COLLAS CRILL

But I thought it was legit, honest guv! - Ivey v Genting Casinos (UK) Ltd

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The UK Supreme Court recently handed down its far-reaching judgment in *Ivey v Genting Casinos (UK) Ltd* [2017] UKSC 67, clarifying the test for dishonesty across all branches of the law.

Whilst the facts of the case were reminiscent of a Hollywood film, involving a professional gambler and a "*carefully planned and executed sting*", the judgment is also significant for directors and other professionals offshore.

The court found that the test for dishonesty previously applied in both criminal and disciplinary proceedings is no longer the correct test. Instead, the test already used in civil cases should now be applied across the board.

Although simplification of the law must be welcomed, the adoption of the civil test across the board inevitably means that directors and professionals are now at greater risk of findings of dishonesty. In reality, that is most likely to be in the context of regulatory and disciplinary proceedings.

The Facts

Mr Ivey is a professional gambler. In August 2012, he "won" over £7million playing Punto Bancoat a London casino. He achieved this by utilising a technique called "edge sorting" which gave him an advantage over the casino. Unfortunately for Mr Ivey, the casino realised what had happened and refused to pay out. Mr Ivey subsequently sued the casino for breach of contract.

Briefly, Mr Ivey falsely represented to the dealer that he was superstitious and thereby manipulated her into turning the cards in a way that allowed him to employ the "edge sorting" technique. Casinos tend to pander to clients' superstitious beliefs as they are, by definition, irrational and usually lead to clients losing even more money.

Mr Ivey persuaded the dealer to rotate the "good" cards – claiming they were "lucky" – before returning them to the deck, which meant that all of those "good" cards were rotated in the same direction. Thanks to tiny differences in the printed pattern on the back of the cards, he was then able to use his undoubted skill to tell when the "good" cards were dealt in later rounds. This tipped the odds of winning slightly in his favour, and he did.

The Arguments at Trial

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At trial, Mr Ivey accepted that his contract with the casino included an implied term not to cheat and that, if he had cheated, the casino was entitled to withhold his "winnings". He also admitted "edge sorting" but claimed it was "legitimate gamesmanship" – he describes himself as an "advantage player".

Therefore, the core argument was whether or not Mr Ivey had actually cheated. The trial judge concluded that:

- Dishonesty was not a necessary ingredient of cheating;
- Mr Ivey's conduct objectively constituted cheating; and
- Mr Ivey was "*genuinely convinced that he is not a cheat*.

On appeal, Mr Ivey argued that:

- Dishonesty is a necessary ingredient of cheating;
- He had not been dishonest, because his genuine beliefs about his conduct (as found by the trial judge) meant that he was not dishonest under (what was then) the criminal test;
- Thus, he did not cheat.

The Court of Appeal dismissed Mr Ivey's appeal, principally on the basis that dishonesty is not a necessary ingredient of cheating.

But the resilient Mr Ivey was not giving up just yet and appealed to the Supreme Court.

The Supreme Court agreed with both lower courts that cheating does not require dishonesty, rejecting the first limb of Mr Ivey's argument. That was fatal to his appeal and their judgment could have ended there but, instead, Lord Hughes went on to consider whether Mr Ivey was dishonest in any event. In doing so, his Lordship took the opportunity to discuss the test for dishonesty more broadly.

In *R v Ghosh (1982)*, a criminal case, the Court of Appeal held that:

- The test for dishonesty had two elements:
  1. Whether, according to the ordinary standards of reasonable and honest people, what was done was dishonest (the objective element); and
  2. If it was dishonest by those standards, whether the defendant himself must have realised that what he was doing was by those standards dishonest (the subjective element).
- The defendant was only dishonest if the answer to both questions is 'yes'.

This two-part *Ghosh* test had also been applied in disciplinary cases involving various professionals, such as solicitors, accountants, medical professionals, and barristers.

However, Lord Hughes (among other critics) believed the subjective element of the *Ghosh* test to be undesirable: a defendant must realise that ordinary, reasonable and honest people would see his behaviour as dishonest before the defendant himself can be found dishonest.

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This arguably allows the defendant to set his own standards and the more haywire his moral compass the more likely he would escape liability. Applied to Mr Ivey's situation, the subjective element would mean that Mr Ivey, who was convinced that he was using a legitimate gambling technique, would not be found dishonest.

However, a different approach was already taken in civil cases. In *Barlow Clowes International Ltd v Eurotrust International Ltd* (2006), the Privy Council held that the test for dishonesty was if, by 'ordinary standards', a defendant's mental state would be characterised as dishonest, then it was irrelevant that the defendant subjectively thought his conduct was honest. In other words, the test was an exclusively *objective* one and results in a lower bar to establish dishonesty.

In his judgment in *Ivey*, Lord Hughes held that the *Ghosh* test "*does not correctly represent the law*". Instead, he held that the test set out in *Barlow Clowes* should be used in all cases.

Given the deference with which the offshore courts (rightfully) treat judgments of the Supreme Court, we expect that *Ivey* now represents the law in offshore financial centres as well.

It should also be noted that while a defendant's beliefs as to their own honesty are now irrelevant, this does not mean that all subjective beliefs are now irrelevant. Such beliefs are still relevant in that the objective test must be applied to the beliefs that the person actually held. The relevance of those beliefs will however depend on the exact, individual facts of the case in question. A person who genuinely believes that public transport is free, having come from a country where it is free (the hypothetical scenario posed in *Ghosh*), does not act dishonestly. On the other hand, a man who deceives a casino into giving him an advantage in a game by false representations, genuinely believing that such conduct is fair game, does.

Conclusion

Ivey is now the leading authority on the definition of dishonesty in any legal proceedings, whether criminal, civil, regulatory, or otherwise, and the more rigorous *Ghosh* test appears to be consigned to history. No longer can a party seek to evade a finding of dishonesty merely by arguing that he genuinely did not consider his conduct dishonest.

Given that criminal proceedings against directors and other professionals are thankfully rare, we expect that the greatest difference that will result from *Ivey* is in the context of regulatory and disciplinary proceedings where a lower threshold will now apply, but only time will tell.

And what of Mr Ivey? Well, his persistence in pursuing his claim all the way to the Supreme Court meant that he successfully appealed his way to a finding that he had been dishonest to the criminal standard! A salutary tale in recognising when the stakes are getting too high and that "doubling-down" could result in disaster...

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