



**CASE 11 – Decision**

**NATIONAL ANTI-DOPING PANEL**

1. This tribunal has been appointed to hear and determine a charge against Player J of violation of the anti-doping rules of Rugby Football League. The player is charged with a breach of Article 2.1 in the finding of the Prohibited Substance, methylhexaneamine (MHA), in a sample taken in an in-competition test carried out on 13<sup>th</sup> May 2011.
2. The player admits the doping violation, but argues that the sanction should be reduced or eliminated, under Article 10.5.1, on the basis that he bore No Fault or Negligence, or under Article 10.5.2, on the basis that he bore No Significant Fault or Negligence. Alternatively as MHA is a Specified Substance listed under section S6(b) of the Prohibited List it is argued that the sanction should be reduced under Article 10.4.1.

### The Doping Offence

3. The athlete is a professional Rugby League player retained by Rugby League Club A. He is subject to the anti- doping rules of the Rugby Football League, which incorporate the UK Anti-Doping Rules, which in turn replicate the provisions of the WADA Code 2009.
4. On 13<sup>th</sup> May 2011 the player was subject to an in competition test after the match between Rugby League Club A and Rugby League Club B.
5. By letter dated 3 June 2011 the player was charged with a violation of Article 2.1 in that a Prohibited Substance, MHA, had been found to be present in the sample taken on 13<sup>th</sup> May.
6. The player waived his right to have the B sample tested and has admitted the presence of MHA, a Prohibited Substance, in his sample and thus the commission of the doping offence. The player denies that he knowingly ingested a Prohibited Substance.

### Procedural History

7. By letter dated 6<sup>th</sup> June 2011 the NADP was requested to convene a tribunal on an urgent basis to determine the charge. The panel was appointed the same day.
8. Due to the urgency of the hearing requested no formal directions were issued for the service of witness statements and submissions. On 8<sup>th</sup> June the parties were sent directions from the chairman, identifying the issues and evidence which the tribunal was likely to consider relevant to

those issues.

9. At the hearing oral evidence was given by the player and Witness A employed by Rugby League Club A as the "head conditioner", that is the coach responsible for conditioning the team players. The evidence also included the written statements made by the player, Witness A and Witness B, the chief executive of Rugby League Club A, together with two supporting statements from the RFL. UKAD submitted written statements from Michael Stow and Jason Torrance.
10. Under article 7.7.2 (a) a provisional suspension will automatically take effect in a case where a player is charged with an offence arising from the finding of a Prohibited Substance which is a Specified Substance, unless UKAD decides to disapply that article. The letter dated 3<sup>rd</sup> June from UKAD had informed the player that he was subject to provisional suspension. However, having been supplied with statements from the player and his club, UKAD communicated a decision by letter dated 6<sup>th</sup> June to disapply the provisional suspension. In the light of the evidence available to UKAD it is difficult to see how that decision could be justified. As appears below UKAD did not suggest at the hearing that this was a case in which the player could seek a complete elimination of any period of disqualification.

#### The issues

11. The player admits the doping violation under article 2.1, on the basis that a Prohibited Substance was found in his sample, but contends that the sanction of disqualification for a period of 2 years, which would automatically apply under Article 10.2, should be eliminated or reduced under the provisions of Article 10. The case is that the period of ineligibility should be eliminated under Article 10.5.1 on the basis of No Fault or Negligence on the part of the player, or reduced under Article 10.5.2 on the basis that there was No Significant Fault or Negligence. Alternatively, as MHA is a Specified Substance, it is argued that the period of ineligibility should be reduced or eliminated under Article 10.4.
12. The material provisions of the Code read as follows:

#### **10.5 Elimination or Reduction of the Period of Ineligibility Based on Exceptional Circumstances**

#### 10.5.1 Elimination of period of Ineligibility based on No Fault or Negligence:

If a Participant establishes in an individual case that he/she bears No Fault or Negligence for the Anti-Doping Rule Violation charged, the otherwise applicable period of Ineligibility shall be eliminated. When the Anti-Doping Rule Violation charged is an Article 2.1 violation (Presence of a Prohibited Substance or its Markers or Metabolites), the Athlete must also establish how the Prohibited Substance entered his/her system in order to have the period of Ineligibility eliminated. In the event this Article is applied and the period of Ineligibility otherwise applicable is eliminated, the Anti-Doping Rule Violation shall not be considered a violation for the limited purpose of determining the period of Ineligibility for multiple violations under Article 10.7.

#### 10.5.2 Reduction of period of Ineligibility based on No Significant Fault or Negligence:

If a Participant establishes in an individual case that he or she bears No Significant Fault or Negligence for the Anti-Doping Rule Violation charged, then the period of Ineligibility may be reduced, but the reduced period of Ineligibility may not be less than one-half of the minimum period of Ineligibility otherwise applicable. If the otherwise applicable period of Ineligibility is a lifetime, the reduced period under this Article may be no less than 8 years. When the Anti-Doping Rule Violation charged is an Article 2.1 violation (Presence of a Prohibited Substance or its Metabolites or Markers), the Athlete must also establish how the Prohibited Substance entered his/her system in order to have the period of Ineligibility reduced.

#### **Definitions:**

##### **No Fault or Negligence**

The athlete's 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 Athlete's establishing that his or her fault or negligence, when viewed in the totality of the circumstances and taking into account the criteria for No Fault or Negligence, was not significant in relation to the Anti-Doping Rule Violation.

#### **10.4 Elimination or Reduction of the Period of Ineligibility for Specified Substances under Specific Circumstances**

Where an Athlete or other Person can establish how a Specified Substance entered his or her body or came into his or her Possession and that such Specified Substance was not intended to enhance the Athlete's sport performance or mask the Use of a performance-enhancing substance, the period of Ineligibility found in Article 10.2 shall be replaced with the following:

First violation: At a minimum, a reprimand and no period of Ineligibility from future Events, and at a maximum, two (2) years of Ineligibility.

To justify any elimination or reduction, the Athlete or other Person must produce corroborating evidence in addition to his or her word which establishes to the comfortable satisfaction of the hearing panel the absence of an intent to enhance sport performance or mask the Use of a performance-enhancing substance. The Athlete's or other Person's degree of fault shall be the criterion considered in assessing any reduction of the period of Ineligibility.

13. Accordingly in this case the issues arising under Articles 10.4 and 10.5 are:
- (1) Whether the player can establish how the Specified Substance entered his body;
  - (2) Whether the player can establish that he bears No Fault or Negligence, or No Significant Fault or Negligence in respect of the ingestion;
  - (3) Whether the player can establish that, when he ingested the Specified Substance, he had no intent to enhance his sport performance;
  - (4) What sanction should be assessed by reference to the athlete's degree of fault.

## Facts

14. The player is aged [REDACTED] and has been a professional rugby league player since 1999. He has played at international level, with 28 caps for Great Britain. During his career he has been subject to doping control tests on more than 30 occasions, with no adverse results. He is an experienced player with practical experience of doping control and has attended some anti-doping education sessions.
15. In 2010 he was playing for Rugby Club C, but for personal reasons decided to move clubs. He joined Rugby League Club A in the week commencing 11<sup>th</sup> April. He continued to live with his parents in [REDACTED] so that he had to leave home each day at 5.30 am to drive to [REDACTED] for training which commenced at 7.30 am. By the end of the first week he was very tired and thought he needed something which would perk him up in the early morning for the drive to [REDACTED] and the first session of training.
16. On Saturday 16<sup>th</sup> April he visited a specialist athletics nutrition shop in Hull and asked the owner, whom he had known for some years, to recommend a stimulant. He was looking for something which would have the same effect as caffeine or Red Bull which he could take easily first thing in the morning. The owner recommended Oxy Elite Pro and sold him a bottle of tablets. On the bottle the product is described as a scientifically reviewed super thermogenic dietary supplement. There is a warning box on the label which says:

"it must be used with extreme caution only by healthy adults capable of handling its quick results and true power. It is mandatory that users get clearance from their physician before using."

Amongst the 5 ingredients listed on the label is "1,-3 Dimethylamylamine HCl ". The player trusted the recommendation and did not ask any questions about the composition of the tablets, nor whether the product contained any banned substances. He did not read the list of ingredients, nor the warning box.
17. The player does not have his own computer or email or password. He will occasionally use a computer in his parents' house but does not generally use the internet. He carried out no checks on the Oxy Elite Pro product on the internet.
18. Witness A is employed by Rugby League Club A as its head conditioner. He has a BSc in sports and exercise science. He has a general practical knowledge of doping control, derived from his degree training and from training sessions run by UKAD. However he has no medical or scientific expertise and would not be qualified to give any advice to players about the medical effect of any substance ingested. A conditioning coach, or conditioner, is employed by a rugby league club to be responsible

for the diet, including supplements, of its players and their physical condition. He will advise and instruct the players on their supplement intake which in general is provided at the club ground. Rugby League Club A has a contract with a trusted supplement supplier, PHD, which supplied all the supplements offered by the club to its players. However some players may also be taking other supplements and in those cases the clear understanding is that the player will check with the conditioner before taking those supplements. The club does not employ a full time doctor but makes use when required of a hospital physician on a part time basis. The doctor does not apparently play any part in the monitoring or checking of supplements.

19. The player was well aware of the practice, which had applied at his previous clubs, that he should not take any supplement without first checking with the conditioner. On Monday 18<sup>th</sup> April he spoke to Witness A. He said he had purchased a stimulant and handed him the bottle of tablets, which had not been opened and was still sealed. Witness A said he would check to see if the supplement was OK to take.
20. Witness A's evidence is that he then carried out some checks on the internet. The white plastic bottle bore a label which clearly listed the ingredients, including "1,-3 Dimethylamylamine HCl". That was one of only two ingredients, in the five listed, which were identified by reference to a chemical name. The other ingredients were referred to as plant extracts. Witness A says he read the label and noted all the ingredients including 1,-3 Dimethylamylamine. He says he then carried out two checks. First he checked, ingredient by ingredient, against the list of Prohibited Substances shown on the WADA website as being "prohibited at all times (in and out of competition)". He did not search the site by reference to the product name or its ingredients, but read through the list of Prohibited Substances checking that they did not refer to the ingredients listed on the bottle. He then says that he searched the Global DRO website, not by reference to the ingredients but by reference to the product name "Oxy Elite Pro" and found no match. As a result of those searches he says that he was satisfied that there was no Prohibited Substance in the tablets and that they could be used by the player. He did not give any consideration as to how these tablets would interact with any supplements provided by the club. He says he thought that the tablets were a form of stimulant, but on his evidence he had no knowledge as to how the supplement worked nor did he have any knowledge whether the product might be harmful to the player or adversely affect his training and condition.
21. Later the same day or the following day Witness A says he handed the bottle back to the player, saying the tablets were OK to take. Witness A did not give any instructions or advice as to when and in what dosage they should be taken. Nor did he give any instruction that the tablets should only be taken on training days, and not on match days, for on his understanding the product contained no

Prohibited Substance.

22. The player's evidence is that he then used the Oxy Elite Pro tablets, 2 or 3 first thing in the morning, on training days between 19<sup>th</sup> April and 3<sup>rd</sup> June, when he was notified of the doping violation, that is over a period of about 6 weeks. During that period he used 39 tablets. He says he kept the tablets in a bag in his car.
23. On 13<sup>th</sup> May the player was tested after the match against Rugby League Club B. The Rugby League Club B club doctor was present. Under the declaration of medication at box 23 the player disclosed a number of medications, including diazepam, asthma spray and Vicks sinex spray. He also disclosed "Java" which is a supplement having the effect of a stimulant which was provided by his club. However he did not disclose Oxy Elite Pro. His explanation is that he was concentrating on the supplements he had taken that day and omitted to disclose tablets of Oxy Elite Pro which he had taken in the early morning of the previous training day, Thursday 12<sup>th</sup> May.
24. After being notified of the charge by letter dated 3<sup>rd</sup> June Witness B, the chief executive of Rugby League Club A, carried out enquiries. The Oxy Elite Pro bottle of tablets was produced. The question arose as to how Witness A had failed to spot that 1,-3 Dimethylamylamine was a Specified Substance prohibited in competition. Witness A ran through his checking on the WADA website and opened the Prohibited List under the box "prohibited at all times (in and out of competition)", which displayed sections S1 to S5. It was then pointed out to him that if he had opened the box "prohibited in competition" then the list would include sections S6 to S9, including a list of the Specified Stimulants at section S6 (b) which refers to MHA.

#### The evidence of Witness A

25. The evidence of Witness A gives rise to a number of serious doubts as to how he could have satisfied himself that the product Oxy Elite Pro did not contain any Prohibited Substance. This is not a case of a contaminated supplement; Dimethylamylamine was openly listed as an ingredient on the bottle. In those circumstances the suggestion that an experienced conditioning coach could have missed the point that the supplement contained a Prohibited Substance appears unlikely even if, as he claims, he was incompetent in carrying out his checks.
26. On 16<sup>th</sup> September 2010 the RFL issued an email warning to all clubs about the use of MHA in supplements. Witness A read that email. The email refers to a number of alternative names for MHA including Dimethylamylamine. The email urged clubs to warn players about the dangers of MHA in supplements. Witness A says he did not specifically have this warning in mind when he checked the



- ingredients of Oxy Elite Pro, but accepts that the name Dimethylamylamine did ring some bells.
27. The method by which Witness A says he checked on the WADA website for the presence of any Prohibited Substance appears peculiar. On his evidence he had no idea of the nature of any of the 5 ingredients, nor which of any of the 5 ingredients might be banned. He would thus have needed to read through the entire list, covering all sections from S1 Anabolic Agents to S5 Diuretics and other masking agents, and apparently to do so by reference to each of the 5 named ingredients. That is a laborious process compared to using a search engine. The process would also require some expert medical or scientific understanding, which Witness A knew he did not have, in order to have any confidence that the listed ingredients could not be a derivation of a listed chemical compound, or within the general description of a type of agent.
28. Witness A's evidence is that he frequently carries out checks on supplements on the internet and it is clear that he does have a close acquaintance with the Prohibited List. It is thus strange that he should have carefully checked against sections S1 to S5, but have failed to notice that he had omitted to check against sections S6 to S9.
29. It would have been much easier to conduct a simple search through an internet search engine by reference to the listed ingredients. A search in respect of Dimethylamylamine would quickly have revealed that this was a Prohibited Substance.
30. Yet when Witness A did use a search engine, on the Global DRO website, he says he did not type in the names of any ingredients, but instead chose to search by reference to the brand name of the product, despite the fact that the website does not purport to provide information on supplements. The terms and conditions of the website, which would have been accepted when he made the search, included the following statement: *"Global DRO does not contain information on, or that applies to, dietary supplements. If a component of a supplement is listed in this database as permitted, the status of any supplement that includes the ingredient is at your own risk."*
31. His evidence that he made any check by searching for "Oxy Elite Pro" on the Global DRO website is contradicted by evidence adduced by UKAD. His evidence is that he did search for that product name on the United Kingdom section, in relation to Rugby League and as a "coach". The evidence of Michael Stow, the head of science and medicine at UKAD, is that the only search made on the Global DRO website under the product name "Oxy Elite Pro" in relation to Rugby League was made on 21<sup>st</sup> March. There was no such search recorded in April or May. If Witness A had searched the site in respect of ingredients, as opposed to the product name, then MHA would have been disclosed as banned in competition.
32. Witness A's evidence is that he had no concerns as to the product, although he knew nothing about

- its composition. He accepts that when he was handed the bottle by the player he was a bit suspicious. Despite being responsible for the nutrition and supplement intake of all his players he apparently gave no consideration at all to the question whether the tablets could be harmful to the player or could interfere with his medication or his legitimate supplement intake. No attention was apparently paid to the warning on the label. If true, this appears to be a remarkable abdication of responsibility.
33. The effect of these factors is that the tribunal has serious reservations about the reliability of the evidence of Witness A. The weight to be attached to his evidence on the issues is dealt with below.

### **Findings of Fact**

34. The primary facts were substantially uncontested by UKAD, save in relation to the checks carried out by Witness A. In cross-examination and submission it was not suggested that the player's evidence was untrue. In cross-examination it was suggested to Witness A that his evidence that he had carried out a check on the Global DRO website was incorrect and that he had agreed to "take the rap" for the player. However in closing submissions UKAD did not advance any case that Witness A had fabricated his evidence to shield the player, but it was maintained that he had not been entirely truthful in stating that he had carried out a check on the Global DRO website. The summary of UKAD's case on the facts is that it is accepted that the player did ask Witness A if the product was safe to take, Witness A did give that assurance, but that he had not carried out all the checks which were referred to in his evidence.
35. UKAD did not concede the issue that the player had taken the supplement with no intent to enhance sport performance. It was clearly stated that that was a matter for the tribunal to decide. UKAD accepted that the evidence of Witness A as to what he had said to the player was correct, and asserted that that evidence corroborated a lack of intent to enhance performance on the part of the player.
36. On this state of the evidence and submissions the tribunal has decided that it would be fair to proceed on the factual basis accepted by UKAD, that the player's evidence is true that he was advised by Witness A that the supplement was safe to take. But the tribunal is not required to treat Witness A's evidence as reliable, having come to the clear conclusion that it is not.
37. On that basis the tribunal finds that the primary facts are as set out at paragraphs 14 – 19 and 21 – 24 above. The tribunal does not accept the evidence given by Witness A referred to in paragraph 20 above as reliable. Our limited findings as to when precisely the player took the tablets before the

match on 13<sup>th</sup> May are set out below.

38. The weight and relevance of the evidence, and whether it provides the corroboration necessary for the application of Article 10.4, is a matter for the tribunal to decide. We are not bound to accept the UKAD submission that the evidence of Witness A, to the extent that it is found to be reliable, provides corroboration for the evidence of the player that he did not use the supplement with an intent to enhance his sport performance.

### The application of Article 10.5.1

39. Articles 10.5.1 and 10.5.2 require consideration of the player's fault, judged against the necessarily strict standards set by the WADA Code. The definition of No Fault or Negligence refers to the "exercise of utmost caution", which is the general statement of the duty of players subject to the Code. The player has a personal responsibility, from which he cannot be absolved by reliance on others. Article 3.2.1.1 provides that it is the athlete's personal duty to ensure that no Prohibited Substance enters his body. 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.

40. The duty of utmost caution imposed on athletes is set out in the Advisory Opinion of CAS (CAS 2005 /C/976 & 986) at paragraphs 73 – 75.

41. The heading makes clear that articles 10.5.1 and 10.5.2 should only apply in exceptional circumstances, and the commentary to the Code states:

Articles 10.5.1 and 10.5.2 are meant to have an impact only in cases where the circumstances are truly exceptional and not in the vast majority of cases.

The commentary then makes the points that athletes are responsible for what they ingest and that a sanction could not be completely eliminated even in the case where the trainer administers a Prohibited Substance.

42. 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.

43. It is a requirement for the application of Articles 10.5.1 and 10.5.2 that the player must establish how the Prohibited Substance entered his system. The burden of proof is on the player and by Article 8.3.3 the standard of proof on this issue is the balance of probabilities.
44. UKAD accepted that the player could establish how the Prohibited Substance entered his system and we agree. The Prohibited Substance MHA entered the player's system from the ingestion of tablets of Oxy Elite Pro taken at some time before the in competition test carried out on 13<sup>th</sup> May 2011. Oxy Elite Pro is the obvious, and only likely, source of MHA in the player's system. The actual circumstances and timing of that ingestion will be considered below, but are not relevant to this issue.
45. The player argued that he had No Fault or Negligence in that he took the reasonable step of checking with the conditioner employed by the club that the tablets did not contain any banned substance. It is said that players must be able to place complete trust in the advice given by a person in the position of Witness A and that it would be unreasonable, and contrary to the general interest of team welfare, if players were to take an independent view of whether it was safe to take supplements.
46. We do not accept that argument. A player has a personal duty to ensure that he complies with rules and must be personally aware of what substances are on the Prohibited List. The player took his own decision to purchase the supplement and took no advice from the supplier. He took no steps at all to read the list of ingredients, and paid no attention to the warning on the label that the product was to be used with extreme caution and only after advice from a physician. A player cannot completely absolve himself from the duty of utmost caution by handing over a product to another, even a club employee tasked with the duty of checking supplements. The request to check and the response from Witness A were extremely casual. A responsible player would have asked some questions, and should at least have asked for information about what the supplement was likely to do to his body. He should then have been prompted to seek proper advice from a medical practitioner expert in doping control. We accept that it is reasonable for players to place some reliance on advice given by the conditioner, but it does not follow that for a player himself to exercise some additional care would lead to any breakdown in the relationship of trust between player and coach.
47. We therefore conclude that the player is not entitled to an elimination of the sanction under Article 10.5.1.
48. It is important to reiterate that the dangers of taking supplements have been made very clear by

the anti doping authorities, and athletes who do so are running a clear risk. We were referred to the case of *USADA v Hardy* (CAS – 2009) at paragraphs 119 to 122 which shows the heavy duty imposed on athletes who take supplements. At paragraph 120 of that decision it was noted that Hardy had made good faith efforts “to leave no reasonable stone unturned” having carried out the investigation which would reasonably be expected from an informed athlete wishing to avoid risks arising from supplements. That was a case of a contaminated supplement where the athlete had made extensive enquiries to check that the supplement was safe, and the case was considered to be truly exceptional so that it was held that the athlete bore No Significant Fault or Negligence. The circumstances of this case are very different, for the reasons given at paragraph 46 above. The player was at significant fault and the circumstances of this case are not truly exceptional in terms of the steps taken by the player to avoid taking a Prohibited Substance.

49. We therefore conclude that the player has not established that he bore No Significant Fault or Negligence so as to be entitled to a reduction in sanction under Article 10.5.2.

#### The application of Article 10.4

50. In this case the Specified Substance, MHA, is a stimulant which under section S6 (b) of the Prohibited List is only prohibited in competition. That provision reflects Article 4.2.1 of the Code which states:

The Prohibited List shall identify those Prohibited Substances and Prohibited Methods which are prohibited as doping at all times (both In-Competition and Out-of-Competition) because of their potential to enhance performance in future Competitions or their masking potential and those substances and methods which are prohibited In-Competition only.

It was accepted by UKAD in argument that the issue in this case is directed to whether there was any intention to enhance performance in competition.

51. Article 10.4 makes clear that there is a high evidential burden on the athlete in this respect. The athlete's assertion in evidence is insufficient. Corroborating evidence must be found, and the standard of proof is that of “comfortable satisfaction” which is defined as being greater than a mere balance of probability.
52. The commentary to Article 10.4 states:

Examples of the type of objective circumstances which in combination might lead a hearing panel to be comfortably satisfied of no performance-enhancing intent would include: the fact that the nature of the Specified Substance or the timing of its ingestion would not have been beneficial to the Athlete; the Athlete's open Use or disclosure of his or her Use of the Specified Substance; and a contemporaneous medical records file substantiating the no sport-related prescription for the Specified Substance. Generally, the greater the potential performance-enhancing benefit, the higher the burden on the Athlete to prove lack of an intent to enhance sport performance.

53. The criterion for reducing or eliminating the period of eligibility is the athlete's degree of fault. The provisions of the Code must be considered against the general principle of strict liability under which it is the athlete's personal duty, described as a duty of the utmost caution, to ensure that no Prohibited Substance enters his body.

54. The commentary to Article 10.4 states:

In assessing the Athlete's or other Person's degree of fault, the circumstances considered must be specific and relevant to explain the Athlete's or other Person's departure from the expected standard of behavior. 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 this Article. It is anticipated that the period of Ineligibility will be eliminated entirely in only the most exceptional cases.

and under Article 10.5:

While Minors are not given special treatment per se in determining the applicable sanction, certainly youth and lack of experience are relevant factors to be assessed in determining the Athlete's or other Person's fault under Article 10.5.2, as well as Articles 10.3.3, 10.4 and 10.5.1.

55. Thus the test must be applied specifically to the circumstances of the player, in considering his fault, if any, in failing to exercise care to prevent the use of a Prohibited Substance. On this issue it is not directly relevant that Witness A, on any basis, failed to exercise reasonable care in checking whether the product contained any banned substance. The issue is the degree of fault of the player personally.

56. The source of the MHA is clear, but whether the tablets were taken without any intent to enhance

sport performance in the match on 13<sup>th</sup> May must depend on the timing and circumstances of the ingestion. The player's evidence is that he did not take any tablets on the morning of the match, but that he did so the day before. He explained that he would not have needed to take a stimulant on the day of the match, because he was not getting up early to travel to [REDACTED]. On the other hand on his evidence he had no reason not to take the tablets on match days, if required, because he believed they did not contain any banned substance.

57. As set out at paragraph 23 above, on the sample collection form the player failed to disclose the fact that he had been using Oxy Elite Pro as a supplement, although he did disclose the use of another stimulant, Java, and some medication. The player is very experienced and has undergone doping tests on many occasions, so the failure to disclose the use of the supplement within the last days, as required by the form, is surprising. The guidance to the WADA code provisions noted at paragraph 52 above state that it is relevant to consider whether the player made open use or disclosure of the Specified Substance. The player failed to disclose the supplement on the doping control form and there is no evidence that any other person at the club, apart from Witness A, knew that the player was using the supplement, which he says he kept in his car. So even on the player's own evidence serious doubts arise as to whether it clearly establishes a lack of intent to enhance sport performance.
58. On this issue the need for corroborating evidence is critical. Thus far the evidence consists solely of the word of the athlete. There is no independent evidence as to the circumstances in which he took the tablets before the match, either on the day or the day before, and thus no objective evidence going to his intention when he did so.
59. It is argued for the player, and this argument was supported by UKAD, that corroborating evidence should be found in the circumstances in which the player received advice from Witness A that the tablets did not contain a Prohibited Substance. But there are a number of difficulties with this argument:
- (1) The evidence of Witness A was not that he gave any advice or instruction to the player that he should not take the tablets on match days. As far as the player was concerned the product could be taken at any time. Therefore this evidence does not logically support a finding that the player cannot have intended to use the product to enhance his performance in competition;
  - (2) The conversation which took place on 18<sup>th</sup> April is too remote from the circumstance of the relevant ingestion, on 12<sup>th</sup> or 13<sup>th</sup> May, to provide any reliable evidence that the player cannot have had the necessary intention at the relevant time. Even if his intention had been

to use the product only on training days when he travelled to ■■■, it does not follow that he could not later have decided to use the tablets to provide a stimulant on the morning of a match day;

- (3) The point depends on the tribunal accepting the evidence of Witness A as demonstrating, to a high standard of proof, the absence of intent on the part of the player. But for the reasons given at paragraph 33 above there are serious reservations as to Witness A's evidence, and we do not consider it to be reliable. The player has not produced reliable corroborating evidence from Witness A that he checked the product, satisfied himself that it did not contain any Specified Substance and advised the player on that basis that it was safe to use.
60. For those reasons we decide that the player has not produced corroborating evidence which establishes, to the comfortable satisfaction of the tribunal, the absence of an intent to enhance sport performance. The player is thus not able to invoke Article 10.4.1 to seek a reduction in the sanction that would follow from the doping violation.
61. For the purposes of this decision it is not necessary to decide the point argued by UKAD that the tribunal should follow the decision of CAS in *Flavia Oliveira v. USADA* in preference to *Kurt Foggo v National Rugby League* and hold that if a player does not know that the supplement which he ingests contains a Specified Substance then it follows that he cannot have had the intent that a Specified Substance should enhance his sport performance. We regard this as a difficult proposition in the light of the general law, the wording of Article construed as a whole, the policy of the WADA code and the reasoning in those two cases. If a player takes a tablet intending that it will enhance his sport performance then he has the intent to use whatever is in the tablet for that purpose. He is not required to have in mind the chemical composition of what he ingests. However we do not need to express a concluded view on the point in this case.
62. The player relied on the decision of the South African Rugby Union Judicial Committee in *Mahlatse Chilibooy Ralepelle & Bjorn Basson* made on 25<sup>th</sup> January 2011 in which two players who had ingested MHA received a reprimand, and no substantial sanction. However that was a case in which, despite the exercise of best endeavours by the players, the team and the suppliers, it was later discovered that some batches of the supplement had been contaminated with MHA. The players were able to produce extensive and unimpeachable evidence to corroborate their case of lack of intent to enhance sport performance by use of a Specified Substance. That case is quite different from this.



### Ineligibility

63. Accordingly under Article 10.2 a period of ineligibility of 2 years must be imposed. As the player has not been subject to any effective provisional suspension the period must start on the date of this decision, 13<sup>th</sup> June 2011.

### Decision

64. This case emphasises, yet again, the dangers of players taking supplements which contain MHA. These risks have been the subject of a public warning by UKAD following the publication of the decision in *UKAD v Wallader* made on 29<sup>th</sup> October 2010. The RFL issued a clear warning to all clubs about MHA in its email sent on 16<sup>th</sup> September 2010. A list of supplements which have been tested to proper standards is available at [www.informed-sport.com](http://www.informed-sport.com). Any athlete who uses supplements which are not on that list is running a serious risk of attracting a doping violation. On the evidence given in this case the player was very badly let down by his club. This is not just the point that any competent check on the listed ingredients would have revealed that this supplement contained MHA. More generally a conditioning coach may not be properly qualified to assess whether the listed ingredients of a supplement are covered by the Prohibited List. The club failed to put in place a proper system, under the supervision of a qualified medical practitioner expert in doping control, under which any supplement use by players is properly checked, monitored and recorded.
65. For the reasons given above, the tribunal makes the following decision:
- (i) A doping offence contrary to Article 2.1 has been established;
  - (ii) Under Article 10.1 the period of ineligibility imposed is 2 years from 13<sup>th</sup> June 2011.

### Right of Appeal

66. Under Article 13.4.2 the player has a right of appeal to the NADP. Under article 13.7.1 any appeal must be brought within 21 days from receipt of this decision.

Charles Flint QC

Professor Peter Sever

Lorraine Johnson



Charles Flint.

signed on behalf of the tribunal

13<sup>th</sup> June 2011