SPORT RESOLUTIONS (UK)

NATIONAL ANTI-DOPING PANEL

SR/NADP/883/2017

IN THE MATTER OF PROCEEDINGS BROUGHT UNDER THE ANTI-DOPING RULES OF THE SCOTTISH FOOTBALL ASSOCIATION

Before:

Jeremy Summers (Chairman)
Professor Dorian Haskard
Professor Gordon McInnes

Between:

UK ANTI-DOPING LIMITED ("UKAD")

Anti-Doping Organisation

and

DARREN McCORMACK

Respondent

DECISION OF THE ANTI-DOPING TRIBUNAL

Introduction

1. This is the unanimous decision of an Anti-Doping Tribunal ("the Tribunal") convened under Article 5.1 of the 2015 Procedural Rules of the National Anti-Doping Panel ("the Procedural Rules") and Article 8.1 of the UK Anti-Doping Rules dated 1 January 2015 ("the ADR") to determine an Anti-Doping Rule Violation ("ADRV") alleged against Mr Darren McCormack ("the Athlete").

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

3. The Athlete was charged by letter issued by UKAD dated 28 April 2017. The Tribunal was appointed by Charles Flint QC, President of the National Anti-Doping Panel ("the NADP").

4. At a hearing convened on 7 September 2017, the Athlete was represented by Mr Rupert Beloff of counsel and UKAD was represented by Mr Paul Renteurs also of counsel. The Tribunal notes that Mr Beloff has acted throughout on a pro bono basis and the Tribunal records its gratitude to both advocates for their assistance in this matter.

5. Additionally, present at the hearing were:

Ms Kylie Brackenridge – NADP Secretariat;

Mr James Laing – paralegal at UKAD;

Mr James Salisbury – observer; and

Mr Ean Gilhooley – witness for the Athlete.

6. This is the reasoned decision of the Tribunal.

Jurisdiction

7. Jurisdiction was not challenged but for completeness the Athlete is a professional football player, who at the material time was registered as a player with Brechin City FC. At the material time Brechin City FC competed in Scottish League One.

8. The Scottish Football Association ("SFA") is the National Governing Body ("NGB") for football in Scotland, and has adopted the UK Anti-Doping Rules ("ADR") as their own Anti-Doping Rules. The ADR apply to all members of the SFA who, by virtue of that membership, agree to be bound by and to comply with them.

9. The Athlete was at all material times a registered SFA member.

10. ADR Article 1.2.1 provides that:

1.2.1 These Rules shall apply to:

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

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

[(c)(d)]

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

12. UKAD submitted a request for arbitration to the NADP by letter dated 11 May 2017.

Background

13. On 8 April 2017 the Athlete participated as an unused substitute in a match between Brechin City FC and Airdrieonians FC at the Excelsior Stadium, Airdrie, Scotland. Doping control personnel attended that match and conducted sample collections from a number of players, including the Athlete.

14. Mr Allan Kilpatrick, Doping Control Officer, noted in a Supplementary Report Form that as a result of the Athlete not playing, and rehydrating throughout the match, he provided three Samples that did not have Suitable Specific Gravity for Testing purposes. The Athlete ultimately provided four urine Samples numbered 1132889, 1129857, 1129846 and 1129850.

15. Each of these was split into an A Sample and a B Sample. In accordance with Article G.4.11 of the WADA International Standard for Testing and Investigations ("ISTI") the first urine Sample collected (A1132889) and the last urine Sample collected (A1129850) were sent for analysis to the World Anti-Doping Agency ("WADA") accredited laboratory at Kings College London ("the Laboratory").

16. On 26 April 2017 the Laboratory reported that Sample A1132889 had returned an adverse analytical finding ('AAF') for 6β-hydroxymetandienone (a metabolite of metandienone) and Sample A1129850 had returned an AAF for 6β-hydroxymetandienone,17-epimetandienone,17β-methyl-5β-androst-1-ene-3a,17a-diol (metabolites of metandienone).

17. Metandienone is a Prohibited Substance under s.1.1(a) of the WADA Prohibited

List 2017. It is a Non-Specified Substance and is prohibited at all times.

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

The Charge

19. By letter dated 26 July 2017 the Athlete was charged with committing an ADRV in respect of the presence of 6β-hydroxymetandienone (a metabolite of metandienone) in Sample A1132889 provided on 8 April 2017, and the presence of 17-epitmetandienone, 60-hydroxymetandienone and 17β-methyl-5β-androst-1-ene-3,17a-diol (epimetendiol) (metabolites of metandienone) in Sample A1129850 provided on 8 April 2017, in violation of ADR Article 2.1.

20. An original charge had been issued to the Athlete by letter dated 28 April 2017. It was confirmed on behalf of the Athlete that no issue arose in consequence of the original charge having been subsequently amended.

21. ADR Article 2.1 provides as follows:

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

22. By a direction dated 14 August 2017 the Tribunal Chair sought further clarification as to the factual background that had led to the amendment of the charge. Such clarification was provided by way of a letter dated 14 August 2017.

23. By way of further direction issued on 14 August 2017 the Athlete was required to confirm his position in respect of the amended charge in light of that additional

clarification. The Tribunal was informed by email from the NADP Secretariat dated 22 August 2017 that the Athlete admitted the ADRV as set out in the amended charge. The Athlete further confirmed that he admitted the amended charge, and thus the ADRV, in oral evidence before the Tribunal.

24. No preliminary points were raised by either party.

Relevant Regulations

25. It was common ground that this was the Athlete's first ADRV. As such ADR 10.2 applied:

10.2 Imposition of a Period of Ineligibility for the Presence, Use or Attempted Use, or Possession of a Prohibited Substance and/or a Prohibited Method

The period of Ineligibility for an Anti-Doping Rule Violation under Article 2.1, 2.2 or 2.6 that is the Athlete's or other Person's first anti-doping offence shall be as follows, subject to potential reduction or suspension pursuant to Article 10.4, 10.5 or 10.6:

10.2.1 The period of Ineligibility shall be four years where:

(a) The Anti-Doping Rule Violation does not involve a Specified Substance, unless the Player or other Person can establish that the Anti-Doping Rule Violation was not intentional.

(b) The Anti-Doping Rule Violation involves a Specified Substance and UKAD can establish that the Anti-Doping Rule Violation was intentional.

10.2.2 If Article 10.2.1 does not apply, the period of Ineligibility shall be two

years.

10.2.3 As used in Articles 10.2 and 10.3, the term "intentional" is meant to identify those Athletes or other Persons who cheat. The term, therefore, requires that the Athlete or other Person engaged in conduct which he or she knew constituted an Anti-Doping Rule Violation or knew that there was a significant risk that the conduct might constitute or result in an Anti-Doping Rule Violation and manifestly disregarded that risk. An Anti-Doping Rule Violation resulting from an Adverse Analytical Finding for a substance which is only prohibited In-Competition shall be rebuttably presumed to be not "intentional" if the substance is a Specified Substance and the Athlete can establish that the Prohibited Substance was Used Out-of-Competition. An Anti-Doping Rule Violation resulting from an Adverse Analytical Finding for a substance which is only prohibited In-Competition shall not be considered "intentional" if the substance is not a Specified Substance and the Athlete can establish that the Prohibited Substance was Used Out-of-Competition in a context unrelated to sport performance.

26. The substances found in the Athlete's AAF derive from a substance commonly described as *Dianabol.* Dianabol is a Non-Specified Substance for the purposes of the ADR. Accordingly the burden rested on the Athlete to establish on the balance of probabilities that the ADRV was not intentional pursuant to ADR 10.2.1 (a) above. For the purposes of meeting that test intentional is being defined as in ADR 10.2.3 above.

27. The Athlete asserted that the ADRV should not be held as being intentional. He additionally sought to place reliance on ADR 10.5 to further reduce any period of ineligibility to be imposed.

10.5 Reduction of the period of Ineligibility based on No Significant Fault or Negligence

10.5.1 Reduction of Sanctions for Specified Substances or Contaminated Products for

Anti- Doping Rule Violations under Article 2.1, 2.2 or 2.6:

(a) Specified Substances

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

[(b) Contaminated Products

10.5.2 Application of No Significant Fault or Negligence beyond the Application of Article 10.5.1:

In an individual case where Article 10.5.1 is not applicable, if an Athlete or other Person establishes that he/she bears No Significant Fault or Negligence, then (subject to further reduction or elimination as provided in Article 10.6) the otherwise applicable period of Ineligibility may be reduced based on the Athlete's or other Person's degree of Fault, but the reduced period of Ineligibility may not be less than one-half of the 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 eight years.

28. In contrast, UKAD asserted that the Athlete's conduct should be found to be intentional. As such neither ADR 10.2 nor ADR 10.5 should be applied in favour of the Athlete.

The Evidence

29. The Athlete gave live evidence before the Tribunal and confirmed the veracity of his written statement dated 26 July 2017.

30. He had not played competitive football since Boxing Day 2016. This had been due to a combination of injury and having fallen out of favour with his manager. He had been named as a substitute in games since that time but had not been used from the bench.

31. He stated that his intention had in any event been to retire from professional football at the end of the season and pursue a career in business with his father, which he was now doing.

32. He had known Mr Ean Gilhooley for a number of years and described him as a good friend.

33. Whilst they did not usually train together they had decided to squeeze in a week of training with each other. That training had taken place at a boxing gym run by the Athlete's father.

34. The Athlete stated that he usually took protein shakes at the end of a training session but had run out that particular week. Mr Gilhooley had then offered to make him shakes which he had agreed to. Mr Gilhooley had simply said that they were protein shakes and he had said okay. There had been no real discussion about the shakes themselves.

35. In response to questioning from the Tribunal, the Athlete agreed that he had taken the shakes offered by Mr Gilhooley during the week of 20 - 24 March some

two weeks before he was tested. He did not know what type of protein shake it was, as Mr Gilhooley had not told him what was in it and he had not asked.

36. He had assumed that the shake provided by Mr Gilhooley was one of those that was commercially available to buy off the shelf and which were routinely taken by many sportspeople. Mr Gilhooley was not a boxer or a bodybuilder but an amateur footballer. The Athlete himself had usually taken Maximuscle after training.

37. Mr Gilhooley had not told the Athlete that he had inserted a fat burner into the shakes he provided until after the Athlete had been notified that he had returned an AAF following his drug test.

38. He and Mr Gilhooley had trained independently although other people were in the gym at the time.

39. In cross-examination from Mr Renteurs, the Athlete confirmed that he loved playing football and he would not have put his career at risk by taking prohibited substances. He further confirmed that he had attended a drug awareness presentation some four months before the date of his sample test, that presentation having been provided by Brechin City FC, on 22 November 2016[1].

40. He recalled that the presentation was about taking illegal substances and that it was his responsibility to ensure that he knew what went into his body.

41. Whilst he confirmed that he knew it was highly important to abide by the anti-doping rules, he was less clear that he fully understood the importance of the

[1] Statement of Peter McLaughlin (page 116, Tab 1 of the Hearing Bundle)

"*tell, check, ask*" regime[2]. He had never discussed the anti-doping rules with any other person.

42. He confirmed that he had not discussed what was in the shake with Mr Gilhooley and had not thought it was a "*big deal*". This was because he did not think Mr Gilhooley would jeopardise his career by putting something improper into the shake.

43. Whilst the Athlete confirmed he understood the risk involved in taking supplements he could not recall the specific PowerPoint slide from that presentation[3], which was in evidence, that outlined those risks. He stated that he had not been paying attention during the presentation and had not thought there was any danger of him ever failing a drugs test.

44. In response to questions raised by the Tribunal, the Athlete indicated that he was earning either £225 or £250 a week as a basic wage with a £25 appearance bonus. There was also a win bonus which was calibrated by reference to where in the league table the club was at the time, up to a maximum of £125.

45. A tub of Maximuscle costs £34.99 (although it could vary with size) and lasted between two weeks and three months.

46. The Athlete stated that he had been unable to afford to replace his protein shake in that particular week due to other regular outgoings such as his mortgage, Sky TV, car insurance, food and travelling to training.

47. He was unable to explain why he had just chosen to train with Mr Gilhooley for that one particular week.

[2] Exhibit PM/1 (page 136, Tab 1 Hearing Bundle)
[3] Exhibit PM/1 (page 143, Tab 1 Hearing Bundle)

48. He was not provided shakes by his club following training and indicated that if he had the money to buy shakes he would do so and if not he would not.

49. He had not had any concerns when tested on 8 April 2017 and the letter of charge dated 28 April 2017 had come as a "*bolt out of the blue*".

50. He could not recall when he had spoken to Mr Gilhooley following notification of the AAF but thought it was some days later.

51. He had texted Mr Gilhooley and at that point had been told that Mr Gilhooley had put fat burners in the shake. He had not shown that text to anyone and his mobile phone had subsequently been lost whilst in Las Vegas and so he no longer had access to the text.

52. The trip to Las Vegas had been in May that he had paid for previously, which is why he had been able to pay for it.

53. When asked by the Tribunal for further detail of the text he stated "*I asked if he had put anything in the shakes. He said he had broken up fat burners called Dbol. I said mate, that's an anabolic steroid"*.

54. He did not have "*a clue*" as to whether Mr Gilhooley had used any other name for the product that he had put into the shakes.

55. The Athlete had not asked Mr Gilhooley if he still had any of the tablets but stated that "*he had just sent me a picture*".

56. When asked whether he had thought it was important to show that picture to his

father or the SFA he stated "*I have no answer to that*".

57. He had Googled *Dbol* and it came up with an anabolic steroid. He did not know if *Dbol* was on the picture sent to him by Mr Gilhooley, but Mr Gilhooley had told him it was *Dbol*. When asked how Mr Gilhooley knew it was *Dbol* the Athlete said that that question would have to be put to him (Mr Gilhooley).

58. Mr Gilhooley had told the Athlete that he had got the product from someone else at a gym. The Athlete had however not asked Mr Gilhooley to identify who that person was and nor had he taken any other steps to find out what product had been put in his shake.

59. The Athlete confirmed that he had not asked anyone else other than Mr Gilhooley if they could have given him anything that would have resulted in the AAF. He had at no stage asked Mr Gilhooley to re-send the texts that had previously been sent to him.

60. In a brief re-examination from Mr Beloff, the Athlete indicated that he had been taking protein supplements for some eight years, being the point at which he began playing senior football. Other than protein supplements he did not take any other products. He had been tested two or three times previously in his career without issue.

61. Mr Gilhooley then gave evidence and confirmed the veracity of his statement dated 26 July 2017.

62. In examination in chief Mr Gilhooley stated that he had been given the *Dbol* from someone at a *PureGym* in Edinburgh. He had understood that the tablets were "*just fat burners*" but had never thought there was anything illegal.

63. He had added the tablets to the shakes because he had a lad's holiday coming up and wanted to be in shape.

64. The protein for the shake itself came in a tub which he had bought online.

65. He just made one batch of shake and divided them into two for himself and the Athlete. He did this at his house. He had understood that the Athlete had run out of protein, and because he had a full tub it was not really a big deal for him to assist his friend.

66. He became aware of the failed drug test following a phone call that he received from the Athlete. He had then done some research and found that what he had put in the shakes was steroids. He had not known until that point that he was doing anything wrong.

67. His recollection was that his dialogue with the Athlete was mainly by phone but then recalled that there might also have been some texts.

68. Mr Gilhooley was clear that he would not have given the Athlete the substance had he known that it was illegal.

69. In response to questions from the Tribunal, Mr Gilhooley confirmed that he had made a shake every day for about five days.

70. The person who had given him the tablets was a bodybuilder. He confirmed he knew that some bodybuilders took steroids. He had not been told what dose to take and stated "*I never really knew what dose to take*". He agreed this now sounded "*a bit reckless*" but was adamant that he had not known he was doing anything illegal and would not have done anything to ruin his friend's career.

71. Mr Gilhooley stated that he had known that the tablets were 50mg each because that was what it said on the tub.

72. In response to cross-examination, Mr Gilhooley confirmed that he had an *iphone* and that, whilst he had it on him today, there were now no relevant text messages on it because as matter of normal practice he deleted his texts every Monday night.

73. He thought that the trip to Las Vegas had been in mid-May but could not remember whether the Athlete had contacted him about his AAF before or after that trip.

74. The Athlete had contacted him by phone. He stated that it had occurred to him that he might have been responsible when he typed in the drug to a Google search.

75. When asked why he had typed that name (Dbol) in he replied "*because that's what Darren told me to do*".

76. When asked how the Athlete had known it was *Dbol*, Mr Gilhooley thought this was because "*he had a letter*".

77. Mr Gilhooley was then shown the letter from UKAD (pages 1-8 of Tab 1 to the Hearing Bundle) and informed that there was no mention of *Dbol* in that letter. Mr Gilhooley responded that he had been asked by the Athlete "*basically whether I put anything in the drinks*".

78. He thought that this conversation had occurred in May.

79. The tablets had come in a white tub with a normal tub lid. He had crushed the tablets up with a spoon at his home.

80. When asked if he thought it would help the Athlete he replied "*if it would help me it would help him*".

81. Asked why he had crushed the tablets rather than just swallowing them he replied "*it was just what everyone was doing in the gym*".

82. He had been taking the tablets for a few weeks before he shared them with the Athlete. He did not agree that if he had thought the tablets were legitimate then there would have been no reason not to tell him he had been putting them in his shakes. He was just making them as he did for himself and did not think he was doing anything wrong.

83. He had known the Athlete for about 15 years but had never discussed doping with him. He denied that he was simply trying to help keep the Athlete's career going and stated that he did not think the Athlete was now too fussed about his career in any event.

84. There had never been any discussion about the tablets and, had the Athlete asked him what was in the shakes, he would have just told him "*fat burning tablets*".

85. In response to questions from the Tribunal, Mr Gilhooley indicated that the person at the PureGym was called "*Lucas*", who was a bodybuilder. Mr Gilhooley stated "[I] *had been burning fat and had therefore asked him for some tips*". Lucas had then said that he would bring some tablets in.

86. The container the tablets came in was not new and had been used. There were about 50 tablets in the tub. He had not kept the tub after he had finished with them and had thrown away the remaining tablets once he had been told by the Athlete that he had tested positive.

87. When asked again how he knew how to research *Dbol* his answer changed to indicating that it was in fact Lucas who had given him this name. When asked when he had spoken to Lucas he stated that this was following his having been spoken to by the Athlete.

88. He was asked whether he had given or sent the Athlete anything else to help him identify the tablets and his answer was "*no".*

89. In response to further questions from Mr Renteurs, Mr Gilhooley appeared uncertain as to whether the Athlete or Lucas had given him the word *Dbol*. He thought the Athlete would have used "*the big fancy word in the letter*" rather than *Dbol*.

90. He had only discussed the position with Lucas over the phone and did not know when this had occurred.

91. There was no re-examination from Mr Beloff.

Submissions

92. The Tribunal was assisted in advance by the provision of detailed written submissions from both parties which are found in the Hearing Bundle, and the oral submissions which summarised those documents are therefore set out in

full. No discourtesy is intended to either advocate.

93. Mr Renteurs submitted that there were serious issues as to the credibility of the witnesses. In this regard he pointed to a number of factors. The pointless crushing of the tablets when they could have just been swallowed; that the education session provided to the Athlete had not been followed; inconsistencies in the evidence given by the witnesses; the fact that none of the texts referred to were available.

94. In Mr Renteurs' submission the evidence did not bear scrutiny and the Athlete had not discharged the burden upon him.

95. In the event, contrary to his submission, that the Tribunal found that the Athlete had not acted intentionally, it was UKAD's further submission that the Athlete had done nothing to determine the nature of the shakes being provided to him and, as such, could not be said to have acted without significant fault or negligence, such as to bring him within the provisions of ADR.10.5.1

96. Mr Beloff noted that the Athlete had advanced a positive explanation as to how the Prohibited Substance had entered his system. This was corroborated in part by scientific evidence advanced by UKAD (statement of Professor David Cowan dated 10 August 2017)[4]. Whilst Mr Beloff acknowledged that there were potential inconsistencies in the evidence advanced on behalf of the Athlete, in his submission the evidence should be accepted and the Tribunal should find that the Athlete had discharged his burden and determine that he had not acted intentionally.

97. The Tribunal was asked to note that the Athlete had been taking shakes for many years, and had passed all previous doping tests. As far as the Athlete had been

[4] Pages 112-114, Tab 2 of the Hearing Bundle.

concerned, he had been taking a like for like substance offered to him by a friend. He had neither known that he was committing an ADRV nor appreciated that that there was a significant risk that he was doing so.

Decision on the ADRV

98. The Tribunal reminded itself that the burden in this instance lay on the Athlete to establish that, on the balance of probabilities, he had not acted intentionally and, if so, that he had further not acted with significant fault or negligence.

99. It was common ground that in discharging that burden, the Tribunal would need to be satisfied as to the manner in which the Prohibited Substance came to be in the Athlete's body. Indeed, on behalf of the Athlete, Mr Beloff argued that a positive explanation had been put forward (the actions of Mr Gilhooley) that the Tribunal should find to be credible.

100. The Tribunal carefully considered all the written and oral evidence. A number of concerns were present. Before addressing the evidence adduced, the Tribunal noted that there was no evidence submitted to establish that *Dbol* is a fat burner as asserted.

101. Leaving aside the lack of evidence to establish that fact, it was not immediately clear as to why either the Athlete, or indeed Mr Gilhooley, should have felt the need to take advantage of fat burning substances. To the extent that Mr Gilhooley explained this as resulting from a need to "*get in shape*" for the Las Vegas trip, it was less than clear to the Tribunal why fat burners ingested in March would be of benefit in that regard for a holiday not to take place until mid-May.

102. It appeared of significance to the Tribunal, that Mr Gilhooley, who sought to stress his business background, had not only failed to ask "Lucas" at the time what it was that had been given to him but, perhaps even more strikingly, had not thought it necessary, or sensible, to ascertain what quantity or dosage of the substance should be taken, and by extension what dosage it would be unsafe to take.

103. The Tribunal also noted that the only reason Mr Gilhooley was able to advance as to why he had crushed the tablets into the shakes as opposed to taking them whole, was that this is what he understood to be the common practice at the gym. This, in the Tribunal's view was not a wholly satisfactory answer.

104. The Tribunal next proceeded to consider the evidence of the Athlete as compared to that tendered by Mr Gilhooley. It was notable that the Athlete claimed that Mr Gilhooley had sent him a picture, by text, of the tub in which the tablets he had received from Lucas had been contained. Mr Gilhooley's testimony, despite having been given ample opportunity to corroborate the Athlete's position, was that he had not sent the Athlete anything with which he could have identified the tablets concerned.

105. This apparent divergence was further compounded by the difficulty Mr Gilhooley had in being clear as to who in fact had told him that the Prohibited Substance involved was *Dbol*. Initially Mr Gilhooley stated that this term had been given to him by the Athlete. This had then caused him to research the position, with a basic Google search, at which point he discovered (as was claimed) that *Dbol* is a prohibited fat burner. When it was put to him however that the Athlete would not have known that *Dbol* was involved at the point he received the ADRV letter of charge on 28 April 2017, Mr Gilhooley appeared to then suggest that he had been told by Lucas that the substance was *Dbol*. There also appeared to be confusion as to whether Mr Gilhooley had been asked about the position in March or in May.

106. Whilst Mr Gilhooley confirmed that he thought there had been some exchanges with the Athlete by text it was a matter of regret that these were no longer available.

107. As to Mr Gilhooley's position in this regard, his explanation that this had resulted from practice of routinely deleting texts every Monday, was not one to merit great sympathy.

108. In relation to the Athlete on this point, and notwithstanding that Mr Gilhooley could not recall sending him anything in any event, it seemed to the Tribunal extraordinary that the Athlete had not kept the text from Mr Gilhooley which he claimed had attached a picture of the tub in which the offending tablets had been contained.

109. The Athlete's account that he no longer had this text because his phone had been lost in Vegas was not one that the Tribunal could readily accept, and in any event did not account for why the Athlete had not saved the picture elsewhere or forwarded it on, for example to a family member or the SFA. Clearly this was a picture that, on its face, could have provided important corroboratory evidence, and as such the Tribunal had great difficulty in understanding why the Athlete had not retained it.

110. The Tribunal was further troubled with the credibility of the Athlete's evidence that he had been unable to afford to purchase his own shakes in March when set against his earnings and in particular that, in May, he apparently was able to take a holiday with friends in Las Vegas.

111. Weighing up the inconsistences in the accounts given by both witnesses and the notable lack of important detail that again, in the view of the Tribunal, caused the overall credibility of the witnesses to be in doubt, the Tribunal was not satisfied that the Athlete had established how the Prohibited Substance had come

to be in his body.

112. The Tribunal noted the decision in *UKAD v Buttifant* which that has since been cited with approval in a number of high profile ADRV cases, establishes that it will only be in rare cases that, where an Athlete is unable to satisfy a tribunal as to the source of the Prohibited Substance concerned, (s)he will then be able to discharge the burden of establishing that the ADRV should be found as being unintentional. In particular it noted at paragraphs 27-29 of that judgment excerpts which are set out below:

> *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….*
>
> [*28]*
>
> *29. There may be wholly exceptional cases in which the precise cause of the violation is not established but there is objective evidence which allows the tribunal to conclude that, however it occurred, the violation was neither committed knowingly nor in manifest disregard of the risk of violation. In such a case the conduct under examination is all the conduct which might have caused or permitted the violation to occur. These rare cases must be judged on the facts when they arise.'*

113. In the view of the Tribunal this case did not fall to be considered wholly exceptional such as to fall within the ambit of *Buttifant*. However, and whilst not necessary given the above finding, had the Athlete been able to establish how the Prohibited Substance had entered his body, the Tribunal would not have then gone on to find that he had not [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*, pursuant to ADR 10.2.3.

114. The Athlete had attended an Anti-Doping training session provided by his club

within 4 months of the week in which he had apparently been given the contaminated shakes by Mr Gilhooley. His signed attendance sheet for that training was in evidence[5]. Despite having had the benefit of that training, the Athlete had gone to a gym which had not been part of his club's training set up. He had there been given a shake and he had made no inquiry whatsoever as to what it was. Even allowing for a degree of latitude as to what should constitute the utmost caution which any athlete is required to exercise to ensure (s)he does not unwittingly commit an ADRV, in the view of the Tribunal in this instance the Athlete had plainly exercised no caution at all.

115. In those circumstances, the Tribunal would not have found, had it been required to do so, that the Athlete's conduct could be viewed having been unintentional as defined by the ADR.

116. The Athlete having been found to have acted intentionally, it was not necessary for the Tribunal to make a determination in relation to ADR 10.5.1.

Conclusion

117. The arguments advanced on behalf of the Athlete having been rejected, the Tribunal found that the Athlete had acted intentionally and imposed a period of Ineligibility of four (4) years upon the Athlete as required by ADR 10.2.1.

118. The Tribunal on balance (despite having rejected the Athlete's substantive arguments) accepted the submission from both UKAD and the Athlete that credit should be given to the Athlete for his prompt admission of the ADRV. Accordingly, the period of ineligibility was ordered to run from 8 April 2017, being the date on which his sample was collected.

[5] Exhibit PM/2 (page 164, Tab 1 Hearing Bundle)

Right of Appeal

119. In accordance with ADR Article 13 the parties may appeal against this decision by lodging a Notice of Appeal in accordance with the applicable time limits.

Jeremy Summers (Chairman)

Professor Dorian Haskard

Professor Gordon McInnes

28 September 2017

Sport Resolutions (UK)
1 Salisbury Square
London EC4Y 8AE

T: +44 (0)20 7036 1966

Email: resolve@sportresolutions.co.uk
Website: www.sportresolutions.co.uk