

## Investment Fraud - Driven by Dishonesty

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**Dishonesty is a major issue in every investment fraud prosecution. This article examines what constitutes dishonesty, how such an allegation can be disproved...and whether that is enough to avoid conviction**

Fraud in business can take a number of forms and has a number of names. Bonds, boiler room scams, pyramid selling, Ponzi schemes, pension liberation and land banking. They're all ways of parting people from their money by convincing them that they can earn more by putting it into the project that the salesman is offering.

That salesman may be completely honest, too over-enthusiastic in their belief in their scheme or completely dishonest. For example, he may be looking for investment in a company that he believes will be a huge success but everyone else thinks is bound to fail. In which case, the question has to be asked: is he dishonest or simply misguided?

We ask the question because dishonesty is at the heart of fraud prosecutions, whatever form the alleged fraud takes. At Rahman Ravelli, we represent all manner of professionals who have been accused of fraud. Chartered accountants, investment brokers, hedge fund managers, company directors, mortgage brokers and financial advisors. The cases may vary, the investments they oversaw may have failed to different degrees but the issue that has to be established in each one is whether they acted dishonestly. Did they have dishonest intent when they ran the scheme and encouraged others to join it? Or did they simply exercise poor judgement?

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**London Office**  
36 Whitefriars Street  
London  
EC4Y 8BQ  
+44 (0)203 947 1539  
enquiries@rahmanravelli.co.uk

**Midlands Office**  
3 Brindley Place  
Birmingham, West Midlands  
B1 2JB  
+44 (0) 121 827 7985

**Northern Office**  
Roma House, 59 Pellon Lane  
Halifax, West Yorkshire  
HX1 5BE  
+44 (0)1422 346 666

**Rapid Response Team**  
24 Hour Emergency Contact  
0800 559 3500  
  
Fax +44 (0)1422 430 526  
DX16001 HX1

Dishonesty relates to the defendant's state of mind. In Ghosh (1982), the Court of Appeal ruled that the test was that "according to the ordinary standards of reasonable and honest people, what was done was dishonest" and that, if so, the jury must be convinced that the defendant "must have realised that what he was doing was, by these standards, dishonest".

A defendant who has not acted dishonestly may have to explain the truth, however complex it may be. While the prosecution paints a picture of him as a crook wanting to get rich by conning others, the defendant has to convince a jury of his innocence. That jury may be immediately suspicious of any defendant and may not even understand the issues or the nature of the defendant's work. At this point, it is the job of the defendant's legal team to make sure the jury is made aware of the defendant's innocence. The defence must explain the nature of the defendant's work, his motivations and pressures, his aims and the reasons for what he did and the way he did it. Using expert witnesses to testify that the defendant was not deviating from acceptable professional behaviour can assist a defence. As can citing examples of his work that are not under scrutiny. In this way, the defence can paint a fuller and more accurate picture than that created by the prosecution. Whether it is stocks and shares, real estate, wine or any commodity whatsoever, these defence principles apply. If carried out correctly, such an approach can gain the jury's empathy and convince its members that the case does not involve dishonesty.

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The Attorney General's Supplementary Guidelines in relation to the disclosure of digitally stored material and Lord Justice Gross' review of disclosure both give the defence an opportunity to get involved with the prosecution in the disclosure process in large and complex fraud cases. This is important because it is in the disclosure of 'unused' material that the defence often find their salvation. Even small fragments of material – such as, for example, an email chain, correspondence or handwritten notes – may help to build up a picture of an honest broker who is simply working under accepted industry standards. Such material can help demonstrate negatives. For example: "Nowhere in X transaction is there any indication of dishonesty or malpractice when, if the prosecution's case were true, you would expect there to be." To get the best out of the disclosure process requires a keen understanding of what is possible from deploying the Gross Review and the Attorney General's Guidelines.

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DX16001 HX1

makes it a criminal offence to make a misleading statement, promise or forecast or dishonestly conceal facts from someone with the intention of inducing someone to do, or refrain from doing, something in relation to an investment. Under this law, a person can be guilty if they are not dishonest but merely reckless as to the statements they make to convince others to invest their money in a scheme.

Therefore, in the same way that it is essential for a defendant's legal team to prove there was no dishonesty, it can be equally important that they can prove that there was no recklessness. That normally requires a similar but more subtle approach. To be successful, any defence solicitor must prove that their client believed his actions would not create a false or misleading impression and that they acted in accordance with professional and market rules. To do this requires the aforementioned ability to convince a jury that the defendant acted honestly and with professional integrity. The accusations can relate to complex issues and involve a wide variety of allegations. But the defence team must make the issues simple enough for juries to understand and then narrow everything down to one thing... their client's integrity.

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