

# **THE COUNCIL THE QUARTERLY**

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### **New Test for Dishonesty**

It is not every day that a decision of the Supreme Court of the United Kingdom overrules previous case law causing a profound change in the way the law will be applied going forward.

I am talking of course of the decision in *Ivey v Genting [2017] UKSC 67*.

Law students and practitioners alike will be aware of the seminal case of *R v Ghosh*, which for over 35 years has formed the test applied for determining dishonesty in criminal trials.

The Ghosh test involved a two stage subjective and objective test:

(1) Was the act one that an ordinary reasonable honest person would consider to be dishonest (the objective test)?

(2) If the answer to (1) above is 'yes', must the defendant have realised that what he was doing was, by those standards, dishonest (the subjective test)?

The purpose of the second limb was to provide a defence to those who committed an act which was objectively dishonest, but they themselves did not realise it.

However, in *Ivey* Lord Hughes held that the Ghosh test "does not correctly represent the law and that directions on it should no longer be given". Instead the correct test that should be applied is the test set out in *Royal Brunei and Tan [1995] 2 AC 378* as clarified by the Privy Council in *Barlow Clowes [2005] UKPC 37*, which is the test applied for dishonesty in civil claims.

The decision in *Ivey* has the effect of removing

the second limb of the Ghosh test thus preserving only the objective limb of that test.

The conduct of the defendant is assessed according to the objective standard of dishonesty though importantly still in light of his actual knowledge.

If Ghosh directions are no longer to be given then the test for criminal and civil dishonesty will be the same. Of course one difference that will still remain is the burden and standard of proof. The prosecution in criminal trials will have to prove dishonesty beyond reasonable doubt, whereas in a civil trial the claimant will only have to discharge its burden on the balance of probabilities.

**For more information please contact:**

Chris Blunt  
Phillips  
[chris.blunt@phillips.gj](mailto:chris.blunt@phillips.gj)  
T: (+350) 200 73900



### **AGM**

The Annual General Meeting of the General Council of the Bar will be held on Wednesday 25 April 2018 at 5 p.m. at the Royal Gibraltar Yacht Club.

This will be an historic AGM as it will be the last meeting of the Bar Council before it is replaced by the Law Council by virtue of the commencement of the Legal Services Act.

All members are should have received the AGM pack, which contains nomination forms for the elections to the Council including the election of a Chairman. If any members have not received the relevant papers please contact the Secretary, Madge Bishop, at [barcouncil@gibtelecom.net](mailto:barcouncil@gibtelecom.net).

All members are reminded that only those members who are up-to-date with their subscriptions will be allowed to nominate and vote at the AGM. Please note that voting by proxy is not permitted and only members present in person will be allowed to vote.

### **Funds and the emerging digital asset class - Gibraltar**

Off the back of Gibraltar's front and center global attention in relation to regulating Distributed Ledger Technology ("DLT") institutions, Gibraltar is increasingly being seen as a potential jurisdiction from which to set-up

investment funds investing in blockchain, distributed ledger technologies, cryptocurrencies and tokens. Cryptocurrencies and tokens are increasingly being recognised as a new alternative asset class in their own right as 'Digital Assets'. This brief article touches upon a personal opinion (and not that of the Bar Council's) and views on how such funds may be approached from a Gibraltar perspective and a macro view on investments in the DLT space generally. The below is also largely an oversimplified synopsis.

### The different facets of investing in DLT

Generally and more increasingly there will be two faces to investment into DLT technologies and their development.

•1) On the one hand you have the typical private buy side of equity in projects, initiatives, technologies and companies. This will more likely be populated by institutional capital in the form of private equity, 'accredited' (Experienced) investor funds and other hedge funds.

•2) On the other hand you have the public buy side of 'crowd sale' participation into projects on the basis that individuals will purchase cryptocurrencies for use as a currency or alternatively what is increasingly referred to and oversimplified as a 'utility token' to be able to use a service on a tokenised platform. Participation in these cryptocurrencies or utility tokens involve public participation and easy access for retail individuals/investors.

•2.1) This latter category also includes investing in mining activities or 'staking', where pooling of cryptocurrency or token investments can be used for mutual benefit and payout rewards. This particular form of investment is not widespread but as particular cryptocurrency and token projects move on to proof of stake frameworks this may increasingly be seen. Given the pooled nature of these investments, participation will most likely need to take the shape of Collective Investment Schemes.

Private institutions also participate in 2 and 2.1.

(For the purposes of this article I will not go into the details on how these 'utility tokens' should be considered in respect of being a financial instrument, a transferable security or either of these classifications).

In terms of the former category, investing in the equity of projects or companies developing technologies will not see much problem from a custodianship and execution perspective. Some predict that the value of the developing technology may best be harnessed by investing in private projects or companies developing enterprise DLT technologies as opposed to the public buy side of the latter category explained.

Others believe that there is competing or other value in participating in the public side of cryptocurrencies and tokens. The problem with the latter category is that (1) little consumer protection exists to the most vulnerable class of investor (retail) and (2) as a result of the constantly developing technologies upon which these cryptocurrencies and tokens are based arranging execution venues and regulated custodianship is a problem yet to be truly solved around the globe.

### Digital Asset Fund Pain Points

Investment funds proposing to invest in the latter in or from Gibraltar over the coming months will likely see the structure of Experienced Investor Funds EIFs. The Gibraltar Funds and Investments Association in their February 2018 newsletter have announced that they will be making representations as to how the funds industry in Gibraltar will approach fund setup investing in cryptocurrencies and tokens and these proposals are eagerly awaited.

As these funds are coming through, funds and investment directors need to consider new pain points in respect of:

(i) **cybersecurity** - As is well known within the industry Digital Asset and Cryptocurrency exchanges, intermediaries and service providers are particularly vulnerable to cybersecurity, malware and phishing attacks. Compromised individuals or fund hardware/software can result in Fund assets being hacked and stolen. For more information on these risks, I would recommend reviewing Europol's Internet Organised Crime Assessment (IOCTA) 2015 and 2017 ;

(ii) **custodianship & physical security** - custodianship of Digital Assets is a fundamental aspect of any investment into Digital Assets as these assets are protected by the privacy of what are known as 'private keys / seed words'. The private key and/or seed word gives full control over the transfer of Digital Assets. Some Digital Asset private keys can be stored on encrypted devices which are then typically kept in secure physical environments. Funds arranging self-storage of Digital Assets can be a difficult, high risk and potentially a costly operation. Increasingly we are seeing solutions for this problem for institutional and retail investors in the form of businesses like Digital Asset Management Ltd (disclosure: the author is a Director), who are seeking regulatory approval in Gibraltar with the GFSC as a non-depository custodian wallet provider, and Kingdom Trust in the USA who a non-depository custodian. Other aspects to consider are the potential of ransom and kidnap, and the difficulties of obtaining adequate ransom and kidnap insurance and the complexities associated in relation to claiming under such policies;

(iii) **depositary** - Gibraltar's Experienced Investor Funds Regulations under regulation 8 require that an EIF shall have a depositary unless (a) the fund is a closed fund; or (b) the GFSC makes a determination that the fund is not required to have a depositary. The only authorised depositaries in Gibraltar, at this stage appear to be banks who are not yet able to take on depositary services or facility of Digital Assets. However, other solutions may be possible where a depositary is still appointed in relation to funds investing in Digital Assets;

(iv) **valuation** of assets under management and investment parameters - International Financial Reporting Standards have not yet been able to provide any guidance as to how Digital Assets should be treated from an accounting perspective, nor is this expected for a while and this is frequently changing. Similarly, no regulations or guidance exist in relation to regulating all types of Digital Assets so investment directors will need to determine their own investment parameters and criteria as well as policy and philosophy.

It is clear that funds in Gibraltar will need to address and monitor these concerns by way of policy documents, processes and controls. The protection of investor's assets is the objective but ultimately in order to be consistent with HMGoG and the GFSC's objective in maintaining the reputation of Gibraltar in regulating DLT institutions, applying the same principled approach to these nuanced issues of investment funds should be viewed in the same approach.



For more information on these articles please contact:



Philip Vasquez  
TSN Law  
[pv@tsnlaw.com](mailto:pv@tsnlaw.com)  
T: +350 20079423

## Anti-Money Laundering and Combating Terrorist Financing Guidance Notes

The Council welcomes the Guidance Notes which were issued by the Registrar of the Supreme Court on 1 November 2017 and circulated to all firms. A copy of the notes can be found on the Courts Service website at <http://www.gcs.gov.gi/index.php/aml-cft>. Members are reminded that Guidance Notes apply to "all notaries, lawyers and other staff in a law firm who are involved in antimoney laundering and terrorist financing." They are also reminded that the Registrar has made the Guidance Notes applicable to any new relationship entered into on or after the 1 February 2018 to allow professionals adequate time to introduce whatever amendments may be necessary to their existing compliance policies and procedures with ample time. The Council therefore recommends that all firms and practitioners become fully conversant with the Guidance Notes and review all existing compliance policies and procedures as a matter of priority. Contact: Kenneth Navas - [ken@kennethnavas.com](mailto:ken@kennethnavas.com)

## General Data Protection Regulation

The Council reminds members that the implementation of the General Data Protection Regulation ("GDPR") will take place on 25 May 2018. As an EU regulation, the GDPR will not require transposition and will automatically become law in Gibraltar by 'direct effect'. The Council welcomes the guidance notes issued by the by the Gibraltar Regulatory Authority ("GRA") providing practical advice for all businesses in their preparations for compliance. To date the GRA has published 4 guidance notes which can be found on their website: [www.gra.gi](http://www.gra.gi). The GRA's firm recommendation is that businesses start preparing immediately for the implementation of the GDPR. Firm's should not underestimate the magnitude of the requirements of the new framework and the very significant impact upon most existing data management systems. The Council recommends that all firms and practitioners become fully conversant with the requirements of the GDPR and avail themselves of the guidance provided by the GRA. Contact: Kenneth Navas - [ken@kennethnavas.com](mailto:ken@kennethnavas.com)

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