

CORPORATE CRIME BRIEFING NOTE

R V BARTON & BOOTH [2020] EWCA CRIM 575: THE LAW ON DISHONESTY IN CRIMINAL PROCEEDINGS AND CONSPIRACY TO DEFRAUD

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Executive summary

A five-judge Court of Appeal confirmed that:

- the criminal test for dishonesty is as set out in *Ivey v Genting Casinos (UK)* [2017] UKSC 67 and not that in *R v Ghosh* [1982] QB 1053,
- conspiracy to defraud requires an element of unlawfulness in its object or means, but no other aggravating feature,
- conspiracy to defraud as alleged was compliant with Article 7 ECHR.

Although this (subject to any appeal) may settle those matters, the judgment has serious ramifications for the reach of the criminal law:

- a person may be convicted of an offence if unaware they have done anything unlawful and not believing that they are dishonest,
- corporate liability following the identification doctrine will be easier to prove in cases of dishonesty.

The facts

Barton ran a care home. Booth was the General Manager. The allegation was that Barton dishonestly targeted and groomed wealthy, vulnerable and childless elderly residents in order to profit from them. Having manipulated and isolated them he became the beneficiary of wills, gained power of attorney and received gifts or 'loans'. He charged excess or fabricated expenses. The residents had capacity and were willing to agree to the transactions, but the prosecution case was that they were highly vulnerable and isolated from advisers when they did so.

An investigation began when one resident died and Barton sued her estate for £10m. The Barton Park book-keeper had pleaded guilty before trial to a count of conspiracy to defraud and one of false accounting, and gave evidence for the prosecution.

The jury returned mixed verdicts but both Barton and Booth were convicted of offences of, *inter alia*, conspiracy to defraud.

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The incidents took place over 20 years and Barton obtained over £4m. Having described the case as “one of the most serious cases of abuse of trust that I suspect has ever come before the courts in this country”, the judge sentenced Barton to a total of 21 years’ imprisonment and Booth to a total of 6 years’.

The issues in the Barton & Booth appeal included:

- whether *Ivey* provided the correct approach to dishonesty, the judge having directed the jury on the issue of dishonesty by reference to *Ivey* rather than *Ghosh* in this case,
- the direction to the jury on conspiracy to defraud, in particular (a) whether there is a requirement of “unlawfulness” or “aggravating feature” over and above a dishonest agreement which includes an element of unlawfulness in its object or means and (b) whether the offence meet the requirements of legal certainty at common law and under article 7 of the European Convention on Human Rights (“ECHR”) having regard to the test of dishonesty.

The issues

What is the correct test for dishonesty in criminal cases?

We will not rehearse the well-trod landscape of the decisions in *Ghosh* and *Ivey*.

Unsurprisingly, in *Barton* the Court of Appeal found that the correct test is that set out in *Ivey* (at [74] by Lord Hughes). Having agreed that the discussion on dishonesty in *Ivey* was *obiter* they nonetheless went on to say that not only were they bound by the alternative test set out by the Supreme Court but that they found the reasoning of Lord Hughes compelling [104 -106].

The Court did reinforce the importance of ascertaining the defendant’s “*actual state of knowledge or belief as to the facts*” as set out by Lord Hughes because “*the test of dishonesty formulated in Ivey remains a test of the defendant’s state of mind - his or her knowledge of belief - to which the standards of ordinary decent people are applied*” [107]. Lord Hughes was, “*referring to all the circumstances known to the accused and not limiting consideration to past facts. All matters that lead an accused to act as he or she did will form part of the subjective mental state, thereby forming a part of the fact-finding exercise before applying the objective standard. That will include consideration, where relevant, of the experience and intelligence of an accused*”. Accordingly the fact that the tourist doesn’t realise he has to pay the bus fare or the shopper who genuinely forgets to pay the bill will form part of the assessment of the defendant’s state of mind, which is to be ascertained from the facts before applying the objective to standard to whether he/she acted dishonestly (the Court implying that they would not be found to be so) [108].

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Conspiracy to defraud

Conspiracy to defraud is a common law offence carrying a maximum of 10 years' imprisonment (notwithstanding calls to increase that sentence). The Law Commission¹ has raised various concerns including the offence "*is so wide that it offers little guidance on the difference between fraudulent and lawful conduct*" and called for its abolition.

Although Parliament retained the offence, the Attorney General sought to address the concerns and issued Guidelines, "Use of the common law offence of conspiracy to defraud". In those Guidelines, she recognised that "...*The [Law Commission's] argument is that the offence is unfairly uncertain, and wide enough to have the potential to catch behaviour that should not be criminal. Furthermore it can seem anomalous that what is legal if performed by one person should be criminal if performed by many*" [3].

Nonetheless, the offence is regularly used, often in cases that are complicated and involve commercial activities outside a jury's experience.

Unlawfulness

One of the essential ingredients of the offence is 'unlawfulness'. It is separate from the further requirement of dishonesty. The asserted unlawfulness should be identifiable to the jury - and the defendants. A properly particularised Indictment is the usual means. This was confirmed in *Barton* [121].

However, the court rejected the requirement for any additional feature: "*There is no requirement of "unlawfulness" or "aggravating feature" over and above a dishonest agreement which includes an element of unlawfulness in its object or means*" [122].

Although the courts have identified what is or isn't unlawful, they have not provided any definition. This means that a person may not know that what they do will, later, be said to be unlawful.

In *Barton* the 'unlawfulness' was described by the Court of Appeal as "*the positive and extensive deceit practised on the victims and others with the intention of prejudicing a proprietary right or interest*" [123]. Reference is made at paragraph 126 to the Court's determination that "there can be no doubt that the jury understood that the prosecution needed to establish that there was a dishonest agreement on the part of the appellants, **by deceit or lies**, to prejudice the proprietary rights or interests of the victims by obtaining property to which they were not entitled".

It is to be noted that the indictment alleged "dishonestly exploiting their position" and gave voluntary particulars alleging, inter alia, obtaining monies or equivalent "in excess of any sums legitimately owed by her" or "at a price far exceeding value". By way of example, the Court of Appeal highlighted as particularly egregious charging £7.2m for fees in part caused by daily drives in a classic car at £25,000 a time. However, the particulars did not particularise that the residents had been lied to or deceived.

¹ Law Commission, Fraud (Law Com No 276, HM Stationary Office 2002)

One does need to be precise as to terms when using ‘exploitation’ as the basis for such a charge. Take an example of D befriending an elderly and vulnerable man V (who has capacity) and encourages him to give X vast sums of money or other property. D does not deceive V, but he plays on his generosity and cultivates the relationship. Is there any offence? What if D is a young, attractive female who marries V?

Dishonesty and conspiracy to defraud

Whilst the reasoning of Lord Hughes in *Ivey* may well be attractive, it cannot be said to be irrelevant that a defendant can no longer rely on the fact he/she did not appreciate that ordinary decent people would consider his activities dishonest. This point is aggravated where the case is based upon *civil* acts of unlawfulness such as in *Libor*. Under *Ghosh*, a person being civilly unlawful would not be considered dishonest if he did not realise that right-minded people considered his actions to be dishonest. That protection (if it be a protection) no longer exists. As the test for dishonesty is an objective one this places a great weight upon an individual group of jurors to determine whether a civil act was committed dishonestly.

The protection to the defendant now is consideration of “*all matters that lead an accused to act as he or she did will form part of the subjective mental state, thereby forming a part of the fact-finding exercise before applying the objective standard*” [108].

What is likely to be a cause for debate at trial is how much evidence may be given in support of a defendant. A defendant can say “this is what I knew and believed” and give reasons why he did so. A defendant is able to call evidence to confirm that such information was available to him and others at the relevant time. What is more controversial is calling evidence, unknown to the defendant, of similar beliefs by others in a similar field to show a widespread view.

The matter is exacerbated by the fact that the three situations provided for in s. 2 of the Theft Act 1968, where a defendant is not to be regarded as dishonest, do not apply to conspiracy to defraud.

Article 7 ECHR

The Court of Appeal in *Barton* did not make any detailed analysis of this argument but rejected it [124]. Although at first blush it is a bold claim to make following years of convictions and Parliamentary reinforcement, the argument builds upon the points raised above about uncertainty.

As the Law Commission put it, “*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*”².

It is likely that this matter will be pursued in the future.

² Law Commission, Fraud and Deception (Law Com Consultation Paper No 155), para 5.43. 1996

Corporate liability

As an aside, taking into account the recently-released *Barclays* judgments on corporate liability and whilst we await the Government to make a decision about widening “failure to prevent” offences and HMRC to take action under the Criminal Finances Act, it will be interesting to see the extent to which further corporate prosecutions are brought using the identification principle. If it is easier to prosecute and convict a directing mind of a *mens rea* offence because of the changes to the dishonesty test (and the fact there can be no reliance by a defendant on the fact that he did not consider his conduct was dishonest) than it will render the corporate more at risk as well.

This briefing note was produced by [Sean Larkin QC](#) and [Polly Dyer](#). This note should not be taken as constituting formal legal advice. To obtain expert legal advice on any particular situation arising from the issues discussed in this note, please contact our clerking team at barristers@qebhw.co.uk. For more information on the expertise of our specialist barristers in criminal and regulatory law please see our website at <https://www.qebholliswhiteman.co.uk/>.

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