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The New Test for Dishonesty in Criminal Law—Lessons From the Courts of Equity?

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Abstract

The Supreme Court decision in *Ivey v Genting Casinos* rejected the two-stage test for dishonesty set out in *R v Ghosh* and replaced it with a single, objective test which transcends both criminal and civil law. This article asks whether it was correct to create a single test for dishonesty and in doing so, what role will subjectivity now play in the criminal law's application of what is considered dishonest behaviour. Historically, the civil courts have beset with confusion as to the role of subjectivity in the test for dishonesty in the light of *Royal Brunei Airlines v Tan*. The author will consider whether lessons can be learned from the civil courts and whether similar problems will trouble criminal law, particularly in the light of criticism of the Ivey test and a preference, by some, for subjectivity to play a greater role in criminal liability for theft and other dishonesty offences.

Keywords

Theft, fraud, dishonesty, dishonest assistance, subjective and objective test

Introduction

In criminal law, the issue of dishonesty in certain property offences[1] is considered a fundamental ingredient[2] in finding criminal liability. However, the concept of dishonesty is only partially defined in statute, with s 2 of the Theft Act 1968 providing examples where a person is not acting dishonestly. Namely when he is acting in a belief that he has a right in law,[3] a belief that the other person would consent to his taking of the property[4] or that he is acting under a belief that the owner of the property

1. For example, theft under s 1 of the Theft Act 1968 and Fraud set out under s 1 Fraud Act 2006.
2. As per Edmund Davies LJ in *R v Royle* [1971] 1 WLR 1764, 1770.
3. Section 2(1)(a) Theft Act 1968.
4. Section 2(1)(b) Theft Act 1968.

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could not be found by taking reasonable steps.[5] The statute fails to define the concept of dishonesty, leaving it to the criminal courts to provide their own definition. Elliott suggests that the word 'dishonestly' should not, in theory, be a difficult concept to define, however, it has been a case of the judges making a rod for their own back, with anyone trying to pin down 'dishonesty' in English case law soon finding that he is aiming at a constantly moving target.[6] Until recently the accepted test for dishonesty was set out in *R v Ghosh*,[7] Lord Lane CJ providing a two-stage test where the jury must first of all decide whether 'according to the ordinary standards of a reasonable and honest people what was done was dishonest'.[8] If they believe that this is the case they must then apply a subjective test to determine 'whether the defendant himself realised what he was doing was by those standards dishonest'.[9]

A contrast between the criminal and civil law approaches to dishonesty emerged, by virtue of cases such as *Royal Brunei Airlines v Tan*,[10] *Barlow Clowes v Eurotrust*[11] and *Abou-Rahman v Abacha*[12] where an objective approach to dishonesty was favoured by the latter.[13] Civil law has not been without its own problems in this area however, as the judiciary struggled to come to terms to what extent the role of the defendant's subjectivity should play within the role of the equitable tort of dishonest assistance in relation to a breach of trust. The recent decision in *Ivey v Genting Casinos*[14] provided the Supreme Court an opportunity to clarify the civil law test for dishonesty, and in doing so, the Court made *obiter* statements criticising the criminal approach set out in *Ghosh*. It is argued that due to the unanimous nature of the Supreme Court's decision, the reasoning of *Ivey v Genting Casinos* is to be adopted by the criminal law and has created a uniform test for dishonesty in the civil and criminal courts.[15]

This article will consider the confusion encountered when balancing the objective test with the subjective knowledge of the defendant which has historically maligned the equitable tort of dishonest assistance and ask whether the decision in *Ivey v Genting Casinos* has provided a satisfactory resolution to this problem. With an apparent unification of the civil and criminal tests for dishonesty, it is important to ask what lessons can be learnt from the civil law when applying an objective test for dishonesty in criminal law going forward.

The Ghosh Test

Prior to *Ghosh*, the case of *Feely*[16] had set the criminal law test for dishonesty purely on objective terms. Lawton LJ finding that the jury were entitled to adjudicate whether 'the man who takes money from a till intending to put it back and genuinely believing on reasonable grounds that he will be able to do so'[17] was acting honestly based on 'the current standards of ordinary decent people'.[18]

Ghosh[19] concerned a surgeon acting as a locum consultant at a hospital who falsified claims in order to obtain money that he was owed for other work that he had carried out previously. The Court of Appeal considered whether he had the requisite *mens rea* of dishonesty under the offence of obtaining property

5. Section 2(1)(c) Theft Act 1968.
6. D Elliott, 'Dishonesty in Theft: A Dispensable Concept' [July 1982] Crim LR 395.
7. [1982] QB 1053.
8. Ibid 1064.
9. Ibid.
10. [1995] 3 All ER 97.
11. [2005] UKPC 37.
12. [2006] EWCA Civ 1492.
13. A Hudson, 'Current Legal Problems Concerning Trusts, Fiduciaries and Finance' (2006) 21(3) JIBLR 149.
14. [2017] UKSC 67.
15. A Jackson, 'Goodbye to Ghosh: The UK Supreme Court Clarifies the Proper Test for Dishonesty to be Applied in Criminal Proceedings' (2017) 81(6) J Crim L 448.
16. [1973] QB 530.
17. Ibid 541.
18. Ibid 538.
19. [1982] QB 1053.

by deception contrary to s 15 of the Theft Act 1968. In rejecting *Feely*, Lord Lane CJ argued that if Parliament, in its use of the term 'dishonesty' in the Act, intended to describe a state of mind, then 'the knowledge and belief of the accused are at the root of the problem'.[20] A man visiting from another country where public transport is free, travelling on a bus without paying in this country, would be unfairly dishonest if judged objectively[21]; his lordship concluding that 'Parliament cannot have intended to catch dishonest conduct . . . . to which no moral obloquy could possible attach'.[22] The prospect of an unadorned objective test was resisted on the basis that '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'.[23]

Griew[24] points out that the objective limb in Ghosh deviates from that in Feely with Lord Lane replacing the term 'ordinary decent people' in favour of 'honest people'.[25] Although this may be a matter of mere linguistics, it was not necessarily helpful in maintaining clarity in this regard. Regardless, he question's Lord Lane's interpretation of the *Feely* test on the basis that his lordship seems to do away with a holistic view of the conduct of the accused with Griew arguing that his should be done 'in the context of the state of mind in which he did it'.[26] The implication is that the *Ghosh* direction considers the dishonesty of the actions alone, independent of the defendant's frame of mind at the time. As Griew puts it:

> The question is not . . . whether the employee who takes money from a till . . . is dishonest in doing so and therefore guilty of theft; the question is rather he is guilty of theft, because dishonest, when he 'takes money from the till intending to put it back and genuinely believing . . . that he will be able to do so'.[27]

The Law Commission suggest that '[c]entral to Feely and Ghosh is the insistence that "dishonesty" is an ordinary word . . . But even [so] . . . there is no guarantee that all speakers of the language will agree as to its application, particularly in marginal cases'.[28] A move to purely objective approach to dishonesty risks a defendant gambling on a trial rather than entering a guilty plea in the chance that those 'ordinary and decent people' may apply different standards than he himself possessed. Thus, Griew suggests that this may result in more drawn out trials when prior to *Feely* 'the defendants might have felt constrained to plead guilty'.[29] This is supported by a notion that it is naïve to suppose that there is a single, uniform standard of ordinary decent people within society.[30] Williams submits that '[t]he practice of leaving the whole matter to the jury might be workable if our society were culturally homogeneous, with known and shared values'[31] but '[s]ince the jury are chosen at random, we have no reason to suppose that they will be any more honest and 'decent' in their standards than the average person'.[32]

A simple subjective test, on the other hand, is problematic when dealing with circumstances such as those in *R v Gilks*[33] where the accused believed that when dealing with a bookmaker he was entitled to keep any winnings paid to him in error and that there was nothing dishonest in doing so. Although

20. Ibid 1063.
21. Ibid.
22. Ibid.
23. Ibid 1064.
24. E Griew, 'Dishonesty: The Objections to Feely and Ghosh' [June 1985] Crim LR 341.
25. Ibid 342.
26. Ibid.
27. Ibid.
28. Law Commission Consultation Paper, Legislating the Criminal Code: Fraud and Deception (1999), No. 155, 5.16.
29. Griew (n 24) 343.
30. Ibid 344.
31. D Baker, *Glanville Williams: Textbook on Criminal Law* (4th edn Sweet & Maxwell, London 2015) 1335.
32. Ibid.
33. [1972] 1 WLR 1341.

Williams suggests that the objection to the approach is 'the judges' supposition that the defendant was entitled as a matter of law to set his own standards',[34] 'subjectivism of this degree gives subjectivism a bad name'.[35] He reasons that the 'subjective approach to criminal liability, properly understood, looks to the defendant's intention and to the facts as he believed them to be, not to his system of values'.[36] Professor Smith agrees, adding that the rule tends to abandon all standards other than that of the accused himself, in the determination of his responsibility.[37]

The introduction of the hybrid, two-stage test of *Ghosh* seemed a compromise on behalf of Lord Lane CJ to mitigate cases such as *Gilks*. By including reference to the ordinary standards of reasonable and honest people in the first limb of the *Ghosh* test, his lordship was confident that:

> Robin Hood or those ardent anti-vivisectionists who remove animals from vivisection laboratories are acting dishonest, even though they may consider themselves to be morally justified in doing what they do, because they know that the ordinary people would consider these actions to be dishonest.[38]

His Lordship considered the example from *Boggeln v Williams*,[39] where D believed that he would be continued to be billed after reconnecting his previously cut-off power supply and therefore refuted any dishonesty on his part. His lordship conceded that this would be a borderline case in which the jury would be entitled to consider if the defendant in that case was merely disobedient or impudent rather than dishonest.[40]

The outcome in *Ghosh* removes the strident nature of the objective test while also preventing a thief's charter provided by a purely subjective test but in doing so, created confusion in the form of the second limb of the test.[41] Halpin highlights that the appeal of the *Ghosh* test is that it appears to strike an effective compromise but '[u]pon further examination . . . we find within it not a stable compromise but a continuing tension between the subjective and objective approaches . . . '.[42] Mellisaris labels the test as being 'vague and indeterminate'.[43] Campbell warns that 'no one should be seduced into thinking that it is a test of pure social fact . . . it is a partially idealised test with a necessary component of moral evaluation which will vary from jury to jury'.[44] Glover, in agreeing with earlier criticisms by Griew,[45] suggests that as a 'consequence of the nebulous nature of the Ghosh test, and reliance on the assumption of jurors' innate knowledge of dishonesty, the law appears uncertain and unpredictable'[46] and therefore contravenes the rule of law.[47] It is suggested that the test's second limb is not necessary as juries should take into account the defendant's circumstances while applying the first limb anyway as a standard of dishonesty is not considered *in vacuo*.[48]

Spencer takes exception to the retention of a subjective limb of the test suggesting that this allows a defendant to advance a defence of mistake of law by arguing that he believed society would have tolerated his behaviour,[49] concluding that for 'the courts to take their criminal law from the Clapham

34. Baker (n 31) 1337.
35. Ibid.
36. Ibid.
37. *Boggeln v Williams* [1978] Crim LR 242.
38. *R v Ghosh* [1982] QB 1053, 1064.
39. [1978] 1 WLR 873.
40. *R v Ghosh* (n 38).
41. D Ormerod, *Smith and Hogan's Criminal Law* (13th edn OUP, Oxford 2011) 830.
42. A Halpin, 'The Test for Dishonesty' (May 1996) Crim LR 283, 286.
43. E Mellisaris, 'The Concept of Appropriation and the Offence of Theft' (2007) 70(4) MLR 581.
44. K Campbell, 'The Test of Dishonesty in *R v Ghosh*' (1984) 43(2) CLJ 349, 359.
45. Griew (n 24).
46. R Glover, 'Can Dishonesty be Salvaged? Theft and the Grounding of the MSC Napoli' (2010) 74(1) J Crim L 53, 59.
47. See A Ashworth, *Principles of Criminal Law* (5th edn OUP, Oxford 2006) 74–76.
48. Campbell (n 44) 349, 353.
49. J Spencer, 'Dishonesty: What the Jury Thinks the Defendant Thought the Jury Would Have Thought' (1982) 41(2) CLJ 222, 224.

omnibus is one thing; to take it from the man accused of stealing is quite another'.[50] Williams notes that 'Lord Lane may have considered his judgement as a rescue operation, but if so, it is a rescue that still leaves this heroine in considerable peril'.[51] Wasik, supported a two-stage approach suggesting that if a jury were to consider the standards of ordinary people, it would not be contradictory in requiring them to take into account whether the accused believed his conduct was honest or not.[52] In its report on Fraud,[53] The Law Commission concluded that '[m]any years after its adaption, the Ghosh test remains, in practice, unproblematic'.[54] Indeed, Spencer had argued at the time that 'sooner or later, the question of dishonesty is bound to make its appearance in the House of Lords',[55] where the slate could be wiped clean and a new definition for dishonesty be provided.[56] Yet, the *Ghosh* test remained the accepted test for the next 35 years until the *Ivey* decision swept it aside.

Dishonesty in Civil Law—Dishonest Assistance

In *Barnes v Addy*,[57] Lord Selborne recognised that strangers to a trust can be personally liable to account as a constructive trustee to beneficiaries of a trust for any loss caused if they assist a breach of trust 'with knowledge in a dishonest and fraudulent design on the part of the trustee'.[58] This concept of 'knowing assistance' moved towards 'dishonest assistance' in *Royal Brunei Airlines v Tan*[59] where, when considering dishonesty in this context, Lord Nicholls purported to put forward an objective test for dishonesty stating that 'dishonestly . . . means simply not acting as an honest person would in the circumstances. This is an objective standard'.[60]

Despite this clear statement, confusion creeped into the law due to his subsequent comments referencing a subjective element, suggesting that

> Honesty . . . 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.[61]

The question therefore is whether Lord Nicholls intended the test in *Royal Brunei Airlines v Tan* to be that of a purely objective nature or whether it should involve some element of subjectivity. It is argued that on a holistic reading of Lord Nicholls judgment, the repeated emphasis on an objective standard of dishonesty seems to suggest that the former is the correct interpretation of his Lordship's decision.[62]

Yet, Lord Hutton in *Twinsectra v Yardley*[63] disagreed. In analysing the possible approaches to civil dishonesty, he identified three possible options, the subjective approach (Robin Hood test), the objective approach and a combined test similar to that set out in *Ghosh.*[64] His interpretation of the *Tan* test was this must be a version of the combined (*Ghosh*) test. He cited the statement from Lord Nicholls that '[u]ltimately . . . an honest person should have little difficulty in knowing whether a proposed

50. Ibid.
51. Baker (n 31) 1338.
52. M Wasik, 'Mens Rea, Motive and the Problem of "Dishonesty" in the Law of Theft' (Sep 1979) Crim LR 543, 556.
53. Law Commission, Report No. 276, Fraud (2002).
54. Ibid 5.18.
55. Spencer (n 49) 225.
56. Ibid.
57. (1874) 9 Ch App 244.
58. Ibid 252
59. [1995] 2 AC 378.
60. Ibid 389.
61. Ibid.
62. A Hudson, *Equity and Trusts* (9th edn Routledge, Abingdon 2017) 787.
63. [2002] UKHL 12.
64. *Twinsectra v Yardley* [2002] UKHL 12 para 27.

transaction . . . would offend the normally accepted standards of honest conduct',[65] highlighting the use of the word 'knowing' as being crucial in this context. His lordship stating that the use of the word would be 'superfluous if the defendant did not have to be aware that what he was doing would offend the normally accepted standards of honest conduct'.[66] Hudson describes Lord Hutton's approach as an awkward 'combination of an alteration of [the] Tan test and yet a purported approval of it by the House of Lords'[67] adding that by emphasising the role of knowledge in the test is 'unfortunate because the test for dishonesty was developed precisely to move away from tests of knowledge'.[68] Lord Millet however, dissenting, argued that Lord Nicholls had purposely avoided adopting the *Ghosh* approach[69] and had instead adopted an objective test which would be applied after considering the defendant's experience, intelligence and knowledge of the circumstances at the time.[70] This, however, did not make it necessary that 'he should actually have appreciated that he was acting dishonestly; it is sufficient that he was'.[71] Although Lord Millet was unable to persuade the rest of the Court in this case, his interpretation of Lord Nicholls' words is preferred in academia over the much maligned approach taken by Lord Hutton.[72] As Ryan puts it, Lord Millett's approach 'arguably reflected more accurately the approach . . . in Royal Brunei, who had . . . expressly rejected any requirement of consciousness on the part of the defendant that his conduct would be considered dishonest by ordinary persons'.[73]

In *Barlow Clowes v Eurotrust*,[74] the Privy Council seemed to reaffirm Lord Nicholls' test for dishonesty in *Tan*.[75] In explaining away the distortion created by *Twinsectra*, Lord Hoffman suggested that he had not departed from the test in *Tan* and that:

> The reference to 'what he knows would offend normally accepted standards of honest conduct' meant only that his knowledge of the transaction had to be such as to render his participation contrary to normally acceptable standards of honest conduct. It did not require that he should have had reflections about what those normally acceptable standards were.[76]

Ryan[77] describes this approach as 'something of a volte face via a judgment that disavows the existence of any divergence between its earlier advice in Royal Brunei and the later approach of the House of Lords in Twinsectra'.[78] Yeo adds that the clarification is unconvincing.[79] Penner suggests that 'this would appear to be an implausible interpretation of Lord Hutton's leading judgment on the dishonesty point in Twinsectra'.[80] Conaglen and Goymour while welcoming the Privy Council's conclusions suggested that 'the sleight of hand in Eurotrust is apparent: the test in Twinsectra was not ambiguous

65. *Royal Brunei Airlines v Tan* [1995] 2 AC 378, 391.
66. *Twinsectra v Yardley* [2002] UKHL 12 para 32.
67. Hudson (n 62) 793
68. Ibid.
69. *Twinsectra v Yardley* (n 66) para 114.
70. Ibid para 121.
71. Ibid.
72. See, eg, D McIlroy, 'What Has Happened to Accessory Liability Is Criminal' (2004) 7 JIBFL 266; M Thompson, 'Criminal Law and Property Law: An Unhappy Combination—*Twinsectra Ltd v Yardley*' (2002) 66 Conv 387 R Hunter, 'The honest truth about dishonesty' *Financial Times* (London, 8 July 2002) 11.
73. D Ryan, 'Royal Brunei Dishonesty: Clarity at Last?' (Mar/Apr 2006) Conv 188, 191.
74. [2005] UKPC 37.
75. Ibid para 10.
76. Ibid para 15.
77. Ryan (n 73).
78. Ibid 192.
79. T Yeo, 'Dishonest Assistance: Restatement From the Privy Council' (2006) LQR 122, 171, 173.
80. J Penner, 'Dishonest Assistance Revisited: Barlow Clowes International Ltd (in liquidation) and others v Eurotrust International Ltd' [2006] Tru LI 20(2), 122, 123.

but has been changed in Eurotrust so as to exclude the second limb of Lord Hutton's formulation in Twinsectra'.[81]

Lord Hoffman's, apparent, reinstatement of the test from *Tan* was endorsed by the Court of Appeal in *Abou-Rahman v Abacha*[82] but in doing so, the test was inadvertently distorted. LJJ Rix[83] and Pill[84] purported the test to include subjective knowledge on one's dishonesty. Lady Justice Arden, in her analysis, declared that the decision in *Barlow Clowes v Eurotrust* 'represented the law of England and Wales'[85]; however, she, just as Lord Hutton had done previously, placed weight into Lord Nicholls' *obiter* statement regarding the knowledge of the defendant. Her ladyship concluded that although the test was predominantly objective 'there are also subjective aspects of dishonesty'.[86] Halliwell and Prochaska sum up the frustrations when they state that 'it is a great pity that the fundamental principles that [Lord Nicholls] adopted have been relegated to an inordinate degree'[87] adding that '[i]t seems yet again that semantic distinctions have denigrated the substantive test'.[88]

The *Ivey* Test for Dishonesty

In *Ivey v Genting Casinos*,[89] concerning a gambler who cheated at Punto Banco Baccarat, the Supreme Court considered the role of dishonesty under s 42 of the Gambling Act 2005. Although the court concluded that dishonesty was not a necessary ingredient for cheating, Lord Hughes took the opportunity to flesh out the legal concept of dishonesty in English law. His Lordship was highly critical of the criminal law test for dishonesty set out in *Ghosh* stating that it benefited defendants with warped standards of honesty; too much reliance is unnecessarily placed on the defendant's state of mind; it provides a confusing test for jurors to understand; it has resulted in a divergence between dishonesty in civil and criminal law and that the court in *Ghosh* were not required to make such a ruling.[90] This adds to academic criticism of the test where it is argued that the second limb of the *Ghosh* test complicates criminal trials and can result in inconsistency due to additional grounds that can be contested.[91] This is particularly problematic if faced with jurors, required to apply their own standards of honesty, whose standards may not live up to those of 'ordinary decent people' creating the danger of asking jurors to apply higher standards than they themselves attain, resulting in hypocrisy.[92] Griew is also unconvinced that the *Ghosh* test rids the law of the undesired 'Robin Hood' defence where a defendant may claim to be ignorant that the conduct was dishonest by ordinary standards[93] and it allows mistakes as to the law to be a valid defence.[94]

In *Ivey v Genting Casinos*, Lord Hughes added to this criticism, stating that the 'principle objection to the second leg of the Ghosh test is that the less a defendant's standards conform to what society in general expects, the less likely he is to be held criminally responsible for his behaviour'.[95] His lordship arguing that '[t]here is no reason why the law should excuse those who make a mistake about what

81. M Conaglen and A Goymour, 'Dishonesty in the Context of Assistance—Again' (2006) 65(1) CLJ 18, 20.
82. [2006] EWCA Civ 1492.
83. Ibid para 23.
84. Ibid paras 93–94
85. Ibid para 69.
86. Ibid para 66.
87. M Halliwell and E Prochaska, 'Assistance and Dishonesty: Ring-A-Ring O'Roses' (Sep/Oct 2006) Conv 465, 474.
88. Ibid.
89. [2017] UKSC 67.
90. Ibid para 57.
91. EJ Griew, 'Dishonesty: The Objection to *Feely* and *Ghosh*' [June 1985] Crim LR 341.
92. Ibid.
93. Ibid.
94. Ibid.
95. *Ivey v Genting Casinos UK Ltd* [2017] UKSC 67 para 58.

contemporary standards of honesty are . . . '[96] regardless of the context. Although Lord Hughes acknowledged Lord Lane's basis for the second limb of the Ghosh test being that criminal responsibility for dishonesty must be based on the accused's actual state of mind, he rejected the presumption that the objective approach to dishonesty would preclude this. His lordship argued that '[w]hat is objectively judged is the standard of behaviour, given any known actual state of mind of the actor as to the facts'.[97]

Lord Hughes expressed preference for the civil test of dishonesty set out in *Royal Brunei Airlines v Tan* and adopted in *Barlow Clowes v Eurotrust*, reasoning that 'there can be no logical or principled basis for the meaning of dishonesty . . . to differ according to whether it arises in a civil action or a criminal prosecution'.[98] Lord Hughes purported to adopt the civil test created by Lord Nicholls in Tan but explained it in the following terms:

> When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual's [genuine] knowledge or belief as to the facts . . . When once his actual state of mind as to knowledge or belief as to facts is established, the question [of dishonesty] is to be determined 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.[99]

In essence, what Lord Hughes set out was an objective test for dishonesty but where before applying this test, the ordinary and decent person is credited with the defendant's knowledge or genuine belief of the facts at hand. By removing the second limb of the *Ghosh* test, the approach in *Ivey* no longer considers whether the defendant subjectively realised that he was dishonest. Horder explains the new approach using the example of the taking of a hotel table lamp. One person takes the lamp believing that hotels have to put up with such a loss; the other takes the lamp because they misconceive a nearby sign stating that 'all lighting is free'.[100] Horder argues that whereas the former may have had a claim to acquittal under *Ghosh*, on the basis that he would not realise that ordinary decent people would find this conduct dishonest, but his defence would fail under the new *Ivey* test. In contrast, the latter's defence would likely succeed on the basis that her mistaken and rather naïve understanding of the sign would be taken into account.[101]

Although *Ivey* was dealing with a civil appeal, Dyson and Jarvis argue that 'the real reason the case of Ivey found its way to the UKSC was nothing to do with cheating at cards and everything to do with a desire to dispense with part of the Ghosh test for dishonesty'.[102] *Ivey* now represents the civil law position in terms of dishonesty. Although, in technical terms, *Ghosh* still remains the leading criminal law precedent, it seems logical, following the same justifications which allowed the Privy Council decisions in *Tan* and *Barlow Clowes* to overrule the Court of Appeal in *Twinsectra*, that *Ivey* will be adopted in future by the criminal courts too. As Laird puts it:

> It is trite law that the only part of a judgment that is binding is the ratio. However, the tone of the Supreme Court's judgment strongly suggests that it intends for its obiter analysis of Ghosh to be treated as binding by lower courts.[103]

Indeed, in *DPP v Pattison*,[104] Sir Brian Leveson recognised the statements by Lord Hughes in *Ivey* to be strictly *obiter* and thus despite the High Court being bound by *Ghosh*, he advocated that

96. Ibid.
97. Ibid para 60.
98. Ibid para 63.
99. Ibid para 74.
100. J Horder, *Ashworth's Principles of Criminal Law* (9th edn OUP, Oxford 2019) 402.
101. Ibid.
102. M Dyson and P Jarvis, 'Poison Ivey or Herbal Tea Leaf?' (2018) 134 LQR 198, 199–200.
103. K Laird, 'Dishonesty: Ivey v Genting Casinos UK Ltd (t/a Crockfords Club.)' (2018) 5 Crim LR 395, 397.
104. [2017] EWHC 2820 (Admin).

> [g]iven 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.[105]

In *R v Pabon*,[106] Lord Justice Gross stated that in the light of *Ivey v Genting Casinos* 'that second leg of R v Ghosh test has been disapproved as not correctly representing the law . . . '[107] and that it is apparent that the jury, who had been given the *Ghosh* direction at trial, were 'directed on a basis more favourable to the Appellant than if he were tried today'.[108]

Conclusion

Having changed the test for dishonesty, Clough suggests that this deals with the common criticism of *Ghosh* in that the second limb could create some absurd jury decisions.[109] The new *Ivey* approach leaving 'less room for manoeuvre'.[110] Likewise, Galli suggests that the 'judgement is likely to be welcome for practitioners and jurors alike, but not those looking to rely on the distorted test for determination of dishonesty in order to circumvent the purpose of the law',[111] arguing that the *Ghosh* test allowed the defendant's belief 'to undermine an objective standard'[112] and the change removes that 'vulnerability'[113] by eliminating the subjective limb of the test. Virgo[114] contests this, suggesting that 'there is no evidence from the cases that juries found the Ghosh direction difficult to apply'.[115]

The mode of the change of law in *Ivey* also attracts widespread criticism. Laird expresses surprise that not only *Ghosh* was rejected but more so in that this took place in a civil case.[116] He points out that *Ghosh* was not even considered during the appellate history of the *Ivey* case and as such, 'Ghosh and its effect upon the criminal law was not subject to detailed scrutiny at any stage of the proceedings in Ivey'[117] adding that this 'perhaps explains some of the problematic omissions evident in the Supreme Court's judgement'.[118] First is the presumption by Lord Hughes, in his judgment, that an 'unprincipled divergence'[119] between the civil and criminal tests was problematic. Dyson and Jarvis brazenly suggest that the 'implication that there could be a principled divergence between civil and criminal concepts is welcome'.[120] They add that 'it is not clear that the function of dishonesty in the criminal law is the same as the function of it in the civil law . . . '[121] and that the civil judiciary can deal with complexity whereas a lay juries require simplicity.[122] Spencer[123] makes similar arguments stating that: 'As unsuccessful

105. Ibid para 16.
106. [2018] EWCA Crim 420.
107. Ibid para 23.
108. Ibid.
109. J Clough, 'Giving up the Ghosh: Ivey (Appellant) v Genting Casinos (UK) Ltd trading as Crockfords (Respondent)' (2018) 236 Crim Law 2, 3.
110. Ibid.
111. M Galli, 'Oh my Ghosh: Supreme Court Redefines Test for Dishonesty in Ivey v Genting Casinos' (2018) 29(2) Ent LR 55, 57.
112. Ibid.
113. Ibid.
114. G Virgo, 'Cheating and Dishonesty' (2018) 77(1) CLJ 18, 20.
115. Ibid.
116. Laird (n 103).
117. Ibid.
118. Ibid.
119. *Ivey v Genting Casinos UK Ltd* (n 98).
120. Dyson and Jarvis (n 102) 198, 200.
121. Ibid.
122. Ibid.
123. JR Spencer, 'Two Cases on the Law of Theft: A Concertina Movement?' (2018) 8 Arch Rev 4.

defendants in criminal proceedings face consequences far worse than do unsuccessful parties to a civil action, a more generous interpretation of the dishonesty requirement in their favour can hardly be described as "an unprincipled divergence"'.[124] Virgo adds that:

> Different tests of dishonesty could be justified because 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.[125]

Horder emphasises the importance of dishonesty in criminal law on the basis that it 'its sphere of operation is enormous: around one-half of all indictable charges tried by the courts include a requirement of dishonesty'.[126] As such, most of these cases are decided under the judicial test and he suggests that 'even under the simplified Ivey test, that test is open to serious objections',[127] particularly on the basis that the unfounded view by the courts that dishonesty is easily recognised,[128] it derogates from the rule of law due to *ex post facto* assessments of ones conduct[129] and leaves room for 'the infiltration of irrelevant factors' in the court room.[130]

This change in direction must also be considered in the light of cases such as *R v Hinks*[131] which considered the *actus reus* of theft and whether the appellant had appropriated £60,000 and a television set when she encouraged her 53-year-old male friend, Mr Dolphin, who was described as naive, gullible and of limited intelligence[132]; to donate the gifts to her. Rose LJ confirmed that there was a distinction between the two separate ingredients of appropriation and dishonesty and that 'appropriation can occur even though the owner has consented to the property being taken'.[133] The result of this was that the entire issue of whether Ms Hinks had committed theft therefore rested on whether the jury could be satisfied that she had acted dishonestly when she persuaded Mr Dolphin to give her the gifts. As suggested by Beatson and Simester,[134] in order for this to have been a civil wrong, the transaction must have been induced by a misrepresentation, duress or undue influence.[135] But despite the absence of any of these inducements, as Beatson and Simester put it, '[i]t appears . . . that such despicable conduct, though with no civil consequences, may constitute a crime'.[136] In essence, the offence of theft hangs on the dishonesty element, and, as a direct consequence of *Hinks* and *Ivey*, there is no longer a need to the defendant to either take another's property adversely nor are they required to realise what they are doing is dishonest. Spencer, who had previously been critical of the *Ghosh* test of dishonesty admits that ' . . . 36 years later, and on the other side of Gomez and Hinks, I confess that I have changed my mind'[137] adding that ' . . . the innocence of anyone who genuinely believes his conduct to be proper by the ordinary standards of honest and reasonable people can be seen as an important limit; and rejecting it

124. Ibid 5
125. Virgo (n 114) 20–21.
126. Horder (n 100).
127. Ibid.
128. Ibid.
129. Ibid 403.
130. Ibid 404.
131. [2000] 1 Cr App R 1.
132. Ibid 2.
133. Ibid 9. See also *Lawrence v Metropolitan Police Commissioner* [1972] AC 626 and *R v Gomez* [1993] AC 442 for earlier authorities finding that appropriation need not be adverse.
134. J Beatson and AP Simester, 'Stealing One's Own Property' (1999) 115 LQR 372.
135. Ibid.
136. Ibid.
137. Spencer (n 123) 5.

extends the offence of theft yet further'.[138] It is hard not to agree with Virgo's concerns when he suggests that theft is now:

> [A] crime which requires neither proof of harm nor subjective fault. Together with Hinks, Ivey has resulted in an unacceptable expansion of the criminal jurisdiction, one which is inconsistent with the civil jurisdiction and so constitutes an unprincipled divergence between criminal and civil law.[139]

Another concern is what the *Ivey* test does with Parliamentary supremacy in relation to the Fraud Act 2006. During the passing of the Fraud Bill, Parliament would have had a perfect opportunity to depart from the *Ghosh* test but chose instead to remain silent on the issue. Laird suggests that 'had Parliament intended for a specific test of dishonesty to apply, it could have made this explicit'.[140] Dyson and Jarvis agree, suggesting that the Fraud Act 2006 does not include any exceptions to dishonesty, such as those found in the Theft Act 1968 s 2, because 'Parliament did not feel the need to enact them in the new legislation because it intended the subjective limb of the Ghosh test to do the same work'.[141] They add that '[n]ow that the subjective limb is gone, an unfortunate chasm opens up between theft on one hand and fraud on the other'.[142]

It has already been observed that when the civil courts have been faced with a simple objective test, they have struggled to maintain this standard and in the cases of *Twinsectra*, *Barlow Clowes v Eurotrust* and *Abou-Rahman v Abacha* a subjective element crept back into the respective judgments. The case of *R v Hayes*,[143] decided under the *Ghosh* test and prior to the change brought about by *Ivey*, is of particular interest. Here, a market trader was convicted of conspiracy to defraud when he manipulated the London Inter-Bank Offered Rate (LIBOR), to his advantage. It was considered whether, when applying the objective limb of the *Ghosh* test, the jury could consider the general ethos of the banking system and evidence of market practice. In rejecting this, the Court of Appeal suggested that this would 'gravely affect the proper conduct of business'.[144] They did, however, concede that this evidence would be 'plainly relevant to the second subjective limb'.[145]

However, in *Hussein v FCA*,[146] the *Ivey* test was applied when considering whether a trader had acted dishonestly when he influenced his employers LIBOR submissions to their advantage. The case was based around communication made by H to the bank's LIBOR submitter and by providing information on his individual trading position this had improperly influenced the submissions. H argued that the conversations were merely about internal hedging opportunities to protect his clients from interest rate fluctuations. He argued that he did not believe the conduct to be improper and believed it to be good practice at the bank during this period. Judge Herrington, accepted that:

> as a consequence of the test now formulated in Ivey . . . . the subjective element must be on what Mr Hussain knew about the definition of LIBOR . . . . in other words what did Mr Hussein genuinely believe were the factors that could be taken into account in determining the objective LIBOR rate . . . In that context it must also be taken into account what Mr Hussein believed as regards to how the information he provided . . . would be taken into account in determining UBS's LIBOR submissions.[147]

138. Ibid.
139. Virgo (n 114) 21.
140. Laird (n 103) 399.
141. Dyson and Jarvis (n 102) 201.
142. Ibid.
143. [2015] EWCA Crim 1944.
144. Ibid para 32.
145. Ibid.
146. [2018] UKUT 186 (TCC).
147. Ibid para 41.

The implication here is that the formulation of the *Ivey* test, in which the jury is invited to consider the actual state of the individual's knowledge or belief as to the facts, leaves the door open for the courts to widen the scope of the test to introduce more subjective components. Dyson and Jarvis speculate whether 'the removal of the subjective limb shifted such awareness on the defendant's part into the objective test, or does it just hang in the air as a piece of evidence unconnected to the issues in the case would be now?'[148] It seems that on the basis of *Hussain* that the answer may be in the former. Dyson and Jarvis point to other areas of criminal law where the objective standard can be informed by the defendant's subjective view about the reasonableness of the conduct they perform, such as self-defence under s 76(7)(b) of the Criminal Justice and Immigration Act 2008.[149] Their conclusion is that '[t]here is precedent here for the courts to develop the objective limb left by Ivey by importing into it more subjective components'.[150] This would allow the jury to take into account factors such as '"market practice" á la Hayes; and . . . the defendant's belief in his or her own honesty by reference to the same standards to be applied to the jury'.[151] It is submitted that decisions such as *Hussein* mark the first rung on this ladder and that the approach in *Ivey* is far from settled, particularly in the light of the historical struggles with similar tests faced by the civil courts and considering that merger of the civil and criminal tests for dishonesty opens up the criminal court to the unenviable task of interpreting Lord Nicholls' words for themselves.

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148. Dyson and Jarvis (n 102) 198, 203.
149. Ibid.
150. Ibid.
151. Ibid.