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NEWS

UK prosecutors' task made easier by Court of Appeal decision

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John Gibson and Tim Harris (Credit: Cohen & Gresser)

John Gibson and Tim Harris of Cohen & Gresser in London discuss the implications of the Court of Appeal's recent judgment in *Barton*, which has definitively consigned the *Ghosh* dishonesty test to legal history, but in doing so, has replaced it with a test that is arguably unfair for defendants charged with dishonesty offences and which could lead to greater confusion for juries.

As fraud investigations and prosecutions are eventually expected to increase in light of the Covid-19 pandemic, this article considers some of the implications for those accused of complex fraud allegations by the alteration of the legal test for dishonesty.

In a judgment handed down on 28 April 2020, the Court of Appeal hammered the final nail into the coffin of the subjectively honest mental state defence. The Lord Chief Justice's ruling in *R v Barton & Booth* confirmed that the criminal test for dishonesty in *Ivey v Genting Casinos* in 2017 has displaced the test in *R v Ghosh* from 1982. The judgment will be received with great relief by prosecuting authorities. *Ivey* is considerably more generous to the prosecution than *Ghosh*, removing, as it does, the opportunity for defendants to argue that they did not realise that their conduct would be considered dishonest – a personal and subjective assessment.

Barton was described by the Lord Chief Justice as "one of the most serious cases of abuse of trust that I suspect has ever come before the courts in this country" and concerned the targeting, befriending and grooming of wealthy and vulnerable elderly residents of a care home. The principal issue for the Court of Appeal to decide was whether the jury in the original Crown Court trial was correctly directed to apply the test for dishonesty given in *Ivey* (rather than *Ghosh*).

Since 1982, the criminal test for dishonesty has been that set out in *Ghosh* as follows:

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(a) Was what was done dishonest according to the ordinary standards of reasonable and honest people? If no, D is not guilty. If yes —
(b) Did the defendant realise that reasonable and honest people regard what he did as dishonest? If yes, he is guilty; if no, he is not.

The *Ghosh* test allowed a defendant to present evidence of his subjective view of the honesty of his acts. *Ghosh* had its academic critics but for 35 years it was applied and with surprisingly little challenge in the criminal courts. When the UK parliament debated and formulated what became the Fraud Act 2006, it was on the basis that *Ghosh* would apply to the dishonesty element of what became the relevant mental state for the principal Fraud Act offences. The mental state for the offences was drafted broadly. Provided the relevant criminal act is carried out, a person will be guilty if they dishonestly intend (i) to make a gain for themselves or another, or (ii) to cause loss to another or to expose another to a risk of loss.

This all changed following the Supreme Court's ruling in the civil case of Ivey. Mr Ivey was a professional gambler, who sued a casino to recover his winnings at baccarat. The casino refused to pay out because it believed Ivey cheated. The Supreme Court considered questions about the meaning of the concept of cheating at gambling and the relevance of dishonesty to that concept. Lord Hughes provided the single judgment in *Ivey* on behalf of the court. He held, among other things, that *Ghosh* did not correctly represent the law and directions on it ought no longer to be given. Lord Hughes identified a number of "serious problems" with *Ghosh*, including that it is a "test which jurors and others often find puzzling and difficult to apply". He argued that the test for dishonesty should be the same in both the civil and the criminal courts. While his remarks were held to be *obiter* because they were not necessary for the decision of the court, *Ivey* was subsequently applied by both civil and criminal courts as the test for dishonesty.

In *Barton*, the Court of Appeal agreed that Lord Hughes' argument was compelling and was bound to follow it. Therefore juries will henceforth continue to be directed as per *Ivey* to consider:

What was the defendant's actual state of knowledge or belief as to the facts; and Was his conduct dishonest by the standards of ordinary decent people?

In *Barton*, likely aware that *Ivey* had been characterised as an objective only test, the Court of Appeal provided some gloss to the test, stating that it included "all matters that lead an accused to act as he or she did will form part of the subjective mental state, thereby forming a part of the fact-finding exercise before applying the objective standard. That will include consideration, where relevant, of the experience and intelligence of an accused [emphasis added]."

But does it matter that a defendant can be prosecuted without realising that their conduct was dishonest? And if so, should we be concerned?

As part of the *Ivey* test, as refined in *Barton*, the jury must consider the defendant's knowledge of facts as relevant to their objective assessment of his dishonesty. A defendant's mental state and appreciation of their conduct based on the facts as understood can be taken into account as part of the jury's assessment of the facts

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presented at trial. Defendants will, however, not have the safeguard of being able at trial to stand back from those facts and defend their actions based on whether they realised that what they did was dishonest.

This matters because, as above, the mental state test for the Fraud Act 2006 offences is startlingly broad. An offence can be committed where a person neither dishonestly intended to make a gain or cause a loss but where they dishonestly "expose another person to a risk of loss".

For those individuals employed by banks and other financial institutions, their conduct inherently exposes a counterparty or their firm to a risk of loss. Conduct which they considered at the time to be genuinely honest and in line with appropriate market conduct or standards, could be considered by a jury to have fallen below its own standards for honest conduct. The accused trader was wrong and should have realised that his conduct was dishonest. While a negligent trader should not be held to be dishonest, the line for judging a person's honesty, for an offence that carries a maximum custodial sentence of 10 years, has become uncomfortably uncertain.

With the dishonest mental state of the defendant carried out as part of the fact-find of the trial, there is an argument, advanced not least by Professor David Ormerod QC, one of the most respected legal academics and a frequent advisor to UK law enforcement, that the honesty (or otherwise) of the accused's conduct has become part of the assessment of their alleged illegal act (or omission). If this is the case, Fraud Act offences begin to appear more akin to strict liability offences – where the offence is committed where the illegal act is carried out. The issue is likely to return to the Court of Appeal – as appears to be anticipated by the court. In our view, it would be remarkable if Parliament had intended the mental state of the Fraud Act offences, to be as broad as it has become based on the *Ivey* formulation of dishonesty.

The decision has significant implications for complex fraud offences relating to the financial markets. While a defendant can adduce evidence of their knowledge of the market and subjective trading strategy in the first *Ivey* limb, it is largely irrelevant that they did not appreciate that their conduct would be considered dishonest. Despite Lord Hughes' concerns about the complexity of directing a jury on *Ghosh*, there is an argument that what facts a jury may be allowed to consider were within the defendant's knowledge as relevant to, for instance, their allegedly dishonest trading strategy, is likely to be even more confused. We expect more legal argument on these issues at trial.

Finally, in respect to certain common-law offences, such as conspiracy to defraud and cheating the public revenue, the constituent part of the mental state is dishonesty. Complex schemes for the purposes of mitigating tax, which may include holding assets in offshore jurisdictions, which would previously be considered by HMRC to be tax avoidance, may come to be investigated and prosecuted on the basis that a jury would be more likely, including for moral reasons, to find such conduct dishonest by society's prevailing standards (and irrespective of whether the taxpayer realised their conduct was dishonest). As a result of *Ivey* and *Barton*, the thickness of the prison wall between tax avoidance and evasion may have become significantly thinner.

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