COURT OF ARBITRATION FOR SPORT APPEALS DIVISION SYDNEY

International Rugby Board Appellant

AND

Luke Troy Respondent

AND

Australian Rugby Union Affected Party

CAS 2008/A/1664

Appeal – Purchase of Prohibited Substances over the internet – no attempt to collect after notification by Customs – 'possession' of Prohibited Substance – 'use or attempted use of Prohibited Substance – appeal allowed

The Respondent was an amateur rugby player in a district competition under the jurisdiction of the Australian Rugby Union ('ARU'). Australian Customs Service ('Customs') seized packages in February and August 2006 addressed to the Respondent. The first package was posted from the United Kingdom as a result of orders placed by the Respondent on the international website, bodybuilding.com. The Customs Declarations for both packages described them as "100% all natural health supplement". The Seizure Notice described the first goods as "One (1) sealed contained said to contain 21 packets of Testosterone-1, a mixture of Androstenes." The second package was posted from the United States and the Seizure Notice described the second goods as 'One (1) bottle x 100 capsules of "DHEA 200" containing 200 mg DeHydroEpiAndrosterone per capsule' ('DHEA'). In both cases the goods were prohibited unless permission in writing to import that goods had been granted (Customs (Prohibited Imports) Regulations, Regulation 5H(2), Schedule 8, Item 3C). In both cases Customs informed the Respondent that no action would be required unless he claimed the goods. Customs took no further action.

The Australian Sports Anti-Doping Agency ('ASADA') informed the Respondent that he had been provisionally suspended, and charged him with two Anti-Doping Rule Violations ('ADRV' under the ARU Anti-Doping By-Law (the 'By-Law'), namely:

(i) using or attempting to use a Prohibited Substance (clause 5.2.2);

(ii) possession of Prohibited Substances (clause 5.2.6).

The Respondent argued that in neither case did he know that the items contained prohibited substances, and that he was never in possession of the substances.

A judicial committee of the ARU dismissed both charges against the Respondent.

The International Rugby Board ('IRB'), the international governing body of the sport, and the World Anti-Doping Agency ('WADA') appealed to the Court of Arbitration for Sport ('CAS'). In a Preliminary Award CAS found that the IRB appeal was within time and could proceed.

The IRB sought that the ARU judicial committee decision be quashed, a finding that the Respondent had committed ADRVs under s5.2 of the ARU Anti-Doping By-Laws (IRB Regulation 21.2), and a sanction of two (2) years.

The applicable law was disputed. The Panel did not determine the issue conclusively since there was no difference in the circumstances between the law of England and the law of New South Wales.

HELD:

1. The appeal hearing was a hearing de novo, and standard of proof was a rule violation to the comfortable satisfaction of the hearing body (clause 6.1 ARU By-Law). The burden was on the IRB.
2. The ARU By-Laws applied to the Respondent at the time of the two seizures.
3. (Dismissing the appeal based on By-Law 5.2.6, possession or constructive possession,)
   (i) while the Respondent ordered the goods over the internet, paid for them by credit card and imported them into Australia, he did not have possession of them in the sense required by the By-Law, which required actual physical possession or constructive possession.
   (ii) The common law of both Australia and England provided that actual possession involved physical control or custody of the goods plus knowledge that the goods were in his possession (*He Kaw The v The Queen* (1985) 157 CLR 523 at 539). Whatever knowledge was required of the Respondent, the Respondent did not have physical control or custody of the goods at any time, in the sense of personal physical control to the exclusion of others not acting in concert with the accused.

(iii) 'Constructive possession' meant exclusive control or knowledge of the presence of the Prohibited Substance and an intention to exercise control over it. The IRB argued that the Respondent knew about the presence of the Prohibited Substance and intended to exercise control over them based on a number of circumstances. The Tribunal found a number of inconsistencies and problems with the evidence given by the Respondent, leading to the conclusion that the goods sent did correspond with what he ordered. Neither the description on the packets nor the Customs description without analysis was sufficient to conclude, however, that the products contained either of the Prohibited Substances.

4. (Upholding the appeal based on By-Law 5.2.2, attempted use)

(i) In order to prove attempted use the IRB needed to prove that the Respondent purposely engaged in conduct that constituted a substantial step in a course of conduct planned to culminate in the commission of an ADRV.

(ii) The elements were satisfied in the circumstances. There was no doubt the Respondent intended to use the products containing the Prohibited Substances when he ordered them and at all times until he was informed of their seizure. There was a course of conduct. There was a finding that he knew he was ordering products containing the Prohibited Substances, even if he did not realise they were Prohibited Substances. Given the intention of By-Laws 4.4, 5.2 and 10, the Tribunal found that this was sufficient.

(iii) It was not essential in respect of this particular By-Law that the substances were in fact proved to be Prohibited Substances. In this regard the Tribunal disagreed with the judicial committee of the ARU. There may be an attempt even though the actual substances are not, in fact, Prohibited Substances (*Britten v Alpogut* [1987] VR 929 at 933; *R v Irwin* [2006] SASC 90 at [13]-[17]; *R V Willoughby* [1980] 1 NZLR 66 at 68; *Docherty v Brown* (1996) S.L.T 325; *Rv Shivpuri* [1987] A.C.1; *U.S. v Dynar* (1997) 147 DLR (4th) 399.)

(iv) Steps taken by the Respondent to acquire the Prohibited Substances amounted to a course of conduct, and when viewed cumulatively constituted a "substantive step" in that course of conduct for the purposes of the By-Law. There was no reliance on the proviso in the definition of "attempt" relating to renunciation.

(v) The Respondent committed ADRVs in each case in breach of By-Law 5.2.2(a).

The CAS quashed the decision of the ARU Judicial Committee, and adjourned to hear the parties on the question of sanction.

[Note: the Respondent was subsequently suspended for two years from the date of this Award, less 28 days of his provisional suspension.]

CAS 2008/A/1664: Appeal by IRB v Luke Troy and the ARU

PARTIAL ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

President: Mr Malcolm **Holmes** QC, Sydney, Australia

Arbitrators: Mr Alan **Sullivan** QC, Sydney, Australia
Mr David **Williams** QC, Auckland, New Zealand

CAS Clerk: Miss Katharine Lee, Sydney, Australia

between

International Rugby Board

represented by Ms Susan Ahern, General Counsel for the IRB, Dublin, Ireland

– Appellant

and

Mr Luke Troy

represented by Mr Paul Hayes, Barrister-at-Law, Melbourne, Australia, instructed by Mr Scott Francis of Deacons, Lawyers, Melbourne, Australia

– Respondent

and

Australian Rugby Union

represented by Mr Tony O'Reilly, Kennedys Lawyers, Sydney, Australia

– Affected Party

Date of Award: **June 2009**

BACKGROUND

The Parties

1. The International Rugby Board (hereinafter referred to as "IRB" or as "the appellant") is the international governing body for rugby union worldwide.

2. The Australian Rugby Union (hereinafter referred to as "the ARU" or "the Affected Party") is the national governing body for rugby football in Australia and a member union of the IRB.

3. Mr Luke Troy (hereinafter referred to as "Mr Troy" or "the Respondent") was in 2006 – 2007 an amateur rugby player who played in the Newcastle Club Rugby Competition with Newcastle Waratahs Rugby Union Club. The Newcastle Waratahs Rugby Union Club plays rugby under the jurisdiction of the ARU.

The Dispute Between the Parties

4. The dispute between the parties arises out of two seizures by the Australian Customs Service ("Customs") on 7 February 2006 and 17 August 2006 respectively of packages which were sent by post addressed to the Respondent from the United Kingdom and the United States respectively. Each package was sent by post to the Respondent as a result of orders he placed for certain products from an international website, bodybuilding.com.

5. In respect of the first seizure by Customs, on 7 August 2006 ("the first seizure") the Customs Declaration description of the contents stated they were "100% all natural health supplement". In respect of the first seizure Customs sent a letter to Mr Troy dated 13 February 2006. That letter enclosed a Seizure Notice in respect of goods which were described as follows:-

   > "One (1) sealed container said to contain 21 packets Testosterone-1, a mixture of Androstenes".

   The letter went on to describe the procedure to be undertaken if Mr Troy wished to claim the goods but stated that no action was required by Mr Troy in respect of the Seizure Notice unless he wished to make a claim for the seized goods. Mr Troy was informed in the letter that if no action was taken by him the goods would be forfeited to the Commonwealth of Australia. The letter also indicated that Customs had decided to take no further action regarding the matter.

   The Customs documents accompanying the letter revealed that the seized goods were prohibited by Regulation 5H(2), Schedule 8, Item 3C of the Customs (Prohibited Imports) Regulations, unless permission in writing to import the goods had been granted.

6. There is no evidence that permission in writing from the Therapeutic Goods Administration to import the goods had been obtained and Mr Troy did not seek to claim the goods. The goods were subsequently received in to a Customs storehouse on 21 February 2006 and were subsequently destroyed by incineration on Friday 5 May 2006.

7. On 17 August 2006 Customs intercepted a further package addressed to Mr Troy (the second seizure). This was a package which was sent by post addressed to the player from the United States of America. Virtually identical documentation was sent by Customs to the Respondent in respect of the second seizure to that which had been sent to him in respect of the first seizure. In respect of the second seizure, the relevant letter from Customs is dated 31 August 2006 and advised Mr Troy that the enclosed Seizure Notice was in respect of goods said to be:-

> "One (1) bottle x 100 capsules of 'DHEA 200' containing 200 mg DeHydroEpiAndrosterone per capsule".

8. Once more, Mr Troy made no attempt to claim the goods from Customs and, although there is no direct evidence of this, it appears to be common ground between the parties that the goods the subject of the second seizure were also destroyed in a similar fashion to those which were the subject of the first seizure.

9. On 22 November 2007, the Australian Sports Anti-Doping Agency ("ASADA") notified Mr Troy of its belief in a proposed finding that he had:-

   (a) Attempted to Use the Prohibited Substances **Testosterone** and **DeHydroEpiAndrosterone (DHEA)** on or about 7 February 2006 and 17 August 2006; and

   (b) That he Possessed the abovenamed Prohibited Substances.

10. Mr Troy responded to the ASADA notification by letter dated 30 November 2007. He denied any wrongdoing. Relevantly he stated as follows:-

> "I placed two (2) separate orders and on both occasions I received advice from Australian Customs in both instances that some items which I ordered contained prohibited substances and as such were not allowed into Australia and had been confiscated. It should be noted that at no time prior to receiving notification from Australian Customs were (sic) I aware that the items contained prohibited substances. It should be noted that the second order I placed did not include that confiscated in the first order. When I was made aware of the situation from Australian Customs I made no attempt to order such supplements …
>
> …

> I acknowledge that I may have been naïve to order by the above method but did so in good faith, with no intention of using any prohibited substance. However, at no time did I have possession of such items due to them being seized by Australian Customs."

11. By letter dated 13 November 2008, ASADA informed the Respondent that, notwithstanding his submission, ASADA had determined that Mr Troy had attempted to use prohibited substances, namely testosterone on or about 7 February 2006 and DHEA on or about 17 August 2006 and that it had also determined that Mr Troy possessed such substances on or about those dates.

    The letter went on to inform Mr Troy that ASADA had made a decision to enter certain details on its Register of Findings and that various bodies including the ARU and the IRB would be given details of Mr Troy's entry on the Register.

12. On 1 February 2008 the ARU wrote to Mr Troy informing him that, as a result of the ASADA determination, he had been provisionally suspended by the ARU with such provisional suspension to come into operation on 1 February 2008.

13. On 7 February 2008 the ARU sent an Infraction Notice to Mr Troy bearing that date. The Infraction Notice informed Mr Troy that he was being charged with two Anti-Doping Rule Violations ("ADRV") under the ARU's Anti-Doping By-Law namely:-

    (i) (Attempt to Use) Using or Attempting to Use a Prohibited Substance – this constitutes an ADRV under clause 5.2.2 of the By-Law;

    (ii) (Possession) Possession of Prohibited Substances – this constitutes an ADRV under clause 5.2.6 of the By-Law.

    The Infraction Notice went on to give more detail of the relevant provisions of the By-Law and acknowledged that Mr Troy had accepted his right to appear before an independent judicial committee of the ARU to answer the charges.

14. The ARU gave the Respondent further particulars of the charges against him by letter dated 21 February 2008.

15. On Thursday, 28 February 2008, a judicial committee of the ARU was convened to deal with the allegations that Mr Troy had committed the ADRVs referred to above. The judicial committee was comprised of Mr J.N. Gleeson QC, Mr P.R. Garling SC and Dr Jeffrey Steinweg.

16. On 12 March 2008 the judicial committee issued its written reasoned decision dismissing both of the charges and declining to make a finding that there had been any ADRV by the Respondent.

17. Both IRB and the World Anti-Doping Agency ("WADA") lodged appeals to the Court of Arbitration for Sport ("CAS") against the decision of the judicial committee of the ARU. A preliminary dispute arose as to whether those appeals had been lodged in time. In our Preliminary Award dated 18 March 2009, this panel determined that the WADA appeal was out of time and was, accordingly, dismissed but that the IRB appeal was within time and could proceed.

The Arbitral Proceedings

18. It is unnecessary for us in this Award to recount a detailed history of the arbitral proceedings to date. To a large extent, that has already been done in our Preliminary Award which we incorporate by reference herein.

19. For present purposes, it is sufficient to note the following that on 30 September 2008 the IRB filed, by means of an Application Form, a Statement of Appeal with the Court of Arbitration for Sport ("CAS") at its Oceania Registry, pursuant to the Code of Sports-Related Arbitration ("the Code") to challenge the decision of the judicial committee of the ARU.

20. On 11 October 2008, the appellant filed its Appeal Brief seeking the following relief:-

> "(a) that the ARU Judicial Committee Decision be quashed and a finding that the (respondent) has committed an anti-doping rule violation pursuant to section 5.2 of the ARU Anti-Doping By-Laws (IRB Regulation 21.2) by engaging in conduct pursuant to which he sought to acquire Prohibited Substance over the Internet; and
>
> (b) that a sanction of two (2) years from the date of the CAS Panel's decision be imposed in accordance with the ARU Anti-Doping By-Law 23.1 (IRB Regulation 21.22.1); and
>
> (c) costs and fees as the CAS Panel deems appropriate."

21. We should note that, at this stage, there is no need for the Panel to determine the question of costs. Sensibly and reasonably the parties have agreed, at an earlier stage, that each party will bear its or his own costs of this appeal.

22. On 10 November 2008 and 19 December 2008 respectively the ARU and Mr Troy filed their Answers to the Appeal Brief. No point is taken by anyone as to the timing of the filing of those Answers.

23. On 24 March 2009 the President of this panel gave various Directions to the parties and the matter was set down for hearing of the Appeal on Wednesday 22 April 2009.

24. Pursuant to the directions given by the President, the following further documents and/or evidence have been filed and served by the parties:

(a) a Response to Directions prepared by the IRB dated 31 March 2009;

(b) submissions by the ARB as to the applicable law to be applied on the hearing of the appeal dated 7 April 2009;

(c) a statement of evidence of Mr Troy dated 9 April 2009;

(d) a response by the ARU as to the applicable law dated 2 April 2009;

(e) an Outline of Submissions filed by the IRB dated 20 October (sic) 2009 but, in fact, intended to be dated 20 April 2009;

(f) an Outline of Submissions by the ARU dated 20 April 2009; and

(g) an Outline of Submissions by Mr Troy dated 21 April 2009.

The Hearing of the Appeal

25. The appeal was heard on Wednesday 22 April 2008 with the panel sitting at the offices of Allens Arthur Robinson in Sydney, Australia. The panel, Mr Troy (and his legal representatives, Mr Hayes and Mr Francis) and the ARU (through Mr Weeks, the ARU's general counsel and Mr O'Reilly who appeared for the ARU in these proceedings) were all physically present in the hearing room in Sydney whilst Ms Ahern representing the IRB participated in the hearing by video link from Dublin, Ireland. The hearing commenced at 4.10pm AEST and concluded at 7.56pm AEST.

26. During the course of the hearing Mr Troy gave further evidence in chief, was cross-examined by Ms Ahern for the IRB and also answered various questions asked of him by members of the panel. Additionally, oral submissions were heard from all parties in addition to the written submissions already received.

27. At the conclusion of the hearing, the panel indicated that it would reserve its award and publish its award and its reasons at a later date. This is that Award.

The Applicable Law

28. This is an issue which can be quickly disposed of. Whilst both the IRB and ARU submitted that the substantive law to govern these proceedings was that of England, Mr Troy submitted that the relevant substantive law was that of New South Wales.

29. However, in the course of discussion with the parties during the course of the appeal hearing, it became apparent that neither party was contending that there was any, or any significant, difference between the law of England and the law of New South Wales insofar as the issues in this appeal were concerned. Indeed, counsel for the parties referred to decisions of Australian Courts and English Courts without discrimination or distinction and it was

not suggested that there was any English or Australian legislation which affected the outcome of the appeal.

30. Whilst the panel is inclined to the view that, for the reasons given in the submissions of the IRB, the substantive law to govern the issues in this appeal is the law of England, in the circumstances, it does not feel it necessary to reach a concluded view on that subject as there appears to be no difference between the two systems of law contended for.

31. Accordingly, the panel intends to approach this appeal upon its understanding of the general or common law applicable in both England and New South Wales.

Nature of the Appeal

32. As was common ground between the parties (and see *D'Arcy v. Australian Olympic Committee (No.2)* CAS 2008/A/1574; (2008) 3(1) ANZ SLJR 1 at 136-137 [63]) by virtue of r57 of the Code this appeal takes the form of a hearing *de novo.* This has two important consequences. First, this panel does not need to identify error on the part of the judicial committee of the ARU in order to interfere with the judicial committee's decision and, secondly, it also means that this panel must make factual findings, and express legal conclusions, on the evidence and materials placed before it notwithstanding that different factual findings or legal conclusions may have been arrived at by the judicial committee.

33. Moreover, in determining whether or not there has been an ADRV, the panel must apply the standard of proof set out in clause 6.1 of the By-Law. That standard of proof is as follows:

> *"The standard of proof shall be whether the [IRB] has established an anti-doping rule violation to the* **comfortable** *satisfaction of the hearing body bearing in mind the seriousness of the allegations made. This standard of proof in all cases is* **greater than** *a mere balance of probability but less than proof beyond a reasonable doubt. Where these by-laws place the burden of proof upon the Player or other Person or entity alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability".* **(Words in brackets and emphasis added)**.

34. It will be seen that, unlike the position at common law (either in New South Wales or in England), this rule does provide for an intermediate and distinct standard of proof different from either proof beyond reasonable doubt or proof upon a mere balance of probabilities.

35. We specifically mention this standard of proof because, as noted, the

Respondent gave oral evidence before us and was questioned about that oral evidence. For the reasons which we set out below, we did not find the Respondent to be an impressive witness. As indicated in these reasons below, there are parts of his evidence which we cannot accept and we will also make some factual findings inconsistent with his evidence.

36. Of course, this does not necessarily mean the appeal must succeed. The mere fact that a person is not accepted as to what he or she says has occurred does not justify a tribunal in finding the opposite occurred (see, eg, *Hobbs v. Tinling* [1929] 2 KB 1). The burden remains upon the appellant (the IRB) to prove each of the constituent elements of the alleged anti-doping rule violations to our **comfortable** satisfaction.

The ARU Anti-Doping By-Law ("the By-Law")

37. By-Law 3 specifies that the By-Law applies, inter alia, to Players. The expression "Players" is a defined term and means "any Player of the Game at whatever level". Prima facie, the By-Law applies to the Respondent (see [3] above).

38. However, the By-Law is only enforceable by reason of contract. Thus there must be some evidence that the Respondent undertook contractually to be bound by the By-Law.

39. It was not seriously disputed before us that all rugby players in Australia are required to sign an ARU membership form. Although the Respondent could not recall the precise nature of the form he signed in 2006 he agreed, in evidence, that each year he played rugby he signed what he believed to be a registration form.

40. In evidence before us is a copy of the 2006 ARU membership form. There is no copy of such a form signed by the Respondent but given his evidence and the fact that it appears to be common ground that the unsigned form in front of us represents the form which all rugby players in Australia were required to sign in 2006, we infer that the Respondent signed the 2006 ARU Membership Form as it exists in evidence before us. That form specifically provides that the Player agrees to observe the ARU's Anti-Doping By-Laws.

41. Accordingly, we are satisfied that the By-Law applied to the Respondent at the time of the two seizures.

42. Anti-doping rule violations are dealt with in By-Law 5.2 and of immediate relevance for present purposes are By-Laws 5.2.2 and 5.2.6 which are in the following form:

> "5.2.2 Use or Attempted Use of a Prohibited Substance or a Prohibited Method

(a) The success or failure of the Use of a Prohibited Substance or Prohibited Method is not material. It is sufficient that the Prohibited Substance or Prohibited Method was Used or Attempted to be Used for an Anti-Doping Rule Violation to be committed.

5.2.6 Possession of Prohibited Substances and Methods

(a) (sic) Possession by a Player at any time or place of a substance that is prohibited in Out-of-Competition Testing or a Prohibited Method unless the Player establishes that the Possession is pursuant to a Therapeutic Use Exemption granted in accordance with By-Law 8 or other acceptable justification.

(d) Possession of a Prohibited Substance that is prohibited in Out-of-Competition Testing or a Prohibited Method by Player Support Personnel in connection with a Player, Match, Series of Matches and/or Tournament or training, unless the Player's Support Personnel establishes that the Possession is pursuant to a therapeutic use exemption granted to a Player in accordance with By-Law 8 or other acceptable justification."

43. Each of these By-laws makes extensive use of defined terms. The most relevant definitions are as follows:

"'Use' means the application, ingestion, injection or consumption by any means whatsoever of any Prohibited Substance or Prohibited Method;

'Prohibited Substance' means any substance so described on the Prohibited List;

'Prohibited Method' means any method so described on the Prohibited List;

'Attempt' means purposely engaging in conduct that constitutes a substantial step in a course of conduct planned to culminate in the commission of an Anti Doping Rule Violation. Provided, however, there shall be no Anti-Doping Rule Violation based solely on an Attempt to commit a violation if the Person renunciates the attempt prior to it being discovered by a third party not involved in the Attempt;

'Possession' means the actual, physical possession, or the constructive possession (which shall be found only if the person has exclusive control over the Prohibited Substance/Method or the premises in

> which a Prohibited Substance/Method exists); provided, however, that if the person does not have exclusive control over the Prohibited Substance/Method or the premises in which a Prohibited Substance/Method exists, constructive possession shall only be found if the person knew about the presence of the Prohibited Substance/Method and intended to exercise control over it. Provided, however, there shall be no Anti-Doping Rule Violation committed based solely on possession if, prior to receiving notification of any kind that the Person has committed an Anti-Doping Rule Violation, the Person has taken concrete action demonstrating that the Person no longer intends to have Possession and has renounced the Person's previous Possession;"

44. There are other defined terms used in the two By-Laws, however, they are not of present relevance.

45. As noted in paragraph [13], the Respondent is alleged to have committed two ADRVs, namely Using or Attempting to Use a Prohibited Substance and Possession of Prohibited Substances. Moreover, each of these allegations is made in respect of each of the two seizures so that, in effect, there are four alleged ADVRs with which this appeal is concerned.

46. Although there is a considerable overlap in the facts, it is convenient to first consider the Possession charges in respect of each of the two seizures and then to consider the Use or Attempted Use charges in respect of each of those two seizures.

Possession of Prohibited Substances

Actual Possession

47. The IRB submits that the Respondent had "actual, physical possession" within the meaning of the By-Law of Prohibited Substances in respect of the goods seized on each occasion. The factual basis for this assertion is as follows:

    (a) the Respondent admitted that he ordered the goods over the internet from overseas;

    (b) the Respondent admits he paid for them by credit card;

    (c) the Respondent admits that he imported them into Australia.

48. According to the IRB's submission, in those circumstances, the Respondent acquired ownership and possession of the substances at the time payment was made and that delivery of the Prohibited Substances to the Respondent occurred once the substances left the seller's possession, that is, once the substances were put into the postal system. The IRB submission concludes

that, in such circumstances, at all times through his actions and admissions the Respondent intended to exercise and did exercise control over the Prohibited Substances.

49. It is well settled under the common law of both Australia and England that in order to have actual possession of goods a person must have physical control or custody of the goods plus knowledge that he or she has those goods in his or her custody or control (see *He Kaw Teh v. The Queen* (1985) 157 CLR 523 at 537 – 539 citing from both English and Australian authority).

50. For the purposes of dealing with the allegation of actual possession, it is not necessary for us to determine whether the requisite knowledge is knowledge of the identity or nature of the goods (ie, testosterone and DHEA) or whether it is also necessary to have knowledge that those goods were "prohibited substances". We take this view because, whatever form of knowledge is required, we are not satisfied that the Respondent had physical control or custody of the goods at any relevant time.

51. The definition of "possession" in the By-Law emphasises the need for the possession to be not only "actual" but also "physical".

52. In *He Kaw Teh v. The Queen*, Gibbs CJ (with whom Mason and Murphy JJ agreed) cited with approval (at 538) an earlier decision of the High Court of Australia in *Moors v. Burke* (1919) 26 CLR 265 at 274 where it was established that actual possession meant "the complete present personal physical control of the property to the exclusion of others not acting in concert with the accused".

53. On the evidence before us, the Respondent never had such complete present personal control over the property to the exclusion of others at any relevant time. The seller had such control over the property until the goods were put in the postal system. Then the postal authorities had such control and, finally, Customs had such control. The goods were destroyed by Customs before they ever came under the control, in the relevant sense, of the Respondent.

54. Therefore, insofar as the appellant relies upon actual possession of the Prohibited Substances, we think this appeal must fail.

Constructive Possession

55. It is clear from the definition of "possession" in the By-Law that constructive possession may be found to exist in the following circumstances:-

    (a) if the person has **exclusive control** over the Prohibited Substance or

    (b) if the person does not have exclusive control over the Prohibited Substance, if the person knew about the presence of the Prohibited Substance and intended to exercise control over it.

56. In its submissions contained in the Appeal Brief, the IRB does not place any reliance upon the first of these two routes to finding constructive possession and, in our view, rightly so. For reasons similar to those we have expressed in respect of "actual possession" we would not have been comfortably satisfied that at any relevant time the Respondent had "exclusive control" over any Prohibited Substances.

57. The IRB submits that the following factors demonstrate that the Prohibited Substances were in the constructive possession of the Respondent in that he:

    (a) knew about the presence of the Prohibited Substance; and

    (b) intended to exercise control over them:-

        (i) player ordered the Prohibited Substances from the Internet, paid for them and imported them into Australia;

        (ii) the seized packages were addressed to the Player at his home address at the given time;

        (iii) the Player knew the Prohibited Substances were being sent to him at his then home address where he intended to take delivery of them;

        (iv) no one else was involved in the purchase of the Prohibited Substance;

        (v) the Player admitted that he intended to use them had they not been intercepted by Customs. It is also possible to infer that the Player would not have specifically ordered the substances unless it was his intention to use them;

        (vi) the Player knew that the substances were seized by Customs as they notified him on each occasion;

        (vii) the Player knew what the substances were – testosterone and DHEA, both of which appear on the Prohibited List 2006;

        (viii) the only reason it is submitted, that the Player did not apply to Customs to have the Prohibited Substances released was that he would not have obtained the requisite import permit from the appropriate authority.

58. In order to deal with this issue of constructive possession it is necessary to establish the relevant facts relating to the two seizures.

59. The Respondent's evidence may be summarised as follows:

    (a) he ordered the products on each occasion for his personal use for the purpose of recovery and meal replacement;

(b) he never intentionally ordered products containing testosterone or DHEA from the bodybuilding.com website;

(c) rather, on each occasion he ordered a product which was said to be a natural testosterone booster and that he only ordered products which were available for sale in Australia. He says the products ordered on the second occasion differed from those which he ordered on the first occasion and, although he cannot recall the difference, he believed both products were natural testosterone boosters;

(d) he checked on the website the ingredients for the products he ordered and those ingredients did not include testosterone or DHEA;

(e) he ordered the products over the internet because it was cheaper that way than buying them in Australia even allowing for delivery costs;

(f) that he had never even heard of the substance, DHEA until he received the Customs correspondence in respect of the second seizure;

(g) that he paid for the products he ordered by credit card;

(h) that he has no written record of the actual products he ordered and has not checked his computer to see whether there is any order confirmation or the like electronically stored there which might describe what was ordered;

(i) that, in respect of each of the first and second seizures, he only became aware from reading the Customs' letters that the goods which were seized did not correspond with those which he ordered;

(j) also, that he only became aware that the products seized contained testosterone and/or DHEA from those letters;

(k) that he did not seek to claim the goods or contact Customs after either of the two seizures because the products seized were not what he ordered;

(l) that he did not contact the bodybuilding.com website to inform it that the goods which had been sent to him did not correspond with those which he had ordered;

(m) that, notwithstanding the fact that the goods the subject of the first seizure were not those he ordered, he placed the order for the goods the subject of the second seizure with the same supplier some months after the first seizure;

(n) that at the time of ordering the natural testosterone boosters on each occasion, he was unaware of what were or what were not Prohibited Substances for the purposes of the By-Law.

60. Although the Respondent gave no specific evidence upon this, it can be inferred from his lack of contact with bodybuilding.com following the seizures that he did not seek a refund from bodybuilding.com for the products he had ordered and paid for but which he did not receive. It appears each shipment of the product cost between $60 and $70 (Q107 – 108 of the Record of Interview). These monetary sums need to be placed in the context where the Respondent said he ordered the product from overseas because it was approximately $30 per order cheaper than in Australia (Q.107 of the Interview). Thus, it can be inferred that $60 – $70 (per order) was not an insignificant amount for the Respondent.

61. There are a number of inconsistencies in, and problematic areas with, the evidence given by the Respondent:-

Ignorance of DHEA

(a) first, we cannot accept that he had never heard of the substance, DHEA until receiving the letter dated 31 August 2006 in respect of the second seizure;

(b) the Respondent's evidence in this regard is directly inconsistent with the following evidence he gave in an interview with Mr McQuillen on 4 October 2007:

"Q97 Okay. And when you were notified of this particular seizure, what did you think?

A97 Obviously, for some reason I don't – I didn't know. I was, like, well, it's here in Australia, why can't – why did it come to me from America.

Q98 Did you realise that it had DHEA in it at this stage?

A98 Yes.

Q99 Where did you find that out?

A99 I knew before I ordered it because it was exactly as what's here in Australia.

Q100 And did you know that DHEA is a prohibited substance?

A100 Well, I didn't think it was due to the fact that you can buy it in any supplements store."

(c) both in his written and oral evidence before the Panel we find his explanation for this inconsistency, unconvincing;

(d) that explanation was that when asked the specific questions about DHEA by Mr McQuillen in the Interview he thought Mr McQuillen's "reference to DHEA was a reference to a natural testosterone booster".

That is, he thought Mr McQuillen was using the term not to describe the Prohibited Substance but as a synonym for "natural testosterone booster";

(e) we have carefully reviewed the Record of Interview and do not think a reasonable person in the position of the Respondent could have thought that Mr McQuillen was referring in these questions to natural testosterone boosters as a generic group. A further reading of the transcript reveals Mr McQuillen was being careful to ask questions specifically about the Prohibited Substance, DHEA and we think a reasonable person in the position of the Respondent would have so understood it;

(f) further, we observed the Respondent closely whilst he gave evidence before the Panel and have carefully reviewed the transcript of that evidence. Before us the Respondent came across as an intelligent and careful witness who showed no sign of confusion or misunderstanding about the questions asked of him;

(g) moreover, the Respondent's explanation of this inconsistency seems at odds with his evidence as to how he became aware of the fact that the goods the subject of the second seizure were not those he had ordered;

(h) the Respondent asserts that when he read the Customs' letter of 31 August 2006 he knew the goods seized were not those ordered because of the reference to DHEA which, he says, he had never heard of and which, he says, was not listed on the website as one of the ingredients of the product he had ordered;

(i) therefore, it is reasonable to infer that at all times since receiving the Customs' letter of 31 August 2006, the Respondent must have been acutely conscious of the distinction between the expression "DHEA" and "natural testosterone booster";

(j) for these reasons, we come to the conclusion set out in (a) above;

Knowledge of Product Seized

(k) secondly, his evidence that the product which was seized was not what he ordered, which fact he says he realised when he received the respective letters from Customs, is also not evidence we are prepared to accept;

(l) that evidence is in direct contradiction to the evidence given by him in response to Q69 of the Record of Interview namely:

"A69 No, I just thought, obviously, that what I'd tried to get wasn't allowed here in Australia because I know people

that have gotten stuff from overseas as supplements and I just thought that wasn't allowed so, obviously, it's different to what I've got." (emphasis added)

(m) when questioned by the Panel about this apparent inconsistency he gave the following evidence which we find unconvincing and implausible:-

"Q. No; what I'm trying to understand is your answer, what you were trying to convey by your answer in answer to question 69?

A. I also thought – What I'm trying to say there is I also thought for some reason, I don't know why, what I tried to order that you could get here in Australia didn't come through.

Q. But you didn't say in answer 69, 'What was sent to me wasn't what I tried to get'; what you said was, 'What I tried to get wasn't allowed in Australia', didn't you? What I'm puzzled by is why you said that if in fact the situation was that what you tried to get wasn't what was sent to you?

A. Probably because I'd already told him that that wasn't what I ordered."

(n) it is to be noted also that the Respondent's answer to Q69 of the Record of Interview appears inconsistent with his evidence that he ordered products which he was aware were available in Australia;

(o) moreover, the Respondent's evidence that the product he ordered was not the same as that which was seized is very difficult to accept for a number of other reasons as follows:

(i) a normal response to paying not inconsiderable sums of money for products which are ordered but not received would be to make a complaint to the supplier and to seek a refund;

(ii) the Respondent's failure to do either in respect of either seizure is indicative of the fact that what was seized on each occasion corresponded to what was ordered;

(iii) after the first seizure, not only was no complaint made to the supplier nor any refund sought but another order was placed with the same supplier again, allegedly, for a testosterone booster. This is, to say the least, surprising conduct if, contrary to the order placed by the Respondent on the first occasion, that supplier had already attempted to supply him with illegal or prohibited substances which had drawn the Respondent (who is a member of the Australian armed forces) to the attention of Customs;

(iv) the detail or substance of what the Respondent ordered on each occasion is peculiarly within his knowledge. Since he placed the orders over the internet it is reasonable to assume that there must be some record of the order placed, or of a confirmation of the order, stored electronically on his computer. If no such record existed because, eg, it had been destroyed innocently without any hard copy having been kept we would have expected the Respondent to give evidence of this;

(v) there was no such evidence given. The only evidence given by the Respondent (and not in chief) was that he had not checked his computer records;

(vi) it has always been central to the Respondent's defence of these allegations that the products seized were not those which he ordered. In these circumstances, the importance of looking for and producing records of what in fact was ordered or of providing an explanation for their absence, would have been obvious;

(vii) in these circumstances, we draw the inference that the computer records would not have assisted the Respondent in proving his assertion that the goods which were seized did not correspond with those that were ordered and, indeed, to assist in us drawing the inference, which is otherwise available, that the goods seized did, in fact, correspond to those which he had ordered;

(p) we, are, therefore, comfortably satisfied that the goods the subject of each of the first and second seizures, as described in the seizure notices, did, in fact, correspond to the goods which the Respondent ordered.

62. The findings we have made so far when coupled with the Respondent's own evidence that he read the list of ingredients set out on the website for each product ordered means we are also comfortably satisfied that, in respect of each of the products he ordered, the Respondent believed they contained testosterone and/or DHEA.

63. It is common ground that, at all relevant times, each of those substances was a Prohibited Substance for the purpose of the By-Law.

64. Of course the fact that the Respondent ordered products believing they contained testosterone and/or DHEA does not necessarily prove, at least to the requisite standard, that the products seized on either relevant occasion did, in fact, contain those substances.

65. There is no evidence, in respect of either of the first seizure or the second seizure, that any analytical testing was done to identify the precise contents or ingredients of the products seized and we are not prepared to infer that such testing was carried out.

66. Moreover, the description of the contents of the packets containing products seized contained in the two seizure notices is not, of itself, sufficient to prove that the products, in fact, contained testosterone and/or DHEA (cf. *Commissioner for Railways (NSW) v. Young* (1962) 106 CLR 535 at 546 per Dixon CJ).

67. But, in the present case, that description does not stand alone. It has to be considered also in the light of our finding that the Respondent in fact ordered products believing they contained testosterone and/or DHEA. Is the Customs description, made without analysis, when coupled with the fact that the Respondent ordered products which he believed contained testosterone and/or DHEA sufficient to enable us to conclude, if such a conclusion be necessary, to the requisite standard, that the products seized by Customs, did, in fact, contain either of the Prohibited Substances?

68. We do not believe so.

69. Even assuming that the Customs Declaration or the description by Customs of the goods is equivalent to a "label" (which we doubt), that, by itself, provides an insufficient basis for finding that the goods seized did, in fact, contain any Prohibited Substance. Moreover, the fact that the Respondent ordered the goods, believing them to contain a Prohibited Substance, and, inferentially, decided not to seek to claim them for the same reason does not mean that the goods seized did, in fact, contain Prohibited Substances. The ingredients of the goods were not identified until they were seized by Customs. At that time, despite what he may have believed, the Respondent had no way of knowing that, in fact, the goods contained the Prohibited Substances and, absent evidence of scientific analysis of the products seized, the description given to the goods by Customs is insufficient to conclude that the products seized did in fact contain either of the Prohibited Substances.

70. This, in our view, disposes of the appeal also in respect of the allegation of constructive possession. As is obvious from the IRB submission (see [57] (a) above) in order for there to be "constructive possession" the Respondent must have known about the presence of the Prohibited Substance at the time the goods were seized. It is impossible, in our view, for the Respondent to have had such knowledge if it has not been proven, to the requisite standard, that the products, in fact, contained Prohibited Substances.

71. Accordingly, we dismiss the IRB appeal also insofar as it relies upon constructive possession.

Attempted Use

72. Of course, there are two further alleged ADRVs upon which the IRB relies in this appeal. They are the allegations of attempted use of Prohibited Substance in respect of the products seized in the first and second seizures.

73. In order to establish that the Respondent Attempted to a Use Prohibited Substance it is necessary for the IRB to prove to our comfortable satisfaction that the Respondent purposely engaged in conduct that constituted a substantial step in a course of conduct planned to culminate in the commission of an ADRV (see [43] above).

74. Given our earlier findings, and indeed on the Respondent's own evidence, there is no doubt that the Respondent intended to use the products, containing the Prohibited Substances, when he ordered them and, relevantly, at all times up until the time he was informed of their seizure.

75. Moreover, we have found that the Respondent believed he was ordering products containing testosterone and DHEA. Even if the Respondent did not realise that those ingredients were "Prohibited Substances" at any time up to their seizure nevertheless, given the obvious purpose and intention of the By-Law as reflected by By-Laws 4.2 (especially 4.2(d)), 5.2 (see eg, 5.2.1) and 10, we consider that it is sufficient to sustain an allegation of an Attempt to Use a Prohibited Substance that the Respondent knew or believed he knew the identity of the substance that he was intending to use even if he did not know that, in fact, the substance was "prohibited" at the time of the attempt.

76. This construction of the By-Law is supported by the proviso to the definition of "attempt" in the By-Law. That proviso affords an escape mechanism for a player who orders a particular substance, not knowing at the time the substance is prohibited, but who subsequently ascertains its prohibited nature prior to discovery by a third party.

77. Therefore, in our view, if the other elements of the definition of "attempt" in the By-Law are satisfied, the Respondent would have committed an ADRV even if he did not know, at the time he ordered the products, that testosterone and DHEA (which he knew or believed the products contained) were Prohibited Substances.

78. The definition of "attempt" in the By-Law has two critical steps:-

> First, a player must **purposely** engage in conduct that constitutes a substantial step in a course of conduct;
>
> Secondly, that course of conduct must be planned to culminate in the commission of an ADRV.

79. In the present case the Respondent:-

    (a) searched internet websites in order to determine what products to order;

    (b) checked the ingredients listed on the website for the product before he ordered the product;

(c) deliberately ordered products believing they contained testosterone and DHEA, each of which was a Prohibited Substance;

(d) he paid for those products;

(e) he arranged, or assisted in the arrangement of, their importation into Australia from overseas for delivery to him at his home address;

(f) on his own evidence, the Respondent intended to use those substances personally when he received them for, as he terms it, "recovery and meal replacement".

80. We are satisfied that the steps outlined in [79] (a) – (e) above amounted to "a course of conduct" for the purposes of the By-Law.

81. Further, in our view, the conduct of the Respondent in knowingly ordering products which he believed contained testosterone and DHEA, paying for those products, and arranging, or assisting the arrangement of, their importation into Australia and delivery to him each constituted individually, and also when viewed cumulatively, conduct constituting a "substantive step" in that course of conduct. Given our finding that the respondent believed the products he ordered contained testosterone and DHEA and the respondent's own evidence that he intended to use those products personally, we are also satisfied that the course of conduct was "planned to culminate in the commission of an ADRV."

82. In these circumstances, we are comfortably satisfied that in respect of the products ordered by the Respondent, and which were the subject of each of the first seizure and of the second seizure, that the Respondent did commit an Anti-Doping Rule Violation namely, in each case, a breach of By-Law 5.2.2(a).

83. The proviso to the definition of "Attempt" in the By-Law has no application. The Respondent did not seek to rely upon it and, indeed, on the evidence, he could not have. There was no evidence of renunciation of the attempt prior to the seizure of the products on each occasion by Customs.

84. Unlike the judicial committee of the ARU and the submissions of the Respondent, we do not see it as essential, for the purposes of proving an ADRV in the form of an Attempt to Use Prohibited Substances, that the substances are in fact proven to be Prohibited Substances. There is nothing in the language of the By-Law which suggests this to be the case. Indeed the language of the By-Law is inconsistent with such a requirement. The definition of "Attempt" does **not** require that the conduct constitutes a substantial step in a course of conduct which **would culminate** in the commission of an ADRV. Rather it only requires the relevant conduct to be "**planned to culminate**" in the commission of such an offence. This use of language strongly suggests that it is irrelevant that the plan to commit the ADRV may fail because the product ordered may not,

contrary to the belief and intention of the Respondent, contain, in fact, Prohibited Substances.

85. Moreover, to the extent to which assistance in the construction of the definition of "Attempt" may be derived from the criminal law in various jurisdictions (and such assistance may be limited due to the intrusion of statutes in various jurisdictions), the criminal law of Australia, New Zealand, England, Scotland and Canada recognises that there may be an attempt to do something, such as use Prohibited Substances, even though the actual substances which are intended to be used turn out not to be Prohibited Substances (see, eg, in Australia *Britten v. Alpogut* [1987] VR 929 at 933 – 935; *R v. Irwin* [2006] SASC 90 at [13] – [17]; in New Zealand, *R v. Willoughby* [1980] 1 NZLR 66 at 68; in Scotland, *Docherty v. Brown* (1996) S.L.T. 325, in England, *R v. Shivpuri* [1987] A.C. 1; in Canada, *U.S. v. Dynar* (1997) 147 DLR (4th) 399).

86. The facts of *R v. Shivpuri*, *Docherty v. Brown* and *Britten v. Alpogut* are very similar to the present in that each involved a person charged with an offence of Attempt relating to a "controlled" or "prohibited" drug when, on analysis, the drug turned out not to be a "controlled" or "prohibited" drug. Nevertheless on each occasion, the court sustained the charge of "Attempt". These cases demonstrate that, under criminal law, a person can be guilty of an attempt even though the facts are such that the commission of the ultimate offence is impossible. As stated in [84] above, we construe the language of the By-Law as achieving a similar result.

87. A valid analogy with the present matter, in our view, is with the situation of a person who "orders" and pays for the killing of someone by a person whom he or she believes is a contract killer but, in fact, is an undercover policeman posing as a contract killer. In such circumstances, it could hardly be said that the person "ordering" the killing was not guilty of attempted murder merely because the "contract killer" was nothing of the sort and had no intention of carrying out the crime.

ON THESE GROUNDS

1. The Court of Arbitration for Sport Rules, for the reasons given, that:

   (a) we dismiss the IRB's appeal insofar as it is based on By-Law 5.2.6;

   (b) we uphold the IRB's appeal insofar as it is based on By-Law 5.2.2.

2. Accordingly, we quash the decision of the ARU Judicial Committee and find that the Respondent has committed an Anti-Doping Rule Violation. In these circumstances, the IRB has asked that a sanction of two years from the date of this decision be imposed on the Respondent in accordance with IRB Regulation 21.22.1. This Regulation concludes with the following:

   > "However, the Player or other Person shall have the opportunity in each case, before a period of ineligibility is imposed, to establish the basis for eliminating or reducing this sanction as provided in Regulation 21.22.4."

3. We note that the Respondent, by his submissions dated 21 April 2009, submitted that if the Appeal was upheld then the Panel should take into account the period of 1 February 2008 until 28 February 2008 during which time he was temporarily suspended and deduct this period of time from the end or finish date of any sanction imposed but made no reference to Regulation 21.22.4.

4. In the circumstances the Panel proposes to hear the parties on the issue of sanction and intends to decide this issue on the basis of written submissions. The Respondent is directed to file and serve any written submissions on the question of sanction within 14 days and the Appellant in reply within 14 days thereafter.

Done in Sydney, **June 2009**

THE COURT OF ARBITRATION FOR SPORT

Mr Malcolm **Holmes** QC

President of the Panel

Mr Alan **Sullivan** QC
Arbitrator

Mr David **Williams** QC
Arbitrator