So what is dishonest?

Michelle Sloane and Alice Kemp examine the repercussions of R v Booth & Barton, clarifying the criminal test for dishonesty

On 29 April 2020, the Court of Appeal released its decision in R v Booth & Ors,[1] which clarifies the law on dishonesty.[2]

Some of you may be asking yourselves how it came to be that the test for dishonesty, a fundamental ingredient in many criminal and civil cases, needed clarifying. Particularly as it is an essential ingredient of fraud, cheating the public revenue and tax evasion, the criminal tax and excise charges most commonly indicted by HMRC.

To answer that question, we have to go back to a time before the pandemic; the historic year of 2017.

In 2017, the Supreme Court delivered its judgment in Ivey v Genting Casinos (UK) (trading as Cockfords Club),[3] which the eagle eyed among you will note is a civil, not a criminal, case. The decision arose out of the question of whether Mr Ivey (a professional card player) was cheating the casino by a process of 'edge sorting' – described by the Supreme Court as exploiting the minute differences between the not-precisely symmetrical edges and using these distinctions, arranged in particular orientations, to show the gambler which cards they are interested in. Mr Ivey argued that what he was doing was not cheating, the Supreme Court held that it was. So far so good. But in order to decide whether Mr Ivey was cheating, the Supreme Court stepped back and looked at the meaning of 'dishonesty' as a whole.

Until that point, everyone in the criminal world thought they knew what the test for dishonesty was. The test was that provided in Ghosh:[4]

was the defendant's conduct dishonest by the ordinary standards of reasonable people; and

did the defendant appreciate that his conduct was dishonest by those standards?

In Ivey, the Supreme Court said, hang on, so the more 'warped'[5] the defendant's standards of honesty, the more likely he is to be found not guilty? The court thought this cannot be correct and suggested that the correct test was:

what was the defendant's actual state of knowledge and belief as to the facts; and

was his conduct dishonest by the standards of ordinary decent people?

The Supreme Court in Ivey did not need to decide what the test for dishonesty was, it simply had to decide on the meaning of 'cheating'.

Ivey created some uncertainty. According to the rules of precedent,[6] the decision in Ghosh was still good law because the Supreme Court's comments in Ivey were obiter; the court had not actually ruled on the meaning of dishonesty. But at the same time, everyone had a good idea of how the Supreme Court was likely to rule if it was asked to consider the issue.

Enter R v Booth & Ors, the facts of which can be read here. In short, Mr Barton, Ms Booth and others were convicted of several counts of theft, conspiracy to defraud, and other

dishonesty related offences arising out of various transactions Mr Barton entered into with wealthy, elderly and vulnerable residents of his nursing home.

Mr Barton was convicted of 10 counts relating to six residents from whom he fraudulently obtained property and large sums of money, in the form of 'gifts', spurious loans, transactions for inflated value and highly inflated fees charged to residents. Ms Booth, the General Manager of the home, acted as Mr Barton's 'eyes and ears' and abused her position to assist Mr Barton in his fraudulent activity. They appealed their convictions on eight grounds (all of which were unsuccessful), but the primary ground related to dishonesty, in particular, did Ivey provide the correct test for dishonesty and, if so, is it to be followed in preference to the test described in Ghosh?[7]

The Court of Appeal rejected the appellants' argument that a strict application of the stare decisis doctrine meant that the test in Ghosh was the relevant precedent and should be followed.

The Court of Appeal said that there was precedent for adopting such an approach. In R v James,[8] the Court of Appeal followed a non-binding decision of the Privy Council in Attorney General for Jersey v Holley[9], in which the Privy Council (both in the judgment for the majority and the judgment in dissent) expressed the view that their decision should be considered as stating the law of England and Wales in relation to the issue of provocation as a partial defence to murder, allowing the Court of Appeal in James to decide that Holley was to be followed as opposed to the decision of the House of Lords in R v Smith (Morgan).[10]

As a result, the Court of Appeal in Barton concluded that it could follow the same approach as was adopted by the Court of Appeal in James, due to the following similarities between the Ivey and Holley decisions:

- the court unanimously stated that the effect of the non-binding decision was to state the law of England and Wales on the issue; and
- the Court of Appeal could predict with confidence how any appeal on this issue would be decided.

There are, however, a number of difficulties with this approach.

Firstly, in James, both Smith (Morgan) before the Privy Council and the subsequent case of Holley before the House of Lords, were criminal cases and the Privy Council therefore had the benefit of learned criminal counsel assisting it with the implications of its decision for the criminal justice system. Appropriate safeguards and protections were considered and the court was alive to the need for the correct balance to be struck between the rights of the individual and the interests of society.

In Ivey, the Supreme Court said that it could see "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. Dishonesty is a simple, if occasionally imprecise, English word. It would be an affront to the law if its meaning differed according to the kind of proceedings in which it arose…".[11]

With the greatest of respect to the Supreme Court, it may have seen a basis for differentiation between the civil and criminal concepts had the submissions of learned criminal counsel been available. In the absence of such submissions, Ivey did not consider

the potential wider implications for the criminal justice system.

Secondly, the Court of Appeal appears not to trust its own line of reasoning in James and came up with an alternative, which was that there was a line of cases starting with R v Gould,[12] in which the criminal courts had adopted "a looser approach to precedent".[13] The Court of Appeal addressed this argument by simply setting it out and not mentioning it again.

Finally, the Court of Appeal's decision appears to have denied the defendants in this case their right to the benefit of one of the most fundamental principles underpinning the criminal justice system; the right to be tried according to the law at the time of the alleged offence, namely the test for dishonesty provided in Ghosh. Until their appeal, counsel for Mr Barton and Ms Booth did not know that the Supreme Court in Ivey had managed to overturn a binding House of Lords decision without, so far as the judgment records, hearing any submissions from either side on it.

It would seem the test for dishonesty is now both a subjective and objective one. This does bring the law in England and Wales on the meaning of dishonesty, in line with most other common law jurisdictions.

For our part, we think the test in Ivey is sensible and addresses the many and valid concerns which had been raised in respect of the Ghosh test, not least of which was the 'Robin Hood' defence, which allowed the defendant's subjective morality to override the objective morality of society.

But the road that was taken to get there… did the end justify the means? Was it right to jettison a fundamental pillar of the criminal law in order to arrive at the right result? Was it worth it? Time will tell.

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