



NINESTJOHNSTREET

Case Summary: Booth and Others, 2020. Ivey, not Ghosh, is the test for dishonesty

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In this post, Helen Longworth summarises the decision in Booth and others. This decision is an important statement of the law in relation to dishonesty and resolves the tension between the cases of Ivey and Ghosh. Helen is a specialist in criminal law with a particular interest in cases of fraud and dishonesty.

Bailii link: **Booth & Anor v R [2020] EWCA Crim 575**

In a judgment published today (29th April 2020), the Lord Chief Justice has set out that the test in the obiter (commentary) remarks of the Supreme Court in *Ivey v Genting Casinos (UK) (trading as Cockfords Club) [2017] UKSC 67* is the test that the courts should follow when considering dishonesty. It is not the decision of the Court of Appeal Criminal Division in *R v Ghosh [1982] QB 1053*.

Put simply, the reasoning as set out in paragraph 104, is this; the Supreme Court in *Ivey* all agreed with the comments on what the test should be and they said that the test was not as set out in *Ghosh*. The outcome of an appeal to them would be a foregone conclusion; *Ivey* is clear about what the test should be, and it is not that from *Ghosh*.

Factually, the case concerns David Barton, who ran the Barton Park Nursing Home in Southport with his wife. Rosemary Booth was the manager of the nursing home, though Mr Booth took a close interest in the decisions. The prosecution case was that David Barton dishonestly manipulated wealthy residents of the care home to take their money from them. He used various means including powers of attorney, selling property on their behalf and inheriting money in their will. There was no evidence that any of the defrauded people were ill-treated in any other respect. Both he and Rosemary Booth were tried before HHJ Everett in Liverpool Crown Court. Mr Barton was convicted of a number of offences, including conspiracy to defraud, theft, fraud, false accounting and transferring criminal property. Ms Barton was convicted of three counts of conspiracy to defraud. The offences had been committed over the course of 20 years. The trial judge directed the jury in line with *Ivey*.

The Court of Appeal in *Booth* considered how the trial judge summed up the case and how the elements of the conspiracy to defraud were put before the jury. But, the most crucial part of the ruling is the decision on the test of dishonesty.

The problems with *Ghosh*

As the court observes at paragraph 81, the *Ghosh* test was articulated as a two -stage test, namely

(a) was the defendant’s conduct dishonest by the ordinary standards of reasonable people?

If so,

(b) did the defendant appreciate that his conduct was dishonest by those standards?

The issues with the *Ghosh* test are centred around the second limb of that test, as is set out by Lord Hughes at paragraph 57 of *Ivey*, quoted at paragraph 88 of Booth. They include that it was subjective at the end, potentially meaning that the more at odds with the “ordinary standards” a defendant was, the more likely it was that s/he would not “appreciate that the conduct was dishonest”. It is not necessary to preserve the principle that the defendant’s state of mind matters, juries find it difficult, it was a departure from the pre-Theft Act law and the order in which the test was set out puts it at odds with the tests for dishonesty in the civil courts, that being a test of a person’s knowledge and beliefs and then if the “fact finder” finds it dishonest against the standards of ordinary people.

The test in *Ivey*

In *Ivey*, the Supreme Court proposed an alternative two-stage test: (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?

As the court sets out at paragraph 107, it is still a test of the defendant’s state of mind. It includes and requires a magistrate or jury to consider what the defendant knew of the facts, and might consider their experience and intelligence. But this is the difference, once those facts are established, it is then that the juror or magistrate applies an objective test based on the views of, as HHJ Everett put it, “you, ordinary decent people”.