

July Update

Proposed New Legislation

Age of Criminal Responsibility Bill 2019-2021

Awaiting second reading at the House of Lords at the time of writing, this Bill should it be enacted seeks to raise the age of criminal responsibility from 10 to 12 in England and Wales.

Assisted Dying Bill 2019-2021

Awaiting second reading at the House of Lords at the time of writing, this Bill should it be enacted aims to enable competent adults who are terminally ill to be provided at their request with specified assistance to end their own life. Cl. 6 would remove criminal liability of a person who assists in line with the criteria outlined in the Bill.

Domestic Abuse Bill 2019-2021

Also awaiting a second reading at the House of Lords at the time of writing, this Bill provides for extensive measures to provide increased protection, intervention and protection in relation to domestic abuse. For the purposes of criminal law, Part 6 clause 65 is most relevant, relating to offences involving violent or abusive behaviour. Clause 65(8) proposes to remove the defence of consent where the victim is inflicted with serious harm for the purposes of obtaining sexual gratification. This will not apply where the harm inflicted is the infection of a sexually transmitted infection. The intention for this clause is to prevent the rise in claims by defendants who abuse and kill their victim, that the victim consented to rough sexual intercourse.

Clause 37 will make a breach of a domestic abuse protection order a criminal offence, attracting a maximum penalty of 12 months' imprisonment and a fine on summary conviction and a maximum penalty of 5 years' imprisonment and a fine on indictment conviction.

Magistrates (Retirement Age) Bill 2019-2021

The second reading of this Bill at the House of Commons is due to take place on 11th September 2020. It seeks to amend s. 13 Courts Act 2003 to extend the retirement age of magistrates from the age of 70 to 75.

Cases

Barton; Booth v R [2020] EWCA Crim 575

The core questions for the criminal court of appeal to address was whether the decision of *Ivey v Genting Casinos (UK)* [2017] UKSC 67 determined by the Supreme Court was correct; and whether it was to be applied in criminal cases, effectively overruling the previous approach to dishonesty established by the Court of Appeal in *R v Ghosh* [1982] QB 1053. The Supreme Court's decision in *Ivey* was not a criminal case and the lengthy discussion about the term 'dishonesty' was made in *obiter dictum*.

Held: The Court of Appeal held that the *Ivey* decision was correct and that there was no obstacle in the doctrine of stare decisis to its application as the law of England and Wales (para. 1)

Facts:

Barton was convicted of four counts of conspiracy to defraud, three counts of theft, one count of fraud, one count of false accounting, and one count of transferring criminal property. Booth was convicted of three counts of conspiracy to defraud.

Barton ran a nursing home and Booth was the General Manager of that home. It was alleged that Barton befriended and 'groomed' wealthy, vulnerable and childless elderly residents in the home, in order to profit from them. Several of these residents made him the beneficiary of their wills soon after arriving at the nursing home. Many of them also granted him control of their finances by, for example, granting him power of attorney. It was alleged he used this money for his own gain.

The prosecution's case was that he had acted dishonestly by exploiting his relationship with the residents in a variety of ways and was in breach of a position of trust. He obtained loans and large cash gifts; charged inflated fees for residency and services at the nursing home and sold cars to residents at inflated prices (para. 5).

The prosecution claimed that he was assisted by Booth and a solicitor (who died prior to the trial).

The prosecution argued that whilst the residents did agree to these transactions that they had entered into with Barton, 'they were highly vulnerable and isolated from advisers at the time when they did so' (para. 7). Although, it was agreed that the residents were cared for well in the nursing home and were happy to be there.

Barton's activities were discovered when he sought a civil claim against one of his deceased resident's estate for the sum of £10 million. The deceased's family contacted the police and requested that Barton's business be investigated (para. 9). At trial he argued that he had received gifts from grateful residents, they had always acted with full capacity and received professional advice. Fees claimed were legitimate and any mistakes relating to the accounting at the home was the fault of the company's bookkeeper (para. 10).

The prosecution alleged that Booth had abused her position of trust by assisting Barton in his fraudulent activities (para. 11). Booth denied this stating that she did not personally benefit financially from the alleged offences.

The decision

Dishonesty: Ivey and Ghosh (paras. 80 – 92)

Was the decision in Ivey about dishonesty correct? Yes.

The *Ghosh* test was in two stages, beginning with an objective limb and followed by a subjective limb:

"... a jury must first of all decide whether according to the ordinary standards of reasonable and honest people what was done was dishonest. If it was not dishonest by those standards that is the end of the matter and the prosecution fails.

If it was dishonest by those standards then the jury must consider whether the defendant himself must have realised that what he was doing was by those standards dishonest. ..." (summarised in *Ghosh* at page 1064D, replicated at para. 81 in *Barton; Booth*).

Several problems with this test were articulated in *Ivey* by Lord Hughes [57]:

"(1) It has the unintended effect that the more warped the defendant's standards of honesty are, the less likely it is that he will be convicted of dishonest behaviour.

(2) It was based on 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 is not necessary to preserve this principle.

(3) It sets a test which jurors and others often find puzzling and difficult to apply.

(4) It has led to 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.

(5) It represented a significant departure from the pre-Theft Act 1968 law, when there is no indication that such a change had been intended.

(6) Moreover, it was not compelled by authority. Although the pre-*Ghosh* cases were in a state of some entanglement, the better view is that the preponderance of authority favoured the simpler rule that, once the defendant's state of knowledge and belief has been established, whether that state of mind was dishonest or not is to be determined by the application of the standards of the ordinary honest person, represented in a criminal case by the collective judgment of jurors or magistrates." (replicated in *Barton; Booth* at para. 88).

In *Ivey* Lord Hughes (with whom the other members of the court agreed) disapproved the decision in *Ghosh*:

"... several considerations provide convincing grounds for holding that the second leg of the test propounded in *Ghosh* [\[1982\] QB 1053](#) does not correctly represent the law and that directions based upon it ought no longer to be given...

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 dishonest is to be determined by the factfinder 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." [74] (replicated in *Barton; Booth* para. 83).

The Court of Appeal summed up the 2-stage *Ivey* test:

'(a) what was the defendant's actual state of knowledge or belief as to the facts; and (b) was his conduct dishonest by the standards of ordinary decent people?'

Rejecting the previous *Ghosh* test for dishonesty the Supreme Court in *Ivey* 'observed that the decision in *Ghosh* involved a departure from pre-1968 law, when no such divergence was intended.' The Court of Appeal agreed with this conclusion (para. 90).

The status of Ivey (paras 93 – 109)

Did *Ivey* set a precedent that should be followed by the criminal courts? Yes.

The Court of Appeal acknowledged that the Supreme Court's discussion of dishonesty 'in *Ivey* was strictly obiter because it was not necessary for the decision of the court (para. 93).' The appellant's argued as a consequence, the trial judge should not have followed *Ivey* and the question about dishonesty should be returned to the Supreme Court.

The Court reflected on the similar position it found itself in *R v James; R v Karimi* [2006] QC 588; [2006] EWCA Crim 14. There the Court of Appeal had to consider whether the Privy Council decision in *Attorney-General for Jersey v Holley* [2005] 2 AC 580 regarding the law of the now abolished provocation defence to murder, should be followed instead of the House of Lords decision in *R v Smith (Morgan)* [2001] 1 AC 146. It decided that it could follow the Privy Council decision, where the judges unanimously agreed that the decision intended to 'clarify definitively the present state of English law (para. 99).'

In *Barton; Booth*, the argument to follow the Supreme Court decision was stronger than for the Court of Appeal following the Privy Council decision in *James* (para. 102).

“The undoubted reality is that in *Ivey* the Supreme Court altered the established common law approach to precedent in the criminal courts by stating that the test for dishonesty they identified, albeit strictly contained in *obiter dicta*, should be followed in preference to an otherwise binding authority of the Court of Appeal. As in *James*, we do not consider that it is for this court to conclude that it was beyond their powers to act in this way (para. 102).

The rules of precedent exist to provide legal certainty which is a foundation stone of the administration of justice and the rule of law. They ensure order and predictability whilst allowing for the development of the law in well-understood circumstances. They do not form a code which exists for its own sake and must, where circumstances arise, be capable of flexibility to ensure that they do not become self-defeating (para. 103).

We conclude that where the Supreme Court itself directs that an otherwise binding decision of the Court of Appeal should no longer be followed and proposes an alternative test that it says must be adopted, the Court of Appeal is bound to follow what amounts to a direction from the Supreme Court even though it is strictly *obiter*. To that limited extent the ordinary rules of precedent (or *stare decisis*) have been modified. We emphasise that this limited modification is confined to cases in which all the judges in the appeal in question in the Supreme Court agree that to be the effect of the decision. Such was a necessary condition before adjusting the rules of precedent accepted by this court in *James* in relation to the Privy Council. Had the minority of the Privy Council in *Holley* not agreed that the effect of the judgment was to state definitively the law in England, it would not have been accepted as such by this court. The same approach is necessary here because it forms the foundation for the conclusion that the result is considered by the Supreme Court to be definitive, with the consequence that a further appeal would be a foregone conclusion, and binding on lower courts (para. 104).

In the result, the test for dishonesty in all criminal cases is that established in *Ivey* (para. 105).”

The Court did acknowledge that the departure from *Ghosh* and application of *Ivey* does create further unresolved issues that are summarised by D. Ormerod and K. Laird, ‘*Ivey v Genting Casinos – Much Ado About Nothing?*’ in UK Supreme Court Yearbook 2018 Vol 9 pages 1-24. However, these will need to be decided as cases are tried (para. 109).

This appeal was brought by the prosecution during the Crown Court trial.

The question for the court to decide related to sections 1 and 3 of the Fraud Act 2006, which create an offence of fraud by dishonestly failing to disclose, with intent to make a gain for oneself or to cause a loss to another, information which the defendant is under "a legal duty" to disclose. For this case, the prosecution required the court to decide on this matter in order to determine whether the defendant was, for council tax purposes, under a legal duty to disclose to the relevant local authority the fact of her residence at a particular address.

Held: There is no requirement of a legal duty to notify to the relevant local authority the fact of her residence at a particular address.

Facts:

Note the facts had yet to be determined by a court of law as the appeal was made during the Crown Court trial.

The prosecution alleged that D had applied for a single person's discount on her council tax and shortly after contacted the council stating that she had moved out of that address. She provided details of her forwarding address. The council set up a new account for the first address in respect of a tenant there and the single person's discount was applied.

It was the prosecution's case that in fact D had remained residing in this first address, possibly with a tenant. In their view D had made a false representation designed to avoid paying the full amount of council tax due. This failure to disclose was contrary to sections 1 and 3 of the Fraud Act 2006.

The decision:

The relevant legal framework in question is:

Section 1(1) and (2) of the Fraud Act 2006 which provide as follows:

Fraud

(1) A person is guilty of fraud if he is in breach of any of the sections listed in subsection (2) (which provide for different ways of committing the offence).

(2) The sections are—

... (b) section 3 (fraud by failing to disclose information)

Section 3 provides as follows:

Fraud by failing to disclose information

A person is in breach of this section if he—

- (d) dishonestly fails to disclose to another person information which he is under a legal duty to disclose, and
- (e) intends, by failing to disclose the information—
 - (i) to make a gain for himself or another, or
 - (ii) to cause loss to another or to expose another to a risk of loss.

Who is required to pay council tax is governed by s. 6 Local Government Finance Act 1992. S.6(2) states:

- (a) he is a resident of the dwelling and has a freehold interest in the whole or any part of it;
- (b) he is such a resident and has a leasehold interest in the whole or any part of the dwelling which is not inferior to another such interest held by another such resident;
- (c) he is both such a resident and a statutory [secure or introductory tenant] of the whole or any part of the dwelling;
- (d) he is such a resident and has a contractual licence to occupy the whole or any part of the dwelling;
- (e) he is such a resident; or
- (f) he is the owner of the dwelling...

What the legislation does not state is whether a person is under a legal duty to notify the council of their continued residence at the address.

Section 3 of the Fraud Act 2006 relates to dishonest non-disclosure of information where there is a legal duty to disclose. Legal duty is not defined by the legislation and the Court of Appeal took the view that a Law Commission Report and the Explanatory Notes to the Fraud Act 2006 are appropriate sources to be taken into account when determining the definition (para. 12).

A point made by the prosecution was that the problem if an implied statutory obligation is not to exist is a serious one for local authorities. How would any local authority have the necessary information to collect council tax, if there was no obligation for residents to disclose their addresses? (para. 17).

However, no legal duty to notify the council about current residence for council tax purposes could be found in law. Whilst D, should it be shown that she was residing at the address with others and that the full council tax amount was due, was liable to make payment, this would be a civil court matter. Liability for payment however, did not amount to a duty to notify the council of your residence, a requirement for the fraud offence under s. 3 Fraud Act 2006. The Court of Appeal could find no public policy reason to find an implied legal duty in the existing statutory framework. 'The local authority is itself a creature of statute; and if it is to be able to recover council tax from those resident within its area then it must look to statutory authority for so doing (para. 21).' From the provisions available it was the Court of Appeal's view that 'the obligation is placed upon the authority to make such a request before the person concerned is required to supply the information sought (para. 22).' If the onus was the other way around it had the potential to make many people vulnerable to criminal prosecution under section 3 of the Fraud Act 2006, where it would be unfair to do so. This would be unfair given that the local authority had the means

to request information from the registered owners of property and could pursue a civil remedy (para. 27).

COVID 19 Challenge

With the arrival of a global pandemic and a threat to public health on a scale unprecedented in recent times, the Government was faced with curtailing our freedoms to stop the spread of COVID 19. Emergency legislation was developed quickly and we saw a number of activities become criminalised for the purpose of public health protection. Some of them are listed here.

Prohibitions on Events and Gatherings

Section 52 of the Coronavirus Act 2020 and Schedule 22 gave the Secretary of State the power to prohibit or restrict events and gatherings and to close or impose restrictions on people entering or remaining in premises. Failing to comply with any prohibition, requirement or restriction imposed without reasonable excuse became a criminal offence with a maximum penalty of a level 3 fine on the standard scale (currently £1,000).

Prohibited from Leaving your Home

Regulation 6 of the Health Protection (Coronavirus, Restrictions (England) Regulations, 2020, SI 2020/350 prohibited a person from leaving the place in which they are living (including any garden, yard, or outhouse, etc) without reasonable excuse. Contravening the provisions amounts to a summary offence attracting a fixed penalty notice. Under the Statutory Instrument 2020/685 Health Protection (Coronavirus, Restrictions) (Leicester) Regulations 2020, regulation 5 restrictions were continued for Leicester from the 4th July 2020.

(1) No person who lives in the protected area may, without reasonable excuse, stay overnight at any place other than the place where they are living or where their linked household is living.

(2) No person who lives outside the protected area may, without reasonable excuse, stay overnight at any place within the protected area other than the place where their linked household is living.

Face Coverings

Face coverings on public transport were made mandatory Statutory Instrument 2020/592 Health Protection (Coronavirus, Wearing of Face Coverings on Public Transport) (England) Regulations 2020, regulation 6(1). This has been extended to shops and supermarkets from the 24th July 2020.

Follow this link: <https://www.gov.uk/government/speeches/face-coverings-to-be-mandatory-in-shops-and-supermarkets-from-24->

[july#:~:text=Under%20the%20new%20rules%2C%20people,covering%20lies%20with%20the%20individual.](#)

Court work has also been heavily affected by the restrictions on movement leading to a significant backlog of criminal court work. Remote working was adopted following the enactment of the Coronavirus Act 2020, but did not allow for jurors to take part through a live audio or video link. Criminal Appeal courts were included in the remote working. A Practice Direction was issued concerning advocates dress, stating that they must dress smartly, no expectation of wearing wigs or gowns, against an appropriate background that respects court proceedings.

Despite the use of remote court working the backlog of court work grew and the Lord Chancellor announced on 19th July 2020 that 10 Nightingale Courts have been set up to tackle the impact of the coronavirus on the justice system:

<https://www.gov.uk/government/news/10-nightingale-courts-unveiled>

The Coronavirus Act will expire after two years (March 2022) according to s. 89, however, it is to be reviewed every six months (s.90) and any provision can be suspended or revived at any time whilst the Act operates (s. 88)