

FOOTBALL ASSOCIATION REGULATORY COMMISSION

In the matter of disciplinary proceedings brought pursuant to the Football Association Doping Control Programme for the season 2011-2012

THE FOOTBALL ASSOCIATION

- and -

MARK MARSHALL

Commission: Christopher Quinlan QC (Chairman)

Maurice Armstrong

Mick Kearns

Robert Marsh (Secretary to the Commission)

Date: 2 May 2012

Venue: Wembley Stadium, London

Present: Mark Marshall

Football Association ('FA')

Matthew Johnson, Representative for The FA

Amina Graham

Jenni Kennedy, Head of Off-Field Football Regulation (witness)

Mark Marshall's legal representatives

Martin Budworth, Counsel

Matthew Chantler, Solicitor, George Davies

Mark Hovell, George Davies

Observers

Nick Cusack, Professional Footballers Association

Hannah McClean, UK Anti-Doping

DECISION

Introduction

1. We were appointed to hear and determine a misconduct charge brought against Mark Marshall ('MM') arising out of his commission of a doping offence contrary to Rule E25 of the Football Association's ('FA') Rules of Association when on 26 December 2011 he provided a sample of urine which contained methylhexaneamine, which is a Specified Substance (Category S6: Stimulants).
2. This document records our decision and the reasons for it.

The Regulatory Scheme

3. Mark Marshall is a professional footballer. He is and was at the material time contracted to play for Barnet FC ('BFC'). He is bound by the Rules of the Football Association ('the Rules'). Part E of the Rules is headed "Conduct". Pursuant to Rule 1(b) defines "misconduct" which includes a breach of "the Rules and Regulations of The Association and in particular Rules E3 to 28".
4. Rule E25, entitled "Doping Control" states: "A Participant shall comply with the provisions of any doping control regulations of The Association from time to time in force". Regulation 2 of the FA Doping Control Programme Regulations 2011-2012 ('FADR') provides that "committing a doping offence will be regarded as amounting to a breach of the [FADR] which must be complied with pursuant to Rule E25 of the [Rules]".
5. Pursuant to FADR 3 a doping offence is committed if a Prohibited Substance or its metabolites or markers is present or detected in a sample provided by a player. FADR 3(b) provides that it is the Player's duty to ensure no prohibited substance(s) or its metabolites or markers enters his body, tissues or fluids or is present or detected there. It

further provides that a player is “strictly responsible” for any prohibited substance present in such a sample.

6. Prohibited Substances are defined in Schedule 3 to the FADR. Category S6b Specified Stimulants includes methylhexaneamine (‘MHA’). It is a Specified Substance.
7. Parts 5-10 of the FADR make provision for the imposition of penalties for doping offences. FADR 29 (Part 5) requires the imposition of minimum penalties set out in FADR 43-51 unless *the Player establishes* that there are grounds to eliminate or reduce such penalties in accordance with FADR 63-79 (Part 9).
8. The minimum penalty for a first offence committed by a Player under FADR 3 *in the circumstances of this case* is a minimum suspension of 2 years (FADR 43, Part 6).
9. By FADR 63 (Part 9) the Regulatory Commission (‘the Commission’) “*may replace*” the minimum penalties if the player establishes any of the applicable conditions set out in FADR Regulations 66-73. In this matter, MM relied upon FADR 66. The applicable conditions under FADR 66 require the player to establish:
 - a. The doping offence involves a Specified Substance;
 - b. How the Specified Substance entered his body or came into his possession; and
 - c. There was no intention to enhance sporting performance or to mask the use of a performance enhancing substance.

Subject to FADR 69, the penalty for a first offence can be reduced to “a minimum penalty of a warning and reprimand without any period of suspension and a maximum of 2 years suspension”.

10. The burden rests upon the player to establish the ‘reduction’ provisions. In such circumstances the standard of proof is the balance of probabilities (FADR 22), except as required by Parts 8 and 9. By FADR 67 the player must produce corroborating evidence (in addition to his own word) that “*establishes to the comfortable satisfaction*” of the

Commission that there was no intention to enhance sporting performance or to mask the use of a performance enhancing substance.

11. By FADR 67 the player's degree of fault shall be the criterion by which to assess any reduction in penalty.
12. FADR 17 provides for the commencement of disciplinary proceedings. These proceedings were conducted in accordance with Part G of the Rules of the Association, Part 3 of the FADR and the appropriate FA Disciplinary Regulations.

The Doping Offence

13. Mark Marshall ('the Player') admitted (in advance of the hearing and before the Commission) committing a doping offence contrary to Rule E25 of the FA Rules of Association when on 26 December 2011 he provided a sample of urine that contained MHA, which is a Specified Substance (Category S6: Stimulants). The facts were not in dispute.
14. The sample was provided following a Football League match played between Dagenham & Redbridge FC v BFC on 26 December 2011. MM played in that match. Under the FA Doping Control Programme he was one of the players selected to provide a urine sample after the game. He did so. The sample was sealed and marked and the necessary and appropriate forms completed according to procedure. On the sample collection form, MM wrote "JACK 3D" in the section which requires the player to disclose "details of any prescription/non-prescription medication or supplements taken in the last 7 days (including dosage where possible)". He did not make any other disclosure.
15. There was no issue in respect of any aspect of the sampling and testing procedure, chain of custody, the laboratory analysis or results thereof.

16. The specimen was sent and the A sample tested. By letter dated 20 January 2012 the Director (Professor DA Cowan) reported that the A sample (A1095881) contained methylhexaneamine. By letter from the FA (Jenni Kennedy) dated 20 January 2012 the Player was informed of that result and provisionally suspended. The same letter advised him, *inter alia*, of his right to have the B sample analysed.
17. By a letter dated 25 January 2012 from his solicitor the Player (a) declined to have the B sample analysed and (b) indicated that “the substance came to be present in his urine sample following the consumption of a supplement ‘Jack3d’”.
18. The FA charged Mark Marshall by way of a letter dated 16 March 2012. He replied admitting the said charge and requested a personal hearing.
19. The burden of proving the doping offence rests upon the FA (FADR 21). In light of the player’s admissions it discharged that burden and established the doping offence.
20. It is the Player’s first doping offence.

Mark Marshall’s Case

21. In advance of the hearing we were provided with the following signed witness statements (in addition to the Player’s) filed in support of MM’s case:
 - a. Whitney Andrews, 5 April 2012
 - b. Sam Deering, 12 April 2012
 - c. Frank Shillingford, 20 April 2012
 - d. Charlie Taylor, 12 April 2012
 - e. Sam Cox, 12 April 2012
 - f. Darren Dennehy, 12 April 2012
 - g. Lawrie Sanchez, 12 April 2012
 - h. Danny Senda, 29 March 2012
 - i. Anwar Uddin, 4 April 2012
 - j. Matthew Chantler, 12 April 2012

22. In addition, we were provided with a copy of an unsigned letter from Simeon Muyiwa, which was also undated.
23. The Commission read, considered and had regard to each of the above.
24. The Player has been a professional footballer for four years. He is in his second season with BFC. He has received anti-doping education. He has been tested three times before. His case was outlined in an interview conducted with him by Jenni Kennedy on 15 February 2012. That interview was audio recorded and we had a transcript of the same, which took place in presence of his solicitor, Nick Cusack and others. He expanded upon that in his witness statement, his account before us and was questioned by both the Commission and by Mr Johnson.
25. In summary, MM admitted committing the doping offence, which he said was inadvertent. His case (in relying upon FADR 66) was that the Specified Substance entered his body through the taking of Jack3d. He did not intend thereby to enhance his sporting performance or to mask the use of a performance enhancing substance. Paragraph 40 of his witness statement summarised his case thus: "I took Jack3d simply to help with my diet plan and as part of a healthy diet".
26. Jack3d is a supplement sold as a powder, which is consumed by mixing with water to produce a drink. It is marketed as a pre-workout supplement. The product label contains a "black box warning" which reads; "this product may produce an intense sensation of focus, energy and awareness...".
27. His case was that a professional nutritionist Simeon Muiyawa ('SM'), who happened also to be a long-standing friend, recommended Jack3d to him. SM told him he was working with the sports science team at Tottenham Hotspur FC and last season provided him with a diet plan. In or about July 2011 SM recommended Jack3d. The Player told us that SM said it contained, *inter alia*, glutamine, creatine and caffeine. SM made that recommendation in the context of MM explaining his "tiredness". SM advised

that it would help as he (MM) was “*not hydrated*”. The Player told us that SM advised him that the three ingredients would help as follows: glutamine would help water retention, creatine would give him energy and caffeine would have a similar effect. The Player asked SM whether it was “legal” and told us he was assured it was. Glutamine is not listed as an ingredient on the product label.

28. The Player bought Jack3d from a shop in Turnpike Lane, London on 26 October 2011. The Player said he checked the product ingredients (as listed on the tub label) that evening using his partner’s iPad to access the Internet. He used the FA website to access the World Anti-Doping Agency (‘WADA’) Prohibited List. He did not see any of the product ingredients on the said list, which reinforced the advice he said he’d received from SM.
29. It is to be noted that one of the listed ingredients which appears on the product label is 1,3-dimethylamylamine, a synonym for methylhexaneamine.
30. The Player’s case was that in addition to his own Internet check, he sought advice from the BFC physiotherapist and doctor before taking the product. His case was that neither advised that Jack3d was “illegal” (his expression) and so he consumed it, believing it ‘safe’ to do so. That was not their recollection and the FA presented both for the Commission (see paragraphs 38-42 below).
31. He took the powder as a drink, *only* on match days and then forty-five minutes/one hour before kick-off. He first took it before an away game at Cheltenham on 8 November 2011. He took it in the changing room, in view of other players, some of whom asked what he was taking. He made no secret of what it was or that he was taking it. He repeatedly took it before matches thereafter, up and including the Boxing Day fixture against Dagenham, following which he was tested and provided the sample that contained methylhexaneamine.

32. The Player's use of Jack3d was directly referable to a match. He did not take it when training or on any other occasion. He took it, he told us, to help reduce the level of dehydration he experienced during a match. Asked why it was not taken, for example, before (for example) training, he said he did not suffer to the same extent (or at all) when training because he did not expend the same amount of energy as he did when playing in a match.
33. Witness statements served as part of the Player's case supported his account. The following were accepted by the FA:
- a. Whitney Andrews - MM's partner, who recalled MM borrowing her iPad to check Jack3d which he purchased earlier that day. He also told her he had checked with the club doctor who said Jack3d "was fine".
 - b. Sam Deering - a fellow player, he knew MM was taking Jack3d and recalled him taking it before matches played before Christmas 2011. MM told him he had "looked it up on the internet".
 - c. Sam Cox - a BFC player on loan, he recalled MM's "nutritionist" visiting the club and meeting some of the players.
 - d. Danny Senda stated in his witness statement that he, like other players, was aware that MM was taking Jack3d.
 - e. Anwar Uddin was in the treatment room when MM saw the club physiotherapist for advice about Jack3d. He could not recall what was said. He too knew MM was taking it "openly".
 - f. Frank Shillingford - coached MM and SM when both were schoolboys. He confirmed SM qualified as a nutritionist and spoke of MM's character in positive terms.
 - g. Further, the letter from SM, brief and lacking in important detail, supported the Player's account to the extent that it confirmed he advised the Player to take Jack3d. He did so when MM "*complained about dehydration and lethargy*". We were told that SM refused to attend the hearing before us or to cooperate further. MM agreed, when questioned before us, that he told SM he was "lethargic" but explained that he was "*not really asking for more energy*".

34. In his witness statement, Lawrie Sanchez said he was not aware the player was taking a supplement and said he had never seen any player taking such before a game. He knew MM was taking advice from a nutritionist but not that he was taking Jack3d.
35. We heard from Charlie Taylor, a BFC player who went with MM to purchase Jack3d from, he thought, a "bodybuilding shop". He too saw MM take Jack3d before games. He recalled MM showing the club physiotherapist a Jack3d tub in his room and being advised (by the physiotherapist) that he "*wouldn't take it as it was crap*".
36. We also heard from another player, Darren Dennehy. He recalled the visit of Jenni Kennedy at the beginning of the season; he recalled that some of the players were noisy and did not behave as they should have ("*people were just taking the piss and everyone was joking about*"). He did take away from that meeting the message that players "*should get everything checked*". He also recalled MM taking Jack3d before the game at Cheltenham. He told us that at the beginning of the season there was no "club rule" in relation to the taking of supplements.

The FA's Case

37. In his opening submissions, Mr Johnson outlined the circumstances of the doping offence, expanding upon his written argument. The FA's case on the issue of the Player's intention was put in this way: "[MM] is put to strict proof regarding the issue of whether he had an intention to enhance his sporting performance". Further, it submitted that his fault was substantial, such that he should receive "*only a minimal reduction, if any*" from the otherwise applicable period of two years.
38. James Peckitt was the BFC physiotherapist. He provided two witness statements in advance of the hearing, dated 13 March and 19 April 2012 respectively. He gave an account before us. He did not take issue with the Player's recollection that MM saw him for advice on 27 October 2011. In the statement dated 13 March 2012 he stated he told MM "*not to take the supplement until he had checked it with the doctor*". In the second statement, when he was being asked to deal with the Player's account, he agreed he

could have told MM it was “crap”. Before us he added something that did not appear in either statement, namely that when MM showed Jack3d to him, he said his nutritionist had recommended it and said he (MM) needed something to “give him a lift”. He denied making that up.

39. He told us that he did not “recognise” Jack3d when shown it. He agreed he might have read aloud the ingredients glutamine, creatine and caffeine; that struck us as curious given that (as observed earlier) glutamine is not a listed ingredient of Jack3d, a fact we pointed out to him. Further, if as he said, he read the ingredient list he did not recognise 1,3-dimethylamylamine or geranium both of which follow immediately after caffeine in the ingredient list. That also might be thought surprising, given he said from the start of the season he had displayed on the wall of the treatment room a large poster advertising the perils of supplements, especially methylhexaneamine, geranium oil and dimethylamylamine. He insisted that on 27 October he advised MM in words to this effect: “I wouldn’t take it until you’ve checked it with the doctor”.
40. Later, he saw MM preparing a supplement before the away game at Cheltenham Town FC. On that occasion he told him he didn’t think he should be taking it because the club doctor had advised him not to take it.
41. Dr Tamin Khanbhai was the BFC club doctor. He recalled MM coming to see him in the treatment room prior to a game on 29 October 2011. He showed him a tub of Jack3d and asked if it was “okay” to take. He had no knowledge of it and advised the player that he did not know nor could he guarantee what was in it. He advised MM that he “didn’t think he should take it”. He recalled the Player told him he had “checked the WADA list” but he did not offer to do so.
42. He could not recall telling the Player he would get back to him and said that was not something he had done before. We note that his contemporaneous note of the consultation reads: “Advised not to take suppl. Not a suppl I am aware of but that can’t always guarantee that other illicit ingredients in it”. Questioned by Mr Budworth he told the

Commission that after 20 January 2012 he held meetings with individual Players who were suspected of having used Jack3d.

43. *Jenni Kennedy* spoke to her witness statement. She told the Commission of the start of the season meeting at BFC when she gave the players advice about gambling and doping. A number of them were loud and rude, prompting her to complain in writing to the BFC Chairman. In advance of that meeting packets containing an FA Short Guide to FA Doping Control, a FA Doping Control Advice card and a Global Drugs Reference Online and Whereabouts Contact Detail card were sent to all Premier and Football League clubs, including BFC ('JK2'). Both the Short Guide and the Doping Control Advice card contain express warnings about supplements and *inter alia*, methylhexaneamine, dimethylamylamine and geranium oil (which are printed in either bold or red coloured font). The Player could not recall having had such a package. If he had received such a pack and had he compared the product ingredients with the documents within, he would no doubt have noted both dimethylamylamine and geranium [oil] appear on the Jack3d label and as a "banned substance" in the Short Guide and the Doping Control Advice card.
44. *Blake Lewendon* is employed by the FA as a Regulation Administrator. He was called by the FA to prove that (using the software Omniture) there was no hit on the FA website link to the WADA Prohibited List on 26 October 2011. However, there were eight hits the following day, none of which could be timed.

Determination

Regulation 66

FADR 66(i) - the doping offence involved a Specified Substance

45. Methylhexaneamine is a Specified Substance.

FADR 66(ii) - how the Specified Substance entered his body

46. The only evidence before us as to the source of the MHA was the Player's admitted taking of Jack3d. 1,3-dimethylamylamine is listed on the product label as an ingredient. 1,3-dimethylamylamine is a synonym for methylhexaneamine. The FA did "not contest" that Jack3d was the source of the methylhexaneamine.
47. We were satisfied (to the requisite standard) that the methylhexaneamine present in the Player's sample came from his ingestion of Jack3d.

FADR 66(iii) - no intention to enhance sporting performance or to mask the use of a performance enhancing substance

48. There was no suggestion in this case of an intention to mask the use of a performance enhancing substance. We considered that aspect no further.

Interpretative approach

49. The FADR provide no definition of "enhance sporting performance". The commentary to Article 10.4 World Anti-Doping Code 2009 ('WADC'), from which FADR 66 derives, provides some assistance:

"Examples of the type of objective circumstances which in combination might lead a hearing panel to be comfortably satisfied of no performance-enhancing intent would include: the fact that the nature of the Specified Substance or the timing of its ingestion would not have been beneficial to the Athlete; the Athlete's open Use or disclosure of his or her Use of the Specified Substance; and a contemporaneous medical records file substantiating the non sport-related prescription for the Specified Substance. Generally, the greater the potential performance-enhancing benefit, the higher the burden on the Athlete to prove lack of an intent to enhance sport performance."

50. It was the MM's case that Jack3d was not being used to enhance sporting performance but as part of a nutritional plan and specifically to combat a dehydration problem. In

any event, he further submitted that he did not know Jack3d contained any Specified Substance. It followed therefore that since he did not know that by using Jack3d he was thereby consuming a Specified Substance, he could not be said to be intending to use it (the Specified Substance) to enhance sporting performance.

51. Although it does not replicate verbatim WADC 10.4, it is clear that the intention to enhance sporting performance in FADR 66 relates to the use of the Specified Substance. The parties agreed between themselves and invited us to the view that the correct approach to this issue was that articulated in *CAS 2010/A/2107 Oliveira V US Anti-Doping Agency* 6 December 2010, as applied in *CAS 2010/A/2229 WADA v FIVB & Gregory Berrios*¹ and in *IRB v Murray* 27 January 2012.

52. In *Oliveira* the Panel opined that the said words in WADC Article 10.4 did not require the athlete to “...to prove that she did not take the product...with the intent to enhance sport performance” (para. 9.14). The Panel concluded that they require “[the athlete] only to prove her ingestion of [the Specified Substance] was not intended to enhance sport performance” (para.9.17). The effect of that approach is that the intent relates to the Specific Substance and not to the product (for example the supplement) in which it is contained.

53. This approach was approved and adopted in *IRB v Murray*². In paragraph 67 of the *Murray* decision the tribunal opined that a “player seeking to rely on [WADC 10.4] will, as a practical matter, have to satisfy the tribunal either

- a. That he or she did not know that he or she was consuming a Specified Substance and, hence, could not be said to by the use of the Specified Substance to have intended to enhance sport performance, or

¹ Though it is worth noting that which was not said of the *Berrios* decision in *Murray*, namely that it predated (by 5 days) *Foggo*; the issue was not argued, still less decided; and the issue on appeal was limited to the length of the applicable sanction

² It is to be noted that the Chairman of the Post Review Body in *Murray* was a member of the CAS panel in *Oliveira*

- b. *That if he or she did know that a Specified Substance was used, that there was no nexus or link between such use and his or her performance as a player of the Game. Whether or not that link will be established will depend on the particular circumstances of the case.*"
54. The *Oliveira/ Murray* interpretation of WADC 10.4 is not one that found favour in a decision of another CAS panel, namely *CAS A2/2011 Foggo v National Rugby League*, 3 May 2011. The *Foggo* CAS Panel found that the effect of Article 10.4 was "to require the athlete to show that the ingestion of the product which contained the Specified Substance was not intended to enhance his sport performance" (paragraph 46). This approach, persuasive to this Chairman, found [obiter] support in the *UKAD v Martin Gleeson*, 13 June 2011 in which the (strong) Panel (whilst expressly not deciding the point) regarded the *Oliveira* approach as "a difficult proposition in the light of the general law, the wording of Article construed as a whole, the policy of the WADA code and the reasoning in those two cases".
55. It is also to be noted that the *Murray* decision cites, as support for its approach, paragraph 6.8 of the decision in *UKAD v Dooler*, 24 November 2011. Paragraph 6.14 (not cited or referred to in *Murray*) reads: "that the [athlete] did not know that the Xtreme Nox Pump contained methylhexanamine is a factor to be taken into account by the Tribunal when determining whether [the athlete] intended by the consumption of the Specified Substance to enhance his sport performance". Further, paragraph 6.18 (also not referred to in *Murray*) is of interest: "An Athlete may intend to enhance his or her sport performance in competition by the taking of a supplement without knowing that the supplement contained a Specified Substance. If all or part of the purpose of the taking of such a supplement is to enhance the Athlete's sport performance in competition then the fact that the Athlete establishes that he or she did not know the supplement contained a Specified Substance will not, of itself mean that the Athlete will establish, by the requisite showing, an absence of intent to enhance sport performance."
56. This not a sterile debate, of academic interest only. It was important in *Murray* and we have found it so in the instant case.
57. The parties invited us to determine the issues in the instant case by adopting the *Oliveira/Murray* approach, it being the basis most favourable to the Player. However,

that approach is not without its own nuance. The infelicitously expressed paragraph 67(a) of *Murray* is open to two different interpretations: (1) the player did not know that he was consuming the Specified Substance or (2) the player did not know that he was consuming the Substance *and* that it was a Specified (i.e. Prohibited) Substance. As to which is correct, some assistance is found in paragraph 72 of *Murray* where, in reviewing the BJC “*evidentiary record*” the Tribunal posed two questions, the first of which was: “*Did the Player know that the drink he consumed contained MHA?*” (emphasis added). We understand that to mean the athlete’s knowledge in paragraph 67 is his/her knowledge as to the presence of the substance (in [for example] the supplement), not its status as being Prohibited or Specified. This is an approach we understand to be consistent with the decision of *Dooler* (when read as a whole). It is the approach we adopted.

Factual findings

58. The burden is upon the Player to satisfy us (to the requisite standard) that he did not intend by using the Specified Substance to enhance sporting performance. The FA chose not to lead expert evidence or material before us as to the performance enhancing properties of methylhexanamine. It is a stimulant and a Specified Substance.
59. The starting point is the Player’s account. We accept SM recommended the Jack3d. MM agreed he told SM he was lethargic and the recommendation was made in that context, together with it being said to be of use to combat his dehydration. When questioned as to why he was taking Jack3d MM repeatedly answered by reference to the three ingredients (as he understood them to be) and the advice he said SM gave him: “*glutamine would help water retention, creatine was a mild like basic energy source and caffeine would give him a mild kick*”. He likened the effect to taking two or three cans of (the energy drink) Red Bull. In answer to a question from Mr Johnson he said he was not “*enhancing my performance illegally*”.

60. It is to be noted that *per* WADC Article 10.4 a material consideration (though not, we appreciate, determinative) is timing of the ingestion of the Specified Substance. The Player's own case was that he took Jack3d only on match days and then about forty-five minutes before the start of each game. His use of Jack3d was directly referable to his participation in a competitive football match; he would not be taking it but for the fact he was about to compete in a professional football match.
61. The Shorter Oxford English Dictionary defines "enhance" as to "lift, raise, raise the level of". "Performance" is defined as "the execution or accomplishment of an action, operation or process undertaken". In taking the supplement Jack3d MM hoped to reduce the level of dehydration he would otherwise experience during the match. Dehydration would have a debilitating effect on his performance. If he were able to reduce the level of dehydration, so it would improve his physical condition and thereby reduce the adverse effect the dehydration had on his performance. The consequence was that his physical condition would be improved and so his sporting performance. In addition, he told us more than once that he believed the creatine and the caffeine within Jack3d would give him a modest "kick"; a modest energy boost, like Red Bull.
62. Mr Budworth sought to circumvent this conclusion by inviting us to the view that there was a "conceptual" difference between seeking to enhance sporting performance (which he submitted MM was not doing) and seeking to restore pre-existing levels (of hydration) which he was. Put another way, MM was seeking to limit the effects of dehydration rather than enhance his sporting performance; it was restoration rather than improvement. If we may say so, a clever argument but one which did not persuade us. It follows that the Player did not satisfy us (to the requisite standard) that he did not intend by his use of the supplement to enhance his sporting performance.
63. That conclusion would suffice for the purposes of a *Foggo* approach. However, it does not if the issue is approach *per Oliveira/Murray*. It was to that approach that Mr Budworth invited us, if his primary submission did not succeed. Turning to that, and

posing the question in paragraph 72 of *Murray*, did MM know the drink he consumed (made from Jack3d) contained the Specified Substance methylhexaneamine?

64. The Player's case was consistently that he did not believe and was never told that Jack3d was of itself "illegal" or contained any substance which was "illegal" (the word he used repeatedly). We understood him to mean by "illegal" that he did not believe it or any one (or more) of its ingredients was Prohibited by WADA. The *Foggo* approach lances this issue; the response in paragraph 69 of the *Murray* decision – that the athlete who prays in aid of such ignorance is likely to be assessed as having a higher degree of fault – is (in our view) unconvincing and not supported by the majority of anti-doping decisions, including *Murray*.
65. Mr Budworth relied upon paragraph 84 of the *Berrios* decision. Therein the CAS Panel expressed the test thus: "...the second condition is met when an athlete can produce corroborating evidence in addition to his or her word which establishes to the comfortable satisfaction of a panel that he or she ingested a specified substance unknowingly, e.g. by means of ingesting a contaminated product". We note the example given, which Mr Budworth submitted should be taken to limit the principle.
66. The Player insisted that he did not know Jack3d contained an illegal substance. Methylhexaneamine is not listed as an ingredient on the product label. But, 1,3-dimethylamylamine is listed (on the product label) as an ingredient. The Player's account was that he read the ingredient list. He checked each ingredient against the WADA Prohibited List. Therefore, he knew Jack3d contained 1,3-dimethylamylamine. That is not the same as knowing it was prohibited (or as he expressed it, "illegal"); but that is not the test *per* FADR 66 or WADC Article 10.4 or indeed *Oliveira/Murray*.
67. We return to the question: did MM know the drink he consumed (made from Jack3d) contained the Specified Substance methylhexaneamine? He knew it contained 1,3-dimethylamylamine. Therefore, the answer must be "yes". That he did not know, he said, it was "illegal" or Prohibited is nothing to this point.

68. Therefore MM failed to make us comfortably satisfied that there was no intention, by his use of methylhexaneamine to enhance his sporting performance.
69. It follows that on the basis of his own account we are not comfortably satisfied that there was no intention, by his use of the Specified Substance, to enhance his sporting performance. Accordingly it is unnecessary for us to consider further the question of whether the Player produced corroborating evidence. Had we been required so to do, we note there is a deal of material which has, in other cases, been found to be capable of corroborating an Athlete's intention. For example:
- a. He declared its use on the doping form.
 - b. He was using the supplement quite openly, in view of and with the knowledge of others.
 - c. He told professionals at his club he was minded to use it.

The Player's degree of fault

70. If the Player had persuaded us (to the requisite standard) that that he did not intend to enhance sporting performance we would of course have been required to assess his degree of fault. Notwithstanding our primary finding, we did so. There was no dispute that MM was at fault. The issue for the Commission to resolve was the extent of that fault. Mr Budworth submitted it was modest; the FA categorised it as significant.
71. "Fault" covers a range of behaviour from (at the most serious end) intentional cheating to (at the least serious end) action that falls a little short of what the average person in the athlete's position could reasonably have been expected to have done in all the circumstances.
72. In addition to the decisions referred to above, in advance of the hearing the parties provided us with the following anti-doping decisions: *CAS 2011/A/2518 Robert Kendrick v ITF, FA v Patrick Kenny* 7 September 2009 & 2 November 2009, *RFU v Steenkamp* 22 March 2011, *UKAD v Christian Lang* June 2011, *FA v Kolo Touré* 28 May 2011, *CS*

2009/A/1870 WADA v Hardy 21 May 2010, RFL v Dean Gaskell 29 September 2009, UKAD v Steven Dooler 24 November 2010, UKAD V James Hamilton 17 June 2010, UKAD V Rachel Wallader 29 October 2010 and UKAD v Duckworth, 10 January 2011.

73. We read and considered each decision and the written and oral submissions made in respect thereof. Care needs to be taken in drawing too much from authorities when it comes to assessing the degree of fault. Every case will depend on its own facts and on the evidence seen and heard.

74. In our judgment the Player was at fault in the following respects:

- a. We accept (on the balance of probabilities) the account of James Peckitt that he advised the Player not to take Jack3d without checking with the club doctor.
- b. We accept (on the balance of probabilities) Dr Khanbhai's account that he advised MM not to take Jack3d. We accept he did so because he could not "guarantee" it was not contaminated with an "illicit" ingredient. There was, of course, a more obvious reason why the Player should have been told not to take it: the ingredients on the product label listed a Prohibited Substance, which fact apparently did not register with either the club physiotherapist or doctor. We do not accept MM's account that the doctor promised to "come back to him" after researching the product. The doctor's contemporaneous note is unequivocal. The Player did not follow that advice. He was at fault in so doing.
- c. Even on his own case, the Player accepted, when questioned by the Chairman, that the doctor advised him that he "wouldn't take it because of the risk of contamination". It followed, as the Player agreed, that when he went onto use Jack3d, he was taking a risk. Asked why he did so, he said he considered the risk to be negligible (our word).
- d. We were prepared to accept Mr Budworth's submission that MM used the FA website to check the WADA list in the very early hours of the morning of 27 October. That was one check. There were others he could reasonably have been expected to do, which he did not.

- i. He did not carry out any other Internet research of the product or ingredients. As the material placed before us revealed, it would not have taken long or much effort to discover the nature of Jack3d and that it contained a Prohibited Substance.
- ii. If he had a copy of the material within Jk2, a few seconds research would have revealed that one of the listed ingredients of Jack3d was (and is) a Prohibited Substance.

75. As the Regulatory Commission in *Patrick Kenny* observed (at paragraph 52) "*we cannot emphasise sufficiently the importance of the principle that a professional athlete, who might derive great advantage from his privileged position, has strict responsibility for ensuring that no Prohibited Substance enters his system*".

76. This was MM's first doping offence, which he admitted. In assessing his fault, we had proper regard (insofar as it was relevant) to all that we heard and read about him and to the written and oral submissions advanced on his behalf. He took Jack3d contrary to the express advice of the club doctor and without making adequate researches of his own. The checks he made were limited and inadequate. His conduct fell significantly below what it would be reasonable to expect of a professional footballer in these circumstances.

77. Mr Budworth submitted the suspension should be in the region of 3-5 months. In our judgment the degree of MM's fault would not adequately have been reflected by a suspension of that length. Had we been required to assess the period of reduction from two years, we would not have imposed a suspension of shorter than eighteen months.

Commencement of suspension

78. The FA provisionally suspended MM by its letter 20 January 2012. We were invited by Mr Budworth to apply FADR 35 & 36 and to backdate the start of the suspension to 26 December 2011, the day the sample was taken. The FA opposed that submission, arguing that the player continued to participate in football and to take Jack3d until 20

January 2012. Since he played up to 20 January 2012 it seems to us perverse for any period of suspension from football to include a period when he was playing. Therefore, in our judgment, the appropriate starting point for commencement of the suspension is the date of the FA's provisional suspension, namely 20 January 2012.

79. His status during his suspension is as provided by FADR 37(a): he cannot participate in any football match or any other football related activity other than anti-doping education or rehabilitation programmes.

80. With effect from the 20th January 2014 (namely the conclusion of his period of suspension) and for a period of two years thereafter, the Player will be subject to designated or target testing as provided for by FADR, Schedule 1, para 10 and the FA Disciplinary Procedures Regulation 8.4.

81. The hearing fee is to be retained by the FA and the Player is ordered to pay costs of the hearing.

Postscript

82. There is much to commend the FA in its supplying professional players with the package exhibited before us as JK2. As we understand it, those packages are sent directly to each Premier and Football league club, sufficient in number for each squad member to have his own. Thereafter the responsibility lies with the clubs to ensure each player receives such a package. Of course players cannot be required to read the contents. They would be well advised to.

83. Finally, we add this. There is no evidence that MM misbehaved when Ms Kennedy attended BFC. She did so for the players' benefit. That some chose to behave in the way we have been told they did is a disgrace. We would like to think the officials of BFC would remind their players of the responsibilities which go with being privileged professional athletes.

Summary

84. For the reasons adumbrated the Commission found as follows -

- a. Mark Marshall committed a doping offence, namely the presence in his urine sample taken on 26 December 2011 of methylhexaneamine, which is a Specified Substance (Category S6: Stimulant). Thereby he is guilty of misconduct.
- b. It was not comfortably satisfied that he did not intend thereby to enhance sporting performance.
- c. Accordingly the appropriate penalty imposed for this doping offence is a period of suspension from all football and football activities for a period of two years.
- d. The suspension is effective (i.e. commences) from the date the FA provisionally suspended the player, namely 20 January 2012.
- e. He will be subject to target testing for a period of two years from 20 January 2014.
- f. The hearing fee is to be retained by the FA and the Player is ordered to pay costs of the hearing.

85. The Player has a right of appeal as provided by FADR Part 11 and the Disciplinary Regulations.

86. We are grateful to the parties for their careful preparation in advance of the hearing and to Matthew Johnson and Martin Budworth for their helpful written and oral submissions.

87. Each member of the Commission contributed to the decision; it is the decision of us all.

Christopher Quinlan QC

Chairman

Regulatory Commission



8 May 2012