



GREENWAY CHAMBERS

Expert Evidence 2026 — Lessons Learned the Hard Way

Thursday, 26 March 2026

SESSION SPEAKERS



Tony Thomas
Barrister 1998



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Solicitor 1996 / Barrister 2013



Agenda

1. The (usual) introduction to expert evidence.
2. *Malone v Qld*
3. *ASIC v Money3 Loans*
4. *Epic Games, Inc v Apple Inc*
5. *The Curious Case of Mr Button*
6. *Marples v Secretary of State for Education*
7. *Optis v Apple*
8. *Lenovo v Ericsson*
9. And never feed them after midnight.



Evidence Act 1995 (NSW)

1. S76 – evidence of an opinion is not admissible.
2. S79 – if a person has specialised knowledge based on the person's training, study or experience, the opinion rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge.



***Makita (Aust) Pty Ltd v Sprowles* [2001] NSWCA 305**

***Lang v The Queen* [2023] HCA 29**

1. The expert must identify an accepted field of expertise
2. The expert must identify a factual basis or foundation for the opinion in the admissible evidence before the court
3. The expert must expose how their expertise connects the facts to the opinion



***Malone v State of Queensland* [2025] FCA 36**

1. Admissibility fight pre-hearing
2. Common industry practices
3. Exposure of underlying facts



ASIC v Money3 Loans Pty Ltd [2025] FCA 75

1. Admissibility fight pre-hearing
2. Common industry practices
3. Exposure of underlying facts



Epic Games, Inc v Apple Inc [2025] FCA 900

1. Intellectual property
2. Strayed beyond expertise and questions
3. Trace gold?



The Curious Case of Mr Button

1. Stay in your lane
2. Don't make legal findings
3. It's a human process



Marples v Secretary of State for Education [2025] EWHC 2794

1. Experts must know their duties.

Experts are expected to be familiar with their duties. A failure to comply with the rules may result in sanctions. One such sanction is the revocation of the permission granted to rely on expert evidence [at 28]

2. Mr Cohen did not. And neither did the client.

The product of Mr Cohen in the shape of his report and the joint report are not independent. They do not represent his objective and unbiased opinion. They represent advocacy on behalf of the claimants, using words put in Mr Cohen's mouth by Peter Marples. They represent what Mr Marples wants Mr Cohen to say and are not Mr Cohen's opinion at all. This includes contributions on matters on which the expert avowedly knows nothing. [at 45(b)]

3. And he is a repeat offender. [47] Do your due diligence.



Optis v Apple [2025] EWCA Civ 552

1. A pox on both of their houses?

The judge decided to “reject the evidence of both accountancy experts as a whole.... - both experts unpacked the licences in accordance with their respective clients’ instructions and failed to agree common workings of their unpacking. The passage also refers back to what the judge had called the parties’ unhelpful approach and the failure of his efforts to rectify the situation”.

2. Not so fast.

It was not put to either expert, either in cross-examination nor by the judge, that they had strayed outside their zone of expertise ([312]) or had provided no independent judgment ([315]). For that reason alone the judge’s conclusions to that effect were unfair and unjustified. If nothing else these allegations ought to have been put. [at 88]



Lenovo v Ericsson [2025] EWCA Civ 182

1. Assess whether expert evidence is essential.

Ericsson relied upon evidence given by Mr Foster, particularly in paragraph 88 of his fifth witness statement, that a payment by Lenovo to Ericsson under an interim licence would "not provid[e] Ericsson with any payment that could be recognised as revenue under generally accepted accounting principles (meaning that Ericsson could not use that money until a final licence is signed)".
[at 119]

2. Where professional standards are concerned (accounting principles, audit principles, professional standards), err on the side of caution. [120]. Or else.



Haley v Newcold Ltd [2025] EWCC 57

1. Never feed your expert after midnight.

I accept that a chance meeting over coffee may give an expert pause for thought, and might even cause an expert to revisit his opinion, perhaps to reconsider the literature originally relied upon in support of his opinion, and may ultimately lead to a change in opinion.

If that is the case, I would expect the expert, consistent with his duty, to notify the other expert and parties immediately and explain why the opinion has changed. None of this was done, and the revised opinion did not rear its head at any point until the midst of cross-examination.

With respect to Professor Harris, therefore, I am afraid that I found this all rather extraordinary. [At 153 – 154]





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