

# The Case for Expert Testimony

By John C. Deane

In equipment leasing industry court cases, one of the challenges lawyers and judges face is simply understanding the nuances and contractual language of the business.

That makes credible expert testimony in such legal matters especially critical to winning a case, whether it involves a bank, captive finance company, or independent leasing firm.

Industry professionals are regularly called upon to evaluate the merits of court cases, help build legal arguments, and provide valuable testimony and insights on equipment leasing and financing.

There may be no better example of the importance of expert testimony than in a high-profile case originally heard in the English Commercial Court in late 2004, involving joint claimants Saudi Arabia-based Riyad Bank, its UK-based subsidiary RBE London and an Irish-registered investment fund, a wholly owned subsidiary of Riyad. The verdict was upheld in the UK Court of Appeal last year.

The claimants filed suit against Kuwaiti-based Ahli United Bank (UK) plc, formerly known as United Bank of Kuwait (UBK). Their differences stemmed from allegations that UBK violated its duty of care to the Fund by providing negligent advice in regard to acquisitions by the Fund of leases for equipment based mostly in the United States.

UBK made recommendations to the Fund to purchase some \$100 million in leases, primarily of laptop computers, forklifts, and other equipment used by large commercial organiza-

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tions. UBK advised rates of return calculated on the basis of overly optimistic renewal rates and residual values, which, in turn, meant the Fund was significantly overvalued.

With investors in the Fund facing large, unexpected exposures and its reputation at stake, Riyad suspended the Fund's operations in 2000. This was done only after it had purchased all of the remaining share capital at par value to protect its investors.

Riyad subsequently commenced proceedings against UBK to recover the amount by which it had overpaid for the leases. The Saudi bank's chances of proving UBK's advice was negligent hinged in large part on its law firm's success at proving UBK did not follow reasonable U.S. industry standards when evaluating the lease transactions for the investment fund.

Riyad Bank's lawyers, the international commercial law firm Slaughter and May, asked The Alta Group to provide expert testimony on practices in the U.S. leasing industry. We assessed how UBK had advised the Fund and then, to the extent that we considered UBK's approach inappropriate, advised a more reasonable approach given the type of equipment in the Fund and its nature. In addition, my firm was asked to help the law firm build a convincing case for the court and then calculate the level of damages.

Slaughter and May also instructed U.S. equipment valuation firm Marshall & Stevens to determine the appropriate basis for estimating the residual values of the equipment in question, calculate these values, and then compare them to the figures originally provided to the Saudi bank by UBK.

We reviewed tens of thousands of pages of lease documents and provided direct testimony via comprehensive written reports submitted to the judge of the case. One of our principals also faced more than three days of cross-examination by UBK's legal counsel.

The judge ultimately ruled in Riyad's favor. The expert testimony provided by both Alta and Marshall & Stevens played a significant, obvious role in winning the case. The facts

and data presented in our written reports, combined with our understanding of the U.S. market and the inherent credibility of our testimony, helped convince the judge that Riyad had, indeed, been wronged.

Our work in the Riyad case took place over 15 months. It began with initial evaluation work to judge the merits of the case, which took about 120 days to complete. The next step was to prepare a detailed expert report prior to trial and the proceedings themselves, which lasted for just over six weeks.

## LEVERAGING EXPERT TESTIMONY

The highly publicized court battle between Riyad and UBK is but one example of how expert testimony can be leveraged in cases involving equipment leasing.

Sonnenschein, Nath & Rosenthal LLP in Chicago hired Alta to provide testimony in litigation involving the captive leasing organization of a major technology company in Silicon Valley. The leasing operation was being sued by another lessor for supposedly failing to live up to its promises.

We provided expert testimony on how lease financing works, the risks of operating such a business, how residual equipment values are calculated, and leasing strategies for companies to stay ahead of the technology curve.

The law firm considered our consultants who testified as more than typical expert witnesses pulled from academia. Our insights were based on real-world experiences in the field. The plaintiff's claims ultimately did not hold up against our testimony. We showed the judge it simply did not make sense for a captive lessor to make any of the alleged promises. Not surprisingly, the case was settled out of court.

In another case, we were called to assist Denver law firm Sherman & Howard LLC. It involved a sub-prime

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## **Expert Testimony**

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leasing company that entered bankruptcy. The law firm represented a third party that was being sued by a bankruptcy trustee.

We were asked to help prove that the lessor's business failed due to poor management, rather than any actions of its client. The law firm could have engaged a forensic CPA to handle this, but it really wanted an industry expert who had experience managing a leasing organization.

We learned everything we could about the failed leasing firm and compared its business practices with industry standards. There are inherent risks with sub-prime leasing, which came to light in this case. We ultimately concluded that the lessor paid the price for its own ineptness and dishonesty, and stated so in court.

Sherman & Howard said our credibility and industry expertise were invaluable to the firm's ability to win the case. According to the firm, such

knowledge could not easily be found among non-leasing industry executives.

In addition to providing insights on standard practices, we are often hired to evaluate and explain the nuances of various lease structures. The goal in most cases is to help judges and juries understand lease contracts and interpret the language used in them, for they are the ones who make the final rulings.

Last year, we provided rebuttal testimony in an income tax suit involving the U.S. Internal Revenue Service. An IRS expert questioned the validity of a lease arrangement in a big-ticket lease transaction. Relying on our experience, we explained how such large leases are typically structured — specifically stating who pays whom and when. Through our testimony, we showed why the IRS agent was wrong, and the government soon withdrew its expert from the case.

As was initially the case with the Riyadh trial, there are also times when

we are engaged to simply analyze the industry-based merits of a case. While there have been many times our opinions have convinced a party to move forward, there are also numerous examples of when we have disagreed with the premise of a court case. At that point, we recommend the client not pursue the matter.

### **CONCLUSION**

Academics, CPAs, and other non-industry professionals may work fine in most commercial law cases. People in our industry agree, however, the business practice nuances of equipment leasing and finance are unique.

The bottom line: Most judges and juries are more comfortable with leasing industry experts who have been in the trenches, gained hands-on knowledge, and experienced the business firsthand, rather than with those who have simply studied the business from the comfort of a classroom or other removed setting.



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## **Solar Power**

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of new wind projects were installed in Texas. Many utilities have chosen to over-comply with renewable energy standards because renewable energy is cost-competitive with traditional sources of energy. However, federal tax incentives, including tax credits and accelerated depreciation deductions, have had the most significant impact on making the financing of solar power projects competitive with more traditional energy projects.

### **SOLAR TECHNOLOGY**

There are many types of solar energy technologies. The two most

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significant types are photovoltaics and solar-thermal electric.

### **Photovoltaics**

Photovoltaic ("PV") is the technical word for solar panels that create electricity. Photovoltaic material, most commonly utilizing highly purified silicon, converts sunlight directly into electricity. When sunlight strikes the material, electrons are dislodged, creating an electrical current that can be captured and harnessed. The photovoltaic materials can be several individual solar cells or a single thin layer, which make up a larger solar panel.

Photovoltaic cells power small calculators and wrist watches we use every day. More complex systems provide electricity to pump water, power communications equipment or highway construction signs, and myriad other small, off-grid uses, which almost always provide electricity for small and/or intermittent electricity needs that are cleaner and cheaper to operate than extending a power line or using liquid fuels.

Photovoltaics are also making inroads as supplementary power for

utility customers already served by the electric grid. In the last two years, grid-connected solar systems have become a larger market than off-grid applications. Currently, compared with most conventional fuel options, photovoltaics are still a very small part of the energy makeup of any country. However, more and more individuals, companies, and communities are choosing PV for a variety of environmental, economic development, emergency backup, fuel and risk diversification, and economic reasons. The economics of a photovoltaic system for a home or business is a combination of the availability of solar resource, operating costs, electricity prices, and local and national incentives.

### **Solar Thermal Electricity**

Solar thermal electricity technologies (also called concentrating solar power, or CSP) produce electric power by converting the sun's energy into high-temperature heat using various mirror configurations, which is then channeled to an on-site

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