

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

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### **Misunderstanding in the criminal law**

In *R v Ghosh* [1982] QB 1053 the Court of Appeal considered the word “dishonestly” in s1 of the Theft Act 1968, which provides: “A person is guilty of theft if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it”.

At p1063 Lord Lane CJ asked the following questions: “Is “dishonestly” in s1 of the Theft Act 1968 intended to characterise a course of conduct? Or is it intended to describe a state of mind?” He added: “If the former, then we can well understand that it could be established independently of the knowledge or belief of the accused. But if, as we think, it is the latter, then the knowledge and belief of the accused are at the root of the problem.”

This led the Court of Appeal to promulgate the following two-stage test at p1064: “In determining whether the prosecution has proved that the defendant was acting dishonestly, a jury must first of all decide whether according to the ordinary standards of reasonable and honest people what was done was dishonest. If it was not dishonest by those standards, that is the end of the matter and the prosecution fails. If it was dishonest by those standards, then the jury must consider whether the defendant himself must have realised that what he was doing was by those standards dishonest.”

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

The Court of Appeal was right to say that dishonesty contains a subjective element. This appears from the partial definition of “dishonestly” in s2 of the Theft Act 1968, which provides (among other things) that a person’s appropriation of property belonging to another is not to be regarded as dishonest if he appropriates the property in the belief that he has in law the right to deprive the other of it, or in the belief that he would have the other’s consent if the other knew of the appropriation and the circumstances of it. This is also consistent with (a) the holding of the Court of Appeal in *R v Gilks* [1972] 1 WLR 1341 that it was sufficient to direct the jury as to dishonesty on the facts of that case: “Well, it is a matter for you to consider, members of the jury, but try and place yourselves in that man’s position at that time and answer the question whether in your view he thought he was acting honestly or dishonestly”, and (b) *R v Feely* [1973] QB 530 in which the Court of Appeal said not only that “Jurors, when deciding whether an appropriation was dishonest, can be reasonably expected to, and should, apply the current standards of ordinary decent people” (an objective criterion) but also that “In their own lives they have to decide what is and what is not dishonest. We can see no reason why, when in a jury box, they should require the help of a judge to tell them what amounts to dishonesty” (which contemplates a subjective element).

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

### **Uncertainty in the civil law**

In *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378, the Privy Council considered the meaning of dishonesty in the context of the liability of an accessory to a breach of trust. Lord Nicholls said at p389: “Whatever may be the position in some criminal or other contexts (see, for instance, *R v Ghosh* [1982] 1 QB 1053), in the context of the accessory liability principle acting dishonestly, or with a lack of probity, which is synonymous, means simply not acting as an honest person would in the circumstances. This is an objective standard. At first sight this may seem surprising. Honesty has a connotation of subjectivity, as distinct from the objectivity of negligence. Honesty, indeed, does have a strong subjective element in that it is a description of a type of conduct assessed in the light of what a person actually knew at the time, as distinct from what a reasonable person would have known or appreciated. Further, honesty and its counterpart dishonesty are mostly concerned with advertent conduct, not inadvertent conduct. Carelessness is not dishonesty. Thus for the most part dishonesty is to be equated with conscious impropriety.”

In *Twinsectra Ltd v Yardley* [2002] 2 AC 164 the House of Lords was divided as to the requirements of the dishonesty spoken of in *Tan*. The majority (Lord Slynn, Lord Steyn, Lord Hoffmann and Lord Hutton) were in favour of what Lord Hutton at [27] called the “combined test” which “requires that before there can be a finding of dishonesty it must be established that the defendant’s conduct was dishonest by the ordinary standards of reasonable and honest people and that he himself realised that by those standards his conduct was dishonest.” That is the *Ghosh* test. Lord Hoffmann said [20]: “...I consider that those principles [in *Tan*] require more than knowledge of the facts which make the conduct wrongful. They require a dishonest state of mind, that is to say, consciousness that one is transgressing ordinary standards of honest behaviour.” In contrast, Lord Millett was in favour of adopting an objective approach as being more apposite to civil as distinct from criminal liability (see [127]-[134]). Lord Hoffmann (at [19]) described Lord Millett’s point of view as being that “It is sufficient that the defendant knew all the facts which made it wrongful for him to participate in the way in which he did.” Nevertheless, at [116] Lord Millet also referred to the test in *Ghosh*: “The same test of dishonesty is applicable in civil cases where, for example, liability depends upon intent to defraud, for this connotes a dishonest state of mind. *Aktieselskabet Dansk Skibsfinansiering v Brothers* [2001] 2 BCLC 324 was a case of this kind (trading with intent to defraud creditors). But it is not generally an appropriate condition of civil liability, which does not ordinarily require a guilty mind. Civil liability is usually predicated on the defendant's conduct rather than his state of mind; it results from his negligent or unreasonable behaviour or, where this is not sufficient, from intentional wrongdoing.” Accordingly, Lord Millett envisaged that the civil and criminal tests for dishonesty might sometimes be the same, and that the *Ghosh* test might apply in both cases.

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

In *Barlow Clowes v Eurotrust International Ltd* [2006] 1 WLR 1476, Lord Hoffmann, delivering the single judgment of the Privy Council, said of his own speech in *Twinsectra* that "... the statement (in [20]) that a dishonest state of mind meant "consciousness that one is transgressing ordinary standards of honest behaviour" was in their Lordships' view intended to require consciousness of those elements of the transaction which make participation transgress ordinary standards of honest behaviour. It did not also...require him to have thought about what those standards were." Lord Hoffmann said at [10]: "Although a dishonest state of mind is a subjective mental state, the standard by which the law determines whether it is dishonest is objective. If by ordinary standards a defendant's mental state would be characterised as dishonest, it is irrelevant that the defendant judges by different standards."

This was followed by the decisions of the Court of Appeal in *Abou-Rahmah & Anor v Al-Haji Abdul Kadir Abacha & Ors* [2007] 1 All ER (Comm) 827, [2007] 1 Lloyd's Rep 115 and *Starglade Properties Ltd v Nash* [2011] Lloyd's Rep FC 102. In the latter case, the Chancellor indicated at [30] that following the decision of the Court of Appeal in *Abou-Rahmah* "the correct approach to questions of dishonesty is that indicated by the Privy Council in *Barlow Clowes*" and "the law is that laid down in *Twinsectra* as interpreted in *Barlow Clowes*" and at [32] that "The relevant standard, described variously in the statements I have quoted, is the ordinary standard of honest behaviour. Just as the subjective understanding of the person concerned as to whether his conduct is dishonest is irrelevant so also is it irrelevant that there may be a body of opinion which regards the ordinary standard of honest behaviour as being set too high. Ultimately, in civil proceedings, it is for the court to determine what that standard is and to apply it to the facts of the case." At [42], Leveson LJ expressed "a note of concern if the concept of dishonesty for the purposes of civil liability differed to any marked extent from the concept of dishonesty as understood in the criminal law." Hughes LJ agreed with the judgment of the Chancellor and with those observations.

In *Ivey v Genting Casinos (UK) Ltd (t/a Crockfords)* [2017] UKSC 67, [2017] 3 WLR 1212, in the course of discussing civil actions in which dishonesty has arisen as an issue, Lord Hughes JSC said of these cases at [62] that "Successive cases at the highest level have decided that the test of dishonesty is objective."

### **Dishonesty and disciplinary proceedings**

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

In *Bryant and Bench v Law Society* [2007] EWHC 3043 (Admin) Richards LJ:

- (a) Referred at [149] to the "*Twinsectra* test" as it was widely understood prior to *Barlow Clowes* as "including not only an essentially objective element ("that the defendant's conduct was dishonest by the ordinary standards of reasonable and honest people", albeit that the conduct is to be assessed in the light of the facts known to the defendant at the time) but also a separate subjective element ("knowledge by the defendant that what he was doing would be regarded as dishonest by honest people")."
- (b) Stated that is how the matter had been approached when it had come before the courts in *D v The Law Society* [2003] EWHC 408 (Admin), *Bultitude v The Law Society* [2004] EWCA Civ 1853, and *Donkin v The Law Society* [2007] EWHC 414 (Admin).

- (c) Stated at [153] that: “In our judgment, the decision of the Court of Appeal in *Bultitude* stands as binding authority that the test to be applied in the context of solicitors’ disciplinary proceedings is the *Twinsectra* test as it was widely understood before *Barlow Clowes*, that is a test that includes the separate subjective element. The fact that the Privy Council in *Barlow Clowes* has subsequently placed a different interpretation on *Twinsectra* for the purposes of the accessory liability principle does not alter the substance of the test accepted in *Bultitude* and does not call for any departure from that test.”

Subsequent High Court cases in the disciplinary sphere have followed this approach: see *Uddin v GMC* [2012] EWHC 2669 (Admin), *Professional Standards Authority for Health and Social Care v Health and Care Professions Council, David* [2014] EWHC 4657 (Admin), *Hussain v GMC* [2014] EWCA Civ 2246, and *Kirschner v GDC* [2015] EWHC 1377 (Admin). However, confusion has prevailed and misgivings have been expressed.

In *Kirschner*, Mostyn J:

- (a) At [17], doubted the correctness of the decision in *Bryant*, said “The decision in *Bultitude* must surely be regarded as having been overreached or superseded by the adoption by the Court of Appeal of the *Barlow Clowes* modification in *Abou-Rahmah*”, and noted that in *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd* [2012] Ch 453 Lord Dyson MR at [74] was of the view that the Court of Appeal in *Abou-Rahmah* had followed the decision in *Barlow Clowes* rather than the earlier decision of the House of Lords in *Twinsectra*.
- (b) At [18], stated that an important argument in favour of the same test for dishonesty in all civil proceedings is that it negates the risk of inconsistent verdicts on identical facts, and that “At present the scope for confusion is immense. A defendant can face the prospect of being found dishonest in one civil court but not in another, depending on the nature of the proceedings.”
- (c) At [19], expressed the opinion that there should be a single test for dishonesty in all civil proceedings, whatever their nature, and “That test should be as propounded by the Privy Council in *Barlow Clowes* and as very recently confirmed by it in *Central Bank of Ecuador & Ors v Conticorp SA & Ors (Bahamas)* [2015] UKPC 11.”
- (d) At [20], said “Under the *Barlow Clowes* test the only relevant mental state of a defendant accused of dishonesty in civil proceedings is his or her knowledge. Once the knowledge of the defendant has been established it is then for the tribunal to act as the “spokesman of the fair and reasonable man, who represents after all no more than the anthropomorphic conception of justice” (per Lord Radcliffe in *Davis Contractors Ltd v Fareham Urban District Council* [1956] AC 696, 728) and to determine if the defendant, possessed of that knowledge, and having engaged in the transactions in question, was dishonest by ordinary standards.”
- (e) At [22], said: “It would, however, be a step too far for me, notwithstanding my great misgivings, to hold that *Bryant* does not represent the law concerning dishonesty in disciplinary proceedings. Or that the *Twinsectra/Ghosh* test has not been adapted as suggested in *Hussain*. As things stand the test is [that] ... The tribunal should first determine whether on the balance of probabilities, a defendant acted dishonestly by

the standards of ordinary and honest members of that profession; and, if it finds that he or she did so, must go on to determine whether it is more likely than not that the defendant realised that what he or she was doing was by those standards, dishonest.”

### **Resolution of the issues**

All the problems discussed above have been resolved by the decision of the Supreme Court in *Ivey v Genting Casinos (UK) Ltd (t/a Crockfords)* [2017] UKSC 67, [2017] 3 WLR 1212.

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

Mitting J found that Mr Ivey was a truthful witness who did not believe that what he was doing was cheating, in accordance with a standpoint that “commands considerable support from others”. He did not find that there had been any dishonesty by Mr Ivey in the course of his gambling. Indeed, and in light of the “surprising and striking omission” of the croupier from the evidence called by the casino, Mitting J felt unable to infer that Mr Ivey had deceived the croupier into agreeing to sort the cards differentially by pretending to be superstitious when he was not. Mitting J found that this conduct was “legitimate gamesmanship” and did not amount to deception “of such a kind as to vitiate the gaming contract”. It was common ground between the parties before Mitting J that the tests of dishonesty for purposes of the criminal law (laid down in *R v Ghosh* [1982] QB 1053) and the civil law (re-iterated in *Starglade Properties Ltd v Nash* [2011] Lloyd’s Rep FC 102) were different. Mitting J referred to both tests, but said that he was “unconvinced” that dishonesty is a necessary element of the act of cheating for purposes of the civil law.

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

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

The Court of Appeal (Arden and Tomlinson LJJ, Sharp LJ dissenting) upheld that decision and dismissed Mr Ivey’s appeal, but for reasons which differed both from those given by

Mitting J and from one another. Both Arden LJ and Sharp LJ analysed the meaning of the word cheating by reference to s42 and arrived at conclusions as to the meaning of cheating within s42 which, as they held, applied equally to the implied term of the contract between Mr Ivey and the casino. However, Arden LJ held that for purposes of s42 an allegation of cheating does not require dishonesty, whereas Sharp LJ held that it does, and would have allowed the appeal on the basis that (as accepted by all three members of the Court of Appeal) Mitting J had acquitted Mr Ivey of dishonesty. Both Arden LJ and Sharp LJ agreed that if dishonesty is a necessary element of the offence under s42, the relevant test is that established in *R v Ghosh* [1982] QB 1053. Tomlinson LJ followed Mitting J in reasoning that the case could be decided without reference to s42, and expressed no view on the mental element of the offence, but held that Mr Ivey had cheated because he had practised deception.

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

In these circumstances, the need to consider the parameters of the concept of dishonesty did not strictly arise. But there seems little doubt that the lower courts will follow this unanimous decision of the Supreme Court, which effectively overrules *Ghosh*. Lord Hughes said:

- (a) At [63] that "there can be no logical or principled basis for the meaning of dishonesty (as distinct from the standards of proof by which it must be established) to differ according to whether it arises in a civil action or a criminal prosecution."
- (b) At [74] that there are "convincing grounds for holding that the second leg of the test propounded in *Ghosh* does not correctly represent the law and that directions based upon it ought no longer to be given."
- (c) Also at [74] that for purposes of both civil and criminal law the test of dishonesty is the same: "When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held. When once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest."

### **What about the future?**

In how many cases did the *Ghosh* test matter in any event?

What are the boundaries of dishonesty in accordance with the *Ivey* test – see [45]?

Could leaving the objective element to the jury in criminal cases give rise to problems?