What is "Dishonesty"?

Following on from **Yasin Patel and Amy Hazlewood's** article on Fraud under the furlough scheme, this article takes a closer look at the test of dishonesty in light of the recent judgement *David Barton, Rosemary Booth v The Queen*[1] ("Barton Booth").

There are many offences within the criminal justice system that are considered dishonesty offences. Fraud, conspiracy to defraud, bribery, theft, false accounting, burglary, and robbery to name but a few. The successful prosecution of these offences could lead to imprisonment, a significant fine and confiscation proceedings. But perhaps most detrimental to those convicted will be the reputational damage to the individual and/or the company involved. The loss of 'good character' and a criminal record are stains on a reputation that remain forever.

Dishonesty is a tricky concept to define. One might be inclined to relate to Justice Potter's famous quote in 1964 when trying to explain pornography when he said:

> *"I shall not today attempt further to define the kinds of material I understand to be embraced... but I know it when I see it ..."*

For 35 years, the Court's approach to dishonesty remained unchanged, governed by the decision of the Court of Appeal in *R v Ghosh.*[2] However the case of *Ivey (Appellant) v Genting Casinos (UK) Ltd*[3] changed this.

The Original Position

The test for dishonesty in *Ghosh* established 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?

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[1] [2020] EWCA Crim 575, 2020 WL 02045846

[2] [1982] QB 1053.

[3] [2017] UKSC 67

The New Position

Ivey v Genting Casinos (UK)[4] 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?

The Issue

When it comes to the legal development and changes, there are two main forms that this occurs. Whilst Parliament has responsibility to pass and amend law, there is another method from which a number of our laws come about. Precedent established by case law retains its importance in the English Legal System. The doctrine of precedent is based on the principle of *stare decisis*, which means to stand by things decided.

The Supreme Court set a precedent in the case of *Ivey* by changing the test for dishonesty. However, the change in law was made within the judgement's *obiter dictum*. This is a judge's expression of opinion uttered in court or in a written judgement. It often comes after the substantive or significant comments made within the main body of the Judgement.

The problem the Court of Appeal considered in the recent case of *Barton Booth* goes right to the heart of law making in turn: a key constitutional principle in England and Wales.

Can the highest court in this country, the Supreme Court, make such a significant change to law that has stood for 35-years within the *obiter dictum* of their judgement?

Where We Are Today

The Court of Appeal took the opportunity in *Barton Booth* to clarify and indeed bring to a halt the uncertainty in *Ivey*. To this end the Court of Appeal in *Barton Booth* were satisfied that the decision in *Ivey* is correct and it is to be preferred.

[4] (trading as Cockfords Club) [2017] UKSC 67; [2018] AC 391

The Court of Appeal also said that there is no obstacle in the doctrine of *stare decisis* to its being applied as the law of England and Wales, stating in its judgement:

> *The undoubted reality is that in Ivey the Supreme Court altered the established common law approach to precedent in the criminal courts by stating that the test for dishonesty they identified, albeit strictly contained in obiter dicta, should be followed in preference to an otherwise binding authority of the Court of Appeal*[5].

In firm rejection to submissions that *obiter dictum* should not be binding on lower courts, the Court of Appeal stated the following:

> *The rules of precedent exist to provide legal certainty which is a foundation stone of the administration of justice and the rule of law. They ensure order and predictability whilst allowing for the development of the law in well-understood circumstances. They do not form a code which exists for its own sake and must, where circumstances arise, be capable of flexibility to ensure that they do not become self-defeating*[6].

Practical Application

The dishonesty test as set out in *Ivey* remains guiding authority when it comes to dishonesty offences.

However, the decision of *Barton Booth* is important not only in terms of the law of dishonesty, but also in terms of the principles of precedent. The process of making and amending laws is often criticized for being slow, rigid and stubborn. However, the case of *Barton Booth* gives an example of how the Court's approach to changing law remains malleable and flexible when it needs to be.

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[5] David Barton, Rosemary Booth v The Queen [2020] EWCA Crim 575, 2020 WL 02045846 para 102
[6] David Barton, Rosemary Booth v The Queen [2020] EWCA Crim 575, 2020 WL 02045846 para 103