



DISHONESTY REDEFINED

**Ivey v Genting Casinos (UK) Ltd
[2017] UKSC 67; [2017] LLR 783**

Kerry Barker, Guildhall Chambers

- 1 Philip Ivey is a world renowned professional gambler. Over 2 days in August 2012 he and his partner, another professional gambler known as Cheung Yin Sun, won over £7.7 million at Crockfords Casino in London. They won that amount simply by playing Baccarat.
- 2 Baccarat is also known as Punto Banco or Chemin de Fer.
- 3 It is played between the casino (bank) and one other player. In some casinos the bank can move from player to player (in which case you have two players). Others can bet on the game at fixed odds. Even money on the player or 19/20 on the bank.
- 4 It is a game of pure chance.
- 5 So how did Mr Ivey manage to win so much?
- 6 2 cards are dealt to the player and 2 to the banker. Face cards and tens count for nought. The player whose cards total closest to 9 wins. Those whose cards total 10 or more have 10 points deducted. So, for example, a 9 of hearts and a two of clubs added together would give a score of one.
- 7 [Insert Clip of James Bond playing Baccarat.]
- 8 Mr Ivey used a method known as “Edging” (which has a different meaning when playing cards!) – or “Edge-sorting”.
- 9 The shoe from which the cards are dealt will often have six or 8 packs or decks of cards.
- 10 The cards are supposed to be indistinguishable when face down and casinos will use decks of cards with no obvious pattern and no distinguishing marks such as the maker’s name.
- 11 But careful scrutiny can reveal that there are minute differences to the edges on the long side of the cards.
- 12 Crockfords were using such cards and over the course of play during those two days Mr Ivey and his partner managed to persuade the croupier to rotate the 10s and face cards based on their alleged superstitions.
- 13 Unsurprisingly, London casinos are anxious to accommodate the superstitions of high rolling players because they want to attract their business. The croupiers were even agreeable to reusing the same packs of cards on the basis that they were “lucky decks” for Mr Ivey.
- 14 So, in due course many of the face cards had been turned enabling the sharp-eyed Mr Ivey to see when they were likely to be played and to adjust his bets accordingly. His stakes went up



from as little as £4,000 - £75,000 per hand on the first day to between £95,000 to £149,000 on the second day.

- 15 That was how Mr Ivey won over £7 million.
- 16 With such a large amount involved the casino delayed paying out simply returning his stake of £1 million to Mr Ivey.
- 17 The management then watched the CCTV and realised what had happened. Their staff had not been trained to look out for edge sorting.
- 18 When the casino refused to pay out Mr Ivey sued.
- 19 It was his case that he had done nothing dishonest and was entitled to his winnings.
- 20 The casino defended the claim on the basis that Mr Ivey had been cheating and that there was an implied term in the contract for betting that neither the banker or the player would cheat.

The Court Case

- 21 In the High Court the judge, Mitting J, found that Mr Ivey was an honest witness who gave a frank and truthful account of what he had done. As a professional gambler he had sought 'advantages' to favour him against the house. He did so by means that were, in his opinion, lawful. Mr Ivey considered them to form legitimate gamesmanship. He was genuinely convinced that what he did was not cheating
- 22 Nevertheless, the judge found that it was cheating and so dismissed the claim.
- 23 Mr Ivey went to the Court of Appeal where two of their lordships agreed with Mitting J but Sharp LJ dissented holding that the mens rea of the criminal offence of cheating required dishonesty. Since the judge had found that Mr Ivey had not acted dishonestly his appeal should be allowed. She took the view that there could not be cheating unless the statutory offence contrary to s. 42 of the Gambling Act 2005 had been committed and that a necessary ingredient of it was dishonesty as defined in R v Ghosh [1982] QB 1053
- 24 Mr Ivey appealed to the Supreme Court.
- 25 So, the Supreme Court was faced with first the question whether the statutory criminal offence of cheating and the common concept of cheating required dishonesty. That question led the justices to consider whether the test in Ghosh was correct.

Cheating

- 26 The Supreme Court held that

(1) it was common ground that the contract for betting into which the parties entered is subject to an implied term that neither of them will cheat. It followed that if what Mr Ivey did was cheating he was in breach of that implied term and could not as a result recover his "winnings".



(2) The concept of cheating long pre-dates s. 42 of the Gambling Act 2005. It clearly embraces the kind of malpractice described in the statutes of 1664, 1710 and 1845. S. 42 thus adopted a longstanding concept. However, there is no reason to doubt that cheating carries the same meaning when considering an implied term not to cheat and when applying s. 42 of the Gambling act. There will be a difference in standard of proof as between civil and criminal proceedings but that does not affect the meaning of cheating. S. 42 expressly does not exhaustively define cheating, and the elaboration in s. 42(3) is explanatory rather than definitive. The section leaves open what is and what is not cheating, as is inevitable given the extraordinary range of activities to which the concept may apply. Plainly what is cheating in one form of game may be legitimate competition in another.

(3) Although the great majority of cheating will involve something which the ordinary person or juror would describe as dishonest, this is not invariably so. When, as it often will, the cheating involves deception of the other party, it will usually be easy to describe what was done as dishonest. It is, however, perfectly clear that in ordinary language cheating need not involve deception, and section 42(3) recognises this. S. 42(3) does not exhaustively define cheating, but it puts beyond doubt that both deception and interference with the game may amount to it.

(4) Dishonesty cannot be regarded as a concept which would bring to the assessment of the behaviour a clarity or certainty which would be lacking if the jury were left to say whether the behaviour under examination amounted to cheating or did not. The issue whether what was done amounts to cheating, given the nature and the rules of the game concerned, is likewise itself a jury question. The judge in the present case applied himself to the question whether there was cheating in exactly this jury manner. He directed himself that it is ultimately for the court to decide whether conduct amounted to cheating and that the standard is objective. In so directing himself he was right.

(5) The judge's conclusion that Mr Ivey's actions amounted to cheating was unassailable. It was an essential element of Punto Banco that the game is one of pure chance with cards delivered entirely at random and unknowable by the punters or the house. Mr Ivey did much more than observe; he took positive steps to fix the deck. That, in a game which depends on random delivery of unknown cards, is inevitably cheating.

27 **The Supreme Court went on to consider the test in Ghosh.**

28 That test required the judge to direct a jury to apply a two-stage test:

First, it must ask whether in its judgment the conduct complained of was dishonest by the lay objective standards of ordinary reasonable and honest people.

(If the answer was no that disposed of the case in favour of the defendant.)

Secondly, whether the defendant must have realised that ordinary honest people would so regard his behaviour

(and he is to be convicted only if the answer to that second question is 'yes')

29 There were a number of serious problems with that approach:

(1) It had the unintended effect that the more warped the defendant's standards of honesty are, the less likely it was that he would be convicted of dishonest behaviour.



(2) It was based upon the premise that it was necessary in order to give proper effect to the principle that dishonesty, and especially criminal responsibility for it, must depend on the actual state of mind of the defendant, whereas the rule was not necessary to preserve that principle.

(3) It set a test which jurors and others often found puzzling and difficult to apply

(4) It led to an unprincipled divergence between the test for dishonesty in criminal proceedings and the test of the same concept when it arose in civil proceedings.

(5) AND it had no basis in authority.

30 In the context of gambling a simple example of how wrong was the Ghosh test is that a defendant who thought that stealing from a bookmaker was not dishonest would be entitled to be acquitted.

31 Convincing himself that what he is doing is honest if frequently the stock in trade of the confidence trickster.

32 So now 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.)

Second, whether it is a genuinely held belief

(Then, once his actual state of mind is established)

Third, 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.)

33 Another way of putting it is:

'Although a dishonest state of mind is a subjective mental state, the standard by which the law determined 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.'

(See Lord Hoffman in *Barlow Clowes International Ltd (in liquidation) v Eurotrust International Ltd* [2005] UKPC 37)



34 Applying that test, had dishonesty been a legal element of cheating, the better view was that Mr Ivey's conduct, contrary to his own opinion, was both cheating and also dishonest.

35 [Play second James Bond clip]

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