

Bristol Alumni Association Lecture 2018

Dishonesty

Lady Hale, President of The Supreme Court

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Being a Supreme Court Justice is a serious business but on occasions it can also be great good fun. Undoubtedly the case which has been most fun recently is *Ivey v Genting Casinos (UK) Ltd, trading as Crockfords* [2017] UKSC 67, [2017] 3 WLR 1212.

The story begins (according to Ben Machell in *The Times Magazine*, 2 December 2017) in 2007. A little-known heiress from China called Cheung Yin Sun, with a fondness for gambling, stayed at the MGM Grand Hotel and Casino in Las Vegas. She was with some friends from China. One of them ran out of money and asked to borrow some money from her. She signed a marker (or IOU to the casino) for \$100,000 and the friend promised to repay the casino. So Ms Cheung left without paying it and thought no more about it. Six months later she arrived back in the US and was arrested and held for 21 days in a Nevada jail. When she got out she vowed to 'kill this MGM'.

How did she set about that? She mastered the art of edge sorting. Many packs of cards for ordinary domestic use have pretty pictures on the back with an obvious top and bottom, so that you know when a card is the wrong way up. This is fine for family games of 'snap' and 'beggar my neighbour' but not fine for games such as bridge when signals might be sent by turning a card the wrong way round. So the packs of cards used by serious card players and in casinos have either completely plain backs or overall symmetrical patterns, with no right or wrong way up.

But when cards are produced in factories they are cut by machines and the machines don't always cut them completely symmetrically. This means that if certain important cards are rotated

through 190 degrees a sharp-eyed person will be able to detect them. This was not a new art, but Cheung applied it to a new game – baccarat, specifically for current purposes the version known as ‘punto banco’ – literally ‘punter banker’. This is a game of pure chance, like betting on the toss of a coin.

There are two positions marked out on the table, one labelled ‘punto’ and one labelled ‘banco’. Cards are dealt face down from a deck or shoe – one to punto, one to banco, one to punto and one to banco. Only the croupier touches the cards – the player does not do so. The actual gambler or gamblers then decides whether to bet on punto or banco to win the deal. The winner is the one whose total is closest to nine. Aces to nines count at face value. Tens to Kings count as nothing. If the two cards add up to more than ten, only the second digit counts. Five plus six, for example, counts as one. Cards with a face value of 7, 8 or 9 are the best cards to have. So if the gambler knows that the first card dealt to punto is a 7, 8 or 9 he knows that punto is more likely to win. If he knows that it is not a 7, 8 or 9, he knows that banco is more likely to win. So he can place his bets accordingly.

In 2011 Ms Cheung and some friends started to take MGM casinos in Las Vegas to the cleaners by persuading the croupiers to rotate certain cards through 180 degrees before putting them back in the shoe – they said it was a Chinese superstition. Casinos are very happy to indulge superstition – especially among high rollers like Ms Cheung. They like punters to believe that something will improve their chances even though the casino knows that nothing will (or at least nothing should).

In 2012, Ms Cheung was introduced to Phil Ivey. Phil Ivey was one of the most successful professional poker players of all time. He also liked to gamble. According to Ben Machell, he was more than a high roller – he was a ‘whale’ – that is, the sort of person who is prepared to gamble one, two, three, four or five million pounds a visit. So casinos would let him play for higher stakes. Operating together in various casinos around the world, they made £20 million in a few months.

On 20 August 2012, they turned up at Crockfords in London. Everyone knew who Mr Ivey was. They did not know who Ms Cheung was. He asked to play punto banco in a private room and for a Mandarin speaking croupier. One was produced – Kathy Lau. At first he was losing. Then he requested a new shoe of cards. This time the cards were of a sort where edge-sorting was possible. He asked that, if he won, he could have the same cards again and was told that he could because he wasn't touching the cards – normally the packs are regularly replaced. He also asked the croupier to cut the cards in the traditional way – seven cards from the end. This maximised the number of deals (or coups) which would be possible using those packs of cards. After the first deal, Ms Cheung asked Ms Lau in Chinese to turn the cards – end to end if she said 'good' and side to side if she said 'not good' – this meant that the long edge of the 'not good' cards was differently orientated from the long edge of the 'good' cards. Ms Lau had no idea of the significance of what she was doing. They did this for each of the 80 deals in the shoe.

Obviously, the players got no advantage the first time. When the shoe was exhausted, Mr Ivey said that he had won £40,000 with that deck so he wanted to keep it (no-one has been able to calculate whether or not that was true). At all events he was allowed to do so. Before the cards were re-used, they had to be shuffled. Mr Ivey had earlier asked for a shuffling machine – this meant that the cards would not be rotated during the shuffle – there was a greater risk of this if they were shuffled manually. The set-up was now perfect for them: they had persuaded the croupier to rotate the cards; they had persuaded the casino to let them use the same cards; and the cards had been shuffled by machine. It still needed Ms Cheung's sharp eyes to detect the high value cards as they were dealt.

Mr Ivey increased his stakes and began to win. The accuracy of his forecasts increased dramatically. That night he won approximately £2 million. When they left in the early hours he asked if they could use the same shoe the next day and was told that he could. In under four hours' play the next day his winnings increased to £7.7 million. Half-way through the last shoe he was told that it would be replaced when finished. Mr Ivey and Ms Cheung left the club when it was.

With such a large win, it is Crockford's practice to conduct a post-mortem before paying out. The whole thing had been filmed on CCTV. They had never heard of edge-sorting but eventually they worked out what had happened and refused to pay.

Mr Ivey sued for his winnings. This couldn't have happened before 2005, because the Gaming Act 1845 made all gambling contracts unenforceable. But this had its disadvantages, not least in encouraging extra-legal methods of enforcement, so the Gambling Act 2005 introduced a comprehensive scheme for licensing gambling providers and made gaming contracts between gamblers and licensed providers enforceable. It also introduced (in section 42) a new criminal offence of cheating at gambling or enabling or assisting another person to do so. It is irrelevant whether the cheater improves his chances of winning anything or actually does win anything. Cheating includes 'actual or attempted deception or interference in connection with the process by which gambling is conducted'. But Mr Ivey and Ms Cheung have never been prosecuted for this or any other offence in connection with what they did.

However, both parties to the case agreed that the gambling contract between Mr Ivey and Crockfords contained an implied term that neither of them would cheat. Crockfords maintained that Mr Ivey was in breach of this implied term and also that he was guilty of the section 42 offence and so he couldn't recover the proceeds under the principle that *ex turpi causa non oritur actio*.

The case was tried by Mr Justice Mitting: [2014] EWHC (QB) 3394, [2015] LLR 98. He found that Mr Ivey gave frank and truthful evidence about what he had done. He was genuinely convinced that what he had done was not cheating. He described himself as an 'advantage player' who by a variety of techniques set out to reverse the 'house edge' – that is the improved chance of winning which every casino gives itself (and has to declare so that punters know). He was adamant that this is not cheating but legitimate gamesmanship. So in one sense he was not

dishonest. But the judge concluded that it didn't matter whether he thought it was cheating – the question was whether in fact and law it was. And he held that it was. So Mr Ivey was in breach of the implied term. The judge did not need, therefore, to consider whether he was also guilty of the section 42 offence.

Many punters might have stopped there, but Mr Ivey is obviously made of sterner stuff. He appealed to the Court of Appeal: [2016] EWCA Civ 1093, [2017] 1 WLR 679. In the Court of Appeal, two of the Justices thought that the meaning of cheat in the implied term must be the same as the meaning of cheat in the section 42 offence. But Lady Justice Arden concluded that the section 42 offence did not require dishonesty in the sense that term was used elsewhere in the criminal law, so she dismissed the appeal. Lady Justice Sharp, on the other hand, concluded that section 42 did require dishonesty and as the judge had found that Mr Ivey was not dishonest he was not guilty of cheating, so she would have allowed his appeal. Lord Justice Tomlinson took the view that there was no reason why the implied term should be identical to the section 42 offence. Cheating was an ordinary word of the English language and should be construed in that way. It mattered not what Mr Ivey thought. This was obviously cheating in this sense. So he too dismissed the appeal.

Nothing daunted, Mr Ivey applied for permission to appeal to the Supreme Court. We gave him permission, not because we thought that the courts below were necessarily wrong in the result, but for two reasons: first, it was unsatisfactory to have two different interpretations of the section 42 offence; and second, how could we resist such an entertaining case? But the outcome of the appeal matters to far more people than to gamblers and the providers of gambling.

We unanimously dismissed the appeal: [2017] UKSC 67, [2017] 3 WLR 1212. Lord Hughes gave the judgment, with which we all, including Lord Thomas, then Lord Chief Justice, agreed. The concept of cheating at gambling had been known to the common law for centuries before the 2005 Act. While it made sense that the common law concept and the criminal law concept should be the same, it made no sense to interpret the common law by reference to an offence

which had only been introduced in 2005. Rather, it was the other way around. The section 42 offence should be interpreted by reference to the common law. And neither of them necessarily involved something which the ordinary person would describe as dishonest. Where it involves deception of some sort, it is usually easy to describe what was done as dishonest – and Lord Justice Tomlinson had thought that what Mr Ivey and Ms Cheung had done was deception – they had persuaded the croupier to do what she did by pretending to be superstitious.

But cheating need not involve any deception. It may involve other forms of interference. Lord Hughes gave some examples: the runner who deliberately trips up another runner; the stable lad who starves the favourite of water for a day then gives him two buckets of water to drink just before the race; the sportsman who takes performance enhancing drugs; deliberate time-wasting in many forms of game – rubber bridge being a prime example known to me; or upsetting the card table to force a re-deal when loss seems unavoidable. If bridge players engaged in edge-sorting to give signals to their partners it would undoubtedly be cheating.

So cheating does not necessarily involve dishonesty and what was done here – taking positive steps to fix the deck so as to distort the odds in his favour – was undoubtedly cheating. I was relieved to learn that a student whom I had the pleasure of calling to the Bar when I was Treasurer of Gray's Inn last year, and who before becoming a Bar student had been a professional poker player, took the same view.

We also held that what was done did amount to a deception of the croupier and so could have amounted to dishonesty had that been needed. But that of course depends on what is meant by dishonesty.

That is why this case is so important. Although it was not necessary for our decision, and thus strictly *obiter dicta*, we went on to consider the meaning of dishonesty in the criminal law. This was because the law had got itself into a very strange position – such that Mr Ivey could claim

that he and Ms Cheung were not dishonest in law, despite having deliberately set out to deceive the croupier into doing something to distort the odds in what was supposed to be a game of pure chance.

Dishonesty is a relatively recent term in English criminal law. It was introduced by the Theft Act 1968 in the definition of some acquisitive offences, of which far and away the most common and important is theft. The 1968 Act was the outcome of the eighth report of the Criminal Law Revision Committee on *Theft and Related Offences* (1966, Cmnd 2977). This recommended that the previous offences of larceny, embezzlement and fraudulent conversion should be replaced by a single offence of dishonest appropriation of another person's property – the treating of 'tuum as 'meum' - thine as mine (para 33). Dishonesty would be a vital element in the new offence. 'Dishonestly' seemed to the committee a better word than 'fraudulently': 'dishonesty is something which laymen can easily recognise when they see it, whereas "fraud" may seem to involve technicalities which have to be explained by a lawyer' (para 39). Hence the Theft Act does not contain a definition of 'dishonestly' (although there is a partial definition preserving two previous rules which need not concern us here).

Accordingly, as Lord Hughes observed, 'dishonesty is by no means a defined concept. On the contrary, like the elephant, it is characterised more by recognition when encountered than by definition' (para 48). It is not a matter of law but a matter of fact for the jury (or the magistrates) and judges must not tell the jury what it means: *R v Feely* [1973] QB 530. However, since the case of *R v Ghosh* [1982] QB 1053, judges have been required to direct the jury how to go about their task.

Ghosh was about a doctor who had claimed payment for operations which he had not carried out or for which no fees were due because they had been carried out on the National Health Service. The judge directed the jury that dishonesty was a matter for them: 'to consider contemporary standards of honesty and dishonesty in the context of all you have heard'. The jury convicted and the defendant appealed. The question was whether the test was purely objective – was what

the defendant had done in fact dishonest – or was it subjective – did the defendant think that his conduct was dishonest?

The Court of Appeal held that it was both:

‘In determining whether the prosecution has proved that the defendant was acting dishonestly, a jury must first of all decide whether according to the ordinary standards of reasonable and honest people what was done was dishonest. If it was not dishonest by those standards, that is the end of the matter and the prosecution fails. If it was dishonest by those standards, then the jury must consider whether the defendant himself must have realised that what he was doing was by those standards dishonest.’

Limb one, the objective test, was a repeat of what the Court had said in *Feely*. In adding limb two, the subjective test, the Court of Appeal thought that they were reconciling some confusing earlier decisions, which had applied an objective test in some contexts and a subjective one in others.

In introducing the subjective element, they seemed to be particularly influenced by the example of a tourist who comes from a country where public transport is free (or, one might suggest, a person who comes from a country where petrol is free). On his first day, he travels on a bus or fills up his tank with petrol. He goes off without paying. He never had any intention of paying. By objective standards his conduct was dishonest, said the court, but morally he was not.

The court also drew a distinction between the person who knows that his conduct is dishonest by ordinary people’s standards but believes it to be morally justified for other reasons, such as the Robin Hoods of this world, and the person who believes that his conduct is not dishonest by ordinary people’s standards. The former is still guilty but the latter is not.

But, as Lord Hughes pointed out (echoing Professor Griew before him), there was no need to introduce the subjective element to cater for the tourist. You have first to ascertain the defendant's state of mind - what did he know or believe about the facts affecting the area of activity in which he was engaging? If he genuinely believed that public transport or petrol was free, there is nothing objectively dishonest about not paying for it. If he did not genuinely believe that it was free, then why should his conduct not be judged by reference to the standards of ordinary decent people? Should he be able to get away with saying that he believed that ordinary people would think that it is not dishonest to dodge paying bus fares or for his petrol?

The Robin Hood point is also suspect. Robin Hood would be acquitted if the jury thought that his actions were not dishonest or he thought that a jury would think that his actions were not dishonest whether or not he himself believed them to be dishonest. Yet, as Professor Griew observed, 'Robin Hood must be a thief even if he thinks the whole of the right-thinking world is on his side' ('Dishonesty: The Objections to Feely and Ghosh' [1985] Crim LR 341, 353).

There is a less dramatic illustration of the problem in the pre-*Ghosh* case of *R v Gilks* [1972] 1 WLR 1341, which is the only case in which the defendant's own view of the honesty of his conduct was squarely raised. Mr Gilks had been betting on horses in a betting shop. He won around £10.00. In one race he bet on a horse called Fighting Scot, which wasn't placed. But when he went for his winnings, the bookmaker thought that he had bet on Fighting Taffy, which had won. So he was paid around £106 too much. He realised the mistake but kept the money anyway. He was charged with theft of the excess. Dishonesty was one of the issues. In his view, bookmakers and punters were a race apart. He agreed that if your grocer gave you too much change and you knew it, it would be theft to keep it. But when you're dealing with a bookmaker different rules apply. The judge directed the jury to try and put themselves in his shoes 'and answer the question whether in your view he thought that he was acting honestly or dishonestly'.

That was a more subjective direction than the one which emerged from *Ghosh*, because it depended entirely on what the defendant thought of his own conduct, not on how the defendant thought others would view his conduct, which is the *Ghosh* test. It didn't do Mr Gilks much good, because the jury convicted him anyway – they must have decided that he didn't really believe what he was saying. Not surprisingly, the Court of Appeal did not agree that the direction ought to have been even more favourable to him – but neither did they suggest that it was too favourable.

The real objection to the second limb of *Ghosh* is that the less acute is a person's moral compass the more likely he is to be acquitted of dishonesty. In simple cases like *Gilks*, the jury may simply disbelieve him. In obvious cases like *Ghosh* itself, the defendant is bound to be convicted: Dr *Ghosh* claimed to be entitled to the payments made. Once the jury had rejected his account, it was inevitable that they would find his conduct dishonest, whichever test was applied. So it did not matter in that case that the judge had not given the second, subjective, limb of the direction. The problem does not often arise. But it is most likely to arise in complex situations, often in the financial world, where it may be easy for a defendant to claim that he did not realise that others would think his conduct dishonest because everyone else he knew was doing the same.

He would not get away with that in a civil action. The test of dishonesty where it is relevant to a civil claim (for example for dishonest assistance in a breach of trust) is firmly established, as explained in the case of *Barlow Clowes International Ltd v Eurotrust International Ltd* [2005] UKPC 35, [2006] 1 WLR 1476. As is well known, Mr Peter Clowes persuaded large numbers of, mostly small, investors to invest their savings with him on the promise of large and totally unrealistic returns. He used the money coming in from new customers to pay out the promised returns and on extravagant living. Eventually the business collapsed, as it was bound to do, and he was sent to jail. The company tried to recover some money for the investors from an investment services company based in the Isle of Man, which had paid away some of the money he had received. The question was whether a director was guilty of giving Mr Clowes dishonest assistance. Lord Hoffmann explained the test:

‘Although a dishonest state of mind is a subjective mental state, the standard by which the law determines whether it is dishonest is objective. If by ordinary standards a defendant’s mental state would be characterised as dishonest, it is irrelevant that the defendant judges by different standards.’

So we held that there were at least six problems with the second limb of the *Ghosh* test: (1) the more warped the defendant’s standards of honesty, the less likely he is to be convicted; (2) the premise was that it was necessary to give effect to the principle that dishonesty must depend upon the defendant’s actual state of mind, when (as the discussion of the tourist example shows) it was not; (3) juries and others often find it puzzling and difficult to apply; (4) it has led to a divergence between the criminal and civil law; (5) it was a significant departure from the law before the Theft Act, whereas all the indications in the Criminal Law Revision Committee’s report were that this was not intended – dishonestly was simply another word for fraudulently; and (6) it was not compelled by the pre-*Ghosh* case law (see *Ivey v Genting*, para 57).

I should record that the test had its defenders. In their report on *Fraud* (2002, Law Com No 276), for example, the Law Commission regarded the second limb as ‘an important brake on what might, despite its express terms, tend to be a subjective approach to the first limb decision. It prevents naïve or innocent defendants from being found dishonest when the jury is not satisfied that they must have recognised that their behaviour fell outside the norms of reasonable honest people’ (para 5.11). Strangely, in order to stop juries being too subjective about the first limb, they are required to be subjective in the second.

Having taken the view that the second limb was not correct, what were we to do about it? Strictly speaking the issue did not arise, although it would have done if we had agreed with Lady Justice Sharp that dishonesty was an ingredient of the section 42 offence. On the other hand, if we said nothing about it, the law would carry on as before, because judges would continue to give the two-limb direction which we considered, for all the reasons given above, to be too

favourable to defendants. We concluded that it did not correctly represent the law and that directions based on it ought no longer to be given (para 74):

‘When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual’s knowledge or belief as to the facts. . . . When once his actual state of mind as to knowledge or belief of the facts is established, the question whether his conduct was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people.’

Judges are already acting accordingly. Convicted defendants may appeal on the basis that *Ghosh* was right and we were wrong. The Court of Appeal does not have to agree with us. However, just over a week after our decision, in *DPP v Patterson* [2017] EWHC 2820 (Admin), a Divisional Court led by the President of the Queen’s Bench Division, Sir Brian Leveson, allowed a prosecutor’s appeal from a magistrates’ court’s finding that a woman accused of keeping the money paid to her for renting her employer’s caravans had no case to answer: he held expressly that the second limb of *Ghosh* no longer applied.

But there are some, led by Professor Griew, who argue that the first limb in *Ghosh* is also wrong, for several reasons (he lists 11, but I shall content myself with 10, and not quite in the same order):

- (1) It is obviously open to argument whether particular conduct is dishonest by the standards of ordinary decent people, which may lead to longer and more difficult trials than there would be if the law defined the prohibited conduct more precisely.
- (2) It is also likely to lead to inconsistent decisions in marginal cases.

- (3) More fundamentally, ‘the idea of a generally shared sense of the boundary between honesty and dishonesty’ is a fiction; ‘it is simply naïve to suppose – surely no-one does suppose – that there is, in respect of the dishonesty question, any such single thing as “the standards of ordinary decent people”’.
- (4) It is not enough to say that ‘dishonesty’ is an ordinary word of the English language and should be construed like any other such word – it does not follow from this that all speakers of the language will share the same view of how it applies to particular conduct.
- (5) It is unsuitable for specialised contexts involving intricate financial activities or dealings in a specialised market, as ordinary people will not get the contextual flavour. They will have no standards to apply.
- (6) And what about ordinary dishonest jurors? Most acquisitive crime is committed by ordinary people, people who may serve on juries: petty theft from work, handling stolen goods which allegedly ‘fell off the back of a lorry’, inflating expenses claims, failing to declare what ought to be declared on an income tax return, and so on. Are the jury to ask themselves what they would have done, in which case many dishonest defendants may be acquitted? Or, perhaps worse, are the jury to impose upon defendants higher standards than they would impose upon themselves?
- (7) Giving juries a moral question to answer without guidance risks subjective judgments which may impact badly on unpopular groups. This could cut either way: an unpopular victim may be denied protection if the jury regard him as ‘fair game’; an unpopular defendant may be convicted if the jury are readier to condemn his conduct than they would be others’. Indeed, had Mr Ivey and Ms Cheung been charged with an offence of dishonesty, it may be thought touch and go (given some of the press coverage of the case) whether a jury would regard the casino as fair game or take against the punters for irrelevant reasons such as their ethnicity.

- (8) Leaving it to the jury may lead to sympathetic acquittals of the obviously guilty – because they sympathise with the defendant’s motives or with the difficult circumstances in which he found himself. There was certainly such a sympathy verdict in a trial over which I presided long ago. The defendant had claimed large sums of money in benefits to which he knew he was not entitled. He suffered from post-traumatic stress disorder as a result of having blown himself up when lighting a bonfire with petrol. I do not know whether the jury acquitted on the basis of the second limb of *Ghosh* – they believed his claims that he did not realise that what he was doing was dishonest – or on the basis of the first – that they might well have done the same in the circumstances.
- (9) The court’s approach to ‘dishonestly’ was an unintended and dramatic departure from the previous law. The Criminal Law Revision Committee, as we have seen, simply thought that ‘dishonestly’ was a better word than ‘fraudulently’. The previous law had not left its meaning to the uninstructed ‘recognition’ of the jury.
- (10) All this all lead Professor Griew to argue that whether a particular state of mind in a particular set of factual circumstances constitutes dishonesty – indeed a criminal offence - should be a question of law, not a question of fact for the magistrates or jury. He did not under-estimate how difficult it would be to devise the law to do this, but that did not mean that it could not and should not be done.

Calling it a question of fact is indeed misleading. It is a moral question. The big issue is whether we should be asking juries and magistrates to answer such moral questions – is it not the job of the law to do so and the job of the jury or magistrates to decide what the facts are and whether they fit the law? But I doubt very much whether this is a matter which the Supreme Court could solve – even supposing that it ever got the opportunity of doing so, which seems unlikely. It must be a matter for Parliament.

In the meantime, as Ben Machell comments, the decision in *Ivey v Genting* ‘is a big change in our law, and all because, ten years ago, a right Chinese girl fell out with a Las Vegas casino and then vowed revenge’.