

# Criminal “Dishonesty” —English Appellate Court Aligns with Civil Test

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For over 30 years, the test for “dishonesty” in English criminal law, central to all fraud offences, was as set out in *R v Ghosh* from 1982.<sup>1</sup> Under *Ghosh* a jury had to ask itself two questions: first, whether the alleged conduct was dishonest by the standard of reasonable and honest people (the objective limb), and second, whether the defendant knew that his or her conduct would be considered dishonest by reasonable and honest people (the subjective limb).

Then, in October 2017, the Supreme Court gave judgment in the civil fraud case *Ivey v Genting Casinos (UK) Ltd.*<sup>2</sup> Although not in issue in *Ivey*, the Supreme Court opined that the criminal *Ghosh* test was wrong because “the more warped the defendant’s standards of honesty are, the less likely it is that he will be convicted of dishonest behavior” and that it was a difficult test for juries to apply. The Supreme Court therefore stated that in its view (although it could not rule on it) the criminal test for “dishonesty” should align with that applicable in civil law as set out in *Ivey*. Under this test, a jury would have to ask itself, first, what the defendant believed the facts to have been, and, second, whether the defendant’s actions were dishonest by the standard of a reasonable and honest person.

Although not strictly binding on them, on the basis of the strong indication of the Supreme Court in *Ivey* criminal courts began applying this new test for “dishonesty”. Inevitably, an appeal came before the Court of Appeal Criminal Division which allowed it to consider whether to overrule *Ghosh* in light of *Ivey*. The case in question concerned the May 2018 conviction and sentencing of the owner and the general manager of a nursing home to 21 and six years’ imprisonment, respectively, for defrauding wealthy but vulnerable residents. The trial judge had directed the jury in accordance with *Ivey* and this was the central ground of appeal. Given its importance, the appeal was heard by five appellate judges with the Lord Chief Justice presiding. On 29 April 2020 judgment was handed down in *R v David Barton and Rosemary Booth*.<sup>3</sup>

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<sup>1</sup> [1982] QB 1053.

<sup>2</sup> [2017] UKSC 67.

<sup>3</sup> [2020] EWCA Crim 575.

The fact that the Supreme Court in *Ivey* took it upon itself to direct a very significant change to the criminal law when deciding a civil case, and without the benefit of a lower court's decision to scrutinise or hear submissions of counsel on the point, has raised eyebrows. The Court of Appeal acknowledged that the Supreme Court in *Ivey* had created a new rule of precedent in criminal law whereby where a unanimous Supreme Court can, even in the context of an appeal not concerned with the point, direct the criminal courts, including the Court of Appeal, to disregard otherwise binding precedent from the Court of Appeal itself.<sup>4</sup> In the case of *Ivey*, this included the setting out and effective direction to adopt the alternative test for criminal "dishonesty."

The Court of Appeal therefore confirmed that the *Ivey* test for "dishonesty" should apply in criminal law and summarised it as: "(a) what was the defendant's actual state of knowledge or belief as to the facts; and (b) was his conduct dishonest by the standards of ordinary decent people?"<sup>5</sup> The Court emphasised that this is in fact "a test of the defendant's state of mind—his or her knowledge or belief—to which the standards of ordinary decent people are applied" and that dishonesty should be assessed "by reference to society's standards rather than the defendant's understanding of those standards".<sup>6</sup> The Court found that the trial judge's jury directions regarding dishonesty were correct because they also required an enquiry into the defendants' actual knowledge or belief as to the relevant facts. This included reminding the jury that the case put forward by Barton and Booth was that they believed that none of the residents were vulnerable, that each had access to independent advice and that each transferred large sums of money to Barton out of gratitude and affection towards him.<sup>7</sup> The jury was directed to decide the issue of dishonesty against the background of facts as they found the defendants had believed them to be.<sup>8</sup>

Criminal courts will therefore confidently continue to apply the *Ivey* test for dishonesty and, consequently, a more objective approach to liability for fraud offences.



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<sup>4</sup> Ibid. at para 104.

<sup>5</sup> Ibid. at para 84.

<sup>6</sup> Ibid. at para 107.

<sup>7</sup> Ibid. at para 114.

<sup>8</sup> Ibid. at para 116.