



IVEY v GENTING AND DISHONESTY – NEW DAWN OR FALSE HORIZON?

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Misunderstanding in the criminal law

R v Ghosh [1982] QB 1053 two-stage test:

In determining whether the prosecution has proved that the defendant was acting dishonestly, a jury must first of all decide whether according to the ordinary standards of reasonable and honest people what was done was dishonest. If it was not dishonest by those standards, that is the end of the matter and the prosecution fails. If it was dishonest by those standards, then the jury must consider whether the defendant himself must have realised that what he was doing was by those standards dishonest.



Uncertainty in the civil law (1)

Royal Brunei Airlines Sdn Bhd v Tan [1995] 2 AC 378 Lord Nicholls:

Whatever may be the position in some criminal or other contexts (see, for instance, R v Ghosh), in the context of the accessory liability principle acting dishonestly, or with a lack of probity, which is synonymous, means simply not acting as an honest person would in the circumstances. This is an objective standard.



Uncertainty in the civil law (2)

Twinsectra Ltd v Yardley [2002] 2 AC 164, the majority of the House of Lords favoured what Lord Hutton called the ‘combined test’:

[This] requires that before there can be a finding of dishonesty it must be established that the defendant’s conduct was dishonest by the ordinary standards of reasonable and honest people and that he himself realised that by those standards his conduct was dishonest.

The only difference between this formulation and the test of dishonesty formulated in *Ghosh* is that the latter test uses the words ‘the defendant himself must have realised’.



Uncertainty in the civil law (3)

Lord Hoffmann said:

...I consider that those principles [in Tan] require more than knowledge of the facts which make the conduct wrongful. They require a dishonest state of mind, that is to say, consciousness that one is transgressing ordinary standards of honest behaviour.

In contrast, Lord Millett was in favour of adopting an objective approach as being more apposite to civil as distinct from criminal liability. Lord Hoffmann described Lord Millett's point of view as being that:

It is sufficient that the defendant knew all the facts which made it wrongful for him to participate in the way in which he did.



Uncertainty in the civil law (4)

Over time, the civil appellate courts clarified that an objective test for dishonesty is appropriate for purposes of the civil law.

Barlow Clowes v Eurotrust International Ltd [2006] 1 WLR 1476 Lord Hoffmann:

... the statement (in [20] in Twinsectra) that a dishonest state of mind meant 'consciousness that one is transgressing ordinary standards of honest behaviour' was in their Lordships' view intended to require consciousness of those elements of the transaction which make participation transgress ordinary standards of honest behaviour. It did not also...require him to have thought about what those standards were.



Dishonesty and disciplinary proceedings (1)

In the context of disciplinary proceedings, however, the courts declined to follow this line of authority.

In *Bryant and Bench v Law Society* [2007] EWHC 3043 (Admin), [2009] 1 WLR 163, Richards LJ referred to *Bultitude v Law Society* [2004] EWCA Civ 1853 and concluded:

In our judgment, the decision of the Court of Appeal in Bultitude stands as binding authority that the test to be applied in the context of solicitors' disciplinary proceedings is the Twinsectra test as it was widely understood before Barlow Clowes, that is a test that includes the separate subjective element.



Dishonesty and disciplinary proceedings (2)

However, confusion persisted and misgivings were expressed. In *Kirschner v GDC* [2015] EWHC 1377 (Admin) Mostyn J concluded:

It would, however, be a step too far for me, notwithstanding my great misgivings, to hold that Bryant does not represent the law concerning dishonesty in disciplinary proceedings. Or that the Twinsectra/Ghosh test has not been adapted as suggested in Hussain. As things stand the test is [that] ... The tribunal should first determine whether on the balance of probabilities, a defendant acted dishonestly by the standards of ordinary and honest members of that profession; and, if it finds that he or she did so, must go on to determine whether it is more likely than not that the defendant realised that what he or she was doing was by those standards, dishonest.



Resolution of the issues (1)

All these problems have been resolved by the decision of the Supreme Court in *Ivey v Genting Casinos (UK) Ltd (t/a Crockfords Club)* [2018] AC 391.

Lord Hughes said: (1) that ‘there can be no logical or principled basis for the meaning of dishonesty (as distinct from the standards of proof by which it must be established) to differ according to whether it arises in a civil action or a criminal prosecution’; (2) that there are ‘convincing grounds for holding that the second leg of the test propounded in *Ghosh* does not correctly represent the law and that directions based upon it ought no longer to be given’; and (3) that for purposes of both civil and criminal law the test of dishonesty is the same.



Resolution of the issues (2)

Lord Hughes said at [74]:

When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held. When once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest.



What about the future?

The general perception seems to be that the *Barlow Clowes* test was reaffirmed in civil actions, and introduced into criminal proceedings (over-turning the test laid down in *Ghosh*) by the Supreme Court in *Ivey*.

The concept of dishonesty remains elusive.

This difficulty of definition leads on to further questions as to whether the objective test of ‘the standards of ordinary decent people’ is (i) appropriate and (ii) workable.

The Supreme Court in *Ivey* seized the opportunity to sort out the concerns that have troubled the law for the past few decades arising from the second limb of the test in *Ghosh*. But there are problems underlying the first limb of that test, which is now part of both the civil and the criminal law, which are likely to provide grounds for debate for years to come.