

**IN THE MATTER OF PROCEEDINGS BROUGHT UNDER THE ANTI-DOPING RULES
OF THE RUGBY FOOTBALL UNION**

Before:

Robert Englehart QC (Chair)

Blondel Thompson

Dr Barry O'Driscoll

BETWEEN:

RUGBY FOOTBALL UNION (RFU)

Anti-Doping Organisation

and

Daniel Wells

Respondent

DECISION OF THE ANTI-DOPING TRIBUNAL

Introduction

1. We were appointed as the Tribunal to determine a charge brought by the Rugby Football Union (“RFU”) against Daniel Wells for an Anti-Doping Rule Violation under World Rugby (“WR”) Regulation 21.2.1. The RFU has adopted WR Regulation 21 as its own anti-doping regulations; WR Regulation 21 follows the WADA Code and incorporates the WADA Prohibited List. There is no dispute about that.

2. Mr Wells was charged in consequence of an Adverse Analytical Finding which revealed two Prohibited Substances in a urine sample which he provided at the end of a match between London Irish Wild Geese and Clifton RFC on 14 April 2018. Mr Wells had been playing at Centre for the latter club. The substances in question were (1) Ostarine and (2) Methylhexanamine (“MHA”). The provision of WR Regulation 21 under which Mr Wells was charged was Regulation 21.2 which provides in material part:

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The following constitute anti-doping rule violations:

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).

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3. Following procedural directions in July and August 2018, we held a hearing on 19 September 2018 at which the RFU was represented by Kendrah Potts of Counsel and Mr Wells was represented by Neil Maddocks. We are grateful to both for their clear and helpful skeleton arguments and oral submissions.

THE FACTUAL BACKGROUND

4. As noted, Mr Wells plays at centre for Clifton RFC, a club which competes in National League 2 South. He is a semi-professional. Previously, he used to play for Henley Hawks where he underwent his only previous drug test. This was some 10 years ago. Mr Wells told us that he had never received any education in drugs from his club, although it emerged during his evidence that over the course of his playing career he has acquired some awareness of drug taking in sport and especially, according to his evidence, the WADA Prohibited List.
5. On 14 April 2018 Mr Wells was playing for Clifton RFC against London Irish Wild Geese. He was randomly selected to provide a urine sample after the match. This produced the positive result for Ostarine and MHA. Both of these are Prohibited Substances under the WADA Prohibited List. The former is an anabolic agent prohibited at all times and is not a Specified Substance. The latter is a stimulant and is a Specified Substance prohibited in competition only.
6. In consequence of the Adverse Analytical Finding, Mr Wells was notified by letter dated 18 May 2018 from the RFU that he would be charged and was provisionally suspended from the date of the letter. Mr Wells did not have his B sample analysed and does not dispute the Adverse Analytical Finding. His case is that the anti-doping rule violation was not intentional and must have arisen from a supplement which he had been taking called Varicose having been contaminated. He further submits that he bears No Significant Fault or Negligence such that we should grant him an additional reduction in sanction on that account.

THE EVIDENCE

7. Two witnesses gave evidence before us, Mr Tennant who is Legal Counsel at the RFU and Mr Wells himself. Both had provided witness statements before the hearing. Mr Tennant could, of course, not provide any direct evidence about the anti-doping rule violation.

Rather, his evidence was mainly concerned with the reasons why the RFU had decided not itself to pay for analysis of the residue of the Varicose product which Mr Wells was claiming to have been the source of the Adverse Analytical Finding in his case. Decisions about funding analysis in alleged contaminated product cases are taken by the RFU on a case by case basis. In this instance it had been decided not to fund testing because of a perceived lack of information from Mr Wells coupled with concerns over his use of the "Warrior Project" website. This had initially been said by Mr Wells to have been the source of his acquisition of the Varicose. Nevertheless, the RFU did inform Mr Wells that he could have analysis effected at a WADA accredited laboratory in Belgium for €800 (ex VAT) rather than the £2,500 (ex VAT) which Mr Wells said he had been quoted.

8. The evidence from Mr Wells was concerned to establish that the source of the Prohibited Substances found in his system must have been the supplement Varicose. In turn, this must have been contaminated. He had been taking Varicose in order to "bulk up" since February 2018. He produced a tub of Varicose at the hearing with a small remaining residue. It was, he said, the supplement which he had acquired in February 2018 and, although he could not afford expert analysis at €800 plus VAT, he could think of no other possible source for the presence of Ostarine and MHA.
9. It is right to note that Mr Wells did not disclose that he had been taking Varicose on his doping control form on 14 April 2018 but rather just "whey protein", a product which he had previously been taking. We found it surprising that Mr Wells had been unable to remember the name Varicose for the purposes of the doping control form.

10. In his first witness statement Mr Wells said:

The product in question is a training supplement called "Varicose", supplied by The Warrior Project, a supplement supplier based in South Wales. Varicose is stated on the container to be a "non-stimulant pump maximiser". I purchased this product over the internet in February 2018 specifically as I wanted to supplement my

strength and training with a non-prohibited product because I am very rigorous on my training, fitness and diet regime. I undertook research on the company website to identify that the product was and the description was stated as;

“the most comprehensive vaso-dialator [sic] formulae to date designed to give you vein bursting pumps and laser guided focus”.

Containing “clinical doses of L-citrulline, Agmatine and Taurine alongside huge doses of glycerol and l-arginine....2g of betaine (trimethyl glycine) ...[and] choline bitartrate (1.5g)”

As can be seen from the above, none of the substances listed are on the WADA Prohibited List at the time of purchase. I was aware that Glycerol had been on the WADA Prohibited List but had been removed in the Prohibited List which came into force on 1 January 2018 I therefore concluded after conducting what I felt was a sufficiently rigorous research process, that this product was safe to use.

11. In a second witness statement and his oral evidence Mr Wells provided a different and rather more nuanced account. He claimed that he had seen an advertisement from the Warrior Project on his Facebook account with a link to a webpage for Varicose. He had clicked on the link and viewed representations of the product with the stated ingredients. He had then written down the advertised ingredients and compared them with the WADA Prohibited List which he had called up online. All this was effected on his phone by switching between tabs for the product and the WADA Prohibited List. The phone itself was no longer available as he had subsequently traded it in for a new one. Mr Wells said in his second witness statement that:

The source for purchasing over the counter was advertised to be a shop in Chippenham. I therefore went in and bought the varicose over the counter, following internet research via facebook.

SUBMISSIONS FOR THE RFU

12. For the RFU Ms Potts put at the forefront of her submissions that Mr Wells had not discharged his onus of proving on the balance of probability that his consumption of Ostarine, which is not a Specified Substance, was not "intentional" within the meaning of WR Regulation 21. Whilst the onus of proving a lack of intention would be on the RFU for MHA, a Specified Substance, if it had been the only Prohibited Substance in question, on the present facts we need only concentrate on the Ostarine. Under WR Regulation 21.10.2 the period of Ineligibility for Mr Wells would be four years.
13. Ms Potts drew our attention to the seminal decision of the Appeal Tribunal in *UKAD v Buttifant* (SR/NADP/508/2016) in which it had been held that it would only be in an exceptional case that a lack of intention would be established if the source of the Prohibited Substance were not proved. She also referred us to a number of CAS decisions where the same approach had been applied. A clear theme was that it was quite inadequate for an athlete simply to say (as so often occurs) that the source of a Prohibited Substance must be a contaminated supplement since he or she would never take a banned product. Specifically, Ms Potts referred us not only to *Buttifant*, cited above, but also to *UKAD v Webster* (SR/NADP/894/2017), especially at paragraph 21, for domestic decisions. International decisions show a similar approach, notably *WADA v IWF and Calcedo* (CAS 2016/A/4377) and *WADA v IIHF* (CAS 2017/A/5282 at paragraph 76).
14. Ms Potts submitted that on the present facts Mr Wells had fallen well short of demonstrating how the Ostarine had entered his system. He had provided no proof of purchase of the Varicose, no Internet history of his alleged research into the product, and his accounts of how he acquired the Varicose varied significantly. Mr Wells had not even had the remainder of the Varicose product in his possession independently analysed. The onus was on Mr Wells and it would effectively be reversing the onus of proof to have required the RFU to pay for analysis. There was nothing by way of proof other than Mr Wells' mere assertion that the source of the Prohibited Substances must have been a contaminated supplement.

15. In the alternative, even if we were prepared to find that the source of the Prohibited Substances was contaminated Varicose, Mr Wells had certainly not demonstrated that there was not a significant risk, which he had manifestly disregarded, that ingestion of Varicose might result in an anti-doping rule violation. The case was factually comparable to *WADA v IIHF and Lestan* (CAS 2017/A/5282). Mr Wells had taken the Varicose product on his own case in order to supplement his strength and conditioning training. The ultimate source, the Warrior Project, was scarcely the equivalent of a conventional health food store or pharmacy. And the risk of supplements being contaminated was a well known risk.
16. Finally, Ms Potts urged us to find that, even if we were prepared to accept the version of events put forward by Mr Wells, this could not be a case of No Significant Fault or Negligence. Mr Wells had not established how the Prohibited Substances entered his system – a requirement of the definition in WR Regulation 21. Second, Mr Wells had to be responsible for what he ingests as the decision in *UKAD v Turley* (SR/NADP/909/2017) at paragraph 26 noted. However, he had taken no steps at all to verify the contents of Varicose other than, as he claimed, noting the named contents. This was quite inadequate for a known risk from a product purchased from an unreliable source.
17. In all the circumstances, Ms Potts invited us to hold that the Period of Ineligibility for Mr Wells on the present facts was four years.

SUBMISSIONS FOR MR WELLS

18. Mr Maddocks on behalf of Mr Wells urged us to accept his evidence. He was not a cheat and had simply done his best to explain the only possible way by which the Prohibited Substances could have entered his system. There was no possible explanation other than from his ingestion of Varicose which he had taken as recently as the Friday before the test. This was the only supplement he had been taking during the period leading up to 14 April 2018. He never took more than one supplement during any given period of

time and was very careful over what went into his body. That was why he had done all he could by way of checking the stated ingredients of Varicose against the WADA Prohibited List.

19. Not only had Mr Wells given a credible explanation as to how he came to have Prohibited Substances in his body, but he had shown his good faith by offering the residue of Varicose in his possession to the RFU for them to have it scientifically analysed to check what he was saying. He earned very little money and was recently married. He could not himself afford the £2,500 plus VAT which he had been quoted for a test. Nor could he afford the €800 plus VAT which the RFU had suggested a Belgian laboratory would charge. For a large organisation such as the RFU €800 plus VAT was a drop in the ocean but it was unfair of the RFU to expect an individual such as him to find that amount of money.
20. In his submissions Mr Maddocks noted that MHA was a Specified Substance which Mr Wells had taken more than 12 hours before the match following which he was tested. Nevertheless, he did not suggest that we could ignore the non-Specified Substance, Ostarine.
21. Clearly there was a distinct possibility of the Varicose which Mr Wells had acquired having been contaminated. Contamination as a possibility had not occurred to Mr Wells at the time, but he had done all within his power to check the legitimacy of the product by carrying out his internet research. He had also corroborated his evidence by producing the actual tub of Varicose which he had purchased. It was unjust to penalise Mr Wells because the RFU declined to pay what would be for them an extremely modest sum to have the product tested.
22. In the context of "intention" Mr Maddocks referred us to the NADP decision in *RFU v Stokes* (SR/NADP/796/2017). That was a decision given by the Tribunal on the papers

and without a contested hearing following a concession by the RFU. In that case the RFU accepted the player's evidence and apparently conceded that the anti-doping rule violation was not intentional. It is right to say, insofar as one can tell from the short decision, that the player's case there was that he was not a cheat and had not knowingly ingested the Prohibited Substance, i.e. cocaine, although he could not advance a positive case as to precisely how he could have tested positive for cocaine. The full reasons for the RFU's concession in that case are not revealed in the decision.

23. Assuming that the Anti-Doping Rule Violation was not "intentional", Mr Maddocks invited us to find that there was No Significant Fault or Negligence on the part of Mr Wells. He referred us to the decision in *UKAD v Turley*, cited above, by way of comparison with the present facts. He also noted the CAS decision in *Cilic v ITF* (CAS 2013/A/3327) especially at paragraphs 74-5. The only precaution which Mr Wells had not taken was, in Mr Maddocks' submission, that he did not "consult appropriate experts in these matters and instruct them diligently before consuming [Varicose]". Otherwise, Mr Wells had taken every step listed in *Cilic* at paragraph 74.

DISCUSSION

24. We address firstly the question whether or not this Anti-Doping Rule Violation by Mr Wells is to be regarded as "intentional" for the purposes of WR Regulation 21. Although this case involves an Anti-Doping Rule Violation by reason of the presence of two Prohibited Substances, one of which is a Specified Substance, we have to concentrate on the finding of Ostarine, which is not a specified substance: cf. WR Regulation 21.10.7.4.1 (multiple violations).
25. For a violation on account of the presence of a Prohibited Substance, as here, the starting point is WR Regulation 21.10.2.1:

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.

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Thus, it is for Mr Wells to establish that the violation on account of Ostarine was not “intentional” if he is not to be subject to Ineligibility for four years. “Intentional” is a term of art for the purposes of Regulation 21. It does not simply mean deliberate. Under WR Regulation 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

.....

26. There is undoubtedly a long line of cases both in this country and before CAS in which it has been held that it is incumbent upon an athlete or player who seeks to show a lack of intention to do more than simply say that he or she is not a cheat and the Prohibited Substance must have come from some supplement or other product which he or she was taking at the material time. In all but perhaps the most unusual case, it is necessary for the athlete or player to adduce concrete evidence that the particular Prohibited Substance was in fact, albeit unknowingly at the time, in a particular supplement or product which he or she was taking. Thus in *Buttifant*, cited above, the Appeal Tribunal said at paragraph 27:

There must be an objective evidential basis for any explanation for the violation which is put forward. We reject the argument put

forward 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.

The Appeal Tribunal continued at paragraph 28:

In summary, in a case to which Article 10.2.1.1 applies the burden is on the athlete to prove that the conduct which resulted in a violation was not intentional. Without evidence about the means of ingestion the tribunal has no evidence on which to judge whether the conduct of the athlete which resulted in the violation was intentional or not intentional

In the following paragraph the Appeal Tribunal referred to cases in which a tribunal might find that there was no intention, even though the precise cause of the violation was not established, as "wholly exceptional cases".

27. Although not cited to us, we should also refer to the Appeal Tribunal decision in *Staples v RFU* (SR/NADP/1016/2017) a case where the point of principle was the same as in this case. The Appeal Tribunal said at paragraph 24:

The ADR do not specifically require that, in order to show that an anti-doping rule violation was not intentional, a Player has to prove how a substance entered his or her system. Nevertheless, there is a consistent line of jurisprudence to the effect that it is likely to be a rare case before a tribunal will be satisfied that the ingestion of a substance was not intentional if the tribunal cannot even know how

the substance was ingested. This is affirmed in *Buttifant*, cited above, and is consistent with the CAS authorities: see, for example, the *International Weightlifting Federation* case, cited above, at 51-2 where the CAS tribunal said:

51. The Athlete bears the burden of establishing that the violation was not intentional within the above meaning, and it naturally follows that the athlete must also establish how the substance entered her body ...

52. To establish the origin of the prohibited substance, CAS and other cases make clear that it is not sufficient for an athlete merely to protest their innocence and suggest that the substance must have entered his or her body inadvertently from some supplement, medicine or other product which the athlete was taking at the relevant time. Rather, an athlete must adduce concrete evidence to demonstrate that a particular supplement, medication or other product that the athlete took contained the substance in question.

The Appeal Tribunal further observed at paragraph 27:

If a tribunal has nothing other than an athlete's own word and speculation as to how a prohibited substance came to be ingested, it is understandable that the evidence will be looked at with rigour. It would be all too easy for an athlete to say that he or she has never knowingly taken a prohibited substance, and it must have come from a contaminated product like a supplement. An Anti-Doping Organisation is rarely in a position to respond to such evidence. It is for this reason that tribunals tend to be rather sceptical in cases which depend solely on an athlete's word. There is a search for what has been called more "concrete" evidence than that.

The *Staples* case, like the present one, involved an athlete saying that the Prohibited Substance in question must have come from a contaminated supplement which he had purchased.

28. As noted, the CAS cases are also consistent with *Buttifant* and *Staples*. We need only refer to the *IWF* case, cited above, at paragraphs 52-6, where various CAS authorities to the same effect are set out.
29. We now express our view of the relevant evidence in the present case. There are several features of the evidence of Mr Wells which we regarded as unsatisfactory. First, the change in his case after his first witness statement does tend to throw some doubt on the reliability of his evidence. Initially, he said that he had bought Varicose on the Internet from the Warrior Project website. This was then changed to buying the product from a shop in Chippenham after having seen a webpage for the product to which he had been led by a link in a facebook advertisement. Second, it is not easy to understand why Mr Wells did not refer to Varicose on the doping control form on 14 April 2018. Third, we had difficulty in accepting that Mr Wells could really have carried out on his phone a thorough comparison between each of the many ingredients listed for Varicose on its container and all the entries in the lengthy WADA Prohibited List. We were also surprised about Mr Wells' claimed detailed personal knowledge about one of the Varicose listed ingredients, Glycerol, having been on the WADA Prohibited List but then removed from it just over a month before his acquisition of the Varicose.
30. Despite our misgivings over the evidence of Mr Wells, we have to say that, even if it were wholly accurate, there is no causal link at all on the evidence between Varicose and the Prohibited Substances. We reject the suggestion that it is sufficient simply to assert that "it must have been" the Varicose. We attach no significance to the *Stokes* decision, cited above, since it was based entirely on a concession rather than on analysis.
31. We are mindful of Mr Wells' claim that funding the cost of laboratory analysis of Varicose would be beyond his means. But the fact is that the onus of proof rests on Mr Wells and, for whatever reason, it is an onus which he has failed to discharge. As for Mr Maddocks' criticism of the RFU for not paying for the analysis, we would have no power to compel the RFU to pay for evidence. It is unfortunate that an organisation like the RFU, which is

concerned with the welfare of Rugby players and has substantial resources, felt unable to pay the fairly modest amount required for laboratory testing of Mr Wells' Varicose. We do not agree with Ms Potts' submission that for the RFU to pay would be reversing the onus of proof in the case; it would simply be assisting the search for the truth. Nevertheless, as stated, we cannot compel the RFU to seek out and pay for the obtaining of evidence if it is not prepared to do so.

32. For the above reasons, we find that Mr Wells has not established that the source of the Prohibited Substances in his case was a contaminated tub of a supplement. He has not discharged the onus of proving that the Anti-Doping Rule Violation was not intentional within the meaning of WR Regulation 21. For completeness, we should stress that we are not in consequence categorising Mr Wells as a cheat. We merely find that the evidence before us was insufficient to establish what would have had to have been established if the four year period of Ineligibility were to be reduced to one of two years under WR Regulation 21.10.2.1: cf. *WADA v Egyptian Anti-Doping Organisation and Anor* (CAS 2016/A/4563) at paragraph 58.
33. In view of our finding, it is unnecessary for us to decide the other issues which arose before us. If we had been satisfied that the source of the Prohibited Substances was the Varicose product acquired by Mr Wells, we doubt that he would have known that there was a significant risk that taking Varicose might result in an Anti-Doping Rule Violation and manifestly disregarded that risk. On the basis of his evidence, such a risk did not occur to him.
34. Finally, we should also say that we do not consider that there is any scope in this case for a reduction in the period of Ineligibility on the basis of No Significant Fault or Negligence. The WR Regulation 21 definition of that expression makes it clear that reduction on that account can only be claimed by a player who has established the source of the Prohibited Substances in question. We have found that Mr Wells has not done so. Moreover, even if the entirety of Mr Wells' evidence were accepted, there was

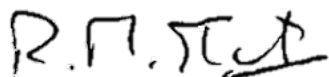
considerable fault here. The dangers associated with supplement taking have been well publicised and are well known. It could be said to be asking for trouble to purchase an unknown product from an unknown ultimate source of claimed body building products like The Warrior Project and then decide regularly to take the product without any advice whatsoever. In coming to this view we have not relied on the *Cilic* case, cited above, as we have difficulty in the notion that different standards of fault may be appropriate according to whether the Prohibited Substance is a Specified Substance or not; *ex hypothesi* the athlete cannot know about the nature of the Prohibited Substance at the time when the degree of fault or negligence falls to be assessed. However, in any event the point does not arise for the reasons stated.

CONCLUSION

35. We summarise our conclusions as follows:

- (1) The Anti-Doping Rule Violation was not in issue and was admitted;
- (2) Mr Wells has not satisfied us that the violation was not intentional;
- (3) The period of Ineligibility in Mr Wells' case is one of four years;
- (4) The four year period should run from 18 May 2018, the date from which he was provisionally suspended.

In accordance with the National Anti-Doping Rules, either party may file a Notice of Appeal against this decision within 21 days of receipt of the decision.



Robert Englehart QC (Chair)

For and on behalf of the Tribunal

28 September 2018

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