EXPERTISE

The Newsletter of GBRW Expert Witness

How long will it take (and how much will it cost)?

In a profession where time-based billing is the norm, the answer to the second half of this question follows close upon the answer to the first.

We are seeing an increasing tendency to request a capped or fixed fee, either for a full CPR 35 compliant report or, more commonly, for a discrete piece of analysis. In some cases, this is driven by PI insurers' requirements for cost estimates; in others, where firms are working on a conditional fee basis, they are looking to cap their own exposure to costs.

...a number of factors may cause us to revisit earlier estimates

We understand the commercial pressures which law firms face vis-à-vis their own clients, and are normally happy to consider caps on costs up to production of a draft final report. This is the period within which the expert's time is within his or her own control; once the draft report has been delivered, it may raise issues which require further work and/or amendments to the Statement of Claim or Defence.

Most experts accept that they may need to absorb any overrun in excess of their time estimates, but a number of factors may also cause us to revisit earlier estimates:

- **Documentation which is badly organised.** In particular, bundles which are not in chronological order (which often go hand in hand with large numbers of duplicate copies) cause serious problems and the expert then has to do the work which should have been done by the instructing solicitor.
- **Illegible documents.** Cases involving trade finance are particularly prone to this issue, as I can confirm from personal experience. Where certain documents are key to a case, the first generation copies in the solicitor's possession have to be legible; if they are not, there is little hope for the expert poring over later versions which have been through the copier an extra couple of times.
- **Subsequent disclosure.** It should be relatively uncontroversial that a time estimate based on two ring binders of documentation may not be valid if another three binders follow a week later. In practice, we have experienced cases of "mission creep" – sometimes in a very pronounced form!

Where we have given time or cost caps, we will use our best efforts to stick to these. In return, we ask our instructing solicitors to help us do so by being conscious of their own responsibilities.

Paul Rex
Managing Director
GBRW Expert Witness

New Expert

John Thirlwell is a former Director of Hill Samuel Bank, where he chaired the Group Credit and Risk Committees, and of the British Bankers' Association, where he was Director, Risk and Regulatory issues. He is currently a non-executive Director of Novae Syndicates Limited and Chairman of Trustees of the Bankside Gallery.

John is an acknowledged authority on business and operational risk in banking, insurance and related sectors. He has worked for GBRW as an expert witness on two cases in the last few months, the first involving regulatory reporting and the second, questions of appropriate behaviour by a senior banker.

Enquiries:
Paul Rex,
Jeremy Denton-Clark
or David Croft
T: 020 7382 9900
F: 020 7382 9988
E: experts@gbrw.com

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

GBRW Expert Witness incorporates Associated Insurance Experts and Intrabank Expert Witness
GBRW Limited Registered in England No. 3041652; Registered Office: 27 Throgmorton Street, London EC2N 2AQ

Insurance Contract Law Reform - An Update

Derrick Cole is a retired Chartered Insurance Broker and former Chairman and Vice President of the British Insurance Law Association. He was an Executive Director of Lloyd's Insurance Brokers Willis Faber (now Willis). Derrick was until recently a Principal of Associated Insurance Experts (now part of GBRW Expert Witness) and has provided us with this update on proposed reforms to insurance contract law.

Background

Since a Joint Scoping Paper was published in 2005 by the Law Commission, and following earlier reports by The British Insurance Law Association and The National Consumer Council, an in-depth review has taken place and is continuing with the object of a proposed reform of insurance contract law. No less than six Consultation Papers have been published, together with other papers providing Summaries of Responses, a paper on Section 83 of the Fires Prevention (Metropolis) Act 1774 and a 385 page Joint Consultation Paper on Misrepresentation, Non-Disclosure and Breach of Warranty.

The Law Commission has been working jointly with the Scottish Law Commission and a recent joint paper has been published on Consumer Insurance Law: Pre-Contract Disclosure and Misrepresentation (which includes a draft Bill). This has been a major exercise during which wide consultation has taken place and the Law Commission is to be congratulated on the scope and content of their publications.

The Issues

The responses received by the Law Commission have shown an almost unanimous need for reform and a letter published by the Daily Telegraph on 5th September 2009 signed by ten leading Professors and University Lecturers confirmed this. Further support has come from senior members of the judiciary. The principal area for reform has clearly been over the insured's duty of material disclosure in the pre-contract period.

Other important areas include the need to clarify where the Agent (or Broker) is acting for the insurer, so that the insurer becomes responsible in law for their actions, and the right of the insured to sue for damages in the event of late payment of a claim instead of only a right to interest, as at present. There are many other issues, such as breach of warranty, insurable interest and the need for insurers to play their part by asking reasonable or obvious questions concerning the risk which they know are vital to their decision making in a particular case, rather than turn a "blind eye" and later claim non-disclosure. This last issue has still to be addressed and is particularly important in business insurance, especially where the risk is placed (as it often is in the Lloyd's Market) without a proposal form.

Consumer Insurance

The draft Bill provides for a change in the duty of disclosure in pre-contract and pre-variation information, so that the standard of care would be based on a reasonable consumer, subject to certain points:

- If the insurer was, or ought to have been, aware of any particular characteristics or circumstances of the actual consumer, these are to be taken into account.
- A misrepresentation made dishonestly is always to be taken as showing lack of reasonable care.

The bill also deals with the situation where the non-disclosure is deliberate, reckless or careless, the latter being subject to a degree of proportionality depending on the attitude of the insurer with the knowledge of the non-disclosure.

The principal area for reform has clearly been over the insured s duty of material disclosure

Amongst other matters, the Law Commission states that "*Where there are no relevant circumstances to show that the agent acts for the insured, then the agent is taken to act for the consumer*".

Business Insurance

The final recommendations of the Law Commission on micro-businesses and the larger business organisations have yet to be published. These will include breach of warranty, where it is expected that there will have to be a relationship between the breach and the loss before the insurer can avoid the claim. Also, it is hoped that the duty of the underwriter in the placing process will also be addressed (on which the Marine Insurance Act 1906 was unusually silent). Geoffrey Lloyd (a former Senior Executive of Royal Insurance and a Principal of Associated Insurance Experts) has joined me in our various submissions to the Law Commission to recommend that serious consideration be given to this aspect.

Conclusions

It will, of course, be a matter for the new Government to decide on legislation. Although the FSA's Insurance Ombudsman plays an important role in the settlement of consumer and small businesses disputes, it is felt nevertheless that sound law is needed, especially as the Ombudsman's awards are limited to £100,000 (which is totally inadequate for even a modest house and contents). It must be remembered that the MIA 1906 was not a reforming but a codifying act and reflected the current common law decisions. Many practitioners feel that it is important that the UK should catch up with recent insurance law reform in EU countries as well as in other parts of the world.

Legally aided cases

Following the response of a number of expert representative bodies to last autumn's Ministry of Justice Consultation Paper on Legal Aid: Funding Reform, the MoJ has decided that it will carry out a data gathering exercise to increase its understanding of the type of work experts undertake and what rates are paid. It will also set up a working group which will include expert witness bodies and other interested stakeholders, to help analyse and validate the findings of this exercise.

Our own position is that we will try to provide experts for legally aided cases, not least because we feel it is important to provide expert comment on issues with which a jury will otherwise have difficulty. However, we remain very concerned at the apparent blanket proposals to reduce hourly rates to a single, inadequate level. We are equally concerned over the proposed fee structures for travelling to, and giving evidence in, Court, which we believe many experts will simply find unacceptable in their current form.