Neutral Citation Number: [2023] EWHC 4 (Ch)

CLAIM NO.: BL-2022-000543

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

Rolls Building
7 Fetter Lane
London EC4A 1NL

Date: 5 January 2023

BEFORE: DEPUTY MASTER HENDERSON

B E T W E E N: -

DECLAN COLGAN MUSIC LIMITED

Claimant

- and -

UMG RECORDINGS, INC.

Defendant

Counsel and solicitors:
The Claimant represented by Ms Celia Rooney (instructed by Clintons)
The Defendant represented by Mr Dominic Howells (instructed by Russells)

Hearing date: 8 November 2022

JUDGMENT

1. This is my judgment on issues as to expert evidence raised at the first hearing of the Case and Costs Management Conference in this claim on 8 November 2022.

2. The main issue is whether the Claimant should have permission to adduce expert evidence concerning the market for the digital consumption of music to address the following issues:
   2.1. The extent to which there was a commercial market for the licensing or consumption of recorded music through streaming in 2005 ("Expert Issue 1"); and
   2.2. The nature of the services offered in 2005 by streaming services to consumers and the extent to which (i) exploitation of a recording via a streaming service or platform is of a different nature to exploitation of a recording via compact disc and/or (ii) the price of usage of a recording via a streaming service or platform is lower than the price of usage of a compact disc (and the reasons for that difference) ("Expert Issue 2").

3. Subsidiary issues which overlap with the main issue were raised as to whether, if any permission is to be granted in respect of expert evidence, it should be granted only to the Claimant (as the

Claimant submitted) or to both parties, or whether I should direct that it be given by a single joint expert.

Background

4. The Claimant is a licensee of the worldwide sound recording copyrights in the master recording of a performance by the group, King Crimson, of the song entitled "21st Century Schizoid Man" (the "Recording").

5. The Defendant is a record company, which forms part of Universal Music Group. It owns and operates a record label business known as "the Island Def Jam Music Group", to a division of which, Roc-A-Fella Records LLC, Kanye West ("Mr West") was, at all material times, signed as an artist (via his production company, Rock the World, LLC).

6. In or around 2010, Mr West recorded a song, entitled "Power" (the "Power Recording"), which was subsequently made available to the public, including on the internet site "YouTube.com". The Power Recording contained a sample of the Recording.

7. On or around 27 July 2010, the parties (together with Mr West and Rock the World LLC, the record company that then was entitled to the exclusive recording services of Mr West) entered into a written agreement, permitting the Defendant's continued commercial exploitation of the Recording (as part of the Power Recording), in exchange for which the Defendant is obliged to account to the Claimant for royalties (the "Licence Agreement").

8. In broad summary, clause 3.2.1 of the Licence Agreement provides that the royalty payable to the Claimant shall be calculated and paid on the same basis and in the same manner as the royalties payable to Mr West in respect of the Power Recording "pursuant to Mr West's existing worldwide agreement(s) relating to the sale and exploitation of the [Power Recording] ("Mr West's Agreement")".

9. Copies of the Licence Agreement and Mr West's Agreement were not before me. What I say about them below is extracted from the pleadings.

10. The Claimant claims that the Defendant has not properly accounted to the Claimant in respect of the royalties due for the exploitation of the Power Recording via streaming services and, thus, that the Defendant has not complied with (or is in breach of) the royalty accounting obligations under the Licence Agreement (as read with Mr West's Agreement).

11. The central substantive issues are issues of construction of Mr West's Agreement.

12. Preamble C to the Licence Agreement provided: "*Mr West has previously incorporated elements of [the Recording] ("the Sample") into his new master recording "Power".*"

13. Preamble D to the Licence Agreement provided: "*The resulting master recording entitled "Power"… incorporating the Sample(s) are herein referred to as "the Master".*"

14. Clause 3.1 of the Licence Agreement provided: "*[The Defendant] shall account to and… pay to [the Claimant] in respect of all records sold by [the Defendant] embodying the Master royalties at the rate and calculated in accordance with the following provisions.*"

15. Clause 3.2 of the Licence Agreement provided: "*in respect of each record embodying a Master which is sold or otherwise exploited by [the Defendant]… [the Defendant] shall account to [the Claimant] for a royalty ("the Royalty") equal to five point three three per cent (5.33%)… on the following terms and conditions…*". Clause 3.2 was subject to a proviso that *"the provisions of 3.2.4 shall apply insofar as the producer of the master shall be paid a royalty; of greater or less than four percent (4%) of each such record".*

16. Clause 3.2.1 of the Licence Agreement provided: "*the Royalty shall be calculated, reduced, computed, accounted and paid on the same basis and in the same manner and at the same time and subject to the same reductions, deductions and diminutions proportionately as the royalties payable to Mr West in respect of the Master pursuant to Mr West's existing worldwide agreement(s) relating to the sale and exploitation of the Master ("Mr West's Agreement") relevant extracts of which [the Defendant] shall provide to [the Claimant] on request.*"

17. Clause 3.2.4 provided that *"In the event that the producer of the Master shall receive a royalty either greater than or less than four percent (4%) then the* [Claimant's] *rate of royalty set out in* 3.2 *above shall be adjusted up or down to equate to one third of the royalties payable to Mr West" .*

18. Mr West's Agreement was a written agreement dated as of 13 April 2005 between Roc-A-Fella Records LLC ("RAF") and Rock The World, LLC.

19. Clause 7.06(b) of Mr West's Agreement provided that *"In the event that RAF shall distribute or authorize other Persons to distribute Records by means of… (iii) any Records in which RAF distributes or authorizes any other Person to distribute as a so-called: (A) "stream" (i.e., for simultaneous playback, and not in a downloadable format)… the royalty to be accrued hereunder in respect of such exploitation shall be determined by applying the applicable royalty rate and Royalty Base set out therein for an equivalent Record…"*

20. Clause 13.27(a) of Mr West's Agreement provided that the Royalty Base is the *"Base Price less all excise, sales and similar taxes and less applicable Container Charges, if any."*

21. Clause 13.06(a) of Mr West's Agreement provided that: *"the Base Price* [where a Retail-related Base cannot be established] *shall be that amount equal to the lowest wholesale price payable by the largest category of RAF's customers in the normal course of business with respect to such Records sold for distribution during the applicable semi-annual accounting period, multiplied by one hundred twenty six percent (126%), provided however, that if a published price to dealers ("ppd") exists in the applicable country of sale then RAF may apply the ppd in lieu of the lowest wholesale price."*

22. The Claimant claims that in the application of clause 7.06(b) of Mr West's Agreement to the distribution or exploitation of Masters by streaming, the Defendant has to account by payment of a royalty determined by applying the applicable royalty rate and Royalty Base for an "equivalent Record". It is unclear to me from the pleadings quite how it is alleged that such an equivalent Record is to be identified. Be that as it may, in para.10(b) of the Particulars of Claim the Claimant alleges that "*An "equivalent record" referred, in the context of streams of the Power Recording, to a physical copy of Mr West's fifth album, "My Beautiful Dark Twisted*

Fantasy", on which the Power Recording appeared (subject to pro-rating the royalty to reflect the number of other recordings on that album)".

23. Essentially the Claimant's case appears to be that the Base Price, and hence the Royalty Base, for each streaming should be calculated by reference to the prices of sale of physical copies of Mr West's fifth album, specifically by reference to the prices of sale of CDs of that album.

24. In para.13.4 of its Defence and of its Amended Defence (for which I gave permission on 8 November 2022), the Defendant accepts that clause 7.06(b) is the applicable clause in respect of streaming. Para.13.4 alleges: "*Under Clause 7.06(b), the royalty to be paid in respect of permanent downloads, subscriptions, streams, conditional downloads and any other form of Electronic Transmission is to be determined by applying the applicable royalty rate and Royalty Base set forth in Mr West's Agreement for an equivalent Record.*"

25. Para.13.4 of the Defence is admitted in the Reply.

26. The Amended Defence added a para.13.4A which provides as follows:

> *"On its true construction, clause 7.06(b) requires, in respect of any mode of distribution of Records by Electronic Transmission, a Base Price and Royalty Base to be calculated for that mode of distribution by applying the same formula for determining the Base Price and Royalty Base as is specified in the contract for an equivalent Record sold through conventional channels."*

27. Thus, para.13.4A refined para.13.4 of the Defence. It appears to allege that "therein" in the part of clause 7.06(b) quoted above meant: "in the contract". The "contract" is not identified in the pleading, but in the context of para.13.4A of the Defence it appears to be intended to be a reference to Mr West's Agreement. It refers to "the contract" as being for an equivalent Record sold through conventional channels.

28. Para.13.5 of the Defence, especially with the clarificatory words added by amendment, alleges that the correct clause for determining the Base Price in relation to the distribution of Records by streaming is clause 13.06(a) which (so clause 13.5 of the Defence alleges) applies with respect to Records other than compact discs and Audio-Visual Devices. Clause 13.5 of the Defence continues:

> "Pursuant to that clause [clause 13.06(a)], wherever a Retail-related Base cannot be established, which is the case in relation to streaming, the Base Price is "*that amount equal to the lowest wholesale price payable by the largest category of RAF's customers in the normal course of business with respect to such Records sold for distribution during the applicable semi-annual accounting period, multiplied by one hundred twenty six percent (126%)*".

29. Para.13.6 of the Defence, as amended, alleges that, applying that formula, the correct Base Price for the distribution of Records by streaming is the wholesale streaming revenue multiplied by 126%. That is the Defendant's primary case. The unamended para.13.6 referred to dividing the wholesale streaming revenue by the number of streams and then multiplying that wholesale price by 126%.

30. The Defendant's case is pleaded in the alternative that, contrary to the Defendant's primary case, clause 13.06(a) does not apply to streaming. It is set out in para.14 of the Amended Defence.

31. Para.14.1 of the Amended Defence alleges in its first sentence that Mr West's Agreement does not provide any directly "equivalent Record" for the purposes of streaming. Para.10.1 of the Reply admits that Mr West's Agreement does not specify any particular "equivalent Record" in respect of any of the forms of Electronic Transmission referred to in clause 7.06(b); but save in that regard denies the first sentence of para.14.1 of the Defence. That denial is clarified in the remainder of para.10.1 of the Reply by alleging that clause 7.06(b) does not require the identification of a "directly equivalent Record"; only an "equivalent Record".

32. In the second sentence of para.14.1 of the Defence it is alleged that "Clause 7.06(b) covers a wide variety of possible forms of digital exploitation, which involve usages of Records of widely differing values." By amendment the words "a range of potential commercial models involving" were added after the word "involve". The allegation is denied in the Reply.

33. Para.14.2 of the Defence (which is denied in the Reply) alleges that on a proper construction of Mr West's Agreement, the correct approach is to determine the equivalent retail net revenue to which the royalty rate in the Licence Agreement can be applied. That, it is alleged, is achieved by applying the uplifts of 130% or 126% (respectively) to US or non-US wholesale streaming revenue, as provided for in relation to CDs pursuant to Clause 13.06(b).

34. Para.14.3 of the Defence, as originally pleaded, read:

> "*It does not follow from this, as the Claimant apparently contends, that a CD sale can be equated with a stream for all purposes, including the determination of the* ***Base Price*** *of each track streamed. Such an approach would be commercially nonsensical, as would have been reasonably apparent to the parties at the time that they entered into the Licence Agreement. A purchase of a CD gives permanent ownership of a copy of the recording, which entitles the owner to play the recording as many times as they wish. By contrast, exploitation of a recording via a streaming service or platform is ephemeral, and only provides the listener or subscriber with conditional access to, rather than ownership of, the recording. The latter is of an intrinsically different nature to the former, and the price of such usage is accordingly very much lower."*

35. In the Amended Defence, the first two sentences of para.14.3 of the Defence were amended so that they read as follows:

> *"It does not follow from this, as the Claimant apparently contends, that a CD sale can be equated with a stream for all purposes, including the ~~determination~~ adoption of the* ***Base Price*** *of a CD on which sum a royalty is payable each time the Record is streamed as though that were a CD sale ~~track streamed~~. Such an approach would be commercially nonsensical, as would have been reasonably apparent to the parties at the time that they entered into Mr West's Agreement ~~the Licence Agreement~~."*

36. In para.10.4.2.2 of the Reply the Claimant denies that, whether in 2005 or 2010, it would have been "commercially nonsensical" to treat a physical album as the "equivalent Record" for the purpose of calculating the royalties due in respect of streaming (the "commercially nonsensical point") or that this would have been reasonably apparent at the relevant time to the parties to

Mr West's agreement or the Licence Agreement ("the reasonably apparent to the parties point").

37. It is now common ground that the commercially nonsensical point and the reasonably apparent to the parties point have to be assessed by reference to the time of Mr West's Agreement in 2005, not the time of the Licence Agreement in 2010.

38. The commercially nonsensical point and the reasonably apparent to the parties point were the main issues by reference to which the Claimant sought to establish that expert evidence was reasonably required as sought by it; though some or all of the expert evidence sought might also go to the other issues of construction, including those raised in respect of the Defendant's primary case.

39. The denial in para.10.4.2.2 of the Reply is expanded upon in the remainder of that paragraph and in para.10.4.4 of the Reply.

40. 10.4.2.2 of the Reply provides (emphasis and underlining taken from the Claimant's skeleton argument):

> *"Further and in any event, it is denied that, whether in 2005 or 2010, it would have been "commercially nonsensical" to treat a physical album as the "equivalent Record" for the purpose of calculating the royalties due in respect of streaming, (or that this would have been reasonably apparent at the relevant time to the parties to Mr West's Agreement or the Licence Agreement). In particular, **in 2005** and/or 2010: (i) **there was no significant or established commercial market for the licensing or consumption of recorded music through streaming**; (ii) **the sale of physical records remained the prevalent form of music distribution**; and (iii) the Defendant retained absolute contractual control under Mr West's Agreement as to whether, when and on what terms to exploit the Power Recording via streaming, In all the circumstances (including those set out in paragraph 10.4.4 below), the establishment by Mr West's Agreement of an equivalence, for royalty calculation purposes, of exploitation of a recording in physical form and exploitation of that same recording by streaming would not and could not have been commercially nonsensical, or reasonably regarded as such."*

41. 10.4.4 of the Reply provides (emphasis and underlining taken from the Claimant's skeleton argument):

> *"It is admitted that streaming services have historically provided users with access to, rather than legal ownership of copies of, recordings. The fourth and fifth sentences are otherwise denied. In particular, **the characterisation of streaming as "ephemeral" and the resulting contrasting of that service with the purchase of a CD, are denied. Many music streaming services have historically provided access to music which is neither short-lived, nor transitory; but which permits repeated use and exploitation over a lengthy period of time. Some music streaming services have also permitted users to make copies of recordings and to store such copies on the user's local device, for off-line play as many times as the user may wish, during the user's subscription to the service. The exploitation of recorded music via streaming has also historically had benefits that do not apply to CDs - in particular, the ease of access to music, which can often be achieved from multiple locations and without the need for a physical copy of the recording. Accordingly, it is denied, in so far as alleged, that the value of streaming is necessarily lower than the value of CD ownership; and/or***

that the two forms of exploitation are "intrinsically different" in the manner or to the extent alleged*. The current 'price' for usage of streaming is irrelevant to the matters to be determined in these proceedings and could not have been known to the parties (reasonably or otherwise) in 2005 or 2010."*

42. In her skeleton argument Ms Rooney submitted that the commercially nonsensical point and the reasonably apparent to the parties point and those parts of paras.10.4.2.2 and 10.4.4 that are underlined and emboldened above could only sensibly be determined with the assistance of experts.

43. In her oral submissions Ms Rooney submitted that both "Expert Issues" raised mixed questions of fact and opinion. She submitted that such evidence was reasonably required to resolve the proceedings.

44. Ms Rooney referred me to the statement at para.9.3 of the Chancery Guide that:

> "*Expert evidence is generally limited to opinion evidence of a suitably qualified expert. Permission for such evidence is only given where the court is satisfied that there is a sufficiently recognised body of expertise on which to draw and that the court would be assisted by such evidence in determining one or more issues in the proceedings."*

45. Ms Rooney took me to the set of three questions listed by Warren J in *British Airways Plc v Spencer* [2015] EWHC 2477 (Ch) at paras.68 and 69 where he said:

> *" … it is necessary to look at the pleaded issues and, unless and until a particular issue is excluded from consideration under CPR 3.1(2)(k) , the court must ask itself the following important questions:*
> - *(a) The first question is whether, looking at each issue, it is necessary for there to be expert evidence before that issue can be resolved. If it is necessary, rather than merely helpful, it seems to me that it must be admitted.*
> - *(b) If the evidence is not necessary, the second question is whether it would be of assistance to the court in resolving that issue. If it would be of assistance, but not necessary, then the court would be able to determine the issue without it (just as in Mitchell the court would have been able to resolve even the central issue without the expert evidence).*
> - *(c) Since, under the scenario in (b) above, the court will be able to resolve the issue without the evidence, the third question is whether, in the context of the proceedings as a whole, expert evidence on that issue is reasonably required to resolve the proceedings. In that case, the sort of questions I have identified in paragraph 63 above will fall to be taken into account. In addition, in the present case, there is the complication that a particular piece of expert evidence may go to more than one pleaded issue, or evidence necessary for one issue may need only slight expansion to cover another issue where it would be of assistance but not necessary.*
>
> *69. Further, although CPR 35.1 does not refer to issues, but only to proceedings, if evidence is not reasonably required for resolving any particular issue, it is difficult to see how it could ever be reasonably required for resolving the proceedings. I therefore see a test directed at issues as a filter. That, at least, is an approach which can usefully be adopted."*

46. Ms Rooney also referred me to para.63 of Warren J's judgment where he said:

"*This [*that Warby J in an earlier case did not regard CPR 35.1 as imposing a test of absolute necessity*], it seems to me, is saying something very different from the proposition that, because expert evidence may prove of assistance, it should be admitted. A judgment needs to be made in every case and, in making that judgment, it is relevant to consider whether, on the one hand, the evidence is necessary (in the sense that a decision cannot be made without it) or whether it is of very marginal relevance with the court being well able to decide the issue without it, in which case a balance has to be struck and the proportionality of its admission assessed. In striking that balance, the court should, in my judgment, be prepared to take into account disparate factors including the value of the claim, the effect of a judgment either way on the parties, who is to pay for the commissioning of the evidence on each side and the delay, if any, which the production of such evidence would entail (particularly delay which might result in the vacating of a trial date).*"

47. Ms Rooney submitted that the claim was worth more than £1 million. The Claim Form merely states that the Claimant expects to recover more than £100,000. Mr Howells for the Defendant did not accept that the claim was worth anything or anything like £1 million.

48. Ms Rooney submitted that the expert evidence which the Claimant sought permission to adduce was necessary or at least would be of assistance to the court in resolving the commercially nonsensical point and the reasonably apparent to the parties point. She submitted that the expert evidence sought by her on those issues was reasonably required to resolve those issues.

49. Mr Howells submitted that Ms Rooney's Expert Issues 1 and 2 could be unpacked and summarised as follows:
    (a) The extent to which there was a commercial market for the licensing or consumption of recorded music through streaming in 2005;
    (b) The nature of the services offered in 2005 by streaming services to consumers;
    (c) Whether and to what extent the exploitation of recordings via streaming and via the sale of compact discs are of a different nature from one another.
    (d) The respective prices of streaming and of compact discs.
    (e) The reasons for the difference in prices between streaming and compact discs.

50. Mr Howells submitted that:
    50.1. Issues (a), (b) and (d) were issues of fact and could not be the subject of opinion evidence.
    50.2. Issue (c) was a matter of characterisation rather than of primary fact.
    50.3. Issue (e) was in part an issue of fact which could not be the subject of opinion evidence and that the other part of it might be a matter of opinion as to the reasons for the price differences, but that the court was unlikely to be assisted by evidence in the form of expert opinion on the reasons for the price differences.

51. Those submissions of Mr Howells have to be considered in the context of Mr Howells' submissions (1) that insofar as the subject-matter of the Claimant's proposed expert evidence would be evidence of fact, it would not be expert evidence and would be outside the scope of CPR 35 and (2) that the subject-matter of the Claimant's proposed expert evidence was not comprised within a recognised body of expertise governed by recognised standards and rules of conduct relevant to the question which the court has to decide.

52. In respect of the Claimant's proposed expert evidence which would go to matters of fact, Mr Howells submitted that there was no issue as to its admissibility but that it would be admissible (subject to the rules as to hearsay) under the ordinary rules of evidence, not as expert opinion evidence. He submitted that factual evidence on the issues identified by him as factual issues did not fall within s.3(1) Civil Evidence Act 1972 which section, he submitted, created an exception to the common law rule against the admissibility of opinion evidence. He submitted that CPR Part 35 was of no application to evidence of fact, notwithstanding the expertise which any particular factual witness might fairly be described as possessing. He submitted that the proposition that CPR Part 35 was concerned with expert opinion evidence only (rather than evidence of fact from persons with expertise) is found in CPR 35.10 and CPR PD 35 2.2.

53. The first part of those submissions of Mr Howells (no issue as to admissibility, but the Claimant's proposed evidence would be admissible (subject to the rules as to hearsay) under the ordinary rules of evidence, not as expert opinion evidence) and parts of the remainder illustrate the limited extent to which his submissions would have a practical effect. If the proposed evidence is admissible either as expert evidence or as lay evidence, and permission is granted for it to be admitted as (or as if it was or if and to the extent that it was) expert evidence, then it would be admissible whether or not it was expert evidence. Conversely, if it was admissible as lay evidence it might be excluded by the court in the exercise of its discretion under CPR 32.1.

54. Mr Howells took me or referred me to various authorities in support of his submissions. I consider them in the course of my analysis and conclusions below.

Preliminary Analysis

55. In relation to the adducing of expert evidence in civil proceedings, at a high level there are three related and overlapping issues:
    - 55.1. (1) Is the evidence admissible as a matter of the law of evidence?
    - 55.2. (2) Even if the evidence would or might be admissible, would it be expert evidence within the meaning of CPR 35 and, if so,
    - 55.3. (3) Is it reasonably required to resolve the proceedings within the meaning of CPR 35.1?

56. Most applications for permission to adduce expert evidence turn on the third of those questions and therefore on the tests outlined by Warren J in *British Airways Pension Fund Ltd v Spencer*, as set out above. Mr Howells' submissions require some consideration of the first and second questions.

57. One important requirement for evidence to be admissible, whether the evidence is lay evidence or expert evidence, is that it must be relevant to one of the issues which the court has to decide. This is elementary. The point is made in relation to expert evidence by Evans-Lombe J in *Barings Plc v Coopers & Lybrand* [2001[PNLR 551 at para.23, where he said:

> "*23. As the authorities make clear, the fact that an expert report comes within the meaning of the words "expert evidence" as used in section 3(1) does not mean that the Court must admit it in evidence and it will not be admitted unless it is relevant to any of the issues which the Court has to decide, relevant meaning "helpful" to the Court in arriving at its conclusions.*"

58. That point is reinforced by s.3(1) Civil Evidence Act 1972. S.3(1) makes admissible expert opinion evidence which is opinion evidence as to any "relevant matter". S.3 Civil Evidence Act 1972 provides:

> "3.— Admissibility of expert opinion and certain expressions of non-expert opinion.
>
> (1) Subject to any rules of court made in pursuance of [Part I of the Civil Evidence Act 1968 or][1] this Act, where a person is called as a witness in any civil proceedings, his opinion on any relevant matter on which he is qualified to give expert evidence shall be admissible in evidence.
> (2) It is hereby declared that where a person is called as a witness in any civil proceedings, a statement of opinion by him on any relevant matter on which he is not qualified to give expert evidence, if made as a way of conveying relevant facts personally perceived by him, is admissible as evidence of what he perceived.
> (3) In this section *"relevant matter"* includes an issue in the proceedings in question."

59. So far as expert opinion evidence on an issue in the proceedings is concerned, s.3(1) makes clear that evidence is admissible unless rules of court made under Part I of the Civil Evidence Act 1968 or the Civil Evidence Act 1972 provide otherwise.

60. The Civil Procedure Rules are made under s.1 Civil Procedure Act 1997. They are not made under Part I of the Civil Evidence Act 1968 or the Civil Evidence Act 1972 and no rules made under the Civil Evidence Acts "provide otherwise". Thus, as a matter of the law of evidence, expert opinion evidence as to a relevant matter is admissible. Whether any such admissible expert opinion evidence should be permitted to be adduced engages CPR 35.1, CPR 35.4 and the overriding objective.

61. Ss.3(1) and (3) Civil Evidence Act 1972 deal with expert opinion evidence as to "relevant matters". There are few, if any, relevant matters in proceedings which are not questions of fact or law. Hence, unless constrained otherwise by authority, I would read ss.3(1) and (3) as extending to expert opinion evidence as to matters of fact.

The nature of the substantive issues to which evidence on Ms Rooney's Expert Issues 1 and 2 might be relevant

62. The candidates for the substantive issues to which evidence on Ms Rooney's Expert Issues 1 and 2 might relate are the commercially nonsensical point; the reasonably apparent to the parties point and, more generally, the interpretation of Mr West's Agreement as part of the background against which Mr West's Agreement has to be construed.

63. There is an issue as to whether and to what extent Mr West's Agreement should be interpreted by reference to English domestic law, by reference to New York domestic law or to some combination of the two of them. On the pleadings as they stand there is a consequential lack of

[1] Words in square brackets repealed by the Civil Evidence Act 1995.

clarity as to what extrinsic evidence is alleged to be admissible to assist in the interpretation of Mr West's Agreement. These applicable law issues have yet to be determined.

64. It is common ground, and if it is not, I hold, that if English law applies, the resolution of Ms Rooney's Expert Issues 1 and 2 will at least assist in the determination of the commercially nonsensical point; the reasonably apparent to the parties point and, more generally, in the interpretation of Mr West's Agreement as part of the background against which Mr West's Agreement has to be construed.

65. Under English law it is clear that the background facts and circumstances known to the parties or which would have been reasonably available to the parties in the situation in which they were in at the time of the contract are admissible for the purpose of interpreting a contract. It is also clear that, with the possible exception of evidence of identity or subject matter in the case of a latent ambiguity, evidence of the parties' subjective intentions is not admissible for that purpose.

66. On the pleadings it is common ground that the interpretation of Mr West's Agreement is governed by New York law. However, from Ms Rooney's and Mr Howells' skeletons and the correspondence it appears that:
    66.1. The Claimant wishes to have the matter tried on the basis that New York law applies insofar as it is admitted on the pleadings, but that otherwise English law should be applied. One difficulty with that approach is that, as I explain below, there is a lack of clarity on the pleadings as to exactly what principles of New York law are admitted on the pleadings.
    66.2. The Defendant proposes that despite Mr West's Agreement in fact being governed by New York law, the court should apply English domestic law to its interpretation. One difficulty with that is that it is admitted on the pleadings that New York law applies and what some principles of New York law are. In those circumstances it would be somewhat artificial to apply English law alone.

67. The issue of whether English law, New York law or a combination of them should be applied by the court has not been fully argued before me, though I have read the parties' skeleton arguments on the subject. That issue, including the difficulties identified in the immediately foregoing paragraph will have to be addressed at the next hearing of the CCMC.

68. Evidence of New York law as to the interpretation of contracts is not before me. In para.13.2 of the Defence it is pleaded:
    "*Mr West's Agreement is governed by New York law. The relevant principles of New York law applicable to the interpretation of contracts include that where a contract is unambiguous, it should be enforced in accordance with its clear terms, without regard to extrinsic evidence. However, where a contract is ambiguous or unclear, then, in addition to established canons of construction, extrinsic evidence is admissible to determine the parties' intention. Such evidence can include the surrounding facts and circumstances which existed when the contract was entered into.*"

69. In para.7.1 of the Reply it is pleaded that the principle of New York law set out in the second sentence of para.13.2 of the Defence is admitted and averred (where a contract is unambiguous, it should be enforced in accordance with its clear terms, without regard to extrinsic evidence).

70. In para.7.2 of the Reply it is admitted that, under New York law, extrinsic evidence is admissible in the circumstances identified in the third sentence of para.13.2 of the Defence (where a contract is ambiguous or unclear, then, in addition to established canons of construction, extrinsic evidence is admissible to determine the parties' intention). I comment that it is unclear from the pleadings what is meant in 13.2 of the Defence by "the established canons of construction" or "by extrinsic evidence".

71. In para.7.2 of the Reply it is alleged that in assessing whether a contractual provision is ambiguous, a Court applying New York law will examine the contractual language objectively, from the perspective of a reasonably intelligent person who is cognisant of the context of the entire agreement, and how the allegedly ambiguous provision is generally understood in the relevant trade or industry.

72. In para.10.3.2 of the Reply it is denied that there is any relevant ambiguity in the terms of Mr West's Agreement. It is unclear whether the Defendant alleges that there is such an ambiguity.

73. The fourth sentence of para.13.2 of the Defence (such evidence can include the surrounding facts and circumstances which existed when the contract was entered into) is not expressly pleaded to in the Reply. It must therefore be taken as being denied pursuant to the general denial in para.1.3 of the Reply ("*Unless expressly admitted or not admitted, each allegation in the Defence is denied*") or by the joinder of issue on matters raised in a defence but not dealt with in a reply imposed by CPR 16.7(2).

74. The pleaded positions in respect of New York law thus leave it unclear whether or not it is alleged that under New York law (i) in determining whether a contract is unambiguous, evidence of background is admissible and to what extent (para.7.2 of the Reply not having been pleaded to); (ii) in the absence of an ambiguity, evidence of background is admissible otherwise than for the purpose of establishing whether there is an ambiguity; (iii) if there is an ambiguity, whether the admissible evidence extends to evidence of the parties' subjective intentions. This lack of clarity is not resolved by the parties' skeletons before me; indeed Mr Howells' skeleton identifies the lack of clarity identified by me.

75. In the absence of evidence as to New York law on the subject I proceed for the purposes of the expert evidence issues before me on the footing that under New York law at least some evidence of background circumstances is admissible. No agreement can be interpreted in a vacuum.

76. The commercially nonsensical point and the reasonably apparent to the parties point are express issues on the pleadings.

Are Expert Issues 1 and 2 issues of fact or of opinion?

77. In order accurately to reflect Expert Issues 1 and 2 and with a change of tense to reflect the common ground that the relevant time is 2005, I consider that Mr Howells' unpacking of them should be adjusted so as to breakdown the Expert Issues as follows:

(a) The extent to which there was a commercial market for the licensing or consumption of recorded music through streaming in 2005.
(b) The nature of the services offered in 2005 by streaming services to consumers.
(c) ~~Whether and to what~~The extent to which the exploitation of a recording~~s~~ via a streaming service or platform and via the sale of a compact disc~~s~~ were~~are~~ in 2005 of a different nature from one another.
(d) The extent to which respective prices of streaming and of compact discs were different in 2005.
(e) The reasons for the difference in prices between streaming and compact discs.

78. Mr Howells submitted that issue (a) (extent to which there was a commercial market) was an issue of fact. I accept that the issue of whether there was "a" commercial market would be an issue of fact. For example, a lay witness might give evidence that she or her company had provided streaming services commercially or that she had purchased streaming services commercially. Once the enquiry is widened to the question of the "extent" of a commercial market for the licensing "or" consumption of streaming services, it would become possible that there would be gaps in the knowledge of individual lay witnesses of fact. It is possible that lay witnesses of fact will be able to say that there were only two companies providing streaming services and what they were; but on the material before me it is at least equally likely that lay witnesses will not be able to say that there might not have been companies which they did not know of which also offered streaming services.

79. Similarly with issue (b) (nature of streaming services offered). That is an issue of fact; but a lay witness might well be able to identify some but not all of the streaming services which were offered in 2005.

80. Mr Howells submitted that issue (c) (extent to which the exploitation of a recording via a streaming service or platform and via the sale of a compact disc were in 2005 of a different nature from one another), was a matter of characterisation rather than of primary fact. I consider that that is an over-simplification. In order to reach the stage of characterisation the court would first need to know or to decide what the natures were of both (i) exploitation via a streaming service or platform and (ii) exploitation via the sale of a compact disc. Armed with that knowledge the differences between those natures would be a matter of secondary fact or of characterisation. The identification of those natures would be matters of fact as to which, if they could not be agreed; which I would expect them to be capable of being; would be a matter for evidence. Thus, issue (c) incorporates either by itself or together with elements of issues (a), (b) and (d) the factual issues as to the natures of the two methods of exploitation.

81. Mr Howells submitted that issue (d) (respective prices) is an issue of fact. I agree that in the ultimate analysis it is an issue of fact, though it is a very widely drafted issue. It begs questions such as: Which streaming? What discs? Where? If the answers to those questions are, respectively, "all", "all" and "everywhere", *prima facie* the scope of the factual enquiry would be unnecessarily and disproportionately large. If the answers are more limited, one would have to ask "why?" and start dealing in matters such as the likely knowledge of the parties, against the important consideration for present purposes that the evidence is only relevant to assist in the determination of the commercially nonsensical point; the reasonably apparent to the parties point; and, more generally, as part of the background against which the West Agreement has to be construed.

82. Mr Howells submitted that issue (e) (the reasons for the difference in prices between streaming and compact discs) was partly a factual issue and partly one of opinion. The example he gave in his skeleton of a factual element was evidence that the price of CDs reflected their physical production costs, which did not apply to streaming. I agree that evidence that the production costs of CDs included physical production costs which did not apply to streaming would be evidence of fact. Where this issue (issue (e)) becomes less factual and more opinion based is when consideration is given to the relative impacts on prices of the various elements which are considered by a producer of CDs or a provider of streaming services in determining their prices.

Can the factual elements of issues (a) to (e) be given by way of expert evidence?

83. Mr Howells' submitted that expert evidence, or at least expert evidence within the scope of CPR 35, cannot be evidence of fact, but can only be evidence of opinion.

84. That submission gives rise both to questions of admissibility and to questions as to the applicability of CPR 35.

85. Mr Howells' starting point was s.3 Civil Evidence Act 1972 which, he submitted, created an exception to the common law rule against the admissibility of opinion evidence. I quibble with the use of the word "created" because expert opinion evidence was admissible at common law before the enactment of s.3 Civil Evidence Act 1972. In substance s.3(1) re-stated the common law position as to expert opinion evidence with the addition of the reference to rules of court. So far as expert evidence is concerned, s.3(3) clarified that expert opinion evidence could be adduced as to an issue in the proceedings.

86. The next step in Mr Howells' submission as to expert evidence being limited to evidence of opinion, was to submit that CPR Part 35 provided the rules contemplated by the 1972 Act. In this context Mr Howells referred me to the first line of note 35.0.1 in the White Book. That line reads: "*The rules in this Part govern the provision of opinion evidence by expert witnesses…*". They undoubtedly do. However, as already mentioned the rules in CPR 35 are not made under the Civil Evidence Acts. More relevant questions are whether the rules in CPR 35 only govern the provision of expert evidence which is opinion evidence as to a non-factual matter, or whether they extend (i) to opinion evidence as to a matter of fact; and/or (ii) to opinion evidence as to a matter of fact even if evidence as to that factual matter could also be given by a lay witness; and/or (iii) to factual evidence of factual matters in respect of which expertise is necessary in order to ascertain the facts; and/or (iv) to factual evidence of factual matters in respect of which expertise is not necessary in order to ascertain the facts.

87. In support of his submission that CPR 35 was concerned only with expert opinion evidence Mr Howells referred me to CPR 35.10 and PD35 para.2.2. CPR 35.10(1) provides that an expert's report must comply with the requirements set out in PD35. Para.2.2 of PD 35 provides:

> "*Experts should assist the court by providing objective, unbiased opinions on matters within their expertise, and should not assume the role of an advocate.*"

88. In my view that paragraph is inconclusive. It undoubtedly contemplates that experts may be providing the court with their opinions, but it does not exclude the possibility that they will be providing some evidence of fact. Similarly with the other references to experts' opinions in PD 35. The wording of the rules in CPR 35 and of PD 35 are not inconsistent with their application to expert evidence of fact.

89. S.2(3) Civil Evidence Act 1972 leads to the opposite inference, though again its provisions are inconclusive on the issues before me. S.2(3) permits rules to be made in relation to statements of fact or opinion contained in an expert report. S.2(3)(a) allows provision to be made by rules of court for enabling the court in any civil proceedings to direct, with respect to medical matters or matters of any other class which may be specified in the direction, that the parties shall disclose in the form of one or more expert reports the expert evidence on matters of that class which he proposes to adduce as part of his case at the trial. S.2(3)(b) then provides (my emphasis) that the rules may provide:

> "*for prohibiting a party who fails to comply with a direction given in any such proceedings under rules of court made by virtue of [s.2(3)(a)], except with the leave of the court, any statement (**whether of fact or opinion**) contained in any expert report whatsoever in so far as that statement deals with matters of any class specified in the direction.*"

90. It can be inferred from the references to "fact or opinion" in s.2(3)(b) that expert evidence within the meaning of the Civil Evidence Act 1972 extends to expert evidence of opinion and to expert evidence of fact.

91. CPR 35 does not contain a rule made under s.2(3)(a) which expressly enables a court to direct disclosure of an expert's report, though orders for service or exchange of expert reports are commonly made. Thus, s.2(3) Civil Evidence Act 1972 is not conclusive against Mr Howells' submission that CPR 35 only applies to expert opinion evidence.

92. There is a distinction between (i) expert evidence of fact and (ii) evidence of facts given by a person who happens to be an expert, but need not be. A clear example of the latter is the well-qualified motor engineer who sees a flat tyre on a car before the car crashes. His evidence that the tyre was flat would not be expert evidence.

93. There are a number of kinds of evidence which can be given by an expert witness, but which, on a more or less detailed analysis, is evidence of fact. I have in mind the following:

    93.1. Experts whose role is to educate the court in technical or scientific matters. I raised this with Mr Howells in the course of his oral submissions. His response was to the effect that that would not be expert evidence. Mr Howells referred me to *Darby Properties Ltd v Lloyds Bank Plc* [2016] EWHC 2494 (Ch) at para.45 where Master Matthews expressed the view that "didactic" or "tutorial" evidence might not be evidence which required permission under CPR 35 before it was adduced. I consider that in some circumstances it would be. Master Matthews said in the same paragraph that he was not trying to define exactly where the line should be drawn between factual and opinion evidence. In my view, ultimately, at least where the technology or science is not in doubt, such evidence would be evidence of fact, but that does not mean that it would not be expert evidence within the meaning of CPR

35. It would be expert evidence if it was not evidence which was capable of being given by a non-expert. Subsequent to the hearing I have found an example of this point in *Technip France SA's Patent* [2004] RPC 46, per Jacob LJ at paras.12 and 13, where he made clear that an expert witness might have an educational function, different from an opining function:

"12. I must explain why I think the attempt to approximate real people to the notional man is not helpful. It is to do with the function of expert witnesses in patent actions. Their primary function is to educate the court in the technology— they come as teachers, as makers of the mantle for the court to don. For that purpose it does not matter whether they do not approximate to the skilled man. What matters is how good they are at explaining things.

13. But it also is permissible for an expert witness to opine on an "ultimate question" which is not one of law. I so held in Routestone Ltd v Minories Finance Ltd [1997] B.C.C. 180 and see s.3 of the Civil Evidence Act 1972. …"

93.2. Cases where the expert draws on the general body of his knowledge and understanding in which he is an expert to give evidence as to a matter of observable fact. In the course of his submissions I put to Mr Howells the example of cases where expert evidence is evidence as to historical facts or circumstances which pre-date living memory. Mr Howells' answer to this example was, consistently with his thesis, that insofar as such evidence was sought to be adduced with a view to establishing facts, it would be evidence of fact, would not be expert evidence and would not be within the scope of CPR 35. I do not agree that that would always be the case. Where an expert relies on his own knowledge or experience but has no first hand knowledge of facts in question his evidence as to the facts may be admissible evidence of those facts and within CPR 35. Expert evidence in those circumstances could be classified as expert opinion evidence as to matters of fact.

93.3. Some cases where the expert collates and presents to the court in an efficient manner the knowledge of others in his or her field of expertise. This head may in some cases overlap with the immediately preceding one.

93.4. Cases where the identification or observation of particular facts is something which only a person with a particular skill is capable of doing. Master Matthews at paras.39 – 43 of his judgment in *Darby Properties Ltd v Lloyds Bank Plc* [2016] EWHC 2494 (Ch) appears to have concluded that evidence of this nature would not be expert evidence within the meaning of CPR 35. I respectfully disagree. Without the expert's expertise, the fact would not be observable, hence the expert's expertise would be a necessary element of his giving evidence of this nature.

93.5. Evidence of foreign law. Generally, foreign law is required to be pleaded and proved as a matter of fact; yet the evidence as to that matter of fact is given by an expert witness. In cases where there is doubt as to what the foreign law provides, the evidence will be opinion evidence; but where there is no doubt, it will at least be closely akin to evidence of fact.

94. Building on those examples, in my judgment there is not an automatic cut off of what is expert evidence when that expert evidence becomes or can be analysed as evidence of fact. Even in a case where an expert's evidence is, on a close analysis or otherwise, evidence of fact, that does not necessarily prevent it from being evidence which is capable of being given by an expert as such, or from CPR 35 applying to it. It is desirable for the efficient and proportionate administration of justice that such evidence of fact which is given by an expert as such should be controlled by the court and that CPR 35 should be construed as permitting such control accordingly.

95. Mr Howells relied on *Darby Properties Ltd v Lloyds Bank Plc* [2016] EWHC 2494 (Ch) as authority for the proposition that "expert evidence" within the meaning of CPR 35 did not include evidence of fact. *Darby Properties* was a decision of Master Matthews, so it is not strictly an authority and nor does it bind me; but it may be persuasive and Mr Howells also referred me to it for relevant extracts from earlier judgments which are contained in it and which he relied upon.

96. In *Darby Properties* the substantive claim was for damages for breach of contract and damages for negligence and/or damages and/or other relief for misrepresentation, all arising out of advice, recommendations, explanations and/or information provided by the defendant bank in connection with certain interest rate derivative products. The main part of the case was an allegation that negligently and in breach of contract the bank recommended certain interest rate hedging products in 2009 notwithstanding (so it was alleged) that they were unsuitable for the claimants. A central issue was whether the products were suitable for the claimants. Master Matthews held that in this context evidence as to suitability was clearly opinion evidence. Master Matthews held, amongst other things, that in relation to questions of the nature of the products, which was complex, and the pattern of the claimants' debts, it seemed to him that those gave rise to issues of fact not opinion and therefore on his analysis were not matters for expert evidence.

97. It is clear from his judgment that although on the basis of the limited submissions which had been made to him and on the limited research which he had been able to carry out, Master Matthews thought that the "evidence of fact and therefore not within CPR 35" reasoning was of universal application, he was not holding that it was. Thus, in relation to educational or didactic evidence he expressly stated in para.45 that he was not trying to define exactly where the line was between expert and factual evidence and in his conclusion at para.62 he said:

> *"62. So my conclusion at this point is that, although I think there would undoubtedly be some assistance to the court in giving the court the benefit of a tutorial on the nature of the products, I am not at all sure that that kind of evidence requires the permission of the court, and it is not the case that it is required in the sense that the court could not reach a decision without it. In relation to the questions of suitability and inadequacy of information, the pleaded allegations do not seem to me to depend on expert evidence at all."*

98. With respect, I disagree with some of Master Matthews' reasoning that led him to think that the "evidence of fact and therefore not within CPR 35" point was of universal application and with his conclusion in that regard.

99. In paras.42 and 43 of his judgment Master Matthews interpreted the following passage in Phipson on Evidence (20th ed at para.33-10) as expressing the view that evidence of facts which

may be obscure or invisible to a lay witness given by a witness with a particular skill or training which enables him to perceive those facts would not be expert opinion evidence. I interpret the statement in the opposite sense. That is to say, I consider that it expresses the view that expert evidence may comprise both evidence of opinion and, in some respects, evidence of fact. The passage in Phipson quoted by Master Matthews reads:

> *"There is an important if elusive distinction to be made in the categorisation of expert evidence. It is generally accepted that there is a difference between evidence of fact and evidence of opinion, notwithstanding that it may be difficult to identify the line which divides the two. Whether a statement is one or the other may depend on the extent to which the evidence goes beyond the witness's direct observations and perceptions. It is also well understood that in practice a witness of fact may not be able entirely to disentangle his perceptions from the inferences he has drawn from them. Although the courts often talk of 'expert evidence' as if it were a single category, representing in every case an exception to the rule against the reception of opinion evidence, it is suggested that a similar distinction exists in the evidence of experts, and it is one which has considerable relevance both to the procedural aspects and to the assessment of the weight of expert evidence. Expert witnesses have the advantage of a particular skill or training. This not only enables them to form opinions and draw inferences from observed facts, but also to identify facts which may be obscure or invisible to a lay witness. The latter might simply be described as 'scientific evidence', the former as 'expert evidence of opinion'. A microbiologist who looks through a microscope and identifies a microbe is perceiving a fact no less than the bank clerk who sees an armed robbery committed. The only difference is that the former can use a particular instrument and can ascribe objective significance to the data it perceives. The question of subjective assessment and interpretation which is the essence of opinion evidence hardly enters into the matter at all."*

100. When Phipson says there that expert witnesses have the advantage of a particular skill or training which not only enables them to form opinions and draw inferences from observed facts, but also to identify facts which may be obscure or invisible to a lay witness, that appears to me to be describing two functions which an expert witness might perform. Phipson says that the latter (i.e. identifying facts which might be obscure or invisible to a lay witness) might simply be described as 'scientific evidence', the former as 'expert evidence of opinion', but it does not follow that the 'scientific evidence' is not expert evidence. In my view it is because only a scientist could give it.

101. At the end of the passage quoted by him Master Matthews said: "*I do not think I need to read any more of this paragraph.*" It is unfortunate that time did not allow Master Matthews to carry out further legal research.[2] I find the passage in Phipson which follows the quoted passage to be helpful and supportive of my interpretation of the passage quoted above. The paragraph in Phipson continues:

> *An example of the dichotomy can be seen in the case of a conflict between experts on handwriting as to the authenticity of a document. By virtue of their training such experts would be able to distinguish parts of letters or techniques of word-formation which a layman would be unable to observe: this is the scientific part of their work. The question of which*

[2] It is clear that Master Matthews had less time and less in the way of submissions than he would have liked. Para.41 of his judgment refers to having a look at Phipson over the short adjournment. Para.44 refers to the "rather fragmentary material which I have been able to look at".

features are significant and the inferences to be drawn from them are questions of judgment, assessment, opinion. This distinction, which has now been accorded a measure of judicial recognition,[60] is thought to be of some practical utility in considering the weight of evidence given by experts, both taken in isolation and when assessing the merits of two competing theories.[61] The distinction is also recognised in the Criminal Procedure Rules 2020 r.19.1[62] which apply only to "expert opinion evidence".

[61] *The Torenia* [1983] 2 Lloyd's Rep. 210 at 233 (where no practical consequences followed from the holding). cf. *Reckitt & Colman Products Ltd v Borden Inc (No.2)* [1987] F.S.R. 407

102. The scientific evidence or scientific part of an expert's work appears to me to part of an expert's expertise and to be within the scope of CPR 35.

103. The decision of Hobhouse J (as he then was) in the case referred to in footnote 61 to the passage from Phipson set out above, *The Torenia* [1983] 2 Lloyd's Reports 210 at pp.233 – 234 supports the proposition that expert evidence within the meaning of CPR 35 may include evidence as to matters of fact. Contrary to the statement in footnote 61 of Phipson, Hobhouse J's decision as to the nature of the evidence sought to be adduced did have a practical impact. Hobhouse J held that the proposed evidence of a Captain Jones, which the defendants in that case sought to lead, was factual evidence which went to an expert opinion issue. Hobhouse J held that that evidence, although factual, was expert evidence for which permission was required under the then applicable rule (RSC O.38 r.36). He refused permission and Captain Jones's evidence was not permitted to be adduced. RSC O.38 r.36 required either the agreement of both parties or the leave of the court before expert evidence could be adduced. It, like CPR 35, did not contain a definition of expert evidence. Hobhouse J broke down the kinds of evidence which might be adduced into three categories: (1) direct factual evidence; (2) opinion evidence which is given with regard to those facts as they have been proved; and (3) evidence which might be described as factual, which is used to support or contradict the expert evidence. Hobhouse J described his third category of evidence as evidence which was commonly given by experts because in giving their expert evidence they rely upon their expertise and experience, and they refer to that experience in their evidence. So, said Hobhouse J, "*an expert may say what he has observed in other cases and what they have taught him for the evaluation of the fact of the particular case. So also experts give evidence about experiments which they have carried out for the purposes of their evidence in the particular case in question.*" He therefore held that the proposed evidence of the proposed witness, Captain Jones, which was only going to be evidence in the third class, was expert evidence within the meaning of RSC O.38 r.36.

104. The decision in the other case referred to in footnote 61 of Phipson's para.33-10, *Reckitt & Colman Products Ltd v Borden Inc (No.2)* [1987] F.S.R. 407, may tend the other way to the *Torenia*. *Reckitt & Colman Products Ltd v Borden Inc (No.2)* was a passing off action. The plaintiff wished to call a witness to give evidence about market surveys carried out for the plaintiff. It was objected that that was expert evidence for which permission was required. Walton J held that the proposed evidence was not expert evidence because the proposed witness did not require any particular expertise to say what the result of the surveys carried out by him were and the witness was not going to give any evidence whatsoever which was a matter of opinion in the slightest, He therefore admitted the evidence as lay evidence. The *Reckitt & Colman* case is inconclusive on the issues before me because the proposed witness did not need any expertise to give his proposed evidence about market surveys.

105. Neither the *Torenia* nor *Reckitt & Colman Products Ltd v Borden Inc (No.2)* were referred to in argument before me and counsel have not had an opportunity to address me on them. I do not therefore rely upon them in reaching my conclusions, but refer to them as illustrations of how, depending on the nature of the case and the proposed evidence, evidence of fact may be given by way of expert evidence.

106. In paras.36 – 41 of his judgment in *Darby Properties* Master Matthews considered the Supreme Court decision in the Scottish case of *Kennedy v Cordia (Services) LLP* [2016] 1 WLR 597 ("*Kennedy*"). The facts and the conclusion of the Supreme Court are described by Master Matthews. He set out a summary of the case and certain paragraphs of the joint judgment of Lord Reed and Lord Hodge JJSC (with which the other members of the court agreed) as follows:

> Summary
> *"The pursuer, employed as a home carer by the defenders, slipped and fell on an icy path leading to a client's house and injured her wrist. She raised an action of damages against the defenders on the grounds that their assessment of the risk of home carers falling on snow or ice had been inadequate, in breach of Regulation 3 of the Management of Health and Safety at Work Regulations 1999, that they had failed to ensure that suitable personal protective equipment was provided or that the risk was adequately controlled by other means which would be equally more effective in breach of Regulation 4 of the Personal Protective Equipment at Work Regulations 1992, and that they had breached their common law duty of care. The pursuer led evidence from a Consulting Engineer with qualifications and experience in the area of Health & Safety at Work. The Judge at first instance accepted some of his evidence and found the defenders in breach of their duties. There was an appeal to the Inner House of the Court of Session which allowed the appeal holding that the judge had impermissibly admitted the evidence of the Consulting Engineer. On the appeal to the Supreme Court it was held, allowing the appeal, that the health and safety practice of employers could properly be the subject of expert evidence and the pursuer's expert had given evidence of factual matters that he had the experience and qualifications to describe and which were admissible because they were relevant and might assist the Judge.*
>
> Paragraphs from the joint judgment of Lord Reed and Lord Hodge quoted by Master Matthews*:*
>
> "*39. Skilled witnesses" – I interpolate here to say that 'skilled witnesses' is, apparently, the term applied to expert witnesses in Scots law – "unlike other witnesses, can give evidence of their opinions to assist the court. This gives rise to threshold questions of the admissibility of expert evidence. An example of opinion evidence is whether Miss Kennedy would have been less likely to fall if she had been wearing anti-slip attachments on her footwear.*
>
> *40. Experts can and often do give evidence of fact as well as opinion evidence. A skilled witness, like any non-expert witness, can give evidence of what he or she has observed if it is relevant to a fact in issue. An example of such evidence in this case is Mr Greasly's" – I interpolate to say that he was the particular expert – "evidence of the slope of the pavement on which Miss Kennedy lost her footing. There are no special rules governing the admissibility of such factual evidence from a skilled witness.*
>
> *41. Unlike other witnesses, a skilled witness may also give evidence based on his or her knowledge and experience of a subject matter, drawing on the work of others, such as the findings of published research or the pooled knowledge of a team of people with whom he or*

she works. Such evidence also gives rise to threshold questions of admissibility, and the special rules that govern the admissibility of expert opinion evidence also cover such expert evidence of fact. There are many examples of skilled witnesses giving evidence of fact of that nature. Thus Dickson on Evidence, Grierson's ed (1887) at section 397 referred to ***Gibson v Pollock*** *(1848) 11 D 343, a case in which the court admitted evidence of practice in dog coursing to determine whether the owner or nominator of a dog was entitled to a prize on its success. Similarly, when an engineer describes how a machine is configured and works or how a motorway is built, he is giving skilled evidence of factual matters, in which he or she draws on knowledge that is not derived solely from personal observation or its equivalent. An expert in the social and political conditions in a foreign country who gives evidence to an immigration judge also gives skilled evidence of fact.*"

107. Master Matthews said at para.40 of his judgment in *Darby Properties*:

"*I confess that until I had seen these paragraphs I was not aware of a distinction being drawn between evidence being given by an expert witness of a purely factual matter which was something, let us say, observed or experienced directly by the witness, such as the slope of the pavement on which the pursuer was walking when she fell; and, on the other hand, factual evidence being based on knowledge and experience of a subject matter or drawing on the work of others such as the findings of published research or pooled knowledge. According to the decision of the Supreme Court in this case, the law of evidence in Scotland draws a distinction between those two classes of factual evidence. In the first case, as their Lordships say, there are no special rules governing admissibility but, in relation to the second, it gives rise to a threshold question of admissibility. An example is given of the engineer describing how a machine is configured or how it works.*"

108. At para.41 Master Matthews said that he had not met this distinction in English law before. He said that over the short adjournment he had had a look at *Phipson*. He did not find any reference to such a distinction, at any rate in relation to whether there is a requirement to obtain the permission of the court for the admissibility of the evidence, or, indeed, whether this is to be properly described as expert evidence at all.

109. Master Matthews appears to have treated *Kennedy* as only dealing with the Scottish law of evidence. I read the Supreme Court's general statements and approach to expert evidence in *Kennedy* as being of general application in common law jurisdictions, including England and Wales, where fact finding is achieved by the taking of witness evidence from lay witnesses and experts, but subject to the effects of relevant differences in procedure. Thus:

109.1. In their introductory paragraph (para.34) of the section of their judgment dealing with expert evidence, Lord Reed and Lord Hodge comment that there is a degree of commonality of approach between jurisdictions which adopt similar methods of fact-finding. They state there that Scots law has drawn on the experience of other jurisdictions both as to the admissibility of skilled [expert] evidence and in relation to the duties of expert witnesses.

109.2. In para.42 Lord Reed and Lord Hodge refer to the Privy Council's decision on an appeal from the Court of Appeal for Bermuda in *Myers v The Queen* [2015] UKPC 40, [2016] AC 314, which is a decision applying the Law of Bermuda. In *Myers* the Judicial Committee of the Privy Council approved of the use of police officers who had special training and considerable experience of the practices of criminal gangs

to give evidence on the culture of gangs, their places of association and the signs that gang members used to associate themselves with particular gangs. The Privy Council held that in giving such factual evidence a skilled witness could draw on the general body of knowledge and understanding in which he is skilled, including the work and literature of others. The examples given by Lord Reed and Lord Hodge at the end of their para.41 as quoted by Master Matthews and set out above of an expert giving skilled evidence of fact of an engineer describing how a machine works and of an expert in the social and political conditions in a foreign country who gives evidence to an immigration judge are also examples given by Lord Hughes JSC giving judgment in *Myers* (at para.65).

109.3. In paras.43 and 44 Lord Reed and Lord Hodge refer to the South Australian case of *R v Bonython (1984) 38 SASR 45* as giving relevant guidance on admissibility of expert opinion evidence.

109.4. In para.45 Lord Reed and Lord Hodge refer to the dictum of Lawton LJ in the English Court of Appeal case of *R v Turner (Terence)* [1975] QB 834.

109.5. In paras.46 – 56 Lord Reed and Lord Hodge refer to various other non-Scottish authorities.

110. Para.44 of Lord Reed and Lord Hodge's judgment in *Kennedy* confirms that in the context of the "evidence of fact and therefore not within CPR 35" submission, not only were they accepting that the South Australian case of *R v Bonython (1984) 38 SASR 45* gave relevant guidance on admissibility of expert opinion evidence; but they also made the point that a skilled person or expert can give expert factual evidence either by itself or in combination with opinion evidence. They laid down the four considerations which governed the admissibility of skilled (expert) evidence in para.44 in the following terms:

> "*44. In R v Bonython the court was addressing opinion evidence. As we have said, a skilled person can give expert factual evidence either by itself or in combination with opinion evidence. There are in our view four considerations which govern the admissibility of skilled evidence: (i) whether the proposed skilled evidence will assist the court in its task; (ii) whether the witness has the necessary knowledge and experience; (iii) whether the witness is impartial in his or her presentation and assessment of the evidence; and (iv) whether there is a reliable body of knowledge or experience to underpin the expert's evidence. All four considerations apply to opinion evidence, although, as we state below, when the first consideration is applied to opinion evidence the threshold is the necessity of such evidence. The four considerations also apply to skilled evidence of fact, where the skilled witness draws on the knowledge and experience of others rather than or in addition to personal observation or its equivalent. We examine each consideration in turn.*"

111. Para.46 of the judgment of Lord Reed and Lord Hodge in *Kennedy* confirms a proposition which I put to Mr Howells in the course of argument and which he rejected. That is that an expert witness might give what on analysis was factual evidence as to long past historical events or as to past economic circumstances; as also does the passage as to social and political conditions in para.41 of their judgment quoted by me above. Para.46 states, my emphasis:

> *"46. Most of the Scottish case law on, and academic discussion of, expert evidence has focused on opinion evidence to the exclusion of skilled evidence of fact.* ***In our view, the test for the admissibility of the latter form of evidence cannot be strict necessity***

as, otherwise, the court could be deprived of the benefit of a skilled witness who collates and presents to the court in an efficient manner the knowledge of others in his or her field of expertise. There may be circumstances in which a court could determine a fact in issue without an expert collation of relevant facts if the parties called many factual witnesses at great expense and thus a strict necessity test would not be met. *In Daubert v Merrell Dow Pharmaceuticals Inc (1993) 509 US 579, the United States Supreme Court referred to rule 702 of the Federal Rules of Evidence , which in our view is consistent with the approach of Scots law in relation to skilled evidence of fact. The rule, which Justice Blackmun quoted at p 588, states:*

> *"If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."*

112. A reason for the court's view that assistance to the court was part of the test for admissibility was explained by Lord Reed and Lord Hodge in their next paragraph, para.47:

> "*47. The advantage of the formula in this rule is that it avoids an over-rigid interpretation of necessity, where a skilled witness is put forward to present relevant factual evidence in an efficient manner rather than to give an opinion explaining the factual evidence of others. If skilled evidence of fact would be likely to assist the efficient determination of the case, the judge should admit it.*"

113. At para.41 of his judgment in *Darby Properties* Master Matthews says that it is "clear" that, when CPR rule 35.1 says that, "Expert evidence shall be restricted", and indeed when expert evidence is referred to throughout Part 35, it plainly refers to expert *opinion* evidence and not expert *factual* evidence. I respectfully disagree. As explained above, expert evidence can extend to evidence of fact. Further, although CPR 35 is usually engaged in relation to opinion evidence, none of its individual sub-rules expressly exclude the possibility of their also applying to expert evidence of fact. CPR 35.10(1) provides that an expert's report must comply with the requirements set out in Practice Direction 35. Practice Direction 35 does contemplate that expert evidence to which it applies will be expert evidence of opinion. However, Practice Direction 35 could be applied to expert evidence of fact and in my view its contemplation that expert evidence will be evidence of opinion is not so strong as to override the reasons explained above for holding that expert evidence can extend to evidence of fact.

114. I recognise the force of Mr Howells' simple submission that if the evidence sought to be adduced is evidence of fact, it should be able to be given by a lay witness or by an expert as if he were a lay witness in accordance with the ordinary rules of evidence. However, in my view, as explained above, the law is that there is some evidence of fact which an expert witness can give.

115. The apparent conundrum presented by Mr Howells' submission will frequently be answered by reference to the principle that although an expert is entitled to inform his opinion of observable factual matters not only by reference to his own personal experience of relevant facts, but also by such material as textbooks, journals and other hearsay material; he is not immune from all inhibition on hearsay. The courts may exclude the expert's hearsay evidence of facts in issue or of particular facts relied upon where it ceases to be the expounding of general study (whether by the witness or others) and becomes the assertion of a particular learning or study. This is summarised by Lord Reed and Lord Hodge in *Kennedy* at para.50 where they say:

"*50. The skilled witness must demonstrate to the court that he or she has relevant knowledge and experience to give either factual evidence, which is not based exclusively on personal observation or sensation, or opinion evidence. Where the skilled witness establishes such knowledge and experience, he or she can draw on the general body of knowledge and understanding of the relevant expertise: Myers v The Queen [2015] 3 WLR 1145, para 63.*"

116. In *Myers v The Queen* [2015] UKPC 40, [2016] AC 314 at paras. 62 – 66 Lord Hughes JSC sets out the relevant law of evidence on this point as I have attempted to summarise it above, but with more detail and reference to authority. I do not set those paragraphs out here, but this judgment should be read as incorporating them.

117. A note at 35.4.1 of the White Book runs counter to my above analysis. It states:

"*Where an expert witness is to give evidence of fact rather than opinion evidence, even if it is of such a nature that only an expert could give, i.e. scientific evidence, that is not within the scope of Pt 35, and the general approach to witnesses of fact applies: see Kirkman v Euro Exide Corp [2007] EWCA Civ 66; [2007] C.P. Rep. 19, CA where a surgeon who had treated the claimant had given a view in his statement as to whether he would have recommended surgery on the claimant's troublesome knee but for the further damage caused to it in the accident. The court held that this was evidence of fact, not opinion evidence, and the trial judge should have allowed it to be admitted. Also see Darby Properties Ltd and Darby Investments Ltd v Lloyds Bank Plc [2016] EWHC 2494 (Ch) at paras 41–44.*"

118. For the reasons given above, insofar as that Note repeats what is said in *Darby Properties*, it is wrong for the reasons given above. Insofar as it is based on *Kirkman v Euro Exide Corp* [2007] EWCA Civ 66; [2007] C.P. Rep. 19, CA it is an oversimplification and potentially misleading. In *Kirkman* the proposed witness was a consulting surgeon, Mr Banks. Mr Banks was the consultant surgeon who was already advising the claimant in respect of his right knee at the time of the claimant's accident at work which further damaged his right knee and led to the proceedings in which the claimant sued his employer in respect of his industrial accident. The factual evidence which the claimant proposed that Mr Banks should be permitted to give went to an issue of causation. Would the claimant have had an operation to his knee even if he had not had his industrial accident? The evidence in issue from Mr Banks was evidence as to whether, in the absence of the accident, he, Mr Banks who would actually have been advising the claimant at that time, would have advised the claimant to have the operation. Mr Banks would have been using his expertise in giving that evidence, but on the causation issue it would not matter whether his application of his expertise was right or wrong. Hence, the expert element of his evidence was not relevant and, as the Court of Appeal held, his evidence was admissible as ordinary evidence of fact outside CPR 35. Accordingly, the *Kirkman* case and the Note does not detract from my above analysis.

119. As I have sought to explain above, it is only particular kinds of evidence of fact which an expert gives which is or can be expert evidence of fact. Where such evidence of fact might be given by an expert, its particular nature makes it desirable for the efficient and proportionate administration of justice that its production and use should be controlled by the court under CPR 35 and CPR 35 should be construed as permitting such control accordingly.

120. Of those particular kinds of evidence which might be given as evidence of fact by an expert acting as an expert, the two which are potentially relevant to Ms Rooney's Expert Issues in the circumstances of the present case are:

120.1. Evidence of the kind contemplated by Lord Reed and Lord Hodge in para.46 of their judgment on *Kennedy*; that is to say evidence which collates and presents to the court in an efficient manner the knowledge of others in his or her field of expertise.

120.2. Evidence of fact given by the expert drawing on the general body of his knowledge and understanding in which he is an expert, an example being that given by Lord Reed and Lord Hodge in para.41 of their judgment in *Kennedy* of the giving by an expert of evidence in the social and political conditions in a foreign country. Evidence of this kind can and generally should be classified as opinion evidence as to matters of fact.

121. The tests for admissibility of expert evidence going to matters of fact set out by Lord Reed and Lord Hodge in *Kennedy* at para.44 of their judgment and quoted by me above does not include an element which Mr Howells submitted was included and was applicable. That was that the subject-matter of the proposed expert evidence must be comprised within a recognised body of expertise governed by recognised standards and rules of conduct relevant to the question which the court has to decide. For present purposes the choice is between:

121.1. The fourth element of the test set out by Lord Reed and Lord Hodge in *Kennedy*. That is whether there is a reliable body of knowledge or experience to underpin the expert's evidence ("the Wider Approach"). Or

121.2. The more restrictive requirement that, as submitted by Mr Howells, the subject-matter of the proposed expert evidence must be comprised within a recognised body of expertise governed by recognised standards and rules of conduct relevant to the question which the court has to decide ("the Narrower Approach").

122. The Narrower Approach is a sub-set of Lord Reed's and Lord Hodge's Wider Approach.

123. I have difficulty with the proposition that the Narrower Approach is of universal application. If it was it would exclude many sets of circumstances in which expert evidence is commonly given. One example might be as to the cause of a ship breaking up. Obviously the cause of a ship breaking up is not subject to any recognised standards or rules of conduct. The rules of physics, chemistry and engineering are the subject of reliable bodies of knowledge or experience; but are not subject to rules of conduct. What may be subject to recognised standards and rules of conduct are the qualifications of the person giving the expert evidence (e.g. an engineer specialising in corrosion in ships); but even that is not of universal application because expert evidence can be given by a person based on their knowledge and experience, even if they have no formal qualifications. The policeman in *Myers v The Crown* is an example.

124. The Narrower Approach is appropriate where the underlying issue to which the evidence relates is as to the defendant's behaviour in comparison with standards or practices in the profession, business or operation in which he, she or it was operating. The vast majority of the authorities to which I was directly or indirectly referred deal with evidence on that kind of issue.

125. The Narrower Approach is explained by Evans-Lombe J in *Barings Plc v Coopers & Lybrand* [2001] PNLR 551 at para.24 as deriving from the judgment of Oliver J in *Midland Bank Trust Company Ltd v Hett Stubbs & Kemp* [1979] 1 Ch 384 which was a case involving the scope of a solicitor's duty upon which extensive evidence had been led in the course of the trial. It was in that context that the Narrower Approach was appropriate. Oliver J said at p.402 (a passage quoted by Evans-Lombe J in *Barings*):

"*I must say that I doubt the value, or even the admissibility, of this sort of evidence, which seems to be becoming customary in cases of this type. The extent of the legal duty in any given situation must, I think, be a question of law for the Court. Clearly if there is some practice in a particular profession, some accepted standard of conduct which is laid down by a professional institute or sanctioned by common usage, evidence of that can and ought to be received. But evidence which really amounts to no more than an expression of opinion by a particular practitioner of what he thinks that he would have done had he been placed, hypothetically and without the benefit of hindsight, in the position of the Defendants, is of little assistance to the Court; whilst evidence of the witness' view of what, as a matter of law, the solicitor's duty was in the particular circumstances of the case is, I should have thought, inadmissible, for that is the very question which it is the Court's function to decide.*"

126. That is the usual context in which the Narrower Approach is appropriate.

127. That the Narrower Approach is appropriate where there are underlying issues of that kind, but is not of universal application is consistent with the first sentence of the following passage in para.45 of the judgment of Evans-Lombe J in *Barings Plc v Coopers & Lybrand* [2001] PNLR 551 which was relied upon by Mr Howells:

"In my judgment the authorities which I have cited above establish the following propositions: expert evidence is admissible under section 3 of the Civil Evidence Act 1972 in any case where the court accepts that there exists a recognised expertise governed by recognised standards and rules of conduct capable of influencing the court's decision on any of the issues which it has to decide and the witness to be called satisfies the court that he has a sufficient familiarity with and knowledge of the expertise in question to render his opinion potentially of value in resolving any of those issues."

128. Evans-Lombe J does not say that expert evidence is "only" admissible in the circumstances specified by him. For the purposes of the admissibility issues before him, where the substantive issues to which the proposed expert evidence related concerned banking management and derivative trading practice, that approach or test, i.e. the Narrower Approach, was appropriate.

129. The judgment of Hildyard J in *The RBS Rights Issue Litigation* [2015] EWHC 3433 (Ch), or at least extracts from it as set out in Master Matthews' judgment in *Darby Properties*, is another case which Mr Howells relied upon as establishing the Narrower Approach. In that case the substantive issues to which the proposed expert evidence related were issues as to what information was required to be in a prospectus; the materiality of any untrue or misleading statement; what did investors generally know at the relevant time about matters which were omitted from the prospectus and whether the belief held by the defendants was reasonable. Expert evidence was sought to be adduced as to "investment information/equity analysis". Hildyard J set out and applied the Narrower Approach as enunciated by Evans-Lombe J in *Barings*, as set out above. The essence of Hildyard J's decision was that the proposed expert evidence would not provide evidence of a body of expertise which went or went sufficiently to the substantive issues in the case. It is therefore in the same class as the *Barings* case and is not inconsistent with the Wider Approach being applicable in the circumstances of the present case.

130. On this point Mr Howells also referred to *M v Carmarthenshire County Council* [2018] EWFC 36, a decision of Mostyn J. In the *Carmarthenshire* case the substantive issue was as to the possible discharge of a care order in relation to a child so that the child might live with its parent. The guardian and the local authority sought to put weight on a report from a social worker as to the attachment which the child might have made to its foster parents. The report was based on "attachment theory". After referring briefly to various cases, including *Barings* and *The RBS Rights Issue Litigation*, Mostyn J at para.14 set out the Narrower Approach. He went on to hold that the proposed evidence was inadmissible or should not be adduced for a number of reasons, including that "attachment theory" did not represent a recognised body of expertise governed by recognised standards and rules of conduct. As the remainder of the judgment shows, that was plainly the case. With respect to Mostyn J he applied the Narrower Approach outside its applicable context. Even if attachment theory had been reliable and well recognised, the theory itself could not have been subject to rules of conduct. Mostyn J's other reasons for refusing to allow the evidence to be adduced were so strong that it was unnecessary for him closely to analyse the possible differences between the Wider and Narrower Approaches and their applicability.

131. As a matter of legal analysis I do not consider myself to be bound by Mostyn J's decision or reasoning in the *Carmarthenshire* case if and insofar as it is or may be to the effect that the Narrower Approach is of universal application to the admissibility of expert evidence. That is for the following reasons:

131.1. The substantive issue and circumstances in respect of which Mostyn J applied the Narrower Approach are distinguishable from those in the present case. Amongst other things the admissibility issue in *Carmarthenshire* was as to expert opinion evidence, not expert evidence of fact or expert opinion evidence as to a matter of observable fact.

131.2. The universal application of the Narrower Approach is inconsistent with the statement of the relevant law in the South Australian case of *R v Bonython* [1984] SASR 45 by King CJ at para.51 which was approved and applied in a number of English judgments including, amongst others, Evans-Lombe J's judgment in *Barings* at para.38. The part of the King CJ's judgment approved and applied by the English courts is to the effect of the Wider Approach, not the Narrower Approach. It provides:

> *"Before admitting the opinion of a witness into evidence as expert testimony, the Judge must consider and decide two questions. The first is whether the subject matter of the opinion falls within the class of subjects upon which expert testimony is permissible. This first question may be divided into two parts: (a) whether the subject matter of the opinion is such that a person without instruction or experience in the area of knowledge or human experience would be able to form a sound judgment on the matter without the assistance of witnesses possessing special knowledge or experience in the area and (b) whether the subject matter of the opinion forms part of a body of knowledge or experience which is sufficiently organised or recognised to be accepted as a reliable body of knowledge or experience, a special acquaintance with which of the witness would render his opinion of assistance to the Court. The second question is whether the witness has acquired by study or experience sufficient knowledge of the subject to render his opinion of value in resolving the issue before the Court.*"

131.3. It is inconsistent with the decision and reasoning in *Kennedy* which, although it is a Supreme Court decision on an appeal from the courts of Scotland, is on the point in question, for the reasons given by me above, a decision which treated English and Scottish law as being the same.

132. Pulling together the threads of my legal analysis which are relevant to the question of whether to allow the Claimant to adduce the particular expert evidence which it seeks to do in the present case, my conclusions are as follows:

132.1. The expert evidence, whether of fact or opinion must be relevant to an issue which the court has to decide.

132.2. In order for the evidence to be expert evidence, it must be given by the witness using his expertise. In the context of the present case that could be:

132.2.1. Expert evidence of fact of the kind contemplated by Lord Reed and Lord Hodge in para.46 of their judgment on *Kennedy*; that is to say evidence which collates and presents to the court in an efficient manner the knowledge and experience of others in his or her field of expertise.

132.2.2. Expert evidence of opinion as to facts given by the expert drawing on the general body of his knowledge and understanding in which he is an expert.

132.3. The following four considerations govern the admissibility of expert evidence under those two heads:

132.3.1. (1) Whether the proposed expert evidence will assist the court in its task.

132.3.2. (2) Whether the witness has the necessary knowledge and experience.

132.3.3. (3) Whether the witness is impartial in his or her presentation and assessment of the evidence; and

132.3.4. (4) Whether there is a reliable body of knowledge or experience to underpin the expert's evidence.

132.4. Even if the proposed expert evidence of fact comes under one of those 2 heads and the 4 considerations are satisfied so as to make it admissible, CPR35 applies, so that in order that it can be adduced:

132.4.1. (A) It must, as required by CPR 35.1, be reasonably required to resolve the proceedings.

132.4.2. (B) Permission must be obtained under CPR 35.4.

132.5. S.3 Civil Evidence Act 1972 makes expert opinion evidence admissible, but that admissibility is qualified by the following:

132.5.1. (a) The need for the subject matter of the opinion to be such that a person without instruction or experience in the area of knowledge or human experience would not be able to form a sound judgment on the matter without the assistance of witnesses possessing special knowledge or experience in the area.

132.5.2. (b) The need for the subject matter of the opinion to form part of a body of knowledge or experience which is sufficiently organised or recognised to be accepted as a reliable body of knowledge or experience, a special acquaintance with which of the witness would render his opinion of assistance to the court. Plus in some classes of case (but not the present one) for the recognised expertise to which the opinion relates to be governed by recognised standards and rules of conduct capable of influencing the court's decision on any of the issues which it has to decide.

132.5.3. (c) The need for the witness to have acquired by study or experience sufficient knowledge of the subject to render his opinion of value in resolving the issue before the court.

132.6. In deciding whether permission should be granted under CPR 35.4 there is the overarching restriction under CPR 35.1 restricting the expert evidence to that which is reasonably required to resolve the proceedings. In deciding that question and in deciding whether to grant permission under CPR 35.4, the three questions listed by Warren J in *British Airways Plc v Spencer* [2015] EWHC 2477 (Ch) at para.68 need to be considered, in the case of the third, having regard to the factors mentioned by him at para.63. Those 3 questions are:

132.6.1. (a) Whether, looking at each issue, it is necessary for there to be expert evidence before that issue can be resolved. If it is necessary, rather than merely helpful, it must be admitted.

132.6.2. (b) If the evidence is not necessary, the second question is whether it would be of assistance to the court in resolving that issue. If it would be of assistance, but not necessary, then the court would be able to determine the issue without it.

132.6.3. (c) Since, under the scenario in (b) above, the court will be able to resolve the issue without the evidence, the third question is whether, in the context of the proceedings as a whole, expert evidence on that issue is reasonably required to resolve the proceedings.

132.7. A judgment needs to be made in every case and, in making that judgment, it is relevant to consider whether, on the one hand, the evidence is necessary (in the sense that a decision cannot be made without it) or whether it is of very marginal relevance with the court being well able to decide the issue without it, in which case a balance has to be struck and the proportionality of its admission assessed. In striking that balance, the court should be prepared to take into account disparate factors including the value of the claim, the effect of a judgment either way on the parties, who is to pay for the commissioning of the evidence on each side and the delay, if any, which the production of such evidence would entail (particularly delay which might result in the vacating of a trial date).

132.8. There may be facts as to which evidence could be given by either or both of (i) lay evidence and (ii) expert evidence. The collation and presentation to the court in an efficient manner of the knowledge and experience of others in his or her field of expertise is an example. If, in a particular case the evidence might be able to be given by a large number of lay witnesses or by an expert or by both, the court can decide as a matter of case management which course or combination of courses would be in accordance with the overriding objective; which decision might involve restricting the number of lay witnesses.

Application of the law to the proposed evidence

133. To rehearse my above analysis as to the nature of the evidence which the Claimant wishes to adduce as expert evidence:

(a) The extent to which there was a commercial market for the licensing or consumption of recorded music through streaming in 2005. This is an issue of fact, but it is quite possible that no one lay witness would be able to give evidence which covered all of the possible ground.

(b) The nature of the services offered in 2005 by streaming services to consumers. This is an issue of fact; but a single lay witness might well not be able to identify all of the streaming services which were offered in 2005.
(c) The extent to which the exploitation of a recording via a streaming service or platform and via the sale of a compact disc were in 2005 of a different nature from one another. The identification of those natures would be matters of fact. Once those natures were identified, the extent to which they were different would be a matter of secondary fact or of characterisation.
(d) The extent to which respective prices of streaming and of compact discs was different in 2005. This is an issue of fact, though its potential scope is very wide and it is very unlikely that a single lay witness could give evidence which covered all the prices of all streaming services and compact discs in 2005.
(e) The reasons for the difference in prices between streaming and compact discs. This raises some issues of fact and some of opinion

134. The essence of what would be of assistance to the court regarding the relevant background and as to the commercially nonsensical point would be evidence as to the respective natures in 2005 of streaming services and CDs; the natures in 2005 of the exploitation of recordings by those methods; and whether there was any, and if so what, linkage between the price for CDs and the prices for streaming services. That is because depending on whether that linkage was more or less remote, that would indicate whether it was more or less likely or, in a more extreme case, commercially nonsensical, for the amounts payable under Mr West's Agreement in respect of the provision of streaming services to be calculated by reference to the price for CDs.

135. Would evidence under any of heads (a) to (e) be relevant to (i) the interpretation of Mr West's Agreement; (ii) whether the Claimant's construction was commercially nonsensical; or (iii) whether, if the Claimant's construction was commercially nonsensical, that would have been reasonably apparent to the parties at the time that they entered into Mr West's Agreement? Evidence under each of those heads would assist the court in understanding the basic commercial elements of exploitation by streaming and by CDs and in determining whether there was any, and if so what, linkage between the price for CDs and the prices for streaming services. Therefore, in my judgment evidence under all of those heads would assist the court in determining issues (i) and (ii) and would therefore be relevant to those issues. Such evidence would only be of marginal relevance to issue (iii) (whether the commercially nonsensical nature of the Claimant's construction would have been reasonably apparent to the parties). That issue would turn principally on what information was available to the parties. Evidence as to the market in streaming services and the related heads (a) to (e) would be background to that question.

136. Without the Claimant's proposed expert's report, I cannot be satisfied one way or the other on whether the Claimant's proposed expert evidence would be expert evidence of fact of the kind contemplated by Lord Reed and Lord Hodge in para.46 of their judgment in *Kennedy* as evidence which collates and presents to the court in an efficient manner the knowledge and experience of others in the expert's field of expertise; or would be expert evidence given by the expert drawing on the general body of his knowledge and understanding.

137. For the same reason that I am satisfied that the proposed expert evidence would be relevant, I am satisfied that the proposed expert evidence would assist the court in its task. That suffices to satisfy the first limb of Lord Reed and Lord Hodge's test so far as expert evidence of fact is concerned.

138. As to whether the witness has the necessary knowledge and experience and is impartial in his or her presentation and assessment of the evidence within the second and third limbs of Lord Reed and Lord Hodge's test so far as expert evidence of fact is concerned, there is no evidence before me as to who the proposed expert would be; whether or not he or she would have the necessary knowledge and experience and whether or not he or she would be impartial in his or her presentation and assessment of the evidence. Therefore I cannot at this stage assess those matters. They would have to be determined after the report was produced.

139. I am not satisfied that there is a reliable body of knowledge or experience to underpin the proposed expert evidence within the fourth limb of Lord Reed and Lord Hodge's test so far as the admissibility of expert evidence of fact is concerned. There is no evidence before me that there is such a body of knowledge or experience. Nor is the existence of such a body of knowledge and experience so well-known that I could take judicial notice of its existence.

140. Insofar as the proposed expert evidence would comprise expert opinion evidence, the current lack of evidence as to the existence of a reliable body of knowledge or experience to underpin the expert's evidence also prevents the equivalent test for expert opinion evidence from being satisfied. That is that the subject matter of the opinion forms part of a body of knowledge or experience which is sufficiently organised or recognised to be accepted as a reliable body of knowledge or experience.

141. As regards the requirement for expert opinion evidence under s.3 Civil Evidence Act 1972 to be admissible that the subject matter of the opinion must be such that a person without instruction or experience in the area of knowledge or human experience would not be able to form a sound judgment on the matter without the assistance of witnesses possessing special knowledge or experience in the area: I am not satisfied that this requirement is met in respect of the proposed evidence as to the reasons for the difference in prices between streaming and compact discs. Once the factual evidence was before the court, I consider that it is likely that the court would be able to identify the reasons for the difference in price without the need for expert assistance in that regard. Otherwise, the satisfaction or otherwise of this requirement cannot be assessed until, at earliest, the expert report is produced and, possibly, compared with the available lay evidence on some or all of the issues covered by it.

142. The need for the proposed expert witness to have acquired by study or experience sufficient knowledge of the subject to render his opinion of value in resolving the issue before the court is something which cannot be ascertained without knowing who the expert would be and what his qualifications were.

143. All the points as to admissibility of the proposed expert evidence as to which at present I am not satisfied, including the questions of whether there is a reliable body of knowledge or experience to underpin the expert's evidence and whether the subject matter of any proposed expert opinion evidence forms part of a body of knowledge or experience which is sufficiently organised or recognised to be accepted as a reliable body of knowledge or experience, raise

questions which could be answered in a less speculative manner and might be answered positively in favour of the Claimant's proposed expert evidence being admissible if the proposed expert evidence was in existence. It could then be analysed for its compliance with the various tests. I consider below whether that process should be permitted, after I have considered the CPR 35 tests.

144. Even if the proposed expert evidence is admissible, should it be permitted to be adduced under CPR 35.4?

145. Is it necessary for there to be the proposed expert evidence before the following issues can be resolved: (i) the interpretation of Mr West's Agreement; (ii) whether the Claimant's construction was commercially nonsensical; or (iii) whether, if the Claimant's construction was commercially nonsensical, that would have been reasonably apparent to the parties at the time that they entered into Mr West's Agreement (the first of the three questions listed by Warren J in *British Airways Plc v Spencer* [2015] EWHC 2477 (Ch) at para.68)? I consider that the answer to that question is "no". All of those issues could be resolved without the proposed expert evidence. Lay evidence could describe enough of the relevant background to enable Mr West's Agreement to be interpreted. More evidence as to background by way of expert evidence might change the background that the court held was relevant or how it impacted on interpretation. As a consequence the evidence might change the outcome of the interpretation issue; but that would not make the proposed expert evidence "necessary" for the interpretation issue to be resolved. Similarly with the "commercially nonsensical" and "reasonably apparent" points.

146. Would the proposed expert evidence be of assistance to the court in resolving the issues as to (i) the interpretation of Mr West's Agreement; (ii) whether the Claimant's construction was commercially nonsensical; or (iii) whether, if the Claimant's construction was commercially nonsensical, that would have been reasonably apparent to the parties at the time that they entered into Mr West's Agreement (the second of the three questions listed by Warren J in *British Airways Plc v Spencer* [2015] EWHC 2477 (Ch) at para.68)? I consider that it would be, for the same reasons as I have held above that it would be relevant; though with the same rider that it would only be of marginal relevance on issue (iii).

147. In the context of the proceedings as a whole, is the proposed expert evidence reasonably required to resolve the proceedings; it, being of assistance as to issues (i) and (ii) and marginal assistance as to issue (iii) (the third of the three questions listed by Warren J in *British Airways Plc v Spencer* [2015] EWHC 2477 (Ch) at para.68)?

148. In support of her submission that I should permit the evidence under CPR 35 Ms Rooney submitted that, unlike the Defendant, the Claimant did not exist in 2005 and would not be in a position to call witnesses as to the factual matters which the Claimant's proposed expert evidence would address. This last point was summarised in her skeleton argument where she submitted that, as a letter from the Claimant's solicitors dated 1 November 2022 explained, the Claimant was not in a position to adduce any factual evidence on the extent to which there was a commercial market for the licensing or consumption of recorded music through streaming in 2005 (her "Expert Issue 1"), as a "*small independent record label that was not involved in the exploitation of recordings by way of streaming in or around 2004/2005*" and only intends to rely on expert evidence.

149. I do not accept that submission for two reasons:

149.1. The Claimant has been able to plead in 10.4.2.2 of its Reply (set out above) that in 2005 there was no significant or established commercial market for the licensing or consumption of recorded music through streaming and in 10.4.4 of its Reply (set out above) that the characterisation of streaming as "ephemeral" and the resulting contrasting of that service with the purchase of a CD, was denied and the reasons for that denial. In order for counsel to have pleaded the Claimant's case to that effect they must have had instructions to that effect. Mr Colgan who signed the statement of truth on the Reply must have had grounds for his belief that the facts alleged in the Reply were true. Those instructions and that belief must have been based on some evidence. That evidence might have been expert evidence of fact; but I substantially discount that because the Claimant has not identified its proposed expert. Alternatively it might be factual evidence, even if only hearsay evidence; in which case it would be admissible without the need for permission under CPR 35.

149.2. If the Claimant's own officers and employees do not include a person who can give the relevant factual evidence, then the Claimant could look elsewhere for an appropriate witness or witnesses as to relevant facts. The only restriction on its ability to do that might be cost, but it budgeted £89,350 for expert reports and in Ms Rooney's skeleton offers £70,250 for those. The cost of finding lay witnesses is likely to be within those bounds.

150. I have already mentioned that the Claimant puts its possible recoveries at more than £1 million. As I have just mentioned, the Claimant budgeted £89,350 for expert reports and in Ms Rooney's skeleton offers £70,250 for those. The Claimant's Precedent H was signed on 17th October 2022. Even in the context of a claim worth £1 million or more, £89,350 or £70,250 for one party's expert evidence which will be of assistance to the court but which is not necessary for the determination of the case appears to me to be disproportionately high. The £89,350 is broken down in the Precedent H with only £20,000 of the figure attributed to the fees of the expert. £23,000 is for counsel and £46,350 is solicitors' time costs. At present it is not apparent to me why the legal costs of obtaining the proposed expert evidence would be so great. The draft Directions Order put forward by the Claimant provides for the insertion of a figure for "the estimated cost of such expert evidence" rather than the standard cap on the expert's fees and expenses which Chancery Form CH1 provides for.

151. I have yet to hear oral submissions on those parts of the costs budgets which are not agreed, but I consider that a figure of £20,000 for the fees of one expert, to include attendance at trial, might well be reasonable and proportionate to the potential value of the claim. For CPR 35.4 purposes proportionality of the cost of experts needs to be assessed by reference to the assistance which the court would be likely to obtain from the experts in resolving the substantive issues in the case. Again it is difficult to assess this without seeing the proposed expert evidence or knowing how comprehensive or contentious the lay evidence on the same subject would be, but I consider that expenditure by each party of £20,000, but not expenditure of £89,350 or £70,250 as sought by the Claimant, would be likely to be proportionate to the degree of assistance which the proposed expert evidence would give the court.

152. In the present case, as in most, proportionality in the sense last-mentioned goes both to the CPR 35.1 test of whether the proposed expert evidence is reasonably required to resolve the proceedings and to the application of the overriding objective to the exercise of the court's powers to permit expert evidence under CPR 35.4. In the present case I consider that the

proportionality consideration weighs against admitting the proposed expert evidence under both heads. I have rejected the submission that the proposed expert evidence was reasonably required because the Claimant did not exist in 2005 and would not be in a position to call witnesses as to the factual matters which the Claimant's proposed expert evidence would address.

153. The broader question is whether the requirement to deal with the case justly affects the reasonableness criterion under CPR 35.1 or the application of the overriding objective in such a way and to such an extent as to outweigh the proportionality consideration so as to make it appropriate to give permission now for the proposed expert evidence to be put in. In my judgment on the material at present before me it does not. That is because the evidence can be given by lay witnesses either by reason of their direct observation or by way of hearsay evidence. Further, the scope for a factual dispute in relation to the issues which the proposed expert evidence of fact would address appears to me to be limited.

154. Thus, as matters stand:

154.1. There are a number of matters relating to admissibility on which I am not satisfied, so that if I had to decide the issue of admissibility now, on the material at present before me I would have to decide that the proposed expert evidence was not admissible as expert evidence.

154.2. The proposed expert evidence would be of assistance to the court but its estimated cost means that it would not be reasonably required within the meaning of CPR 35.

155. Ms Rooney submitted that if there was doubt as to the admissibility of the Claimant's proposed expert evidence, that doubt should be resolved by the Trial Judge rather than by me or another master at the directions stage. She submitted that the hands of the Trial Judge should not be tied by my excluding evidence at this stage.

156. A decision taken at a case management hearing before trial to exclude expert evidence will, subject to the terms of the order (which, for example, might expressly grant permission to re-apply) and subject to any appeal, be final. On the other hand, a decision at such a hearing to grant permission to a party to put in expert evidence will not bind the trial judge who may still exclude it. These two alternatives weigh in favour of Ms Rooney's submission that if there was doubt as to the admissibility of the Claimant's proposed expert evidence, that doubt should be resolved after it has been produced and by the Trial Judge rather than by me or another master at the directions stage. However, they are far from conclusive.

157. Insofar as Ms Rooney's submission is concerned with admissibility it is also supported as a general consideration by what Mummery LJ said in *Stroude v Beazer Homes Ltd* at paras.9 and 10:

> "*9. In general, disputes about the admissibility of evidence in civil proceedings are best left to be resolved by the judge at the substantive hearing of the application or at the trial of the action, rather than at a separate preliminary hearing. The judge at a preliminary hearing on admissibility will usually be less well informed about the case. Preliminary hearings can also cause unnecessary costs and delays.*

10. In the present case no good reason is apparent nor has one been advanced for departing from the usual practice. It has not been suggested that this is one of those cases in which the ruling on admissibility would dispose of or abbreviate the substantive application."

158. The issue in *Stroude v Beazer Homes Ltd* was as to the admissibility of evidence of subjective intentions and negotiations in construing a written agreement. The issue arose in different circumstances in that in *Stroude* the evidence sought to be relied upon did not require the permission of the court before it was filed and served in the way that expert evidence does.

159. By way of contrast, in relation to proposed expert evidence, in *Barings*, Evans-Lombe J gave the defendants "preliminary leave" to call the expert evidence in question, before themselves being put to the cost of answering it. That was designed (see per Evans-Lombe J at para.1) to give the Applicants the opportunity to apply to strike out the whole or part of such expert evidence before answering it. The application before Evans-Lombe J was such an application.

160. In *The RBS Rights Issue* case Hildyard J had adopted a slightly different route which was also designed to allow the court to exercise its exclusionary powers before the trial, but after the proposed expert evidence had been substantially produced. Hildyard J had made an order permitting the proposed expert evidence, but that order was "*subject to review by the court as to the necessity therefore when the list of [expert] questions … has been provided"*.

161. At para.20 in *Barings*, Evans-Lombe J said:
"*The evidence of experts will always be exchanged and filed well in advance of the hearing. It clearly serves the purpose of effective case management that, as far as possible, issues relating to the admissibility of expert evidence be disposed of well before the trial starts so that significant costs can be saved. See Woodford & Ackroyd v Burgess [1999] Lloyd's Rep. (PN) 231.*"

162. As I have already held, if I had to decide the issue of admissibility (as opposed to the CPR 35 issues) now, on the material at present before me I would have to decide that the proposed expert evidence was not admissible as expert evidence. However, I consider that there is a real prospect of the proposed evidence when and if it is produced, being admissible as a matter of the law of evidence, so that if case management considerations, including those expressly set out in CPR 35 and the tests enunciated by Warren J in *British Airways Plc v Spencer* [2015] EWHC 2477 (Ch) at para.68 as quoted above, favoured the granting of permission under CPR 35.4, then, as in *Barings* and the *RBS Rights Issue Litigation* it would be appropriate to give preliminary or reviewable permission for the proposed expert evidence. That preliminary or provisional permission would enable the Claimant to cause an expert's report to be produced which complied with the requirements as to admissibility. Insofar as the report comprised evidence of fact, the evidence in it might be either or both of expert evidence of fact or lay evidence of fact which would be admissible even if not given by an expert. Issues as to admissibility could then be determined subsequent to the production of the report either as a condition of its admissibility attached to the preliminary or provisional permission or on an application to strike out. Those issues of admissibility would be determined by a Master well prior to the trial and, possibly prior to the Defendant having to incur costs in obtaining its own expert report, though some finer questions around legal admissibility and relevance might be left for determination by the Trial Judge, bearing in mind that the trial judge would still have an exclusionary power.

163. The difficulty for the Claimant with that approach in the present case is that on the material at present before me the CPR 35 case management considerations, and in particular the proportionality of the cost of the proposed expert evidence in comparison with the degree of assistance which it is likely to give the court militate against allowing the proposed expert evidence, even if the tests for legal admissibility were satisfied.

164. Accordingly I consider that unless and until the likely cost of the expert evidence is re-visited and reduced I should not even make a preliminary or reviewable order for expert evidence and I do not do so.