

The Future of Dishonesty – Some Practical Considerations

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Introduction

On 29 April 2020, three months after it heard oral argument, a five-member Court of Appeal¹ delivered its judgment in *R v Barton; R v Booth* (“*Barton*”).² The court confirmed that the criminal law test of dishonesty is that suggested *obiter* by the Supreme Court in *Ivey v Genting Casinos* (“*Ivey*”):³ the *Ghosh* test⁴ is abolished. The test to be applied is now settled, but the court declined the opportunity to consider numerous consequential implications. In this brief article our focus is on some immediate practical problems facing the courts, although we recognise fully the theoretical significance of the redefinition of the dishonesty test and the court’s novel approach to *stare decisis*. By way of introduction it is necessary to say something about *Ivey*.

The Supreme Court’s rejection of *Ghosh*

Applying *Ghosh*,⁵ in those rare cases in which a direction on dishonesty was necessary, the jury were required to apply a two-limb test. They first had to consider whether the defendant’s conduct was dishonest according to the standards of reasonable and honest people. If the defendant’s conduct was dishonest according to that standard, the jury could only convict if the defendant realised that his conduct would be considered dishonest by that standard. One context in which the test was significant was recognised in *Hayes*,⁶ where the defence relied on evidence about practises in a particular industry, such as banking. Lord Thomas CJ in that case held that such evidence was relevant only to the second limb of the *Ghosh* test, but not the first.

In *Ivey* Lord Hughes catalogued the reasons for rejecting the *Ghosh* test, focussing exclusively on the problems of the subjective second limb. It rendered the test for dishonesty

¹ Which included the Lord Chief Justice, the President of the Queen’s Bench Division and the Vice President of the Court of Appeal (Criminal Division).

² *R v Barton; R v Booth* [2020] EWCA Crim 575.

³ *Ivey v Genting Casinos (t/a Crockfords Club Ltd)* [2017] UKSC 67.

⁴ *R v Ghosh* [1982] Q.B. 1053.

⁵ For discussion of the *Ghosh* test in this context see D. Ormerod and K. Laird, “*Ivey v Genting Casinos* – Much Ado About Nothing?” (2019) 9 *Supreme Court Yearbook* 1 at <https://ukscy.org.uk/doi/10.19152/ukscy.762>

⁶ *R v Hayes* [2015] EWCA Crim 1944.

inconsistent with the civil law, was difficult for juries to apply, and provided an opportunity for a defendant with warped moral standards to exploit the test.⁷ The Supreme Court was keen to remedy these defects but without making the test for dishonesty purely objective. The test formulated by the court in *Ivey* requires the jury first to ascertain the actual state of the defendant's knowledge or belief as to the facts. Once ascertained, the question for the jury is whether his conduct was dishonest according to the standards of ordinary decent people. Unlike under *Ghosh* there is no requirement that the defendant must appreciate what he has done is, by those standards, dishonest.

***Barton*: the demise of *Ghosh* confirmed**

Barton owned a luxury care home. The Crown's case was that he dishonestly targeted, befriended, and "groomed" wealthy and vulnerable (and childless) elderly residents in order to profit from them. He was convicted of various dishonesty offences, including theft, and sentenced to 21 years' imprisonment. His co-defendant, Booth, alleged to be his "eyes and ears" managing the home, was convicted of conspiracy to defraud.

The judge directed the jury in accordance with *Ivey*, as the Supreme Court's judgment was delivered during the course of the 12-month trial. On appeal, the appellants argued that the judge should have applied *Ghosh* and not the test suggested *obiter* in *Ivey*. In a judgment delivered Lord Burnett CJ, the Court of Appeal rejected this and held that it was bound to follow what, although strictly *obiter*, amounted to a binding direction from the Supreme Court.⁸ The Court succinctly stated the test for dishonesty as follows:

- (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.⁹

Immediate issues

Barton's confirmation that, for criminal law, dishonesty is as described in *Ivey* and not *Ghosh* was predictable. The courts had previously voiced concern about *Ghosh* in several cases.¹⁰ Although *obiter*, Lord Hughes' analysis in *Ivey* left no doubt that *Ghosh* was history. Indeed, it would have been surprising if *Barton* had not followed *Ivey* given the strong endorsement of

⁷ [2017] UKSC 67 [58].

⁸ On the implications see R Percival, issue x p xxx.

⁹ [2020] EWCA Crim 575 [84].

¹⁰ *R v Cornelius* [2012] EWCA Crim 500; *Starglade Properties Ltd v Nash* [2010] EWCA Civ 1314.

Ivey by Sir Brian Leveson P in *Patterson v DPP*,¹¹ the Court of Appeal's approving reference in *Pabon*,¹² and the explicit advice to judges in the *Crown Court Compendium* to follow *Ivey*. Space precludes further analysis of the relative merits of the *Ivey* and *Ghosh* tests. That is an important but now academic debate: the law is settled in favour of *Ivey*. more pressing is the need to resolve several practical issues that will confront practitioners and judges in the near future. Crucial to understanding the application of the law is appreciating the relationship between the first and second limb of the *Ivey/Barton* test and being very specific about the elements involved. It is unhelpful to assert that the second limb of *Ghosh* is gone without providing further explanation.

Dishonesty – conduct, states of mind and their assessment

The approach taken to dishonesty has shifted over the course of 50 years and can be summarised as follows:

*Feely*¹³ when read properly, required:

- (a) Determination of the conduct/facts;
- (b) An objective assessment of the conduct/facts (having regard to *D's state of mind* about them, albeit this latter aspect was not made explicit¹⁴) applying the standards of ordinary decent people;

Ghosh required:

- (a) Determination of the conduct/facts;
- (b) Objective assessment (standards of reasonable honest people) of whether the conduct was dishonest;
- (c) *D's* state of mind as to (a) and (b) i.e. the conduct and what reasonable honest people would think of it.

As a result of *Ivey/Barton*, in our view, dishonesty *now* turns on:

- (a) Determination of the conduct/facts;
- (b) Determination of *D's* belief about the conduct/facts (subjective state of mind); and,

¹¹ *Patterson v DPP* [2017] EWHC 2820 (Admin).

¹² *R v Pabon* [2018] EWCA Crim 420.

¹³ *R v Feely* [1973] Q.B. 530 at 541.

¹⁴ See E. Griew, *The Theft Act* (7th ed 1995) para 2-132 et seq.

- (c) A decision whether to classify the conduct, in the light of D's subjective beliefs, as dishonest according to the standards of ordinary decent people.

Barton - Limb 1

The preliminary task, uncontroversially, is for the jury to establish the facts. We need say no more about that. The jury must then consider the first limb of the new test. That involves ascertaining the defendant's state of mind. In *Ivey* Lord Hughes was clear it is a subjective assessment – what was in this defendant's mind. This first limb is designed to address the well-worn example of the foreign tourist who does not realise that people must pay to use public transport in the UK.¹⁵ Whereas previously the second limb of *Ghosh* would come to the “rescue”¹⁶ to ensure acquittal; now it is intended for the first limb to fulfil this purpose. What *Ivey* did not make clear was the scope of the jury's inquiry: what facts or beliefs which the defendant might have held are the jury to consider? Did the Supreme Court in *Ivey*, by removing the second limb of *Ghosh* but retaining subjectivity in this first limb, mean to (a) render totally irrelevant D's belief as to the perceptions of others about the honesty of the conduct? Or (b) remove the binding nature of that belief – if D did not believe others would see it as dishonest would he be entitled to an acquittal under *Ghosh* ?

The court in *Barton* provided the answer at para 108: the reference in *Ivey* to the “actual state of mind as to knowledge of belief as to the facts” was to all the circumstances known to the accused and not limited to consideration of past facts. Lord Burnett C.J. explained that, “[a]ll 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”¹⁷ (emphasis added). We suggest therefore that in limb 1 the jury are to have regard not only to D's state of mind as to the facts, but also as to his beliefs about whether the conduct would be seen as dishonest (a matter which led him to act as he did).

Barton - Limb 2

The second limb of the test requires the jury to decide whether the defendant's conduct (having regard to his beliefs about the conduct/facts), was dishonest according to the standards of

¹⁵As Campbell pointed out decades ago, if *Feeley* [1973] Q.B. 530 was applied properly *Ghosh* did not need to deal with this by creating limb 2. See K. Campbell, “The test of dishonesty in *Ghosh*” (1994) 43 C.L.J. 349.

¹⁶G. Williams, *Textbook of Criminal Law* (2nd ed 1983), page 728.

¹⁷*R v Barton; R v Booth* [2020] EWCA Crim 575, [108].

ordinary decent people. As noted above, *Ghosh* included an objective limb, but under *Ivey/Barton* the objective limb takes on primary significance. Academics' "almost universal dissatisfaction"¹⁸ with *Ghosh* had largely focussed on the objective limb. Although the Supreme Court and the Court of Appeal acknowledged the existence of this academic commentary, neither judgment engages with the challenges raised. Perhaps the most problematic aspect of the test for dishonesty—that it assumes the existence of a community norm on dishonesty—has become its most prominent feature.¹⁹

The relationship between the two limbs

The Supreme Court did not expand on the relationship between the subjective and objective limbs of the reformulated test for dishonesty and nor did the Court of Appeal in *Barton* other than explaining limb 1 as above. Analogies might be drawn with the two limbs of self-defence but it seems sensible to focus on the language of the judgment in *Ivey* and *Barton*.²⁰

Considering the way the test is expressed (see paragraph 84, cited above and para 60 of *Ivey*), it cannot have been intended that the two limbs of *Ghosh* were simply to be inverted. That would require the jury to ask what the defendant thought others would think was dishonest and then apply an objective assessment of dishonesty *constrained by* what the defendant thought others would consider was dishonest.²¹ Accepting that approach to be untenable, what is the correct interpretation?.

We suggest that the answer lies in appreciating the nature of the assessment required by first limb. As we have noted, the jury is required to assess the defendant's conduct *and* state of mind as broadly construed in para 108 above. It would, in practice, be wrong for the judge to limit that assessment by restricting what the defendant can adduce in evidence about either what he thought was dishonest or what he thought others thought was dishonest. It follows from para 108 that it cannot be right to direct a jury that such evidence is to be ignored as irrelevant. Such an interpretation would contradict para 108 and would, in effect, overturn *Hayes*, but there is no suggestion this was the intention of either the Supreme Court or the Court of Appeal and it is contrary to the language of both judgments.

¹⁸ ATH Smith, *Property Offences*(1994), para 7-60.

¹⁹ For a summary of the criticisms of the objective limb, see D. Ormerod and K. Laird, *Smith, Hogan, and Ormerod's Criminal Law* (15th ed, 2018), pp 870-885.

²⁰ The analogy is not perfect: in self-defence, the jury assesses D's subjective perception of one issue (the need to use force) and then applies an objective assessment of a different issue (the amount of force used).

²¹ That would be closer to the self-defence test.

Accepting that limb 1 requires the jury to consider D's beliefs about all the circumstances, we must consider how the jury is permitted to use that in applying the second (objective) limb. When it eventually confronts the issue, we suggest that there are at least two ways in which the Court of Appeal might answer that question. First, it could hold that evidence of what the defendant believed about the honesty of his actions was evidence relevant only to his credibility. This is, we suggest, an undesirable approach. The distinctions between 'issue' and 'credibility' bedevil other areas of criminal law, and to say in this context that the defendant's perception of the honesty of his conduct affects only his likely honesty as a witness seems particularly unhelpful. The second approach is more pragmatic: to recognise that defendants are entitled to adduce evidence of their perceptions of the honesty of their conduct; to tell the jury they can have regard to that evidence but also, crucially, to direct the jury that what the defendant believed is not determinative of whether that conduct was dishonest by objective standards.

The relationship between the limbs and the way the jury is to be directed has real practical significance in cases such as *Hayes*. A defendant should be entitled to adduce evidence about industry practises (as they were entitled to do under the subjective limb of the *Ghosh* test), but the jury is no longer *bound* to acquit if the defendant held a belief that ordinary decent people would not regard his conduct as dishonest.

Where necessary, juries should be directed to approach dishonesty as follows:

1. What were the facts or circumstances at the time D did what he is alleged to have done by the prosecution?
2. What was D's knowledge or belief as to those facts or circumstances. You are entitled to consider D's explanation for his conduct, his experience and his intelligence.
3. Having regard to the facts *and* D's state of mind about them, was his conduct dishonest according to the standards of ordinary decent people.
4. D's belief about the honesty of his conduct, or what others think of his conduct, is not conclusive. The standard of honesty in law is that of ordinary decent people, which is a matter for you and not the defendant.

When is a dishonesty direction required?

The *Ghosh* direction was only given in cases where the defendant claimed he did not realise that reasonable honest people would regard his conduct as dishonest.²² Should juries now be directed on how to approach dishonesty in every case? A new approach is necessary because the reformulated test requires the jury to consider the facts or circumstances known to the defendant, including why he behaved as he did. We suggest that there will be many cases where, if no explanation or direction on dishonesty is provided, there would be a risk that jurors would simply apply an objective assessment without having proper regard to the defendant's knowledge or belief as to the facts. The safest course may be for at least the two limb *Barton* direction (para 84) to be given in every case. That would maximise consistency and reduce the possibility of defendants being disadvantaged. In more complex cases, it will be incumbent to consider whether any expanded direction on dishonesty must be given along the lines of the 4 steps we suggest above.

Looking forward

Space precludes us from examining the myriad other issues that may call for resolution, including:²³ how the disparity between approaches in theft (where section 2 of the Theft Act 1968 mandates certain conduct is not dishonest) and other dishonesty offences where *Ivey/Barton* defines dishonesty exhaustively; whether explicit Parliamentary statements that *Ghosh* will apply in the Fraud Act 2006 have any binding force (surely not?); and whether an Article 7 ECHR claim might be made by a defendant who claims that, (even with legal advice), he could not have anticipated that a jury would consider his conduct to be dishonest.

There are two further issues worth highlighting. Both arise because the approach to dishonesty has shifted from being conclusively determined by the defendant's state of mind (limb 2 of *Ghosh*), to a test that now turns on an objective assessment of the defendant's conduct and beliefs of all the circumstances. First, a company can only commit a crime if a corporate officer who is sufficiently senior to constitute its directing mind and will ("DMW") has the necessary *mens rea*.²⁴ In *SFO v Barclays Plc*²⁵ Davis LJ recently confirmed that since liability for an offence under the Fraud Act 2006 requires a "dishonest state of mind" a

²² See *Jouman* [2012] EWCA Crim 1850, in which the Court of Appeal reaffirmed that unless the question of the subjective element was properly raised, it was not necessary for the trial judge to give a full *Ghosh* direction. See also *Roberts* (1987) 84 Cr. App. R. 117.

²³ Whether the *Ivey/Barton* test complied with Article 7 of the European Convention on Human Rights requires detailed judicial analysis. For discussion, see D. Ormerod and K. Laird, "*Ivey v Genting Casinos – Much Ado About Nothing?*" (2019) 9 Supreme Court Yearbook 1.

²⁴ For discussion, see D. Ormerod and K. Laird, *Smith, Hogan, and Ormerod's Criminal Law* (15th ed, 2018), Ch 8.

²⁵ *SFO v Barclays Plc* [2018] EWHC 3055, [129] and [131].

company could only be liable if a DMW behaved dishonestly. Following *Ivey* and *Barton* fraud turns more on the presence of a dishonest course of conduct than a dishonest state of mind. Whether this makes it easier to prosecute corporates remains to be seen, but that may prove to be the case. Secondly, to be guilty as an accessory a defendant must have knowledge or belief about any “facts” necessary to make the principal’s conduct in question criminal. Similarly, for a statutory conspiracy the defendant must intend or know the facts necessary for the commission of the offence.²⁶ Following *Ivey* and *Barton*, on a rather technical construction it is arguable that a “fact” that makes the conduct criminal in dishonesty offences is that the principal’s conduct would be considered dishonest by ordinary decent people. Could it be argued therefore that to be an accessory or a statutory conspirator the defendant must now be proved to have known/intended/believed that the principal’s conduct would be considered dishonest by ordinary decent people.²⁷ That is likely to be an unpalatable interpretation for the Court of Appeal. It would make such offences difficult to prove; would distinguish statutory conspiracy from conspiracy to defraud;²⁸ and would mean that *Ghosh* was effectively retained in such cases, resulting in different tests for different offences,²⁹ thereby defeating Lord Hughes’s aim of maximising consistency of approach. Moreover, on an examination of the elements above, it seems to be an over-simplification to say that the objective assessment of conduct is what renders it dishonest. Properly read, *Barton* requires an objective assessment of the conduct and the defendant’s state of mind about it.

Conclusion

The judgment in *Barton* is of enormous significance for the law of precedent and all offences of dishonesty, but the law remains far from satisfactory. The Supreme Court’s casting aside of the *Ghosh* test of dishonesty without detailed argument left many issues unresolved. *Barton* begins to provide the answers. Given the prominence of the role of dishonesty in so many very wide-reaching offences, further clarification is desperately needed.

²⁶ D. Ormerod and K. Laird, *Smith, Hogan, and Ormerod’s Criminal Law* (15th ed, 2018), Chs 6 and 11.

²⁷ This issue arose in *R v Nyonyintono* [2020] EWCA Crim 454 but it was not considered in any great detail.

²⁸ Unless *Churchill v Walton* [1967] AC applies.

²⁹ Almost reminiscent of the position in *R v McIvor* (1982) 1 All E. R. 49 the court in *Ghosh* sought to resolve.