INTERNATIONAL TENNIS FEDERATION

INDEPENDENT ANTI-DOPING TRIBUNAL

DECISION IN THE CASE OF ROBERT KENDRICK

Ian Mill QC, Chairman
Dr Anik Sax
Dr Barry O'Driscoll

(A) Introduction and Summary of Issues

1. This is the decision of the independent Anti-Doping Tribunal ("the Tribunal") appointed by the International Tennis Federation ("the ITF") under Article K.1.1 of the ITF Tennis Anti-Doping Programme 2011 ("the Programme") to determine the charge that Robert Kendrick ("Mr Kendrick") committed an Anti-Doping Rule Violation[1] under Article C.1 of the Programme, the allegation being that a Prohibited Substance (methylhexaneamine, otherwise known as dimethylpentylamine ("MHA")) was found to be present in a urine sample provided by him at the 2011 French Open on 22 May 2011 ("the Charge").

2. The ITF was represented at the hearing of the Charge in London by Jonathan Taylor of Bird & Bird, its solicitors. Mr Kendrick was represented by Paul Greene of PretiFlaherty and Brent Nowicki of Hodgson Russ, his attorneys. Mr Kendrick, who lives in the USA, and his representatives attended the hearing via videolink. The Tribunal heard live evidence from Mr Kendrick and from Dr Stuart Miller, the ITF's Anti-Doping Manager ("Dr Miller"). It also received into evidence on behalf of Mr Kendrick: (a) Affidavits of Jim Rich ("Mr Rich"), a USTA teaching tennis professional, and of Richard Schmidt ("Mr Schmidt"), Mr Kendrick's hitting coach; (b) an Expert Report of Paul Scott ("Mr Scott"), a chemical analyst, and (c) a number of letters written

[1] This Decision contains a number of undefined capitalised terms. The definitions are to be found in the Programme.

by senior and respected figures in international tennis in support of Mr Kendrick. The Tribunal listened to and considered this evidence and read and listened to detailed and extensive submissions on behalf of the parties. In all, the hearing lasted some seven hours. The Tribunal additionally permitted subsequent written submissions to be made on specific points, which have also been taken into account.

3. The Tribunal would like to thank the parties' representatives for the considerable assistance which it has derived from their efforts on behalf of their respective clients.

4. Mr Kendrick did not dispute the Charge. Accordingly, the hearing was concerned with the Consequences (in particular, under Article M of the Programme) which should flow from the admitted commission by Mr Kendrick of the Anti-Doping Rule Violation referred to above.

5. Specifically, Mr Kendrick sought to bring himself within the provisions of Article M.4 of the Programme, in order to be able to argue that the Period of Ineligibility to be imposed should be less than the otherwise applicable two years for a first offence (which this was, in Mr Kendrick's case). Mr Kendrick's assertion was that a three month Period of Ineligibility would meet the justice of the case, that period to be back-dated to 22 May 2011, the date upon which Mr Kendrick had provided the sample in question[2]. The ITF did not demur from the principle of back-dating to this extent (in circumstances which are explained below). It did not, however, support the proposed length of the Period of Ineligibility, nor did it propose any other Period as being appropriate. Very properly, the ITF as prosecutor was content to leave that matter to the Tribunal.

[2] Such a finding by the Tribunal would allow Mr Kendrick to participate in the qualifying rounds for the US Open, which commence on 23 August 2011. Any longer Period of Ineligibility would not permit any such participation.

6. Having considered the evidence and had the opportunity to question Mr Kendrick, the ITF's position in oral closing argument was that it did not oppose the case put forward by Mr Kendrick that the circumstances of his offence brought him within Article M.4. Accordingly, the focus of the closing arguments was upon: (a) the approach that the Tribunal should adopt in considering what the Period of Ineligibility should be, and (b) the findings of fact which the Tribunal should reach and on the basis of which the appropriate Period of Ineligibility should be determined.

(B) <u>The Facts</u>

7. Mr Kendrick is a very experienced professional tennis player. He is 31 years old and turned professional 11 years ago, in 2000.

8. On 19 May 2001, Mr Kendrick travelled from his home in Florida to Paris to participate in the French Open Championship at Roland Garros. He arrived in Paris late the following morning. His first match was scheduled for 22 May 2011, only two days later.

9. Mr Kendrick left it to the last minute to travel to this tournament because his fiancée was very heavily pregnant with their child at the time and he was concerned not to be away from her for any longer than was strictly necessary. In consequence, and having suffered recent episodes of jetlag following flights to other European cities (Barcelona and Munich), he was concerned prior to his departure for France as to how he might reduce the risk of jetlag affecting him adversely in relation to this Grand Slam event.

10. Some four or five days before his departure, he discussed these concerns with Mr Rich, in the presence of Mr Schmidt, at the Winter Park Racquet Club in Florida, which was Mr Kendrick's home practice facility and where Mr Schmidt was the head teaching professional. Mr Rich (who had known Mr Kendrick for about four years and was a teaching professional with over 30

years experience) suggested to Mr Kendrick that he should try a product called Zija XM3 ("Zija") and handed to him what Mr Rich describes as a *"trial-size, sample packet"* containing two Zija capsules[3]. According to Mr Rich, he had previously given that product to several other athletes to assist with problems associated with jetlag and had always received positive feedback. Mr Kendrick asked Mr Rich whether Zija contained anything that was illegal or banned and received the assurance that it did not. According to Mr Kendrick, Mr Rich's response was that it was *"an all-natural and organic product from the Moringa tree"*.

11. Mr Kendrick was not satisfied that he could rely upon this assurance from Mr Rich. As a result he spent some time researching Zija on the internet. He told us in evidence that he spent about an hour on the internet and that he was trying to find an ingredient list for the product. The Tribunal has some difficulty accepting the totality of Mr Kendrick's evidence in this respect (we set out our views upon him in this regard in the next section of this Decision), but we accept that he did conduct some research and that this research did not (as he told us) result in the ascertainment of a list of the ingredients of Zija.

12. Despite this, Mr Kendrick concluded that he could be satisfied that Zija was a product that did not contain any Prohibited Substance and, as such, one that he could safely ingest. He told us that he had reached this conclusion after finding, through his internet research: (a) no webpages that led him to believe that Zija did contain any banned substance, and (b) a webpage (in the nature of a blog)[4] which contained the following in relation to Zija:

APPROVED BY THE
WORLD ANTI DOPING ASSOCIATION

[3] We were shown photographs of one such packet, which appears to be green/gold in colour and to bear no discernable markings whatsoever other than an expiry date of December 2012 and a barely legible series of letters and numbers, which might be some form of code.
[4] www.buyxm3.blogspot.com

Can you strengthen train and condition using the XM3 drink without the worry of a governing body (NCAA, NFL, MLB, NBA, IOC)?
The answer is a resounding yes!!! XM3 is legal under all FDA regulations because it does not contain the alkaloids restricted by the Food and Drug Administration…..
With all the scrutiny regarding vitamins, hormones and supplements in today's athletic world, you can relax and enjoy Zija XM3 with the knowledge that we are concerned for your health and follow the strictest protocols for acquisition of ingredients and manufacturing.
XM3 is used as a training mainstay for many professional and amateur athletes. Names such as Anton Apollo Ono (Olympic speed skater), Monterio Hardesty (running back of Cleveland Browns), Chris Scott (offensive lineman for the Pittsburgh Steelers), and Tyler Smith (former Tennessee men's basketball star) make the XM3 energy drink a daily part of their training regimen…[5]

13. As a result of his conclusion, Mr Kendrick took the Zija sample that he had been given by Mr Rich with him to France and ingested one of the capsules with his lunch on 20 May 2011, following his arrival in Paris. Later that evening he also took a substance called Ambien, which had been prescribed a number of years earlier by a doctor in Fresno, California (where he was then based) in order to assist him in sleeping following international flights. (He told us that he used this substance only occasionally and that he still had some remaining of the product originally prescribed).

14. On 22 May 2011, Mr Kendrick played in his first round match in the French Open. He lost in four sets. Following that match, he gave an in-competition sample. It was this sample that contained the Prohibited Substance, MHA.

15. Following notification that he had failed that drug test, Mr Kendrick to his credit promptly admitted that he had committed the violation alleged in that notification and accepted a voluntary suspension from competition (with effect from 17 June 2011), thereby foregoing participation in the All England Tennis Championships at Wimbledon.

[5] Mr Kendrick told us that this webpage was the first one that he opened. He did not regard the contents of that page as providing him with sufficient comfort and he therefore continued to carry out further searches.

16. Later that month, following his analysis of materials provided to him on behalf of Mr Kendrick (including the sample analysis sent to him with the notification), Mr Scott compiled a report in which he concluded that the sample given by Mr Kendrick did indeed contain MHA and that the concentration present was consistent with the ingestion by him of a single capsule of Zija some 48 hours prior to the provision of the sample.

(C) Mr Kendrick as a witness

17. As stated at the outset of this Decision, Mr Kendrick gave oral evidence via videolink. The Tribunal, at the request of his representatives, allowed him to give extensive evidence in chief (despite the existence of a sworn Affidavit of his evidence) and he was then questioned by Mr Taylor on behalf of the ITF. This enabled the Tribunal to form a firm conclusion as to Mr Kendrick's approach to his doping related responsibilities as a professional sportsman and we are grateful to him for the candour with which he answered a series of questions which helped us to that conclusion. However, we regrettably found ourselves unable to accept the totality of his evidence and therefore have looked for some element of corroboration insofar as our findings of fact based on his evidence are concerned.

18. We had difficulties with the following aspects of Mr Kendrick's evidence:

(i) The alleged conversations with Mr Schmidt

Mr Kendrick told us during his oral testimony that, after Mr Rich had handed the Zija sample to him, Mr Schmidt advised him to conduct research on that product when he got home. He also gave oral evidence that, on the following day, he told Mr Schmidt that he had carried out that check. He told us that these were casual conversations and that *"it was a new product for both of us"*. There is nothing inherently improbable in such discussions having occurred. The difficulty for the Tribunal in accepting this evidence is that neither conversation is

referred to in the written Affidavits of Mr Kendrick or Mr Schmidt. Since Mr Schmidt was Mr Kendrick's coach, it seems unlikely that it was thought (when those Affidavits were being prepared) that these conversations were irrelevant and so need not be included. The explanation afforded by Mr Kendrick's representatives was that the Affidavits were not intended to be exhaustive. We were unimpressed by that explanation. It was established in advance that Mr Schmidt was not required to attend for cross-examination. If there was further relevant evidence for him to give, it could have been contained in a further Affidavit, or Mr Kendrick's representatives could have asked to call him anyway. Further, the oral evidence from Mr Kendrick was not elicited during his examination in chief. It came out only through subsequent questioning. We are not satisfied that the conversations to which we have referred above in fact took place.

(ii) <u>The alleged internet searches</u>

(a) As set out above, Mr Kendrick's evidence to us was that he went on to the internet to try to find an ingredient list for Zija and that he spent about one hour conducting searches before he felt comfortable about taking the product. In his Affidavit, he sets out a number of specific words that he claims to have included in searches that he conducted, namely *"Zija MX3 and Approved by World Anti Doping Agency"* (he says that this was the first search that he conducted and that this led him to the webpage from which we have quoted above); *"Zija"; "banned substance"; "approved by World Anti Doping Agency"; "organic"; "safe"; "moringa"*, and *"Apollo Anton Ohno"*. It will be noted that, despite his stated intention, Mr Kendrick does not claim to have conducted a search that included the words *"ingredients"* or *"ingredient list"*. As Dr Miller explained in unchallenged evidence:

> *It is not difficult to find a proper ingredients list for the Zija XM3 capsule product on the Internet. For example, simply by doing a Google search for "Zija XM3 ingredients"…I found the webpage http://www.my-healthy-choice.com/xm3-produts.html (see 1st search hit – copy exhibited...)*

The exhibited copy contained a list of ingredients, which included MHA.

(b) In the circumstances, we are unable to accept Mr Kendrick's evidence that he tried to find an ingredients list for Zija during his internet research. It is our conclusion that this would have involved a degree of endeavour (including checking all the ingredients against published lists of Prohibited Substances) which Mr Kendrick was not prepared to undertake. Instead, he was looking for confirmations that the product had been approved and that it was being used by others involved in professional sport without adverse consequences. We consider that in all likelihood he allowed himself to be satisfied without any great degree of research, let alone research over a period of one hour[6]. In particular, we note that his only specific recollection of webpages viewed is the one from which we have quoted above. This was clearly a webpage which on any thoughtful analysis would have been discounted as wholly unsafe. In the first instance, it was evidently created by or on behalf of the manufacturers or suppliers of the product. Secondly, its capitalised announcement, at the outset, of approval referred to the World Anti Doping *"Association"*, not *"Agency"*. Mr Kendrick told us that this fact passed him by. We are prepared to accept this. However, we also accept Dr Miller's evidence that one would expect a professional sportsman with Mr Kendrick's experience to know the correct full title of "WADA". In our view, Mr

[6] Mr Kendrick was asked why he had not disclosed his recent browsing history in order that one could clearly know which sites he had accessed. He said that this was because he was in the habit of wiping his browsing history on a regular basis. This was a convenient and not entirely convincing answer.

Kendrick's failure to spot this error was the result of the casual approach to his research that he was adopting at the time.

(iii) Mr Kendrick's Doping Control Form

For the purposes of his in-competition test on 22 May 2011, Mr Kendrick filled out the box in which he was obliged to list *"any prescription/non-prescription medication or supplements, including vitamins or minerals, taken over the past 7 days"* without listing either Zija or Ambien. His explanation for this was unsatisfactory. He claimed that his practice was just to list what was in his system (i.e. not what he was required to list given the requirements of the form). Yet, as the test clearly established, he had Zija in his system at the time. This was unsurprisingly the case as he had only taken it two days previously. Further, we would expect the presence of Ambien to have continued at that time as well. At best, this was further evidence of an inappropriately relaxed approach by Mr Kendrick to his doping responsibilities.

(iv) The distributor role of Mr Rich's wife

In paragraph 6 of his Affidavit, Mr Kendrick asserted as follows: *"Mr Rich also told me that he was not aware of any athlete to ever test positive for a banned substance after taking Zija. Indeed, Mr Rich's wife, Susan, is a distributor of Zija and she also represents that Zija is completely clean of any banned substance"*. Anyone reading this passage would be likely to conclude that this information about Susan Rich was known to Mr Kendrick at the time that Mr Rich handed the Zija sample to him and that this information was included in the Affidavit in order to give some support for Mr Kendrick's position in accepting this unmarked container from Mr Rich (who was not even his coach). In fact, as emerged during the course of his oral testimony, Mr Kendrick only found this out once the ITF had notified him of his doping offence. In

those circumstances, it is unclear how this assertion in Mr Kendrick's sworn Affidavit had any relevance whatsoever. If anything, it was likely to mislead.

(D) Mr Kendrick's approach to his doping responsibilities

19. We have already alluded to various indications in the evidence of Mr Kendrick that suggested to us an insufficiently conscientious attitude on his part to his doping responsibilities. In this section of our Decision, we identify what we perceive those responsibilities to be and then set out our findings on the evidence as to the extent to which Mr Kendrick fell short in this respect.

(1) Mr Kendrick's responsibilities

20. The Programme imposes the following duties and responsibilities on Players:

> *B.3 It is the sole responsibility of each Player:*
>
> *B.3.1 to acquaint him/herself, and to ensure that each Person from whom he/she takes advice (including medical personnel) is acquainted, with all of the requirements of the Programme;*
>
> *B.3.2 to know what constitutes an Anti-Doping Rule Violation under this Programme and what substances and methods are prohibited; and*
>
> *B.3.3 to ensure that anything he/she ingests or uses, as well as any medical treatment he/she receives, does not give rise to an Anti-Doping Rule Violation under this Programme.*
>
> …….
>
> *C.1.1 It is each Player's personal duty to ensure that no Prohibited Substance enters his/her body. A Player is responsible for any Prohibited Substance or any of its Metabolites or Markers found to be present in his/her Sample. Accordingly, it is not necessary that intent, fault, negligence or knowing Use on the Player's part be demonstrated in order to establish an Anti-Doping Rule Violation under Article C.1; nor is the Player's lack of intent, fault, negligence or knowledge a*

defence to a charge that an Anti-Doping Rule Violation has been committed under Article C.1.

21. As the ITF submitted to the Tribunal, the inclusion in the Programme of these duties and responsibilities on Players is necessary, in the present context, because so many medications taken for therapeutic purposes may contain a Prohibited Substance as an active ingredient.

22. In order to remind Players of these important responsibilities, one of the steps taken by the ITF is to send to Players on an annual basis a so-called "Wallet Card", which contains lists of the then current Prohibited Substances and Prohibited Methods, which repeats the set of obligations quoted above from Article B of the Programme, which advises Players to *"keep a list of medications, substances and supplements you are taking with you at all times, so that you can accurately list them on the Doping Control Form at the time of testing"* and which contains the following relevant passages:

> *Players are solely responsible for all substances that they ingest, including all medicines they take. Thus, it is crucial that all medication is checked for prohibited substances.*
> ……
> *This document is a summary of parts of the ITF Anti-Doping Programme. Players are required to be familiar with the full Programme, which is the definitive statement of the anti-doping requirements applicable to tennis players. A full copy of the Programme is available at www.iftennis.com/anti-doping.*
> ……
> *WARNING ON DIETARY SUPPLEMENTS*
> *…some products may contain ingredients not listed on the label, or in different quantities than stated on the label, or may be contaminated with other substances which may be Prohibited Substances*
> ……
> *IMPORTANT*
> *KEEP THIS CARD WITH YOU AT ALL TIMES. GIVE A COPY TO YOUR PHYSICIAN, COACH AND PERSONAL TRAINER. A PLAYER MUST APPLY FOR A TUE BEFORE USING ANY PROHIBITED SUBSTANCE OR METHOD.*

23. Both the ITF and USADA offer telephone hotlines and email contact details to those engaged in professional sport to assist them by answering questions about particular medications, and otherwise by helping them to fulfil their doping responsibilities. ITF contact information is available not only on its website but also on the Wallet Cards. Professional tennis players should make use of these points of contact in the event of any uncertainty as to their entitlement to ingest any particular supplement or medication.

24. The case law on the Programme and on the WADA Code from which the Programme is derived ("the Code") emphasises the heavy burden that these responsibilities impose on players. Thus, Puerta v ITF (CAS 2006/A/1025 at paragraph 11.25 and FIFA & WADA (CAS 2005/C/976 & 986 at paragraphs 73 and 74 clearly demonstrate that a player can only fulfil these duties if he can show that he used *"utmost caution"* to keep himself clean of any Prohibited Substance, which means (in the context of an ingestion of a Prohibited Substance) showing that he did not know or suspect, and could not reasonably have known or suspected even with the exercise of the utmost caution, that he had ingested that Substance. Again, in Knauss v FIS (CAS 2005/A/847) the test was expressed as being whether the skier in that case had made *"every conceivable effort to avoid taking a prohibited substance"*.

(2) Mr Kendrick's performance of his responsibilities

25. Mr Kendrick confirmed during his oral testimony that he was aware of his duties as a professional tennis player to ensure that no Prohibited Substance entered his body. He also confirmed that he was aware of the Programme and of the existence of the contact hotlines referred to above, and he also confirmed that Wallet Cards were probably posted to him once a year.

26. As set out above in our findings of fact, Mr Kendrick did take some steps in furtherance of his doping responsibilities. In particular, he asked Mr Rich

whether Zija contained any banned substance, he did not accept Mr Rich's positive assurances on this point, he conducted some internet research and he did not accept as sufficient confirmation the contents of the webpage (quoted above) that he first opened.

27. Unfortunately, those are the only steps that Mr Kendrick took. In our view, he woefully failed to discharge his doping responsibilities and it was this failure that led to the avoidable ingestion by him of MHA, a Prohibited Substance. Our particular findings in this regard are as follows:

(i) Mr Kendrick should not have accepted the packet from Mr Rich in the first place. Mr Rich was neither a doctor nor a nutritionist. He was not even Mr Kendrick's own coach. Moreover, he only had Mr Rich's word for what was in fact in the packet he was given. It was completely unmarked and Mr Rich gave no explanation as to how he had come by it.

(ii) Mr Kendrick had plenty of time in which to consult a medical practitioner over his jetlag concerns. He should have done this instead of accepting an unmarked packet from Mr Rich - or at any rate he should have consulted such a practitioner over what he had been given, if he chose to accept it. Mr Kendrick was directed by his annual Wallet Cards to give a copy of them to his physician. Had he done so, this would have assisted that physician (had he consulted him or her) in advising him if it was safe for him to ingest Zija. As it was, he did not give any such copy to his physician. Nor did he keep a copy of the Wallet Cards on him at all times (as he was also directed to do). On the

contrary, as he conceded during his oral testimony, he was in the habit of throwing those Cards away.[7]

(iii) The internet searches that he conducted were unsatisfactory for the reasons set out above. He concluded that he was comfortable that he could ingest the product without having taken any reasonable steps in that research to ascertain the ingredients in Zija. He had no proper basis for so concluding. Had he located a Zija ingredients list, as he should have done, he would have found upon a comparison of those ingredients with the list of Prohibited Substances that one of them, MHA, was specified as a Class S6 Stimulant.

(iv) Mr Kendrick failed to make contact with either the USADA or the ITF hotline in order to obtain advice about the contents of Zija, nor did he send any message to either of the proferred email addresses, seeking such advice.

(v) Mr Kendrick's conduct as set out above demonstrates a cavalier approach to his doping responsibilities. This is consistent with our evaluation of his approach in the various respects discussed in paragraph 18 above.

28. The most serious aspect of all this, in our view, is the fact that Mr Kendrick behaved as we find that he did despite his very great experience as a tennis professional. Had he been a newcomer to the professional circuit, his conduct would have been more excusable. Senior tennis professionals should be assiduous in setting the highest of standards in relation to their doping responsibilities in order to set appropriate examples for those new to the profession to follow. Mr Kendrick did quite the opposite.

[7] He sought to justify this conduct by claiming that this is what 95% of his fellow professionals do. If true, this is a very worrying statistic. In any event, this was of course no justification at all for his own behaviour.

29. We now turn to consider the applicable Articles of the Programme.

(E) <u>Article M.4</u>

30. It is Mr Kendrick's submission that the circumstances of his doping offence bring him within the provisions of Article M.4 of the Programme. Article M.4 is in the following terms:

> *M.4 Elimination or Reduction of the Period of Ineligibility for Specified Substances under Specified Circumstances:*
>
> *M.4.1 Where the Participant can establish how a Specified Substance entered his/her body or came into his/her possession and that such Specified Substance was not intended to enhance the Player's sport performance or to mask the Use of a performance-enhancing substance, the period of Ineligibility established in Article M.2 shall be replaced (assuming it is the Participant's first offence) with, at a minimum, a reprimand and no period of Ineligibility, and at a maximum, a period of Ineligibility of two (2) years.*
>
> *M.4.2 To qualify for any elimination or reduction under this Article, the Participant must produce corroborating evidence in addition to his/her word that establishes, to the comfortable satisfaction of the Anti-Doping Tribunal, the absence of an intent to enhance sport performance or to mask the Use of a performance-enhancing substance. The Participant's degree of fault shall be the criterion considered in assessing any reduction of the period of Ineligibility.*

31. In order to succeed in his submission, Mr Kendrick therefore needs to establish: (a) that the Substance which he ingested was a Specified Substance; (b) how that Substance entered his body, and (c) that this Substance was not intended to enhance his sporting performance or to mask the use of a performance-enhancing substance. The Tribunal needs to be comfortably satisfied on this last point, having received evidence that corroborates the player's assertions in this regard.

32. The Tribunal accepts Mr Kendrick's submission that he has satisfied each of the conditions necessary to bring himself within the provisions of Article M.4:[8]

(i) The Programme defines a Specified Substance as follows:

> *D.4.1 For purposes of this Programme all Prohibited Substances shall be considered* ***"Specified Substances"*** *except (a) substances in the class of anabolic agents and hormones; and (b) those stimulants and hormone antagonists and modulators so identified on the Prohibited List. Prohibited Methods shall not be Specified Substances.*

MHA is, as stated earlier, a class S6 Stimulant. It is not classified as an anabolic agent or hormone. It is not contained within class S6.a of the list of Stimulants, which are "Non-Specified Stimulants". It is therefore a Specified Substance.

(ii) As our factual findings indicate, we are satisfied that MHA found its way into Mr Kendrick's system prior to his failed test on 22 May 2011 due to his ingestion of a Zija capsule. Mr Kendrick's evidence is supported by the findings of Mr Scott and by the factual evidence of Mr Rich and Mr Schmidt.

(iii) We are comfortably satisfied, having regard to the evidence to which we have just referred, that Mr Kendrick did not intend by his ingestion of the Zija capsule to enhance his sporting performance or to mask the use of a performance-enhancing substance. The ITF properly drew to the Tribunal's attention to the case of Depres v CCES (CAS 2008/A/1489 & 1510) in which it was held (at paragraph 7.13) that the ingestion of a nutritional substance with the intention of recovering

[8] The ITF for its part, having considered the evidence, did not contend otherwise.

more quickly from surgery was for a performance-related reason. However, in DFSNZ v Brightwater-Wharf (STNZ Decision, 29 November 2010) the tribunal observed that: *"it might, of course, be said that almost anything drunk or eaten leading up to a competition is taken with the intent of benefitting performance. Hydrating before a marathon is an obvious example. In a general sense that will always be so. In the Tribunal's view the intent relevant....has to be more specific than that. And it must be considered in all of the circumstances."* We agree with this observation. In all of the circumstances, we do not consider that taking a substance in order to assist in fighting jetlag in advance of a competition is an act done with performance-related intent.

33. In consequence, the otherwise applicable Period of Ineligibility of two years for Mr Kendrick's first offence (see Article M.2 quoted below) is *"replaced…with, at a minimum, a reprimand and no Period of Ineligibility, and at a maximum, a period of Ineligibility of two (2) years."* As is made clear in Article M.4.2, it is Mr Kendrick's *"degree of fault"* that is to be *"the criterion considered in assessing any reduction of the period of Ineligibility".*

(F) **Assessment of *"degree of fault"***

34. Article M.2 of the Programme provides (insofar as material) that:

> *The period of Ineligibility imposed for an Anti-Doping Rule Violation under Article C.1 (presence of Prohibited Substance or any of its Metabolites or Markers) ….. that is the Participant's first offence shall be two years, unless the conditions for eliminating or reducing the period of Ineligibility (as specified in Articles M.4 and M.5) ….. are met.*

35. A major topic for debate during the hearing was the relevance of Article M.5 (and the cases decided by reference to its provisions) in the Tribunal's assessment of Mr Kendrick's *"degree of fault"* for the purposes of Article M.4 of the Programme. The material provisions of Article M.5 are as follows:

M.5.1 If a Participant establishes in an individual case that he/she bears No Fault or Negligence in respect of the Anti-Doping Rule Violation in question, the otherwise applicable period of Ineligibility shall be eliminated. When the Anti-Doping Rule Violation is an Article C.1 offence (presence of a Prohibited Substance or any of its Metabolites or Markers), the Player must also establish how the Prohibited Substance entered his/her system in order to have the period of Ineligibility eliminated. In the event that this Article is applied and the period of Ineligibility otherwise applicable is eliminated, the Anti-Doping Rule Violation shall not be considered an Anti-Doping Rule Violation for the limited purpose of determining the period of Ineligibility for multiple Anti-Doping Rule Violations under Article M.7.

M.5.2 If a Participant establishes in an individual case that he/she bears No Significant Fault or Negligence in respect of the Anti-Doping Rule Violation charged, then the period of Ineligibility may be reduced, but the reduced period of Ineligibility may not be less than one-half of the period of Ineligibility otherwise applicable….. When the Anti-Doping Rule Violation is an Article C.1 offence (presence of Prohibited Substance or any of its Markers or Metabolites), the Player must also establish how the Prohibited Substance entered his/her system in order to have the period of Ineligibility reduced.

36. On behalf of Mr Kendrick, it was submitted that:

(i) The level of scrutiny and review under Article M.5.2 is significantly higher when determining whether an athlete bears no significant fault or negligence for committing a doping violation than it is under Article M.4.

(ii) Accordingly (and in any event) the case law involving Article M.5 issues is irrelevant to the present case, as it falls to be considered under Article M.4.

(iii) The correct approach is not to assume that the starting point for the assessment under Article M.4 is 24 months subject to any ineligibility reduction (as would be the case under Article M.5). On the contrary, 24 months is the end point. The Tribunal has a broad discretion, based on

the degree of the athlete's fault, to establish a Period of Ineligibility between 0 and 24 months.

37. We consider the last point first. We were taken to a number of provisions both in the Programme and in the Code (and to comments annotating various provisions of the Code which, as Article A.7 of the Programme makes clear, may be used to assist in the understanding and interpretation of the Programme).[9] This was for the purpose of showing the Tribunal language which was said to support Mr Kendrick's *"replacement"* construction or, as the case may be, the ITF's *"reduction"* construction of Article M.4. Ultimately, we did not find this a very helpful exercise. We do not consider that a Tribunal, charged with the task of assessing an athlete's degree of fault under Article M.4, would reach a different conclusion as to the appropriate length for the Period of Ineligibility depending on whether it viewed 24 months as a starting or an end point. The task for the members of the tribunal is to decide where, within the range of 0 to 24 months, the athlete's degree of fault takes them.

38. Mr Kendrick's first submission, that the level of scrutiny is significantly higher under Article M.5.2 than it is under Article M.4, is a bold one. It appeared to us to be more a matter of assertion than one based upon authority or principle. We assume that it takes as its starting point the rationale behind Article M.4 of the Programme (Article 10.4 of the Code) which (as explained in comments annotating the Code) is to *"allow for more flexible sanctions which better take into consideration the circumstances of each individual case"* and to recognise *"the greater likelihood that Specified Substances, as opposed to other Prohibited Substances, could be susceptible to a credible, non-doping explanation"*. Beyond that, it appeared to us that Mr Kendrick was seeking to support his proposition solely on the basis of the short length of the Periods of Ineligibility imposed in certain cases involving the ingestion of MHA (of which there have been a number).

[9] Article A.7 also makes clear that the Programme is to be interpreted in a manner that is consistent with the Code.

39. We deal with those cases further below. As to Mr Kendrick's proposition, we reject it as being contrary to logic and principle. The greater flexibility inherent in Article M.4 of the Programme (Article 10.4 of the Code) does not mean that the burden on the athlete to fulfil his doping responsibilities is any the less in relation to an Article M.4/Article 10.4 case than it is in relation to an Article M.5.2/Article 10.5.2 case or otherwise under the Programme or the Code. In the first place, the nature of the substance cannot be relevant because Article M.5.2/Article 10.5.2 applies as much to Specified Substances as to non-Specified Substances. Secondly, the doping responsibilities of the athlete (which we have set out extensively above) are the same under the Programme and the Code, whatever the substance and whatever the circumstances of the offence. Thirdly, the comments under Articles 10.4 and 10.5 of the Code make it clear[10] that the intention of the Code (and therefore of the Programme) is that the criteria for assessing the athlete's degree of fault is the same in each case. Fourthly, tribunals have in the past referred to Article 10.5 cases in deciding the degree of fault under Article 10.4 (e.g. Foggo v National Rugby League (CAS A2/2011), which referred to the case of WADA v Lund (CAS OG06/001), a finasteride case, in its assessment of what constituted *"utmost caution"*). Finally, there is in our view no reason in principle or logic why the greater flexibility as to sanction under Article M.4/Article 10.4 should mean that any more lenient approach should be taken to the degree of fault of an athlete who has taken a Specified Substance in circumstances to which Article M.4/Article 10.4 applies.

40. Nonetheless, the tribunal in an Article M.4/Article 10.4 case has greater flexibility in its decision on sanction than a tribunal dealing with a case to which Article M.5.2/Article 10.5.2 applies. This is because the tribunal in the latter case is restricted in its ability to reduce the otherwise applicable sanction, following a finding of No Significant Fault or Negligence. It can only

[10] In particular through the use of materially identical language: *"…the evidence considered must be specific and relevant to explain the Athlete's or other Person's departure from the expected standard of behaviour…."*

reduce the Period of Ineligibility by a maximum of 50% - i.e. to one year from two years in the case of a first offence. Thus, in a case where it cannot be said that there is No Fault or Negligence (i.e it is not an Article M.5.1./Article 10.5.1 case) but the degree of fault is nominal, the tribunal's hands are tied in a way that they would not be in such a case under Article M.4/Article 10.4. The Tribunal accepts therefore that it would not be appropriate to consider whether Mr Kendrick would have been cleared of Significant Fault or Negligence had this been an Article M.5.2/Article 10.5.2 case and then apply the reduction that would have been appropriate in those hypothetical circumstances. Article M.5.2/Article 10.5.2 does not have application in a case where it is established that Article M.4/Article 10.4 applies.

41. However, the fact that, in the sense explained in the previous paragraph, Article M.5.2/Article 10.5.2 does not have application in an Article M.4/Article 10.4 case does not mean that the case law relating to the former category of cases has no relevance to cases in the latter category. As explained above, they are relevant in the assessment of the athlete's degree of fault. We therefore also reject Mr Kendrick's second submission.

42. Overall, therefore, the Tribunal considers that its obligation is to assess the degree of Mr Kendrick's fault in the light of his duties as expressed in the Programme, the Code and the case law generally, and to decide upon a Period of Ineligibility for Mr Kendrick within the limits imposed by Article M.4 which reflects that assessment.

(G) <u>Mr Kendrick: Period of Ineligibility</u>

43. We have concluded, in the light of our findings in Section (D) of this Decision (and, in particular the matters to which we allude in paragraphs 27 and 28), that the Period of Ineligibility that we should impose on Mr Kendrick is one of 12 months. As explained in those paragraphs, we were particularly

concerned that such a cavalier approach to doping responsibilities should have been taken by an athlete of Mr Kendrick's experience[11]. His conduct was not wilful, but it was culpably negligent, if not reckless. On behalf of Mr Kendrick, it was accepted that the Period of Ineligibility that we should impose was one that was *"sufficient to send a message to Mr Kendrick and the other players on tour that one can never be too careful when it comes to ingesting supplements"*. We agree that such a message should be sent. In our view, a Period of 12 months achieves this; a shorter Period would not – especially having regard to the need to emphasise to senior professionals on the tour their obligations to set good examples for those less experienced to follow. The importance of sending the right message was emphasised by Dr Miller in his evidence:

> *The overriding purpose of the Tennis Anti-Doping Programme is to preserve the integrity of the sport of professional tennis, and to protect the right of players to compete on a level playing-field, by striving to maintain a clean sport. Obviously that means doing everything possible to deter players from intentionally taking drugs to enhance their performance. But almost as importantly, it means ensuring that every player takes personal responsibility to avoid inadvertently ingesting prohibited substances. Taking drugs inadvertently is clearly not as morally blameworthy as intentional cheating, but the consequences in terms of tainted performances can be just as bad. Drug-testing alone cannot provide a cure for this problem, because we only have the resources to test a minority of players at selected events. Therefore, players must take personal responsibility to stay clean, and must be assiduous in living up to that responsibility, and when they fail to do so, a strong message must be sent that that is not good enough. Only in this way do we have any chance of ensuring that everyone is competing on a level playing field.*

We respectfully agree.

44. We reached this conclusion without regard to the sanctions that were imposed in the large number of cases to which the parties referred in their submissions. We did so because it is very often difficult to be certain that one

[11] We note that, in the comments on Article 10.5 of the Code, it is stated that *"youth and lack of experience are relevant factors to be assessed in determining the Athlete's or other Person's fault under Article 10.4"*.

is sufficiently apprised of the relevant facts of other cases to be able to use them as reliable comparisons. Indeed, in many instances we were simply informed of the length of the sanction imposed without any written reasons to explain the thinking of the tribunal concerned. In our view, we were unable to derive any assistance from the many cases in this category, other than to note that (unsurprisingly) the range of sanctions imposed in those other cases encompassed the entire spectrum of Periods of Ineligibility permitted by Article M.4/Article 10.4.

45. Nonetheless, we bear in mind the desirability of *"harmonisation of sanctions"* in international sport[12] and therefore we have checked that there is not a body of clear authority which would suggest that our conclusion is manifestly too harsh or too lenient. We were taken by each party to a number of authorities (which contained full written reasons) which were said to be cases from which we should derive guidance. Insofar as they provided assistance, they confirmed our conclusion that a Period of Ineligibility for Mr Kendrick was proportionate to the circumstances of his offence.

46. (i) <u>The ITF's cases</u>

The ITF drew our attention to the cases of: (a) <u>Laura Pous Tio</u>, in which an athlete had obtained medication from a doctor to treat legitimate medical conditions but had not used the Wallet Card nor called the ITF hotline nor checked with her doctor whether the medication contained any Prohibited Substances - her Period of Ineligibility was one of 18 months; and <u>Nagle</u> where on facts that were considered to be similar to those of Ms Pous Tio, a Period of 16 months' Ineligibility was imposed. However, both these decisions were taken by Dr Miller rather than by an independent tribunal. They are therefore of limited assistance. The ITF also referred to the case of <u>Foggo</u>, in which a young professional rugby player had been given very limited drug education by his club and had checked the Prohibited Substance

[12] See the comments on Article 10.2 of the Code.

list for 5 years (when it was not listed) but not in a sixth year (when it was). He was banned for 6 months.

47. (ii) Mr Kendrick's cases

Our attention was drawn by Mr Kendrick to a number of Article M.4/Article 10.4 cases in which Periods of Ineligibility of less than 12 months were imposed - Wallader, a decision of a National Anti Doping Appeal Tribunal: 4 months; Dooler, a decision of a National Anti-Doping Panel: 4 months; Steenkamp, a decision of Rugby Football Union Disciplinary Tribunal: 3 months, and Duckworth, a decision of a National Anti-Doping Appeal Tribunal: 6 months. In our view, there is nothing in these cases that suggests that a Period of Ineligibility of 12 months for Mr Kendrick is disproportionate. In Wallader, the athlete took *"considerable steps on her own to ascertain the status of the ingredients"* and she openly disclosed the use of the supplement on the doping control form; in Dooler, an internet search would not readily have identified the potential for the supplement to contain the Specified Substance, and a search had been made against all the ingredients which were listed on the box containing the product; Steenkamp was a case of a rugby player who had only just ceased to be an amateur player and who had been offered a semi-professional contract on a per game basis, who had not been in the anti-doping regime before, had scant education and had taken a contaminated substance; in Duckworth, a young man had taken *"reasonable (but not sufficient) steps to satisfy himself"* that the product could be taken safely.

48. The next matter to address in this context is an important set of submissions that were made on behalf of Mr Kendrick, to the effect that we should take into account, in our conclusion on his Period of Ineligibility, his personal circumstances. In particular, it was urged upon us that the amount of money that he would lose even with a three month back-dated ban would be very significant and that any ban in excess of three months back-dated to 22 May 2011 could in effect end his career. We were repeatedly reminded that Mr

Kendrick was right at the end of his career and that he had just become a father and a married man. Mr Kendrick relied, in support of his contention that these were matters which the Tribunal should bear in mind, on two cases (Koubek and Oliver) which were decided prior to the coming into operation of the current Code. They were also decided before the case of Knauss v International Ski Federation (CAS 2005/A/847) in which it was stated (at paragraph 7.5.2):

> *"..the [Code] does not provide that the athlete's personal history also to be taken into account when fixing the penalty. The same applies to the question how severely the penalty impacts upon the athlete in his personal life. The athlete's age, the question of whether taking the substance had a performance-enhancing effect or the peculiarities of the particular type of sport are - according to the [Code] – matters to be weighed when determining the period of ineligibility…"*

That case was also decided before the commencement of the current Code, but the comments under Article 10.4 (and, indeed, Article 10.5.2) of the current Code make it clear that the approach of CAS in the Knauss case was and remains correct (so far as the promulgators of the Code are concerned). Thus:

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

49. We were urged by those representing Mr Kendrick not to consider ourselves bound by these comments (or by the Knauss decision), but instead to take into account the personal circumstances of Mr Kendrick as an exercise in proportionality. While we sympathise with the position in which Mr Kendrick finds himself, we do not consider that we can or should do this. In particular, we bear in mind the wording of Article M.4/Article 10.4, which

makes it clear that it is the degree of fault that is *"the criterion"* to be considered in assessing the Period of Ineligibility.

50. Finally on this point we need to address the date on which the Period of Ineligibility should commence. As indicated in Section (A) of this Decision, the parties are agreed that, subject to our own contrary views, the Period of Ineligibility should be backdated to 22 May 2011 (i.e. to the date of Mr Kendrick's failed test). The ITF explained that its support for this date derives from the response of Mr Kendrick to the Charge in admitting it and in voluntarily withdrawing from Wimbledon. The Tribunal is content to abide by this agreement. Following the conclusion of the hearing, the ITF provided the Tribunal at our request with a note which explained how such a back-dating was in accordance with the relevant parts of the Programme. We were satisfied by that explanation, and do not consider that it would assist if our reasons in that regard added to this already lengthy Decision.

Other Consequences

51. These can be addressed briefly.

52. Mr Kendrick's results at the 2011 French Open are subject to automatic disqualification, with consequent forfeiture of the 10 ranking points and €15,000 in prize money that he earned at that event: see Article L.1. of the Programme.

53. The results which Mr Kendrick obtained at the event he played in after the 2011 French Open (the UNICEF Open at s-Hertogenbosch) also stand to be disqualified, and the prize money he earned there (€3,905) forfeited, unless Mr Kendrick can show that *'fairness requires otherwise'*: see Article M.8.8 of the Programme. In line with: (a) the circumstances of Mr Kendrick's doping offence, and (b) the approach that the ITF has taken to the back-dating of Mr

Kendrick's Period of Ineligibility and the reasons for it, we consider that fairness does require otherwise. Mr Kendrick can retain that prize money.

The Tribunal's Ruling

54. Accordingly, for the reasons given above, the Tribunal:

(1) Confirms the commission of the doping offence specified in the Charge;

(2) Orders that Mr Kendrick's individual result must be disqualified in respect of the French Open 2011, and in consequence rules that the 10 ranking points and €15,000 in prize money obtained by him from his participation in that event must be forfeited;

(3) Orders further that Mr Kendrick be permitted to retain the prize money obtained by him from his participation in the subsequent UNICEF Open;

(4) Finds that Mr Kendrick has established that the circumstances of his doping offence bring him within the provisions of Article M.4 of the Programme;

(5) Declares Mr Kendrick ineligible for a period of 12 months, commencing on 22 May 2011, from participating in any capacity in any event or activity (other than authorised anti-doping education or rehabilitation programmes) authorised by the ITF or by any national or regional entity which is a member of the ITF or is recognised by the ITF as the entity governing the sport of tennis in that nation or region.

Ian Mill QC, Chairman **Dr Anik Sax** **Dr Barry O'Driscoll**

29 July 2011