

EXPERTISE

The Newsletter of GBRW Expert Witness

Where do expert witnesses come from?

The ideal expert witness works in the relevant sector and has experience of giving evidence. Such individuals are hard to find in our areas of specialisation, since banks and investment management companies discourage staff from doing expert work on their own account (although the insurance sector tends to be more relaxed on this issue).

Most of our experts are therefore working for themselves or in small professional partnerships – giving them flexibility to act as experts while active in their field. We at GBRW Expert Witness are conscious of the need to add new experts to meet changing demands from our clients and we look for a number of qualities in potential candidates:

- Interest level – not everyone wants to appear as an expert witness and some people will refuse point blank.
- Professional experience – the ideal candidate will have worked in a number of organisations, so will have a breadth of experience which enables them to deal with issues where there may be a range of approaches.
- Ability to present their views clearly – most experts have made oral and written presentations, but this is not a given in areas such as trading or quantitative analysis.

- Ability to cope with cross-examination. Although it's not possible to predict this, we look for individuals who've had comparable experience in pressured situations.
- Other professional activities – consulting assignments and memberships of industry bodies or professional associations are helpful in ensuring that experts are up to date on developments in their sector.

However strong a candidate is professionally, most will not be familiar with the roles and responsibilities of an expert witness (or adviser) and most law firms will have concerns about engaging someone who has not played this role before. We help address this by assisting with research and presentation issues, reviewing draft and final reports and preparing them for experts' meetings and cross-examination.

Last - and certainly not least - new experts can (subject to acceptance) be covered by our Professional Indemnity insurance until they arrange their own or are eligible for membership of one of the expert witness professional bodies which provide block cover.

Paul Rex

Managing Director
GBRW Expert Witness
February 2015

New expert

Anne Miglorine is a trade finance professional with more than 30 years of experience in all aspects of documentary credits and guarantees. She has acted as an expert adviser on a number of trade finance disputes in the past three years.

Anne has managed trade finance departments in a number of international banks in the City. She is a member of the ICC UK Banking Technique and Practice Committee and the ICC Banking Commission in Paris; a member of the Association of Foreign Banks' Trade Finance Committee from its inception; a former Chair of the ICC UK Sub-Committee for Foreign Banks in the City of London; and UK representative on the Consulting Group for the recent revision of International Standard Banking Practice for the Examination of Documents under Documentary Credits (ISBP 745). She is also an approved expert for DOCDEX (Documentary Credit Dispute Resolution) and has sat on the examination committee for the Institute of Financial Services.



Enquiries

GBRW Expert Witness Limited
Paul Rex, Jeremy Denton-Clark,
David Croft, Tim Dowlen
60 Lombard Street, London EC3V 9EA
T: +44 20 3178 2060
F: +44 20 7464 8656
E: experts@gbrowexpertwitness.com
Website: www.gbrwexpertwitness.com

Singapore office:

Martin Edwards, Director Asia
E: martin.edwards@gbrwexpertwitness.com
T: +65 9623 1657



Areas of Expertise include:

BANKING & FINANCIAL

- Corporate Lending
- Personal Lending
- Risk Management
- Investment Banking
- Corporate Finance
- International Banking
- Correspondent Relationships
- Commercial Property
- Residential Mortgages
- Syndicated Lending
- Loan Workouts
- Recoveries and Realisations
- Back Office Procedures
- Trade Finance
- Letters of Credit
- Leasing
- Credit and Debit Cards
- Know Your Customer
- Anti Money Laundering
- Anti Terrorist Financing

INVESTMENT MANAGEMENT

- Investment Services
- Investment Advice
- Fund Management
- Structured Investment Funds
- Stockbroking
- Hedge Funds
- Options, Swaps, Derivatives
- Treating Customers Fairly
- Pensions

FINANCIAL MARKETS

- Money Markets
- Commodities Markets
- Securities Trading
- Financial Instruments

INSURANCE

- Property Insurance
- Professional Indemnity
- Life Assurance
- Broking
- Underwriting
- Reinsurance
- Regulation
- Actuarial Issues
- Loss Adjustment
- Treating Customers Fairly

BUSINESS FINANCE

- Limited Companies
- Partnerships
- Private Companies
- Sole Traders
- Mergers & Acquisitions
- Treasury Management
- Sales of Businesses
- Property Finance
- Business Planning
- Company Valuation
- Venture Capital

OTHER AREAS

- Employment Disputes
- Loss of Earnings
- Compensation Calculations
- Arbitration and Mediation



The pattern of GBRW's investment-related expert witness work

David Croft is a Director of GBRW Expert Witness with a strong background in structured investments, capital markets, liability management and derivatives. He has acted as expert witness in several high profile, high value cases. Here he analyses the changing pattern of expert work in investment related disputes.



The financial crisis peaked in the final quarter of 2008 and the first quarter of 2009, although low points varied from country to country, reflecting an initial but short-lived consensus that the problems were largely to do with the USA and US\$ mortgage backed debt. Contagion quickly took hold.

We expected a flood of litigation as investments (many of which had been thought low risk) crashed in value and banks forced liquidations of collateral, but we were surprised at how long it took before cases reached the UK courts. Aggrieved investors in other countries where we are active (notably Hong Kong, Singapore and Australasia) have generally been quicker to start actions. Many investments involved a toxic combination of leverage and structured products.

2011 and 2012 represented the high water mark of enquiries and engagements, not least because of UK derivatives mis-selling; the stream of litigation (with the exception of derivatives mis-selling) now seems to be ebbing. A major factor is the UK's limitation period of six years for civil claims - any claim arising from 2008 and 2009 now needs to have been formalised and on its way to court, arbitration or negotiated settlement.

Investment disputes

The number of cases involving structured products, mismanagement of discretionary funds and the sometimes brutal effects of forced liquidations has fallen to a more normal pattern. Financially engineered investments designed to reduce or change tax liabilities from several years ago (some of them very large indeed) continue to emerge as the tax authorities crank up efforts to improve their revenues. The spate of sometimes sprawling cases resulting from the collapse of financial firms has passed – at least in the UK.

For cases involving asset management, recurrent themes in instructions for experts are pricing and valuation, the riskiness of liquidated securities and portfolios and the investment manager's

performance. Opining on these issues, plus the reasonableness of prices and the extent of risks taken, is often difficult and it can be challenging to explain technical nuances to a non-financial audience.

The issue of the quality of the mark-to-market or valuation exercise often arises, as does the question of how much slippage there can be between a valuation and the value achieved on liquidation. There is insufficient appreciation of just how illiquid markets became, even when the financial instruments concerned were supposedly being traded and had daily price quotations. In this context, experience of markets is far more relevant than a theoretical or academic approach.

Mis-selling of interest rate swap derivatives contracts

Whilst a common-sense approach would suggest that derivatives used for hedging interest rates are not investments, they are treated as such under the COBS (Conduct of Business Sourcebook) regulations applicable to banks. As a result, interest rate swap derivatives could not be sold by relationship managers or account officers - a significant contributory factor to the problem, in our view.

The trend here has been a steadily rising number of enquiries and engagements since 2010, which reduced sharply after the FSA's redress scheme agreement with the clearing banks in 2012 (the FSA's responsibilities were partially assumed by the Financial Conduct Authority (FCA) in April 2013). However, we continue to see a flow of instructions as SMEs challenge, and banks defend, offers made under the scheme. That is not surprising considering there were at least 40,000 hedges sold to SMEs, of which perhaps 25,000 were eligible for the scheme.

A cottage industry of experts has grown up advising smaller companies about interest rate swap losses, pricing received, break costs and legal remedies. Based on some of the expert reports we see, the quality of that advice is - to say the least - variable. Some experts tend to give too much attention to pricing details and technicalities and too little to providing a balanced view on standards, implementation and how compliance with COBS was carried out. They often reel out a standard litany of arguments, despite the fact that the merits of claims are rarely the same.

It is also notable how much narrower the issues on which experts are now being instructed have become, reflecting a refinement of legal arguments and better understanding of what is likely to succeed. This goes hand in hand with

the trend of expert reports being commissioned but settlements being agreed before cases reach court.

Many SMEs, unsurprisingly, do not trust their banks and perceive the redress scheme to be biased towards the banks' interests. The process has been slow and banks have generally missed the FSA deadline by months, but they have now worked through 90% or more of their lists and made their required compensation offers to SMEs.

While many customers have accepted the offers, a number have been disappointed and are continuing their pursuit of compensation in the courts. Based on the numerous requests for experts that we have seen, our guess is that there are several hundred cases pending.

The source of disappointment for many SMEs lies in the FSA's stipulation that compensation for structured hedge products should be based on a comparison with an alternative suitable/appropriate hedging product (generally a plain vanilla interest swap for a term and amount matching the underlying loan) rather than a voiding of the original contract. Since rates fell from 5% or 6% per annum to 1% or less, the resulting calculation may leave large amounts payable to the banks. There is also controversy around how consequential loss amounts are arrived at, particularly where SMEs have defaulted or where the break costs are argued to have led to consequential losses.

Background briefing papers

GBRW Expert Witness produces briefing papers for the topics on which we are approached most often. The series includes:

- Instructing an expert
- Commercial property lending disputes
- Insurance disputes
- Interest rate swap disputes
- Investment disputes
- Trade finance disputes

The briefing papers can be downloaded from www.gbrwexpertwitness.com/Expert-Witness/briefings

GBRW Expert Witness

Our directors and associates contracted by us are instructed as experts in banking, investment and insurance disputes. We advise on civil and criminal court proceedings, arbitrations and mediations in jurisdictions including England and Wales, Scotland, Australia, Bahamas, Cayman Islands, Hong Kong, Ireland, Jersey, New Zealand, Singapore and Sweden.