

**INTERNATIONAL TENNIS FEDERATION**

**INDEPENDENT ANTI-DOPING TRIBUNAL**

**DECISION IN THE CASE OF M. RICHARD GASQUET**

**Tim Kerr QC, Chairman**

**Professor Richard H. McLaren**

**Dr. Mario Zorzoli**

**Introduction**

1. This is the decision of the independent Anti-Doping Tribunal (“the Tribunal”) appointed by Dr Stuart Miller, the Anti-Doping Manager of the International Tennis Federation (“the ITF”) under Article K.1.1 of the ITF Tennis Anti-Doping Programme 2009 (“the Programme”) to determine a charge brought against M. Richard Gasquet (“the player”). An oral hearing in respect of the charge took place in London on 29 and 30 June 2009.
2. The player was represented by Mr Adam Lewis QC, instructed by Mr Simon Davis, Mr Payam Beheshti and Mr Alexander Kennedy, all of Clifford Chance LLP, solicitors in London. The ITF was represented by Mr Jonathan Taylor, assisted by Mr Jamie Herbert, Mr Tim Endersby and (though she was not present at the hearing) Ms Anna-Marie Blakeley, all of Bird & Bird LLP, solicitors in London. Dr Miller, the ITF’s Anti-Doping Manager, also attended on behalf of the ITF. The Tribunal is grateful to the representatives of both parties for the assistance they gave us with oral and written presentations of high quality.

3. The player was charged with a doping offence following an adverse analytical finding in respect of a urine sample, no. 3018938, provided on 28 March 2009 at the Sony Ericsson Event, in Miami, Florida. Both the A and B samples returned adverse analytical findings for a metabolite of cocaine in a very small quantity. During the A sample analysis, a very small amount of cocaine in unmetabolised form was also found. Cocaine and its metabolites are prohibited in competition but not out of competition. Following a DNA test, the player accepted that the sample tested was his. He also accepts the reliability of the laboratory test results.
4. The player denied that he had ever deliberately taken cocaine. He submitted that there was no doping offence because the sample was taken out of competition, not in competition. In the alternative, he submitted that if the sample was deemed to have been taken in competition, the provisions having that effect were unlawful and could not be relied on by the ITF or applied by the Tribunal.
5. As to sanctions, the player argued that if there was a doping offence, the player could establish "No Fault or Negligence" or alternatively "No Significant Fault or Negligence". Further, he argued that there should be no period of ineligibility because the circumstances of the offence - accidental contamination in a social setting after the player had decided to withdraw from the competition through injury - were such that any ban would be grossly disproportionate to the offence and therefore unlawful.
6. The ITF disagreed with the player's propositions and argued that he had committed a doping offence, that he could not establish his defences and that a period of ineligibility of two years was mandatory. The ITF asserted that the ban should start from 1 May 2009 when the player voluntarily stopped competing. The player argued that any ban should start from 28 March 2009 when his sample was collected. The parties also disagreed about whether the

player's results, ranking points, and prize money obtained during April 2009 should be forfeited.

7. By Article A.9 of the Programme, the proceedings before the Tribunal are governed by English law, subject to Article A.7, which requires the Tribunal to interpret the Programme in a manner that is consistent with the World Anti-Doping Code ("the Code"). According to Article A.7 of the Programme, the Code:

"shall be interpreted as an independent and autonomous text and not by reference to the existing law or statutes of any Signatory or government. The comments annotating various provisions of the Code may be used to assist in the understanding and interpretation of this Programme."

### **The Facts: Before the Charge**

8. The player was born on 18 June 1986 and is therefore now aged 23. He is a French national resident in Switzerland. He already has a series of illustrious achievements behind him. He has been ranked number one in France and was ranked in the top twenty-five in the world four years running, from 2004 to 2008. In 2007, he was ranked in the top 10, reaching the Wimbledon semi-final in which he was defeated by Mr Roger Federer.
9. The Tribunal found the player to be a truthful and honest witness, and a man of integrity. We accept the following evidence from the player and other witnesses attesting as to his character. He is highly motivated and hard working, and also quite reserved and shy. He does not often socialise in large groups of people, preferring the company of people he knows and small groups. He rarely consumes alcohol. We accept that he is not a user of illegal recreational drugs, nor of performance enhancing drugs. He occasionally goes out to bars and nightclubs, but never does so when competing.
10. The player is well aware of the anti-doping rules applicable to his sport. He is in the habit of taking the necessary precautions to ensure that he does not

breach the rules applicable to him, such as drinking only from bottles he has himself opened, and being careful about his diet and any medication. He has frequently been tested, always with negative result, apart from the occasion which has led to this case. His attitude is that he is indifferent to whether testing is being done at any competition. He is happy to be tested any time, being confident that he should always test negative because he would not allow any prohibited substance to enter his system.

11. From December 2008, the player was experiencing pain in his right shoulder. He coped with the injury and continued playing despite the pain, though he had to withdraw from one tournament in Marseille in February 2009. He arrived in Miami on 22 March 2009, intending to take part in the Sony Ericsson Event. He was a seeded player and therefore an automatic entrant to the competition. He had a bye in the first round and was not scheduled to play until Saturday 28 March 2009.
12. From Monday 23 March to Thursday 26 March 2009, the player did some training but was hampered by his shoulder injury. He did not go out much during that time and went to bed early. The first match of the Event took place on Wednesday 25 March 2009. By Friday 27 March the concern about his shoulder injury was such that he was advised by the tournament doctor soon after 3pm to obtain a magnetic resonance imaging (“MRI”) scan of his right shoulder.
13. He obtained the MRI scan and returned to the tournament doctor with the results at about 6.40pm. The doctor noted significant inflammation and advised against playing in the tournament. The player, his coach and physiotherapist left the doctor’s office at about 7pm, discussed the matter for about 15 minutes and agreed that the player should not play. The player informed the Tribunal that he had decided “90%” to withdraw when he left the tournament site to return to the hotel with his coach, but the final decision was made at the hotel.

14. The player had become aware from his coach that his first match was not scheduled until quite late the next day. They decided not to go through the formalities of withdrawal that evening, instead deferring it until the next day. They had to return to the Event site anyway to return a hired car and collect an expenses cheque. Therefore, they decided to go through the formalities of withdrawal at that time, which include the filling in of a form and, under the rules, a requirement to submit to doping control if requested to do so.
15. We find that the player could have gone through the formality of withdrawal on the evening of 27 March 2009 if he had chosen to do so. He could have completed the required form and obtained the signature of the tournament doctor and physiotherapist. Their presence on the site at that time was required under the relevant ATP rules which applied to the competition. However, we have no evidence as to whether there was, or was not, a doping control testing facility in operation at the site after 7.15pm during the evening of 27 March.
16. The player was disappointed that he would not be playing. After arriving at the hotel and making the decision not to compete, he called his mother in France and agreed that she would change his flight back to France so that he would leave at 6pm on Saturday 28 March 2009. Having decided to withdraw from the tournament, he felt there was no reason to stay at the hotel that evening. He decided to go out and see a well known French DJ, M. S \_\_\_\_\_, whom he had briefly met earlier that day, and who, as he knew, would be performing that evening in Miami as part of the Winter Music Conference; an event which, though the player did not know it, is notoriously associated with use of illegal recreational drugs including cocaine.
17. The player's coach, M. Guillaume Peyre, called M. Thierry Champion, another coach in the same team who was a friend of M. S \_\_\_\_\_ and his wife. M. Champion confirmed that the player and his coach could attend the performance and proposed dinner beforehand at a restaurant called Vita, owned by another friend of M. Champion. They arrived at Vita and met M. Champion

and another friend of his there. They dined together, joined by the owner of the restaurant. While waiting at the bar for their table, the player noticed a group of four young women dining at a nearby table. He recognised one of them, M\_\_\_\_\_, a \_\_\_\_\_.

18. At about 10.30pm one of the women invited the group of men to join them for a drink after dinner. The men did so, joining them at their table. The player talked mostly to one of the women called P\_\_\_\_\_. We do not know her family name and therefore refer to her simply as P\_\_\_\_\_. The player learned that P\_\_\_\_\_ lived in Paris and that she, M\_\_\_\_\_ and another of the women, known as N\_\_\_\_\_, were on holiday together in Miami. The player and his companions discovered that these three women were also planning to see M. S\_\_\_\_\_ perform that night, at a club called Set. The fourth woman, called D\_\_\_\_\_, was due to leave to work at a different venue.
19. The group of four men, including the player, and the three women, including M\_\_\_\_\_ and P\_\_\_\_\_, set off for Set on foot at about midnight. They entered Set at about 12.40am on 28 March 2009, after awaiting the arrival of M. S\_\_\_\_\_. He then started his performance. The player and the others in his group were soon invited to M. S\_\_\_\_\_’s table by \_\_\_\_\_. They stood around the table talking and listening to the music. On the table top, there were open jugs of mixer drinks, including apple juice, a bottle of vodka and bottles of water.
20. The player drank a vodka and apple juice prepared for him by M. Champion. Later, at about 2am, he helped himself to more apple juice, without vodka. The player talked particularly to P\_\_\_\_\_, though he was not with her all the time, and also talked to others. The Tribunal accepts the player’s evidence that he and P\_\_\_\_\_ kissed mouth to mouth about seven times while they were at Set, each kiss lasting about five to ten seconds. We accept his evidence that he was not with P\_\_\_\_\_ constantly while at the club. At one stage the two of them went upstairs and sat on a sofa where they kissed. After that they came

downstairs again, stopping to kiss on the stairs. The player then drank only water from a sealed bottle and a vodka and apple juice he had ordered from the bar.

21. At about 4.15am, the player and the others with whom he had arrived decided to leave. They left at about 4.35am, after awaiting the end of M. S\_\_\_\_\_’s performance, thanking him and saying goodbye. The player was tired. His impression was that P\_\_\_\_\_ did not seem tired. She expressed a wish to go to another venue called Goldrush, where the fourth woman from the restaurant, D\_\_\_\_\_, was working. The group of seven travelled in two taxis. The player went in a taxi with P\_\_\_\_\_. Goldrush turned out to be a strip club. The player and his three male companions did not like it and wanted to leave about 10 minutes after arriving. He did not have any physical contact with D\_\_\_\_\_ or anyone else at Goldrush.
22. They waited for P\_\_\_\_\_ to return from the toilet where she had spent longer than expected. When she returned, she had replenished her make-up and rearranged her hair. The group then left at about 5am and said their goodbyes outside. The player kissed P\_\_\_\_\_ on the mouth for two or three seconds before boarding a taxi back to his hotel with his coach. On arrival at his hotel he went to his room and slept.
23. Later that day the player awoke, showered, dressed, packed and checked out of his hotel. He went to the site of the Sony Ericsson Event. While he was there, he signed a withdrawal form in the early afternoon of 28 March 2009. He cited his shoulder injury as the reason for withdrawal. The form was countersigned by the tournament doctor and physiotherapist, as the relevant ATP rules require. There is no dispute that the shoulder injury was the true reason for withdrawing from the Event. It is not suggested that the player withdrew to avoid being tested.

24. Indeed, he was required to provide a urine sample immediately after withdrawing. He did so at 2.20pm on 28 March 2009 and signed the doping control form at 2.30pm. He then went with his coach directly to the airport and boarded his flight to Paris. After arriving back in France, he received treatment for his injured shoulder which began to improve, to the point where he felt able to travel to Barcelona on 18 April 2009 in order to compete again.
25. Unaware that the urine sample provided in Miami would test positive, the player played in a competition in Barcelona on 20 April 2009, gaining 20 ranking points and 10,000 euros in prize money. His A sample, meanwhile, had been tested at the WADA accredited laboratory in Montréal and found to contain benzoylecgonine, a cocaine metabolite, and a very small amount of unmetabolised cocaine.
26. On 21 April 2009, the adverse analytical finding was reported to International Doping Tests and Management AB (“IDTM”), of Lindigö, Sweden. IDTM arranges the carrying out of doping tests on behalf of the ITF. Still unaware of the positive test result, the player played in Rome on 27 April 2009, gaining 90 ranking points and 27,500 euros in prize money.

### **The Facts: from the Charge Onwards**

27. By letter dated 30 April 2009, the player was charged with a doping offence under Article C.1 of the Programme, namely, the presence of benzoylecgonine in his urine sample provided at the Sony Ericsson Event in Miami on 28 March 2009. The player then stopped competing and has not competed since. He sought advice, initially, from M. Lamperin and Dr Bernard Montalvan, a doctor who works for the Fédération Française de Tennis.
28. On 6 May 2009, the player underwent a test on a sample of his hair at the laboratory of Dr Pascal Kintz at Illkirch, France. No cocaine was detected in the player’s hair. The expert witnesses agreed, following a witness conference

at the hearing, that the test administered by Dr Kintz would reveal the presence of cocaine if it had been ingested during a period of about four months prior to the test and if the quantity of cocaine ingested was 10 mg (approximately) or more.

29. Two days later on 8 May 2009, the B sample was opened and analysed at the Montréal laboratory. The sample bottle was opened in the presence of the player's representative, Dr Bruce Goldberger. It was also found to contain benzoylecgonine. The finding was reported to IDTM on 10 May 2009.
30. On 9 May 2009, the player and M. Nicolas Lamperin, his manager, contacted P\_\_\_\_\_ by telephone. She told them how sorry she was that he had tested positive. She said that she and M\_\_\_\_\_ had been offered cocaine at Set that night, i.e. the night of 27-28 March. She said that M\_\_\_\_\_ had taken cocaine at some point while in Miami. She agreed to meet the two of them later that evening after finishing work, but subsequently called saying she was tired and postponed the meeting until the next day.
31. The player and M. Lamperin met her at about 7pm in the evening of 10 May 2009 at her workplace, a restaurant in Paris. She again said that cocaine had been in use at Set that night and that she had been offered some, but denied taking any. She proposed dinner with M\_\_\_\_\_ that evening, saying that she was due to meet her for dinner anyway.
32. The player and M. Lamperin wanted to be sure that M\_\_\_\_\_ was happy with this plan, in view of the sensitivity of the matter and her position. They asked P\_\_\_\_\_ to check with M\_\_\_\_\_ first. Later at about 8.30pm the player called P\_\_\_\_\_ who informed him that the proposed dinner would not take place.
33. The next day, 11 May 2009, M. Lamperin sent P\_\_\_\_\_ a text message asking if she had spoken to M\_\_\_\_\_. He received no response. After

that, there was no further contact between the player and P\_\_\_\_\_, nor between M. Lamperin and P\_\_\_\_\_.

34. The player decided not to apply to the chairman to lift his provisional suspension. A letter from the ITF's lawyers to the player's lawyers dated 11 May 2009 confirmed this. The player set out his initial response to the charge in a letter from Clifford Chance dated 11 May 2009.
35. In that letter, he stated that that sample was not his; that the hair test had not indicated the presence of cocaine; that there were various difficulties with the sampling procedure; that if the sample was his, he did not knowingly take cocaine; that the test was administered out of competition while the drug is only prohibited in competition; and that if on the true construction of the rules, the test was administered in competition, the rules having that effect were unlawful and disproportionate and could not be relied upon to support the charge.
36. On 20 May 2009, a telephone conference attended by the parties and the chairman took place. Procedural directions were given. Pursuant to them, the ITF submitted its opening brief on 22 May 2009, alleging that a doping offence had been committed; that the sample was the player's; that the test was administered in competition; and that the normal consequences including a two year period of ineligibility should follow unless the player could establish a basis for reducing or eliminating the period of ineligibility under Article M.5 of the Programme.
37. The parties then cooperated for the purpose of subjecting the sample to a DNA test, which was carried out at a laboratory in Oxfordshire, England. The results became available on 29 May 2009. The DNA test convinced the player that the sample was his. He then lodged a written complaint dated 4 June 2009 with the French prosecuting authority, alleging against "X" that a harmful substance had been administered to him, contrary to the French penal code.

38. On 7 June 2009, the French newspaper, Aujourd'hui, published an interview with P\_\_\_\_\_ which was said to have taken place the previous afternoon. According to the article, P\_\_\_\_\_ denied taking cocaine that night and also denied that either she or the people with her had been offered any. She did not deny taking cocaine on previous occasions in her life. She also asserted that she had kissed the player only briefly and not mouth to mouth, and that she was willing to give evidence and undergo a hair test herself. She said that the matter had caused her difficulty because she was living with a man.
39. On 8 June 2009, a French radio journalist at a radio station called RMC cited an anonymous witness alleged to have been present at Set on the night of 27-28 March as saying that P\_\_\_\_\_ had taken cocaine that night, contrary to the denial of having done so attributed to her in the article in Aujourd'hui. The journalist's source was unnamed and the evidence has no probative value, but it came to the attention of the player's advisers and helps to explain – along with the article in Aujourd'hui – why the player did not attempt to call P\_\_\_\_\_ (or M\_\_\_\_\_ ) as a witness.
40. On 11 June 2009, the player submitted his answering brief to the Tribunal. It was very long and detailed, and contained numerous detailed arguments supported by witness statements, experts' reports and a large number of case law authorities and extracts from publications. The defence, developed at length in his answering brief, was as already summarised at paragraphs 4 and 5 above. In the light of the DNA test, he accepted that the sample tested was his. In other respects, his defence was in line with his initial response to the charge letter.
41. The ITF submitted its reply brief to the Tribunal on 25 June 2009. In it, the ITF sought to explain the history of the rules separating in competition and out of 11 competition testing, and the subsequent introduction of rules distinguishing between substances banned at all times and substances banned only in competition. The ITF insisted that on the correct construction of the relevant

