

## Financial Services and Markets Act 2000

This page includes directions for offences of

(1) communicating an invitation or inducement to engage in investment activity (FSMA ss19 to 23);

(2) being an unauthorised person carrying on a regulated activity (FSMA ss19 to 23); and

(3) dishonestly concealing a material fact (FSMA s397)

### **(1) Communicating an invitation or inducement to engage in investment activity**

Being an unauthorised person, in the course of business, communicated invitations or inducements to engage in investment activity.

It is not disputed that D\*\* was an “unauthorised person”. W\*\* from the Financial Services Agency gave evidence that there is no record of D\*\* being authorised as an authorised person or having made an application for him to be an approved person. Nor has it been argued that he was exempt. There is evidence that he was not entitled to exemption.

#### “in the course of business”

I stress the word “business”. If there was no business, there was no criminal offence. So, the prosecution have to make you sure that D\*\* was operating a business. The word “business” is an ordinary English word. It has no special legal meaning. At one end of the spectrum, a bank or building society clearly operates a business. At the other end, a hobby conducted on a small scale from a living room is unlikely to be a business. A private or family arrangement is far less likely to be a business. It is for you to decide whether or not D\*\* was operating a business. In deciding that you may find it helpful to consider

- the amount of money received;
- the number of people paying in money – e.g. was it limited to family or friends?
- whether or not there was an office or offices;
- whether or not there were staff or employees (either in a formal or informal sense) to perform particular functions; and
- advertising or sponsorship

This is not an exhaustive list. You may consider that other factors are relevant in deciding whether or not there was a business.

The prosecution say that the \*\*\*, which, when looked at as a whole, was a business. They rely on \*\*\*. D\*\* has said \*\*\*.

This is a matter for you to decide.

“communicated invitations or inducements” These are ordinary English words with no special legal meaning. Did D\*\*, either by \*\*\* or in other ways invite people to engage in investment activity?

“to engage in investment activity” means “exercising any rights conferred by a controlled investment to acquire, dispose of, underwrite or convert a controlled investment”. That includes a collective investment scheme.

A “collective investment scheme” is “any arrangement with respect to property of any description, including money, the purpose or effect of which is to enable persons taking part in the arrangements ... to participate in or receive profits or income arising from the acquisition, holding, management or disposal of the property or sums paid out of such profits or income”.

Arrangements do not amount to a collective investment scheme if they are operated otherwise than by way of business.

For there to be a collective investment scheme, the arrangements must be such that the persons who are to participate (‘participants’) do not have day-to-day control over the management of the property, whether or not they have the right to be consulted or to give directions.

The arrangements must also have either or both of the following characteristics:-

- (a) The contributions of the participants and the profits or income out of which payments are to be made to them are pooled; and
- (b) The property is managed as a whole by or on behalf of the operator of the scheme.

In essence, put simply, a collective investment scheme is an arrangement whereby people pay money into a pool, over which they do not have day to day control, in the expectation that they will receive a profit or an income.

The prosecution say that is what happened. They say that \*\*\*.

The defence say that \*\*\* was not a business, but an arrangement between family and friends. D\*\*.

Ignorance or lack of understanding of the law is not a defence to this, or any other charge. A defendant may commit an offence relating to collective investment schemes even if he does not know what a collective investment scheme is.

Similarly, the fact that others may have been involved and may also have committed an offence, but have not been prosecuted, is no defence.

In view of the fact that it has not been disputed that there was no FSA authorisation, the key questions for you to answer in relation to Count \*, having regard to all the evidence and the directions which I give you, are these

(i) Did D\*\* invite people to invest money in a collective investment scheme?

(ii) Did he do that in the course of a business?

If you are sure that the answer to both questions is “yes”, the defendant is guilty of Count \*. If the answer to either question may be “no”, he is not guilty of Count \*.

**(2) Being an unauthorised person carrying on a regulated activity**

not being an authorised or exempt person, contravened the general prohibition by carrying on, or purporting to carry on, a regulated activity namely the establishing by way of business of a collective investment scheme, known as \*\*\*.

“not being an authorised or exempt person” It is not disputed that D\*\* was “unauthorised”. He did not have the authorisation or permission of the Financial Services Agency. It is common ground that he was not “exempt” from regulation or in a position to be exempt.

“contravened the general prohibition by carrying on, or purporting to carry on, a regulated activity” Putting it simply, you cannot establish or set up certain kinds of financial or investment business unless you are authorised or exempt. If someone establishes or sets up certain kinds of financial or investment business without getting authorisation or being exempt, a criminal offence is committed.

“business” has the same meaning as (see (1) above). It is one of the key issues in relation to this count. Are you sure that D\*\* established a business?

“establishing ... a collective investment scheme This is the other key point in relation to Count \*. Did D\*\* establish a collective investment scheme? That phrase has the same meaning as (see (1) above) - in essence an arrangement whereby people pay money into a pool, over which they do not have day to day control, in the expectation that they will receive a profit or an income.

“establish” is an ordinary English word with no special legal meaning. In this sense it means “found” or “set up”. The prosecution do not have to prove that D\*\* was the only person who set up the scheme. It is sufficient for him to have been one of several people who established the scheme.

The prosecution say that \*\*\* was a collective investment scheme and that D\*\* set it up. They rely on \*\*\*.

The defence deny that they were collective investment schemes. D\*\* says ...

In view of the fact that it has not been disputed that there was no FSA authorisation or exemption, the key questions for you to answer in relation to Count \*, having regard to all the evidence and the directions which I give you, are these

(i) Did D\*\* establish \*\*\*?

(ii) (If he did), did he do this in the course of business? and

(iii) Was it a collective investment scheme?

If you are sure that the answers to all the questions are “yes”, the defendant is guilty of Count \*. If the answer to any question may be “no”, he is not guilty of Count \*.

### **(3) Dishonestly concealing a material fact**

dishonestly concealed material facts whether in connection with statements, promises or forecasts made by him or otherwise for the purpose of inducing, or being reckless as to whether it may induce, other persons to enter into relevant agreements, by concealing that \*\*\*

“dishonestly”

The prosecution must make you sure that the defendant was acting dishonestly. You must decide two questions:

1. Was what the defendant did dishonest by the ordinary standards of reasonable and honest people?

In this regard, you, the jury, must form your own judgment of what those standards are.

2. Must the defendant himself have realised that what he was doing would be regarded as dishonest by those standards?

In deciding this you must consider the defendant's own state of mind at the time.

If, after taking into account all of the evidence, you are sure that the answers to both of these questions are yes, the element of dishonesty is proved. If you are not sure of that, the element of dishonesty is not proved and the defendant is 'not guilty' of the offence in the particular count you are considering.

It is for you to decide whether or not he was dishonest at the time when, if, as the prosecution say that he did, he concealed material facts. The prosecution say that he is a dishonest man who lied to \*\*\*. The defendant denies that he was dishonest then, or indeed, at all. He says that he believed that \*\*\*. This is one of the most important questions for you to consider.

“concealed”

This is an ordinary English word which has no special legal meaning. It means to hide or keep secret.

Concealment may be a positive or negative step. It may involve telling lies and/or deliberately not mentioning something to hide it or keep it secret.

“material facts whether in connection with statements, promises or forecasts made by him for the purpose of inducing, or being reckless as to whether it may induce, other persons to enter into relevant agreements”

Again, “material facts” is an ordinary English phrase which has no special legal meaning. In relation to Counts \*, it includes any significant fact which would affect a decision by potential investors whether or not to pay money into one of the schemes referred to in these counts on the indictment.

What is “material” has to be considered from the view point of an ordinary, reasonable man or woman.

“induce” is just another word for “persuade”.

“relevant agreements” in these counts means a collective investment scheme. That has the same meaning as for (see (1) above).

The prosecution case is that \*\*\*

The defence deny that D\*\* was dishonest. They say that D\*\* believed that \*\*\*.

The key questions for you to answer in relation to Count \*, having regard to all the evidence and the directions which I give you, are these

(i) Did D\*\* conceal the facts set out in the Particulars of Offence?

(ii) (If he did), were they material facts?

(iii) In doing so was he acting dishonestly? and

(iv) Did he say what he said (or fail to say what he omitted) to induce (or persuade) people to pay money into a collective investment scheme?

If you are sure that the answer to all the questions is “yes”, the defendant is guilty of the count that you are considering. If the answer to any question may be “no”, he is not guilty of that count.