# R. v Barton (David)

No Substantial Judicial Treatment

**Court**
Court of Appeal (Criminal Division)

**2020 WL 02045846**

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*Neutral Citation Number: [2020] EWCA Crim 575*

Case No: 201802396 C1; 201803347 C1

& 201802305 C1

**IN THE COURT OF APPEAL (CRIMINAL DIVISION)**

**ON APPEAL FROM THE CROWN COURT AT LIVERPOOL**

**HHJ Everett**

**T20167320 & T20167360**

Royal Courts of Justice

Strand, London, WC2A 2LL

 

Date: 29 April 2020

**Before:**

**THE RT HON THE LORD BURNETT OF MALDON**

**LORD CHIEF JUSTICE OF ENGLAND AND WALES**

**THE RT HON DAME VICTORIA SHARP DBE**

**PRESIDENT OF THE QUEEN'S BENCH DIVISION**

**THE RT HON LORD JUSTICE FULFORD**

**VICE PRESIDENT OF THE COURT OF APPEAL CRIMINAL DIVISION**

**THE HON MRS JUSTICE McGOWAN DBE** and

**THE HON MR JUSTICE CAVANAGH**

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**Between:**

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| 1. **DAVID BARTON**<br>2. **ROSEMARY BOOTH** | **Appellants** |
| **- and -** | |
| **THE QUEEN** | **Respondent** |

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**Paul Bogan QC and Bob Sastry**

(instructed by **Farleys Solicitors**) for the **1st Appellant/Applicant**

**Geoffrey Payne and Sushil Kumar**

(instructed by **JD Spicer Zeb Solicitors**) for the **2nd Applicant**

**David Perry QC, Benjamin Myers QC, Nicola Daley and Katherine Hardcastle**

(instructed by **CPS**) for the **Respondent**

Hearing dates: 20-21 January 2020

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**Approved Judgment**

**The Lord Chief Justice:**

**Introduction**

1. For 35 years the approach to dishonesty in the criminal courts was governed by the decision of the Court of Appeal Criminal Division in *R v Ghosh [1982] QB 1053* . In *Ivey v Genting Casinos (UK) (trading as Cockfords Club) [2017] UKSC 67* ; *[2018] AC 391* the Supreme Court, in a carefully considered lengthy *obiter dictum* delivered by Lord Hughes of Ombersley, explained why the law had taken a wrong turn in *Ghosh* and indicated, for the future, that the approach articulated in *Ivey* should be followed. These appeals provide the opportunity for the uncertainty which has followed the decision in *Ivey* to come to an end. We are satisfied that the decision in *Ivey* is correct, is to be preferred, and that there is no obstacle in the doctrine of *stare decisis* to its being applied as the law of England and Wales.

**The Facts: Overview**

1.The appellant, David Barton, ran a luxury nursing home in Birkdale, Southport, Lancashire, the Barton Park Nursing Home (Barton Park), along with his wife, Lucinda Barton. He operated the

 

business through a company, Choice Classic Limited, (CCL). David Barton exercised close control over Barton Park and made all key decisions in relation to the management of the home.

2.The applicant, Rosemary Booth, was the General Manager of Barton Park. Ms Booth seeks leave to appeal against conviction out of time. We grant leave to appeal.

3.The prosecution case against David Barton was that, over many years, he had dishonestly targeted, befriended, and "groomed" wealthy and vulnerable (and childless) elderly residents of the home, in order to profit from them. He manipulated them and isolated them from their family, friends and advisers. A number of these residents made him the residuary beneficiary of their wills, usually within a short time of arriving at Barton Park. They also allowed him to assume control of their finances, by making him next of kin, or granting him power of attorney, or by making him executor, and he used this control to enrich himself.

4.The prosecution alleged that David Barton dishonestly exploited his relationship with these residents in a number of different ways. He did so in breach of the trusted position that he occupied. He obtained large cash gifts and spurious "loans" from the residents. He charged fees to the residents which were vastly in excess of reasonable fees and were sometimes entirely fabricated. In some cases, he claimed to have negotiated or entered into "lifetime agreements" pursuant to which the resident had agreed to make a large up-front payment in return for the right to reside in the home for the whole of the rest of the resident's life. He also overcharged residents for services. Still further, David Barton sold Rolls-Royce motor cars to two residents for grossly inflated prices.

5.The prosecution alleged that David Barton was assisted by others in his criminal behaviour, and, in particular, by Rosemary Booth and by a solicitor, Thomas Mills. Mills would have been tried alongside him, but died before the trial.

6.The residents who were the victims of these practices were willing to agree to the transactions that David Barton entered into with them, and had capacity to do so, but, the prosecution said, they were highly vulnerable and isolated from advisers at the time when they did so.

7.There was no suggestion that any of the victims was physically mistreated or neglected at Barton Park. In fact, it was common ground that they were well-treated and well looked after. They had been living in unsatisfactory conditions before they arrived at Barton Park, and were happy to be there, and were grateful to David Barton for accommodating them.

8.The treatment of these residents at Barton Park came to the attention of the police in 2014 after one of them, Katie Willey, died, and a civil claim was brought by David Barton, Lucinda Barton, and CCL against her estate for a sum of approximately £10 million. Members of Mrs Willey's family asked the police to investigate Mr Barton's business.

9.David Barton was arrested in 2014, and the trial, before Judge Everett, took place in 2017-18. David Barton gave evidence. He said that the money that he had received consisted of gifts from

 

grateful residents, whom he had treated very well. The residents had always acted with full capacity and with professional advice. All of the fees that had been claimed were legitimate, save where there had been an occasional misunderstanding. The civil claim against Mrs Willey's estate had been brought on professional advice and in good faith. In so far as any mistakes had been made in relation to that claim, or in relation to the accounting at the home, this was the fault of a bookkeeper, Kiria Hughes, not him.

10.As for Rosemary Booth, the essence of the case against her was that she, too, had abused her trusted position as General Manager of Barton Park, and confidante of vulnerable residents, to act as the "eyes and ears" of David Barton and to assist him in this fraudulent activity.

11.Rosemary Booth said that she was responsible for managing the domestic arrangements at Barton Park, and that she had no responsibility for the establishment's financial affairs, which were managed elsewhere. She knew little about finances and had limited ability so far as computers were concerned. She had not taken part in any fraudulent conspiracies. She did not personally benefit financially from the alleged offences, to any significant extent.

12.The trial, with breaks, lasted from May 2017 to May 2018. Verdicts were returned between 2 and 11 May 2018. There were 25 counts on the indictment, although some of these were alternatives. David Barton was convicted of 10 counts. These consisted of four counts of conspiracy to defraud, contrary to common law, three counts of theft, one count of fraud, one count of false accounting, and one count of transferring criminal property, contrary to section 327 Proceeds of Crime Act 2002. David Barton was acquitted of three counts, and the judge directed not guilty verdicts on a further two counts. No verdict was taken on seven alternative counts, in light of the convictions on the principal counts. The jury was unable to agree on three further counts. The prosecution did not seek a retrial, and these counts were ordered to lie on the file.

13.Rosemary Booth was convicted on three counts of conspiracy to defraud, and the jury was unable to reach a verdict on a further count, which was ordered to lie on the file.

14.On 13 July 2018, David Barton was sentenced to a total period of imprisonment of 21 years and Rosemary Booth was sentenced to a total of 6 years' imprisonment. The following is a chart of the convictions and sentences:

| | | | |
|---|---|---|---|
| 1 | Conspiracy to Defraud Patricia Anderson-Scott | David Barton: 6 years | |
| 5 | Theft from the estate of Patricia Anderson-Scott | David Barton: 2 ½ years | Concurrent |
| 7 | Theft from Margaret Pinnington | David Barton: 5 years | Concurrent |

 

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| 8 | Theft from Margaret Pinnington | David Barton: 2 years | Concurrent |
| 15 | Fraud relating to the estate of Rita Gibson | David Barton: 1 ½ years | Concurrent |
| 16 | Conspiracy to Defraud Ronald Ward-Howlett | David Barton: 6 years<br><br>Rosemary Booth: 2 years | Consecutive |
| 19 | Conspiracy to Defraud Katie Willey and Gordon Willey | David Barton: 8 years<br><br>Rosemary Booth: 4 years | Consecutive<br><br>Consecutive |
| 22 | Conspiracy to Defraud the estate of Katie willey and Gordon Willey | David Barton: 8 years<br><br>Rosemary Booth: 3 years | Concurrent<br><br>Concurrent |
| 24 | False Accounting re Choice Classic Ltd | David Barton: 15 months | Concurrent |
| 25 | Transferring Criminal Property | David Barton: 1 year | Consecutive |

15.David Barton was aged 64, and Rosemary Booth was aged 69, at the time of sentence. They were each of previous good character.

16.In his sentencing remarks, the judge said that “this case is one of the most serious cases of abuse of trust that I suspect has ever come before the courts in this country”. He described David Barton as a “despicably greedy man”. He said that there was “effectively a web of deceit and dishonesty.” The judge referred the two conspiracies to defraud perpetrated upon Mr and Mrs Willey (counts 19 and 22) as being perhaps “the most brazen I have ever come across”.

17.The case concerned a period of offending of almost twenty years. As for the sums involved, David Barton obtained approximately £4,130,000 in total from the offences for which he was convicted and, as indicated above, attempted to obtain a further sum of approximately £10 million in relation to proceedings against Katie Willey’s estate.

18.At the time that the police investigation into David Barton commenced in June 2014, he had a portfolio of 23 properties in the Southport area, owned by him, his wife and his business. In addition, he had a fleet of luxury vehicles, including four Ferraris, three Rolls-Royces, two high-value Mercedes and other motor cars.

 

19.Kiria Hughes, the bookkeeper at Barton Park, pleaded guilty before trial to one count of conspiracy to defraud (Gordon Willey and the estate of Katie Willey) and one count of false accounting. She gave evidence on behalf of the prosecution. She was sentenced to eight months' imprisonment suspended for 12 months. Nicola Pimlott, the Home's Care Manager, was acquitted of one count of conspiracy to defraud (again in relation to the will of Katie Willey), and the jury was unable to agree in relation to the home's Registered Manager, Colette Morris, on the same count. The prosecution have not sought a retrial of Ms Morris, and a verdict of not guilty has been entered. David Barton's wife, Lucinda Barton, was charged with three counts of conspiracy to defraud. She was discharged on medical grounds during the course of the trial, and a re-trial is pending. David Barton's sons, David Charles Barton and David Richard Barton, each faced one count of transferring criminal property. They also were discharged during the trial and were acquitted at their re-trial.

**The Facts: Detail**

20.We summarise the facts principally by reference to the particular residents who had been targeted.

***Patricia Anderson-Scott***

21.Two of the counts on which David Barton was convicted related to a resident named Patricia Anderson-Scott.

22.David Barton was convicted of one count of conspiracy to defraud in respect of Mrs Anderson-Scott (count 1). He was also convicted of one count of theft (count 5). This latter count related to a Rolls-Royce motor car.

23.Mrs Anderson-Scott was a wealthy, elderly, widow who entered Barton Park, aged 83, on 8 September 1997 and who lived there for just over 10 years, until her death, aged 94, on 9 January 2008. At the time when she entered Barton Park, she was in a state of distress and in poor health. She had been unhappy in her previous care home. She had no children, but she had a nephew.

24.Five months after Mrs Anderson-Scott's arrival at Barton Park, she granted David Barton power of attorney over her affairs. A couple of weeks later, on 6 March 1998, he was made the principal beneficiary under her will. Thomas Mills dealt with this will and received a payment of £50,000 from David Barton at about the same time, which the prosecution said was a reward for his part in the conspiracy.

25.During her time at Barton Park, Mrs Anderson-Scott transferred a total of about £1.4 million to David Barton or CCL (including a sum of £70,000 to Lucinda Barton). This was far in excess of any legitimate fees. In a "Hansard" report prepared for a tax investigation into his affairs in about 2007, David Barton admitted to receiving about £500,000 in payments over and above legitimate

 

fees. David Barton said that these were gifts or loans to fund his business. The prosecution also alleged that David Barton took furniture belonging to Mrs Anderson-Scott.

26.On 5 March 1999, David Barton sold a Rolls-Royce motor car to Mrs Anderson-Scott for the sum of £500,000. This was approximately four times its true value. David Barton had purchased the car for £99,950 in January 1993. On the same day David Barton sold another Rolls-Royce, again for an inflated price, to another elderly and vulnerable resident, Margaret Pinnington.

27.After the sale, David Barton took another £57,429.23 from Mrs Anderson-Scott to pay for the outstanding finance on the Rolls-Royce.

28.After Mrs Anderson-Scott died, the will that she had made on 6 March 1998 went missing. It did not turn up again until 2 November 2017, whilst David Barton was giving evidence at his trial. Although David Barton and Thomas Mills knew about this will, and David Barton was executor, they had not taken any steps towards obtaining probate. Probate would have shed light on what David Barton had done with Mrs Anderson-Scott's assets, and would have led to payments out of the estate to other beneficiaries.

29.After Mrs Anderson-Scott died, David Barton transferred the Rolls-Royce back into his own name, and became its registered keeper. This was count 5 (theft).

30.David Barton's defence to the counts in relation to Mrs Anderson-Scott was that she was a very old friend of his family, to whom he had been kind. She had been very unhappy in her previous care home and was grateful to him for providing her with a home where she was happy. She had spent 10 happy years at Barton Park and had given him financial support out of gratitude and affection. She had bought the Rolls-Royce in March 1999 because she had enjoyed outings that David Barton had given her in it and had heard that he was planning to sell it. A foreign purchaser had been found for the Rolls-Royce by the Jack Barclay dealership in Mayfair, London, who was prepared to pay £550,000, and so the price of £500,000 was a fair one. He said that, after Mrs Anderson-Scott's death, he had been told by his legal adviser, Mr Mills, that he was entitled to take back ownership of the Rolls-Royce, as the principal beneficiary under her will.

31.The transferring criminal property (money laundering) count relates to the proceeds of sale after David Barton's disposal of this Rolls-Royce motor car in July 2015, and will be dealt with separately, below.

***Margaret Pinnington***

32.David Barton was acquitted of conspiracy to defraud in relation to Mrs Pinnington but was convicted of two counts in relation to this victim. The first was theft (count 7). This related to the inflated price obtained by David Barton from the sale of a Rolls-Royce to Mrs Pinnington on 5 March 1999. The second count (count 8) was concerned with the theft of two sums of £35,000 from Mrs Pinnington on 6 and 19 April 1999, respectively. These were sums received from Mrs

 

Pinnington in excess of legitimate fees. These were specimen counts, and the two transactions were representative of a large number of other transactions. The total in excess fees was about £800,000.

33.Like Mrs Anderson-Scott, Mrs Pinnington was a wealthy, elderly, widow, when she came to Barton Park. She arrived at the Home on or about 13 November 1997, when she was 86, and remained there until her death, aged 90, on 3 November 2001.

34.Mrs Pinnington had no known relatives. She had suffered a traumatic time at her previous place of residence, having been assaulted by a neighbour, and she was grateful to David Barton for taking her in.

35.So far as the Rolls-Royce is concerned, this was sold by David Barton to Mrs Pinnington for £500,000, which was a sum far in excess of its actual value. David Barton had bought the car in May 1996 for £140,000. In his sentencing remarks, the judge described the sale of this car to Mrs Pinnington as "a deliberate, carefully thought out and indeed callous enterprise".

36.David Barton's defence to these counts was that, as with Mrs Anderson-Scott, Mrs Pinnington was an old friend, having attended his father's church. She moved to Barton Park after suffering some very traumatic experiences and was very happy there. In the Hansard Report, David Barton admitted receiving around £300,000 in excess of legitimate fees. He said that she had willingly gifted him money, over and above the cost of the fees, because she was so happy in the Home and so grateful to him. She bought the Rolls-Royce because she enjoyed being driven in it and did not want it to be sold to someone else which would mean that her outings would come to an end.

***Rita Gibson***

37.David Barton was convicted of one count of fraud in relation to Rita Gibson's brother's "Will Trust" (count 15).

38.Miss Gibson entered the home in February 2003 at the age of 80, and stayed there until she died on 31 May 2012, at the age of 89. Her fees were mainly paid by a Will Trust. Throughout Miss Gibson's time at Barton Park, David Barton was involved in a dispute with the Trust relating to arrears of fee payments which he claimed were due.

39.On 31 August 2012, after Miss Gibson had died, David Barton's then solicitors wrote to the Will Trust's administrators, claiming £202,686.61 in unpaid fees. This claim was supported by a false invoice in this sum. David Barton threatened legal action in relation to the unpaid fees. However, only two months before, David Barton had claimed that the unpaid fees at the time of Miss Gibson's death were £49,705.51. The prosecution alleged that he had asked Kiria Hughes, the Bookkeeper, to inflate the amount of fees that were claimed in order to use the higher figure as leverage against the Will Trust. He was successful to the extent that the Trust settled with him for £65,000, somewhat in excess of the true amount of fees that were owing.

 

40.David Barton's defence to this count was that there had been a misunderstanding, and that his solicitors had misunderstood his instructions. By mistake, they had claimed the debt that would have been payable if David Barton had not agreed to reduce the monthly fee because of problems with claiming the full amount from the Will Trust, but he had not intended to claim more than the reduced amount.

***Ronald Ward-Howlett***

41.David Barton and Rosemary Booth were each convicted of one count of conspiracy to defraud in relation to Ronald Ward-Howlett (count 16).

42.Mr Ward-Howlett arrived at Barton Park in January 2011 aged 78 years. He was very wealthy but had no family and was vulnerable. At the time of trial, he was still alive but declined to give evidence against David Barton and Rosemary Booth.

43.Prior to coming to Barton Park, Mr Ward-Howlett had been living on his own in squalor in a small flat. He was overcome with grief for deceased family members. He was suicidal. Rosemary Booth had visited him in this flat to assess his suitability for a move to Barton Park.

44.Within two weeks of arriving at Barton Park, Mr Ward-Howlett had granted power of attorney to David Barton, and within two months, by February 2011, he had made David Barton his executor and principal beneficiary in a new will. Thomas Mills had helped to draw up this will. Mr Ward-Howlett made a further new will, with different solicitors, in May 2012, which named David Barton and Lucinda Barton as principal beneficiaries. In this second will, David and Lucinda Barton were referred to as Mr Ward-Howlett's brother and sister. Rosemary Booth was also made a beneficiary under this will.

45.Mr Ward-Howlett made David Barton a joint signatory on one of his bank accounts. He dismissed his long-standing financial adviser, Stephen Milford, and replaced him with an adviser recommended by David Barton. When Mr Milford complained, David Barton arranged for a letter to be sent, warning him off with threats of legal action. Mr Ward-Howlett paid £1.19 million to David Barton, which was approximately £900,000 in excess of legitimate fees. Though this was later said by David Barton to be part of a "global" contract for lifelong care, documentation drawn up at the time was not signed. Contract documentation to support the existence of a lifetime care agreement was only signed after the police investigation had commenced, in June 2014. In this documentation, David Barton accepted that he owed a "debt" to Mr Ward-Howlett of £400,000. Some of the money that flowed from Mr Ward-Howlett to David Barton and his business was used to purchase further properties by and for Mr Barton (only one of which was put in the joint names of Mr Ward-Howlett and David Barton).

46.The prosecution alleged that Rosemary Booth played an active role in this conspiracy, because she was instrumental in recruiting him to Barton Park, and in isolating him from his previous solicitor, Joan Williamson, and his financial adviser, Mr Milford. She acted as the "eyes and ears"

 

of David Barton, and assisted David Barton with his plan to separate Mr Ward-Howlett from his financial adviser. In particular, she drafted, in her own handwriting, a letter dismissing the financial adviser, which Mr Ward-Howlett then copied. She only accepted that it was her handwriting after Kiria Hughes had given evidence to the jury that it was, despite cross-examination on Rosemary Booth's behalf to the contrary. She also witnessed the second will, made in favour of David and Lucinda Barton.

47.David Barton's defence to this count was that Mr Ward-Howlett's life was transformed for the better when he moved to Barton Park. He had been neglecting himself. Mr Ward-Howlett became close to David Barton, who would drive him to Gerrards Cross to visit the family grave plot. Mr Ward-Howlett gave gifts to David Barton for turning his life around and to assist with property investments, and also as part of an agreement for a lifetime care contract. Two lifetime care contracts had been entered into, the second of which had been drafted by Mr Ward-Howlett's solicitors, Pinsent Masons, in 2015. The replacement financial adviser was a reputable independent adviser, who was only appointed because Mr Ward-Howlett had lost faith in his previous adviser. The power of attorney was never exercised and the bank account to which he was a signatory was never used by David Barton.

48.Rosemary Booth's defence was that she was the General Manager, in charge of domestic arrangements, and was not involved with the personal finances of the residents, about which she knew very little. The financial affairs of Barton Park were dealt with off-site and she was not involved with them. She had not sought to isolate Mr Ward-Howlett from his financial advisers, and he knew his own mind. When she drafted the letter to Mr Milford, she was merely helping Mr Ward-Howlett with his dictation. She did not know that she was a beneficiary under Mr Ward-Howlett's will.

***Katie and Gordon Willey***

49.David Barton and Rosemary Booth were convicted of two counts in relation to Mr and Mrs Willey, each being a count of conspiracy to defraud. The first (count 19) was concerned with a conspiracy to defraud Mr and Mrs Willey of money and property. The second (count 22) related to the fraudulent claim for approximately £10 million after Mrs Willey's death, against Mrs Willey's estate and against Mr Willey.

50.Focussing on count 19, Mr Gordon and Mrs Katie Willey arrived at Barton Park in April 2011. Mr Willey was 81 and had advanced dementia. Mrs Willey was 75 and had endured an extremely stressful time looking after her husband. She had developed a heart problem and was close to a nervous breakdown. They were a wealthy couple. They were childless, but they had siblings, nephews and nieces, employees and friends to whom they were close. They also had long-standing advisers.

51.The prosecution case was that David Barton, supported by Rosemary Booth, embarked on a campaign to estrange Mrs Willey from her family and friends, making use of menacing solicitors'

 

letters, the blocking of telephone and personal contact, the poisoning of her feelings towards her own family, and fawning and ingratiating behaviour towards Mrs Willey.

52.As a result of this campaign, David Barton persuaded Mrs Willey to agree to enter into a lifetime agreement which would permit the Willeys to remain in Barton Park for the rest of their lives in return for a payment of £6m. As part of this arrangement, Mrs Willey would be provided with a luxury apartment, and a purpose-built showroom would be constructed for Mr Willey for his collection of classic cars. In his sentencing remarks, the judge said that this lifetime agreement was just a ruse to get Mr and Mrs Willey's hard-earned money.

53.In the event, the written lifetime agreement was never entered into, because Mrs Willey died suddenly and unexpectedly on 23 May 2013. Before this point, David Barton had subjected Mrs Willey to intense pressure to pay up under the lifetime agreement. Less than a week before Mrs Willey died, solicitors on behalf of David Barton wrote to her with a demand for a minimum sum of £4,807,243. This was on the basis that the Willeys would still be liable to pay further consideration for the lifetime agreement, including £750,000 from the sale of their former family home, Briardene.

54.As Mrs Willey lay dying, David Barton was overheard by a witness to say, "I can't believe she has done this to me".

55.In addition, before Mrs Willey died, David Barton had engineered the dismissal of the couple's long-standing friend and financial adviser, Nick Farmer, after groundless allegations of fraud.

56.The prosecution also alleged that David Barton influenced Mrs Willey to buy an apartment in a development known as Regency Court, in August 2011. This benefitted David Barton, because he stood to receive an "overage" payment from the developer of 50% of proceeds after sales exceeded a certain value, and the purchase would trigger the overage payment. Mrs Willey assisted David Barton in this by being less than frank about her relationship with David Barton, and by giving a false address. David Barton received an overage payment of £325,000. The apartment was sold soon after David Barton received the overage payment. David Barton also influenced Mrs Willey to buy land next to her old home, Briardene, for which title did not pass to her and which was purchased for the ultimate benefit of David Barton or his business.

57.In the period before Mrs Willey's death, the Willeys were induced to pay fees of a little over £1 million to CCL, a figure which was approximately £900,000 in excess of legitimate fees for their care. Also, David Barton gained control over Briardene, and enticed Mrs Willey into placing Mr Willey's large and valuable classic car collection into his hands for safekeeping.

58.So far as Rosemary Booth was concerned, the prosecution alleged that she acted as David Barton's eyes and ears. She stayed close to Mrs Willey and went on holiday with her. She attended the viewing of the apartment in Regency Court with Mrs Willey but did not disclose that she was the General Manager of Barton Park. She always acted in support of David Barton. In his

 

sentencing remarks, the judge said that she was a "particularly enthusiastic conspirator" in the conspiracy to defraud the Willeys.

59.David Barton's defence was that when Mrs Willey came to Barton Park after caring for her husband became too much for her, she wanted a break from friends and family, and this was interpreted, wrongly, as being the result of a desire by David Barton to isolate her. Safeguarding referrals were made to Social Services by friends and family, and a social worker visited Mrs Willey on three occasions in 2011-12, each time concluding that she had full capacity. This alienated Mrs Willey from her relatives still further. The whole life agreement was discussed over a long period, and Mrs Willey was keen to have the luxury apartment and an appropriate setting for her husband's classic cars, which he could enjoy. Mrs Willey was legally represented during these discussions, and drafts were drawn up by her solicitors on her instructions. Further, Mrs Willey had offered to assist Mr Barton in relation to triggering an overage payment in respect of Regency Court (the developer would have been suspicious if David Barton had tried to buy one of the apartments, because it would have forced the overage payment).

60.Mr Willey was exceptionally well cared-for and was taken for drives in classic cars by David Barton. Mrs Willey recovered her zest for life whilst at Barton Park.

61.Rosemary Booth said that Mrs Willey knew her own mind and she denied attempting to influence her. So far as the estrangement from friends and family was concerned, she acted on instructions from Mrs Willey. There had been long-standing issues between Mrs Willey and her friends and family. They had not helped her sufficiently in her predicament before she came to Barton Park. Rosemary Booth denied attending any meetings with Mrs Willey and her professional advisers.

62.The allegation in count 22 was that David Barton, Rosemary Booth and other employees of Barton Park, including Kiria Hughes, had conspired to defraud Mrs Willey's executors, and Mr Willey (who survived her) by bringing or supporting a fraudulent civil claim. After Mrs Willey's death, and before her funeral, David Barton began preparing a claim on behalf of himself, Lucinda Barton and CCL, against the estate and Mr Willey. Particulars of Claim were lodged in the High Court on 3 February 2014. The proceedings claimed specific performance of the whole life agreement (although it had not been signed) or, in the alternative, the sum of £9,787,612, including VAT, for services rendered. These claims were based on false invoices, sham contracts, and fabricated care records. David Barton was in control of this claim throughout and discussed the contents of the financial reports with the expert whom he retained to write them.

63.Perhaps the most egregious part of the claim related to fees due for taking Mr Willey on drives out in classic cars. This part of the claim was costed at £7.2 million (including VAT). This was on the basis of David Barton's assertion that there was an understanding that there would be a payment in excess of £25,000 per day for Mr Willey's drives out, which were a means of managing his condition.

 

64.After the police investigation commenced in June 2014, and certain inconsistencies in the claim were pointed out in the police interviews, the figures claimed were revised downwards, but the total for the overall claim was still £6,448,438.02, and the sum claimed for drives in classic cars was £4,200,000.

65.The claim was eventually settled for a net sum of about £139,000.

66.The prosecution alleged that the sums claimed by David Barton were grossly inflated by (i) exaggerating the number of drives that Mr Willey was taken on, and providing false records in support; (ii) creating false residence agreements showing inflated weekly fees; (iii) creating false invoices for a party held for the Willeys at Barton Park; (iv) creating false invoices for security services at Briardene; and (v) providing false testimony in witness statements in support. In addition, the claim falsely stated that the whole life agreement had been entered into when it had not been.

67.Rosemary Booth had been involved in this conspiracy in that she had helped to manufacture a false handwritten diary of drives out for Mr Willey, and had doctored a "visitors' list" of people whom Mrs Willey did not want Mr Willey to see, to make it appear that Mrs Willey had forbidden the attendance of certain people before she died.

68.David Barton's defence to this count was that he had been advised in relation to the claim by solicitors and forensic accountants. He was not personally responsible for any mistakes in the paperwork. The charges for drives in classic cars were based on advice from experts in the trade. Insofar as there were false or fraudulent documents, these were only a very small part of the claim, and they were the result of a separate fraud by Kiria Hughes. David Barton said he had told the truth in his witness statement in the civil proceedings.

69.Rosemary Booth said that she had known little of the civil action. She had seen a solicitor at the request of David Barton to prepare a witness statement, the contents of which were broadly correct. The care plans relied on were genuine and had been made contemporaneously. She was involved in the diary notes to the extent that she was able to decipher Mrs Willey's handwriting on certain calendars.

***False accounting***

70.This count (count 24) does not relate to any resident at Barton Park. Rather, it concerns an allegation of false accounting, also involving Kiria Hughes.

71.The essence of this count was that David Barton agreed with Kiria Hughes that he would pay her additional sums over and above her wages, and that this would be done by paying off monies owed on her credit card. Kiria Hughes wrote out cheques on the business accounts, which David Barton would sign. Entries were falsified in the company accounts to conceal the true nature of these payments. In this manner, Kiria Hughes received nearly £60,000. The same method was used

 

from time to time for David Barton's benefit, by disguising payments that were for his personal benefit as business expenses.

72.A total £74,571 was accounted for falsely in this manner, in 27 entries, between February 2011 and January 2014.

73.David Barton's defence to this count is that the false accounting was entirely Kiria Hughes's doing, to cover her credit card debts. The false accounting was done without David Barton's knowledge, and was concealed by Kiria Hughes.

***Transferring criminal property***

74.The final count (count 25) was a count of transferring criminal property.

75.After the police attended at Barton Park in June 2014, David Barton sold a number of luxury vehicles. These included the sale, in July 2015, of the Rolls-Royce which he had sold to Patricia Anderson-Scott and then took back after her death (the subject of count 5). The profit on the sale, after commission, was £140,000.

76.Given the jury's verdict on count 5, David Barton had stolen this vehicle and so the proceeds of sale were criminal property. A month after the funds were received in his bank account, in September 2015, David Barton transferred £129,000 to his sons' student accounts, £69,000 into one account and £60,000 into another. Over the next six weeks, these funds were transferred in tranches back to David Barton's business accounts. The prosecution alleged that this was done to obscure the source of the funds, and to minimise the risk that the cash would be confiscated as the proceeds of crime.

77.David Barton maintained that he had only moved the money in this way because his solicitor told him to do so.

**Conviction: The eight grounds of appeal**

78.The Grounds of Appeal for David Barton and Rosemary Booth, in outline, raise the following main issues:

i)**Dishonesty:** in particular, does *Ivey* provide the correct approach to dishonesty and, if so, is it be followed in preference to the test described in *Ghosh*?

ii)**The summing up on dishonesty:** Did the judge err in his directions to the jury on dishonesty during the summing up?

iii)**Conspiracy to defraud:** Did the judge err in his approach to the offence of conspiracy to defraud?

 

iv)**Section 2 (1) Theft Act 1968:** Did the judge err in failing to give a direction concerning section 2 (1) Theft Act 1968?

v)**Capacity:** Did the judge err in his approach to the issue of capacity?

vi)**Count 16:** Was there sufficient evidence to be considered by the jury on count 16? (Mrs Booth only)

vii)**The Tinto conversation:** Did the judge err in admitting the evidence of a conversation between Mrs Booth and Mr Barton concerning James Tinto?

viii)**Safety of other counts:** If counts 5, 16 and 19 are unsafe, is there a consequential impact on counts 22 and 25?

**Dishonesty: *Ivey* and *Ghosh***

79.The central question concerns the status of the decision of the Supreme Court in *Ivey.* In this case the judge directed the jury on the issue of dishonesty by reference to *Ivey* rather than *Ghosh*. In doing so he did what the Supreme Court had indicated should happen at [74], namely that directions based upon *Ghosh* "should no longer be given". That indication is reflected in the Crown Court Compendium (a practical aid to judges sitting in that court) and the two leading practitioners' works, Archbold and Blackstone. Mr Bogan Q.C., for David Barton, and Mr Payne, for Rosemary Booth, submit that the judge should have followed *Ghosh* because the observations in the Supreme Court were not essential to its decision (i.e. were *obiter dicta*) whilst *Ghosh* remained binding authority. In any event, they submit that the reasoning in *Ghosh* is correct and to be preferred to that of the Supreme Court.

80.The test for dishonesty in *Ghosh* was summarised at page 1064D:

"... 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. …"

81.This articulated a two-stage test, namely (a) was the defendant's conduct dishonest by the ordinary standards of reasonable people? If so, (b) did the defendant appreciate that his conduct was dishonest by those standards?

 

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

"These 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. The test of dishonesty is as set out by Lord Nicholls in *Royal Brunei Airlines Sdn Bhd v Tan [1995] 2 AC 378* and by Lord Hoffmann in *Barlow Clowes [2006] 1 WLR 1476* , para 10 […]. 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]

83.Thus, the Supreme Court proposed an alternative two-stage 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?

84.*Ghosh* concerned a locum surgeon who claimed payments for operations when he had no possible entitlement to remuneration (either he had not performed any procedure or they were carried out under the National Health scheme). He was convicted of attempting to procure the execution of a valuable security by deception, contrary to section 20 (2) Theft Act 1968 and three counts of obtaining or attempting to obtain money by deception, contrary to section 15 (1) Theft Act 1968. "Dishonesty" is an ingredient of both offences. On appeal this court concluded that whichever test of dishonesty applied, once the jury rejected the defendant's account (as they clearly did), a guilty verdict was inevitable.

85.*Ivey* involved a professional gambler who sued Crockfords casino in Mayfair for winnings at the card game Punto Banco (a form of Baccarat). Over two days in August 2012, Mr Ivey deployed a specialist technique known as "edge-sorting" by which he was able to identify cards by observing minute differences in the patterns of the back of the cards, a technique which greatly improved his chances of winning. Using "edge-sorting" and with the help of another professional gambler, Mr Ivey won approximately £7.7 million.

86.The casino suggested that Mr Ivey had cheated and that his betting was void. As a consequence, it refused to pay out on his winnings. Mr Ivey's case was that he had deployed a legitimate advantage and he had been open about his conduct. By section 336 of the Gambling Act 2005, a bet taken by a licensee may be declared void if the bet was "substantially unfair". Amongst the factors

 

to be taken into account in that question is whether it involved the commission of the offence of cheating contrary to section 42 of the Act. The trial judge found that Mr Ivey was genuinely convinced that what he did was not cheating but concluded that Mr Ivey's actions amounted to cheating. The Supreme Court held that in assessing whether the conduct was cheating it was unnecessary to decide whether it was dishonest. Against that background, the court concluded that the trial judge's assessment was unassailable.

87.Notwithstanding that conclusion, the Supreme Court took the opportunity to review the history of the test of dishonesty since the Theft Act 1968. Before 1968 "dishonestly" had not appeared in the legal definition of any acquisitive offence. Lord Hughes explained (at [57]) that there are serious problems with the second leg of the test in *Ghosh*:

"(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."

 

88.He expressed the view that the court in *Ghosh* had erroneously concluded that its 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 1968, was intended to characterise a course of conduct or to describe a state of mind. This was an unnecessary step and has presented problems for jurors.

89. As we have indicated, Lord Hughes observed that the decision in *Ghosh* involved a departure from pre-1968 law, when no such divergence was intended. On careful analysis, it was not justified by the post-1968 jurisprudence, which tended, albeit with some inconsistency, to accept the approach preferred by the Supreme Court in *Ivey*. We agree with, but do not repeat, Lord Hughes's analysis of the relevant authorities ([65] – [74]).

90.The conclusion of the Supreme Court was that that there were convincing grounds for suggesting that the second leg of the test in *Ghosh* does not correctly represent the law and that directions based on it should no longer be given. He expressly approved the test formulated in *Barlow Clowes International Ltd v Eurotrust International Ltd [2006] 1 WLR 1476* ; *[2005] UKPC 37* by Lord Hoffmann at [10]:

"Although a dishonest state of mind is a subjective mental state, the standard by which the law determines 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. The Court of Appeal held this to be a correct state of the law and their Lordships agree."

91.*Ghosh* created a different approach to dishonesty in the criminal courts but:

"… there can be no logical or principled basis for the meaning of dishonesty (as distinct from the standards of proof by which it must be established) to differ according to whether it arises in a civil action or a criminal prosecution. Dishonesty is a simple, if occasionally imprecise, English word. It would be an affront to the law if its meaning differed according to the kind of proceedings in which it arose. …". *Ivey* at [63]

*The Status of Ivey*

92.There is no doubt that the discussion on dishonesty in *Ivey* was strictly *obiter* because it was not necessary for the decision of the court. It is for that reason that the appellants submit that it has no legal impact on the decision in *Ghosh*. We note that the possibility was raised in argument that *Ghosh* itself was *obiter* but we approach the question on the basis that, subject to the status of *Ivey*, it is binding not least because it was applied as the law of England and Wales for 35 years, including by this court. The appellants submit that we should apply *Ghosh* and then let the matter return to the Supreme Court. They point out that the Supreme Court did not appear to hear

 

argument on the issue. They recognise that would give rise to the distinct possibility that the wrong test for dishonesty would be applied in the meantime in thousands of cases in the Magistrates' and Crown Courts but that is a consequence of following properly the rules of precedent.

93.In answer to that argument, Mr Perry Q.C. for the prosecution submits that by analogy with *R v James; R v Karimi [2006] QB 588* ; *[2006] EWCA Crim 14* we should hold that the decision of the Supreme Court binds this court (and he submits all courts in England and Wales) as to the meaning of dishonesty in the criminal context and expressly overrules *Ghosh*. That, he submits, is the consequence of [74] which we have set out.

94.An alternative route to arriving at the same conclusion was proposed by Sir Brian Leveson P in *Director of Public Prosecutions v Patterson [2017] EWHC 2820 (Admin)* ; *[2018] 1 Cr. App. R. 28*, a decision of the High Court. Having quoted Lord Hughes's judgment at [74] he said:

"16. 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. This much is clear from *R. v Gould (1968) 52 Cr. App. R. 152; [1968] 2 Q.B. 65*, in which Diplock LJ observed at 153 and 68 that:

'In its criminal jurisdiction, … the Court of Appeal does not apply the doctrine of *stare decisis* with the same rigidity as in its civil jurisdiction. If upon due consideration, we were to be of opinion that the law has been either misapplied or misunderstood in an earlier decision of this court or its predecessor, the Court of Criminal Appeal, we should be entitled to depart from the view expressed in that decision ….'

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.

17. For purposes of this case it is unnecessary to go further. …"

95.*Gould* was one of a series of cases in which the Court of Appeal (Criminal Division), and its predecessor, developed a looser approach to precedent than applies in the Civil Division, particularly when it considered that an error had been made in an earlier decision which, if applied, would adversely affect the defendant in criminal proceedings. It followed *R v Taylor [1950] 2 KB 368* , *[1950] 34 Cr App R 138*. The approach is not limited to circumstances where a departure from earlier authority would favour the accused, as was explained by Lord Woolf CJ in *R v Simpson*

 

*[2004] QB 118* at [34]. Yet these authorities proceed on the basis of this court being concerned to reconsider one of its own earlier decisions with a view to affirming it or departing from it. They are not directly concerned with the circumstances in these appeals, which involve an instruction from the Supreme Court.

96.The first question is whether we are obliged to follow the Supreme Court.

97.Against that background, we turn to the approach adopted in *James*. The Court of Appeal (Criminal Division) considered whether the correct statement of the law of provocation was to be found in the decision of the House of Lords in *R v Smith (Morgan) [2001] 1 AC 146* or the subsequent Privy Council decision in *Attorney General for Jersey v Holley [2005] 2 AC 580* . Ordinarily, the Court of Appeal would be bound by the rules of precedent to follow a decision of the House of Lords. Generally, the Judicial Committee of the Privy Council does not bind the courts of England and Wales. Nonetheless the court decided that it was bound to follow a decision of the Privy Council.

98.The Committee consisted of nine of the twelve Lords of Appeal in Ordinary. Lord Nicholls gave the opinion of the majority of six whilst Lords Bingham of Cornhill, Hoffmann and Carswell dissented. The majority (at [1]) said that the appeal was concerned to resolve a conflict between decisions of the House of Lords and the Privy Council "and clarify definitively the present state of English law, and hence Jersey law, on this important subject." The minority agreed at [68] that that was the effect of the conclusion of the majority.

99.In giving the judgment of the Court of Appeal in *James* Lord Phillips of Worth Matravers CJ noted that the effect of continuing to follow the earlier House of Lords decision, whilst inevitably giving leave to appeal, would be to require judges to direct juries in a way which would necessarily be overturned. The court did not want to produce that result, but to avoid it needed to answer two questions:

"(i) How do we justify disregarding well-established rules of precedent? And (ii) what principles do we put in place of those that we are disregarding? The two questions are obviously interrelated." [40]

100.The answers to those questions followed between [41] and [45]. In summary, it was the Lords of Appeal in Ordinary, albeit sitting in the Privy Council, who had altered the established approach to precedent. The rules of precedent are common law principles and it was not for the Court of Appeal to rule that it was beyond their powers to develop them. The position had been reached where the Privy Council could overrule a decision of the House of Lords with the consequence that the Court of Appeal was bound to follow the decision of the Privy Council. Lord Phillips then identified three features of the decision which justified the conclusion. First, all the Law Lords sitting in the Privy Council, including those who dissented, agreed that the decision definitively clarified English law. Secondly, the majority in the Privy Council constituted half the Appellate

 

Committee (i.e. six) of the House of Lords. Thirdly, the result of an appeal to the House of Lords was a foregone conclusion. Lord Phillips noted that it was unlikely that these circumstances would again arise, and the judgment should not be taken as an invitation to decline to follow a decision of the House of Lords in any other circumstances.

101.We are in a strongly analogous position, indeed it is stronger because the ordinary rules of precedent require us to follow decisions of the Supreme Court (as the successor of the Judicial Committee of the House of Lords). 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.

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.

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.

104.In the result, the test for dishonesty in all criminal cases is that established in *Ivey*.

105.We would not wish it to be thought that we are following *Ivey* reluctantly. The concerns about *Ghosh* have resonated through academic debate for decades. Lord Hughes's reasoning is compelling.

106.That said, we wish to endorse the respondent's submission that the test of dishonesty formulated in *Ivey* remains a test of the defendant's state of mind – his or her knowledge or belief – to which the standards of ordinary decent people are applied. This results in dishonesty being assessed by reference to society's standards rather than the defendant's understanding of those

 

standards. Lord Nicholls of Birkenhead, echoing the approach suggested by Lord Hoffmann in *Barlow Clowes* (see [91] above) observed in *Royal Brunei Airlines* at page 389:

"[…] acting dishonestly, or with a lack of probity, which is synonymous, means simply not acting as an honest person would in the circumstances. This is an objective standard. At first sight this may seem surprising. Honesty has a connotation of subjectivity, as distinct from the objectivity of negligence. Honesty, indeed, does have a strong subjective element in that it is a description of a type of conduct assessed in the light of what a person actually knew at the time, as distinct from what a reasonable person would have known or appreciated. […] However, these subjective characteristics of honesty do not mean that individuals are free to set their own standard of honesty in particular circumstances. The standard of what constitutes honest conduct is not subjective. Honesty is not an optional scale, with higher or lower values accordingly to the moral standards of each individual. If a person knowingly appropriates another's property, he will not escape a finding of dishonesty simply because he sees nothing wrong in such behaviour."

And at page 391:

".... when called upon to decide whether a person was acting honestly a court will look at all the circumstances known to the third party at the time. The court will also have regard to personal attributes of the third party, such as his experience and intelligence, and the reason why he acted as he did."

107.This approach, which was the approach of the Supreme Court in *Ivey*, makes clear that when Lord Hughes talked in [74] of the "actual state of mind as to knowledge or belief *as to the facts*" [our emphasis] he was referring to all the circumstances known to the accused and not limiting consideration to past facts. All matters that lead an accused to act as he or she did will form part of the subjective mental state, thereby forming a part of the fact-finding exercise before applying the objective standard. That will include consideration, where relevant, of the experience and intelligence of an accused. In an example much used in debate on this issue, the visitor to London who fails to pay for a bus journey believing it to be free (as it is, for example, in Luxembourg) would be no more dishonest that the diner or shopper who genuinely forgets to pay before leaving a restaurant or shop. The Magistrates or jury in such cases would first establish the facts and then apply an objective standard of dishonesty to those facts, with those facts being judged by reference to the usual burden and standard of proof.

108.There is, no doubt, a range of consequential issues that will need to be decided following the decision in *Ivey.* Many of these have been usefully summarised by Professor David Ormerod QC

 

and Karl Laird in their article in the UK Supreme Court Yearbook 2018 Volume 9 pages 1 – 24. They will be addressed as cases are tried.

**The summing up on dishonesty**

109.Mr Bogan and Mr Payne submit that even applying the *Ivey* test, the convictions are unsafe because the trial judge failed to direct the jury in accordance with Lord Hughes's formulation. In particular, it is suggested that the judge should have directed the jury to ascertain the defendants' actual state of mind, before they went on to consider whether their actions were dishonest by ordinary standards.

110.In the written directions on the law, the trial judge first explained dishonesty in the following way, when dealing with the offence of conspiracy to defraud:

"The question of whether a person acts dishonestly is to be determined by you the jury – by applying the standards of ordinary decent people – but this would not include acting in a commercially or morally reprehensible manner."

111.Later in his written directions, when dealing with the other offences for which dishonesty was an ingredient, such as theft and false accounting, the judge said, "The question of whether a person acts dishonestly is to be determined by you the jury – by applying the standards of ordinary decent people". In his oral directions, the judge added, "it [dishonesty] does not need another definition; you, ordinary decent people decide what is dishonest, nobody else".

112.The judge was here dealing with the second part of the definition of dishonesty in *Ivey* at [74]. Yet it is was clear from the summing up as a whole that the jury should apply that objective test for dishonesty by reference to all of the relevant facts, as the jury found them to be, including their findings as to the states of mind and knowledge of David Barton and Rosemary Booth. In written directions, the judge referred to the "stark issue between the prosecution and the defence concerning the reasons why such property was handed over or gifted in wills". He continued by summarising the competing positions of the prosecution and the defence on the defendants' knowledge or belief as to the facts at the time when the offences took place:

"What do the prosecution and those who represent David Barton and Rosemary Booth submit to you on this issue?

The prosecution alleges that, when they first went into [Barton Park], each of these residents was vulnerable to influence – and for some of the other residents, vulnerable to isolation from close friends or family – principally by David Barton, but assisted by others charged or named

 

on the relevant counts of the indictment …. The prosecution case is that, looking separately at the backgrounds to each of the five residents, there were similarities that were not coincidences. The prosecution alleges that it is no coincidence that each of these residents was childless and wealthy, with no relatives (or relatives who, for the most part, did not live close by) and, because of difficulties in their personal lives at the time that they moved to [Barton Park], were pathetically grateful – and highly vulnerable to such influence from relevant defendants. Consequently, it is asserted that they were, each of them, separately, dishonestly taken advantage of – as a result of separate conspiracies or agreements – to dishonestly persuade them to part with substantial monies and properties and/or to change their wills in favour of relevant defendants and, when monies were transferred, they went into bank accounts under the control of [David Barton, Lucinda Barton and CCL] – a company of which both [David Barton] and [Lucinda Barton] were officers.

On behalf of David Barton …. and Rosemary Booth, …., it is denied that they are guilty of any of the offences with which they are charged.

Specifically on behalf of David Barton it is submitted that he had, in effect, saved all of these residents from huge difficulties in their lives, and, even though they may have been affected by those difficulties at the time of their admission to [Barton Park]: they always retained their capacity and once they received proper care and attention in a well-run "five-star" nursing home, they quickly recovered their ability to properly look after their own lives; were capable of making proper and reasonable decisions affecting their lives, including who they were prepared to see or not to see of their friends and family; were justifiably grateful to David Barton for rescuing them from their previous difficulties and, as a consequence, were prepared to substantially financially assist him and his businesses – by transferring large sums of money to him and his businesses and either change their wills wholly in his favour or make gifts in their wills to him and others of his family and employees – because of their gratitude and their great affection for him. His case is that, when they carried out these acts of generosity they did so because they wanted to do so – with full capacity and understanding of what they were doing – and not because of dishonest influence from him assisted by other others – or any vulnerability. Further, it is his case that each of the residents concerned was assisted, at times, by a solicitor or solicitors and/or financial advisers, none of whom indicated that any of the residents concerned was incapable of making such decisions.

On behalf of Rosemary Booth it is also denied that there were any such dishonest agreements, and she also relies on the same issues raised on behalf of David Barton, including the assertion raised on his behalf concerning the capacity of residents to make their own decisions – but, additionally, it is her case that she was unaware of the finances of any of the residents. Further, it is her case that neither Sheila Wardrop nor Ronald Ward-Howlett were vulnerable, but if there were any

 

such dishonest agreements she was not a party to them and was completely unaware of their existence……"

113.In this part of his directions, consistently with *Ivey*, the judge directed the jury to take account of the defendants' actual state of mind as to knowledge or belief as to the relevant facts. He summarised the parties' competing contentions, and reminded the jury to bear in mind that the case put forward by David Barton and Rosemary Booth was that they believed that none of the residents was vulnerable, that each of them was of full capacity and understanding, that each had access to independent advice, and that each was willing to transfer large sums of money to David Barton and his businesses out of gratitude and affection towards him. So far as Rosemary Booth is concerned, he directed the jury to consider her contention that she had no significant knowledge or understanding of financial matters in general, or of the finances of the residents or the financial affairs of Barton Park, in particular.

114.In addition to the written directions, the judge addressed these matters in detail in other parts of the summing up, which extended over many days. A similar approach was taken in relation to each of the counts that involved dishonesty. For example, in relation to the theft counts concerning the Rolls-Royce motor cars, the jury was reminded of David Barton's case why he believed he had been entitled to sell the two cars to Patricia Anderson-Scott and Margaret Pinnington on 5 March 1999. It was against that background that the jury had to decide the issue of dishonesty in respect of the theft counts. In relation to Rosemary Booth, the jury was reminded in detail of the evidence of what she knew about the various transactions.

115.Taking the summing up as a whole, we do not consider that there is any possibility that the jury could have been in any doubt that, when applying the objective standard of dishonesty, they should do so by reference to their findings about the state of the knowledge or belief of David Barton and Rosemary Booth regarding the circumstances. As Mr Perry submits, the requirement to consider the states of mind of David Booth and Rosemary Barton was self-evident from the way that the issues arose before the jury.

**Conspiracy to defraud**

116.Mr Bogan advanced a number of submissions on counts 1, 16 and 19, each of which alleged offences of conspiracy to defraud. These submissions were adopted by Mr Payne. The issues of general principle that arise in this context are, first, a description of the elements of the offence of conspiracy to defraud and, in particular, whether there is a requirement of "unlawfulness" or "aggravating feature" over and above a dishonest agreement which includes an element of unlawfulness in its object or means. Secondly, whether the offence meet the requirements of legal certainty at common law and under article 7 of the European Convention on Human Rights (ECHR) having regard to the test of dishonesty.

117.Additionally, focussing on the circumstances of the present case, it is argued: (i) the judge failed to direct the jury correctly on the elements of the offence; (ii) there was insufficient evidence

 

to support the three counts; and (iii) the particulars of the offence gave insufficient notice of the case to be met.

118.The elements of the offence of conspiracy to defraud were described in *Scott v Metropolitan Police Commissioner [1975] AC 819* by Viscount Dilhorne:

"[I]t is clearly the law that an agreement by two or more by dishonesty to deprive a person of something which is his or to which he would or might be entitled [or] an agreement by two or more by dishonesty to injure some proprietary right of his, suffices to constitute the offence of conspiracy to defraud"

119.Mr Bogan and Mr Payne submit that this passage should not be treated as definitive, but it has been applied for the last 45 years.

120.We endorse the explanation given in the Crown Court by Hickinbottom J in *R v Evans (Eric) and others [2014] 1 WLR 2817* at [38] and following, that there must be a dishonest agreement which includes unlawfulness, either as to the object of the agreement or the means by which it will be carried out. It is not necessary to prove an intent to deceive or an intent to cause economic or financial loss to the victim or victims, but instead either a proprietary right or interest of the potential victim must be injured (or potentially injured). As it was put in *R v H [2015] EWCA Crim 46* at [31], the defendant must act with an intention to prejudice another's rights. The agreement need not necessarily include the commission of a substantive offence if carried out: see *Scott* (above) and *Cooke [1986] AC 909* .

121.Conspiracy to defraud does not apply to agreements to achieve a lawful object by lawful means. But there is no requirement of "unlawfulness" or "aggravating feature" over and above a dishonest agreement which includes an element of unlawfulness in its object or means. This approach was endorsed by the House of Lords in *R v Goldshield Group Plc and others [2008] UKHL 17* ; *[2009] 1 Cr App R 33*. The defendants were alleged to have elevated what was otherwise non-criminal price fixing into a criminal conspiracy to defraud when it operated to the financial detriment of the Department of Health, which paid inflated prices in accordance with an artificially fixed drug tariff. It was held that lies and/or positive deception can form the basis of a charge of conspiracy to defraud in these circumstances ([18]). There was no suggestion of a requirement for additional unlawfulness or aggravating circumstances over and above the deliberately false statements and/or deliberate deceit.

122.In the present case, the necessary element of unlawfulness was the positive and extensive deceit practised on the victims and others with the intention of prejudicing a proprietary right or interest (by obtaining property to which the appellants were not entitled). Count 1 demonstrates the extent to which the final form of the indictment, including the "voluntary" particulars, described the unlawful conduct:

 

"Count 1

**STATEMENT OF OFFENCE**

CONSPIRACY TO DEFRAUD contrary to common law.

**PARTICULARS OF OFFENCE**

DAVID BARTON on days between the 7th September 1997 and the 10th January 2008 conspired together and with Thomas Mills and Lucinda Barton to defraud Patricia Anderson- Scott by dishonestly exploiting their position to control or obtain money or proprietary rights belonging to Patricia Anderson-Scott, for the benefit of David Barton, Lucinda Barton and/or their businesses, to which David Barton, Lucinda Barton and/or their businesses were not entitled.

Voluntary Particulars

(i) placing David Barton in a position of influence over Patricia Anderson-Scott's personal, legal and financial affairs;

(ii) taking money and / or credit balances and / or cheques from Patricia Anderson- Scott in excess of any sums legitimately owed by her for care or associated services;

(iii) receiving money and / or credit balances and / or cheques from Patricia Anderson- Scott in excess of any sums legitimately owed by her for care or associated services;

 

(iv) selling a Rolls Royce motor vehicle registration 3RR to Patricia Anderson-Scott at a price far exceeding its value;

(v) obtaining money from Patricia Anderson-Scott to settle payment for finance on Rolls Royce motor vehicle registration 3RR;

(vi) taking furniture that was the property of Patricia Anderson-Scott."

123.The offence of conspiracy to defraud was properly described in the indictment, revealing in each instance an offence on which the jury were entitled to convict. We do not accept that the offence lacks certainty and thus falls foul of article 7 ECHR. The offence of conspiracy to defraud was described in the indictment, as the example above demonstrates, with clarity. The appellants would have been able readily to identify the case they had to meet.

124.Mr Bogan and Mr Payne suggest that the judge's directions on the counts of conspiracy to defraud were insufficient and that the jury received inadequate assistance on the matters that the prosecution had to establish. We do not accept these arguments. The written directions included the following passages:

"**Definition of Conspiracy to Defraud (Counts 1, 6, 10, 16, 19 and 22)**

The offence of "conspiracy to defraud" is committed when at least two people agree to defraud a person (or persons) by; (1) dishonestly depriving that person (or persons) of something which is theirs, or to which they are or would be, or might be, entitled, and/or; (2) dishonestly injuring some 'proprietary right' of that person (or persons).

A 'proprietary right' is the right of a person to deal with property as he/she wishes – which includes the right to make another person a beneficiary under his/her will.

The four main elements of the offence of "conspiracy to defraud"

 

In order to prove that a person – "A" – has committed the offence of conspiracy to defraud, the prosecution must prove, so that you the jury are sure, the following four "elements": –

(1) there was an agreement between two or more persons to (1) dishonestly deprive another (or others) of something which is theirs, or to which they are or would be, or might be, entitled, and/or; (2) to dishonestly injure a proprietary right of that other (or others).

(2) that, by active involvement, "A" joined in with that agreement;

(3) that when "A" did so "A" knew what he/she was agreeing to;

(4) further, that when "A" joined in with that agreement "A" intended that he/she or some other person or persons should carry the agreement out."

…

The prosecution alleges that there were separate conspiracies or agreements to dishonestly defraud each of these residents – by deliberately exploiting their position to control or obtain money or proprietary rights of those residents – by selecting each of them because they were vulnerable, and preying upon that vulnerability to dishonestly get each of them to make gifts or payments, or change their wills in favour of relevant individuals.

…

The prosecution alleges that, when they first went into Barton Park, each of these residents was vulnerable to influence – and for some of the residents, vulnerable to isolation from close friends or family – principally from David Barton, but assisted by others charged or named on the relevant counts of the indictment – i.e. Lucinda Barton, Rosemary Booth and Thomas Mills. The prosecution asserts that, following a number of different conspiracies or agreements by co-

 

conspirators, this resulted in each of these residents being dishonestly influenced to hand over property and/or change their wills, as alleged. The prosecution case is that, looking separately at the backgrounds to each of the five residents, there were similarities that were not coincidences. The prosecution asserts that it is no coincidence that each of these residents was childless and wealthy, with no relatives (or relatives who, for the most part, did not live close by) and, because of difficulties in their personal lives at the time they moved to Barton Park, were pathetically grateful – and highly vulnerable to such influence from relevant defendants. Consequently, it is asserted that they were, each of them, separately, dishonestly taken advantage of – as a result of separate conspiracies or agreements – to dishonestly persuade them to part with substantial monies and properties and/or to change their wills in favour of relevant defendants and, when monies were transferred they went into bank accounts under the control of David Barton, Lucinda Barton and CCL – a company of which both David Barton and Lucinda Barton were officers. “

125.The jury was reminded of the elements of the offences, as set out in the final version of the indictment. That alleged that the appellants obtained monies etc. to which they were not entitled, for instance because what they claimed was in excess of sums that were legitimately owed. The trial concerned allegations that the appellants sought to persuade the victims, by way of extensive deceptions and lies, into parting with their property. In our judgment there can be no doubt that the jury understood that the prosecution needed to establish that there was a dishonest agreement on the part of the appellants, by deceit or lies, to prejudice the proprietary rights or interests of the victims by obtaining property to which they were not entitled. In these circumstances there is no substance in the argument that the directions were inadequate.

**Section 2(1) Theft Act 1968**

126.The appellants submit that the judge failed to direct the jury in accordance with section 2(1) of the Theft Act 1968. It sets out circumstances in which an appropriation is not dishonest:

“2. “Dishonestly”

1. A person’s appropriation of property belonging to another is not to be regarded as dishonest-

(a) if he appropriates the property in the belief that he has in law the right to deprive the other of it, on behalf of himself or of a third person; or

(b) if he appropriates the property in the belief that he would have the other’s consent if the other knew of the appropriation and the circumstances of it; or

 

(c) …

(2) …"

127.The judge did not set out the terms of section 2(1) in his directions to the jury on counts 5, 7 and 8. The appellant Barton's case was that he had, and that he believed he had, the consent of the owners to deal with the property (count 5: a Rolls-Royce, count 7, the sale price of a Rolls-Royce, and count 8: £70,000) as if it was his own.

128.In the written directions given to the jury, the judge included a passage identifying the case for David Barton by making clear that he said that he believed that the property in question was freely given to him by people of capacity, in short that there were straightforward gifts which he neither procured nor accepted dishonestly. That explanation was rejected by the jury. Whilst a direction tailored to section 2(1)(a) might have been given, it was not required. If his case on the "gifts" was or might have been true, David Barton was not dishonest and would have been acquitted.

**Capacity**

129.David Barton and Rosemary Booth rely on four grounds of appeal under this broad heading. They submit that the judge misdirected the jury because:

i)The judge failed to direct the jury that each of the residents had "capacity";

ii)The judge's written directions conflated "vulnerability" and "capacity";

iii)The judge failed to direct the jury in accordance with the guidance of Lord Hutton in *R v Hinks [2001] 2 AC 241* ; and

iv)(overlapping with iii)), the judge failed to give the jury a direction on the validity of gifts, to the effect that there is a complete defence in cases where the giver had complete capacity to make a gift, was in full knowledge of the material facts, and had made the gift voluntarily.

**Capacity and Vulnerability**

130.It was common ground between prosecution and defence that each of the five residents had legal "capacity" to make gifts and testamentary dispositions. The prosecution case did not depend upon the contention that the residents were not capable of entering into lawful transactions. Rather, it was the prosecution case that the appellants knew that the residents were vulnerable and dishonestly exploited that vulnerability to persuade them to transfer money and gifts to David

 

Barton and his company. This amounted to the offence of conspiracy to defraud, notwithstanding that the residents had legal capacity to make gifts and enter into transactions.

131.In those circumstances the trial judge had no need to give legal directions to the jury on the technical legal meaning of the word "capacity". He did give directions on capacity and vulnerability and how, despite the undoubted fact that the residents had capacity to deal with their own affairs, they might nonetheless be victims of conspiracy to defraud. The directions were more extensive than requested by the appellants during submissions in advance of the summing up. This passage is not criticised:

"Just because a person has capacity to make their own decisions, this does not mean that they could never be vulnerable to dishonest influence to make decisions that adversely affect them – and it would not necessarily be a defence to a charge of conspiracy to defraud, to say that the person (or persons) who were targeted had capacity to make their own decisions."

132.The judge also reminded the jury:

"When considering this part of the case you will appreciate that there is a stark issue between the prosecution and the defence concerning the reasons why such property was handed over or gifted in wills …"

133.He also reminded the jury that it was the appellants' case that the residents carried out acts of generosity because they wanted, with full capacity and understanding of what they were doing, and not because of dishonest influence from David Barton and others, or vulnerability. He encapsulated the issue for the jury:

"You, the jury, must look at all the circumstances of the case and keep in mind all relevant evidence. If, in doing so, you decide that it is or <u>may</u> be the case – looking at each of the counts and the defendants separately – that the making of such gifts, transferring of property and/or changing of wills by the relevant residents, occurred not as a result of agreements to defraud them, which were then carried out by the conspirators, but, simply, were actions taken by residents who were fully in control of their decision-making and understood what they were doing, and made proper decisions: if that is or may be the case on any or all of those five counts of conspiracy to defraud, your verdicts would be "not guilty" as appropriate."

134.Accordingly, there is no substance in the criticism that the judge failed to direct the jury that the victims had legal capacity. It was common ground that the residents had legal capacity.

 

135.The second ground is that the judge conflated "capacity" with "vulnerability". We do not consider this is a fair criticism of the legal directions. The judge dealt with capacity in the context of his summary of the defence case on this issue, namely the fact that the residents had legal capacity made it much less likely that they could have been subjected to a conspiracy to defraud. The judge then dealt with vulnerability in his summary of the prosecution position, namely that evidence of the residents' vulnerability, notwithstanding their legal capacity, was relevant to the case against the defendants. As Mr Perry contends, the judge's direction correctly identified that the issue was whether, notwithstanding their formal capacity, the residents' vulnerability had been dishonestly exploited by the defendants as part of the fraud.

***Hinks***

136.The appellants advanced an argument based upon an observation of Lord Hutton in the course of his dissenting judgment in *Hinks* that:

"It appears contrary to common sense that a person who receives money or property as a gift could be said to have acted dishonestly, no matter how much ordinary and decent people think it morally reprehensible that for that person to accept the gift."

137.The certified question in *Hinks* concerned the meaning of "appropriation" for the purposes of section 1 of the Theft Act 1968. The victim was a man of low intelligence cared for by the defendant. Over a period of over six months, the defendant accompanied the victim to his building society, where he made withdrawals of the maximum daily amounts and gave her the money. She received a total of about £60,000, effectively all his savings. The defendant was charged with theft. The certified question was:

"'Whether the acquisition of an indefeasible title to property is capable of amounting to an appropriation of property belonging to another for the purposes of section 1(1) of the Theft Act 1968.' In other words, the question is whether a person can "appropriate" property belonging to another where the other person makes him an indefeasible gift of the property." Lord Steyn at 244B

The majority in the House of Lords, including Lord Hutton on this point but with Lord Hobhouse of Woodborough dissenting, concluded that the answer was yes: there would be an appropriation for the purposes of the Theft Act.

138.Lord Hutton was concerned that the judge's directions on dishonesty were inadequate because, in his view, they failed to give the jury sufficient help on how dishonesty should be judged in those circumstances. Lord Hobhouse agreed with him. The certified question did not encompass

 

the judge's approach to dishonesty. Although the House of Lords was entitled to stray outside the certified question, the majority (Lord Steyn, Lord Jauncey of Tullichettle and Lord Slynn of Hadley) were not prepared to engage in an analysis of his directions when the criticisms formed no part of the grounds of appeal, were not dealt with in the statement of facts and issues before the House and the evidence (and so the way in which the case was put) was not available.

139.Lord Hutton discussed how dishonesty might be considered when the appropriation in question was a gift. His reasoning was not endorsed by the majority and, on any view, the extract from his judgment we have just quoted is not a binding proposition of law. He was careful in the discussion that followed, in the context of theft, to explore what was meant by a "valid gift", recognising that something that looked like a gift might nonetheless be the subject of a theft charge. This argument adds nothing, in our view, to the antecedent arguments which criticise the summing up. The judge made clear to the jury that unless they were satisfied that the defence advanced by the appellants (see para 134 above) was disproved by the prosecution, they should acquit.

***Count 16***

140.Mr Payne submits on behalf of Mrs Booth that Count 16 (conspiracy to defraud Ronald Ward-Howlett) should have been withdrawn at the close of the prosecution case on the basis that there was insufficient evidence for it to be left to the jury.

141.Count 16 was in the following terms:

"**STATEMENT OF OFFENCE**

CONSPIRACY TO DEFRAUD contrary to common law.

**PARTICULARS OF OFFENCE**

DAVID BARTON and ROSEMARY BOOTH on days between the 4 th January 2011 and the 13 th January 2014 conspired together and with Thomas Mills to defraud Ronald Ward- Howlett by dishonestly exploiting their position to control or obtain money or proprietary rights belonging to Ronald Ward-Howlett, for the benefit of David Barton, Lucinda Barton and/or their businesses, to which David Barton, Lucinda Barton and /or their businesses were not entitled.

 

Voluntary Particulars

(i) placing David Barton in a position of influence over Ronald Ward-Howlett's personal, legal and financial affairs;

(ii) enabling David Barton and Lucinda Barton to become principal beneficiaries under Ronald Ward-Howlett's will;

(iii) using Ronald Ward-Howlett's money to fund a deposit for the purchase of a Ferrari motor car;

(iv) taking money and / or credit balances and / or cheques from Ronald Ward- Howlett in excess of any sums legitimately owed by him for care or associated services, including:

a) a cheque for £112,348.48 for the purchase of a property at 6 Post Office Road;

b) monies totalling £865,000 between April and December of 2013;

(v) receiving money and / or credit balances and / or cheques from Ronald Ward- Howlett in excess of any sums legitimately owed by him for care or associated services, as in iv., above;

(vi) using Ronald-Ward-Howlett's money to purchase land that David Barton intended to obtain under the wills of either Ronald Ward-Howlett or Katie Willey, or by agreement with Katie Willey."

142.The prosecution alleged that Rosemary Booth played an active role in this conspiracy, because she was instrumental in recruiting Mr Ward-Howlett to Barton Park, and in isolating him from his previous solicitor, Joan Williamson. Mr Ward-Howlett made a will within weeks of entering Barton Park Nursing Home on 23 February 2011, in which Rosemary Booth received a £6,000 bequest, with the residual estate left to David Barton. At the same time, the services of Mr Ward-

 

Howlett's long term financial adviser, Mr Milford, were dispensed with. Rosemary Booth drafted, in her own handwriting, a letter dismissing Mr Milford, which Mr Ward-Howlett then copied. As we noted when summarising the facts, she only accepted that the handwriting was hers after Kiria Hughes had given that evidence to the jury, despite being cross-examined to the contrary. She also witnessed the second will made in favour of David and Lucinda Barton. She acted as the "eyes and ears" of David Barton, and generally assisted him at Barton Park.

143.Furthermore, she was aware of the relationships which David Barton cultivated with particular residents.

144.In our judgment, these various strands of evidence justified count 16 as regards Rosemary Barton being left to the jury. The evidence demonstrated *prima facie* her involvement in this criminality.

145.In his ruling on the submission of no case to answer, the judge also referred to evidence from Kiria Hughes, following Katie Willey's death, of David Barton, in the presence of Rosemary Booth, telling Ronald Ward-Howlett that he would not be buried in the family grave if he did not cooperate. In fact, this was a mistake, as the judge subsequently acknowledged, when it was pointed out to him. Kiria Hughes had not suggested that Rosemary Booth was present when this conversation took place. The judge later summed up the conversation correctly to the jury. This mistake did not mean that the judge erred in leaving the case against Rosemary Booth on count 16 to the jury. As we have said, even without this evidence, there was ample evidence to justify proceeding with this count against Rosemary Booth.

***The Tinto conversation***

146.Rosemary Booth complains of the judge's decision to admit evidence from Kiria Hughes under sections 101 and 103 of the Criminal Justice Act 2003 ("the 2003 Act"), of a conversation she overheard in about June 2014 between David Barton and Rosemary Booth. Ms Hughes said that this conversation took place shortly after the police investigation had commenced into the frauds. She overheard David Barton and Rosemary Booth discuss a payment of £10,000 that had been made by a resident, James Tinto, into Rosemary Booth's bank account, some years before. Ms Hughes said that Barton and Booth were discussing trying to find furniture to the equivalent value of £10,000, so that, if the police ever questioned her about the payment, she could say that it was in return for the sale of furniture from Rosemary Booth to James Tinto.

147.It was accepted that Rosemary Booth had received a payment of £10,000 from James Tinto in 2005 but the defence argued that it had not been suggested by the prosecution that this was improper. The judge held, nonetheless, that the evidence potentially came within section 101(1)(d), as evidence relevant to important matters in issue between the prosecution and Rosemary Barton, because it demonstrated a propensity on the part of Rosemary Booth, first, to be untruthful and, secondly, to co-operate with David Barton to conceal the truth and to invent a bogus explanation for the payment. It additionally shed light on Rosemary Booth's relationship with David Barton.

 

Section 103(1)(b) sets out that the "matters in issue" can include the defendant's propensity to be untruthful.

148.The judge considered whether the evidence should nevertheless be excluded, on the basis that its admission would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it (section 101(3)). The judge had regard to the "checklist" in *R v Hanson [ [2005] 2 Cr App R 21*2005] EWCA Crim 824; and concluded that the evidence should be admitted.

149.The judge made clear that he was admitting this evidence on condition that the prosecution would admit that the £10,000 was not dishonestly obtained. This was subsequently dealt with by way of an agreed fact that was put before the jury.

150.Kiria Hughes was cross-examined on her evidence on behalf both of David Barton and Rosemary Booth. Both Barton and Booth subsequently gave evidence about this conversation. In essence, their case was that Kiria Hughes had misheard or misunderstood a snippet of conversation between Barton and Booth. They had had a conversation about a payment of £10,000, but it concerned a payment of £10,000 that David Barton made to Rosemary Booth in return for bedroom furniture that had been supplied to him by Rosemary Booth's father in law. It was pointed out that Kiria Hughes, a former bookkeeper at Barton Park, had pleaded guilty to false accounting and had agreed to give evidence on behalf of the prosecution. It was suggested she had an obvious motive for giving evidence that was damaging to Barton and Booth.

151.Mr Payne submits that the judge should have excluded this evidence under section 101(3) of the 2003 Act or section 78 of the Police and Criminal Evidence Act 1984, on the basis that it was more prejudicial than probative. Indeed, he submits that the evidence was grossly disproportionate to its probative value. In particular:

i)The prosecution had chosen not to charge any offence in relation to the payment to Mr Tinto;

ii)Kiria Hughes's evidence was of dubious value, as she had lied in interview and the conversation had taken place several years previously;

iii)Rosemary Booth was, at the time, a person of good character;

iv)This was a snippet of conversation, the content of which differed from any of the offending alleged by the prosecution in the indictment;

v)The reference to a payment of £10,000 being received by Rosemary Booth from an elderly resident might well prejudice her in the eyes of the jury, and, without more, could lead the jury to suspect that there was something untoward about the transfer from Mr Tinto; and

 

vi)The prejudicial nature of this evidence was increased because there was no other evidence that Rosemary Booth had been materially enriched by any of the residents.

152.In response, Mr Perry submits that:

i)This evidence of David Barton and Rosemary Booth conspiring together to tell a lie to police about obtaining a significant sum of money from a resident was of obvious relevance to a central issue between the parties;

ii)David Barton and Rosemary Booth agreed that a conversation took place, although they disputed Kiria Hughes's evidence as to its content;

iii)Rosemary Booth could challenge Kiria Hughes's account in cross-examination, and, along with David Booth, give evidence of the conversation;

iv)The prosecution made a formal admission that no allegation was made in respect of the receipt of the money; and

v)The judge gave a careful direction in relation to the evidence, setting out the competing versions of the evidence, and emphasising that it was to be considered only as one piece of evidence in the case.

153.There is no suggestion that the judge misdirected himself as to the test to be applied. We agree the evidence was relevant to: (i) the suggested propensity on the part of Rosemary Barton to be untruthful about financial transactions with residents; (ii) the extent to which Rosemary Booth worked closely together with David Barton; and (iii) her propensity to work with David Barton to invent a false explanation for a payment that might be investigated by the police. The evidence could be challenged and contradicted by Rosemary Booth and David Barton. The issue was addressed appropriately in the summing up and, in our view, was properly admitted.

***Safety of other counts (5, 16 and 19)***

154.Given we have dismissed all the other grounds of appeal, this ground falls away. We have looked with care at these convictions and are satisfied that they are safe.

**Sentence: David Barton**

155.David Barton was sentenced to a total of 21 years' imprisonment. The maximum sentence for a single count of theft is seven years and for conspiracy to defraud 10 years' imprisonment. He renews his application for leave to appeal against sentence. In his clear and succinct oral submissions, Mr Sastry argued that the total term was manifestly excessive. He submits that although some allowance was made to reflect the principle of totality, it was insufficient.

 

156.He further contended that the judge failed sufficiently to allow for the fact that the home was run to an exceptionally high standard and no resident suffered any physical harm or discomfort.

157.It is accepted that the judge correctly identified the appropriate category for each offence and that the individual sentences are not manifestly excessive. The simple submission is that, having regard to totality, 21 years' imprisonment was far too long for the offending.

158.The following features of the offending are relevant:

i)David Barton was of good character;

ii)By contrast, the indictment period was long with multiple victims;

iii)This was a very substantial breach of trust involving financial abuse of the elderly coupled with the dishonest attempts to sue the estates of some;

iv)The sums illegally obtained ran into millions and the conspiracy aimed for more;

v)The fraudulent behaviour involved a variety of sophisticated devices, including the manipulation of powers of attorney, wills and other legal processes;

vi)David Barton involved others in the commission of the offences;

vii)The victims were persuaded to abandon contact with their families, friends and professional advisors, often by flattery and cajoling, sometimes by persuasion or even threats;

viii)Although the victims were not subjected to physical harm or discomfort, the psychological consequence of their isolation and the undermining of their relationships with their families, friends and professional advisors had an impact; and

ix)Whilst the exploitation was gross, unusually, some of the victims themselves do not appear to have appreciated that they had been exploited.

159.This was an exceptional case involving a high level of exploitative criminality that was targeted at vulnerable elderly individuals, and it undoubtedly merited a long overall sentence of imprisonment. The question for us is whether the total term is manifestly excessive. In respectful disagreement with the experienced judge who presided over the trial, we have concluded that a total sentence of 21 years is manifestly excessive for a man of 64 years of good character when taking into account the features we have identified. In our view, in all the circumstances, the total term was significantly too long.

160.We conclude that a total term of 17 years' imprisonment represents the appropriate custodial term. That can be achieved by reducing the sentence on each of counts 1 and 16 to 5 years'

 

imprisonment, on each of counts 19 and 22 to 7 years' imprisonment, and by ordering the sentence on Count 25 to be served concurrently with the other sentences.

**Conclusion**

161.The appeals against conviction are dismissed. We give leave to David Barton to appeal against sentence and allow the appeal by reducing the overall sentence from 21 years' to 17 years' imprisonment in the way we have indicated.