

EXPERTISE

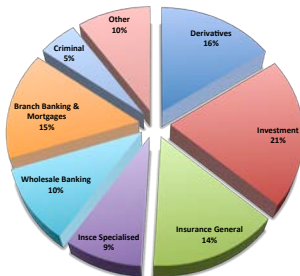
The Newsletter of GBRW Expert Witness

2012 Trends

The year just ended has been our busiest to date, with almost 200 approaches from law firms leading to more than 70 engagements. We have now worked with 70% of the Legal Week Top 50 firms and with an increasing number of overseas practices.

The pie chart below, based on a recent analysis, shows how requests for expert support break down over different subject areas.

Pattern of approaches: 2012



GBRW Expert Witness: Enquiries for 12 months to October 2012

Comparing this with the results of a similar exercise two years ago, a number of trends can be seen.

Enquiries relating to derivatives disputes are up by 50%, mainly because of the Interest Rate Swap disputes between small businesses and banks (see article overleaf); Investment disputes remain a very active field, although the focus has moved from underperformance on "classic" portfolios to litigation over more complex structured investments;

We continue to be surprised at the low level of litigation over commercial property lending, which is reflected in the 10% share of "Wholesale Banking" enquiries. By this stage we would have expected to see many lenders claiming against professional advisers, especially as many transactions must by now be approaching limitation periods.

The consensus among litigators seems to be that 2013 will show no reduction in activity, so we look forward to continuing to work with the legal profession on banking, investment and insurance disputes.

Paul Rex
Managing Director
GBRW Expert Witness
January 2013

Expert work in Hong Kong and Singapore

GBRW Expert Witness now has a Director, Asia located in Singapore. Martin Edwards joined us at the end of 2011 after a career in banking and trade finance with Crédit Agricole, Banque Indosuez and Chemical Bank, the majority spent in Asia. Martin is our point of contact for law firms based in Hong Kong and Singapore and can be contacted at:

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He is also working to develop our pool of experts based in the region, so would be interested in talking to potential candidates for expert work.



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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



IRS mis-selling – done and dusted?

Nick Douch has been extensively involved as an expert in reviewing allegations of Interest Rate Swap (IRS) mis-selling. We have asked him to review where things now stand for small businesses following the FSA's ruling in June last year.

Background

On 29 June 2012, the Financial Services Authority (FSA) announced that it had reached agreement with four major banks – Barclays, Lloyds, HSBC and RBS – so that the banks would provide appropriate redress where mis-selling of interest rate derivatives had occurred. Independent reviewers were to be appointed and approved by the FSA and would decide what level of compensation – if any – would be paid by the banks. On 23 July 2012 a further seven banks agreed to do the same. The independent reviewer process is obviously an attractive route for clients of the banks who feel that they were mis-sold interest rate hedging products, because it will provide a low or no cost method of settling the dispute, and will avoid expensive mediation or court costs. Furthermore, the banks are obliged to approach every client who was sold these products if there is a case for mis-selling.

What is covered?

However, not all interest rate hedging products are automatically included in the scheme; structured collars are specifically mentioned and the banks have agreed that no further sales of these products will be made to retail customers.

Structured collars were sold under a number of different brand names, but essentially they gave the client a maximum and minimum rate payable on the product, but also raised the rate (although never above the maximum) if interest rates fell below certain levels. With the massive fall in interest rates seen after the financial crisis, the vast majority of these minimum rates kicked in, and clients found themselves paying higher rates – even while market interest rates continued to fall.

Not all suspect products were structured collars; many interest rate swaps were also “structured” in different ways. They could be cancellable (by the bank), extendable (by the bank) or increased or decreased in amount (by the bank); all of these features involved the client – often unknowingly – selling one or a series of options to the bank. Selling options is a potentially risky activity for a small business and banks were frequently at fault in not making it transparent that the client was taking on these risks when it bought such products.

Not all clients will be eligible for this scheme:

- Firstly, “sophisticated” customers will be excluded; I am told by the FSA that this is intended only to exclude clients who should have been very familiar with the complexity of these products. It remains to be seen whether any of the banks seeks to exclude claims on the basis of the FSA parameters, even if it is clear that the client was non-sophisticated.
- Secondly, if the bank believes that the client fully understood the product when it was sold, then such clients will also be excluded. This is clearly a very subjective area, and it is impossible to give clear advice on this until individual situations can be assessed.

Redress offers

It is important to bear in mind that any redress offer from the bank is binding on the bank, but not on the client. This suggests that in many cases the first offer will not necessarily be the final offer and a period of negotiation may well ensue. If the final offer is not acceptable to the client, the client will still have available legal or non-legal methods of recourse.

But how does a small business assess what is a fair offer, and how can it tell whether

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the independent assessor has taken into account all the facts that might have established mis-selling? I would suggest that there is no template that will answer either question definitively.

The FSA press release also makes no mention of consequential losses as being part of any offer. Consequential losses involve arguments on causation and quantum, but in many cases will be relevant to the client's claim against its bank. For example, a client may have breached its loan covenants because of the impact of a mis-sold hedge, or in more extreme cases may have become insolvent. It is hard to see how a court would ignore consequential losses that occurred in such situations.

Done and dusted?

Not quite. There is no doubt that the agreement and independent process is a major step forward, but it is not the final answer. Once banks start making redress offers this year (most, if not all, should be within the first half of 2013), it is likely that many small businesses will require expert support to help them assess the offer. If they choose not to accept it, then expert evidence will be further required to help support the subsequent claim.

Jonathan Eardley: An obituary

We were very sorry to learn just before Christmas of the death of Jonathan Eardley. Jonathan was a widely respected expert with whom we had worked over several years and the obituary below has been contributed by his friend and colleague Mike Jones.

Jonathan was a highly experienced expert, specialising in stockbroking and asset management disputes. Having trained as a consultant with Thomson McLintock, he became Director of Consultancy before moving on to become a director of the National Investment Group, an amalgamation of a number of stockbroking firms. He then became Chief Executive of Société Générale's operations arm, which provided clearing and settlement services to a large number of stockbroking firms.

Jonathan served on a number of industry committees, including the Bank of England Crest Steering Committee, which designed the system that Euroclear now uses to provide central settlement for the UK. He was a founder member of the Quoted Companies Alliance and chaired their Markets and Regulation committee for many years.

Jonathan was a keen sportsman, with a fine sense of humour. He was a member of Beaconsfield Golf Club and a very competitive golfer; occasionally lawyers would be told that he and I were unavailable that morning as we were “on a course.” He was highly regarded by clients for his breadth of knowledge concerning City matters, his attention to detail and his ability to put anyone at ease immediately on meeting them.

He leaves a wife, Lindsey, a daughter, Liz, and a grandchild, Ben.

A confession

While Expertise is intended to be a semi-annual publication, we have to confess that 2012 was marked by its absence. We can only plead pressure of enquiries (see above) and our corporate New Year's Resolution is to try to be more punctual!