Neutral Citation Number: [2016] EWCA Civ 1093

Case No: A2/2014/3507

**IN THE COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM**
**THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**Mr Justice Mitting**
**[2014] EWHC 3394 (QB)**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/11/2016

**Before :**

**LADY JUSTICE ARDEN**
**LORD JUSTICE TOMLINSON**
and
**LADY JUSTICE SHARP**

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**Between:**

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| **PHILLIP IVEY** | **Appellant** |
| **- and -** | |
| **GENTING CASINOS UK LIMITED T/A CROCKFORDS CLUB** | **Respondent** |

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**Richard Spearman QC** and **Max Mallin** (instructed by **Archerfield Partners LLP**) for the **Appellant**
**Christopher Pymont QC** and **Siward Atkins** (instructed by **Kingsley Napley LLP**) for the **Respondent**

Hearing date: 13 April 2016.
Further submissions lodged: 9, 17 and 20 May 2016

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# Judgment Approved

## LADY JUSTICE ARDEN:

### *Core issue: is edge-sorting legitimate play or cheating if used when playing Punto Banco?*

1. The principal issue on this appeal is whether a method of play called "edge-sorting", which involves exploiting design irregularities on the backs of playing cards, results in cheating when playing Punto Banco, a variant of Baccarat. In Punto Banco, a single player plays against the casino or "house" offering the game. The appellant, Mr Philip Ivey (hereafter Mr Ivey), a well-known professional gambler from the United States, considers that it is lawful for skilful players such as him, known as "advantage players", to use methods of play such as this. He contends that edge-sorting ought to be known to the casino and the casino could protect itself against it. It follows that when he admittedly used edge-sorting he subjectively did not have any dishonest intention and his play cannot therefore have amounted to cheating. The respondent casino, known as Crockfords Club (hereafter "Crockfords"), say that they did not know about edge-sorting, and that it altered the odds against them unfairly.

2. Mitting J in a concise and carefully reasoned judgment held that Mr Ivey had been a truthful witness but that his play on this occasion amounted in law to cheating. This meant he had breached the terms on which Crockfords agreed to allow him to play: it was common ground that there was an implied term that Mr Ivey would not cheat. Accordingly the judge dismissed Mr Ivey's claim to recover his winnings, totalling £7.7.m. The appeal is against the judge's order dated 8 October 2014.

3. This is a most unusual claim. For much of our history, the keeping of gaming houses for the playing of games involving chance has been illegal and subsequently the making of gaming contracts was made illegal (see Gaming Act 1845, section 18). No doubt this explains why contracts arising from gambling rarely came before the courts. But in recent times there was a change of policy towards gambling. Parliament took the view that it was better in the modern world to permit places where people could game provided it was properly regulated. It permitted the enforcement of gambling debts. It set up the Gambling Commission. Among its functions the Gambling Commission grants licences to casinos. These reforms were implemented by the Gambling Act 2005 ("the 2005 Act"). Section 42 of this Act criminalises cheating in gaming generally. I have set out section 42 in the annex to this judgment.

4. It should not be thought, however, that the courts have never had to consider the meaning of cheating in relation to card games. We have received some assistance by the citation of some old authorities, and Scottish and Commonwealth authorities. But none of these cases was concerned with advantage play as such.

5. I propose to adopt the judge's description of the game, related concepts and edge-sorting. The facts are not in dispute and are set out by the judge, and so I can take the events leading to this claim shortly. I will then move to the parties' submissions and to my conclusions.

### *Punto Banco and the meaning of edge-sorting*

6. Mitting J helpfully described Punto Banco and edge-sorting as follows:

> 4. Punto Banco is a variant of Baccarat. It is not normally, to any extent, a game of skill. Eight decks or, in English nomenclature, packs, sometimes six, of 52 cards are dealt from a shoe [card holder used by the dealer], face down by a croupier. She deals the cards in a sequence from which no deviation is permitted to two positions on the table in front of her, marked 'player', the 'Punto' in the name, and 'Banker', 'Banco': one card to player, one to banker; a second to player and a second to banker. In prescribed circumstances she must deal one further card, either to player or to banker or to both.
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> 5 The basic object of the game is to achieve, on one of the two positions, a combination of two or three cards which, when added together, is nearer to nine in total than the combination on the other position. Aces to 9 count at face value, 10 to King inclusive count as nothing. Any pair or trio of cards adding up to more than 10 requires 10 to be deducted before arriving at the counting total. Thus 4 plus 5 equals 9, but 6 plus 5 (which equals 11) equals only 1.
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> 6 Punters bet before any card is dealt and can bet on player or banker. Winning bets are paid at evens on player, and at 19 to 20 on banker. It is possible to bet on a tie. In the event of a tie, all bets on player or banker are annulled, in other words, the punter keeps his stake and the only bet paid out on is the tie at odds set by the casino of either eight to one or, at Crockfords, nine to one. It is possible to place other types of bet, but this case does not concern them and it is unnecessary for me to describe them.
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> 7 The house edge in Punto Banco is 1.24% if player wins and 1.06% if banker wins. The counter intuitive difference is accounted for by the different rules which apply to drawing a third card for player or banker. The play of each sequence of two or three pairs of cards is known as a 'coup'.
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> 8 Before play begins, the cards are cut to eliminate a proportion of the shoe from those to be played. The cut is effected by placing a blank divider between the bulk of the shoe and the remaining cards. Traditionally, seven cards out of 416 were cut from the shoe, but some casinos routinely eliminate more, typically about one deck of 52 cards. The croupier can deal a fresh shoe of cards as each is exhausted, or, after reshuffling, reuse the same cards.
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> 9 The claimant aided by another professional gambler, Cheung Yin Sun (Ms Sun), played 15 shoes of Punto Banco at

Crockfords Club in Mayfair on the afternoon and night of 20 to 21 August 2012 and on the afternoon of 21 August. He won just over £7.7 million. There is no dispute about the means which he used to achieve that win, a technique known as 'edge-sorting'.

10 A deck of 52 playing cards is manufactured so as to present a uniform appearance on the back and a unique appearance on the face. The backs of some cards are, however, not exactly uniform. The backs of many packs of cards for social use have an obvious top and bottom, for example, the manufacturer's name may be printed once only, or the pattern may be obviously the right way up and upside down. In casino games in which the orientation of the back of the card may matter, cards which are in principle indistinguishable whichever way up they are when presented in a shoe are used. Cards with no pattern and no edge present no problem, they are indistinguishable. However many cards used in casinos are patterned. If the pattern is precisely symmetrical the effect is the same as if the card is plain: the back of one card is indistinguishable from any other. But if the pattern is not precisely symmetrical it may be possible to distinguish between cards by examining the backs.

11 'Edge-sorting' is possible when the manufacturing process causes tiny differences to appear on the edges of the cards so that for example, the edge of one long side is marginally different from the edge of the other. Some cards printed by Angel Co. Ltd for the Genting Group (which owns Crockfords) have this characteristic. The machine which cuts the card leaves very slightly more of a pattern, a white circle broken by two curved lines, visible on one long edge than on the other. The manufacturers assert that this is not a defect but is within a contractually specified tolerance of up to 0.3 millimetres. Before a card is dealt from a shoe, it sits face down at the bottom of the shoe, displaying one of its two long edges. It is possible for a sharp-eyed person sitting close to the shoe to see which long edge it is. The information thus gained is only useful to the punter if he knows or has a good idea of what the card is.

12 In Punto Banco cards with a face value of 7, 8 and 9 are high value cards. If one such card is dealt to player or to banker, it will give that position a better chance of winning than the other. Thus a punter who knows that when the first card dealt, always to player is a 7, 8 or 9, he will know that it is more likely than not that player will win. If he knows that the card is not a 7, 8 or 9, he will know that it is more likely than not that banker will win. Such knowledge, it is agreed, will give

the punter a long-term edge of about 6.5% over the house if played perfectly accurately.

13 According to Dr Jacobson, a former Professor of Mathematics, currently an expert adviser to the gambling industry, the house edge on any particular coup varies and is not precisely the long-term edge thus described. It may be between 4.5% and 7%, using the edge-sorting technique which I have described. I accept his evidence.

14 Three conditions must occur before the punter can gain that knowledge:

(1) the same shoe of cards must be used more than once;

(2) cards with a face value of 7, 8 or 9 must be turned through 180 degrees by comparison with all other cards;

(3) when reshuffled no part of the shoe must be rotated. Step (2) is the process known as edge-sorting.

15 As the claimant frankly, and without hesitation, admitted, if the casino realises that cards with a face value of 7, 8 or 9 are being turned, it will take one or more of the simple steps needed to avoid giving the punter an advantage: by covering the base of the shoe so that the leading edge is not visible before bets are placed; by only using one shoe of cards; or by turning a significant proportion of the cards when reshuffling. It is therefore essential for edge-sorting to work that the croupier does not realise that cards with a face value of 7, 8 or 9 have been differentially sorted unless of course she is complicit, of which there is no suggestion in this case whatever. Two people can rotate the cards – the punter or the croupier. If the punter touches the cards, most casinos will not permit that shoe to be reused. That is Crockfords' invariable practice.

16 For edge-sorting to work at Crockfords it is therefore essential that the croupier is persuaded to rotate the relevant cards without her realising why she is being asked to do so. Casinos routinely play on quirky and superstitious behaviour by punters. It is in the casino's interests that punters should believe, erroneously, that a lucky charm or practice will improve their chance of winning and so modify or defeat the house edge. Consequently a wide variety of requests by punters, particularly those willing to wager large sums on games which they must in the long run lose, are accommodated by casinos without demur or surprise.

7. The judge also explained that in Punto Banco there was a 'house edge' which meant that played over a longish time the house should beat the player.

8. The judge then explained how in August 2012 Mr Ivey, together with an associate, Ms Sun, persuaded the croupier to rotate the cards so that those of high value could be distinguished from other cards before the first card for any shoe was taken out of the shoe for any coup, and therefore before the bets were placed. Crockfords did not appreciate the purpose of rotating the cards.

9. The judge examined section 42 of the 2005 Act and the statutory history. He considered Australian, New Zealand and US statutes. He was not shown a number of cases which have been cited on this appeal.

10. The judge heard expert evidence. He found that there was no general agreement as to what might be termed the industry standard of cheating or not cheating. He concluded:

> It is ultimately for the court to decide, as it must in the case of the standard of honesty to be expected in dealing of businessmen and trustees, whether or not conduct amounts to cheating.

11. The judge took the view that the test of honesty in the context of playing cards was objective. Therefore Mr Ivey's own view of the legitimacy of his conduct was not determinative. It was therefore necessary to analyse the consequences of his conduct. The judge held that there were three material consequences and from them he concluded that cheating had occurred:

> 50. …(1) He gave himself an advantage, throughout the play of the sixth and subsequent shoes, which the game precludes – knowing, or having a good idea, whether the first card was or was not a 7, 8 or 9. That is quite different from the advantage which may accrue to a punter as a result of counting the cards, so that very near to the end of the shoe he may obtain a legitimate advantage by doing so.
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> (2) He did so by using the croupier as his innocent agent or tool by turning the 7s, 8s and 9s differentially. He was not simply taking advantage of an error on the part of the croupier or an anomaly produced by a practice of the casino for which he was not responsible.
>
> (3) He was doing so in circumstances in which he knew that she and her superiors did not realise the consequence of what she had done at his instigation. Accordingly, he converted a game in which the knowledge of both sides as to the likelihood that player or banker will win – in principle nil, – was equal into a game in which his knowledge is greater than that of the croupier and greater than that which she would reasonably have expected it to be.

> 51 This in my view is cheating for the purposes of civil law. …

12. The judge rejected an argument by Crockfords that the play did not amount to the game of Punto Banco. The judge held that it was not necessary to rule on a further defence that Mr Ivey could not bring a claim founded on his own illegal conduct. Crockfords have filed a respondent's notice in which they contend that, if Mr Ivey succeeds on his appeal, the judgment should be affirmed on this third ground of defence.

***Overview of this judgment***

13. After carefully considering the arguments and numerous cases relevant to this appeal, I conclude, for the reasons developed below, that Mr Ivey's challenge to the judge's conclusion must fail. Mr Ivey achieved his winnings through manipulating Crockfords' facilities for the game without Crockfords' knowledge. His actions cannot be justified on the basis that he was an advantage player. It is said that this status results in a cat and mouse game between him and the casino, basically putting them into an adversarial position towards each other.

14. As appears below, I do not consider that dishonesty is a necessary ingredient of the criminal offence of cheating. If it were, then the test established in *R v Ghosh* [1982] QB 1053 would apply. *Ghosh* decides that, if dishonesty has to be shown, there is a two-fold test, namely whether the defendant's actions were dishonest according to the ordinary standards of reasonable and honest people and, if so, whether he realised that his actions were, according to those standards, dishonest. The *Ghosh* test means that dishonesty could not be established in this case. It is *Ghosh* which makes the judge's finding that there was no subjective dishonesty on Mr Ivey's part so central in this case.

15. I now turn to Mr Ivey's submissions. I deal first with two particular submissions on behalf of Mr Ivey, namely, that cheating required subjective dishonesty on Mr Ivey's part, which was not established, and on the relevance of the fact that play was between a casino and an advantage player, and Crockfords' response to those submissions. I shall then, in the light of my answers on those two points, consider whether the judge was right to say that there was cheating in this case. I shall consider Crockfords' respondent's notice seeking to uphold the judge's judgment on grounds which the judge held that he did not have to decide. Finally I shall make observations on the dissenting judgment of Lady Justice Sharp. I summarise my conclusions at the end of my judgment.

***Mr Ivey's "no dishonesty" submission: no cheating without subjective dishonesty***

16. Mr Richard Spearman QC, for Mr Ivey, submits that cheating requires a dishonest state of mind, and that this is its ordinary meaning. The fact that the judge found that Mr Ivey had an honest belief that his actions were not cheating means that he was not cheating.

17. Mr Spearman cites *Scott v The Metropolitan Police Commissioner* [1975] AC 819, at 840 where Viscount Dilhorne, speaking for the House of Lords, observed with apparent approval that:

> In *East's Pleas of the Crown* vol. II the author stated that in his view the common law offence of cheating consisted in:
>
> "the fraudulent obtaining of the property of another by any deceitful or illegal practice or token (short of felony) [which affects or may affect the public.]…"

18. Mr Spearman submits that in *Scott* intent to deceive is used synonymously with intent to defraud. Likewise, section 25(5) of the Theft Act 1968 defined "cheat" for the purposes of the offence of going equipped to cheat as obtaining property by deception, which under section 15 of the Theft Act 1968 (which was in force when the 2005 Act was enacted) required dishonesty. In *Scott*, Lord Diplock (at 840) also explained how up to the nineteenth century no clear distinction was drawn between conspiracies to defraud and to cheat, reinforcing his submission that cheating involved an intention to defraud.

19. Mr Spearman submits that section 42(3) of the 2005 Act does not provide that every deception or interference in connection with the process by which gambling is conducted is cheating: merely that they may be cheating. Section 42(3) does not define cheating. It is possible for cheating to consist of deception but section 42(3) does not, he submits, say that interference with the process by which a game is played is of itself without dishonesty cheating. The Explanatory Notes to the 2005 Act published by Parliament following its passing on his submission support this approach. This is because, while they state that interference of this nature may constitute cheating, they also state that sub-section (3) is without prejudice to sub-section (1) of section 42. The Explanatory Notes on that sub-section state that "cheating" bears its "normal, everyday meaning", which he contends involves dishonesty.

20. The predecessor of section 42 was section 17 of the Gaming Act 1845, which defined the criminal offence of cheating as:

> Every person who shall, by any fraud or unlawful device or ill practice in playing at or with cards … win from any other person to himself … any sum of money or other valuable thing from such other person by a false pretence, with intent to cheat or defraud such person of the same …

21. This section, therefore, uses the word "device" but Mr Spearman submits that this may be a "trick" as well as or instead of a physical thing. He submits that the "ill practice" in section 17 was part of a larger genus of wrongs such as cozenage and collusion. Mr Spearman took the court to the earlier statute, the Statute of Charles II (16 Car 2 cap 7 Section II), which uses the same language of ill practice. He also refers to the Statute of Anne (9 Anne cap 14 Section V), but this concerns excessive (ie extravagant) gaming and the recovery of bets by the losing party, rather than with cheating.

22. Mr Spearman notes that Crockfords rely on the decision of the Divisional Court in *R v Moore* [1914] 10 Cr App R 54, which used the word "unfairness" in relation to cheating, but he submits that this does not determine whether ill practice needs to be

dishonest. He submits that ill practice is basically a fraudulent device or means of fraud.

23. Mr Spearman submits the idea that section 42(3) covers unfairness is a surprising development. It would make the law "unacceptably vague", whereas honesty provides "an ascertainable standard by which conduct can be judged".

24. Mr Spearman submits that cheating involves dishonesty and that is so under the criminal law, and for the purposes of criminal law, the term "dishonesty" requires not only objective dishonesty but also subjective dishonesty (*R v Ghosh*).

25. Mr Spearman's primary submission is that there is no "civil law concept of cheating". Its meaning in the civil context can only be determined by reference to the criminal law. On his submission, there is a single concept of cheating, whether it is being used in civil law or in criminal law. Where there is a single wrong for civil and criminal purposes, the mental element must be the same. However, he also accepts that there are a number of old cases in which the courts have awarded compensation for cheating in a game of dice or cards where a person uses a device to cause loss to the plaintiff. For instance he may use false device or a false card, called a "bumcard" (see, for example, *Baxter v Woodyard* (1606) Moo K.B. 776, 72 English Reports 899 pi 1075 and other cases cited in *Baker and Milsom*, Sources of English Legal History, (2nd ed) (Oxford University Press, 2010) page 387, n 15. He submits, however, that these cases all support his case that cheating involves dishonesty since they involve either the allegation that the plaintiff was induced to play by some fraud or if not so induced that he lost money by some ruse, such as the use of false cards.

26. As the judge was satisfied that Mr Ivey believed that the steps he took were legitimate, dishonesty was not shown and the judge should therefore have held that Crockfords' defence failed.

***Crockfords' case: sufficient that Mr Ivey's actions disturbed the balance of chance***

27. The primary argument of Mr Christopher Pymont QC, for Crockfords, on this issue is that dishonesty is not required for cheating, that other statutes referring to cheating do not require dishonesty, that cheating may take the form of interference with the balance of chance in the game and that his submission on the meaning of cheating is consistent with the dictionary definition of cheating. The steps taken in the present case constituted cheating. I propose to separate out the various layers in these submissions.

*Section 42 does not require dishonesty*

28. Mr Pymont submits that there is no exhaustive definition of cheating but section 42(3) of the 2005 Act shows that it can include either deception (a species of dishonesty) or interference with the game. So it is not necessary to show that anyone was deceived. Section 42(3) uses the words "consist of", which can only mean that interference with the game without deception can amount to cheating.

29. Furthermore, submits Mr Pymont, it is not possible to imply any requirement for dishonesty from the reference to deception. Dishonesty is not therefore required.

30. Mr Pymont emphasises that section 42 is new and accordingly that it should not be interpreted by reference to the earlier statutes.

31. Mr Pymont submits that if, contrary to his submission, the court considers that section 42 is ambiguous as to whether dishonesty is an essential ingredient of the offence of cheating, the court can use as an aid to interpretation the statement in Parliament by the Rt Hon Richard Caborn MP, Minister of State for Sport and Tourism, in response to amendments proposed during the passage of the bill which led to the 2005 Act and his statement confirms that cheating may consist of unfair conduct by a player which increases his chances of winning. So dishonesty is not necessary. It is enough that it had a dramatic effect on the odds, in this case reducing the house edge by some 8%.

*Other statutes criminalising cheating also show dishonesty is not essential*

32. Mr Pymont submits that the words "ill practice" in section 17 of the Gaming Act 1845 cover actions which may not involve dishonesty.

33. Furthermore, submits Mr Pymont, the courts have held that there is no requirement for dishonesty in the case of statutory offences for corruption (see *R v Harvey* [1999] CLR 70 and *R v Godden-Wood* [2001] EWCA Crim 1586). To introduce a requirement for dishonesty into section 42 would be to place an illegitimate gloss on a statutory provision.

*Interference with the process of the game*

34. Mr Pymont submits that the expression "ill practice" in the Gaming Act 1845, section 17 could cover interfering with the game. Therefore, submits Mr Pymont, cheating does not have any necessary element of dishonesty. In support of this submission, Mr Pymont relies on the decision of the Divisional Court in *R v Moore*, which held that "ill practice" was a jury question. The legislature did not specify any *mens rea* in relation to ill practice.

35. Mr Pymont submits that this meaning of cheating now finds its reflection in section 42(3) of the 2005 Act, which states that cheating may "consist of" either deception or "interference in connection with…the process" by which the game is played. That would include taking steps which alter the balance of chance between the parties, it being fundamental that Punto Banco is a game of chance and there is a published house edge.

*Dictionary meaning of "cheat"*

36. Moreover, submits Mr Pymont, this is a civil case and, even if dishonesty were required by the criminal law, there is no reason that should be so in the present case. The court should simply apply the ordinary meaning of cheating. He cites the Concise Oxford English Dictionary (2011) definition of "cheat", which gives as the first meaning "act dishonestly or unfairly in order to gain an advantage." Mr Spearman, however, shows that the Oxford English Dictionary (1989) shows that the meaning of "to cheat" is "to deal fraudulently or practise deceit." Mr Pymont submits that that the Oxford English dictionary meaning of "cheat" conflates dishonesty and deceit and takes the matter no further forward.

### *My conclusion: there may be cheating without dishonesty*

37. For the reasons given below, I consider that section 42 does not require dishonesty to be shown. In this section of my judgment, I explain why I reach that conclusion on the interpretation of section 42 itself. I then go on to explain that there is some support for that conclusion from the authorities from before the 2005 Act, and to deal with the submissions made on the civil law concept of cheating and Hansard. I conclude that in some circumstances interference with the process of the game without proof of dishonesty will be enough.

*Interpretation of section 42*

38. There are three reasons why, in my judgment, section 42(3) makes it clear that dishonesty need not be shown.

39. First, section 42 is new and it must therefore be interpreted as new legislation. It is not to be assumed that it means what its predecessor, section 17 of the Gaming Act 1845, said.

40. Second, section 42(3) provides that cheating may consist of deception or it may consist of interference with the process of the game. There are two points here. Firstly, there is no reason why deception should be mentioned if dishonesty is already required. Secondly, section 42(3) expressly uses the words "consist of", and, in my judgment, this can only mean that, on appropriate facts, interference with the process of the game may be the sum total of the facts constituting the offence. Interference is a word describing a particular result and is neutral as to the mental state with which it is done. Not every interference with the process of a game constitutes cheating, but it may do so and section 42(3) clearly contemplates that this may be so without requiring proof that that person was dishonest.

41. Third, section 42(3) is stated to be "without prejudice to the generality of [section 42(1)]". Mr Spearman reads those words as meaning that there is some ingredient of "cheating" present in subsection (1), to which the reader must refer back and which, on his submission, is dishonesty. I do not consider that that is the function of those opening words. Their function is to reinforce the point that deception and interference, which are referred to in section 42(3), are only particular examples of what may constitute cheating. Furthermore, the dictionaries do not preclude a concept of cheating which does not require dishonesty (see [36]) above).

42. It is possible to think of actions which are neither deception nor interference with the process of the game, which may in some circumstances constitute cheating. For example, someone who has material information (for example, as to whether a star player will play in a particular game) which is not in the public domain may place a bet on the result of the game on the basis of that information. That person may be guilty of cheating because he has used his unequal access to confidential information to make a profit. In this type of situation, Parliament may well have taken the view that it was enough that covert use of confidential information was intrinsically wrong and that it could amount to cheating without any requirement for subjective dishonesty.

43. Section 42 contemplates that a person may be guilty of cheating (on the ordinary meaning of that word) even if there is no interference with the process of the game and no deception. That takes one back to the word "cheating" in subsection (1). I do not consider that the ordinary meaning of cheating is restricted to dishonest cheating, and the references to unfairness in the definition of cheating in the Concise Oxford English Dictionary, on which Mr Pymont relies, supports this conclusion. I have set out the dictionary definitions of "cheating" placed before us in [36] above.

44. That is not to say that dishonesty is never relevant. Cheating may, and perhaps in most cases will, involve dishonesty, but it need not do so. Whether interference with the process of the game amounts to cheating in any particular case is a matter for a common sense judgment having regard to the ordinary meaning of "cheat".

45. At first sight, it may seem odd that a player's actions can constitute cheating even if he was not dishonest. However, it was open to Parliament to take a different view, and that view would have been motivated by a desire to maintain the integrity of the gaming facilities provided by the gambling industry following the institution of the new system of regulation introduced by the 2005 Act. To go back to my example in [42] above about unequal access to information, Parliament may have decided as a matter of policy that the defendant should not be able to use material information which other persons placing bets did not have. In a similar vein, Parliament has made insider dealing a criminal offence. The offence may be constituted where a person deals in securities on the basis of unpublished price sensitive information (see section 52 of the Criminal Justice Act 1993). There is no requirement for dishonesty. This suggests that in Parliament's view dishonesty is not necessarily the right ingredient of a criminal offence where other participants in the same activity are deprived of material information. So too in gaming, Parliament may have taken the view that the courts should be free to conclude, if they thought it fit so to do in the circumstances of any particular case, that cheating might occur where one player knowingly uses confidential information which is not disclosed to the other player or players.

46. However that may be, it seems to me that the effect of section 42 is clearly that a person may be liable to a criminal penalty for cheating if he deliberately interferes with the process of a game so that the game is then played to his or another's advantage in a way which was never intended by the participants. This is so even if he thought that that was a proper mode of play. It may also be the case if he did not intend to cause any harm to any other player but merely wanted to obtain the glory of winning for himself. If there were criminal proceedings, no doubt his lack of dishonesty might be a factor to be taken into account when the court considers the appropriate penalty. The sentencing powers in section 42 also support the wider view of its effect since section 42 does not impose any minimum penalty for cheating, and provides that imprisonment is not an inevitable outcome. In addition, the conclusion I have reached does not mean that cheating is the only offence of its kind with no requirement for dishonesty. As Mr Pymont submits ([33] above), this Court has held that there is no requirement for dishonesty where a person is charged with certain statutory offences of corruption.

47. There is a statement in the Explanatory Notes to the 2005 Act that a person who inadvertently enables another person to cheat does not commit an offence but this does not assist on the question whether dishonesty is required as it merely refers to

inadvertence on the part of the person who assists in cheating. If this is correct, a person must act knowingly.

48. It follows from my interpretation of section 42 that whether particular conduct was "cheating" is to be decided on the ordinary meaning of the word "cheat". In criminal proceedings, whether particular conduct constituted cheating will be a question for the jury. In these proceedings, it is a question for the court. There is no constraint on what may constitute cheating other than that the conduct must fall within the ordinary meaning of that word. In particular, there is no constraint which means that dishonesty for the purposes of the *Ghosh* test must be shown.

*Earlier authorities provide some support for this conclusion*

49. It is clearly not correct to say that cheating was only ever a concept in criminal law. The civil courts gave remedies to players who have been cheated. That appears to have been established in the case of *Richmond* in the Common Pleas to which Williams J referred in *Baxter v Woodyard*. The only cases that counsel have cited to us are cases where parties have been defrauded by some dishonest conduct, but, as Mr Pymont observes in his submission, Fitzherbert in *Natura Brevium* (1794) expressed the view that the remedy would lie in the absence of enticement because of the use of false dice. This will generally be dishonest but need not be. Fitzherbert writes (on the subject of the writ of trespass on the case and after discussing deceit):

> And although the defendant do not entice the plaintiff to play, yet if the defendant play with false dice, &c. by which he gets the plaintiff's money; it seemeth the plaintiff may maintain this action well enough, because the enticement is not the cause of the action, but the casting of the false dice, by which he gaineth the money, &c.

50. This view is consistent with "ill practice", as it is described in section 17 of the Gaming Act 1845. It is consistent with a rather wider concept of cheating than fraud or deceit. Moreover, loaded dice are objectionable for the very reason that they alter the laws of chance. If I am right that the remedy provided by the common law is to be so interpreted, that might explain why Parliament chose to include mere interference without deception in section 42 of the 2005 Act. The offence would after all have been drafted by Parliamentary counsel, who might well have thoroughly investigated the law from a historical point of view, given our ancient gaming law, in order to be satisfied that the law at least covered what the law had previously covered. For this purpose it would not I think matter that there were no reported cases after the seventeenth century: there is nothing to suggest that the common law in this respect was somehow set aside.

51. At all events the remedy existed even before the development of the two-fold test in *Ghosh* and possibly also before the development of a separate civil wrong for deceit, which is consistent with the view that knowledge of deliberate use of some practice, not forming part of the game as normally played, was the touchstone of liability. True, the civil remedy was not called a remedy against cheating but that hardly

matters when its function was to grant compensation against the wrongful playing of games of chance.

52. I have reached this conclusion without placing any reliance on the earlier statutes which Mr Spearman drew to our attention. It is correct that, as Mr Spearman QC submits, there appears in the Statute of Charles II to be a genus of dishonest activity so that all the matters mentioned in that Act must be dishonest. The wording changed in the Gaming Act 1845, but I need not decide whether dishonesty was required because the 2005 Act creates a new offence of cheating and it must accordingly be interpreted without any assumption that it intends to produce the same effect as its predecessors.

53. The parties have both made submissions on *R v Moore.* This case is very shortly reported. The matter of note for present purposes is that the prosecutor was persuaded to play cards on a train journey by three individuals who asserted that he would be bound to win because he could follow the cards as one of them had an upturned corner. The prosecutor nonetheless lost the game and he reported the matter on arrival to the police. The charge was not cheating but obtaining by false pretences, and there were questions whether there had been any false pretence because the prosecutor was warned that he might be defrauded and whether there had been an unlawful device or "ill practice" for the purposes of section 17 of the Gaming Act 1845. The Lord Chief Justice (sitting it appears in the Divisional Court) held that the jury had been entitled to consider "the matter of the turned up card" and if they thought that the game was fairly played, or had any doubt about its unfairness, they should find for the defendant. The judgment of the Lord Chief Justice is only briefly reported. The question of fairness appears to have arisen not in the context of cheating but in the context of an argument that the prosecutor had not been defrauded but rather had himself not played fairly because he took advantage of the turned up card. I do not consider that it can safely be concluded that it decides that an "ill practice" for the purposes of section 17 of the Gaming Act 1845 includes something which is not unlawful or fraudulent. However, as I have noted, that may be the position even without this authority.

54. *Macpherson v Steuart* [1918] SLT 125 is another case about card-sharping in a railway carriage which occurred some four years later and in which *Moore* was distinguished on the basis it showed that the legislation was more limited than in Scotland. The High Court of Justiciary only had to consider whether there was a fraudulent act where a group of confederates pretending to be strangers to each other practised a three-card trick in which the defrauded party had to guess the position of a particular card and steps were taken to prevent him from identifying the correct card in time so that he lost his bet. Under Scots law there was no need to show any unlawful device or ill practice.

55. Interestingly the contrary conclusion was reached in yet another card-trick case: *R v Governor of Brixton ex parte Sjoland and Metzler* [1912] 3 KB 568. In this case the Court of Appeal held that the defendant won a three-card trick by "sleight of hand" (meaning, it appears, adroitness). This is relevant to a point which I shall make later about the use of innate skill.

*Is there a civil law concept of cheating?*

56. Mr Pymont's alternative approach is that the civil law concept of cheating should apply, and that cheating should be taken to have what he submits is its ordinary dictionary meaning of either dishonesty or unfairness (see [36] above). The judge too considered that the case fell to be decided on the basis of the meaning of cheating for civil law purposes (see [51] of his judgment, set out [11] above). He recognised that there was a "complete dearth of authority on cheating at common law, at least in the civil context" (Judgment, [35]). However, he considered that the criminal law on cheating in this and other jurisdictions did not necessarily involve dishonesty or any deception. Moreover, the judge was "unconvinced that [dishonesty was required] in relation to the civil concept of cheating" (Judgment, [45]). When the judge referred to the civil concept of cheating, he meant that:

> ..it was ultimately for the court to decide, as it must in the case of the standard of honesty to be expected in dealing of businessmen and trustees, whether or not conduct amounts to cheating. The standard is objective. See, for example, paragraph [32] of *Starglade Properties Ltd v Nash* [2010] EWCA Civ 1314, per the Chancellor of the High Court. I accept and follow his statement that, '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'. (Judgment, [49])

57. Mr Spearman's response is that there is no difference between the civil and criminal law of cheating. Both require dishonesty, as also does the Oxford English Dictionary (1989) ([36] above).

58. As I see it, the only issue is the meaning of the "cheat" for the purpose of the implied term, admitted by Mr Ivey in his pleading. The implied term, however, is formulated as a term that Mr Ivey would not cheat or otherwise act to defeat the essential premise of the game, and that if he did so the contract would be void and he could recover no winnings under it. (Mr Ivey's case is of course that he did not cheat and that advantage play did not amount to cheating because it did not interfere with the rules of the game.) Mr Pymont did not argue for any wider term than that admitted by Mr Ivey.

59. In my judgment, the implied term is intended to do no more than reflect the basic common law rule that a contract to do an unlawful act is not enforceable. If that is correct, then the meaning of "cheat" must follow section 42 of the 2005 Act. Of course, Crockfords would only have to prove a breach of section 42 to the civil standard (that is, on a balance of probabilities) rather than to the criminal standard (beyond all reasonable doubt). The implied term does not mean that it is necessary for Crockfords to prove a breach of section 42 to the criminal standard if the parties are in dispute as to whether Mr Ivey is in breach of the implied term.

60. In my judgment, a term which gives a wider meaning to cheating than the criminal law cannot be implied. Unless there was a breach of section 42, there was no reason for Mr Ivey to agree that his winnings should be irrecoverable. I do not accept, therefore, Mr Pymont's argument that "cheating" can have some wider meaning for the purposes of the implied term. It follows that the dictionary meanings of "cheating" do not assist in finding the meaning of the implied term. By the same token, I do not

accept that it was open to the judge to decide this case by reference to what he termed the civil concept of cheating (cf Judgment, [51], above paragraph 11).

*Hansard*

61. In response to Mr Pymont's argument on *Hansard*, Mr Spearman opposes the admission of that material on the grounds that it was served too late, did not comply with the Practice Direction (Hansard: Citation)[1995] 1 WLR 192 and that it did not satisfy the requirements laid down in *Pepper v Hart* [1993] AC 593. Furthermore he submits that the Minister's statement in *Hansard* does not take the Court any further. He submits that the only answer given was in the context of electronic devices.

62. In my judgment, it is not necessary to have regard to the Minister's statement but, had it been necessary to do so, I would have rejected the submission that the statement in question was limited to electronic devices (see in particular *Hansard*, 4 April 2005, WS 68). I would also have rejected the submission that this material was inadmissible because of failure to comply with the Practice Direction. Mr Ivey has had plenty of time to consider the matter. If there had been any defect in compliance with the Practice Direction, this Court could waive the irregularity. There would have been a strong reason to do so if the material were necessary to resolve a question of statutory construction.

*Conclusion: interference with the process of the game may be enough*

63. I conclude, therefore, that interference with the process of the game without proof of dishonesty may be enough to constitute cheating for the purposes of section 42 of the 2005 Act. The question then is: what form of interference qualifies for this purpose? To answer that question, I must first consider Mr Ivey's submission that the question whether conduct amounts to cheating must also take account of the context, which includes the fact that he is an advantage player, and the consequences of that submission.

***Mr Ivey's "advantage player" submission***

64. As Mr Spearman submits, clearly some of the steps which a player takes, and which give him an advantage, are not cheating, whereas other steps, such as collusion with the dealer, would clearly be cheating. This case falls on the former side of the line because Mr Ivey was recognised internationally to be "an advantage player". Gambling between him and the casino was therefore (in counsel's words) a cat and mouse game. The parties are in an adversarial position, and the casino had to take steps to protect itself. Mr Ivey describes his approach as an advantage player in these terms:

> I am an advantage play purist – we are all very careful to stay the right side the line and we discuss advantage play strategies at length. The fundamental principles of advantage play are:
>
> (i) that we seek every mathematical advantage including targeting the weaknesses of the casino, and seek every psychological advantage by employing necessary gamesmanship, bluff and strategic deception to disguise our skill. An example might be by initially giving the

> house the impression that you are a poor player by making bad bets at strategic times, or by making request of the casino based on luck or superstition, when in fact they are designed to help you in trying to gain an edge over the house;
>
> (ii) that we only consider the information provided to us and that was made available to all players at the table;
>
> (iii) that we will never employ devices or "spotters" (a "spotter" is an individual who, amongst other things, provides information to a player from off the table about unintentionally exposed cards during the shuffle, cut or dealing of the game);…

65. On Mr Ivey's case, the judge fell into error because he failed to interpret the implied term on which Crockfords relied in its context, as he was required under the well-known authorities on interpretation to do. Moreover the judge failed to analyse what cheating involved by reference to any definition or standard.

66. Mr Spearman submits that it would have been entirely open to Crockfords to refuse to comply with the various requests: for the cards to be automatically shuffled, for the same cards to be used, and for the croupier to turn the cards as directed by Ms Sun. Any of the relevant events could have been prevented by the casino. They could have refused to use a shuffling machine so that the cards would be reoriented. The parties are in an adversarial environment. Crockfords deliberately chose to accommodate the requests made by Mr Ivey and Ms Sun and Mr Ivey was entitled to exploit their defects in procedure. The casino has a commercial motive to keep the gambler happy and therefore offers him as much as possible. Mr Spearman makes the point that Crockfords offer free drinks and provide trend screens. Trend screens show the results of previous hands of Baccarat, which suggests a pattern exists (but which they accept it does not).

67. Mr Spearman contends that the Canadian case of *R v Zalis* [1995] OJ No. 20, where the High Court of Ontario held that card counting was not to be cheating, is analogous and instructive. In that case the defendants were accused of cheating by using the strategy of card-counting in blackjack, which involved the player's team watching cards as they were shuffled and played in order to locate the valuable card and then signalling that to the player. First, on Mr Spearman's submission, the judge, S.Nosanchuk Prov. J, accepted that the fact that the players adopted a strategy which reduced or reversed the advantage which the casino would otherwise enjoy did not of itself amount to cheating. Second, S.Nosanchuk Prov. J held that the defendants had not cheated even though they had taken a number of orchestrated steps and concealed their purpose and identities. Third, in determining the legitimacy of what the defendants did, S.Nosanchuk Prov. J had regard to the nature of the relationship between the casino and the player and to the fact that the casino could have protected itself against advantage play.

68. Mr Spearman refers to the evidence before the trial judge that edge-sorting was a widely known practice. Dr Jacobson, Mr Ivey's expert, set out a number of articles which he had written and articles written by other people. He made it clear that most

experts in the US knew about edge-sorting. He submits that people looked to the US for that sort of knowledge. The grandfather of Mr Duffy of Crockfords had known about a magic trick which took advantage of the printing defects on the backs of cards. Dr Jacobson had spoken about edge-sorting at a World Games Protection conference in about February 2012. Moreover, submits Mr Spearman, some casinos use shoes that hide the leading edge by a fringe because seeing it might help players. Mr Spearman recognises that the judge found that there was no industry standard on the meaning of cheating but contends that this should have meant that the judge could not find that there was cheating in the present case.

69. In addition, submits Mr Spearman, the judge did not properly explain what he meant when he said that "the game precludes" (see paragraph 50 of his judgment, cited in [11] above) the advantage which Mr Ivey obtained by edge-sorting. There is no rule which states that edge-sorting is prohibited. In addition, Crockfords had control of the cards, and agreed to use the same deck of cards for successive shoes. The fact that Crockfords did not know of Mr Ivey's subjective motivations did not matter because there was no rule that the parties had to have equal knowledge. The judge accepted this since he declined to hold that Mr Ivey and Ms Sun's deception was of such a kind as to vitiate the gaming contract.

*Crockfords' submission: their lack of knowledge of the advantage player's intentions is crucial*

70. Mr Pymont rejects Mr Ivey's advantage player argument. None of Crockfords' employees knew about edge-sorting. Even though Ms Yau, the croupier, was not called as a witness, the judge was satisfied that she was ignorant of edge-sorting when she turned the cards at Mr Ivey's request. Mr Ivey had originally run his case on the basis that Crockfords knew about edge-sorting but he dropped that case in opening at the trial before the judge, i.e. at a very late stage.

71. In any event, submits Mr Pymont, this argument is circular because the judge found that there was no standard belief in the industry that this conduct was not cheating.

72. Mr Pymont submits that *Zalis* is distinguishable for a number of reasons. The applicable statute required intent to defraud to be shown. Moreover, contrary to the case here, there was no physical interference with the cards in that case. The key distinction was in [23] of the judgment, where the judge agreed with the defendants that the advantage which they could obtain from card-counting was not caused by any physical act or dishonest conduct that caused the cards to come out in any particular way.

*My conclusions on the "advantage player" submission*

73. The fact that someone is an advantage player is of course part of the relevant background but it is difficult to see how there can be any special meaning of cheating according to whether the player is an advantage player or not. The courts could not define such a player and there cannot be one rule for such players, however skilful, and one rule for other players, on facts such as these.

74. Mr Spearman points out that the judge considered that it was legitimate gamesmanship by itself for Mr Ivey and Ms Sun to give the impression that they were superstitious players.

75. The fact that Crockfords acceded to Mr Ivey's requests is an important factor to be taken into account but it is not suggested and could not be suggested that they acceded to the requests knowing that he was about to change the nature of the game dramatically by altering the odds through edge-sorting. Moreover, Mr Ivey was not just "making request of the casino based on luck or superstition" as he states in the passage cited in [64] above nor was he simply giving the impression that he was superstitious: he was asking Crockfords unwittingly to take steps that would materially diminish the house edge which formed the basis on which they held themselves out as willing to play the game of Punto Banco.

76. Moreover *Zalis* does not support Mr Spearman's submissions. By way of background, it turned on the meaning of cheating for the purposes of section 209 of the Canadian Criminal Code, which made "cheating" a criminal offence if there was an intent to defraud. The judge, S.Nosanchuck Prov J did not come to his conclusion on the absence of intent to defraud but on the basis that card-counting was not "cheating". For this purpose the judge adopted the analysis of the Court of Appeal of the State of Nevada in *Lyons v The State of Nevada* (1989) 105 NR 317 where cheating was defined to mean "alter[ing] the criteria which determine … the result of the game…". The Nevada Court of Appeal held that this offence did not include obtaining an advantage by mere observation as opposed to taking some step such as resorting to mirrors or confederates which interfered with play. S.Nosanchuk Prov J also took into account that card-counting was well-publicised in books on blackjack that were available in the casino itself and elsewhere. It did not become unlawful simply because the defendants had camouflaged what they were doing and made covert signals so that the casino did not spot what they were doing. The judge added that the casino and players were involved in a cat and mouse game and that the casino could have taken steps to protect itself. But that was an additional reason for holding that there was no cheating. The real reason was that there was no physical act of interference and the players were merely using their "highly developed skills." In the present case, Mr Ivey did not obtain his advantage merely by watching the game and using his own intellectual skills with those of Ms Sun. He also caused the position of cards to be changed from that which they would normally have been in.

77. Furthermore, while the normal rules of interpretation apply to the parties' contract, the implied term relied upon must surely refer to the statutory definition of cheating, and that cannot change according to the context. If the parties had intended anything different, they would have to have done so expressly.

78. Mr Pymont argues that the advantage player argument is in any event circular because the judge found that there was no standard belief in the industry that this conduct was not cheating. This seems to me, if I have understood it, to miss Mr Spearman's point. His submission is that the judge did not take account of the context, and, had he done so, he would have found that there was no cheating as a matter of law. I do not accept that submission because what was cheating was a matter for the court and not for industry standards.

79. I now reach the final question about whether what was done was legitimate. On the proper approach to this question, I agree with the judge. The word "cheating" is undefined. It is not a term of art, but an ordinary word of the English language. It is open-textured and that means that the court must decide what on any particular set of facts constitutes cheating. (In doing so the court would of course give appropriate weight to any relevant expert evidence.) The categories of cheating are not closed but that does not make the offence uncertain to an unacceptable degree because the court must give a reasoned decision if it reaches the view that the conduct constituted cheating. Reasons will support the decision and reasons given in past cases will also guide participants for the future.

80. The court must therefore approach it as a word according to its ordinary meaning in the context of section 42. In those circumstances, it is not necessary for the court to come up with a definition covering all cases, provided it gives adequate reasons why a particular set of facts did amount to cheating.

81. Moreover, it is difficult to define cheating comprehensively, just as it may be difficult to define what constitutes a "game" for gaming legislation. Of that, Lord Wilberforce made the following observations which seem equally applicable here:

> Legislation against, or controlling, gaming, wagering and betting is many centuries old in the United Kingdom. With only moderate success Parliament has endeavoured to keep up with the enormous variety of these activities which has arisen from the ingenuity of gamblers and of people who exploit them. It is impossible to frame accurate definitions which can cover every such variety: attempts to do so may indeed be counter-productive, since each added precision merely provides an incentive to devise a variant which eludes it. So the legislation contains a number of expressions which are not, or not precisely defined: bet, wager, lottery, gaming, are examples of this. As to these, while sections appear in various Acts saying that a particular activity is, or is deemed to be, within the word, the general meaning is left to be decided by the courts as cases arise under the common law. (*Seay v Eastwood* [1976] 1 WLR 1117, 121)

82. As Lord Wilberforce makes clear, the forms of games of chance or skill and chance can be so varied that they defy neat classification. That must equally be the case with cheating. It, therefore, cannot be said that the judge was wrong, as Mr Spearman contends, not to set out the benchmarks or criteria that apply to all forms of cheating. Had it been otherwise, I would agree that the law would be open to criticism if it did not set out a comprehensive definition.

83. The task of any court which has to decide whether conduct amounts to cheating is therefore to assess the facts, to which I now turn.

***Was the judge wrong in his assessment of the facts as constituting cheating?***

84. I now come to the question whether what was done was cheating. The judge took the view that it was cheating and gave three reasons in paragraph 50 of his judgment ([11]

above). I proceed to this question on the basis that dishonesty is not required in every case and on the further basis that the fact that a person is an advantage player does not mean that the steps he takes cannot be cheating.

85. In my judgment, the judge's conclusion was correct for the reasons given in [86] to [93] below.

86. The crucial factor in this case is that Punto Banco is a game of pure chance (see, on this *Jenks v Turpin* (1884) 13 QBD 505, which deals with Baccarat played by several players). What Mr Ivey caused Crockfords' staff to do was to take steps which would alter the chance of his winning materially by some 8% in his favour. In my judgment, because of his plan to play using the knowledge obtained from the reorienting of the cards under his direction, those matters amounted to interference with the process by which the game was conventionally played. It was quite different from card-counting which involves memorising where particular cards are.

87. True, the judge found neither dishonesty nor deception. The court has to take into account the fact that these factors were not present, but, as already explained, the 2005 Act does not make dishonesty a necessary ingredient of "cheating" in every situation.

88. True, Crockfords could have taken steps to prevent Mr Ivey taking advantage of what were undoubtedly systemic weaknesses in their procedures, but they were only weaknesses which operated to give him an advantage because of the steps that he expressly took to cause the staff of Crockfords to take - reorienting the cards under his direction, persuading them to reuse the cards for subsequent shoes and to use a card-shuffling machine - when they were ignorant of Mr Ivey's real intention, which was to practise edge-sorting. Analysed in that way, the present case falls within the principle illustrated by my example in [42] above.

89. True, Crockfords in the course of their business also take steps to persuade people to gamble which are open to criticism, such as offering free drinks and providing "trend" screens. But players can reject these facilities, and such activities are, we understand, regulated by the Gambling Commission. The real point is that Crockfords were not in a position to reject Mr Ivey's proposed method of play because it did not know of the added knowledge which he had as a result of the stratagem of Mr Ivey and Ms Sun. It was a case of his thereby putting himself in the position of having materially asymmetric information. Mr Ivey submits that this was not the case because everything he did was open to Crockfords' staff to see and could not have happened without their consent. But, while his interference with the game may have been transparent in the sense that it was played out in the open, Crockfords did not know that it was Mr Ivey's intention to practise edge-sorting or that his actions put him in a special position to do so.

90. Edge-sorting bears no similarity to legitimate card-counting, which some mathematically skilled players can do in other games, which are not games of pure chance but games of chance and skill. There, the advantage is obtained by innate skill which is an accepted determinant of success in the game. It is quite otherwise with a game of pure chance, such as Punto Banco. The concept of advantage play precludes cheating in the case of card-counting in so far as it means bringing innate

mathematical skill to bear. The distinction which I draw follows that drawn in *Zalis* (see [67] above) and in this jurisdiction in *Sjoland*, above [55].

91. The question whether a reasonable person would say this is cheating turns on whether there was a dramatic effect on the odds in the game. Punto Banco, as I have already said, is a game of pure chance, and not a game of mixed skill or chance. The casino is highly regulated. It does not try to win every game but the house edge means that it should win over time. Edge-sorting materially altered the odds in the game of Punto Banco offered by Crockfords.

92. In the circumstances of this case, the fact that Mr Ivey was an advantage player did not mean that his actions were simply part of a cat and mouse game between him and the casino, and not cheating. Moreover, on the judge's findings ([41] of his judgment), which are reflected in [50(3)] (set out at [11] above), Mr Ivey took steps not explicitly mentioned in his description of what he said an advantage player would be entitled to do.

93. In reaching the conclusion that there was cheating in this case, I have worked on the basis only of the facts as found by the judge. But the judge made no finding on dishonesty or deception. Crockfords say that he should have done so and it is to those contentions that I next turn.

***Respondent's notice – was dishonesty and deception shown?***

94. Crockfords have filed a respondent's notice in which they contend that, if dishonesty is an essential ingredient of cheating, the judge's decision can still be affirmed because he could and should have found that Mr Ivey was dishonest and /or deceived the staff of Crockfords.

95. Crockfords raised this argument only if the appeal succeeds, and so it is unnecessary for me to express any view on it. In those circumstances, I consider that the right course is for the respondent's notice to be dismissed.

***Judgment of Lady Justice Sharp***

96. Since writing this judgment, I have had the privilege of reading the dissenting judgment of Lady Justice Sharp. I wish to make some brief observations before I summarise my conclusions. Lady Justice Sharp's principal concern is with the *mens rea* of the offence created by section 42. In her judgment, the appropriate touchstone for liability, once the *actus reus* is proved, is dishonesty (see [128] below). I certainly agree with her that the *mens rea* of the criminal offence of cheating is an important issue.

97. However, I respectfully proffer four answers to Lady Justice Sharp's concern. First, the section does not include a reference to dishonesty. What we must do is interpret the words which Parliament has used, and in my judgment there is no requirement for dishonesty. At least one dictionary definition of the word "cheat" does not require that it should always involve dishonesty and the unfair conduct may be enough (see above, [36]). A criminal statute has to be clear, but, in the common law system, the requirement for legal certainty does not mean that the content of a word cannot be considered against the facts of new cases. It is a function of a common law court to

explicate the meaning of the word in those cases. In addition, this is a recent statute and it was passed after the decision in *Ghosh.* Parliament may reasonably be expected to make it clear by express wording if dishonesty is required with the consequence that *Ghosh* applies. Second, this case does not fall within the narrow category of cases in which the court may reject an interpretation. It may do this, for instance, where an interpretation is absurd. It cannot be said to be absurd for Parliament to have legislated in terms that preclude a defence that a person honestly believed that his conduct did not amount to cheating. That, in my judgment, is a valid legislative decision for Parliament to have taken. Third, there is no question of honest cheating: what is in issue is whether cheating involves subjective dishonesty, which is only one form of dishonesty. Fourth, section 42(3) in my judgment supports my interpretation for the reasons already given above ([40 and [41] above). I do not consider that my interpretation would give rise to any difficulty in directing the jury, who would be told that the state of the defendant's mind was a matter that they could take into account (as I have stated above in [44] but that the absence of subjective dishonesty was not a defence.

98. Overall, I do not, respectfully, accept that Mr Ivey did no more than "legitimately exploit a chink in the Casino's considerable armour" (below, [120]). He clearly took advantage of Crockford's lack of information as to what he was doing.

***Summary of my conclusions***

99. I now summarise my conclusions. It is common ground that there was an implied term in the parties' contract not to cheat. The meaning of cheating for this purpose is to be determined in accordance with section 42 of the 2005 Act. In my judgment, this section provides that a party may cheat within the meaning of this section without dishonesty or intention to deceive: depending on the circumstances it may be enough that he simply interferes with the process of the game. On that basis, the fact that the appellant did not regard himself as cheating is not determinative.

100. There is no doubt that the actions of Mr Ivey and Ms Sun interfered with the process by which Crockfords played the game of Punto Banco with Mr Ivey. It is for the court to determine whether the interference was of such a quality as to constitute cheating.

101. In my judgment it had that quality for the reasons given above, which reflect the reasons given by judge. In particular the actions which Mr Ivey took or caused to be taken had a substantial effect on the odds in the game and Crockfords were not aware of this at the relevant time. In these circumstances, no lower standard applied in this case because Mr Ivey was an advantage player who was in an adversarial position with the casino.

102. The respondent's notice raises issues which do not, in my judgment, arise.

103. I would therefore dismiss both the appeal and the respondent's notice.

# ANNEX

## SECTION 42 OF THE GAMBLING ACT 2005

‘(1) A person commits an offence if he—

(a) cheats at gambling, or

(b) does anything for the purpose of enabling or assisting another person to cheat at gambling.

(2) For the purposes of subsection (1) it is immaterial whether a person who cheats—

(a) improves his chances of winning anything, or

(b) wins anything.

(3) Without prejudice to the generality of subsection (1) cheating at gambling may, in particular, consist of actual or attempted deception or interference in connection with—

(a) the process by which gambling is conducted, or

(b) a real or virtual game, race or other event or process to which gambling relates.

(4) A person guilty of an offence under this section shall be liable—

(a) on conviction on indictment, to imprisonment for a term not exceeding two years, to a fine or to both, or

(b) on summary conviction, to imprisonment for a term not exceeding 51 weeks, to a fine not exceeding the statutory maximum or to both.

(5) In the application of subsection (4) to Scotland the reference to 51 weeks shall have effect as a reference to six months.

(6) Section 17 of the Gaming Act 1845 (c 109) (winning by cheating) shall cease to have effect.

## Lord Justice Tomlinson:

104. I agree with Arden LJ that this appeal should be dismissed. However I have also had the opportunity of reading in draft the judgment prepared by Sharp LJ. I understand and have sympathy with her concern that we should not on this civil appeal espouse a meaning of section 42 of the Gambling Act 2005 which might prove insufficiently certain in its application in the criminal jurisdiction. In my view it is possible to dispose of this appeal without deciding the content of the criminal offence created by section 42 and I prefer to do so on that basis. In so doing I am following the lead of the judge, although as will appear I respectfully part company with him on the question whether Mr Ivey and Ms Sun practised a deception on Crockfords.

105. In my view the content of the implied term that the player (or punter) would not cheat contained in this contract made between Mr Ivey and Crockfords in 2012 is most unlikely to be any different from that of the identical implied term which would have been contained in a similar contract made before the coming into force of section 42 of the Gambling Act 2005, or indeed before the coming into force of any Part of that Act. In particular, I cannot think that it is correct to impute to the parties an intention that the agreement not to cheat should extend only to a self-denying ordinance against criminal conduct. In any event such a term would be superfluous as recovery of winnings would be precluded by reliance on criminal conduct. Whilst therefore I acknowledge that an English law contract such as this was must be taken to have been made in the context of the Gambling Act 2005, I do not think that it follows inexorably therefrom that the content of the implied term is simply a prohibition of the criminal offence of cheating at gambling created by section 42. The concept of cheating, and indeed cheating at gambling, long antedates that legislation, and the implied term must have had a content independent of it in the long period during which gambling contracts were enforceable at common law albeit rendered null and void by statute.

106. Nor, in agreement with Arden LJ at [73] above, do I consider that the content of the implied term is affected by the circumstance that Mr Ivey is a so-called advantage player. In *Nereide S.p.A. Di Navigazione v Bulk Oil International Ltd, "The Laura Prima"* [1982] 1 Lloyd's Reports 1 at 6 Lord Roskill observed that it is a novel proposition that the construction of an express contractual term can be legitimately made to depend upon the identity of one of the parties to the contract, and the same is surely true of the content of an implied term. The content of the implied term here in issue must surely be the same whether the player party is an "advantage player" or someone of more modest pretensions.

107. I agree with Arden LJ at [86] above that the crucial factor in this case is that Punto Banco is a game of pure chance. Dr Jacobson, Mr Ivey's expert witness, described it in evidence, or at any rate described Baccarat of which this is a variant, as "a brain dead game". We do not need to debate whether it is correctly described as a game, but it is not an adversarial contest. It is not a game played by the player against another person. It is as the judge described a game in which cards are dealt in a sequence from which no deviation is permitted where it is of the essence that bets are placed by the punter before any card is dealt and at a time when neither player nor banker should have any knowledge of the likely value of the first or any subsequent card dealt. As the judge records at [50(1)] and Arden LJ records at [86], what Mr Ivey caused Crockfords' staff to do was to take steps which caused him, throughout

the play of the sixth and subsequent shoes, to know or to have a good idea whether the first card dealt would or would not be a 7, 8 or 9. It is, as I have described, of the essence of this "brain dead game" that neither player nor banker should have this knowledge because possession of it enables the punter to place bets on something other than the outcome of pure chance. That, I have no doubt, is what the judge meant by saying that Mr Ivey gave himself an advantage which the game precludes – [50(1)].

108. On this basis I would I think have been more attracted than was the judge by the first line of defence, to the effect that no game of Punto Banco was in fact played. The game includes the preliminary placing of bets. However there is no appeal against the judge's rejection of this defence and so I say no more about it.

109. However where I do respectfully part company with the judge is in his conclusion that what was done by Mr Ivey and Ms Sun did not amount to deception of such a kind as to vitiate the gaming contract – [40].

110. I do not question the judge's finding that Mr Ivey was a truthful witness who believed that he had found "a legal way to beat the house". I did not understand Mr Pymont to invite us to revisit the judge's finding that Mr Ivey had not behaved dishonestly, nor does the Respondent's Notice advance a case founded on dishonesty. Rather Mr Pymont invited us to revisit the judge's finding that there had been no deception practised by Mr Ivey and Ms Sun.

111. In fact the judge's finding, as I have already recounted, was that there was "no deception of such a kind as to vitiate the gaming contract" – [40]. What the judge went on to describe in [41] was I consider relevant deception:

> "His purpose, which succeeded, was no more and no less than to try to ensure that the casino staff, and in particular Ms Yau and her immediate supervisor, Mr. Hillier, did not depart from the usual practice of humouring high stakes gamblers by acceding to a request which did in their view not affect the outcome of the game. But it did. What the claimant and Ms Sun did was to persuade Ms Yau to turn some of the cards in a shoe so as to permit them to know that they were or were very likely to be - 7s, 8s or 9s - and to do so in circumstances in which they knew that she did not realise that she had done so and that if she had, she would immediately have stopped play and sought the advice of her supervisors who would inevitably have put an end to it."

112. In my view the inference is simply inescapable that Mr Ivey set out to deceive, as I think he accepted in evidence during cross-examination by Mr Pymont – see pages 117-132 of the transcript of the proceedings on 3 October 2014. I am prepared to accept, in respectful disagreement with Arden LJ, see [64] and [92] above, that Mr Ivey did not go beyond the steps mentioned in his description of what he said an advantage player would be entitled to do. Nonetheless, in my view, Mr Ivey did more, far, far more, than simply "to play up to Crockfords' staff's perception of what influenced his play, superstition" – see the judgment at [40]. Mr Ivey and his accomplice created that impression. He admitted that his remarks about luck and

about being superstitious "were designed to create an air of superstition around our play". Having created an air of superstition he then used it to persuade the staff to do what they would not otherwise have done and would certainly not have done had they appreciated the purpose for which it was done. The staff were deceived as to his reason for wanting the cards turned. The CCTV which we viewed and the transcript which we could read, in translation where necessary of the Cantonese, revealed an elaborate charade. When in the middle of the last shoe Mr Ivey was told that it would be changed when exhausted, he sought to ensure that his deception would not be discovered by thenceforth asking in an entirely random fashion for cards to be turned. He was covering his tracks. When subsequently challenged on 30 August 2012 by Mr Pearce, Managing Director of Crockfords' owners, who suggested that the integrity of the game had been compromised, Mr Ivey did not explain that he had contrived to win by practising a legitimate technique or "advantage play". Mr Ivey's evidence on this last point in cross-examination by Mr Pymont is particularly unconvincing – see again the transcript of the proceedings on 3 October 2014 at pages 122-131.

113. In my view most right-minded people would regard what was done by Mr Ivey and Ms Sun as cheating. I am surprised that Mr Ivey did not so regard it, but his own view of his conduct is not in this context determinative. This was a case of physical interference with the cards brought about in a consciously deceptive manner. I am quite satisfied that this was conduct which falls within the ordinary and natural meaning of the word cheating, and I find support for that view, even if it is not uniform, in the various dictionary definitions to which we were taken and which are summarised by Arden LJ in her judgment at [36]. There is nothing in the authorities which precludes the conclusion that the court should simply give to the word the meaning which is ordinary and natural in its context. In my judgment cheating as a concept in ordinary parlance, and thus in the common law, is as much encapsulated by the notion of unfairness in order to gain an advantage or by the notion of practising a deceit as it is by conduct which is, by ordinary standards, dishonest. Perhaps that is why sections 15 and 16 of the Theft Act 1968 were drafted as originally they were, emphasising that it is that species of deception which is also dishonest which gives rise to criminal responsibility. A finding that Mr Ivey here practised deception is not inconsistent with the judge's finding that he did not behave dishonestly.

114. For these reasons the judge in my view reached the correct conclusion as to the disposition of the claim and I too would dismiss the appeal.

115. Before parting with the appeal I should in fairness to Mr Ivey record that whilst I am surprised that he did not regard what he did as cheating, I am equally surprised (a) that Crockfords did not know about edge-sorting, in view of the literature on the subject circulating in the U.S. and available on the internet and (b) that apparently neither the croupier nor any other member of Crockfords' staff suspected at the time that the integrity of the game was being compromised. I have given careful consideration to Mr Ivey's contention that he was doing no more than taking advantage of shortcomings in the procedures of the casino. However the same could be said of any number of situations in which cheating would ordinarily be acknowledged to be taking place. Crockfords may have been there for the taking, but they were, by deception, unwittingly led into an interference with the conduct of the game which deprived it of its essential character as a game in which bets are placed on the outcome of pure chance. I cannot conclude that Crockfords' surprising

ignorance or even naiveté transforms Mr Ivey's conduct into something other than cheating. Indeed, if anything it reinforces my conclusion that Mr Ivey was consciously and deceptively transforming the essential nature of the game in a manner not appreciated by the banker.

**Lady Justice Sharp:**

116. I gratefully adopt Lady Justice Arden's recitation of the facts and analysis of the law, save in relation to the issue of the *mens rea* of the offence of cheating contrary to Section 42 of the Gambling Act, which in my opinion, in respectful disagreement with Lady Justice Arden, is one of dishonesty.

117. The point is an important and novel one. There is a dearth of authority on the meaning of "cheat" in relation to gaming contracts in the civil context. This is not surprising, as the judge said, because though at common law gaming contracts were enforceable in principle, section 18 of the Gaming Act 1845 (which provided that all contracts or agreements by way of gaming and wagering shall be null and void) was not repealed until 1 September 2007, when Part 17 of the Gambling Act 2005 came into force. The parties were also unable to find any case in which the meaning of "cheat" in section 42 of the Gambling Act 2005 has received any relevant judicial consideration; this may be because prosecutions are rare, or are only brought in circumstances which are so clearly cheating that no need for any definition of that term has arisen (a point exemplified perhaps by the notorious case of "spot fixing" in cricket matches, briefly mentioned below, where there were convictions for a conspiracy to cheat at gambling contrary to section 42 of the Gambling Act 2005: see *R v Majeed, R v Westfield and ors* [2012] EWCA Crim 1186, [2012] 2 All ER (D) 249).

118. Because the matters raised in this appeal are so fully dealt with in Lady Justice Arden's judgment, I need only summarise the background to the issue which I wish to raise in relation to section 42.

119. The respondent disputed its liability to pay Mr. Ivey his winnings on three grounds. First, there was no contract: no game of Punto Banco was played because Mr. Ivey had operated a "Scam" whereby he knew what the first card of any coup dealt was likely to be before it was turned face up, thus defeating the premise of the game that cards will be dealt at random. This ground was rejected by the judge; and there is no challenge to that aspect of his decision in this appeal. Second, insofar as a contract did arise, it became void, because there was an implied term that Mr. Ivey would not cheat and by the Scam Mr. Ivey had cheated and/or acted to defeat the game's essential premise. Thirdly, the claim was based upon an illegal act/was for the benefits of crime. Mr. Ivey had committed the criminal offence of cheating under section 42 of the Gambling Act 2005 by interfering with the game or deceiving Crockfords' staff and so was disentitled to found his claim on his own criminal conduct.

120. Mr. Ivey admitted the implied term but denied cheating or committing any criminal offence. He frankly acknowledged that he had used edge-sorting with the assistance of Ms. Cheung Yin Sun. His case was that this was a legitimate way to "beat the house". He had not touched or marked the cards. His various requests to the croupier, approved by house managers on the floor, which had enabled edge-sorting to take place had been open ones, which Crockfords could have refused. His evidence was

that Crockfords were in complete control of the procedures by which his play was conducted, and the gaming equipment used for play, and they had the power to consent to or refuse any requests he made. Accordingly, as a result of Crockfords' decision to: (a) deal defective cards; (b) comply with his open request to continue using the same deck or decks; (c) orientate some cards while they were turned over; (d) shuffle the cards mechanically and (e) allow the leading edge of the first card in the shoe to be visible before it was dealt, Crockfords allowed Mr. Ivey and Ms. Sun to use the advantage play strategy of edge-sorting and gain a potential advantage as to the likely range of values of the first card in the shoe before that card was dealt. He had done no more therefore than legitimately exploit a chink in the Casino's considerable armour, which he was quite entitled to do.

121. Edge-sorting did not mean Mr. Ivey would win every coup, but it changed the odds, away from the "house edge" which Crockfords would otherwise have had in their favour of 1.06% if Punto (player) won or 1.75 % if Banco (bank) won to 6.75 % in Mr. Ivey's favour. As I read his evidence, he considered this was no more nor less than an aspect of the "cat and mouse" game between casino and punter, in which casinos for their own profit encourage players to gamble and punters, particularly advantage players, of whom he is one, try and improve the odds in their favour.

122. The judge decided this case on the respondent's second ground of defence. He concluded that Mr Ivey was a truthful witness, who was genuinely convinced that he was not a cheat. Further, Mr. Ivey's opinion that edge-sorting was a legitimate form of advantage play commanded considerable support from others. However, "cheat" for the purposes of the implied term was a civil concept, to be determined objectively; it did not require proof of dishonesty and edge-sorting was cheating for the purpose of the "civil law of cheating" because of the consequences of what Mr. Ivey did in relation to the game he was playing.

123. Thus the judge was able to determine both that Mr. Ivey was honest (in the sense that he honestly believed that edge-sorting was a legitimate technique of advantage play that could be used to beat the house) and that he had cheated. I should add that the judge also rejected the respondent's argument, that Mr. Ivey had practised a deception on Crockfords by pretending to be superstitious when he was not. He decided this was "legitimate gamesmanship" and did not amount to deception "of such a kind as to vitiate the gaming contract".

124. Given his conclusion on the second ground, the judge did not find it necessary to determine the respondent's third ground of defence. He said what precisely is condemned as cheating by section 42 of the Gambling Act 2005 and what must be proved to make out the offence is not clear, and it would be unwise, if unnecessary, to determine what that might be.

125. Mr. Pymont QC for the respondent maintains that the judge's route to his decision was correct. However, the argument before us has focused principally on the proper interpretation of section 42 of the Gambling Act 2005, on the premise (advanced by Mr Spearman QC) which in my view is a correct one, that there is no rational reason for concluding that there is a distinction between the meaning of "cheat" for the purposes of the implied term on the one hand, and for the purpose of section 42 of the Gambling Act 2005, on the other. The respondent does not seek to argue, as I understand it, that the judge's conclusions on the facts, including that Mr. Ivey's

opinions were honest ones, should be disturbed, but maintains that the appeal should be dismissed because dishonesty is not a necessary ingredient of "cheat" in section 42 or at all. Mr. Spearman QC for Mr. Ivey however, argues that dishonesty is an essential ingredient of cheating for this purpose, and since Mr. Ivey was acquitted of that sin, the appeal must be allowed.

126. I can quite see why there was no issue below that it was the unexpressed intention of the parties that Mr. Ivey (or the respondent for that matter) should not cheat. It is an obvious part of the bargain between the parties to any gaming contract, that neither side should cheat, and a gaming contract in which either side could do would, self-evidently, lack any efficacy. But more particularly here it was a relevant part of the context that this was a gaming contract made in relation to an activity permitted only under the highly regulated circumstances specified by the Gambling Act 2005, an Act which specifically criminalises cheating. True it is that the commission of the offence would make the contract unenforceable by the cheating party on the grounds of illegality, regardless of any implied term (the respondent's third ground of defence). But subject only to matters concerning the standard of proof, I do not think that "cheating" for the purposes of the implied term between these parties can sensibly be looked at or defined differently from "cheating" contrary to section 42.

127. It therefore becomes necessary to determine the meaning of "cheat" for the purposes of section 42, and in particular the relevant *mens rea*, where the offence is not suggested to be one of strict liability, or one that is capable of being committed regardless of intent or knowledge. Mr. Pymont QC points out that section 42 does not specify by any particular adverb (such as knowingly) what the particular *mens rea* of the offence should be. However, the fact that it does not do so is by no means the end of the matter. In *Sweet v Parsley* [1970] AC 132; [1969] 2 WLR 470; (1969) 53 Cr. App. R. 221, Lord Diplock said at page 162:

> "Where the crime consists of doing an act which is prohibited by statute the proposition as to the state of mind of the doer which is contained in the full definition of the crime must be ascertained from the words and subject-matter of the statute. The proposition, as Stephen J. pointed out, may be stated explicitly by the use of such qualifying adverbs as "maliciously," "fraudulently," "negligently" or "knowingly" - expressions which in relation to different kinds of conduct may call for judicial exegesis. And even without such adverbs the words descriptive of the prohibited act may themselves connote the presence of a particular mental element."

128. This is a case *par excellence* in my judgment where the required *mens rea* of the offence can be inferred from the description of the prohibited act of "cheat". The word "cheat" is an ordinary English word, which as a matter of ordinary language and usage, in my opinion, connotes dishonest conduct (a view which is supported by the (fuller) dictionary meanings relied on by Mr. Spearman QC to which Lady Justice Arden has referred). The point is not one that is capable of substantial elaboration. The word "cheat" is not defined anywhere in the statute. The Explanatory Notes to the Gambling Act 2005, prepared by the Department for Culture Media and Sport state at

paragraph 1 that: "[Section 42] creates a criminal offence for cheating at gambling, and repeals the old offence of cheating in section 17 of the Gaming Act 1845 (c.109). The word cheating is not defined but it has its normal everyday meaning."

129. The addition of the word "dishonestly" to the word "cheat" would I think, be a solecism. And I am bound to say I find the suggestion that someone can be guilty of the criminal offence (in effect) of "honest cheating" at gambling to be a startling one which is not mandated by the language of the statute itself.

130. Mr Pymont QC fastens on section 42(3) and argues that since the offence can consist of interfering with the process of the game etc. it follows that dishonesty is not a necessary ingredient of the offence. I do not accept that is correct as a matter of construction.

131. It is convenient here to set out section 42 in part.

"**Cheating**

(1)A person commits an offence if he—

(a) cheats at gambling, or

(b) does anything for the purpose of enabling or assisting another person to cheat at gambling.

(2) For the purposes of subsection (1) it is immaterial whether a person who cheats—

(a) improves his chances of winning anything, or

(b) wins anything.

(3)Without prejudice to the generality of subsection (1) cheating at gambling may, in particular, consist of actual or attempted deception or interference in connection with—

(a) the process by which gambling is conducted, or

(b) a real or virtual game, race or other event or process to which gambling relates..."

132. I agree with Mr. Spearman QC that section 42(3) is not a deeming provision: the subsection provides that cheating may consist of interfering with the process of the game etc. and it is made clear that the subsection does not derogate from the generality of section 42(1). Even if I am wrong about that however, the effect of subsection (3), read consistently with subsection (1) is in my opinion, to deem interference with the process of the game etc., to be cheating and (therefore) dishonest. It certainly does not follow from either construction that in respect of any other conduct which may fall to be considered, that is conduct falling outside that specified in subsection (3), the requirement of dishonesty which the use of the word "cheat" imports is displaced. Mr. Pymont QC did not propose what the court's approach should be (or how the jury should be directed) in cases falling outside subsection (3). And it is material in this context to bear in mind the potential breadth of the conduct penalised by section 42(1). As it is baldly put, "A person commits an

offence if he.. cheats at gambling, or …does anything for the purpose of enabling or assisting another person to cheat at gambling." [emphasis added]

133. It may be, as I have already said, that in most cases, the conduct concerned is so obviously dishonest, that no issue arises in relation to it; or it may be that the conduct concerned is acknowledged to be cheating, and the only issue for the jury would be whether the defendant engaged in the relevant conduct or not. But would a defendant in a case falling outside section 42(3) be precluded from giving evidence as to his state of mind, and denying liability on the grounds that he was not dishonest? And what direction would the jury be given – either if they asked about the issue – or the issue of honesty or its absence was raised in evidence? It would not be good enough in my judgment for them simply to be told, "The word is an ordinary English word and you have to decide whether what he did was cheating." The jury would in my view be entitled to expect and receive proper guidance on the matter from the judge.

134. These issues are of some potential importance, and not merely hypothetical, because unlike some offences – assault for example - where it is obvious that the conduct is criminal - there may be real difficulties in deciding whether conduct (such as advantage play) can properly be regarded as cheating, and on which side of the line particular conduct should fall.

135. I note for example in this case, albeit the judge said he considered such evidence of little assistance, that there was no consensus on whether edge-sorting was a legitimate practice in an (admittedly unscientific) survey of 7 persons working in security and surveillance casinos in the United Kingdom, that was conducted by the respondent's expert, Mr. Mills. But it is in factual circumstances where there may be genuinely grey areas, that the limits to the scope of liability should be clear. If the criminal law in this area is to be sufficiently certain and workable, then in my view, the appropriate touchstone for liability under section 42 – once the relevant conduct or *actus reus* is proved, must be one of dishonesty; and in my judgment, a proper and close construction of the statutory provision permits such an interpretation. I would not accept that "unfairness" (a somewhat nebulous concept in any event) provides an appropriate alternative, as I understand Mr. Pymont QC to suggest, since whilst cheating may result in unfairness, the converse may not be true.

136. I could not improve on Lady Justice Arden's analysis of the historical material put before us, some of it going back hundreds of years, and do not propose to do so. But I respectfully do not find it of even slight assistance on the issues raised by this appeal, one way or the other. The Gambling Act 2005 is a modern statute consisting of several hundreds of paragraphs and subparagraphs. It regulates commercial gambling, as does the Gambling Commission, also set up under that Act. Entertaining as some of the older cases are, they have no relevance in my view, to gambling in the modern age; and more particularly to the meaning of "cheat" for the purposes of section 42, and the mental element that must be proved for a conviction under that section.

137. Finally, I do not think it can be said that the fact that the maximum sentence is one of 2 years, somehow moderates the approach the court should take to this issue. Cheating contrary to section 42 of the Gaming Act 2005 is a serious offence, triable on indictment as well as summarily. The effect of a conviction for this offence, as with any other, goes beyond the risk of imprisonment (for the not insubstantial maximum term of 2 years). It carries with it a public stigma, and other consequences,

which can have a profound effect on the future life of the person convicted. Even if I am wrong on the question of construction, I think a conviction for cheating, like one for theft, inevitably stigmatises someone as dishonest.

138. If as I think it is, dishonesty is an essential ingredient of the criminal offence of cheating, then in my view, there is no difficulty in determining the correct test to be applied by the trier of fact in any case where it is necessary to give a dishonesty direction. It is that identified in *R v Ghosh* [1982] QB, namely "… 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 but only if the defendant's conduct was dishonest by those standards, then the jury must go on to consider: "…whether the defendant himself must have realised that what he was doing was [by the standards of or reasonable and honest people] dishonest."

139. The test has undoubtedly come in for considerable academic criticism. See also *Starglade Properties Ltd v Nash* [2010] EWCA Civ 1314, [2011] 1 P. & C.R. DG17 where Sir Brian Leveson, P., expressed (obiter) his concern if the concept of dishonesty for the purposes of civil liability were to differ to any marked extent from the concept of dishonesty as understood in the criminal law, and said the *Ghosh* test may need to be re-evaluated by the Court of Appeal, Criminal Division in due course. But it is the test for dishonesty across the range of criminal offences where dishonesty has to be determined, and remains good law: see *R v Cornelius* [2012] EWCA Crim, 500.

140. As Lady Justice Arden and Lord Justice Tomlinson would affirm the judge's ruling, albeit on different grounds to those which found favour with the judge, I need deal only briefly with my conclusions as to outcome. The judge plainly concluded that Mr. Ivey was honest; but that looking at the matter objectively, he had cheated. There may be cases, of which *Starglade Properties* is an example, where it is appropriate for an appellate court to disturb a finding as to honesty. I do not consider it would be right to do so in this case, and to attempt, retrospectively, to apply the *Ghosh* test to the facts, not least because no argument was addressed to us on this issue. In my opinion, the judge in this case was wrong to construe the issue of cheat in the way that he did, and I would allow this appeal.