

INTERNATIONAL TENNIS FEDERATION

and

Roy Mariano Hood

Decision of the Independent Anti-Doping Tribunal

Charles Flint QC, Chairman

Dr. Joe Cummiskey

Professor Vivian James

Date of Decision: 8 February 2006

Date of hearing: 16 January 2006

Mr Jonathan Taylor of Hammonds for the ITF

Mr Nicholas de Marco instructed by Louise Roberts of Max Bitel Greene for the Player

DECISION

1. The tribunal has been appointed under Rule K of the ITF's Tennis Anti-Doping Programme 2005 ("the Rules") to hear a charge brought against Roy Mariano Hood ("the player") of a doping offence contrary to article C.1, that a prohibited Substance (Finasteride) had been found to be present in a urine specimen taken from the player on 31 May 2005 at the French Open Championship held at Roland Garros.
2. The player initially challenged the jurisdiction of the tribunal, on the basis that the application form for the event, which the player signed, did not incorporate the Rules or give the ITF jurisdiction in respect of anti-doping offences at that event. That challenge was withdrawn shortly before the

hearing and it was accepted that the tribunal had jurisdiction to hear and determine the offence and the appropriate sanction.

3. The ITF and the player submitted written representations, attaching witness statements and documents. A hearing was held in London on Monday 16 January at which the player gave evidence, and was cross-examined on behalf of the ITF, and Laura Warwin of the ATP answered questions by telephone.
4. The player did not dispute that a doping offence had been committed, in that Finasteride, a Prohibited Substance, had been found to be present in a specimen taken from the player at Roland Garros. His case was that he had acted in good faith, without knowledge that Finasteride had been made a Prohibited Substance only from 1 January 2005, in continuing to take daily medication in the form of tablets of Finasteride for the treatment of hair loss as he had done, on medical advice, since 1996. In those circumstances he argued he bore no fault or negligence, or no significant fault or negligence, within the meaning of the exceptional circumstances provisions contained in articles M.5.1 and 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 by the player at the French 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 Tribunal, having heard evidence from Mr Hood, who was cross-examined on his written statement, and considered the evidence and documents contained in the ITF's and player's exhibit bundles makes the findings of fact set out below. We accept the evidence from the player as being honest and reliable.

6. The findings of fact are:

(1) Since 1996 the player has been taking 1mg Finasteride by tablet every day for the treatment of hair loss.

(2) He began using the drug on the recommendation of a friend, and was very shortly thereafter advised by his doctor to continue the treatment.

(3) Finasteride is a controlled drug in Argentina, but in practice it can be obtained from a pharmacy without a doctor's prescription.

(4) On his initial visit to the doctor in 1996 the player did ask the doctor whether Finasteride was prohibited under the anti-doping rules, and was advised that it was not.

(5) The player had surgical procedures for alopecia in 2001 and 2003; on these occasions he was advised by the doctors performing the surgery that he should continue to take Finasteride; in 2001, but not in 2003, he did check with the doctor that Finasteride was not a prohibited substance.

(5) He continued to take Finasteride daily, but after 2001 he did not take any specific steps to check with his medical advisers, or the sporting authorities, that he could safely continue to take the drug without infringing the anti-doping rules.

(6) Finasteride was not a Prohibited Substance under the doping rules applying prior to 2004, and was not a Prohibited Substance under the World Anti-Doping Code rules introduced by the ATP and ITF on 1 January 2004.

(7) In an edition of the ATP Player's Weekly, issued on 4th October 2004, there appeared a news story that the WADA Executive Committee had approved the Prohibited List for 2005, which would take effect from 1st January 2005. It was stated that some changes would be made to the current list of prohibited substances and it was specifically noted:

"Due to the findings of a WADA-sponsored research project, Finasteride, a product used for prostate problems in men and also for hair loss, will be added to the Prohibited List as a masking agent."

(8) The Player did not see or read that edition of the Player's Weekly and it was not brought to his attention that the list was to be changed to include Finasteride.

(9) In December 2004 there was sent out by the ATP to all players, including Mr Hood, a mailshot including the full text of the Prohibited List. However that mailshot did not reach Mr Hood because he had moved.

(10) In the Player's Weekly of 3rd January 2005 there was an item headed "Anti-Doping News" which the player recalls reading. That item reminded players that the Rules place strict liability on players for being aware of substances that are introduced into their bodies, and that it was critical that every time a player received a medical treatment, the player presented his anti-doping wallet card to the treating physician or trainer to ensure that the treatment did not contain any prohibited substances. There was also an announcement that the final list of prohibited substances for 2005 had been approved and would apply in full from the first tournament in 2005. The item noted certain "important changes" including that nine new anabolic steroids had been added to the list, but did not specifically refer to the change in respect of Finasteride. It was stated that full changes to the WADA list were available on the player zone of the ATP website.

(11) The player read that news item but did not take any steps to check, or take any advice, whether the rule changes affected his ability to continue to take Finasteride.

(12) On the website, there was displayed the full Prohibited List, without noting which parts of that list represented changes. It would therefore not have been at all easy for any player to discover which parts of the list had changed. If the player had read the detailed list in full, he would have been able to see that Finasteride had been added as a prohibited substance under the heading "diuretics and other masking agents". The player did not check the website.

(13) In 2005 there was not the customary mandatory players' meeting at the first tournament in Melbourne; there was a meeting but it was not mandatory and anti-doping matters were not discussed at the meeting. There

was thus no opportunity for the player to be briefed at a meeting on the effect of the rule changes.

(14) The player remained unaware that Finasteride had become a prohibited substance with effect from 1st January 2005. In 2005 he continued to take 1mg of Finsteride daily.

(15) Finasteride was the only regular medication which the player took, but he did not declare it on the doping control form signed by him on 31 May 2005 when the sample was taken.

(16) On being notified of the positive test of the A sample by letter dated 28 July 2005 the player for the first time appreciated that Finasteride was a Prohibited Substance. He promptly applied for a Therapeutic Use Exemption (“TUE”) in respect of Finasteride which was approved on 25 August 2005.

(17) The B sample was tested on 8 September 2005 and the player was charged with a doping offence on 26 September. The player continued to compete until 3 October 2005.

Legal Approach

7. Under Article S the Rules are governed by English law. It is expressly provided that the programme is to be interpreted in a manner consistent with the applicable provision of the WADA Code, taking into account the commentary to that code. As the Rules are based on the WADA Code, it is clear that they must be interpreted consistently so as to accord with generally internationally accepted principles of sports law which would be applied by tribunals in other jurisdictions, and by the Court of Arbitration for Sport (“CAS”) to which any appeal lies under Article O.

The Doping Offence

8. As previously mentioned the player does not dispute that he committed a doping offence under Rule C.1 on the basis that Finasteride, a prohibited substance, was present in the specimen taken on 31 May 2005 at the French Open Championship. The doping offence is established, and it follows that he is automatically disqualified from that competition and forfeits any ranking points and prize money obtained in that competition.

Sanctions

Exceptional Circumstances

9. The issue in this case is as to the sanctions, if any, beyond the automatic disqualification, which ought to be imposed under Rule M. The player contends that in the exceptional circumstances of this case he bore no or no significant fault for the offence, and thus the period of ineligibility which would otherwise apply should be eliminated or reduced.
10. Rule M.5.1 reads:

If a Player establishes in an individual case involving a Doping Offence under Article C.1 (presence of Prohibited Substance...) that he or she bears No Fault or Negligence for the offence, the otherwise applicable period of Ineligibility shall be eliminated. When the case involves a Doping Offence under Article C.1.... the Player must also establish how the Prohibited Substance entered his or her system in order to have the period of Ineligibility eliminated.
11. Rule M.5.2 similarly provides for the period of ineligibility to be reduced by up to one half if the Player shows No Significant Fault or Negligence.
12. The relevant expressions are defined as follows:

No fault or negligence. The Player establishing that he or she did not know or suspect and could not reasonably have known or suspected even with the exercise of utmost caution, that he or she had Used or been administered the Prohibited substance or Prohibited method.

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.

13. We have been referred to a number of previous cases, including some decided by CAS, to assist in the interpretation and application of these rules. However these cases all tend to be very fact specific, and as illustrations of how other tribunals have applied the Rules, or similar WADA Code based rules, in other circumstances they are of limited value. In the application of anti-doping rules there can be no doctrine of precedent, for that common law approach would not generally be accepted internationally nor applied by CAS. Certainty and consistency of application of the rules in order to ensure equitable treatment of sporting participants is a desirable aim, but that is achieved not by purporting to follow the approach of another tribunal to a different case, but by applying the general principles expressed in or to be inferred from the WADA Code.

14. A precondition to the application of Rules M5.1 or M.5.2 is that the player must be able to establish how the prohibited substance entered his system. The purpose of this provision is to confine the circumstances in which the automatic sanctions may be reduced to truly exceptional circumstances in which the player can show, the burden of proof lying upon him, how the substance did indeed enter his body. That burden of proof must be discharged on the balance of probability. The provision thus ensures that mere protestations of innocence, and disavowal of motive or opportunity, by a player, however persuasively asserted, will not serve to engage these provisions if there remains any doubt as to how the prohibited substance entered his body. This provision is necessary to ensure that the fundamental principle that the player is personally responsible for ensuring that no

prohibited substance enters his body is not undermined by an application of the mitigating provisions in the normal run of cases.

15. In this case the player has clearly shown how the substance entered his system; he continued his regular practice of taking his daily medication of Finasteride, which he assumed not to be a prohibited substance. He has therefore satisfied the precondition for the application of the relevant provisions. But it does not follow that the circumstances of this case are necessarily truly exceptional, so as to bring either Rule M.5.1 or M.5.2 into play.
16. Those provisions 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. The responsibilities of athletes are set out in article 21 of the WADA Code, including an obligation to make sure that any medical treatment does not violate the code. In general a player will be responsible for the actions and faults of his coach, trainer and his medical advisers. Rule B4 provides that it is the sole responsibility of each player to acquaint himself with all the provisions of the Rules.
17. In these Rules there is a particular requirement at Rule D1.3, which does not reflect a provision of the WADA Code, that the ITF shall take reasonable steps to publicise any amendments made by WADA to the Prohibited List. However that provision cannot, in the absence of most exceptional circumstances, allow the player to shift from himself to the sports organisation the responsibility for ascertaining and checking whether any medication taken by the player, of which only he will be aware, remains permitted under the anti-doping regime.
18. It is against that background that the exceptional circumstances provisions have to be interpreted. No fault or negligence requires the player to show the

utmost caution, that is that he had taken all the necessary precautions within his power to ensure that a doping offence could not be committed. It is not a standard of negligence, in the sense of requiring only reasonable care to have been taken. On the other hand the standard of the paradigm must not be set at such a level that it is practically unattainable or unrealistic. If the player fails to meet that very high standard 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 particularly culpable, but failed to meet the standard of utmost caution. In either case, no fault or no significant fault, the circumstances have to be truly exceptional. Again these exceptions have to be restrictively applied to prevent the principle of strict liability being eroded, so that the exception becomes the norm.

19. The anti-doping rules thus place a very strict burden on a player who claims to be absolved from the mandatory sanctions on ineligibility. In this case the player invoked the principle of proportionality as an argument, not for overriding any provision of the Rules, but as influencing the standards to be applied under those Rules. However it is not necessary in this case to examine the principles underlying the doctrine of proportionality as, for the reasons given below, the tribunal does not consider that the sanction which the Rules require is in this case to be disproportionate.

Whether the player was at fault

20. It is important to note that the player would have no argument if he had been a new entrant to the sport on 1 January 2005. His ignorance of the scope of the

prohibited list could not begin to provide mitigation sufficient to engage the exceptional circumstances provisions.

21. Thus the argument for the player has to be based on a legitimate assumption that as he had been participating lawfully in the sport for a number of years, taking his Finasteride medication without objection, he could safely continue on the basis that the rules had remained the same as before. His lack of knowledge of the change in the scope of the Prohibited List is not in doubt and his good faith is accepted. Finasteride, as taken by the player, is not performance enhancing and if he had known of the change in the Rules he would have applied for, and been granted, a TUE and could legitimately have continued to participate while taking Finasteride. His doping offence may thus fairly be described as technical in the sense that he was not aware of a change in the rules, which did not debar him from competing, but which, in the particular circumstances of this case, only required that he should have applied for a TUE before competing.
22. The tribunal is persuaded that this is an exceptional case, which does not call into question the general principles underlying the WADA Code. The fault of the player is understandable and to an extent excusable, the circumstances of the ingestion of the prohibited substance are clear, there was no competitive advantage sought or obtained, and the Rules would not have prevented the player from competing, with the prohibited substance in his body, if he had applied for a TUE at the proper time.
23. However it does not follow that the player is not, against the high standards set by the Rules, to be regarded as being at fault to some extent. It should be noted that despite knowing that the prohibited list had changed, he took no steps to ascertain what substances were prohibited and in particular took no steps himself to check, or seek any advice from a physician or trainer, as to whether he could safely continue to take Finasteride. Indeed he does not appear to have made any specific enquiry of a physician since 2001 as to

whether Finasteride, his only regular medication, was permitted. The ATP advises players that it is critical that every time they receive medical treatment they should present an Anti-Doping wallet card to the physician or trainer to ensure that the treatment is prohibited. How often a player should check in respect of regular medication will depend on the circumstances, but in this case we consider that the player should have made a proper check with a physician knowledgeable of the rules at least annually, and could reasonably have been expected to make proper enquiries when he was alerted to the fact that the prohibited list had been amended. A lack of attention to the importance of the anti-doping regime is also demonstrated by his failure to declare the medication on the sample collection form, notwithstanding that it was the only medication that he was then taking.

24. It is fair to note that the ATP did not specifically draw attention to the addition of Finasteride to the prohibited list in the Players' Weekly edition of 3 January 2005, as had been done in the edition of 4 October 2004, but the player could not reasonably have relied on the summary of the rule changes as a complete statement. The notification given by the ATP was in no sense misleading and could not reasonably have been read as giving any assurance that Finasteride was not one of the substances that had been added to the list. The ATP could not have known that the player was taking Finasteride and thus was directly affected by the change. The player should have checked, and he did not do so.
25. In these circumstances we consider that the player clearly cannot discharge the high burden required by the Rules of showing that he exercised the utmost caution.
26. However, not without some reservations, we are persuaded that he was not at significant fault, given the nature of the shortcoming and its gravity. This finding in the circumstances of this case does not contradict the policy of the WADA Code for the reasons given in paragraph 22 above. His omission to

check is understandable, given the length of time for which he had legitimately been taking the medication. The fault was not of the most serious kind given that if he had checked he would certainly have applied for and been granted a TUE.

27. There is a further general consideration. These are very strict rules which must continue to carry the support of the players as being considered necessary to combat drugs in sport. To equate the moral fault of this player in these particular circumstances with the normal case in which a player protests his innocence, but is unable to provide a convincing explanation for the prohibited substance in his body, would be perceived as being unjust. This is one of those truly exceptional cases which must in fairness be distinguished from the normal doping violation case.

Sanctions to be applied in this case

28. For those reasons we decide to reduce the mandatory period of ineligibility under Rule M.5.2. We consider that fairness, in the exceptional circumstances of this case, requires a reduction to a period of 1 year's ineligibility.

29. 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).

30. In this case there is a risk that the player may suffer an exceptional detriment as a result of any disqualification affecting his pension entitlement. Pension entitlements are a complex subject and we are not confident that we have

sufficient information as to the implications of this decision on his entitlement. However we intend that, so far as possible, this decision should not adversely affect his pension entitlement, save to the extent that necessarily follows from the automatic disqualification in respect of the participation in the French Open Championship 2005 and the period of ineligibility which we are obliged to impose.

31. Taking into account all the circumstances of the case, including the pension consideration, under Rule M.7 we decide that fairness requires that the player be not disqualified from any event subsequent to the French Open.
32. Under Rule M.8.3 we direct that the period of ineligibility should commence on 10 October 2005, since when the player has ceased to compete.
33. To avoid any risk of unintended adverse consequences on the player's pension entitlement this decision is not a final award. It is subject to the reservation that the player should be entitled to apply to the chairman in writing to postpone the commencement date for the period of ineligibility.
34. This is an amended version of the decision issued this morning to correct an error in the date referred to at paragraph 32 of the previous decision from 3 October 2005 to 10 October 2005. Both parties have agreed that 10 October 2005 is the correct date, and that the decision should be amended accordingly.

Decision

35. For the reasons given above, and subject to the reservation of a right to apply to vary the commencement date for the period of ineligibility as set out at paragraph 33, 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 French Open Championship 2005, and forfeits any medals, titles, computer ranking points and prize money (without deduction for tax) obtained in that competition;
- (iii) Under Rule M.5.2 the period of ineligibility to be imposed is 1 year;
- (iv) Under Rule M.8.3 the period of ineligibility shall commence on 10 October 2005;
- (v) Under Rule M.7 the player shall not be disqualified from any events subsequent to the French Open Championship 2005.

Charles Flint QC

Dr. Joe Cumiskey

Professor Vivian James

signed on behalf of the Tribunal in London on 8 February 2006

A handwritten signature in black ink that reads "Charles Flint." The signature is written in a cursive style and is underlined with a single horizontal stroke.