



Ghosh is gone - now a one-stage test for dishonesty?

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Ghosh is gone - now a one-stage test for dishonesty?

A recent UK Supreme Court case¹ has decided that the current test for dishonesty in criminal proceedings should no longer be used when directing juries on the law in criminal cases. The *Ghosh*² test, which has represented established law for over thirty years, is gone.

The *Ghosh* two-stage test required (i) the conduct complained of to be found dishonest by the objective standards of ordinary reasonable and honest people (the objective limb); and (ii) for the defendant to have realised that ordinary honest people would regard his behaviour as dishonest (the subjective limb). This caused much confusion – not least because it had the unintended effect that the more warped the defendant's standards of honesty are, the less likely it was that the defendant would be convicted of dishonest behaviour.

This latest case (though *obiter*) does away with the second, subjective limb of the test – meaning that standards of behaviour which are acceptable should be objectively judged, and no longer allow a loophole for someone to escape liability just because that person did not think his/her actions dishonest.

The revised test is likely to make the law easier for juries and lawyers to understand. However, individuals facing criminal charges which involve an element of dishonesty, for example conspiracy to defraud – the charge used in the LIBOR cases – may have to re-think how they argue their defence. They may no longer have the same opportunity to convince the jury that they did not realise that ordinary people would have found their actions to be dishonest.

The game

Mr Ivey (a professional gambler) deployed a highly specialist technique called edge-sorting³

during a session of *punto banco baccarat* at the Crockfords casino and won £7.7 million. The casino declined to pay out his winnings, arguing that his behaviour amounted to cheating and Mr Ivey sued for his winnings.

Mr Ivey's primary case was that he had not cheated, but had used legitimate gamesmanship to give him an advantage; he was open about his methods and practices with the Court, and adamant that he had behaved honestly.

The decision on cheating

It was common ground throughout the litigation that the contract for betting entered into by Mr Ivey and the casino was subject to an implied term that neither of them would "cheat".

The decision hinged on the court's finding that that dishonesty was not a necessary legal element in the criminal offence of cheating, under section 42 of the Gambling Act 2005, as argued by Mr Ivey.

Trying to define 'cheating' was pointless, as this would depend on the form of game or contest and its context, as well as the standards of the person judging the issue. The correct question should be whether Mr Ivey's conduct amounted to cheating by objective standards: Mr Ivey took positive steps to turn a game that should be one of pure chance, into one in which he knew what cards were being dealt and when, by fixing the deck. That Mr Ivey's steps were clever and skilful was irrelevant; he was still cheating. Dishonesty could not be regarded as a concept which would bring clarity to an assessment of such behaviour.

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

2 (1982) Q.B. 1053

3 Edge-sorting takes advantage of a quirk in the production of Angel playing cards used at Crockfords, on which the patterned surface is rendered slightly closer to one edge of the cards than the other. This results in a visible difference

between the long edges of the cards, to the highly trained eye, so that cards will have either 'edge A' or 'edge B' visible to a player as the croupier deals. This is only useful if the player can manipulate the croupier's sorting of the cards so that high value cards are one way round, displaying edge A, and other less useful cards are the other way round, displaying edge B, to him as he plays.

Dishonesty and the *Ghosh* test

The UK Supreme Court upheld the lower court's decision and as a result, it was not necessary to address the application of the dishonesty test.

However, if, contrary to the conclusion reached above, dishonesty was required for a finding of cheating, the deception by Mr Ivey practised on the croupier (by making her believe that her actions were irrelevant when they were not) would be prima facie dishonest, unless it was prevented from being so by satisfying the second subjective limb of the test in *R v Ghosh* (whether the defendant must have realised that ordinary honest people would regard his behaviour as dishonest). This was particularly relevant as Mr Ivey was clearly convinced that his own conduct was honest.

The test in *Ghosh* requires a direction for juries to apply a two-stage test in relation to dishonesty:

1. whether the conduct complained of was dishonest by the objective standards of ordinary reasonable and honest people (the objective limb); and
2. if so, whether the defendant must have realised that ordinary honest people would regard his behaviour as dishonest (the subjective limb).

In order for a defendant to be found guilty, a jury would need to be sure that the answer to both questions was 'yes'.

The UK Supreme Court found that the second limb of the *Ghosh* test did not correctly represent the law, and that directions based on it should no longer be given. It was a crucial function of the criminal law to determine what is criminal and what is not, which involves setting the standards of behaviour which are acceptable. Lord Hughes concurred with Smith's Law of Theft 9th edition (2007), para 2.296 which stated that, "... *the second limb allows the accused to escape liability where he has made a mistake of fact as to the contemporary standards of honesty. But why*

should that be an excuse?" It would be unjust for Mr Ivey to escape liability for his cheating, just because he did not think it was dishonest. The law should not provide such a loophole.

Comments

While the Supreme Court's comments on the *Ghosh* test were *obiter* – the Court had not been invited to decide the definition of dishonesty – the new simplified test is likely to be adopted by the lower courts in the UK.

It is likely that the Hong Kong courts will soon need to consider whether Hong Kong will adopt this revised test in deciding what is dishonest in both the criminal and civil context.

The new test, if adopted in Hong Kong, is likely to make the law easier for juries and lawyers to understand. However, individuals facing criminal charges which involve an element of dishonesty, for example conspiracy to defraud – the charge used in the LIBOR cases – may have to re-think how they argue their defence. They may no longer have the same opportunity to convince the jury that they did not realise that ordinary people would have found their actions to be dishonest.

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