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

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Misunderstanding in the criminal law

In *R v Ghosh*[1] the Court of Appeal considered the word 'dishonestly' in s1 of the Theft Act 1968, which provides: 'A person is guilty of theft if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it'. Lord Lane CJ asked the following questions: 'Is 'dishonestly' in s1 of the Theft Act 1968 intended to characterise a course of conduct? Or is it intended to describe a state of mind?', and added the following comments: 'If the former, then we can well understand that it could be established independently of the knowledge or belief of the accused. But if, as we think, it is the latter, then the knowledge and belief of the accused are at the root of the problem'.[2]

This led the Court of Appeal to promulgate the following two-stage test:[3]

> 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.

Lord Lane CJ then observed:[4]

> In most cases, where the actions are obviously dishonest by ordinary standards, there will be no doubt about it. It will be obvious that the defendant himself knew that he was acting dishonestly. It is dishonest for a defendant to act in a way which he knows ordinary people consider to be dishonest, even if he asserts or genuinely believes that he is morally justified in acting as he did. For example, Robin Hood or those ardent anti-vivisectionists who remove animals from vivisection laboratories are acting dishonestly, even though they may consider themselves to be morally justified in doing what they do, because they know that ordinary people would consider these actions to be dishonest.

The Court of Appeal was right to say that dishonesty contains a subjective element. This is borne out by the partial definition of 'dishonestly' in s2 of the Theft Act 1968, which provides (among other things) that a person's appropriation of property belonging to another

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[1] [1982] QB 1053.

[2] ibid 1063.

[3] ibid 1064.

[4] ibid 1064.

is not to be regarded as dishonest if he appropriates the property in the belief that he has in law the right to deprive the other of it, or in the belief that he would have the other's consent if the other knew of the appropriation and the circumstances of it.

This is also consistent with earlier decisions of the Court of Appeal. In *R v Gilks*[5] the defendant placed bets with a bookmaker, and had winnings which amounted to £10.62, but was paid £117.25 by the bookmaker in the mistaken belief that he had backed a particular successful horse when he had not. Although the defendant was aware of the bookmaker's mistake, he accepted the money and kept it. He was charged with stealing the sum of £106.63. The nub of his case was 'if your bookmaker makes a mistake and pays you too much there is nothing dishonest about keeping it', and the trial judge directed the jury as follows: 'Well, it is a matter for you to consider, members of the jury, but try and place yourselves in that man's position at that time and answer the question whether in your view he thought he was acting honestly or dishonestly'. The Court of Appeal held that, in the circumstances of the case, this was a proper and sufficient direction on the matter of dishonesty.[6] In *R v Feely*[7] the defendant was charged with theft of about £30 from his employers. He accepted that had taken the money from their till, but claimed that this was only by way of borrowing, that he intended to pay the money back, that his employers owed him about £70, and that he wanted them to deduct the money which he had taken. The trial judge directed the jury that if the defendant had taken the money it was no defence for him to say that he had intended to repay it and that his employers owed him enough to cover what he had taken. His appeal against conviction was allowed. The Court of Appeal said not only that 'Jurors, when deciding whether an appropriation was dishonest, can be reasonably expected to, and should, apply the current standards of ordinary decent people' (an objective criterion) but also that 'In their own lives they have to decide what is and what is not dishonest. We can see no reason why, when in a jury box, they should require the help of a judge to tell them what amounts to dishonesty' (which would appear to contemplate a subjective element).[8]

Where the Court of Appeal in *Ghosh* fell into error was in dividing the subjective and objective elements in the way that it did. In fact, both the language of s2 of the Theft Act 1968 and *Gilks* and *Feely* (for example) pointed to a different two-stage exercise, comprising: first, a determination of what the defendant did and his state of mind at the time he did it (the subjective element), and, second, a determination of whether on those facts what he did was dishonest in accordance with the standards of ordinary decent people (an objective test).

Uncertainty in the civil law

In *Royal Brunei Airlines Sdn Bhd v Tan*,[9] the Privy Council considered the meaning of dishonesty in the context of the liability of an accessory to a breach of trust. Lord Nicholls, delivering the single judgment of the Privy Council, said:[10]

[5] [1972] 1 WLR 1341.

[6] ibid, Cairns LJ at 1345.

[7] [1973] QB 530.

[8] ibid, Lawton LJ at 537-538.

[9] [1995] 2 AC 378.

[10] ibid, 389.

> 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. At first sight this may seem surprising. Honesty has a connotation of subjectivity, as distinct from the objectivity of negligence. Honesty, indeed, does have a strong subjective element in that it is a description of a type of conduct assessed in the light of what a person actually knew at the time, as distinct from what a reasonable person would have known or appreciated. Further, honesty and its counterpart dishonesty are mostly concerned with advertent conduct, not inadvertent conduct. Carelessness is not dishonesty. Thus for the most part dishonesty is to be equated with conscious impropriety.

In *Twinsectra Ltd v Yardley*,[11] the House of Lords was divided as to the requirements of the dishonesty spoken of in *Tan*. The majority (Lord Slynn, Lord Steyn, Lord Hoffmann and Lord Hutton) were in favour of 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'.[12] 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'. That difference of language would appear to be explicable on the basis that the standard of proof in criminal cases is higher. 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'.[13] In contrast, Lord Millett was in favour of adopting an objective approach as being more apposite to civil as distinct from criminal liability.[14] 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'.[15]

Nevertheless, it would appear that Lord Millett envisaged that in certain circumstances the civil and criminal tests for dishonesty might sometimes be the same, and that the *Ghosh* test might therefore apply in both instances. Referring to the test in *Ghosh*, Lord Millett said:[16]

> The same test of dishonesty is applicable in civil cases where, for example, liability depends upon intent to defraud, for this connotes a dishonest state of mind. *Aktieselskabet Dansk Skibsfinansiering v Brothers* [2001] 2 BCLC 324 was a case of this kind (trading with intent to defraud creditors). But it is not generally an appropriate condition of civil liability, which does not ordinarily require a guilty

[11] [2002] 2 AC 164.

[12] ibid, Lord Hutton at [27].

[13] ibid [20].

[14] ibid [127]-[134].

[15] ibid [19].

[16] ibid [116].

> mind. Civil liability is usually predicated on the defendant's conduct rather than his state of mind; it results from his negligent or unreasonable behaviour or, where this is not sufficient, from intentional wrongdoing.

Over time, although the majority view in *Twinsectra* seemed clear, the civil appellate courts clarified that an objective test for dishonesty is appropriate for purposes of the civil law.

In *Barlow Clowes v Eurotrust International Ltd,*[17] Lord Hoffmann, delivering the single judgment of the Privy Council, said of his own speech in *Twinsectra* that '… the statement (in [20]) 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'.[18] Lord Hoffmann further said: 'Although a dishonest state of mind is a subjective mental state, the standard by which the law determines whether it is dishonest is objective. If by ordinary standards a defendant's mental state would be characterised as dishonest, it is irrelevant that the defendant judges by different standards'.[19]

This was followed by the decisions of the Court of Appeal in *Abou-Rahmah & Anor v Al-Haji Abdul Kadir Abacha & Ors*[20] and *Starglade Properties Ltd v Nash.*[21] In the latter case, the Chancellor stated that following the decision of the Court of Appeal in *Abou-Rahmah* 'the correct approach to questions of dishonesty is that indicated by the Privy Council in *Barlow Clowes*', that 'the law is that laid down in *Twinsectra* as interpreted in *Barlow Clowes*', and that 'The relevant standard, described variously in the statements I have quoted, is the ordinary standard of honest behaviour. Just as the subjective understanding of the person concerned as to whether his conduct is dishonest is irrelevant so also is it irrelevant that there may be a body of opinion which regards the ordinary standard of honest behaviour as being set too high. Ultimately, in civil proceedings, it is for the court to determine what that standard is and to apply it to the facts of the case'.[22] In the same case, Leveson LJ expressed 'a note of concern if the concept of dishonesty for the purposes of civil liability differed to any marked extent from the concept of dishonesty as understood in the criminal law', and voiced the opinion that it was important that 'at some stage the opportunity to revisit this issue should be taken by the Court of Appeal (Criminal Division)'.[23] Hughes LJ (as he then was) agreed with the judgment of the Chancellor and with those observations.[24]

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[17] [2005] UKPC 37, [2006] 1 WLR 1476.

[18] ibid [16].

[19] ibid [10].

[20] [2006] EWCA Civ 1492, [2007] 1 All ER (Comm) 827, [2007] 1 Lloyd's Rep 115.

[21] [2010] EWCA Civ 1314, [2011] Lloyd's Rep FC 102.

[22] ibid [30], [32].

[23] ibid [42], [44].

[24] ibid [41].

In *Ivey v Genting Casinos (UK) Ltd (t/a Crockfords Club)*,[25] in the course of discussing civil actions in which dishonesty has arisen as an issue, Lord Hughes said of these cases that 'Successive cases at the highest level have decided that the test of dishonesty is objective'.[26]

Dishonesty and disciplinary proceedings

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

In *Bryant and Bench v Law Society*,[27] Richards LJ, delivering the judgment of the court, referred to the *'Twinsectra* test' as it was widely understood prior to *Barlow Clowes* as 'including not only an essentially objective element ('that the defendant's conduct was dishonest by the ordinary standards of reasonable and honest people', albeit that the conduct is to be assessed in the light of the facts known to the defendant at the time) but also a separate subjective element ('knowledge by the defendant that what he was doing would be regarded as dishonest by honest people')'.[28] Richards LJ further stated[29] that is how the matter had been approached when it had come before the courts in *D v The Law Society*,[30] *Bultitude v The Law Society*,[31] and *Donkin v The Law Society*.[32] Richards LJ concluded:[33]

> 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. The fact that the Privy Council in *Barlow Clowes* has subsequently placed a different interpretation on *Twinsectra* for the purposes of the accessory liability principle does not alter the substance of the test accepted in *Bultitude* and does not call for any departure from that test.
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> In any event there are strong reasons for adopting such a test in the disciplinary context and for declining to follow in that context the approach in the *Barlow Clowes* case. As we have observed earlier, the test corresponds closely to that laid down in the criminal context by *R v Ghosh*; and in our view it is more appropriate that the test for dishonesty in the context of solicitors' disciplinary proceedings should be aligned with the criminal test than with the test for determining civil liability for assisting in a

[25] [2017] UKSC 67, [2017] 3 WLR 1212.

[26] ibid [62].

[27] [2007] EWHC 3043 (Admin), [2009] 1 WLR 163.

[28] ibid [149].

[29] ibid [150]-152].

[30] [2003] EWHC 408 (Admin).

[31] [2004] EWCA Civ 1853.

[32] [2007] EWHC 414 (Admin).

[33] *Bryant* (n27) [153]-[154].

> breach of a trust … the tribunal's finding of dishonesty against a solicitor is likely to have extremely serious consequences for him both professionally (it will normally lead to an order striking him off) and personally. It is just as appropriate to require a finding that the defendant had a subjectively dishonest state of mind in this context as the court in *R v Ghosh* considered it to be in the criminal context. Indeed, the majority of their Lordships in the *Twinsectra* case appeared at that time to consider that the gravity of a finding of dishonesty should lead to the same approach even in the context of civil liability as an accessory to a breach of trust. The fact that their Lordships in the *Barlow Clowes* case have now taken a different view of the matter in that context does not provide a good reason for moving to the *Barlow Clowes* approach in the disciplinary context.

Subsequent High Court cases in the disciplinary sphere followed this approach: see *Uddin v GMC*,[34] *Professional Standards Authority for Health and Social Care v Health and Care Professions Council, David*,[35] *Hussain v GMC*,[36] and *Kirschner v GDC*.[37]

However, confusion persisted and misgivings were expressed. These points are illustrated by the judgment of Mostyn J in *Kirschner*. First, Mostyn J doubted the correctness of the decision in *Bryant*, said that 'The decision in *Bultitude* must surely be regarded as having been overreached or superseded by the adoption by the Court of Appeal of the *Barlow Clowes* modification in *Abou-Rahmah*', and noted that in *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd*[38] Lord Dyson MR was of the view[39] that the Court of Appeal in *Abou-Rahmah* had followed the decision in *Barlow Clowes* rather than the earlier decision of the House of Lords in *Twinsectra*.[40] Second, Mostyn J stated than an important argument in favour of the same test for dishonesty in all civil proceedings is that it negates the risk of inconsistent verdicts on identical facts, and that 'At present the scope for confusion is immense. A defendant can face the prospect of being found dishonest in one civil court but not in another, depending on the nature of the proceedings'.[41] Third, Mostyn J expressed the opinion that there should be a single test for dishonesty in all civil proceedings, whatever their nature, and that 'The test should be as propounded by the Privy Council in *Barlow Clowes* and as very recently confirmed by it in *Central Bank of Ecuador & Ors v Conticorp SA & Ors (Bahamas)* [2015] UKPC 11'.[42] Mostyn J observed that 'Under the *Barlow Clowes* test the only relevant mental state of a defendant accused of dishonesty in civil proceedings is his or her knowledge. Once the knowledge of the defendant has been established it is then for

[34] [2012] EWHC 2669 (Admin).

[35] [2014] EWHC 4657 (Admin).

[36] [2014] EWCA Civ 2246.

[37] [2015] EWHC 1377 (Admin).

[38] [2012] Ch 453.

[39] ibid [74].

[40] *Kirschner* (n37) [17].

[41] ibid [18].

[42] ibid [19].

the tribunal to act as the 'spokesman of the fair and reasonable man, who represents after all no more than the anthropomorphic conception of justice' (per Lord Radcliffe in *Davis Contractors Ltd v Fareham Urban District Council* [1956] AC 696, 728) and to determine if the defendant, possessed of that knowledge, and having engaged in the transactions in question, was dishonest by ordinary standards'.[43] Fourth, however, Mostyn J concluded:[44]

> 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

All these problems have been resolved by the decision of the Supreme Court in *Ivey*.

This was an appeal by a professional gambler, Mr Ivey, against the rejection by Mitting J and the Court of Appeal of his claim for winnings of just over £7.7m derived from playing Baccarat at the defendant's casino. Mr Ivey used a technique known as 'edge-sorting', which he contended to be a legitimate gambling technique. The casino contended that it amounted to cheating, and thus placed Mr Ivey in breach of the implied term in the gaming contract that neither side would cheat. The casino further contended that Mr Ivey had committed the criminal offence of cheating at gambling contrary to s42 of the Gambling Act 2005, and that he could not succeed on his claim because he was relying upon his own illegal act.

Mitting J found that Mr Ivey was a truthful witness who did not believe that what he was doing was cheating, in accordance with a standpoint that 'commands considerable support from others'. He did not find that there had been any dishonesty by Mr Ivey in the course of his gambling. Indeed, and in light of the 'surprising and striking omission' of the croupier from the evidence called by the casino, Mitting J felt unable to infer that Mr Ivey had deceived the croupier into agreeing to sort the cards differentially by pretending to be superstitious when he was not. Mitting J found that this conduct was 'legitimate gamesmanship' and did not amount to deception 'of such a kind as to vitiate the gaming contract'. It was common ground between the parties before Mitting J (and indeed before the Court of Appeal and the Supreme Court) that the tests of dishonesty for purposes of the criminal law (laid down in *Ghosh*) and the civil law (re-iterated in *Starglade Properties Ltd v Nash*[45]) were different. Mitting J referred to both tests, but said that he was 'unconvinced' that dishonesty is a necessary element of the act of cheating for purposes of the civil law.[46]

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[43] ibid [20].

[44] ibid [22].

[45] (n21).

[46] *Ivey v Genting Casinos (UK) Ltd (t/a Crockfords Club)* [2014] EWHC 3394 (QB), [2015] Lloyd's Law Rep 98.

Mr Ivey contended that (1) it was plain from this, and from the reasons that Mitting J gave for holding that Mr Ivey had cheated, that Mitting J acquitted him of dishonesty, in either the criminal or the civil sense, (2) if Mitting J had found him to be dishonest in either sense, he would have said so, rather than (a) formulating and then (b) applying a test for cheating that did not require dishonesty, and (3) that this was acknowledged by all three members of the Court of Appeal: Arden LJ said 'the Judge found neither dishonesty nor deception', Tomlinson LJ (inferring deception where the judge of the facts had not) said 'A finding that Mr Ivey here practised deception is not inconsistent with the Judge's finding that he did not behave dishonestly', and Sharp LJ said that 'the Judge plainly concluded that Mr Ivey was honest' (and that it would not be right for an appellate court to disturb that finding).

However, applying what he described as 'the civil concept of cheating', Mitting J held that Mr Ivey had cheated and dismissed his claim. Mitting J considered that the requirements of s42 are not clear, and that it was unnecessary for him to consider it.

The Court of Appeal (Arden and Tomlinson LJJ, Sharp LJ dissenting) upheld that decision and dismissed Mr Ivey's appeal, but for reasons which differed both from those given by Mitting J and from one another. Both Arden LJ and Sharp LJ analysed the meaning of the word cheating by reference to s42 and arrived at conclusions as to the meaning of cheating within s42 which, as they held, applied equally to the implied term of the contract between Mr Ivey and the casino. However, Arden LJ held that for purposes of s42 an allegation of cheating does not require dishonesty, whereas Sharp LJ held that it does, and would have allowed the appeal on the basis that (as accepted by all three members of the Court of Appeal) Mitting J had acquitted Mr Ivey of dishonesty. Both Arden LJ and Sharp LJ agreed that if dishonesty is a necessary element of the offence under s42, the relevant test is that established in *Ghosh*. Tomlinson LJ followed Mitting J in reasoning that the case could be decided without reference to s42, and expressed no view on the mental element of the offence, but held that Mr Ivey had cheated because he had practised deception.[47]

The judgment of the Supreme Court was given by Lord Hughes, with whom all the other Justices agreed. Lord Hughes accepted Mr Ivey's argument that the test of what is cheating must be the same for the implied term as for s42, but rejected his case that dishonesty is an essential requirement of cheating in the context of games and gambling, and held that Mitting J's finding that he had cheated by using the technique of edge-sorting was 'unassailable'.

Lord Hughes considered the provisions of the Gaming Act of 1664 (16 Car 2 c7), the Gaming Act 1710 (9 Ann c 14), and the Gaming Act 1845 (8 & 9 Vict c 109), and held that given the origin of the expression 'ill practice' in the proscription with regard to 'any fraud, shift, cousenage, circumvention, deceit or unlawful device, or ill practice whatsoever' in the 1664 Act, which related to foot races, tennis and the like, as well as to gambling: 'it is not possible to treat 'ill practice' as having been limited by the principle of *ejusdem generis* to deception or fraud'.[48] Accordingly, Lord Hughes rejected Mr Ivey's argument based on common law offences and co-existing offences created by the Theft Act 1968, on the following basis:[49]

[47] *Ivey v Genting Casinos (UK) Ltd (t/a Crockfords Club)* [2016] EWCA Civ 1093; [2017] 1 WLR 679.

[48] *Ivey* (n25) [32].

[49] ibid [43].

> Whilst it makes perfect sense to interpret the concept of cheating in section 42 of the Gambling Act in the light of the meaning given to cheating over many years, it makes none to interpret cheating, as used over those many years, by reference to an expression—dishonesty—introduced into the criminal law for different purposes long afterwards in 1968. In gambling, there is an existing close relationship between the parties, governed by rules and conventions applicable to whichever game is undertaken, and which are crucial to what is cheating and what is not. Cheating at gambling need not result in obtaining the property of the other party, as section 42(2) explicitly says. Most importantly, whilst the additional element of dishonesty was necessary to the common law offence of cheating, and no doubt still is to the surviving offences of cheating the Revenue and conspiracy to defraud, in order to mark out the illegitimate and wrongful from the legitimate, the expression 'cheating' in the context of games and gambling carries its own inherent stamp of wrongfulness.

With regard to the argument based on the ordinary meaning of the word 'cheating', Lord Hughes said:[50]

> This argument is most neatly encapsulated by inversion: 'honest cheating' is indeed, as has been sensibly recognised by those who have addressed the phrase in this litigation, an improbable concept. But that is because to speak of honest cheating would be to suggest that some cheating is right, rather than wrong. That would indeed be contrary to the natural meaning of the word cheating. It does not, however, follow, either (1) that all cheating would ordinarily attract the description 'dishonest' or (2) that anything is added to the legal concept of cheating by an additional legal element of dishonesty.

Lord Hughes then said:[51]

> Although the great majority of cheating will involve something which the ordinary person (or juror) would describe as dishonest, this is not invariably so. When, as it often will, the cheating involves deception of the other party, it will usually be easy to describe what was done as dishonest. It is, however, perfectly clear that in ordinary language cheating need not involve deception, and section 42(3) recognises this. Section 42(3) does not exhaustively define cheating, but it puts beyond doubt that both deception and interference with the game may amount to it. The runner who trips up one of his opponents is unquestionably cheating, but it is doubtful that such misbehaviour would ordinarily attract the epithet 'dishonest'. The stable lad who starves the favourite of water for a day and then gives him two buckets of water to drink just before the race, so that he is much slower than normal, is also cheating, but there is no deception unless one manufactures an altogether artificial representation to the world at large that the horse has been prepared to run at his fastest, and by themselves it is by no means clear that these actions would be termed dishonesty. Similar questions could no doubt be asked about the taking of performance-enhancing drugs, about the overt application of a magnet to a fruit machine, deliberate time wasting in many forms of game, or about upsetting the card table to force a re-deal when loss seems unavoidable, never mind sneaking a look at one's opponent's cards.

[50] ibid [44].

[51] ibid [45].

Dealing with the interaction between cheating and dishonesty, Lord Hughes said:[52]

> Where it applies as an element of a criminal charge, dishonesty is by no means a defined concept. On the contrary, like the elephant, it is characterised more by recognition when encountered than by definition. Dishonesty is not a matter of law, but a jury question of fact and standards … Accordingly, dishonesty cannot be regarded as a concept which would bring to the assessment of behaviour a clarity or certainty which would be lacking if the jury were left to say whether the behaviour under examination amounted to cheating or did not …
>
> There is no occasion to add to the value judgment whether conduct was cheating a similar, but perhaps not identical, value judgment whether it was dishonest. Some might say that all cheating is by definition dishonest. In that event, the addition of a legal element of dishonesty would add nothing. Others might say that some forms of cheating, such as deliberate interference with the game without deception, are wrong and cheating, but not dishonest. In that event, the addition of the legal element of dishonesty would subtract from the essentials of cheating, and legitimise the illegitimate. Either way, the addition would unnecessarily complicate the question whether what is proved amounts to cheating.

Turning to the issue of dishonesty, Lord Hughes carried out a comprehensive review of the criminal and civil cases[53] before reaching the conclusion that for purposes of both civil and criminal law the test for dishonesty is the same, and is as set out below. That analysis and conclusion have the effect of resolving all the pre-existing problems relating to dishonesty in the criminal and civil law (including disciplinary proceedings) discussed above.

In light of the conclusions reached on the issue of cheating, the need for the Supreme Court to consider the parameters of the concept of dishonesty did not strictly arise. But there seems little doubt that the lower courts will follow this unanimous decision of the Supreme Court, which effectively overrules *Ghosh*.

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';[54] (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';[55] and (3) that for purposes of both civil and criminal law the test of dishonesty is the same:[56]

> 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.

[52] ibid [48]-[49].

[53] ibid [62]-[73].

[54] ibid [63].

[55] ibid [74].

[56] ibid [74].

> 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?

At the time of writing, the Court of Appeal (Criminal Division) has not had occasion to consider the inter-relationship between *Ivey* and *Ghosh*. The general perception of the courts of first instance is as stated in *Signia Wealth Ltd v Vector Trustees Ltd*,[57] namely that the test in civil proceedings as to whether particular conduct amounts to dishonesty is that set out by the Privy Council in *Barlow Clowes* and that 'This test was reaffirmed in civil actions, and introduced into criminal actions, (over-turning the test in criminal proceedings laid down in *Ghosh*) by the Supreme Court in *Ivey*'.[58] The status of Lord Hughes' observations concerning the concept of dishonesty for purposes of the criminal law was discussed in *DPP v Patterson*,[59] by Sir Brian Leveson, President of the Queen's Bench Division:[60]

> These observations were clearly *obiter*, and as a matter of strict precedent the court is bound by *Ghosh*, although the Court of Appeal could depart from that decision without the matter returning to the Supreme Court. This much is clear from *R v Gould* [1968] 2 QB 65, in which Diplock LJ observed at 68G that:
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> > 'In its criminal jurisdiction …the Court of Appeal does not apply the doctrine of *stare decisis* with the same rigidity as in its civil jurisdiction. If upon due consideration, we were to be of opinion that the law has been either misapplied or misunderstood in an earlier decision of this court or its predecessor, the Court of Criminal Appeal, we should be entitled to depart from the view expressed in that decision …'
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> Given the terms of the unanimous observations of the Supreme Court expressed by Lord Hughes, who does not shy from asserting that *Ghosh* does not correctly represent the law, it is difficult to imagine the Court of Appeal preferring *Ghosh* to *Ivey* in the future.

The concept of dishonesty remains elusive. On the one hand, it is apparent from *Ghosh* that a Court of Appeal presided over by the then Lord Chief Justice considered that anti-

[57] [2018] EWHC 1040 (Ch).

[58] ibid, Marcus Smith J [561]. See also *Raychaudhuri v General Medical Council, Professional Standards Authority for Health and Social Care intervening* [2018] EWCA Civ 2027 (judgment handed down on 14 September 2018), Sales LJ at [54]: "At the time of the decision of the MPT, the approach to dishonesty was taken to be that set out in *[Ghosh]* … Before Sweeney J and before us it was common ground that the approach to dishonesty in relation to findings made by the MPT should be that set out in *Ivey*."

[59] [2017] EWHC 2820 (Admin), [2018] 1 Cr App R 28.

[60] ibid [16]-[17].

vivisectionists who remove animals from a vivisection laboratory would incontrovertibly be acting dishonestly because it is inescapable that they would 'know that ordinary people would consider such actions to be dishonest'. On the other hand, it is apparent from *Ivey* that five Supreme Court judges including a later Lord Chief Justice regarded it as not dishonest or only doubtfully dishonest (a) for a runner to trip up one of his opponents, (b) for a stable lad to starve a horse of water and then give the horse buckets of water to drink just before a race so that the horse is much slower than normal, (c) for an athlete to take performance-enhancing drugs, (d) to apply a magnet to a fruit machine, (e) to upset a card table to force a re-deal when loss seems unavoidable, and (f) to sneak a look at an opponent's cards. These views presumably reflect the perception of these tribunals as to what is and is not honest according to the standards of ordinary decent people. However, it is unclear that this perception is correct. It certainly does not accord with the reactions of many people when these illustrations are put to them. Based on my own experience, the position is the reverse: while most people agree that releasing an animal from a laboratory to save it from vivisection is unlawful, fewer than 50% consider that it is dishonest, whereas well over 50% of people consider that all or some of the courses of conduct identified at (a)-(f) above are dishonest.

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 test assumes that there is a single standard which exists, and which can be applied to determine whether particular conduct by a person or persons having a certain state of knowledge ought or ought not to attract the epithet 'dishonest' (an ordinary English word, which is not susceptible to further elaboration, but which, at least in accordance with what was said in *Tan*, is synonymous with lack of probity, and 'means simply not acting as an honest person would in the circumstances', and includes 'commercially unacceptable conduct in the particular context involved'[61]). Even if it is assumed that there is, indeed, a single applicable standard which is capable of being applied to the particular facts that are in issue, there is, or may be, a problem as to how a jury is to apply it. If, as seems probable, jurors typically regard themselves as 'ordinary decent people', they will apply their own standards. That works well if their self-perception is accurate, but less well if it is not. If and to the extent that jurors are not 'ordinary decent people', there are difficulties about asking them to apply a standard to which they themselves do not measure up: first, they may not know what that standard is; second, they may feel uncomfortable about requiring higher standards from others than they require of themselves. These problems are exacerbated because the exercise is only likely to assume significance in marginal cases. On the facts of *Feely*, for example, a jury sympathetic to employees might acquit, while one sympathetic to employers might convict. These problems may also be exacerbated if the jury are asked to apply a standard which they have no difficulty in identifying to a context with which they are unfamiliar. Indeed, Mitting J observed that if dishonesty was an element of the section 42 offence 'It is not obvious … how in the unusual circumstances of a casino it is to be measured.'[62]

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*. However, there are problems underlying the first limb of that test, which is part of both the civil and the criminal law of dishonesty, which are likely to provide grounds for debate for years to come.

[61] *Tan* (n9), Lord Nicholls 389, 390.

[62] *Ivey* (n46) [44].