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When and how dishonesty needs to be shown following *Ivey v. Genting Casinos (UK) Ltd t/a Crockfords* [2017] UKSC 67

The Gaming Act of 1664 imposed a forfeit on anyone who won a wager or prize, if they did so by means of "fraud, shift, cousenage, circumvention, deceit or unlawful device, or ill practice whatsoever". It is, arguably, still perfectly creditable drafting. Its 21st century equivalent, the Gambling Act 2005, creates a rather more prosaic offence of "cheating at gambling".

In a much-publicised recent case, the Supreme Court has considered two issues: first, whether it is necessary to prove dishonesty in order to make out an offence of cheating; and second, what the test for dishonesty should be. It is the second of these issues, and particularly the decision to bring the criminal test for dishonesty into line with the civil one, which has attracted the most attention. For those conducting internal investigations, however, the lessons to be drawn from the first issue may be just as instructive. It is not always necessary to prove dishonesty where, intuitively, one might expect to find it, and investigations should be directed accordingly.

Facts of the case

The history of the dispute between Mr Ivey and Genting Casinos (UK) Ltd (Crockfords) was, briefly, as follows. Mr Ivey is a professional gambler. He played a number of games of Punto Banco at Crockfords over two days in August 2012, with the help of another professional gambler, Ms Sun. Punto Banco is played with six or eight packs of cards. It requires the dealer to deal two or three cards, face down, onto two positions on the table ("punto" and "banco"). The gambler places a bet on one of those positions, and if the total of the cards dealt is closer to nine than the other position (subject to the rules of the game), he or she wins. The house, inevitably, enjoys a small advantage, or "house edge".

There is an advantage to the gambler in knowing which cards are "high value" which, in this context, means cards with a face value of seven, eight or nine. That would not, of course, normally be possible. However, Mr Ivey sought to take advantage of a technique called "edge-sorting". This can be done where the manufacturing process means that the pattern on the back of the card is marginally closer to one long edge of the card than the other. The Supreme Court described the difference as "sub-millimetric", but it was enough for Mr Ivey to be able to use. The difficulty lay in ensuring that the cards were sorted such that one type of long edge appeared for the high value cards, and not for the others. This was Ms Sun's role. She and Mr Ivey relied on the fact that casinos are accustomed to playing along with strange requests from their punters aimed at changing bad luck or hanging on to good. In that way, as the cards were turned face up at the end of each coup, she indicated to the croupier which cards were "good" (asking her to turn

them one way) and which were "not good", asking her to turn them the other. The use of a shuffling machine (at the request of Mr Ivey) meant that the cards were not rotated when they were shuffled and Mr Ivey also asked to keep using the same cards. By the time the sorting process was finished, Mr Ivey's bets per coup increased. By the time he stopped playing, his success rate had risen markedly. His bets for the last three coups averaged £150,000 each time, and he ultimately won in excess of £7.7 million.

Alarmed by the size of its loss, Crockfords reviewed its footage of the game, and the cards, and worked out how Mr Ivey had been so successful. At trial, Mr Ivey admitted to edge sorting, but was adamant that edge sorting did not amount to cheating. The Supreme Court had to decide whether he was right.

Key issues

The parties agreed that there was an implied term in the contract between Mr Ivey and Crockfords that he would not cheat. There is also, as indicated above, a statutory offence of cheating. The Supreme Court held that cheating meant the same thing in either case, but the shape of its considerations was driven largely by Mr Ivey's submissions as to why he should not be found to have cheated.
His argument (in essence) was that cheating necessarily involves dishonesty. In order for him to be held to be dishonest, the relevant legal test (in relation to the criminal offence) required Mr Ivey to have known that his conduct (viewed objectively) was dishonest. He did not see it as dishonest. He had therefore not cheated, and should recover his winnings.

The Supreme Court therefore considered two issues:

- whether there was any requirement to show dishonesty; and
- if so, whether Mr Ivey was dishonest applying the proper test.

We consider those issues in reverse order below.

The test for dishonesty

It is this aspect of the Supreme Court's decision which has attracted most interest, although the question did not strictly arise, in view of the court's finding in relation to the first issue above. In relevant criminal cases, judges have been required for the last 35 years to direct the jury to consider the so-called *Ghosh* test[1]. The jury has been directed to consider dishonesty in two stages: (i) was the conduct complained of dishonest by the lay objective standards of ordinary, reasonable and honest people; and (ii) if so, whether the defendant must have realised that ordinary honest people would so regard his or her behaviour. The *Ghosh* test is therefore usually described as involving both an objective and a subjective test.

Lord Hughes, giving the judgment of the Supreme Court, identified six problems with the second, subjective limb of the test. He included in these:

- the unintended effect that the more warped the defendant's standards of honesty are, the more likely he or she is to be acquitted; and
- "an unprincipled divergence between the test for dishonesty in criminal proceedings and the test of the same concept when it arises in the context of a civil action".

He further held that the subjective limb of the test had been introduced on the basis of a misunderstanding of earlier authorities.

The Supreme Court therefore came to the conclusion that the subjective limb of the Ghosh test does not correctly

represent the law. Going forward, in both civil and criminal cases, the test will be that currently used in civil cases – the judge or jury (depending on the type of case) will first have to ascertain the actual state of the individual's knowledge or belief as to the facts. Once that is established, the question of whether his or her conduct was honest or dishonest is to be determined by applying the standards of ordinary decent people.

The test therefore retains a role for the state of mind of the individual defendant, but it removes the requirement for him or her to appreciate the dishonesty of his or her actions.

Requirement for dishonesty

The amputation of the second limb of the *Ghosh* test is of huge significance in criminal cases in particular, but it was not, as it happens, of great importance to this particular case. This was because the Supreme Court held that it is not necessary to show dishonesty, in order to prove that someone has cheated.

By some measures, this might seem an unnatural conclusion – the concept of honest cheating is, as Lord Hughes accepted, an improbable one. It is not, however, impossible. Lord Hughes provided several examples, such as tripping an opponent in a race, giving a horse too much water before it is due to run, or deliberate time-wasting in a number of sports. Each of these specific examples may have a counter-argument that the dishonesty lies in the pretence that the cheat in each such example is taking the relevant action by accident, or for some perfectly legitimate reason. The point, however, is still a good one. It is possible to cheat by means of an overt action. Small children, for example, are often flagrant cheats when playing board games – it is obvious what they are doing, but it is still cheating according to the rules of the game.

Cheating is not the only offence where some caution is needed before leaping to a conclusion that the person involved must be shown to have been dishonest. A number of other such offences are relevant in a corporate context. These include bribery offences, money laundering offences and some offences under the Fraud Act 2006. Even in relation to deceit or fraudulent misrepresentation where there is a requirement of dishonesty, it is not dishonesty in the criminal law sense.

In *Ivey,* the Supreme Court emphasised the role of dishonesty in some cases as supplying the necessary element of "illegitimacy and wrongfulness", but that, in the case of cheating for example, the cheating itself carried its own inherent stamp of wrongfulness.

Conclusions

The distinctions as to when dishonesty need or need not be proved may not be easy to follow intuitively, but this is all the more reason for those conducting internal investigations to be clear as to what the necessary ingredients of a particular offence or form of unlawful behaviour might be. Dishonesty does not need to be shown as often as might be expected. There are limits, however, to how far this matters – in real terms, conduct that a jury would call dishonest might also be called any number of other things, depending on the necessary elements of the offence, assuming it offends normal standards of lawful behaviour.

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[1] Derived from *R v. Ghosh* [1982] QB 1053