

**IN THE MATTER OF APPEAL PROCEEDINGS BEFORE THE JUDICIAL COMMISSIONER, THE HON
MICHAEL.J BELOFF QC, PURSUANT TO THE INTERNATIONAL CRICKET COUNCIL CODE OF CONDUCT
FOR PLAYERS AND PLAYER SUPPORT PERSONNEL**

FRANCOIS DU PLESSIS (APPELLANT)

v.

INTERNATIONAL CRICKET COUNCIL ('ICC') (RESPONDENT)

AWARD

1. INTRODUCTION

- 1.1 This is an appeal to me, sitting as a Judicial Commissioner ("Commissioner"), brought on 25th November 2016 by Francois Du Plessis, the Captain of the South African Test team ("the Appellant") against a decision dated 22nd November 2016 ("the Decision") of Andrew Pycroft, the Match Referee, for the Australia v South Africa Test Match in Hobart ("the Match") that, during the Match on 15th November 2016, the Appellant breached Article 2.2.9 of the ICC Code of Conduct ("the Code") ('[Changing the condition of the ball in breach of Law 42.3 of the Laws of Cricket](#)') by applying a substance, namely a mint or sweet mixed with saliva, to the match ball ("the Offence") and in consequence fined him 100% of his Match Fee being SA Rand 46,256 ("the Sanction").
- 1.2 Neither my jurisdiction nor the admissibility of the appeal are disputed. It is further common ground that the appeal proceeds *de novo* (Code Article 8.2.2.3), that the burden lies upon the ICC to prove that the Appellant committed the Offence (Code Article 6.1) and that I am '[not bound by judicial rules governing the admissibility of evidence](#)' but that the facts relied on '[may be established by any reliable means, including admissions](#)' (Code Article 6.2).
- 1.3 Article 6.1 of the Code of Conduct provides that '[the standard of proof in all cases brought under the Code of Conduct shall be whether the Match Referee or Judicial Commissioner is comfortably satisfied, bearing in mind the seriousness of the allegation that is made, that the alleged offence has been committed. This standard of proof in all cases shall be determined on a sliding scale from, at a minimum, a mere balance of probability \(for the least serious offences\) up to proof beyond a reasonable doubt \(for the most serious offence\)](#)'.

- 1.4 The ICC argues that English law recognizes only two standards of proof - the civil i.e. balance of probabilities and the criminal i.e. beyond reasonable doubt. The Offence under Article 2.2.9 of the Code is a 'Level 2' offence (out of four), for which the sanctions available are limited in severity so that the criminal standard of proof is inapplicable. It follows inexorably that the appropriate standard is balance of probabilities with the Commissioner deciding how cogent the evidence has to be to satisfy him/her that the conduct of the nature alleged is more likely than not to have happened.
- 1.5 The Appellant argues that Article 6.1 is a specific provision allowing for a sliding scale of probability calibrated to the seriousness of the alleged Offence. While English law itself provides generally for two standards of proof only, it does not prohibit parties to a contract such as that constituted by the Code from agreeing alternative standards. Level 2 offences are not like Level 1 offences which are "of a minor nature", albeit less serious than Level 3 offences which are "of a very serious nature" or Level 4 offences which are of "an overwhelmingly serious nature" and so the Commissioner should apply a higher standard than mere balance of probability.
- 1.6 I prefer the Appellant's argument. In my view the standard of proof under the Code Article 6.1 is designedly one of comfortable satisfaction, a criterion introduced by an ad hoc panel of the Court of Arbitration for Sport during the Atlanta Summer Olympics 1996 in the case of *Korneev & Gouliev v IOC* (CAS OG 96/003 and 004) - and now part of the *lex sportiva* - which is more stringent than the ordinary civil standard but less stringent than the criminal standard (*Wang v FINA* CAS 98/2008 para 5.6).
- 1.7 The evidence before me consists of (i) video footage of the incident said to constitute the Offence, (ii) an agreed transcript of the evidence provided by the Appellant and other witnesses, John Stephenson, Head of Cricket at the MCC and Richard Kettleborough, the on-field umpire, to the Match Referee at the hearing on 22nd November 2016, (iii) a later witness statement dated 29 November 2016 from Dr Charles Crosby a practicing fluid-dynamicist. Each party has helpfully agreed to rely on that evidence in these appeal proceedings, without further direct examination or cross-examination of any of those witnesses. I have also had the benefit of careful and skillful written and oral submissions by Will Houghton QC assisted by David Becker for the Appellant and Jonathan Taylor assisted by Sally Clark for the ICC.
- 1.8 In my view, the following are the main questions posed for my resolution:
- 1.8.1. What are the elements of an offence under Article 2.2.9 of the Code of Conduct, ("Law");
 - 1.8.2. Does the evidence in the record establish each of those elements to the requisite standard of proof? ("Fact");
 - 1.8.3. If so, what is the appropriate sanction for the offence in all the facts and circumstances of this case? ("Sanction").

2. THE APPELLANT'S ARGUMENTS

In summary the Appellant argues:

- 2.1. A charge under Article 2.2.9 of the Code is effectively a charge of ball tampering, and so of cheating. Each element of it must therefore be proved to a commensurately high standard (see above paragraph 1.5).
- 2.2. Article 2.2.9 of the Code, properly construed, requires proof that the Appellant changed the condition of the match ball. There was no such evidence. It was for the Umpires alone to assess whether the offence had been made out, but they inspected the ball both before and after the incident and noticed no change. Furthermore, no-one on the field complained about any change.
- 2.3. Expert scientific evidence would be required to prove that applying a 'sugary residue' to a ball changes the condition of the ball at all, but no such evidence had been adduced.
- 2.4. The Appellant's evidence (which should be accepted) was that he was not trying to change the condition of the ball, but merely to preserve its condition ('to keep the shine by polishing it'). The on-field umpire himself said that merely polishing the ball does not change its condition.
- 2.5. Alternatively, if Article 2.2.9 of the Code treats applying an 'artificial substance' to the ball, or polishing the ball using an 'artificial substance', as a *per se* breach (i.e., it is deemed to change the condition of the ball unfairly), then there was still no breach, because the match umpire said that saliva containing residue from chewing gum is not considered an 'artificial substance' for these purposes, and therefore saliva containing residue from a mint cannot be considered an 'artificial substance' either.
- 2.6. Therefore the Appellant should be acquitted of the Offence with which he was charged.

3. THE ICC'S ARGUMENTS

In summary the ICC argues:

- 3.1. Law 42.3 of the Laws of Cricket ('The match ball – changing its condition') regards any polishing as changing the condition of the ball. The on-field umpire did not say otherwise. His statement, read in context, was only to the effect that polishing a ball with a natural substance was not an Offence.
- 3.2. Law 42.3 expressly prohibits both polishing the ball with an artificial substance ('Any fielder may ... polish the ball provided that no artificial substance is used') and applying any artificial substance to the ball ('The following actions shall not be permitted ... applying any artificial substance to the ball...').
- 3.3. The evidence both of the visual footage and the Appellant's own testimony both prove conclusively that the Appellant polished the match ball with an artificial substance i.e. saliva

containing a residue of mint.

3.4. The Appellant should therefore be found guilty of the Offence with which he was charged.

4. LAW

The proper approach to construction of the rules

4.1. English law governs the Code (Code Article 10.5)

4.2. The ICC argues, basing itself on case law culled from various jurisdictions, that it is to be construed in accordance with the following principles:

4.2.1. The words in one provision should be construed in the context of all of the relevant provisions, not in isolation.

4.2.2. The words should not be given an unduly legalistic interpretation, as if the Code was a statute or a technical legal document (such as a conveyance). Rather, they should be given their natural and ordinary meaning.

4.2.3. The words should not be given any unnecessary gloss that changes their natural and ordinary meaning.

4.2.4. In particular, the words should be interpreted in a manner that gives effect to the objectives underlying the rules, and not in a manner that undermines those objectives.

4.2.5. In addition, a construction that would lead to an unworkable or impractical result should be rejected.

4.3. The Appellant accepts that approach but adds that any provision which describes an offence, such as Code 2.2.9 and Law 42.3, should, in the case of ambiguity, be strictly construed, an addition which the ICC in turn accepts.

4.4. In my view, for present purposes, it is sufficient to summarise the relevant rules of contractual interpretation as follows. The starting point must be the language of the provision in question. That language must be construed in its context. To the extent that there is a tension between a purposive and a literal construction, the latter must yield to the former. Where possible, a disciplinary provision must be capable of ready application but must, in the case of any ambiguity, be interpreted *contra proferentem* i.e. (here) against the ICC and in favour of the Appellant. The conduct of those who applied the provision after its enactment in principle is generally inadmissible as an aid to construction.

The relevant provisions:

4.5 Article 2.2.9 of the Code under the rubric "Level 2 Offences" provides, so far as material, the following to constitute such an offence: '**Changing the condition of the ball in breach of Law 42.3 of the Laws of Cricket**'; ("the Laws") (it is common ground that Law 42.3 is therefore

incorporated in Article 2.2.9)

4.6 The Preamble to the Laws provides, so far as material, as follows:

“Cricket is a game that owes most of its unique appeal to the fact that it should be played not only within its Laws but also within the Spirit of the Game.

Any action which is seen to abuse this spirit causes injury to the game itself. The major responsibility for ensuring the spirit of fair play rests with the captains.

1. There are two Laws which place the responsibility for the team’s conduct firmly on the captain.

Responsibility of captains

The captains are responsible at all times for ensuring that play is conducted within the Spirit of the Game as well as within the Laws.

...

2. Fair and unfair play

According to the Laws the umpires are the sole judges of fair and unfair play.

The umpires may intervene at any time and it is the responsibility of the captain to take action where required.

3. The umpires are authorized to intervene in cases of:

...

Tampering with the ball.”

4.7 Law 42.3 of the Laws, under the rubric 'Fair and Unfair Play', provides, so far as material, as follows:

“1. Fair and unfair play - responsibility of captains

The responsibility lies with the captains for ensuring that play is conducted within the spirit and traditions of the game, as described in The Preamble – The Spirit of Cricket, as well as within the Laws.

2. Fair and unfair play - responsibility of umpires

The umpires shall be the sole judges of fair and unfair play. If either umpire considers an action, not covered by the Laws, to be unfair he shall intervene without appeal and, if the ball is in play, call and signal Dead ball and implement the procedure as set out in 18 below. Otherwise umpires shall not interfere with the progress of play without appeal except as required to do so by the Laws.

3. The match ball – changing its condition

(a) Any fielder may

(i) Polish the ball **provided that no artificial substance is used** and that such polishing wastes no time.

(ii) Remove mud from the ball under the supervision of the umpire.

(iii) Dry a wet ball on a piece of cloth.

(b) It is unfair for anyone to rub the ball on the ground for any reason, to interfere with any of the seams or the surface of the ball, to use any implement, or to take any other action whatsoever which **is likely to alter the condition of the ball**, except as permitted in (a) above.

(c) The umpire shall make frequent and irregular inspections of the ball.

(d) ¹If the umpires together agree that the deterioration of the ball is inconsistent with the use it has received, they shall consider that there has been a contravention of this Law. They shall then decide together whether they can identify the player(s) responsible for such conduct.

1. If it is possible to identify the player(s) responsible:

a) Change the ball forthwith. The batsman at the wicket shall choose the replacement ball from a selection of six other balls of various degrees of usage (including a new ball) and of the same brand as the ball in use prior to the contravention.

Additionally the bowler's end umpire shall:

b) Award 5 penalty runs to the batting side.

c) Inform the captain of the fielding side of the reason for the action taken.

d) Inform the captain of the batting side as soon as practicable of what has occurred.

e) Together with the other umpire report the incident to the ICC Match Referee who shall take action as is appropriate against the player(s) responsible for the conduct under the ICC Code of Conduct.

2. If it is not possible to identify the player(s) responsible:

a) Change the ball forthwith. The umpires shall choose the replacement ball for one of similar wear and of the same brand as the ball in use prior to the contravention.

b) The bowler's end umpire shall issue the captain with a first and final warning, and

c) Advise him that should there be any further incident by that team during the remainder of the match, steps 42.1.1 a) to e) above will be adopted, with the captain deemed under e) to be the player responsible." [Emphasis added]

4.8 The on field umpire summarized his view of the relevant options open to the umpires by

¹ As amended by the ICC Standard Test Match Playing Conditions for the purposes of a Test Match.

reference to this very case on the hypothesis that they had witnessed the incident (which it is agreed they had not).

“ANDY PYCROFT: Well, except that, if you take the preamble to Laws of Cricket Clause 2 – According to the Laws, **the Umpires are the sole judges of fair and unfair play.** ... So I would be very interested to hear what they considered and whether this is fair or unfair.

...

RICHARD KETTLEBOROUGH: ... As I said before, ... none of us saw this alleged offence. In answer to your question, ‘What would we have done if we had seen it? Err, we would have to have acted under Law 42.3, which is a match ball changing its condition, and under 42.3.1 of the ICC test match playing regulations, if it is possible to identify the player, in this case, the captain of South Africa Mr du Plessis, is responsible, we would have to go down the following line – change the ball forthwith. In addition, we would have to award five penalty runs. We would have had to inform the Captain of the Fielding side of the reason that the action was taken. We would have had to inform the Captain of the batting side, the reason the action was taken and together with the other umpires, we would have had to inform the ICC match referee who shall take appropriate action against the player, players, responsible for the conduct, under the ICC code of conduct.” (Transcript p 9). [Emphasis added]

- 4.9 In my view, as indicated in its title **“The match ball – changing its condition”**, all the actions set out in Law 42.3 (a) and (b) amount to changing the condition of the match ball. The distinction drawn in that Law is between those actions which are permitted (i.e. those in sub paragraph (a)) and those which are not (i.e. those in subparagraph (b)). The proviso to the sweep up prohibition, in (b), taking **“any other actions whatsoever which is likely to alter the condition of the ball”** i.e. **“except as permitted in (a) above”** would otherwise make no sense.
- 4.10 Furthermore, in my view, any action **“likely to alter the condition of the ball”** is amounts, in the context of Article 2.2.9, to changing the condition of the ball, even if it extends the ordinary meaning of that concept. The phrase would otherwise be redundant. It is not necessary to resort to the concept of deeming. The provision simply means what it says.
- 4.11 The conclusions in 4.9 and 4.10 above avoid the need in any particular case for either the umpires or the Match Referee or the Commissioner to receive evidence as to whether an action falling with (b) in fact alters the ball’s condition: notably if **“a range of experiments in controlled conditions”** as canvassed by Dr Crosby were required to make such determination the law would be made unworkable. (See further the final paragraph in the Guidance cited in Paragraph 4.15 below), whereas the Code is specifically designed to provide **‘a robust disciplinary procedure pursuant to which all matters of improper conduct can be dealt with fairly, with certainty and in an expeditious manner’** (Code Introduction).
- 4.12 In any event, even polishing a ball would change its condition. After polishing it would not be in the same condition as it was before the polishing, even if that polishing merely restored the ball to its condition before it was first used.
- 4.13 Polishing the ball with an artificial substance is clearly an offence: subparagraph (a) cannot be read in any other way. A bright line is drawn in between polishing with a natural substance (e.g. sweat or saliva), which is permitted, and with an artificial substance, which is not.

4.14 Guidance notes are provided for Code of Conduct Offences. They are stated to be ‘intended only to provide guidance as to the nature and examples of certain conduct that might be prohibited by a particular article and should not be read as an exhaustive or limited list of Conduct prohibited by such Article’. Nonetheless as the ICC has grafted them on to the substantive offences they are, in my view, an admissible aid to interpretation, although they could not override any part of the Code (if any) inconsistent with it.

4.15 The Guidance Note to Article 2.2.9 of the Code of Conduct states:

‘NOTE: This offence supplements and does not replace ICC Standard Test Match, International Match Playing Conditions clause 42.3.

Any action(s) likely to alter the condition of the ball which were not specifically permitted under Law 42.3(a) may be regarded as ‘unfair’. The following actions shall not be permitted (this list of actions is not exhaustive but included for illustrative purposes): (a) deliberately throwing the ball into their ground for the purpose of roughening it up.; (b) **applying any artificial substance to the ball**; and applying any non-artificial substance for any purpose other than to polish the ball; (c) lifting or otherwise interfering with the any of the seam of the ball ; (d) scratching the surface of the ball with finger or thumb nails or any implement ..

The Umpires shall use their judgment to apply the principle that actions taken to maintain or enhance the condition of the ball, **provided no artificial substances are used**, shall be permitted. Any actions taken with the purpose of damaging the condition of the ball or accelerating the deterioration of the condition of the ball shall not be permitted.’ [Emphasis added]

4.16 As far as this case is concerned, the Guidance Note is in entire harmony with the substantive provisions of both the Code and the Law. The application of artificial substances to the ball is clearly outlawed.

4.17 As to what is an artificial substance, neither Code, Law nor Guidance define it. The adjective “artificial” is ordinarily used as the opposite of natural. The Oxford English Dictionary defines it as “made or produced by human beings rather than occurring naturally” which the Appellant was prepared to accept. There is nothing in the regulatory context to require, in my view, any alternative or different definition.

4.18 The MCC’s Open Learning Manual, whose purpose is expressed to be “to set a straightforward account of the Laws of Cricket”, is also entirely consistent with above conclusions (though, in my view, a weak, even if admissible aid, to construction of the Laws.). I need quote only one extract:

‘Notice that umpires need to ensure that no artificial substance is used for polishing. The players will often lick their fingers or wipe them in the sweat on their brows before rubbing the ball. This is acceptable as the substances involved are natural.’ This is consistent with my own interpretation of Law 42.3.

- 4.19 I have, I should emphasize, taken into account the Appellant's submission that the literal language of Law 42.3 should be read down not only in accordance with the contra proferentem principle but also by inference to the introductory rubric of fairness. In my view, however, Law 42.3 itself identifies what is considered to be fair or unfair under Law 42. Fairness is not an extrinsic concept which colours the specific provisions of the Law subsequently set out in it. Rather the specific provisions of the Law subsequently set out in it explain what is meant by the concept of fairness in that particular context. If there were any doubt in the matter, it is allayed by the opening words of 42.3 (b): 'It is unfair ...'.
- 4.20 While I accept that the views of Mr Stephenson, Head of Cricket at the MCC, cannot be used as an aid to interpretation, they are useful (if not conclusive) as an exposition of the relevant concept of fairness. He said:
- 'JOHN STEPHENSON:** yeah, well, err, obviously as a law-writer we have to ensure that the game is played fairly and as part of those pre-conditions, we have developed this law over the years to ensure that the spirit and fairness of the game is upheld and in that respect, err, whilst drafting this law we felt that it was extremely important to make sure that 42.3 (a) was very clear in that no artificial substances can be used to polish that ball.'" (Transcript p.21)
- 4.21 Turning to the Appellant's other arguments, I note that the difference between Law 42.3 pursuant to the TMPC and in its basic form lies only in a variation to sub paragraphs (d) and (e) in effect amalgamating them (with alterations immaterial to the present case). These sub paragraphs describe the powers of the umpires if they agree that there has been 'a deterioration in the condition of the ball inconsistent with the use it has received'. The Appellant submits that a change in the condition of the match ball must therefore be read down as synonymous with its deterioration (the word used in sub-paragraph (d)) said to constitute 'a contravention of this Law' whereas the product of polishing is preservation of it. Therefore, he further submits, that the umpires could not have done that which the on field Umpire suggests they would have done if aware of the Appellant's actions.
- 4.22 I see the force of that submission and find it somewhat odd that the draftsman should have chosen the word "deterioration" which does not capture well the amplitude of the concept of changing the condition of the ball. But the Appellant's construction leaves no scope for any immediate steps to be implemented by umpires when a player has, for example, used vaseline or lubricant to polish a ball (or, taken to its logical conclusion, to any later disciplinary action). And I have concluded that a passage which deals with how procedurally umpires should determine a contravention of the law and what to do in consequence cannot trump the primary and substantive definition of what constitutes a change of condition in Law 42.3 (a) and (b). The substantive dog must wag the procedural tail, not vice versa.
- 4.23 The Appellant further submits – and correctly – that the umpires did not identify any change in the condition of the ball between the drinks interval which preceded the incident and the fall of the wicket which occurred two balls after the incident, on both of which occasions pursuant to Law 5 (The Ball) (2)(b) (*"the umpires shall take possession of the ball in use at the fall of each wicket; at the start of any interval and at any interruption of play"*), they should have taken possession of the ball and, in the absence of contrary evidence, may be presumed to have done so.

- 4.24 However, (1) on what I have found to be the true construction of Law 42.3 such a change in condition is treated as occurring whenever, for example, there has been any polishing. (2) Without prejudice to (1), given the fact that the ball changes condition on a recurrent basis whenever it comes into contact with anything, the only true comparison would be between the ball immediately before the incident (i.e. when it came into the Appellant's hands) and the ball immediately after it (i.e. before it was passed to the bowler), which the umpires did not consider. So this submission fails both in law and in fact.
- 4.25 Finally the Appellant submits that rubbing the ball on shirt or trousers (both being artificial) is not proscribed so neither should the Appellant's actions. In my view, however, the analogy is inapplicable. In such action the ball is ordinarily applied to the clothing; not the clothing to the ball and, in any event, the fabric of the clothing is not intended to be transferred to the ball.

5. THE FACTS

- 5.1 In his evidence to the Match Referee, the Appellant said; inter alia, as to the incident:

SALLY CLARK: ...you repeatedly put your finger into your mouth and you can clearly see that your finger is going to the exact position on your tongue when the mint is ...

FAF DU PLESSIS: ...I haven't denied that, I said that straight away that, that is what I was doing, I put my finger in my mouth to try and shine the ball. What I did also say is that **I didn't see that it was wrong**, wrong because it was just in our mouths all the time.

SALLY CLARK: so are you accepting that you actually put your finger on the mint in your mouth?

FAF DU PLESSIS:obviously my finger touched the mint and my saliva on my tongue or what you call it, so I am pretty sure that it touched that sweet as well.

SALLY CLARK: And the footage shows your finger, we would submit, going over, three or four times, going over the mint in your mouth

FAF DU PLESSIS: Yeah, that is what I said (transcript p 38)

SALLY CLARK: If you didn't have the mint in your mouth, would your normal practice be almost a quick lick of your finger, to get the saliva on your finger?

FAF DU PLESSIS: I don't know exactly how I shine the ball, but yeah I use my tongue, so whether it is the front of my tongue or the back of my tongue, it is on my tongue.

SALLY CLARK: So, given that you have accepted that you put your finger in the mouth and some residue from the mint was on the saliva on your finger, that was then transferred directly onto the ball, which you then polished? That is correct isn't it?

FAF DU PLESSIS: Yeah, I would hope so.

SALLY CLARK: And the reason you did that you have said, is because, it was to polish the ball

and to maintain and to enhance the condition, the shine on the ball?

FAF DU PLESSIS: Yes. The word I would use is preserve. But yeah, if it does enhance, then obviously that's great.' [Emphasis added]

5.2 The video footage which I have viewed is entirely consistent with the Appellant's own testimony.

5.3 The Appellant also said more generally in answer (i) to his own Counsel:

'Basically, we use sweets for two reasons. One was that my mouth was very dry and I wanted to try and get a bit of saliva going. And the second is to make sure that you can keep the ball as new and as shiny and preserve that shine for as long as possible'. (Transcript p 29)

'...I was trying to preserve by getting my saliva **or whatever is on my tongue** onto the ball to try and stay as good as long as possible'. (Transcript p 32). [Emphasis added]

and (ii) in answer to Counsel for the ICC:

'...we have mints in our pockets and then whenever I feel like it is my time to shine the ball or not even put it on always when I get the ball because the ball comes to you randomly but when it was my time to shine the ball, that was one of the occasions when I put a sweet into my mouth, yeah to try and see if it can help preserve the hardness or whatever of the ball'. (Transcript p 37)

5.4 I should emphasise that the Appellant repeatedly denied that he had committed an offence or thought that he had done so. His position was best epitomized in the following exchange:

'WILL HOUGHTON QC: what would you say about the allegation that you – first of all – altered the condition of the ball.

FAF DU PLESSIS: well that's why I pleaded not guilty, because I feel I didn't do that. I felt like I was just shining the ball.' (Transcript p 30)

5.5 On the basis of the evidence, I make the following findings:

5.5.1 The saliva/mint or the combination thereof was an "artificial substance" (although the saliva per se is not). If the drinking of gin is prohibited it is not a defence to say that it was mixed with tonic.

5.5.2 The Appellant applied the substance to the match ball and did so intentionally. I am content to adopt the ICC's summary of the evidence as advanced to the Match Referee (which was not disputed), "He deliberately used his finger and repeatedly placed his finger over and on the mint in his mouth with the intention of transferring the residue from that mint in his saliva on to the ball, to shine the ball with that in an effort to maintain and enhance the shine of the ball and in the hope this it would do so". (The video shows him doing this with the 3X mint no less than four times).

5.5.3 The consequence of his action was to alter the condition of the ball (or was likely to do) in the relevant sense, that is to say, it altered the **status quo ante** of the match ball (i.e.

its condition prior to the polishing). Whether that can be described as maintenance (i.e. restoring the ball to its pristine condition) or enhancement, (i.e. improving its condition from what it was prior to shining), matters not.

5.5.4 Because of the way the appeal was, by agreement, presented to me, I did not have the opportunity to form my own view by sight and sound of him-one of the characteristic ways in which in an adversarial common law system a person's credibility is assessed, whether the Appellant did or did not genuinely believe in the propriety of his actions. The Match Referee who did have such an opportunity did not accept the Appellants denial (see the reasons on Decision Form: "I disbelieved the evidence of the player in favour of the umpires that he did not know or believe that what he was doing was likely to alter the condition of the ball and so was illegal" and his factual Findings Para 6 to like effect).

5.5.5 However, it was not put to the Appellant either by the Match Referee (who as the judge was inhibited in the nature of the questions he could put) or by the ICC (who as the prosecutor was not) that the Appellant was lying, I cannot regard the view of a third party, the Match Referee, even if, as I accept, formed in good faith as "reliable evidence" pursuant to Article 6.2 of the Appellants lack of credibility, certainly to the standard of comfortable satisfaction.

6. CONCLUSION

6.1 On the basis of my analysis of the law and the facts as set out above, I endorse the Decision of the Match Referee that the Appellant was guilty of the offence charged in that he applied an artificial substance, saliva mixed with mint residue, to the match ball during the Australia v South Africa Test Match in Hobart and so changed its condition in breach of Article 2.2.9 of the Code. The evidence, viewed through the lens of the Code and the Law, admits of no other conclusion whatever standard of proof was engaged.

7. SANCTION

7.1 As I have determined that an offence has been committed by the Appellant, I have to impose an appropriate sanction Article 8.2.3.3 of the Code of Conduct provides: 'For the avoidance of doubt, the Judicial Commissioner shall have the power to increase or decrease, amend or otherwise substitute a new decision on the appropriateness (or otherwise) of the sanction imposed at first instance, provided that any new sanction must be within the permitted range of sanctions set out in the table at Article 7.3 ...'.

7.2 That range is 'the imposition of a fine of between 50-100% of the applicable Match Fee and/or up to two (2) Suspension Points'. One Suspension Point means the player is suspended from an ODI or T20I match; two Suspension Points means the player is suspended for two such match or for a Test Match.

7.3 I am not "bound in any way by the decision being appealed" (ditto) but "can take into account any factors that he/she deems relevant and appropriate to the mitigation or aggravation of the sanctions of the Code of Conduct offence" (Article 7.2).

- 7.4 The ICC submits that the following factors are relevant to the sanction in this case:
- 7.4.1 The Appellant is not an inexperienced youth. He is 32 years old, and has been playing first class cricket since he was 18.
 - 7.4.2 As the captain not only of South Africa's Test team but also its ODI team, he is a role model.
 - 7.4.3 The Appellant knew what he was doing was wrong.
 - 7.4.4 His previous breach of Law 42.3 is not an aggravating factor *per se*, but it does go to his fault there, because if he was in any doubt, he could and should have asked the umpires.
 - 7.4.5 There is a need to deter other players from such conduct. The comment to Article 7 of the Code of Conduct states: 'The aim of the sanctioning regime under this Code of Conduct is to (a) sanction those Players and Player Support Personnel found to have committed an offence under the Code of Conduct, and (b) to act as a deterrent to other Players and Player Support Personnel to deter them from conducting themselves improperly on and off the "field of play". The ICC believes that the threat of a suspension is the strongest deterrent to bring about a change in behavior'.
- 7.5 The Appellant submits in response:
- 7.5.1 He believed in the propriety of what he was doing.
 - 7.5.2 The reputational damage he has suffered already is a sufficient penalty.
- 7.6 Had I concluded as did the Match Referee, that the Appellant was not telling the truth when he claimed that he believed that his actions were compatible with the Code and the Laws, I would have given serious consideration to the imposition of Suspension Points, not least because of the special responsibility imposed upon a captain, especially of a Test match side (see e.g. the Preamble to the Laws).
- 7.7 However, as explained in para 5.5.4 above I do not so conclude, and after evaluating all other competing arguments, I consider that a fine of 100% of the applicable match fee (the top end of the scale) does justice to the Appellant's degree of culpability.
- 7.8 I would therefore not amend the sanction which remains as it was.

8. EPILOGUE

- 8.1 It appears that there is a belief current in cricketing circles (whatever its validity) that applying a mixture of saliva and a sweet to a match ball enhances its propensity to swing. This was somewhat hyperbolically described in Marcus Trescothick's memoir (Coming Back to Me) as one of "the great scientific discoveries". It was a view shared by the Appellant and indeed by Mr Kettleborough, the on field Umpire. (Transcript p.10)
- 8.2 I was shown documents about two cases, one covering the well-known Indian Test batsmen Rahul Dravid and one covering the lesser-known Warwickshire County player, Frederick

Coleman, in which each cricketer had been found guilty of an offence under Law 42.3 (b) (and of the Code). Neither document contained a reasoned award and, in any event, neither case would constitute a binding precedent. They do, however, show that the provision is not treated as a dead letter.

- 8.3 Furthermore on 6-7 December 2016, at one of its regular meetings, the MCC's World Cricket Committee took the opportunity to consider Law 42.3 in light of this very case. It concluded that Law 42.3(a) is sufficiently clear and no changes should be made to it. Mike Brearley, the chair of the Committee and a distinguished former captain of England, rejected concerns that other players had done what the Appellant did and had not been punished. In media reports Mr Brearley was quoted as saying "If you speed you'd probably get away with it. But not everyone does. Sometimes you are caught. And when you are caught flagrantly doing something, you deserve to face the penalty, whatever that penalty is. Which seems to me as far as I know is what happened to Faf du Plessis. The fact that other people do it doesn't mean that you shouldn't catch the odd person who does it flagrantly".
- 8.4 No doubt there are two possible views on this issue as to where the line should be drawn.. Some might say that since shining with natural substances is permissible, there is no reason to prohibit shining with artificial substances. (In the same way that some argue that since good food is performance enhancing, there is no reason – health considerations apart – to prohibit performance enhancing drugs). But where the line is drawn and what conduct is or is not considered to be offensive to the sport of cricket is a matter for the custodians of the game,(the MCC and ICC) and the rule-makers. It is emphatically not a matter for the Commissioner, or anyone else, on or off pitch, who have to apply the rules as they stand.
- 8.5 I have accordingly sought in this award to clarify and state, given its continued vitality, what I can conceive to be the true meaning and purpose of Code Article 2.2.9 and Law 42.3.
- 8.6 Unless and until my analysis of the relevant provisions is superseded, it should send a message to the cricketing community as to what behavior in connection with the condition of the match ball will or will not be tolerated in the future, and make it more difficult for anyone charged with an offence under the relevant provisions to plead ignorance of his (or her) responsibilities.

Michael J Beloff QC

Dubai

21 December 2016

MICHAEL J BELOFF QC

JUDICIAL COMMISSIONER