"Working as an International Expert"

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I have been invited to write an article for this international magazine as a court expert witness with experience working in many of the world's international courts. I thought it might be useful to readers to have a personal account of my working life in the first quarter of 2019 to give an idea of what one might expect from the role. In the narrative below, minor details have been changed to preserve confidentiality.

I practise as an expert witness in banking and financial matters, having spent the majority of my working life in this field, initially in junior positions and later achieving promotions, which led to my having a very wide range of experiences, subsequently in relatively senior roles. I started in venture capital (now generally referred to as private equity, although we rarely used that term in the 1980s) and then became a front line equity manager, running portfolios contained within unit and investment trusts. There was never a dull moment, including major events such as the crash of 1987 and equally "big bang", the new system which removed the rules keeping jobbers, brokers and banks separate and abolished fixed commission charges. There have been further changes since these years. More recently, I ended up running the private client investment divisions of subsidiaries of banks, providing advice and management of portfolios for individuals, trusts and investment companies both onshore and offshore, depending on the available circumstances.

As you can imagine, and particularly during the years 1987, 1990, 1998, 2000-2003 and 2008, when the stock market had serious wobbles, there were many instances when client portfolios did not live up to their expectations and this led to complaints. As a senior director of the department, it was left to me to deal with the clients and seek to ensure they understood the risk/return balance which a portfolio manager might be expected to achieve.

At the same time, over this period, the whole regulatory framework imposed on the financial industry was developed and implemented and modern day regulation, as we now know it, came into being.

As a result, by 2009, I had a very broad experience of many different banking principles and also of dealing with disputes between financial institutions and their clients. It was, therefore, a natural consequence of this that I set up Expert Evidence to provide advice and information to the legal profession and ensure that courts had the right input so that cases could be decided from a position of knowledge. Amazingly, there is not a great deal of competition in this area. The role of the financial expert witness in the courts has become all the more important due to the increasing complexity of financial instruments over this period. The idea of a synthetic derivative or a collateralised mortgage obligation as a security was relatively unheard of in the 1980s outside the world of city dealers. In the 2000s, many private clients, particularly the wealthier ones, were sold Structured Products, many of which were not fully understood.

Litigation is not the only means of resolving a dispute: parties can seek to resolve disputes through mediation and arbitration, so these too became essential additional facilities which are offered by the Expert Evidence service. Both can provide quicker, less adversarial environments for dispute resolution.

The shocks of 2008 were enormous in the financial markets and they initiated a whole change in regulatory approach and the kind of service that clients would accept. The crash also initiated a whole new series of disputes, many people having lost substantial amounts of capital and few understanding what had really gone wrong. Overlay this with additional problems, like the Madoff saga, and losses expanded. Such were the liquidity issues after this, national governments were forced to enter a period of quantitative easing and low interest rates which then produced their own problems. Interest rates remained low for 10 years, which then led to the Interest Rate Hedging Product problems for many commercial companies, which had sought to protect themselves from interest rate rises.

The stage was set for many disputes.
The world works on very similar financial systems and, although each country or region has its own currency, the banking principles remain largely similar. Many of the major banks are highly international and hence operate in many different jurisdictions. In some cases, clients sought to protect their wealth from authoritarian regimes and so would invest part of their wealth abroad. Others sought to mitigate their tax obligations and therefore frequently chose to invest through low tax jurisdictions. Many of the world's largest banks are truly global and so have subsidiaries in many countries. Finally, one of the most common investment principles is to look for diversification to mitigate risk and, consequently, clients are often persuaded to invest in many different industrial areas. All these factors combined led to the elements causing international disputes.

Finance is not the only discipline to be widely international. Shipping and maritime trade have the same elements and potential for problems to arise where there are losses. Disputes arising from maritime incidents can also occur in any part of the world and as a result the disputes need to be heard on an international basis. Medicine is very similar the world over and hence medical principles are similar throughout. Experts in medicine in one country can well apply elsewhere and countries' borders provide no limit to the application of medical principles. Gravity is also, obviously, universal, hence engineering principles remain the same. A bridge in one part of the world will usually also remain in place elsewhere, hurricanes and earthquakes excepted.

Lastly, international expertise can also be preferable when the available pool of experts is very small and all the experts in one country know each other and have trained together. In such a situation, the requirement for an expert who can be independent, impartial and completely removed from the litigation parties is best achieved by using an expert from another country.

All the above principles came together for me and Expert Evidence in the first few months of 2019. I have previously given evidence in trials in England, Ireland, the UAE (DIFC), the US, the Caribbean and Singapore, so am quite familiar with the different rules and ways of running cases. At the start of 2019, I had been working on three cases which were due to be scheduled for trial in February and March. The first was in Singapore from 19th February and was due to last until 1st March. Then I was due to be available for a court in Nassau, Bahamas on Tuesday 5th March, which was due to last that week closing on 8th, following that, I was due in the Southern District of New York for a jury-decided civil trial from 11th to 15th March. It took quite a challenging itinerary to get from Singapore to Nassau over the space of a weekend, involving flying to Hong Kong, Los Angeles and Miami where I had an overnight night stop before finally reaching the Bahamas.

The trial in Singapore, to be heard in the Singapore International Commercial Court ('SICC') started on time and in the main Supreme Court building, just behind the National Gallery of Singapore. The building is fantastic, having a marble-faced exterior and a large central atrium with the main courts off both sides and escalators serving each floor. Security is tight with everyone needing to go through airport style checks whenever they enter the building. We had been working on the case since October 2016. I had completed an expert's report in December 2018, which had been submitted to the court and I then received the report that had been written by the expert appointed by the other side. A number of issues had come up on which we did not agree, and we therefore scheduled an experts' meeting in London in late January 2019 to discuss this and were then instructed by the court to produce a joint statement. This was completed in early February. The discussions at an experts' meeting for the English Courts are always conducted under Civil Procedure Rules 35 (those that apply in the England and Wales), although this case was to be heard in the Singapore Courts and under

Singapore Litigation rules. In Singapore the applicable rules are those contained in the Rules for the Court 40A and the SICC has its own set of rules contained in part XIII of the SICC Practice Directions.

I sat in court each day making notes on the evidence and cross-examination and there were really very few surprises. The story, as told by the main plaintiffs, was in line with the witness statements that they had previously provided. However, this was still a very productive time in that it made sure I was fully familiar with the facts of the case and all the evidence available. Following the cross-examination of the two plaintiffs, the focus of the court turned to the bank and the appropriate executives who had provided the advice and service to the clients. The case was complex in that it involved financial institutions in Singapore, Dubai, Bermuda, the UK and Germany.

The judge made a particular effort to ensure that the trial kept to the timetable and would not overrun the two week window reserved for it. He achieved this most satisfactorily while at the same time allowing for the attorneys to probe those areas that they wished to.

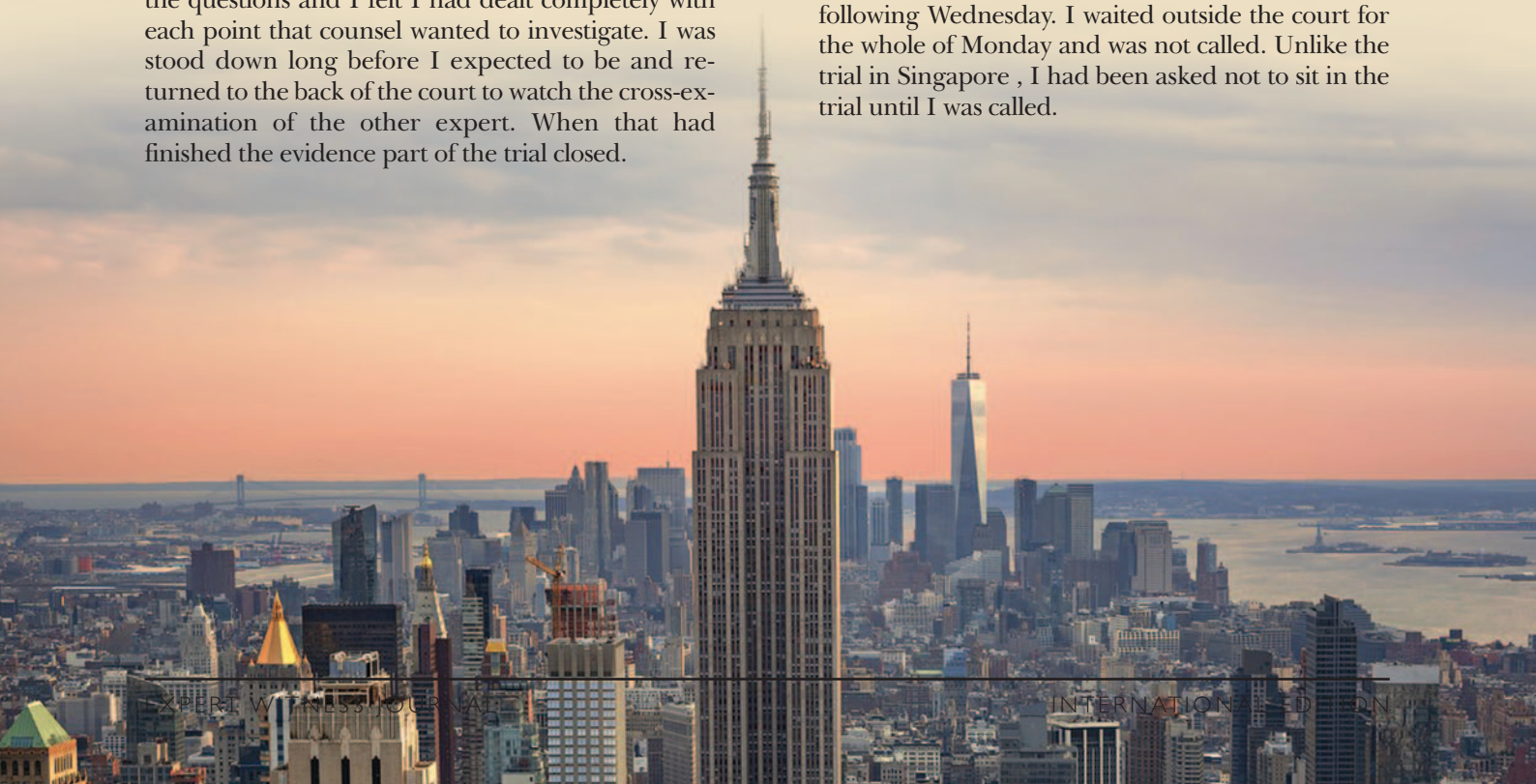
My turn in the witness box came up on the afternoon of the eighth day. By this stage I was living and breathing the case and had all the facts and references at my fingertips. As much as one feels nervous about giving evidence, it is also a chance to show knowledge about not only the facts of the case but also the general principles and processes applied within banks to provide a service to their customers. In this case, an investment portfolio had purchased a life policy through a loan and the interest payments had become too expensive to afford. As a result, the loans had been recovered by the bank and the investments and policy sold to provide the liquidity. This had caused severe losses to the clients.

My time in the witness box was almost over before I really even knew it. It was not too difficult to answer the questions and I felt I had dealt completely with each point that counsel wanted to investigate. I was stood down long before I expected to be and returned to the back of the court to watch the cross-examination of the other expert. When that had finished the evidence part of the trial closed.

The final day was taken up with the judge providing instructions to the counsel so that they could prepare their closing statements. This dealt with many of the legal aspects of the situation and the duties of financial institutions and the ways that contract law applied to this case. I then left Singapore, arriving in Nassau on 4th March. I found that the trial there had been delayed until later in the year but I went anyway to meet up with the lawyers as planned followed by a case management hearing in court. This left me with three days to kill before I was due in New York at the weekend for the trial there.

The Nassau case had been on my books since November 2014 – some 4 ½ years earlier. It would now take 5 years to come to trial. We had completed the expert's reports in December 2017 and, at the request of the lawyers, had held an experts' meeting in February 2019, just before I left for the Singapore trial. It had been found that the two experts had received different evidence and, in particular, different valuations of the same portfolio. It was considered prudent to ensure that we were both working from the same hymn sheet and so we carried out an analysis of the differences and what were the correct valuations which we could agree between ourselves. This caused some delay and the experts' joint statement was eventually completed in June 2019.

On leaving Nassau, I had to deal with the New York trial, which had already started, and where I was expected to be giving evidence. I flew up there on the Saturday and met with the lawyers on the Sunday to run through what had been happening in the trial so far and to prepare myself for the facts of the case. I had expected to give evidence on the Tuesday and so prepared for this. Tuesday came and went and I was not called and the Judge was unable to sit on Wednesday, so the next opportunity was Thursday. However, it turned out that the plaintiffs wanted to put on a couple of new witnesses before me, so that blew Thursday out! Consequently my return flight on the Friday was not possible and I had to delay it until the following Wednesday. I waited outside the court for the whole of Monday and was not called. Unlike the trial in Singapore , I had been asked not to sit in the trial until I was called.



I eventually went on to the stand on Tuesday afternoon. I was not there long and indeed was released within a couple of hours. The time went by so quickly I don't think that I was really aware it had all started. It began with my evidence in chief, where the lawyers for the plaintiff (who appointed me) took me through the most important parts of my report and gave the jury the opportunity to appreciate the essential points on which the case was based. This evidence in chief is taken as read, in the English civil courts and so it rarely arises. It was a new experience. After that, the defendant's attorney got up and asked a number of questions which I think were primarily intended to test my knowledge of the situation and the limits and range of available answers that applied. My background and experience were accepted by both sides as being sufficient to act as an expert in this case which was very pleasing. Finally, the plaintiff's lawyer had the opportunity to re-examine me on any points that he felt needed further explanation. None was necessary. After that I was stood down and was able to relax a bit and listen to the rest of the trial from the public gallery.

I have been extremely lucky to have had an opportunity to advise courts in exciting parts of the world. As I stated earlier, finance is an international activity and the principles are not very different in other countries, nor are the nature and issues involved in the disputes. London remains a primary pivot point in litigation and dispute resolution as well as a source of substantial knowledge, with strong rules about fair dealing and legal knowledge. This has meant that, as a British expert, you are globally respected. I have much enjoyed the opportunity this has provided me. I hope and trust that we can maintain this position in the eyes of the world.

All the above cases which I have been involved in have many interesting and critical points that the courts need to understand and I hope that my contribution has assisted in that endeavour. The correct ultimate decision, in my opinion, is really only possible if the judge and/or jury is in receipt of all the facts and understands how they should be interpreted in the financial world.

Inevitably, there is considerable waiting involved before an appearance in a dynamic court situation, where the progress of the case is inevitably largely determined by the speed of the previous witnesses' evidence. New arguments come up and additional points on which the case may turn. This requires enormous flexibility on the part of all participants, including the experts who are being called to give evidence. There are frequent situations where an expert is called to account for their views and he/she needs to be able to defend them under cross-examination. Being a good expert in open court is a necessity. The adversarial system is very good at ensuring the evidence is critically examined and I always welcome the chance to show my knowledge. Poor or shallow experts are often ultimately exposed, which has to be a good thing for the profession in the long run.

Lastly, I would come to the rules under which an expert operates. Every legal jurisdiction has a set of rules or principles (either written or understood). In some countries there are different sets of rules for different courts and in the criminal and civil systems. It is absolutely necessary that an expert is familiar with these rules wherever they are called on to assist a court. In some parts of the world, judges may have their own additional rules for experts who appear in front of them in their courts. Failure to observe these rules can lead to the evidence being excluded and it will normally be for an expert's instructing lawyers to ensure you know what the rules are and that you have kept to them in the period up to trial. Once you are in the witness box, you are on your own and then knowledge of the rules is necessary to ensure you stay within the requirements. Although they may be different in each legal jurisdiction, they have the same basic principles, requiring the expert to be impartial, independent and have a duty to the court. We are also lucky in that the English legal system often uses a set of principles referred to as the Ikarian Reefer rules after a judgement by Sir Peter Cresswell in 1993 in a case concerning a ship. The detail of the case has been lost in history, as it not really relevant, but the duty of the expert to the court has been enshrined in his judgement ever since. He said in the judgement that Experts "should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation."

I wish you all luck and every success in developing your own international expert business.