

EXPERTISE

The Newsletter of GBRW Expert Witness

(Some) bankers behaving badly

The 2008-2009 global financial crisis continues to cast a long shadow.

In November last year, RBS announced that it had set aside almost £400m to compensate small business owners who are claiming against its controversial Global Restructuring Group unit over the way in which their banking relationships were handled. While the Financial Conduct Authority cleared RBS of the most serious allegations, it found several lapses in conduct by GRG, including faulty processes and a "failure to support" small businesses.

In January two former HBOS bankers and four business associates were convicted of fraudulent trading, corruption and money laundering involving small companies in financial distress which were handled by HBOS's impaired assets division. Lynden Scourfield, the senior banker heading this division, was found to have referred clients to Quayside Corporate Services, a small turnaround consultancy run by former banker David Mills, resulting in Mills and QCS demanding huge fees and in some cases taking over businesses for their own benefit.

The trading problems of many small businesses in the wake of the financial crisis were compounded by mis-selling

of interest rate swaps – when interest rates fell sharply in the first quarter of 2009, the resulting "mark to market" exposures (the additional amounts payable by borrowers if they wished to terminate these swaps) created increased risk exposures for the banks, leading them in many cases to reduce the debt facilities which they were prepared to provide.

These developments will inevitably lead to an increase in civil claims against RBS and HBOS, which we expect to require expert evidence in a number of areas, including the conduct of banking relationships, the impact of IRS products and/or increases in loan interest rates, quantification of opportunity losses for borrowers and valuations of business at different points.

GBRW Expert Witness has provided experts for all of these areas, both for claimants and for defendants, and we are very happy to discuss any requirements.

Paul Rex

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Areas of Expertise

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

- Claims Handling
- Public Liability
- Employer's Liability
- Broking
- Underwriting
- Property Insurance
- Professional Indemnity
- Life Assurance
- Liability/Casualty
- Financial Institutions
- Directors & Officers
- Motor
- Motor Fleet
- Reinsurance
- Regulation
- Loss Adjustment
- Treating Customers Fairly
- Space
- Medical Malpractice
- Financial Institutions

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



Expert witness requirements in Australia



Fergus Clark is a Principal Consultant with GBRW Expert Witness. He is a qualified solicitor who has practised law in Australia and England and has 17 years of international banking experience with banks including RBS, HSBC and Commonwealth Bank of Australia.

Fergus has held senior roles in financial markets, structured finance and credit risk management. During 2016 he spent nine months on assignment with a top 50 publicly-listed Australian corporate. He comments on expert witness services in the Australian market.

“Forms of manipulation can depend on a number of factors, including the composition of the submitting panel and trading volumes....”

Australia is an equally sophisticated market for expert witness services when compared with larger jurisdictions. We have also observed a tendency for regulator-led litigation to mirror similar action in other countries. During 2016, a good example of this - and one of the hottest topics - was the Bank Bill Swap Rate (BBSW) litigation.

The Australian Securities & Investments Commission (ASIC) investigations and proceedings against three of the “Big Four” Australian banks are based on allegations that they have manipulated BBSW with the intention of profiting from their BBSW-based derivatives positions.

BBSW is an interest rate benchmark (similar to LIBOR and others) designed to reflect the cost of borrowing by banks. The ASIC proceedings echo regulator-led investigations against banks in other jurisdictions for manipulating other interest rate benchmarks such as USD-LIBOR, Yen LIBOR and Euribor.

BBSW is similar to LIBOR and others in that these interest rate benchmarks are determined by a panel of banks using a “trimmed mean” method. However, there is also a key difference. LIBOR panel banks submitted bids intended

to answer the question “at what rate could you borrow funds, were you to do so by asking for and then accepting inter-bank offers in a reasonable market size?” On the other hand, BBSW is calculated based on

14 panel banks’ observed rates in an actively traded market for paper of the country’s “Big Four” banks. In other

words, rather than being a bank’s estimate of its own cost of funds (which is open to direct manipulation by the bank itself), it reflects the rate at which market participants are willing to lend to the four prime banks.

Forms of manipulation can depend on a number of factors, including the composition of the submitting panel and trading volumes. LIBOR investigations show that motives to manipulate rates can be categorised under three main headings:

- **Reputation:** If a bank’s management is concerned that posting its “true” cost of funds might cause investors to perceive the bank as financially weak, they may be motivated to submit a low rate. This action is particularly in the bank’s interest during periods of stress.
- **Collusion:** This can arise out of poor internal controls. Direct collusion occurs among traders (at the same bank or across different banks). Indirect collusion via intermediary brokers was seen in the case of UBS.
- **Rogue traders:** Traders having sizeable positions in assets or derivatives that are linked to LIBOR had personal incentives to manipulate LIBOR to gain from the resulting change in the rate.

The BBSW litigation is ongoing. Our previous experience with LIBOR-related expert work in the UK suggests that it will throw up a number of significant challenges, not least for ASIC in obtaining sufficient evidence to lead a successful case against the defendants.



New Director

We are delighted to announce that John Turnbull has joined GBRW Expert Witness as Director, Trade Finance.

As a senior banker and trade finance specialist John has 35 years' experience of origination, negotiation, structuring, risk management and regulation of the full range of international trade and documentary credit transactions. Most recently he was Joint General Manager

of the Global Trade Finance Department at Sumitomo Mitsui Banking Corporation Europe, where he was Global Head of Structured Trade & Commodity Finance

as well as having responsibility for all trade finance activities for the EMEA region.

John has chaired the UK International Chamber of Commerce conferences on international trade, documentary credits and regulatory issues for more than 20 years. He has also chaired the UK Association of Foreign Banks trade

finance committee since its inception in 2007 and sits on many national and international trade committees, including the IECA European committee, as well as on the editorial board of *Global Trade Review*. He is a long standing member of the International Chamber of Commerce, Co-Chair of the global consulting group for the revision of UCP and a member of the ICC Financial Crime Committee

which has just completed an update of the "Wolfsburg Group" Trade Finance Principles paper.

Over this period, John has been engaged as an expert witness and

adviser on a wide range of high profile trade finance and documentary cases in the High Court in London and internationally. John says, "I've known GBRW Expert Witness for several years - having had experience with Paul Rex and his colleagues on a number of cases in the past, I look forward to working more closely with them as a colleague."

"As a senior banker and trade finance specialist John has 35 years' experience...."



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, France, Hong Kong, Ireland, Jersey, New Zealand, Poland, Singapore and Sweden.