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The Legal Issues relating to ‘Betting-gate’

Ian Loveland

The scandal which emerged in the run up to the 2024 general election relating to the alleged placing of bets on the election date by some Conservative politicians, Conservative Party officials and some police officers deployed in No. 10 Downing Street has raised legal as well as political questions. This paper considers the scope of two offences which appear to be in play in what is likely to become known as ‘Betting-gate;’ the statutory crime created by s.42 of the Gambling Act 2005 and the common law offence of misconduct in public office.

One of the more optimistically ingenious defences served up by a defendant in a prosecution involving an offence of dishonesty came from a Mr Gilks in 1972.¹ Mr Gilks was accused of theft per s.1 of the Theft Act 1968. He had mistakenly been presumed by the Ladbrokes shop in North Cheam to have staked a winning bet on a horse, but had actually bet on a similarly named runner which trailed in some substantial way behind first place.² Mr Gilks knew that he was not entitled to the £100 winnings, but took it anyway and refused to give it back. The core of Mr Gilks’ defence was that since the ‘victim’ of the alleged theft was a bookmaker, what he had done was not dishonest, either subjectively in his own view or objectively among the public at large:

“Now, what this man says is that he did not act dishonestly. He says in his view bookmakers and punters are a race apart and that when you are dealing with your bookmaker different rules apply. He agreed it would be dishonest if his grocer gave him too much change and he knew it and kept the change; he agreed it would be dishonest but he says bookmakers are different and if your bookmaker makes a mistake and pays you too much there is nothing dishonest about keeping it.”³

The QC chairing the Quarter Sessions where Mr Gilks was prosecuted was not much impressed by this innovative submission as a matter of law. Mr Gilks’ honesty in a s.1 sense remained a matter for the jury to determine: " Well, it is a matter for you to consider, members of the jury, but try and place yourselves in that man's position at that time and answer the question whether in your view he thought he was acting honestly or dishonestly."⁴ Even if it were true that bookmakers were a much-despised occupational class in the England of the mid-twentieth century, the jury was evidently unpersuaded as to the sincerity of Mr Gilks’ assertion, and found him guilty. His sentence was a fine of £250. His appeal, challenging the adequacy of the direction to the jury, did not succeed.

While the nature of the gambling industry – and of its legal regulation – has changed greatly in the 50 years since *Gilks* was decided, Mr Gilks’ suggestion that bookmakers were a morally undeserving breed seems to have some resonance in the modern era. A recent report by the

¹ [1972] 1 W.L.R. 1341.

² The clerk in Ladbrokes was presumably English, as he or she failed to note the differences (territorial and ethnic) between the horse Mr Gilks backed – *Fighting Scot* – and the horse which won – *Fighting Taffy*.

³ Ibid, 1345E.

⁴ Ibid, 1345G.

Gambling Commission identified widespread public disapproval of many industry practices.⁵ A January 2023 survey by the Statista group recorded only 6% of respondents offering a favourable view of the industry, while 21% held; an unfavourable view and 40% regarded the industry very unfavourably.⁶

If there has latterly been a sub-group of the population regarded with similar disdain, it is perhaps some of the politicians and party officials who fought the 2024 general election.⁷ In the run up to the poll, the media was awash with reports speculating that various Conservative politicians and officials had placed bets on the date of the election shortly before its announcement, when they already knew what the date would be.⁸ As of July 2024, five Conservative party politicians or officials had been identified in the press as having placed bets on the election. Those concerned were Craig Williams, who when he placed his alleged bet was both an MP and Parliamentary Private Secretary to Rishi Sunak; Tony Lee, Conservative Party Director of Campaigning; Laura Saunders, wife of Tony Lee and Conservative candidate in the 2024 election for the Bristol North West constituency; Nick Mason, Conservative Party Chief Data Officer; and Russell George, a Conservative member of the Senedd.⁹ Various members of the Metropolitan Police were also reported to have made similarly well-informed bets.¹⁰

Then Prime Minister Sunak's dismay at such alleged behaviour eventually led him to withdraw official party support for Williams' and Saunders' candidatures,¹¹ while Messrs Lee and Mason each took a 'leave of absence' from their party roles. A press release from the Metropolitan Police on 27 June 2024¹² indicated that an investigation had been opened in respect of two possible criminal offences. The first was the recently created statutory crime of 'cheating', concisely articulated in s42(1) of the Gambling Act 2005:

"42 Cheating

⁵ [Gambling participation in 2019: behaviour, awareness and attitudes - Public opinion on gambling policy \(gamblingcommission.gov.uk\)](https://gamblingcommission.gov.uk)

⁶ [Opinion on the gambling industry Great Britain 2023 | Statista](https://www.statista.com/topics/1112/gambling-industry-great-britain-2023/)

⁷ [General election 2024: three quarters have a negative view of politics in Britain | YouGov](https://www.yougov.com/election-2024/three-quarters-have-a-negative-view-of-politics-in-britain/)

⁸ For example A. Toth, "Everything we know about Tory election betting scandal and who is being investigated", Independent, 27 June 2024; [Tory election betting scandal: Everything we know and who is being investigated | The Independent](https://www.independent.co.uk/news/politics/tory-election-betting-scandal-everything-we-know-and-who-is-being-investigated/); J. Elsom et al, "FLUTTER MORONS: Election betting scandal deepens as Tory candidate and her party official husband are probed by gambling watchdog", The Sun 20 June 2024; [Election betting scandal deepens as Tory candidate and her party boss husband are probed by gambling watchdog | The Sun](https://www.thesun.co.uk/news/28724722/rishi-sunak-drops-two-tory-candidates-engulfed-in-election-betting-scandal-saying-we-can-no-longer-support-them/); N.Gutteridge, "Huge spike in bets on day before Sunak announced election" Daily Telegraph, 20 June 2024; [Huge spike in bets on day before Rishi Sunak announced general election date](https://www.telegraph.co.uk/news/politics/2024/06/20/huge-spike-in-bets-on-day-before-rishi-sunak-announced-general-election-date/).

⁹ One of the more helpful overviews of the initial events – which does not suffer the potentially distortive effects of (UK) party political bias – is offered by Anna Gordon, "Breaking down the UK election betting scandal", Time, 27 June 2024; [Breaking Down the U.K. Election Betting Scandal | TIME](https://www.time.com/time/world/2024/06/27/breaking-down-the-u-k-election-betting-scandal/). See also H. Johnson, "The election betting scandal explained", Channel 4 News Factcheck, 27 June 2024; [FactCheck: the election betting scandal explained – Channel 4 News](https://www.channel4.com/news/factcheck/the-election-betting-scandal-explained).

¹⁰ See inter alia The Guardian (no by-line), "'At least seven' Met Officers under investigation over general election bets", The Guardian, 27 June 2024; [At least seven Met officers under investigation over general election bets | Metropolitan police | The Guardian](https://www.theguardian.com/politics/2024/jun/27/at-least-seven-met-officers-under-investigation-over-general-election-bets); J. Tapsfield, "Gambling watchdog passes election date betting allegations about FIVE more police officers to Scotland Yard after Rishi Sunak FINALLY suspends two Tory candidates", Daily Mail, 25 June 2024; [Gambling watchdog passes election date betting allegations about FIVE more police officers to Scotland Yard after Rishi Sunak FINALLY suspends two Tory candidates | Daily Mail Online](https://www.dailymail.co.uk/news/28724722/rishi-sunak-drops-two-tory-candidates-engulfed-in-election-betting-scandal-saying-we-can-no-longer-support-them/).

¹¹ See *The Sun's* coverage at T. Godfrey, "BETS ARE OFF. Rishi drops two Tory candidates and 5 Met police office are accused of placing bets as gambling scandal deepens", The Sun, 25 June 2024; <https://www.thesun.co.uk/news/28724722/rishi-sunak-drops-two-tory-candidates-engulfed-in-election-betting-scandal-saying-we-can-no-longer-support-them/>.

¹² Metropolitan Police, "Met and Gambling Commission set out approach to election bets investigation"; [Met and Gambling Commission set out approach to election bets investigation | Metropolitan Police](https://www.met.police.uk/news/2024/06/27/met-and-gambling-commission-set-out-approach-to-election-bets-investigation/)

- (1) A person commits an offence if he—
(a) cheats at gambling, or
(b) does anything for the purpose of enabling or assisting another person to cheat at gambling.
(2) For the purposes of subsection (1) it is immaterial whether a person who cheats—
(a) improves his chances of winning anything, or
(b) wins anything....”.

The second was the long-established – and certainly not concisely defined - common law offence of misconduct in public office. The focus of this article is the legal issues raised by this situation rather than the specific circumstances of the various individuals involved.

S. 42 of the Gambling Act 2005

The 27 June 2024 Metropolitan Police press release clarified that, while the force itself would be conducting the misconduct in public office inquiries, the s.42 offence fell within the purview of the Gambling Commission. The Commission’s investigatory and prosecutorial powers are created (in notably stark terms) by s.28 of the Act. A s.42 conviction is not a trivial matter. The offence is triable either way, and on indictment can carry a two-year gaol sentence and a fine. It is unfortunate that the text of the 2005 Act does not offer an authoritative definition of ‘cheating’ in s. 42.¹³ The common law offence of cheating (other than of the public revenue) was one of many common law offences expressly abolished by s.32 of the Theft Act 1968.¹⁴ There is nothing in the text of the Gambling Act 2005 to indicate to what extent, if any, of the statutory concept of ‘cheating’ is informed by its abolished common law predecessor. S.42(3) takes us a little beyond the bare, dictionary meaning of the word by providing that:

“Without prejudice to the generality of subsection (1) cheating at gambling may, in particular, consist of actual or attempted deception or interference in connection with—
(a) the process by which gambling is conducted, or
(b) a real or virtual game, race or other event or process to which gambling relates”.

The matter came before the Supreme Court for decision in 2017. The controversy which the Supreme Court resolved unanimously in *Ivey v Genting Casinos (trading as Crockfords Club)*¹⁵ was not a criminal prosecution, but a breach of contract action over Crockford’s refusal to pay Mr Ivey £7.7 million which he had ‘won’ playing a card game called Punto Banco Baccarat.

¹³ S. 42 expressly repealed and replaced s.17 of the Gaming Act 1845, which provided:

“...That every Person who. shall, by any Fraud or unlawful Device or ill Practice in playing at or with Cards, Dice, Tables, or other Game, or in bearing a Part in the Stakes, Wagers, or Adventures, or in betting on the Sides or Hands of them that do play, or in wagering on the Event of any Game, Sport, Pastime, or Exercise, win from any other Person to himself, or any other or others, any Sum of Money or valuable Thing, shall be deemed guilty of obtaining such Money or valuable Thing from such other Person by a false Pretence, with Intent to cheat or defraud such Person of the same, and, being convicted thereof, shall be punished accordingly”.

¹⁴ On the meaning of the term at common law see C. Griffiths, “The honest cheat: a timely history of cheating and fraud following *Ivey v Genting Casinos (UK) Ltd t/a Crockfords*” (2020) 40 (2) Legal Studies 252.

¹⁵ [2017] UKSC 67; [2018] A.C. 391. For a more detailed analysis than is offered here, particularly in respect of the case’s broader (and substantial) implications for the meaning of dishonesty in other offences, see B. Wang, “Making theft: dishonesty ‘turns over a new leaf’” (2022) 86 (1) Journal of Criminal Law 3; K. Laird, Dishonesty: *Ivey v Genting Casinos Ltd (t/a Crockfords Club)* (2018) 5 Crim. L. R. 395. The constitutional law implications of the case – assessing whether the Supreme Court overstepped its proper ‘lawmaking’ role are nicely brought out in F. Stark, “Judicial development of the common law by the Supreme Court” (2020) 41 Oxford Journal of Legal Studies 1. In the more specific context of betting behaviour see Griffiths fn. 10 supra.

The case is nonetheless relevant to Betting-gate investigation, as the Court clearly told us that the meaning of s.42 cheating was the same in both the criminal and contract law contexts.¹⁶

Punto Banco Baccarat is (supposed to be) a game of pure chance,¹⁷ its outcome turning entirely on the player's guess as to the cards being dealt. Unlike in games as such as poker, there is no legitimate skill or knowledge which a player can bring to bear to nudge the odds of winning in her favour. Mr Ivey – a professional gambler – deployed a technique called 'edging' to shift those odds. The Court spent 27 paragraphs of its judgment explaining this remarkably complicated activity, which relied on a combination of Mr Ivey memorising the distinctive markings on the edges of particular cards and then inveigling Crockford's dealer into sticking with the same pack for repeated plays. Mr Ivey admitted what he had done, but defended his technique on the basis that it was a legitimate skill rather than cheating. At trial, the judge accepted that Mr Ivey was sincere in that belief, but such sincerity did not resolve the issue. As far as Mitting J and subsequently the Supreme Court were concerned, in a game supposedly of pure chance, such manipulation was properly regarded as cheating.¹⁸ The Court was willing to countenance the possibility that had Mr Ivey limited his technique to mere identification and memorisation of the idiosyncratic markings on the back of the cards, and had eschewed any attempt to persuade the dealer always to use the same pack, he might not have been cheating; "[B]ut [Mr Ivey did much more than observe; he took positive steps to fix the deck."¹⁹ The Court's conclusion rested primarily on an historical survey going all the way back to and beyond the Gaming Act 1710, s.5 of which made it a criminal offence for gamblers to engage in "any fraud, shift, cousenage, circumvention, deceit or unlawful device, or ill-practice whatsoever" when making their bets. 300 years later in *Ivey*, the Supreme Court concluded that all of these ideas had been absorbed into the concept of cheating within s.42, making s.42 in effect something of a catch all provision. In particular, the 1707 Act's use of terms other than 'fraud' mean that it was not even necessary for the prosecution to prove that the gambler had been dishonest: even clever sharp practice, like Mr Ivey's 'edging', would be enough:

"It would be very unwise to attempt a definition of cheating. No doubt its essentials normally involve a deliberate (and not an accidental) act designed to gain an advantage in the play which is objectively improper, given the nature, parameters and rules (formal or informal) of the game under examination".²⁰

Whether a particular course of conduct amounted to 'cheating' was quintessentially a jury question. The Supreme Court observed that cheating under s.42 is apparently much like an elephant.²¹ We may find it hard to describe it in advance, but the members of a jury could be relied upon to recognise it whenever they saw it.

Betting on election dates

The 'game under examination' here, 'the game' played by people who bet on election dates, is not necessarily – like Punto Banca Baccarat – one of pure chance. The sophisticated observer

¹⁶ [2018] A.C. 392, para38.

¹⁷ The game is enticingly described by the Empire Casino at [Play Punto Banco in London's Leicester Square 24/7 | Empire Casino \(thecasinolsq.com\)](https://www.empirecasino.com/Play-Punto-Banco-in-London-s-Leicester-Square-24-7). For sight of the game in play see [How To Play Baccarat - YouTube](https://www.youtube.com/watch?v=...).

¹⁸ The initial trial is reported at [2015] LLR 98. For Mr Ivey's reactions see [Top poker player Phil Ivey loses court battle over £7.7m winnings | Poker | The Guardian](https://www.theguardian.com/sport/2015/jun/16/phil-ivey-loses-court-battle-over-7m-winnings). The Court of Appeal judgment, holding by a majority that Mr Ivey was cheating, is at [2016] EWCA Civ 1093; [2017] 1 W.L.R. 679.

¹⁹ [2018] A.C. 391, para 50.

²⁰ *Ibid*, para 47.

²¹ *Ibid*, para 48.

of political life with an inclination to place an election date bet can quite properly – without cheating - consider and evaluate all sorts of publicly available knowledge which might bear upon a Prime Minister’s choice of date; the trends in economic matters such as inflation, unemployment levels or house prices; the outcome of recent by-elections; the likely impact of constituency boundary changes and so on – even the weather or English prospects of success at the Euros - are all matters which make date prediction to some extent at least a game of skill. Correctly predicting how such factors might weigh in the balance when a Prime Minister chooses a date does give the putative gambler an ‘advantage’ when placing her bet in comparison to the punter who chooses a date through pure guesswork. There is nothing ‘objectively improper’ in the *Ivey* sense about indulging such an advantage. It is, to borrow Mr Ivey’s terminology, a legitimate way for a punter to gain ‘an edge’ over the bookmaker who sets the odds. Such knowledge is no different in kind from developing an expertise in the respective forms of horses competing in a race, the various jockeys who might be riding them and the condition of the track where a race was taking place.

It may be that the best ways to characterise what the jury would be asked to look for in an election date case would be ‘misuse of confidential or inside information’; ‘insider trading’ might be more succinct soubriquet. Was the placing of the bet prompted by the better having access to information which was not, and could not, be available to the public at large? The Gambling Commission published a policy document in 2018 entitled *‘Misuse of inside information’*.²² The possibility of election betting ‘cheating’ had evidently not occurred to the Commission back in 2018. Its guidance was concerned primarily with sporting events, but its general approach to ‘misuse’ of such information could be seen as applicable to the Betting-gate scenario:

“Activity related to a non-sporting event on which bets can be placed: Knowledge of activity that isn’t connected to an event involving sports competitors but on which bets can be placed. Examples of inside information that could be used to unfairly place a bet when the information is not in the public domain:

- Knowledge that a team manager will be leaving their position
- Knowledge of the appointment of a new team member
- Knowledge of a person taking over as a presenter of a TV show
- Knowledge of the winner of a competition (eg Best Actor, Sports Personality).”²³

The guidance goes on to suggest that such misuse would be more serious if the (mis)users were aware that the information was ‘restricted’ and that they became aware of it only because of their role in respect to or relationship with the source. If the information was overheard by chance and the hearers were not aware it was confidential in nature would make any misuse much less problematic.²⁴

In a political context, that guidance would mean ascertaining whether those placing disputed bets had been told directly when the election would be; overheard a conversation or read a memo to someone else in which the date was confirmed before their bets were placed. However the information was obtained, the gamblers would also then have to establish that they had not appreciated its sensitivity.

²² <https://assets.ctfassets.net/j16ev64qyf6l/4KPgzbWpVpd5ZPsE444S9F/f4c8a91df1d3e578d698a6fbd24c5a55/Misuse-of-inside-information.pdf>

²³ Ibid, table 1. (The document does not have any page numbers).

²⁴ Ibid, appendix 1.

By mid-2024, almost 20 years since the 2005 Act came into force - the Gambling Commission had brought only *one* prosecution under s.42.²⁵ That does seem *prima facie* a remarkably low figure. The Commission's 2018 guidance suggested, without offering any explanation as to why, that this was a power that it would rarely be eager to use:

"13. There may be some limited circumstances where criminal enforcement action may be undertaken. For example, the Commission may take direct action in high-impact cases, where there is a history of previous behaviour known to the Commission, or where there is a need to establish legal precedent. Cases of repeat offending would be treated more seriously".

As of November 2024, it seemed that the Commission might be willing to take that very rare prosecutorial step again. A leak from an unidentified source to Sky News indicated that as many five people might soon find themselves facing prosecution under s.42.²⁶ By that point however, the Metropolitan Police's investigation into its officers to consider whether they had committed 'misconduct in public office'²⁷ had come to a different conclusion.

Misconduct in public offence

Misconduct in public office is a common law offence, rooted in English legal history at least as far back as the seventeenth century. It is a crime which – at least in theory – can attract a sentence of life imprisonment. The offence - rather like its recently abolished common law sibling 'public nuisance'²⁸ – has a potentially very wide sweep if one takes as one's definitional starting point, as modern authorities generally do,²⁹ Lord Mansfield's 1783 judgment in *R v Bembridge*:³⁰

"Here there are two principles applicable: first, that a man accepting an office of trust concerning the public, especially if attended with profit, is answerable criminally to the King for misbehaviour in his office; this is true, by whomever and in whatever way the officer is appointed ... Secondly, where there is a breach of trust, fraud, or imposition, in a matter concerning the public, though as between individuals it would only be actionable, yet as between the King and the subject it is indictable. That such should be the rule is essential to the existence of the country."

The offence had fallen into almost complete misuse by the latter part of the twentieth century, in large part it seemed because many of the behaviours to which it had previously been applied had subsequently become the subject of more closely defined statutory offences. In the last 30 years or so it has enjoyed something of a renaissance, with many of the prosecutions being directed at (male) police officers who had used their professional status as means to engage in inappropriate sexual relations with victims of crime or witnesses.³¹

²⁵ H. Quirk, "Prosecutions and gambling offence" (2024) 8 Crim. L.R. 505.

²⁶ [Charges considered in election date betting scandal | Politics News | Sky News](#).

²⁷ H. Cole and T. Godfrey, "BETTING SAGA: Cops to probe 'misconduct in public office' into election betting as scandal deepens", The Sun, 26 June 2024; [Cops to probe "misconduct in public office" into election betting as scandal deepens | The Sun](#); Metropolitan Police, fn 14 *supra*.

²⁸ Which was being deployed with increasing frequency as a public order offence against climate change protestors. On that specific point see I. Loveland, "A rollercoaster ride: Article 10 and 11 defences in aggravated trespass and public nuisance prosecutions" (2024) 4 Conveyancer and Property Lawyer forthcoming.

²⁹ For example, *Attorney-General's Reference (No. 3 of 2003)* [2004] EWCA Crim 868; [2005] Q.B. 73, para 35, per Pill LJ.

³⁰ (1783) 3 Doug. K.B. 327, 332.

³¹ C. Sjölin and H. Edwards, (2017), 'When Misconduct in Public Office is Really a Sexual Offence.' *The Journal of Criminal Law*, 81(4), 292-302. <https://doi.org/10.1177/0022018317712377>

The authoritative contemporary definition of the crime might be taken from *Attorney-General's Reference (no.3 of 2003)*,³² in which the Court of Appeal, having undertaken a survey of Court of Appeal, House of Lords and Commonwealth authority,³³ concluded:

“The elements of the offence of misconduct in a public office are: (1) a public officer acting as such (para 54); (2) wilfully neglects to perform his duty and/or wilfully misconducts himself (paras 28, 30, 45 and 55); (3) to such a degree as to amount to an abuse of the public's trust in the office holder (paras 46 and 56-59); (4) without reasonable excuse or justification (para 60). As with other criminal charges, it will be for the judge to decide whether there is evidence capable of establishing guilt of the offence and, if so, for the jury to decide whether the offence is proved.”³⁴

It would seem unarguable that police officers are occupants of a public office for this purpose. A person who was an elected member of the Commons or of a devolved legislature would also certainly be a public officer in that sense. People who were merely candidates for such offices would not be. Employees of a political party – assuming their salaries came from party rather than public funds – would also fall outwith the bounds of the offence. That much at least of the offence is clear.³⁵

Matters become more complicated when one considers whether the occupants of those various public offices were – in placing their respective alleged bets – performing a public function of any kind. Merely occupying a public office does not make every crime a person might commit ‘misconduct’ in that office.³⁶ For an MP to be driving home while drunk is a criminal offence, but it does not amount to misconduct in public office. Pressurising the arresting police officer to overlook the matter by threatening to make a complaint about her behaviour to the local Police and Crime Commissioner presumably would be, as such action would amount to an attempt to exploit the benefits of that office to evade criminal prosecution. The mere placing of a bet need not fall within the scope of the public function concept. It is an activity in which anyone can engage, and so quite unlike – for example – the actions of a police officer who tries to inveigle the victim of a crime into his bed,³⁷ or the magistrate’s court clerk who takes bribes to remove people’s driving offence convictions from the court record.³⁸ A recent judgment involving Boris Johnson provides some helpful guidance on this issue.

³² [2004] EWCA Crim 868; [2005] Q.B. 73. The offence has been the subject of extensive examination by the Law Commission; *Reforming Misconduct in Public Office: A Consultation Paper*, (2016) Consultation Paper 229; (hereafter Law Commission, Consultation Paper). See the (mostly) approbatory discussion of the consultation paper in Gillespie, “Reforming misconduct in public office” (2017) 4 Crim. L. R. 270. The Law Commission’s final report, *Misconduct in Public Office*, Law Com No. 397 was published in 2020; (hereafter referred to as Law Commission, Misconduct). The remarkably broad reach of the offence is best revealed by the Law Commission’s cataloguing of recent convictions in cases which did not find their way into the law reports; see Law Commission, Consultation Paper, Appendix D.

³³ In particular, *R v Dytham* [1979] Q.B. 722; *Three Rivers District Council v Governor and Company of the Bank of England (No.3)* [2003] 2 A.C. 1; and in the Court of Final Appeal in Hong Kong, *Shwum Kwok Sher v Hong Kong Special Administrative Region* (2002) 5 H.K.C.F.A.R. 381.

³⁴ [2005] Q.B. 73, para 61. (The para references in the quotation refer back to previous parts of the judgment).

³⁵ MPs and police officers fall squarely within the core definition – now elderly but still authoritative – offered in *Henly v Mayor and Burgesses of Lyme Corp* (1828) 130 E.R. 995, 1001: “[E]veryone who is appointed to discharge a public duty and receives a compensation in whatever shape, whether from the crown or otherwise, is constituted a public officer”. It should however be noted that *Henly* was not a criminal prosecution, but a civil action, and so strictu sensu not the source of the orthodoxy in the criminal law context. For a (more) contemporaneous approval and application of the *Lyme* principle in the criminal law context see *R v Bowden* [1968] 1 W.L.R. 68. There is a helpful overview of the case law in Law Commission, Misconduct, 53-55.

³⁶ The Law Commission again provides helpful insight into this element of the offence; *ibid*, 22-23.

³⁷ See *R v Longmate* [2024] EWCA Crim 443.

³⁸ This being among the misconduct for which a Mr Patel initially received a six years sentence, reduced to four on appeal; *R v Patel (Munir Yakub)* [2012] EWCA Crim 143; [2013] 1 Cr. App. R. (S) 48. Mr Patel – whose

In *R (on the application of Johnson) v Westminster Magistrates Court*,³⁹ the then Prime Minister sought to quash the decision of a District Judge to allow a (private) prosecution for misconduct in public office on the basis that Johnson told lies during the 2016 European Union referendum campaign. That decision was quashed on various grounds. For present purposes, the significance of the judgment lies in the approach that the court took to the hitherto not much explored element of the offence of whether the impugned office holder's conduct was indeed 'official.'⁴⁰ In concluding that Mr Johnson's assertions did not have that character, the court observed:

"33. Misconduct in public office bites on breaches of duties, which constitute the offence itself. All the cases to which we have referred and many more we were shown share the common feature of corrupt *abuse* of public power for personal gain, or gross neglect in failing to comply with the core duties of the office. Such conduct is capable of satisfying the connected tests of breach of duty and the gravity necessary for the offence to be established. The offence will be made out only if the manner in which the specific powers or duties of the office are discharged brings the misconduct within its ambit. Consequently *at the time of the alleged misconduct the individual must be acting as, not simply whilst, a public official*".

34..... No authority was shown to us suggesting that the offence can be or has been equated to bringing an office into disrepute or misusing a platform outside the scope of the office".

If it can be established that an individual placed a bet based on confidential political information obtained through her position, rather than informed Westminster speculation, any decision regarding prosecution would have to consider whether this amounted to an "abuse" of her position (para 33 of *Johnson*) and also whether taking advantage of such confidential information to place a surefire winning bet would be regarded as merely 'disreputable' by a fair-minded observer, (Whether the bar would be met if the fair-minded observer thought such behaviour brought the relevant office 'seriously' or 'egregiously' into disrepute is unclear). The dividing line between 'disrepute' (not criminal) and 'abuse' (criminal) is by no means an obvious one.

Such considerations may weigh heavily in the balance in a Crown Prosecutor's mind when deciding whether to bring a misconduct in public office prosecution. However, the reinvigorated use of the offence in recent years has attracted a consistent line of academic criticism,⁴¹ which has questioned the appropriateness of deploying such a wide-ranging offence – and one carrying such a severe maximum penalty – when there are more tightly defined statutory offences available.⁴² The criticism gains increased force in circumstances where the alternative statutory offence has obvious benefits from a defendant's perspective in terms of

activity was exposed by a sting operation conducted by *The Sun* newspaper- also enjoyed the unhappy distinction of being the first person to be charged under the Bribery Act 2010; [Court clerk becomes first person charged under Bribery Act | Bribery Act | The Guardian](#)

³⁹ [2019] EWHC 1709 (Admin); [2019] 1 W.L.R. 6238.

⁴⁰ "In fact, this aspect of the offence has been subject to no judicial elucidation whatsoever" K. Laird, "Misconduct in public office: *Johnson v Westminster Magistrates' Court* Queen's Bench Division (Divisional Court): Rafferty LJ and Supperstone J: 3 July 2019; [2019] EWHC 1709 (Admin)" (2020) Crim. L. R. 458, 460.

⁴¹ See for example S. Parsons, "Misconduct in a public office—should it still be prosecuted?" (2012) 76 Journal of Criminal Law 179; J. Spencer, "Police behaving badly—the abuse of misconduct in office" (2010) 69 Cambridge Law Journal 423.

⁴² The aforementioned Law Commission report (Misconduct (2020)) concluded that there was a pressing need for the very loosely cast common law offence to be abolished and replaced by several more tightly drawn statutory alternatives.

such matters as the maximum penalty, (which is very much the case for s.42) shorter limitation periods or various other procedural constraints.

There has latterly been a line of appellate court authority exploring the circumstances in which it would be unlawful for a prosecuting authority to charge a defendant with the (now abolished) common law offence of public nuisance when an appropriate statutory remedy (carrying a lesser sentence and/or other beneficial features from a defendant's perspective. The issue was first broached by the House of Lords in *R v Rimmington*.⁴³

The *Rimmington* principle

Mr Rimmington was charged with of public nuisance after having sent hundreds of malicious messages to many different people over a period of several years. At trial, he challenged the basis of the prosecution on various grounds, the one of concern here being that he should have been charged under either s.1 of the Malicious Communications Act 1988 or s.85 of the Postal Services Act 2000. In the event, the court concluded that Mr Rimmington's behaviour did not fall within the scope of public nuisance at all, so its comments on choice of offence were obiter. The argument being made by Mr Rimmington on this point was in effect that such statutory initiatives impliedly precluded prosecution for public nuisance for the statutorily prescribed behaviour: the statutory offence which addressed their respective behaviours was the only one which could be charged. Lord Bingham's leading judgment accepted that there was "considerable force" in this submission:

"30....Where Parliament has defined the ingredients of an offence, perhaps stipulating what shall and shall not be a defence, and has prescribed a mode of trial and a maximum penalty, it must ordinarily be proper that conduct falling within that definition should be prosecuted for the statutory offence and not for a common law offence which may or may not provide the same defences and for which the potential penalty is unlimited.... It cannot in the ordinary way be a reason for resorting to the common law offence that the prosecutor is freed from mandatory time limits or restrictions on penalty. It must rather be assumed that Parliament imposed the restrictions which it did having considered and weighed up what the protection of the public reasonably demanded. I would not go to the length of holding that conduct may never be lawfully prosecuted as a generally-expressed common law crime where it falls within the terms of a specific statutory provision, but good practice and respect for the primacy of statute do in my judgment require that conduct falling within the terms of a specific statutory provision should be prosecuted under that provision unless there is good reason for doing otherwise".

The point was put more strongly in Lord Rodger's opinion:

53. Here, however...the Crown had deliberately chosen the common law offence in order to avoid the time-bar which Parliament had enacted and to allow the judge, if he thought fit, to impose a heavier sentence than the one permitted under statute.....But Parliament has deliberately chosen to intervene and to prescribe a period within which conduct of this kind can be prosecuted summarily under statute....Similarly, in the matter of sentence, Parliament has reached a view that certain conduct is appropriately covered by an offence which can be tried only summarily and which should attract no more than a particular level of sentence....

54. It is not for the Crown to second-guess Parliament's judgment as to any of these matters by deliberately setting out to reject the applicable statutory offences and to charge the conduct in question under common law in order to avoid the time-limits or limits on sentence which Parliament has thought appropriate....".

⁴³ [2005] UKHL 63; [2006] 1 A.C. 459.

Several cases decided shortly after *Rimmington* seemed to take a very expansive view of the judgment's scope, making it in effect very difficult for the Crown Prosecution Service to justify use of common law offences when less punitive statutory alternatives were available.⁴⁴ However more recently the *Rimmington* test has morphed rather mysteriously at the Court of Appeal's behest into an abuse of process test; a test which is always very difficult for a defendant to surmount.⁴⁵

Rimmington may thus be no more beneficial a shield for the politicians and police officers caught up in this matter than the Crown Prosecution Service guidance (of July 2023) on misconduct in public office prosecutions.⁴⁶ Some matters which the guidance suggest point against prosecution. None of the 'victims' of the bets were vulnerable in any sense. There was no sexual exploitation. There was no risk to anyone of death or serious injury. Other matters identified in the guidance point towards a prosecution. The defendants' motives were likely for personal financial gain, but the sums involved in these cases are small. The bets – if won and paid out – would not create any benefit for the public at large; (even though Mr Gilks, if he is still with us, might extract some pleasure from that outcome). Furthermore, the criminal law is not the only sanction in issue in this episode. None of the political candidates involved won their seats.⁴⁷ Party operatives may find their positions no longer exist and the police officers implicated in the affair, if not prosecuted, may face internal disciplinary proceedings.

Conclusion

In the event, a Metropolitan Police press release on 22 August 2024⁴⁸ announced that, following consultation with the Gambling Commission and the Crown Prosecution Service, it had decided not to pursue its misconduct in public office investigations any further:

"Based on the assessment of the evidence and advice from the CPS, it was determined that the high bar for Misconduct in Public Office to be proven was not met. It has therefore been agreed between the Met and the Gambling Commission that the more appropriate criminal offences to progress with would be those under the Gambling Act".

That would seem an entirely defensible – if not very fully explained – conclusion. It would certainly have seemed *prima facie* illogical for some suspects to have found themselves facing prosecution under s.42 and others under the common law offence, given the very different elements of each crime and the very different sentences which they might respectively attract. A similar criticism could be made of initiating prosecution on the basis of the *lex (very) generalis* offence of misconduct in public office when Parliament has enacted the *lex (very) specialis* crime found in s.42. This step in the investigative process may best be seen as an implicit endorsement of the broader, essentially constitutional, principle articulated by the Law Commission in its recommendation that Parliament abolish the common law offence of public

⁴⁴ See especially *R v Dady* [2013] EWHC 475 QB; [2013] C.T.L.C 199.

⁴⁵ See the judgments in *R v Stockli* [2017] EWCA Crim 1410; [2018] 1 W.L.R. 5609; and *R v Brown (James Hugh)* [2022] EWCA Crim 6; [2022] 1 Cr. App. R. 18. The shift seems to have been driven largely by Lord Chief Justice Burnett. The mystery arises because at no point in *Rimmington* did any of the five Law Lords who offered opinions, even mention, still less premise their judgments on, the notion of abuse of process.

⁴⁶ [Misconduct in Public Office | The Crown Prosecution Service \(Crown Prosecution Service.gov.uk\)](https://www.cps.gov.uk/misconduct-in-public-office)

⁴⁷ [Bristol North West - General election results 2024 - BBC News](https://www.bbc.com/news/uk-politics-66000000); [Montgomeryshire and Glyndwr - General election results 2024 - BBC News](https://www.bbc.com/news/uk-politics-66000000)

⁴⁸ The release was posted at <https://news.met.police.uk/news/update-on-general-election-betting-investigation-487223>. It had been removed as of 6 December 2024. A pdf copy is available from the author.

nuisance: “It is in general desirable that criminal law should be contained in statute, as this gives potential offenders clear notice of what conduct is forbidden and what the consequences will be.”⁴⁹ It remains to be seen which, if any, of the people subject to investigation eventually face charges under s.42; (thereby doubling , tripling or quadrupling the number of prosecutions that the Gambling Commission has brought). The episode could be used to frame reform around the criminal law and standards in public life. Or it may be left to be recorded as just another unfortunate episode of politicians, party officials and police officers engaging in morally questionable behaviour.⁵⁰ It may be that a (former) Conservative politician or a Metropolitan Police officer who now has some unexpected time on his or her hands could find a bookie who would take a bet on that.

⁴⁹ Law Commission, *Simplification of criminal law: public nuisance and outraging public decency. a consultation paper* (2010) Consultation Paper No 193, 37. That offence was abolished and replaced with a more tightly drawn statutory alternative by s.78 of the Police, Crime, Courts and Sentencing Act 2020.

⁵⁰ See for example the fierce critique – from a perhaps unexpected quarter - by T. Harris, “This betting scandal has exposed the rotten heart of our political class”, Daily Telegraph, 21 June 2024; [This betting scandal has exposed the rotten heart of our political class](#).