

# Client Alert

Financial Institutions & Government Investigations

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## Dishonesty Test in Criminal Law

The Supreme Court has made a substantial change to the test for dishonesty in the criminal law. Since 1982 the two stage test set out in *R v Ghosh [1982] QB 1053* by the Court of Appeal has been the approach taken by the courts. The Supreme Court in *Ivey v Genting Casinos UK Ltd t/a Crockfords [2017] UKSC 67*, has decided that the Ghosh test does not correctly represent the law and that directions based upon it should no longer be given.

This could have a significant impact on the defence of those charged with criminal offences where dishonesty is a key ingredient in the offence.

The case before the Supreme Court was a civil law appeal from a High Court finding that the claimant, a professional gambler, had cheated when he deployed a highly specialist technique called edge-sorting which had the effect of greatly improving his chances of winning at Punto Banco which he played at Crockfords, ultimately winning approximately £7.7m in one evening.

The casino declined to pay, claiming that the outcome had been the result of cheating.

The Judge and the Court of Appeal agreed with the casino and the Supreme Court had to decide if they were right or wrong.

The Supreme Court considered the meaning of the concept of cheating at gambling, the relevance of it to dishonesty and the proper test for dishonesty if such is an essential element of cheating. Having reviewed the facts and the law the Supreme Court dismissed the appeal. In doing so the court took the opportunity to clarify the correct test for dishonesty in the criminal law.

The two stage Ghosh test, as given by judges in directions to juries, was summarised by Lord Hughes, who delivered the judgment of the Supreme Court, as follows:

“Firstly, it must ask whether in its judgment the conduct complained of was dishonest by the lay objective standards of ordinary reasonable and honest people. If the answer is no, that disposes of the case in favour of the defendant. But if the answer is yes, it must ask, secondly, whether the defendant must have realised that ordinary honest people would so regard his behaviour, and he is to be convicted only if the answer to that second question is yes.”

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Lord Hughes observed that “the principal objection to the second leg of the Ghosh test is that the less the defendant’s standards conform to what society in general expects, the less likely he is to be held criminally responsible for his behaviour.”

The Supreme Court engaged in a thorough review of the leading authorities including those dealing with the test of dishonesty in civil actions. In contrast to the criminal law an objective test for dishonesty is settled law in the civil jurisdiction. In *Barlow Clowes International Ltd v Eurotrust International Ltd* [2005] UKPC 37 Lord Hoffman explained the civil law test as follows:

“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.”

The Supreme Court, unsurprisingly, noted that it was illogical that the meaning of dishonesty should differ according to whether it arises in a criminal prosecution or a civil action.

Against that background the Court concluded that the second leg of the Ghosh test was not good law and that the civil test should be followed. Lord Hughes stated the law as follows:

“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. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held. When once his actual state of mind as to knowledge or belief as to 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. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest.”

Will this change of direction have an impact on those charged with offences alleging dishonest conduct? The answer depends to a large extent on the amount of notice that juries have taken of the Ghosh direction or whether they looked at the facts before them and made a decision using their common sense and experience. Many criminal practitioners would agree with the proposition that juries act on their instincts but that, of course, is pure speculation. It will remain to be seen if those to be prosecuted for alleged criminal offences in the financial services industry, who mount a defence that the conduct in question was widespread and accepted as the norm, may need to seek further advice as to the impact of this significant change in the law.

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