

UK Prosecutors' Job Made Easier By Dishonesty Test Ruling

By Richard Crump

Law360, London (June 4, 2020, 4:27 PM BST) -- The Court of Appeal handed more power to prosecutors in a recent decision by lowering the bar for proving dishonesty in criminal cases, a move that could encourage more prosecutions against individuals for complex frauds.

The Court of Appeal affirmed in an April 29 ruling that a jury should assess whether an individual had behaved dishonestly based on society's standards rather than on what a defendant understands to be dishonest.

The decision brought an end to the requirement that the accused should be aware that their actions would be viewed as dishonest.

By endorsing the U.K. Supreme Court's 2017 decision in a civil case between a casino and poker champion Phil Ivey, the Court of Appeal firmly discarded the 35-year old test for criminal dishonesty. Lawyers say the ruling lowers the bar for prosecuting individuals for corruption.

"The new regime is unambiguously prosecutor-friendly and may open the door for more prosecutions in cases involving complex commercial and financial arrangements," Edward Norman, counsel at Crowell & Moring, said.

The case concerned an appeal by David Barton, the director of a luxury care home, who was sentenced to 21 years in jail for defrauding wealthy and vulnerable customers by tricking them into handing him control of their finances.

Barton and Rosemary Booth — the nursing home's manager, who was also convicted of conspiracy to defraud — argued that the former test remained the binding authority because the Supreme Court's directions on dishonesty were obiter dicta: observations or opinions that were not essential to the court's decision and therefore not legally binding as a precedent.

But the Court of Appeal ruled unanimously that juries in criminal cases must follow the Supreme Court's guidance for convicting a defendant of dishonesty. The decision ended any remaining confusion over which standard judges should instruct juries to follow.



The Court of Appeal's decision has ended the requirement that the accused should be aware that their actions would be viewed as dishonest. (AP)

"The difficulty facing courts and practitioners since Ivey was that the remarks in that case were obiter, so not binding in criminal cases," Sundeep Soor, head of tax and fraud at Cartwright King, said. "What the Booth case does is confirm that the Ivey test is the preferred test to use."

Appellate judges said the Supreme Court had "altered the established common law approach" for establishing dishonesty by advising courts to stop following the Court of Appeal case *R v. Ghosh*.

Dr. Ghosh, a British surgeon, was convicted under the Theft Act 1968 for obtaining money by claiming fees for work that others, including the National Health Service, had carried out.

Ghosh was found guilty. But he appealed on the basis that the judge should have instructed the jury that dishonesty was about the accused's state of mind — a subjective test — rather than the jury's point of view, an objective test.

The surgeon lost the appeal, but the Court of Appeal reformulated the test, which then became standard in criminal cases.

In its place, the Supreme Court revised the "state of mind" test in *Ivey v. Genting Casinos*. The justices ruled that Phil Ivey, a former world No. 1 poker player, cheated Genting Casinos out of £7.7 million (\$9.7 million) in 2012 by using an illegal technique called "edge sorting" in a game of baccarat.

The Supreme Court said jurors should look at a defendant's "actual state of knowledge or belief as to the facts" before applying the standards of ordinary reasonable people to judge whether the defendant's conduct was dishonest. As a result, the test is now more straightforward.

"Jurors used to have to decide whether the defendant realized their behavior was dishonest, which was extremely challenging and perhaps even confusing," Norman of Crowell & Moring said. "Now the questions they must address are relatively simple: what did the defendant know, and did they behave dishonestly by the standards of ordinary people?"

The Supreme Court's rationale for discarding the second element of the test was that the more warped was the defendant's standards of honesty, the less likely he would be to appreciate that his conduct was dishonest by ordinary standards.

In *Ivey*, the court made it clear that "there is no reason why the law should excuse those who make a mistake about what contemporary standards of honesty are, whether in the context of insurance claims, high finance, market manipulation or tax evasion."

Norman said that the new test "does at least prevent the rather perverse possibility of a defendant being acquitted because they personally had a warped standard of honesty, which was possible under the previous regime."

The Court of Appeal's decision in *Barton* also clarified that, to prove a charge of conspiracy to defraud, there must be a dishonest agreement which includes an element of unlawfulness in its object or means.

The court held that the defendant must act with an intention to prejudice another's rights. But the agreement need not necessarily include the commission of a substantive offense if carried out, Dechert LLP partner Matthew Banham said.

This, combined with the wider scope for conviction, will make it easier to prosecute defendants in complex fraud cases. These include market misconduct in the financial sector, where the context and general operating practices might not be known to ordinary people, according to Banham.

Under the new test, business practices that might not be considered unusual or even unfair by participants and experts in that industry could nevertheless strike jurors as dishonest.

"This creates the risk that the subjective defenses which remain open to the defendant, such as market practice and cultural standards, will now be judged by a juror's objective standards," Banham said.

Prosecutors will be more confident in pursuing accounting fraud — such as in cases where individuals could be tempted to massage their firm's accounts because of commercial pressures brought to bear on company balance sheets by the COVID-19 crisis, Banham added.

"If they do, the fact they may think their actions were honest will no longer be a defense," Banham said. "Juries will have to decide by their own standards if such actions were legitimate or if the scheme was fundamentally dishonest."

The Financial Conduct Authority may also find it easier to impose prohibition orders preventing a person from operating in the regulated financial services sector if the regulator determines that a person lacks honesty, according to Banham.

"Away from the SFO, the FCA will absolutely be able to bring cases for lack of integrity based on the objective standard of dishonesty," Banham said. "The FCA will have a wider test to think about. The bar is a bit lower, so they can be a bit punchier."

Complex tax schemes — which could include those with assets held offshore that would previously have been considered by HM Revenue & Customs to be tax avoidance — could now be prosecuted on the basis that a jury would be more likely to find such conduct dishonest by society's standards.

There have been fewer HMRC prosecutions for tax evasion in the last five years, partly because of concerns that the allegedly fraudulent taxpayer can point to the complexities of the rules and claim they did not realize they were acting dishonestly.

"Now the jury might think wealthy tax-payers using devices such as exotic tax schemes and secretive offshore structures are inherently dishonest and convict on that basis," said John Gibson, a partner at Cohen & Gresser LLP.

However, the test applies to a very broad range of offenses that include dishonesty as an ingredient and will probably be the subject of further appeals in the future.

The Court of Appeal itself acknowledged that "there is, no doubt, a range of consequential issues that will need to be decided following the decision in Ivey."

Jamas Hodiala QC of Matrix Chambers said the fact that defendants believe they were acting honestly will probably still be relevant to jurors when they consider their verdict.

"Practically, a defendant must be able to give evidence they believed they were acting honestly. In which case the jury will ask whether there was any objective basis for why the defendant thought they were acting honestly," Hodialva said. "To that extent, I don't think it is going to change how the jury reflects dishonesty in its verdict."

However, the new objective test could make it easier to convict a company because it could remove the requirement to identify what is known as the directing mind behind the crime, Hodialva added.

"By looking objectively at how the company acted, and what facts the company as a whole knew, prosecutors might now be able to fix the company with that knowledge and not have to prove the subjective state of mind of a 'directing will and mind,'" he said.

The new Barton/Ivey test will make it easier to convict traders of dishonesty now that prosecutors are free from the confines of the original Ghosh test.

This could apply particularly to junior financial professionals whose conduct might have breached their firm's policies or FCA expectations, but who argued they were acting in line with market conduct or what they had informally been taught, according to Tim Harris, an associate at Cohen & Gresser.

"The judgment is good for prosecutors," Harris said. "We expect that, once they've weighed up the evidence, jurors will be told to back their own instincts as to whether the defendant behaved honestly and make a decision on that basis."

--Additional reporting by Christopher Crosby. Editing by Ed Harris.