



New Park Court

## Regulatory Briefing

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*Ryan currently has a mixed practice in crime, regulatory law and professional discipline and has quickly adapted his skills gained at the criminal Bar and applied these to secure admission to the List of Specialist Regulatory Advocates and the General Medical Council's Approved Counsel Panel. Ryan is increasingly instructed in high-profile regulatory and professional discipline proceedings, both acting alone and also as a led junior.*

"A hard working and calm barrister. Ryan is extremely knowledgeable about healthcare law, very efficient and well-liked by judges."

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by Ryan Donoghue

### Dishonesty and professional discipline proceedings

#### Introduction

The landscape in relation to the assessment of dishonesty in the courts of England and Wales changed significantly in 2017 as a result of the judgment of the Supreme Court in [Ivey v Genting Casinos Ltd t/a Crockfords \[2017\] UKSC 67](#). Prior to [Ivey v Genting](#), the assessment of whether a person had acted dishonesty was based upon the test established in the case of [R v Ghosh \[1982\] QB 1053](#) and required, in addition to the defendant's actions being dishonest by the ordinary standards of reasonable and honest people (the objective element), that the defendant also realised that their actions would be considered dishonest (the subjective element).

However, in [Ivey v Genting](#), the Supreme Court expressed concern that the law should not in principle excuse those whose standards are criminal, by the benchmarks set by society. The Court therefore went on to reframe the test for dishonesty. The effect of [Ivey v Genting](#) is that subjectivity is largely removed from the assessment of whether an individual's actions were dishonest. Under the [Ivey v Genting](#) test, subjectivity is only relevant to the first limb – the question of what the defendant's state of knowledge or belief was as to the relevant facts and whether that belief was genuinely held. The second limb – the assessment of whether a defendant's actions were dishonest – is now solely an objective assessment.

### Application to professional discipline cases

Any such change in the test for dishonesty in civil and criminal proceedings also has consequential impacts upon the assessment of dishonesty in professional discipline cases. Members of regulated professions are generally expected to be honest in dealings in both their professional and personal lives. One need look no further than ‘codes of conduct’ published by the Bar Standards Board, or the General Medical Council, to find examples of expectations of honesty on the part of those persons regulated by either of the two bodies. It follows that members of such professions can, and often do, find themselves facing proceedings brought by their regulator in relation to alleged dishonesty in their professional and/or personal lives. Those proceedings can relate to allegedly dishonest actions for which non-regulated members of society would generally face little formal consequence, if they were to act in such a way.

Given the importance attached to honesty in such professions, is it not also fair and appropriate that, in professional discipline proceedings, when assessing whether a professional’s actions were dishonest, they are compared to the ordinary standards of other reasonable and honest members of their profession (rather than the general public)? The courts have not ruled out this possibility. Prior to *Ivey v Genting*, the Court of Appeal considered the application of the *Ghosh* test to professional discipline proceedings in [Hussain v General Medical Council \[2014\] EWCA Civ 2246](#). Longmore L.J. made the following comments in a case of alleged dishonesty before the Medical Practitioners Tribunal:

*51. I would only add that I am a little troubled about the Ghosh direction given by the legal assessor in this case. It would have been standard in a criminal case. But this was a professional disciplinary hearing and it seems to me that in future it would be right and proper for the first part of the direction to be adapted to read that the panel should decide “whether according to the standard of reasonable and honest doctors [not people] what was done was dishonest”. There may be a not unimportant difference between the two as shown by the decision of the judge in this very case.*

The comments of Longmore L.J. therefore potentially opened the door to the application of a different, higher standard, to regulated professionals, when considering whether their actions were objectively dishonest. However, in [Dowson v General Medical Council \[2015\] EWHC 3379 \(Admin\)](#) (a case also decided under the *Ghosh* test), a different approach was taken. The High Court distinguished the case from that of *Hussain* and opted not to apply a higher standard. Edis J., delivering the judgment of the court, stated as follows:

*49. ...In the present case the appellant did not say that his standards of honesty were any different from anyone else's, or that he had some unusual motive for failing to tell the West Midlands MREC about the problems on the Botox Trial or signing a CTA with a false warranty in it. There was also no evidence that reasonable and honest doctors have any different view of what is required in the two particular situations*

*where dishonesty was found than that held by reasonable and honest people. It is reasonable to assume that the medical profession is at least as scrupulous about integrity in its professional work than the population at large might be. If that is right then the test propounded by Longmore LJ would impose a higher standard than the test which applies to non-medical endeavours. It would be unwise for me to attempt to follow that line further in a case where the evidence and the facts render any such enquiry unnecessary. In this case it seems to me that the relevant standard is the same whether it is derived from the standards of reasonable and honest doctors or reasonable and honest people...*

The residual position, after Dowson, is therefore somewhat unclear. Hussain is a Court of Appeal judgment, a higher court of record than in Dowson, yet Dowson provides rationale for the approach that a higher standard should not be adopted without evidence to support such an approach. Exactly what form such evidence could take is a difficult question to answer, nor is it easy to hypothesise as to the type of cases where the application of a higher standard of honesty could be said to be appropriate.

#### The effect of Ivey v Genting on Hussain and Dowson

The move in Ivey v Genting to an entirely objective assessment of whether an individual's actions were dishonest would only seem to strengthen the appropriateness of the approach of the High Court in Dowson. If subjectivity is now removed from the assessment of whether an individual's actions were dishonest such that the prospect of a lower standard being applied is now removed, it would seem inconsistent for subjectivity in the form of a higher standard to be applied to regulated professionals.

Regulated professionals are already subject to higher expected standards of conduct in relation to their professional and personal lives. The standards which such professionals are expected to adhere to will always be considered in professional discipline cases, after the relevant facts have been established, and when deciding whether action is required on the professional's registration. To suggest that, even at the facts stage, regulated professionals should be compared to a higher standard of honesty, carries a significant risk of unfairness.

Concerns have already been expressed as to the bringing of professional discipline proceedings in relation to allegations of low-level dishonesty (see, for example, the recent review into [‘The GMC’s handling of the case of Dr Manjula Arora’](#)). With such concerns of the professional population in mind, and when set against the move to a more objective assessment of dishonesty in civil and criminal proceedings following Ivey v Genting, any tribunal adopting the approach in Hussain and subjecting a professional person to a higher factual standard of honesty would surely be taking a step in the wrong direction.