

Case Comment: *Ivey v Genting Casinos (UK) Ltd t/a Crockfords* [2017] UKSC 67

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Summary of Facts

Between the 20th and 21st August 2012, the appellant ('Ivey') attended the Crockfords Club ('Crockfords') in Mayfair, London. Playing the card game 'Punto Banco,' he had amassed winnings totalling £7.7m using a tactic known, albeit not to Crockfords, as 'edge-sorting.' This tactic involves the skill of being able to identify cards through memorizing tiny differences on the patterns and edging of playing cards.

Given the large value of the win, Crockfords' practice is to conduct an *ex post facto* investigation to ensure legitimacy. If satisfied, these winnings are then electronically transferred to the 'winners' bank account. Suspicions of untoward behaviour were raised after a review of the CCTV and audio recordings. In response, Crockfords refused to transfer the 'winnings' on the basis that Ivey had cheated. which breached an implied term of the gaming contract entered into by both parties that neither would cheat. With the contract now void, they refunded Ivey's total betting stakes, some £1m.

Ivey maintained that, even though he could read the cards, in the sense that he had memorised patterns and distinct edgings of 'high value' cards, he had only requested some cards (of 'low value') be rotated due to superstitions and had further requested that the same deck of cards be used throughout (it is common that decks of cards are routinely swapped). He argued that this amounted to gamesmanship, not cheating. Had he physically touched the cards this would have amounted to cheating and led to the cards being swapped. Moreover, Ivey had sought permission

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from the club manager to use the same cards and rotate cards in this manner to pacify his superstitions. Given the large stakes being made by Ivey, the Club Manager agreed to accommodate these requests. After Crockfords' refusal to pay the appellant's winnings, he sought to recover them via a civil process.

At first instance, Mitting J dismissed Ivey's claim and the Court of Appeal (CoA) further held that Ivey had acquired his winnings 'through manipulation;' this amounted to cheating and therefore breached the implied term of the contract. The CoA confirmed that dishonesty was not a necessary ingredient of cheating. If it had been a constitute ingredient, establishing dishonesty would be problematic, given the test laid down in *R v Ghosh* [1982] QB 1053 (CA (Crim Div)). *Ghosh* outlined a two-limbed test for juries in determining dishonesty in most acquisitive criminal cases:

- i) was the conduct of the defendant dishonest by the standards of reasonable and honest people (the objective limb); if yes
- ii) did the defendant himself realise that what he was doing was, by such standards, dishonest (the subjective limb)

If the answer is no to either question, then dishonesty is not established. Ordinarily, the meaning of 'dishonesty' should simply be left to the jury; but where a direction is needed, the *Ghosh* test should be given. Counsel for Ivey had argued that cheating *did* require a dishonest state of mind. Counsel suggested Ivey lacked this state of mind since he was 'genuinely convinced' his actions were not dishonest, the second limb failed and he was therefore entitled to his winnings. With leave to appeal granted, it was for the Supreme Court to address three elements:

1. The meaning of 'cheating' in the context of gambling;

2. The relevance of dishonesty and;
3. The proper test for dishonesty if it is essential to cheating.

The appeal was dismissed, with the Supreme Court agreeing with the lower courts that Ivey had, by manipulation, cheated in winning the £7.7m withheld by Crockford's. The court concluded that if cheating did require an element of dishonesty, then the test set out in *Royal Brunei Airlines Sdn Bhd v Tan* [1995] UKPC 22 should be the appropriate test, rather than that set out in *Ghosh*.

Commentary

Every few years, cases of enormous importance emerge from the highest levels of the English and Welsh appellate system, ushering in far-reaching change to established law. A recent example would be *R v Jogee (Ameen Hassan)* [2017] AC 387, which overturned 30 years of joint enterprise precedent in 2016. *Ivey* is another of those rare cases falling into this category, in this instance relating to the meaning of dishonesty in criminal cases. Whilst the facts of *Ivey* do not directly relate to dishonesty in the criminal context, the clarity, reasoning and force of the judgment of the Supreme Court effectively sweeps away three decades of accepted – if criticised – precedent, stemming from *Ghosh*.

The *Ghosh* test has remained the prevailing authority on matters of dishonesty in criminal proceedings since 1982. Every law student and criminal lawyer is (or will have been at some point) familiar with its basic requirements. Notwithstanding its continued legal precedence during the last 35 years, the *Ghosh Test* has not enjoyed the support of commentators. There is not room here to fully rehearse these arguments; but much criticism has been levelled at the subjective limb, granting as it does the opportunity for defendants to argue that – regardless of

the objective standard of dishonesty – they did not realise they had been dishonest by such standards (for a summary of the problems, see Para. 57 of the [judgment](#)). This could, for example, allow defendants to argue that, due to a lack of evidence about the defendant’s state of mind, a jury could not be satisfied that the accused had ‘realised that what he was doing was by [objective] standards dishonest.’ Considering the practical difficulty in proving facts as to someone’s state of mind, this presented a potential barrier to convictions where the defendant’s appreciation of ordinary standards of honesty was not obvious. Equally problematic was the opportunity for defendants to raise the ‘robin hood defence’ – that is, if the defendant genuinely believes ‘robbing the rich’ is not dishonest then they should be acquitted, regardless of what wider society thinks. It has therefore been argued, as Lord Hughes does explicitly in *Ivey*, that the *Ghosh Test* effectively meant that ‘any defendant whose subjective standards were sufficiently warped would be entitled to be acquitted’ (Para. 72). The test effectively favoured defendants whose personal standard of dishonesty diverged from that of mainstream society (an equally problematic concept; see below). A very unfortunate and clearly undesirable consequence.

Ivey changes this. As Lord Hughes states in the judgment, 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’ (Para. 74). Instead, the test established in *Tan* and explained in *Barlow Clowes International Ltd v Eurotrust International Ltd* [2006] 1 WLR 1476 was approved at Paragraph 62:

‘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 objective test, as Lord Hughes asserted, represented the reasoning of 'successive cases at the highest level' (Para. 62), whereas *Ghosh* 'was not compelled by authority' due to the pre-existing case law being 'in a state of some entanglement' (Para. 57). In short, *Ghosh* was built on rather shaky foundations. In critiquing the subjective limb of *Ghosh*, it was highlighted that a defendant's genuine belief in their own honesty should not be determinative of whether they were in fact dishonest. Using the example of the appellant in this case, Lord Hughes said:

'Truthfulness is indeed one characteristic of honesty, and untruthfulness is often a powerful indicator of dishonesty, but a dishonest person may sometimes be truthful about his dishonest opinions' (Para. 75)

As noted above, the CoA accepted that the appellant was 'genuinely convinced' he had not been dishonest – he was truthful about his own state of mind. The Supreme Court considered this to be irrelevant and certainly not conclusive in determining dishonesty, since by ordinary standards he had been. Therefore, a person's deeply held conviction in their own honesty cannot insulate them from being considered dishonest by wider society or indeed in the eyes of the law.

Lord Hughes also noted that a divergence had emerged over the years between the meaning of dishonesty in civil and criminal proceedings. The court suggested there was 'no logical or principled basis for the meaning of dishonesty ... to differ according to whether it arises in a civil action or a criminal prosecution,' branding it an 'affront' (Para. 63). Relying on *Tan, Barlow Clowes, and Twinsectra Ltd. v Yardley* [2002] 2 AC 164, the Supreme Court closed this

gap, effectively uniting the civil and criminal tests for dishonesty under a single limb – that is, the purely objective test. By doing so, many of the criticisms above are addressed.

Some final points to note. As a civil case relating to cheating in gambling, it was not necessary for the court to pass judgment on the *Ghosh* test. As such, *Ivey* strictly represents *obiter* rather than binding precedent when lower courts consider acquisitive criminal cases where dishonesty is an element of the alleged offence. That being said, this Supreme Court judgment overrules a long-standing CoA decision, and provides clear and unequivocal agreement between five judges, including the new President of the Supreme Court (Lady Hale), the former President (Lord Neuberger), and the former Lord Chief Justice (Lord Thomas). If any case is highly persuasive, it is *Ivey*. There can be little doubt that the ‘full’ *Ghosh* test has been consigned to history.

It should also be remembered, as suggested above, that the removal of the second limb of the *Ghosh Test* does not perfect the determination of dishonesty in criminal cases. Criticism has been directed at the objective limb for many years. Spencer argued it was too vague and complicated for juries to understand, while Griew suggested there was no “ordinary standard” of honesty for juries to rely on; this would therefore leave jurors to simply apply their individual standards (which may or may not adhere to the amorphous concept of “ordinary” honesty) leading to inconsistency, uncertainty and expense. More recently, both Parsons and Haynes have argued that such vagueness potentially breaches Article 7(1) of the European Convention on Human Rights (the clarity and precision of criminal offences). That said, Strasbourg jurisprudence has acknowledged in *The Sunday Times v United Kingdom* (1979) EHRR 245, that whilst legal certainty is desirable, it is often unattainable.

In light of this, concerns have been raised about the weight placed on dishonesty in convicting defendants. The breadth afforded to the ‘appropriation’ element of theft (under Section 1 of the

Theft Act 1968) in cases including *R v Lawrence* (1971) 57 Cr App R 64, *DPP v Gomez* [1993] AC 442, and *R v Hinks* [2001] 2 AC 241 has arguably created a situation where proving the offence hinges on proving dishonesty. As the Law Commission illustrated in a consultation paper on fraud: '[w]hen a person selects a newspaper to buy at a newsagent's, he or she has committed all the elements of theft save for dishonesty' Therefore, a test for dishonesty which is unclear and inconsistent represents a significant issue.

Whilst the decision in *Ivey* goes some way to ameliorating this problem by abandoning the subjective limb, it does not overcome the potential pitfalls inherent in the objective limb. It has been suggested (most recently by Haynes) that a statutory definition of dishonesty could help (an example being Section 217 of the *Crimes Act 1961* in New Zealand) In the 27 years since *Ghosh*, Parliament has not sought to intervene; nor has the Law Commission specifically examined reform of theft (as it hinted it would at the turn of the century) or the plausibility of a statutory definition for dishonesty, beyond the negative ones currently outlined under Section 2 of the *Theft Act 1968*. Dishonesty was introduced to replace a legislative definition ('fraudulently and without a right of claim' under the *Larceny Act 1916*) on the basis it would be more easily understood; it thus seems unlikely that statutory intervention will be coming any time soon. Indeed, a legislative definition presents its own difficulties - primarily, drafting in a sufficiently definitive manner without tying the hands of juries too tightly. As Lord Hughes suggests, dishonesty is 'characterised by recognition rather than by definition' and juries have largely 'coped well' with the task of interpreting it (Para. 53) As such, we are likely – as Adam King suggests – to be referring to the *Ivey Test* for dishonesty for many years to come.