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

CHEATING

The Hon Michael Beloff QC[*]

1 Introduction

In a card game of chance, Punto Banco Baccarat, a gambler, Mr Ivey, used the technique of 'edge-sorting', which relied on noting tiny physical differences in the edges of the cards. By claiming to be superstitious, he persuaded the croupier at Crockfords to use the same pack of cards and to turn 'lucky' cards around, enabling him to use the technique. That increased his odds of winning. The gambler believed that edge-sorting was an honest technique. He sued for his winnings of £7 million, which Crockfords had refused to pay on the basis that he had cheated. The judge, Mr Justice Mitting, who heard inconclusive expert evidence as to whether there was an industry standard for cheating, held that although the gambler was genuinely convinced that what he had done was not cheating, he had in fact and law cheated, thus breaching the implied term against cheating in his contract with the casino. The Court of Appeal by a majority (Sharp LJ dissenting) upheld his decision,[1] as did a unanimous panel of the UK Supreme Court ('the Court'), in which the leading judgment given by Lord Hughes (which demonstrated a fine appreciation of the nuances of the game, itself a variant of the better-known baccarat), was agreed with by Lord

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[1] *Ivey v Genting Casinos UK Ltd* [2016] EWCA Civ 1093, [2017] 1 WLR 679.

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Neuberger, Lady Hale, Lord Kerr and Lord Thomas.[2] As Lord Hughes explained:

> The judge's conclusion, that Mr Ivey's actions amounted to cheating, is unassailable. It is an essential element of Punto Banco that the game is one of pure chance, with cards delivered entirely at random and unknowable by the punters or the house. 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. As soon as the decision to change the cards was announced, thus restoring the game to the matter of chance which it is supposed to be, he first covered his tracks by asking for cards to be rotated at random, and then abandoned play. It may be that it would not be cheating if a player spotted that some cards had a detectably different back from others, and took advantage of that observation, but Mr Ivey did much more than observe; he 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.[3]

According to Lord Hughes, there were three issues in play in the appeal: '(1) the meaning of the concept of cheating at gambling, (2) the relevance to it of dishonesty, and (3) the proper test for dishonesty if such is an essential element of cheating'.[4] But the judgment itself, in particular the criticism of the *Ghosh* test for dishonesty[5] which had held sway in the field of criminal law for more than three decades, raised more varied questions of much wider interest: *inter alia*, whether and, if so, how an *obiter dictum*

[2] *Ivey v Genting Casinos (UK) Ltd* [2017] UKSC 67, [2017] 3 WLR 1212 (subsequent references to '*Ivey*' are to this case).
[3] ibid [50].
[4] ibid [1].
[5] As found in *R v Ghosh* [1982] 1 QB 1053 (CA).

de jure can become *de facto* a precedent;[6] whether and to what extent, in fashioning the common law, the judiciary should pay heed to a steer from the legislature;[7] whether the replacement of *Ghosh* by a new test for dishonesty in criminal law has satisfactorily resolved the problems which existed in that sphere;[8] whether and to what extent the criminal and civil law concepts of dishonesty should coincide;[9] and the impact of the decision on other areas, including sport, where the notion of cheating provides a dividing line between acceptable and unacceptable behaviour.

My mandate is to focus on the concepts of dishonesty and of cheating, and how the Court's decision impacts upon the latter not only in the specific area of gambling but in the wider world of sport.[10] I shall start with a consideration of the status post-*Ivey* (a civil, not a criminal law case) of dishonesty in civil law, because – although it was only discussed in the latter part of the judgement (and strictly unnecessarily in the light of the Court's ruling in the former part that cheating did not always involve dishonesty) – it requires no great imagination to infer that it was to pronounce on the dimensions of dishonesty that the Court decided to hear the appeal at all. Those observations on dishonesty, although gratuitous – the gambler's appeal was lost, whatever the Court's view as to the meaning of dishonesty in this context – will inevitably be the most important legal legacy of the case.

2 Twists and turns in the law on dishonesty before *Ivey*

There were previous to *Ivey* two different tests for dishonesty, one in criminal, one in civil law. The former stemmed from *R v Ghosh*[11] *('Ghosh')* and contemplated a two-stage test for a jury, aptly summarised by Lord Hughes in *Ivey* as follows:

> Firstly, it must ask whether in its judgment the conduct complained of was dishonest by the lay objective standards of

[6] See David Ormerod QC and Karl Laird, '*Ivey v Genting Casinos – Much Ado About Nothing?*' in Daniel Clarry (ed), *The UK Supreme Court Yearbook, Volume 9: 2017–2018* (Appellate Press 2019). See also Karl Laird, 'Dishonesty: *Ivey v Genting Casinos UK Ltd (t/a Crockfords Club)*' [2018] Crim LR 395, 397–99.

[7] ibid 399: the Fraud Act 2006 appeared to accept the *Ghosh* test for dishonesty. To the same effect, see Matthew Dyson and Paul Jarvis, 'Poison Ivey or Herbal Tea Leaf?' (2018) 134 LQR 198, 200–01.

[8] Since the *Ivey* test is less favourable to defendants than the *Ghosh* test, there is no scope for a challenge by persons convicted under the old law to seek to re-open their convictions on the basis of the *lex mitior* principle.

[9] Graham Virgo, 'Cheating and Dishonesty' (2018) 77 CLJ 18.

[10] For the the implications of *Ivey* (n 2) for criminal law, see Ormerod QC and Laird (n 6).

[11] *Ghosh* (n 5).

> ordinary reasonable and honest people. If the answer is no, that disposes of the case in favour of the defendant. But if the answer is yes, it must ask, secondly, whether the defendant must have realised that ordinary honest people would so regard his behaviour, and he is to be convicted only if the answer to that second question is yes.[12]

Oddly, as in *Ivey* itself, while the restatement in *Ghosh* was designed to eliminate previous doubts as to whether the criminal law test was objective or subjective (the previous law being described by Lord Hughes as 'in a state of some entanglement'[13]), it was unnecessary on the facts of that case: a surgeon who had claimed, *inter alia*, payment for operations he had not performed was dishonest on any conceivable test, objective, subjective or – as in *Ghosh* – a mixture of the two.[14] Moreover, a *Ghosh* direction was only required to be given to the jury if a defendant submitted that he had not appreciated that what he had done would be regarded as dishonest by ordinary and reasonable people.[15]

The latter test for dishonesty in civil law, stemmed from *Royal Brunei Airlines Sdn Bhd v Tan* ('*Tan*'),[16] a decision of the Privy Council which concerned the liability of an accessory to a breach of trust. In this case too the dimensions of dishonesty were incidental to the main issue in the appeal, described by Lord Nicholls as 'whether the breach of trust which is a prerequisite to accessory liability must itself be a dishonest and fraudulent breach of trust by the trustee'.[17] But in this area also the law had for a while lacked desirable certainty. Quite apart from the contextual misreading of the classic dictum of Lord Selborne LC in *Barnes v Addy*[18] which had led generations of judges to focus perversely on the state of mind of the trustee rather than of the accessory,[19] there was the issue as well of the test of fault

[12] *Ivey* (n 2) [54].
[13] ibid [57].
[14] *Ghosh* (n 5) 1064–65 (Lord Lane CJ).
[15] *R v Roberts (William)* (1987) 84 Cr App R 117 (CA) 122–23 (O'Connor LJ).
[16] [1995] 2 AC 378 (PC). I was counsel for the successful appellant, though any association between my submissions and the judgment itself was adventitious.
[17] ibid 384.
[18] (1873–74) LR 9 Ch App 244, 251–52 (Lord Selborne LC) ('[The responsibility of a trustee] may no doubt be extended in equity to others who are not properly trustees, if they are found […] actually participating in any fraudulent conduct of the trustee to the injury of the *cestui que trust.* But […] strangers are not to be made constructive trustees merely because they act as the agents of trustees in transactions within their legal powers, transactions, perhaps of which a Court of Equity may disapprove, unless those agents receive and become chargeable with some part of the trust property, or unless they assist with knowledge in a dishonest and fraudulent design on the part of the trustees.').
[19] *Tan* (n 16) 386 (Lord Nicholls) ('Their Lordships venture to think that the reason is that, ever since the *Selangor* case [1968] 1 WLR 1555 highlighted the potential uses of equitable

for the accessory. The tension here has been described by Graham Virgo as follows: 'It is clear that some fault is required since it is an obligation-based rather than a receipt-based liability so that an innocent third party with no reason to suspect a breach of trust or fiduciary duty will not be liable.'[20] Lord Nicholls accordingly rejected in principle and for practical reasons the polar opposites of no liability and strict liability.[21] He also adverted to but discarded the notion that negligence should suffice, and departed from a series of cases which identified constructive notice of the breach of trust as the appropriate test of fault,[22] preferring those which proposed a test of want of probity[23] or dishonesty.[24]

The Privy Council accordingly held that dishonesty, rather than mere knowledge of the breach of trust or fiduciary obligation, was both a necessary and a sufficient ingredient of liability.[25] In Lord Nicholls' words:

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remedies in connection with misapplied company funds, there has been a tendency to cite and interpret and apply Lord Selborne LC's formulation in *Barnes v Addy*, LR 9 Ch App 244, 251–252, as though it were a statute. This has particularly been so with the accessory limb of Lord Selborne LC's apothegm. This approach has been inimical to analysis of the underlying concept. Working within this constraint, the courts have found themselves wrestling with the interpretation of the individual ingredients, especially "knowingly" but also "dishonest and fraudulent design on the part of the trustees," without examining the underlying reason why a third party who has received no trust property is being made liable at all.'). See also *Williams v Central Bank of Nigeria* [2014] UKSC 10, [2014] AC 1189, [35] (Lord Sumption) ('liability of a knowing assister has always depended on the unconscionability of *his* conduct. Cases involving an honest trustee and a dishonest assister have rarely arisen, whether before or after 1939. In practice, the trustee usually is dishonest and the alleged constructive trustee's conscience is affected because he has participated in the scheme with knowledge of that fact. That was why Lord Selborne LC spoke as he did. But the authorities cited by Lord Nicholls of Birkenhead in the *Royal Brunei Airlines* case [1995] 2 AC 378, 385, show that in those, older, cases where the question of the honest trustee and the dishonest assister had been considered, the critical question was the state of mind of the assister. The problem, as he pointed out at p 386, was the tendency since *Selangor United Rubber Estates Ltd v Cradock (No 3)* [1968] 1 WLR 1555 to read Lord Selborne LC's statement like a statute.'). However, Graham Virgo criticises this observation on the basis that '[i]n the space of one paragraph the whole gamut of equitable fault is encompassed without any apparent awareness that these terms might bear different meanings': Graham Virgo, *The Principles of Equity and Trusts* (2nd edn, OUP 2016) 727. I doubt that Lord Sumption is ever guilty of lack of legal awareness and I am unconvinced by the criticism, which is in any event irrelevant to Lord Sumption's endorsement.

[20] Virgo, *Principles* (n 19) 725.

[21] *Tan* (n 16) 386–87.

[22] See eg *Selangor United Rubber Estates Ltd v Cradock (No 3)* [1968] 1 WLR 1555 (Ch), 1590 (Ungoed-Thomas J); *Baden v Societe Generale pour Favoriser le Developpement du Commerce et de l'Industrie en France SA* [1993] 1 WLR 509 (Ch).

[23] *Tan* (n 16) 387–89. See eg *Carl Zeiss Stiftung v Herbert Smith & Co (No 2)* [1969] 2 Ch 276 (CA); *Eagle Trust Plc v SBC Securities Ltd* [1993] 1 WLR 484 (Ch), 495 (Vinelott J).

[24] See eg *Re Montagu's Settlement Trusts* [1987] Ch 264 (Ch), 285 (Sir Robert Megarry V-C); *Agip (Africa) Ltd v Jackson* [1990] Ch 265 (Ch), 293 (Millett J).

[25] ibid 392 (Lord Nicholls).

> A liability in equity to make good resulting loss attaches to a person who dishonestly procures or assists in a breach of trust or fiduciary obligation. It is not necessary that, in addition, the trustee or fiduciary was acting dishonestly, although this will usually be so where the third party who is assisting him is acting dishonestly. 'Knowingly' is better avoided as a defining ingredient of the principle, and in the context of this principle the *Baden* [1993] 1 WLR 509 scale of knowledge is best forgotten.[26]

This still left for resolution whether the civil law test for dishonesty was objective or subjective. Lord Nicholls analysed the matter in the following way:

> [I]t will be helpful to define the terms being used by looking more closely at what dishonesty means in this context. Whatever may be the position in some criminal or other contexts (see, for instance, *Reg v Ghosh* [1982] QB 1053), 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 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. However, these subjective characteristics of honesty do not mean that individuals are free to set their own standards of honesty in particular circumstances. The standard of what constitutes honest conduct is not subjective. Honesty is not an optional scale, with higher or lower values according to the moral standards of each individual. If a person knowingly appropriates another's property, he will not escape a finding of dishonesty simply because he sees nothing wrong in such behaviour.

[26] ibid.

> In most situations there is little difficulty in identifying how an honest person would behave. Honest people do not intentionally deceive others to their detriment. Honest people do not knowingly take others' property. Unless there is a very good and compelling reason, an honest person does not participate in a transaction if he knows it involves a misapplication of trust assets to the detriment of the beneficiaries. Nor does an honest person in such a case deliberately close his eyes and ears, or deliberately not ask questions, lest he learn something he would rather not know, and then proceed regardless.[27]

Later he emphasised that:

> when called upon to decide whether a person was acting honestly, a court will look at all the circumstances known to the third party at the time. The court will also have regard to personal attributes of the third party, such as his experience and intelligence, and the reason why he acted as he did.[28]

The objective test for civil dishonesty – an essential element in the accessory's liability – was finally vouched for by a series of later cases, some at the highest level of the judicial hierarchy, though not without some volatility. In *Twinsectra Ltd v Yardley* ('*Twinsectra*'),[29] a decision of the House of Lords, the main debate (somewhat obscured by peripheral considerations of the rulings of the first instance judge[30] and of the particular facts of the case) was between the majority, who considered that dishonesty in the *Tan* sense was required, and the minority – consisting of Lord Millett – who held that the true test for civil liability was framed in this way: '[I]t should not be necessary that the defendant realised that his conduct was dishonest; it should be sufficient that it constituted intentional wrongdoing.'[31]

In relation to the issue of dishonesty the decision is somewhat unsatisfactory. Lord Hutton in the most detailed judgment for the majority identified three possible tests: purely subjective (colloquially known as the Robin Hood test); purely objective; and a hybrid or combined test 'which requires that before there can be a finding of dishonesty it must be established that

[27] ibid 389.
[28] ibid 391.
[29] [2002] UKHL 12, [2002] 2 AC 164.
[30] Justice Carnwath, later Lord Carnwath.
[31] *Twinsectra* (n 29) [127].

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'.[32] He noted:

> It would be open to your Lordships to depart from the principle stated by Lord Nicholls that dishonesty is a necessary ingredient of accessory liability and to hold that knowledge is a sufficient ingredient. But the statement of that principle by Lord Nicholls has been widely regarded as clarifying this area of the law and, as he observed, the tide of authority in England has flowed strongly in favour of the test of dishonesty. Therefore I consider that the courts should continue to apply that test and that your Lordships should state that dishonesty requires knowledge by the defendant that what he was doing would be regarded as dishonest by honest people, although he should not escape a finding of dishonesty because he sets his own standards of honesty and does not regard as dishonest what he knows would offend the normally accepted standards of honest conduct.[33]

This conclusion was on its face more *Ghosh* than *Tan*. Lord Hutton, however, purported not to perceive any difference between them,[34] whereas Lord Millett, the dissenter, was confident that there was, saying that Lord Nicholls 'did not employ the concept of dishonesty as it is understood in criminal cases'.[35] In this he was clearly correct, since it was no accident that Lord Nicholls had, as cited above, started his analysis with the cautionary words distinguishing between the two: 'Whatever may be the position in some criminal or other contexts (see, for instance, *Reg v Ghosh* [1982] QB 1053), in the context of the accessory liability principle […]'.[36]

The question of whether *Tan* and *Twinsectra* rode in tandem or not was further complicated by the fact that 'the usual rules of precedent would mean that the decision of the House of Lords prevailed.'[37] In another Privy Council case, *Barlow Clowes International Ltd v Eurotrust International Ltd* ('*Barlow Clowes*'),[38] which sought to set the law back on the true path,

[32] ibid [27] (emphasis added).
[33] ibid [36]. TM Yeo and H Tjio, 'Knowing What is Dishonesty' (2002) 118 LQR 502 note the actual, if not admitted, departure from *Tan*; the clue is in the conjunctive.
[34] *Twinsectra* (n 29) [31].
[35] ibid [114].
[36] *Tan* (n 16) 389.
[37] Virgo, *Principles* (n 19) 729–730.
[38] [2005] UKPC 37, [2006] 1 WLR 1476.

Lord Hoffmann for the Board accepted, vis-à-vis Lord Hutton's conclusion, that 'there [was] an element of ambiguity in those remarks',[39] while himself ruling:

> 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.[40]

However, he further complicated the clarity of that statement by saying expressly that the principles laid down in *Twinsectra* were 'no different' from the principles in *Tan*,[41] In doing so, he doubled down on, rather than destroyed, the previously perceived dilemma as to what the test was for dishonesty in a civil law context and which decisions, if the House of Lords and Privy Council actually spoke with different voices, bound the lower courts. Academic commentary has described this ingenious attempt at reconciliation as a 'sleight of hand'[42] and in my respectful view rightly so. It would be impertinent to suggest that the Board in *Barlow Clowes* did not know what the House of Lords in *Twinsectra* meant, not least because of the overlap of membership of those two bodies in those two cases; but what was meant and what was said in *Twinsectra* was not the same.

In *Abou-Rahmah v Abacha*,[43] the Court of Appeal cut the Gordian knot and followed *Barlow Clowes* on the basis that it clarified rather than departed from *Twinsectra*; therefore, even though it was a decision of the Privy Council and not of the House of Lords, it was the firmer guide.[44] The

[39] ibid [15]. His Lordship had to 'interpret' so as to clarify his statements in *Twinsectra*: *Abou-Rahmah v Abacha* [2006] EWCA Civ 1492, [2007] 1 All ER (Comm) 827, [59], [65]-[66], [68]-[69] (Arden LJ).

[40] *Twinsectra* (38) [10].

[41] ibid [18].

[42] Matthew Congalen and Amy Goymour, 'Dishonesty in the Context of Assistance – Again' (2006) 65 CLJ 18, 20. See, to like effect, TM Yeo, 'Dishonest Assistance: A Restatement from the Privy Council' (2006) 122 LQR 171, 173.

[43] *Abou-Rahmah* (n 39).

[44] ibid [65]–[69] (Arden LJ). In *Sinclair Investments Ltd v Versailles Trade Finance Ltd* [2011] EWCA Civ 347, [2012] Ch 453, [74]-[76] (Lord Neuberger MR), the Court of Appeal was asked to adopt a similar, interpretative approach to that taken by the Court of Appeal in *Abou-Rahmah* (n 39) in relation to the Privy Council decision in *Barlow Clowes* (n 38) on the basis that it was clear that had the relevant point of law under consideration in that case gone to the House of Lords, the decision of the Privy Council in *Attorney-General for Hong Kong v Reid* [1994] 1 AC 324 – technically, a decision under the law of New Zealand by virtue of the appeal to the Privy Council being from a decision of the Court of Appeal of New Zealand – would have been followed as opposed to earlier decisions in English law.

objective test was recognised in *Starglade Properties Ltd v Nash* ('*Starglade*'),[45] where Sir Andrew Morritt C said, '[t]here is a single standard of honesty objectively determined by the court. That standard is applied to specific conduct of a specific individual possessing the knowledge and qualities he actually enjoyed.'[46] In short there are two questions: first, what the defendant knew or suspected about the particular transaction he was assisting (for absent such knowledge or suspicion, the precondition for a finding of dishonesty would be lacking); and second, given such knowledge or suspicion, if his conduct fell below ordinary standards of honesty, whether or not he recognised such shortfall.

3 The legal legacy of *Ivey*

Mindful of the divergent development of dishonesty in the civil and criminal law – though, as just highlighted, the reality was somewhat more nuanced – *Ivey* marked a watershed in the Court endorsing a single test for dishonesty in the law generally, preferring *Tan* to *Ghosh*. As Lord Hughes said:

> When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively[47]) 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 [of] whether his conduct was honest or 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.[48]

In so ruling, the Court has gone some way towards answering concerns that the divergence between civil and criminal law on the face of it lacked

In another chapter in the fascinating interplay of roles performed by the senior judiciary in this area, Lord Neuberger presided on the panel of the Supreme Court that heard and determined *Ivey*.

45 [2010] EWCA 1314, [2011] Lloyd's Rep FC 102.

46 ibid [25].

47 The adverb is oddly located in this sentence, compared to the later, more obviously well-placed adjective 'objective', but the sense is clear.

48 *Ivey* (n 2) [74].

coherence.[49] It is worth noting, though, that this distinction still has its champions on campus, if not in court. For instance, the departure from it in *Ivey* has been described by one academic as 'not convincing',[50] because:

> There are many examples of situations where the criminal and civil law use the same concepts which are defined differently, and such divergence may be justified by virtue of the different functions of the criminal and civil law. Different tests of dishonesty could be justified because in the civil law dishonesty determines unacceptable conduct in order to impose liability, whereas dishonesty in the criminal law is concerned with identifying culpability, which requires consideration of the defendant's mental state. The effect of *Ivey* is to treat dishonesty in the criminal law as a mechanism for assessing conduct rather than culpability, albeit that the defendant's knowledge or belief about the facts is relevant to this objective assessment.[51]

However, because of the different standards of proof, the results of application of the same test in different spheres will inevitably differ – which would be of some consolation at least to Mr Ivey, who might in principle have been vulnerable to a criminal charge for breach of s 42 of the Gambling Act 2005 ('the GA 2005'), although his belief that what he was doing was honest was not challenged.

All told, there is no doubt now as to the test for dishonesty in civil law;[52] *Tan* has emerged triumphant. There is little doubt too as to the test in criminal law (which is now the same). In *DPP v Patterson*,[53] a post-*Ivey* case, Sir Brian Leveson P observed:

> [A]s a matter of strict precedent the court is bound by *Ghosh*, although the Court of Appeal could depart from that decision

[49] *Starglade* (n 45) [42] (Leveson LJ) (in which his Lordship 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 criminal law' – a concern shared by Hughes LJ at [41]). It has certainly caused confusion in the sphere of professional discipline, which occupies territory between the civil and criminal spheres: Gregory Treverton-Jones, 'Disciplinary Proceedings: Defining Dishonesty' (*Law Society Gazette*, 6 November 2017) <www.lawgazette.co.uk/practice-points/discliplinary-proceedings-defining-dishonesty/5063514.article> accessed 5 June 2018. But post-*Ivey* cases now necessarily apply *Ivey*: see, for instance, *General Medical Council v Krishnan* [2017] EWHC 2892 (Admin).

[50] Virgo, 'Cheating and Dishonesty' (n 9) 20.

[51] ibid 20–21.

[52] At any rate in the sphere of and related to trusts. The Court of Appeal in Jersey – a jurisdiction much involved in trusts – has yet to pronounce on the issue in the trusts sphere.

[53] [2017] EWHC 2820 (Admin), [2018] 1 Cr App R 28.

> without the matter returning to the Supreme Court […] 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.[54]

It would clearly be an ambitious advocate who sought to resurrect the ghost of *Ghosh*.

It is worth pausing to consider why on so key and far reaching a legal question as the meaning of dishonesty the courts were so slow to promote legal certainty. There seem to me to be two main reasons, one substantial, the other procedural. The first is that the true test, belatedly recognised in a definitive manner, has both objective and subjective elements; there was not a bare choice between the two. What a defendant in proceedings, civil or criminal, knows or ought to know, if he or she has suspicions into which inquiry should be made, is a subjective matter; the standard by which he or she is then to be judged is an objective one. Lord Hutton's combined test recognised the hybridity but altered its elements, placing an objective element first (whether the defendant's conduct was dishonest by the standards of the man on the Clapham omnibus) and then a subjective element (but the wrong one) – whether the defendant knew that he was breaching those standards.[55] The second is that English judges are faithful to the doctrine of precedent (paradoxically in this context the best guarantor of legal certainty), which has constrained what might otherwise be their natural instincts and inhibited them from standing back as Lord Nicholls did so classically in *Tan* to seek the underlying principle in the sphere under consideration.

4 Cheating in gambling

Turning to cheating, it was common ground between the parties that the contract for betting – prima facie enforceable since the coming into force of the GA 2005 – was subject to an implied term that neither would cheat.[56] The reason why the Court travelled (rather than trespassed) into the field of criminal law is that the starting point for the submissions of leading counsel

[54] ibid [16].

[55] *Ivey* (n 2) [65]–[73] (Lord Hughes) (his Lordship illustrated similar illogicalities and inconsistencies in the criminal law both pre- and post-*Ghosh* on the objective v subjective dispute).

[56] ibid [35].

for the appellant[57] was that the test of what is cheating must be the same for the implied term as for s 42 of the GA 2005 (itself titled 'Cheating').[58] The Court accepted that submission, stating that 'there is no reason to doubt that cheating carries the same meaning when considering an implied term not to cheat and when applying section 42 of the Act'.[59] Although there was no exegesis of this statement, it is clearly correct.[60]

Section 42 of the GA 2005 provides, so far as material:[61]

> Cheating
>
> (1) A person commits an offence if he—
>
> (a) cheats at gambling, or
>
> (b) does anything for the purpose of enabling or assisting another person to cheat at gambling.
>
> (2) For the purposes of subsection (1) it is immaterial whether a person who cheats—
>
> (a) improves his chances of winning anything, or
>
> (b) wins anything.
>
> (3) Without prejudice to the generality of subsection (1) cheating at gambling may, in particular, consist of actual or attempted deception or interference in connection with—
>
> (a) the process by which gambling is conducted, or
>
> (b) a real or virtual game, race or other event or process to which gambling relates.

The ancient common law offence of cheating was described in *East's Pleas of the Crown*[62] as a subset of fraudulently depriving another of property,

[57] Richard Spearman QC, who has also contributed to the symposium in this volume: see Richard Spearman QC, '*Ivey v Genting Casinos*: New Horizon or False Dawn?' in Daniel Clarry (ed), *The UK Supreme Court Yearbook, Volume 9: 2017–2018 Legal Year* (Appellate Press 2019).

[58] *Ivey* (n 2) [37(a)] (Lord Hughes).

[59] ibid [38].

[60] Not least because the Gambling Commission is given power to declare void a bet taken by a licensee if satisfied that the bet was 'substantially unfair', and because in determining whether or not such unfairness was present the Commission will take into account whether either party did believe or ought to have believed the offence of cheating had been committed (Gambling Act 2005, s 336). The judges in the Court of Appeal were also unanimous on this specific issue.

[61] The section has no associated Explanatory Notes.

[62] Sir Edward East, *East's Pleas of the Crown* (1803) vol II, 816ff.

where the fraud affected the public as a whole.[63] It was abolished by section 32(1) of the Theft Act 1968, except in so far as it consisted of cheating the public revenue. That offence 'does not necessarily require a false representation, either by words or conduct. Cheating can include any form of fraudulent conduct which results in diverting money from the revenue and in depriving the revenue of money to which it is entitled'.[64] The Court again, with respect, correctly held that an all but obsolete common law offence offered 'no help in construing the meaning of cheating in the quite separate concept of gambling'.[65] Of greater, if still only of 'limited importance'[66] was the long history of statutory regulation of gaming from the Gaming Act 1664 via the Gaming Act 1710 and the Gaming Act of 1845.[67] From this history, the Court deduced that by 1845 the general expression used for malpractice at gaming was 'cheating', and that 'ill practice' (a synonym for malpractice) extended beyond deception and fraud, since in 1664 it was proscribed in relation to tennis, foot races and horse races.[68] In short, the Court opined that 'the expression "cheating" in the context of games and gambling carries its own inherent stamp of wrongfulness'[69], and that while '"honest cheating" is…an improbable concept'[70] – I would prefer to say a contradiction in terms – the Court held that it did not 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'.[71] Equating the statutory expression with ordinary parlance, the Court accordingly concluded that cheating need not involve deception.[72]

Having identified the inessential elements of cheating, the Court said that 'it would be very unwise to attempt a definition of cheating', regarding it

63 Quoted in *Scott v Metropolitan Police Comr* [1975] AC 819 (HL), 840 (Viscount Dilhorne) (a case about film piracy).

64 *R v Mavji* [1987] 1 WLR 1388 (CA), 1392 (Michael Davies J); *R v Less* The Times, 30 March 1993 (CA). See also Charles Yorke, 'Dishonesty and the Failure to Prevent Evasion' [2017] Tax J 16 (arguing that *Ivey* significantly expands the scope of the new corporate offence of failing to prevent tax evasion).

65 *Ivey* (n 2) [43] (Lord Hughes).

66 ibid [32].

67 Economically traced by Lord Hughes in *Ivey* (n 2) [29]–[31].

68 ibid [32] (Lord Hughes).

69 ibid [43].

70 ibid [44].

71 ibid.

72 ibid [45] (in which the Court per Lord Hughes observed that section 42(3) of the 2005 Act made clear that both deception and interference with the game could involve cheating, so aligning itself with the majority in the Court of Appeal (Arden and Tomlinson LJJ) and rejecting the dissent of Sharp LJ, who instead construed it as making dishonesty a *sine qua non* of the offence). See Siu Yin Wong, 'Cheating in Court' (2017) 133 LQR 203 (for support of Sharp LJ's conclusions).

as a 'near impossible task'.[73] Indeed, what might popularly be regarded as cheating is either now embraced within statutory definitions which do not deploy the noun at all;[74] or, as in the common law offence of cheating the public revenue, its lineaments are well known. In effect, what constitutes cheating has become a jury question.

Although the elimination of any requirement to prove dishonesty removed one layer of complication from an assessment of whether someone was in breach of an implied term not to cheat, *Ivey* does not resolve all the questions of precisely when a gambler oversteps the line between cheating and not cheating – a question for the judge in a civil claim, for the jury if a charge were brought. In the core passage of his judgment, Lord Hughes left open the question of whether or not it would be cheating 'if a player spotted that some cards had a detectably different back from others, and took advantage of that observation'.[75] In such circumstances it could be argued that the house, in whose favour the odds were, of course, always tilted, was the author of its own misfortune for using cards whose backs were not identical; but it could also be argued with force that the gambler's acuity had deprived what was supposed to be a game of pure chance of its essential quality. Matthew Dyson and Paul Jarvis, summarising the judicial analysis as being '[s]potting and taking advantage is not cheating but positive steps affecting the desk could be',[76] probed a little further:

> Why? Presumably the answer is that by 'tricking' the house into preserving for him the advantage he had acquired through the use of his skill in spotting and memorising the evident differences on the back of the playing cards, Mr Ivey's conduct tipped from being legitimate 'advantage play' into cheating. But if that is the case it offers little insight into what will and what will not constitute cheating in any future case.[77]

Nor indeed is it crystal clear whether a game is a game of pure chance (the starting point for *Ivey*) or a game of mixed chance and skill.[78] Be that as it may, it is difficult to quarrel with the proposition that '[i]t would be unsurprising if casinos were to use this decision as encouragement to

[73] *Ivey* (n 2) [47](Lord Hughes).

[74] See Criminal Law Revision Committee, *Eighth Report: Theft and Related Offences* (Cmnd 2977, 1966–67) – the chief begetter of the Theft Act 1968, which used the expression 'cheat' in only a single section (in relation to the offence created by s 25 of going equipped) when first enacted (an expression now repealed in the current form of s 25).

[75] *Ivey* (n 2) [50].

[76] Dyson and Jarvis (n 7) 199.

[77] ibid.

[78] Wong (n 72) 205–06.

attempt to step away from their liability to award a punter his winnings when tactics such as edge-sorting or card-counting have been used'.[79]

5 Cheating in sport

Cheating itself poses problems in sport, over and above the games played in casinos, which themselves do not strictly warrant the description sport at all. As Lord Hughes pointed out, '[s]ection 42(3) does not exhaustively define cheating, but it puts beyond doubt that both deception and interference with the game may amount to it'.[80] He went on to provide examples to explain the difference:

> 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 […].[81]

I would cavil with Lord Hughes' language, since he appears to have embodied within his definition of dishonesty the element of a false representation, which lawyers would acknowledge but lay people might think superfluous (although there might be consensus in respect of another of his examples of cheating without dishonesty, 'deliberate time wasting in many forms of game'[82]).

It is a fortuity, but an apt one, that any discussion of cheating in sport was located within a case about gambling, since as a matter of history the two have always been umbilically linked.[83] This lamentable link has

[79] Gillie Abbotts-Jones, 'The House Always Wins – Court of Appeal Rules No "Honest Cheats"' (2017) 28 Ent LR 121. The comment, while made in relation to the Court of Appeal decision, still remains pertinent.

[80] *Ivey* (n 2) [45].

[81] ibid.

[82] ibid.

[83] See, to draw but one example from tennis, Adam Lewis QC, Beth Wilkinson and Marc Henzelin, 'Independent Review of Integrity in Tennis: Interim Report' (Independent Re-

been authoritatively explained by a highly experienced sports arbitrator and former judge:

> Although the earnings in top-level sport have grown considerably, the profits from sports betting reach a completely different level. Athletes on lower salaries may therefore have become easier targets for manipulation. Athletes who take part in match-fixing in one match or competition can receive as a bribe an amount of money which may be higher than their earnings for an entire year. As a consequence, sports manipulation has increased to an alarming extent in those sports which are subject to sports betting.[84]

Cheating in sport is multi-layered. At its most serious level it is coincident with the criminal law.[85] In a case brought against three Pakistani cricketers, who were persuaded in aid of a purported betting coup to bowl three no-balls at particular junctures in a Test match against England at Lords in 2011 (so-called 'spot fixing'), the charge was, inter alia, conspiracy to cheat.[86] Upholding the sentences of imprisonment imposed upon the trio involved, Lord Judge CJ said:

> As the narrative shows, the corruption was carefully prepared. It was not set up on the spur of the moment. Nor was it the result of a sudden temptation to which either appellant succumbed in effect on the spur of the moment. The criminality was that these three cricketers betrayed their team, betrayed the country which they had the honour to represent, betrayed the sport that had given them their distinction, and betrayed the very many followers of the game throughout the world.

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view Panel, 25 April 2018) <http://tennisirp.com/wp-content/uploads/2018/04/Interim-Report.pdf> accessed 8 June 2018 ('betting-related corruption and other breaches of integrity have taken firm root in professional tennis, in particular at the lower and middle levels of the men's game, and may well be increasing and spreading').

84 Lauri Tarasti, 'First International Convention Against Sport Manipulation' [2015] ISLR 20, 20. Tarasti goes on to elaborate on the background to the Council of Europe Convention on the Manipulation of Sports Competitions.

85 See generally Michael Beloff et al, *Sports Law* (2nd edn, Hart Publishing 2012) para 5.6.

86 *R v Amir (Mohammad)* [2011] EWCA Crim 2914, [2012] 2 Cr App R (S) 17. Previously, a tribunal, under the auspices of the International Cricket Council ('ICC') Code of Conduct Commission and consisting of Michael Beloff QC (Chair), Albie Sachs and Sharad Rao, had imposed bans of various lengths upon the players (a decision unpublished but referred to in *Amir* at [26] (Lord Judge CJ)). Sport has its own imperatives and its own sanctions. See in historical perspective James Wilson, *Court and Bowled: Tales of Cricket and the Law* (Wildy, Simmonds & Hill 2014), ch 13.

> In exchange for the privilege and advantages of playing Test cricket it was required of them that at all times they should perform honestly and play to the best of their respective abilities – no more, but certainly no less. If for money or any other extraneous reward it cannot be guaranteed that every Test player will play on the day as best he may, the reality is that the enjoyment of many millions of people around the world who watch cricket, whether on the television or at Test matches, will eventually be destroyed. [87]

In such criminal cases, the standard of proof is that of beyond reasonable doubt.

At its next level, it may give rise to civil claims: in contract, by reason of a breach of an express or, as in *Ivey*, an implied term not to cheat, or possibly in tort. For example, cheating (in the extended sense of seeking to interfere with the outcome of a football match) by deliberately seeking to injure the other side's star striker would be a tort as well as a crime.[88] The standard of proof in such cases is that of the balance of probabilities.

But at yet another level it falls foul, not of the criminal law but of the codes or rules of the game. It becomes a regulatory offence. Here, it is rooted not in the public law of the land but in the contractual mechanism, which by a series of chains or 'matrix of interlocking contracts'[89] ultimately ensures that all who chose to participate in a sport are subject, inter alia, to the disciplinary jurisdiction of sports governing bodies (SGBs), national or international.

Disciplinary offences of this character are usually resolved by sport-specific tribunals[90] rather than in the ordinary courts. It is also increasingly usual for national or international SGBs to provide for appeals to the Court of Arbitration for Sport (CAS), which was founded in 1983 to supply a mechanism for sports-related disputes to be resolved quickly and inexpensively by specialist lawyers.[91]

Even where criminal and regulatory offences coincide, the approach of the SGBs differs from that of the criminal courts, not least because the

[87] *Amir* (n 86) [32].

[88] Beloff et al (n 85) para 5.42.

[89] ibid para 2.59; see also *Modahl v British Athletics Federation Ltd (No 2)* [2001] EWCA Civ 1447, [2002] 1 WLR 1192.

[90] See eg Sport Resolutions (UK), which provides its services to a number of sports.

[91] See the encomium on this matter by the Swiss Federal Tribunal in *Danilova and Lazutina v IOC and FIS* [2003] 3 Digest of CAS Awards 649; see also, generally, Beloff et al (n 85) paras 8.148–8.166.

penalties available to each differ in kind and degree. No sports tribunal can impose a prison sentence; no criminal court can impose a match ban.[92] The thresholds of proof differ, too: a disciplinary charge proven to a standard short of 'beyond reasonable doubt' may nonetheless be above that of 'balance of probabilities'. In this regard, the concept of 'comfortable satisfaction' has gained increasing currency;[93] it would be prima facie applicable to all forms of cheating in the sporting sphere where the actor is liable to disciplinary action.

Just as alluded to in *Ivey*, per Lord Hughes' catalogue,[94] it is not always clear in sport what constitutes cheating. Many forms of cheating which give rise to disciplinary action are sport-specific. Among the examples[95] are false starting in a swimming or track race;[96] diving in football;[97] selecting for a team in any sport persons who are ineligible;[98] claiming non-existent or more serious disabilities to improve classification in Paralympic sports;[99] consciously breaking the rules as to ballast in yacht[100] or to battery construction in motor racing;[101] or – at the exotic end of the spectrum – the scheme devised by the rugby club Harlequins to fake a blood injury to a player, so as to allow another fresh player to be brought on at a critical moment in a cup match, and then deliberately cutting the player's mouth

[92] See Tarasti (n 84) 24. Both of course can impose fines.

[93] See *Korneev and Gouliev v IOC,* CAS (OG Atlanta) 96/003 and 96/004, the *fons et origo* of the phrase.

[94] See text to n 87.

[95] Ian Hewitt, *Sporting Justice: 101 Sporting Encounters with the Law* (SportsBooks 2008) ch 2.

[96] It would be unusual, however, for any sanction over and above immediate disqualification to be required. It would be an imprudent athlete who, given that automatic consequence, deliberately tried to gain such advantage. I am unaware that any such further sanction has ever been imposed, although if the false start was in aid of a betting coup different considerations would arise. See Michael J Beloff QC, 'Sport, Ethics and the Law' [2017] ISLR 3, 3.

[97] Since the start of the 2017–2018 football season, on account of its increasing prevalence, this has in England entailed potential post-match punishment.

[98] Rachel Quarrell, 'Boat Race: Five Controversial Races between Oxford and Cambridge' *Daily Telegraph* (London, 23 March 2016). Quarrell cites the German member of the Cambridge boat race crew in 2007, who in the immediate aftermath of the race returned to Germany to train with the national team, thus flouting the rule that only student oarsmen who intended to complete their course of study were eligible to race.

[99] Gareth A Davies, 'Disabled Sport: Sydney Cheats Stripped of Medals' *Daily Telegraph* (London, 14 December 2000), referring to a wholly abled Spanish basketball team who had pretended to be intellectually disabled.

[100] *Dirk de Ridder v International Sailing Federation*, CAS 2014/A/3630.

[101] Mark Hughes, 'Ferrari's Controversial F1 ERS System' *Motor Sport Online* (London, 24 May 2018) <https://www.motorsportmagazine.com/news/f1/ferraris-controversial-f1-ers-system> accessed 8 June 2018. (Ferrari were subsequently exculpated of any wrong-doing.)

open after the match in order to cover up the fake injury.[102] Other practices pose nice questions as to what is (or ought to be) proscribed; ball tampering in cricket provides a useful illustration.[103] In *Du Plessis v International Cricket Council*, [104] which involved deliberately shining the ball with saliva infused with sticky mint, the Judicial Commissioner said:

> No doubt there are two possible views on this issue as to where the line should be drawn. Some might say that since shining with natural substances is permissible, there is no reason to prohibit shining with artificial substances. (In the same way that some argue that since good food is performance enhancing, there is no reason – health considerations apart – to prohibit performance enhancing drugs). But where the line is drawn and what conduct is or is not considered to be offensive to the sport of cricket is a matter for the custodians of the game, (the MCC and ICC) and the rule-makers.[105]

Curiously, though, while many of the rules of sport outlaw behaviour that would be generally recognised as cheating by application of the *Ivey* criteria, these rules rarely refer to such behaviour in those terms.[106]

Dominant in modern times as an aspect of cheating is sports doping,[107] an example indeed listed in Lord Hughes' catalogue.[108] Most sporting offences embraced within the concept, if not quite attracting the name, of cheating require some deliberate act or omission on the part of the participant. On the other hand, an anti-doping rule violation can be committed by inadvertent use of substances prohibited in or out of competition under the World Anti-Doping Code 2015, since such use can affect the level playing field. But intention nonetheless plays a vital role in determining

[102] Helen Carter, 'Bloodgate Scandal Doctor "Pressured into Cutting Rugby Player's Lip"' *The Guardian* (London, 23 August 2010).
[103] Wilson (n 86) ch 11.
[104] [2017] ISLR SLR67.
[105] ibid para 8.4. Sometimes, of course, there is no doubt: for example, the covert use of sandpaper to deform the ball's surface by certain Australian players in the third Test match against South Africa in Cape Town in March 2018.
[106] The words 'cheat' or 'cheating' do not, for example, appear *eo nomine* in the list of offences in the FIFA Code of Ethics (a document which cynics have suggested had in the past been more honoured by breach than by observance). In contrast, the ICC Code of Conduct does refer to "cheating" (at the explanatory note to Article 2.1.1), though only as an example of a minor offence contrary to the spirit of the game.
[107] Ulrich Haas and Deborah Healey (eds), *Doping in Sport and the Law* (Bloomsbury 2017); Thomas H Murray, *Good Sport: Why Our Games Matter – And How Doping Undermines Them* (OUP 2017).
[108] See text to n 87.

the sanction to be meted out: intentional use carries with it prima facie a four-year ban. The nuances of this are articulated in the Code:

> 10.2.1 The period of Ineligibility shall be four years where:
>
> 10.2.1.1 The anti-doping rule violation does not involve a Specified Substance,[109] unless the Athlete or other Person can establish that the anti-doping rule violation was not intentional.
>
> 10.2.1.2 The anti-doping rule violation involves a Specified Substance and the Anti-Doping Organization can establish that the anti-doping rule violation was intentional.
>
> […]
>
> 10.2.3 As used in Articles 10.2 and 10.3, the term 'intentional' is meant to identify those Athletes who cheat. The term, therefore, requires that the Athlete or other Person engaged in conduct which he or she knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk […] An anti-doping rule violation […] shall not be considered 'intentional' if the substance is not a Specified Substance and the Athlete can establish that the Prohibited Substance was Used Out-of-Competition in a context unrelated to sport performance.

It is cheating which eviscerates a sporting victory of value, not contingencies such as injury or officials' errors. As a renowned scholar of sporting (and other) ethics writes:

> The winners of the contest, as long as they didn't cheat, are entitled to their victory and whatever rewards come with it. The losers may have played better, and deserve to be admired for the worthiness of the performance. But they still lost […] Sport is not a morality contest where only the virtuous win.[110]

Litigation likewise is not a contest in which justice is always the determinant factor. Mr Ivey was found to have cheated and done so prima facie dishonestly;[111] but to prevent him from enjoying the financial fruits of his

[109] A Specified Substance is a substance prohibited in competition only.
[110] Murray (n 107) 32.
[111] *Ivey* (n 2) [51] (Lord Hughes).

victory it was sufficient that he had cheated. The Court's judgment may not have direct precedent value in the fora where sporting disputes are resolved,[112] but nonetheless it casts a light, even if indirect, on an issue of profound importance to sport.

[112] Though it may do so where open-textured obligations are involved, such as the obligation found in Article 6.3 of the International Association of Athletic Federation's Integrity Code of Conduct to 'ensure the integrity of […] Athletics competitions'.