EXPERTISE

The Newsletter of GBRW Expert Witness

Financial sector litigation – what does 2016 hold in store?

The global financial crisis in 2008 had an almost immediate impact on our business, with new enquiries more than tripling between 2007 and 2009. As we look ahead to 2016 after eight very busy years, we have been peering into our crystal ball to see what can be expected this year. Our conclusion is that the volume of litigation is unlikely to reduce in the short to medium term.

- Legal actions - both civil and criminal - relating to manipulation of interest and foreign exchange rates and other unfair trading practices are under way in a number of jurisdictions. While it can be difficult to quantify the impact of the actions of specific institutions - and indeed the actual losses suffered by borrowers and investors - there is no question that the amounts involved and the scale of manipulative activity will support continuing litigation over the next few years.

- Against this backdrop, the UK Financial Conduct Authority has acted to strengthen personal accountability of managers in the financial sector. Ian Gaskell of FMCR discusses the responses of regulators in an extremely timely article in this newsletter.

- While the Redress Scheme put in place by the FSA in 2012 dealt with many of the individual cases of interest rate swap mis-selling, there is still a continuing flow of cases involving bank customers who argue that they are entitled to higher compensation than that resulting from the application of the Scheme.

- 2012 also saw our peak level of expert instructions resulting from losses suffered by investors in the wake of the global financial crisis. Current price falls in emerging markets and commodities suggest high potential for significant losses – followed almost certainly by claims – in these and other sectors.

- The insurance market will continue to provide a regular flow of disputes between insured parties, brokers, underwriters and reinsurers. Many of these are settled at a relatively early stage through mediation or arbitration. We have seen strong interest in our fixed fee approach which provides an indication of an expert's views at an early stage in the dispute process, often facilitating settlement negotiations.

- From a geographic perspective, we are seeing rapid growth in dispute resolution practices in the Far East (Hong Kong, Singapore and Malaysia) as well as in the Gulf (the Dubai International Financial Centre, with Abu Dhabi Global Market having opened in October last year).

In summary, life looks set to remain as busy in 2016 as in previous years and we look forward to working with existing and new clients both in the UK and internationally.

Paul Rex

Managing Director , GBRW Expert Witness
February 2016

Expert Witness Institute Asia representation

Martin Edwards, our Director, Asia, has also been appointed as the Representative - Asia for the Expert Witness Institute. Martin will act as a local point of contact for individuals based in the region who are current or potential experts and will promote the Institute's capabilities with the relevant authorities and with local law firms.

The London-based Expert Witness Institute (http://www.ewi.org.uk) was launched 20 years ago to service and support experts. It acts as a voice for the expert witness community, supporting experts from all professional disciplines and lawyers who use their services. The Institute functions to encourage, train and educate experts and actively works with a wide range of professional bodies to achieve this. The EWI is a non-profit-making company limited by guarantee, is independent of outside commercial interests and is democratic, transparent and fully accountable to its members.

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What next for regulation of the trading floor?

The onus will be on the individual, predicts Ian Gaskell

Ian Gaskell, co-founder and managing director of FMCR (Financial Markets Consulting & Resourcing), has held senior global posts with NatWest Bank and RBS, spanning trading, risk and project management.

FMCR provides advisory services in trading-floor related activities to banks and other financial institutions and is also developing an expert witness practice in cooperation with GBRW Expert Witness.

Last year the focus of the UK financial services regulatory landscape shifted from high-profile fines levied by regulators on banks for Libor and FX rigging towards individuals' conduct and their responsibility for abuses. This is likely to be a major theme for 2016, and is stated in the FCA's Business Plan for 2015/16 as one of its top priorities: "We must ensure that senior individuals in positions of responsibility are held personally accountable for how their firm operates, and for the consequences of misconduct."

The FCA levied fines with a total value of nearly £1.5bn in 2014. The benchmarks in 2015 were Barclays' fine of £284m in May for FX manipulation and Deutsche Bank's fine of £227m in April for Libor and Euribor manipulation. The investigation of the mis-selling of interest rate hedging products has largely run its course, with more than £1.8bn paid out as compensation by banks. While there may be other mis-selling fines in the pipeline, the focus has firmly moved to individuals' liability for conduct risk.

In the first half of 2015 the FCA singled out four individuals working as traders for City firms and fined them sums ranging from £95k to £662k for a variety of market-rigging offences - a clear signal that the regulators are having some success in getting across their message of individual accountability. Some individuals also faced lifetime bans from regulated activities.

The cascade of new regulations has not occurred without push-back from the City, and recently the much-feared "reversal of the presumption of responsibility" has been tempered, being replaced by a "duty of responsibility." However the Senior Managers and Certification Regime (SM & CR) is going to be extended across the entire financial services industry, according to HM Treasury's announcement in October 2015. This described the previous Approved Person's Regime as "discredited", illustrating how keen the Government is to move on with its conduct and accountability agenda.

"We must ensure that senior individuals in positions of responsibility are held personally accountable"

This extension of SM & CR to asset managers and hedge funds is going to place a heavy burden on some firms which might have thought that they were going to escape the net. The change was announced in an FCA statement on 15 October and by the Chancellor alongside a policy paper noting "the introduction of a statutory duty for senior managers to take reasonable steps to prevent regulatory breaches".

The determination of the Serious Fraud Office to get involved in misconduct is illustrated by the case of Tom Hayes, who was found guilty on eight charges relating to Libor rigging in August 2015. The sentence was reduced by the Court of Appeal in December from 14 to 11 years to take account of mitigating factors. In a setback for the SFO, however, six people charged with conspiring with Hayes were acquitted last month.

"Spoofing" (stock market manipulation by placing orders with no intent to execute) came under the spotlight last year with the US Department of Justice's criminal complaint against British trader Navinder Sarao. Spoofing is banned in the US under the Dodd-Frank Wall Street Reform and Consumer Protection Act, and will become easier to define and prosecute in the UK once the new Market Abuse Regulation and MiFID II come into operation in Europe, probably in 2018. However, it remains a complex area, difficult for authorities to define and to distinguish from legitimate market practice.

The problems that banks seem to have in curbing abusive practices were illustrated by the $150m penalty announced by the New York Department of Financial Services in November 2015 for the way Barclays allegedly used its "last look" forex trading system to reject unprofitable trades. This year the spotlight is likely to migrate to other market abuse practices, including those potentially found in activities such as high-frequency trading. All market participants, including non-bank parties, will therefore need ever-more sophisticated vigilance to prevent abuses in areas which are beginning to attract the attention of regulators.

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.