

## **WORLD RUGBY INDEPENDENT JUDICIAL COMMITTEE**

IN THE MATTER OF THE REGULATIONS RELATING TO THE GAME

AND IN THE MATTER OF THE WORLD RUGBY ANTI-DOPING RULES

AND IN THE MATTER OF AN ALLEGED ANTI-DOPING RULE VIOLATION BY  
**RUBÉN RICCO** (ARGENTINA) CONTRARY TO REGULATION 21

BEFORE A JUDICIAL COMMITTEE APPOINTED PURSUANT TO REGULATION  
21.8.2 CONSISTING OF:

### **Judicial Committee:**

Graeme Mew (Canada - Chair)  
Dr. George Ruijsch Van Dugteren (South Africa)  
Joseph de Pencier (Canada)

### **Representatives and Participants:**

*Louise Reilly* (Counsel for World Rugby)  
*Aaron Lloyd* (Counsel for the Player)

Mike Earl (General Manager, Anti-Doping, World Rugby)  
David Ho (Anti-Doping Manager - Compliance and Results, World Rugby)  
Ben Rutherford (Senior Legal Counsel & Integrity Unit Manager, World Rugby)

Rubén Ricco (the Player)

Greg Peters (General Manager, Unión Argentina de Rugby)  
Jaime Barba (Legal Counsel, Unión Argentina de Rugby)

Hearing conducted by video/telephone conference on 15 November 2016.  
Additional written submissions received on 26 January 2017.

## **REASONS FOR DECISION**

### Overview

[1] On the recommendation of a friend he worked out with, Rubén Ricco, the Player, then aged 19, obtained and used some Clomiphene pills at a pharmacy to treat pain and discomfort that he was experiencing as a result of an irritated nipple.

[2] Clomiphene is an anti-estrogenic medical substance. In medicine, clomiphene is used for fertility treatments for both men and women. In men, the medical dose of Clomiphene accelerates testosterone secretion.

[3] Clomiphene is also a Specified Substance and is listed in category S4. Hormone and Metabolic Modulators on the World Anti-Doping Agency's 2016 List of Prohibited Substances (which appears at Schedule 2 of World Rugby Regulation 21). It can be used to inhibit oestrogen problems caused by anabolic steroid use, one of the manifestations of which can be over-growth of breasts (gynecomastia).

[4] The Player was selected as a member of the Argentina squad participating in the World Rugby Under 20 Championship 2016 in England.

[5] On 30 May 2016, a sample was collected from the Player in Cheshire, England, as part of the tournament's Out of Competition testing programme. Analysis of that sample yielded a positive finding for the presence of Clomiphene.

[6] The Player did not dispute the adverse analytical finding ("AAF") and has subsequently admitted an anti-doping rule violation for the presence of Clomiphene.

[7] The presumptive sanction for the presence of a Specified Substance such as Clomiphene, is two years Ineligibility. This can be increased to four years if World Rugby establishes that the violation was intentional. Or, if the Player can establish that his use did not involve significant fault or negligence on his part, the sanction can be reduced to, at a minimum, a reprimand and no period of Ineligibility, and at a maximum, two years of Ineligibility, depending on the Player's degree of Fault.

[8] World Rugby asserts that the Player's use of Clomiphene was intentional, and should attract a four year sanction.

[9] The Player denies intentional use and asserts that his degree of fault or negligence was less than significant, and warrants reduction of the period of ineligibility to six months, to properly reflect the degree of fault or negligence on his part.

## Procedural History

[10] A preliminary review of the case was undertaken in accordance with World Rugby Regulation 21.7.2, following which the Player was notified, via the Unión Argentina de Rugby (the "Union"), that it was alleged that he had committed an anti-doping rule violation. The Player was provisionally suspended with effect from 11 July 2016 (the date on which the notification letter was acknowledged by the Union), pursuant to Regulations 21.7.9 and 21.7.10, pending the outcome of his case.

[11] The Player was also informed of his right, pursuant to Regulation 21.7.3, to have the "B" sample, provided by him at the time he was tested, analysed. Having not requested analysis of his "B" sample within the prescribed time, the Player was deemed to have waived this right and accepted the accuracy of the finding with respect to his "A" sample.

[12] By a letter dated 29 July 2016, the Player was notified of his right to have his case heard by a Judicial Committee (JC) and to make submissions to the JC.

[13] On 11 August 2016, the Player's legal representative wrote to World Rugby advising that the Player acknowledged the anti-doping rule violation being asserted against him, giving notice of the Player's election to admit the violation, and requesting a hearing as to sanction pursuant to Regulation 21.8.2.1. Attached to the 11 August 2016 letter was a signed statement from the Player dated 3 August 2016.

[14] This Judicial Committee ("JC") has been appointed to consider the Player's case. The hearing will be conducted in accordance with Regulation 21.8 (Right to a Fair Hearing).

[15] On 26 September 2016, the JC provided directions to the parties concerning disclosure, written submissions and evidence at the hearing.

[16] The hearing was conducted through a combination of video and telephone conferencing technologies on 15 November 2016. Following the hearing, the JC brought to the attention of the parties two recent anti-doping tribunals and offered the parties the opportunity to make written submissions on the applicability, if any, of those decisions to the present case. As a result further written submissions were received on 26 January 2017.

[17] While the JC has read the entire record and paid careful attention to the testimony of the witnesses and the comprehensive written and oral submissions, we refer in these reasons only to those matters which we regard as necessary to describe and explain our decision.

## Issues

[18] As a result of the Player's acceptance of the AAF, World Rugby has met its burden of establishing that the Player has committed an Anti-Doping Rule Violation, namely the presence in the player's sample of the Prohibited Substance Clomiphene.

[19] An Anti-Doping Rule Violation on the part of the Player having been established, the following issues remain:

- a. Was the Player's anti-doping rule violation intentional?
- b. If not, should the presumptive sanction of two years Ineligibility be reduced because of a lack of fault or negligence, or significant fault or negligence, on the Player's part?

[20] World Rugby bears the onus of establishing, to the comfortable satisfaction of the JC, that the Player's anti-doping rule violation was intentional (see CAS 2016/A/4512 *WADA v Turkish Football Federation and Ahmet Kuru*).

[21] If the anti-doping rule violation was not intentional, the Player bears the onus of establishing, on the balance of probabilities, that there was no fault or negligence on his part (in which case the otherwise applicable period of Ineligibility would be eliminated), or no significant fault or negligence on his part (in which case the period of Ineligibility would, at a minimum, be a reprimand and no period of Ineligibility, and at a maximum, two years of Ineligibility, depending on the Player's degree of Fault).

## The Evidence

[22] Witness statements were provided for each witness and stood as their evidence in chief. The Player and his friend and training partner, Franco Ruiz, gave oral evidence at the hearing via a video link.

[23] World Rugby called two expert witnesses, Dr. Audrey Kinahan and Professor David Cowan. They provided their oral evidence by telephone.

[24] The Player was a member of the Argentina Under 20 squad and was a participant in World Rugby's U20 Championship tournament. The urine sample which gave rise to his positive test was obtained out of competition on 30 May 2016. On his Doping Control declaration form, the player declared that he was taking B. Alanin, Ultra Mass and Diclofene.

[25] Back in late 2015, around Christmas time, the Player had been experiencing pain and hardness around his nipple. It was itchy. He told his friend Franco Ruiz about it. Mr Ruiz says that he saw the hardness and the irritation.

[26] The Player and Mr Ruiz, a twenty year old student who is not involved in rugby, both work out of the same gym. Mr Ruiz said that he had experienced

similar symptoms in 2014. A trainer he was working with at the time recommended that he take Clomiphene. Mr Ruiz was able to obtain Clomiphene over the counter from a local pharmacy and after taking it his irritation and discomfort disappeared.

[27] Mr Ruiz suggested to the Player he, too, should go to a chemist and buy some Clomiphene.

[28] The Player was able to buy Clomiphene over the counter at a local pharmacy without prescription for 100 – 120 pesos. The Clomiphene came in a blister pack with ten tablets. After taking the Clomiphene for five days at the end of December and start of January (one in the morning and one at night), the itching and hardness around his nipple went away.

[29] The Player did not tell the pharmacist he was a professional rugby player. Nor did he undertake in the investigation or enquiries to see if there were any problems with using this substance. He offers two reasons for not having done so, namely:

- a. He did not think that the substance could in any way enhance his performance. He understood that this was what the anti-doping rules were all about. He knew from talking to Mr Ruiz that the Clomiphene was going to help get rid of his skin irritation.
- b. Although he did not think he needed to check, that was probably subconsciously reinforced by the fact that it was out of season when the player took Clomiphene. He knew he was not going to be playing rugby again for a number of weeks.

[30] The Player did not keep any of the blister packs. He has no receipt. He has not gone back to the pharmacist to obtain evidence of his purchase or to obtain a statement confirming the availability of Clomiphene over the counter.

[31] The Player admits having received anti-doping education through the Union's Academy programme and, therefore, knew that he should check any medication taken by him. However, while he knew that he was not allowed to take illegal substances which would enhance his performance, it did not occur to him to not take Clomiphene, which he did not believe to be performance enhancing. Accordingly, while the Player acknowledges that he intentionally used Clomiphene, he denies any intention to enhance sport performance, violate anti-doping rules or otherwise cheat.

[32] The Player says that it was not until after his positive test that he became aware that the authorised use of Clomiphene is in relation to human female fertility issues.

[33] The Player denies that he used Clomiphene to counteract the side effects of steroid use. Despite the suggestion made by one of World Rugby's witnesses

to the contrary, he is adamant that he did not need a prescription to obtain Clomiphene. He also denies having obtained it over the Internet.

[34] It is submitted on behalf of the Player at the latest possible date ingestion of Clomiphene would have been at the beginning of January 2016.

[35] The expert evidence tendered by World Rugby is to the contrary.

[36] Dr Audrey Kinahan, a practising dispensing pharmacist and the current chair of the WADA List Expert Group, stated that it would be extraordinary for Clomiphene taken when the Player claims it was to still be in his system in May.

[37] While acknowledging that she is not qualified in Argentina and has no experience of local practices in that country, Dr Kinahan's research informs her that the two brands of Clomiphene available in Argentina are sold by prescription. The same source of information states that the medication is for use for female infertility. This accords with Dr Kinahan's own experience in her work as a dispensing pharmacist in Ireland during the course of which she has never seen Clomiphene prescribed for a man.

[38] With respect to the Player's stated reason for his use of Clomiphene, Dr Kinahan comments:

... clomiphene is for legitimate medical use as a fertility treatment for women only, to stimulate ovulation. In my over 20 years' experience as a practising pharmacist and as a medicine regulator the clinical use of clomiphene as a treatment for pain and itching around the nipple of a man is unheard of [*sic*]. However, in "doping" circles where one of the side effects of the abuse of testosterone is that testosterone metabolises to oestrogens which in turn can stimulate breast tissue, such a complaint is not to be unexpected. Such issues are not medically charted nor routinely scientifically published, because of their association with illicit use. However, it could be speculated that the nipple soreness is a side-effect of Mr Ricco's possible androgen use and Mr Ruiz advised him accordingly. It could also be speculated that Mr Ricco's use of clomiphene was as a result of an androgenic stimulation regime and while all traces of the earlier androgenic agents are cleared from his system as these were administered before the clomiphene, because of the timing of the test, the only evidence of such a regimen is the presence of clomiphene in his urine.

[39] During the course of cross-examination, Dr Kinahan acknowledged the possibility of "off-label" use of Clomiphene treatment for men with breast cancer. She also acknowledged that there would be a general understanding that a growth can be a symptom of breast cancer.

[40] Prof David Cowan, Director of the Drug Control Centre at Kings College, London, was of the opinion that it was likely that the Player consumed Clomiphene in the three-month period immediately preceding his test (although

he did not rule out completely the possibility of administration outside that three-month period).

### Applicable Provisions

[41] The following provisions of World Rugby Regulation 21 are engaged:

#### Strict Liability

##### **21.2.1 Presence of a Prohibited Substance or its Metabolites or Markers in a Player's Sample**

**21.2.1.1** It is each Player's personal duty to ensure that no Prohibited Substance enters his or her body. Players are responsible for any Prohibited Substance or its Metabolites or Markers found to be present in their Samples. Accordingly, it is not necessary that intent, Fault, negligence or knowing Use on the Player's part be demonstrated in order to establish an anti-doping rule violation under Regulation 21.2.1 (Presence).

#### Onus

##### **21.3.1 Burdens and Standards of Proof**

World Rugby shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether World Rugby has established an anti-doping rule violation to the comfortable satisfaction of the hearing panel bearing in mind the seriousness of the allegation which is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt. Where these Anti-Doping Rules place the burden of proof upon the Player or other Person alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability.

#### Medications

##### **21.4.8 Nutritional Supplements and Medications**

**21.4.8.1** The use of nutritional supplements by Players is a risk. In many countries regulations either do not exist or are limited in nature in relation to the manufacturing and labelling of supplements. This may lead to a supplement containing an undeclared substance that is prohibited under these Anti-Doping Rules. Nutritional supplements may not be regulated or could be contaminated or suffer from cross contamination or may not have all the ingredients listed on the product label. Players are advised to exercise extreme caution regarding the use of nutritional supplements.

**21.4.8.2** Many of the substances in the Prohibited List may appear either alone or as part of a mixture within medications or supplements which may be available with or without a doctor's prescription. Any Player who is concerned about the appropriateness of treatment being administered to him, or medications or supplements being ingested by him, should seek clarification from his doctor or other relevant authority as to whether such treatment is or such medications or supplements are prohibited prior to taking possession of or using such item. For the avoidance of doubt nothing herein shall displace the Player's responsibility to ensure he does not commit an anti-doping rule violation.

## Sanctions

### **21.10.2 Ineligibility for Presence, Use or Attempted Use, or Possession of a Prohibited Substance or Prohibited Method**

The period of Ineligibility for a violation of Regulations 21.2.1 (Presence), 21.2.2 (Use or Attempted Use) or 21.2.6 (Possession) shall be as follows, subject to potential reduction or suspension pursuant to Regulations 21.10.4, 21.10.5 or 21.10.6:

**21.10.2.1** The period of Ineligibility shall be four years where:

21.10.2.1.1 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.

21.10.2.1.2 The anti-doping rule violation involves a Specified Substance and World Rugby (or the Association, Union or Tournament Organiser handling the case as applicable) can establish that the anti-doping rule violation was intentional.

**21.10.2.2** If Regulation 21.10.2.1 does not apply, the period of Ineligibility shall be two years.

**21.10.2.3** As used in Regulations 21.10.2 and 21.10.3, the term "intentional" is meant to identify those Players 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.

### **21.10.5 Reduction of the Period of Ineligibility based on No Significant Fault or Negligence**

**21.10.5.1** Reduction of Sanctions for Specified Substances or Contaminated Products for Violations of Regulations 21.2.1 (Presence), 21.2.2 (Use or Attempted Use) or 21.2.6 (Possession).

#### 21.10.5.1.1 Specified Substances

Where the anti-doping rule violation involves a Specified Substance, and the Player or other Person can establish No Significant Fault or Negligence, then the period of Ineligibility shall be, at a minimum, a reprimand and no period of Ineligibility, and at a maximum, two years of Ineligibility, depending on the Player's or other Person's degree of Fault.

#### The Player's Position

[42] The Player argues that he did not turn his mind to consider whether Clomiphene was a prohibited substance because he did not think of his condition, and the treatment to combat it, as in any way being about enhancement of performance. He took Clomiphene, for a very short period of time, to address a specific discomfort only.

[43] The evidence does not support a conclusion of intentional Use. Regulation 21.10.2.3, which defines "intentional" to mean Players who cheat, requires conduct which a Player knows to constitute an anti-doping rule violation, or which the Player knows might constitute a violation and is reckless as to whether it does. This is a subjective test. A player can be naïve about the risk, but if it is believed that he did not have any knowledge of an actual or potential breach, the player's conduct will not be intentional: *Rugby Football Union v Stapley*, RFU Disciplinary Panel, 11 April 2016.

[44] The Player's circumstances compare favourably to those in *USADA v Lea*, American Arbitration Association, 5 January 2016, when the athlete, an elite cyclist, took a Percocet tablet the night before a race, at which he was tested. He did so to facilitate sleep, claiming that there was no intention to enhance performance. The Percocet had been prescribed by a physician. Before ingesting the Percocet, the athlete did not check with any reference source to determine if Percocet, a well-known and widely used pain medication, contained any ingredients which were on the prohibited list. Nor did he declare his use of Percocet on his doping control form. He subsequently tested positive for the presence of oxycodone, a specified substance.

[45] The AAA panel in *Lea* concluded that the athlete had not known that the Percocet contained oxycodone, that he did not intend to gain any competitive

sporting advantage beyond sleeping well, and that he was not using a prohibited substance to mask an injury. Although he had been negligent in not researching the constituent ingredients before used Percocet, that was not found to translate to an intentional violation of the anti-doping rules by taking the medication that he knew contained a prohibited substance or ignored a known risk that taking the Percocet would create an anti-doping rule violation.

[46] Both the Player and Mr Ruiz testified that the Clomiphene used by the Player was obtained over-the-counter at a pharmacy. Mr Ruiz was not directly challenged on his evidence in that regard. The information obtained by Dr Kinahan is of limited assistance given her lack of first-hand knowledge of pharmacy practices and protocols in Argentina. Be that as it may, if the conduct of Mr Lea, who obtained Percocet on prescription and used it to help him sleep during an ongoing competition was not regarded as intentional, nor should the Player's actions, bearing in mind his evidence that he obtained the product over the counter during the off-season and used it to help resolve a skin irritation.

[47] Not only is there a lack of evidence to support a finding of intentional Use, but a reduced sanction is warranted based on their having been no significant fault or negligence on the Player's part. In the *Lea* case the two-year presumptive sanction was reduced to 16 months. An appropriate range for any period of Ineligibility imposed on the Player would be 12 to 16 months.

#### World Rugby's Position

[48] The illicit use of Clomiphene as a doping agent is described not only in the expert evidence of Dr. Kinahan, but in scientific literature and online forums as being twofold:

- a. to cause a consistent and sustained rise in blood testosterone levels; and
- b. to inhibit the oestrogen problems caused by use of anabolic steroids, including the over-growth of breasts.

[49] The presumptive sanction of two years Ineligibility should be increased to four years because the Player's anti-doping rule violation was intentional, that is:

- a. The Player knew his conduct constituted an anti-doping rule violation; or
- b. The Player 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.

[50] The Player had received anti-doping education and was aware that he was responsible for knowing what substances were on the prohibited list. This is not a case where a player took a supplement and failed to check the list of

ingredients for prohibited substances. Rather, the Player did not turn his mind to consider whether Clomiphene was a prohibited substance because he did not think of his condition, and the treatment to combat it, as in any way being about enhancement of performance.

[51] If the Player's position were to be accepted, it would permit him to rely on a complete abdication of his responsibility to know what substances are included on the Prohibited List. This, in turn, would yield the absurd result of rewarding the Player for remaining ignorant of the products he ingested. Such a ruling would run contrary to a fundamental objective of the anti-doping regulations, namely to create powerful incentives for competitors to take active and earnest initiatives to inform themselves.

[52] Furthermore, having regard to the second limb of the definition of "intentional", the Player manifestly disregarded the risk of committing an anti-doping rule violation by taking a substance which was named on the Prohibited List without making even the most basic enquiry to assure himself that the substance was safe to use.

[53] In order to prove that an anti-doping rule violation was intentional, it is sufficient for World Rugby to establish that the Player knew his conduct would constitute an anti-doping rule violation, or disregarded the significant risk that it would. There was no separate requirement that World Rugby prove intent to cheat by enhancing performance on the field of play: *WADA v Turkish Football Federation, supra*.

[54] Whereas in the *Stapley* case the panel found the player's version of events credible, the evidence in the present case does not warrant such a finding because:

- a. The Player's account is not credible – he had no legitimate need or use for female fertility medication.
- b. Knowing that there would be an issue over whether he had purchased Clomiphene over-the-counter at a pharmacy, no attempt was made to obtain confirmation that that is in fact what happened.
- c. It is more likely, based on Prof Cowan's expert evidence, that the Player's ingestion of Clomiphene occurred within the three months preceding the collection of the urine sample that gave rise to the Player's adverse analytical finding.

[55] In the event that the JC concludes that the Player's conduct does not amount to intentional in nature, it cannot be *said* that there was no significant fault or negligence on the Player's part: by his own admission, he did not take any steps to ensure that the medication he was taking did not contain a prohibited substance. Nor did he advise his doctor or pharmacist he may be subject to drug testing.

[56] The *Lea* case is distinguishable on its facts. Unlike oxycodone (the substance in issue in *Lea*), clomiphene is prohibited both In- and Out-of-Competition. Accordingly, the athlete in the *Lea* case benefited from a rebuttable presumption that his anti-doping rule violation was not intentional: see Article 10.2.3 of the UCI *Anti-Doping Rules* (which is substantially similar to World Rugby Regulation 21.10.2.3).

### Discussion and Analysis

[57] We start by observing that we do not read the decision in *RFU v Stapley* as holding, as was suggested, that wilful blindness on the part of the player will necessarily defeat an allegation of intentional doping.

[58] However, *Stapley*, and another decision which it refers to, *UK Anti-Doping v. Buttifant*, SR/NADP/508/2016 (affirmed on appeal, 7 March 2016), do emphasise that the definition of “intentional” in WR regulation 21.10.2.3 (and its equivalent provision in the *World Anti-Doping Code*, Article 10.2.3) is subjective: a player must have either known that his conduct constituted an anti-doping rule violation or must have known that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk.

[59] The concept of “subjectivism” is a familiar one in the criminal law of England and other jurisdictions. It may not be enough, however, for a person charged to say “I didn’t know”. In practice, triers of fact may simply not believe that a defendant was unaware of the obvious consequences of his or her actions: Andrew Ashworth, *Principles of Criminal Law*, 5<sup>th</sup> ed. (Oxford: 2006) at p. 184.

[60] Although the standard of proof in anti-doping cases is not a criminal standard, judicial committees will look at all of the circumstances and decide whether, to the comfortable satisfaction of the panel (where World Rugby has the burden of proof), they believe that the anti-doping rule violation was not intentional.

[61] That, essentially, is the approach which the UK National Anti-Doping Panel took in *Buttifant*. That case involved a nineteen year old Welsh club rugby player, who was dyslexic and was found by the panel to be reluctant to ask questions which might appear to show his ignorance and who, as a club rugby player, had “little real understanding of drugs in sport”. He had been told that he needed to “bulk up” if he wanted to get on to the senior team. Having used various supplements, he heard about a product called M-Sten and found that it was available online through Amazon. His evidence was that he did not think that Amazon would sell such a product if it was not reputable. He purchased it and used it for 21 days. He found that the supplement had side effects, including anxiety, insomnia, hair loss and bloating. He gained weight and began to notice breast development. He experienced low mood. He was tested 40 days after he stopped using the product. Some days after the test he told his mother about M-Sten and asked her to help him research it. With her

assistance he was quickly able to determine that one of its listed active ingredients was an anabolic steroid. The player's evidence was that he did not intend to take a steroid and did not intend to cheat.

[62] The panel in *Buttifant* also heard evidence from the head coach of club that players did not receive nutritional advice from the club and did not receive any advice about drugs or banned substances. The coach confirmed that he had never seen the player cheat and could only think that the player had taken a banned substance by mistake.

[63] There was also evidence about the player's dyslexia and dyspraxia from the individual who had diagnosed those disabilities and who explained their extent and the further difficulties faced by the player as a result of his decision not to reveal them.

[64] Faced with all of this, as well as evidence dealing with possible contamination of the product used by the player, the Tribunal was not comfortably satisfied that the player had engaged in conduct which he knew constituted an anti-doping rule violation or knew might constitute or result in an anti-doping rule violation. Factors which appear to have weighed in favour of that conclusion included the player's age, his naivety, his disability and his lack of drugs training or nutritional advice. The panel accepted that the reference to what was in fact a steroid on the M-Sten label would have meant nothing to him. His evidence that he did not think Amazon would sell anything dodgy "rang true". Indeed, the panel concluded that "[w]hen taken together with the powerful evidence of his mother, we accepted his explanation of events".

[65] On appeal, the appeal panel noted that the test for intention does permit a tribunal to have regard to any relevant evidence, both objective and subjective as to the athlete's state of mind (see NADP Appeal Panel decision, at para 26).

[66] The appeal panel continued, at para 27:

Article 10.2.3 does allow a tribunal to consider all relevant evidence in assessing whether the violation was intentional, but the most important factor will be the explanation or explanations advanced by the athlete. *There must be an objective evidential basis for any explanation for the violation which is put forward.* We reject the argument put by the Respondent that the athlete's contention that he does not know how the prohibited substance entered his body is consistent with an intention not to cheat and that the ultimate issue is the credibility of the athlete. The logic of the argument would be that where the only evidence is that of the athlete who, with apparent credibility, asserts that he was not responsible for the ingestion then on the balance of probability the athlete has proved that he did not act intentionally. Article 10.2.3 requires an assessment of evidence about the conduct which resulted or

might have resulted in the violation. *A bare denial of knowing ingestion will not be sufficient to establish a lack of intention.* [emphasis added].

[67] We agree with this statement.

[68] We find it highly unlikely that the Player obtained Clomiphene over the counter at a pharmacy. The Player's failure to take the obvious step of obtaining other evidence to corroborate his purchase from the pharmacy is telling.

[69] However, even if we give the Player the benefit of that doubt, we do not believe that the Player purchased, and subsequently used, Clomiphene to treat a sore nipple. There is no suggestion that he believed he had breast cancer (which is a known "off-label" use of Clomiphene). We did not find the evidence of Mr. Ruiz, who worked out with the Player, that he recommended the use of Clomiphene to the Player because he had himself successfully used it to relieve pain and itchiness on his chest, to be credible. Mr. Ruiz had himself taken Clomiphene on the recommendation of a trainer, rather than a physician. He acknowledged no knowledge of medicine or anti-doping rules.

[70] While there is every reason to believe that the Player used Clomiphene on Mr. Ruiz's recommendation, we do not accept it was used to treat a skin condition.

[71] Furthermore, given the expert evidence, we find it improbable that more than five months had elapsed between the Player's administration of Clomiphene and sample collection.

[72] Regardless of when the Player used Clomiphene, he knew enough about anti-doping regulations to have realised that using any pharmaceutical product – particularly one recommended by a friend he worked out with at the gym – without checking its contents would run the risk of resulting in an anti-doping rule violation. We simply do not believe his evidence to the contrary.

[73] It follows that we reject much of the evidence tendered by the Player.

[74] Accordingly, the Player's acts and omissions, as we have found them, leave us comfortably satisfied that the Player engaged in conduct which he 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.

[75] The applicable sanction for the Player's anti-doping rule violation is four years Ineligibility.

[76] As a result of this finding, it is not necessary for us to consider whether the sanction should be reduced because of a lack of fault or negligence, or significant fault or negligence, on the Player's part.

## Findings and Conclusions

[77] The Player committed an anti-doping rule violation as a result of the presence of Clomiphene, a Specified Substance, in the sample which he provided.

[78] Further, the JC finds that the Player engaged in conduct which he 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.

[79] As a result, the applicable sanction is a period of Ineligibility of four years, commencing on 11 July 2016 and ending at midnight on 10 July 2020.

[80] The Player's attention is drawn to Regulation 21.10.12 which provides, *inter alia*, that:

### **21.10.12.1 Prohibition Against Participation During Ineligibility**

No Player or other Person who has been declared Ineligible may, during the period of Ineligibility, participate in any capacity in a Competition or activity (other than authorized anti-doping education or rehabilitation programmes) authorised or organised by World Rugby or any Member Union, Association or a Club, Rugby Body or other member organisation of World Rugby or any Association or Member Union, or in Competitions authorised or organised by any professional league or any international- or national-level Event organisation or any elite or national-level sporting activity funded by a governmental agency".

...

A Player or other Person subject to a period of Ineligibility shall remain subject to Testing.

### **21.10.12.2 Return to Training**

As an exception to Regulation 21.10.12.1, a Player may return to train with a team or to use the facilities of a Union, Club, Rugby Body or other member organisation of World Rugby, an Association or a Union during the shorter of: (1) the last two months of the Player's period of Ineligibility, or (2) the last one-quarter of the period of Ineligibility imposed".

[81] The full text of Regulation 21.10.12 and the related commentaries should be consulted. In the case of the Player, he would be able to return to training at the start of month 46 of the four year period of Ineligibility, so on 11 May 2020.

### Right of Appeal

[82] This decision is final, subject to referral to a Post Hearing Review Body (Regulation 21.13.8) or an appeal, where the circumstances permit, to the Court of Arbitration for Sport (Regulation 21.13.2). The regulation sets out the timelines within which any referral or appeal must be commenced.

### Costs

[83] Should World Rugby wish us to exercise our discretion in relation to costs under Regulation 21.8.2.10 or 21.8.2.11, written submissions should be provided to the JC via Mr. Ho within 10 business days of the receipt by World Rugby of this decision. The Player will then have 10 business days to respond.

30 March 2017

A handwritten signature in black ink, appearing to read 'Graeme Mew'. The signature is stylized with a large initial 'G' and a horizontal line under the name.

Graeme Mew, Chairman