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Part II: The Cutting Edge of Dishonesty – *Ivey v Genting Casinos* symposium

IVEY v GENTING CASINOS AND DISHONESTY: NEW DAWN OR FALSE HORIZON?

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1 Introduction

Writing extra-judicially in the symposium for this volume, Lady Hale has said that the work of the UK Supreme Court ('the Court') involves serious business but that it can also on occasion be great good fun, and that *Ivey v Genting Casinos (UK) Ltd (t/a Crockfords Club)* ('*Ivey*')[1] was undoubtedly the case which had recently been most fun.[2]

The serious business which led to *Ivey* coming before the Court was that it comprised the first occasion on which an appellate court had to consider the meaning of s 42 of the Gambling Act 2005 ('GA 2005'), which creates a criminal offence of cheating at gambling. Section 42 contains no definition of 'cheating' in that context, although it does provide by s 42(3) that cheating 'may, in particular, consist of actual or attempted deception or interference in connection with (a) the processes by which gambling is conducted, or (b) a real or virtual game, race or other event or process to which gambling relates'. *Ivey* was not a criminal case, but was instead a civil claim brought by a professional gambler ('Mr Ivey') for the recovery of just over £7.7m from playing (in mini format, involving only him and the casino) a version of Baccarat known as Punto Banco at Crockfords Club in Mayfair ('Crockfords') on 20 and 21 August 2012. As explained below, this issue reached the Court due to a peculiar combination of factors, arising from the way in which the claim was defended and the way in which the arguments were decided by the courts below.

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1 [2017] UKSC 67, [2018] AC 391.

2 Lady Hale, 'Dishonesty' in Daniel Clarry (ed), *The UK Supreme Court Yearbook, Volume 9: 2017–2018 Legal Year* (Appellate Press 2019).

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If that was not serious enough, the Court took the opportunity in *Ivey* to consider the meaning of dishonesty in the criminal law. This was in spite of the fact that (contrary to Mr Ivey's arguments) the Court held that cheating at gambling does not require dishonesty. Accordingly, a discussion of the requirements of dishonesty was not necessary for the determination of the appeal. Moreover, it formed no part of the case of either party before the Court to suggest that the criminal law concerning dishonesty was unclear or in need of reform. The way in which this issue arose in the Court was therefore slightly extraordinary. Nevertheless, the decision is of great importance because it resolves a number of problems which have affected both the civil and the criminal law for many years, and effectively overrules the test for dishonesty in criminal cases laid down in *R v Ghosh* ('*Ghosh*').[3] In terms of significant cases concerning criminal law in recent years, *Ivey* equals the 2016 decisions of the Court and Privy Council concerning parasitic accessory liability.[4]

The judgment of the Court was given by Lord Hughes (with whom Lord Neuberger, Lady Hale, Lord Kerr and Lord Thomas agreed). So far as the topic of dishonesty is concerned, it contains three key elements. First, that 'there can be no logical or principled basis for the meaning of dishonesty (as distinct from the standards of proof by which it must be established) to differ according to whether it arises in a civil action or a criminal prosecution'.[5] Second, that there are 'convincing grounds for holding that the second leg of the test propounded in *Ghosh* does not correctly represent the law and that directions based upon it ought no longer to be given'.[6] Third, following on from the first two points, that for purposes of both civil and criminal law the test of dishonesty is 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

3 [1982] QB 1053.

4 *R v Jogee; Ruddock v The Queen* [2016] UKSC 8, [2016] UKPC 7, [2017] AC 387. See Julian B Knowles QC, 'Joint Enterprise after *Jogee* and *Ruddock*: What Next?' in Daniel Clarry (ed), *The UK Supreme Court Yearbook, Volume 7: 2015–2016 Legal Year* (rev edn, Appellate Press 2018).

5 *Ivey* (UKSC) (n 1) [63] (Lord Hughes).

6 ibid [74].

> 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.[7]

In order to understand why Lady Hale regarded *Ivey* as fun it is necessary to have regard to the fact that Mr Ivey used a technique known as 'edge-sorting'. He contended that this is a legitimate gambling technique, whereas Crockfords contended that it constitutes cheating. In essence, for purposes of Punto Banco, 'edge-sorting' requires cards with a face value of 7, 8 or 9 to be turned through 180 degrees in comparison with all other cards. If that is done, it is possible for the player to gain an advantage by looking at the leading edge of the first card in the dispenser ('shoe') before placing a bet, assessing whether that card appears to be a 7, 8, or 9, and placing a bet accordingly – on player to win if it is; and on banker to win if it is not.

This technique only works if the following further conditions are satisfied: (1) the pattern on the back of the cards is not symmetrical, (2) the same cards are used more than once, (3) the cards, when reshuffled, are not rotated at all, and (4) the leading edge of the first card in the shoe is visible to the player when it is sitting in the shoe and before the player places a bet.

Mr Ivey was only able to win using this technique (with the assistance of Ms Cheung Yin Sun, also known as 'Kelly' and, according to some media articles, as 'the queen of sorts') because Crockfords (1) used cards which had an asymmetrical pattern on the back, (2) chose to comply with their requests (a) to use an automatic shuffling machine (which does not rotate cards during the shuffling process) (b) to rotate the cards having a face value of 7, 8 and 9 through 180 degrees in comparison to all other cards and (c) to re-use the same cards (after they had thus been rotated), (3) chose not to manually cut the cards that had been mechanically shuffled, (4) used a shoe which exposed to view the leading edge of the first card in the shoe, and did not cover it by a brush or similar device, and (5) allowed them (a) to 'edge-sort' an entire shoe of cards (comprising 8 decks of 52 cards) between about 20:56 and 22:03 on 20 August 2012 and (b) to then play repeatedly with the 'edge-sorted' shoe between about 22:12 on 20 August 2012 and 03:57 on 21 August 2012, during which time Mr Ivey won about £2m, and between about 15:00 and 18:40 on 21 August 2012, during which time his winnings increased to the sum of just over £7.7m. Crockfords' case was that it was only when the casino decided to review matters before wiring these monies to Mr Ivey that the casino first had an inkling that anything to which it might take exception had occurred.

[7] ibid [74].

All these requests were openly made, and were voluntarily complied with by Crockfords. The reason for this is not hard to find: 'Casinos routinely play on quirky and superstitious behaviour by punters. It is in the casino's interests that punters should believe, erroneously, that a lucky charm or practice will improve their chance of winning and so modify or defeat the house edge. Consequently a wide variety of requests by punters, particularly those willing to wager large sums on games which they must, if they play long enough, lose in the long run, are accommodated by casinos without demur or surprise'.[8] At the same time, no doubt Crockfords would not have complied with the requests of Mr Ivey and Ms Sun if the casino had realised their significance. As Lord Hughes explained: 'For edge-sorting to work […] it is […] essential that the croupier is persuaded to rotate the relevant cards without her realising why she is being asked to do so'.[9] This forms the basis for Lord Hughes' conclusions that:

> What Mr Ivey did was to stage a carefully planned and executed sting. The key factor was the arranging of the several packs of cards in the shoe, differentially sorted so that this particular punter did know whether the next card was a high value or low value one. If he had surreptitiously gained access to the shoe and re-arranged the cards physically himself, no one would begin to doubt that he was cheating. He accomplished exactly the same result through the unwitting but directed actions of the croupier, tricking her into thinking that what she did was irrelevant [Mr Ivey] took positive steps to fix the deck. That, in a game which depends on random delivery of unknown cards, is inevitably cheating. That it was clever and skilful, and must have involved remarkably sharp eyes, cannot alter that truth.[10]

I have discussed *Ivey* with colleagues and friends on many occasions over the past few years, and numerous lawyers, including quite a few senior judges with whom I had no previous personal acquaintance, have volunteered their opinions. Those conversations suggest that there is no unanimity amongst the legal fraternity that Mr Ivey's actions amounted to cheating. Among other things, opinions may vary as to whether the croupier was 'persuaded' or 'tricked'. Crockfords did not call her to give evidence, and the trial judge, Mitting J, held that he therefore '[could not] safely infer what, if anything, she believed to be the situation when she agreed to sort

[8] ibid [13].
[9] ibid [13].
[10] ibid [50].

the cards differentially'.[11] Furthermore, with regard to the reasons for the request for the cards to be rotated that were given to the croupier by Ms Sun, it is perhaps ironic that the explanation that some cards were 'good' and others were 'not good' was factually correct. The casino may not have realised the significance of the request because Mr Ivey and Ms Sun said that it would 'change the luck'. However, this was held by Mitting J to be no more than playing up to the perception of Crockfords' staff that they were superstitious and to be 'by itself on the right side of the line separating cheating from legitimate gamesmanship'.[12] Be all that as it may, it seems clear that the general public, or a significant sector of it, takes a different view to the Court. This is illustrated by some of the media commentary about the case. Leaving aside the contents of publications and social media that are devoted to gaming, Victoria Coren Mitchell (a poker player) wrote in the Guardian that 'Phil and his partner noticed that Crockfords was using cards with an asymmetrical pattern on the back. (Like, duh.) Persuading the croupier to turn some of them upside down 'for luck' – which was eagerly agreed, as the house anticipated fat losses from this pair of visiting rubes – he could basically tell what was coming off the deck … Any clever person could see the situation … in my view, he didn't so much *cheat* the casino as *outwit* it';[13] and David Flusfeder (an author and poker player) wrote in the Financial Times:

> Casinos are machines engineered to separate people from their money. Most of those people are poor, losing money they can't afford, and casinos are generally slightly grubby places. But there are some that pride themselves, and flatter their customers, in being more high-end. The website for Crockfords in Mayfair declares its faithfulness to the 'heritage' of William Crockford's club that opened in 1828: 'To be selected for membership was to join an aristocratic and fashionable gaming elite and enjoy the best food and wines in surroundings of splendour'. There is an exacting dress code, too: 'Formal wear such as a suit or a tuxedo is required by men… and women must wear formal dresses or cocktail dresses'.
>
> Yet in August 2012, when Mr Ivey and his baccarat partner Cheung Yin 'Kelly' Sun won £7.7m at Crockfords, they weren't

[11] *Ivey v Genting Casinos (UK) Ltd (t/a Crockfords Club)* [2014] EWHC 3394 (QB), [2015] Lloyd's Law Rep 98, [39].

[12] ibid [40].

[13] Victoria Coren Mitchell, 'Casinos gamble on their credibility' *The Guardian* (London, 29 October 2017) <www.theguardian.com/commentisfree/2017/oct/28/casinos-gamble-on-their-credibility> accessed 27 August 2018.

> wearing formal clothes. A number of other rules or customs had also been waived on their behalf. […]
>
> Many poker players have what are known as 'leaks' from the game of skill to gambling games of pure chance. Mr Ivey has a reputation for being a big gambler. In the casino world, this is a good reputation to have. It means you are going to get 'comped'. In other words, the casinos are going to roll up their sleeves and give you things to coax you on to their gaming floor. And it means you're going to be underestimated.
>
> Mr Ivey and Ms Sun, in their casual clothes, made some requests of Crockfords. The former had wired £1m in advance, which increased the chances that their requests would be smiled upon.
>
> First, Ms Sun wanted an Asian dealer, because she is not very fluent in English. Perhaps playing up to the stereotype of the superstitious Chinese gambler, she talked to the dealer in Cantonese about luck. She asked to keep to the same deck of cards that had been opened to start the game. And finally, she asked for the high cards — the 7s, 8s and 9s — to be turned around from the rest of the deck.
>
> And as, over two sessions, the millions rolled their way, she was 'edge sorting'. Any deck of cards with a pattern on the back is exploitable. Being machine cut, there will be tiny irregularities in design, for example disparities between the right side of the card and the left. Ms Sun has learned how to notice those irregularities. And once the high cards had been turned, her advantage had moved from about – 1 per cent to + 6 per cent.
>
> For any poker player, the morality is clear: the casino was playing with its own deck, and it had chosen to give away its advantages. Mr Ivey and Ms Sun exploited the casino's greed and also some tired racial stereotypes — a black American poker player, a Chinese woman with broken English who was typically obsessed with luck. It didn't protect its hand. It gave away its advantage. And then it decided not to pay. Shamefully, the courts have backed this.[14]

[14] David Flusfeder, 'Poker's Ivey case shows the casino failed to protect its hand' *Financial Times* (London, 27 October 2018) <www.ft.com/content/e8ad2f60-ba68-11e7-bff8-f9946607a6ba> accessed 27 August 2018.

This chapter will first set out the facts of *Ivey*. Next, it will summarise the basis of the decisions of Mitting J at first instance and of the Court of Appeal. It will then identify some of the problems relating to the issue of dishonesty which pre-dated the decision of the Court in *Ivey*. After that, it will analyse the judgment of Lord Hughes. Finally, it will consider what, if any, issues concerning cheating and dishonesty are left outstanding.

2 The facts

Mr Ivey is recognised as one of the leading professional poker players in the world and is a citizen of the USA. Crockfords is owned by an English company which is part of the Genting Group, a Malaysian conglomerate which is one of the largest casino operators in the world.

The gaming took place in a private room and was recorded on CCTV. There was an agreed transcript of recordings of what occurred throughout each of the relevant sessions. The facts were therefore not in dispute. They were summarised by Lord Hughes, substantially in the words of Mitting J, whose findings of primary fact were accepted by both sides.

First, Lord Hughes summarised the features of Punto Banco:

> Punto Banco is a variant of Baccarat. It is not normally, to any extent, a game of skill. Six or eight decks or, in English nomenclature, packs of 52 cards are dealt from a shoe, face down by a croupier. Because the cards are delivered one by one from the shoe, she has only to extract them; no deviation is permitted in their sequence. She places them face down in two positions on the table in front of her, marked 'player', the 'Punto' in the name, and 'Banker', 'Banco'. Those descriptions label the positions marked on the table; there need be no person as 'player' and ordinarily there is not. She slides the cards from the shoe, face down, one card to player, one to banker; a second to player and a second to banker. In prescribed circumstances she must deal one further card, either to player or to banker or to both, but this possibility is irrelevant to what occurred.
>
> The basic object of the game is to achieve, on one of the two positions, a combination of two or three cards which, when added together, is nearer to 9 in total than the combination on the other position. Aces to 9 count at face value, 10 to King inclusive count as nothing. Any pair or trio of cards adding up to more than 10 requires 10 to be deducted before arriving at

> the counting total. Thus 4 plus 5 equals 9, but 6 plus 5 (which equals 11) counts as only 1.
>
> Punters (of whom there need only be one) play the house. They bet before any card is dealt and can bet on either the player or banker position. The cards are revealed by the croupier after a full hand (or 'coup'), usually of four cards, two to each position, has been dealt. Winning bets are paid at evens on player, and at 19 to 20 on banker. It is possible to bet on a tie. In the event of a tie, all bets on player or banker are annulled; in other words, the punter keeps his stake and the only bet paid out on is the tie at odds set by the casino of either eight to one or, at Crockfords, nine to one. It is possible to place other types of bet, but this case does not concern them and they need not be described. The different odds mean that the casino, or house, enjoys a small advantage, taken over all the play. That is standard and well known to all; casinos publish the percentage 'house edge' which they operate. In Punto Banco at Crockfords it was 1.24% if player wins and 1.06% if banker wins.[15]

Next, Lord Hughes explained how 'edge-sorting' becomes possible:

> A pack of 52 playing cards is manufactured so as to present a uniform appearance on the back and a unique appearance on the face. The backs of some cards are, however, not exactly uniform. The backs of many packs of cards for social use have an obvious top and bottom: for example the manufacturer's name may be printed once only, or the pattern may have an obviously right way up and an upside down. In casino games in which the orientation of the back of the card may matter, cards are used which are in principle indistinguishable whichever way round they are when presented in a shoe.
>
> Cards with no pattern and no margin at the edge present no problem; they are indistinguishable. However, many cards used in casinos are patterned. If the pattern is precisely symmetrical the effect is the same as if the card is plain; the back of one card is indistinguishable from any other. But if the pattern is not precisely symmetrical it may be possible to distinguish between cards by examining the backs.

[15] *Ivey* (UKSC) (n 1) [4]-[6].

'Edge-sorting' becomes possible when the manufacturing process causes tiny differences to appear on the edges of the cards so that, for example, the edge of one long side is marginally different from the edge of the other. Some cards printed by Angel Co Ltd for the Genting Group (which owns Crockfords) have this characteristic, apparently within the narrow tolerances specified for manufacture. The pattern is not precisely symmetrical on the back of the cards. The machine which cuts the card leaves very slightly more of the pattern, a white circle broken by two curved lines, visible on one long edge than on the other. The difference is sub-millimetric, but the pattern is, to that very limited extent, closer to one long edge of the card than it is to the other. Before a card is dealt from a shoe, it sits face down at the bottom of the shoe, displaying one of its two long edges. It is possible for a sharp-eyed person sitting close to the shoe to see which long edge it is.

Being able thus to see which long edge is displayed is by itself of no help to the gambler. All the cards have the same tiny difference between their right and left long edges, so knowing which edge is displayed tells the gambler nothing about the value of the next card in the shoe. The information becomes significant only if things can be so arranged that the cards which the gambler is most interested in are all presented with long edge type A facing the table, whilst all the less interesting cards present long edge type B. Then the gambler knows which kind of card is next out of the shoe.

In Punto Banco cards with a face value of 7, 8 and 9 are high value cards. If one such card is dealt to player or to banker, it will give that position a better chance of winning than the other. Thus a punter who knows that when the first card dealt (always to the 'player' position) is a 7, 8 or 9, he will know that it is more likely than not that player will win. If he knows that the card is not a 7, 8 or 9, he will know that it is more likely than not that banker will win. Such knowledge, it is agreed, will give the punter a long-term edge of about 6.5% over the house if played perfectly accurately.

What is therefore necessary for edge-sorting to work is for the cards in the shoe to be sorted so that all the 7s, 8s and 9s display edge type A, whilst the rest display edge type B. That means rotating the high value cards so that they display edge type A. If the punter were to touch the cards, the invariable practice at most casinos, including at Crockfords, would be that those

> cards would not be used again. The only person who touches the cards is the croupier. So what had to happen was to get the cards sorted (ie differentially rotated) by type A and type B by the croupier and then to get them re-used in the next shoe, now distinctively sorted.
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> For edge-sorting to work at Crockfords it is therefore essential that the croupier is persuaded to rotate the relevant cards without her realising why she is being asked to do so […].[16]

Lord Hughes then summarised the material events:

> All of the games of Punto Banco played by the claimant and Ms Sun on 20 and 21 August 2012 were captured on CCTV, mostly with contemporaneous audio recording as well. The moment at which they persuaded the croupier, Kathy Yau, to rotate the cards was at 9 pm on 20 August. The video shows it and the words spoken have been transcribed. Before then, the claimant and Ms Sun had played part of four shoes, the first two plain backed, and the second two Angel cards but with no asymmetry on the back.
>
> The claimant is a high stakes gambler. He began, by his standards, modestly: bets placed on those four shoes ranged from £4,000 to £75,000 per coup. He was losing. At 8.56 pm he requested a new shoe of cards. A new shoe was produced. The cards were blue Angel cards with the rounded pattern described on the back. At 8.57 the claimant asked Jeremy Hillier, the senior croupier overseeing the game: 'If I win, can I say I want the same cards again?' to which Mr Hillier replied he could, 'because [he was] not bending them'. The claimant had in fact avoided touching the cards from either the first or second shoe onwards.
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> The croupier, Kathy Yau, then put the cards face down in blocks on the table to make the cut, as is conventional. She cut the cards so as to exclude about one deck from play. The claimant asked about the cut: 'Why so big?' Ms Sun said: 'They don't cut the seven cards', a reference to the traditional cut of 7 cards from the end. Ms Yau asked if he wanted her to cut 7 cards, to which he replied 'yes', he wanted to play 90 hands, slightly more than the maximum likely to be possible with an

[16] ibid [7]-[13].

eight-deck shoe with a seven-card cut. She complied, after checking with the supervisor on duty in the room. That had the effect of maximising the number of coups which would be possible with those packs, and of exposing the maximum number of cards to the sorting (rotation) process.

Ms Yau then dealt the first coup. After the bet was made, and all the cards then dealt, the next stage was for the croupier to turn the cards face up to reveal whether Player or Banker had won. Ms Sun then asked Ms Yau in Cantonese to do it, in other words to turn the cards over so that the face showed, slowly. Ms Yau said 'yes'. Ms Sun then asked her again in Cantonese to turn the cards in a particular and differential way as they were being exposed and before they were put on the pile of used cards. 'If I say it is good, you turn it this way, good, yes? Um, no good'. (A slightly different sounding um). Ms Yau did not immediately understand what was required. She asked, 'so you want me to leave it?' To which Ms Sun replied, 'change, yeah, yeah, change luck'. Ms Yau: 'what do you mean?' Ms Sun gestured how to turn it. 'Turn it this way'. Ms Yau: 'what, just open it? Yeah'. Ms Sun: 'um', signifying good in Cantonese.

The claimant then chipped in, 'yeah, change the luck, that's good. Anything to change the luck, it is okay with me'. Ms Sun reiterated her request in Cantonese, 'If I say it is not good, you turn it this way. If it is good, turn it this way, okay?' To which Ms Yau said 'okay'. When she turned over the cards of the second coup, Ms Sun said of four of them, 'good', and of one, 'not good', in Cantonese. Ms Yau did as requested. What she was being asked to do, and did, was to turn the cards which Ms Sun called as 'good' end to end, and the 'not good' cards side to side. In consequence, the long edge of the 'not good' card was oriented in a different way from the long edge of the 'good' cards. The judge found that she had been 'wholly ignorant' of the significance of what she was doing, card by card, at the call of Ms Sun.

This procedure was followed for each of the next 79 coups dealt from this shoe. The maximum amount staked by the claimant on the coups towards the end of the shoe reached £100,000. Self-evidently, at no time during the play of this shoe did he derive any advantage from the rotation of the cards requested by Ms Sun because that rotation occurred at the end, not at the beginning, of each coup. This was all preparation.

At 10.03 pm, when the shoe was exhausted, the claimant said that he had won with that deck (ie shoe), and that he would keep it. The senior croupier, who had brought in a new collection of cards, was told by the claimant he did not want them, as he 'had won £40,000 with that deck'; that was agreed to. The original cards were reused. The defendant has not been able to calculate retrospectively whether that assertion of winnings to that point was true.

Before the shoe was reused it had to be reshuffled. The claimant had earlier asked Ms Yau's predecessor as croupier for a shuffling machine to shuffle the cards. The cards were reshuffled by a machine. For a punter using the edge-sorting technique this ensured that the shuffle would be effected without rotating any of the cards unless the croupier did so before they were put into the machine. Ms Yau did not do so. Manual shuffling would have carried a much higher risk of re-rotation as it was done.

Play with the reshuffled shoe recommenced at 10.12 pm and continued until Ms Yau went for a half hour break at 10.31 pm. The claimant did not play during her break but resumed when she returned until 3.57 am on 21 August. Ms Yau was the croupier throughout. The claimant's stake increased to £95,000 and then to £149,000 per coup. He won approximately £2m.

The accuracy of his bets on player increased sharply. In the first two shoes in which Angel cards were used, those without an asymmetric pattern on the back, he placed respectively 11 bets and then 1 bet on player and a 7, 8 or 9 only occurred once in that 12 times. On the shoe in which the edge-sorting was done in the manner described, he placed 23 bets on player of which eight were 7s, 8s or 9s. On the succeeding shoes, those at least that were completed on that night, shoes four to eight, the record was as follows. Shoe four, 23 accurate bets out of 27; shoe five, 22 accurate bets out of 25; shoe six, 20 accurate bets out of 26; shoe 7, 23 accurate bets out of 30; shoe 8, 17 accurate bets out of 19. A similar but slightly less pronounced pattern occurred on the following day.

At the end of play on the early morning of the 21st the claimant asked if he could keep the same shoe, which he referred to as a deck, if he returned on the following day. He was told he could. Ms Yau returned to duty at 2 pm on 21 August. The claimant resumed play with the same cards at 3 pm and played

> until 6.41 pm. His average stake was never less than £149,000. For the last three shoes it was £150,000, the maximum that he was allowed to bet each time. In the middle of play of the last shoe, the senior croupier told the claimant that the shoe would be replaced when it was exhausted. When it was, the claimant and Ms Sun left. By then he had won just over £7.7m.
>
> Crockfords' practice after a large win such as this is to conduct an ex post facto investigation to work out how it occurred. After quite lengthy review of the CCTV footage and examination of the cards, the investigators succeeded in spotting what had been done. Nobody at Crockfords had heard of edge-sorting before.
>
> Nine days after the play, on 30 August, the claimant spoke to Mr Pearce, Managing Director of the London casinos of Genting UK, who told him that Crockfords would not be paying his winnings because the game had been compromised. The claimant said he had not touched the cards, but did not state that which at the trial he freely admitted, that he had used edge-sorting. Arrangements were made to refund his deposited stake, £1m, on 31 August.[17]

Lord Hughes then summarised some of Mitting J's further findings of fact:

> The judge found that Mr Ivey gave factually frank and truthful evidence of what he had done. The finding was that he was a professional gambler who described himself as an 'advantage player', that is one who, by a variety of techniques, sets out to reverse the house edge and to play at odds which favour him. The judge found that he does so by means that are, in his opinion, lawful. He is jealous of his reputation and is adamant that what he does is not cheating. He described what he did, with Ms Sun, as legitimate gamesmanship. The judge accepted that he was genuinely convinced that what he did was not cheating.[18]

Mr Justice Mitting made further findings, upon which Mr Ivey sought to rely in the Court. First, Mitting J found that Mr Ivey's genuine opinion that what he was doing was not cheating was one that 'commands considerable

[17] ibid [14]-[26].
[18] ibid [27].

support from others'. [19] Second, with regard to deception, Mitting J held as follows:

> A surprising and striking omission from the evidence called by Crockfords is Ms Yau. She has not given evidence. I cannot, therefore, safely infer what, if anything, she believed to be the situation when she agreed to sort the cards differentially. I cannot safely say precisely what caused her to do that beyond accepting, as I do, that she followed house policy in doing whatever a high rolling punter requested which did not corrupt the game […]
>
> The claimant describes what he and Ms Sun did as legitimate gamesmanship. I am not satisfied that it amounted to deception of such a kind as to vitiate the gaming contract. What they did was to play up to Crockfords' staff's perception of what influenced his play, superstition. It was by itself on the right side of the line separating cheating from legitimate gamesmanship […].[20]

Third, it was common ground between the parties before Mitting J (and, indeed, before the Court of Appeal and the Court) that the tests of dishonesty for purposes of the criminal law (laid down in *Ghosh*[21]) and the civil law (re-iterated in *Starglade Properties Ltd v Nash*[22]) were different. Mr Justice Mitting expressly referred to both tests, and said that he was 'unconvinced' that dishonesty is a necessary element of the act of cheating for purposes of the civil law.[23] Mr Ivey submitted that it was plain from these passages, and from the reasons that Mitting J gave for holding that Mr Ivey had cheated, that Mitting J acquitted him of dishonesty, in accordance with either the criminal test or the civil test. Mr Ivey contended that if Mitting J had found him to be dishonest in accordance with either test, then Mitting J would have said so, because this would have provided a short answer to Mr Ivey's case. Instead, Mitting J formulated and applied a test for cheating that did not require dishonesty.[24] In the Court, Mr Ivey contended that this had been acknowledged by all three judges in the Court of Appeal. Lady Justice Arden said: 'the judge found neither dishonesty nor

[19] *Ivey* (EWHC) (n 11) [50].
[20] ibid [39].
[21] [1982] QB 1053.
[22] [2010] EWCA Civ 1314, [2011] Lloyd's Rep FC 102.
[23] *Ivey* (EWHC) (n 11) [44], [45] and [49].
[24] ibid [50].

deception'.[25] Lord Justice Tomlinson (who took up Crockfords' invitation 'to revisit the judge's finding that there had been no deception practised by Mr Ivey and Ms Sun' and held that '[t]he staff were deceived as to his reason for wanting the cards turned'[26]) said: '[a] finding that Mr Ivey here practised deception is not inconsistent with the judge's finding that he did not behave dishonestly'.[27] Lady Justice Sharp said that 'the judge plainly concluded that Mr Ivey was honest'.[28] Mr Ivey further contended that the Court could not properly disturb that finding.

3 The decisions of Mitting J and the Court of Appeal

It was common ground that the gaming contract between the parties was subject to an implied term that neither of them would cheat. This was the primary reason why the concept of cheating – on which there was 'a complete dearth of authority'[29] – became of relevance.

At first instance, Crockfords denied liability on three grounds. First, that in light of Mr Ivey's use of the technique of 'edge-sorting' no game of Punto Banco was, in fact, played. Mr Justice Mitting rejected that ground,[30] and Crockfords did not seek to revive it thereafter on appeal. Third, that Mr Ivey had committed the criminal offence of cheating at gambling under s 42 of the GA 2005, and could not found a claim on his own criminal conduct. As to that ground, Mitting J decided that the meaning of cheating under s 42 of the GA 2005 is not clear and that as it was not necessary for him to rule on the point (in light of his ruling on the second ground) it would be unwise for him to do so.[31] Crockfords' second ground of defence was that Mr Ivey had acted in breach of the implied term. Mr Justice Mitting upheld that ground on the following basis:

> It is necessary to analyse what the consequences are of what he did in relation to the game that he was playing. They were threefold.
>
> (1) He gave himself an advantage, throughout the play of the sixth and subsequent shoes, which the game precludes – knowing, or having a good idea, whether the first card was or

[25] *Ivey v Genting Casinos (UK) Ltd (t/a Crockfords Club)* [2016] EWCA Civ 1093, [2017] 1 WLR 679, [87].
[26] ibid [110], [112].
[27] ibid [113].
[28] ibid [140].
[29] *Ivey* (EWHC) (n 11) [35].
[30] ibid [34].
[31] ibid [52].

> was not a 7, 8 or 9. That is quite different from the advantage which may accrue to a punter as a result of counting the cards, so that very near to the end of the shoe he may obtain a legitimate advantage by doing so.
>
> (2) He did so by using the croupier as his innocent agent or tool by turning the 7s, 8s and 9s differentially. He was not simply taking advantage of an error on the part of the croupier or an anomaly produced by a practice of the casino for which he was not responsible.
>
> (3) He was doing so in circumstances in which he knew that she and her superiors did not realise the consequence of what she had done at his instigation. Accordingly, he converted a game in which the knowledge of both sides as to the likelihood that player or banker will win - in principle nil, - was equal into a game in which his knowledge is greater than that of the croupier and greater than that which she would reasonably have expected it to be.
>
> This in my view is cheating for the purposes of civil law. It is immaterial that the casino could have protected itself against it by simple measures. The casino can protect itself by simple measures against cheating or legitimate advantage play. The fact that it can do so does not determine which it is.[32]

Mr Ivey appealed to the Court of Appeal against Mitting J's ruling on the second ground. At the same time, Crockfords contended before the Court of Appeal that Mitting J's decision could also be upheld on the third ground. The Court of Appeal, by a majority, upheld Mitting J's decision and dismissed Mr Ivey's appeal. However, the reasoning of the judges in the Court of Appeal differed both from that of Mitting J and from one another.

Lady Justice Arden dismissed Mr Ivey's appeal for the following principal reasons. First, the meaning of 'cheat' for purposes of the implied term in the contract between the parties must follow s 42 of the GA 2005. Therefore, unless there was a breach of s 42 of the GA 2005, there was no reason for Mr Ivey to agree that his winnings should be irrecoverable.[33] Second, dishonesty is not a necessary ingredient of the criminal offence of cheating. If it were, the test established in *Ghosh* would apply, meaning that dishonesty could not be established in this case.[34] Third, Mitting J was correct to conclude that Mr Ivey's conduct amounted to cheating because Punto Banco

[32] ibid [50]-[51].
[33] *Ivey* (EWCA) (n 25) [59]-[60].
[34] ibid [14], [37]-[42].

is a game of pure chance. Mr Ivey's conduct materially altered his chances of winning and because of his plan to use the knowledge obtained from the reorienting of the cards, this amounted to interference with the process by which the game is conventionally played.[35]

Lord Justice Tomlinson agreed with Arden LJ's conclusion that Mr Ivey's appeal should be dismissed, for the following principal reasons. First, it was possible to dispose of the appeal without deciding the content of the criminal offence created by s 42 of the GA 2005.[36] Second, the concept of cheating and indeed cheating at gambling long ante-dates s 42 of the GA 2005 and the implied term in the contract between the parties must have had a content independent of it in the long period during which gambling contracts were enforceable at common law albeit rendered null and void by statute.[37] Third, contrary to Mitting J's conclusion, there was deception on the part of Mr Ivey of such a kind as to vitiate the gaming contract, and the inference was simply inescapable that Mr Ivey set out to deceive.[38] Fourth, most right-minded people would regard what was done by Mr Ivey as cheating. This was a case of physical interference with the cards brought about in a consciously deceptive manner. That is conduct which falls within the ordinary and natural meaning of the word 'cheating'. For purposes of the common law, cheating encapsulates unfairness in order to gain an advantage or deceit as much as it does conduct which is, by ordinary standards, dishonest; further, only some species of deception are dishonest; accordingly, there is no inconsistency between the finding that Mr Ivey practised deception and Mitting J's finding that Mr Ivey did not behave dishonestly.[39]

Lady Justice Sharp would have allowed Mr Ivey's appeal for the following principal reasons. First, subject to matters concerning the standard of proof, cheating for the purposes of the implied term cannot sensibly be looked at or defined differently from cheating contrary to s 42 of the GA 2005.[40] Second, it therefore becomes necessary to determine the meaning of the word 'cheat' for the purposes of s 42 of the GA 2005 and in particular the relevant *mens rea* where the offence is not suggested to be one of strict liability or one capable of being committed regardless of intent or knowledge.[41] Third, the required *mens rea* of the offence can be inferred from the description of the prohibited act, namely cheating. The word

35 ibid [86].
36 ibid [104].
37 ibid [105].
38 ibid [109], [112].
39 ibid [113].
40 ibid [126].
41 ibid [127].

'cheat' is an ordinary English word which as a matter of ordinary language and usage connotes dishonest conduct.[42] Fourth, nothing in s 42 of the GA 2005 displaces the requirement of dishonesty which the word 'cheat' imports. If the criminal offence in this area is to be sufficiently certain and workable, the appropriate touchstone for liability under s 42 of the GA 2005 must be one of dishonesty, and a proper and close construction of the section permits such an interpretation.[43] Fifth, the correct test for dishonesty is that identified in *Ghosh*.[44] Sixth, it would not be right to disturb Mitting J's findings as to Mr Ivey's honesty.[45]

The divergence of approach between these three judgments resulted in uncertainty as to the meaning of cheating within s 42 of the GA 2005, and, in particular, as to whether the offence created by that section requires dishonesty. This opened the way for an appeal to the Court.

4 Some historic problems relating to dishonesty

4.1 Misunderstanding in the criminal law

In *Ghosh*[46] the Court of Appeal considered the word 'dishonestly' in s 1 of the Theft Act 1968 ('TA 1968'), which provides: 'A person is guilty of theft if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it'. Lord Lane CJ asked the following questions: 'Is "dishonestly" in s 1 of the Theft Act 1968 intended to characterise a course of conduct? Or is it intended to describe a state of mind?', and added the following comments: 'If the former, then we can well understand that it could be established independently of the knowledge or belief of the accused. But if, as we think, it is the latter, then the knowledge and belief of the accused are at the root of the problem'.[47]

This led the Court of Appeal to promulgate the following two-stage test:

> In determining whether the prosecution has proved that the defendant was acting dishonestly, a jury must first of all decide whether according to the ordinary standards of reasonable and honest people what was done was dishonest. If it was not dishonest by those standards, that is the end of the matter and the prosecution fails. If it was dishonest by those standards,

[42] ibid [128].
[43] ibid [132], [135].
[44] ibid [138].
[45] ibid [140].
[46] [1982] QB 1053.
[47] ibid 1063.

> then the jury must consider whether the defendant himself must have realised that what he was doing was by those standards dishonest.[48]

Lord Lane CJ then observed:

> In most cases, where the actions are obviously dishonest by ordinary standards, there will be no doubt about it. It will be obvious that the defendant himself knew that he was acting dishonestly. It is dishonest for a defendant to act in a way which he knows ordinary people consider to be dishonest, even if he asserts or genuinely believes that he is morally justified in acting as he did. For example, Robin Hood or those ardent anti-vivisectionists who remove animals from vivisection laboratories are acting dishonestly, even though they may consider themselves to be morally justified in doing what they do, because they know that ordinary people would consider these actions to be dishonest.[49]

The Court of Appeal was right to say that dishonesty contains a subjective element. This is borne out by the partial definition of 'dishonestly' in s 2 of the TA 1968, which provides (among other things) that a person's appropriation of property belonging to another is not to be regarded as dishonest if he appropriates the property in the belief that he has in law the right to deprive the other of it, or in the belief that he would have the other's consent if the other knew of the appropriation and the circumstances of it.

This is also consistent with earlier decisions of the Court of Appeal. In *R v Gilks* ('*Gilks*')[50] the defendant placed bets with a bookmaker, and had winnings which amounted to £10.62, but was paid £117.25 by the bookmaker in the mistaken belief that he had backed a particular successful horse when he had not. Although the defendant was aware of the bookmaker's mistake, he accepted the money and kept it. He was charged with stealing the sum of £106.63. The nub of his case was 'if your bookmaker makes a mistake and pays you too much there is nothing dishonest about keeping it', and the trial judge directed the jury as follows: 'Well, it is a matter for you to consider, members of the jury, but try and place yourselves in that man's position at that time and answer the question whether in your view he thought he was acting honestly or dishonestly'.

[48] ibid 1064.
[49] ibid 1064.
[50] [1972] 1 WLR 1341.

The Court of Appeal held that, in the circumstances of the case, this was a proper and sufficient direction on the matter of dishonesty.[51] In *R v Feely* ('*Feely*')[52] the defendant was charged with theft of about £30 from his employers. He accepted that he had taken the money from their till, but claimed that this was only by way of borrowing, that he intended to pay the money back, that his employers owed him about £70, and that he wanted them to deduct the money which he had taken. The trial judge directed the jury that if the defendant had taken the money it was no defence for him to say that he had intended to repay it and that his employers owed him enough to cover what he had taken. His appeal against conviction was allowed. The Court of Appeal said not only that 'Jurors, when deciding whether an appropriation was dishonest, can be reasonably expected to, and should, apply the current standards of ordinary decent people' (an objective criterion) but also that 'In their own lives they have to decide what is and what is not dishonest. We can see no reason why, when in a jury box, they should require the help of a judge to tell them what amounts to dishonesty' (which would appear to contemplate a subjective element).[53]

Where the Court of Appeal in *Ghosh* fell into error was in dividing the subjective and objective elements in the way that it did. In fact, both the language of s 2 of the TA 1968 and *Gilks* and *Feely* (for example) pointed to a different two-stage exercise, comprising: first, a determination of what the defendant did and his state of mind at the time he did it (the subjective element), and, second, a determination of whether on those facts what he did was dishonest in accordance with the standards of ordinary decent people (an objective test).

4.2 Fluctuations in the civil law

In *Royal Brunei Airlines Sdn Bhd v Tan* ('*Tan*'),[54] the Privy Council considered the meaning of dishonesty in the context of the liability of an accessory to a breach of trust. Lord Nicholls, delivering the single judgment of the Privy Council, said:

> Whatever may be the position in some criminal or other contexts (see, for instance, *R v Ghosh*), in the context of the accessory liability principle acting dishonestly, or with a lack of probity, which is synonymous, means simply not acting as an honest person would in the circumstances. This is an objective

[51] ibid 1345 (Cairns LJ).
[52] [1973] QB 530.
[53] ibid 537-538 (Lawton LJ).
[54] [1995] 2 AC 378.

> standard. At first sight this may seem surprising. Honesty has a connotation of subjectivity, as distinct from the objectivity of negligence. Honesty, indeed, does have a strong subjective element in that it is a description of a type of conduct assessed in the light of what a person actually knew at the time, as distinct from what a reasonable person would have known or appreciated. Further, honesty and its counterpart dishonesty are mostly concerned with advertent conduct, not inadvertent conduct. Carelessness is not dishonesty. Thus for the most part dishonesty is to be equated with conscious impropriety.[55]

In *Twinsectra Ltd v Yardley* ('*Twinsectra*'),[56] the House of Lords was divided as to the requirements of the dishonesty spoken of in *Tan.* The majority (Lord Slynn, Lord Steyn, Lord Hoffmann and Lord Hutton) were in favour of what Lord Hutton called the 'combined test'. This 'requires that before there can be a finding of dishonesty it must be established that the defendant's conduct was dishonest by the ordinary standards of reasonable and honest people and that he himself realised that by those standards his conduct was dishonest'.[57] The only difference between this formulation and the test of dishonesty formulated in *Ghosh* is that the latter test uses the words 'the defendant himself must have realised'. That difference of language would appear to be explicable on the basis that the standard of proof in criminal cases is higher. Lord Hoffmann said: '…I consider that those principles [in *Tan*] require more than knowledge of the facts which make the conduct wrongful. They require a dishonest state of mind, that is to say, consciousness that one is transgressing ordinary standards of honest behaviour'.[58] In contrast, Lord Millett was in favour of adopting an objective approach as being more apposite to civil as distinct from criminal liability.[59] Lord Hoffmann described Lord Millett's point of view as being that 'It is sufficient that the defendant knew all the facts which made it wrongful for him to participate in the way in which he did'.[60]

Nevertheless, it would appear that Lord Millett envisaged that in certain circumstances the civil and criminal tests for dishonesty might sometimes be the same, and that the *Ghosh* test might therefore apply in both instances. Referring to the test in *Ghosh*, Lord Millett said:

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[55] ibid 389.
[56] [2002] 2 AC 164.
[57] ibid [27] (Lord Hutton).
[58] ibid [20].
[59] ibid [127]-[134].
[60] ibid [19].

> The same test of dishonesty is applicable in civil cases where, for example, liability depends upon intent to defraud, for this connotes a dishonest state of mind. *Aktieselskabet Dansk Skibsfinansiering v Brothers* [2001] 2 BCLC 324 was a case of this kind (trading with intent to defraud creditors). But it is not generally an appropriate condition of civil liability, which does not ordinarily require a guilty mind. Civil liability is usually predicated on the defendant's conduct rather than his state of mind; it results from his negligent or unreasonable behaviour or, where this is not sufficient, from intentional wrongdoing.[61]

Over time, although the majority view in *Twinsectra* seemed clear, the civil appellate courts clarified that an objective test for dishonesty is appropriate for purposes of the civil law.

In *Barlow Clowes v Eurotrust International Ltd* ('*Barlow Clowes*'),[62] Lord Hoffmann, delivering the single judgment of the Privy Council, said of his own speech in *Twinsectra* that 'the statement (in [20]) that a dishonest state of mind meant 'consciousness that one is transgressing ordinary standards of honest behaviour' was in their Lordships' view intended to require consciousness of those elements of the transaction which make participation transgress ordinary standards of honest behaviour. It did not also require him to have thought about what those standards were'.[63] Lord Hoffmann further said: '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'.[64]

This was followed by the decisions of the Court of Appeal in *Abou-Rahmah & Anor v Al-Haji Abdul Kadir Abacha & Ors* ('*Abou-Rahmah*')[65] and *Starglade Properties Ltd v Nash.*[66] In the latter case, the Chancellor stated that following the decision of the Court of Appeal in *Abou-Rahmah* 'the correct approach to questions of dishonesty is that indicated by the Privy Council in *Barlow Clowes*', that 'the law is that laid down in *Twinsectra* as interpreted in *Barlow Clowes*', and that 'The relevant standard, described variously in the statements I have quoted, is the ordinary standard of honest behaviour. Just

[61] ibid [116].
[62] [2005] UKPC 37, [2006] 1 WLR 1476.
[63] ibid [16].
[64] ibid [10].
[65] [2006] EWCA Civ 1492, [2007] 1 All ER (Comm) 827, [2007] 1 Lloyd's Rep 115.
[66] [2010] EWCA Civ 1314, [2011] Lloyd's Rep FC 102.

as the subjective understanding of the person concerned as to whether his conduct is dishonest is irrelevant so also is it irrelevant that there may be a body of opinion which regards the ordinary standard of honest behaviour as being set too high. Ultimately, in civil proceedings, it is for the court to determine what that standard is and to apply it to the facts of the case'.[67] In the same case, Leveson LJ expressed 'a note of concern if the concept of dishonesty for the purposes of civil liability differed to any marked extent from the concept of dishonesty as understood in the criminal law', and voiced the opinion that it was important that 'at some stage the opportunity to revisit this issue should be taken by the Court of Appeal (Criminal Division)'.[68] Lord Justice Hughes (as he then was) agreed with the judgment of the Chancellor and with those observations.[69]

In *Ivey*, in the course of discussing civil actions in which dishonesty has arisen as an issue, Lord Hughes said of these cases that 'Successive cases at the highest level have decided that the test of dishonesty is objective'.[70]

4.3 Dishonesty and disciplinary proceedings

In the context of disciplinary proceedings, however, the courts declined to follow this line of authority. In *Bryant and Bench v The Law Society* ('*Bryant*'),[71] Richards LJ, delivering the judgment of the court, referred to the *'Twinsectra* test' as it was widely understood prior to *Barlow Clowes* as 'including not only an essentially objective element ("that the defendant's conduct was dishonest by the ordinary standards of reasonable and honest people", albeit that the conduct is to be assessed in the light of the facts known to the defendant at the time) but also a separate subjective element ("knowledge by the defendant that what he was doing would be regarded as dishonest by honest people")'.[72] Lord Justice Richards further stated[73] that is how the matter had been approached when it had come before the courts in *D v The Law Society*,[74] *Bultitude v The Law Society*,[75] and *Donkin v The Law Society*[76]. Lord Justice Richards concluded:

> In our judgment, the decision of the Court of Appeal in *Bultitude* stands as binding authority that the test to be applied

[67] ibid [30], [32].
[68] ibid [42], [44].
[69] ibid [41].
[70] *Ivey* (UKSC) (n 1) [62].
[71] [2007] EWHC 3043 (Admin), [2009] 1 WLR 163.
[72] ibid [149].
[73] ibid [150]-152].
[74] [2003] EWHC 408 (Admin).
[75] [2004] EWCA Civ 1853.
[76] [2007] EWHC 414 (Admin).

> in the context of solicitors' disciplinary proceedings is the *Twinsectra* test as it was widely understood before *Barlow Clowes*, that is a test that includes the separate subjective element. The fact that the Privy Council in *Barlow Clowes* has subsequently placed a different interpretation on *Twinsectra* for the purposes of the accessory liability principle does not alter the substance of the test accepted in *Bultitude* and does not call for any departure from that test.
>
> In any event there are strong reasons for adopting such a test in the disciplinary context and for declining to follow in that context the approach in the *Barlow Clowes* case. As we have observed earlier, the test corresponds closely to that laid down in the criminal context by *R v Ghosh*; and in our view it is more appropriate that the test for dishonesty in the context of solicitors' disciplinary proceedings should be aligned with the criminal test than with the test for determining civil liability for assisting in a breach of a trust […] the tribunal's finding of dishonesty against a solicitor is likely to have extremely serious consequences for him both professionally (it will normally lead to an order striking him off) and personally. It is just as appropriate to require a finding that the defendant had a subjectively dishonest state of mind in this context as the court in *R v Ghosh* considered it to be in the criminal context. Indeed, the majority of their Lordships in the *Twinsectra* case appeared at that time to consider that the gravity of a finding of dishonesty should lead to the same approach even in the context of civil liability as an accessory to a breach of trust. The fact that their Lordships in the *Barlow Clowes* case have now taken a different view of the matter in that context does not provide a good reason for moving to the *Barlow Clowes* approach in the disciplinary context.[77]

Subsequent High Court cases in the disciplinary sphere followed this approach: see *Uddin v GMC*,[78] *Professional Standards Authority for Health and Social Care v Health and Care Professions Council, David*,[79] *Hussain v GMC*,[80] and *Kirschner v GDC* ('*Kirschner*').[81]

[77] *Bryant* (n 71) [153]-[154].
[78] [2012] EWHC 2669 (Admin).
[79] [2014] EWHC 4657 (Admin).
[80] [2014] EWCA Civ 2246.
[81] [2015] EWHC 1377 (Admin).

However, confusion persisted and misgivings were expressed. These points are illustrated by the judgment of Mostyn J in *Kirschner*. First, Mostyn J doubted the correctness of the decision in *Bryant,* said that 'The decision in *Bultitude* must surely be regarded as having been overreached or superseded by the adoption by the Court of Appeal of the *Barlow Clowes* modification in *Abou-Rahmah*', and noted that in *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd*[82] Lord Dyson MR was of the view[83] that the Court of Appeal in *Abou-Rahmah* had followed the decision in *Barlow Clowes* rather than the earlier decision of the House of Lords in *Twinsectra*.[84] Second, Mostyn J stated than an important argument in favour of the same test for dishonesty in all civil proceedings is that it negates the risk of inconsistent verdicts on identical facts, and that 'At present the scope for confusion is immense. A defendant can face the prospect of being found dishonest in one civil court but not in another, depending on the nature of the proceedings'.[85] Third, Mostyn J expressed the opinion that there should be a single test for dishonesty in all civil proceedings, whatever their nature, and that 'The test should be as propounded by the Privy Council in *Barlow Clowes* and as very recently confirmed by it in *Central Bank of Ecuador & Ors v Conticorp SA & Ors (Bahamas)* [2015] UKPC 11'.[86] Mr Justice Mostyn observed that 'Under the *Barlow Clowes* test the only relevant mental state of a defendant accused of dishonesty in civil proceedings is his or her knowledge. Once the knowledge of the defendant has been established it is then for the tribunal to act as the 'spokesman of the fair and reasonable man, who represents after all no more than the anthropomorphic conception of justice' (per Lord Radcliffe in *Davis Contractors Ltd v Fareham Urban District Council* [1956] AC 696, 728) and to determine if the defendant, possessed of that knowledge, and having engaged in the transactions in question, was dishonest by ordinary standards'.[87] Fourth, however, Mostyn J concluded:

> It would, however, be a step too far for me, notwithstanding my great misgivings, to hold that *Bryant* does not represent the law concerning dishonesty in disciplinary proceedings. Or that the *Twinsectra/Ghosh* test has not been adapted as suggested in *Hussain.* As things stand the test is [that] The tribunal should first determine whether on the balance of probabilities, a defendant acted dishonestly by the standards of ordinary and honest members of that profession; and, if it finds that he or

[82] [2012] Ch 453.
[83] ibid [74].
[84] *Kirschner* (n 81) [17].
[85] ibid [18].
[86] ibid [19].
[87] ibid [20].

> she did so, must go on to determine whether it is more likely than not that the defendant realised that what he or she was doing was by those standards, dishonest.[88]

5 The judgment of the Court in *Ivey*

Mr Ivey's arguments before the Court included the following elements. First, 'cheating' is an ordinary English word, which should be given its ordinary meaning. According to the most authoritative dictionary of the English language, the Oxford English Dictionary, the intransitive verb 'to cheat' means: 'To deal fraudulently, practise deceit'.[89]

Second, there is a long line of cases which show that dishonesty was plainly a requirement of all the common law offences which involved cheating, as exemplified by the definition of the common law offence of cheating cited in *Scott v The Metropolitan Police Commissioner*:[90] 'the fraudulent obtaining the property of another by any deceitful and illegal practice or token (short of felony) [which affects or may affect the public]'. Further, s 25 of the TA 1968 created the offence of 'going equipped to cheat' in which regard: 'cheat' means 'an offence under section 15 of this Act', and this concerns 'A person who by any deception dishonestly obtains property belonging to another, with the intention of permanently depriving the other of it'. As these offences simply criminalised the conduct described by the ordinary use of the word, they did not introduce the requirement of dishonesty: it stems from the word itself.

Third, once it is appreciated that there is a uniform concept of 'cheating' and that it (uniformly) requires dishonesty, the only sensible conclusion is that the same requirement of dishonesty is of universal application in whatever context the concept falls to be considered.

Fourth, turning to s 42 of the GA 2005: (a) this is a penal statute, and it must be strictly construed accordingly; (b) that 'cheating' in s 42 bears its normal, everyday meaning (i) is clear from the fact that s 42 contains no definition of the word, and (ii) is supported by the Explanatory Notes prepared by the Department of Media, Culture and Sports, which state that in s 42 '[t]he word "cheating" is not defined but has its normal everyday meaning', and by the Gambling Bill: Hansard (HC Debates) Standing Committee B, 30 November 2004. This interpretation is further supported by the considerations that (i) in accordance with judge-made law cheating required

[88] ibid [22].

[89] *OED Online* (OUP) < www.oed.com/view/Entry/31065 > accessed 27 December 2018 ('cheat, v').

[90] [1975] AC 819, 840 (Viscount Dilhorne).

dishonesty and '[i]t is a well-established principle that a rule of the common law is not extinguished by a statute unless the statute makes this clear by express provision or by clear implication'[91]); and (ii) there were other co-existing offences of cheating when s 42 of the GA 2005 was enacted (although many of them had been repealed by s 32(1) of the TA 1968, those that were still in existence required dishonesty as an essential element).

Fifth, while it may be right that, generally speaking, criminal liability depends on a person's state of mind whereas civil liability depends on a person's conduct rather than his state of mind, the latter proposition makes no sense where the wrong under consideration in the civil law connotes a dishonest state of mind. In such circumstances, the same test of dishonesty applies in both the criminal and civil contexts, as stated by Lord Millett in *Twinsectra*.[92]

Sixth, accordingly, for Mr Ivey to have cheated, he must have been dishonest and, moreover, dishonest in accordance with the test laid down in *Ghosh*, which he was not.

Lord Hughes accepted Mr Ivey's argument that the test of what is cheating must be the same for the implied term as for s 42 of the GA 2005, but rejected his case that dishonesty is an essential requirement of cheating in the context of games and gambling, and held that Mitting J's finding that he had cheated by using the technique of edge-sorting was 'unassailable'.

Lord Hughes considered the provisions of the Gaming Act of 1664 (16 Car 2 c7), the Gaming Act 1710 (9 Ann c 14), and the Gaming Act 1845 (8 & 9 Vict c 109), and held that given the origin of the expression 'ill practice' in the proscription with regard to 'any fraud, shift, cousenage, circumvention, deceit or unlawful device, or ill practice whatsoever' in the 1664 Act, which related to foot races, tennis and the like, as well as to gambling: 'it is not possible to treat 'ill practice' as having been limited by the principle of *ejusdem generis* to deception or fraud'.[93] Accordingly, Lord Hughes rejected Mr Ivey's argument based on common law offences and co-existing offences created by the TA 1968, on the following basis:

> Whilst it makes perfect sense to interpret the concept of cheating in section 42 of the Gambling Act in the light of the meaning given to cheating over many years, it makes none to interpret cheating, as used over those many years, by reference to an expression—dishonesty—introduced into the

[91] *R (Rottman) v Commissioner of Police for the Metropolis* [2002] 2 AC 692, [75] (Lord Hutton).
[92] *Twinsectra* (n 56) [115]-[116].
[93] *Ivey* (UKSC) (n 1) [32].

> criminal law for different purposes long afterwards in 1968. In gambling, there is an existing close relationship between the parties, governed by rules and conventions applicable to whichever game is undertaken, and which are crucial to what is cheating and what is not. Cheating at gambling need not result in obtaining the property of the other party, as section 42(2) explicitly says. Most importantly, whilst the additional element of dishonesty was necessary to the common law offence of cheating, and no doubt still is to the surviving offences of cheating the Revenue and conspiracy to defraud, in order to mark out the illegitimate and wrongful from the legitimate, the expression 'cheating' in the context of games and gambling carries its own inherent stamp of wrongfulness.[94]

With regard to the argument based on the ordinary meaning of the word 'cheating', Lord Hughes said:

> This argument is most neatly encapsulated by inversion: 'honest cheating' is indeed, as has been sensibly recognised by those who have addressed the phrase in this litigation, an improbable concept. But that is because to speak of honest cheating would be to suggest that some cheating is right, rather than wrong. That would indeed be contrary to the natural meaning of the word cheating. It does not, however, follow, either (1) that all cheating would ordinarily attract the description 'dishonest' or (2) that anything is added to the legal concept of cheating by an additional legal element of dishonesty.[95]

Lord Hughes then said:

> Although the great majority of cheating will involve something which the ordinary person (or juror) would describe as dishonest, this is not invariably so. When, as it often will, the cheating involves deception of the other party, it will usually be easy to describe what was done as dishonest. It is, however, perfectly clear that in ordinary language cheating need not involve deception, and section 42(3) recognises this. Section

[94] ibid [43].
[95] ibid [44].

> 42(3) does not exhaustively define cheating, but it puts beyond doubt that both deception and interference with the game may amount to it. The runner who trips up one of his opponents is unquestionably cheating, but it is doubtful that such misbehaviour would ordinarily attract the epithet 'dishonest'. The stable lad who starves the favourite of water for a day and then gives him two buckets of water to drink just before the race, so that he is much slower than normal, is also cheating, but there is no deception unless one manufactures an altogether artificial representation to the world at large that the horse has been prepared to run at his fastest, and by themselves it is by no means clear that these actions would be termed dishonesty. Similar questions could no doubt be asked about the taking of performance-enhancing drugs, about the overt application of a magnet to a fruit machine, deliberate time wasting in many forms of game, or about upsetting the card table to force a re-deal when loss seems unavoidable, never mind sneaking a look at one's opponent's cards.[96]

Dealing with the interaction between cheating and dishonesty, Lord Hughes said:

> Where it applies as an element of a criminal charge, dishonesty is by no means a defined concept. On the contrary, like the elephant, it is characterised more by recognition when encountered than by definition. Dishonesty is not a matter of law, but a jury question of fact and standards … Accordingly, dishonesty cannot be regarded as a concept which would bring to the assessment of behaviour a clarity or certainty which would be lacking if the jury were left to say whether the behaviour under examination amounted to cheating or did not […]
>
> There is no occasion to add to the value judgment whether conduct was cheating a similar, but perhaps not identical, value judgment whether it was dishonest. Some might say that all cheating is by definition dishonest. In that event, the addition of a legal element of dishonesty would add nothing. Others might say that some forms of cheating, such as deliberate interference with the game without deception, are wrong and cheating, but not dishonest. In that event, the addition of the

[96] ibid [45].

> legal element of dishonesty would subtract from the essentials of cheating, and legitimise the illegitimate. Either way, the addition would unnecessarily complicate the question whether what is proved amounts to cheating.[97]

Turning to the issue of dishonesty, Lord Hughes carried out a comprehensive review of the criminal and civil cases[98] before reaching the conclusion that for purposes of both civil and criminal law the test for dishonesty is the same, and is as already quoted above.[99] That analysis and conclusion have the effect of resolving all the pre-existing problems relating to dishonesty in the criminal and civil law (including disciplinary proceedings) discussed above.

However, the judgment of the Court raises further questions, as discussed below.

6 Where next?

At the time of writing, the Court of Appeal (Criminal Division) has not had occasion to consider the inter-relationship between *Ivey* and *Ghosh*. The general perception of the courts of first instance is as stated in *Signia Wealth Ltd v Vector Trustees Ltd*,[100] namely that the test in civil proceedings as to whether particular conduct amounts to dishonesty is that set out by the Privy Council in *Barlow Clowes* and that 'This test was reaffirmed in civil actions, and introduced into criminal actions, (over-turning the test in criminal proceedings laid down in *Ghosh*) by the Court in *Ivey*'.[101] Indeed, it appears that this analysis is widely accepted, at least by civil practitioners, such that the point is typically not put in issue. In *Raychaudhuri v General Medical Council*,[102] Sales LJ said: 'At the time of the decision of the MPT, the approach to dishonesty was taken to be that set out in [*Ghosh*]. Before Sweeney J and before us it was common ground that the approach to dishonesty in relation to findings made by the MPT should be that set out in *Ivey*.'[103] In *Solicitors Regulation Authority v James*,[104] Flaux LJ referred to the fact that, in one of the three cases before the court, the Solicitors' Disciplinary Tribunal ('SDT') had held that dishonesty was established

[97] ibid [48]-[49].
[98] ibid [62]-[73].
[99] ibid [74].
[100] [2018] EWHC 1040 (Ch).
[101] ibid [561] (Marcus Smith J).
[102] [2018] EWCA Civ 2027.
[103] ibid [54].
[104] [2018] EWHC 3058 (Admin), [2018] 4 WLR 163.

'applying the objective test of dishonesty as clarified by the Supreme Court in [*Ivey*]' and observed that: 'It is not suggested that there was any error of law in the application of that test.'[105] Accepting the force of the submissions of Counsel in another of those three cases, Flaux LJ referred to the considerations that at the time of the appellant's witness statement and until shortly before the hearing in front of the SDT 'the law on dishonesty had been thought to require both subjective and objective dishonesty as per the second limb of the test in [*Ghosh*]' and that '[t]he law had changed or been clarified by the Supreme Court in *Ivey* which disapproved the second limb of the *Ghosh* test.'[106] The status of Lord Hughes' observations concerning the concept of dishonesty for purposes of the criminal law was discussed in *DPP v Patterson*[107], by Sir Brian Leveson, President of the Queen's Bench Division:

> These observations were clearly *obiter*, and as a matter of strict precedent the court is bound by *Ghosh*, although the Court of Appeal could depart from that decision without the matter returning to the Supreme Court. This much is clear from *R v Gould* [1968] 2 QB 65, in which Diplock LJ observed at 68G that:
>
> 'In its criminal jurisdiction …the Court of Appeal does not apply the doctrine of *stare decisis* with the same rigidity as in its civil jurisdiction. If upon due consideration, we were to be of opinion that the law has been either misapplied or misunderstood in an earlier decision of this court or its predecessor, the Court of Criminal Appeal, we should be entitled to depart from the view expressed in that decision […]'
>
> Given the terms of the unanimous observations of the Supreme Court expressed by Lord Hughes, who does not shy from asserting that *Ghosh* does not correctly represent the law, it is difficult to imagine the Court of Appeal preferring *Ghosh* to *Ivey* in the future.[108]

This discussion seems to provide a strong indication that the decision in *Ivey* concerning the topic of dishonesty ought to be followed and applied in the context of the criminal law, just as (it would appear) that decision is accepted as having changed or clarified the law for the purposes of all forms

[105] ibid [7].
[106] ibid [79].
[107] [2017] EWHC 2820 (Admin), [2018] 1 Cr App R 28.
[108] ibid [16]-[17].

of civil proceedings. Both the origin of the problem (namely that the Court considered the topic *obiter* but nevertheless plainly intended that its analysis and conclusion should be treated as binding) and the suggested solution (to the effect that the principle of *stare decisis* applies or may be regarded as applying less strictly in the context of the criminal law) have been the subject of extensive commentary and some criticism. Concerns have been expressed not only about the dilemma which the precedential status of *Ivey* poses for courts of first instance, but also about the implications of the revised test for dishonesty in contexts which the Court had no occasion to consider, such as offences of conspiracy and under the Fraud Act 2006. The suggestion that the Court of Appeal could depart from the strict principle of precedent in a way which is disadvantageous to a criminal defendant has been said to be contrary to the judgment of May LJ in *R v Spencer*: '[a]s a matter of principle we respectfully find it difficult to see why there should in general be any difference in the application of the principle of *stare decisis* between the civil and the criminal divisions of this court, save that we must remember that in the latter we may be dealing with the liberty of the subject and if a departure from authority is necessary in the interests of justice to an appellant, then this court should not shrink from so acting.'[109] It has been argued that there are, or at least there may be, good reasons for not adopting the same test for dishonesty in both criminal and civil contexts. In part, these reasons echo the approach that was previously adopted in cases involving disciplinary proceedings like *Bryant*.

I would not question for one moment the significance of these issues. They merit the detailed consideration which they have been afforded, and no doubt will continue to be afforded, elsewhere. My own contribution to the debate is more prosaic. It involves accepting the premise that *Ivey* is clear and binding, and asking where that leaves the law on dishonesty.

The concept of dishonesty remains elusive. On the one hand, it is apparent from *Ghosh* that a Court of Appeal presided over by the then Lord Chief Justice considered that anti-vivisectionists who remove animals from a vivisection laboratory would incontrovertibly be acting dishonestly because it is inescapable that they would 'know that ordinary people would consider such actions to be dishonest'. On the other hand, it is apparent from *Ivey* that five Supreme Court judges including a later Lord Chief Justice regarded it as not dishonest or only doubtfully dishonest (a) for a runner to trip up one of his opponents, (b) for a stable lad to starve a horse of water and then give the horse buckets of water to drink just before a race so that the horse is much slower than normal, (c) for an athlete to take performance-enhancing drugs, (d) to apply a magnet to a fruit machine, (e) to upset a card table

[109] [1985] QB 771, 779.

to force a re-deal when loss seems unavoidable, and (f) to sneak a look at an opponent's cards. These views presumably reflect the perception of these tribunals as to what is and is not honest according to the standards of ordinary decent people. However, it is unclear that this perception is correct. It certainly does not accord with the reactions of many people when these illustrations are put to them. Based on my own experience, the position is the reverse: while most people agree that releasing an animal from a laboratory to save it from vivisection is unlawful, fewer than 50% consider that it is dishonest, whereas well over 50% of people consider that all or some of the courses of conduct identified at (a)–(f) above are dishonest.

This difficulty of definition leads on to further questions as to whether the objective test of 'the standards of ordinary decent people' is (i) appropriate and (ii) workable. The test assumes that there is a single standard which exists, and which can be applied to determine whether particular conduct by a person or persons having a certain state of knowledge ought or ought not to attract the epithet 'dishonest' (an ordinary English word, which is not susceptible to further elaboration, but which, at least in accordance with what was said in *Tan*, is synonymous with lack of probity, and 'means simply not acting as an honest person would in the circumstances', and includes 'commercially unacceptable conduct in the particular context involved'[110]). Even if it is assumed that there is, indeed, a single applicable standard which is capable of being applied to the particular facts that are in issue, there is, or may be, a problem as to how a jury is to apply it. If, as seems probable, jurors typically regard themselves as 'ordinary decent people', they will apply their own standards. That works well if their self-perception is accurate, but less well if it is not. If and to the extent that jurors are not 'ordinary decent people', there are difficulties about asking them to apply a standard to which they themselves do not measure up: first, they may not know what that standard is; second, they may feel uncomfortable about requiring higher standards from others than they require of themselves. These problems are exacerbated because the exercise is only likely to assume significance in marginal cases. On the facts of *Feely*, for example, a jury sympathetic to employees might acquit, while one sympathetic to employers might convict. These problems may also be exacerbated if the jury are asked to apply a standard which they have no difficulty in identifying to a context with which they are unfamiliar. Indeed, Mitting J observed that if dishonesty was an element of the offence under s 42, '[i]t is not obvious […] how in the unusual circumstances of a casino it is to be measured.'[111]

[110] *Tan* (n 54) 389, 390 (Lord Nicholls).
[111] *Ivey* (EWHC) (n 11) [44].

The Supreme Court in *Ivey* seized the opportunity to sort out the concerns that have troubled the law for the past few decades arising from the second limb of the test in *Ghosh*. However, there are problems underlying the first limb of that test, which is part of both the civil and the criminal law of dishonesty, which are likely to provide grounds for debate for years to come.