

EXPERTISE

The Newsletter of GBRW Expert Witness

Experts' Immunity

We have received a flood of briefings from law firms on the implications of the removal of experts' immunity following the Supreme Court's decision in *Jones v Kaney*. Following discussions with other experts and with lawyers involved in dispute resolution, a number of points arise from the expert's perspective.

It is unlikely that many law firms will sue experts; the behaviour of the expert in this case was described as "egregious". However, the ruling does open the door to aggrieved clients to sue their experts if they are unhappy with the outcome of the case. This risk is probably greater where the claimant is a individual rather than a corporate or financial institution.

The basis for any action against the expert is unlikely to be the expert's modification of his or her views as a result of an experts' meeting or cross-examination. However, these may provide support for an argument that the expert's preliminary views, or opinions expressed prior to preparing a full report, were the negligent element of the expert's performance.

PI cover will be essential to protect against the legal costs of defending claims, however spurious, since a client cannot be prevented from launching a claim even if the expert's performance has been impeccable.

New Expert

Dr Thomas Walford has had very wide experience in private banking, investment management issues and wealth management. He has spent 19 years managing Private Banks and a total of 28 years in the City managing or advising clients on investment and banking issues.

Following several years' involvement in dispute resolution, Thomas has worked as an expert in a number of cases where he has been instructed by GBRW Expert Witness, including one which went to trial in the High Court last month. Current events suggest that his area of expertise is one which will remain in demand for some years to come.



The scope of the PI cover will also need to cover claims arising from events which may date back some years, given the timing of the events in *Jones v Kaney*.

Our response has been to include limitation of liability language in our engagement letters (with the usual exceptions for negligence, reckless or fraudulent behaviour). We have also included an acknowledgement from the instructing firm that *"..an expert's preliminary comments are often based on a review of a selected sample of documentation. As such, any initial views expressed by the expert should be treated as provisional in nature..."*, a point which we feel important to highlight for all parties.

A further effect of *Jones v Kaney* may be to discourage new experts from agreeing to be instructed, especially when they face a "Catch 22" in trying to find PI cover for expert work without a prior track record. We have already had a couple of reactions along these lines.

Paul Rex
Managing Director
GBRW Expert Witness
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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

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Financial Sector Employment Disputes

GBRW Expert Witness is not always seen as a source of expert advice for employment related disputes. However, we have provided experts for a number of severance, bonus and loss of earnings disputes over the past few years.

Alastair Colgrain, the Managing Director of Webster Partners, comments on a number of areas where disputes arise.

The banker-bashing headlines of recent years have tended to throw all types of banker into the same category in the public imagination. In reality, whilst there are myriad different activities within banks and brokers, many have in common a level of total remuneration which is way in excess of the average compensation paid across the country. At the top level, the sums of money are so large as to seem to bear little relation to a normal world, but they are normal in this environment, and it is for the expert to demonstrate where this is, or is not, the case. Three of the areas in which my advice has been required are:

Loss of employment. The financial crash of 2008-2009 brought about significant redundancies in the City. Apart from wholesale closures such as at Lehman, most redundancies have been undertaken selectively and under formal guidelines and disciplines. In large part, the reduction in headcount across financial services has taken place reflecting the spirit of high risk/high reward, and without wholesale litigation. However, this has not prevented disputes arising from time to time, in addition to which there have been more polarised cases relating to sexual or racial discrimination.

Loss of earnings on account of accident or death is an area where experts are frequently asked to opine. Most senior financial employees will receive a base salary, one or more cash bonuses, the award of options or shares (which may or may not be in a Long-Term Incentive Plan) and a pension contribution, together with other benefits such as life cover and death in service. The expert will be asked to draw a value trajectory for each of these types of payments; he or she will need to be mindful of issues such as the timing of payments within the calendar year, qualifying periods (which may be over a number of years), and whether there may be a clawback or malus, (i.e. the opposite of a bonus) for subsequent corporate or individual underperformance.

Bonus Disputes. The annual award of bonuses causes endless internal frictions and is fraught with difficulty for management. In the case of talented employees whom the employer does not wish to lose, it is an opportunity for them to be seen to be valued; the converse is also true. Too much brinkmanship or too big a gap between expectation and reality can significantly damage corporate spirit, and it has been noticeable that bonus expectation management is an issue that has been referred to more frequently over recent years. It is also where some of the most well publicised problems have arisen.

For such cases, my starting point is to explain and define the exact nature of an employees' position. This can help to show just how marketable an individual would be, the extent to which he or she was working for a top name, and consequently where in the scale of earnings they would most likely fall. This information can be supported by Remuneration Surveys compiled by recognised benefits advisors and by comparable data provided either by HR Departments or other sources.

For lawyers who have not had first hand experience of working with financial institutions, the terminology and the definition of roles can be confusing and it is not unusual for an expert to provide a glossary of terms to shed light on some of the more opaque and specialised functions of the market. It is also helpful to be able to distinguish the reputational and credit rating strengths of different institutions, and to provide a league table of firms in terms of earnings, pay-scales and employability.

There can also be a strong element of subjective judgement in financial sector earnings projections. Compensation packages are often based on a pre-agreed budget or turnover target, against which an individual will expect to be paid in the form of a real or notional percentage. The percentage varies from firm to firm, and may be dependent on firm wide, country wide, division wide, desk wide or totally individual criteria, as well as being subject to the personal vagaries of senior management. An expert's ability to opine therefore requires a detailed understanding of the particular product area as well as standing of the employer and the history of the market at the time.

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Derrick Cole ACII: An obituary

We were very sorry to learn in April of the death of Derrick Cole, one of the founders of Associated Insurance Experts, at the age of 84. The obituary below has been contributed by his friend and colleague Geoffrey Lloyd.

Derrick Cole joined Eagle Star after brief active service towards the end of World War II and after being manager of several branches was attracted to the City, joining the international broking firm of Willis. He always claimed that the law was his first career preference and this led him to join with others in his retirement to launch Associated Insurance Experts. He later joined the Academy of Experts and became a founder member when the Expert Witness Institute was formed.

However, his most outstanding achievement flowed from his chairmanship of the British Insurance Law Association in the early 1990s. Motivated partly by his full time career experience, but ultimately by his experience as an expert advising on broker professional negligence, he pressed for reform of insurance contract law. With the full support of the BILA committee the project took shape and in 2002 the BILA report was published with strong judicial support.

It is doubtful whether many appreciate the enormous amount of personal effort Derrick invested into arguing for the reform. He was rewarded a few years later, when the last government was persuaded to allow the Law Commission to take insurance contract law reform as a major project.

Derrick was a true gentleman: warm hearted and generous and a real pleasure to work with. To me he was a close personal friend whom I shall never forget.

Proposals for the Reform of Legal Aid

In July, the LSC published its schedule of revised legal aid fees, including those applicable to expert work. The results, while not surprising, do little to motivate experts in our field as they bear little resemblance to those applying to civil cases. While we are still willing to discuss legally aided cases, individual experts will normally be unwilling to consider being instructed unless special factors apply.