

# Financial Sector Expert Witnesses

by DR THOMAS WALFORD



Expert witnesses with banking and investment backgrounds have found themselves increasingly in demand in recent years. This is partly due to people in general being more litigious but also, in the financial world, to the economic problems that hit most western economies in 2007-09. In addition, as the investment markets have become more sophisticated, clients of financial institutions have become involved in many new forms of investment instruments, without necessarily understanding the risks associated with them. This latter factor has resulted in many people incurring major losses, in some cases through receiving inappropriate investment advice.

However, acting as an expert witness in the world of finance is not limited to disputes between clients and financial institutions. Advice may also address bank versus bank, bank versus custodian and, quite frequently, involve a professional indemnity insurer which is seeking to defend claims and/or claim against other institutions involved in a transaction. In a bull market, the rising market tends to cover a great many of the mistakes. The situation is quite the reverse in a bear market (or after a bear market, as this is when the cases tend to come to the legal system) when even a minor error can result in really quite major losses. The last few years are no exception, with the sub-prime mortgage problems in the US, which then had a major impact on many structured products, the collapse of Lehmans, which was both a guarantor and counter-party to many hedge funds, and the rescue of AIG and Merrill Lynch and a multitude of other banks in the US market. Although many of the problems emanated from the US, the shock waves and implications have been felt throughout the world.

## The breadth of work involved

The UK has impressive systems for looking after both small investors and depositors in the financial markets. The Financial Ombudsman will handle claims against financial institutions where there are financial losses of up to £100,000 and the Financial Services Compensation Scheme looks after depositors by guaranteeing deposits up to £50,000. In the cases of the disasters within the banking system in 2008 in the UK, it was general to safeguard all depositors irrespective of size and, although they may have seen a period of illiquidity, very few have lost money in cases such as Northern Rock or Icesave. However, if the claims are over the prescribed limits, then the only resort is to the court system and, due to the size of the claims, the cases normally have to be heard in the High Court.

There are many cases currently in the Civil Procedures System but legal cases in the financial world are not limited to these areas. Perhaps not so common, but no less important, are the cases that have been brought under criminal procedures, dealing with matters such as

insider dealing and fraud but also with regulatory issues and ability to practise and those involving arbitrators.

There is frequently a role for mediation, which provides an alternative or first attempt to resolve the issues prior to the case, and this is often a major opportunity for the sides to do so in private and at considerably lower cost. Banks and institutions with reputations to protect, as well as clients who would wish to see their financial matters dealt with away from the public forum of the court, may find this a very convenient option.

Historically, there have been a multitude of experts dealing with claims in the medical and construction fields. These are often highly complicated and specialist areas where only practitioners in the field can determine what has gone wrong and provide the court with advice. However, the world has now become substantially more complicated in just about every field and, as a result, the courts have needed guidance on where liability lies in many cases outside the medical and construction disciplines. Consequently, experts have appeared in many fields and finance is no exception. Frequently deals which involve derivative contracts, interest rate swaps, warrants, credit default obligations, investment advice and the duty of care that a financial institution owes its clients require a specialist to unravel the issues and advise the court on the core aspects concerning which the judge or jury can then make decisions.

## The role of the expert



The role of the expert has also evolved in recent years – with the Lord Woolf reforms and the introduction of CPR 35 (for Civil Cases) and CPR 33 (for Criminal Cases). The expert is normally appointed by one party but owes a duty to the court to look at all matters relevant to the case. In some instances, generally in smaller cases, the two parties can decide to appoint a Single Joint Expert. However, this is rare in financial disputes.

The expert's role in litigation involves a number of stages. The first and often the most important is in pre-litigation advice, whether a claim exists, and then subsequently on what should be the claimant's main focus. As a result, I have found that I am frequently called on to write a report very early on in a case to determine whether the case has a prospect of success and subsequently to advise on which are the strongest arguments. Assisting the solicitors with the pre action letters, particulars of claim follows shortly thereafter. If this is done with precision and sufficiently careful targeting it can result in a successful resolution to the case.

The expert will normally be provided with all the evidence for the court case and will seek to interpret what has actually happened. With phone logs and emails needing to be disclosed this can run to a multitude of files! The expert is not only concerned with matters of fact but also with seeking to interpret what has happened and giving an opinion on what should have happened and what has gone wrong. Once the expert's report has been written, exchanged with the other side and any additional issues dealt with, it is then normal for the court to require a meeting between the two experts. This meeting results in a joint statement being produced which will frequently focus on the areas that the court will need to concentrate on. Then, finally, it comes to the case being heard in court and the expert will normally be required to give evidence and be subject to cross examination.

My own experience has involved cases that involve nearly all the elements mentioned above – criminal and civil, small and large (even to the point where losses may be \$50-100m), investment and banking and both for and against financial institutions. Each of the cases has been really fascinating and has brought up situations which my clients would have hoped to avoid if they could 'press replay!' □

**Dr Thomas Walford**  
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A highly experienced Expert Witness with wide experience in private banking, investment management issues and wealth management. Dr Walford has spent 19 years managing private banks and a total of 28 years in the city managing or advising clients on investment and their banking needs. Court cross examination is a speciality as well as advising on pre-litigation decisions on a Particulars of Claim.

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