

Tribunal Arbitral du Sport
Court of Arbitration for Sport
CAS 2006/A/1081

FINAL ARBITRAL AWARD
Pronounced by the
COURT OF ARBITRATION FOR SPORT
OCEANIA REGISTRY
Appeal Division

Sitting in the following composition:

Panel:

The Hon Justice Tricia Kavanagh (President)
The Hon Bob Ellicott QC
Ms Eugenie Buckley

In the matter of:

MOTOR CYCLING AUSTRALIA LIMITED

Appellant

Represented by Mr Ian Fullagar of Lander and Rogers, Lawyers

and

MR ANDREW LEDINGHAM

Respondent

Represented by himself

Court assisted by: Mr. Tim Holden, solicitor.
Date & place of hearing: 28 April 2006, Sydney, Australia
Date of Award: 28 April 2006
Reasons Published: 9 May 2006

PRELIMINARY

- 1 This is an appeal by Motorcycling Australia (the *Appellant*) from the decision of the Judicial Committee of Motorcycling Australia, dated 25 November 2005. The Judicial Committee found that Mr Andrew Ledingham (the *Rider*) had committed an anti-doping rule violation under Chapter 28 of the Appellant's "2005 Manual of Motorcycle Sport". Chapter 28 states the sport's Anti-Doping Policy (the *Policy*).
- 2 The Judicial Committee found that the Rider committed an anti-doping rule violation as a result of his positive test to amphetamine and methamphetamine (the *Prohibited Substance*) on 25 September 2005 under Rule 28.5.1 of the Policy.
- 3 The relevant Rules of Motorcycling Australia are:

28.16.1 Decisions Subject to Appeal

Decisions made under these Anti-Doping Rules may be appealed as set out in Rules 28.16.2-28.16.4. Such decisions shall remain in effect while under appeal unless the appellate body orders otherwise. Before an appeal is commenced, any post-decision review authorised in Rules 28.11.9 must be exhausted.

28.16.2 Appeals from Decisions Regarding Anti-Doping Rule Violations, Consequences, and Provisional Suspensions.

A decision that an Anti-Doping Rule Violation was committed and a decision to impose a Provisional; Suspension as a result of a *Provisional Hearing* or otherwise in violation of Rule 28.10.5 may only be appealed as provided for in this Rule 28.16.2. ...

28.16.2.2 In cases involving *Riders* that do not have a right to appeal under Rule 28.16.2.1, MA shall have in place an appeal procedure that respects the following principles of natural justice; a timely hearing, a fair and impartial hearing body; the right to be represented by a counsel at the *Person's* expense; and a timely written, reasoned decision. Any such appeal will apply Rules 27.4, 28.5, 28.6, 28.7, 28.12 and 28.13 of these Anti-Doping Rules.

(a) Any appeal from a determination of the MA judicial or disciplinary panel must be solely and exclusively resolved by the CAS Appeals Division. The determination of the CAS Appeals Division will be final and binding on the parties to the appeal and no *Person* may institute or maintain the generality of the foregoing and further and better assurance, notwithstanding that such provisions have no applicability, neither party will have the right of appeal under section 3 of the *Commercial Arbitration Act* of any of the Australian States or to apply for the determination of a question of law under section 39(1)(a) of such Act.

(b) The ADCO must inform any *Person* or organisation informed of the original determination of any change to the original determination as a result of the appeal.

(c) The outcome of all appeals must be reported to the ASC and ASDA within 14 days of the conclusion of the appeal.

(d) The ADCO may then inform other *Persons* or organisations as the ADCO thinks appropriate. The *FIM's* rights of appeal with respect to these cases are set forth in Rule 28.16.2.3

28.16.2.3 In cases under Rule 28.16.3.2.1, the following parties shall have the right to appeal to CAS:

(a) The *Rider* or other *Person* who is the subject of the decision being appealed,

(b) The other party to the case in which the decision was rendered.

(c) The *FIM* and any other *Anti-Doping Organisation* under whose rules a sanction could have been imposed.

(d) WADA.

Rule 28.13.7.2: This Rule . . . applies only to Anti-Doping Rule Violations involving Rule 28.5.1 (presence of Prohibited Substance or its Metabolites or Markers). Use of a Prohibited Substance or Prohibited Method under Rule 28.5.2, failing to submit to Sample collection under Rule 28.5.3 or administration of a Prohibited Substance or Prohibited Method under Rule 28.5.8. If a *Rider* establishes in an individual case involving such violations that he bears No Significant Fault or Negligence, then the period of Suspension may be reduced but the reduced period of Suspension is a lifetime, the reduced period under this section may be no less than 8 years. When a Prohibited

Substance or its Markers or Metabolites is detected in a Rider's Specimen in violation of Rule 28.5.1 (presence of Prohibited Substance), the Rider must also establish how the Prohibited Substance entered his system in order to have the period of Suspension reduced.

Rule 28.21, Appendix 1, Definition:

No Fault or Negligence: The Rider's establishing that he did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution that he had Used or been administered the Prohibited Substance or Prohibited Method.

No Significant Fault or Negligence: The Rider's establishing that his fault or negligence, when viewed in the totality of the circumstances and taking into account the criteria for No Fault or Negligence, was not significant in relationship to the Anti-Doping Rule Violation.

- 4 Therefore under these rules a Rider with a positive drug test for a prohibited substance appeals to the sports Judicial Committee. An appeal from that Committee is to the CAS. If a violation is found to have occurred the appropriate sanction for a first offence is 2 years but this sanction can be reduced if the Rider establishes he bears "No Significant Fault or Negligence" by proving "he did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution that he had used . . . a Prohibited substance." The rider must also establish how the Prohibited Substance entered his system.

JURISDICTION

- 5 The scope of an appeal to the CAS Appeals Division is under the CAS Rules s57:

Scope of Panel's Review, Hearing

The Panel shall have full power to review the facts and the law. It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance. . . .

After consulting the parties, the Panel may, if it deems itself to be sufficiently well informed, decide not to hold a hearing. . . .

- 6 Therefore this appeal panel can review the facts and the law. At the mention of this matter both parties agreed the appeal should proceed on the papers. After a number of extensions of time the Rider, in finally filing his submissions, requested a hearing. This request was opposed by the Appellant, however, upon due consideration we believe that Rider should have the opportunity of presenting his case to us, if he so chooses, and hence a hearing was convened in Sydney on 28 April 2006.

BACKGROUND

- 7 The Motorcycling Australia Judicial Committee's reasoning in granting a reduced penalty for a violation was a follows:

"Mr Ledingham went on to explain to the Committee that...perhaps 72 hours prior to his weekend test sample being taken – a quantity of 'No-doze'. These are, apparently, tablets that retard sleepiness and their use amongst inter-state truck drivers is commonplace, if not notorious. It was Mr Ledingham's belief, so he said, that any trace of the No-doze would have been expelled from his system by the time of the scheduled racing. Evidently, he was wrong. And evidently, No-doze has active ingredients that include amphetamine and methamphetamine. [sic]

It is the Committee's view, however, that although he has been at fault and has exhibited some negligence, Mr Ledingham is entitled in this case to the partial leniency afforded by Rule 28.13.7.2.

8 Mr Ledingham was then suspended for 1 year until 30 September 2006.

APPELLANT'S SUBMISSIONS

9 Motorcycle Australia appeals on the following grounds:

That Motorcycling Australia Judicial Committee erred:

- (1) in reducing the period of Ineligibility under Rule 28.13.7.2 of MA's ADP and
- (2) in accepting Mr Ledingham's evidence and finding that "No-Doz" included amphetamine.

10 Motorcycle Australia asserts that Mr Ledingham did not meet the criteria required under Motorcycling Australia Anti-Doping Policy to establish a "No Significant Fault or Negligence" reduction of sanction under Rule 28.13.7.2 and therefore the Rider was not entitled to the reduced period of ineligibility as awarded by the Tribunals. Motorcycling Australia claims the appropriate sanction under its Rules requires the Rider be ineligible to compete for 2 years.

11 To successfully attract a No Significant Fault or Negligence reduction of penalty under Rule 28.13.7.2 of the Policy, the Appellant submitted the Rider must establish two matters:

- (i) first, because a prohibited substance was detected in the Athlete's specimen in violation of Rule 28.5.1, the Athlete must establish how the Prohibited Substances entered his system; and
- (ii) secondly, that his fault or negligence:
 - a) when viewed in the totality of the circumstances,
 - b) taking into account whether he knew or suspected and could not reasonably have known or suspected that he had used or been administered the Prohibited Substances even with the exercise of utmost caution;was not significant in relationship to the anti-doping rule violation.

12 The Appellant submitted that the Rider failed to meet the first requirement of Rule 28.13.7.2 by failing to establish how the Prohibited Substances entered his system. Therefore, given that failure, it was not open to the Committee to reduce the period of suspension (*Triathlon Australia v Keat* (Final Arbitral Award, dated 18 May 2005)). The Appellant submitted that according to the Anti-Doping Policy, Rule 28.6.1, the Rider must establish this on the balance of probability.

13 There was no other evidence before the Committee or other possible explanation as to how the substances entered Mr Ledingham's system. Reliance is placed by the Appellant in this hearing on the statutory declaration of Mr Ben Corbett of the Australian Sports Drug Agency ("ASDA").

14 Mr Corbett, as an expert, asserted that the Prohibited Substances for which the Rider tested positive are not found in medications or preparations available to the public, including No-Doz. He asserted that No-Doz does not contain the prohibited substance found in the sample given by the Rider, and as to the other substances that the Rider declared on his "ASDA Doping Control Test" that he had ingested, namely *Panadeine Forte* and *Sudafed*, they also do not have as an

active ingredient the Prohibited Substances. The Appellant submitted that as the Rider's explanation therefore cannot be accepted, the Judicial Committee made an error.

- 15 Therefore the Appellant asserted the Rider had failed to establish he was entitled to a "no significant fault or negligence" finding by the Judicial Committee.

RESPONDENT'S SUBMISSIONS

- 16 Mr Ledingham, the Rider, submitted as follows:

I had in fact taken a quantity of "no doze" a few days prior to the event but also explained to Mr Lawson in length at my original hearing that on the Thursday afternoon/evening prior to the event I was carrying out repairs to a clients truck and as I'd been working long hours all week and was tired my client offered me what was described to me at the time as "no doze", as I was under the assumption that what I was being given was the same supplement I'd been having, and that the supplement (No-Doz) . . .

- 17 As to Mr Corbetts' statutory declaration which asserted that No-Doz did not contain the identified prohibited substance and neither did the other substances Mr Ledingham revealed he had consumed, Mr Ledingham asserted:

Ben Corbett has given a statutory declaration to confirm (I) would not return a positive test result. I have since come to find that this was the source of the Amphetamine & Methamphetamine found in my system. This is why Mr Lawson found I was eligible for a reduced sentence on the grounds of "no significant fault or negligence" rule 28.5.8. I'm unsure for the reason Mr Lawson worded his decision as he has, this seems to be the main point of confusion resulting in M.A wanting to appeal.

- 18 Mr Ledingham further submitted that the ban, which he accepted after the positive "A" sample result, should begin on the date of the original decision of 30 September 2005 not the date of the Judicial Committee Decision on 25 November 2005.

CONSIDERATION

- 19 Under Rule 57 of the CAS Rules, this Panel has full power to review the facts and the law in its consideration.
- 20 Amphetamine and methamphetamine are prohibited substances under the Policy. The Judicial Committee correctly found that their presence in the Rider's bodily specimen was an anti-doping rule violation under Rule 28.5.1 of the Policy. The sanction for such a violation is suspension from competition for 2 years.
- 21 Under the Rules of Motorcycling Australia, a rider may have his suspension reduced if he establishes that he bears No Significant Fault or Negligence. The rider must also establish how the Prohibited substance entered his system (M.A Rule 28.13.7.2).
- 22 The Judicial Committee in its consideration only had before it the assertion of Mr Ledingham as to how he consumed the Prohibited substances. The consideration of the Judicial Committee

does not reveal details of that evidence except to determine that, on the evidence, it was satisfied the Prohibited Substance must have been in the No-Doz.

23 The Appellant now relies upon the expert evidence tendered to assert the Prohibited Substances could not have been either in the No-Doz or in the other substances the Rider declared he ingested namely *Panadeine Forte* and *Sudafed*.

24 The Rider asserted that the Prohibited Substance must have been in another tablet given to him by a friend, who had assured him that it was No-Doz. Apparently, the tablet was not No-Doz the Rider now submits:

"I have since come to find that this (the tablet from a friend) was the source of amphetamine and methamphetamine found in my system".

Therefore, the Rider submits that he has established how the Prohibited Substance entered his body.

25 We are satisfied, having heard the Rider, that he has given an honest explanation as to how the Prohibited Substance entered his system. We therefore find that he has, on the balance of probabilities, satisfied the first requirement under Rule 28.5.1 of the Policy that he must establish how the Prohibited Substances entered his system. However, he lead no evidence as to what he subsequently found out that he did consume, or why the client would lie or mislead him as to the tablet's contents.

26 Accepting as we do that the Rider has established how the Prohibited Substance entered his system, he must then also establish, to have the benefit of the mandatory sanction of 2 year ban reduced, that there was No Significant Fault or Negligence on his part in using the Prohibited Substance. The Appellant therefore, must establish that he did not, while taking the utmost caution, know or suspect and could not reasonably know or suspect, that he had used a prohibited substance.

27 The Australian Concise Oxford Dictionary (7th edition) defines "utmost" as meaning: '*to the highest degree*' and "caution" as: '*to take care or avoidance*.'

28 To gain a reduction of sanction under the Rules of Motorcycling Australia, Mr Ledingham must therefore establish, in all the circumstance, that he took the highest degree of care to ensure he knew what the substance he ingested was, such that he could not know or suspect nor reasonably know or suspect that he had used a prohibited substance.

- 29 Yet, the evidence as it is now before us is simply that Mr Ledingham accepted the word of a client and friend that the tablet given to him was No-Doz. He did not check a label, but merely accepted a client's word.
- 30 The rules of Motorcycling Australia are based on Article 10 of the World Anti-Doping Code, and Rule 28.20.1.5 of the Policy requires that it be interpreted in a manner consistent with the World Anti-Doping Code. The commentary on the Code contains the following section:
- 10.5.1 Comment:** Article 10.5.1 applies only to violations under Articles 2.1 and 2.2 (presence and use of Prohibited Substances) because fault or negligence is already required to establish an anti-doping rule violation under other anti-doping rules.
- 10.5.2 Comment:** The trend in doping cases has been to recognise that there must be some opportunity in the course of the hearing process to consider the unique facts and circumstances of each particular case in imposing sanctions. This principle was accepted at the World Conference on Doping in Sport 1999 and was incorporated into the OMADC which provides that sanctions can be reduced in "exceptional circumstances". The Code also provides for the possible reduction or elimination of the period of Ineligibility in *the unique circumstance* where the Athlete can establish that he or she had No Fault or Negligence or No Significant Fault or Negligence, in connection with the violation. This approach is consistent with basic principles of human rights and provides a balance between those Anti-Doping Organisations that argue for a much narrower exception, or none at all, and those that would reduce a two year suspension based on a range of other factors even when the Rider was admittedly at fault. These Articles apply only to the imposition of sanctions: they are not applicable to the determination of whether an anti-doping rule violation has occurred. *Article 10.5 is meant to have an impact only in cases where the circumstances are truly exceptional and not in the vast majority of cases.*
- Article 10.5.2 applies only to the identified anti-doping rule violations because *these violations may be based on conduct that is not intentional or purposeful*. Violations under Article 2.4 (whereabouts information and missed tests) are not included, even though intentional conduct is not required to establish these violations, because the sanction for violations of Article 2.4 (from three months to two years) already builds in sufficient discretion to allow consideration of the Athlete's degree of fault. (*Emphasis added*)
- 31 We find that the Rider has established, in the totality of the circumstances, no unique nor exceptional circumstance to persuade us that the sanction should be reduced. He was, on the evidence and accepting all he has put to us in his submission, simply not at all cautious. In the totality of the circumstance, we do not believe Mr Ledingham acted with the utmost caution, that is the highest level of care, to ensure he did not ingest a prohibited substance. With respect to the Judicial Committee, it accepted the word of the Rider that No-Doz contained the Prohibited Substance and on the evidence before us now, this was an error of fact. Further, as to the determination it had to make of No Significant Fault or Negligence, it failed to give its reasoning and as such made an error of law.
- 32 It must follow, that Mr Ledingham had failed to establish that his fault or negligence in using a prohibited substance was Not Significant, in relation to his violation of the Anti-Doping rule. Therefore Mr Ledingham attracts a suspension from competition for 2 years.
- 33 The ban should begin from 25 September 2005, the date of the test.

34 We uphold the Appeal. We find that the Rider has committed a doping offence, and has not established the circumstance required under Motorcycling Australia's Rules for a reduction of penalty. Therefore the Rider is banned from competing in Motorcycling events from 25 September 2005 for 2 years, expiring at midnight on 24 September 2007.

35 In the circumstance we determine that there should be no order as to costs.

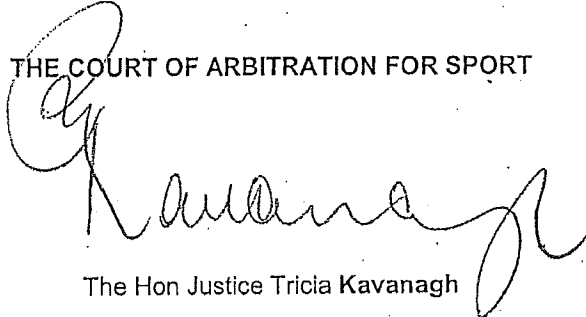
ON THESE GROUNDS

36 The Court of Arbitration for Sport rules that:

1. Mr Andrew Ledingham is ineligible to compete during the period commencing on 25 September 2005 for 2 years, expiring at midnight on 24 September 2007; and
2. There be no order as to costs.

Sydney 28 April 2006

THE COURT OF ARBITRATION FOR SPORT



The Hon Justice Tricia Kavanagh
President of the Panel

The Hon Bob Ellicott QC
Arbitrator

Ms Eugenie Buckley
Arbitrator