



BEDFORD ROW

“DISHONESTY” – A NEW TEST

INTRODUCTION

1. With Barton and Booth [2020] EWCA Crim 575 The Court of Appeal have delivered a landmark judgement which confirms the test that juries are to apply when assessing ‘dishonesty’. Any uncertainty as to what test to be applied has been resolved.
2. For 38 years the definition of ‘dishonesty’ has been as set out in the case of Ghosh [1982] QB 1053. The Court of Appeal has now re-visited this test, and effectively replaced it with the test as propounded in Ivey – Ivey v Genting Casinos (UK) trading as Cockfords Club [2017] UKSC 67; [2018] AC 391.
3. Such was the importance of the points raised as to the correct definition of dishonesty that the Court of Appeal sat as a court of five, with the Lord Chief Justice delivering the judgement which was handed down on 29th April 2020. Having considered the conflict that has arisen between on the one hand *Ghosh*, and on the other hand *Ivey* (and other more recent cases), the Lord Chief Justice stated ‘We are satisfied that the decision in *Ivey* is correct and to be preferred... The test for dishonesty in all cases is that established in *Ivey*’ [1 and 105].
4. The full judgment can be accessed, via BAILII → [https://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWCA/Crim/2020/575.html&query=\(Barton\)+AND+\(booth\)](https://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWCA/Crim/2020/575.html&query=(Barton)+AND+(booth))

BARTON & BOOTH: THE FACTS

5. Mr Barton ran a luxury nursing home in Southport Lancashire, and the defendant Booth was the General Manager. Mr Barton was convicted of offences of dishonesty which had occurred over a period of almost 20 years. He committed the offences against vulnerable, unsuspecting (and childless) residents. The sums involved were in excess of £4 million, and he had also attempted to obtain a further £10 million from one of the resident’s estate. In short Mr Barton befriended and ‘groomed’ wealthy victims, manipulated them and isolated them from their families and friends. He then exploited them in a number of different ways, all of which had the result of divesting them of large sums of money. His actions were described as involving a ‘high level of exploitative criminality’.
6. The trial was held at Liverpool Crown Court from May 2017 to May 2018, with various breaks. Mr Barton ultimately received a sentence of 17 years (reduced from 21 on appeal).

THE CONFLICTING TESTS OF DISHONESTY

7. The old Ghosh test summarised:
 - i. Was the defendant's conduct dishonest by the ordinary standards of reasonable and honest people.
 - ii. If the answer to (i) is 'yes', then did the defendant himself realise that what he was doing was by those standards dishonest. (In other words, a 'subjective test').

8. The Ivey test summarised
 - i. What was the defendant's actual state of knowledge or belief as to the facts, and;
 - ii. Given that state of knowledge - was the defendant's conduct dishonest by the standards of ordinary decent people. (In other words an 'objective test')

9. The Judge in the Liverpool Crown Court trial directed the jury using the Ivey test. The defendants appealed. They submitted that the Ghosh test was to be preferred. They failed in that appeal, so it follows that the Ivey test now prevails on the definition of dishonesty.

THE PROBLEMS THAT HAD ARISEN WITH THE GHOSH TEST

10. Lord Hughes in the case of Ivey had stated that there were a number of problems with the Ghosh test. The main problem was that the more warped that a defendant's standard of behaviour was then the less likely he could be found guilty of an offence. There were other problems. For example, it was thought that juries found the Ghosh test difficult to apply; that the Ghosh test represented a divergence from the definition of dishonesty in civil cases; and that the Ghosh test was a departure from the law that had gone before it and prior to the 1968 Theft Act.

11. In Barton the Court of Appeal stated [107] that "the test of dishonesty formulated in Ivey remains 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. This results in dishonesty being assessed by reference to society's standards rather than the defendant's understanding of those standards."

12. In effect the change from the Ghosh test to the Ivey test removes the requirement that a defendant must appreciate his own dishonesty by reference to the standards of ordinary decent people.

THE HURDLE OF PRECEDENT?

13. Although the centrepiece of Barton is ending the uncertainty over whether the criminal courts should prefer the dishonesty test of Ivey over Ghosh, the judgment is noteworthy for the means by which the Court of Appeal disappplied

Ghosh. Following the common law rules of precedent, it would, at first sight, only be the Supreme Court capable of disapplying Ghosh, expressly stated as ratio in a judgment, as opposed to obiter. Instead, in Barton, the Court of Appeal followed the Supreme Court's obiter comments, in a civil case which did not expressly assess whether the conduct of Mr Ivey was dishonest [87].

14. It is clear that the view of the Court of Appeal in Barton is that one consequence of Ivey was that the Supreme Court modified the rules of precedent and that they were therefore bound to follow the obiter formulation of the new dishonesty test in Ivey [102 – 104].
15. The Court of Appeal held this to be the case as the Supreme Court had ***unanimously*** directed itself in Ivey that when: “an otherwise binding decision of the Court of Appeal [Ghosh] should no longer be followed and proposes an alternative test that it says must be adopted, the Court of Appeal is bound to follow what amounts to a direction from the Supreme Court even though it is strictly obiter” [104].
16. The Court of Appeal in Barton, have explained the means by which they followed Ivey and depart from Ghosh, through analogy to the cases of: R v James; R v Karmimi [2006] QB 588; [2006] EWCA Crim 14.
17. In James, the Court of Appeal considered whether the correct statement of law on provocation was contained within R v Smith (Morgan) [2001] 1 AC 146 or AG Jersey v Holley [2005] 2 AC 580. The court found favour with Holley despite that being a decision of the Privy Council and therefore not to be followed over Smith which was a decision of the more senior House of Lords. In giving judgment in James, Lord Philips identified three features which entitled the Court of Appeal to follow the Privy Council decision of Holley rather than that of the House of Lords in Smith [101].
 - i. All the Law Lords sitting in the Privy Council, including those who dissented agreed that the decision definitively clarified English law.
 - ii. The Law Lords sitting in the Privy Council constituted half the Appellant Committee of the House of Lords
 - iii. The result of an appeal to the House of Lords was a foregone conclusion (by virtue of a majority composition of House of Lords consisting of the same Law Lords sitting on the Privy Council in Holley).
18. From the perspective of precedent, in Barton, the Court of Appeal argues that they were in a “strongly analogous” position to James. The Court of Appeal states, that in actuality, they are in a stronger position still, in the sense that they are compelled to follow the obiter comments in Ivey; such comments have come from the Supreme Court as a direction, as opposed to in James in which the then Court of Appeal favoured the Privy Council over a decision of the House of Lords [102].
19. In short, the Court of Appeal in Barton, concluded that the unanimously direction of the Supreme Court, to follow its objective dishonesty test in Ivey, modified the law of precedent by making the new test apply despite it being

merely obiter; as were argument on the test be heard before the Supreme Court the result would invariably be the same - Ghosh being overturned.

IMPLICATIONS & ANALYSIS

20. The obvious implication of Barton is there can now be no dispute over which dishonesty test is to be preferred. The Court of Appeal clearly hope that many of the issues and problems concerning the Ghosh test are now resolved (see paras 9-11 above). Furthermore, there is also now uniformity between the civil and criminal jurisdictions when it comes to testing for dishonesty. This uniformity is likely to be welcomed by regulators who frequently deal with matters of dishonesty such as the FCA.
21. There are however significant questions still left to answer. Indeed, the Court of Appeal in Barton acknowledged this in stating: “There is, no doubt, a range of consequential issues that will need to be decided following the decision in Ivey.” [109].
22. Although the Court of Appeal in Barton were keen to stress that subjective consideration of the defendant’s state of mind could take place in the first stage of Ivey test, before subsequent application to the objective standard, it is difficult to see how such an analysis will be as fair to defendants as the Ghosh test [108]. The wholesale removal of a clear subjective limb for testing dishonesty, will clearly count against defendants. Any expectation that Barton may pave the way for a surge in appeals therefore is likely to be unfounded.
23. It is possible that some may criticise Barton on the basis that the Supreme Court heard no argument on whether to replace Ghosh or not in Ivey. Ivey being a civil case, where the Supreme Court thought it unnecessary to fully assess dishonesty, but took the opportunity to clarify the test regardless [87]. As such the Supreme Court in Ivey did not “have the benefit of the detailed analysis of the consequences for the criminal law of departing from Ghosh”¹
24. By extension it may be possible to argue, in contrary, to what the Court of Appeal in Barton suggest through analogy to the case of James, that one could not conclude that the result of an appeal to the Supreme Court (on the point of dishonesty / Ghosh) would be a foregone conclusion (as the Court of Appeal pointed to through reference to the words of Lord Philips in James, para 16 above).

CONCLUSION

25. The ambiguity over which dishonesty test to be applied by practitioners in Crown and Magistrates’ Courts across the jurisdiction, has now been resolved in favour of the Supreme Court formulation in Ivey. What is equally clear

¹ Professor David Ormerod and Karl Laird, “IVEY v GENTING CASINOS – MUCH ADO ABOUT NOTHING?”, UK Supreme Court Yearbook 2018, 391

however, is that debate over both the means and the merits of this decision are likely to rumble on for some time to come.

26. In a society grappling with the fallout from coronavirus, where crimes of dishonesty, such as fraud are widely predicted to soar, perhaps the decision in Barton will have even greater and more frequent applicability than the Supreme Court could ever have envisaged when it formulated the Ivey test in 2017.

Jollyon Robertson
Matthew Simpson

9 Bedford Row