THE TEST FOR DISHONESTY IN PROFESSIONAL REGULATORY PROCEEDINGS

Emile Burke-Murphy BL

"*Dishonesty is a simple, if occasionally imprecise, English word.*"[1]

I. INTRODUCTION

1. Lord Hughes in *Ivey v Genting Casinos* [2017] UKSC 67 observed that dishonesty is "*characterised by recognition rather than by definition*."[2] Although the concept has been statutorily defined in Ireland pursuant to s 2 of the Criminal Justice (Theft and Fraud Offences) Act 2001 – "*without a claim of right made in good faith*" – the observation of Lord Hughes resonates nonetheless, in particular outside of the context of the 2001 Act where no definition of dishonesty is to be found. In the professional disciplinary and regulatory context, the concept of dishonesty is a significant one; it constitutes one of the most serious forms of professional misconduct. However, not only is there no definition of dishonesty in the relevant legislation, the Irish courts have not addressed the question of whether the test for dishonesty is subjective or objective. This question was addressed recently by the United Kingdom Supreme Court (UKSC) in *Ivey v Genting Casinos*, causing the "*tectonic plates of the legal firmament*" to move.[3] In short, before *Ivey* a subjective test for dishonesty applied in criminal and regulatory proceedings; *ie*, a defendant must have appreciated that his conduct was dishonest by reference to the standards of ordinary and reasonable people. After *Ivey*, there is no such requirement. The new objective test for dishonesty has been expressly followed in disciplinary proceedings in the UK. This paper will, *inter alia*, consider the UK case law, relevant Irish jurisprudence, and the statutory and regulatory frameworks in an attempt to discern what approach the Irish courts are likely to adopt if and when the question arises.

II. DISHONESTY AS PROFESSIONAL MISCONDUCT

A. Statutory Definitions of Professional Misconduct

2. The most recent statutory intervention in the realm of professional regulation comes in the form of the Legal Services Regulation Act 2015. It defines misconduct by legal practitioners

[1] *Ivey v Genting Casinos* [2017] UKSC 67, para 63, *per* Lord Hughes.
[2] *Ibid*, para 53, *per* Lord Hughes.
[3] *Wingate v Solicitors Regulation Authority* [2018] EWCA 366, para 90, *per* Jackson LJ.

as including acts or omissions which involve fraud or dishonesty.[4] Fraudulent or dishonest acts or omissions are only one example of the potential misconduct identified in s 50. A wide range of behaviour may amount to misconduct, such as providing legal services which are, to a substantial degree, of an inadequate standard; bringing the profession into disrepute; committing arrestable offences; seeking a grossly excessive amount of costs. The 2015 Act does not elaborate further on the definition of misconduct nor the nature of fraud or dishonesty required. However, it merits note that there is no distinction drawn between the misconduct matters listed in s 50; fraud and dishonesty are listed in an undifferentiated manner alongside matters which clearly carry an objective test.

3. The Veterinary Practice Act 2005, as amended, and the Pharmacy Act 2007 are the only two professional regulatory Acts that define "*professional misconduct*." For the purposes of this paper, the relevant parts of the definitions are identical and define professional misconduct to mean "*any act, omission or pattern of conduct that ... is infamous or disgraceful in a professional respect (notwithstanding that, if the same or like act, omission or pattern of conduct were committed by a member of another profession it would not be professional misconduct in respect of that profession) [or] involves ... fraud or dishonesty of a nature or degree which bears on the carrying on of the profession...*"[5]

4. Section 57 of the Medical Practitioners Act 2007 identifies the grounds on which a person may make a complaint to the Preliminary Proceedings Committee concerning a registered medical practitioner. These grounds include, *inter alia*, professional misconduct, poor professional performance and a contravention of any provision of the Act. Professional misconduct is not defined any further in the Act but the Medical Council has provided guidance on what constitutes professional misconduct. The Dentists Act 1985 and the Nurses and Midwives Act 2011 adopt the same approach.

B. *O Laoire v Medical Council*

5. The definition of "*professional misconduct*" adopted by the courts hardly needs repeating:

> *(1) Conduct which is "infamous" or "disgraceful" in a professional respect is "professional misconduct" within the meaning of s 46(1) of the Act.*

[4] Section 50, Legal Services Regulation Act 2015. This provision has not yet been commenced.
[5] See s 76(10), Veterinary Practice Act 2005, as substituted by s 9, Veterinary Practice (Amendment) Act 2012 and s 33, Pharmacy Act 2007 (which refers to any act that involves "*moral turpitude, fraud or dishonesty ...*").

(2) *Conduct which would not be "infamous" or "disgraceful" in any other person, if done by a medical practitioner in relation to his profession, that is, with regard either to his patients or to his colleagues, may be considered as "infamous" or "disgraceful" in a professional respect.*

(3) *"Infamous" or "disgraceful" conduct is conduct involving some degree of moral turpitude, fraud or dishonesty.*

(4) *The fact that a person wrongly but honestly forms a particular opinion cannot of itself amount to infamous or disgraceful conduct in a professional sense.*

(5) *Conduct which could not properly be characterised as "infamous" or "disgraceful" and which does not involve any degree of moral turpitude, fraud or dishonesty may still constitute "professional misconduct" if it is conduct connected with his profession in which the medical practitioner concerned has seriously fallen short, by omission or commission, of the standards of conduct expected among medical practitioners.*[6]

C. Codes of Conduct

6. In their various codes of conduct, professional regulatory bodies have either confined themselves to the strict wording of the relevant statutory definition of professional misconduct or, where no statutory definition is provided, some regulators have sought to identify and adopt the *O Laoire* definition. For vets and pharmacists, the *O Laoire* test has been incorporated into the relevant statutory definition. As for doctors, dentists, nurses and midwives, whose governing legislation does not define professional misconduct, it is instructive to consider how their regulators have elaborated on the simple statutory reference to "*professional misconduct*". It may provide an insight into whether they would be more likely to view the test for dishonesty as subjective or objective.

7. The approach of the Medical Council is especially instructive. In its *Guide to Professional Conduct and Ethics for Registered Medical Practitioners* (8th ed, 2016), at p 7, the Medical Council defines professional misconduct as "*conduct which doctors of experience,*

[6] *O Laoire v Medical Council* (Unreported, High Court, Keane J, 27 January 1995).

competence and good repute consider disgraceful or dishonourable." This definition manifestly imports an objective test into the consideration of professional misconduct, in light of which it would be difficult to avoid the conclusion that the Medical Council would apply an objective test for dishonesty if and when the question arises; *ie*, referring to the standards of ordinary, decent and honest professionals, without reference to the registrant's appreciation of these standards.

8. The *Code of Practice relating to Professional Behaviour and Ethical Conduct* (February 2012) published by the Dental Council makes the following observation in respect of "*professional conduct*" at para 15.2: "*Your conduct should not lower the public's opinion of the profession*." Although this addresses the broad question of professional conduct (it does not purport to be a definition of professional misconduct), rather than the specific question of dishonesty, the emphasis on the public's opinion of the profession is instructive. It suggests that the Dental Council, in exercising its disciplinary function, might favour an objective test for dishonesty. This conclusion can be drawn because, as discussed *infra*, a subjective test for dishonesty would undermine public trust in professionals as well as public trust in professional regulation.

9. The Nurses and Midwives Act 2011 also neglects to define professional misconduct. The NMBI, however, in its attempt to set out what constitutes professional misconduct (in the "*Grounds for complaints about nurses and midwives*" section of its website), has adhered closely to the *O Laoire* definition. The "*infamous or disgraceful*" limb of that test requires conduct "*involving some degree of moral turpitude, fraud or dishonesty*". The NMBI guidance, unlike the Medical Council's, does not in and of itself give any indication of whether an objective or subjective test for dishonesty applies.

III. DISHONESTY IN THE UK CASE LAW: AN OBJECTIVE TEST

A. *R v Ghosh* – The Subjective Approach

10. A two stage test, combining objective and subjective perspectives, was established for dishonesty by the Court of Appeal of England and Wales in *R v Ghosh* [1982] QB 1053. At the first stage, the judge had to direct the jury whether in its judgment the conduct complained of was dishonest by reference to the objective standards of ordinary, reasonable and honest people. At the second stage, the judge had to direct the jury to consider whether the defendant must have realised that ordinary, reasonable and honest people would consider his conduct to be dishonest. If the jury was satisfied that the defendant's conduct

was objectively dishonest and that the defendant knew it was objectively dishonest then the element of dishonesty in the offence would be made out.

B. After *Ghosh* – Divergent Lines of Authority

11. The decision in *R v Ghosh* gave rise to a number of subsequent inconsistent decisions. In *Royal Brunei Airlines v Tan* [1995] 2 AC 378, a case involving dishonest breach of trust, Lord Nicholls attached liability where the defendant was "*not acting as an honest person would in the circumstances. This is an objective standard.*"[7]

12. In *Twinsectra Limited v Yardley* [2002] 2 AC 164, a subjective element was re-emphasised. A "*defendant must himself appreciate that what he was doing was dishonest by the standards of honest and reasonable men*".[8] Although crucially, he could not set his own standard of honesty and escape liability simply because he did not regard as dishonest what he knows would offend the normally accepted standards of honest conduct.

13. The Privy Council in *Barlow Clowes v Eurotrust* [2005] UKPC 37 considered *Twinsectra* and rejected its subjective element in the test for dishonesty. What was required was an inquiry into a defendant's mental state about the nature of the transaction which he was participating in but not his views about generally accepted standards of honesty. Knowledge of the transaction had to be such as to render his participation contrary to normally acceptable standards of honest conduct; but it was not a requirement that he have reflected about what those standards were.

14. In the professional disciplinary context, however, until recently, the *Ghosh*/*Twinsectra* approach was favoured: see *Bultitude v Law Society* [2004] EWCA Civ 1853; *Sharma v General Medical Council* [2014] EWHC 1471; *R (Endicott) v General Dental Council* [2014] EWHC 2280. Even after accounting for its treatment in *Barlow Clowes*, the High Court of England and Wales persisted with the two stage *Twinsectra* test for dishonesty in professional regulatory proceedings. In *Bryant v Law Society* [2007] EWHC 3043, the following justification was advanced:

> *In any event there are strong reasons for adopting such a test in the disciplinary context and for declining to follow in that context the approach in the Barlow Clowes case. As we have observed earlier, the test corresponds*

[7] *Royal Brunei Airlines v Tan* [1995] 2 AC 378, 389, *per* Lord Nicholls.
[8] *Twinsectra Limited v Yardley* [2002] 2 AC 164, 174, *per* Lord Slynn.

closely to that laid down in the criminal context by R v Ghosh [1982] QB 1053; and in our view it is more appropriate that the test for dishonesty in the context of solicitors' disciplinary proceedings should be aligned with the criminal test than with the test for determining civil liability for assisting in a breach of a trust. It is true ... that disciplinary proceedings are not themselves criminal in character and that they may involve issues of dishonesty that could not give rise to any criminal liability (eg lying to a client as to whether a step had been taken on his behalf). But the tribunal's finding of dishonesty against a solicitor is likely to have extremely serious consequences for him both professionally (it will normally lead to an order striking him off) and personally. It is just as appropriate to require a finding that the defendant had a subjectively dishonest state of mind in this context as the court in R v Ghosh considered it to be in the criminal context. Indeed, the majority of their Lordships in the Twinsectra case appeared at that time to consider that the gravity of a finding of dishonesty should lead to the same approach even in the context of civil liability as an accessory to a breach of trust. The fact that their Lordships in the Barlow Clowes case have now taken a different view of the matter in that context does not provide a good reason for moving to the Barlow Clowes approach in the disciplinary context.[9]

C. *Ivey v Genting Casinos*

15. Clarity has been provided by the UKSC in the recent case of *Ivey v Genting Casinos* [2017] UKSC 67. The *Royal Brunei Airlines*/*Barlow Clowes* objective approach prevails: "*the second leg of the test propounded in Ghosh does not correctly represent the law and ... directions based upon it ought no longer to be given.*"[10] In all contexts – civil, disciplinary and criminal – the test for dishonesty in the UK is an objective one. But in so holding, the UKSC was careful to emphasise that the objective test must be applied with reference to the individual's actual state of mind as to the facts.

16. The facts of *Ivey* are memorable indeed. The plaintiff, who was a well-known professional gambler, won £7.7m playing Punto Banco, a game of pure chance, at the defendant's casino, using a method of play called "*edge-sorting*", which involved exploiting design irregularities on the backs of playing cards so as to defeat the house advantage. After reviewing CCTV footage and examining the cards, the defendant realised what the plaintiff

[9] *Bryant v Law Society* [2007] EWHC 3043, para 154, *per* Richards LJ.
[10] *Ivey v Genting Casinos* [2017] UKSC 67, para 74, *per* Lord Hughes.

had been doing and refused to pay him his winnings, on the ground that he had breached an implied term in the gaming contract not to cheat. The plaintiff brought proceedings to recover his winnings, contending that such a method of play was legitimate gamesmanship and that, as he did not have any dishonest intention, his play did not amount to cheating. It was held at first instance, and upheld twice on appeal, that cheating did not necessarily require dishonesty. It was accepted that the plaintiff was genuinely convinced that what he did was not cheating but, in fact and law, it was held to be. As the view that cheating did not require dishonesty was shared by the UKSC, its lengthy and consequential discussion of dishonesty was in fact *obiter*. Given that the court was overturning long-established criminal authority in civil proceedings, it is doubly surprising that the issue as it arose in the case was *obiter*. However, the UKSC's eagerness to overturn settled criminal jurisprudence in *Ivey* may have been influenced by the fact that the *Ghosh* test had been considered by the Lord Chief Justice as recently as 2015 (*R v Hayes* [2015] EWCA 1944) without any indication that the Court of Appeal was dissatisfied with its subjective limb. In the UKSC's mind, *Ivey* may well have represented its only opportunity to impose an objective test in all contexts.

17. A number of objections to the subjective limb of the test for dishonesty were raised by Lord Hughes in *Ivey*. These included "*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*" and the "*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.*"[11] On the other hand, he addressed the principal concerns with an objective test as follows:

> *It is plain that in Ghosh the court concluded that its compromise second leg test was necessary in order to preserve the principle that criminal responsibility for dishonesty must depend on the actual state of mind of the defendant. It asked the question whether "dishonestly", where that word appears in the Theft Act, was intended to characterise a course of conduct or to describe a state of mind. The court gave the following example, at p 1063, which was clearly central to its reasoning:*
>
> > *"Take for example a man who comes from a country where public transport is free. On his first day here he travels on a bus. He gets off without paying. He never had any intention of paying. His mind is clearly honest; but his conduct, judged*

[11] *Ibid*, para 57.

> *objectively by what he has done, is dishonest. It seems to us that in using the word 'dishonestly' in the Theft Act 1968, Parliament cannot have intended to catch dishonest conduct in that sense, that is to say conduct to which no moral obloquy could possibly attach."*
>
> *But the man in this example would inevitably escape conviction by the application of the (objective) first leg of the Ghosh test. That is because, in order to determine the honesty or otherwise of a person's conduct, one must ask what he knew or believed about the facts affecting the area of activity in which he was engaging. In order to decide whether this visitor was dishonest by the standards of ordinary people, it would be necessary to establish his own actual state of knowledge of how public transport works. Because he genuinely believes that public transport is free, there is nothing objectively dishonest about his not paying on the bus. The same would be true of a child who did not know the rules, or of a person who had innocently misread the bus pass sent to him and did not realise that it did not operate until after 10.00 in the morning. The answer to the court's question is that "dishonestly", where it appears, is indeed intended to characterise what the defendant did, but in characterising it one must first ascertain his actual state of mind as to the facts in which he did it. It was not correct to postulate that the conventional objective test of dishonesty involves judging only the actions and not the state of knowledge or belief as to the facts in which they were performed. What is objectively judged is the standard of behaviour, given any known actual state of mind of the actor as to the facts.*[12]

18. Lord Hughes further justified an objective test for dishonesty with the following argument:

> *[T]he capacity of all of us to persuade ourselves that what we do is excusable knows few bounds. It cannot by any means be assumed that the appropriators of animals from laboratories, to whom the court referred in R v Ghosh [1982] QB 1053, know that ordinary people would consider their actions to be dishonest; it is just as likely that they are so convinced, however perversely, of the justification for what they do that they persuade themselves that no one could call it dishonest. There is no reason why the law should*

[12] *Ibid*, para 60.

> *excuse those who make a mistake about what contemporary standards of honesty are, whether in the context of insurance claims, high finance, market manipulation or tax evasion. The law does not, in principle, excuse those whose standards are criminal by the benchmarks set by society, nor ought it to do so. On the contrary, it is an important, even crucial, function of the criminal law to determine what is criminal and what is not; its purpose is to set the standards of behaviour which are acceptable. As it was put in Smith's Law of Theft, 9th ed (2007), para 2.296: "the second limb allows the accused to escape liability where he has made a mistake of fact as to the contemporary standards of honesty. But why should that be an excuse?"*[13]

19. It is clear that, even when applying an objective test, the defendant's state of mind as well as his conduct is relevant to determining whether he has acted dishonestly. The following passage from *Ivey* best encapsulates and explains the test for dishonesty:

> *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 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.*[14]

D. Applying *Ivey* in the Regulatory Context

20. It did not take long for the *Ivey* test to be applied in professional regulatory proceedings. In Solicitors Regulation Authority v Malins [2018] EWCA 366 the Court of Appeal of England and Wales confirmed the applicability of the *Ivey* objective test, albeit *Malins* was itself a case concerned with integrity rather than honesty.[15] In Yussouf v Solicitors Regulation Authority [2018] EWHC 211, an objective test for dishonesty, which involves ascertaining the

[13] *Ibid*, para 59.
[14] *Ibid*, para 74.
[15] See also *General Medical Council v Krishnan* [2017] EWHC 2892.

individual's actual state of mind as to the facts and then judging that by reference to the standards of reasonable and honest people, was applied to a case of a solicitor who in her application for admission to the Roll had answered "*no*" when asked whether she had a county court judgment issued against her. Judge Howell QC expressed the view that an objective test is particularly suited to professional disciplinary proceedings:

> *[66] ... [I]n the light of Ivey, the test in criminal proceedings is now likely to be treated as the same as that in civil proceedings. Moreover it would indeed be "curious" for the test for what constitutes dishonesty to be different in regulatory or disciplinary proceedings from other civil proceedings. This is not merely because, as Lord Hughes put it, it would be an "affront to the law" for dishonesty to mean something different in regulatory or disciplinary proceedings from other forms of civil proceedings, when the consequences of an adverse finding of dishonesty may be just as great. In the context of proceedings the purpose of which is to uphold proper professional standards, it would be not merely "curious" but also incongruous to treat actions as honest that ordinary and reasonable people (or solicitors) would regard as dishonest. That would imply that professions, such as solicitors, have laxer standards of honesty than ordinary reasonable people. Such an approach would undermine public confidence in the regulation of those involved.*

21. This passage appears to be in direct contradiction of the rationale put forward for a subjective test in *Bryant v Law Society* [2007] EWHC 3043. However, upon closer inspection, it is clear that the argument being made in *Bryant* was for an alignment of the test in the regulatory and criminal contexts where, prior to *Ivey*, there had been a divergence between the test for dishonesty in civil and criminal proceedings. The divisional court in *Bryant* did not advance a standalone rationale for a subjective test in disciplinary proceedings. It simply expressed the view that the more favourable criminal test ought to benefit professionals the subject of disciplinary proceedings. It did not address the question of whether there ought to be different tests in the criminal and civil contexts as that question had already been settled by courts of higher authority.

IV. THE TEST FOR DISHONESTY IN IRISH CASE LAW

22. Somewhat surprisingly, there is only one reported Irish decision which considers *R v Ghosh* [1982] QB 1053, the UK case which laid down a subjective test for dishonesty in both criminal and disciplinary proceedings for over 35 years: *DPP v Bowe and Casey* [2017] IECA

250. And it is a clear rejection of *Ghosh*. *Bowe and Casey* involved appeals against convictions for conspiracy to defraud. The requisite intent was intent to defraud and the intended means by which the fraudulent purpose was to be achieved had to be "*dishonest*"; however, there was disagreement as to what "*dishonesty*" comprised. The relevant ground of appeal concerned the trial judge's failure to direct the jury along *Ghosh* lines, *ie*, that the prosecution had to prove beyond a reasonable doubt that the appellant must have appreciated that his act or the scheme in question would be viewed objectively as dishonest at the time of intentionally doing the act or participating in the scheme. The position of the prosecution was that it was sufficient to prove that the accused intended to do the act or participate in the scheme; the relevant act or scheme would then be judged by the standards of ordinary reasonable men as to whether or not it was dishonest.

23. This ground of appeal was rejected:

> *We are satisfied that the trial judge did not fall into error in the manner in which he approached his charge to the jury on the issue of the mens rea for the common law offence of conspiracy to defraud. All of the jurisprudence relating specifically to this offence seems to us to indicate that it is sufficient for a conviction that the prosecution should prove merely that the accused intended to do the impugned act or to participate in the impugned scheme in circumstances where the relevant act or scheme would attract the value judgment, judged by the standards of ordinary reasonable men, that it was dishonest. Accordingly, we are not disposed to uphold the first named appellant's ground of appeal No 16.*
>
> *The Court readily understands why it would have suited the defence case if the trial judge could have been persuaded to adopt the Ghosh approach. However, the trial judge would have had no legitimate basis for doing so. The Theft Act 1968 is not law in this country. In the context of conspiracy to defraud the concept of "dishonesty" provides no more than a modern analogue for the language of older case law which referred to conduct which was "wrongful and fraudulent." While the natural and ordinary meaning of "dishonesty" may indeed sometimes import both a state of mind and a value judgment as to conduct, the offence of conspiracy to defraud is long standing and has never been understood as incorporating a specific mens rea of subjective dishonest intent as opposed to a general mens rea requiring intentional participation in whatever act or scheme is said to constitute the*

> *conspiracy in circumstances where that act or scheme would be regarded, objectively, as being dishonest. It is the conduct which must be dishonest. The motivation of the relevant actor is irrelevant to liability. Accordingly, "by dishonesty" has never been regarded in the context of the offence under consideration as referring to an individual's state of mind, but rather as referring to an objective characterization of, or value judgment with respect to, the impugned conduct.*[16]

24. The Court of Appeal was careful to emphasise that its judgment related to the long-standing common law offence of conspiracy to defraud rather than any statutory offence. Whether it will be viewed as authority for an objective test for dishonesty in all contexts remains to be seen; although the following *dicta* of Ryan P deprecate definitional divergence:

> *[C]ertainty in the law is an important value, and it can be readily appreciated why it is not in general desirable that a term should have one meaning at common law, and another for the purposes of a particular statute, although such a situation is legally possible.*[17]

25. In an earlier professional disciplinary case relating to veterinarians, *Petitions of Lynch and Daly* [1970] IR 1, the High Court was tasked with determining whether each petitioner had been guilty of conduct disgraceful to him in a professional respect. Although addressing "*disgraceful*" conduct, rather than dishonest conduct specifically, Kenny J's discussion offers a real insight into how the High Court might approach the value judgment question were it to arise again:

> *I have had some difficulty in understanding the significance of the words "to him" in s 36 of the Act of 1931. They do not mean that the person against whom the charge is made must realise that the conduct is disgraceful: they were intended, I think, to emphasise the feature that the conduct must be of a kind which brings disgrace upon the person primarily in the eyes of the members of his profession, but also in those of the public. "Disgraceful" implies an element of conscious wrongdoing or the doing of something which a professional person by reason of his training must have realised would cause him to incur shame in the eyes of his professional colleagues.*[18]

---

[16] *DPP v Bowe and Casey* [2017] IECA 250, paras 174 and 175, *per* Ryan P.
[17] *Ibid*, para 166, *per* Ryan P.
[18] *Petitions of Lynch and Daly* [1970] IR 1, 11.

26. The above analysis corresponds to the objective approach set down in *Ivey*. If, as it ought to, the High Court adopts a similar analysis in respect of dishonesty (which it must be remembered, according to the first *O Laoire* limb, simply characterises conduct which is "*infamous or disgraceful in a professional respect*"), the objective test will prevail.

V. STATUTORY DEFINITION OF DISHONESTY

27. In *Bowe and Casey* the statutory definition of "*dishonestly*" in s 2 of the Criminal Justice (Theft and Fraud Offences) Act 2001 – "*without a claim of right made in good faith*" – was described as representing the "*traditional understanding*" of the concept which stood in contrast to the subjective test pronounced in *Ghosh*.[19] The compatibility of this statutory definition with the *Ivey* objective test is clear to see. The first limb of that test requires determination of the defendant's state of mind as to the facts; whether he conducted himself in a manner consistent with a claim of right he sincerely believed to enjoy is a critical first part of the *Ivey* analysis. Then, having established his state of mind as to the facts, his conduct will be judged by objective standards.

28. The s 2 definition of "*dishonestly*" arose for consideration in the recent extradition case of *Minister for Justice v Dziugas* [2018] IEHC 87. The High Court had to examine whether the facts set out by the Lithuanian judicial authority corresponded to the offence of theft in this jurisdiction. Although the language adopted by Donnelly J does not fit comfortably with that used in *Ivey* and other relevant cases, it is submitted that the following interpretation of s 2 accords with the *Ivey* test for dishonesty:

> *The requirement of dishonesty in the offence of theft is a requirement that there be a subjective element of dishonesty. Where there is a claim of right i.e. a claim to be entitled at law to deprive the other person of the property which is made in good faith, a defendant in this jurisdiction will not be guilty of the offence of theft even if there is no legal basis for that claim of right. It is therefore necessary to address what the state of mind of the respondent was at the time he carried out the act as found by the Lithuanian court.*[20]

[19] *DPP v Bowe and Casey* [2017] IECA 250, para 167, *per* Ryan P.
[20] *Minister for Justice v Dziugas* [2018] IEHC 87, para 30, *per* Donnelly J.

29. However, Donnelly J went on to clarify that the "*question of the respondent's subjective dishonesty is separate from the issue of objective dishonesty.*"[21] She stated that "*the fact that a person knows that an act is criminal or unlawful is relevant to the question of whether that person can be said to be acting honestly.*"[22] Had she said that this fact was "*necessary*" rather than simply "*relevant*", a definitive conclusion as to Donnelly J's view on the test for dishonesty could be adopted. Nevertheless, the following paragraph gives further indication that Donnelly J favours a subjective test for dishonesty:

> *In my view, the references to good morale, common rules of life, principles of honesty and justice are references to objective criteria from which the conduct of the respondent may be viewed. In that sense, in an objective fashion, it is quite clear that taking an item of property from one person in lieu of another item of property which they have taken from you, would violate community standards of honesty, justice, and behavioural norms. As has been stated however, for the offence of theft in this jurisdiction to be committed, there must be subjective dishonesty on the part of an accused person. Those references are not therefore on their own sufficient to show that this act by the respondent was carried out in a subjectively dishonest fashion.*[23]

30. *Dziugas* is a recent authority which muddies the water. In appearing to favour a subjective test for dishonesty, it is out of step with earlier Irish authorities, and indeed the test laid down by the UKSC in *Ivey*. Moreover, it purports to endorse a subjective approach without reference to any of the relevant authorities. Ultimately, however, only limited guidance can be sought from *Dziugas*. The above passages are *obiter dicta*. Donnelly J was not required to consider whether the second limb of a dishonesty analysis – a value judgment of the conduct in light of the defendant's appreciation of the facts – imported a subjective requirement (*ie*, whether the defendant appreciated that his conduct would be considered dishonest by ordinary and reasonable people). This is because the Lithuanian issuing judicial authority had made it perfectly clear that the respondent knew he was behaving in a criminal way. In those circumstances, regardless the test applied, subjective or objective, the respondent had acted dishonestly.

---

[21] *Ibid*, para 34.
[22] *Ibid*.
[23] *Ibid*, para 35.

VI. A DEARTH OF CASES

31. That the facts in *Dziugas*, if proved, would satisfy both an objective and subjective test for dishonesty is familiar. Only an unusual set of facts will raise the objective/subjective dichotomy. Of particular interest for the purposes of this paper are facts and circumstances which would amount to objective dishonesty but which would not, or did not, pass a subjective test for dishonesty. Most cases involving allegations of dishonesty in the professional regulatory context lie far from the border area between objective and subjective dishonesty. The facts are such that the conduct was dishonest on both objective and subjective bases. No Irish case addresses this point as part of its *ratio*. Perhaps the facts have never lent themselves to such an argument; perhaps registrants have never raised the point; perhaps the courts have never considered it.

32. That only an unusual set of facts will give rise to the issue may be seen from *Ivey v Genting Casinos*. Indeed it is notable that the UKSC took the unusual (and controversial) step of expressly disapproving and seeking to reverse a long-established line of criminal authority setting out a subjective test for dishonesty *obiter* in a civil case. This may be an indication of the rarity of factual circumstances enabling the objective/subjective dishonesty question to be considered. The UKSC grasped its opportunity. It may be that the Irish courts will not be called upon to answer this question any time soon. But do not count on it. In any event, it is a question worth considering given the potential analytical difficulty it presents; the severe consequences for a professional of a finding of dishonesty; and the issue of fairness were an objective test to apply.

VII. HYPOTHETICAL EXAMPLES

33. The following example illustrates how the objective/subjective test dichotomy could potentially play out in a professional regulatory context. Consider an application by a solicitor to be included on an insurance panel where the application process requires disclosure of potential conflicts of interest. In this hypothetical scenario, the applicant solicitor acts for a number of plaintiffs who are suing defendants who happen to be insured by the insurance company in question. The solicitor fails to disclose this information on his form and a complaint of misconduct is made against him to the Law Society. It might be expected that an objective test would inevitably lead to a finding of dishonesty against the solicitor because, by the standards of reasonable and honest people, the failure to disclose a potential conflict of interest when required to do so is dishonest. However, the first step in the *Ivey* test is to determine the facts as they were known to the solicitor; these are the facts

upon which the objective test is carried out. It is conceivable, in the above scenario, that the solicitor did not know that the insurer was involved in the litigation (although the question may then be asked whether he closed his mind to this prospect). If the solicitor was not aware of the facts which gave rise to the conflict, then it is unlikely that he will be considered dishonest (but merely guilty of a want of care before making the statement). The distinction is between what he knows or chose to ignore on the one hand and what he should have known. Only the former can ground a finding of dishonesty. The difference that the *Ivey* objective test makes in this scenario is that a solicitor who knew of or chose to ignore the potential conflict and the requirement to disclose it, but failed to do so, would be guilty of dishonesty even if he did not appreciate that objectively it would be considered dishonest. (He might, for example, hold the view, and believe that ordinary and reasonable people also hold the view, that insurance companies seek too much information and therefore it is not dishonest to withhold information in response to an onerous request). Under the *Ghosh*/*Twinsectra* subjective test, he could well escape a finding of dishonesty in such circumstances.

34. Further scenarios where there is potential for the subjective/objective dishonesty distinction to arise include, for example, a nurse who, whilst on sick leave from the HSE, takes up another nursing job. Although the genuineness of the belief can always be questioned, the argument might be advanced on the nurse's behalf that he did not appreciate that reasonable and honest people would consider such conduct dishonest (perhaps on the dubious basis that such restrictions are not generally taking seriously). It is likely, even if a subjective test were to apply, that this argument concerning the registrant's appreciation of objective standards of honesty would be rejected. But if an objective test for dishonesty were to apply, it would not even open to the nurse to make the argument.

VIII. PROFESSIONAL REGULATORY PROCEEDINGS: THE TEST TO APPLY

35. The seriousness for a professional of a finding of dishonesty will no doubt weigh heavily when an Irish court is called upon to decide this point. But given that the overriding purpose of the statutory regimes is to protect the public and to uphold confidence in the professions, it is submitted that the objective test for dishonesty would be more appropriate. In *Law Society v Enright* [2016] IEHC 151, Kelly P considered the principles underlying the sanctioning of professionals and made it clear that the maintenance of the reputation of the profession was the most important one:

> *The purpose of this order is not punitive as he has already been punished with a term of imprisonment. It is not directed to ensuring that he does not have the opportunity to repeat an offence or offences of dishonesty. I am satisfied that there is no danger of that. The sole purpose is to maintain the reputation of the solicitors' profession "as one in which every member, of whatever standing, may be trusted to the ends of the earth" (per Bingham MR [Bolton v Law Society [1994] 1 WLR 512]). I do not believe that anything less than a strike-off order would be sufficient to achieve that purpose.*[24]

36. Under the *Ghosh* subjective test, a finding of dishonesty would be avoided if a registrant did not or was unable to appreciate what was honest or dishonest by ordinary reasonable standards. This would be an entirely unsatisfactory approach to the regulation of the professions. Professionals cannot be permitted to fall below a standard that ordinary and reasonable people consider honest simply because they see nothing wrong in what they are doing. Although the subjective limb of the *Ghosh* test was concerned with the defendant's belief by reference to the standards of ordinary and reasonable people rather than his own standards and thus he could not escape liability simply by relying on his own low standards, he could if he failed to recognise how low they actually were.

37. In Ireland, there is statutory recognition and enforcement of the underlying purpose of professional regulation and the damage caused thereto by dishonesty. Section 10(4) of the Solicitors (Amendment) Act 1960, as inserted by s 19 of the Solicitors (Amendment) Act 1994, provides as follows:

> *Where, on the hearing of an application under this section, it is shown that the circumstances which give rise to the striking off the Roll of the applicant's name involved an act or acts of dishonesty on the part of the applicant arising from his former practice as a solicitor or that the applicant was convicted of a criminal offence, the High Court shall not restore the applicant's name to the Roll, either conditionally or unconditionally, unless it is satisfied that, having regard to all the evidence, the applicant is a fit and proper person to practise as a solicitor and that the restoration of the applicant to the Roll would not adversely affect public confidence in the solicitors' profession as a whole or in the administration of justice.*

[24] *Law Society v Enright* [2016] IEHC 151, para 43.

38. One of the main arguments in favour of an objective test for dishonesty in a regulatory context is that a subjective test, and the leeway that it affords to professionals who fail to appreciate generally accepted standards of honesty, is likely to undermine public confidence in the professions. That the legislature has endorsed and requires the attainment of this goal gives further support to the explicit adoption of the objective test.

IX. QUESTION OF SANCTION

39. If the test for dishonesty is to be an objective one, then arguably a lack of subjective appreciation by the registrant of those objective standards should count for something. In the criminal context, if an objective test were to apply, there is no doubt but that this lack of appreciation would be a weighty mitigating factor in sentencing. However, there is far less room for manoeuvre at the sanctioning stage in professional disciplinary proceedings following a finding of dishonesty. This can be seen from the *dicta* of Bingham MR in *Bolton v Law Society* [1994] 1 WLR 512, which have been cited with approval on numerous occasions in this jurisdiction (with the proviso that the strictness of its presumptive approach may not be fully appropriate in the Irish constitutional context):[25]

> *Any solicitor who is shown to have discharged his professional duties with anything less than complete integrity, probity and trustworthiness must expect severe sanctions to be imposed upon him by the Solicitors Disciplinary Tribunal. Lapses from the required high standard may, of course, take different forms and be of varying degrees. The most serious involves proven dishonesty, whether or not leading to criminal proceedings and criminal penalties. In such cases the Tribunal has almost invariably, no matter how strong the mitigation advanced for the solicitor, ordered that he be struck off the Roll of Solicitors. Only infrequently, particularly in recent years, has it been willing to order the restoration to the Roll of a solicitor against whom serious dishonesty had been established, even after a passage of years, and even where the solicitor had made every effort to re-establish himself and redeem his reputation.*[26]

[25] See *Law Society v Carroll* [2016] IESC 49; and, most recently, *Law Society v Callanan* [2018] IEHC 160.

[26] *Bolton v Law Society* [1994] 1 WLR 512, 518.

X. CONCLUSION

40. The importance of dishonesty and the importance of understanding what it comprises in the context of professional regulation cannot be overstated. Dishonesty constitutes one of the most serious forms of professional misconduct; a finding of dishonesty almost inevitably leads to a strike-off. In all likelihood, before long, a case will present itself wherein the distinction between an objective and subjective test for dishonesty will be all important and will have to be fully considered by the courts. At the moment, despite its significance, we cannot state with certainty what the test for dishonesty in this jurisdiction is. There has been a major reversal in the UK recently, with the UKSC overruling a long-established line of authority which set down a subjective test for dishonesty in criminal and regulatory proceedings. In Ireland, there is no real guidance to be gleaned from the legislative framework or the professional bodies as to whether an objective or subjective test for dishonesty applies. However, the recent decision of the Court of Appeal in *DPP v Bowe and Casey*, although concerned with the criminal offence of conspiracy to defraud, establishes a strong case for the adoption of an objective test. The older High Court authority of *Petitions of Lynch and Daly* can also be interpreted as supporting an objective test. *Minister for Justice v Dziugas*, which contains *obiter* comments to the effect that a subjective test applies to offences under the Criminal Justice (Theft and Fraud Offences) Act 2001, it is respectfully submitted, ought not to be taken as firm authority for that proposition, owing to its failure to consider any of the relevant case law. Having regard therefore to all the relevant jurisprudence and the overriding purpose of professional regulation, *ie*, the maintenance of the good reputation of the professions and public confidence therein, it is likely that the Irish courts will apply an objective test for dishonesty if and when the question arises.