

# Seeing the wood for the trees

Dr Chris Pamplin explores evidence of fact among ‘the tangled thicket’ of expert evidence

## IN BRIEF

► There is often a fine line between evidence of fact and expert opinion, and the rules of evidence in both the civil and criminal courts have given rise to such dilemmas.

► Expert witnesses can give factual evidence within the ambit of CPR 35 if it aids in efficiently resolving the case.

In *Darby Properties Ltd v Lloyds Bank plc* [2016] EWHC 2494 (Ch), Master Matthews held that expert evidence of fact was not expert evidence within the meaning of Civil Procedure Rules (CPR) Part 35. This view persisted until 2023 when, in *Declan Colgan Music Ltd v UMG Recordings Inc* [2023] EWHC 4 (Ch), the High Court held that CPR 35 can apply to expert evidence of fact.

*Declan* concerned a dispute over the payment of music royalties under a licence agreement. The claimant sought permission to introduce expert evidence on the digital music market, while the defendant argued that this was evidence of fact, making it inadmissible under CPR 35.

Deputy Master Henderson identified several types of expert evidence that qualify as evidence of fact:

- evidence whose role is to educate the court in technical or scientific matters;
- evidence as to matters of technical fact;
- evidence that summarises the technical knowledge of other experts;
- evidence that presents facts that only an expert can recognise as facts; and
- evidence of foreign law.

Rejecting the reasoning in *Darby Properties*, the court held that an expert witness may give factual evidence if it aids

in efficiently resolving the case and avoiding the need for multiple factual witnesses (*Kennedy v Cordia (Services) LLP* [2016] UKSC 6 at paras [46]–[47] applied). The court found, in addition, that CPR 35 does not explicitly exclude the possibility of applying to expert evidence of fact.

This decision made clear that it is permissible for expert witnesses to give evidence of fact within the ambit of CPR 35, provided the factual evidence falls within the categories identified by Deputy Master Henderson.

However, there is a corollary to this. Does factual evidence with an expert element that is led by a witness of fact also fall within CPR 35?

## Witnesses & expert evidence of fact

In *Re Chaptre Finance plc* [2024] EWHC 2908 (Ch), a company applied for an order sanctioning a restructuring plan. During the course of the dispute, two anonymous reports had been produced by an advisory firm. The reports were not compliant with CPR 35. Indeed, they contained a disclaimer that the advisory firm owed no duties to the court.

After proceedings began, evidence was adduced, and it included a letter referring to the two reports. The letter explained that it had been prepared by a restructuring partner and a valuations partner. The letter stated that the partners had been asked to conduct a limited scope review of the two advisory firm reports. However, this was, in essence, led as ordinary evidence. The party relying on the letter acknowledged that it was not an expert report and it was subject to a number of caveats. Nevertheless, the party stated that the letter had been prepared by experts

in the fields of insolvency, restructuring and valuation.

Mr Justice Miles held that the original opinion evidence contained in the two anonymous reports was flawed and could not be adduced under the guise of evidence of fact. The reports did not comply with CPR 35, and neither did they identify the authors or their expertise. Worse still, the reports specifically disclaimed any duty to the court. On the face of it, this was a disavowal of the overriding duty under CPR 35.3. So the letter was, he concluded, of very limited (if any) evidential value.

The opposing creditors had relied on the letter as if it were expert evidence, despite it not complying with CPR 35. In general, where either party wishes to rely on evidence that refers to or contains expert opinions, any original reports should comply with CPR 35.

The general rule is that a party is required to cross-examine the evidence of an opposing expert witness if it wishes to submit that the expert’s evidence should not be accepted. That approach is a matter of fairness. It also enables the judge to make a proper assessment of the evidence and give the witness time to explain or clarify the evidence. Those reasons apply with real force in restructuring cases where the expert evidence is often complex and technical. In this instance, cross-examination of the report’s authors could not take place because their identities were unknown.

Although in this case counsel had argued that the court should adopt a flexible approach, apply the overriding objective and have regard to timing constraints, the judge held firmly to the view that if any party wished to rely on the opinions of

experts, their reports should comply with the requirements of CPR 35.

This ruling can be contrasted with another recent case, again dealing with a company restructuring. In *Re DS Smith plc* [2025] 1 WLUK 446, Mr Justice Hildyard gave a reminder that CPR 35 does apply to expert evidence that is led as evidence of fact. The applicant adduced a witness statement from an American lawyer explaining the position under the US Securities Act 1933. It appeared to be evidence of the meaning and effect of the US statute, but the fine line here, between information and evidence, was difficult to discern. The applicant's better argument might have been that the effect of the 1933 Act was not something the court needed to determine. However, it was useful for the court to make clear that schemes of arrangement and reconstructions remain subject to the provisions of CPR 35 on expert evidence.

### Differentiating between fact & opinion

The difficulty faced by the court in identifying the fine line between evidence of fact and expert opinion is, of course, not confined to cases in the civil courts. The parallel rules of evidence in the criminal court have given rise to similar dilemmas.

In *R v Skeene and another* [2025] EWCA Crim 17, the appellants appealed against their convictions on three counts of conspiracy to defraud. The prosecution's case had been that the appellants had designed, operated and controlled three investment fraud schemes involving Brazilian teak plantations between 2010 and 2015. These frauds targeted members of the public.

The appellants received £36.8m from investors across the schemes. The funds were funnelled through complex corporate structures and multiple accounts. Over time, they used nominees or straw directors and signatories to conceal ownership and to disguise their true involvement and financial benefit. It was alleged that the appellants made false or misleading statements about the schemes and investments, and fabricated documents to create the illusion of legitimacy.

During the course of proceedings, evidence had been given by a prosecution witness with qualifications and experience in forestry. He had conducted a survey of the plantations in Brazil, noting how they were managed and whether, for example, firebreaks were in place. In 2014, he travelled to the region and spent approximately two weeks completing the assessment. In 2017, the prosecution submitted a witness statement containing the standard s 9 declaration of truth for a lay witness. However, approximately one month

before the trial, in January 2022, the prosecution served a new witness statement but this time including a form of expert's declaration.

At the start of the trial in February 2022, the trial judge considered a defence application to exclude the witness's evidence. The defence argued that the forestry expert's testimony contained opinion evidence, which should only be admissible from a properly qualified, independent and impartial expert. They contended that the expert did not meet these criteria.

The trial judge noted that the witness had not been instructed as an expert from the outset, and the role of an expert witness was fundamentally different from that of a consultant engaged by a party. According to the transcript, the trial judge said: 'He is a factual part of the history of this case. That is his status, and he cannot be converted into an expert retrospectively to comply with the rule that permits an expert to give opinion evidence.'

**“The line is not always clear between expert evidence & evidence that a person can give from their own observations”**

As noted by the applicant, the trial judge had added that 'he can, however, be a factual witness who gives evidence of his actual, personal observations as part of his role when instructed as a consultant... simply presenting facts from his involvement in the case. ... To spell it out, there can be no consequential expert opinions.'

At a second hearing, the trial judge dealt with objections to the evidence by saying:

'This is so simple, he is entitled to say what he saw, for example, whether or not there were fire breaks... because he is a consultant, he is obviously entitled to say what a firebreak is. That is not him becoming a retrospective expert witness... He is entitled to say... whether or not there was evidence of active management. [That is] perfectly admissible as part of his observations, and so if that appears again, my ruling is that he may say that from what he saw and observed [that there was] no evidence of active management, if that is in fact what he observed.'

The appellants' application for leave to appeal the decision to allow the evidence was refused at first instance by the appeal judge (Mr Justice Wall). In doing so, the appeal judge recognised that the line is not always clear between expert evidence and evidence that a person can give from their own observations. In this case, the individual had training that enabled them to recognise features that a person with no experience of forests would fail to recognise. The appeal judge did hold, though, that it was not arguable that a trial judge was not entitled to draw the line as he had done in this case. In any event, the appeal judge also took the view that there was copious other evidence that went to the same issue. Accordingly, even if errors were made in relation to the witness's evidence, the convictions were not rendered unsafe as a result.

### Court of Appeal in the tangled thickets

Hearing the appeal against refusal, the Court of Appeal heard submissions that evidence about the extent to which the plantations were properly managed 'whether by thinning, pruning, demarcation, weeding, maintenance of fire breaks or otherwise', which the trial judge allowed the witness to give as evidence of what he saw, all 'involved both expert knowledge of the professional standards to be expected in plantation management and [his] expert opinion as to whether those standards had been met.' Accordingly, it was evidence that should have been adduced from an expert.

Giving judgment, Judge Peden KC concurred with the reasoning of both the trial judge and the original appeal judge. Dismissing the appeal, he said that the trial judge was undoubtedly right to place the dividing line where he did and to apply the touchstone identified. The fact that some members of the jury may not have had the experience to allow them to recognise a firebreak did not justify a submission that direct evidence of what the witness saw was somehow converted into opinion evidence.

In this case, evidence of fact was given by a witness with professional experience and expertise, but this did not automatically make it expert evidence. This is so despite the form of expert's declaration in the second statement.

Having read a summary of the witness's evidence in the judge's summing up, the Court of Appeal was satisfied that there was no indication that the forestry witness had been allowed to 'stray from the permissible path of an experienced forester into the tangled thickets of expert evidence'. **NLJ**

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