Mr Giovannelli for the Applicant, the Arbitrator asked if it was intending to rely on two statements only, and if one of those statements is Professor Cowan's of 25 August 2017, and whether there were any issues between the parties in relation to the contents of those two statements. Mr Giovannelli advised that he would be relying on both the statement of Professor Cowan and the statement of Mr Peter McLaughlin of 14 August 2017, along with its accompanying exhibits, but would not intend to call either of them to give oral evidence.

28 The Arbitrator enquired of Mr Phillips whether the terms of the statements including that of Professor Cowan could be treated as agreed evidence. Mr Phillips advised that his only issue was in relation to paragraph 15 and otherwise the Applicant's witness statements could be regarded as agreed.

29 Paragraph 15 states:

> "*I would expect that the dose administered could have a stimulant effect on the body producing euphoria, tachycardia, hypertension and appetite suppression. This is likely to be blunted by the effect of alcohol. Because it has a local anaesthetic effect, I would expect numbness of the mouth and throat to be experienced if taken orally*."

30 Mr Giovanelli advised that it is Professor Cowan's position that he is not able to assert the contention relating to the production of numbness in the mouth of the Respondent positively in this case, with any sufficient degree of confidence, and therefore he is unable to say whether the Respondent would have experienced numbness of the mouth or not, assuming that the Respondent's witnesses'

accounts are accurate. Mr Giovannelli advised that this position only came to light when he had raised the potential for challenge of this part of his statement with Professor Cowan. The Arbitrator noted that Professor Cowan was not present to have his evidence tested which, in turn, may have an effect on the weight to be given to the expert opinion evidence comprised in his report unless it is agreed. Mr Phillips stressed that the Respondent does not have the funds to test the evidence scientifically and therefore, he is not in a position to lead his own scientific evidence.

31 It was agreed that the hearing would proceed on the basis that Professor Cowan's report would, apart from the second sentence in paragraph 15, be treated as agreed evidence and that no weight would be given to the second sentence by the Arbitrator in coming to any decisions and that the second sentence would not be relied on for the Applicant in closing submissions.

32 The Arbitrator asked counsel for the parties if there were any other preliminary issues and they confirmed that there were not.

The Respondent's Evidence (Written and Oral)

33 The Respondent confirmed his full name as Jamie Paul Insall and his address in Worcester. The Respondent advised that he was in Edinburgh on 10 March 2017 for the whole of the day with four of his friends. At that time, the Respondent was registered as a professional player with East Fife FC on the basis of a temporary transfer from Hibernian FC and was living with Ms Harris (his fiancée) in a flat in Edinburgh. The Respondent was scheduled to Play (as that term is defined in the Rules of the SPFL) for East Fife FC in a League One Match against Livingston FC on 11 March 2017, initially as one of the seven named substitutes but with the potential to be required to enter the field of play as a substitute at any time during the Match. The Respondent was called upon as a substitute for another player and entered the field of play for the final two minutes or so of the Match.

34 The friends were Mr Callum Melnyk, Mr Sam Mogford, Mr George Martin and Mr Robert Berry. 10 March was the Respondent's birthday; they were spending the day and overnight with the Respondent in celebration of his birthday and attending the East Fife FC Match the next day, 11 March.

35 The Respondent advised that he had a close friendship with all four men. He had played football with Mr Melnyk, Mr Mogford and Mr Martin from the age of seven and through their teenage years. Mr Melnyk and Mr Mogford also went to the same school as him. The Respondent confirmed that he had known Mr Berry for a number of years (likely to be just under 10 years) and he had met him whilst playing men's football.

36 The Respondent advised that he was not aware that any of his friends had taken recreational drugs in the past other than that Mr Berry had smoked 'weed'. He knew this as when they were younger, in their teenage years, he could smell weed when he was close by Mr Berry. The Respondent said that he was not aware, at any point, during the weekend in question that Mr Berry was smoking weed. He would not expect anything like that to go on within his flat as he and his fiancée do not allow people to smoke within their flat.

37 During the course of the day on 10 March the Respondent and his four friends had spent the day together engaged in various recreational pursuits, some of them in premises licensed to sell alcohol. The Respondent gave somewhat diffident evidence that he had drunk two pints during the course of the day but the impression left was of a greater amount having been consumed by all attending, including the Respondent. However, this decision proceeds on the basis that during the course of the day the Respondent drank two pints of regular strength beer.

38 In the early evening of 10 March, as they made their way to the Respondent's flat where they intended to spend the evening socialising and watching football on television the Respondent and his friends purchased 48 bottles of beer from a nearby corner shop which was some five minutes' walk from the flat in which the Respondent resided with his fiancée. They purchased 48 bottles of Budweiser (the bottles were on offer so they were able to get two packs of 24 for a discount).

39 The Respondent advised that the living area in his flat was quite large. There was a table in the middle of the living room and the bottles of beer were left either on the table or on the kitchen side. The kitchen is within the living room.

The bottles lay there throughout the evening and into the night with any of the five persons present able to select a bottle, open and drink it. In the morning, the bottles were cleared up, put into a black bag and disposed of with the rubbish in the usual way. The Respondent asserted that he drank 10 to 11 bottles of beer that night as originally, he had not been expecting to play the next day, due to a 'knock' that he had picked up on the Thursday. However, on the Saturday, i.e. on 10 March, it was advised to him by his then Club, East Fife FC, that he would be on the bench due to another player being sick and that therefore he would be included amongst the selected 18 players and would Play, as defined. The Scottish Professional Football League is the top professional football league in Scotland and League One is its 3rd Division. It comprises of 10 Clubs, each of which play the other 9 Clubs 4 times in each Season i.e. 36 matches for each Club in the Division in each Season.

40 During the course of the evening, nothing of moment occurred so far as the Respondent was concerned. No one mentioned drugs of any type, and in particular not cocaine and he saw nothing unusual either in the actions or language of his friends which caused him to be suspicious that any form of narcotic was being taken.

41 The Respondent advised that he has a very negative view on drugs because a close friend's brother overdosed on heroin and cocaine, and thereafter died. The Respondent advised that he cannot get his head around why people would take drugs when they know the risks involved.

42 The Respondent advised that two of his friends who were present that night did not prepare statements in support of his case. He advised that he did not succeed in contacting either of those friends for statements although he had attempted to do so. He advised that he did not speak to Mr Martin as he (Mr Martin) is away travelling. He did not seek him out in order to speak to him. He had not, for example enquired of friends or family to provide him with contact details. He also asserted that he was not able to speak to his other friend Mr Berry and has not spoken to him regarding the events of 10 March as he tried to ring his mobile number but the number appears to have changed and was no longer working. The Respondent advised that he was closer to his other friends,

Mr Mogford and Mr Melnyk. He explained that Mr Melnyk is like family rather than just a friend. He has played football at least three to four times per week growing up with Mr Mogford and Mr Melnyk and they are also the same age as him. He confirmed that in relation to Mr Martin, Mr Martin is two years older than him, around 26 or 27 years old. He would class him as a very close friend but would not put him in the same bracket as Mr Mogford and Mr Melnyk. In relation to Mr Berry, Mr Berry is at least 10 years older than him (around 35 or 36 years of age). However, he is still considered a close friend and will always be there if he calls him.

43 As at March 2017, Mr Melnyk was living in Scotland and his other three friends lived in Worcester. The Respondent confirmed that he did not socialise regularly with them unless his friends were up in Scotland for a special occasion. He confirmed that he was not aware that his friends were in the habit of taking cocaine socially and he was not aware of Mr Berry taking any drugs other than weed. He confirmed that he has never had any conversations in relation to drugs with his friends as they know his feelings on drugs.

44 The Respondent confirmed that he vaguely recollected being present at a presentation at his Club in 2016 from the Scottish Football Association on the topic of Anti-Doping. He has been involved in senior professional football for two years but does not recall any anti-doping education, other than that presentation. He advised that he cannot recall the contents of the presentation and cannot recall any advice in relation to the responsibility that Athletes bear to ensure that they do not digest any prohibited substances. He reiterated that he cannot recall the contents of the presentation itself and certainly not any recommendation to tell associates that they have to assist him in complying with his anti-doping duties.

45 The Respondent discussed whether he takes any precautions to not come into contact with Prohibited Substances when going out socially. He confirmed that he goes out drinking 'once in a blue moon'. He can count on one hand the amount of times he has been out in Edinburgh over a period of two years. He confirmed that when he does go out socially, he does not take any precautions as he does not expect any adverse incidents with Prohibited Substances. In addition,

he takes no precautions when consuming drink or food in his own home. He does not explain to others that they should help him ensure he does not inadvertently consume a Prohibited Substance nor does he supervise the opening of bottles or preparation of food or drinks for him to consume.

46 The Respondent provided more detail on the night which he asserts led to his ADRV. The living room in his flat is a rather large space with minimal interior decoration. There is a corner settee and then a two-seater settee. On the night in question, his fiancée was not present due to work commitments. There were five people, including the Respondent, all watching the football. There were people moving seats throughout the night due to getting up and down either to go to the toilet or to get another beer. At one point, he was sitting on the floor along with other friends as they were playing cards on the table. He confirmed that the bottles of beer were in the fridge and reiterated that there were two packs of 24. His flat in Edinburgh is a two-bedroom accommodation. There are two toilets, there is an en-suite bathroom/toilet connected to one of the bedrooms and there is another bathroom/toilet as you come out of the living room and into the hall. That bathroom/toilet is located on the left-hand side of the hall. He confirmed that he can recall that his friends were going up and down to the bathroom/toilet but at this particular point he did not think it unusual. He provided the analogy - "breaking the seal". He confirmed that he did not think there was anything suspicious in the night about his friends' behaviour. He advised that his friends were more excitable than usual but he thought that this was just due to his birthday and the fact that they were up in Edinburgh for the weekend plus the consumption of alcohol and its effects. Even in the event that he had noticed something suspicious about his friends' behaviour, he advised that he would not have linked it to drugs.

47 The Respondent advised that when drinking a bottle of beer, he takes a sip and then places the bottle on the table. He lifts the bottle from the table when he wants another sip. He did not consider there was anything suspicious going on that night for him to think that he had to keep an eye on his own individual bottle. He offered no explanation as to when or why he might have picked up another person's bottle of beer which had been laced with cocaine or why, if he

did, inadvertently pick up such a bottle, the person who had placed the cocaine in it did not seek to recover the bottle with the expensive narcotic laced into the beer. There was no suggestion made by the Respondent that there might have been deliberate lacing of a bottle of beer intended for the Respondent by any of the persons present in his flat that evening.

48 The Respondent described his actions after he became aware that he had been charged with an ADRV. He advised that he contacted his friend Mr Melnyk at the same time as requiring that the B Sample be Analytically Tested. This was on or around 10-12 April 2017. At this point he did not question either Mr Mogford or Mr Melnyk in relation to the ADRV as he considered that it must be some kind of mistake and he made no connection between the events of 10 March and the ADRV. Mr Mogford did not volunteer an explanation in relation to the ADRV and the Respondent still considered that the B sample would support his position. During the conversation, Mr Mogford did not ask the Respondent what drug he had tested positive for. Thereafter, he called his other friend, Mr Melnyk. Mr Melnyk immediately admitted that they had been taking cocaine when visiting the Respondent on 10 March at his flat in the evening but that he should not worry about it as they had been putting it in their own drinks and not the Respondent's. Following that information, he advised that he had a lot of anger in him but he still considered that this must have been a misunderstanding as he was sure he would have noticed that something was 'off' that night.

49 In relation to the dates that the Respondent states he spoke to Mr Mogford, those differ from Mr Mogford's statement in which Mr Mogford considers he spoke to the Respondent towards the end of April. However, he advised that he thinks Mr Mogford is mistaken and he is confident that he spoke with Mr Mogford around the time that he has suggested (when the B Sample was going for analysis around April 10 to 12 April). He advised that he was unaware as to the full extent of what his friends had been up to in his flat, in Edinburgh, until the statements were received. He advised that Mr Melnyk prepared his statement first of all and thereafter, Mr Mogford prepared his.

50 The Respondent advised that he now understood that his friends were going backwards and forwards to the bathroom on the evening of 10 March and

sprinkling cocaine in their bottles of beer. He believes they were doing so because of his views on drugs so that the drug taking would not be known to him. He is unable to explain why his friends would choose to sprinkle the cocaine in their bottles of beer, rather than 'snorting' it, given they were in the bathroom and out of sight of the Respondent.

51 The Respondent stressed that he did not take cocaine deliberately and he did not ask his friends to lodge statements that supported his position. The Respondent advised that he did not ask his friends how much cocaine had been brought into his flat that evening, nor did he ask if they had brought the cocaine up from Worcester. He did not ask how long his friends had been taking cocaine recreationally and confirmed, that at this point, he was more concerned about himself and his career rather than whether this had been a regular pattern of behaviour for his friends.

52 In response to questions from the Arbitrator, the Respondent stated that he did not consider it unusual that his friends were going to the toilet with their bottles although he now understood they were doing so in order to sprinkle into the beer a quantity of cocaine.

53 The Respondent advised that he was unable to confirm why his friends would consider they had to "slyly" sprinkle cocaine in their drinks, as described in the statement of Mr Mogford, if they were already in a bathroom/toilet and out of sight of Respondent. 'Slyness' whether in the actions of adding to the bottles of the cocaine and in not using the much more satisfactory, in terms of desired narcotic effect, 'snorting' of the cocaine could have easily been undertaken without any knowledge of the Respondent in one of the bathrooms in the flat

54 The Respondent confirmed that he understands, from Mr Mogford and Mr Melnyk that it was Mr Martin who had brought the cocaine with him to the flat – he, Mr Martin, had been the person carrying it. The Respondent was unable to advise when Mr Mogford and Mr Melnyk became aware that Mr Martin had cocaine in his possession or when, how or from whom the cocaine was acquired. The Respondent had not asked any of these questions.

55 The Respondent confirmed that he is not aware as to the quantity or quality (by weight and % concentration of the narcotic respectively) of cocaine brought into the flat nor is he aware as to the cost of the cocaine. He also confirmed that he is not aware as to whether Mr Mogford and Mr Melnyk paid for their share of the cocaine nor is he aware as to how neither the costs nor the relative quantities were divided amongst each of his four friends. He did not know how much each of the four friends claimed to have 'sprinkled in their bottles', how many bottles each had sprinkled with cocaine, how the numbers and amounts were divided between before and after he went to bed. He had not asked Mr Mogford and/or Mr Melnyk for any of this information

56 The Respondent again advised he has not been able to speak with Mr Martin. Mr Martin left the country to go travelling at the end of April. He is unaware as to his current whereabouts. He confirmed that he had not tried to contact Mr Martin's family or friends to find out where he was or to get a number, as he had taken a dim view of him. When pressed, he confirmed that he did try his mobile but didn't have his house number. He also tried Facebook. He confirmed that he understands that Mr Martin lives in St John's which is a suburb, just outside Worcester. When back in Worcester, he confirmed that he did not try to go to Mr Martin's home to speak to his parents or try and locate him. Mr Martin's parents had moved from the estate in which they all grew up. He explained that he did not ask any of his friends as to Mr Martin's whereabouts as, in his opinion, it was unlikely anyone would know where he was.

57 In relation to the other friend that was in the flat that night, Mr Berry, the Respondent advised that Mr Berry was not prepared to make a statement when the Respondent asked him to do so. When he spoke to Mr Berry by telephone he said he was worried about his criminal past, that he has a criminal record, and when they discussed matters, Mr Berry said that he would rather not get involved. This was in direct contradiction to the evidence previously given by the Respondent when he had unequivocally stated that he had not spoken to Mr Berry about this matter because he had been unable to contact him.

58 The Respondent attempted to explain how it might have been that he had come to drink from a bottle that was not his own and where the beer in that bottle was

contaminated with cocaine. He advised that there were 27 to 28 bottles on the table at one point. He suggested that since all the bottles were identical that he, the Respondent, might simply have inadvertently picked up a 'contaminated' bottle rather than his own. He did not suggest that at any point in the evening that either of his friends had tried to retrieve from him a bottle of beer which he had inadvertently picked up and which his friend wanted back because it contained cocaine. Further, neither of his friends who gave statements said that this had occurred to them during the evening, when the Respondent had got hold of one of their cocaine laced bottles or that either of the other two friends had told them of any such incident.

59 The Respondent referred to his own statement and confirmed that when he refers to the "big day" he was referring to his side playing. He asserts that his statement, in his opinion, does not imply that he was expecting to play football, by entering the field of play, on 11 March. He advised that he was conscious of the level of alcohol he was consuming on 10 March, whether he was playing or not, he still had to represent the club the next day and would be expected to do interviews and meet fans etc. He accepts that if there was the slightest possibility of his entering the field of play he should not have been consuming alcohol and because of his other non-playing duties he should also not be so consuming on 10 March. However, the Respondent accepts that he consumed 10 of the bottles of beer and had been drinking, at least 2 pints, when he was out prior to returning to his flat. The Respondent would, on any view, have been considerably intoxicated by the time he went to his bed around or just after midnight on the 10th. In fact, the Respondent did enter the field of play on 11 March, coming on as a substitute in the last minutes of the match. The Respondent was unable to reconcile his assertions that if there was the slightest chance of his entering the field of play and, in any event, by reason of his non-playing duties, that he should not have been consuming alcohol on 10 March with his very significant level of alcohol consumption on that day and the consideration that he knew he was going to play by being listed as a substitute.

60 However, it is not the function of these proceedings to make judgements on the actions of the Respondent in consuming alcohol whether in small, moderate or large quantities prior to a Competition in which he is an Athlete.

61 Alcohol is not a Prohibited Substance and its consumption by the Respondent in significant quantities on 10 March and its relevance is restricted to: (i) the extent that his degree of intoxication might bear upon the reliability of his evidence as to what occurred on the evening of 10 March; and (ii) whether an Athlete who allows himself to become significantly intoxicated immediately before a Competition, in which he is to be a participant Athlete, can be said to have No Fault or Negligence, failing which, No Significant Fault or Negligence where he asserts that he, during the process of becoming and/or being intoxicated, inadvertently consumed a bottle or bottles of beer belonging to a third party which had been laced, by that third party or another third party, with cocaine intended for the consumption of and for a narcotic effect on that first third party.

62 In relation to the Respondent's current relationship with Mr Mogford and Mr Melnyk, he advised that he still speaks to both men but the relationship is now strained as they had decided not to come to give oral evidence at the hearing. He advised that he was disappointed that they had not come to give evidence as he needed them to 'clear his name'. It was "stronger", in his opinion, for three people to be present in person rather than him giving oral evidence on his own. It was clear from these responses by the Respondent and from the manner and tone in which he gave them that he did not consider that work commitments were an adequate explanation for the non-attendance of Mr Melnyk and Mr Mogford at the Hearing.

Other Witness Evidence

61 **(a) Statement of Mr Melnyk**

Mr Melnyk confirms that he is a friend of the Respondent and that he had travelled to Edinburgh on 10 March 2017 to celebrate the birthday of the Respondent and that he had spent the day with the Respondent and three other friends of the Respondent in various social activities. During the evening he had

drunk a significant number of bottles of Budweiser beer in the Respondent's flat although he asserts that, contrary to the evidence given by the Respondent, the Respondent was not drinking as much as his friends because the Respondent "*had a game the next day*." Mr Melnyk goes on to state that the four friends of the Respondent were "*taking cocaine*" but had decided not to tell the Respondent that they were doing so because the Respondent is "*very anti-drugs*." Mr Melnyk asserts that the four friends had decided to "*sprinkle our cocaine into our bottle of Budweiser*." As the evening continued, the cocaine had continued to be put in bottles. Each of the four friends had gone to the toilet in order to "*put cocaine into our own bottles so that Jamie wasn't aware of what was going on*." Mr Melnyk observes that in his view the only circumstance which the Respondent could have taken any of the cocaine "*was by picking up and drinking from someone else's bottle of Budweiser during the evening. This would have been easily done as we were all drinking Budweiser*." Mr Melnyk goes on to assert that the Respondent was not aware that his four friends were using cocaine on the evening of 10 March and that the Respondent is "v*ery serious about his football career and would never take drugs*." In a postscript to the statement, Mr Melnyk asserts "*I want to alliterate* (sic) *the fact that the only reason I am writing this letter is because Jamie has a positive reading for 'cocaine' and this is through no fault of his own*. *i* (sic) *want to be clear, he had no idea what we were doing that night*."

(b) Statement of Mr Mogford

Mr Mogford begins his statement by confirming the same basic information as Mr Melnyk regarding the circumstances and events during the day on 10 March. He states that the group of five persons "*went for a few beers at Ocean terminal.*" During the evening, they went to the Respondent's flat and "*ended up having a fair few beers*." He asserts that "*One of our mates had cocaine on him which he mentioned to us and decided not to tell Jamie. It started by us slyly putting cocaine into our own drinks because we knew Jamie wouldn't agree with what we were doing. This was all out of the way of Jamie and he knew nothing about this. As the night went on this frequently happened*." Mr Mogford closes his statement by "*Im* (sic) *writing this letter because I'm adament* (sic) *that Jamie Insall did not*

touch any of the drug, the only explanation would be is he picked up one of the many beers that were around his flat that day."

It is observed that whilst Mr Mogford states that the putting of the cocaine into the bottles of beer was "*started … slyly*" and was undertaken "*all out of the way of Jamie*", Mr Mogford says nothing about him or any of the other three friends doing so in the bathroom/toilet.

(c) Character References provided by the Respondent

The Respondent provided three "character references" from Gary Naysmith, the Manager of Queen of the South Football Club and previously the Manager of East Fife, George Craig, the Head of Football operations at Hibernian FC and Neil Lennon, the Manager of Hibernian FC. Each of these letters talk about the period during which the Respondent had been a professional footballer under their management/supervision and generally the excellence of his character, his honesty, integrity and hard-working attitude, how he had dealt with moving away from his home and changes in lifestyle etc. and how his honesty and integrity are apparent. In the case of Mr Naysmith, he expresses "shock" at the failure of the drug test by the Respondent and that Mr Naysmith finds it difficult to imagine the Respondent taking recreational drugs. The references as given by Mr Craig and Mr Lennon make no mention of recreational drug taking, whether generally or in relation to the Respondent in particular.

(d) Statement of Peter McLaughlin

A witness statement of Mr Peter McLaughlin is provided. It is explained that Mr McLaughlin is the Security and Integrity Officer of the Scottish FA and that part of his duties involves delivering presentations relating to anti-doping to players at clubs. He advises that on 17 October 2016, he attended at Hibernian FC and presented "*100% me*" which is designed by the Applicant and has the purpose of delivering anti-doping education. He provides a copy of the information provided to the players present which is in the form of a PowerPoint presentation. The presentation is accompanied by notes and it is explained that Mr McLaughlin

supplements the provided notes with his own input. Mr McLaughlin also provides the register for the anti-doping session which includes the Respondent as one of the attendees. The register is signed by the Respondent.

On page 18 of the presentation, there is a "Top Tip" entitled "**T**ELL **C**HECK **A**SK" (Emphasis added). TCA is an acronym for three pieces of key advice to athletes. T for "*TELL*" is "*tell everyone, including parents, friends, doctors, physios etc, that you are an athlete and have to abide by the anti-doping rules. They need to help you stay away from situations that put you at risk (think about drink-spiking for example)*."

(e) Statement of Professor David Cowan

Professor David Cowan, the Director of the Drug Control Centre at King's College, London, provided a detailed witness statement dated 25 August 2017 which was lodged into evidence by the Applicant. The majority of the statement is taken up with describing aspects of analysis of the Samples and the concentration of benzoylecgonine in the Samples for the purpose of reaching an opinion as to whether the cocaine, whatever the manner of ingestion by the Respondent, had been taken In-Competition or Out of Competition. Professor Cowan concludes that the cocaine had more likely than not been ingested more than 12 hours before the Samples had been collected and therefore outside of the "*In-Competition*" period.

In light of this conclusion, the Applicant had made the concession that the Respondent had not intended to enhance his sport performance by ingestion of the cocaine and therefore the starting point in considering any Period of Ineligibility would be two years and not four years.

In his statement at paragraph 8, Professor Cowan estimates that based on analysis of one of the Samples the Respondent ingested approximately 50 milligrams of cocaine to provide the concentration of benzoylecgonine identified

in the analysis. In the case of another of the Samples, the approximate amount of cocaine calculated as having been ingested is 65 milligrams of cocaine to provide the concentration of benzoylecgonine identified in the analysis. These assume a 100% purity of cocaine in the material consumed by the Respondent. Professor Cowan observes that the 'purity' of cocaine purchased 'on the street' varies widely from between 30% to 100% pure. There was no evidence provided to the Tribunal as to what the purity of any cocaine ingested by the Respondent on 10 March 2017, or any other day, might have been.

Professor Cowan also observes that the ingestion of cocaine by being dissolved in a liquid is approximately half as efficient, in terms of absorption into the 'system' of the user and, as a consequence, narcotic effect, as insufflation ('snorting').

Submissions

For the Respondent – Mr Phillips QC

63 As identified in the Directions issued by the Chair on 31.07.17, the starting point for the period of the Respondent's Ineligibility is 2 years pursuant to ADR 10.2.

64 It is contended that this period of Ineligibility should be eliminated on the basis that the Respondent bore No Fault or Negligence for the ADRV pursuant to ADR 10.4. In the alternative, the period of Ineligibility should be reduced to 12 months on the basis of No Significant Fault or Negligence pursuant to ADR 10.5.2.

65 The Tribunal has heard oral evidence during the course of the hearing and the witness statements disclosed by the Respondent and the Applicant support, it was submitted by Mr Phillips, the following findings:

(a) There is credible and reliable evidence that the Respondent's ingestion of cocaine was by inadvertently drinking from a friend's bottle of Budweiser.

(b) The Respondent was drinking Budweiser along with four friends in his own flat over a number of hours. He was not in a public place or with people who were unknown to him.

(c) The Respondent had no idea that his friends were taking cocaine and had no reason to believe that they were. His friends were deliberately hiding from the Respondent the fact that they were dissolving cocaine in their Budweiser.

(d) Given the number of people drinking from identical bottles of Budweiser in a relatively confined space, it is entirely credible that the Respondent accidentally drank from another person's bottle during the course of a long evening.

(e) The Respondent is adamantly anti-drugs.

(f) Professor Cowan's evidence supports the Respondent's case in that he estimates ingestion of cocaine (50-65mg) well below the "typical recreational dose" of 100-200mgs. This evidence is inconsistent with the Respondent intentionally consuming cocaine.

(g) The estimated digestion of cocaine was considered to be 50-65mgs where as a typical dose is 100-200mgs. That suggests that Mr Insall ingested 25 to 50% of the usual recreational dose. Mr Phillips submits that those levels are well below the typical recreational dose. However, he recognised that this may be different depending on how pure the cocaine was and that there is no evidence as to the percentage concentration of cocaine in the material brought to the Respondent's flat on 10 March.

(h) Professor Cowan expresses the view that he "would expect" a stimulant effect and numbness in the mouth/throat. The Respondent did not notice any narcotic effects or local anaesthetic effects (this latter element being given no weight by the Arbitrator on the basis agreed at the beginning of the Hearing) on the evening in question. However, the absence of such symptoms is not inconsistent with the Respondent's version of events given Professor Cowan's evidence in his statement that:

i) the likely dose was only 50-65mg;

ii) oral ingestion is only about half as efficient as insufflation in terms of cocaine absorption; and

iii) alcohol consumption (admitted by the Respondent) has a "blunting" effect on the impact of the cocaine.

66 It is also relevant to note that the cocaine was dissolved in beer and thereby diluted prior to ingestion. It is therefore unlikely to have the same anaesthetic effect on the mouth/throat as the powdered form of the drug.

67 It follows from the above that it is contended that the Respondent has proven, on the balance of probabilities, how the cocaine entered his system. He therefore qualifies for consideration of an elimination/reduction of the two-year period of Ineligibility pursuant to ADR 10.4/10.5.

68 Mr Phillips went on to observe that the Respondent was not accepting drinks from strangers in a public place. He was socialising with friends in the reassuring environment of his own flat. He had no reason to suspect that his friends were taking cocaine or that there was a risk that he might come into contact with an illicit substance. There was no reason for him to be "on his guard" regarding what he was drinking. He did not "entrust" his drink to another person and thereby risk sabotage of the same. In the circumstances of this case it is difficult to see what precautions the Respondent ought reasonably to have taken. He is an entirely unwitting victim of his friends' ill-advised behaviour.

69 Mr Phillips submitted that on the night in question it was a chaotic environment of drinks being left behind carelessly. It is easy to see why one could easily inadvertently drink from a bottle that was not his. It is entirely credible that everyone drinks from the same drink. On the balance of probabilities question, given there was cocaine dissolved in the bottles, frequently, the risk that the Respondent may drink from a contaminated bottle is therefore increased. If he had not drunk from a contaminated bottle he would have been 'pretty damn lucky' given the circumstances in which the Respondent found himself. Mr Phillips submitted that there is no reliable evidence to draw inference from Professor Cowan's comments within his report at paragraph 15. In those circumstances, with the signed statements, The Respondent's evidence and Professor Cowan's report, the Respondent has proven, on the balance of

probabilities, that he bore No Fault or Negligence and is therefore eligible for elimination or at least, reduction of the sanction.

70 It was regrettable that the witnesses who have given written statements were not present at the hearing but Mr Phillips suggested that the Arbitrator has heard credible and reliable evidence to confirm that the Respondent accidentally ingested cocaine. Even without the witnesses in person, signed statements are available confirming that the parties were dissolving cocaine in bottles of beer and that they were doing this "slyly". This is consistent with evidence that the parties were frequently leaving the room.

71 In those circumstances, it is the Respondent's primary contention that he should bear No Fault or Negligence under ADR 10.4. In the event that the Tribunal is not persuaded that the Respondent bears No Fault or Negligence it is submitted that his degree of fault/negligence is only "light", (*FIFA v Fernandez*[1]) and that a twelve-month period of Ineligibility is appropriate.

72 Mr Phillips submitted that the *Fernandez* case is of some assistance to the Tribunal in this case when we attempt to consider the scale of significance. In the *Fernandez* case, it was a deliberate ingestion and at paragraph 227 the scale of ineligibility is discussed. A normal scale is considered to be eighteen – twenty-four months whereas for a case where there is a lighter degree this is considered to be reduced. Paragraph 229 takes account of the breach being close to a competition and that there were ongoing issues in the Respondent's personal life. The breach was considered to be of a negligible degree and the Respondent was sanctioned with an eighteen-month suspension. Given that the ingestion was deliberate, Mr Phillips submitted that eighteen months was perhaps 'generous'. Mr Phillips was of the opinion that this should be taken into account in determining what, if any, suspension should apply in the Respondent's case.

73 Mr Phillips advised that if the Arbitrator is not with him in relation to article 10.4 which would be a complete elimination of the sanction then he would ask the Arbitrator to find that this is a case where there is a 'light' degree of negligence, given the Respondent was not in a public place drinking and he was with friends,

[1] CAS 2016/A/4416

who he had a close relationship with, and was also in his own flat which could be considered a place of safety. Mr Phillips advised in that particular instance, he would ask the Arbitrator to look at the *Gibbs*[2] case and in particular, the CAS decision at page 508 as well as sections 10 and 11.7. Mr Phillips advised that there will always be some doubt in relation to the Respondent's statement as the Respondent can never be sure of how the substance was ingested but the test is to get over that hurdle on the balance of probabilities and in Mr Phillips' opinion, the Respondent does that comfortably.

74 Mr Phillips also referred to the case of *UKAD v McMillan*[3] whereby the Appeal Tribunal noted the same observations and made no adverse comment. The Respondent was believed for a variety of reasons. Mr Phillips advised that he is drawing attention to those particular cases because the Respondent had no reason to consider that he was at risk.

75 Mr Phillips anticipated that the Applicant will rely upon decisions of both the NADP and the NAPD Appeal Tribunal in the recent case of *McMillan*. It is contended that this case can readily be distinguished. In *McMillan,* it was held that the Respondent had failed to establish how the cocaine had entered his system because the evidence of the individual who claimed to have spiked the drink was not "reliable or credible". It is also relevant to note that the absence of any narcotic effect in the *McMillan* case was inconsistent with the amount of cocaine allegedly consumed – that cast further doubt on the Respondent's version of events.

76 Mr Phillips considered that in the Respondent's case, he was at less fault than *McMillan* as McMillan had entrusted his drink to a stranger and therefore 12 months suspension would be more appropriate in the case of the Respondent.

77 This is not a case in which the Respondent accepted drinks from strangers in a night club, *IRB v Keyter*[4]. It is contended that this case is more akin to the decision in *WADA v Gasquet*[5] in which the Respondent's period of Ineligibility was

[2] IWBF v UKAD & Gibbs CAS 2010/A/2230
[3] SR/NADP/384/2015
[4] CAS 2006/A/1067
[5] CAS 2009/A/1930

eliminated under ADR 10.4. In that case small quantities of cocaine were ingested as a result of the Respondent kissing a stranger in a night club.

78 Mr Phillips submitted that the Respondent's case differs from the usual cases as the Respondent was not accepting drinks from strangers and he was in his own flat. Mr Phillips submitted that there is no evidence to suspect that any of the friends had taken cocaine previously or were taking cocaine at the time. There was no reason for the Respondent to be on his guard and he did not entrust his drink to another person. He did not risk 'sabotage' of his drink. Mr Phillips advised that the critical word in relation to the commentary on the WADA Code is "entrust food or drink to someone else".

79 The Respondent was with close friends in his own flat. The Respondent appears to be uneducated in relation to Anti-Doping Rules and how could he expect his friends to be any more educated in that instance? Mr Phillips accepts that the Respondent has to educate himself in relation to Anti-Doping but stressed again that the Respondent was a new professional. Mr Phillips referred to the Scottish Football Association presentation and suggested that "this all goes into the balance". Mr Phillips referred back to the case of *McMillan*, and advised that in that case it was a virtual stranger who had mixed a drink whilst McMillan was out of his own home and at a friend's house in a social context. Mr Phillips returned to the case of *Gibbs* and noted that the circumstances there were a public place and that is different from no significant fault. Mr Phillips reiterated that in the circumstances the Respondent was in his own flat with trusted friends and that there was a sound basis to trust those friends in March 2017.

For the Applicant – Mr Giovannelli

80 In light of the evidence of Professor Cowan, the Applicant has accepted that the Respondent ingested cocaine prior to 12 hours before the match, and therefore Out-of-Competition, in a context unrelated to sporting performance. Accordingly, pursuant to ADR 10.2.1 and 10.2.2, the Applicant accepts that the Respondent did not act "intentionally" (as defined in ADR 10.2.3), and that the starting point for the period of Ineligibility is two years.

81 As regards the particularity of the Respondent's explanation and the extent to which he is entitled to any reduction in the period of Ineligibility, the Applicant intends to test the evidence of the Respondent and his witnesses of fact. The Applicant submits that, even if the Tribunal were to accept the Respondent's explanation in its entirety, he would be unable to claim No Fault or Negligence given the context in which he describes the ingestion having taken place.

82 The issue to be resolved by the NADP is the sanction to be applied in respect of the admitted ADRV.

83 The relevant provisions of the ADR are as follows:

> **"10.2** ***Imposition of a Period of Ineligibility for the Presence, Use or Attempted Use, or Possession of a Prohibited Substance and/or a Prohibited Method***
>
> *The period of Ineligibility for an Anti-Doping Rule Violation under Article 2.1, 2.2 or 2.6 that is the Player's or other Person's first anti-doping offence shall be as follows, subject to potential reduction or suspension pursuant to Article 10.4, 10.5 or 10.6*:
>
> **10.2.1** *The period of Ineligibility shall be four years where:*
>
> (a) *The Anti-Doping Rule Violation does not involve a Specified Substance, unless the Player or other Person can establish that the Anti-Doping Rule Violation was not intentional*.
>
> **10.2.2** *If Article 10.2.1 does not apply, the period of Ineligibility shall be two years.*
>
> **10.2.3** *As used in Articles 10.2 and 10.3, the term "intentional" is meant to identify those Players or other Persons who cheat. The term, therefore, requires that the Player 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. An Anti-Doping Rule Violation resulting from an Adverse Analytical Finding for a substance which is only prohibited In-Competition shall be rebuttably presumed to be not "intentional" if the substance is a Specified Substance and the Player can establish that the Prohibited Substance was used Out-of-Competition. An Anti-Doping Rule Violation resulting from an Adverse Analytical Finding for a substance which is only prohibited In-Competition shall not be considered "intentional" if the substance is not a Specified Substance and the Player can establish that the Prohibited Substance was Used Out-of-Competition in a context unrelated to sport performance.

10.4 *Elimination of the Period of Ineligibility where there is No Fault or Negligence*

If a Player or other Person establishes in an individual case that he/she bears No Fault or Negligence for the Anti-Doping Rule Violation charged, then the otherwise applicable period of Ineligibility shall be eliminated.

10.5 Reduction of the period of Ineligibility based on No Significant Fault or Negligence

10.5.2 Application of No Significant Fault or Negligence beyond the Application of Article 10.5.1:

In an individual case where Article 10.5.1 is not applicable, if a Player or other Person establishes that he/she bears No Significant Fault or Negligence, then (subject to further reduction or elimination as provided in Article 10.6) the otherwise applicable period of Ineligibility may be reduced based on the Player'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. If the otherwise applicable period of Ineligibility is a lifetime, the reduced period under this Article may be no less than eight years."

84 *The relevant definitions are set out in the Appendix to the ADR as follows:*

"No Fault or Negligence:

The Player or other Person establishing that he or she 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 or Prohibited Method or otherwise violated an anti-doping rule. Except in the case of a Minor, for any violation of Article 2.1, the Player must also establish how the Prohibited Substance entered his/her system.

No Significant Fault or Negligence:

The Player or other Person 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 relation to the Anti-Doping Rule Violation. Except in the case of a Minor, for any violation of Article 2.1, the Player must also establish how the Prohibited Substance entered his/her system.

Fault

Fault is any breach of duty or any lack of care appropriate to a particular situation. Factors to be taken into consideration in assessing an Athlete's […] degree of Fault include, for example, the Athlete's […] experience, whether the Athlete […] is a Minor, special considerations such as impairment, the degree of risk that should have been perceived by the Athlete and the level of care and investigation exercised by the Athlete in relation to what should have been the perceived level of risk. In assessing

the Athlete's […] degree of Fault, the circumstances considered must be specific and relevant to explain the Athlete's […] departure from the expected standard of behaviour. Thus, for example, the fact that an Athlete would lose the opportunity to earn large sums of money during a period of Ineligibility, or the fact that the Athlete only has a short time left in his or her career, or the timing of the sporting calendar, would not be relevant factors to be considered in reducing the period of Ineligibility under Article 10.5.1 or 10.5.2."

85 The relevant Commentary from the Code provides:

***"Comment to Article 10.4**: This Article and Article 10.5.2 apply only to the imposition of sanctions; they are not applicable to the determination of whether an anti-doping rule violation has occurred. They will only apply 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 (a) a positive test resulting from a mislabeled or contaminated vitamin or nutritional supplement (Athletes are responsible for what they ingest (Article 2.1.1) and have been warned against the possibility of supplement contamination); (b) the Administration of a Prohibited Substance by the Athlete's personal physician or trainer without disclosure to the Athlete (Athletes are responsible for their choice of medical personnel and for advising medical personnel that they cannot be given any Prohibited Substance); and (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). However, depending on the unique facts of a particular case, any of the referenced illustrations could result in a reduced sanction under Article 10.5 based on No Significant Fault or Negligence."*

86 Mr Giovannelli went on to observe that, on the basis of the evidence of Professor Cowan, the Applicant has accepted that the cocaine ingested by the Respondent

was consumed Out-of-Competition in a context unrelated to sporting performance. Accordingly, the Applicant does not contest that the Respondent would establish that the ADRV was not intentional (as defined in ADR 10.2.3) for the purposes of ADR 10.2.1(a), and that the period of Ineligibility should, subject to other considerations, be two years pursuant to ADR 10.2.2, and since the Respondent has been provisionally suspended since 31 March 2017; pursuant to ADR 10.11.3, the Applicant accepts that, if the suspension has been respected by the Respondent, the period of Provisional Suspension already served should be credited against any period of Ineligibility imposed.

Applicability of ADR 10.4 or ADR 10.5.2

87 Turning to the issues of elimination, failing which restriction of the two-year period of Ineligibility, Mr Giovannelli observed that the Respondent claims that he ingested cocaine inadvertently and so bears No Fault or Negligence, or alternatively No Significant Fault or Negligence. The Respondent seeks to rely on ADR 10.4, or in the alternative ADR 10.5.2, in order that the period of Ineligibility is either eliminated or alternatively reduced to a period which may not be less than one year.

88 In light of the Commentary to the Code, set out above, the Applicant does not accept that ADR 10.4 may be applied in the context of the Respondent's account. In the circumstances he describes, the Respondent is not entitled to claim No Fault or Negligence. The Applicant accepts that ADR 10.5.2 may be applied in the circumstances described by the Respondent, subject to that factual account being accepted by the Tribunal as reliable and credible. However, submits Mr Giovannelli, the jurisprudence is very clear that to sustain a plea of No Significant Fault or Negligence, the athlete must first establish how the prohibited substance entered his system. This is a strict *'precondition'* or *'threshold'* requirement, i.e., unless and until it is satisfied the plea cannot even be considered.[6] The reason for this is clear: a hearing panel cannot make any meaningful analysis of whether an athlete is at fault for the presence of a prohibited substance in his system unless

[6] See e.g. IAAF v AFI, Ashwini et al, CAS 2012/A/2763, para 9.2

it knows how the substance got there.[7] Further it is not sufficient for the Respondent simply to deny having deliberately ingested cocaine and advance a theory that he must have consumed the cocaine inadvertently by way of accidental spiking. He must establish that the inadvertent and accidental spiking, in fact, took place[8].

89 The Panel must therefore first be satisfied on the balance of probabilities that the Respondent's account of how the Prohibited Substance came to be in his system is reliable and accurate[9].

90 Mr Giovannelli submitted that the Respondent has not satisfied that requirement as we have been unable to explore the methods, the mechanics and the motives for the alleged ingestion. The Respondent is without witness evidence that has been tested and this has left many unknowns. The purported explanation is just one of many possible explanations. We do not know how the cocaine was brought into the flat or how it was wrapped. We do not know how it was passed between friends. We don't know how it was dissolved into the beer. We do not know how effective dissolving the cocaine in beer would be; we are unaware as to whether there was a discussion as to how they would go about doing that. We also do not know where the discussion to dissolve the cocaine took place and whether it was it out of the presence of the Respondent. We have no information as to why they would go into the bathroom and dissolve it instead of snorting it in the bathroom outwith the sight or knowledge of the Respondent.

91 Mr Giovannelli advised that all of those unanswered questions raise concerns with regards to the reliability of the limited evidence provided. Critically, we are unable to explore why, having dissolved the expensive drug, the holder of that bottle allowed the bottle out of sight and the Respondent to drink from it, given his stance on drugs and of course, the detriment to his career. If we are to accept the Respondent's account, we have to accept that his friends abandoned their responsibility and put the Respondent at risk of an ADRV. Mr Giovannelli asserted that it is not for UK Anti-Doping to negate the Respondent's account or

[7] Rybka v UEFA, CAS 2012/A/2759, para 11.37
[8] IWBF v UKAD & Simon Gibbs, CAS 2010/A/2230 (award dated 22 February 2011), para 11.12
[9] UKAD v Gibbs, NADP Tribunal Decision, 4 June 2010, para 98 (the 'reliability and credibility' of the friend's evidence was of 'crucial importance').

offer an alternative explanation; it is for the Tribunal to decide whether the burden on the Respondent has been discharged.

92 Mr Giovannelli submitted that the written accounts provided by the witnesses are not reliable, in relation to the requisite standard, or credible in the absence of clarification. Therefore, he submits, the Tribunal should not be satisfied that the balance of probabilities test has been met.

93 With regards to Professor Cowan's evidence, Mr Giovannelli referred to pages 130 to 131 (paragraph 89). Mr Giovannelli confirmed that this paragraph relates to timings. If the cocaine was digested before midnight then it is suggested that 50-65mgs was digested (assuming this was 100% pure). Paragraph 12 advises that the street level of cocaine varies in purity – in this case we do not have any evidence of the level of purity of the cocaine that was ingested by the Respondent or the volume of the material. If the cocaine was of 30% purity, the Respondent could reasonably have ingested three times the amount of powder and only achieved a usual recreational dose. The dose could be consistent with the Respondent's witnesses' accounts or they may not be consistent. They could also be consistent with usual recreational use by the Respondent. If the Respondent, or whoever else may have put the cocaine in a bottle of beer, thought the material available was 100% pure, when, in fact, it was only 30% pure then the belief may have been that a bottle was being laced with a usual recreational dose when in fact it was only a third of such a dose.

94 Mr Giovannelli referred to the *Gasquet* case whereby the most likely source was considered to be via kissing. Mr Giovannelli referred to sections 7.01 to 7.11 and paragraph 3.21.1 whereby it was considered that the quantity was so minute that it was very unlikely that it could have been taken via recreational use. Mr Giovannelli then referred to paragraphs 5.11 to 5.12 on page 711 and advised that as a consequence of the hair test it was proven that the player did not use more than 10mgs of cocaine which ruled out recreational use. Mr Giovannelli stressed that that is not the position in the Respondent's case and that we also do not have a hair test.

95 Recreational use, in Mr Giovannelli's opinion, is one of a number of explanations that lies open to the Tribunal today.

96 Having first established how the cocaine entered his system, the Respondent must then satisfy the Tribunal that if he bears any fault or negligence for the ADRV, his fault or negligence was not significant.

97 The standard of care that must be exercised by an athlete to sustain a plea of No Significant Fault or Negligence was discussed in FIFA & WADA[10]:

> '*The WADC [*which effectively contains the same provisions as to No Significant Fault or Negligence as the ADR] *imposed on the athlete a duty of utmost caution to avoid that a prohibited substance enters his or her body. […] It is this standard of utmost care against which the behaviour of an athlete is measured if an anti-doping violation has been identified. "No fault" means that the athlete has fully complied with the duty of care. […] "No Significant Fault" means that the athlete has not fully complied with his or her duties of care'*.

98 ADR Article 1.3.1(c) expressly states that an athlete must *'take full responsibility for what he/she ingests and uses*'. This clearly includes taking precautions to ensure that he does not inadvertently ingest a Prohibited Substance.

99 As to the fault of third parties, Mr Giovannelli submitted that the CAS has repeatedly ruled that for purposes of assessing No Fault or Negligence pleas (i.e. determining whether an athlete exercised 'utmost caution'), the athlete is fixed not only with his own acts and omissions but also with the acts and omissions of his friends, relatives, and other members of his entourage.[11] This principle is so fundamental that it is enshrined in the commentary to Code Article 10.4, which expressly states: *'No Fault or Negligence would not apply in the following circumstances: … 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*

[10] CAS 2005/C/976 & 986

[11] See, e.g., Hipperdinger v ATP, CAS 2004/A/690, paras 65 and 74; ITF v Koubek, Independent Tribunal decision dated 18 January 2005, para 75, affirmed on appeal, CAS 2005/A/823, paras 53-61.

what they ingest and for the conduct of those Persons to whom they entrust access to their food and drink)'.[12]

100 The CAS, he asserted, has also specifically ruled that it is not unrealistic to expect a professional athlete, as part of the duty of 'utmost caution', to ensure that his friends and relatives from whom he accepts (or to whom he entrusts custody of his) food and drink are aware of his obligation as a professional sportsman not to ingest any prohibited substance.[13]

101 However, while the fault of a third party is attributed to an athlete for purposes of a plea of No Fault or Negligence, the case law suggests that only the Athlete's personal fault is considered when assessing a plea of No Significant Fault or Negligence. In particular, it is relevant to assess the Athlete's personal fault in failing to check and enquire into the actions and omissions of his entourage[14]

102 Mr Giovannelli went on to submit that should the Tribunal determine that it is satisfied as to how the Prohibited Substance came to be in the Respondent's system, and that accordingly ADR 10.5.2 may be applied, the following matters may be relevant to the Panel's determination of the extent of the Fault or Negligence borne by the Respondent:

102.1 the paramount duty and responsibility of the Respondent to ensure that no Prohibited Substance enters his body;

102.2 the extent of the Respondent's failure to discharge that duty by ensuring his associates were aware of his responsibility under the Code and the risks posed to him of contaminated drinks;

102.3 the extent to which the Respondent failed to check and enquire into the actions and omissions of his associates;

102.4 the extent to which the Respondent abandoned his responsibility by drinking from a shared bottle, or bottles, of beer.

[12] ADR Article 1.5.4 provides that 'the comments annotating various provisions of the Code shall be used to interpret these Rules'.
[13] In Rybka v UEFA, CAS 2012/A/2759, para 11.44
[14] Sharapova v ITF, CAS 2016/A/4643, para 85

103 In relation to 10.5.2 of the WADA Code which relates to No Significant Fault or Negligence, Mr Giovannelli submitted that if the Respondent's account is to be accepted, the panel must consider the extent to which the Respondent exercised any caution. Even if we accept that he was at home and in the company of close friends who were aware of his stance on drugs, he did not warn them of the responsibilities that he had not to commit an anti-doping rule violation. He did not ask his friends to assist him in meeting those responsibilities. He confirms himself that he made no change to his behaviour following the anti-doping education that he received from the Scottish Football Association. He also confirmed that he took no precaution whilst at his flat to ensure that he was drinking his own bottle. The Respondent also confirmed that he drank a considerable quantity of alcohol, which, even if he was attempting to exercise caution, would have affected his ability to discharge his responsibilities. Mr Giovannelli observed that the Respondent took no notice of his friends' trips back and forth to the toilet, he took no attention of his friends' change in mood and all of the above go towards his own fault or negligence, in the circumstances.

Discussion

104 In this matter, the Respondent admits the Charged ADRV, *viz* presence in his body of the Prohibited Substance as set out in paragraphs 3 to 18 (inclusive) above. The Applicant accepts, based on scientific opinion evidence from Professor Cowan, see paragraphs 19 & 61(e) above, that the consumption of the cocaine, of which the Prohibited Substance found in the Sample was a metabolite, took place Out-of-Competition and was not intended to enhance sport performance. The Respondent contends that the otherwise mandatory period of Ineligibility of two years should be eliminated on the basis that the Respondent bore No Fault or Negligence in the circumstances, pursuant to ADR 10.4, failing which, should be reduced, on the basis that the Respondent bore No Significant Fault or Negligence pursuant to ADR 10.5.2.

105 Each of "No Fault or Negligence" and "No Significant Fault or Negligence" are defined in the appendix to the ADR. The terms of the relevant provisions of ADR are set out at paragraphs 82 and 83 above.

106 In this case the admitted ADRV is the "presence" of the identified Prohibited Substance in the Respondent's Samples and therefore a contravention of ADR 2.1. The closing provisions of the definition of each of "No Fault or Negligence" and "No Significant Fault or Negligence" are therefore relevant. The Respondent is not a minor and accordingly it is a prerequisite of each of elimination of eligibility in terms of ADR 10.4 and reduction in the period of Ineligibility in terms of ADR 10.5.2 that the Respondent "establish how the Prohibited Substance entered his/her system". If he fails to so establish then the Respondent cannot rely on either of ADR 10.4 and 10.5.2 because he cannot meet the requisite definitions of either of the operative terms.

107 In considering whether the Respondent has discharged the burden of proof on the balance of probabilities, of establishing how the Prohibited Substance entered his system, the Tribunal can accept both circumstantial and witness evidence and, for that matter, such other evidence as the Respondent may offer together with any evidence provided by the Applicant.[15] However, the Tribunal can only consider, in reaching its decision as to whether the burden has been discharged, on the evidence provided by each of the parties in support of its respective cases.[16]

108 In the case of *WADA v International Federation of Associated Wrestling Styles, Maria Stadnyik and Azerbaijan Wrestling Federation*[17] the CAS Panel was required to decide an arbitration in which the claim of the Athlete was that her drink had been 'spiked' with a diuretic by a fellow competitor. At paragraph 97 the Panel records that "*how a prohibited substance entered an Athlete's system is a fundamental precondition to the defence of no significant fault or negligence.*" In support of that proposition the Arbitral Panel cited the decision in *WADA v Stanic and Swiss Olympic Association*[18] at paragraph 39. Whilst the *Stanic* decision was concerned with then Articles 10.5.1 and 10.5.2 and predated both the WADA Code 2009 and the WADA Code 2015 their recognition of it being a fundamental precondition to attempt to eliminate or reduce an otherwise mandatory period of

[15] CAS *ad hoc* Division (OG Rio) 16/025 WADA v Yadav and another
[16] *Yadav* paragraph 7.24
[17] (CAS 2007/A/1399)
[18] (CAS 2006/A/1130)

Ineligibility on the basis of establishing No Fault or Negligence or No Significant Fault or Negligence respectively continues to apply and has been reinforced by the inclusion of the referenced words in the respective definitions of the terms in the Appendix of the ADR derived from the relevant provisions of WADA Code 2015.

109 The standard by which the circumstances of the origin of the ingestion of the Prohibited Substance is required to be proved has been recently reiterated in *WADA v International Weight Lifting Federation (IWLF) and another*[19] at paragraph 51, citing in support of the decision in CAS 2008/A/1515 at para 116.

110 As the decision in *WADA v IWLF* makes clear at paragraph 52:

> "T*o establish the origin of the prohibited substance, CAS and other cases make clear that it is not sufficient for an athlete merely to protest their innocence and suggest that the substance must have entered his or her body inadvertently from some supplement, medicine or other product which the Athlete was taking at the relevant time. Rather, an athlete must produce concrete evidence to demonstrate that a particular supplement, medication or other product that the athlete took contained the substance in question.*"

111 In *International Wheelchair Basketball Federation v UK Anti-Doping and Simon Gibbs*[20] the Athlete sought to persuade three different arbitral bodies, each of which considered his case *de novo*, an NADP first instance tribunal, an NADP appeal tribunal and a CAS single arbitrator, that his drink had been "spiked" in a public house, when he was away from his drink, by a specified individual who had given evidence at the NADP first instance tribunal hearing to the effect that he had placed the relevant Prohibited Substance in the drink of the Athlete when he was away from his drink, and that he did so in a public place. In *Gibbs,* the CAS Sole Arbitrator expressed the Athlete's burden as follows:

> "*To permit an athlete to establish how a substance came to be present in his body by little more than a denial that he took it would undermine the*

[19] (CAS 2016/A/4377)
[20] (CAS 2010/A/2230)

objectives of the Code and Rules. Spiking and contamination – two prevalent explanations volunteered by athletes for such presence – do and can occur; but it is too easy to assert either; more must sensibly be required by way of proof, given the nature for the athlete's basic personal duty to ensure that no prohibited substances enter his body."

112 At paragraph 11.34 in *Gibbs* the Sole Arbitrator sets out the then *corpus* of authority on this issue. To that should be added CAS 99/A/234 and 235 where the Panel stated, "*the raising of an unverified hypothesis is not the same as clearly establishing the facts*". At CAS level the authorities are brought up to date by *IWLF* and in applying the principles at NADP first instance level, *UKAD v McMillan*, 21 April 2015 and at NADP Appeal Tribunal level *McMillan,* 24 July 2015.

113 As in *Gibbs* and *McMillan,* in this case, the Respondent, himself provides no direct and only limited circumstantial evidence concerning how the Prohibited Substance may have entered his system. The Respondent does provide contextual evidence of the events of the day on 10 March, including of the consumption of alcohol, the facilities in his flat, the general course of the evening, his own intoxication and the absence of any indication to him by any of those present that cocaine was being taken, in whatever form, during the evening. He reasons, that since that is the only occasion in the days preceding the provision of his Sample on 11 March when he is now aware that he was in the presence of cocaine that he must inadvertently have consumed some quantity of that cocaine which was being taken, it is said, by others in his flat on the evening of 10 March. Neither he, nor any other witness, whether orally or in writing, provides any direct evidence of any inadvertent consumption of cocaine by the Respondent, whether on the evening of 10 March in his flat, or at any other time and whether by drinking beer contaminated with cocaine or otherwise.

114 As regards the assertion that the Respondent had somehow come into the possession of a bottle of Budweiser beer which had become contaminated with cocaine and which he inadvertently drinks, no-one provides any direct evidence of that having occurred. For example, no evidence is adduced from any of the other four persons present that they had been anticipating consuming a bottle of

beer laced with cocaine for their own use and discovered instead that somehow, they had come into possession of a bottle of beer that was not laced with cocaine whilst the Respondent had come to be drinking their bottle of cocaine laced beer. There is no evidence, for example, of anyone experiencing an unexpected absence of narcotic effect on drinking a bottle of beer or, for that matter, any evidence from the Respondent of him experiencing an unexpected narcotic effect in like circumstances.

115 No evidence was adduced from any source regarding:

(i) the cost of the cocaine said to have been purchased and brought to the Respondent's flat on 10 March;

(ii) the quantity of cocaine brought to the flat on that evening;

(iii) when and where the cocaine was purchased and by whom;

(iv) how the cocaine was carried around on 10 March;

(v) whether and, if so, how and by whom was any of the cocaine consumed during the day of 10 March;

(vi) whether there had been discussion beforehand between any two or more of the friends regarding whether cocaine would be brought to the flat that evening and/or how the Respondent would be duped in that regard;

(vii) the Tribunal was not told how the cocaine was to be shared amongst those who were present and who were going to consume some, this includes what proportionate shares each would have, the volume/weight of each of the shares that each would have and how it was that the shares were to be physically distributed amongst those who were present and who were to participate in the consumption of the cocaine; if there had been evidence of the quantity of cocaine brought to the flat, how much was available for consumption by each individual and how many bottles were laced with cocaine, apart from the assertion by Mr Mogford that it occurred "frequently" then an analysis could have been instructed as to whether the inadvertent consumption of one bottle of laced beer by the Respondent was consistent

with the quantities of cocaine in his Samples and the calculated amount he had consumed;

(viii) how the written evidence of Mr Mogford and Mr Melnyk as regards the taking of the cocaine was to be reconciled, Mr Melnyk describes cocaine and bottles of beer being taken to the bathroom so that cocaine could be inserted into bottles without the Respondent knowing that such was the case, whereas Mr Mogford claims that the lacing of the bottles of beer was done "slyly" so that the Respondent was not aware of what was being done, with Mr Mogford making no mention of visits to the bathroom for this purpose;

(ix) there is no explanation, from those who it is said took the cocaine intentionally, why the cocaine was being laced into beer, rather than being 'snorted' in the usual way; Professor Cowan provided evidence that it is about half as effective from an absorption and resultant narcotic perspective to lace cocaine in beer as opposed to snorting same;

(x) there was no evidence as to what the concentration of cocaine was in the material with which it was 'cut', if at all, even if none of the four persons knew the exact percentage of cocaine in the material, evidence could have been provided about the relative narcotic effect of the material considered by each of the participants who was prepared to provide evidence to the Tribunal;

(xi) there was no evidence provided by the four participants regarding the mechanism by which any one or more of them could have become parted from a bottle of beer which was laced with cocaine, and how that bottle could have "inadvertently" come into the possession of the Respondent and whereby he had drunk the same. For example, there was no evidence of those participating in the taking of the cocaine putting down their 'laced' bottle, or bottles, at any time in a place where a 'laced' bottle, or bottles, could have been picked up by the Respondent, or any evidence from a person consuming a bottle which they believed to be laced with cocaine, only to discover it was not laced when there was no narcotic effect;

(xii) there was no evidence regarding how much cocaine in terms of value/volume/weight was incorporated in each bottle in which it was so incorporated. It would have been highly relevant to know, in terms of the likelihood of inadvertent possession and consumption by the Respondent whether the alleged incorporation was in only four bottles so that each participant had one bottle of laced beer to consume, or whether it involved a number of bottles being laced with cocaine for each of the participants;

(xiii) there was no evidence about how, when and where the conversations took place and agreements were reached between the participants regarding the consumption of cocaine, about how it would be taken and how it would be divided up;

(xiv) there was no evidence about how much cocaine there was remaining at the end of the evening after everyone had finished consuming some and who, if anyone, was left with a quantity of cocaine and what they did with it; and

(xv) there was no detailed evidence about what the effects of the consumption of the cocaine was on any of the individuals who are alleged to have consumed it on an intentional basis during the evening in question. It would have been relevant to know whether each of them had experienced a significant narcotic effect from the cocaine which he had consumed or whether any of them had unexpectedly had no or reduced narcotic effect.

116 This is not an exhaustive list of all of the adminicles of 'concrete' evidence that could have been provided to the Tribunal nor is it suggested that all of these details would have to be provided for the Respondent to discharge the burden of proving how the Prohibited Substance entered his system.

117 Further and in any event, there is the issue of the weight to be given to the written evidence of Mr Mogford and Mr Melnyk. There was no opportunity to test the evidence given in written statements by cross-examination. This is particularly concerning in circumstances where the Respondent himself has little to contribute in terms of how it was that the cocaine entered his system. The absence of Mr Mogford or Mr Melnyk in person, or even by telephone, no explanation being offered as to why they were not available by telephone,

significantly reduces the weight to be afforded to their relatively brief written evidence. Their absence, by whatever means, from the hearing meant that none of the detailed questions on the alleged circumstances which would have been asked had they been present could be asked.

118 Circumstances in which there is an absence of concrete evidence as to how a Prohibited Substance entered the system of an Athlete and how that should be approached by a Tribunal are discussed at paragraphs 48 to 60 of the decision in *IWLF*. It is appreciated that the decision in *IWLF* is concerned with the matter of "intention" but the difficulty which a tribunal will have in accepting a contention as to how a Prohibited Substance entered the system of an athlete where there is limited 'concrete' evidence, as is the case in the present case, has parallels with the difficulty which a tribunal will have in making a finding in favour of an Athlete where the issue arises in the context of whether there was Intention.

119 It was suggested in submission that the present case has similarities to the circumstances in the cases of *Gibbs* and *McMillan* but in both of those cases the person who was alleged to have contaminated the drink, said to have been taken by the Athlete, was identified by the Athlete and gave oral evidence before the first instance tribunal. In both cases the evidence of that person was held, for a variety of reasons, not to be reliable and credible and since the Athlete in each case had no direct evidence, beyond speculation and some circumstantial evidence to proffer, the Athlete, in each case, failed to establish how the Prohibited Substance entered his system. In this case the position is somewhat different. It is not specifically asserted that either Mr Melnyk or Mr Mogford contaminated a bottle of beer which was then drunk by the Respondent. Both of them essentially offered the same speculation as the Respondent i.e. drink was being consumed, some drink was being consumed laced with cocaine, the bottles were the same, due to a combination of intoxication and inadvertence the Respondent came into possession of a contaminated bottle and thereby ingested cocaine inadvertently. There is no significant reason to regard the evidence of the Respondent, Mr Melnyk or Mr Mogford so far as concerns the evening of 10 March, as not being credible. The question for the Tribunal is whether there is reliable evidence to discharge the burden of proving on the balance of

probabilities that the cocaine entered the system of the Respondent by the mechanism proposed.

120 The Tribunal finds that the Respondent has failed to adduce evidence of sufficient weight and reliability to satisfy the Tribunal, on the balance of probabilities, that the cocaine entered the system of the Respondent during the evening of 10 March 2017 through the mechanism of the Respondent inadvertently consuming a bottle or bottles of beer which had been contaminated, by one or more of four third parties, with cocaine. It follows that since no other mechanism of ingestion of the cocaine is proffered in explanation by the Respondent that the Respondent must necessarily fail to establish that he had No Fault or Negligence and No Significant Fault or Negligence for the admitted ADRV.

121 The Tribunal also considered whether, if the Respondent had established that the cocaine entered his system through the inadvertent ingestion of beer laced with cocaine during the evening of 10 March then it would have held that the Respondent had, in any event, failed to establish either that he bore No Fault or Negligence or that he bore No Significant Fault or Negligence having regard to the circumstances in which the ADRV occurred.

122 The Respondent had attended an anti-doping education session organised by the Scottish FA which had included discussion of the responsibility of Athletes such as the Respondent, for ensuring that they applied all due care to prevent themselves inadvertently ingesting material containing a Prohibited Substance. The Respondent candidly admitted that he had taken on nothing from the session that he had attended and could not recall any of what was said to him. This included the guidance given to the players present to explain to their 'associates' the care that required to be taken with food and drink which an Athlete might consume and to encourage those persons to be part of the circle of persons who took responsibility for compliance by the Respondent with the ADR. The Respondent had said nothing to any of the four individuals about what it was that they should and should not do so as to assist the Respondent in ensuring that no Prohibited Substance entered his system. This was notwithstanding that he described each of the four persons visiting that evening as being close friends with, in one case, being akin to family. If any such explanation or guidance had been given to the

four persons present then, with even the simplest measures, they could have ensured that there was no prospect of the Respondent coming into contact with beer contaminated with cocaine. They could, as they ought to have done, desisted from having or taking a Prohibited Substance *viz* cocaine in the presence of the Respondent, if for some reason that was considered beyond the extent of their concern for their friend, they could have snorted the cocaine in the bathroom, they could have laced the cocaine into beer in the bathroom and drunk all of it in the bathroom or they could have taken the bottles of the beer contaminated with the cocaine outside and consumed it outside. There are numerous means by which any risk to the Respondent could have been excluded.

123 The Respondent was significantly at fault in failing to warn his four friends regarding the risk to the Respondent of those around him consuming a Prohibited Substance and in him not taking steps to satisfy himself that any of his intoxicated friends was not also consuming a Prohibited Substance in circumstances which placed him at risk of inadvertent consumption of such a substance.

124 Further, and in any event, the level of intoxication of the Respondent during the evening in question would clearly have increased the risk that by some misadventure the Respondent would come into contact with consumable material which was not his or which was not prepared under his supervision. With 48 bottles of Budweiser, in identical bottles, being in and around the Respondent's living room, there was a risk that the Respondent might come into contact with a bottle of beer that was not his. Whilst for the most part in the ordinary course of events, persons engaged in a social occasion do not pick up and consume a drink that is not theirs, that does not mean that there was not a significant risk that it could occur in the circumstances of identical multiple bottles and significant levels of intoxication. By allowing himself to become intoxicated to the level which he did, the Respondent placed himself at considerable risk of being unable to make rational and sensible judgements and take appropriate levels of care consistent with his personal obligation not to allow Prohibited Substances to enter his system.

125 Having regard to the definition of "Fault" in the appendix to the ADR and the commentary to Article 10.4 in the Code, the Tribunal considers that the Athlete has failed, in the circumstances, to discharge the burden on him of establishing on the balance of probabilities No Fault or Negligence and No Significant Fault or Negligence on his part. Further, in fact, the Tribunal finds that the Respondent was, if he did ingest the cocaine by inadvertently picking up a contaminated bottle or bottles of beer on the evening of 10 March, substantially at fault for consuming the cocaine contained in such bottle or bottles.

126 In the event that the Tribunal had been required to consider what the reduced period of Ineligibility of the Respondent should be on the application of ADR 10.5.2, the Tribunal would have found that the level of fault was at the highest level below "Significant" for the reasons set out above and would have restricted the period of Ineligibility by no more than 3 months so that the period would have been 21 months.

Disposal

127 The provisional suspension of the Respondent was effective from 31 March 2017. Accordingly, his period of Ineligibility extends from 31 March 2017 until midnight on 30 March 2019 (inclusive).

Appeal

128 In accordance with the Rules, the Respondent, UKAD, the Scottish FA, WADA or FIFA may file a Notice of Appeal against this decision with the Secretariat of the National Anti-Doping Panel within 21 days of receipt of this decision.

Rod McKenzie (Arbitrator)
03 October 2017

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