
***Para 10.15** In *Darroux* [2018] EWCA Crim 1009, the Court of Appeal had considerable reservations about the two factors, set out in the first paragraphs of the two bullet points at the end of para 10.15, which 'fortified' the Court of Appeal in coming to its decision in *Briggs* [2003] EWCA Crim 3662. The Court echoed the concerns expressed in the second paragraphs of those bullet points. As to the first factor, it noted that no reference had been made to - and presumably there had been no citation of *Gomez* [1993] AC 442, HL, or *Hinks* [2001] 2 AC 241, HL. As to the second factor, it stated that it was well established that appropriation, within the meaning of s 3(1) did not necessarily require there to be a 'physical' act '.

***Paras 10.15 and 10.28** In *Darroux* above, D, a manager at a residential care home for the elderly, operated by a housing association (HA), was responsible for administering the pay roll of all staff, including herself. D was entitled to claim additional payment when she worked overtime, as well as payment in lieu of holiday not taken. Such claims had to be approved by the chair of HA's board of trustees. At the material time, the chair did not check or approve the monthly pay and overtime sheets, although she did review the annual holiday request forms. D submitted her claims to a company (PCS) which provided pay-roll services for HA. PCS had a mandate to operate HA's bank account and arrange for payment to be made to each employee by bank transfer to the employee's bank account. An audit revealed that D had submitted falsely inflated claims for overtime and payments in lieu of holiday entitlement. D was tried on nine counts of theft of 'monies' belonging to HA. These counts were incorrectly particularised because the 'monies' in question related to HA's (in credit) bank account, which credit was, of course, a thing in action. D was convicted on six of the counts of theft and appealed.

Allowing D's appeal against these convictions, the Court of Appeal held that, although the jury had clearly decided that D had been dishonest, there were insufficient facts to establish that D had appropriated property belonging to another. PCS was not a mere cipher, automatically giving effect to the claim forms (or at least, the limited evidence did not establish that it was). PCS had a payroll service to perform; PCS would need to check the forms for errors before preparing the pay slips, and if they had found errors PCS would not have been entitled, or even obliged, to withhold processing the form pending further clarification.

The Court concluded that, in submitting the claim forms D was not assuming any rights of an owner with regard to HA's bank account. It distinguished the facts of the case before it from those in *Williams* [2001] 1 Cr App R 362, CA, *Hilton* [1997] 2 Cr App R 445, CA (discussed in para 10.6) and *Kohn* [1979] 69 Cr App R 395, all three cited in the footnotes to para 10.28, in each of which the Court of Appeal had held that there had been an appropriation.

In *Williams,* D, a builder, having grossly and dishonestly overcharged elderly householders for work and obtained cheques for payment from them, had then presented the cheques to the bank, thereby diminishing the credit balance on each householder's account, and thereby (it had been held) appropriated those credit balances because by presenting the cheques he had exercised the rights of an owner with regard to them. The Court in *Darroux* held that the monthly forms were not to be equated with the cheques. The monthly forms of themselves conferred no rights on D with regard to the bank account. Rather, D was doing, albeit in some instances dishonestly, what she was employed to do as part of her employment – viz. submitting to PCS the monthly forms for payroll preparation purposes. She had no contact with the bank at all and no control of the bank account. What she did was too far removed to be an act of appropriation with regard to the bank account. It noted that it might well be that such conduct was an essential step in procuring, via the instructions of PCS to the bank, the ultimate payment out (and thence the diminution pro tanto of the credit balance). But, the Court held, conduct which ultimately is causally operative in reducing a bank balance does not necessarily become an assumption of rights of the owner with regard to the bank balance simply and solely because it is causally operative. D had dishonestly induced HA (by its agents PCS) to do acts – viz instruct the payments out – which would be an appropriation, through PCS, by HA itself, but that did not thereby necessarily render D's dishonest conduct an appropriation by *her* of the relevant thing in action.

The Court of Appeal (in *Darroux*) distinguished *Hilton* and *Kohn* on the ground that in those cases the defendant was a signatory on, and had direct and authorised control of, the account in question and gave the necessary instruction for payment by drawing and presenting a cheque or other means, whereas in the case before it D did not. Control of the account rested solely with HA and, for payroll purposes, with PCS, the authorised agents of HA. PCS were not D's agents in any true sense. Rather, they were her dupes. D successfully deceived HA and PC, but (the Court held) such deceit was not of itself an appropriation, for the purposes of the Theft Act 1968, of the thing in action representing HA's bank balance.

Accordingly, given those facts,the Court concluded that the charges were not properly framed in theft. The case was, on the facts, a clear potential case of fraud (by misrepresentation), contrary to the Fraud Act 2006, s 2, but that had not been not been charged.

The Court observed that, while its statement in *Naviede* [1997] Crim LR 662, CA, which had been confirmed in *Briggs* [2003] EWCA Crim 3662, that the Court of Appeal was 'not satisfied that a misrepresentation which persuades an account holder to direct payment out of his account is an assumption of the rights of the account holder as owner such as to amount to an appropriation of his rights

within s 3(1) the 1968 Act' might in general terms frequently represent the correct position, such statement should not be taken as an inflexible statement of principle of invariable application. There might be cases where a deceptive representation inducing an account holder to make payment out of his bank account could constitute an appropriation (within the meaning of the Theft Act 1968). It would depend on the circumstances. The Court did not explore this point further.

***Para 10.33, n 96** See the next entry**.**

***Paras 10.74 – 10.78** In *Ivey v Genting Casinos UK Ltd* [2017] UKSC 67, Lord Hughes, with whose judgment the rest of the Supreme Court agreed, observed, *obiter*, that the second, subjective, limb of the test for dishonesty added in *Ghosh* [1982] QB 1053, CA, which had rarely been given in practice, did not correctly represent the law and should no longer be given. When dishonesty was in question, Lord Hughes stated, the fact-finding tribunal (ie the jury or magistrates) had first to ascertain the actual state of the individual's knowledge or belief as to the facts. The question whether the conduct was honest or dishonest was then to be determined by applying the objective standards of ordinary decent people. In *DPP v Patterson* [2017] EWHC 2820 (Admin), DC, Leveson LJ said (at [16]) that: 'These observations were clearly *obiter*, and as a matter of strict precedent the court is bound by *Ghosh*, although the Court of Appeal could depart from that decision without the matter returning to the Supreme Court …Given 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.'

Subsequently, the Court of Appeal held in *R v Pabon* [2018] EWCA Crim 420 that what was said about the concept of dishonesty in *Ivey v Genting Casinos UK Ltd* now represents the law.