CAS 2014/A/2 Drug Free Sport New Zealand v. Kris Gemmell

ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

President:	David Williams, QC, Barrister, Auckland, New Zealand
Arbitrators:	Barry Paterson, QC, Auckland, New Zealand
	Alan Sullivan, QC, Barrister, Sydney, Australia
Ad hoc Clerk:	Edward Bangs, Sydney, Australia

in the arbitration between

Drug Free Sport New Zealand ("DFSNZ"), New Zealand
Represented by Mr. Isaac Hikaka and Mr. Shaun Maloney, Lee Salmon Long, Auckland, New Zealand

Appellant

and

Kris Gemmell, New Zealand
Represented by Mr. Ian Hunt, Young Hunter Lawyers, Christchurch, New Zealand

Respondent

Triathlon New Zealand, New Zealand
Represented by Ms Jo Tish, Board Member of Triathlon New Zealand, Auckland, New Zealand

Interested Party

I. INTRODUCTION – NATURE OF APPEAL – PROCEDURAL HISTORY

1. This case concerns an allegation by Drug Free Sport New Zealand ("**DFSNZ**") that Kris Gemmell (**Mr Gemmell**) committed an Anti-Doping Rule Violation under Rule 3.4 of the Sports Anti-Doping Rules 2013 (New Zealand) ("**SADR**"). Rule 3.4 and its accompanying comment are as follows:

> 3.4 Violation of the requirements regarding Athlete availability for Out-of Competition Testing including failure to provide whereabouts information required by DFS or any other Anti-Doping Organisation and missed tests which are declared by DFS under the Rules. Any combination of three missed tests and/or filing failures within an eighteen-month period as determined by DFS (or any other Anti-Doping Organisation with jurisdiction over the Athlete) shall constitute an Anti-Doping Rule Violation.
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> [Comment to Rule 3.4: Separate whereabouts filing failures and missed tests declared under the rules of the Athlete's International Federation or any other Anti-Doping Organisation with authority to declare whereabouts filing failures and missed tests in accordance with the International Standard for Testing shall be combined in applying this Rule. In appropriate circumstances, missed tests or filing failures may also constitute an Anti-Doping Violation under Rule 3.3 or Rule 3.5]

2. DFSNZ contends that the violation arose through three whereabouts failures within an 18-month period, being:

   a. a missed test on 28 August (2012) ("**First Alleged Failure**");

   b. a filing failure on 16 July 2013 ("**Second Alleged Failure**"); and

   c. a further missed test on 13 September 2013 ("**Third Alleged Failure**").

3. Mr Gemmell is a member of Triathlon New Zealand which organisation has agreed to the application of the SADR. On 3 December 2013, DFSNZ filed an Application with the Sports Tribunal of New Zealand ("the **Tribunal**") for Anti-Doping Rule Violation Proceedings under Rule 3.4 of the SADR. DFSNZ applied within that Application for the provisional suspension of Mr Gemmell. The latter application was opposed and heard on 17 December 2013. The Tribunal determined that provisional suspension was not appropriate in the circumstances and it adjourned the application until the substantive hearing which was fixed for the week of 3 February 2014. The hearing of the main Application was held on 7 February 2014.

4. DFSNZ contended that Mr Gemmell had committed the violation, and sought a finding accordingly and the imposition of a sanction in accordance with SADR Rule 14.3.4. The Tribunal heard oral evidence from Mr Gemmell and three other witnesses.

5. By a decision dated 12 February 2014 ("**Sports Tribunal Decision**" or "the **Decision**"), the Tribunal[1] dismissed DFSNZ's Application. The Decision is

[1] Sir Bruce Robertson (Chair), Mr Alan Galbraith QC (Deputy Chair) and Mr Jim Farmer QC (Deputy Chair).

discussed in detail below, but the essence of the ruling was that the first alleged missed test had not been proved to the satisfaction of the Tribunal, and therefore the requirement of three whereabouts failures within an 18-month period had not been established.

6. DFSNZ lodged a timely appeal on 4 March 2014. On 14 March 2014, it filed and served its Statement of Facts and Legal Arguments Giving Rise to the Appeal in which it submitted that:

   a. the Tribunal did not properly direct itself in its approach to the question of whether Mr Gemmell had committed a whereabouts failure on 28 August 2012;

   b. the Tribunal erred in its interpretation and application of 11.4.3(c) of the International Standard for Testing (January 2012) and was incorrect in finding that the Doping Control Officer (DCO) had failed to do what was reasonable to locate Mr Gemmell for the purposes of testing on 28 August 2013; and

   c. the two additional whereabouts breaches upon which the Tribunal did not rule were made out on the evidence.

7. Thereafter, on Friday, 14 March 2014, DFSNZ filed its Appeal Brief in two volumes consisting of Volume 1 – Key Documents and Evidence and Legal Arguments, and Volume 2 – Exhibits. Included in Volume 1 were copies of the various statements of witnesses which were put before the Tribunal, as well as two new witness statements, being a joint statement from Mr Julien Sieveking and Stuart Kemp senior employees of the World Anti-Doping Agency ("**WADA**") Montreal, Quebec and a statement from Mr Graeme Steel, Chief Executive of DFSNZ on behalf of DFSNZ. The admissibility of some sections of these statements was challenged by the Respondent and the disposition of the challenge is addressed below. The Respondent's Brief for Appeal was filed and served on 23 May 2014 and it contained a summary of the Respondent's submissions of Appeal, photographs of 49 Cliffhanger Drive, Boulder, Colorado, and various relevant documents relating to the hearing before the Sports Tribunal.

8. The Panel convened a procedural conference by telephone on 23 April 2014, at which time the provisional date for the CAS hearing was settled and a procedural timetable was established. In accordance with the timetable, the Reply of the Appellant was filed on 29 May 2014, the Pre-hearing submissions of the Applicant on 11 June 2014, and the Synopsis of Submissions on behalf of the Respondent on 12 June 2014.

9. The hearing took place at the offices of the law firm Russell McVeagh at 48 Shortland Street, Auckland on 16 June 2014. It commenced at 10.00 am and concluded at 5.00 p.m. As noted earlier, the Respondent challenged the admissibility of the evidence in the joint statement of Messrs Kemp and Sieveking, and Mr Steel. With the agreement of the parties, the evidence was provisionally admitted at the commencement of the hearing on the basis that the objection would be dealt with later by the Panel.

10. At the hearing, oral evidence was received from Messrs Kemp and Sieveking (via telephone). Ms Jo Tish, a Board member of Triathlon New Zealand, referred to the earlier statement lodged on behalf of her organisation and advised that Triathlon New Zealand would abide by the decision of the Panel. Extensive oral submissions were presented by Mr Isaac Hikaka, who appeared as counsel for the Appellant with Mr Shaun Maloney, and from Mr Ian Hunt as counsel for the Respondent. At the conclusion of the hearing the Panel reserved its decision.

II. CAS JURISDICTION – APPLICABLE LAW – ONUS OF PROOF – ADMISSIBILITY OF APPEAL

11. The admissibility of an appeal before CAS shall be examined in light of Article R47 of the CAS Code of Sports-related Arbitration (Edition 2013) (the "Code"), which reads as follows: "*An Appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of that body.*"

12. The jurisdiction of CAS to hear this appeal is provided for by Rule 15.2.1 of the SADR, which states that "a decision of the Sports Tribunal under these Rules may be appealed exclusively to CAS in accordance with the provisions applicable before CAS". Neither party challenges the jurisdiction of CAS. The Panel, therefore, confirms that CAS has jurisdiction to hear this appeal.

13. Article R49 of the Code provides as follows: "*In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or of a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. After having consulted the parties, the Division President may refuse to entertain an appeal if it is manifestly late*

14. There is no question of admissibility of the appeal since DFSNZ is qualified to bring the appeal under Rule 15.2.2 of SADR and the appeal was filed within 21 days of the Sports Tribunal Decision in accordance with Article R49 of the Code.

15. Under Rule 57 of the CAS Procedural Rules, the Panel has 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 tribunal. It hears the case *de novo*[2] and it has been held that the Panel ought not

[2] As to CAS jurisprudence on this matter see, for example, *IAAF v ARAF and Yegorova and others* (CAS 2008/A/1718) where the Panel stated at para [166]: "*Based on the clear wording of Art. R57 of the code, the Panel finds that in view of the specific circumstances of the case nothing supports the ARAF's view on the scope of the Panel's review. Not only can the Panel review the facts and the law contained in the Decisions but it can as well replace those Decisions if the Panel finds that the facts were not correctly assessed or the law was not properly applied leading to an 'erroneous' decision. The procedure before CAS is indeed an appeal procedure, which means that if the appeal is admissible,*

give any deference to the decision of the Tribunal that is under review.[3] Counsel for the Appellant also referred to the following observations in *Campbell Brown v Jamaica Athletics Administrative Association* at paragraph 133, where it was said:[4]

> 133. … the Panel is satisfied that it has power to undertake a full de novo rehearing of the issues determined by the IAAF Doping Review Board and the JAAA Disciplinary Panel. In concluding that rehearing it will take account, to the extent it considers appropriate, the factual findings and conclusions expressed in those decisions, especially where based on oral testimony of witnesses who did not appear before the Panel in this appeal.

16. Consistent with Article R58 of the Code, the Order of Procedure (which was signed by both parties) provided that the Panel was to apply the substantive law of New Zealand as the law of the merits, save that such law was to be disregarded to the extent that it would lead to a result incompatible with Swiss Public policy. Under Article R28 of the CAS Code, the seat of the arbitration is Lausanne, Switzerland. The decision of the Panel is final, subject only to the right of a party to petition the Swiss Federal Tribunal.

17. As to onus of proof, the Applicant has the burden of establishing an Anti-Doping Rule Violation has occurred. The standard of proof is to the comfortable satisfaction of the Panel, bearing in mind the seriousness of the allegations which are made. This standard of proof is greater than the balance of probabilities, but less than proof beyond reasonable doubt.

III. OVERVIEW OF THE RELEVANT PARTS OF THE ANTI-DOPING REGIME – THE WHEREABOUTS REQUIREMENTS

18. Counsel for the Appellant provided the following analysis, which the Panel accepts as accurate, especially since, as noted below, it was supported by the evidence of two highly qualified WADA officials. The anti-doping regime has three levels. At the top is the World Anti-Doping Code 2009 ("the **WADA Code**" or "the **Code**" or "the **WADC**"). In the New Zealand context, the Code is given effect by the SADR. The SADR are delegated legislation promulgated under a statute, the Sports Anti-Doping Act 2006. They are required to be, and are, substantially identical to the WADA Code.[5] At the second level are the International Standards for Testing (January 2012) ("**the IST**"). Both the SADR and the IST are mandatory. At the third level are Models of Best Practice and Guidelines. Though not mandatory, these are intended to support sporting organisations in their efforts and to promote a harmonised approach to anti-doping practice. Of relevance in this case are the WADA Guidelines for Implementing an Effective Athlete Whereabouts Programme of December 2008 ("**the WADA Guidelines**").

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the whole case is transferred to CAS for a complete rehearing with full devolution power in favour of CAS. CAS is thus only limited by the requests of the parties (the so called 'petita')."

3 *Glasner v. FINA* (CAS 2013/A/3274).

4 *Campbell Brown v Jamaica Athletics Administrative Association* (CAS 2014/A/3487).

5 See Articles 5.2 and 23.2 of the Code and the Introduction of Part One of the code at para [2].

19. The SADR and the Code enforce a principle of strict liability in relation to anti-doping violations involving the presence of prohibited substances in an athlete's system. It is not necessary for an authority to prove either the intention of the athlete or the existence of fault on his or her part in order to establish that the athlete committed a violation.[6] The strict liability principle is well established and widely applied by courts and CAS hearing panels in doping cases.[7]

20. CAS has enunciated a two-fold rationale for this approach. First, sporting fairness requires the disqualification of any athlete who is found to have competed in violation of strictures that were respected by his competitors. Second, a requirement to prove intent would, from a practical perspective, "cripple the sports federations in their fight against doping."[8] While onerous, the Code contemplates that a strict liability approach to anti-doping rule violations best supports its overall purpose of fighting doping by promoting the spirit of sport.

21. The whereabouts regime functions in this context. It represents a powerful and effective means of deterring and detecting doping in sport. In order to ensure the efficiency and effectiveness of anti-doping testing, it is crucial to know where athletes are located at any particular time. In an arbitration concerning an athlete's failure to provide accurate whereabouts information and the consequences of such failure, CAS has emphasised that, while the obligations imposed on an athlete by the whereabouts regime are onerous, the regime is "necessarily strict".[9] CAS panels take the provision of whereabouts information "extremely seriously as [it] is a vital part in the on-going fight against drugs…"[10]

22. As to this case, the critical provision is Clause 11.4.3 of the IST which reads as follows:

> 11.4.3 An Athlete may only be declared to have committed a Missed Test where the Responsible ADO, following the results management procedure set out in Clause 11.6.3, can establish each of the following:
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> a. that when the Athlete was given notice that he/she had been designated for inclusion in a Registered Testing Pool, he/she was advised of his/her liability for a Missed Test if he/she was unavailable for Testing during the 60-minute time slot specified in his/her Whereabouts Filing at the location specified for that time slot;
>
> b. that a DCO attempted to test the Athlete on a given day in the quarter, during the 60-minute time slot specified in the Athlete's Whereabouts Filing for that day, by visiting the location specified for that time slot;
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> *[11.4.3(b) Comment: If the Athlete is not available for Testing at the beginning of the 60-minute time slot, but becomes available for Testing later on in the 60-minute time slot, the DCO should collect the Sample and should not process the attempt as an unsuccessful*

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6 *L* v *International Olympic Committee* (CAS 2000/1/310).

7 See, for example, *N., J., Y., W. v FINA* (CAS 98/208).

8 *L v International Olympic Committee* CAS 2000/1/310.

9 *Ohuruogu v UK Athletic Limited & International Association of Athletics Federations* (CAS 2006/A/1165).

10 Ibid.

attempt to test, but should include full details of the delay in availability of the Athlete in the DCO's Sample collection report. Any pattern of behaviour of this type should be investigated by the Responsible ADO as a possible anti-doping rule violation of evading Sample collection under Code Article 2.3 or Code Article 2.5. It may also prompt Target Testing of the Athlete.

If located for Testing, the Athlete must remain with the DCO until the Sample collection has been completed, even if this takes longer than the 60-minute time slot.

If an Athlete is not available for Testing during his/her specified 60-minute time slot at the location specified for that time slot for that day, he/she will be liable for a Missed Test even if he/she is located later that day and a Sample is successfully collected from him/her.]

c. that during that specified 60-minute time slot, the DCO did what was reasonable in the circumstances (i.e. given the nature of the specified location) to try to locate the Athlete, short of giving the Athlete any Advance Notice of the test;

[11.4.3(c) Comment: Once the DCO has arrived at the location specified for the 60-minute time slot, if the Athlete cannot be located immediately then the DCO should remain at that location for whatever time is left of the 60- minute time slot and during that remaining time he/she should do what is reasonable in the circumstances to try to locate the Athlete.]

d. that the provisions of Clause 11.4.4 (if applicable) have been met; and

e. that the Athlete's failure to be available for Testing at the specified location during the specified 60-minute time slot was at least negligent. For these purposes, the Athlete will be presumed to have been negligent upon proof of the matters set out at sub-Clauses 11.4.3(a) to (d). That presumption may only be rebutted by the Athlete establishing that no negligent behaviour on his/her part caused or contributed to him/her (i) being unavailable for Testing at such location during such time slot; and (ii) failing to update his/her most recent Whereabouts Filing to give notice of a different location where he/she would instead be available for Testing during a specified 60-minute time slot on the relevant day.

[11.4.3(e) Comment: In the event that a Code Article 2.4 anti-doping rule violation is established, the actual degree of fault involved on the part of the Athlete (i.e. whether negligence or greater) will be relevant to the assessment, under Code Article 10.3.3, of the period of Ineligibility to be imposed.]

23. The central obligation imposed on DFSNZ in this case, by Article 11.4.3(c), was to establish to the comfortable satisfaction of the Tribunal, or this Panel, that "the DCO did what was reasonable in the circumstances, i.e., given the nature of the specified location, to try to locate the Athlete, short of giving the Athlete any Advance Notice of the testing. Under Article 3.1 of the IST, No Advance Notice is defined as a "*Doping Control* which takes place with no advance warning to the *Athlete* and where the *Athlete* is continuously chaperoned from the moment of notification through *Sample* provision." It is, of course, accepted by the Panel that the comment to Article 11.4.3(c) is to be given weight, in that it directs a DCO to

use "the remaining time" to do what is reasonable in the circumstances to try to locate the athlete.[11]

24. Also relevant, although not binding, is paragraph 4.16 of the WADA Guidelines which states that an athlete who does not answer the door to a DCO should not be telephoned to advise him/her of the attempt:

> 4.16 If the specified location is the Athlete's house or other place of residence, the DCO should ring any entry bell and knock on the door as soon as he/she arrives. If the Athlete does not answer, the DCO should not telephone the Athlete to advise him/her of the attempt. Instead, the DCO should wait somewhere close by (e.g., in his/her car) in a place where he/she can observe the main entrance to the residence. He/she should then knock/ring again a short time later (e.g., 15 minutes), and should keep doing so periodically until the end of the 60 minutes. At that point, he/she should try one last time at the end of the 60 minutes before leaving the location and completing an Unsuccessful Attempt Report.

25. As to the nature and role of the whereabouts requirements, the Panel was assisted by the following statements which appeared in the joint expert evidence of Mr Julien Sieveking, Chief Legal Manager of WADA and Mr Stuart Kemp, Senior Manager, Standards and Harmonisation of WADA given on behalf of WADA. They stated:[12]

> **The importance of whereabouts and no advance notice**
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> 6. The primary purpose of the Code whereabouts requirements is to facilitate Out-Of-Competition Testing of elite-level Athletes and other Athletes most at risk of doping. Unannounced testing is the corner stone of the World Anti-Doping Program. Without "surprise testing", the fight against doping would be lost. This is well recognized, admitted and supported by all anti-doping actors, in particular clean athletes given that it is well known for many years that doping occurs away from the competitions. Substances such as anabolic steroids or EPO shall be taken well in advance to any competition in order to produce their enhancing effect and yet be undetectable by the time of competition. If an athlete cannot be located in a period where he is not registered in any competition, he would be free to take whatever substance he wishes and therefore get an unfair advantage on clean competitors who prepare themselves for the same competition in a clean fashion. Consequently anti-doping organisations must use the whereabouts information to locate athletes and rely on no-advance notice to maximise the potential for doped athletes to be caught.
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> **Explanation of WADA's view of best practise and the predominant approach internationally**
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> 7. The effectiveness of no-notice out of competition testing is well established. The most robust anti-doping programs conduct a significant majority of their out of competition tests in an unpredictable fashion that

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11 Article 24.2 of the Code and Article 20.2.3 of the SADR.

12 Statement of Julien Sieveking and Stuart Kemp, 13 March 2014, paras [6] – [10].

focuses testing on those athletes most likely to be doping during the periods when they are most likely to be detected. Affording any athlete advance notice that they will be tested, even of a short duration, undermines the effectiveness of detecting those athletes that choose to cheat, and advance-notice testing does little to deter doping given that the athlete has the opportunity to manipulate the control and continue with a doping regime thereafter. Best practice internationally continues to recognize the benefit of "surprise" testing combined with deterrence strategies such as in competition testing and athlete education.

Clarification of the intent behind the Introductory Note

8. The main elements of the World Anti-Doping Program are the World Anti-Doping Code (Level 1), the International Standards (Level 2) and the Models of Best Practice and Guidelines (Level 3). The Code and the International Standards are mandatory. This is not the case for the Guidelines and Models of Best Practice which are intended to support organizations with limited practical experience and in order to promote harmonized approaches to specific aspects of anti-doping practice. The Introductory note in question was not afforded Level 3 status as it was merely drafted to provide clarity on the whereabouts rules contained in the 2012 IST. This document has no legal status as it was drafted as an explanatory paper to present the rationale and process behind the 2012 IST's whereabouts requirements in simple terms. Doping Control Officers are required to make all reasonable efforts under the circumstance to locate the Athlete for Testing. In some locations, such as hotels and gated communities, telephone contact with the Athlete before the Athlete is physically in the presence of the Doping Control Officer is unavoidable. Similarly, a Doping Control Officer may call an Athlete within five minutes before the Doping Control Officer leaves a specified 60-minute location in case the Athlete is there but is not aware that the Doping Control Officer is trying to conduct a test.

The wording for the 2015 IST also reflects what WADA believes to be the proper approach to the issue under the current regime

9. These rules will not change in the future. According to the 2015 IST, which will enter into force on 1 January 2015 save in exceptional circumstances,[13] no advance notice shall be the method for sample collection (Article 531 IST). Therefore, any contact with the athlete prior to the notification in persona, such as a telephone call, shall not occur in the vast majority of cases but only under particular and rare circumstances where the Doping Control Officer considers that it is necessary, the rule being that an athlete has the obligation to be present and available at the specified time and location.[14]

10. The athlete shall not be made aware that he is going to be tested before he is notified in person by the Doping Control Officer. Such prevailing and mandatory practice is necessary to ensure the athlete does not have the time to do anything that could undermine the doping control. It is scientifically established that in a few minutes, several manipulations can

[13] Underlining in original statement.
[14] Underlining added by the Panel.

> be achieved to make the use of a prohibited substance or method undetectable (Blood hemodilution or withdrawal, manipulation/substitution of urine, forced diuresis to expedite elimination of drugs (hyperhydration), dilution of urine excreted to weaken detection of drugs or metabolites. For this very reason, the applicable rules have always made it clear and mandatory that the athlete remains within direct observation from the notification until the completion of the sample collection so that no opportunity is afforded to manipulate the doping control process.

26. The Panel notes in passing, the words which it has underlined in paragraph 9, which understandably emphasise the obligation of the athlete to be present and available at the specified time and location.

27. Counsel for Mr Gemmell challenged the admissibility of paragraphs 8 - 10 of this joint statement on the basis that they consisted of a mixture of submissions and evidence. The Panel does not uphold this challenge. In response to this challenge counsel for DFSNZ accurately described the impugned evidence as follows:

    i. Paragraph [8] gives evidence of the elements of the world anti-doping programme, the requirements on doping control officers, the practice of anti-doping organisations and the provision of phone numbers by athletes.

    ii. Paragraph [9] gives evidence on the 2015 ISTI.

    iii. Paragraph [10] gives evidence on the actions that can be taken by athletes if they are not under direct observation, and the reasons for the direct observation requirement.

28. While it is true that the WADA witnesses said that "WADA had been asked to comment on matters raised by the decision" their statement primarily explained matters such as "the process by which the Code is approved", the primary purpose of the whereabouts regime, its effectiveness, the practical significance of wording of the 2015 ISTI and other matters. There is no doubt in the view of the Panel that their statement qualified as admissible expert evidence under New Zealand Law, since, if in the exercise of its overall procedural discretion, the Panel tested the matter by reference to the rules of evidence applying to court proceedings in New Zealand, the evidence would be admissible. In New Zealand Court proceedings the statutory Code of Evidence contained in the Evidence Act 2006 applies, and sections 25(1) and (2) of the Evidence Act provide as follows:

    (1) An opinion by an expert that is part of expert evidence offered in a proceeding is admissible if the fact-finder is likely to obtain substantial help from the opinion in understanding other evidence in the proceeding or in ascertaining any fact that is of consequence to the determination of the proceeding.

    (2) An opinion by an expert is not inadmissible simply because it is about — (a) an ultimate issue to be determined in a proceeding; or (b) a matter of common knowledge.

29. The impugned evidence is certainly admissible under these provisions.[15] In short, these were extremely experienced experts in the field of sports doping administration and their testimony was relevant and helpful to understand other evidence in the proceeding, for example, that of the US Anti-Doping Agency Doping Control Officer ("**DCO**") Mr Richard Brooks and to illuminate the interpretative issues arising for determination by the Panel. The fact that their evidence related to issues for determination by the Panel is not a disqualifying factor. The Panel notes in passing, that counsel for the Respondent elected to ask Mr Sieveking questions in cross examination concerning his views as to the proper interpretation of the current and proposed WADA International Standards for Testing. It would be rather strange if such was allowed but other expert opinion evidence of a similar kind was ruled inadmissible.

30. Mr Graeme Steel, Chief Executive of DFSNZ, gave evidence for DFSNZ, some of which was factual, while other sections provided his expert opinion. Such evidence included the following:[16]

> 9. DFSNZ does not consider that it is appropriate to establish any system for locating an athlete which would, as a natural course, provide warning to the athlete of the test and prevent the possibility of notification at the first point of contact. This approach is followed by most anti-doping organisations in the operation of whereabouts regimes under the IST.
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> 10. For its own reasons the United States Anti-Doping Agency (**USADA**) decided that, notwithstanding the provisions of both the Code and the IST, it would make provision for a testing official to make a phone call five minutes prior to the end of a one hour window to establish whether or not the athlete was present at a specific location.
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> 11. DFSNZ was aware of this approach by USADA but, along with most Anti-Doping Organisations, did not adopt this practice. To do this as a routine practice it would mean that athletes could expect to receive, and rely on receiving, a telephone call. In this way, athletes would always receive "notice" of a test. DFSNZ did not consider that this was consistent with Code requirements.
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> 12. DFSNZ is of the view that no telephone call should be made because this would be contrary to the fundamental aims of the Code and IST and contrary to the express direction to make reasonable attempts to locate the athlete short of giving any advance notice of the test. DFSNZ adopts and applies procedures on this basis and directs that testing officials should not attempt to make contact with the athlete before first notification of selection for testing.

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15 If reference was made to Swiss Law the result would be the same: See Swiss Federal Code on Private International Law 1987 ("Swiss CPIL"), Articles 176 – 194 (Chapter 12). Paul David notes in his second edition text, "*A guide to the WADA Code*", at pages 207 and 208, that Swiss law contains no detailed provisions on admissibility of evidence and that it is ultimately a matter of applying Swiss legal concepts of procedural public order and any procedural rights of the parties. In other words, evidence is generally admissible so long as its introduction does not cause procedural unfairness or is otherwise procedurally irregular.

16 Statement of Graeme Steel, 14 March 2014.

13. It is important to emphasise that there are sound practical reasons behind the Code requirements. There are many examples of how an athlete can alter the integrity of a sample given even a short time frame and while there is no intent to provide an exhaustive list here, it is important that those considering cases such as this are aware of why it is important. Examples include:

(a) attaching a device which will conceal and provide a false sample;

(b) injecting a saline solution into the blood stream; and

(c) urinating and then superhydrating to create diluted samples.

14. Perhaps most critically, an athlete who does not present for a test will be alerted by the phone call and warned of the Anti-Doping Organisation's desire to test them at that time. Such warning enables the athlete to make preparations to prevent the detection of doping in follow up attempts to collect a sample within a short time frame.

Approach of other Anti-Doping Organisations

15. Since the Tribunal hearing I have made enquiries of other Anti-Doping Organisations who are part of the International Anti-Doping Arrangement. These are eleven countries which have generally been at the forefront of anti-doping work over many years. All have implemented and operate a whereabouts regime under the IST. Their positions with respect to making a phone call 5 minutes before the end of a one hour test attempt on RTP athletes, where the circumstances are not exceptional, are as follows:

Country	Use Phone Call
Australia[17]	No
Canada	No
Denmark	Yes
Finland	No
Japan	Yes
Netherlands	No
New Zealand	No
Norway	Yes
South Africa	Yes
Sweden	Yes

[17] The fact that Australia does not use a phone call is of interest since it has been held by CAS panels in New Zealand that there are good reasons, including the existence of a Trans-Tasman market in professional sport, for harmonising legal principles as to sports laws applicable in both countries. See *Yachting New Zealand v. Cooke, Gaire & Murdoch* (CAS 2004/A/582 (2.4.2004)) at para [4.5].

United Kingdom	No

> 16. DFSNZ conducts out of competition testing for International Federations in New Zealand. DFSNZ does not retain in one place a specific record of each International Federations policy or instructions with respect to the one hour phone call. Staff report that based on their experience of dealing with at least 10 different International Federations only one (Hockey) has requested that a phone call be made. Of particular relevance to this case is that the International Triathlon union make no such request.
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> 17. While some organisations do allow for the making of a telephone call, the majority do not. They operate in the same way as DFSNZ, which we believe is consistent with the objectives of testing under the Code and IST when properly understood.

31. Mr Gemmell's counsel objected to paragraphs [9]-[12], [14], [16] and [17] of Mr Steel's evidence. The objections were based on two grounds, first, that the paragraphs were submissions, and secondly, that it is inappropriate for Mr Steel to be an "expert in his own cause".

32. DFSNZ submitted that with regard to the first ground of objection, if the Panel decided there are statements in the paragraphs that were submissions, then the Panel could choose not to read those statements (as opposed to the whole paragraphs). DFNZ submitted however, that the paragraphs were not submissions for the following reasons:

    a. Paragraph [9] sets out the reasons for DFSNZ not making a phone call, and the approach adopted by most other anti-doping organisations.

    b. Paragraph [10] sets out the approach of USADA.

    c. Paragraph [11] sets out DFSNZ's awareness of that approach, decision not to adopt it, the approach of most other anti-doping organisations, and the DFSNZ reasons for not following it.

    d. Paragraph [12] sets out DFSNZ's reasons for not making telephone calls to athletes who are to be tested, and the directions it makes to testing officials.

33. With regard to the second ground of objection, DFSNZ submitted that an association with a party does not make the evidence inadmissible. In *Smith v Attorney-General* the New Zealand Supreme Court stated:[18]

> The Court of Appeal held that an expert's evidence is not made inadmissible because the expert is associated with a party. Nor does it become inadmissible because the expert gave evidence on factual matters. Those rulings are entirely orthodox…

[18] *Smith v Attorney-General* [2010] NZSC 114, para [9].

34. Counsel for DFSNZ noted that this was recently confirmed by the New Zealand Court of Appeal in *Lisiate v R.*[19]

> Expert evidence will not be inadmissible simply because the expert is associated with one of the parties, without any other indication that professional impartiality will not be maintained.

35. Unsurprisingly, there was no suggestion that Mr Steel is not an expert in matters relating to sports anti-doping administration. Also, there was no suggestion that Mr Steel's impartiality was at issue. Accordingly, DFSNZ asserted that there could be no proper objection to his evidence. The Panel has carefully considered the competing submissions and upholds the DFSNZ contentions.

36. In conclusion, the Panel finds that all the challenged evidence is admissible, especially since none of the witnesses expressed any views on the ultimate issue in the case, namely whether the conduct of the DCO was reasonable in all the circumstances. Moreover, the weight to be given to it is considerable in view of the vast experience of the three witnesses but, of course, as already stated, the decisions on the ultimate issues of whether doping offences have been committed are ones upon which the Panel must make its own independent assessment.

A. MISCONDUCT IN OUT OF COMPETITION TESTING

37. It is important to note that the possibility of manipulation of out of competition samples, which underlies the whereabouts regime and its general no advance notice policy is not merely theoretical. There is no need to discuss all reported CAS cases[20] but, as noted earlier, the cases show, as Messrs Sieveking and Kemp said in their joint statement "that in a few minutes several manipulations can be achieved to make the use of a prohibited substance or method undetectable."

38. Moreover, while, as we find below, this is not a case of an athlete deliberately trying to avoid or circumvent the testing regime, it is appropriate to record there have been some very serious CAS cases on record where athletes have been found to have misconducted themselves in relation to out of competition testing because of pre-notification accompanied by corrupt behaviour. For example, in *IAAF v All Russia Athletic Federation and Yegorova et al* [21] DNA analysis of out of competition urine samples with in competition samples of seven members of the Russian elite female track and field team found the samples did not match and that the athletes had a collaborative system whereby another person's urine was provided for out of competition testing. Lengthy bans were imposed. An IAAF results manager explained in evidence to the CAS Panel in that case the various ways in which the urine substitution could have been effected and stated that the requirements of no advance notice of testing appeared not to have been followed in

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19 *Lisiate v R* [2013] NZCA 129.

20 See e.g., *B. v FINA* CAS 98/211 published in Reeb (ed) Digest of CAS Awards II 1998-2000 pp255-273.

21 *IAAF v All Russia Athletic Federation & Olga Yegorova et al* (CAS 2008/A.1718) (Mr David A.R. Williams QC, Barrister, Auckland, New Zealand, Mr Ulrich Haas, Professor, Zurich, Switzerland and Mr Massimo Coccia, Professor and attorney-at-law, Rome Italy).

relation to the out of competition testing of some of the Russian athletes who were involved in the case.

IV. SUMMARY OF THE PRIMARY FACTS

39. Before the Sports Tribunal the primary facts were undisputed, apart from whether Mr Gemmell was at 49 Cliffhanger Drive, Boulder Colorado 80302-9454, USA ("**49 Cliffhanger Drive**"), at the relevant time, and whether the DCO had been provided with Mr Gemmell's telephone number. The applicant's primary position before the Tribunal was that it sought to prove Mr Gemmell was not present at 49 Cliffhanger Drive on 28 August 2012. On the evidence, the Tribunal found not only that the applicant had failed to prove that Mr Gemmell was not present at the address (where the whereabouts filing required him to be) but that he had positively proved he was indeed present at the address at that time.[22] Before this Panel, Counsel for the Appellant advised that, although it considered the finding was open to challenge, it was not seeking to pursue the matter. Therefore, the finding that Mr Gemmell was present at 49 Cliffhanger Drive is to be treated as standing. As to the telephone number, the Tribunal found that Mr Gemmell's telephone number had been supplied to Mr Brooks. On appeal there was a suggestion by Mr Hikaka that this may not have been a correct finding. However nothing ultimately turns on this point.[23]

A. First Whereabouts Failure

40. Mr Gemmell was a member of Triathlon NZ, and subject to the SADR. He was notified of his inclusion on the Registered Testing Pool (**RTP**) on 1 December 2008.[24] He had been required to provide whereabouts information since January 2009, and regularly submitted quarterly whereabouts information and change of plan updates as required.[25]

41. The whereabouts information given by Mr Gemmell for 28 August 2012 stated that he would be at 49 Cliffhanger Drive between 10pm and 11pm.[26]

42. The attempt to test was carried out by Richard Brooks, a DCO for the United States Anti-Doping Agency ("**USADA**") with (at the time) almost 12 years' experience.[27] Mr Brooks went to 49 Cliffhanger Drive with Randall Caswell (a Blood Collection Officer), arriving at 9.45pm. There were no lights on inside or outside the house, and there were no cars in the driveway.[28]

43. At 10pm Mr Brooks rang the doorbell at the property, which he could hear ringing inside from where he was standing. When no-one came to the door, he then

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22 *Drug Free Sports New Zealand v Kris Gemmell* (ST 08/13) Decision 12 February 2014, at para [26].
23 See Transcript, pages 19 and 20.
24 Appeal Brief, vol. 2, p.301
25 Appeal Brief, vol. 1, tab 11, p.254, para [10].
26 Appeal Brief, vol. 2, p.304.
27 Appeal Brief, vol. 1, tab 12, p.259.
28 Appeal Brief, vol. 1, tab 12, p.259.

double rang the doorbell and knocked soundly on the door. Again, there was no answer.[29]

44. After approximately 15 minutes he went around the back of the house and looked through the windows under the deck and on the main level but could see no-one.[30] There were still no lights on at the residence.[31]

45. Mr Brooks then returned to the front door and rang the doorbell and knocked on the door again. He proceeded to remain at the front of the residence and rang the doorbell and knocked on the door every 10 minutes. He checked at the back of the house once again, then knocked on the front door and rang the doorbell at 11pm.[32] Throughout the entire time there was no answer and Mr Gemmell did not make himself available for testing.

46. Mr Brooks did not make a telephone call to Mr Gemmell or to the property.[33]

47. Mr Gemmell was at 49 Cliffhanger Drive between 10pm and 11pm on 28 August 2012.[34] He says he was tired due to jet lag, and that he and his then partner would have gone to bed early that night.[35] He said he did not hear the doorbell or knocking.[36]

B. Second Whereabouts Failure

48. Between 16 and 28 July 2013, Mr Gemmell's whereabouts filing said that he would either be at his home address in Palmerston North or at an address in Boulder, Colorado.

49. In the course of organising an attempt to test Mr Gemmell during this period, it was discovered that Mr Gemmell was actually in Hamburg, Germany.

50. Had DFSNZ attempted to test Mr Gemmell at either of the addresses he had specified for his whereabouts it would have resulted in a missed test. The whereabouts information provided by Mr Gemmell was not accurate and he failed to update it in advance to reflect the change in his whereabouts.

C. Third Whereabouts Failure

51. On 13 September 2013, a DCO went to Apartment 2A, 9 Long Street, Shoreditch, London to test Mr Gemmell. Mr Gemmell had specified that he would be available for testing at this address between 10pm and 11pm that day.

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29 Appeal Brief, vol. 1, tab 12, p.259.
30 Appeal Brief, vol. 1, tab 12, p.259.
31 Transcript, p.49, lines 13-14.
32 Appeal Brief, vol 1, tab 12, p.259.
33 Transcript, p.45, lines 32-33.
34 Appeal Brief, vol. 1, tab 13, p.263, para [16].
35 Appeal Brief, vol. 1, tab 13, p.264, para [21].
36 Appeal Brief, vol. 1, tab 13, p.265, para [27].

52. The DCO attempted to locate Mr Gemmell for testing at this address between 10pm and 11pm, but Mr Gemmell was not home. Mr Gemmell admitted that he was not present at the address during this time.

V. SUMMARY OF DECISION OF THE SPORTS TRIBUNAL OF NEW ZEALAND

53. The Tribunal decided that DFSNZ had not established the First Whereabouts Failure had occurred because Mr Brooks had not done what was reasonable in the circumstances to locate the athlete. As the First Whereabouts Failure was not established, the Tribunal did not determine whether the Second or Third Whereabouts Failures had occurred. DFSNZ's application was accordingly dismissed.

54. The key points in the decision on the First Whereabouts Failure were as follows. The Tribunal decided that the Athlete was present at the specified address between 10 pm and 11 pm on 28 August 2012. It then said correctly that that was not the end of the enquiry since "Mr Gemmell's obligation was to be available and the question whether the steps taken by the officer in all the circumstances were reasonable". The crux of the decision is found in paragraphs 28 – 36:

> [28] The critical issue is whether, in the circumstances which unfolded, to cover all bases there should have been an endeavour to contact Mr Gemmell on his mobile phone, the number of which was available. Mr Brooks was not specifically asked to do so. DFS took the view that a phone call should not occur because of its potential to breach the element of surprise in such a testing regime. Specifically DFS referred to paragraph 4.16 of "The World Anti-Doping Program Guidelines for Implementing an Effective Athletes Whereabouts Program, Version 2.0, December 2008" which provides:
>
> > *If the specified location is the Athlete's house or other place of residence, the DCO should ring any entry bell and knock on the door as soon as he/she arrives. If the Athlete does not answer, the DCO should not telephone the Athlete to advise him/her of the attempt. Instead, the DCO should wait somewhere close by (e.g., in his/her car) in a place where he/she can observe the main entrance to the residence. He/she should then knock/ring again a short time later (e.g., 15 minutes), and should keep doing so periodically until the end of the 60 minutes. At that point, he/she should try one last time at the end of the 60 minutes before leaving the location and completing an Unsuccessful Attempt Report.*
>
> This is a guide and not absolutely conclusive.
>
> [29] It is instructive to note that this approach is not adopted in the United States of America where it is USADA practice to attempt to make a telephone contact in the last five minutes or so of a stipulated hour. Further Mr Steel advised us that new international guidelines which are to be promulgated will recognise greater flexibility.
>
> [30] From the telephone cross-examination of Mr Brooks it became clear that Mr Brooks himself thought he should do more than simply knock and ring at the front door. On what he agreed was a dark night he scrambled down a steep bank at the side of the house and under a low deck on broken ground to attempt to look in through a lower floor window. The attempt failed in the sense that the night

was dark and the positioning of the window under a deck made it doubly dark so that he was unable to see anything. It is to state the obvious that it would have been much simpler and likely much more effective to have called Mr Gemmell's mobile number, which as we understand the evidence is most likely what he would have done under USADA procedures. We appreciate that he did not do so because of his interpretation of the instructions he had from DFS but, while instructions may be a relevant factor in determining reasonableness, they are no the absolute determinant of what is objectively reasonable in a particular fact situation.

[31] We are satisfied that it was necessary in light of what Mr Brooks had observed, to make a call which would have had the potential to confirm exactly where Mr Gemmell was and if he was sleeping, as his evidence suggests, to have woken him. To make or not make a phone call will always depend on the particular facts of an individual case but it would have been of crucial value here.

[32] Although there must be a clear and simple arrangement, its focus should be upon getting a sample. A laboured approach to process should not deflect the task away from practical reality and common sense.

[…]

[34] We are of the view that the DCO did not do all that was reasonable in the particular circumstances, which include Mr Brooks' previous experience of successfully undertaking tests at the property, to locate Mr Gemmell. We reject the suggestion that a phone call would have been giving him advance notice. It would merely have clarified whether he was at the premises and the potential for interference with a drug test result would have been no greater than if a third party had answered the knocking at the door and had gone down to wake and fetch Mr Gemmell.

[35] We need not engage with an interpretation and application of 11.4.3(e) as we are not persuaded that in all the circumstances 11.4.3(c) was fulfilled.

[36] Accordingly we hold that a missed test violation on 28 August 2012 is not established.

VI. ISSUES FOR DETERMINATION

55. There was no dispute in this area. The Parties agreed that the key issues which arose in light of the Applicant's argument and the grounds of appeal were as follows:

1. With respect to the alleged missed test on 28 August 2012, did the Tribunal err in its interpretation of and application of Article 11.4.3(c) of the International Standard for Testing, January 2012 (**IST**)?

2. With regard to the First Alleged Failure, did the doping control officer do what was reasonable in the circumstances to try to locate Mr Gemmell, short of giving him any Advance Notice of the test (in compliance with Article 11.4.3(c) International Standard for Testing 2012 (**IST**))?

3. Were it to be concluded that the DCO did what was reasonable in the circumstances to try and to locate the respondent, did the respondent fail to be "*present and available*" (**IST** Article 11.4.1, 11.4.3(e))?

4. Were it to be concluded that the respondent was not available, was that a result of negligence on his part (**IST** Article 11.4.3(e))? If so, was it nevertheless excusable?

5. With respect to the second and third alleged failures in July 2013 and on 13 September 2013, was the unavailability of the athlete negligent and if so, was it not excusable?

6. Does the *lex mitior* principle apply?

7. If an Anti-Doping Rule violation is established, were any of the three alleged breaches/failures "inexcusable"?

8. If an Anti-Doping Rule violation is established what is the appropriate sanction" and in that regard from what point in time should the sanction apply?

56. Because of its findings on issues 1 – 3, the Panel finds it appropriate to deal with issues 4, 5, 7 and 8 together.

Issue One: Did the Tribunal Err in its Interpretation and Application of Article 11.4.3(c) of the IST

Appellant's Submissions

57. The Appellant contended that the Tribunal had failed to properly direct itself. It noted that when the Tribunal considered the First Whereabouts Failure, it gave primacy to evidence that Mr Gemmell was present at 49 Cliffhanger Drive at the time the DCO attended the address. It asserted that this had led to the Tribunal approaching the requirements of Article 11.4.3(c) of the IST erroneously since it was not necessary for DFSNZ to prove that Mr Gemmell was not present at 49 Cliffhanger Drive. Evidence as to whether Mr Gemmell was present at 49 Cliffhanger Drive was only relevant to whether or not there was any negligence on Mr Gemmell's part that contributed to the failure (Article 11.4.3(e) IST), and should not be considered before the requirements of Article 11.4.3(a)-(d) of the IST had been established.

58. By beginning its analysis with determining whether Mr Gemmell was present at 49 Cliffhanger Drive, the Tribunal's approach to Article 11.4.3 of the IST was flawed, and once the Tribunal had prematurely concluded that Mr Gemmell was present at 49 Cliffhanger Drive, this determination coloured its enquiry into whether the DCO did what was necessary to locate Mr Gemmell in the circumstances under Article 11.4.3(c) of the IST, and caused the Tribunal to err. Rather than merely assessing whether the DCO took reasonable steps to locate Mr Gemmell at 49 Cliffhanger Drive, the Tribunal effectively asked itself whether the DCO took reasonable steps to locate Mr Gemmell at 49 Cliffhanger Drive *in circumstances where Mr Gemmell was present at that address*. This erroneous approach was said

to have resulted in the Tribunal taking irrelevant factors into account, such as Mr Gemmell's location in a basement room and the possibility that Mr Gemmell was asleep, and wrongly interpreting and applying Article 11.4.3(c) of the IST. This also caused the Tribunal to erroneously focus on what steps the DCO could have reasonably taken to wake Mr Gemmell.

59. When the enquiry was approached properly, it was irrelevant that Mr Gemmell may have been asleep in a basement room. The reasonableness of the actions of the DCO were to be assessed objectively, without reference to the particular situation of Mr Gemmell. Any consideration of the particular situation of Mr Gemmell was only relevant to whether he can establish that he was not negligent in being unavailable for testing.

Respondent's Submissions

60. For the Respondent it was submitted that the Tribunal correctly directed itself in its approach to the question of whether a whereabouts failure was committed on 28 August 2012, having regard to the evidence presented to it, and the position taken by the applicant.

61. The Respondent contended that the Tribunal properly recognised that the applicant was required to establish, pursuant to Art 11.4.3(c) of the IST, *"that during the specified 60-minute time slot, the DCO did what was reasonable in the circumstances (i.e. given the nature of the specified location) to try and locate the Athlete, short of giving the Athlete any advanced notice of the test"*. That provision was reinforced by the comment to it, which states *"Once the DCO has arrived at the location specified for the 60-minute time slot, if the Athlete cannot be located immediately then the DCO should remain at that location for whatever time is left of the 60-minute time slot and during that remaining time he/she should do what is reasonable in the circumstances to try and locate the Athlete"*. The Tribunal did not err in its interpretation of an application of Article 11.4.3(c) of the IST, and was correct to hold that the claim that to make a phone call to Mr Gemmell would not have been to give him advance notice (paragraph 34). In this respect the applicant's position before the Tribunal was informed by and based upon its interpretation of paragraph 4.16 of the WADA Guidelines. This document was correctly described by the Tribunal as a guide, and not a document that was either binding, or conclusive. Furthermore the Tribunal correctly noted that the approach suggested by the WADA Guidelines was not adopted in the USA where the test was to be taken.

Panel's Findings on Issue 1

62. The Panel upholds the Appellant's contentions. In view of the wording of the mandatory New Zealand SADR which lays down an explicit rule prohibiting advance notification, it is of little or no relevance that USADA and certain other countries elect to allow a phone call to the athlete at a certain point in the testing process. The Tribunal gave excessive weight to the USADA approach. The only procedures which had direct and mandatory application in this case were those contained in the SADR and the IST. The fact that the testing was being carried out in the USA was irrelevant from a legal standpoint.

63. The out of competition regime is an important element of the WADA Code and the general rule of no notification is the central element of that regime. To use the language of Article 11.1.1 of the IST, when referring to "objective/general principles", "it is recognised and accepted that … No Advance Notice of out of competition testing is at the core of effective Doping Control." The starting point in New Zealand cases, when considering whether all reasonable steps have been taken by the DCO, is that No Advance Notice should be given to the athlete.

64. The Sports Tribunal erred in law when concluding that "although there might be a clear and simple arrangement its [the testing procedures] focus should be on getting a sample. A laboured approach to process should not deflect the task away from practical realties and common sense". The major purpose of the out of competition testing regime is to obtain a valid and reliable sample. Meticulous care needs to be taken to ensure as far as possible the provision of reliable samples. The practical, and indeed unfortunate reality, is that a small number of athletes will take steps to thwart these objectives. The evidence supports, and the Panel accepts in its entirety, the submissions of the Appellant, that:

> 49. There is good reason for the repeated requirement in the SADR, Code, IST and Guidelines for chaperoning from the moment of notification. In a very short timeframe (a matter of minutes) an athlete can alter the integrity of a sample, using methods known to have been used by athletes in the past, including:
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> (a) blood hemodilution (often by injecting saline solution) or withdrawal;
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> (b) manipulation or substitution of urine;
>
> (c) forced diuresis;
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> (d) urinating and superhydrating to create diluted samples;
>
> (e) attaching a device.[37]
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> 50. Furthermore, an athlete who is phoned may answer the phone and then simply decide not to present themselves to the DCO (by claiming they are not there). Athletes have been known to provide unique phone numbers to anti-doping organisations so they immediately know who is ringing. An athlete in this circumstance could effectively choose to get one whereabouts 'strike' (out of three) instead of providing a sample that contained a prohibited substance.
>
> 51. Most critically, such a phone call alerts any athlete who may be doping that the anti-doping organisation is seeking to test them about that time. So, rather than an attempt simply being unsuccessful, enabling further attempts within a short (and potentially critical) timeframe, the athlete is warned and may be in a position to confound future attempts until he/she is able to present "clean".
>
> 52. Diluting the requirement that, except in exceptional circumstances, an athlete must be continuously observed from the moment they receive notification of test to the time they provide the sample will create greater opportunity for doping

[37] Appeal Brief, vol. 1, tab 18, p.287, para [13]; Appeal Brief, vol.1, tab 17, p.284, para [10].

> athletes to manipulate samples, undermining the "core of effective doping control".

65. The Panel also cannot accept as a matter of legal interpretation, the Tribunal's understanding of No Advance Notice and its consequent findings that a telephone call would not have been giving the athlete advance notice. As was submitted by the Appellant:

> 48. The definition of 'no advance notice' is clear – it requires that the athlete is continuously chaperoned from the moment of notification through to the sample provision. Chaperoning requires that the athlete be in sight of the DCO or chaperone. Obviously, if the phone call was placed Mr Gemmell would not have been in sight of Mr Brooks when Mr Brooks notified him that he was needed. Accordingly, the test would have occurred with advance notice to Mr Gemmell as he would not have been chaperoned from the moment of notification.

66. As a practical matter, if an athlete receives such a call indicating a DCO has arrived, there is the opportunity for the athlete to delay making himself or herself available for a time. As the cases have shown, this can open the way to malpractice.

67. In summary, the Tribunal in a number of respects misconstrued and misapplied the IST. It also gave excessive weight to the largely irrelevant views and approach of USADA. Moreover, as contended by the Appellant, to uphold the Tribunal's decision would indirectly make a telephone call to the athlete in other cases a mandatory requirement.

Issue Two: Reasonableness of Steps Taken to Locate the Athlete

Appellant's Submissions

68. As to the reasonableness of the steps taken by the DCO to locate Mr Gemmell, the Appellant submitted that Article 11.4.3(c) of the IST required the DCO to do what was reasonable in the circumstances to try and locate Mr Gemmell, short of giving him any advance notice of the test. This was consistent with the express focus of the WADA Code and the SADR on testing on a No Advance Notice basis. After referring to the definition of "No Advance Notice" in the IST, SADR and the Code, which the Panel has quoted earlier, the Appellant observed that the importance of out of competition testing being carried out without notifying the athlete was emphasised by Article 2.0 of the IST, Rule 6.5 of the SADR and Article 5.1.2 of the Code, which all specify that all out of competition testing shall be on a no advance notice basis, except in exceptional circumstances. Therefore, what was reasonable to locate an athlete in accordance with Article 11.4.3(c) of the IST must be assessed against the express overriding aim of not giving an athlete advance notice of testing.

69. The Tribunal's finding that the DCO should have contacted Mr Gemmell on his mobile phone was incorrect on the proper interpretation and application of Article 11.4.3(c) of the IST and was contrary to the requirements of the no advance notice regime in the WADA Code, SADR and IST. DFSNZ contended that a telephone

call to the athlete could only ever be appropriate in exceptional circumstances, viewed objectively at the time. Such circumstances did not exist in this case.

70. Counsel for the Appellant noted that the IST did not specifically say what steps will be considered "reasonable" for the purposes of Article 11.4.3(c) (other than the requirement that they are to be short of giving any advance notice of the test). However, the comment to Article 5.1 of the IST expressly refers to the WADA Guidelines in determining what constitutes reasonable steps to locate an athlete in the context of Article 11 of the IST. Paragraph 4.16 of the WADA Guidelines specifically provides that a DCO should not telephone the athlete. It states:

> 4.16 If the specified location is the *Athlete's* house or other place of residence, the DCO should ring any entry bell and knock on the door as soon as he/she arrives. If the *Athlete* does not answer, the DCO should not telephone the *Athlete* to advise him/her of the attempt. Instead, the DCO should wait somewhere close by (e.g., in his/her car) in a place where he/she can observe the (main) entrance to the residence. He/she should then knock/ring again a short time later (e.g. 15 minutes), and should keep doing so periodically until the end of the 60 minutes. At that point, he/she should try one last time at the end of the 60 minutes before leaving the location and completing an Unsuccessful Attempt Report.

71. It was therefore argued for the Appellant, that the DCO who attended 49 Cliffhanger Drive on 28 August 2012, acted in accordance with the WADA Guidelines. Specifically, he periodically knocked on the door of the residence and rang the door bell during the 60 minute time slot designated by Mr Gemmell for testing. Importantly, the DCO also complied with the WADA Guidelines by not telephoning Mr Gemmell to advise him of the attempt. This was also in accordance with the International Testing Mission Order provided by DFSNZ for the attempt, which specifically stated that "all tests must be conducted with no advance notice."

72. The Tribunal correctly noted that the WADA Guidelines were not conclusive and the approach in the WADA Guidelines had not been adopted in the United States of America, where it is the practice of USADA to attempt to make telephone contact in the last five minutes or so of a stipulated hour. However, DFSNZ submitted that it was an error for the Tribunal to consider the approach of USADA, as USADA practice is out of step with the majority of international practice, and in any event the requirements of the IST are not to be interpreted on the basis of the approach of USADA to those guidelines.

73. In DFSNZ's submission, the Tribunal's approach was erroneous as it failed to properly interpret and apply Article 11.4.3(c) of the IST, in particular the issues of advance notice and the realities of drug testing. By way of example, counsel for DFSNZ argued:

    a. At paragraph [30] of its decision, the Tribunal comments on the attempts of the DCO to locate Mr Gemmell. It states that the DCO, in searching at the back of the residence, shows that he thought that more should be done than knocking on the door. DFSNZ agrees that DCOs are expected to make any additional

reasonable investigation of the location, but the Tribunal's approach fails to distinguish between efforts which are not designed to give advance warning to the athlete and ones which inevitably do. What is stated by the Tribunal to be obvious - that a phone call is likely to be both simpler and more effective - if taken logically suggests that the DCO should simply arrive and knock on the door and if there is no reply make the phone call immediately (negating any need to investigate the premises). Such an approach is not in line with the fundamental purpose of drug testing.

b. At paragraph [32] of its decision, the Tribunal states that the "focus should be upon getting a sample." This is not correct - the real purpose and focus is to obtain a sample which is most likely to not have been manipulated in some way to obscure evidence of doping. Otherwise none of the complicated elements of the whereabouts programme would be necessary and athletes would simply be phoned and asked to report in.

74. Further, the statement at paragraph [34] of the Tribunal's decision that "We reject the suggestion that a phone call would have been giving him advance notice" was erroneous. It did not accord with the definition of "No Advance Notice", nor did it accord with what was set out as the notification process in the IST.

75. The Tribunal also noted that new 2015 international guidelines are to be promulgated, which will recognise greater flexibility in respect of telephone calls. DFSNZ submitted that the Tribunal erred in its interpretation of the guidelines, and in giving weight to them in making its decision.

Respondent's Submissions

76. The Respondent supported the finding of the Tribunal that the DCO had not been shown to have acted reasonably. The Tribunal's assessment of what would have been reasonable in the circumstances, given the steps that the DCO actually took, led it to conclude correctly that in the circumstances which had arisen, it was necessary for the DCO to have attempted to make a call to Mr Gemmell to confirm where he was, and if he was sleeping, as the evidence suggested he had been, to have woken him.

77. The Tribunal expressly acknowledged that whether it was reasonable to make or not make a phone call would always depend on the particular facts of an individual case. Here, such a call was necessary. This conclusion was one the Tribunal was entitled to reach, and was correct.

78. As to the evidence of Messrs Sieveking and Kemp, their assertion at paragraph 8, that "*Most anti-doping organisations never make phone calls and this shall be done only in exceptional circumstances*", was belied by the evidence/statement of Mr Steel which disclosed, to the contrary, that in 6 out of 12 countries identified, the anti-doping organisations will make a telephone call 5 minutes before the end of a one hour test on RTP athletes, where circumstances are <u>not</u> exceptional.

79. In other words, the Respondent said 6 of 12 leading anti-doping nations accept that in unexceptional circumstances, a phone call 5 minutes before the end of a 1 hour

test is an appropriate and reasonable step for a DCO to take (where, of course, the DCO has a number to call). The clear position was that, on the limited evidence of the practice in other countries presented, there is no uniform policy or procedure, either mandating or prohibiting, the making of a phone call within 5 minutes of the end of a 1 hour test in unexceptional circumstances. Contrary to the Appellant's submissions, it could not be said that a majority of the 12 countries referred to do not allow this, or that the approach of USADA is out of step with the majority of international practice.

80. The Respondent challenged the assertion of Mr Steel, that since athletes who are included in the register testing pool have no obligation to provide their phone number, not recording a missed test for the reason that a DCO did not try and call an athlete, would therefore create an obvious inequality among athletes depending on whether the athlete provides his or her phone number or not. This was both otiose – given the fact specific circumstances of the case – and in any event not compelling in its logic.

81. Nor could it be said that it was an error for the Tribunal to have taken into account the evidence of USADA practice – a submission that invited the response, that on that basis neither the Tribunal (nor this Panel) should take into account the practice of other national doping organisations – which would be unreal. The Appellant was simply seeking to pick and choose the evidence that supported the particular approach and policy position it takes.

82. It was unknown the approach of other anti-doping organisations, for example, China, France, Germany, Finland, Greece, Ireland, Italy, Spain, any Middle Eastern countries, or any African or South American countries. It was inappropriate, in those circumstances – and in any event – for the Panel to be asked to determine, as a matter of policy of international application, that any particular approach is correct or mandatory. Such would be to deprive any future Tribunal or CAS panel, or equivalent of the latitude to deal with an application having regard to the particular facts of the case.

83. For all of the foregoing reasons, it was therefore Mr Gemmell's position that the Tribunal's conclusion that the alleged whereabouts failure on 28 August 2012 was not established, should be upheld.

Panel's Findings of Issue Two

84. In addressing the question of whether the Tribunal was correct to reach the conclusion that the Applicant had not shown that the DCO had acted reasonably in the circumstances, it is important to recall that this Panel is entitled to approach the matter *de novo* and reach its own conclusion on the issue of reasonableness. In short, the Panel is entitled, if it concludes it appropriate, to substitute its own view for that of the Tribunal. In other words, this is not a Wednesbury

unreasonableness or error case in either the *Edwards v Bairstow*[38] or *Mahon v Air New Zealand*[39] sense.

85. Regrettably, the Panel has concluded that the Tribunal's view on the question of reasonableness was unjustified and incorrect. The proper conclusion was, that taking into account the mandatory legal out of competition testing framework, and in particular Article 11.4.3(c), and the specific instructions to the DCO, the DCO acted reasonably in the circumstances. The Panel's conclusion is based on the following reasons.

86. First, the out of competition testing regime applicable under New Zealand law was set out in Article 11.4.3 of the IST. There is no ambiguity in that provision as to preclusion of advance notice to the athlete by telephone. The test as to what was reasonable in the circumstances must therefore be considered on the basis that one puts to one side any kind of advance notice of the test. This is underlined by the definition of "No Advance Notice" in Article 3.1 of the IST. As correctly submitted by the Appellant (see paragraph 69 above), a telephone call to the athlete is logically inconsistent with the "No Advance Notice" definition. Whether that approach is sensible or justifiable was not for the Tribunal to decide. It may well be that the amended 2015 version of the IST, which will allow an exceptional circumstance to the No Advance Notice regime is more likely to be efficacious, but that is a matter for the future. It should not have influenced the decision of the Tribunal on the application of the rules as they stand.[40] It is apparent from a reading of the transcript that the Tribunal allowed itself to be misled by discussing exceptional cases such as gated communities or multi-story apartment blocks where as a matter of necessity a telephone call may simply have to be made, and assuming that if calls could reasonably be made in those cases there was no logical reason why it was not reasonable to make a call in the present case. To take that approach, is to allow the truly exceptional case to swallow the general rule requiring no advance notice.

87. Secondly, the Tribunal did not give sufficient weight to the mandatory no advance notice provisions under the SADR. Instead it reasoned that a significant factor, showing that the DCO did not act reasonably, was that USADA practice was to make a telephone call at the end of the allocated hour for testing if the athlete had not been located. The procedure of USADA may well be of some interest but it cannot itself require ignoring the explicit New Zealand legal procedure to the contrary. In this respect it must be emphasised, in fairness to the DCO, that the International Testing Mission Order addressed to him, consistently with the SADR provisions, stated explicitly that "all tests must be conducted with No Advance Notice." The fact that those words were capitalised suggests it was plainly intended that the DCO would understand and apply the No Advance Notice requirement. It may be noted in passing that the Tribunal appears to have misunderstood, or not been made aware of this fact, for in paragraph 28 of its decision, instead of recording this explicit instruction, which prohibited the making

38 *Edwards v Bairstow* [1956] AC 14.

39 *Mahon v Air New Zealand* [1983] NZLR 662.

40 Transcript of Tribunal hearing at T 98, line 27 – T99, line 2 (Mr Galbraith QC; Tribunal's Ruling; para 29 – 30.

of a telephone call (see our finding in paragraph 64), it simply noted on what it called "the critical issue" (i.e., whether there should have been an endeavour to contact Mr Gemmell on his mobile phone, the number for which was available) that "Mr Brooks was not specifically asked to do so", i.e., make a telephone call.

88. Thirdly, the Tribunal gave no, or no significant weight to the legal obligation of the athlete to make himself available for testing during the specified time, which he or she has specified. As we note below,[41] the athlete had chosen the latest possible time for a test. Therefore, he needed to take steps to ensure that he was in a position to hear a knock at the door.

89. Finally, it was obviously of greater importance that the conduct of the DCO complied with the WADA Guidelines (although they are not binding) and the mandatory SADR Rules and the IST, than it was that the DCO was not acting in accordance with USADA policy. Under the WADA Code it is for each state to decide on the merits which approach to adopt. The New Zealand position, as explained by Mr Steel, is clear on the matter, and in short, what other countries like the USA choose is for the most part beside the point. Why the USADA policy should be given significant weight was never satisfactorily explained by the Tribunal. Nor is it appropriate for the Panel to take into account a policy which is not expressed in the terms of the IST itself, and which seeks to read down the express words of the IST, or to read into the express terms of the IST words that do not exist, such as "*save in exceptional circumstances*". Moreover, the evidence was that all but one of the International Sporting Federations for whom DFSNZ undertook testing supported the No Advance Notice stance of the Appellant.

90. For all the foregoing reasons the Panel finds that the DCO acted reasonably in carrying out the testing procedures on 28 August 2012.

Issue Three: Were it to be concluded that the DCO did what was Reasonable in the Circumstances to Try and Locate the Athlete, Did the Respondent Fail to be "Present and Available" for Testing, and was he Negligent?

91. The Appellant acknowledged that Clause 11.4.3(e) of the IST requires an athlete's failure to be "available" for testing to be at least negligent.[42] Being "available" was not synonymous with being "present" at a specified address. It was the athlete's responsibility to be aware of the requirements of the IST. This responsibility cannot be derogated from by relying on a secondary document, such as the athlete whereabouts guide.

92. Athletes that place themselves in a position whereby they cannot either hear or see a DCO who attends a specified location during the time they have nominated for testing defeat the purpose of the rules and cannot be considered to have made themselves "available". An athlete's failure to make him/herself available for testing on a no advance notice basis is not an exceptional circumstance that justifies notice being given.

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41 See para [143] below.

42 See para [22] above.

93. For the Respondent, it was submitted that any presumption that he was negligent (upon proof of the matters set out in sub-clauses 11.4.3(a) – (d)) was answered by his evidence, which positively established that no negligent behaviour on his part caused or contributed to him being *"unavailable for testing at such location during such time slot"*. This was because:

    1. It is not negligent behaviour to be present at the location nominated in a whereabouts filing, but to be unable to hear a doorbell or knock at the door, whilst sleeping heavily following strenuous and exhausting physical activity and travel; and

    2. On the evidence, the applicant failed to establish that Mr Gemmell ought to have been aware that, in addition to being at the location identified in his whereabouts filing, he needed to be *"available"* in the sense of being able to hear a knock on the door or the ringing of a doorbell.

       Wholly absent from the applicant's evidence before the Tribunal, and the Panel, was evidence establishing that any education, or any sufficient education, was provided to the athlete as to what *"availability"* means, beyond the obvious need to be present at the location identified in the whereabouts filing. To the extent that evidence was tendered by the applicant:

       (a) Mr Gemmell relied on the content and focus of the athlete whereabouts guide (appeal brief, volume 2, p 296 – 300) which fail to identify what is claimed to be required, in terms of the approach adopted by the applicant in its prosecution of this case.

       (b) That guide, was in particular at page 297/298, and the newsletter at pages 299/300 entirely directed to the provision of advice to RTP and other athletes, as to their obligation to provide whereabouts filings that identify their primary residential address; training locations, dates and times; temporary addresses; flight information; competition locations dates and accommodation details; and a *"specific 60-minute time slot and location – only if you are an athlete in the registered testing pool (RPT)"*.

       (c) There was no evidence before the Tribunal, and there was none before this Panel, that Mr Gemmell was ever provided with information or education informing him that his obligation extended to more than nominating a location where he would be available for 60 minutes on any particular day and being there. See further, cross examination of Ms Ellis, transcript, p 37 l 17 – p 40 l 20, p 56 l 1 – 21.

94. On the evidence, Mr Gemmell was at the property nominated by him in his whereabouts filing, and he had no reason to think his obligation required him to do more than that, to be *"available"*, particularly in circumstances where there is no suggestion that he was, in fact, seeking to evade a test. In those circumstances, the Applicant's submission to the Tribunal, in particular the submission that *"An athlete who puts himself in a position where he cannot hear the ringing of the doorbell and knocking at the door at the location he has specified cannot rebut the presumption of negligence"*, was not, given Mr Gemmell's evidence and the

supporting evidence tendered by him, particularly of Nikki Butterfield, sustainable on the facts of this case.

95. The Panel is unable to accept the Respondent's submissions and finds without any hesitation that there was negligence on Mr Gemmell's part, for the reasons urged upon it by the Appellant.

Issue Four and Five: Second and Third Whereabouts Failures

96. In view of the finding of the Panel, that the First Whereabouts Failure occurred on 28 August 2012, it becomes necessary to consider Mr Gemmell's position on these matters.

97. Mr Gemmell's position in respect of the second alleged whereabouts failure, is that a filing failure did occur (i.e., negligence was conceded), but it was not inexcusable.[43]

98. Mr Gemmell's position in respect of the third alleged whereabouts failure, was that he was not present at the address stated in his whereabouts filing at the time the DCO attempted to locate him, but this was not negligent, or should it become relevant, was not inexcusable.[44]

99. For reasons set out below, when sanctions are addressed, the Panel has found that Mr Gemmell has committed an Anti-Doping Rule Violation ("**ADRV**") under Rule 3.4 of the SADR in that it has been established that these were three missed tests within an eighteen month period.

Issue Six: *Lex Mitior*

100. It was Mr Gemmell's position that if this Panel allowed the appeal and found that he had committed an Anti-Doping Rule Violation under Rule 3.4 of the SADR, he was entitled to the benefit of the *lex mitior* rule.

101. The basis of this submission is Rule 22.1.2 of the SADR which states:

> With respect to any *Anti-Doping Rule Violation* case which is pending as of the Effective Date and any *Anti-Doping Rule Violation* case brought after the Effective Date based on an *Anti-Doping Rule Violation* which occurred prior to the Effective Date, the case shall be governed by the substantive anti-doping rules in effect at the time the alleged *Anti-Doping Rule Violation* occurred, unless the *Sports Tribunal* hearing the case determine the principle of "*lex mitior*" as applied by *CAS* should be applied in the circumstances of the case.

102. The *lex mitior* Rule has been applied by the Sports Tribunal of New Zealand (the Sports Tribunal) and in several cases by the Court of Arbitration for Sport.

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43 See paras [147] – [149] below.

44 See paras [150] – [154] below.

The principle was originally a criminal law principle and applies to sanctions. In general terms it is that if at the date of hearing a more lenient sanctions regime has replaced the regime applicable at the time of the violation, the athlete is entitled to be sanctioned under the more lenient regime.

103. The position of DFSNZ is that the principle applies only to sanctions and not the elements of violation and in any case can not apply in this case because a more lenient regime was not in place at the date of the hearing. Mr Gemmell's position is that it should also apply to the elements of the violation and be applied where a change to the WADA Code has been adopted but is not yet in force.

104. The factual position is that in November 2013 WADA provisionally adopted the 2015 WADA Code which does not come into force until 1 January 2015 ("the **2015 Code**"). The revised Code was put out for consultation in November 2013 and was finally adopted in March 2014 without any substantive changes. The relevant change which will come into effect on 1 January 2015 reduces the period in which the three missed tests and/or filing failures must take place from 18 months to 12 months. If this regime had been in place at the time of the alleged violations, Mr Gemmell would not have committed a violation under Rule 3.4 of the SADR.

105. Mr Hunt acknowledged that he could not cite authorities to support the proposition advanced on behalf of Mr Gemmell but said that this was probably because the specific factual position of a new rule being adopted but not yet being in force at the date of the hearing had not previously been considered. His submission was that this Panel should approach the matter on the basis of first principles which favoured the application of the *lex mitior* principle in the circumstances of this case.

106. In support of his submissions, Mr Hunt noted that Rule 22.1.2 gave the Sports Tribunal the power to apply the principle if it considered it appropriate to do so in the circumstances of the case; noted that Rule 25.1 of the 2015 Code provides that it "shall apply in full on 1 January 2015" thus leaving open the possibility of transitional provisions or arrangements; and place some reliance on a WADA statement which appears in the Sports Tribunal case of *Drug Free Sport New Zealand v Rangimaria Brightwater-Wharf* (ST14/10).

107. The WADA statement which appeared in *Brightwater-Wharf* stated:

> WADA is satisfied that as of the publication of the list, i.e a few days ago, any substance that has changed category and could then result in a more favourable treatment of a pending case should be taken into account immediately.
>
> While legally, the *lex mitior* would only apply as of 1st January when the list is fully enforced, we accept for practical reason (sic) that this principle be applied by anticipation to existing pending cases. It means that WADA would not appeal the decision where a non-specified substance is already considered as specified.

> We agree there is no specific legal justification to this advice. Our sole intention is to be pragmatic. Therefore, sanctioning bodies remain free to decide as they wish.

108. A relevant consideration, advanced by Mr Hikaka on behalf of DFSNZ, is that if *lex mitior* applies to the elements of the violation, it leads to an uneven playing field, a situation which the WADA Code does not support. The underlying point is that fairness dictates that all athletes compete on a level playing field. To allow some athletes to gain a competitive advantage by the retrospective application of the rule providing for different elements of a violation, creates an uneven playing field.

109. This Panel on a construction of the SADR, a consideration of how the *lex mitior* principle has been applied, and the basis of the principle, is of the view that *lex mitior* cannot assist Mr Gemmell. The civil law basis of the principle applies to criminal sanctions only; it has been applied in anti-doping cases on the basis that the new sanctions are in place at the date of hearing; and Rule 22.1.2 on its construction cannot assist. Also, it cannot apply if the new sanction is not in force at the date the sanction is imposed.[45]

110. Rule 22.1.2 of the present Rules has no application to a violation committed after 1 January 2012. The rule in the 2015 Code does not come into effect until 1 January 2015. Even if that rule applied at this stage, it would be necessary to apply the relevant rules at the time of the violation unless this Panel considers it appropriate for the *lex mitior* principle to apply (Rule 22.1.2).

111. The 2015 Code is not yet in force. There needs to be appropriate steps taken to promulgate a new SADR in New Zealand. This Panel accepts that because New Zealand is a signatory to WADA, the relevant provisions of the 2015 Code will almost certainly be incorporated into a new SADR to take effect from 1 January 2015. However, the 2015 Rule is not yet in place in New Zealand.

112. As already indicated, even if the rule had been in force this Panel is of the view that it applies to sanctions only and not to the elements of the violation. This view is based on the origin of the *lex mitior* principle, namely a rule to allow a criminal to be sentenced under a more lenient regime, which is in force at the date of sentencing and is reinforced by the manner in which the Court of Arbitration for Sport has applied the principle.

113. Mr Hunt submitted that a lacuna which now exists between the present Rule 22.1.2 and its replacement, which will not come into effect until 1 January 2015, can be met by applying the principles of proportionality. Even if this Panel had accepted that the *lex mitior* principle applies to elements of the violation as well as to sanctions, it would not have applied the principles of proportionality to assist Mr Gemmell. One reason for this is that the 2015 Code has in Rule 25.3 its own

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[45] See *Drug Free Sport New Zealand v Brightwater-Wharf* (ST 14/10) at [6]; Advisory opinion of the Court of Arbitration for Sport CAS 2005/C/841 at [52]; *World Anti-Doping Agency v McHale* (decision of Irish Sport Anti-Doping Appeal Panel, 29 July 2010) at [29]; *Warren v USADA* (CAS 2008/A/1473) at [130] – [131]; and *Scoppla v Italy No. 2* (decision of the European Court of Human Rights, 17 September 2009) (Application No. 10249/03) at [108].

proportionality provision. Article 25.3 of the 2015 Code provides that if a final decision finding an Anti-Doping Rule Violation is given prior to 1 January 2015, and the athlete is still serving the period of *Ineligibility* as at 1 January 2015, the athlete may apply to the *Anti-Doping Organisation* (namely the Sports Tribunal) to consider a reduction of the period of ineligibility in light of the 2015 Code. The Sports Tribunal would then have power if it considered it appropriate to reduce the period of ineligibility.

114. This provision, when considered with the introductory words in both the WADA Code and the proposed 2015 Code, suggest that WADA recognised the position and elected to take no action. The introductory note that "the Code has been drafted giving consideration to the principles of proportionality and human rights", suggests that WADA chose not to alter the provisions of the replacement provision to Rule 22.1.2 of the 2015 Code to allow *lex mitior* to apply once a new Code has been adopted and before it came into force.

115. Lastly, in this Panel's view, it is appropriate that the principle only applies to sanctions, as there is a need to protect the principles of the level playing field. It is inappropriate to apply what would in effect be a modified *lex mitior* principle.

116. It is only necessary to refer briefly to the WADA statement noted in the *Brightwater-Wharf* case and earlier authorities of this Court. While the WADA statement gives some support to Mr Hunt's submissions, it acknowledged that there was no specific legal justification for the advice. It was giving pragmatic advice on the basis of the circumstances of that case. This Court is required to apply the provisions of the SADR and in its view the pragmatic advice given in that case does not assist in the circumstances of this case, particularly when WADA employees give evidence before the Panel and did not advocate a pragmatic approach.

117. Mr Hunt acknowledged that he could not locate any authority which determined that a WADA Code Rule not yet in force could be utilised in applying the *lex mitior* principle. The issue is not whether the principle has application to Anti-Doping Violations, but whether it can be applied when the new provisions are not yet in force. One of the cases referred to in support of the respondent's submissions was *WADA v Hardy and USADA* (CAS 2009/A/1870). That case referred to a Court of Arbitration and Sport Advisory opinion (CAS 94/128 UCI and CONI). This opinion included a consideration of the *lex mitior* principle.

118. The discussion on the principle in CAS 94/28 related to penalties. The question and answer was in the following terms:

> **Question d):If the IOC rules on doping decree penalties which are less severe than the previous ones:**
>
> *1. do these new penalties apply automatically? (without internal introduction)*
>
> **New provisions enacted by the IOC do not apply automatically, except in the case where the statutes or regulations of the sports authority**

> **concerned or the undertakings entered into by it contain a clause under the terms of which such provisions apply immediately.**
>
> *2. must these new penalties take the place of those already applied to athletes?*
>
> **In the case where the answer to the first part of the question is affirmative, the new provisions must also apply to events which have occurred before they came into force if they lead to a more favourable result for the athlete convicted of doping. Except in cases where the penalty imposed is fully executed, the penalty provided by the new provisions will replace, it, if necessary.**

119. While the advisory opinion is not binding on this Panel, it is noted that if it is a correct statement of the principle, it does not assist Mr Gemmell in this case. This is because the new rule is not yet in force in New Zealand and because it is a reference to penalties only.

120. While it is not necessary to refer to the various cases mentioned by counsel, it is necessary to briefly comment on three of them. In *Puerta v ITF* CAS 2006/H/1025, the panel noted that a sanction must be just and proportionate and if it is not, may be challenged. It stated that if the WADA Code does not provide a just and proportionate sanction, namely when there is a gap or lacuna in the Code, the gap or lacuna must be filled by the panel.

121. The submission on the basis of *Puerta* was that there is a gap created by the provisions of the WADA Code and the 2015 Code because of an oversight. This is because the 2015 Code allows relief to be given to an athlete whose sanction is still running at 1 January 2015, but there is no relief available where the sanction terminates prior to 1 January 2015. This Panel is not satisfied that there is an unintended gap or lacuna. Further, the principle of proportionality cannot in the Panel's view apply in circumstances where the new more lenient provision is not in force.

122. Support was also sought from the European Court of Human Rights case of *Scoppola v Italy* (No 2) (Application No 10249/03 17 September 2009). The Court in that case stated:

> … it is necessary to … affirm that Article 7(1) of the Convention guarantees not only the principle of non-retrospectiveness of more stringent criminal laws, but also, and implicitly, the principle of retrospectiveness of the more lenient criminal law. That principle is embodied in the Rule that where there are differences between the criminal law in force at the time of the commission of the offence and the subsequent criminal laws enacted before a final judgment is rendered, the Courts must apply the law whose provisions are most favourable to the defendant.

123. The Court in *Scoppola* was considering whether a person convicted of murder was entitled to be sentenced under a more lenient law which applies at the date of sentencing. Article 7(1) was an article in the Convention for the Protection of Human Rights and Fundamental Freedoms. The article provided in effect that a

person could not be convicted of a criminal offence retrospectively and also stated, "nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed". An earlier Court case had provided that the article did not guarantee a right to a more lenient penalty which is provided for in a law subsequent to the offence. The Court in *Scoppola* effectively reversed that earlier decision by providing for the retrospective application of more lenient penalties. The case should be considered in that context and has no application in the circumstances of this present case.

124. Finally, Mr Hunt referred to a recent American decision of *Klineman v USADA* CAS 2014/A/3540. Klineman was suspended after a positive drug test and applied for a reduction in the terms of the suspension imposed on her. Evidently the basis of the application was that Article 25.3 of the WADA 2015 Code contained a gap or lacuna so that the doctrine of proportionality required modification of the terms of suspension. A sole arbitrator has allowed her appeal that has not yet given the reasons for doing so. Without knowing these reasons the Panel does not find the case of any assistance.

125. In summary, the principle of *lex mitior* does not assist Mr Gemmell. It does not apply to a provision which is not yet in force and when it does apply, the authorities indicate it applies to sanctions and not the elements of a violation.

VII. SANCTION

126. For the reasons given, the Panel has found that Mr Gemmell has committed an ADRV under Rule 3.4 of the SADR and that the *lex mitior* rule has no application. It is therefore necessary for the Panel to consider the appropriate sanction.

127. Rule 14.3.3 of the SADR specifies the sanctions applicable to breaches of Rule 3.4. Relevantly it states the period of ineligibility shall be a minimum of one year and maximum of two years based on the Athlete's degree of fault.

128. The written Comment to Rule 14.3.3 states at follows:

> The sanction under Rule 14.3.3 shall be two years where all three filing failures or missed tests are inexcusable. Otherwise, the sanction shall be assessed in the range of two years to one year, based on the circumstances of the case.

129. Rule 20.2.3 of the SADR provides that the Comments annotating various provisions of the SADR shall be used to interpret them, where applicable, to assist in the understanding and interpretation of the Rules.

130. In *Australian Sports Anti-Doping Authority v Bannister* (Ref A1/2013) Mr Sullivan QC, sitting as the sole member constituting the CAS panel for that matter, speaking of the WADC equivalent of Rule 14.3.3 of the SADR (it being remembered that the SADR are, as they are required to be, substantially identical to the provisions of the WADC) said (at paragraph 51):

> Confining the comment to its true purpose of being an aid to interpretation, or to be used in interpreting the relevant [rule], in my opinion [Rule 14.3.3] is to be construed as meaning that a two year sanction will be applicable only where all three missed tests are inexcusable. If one or more of the missed tests is not "inexcusable" then the sanction should be reduced based on the Tribunal's assessment of the Athlete's "degree of fault".

131. Each of the parties before the Panel submitted that this was a correct statement of the effect of Rule 14.3.3 and, in those circumstances, the Panel proposes to adopt it.

132. As will be seen from what follows, the Applicant acknowledges that at least one of the three missed tests was not "inexcusable". Whilst the Athlete ultimately did not dispute that one of the missed tests was "inexcusable", he submits, however, that the other two missed tests were not "inexcusable".

133. The Applicant submits that the appropriate sanction in the present case is a period of ineligibility of 20 months whilst the Athlete submits that, in all circumstances, the appropriate period of ineligibility is the minimum period of one year.

134. Given that it is common ground that at least one of the missed tests was not "inexcusable" the Panel is at liberty to impose a sanction of less than a period of two years ineligibility if the circumstances otherwise warrant it. In order to determine what is the appropriate sanction the Panel needs first to determine how many of the missed tests were not "inexcusable" (as stated, the Applicant says one, the Athlete says two). Having determined that, the Panel must then consider all other relevant circumstances of the case to determine the relevant "degree of fault" of the Athlete which is involved in the ADRV.

A. How many of the missed tests were not "inexcusable"

135. In *Bannister*, it was held that the ordinary natural meaning of "inexcusable" is "not excusable, unable to be excused or justified" (paragraph 58). Further, it was held that something may be able to excused or justified even if the athlete's carelessness or negligence has contributed to the happening of that occurrence (at paragraph 59).

136. Once more, the parties to this appeal do not challenge the correctness of those views expressed in *Bannister*. It is necessary, therefore, to look briefly at the circumstances of each of the three missed tests.

137. Strictly speaking there were only two missed tests and one filing failure but the SADR, as does the WADC, treats, for relevant purposes, a filing failure as the equivalent of a missed test (see, e.g., Rule 3.4 of the SADR which provides that any combination of three missed tests and/or filing failures within an 18 month period constitutes an ADRV). For convenience, we shall refer to each of the three occurrences as a "missed test". The three missed tests occurred on:

a. 28 August 2012 ("the first missed test");

b. 16 July 2013 ("the second missed test"); and

c. 13 September 2013 ("the third missed test").[46]

138. Factually, most of the discussion before this Panel related to the first missed test because as this Panel has already noted, the Sports Tribunal of New Zealand determined that there was in fact no "missed test" on 28 August 2012 with the result that an ADRV had not occurred. Thus, much of the factual focus before the Sports Tribunal of New Zealand and before this Panel was on the events of 28 August 2012. This Panel has determined that the events of 28 August 2012 did constitute a "missed test" for the purposes of the SADR and, therefore, it is necessary to look at the circumstances of each of the three missed tests in order to determine an appropriate sanction.

a. The first missed test

139. In late August 2012, the Athlete was competing in international triathlon events in Europe. On 27 August 2012 he flew from Stockholm to Denver via Frankfurt. On arriving in Colorado, he spent the evening of 27 August 2012 with his then partner at her home in Boulder, Colorado. The following day, he returned to his normal residence in Colorado which was a three-bedroom house owned by a fellow triathlete who was a friend of the Athlete.

140. The unchallenged evidence was that the Athlete, on such occasions, occupied a bedroom in the basement of the house which was the most distant point in the house away from the front door.

141. It is not disputed that the Athlete had given to USADA (who were acting as the Applicant's agent for the purposes of carrying out doping controls in the USA on New Zealand athletes) his mobile telephone number. What is put in issue is whether USADA gave that number to the DCO, Mr Phillips. We find it unnecessary to resolve the issue although our preliminary view is that if the number was not given it ought have been so given lest the DCO be confronted with an exceptional circumstance of the kind, referred to in paragraph 85 above, when a telephone call may have been necessary. What is clear is that, whether the DCO had the number or not, no attempt was made at any time in the hour between 10pm and 11pm (being the designated testing time) to contact the Athlete on that mobile telephone number. It is further not in dispute or, at least indisputable, that the Athlete had given to USADA (who are acting as agents of the Applicant for the purposes of carrying out doping controls in the USA on New Zealand athletes) his mobile telephone number but that no attempt was made at any time in the hour between 10:00 pm to 11:00 pm (being the designated testing time) to contact the Athlete on that mobile telephone number.

142. This Panel has already found that the failure of the DCO to telephone the Athlete on 28 August 2012 does not mean there was not a "missed test" on that occasion. However, it is a factor that can be taken into account when determining whether the resultant "missed test" was "inexcusable" or not.

[46] See, generally paragraphs 2, 39 – 51 above.

143. In all the circumstances, this Panel is satisfied that there was some excuse for the Athlete missing this test. Undoubtedly, had the Athlete taken more care he could have avoided missing the test. Having chosen the latest possible time for a test (10:00 pm - 11:00 pm) the Athlete was consciously running the risk that he might be asleep when a DCO arrived. Prudence, in such circumstances, would have dictated that he ensure that he was in a position to be able to hear someone knocking on the front door or that there was some system in place whereby someone else could notify him of such an occurrence. That is especially the case where, it appears, in the past, he had to be woken by others for the purposes of undergoing such testing.

144. Moreover, whilst it is true that he might have hoped that the DCO would seek to contact him on his mobile phone, as an elite athlete he should have known the provisions of the SADR and the International Standards for Testing and of the fact that such telephone calls are not required to be made under the SADR.

145. Notwithstanding these matters, however, it has never been suggested that the Athlete was deliberately trying to avoid testing nor that he was not at the designated address when the DCO arrived. He was tired and asleep. He had some expectation that if he did not answer the front door then, perhaps, someone would ring him on his mobile phone.

146. Whilst these factors are not sufficient to enable this Panel to find that there was no "missed test" they are sufficient for it to conclude that missing the test, albeit careless, or negligent, was not inexcusable.

b. Second missed test – 16 July 2013

147. This was a filing failure. Very little time was spent by the parties in respect of its circumstances. Although the Athlete formally submitted initially it was not "inexcusable", ultimately he offered no reasons as to why or how it could be excused, acknowledging that it was difficult to say that it was not inexcusable (see transcript p.71)

148. Briefly, the Athlete's Whereabouts Information indicated that he would be in New Zealand or in the United States between 16 and 22 July 2013. In fact he was in Hamburg, Germany. The Athlete did not notify the Applicant of the change but, serendipitously, through social media reports, the Applicant became aware of the fact that Athlete was in Hamburg rather than at either of the specified addresses in the relevant period.

149. Whilst the Panel accepts that, as the Athlete submitted, he was not "trying to hide" or seeking to deliberately avoid testing by going to Germany (as is evident from the Athlete telling the world where he was through social media such as Twitter) nevertheless the Panel can see no excuse for the failure of the Athlete to inform the Applicant of his Change of Plan. In the scale of things, however, and viewed in isolation, this was an offence at the lower end of the scale.

c. The third missed test – 13 September 2013

150. Once more comparatively little time was spent on this matter by the parties. It relates to a "missed test" in London. The Athlete acknowledges that he was not present at the address stated in his Whereabouts filing at the time the DCO attempted to locate him. However he says that such absence was not negligent as it was not "inexcusable" because:

a. he had that day received news that his father had been admitted to hospital; and

b. he was called away by his employer to go to work to deal with a situation that had arisen.

151. In those circumstances the Athlete was upset and under pressure and simply failed to update his Whereabouts Information, easy though that would have been to do.

152. In its oral closing submissions, the Applicant very fairly acknowledged that the matters raised by the Athlete in respect of his third missed test whilst not rebutting the presumption of carelessness or negligence, were sufficient to render this test "not inexcusable" (see pp 31 and 71 of the transcript).

153. The Panel agrees. It is relevant that this was the third possible missed test within the 18 month period. Mr Gemmell should have been extremely alert, in such circumstances, to his obligations to keep updated his Whereabouts Information and to be present at the specified address during the hours nominated by him for testing.

154. Whilst the matters raised by him do explain, as properly acknowledged by the Applicant, the reason why he missed the London test and do provide some partial excuse for that happening they do not by any means exonerate him. Notwithstanding his upset and the pressure he was under he ought to have done more, in all circumstances, to avoid this third missed test. It takes very little effort to connect to the internet and update the relevant information.

d. Summary in respect of sanction

155. Accordingly, the Panel finds that there was some excuse for the first and third missed tests whilst the second missed test (or filing failure) was inexcusable. However, the filing failure, viewed by itself, was a relevantly minor offence. Balanced against that, the Athlete was undoubtedly careless in respect of the first and third missed tests even though, as the Panel has found, it was not "inexcusable" for him to miss those tests. As stated, no submission was made to the Panel that this was the case of an athlete deliberately trying to avoid or circumvent the testing regime. Moreover, the Panel is satisfied on the evidence before it that the Athlete was not trying to avoid the testing regime on any of three occasions which constituted the missed tests in this matter. Rather he simply did not take the care he should have taken to comply with these very important obligations.

156. In all the circumstances, the Panel considers that it is appropriate for it to exercise its discretion to impose a period of ineligibility of less than two years. The Panel considers that the ADRV committed here is at the lower end of the scale of possible ADRV's to be considered under Rule 3.4 but not at the very lowest end.

157. In the circumstance, the Panel is of the view that a period of ineligibility of 15 months is appropriate.

158. The next issue is the date of commencement of the period of ineligibility.

B. Date of commencement of period of ineligibility

159. Ordinarily, in the absence of a provisional suspension or like circumstance, the period of ineligibility would commence from the date of this Award. However, neither party, in the present case, submits that that is appropriate.

160. Very fairly, the Applicant submits that there have been delays, unrelated to any fault on behalf of either the Applicant or the Athlete, between the date of handing down by the tribunal of its decision (12 February 2014) and the date of this Award.

161. It is common ground between the parties that between 12 February 2014 and the date of the hearing of the Appeal the Athlete had not participated in the sport of triathlon nor been involved in a relevant sports-related activity.

162. In all the circumstances, the Applicant submits that the appropriate commencement date for the period of ineligibility would be the date when the Sports Tribunal handed down its decision, namely 12 February 2014 (transcript page 79).

163. For his part, the Athlete submits that any period of ineligibility should commence earlier. However, the Panel cannot accept that submission especially in the light of the fact the Athlete opposed the imposition of any provisional suspension when that matter was raised before the Sports Tribunal. (see paragraph 3, above)

164. However, the Panel accepts that there have been delays for which the Athlete is not responsible between the date of the decision of the Sports Tribunal and the date of this Award. It further accepts that the Athlete has not, in fact, participated in the sport of triathlon nor in any sports related activity since that date. In those circumstances, in exercise of its discretion, the Panel considers that the appropriate commencement date would be the date upon which the Sports Tribunal handed down its decision, namely, 12 February 2014.

165. It follows that the period of ineligibility which the Panel will impose upon the Athlete is for a period of 15 months commencing on 12 February 2014 and concluding at midnight 11 May 2015.

VIII. COSTS

166. CAS Rule 64.5 states:

> In the arbitral award, the Panel shall determine which party shall bear the arbitration costs or in which proportion the parties shall share them. As a general rule, the Panel has discretion to grant the prevailing party a contribution towards its legal fees and other expenses incurred in connection with the proceedings and, in particular, the costs of witnesses and interpreters. When granting such contribution, the Panel shall take into account the complexity and outcome of the proceedings, as well as the conduct and the financial resources of the parties.

167. There are two aspects to CAS Rule 64.5. First, this rule provides a general discretion to award costs of the arbitration. Secondly, there is a discretion to award the prevailing party a contribution towards its legal and other costs.

168. The Panel notes CAS Rule 64.4, which provides that the final amount of the cost of arbitration is to be determined by the CAS Court Office and may thereafter be communicated separately to the parties. In this Award the Panel will therefore only allocate the proportion of arbitration costs to be borne by each party and not the final amount of such costs.

169. The Panel is mindful of the nature of this appeal as a test case. While DFSNZ exercised its right of appeal, it also has a continuing interest in the outcome because the Award has precedential value in the interpretation and application of the WADA Code from a New Zealand perspective.

170. Although DFSNZ was successful overall, it was not successful on at least two matters (two of the three breaches were not inexcusable, and a lower sanction than what was requested was awarded).[47] Further, although Mr Gemmell did commit an ADRV, this is not a case of an athlete deliberately trying to avoid or circumvent the testing regime.[48] Taking into consideration these factors, and in particular, the nature of the whereabouts breaches, it would be inappropriate for Mr Gemmell to bear the full costs of arbitration in this case.

171. For the above mentioned reasons, the Panel is of the view that the costs of arbitration should be borne equally by the parties and it decides accordingly. It further directs that each party shall bear its own legal costs and other expenses incurred in connection with this arbitration.

IX. PUBLICATION OF THE AWARD

172. CAS Rule R59 states:

> The award, a summary and/or a press release setting forth the results of the proceedings shall be made public by the CAS, unless both parties agree that they should remain confidential.

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47 See paras [153] and [154] above.

48 See para [36] above.

173. This matter was discussed with counsel at the end of the hearing. Counsel for DFSNZ requested publication whatever the outcome of this appeal since the Award would have precedential value. Counsel for the Respondent did not oppose publication but sought redaction of the athlete's name. The position is therefore that the Award may be published since both parties did not agree that there should not be publication. As for the redaction of the athlete's name, such a request shall be addressed to the CAS Court Office, as this is a matter for them to decide.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The Athlete Mr Kris Gemmell is found to have committed an Anti-Doping Rule Violation under Rule 3.4 of the Sports Anti-Doping Rules 2013.

2. The appeal filed by Drug Free Sport New Zealand on 4 March 2014 is upheld and the decision of the Sports Tribunal of New Zealand dated 12 February 2014 is set aside.

3. The Athlete is sanctioned with a period of ineligibility of 15 months commencing on 12 February 2014. The costs of the arbitration, to be determined by the CAS Court Office, and thereafter communicated separately to the parties, shall be borne equally by the parties.

4. Each party shall bear its own legal costs and other expenses incurred in connection with this arbitration.

5. All other motions or requests for relief are dismissed.

Seat of arbitration: Lausanne, Switzerland
Date: 1 December 2014

THE COURT OF ARBITRATION FOR SPORT

David Williams QC
President of the Panel

Barry Paterson, QC
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