SPORT RESOLUTIONS (UK)
SPECIALIST INDEPENDENT DISPUTE SERVICE

SR/0000120227

NATIONAL ANTI-DOPING PANEL

IN THE MATTER OF PROCEEDINGS BROUGHT UNDER THE INTERNATIONAL ASSOCIATION OF ATHLETICS FEDERATION and UK ATHLETICS ANTI-DOPING RULES 2014-2015

Before:

Christopher Quinlan QC (Chairman)
Dr Barry O'Driscoll
Colin Murdock

BETWEEN:

UK Anti-Doping

National Anti-Doping Organisation

-and-

Gareth Warburton

Respondent

-and-

Rhys Williams

Respondent

FINAL DECISION OF THE ANTI-DOPING TRIBUNAL

A. INTRODUCTION

1. This is the final decision of the Anti-Doping Tribunal ('the Tribunal') convened pursuant to Article 5.1 of the National Anti-Doping Panel Procedural Rules to hear and determine separate charges brought against Gareth Warburton and Rhys Williams (the Respondents) for violations

of Rule 32.2(a) of the International Association of Athletics Federation ('IAAF') and UK Athletics ('UKA') Anti-Doping Rules ('ADR') 2014-2015.

2. Gareth Warburton ('GW') was born on 23 April 1983 and is thirty-one years of age. Rhys Williams ('RW') was born on 27 February 1984 and is thirty years of age. Both are international track athletes registered with UKA.

3. UKA is the National Governing Body for Athletics in the UK. It is a Member Association of the IAAF and has adopted the IAAF ADR. GW is a member of UKA and submitted to Out-of-Competition testing. He was thereby bound by the UKA ADR. RW was subject to In-Competition testing at an International competition and was thereby bound by the IAAF ADR. There is no material difference between the respective ADRs.

4. The Tribunal held a hearing on 15 December 2014. In addition to the Tribunal, the hearing was attended by;
    - The Respondents
    - Timothy Meakin, Counsel for GW
    - Rod Baker, Theresa Hudson & Sian Howells - Hogan Lovells International LLP, Solicitors for GW
    - Adam Lewis QC, Counsel for RW
    - Colin Gibson & Charles Frost - Charles Russell Speechlys LLP, Solicitors for RW
    - Darren Foote, witness
    - Sioned Jones, witness
    - Graham Arthur, Legal Director, UKAD
    - Stacey Shevill, presenting case for UKAD
    - Tony Jackson, UKAD and witness
    - David Herbert, UK Athletics
    - Richard Harry, Sport Resolutions (UK)
    - Leila James, JJ Williams, Wynford Leyshon & Adrian Thomas - observing

5. This document constitutes our final reasoned decision, reached after due consideration of the evidence, submissions and Arbitral Awards placed before us.

B. PROCEDURAL HISTORY

(1) Gareth Warburton

6. The Respondent GW was charged with an ADRV by letter dated 10 July 2014 ('charge letter'). The charge letter set out the details of the violation and a summary of the facts and the evidence relied upon by UKAD. The letter also imposed a provisional suspension with effect from 11 July 2014.

7. By letter dated 11 July 2014 GW stated, inter alia:

> *"In that context and given the A sample tested positive, I elect to take the following course:*
> *(1) That in accordance with paragraph 6.3 of your letter, to accept the charge but there being no agreement as to the consequences.*
> *(2) That the acceptance under (1) above would be conditional on the results of the B Sample being the same as the A Sample. We understand this result will be available on Monday or Tuesday 15th June and so the process of further analysis has already commenced, but will be finalised in the near future.*
> *(3) That I requests* [sic] *a hearing before the NADP to determine consequences."*

8. Subsequent analysis of the B sample confirmed the result of the A sample. By way of an undated response received by UKAD on 23 July 2014 GW, inter alia, admitted the findings in his A and B samples and the ADRV.

9. On 30 July 2014 the Tribunal Chairman (Christopher Quinlan QC) conducted Directions Hearings by telephone conference call. Counsel represented the Respondent and confirmed that the ADRV was admitted. Thereafter the Chairman issued procedural Directions, which were promulgated in writing.

10. They were subsequently varied on 11 August 2014 following the Directions Hearing conducted in respect of RW and on GW's application on 9 September 2014.

(2) Rhys Williams

11. The Respondent RW was charged with an ADRV by letter dated 22 July 2014 ('charge letter'). The charge letter set out the details of the violation and a summary of the facts and the evidence relied upon by UKAD. The letter also imposed a provisional suspension with effect from 23 July 2014.

12. By letter dated 24 July 2014 RW stated, inter alia:

*"In accordance with paragraphs 7.1 and 7.5 of the Notice of Charge and Provisional Suspension I elect to have the B sample analysed. In the event that the result matches the analysis of the A sample then in accordance with paragraph 6.3 of the charge letter I will accept the charge but do not agree the consequences. I will seek to rely on Article 10.5.2 (of the relevant rules) to reduce the period of ineligibility in that I can demonstrate, on balance, how the prohibited substance entered my system and further that I bear no significant fault or negligence for its presence in my system***."**

13. On 8 August the Tribunal Chairman conducted a Directions Hearing by telephone conference call. The Respondent was represented by Mr Gibson, Solicitor, who confirmed that the only issues concerned sanction for the ADRV. Thereafter the Chairman issued procedural Directions, which were promulgated in writing.

(3) Joinder

14. Following a joint Directions Hearing conducted on 15 October, the Chairman issued further Directions by consent. By agreement of all parties in light of the shared facts and common issues, the two cases were provisionally joined, subject to review by the Chairman upon service of the respective cases. A joint substantive hearing (subject the said review) was fixed for 15 and 16 December 2014.

15. Upon application by the Respondents those Directions were varied on 4 November 2014. They were further varied on 27 November 2014 upon UKAD's application. Following service of the evidence and submissions the Chairman confirmed that the cases would be heard and determined together.

16. Written submissions advanced on behalf of both Respondents confirmed that their respective positions remained as before: the ADRV were admitted and the only issues concerned sanction. That remained their respective positions at the hearing on 15 December 2014.

C. <u>DETERMINATION OF THE CHARGES</u>

(1) Gareth Warburton

17. On 17 June 2014, a UKAD Doping Control Officer ('DCO') collected a urine sample Out-of-Competition from GW under the jurisdiction of UK Athletics ('UKA') pursuant to the UKA ADR. The sample was split into two separate bottles, reference numbers A1111733 and B1111733.

18. On 9 July 2014, the World Anti-Doping Agency ('WADA') accredited laboratory in London, the Drug Control Centre, Kings College, London ('the Laboratory') reported to UKAD that the Sample numbered A1111733 had returned an Adverse Analytical Finding ('AAF') for 17β-hydroxyestra-4,9-diene-3-one and 17α-methyl-5 β-androstane-3α,17β-diol.

19. 17β-hydroxyestra-4,9-diene-3-one is a metabolite of estra-4,9-dien-3,17-one. Metabolites are generally smaller, less active molecules which are excreted from the body once the drug has broken down. Estra-4,9-dien-3,17-one is not specifically listed as an exogenous anabolic steroid under S1.1(a) of the World Anti-Doping Agency Code ('WADC') Prohibited List (as incorporated with the ADR) but is prohibited by the WADC by virtue of it being a substance "*with a similar chemical structure or similar biological effect(s)"* to an anabolic steroid.

20. Estra-4,9-dien-3,17-one is a designer steroid, said to provide modest assistance in increasing muscle mass, decreasing body fat, enhancing recovery and promoting more intense training.

21. 17α-methyl-5 β-androstane-3α,17β-diol is a metabolite of several exogenous anabolic steroids including methyltestosterone and methandienone both listed as exogenous anabolic steroids under S1.1(a) of the WADC Prohibited List. Methyltestosterone is derived from testosterone but cannot be produced naturally in the body. It is considered to have moderate anabolic and androgenic effect and high oestrogenic (water retention and gynaecomastia) activity.

22. By Section 3 of the ADR, UKAD is the National Anti-Doping Organisation for UK Athletics and is appointed to undertake testing in the UK, to carry out the process of Results Management in relation to potential violations that arise in respect of Athletes who are subject to the UKA ADR and enforce the ADR.

23. Following the AAF, UKAD charged GW with a single ADRV contrary to UKA ADR Rule 32.2(a), for the presence of the said Prohibited Substances in the sample taken on 17 June.

24. In light of the evidence (including his own) and his admissions summarised hereinbefore and contained in the written and oral submissions advanced on his behalf, we are comfortably satisfied that UKAD discharged its burden and established that GW committed the ADRV as charged.

(2) Rhys Williams

25. In advance of the Sainsbury's Grand Prix in Glasgow UKAD informed the IAAF that it wished to collect a sample at that meeting from RW. The Sainsbury's Glasgow Grand Prix, is an International Competition listed on the IAAF website and the IAAF agreed to UKAD assuming responsibility for the result management thereof.

26. On 11 July 2014 a UKAD DCO collected an In-Competition urine sample at the said meeting. RW split the sample into two separate bottles, reference numbers A1110442 and B1110442 respectively.

27. On 21 July 2014, the Laboratory reported to UKAD that the Sample numbered A1110442 had returned an AAF for 17β-hydroxyestra-4,9-diene-3-one (one of the two metabolites found in the GW sample)**.** By the said charge letter, UKAD charged RW with an ADRV contrary to IAAF ADR Rule 32.2(a), for the presence of the said Prohibited Substances in the sample taken on 17 June.

28. In light of the evidence and his admissions summarised hereinbefore and in the written and oral submissions advanced on his behalf, we are comfortably satisfied that UKAD discharged its burden and established that RW committed the ADRV as charged.

D. <u>SANCTION</u>

(1) The Issues

29. The UKA ADR incorporate the IAAF ADR and the rule references are identical. Therefore, unless otherwise indicated, hereinafter reference is made only to the relevant rule and the 2009 and 2015 WADCs.

30. Rule 40.5 provides:

> "*The period of Ineligibility imposed for a violation of Rule 32.2.(a) (Presence of a Prohibited Substance or its Metabolites or Markers), 32.2(b) (Use or Attempted Use of a Prohibited Substance or Prohibited Method) or 32.2.(f) (Possession of Prohibited Substances or Prohibited methods), unless the conditions for eliminating or reducing the period of Ineligibility as provided in Rules 40.4 and 40.5, or the conditions for increasing the period of Ineligibility as provided in Rule 40.6 are met, shall be as follows: First violation: Two (2) years" Ineligibility.*"

31. This is each Respondent's first anti-doping rule violation. Therefore, the starting point is a period of Ineligibility of two years.

32. In a sentence each Respondent contended that his AAF was the result of his using a supplement which unknown to him was contaminated with a Prohibited Substance at its point of manufacture. Each averred that he had used the same supplement from the same supplier. Accordingly, both relied upon Rule 40.5(a) and contended that any sanction should be eliminated. Alternatively they argued the two year starting point should be reduced by operation of Rule 40.5(b).

33. Rule 40.5(a) derives from Article 10.5.1 of the WADC 2009 and provides:

> *"No Fault or Negligence: If an Athlete or other Person establishes in an individual case that he bears No Fault or Negligence, the otherwise applicable period of Ineligibility shall be eliminated. When a Prohibited Substance or its Markers or Metabolites is detected in an Athlete's Sample in violation of Rule 32.2(a) (Presence of a Prohibited Substance), the Athlete must establish how the Prohibited Substance entered his system in order to have his period of Ineligibility eliminated. In the event that this Rule 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 Rule 40.7."*

34. Rule 40.5(b) derives from Article 10.5.2 of the WADC 2009 and provides:

> *"No Significant Fault or Negligence: If an Athlete or other Person establishes in an individual case that he bears No Significant Fault or Negligence, then the otherwise applicable period of Ineligibility may be reduced, 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 Rule may be no less than eight (8) years. When a Prohibited Substance or its Markers or Metabolites is detected in an Athlete's Sample in violation of Rule 32.2(a) (Presence of a Prohibited Substance), the Athlete must establish how the Prohibited Substance entered his system in order to have the period of Ineligibility reduced."*

35. UKAD contended that in each case, Rule 40.5(a) did not apply for each Respondent was at fault and/or negligent. Further, application of Rule 40.5(b) was a matter for the Tribunal but if engaged in either or both cases, the appropriate sanction (subject to the WADC 2015) was a period of ineligibility "*not less than fifteen months".*

36. The passage of time between charge and the hearing of these cases was principally caused by the Respondents preparing their respective cases, including analysis of the 'offending supplement'. That is not a criticism; it necessarily took time and the results proved to be of great significance to each. However, it caused a further issue for the Tribunal to resolve, namely the impact of the WADC 2015, which came into force on 1 January 2015, and the principle of *lex mitior* namely if since the commission of the ADRV the relevant law has been amended the less severe law should be applied.

37. Article 10.5.1.2 of 2015 WADC provides (and 2015 UKAD Code Article 10.5.1(b) is in the same terms):

"*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 Violations of Article 2.1, 2.2 or 2.6.

10.5.2 10.5.1.1 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.

10.5.1.2 Contaminated Products

In cases where the Athlete or other Person can establish No Significant Fault or Negligence and that the detected Prohibited Substance came from a Contaminated Product, then the period of Ineligibility shall be, at a minimum, a reprimand and no period of Ineligibility, and at a maximum, two years Ineligibility, depending on the Athlete's or other Person's degree of Fault."

10.5.2 Application of No Significant Fault or Negligence beyond the Application of Article 10.5.1 If an Athlete or other Person establishes in an individual case where Article 10.5.1 is not applicable, that he or 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 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.

[Comment to Article 10.5.1.2: In assessing that Athlete's degree of Fault, it would, for example, be favourable for the Athlete if the Athlete had declared the product which was subsequently determined to be contaminated on his or her Doping Control form.]"

38. "Contaminated Products" are defined for these purposes in 2015 WADA Code Appendix 1, page 133 thus:

"Contaminated Product: A product that contains a Prohibited Substance that is not disclosed on the product label or in information available in a reasonable Internet search."

39. The issue, shortly stated, is as follows. If Rule 40.5(a) was found not to apply, Rule 40.5(b) as drafted (if engaged) provides for a period of Ineligibility of not less than twelve months. However, Article 10.5.1.2 WADC 2105, if established, provides a much wider range of sanction including, at a minimum a reprimand.

40. In addition to the evidence, the written and oral submissions, we had regard to the following Arbitral Awards placed before us:
    - *Alabbar v Fédération Equestre Internationale ('FEI'),* CAS decision dated 27 September 2013
    - *Armstrong v World Curling Federation*, CAS decision dated 21 September 2012
    - *British Bobsleigh and Skeleton Association v Peter Howe*, NADP decision dated 4 May 2009
    - *CJS GAI FOREST v FEI*, FEI Tribunal decision dated 14 September 2010
    - *Clifton Pinot v FEI*, FEI Tribunal decision dated 6 August 2014
    - *Clifton Promise v FEI*, FEI Tribunal decision dated 6 August 2014
    - *Despres v Canadian Centre for Ethics in Sport ('CCES'),* CAS decision dated 30 September 2008
    - *Eder v Ski Austria*, CAS decision dated 13 November 2006
    - *F v International Olympic Committee ('IOC'),* CAS decision dated 31 March 2005
    - *Fédération Internationale de Football Association ('FIFA') v WADA*, CAS Advisory Opinion dated 21 April 2006
    - *Fédération Internationale de Natation ('FINA') v Cielo*, CAS decision dated 29 July 2011
    - *Kendrick v International Tennis Federation ('ITF'),* CAS decision dated 10 November 2011
    - *Knauss v International Ski Federation ('FIS'*), CAS decision dated 20 July 2005
    - *Muehlegg v FIS*, CAS decision dated 24 January 2003
    - *Puerta v International Tennis Federation ('ITF'),* CAS decision dated 12 July 2006
    - *South Africa Rugby Union ('SARU') v Ralapelle and Basson*, SARU Judicial Committee decision dated 27 January 2011
    - *UKAD v Croall*, NADP decision dated 24 April 2014
    - *UKAD v Gleeson*, NADP decision dated 13 June 2011
    - *UKAD v Kruk*, NADP decision dated 11 August 2014
    - *UKAD v Wallader*, NADP Appeal Tribunal decision dated 29 October 2010

- *Vencill v USADA*, CAS decision dated 11 March 2004
- *WADA v Football Association of Wales ('FAW') & James*, CAS decision dated 21 December 2007
- *WADA v Hardy & USADA*, CAS decision dated 21 May 2010
- *WADA v Stanic & Swiss Olympic Association*, CAS decision dated 4 January 2007
- *WADA v USADA & United States Bobsled and Skeleton Federation ('USBSF') & Lund*, CAS ad-hoc Division decision dated 10 February 2006
- *WADA v USADA & Thompson*, CAS decision 25 June 2008
- *WADA & UCI v Alberto Contador Velasco*, CAS decision dated 6 February 2012

(2) Factual Cases

Gareth Warburton

41. GW's factual case, in summary, was as follows. He is an experienced and successful international track athlete who has represented Great Britain at 800m in, *inter alia*, four European Championships and the 2012 London Olympics. He is the current Welsh 800m record holder. He confirmed the truth of his signed witness statement and gave evidence at the hearing and it is necessary only to summarise the relevant parts of his account.

42. In summary only, the relevant background is that prior to June 2014, the Respondent used supplements (legitimately) to improve his sporting performance, as he asserted would be the case with all such athletes. The use of supplements for these purposes was endorsed and even encouraged, he said, by Welsh Athletics and UKA. He knew of his core duties in relation to Prohibited Substances under the WADC and prior to 1 June 2014, had been regularly tested.

43. In early 2014, the Respondent was preparing to represent Wales in the Commonwealth Games 2014 in the 800m. As part of his preparation, he followed a strict nutritional system. In or about April 2014, he sought some assistance with his diet and nutrition from a recognised sports nutritionist. His agent, Steve Griffin ('SG'), whom he shared with RW, set up a meeting with Darren Foote ('DF'), a nutritionist and the owner of a company trading under the name of Mountain Fuel, which supplied supplements to athletes. The Respondent knew of Mountain Fuel and he knew that DF was working with his team mate, RW. DF was open in his intention to work with the Welsh Athletics team. GW met DF, initially with his agent and subsequently with his coach, on two occasions in April and May 2014 to investigate the possibility of receiving nutritional advice from him and perhaps to use his supplements.

44. At the first meeting, DF explained his background and the Mountain Fuel products. He reassured GW that he intended to develop wider links with the Welsh Athletics Association. The supplements, which were essentially energy and recovery drinks, were advertised as being designed to provide natural protein and energy in a concentrated form.

45. Mountain Fuel was manufactured by Cambridge Commodities Limited (CCL) in Ely, Cambridge, which company identifies itself as "*…the leading importer, distributor and manufacturer of nutritional ingredients, as well as made-to-specification finished products*". Both DF and in turn GW place particular reliance on this fact, given its known reputation for the manufacture of 'safe' products/supplements.

46. After this meeting, GW and SG made their own detailed enquiries about the ingredients of Mountain Fuel. GW personally investigated Mountain Fuel and DF (including his Facebook page and website). He accepted he did so as he was aware of the "*risks inherent in taking supplements and the need to make all necessary enquiries as to their safety"*. He researched the Mountain Fuel website and undertook appropriate additional investigations, including that Mountain Fuel products were backed by certificates of conformity, indicating to him that they were properly batch tested and safe to use. Further, he discussed it with his agent, and his partner Sioned Jones (an amateur athlete) and colleagues. No one said it was anything other than 'safe' to use.

47. A second meeting with DF followed thereafter. During the course thereof, there was further discussion about Mountain Fuel. His coach, Darryl Maynard, accompanied him. GW concluded that it was 'safe' to take the supplements. In doing so he claimed to have exercised all appropriate care and specifically asserted that in all the circumstances there was nothing that could, or should, reasonably have made him suspicious about Mountain Fuel products.

48. Having previously taken only a few sachets to taste them, he started taking Mountain Fuel regularly from 15th May 2014 to June 2014. He took it orally; it came in a porridge form for his morning training session and in a drink form for the day and the evening. He took:
    - Myprotein: Beta Alanine is a non-essential amino acid and a naturally occurring beta-amino acid. This was batch tested and was part of the Informed Sport programme. He had taken it daily for many years.
    - Mountain Fuel: Morning Fuel. Morning Fuel is an energy breakfast in the form of a porridge containing added vitamins and minerals. It was taken regularly starting about 15th May 2014 and taken 2-3 times per week.

- Mountain Fuel: Xtreme Energy (tropical and blackcurrant flavours). Xtreme Energy is a powder mixed with water to make an energy drink and was taken before training. He started taking it on about 15th May 2014 and took it 4-5 times per week.
- Mountain Fuel: Ultimate Recovery. A protein based chocolate powder which is added to milk in order to aid recovery. He started using it regularly from about 15th May 2014, 2-3 times a week.
- Mountain Fuel: Night Fuel. A protein based hot chocolate type drink, taken 3-4 times a week from 15th May 2014.
- Powdered Beetroot: commenced on 19th May 2014 and taken daily.
- Dandelion Leaf Tea: taken daily from 19th May 2014
- Wheatgrass Powder: taken daily for 8 days from 19th May 2014 and then intermittently before he stopped.
- Glucose C Powder: a supplement was taken for energy following races on two occasions.

49. It is to be noted that on 1st June 2014 the Respondent provided an In-Competition sample which proved 'negative'. On the undisputed evidence he was taking Mountain Fuel supplements at that time.

50. The DCO attended on the Respondent on 17th June 2014 when a urine sample was requested and provided. He did not declare any of the Mountain Fuel products on the Doping Control Form ('DCF'). Questioned about that before us, he said he forgot, as he felt rushed. For the same reason he also did not declare them on the 1 June 2014 DCF.

51. The immediate consequence of his AAF was that he missed the Glasgow Commonwealth Games.

52. Following notification of the AAF and analysis of his sample, he arranged for the supplements he had been taking to be analysed. DF from whom we heard sent the Mountain Fuel products to the LGC laboratory. The unchallenged result was the Xtreme Energy Fuel 3283 blackcurrant flavour was found to contain similar Prohibited Substances to those in his A and B samples, namely estra-4,9-dien-3,17-one and methyltestosterone. It is to be remembered that his A sample was found to contain:
    - 17β-hydroxyestra-4,9-diene-3-one which is a metabolite of estra-4,9-dien-3,17-one; and
    - 17α-methyl-5 β-androstane-3α,17β-diol is a metabolite of several exogenous anabolic steroids including methyltestosterone

53. The other products were clear.

Rhys Williams

54. His case was strikingly similar to GW's. He is an international 400m hurdler, who has competed at European, World Championships as well as Commonwealth and Olympic Games. He undertook his first drug test aged 17 in 2001. He has a sports science degree and has significant knowledge of nutrition.

55. He told us that like the vast majority of international athletes he takes supplements and has done so since 2008. He said he was encouraged to do so by British and Welsh Athletics, though at his own risk. He thoroughly researches each before taking it. Such research includes investigating the manufacturer, its ingredients and checking the unfamiliar ingredients on the Global Drug Reference website. An energy drink was considered low risk; he described it as "*essentially a sugar fix"*.

56. RW became dissatisfied with the Sport Wales nutritionist's generic approach to supplements; he wanted something specific to his discipline. Through the former British international athlete Jamie Baulch he learned of DF and Mountain Fuel. His agent SG, shared with GW, set up a meeting with DF in December 2013. He said DF told him about his qualifications and experience as a nutritionist and the Mountain Fuel product range, that all his products had been batch tested and that they were manufactured at CCL, which DF said had Informed Sport accreditation.

57. RW did not rely upon all that he was told. He carried out his own researches of CCL and the Mountain Fuel website and the products ingredients (using Global Drug). He said he did use the Informed Sport ('IS') website and saw that the Mountain Fuel products were not listed on it. When he asked DF why, he said DF told him (1) the products had come from CCL which was an IS accredited manufacturer (2) the products had gone through an identical manufacturing process as those listed by IS but (3) they were not so listed as he was not prepared to pay the £4000 fee DF said was required.

58. Satisfied that they did not contain any Prohibited Substances he started a two-week trial of the products in January 2014. Like GW, he used
    - Mountain Fuel Morning Fuel.
    - Mountain Fuel Xtreme Energy, both tropical and blackcurrant flavours.
    - Mountain Fuel Ultimate Recovery.
    - Mountain Fuel Night Fuel.

59. He continued to use the said products until 11 July 2014. He estimated his usage as follows
    - Mountain Fuel Morning Fuel – 3-4 sachets a week, an estimated 84 in all.
    - Mountain Fuel Xtreme Energy, both tropical and blackcurrant flavours -approximately 116 in total, with neither flavour the favourite.
    - Mountain Fuel Ultimate Recovery - an estimated 80 sachets in total.
    - Mountain Fuel Night Fuel - an estimated 112 sachets in total.

60. RW gave the sample at the meeting on 11 July. Unlike GW, he did declare on the DCF his use of Mountain Fuel Xtreme Energy. It is to be further noted that when tested on 21 January 2014 he declared on the DCF "*Mountain Fuel Energy Drink*" and on the 9 July DCF, "*Mountain Fuel Xtreme Energy*". Like GW, significantly RW returned negative tests while using Mountain Fuel Xtreme Energy supplements of both flavours. On 21 January 2014 he undertook urine and blood tests. The second (blood) test was on 9 July 2014. His evidence, which we accept, was that he did not know that the blood tests were not tested for the substance in question.

61. Like GW the immediate consequence was that he too missed the Glasgow Commonwealth Games. He was one of two Wales captains.

62. Following notification of the AAF and analysis of his sample, DF arranged for the supplements RW had been taking to be analysed. The results are set out at §52 hereof. It is to be remembered that his A sample was found to contain 17β-hydroxyestra-4,9-diene-3-one, a metabolite of estra-4,9-dien-3,17-one, which was found in the blackcurrant flavour.

<u>Other Respondent Evidence</u>

63. GWs account was supported by signed statements from Sioned Jones and SG, neither of whom was required by UKAD to give 'live evidence' and by DF, who did give evidence before us. We were provided with LGC certificates of analysis for the work it carried out on the relevant supplements in September 2014.

64. RW's account was supported by signed statements from Adrian Thomas and SG, neither of whom was required by UKAD to give 'live evidence' and by DF.

65. DF founded Mountain Fuel Limited in 2008. He has a military background and a Diploma in sport nutrition. He arranged for CCL to produce his products for it is, he said, registered with Informed Sport which means it has completed successfully a "*rigorous audit of its quality*

systems and operating procedures". The first products were produced in 2011 and batch tested by LGC (as it now is). All tested negative for Prohibited Substances. They were supplied to and used by military personnel and competing sports people.

66. In September/October 2013 he arranged for CCL to produce a further run of Mountain fuel products. This was the only production run undertaken and they were produced in exactly the same way as the first lot. They were not batch tested.

67. He agreed the essentials of the meetings with first RW and then later and separately with GW. He was careful to say this about his first meeting with RW: "*I confirmed that the original batch of products had been tested and that the current batch was made to exactly the same recipe".* He said he told GW the same. He told both that other competitors had used the products and been tested with negative results.

68. He said he was "*shocked*" at the positive results and was sure his products were not the source and did not contain a Prohibited Substance. In light of the results of LGC analysis in September 2014, he accepted they are the source and opined that "*the only logical explanation is that something must have gone wrong during the blending, manufacturing or packaging process which led to the contamination of the process with substances which should not have been present"*. He said CCL has not replied to his correspondence.

UKAD's Response on the Facts

69. UKAD did not challenge the material facts of the Respondents' cases. There was no challenge to the scientific analysis by LGC nor to the substance of their accounts, including the events at the meetings with DF and the researches each said he undertook. Mr Arthur's questioning of each was designed to explore whether they could properly be said to have been at fault or negligent and the extent thereof.

(3) 'Legal' Submissions

70. We mean no discourtesy in summarising the written and oral submissions advanced on behalf of each Respondent and UKAD. We hope we do no disservice to those submissions, which we considered in detail and with care.

UKAD

71. UKAD accepted that Rule 40.5(a) was "*capable*" of applying. It argued that the fact that both committed ADRVs arising from the use of a supplement of itself automatically precluded application of the Rule. In any event, UKAD submitted that both GW and RW were at fault and/or were negligent.

72. UKAD reminded us that the risks of using supplements are well known to athletes from across a wide range of sports, particularly athletics. Both GW and RW acknowledged that they were aware of these risks. Correctly (in our judgment) it observed, that there is never a guarantee that supplements can ever be free of any banned substances, either through mislabelling or contamination. The IAAF advises:

> "*According to the principle of strict liability, as an Athlete, you are solely responsible for whatever is in your body at all times. Alongside the List, you must take all steps to verify the ingredients of all medicines and supplements. Be sure to talk to your Anti-Doping Organisation, or doctor, if in any doubt. And never purchase supplements from non-reputable sources. Some online resources can help with this, but may not be able to check supplements, and product ingredients may vary from country-to-country.*"

73. British Athletics advises:

> "*The World Anti-Doping Agency (WADA) recommends extreme caution regarding supplement use as there is no guarantee that any supplement is free from prohibited substances. The use of dietary supplements by Athletes is a concern because in many countries the manufacturing and labelling of supplements may not follow strict rules, which may lead to a supplement containing an undeclared substance that is prohibited under anti-doping regulations. A significant number of positive tests have been attributed to the misuse of supplements and taking a poorly labelled dietary supplement is not an adequate defence in a doping hearing.*"

74. As for Rule 40.5(b), UKAD submitted that the use of a contaminated supplement is not of itself evidence that the user acted without significant fault or negligence. It argued that an athlete has a duty to make sure that any supplements that he or she uses are 'safe'. Using a contaminated supplement is a misfortune that often afflicts Athletes at all levels of sport; such bad luck is not the same thing as acting without significant fault.

75. UKAD's submission was that the expected standard of behaviour in relation to supplement use is that an athlete who is aware of the risks associated with supplement use must conduct a reasonable degree of checking, research and consultation to ensure that his or her use of the supplement is necessary and that the supplement itself is 'clean'. It submitted that both Respondent's departed from this expected standard and so were at fault.

76. It submitted that RW failed to conducted the necessary due diligence that would be expected of an athlete of his standing. In particular UKAD argued:

    (a) He failed to contact or (it appears) attempt to contact any of Welsh Athletics, British Athletics, UKA, UKAD or the IAAF to discuss his use of the Mountain Fuel supplements.

    (b) At no stage did he seek medical advice as regards the use of the Mountain Fuel supplements.

    (c) He was negligent in relying on a search undertaken using the Global DRO facility. It is clear that Global DRO is not intended to be used for research relating to supplements.

    (d) He failed to make reasonable enquiries of DF and the Mountain Fuel supplements. He did not ask when the batch testing conducted in relation to the Mountain Fuel supplements had taken place, nor did he ask for verification of that testing. He did not make any reasonable enquires of any third party as to DF's stated qualifications as a nutritionist. He also appeared (it argued) to have had insufficient regard to the fact that DF was selling supplements and that his business would obviously derive a commercial and reputational benefit from being associated with him. He was said to have been naïve to accept DF's assurances.

77. As for GW, UKAD submitted that he also failed to conduct the necessary due diligence that would be expected of an athlete of his standing. In particular it was said:

    (a) He could and should have referred to the Informed-Sport website, which he knew about (not least through his use of Myprotein Beta Alanine, part of the Informed-Sport programme).

    (b) Like RW, he did not attempt to contact Welsh Athletics, British Athletics, UKA, UKAD or the IAAF to discuss his use of the Mountain Fuel supplements. Such checks as he did carry out were insufficient, it argued.

(c) He did not seek medical advice as regards the use of the Mountain Fuel supplements.

(d) GW was wrong to rely (if he did) on his partner, Sioned Jones. Undoubtedly well meaning, she was in a position to offer nothing more than an informed lay opinion.

(e) He was similarly unwise to rely upon colleagues' use of the products.

(f) Like RW, he failed to make any reasonable enquiries of DF and the Mountain Fuel supplements. He failed to make any reasonable enquiries as to the batch testing or even verification that such tests had taken place.

78. Mr Arthur submitted that assessment of the degree of the fault or negligence should not be calibrated simply in terms of assessing whether or not things could or would have turned out differently had the steps been taken. That is often impossible to say and the *Cielo* decision makes it clear that this does not matter. They could and should have investigated the Mountain Fuel supplements with a responsible third party (such as UKA) and been told that none of the ingredients in the Mountain Fuel supplements appear on the WADA Prohibited List. Such might have reassured them. Alternatively, they might have been advised to avoid their use.

79. He further submitted that the largest element of fault or negligence lay in their reliance on DF. Both were naïve, he argued. He was careful to make it clear that he was not suggesting DF acted improperly or had any idea that the Mountain Fuel supplements were a potential issue. He was entitled to rely on the fact that CCL were a responsible manufacturer but his referral to old batch tests was "*less creditable*".

80. UKAD did not argue that the Respondents' fault or negligence was significant nor concede that it was not. Rather it categorised its position thus: "*UKAD's view is that the Panel should look closely at the failings of both Mr. Warburton and Mr. Williams, but whilst doing so recognise that this is a contaminated supplement case. Mr. Warburton and Mr. Williams may have brought this matter on themselves but they are victims. They are not cheats. They made mistakes and have paid for them heavily already. UKAD would not disagree with the Panel if the Panel found that their failings were not significant*".

81. If we found that Rule 40.5(b) (Article 10.5.2) applied, UKAD submitted that the sanction should not be less than fifteen months' Ineligibility. Such should commence (pursuant to Rule 40.10) no later than the date their respective provisional suspensions took effect.

82. As for the 2105 WADC, Mr Arthur submitted that the "*technically correct approach would be to apply the current rules*", and leave it to GW and RW to make an application in 2015 pursuant to Article 25.3. However, he said, "*UKAD has no objection to the Panel proceeding on the basis that, if they are not satisfied that ADR 10.5.1 can be applied, that the appropriate sanction may be imposed on the basis of Article 10.5.1.2 of the 2015 Code*".

83. If we applied the 2015 WADC provisions UKAD's position was that the appropriate sanction should be a period of Ineligibility of between six months and one-year. However, in this regard, he suggested that the Panel could have regard to the "*quality*" of the time the Respondents had already been Ineligible through suspension. He opined that their punishment had already been "*severe and irreversible*".

The Respondents

84. On behalf of each Respondent it was submitted that he had showed no fault or negligence. The same points were made on behalf of each, reflecting their individual circumstances. On the evidence each acted without fault or negligence:

(a) UKAD was wrong to argue that every supplement case must involve fault or negligence.

(b) The test must be approached reasonably and the standard must not be unobtainable.

(c) Neither Respondent knew nor suspected and could not reasonably have known that he had used or been administered the Prohibited Substances.

(d) The fact of prior negative test/s while taking the supplement was a "*further factor of considerable significance*" (*per* Mr Lewis QC), relying upon *Clifton Promise* and *Clifton Pinot*.

a. It "trumps" the fact the Respondents did not obtain independent certification or take other steps when they first used the supplement.
b. One negative test alone is sufficient.
c. An athlete can rely upon the negative tests of other athletes using the same supplement, if he knew of them.
d. It is irrelevant that an athlete used different batches when he tested negative and positive: he must necessarily have done so to explain the different results.
e. A negative test in those circumstances means the Respondent succeeds in establishing no fault or negligence.

85. Alternatively, each showed no significant fault or negligence and sanction falls to be imposed by reference to the degree of fault.

(a) Mr Lewis QC submitted (and Mr Meakin agreed) that this case has similarities (with the exception of the previous negative tests) to *WADA v Hardy & USADA*, where there was a finding of no significant fault or negligence, based on the factors set out in §119 and 120:

> "119 *The Panel agrees with the AAA Panel that the circumstances of Hardy's case are 'truly exceptional'. Hardy had personal conversations with AdvoCare about the supplements' purity prior to taking them; Hardy had been told by AdvoCare that its products were tested by an independent company for purity and its website confirmed that, though only with respect to one of its products; the AdvoCare website assured that its products were 'formulated with quality ingredients'; Hardy had obtained supplements directly from AdvoCare, not from an unknown source; the supplements Hardy took were not labelled in a manner which might have raised suspicions; Hardy took the same supplements for at least eight months prior to her positive doping control result; Hardy had obtained an indemnity from AdvoCare with respect to its products; Hardy had consulted with various swimming personnel, including the team nutritionist and the USOC sports psychologist, and her coach, about the quality of the AdvoCare products. In other words, Hardy appears to have purchased the supplements which caused the Adverse Analytical Finding from a source unrelated to prohibited substances, and exercised care in not taking other nutritional substances.*
>
> *120. The Panel recognises that Hardy could have taken other conceivable steps. WADA, indeed, indicated in its submissions other actions that Hardy could have taken: for instance, she could have conducted further investigations with a doctor or another reliable specialist; she could have the supplements tested. Those circumstances actually show that Hardy was indeed negligent, also considering that the risks associated with food supplements are well known among athletes, years after the first cases of anti-doping rule violations caused by contamination or mislabelled products were detected and considered in the CAS jurisprudence. The Panel however finds that Hardy has shown good faith efforts 'to leave no reasonable stone unturned' (Despres Award paragraph 7.8) before ingesting the AdvoCare products: she made the research and investigation which could be reasonably expected from an informed athlete wishing to avoid risks connected to the use of food supplements*."

Hardy received the maximum discount of twelve months.

(b) It was argued that a failure to take a further reasonable investigatory step/s before taking the supplement, which would make no difference at all to the outcome, cannot constitute a basis for depriving an athlete of a finding of no significant fault or negligence.

(c) For reasons he developed in a coruscating analysis of the decisions, Mr Lewis QC submitted it is wrong to rely upon "*cherry-picked one-liners from Despres Knauss and Wallader".*

(d) Each Counsel set out factors relevant to our assessment of the extent of the fault or negligence and in turn the appropriate sanction. Mr Lewis QC submitted that on the facts, the appropriate sanction for RW would be no more than six months from the date of the sample (11 July 2014).

86. Further, if this was the case where either or both was found to be at fault or negligent but not significantly so, both Respondents argued that pursuant to the principle of *lex mitior* the more lenient 2015 WADC should be applied.

(4) Determination

Route of Ingestion

87. This issue is common to both Rule 40(5)(a) and 40(5)(b). The burden is upon each Respondent to establish how the Prohibited Substance entered his system, which he must prove on the balance of probabilities. Both Respondents aver that the source was contaminated Mountain Fuel Xtreme Energy Fuel blackcurrant flavour.

88. Mr Lewis QC (candidly) reminded us that the athlete must also show how a normal product that is now known to have been contaminated, came to be contaminated (*Clifton Pinot* and *Clifton Promise*). In *Alberto Contador Velasco* the CAS panel observed that if an athlete raises a prima facie case as to how the Prohibited Substance came into his body, the anti-doping authority cannot simply sit back and say that the athlete has not proven it on the balance of probabilities. Rather it has a duty to raise a counter explanation if it sees one, and the role of the Tribunal is then to assess which of the explanations is most likely on the evidence. The same point was made in *Mariano Puerta.* UKAD, having considered all the evidence, did not advance a contrary explanation as to how the Prohibited Substances came into the Respondents' systems. We could find none.

89. In respect of each Respondent we are satisfied that the Mountain Fuel Xtreme Energy Fuel blackcurrant flavour consumed by each was the source of the Prohibited Substance detected in their samples. UKAD "*did not dispute*" that the said contaminated supplement was the cause of their AAFs. Notwithstanding that, we (as we are bound to – it being a matter of fact for us

to decide) analysed the evidence and reached our own conclusion. In summary we were so satisfied for these reasons:

(a) We accept their evidence that they had not knowingly taken anything containing the prohibited substances.

(b) The unchallenged result of the LGC analysis performed on behalf of the Respondents was the Xtreme Energy Fuel 3283 blackcurrant flavour (which they had been using) was found to contain similar Prohibited Substances to those in each of their A and B samples, namely estra-4,9-dien-3,17-one and methyltestosterone.

(c) The A and B Sample Analyses confirm the presence of the Prohibited Substance but do not purport to specify quantity, or suggest that the nature or quantity of the substance found is inconsistent with its having come into the Respondents through their use of a contaminated product.

(d) Both of the foregoing facts are in the context of there being no other evidence of a possible source of the Prohibited Substances.

Rule 40.5(a) – No fault or negligence

Approach

90. The 2009 WADC defines 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*".

91. That is repeated in the Definition Section of the 2014-15 IAAF Rules. Tribunals have approached the definition of no fault or negligence as involving a high standard. Such approach reflects the commentary to Article 10.5.1 2009 WADC which observes:

> "*…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. To illustrate the operation of Article 10.5.1 an example where No Fault or Negligence would result in the total elimination of a sanction is where the Athlete could prove that, despite all due care, he or*

she was sabotaged by a competitor. Conversely a sanction could not be completely eliminated on the basis of No Fault or Negligence in the following circumstances: (a) a positive test resulting from a mislabelled or contaminated vitamin or nutritional supplement (Athletes are responsible for what they ingest (Article 2.1.1) and have been warned against the possibility of supplement contamination);…"

92. We appreciate that the commentary is just that. In *Cielo* the CAS Panel observed (§8.8):

> *"It is very easy to imagine situations where a party would be held neither to be at fault nor negligent in circumstances of contamination or mislabelling of a supplement by third parties if civil law or common law principle were strictly be applied. However the comments to the Rule* [Article 10.5.1] *makes it clear that wherever there is such contamination or mislabelling of a supplement then a sanction of some sort must be applied, and it follows, that notwithstanding the definition of 'no fault or negligence' in the FINA Rules/WADC, some fault or negligence has to be found to exist whenever an Athlete uses a contaminated or mislabelled supplement."*

93. It seems to us that the basis for the conclusion in the second sentence of the cited paragraph is the Panel's elevation of the commentary, treating it as though it were part of the Code. By its use of the words "*has to be found*" it seems to us the CAS Panel meant that there must be some fault or negligent *imputed* (whatever the other facts of the case) where athlete takes a contaminated supplement. That is not what the words of the 2009 WADC and the definition of 'no fault or negligence' therein provide. They were also used deliberately by WADA, being words derived from, and well understood by lawyers familiar with civil and common law.

94. Whether *Cielo* survives the new definition of fault propounded in the 2015 WADC we need not decide. Rather than the absolute rule of the *Cielo* kind we prefer (not least because it is consistent with the words of the 2009 WADC) the approach promulgated by a differently constituted *CAS* panel in *FIFA & WADA* (§73):

> *"The Panel underlines that this standard is rigorous, and must be rigorous, especially in the interest of all other competitors in a fair competition. However, the Panel reminds the sanctioning bodies that the endeavours to defeat doping should not lead to unrealistic and impracticable expectations the athletes have to come up with. Thus, the Panel cannot exclude that under particular circumstances, certain examples listed in the commentary to Art 10.5.2 of the WADC as cases of 'no significant fault or negligence' may reasonably be judged as cases of 'no fault or negligence'."*

95. Further, in *FEI v CJS Gai Forest* (§33):

> "*With regards to the question of fault or negligence, the Tribunal is of the opinion, in line with the CAS Advisory Opinion of 2006 issued by CAS upon request of FIFA and WADA, that the prerequisite of 'no negligence no fault' has to be achievable and that a 'reasonableness test' has therefore to be applied*".

96. Support for our approach is to be found in *Pinot Promise and Clifton Pinot,* both contaminated supplements cases, in which there were findings of no fault or negligence. Similarly, in *Ralapelle and Basson,* another contaminated supplement case.

97. In *Wallader* the NADP observed (at §46):

> "*It is important to reiterate that the dangers of taking supplements have been made clear by the anti-doping authorities, and Athletes who do so are running a risk. … Any Athlete who takes a supplement without first taking advice from a qualified medical practitioner with expertise in doping control places herself at real risk of committing a rule violation. Only in the most exceptional circumstances could such an Athlete expect to escape a substantial sanction if a Prohibited Substance is then detected.*"

98. Mr Lewis QC submitted that in so far as that passage purported to expound any general principle, the Panel "*ought not have*" and it was "*unhelpful and wrong*". For our part, regarding the failure to obtain qualified medical advice before using supplements, we do not understand from that passage and from the decision read as a whole, that the Panel was doing any more than observing that it was a relevant factor to be considered in deciding the question of whether an athlete was at fault or negligent.

99. Having set out what we understand to be the general principles, we turn to apply them to the individual cases of each Respondent. Ultimately, in our judgment, what is required is a fact-specific decision and their cases, on the facts, are not identical. Necessarily, we consider them separately.

GW

100. The Respondent has not established on the balance of probabilities that he bears no fault or negligence.

101. We find he was at fault or negligent in the following respects:

(a) Context is important. He was taking supplements. That is commonplace but he knew that which is well known: there are inherent risks in taking supplements, including contamination with Prohibited Substance/s.

(b) He did not attempt to contact nor seek advice from persons at IAAF, Welsh Athletics, British Athletics, UKA, or UKAD about his intended use of the Mountain Fuel supplements. The letter from Scott Simpson, Welsh Athletics dated 9 December 2014, states only that on 23 January 2014 Adrian Thomas informed them that RW was using an undisclosed supplier for "nutritional inputs". It is speculative to suggest such would have had no causative effect.

(c) He did not seek medical advice as regards the use of the Mountain Fuel supplements. Once more it is speculative to suggest such would have had no causative effect.

(d) The enquiries he made of DF and the Mountain Fuel supplements were not sufficient for him to satisfy us he was not at fault or negligent. We note DF was careful to say he did not tell GW that the 2013 batch had been batch tested. DF might have implied it or GW might have inferred it from what DF did say, but that is not the same as establishing it as a fact, which he failed to do.

(e) He could and should have referred to the Informed-Sport website, the value of which he said he knew not least because he used it for other products he took.

(f) As CAS observed in *Hardy* he could have had the supplements tested. There was no independent certification that the supplements were 'safe'.

102. Turning to his (1 June) negative test when taking the same supplement, and any knowledge of the negative test of other athletes taking the same supplement - the "*trumping*" argument (*per* Mr Lewis QC) - we do not consider such would entitle him to assume that the products were all free from contaminants. First (contrary to the view expressed in *Clifton Pinot*), we do not consider a negative test equivalent to a laboratory or "*comparable to an independent third party testing authority"* (*per Clifton Pinot* §13.9 & *Clifton Promise* §18.8) test. Second, the very nature of contaminants is that they are or might not be evenly spread in any particular batch or production run. In our judgment, a negative test merely establishes that a particular sample is free from any Prohibited Substance/s for which it was tested. Of itself, the fact of a negative test, without more, does not mean an athlete is entitled to assume that he/she can continue to take the supplements or products presuming they will be forever be 'safe' to use.

103. The negative test did not trump his fault or negligence before and while he continued to take the supplement.

Rhys Williams

104. This Respondent also failed to establish on the balance of probabilities that he bears no fault or negligence.

105. We find he was at fault or negligent in the following respects:

(a) As with GW, context is important. He was taking supplements. That is commonplace but he knew that which is well known to athletes: there are inherent risks in taking supplements, including contamination with Prohibited Substance/s.

(b) He did not attempt to contact nor seek advice from persons at IAAF, Welsh Athletics, British Athletics, UKA, or UKAD about his intended use of the Mountain Fuel supplements.

(c) He did not seek medical advice as regards the use of the Mountain Fuel supplements.

(d) In relation to (b) and (c) we do not find his response – any third person to whom he turned for advice would have done no more than he did – to be satisfactory.

(e) The enquiries he made of DF and the Mountain Fuel supplements are insufficient for him to satisfy us he was not at fault or negligent. We note DF did not tell RW that the 2013 products had been batch tested. DF might have implied it or RW might have inferred it from what DF did say, but that is not the same as an express assurance. Further, having found the supplement absent from the Informed Sport website he should not simply have relied upon DF's explanation as to why (*viz.* the £4000 charge).

(g) As CAS observed in *Hardy* he could have had the supplements tested. There was no independent certification that the supplement was 'safe'. We have addressed the negative tests argument in §102 hereof.

<u>Rule 40.5(b) – No significant fault or negligence</u>

Approach

106. The next question is whether either or both Respondent established that his fault or negligence was not significant.

107. No significant fault or negligence is defined in the 2009 WADC and IAAF ADR as:

> "*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 relationship to the anti-doping rule violation"*.

108. The WADC imposes on the Athlete a duty of utmost caution to avoid a Prohibited Substance entering his/her body. That standard of care is demanding.

109. The commentary to the 2009 WADC Article 10.5.1 and 2 observes:

> "*…Depending on the unique facts of a particular case any of the referenced illustrations could result in a reduced sanction based on No Significant Fault or Negligence. (For example, reduction may well be appropriate in illustration (a)* [a positive test resulting from a mislabelled or contaminated vitamin or nutritional supplement] *if the Athlete clearly establishes that the cause of the positive test was contamination in a common multiple vitamin purchased from a source with no connection to Prohibited Substances and the Athlete exercised care in not taking other nutritional supplements*."

110. The said commentary continues:

> "*…For purposes of assessing the Athlete's or other Person's fault under Articles 10.5.1 and 10.5.2, the evidence considered must be specific and relevant to explain the Athlete's or other Person's departure from the expected standard of behaviour."*

111. Thus it is the degree of the athlete's own fault alone that is relevant (*UKAD v Gleeson,* §55).

112. We consider their cases separately.

GW

113. The fault or negligence is the extent to which the individual athlete departed from the ideal of utmost caution *in the circumstances of the case*. On our factual findings, those circumstances in this instance include:

(a) Inadvertent ingestion through contamination;

(b) No evidence of performance enhancement;

(c) With a single negative test while using the same supplement; and

(d) Having carried out some research into and investigation of the supplement in question

114. In the circumstances the Respondent satisfied us that his fault or negligence was not significant.

RW

115. As with GW, so with RW. The fault or negligence is the extent to which the individual athlete departed from the ideal of utmost caution *in the circumstances of the case*. On our factual findings, those circumstances in this instance include:

(a) His inadvertent ingestion through contamination;

(b) No evidence of performance enhancement;

(c) A background of a number of negative tests while using the same supplement; and

(d) Having carried out a deal of research into and investigation of the supplement in question.

116. In the circumstances the Respondent satisfied us that his fault or negligence was not significant.

Application of the 2015 WADC

117. The 2015 WADC comes into effect on 1 January 2015 (Article 25.1). It applies to ADR committed on or after that date. It does not apply directly to this case. However, Article 25.2 of the 2015 WADC provides that the principle of *lex mitior* operates to require a tribunal deciding a case after the effective date of 1 January 2015 to apply the more lenient 2015 WADA Code Art 10.5.1.2 range of sanctions for no significant fault or negligence in a contaminated product case in place of the restricted 2009 WADC Article 10.5.2 range of sanctions in the same circumstances.

118. The fact that this matter is being dealt with under the IAAF and UKA ADRs 2014-2015 make no difference. The IAAF 2014-2015 Rules mirror the current 2009 WADA Code. UKA has adopted the IAAF Rules as amended from time to time (UKA Rule 2.2). Both the IAAF and UK Athletics (and indeed UKAD) are obliged to comply with the WADA Code and apply Article 10

of it (new 2015 WADC Article 23.2.2). The IAAF and UKA are obliged, as UKAD has done, to adopt new codes complying with the new 2015 WADC from 1 January 2015.

119. It follows that from 1 January 2015, a tribunal applying IAAF Rule 40(5)(b) must construe it in accordance with 2015 WADC Article 10.5.1.2 (or new 2015 UKAD Code Article 10.5.1(b)); none of the IAAF, UK Athletics, or UKAD as UKA's delegate, could lawfully ask for it to be construed otherwise, and there must be harmonisation of the application of the test.

120. We heard these cases on 15 December. We were invited to reach our decision on or after 1 January 2015 so if it became appropriate, we could apply 2015 WADC Article 10.5.1.2. Alternatively, Mr Lewis submitted that even if we were not prepared to wait (if that is what we would otherwise have to do) we were still bound to observe the principle of *lex mitior.*

121. It is to be noted that 2015 WADC Article 25.3 provides:

> *"25.3 Application to Decisions Rendered Prior to the 2015 Code With respect to cases where a final decision finding an anti-doping rule violation has been rendered prior to the Effective Date, but the Athlete or other Person is still serving the period of Ineligibility as of the Effective Date, the Athlete or other Person may apply to the Anti-Doping Organization which had results management responsibility for the anti-doping rule violation to consider a reduction in the period of Ineligibility in light of the 2015 Code. Such application must be made before the period of Ineligibility has expired. The decision rendered by the Anti-Doping Organization may be appealed pursuant to Article 13.2.The 2015 Code shall have no application to any anti-doping rule violation case where a final decision finding an anti-doping rule violation has been rendered and the period of Ineligibility has expired*."

122. What this would mean therefore is if we had reached our decision prior to 1 January 2015, and applied the current range of sanctions under current Rule 40.5(b) (reflecting the 2009 WADA Code Art 10.5.2) the Respondent/s would on 1 January 2015 have been entitled to apply to UKAD under the new Article 25.3 for a reduction in the sanction, and to recommence proceedings on appeal if UKAD refused. We see the force of the argument that such would involve unnecessary cost, duplication and procedural confusion.

123. In the event the expedient of delay (if that is what it would have been) proved unnecessary. We did not reach our final decision in either case until after 1 January 2015. Therefore, consistent with *lex mitior,* we apply 2015 WADC Article 10.5.1.2.

Period of Ineligibility

124. Article 10.5.1.2 provides for a minimum sanction of a reprimand and no period of Ineligibility to a maximum of two years Ineligibility depending on the athlete's degree of fault. The minimum period of a year under current 2009 WADA Code Art 10.5.2 has been removed. In Mr Lewis's vivid phrase, "*Tribunals are now freed to do justice*". This change is but one example of the 2015 WADC's greater flexibility in certain circumstances, particularly in a case such as this where one is not dealing with intentional dopers.

125. With respect, we disagree with Mr Arthur's submission that in assessing the suitable length of Ineligibility we can have regard to the "*quality*" of the time for which both have been provisionally suspended. We do so, in summary, for these reasons:

(a) The 2009 WADC does not so provide.

(b) It is contrary to the WADC, which provides that fault and not consequence is the criterion by which to assess sanction.

(c) The commentary to Article 10.5.1 and 10.5.2 suggests such is wrong:

> "T*he fact that an Athlete would lose the opportunity to earn large sums of money during a period of Ineligibility or the fact that an Athlete only has short time left in his or her career or the timing of the sports calendar would not be relevant factors to be considered in reducing the period of Ineligibility under this Article.*"

If one cannot look forward, we failed to see why one should be permitted to look back.

(d) In any event it is, in our judgment, undesirable to introduce an element of such subjectivity into the process of assessing sanction. Tribunals would face the unenviable (and arguably impossible) task of assessing one athlete's diary against another.

126. We have set out herein (§101-105 inclusive) the respective fault or negligence of each Respondent. In this regard, disclosure or otherwise of the product on the DCF is a relevant consideration (*per* commentary to 2015 WADC Article 10.5.1.2). RW did so declare; GW did not. For that and other reasons, we assess GW to be more at fault than RW. Having regard to all the circumstances, and their different levels of fault (as we assessed them) we consider the appropriate sanctions to be as follows:

(a) Gareth Warburton- a period of Ineligibility of six months.

(b) Rhys Williams - a period of Ineligibility of four months.

127. In the case of Rhys Williams by operation of Rule 39, he is automatically disqualified from the race he ran on 11 July with all resulting consequences, including forfeiture of points and prize and appearance money, if any.

(5) Commencement of and Status During Periods of Ineligibility

Rule 40.10 states:

> "*Except as provided below, the period of Ineligibility shall start on the date of the hearing decision providing for Ineligibility or, if the hearing is waived, on the date the Ineligibility is accepted or otherwise imposed. Any period of Provisional Suspension (whether imposed or voluntarily accepted) shall be credited against the total period of Ineligibility to be served.*
> *Timely Admission: where the Athlete promptly admits the anti-doping rule violation in writing after being confronted (which means no later than the date of the deadline given to provide a written explanation in accordance with Rule 37.4(c) and, in all events, before the Athlete competes again), the period of Ineligibility may start as early as the date of Sample collection or the date on which another anti-doping rule violation last occurred. In each case, however, where this Rule is applied, the Athlete or other Person shall serve at least one-half of the period of Ineligibility going forward from the date the Athlete or other Person accepted the imposition of a sanction, the date of a hearing decision imposing a sanction or the date the sanction is otherwise imposed."*
> *b) If a Provisional Suspension is imposed and respected by the Athlete, then the Athlete shall receive a credit for such period of Provisional Suspension against any period of Ineligibility which may ultimately be imposed.*
> *c) If an Athlete voluntarily accepts a Provisional Suspension in writing (pursuant to Rule 38.2) and thereafter refrains from competing, the Athlete shall receive credit for such period of voluntary Provisional Suspension against any period of Ineligibility which may ultimately be imposed. In accordance with Rule 38.3, a voluntary suspension is effective upon the date of its receipt by the IAAF.*
> *d) No credit against a period of Ineligibility shall be given for any time period before the effective date of the Provisional Suspension or voluntary Provisional Suspension regardless of whether the Athlete elected not to compete or was not selected to compete."*

128. In the case of GW:

(a) He made a prompt admission.

(b) He has been provisionally suspended since 23 July 2014.

(c) In accordance with IAAF ADR Rule 40.10 the period of Ineligibility shall start on 11 July 2014, the date upon which the date upon which his provisional suspension took effect.

129. As for RW:

(a) He made a prompt admission.

(b) He did not compete between 11 July and charge letter.

(c) He has been provisionally suspended since 23 July 2014.

(d) In accordance with IAAF ADR Rule 40.10 the period of Ineligibility shall start on 23 July, the date upon which he was provisionally suspended.

130. The Respondents' status during the period of ineligibility is as provided in IAAF ADR Article 10.11.

E. SUMMARY

131. For the reasons set out above, in respect of **Gareth Warburton** the Tribunal finds:

(a) The anti-doping rule violation has been established.

(b) The period of ineligibility imposed is six months commencing on 11 July 2014.

132. For the reasons set out above, in respect of **Rhys Williams** the Tribunal finds:

(a) The anti-doping rule violation has been established.

(b) The period of ineligibility imposed is four months commencing on 23 July 2014.

(c) He is automatically disqualified from the race he ran on 11 July with all resulting consequences.

F. RIGHT OF APPEAL

133. In accordance with IAAF ADR Rule 42 the parties (as defined by Rule 42) may appeal against this decision by lodging a Notice of Appeal according to the applicable time limits.

G. POSTSCRIPT

134. We repeat our gratitude to the parties for their careful preparation in advance of the hearing and for the written and oral submissions, which were of the highest quality.

Christopher Quinlan QC, Chairman

On behalf of the Tribunal

12 January 2015

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