CAS 2009/A/1948 Appeal by Mr Robert Berger v World Anti-Doping Authority

FINAL AWARD

rendered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

President: Mr Alan **Sullivan** QC, Sydney, Australia

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

Mr Tim **Castle**, Barrister, Wellington, New Zealand

CAS Clerk: Ms Sarah Longes, Sydney, Australia

between

MR ROBERT BERGER, New Zealand
represented by Mr Paul David, Barrister, Auckland, New Zealand
instructed by Mr Mark Copeland, Blackman Spargo, Rotorua, New Zealand

- Appellant -

and

WORLD ANTI-DOPING AGENCY, Montreal, Canada
represented by Mr John Marshall SC, Barrister, Sydney, Australia
on instructions from Mr Julien Saeveking, Manager, Legal Affairs, World Anti-Doping Agency

- Respondent –

Introduction

1. The Appellant is an international-level athlete within the meaning of the International Paralympic Committee's Anti-Doping Code ("the IPC Code"). He is a 52 year old paraplegic shooter. He has been taking a beta-blocker called Metoprolol for many years to treat significant heart disease. It is common ground that his life would be endangered if he were not to take this drug. Metoprolol is prohibited in and out of competition in shooting under the Prohibited List which fulfils the essential and fundamental role of identifying substances which are prohibited under the IPC Code.

2. It should be noted that the IPC Code is, as it is required to be, virtually identical, in all material respects, to the World Anti-Doping Code 2009 ("the 2009 WADC").

3. Possession or administration of a substance on the Prohibited List would ordinarily constitute an Anti-Doping Rule Violation ("ADRV") for the purposes both of the 2009 WADC and the IPC Code (see Articles 2.6 and 2.8).

4. However, both Codes provide for the obtaining of what is called a Therapeutic Use Exemption (TUE) which, if obtained, means that the possession or use of the Prohibited Substance by the athlete who obtains the TUE in respect of that substance is deemed not to be an ADRV for the purposes of either Code (see Article 4.4.1 of the respective Codes).

5. Article 4.4.2 of the IPC Code required the appellant to obtain a TUE from the IPC if he wished to compete in shooting events whilst using

Metoprolol. Decisions by the IPC as to the grant or denial of a TUE are made by an internal expert committee of the IPC known as the IPC TUEC (see Article 4.4.6 of the IPC Code). Members of the IPC TUEC have medical qualifications and experience.

6. On 18 February 2009 the IPC TUEC rejected the appellant's application for a TUE in respect of the use of Metoprolol.

7. Article 4.4.7 of the IPC Code provided for a review by the respondent's own TUEC of the decision of the IPC TUEC to deny the granting of a TUE to the appellant. Like the IPC TUEC, the WADA TUEC is an expert committee comprising members with appropriate medical qualifications and experience in respect of disabled athletes. The appellant engaged that review process and the respondent's TUEC, by a decision made on 19 August 2009, did not reverse the decision of the IPC TUEC not to grant the TUE.

8. The appellant then filed a CAS application dated 2 September 2009 seeking to appeal from the respondent's "decision" of 19 August 2009. It is important to emphasize that this appeal was expressly stated to be one from the decision of the WADA TUEC, not one from the decision of the IPC TUEC. The IPC has not been joined as a respondent to the appeal.

9. It is common ground between the parties, and the Panel agrees, that the only possible provision of the IPC Code which would confer a right of appeal to the appellant from the "decision" of the respondent is Article 13.4 of the IPC Code.

The Decision of the IPC TUEC and its Confirmation by the WADA TUEC

10. In his application for a TUE from the IPC TUEC, the Appellant relied upon a considerable amount of medical evidence from a number of eminent doctors including Dr Ian Murphy, Professor David Gerrard and Dr Malcolm Leggot (Cardiologist).

11. By letter dated 18 February 2009 Dr Oriol Martinez, the Chairperson of the IPC TUEC notified *Paralympics New Zealand* of the outcome of its review of the TUE application made by the Appellant. Dr Martinez informed *Paralympics New Zealand* that the IPC TUEC had decided not to approve the TUE. This was notwithstanding the belief that the IPC believed that the case had "considerable merit" and despite the fact that it was the IPC TUEC's view that there was "no question that it is medically indicated to treat the athlete with beta-blocker therapy".

12. Notwithstanding the sympathy which the IPC TUEC evidently had with the Appellant's plight its reason for refusing the TUE, or not approving it, was as follows:-

> *"There is also little question that beta-blockers improve athletic performance in athletes involved in accuracy events such as Shooting. Beta blockers slow heart rate, decrease heart rate variability and blunt the normal increased heart rate response in particular in sports with significant stress and anxiety component. Based on the available scientific literature, it is not possible to firmly argue that use of a beta-blocker in no way provides enhanced performance for this athlete."*

13. As stated, the Appellant then sought a review of the decision of the IPC TUEC not to approve a TUE by the WADA TUEC. By letter dated 19 August 2009 WADA informed the Appellant of the decision of the WADA TUEC in respect of his application for review. That letter indicated that the WADA TUEC had decided on 19 August 2009 to confirm the decision made by the IPC TUEC. It enclosed the decision of WADA TUEC which consisted of three medical practitioners (two of whom were cardiologists) and who, as is now common ground, had the requisite expertise and experience in respect of the care and treatment of Athletes with disabilities.

The International Standard

14. As Article 4.4.1 of the IPC Code makes plain a TUE must be issued pursuant to the WADC *International Standard for Therapeutic Use Exemptions* if use of the prohibited substance is not to be considered as an ADRV. The current version of the International Standard came into force in 2009 replacing the earlier 2004 version but, correctly, the parties are agreed that nothing turns on which version of the Standard is considered. They are relevantly identical.

15. As agreed by the parties, Article 4 of the International Standard imposes an obligation on the athlete seeking the TUE to satisfy the relevant tribunal of four matters as follows:-

    (i) that the athlete would experience a significant impairment to health if the prohibited substance were to be withheld in the course of treating an acute or chronic medical condition (Article 4.2);

(ii) the therapeutic use of the prohibited substance would produce no additional enhancement of performance other than that which might be anticipated by a return to a state of normal health following the treatment of a legitimate medical condition (Article 4.3);

(iii) there is no reasonable therapeutic alternative to the use of the otherwise prohibited substance (Article 4.4);

(iv) that the necessity for the use of the otherwise prohibited substance is not a consequence, wholly or in part, of prior non-therapeutic use of any prohibited substance (Article 4.5).

16. In its decision, the WADA TUEC noted correctly that a TUE could only be granted if the "imperative and cumulative conditions fixed in Articles 4.2 to 4.5" of the International Standard were fulfilled.

17. As is common ground in this appeal, the WADA TUEC found that all of the "imperative and cumulative conditions" fixed in those Articles were fulfilled **except** that imposed by Article 4.3 of the International Standard, namely the requirement to demonstrate that the therapeutic use of the Metoprolol would produce no additional enhancement of performance other than that which might be anticipated by a return to a state of normal health following the treatment of a legitimate medical condition.

18. The WADA TUEC's reasoning is relevantly contained in this passage from its decision:-

"Considering the numerous publications in the scientific literature suggesting a significant improvement of sport performance in activities requiring precision and accuracy,

such as shooting, by use of different beta-blocking agents. In these studies, it was demonstrated that shooting scores were significantly improved. The enhancement was not only correlated with changes in heart rate or systolic blood pressure, suggesting that the improved performance also results from decreased hand tremor and anxiolytic effects. It is therefore strongly speculated that peripheral, rather than central blockade, contributes to the beneficial effect;

Considering as a consequence that we do not recognise the argument preceded by Mr Berger's physicians with the Holter Monitoring registration …".

19. The WADA TUEC's decision concluded by informing the Appellant that, in accordance with Articles 13.4 and 13.5 of the IPC Code, the WADA decision could be appealed before CAS within twenty-one days of its notification.

<u>**The Appeal to CAS**</u>

20. As noted above, the Appellant filed a CAS Application dated 2 September 2009 seeking leave to appeal from the decision only of the WADA TUEC of 19 August 2009.

21. Following a preliminary telephone conference conducted on 28 September 2009, and in accordance with the Order of Procedure signed by the parties, this Panel heard that appeal on 3 November 2009 and 16 December 2009. At the conclusion of the hearing on 16 December 2009 the Panel indicated that it wished to carefully consider the very helpful submissions made on behalf of each of the parties and that it would

render its Award as soon as reasonably practicable. This document constitutes that Award.

The Central Issues in this Appeal

22. There are three significant issues to be determined by this Panel in order to resolve this appeal. Those issues are as follows:-

    (a) whether this Panel has jurisdiction to hear an appeal from the "decision" of the WADA TUEC dated 19 August 2009 and, if so, what is the basis of that jurisdiction;
    (b) in the event that this Panel does have jurisdiction to hear an appeal from the WADA decision, what is the nature of that appeal and, in particular, can this Panel have regard to materials and evidence which were not before either the IPC TUEC or the WADA TUEC and, also, whether or not this Panel is free to reach its own decision on the outcome of the appeal without the need to find any "error" in the decision appealed from;
    (c) in the event that the Panel has the jurisdiction to hear the appeal, and in the light of the nature of the appeal as determined by this Panel, what should be the outcome of the appeal.

23. Each of these issues is a very important one. The first two issues raise matters of importance not only for the particular parties to this appeal but also in respect of the adjudication and determination of disputes relating to the grant of TUEs in all sporting competitions conducted or controlled by the very many sporting organisations which have adopted the 2009 WADC. The importance of the third issue, from the athlete's

perspective, can hardly be over estimated. If he is unsuccessful in this appeal, he has a very stark choice. He can either cease taking the Metoprolol, thereby risking his life, but continue shooting on a competition basis or, alternatively, he can continue to take his necessary medication but, by so doing, he will be deprived of the opportunity to continue competitive shooting.

The Jurisdiction Issue

24. During a preliminary telephone conference conducted on 28 September 2009, Mr John Marshall SC representing the respondent raised the issue of the jurisdiction of CAS to hear this appeal, indicating that his client wished to support the view that CAS had jurisdiction to entertain the appeal but that, because the matter was one of general importance, the Panel should rule on the question of jurisdiction. Mr David, representing the respondent, agreed with that approach.

25. The Panel agrees that the issue of jurisdiction is one of general importance. The general importance arises because:-

    (a) the relevant appeal provision of the IPC Code (Article 13.4) is, as it is required to be (see Article 23.2.2 of the 2009 WADC), virtually identical to Article 13.4 of the 2009 WADC;

    (b) as the 2009 WADC has been adopted by over 600 international sporting organisations including the IPC and also, directly or indirectly, implemented by over 100 governments and comprises "a kind of international law of sport in the anti-doping area" (see P. David, A Guide to the World Anti-Doping Code, Cambridge, 2008

at 40), it is important to determine the proper construction of Article 13.4;

(c) furthermore, as far as the parties and the Panel are aware, CAS has not yet had to determine the proper construction of Article 13.4 of the 2009 WADC or its predecessor in the 2003 WADC. As the Introduction to the 2009 WADC explains (at p.18) its provisions are "aimed at enforcing anti-doping rules in a global and harmonised way … and are … not intended to be subject to or limited by any national requirements …". The Introduction further reminds arbitral bodies such as this Panel that, when reviewing the facts and law of a given case, this Panel "should be aware and respect the distinct nature of the anti-doping rules in the Code and the fact that those rules represent the consensus of a broad spectrum of stakeholders around the world with an interest in fair sport";

(d) it is, therefore, important that CAS, which is the arbitral body principally entrusted with interpretation and application of the 2009 WADC, gives a reasoned and publicly available decision on the proper construction of Article 13.4 so that in future disputes involving the 2009 WADC or its derivatives the question of jurisdiction posed by the construction of Article 13.4 of the 2009 WADC may be approached and dealt with by stakeholders in the future in a "global and harmonised way" as is the object of the 2009 WADC;

(e) so far as our research, and that of counsel, reveals no CAS Panel has yet made a ruling on the jurisdiction issue raised by Article 13.4 of the 2009 WADC (or its equivalent provision in the 2003 WADC or in the anti-doping rules of the many sporting organizations which have adopted the WADC).

26. It is for these reasons, and despite the fact that the parties agree that CAS does have jurisdiction under Article 13.4 of the IPC Code, that Order 2.1 was introduced into the Order of Procedure for this appeal. Order 2.1 is in the following form:-

> *"2.1 The appellant contends and the respondent does not dispute that the Court of Arbitration for Sport (CAS) has jurisdiction to determine, by arbitration, the dispute which is the subject of the appeal brought by Mr Robert Berger (the Appellant) dated 2 September 2009 against the WADA (the Respondent). Notwithstanding that position, in order for the Panel to be satisfied that it has jurisdiction, the parties are to file submissions as to jurisdiction as set out in Articles 10.1 and 10.2 below. In the event that the Panel after submissions is not satisfied that it has jurisdiction pursuant to articles 13.4 and 13.5 of the International Paralympic Committee Anti-Doping Code (the Policy), then and only then, the respondent agrees (such agreement be with effect from the date of this order of procedure) to refer the dispute to CAS for determination by arbitration as if it was a validly constituted appeal pursuant to the Policy."*

27. As is apparent from Order 2.1 of the Order of Procedure, the real question in respect of the first issue is not whether this Panel has jurisdiction but rather the **basis** of that jurisdiction. The parties contend that CAS does have jurisdiction under Article 13.4 of the IPC Code and ask this Panel to confirm that that Article is the basis of the jurisdiction. It is only if the Panel determines that Article 13.4 of the IPC does not confer jurisdiction upon it to hear this appeal that the parties have agreed to submit in any event to the jurisdiction of CAS in respect of this appeal.

28. The Panel notes that, in CAS 2004/A/769 *Franck Bouyer v. UCI and WADA*, another Panel of CAS had to face an identical jurisdiction issue in respect of the 2003 WADC and the Anti-Doping Rules of the UCI which was a signatory of that Code and which had derived those rules from that Code. In *Bouyer*, the Panel did not need to, and did not, determine whether or not the then equivalent of Article 13.4 of the IPC Code conferred jurisdiction on CAS in a situation where the WADA TUEC had "not reversed" the initial decision of the TUEC of the UCI. Rather, in that matter, the parties expressly conferred jurisdiction on CAS to hear the appeal irrespective of whether or not the then equivalent of Article 13.4 was sufficient to confer such jurisdiction in any event (see [31] – [35] of *Bouyer*).

29. The situation in this appeal is different. As we have stated, in the O of P here, the parties have only conferred jurisdiction upon the Panel expressly in the event that it decides that it does not have jurisdiction under Article 13.4 of the IPC Code. In other words, they wish the Panel to determine, first of all, the question of whether or not it does have jurisdiction to hear this appeal under Article 13.4 of the IPC Code.

30. Although, as we shall discuss below, there are several approaches to the construction of Article 13.4 which could be utilised to arrive at a conclusion that it does confer jurisdiction, in the end and after much thought, the Panel has concluded that each of those approaches is too problematic to enable it to be satisfied that Article 13.4 does confer jurisdiction. Accordingly, for the reasons which follow, we proceed upon the basis that we have jurisdiction only by virtue of the agreement of the parties set out in the last sentence of cluse 2.1 of the O. of P. (see [26] above).

Article 13.4 of the IPC Code

31. Article 13.4 of the IPC Code is headed "Appeals from Decisions Granting or Denying a TUE". Relevantly, it reads as follows:-

    "Decisions by WADA ***reversing*** *the grant or denial of a TUE may be appealed exclusively to CAS by the Athlete, the IPC, or National Anti-Doping organisation or other body designated by an NPC whose decision was reversed.* ***Decisions by the IPC*** *other than WADA denying Therapeutic Use Exemptions,* ***which are not reversed*** *by WADA, may be appealed by International Level Athletes to CAS."* (emphasis added)

32. Determination of the issue of jurisdiction depends, first, upon interpreting the provisions of Article 13.4 of the IPC Code. In considering the interpretation issue, the Panel has been greatly assisted by the very helpful submissions of Mr Marshall SC, senior counsel for the respondent dated 6 October 2009. Mr David, who appears on behalf of the Appellant and whose text book is referred to in these reasons, has indicated expressly that he accepts and agrees with the respondent's submissions. We shall deal more fully with the submissions of the parties below. However it is first desirable to say a little about the approach we prefer to the construction of the 2009 WADC (and its derivatives in the Rules of the sporting bodies which are signatories to it).

The Proper Approach to the Interpretation of the IPC Code (and the 2009 WADC)

33. As stated, the IPC has adopted the WADC and the IPC Code contains provisions substantially identical to corresponding provisions in the WADC as is required by Article 23.2 of the WADC. Article 23.2 of the WADC requires a signatory, such as the IPC, to implement "without substantive change" Article 24 of the WADC which deals with interpretation. Consistently with that obligation, the IPC Code contains Article 21 which contains the following provision:-

> *"21.3 This Code, adopted pursuant to the applicable provisions of the WADC, shall be interpreted as an independent and autonomous text and not by reference to any other existing law or statutes except the WADC."*

34. As Mr. David, in his book, *A Guide to the World Anti-Doping Code*, states at p.86:-

> *"This important provision emphasises for tribunals, which have to consider the interpretation of the Code, that general principles of interpretation are to be applied, rather than particular principles of interpretation and law derived from one particular national legal system or another. The focus in interpreting the Code should, accordingly, be on the principles of interpretation which are common to all legal systems because, if that approach is adopted, it is more likely that the Code will be interpreted and applied in a consistent manner."*

35. Such an approach to interpretation of the Code, or of anti-doping rules of a sporting organisation based on the Code, is consistent with the international nature of the text as a code which is intended to function outside the constraints of a particular legal system and is analogous to with the way in which common law courts have treated the interpretation of international treaties or conventions.

36. The approach of courts to the interpretation of international treaties or conventions is that they should be interpreted "uniformly by contracting states" (*Povey v. Qantas Airways Limited* (2005) 223 CLR 189 at 202 [25]; *LK v. Director-General, Department of Community Services* [2009] HCA 9 at [36]). Moreover, such international treaties should not "be interpreted by reference to presumptions and technical rules of interpretation applied in construing domestic statutes or contracts" (*Povey v. Qantas Airways Limited* at 211 [60]. See, also, *Applicant A v. Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 251 – 256) but rather should be interpreted in a manner which emphasises uniformity, and achieves comity, and is "consistent with broad principles of general acceptation" (*Fothergill v. Monarch Airlines Limited* [1981] AC 259; *J.I. McWilliam Co. Inc. v. Mediterranean Shipping Co. SA [2005] 2 AC 423 at 437; El Greco (Australia) Pty Limited v. Mediterranean Shipping Co. SA* [2004] 2 Lloyds Rep 537 at 559); *Commissioner of Inland Revenue v. JFP Energy Inc* (1990) 3 NZLR 536; *Attorney-General v. Zaoui (No.2)* (2006) 1 NZLR 289).

37. What then are the "broad principles of general acceptation" in the international community applicable to the interpretation of the WADC and of anti-doping rules derived from the Code?

38. Subject to several comments which we make below, we think Mr David has accurately summarised these principles as follows at p.84 of his book:-

> *"The general principles of contractual interpretation are a well-established feature of the legal principles in most, if not all, jurisdictions. In general terms, the applicable principles involve ascertaining the intention of the parties to the agreement in the objective sense, by reference to the natural ordinary meaning of the words used in the contract. The court or arbitrator must consider what a reasonable person in the position of the parties to the contract would have understood the contract to mean at the time it was entered into. The meaning will be considered in the general background context of the contract and where there is doubt as to the meaning of the words, the court or arbitrator may consider how a suggested interpretation fits with the purpose of the contract."*

39. The several comments, which we would respectfully make, qualifying this approach to construction, are as follows:-

    (a) the Panel does not think that modern principles of interpretation, in any jurisdiction, now require there to be doubt or ambiguity about the meaning of a word or a phrase or a provision in a contract before consideration is given to the purpose or object of the contract or its surrounding circumstances (see *Chartbrook Ltd v. Persimmon Homes Ltd* [2009] AC 1101 at [37]; *Masterton Homes Pty Ltd v. Palm Assets Pty Ltd* [2009] NSWCA 234 at [2] – [4], [113]; *Franklins Pty Ltd v. Metcash Trading Ltd* [2009] NSWCA 407 at [14] – [18], [322]; *Vector Gas Ltd v. Bay of Plenty Energy Ltd* SC 65/2008 (2010) NZSC 5; *Ansley v. Prospectus Nominees Unlimited* (2004) 2 NZLR 590 and as to the similar position in at

least some civil law jurisdictions see Vogenauer "*Interpretation of Contracts: Concluding Comparative Observations*" in Burrows and Peel (Ed), Contract Terms, Oxford, 2007, especially at 128 – 129 and 133 – 134);

(b) next, it must be remembered that, according to the modern approach to construction, although it requires a strong case to persuade the court that something must have gone wrong with the language used by the parties in the contract (*Chartbrook* at [15]), nevertheless, where the court comes to the conclusion that the parties have made a clear mistake the court will correct that mistake by supplying, omitting or correcting words in an instrument and in so doing there is no limit to the amount of "red ink or verbal re-arrangement or correction which the court is allowed". All that is required is that it should be clear that something has gone wrong with the language and it should be clear what a reasonable person would have understood the parties to have meant (*Chartbrook* at [21] and [25]);

(c) as Lord Hoffman stated in his celebrated speech in *Investors Compensation Scheme Ltd v. West Bromwich Building Society* (1998) 1 WLR 896 at 912 – 913 (which is the foundation of the modern approach to construction in at least some common law countries such as England, Australia and New Zealand and which also appears to reflect the position in civil law jurisdictions – see *Vogenauer* at 134 - 135);

> *"The 'rule' that words should be given their 'natural and ordinary meaning' reflects the common sense proposition that we do not easily accept that people have made*

linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in Antaios Companie Naviera SA v. Salen Rederierna AB [1985] AC 191:

'if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must yield to business common sense'"

We note that Article 32 of the Vienna Convention which we believe, by analogy, is relevant, also sets out a similar principle of construction, stating relevantly:-

"Recourse may be had to supplementary means of interpretation … to determine the meaning when the interpretation according to Article 31:-

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable"

(d) of course, words in, or a provision of, any contract are not construed in isolation from the rest of the contract. Rather, they must be construed in the context of the contract as a whole.

40. Although we do not pretend to assert that what we have so far said is an exhaustive statement of the relevant principles of interpretation, it is, we think, a sufficient one for present purposes.

The Problem with a Literal Interpretation of Article 13.4 of the IPC Code

41. As submitted by the parties, read literally, Article 13.4 would not permit CAS to entertain the current appeal by the appellant against the respondent's decision not to reverse the IPC's decision to deny a TUE. This is because the first sentence of Article 13.4 (see [31] above) would not appear to confer jurisdiction because the respondent did not **reverse** the position that obtained prior to the review by it. Moreover, a literal reading of the second sentence in Article 13.4 would again deny jurisdiction for this appeal. On such a literal reading, the only decision that could be appealed would be the decision by the IPC denying the TUE. That would follow from the proposition that the IPC TUEC decision had not been reversed. Further, read literally, if the second sentence was applicable, the relevant appeal would be not from the respondent's decision but from the IPC's decision.

42. It was submitted that some of the consequences which a literal construction would produce are as follows:-

    (a) an interpretation that it is the original decision alone which can be appealed would mean that the athlete would only have 21 days in which to appeal but may not know in that 21 days the outcome of the WADA review. This is because WADA is entitled to take up to 30 days from the date of notification of the original decision to it to take any relevant action (Article 4.4.7.1 of the IPC Code) yet Article 13.5 of the IPC Code would require the appeal to CAS from

the IPC decision to be lodged within 21 days of that IPC decision being notified to the appellant. Hence, the appellant would have to put on an appeal and pay the fee to CAS without knowing whether it would be necessary to do so from a practical point of view. It would mean that the athlete would have to embark upon two routes of review or appeal concurrently rather than consecutively as would ordinarily be expected;

(b) it would mean there was no right of appeal, as such, from a WADA review which upholds the decision WADA was reviewing to CAS at all;

(c) it would create an appeal process or appeal structure out of step with the appeal structures commonly found in all jurisdictions of which we are aware. The normal appeal structure is for there to be consecutive appeals from, at each level of appeal, the immediately preceding decision;

(d) it would lead to a discordant and inexplicably inconsistent regime within Article 13.4 itself. On the one hand, according to the first sentence of Article 13.4, decisions by WADA reversing the grant or denial of a TUE may be appealed to CAS but, on the other hand, because of the language of the second sentence, a decision of WADA confirming or "not reversing" the earlier decision relating to the grant or denial of a TUE could not be appealed to CAS.

43. On the other hand, it could be argued quite reasonably that Article 13.4 of the WADC was meant to have effect as it reads literally because a policy decision has been made that there is to be no appeal to CAS where two expert tribunals, each comprised of highly qualified medical

practitioners, have reached the same result or decision about not granting a TUE. But, arguably, the language of the last sentence of the first sub paragraph of Article 13.4 tells against any such intended policy or object. It reads:-

> *"Decisions by the IPC other than WADA denying Therapeutic Use Exemptions, which are not reversed by WADA, may be appealed … to CAS"*

44. The language of this sentence, on one view, is inconsistent with there being any intention that there was not to be a right of appeal to CAS merely because the TUECs of both the relevant sporting organisation and of WADA have decided that a TUE was not appropriate.

One Approach to Overcoming the Problem of a Literal Interpretation

45. If the Panel was able to conclude that the consequences set out in [42] above were unintended and uncontemplated ones and that a reasonable person in the position of a stakeholder to the WADC or the IPC Code would conclude that this is a clear case of something having gone wrong with the language then, possibly, the principles of construction referred to in [39](a)(b) and (c) above may be brought into play.

46. As we have set out in [39](b) and (c) above where a tribunal concludes that there has been a clear mistake in the language used in the contract, it can correct that mistake by supplying, omitting or correcting words

and in doing so it seems there is no limit to the amount of "red ink or verbal re-arrangement or correction" which is allowed.

47. The parties have submitted that the corrections which should be made to the language of Article 13.4 of the 2009 WADC and the IPC Code respectively are as set out in the following paragraphs.

48. 13.4 Appeals from Decisions Granting or Denying a TUE

Decisions by WADA ~~reversing the~~ granting or denying~~ial of~~ a therapeutic use exemption may be appealed exclusively to CAS by the Athlete or the Anti-Doping Organization who~~se~~ is adversely affected ~~decision was reversed~~. Decisions by Anti-Doping Organizations other than WADA denying therapeutic use exemptions, where there is no review by WADA ~~which are not reversed by WADA~~, may be appealed by International Level Athletes to CAS and by other Athletes to the national-level reviewing body described in 13.2.2.

49. The same without mark up would be as follows:

13.4 Appeals from Decisions Granting or Denying a TUE

Decisions by WADA granting or denying a therapeutic use exemption may be appealed exclusively to CAS by the Athlete or the Anti-Doping Organization who is adversely affected. Decisions by Anti-Doping Organizations other than WADA denying therapeutic use exemptions, where there is no review by WADA may be appealed by International Level Athletes to CAS and by other Athletes to the national-level reviewing body described in 13.2.2.

50. Applying the same approach to the IPC Code would mean that it read as follows:

13.4 Appeals from Decisions Granting or Denying a TUE

Decisions by WADA ~~reversing the~~ granting or denying~~ial of~~ a TUE may be appealed exclusively to CAS by the Athlete, the IPC, or National Anti-Doping Organization or other body designated by an PC who~~se~~ is

adversely affected ~~decision was reversed~~. Decisions by the IPC other than WADA denying Therapeutic Use Exemptions, where there is no review by WADA ~~which are not reversed by WADA~~, may be appealed by International-Level Athletes to CAS.

51. The same without mark up would result in Article 13.4 of the IPC Code being read as follows:-

> "*13.4 Appeals from Decisions Granting or Denying a TUE*
>
> *Decisions by WADA granting or denying a TUE may be appealed exclusively to CAS by the Athlete, the IPC, or National Anti-Doping Organization or other body designated by an NPC who is adversely affected. Decisions by the IPC other than WADA denying Therapeutic Use Exemptions, where there is no review by WADA, may be appealed by International-Level Athletes to CAS."*

52. If we were confident that a clear mistake had been made in the drafting of Article 13.4 we may have been inclined to accept this re-writing of the language of Article 13.4 although the extent of the surgery required to the language would have troubled us. However, although we suspect there may have been a drafting error, suspicion is not enough.

53. There are a number of reasons why we have been unable to conclude to the requisite degree of satisfaction that there has been a clear mistake in the drafting of Article 13.4. These include:-

    (a) the fact that the same wording appeared in the 2003 WADC. The history of its review and restatement in 2009 is not supportive of

the suggestion that there has been a "clear mistake" in the language used;

(b) we have not been directed to any preparatory materials or minutes or notes of working sessions in relation to the drafting of either the 2003 WADC or the 2009 WADC which cast light on the intended meaning of Article 13.4;

(c) although the *Bouyer* Award was handed down in 2004 no attempt has been made to alter the language of Article 13.4 to overcome the problems the Panel in that matter evidently felt it had in that proceeding;

(d) in respect of the IPC Code, although Article 13.4 was required to be adopted without substantive change, there was nothing to stop the IPC Governing Board, under Article 21.1 of the IPC Code, from inserting an additional provision providing for a more generous right of appeal, viz, an appeal from the decision of the WADA TUEC;

(e) as discussed above, the common law approach to the construction of commercial contract does allow for some "red ink" to be used. However, in the present case, the Panel does have a concern about the amount of red ink one would have to spill on what are essentially the terms of an established international instrument to confer jurisdiction on the Panel.

(f) on one available construction, Article 13.4, as presently drafted, gives the athlete a clear and reasonable choice. The athlete may immediately appeal directly to CAS from the decision of the IPC or, alternatively, the athlete may seek a review of the IPC decision by the WADA TUEC. If the latter course is taken, the consequences are clearly stated - there is no subsequent right of appeal to CAS unless the WADA TUEC overturns the decision.

There is nothing inherently unfair about the options thus open to the athlete. There is no denial of a right to a hearing before CAS. There is nothing "perverse" or "unreasonable" about a clearly defined structure for reviewing a decision. The athlete has a period of 21 days to decide whether or not to appeal to CAS from the IPC TUEC. This is the usual period provided by the CAS rules within which to appeal. Furthermore, Article 47 of CAS rules, which requires an appellant to exhaust the legal remedies available to him or her prior to the appeal, would be no barrier to such an appeal. Where the statutes or regulations of the body against whose decision an appeal is sought to be lodged provide for alternative routes it cannot be said that choosing one legitimately available route (a direct appeal to CAS) is inconsistent with the regime imposed by R47 of the CAS rules.

54. There is, however, another possible process of interpretation which may lead to the result the parties contend for (although neither advanced this approach), and which we set out below, but which, also, ultimately, we do not believe we can adopt.

The Second Approach to Interpretation of Article 13.4

55. As a result of contractual arrangements between the appellant and the IPC which also involved the National Paralympic Committee, regional councils, international federations and the international organisations of sport for the disabled, the appellant is contractually obliged to comply with the IPC Code. Under clause 4.4.6 of the IPC Code the IPC TUEC is obliged to properly evaluate any application for a TUE and render a

decision on such request "which shall be the final decision of the IPC". Under clause 4.4.7, WADA, at the request of an athlete or on its own initiation, may review the granting or denial of any TUE. It is specifically provided that decisions on TUEs are subject to further appeal as provided in Article 13.4.

56. It is the terms of Article 13.4 which the parties to the present dispute jointly ask the Panel to correct. It is said that there has been "a clear mistake in the language used in the contract". For the reasons we have given in [53] above, we are unable to conclude that is the case.

57. The possible alternative construction of Article 13.4 and 13.5 is as follows:-

    (a) it may be argued that this alternative construction is reasonably open and reflects the ordinary and natural meaning of the words used in Articles 13.4 and 13.5 and does not do undue offence to the language. It would seem to promote the objects of allowing international level athletes to take disputes to CAS. It would also meet the apparent time limit problem posed by Article 13.5 which requires the athlete to appeal to CAS within 21 days "from the date of the receipt of the decision by the appealing party";

    (b) the right of appeal is conferred by the second sentence of Article 13.4 which states that decisions by the IPC denying a TUE "which are not reversed by WADA" may be appealed to CAS. In the present case there was no such decision until the WADA decision was made and WADA decided not to reverse the decision of the IPC. Once the decision which was when, in effect, both the decision of the IPC and the later decision of WADA not reversing it

had been made, the 21 day time limit began to run from the receipt of that "decision" by the athlete;

(c) thus it was only when the athlete had received both decisions that the time to appeal to CAS commenced. On the proper construction of Article 13.5 in the present case, the "decision" referred to in Article 13.5 only came into existence when the decision of the IPC on 18 February 2009 and the decision of WADA on 19 August 2009 had been made; and

(d) the combined decision, from which the appellant had a right of appeal, was received by the appellant not earlier than 19 August 2009 and the appeal was lodged with CAS on 2 September 2009. The appeal was within time and admissible.

58. But there are a number of problems also with this different route. It finds the solution to the jurisdiction issue by interpreting the phrase "decision by the IPC" in the second sentence of Article 13.4 and the word "decision" in Article 13.5 as meaning the **combination** of two separate, discrete and independent decisions made by two completely different bodies. Thus, on that approach, the time limit imposed by Article 13.5 for appeals to CAS does not begin to run until the athlete is notified of the second "part" of the combined decision namely the decision by WADA not to reverse the IPC decision.

59. It is difficult to so construe the word "decision". It seems to involve a significant departure from the ordinary and natural meaning of that word.

60. Moreover, this approach relies, partly, on the language of Article 13.5 to construe Article 13.4. Whilst it is orthodox to construe one provision of

a private contract by reference to other provisions in it, such an approach should not be adopted in an anti-doping code derived from the WADC where, as here, one of the relevant provisions being used in the construction process (Article 13.5) does not derive from the WADC whilst the other one (Article 13.4) does. Moreover, even if it was permissible to use Article 13.5 as an aid to the construction of Article 13.4 this approach overlooks the significance of Articles 13.5.1 and 13.5.2 of the IPC Code which read:-

> *"13.5.1 Within ten (10) days from notice of the decision such party/ies shall have the right to request from* ***the body having issued the decision*** *a copy of the file on which such body relied.*
>
> *13.5.2 If such a request is made within the ten (10) day period, then the party making such request shall have twenty-one (21) days from the receipt of the file to file an appeal to CAS."* (emphasis added)*"*

61. The language of Articles 13.5.1 and 13.5.2 is apt only to embrace a single decision by one body not a combined decision by two bodies. It strongly indicates that the "decision" in respect of which the appeal to CAS may be filed is the last or latest of the decision or decisions relating to the relevant subject matter. The language of those articles is not apt to refer to a "combined" decision by two independent bodies made at considerably different times. It may be asked rhetorically which body, on the dissenting view, is to provide the requested file? The IPC? WADA? Or both?

62. Further, the alternative approach necessitates that "on the proper construction of Article 13.5 in the present case, the decision referred to in Article 13.5 only came into existence when the decision of the IPC on 18 February 2009 and the decision of WADA on 19 August 2009 had been made …"

63. Inherent in this view must be the proposition that where an IPC TUEC decision is in the process of being reviewed by WADA it does not have any effect until the decision of WADA is made (or, "deemed to be" made).

64. But such an approach is inconsistent with Article 4.4.7.1 of the IPC TUEC which makes it plain that the IPC TUEC decision does have effect before the review process is complete. This is clear from the use of the word "remains" in that article.

65. We note also that, on this alternative approach, the IPC would have to be a respondent to any appeal as it is its "decision" or the "combined" decision of it and WADA that would be the decision in respect of which a right of appeal is conferred. Whilst this circumstance does not detract, as a matter of construction from the merit of the alternative approach it would have practical consequences for this particular Appeal. Thus, notwithstanding its attraction, we feel unable to adopt the alternative approach.

66. The conclusion that Article 13.4 of the IPC Code does not confer jurisdiction is militated to a significant extent by the fact, as both parties agree is the position, that an athlete is free to make further fresh applications to the IPC TUEC if he or she believes changed

circumstances or medical evidence permit. A decision by the IPC TUEC is not a once and for all one.

Conclusion on Jurisdiction

67. For the reasons we have given, we are unable to conclude that this Panel has jurisdiction to hear the appeal pursuant to Article 13.4 of the IPC Code.

68. If, as its submissions in this appeal indicate, WADA is of the view that Article 13.4 of the 2009 WADC (and its derivative in the IPC Code) was intended to confer a direct right of appeal from a decision of a WADA TUEC not reversing the decision of the TUEC of the relevant sporting organisation, then we would respectfully urge WADA to take the steps contemplated by Article 23.6 of the 2009 WADC to initiate a modification of the language of Article 13.4 of the 2009 WADC.

69. In the absence, however, of any such modification to the language, for the reasons we have given, we feel unable to conclude that the Panel has jurisdiction under Article 13.4. In those circumstances, we proceed upon the express jurisdiction conferred upon us by the parties to this Appeal by clause 2.1 of the O. of P.

Nature and Scope of the Appeal

70. WADA as part of its overall responsibility for the WADC has issued a publication entitled "Therapeutic Use Exemption Guidelines", the first being published in January 2007 and more recently in April 2009 ("the Guidelines"). WADA and the appellant submitted that a sensible and purposive construction of the appeal rights in the IPC Anti-Doping Code limited the role of CAS in the appeal. It was submitted that this construction was supported by the statements on appeal rights in the Guidelines.

71. In each of these publications the view is expressed that CAS has a limited role as it is not a substitute for the TUE Committee (TUEC). The reason advanced is that unlike the TUECs, CAS panels are not composed of physicians. In 2007 the Guidelines stated that "[i]t is only on the basis of very probative elements in the TUE application file that CAS could deem that a TUE Committee wrongfully refused a TUE request". In 2009 these words were changed and the Guidelines stated that "[t]he CAS may consider that a TUE Committee has unduly rejected a TUE application only on the basis of particularly convincing elements contained in the TUE application file". In both cases the Guidelines refer to the case of *Bouyer*, CAS 2004/A/769.

72. In addition the Guidelines in each case stated that CAS cannot base its decision on facts and other evidence that were not submitted to the relevant TUEC with the TUE application. The Guidelines quoted from a passage in the CAS award in *Bouyer* in which it was said that "[i]n principle an athlete is not allowed to ask the CAS to hand down a decision based on facts and other evidence that have not been submitted

to the relevant TUE Committee with the TUE application". Accordingly it was stated in the Guidelines that no additional medical information/data can be provided to the CAS Panel and the review or appeal has to be judged on the same documents as the first decision. The authority for this was also given as the award in the matter of *Bouyer*.

73. The Panel has been provided with a redacted copy of the award in *Bouyer* and this Panel finds itself in the invidious position that it has reached a different view as to the nature and the scope of the jurisdiction exercised by CAS on an appeal from a decision relating to an application for a TUE. The Panel notes that the decision in *Bouyer* was expressly followed in the matter of *IPC and Brockman v WADA*, CAS 2004/A/717 which confirmed that in its view the "role of the CAS Panel is not that of substituting itself for the TUE Committee of the relevant anti-doping organization" (at [51](i)).

74. The WADC and the IPC Anti-Doping Code do not in their terms seek to restrict the jurisdiction conferred on CAS. It is well known that the Code of Sports-related Arbitration (the CAS Code) which applies to all CAS proceedings specifically provides in Rule 57 that "[t]he Panel shall have full power to review the facts and the law. It may issue a new decision which replaces the decision challenged or annual the decision and refer the case back to the previous instance". This rule has been repeatedly considered and analysed in proceedings before CAS. Almost invariably CAS arbitration panels when faced with the issue have consistently expressed the view that as a result of the powers conferred on an Appeal Panel by Rule 57, the procedure before an appeal panel such as the present is a hearing *de novo* of the dispute (eg *D'Arcy v*

Australian Olympic Committee CAS 2008/A/1574 at paragraph [51]). In *French v The Australian Sports Commission and Cycling Australia* (CAS 2004/A/65, awards made 31 January 2005 and 30 March 2005) the CAS Appeal Panel ruled that it would consider all oral, documentary and real evidence produced before it and that any fresh evidence may be adduced as of right in a re-hearing whether or not that new evidence was available for use at first instance or discovered subsequently.

75. In *Bouyer* the Panel said at [50] that, because of the burden of proof that rests on a racer, and the possibility that he can make a new request, it is in principle not admissible that a racer request the CAS to pronounce judgments on facts and proofs that have not been submitted to the competent TUEC with the request for a TUE. If new facts and new proofs were to be admitted before CAS, that body would be substituting itself for the TUEC in the decision not to attribute or refuse TUE, which is clearly not the role of CAS.

76. With the utmost respect to the distinguished Panels which decided *Bouyer* and *Brockman,* which awards were published in 2005, and those who were responsible for issuing the generally helpful and useful Guidelines, the extensive nature of the powers conferred on a CAS appeal panel has become well entrenched in CAS jurisprudence and we see nothing the Code, the IPC Anti-Doping Code or the WADC which would restrict the express power of an appeal panel to review the facts and the law. There is no reason to suppose that merely because the members of the panel may not be physicians that they are not competent to decide matters of a medical nature assisted by expert evidence. Just as in cases coming before courts of law, medical issues frequently arise in cases before CAS panels whose members have no medical

qualifications. They frequently arise in cases of alleged anti-doping violations under the WADC. The Panel will give the views of persons with appropriate qualifications the utmost respect and weight which is due but will not shrink from taking a different view if, on the totality of the evidence before the Panel, a different conclusion is more compelling as a matter of logic and commonsense.

77. WADA also submitted that, even if the evidence before the Panel established the criteria in the WADC, the TUEC has no obligation to issue a TUE and the athlete has no right to obtain a TUE. In this respect we disagree. It is apparent that the list of criteria in the International Standards for TUEs issued under the IPC Code is exhaustive (and the Guidelines state in paragraph 4.0 that an "exemption will be granted only in strict accordance with the following criteria"). An athlete would effectively be denied an opportunity to present its case if the IPC TUEC could reject an application based on considerations outside the stated criteria. In this respect, we agree with that part of the award in *Brockman* where a similar submission then advanced by the IPC was rejected. As was said in that case (at [64] and [65]) a consideration of matters outside the stated criteria would render the task of meeting the criteria "meaningless" and the proper construction of the list of criteria as "exhaustive' adds to the smooth administration of the TUE issuance procedure, conforms to the expectancy of the athletes, favours the certainty and the rule of law, and secures uniformity in the application of the rules.

78. Mr David, on behalf of the appellant, submitted there was no residual discretion in a TUEC to decline to issue a TUE if the criteria set out in article 4 of the International Standard are satisfied. We agree.

79. Thus, we propose to consider all of the material which has been placed before us, including the medical evidence and publications, even if some of that material was not before either the IPC TUEC or the WADA TUEC.

Resolution of the Appeal

80. Approaching the matter accordingly we first set out our conclusions on the issue of upon whom rests the burden of establishing entitlement to an exemption (and therefore upon whom rests the burden of this appeal) before then considering the evidence presented to the Panel on behalf of both parties, the appellant Mr Berger and WADA as respondent. Our analysis of the evidence presented then follows. Thereafter our conclusion.

Burden to establish entitlement to TUE

81. In relation to TUE appeals the WADA Code (WADC) is silent as to who has the burden of proof necessary to maintain or reverse the relevant TUE Committee (the IF or WADA TUE Committee) decision. It is clear that it is for the athlete to establish his or her entitlement to a TUE exemption before each and any of the relevant TUE Committees. Under the WADC International Standard "Therapeutic Use Exemptions, January 2009", at para.6.2, TUECs may seek whatever medical or scientific expertise they deem appropriate in reviewing the circumstances of any application for a TUE. Before a TUE Committee the athlete as applicant must submit for scrutiny comprehensive information, including medical evidence, indeed, if necessary his entire

medical file, to support the application for a TUE. Upon review by WADA TUE or CAS the athlete is also required to submit all information submitted initially.

82. Version 2.1 (April 2009) of the WADA TUE Exemption Guidelines is predicated on an athlete establishing his or her case for exemption against the applicable criteria. As the CAS Panel in ***Bouyer*** said, at para.46:

> *"The TUE procedure is (thus) exclusively a method by which the athlete may request an individual exception to the principle of prohibition; this exemption is based on individual and specific facts and motivations."*

and at para.47:

> *"Thus the logical consequence is that the athlete must establish the reasons for which an exception should be admitted and that this proof must be delivered to the competent TUEC when the request for a TUE is made. In other words, the full demonstration of the basis for an exception must be included within the documentation made in the request of a TUE."*

As para.50 of the ***Bouyer*** decision confirms, the Panel in that case specifically proceeded on the basis that the burden rests on the athlete to establish entitlement to a TUE. We observe that that paragraph also addresses other issues which we have already dealt with, namely whether CAS is entitled to consider facts and proof that have not been submitted to the competent TUEC with the initial request for the TUE. We have already held that we are not bound to consider only that

material which was before the TUEC or even the WADA TUE Review Committee.

83. Just as it is clear that it was for the Athlete to establish his or her entitlement to a TUE before each of the relevant TUEC's, since this is a hearing **de novo** the appellant must also bear that onus of proof before us. It follows that it is for the appellant to satisfy us that each of the cumulative criteria in Article 4 of the International Standard has been satisfied.

84. Likewise, it is clear from our findings on the Nature and Scope of the Appeal that, although Mr Marshall for WADA objected to the admissibility before the Panel of the further statement of Dr Ian Murphy, 14 October 2009 (which we allowed into evidence **de bene esse** – provisionally) we should now admit that statement into evidence on a final basis and take it into account in this appeal.

85. In the paragraphs which follow, we summarise the evidence for the appellant.

    85.1 The appellant Robert Berger was born in England on 25 February 1958. He took citizenship to represent New Zealand in or about 2007. In 1975 he suffered a T12/L1 spinal injury in a motor vehicle accident which resulted in him becoming a paraplegic. In 1990 he was diagnosed with high blood pressure (hypertension). To help lower his blood pressure his doctor prescribed him a beta-blocker which he used for a short period, apparently, without much effect. He was subsequently prescribed another beta-blocker known as metoprolol. In December 2004 Mr Berger suffered his first heart attack, was

hospitalised and had a stent inserted in one of his arteries, designed to prevent the occurrence of further heart attacks. In February 2005 he suffered his second heart attack for which he again required hospitalisation. He had double by-pass graft surgery late in 2005; and subsequently, open heart surgery. He retired from his position as a self employed company director in May 2007.

85.2 A temporary TUE allowing him to compete whilst continuing to use the beta-blocker metoprolol to treat his cardiac disease was granted upon the application of Paralympics New Zealand ("PNZ") to the International Paralympic Committee ("IPC") on 22 October 2007. Mr Berger presented evidence of ongoing Holter monitor tests, the most recent of which was March 2009 which identified fairly frequent episodes of heart palpitations which Mr Berger impressed upon us adversely affected his steadiness when shooting so that it could be deduced he received no performance advantage or enhancement from the use of metoprolol. Mr Berger consulted a number of doctors on seeking a full TUE, particularly citing and supporting the Holter monitor tests showing that Mr Berger's heart rate had not showed any significant decrease while under medication.

85.3 The evidence adduced for the appellant traversed the relevant sequence of events as did the submissions for appellant of 13 October 2009. Upon a full application for a TUE to the IPC on 15 March 2008, the IPC determined not to approve a

TUE for the appellant for his use of the beta-blocker metoprolol.

However, the evidence before us from Mr Berger was that Dr Ian Murphy, Medical Director of PNZ was subsequently in communication with Mr Oriol Martinez, the Chairperson of the IPC TUE Committee during the 2008 Beijing Paralympics. Dr Murphy, so the evidence was, was informed by Mr Martinez that he was happy for Mr Berger's application for a TUE to be re-submitted to the IPC together with the results of a new Holter monitor Test, for renewed consideration by the IPC TUE Committee instead of an appeal to the WADA TUE Committee. A further application together with the requested new Holter monitor test result was accordingly submitted, but on 18 February 2009 the IPC refused to approve a TUE for Mr Berger for the use of metoprolol. The WADA TUE Committee subsequently upheld the decision by the IPC. The reasons for the IPC TUE Committee not to approve the TUE application for metoprolol in accordance with the provisions of the IPC Anti-Doping Code 4.4.6 (which is the final decision of the IPC) have already been referred to by us in this award.

85.4 Evidence was adduced before the CAS Panel from Dr (Professor) David Gerrard, Chairman, Drugfree Sport NZ Therapeutic Use Exemption Committee. The evidence of Dr Gerrard had previously been presented to the IPC TUE Committee. The fact that the appellant suffered from a condition, namely a dysfunctional left ventricle and consequent marked reduction in ejection fraction which was

well demonstrated and for which the recommended treatment demanded a use of a prohibited substance was substantiated by Dr Gerrard. Dr Gerrard also provided the Drugfree Sport NZ TUE Committee opinion – expressed as having been confirmed by an independent specialist – that beta-blockers are the drugs of first choice and that denying the appellant this treatment would render him liable to a significant if not fatal consequence. Accordingly, Dr Gerrard advised that although the DFSNZ TUE Committee had no jurisdiction to formally pronounce on the matter, it was satisfied with respect to the International Standard for TUE criteria 4.2 and 4.4.

85.5 Dr Gerrard then went on to say:-

> *"With respect to 4.3, like all TUE committees, we approach a prospect of granting a TUE for beta-blockers to an athlete in a sport such as shooting with great caution. Nevertheless the particular and, in our view, persuasive factor, is the information from the Holter monitoring testing. In this case while there is clearly a therapeutic effect from the beta-blockers, there is good evidence that the heart rate is not lowered significantly. Given that the only substantiated performance benefit of the use of beta-blockers is through the lowering of the heart rate and the consequent "steadiness" available to athletes in shooting and like sports, it is apparent to us that in (the appellants) case (there is) no additional enhancement of performance other than that which might be anticipated by a return to a state of normal health following the treatment of a legitimate medical condition"*

85.6 Finally, Dr Gerrard said:-

"It is arguable that higher than therapeutic doses may have such an effect but, of course, there are ethical barriers to any such trial. While the Holter monitor evidence can be taken as factual any speculation on benefits accruing from higher doses is purely hypothetical and, in our view, unlikely.

Taking the totality of (the appellant's) position into account, were we to have jurisdiction, … Robert has met the criteria under the ISTUE and would be awarded a TUE for the lifetime use of beta-blockers on the understanding that he receives annual cardiological review to confirm his clinical status and to alert the NADO and IF of any changes to his treatment regime."

85.7 Dr Malcolm Leggett, a New Zealand cardiologist, in evidence also presented to the IPC TUE Committee, and available therefore on review by the WADA TUE Committee and this CAS Panel, addressed the critical question in this case:-

"Does Robert's use of metoprolol produce any additional enhancement performance other than what might be anticipated by return to a state of normal health? Tthis is a somewhat difficult question to answer. However I would draw your attention to both Holter monitor tests that have been performed. These show that he is in sinus rhythm with heart rate between 63 and 106 beats/min. He is therefore not obviously heavily beta blocked and I cannot therefore logically see what enhancement of performance he may be obtaining by being on the beta-blocker."

85.8 All this led to Dr Murphy re-submitting in 2008 the appellant's application for the use of metoprolol (95mg) for

his well documented cardiac disease as a "talented athlete with a disability who participates in the sport of shooting".

86. In his statement of evidence 14 October 2009 presented for this appeal Dr Murphy gave the following evidence:-

> *"Beta-blocker medication works in a variety of ways. Amongst these is the control of heart rate to reduce cardiac workload. Metoprolol is a beta-1 receptor selective beta-blocker medication. Beta-1 receptors are predominantly present in the heart (centrally) whereas beta-2 receptors are in a number of other tissues including skeletal muscle (peripherally). At lower doses the effects of metoprolol are predominantly central on the beta-1 receptors. In higher doses, beta-2 receptor effects may also be seen with metoprolol. Robert is on the maximum recommended dose of metoprolol and it is accordingly reasonable to accept both central and peripheral effects. It would be unlikely (and illogical) to conclude that Robert would have peripheral effects without demonstrable central effects, even at a higher dose, as these effects are mutually exclusive.*
>
> *In order to support Robert's case, on two occasions Holter monitor testing was undertaken (on the second occasion at the request of the IPC TUE Committee). The testing involved wearing a monitor for 24 hours so that a full picture of heart rate variability can be obtained. The result showed that he is sinus (normal) rhythm with a variable rate of between 63 and 112 beats per minutes (normal is accepted as between 60 and 100 beats more minute). The Holter monitor testing showed that Robert's heart rate was still fluctuating to levels above normal even though he takes the beta-blockers."*

87. Before reviewing additional evidence presented to the CAS Panel on behalf of Mr Berger, it is necessary for us to refer to the principal evidence adduced before us on behalf of WADA.

88. Evidence for WADA was given by Dr Peter Jenoure (Crossklinik Merian Iselin Spital Fohrenstrasse 2, 4009, Basel, Switzerland), who is a specialist in sports medicine and a member of the WADA TUE Commission. He is currently a member of the IOC Medical Committee (Medicine and Science), a member of the Board of the European Federation of Sports Medicine Association, a member of the Committee of World Sports Medicine Federation FINZ and Chair of the Sports Medicine of CISM, the world military sports council. He is described as a specialist in sports medicine with many years experience in anti-doping matters and was the Chairman of the WADA TUE Committee at the time the appellant applied to have the decision of the IPC TUE Committee reviewed.

89. In his statement of evidence dated 24 October 2009 Dr Jenoure responded to the request by WADA that he provide a statement as to the scientific literature referred to by the WADA Committee on the TUE review in the following paragraph of the WADA TUE Committee's decision:-

> *"Considering the numerous publications in the scientific literature suggesting a significant improvement of sports performance and activities requiring precision and accuracy, such as shooting, by the use of different betablocking agents. In these studies, it was demonstrated that shooting skills were significantly improved. The enhancement was not only correlated with changes in heart rate or systolic blood pressure, suggesting that the improved performance also results from decreased hand tremor and anxiolytic effects. It is therefore strongly speculated that peripheral, rather than central blockade contributes to the beneficial effect."*

90. Dr Jenoure says that it is not his understanding that a TUE decision has to explain all the medical and scientific material its members took into account. He says that he *"… approached my role on the TUEC as its Chair as being a person of medical expertise and that I could rely on that expertise without having to state in the decision the particular published work and scientific literature that are known or researched for the decision"*. However, because he had been asked, Dr Jenoure records that *"there is considerable material to the effect mentioned … of those written in English, studies and materials that were in my mind and/or referred to in deliberations by the Committee members"* included:-

"1. ***'Bta blockade used in precision sports – effect on pistol shooting performance'*** *conducted by the Institute of Medical Physiology at the University of Copenhagen (the American Physiological Society, February 1986);*

2. *A 2008 study published in the British Journal of Pharmacology* **'The Rush to Adrenalin: Drugs in Sport Acting on the B-adrenergic system'** *by E Davis, R Loiacono, and R J Summers, Department of Pharmacology, Monash University, Clayton, Victoria, Australia;*

3. **Drugs in Sport. 'Research findings and limitations'** *Clarkson PM, Thompson HS, SportsMed, December 24 1997 (6) 36-84;*

4. *From the* **World in Sport Science** *website."*

91. In the last of these publications, said to represent information in the minds of the WADA TUE Committee members, available on the World of Sports Science website it is recorded:-

> *"As a result of ingesting beta-blockers, arteries become wider. This is beneficial particularly if an individual has a heart problem since the hearts demand for oxygen and blood is reduced and does not have to work as hard to pump blood through the body. As well, artery dilation can relieve chest pain (angina), irregular heart beat, glaucoma, lessen the occurrence of migraines and even reduce nerve-inducing muscle twitches and shaking. The calming effect of beta-blockers on muscle action has made the drugs as a popular, although illegal, choice of some athletes whose performance depends on balance (such as gymnastics) or a steady hand (archery, shooting and biathalon)."*

92. In the third of the research materials, the 1997 SportsMed. Report, it is recorded, among other things:-

> *"Beta-blockers have been found to reduce heart rate and tremor and to improve performance in sports that are not physiologically challenging but require accuracy (eg pistol shooting)."*

93. In the 2008 report in the British Journal of Pharmacology the authors from the Department of Pharmacology at Monash University in Victoria, Australia note:-

> *"Beta-AR antagonists (beta-blockers) are used in sports that require steadiness and accuracy, such as archery and shooting, where their ability to reduce heart rate and muscle tremor may improve performance." [584]*

94. Elsewhere the authors note that:-

> *"Beta-AR antagonists are widely used therapeutically to treat heart failure, high blood pressure, cardiac arrhythmias, angina and glycoma, but they have also been used illicitly in sport to reduce tremor, particularly in pistol shooting and motor racing. (The World Anti-Doping Code and in particular the 2008 Prohibited List International Standard.)" [586]*

95. The authors go on to record:-

> *"In sport, the main ergogenic of beta AR antagonists relates to their ability to decrease heart rate and hand tremor (Bowman and Anden, 1981) that is likely to be of benefit in sports that require steadiness and accuracy (for example archery, shooting). In addition their actions to reduce the symptoms of anxiety, manifested as tachycardia and skeleton muscle tremor (Reilly 2005), may enhance performance in some sports. These potential ergogenic effects of beta AR antagonists have led to their prohibition in competition in a number of sports, including archery, billiards, boules, gymnastics, shooting and modern pentathlon disciplines involving shooting. They are also prohibited out of competition for archery and shooting." [589-590]*

96. Finally in the first of these published studies **"Beta-blockers used in precision sports: effect on pistol shooting performance 1986"** it is noted that in a "… double-blind crossover study of 33 marksmen (standard pistol, 25m) the adrenergic beta 1-receptor blocker, metoprolol was compared to placebo; that metoprolol had obviously improved the pistol shooting performance compared with placebo" and that "the shooting improvement is an effect of metoprolol on hand tremor".

97. In the submissions on behalf of WADA 27 October 2009 Mr Marshall also drew attention to the opinion of Dr Martinez, Chairperson of the IPC TUEC Committee who had opined in the letter 18 February 2009:-

> *"… there is also little question that beta-blockers improve athletic performance in athletes involved in accuracy events such as shooting. Beta-blocker slow heart rate, decrease heart rate variability and blunt the normal increased heart rate response in particular with sports with significant stress and anxiety component. Based on the available scientific literature it is not possible to firmly argue that use of a beta-blocker in no way provides enhanced performance for this athlete."*

98. In new evidence before the Panel, the appellant called in aid a statement from Associate Professor Dr Robert Doughty, who is a Clinical-Academic Cardiologist in Auckland, a Fellow of the Royal College of Physicians of London, the Royal Australasian College of Physicians and the Cardiac Society of Australia and New Zealand. His doctoral thesis is said to be in the area of the role of beta-blockers in patients with heart failure. He has particular experience in clinical and research aspects of cardiovascular disease and in particular sub-speciality expertise in heart failure.

99. Dr Doughty challenges the conclusions reached by Dr Jenoure as well as the conclusions reached in/by the four studies already identified. In his evidence, Dr Doughty provided a written response to the various studies relied upon by Dr Jenoure and the WADA TUEC. In respect of the 1986 American Physiological Society study ***"Beta blockade used in precision sports – effect on pistol shooting performance"*** Dr Doughty says:-

"The study results show (inter alia) that there was a statistically significant increase in the shooting scores of the subjects who received metoprolol compared to those subjects who received placebo tablets. Heart rate and blood pressure were reduced with metoprolol, but, in the study, these changes were found not to correlate to the improvement in shooting."

100. The limitations this study is considered to have for the appellant's case are expressed by Dr Doughty as follows:-

> *"(a) The paper states in the conclusions that 'the shooting improvement is in effect of metoprolol on hand tremor', whereas there is no evidence from this paper that this is the case and thus this is pure speculation not substantiated by the data from the study;*
>
> *(b) It is important to note that this study was carried out on normal subjects who did not have any underlying cardiovascular disease."*

This means said Dr Doughty that the effects of the beta-blocker on the subjects in the study were not also influenced by any clinical underlying disease present in those subjects.

101. Dr Doughty says that in cardiovascular medicine very few, if any, pharmacological agents have effects that occur 100% of the time in all subjects who receive these agents. In his opinion, it cannot be assumed that all patients with cardiovascular disease respond in the same way to all agents; nor that the effects are the same as for subjects without cardiovascular disease. Dr Doughty's thesis is that:-

"Beta-blockers directly block the effect of the sympathetic nervous system, via blockade of the beta-blocker receptor. Not all patients receive similar effects with beta-blockers."

…

"*It is not reasonable to extrapolate from the results in a small study involving normal volunteers possible favourable effects on shooting to an individual with a long-standing cardiovascular disease. The individual response to beta-blocker therapy is very difficult to assess in an accurate manner. There is certainly sufficient literature to support the view that not all patients will respond in the same way and that it should not be assumed that Mr Berger, considering his medical history, will gain any marked benefit in relation to his shooting. The study and other literature provided by Dr Jenoure supports the hypothesis that there is considerable variability in response to beta-blockers as between individual subjects. Importantly the exact mechanistic pathways underlying the improvement in shooting performance in normal subjects have not been established. Consequently it is not possible to test in an objective manner whether such effects are occurring in Mr Berger. In a case such as Mr Berger's, the study materials provided by Dr Jenoure confirm the need to consider the individual subject, and it should not simply be assumed that he will gain a benefit in shooting performance."*

102. Furthermore, says Dr Doughty:-

"The Holter thus demonstrates that Mr Berger does not appear to be markedly affected by metoprolol, based on heart rate. There are no clear means to establish the effects of beta-blockers on hand tremor in an individual subject patient, and, in order to assess the effect of a beta-blocker, consideration has to be given to measurable effects such as heart rate."

103. Of no little significance in our view is the clear restriction on the application of these conclusions to heart rate only. Not dealt with is the

effect of metoprolol on the other important touchstone, namely hand tremor.

104. Mr Marshall submitted that in the event the statements of Dr Murphy and Associate Professor Doughty were admitted, WADA maintained that:-

> *"1. Associate Professor Doughty accepted that one of the factors identified in the scientific literature is the reduction in hand tremor; although he says that it is not necessarily something that will occur in all patients.*
>
> *2. Given that the IS for TUEs places the onus on the athlete to establish no additional enhancement it was for Mr Berger to negative decreased hand tremor which he has not attempted to do. Mr Doughty's evidence at its highest does not negative this in the case of Mr Berger.*
>
> *3. Dr Doughty does not allege that the use of metoprolol has no performance enhancing effect on Mr Berger; he merely asserts that there is ambiguity which surrounds the means to establish the effects of beta blockers on hand tremors and heart rate. As noted in para.59 of the* ***Bouyer*** *decision 'Frank Bouyer has furnished no tangible proof that his impression corresponds to an objective reality. The physicians … did not declare with certainty that (**MASKED**) has no eurogenic effect'."*

Our analysis of the evidence and submissions and reasoning

105. We return to the reasons given for the WADA TUEC confirming on 19 August 2009 the IPC TUEC decision of 18 February 2009. As we have already said, and indeed as the WADA TUEC said, a TUE can only

be granted if the imperative and cumulative conditions fixed in Articles 4.2-4.5 of the TUE Standard are fulfilled. The WADA TUEC concluded that the conditions in Articles 4.2, 4.4 and 4.5 were fulfilled but the "condition set forth in Article 4.3" was "not fulfilled".

106. The WADA TUEC did give reasons for reaching the conclusion that the requirements of Article 4.3 had not been fulfilled. Accordingly, we do not accept the submission for the appellant, even if it was relevant, that the decision of the WADA TUEC was not a reasoned one. The reasons the WADA TUEC set out are as follows:-

> *"Considering the numerous publications and the scientific literature suggesting a significant improvement of sport performance in activities requiring precision and accuracy, such as shooting, by the use of different beta blocking agents. In these studies it was demonstrated that shooting scores were significantly improved. The enhancement was not only correlated in changes in heart rate or systolic blood pressure, suggesting that the improved performance also results from decreased hand tremor and anxiolytic effects. It is therefore strongly speculated that peripheral rather than central blockade, contributes to the beneficial effect."*

107. In submissions for Mr Berger, his counsel placed much emphasis on the use by the WADA TUEC of the words *"strongly speculated"*. It was submitted that what this language effectively meant was that the WADA TUEC had been persuaded by material which was "speculative" rather than paying proper or sufficient regard to evidence which was not "speculative" and to the specific medical evidence adduced on behalf of the appellant before the IPC TUEC and the WADA TUEC which, of

course, counsel for the appellant also pointed out, was supplemented by additional evidence put before this CAS Panel.

108. We have given careful consideration to this submission and particularly reflected on the processes and procedures followed by the expert medical TUE Committees, which were addressing, after all, issues which permit bilingual expression. We are talking here about the language of men of science whose native tongue is not English. In context, we consider it clear that by using the expression 'strong speculation' the WADA TUEC meant words to the effect 'strongly believed, although there is no definite scientific proof'. We conclude that the particular focus appellant's counsel placed on the words *"strongly speculated"* is misplaced for the purposes of founding the submission that the relevant Committees were persuaded by matters inherently speculative as distinct from matters not speculative at all on the matters at issue and other matters specific to this athlete in particular, his prevailing medical condition requiring and justifying treatment by metoprolol.

109. That said, we do consider it permissible for the Committees considering TUE applications, measured against the applicable published International Standards criteria, to refer generally to medical and scientific literature and studies which are publicly available and which one or other or both of those Committees may consider relevant and persuasive to a considered and reasoned point of view. There is, in our view, nothing inherently unsatisfactory or unfair about the WADA TUEC in this case referring to such studies as being amongst the body of knowledge possessed by them and relied upon by them for reaching their conclusion.

110. The expert medical practitioners who undertake their responsibilities as TUE Committee members do not "leave their expert knowledge behind them at the door of the committee room" when undertaking their responsibilities. They are entitled to rely on their knowledge and the information which is available in the public domain as part of the process of considering an individual TUE. Of course, that knowledge and the information which is in the public domain, relevant to the issue before them, cannot substitute for consideration of the specific matters particular to the athlete, his or her medical condition, or the full breadth of circumstances upon which the athlete relies for the TUE application. All relevant information must be considered, be it of general application or specific to the athlete.

111. Given that the WADA TUEC was satisfied on all conditions applying to Articles 4.2, 4.4 and 4.5 for the satisfaction of which medical evidence specific to Mr Berger had to have been considered, understood and accepted it could not be successfully contended before us that, in relation to the conditions applying to Article 4.3, the WADA TUEC had ignored information specific to Mr Berger in favour of the "general studies" to which the WADA TUEC also referred.

112. We consider that before us at this time there is no sound basis to challenge the evidence of Dr Jenoure. His evidence was that the studies he has specified in material available to the CAS Panel were in the minds of and considered by the WADA TUEC in respect of Mr Berger's TUE application. We find some of the observations in the material relied upon by the WADA TUEC of particular assistance in our evaluation. We refer in this regard to material contained in the World of Sport Science website:-

"Beta blockers are drugs taken to block the action of a chemical produced in the body (a neurochemical) called noradrenalin. It is most commonly taken as a prescription medication by patients with heart problems. By binding to Beta-1 or Beta-2 receptors in arteries and in the heart muscle, the normal binding of noradrenalin to the same receptors is prevented, or blocked. This slows down or blocks completely the noradrenalin-induced transmission of messages between nerves and muscles or between different nerves. As a result of ingesting beta blockers, arteries become wider. This is beneficial particularly if an individual has a heart problem since the heart's demand for oxygen in blood is reduced and does not have to work as hard to pump blood through the body. As well, artery dilation can relieve chest pain (angina), irregular heart beat, glaucoma, lessen the occurrence of migraines, and even reduce nerve-inducing muscle twitchers and shaking."

113. In our view, these observations are consistent with additional observations made in the study conducted by the Institute of Medical Physiology at the University of Copenhagen which has already been referred to by us. The 1986 report of this study tendered to us records:-

"The improved shooting performance … is probably not due to the recorded changes in cardiovascular variables (such as changes in heart rate or an arterial blood pressure) and possibly not either to the passive vibrations produced by the activity of the heart. Thus other factors must be considered and the physiological neural hand tremor is a likely candidate."

114. It seems to us that an inference clearly available from these observations is that even though Mr Berger's heart rate, as the Holter monitoring tests revealed, ranged still at high levels notwithstanding his ingestion of metoprolol, an improved shooting performance, even if not due to

changes in cardiovascular variables such as changes in heart rate, could, indeed will likely, be the result of a reduced neural hand tremor as the study at the University of Copenhagen concludes. This information, in the minds of the WADA TUEC, was entirely relevant. It was open to the WADA TUEC to attach considerable weight to that conclusion in relation to Mr Berger's specific situation.

115. The study reported in the British Journal of Pharmacology, ***"The Rush to Adrenalin: Drugs in Sport Acting on the Beta-Adrenergic System"*** confirms what we consider can be properly deduced from the studies already referred to, namely, that in addition to a reduced heart rate which, it seems to us, is a perfectly valid consequence consciously strived for by the use of metoprolol, a reduced muscle tremor will be available from the use of that beta-blocker. The 2008 study published in the British Journal of Pharmacology notes that Beta-AR antagonists (beta-blockers) are used in sports that require steadiness and accuracy, such as archery and shooting, where the ability to reduce heart rate and muscle tremor may improve performance.

116. We have already referred to the studies completed by Bowman and Anden in 1981, also referred to in the 2008 study published in the British Journal of Pharmacology, which notes that the main ergogenic effect of beta-AR antagonists relates to their ability to reduce heart rate and hand tremor.

117. In our view, the evidence available to both TUE Committees and to the CAS Panel of likely hand tremor reduction upon the use of metoprolol is of a kind that cannot be dismissed as "pure speculation". We acknowledge that the Holter monitor tests demonstrate that Mr Berger

does not appear to be markedly affected by metoprolol based on heart rate. This much we accept from Dr Doughty's evidence and it is consistent, of course, with what Dr Murphy has said. But we accept that impact upon, and likely reduction of, hand tremor is a different point and we do not reach the conclusion that the evidence available to the WADA TUEC and available publicly of likely reduction in hand tremor consequent upon the use of metoprolol is not capable of reliance. The evidence relied upon by the appellant in this case and available to him at this time does not displace such reasonable reliance by the WADA TUEC.

118. Considering the medical evidence as a whole, we take the view the appellant has not demonstrated that the therapeutic use of the Prohibited Substance would produce no additional enhancement of performance other than that which might be anticipated by return to a state of normal health following the treatment of a legitimate medical condition. Thus we have reached the conclusion that the athlete in this case, at this time, on the basis of all the evidence before us, has not discharged the burden resting upon him to establish his entitlement to a TUE for the use of Metoprolol whilst participating in his chosen sport of shooting.

ON THESE GROUNDS

The Court of Arbitration for Sport rules:-

1. The Court of Arbitration for Sport has jurisdiction to hear this Appeal but only by reason of the express conferral of jurisdiction upon it by Order 2.1 of the Order of Procedure.

2. The Appeal is dismissed.

3. The decision of the IPC TUEC dated 18 February 2009 not to approve a TUE for the appellant and the decision of the WADA TUEC dated 19 August 2009 not reversing the decision of the IPC TUEC, remain in force.

4. That this Award be made public.

5. In respect of costs:-

   (a) as agreed between the parties, each of them is to bear its or his own costs of the Appeal;

   (b) insofar as the costs of CAS are concerned, the Panel has a discretion under Rule 64.5 of the CAS Rules and has agreed to the parties putting in submissions as to those costs once this Award is published. We direct that the respondent serve any written submissions on the question of CAS costs within seven days of the date of publication of this Award and that the appellant put on submissions in reply in respect of the CAS costs within fourteen days of the date of publication of this Award. The respondent, if it sees fit, may then put on brief

submissions in reply within twenty-one days of the date of publication of this Award. The Panel will determine the question of the CAS costs on the papers and without a further oral hearing.

DATED: March 2010

The Court of Arbitration for Sport

……………………………

Mr Alan Sullivan QC

President

…………………………………..

Mr Malcolm Holmes QC

Arbitrator

……………………………….

Mr Tim Castle

Arbitrator