

Oh my Ghosh!

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Just when you thought there was no need to attend another seminar regarding dishonesty in regulatory proceedings and then comes along *Ivey (Appellant) v Genting Casino (UK) Ltd t/a Crockfords (Respondent) [2017] UKSC 67.*

Background to the appeal

The Supreme Court, comprising five justices: - Lord Neuberger, Lady Hale, Lord Kerr, Lord Thomas and Lord Hughes heard an appeal in which a professional gambler, Mr Ivey, sued a casino, Crockfords, to recover his winnings (£7.7 million) from playing Punto Banco. Crockfords refused to pay out the winnings because it alleged that Mr Ivey had cheated.

As well as providing a detailed explanation of how Mr Ivey cheated at Punto Banco, the appeal raised questions about the relevance of dishonesty to the concept of cheating in gambling. In answering those questions, the Court took the opportunity to provide a history lesson in the evolving caselaw on dishonesty which reached its climax by the Court harmonising the criminal and civil test for dishonesty.

The trouble with *Ghosh*

R v Ghosh [1982] EWCA Crim 2 set down a two-stage test in relation to dishonesty:-

The first question to answer is whether the conduct complained of was dishonest by the objective standards of ordinary reasonable and honest people; and, if yes

The second question is whether the defendant must have realised that ordinary honest people would so regard his behaviour.

Consequently, in order for a defendant to be found guilty, a jury needed be sure that the answer to **both** questions was yes.

The Court identified several issues with the second limb of the *Ghosh* test. Two of which were that:

(1) It has the unintended effect that the more warped the defendant's standards of honesty are, the less likely it is that he will be convicted of dishonest behaviour....

.....

(4) It has led to an unprincipled divergence between the test for dishonesty in criminal proceedings and the test of the same concept when it arises in the context of a civil action. [para 57]

In light of the many issues identified, the Court decided that the second limb of the *Ghosh* test does not correctly represent the law and that directions based upon it ought no longer to be given.

The solution

The test of dishonesty is now as set out by Lord Nicholls in *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378 and by Lord Hoffmann in *Barlow Clowes International Ltd v Eurotrust International Ltd* [2006] 1 WLR 1476:

"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. The Court of Appeal held this to be a correct state of the law and their Lordships agree." [pp1479-80]

In Lord Hughes words:

"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” [Para 74].

The Result

There is no reason why the law should excuse those who make a mistake about what contemporary standards of honesty are, whether in the context of insurance claims, high finance, market manipulation or tax evasion. The law does not, in principle, excuse those whose standards are criminal by the benchmarks set by society, nor ought it to do so [para 59].

The defendant’s state of mind will still have to be established by the evidence in order to characterise the registrant’s actions. However, the question of whether the actions were dishonest will **only** be judged by an objective standard.

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