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Insights

THE CRIMINAL DISHONESTY TEST – A SEISMIC CHANGE OR A MERE TREMOR?

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SUMMARY

In *R v Barton & Booth*, a five member Court of Criminal Appeal:

1) emphatically endorsed the *Ivey* test for dishonesty, firmly dismissing the previous two-stage test in *Ghosh*;

2) affirmed that, in relation to conspiracy to defraud, there needed to be no requirement of an "aggravating feature" over and above a dishonest agreement which includes some unlawfulness in its object or means; and

3) rejected the suggestion that conspiracy to defraud, when properly particularised, falls foul of Article 7 of the ECHR.

We examine some of the implications of the decision, particularly in relation to corporate fraud and the effect on companies, small and large, including financial institutions.

DISHONESTY

Dishonesty is a key element in every offence under the Fraud Act 2006 and a myriad of other offences, including the common law offence of conspiracy to defraud.

Since 1982 the test contained in *R v Ghosh*[1] had been used in the criminal courts. The *Ghosh* test contained both an objective and subjective element which had to be satisfied before dishonesty could be established. In *Ghosh* it was set out as follows: (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?

That test had been the subject of much criticism in the 35 years of its existence. However, it had survived unscathed in the criminal courts and it took a civil case in the Supreme Court in 2017,

Ivey[2], involving an allegation of cheating a casino, to unravel it.

In its judgment, the Supreme Court held that the second leg of the test in *Ghosh* did not correctly represent the law and that directions based upon it ought no longer be given. The 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?

Critical within that test is that there is no requirement (as there had previously been under *Ghosh*) that the person must appreciate that what he has done is, by those standards, dishonest.

These remarks were clearly *obiter* as they were not necessary for the decision of the court. Thus, they generated debate as to their effect in criminal cases which, strictly speaking, were still bound to follow the law as set out in *Ghosh*. While the criminal courts thereafter used (and the Crown Court Compendium was amended to reflect) the *Ivey* test, the debate about whether it was the correct test quietly rumbled on.

So it was that the matter came before the Court of Appeal in *R v Barton & Booth*[3] as it had been contended, at trial, that *Ivey* was the wrong test and that the jury should have been directed in accordance with the *Ghosh* test. The Court concluded that the test of dishonesty formulated in *Ivey* was the correct test as it remains a test of the defendant's state of mind to which the standards of ordinary decent people are applied and therefore dishonesty is assessed by reference to society's standards rather than the defendant's understanding of those standards. Thus, the test of dishonesty now being applied across both the civil[4]and criminal jurisdictions

The *Ivey/Barton* test theoretically makes it easier to prove offences of dishonesty, although the reality is that such easing of the burden on the prosecution will apply to a very small number of cases requiring proof of dishonesty. In the vast majority of cases it will simply not be necessary to provide any detailed description to a Jury in determining the issue of dishonesty. Cases involving complex issues and/or those involving financial markets and products are likely to be the ones that are most susceptible to a detailed direction on dishonesty. Of particular note will be cases where the subjective elements of market practice, which previously would have been relied upon as part of the subjective test under *Ghosh* and went directly to the critical question determining dishonesty, have been relegated to background evidence in the first limb of the *Ivey* test.

CONSPIRACY TO DEFRAUD

Like the dishonesty test in *Ghosh*, the common law offence of conspiracy to defraud has been the subject of much debate and academic criticism. The common law offence is controversial as it potentially has a very broad reach. Because of its broad reach, this offence is one that is embraced

by prosecutors grappling with complex cases and reviled by defenders who have to deal with what may appear to be an elastic and sometimes elusive beast.

In *Barton*, it was argued by the appellants, first, whether there is a requirement of "unlawfulness" or "aggravating feature" over and above a dishonest agreement which includes an element of unlawfulness in its object or means in the description of the elements of the offence. Second, whether the offence meets the requirements of legal certainty at common law and under Article 7 of the European Convention on Human Rights ("**ECHR**") having regard to the test of dishonesty.

The Court rejected both of those submissions. Therefore, the law in relation to conspiracy to defraud is unchanged in consequence of *Barton*. It will remain a powerful tool in the prosecutor's armoury and will be particularly apposite to complex cases and cases involving financial markets and products. It can have come as no surprise that it was extensively utilised in the SFO's LIBOR and EURIBOR prosecutions. It will remain of importance in any consideration of the prosecution of corporates as well as individuals.

Proving dishonesty as a critical element of the offence has, in consequence of *Ivey/Barton*, been made simpler and easier in those cases where a detailed analysis of dishonesty is required.

CONCLUSIONS

The decision in *Barton* is wholly unsurprising. Offences, where a detailed examination of dishonesty is required, whether for statutory offences of theft or fraud or for conspiracy to defraud, will be easier to prove. Those cases will still be relatively rare. However, a substantial proportion of that minority of cases will be those that involve complex issues and/or relate to financial products and financial markets. The *Ivey/Barton* test will, therefore, be of potential importance to all prosecutors and those subjected to investigation for complex offences or those involving particular market practices and financial products involving dishonesty.

Proving offences of dishonesty against individuals in complex cases will be easier and may have a potential significant impact for individual employees of both large and small companies.

The effects of the *Ivey/Barton* test for corporates are contradictory and unfortunate.

For smaller companies, where the directing mind and will of the company is straightforward to establish and the linkage to criminal conduct is, therefore, also straightforward, a prosecution is rendered substantially easier.

For large companies including many financial institutions, overcoming the hurdle of linking criminality to the directing mind and will remain the real and, in many cases, insuperable challenge to prosecutors. Thus, it is unlikely, although not impossible, that the change of the dishonesty test will have any practical consequences for those large companies.

Thus the growing chasm between the ability to prosecute smaller companies and large companies is an unintended and unfortunate consequence of revamped dishonesty test.

This summary is distilled from a more detailed analysis.

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[1] [1982] Q.B. 1053.

[2] Ivey v Genting Casinos (UK) (trading as Cockfords Club) [2017] UKSC 67; [2018] AC 391.

[3] 29 April 2020, [2020] EWCA Crim 575.

[4] *Bilta (UK) Limited and ors v NatWest Markets plc* [2020] EWHC 546 (Ch) is a very recent example of the *Ivey* test being used in civil proceedings.

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