The UK Supreme Court Yearbook · Volume 9 pp. 380–403

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

IVEY v GENTING CASINOS – MUCH ADO ABOUT NOTHING?

Professor David Ormerod QC[*]
Karl Laird[†]

1 Introduction

Despite the fact that the case only gave rise to issues concerning civil law, the judgment of the UK Supreme Court ('the Court') in *Ivey v Genting Casinos* ('*Ivey*') will reverberate throughout the criminal law for some time to come.[1] The purpose of this chapter is both to scrutinise the reasoning invoked to justify abolishing the subjective limb of the *Ghosh* test and also to examine the broader impact of the judgment on the criminal law. This chapter argues that what will come to define the Court's judgment in *Ivey* are the issues that the Court did not consider – that is, the significance of adopting a predominantly objective test of dishonesty across a broad range of criminal offences. Before discussing these issues, it is necessary first to trace the development of dishonesty as a concept within the criminal law.

2 The law prior to *Ghosh*

Dishonesty provides the *mens rea* for a large number of criminal offences, both in statute and at common law, from theft to conspiracy to defraud. It is never the sole element of *mens rea*, but in practice is often determinative of guilt. The analysis of how dishonesty ought to be understood has usually taken place in the context of the Theft Act 1968. To appreciate both the significance of *Ivey* for future cases, and the Court's reasoning in reaching

[*] Bencher of the Middle Temple; Law Commissioner for Criminal Law and Evidence, Law Commission of England and Wales; Professor of Criminal Law, Faculty of Law, University College London. The views expressed are those of the authors alone.
[†] Pupil Barrister, 6KBW College Hill; Stipendiary Lecturer and Tutor in Law, St Edmund Hall, University of Oxford.
[1] *Ivey v Genting Casinos* [2017] UKSC 67, [2018] AC 391.

 DOI: 10.19152/ukscy.762

its decision, the evolution of the *mens rea* for theft under the Theft Act must be considered.[2]

To be guilty of larceny under the Larceny Act 1916, the predecessor to the Theft Act 1968 ('TA 1968' and '1968 Act'), the defendant had to take the property in question 'fraudulently and without a claim of right'.[3] Under the 1916 Act, the Court of Criminal Appeal appeared to have interpreted the concept in such a way that it was probably for the judge to say whether the defendant's state of mind, once ascertained, was to be characterised in law as 'fraudulent'.[4] In drafting the 1968 Act, the Criminal Law Revision Committee ('CLRC') replaced the concept of 'fraudulently' with 'dishonestly', not because the meaning was any different, but because it thought it would be more easily understood by juries:

> 'Dishonestly' seems to us a better word than 'fraudulently'. The question 'Was this "dishonest"?' is easier for a jury to answer than the question 'Was this "fraudulent"?' 'Dishonesty' is something which laymen can easily recognise when they see it, whereas 'fraud' may seem to involve technicalities which have to be explained by a lawyer. [5]

This passage suggests that under the TA 1968, it is for jurors to decide whether "this" is dishonest.[6] Irrespective of whether the CLRC had intended that interpretation, the courts soon interpreted the 1968 Act as having effected a significant change to the law. For a period of years, the law was in a state of flux. In *R v Feely* ('*Feely*'), possibly influenced by the passage from the CLRC's Report cited above, the Court of Appeal held that it was for each jury in each case to decide, not only what the defendant's state of mind was, but also, subject to s 2 of the 1968 Act,[7] whether that state of mind was to be categorised as dishonest. The court stated:

---

2 See David Ormerod and Karl Laird, *Smith, Hogan, and Ormerod's Criminal Law* (15th edn, OUP 2018) ch 18; David Ormerod and David Williams, *Smith's Law of Theft* (9th edn, OUP 2007) ch 2.

3 For discussion, see John Smith and Brian Hogan, *Criminal Law* (Butterworths, 1965) Ch 16.

4 Ormerod and Williams (n 2) 290, para 2.

5 Criminal Law Revision Committee, *Eigth Report: Theft and Related Offences* (Cmnd 2977, HM Stationery Office 1966) para 39.

6 Ormerod and Williams (n 2) 291, para 2.

7 By virtue of s 2 of the Theft Act 1968 a person is not to be regarded as dishonest if he believed he had a right in law to deprive; if he believed he had the owner's consent; or if he appropriated the property in the belief that the person to whom the property belonged could not be discovered by taking reasonable steps. See Ormerod and Laird (n 2) 872.

> Jurors, when deciding whether an appropriation was dishonest can be reasonably expected to, and should, apply the current standards of ordinary decent people. 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.[8]

What is striking about this statement is how far it deviates from the approach to the typical *mens rea* requirement in the criminal law. To take recklessness as an example, the judge defines that concept and then directs the jury to determine whether, on the facts as they find them to be, the defendant's state of mind falls within that legal definition.[9] The jury is not invited to define recklessness for themselves. In concluding that dishonesty ought to be defined by the jury, the Court of Appeal was no doubt influenced by the then recent opinion of the House of Lords in *Brutus v Cozens* in which it was held that the meaning of an ordinary word of the English language is not a question of law for the judge but one of fact for the jury.[10] The flaw with this approach, at least from the perspective of legal certainty, is that it increases the risk that juries and magistrates will give different answers on facts which are indistinguishable. This issue is considered in greater detail below.

It is important to note that the Court of Appeal in *Feely* adopted an objective test of dishonesty, and provided a standard of 'ordinary decent people'[11] as understood by the jury – against which the defendant's intentions and beliefs were to be tested. The extent of the confusion in the law at that time is illustrated by the fact that there were other cases in which a purely subjective approach was adopted. In *R v Gilks* ('*Gilks*'), for example, the defendant agreed that it would be dishonest if his grocer gave him too much change and he kept it, but he said that bookmakers are 'a race apart' and there was nothing dishonest about keeping an overpayment made in error.[12] The judge invited the jury to 'try and place yourselves in [the defendant's] position at that time and answer the question whether in your view *he thought* he was acting dishonestly'.[13] The Court of Appeal concluded that this was a proper and sufficient direction, agreeing that, if the defendant may have held the belief he claimed, the prosecution had not established dishonesty. This applied not the standards of ordinary decent people, but

8 *R v Feely* [1973] QB 530, 538.
9 *R v G* [2004] 1 AC 1034.
10 *Brutus v Cozens* [1973] AC 854. See also Timothy Endicott, 'Questions of Law' (1998) 114 LQR 292; DW Elliot, '*Brutus v Cozens* – decline and fall' [1989] Crim LR 323.
11 *Feely* (n 8) 538.
12 *R v Gilks* [1972] 1 WLR 1341 (Cairns LJ).
13 ibid [1345].

the defendant's own standards, however deplorable they might be. The Court of Appeal added yet further complexity in *R v McIvor* (*'McIvor'*) in which it held that the test for dishonesty in conspiracy to defraud was different from that to be applied in theft.[14] Such uncertainty was deeply undesirable, given that dishonesty, as noted, provides the *mens rea* for a large range of offences and, in practice, is often determinative of guilt.

3 The judgment in *Ghosh*

In *R v Ghosh* (*'Ghosh'*), the aim of the Court of Appeal was to evaluate two competing strands of authority in which subjective and objective approaches to dishonesty had been adopted and to settle on a single test.[15] Until it was disapproved by the Supreme Court, *Ghosh* was the leading authority which had been unwaveringly applied for 35 years in all offences in which dishonesty was in issue. Given its authoritative status for so many years, it is worth examining the Court of Appeal's reasoning in detail. The first point to note about the judgment is that the court disapproved of the distinction that had been drawn in *McIvor* between conspiracy to defraud and theft. After an analysis of the relevant authorities, the court concluded that the same test of dishonesty is to be applied in both offences. The second point to note is that the court in *Ghosh* did not choose between the subjective and objective versions of dishonesty, but instead adopted a twofold test:

> (a) Was what was done dishonest according to the ordinary standards of reasonable and honest people? If no, D is not guilty. If yes —
>
> (b) Did the defendant realise that reasonable and honest people regard what he did as dishonest? If yes, he is guilty; if no, he is not.

In arriving at this formulation, the Court of Appeal held that it was not possible to reconcile the conflicting cases. It was, therefore, necessary for the court either to choose between the two strands of authority or to propose some other solution. In considering this issue, Lord Lane CJ[16] concluded that 'dishonestly' in s 1 of the 1968 Act is intended to characterise a state of mind, rather than a course of conduct. His Lordship stated that this distinction was at 'the heart of the problem'.[17] According to the court, the

[14] *R v McIvor* [1982] 1 WLR 409.

[15] *R v Ghosh* [1982] QB 1053.

[16] Although as Lord Lloyd revealed in debates in the House of Lords on the Fraud Bill 2006, he was the author of the test when sitting with Lord Lane CJ in *Ghosh*: Hansard, HL 22 June 2005, col 1666.

[17] *Ghosh* (n 15) [1063] (Lord Lane CJ).

consequence of 'dishonestly' being intended to describe a state of mind was that the defendant's knowledge and belief are 'at the root of the problem'.[18] The court gave what has become a rather infamous example of a tourist who comes from a country where public transport is free to demonstrate why Parliament must have intended for this to be the case. If the tourist were to travel on a bus without paying, the court stated that his mind was clearly honest. Judged objectively by what he has done, however, the court felt confident that the tourist had acted dishonestly. Lord Lane CJ explained that the tourist should not commit any offence on the basis that Parliament could not have intended to criminalise conduct to which no moral obloquy could possibly attach. Despite its attractions from a practical point of view, the court did not believe that a purely objective test would be appropriate:

> If we are right that dishonesty is something in the mind of the accused, then if the mind of the accused is honest, it cannot be deemed dishonest merely because members of the jury would have regarded it as dishonest to embark on that course of conduct.[19]

The court stated that to characterise a subjective test as bringing about a state of affairs in which 'Robin Hood would be no robber'[20] would be to misunderstand the nature of the subjective test. The court stated that the subjective test would only entitle the defendant to an acquittal if he did not realise that ordinary decent people would consider his conduct to be dishonest. It would not enable the defendant to avoid liability where he realised that his conduct was generally regarded as dishonest but did not himself believe it to be such. The court in *Ghosh* managed to inject an element of subjectivity into the test for dishonesty, but in doing so moved away from the extreme and unacceptable subjectivism of *Gilks*, as the defendant was no longer to be judged only against his own standard of dishonesty.

Almost immediately after the Court of Appeal delivered its judgment in *Ghosh*, the test for dishonesty it formulated was subject to virulent academic criticism.[21] The most trenchant critic of the test formulated by the Court

[18] ibid.

[19] ibid 1064

[20] ibid.

[21] Martin Wasik, '*Mens Rea*, Motive and the Problem of Dishonesty in the Law of Theft' [1979] Crim LR 543; DW Elliott, 'Dishonesty in Theft: A Dispensable Concept' [1982] Crim LR 395. The judgment did have its defenders, however. For an argument in support of leaving such issues to the jury, see R Tur, 'Dishonesty and the Jury Question' in A Phillips Griffiths (ed), *Philosophy and Practice* (CUP 1985). The Law Commission provisionally

of Appeal was Professor Griew,[22] who identified the following issues:

(a) it confused the state of mind with the concept of dishonesty;

(b) it left a question of law to the jury, which could lead to inconsistent decisions with the potential for different juries to reach different verdicts on identical facts, thus presenting acute problems in respect of the principle of legal certainty and now art 7 of the European Convention on Human Rights ('ECHR') (see below);

(c) it led to more trials, as defendants have little to lose by pleading not guilty and hoping that the dishonesty element is not made out;

(d) it led to longer trials, as the dishonesty issue is a 'live' one in all cases since it lacks a clear legal definition;

(e) it assumed a community norm within the jury in that they must agree on the ordinary standards of honesty;

(f) it assumed that jurors are honest, or at least that they can apply ordinary standards of honesty even if they do not adhere to them in their personal lives; and

(g) it was unsuitable in specialized cases such as complex commercial frauds which the 'ordinary' person is unlikely to understand and therefore to be able to evaluate the honesty or otherwise of the activities.

Despite the hostile academic reception and lukewarm support in other jurisdictions,[23] the Court of Appeal's judgment in *Ghosh* reigned in England and Wales for over 35 years. There are two reasons why the judgment was not quickly overturned despite significant academic criticism. First, s 2 of the TA 1968 enumerates three states of mind that are not to be considered dishonest for the purposes of theft.[24] This partial definition

concluded that 'the circumstances in which such conduct may be found to be non-dishonest cannot be circumscribed by legal definition. Where dishonesty is a positive element, it *must* be open to the fact-finders to find that particular conduct is not dishonest, even if the legislation does not say so': Law Commission, *Legislating the Criminal Code: Fraud and Deception* (Consultation Paper No 155, HM Stationery Office 1999) para 5.6.

[22] EJ Griew, 'Dishonesty—The Objections to *Feely* and *Ghosh*' [1985] Crim LR 341.

[23] David Ormerod and Karl Laird, *Smith and Hogan's Criminal Law* (14th edn, OUP 2015) 947.

[24] Theft Act 1968, s 2.

precluded potential unfairness in most cases, at least in the context of theft. Secondly, since a *Ghosh* direction only needed to be given in those rarest of cases where the defendant's defence was that he did not realise that others would see his conduct as dishonest, there was very little opportunity for the Court of Appeal to evaluate the test in appeals.

The most significant development to take place in the law of dishonesty during these years was the House of Lords' articulation of the test in a series of civil cases. In these cases, the House of Lords decided that the test of dishonesty in the civil law is solely objective. In *Barlow Clowes International Ltd v Eurotrust International Ltd,* Lord Hoffmann articulated the applicable test in the following terms:

> 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. The Court of Appeal held this to be a correct state of the law and their Lordships agree.[25]

A clear divergence, therefore, opened up between the test of dishonesty as it applied in the civil law and the criminal law, as the former did not include consideration of whether the defendant appreciated that his conduct would be characterised as dishonest.

Although *Ghosh* remained the binding authority in the criminal law, it began to be subjected to criticism from senior judges. For example, in *Starglade Properties Ltd v Nash*, Leveson LJ, as he then was, expressed concern about the divergence between the civil and criminal test for dishonesty.[26] In *R v Cornelius*, a five-member Court of Appeal was convened, including Hughes LJ as he then was, because one of the parties expressed an intention to challenge the validity of the *Ghosh* test.[27] The issue was never raised, however. The opportunity to evaluate the validity of *Ghosh* evaporated when it was realised the *actus reus* of fraud by false representation had not been established. In other cases, however, there was not even a hint of judicial dissatisfaction with *Ghosh.* To take the relatively recent example of *R v Hayes,* the Court of Appeal extensively reviewed the *Ghosh* test.[28] Despite

[25] *Barlow Clowes International Ltd v Eurotrust International Ltd* [2005] UKPC 37, [2006] 1 WLR 1476, [10].
[26] *Starglade Properties Ltd v Nash* [2010] EWCA Crim 1314.
[27] *R v Cornelius* [2012] EWCA Crim 500.
[28] *R v Hayes* [2015] EWCA Crim 1944 (Lord Thomas CJ)

having a clear opportunity to do so, there was no suggestion form the then Lord Chief Justice that the validity of the subjective limb of the test ought to be reconsidered. What the judges did do in that case was make clear that evidence relevant to the practice in a particular professional context, in this case investment banking, was not relevant to the objective limb of the *Ghosh* test and the jury had to be directed to disregard it. Lord Thomas CJ stated that such evidence was relevant only to the subjective limb of the test.[29] The analysis in *Hayes* led some to argue that the Court of Appeal, in holding that the jury ought to be directed to disregard contextual evidence, had inadvertently curtailed the unfettered discretion *Ghosh* was intended to confer upon them.[30]

It was against this background that the Supreme Court heard the civil case of *Ivey*.

4 The rejection of *Ghosh*

The appellant, Phil Ivey, was a well-known professional gambler who used a technique called 'edge sorting'[31] to give himself an advantage when playing Punto Banco Baccarat, a card game, at a London casino. Unlike other card games, Punto Banco is not a game of skill, but a game of chance. By noting minute physical differences on the edges of the cards, Mr Ivey was able to increase his odds of winning. To do so, however, he needed to ensure that the deck of cards was not changed. Mr Ivey pretended to be superstitious, persuaded the croupier to use the same pack of cards and directed the croupier to turn 'lucky' cards around, thereby enabling him to predict which cards would emerge from the shoe. By this technique, Mr Ivey dramatically increased his odds of winning. He ultimately won £7.7 million in a single night of playing Punto Banco Baccarat. However, the casino discovered his 'edge sorting' strategy and refused to pay Mr Ivey his winnings.

In the action for breach of contract, Mitting J found at first instance that, as a matter of fact, although Mr Ivey 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 gambling contract with the casino. Mr Ivey argued that the test of what was cheating was the same for the implied contractual term as for the criminal offence of cheating at gambling, contained in s 42 of the Gambling Act 2005.[32] Furthermore, it was argued

[29] ibid.
[30] Nicholas Dent and Aine Kervick, '*Ghosh*: a change in direction' [2016] Crim LR 553.
[31] *Ivey* (n 1) [9]-[10] (Lord Hughes).
[32] Gambling Act 2005, s 42.

that cheating necessarily involved dishonesty, which had not been proven in his case, meaning that Mr Ivey was disentitled to recover his winnings. The Court of Appeal upheld the trial judge's decision.

In a unanimous judgment delivered by Lord Hughes, the Supreme Court held that s 42 of the 2005 Act leaves open the question of what is and what is not cheating. Although it was sensible to interpret the concept of cheating contained in s 42 of the 2005 Act in the light of the meaning given to cheating over many years, his Lordship held that it made no sense to interpret cheating by reference to dishonesty, an expression introduced into the criminal law for different purposes in the Theft Act 1968. 'Cheating' in the context of games and gambling, carried its own inherent stamp of wrongfulness. Although 'honest cheating'[33] was an improbable concept, it was held that it did not follow that all cheating ordinarily attracted the description 'dishonest', or that anything was added to the legal concept of cheating by an additional legal concept of dishonesty.

Lord Hughes held that, as an element of a criminal offence, dishonesty is not a defined concept. His Lordship stated that it is not a matter of law, but a question of fact for the jury to determine in each case.[34] Except to the limited extent that s 2 of the 1968 Act required otherwise (for charges of theft), judges must not attempt to define it. Likewise, whether conduct amounted to cheating, given the nature of the game, is also a question for the jury. The addition of the legal element of dishonesty would unnecessarily complicate the question. The conclusion that Mr Ivey's actions amounted to cheating was unassailable. The key factor in this determination was the fact that Mr Ivey had contrived a situation that enabled him to know whether the next card was of a high or low value. He had, therefore, taken positive steps to fix the deck. In a game which depended on the random delivery of unknown cards, that was inevitably cheating.

Having disposed of the appeal, Lord Hughes, in *obiter dicta* passages,[35] proceeded to explore the concept of dishonesty. His Lordship's analysis focused on objections to the subjective second limb of the *Ghosh* test. The first objection raised by his Lordship was that 'the more warped the defendant's standards of honesty are, the less likely it is that he will be convicted of dishonest behaviour'[36]. As has already been pointed out, the subjective limb of the *Ghosh* test was, when read carefully, not concerned with whether the defendant himself considered his conduct to be dishonest,

[33] [2018] AC 391 [44] (Lord Hughes).
[34] ibid [48] (Lord Hughes).
[35] On the basis that the decision could have been reached without any of these points being made and because it was treated as such by Sir Brian Leveson P in *Patterson v DPP* [2017] EWHC 2820 (Admin).
[36] ibid [59] (Lord Hughes).

but whether he realised that ordinary decent people would consider it to be such. To that extent, Lord Hughes' criticism is overstated.

The second objection put forward by Lord Hughes is that *Ghosh* created 'an unprincipled divergence between the test for dishonesty in criminal proceedings, and the test of the same concept when it arises in the context of a civil action'.[37] What Lord Hughes did not discuss, however is that the House of Lords had earlier held that it is not unprincipled for the criminal law to diverge from the civil law in the context of theft. In *Hinks v R*, Lord Steyn made the following observations:

> The purposes of the civil law and the criminal law are somewhat different. In theory the two systems should be in perfect harmony. In a practical world there will sometimes be some disharmony between the two systems. In any event, it would be wrong to assume on *a priori* grounds that the criminal law rather than the civil law is defective.[38]

As Matthew Dyson and Paul Jarvis argue, it is not clear whether the role played by dishonesty in the criminal law is the same as in the civil law.[39] Lord Hughes did not explain why it was particularly important in this context for the civil law and the criminal law to converge on a single test for dishonesty, nor why the civil test ought to trump the criminal test.

Thirdly, Lord Hughes stated that jurors often found the second limb of the *Ghosh* test puzzling. His Lordship did not cite any empirical evidence to verify this claim, however. It was rare for the direction to be given so there would be little evidence of juror's reactions in any event.

Finally, his Lordship made the point that *Ghosh* represented a significant departure from the pre-1968 Act case law, in circumstances where there was no indication that such a change was intended. As the earlier analysis demonstrated, there is no doubt that this is an accurate criticism of the development of the law. It is at least arguable, however, that the force of this criticism had diminished some 50 years after the enactment of the Theft Act and 35 years after the Court of Appeal clarified the test of dishonesty in *Ghosh.* Despite the fact that the force of these criticisms is not self-evident, Lord Hughes concluded that they provided convincing grounds for holding that the second limb of the test propounded in *Ghosh* did not correctly represent the law and that directions based upon it should no longer be given.

---

[37] ibid [57].

[38] *Hinks v R* [2001] 2 AC 241, 252. For analysis, see Ormerod and Laird (n 2) 831-34.

[39] M Dyson and P Jarvis, 'Poison *Ivey* or herbal tea leaf?' (2018) 134 LQR 198.

His Lordship reformulated the test for dishonesty 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 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. [40]

Assuming that the Court's analysis will be treated as binding, which it surely will be as we discuss below, a defendant can be considered dishonest and therefore potentially guilty of a serious criminal offence, even though he did not appreciate that 'ordinary decent people' would consider his conduct dishonest. This possibility runs counter to the recent trend of the courts favouring subjective tests of *mens rea*.[41] The most authoritative articulation of why subjective tests tend to be favoured over objective tests is the opinion of the House of Lords in *R v G* ('*G*').[42] In overturning the earlier decision in *Comr of Police v Caldwell*[43] and concluding that the test for recklessness in the Criminal Damage Act 1971 ought to be subjective, Lord Bingham stated that:

> it is a salutary principle that conviction of serious crime should depend on proof not simply that the defendant caused (by act or omission) an injurious result to another but that his state of mind when so acting was culpable. This, after all, is the meaning of the familiar rule *actus non facit reum nisi mens sit rea*.[44]

[40] [2018] AC 391, [74] (Lord Hughes).
[41] For discussion, see Ormerod and Laird (n 2) 87-88; Jeremy Horder, *Ashworth's Principles of Criminal Law* (8th edn, OUP 2016) 174-75.
[42] *R v G* (n 9).
[43] *Comr of Police v Caldwell* [1982] AC 341.
[44] ibid [32].

The importance of this principle has been emphasised by the Court on numerous occasions, most recently in *R v Lane and Letts.*[45] There are, however, long-established instances of the common law deviating from this 'salutary principle', for example, objective standards are applied in both gross negligence manslaughter and intoxication.[46] Dishonesty can now be added to this list, along with those offences for which it is the principal form of *mens rea.* As will be discussed in detail below, the fact dishonesty now deviates from the principle enunciated in *G* is particularly problematic. This is because several offences for which dishonesty is the *mens rea* encompass extremely broad forms of conduct that, in some instances, would not be criminal in the absence of a finding of dishonesty.

5 Evaluating the impact of *Ivey* on the criminal law

To assess the impact of *Ivey* on the criminal law, it is first necessary to address the fact that the Court's analysis of *Ghosh* was *obiter dictum.* The tone of Lord Hughes' judgment strongly suggests that the Court intends for its analysis of *Ghosh* to be treated as binding, however. In *DPP v Patterson* ('*Patterson*'), decided very shortly afterwards, Sir Brian Leveson P stated that it would be 'difficult to imagine the Court of Appeal preferring *Ghosh* to *Ivey* in the future'.[47] His Lordship went further and opined that it would be possible for the Court of Appeal to depart from *Ghosh* without the matter first returning to the Supreme Court. The Divisional Court's judgment in *Patterson* is clearly intended to convey to trial judges that, should the need arise, they ought to direct juries in accordance with *Ivey* rather than *Ghosh.* This is potentially problematic for two reasons. First, as this section will examine, the consequence of *Ivey* being a case that was concerned solely with the civil law is that the Court did not have the benefit of detailed analysis of the consequences for the criminal law of departing from *Ghosh.* For this reason, the judgment in *Ivey* gives rise to a number of difficult questions of principle. Secondly, elevating *obiter* comments to the status of *ratio* undermines the system of precedent upon which the common law is based. It was presumably to avoid this criticism that Sir Brian Leveson P cited the judgment of Diplock LJ, as he then was, in *R v Gould* in which his Lordship stated:

> In its criminal jurisdiction, […] the Court of Appeal does not apply the doctrine of *stare decisis* with the same rigidity

[45] *R v Lane and Letts* [2018] UKSC 36, [2018] 1 WLR 3647.

[46] For discussion, see Findlay Stark, 'It's only words: on meaning and *mens rea*' (2013) 72 CLJ 155.

[47] [2017] EWHC 2820[16].

> 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.[48]

What Sir Brian did not discuss, however, is that in the subsequent case of *R v Spencer* ('*Spencer*') May LJ stated:

> As 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.[49]

As discussed by Cross and Harris,[50] the Court of Appeal in *Spencer* stated that *stare decisis* should not be rigidly adhered to if necessary to do justice to the defendant. In opining that the Court of Appeal could choose to follow *Ivey* over *Ghosh*, the Divisional Court did not consider the relevance of the fact that the court would be preferring a test that is less generous to defendants. Despite these issues, there are clear signs that the Supreme Court's analysis of *Ghosh* will be treated as binding, not only from the Divisional Court in *Patterson*, but also from the Court of Appeal. For example, in *R v Pabon*, Gross LJ observed that, since the defendant was tried before the Supreme Court delivered its judgment in *Ivey,* he had benefited from a more generous test of dishonesty than that which would have been applied if he were to be tried today.[51] The *Ivey* test has also been applied in a number of professional discipline cases.[52]

On the assumption that *Ivey* will be treated as binding, the following sections will examine the potential impact of the judgment upon the criminal law. Unsurprisingly, since the matter was *obiter dicta*, none of the issues that are considered below were addressed by the Court. It is respectfully submitted that, in practical terms, this is the major shortcoming of the decision of the Supreme Court in *Ivey*.

5.1 The consequences of adopting an objective test of dishonesty

As has already been touched upon, the fact a jury can find that a defendant was dishonest and therefore guilty of a serious criminal offence even though

[48] *R v Gould* [1968] 2 QB 65, 68.
[49] *R v Spencer*[1985] QB 771, 779.
[50] Rupert Cross and J.W. Harris, *Precedent in English Law* (4th edn, Clarendon Press, 1991).
[51] [2018] EWCA Crim 420, [23].
[52] See eg *Wingate v Solicitors Regulation Authority* [2018] EWCA Civ 366, [2018] WLR 3969.

he did not appreciate that ordinary decent people would characterise his conduct to be such conflicts with the sustained dominance of subjectivism in English criminal law. The merits of subjectivism have been long debated and here is not the place to rehearse them.[53] It is, however, necessary to consider the impact of the imposition of the predominantly objective standard of dishonesty mandated by the Court across the range of offences in which that *mens rea* element applies. What characterises many of these offences is that their *actus reus* has been reduced to vanishing point which means that they lack what Fletcher calls 'manifest criminality'.[54] To take theft as an example, following the opinion of the House of Lords in *Hinks*,[55] an appropriation does not require an adverse interference with property rights contrary to the owner's wishes. Furthermore, an individual can commit theft even if he receives indefeasible title to the property in question. Prior to *Ivey*, the requirement for the defendant to appreciate that his conduct would be considered dishonest by ordinary decent people provided a safeguard against criminal liability in cases in which there was a legitimate interference with property rights. The safeguard provided by the subjective limb of the *Ghosh* test has now gone. As Graham Virgo notes:

> conviction for interference with property rights even though the owner of the property consents depends only on whether reasonable people would consider the conduct to be dishonest. Theft is now a crime which requires neither proof of harm nor subjective fault.[56]

This shift towards a more objective test could impact most acutely in the context of conspiracy to defraud. Conspiracy to defraud is one of the most controversial offences in English criminal law, as it criminalises conduct between two or more people that would not be criminal or even tortious if engaged in by only one of them.[57] The Law Commission has commented that the offence 'is so wide that it offers little guidance on the difference between fraudulent and lawful conduct'.[58] Despite calls for its abolition, the offence is still regularly charged, often in cases involving complex financial transactions. Dishonesty is the essential constituent of the *mens rea* of the offence.[59] In the same way that the subjective limb of the *Ghosh* test might have prevented theft from becoming unacceptably broad, the same could

[53] For discussion, see Ormerod and Laird (n 2) 87-88; Horder (n 41) 174-75.
[54] George Fletcher, *Rethinking Criminal Law* (Little, Brown & Co 1978), 82.
[55] [2001] 2 AC 241.
[56] Graham Virgo, 'Cheating and dishonesty' (2018) 77 CLJ 18,21.
[57] For further discussion see Ormerod and Laird (n 2) 461; Ormerod and Williams (n 2) ch 5.
[58] Law Commission, *Fraud* (Law Com No 276, HM Stationary Office 2002), para 1.6
[59] *Norris v US* [2007] EWHC 71 (Admin) [66] (Auld LJ).

be said of conspiracy to defraud. To take an example, as a result of *Ivey* the scope of conspiracy to defraud has been expanded to encompass cases where the defendant did not appreciate that ordinary decent people would consider it dishonest to induce a third party to take an economic risk that he would not otherwise have taken. Given the types of case in which conspiracy to defraud is charged, which often involve complex financial transactions far-removed from the average juror's experience, it may now be even easier to secure a conviction. As Griew argued, the jury in such cases may be inclined to take their cue from the fact of prosecution.[60] That the defendant did not appreciate that ordinary decent people would consider his activities dishonest is now irrelevant.[61]

Given the fact that s 2 of the Theft Act 1968, which specifies three situations where the defendant's appropriation is not to be regarded as dishonest, does not apply to conspiracy to defraud, the impact of *Ivey* is even more significant in the context of conspiracy to defraud than it is in theft. As has been explained, in *Ghosh* the Court of Appeal addressed the question of whether the same test of dishonesty applied in theft and conspiracy to defraud and concluded that they were the same. Given the conclusion in *Ghosh* that the same common law test of dishonesty should be applied across both offences, presumably there would be no liability for conspiracy to defraud either.[62] After *Ivey*, whether there would now be criminal liability for conspiracy to defraud in these circumstances is an open question. It is unfortunate that the Supreme Court did not consider the impact of abolishing the subjective limb of the *Ghosh* test on those offences for which dishonesty is determinative of criminal liability. The failure to do so means that the Court may have inadvertently broadened a number of criminal offences that were already stretching the limits of what can legitimately be criminalised.

5.2 Legal certainty and Article 7 of the European Convention on Human Rights

It is necessary to consider whether the overwhelmingly objective nature of *Ivey* test for dishonesty satisfies the requirement under the common law and art 7 of the ECHR that criminal offences should be sufficiently certain to enable citizens foresee, if need be with appropriate advice, the consequences which a given course of conduct might entail. The European

[60] Griew (n 22).

[61] The same would be true under the offence of cheating the public revenue where what separates tax avoidance from tax evasion is the proof of dishonesty. see Ormerod and Laird (n 2) 995.

[62] Ormerod and Williams (n 2) para 5.47.

Court held in *Kokkinakis v Greece*,[63] and has reiterated many times since, that art 7 is not confined to prohibiting the retrospective application of the criminal law to an accused's disadvantage: it also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*), and the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy. It follows that an offence must be clearly defined in the law.[64] The Strasbourg court looks to whether the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him criminally liable. Admittedly, this is not a prohibition on the development of the common law. As the court noted in *SW v UK*:

> However clearly drafted a legal provision may be, in any system of law, including criminal law, there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances. Indeed, in the United Kingdom, as in the other Convention States, the progressive development of the criminal law through judicial law-making is a well entrenched and necessary part of legal tradition. Article 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen.[65]

To date, the English courts have taken a very narrow view of the protection afforded by art 7 of the ECHR and have failed to accept that common law crimes such as manslaughter by gross negligence, public nuisance, and ambiguous statutory offences such as those in the Serious Crime Act 2007 and Part 2 and the Armed Forces Act 2006, are incompatible with art 7 on the grounds of their vagueness. Of all criminal offences, it is perhaps those for which dishonesty is an element of *mens rea* that have received the most scrutiny through the prism of art 7 of the ECHR and legal certainty. In its Consultation Paper No 155 on fraud, the Law Commission referred to the *Sunday Times* case,[66] where, in interpreting the obligations of certainty under the Convention, the court stated that:

---

[63] *Kokkinakis v Greece* (1994) 17 EHRR 397 (Commission Decision) [52].

[64] For discussion of Article 7, see Cian Murphy, 'The Principle of Legality in Criminal Law under the European Convention on Human Rights' [2010] EHRLR 192.

[65] See *SW v UK* [1996] 1 FLR 434, [34].

[66] *Sunday Times v the United Kingdom* [1979] 2 EHRR 245.

> the following are two of the requirements that flow from the expression 'prescribed by law'. First, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able—if need be with appropriate advice—to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.[67]

The Law Commission ultimately concluded that:

> The thrust of our analysis of dishonesty as a positive element is that, in certain circumstances, a person may not be able to foresee with any accuracy whether a proposed course of action would or would not be criminal. Seeking legal advice is not likely to take matters any further, since a lawyer's guess as to what a jury may think 'dishonest' is likely to be no better than anyone else's.[68]

Subsequently, the Law Commission concluded, in Report No 276 on Fraud, that the *Ghosh* test might be Article 7 compatible. The Law Commission nevertheless acknowledged the force of the argument in its Report on Fraud by stating:

> We continue to believe that a general dishonesty offence, by not requiring as an element some identifiable morally dubious conduct to which the test of dishonesty may be applied, would fail to provide any meaningful guidance on the scope of the criminal law and the conduct which may be lawfully pursued. We do not accept the argument that inherent uncertainty is satisfactorily cured by the promise of prosecutorial discretion. This cannot make a vague offence clear and, while it might ameliorate some of the risks, it does not excuse a law reform agency from formulating a justifiable and properly defined offence. We do not believe it is for the police and prosecutors to decide the ambit of the criminal law.[69]

[67] ibid [49].
[68] Law Commission, *Fraud and Deception* (Law Com Consultation Paper No 155), para 5.43.
[69] ibid para 5.28.

These views were echoed by the Joint Parliamentary Committee on Human Rights when scrutinising the Fraud Bill.[70]

The reason why legal certainty becomes a particularly acute issue is because the objective nature of the test assumes the existence of a community norm. As Edward Griew explained:

> It is simply naïve to suppose – surely no one does suppose – that there is, in respect of the dishonesty question, any such single thing as 'the standards of ordinary decent people'. Although most people will unite in condemning, or in tolerating, some forms of behaviour, there are others as to which considerable divergence of views will exist. How juries cope with this obvious difficulty we do not know. Presumably some acquittals derive from the triumph of the most relaxed standard represented on the jury. The present objection is not to outcomes, however, but to the legitimacy of the stated test as resting disreputably on a reference to a fictitious category.[71]

The standard mandated by the objective test of dishonesty is that of ordinary decent people, as defined by the jurors or magistrates who try the defendant. The defendant will have had no way of knowing what standard they would apply when he engaged in the conduct for which he is now on trial. Despite this fact, in *R v Pattni*[72] His Honour Judge Mercer, sitting at the Crown Court at Southwark, held that the *Ghosh* test did satisfy the requirements of legal certainty. His Honour disagreed with the view expressed by the Law Commission that a general dishonesty offence would be incompatible with the ECHR, noting that there is no requirement for absolute certainty in the law.

The strongest argument for why the *Ghosh* test satisfied the requirement of legal certainty was the existence of the subjective limb, as it precluded a defendant from being considered dishonest and therefore guilty of an offence unless he realised that his conduct would be viewed as such by ordinary decent people. As a result of *Ivey* this safeguard is now gone. This opens up the possibility of a number of offences being challenged on the basis that they violate the principle of legal certainty and art 7 of the ECHR. Take fraud by false representation, for example. The *actus reus* of that offence is making a false representation. By virtue of s 2(2) of the Fraud Act 2006, a representation is false if it is untrue or misleading.

[70] Joint Committee on Human Rights, *Fraud Bill* (Fourteenth Report, 2005–06) para 2.25.
[71] Griew (n 22) 344.
[72] [2001] Crim LR 570.

Furthermore, this is a conduct offence, so the defendant commits the *actus reus* even if no one believes his false representation and even if he gains nothing. It is difficult to conceive of how the offence could have been more broadly drafted.[73] To be guilty, the defendant must have dishonestly made the false representation and have intended to gain or cause a loss. If the defendant, a used car salesman, is asked by a customer whether the car he intends to buy has been involved in any accidents in the past 12 months, and the defendant says that it has not, knowing that it was a right-off 13 months ago, he has made a misleading representation. This is sufficient to constitute the *actus reus* of fraud. Given that his intention was to induce the customer to buy the car, whether he is guilty of fraud depends upon whether the jury considers his conduct to be dishonest. At the time he answered the customer's question, the defendant may have thought that he was being honest, on the basis that he answered the question truthfully in a literal sense. The defendant may also believe firmly in the principle of *caveat emptor*. If, however, the jury is comprised of 12 people who feel they have been ripped off one too many times by used car salesmen, they may well conclude that such a misleading answer was in fact dishonest. At the time he answered the customer's question, the defendant had no way of knowing that 12 members of a hypothetical jury would consider his answer to be dishonest. Under *Ghosh* he would have avoided liability if he genuinely did not realise that ordinary decent people would consider his response to be dishonest. Under *Ivey*, he is guilty, despite the fact he had no way of knowing what standard of honesty would be applied and also did not appreciate that his conduct would be considered dishonest.

5.3 Parliament's endorsement of the *Ghosh* test

In July 2002, the Law Commission recommended the enactment of a general fraud offence and the attached draft Bill described three forms the offence should take.[74] The Bill was passed almost unchallenged and received the Royal Assent on 8 November 2006.[75] As already indicated, the principal element of *mens rea* for the offence of fraud in each of its three forms is dishonesty. This was despite the fact that a number of those who responded to the Law Commission's consultation expressed reservations about the retention of dishonesty. In its Report, the Law Commission recognised that the test for dishonesty was the two-stage *Ghosh* test.[76] The explanatory notes to the Bill, in recognising that dishonesty would be an element of the new offences, added that 'the current definition of dishonesty was

[73] See David Ormerod, 'The Fraud Act 2006 - criminalising lying?' [2007] Crim LR 193.
[74] Law Commission (n 68).
[75] Ormerod and Laird (n 2) 928.
[76] Law Commission (n 68) para 5.18.

established in *Ghosh*'.[77] In the parliamentary debates, Ministers confirmed that the *Ghosh* test would apply to the offences contained in what would become the Fraud Act 2006.[78] There is clearly a basis for arguing that the *Ghosh* test, at least in the context of the Fraud Act 2006, received Parliament's *imprimatur*. The Court in *Ivey* did not consider the propriety, in constitutional terms, of abolishing a test that has received parliamentary endorsement. In this regard, there is a distinction between the earlier judgment in *R v Jogee* ('*Jogee*'), in which the Court also decided to depart from a longstanding common law doctrine.[79] Parliament had never endorsed the judgments in which parasitic accessory liability was developed nor did it legislate on the basis that it existed. Although *Jogee* arguably gave rise to other constitutional issues,[80] they are distinct from the one that arose in *Ivey*. In choosing to rely upon the common law instead of enacting a specific test for dishonesty, Parliament must be taken implicitly to have accepted that the common law is subject to change. It would have been preferable, however, for the Court to have considered this issue directly. This would have avoided the potential for uncertainty to creep into the law.

5.4 Should the defendant's state of mind and the particular context be relevant?

Under the *Ghosh* test, juries were required to consider the question 'was what was done dishonest according to the ordinary standards of decent honest people?' That element of the test still applies. The question that arises is how objective this test is intended to be.

As has already been explained, the Court of Appeal had, shortly before *Ivey*, a rare opportunity to consider the objective test of dishonesty under the *Ghosh* test. In *Hayes*,[81] the defendant was accused of conspiring dishonestly to manipulate the Yen LIBOR. He argued that his behaviour was not dishonest by the standards of those working in that market. It was submitted on his behalf that the objective aspect of the dishonesty direction (then under *Ghosh*) must sometimes be modified so as to invite the jury to consider not just the standards of honest and reasonable people generally,

[77] House of Commons, *The Fraud Bill* (Research Paper 06/31, Bill 166 of 2005-06) 14.

[78] See HL Deb 19 July 2005, vol 673, col 1424 (Attorney-General); HC Research Paper 31/06, 14; HC Standing Committee B, *Fraud Bill* (20 June 2006), col 8 (Solicitor-General).

[79] *R v Jogee* [2016] UKSC 8, [2016] 1 Cr App R 31. For analysis, see David Ormerod and Karl Laird, '*Jogee*: not the end of a legal saga but the start of one?' [2016] Crim LR 539; 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).

[80] For discussion, see Findlay Stark, 'The demise of "parasitic accessorial liability": substantive judicial law reform, not common law housekeeping' (2016) 75 CLJ 550.

[81] *Hayes* (n 28).

but the standards set by the particular market or business in which the defendant was operating. The trial judge rejected that submission. This is unsurprising. It had been clear for decades that the objective limb of the test (as the first limb under *Ghosh*) should not be altered to accommodate the particular context or market in which the alleged acts occurred.[82] In *R v Robertson*, for example, it was wrong to amend the objective test by reference to 'reasonable and honest people *engaged in business*'.[83] The Court of Appeal emphatically stated that there is no separate first limb of the test for commercial fraud or market standards or market ethos, standard practice in an industry or any common understanding amongst employees. That would dilute the test since within certain sectors practices can develop that would be regarded as dishonest by all reasonable people even though they are adopted within the sector. In *Hayes*, the Court of Appeal unsurprisingly upheld the conviction. Lord Thomas CJ stated:

> Not only is there is no authority for the proposition that objective standards of honesty are to be set by a market, but such a principle would gravely affect the proper conduct of business. The history of the markets have shown that, from time to time, markets adopt patterns of behaviour which are dishonest by the standards of honest and reasonable people; in such cases, the market has simply abandoned ordinary standards of honesty. Each of the members of this court has seen such cases and the damage caused when a market determines its own standards of honesty in this way. Therefore to depart from the view that standards of honesty are determined by the standards of ordinary reasonable and honest people is not only unsupported by authority, but would undermine the maintenance of ordinary standards of honesty and integrity that are essential to the conduct of business and markets.[84]

The Court of Appeal in *Hayes* confirmed that evidence of the kind the defendant wanted to adduce was relevant to the second, subjective limb of the *Ghosh* test.

Since *Ivey* has abolished the subjective limb of the *Ghosh* test, it remains to be seen what relevance, if any, evidence of the practices in a particular market or sector now has. Presumably, it is now relevant to the first limb of the

[82] Ormerod and Laird (n 2) 883.
[83] [2006] EWCA Crim 1289.
[84] *Hayes* (n 28) [32].

Ivey test, which requires the tribunal of fact to determine the actual state of the individual's knowledge or belief as to the facts. It is unclear, however, what impact the Supreme Court envisaged this limb having on the jury's or magistrates' assessment of whether the defendant's conduct was dishonest, since the *Ghosh* test already required the jury to consider the defendant's state of mind. The Court stated in unequivocal terms that the defendant's conduct cannot be evaluated against his own dishonest standard, so the first limb of the *Ivey* test cannot have the effect of diluting the objective nature of the assessment. In the vast majority of cases, this will not be a problem. In cases like *Hayes*, however, the question is whether the defendant will be entitled to adduce evidence that a practise was prevalent in a particular sector and, if so, what impact, if any, that will have on the assessment of whether what the defendant did was objectively dishonest. Even if such evidence can be adduced under the first limb of the *Ivey* test, it is unlikely that it will impact upon the jury's assessment of whether the defendant was dishonest, since, in contrast to *Ghosh*, the first limb of *Ivey* does not entail an examination of the defendant's assessment of the normative dishonesty of his conduct. The example given by the Court of when this limb will make a difference, the tourist who genuinely believes that public transport is free, is discussed above. Factual scenarios such as these will be rare, however. The more likely scenario is where the defendant is involved in dealing in complex financial products that are far-removed from the average juror's experience. It will be for the Court of Appeal to resolve these complex issues.

5.5 Other issues

There are two other potential implications of the Supreme Court's judgment in *Ivey*. The first relates to the criminal liability of corporates. Under the approach mandated by the so-called identification doctrine, in order to attribute criminal liability to a corporate, it is necessary for someone who can be categorised as the directing mind and will of the corporate to have engaged in the prohibited conduct with the requisite *mens rea*.[85] The culpable state of mind of the directing mind and will is attributed to the corporate, enabling it to be held criminally liable. The numerous problems with this approach have been extensively catalogued elsewhere.[86] One of the most pernicious problems is that it makes it very difficult to hold corporates liable for criminal offences.[87] A large number of the offences that might be

[85] Ormerod and Laird (n 2) 249-53.

[86] See Celia Wells, *Corporations and Criminal Responsibility* (2nd edn, OUP 2001), ch 5; James Gobert and Maurice Punch, *Rethinking Corporate Crime* (CUP 2003), ch 3

[87] Law Commission, *Criminal Liability in Regulatory Contexts* (Law Com CP No 195, 2010) paras 5.84–5.89.

committed in a corporate context are crimes of *mens rea* – fraud being the most obvious example. Hitherto it has been almost impossible to hold corporates liable for these offences because those who could be identified as the directing mind and will take steps to insulate themselves from wrongdoing and, in doing so, also insulate the corporate. The Supreme Court in *Ivey* may inadvertently have made it easier to prosecute corporates for crimes for which dishonesty is the principal element of *mens rea*, such as conspiracy to defraud. This is because, unlike the *Ghosh* test, the test enunciated by the Court in *Ivey* does not require anyone subjectively to have appreciated that the conduct in question would be considered dishonest by ordinary decent people. This appears to enable the corporate to be held liable – for conspiracy to defraud, to take the most apposite example – while dispensing with the requirement to prove that the directing mind and will realised that the conduct in question would be considered dishonest by ordinary decent people. If this proves to be the case, then the Court may inadvertently have removed one obstacle that has precluded corporates from being held criminally liable for some offences of dishonesty. Whether that result is justified as a matter of public policy, the implications of doing so were not considered by the Court. The second point relates to how offences of dishonesty are structured. The orthodox approach, adopted in *Ghosh* for example, is to categorise dishonesty as an element of *mens rea*. In concluding that the test of dishonesty ought to be shorn of its subjective element, the issue that the Supreme Court in *Ivey* did not address is whether dishonesty remains an element of *mens rea* or whether it should now more accurately be categorised as being part of the *actus reus* of a criminal offence. This is not merely a semantic distinction. If dishonesty now forms part of the *actus reus* of a criminal offence, then those offences for which dishonesty is the determinant of criminal liability begin to look more like offences of strict liability.

One consequence that does not follow from the Supreme Court's judgment in *Ivey*, for which the Court of Appeal will presumably be grateful, is that it does not provide a possible avenue of appeal by which defendants may attempt to reopen old convictions. This is because, as has already been explained, the *Ghosh* test was more generous to defendants. Not only does this mean the Court of Appeal will not be deluged with appeals, but it also means that it does not have to grapple with the protean concept of 'substantial injustice' which must be established by an offender who seeks leave to appeal their conviction out of time.[88]

[88] For discussion of this concept and the problems that have arisen in defining it, see Karl Laird, 'Joint enterprise: *R v Johnson*' [2017] Crim LR 216.

6 Conclusion

Given the apparent infrequency with which juries need a direction on how dishonesty ought to be understood, it might have been assumed that the impact of the Supreme Court's judgment in *Ivey* would be minimal. As this chapter has discussed, though, the Court's judgment has the potential to have far-reaching consequences. The Court did not consider the merits of these consequences explicitly in its judgment, which is perhaps unsurprising given the *obiter* nature of its analysis of dishonesty. Whether any of these consequences will eventuate remains to be seen. What does seem tolerably clear, however, is that both trial judges and the Court of Appeal will be faced with submissions based on the application and implications of *Ivey* for some time to come with little assistance from the Supreme Court as to how they ought to be resolved.