

**INTERNATIONAL TENNIS FEDERATION**

**and**

**MARK NIELSEN**

**Decision of the Independent Anti-Doping Tribunal**

**Charles Flint QC, Chairman**

**Professor Vivian James**

**Dr. Anik Sax**

**Date of Decision: 5 June 2006**

**DECISION**

1. The tribunal has been appointed under Rule K of the ITF's Tennis Anti-Doping Programme 2006 ("the Rules") to hear a charge brought against Mark Nielsen ("the player") of a doping offence contrary to article C.1, that a prohibited substance (Finasteride metabolite) had been found to be present in a urine specimen taken from the player on 12 January 2006 at the Australian Open event held in Melbourne.
2. In this case the player did not request an oral hearing. He submitted written representations, attaching witness statements and documents. The ITF has accepted the player's evidence so that there is no dispute as to the primary facts.
3. The player did not dispute that a doping offence had been committed, in that a metabolite of Finasteride, a Prohibited Substance, had been found to be present in the specimen taken from the player.

4. The player's case was that since November 2003 he had been taking Finasteride in the form of tablets as a treatment for premature baldness and he did not know that Finasteride had been made a Prohibited Substance from 1 January 2005. In those circumstances he argued he bore no significant fault or negligence, within the meaning of the exceptional circumstances provisions contained in article M.5.2 of the Rules. He thus argued that the tribunal should not impose the mandatory sanction of 2 years' ineligibility to compete. He accepted that the commission of a doping offence inevitably leads to disqualification of all results obtained at the Australian Open, together with loss of ranking points and prize money from that event. However he argued that fairness required that he not be disqualified from subsequent events.

### **Findings of Fact**

5. The relevant facts are as follows:
  - (1) The player has been a professional tennis player since 1997; between 1997 and 2006 he has played in a large number of ITF and ATP events.
  - (2) In November 2001 he sought medical advice and treatment for premature baldness. On 21<sup>st</sup> November 2003 he received a prescription for Propecia, with a further prescription on 11<sup>th</sup> November 2004.
  - (3) In October 2004 he visited another medical practitioner and was prescribed Proscar on a prescription issued on 14<sup>th</sup> October 2004, which was repeated on 11<sup>th</sup> January 2005 and 9<sup>th</sup> March 2005.
  - (4) Since November 2003 the player has taken this medication, which contains Finasteride, on a regular basis.
  - (5) Finasteride was added to the list of prohibited substances with effect from 1 January 2005, but that fact did not come to the attention of the player. He did not see the article in the ATP Player's Weekly issued on 4 October 2004 stating that Finasteride was being added to the list of prohibited substances, and he did not receive or review a copy of the prohibited list.

(6) He was tested at the Australian Open on 12 January 2006. He did list a number of substances, but not this medication, on the Doping Control Form which was completed for him; his explanation is that he was embarrassed to admit the need for this treatment to a stranger and he did not wish to be embarrassed at not knowing how to spell the medication.

(7) It was not until after he received the letter dated 20 February 2006 when he was informed that he had tested positive for Finasteride that he first realised the significance of the medication that he was taking.

(8) Subsequent to the adverse result he applied for a therapeutic use exemption and was granted an exemption for Finasteride with effect from 23<sup>rd</sup> March 2006 to 31<sup>st</sup> December 2006.

(9) His last competition was the Blenheim ITF Future Tournament which ended on 5<sup>th</sup> March 2006. After receiving advice of the adverse result, on 10<sup>th</sup> March 2006 he withdrew from the New Zealand Davies Cup Team.

6. On the player's evidence he does not appear to have taken any steps to seek advice as to whether the medication he was taking was permitted under the anti-doping rules. He did not ask either of the doctors who prescribed the medication containing Finasteride for advice as to whether the medication contained a prohibited substance.
7. More generally on his statement he does not appear to have taken any steps to have informed himself of the relevant provisions of the anti-doping rules which have applied since he commenced taking the relevant medication in 2003. Between 2003 and 2005, when he participated in at least 25 ATP and ITF events and was subject to an in-competition test on 28 December 2004, he took no steps to acquaint himself with the WADA Code, nor to seek any advice on the anti-doping provisions. He accepts that he did not look at the anti-doping pages on the ITF or ATP websites during this period. He accepts that he had a wallet card early in his professional career, but he thought the

issue of doping was not relevant to him as he was not taking any banned substances.

8. At no stage did the player take any advice from the ITF or ATP, or any official or coach from his national federation, as to whether the medication that he was taking might place him in breach of the WADA Code.

### **The Doping Offence**

9. As previously mentioned the player does not dispute that he committed a doping offence under Rule C.1 on the basis that a metabolite of Finasteride, a prohibited substance, was present in the specimen taken
10. The doping offence is established, and it follows that the player is automatically disqualified from the Australian Open and forfeits any ranking points and prize money obtained in that competition.

### **Sanctions**

### **Exceptional Circumstances**

11. The issue in this case is as to the sanctions, if any, beyond the automatic disqualification, which ought to be imposed under Rule M.
12. The player contends that in the circumstances of this case he bears no significant fault for the offence, and thus the period of ineligibility which would otherwise apply should be reduced under Rule M.5.2.

13. The relevant part of Rule M.5.2 reads:

“If a Player establishes in an individual case involving such offences .... that he or she bears No Significant Fault or Negligence for the offence, then the period of Ineligibility may be reduced, but the reduced period of Ineligibility may not be less than than one-half of the minimum period of Ineligibility otherwise applicable. .... the Player must also establish how the Prohibited Substance entered his or her system in order to have the period of Ineligibility eliminated.”

14. No Significant Fault or Negligence is defined as follows:

No Significant Fault or Negligence. The Player 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 Doping offence.

15. In this case the player is able to establish how the prohibited substance entered his system. He continued his regular practice of taking his medication of Finasteride, which he assumed not to be a prohibited substance. He has therefore satisfied the precondition for the application of the relevant provision.

16. Rule M.5.2 require consideration of the player’s moral fault, judged against the necessarily strict standards set by the Rules applying the WADA Code. The player has a personal responsibility, from which he cannot be absolved by reliance on others. Rule B4 provides that it is the sole responsibility of each player to acquaint himself with all the provisions of the Rules. Any player has a clear duty to check whether any medication being taken by him, of which only he is aware, is permitted under the anti-doping rules. It is fundamental to the strict liability anti-doping regime that a player is responsible for any prohibited substance found to be present in his body and that ignorance of the rules or of the nature of any substance administered or ingested can be no defence.

17. The duty of utmost caution imposed on athletes is reiterated in the Advisory Opinion of CAS (CAS 2005 /C/976 & 986) at paragraphs 73 - 75. The tribunal has also noted the decision of CAS in *WADA v. Lund* (CAS OG 06/001) particularly at paragraph 4.11. It is clear that a player who is taking medication has a continuing duty to check properly whether that medication is permitted under the anti-doping rules.
  
18. If the player fails to meet the high duty of care he may be regarded as having borne some fault, but it may not be "significant". That word in its context connotes a lack of serious or substantial moral fault or blameworthiness, so that the rigorous application of these very strict anti-doping rules is tempered in the case of an excusable and understandable failure to have foreseen or prevented the doping offence where the conduct of the player was not culpable, but failed to meet the standard of utmost caution. However the circumstances have to be truly exceptional so as to prevent the principle of strict liability being eroded.
  
19. In the circumstances of this case the player is clearly unable to show that he was not significantly at fault. As set out above he did not take any steps at all to check whether his medication infringed the anti-doping rules. There was no basis for any legitimate assumption that the medication was not a prohibited substance. Indeed the player does not appear to have paid any regard to the anti-doping rules. His attitude, as expressed at paragraph 4.8 of his statement in explaining why he did not keep or obtain an anti-doping wallet card, was:

"...I adopted the view that since I knew I was not taking any banned substances (or so I thought) that the issue of doping was not directly relevant to me and I did not have to be concerned with holding a card."

But in the absence of any proper advice that his medication was not a prohibited substance the player had no basis for assuming that he would not

be in breach of the rules by taking the substance. In the view of the tribunal that comment indicates a serious dereliction of duty on the part of any player who participates in a sport governed by the WADA Code. Players have a personal duty to ensure that medication which they are taking does not infringe that code. In this case the player's fault cannot properly be described as insignificant.

20. It is not relevant to this issue whether the player might have been granted a therapeutic use exemption if he had taken proper steps to check all his current medication against the prohibited list from time to time. Rule M5.2 is concerned with the moral fault of the player and that requires a judgment on the adequacy of the steps he took in an effort to discharge the high duty of care imposed under the Rules.

#### **Sanctions to be applied in this case**

21. For those reasons we decline to reduce the mandatory period of ineligibility under Rule M.5.2. The mandatory period of 2 years' ineligibility must take effect.
22. Under Rule M.8.3 the period of Ineligibility is to start on 10 March 2006 which is the date on which the player voluntarily withdrew from competition.
23. Rule M.7 provides:

In addition to the automatic Disqualification .... all other competitive results obtained from the date a positive Sample was collected .... through to the date of commencement of any Ineligibility period shall, unless the Anti-doping Tribunal determines that fairness requires otherwise, be Disqualified with all the resulting consequences, including forfeiture of any medals, titles, computer ranking points and prize money (without deduction for tax).

24. In this case there is no evidence of potential performance enhancement and it is accepted that if the player had applied for a TUE earlier it would have been granted. In those circumstances there can be no legitimate grievance on the part of fellow competitors arising from the player continuing to compete between 12 January and 5 March 2006. Taking into account all the circumstances of the case under Rule M.7 we decide that fairness requires that the player be not disqualified from any event subsequent to the Australian Open.

### **Decision**

25. For the reasons given above, the tribunal unanimously makes the following decision:
- (i) A doping offence contrary to Rule C.1 has been established;
  - (ii) Under Rule L.1 the player is automatically disqualified in respect of the Australian Open Championship 2006, and forfeits any computer ranking points and prize money obtained in that competition;
  - (iii) Under Rule M.2 the period of ineligibility to be imposed is 2 years;
  - (iv) Under Rule M.8.3 the period of ineligibility shall commence on 10 March 2006;
  - (v) Under Rule M.7 the player shall not be disqualified from any events subsequent to the Australian Open Championship 2006.

Charles Flint QC

Professor Vivian James

Dr. Anik Sax



Charles Pitt.

signed on behalf of the Tribunal in London on 5 June 2006