

## IN BRIEF

- ▶ The relationship between two concepts: honesty and integrity.
- ▶ Clear ethical standards are the foundation of our profession and the basis of the public trust upon which our profession depends.
- ▶ Distinguishing between the two, integrity is the standard that matters for the regulation of our profession.

# Regulatory matters

In a new NLJ series dedicated to navigating the challenges of regulation, John Gould explains why honesty & integrity are not the same

You might have thought that what it means to act honestly or with integrity wouldn't have been in much doubt since the days when Adam came to realise that serpents weren't to be trusted to the ends of the Garden of Eden. You would, however, be wrong. Ethical standards change according to time and place. If there had been a Viking Code of Conduct, no doubt successful murder and pillage would have been required outcomes and the particularly harsh treatment of monks an indicative behaviour.

The same, of course, is true of the standards of conduct generally. Once, a solicitor who kept clients' money in his own bank account and acted as a banker would not have been criticised whereas a solicitor who advertised or, for all I know, failed to wear a top hat within the precincts of the court, would have been found guilty of 'conduct unbecoming'. This evolutionary change is one of the reasons why the culpability of conduct is to be judged by a specialist tribunal on the particular facts of the case by the contemporary standards of the profession.

But the muddle of which I write does not relate to social change, it relates essentially to the relationship between two concepts: honesty and integrity. This matters because clear ethical standards are the foundation of a profession and the basis of the public trust upon which a profession depends. In this article I explore the two concepts and suggest why integrity is the one that matters for the regulation of professions.

## Question for the jury

There has never been an encompassing definition of dishonesty because it is essentially a 'jury question'. What must be applied are the ordinary standards of reasonable and honest people. In most cases, however, that objective standard cannot be the end of the story. A foreign visitor, for example, who genuinely believes that bus travel is free in Wales may not be acting dishonestly in not paying the fare. The hypothetical jury must first consider the facts including the state of mind of the accused

and then they must apply the standards of ordinary decent people.

A 35-year diversion from this basic approach followed from *R v Ghosh* [1982] 1 QB 1053. *Ghosh* put forward a different two-part approach. First the jury was to decide whether what was done was dishonest by the ordinary standards of reasonable and honest people; second it had to consider whether the defendant must have realised that what he was doing was dishonest by those standards. This posed the problem of the defendant who claimed (probably correctly) that he hadn't considered for a moment how his conduct would be viewed by hypothetical reasonable and honest people. It seems entirely plausible, for example, that a hypothetical burglar's mind during the course of his burgling would be on a hypothetical guard dog or some hypothetical tool of his trade rather than the hypothetical view of others as to the ethical quality of his actions. This led Lord Hoffmann in *Barlow Clowes International Ltd (in liquidation) v Eurotrust International Ltd* [2005] UKPC 37, [2005] All ER (D) 99 (Oct) to opine that in order to have the necessary realisation, it wasn't necessary for the defendant to have actually thought about what the standards were. This suggested that what was required was a sort of intuitive hypothetical realisation of the obvious or perhaps (with hindsight) that *Ghosh* was deeply flawed.

## Disciplinary proceedings

For the purposes of disciplinary proceedings the *Ghosh* test, as endorsed in *Twinsectra Ltd v Yardley and others* [2002] 2 AC 164, [2002] 2 All ER 377 was applied following the Court of Appeal's decision in *Bultitude v The Law Society* [2004] EWCA Civ 1853. The application of the *Ghosh* test by disciplinary tribunals became routine when considering dishonesty. This was to extend the application of the test which logically should only be relevant when the defendant's ethical understanding is actually in issue. Recently that branch of the legal rose that had grown from *Ghosh* was pruned by the Supreme Court in *Ivey v Genting Casinos (UK) Ltd (t/a*

*Crockfords*) [2017] UKSC 67, [2017] All ER (D) 134 (Oct) which was a case about cheating at cards (apparently in a game of 'Punto Banco' with which I have to say I am not personally familiar). Although the actual decision did not require the concept of dishonesty to be revisited, the Supreme Court reached a unanimous view. The meaning of dishonesty is the same in both criminal and civil proceedings and the second (subjective) leg of the *Ghosh* test was wrong and directions based upon it should no longer be given.

Lord Hughes said at [74]: 'When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held. When once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest.'

## Professional conduct

So much for dishonesty, but what about integrity? Integrity is an almost universal and express requirement in codes relating to professional conduct. It is often linked with honesty and so, to take but two of numerous examples, the Code of the Nursing and Midwifery Council imposes an obligation to 'act with honesty and integrity' [20] and the General Optical Council's Standards of Practice includes a requirement to act with 'honesty and integrity to maintain public trust' [16.1].

Integrity is often linked with public confidence, reputation and trust. Sometimes it stands alone, as in the case of the SRA's Code of Conduct which imposes an obligation to 'act with integrity' (Principle 2). Unlike honesty, integrity in the professional disciplinary

context has never been considered to require the second (subjective) element of the now defunct *Ghosh* test. It has been the objective ethical standard of the profession.

On 7 March 2018, the Court of Appeal (Jackson, Carr and Singh LJ) handed down judgment in the SRA's appeal from the decision of Mostyn J in *Malins v SRA* [2017] EWHC 835 (Admin), [2017] All ER (D) 82 (Apr). Controversially the judge had decided that integrity and honesty were conceptually the same thing. This came as something of a surprise given previous authority that they were not and the absence of such an argument from either party during the hearing. Referring to elements of the definition of dishonesty in the Oxford English Dictionary and addressing the position 'as if I had a blank canvas' before considering the authorities, the judge concluded that honesty and integrity were synonyms. The Court of Appeal have now confirmed that honesty and integrity are not the same thing.

The key distinction is that honesty is a single standard applicable to all members of society whereas integrity is the higher standard of a particular profession. The additional distinction that dishonesty was subject to the two part *Ghosh* test, whereas lack of integrity was wholly objective, has dropped away following *Ivey*. Logically a very similar approach of establishing the facts, including state of mind, and then determining objectively, to the relevant standard, how those facts are to be characterised should apply to both dishonesty and integrity. The difference being that in the case of dishonesty the standard is that of ordinary and decent people whereas for a professional it is the standard required of the reasonable and competent member of that profession.

Fortunately this accords with both common sense and the purposes of professional regulation. If it were right that honesty and integrity were the same, then the answer to the question, 'Is the standard of integrity to be expected by a member of the public of a high court judge the same as that to be expected of a cold calling salesman of high yielding investment opportunities?' would have been affirmative.

So what did Jackson LJ consider integrity to be in his judgment in *Solicitors Regulation Authority v Malins* [2018] EWCA Civ 366, [2018] All ER (D) 61 (Mar)? He agreed with the comments of Sir Brian Leveson P in *Williams v SRA* [2017] EWHC 1478 (Admin), [2017] All ER (D) 120 (Jun): 'Honesty, ie a lack of dishonesty, is a base standard which society requires everyone to meet. Professional standards, however, rightly impose on those who aspire to them a higher obligation to demonstrate integrity in all of their work. There is a real difference between them.'

Jackson LJ identified the word integrity

as a 'useful shorthand' to express the higher standards which society expects of professionals and which professions expect from their own members. This is an insightful approach because if the word integrity had meant the same as honesty, it would have been necessary to adopt a new word to encompass the required concept of a necessary professional ethical standard which was more than common honesty.

Without seeking to provide a definitive definition, Jackson LJ went beyond the unambitious idea of something you know when you see it. He said at para [100]: 'Integrity connotes adherence to the ethical standards of one's own profession. That involves more than mere honesty. To take one example, a solicitor conducting negotiations or a barrister making submissions to a judge or arbitrator will take particular care not to mislead. Such a professional person is expected to be even more scrupulous about accuracy than a member of the general public in daily discourse.'

He was then able to refer to examples drawn from previous integrity cases relating to solicitors at para [101]:

- (i) A sole practice giving the appearance of being a partnership and deliberately flouting the conduct rules (*SRA v Emeana* [2013] EWHC 2130 (Admin), [2013] All ER (D) 220 (Jul)).
- (ii) Recklessly, but not dishonestly, allowing a court to be misled (*Brett v SRA* [2014] EWHC 2974; [2015] PNLR 2, [2014] All ER (D) 82 (Sep)).
- (iii) Subordinating the interests of the clients to the solicitors' own financial interests (*SRA v Chan* [2015] EWHC 2659 (Admin), [2015] All ER (D) 124 (Sep)).
- (iv) Making improper payments out of the client account (*Scott v Solicitors Regulation Authority* [2016] EWHC 1256 (Admin), [2016] All ER (D) 194 (May)).
- (v) Allowing the firm to become involved in conveyancing transactions which bear the hallmarks of mortgage fraud (*Newell-Austin v Solicitors Regulation Authority* [2017] EWHC 411 (Admin); [2017] Med LR 194, [2017] All ER (D) 43 (Mar)).
- (vi) Making false representations on behalf of the client (*Williams*).'

#### A higher standard?

So if the distinction between integrity and honesty has now been confirmed as being the distinction between the standard of an ordinary decent person and the higher standard of the particular profession, a professional who acts dishonestly will always be acting without integrity. Proving dishonesty is to prove an aggravating factor but is not required to show a lack of integrity. For solicitors the requirement to act with integrity in Principle 2 of the

Code of Conduct is the correct expression of the relevant requirement. The proposed amendment to that Principle to require 'honesty and integrity' is confirmed by the decision in *Malins* as unnecessary. Integrity as a concept is sufficient and indeed in some cases the addition of the word 'honesty' may be taken to colour and restrict the application of the concept of integrity in situations such as sexual misbehaviour which would not generally be regarded as dishonest (see *Bar Standards Board v Howd* [2017] EWHC 210 (Admin), [2017] All ER (D) 138 (Feb)).

Dishonesty, if alleged as a characterisation of an action or inaction, must be properly pleaded. It is equally important that where a lack of integrity is alleged it should be clearly pleaded that the breach goes to fitness to practise and is therefore sufficiently serious to justify striking off. The requirements of fairness are the same.

A re-focus on lack of integrity rather than dishonesty in the consideration of allegations is both more logical and more functional. There is no doubt that for a solicitor to fall below even the standard of honesty of an ordinary person is a seriously aggravating factor but it should not form the central question for a tribunal. The central question is that of integrity or in other words the standard of the profession. Dishonesty is a blunt and inflexible tool. Not all dishonesty is equally serious. Recently we have seen two cases before the SDT in which mitigated dishonesty was not considered sufficiently serious to require striking off (see *Sovani James* [11657-2017] and *Peter Naylor* [11602-2017]).

#### Comment

An allegation of dishonesty has become a shorthand for such a serious failure to act with integrity as to require striking off in the absence of exceptional circumstances. But a serious lack of integrity justifying striking off is not coterminous with dishonesty. Serious failures of integrity may lead to striking off, even if not dishonest. Some dishonesty may not (perhaps exceptionally) be sufficiently serious to make striking off appropriate. Some actions which lack integrity may not require the sanction of striking-off. It is a damning forensic criticism that a professional has not even met the standard of honesty of ordinary and decent people. It is relevant to sanction but it is not actually the point. The over-emphasis of the determination of honesty or dishonesty in solicitors' disciplinary cases has a relationship with other issues including the application of the criminal standard of proof—but that is for another day.

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