

A PERSONAL HEARING

*In the matter of proceedings brought pursuant to
The Football Association's Anti-Doping Programme*

THE FOOTBALL ASSOCIATION

and

**Mr CHEY DUNKLEY
Oxford United FC**

**THE DECISION AND REASONS
OF THE FA REGULATORY COMMISSION**

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Introduction

1. Mr Cheyenne “Chey” Dunkley is a professional football player with Oxford United FC (“Oxford United”, the “Club”) in the Football League, League 2.
2. Pursuant to The Football Association (“The FA”) Anti-Doping Programme, Mr Dunkley provided a urine sample to the UK Anti-Doping Doping Control Officials after the Oxford United versus Cheltenham Town match (the “match”) on 03 January 2015.
3. Mr Dunkley declared on the Doping Control Form at the time of providing his urine sample that he takes ‘Salbutamol’ and ‘Ventolin’ as medication.
4. The sample was analysed for the presence of substances as listed in the World Anti-Doping Code List of Prohibited Substances and Methods, valid 01 January 2015, and also of substances listed in paragraph 6 of the Preamble to The FA Anti-Doping Regulations.

Findings in “A” Sample

5. On 22 January 2015, The FA received the analytical report, dated 20 January 2015, from the King’s College Drug Control Laboratory via UK Anti-Doping. It had confirmed that the analysis of the “A” sample taken (in para 2) disclosed the presence of ‘salbutamol’ at a concentration measured to be at 1,500ng/mL. ‘Salbutamol’ is classified as a S3 (Beta-2 agonists) under the 2015 Prohibited List of the World Anti-Doping Code and when found at a concentration in excess of 1,000ng/mL is presumed not to be a therapeutic use of the substance.

Procedures for “B” Sample Analysis

6. According to The FA Anti-Doping Regulations, a Player incurring a positive finding is entitled under Paragraph 30.1 of the Procedural Guidelines for the Conduct of Drug Testing (see para 42) to request analysis of the “B” sample. This is to ascertain whether the “B” sample discloses the presence of the same prohibited substances as were detected in the main “A” sample.

7. On 23 January 2015, The FA advised Mr Dunkley how to request for the “B” sample to be analysed and also provided him with the appointment for this analysis, at which he was entitled to be present or to send a representative on his behalf.
8. The FA added that, regardless of Mr Dunkley’s decision on whether he wished the “B” sample to be analysed or not, The FA retained the right to proceed with the “B” sample analysis at its own discretion as per Paragraph 30.2 of FA Procedural Guidelines for the Conduct of Drug Testing (see para 42).

Required Responses

9. Mr Dunkley was required to confirm in writing:
 - 9.1. By 26 January 2015, whether or not he wished his “B” sample to be analysed; and
 - 9.2. By 30 January 2015, of his precise usage of the declared ‘salbutamol’ and ‘ventolin’ in the 24 hours prior to the collection of the sample. Furthermore, Mr Dunkley was asked to provide the details of his regular usage of this substance and any reasons for increased usage of the substance over the four weeks prior to the collection of the sample, as well as how he takes the ‘salbutamol’/ ‘ventolin’, what days he takes it, when in the day he takes it and how long he has been taking ‘salbutamol’ for.

Mr Dunkley’s Initial Responses

10. On 26 January 2015, the Club responded on behalf of Mr Dunkley via EMail from Mr Mick Brown, the Club General Manager/Secretary, that Mr Dunkley did not require his “B” sample to be analysed.
11. In a letter dated 28 January 2015, Mr Dunkley explained that:
 - 11.1. About two years ago, after some wheeziness during exercise, he went to see his doctor who diagnosed him as having mild asthma and prescribed

Ventolin to be used as and when required;

- 11.2. In the four weeks prior to the game, he did not use Ventolin daily and only used it as and when required – normally taking one puff before training starts. This was usually in cold weather when he gets wheezier, especially during strenuous exercises. It was the same on the match-days and when linked to very much cold weather;
- 11.3. In the 24 hours prior to the collection, he did not use his inhaler at all on Friday, during the day or in the evening. The day before the match, the training was only light and on tactics, and he did not suffer from any wheeziness; and
- 11.4. On the day of the match, he took one puff of Ventolin before warming up. After the warm up, he was feeling particularly wheezy due to the very cold weather so took a further three puffs before going out for kick-off. He did not take any further puffs before the sample collection.

The Pharmacokinetic Study

12. Mr Dunkley's explanations in his letter of 28 January 2015 (see para 11), were forwarded to UK Anti-Doping for their review.
13. On 11 February 2015, The FA advised Mr Dunkley that he was now required to undergo a Pharmacokinetic Study, in order to establish that the elevated concentration of 'salbutamol' detected in his sample was as a result of his therapeutic use of the substance.
14. Mr Dunkley was also provided with two appointment dates for this study to choose, and advised that he was entitled to nominate a doctor to accompany him throughout the study as well as another representative, if he wished.
15. On 18 February 2015, the 'Salbutamol – Controlled Pharmacokinetic Study' (the "Study") was carried out by Professor David Cowan at King's College Drug Control Centre in London.

16. During this Study, Mr Dunkley was asked to inhale 1 x 100µg puff and 3 x 100µg puffs of 'salbutamol' a few minutes later and his urine samples were analysed.
17. In a report dated 04 March 2015, Professor Cowan summarised that the Study data showed the specific gravity adjusted maximum concentration of approximately 380ng/mL occurred at approximately just over three hours after administration of 'salbutamol'.
18. Professor Cowan stated that the half-life of elimination of 'salbutamol' appeared to be approximately 2 hours 20 minutes.
19. Professor Cowan also added that Mr Dunkley felt his first puff during the study might not have contained any 'salbutamol'. To give Mr Dunkley the benefit of any doubt, Professor Cowan had further adjusted his calculations to take into consideration the possibility that only three doses were taken by multiplying the specific gravity adjusted concentrations by 4/3. However, inspection of the data still led him to the opinion that the peak concentration was unlikely to have exceeded the concentration found in Mr Dunkley's sample (~1,500ng/mL). Furthermore, in his opinion, these data are consistent with the dose of 'salbutamol' administered in this Study and are consistent with published data.

The FA's Interview with Mr Dunkley

20. The FA held an interview with Mr Dunkley on 01 April 2015 at Wembley Stadium in London. The transcript of the interview was made available.
21. The FA was represented by Mr David Matthews, FA Investigations Manager, and Mr Robert Henderson, FA Anti-Doping Manager.
22. Mr Dunkley was in attendance, accompanied by Mr Nick Cusack from the PFA.
23. In this interview, Mr Dunkley expanded on the explanations given in his letter, as well as on related events leading up to him providing his urine sample and the resulting developments since the Adverse Analytical Finding of the sample.

24. Mr Dunkley explained though that he was not sure how many puffs he actually took from his inhaler before the match, after which he was selected to provide the urine sample.
25. He used the inhaler before the match as he needed to bring his breathing back to normal rate and he did not, and does not, count the number of puffs he takes.
26. And, when he was asked to provide the 'precise usage in the 24 hours prior to the collection of the sample' by The FA, he was told by his Physio that he "*had to be definitive with the value given of puffs*", "*remember correctly as best you can*" and "*Well, we have to come up with a number*". Mr Dunkley was not aware that he could say he "*wasn't sure*" and made a guess that he had taken "*four puffs*".
27. Mr Dunkley said that he remembered it was a very cold day, he was struggling and felt that, in order to actually get through the match, he had to take the puffs to get back to a normal breathing rate and he could not remember how many puffs he actually took then.
28. He did not feel he had done anything wrong, he had not used the inhaler excessively and he had not used it any differently to what he had been told. His aim was to get back to a normal breathing rate. He was not trying to gain any advantage.
29. He had joined Oxford United in November 2014 on a loan deal and signed a permanent professional contract with the Club in January 2015.

The Charge

30. On 17 April 2015, The FA charged Mr Dunkley with a breach of FA Rule E1(b) (see para 36). In accordance with FA Rule E25 (see para 37), Mr Dunkley breached Regulation 3 (see para 38) of The FA Anti-Doping Regulations for presence of the substance 'salbutamol', at a concentration measured to be 1,500ng/mL. 'Salbutamol', when found at a concentration in excess of 1,000ng/mL, is a Prohibited Substance listed in S3 (Beta-2 agonists) (see para

- 39) and is presumed not to be an intended therapeutic use of the substance (collectively the “Charge”).
31. The FA enclosed, the following initial evidence that it intended to rely on:
- 31.1. Covering letter (20 January 2015), analytical report and accompanying documentation (21 January 2015);
 - 31.2. Letter from UKAD to Ms Jenni Kennedy, The FA (22 January 2015);
 - 31.3. Letter from Ms Jenni Kennedy, The FA, to Mr Dunkley (23 January 2015);
 - 31.4. Letter from Mr Dunkley to Ms Jenni Kennedy (28 January 2015);
 - 31.5. Salbutamol - Controlled Pharmacokinetic Study report (04 March 2015); and
 - 31.6. Interview transcript of Mr Dunkley’s interview with Mr David Matthews and Mr Robert Henderson, The FA, on 01 April 2015.
32. Mr Dunkley was not provisionally suspended in respect of this matter.
33. Mr Dunkley was required to reply to the Charge by 27 April 2015.

The Reply

34. On 21 May 2015, Mr Dunkley responded through Brabners LLP by admitting to the Charge and requested an opportunity to attend a Commission to make a personal plea (the “Reply”).
35. On behalf of Mr Dunkley, Brabners LLP also submitted the following documentation:
- 35.1. Written submission by Mr Nick De Marco, on behalf of Mr Dunkley;
 - 35.2. Mr Dunkley’s witness statement;
 - 35.3. Statement provided by Oxford United;
 - 35.4. Statement provided by Dr S. Gowda on behalf of Mr Dunkley’s GP practice ‘The Surgery’, Woden Road, Wolverhampton; and

35.5. A summary of Mr Dunkley's medical records.

Relevant FA Rules

36. The FA Rule E1(b), on p112 of FA Handbook Season 2014-2015, states:

"1. The Association may act against a Participant in respect of any 'Misconduct', which is defined as being a breach of the following: ...

(b) the Rules and regulations of The Association and in particular Rules E3 to E28 below; ..."

37. The FA Rule E25, on p119 of FA Handbook Season 2014-2015, states:

"25. A Participant shall comply with the provisions of any anti-doping regulations of The Association from time to time in force."

Relevant FA Anti-Doping Regulations

38. The FA Anti-Doping Regulation 3, on p224 of FA Handbook Season 2014-2015, states:

"The presence of a Prohibited Substance or its Metabolite or Marker in a Player's Sample

3. The presence of a Prohibited Substance or its Metabolites or Markers in a Sample provided by a Player is prohibited unless the Player establishes that the presence is consistent with a Therapeutic Use Exemption that has been granted to the Player. The presence of any quantity of a Social Drug or its Metabolites or Markers in a Sample provided by a Player is prohibited both In Competition and Out of Competition.

(a) Sufficient proof that an Anti-Doping Rule Violation has been committed pursuant to Regulation 3 is established by either of the following: the presence of a Prohibited Substance or its Metabolites or Markers in the Player's 'A' Sample where the Player waives analysis of the 'B' Sample and the 'B' Sample is not analysed; or, where the Player's 'B' Sample is

analysed and the analysis confirms the presence of the Prohibited Substance or its Metabolites or Markers found in the Player's 'A' Sample.

- (b) It is a Player's duty to ensure that no Prohibited Substance(s) or its Metabolites or Markers enters his body, and a Player is therefore strictly responsible for any Prohibited Substance or Metabolites or Markers found to be present there. It is not necessary that intent, fault, negligence or knowing Use on the Player's part be demonstrated in order to establish an Anti-Doping Rule Violation pursuant to Regulation 3. A Player's lack of intent, fault, negligence or knowledge is not a valid defence to a charge that an Anti-Doping Rule Violation has been committed pursuant to Regulation 3.*
- (c) Subject to Regulation 3(d) the detected presence of any quantity of a Prohibited Substance or its Metabolites or Markers in a sample will constitute an Anti-Doping Rule Violation.*
- (d) The Prohibited List may make special provisions for substances which have a quantitative reporting threshold and/or which can be produced endogenously.*
- (e) The Prohibited Substances are set out in the Prohibited List. The version of the Prohibited List in force as at the date of publication of the Anti-Doping Regulations is set out in Schedule 3. Participants should note that the Prohibited List may be updated from time to time by WADA. Participants must be aware that any change to the Prohibited List will be recognised and enforced by The FA from the date of such change. Any substance added to the Prohibited List shall immediately be deemed a Prohibited Substance for the purpose of the Anti-Doping Regulations. The current version of the Prohibited List can be accessed via the WADA website located at www.wada-ama.org.*
- (f) The FA will carry out testing:*

 - (i) without giving advance notice to Participants; and*

(ii) both In Competition and Out of Competition.

(g) The FA may test for Social Drugs Out of Competition regardless of whether or not a particular Social Drug is classified as being prohibited In Competition only on the Prohibited List.

(h) The penalties set out in Regulation 42 apply to this violation, unless the violation involves only a Social Drug which is present or detected in an Out of Competition test, in which case the penalties set out in Regulation 43 apply.”

39. The WADA 2015 Prohibited List– effective 01 January 2015¹, states:

“In accordance with Article 4.2.2 of the World Anti-Doping Code, all Prohibited Substances shall be considered as ‘Specified Substances’ except substances in classes S1, S2, S4.4, S4.5, S6.a, and Prohibited Methods M1, M2 and M3.”

And, S3² states:

“S3. Beta-2 agonists

All beta-2 agonists, including all optical isomers, e.g. d- and l- where relevant, are prohibited.

Except:

- *Inhaled salbutamol (maximum 1600 micrograms over 24 hours);*
- *Inhaled formoterol (maximum delivered dose 54 micrograms over 24 hours);*
and
- *Inhaled salmeterol in accordance with the manufacturers’ recommended therapeutic regimen.*

The presence in urine of salbutamol in excess of 1000 ng/mL or formoterol in excess of 40 ng/mL is presumed not to be an intended therapeutic use of the substance and will be considered as Adverse Analytical Finding (AAF) unless the Athlete proves, through a controlled pharmacokinetic study, that the abnormal result was the

¹ <https://wada-main-prod.s3.amazonaws.com/resources/files/wada-2015-prohibited-list-en.pdf>, page 2

² *ibid* page 5

consequence of the use of the therapeutic inhaled dose up to the maximum indicated above.”

40. The FA Anti-Doping Regulations, Schedule One, Procedural Guidelines for the Conduct of Drug Testing, Paragraphs 30.1 and 30.2, on p253 of FA Handbook Season 2014-2015, states:

“30. Analysis of the ‘B’ sample in Adverse Analytical Findings

30.1 *The Player has the right to request the analysis of the ‘B’ sample within 5 calendar days of being notified of an Adverse Analytical Finding. The request for the ‘B’ sample has no impact on a provisional suspension of the Player.*

30.2 *A Player may accept an ‘A’ sample analytical result by waiving his right to the ‘B’ sample analysis. The FA may however request the analysis of the ‘B’ sample at any time if it believes that such analysis will be relevant to consideration of the Player’s case.”*

41. The FA Anti-Doping Regulation 42, on p233 of FA Handbook Season 2014-2015, states:

“Part Six – Penalties for an Anti-Doping Rule Violation committed by a Player

Presence, use, possession

42. *Subject to the provisions of Regulations 43 and 64 – 81 (inclusive), for a violation committed by a Player under Regulation 3 (the presence of a Prohibited Substance), Regulation 4 (the use/attempted use of a Prohibited Substance/Prohibited Method), or Regulation 10 (possession) the following penalties must be imposed:*

(a) for first violation – 2 years suspension; and

(b) for repeated violations – refer to the table at Regulation 51.

42. The FA Anti-Doping Regulations 62 and 63 addressing the *Reduction of penalties for Exceptional or Specific Circumstances*, on pp.237–238 of FA Handbook Season 2014-2015, state:

“Part Nine – Reduction of penalties for Exceptional or Specific Circumstances

General

62. *If the Participant establishes any of the applicable conditions set out in Regulations 64 – 71 the Regulatory Commission may replace the penalties set out in Regulation 42 – 49 with the penalties stipulated in Regulations 64 – 71 (inclusive).*

Principles for Exceptional or Specific Circumstances

63. *Decisions taken under these Regulations regarding exceptional or specific circumstances must be consistent. Therefore the following principles shall apply:*

- (a) Exceptional or specific circumstances will exist only where the circumstances are truly exceptional and not in the vast majority of cases;*
- (b) The evidence must be decisive and specific to explain the departure from expected standards of behaviour;*
- (c) A Player’s or Participant’s minority is not in itself a justification of a reduction of the minimum penalty, but youth and inexperience are factors to be taken into account in determining fault under Regulations 67 – 71 below.*

43. *The FA Anti-Doping Regulations 64 to 66 dealing with Specified Substances under Specified Circumstances, on p.238 of FA Handbook Season 2014-2015, state:*

Specified Substances under Specified Circumstances

64. *For these purposes, Specified Substances shall mean all Prohibited Substances classified as such in Prohibited List. Prohibited methods shall not be Specified Substances.*

65. *If the violation was committed by a Player under Regulation 3 (the presence of a Prohibited Substance), by a Player under Regulation 4 (the use/attempted use of a Prohibited Substance), or by a Player/Player Support Personnel under Regulation 10 (possession) and the Player/Player Support Personnel:*

- (i) *establishes that the relevant Anti-Doping Rule Violation involves a Specified Substance; and*
 - (ii) *establishes how that Specified Substance entered his body or came into his possession; and*
 - (iii) *establishes that there was no intention to enhance sporting performance or to mask the Use of a performance enhancing substance, then (subject to Regulation 66), the penalties can be reduced as follows:*
 - (a) *for a first violation – a minimum of a warning and reprimand without any period of suspension and a maximum of 2 year’s suspension;*
 - (b) *for repeated violations – refer to the table at Regulation 51.*
66. *For a reduction of the minimum penalty to be applied, the Player/Player Support Personnel must produce corroborating evidence in addition to his word that establishes to the comfortable satisfaction of the Regulatory Commission that there was no intention to enhance sporting performance or mask the use of a performance enhancing substance. The Player’s/Player Support Personnel’s degree of fault shall be the criterion used in assessing any reduction in the penalty.*

The Regulatory Commission

44. The following members were appointed to the Regulatory Commission (“the Commission”, “We/us”) to hear this case:

Mr Thura KT Win, JP (Chairman);

Mr Tom Finn; and

Mr Gareth Farrelly.

Mr Robert Marsh, The FA Judicial Services Manager, acted as Secretary to the Commission.

The Hearing & Evidence

45. We convened at 11am on 04 June 2015 at Sport Resolutions offices in London EC4 for this Personal Hearing (the “Hearing”).
46. Mr Matthew Johnson was the Counsel for The FA.
47. Mr Dunkley was in attendance with his Counsel, Mr Nick De Marco, from Blackstone Chambers, and assisted by Ms Deirdrie McCarthy and Mr Edward Canty, Instructing Solicitors from Brabners LLP.
48. Mr Nick Cusack, from The PFA, and Mr Luke Werhun, from Oxford United, were also in attendance as observers to support Mr Dunkley.
49. We had read the bundle of documents prior to the Hearing.

Preliminary Issues

50. We noted from Mr De Marco’s submissions on behalf of Mr Dunkley that:
51. Mr Dunkley had admitted the substance in his sample at the concentration tested. To this extent only, Mr Dunkley had admitted the Charge. Mr Dunkley, however, claimed that the substance was in his sample at the concentration tested as a result of his use of his inhaler for treating his medical condition of asthma, and that:
 - 51.1. He had no intention to enhance sporting performance or to mask the use of a performance enhancing substance, such that his penalty should be reduced to a minimum of a warning and reprimand without any period of suspension pursuant to Regulation 65 of the FA Anti-Doping Regulations (*“Specified Substances under Specific Circumstances”*); alternatively,
 - 51.2. He bore no fault or negligence for the sample being at the concentration it was, and any period of suspension should be eliminated pursuant to Regulation 67 of the FA Anti-Doping Regulations (*“No Fault or*

Negligence"); alternatively,

- 51.3. He bore no significant fault or negligence for the sample being at the concentration it was, and that any period of suspension should be eliminated pursuant to Regulation 70 of the FA Anti-Doping Regulations ("*No Significant Fault or Negligence*") read with paragraph 10.5.1.1 of the WADA Code 2015.
52. Mr Johnson's submissions on behalf of The FA were that:
53. It was for us to determine Mr Dunkley's penalty in accordance with the relevant provisions. It was submitted however that we should assess Mr Dunkley's case with particular reference to Regulations 64 – 66 (*Specified Substances under Specific Circumstances*), as this was not a case where there was any basis to argue *No Fault or Negligence*, and the provisions relating to *No Significant Fault or Negligence* do not materially assist him (as they allow for a possible reduction in penalty only to a suspension of not less than twelve months, whereas Regulations 64 – 66 allow for a possible reduction down to a minimum of a warning and reprimand with no period of suspension). The cases cited and referred to in Mr Dunkley's submissions, which each concerned the use of 'salbutamol', were dealt with in accordance with equivalent provisions to Regulations 64 – 66.
54. Whilst we noted Mr De Marco was advancing *No Fault or Negligence* and *No Significant Fault or Negligence* as alternative arguments to *Specified Substances under Specific Circumstances*, we were grateful to him that given the position set out by The FA, he agreed that Mr Dunkley's case falls under *Specified Substances under Specific Circumstances*.
55. Based on the evidence and submissions we received in the bundle, we agreed with this approach and that the applicable Regulations would be Regulations 64 – 66 (see para 43).
56. Therefore, we will not be addressing *No Fault or Negligence* and *No Significant*

Fault or Negligence arguments and counter-arguments, or associated arguments, made in the parties' written submissions in this document.

The Burden and Standard of Proof

57. The General Provisions relating to usual Inquiries, Commissions and Appeal Boards do not apply in Anti-Doping Rule Violation cases. The burden and standard of proof for Anti-Doping Rule Violation are set out in Regulations 20 and 21 of Anti-Doping Regulations (p.230 of FA Handbook Season 2014-2015).
58. In Anti-Doping Rule Violation cases, other than for a charge of misconduct pursuant to Regulation 13, Regulation 20 requires The FA to bear the burden of proving to the comfortable satisfaction of any Regulatory Commission or Appeal Board etc. that an Anti-Doping Rule Violation has taken place. The standard of proof in all such cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt.
59. In such cases, under Regulation 21, the burden of proof shifts to a Participant to rebut a presumption or establish specific facts or circumstances and the standard of proof shall be on the balance of probabilities, except as expressly provided for in Parts Eight and Nine of The FA Anti-Doping Regulations, where the Participant must satisfy a higher standard of proof.

The FA's Case

60. Mr Johnson stated that Mr Dunkley had admitted to the Charge, and requested a personal hearing. We must therefore determine the penalty to be applied to Mr Dunkley for this breach.
61. As this case concerns a Specified Substance, under Regulations 64 – 66 we may reduce the otherwise applicable penalty, but only if certain conditions are met. These are that Mr Dunkley establishes how the Specified Substance entered his body (Regulation 65(ii)) – this to be established by Mr Dunkley on the balance of probabilities, and also (subject to Regulation 66) that there was no intention

- to enhance his sporting performance or to mask the Use of a performance enhancing substance (Regulation 65(iii)).
62. Mr Johnson drew our attention to the applicable standard of proof under Regulation 66 (as expressly acknowledged in Regulation 21) that Mr Dunkley needed to produce corroborating evidence in addition to his own word that established to our “*comfortable satisfaction*”, rather than the balance of probabilities, that there was no intention to enhance sporting performance or mask the Use of a performance enhancing substance. Where all of the conditions are met, under Regulation 65(iii)(a) the penalty can be reduced, for a first breach, to a minimum of a warning and reprimand with no period of suspension, up to a maximum of two years’ suspension.
63. Mr Johnson added that The FA does not positively assert that Mr Dunkley had an intention to enhance his sporting performance or to mask the Use of a performance enhancing substance in taking ‘salbutamol’ in this case. Corroboration might be found in the fact that Mr Dunkley was prescribed ‘salbutamol’ and his disclosure of the use of an inhaler to the Club and of ‘salbutamol’ on the Doping Control Form.
64. If Mr Dunkley satisfied us to the required standard of the conditions for a possible reduction in the otherwise applicable penalty, then in accordance with Regulation 66 we would need to consider the degree of his fault to assess any reduction in the penalty.
65. Mr Johnson reserved The FA’s final position as to Mr Dunkley’s level of fault until after he had given evidence at the Hearing, but made the following observations at this stage.
66. Whilst each case must be assessed on its own facts, The FA accepted that the cases of *UK Anti-Doping v X*³ in 2013 and *UK Anti-Doping v Y*⁴ in 2011 should provide us with some assistance in this case as to how to approach Mr

³ *UK Anti-Doping v X*, 06 August 2013

⁴ *UK Anti-Doping v Y*, 10 August 2011

- Dunkley's level of fault and the appropriate penalty (a copy of these cases were provided).
67. As noted in paragraph 17 of the X case, the minimum standard of behaviour expected of a player is that he understands the rules of his sport and that he has a duty to compete without there being any Prohibited Substance in his system. At paragraph 22, it is noted that the athlete used an inhaler without being aware of the rules relating to its use or taking care to ensure his use was consistent with those rules. In those circumstances it was stated that the athlete "*...cannot be said to have acted without fault...*".
 68. Similarly in the Y case, at paragraph 29 it was noted that the athlete was at fault where he was unaware that there was a daily limit on how much 'salbutamol' he was permitted to use, and at paragraph 37 it was stated that "*...the Athlete's fault lies in his failure to acquaint himself with the relevant rules and thereby putting himself in a position whereby over-use was more likely.*"
 69. The Preamble to The FA's Regulations states that players must be aware of what constitutes an Anti-Doping Rule Violation, must take responsibility for all substances that they ingest, must inform medical personnel of their obligation not to use Prohibited Substances and take responsibility to ensure that any medical treatment received does not contravene FA Rules and Regulations. Regulation 3(b) categorically states that it is a player's duty to ensure that no Prohibited Substance enters his body and makes players strictly responsible in this respect.
 70. Mr Dunkley's conduct must be judged in this context. Mr Johnson invited us to note in Mr Dunkley's witness statement that he, Mr Dunkley, is not aware of the maximum permitted dosage/usage of his inhaler.
 71. Mr Johnson submitted that the penalty in Mr Dunkley's case ought to be assessed with reference to Regulations 64 – 66. Should we be satisfied that the conditions have been met so that a reduction in the otherwise applicable

penalty may be considered, we should be assisted by the decisions of UKAD of X and Y in deciding the level of penalty to impose on Mr Dunkley.

Mr Dunkley's Case

72. We received live evidence from Mr Dunkley and his examination-in-chief could be summarised as:

72.1. He, Mr Dunkley, was prescribed by his GPs to use inhalers that contained the substance 'salbutamol' because of his asthma;

72.2. He had never been told to only take a certain number of "*puffs*" of the inhaler, or that there was a maximum number he could take on each day – he was simply instructed to use his inhaler "*as needed*" to regulate his breathing;

72.3. He did not know how much 'salbutamol' was in the inhaler, or what concentration was involved in a puff, or indeed what concentration was permitted and what was not;

72.4. He tended to use his inhaler intermittently, as and when he required it. He would use it when he was short of breathing, which was most often when the weather was cold and/or when he was exercising;

72.5. Because he had never been given any indication that he could only take a set number of puffs of his inhaler on any day, he did not count the number of puffs he took – he simply continued to take puffs until his breathing was comfortable;

72.6. He did not receive any anti-doping training or education from the Club or from The FA. This was in part a consequence of him only joining the Club after such education is usually provided, and the fact that he had previously been signed to non-league football clubs for which The FA's programme of anti-doping education does not extend;

- 72.7. He did, however, inform the Club during his medical in November 2014 when he joined of his use of the inhaler. He was not told by the Club to limit the use in any way;
- 72.8. After the Test he was asked to recall the number of times he used the inhaler on the day of the Test. The reality was he did not count the number of puffs he took, but as he was asked to be definitive and he thought he must have taken at least 4 puffs this was the information he provided;
- 72.9. He accepted, however, that it was most likely he took many more puffs. He was certain of the times he used the inhaler (before and after the warm-up before kick off) but did not count the number of puffs he took. He simply used the inhaler, taking puffs, until his breathing was OK;
- 72.10. He did not use the inhaler to enhance his performance or to mask anything else. He simply used it to treat his asthmatic condition the way he had previously used it. He did not take ‘salbutamol’ in any other way (for example, orally), and was unaware it could be taken in any other way; and
- 72.11. His use of his inhaler was quite open and never hidden. Crucially, he declared it to the Club at the first opportunity and declared it on the Doping Test Control Form on the day of the Test.
73. In cross-examination by Mr Johnson, the answers given could be best summarised as:
- 73.1. Mr Dunkley had the same two ‘salbutamol’ inhalers (blue inhalers) since the first prescription in June 2011 and another in July 2011. He normally kept one in his bag and the other in his car. These inhalers only became empty in late February 2015, after the Pharmacokinetic Study. As each inhaler would provide 200 doses, Mr Johnson suggested – based on his own calculations of Mr Dunkley’s stated usage in his evidence, it seemed

doubtful that a total of 400 doses would last some 42 months. Mr Dunkley maintained that he did not use his inhaler every day, his stated usages were on occasions only, and mainly used it during 'hay fever months' or cold periods or when he was doing strenuous exercises. Mr Dunkley had not sought a replacement prescription since his inhalers depleted at the end of February and he does not have an inhaler at present;

- 73.2. Mr Dunkley appears to have two further prevention inhalers (brown inhalers) but, according to his medical records, he was only prescribed with one in June 2011. Mr Dunkley could not recall where he got the second prevention inhaler from but thought it might have been from his sister who also has the same type;
- 73.3. Mr Dunkley has not had his asthma / inhaler annual review with the GP since August 2012 and he would need to do a new test when he goes to his GP;
- 73.4. Mr Dunkley has not had any formal training on anti-doping but he was aware of the anti-doping testing programme. He knew he had the responsibility to declare his Ventolin usage, which he had done with the Club;
- 73.5. Mr Dunkley had not spoken to his GP about being a professional footballer and had never asked about the possible effects on a sports person; and
- 73.6. Mr Dunkley did not think it would be performance enhancing – he does not know one way or the other – but accepted that it possibly could have. However, he used his inhaler to help him return to normal breathing rate.
74. In re-examination by Mr De Marco, the answers could be best summarised as:

- 74.1. Mr Dunkley could have gone for months without the need to use the inhaler; and
 - 74.2. When Mr Dunkley told his GP that he was using his inhaler 2 – 3 times per week during a period, it was in the month of July when he would have been doing strenuous training as part of his pre-Season training and also it was when he would have experienced hay fever. Therefore, he would need to use his inhaler frequently at that time.
75. In answer to our questions, Mr Dunkley told us that:
- 75.1. He had not sought to replace his depleted inhalers, as he had been having anxieties in respect of the use of an inhaler since the Test; and
 - 75.2. He has two years left in his contract with the Club.
76. Mr De Marco submitted that if we accepted Mr Dunkley’s evidence, given the circumstances of this case, Mr Dunkley ought not to be subject to any period of suspension.
77. Mr De Marco told us that Mr Dunkley accepted the Anti-Doping Rule Violation. He apologised to The FA for his violation. He was entirely unaware of the dangers of taking too many puffs of his inhaler. He had never been advised previously, whether by his GP, the Club (to whom he properly informed about his use of the inhaler) or The FA that he should only take a certain number of puffs from his inhaler on any given day because if he took more puffs he might be in breach of the Regulations.
78. Mr Dunkley had been using inhalers for a number of years before the Test, and had always used them as he was advised to, that was “*as needed*”. This meant he might go for long periods without using the inhaler at all. On other occasions he might use the inhaler frequently within the same day. As such, he never counted the number of puffs of the inhaler he took on any given day.

79. On the day of the Test, Mr Dunkley recalled it was cold. He recalled using his inhaler before the warm up because he was short of breath. He also recalled using it again, taking several puffs, after the warm up as his breathing was still not normal. He could not recall the exact number of puffs he took because he did not ever count them – it never occurred to him he should only take a set number of puffs or that he should be keeping a mental record of the number of puffs. He simply continued to use his inhaler, taking as many puffs as was needed to regulate his breathing to a normal level.
80. When he was first asked to set out in writing how many puffs he took, he was led to believe by the Club that after doing so the matter would probably not go any further. He was told he should give an exact number. He did not think he could say he did not count and so gave a number he could be sure of, in other words he knew he must have had at least 4 puffs because he used the inhaler before and after warm up and it was unlikely, in his mind, he had less than 4 puffs. He thought it better to say a number he could be sure he must have taken rather than guess another number or not state any number.
81. However, it was clear from his interview with The FA on 01 April 2015 that he did not recall the exact number of puffs he took and in that interview he said that it obviously must have been more than 4 and he must have used it several times more than he anticipated.
82. The FA had indicated that in these proceedings it would not be positively asserting that the ‘salbutamol’ taken would have had a performance-enhancing benefit to Mr Dunkley. It was submitted, with respect, that it was a sensible concession for The FA to make. Mr Dunkley’s solicitors had been told by a medical expert that this is bound to be the case, but given The FA did not positively assert that Mr Dunkley had an intention to enhance his performance or to mask the Use of a performance enhancing substance, they had not gone to the unnecessary expense of producing expert evidence to demonstrate the same.

83. However, Mr De Marco submitted that there was evidence before us that Mr Dunkley legitimately used an inhaler for his asthma. We were invited to adduce from the evidence before us and the cases relied on, that if a number of puffs were taken (according to The FA's communications with the Club about 16 puffs) then that would give a concentration consistent with the one found in Mr Dunkley's sample.
84. Mr De Marco stated that all of the evidence showed Mr Dunkley did not know he should only take a limited number of puffs or that he would be risking a breach of the Regulations if he took over that amount. Given the circumstances of the case, and in particular the fact Mr Dunkley is relatively young and inexperienced at this level being that he was new to football at Football League level, and given he declared his use to the Club and was not told by it to regulate it to a limited number of puffs, Mr Dunkley was not negligent. He has not had the benefit of any training as part of The FA's anti-doping programme because by the time he joined the Club in November 2014, the annual meeting on such matters at the Club had already taken place, and neither the Club nor his GPs ever told him he should not take over a certain amount of puffs of his inhaler.
85. Given the lack of any performance enhancing effect of the amount of 'salbutamol' Mr Dunkley had in his sample, and the legitimate reason he was using his inhaler, we were asked to find that, on the balance of probabilities:
- 85.1. Mr Dunkley had established that 'salbutamol' is a specified substance – this is clear from the Regulations;
 - 85.2. Mr Dunkley had established how the 'salbutamol' at the level found was found in his sample – i.e. as a result of taking several puffs on his inhaler on the day of the Test; and
 - 85.3. Mr Dunkley had established that he did not use his inhaler to enhance performance (and indeed it would be the least likely explanation of the

use of an inhaler in the circumstances) but rather simply to normalise his breathing, i.e. for the legitimate use it was intended.

86. It was submitted that the appropriate sanction ought to be a warning and a reprimand and it would be unfair and/or disproportionate to have any sanction that imposed a period of ineligibility from playing on Mr Dunkley.
87. In this regard, Mr De Marco cited three recent decisions of various domestic sporting bodies relating to the use of 'salbutamol'. Mr De Marco accepted that no two cases are the same, and that we are not bound by decisions of other sporting tribunals, but those decisions would be useful in demonstrating the general approach to findings of similarly high or higher concentrations of 'salbutamol' in similar circumstances.
88. In *WADA v Ian Sibbit*⁵ an RFL Anti-Doping Tribunal reprimanded Mr Sibbit but imposed no period of ineligibility:
- 88.1. The player's sample showed 1,997ng/mL concentration of 'salbutamol' – that is more than 99% over the permitted amount compared to 50% in this case.
- 88.2. The player had originally said he took only 6 puffs of his Ventolin Inhaler, but later gave evidence that he must have taken 54 – 68 puffs before and during the game - that was both a far greater amount of puffs overall and a greater discrepancy than in this case.
- 88.3. The Tribunal was nevertheless satisfied that the 'salbutamol' got into the player's sample as a result of inhalation.
- 88.4. The Tribunal remarked that the maximum safe daily dose of 'salbutamol' is 1,600ng, "i.e. 16 puffs."

⁵ *WADA v Ian Sibbit*, RFL Anti-Doping Tribunal, 9 February 2009

- 88.5. The Tribunal was not satisfied on the balance of probabilities that the abnormally high result was caused by the therapeutic use of inhaled salbutamol and therefore there was a violation.
- 88.6. However, as ‘salbutamol’ was now a specified substance (and quite properly applying the principle of *lex mitior*), the Tribunal was satisfied that this was the player’s first offence, that the ‘salbutamol’ entered the player’s body as a result of inhalation, that the player believed he was using ‘salbutamol’ for therapeutic purposes and not to enhance his performance, and that therefore a reprimand was sufficient sanction.
89. In a decision of UK Anti-Doping concerning a Welsh amateur boxer,⁶ the boxer was subject to a reprimand but no period of ineligibility:
- 89.1. The concentration of ‘salbutamol’ found was 2,670ng/ml – 167% over the permitted amount compared to 50% over in this case.
- 89.2. The athlete was prescribed an asthma inhaler and estimated he took about 12 puffs a day, but due to pre-fight anxiety took about 16 puffs on the day of the fight.
- 89.3. The panel was satisfied that the ‘salbutamol’ entered the boxer’s system as a result of use of the inhaler, it was not used to mask another Prohibited Substance, the inhaler was used for therapeutic reasons, and the boxer’s evidence of absence of intent was corroborated by the evidence that he used an inhaler and declared the same.
- 89.4. Having considered various previous cases, and taking into account the boxer’s “*youth, inexperience and general lack of awareness of his anti-doping responsibilities (so far as his use of the inhaler is concerned)*” he was subject to a reprimand but no period of ineligibility.
90. In a decision of *UK Anti-Doping v Y*⁷ (a Judo athlete), the athlete was subject to a warning and reprimand but no period of ineligibility:

⁶ *UK Anti-Doping v X*, 06 August 2013

- 90.1. The concentration of ‘salbutamol’ was 1,462ng/ml – very close to the one in this case.
- 90.2. UK Anti-Doping accepted that the ‘salbutamol’ the athlete ingested was for the purpose of regaining control of his breathing and not to gain a performance enhancing benefit.
- 90.3. This was corroborated by the fact that the athlete used the inhaler openly and disclosed the use of the inhaler at the time of the test (although he failed to properly indicate the number of puffs he took). It was suggested that this was analogous with the case we are concerned with, as here Mr Dunkley indicated that in the 7 days prior to the date of the Test he had taken ‘salbutamol’ and ‘ventolin’ on the sample collection form signed on 03 January 2015, had informed the Club he was using the inhaler when he first joined the Club (as corroborated by the Club’s statement) and produced evidence in the form of GP notes and prescriptions that he was using it and the nature of the instructions he received as to its use.
- 90.4. In paragraphs 34 and 36 of their decision, the Tribunal contrasted the facts with two earlier cases and took into account “*the poor medical advice and care*” provided to the athlete by the judo club (that was a lack of information about the number of puffs to use) and (ii) the extent of “*over use*” of the inhaler, before finding that a warning and reprimand, and no period of ineligibility, was appropriate. Again, we were invited to draw similarities with the case in hand, as Mr Dunkley also did not receive any medical advice about the number of puffs he could take, and his over use was very similar to the amount of over use by the Judo athlete (50% over use compared with 46.2% over use, both much less than the amounts in the previous two cases).

⁷ UK Anti-Doping v Y, 10 August 2011

91. For all the reasons set out above, Mr De Marco submitted on behalf of Mr Dunkley that his penalty ought to be a warning and reprimand and not include any period of ineligibility.
92. In closing, Mr Johnson summarised some key points of *The FA's Case* stated above and added that Mr Dunkley appeared to have put the onus on others to educate him and some level of fault must be attributed to Mr Dunkley. There had been no explanation for Mr Dunkley not having annual reviews since August 2012 and he does not know the impact of 'salbutamol' use. It is incumbent on Mr Dunkley to know what he is taking, he could have made a simple enquiry and he needs to take responsibility on what he ingests.
93. Mr Johnson stated that The FA's view would be that this case was at the lower end of the sanctions and, if any suspension at all, it ought to be minimal.
94. In closing, Mr De Marco summarised some key points of *Mr Dunkley's Case* stated above, agreed with The FA's view that the sanction should be at the low end and suggested that Mr Dunkley was entitled to no period of ineligibility at all.
95. That concluded the submissions and we were grateful, and wished to record our thanks, to everyone involved and assisted us with this case.

Our Decision

96. We noted that Mr Dunkley had accepted the Adverse Analytical Finding of his "A" sample (in para 51) and did not request his "B" sample to be analysed (in para 10).
97. Mr Dunkley also accepted the concentration of 1,500ng/mL of 'salbutamol' found in his "A" sample (in para 51), which was 50% more than accepted level to be an intended therapeutic use of the substance.
98. In accordance with the WADA Prohibited Substances 2015 listed in S3 (see para 39), it allows the Athlete to prove through a controlled Pharmacokinetic Study that the abnormal result was the consequence of the use of the therapeutic

- inhaled dose up to the maximum concentration of 1,000ng/mL. This controlled Study was conducted on 18 February 2015 at King’s College Drug Control Centre in London (in para 15) and Professor Cowan reported that the data from this controlled Study led him to the opinion that the peak concentration was unlikely to have exceeded the concentration found in Mr Dunkley’s sample (~1,500ng/mL) (in para 19). Therefore, Mr Dunkley had not proved that his abnormal result was the consequence of therapeutic use.
99. Accordingly, the Charge issued by The FA (in para 30) is valid and, due to the strict liability nature of the Anti-Doping Rule Violation – see Regulation 3 (para 38) – and it had not been proved through controlled Study that his abnormal result was the consequence of therapeutic use (in para 98), Mr Dunkley had no option but to accept the Charge, which he duly did (in paras 34, 51 and 77).
100. Consequently, Regulation 3(h) directs that the penalties set out in Regulation 42 (see para 41) apply to this violation.
101. Regulation 42 requires a *2 years suspension for a first violation* of Anti-Doping Rule. But it is subject to Regulations 64 – 81 (inclusive), which includes the provisions for *Specified Substances under Specified Circumstances* as advanced by both Mr Johnson and Mr De Marco.
102. The ‘salbutamol’ is classified as a Specified Substance in WADA’s 2015 Prohibited List (see para 39), so it established the condition sets out in Regulation 65(i). And, IF Mr Dunkley could satisfy us on the *balance of probability* how it entered his body (see Regulation 65(ii) in para 43) AND if he could satisfy us on the higher standard of proof of *comfortable satisfaction* that there was no intention to enhance sporting performance or to mask the Use of a performance enhancing substance (see Regulations 65(iii) and 66 in para 43), THEN Regulation 65 would apply.
103. Regulation 65 sets the penalty *for a first violation* to be *a minimum of a warning and reprimand without any period of suspension and a maximum of 2 year’s suspension* (see Regulation 65(iii)(a) in para 43).

104. Regulation 66 directs that *The Player's degree of fault shall be the criterion used in assessing any reduction in the penalty* (see in para 43).
105. From the evidence before us, we accepted that Mr Dunkley had proved on the *balance of probability* that 'salbutamol' entered his body via his use of his own inhaler, which was prescribed to him by his GP to address his mild asthma condition (in paras 72.1 and 73.1) and the concentration found in his sample was consistent with approximately 16 puffs of his inhaler (in para 83). We were content that this required condition under Regulation 65(ii) was established.
106. We also received evidence from Mr Dunkley (in paras 28, 51.1, 72.10 and 73.6) and submissions from Mr De Marco (in paras 85 and 85.3) that Mr Dunkley was not intending to enhance sporting performance or to mask the Use of a performance enhancing substance but he was legitimately using it for his asthma condition (in paras 83, 85 and 85.3). We also noted that The FA was not positively asserting Mr Dunkley had an intention to enhance his sporting performance or to mask the Use of a performance enhancing substance (in para 63). As corroborating evidence, we found that the inhaler was prescribed to Mr Dunkley by his GP (in paras 63, 72.1, 73.1, 90.3 and 105), he declared his usage of an inhaler to the Club during his medical (in paras 63, 72.7, 77 and 90.3) and he disclosed it on his Doping Control Form (in para 63, 72.11 and 90.3). In assessing this, we reminded ourselves that the burden was on Mr Dunkley to prove to our *comfortable satisfaction*. We were satisfied that this required condition under Regulation 65(iii) was established.
107. Therefore, this being Mr Dunkley's first Anti-Doping Rule Violation, *a minimum of a warning and reprimand without any period of suspension and a maximum of 2 year's suspension* as set out in Regulation 65(iii)(a) will apply in this case (in para 103).
108. We went on to consider the degree of Mr Dunkley's fault to assess how much reduction, if any, to be applied to the penalty range.
109. In this regard, we noted in particular that:

- 109.1. the high level of ‘salbutamol’ concentration found in Mr Dunkley’s sample was a result of his excessive use of his prescribed inhaler (in para 105);
 - 109.2. he had never counted the number of puffs he takes on any given day (in para 78);
 - 109.3. he did not know that he should only take a limited number of puffs or that he would be risking a breach of Regulations if he took over that amount (in paras 77 and 84); and
 - 109.4. he had not spoken to his GP about being a professional footballer and never asked about possible effects of ‘salbutamol’ on a sports person (in para 73.5).
110. As Mr Johnson had pointed out (in para 69), the Preamble of FA Anti-Doping Regulations (p.221 of FA Handbook Season 2014-2015) clearly sets out the *Participant’s Responsibilities* (on p.222). In particular, the Players must take responsibility for all substances that they ingest, must inform medical personnel of their obligation not to use Prohibited Substances and take responsibility to ensure that any medical treatment received does not contravene FA Rules and Regulations.
111. Although Mr Dunkley had not received any education from The FA about Anti-Doping programme, Mr De Marco accepted in his submission that Mr Dunkley joined from a non-league football club in November after the annual meetings conducted by The FA and, therefore, he missed such training (in para 84). Mr Johnson also informed us that the non-league football clubs receive their anti-doping information leaflets annually.
112. Whilst we noted from Mr Dunkley’s evidence and submissions (in paras 72.7, 77 and 90.3) that he informed the Club during his medical when he joined the Club and he did not receive any information or advice about his use of the inhaler (on which we included our observations below in para 124), he was not

fully aware of the rules or has not taken responsibility for himself to enquire about the maximum dosage and possible impacts his use of an inhaler could have on him as a professional footballer.

113. We, therefore, found that a degree of fault was attributable to Mr Dunkley but that this was at the low end of the spectrum.

114. We accepted that Mr Dunkley is relatively young and inexperienced professional football player (in para 84). Accordingly and as provided for by Regulation 63(c) (see para 42), we would consider his youth and inexperience as factors to be taken into account in determining Mr Dunkley's degree of fault.

The Sanction

115. In considering an appropriate and proportionate sanction, we were grateful to both Mr Johnson and Mr De Marco for the previous cases cited involving other sports and their observations.

116. We agreed with:

116.1. Mr Johnson's submission that each case must be assessed on its own facts and the cases cited were to provide us with some assistance in how we might approach Mr Dunkley's level of fault and the appropriate penalty (in para 66); and

116.2. Mr De Marco's submission that no two cases are the same and that we are not bound by decisions of other sporting tribunals (in para 87).

117. We were mindful that one of the purposes of the WADA's World Anti-Doping Code and the World Anti-Doping Program is "*to ensure harmonized, coordinated and effective anti-doping programs at the international and national level with regard to detection, deterrence and prevention of doping*"⁸, and accordingly we will give regard to the previous decisions in other sports.

⁸ <https://wada-main-prod.s3.amazonaws.com/resources/files/wada-2015-world-anti-doping-code.pdf> page 11

118. We found *UK Anti-Doping v X* (in paras 67 and 89) and *UK Anti-Doping v Y* (in paras 68 and 90) to be particularly useful as having many similarities with Mr Dunkley's case.
119. We found that the degree of fault found in those cases were similar to that we had assessed on Mr Dunkley.
120. We noted that in both *X* and *Y* cases, the sanctions were "*a warning and reprimand with no period of ineligibility imposed*".
121. After having admitted to the Charge for the first offence of an Anti-Doping Rule Violation, and taking into consideration the submissions and findings, we ordered that Mr Dunkley be:
- 121.1. issued with a warning and reprimand without any period of suspension;
and
 - 121.2. subject to target testing for a period of 2(two) years.
122. We further ordered that Mr Dunkley pay £1,000 (one thousand pounds) as a contribution towards the costs of the Hearing.
123. The decision is subject to the right of appeal as provided by Regulations 82 and 83 of The FA Anti-Doping Regulations, on pp.240-241 of FA Handbook Season 2014-2015.

Additional Observations

124. Whilst the Preamble to The FA's Regulations requires Mr Dunkley to be aware and take responsibility (in para 69), we felt that the Club could have provided more help and support to Mr Dunkley than they did, after he declared his usage of an inhaler, especially as this was Mr Dunkley's first professional football contract.

Application from Mr Dunkley

125. After the Hearing and prior to us issuing the Written Reasons, we received an

application on behalf of Mr Dunkley, from Mr De Marco, to redact Mr Dunkley's name in our Written Reasons and exclude from publications by The FA (the "Application").

126. The Application was made on the basis that the publication of his name could most likely cause serious reputational damage to Mr Dunkley, from which he may not be able to recover – despite us finding that Mr Dunkley did not intend to enhance sporting performance or to mask the Use of a performance enhancing substance and the degree of fault attributable to Mr Dunkley was at the low end of the spectrum.
127. It was argued that an Anti-Doping Rule Violation is a serious offence for any sportsman. It is generally regarded within the public, often by the press, and no doubt amongst many football fans as a finding that a player has "cheated". This, more than anything else, seriously undermines the reputation of the player involved.
128. Mr De Marco referred to The FA Anti-Doping Regulations, Schedule One, Procedural Guidelines for the Conduct of Drug Testing, General Provisions Paragraphs 2.6 and 2.7, on p242 of FA Handbook Season 2014-2015. These Paragraphs state:
- "2.6 In the event of disciplinary proceedings, including appeal proceedings, The FA may publish, in the press or otherwise, certain matters of fact relating to such proceedings (see 'General Provisions relating to Inquiries, Commissions of Inquiries, Regulatory Commissions of The Association, Other Disciplinary Commissions and Appeal Boards and Safeguarding Review Panel Hearings' contained in The FA Handbook) and following the disciplinary proceedings The FA (and /or the NADO where the disciplinary proceedings concern an Anti-Doping Rule Violation contained in the World Anti- Doping Code) may publicly disclose (at its election) the decision or the outcome of the proceedings, save where the decision is that no Anti-Doping Rule Violation has been committed, in which case the decision may only be disclosed publicly with the consent of the Participant.*

2.7 *Notwithstanding paragraph 2.6, the Regulatory Commission or Appeal Board may order that some or all of the text of any decision it reaches in an anti-doping case may not be published, where there are compelling reasons not to publish. In such cases, only the outcome may be published."*

129. Mr De Marco put forward some arguments and invited us to exercise the jurisdiction by making the order requested.

130. The FA opposed the Application. Mr Johnson submitted that:

131. In this case, as in general in any disciplinary matter, the presumption must be that the balance of the sport's interests is in complete transparency, so that the player is identified in any published decision. Where anti-doping rule violations are concerned, particularly WADA offences, The FA needs to be seen to respond appropriately. Publishing the decision in full will mean all of the factual circumstances of the breach, the level of fault, the nature of the rule breach and the sanction are made clear to the public and other participants. Redacting Mr Dunkley's name will send a message that players may commit WADA offences without being named, and this can only damage the image of the anti-doping programme and so the sport;

132. No compelling reason has been put forward to move away from full publication in this case and the onus is on Mr Dunkley to do so under Paragraph 2.7. Mr Dunkley committed a WADA offence, and the Commission found that he had acted with some fault. The level of fault and the nature of the rule breach will be clear from the decision. In those circumstances it is not accepted that the player will suffer the level of reputational damage claimed; and

133. There is no compelling reason in this case for The FA to adopt any other course of action than to publish this decision in full.

134. We convened again on 17 June 2015 via teleconference to consider the Application.

135. We considered the submissions from both parties and agreed with Mr De Marco that Paragraph 2.7 (in para 128) gives us the jurisdiction to “*order that some or all of the text of any decision it reaches in an anti-doping case may not be published*” and agreed with Mr Johnson that it states “*where there are compelling reasons not to publish*”.
136. We also agreed with Mr Johnson that the balance of the sport’s interests is in complete transparency and we found *no compelling reasons* have been advanced by Mr Dunkley for The FA to adopt any other course of action than to publish our decision in full.
137. We, therefore, dismissed the Application.

Signed...

Thura KT Win, JP (Chairman)

Tom Finn

Gareth Farrelly

17 June 2015