

## **WORLD RUGBY POST-HEARING REVIEW BODY**

**IN THE MATTER OF THE REGULATIONS RELATING TO THE GAME**

**AND IN THE MATTER OF AN ALLEGED DOPING RULE VIOLATION BY RUBÉN RICCO (ARGENTINA) CONTRARY TO REGULATION 21 OF THOSE RULES**

**AND IN THE MATTER OF A DECISION OF A WORLD RUGBY INDEPENDENT JUDICIAL COMMITTEE DATED 30 MARCH 2017**

**AND IN THE MATTER OF A REFERRAL TO A POST-HEARING REVIEW BODY APPOINTED PURSUANT TO REGULATION 21.13 CONSISTING OF:**

### **Post-Hearing Review Body**

Tim Gresson (New Zealand), Chairman

Margo Mountjoy (Canada)

Nicholas Stewart QC (England)

### **Appearances**

Aaron Lloyd (Counsel for the Player Rubén Ricco)

Louise Reilly and Ben Rutherford (Counsel for World Rugby)

### **Hearing**

Conducted on the papers. Written submissions dated 6 July and 14 August 2017 (Player) and 31 July 2017 (World Rugby)

## **DECISION AND REASONS**

### **Overview and procedural history**

1. The Player, Rubén Ricco is an Argentine rugby player who was a member of the Argentina squad participating in the World Rugby Under 20 Championship in England.
2. On 30 May 2016 a sample was collected from the Player in Cheshire, England, as part of that tournament's Out of Competition testing programme. Analysis of that sample produced a positive finding for the presence of Clomiphene. The Player did not dispute that adverse analytical finding ("AAF") and admitted that the presence of Clomiphene in his body constituted an anti-doping rule violation ("ADRV") under Regulation 21.2.1 of the World Rugby Anti-Doping Regulations 2016.

3. Clomiphene is an anti-estrogenic medical substance, used for fertility treatment for men and women. In men, a medical dose of Clomiphene accelerates testosterone secretion.
4. Clomiphene is in the World Anti-Doping Agency ("WADA") 2016 List of Prohibited Substances, set out as Schedule 2 to the World Rugby Anti-Doping Regulation 21 ("Regulation 21"). It is in category S4, Hormone and Metabolic Modulators. It can be used by athletes to inhibit oestrogen problems caused by anabolic steroid use, one manifestation of which can be over-growth of breasts (gynecomastia).
5. Clomiphene is a Specified Substance, as defined by Regulation 21.4.2.2 for the purposes of the application of Regulation 21.10, which deals with sanctions on individuals for an ADRV under Regulation 21.2.
6. By Regulation 21.10.2, the presumptive sanction for the Player's admitted ADRV involving a Specified Substance is:
  - four years ineligibility if World Rugby can establish that the ADRV was intentional (Regulation 21.10.2.1.2)
  - two years ineligibility if Regulation 21.10.2.1.2 does *not* apply; i.e. if World Rugby does *not* establish that the ADRV was intentional (Regulation 21.10.2.2)
7. The presumptive sanction can be reduced or even eliminated in some circumstances, as follows:
  - The period of ineligibility is eliminated if the Player establishes that he bears No Fault or Negligence (Regulation 21.10.4).
  - If the Player can establish No Significant Fault or Negligence, then at a minimum there must be a reprimand and no period of ineligibility, and at a maximum a period of two years ineligibility (Regulation 21.10.5.1.1).

Because of the definition of the word "*intentional*" as provided by Regulation 21.10.2.3<sup>1</sup> factually there is no room for the application of either of those grounds for reduction or elimination if it is established that the ADRV was intentional. Moreover, in the present case it has never been argued for the Player that he bore No Fault or Negligence, as opposed to No Significant Fault or Negligence.

8. Having been formally notified through the Unión Argentina de Rugby, that World Rugby alleged an ADRV against him, the Player was provisionally suspended under Regulation 21.7.9 and 21.7.10 with effect from 11 July 2016 pending the outcome of his case.
9. On 11 August 2016 the Player's legal representative wrote to World Rugby giving notice of the Player's intention to admit the ADRV and requesting a hearing by a Judicial Committee appointed under Regulation 21.8.2 as to sanction only.

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<sup>1</sup> Regulation 21.10.2.3 provides:

" the term "*intentional*" is meant to identify those players who cheat. The term therefore requires that the player or other person engaged in conduct which he or she knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk."

10. The appointed Judicial Committee was: Graeme Mew (Canada), Chair, Dr George Van Dugteren (South Africa) and Joseph de Pencier (Canada).
11. The Judicial Committee conducted a hearing on 15 November 2016 by a combination of video and telephone conferencing facilities. The Judicial Committee received written submissions before the hearing, heard witnesses and oral submissions at the hearing and received further written submissions on 26 January 2017.
12. At the hearing Mr Lloyd presented the Player's case and Ms Reilly the case for World Rugby. All witnesses had provided written witness statements. For the Player, he and his friend and training partner Mr Franco Ruiz gave oral evidence by video link (each with interpretation from Spanish to English) and were cross-examined. For World Rugby, its two expert witnesses Dr Audrey Kinahan and Professor David Cowan gave oral evidence by telephone and were cross-examined.
13. The evidence before the Judicial Committee will be considered, so far as necessary in these reasons when we discuss the grounds of challenge by the Player to the Judicial Committee's findings and decision.
14. World Rugby submitted to the Judicial Committee that the Player's use of Clomiphene had been intentional and the sanction should be four years ineligibility.
15. The Player denied intentional use. He asserted that his degree of fault was less than significant and warranted reduction of the period of ineligibility to six months so as properly to reflect the degree of his fault or negligence. He did not argue No Fault or Negligence, so Regulation 21.10.4 did not come into play (see paragraph 7 above).

#### **The Judicial Committee decision under review**

16. The Judicial Committee's Decision now under review ("the Decision"), including its written reasons, was given on 30 March 2017. The Judicial Committee stated that it rejected much of the evidence tendered by the Player [para 73]. It accepted World Rugby's submission that the Player's use of Clomiphene had been intentional. In particular, the Judicial Committee held that regardless of when he had used Clomiphene, the Player *"...knew enough about anti-doping regulations to have realised that using any pharmaceutical product – particularly one recommended by a friend he worked out with at the gym – without checking its contents would run the risk of resulting in an ADRV."* [para 72]
17. The Judicial Committee, having decided that the Player's ADRV had been intentional, stated that it was not necessary for it to consider whether there should be any reduction because of lack of fault or negligence or lack of significant fault or negligence on the Player's part (para 76 and see para 7 of this decision). That was clearly correct.
18. The applicable sanction imposed on the Player was therefore four years ineligibility.
19. On 7 April 2017 the Player gave timely written notice exercising his right under Regulation 21.13.8 to refer the sanction imposed by the Judicial Committee to a Post-Hearing Review Body and we have been duly appointed as the Post-Hearing Review Body ("the PHRB").

20. Under regulation 21.13.8.5 and 21.13.8 the PHRB is to determine the basis on which the review will proceed and has a discretion to rehear the whole or part of the evidence given before Judicial Committee. It also has wide powers in its discretion, under regulation 21.13.8.6, 21.13.8.8 and 21.13.8.9 to receive further evidence and to call on experts for specialist advice.
21. In the present case we did not consider it necessary or appropriate to rehear any evidence or receive any new evidence or expert advice. Neither party had asked us to do so.
22. Save where the PHRB decides to hear the entire case *de novo*, by regulation 21.13.8.11 the party seeking review has the burden of proving that the decision being challenged should be overturned or varied. That burden, therefore, fell upon the Player on this review.
23. We held a directions hearing by telephone on Thursday 27 April 2017, with the participation of Counsel for the Player, World Rugby and the Unión Argentina de Rugby. We (via the Chairman) then issued written directions dated 2 May 2017 for the filing of submissions and the preparation of transcripts of the oral evidence given at the 15 November 2016 Judicial Committee hearing.
24. We received written submissions dated 6 July 2017 from Mr Lloyd, written submissions in response from World Rugby dated 31 July 2017 and reply submissions from Mr Lloyd dated 14 August 2017. We also received transcripts in English of the oral evidence given on 15 November 2016.
25. On this review the Player requests:
- (a) a reversal of the finding of the Judicial Committee that the Player intentionally committed an Anti-Doping Rule Violation; and
  - (b) a reduction in the sanction imposed by the Judicial Committee from four years' ineligibility to no more than 2 years' ineligibility - specifically 16 months.
26. The grounds advanced by the Player on this review are that the Judicial Committee erred:
- (a) in finding that the Player engaged in conduct which he knew constituted an ADRV or knew that there was a significant risk that the conduct might constitute or result in an ADRV and manifestly disregarded that risk;
  - (b) in rejecting the evidence of the Player that:
    - (i) he had been experiencing pain and discomfort and his use of Clomiphene was for the purpose of managing that pain and discomfort; and
    - (ii) he did not turn his mind to consider whether Clomiphene was a prohibited substance because he did not think of his condition, and the treatment to combat it, as in any way being for the purpose of performance enhancement.
  - (c) in finding that it was likely that Clomiphene was only available on prescription in Argentina; and

(d) in finding that World Rugby had established, to the comfortable satisfaction of the Judicial Committee, that the Player's ADRV had been intentional.

27. Mr Lloyd indicated that the Player's application for review alleged that the Judicial Committee had erred in both fact and law but was principally focused on legal error.

28. We turn to consider each of the specific Judicial Committee errors of law and/or fact alleged on behalf of the Player, set out as points (a) to (f) in Mr Lloyd's submissions [para 5] in support of his grounds of challenge recorded in paragraph 26 above.

**Point (a): The Judicial Committee applied the "comfortable satisfaction test incorrectly, leading to legal error.**

29. This complaint is based on the following passage in paragraph 60 of the Decision:

*" . . . . judicial committees will look at all of the circumstances and decide whether, to the comfortable satisfaction of the panel (where World Rugby has the burden of proof), they believe that the anti-doping rule violation was not intentional."*

30. The key word is the penultimate word "not". It is alleged by Counsel that the Judicial Committee got the test 180 degrees wrong. It was submitted that *"the Judicial Committee should not have been asking itself whether it was established to its comfortable satisfaction that the ADRV was not intentional (as recorded in [JCD para 60]) but rather whether they were satisfied to the comfortable satisfaction standard that it was."*

31. There is nothing in this point. On any sensible reading of the Decision (and in particular paragraphs 7, 19 and 20), or even paragraph 60 on its own, it is blindingly obvious that the inclusion of "not" as the penultimate word of that paragraph was just a slip. The reference in paragraph 60 to *"where World Rugby has the burden of proof"* is itself enough to show that. It would have made no sense to be talking explicitly about that situation and then later in the same sentence to describe the test as being whether the Judicial Committee believed that the ADRV was *not* intentional; i.e. the exact opposite of the burden of proof being on World Rugby.

32. On this point, there is not only no fundamental error, as Counsel submits. There is no error of substance at all. The only error was that slip, which had no effect on the Judicial Committee's reasoning or decision.

**Points (b) and (c): The Judicial Committee failed to provide any reasoning or justification for the rejection of the evidence by the Player and his supporting witness Mr Ruiz. It took into account irrelevant matters and failed to take into account relevant matters in rejecting the Player's evidence that he had acquired the substance taken "over the counter"**

33. Mr Lloyd treated these two points together [paragraphs 15 to 22]. That is helpful as in practical terms they are inextricably connected.

34. We note the express acknowledgment by Mr Lloyd [para 17] that, subject to specific comments on behalf of the Player which we consider below in relation to points (e) and (f), the Judicial Committee had fairly set out the key parts of the evidence and argument before it.

35. Mr Lloyd criticised the Judicial Committee's "Discussion and Analysis" at paragraphs 57 to 76 of the Decision. He submitted that the Judicial Committee provided no proper analysis of the evidence before it, nor of its reasons for rejecting crucial evidence. Specifically he submitted:

- The Judicial Committee did not state why it found it highly unlikely that the Player obtained Clomiphene over the counter.
- It did not state why that conclusion was relevant to its further findings.

36. Dealing with the specific complaints:

- It is incorrect to state that the Judicial Committee did not state why it made the finding. The Judicial Committee stated at paragraph 68: "*We find it highly unlikely that the Player obtained Clomiphene over the counter at a pharmacy. The Player's failure to take the obvious step of obtaining other evidence to corroborate his purchase from the pharmacy is telling.*" The second sentence gave a reason for the finding. It was clearly linked with, and supported by, the Judicial Committee's findings at paragraph 69 where it explained why it did not accept Mr Ruiz's evidence that he had recommended Clomiphene to the Player as treatment for pain and itchiness on the chest – noting particularly, that Mr Ruiz had taken Clomiphene on the recommendation of a trainer, rather than a physician.
- The relevance of this conclusion was obvious, without any need to spell it out explicitly. An over-the-counter purchase was more likely to be consistent with the Player's case that he was using Clomiphene innocently for treatment of chest pain and itchiness. If he had obtained the Clomiphene from a doctor, he would have faced the argument that he could and should have taken the opportunity of checking with the doctor so as to ensure that it was not and did not contain any prohibited substance. If he had obtained it from another source, such as a trainer or another athlete, the conclusion that it was for performance enhancing purposes, rather than for innocent medical reasons, would have been hard to resist.

37. We note that although the conclusions in paragraph 69 of the Decision are supportive of the finding stated in paragraph 68, those conclusions in paragraph 69 are expressed to apply even if the Player had been given the benefit of the doubt on the question of over-the-counter purchase.

38. Mr Lloyd is correct in submitting that World Rugby produced no direct evidence of the availability of Clomiphene in Argentina. However, the Judicial Committee also noted [para 30] that the Player had neither gone back to the Pharmacist to obtain evidence of his purchase nor (this would have been a simple step to take) to obtain a statement confirming the availability of Clomiphene over the counter.

39. Mr Lloyd described it as important that Mr Ruiz was not cross-examined on this point. We do not see that as important. In the light of the overall evidence and the cross-examination of the Player, it is insignificant. We do see that even though the Player was cross-examined on the point, it might have been preferable for Counsel to have put the point squarely in cross-examination of Mr Ruiz as well. However, even if that had been done, the most favourable result for the Player would have been that Mr Ruiz was unshaken and simply stuck to his evidence on that point.
40. That leads directly into the closely related submission by Mr Lloyd, that the Player was apparently unshaken by cross-examination. We see no significant force in that submission. An untruthful witness may well be able to maintain his position firmly without any apparent doubt or weakness but that does not prevent a tribunal from finding, as here, that when judged with common sense in the light of all the other evidence, he was not being truthful. This is a familiar situation in cases of contested evidence. If Mr Ruiz had also been cross-examined on this point, then on the most favourable outcome of that cross-examination the Judicial Committee would have been faced with two unshaken witnesses telling the same story. That is another familiar situation faced by fact-finding tribunals. It is clear that having two unshaken witnesses would and should have made no difference to the Judicial Committee's conclusion that the story was false when judged in the entirely proper way described above.
41. Mr Lloyd submitted paragraph 70 of the Decision was tainted by this alleged error. Paragraph 70 states: *"While there is every reason to believe that the Player used Clomiphene on Mr Ruiz's recommendation, we do not accept that it was used to treat a skin condition."* There is no question of taint. Paragraph 70 of the Decision is simply to be read together with paragraphs 68 and 69 which set out coherent conclusions well supported by the evidence.
42. We see no force in the complaint in paragraph 22 of Mr Lloyd's Submission that the Judicial Committee accepted parts of the evidence of Mr Ruiz and the Player, but rejected other parts and in this regard we do not consider there was a rational reason why the Judicial Committee should also have rejected their evidence that the suggestion to use Clomiphene had come from Mr Ruiz. But, in any event there is no objection in principle to a fact-finding tribunal accepting parts of a witness's evidence while rejecting other parts, as long as it results in no inconsistency in the factual findings. There is no such inconsistency here.
43. At paragraph 22 Mr Lloyd submitted *"it appears that the Judicial Committee is ascribing some nefarious purpose for the use of Clomiphene without explaining why, or on what basis, that assumption is made."* We do not consider that the label "assumption" fits at all. It was a conclusion reached by the Judicial Committee, not a mere assumption, and it was explained in the Decision.

**Point (d): The Judicial Committee failed to give any apparent weight to concessions by the expert witness for World Rugby regarding the possibility of administration of the substance outside the expected timeframe (and related to this, appeared to put improper weight and unexplained weight on conclusions reached regarding the possible time of administration of the substance).**

44. This was a flimsy point, which we have fully considered but firmly rejected.

45. The Player's case was that it was around Christmas 2015 Mr Ruiz recommended Clomiphene and the Player then bought it over the counter and the very latest possible date for ingestion of Clomiphene would have been at the beginning of January 2016.
46. The concession in question was by one of World Rugby's two expert witnesses, Prof David Cowan, Director of the Drug Control Centre at King's College, London. Although he clearly stated his opinion it was likely that the Player had consumed Clomiphene within the three month period before the 30 May 2016 test, he told the Judicial Committee that he did not rule out completely the possibility of administration outside that period.
47. World Rugby's other expert witness, Dr Audrey Kinahan, a practising dispensing pharmacist and the Chair of the WADA List Expert Group, stated that it would be extraordinary for Clomiphene to have been still in the Player's system on 30 May 2016 if it had last been taken when the Player claimed.
48. That was all the expert evidence before the Judicial Committee. In the light of the evidence, it is not surprising that the Judicial Committee concluded it was improbable that more than five months had elapsed between the Player's administration of Clomiphene and the test on 30 May 2016 [refer paragraph 71]. It plainly was improbable, to put it at its lowest.
49. The Judicial Committee did not ignore what Mr Lloyd described as a concession by Prof Cowan. It was expressly noted in the Decision but the Judicial Committee accepted the clear opinions of Dr Kinahan and Prof Cowan, who unequivocally concurred on the improbability of the ingestion by the Player having occurred during the period he indicated. There was no need at all for the Judicial Committee to give any further explanation.
50. Contrary to Counsel's submission there was not remotely any error of law by the Judicial Committee on this point.
51. Although we see no sensible reason for questioning the Judicial Committee's conclusion on the timing of the Clomiphene use, we note that at paragraph 72 of the Decision the Judicial Committee concluded: *"Regardless of when the Player used Clomiphene, he knew enough about anti-doping regulations to have realised that using any pharmaceutical product – particularly one recommended by a friend he worked out with at the gym - without checking its contents would run the risk of resulting in an anti-doping rule violation. We simply do not believe his evidence to the contrary."* [our underlining]. That was also an entirely reasonable conclusion on the evidence.

**Points (e) and (f): The Judicial Committee wrongly assumed an admission by the Player of knowledge of risk although that admission had not been made by the Player in evidence. It had also failed to consider and apply the correct legal test for knowledge of risk of an ADRV in reaching its conclusion that the Player had acted intentionally.**

52. Mr Lloyd treated these two points together, which was helpful as they are closely connected.
53. On these points Mr Lloyd referred specifically to paragraph 72 of the Decision which we have set out in paragraph 57 above and submitted there were two errors:



- the Judicial Committee *assumed* that the Player had actual knowledge of the risk of an ADRV, rather than turned its mind to whether that was his state of mind.
- paragraph 72 reflected an earlier mistake in paragraph 31 of the Decision, where it is stated: *"The Player admits having received anti-doping education through the Union's Academy programme and, therefore, knew that he should check any medication taken by him."* The alleged mistake is that although the Player clearly admitted the first point, he did not admit that he had known that he should check any medication.

54. As to the first of the two alleged errors, we see no merit in the point. There is no basis at all for describing the Judicial Committee as having *assumed* that position rather than turning its mind to examination of the evidence and drawing its conclusion from the evidence.

55. Paragraph 74 of the Decision stated:

*"Accordingly, the Player's acts and omissions, as we have found them, leave us comfortably satisfied that the Player engaged in conduct which he knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk."*

56. The Judicial Committee's findings on the evidence and its reasons for its crucial conclusions in paragraphs 72 and 74 are based upon its findings of fact succinctly but clearly set out in paragraphs 68 to 71. All those findings and conclusions are fully justified by the evidence on a correct legal analysis and application of the relevant regulations.

57. As to the second suggested error, Mr Lloyd's submission cited the following passage as *"the best record"* of the Player's evidence:

Q. *And can you also confirm that you received anti-doping education from your Rugby Academy Programme?*

A. *Yes.*

Q. *So you knew before taking medication that you should make sure the medication was safe to use?*

A. *Yes, but I didn't know that that medication was going to leave a positive result because it wasn't performance enhancing medication.*

58. Mr Lloyd argued that this was not a blanket acceptance by the Player that he knew he needed to check all medication.

59. We accept the qualification in the second answer does dilute the admission by the first word "Yes". In effect, the Player indicated although he admitted he knew in general that he should make sure medication was safe to use (i.e. safe in anti-doping terms), he did not think that applied to this particular substance, Clomiphene, because he did not think it was performance-enhancing. To that extent, the second part of paragraph 31 (after the word "therefore"), insofar as it was citing an admission by the Player, marginally overstated the admission.

60. We regard that, as a nuance so fine that it hardly justifies the label "error". Nevertheless, accepting it for the sake of argument as an error, where does it lead?
61. Our conclusion is that paragraph 31 would be correct and fully justified on the evidence if the second part did not purport to refer to an admission at all (which is a possible reading of paragraph 31, although we shall assume in the Player's favour that it is not the correct reading). We consider that in the light of the unequivocal admission that the Player had received anti-doping education through the UAR, it followed, whether he admitted it or not, that he knew that he should check any (that is to say, all) medication taken by him. It is not realistic to suppose that what he had learned and knew from the Rugby Academy Programme, had been qualified by any suggestion of an exception whereby he thought that a substance was not performance-enhancing. It would be stretching credulity to suppose that the Player had failed to appreciate the whole point of his personal responsibility (to check that medication was safe to use), was that it was clearly risky to make any assumption without checking.
62. Moreover, there was ample evidence to support the conclusions reached in paragraph 72, without the need to treat the second of the Player's answers in the cited passage as an admission that he knew that he must check all medication.
63. It is not necessary to determine on this review whether the Player's acts and omissions (as in our view correctly found by the Judicial Committee), mean that he had engaged in conduct which he knew constituted an anti-doping rule violation. This is because we conclude the Judicial Committee was right, at the very least, to be comfortably satisfied that the Player had known there was a significant risk that his conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk. Thus, for the purposes of Regulation 21.10.2.1.2 the Player's ADRV was intentional.
64. Mr Lloyd also submitted that World Rugby's analysis of knowledge and intention recorded in the Decision (paragraph 51) was wrong, as being a too literal interpretation of the knowledge requirement inherent in the concept of intention. However, Mr Lloyd appeared to accept, it is not clear how far the Judicial Committee adopted that analysis. Thus, we do not need to go into those questions. It could only affect the question whether the Player knew that his conduct constituted an ADRV and not the alternative definition of "intentional" – that is the Player knew there was a significant risk that the conduct might constitute or result in an ADRV and manifestly disregarded that risk.
65. The Judicial Committee correctly noted [at para 76] that as a result of its finding of an intentional ADRV it was not necessary to consider whether the sanction should be reduced because of a lack of fault or negligence, or significant fault or negligence on the Player's part.

#### **Decision on this review**

66. The applicable sanction was therefore the four years' ineligibility imposed by the Judicial Committee. We find no ground for interference with the Judicial Committee's decision of a period of ineligibility of four years from 11 July 2016, ending at midnight on 10 July 2020.
67. The decision of this Post-Hearing Review Body is to uphold the decision of the Judicial Committee delivered on 30 March 2017. The Judicial Committee Decision drew attention to

regulation 21.10.12.1 and 21.10.12.2. The result is that the Player will be allowed to return to training on 11 May 2020 although he will not be eligible to take part in competition until 11 July 2020.

### **Appeal to the Court of Arbitration for Sport**

68. Regulation 21.13 sets out the circumstances in which an appeal against this decision can be made to the Court of Arbitration for Sport (CAS).

### **Costs**

69. By regulation 21.13.8.14 costs associated with any proceedings before the Post-Hearing Review Body shall ordinarily be borne by the party seeking review, in this case the Player Rubén Ricco. However, under that regulation the PHRB does have full discretion in relation to the costs. If the Player or World Rugby wish us to exercise our discretion so as to depart from that ordinary rule, written submissions must be submitted to the PHRB through Mr David Ho at World Rugby by 17:00 GMT on 20 October 2017.



**Tim Gresson**

**Margo Mountjoy**

**Nicholas Stewart QC**

5 October 2017

## **WORLD RUGBY INDEPENDENT JUDICIAL COMMITTEE**

IN THE MATTER OF THE REGULATIONS RELATING TO THE GAME

AND IN THE MATTER OF THE WORLD RUGBY ANTI-DOPING RULES

AND IN THE MATTER OF AN ALLEGED ANTI-DOPING RULE VIOLATION BY  
**RUBÉN RICCO** (ARGENTINA) CONTRARY TO REGULATION 21

BEFORE A JUDICIAL COMMITTEE APPOINTED PURSUANT TO REGULATION  
21.8.2 CONSISTING OF:

### **Judicial Committee:**

Graeme Mew (Canada - Chair)  
Dr. George Ruijsch Van Dugteren (South Africa)  
Joseph de Pencier (Canada)

### **Representatives and Participants:**

*Louise Reilly* (Counsel for World Rugby)  
*Aaron Lloyd* (Counsel for the Player)

Mike Earl (General Manager, Anti-Doping, World Rugby)  
David Ho (Anti-Doping Manager - Compliance and Results, World Rugby)  
Ben Rutherford (Senior Legal Counsel & Integrity Unit Manager, World Rugby)

Rubén Ricco (the Player)

Greg Peters (General Manager, Unión Argentina de Rugby)  
Jaime Barba (Legal Counsel, Unión Argentina de Rugby)

Hearing conducted by video/telephone conference on 15 November 2016.  
Additional written submissions received on 26 January 2017.

## **REASONS FOR DECISION**

### Overview

[1] On the recommendation of a friend he worked out with, Rubén Ricco, the Player, then aged 19, obtained and used some Clomiphene pills at a pharmacy to treat pain and discomfort that he was experiencing as a result of an irritated nipple.

[2] Clomiphene is an anti-estrogenic medical substance. In medicine, clomiphene is used for fertility treatments for both men and women. In men, the medical dose of Clomiphene accelerates testosterone secretion.

[3] Clomiphene is also a Specified Substance and is listed in category S4. Hormone and Metabolic Modulators on the World Anti-Doping Agency's 2016 List of Prohibited Substances (which appears at Schedule 2 of World Rugby Regulation 21). It can be used to inhibit oestrogen problems caused by anabolic steroid use, one of the manifestations of which can be over-growth of breasts (gynecomastia).

[4] The Player was selected as a member of the Argentina squad participating in the World Rugby Under 20 Championship 2016 in England.

[5] On 30 May 2016, a sample was collected from the Player in Cheshire, England, as part of the tournament's Out of Competition testing programme. Analysis of that sample yielded a positive finding for the presence of Clomiphene.

[6] The Player did not dispute the adverse analytical finding ("AAF") and has subsequently admitted an anti-doping rule violation for the presence of Clomiphene.

[7] The presumptive sanction for the presence of a Specified Substance such as Clomiphene, is two years Ineligibility. This can be increased to four years if World Rugby establishes that the violation was intentional. Or, if the Player can establish that his use did not involve significant fault or negligence on his part, the sanction can be reduced to, at a minimum, a reprimand and no period of Ineligibility, and at a maximum, two years of Ineligibility, depending on the Player's degree of Fault.

[8] World Rugby asserts that the Player's use of Clomiphene was intentional, and should attract a four year sanction.

[9] The Player denies intentional use and asserts that his degree of fault or negligence was less than significant, and warrants reduction of the period of ineligibility to six months, to properly reflect the degree of fault or negligence on his part.

## Procedural History

[10] A preliminary review of the case was undertaken in accordance with World Rugby Regulation 21.7.2, following which the Player was notified, via the Unión Argentina de Rugby (the "Union"), that it was alleged that he had committed an anti-doping rule violation. The Player was provisionally suspended with effect from 11 July 2016 (the date on which the notification letter was acknowledged by the Union), pursuant to Regulations 21.7.9 and 21.7.10, pending the outcome of his case.

[11] The Player was also informed of his right, pursuant to Regulation 21.7.3, to have the "B" sample, provided by him at the time he was tested, analysed. Having not requested analysis of his "B" sample within the prescribed time, the Player was deemed to have waived this right and accepted the accuracy of the finding with respect to his "A" sample.

[12] By a letter dated 29 July 2016, the Player was notified of his right to have his case heard by a Judicial Committee (JC) and to make submissions to the JC.

[13] On 11 August 2016, the Player's legal representative wrote to World Rugby advising that the Player acknowledged the anti-doping rule violation being asserted against him, giving notice of the Player's election to admit the violation, and requesting a hearing as to sanction pursuant to Regulation 21.8.2.1. Attached to the 11 August 2016 letter was a signed statement from the Player dated 3 August 2016.

[14] This Judicial Committee ("JC") has been appointed to consider the Player's case. The hearing will be conducted in accordance with Regulation 21.8 (Right to a Fair Hearing).

[15] On 26 September 2016, the JC provided directions to the parties concerning disclosure, written submissions and evidence at the hearing.

[16] The hearing was conducted through a combination of video and telephone conferencing technologies on 15 November 2016. Following the hearing, the JC brought to the attention of the parties two recent anti-doping tribunals and offered the parties the opportunity to make written submissions on the applicability, if any, of those decisions to the present case. As a result further written submissions were received on 26 January 2017.

[17] While the JC has read the entire record and paid careful attention to the testimony of the witnesses and the comprehensive written and oral submissions, we refer in these reasons only to those matters which we regard as necessary to describe and explain our decision.

## Issues

[18] As a result of the Player's acceptance of the AAF, World Rugby has met its burden of establishing that the Player has committed an Anti-Doping Rule Violation, namely the presence in the player's sample of the Prohibited Substance Clomiphene.

[19] An Anti-Doping Rule Violation on the part of the Player having been established, the following issues remain:

- a. Was the Player's anti-doping rule violation intentional?
- b. If not, should the presumptive sanction of two years Ineligibility be reduced because of a lack of fault or negligence, or significant fault or negligence, on the Player's part?

[20] World Rugby bears the onus of establishing, to the comfortable satisfaction of the JC, that the Player's anti-doping rule violation was intentional (see CAS 2016/A/4512 *WADA v Turkish Football Federation and Ahmet Kuru*).

[21] If the anti-doping rule violation was not intentional, the Player bears the onus of establishing, on the balance of probabilities, that there was no fault or negligence on his part (in which case the otherwise applicable period of Ineligibility would be eliminated), or no significant fault or negligence on his part (in which case the period of Ineligibility would, at a minimum, be a reprimand and no period of Ineligibility, and at a maximum, two years of Ineligibility, depending on the Player's degree of Fault).

## The Evidence

[22] Witness statements were provided for each witness and stood as their evidence in chief. The Player and his friend and training partner, Franco Ruiz, gave oral evidence at the hearing via a video link.

[23] World Rugby called two expert witnesses, Dr. Audrey Kinahan and Professor David Cowan. They provided their oral evidence by telephone.

[24] The Player was a member of the Argentina Under 20 squad and was a participant in World Rugby's U20 Championship tournament. The urine sample which gave rise to his positive test was obtained out of competition on 30 May 2016. On his Doping Control declaration form, the player declared that he was taking B. Alanin, Ultra Mass and Diclofene.

[25] Back in late 2015, around Christmas time, the Player had been experiencing pain and hardness around his nipple. It was itchy. He told his friend Franco Ruiz about it. Mr Ruiz says that he saw the hardness and the irritation.

[26] The Player and Mr Ruiz, a twenty year old student who is not involved in rugby, both work out of the same gym. Mr Ruiz said that he had experienced

similar symptoms in 2014. A trainer he was working with at the time recommended that he take Clomiphene. Mr Ruiz was able to obtain Clomiphene over the counter from a local pharmacy and after taking it his irritation and discomfort disappeared.

[27] Mr Ruiz suggested to the Player he, too, should go to a chemist and buy some Clomiphene.

[28] The Player was able to buy Clomiphene over the counter at a local pharmacy without prescription for 100 – 120 pesos. The Clomiphene came in a blister pack with ten tablets. After taking the Clomiphene for five days at the end of December and start of January (one in the morning and one at night), the itching and hardness around his nipple went away.

[29] The Player did not tell the pharmacist he was a professional rugby player. Nor did he undertake in the investigation or enquiries to see if there were any problems with using this substance. He offers two reasons for not having done so, namely:

- a. He did not think that the substance could in any way enhance his performance. He understood that this was what the anti-doping rules were all about. He knew from talking to Mr Ruiz that the Clomiphene was going to help get rid of his skin irritation.
- b. Although he did not think he needed to check, that was probably subconsciously reinforced by the fact that it was out of season when the player took Clomiphene. He knew he was not going to be playing rugby again for a number of weeks.

[30] The Player did not keep any of the blister packs. He has no receipt. He has not gone back to the pharmacist to obtain evidence of his purchase or to obtain a statement confirming the availability of Clomiphene over the counter.

[31] The Player admits having received anti-doping education through the Union's Academy programme and, therefore, knew that he should check any medication taken by him. However, while he knew that he was not allowed to take illegal substances which would enhance his performance, it did not occur to him to not take Clomiphene, which he did not believe to be performance enhancing. Accordingly, while the Player acknowledges that he intentionally used Clomiphene, he denies any intention to enhance sport performance, violate anti-doping rules or otherwise cheat.

[32] The Player says that it was not until after his positive test that he became aware that the authorised use of Clomiphene is in relation to human female fertility issues.

[33] The Player denies that he used Clomiphene to counteract the side effects of steroid use. Despite the suggestion made by one of World Rugby's witnesses



to the contrary, he is adamant that he did not need a prescription to obtain Clomiphene. He also denies having obtained it over the Internet.

[34] It is submitted on behalf of the Player at the latest possible date ingestion of Clomiphene would have been at the beginning of January 2016.

[35] The expert evidence tendered by World Rugby is to the contrary.

[36] Dr Audrey Kinahan, a practising dispensing pharmacist and the current chair of the WADA List Expert Group, stated that it would be extraordinary for Clomiphene taken when the Player claims it was to still be in his system in May.

[37] While acknowledging that she is not qualified in Argentina and has no experience of local practices in that country, Dr Kinahan's research informs her that the two brands of Clomiphene available in Argentina are sold by prescription. The same source of information states that the medication is for use for female infertility. This accords with Dr Kinahan's own experience in her work as a dispensing pharmacist in Ireland during the course of which she has never seen Clomiphene prescribed for a man.

[38] With respect to the Player's stated reason for his use of Clomiphene, Dr Kinahan comments:

... clomiphene is for legitimate medical use as a fertility treatment for women only, to stimulate ovulation. In my over 20 years' experience as a practising pharmacist and as a medicine regulator the clinical use of clomiphene as a treatment for pain and itching around the nipple of a man is unheard of *[sic]*. However, in "doping" circles where one of the side effects of the abuse of testosterone is that testosterone metabolises to oestrogens which in turn can stimulate breast tissue, such a complaint is not to be unexpected. Such issues are not medically charted nor routinely scientifically published, because of their association with illicit use. However, it could be speculated that the nipple soreness is a side-effect of Mr Ricco's possible androgen use and Mr Ruiz advised him accordingly. It could also be speculated that Mr Ricco's use of clomiphene was as a result of an androgenic stimulation regime and while all traces of the earlier androgenic agents are cleared from his system as these were administered before the clomiphene, because of the timing of the test, the only evidence of such a regimen is the presence of clomiphene in his urine.

[39] During the course of cross-examination, Dr Kinahan acknowledged the possibility of "off-label" use of Clomiphene treatment for men with breast cancer. She also acknowledged that there would be a general understanding that a growth can be a symptom of breast cancer.

[40] Prof David Cowan, Director of the Drug Control Centre at Kings College, London, was of the opinion that it was likely that the Player consumed Clomiphene in the three-month period immediately preceding his test (although

he did not rule out completely the possibility of administration outside that three-month period).

#### Applicable Provisions

[41] The following provisions of World Rugby Regulation 21 are engaged:

#### Strict Liability

##### **21.2.1 Presence of a Prohibited Substance or its Metabolites or Markers in a Player's Sample**

**21.2.1.1** It is each Player's personal duty to ensure that no Prohibited Substance enters his or her body. Players are responsible for any Prohibited Substance or its Metabolites or Markers found to be present in their Samples. 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 Regulation 21.2.1 (Presence).

#### Onus

##### **21.3.1 Burdens and Standards of Proof**

World Rugby shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether World Rugby has established an anti-doping rule violation to the comfortable satisfaction of the hearing panel bearing in mind the seriousness of the allegation which is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt. Where these Anti-Doping Rules place the burden of proof upon the Player or other Person alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability.

#### Medications

##### **21.4.8 Nutritional Supplements and Medications**

**21.4.8.1** The use of nutritional supplements by Players is a risk. In many countries regulations either do not exist or are limited in nature in relation to the manufacturing and labelling of supplements. This may lead to a supplement containing an undeclared substance that is prohibited under these Anti-Doping Rules. Nutritional supplements may not be regulated or could be contaminated or suffer from cross contamination or may not have all the ingredients listed on the product label. Players are advised to exercise extreme caution regarding the use of nutritional supplements.

**21.4.8.2** Many of the substances in the Prohibited List may appear either alone or as part of a mixture within medications or supplements which may be available with or without a doctor's prescription. Any Player who is concerned about the appropriateness of treatment being administered to him, or medications or supplements being ingested by him, should seek clarification from his doctor or other relevant authority as to whether such treatment is or such medications or supplements are prohibited prior to taking possession of or using such item. For the avoidance of doubt nothing herein shall displace the Player's responsibility to ensure he does not commit an anti-doping rule violation.

## Sanctions

### **21.10.2 Ineligibility for Presence, Use or Attempted Use, or Possession of a Prohibited Substance or Prohibited Method**

The period of Ineligibility for a violation of Regulations 21.2.1 (Presence), 21.2.2 (Use or Attempted Use) or 21.2.6 (Possession) shall be as follows, subject to potential reduction or suspension pursuant to Regulations 21.10.4, 21.10.5 or 21.10.6:

**21.10.2.1** The period of Ineligibility shall be four years where:

21.10.2.1.1 The anti-doping rule violation does not involve a Specified Substance, unless the Player or other Person can establish that the anti-doping rule violation was not intentional.

21.10.2.1.2 The anti-doping rule violation involves a Specified Substance and World Rugby (or the Association, Union or Tournament Organiser handling the case as applicable) can establish that the anti-doping rule violation was intentional.

**21.10.2.2** If Regulation 21.10.2.1 does not apply, the period of Ineligibility shall be two years.

**21.10.2.3** As used in Regulations 21.10.2 and 21.10.3, the term "intentional" is meant to identify those Players who cheat. The term therefore requires that the Player or other Person engaged in conduct which he or she knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk. An anti-doping rule violation resulting from an Adverse Analytical Finding for a substance which is only prohibited In-Competition shall be rebuttably presumed to be not intentional if the substance is a Specified Substance and the Player can establish that the Prohibited Substance was Used Out-of-Competition. An anti-doping rule violation resulting from an Adverse Analytical Finding for a substance which is only prohibited In-Competition shall not be considered intentional if the substance is not a Specified Substance and the Player can establish that

the Prohibited Substance was Used Out-of-Competition in a context unrelated to sport performance.

### **21.10.5 Reduction of the Period of Ineligibility based on No Significant Fault or Negligence**

**21.10.5.1** Reduction of Sanctions for Specified Substances or Contaminated Products for Violations of Regulations 21.2.1 (Presence), 21.2.2 (Use or Attempted Use) or 21.2.6 (Possession).

#### **21.10.5.1.1 Specified Substances**

Where the anti-doping rule violation involves a Specified Substance, and the Player 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 Player's or other Person's degree of Fault.

#### The Player's Position

[42] The Player argues that he did not turn his mind to consider whether Clomiphene was a prohibited substance because he did not think of his condition, and the treatment to combat it, as in any way being about enhancement of performance. He took Clomiphene, for a very short period of time, to address a specific discomfort only.

[43] The evidence does not support a conclusion of intentional Use. Regulation 21.10.2.3, which defines "intentional" to mean Players who cheat, requires conduct which a Player knows to constitute an anti-doping rule violation, or which the Player knows might constitute a violation and is reckless as to whether it does. This is a subjective test. A player can be naïve about the risk, but if it is believed that he did not have any knowledge of an actual or potential breach, the player's conduct will not be intentional: *Rugby Football Union v Stapley*, RFU Disciplinary Panel, 11 April 2016.

[44] The Player's circumstances compare favourably to those in *USADA v Lea*, American Arbitration Association, 5 January 2016, when the athlete, an elite cyclist, took a Percocet tablet the night before a race, at which he was tested. He did so to facilitate sleep, claiming that there was no intention to enhance performance. The Percocet had been prescribed by a physician. Before ingesting the Percocet, the athlete did not check with any reference source to determine if Percocet, a well-known and widely used pain medication, contained any ingredients which were on the prohibited list. Nor did he declare his use of Percocet on his doping control form. He subsequently tested positive for the presence of oxycodone, a specified substance.

[45] The AAA panel in *Lea* concluded that the athlete had not known that the Percocet contained oxycodone, that he did not intend to gain any competitive

sporting advantage beyond sleeping well, and that he was not using a prohibited substance to mask an injury. Although he had been negligent in not researching the constituent ingredients before used Percocet, that was not found to translate to an intentional violation of the anti-doping rules by taking the medication that he knew contained a prohibited substance or ignored a known risk that taking the Percocet would create an anti-doping rule violation.

[46] Both the Player and Mr Ruiz testified that the Clomiphene used by the Player was obtained over-the-counter at a pharmacy. Mr Ruiz was not directly challenged on his evidence in that regard. The information obtained by Dr Kinahan is of limited assistance given her lack of first-hand knowledge of pharmacy practices and protocols in Argentina. Be that as it may, if the conduct of Mr Lea, who obtained Percocet on prescription and used it to help him sleep during an ongoing competition was not regarded as intentional, nor should the Player's actions, bearing in mind his evidence that he obtained the product over the counter during the off-season and used it to help resolve a skin irritation.

[47] Not only is there a lack of evidence to support a finding of intentional Use, but a reduced sanction is warranted based on their having been no significant fault or negligence on the Player's part. In the *Lea* case the two-year presumptive sanction was reduced to 16 months. An appropriate range for any period of Ineligibility imposed on the Player would be 12 to 16 months.

#### World Rugby's Position

[48] The illicit use of Clomiphene as a doping agent is described not only in the expert evidence of Dr. Kinahan, but in scientific literature and online forums as being twofold:

- a. to cause a consistent and sustained rise in blood testosterone levels; and
- b. to inhibit the oestrogen problems caused by use of anabolic steroids, including the over-growth of breasts.

[49] The presumptive sanction of two years Ineligibility should be increased to four years because the Player's anti-doping rule violation was intentional, that is:

- a. The Player knew his conduct constituted an anti-doping rule violation; or
- b. The Player knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk.

[50] The Player had received anti-doping education and was aware that he was responsible for knowing what substances were on the prohibited list. This is not a case where a player took a supplement and failed to check the list of

ingredients for prohibited substances. Rather, the Player did not turn his mind to consider whether Clomiphene was a prohibited substance because he did not think of his condition, and the treatment to combat it, as in any way being about enhancement of performance.

[51] If the Player's position were to be accepted, it would permit him to rely on a complete abdication of his responsibility to know what substances are included on the Prohibited List. This, in turn, would yield the absurd result of rewarding the Player for remaining ignorant of the products he ingested. Such a ruling would run contrary to a fundamental objective of the anti-doping regulations, namely to create powerful incentives for competitors to take active and earnest initiatives to inform themselves.

[52] Furthermore, having regard to the second limb of the definition of "intentional", the Player manifestly disregarded the risk of committing an anti-doping rule violation by taking a substance which was named on the Prohibited List without making even the most basic enquiry to assure himself that the substance was safe to use.

[53] In order to prove that an anti-doping rule violation was intentional, it is sufficient for World Rugby to establish that the Player knew his conduct would constitute an anti-doping rule violation, or disregarded the significant risk that it would. There was no separate requirement that World Rugby prove intent to cheat by enhancing performance on the field of play: *WADA v Turkish Football Federation, supra*.

[54] Whereas in the *Stapley* case the panel found the player's version of events credible, the evidence in the present case does not warrant such a finding because:

- a. The Player's account is not credible – he had no legitimate need or use for female fertility medication.
- b. Knowing that there would be an issue over whether he had purchased Clomiphene over-the-counter at a pharmacy, no attempt was made to obtain confirmation that that is in fact what happened.
- c. It is more likely, based on Prof Cowan's expert evidence, that the Player's ingestion of Clomiphene occurred within the three months preceding the collection of the urine sample that gave rise to the Player's adverse analytical finding.

[55] In the event that the JC concludes that the Player's conduct does not amount to intentional in nature, it cannot be *said* that there was no significant fault or negligence on the Player's part: by his own admission, he did not take any steps to ensure that the medication he was taking did not contain a prohibited substance. Nor did he advise his doctor or pharmacist he may be subject to drug testing.

[56] The *Lea* case is distinguishable on its facts. Unlike oxycodone (the substance in issue in *Lea*), clomiphene is prohibited both In- and Out-of-Competition. Accordingly, the athlete in the *Lea* case benefited from a rebuttable presumption that his anti-doping rule violation was not intentional: see Article 10.2.3 of the UCI *Anti-Doping Rules* (which is substantially similar to World Rugby Regulation 21.10.2.3).

### Discussion and Analysis

[57] We start by observing that we do not read the decision in *RFU v Stapley* as holding, as was suggested, that wilful blindness on the part of the player will necessarily defeat an allegation of intentional doping.

[58] However, *Stapley*, and another decision which it refers to, *UK Anti-Doping v. Buttifant*, SR/NADP/508/2016 (affirmed on appeal, 7 March 2016), do emphasise that the definition of “intentional” in WR regulation 21.10.2.3 (and its equivalent provision in the *World Anti-Doping Code*, Article 10.2.3) is subjective: a player must have either known that his conduct constituted an anti-doping rule violation or must have known that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk.

[59] The concept of “subjectivism” is a familiar one in the criminal law of England and other jurisdictions. It may not be enough, however, for a person charged to say “I didn’t know”. In practice, triers of fact may simply not believe that a defendant was unaware of the obvious consequences of his or her actions: Andrew Ashworth, *Principles of Criminal Law*, 5<sup>th</sup> ed. (Oxford: 2006) at p. 184.

[60] Although the standard of proof in anti-doping cases is not a criminal standard, judicial committees will look at all of the circumstances and decide whether, to the comfortable satisfaction of the panel (where World Rugby has the burden of proof), they believe that the anti-doping rule violation was not intentional.

[61] That, essentially, is the approach which the UK National Anti-Doping Panel took in *Buttifant*. That case involved a nineteen year old Welsh club rugby player, who was dyslexic and was found by the panel to be reluctant to ask questions which might appear to show his ignorance and who, as a club rugby player, had “little real understanding of drugs in sport”. He had been told that he needed to “bulk up” if he wanted to get on to the senior team. Having used various supplements, he heard about a product called M-Sten and found that it was available online through Amazon. His evidence was that he did not think that Amazon would sell such a product if it was not reputable. He purchased it and used it for 21 days. He found that the supplement had side effects, including anxiety, insomnia, hair loss and bloating. He gained weight and began to notice breast development. He experienced low mood. He was tested 40 days after he stopped using the product. Some days after the test he told his mother about M-Sten and asked her to help him research it. With her

assistance he was quickly able to determine that one of its listed active ingredients was an anabolic steroid. The player's evidence was that he did not intend to take a steroid and did not intend to cheat.

[62] The panel in *Buttifiant* also heard evidence from the head coach of club that players did not receive nutritional advice from the club and did not receive any advice about drugs or banned substances. The coach confirmed that he had never seen the player cheat and could only think that the player had taken a banned substance by mistake.

[63] There was also evidence about the player's dyslexia and dyspraxia from the individual who had diagnosed those disabilities and who explained their extent and the further difficulties faced by the player as a result of his decision not to reveal them.

[64] Faced with all of this, as well as evidence dealing with possible contamination of the product used by the player, the Tribunal was not comfortably satisfied that the player had engaged in conduct which he knew constituted an anti-doping rule violation or knew might constitute or result in an anti-doping rule violation. Factors which appear to have weighed in favour of that conclusion included the player's age, his naivety, his disability and his lack of drugs training or nutritional advice. The panel accepted that the reference to what was in fact a steroid on the M-Sten label would have meant nothing to him. His evidence that he did not think Amazon would sell anything dodgy "rang true". Indeed, the panel concluded that "[w]hen taken together with the powerful evidence of his mother, we accepted his explanation of events".

[65] On appeal, the appeal panel noted that the test for intention does permit a tribunal to have regard to any relevant evidence, both objective and subjective as to the athlete's state of mind (see NADP Appeal Panel decision, at para 26).

[66] The appeal panel continued, at para 27:

Article 10.2.3 does allow a tribunal to consider all relevant evidence in assessing whether the violation was intentional, but the most important factor will be the explanation or explanations advanced by the athlete. *There must be an objective evidential basis for any explanation for the violation which is put forward.* We reject the argument put by the Respondent that the athlete's contention that he does not know how the prohibited substance entered his body is consistent with an intention not to cheat and that the ultimate issue is the credibility of the athlete. The logic of the argument would be that where the only evidence is that of the athlete who, with apparent credibility, asserts that he was not responsible for the ingestion then on the balance of probability the athlete has proved that he did not act intentionally. Article 10.2.3 requires an assessment of evidence about the conduct which resulted or



might have resulted in the violation. *A bare denial of knowing ingestion will not be sufficient to establish a lack of intention.* [emphasis added].

[67] We agree with this statement.

[68] We find it highly unlikely that the Player obtained Clomiphene over the counter at a pharmacy. The Player's failure to take the obvious step of obtaining other evidence to corroborate his purchase from the pharmacy is telling.

[69] However, even if we give the Player the benefit of that doubt, we do not believe that the Player purchased, and subsequently used, Clomiphene to treat a sore nipple. There is no suggestion that he believed he had breast cancer (which is a known "off-label" use of Clomiphene). We did not find the evidence of Mr. Ruiz, who worked out with the Player, that he recommended the use of Clomiphene to the Player because he had himself successfully used it to relieve pain and itchiness on his chest, to be credible. Mr. Ruiz had himself taken Clomiphene on the recommendation of a trainer, rather than a physician. He acknowledged no knowledge of medicine or anti-doping rules.

[70] While there is every reason to believe that the Player used Clomiphene on Mr. Ruiz's recommendation, we do not accept it was used to treat a skin condition.

[71] Furthermore, given the expert evidence, we find it improbable that more than five months had elapsed between the Player's administration of Clomiphene and sample collection.

[72] Regardless of when the Player used Clomiphene, he knew enough about anti-doping regulations to have realised that using any pharmaceutical product – particularly one recommended by a friend he worked out with at the gym – without checking its contents would run the risk of resulting in an anti-doping rule violation. We simply do not believe his evidence to the contrary.

[73] It follows that we reject much of the evidence tendered by the Player.

[74] Accordingly, the Player's acts and omissions, as we have found them, leave us comfortably satisfied that the Player engaged in conduct which he knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk.

[75] The applicable sanction for the Player's anti-doping rule violation is four years Ineligibility.

[76] As a result of this finding, it is not necessary for us to consider whether the sanction should be reduced because of a lack of fault or negligence, or significant fault or negligence, on the Player's part.

## Findings and Conclusions

[77] The Player committed an anti-doping rule violation as a result of the presence of Clomiphene, a Specified Substance, in the sample which he provided.

[78] Further, the JC finds that the Player engaged in conduct which he knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk.

[79] As a result, the applicable sanction is a period of Ineligibility of four years, commencing on 11 July 2016 and ending at midnight on 10 July 2020.

[80] The Player's attention is drawn to Regulation 21.10.12 which provides, *inter alia*, that:

### **21.10.12.1 Prohibition Against Participation During Ineligibility**

No Player or other Person who has been declared Ineligible may, during the period of Ineligibility, participate in any capacity in a Competition or activity (other than authorized anti-doping education or rehabilitation programmes) authorised or organised by World Rugby or any Member Union, Association or a Club, Rugby Body or other member organisation of World Rugby or any Association or Member Union, or in Competitions authorised or organised by any professional league or any international- or national-level Event organisation or any elite or national-level sporting activity funded by a governmental agency".

...

A Player or other Person subject to a period of Ineligibility shall remain subject to Testing.

### **21.10.12.2 Return to Training**

As an exception to Regulation 21.10.12.1, a Player may return to train with a team or to use the facilities of a Union, Club, Rugby Body or other member organisation of World Rugby, an Association or a Union during the shorter of: (1) the last two months of the Player's period of Ineligibility, or (2) the last one-quarter of the period of Ineligibility imposed".

[81] The full text of Regulation 21.10.12 and the related commentaries should be consulted. In the case of the Player, he would be able to return to training at the start of month 46 of the four year period of Ineligibility, so on 11 May 2020.

### Right of Appeal

[82] This decision is final, subject to referral to a Post Hearing Review Body (Regulation 21.13.8) or an appeal, where the circumstances permit, to the Court of Arbitration for Sport (Regulation 21.13.2). The regulation sets out the timelines within which any referral or appeal must be commenced.

### Costs

[83] Should World Rugby wish us to exercise our discretion in relation to costs under Regulation 21.8.2.10 or 21.8.2.11, written submissions should be provided to the JC via Mr. Ho within 10 business days of the receipt by World Rugby of this decision. The Player will then have 10 business days to respond.

30 March 2017

A handwritten signature in black ink, appearing to read 'Graeme Mew'.

Graeme Mew, Chairman