SPORT RESOLUTIONS (UK)

SPECIALIST INDEPENDENT DISPUTE SERVICE

SR/NADP/120/2018

THE MATTER OF PROCEEDINGS BROUGHT UNDER THE ANTI-DOPING RULES OF THE BRITISH BOXING BOARD OF CONTROL

Before:

Mr Jeremy Summers (Sole Arbitrator)

Between:

UK ANTI-DOPING LIMITED ('UKAD') *Anti-doping Organisation*

and

JOE MULLENDER *Respondent*

DECISION OF THE ANTI-DOPING TRIBUNAL

Introduction

1. This is the decision of an Arbitral Tribunal (the 'Tribunal') appointed under Article 5.1 of the 2015 Procedural Rules of the National Anti-Doping Panel (the 'Procedural Rules') and Article 8.1 of the UK Anti-Doping Rules dated 1 January 2015 (the 'ADR') to determine an Anti-Doping Rule Violation ('ADRV') alleged against Mr Joe Mullender ('the Athlete').

2. The alleged ADRV was a violation of ADR Article 2.1 (Presence of a Prohibited Substance in an Athlete's Sample).

3. The Athlete was charged by letter issued by UKAD dated 12 January 2018. The Tribunal was appointed by the President of the National Anti-Doping Panel ('the NADP') by letter dated 28 June 2018.

4. At a hearing on 1 August 2018 held at the offices of Sport Resolutions, the Athlete was in attendance and represented by Mr Stephen Heath, Solicitor of IPS Law LLP. UKAD was represented by Mr Richard Bush, Solicitor of Bird & Bird LLP. The Tribunal records its gratitude to both advocates for their assistance in this matter.

5. Additionally, present at the hearing were:

NADP:

- Alex Treacher – secretariat.
- Anna Thomas – observer.

UKAD:

- Nick Wojek - witness.
- Ben Davies – legal officer.
- Adam Sutcliffe - logistics & allocations officer – observer.
- Sam Pool - medical programmes officer – observer.

The Athlete:

- Andy Ayling - representative and manager
- Emily Pybus - trainee solicitor.
- Kelly Thompson – witness.
- Mike Cooper - witness.

6. This is the reasoned decision of the Tribunal.

Procedural History

7. A directions order was issued by the Tribunal on 4 July 2018 following a telephone conference call that day. Owing to the need to conduct the hearing with some urgency, those directions were added to by subsequent emails issued by the Tribunal from time to time in advance of the hearing.

8. All directions were fully complied with, and the Tribunal acknowledges, with gratitude, the efforts of all parties to facilitate an expedited hearing in this matter.

Jurisdiction

9. Jurisdiction was not challenged but, for completeness, the Athlete is a Middleweight boxer, who at all material times was licensed by the British Boxing Board of Control ('BBBoC').

10. The BBBoC is the National Governing Body ('NGB') for professional boxing in the United Kingdom and has adopted the ADR as its own anti-doping

rules. The ADR apply to all members of the BBBoC who, by virtue of that membership, agree to be bound by and to comply with them.

11. ADR Article 1.2.1 provides that:

1.2.1 These Rules shall apply to:

(a) all Athletes and Athlete Support Personnel who are members of the NGB and/or of members of affiliate organisations or licensees of the NGB (including any clubs, teams, associations or leagues);

(b) all Athletes and Athlete Support Personnel participating in such capacity in Events, Competitions and other activities organised, convened, authorised or recognised by the NGB or any of its member or affiliate organisations or licensees (including any clubs, teams, associations or leagues), wherever held;

12. Pursuant to ADR Article 1.2.1(a) and ADR Article 1.2.1(b), the Athlete was subject to, and bound to comply with, the ADR at all material times.

13. UKAD submitted a request for arbitration to the NADP by letter dated 18 June 2018.

The Facts

14. On 9 December 2017, a Doping Control Officer (‘DCO’) collected a urine sample ('Sample') from the Athlete In-Competition after a fight for the International Boxing Federation ('IBF') European Middleweight title held that evening.

15. The Sample was split into two separate bottles which were given reference numbers A1140777 (the ‘A Sample’) and B1140777 (the ‘B Sample’). Both Samples were sealed at 19:49.

16. The Samples were transported to the World Anti-Doping Agency ('WADA') accredited laboratory, at the Drug Control Centre, King's College, London (the 'Laboratory'). The Laboratory analysed the A Sample in accordance with the procedures set out in WADA's International Standards for Laboratories. Analysis of the A Sample returned an Adverse Analytical Finding ('AAF') for 1,3-dimethylbutylamine.

17. 1,3-dimethylbutylamine is a stimulant and was deemed prohibited at S6 of the WADA 2017 Prohibited List. It was specifically added to the Prohibited List in 2018. It is a Specified Substance that is prohibited In-Competition only.

18. The Athlete did not hold a Therapeutic Use Exemption ('TUE').

The Charge

19. The Athlete was accordingly charged with committing an ADRV in that a Prohibited Substance, namely 1,3-dimethylbutylamine, was present in a Sample provided on 9 December 2017, in violation of ADR Article 2.1.

20. ADR Article 2.1 provides as follows:

> 2.1 Presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's sample unless the Athlete establishes that the presence is consistent with a TUE granted in accordance with Article 4.

21. The Athlete admitted the charge and thus the ADRV.

Further Background

22. The Athlete is a 31-year-old boxer who turned professional in 2012. Since that time he has fought professionally on 13 occasions, each fight having

been held close to his Essex home. He won the BBBoC English Middleweight title on 6 February 2017 and the vacant IBF European Middleweight title on 9 December 2017. His purse for this last fight was some £12,000. Prior to that fight, the purses that he had won had been in the region of £4,000.

23. Following receipt of the Notice of Charge dated 12 January 2018, the Athlete and his manager established that the Prohibited Substance had come from a contaminated supplement "Intra MD Ultra peri workout formula", manufactured by a US company trading as Prime Nutrition (the 'Product').

24. It was common ground that 1,3-dimethylbutylamine, or 'DMBA' as it is commonly known, was not listed on the label of the Product.

25. The Athlete provided the tub from which he had ingested the Product to UKAD. UKAD then arranged for its secure transfer it to the Laboratory for analysis.

26. That analysis confirmed the presence of 1,3-dimethylbutylamine. A report prepared for UKAD was in evidence from Dr Christopher Walker, dated 30 April 2018. This indicated that the ingestion of the Product was a "plausible explanation" for the AAF and that the amount of 1,3-dimethylbutylamine "was unlikely to have had a significant pharmaceutical or physiological effect".

27. Prime Nutrition has since ceased trading and therefore, despite efforts by both the Athlete and UKAD, it was not possible to test a further sample from an unopened tub of the Product that had been manufactured in the same batch.

28. It was common ground that, in 2015, Prime Nutrition had been subject to issues in the USA in relation to a further and separate product "PWO/STIM", which had contained DMBA within its ingredients.

29. UKAD made clear that it was not accusing the Athlete of cheating or having acted intentionally

30. On behalf of the Athlete it was accepted that it could not be said that he had acted with 'No Fault or Negligence'[1]. However it was asserted that he had acted with 'No Significant Fault or Negligence'[2].

31. UKAD's position was that it considered that the Athlete had been significantly at fault.

Relevant Regulations

32. It was accepted that this was the Athlete's first ADRV. As such ADR 10.2 applied:

> 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 Athlete'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:

[1] ADR 10.4
[2] ADR 10.5.1

(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.

(b) The Anti-Doping Rule Violation involves a Specified Substance and UKAD can establish that the Anti-Doping Rule Violation was 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 Athletes or other Persons who cheat. The term, therefore, requires that the Athlete or other Person engaged in conduct which he or she knew constituted an Anti-Doping Rule Violation or knew that there was a significant risk that the conduct might constitute or result in an Anti-Doping Rule Violation and manifestly disregarded that risk. 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 Athlete 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 Athlete can establish that the Prohibited Substance was Used Out-of-Competition in a context unrelated to sport performance.

33. ADR Article 10.5.1 explains how the period of Ineligibility may be reduced if the ADRV involves a Specified Substance or a Contaminated Product. It provides:

10.5.1 Reduction of Sanctions for Specified Substances or Contaminated Products or ADRVs under Article 2.1, 2.2 or 2.6

(a) Specified Substances

Where the Anti-Doping Rule Violation involves a Specified Substance, and the Athlete or other Person can establish No Significant Fault or Negligence, then the period of Ineligibility shall be, at a minimum, two years of Ineligibility, depending on the Athlete's or other Person's degree of Fault.

(b) Contaminated Products

In cases where the Athlete or other Person can establish No Significant Fault or Negligence and that the detected Prohibited Substance came from a Contaminated Product, then the period of Ineligibility shall be, at a minimum, a reprimand and no period of Ineligibility, and at a maximum, two years Ineligibility, depending on the Athlete's or other Person's degree of Fault.

34. Insofar as Fault is concerned, the relevant definitions are set out in the Appendix to the ADR:

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.

No Fault or Negligence:

The Athlete's or other Person's establishing that he did not know or suspect, and could not reasonably have known or suspected, even with the exercise of utmost caution, that he 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 Athlete must also establish how the Prohibited Substance entered his/ her system.

No Significant Fault or Negligence:

The Athlete's or other Person's establishing that his 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 Athlete must also establish how the Prohibited Substance entered his system.

35. Contaminated Product is defined as follows:

Contaminated Product:

A product that contains a Prohibited Substance that is not disclosed on the product

label or in information available in a reasonable internet search.

36. It is also necessary to note the provisions of ADR 1.31.(d)

It is the personal responsibility of each Athlete:

[ ]

(d) to carry out research regarding any products or substances which he/she intends to ingest or Use (prior to such ingestion or Use) to ensure compliance with these Rules; such research shall, at a minimum, include a reasonable internet search of (1) the name of the product or substance, (2) the ingredients/substances listed on the product or substance label, and (3) other related information revealed through research of points (1) and (2);

Evidence

UKAD

37. UKAD called evidence from Mr Nick Wojek, Head of Science and Medicine at UKAD. Mr Wojek confirmed the content of his written statement dated 5 July 2018 and gave further oral testimony.

38. In response to questions he confirmed that DMBA had been deemed as included on the 2017 WADA Prohibited List ('the List') under section S6 b: *Specified Stimulants* by virtue of it being similar in composition to *methylhexanamine* (which was included on the List) and by reference to the final sentence in that section *"and other substances with a similar chemical structure or similar effect".*

39. DMBA was then specifically added to S6 of the List in 2018. Mr Wojek candidly expressed his belief that it might have been helpful if WADA had added it to the list before that time.

40. He agreed that there was no direct obligation upon an athlete to research a manufacturer as distinct from a product and its ingredients (which were required to be checked). [3]

[3] ADR 1.3.1 (d)

41. As the relevant NGB, the BBBoC, had the primary responsibility for educating boxers as to the dangers of ADRVs, and he was aware that UKAD had sent NGB's information packs to assist in that regard.

42. He was shown the BBBoC Information Pack 2012[4] (the 'Information Pack') that had been provided to the Athlete on obtaining his professional license but had not previously seen the document in the context of this case. He broadly agreed that this document did not appear to contain all the information that he understood the BBBoC would have received from UKAD.

43. Mr Wojek was however of the view that the Product (as ingested by the Athlete) could be viewed as an isotonic drink. In this respect he noted that there was a warning in the Information Pack as to the dangers of contaminated isotonic drinks.[5]

44. In his view, because of the risk of supplements being contaminated, athletes should get any supplements that they proposed to use batch tested.

45. A written statement was also submitted from Ms Charlotte Landy, a UKAD legal officer. This exhibited various internet searches that she had conducted in July 2018. Ms Landy was not called to give evidence, with the agreement of Mr Heath, and Mr Bush advised that he was not seeking to place weight on her evidence.[6]

Athlete

46. The Tribunal considered written statements and exhibits from the Athlete, Mr Michael Cooper and Ms Kelly Thompson. In addition, the Tribunal had

[4] Exhibit STH1: Tab 22 Bundle
[5] Exhibit STH1: page 7
[6] The Tribunal noted a concern that the exhibits produced risked being viewed as perhaps not adhering to the desired standard of objectivity required of a prosecutor.

before it documents marked "STH1-8" produced by Mr Heath on behalf of the Athlete.

47. The Athlete gave oral evidence. He confirmed his written statement and explained that he had taken the Product on the advice of his nutritionist, Michael Cooper. Mr Cooper had advised that this was taken to ensure that the Athlete was properly rehydrated, and in particular to get electrolytes and carbohydrates into his system after the pre-fight weigh in on 9 December 2017.

48. He trusted Mr Cooper who he had known since he was a boy and who he knew assisted other athletes. His belief was that Mr Cooper checked all details before advising him, or any athlete, to ingest any product.

49. He was not able to do the necessary checks himself, and he spoke candidly about suffering from dyslexia. Because of that condition, in addition to taking Mr Cooper's assurance, he also had sat with his partner (a healthcare assistant) who checked the ingredients set out on the label of the Product and confirmed that none were on the List.

50. Whilst he was not aware of UKAD and had not previously been tested, he confirmed that he was aware that, if an athlete took a Prohibited Substance, they risked being sanctioned and banned from competing. He however relied on his advisors, Mr Cooper and his partner to ensure that he was not taking anything that was prohibited. He nevertheless confirmed that he knew that the obligation to remain clean was ultimately his.

51. He had retained the services of his manager (Mr Ailing, Queensbury Promotions) within 6 months of his receiving the Notice of Charge (dated 12 January 2018) and they had not previously discussed doping matters.

52. He was a clean-living person who did not drink. He did not eat meat for fear of the contaminants it might contain. He eats the best he can within his

means and relies on Mr Cooper to advise him in this regard. His partner is also passionate about nutrition and closely monitors what he eats and drinks.

53. He had not been aware that UKAD had recommended that supplements should be independently tested.

54. The Athlete explained that he has two young children, one of whom is unfortunately ill. He is reliant on his limited boxing income to provide for them and meet his other financial commitments.

55. Oral evidence was then given by Mr Cooper who confirmed the content of his written statement. That detailed that he was a personal trainer and nutritional advisor with the following qualifications and experience:

- BTEC National Diploma — Sports science (including nutritional modules).
- Certificate from Premier Training, in nutrition for health and fitness.
- Diploma in Sports Therapy.
- Diploma in Personal Training (including health, nutrition and weight loss).
- 15 years' experience working as a Personal Trainer and nutritional advisor for health and fitness. In that time, [he had] worked with athletes to help them physically prepare for competition through strength and conditioning exercises.

56. Mr Cooper confirmed that he had advised the Athlete to take the Product, which contained electrolytes, carbohydrates and amino acids. Whilst he accepted that it could be viewed as an isotonic drink he had recommended it because it contained no artificial sweeteners or colouring.

57. He was aware of the danger of stimulants but, as far as he had known, the Product did not contain any. DMBA was not listed in its ingredients. He had recommended the Product to other clients and had taken it himself. He had checked every ingredient listed for the Product against the List. He had not seen anything negative about the Product or Prime Nutrition. He thought that he would have most recently searched against the Product in late 2017.

58. He did not take stimulants and would not advise anyone to do so. He had some knowledge about anti-doping and knew that there was a Prohibited List which he regularly checked against.

59. He had initially met the Athlete whilst they were both goalkeepers at the Tottenham Hotspur FC's Youth Academy. He had been impressed by the Athlete's work rate and attitude. They had met subsequently at a gym and in time he had been asked to work for the Athlete.

60. He had seen the Information Pack but had not read it. He was not currently working with other boxers.

61. The Athlete's partner, Ms Thompson, then gave evidence and confirmed the content of her written statement. She explained that she looks after the Athlete in terms of what he eats as he does not fully understand. She does the shopping and cooking and had done a basic nutrition course as part of her job. The Athlete knows his diet is important and he trusts her.

62. She confirmed that she had checked the Product's ingredients against the List (as published in 2017). She was referred to a copy of that document, which she had written on and pointed to her annotation around "Phenethylamine" in section S6. She had seen something similar in the Product's ingredients and so had double checked to make sure the Product did not contain this and was satisfied that it did not. There was no reference to DMBA on the List in 2017.

63. She had seen the Information Pack before. She was not aware of anything in it that the Athlete had not followed.

64. At the time she had just searched the company, the Product and the ingredients. When she had been made aware of the issue she had searched Prime Nutrition and DMBA, because she then knew what to look for.

65. She confirmed that the Athlete suffered from dyslexia. Whilst he could read short texts and documents he struggled to take in longer material and she would quite often break things down for him and help him understand.

Submissions

66. The Tribunal received detailed closing submissions, which are summarised below without discourtesy to either advocate.

UKAD

67. Mr Bush opened his closing address by stating that UKAD did not consider that a period of Ineligibility of seven and a half months (being time served as urged by the Athlete) would be an appropriate sanction. In UKAD's submission the Athlete should face a period of Ineligibility of 2 years subject to such reduction the Tribunal deemed appropriate.

68. In this regard he took the Tribunal to paragraph 27 of UKAD's written submission:

> The extent of Mr Mullender's fault for the presence of DMBA in his system is assessed against the strict personal duty imposed on him by the UK ADR to 'ensure that no Prohibited Substance enters his/her body'. That duty is only discharged 'with the exercise of utmost caution', and an athlete must make 'every conceivable effort to avoid taking a prohibited substance' and leave 'no reasonable stone unturned'.

69. If the Athlete had not taken every conceivable step but had only reasonable steps he would not have discharged this obligation. If that was the position, and assuming that the Tribunal was satisfied as to the route by which the Product had been ingested, the Tribunal could still then proceed to consider whether the Athlete had established that he had acted without Significant Fault or Negligence.

70. Mr Bush noted the detailed analysis in *UKAD v Warburton & Williams*[7] *('Warburton & Williams)* but additionally referred to a number of previous cases. In doing so he accepted that tribunals had been afforded more flexibility under the current WADA Code adopted in 2015.

71. Mr Bush nevertheless wished to refer the Tribunal to a number of authorities that pre-dated the 2015 Code that, in his submission, established important principles. In this respect he first referred the Tribunal to paragraph 2 of *Knauss v FIS*[8]:

> The requirements to be met by the qualifying element "no significant fault or negligence" must not be set excessively high. The higher the threshold is set, the less opportunity remains for differentiating meaningfully and fairly within the (rather wide) range of the period of ineligibility sanctioning the fault or negligence. But the low end of the threshold must also not be set too low; for otherwise the period of ineligibility of two years laid down for an anti-doping rule violation would form the exception rather than the general rule."

72. In Mr Bush's submission, the period of ineligibility should not be set too high nor too low, and in this regard he also referred to paragraph 1 of *Despres v CCES*[9]:

> The athlete who did not contact the manufacturer of a nutritional supplement directly to seek a guarantee before ingesting it, has not taken a clear and obvious precaution. Simply believing such guarantees to be generic fails to explain why

[7] [2015] SR/00001/120227
[8] CAS/2005/A/847
[9] CAS/2008/A/1489 and 1510

he/she did not take this additional, prescribed step. As a consequence, the athlete has not exercised a standard of care meriting a "no significant fault or negligence" reduction to the mandated two year period of ineligibility. The advice of a team nutritionist also constitutes an inadequate claim for establishing "no significant fault or negligence"

73. He noted that in this case the Athlete had similarly relied on his nutritionist and in this respect submitted that paragraph 5 of *IAAF v Athletics Federation of India & Others*[10] was relevant:

> Even in the case where athletes may not be deemed informed athletes due to a lack of anti-doping education, they must be aware of the basic risks of contamination of nutritional supplements. If athletes have been taking a cocktail of supplements despite the numerous warnings in place about taking supplements, have failed to contact the manufacturers directly or arrange for the supplements to be tested before using them, did not seek advice from a qualified doctor or nutritionist, have failed to conduct a basic review of the packaging of the supplements and any basic Internet research about the supplement, they cannot be deemed to have taken any of the reasonable steps expected of them and cannot establish on the facts that they bear no significant fault or negligence.

74. Mr Bush noted that *Warburton & Williams* sets out what might be thought of a "menu" of factors to be considered in determining the applicability of the No Significant Fault or Negligence provision, but also referred to *WADA v Hardy & USADA*[11], which he submitted illustrated the steps that would have to be taken to reach that threshold.

75. In his view the question required an assessment of both the Athlete's objective and subjective fault and in this regard referred to the analysis as set out in *Cilic v ITF*[12].

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[10] CAS/2012/A/2763
[11] CAS/2009/A/1870
[12] CAS/2013/A/3327

76. He referred to paragraphs 101 and 105 of *Warburton & Williams* (supra), which set out the objective reasons why fault was found. In summary these were:

- the use of supplements and the risk of contamination being a well-known risk;

- neither athlete made any attempt to contact their NGB or other relevant bodies for advice;

- no medical advice was sought;

- insufficient research was undertaken; and

- no batch testing had been requested.

77. To the extent that the Athlete sought to rely on the checks that had been undertaken on his behalf, Mr Bush sought to contrast this with the research that had been undertaken by Warburton as set out at paragraphs 45 and 46 of the decision of *Warburton & Williams*.

78. Mr Bush stressed that the Athlete could have contacted UKAD but had not done so. Further, he could have had the Product batch tested, and again had not done so.

79. Mr Bush however accepted that the mitigating factors, which had enabled the tribunal in *Warburton & Williams* to find that the athletes had not acted with Significant Fault or Negligence, appeared to be present in this case.

80. UKAD rejected the argument that the Athlete had not had sufficient information/education from the BBBoC. He again noted that page 7 of the Information Pack (supra) clearly referred to isotonic drinks, and that both

Mr Wojek and Mr Cooper had agreed in their respective evidence that the Product could be viewed as isotonic.

81. UKAD maintained that the Athlete had undertaken insufficient research. In its view *Warburton & Williams* could be distinguished on the facts and therefore different sanctions should apply. UKAD asked for 2 years Ineligibility subject to any reduction the Tribunal considered appropriate.

82. UKAD did not take any point as to the Athlete having not disclosed the use of the Product to the DCO after the fight when he was asked to provide a Sample.

Athlete

83. On behalf of the Athlete Mr Heath submitted that UKAD was attempting to arrive at a position where, if an athlete does not independently test the supplements, they should expect a period of ineligibility of two years. In his view that position was not what the ADR or the relevant case law provided for.

84. He referred in particular to *Warburton & Williams* (supra), where the athletes had argued not just that *No Significant Fault or Negligence* was present, but that there was *No Fault or Negligence* present at all[13].

85. In that case, Warburton was found to have done "some research", and Williams "a deal of research". The athletes were sanctioned with periods of Ineligibility of 6 and 4 months respectively, significantly below the period now sought by UKAD in respect of the Athlete.

86. Turning to the route of ingestion, Mr Heath submitted that the Tribunal could find that this had been through the Athlete having taken the Product.

[13] Paragraphs 100 and 104 of decision (supra)

He noted that UKAD had a positive duty to advance a counter explanation if it wished to do so. UKAD had not argued against the explanation advanced by the Athlete, and its own evidence, from Dr Walker, appeared to corroborate the Athlete's position.

87. Mr Heath accepted that research about the Product undertaken subsequently in consequence of the charge had revealed an investigation in the USA that suggested that Prime Nutrition had marketed a separate product that had contained DMBA. He therefore questioned why UKAD had not issued a warning about that product. He suspected UKAD had not done so for fear of litigation being brought against the agency by Prime Nutrition.

88. The advice given by UKAD is simply that it cannot guarantee a product is not contaminated, and that an athlete should therefore make individual batch checks. The Athlete had however only looked to the BBBoC for guidance. The BBBoC has its own disciplinary proceedings and it provides licenses to all professional boxers who all rely on the BBBoC. In doping matters, whilst cases are prosecuted by UKAD, Mr Wojek had accepted that, as the NGB, BBBoC was responsible for educating the Athlete on the anti-doping framework. In his view, the BBBoC had failed in its duty in that regard.

89. With reference to the warning about isotonic drinks in the Information Pack (page 7), he contended that the Product had not been marketed as an isotonic drink, but as a supplement. The relevant page (page 7) only stated that boxers should seek guidance in relation to isotonic drinks, and there was no reference anywhere in the Information Pack about supplements.

90. The Athlete had sought guidance from Mr Cooper whom he trusts and considers to be reliable. Mr Cooper had undertaken internet searches based on the name of the Product and its ingredients. Ms Thompson had similarly researched the Product and its ingredients. They had accordingly (on behalf of the Athlete) done everything that could reasonably be expected of a normal person, and no red flags had been revealed. The Athlete was not

educated to a level that would allow him to affect these searches himself, and Mr Heath further submitted that his dyslexia was relevant in this regard.

91. Once the contamination had been discovered following the Athlete having been charged with the ADRV, further targeted internet searches had been made, and only these had uncovered the adverse issues relating to Prime Nutrition.

92. Mr Heath also urged that the Tribunal should have regard to proportionality in the sanction to be imposed. The Athlete was a local boxer, with a limited source of income from which he pays a nutritional advisor. He had paid for the best he could afford. He is 32 and coming to the end of his career, which bar his last fight, had only involved very modest purses of around £4,000. He had only relatively recently retained Queensbury Promotions to represent him.

93. Mr Heath further highlighted the advice that the BBBoC is now giving, which he believed had been in response to this case. In his view that was consistent with similar matters faced by the BBBoC. For example, following a related negligence claim it had changed its rules detailing the steps to be taken to ensure that injured fighters are taken to hospital. The Information Pack now goes into much more detail on stimulants and potential doping risks. It had not done so before this case.

94. In Mr Heath's view, a 24-month suspension should not simply follow because an athlete had not undertaken a batch test.

95. The Athlete was, however, not arguing No Fault or Negligence and accepted that a period of Ineligibility would be ordered. He urged an approach as in *Cilic* (supra). This had found that the degree of fault present in a particular ADRV could be assessed as being light, normal or significant, with graduated sanctions then following according to that assessment.

96. In Mr Heath's view, significant fault lay with Prime Nutrition and on the BBBoC for failing to advise athletes under its jurisdiction as to what steps to take to avoid ADRVs. In those circumstances, the Athlete should be viewed as having been at light fault.

97. He again noted the sanctions imposed in *Warburton & Williams* and contrasted the resources available to the athletes in that matter as compared to the Athlete. In his submission a period of Ineligibility reflecting the time served (since the Notice of Charge and Provisional Suspension) would be appropriate.

Decision on the ADRV

98. The Tribunal gave very careful consideration to the all evidence and submissions and reminded itself of the relevant burdens and standard of proof that applied.

99. Given the admission by the Athlete of the ADRV, and having considered the relevant evidence, the Tribunal made a formal finding that the Athlete had committed the ADRV as alleged in the Notice of Charge.

100. The Tribunal noted that UKAD was not arguing that the Athlete's conduct had been Intentional and that the Athlete was not advancing a case that he had acted with No Fault or Negligence.

<u>Route of Ingestion</u>

101. The Tribunal was accordingly required to determine whether any reduction in the period of Ineligibility could be ordered by virtue of the Tribunal being able to find that the Athlete had acted with No Significant Fault or Negligence.

102. In order to be able to make such a finding, pursuant to ADR 10.5.1 (b), it was necessary for the Athlete to satisfy the Tribunal, on the balance of probabilities, that the detected Prohibited Substance came from a Contaminated Product, in this case the Product.

103. UKAD did not challenge the Athlete's case that the AAF, and resultant ADRV, had arisen in consequence of his having taken the Product on 9 December 2017 within the In-Competition window. The Athlete had submitted his tub of the Product for analysis by UKAD, and that analysis had established the presence of the Prohibited Substance within the Product

104. The Tribunal reminded itself that, although the burden of proof rested with the Athlete, UKAD was still required to advance an alternative explanation as to the route of ingestion if it wished to challenge the Athlete's case in this regard, and no alternative had been advanced.

105. In those circumstances, the Tribunal was satisfied, to the standard required, that the Prohibited Substance had entered the Athlete's system through his having ingested the Product, and that the Product had been contaminated. In making that finding the Tribunal:

i. Accepted the Athlete's position that he had not knowingly taken a Prohibited Substance;

ii. Placed reliance on UKAD's own evidence confirming that the Product had been contaminated by the Prohibited Substance; and

iii. Further noted that UKAD's evidence found that the ingestion of the Product was a plausible explanation for the AAF (paragraph 26 above).

No Significant Fault or Negligence

106. Whilst it was not argued that Athlete bore No Fault or Negligence, the Tribunal considered that an analysis of the Athlete's Fault would be of assistance. Such an approach was adopted in *Warburton & Williams*, although in that case No Fault or Negligence had been advanced as a positive case.

107. The Tribunal made the following findings in relation to the Athlete's Fault:

i. The Athlete had taken a supplement and, on his own evidence, knew that there were risks in so doing;

ii. The Athlete did not contact UKAD or BBBoC to seek advice about the supplement he was proposing to take. Whilst it is speculative to suggest what would have happened had he done so, given the previous issues with Prime Nutrition (in relation to PWO/STIM) it is at least plausible that he would have been warned about the increased risk surrounding the company;

iii. He did not seek medical advice. Mr Cooper is a nutritionist and personal trainer, but is not medically qualified;

iv. He did not check the Informed-Sport website; and

v. He did not seek to have the Product batch tested.

108. Whilst the Athlete did cause some research of the Product to be undertaken on his behalf, such steps as were taken would not have been sufficient to have enabled the Tribunal to have concluded that the Athlete was not at Fault. As noted, this was not argued by the Athlete in any event.

109. As with the approach in *Warburton & Williams*, the Tribunal then proceeded to consider the issue of No Significant Fault or Negligence. In so doing it reminded itself of the definitions set out at paragraph 34 above.

110. The Tribunal found that the following objectively assessed factors were relevant in determining the extent to which the Athlete had departed from his duty to exercise the utmost caution:

i. The ingestion of the Prohibited Substance had been inadvertent and had resulted from his having taken the Product, which had later been found to have been contaminated;

ii. There was no evidence of (or assertion from UKAD) as to performance enhancement;

iii. The Athlete had caused research to be undertaken consistent with the obligation imposed upon him by virtue of ADR 1.3.1 (d).

111. It is necessary to undertake further analysis of this last point. ADR 1.3.1 (d) provides that the research to be undertaken should at a minimum include:

a reasonable internet search of (1) the name of the product or substance, (2) the ingredients/substances listed on the product or substance label, and (3) other related information revealed through research of points (1) and (2).

112. On the evidence, the Tribunal found that the Athlete had caused searches to be undertaken on his behalf which satisfied the requirements of the above points (1) and (2). Further, there was no evidence adduced from UKAD to suggest that a search of the product (1) or the ingredients (2) would have revealed the issues with Prime Nutrition that UKAD now appeared to seek to place reliance upon.

113. The evidence adduced by UKAD, which purported to show the information that the Athlete could have accessed was based principally on internet searches, conducted on 31 May 2018. Those searched were undertaken using additional search terms "*doping*", "*contaminated*" and "*Prohibited List*"[14]. In submissions before the Tribunal, Mr Bush (fairly) did not seek to suggest ADR 1.3.1 (d), or any other relevant provision, imposed an obligation upon an athlete to make a search using those terms

114. A further internet search was (perhaps belatedly) effected by UKAD on 5 July 2018 for "*Prime Nutrition*" alone. Exhibit CL4 comprised a single page with the fourth hit on that page alighting on the 2015 USA issue referred to above. No evidence was however before the Tribunal as to whether that entry would have appeared in 2017 when the searches were undertaken on behalf of the Athlete.

115. However, evidence was adduced on behalf of the Athlete recording internet searches undertaken for "*Prime Nutrition*" and "*Intra MD Ultra peri workout formula*". These searches were undertaken between 27 and 31 July 2017 using the *Bing* search engine (UKAD had used *Google*). The results of those searches were included at Tab 24 to the documents bundle and comprised a significant number of pages. Mr Bush did not draw the Tribunal's attention to any hit in those pages that would have resulted in a red flag having become apparent, and the Tribunal was unable to see any such red flag from its own perusal of the material.

116. In those circumstances the Tribunal was not satisfied that it had any evidence before it that would have suggested the need for further searches to have been conducted resulting from related information revealed by the searches made against either the Product (1) or the Ingredients (2) as required by ADR1.3.1 (d). As noted, the Prohibited Substance was not listed in the ingredients of the Product.

[14] Exhibits CL1-3

117. In light of the above, the Tribunal was satisfied that the Athlete had established that his Fault should not be found to be significant.

Sanction

118. As noted, periods of Ineligibility of 6 and 4 months respectively were imposed in *Warburton & Williams*. The difference in sanction being attributable to the fact that Williams had disclosed he was taking the supplement concerned to the DCO when he was tested whereas Warburton had not.

119. The Athlete was asked to provide a sample following the conclusion of an 11 round European title bout and Mr Bush had, fairly and sensibly, confirmed that no point was taken against the Athlete in relation to his failure to disclose to the DCO that he taken the Product.

120. The Tribunal again reminded itself that each case fell to be determined on its own facts but noted that there were a number of similar factors applying both to this case and in *Warburton & Williams*.

121. In the view of the Tribunal, the principle area in which a divergence on the facts could be found lay in the research that had been undertaken in the respective cases. On the credit side, there was evidence, in favour of the Athlete, of research having been done to confirm that none of ingredients listed for the Product were on the Prohibited List. That exercise was not specifically referred to as having been undertaken in *Warburton & Williams*.

122. Potentially on the other side of the balance, was the fact that both Warburton and Williams had held meetings with the company marketing the supplement in question and appeared to have undertaken significant research about that business. The Athlete had not researched Prime Nutrition other than by way of an internet search. Warburton and Williams

were however significantly more experienced than the Athlete and, being part of the Welsh national athletics programme, would have been likely to have had support systems available to them that would not have been available to the Athlete.

123. Each of the three athletes had however failed to:

- take advice from UKAD or their NGB;
- take medical advice;
- undertake adequate research; or
- have their respective supplements batch tested.

124. Similarly each case involved the inadvertent ingestion of a contaminated product and no suggestion of performance enhancement (or the intention to seek such).

125. Mr Bush did not argue that *Warburton & Williams* had been wrongly decided. Of note three (of the four) cases referred to the Tribunal in urging an increased sanction, being *Knauss*, *Despres* and *Hardy* had been before the panel in *Warburton & Williams*.

126. The similarities between the cases were such that the Tribunal felt unable to conclude that the increased sanction of not less than 8 months and up to 24 months, which UKAD had urged, could be justified. Rather, a sanction consistent with that imposed in *Warburton & Williams* was appropriate having regard to the facts relating to the Athlete's case.

127. Given that UKAD was not taking a point as to the failure to disclose to the DCO, the Tribunal concluded that the sanction that fell to be imposed was a period of ineligibility of four months.

128. The Tribunal was fortified in that view having regard to case of *Cilic* (supra). Although *Cilic* was decided before *Warburton & Williams* it appears that it was not referred to in that case and is not therefore cited in the decision.

129. Whilst *Cilic* did not involve a contaminated product it has relevance to this determination in that, on the specific request of the International Tennis Federation ('ITF'), the Court of Arbitration for Sport ('CAS') provided guidance as to how to approach sanctioning when dealing with cases involving Article 10.4 of the *Tennis Anti-Doping Programme* ('TADP') as was then was in force:

> Where the Participant can establish how a Specified Substance entered his/her body or came into his/her possession and can further establish, to the comfortable satisfaction of the Independent Tribunal, that such Specified Substance was not intended to enhance the Player's sport performance or to mask the Use of a performance enhancing substance, the period of Ineligibility established in Article 10.2 shall be replaced (assuming it is the Participant's first antidoping offence) with, at a minimum, a reprimand and no period of Ineligibility, and at a maximum, a period of Ineligibility of two (2) years.

130. In providing the requested guidance the CAS tribunal found:

> 69. The breadth of sanction is from 0 – 24 months. As Article 10.4 says, the decisive criterion based on which the period of ineligibility shall be determined within the applicable range of sanctions is fault. The Panel recognises the following degrees of fault:
>
> a. Significant degree of or considerable fault.

b. Normal degree of fault.

c. Light degree of fault.

70. Applying these three categories to the possible sanction range of 0 – 24 months, the Panel arrive at the following sanction ranges:

a. Significant degree of or considerable fault: 16 – 24 months, with a “standard” significant fault leading to a suspension of 20 months.

b. Normal degree of fault: 8 – 16 months, with a “standard” normal degree of fault leading to a suspension of 12 months.

c. Light degree of fault: 0 – 8 months, with a “standard” light degree of fault leading to a suspension of 4 months.

131. Mr Cilic is well known as an experienced and successful international tennis player. Whilst competing at a Masters Tournament in Monte Carlo 2013 he ran out of glucose powder. He asked his mother to obtain some more, and she did so by going to a local pharmacy. The product she purchased contained *nikethamide* which is a Prohibited Substance. Mr Cilic asserted that, as a non-French speaker, he mistook *nikethamide* for nicotinamide which is not a Prohibited Substance and contained within the ingredients of the glucose product that he regularly took.

132. In any event, Mr Cilic did not do anything to check the ingredients of what was a new product that had been purchased from a source that had not been verified as trustworthy. He similarly did not seek medical advice or any anti-doping advice in relation to the product given to him by his mother.

133. As such Mr Cilic did no more, and in fact less, than the Athlete to check what he was proposing to ingest.

134. In the finding of the CAS appeal tribunal, Mr Cilic's fault fell to be held as light and meriting a standard light degree of fault suspension of 4 months.

135. The guidance set out in Cilic was followed in *Sharapova*[15], with her fault being assessed, on appeal, as being a normal degree of fault. *Sharapova* was the most recent authority referred to the Tribunal for consideration.

136. Before concluding, to the extent that Mr Heath urged that the Tribunal should approach the question of sanction having regard to proportionality, that submission was rejected. As the relevant jurisprudence has repeatedly made clear, proportionality is not a factor that can be taken into account by Anti-Doping Tribunals.

Conclusion

137. The Tribunal imposed a period of Ineligibility of four months upon the Athlete.

138. The period of Ineligibility was ordered to run from 12 January 2018, being the date that the Athlete was notified that he had been made subject to a Provisional Suspension as detailed in the Notice of Charge.

139. ADR 9.1 applies in relation to the fight on 9 December 2017.

Appeal

140. Parties are reminded of the right of appeal provided for by ADR Article 13.

[15] CAS/2016/A/4643

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Sole Arbitrator

09 August 2018

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