Case No: 8Q228879

IN THE BIRMINGHAM COUNTY COURT

Priory Courts
33 Bull Street
Birmingham B4 6DS

30th July 2010

BEFORE:

HIS HONOUR JUDGE OWEN QC

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BETWEEN:

Claimant

DAVID W FLAVELL CONSULTANTS LIMITED

- and -

RES IPSA SOLICITORS Defendant

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MR EVANS appeared on behalf of the Claimant

MR ROGERS appeared on behalf of the Defendant

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Approved Judgment

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147 Folios
10,600 Words

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JUDGE OWEN QC:

1. The claimant, David W Flavell Consultants Limited, claim £32,815 in respect of unpaid invoices rendered for services provided by them between March 2007 and October 2008 to the defendant, Kamar Uddin, solicitor, trading as 'Res Ipsa Solicitors'.

2. The services rendered concern property inspections and the resulting preparation of reports on condition in housing disrepair cases. These services were carried out by the claimant's alter ego, David Flavell, who holds himself out as a qualified professional, trained and experienced in undertaking such work both on the practical side in inspecting and reporting upon properties and their state of repair and in providing and presenting to a court an expert's report on such properties. As will appear in this judgment whilst Mr Flavell may well be able to hold himself as 'expert' in certain housing disrepair cases he is unfit to hold himself out as, or be recognised as an expert witness for the purposes of CPR 35, or otherwise. He lacks the necessary training and understanding of an expert witness's abilities and qualities demanded by a court. Mr Michael Vaux has demonstrated to me that he is presently unfit to be allowed unsupervised involvement in or any control of litigated matters before or likely to come before a court. Mr Uddin has demonstrated that he would benefit from additional guidance and training in respect of the duties expected of a solicitor engaged in litigation.

3. The services in question were rendered to the claimant's client, the defendant, a solicitor having qualified in November 2003, who operated and continues to operate as a sole practitioner. His firm operates with a small staff, but not with partners or associate solicitors.

4. These proceedings, in which the parties produced a trial bundle comprising in excess of nine full lever arch files (containing nearly 3,000 pages) raise issues of serious concern affecting the good administration of justice which make the sum claimed and the very substantial costs of litigation in this case pale into insignificance and relative unimportance. It is as though a stone had been lifted to reveal a number of unpleasant practices and individuals who hold themselves out to the public as honest, competent professionals upon whom not only the public but also the courts may rely in the discharge their professional services and duties without impropriety and to the minimum standards expected of their respective professions.

5. In their short and helpful submissions in closing both counsel, Mr Evans, for the claimant, and Mr Rogers, for the defendant made certain concessions on behalf of their respective clients arising out of the evidence in this trial. Those concessions have rendered it unnecessary for me to set out in great detail each of the events which have occurred commencing with the formation of the parties' professional relationship, its duration and acrimonious termination and post-termination events.

6. Before I turn to the background material, the facts and principal findings, I should summarise the matters which were clarified by counsel in their closing submissions. For the claimants, it was conceded that at all material times Mr Flavell was not in fact qualified or competent to act as an expert or otherwise to deal with claims arising under sections 79 to 82 of the Environmental Protection Act 1990 (that is, statutory nuisance attributable to the state of premises) and that there had been on his part in respect of this field of expertise misrepresentations as to his qualifications and expertise.

7. Mr Evans also identified, from his client's own testimony, four matters of apparent misconduct by an alleged expert witness. First, that having prepared the reports, but in particular what are now known as the 'section 82 reports' complained of in this case, and in particular in two of the first four cases of Azoun and Landon, Mr Flavell gave evidence for the claimant, before the Birmingham Magistrates' Court on 14 May 2007 and 6 June 2007 claiming to be an expert qualified to give evidence on such matters when he was not in fact so qualified to do so.

8. It was said in closing submissions, 'in mitigation', that Mr Flavell had no intention to mislead the court on those occasions. On the evidence before me it is not possible to accept that submission. It is true that his expertise was in fact challenged in those cases, successfully so, and that his evidence was rejected on both occasions by the court, certainly on the first occasion, on the very basis he was not competent to give the evidence he was giving. Such findings by that court were plainly correct. It is a matter of record and concern

that until the concession was finally made before me the claimant's case, through Mr Flavell, was entirely to the contrary. That is, that he was competent to give such expert evidence, by way of expert report and on oath to a court.

9. Secondly, in relation to those two occasions and not withstanding what was set out in his report and as presented to the magistrates' court, he, Mr Flavell, had told his client (so he asserted in evidence to this court in this case), the defendant Mr Uddin, before going into court, that the defects in question in those cases in his report, certainly at least in relation to the first case, were "minor" and not sufficient to support the case set out in his report. Having said that, according to his evidence in this case, he, Mr Flavell, then went into the witness box and gave evidence to support his report, contrary to that which he had allegedly confided to his client outside of court.

10. That evidence, given by Mr Flavell before me, in a misguided attempt to salvage, as he thought, his credibility as a person who could distinguish a minor defect from a serious or substantial defect served merely to show that he is an unreliable witness and in my judgment, unfit to be permitted to give 'expert' evidence, by report or oral testimony, to a court pursuant to CPR 35.

11. Mr Flavell's evidence that he had told Mr Uddin that the case was unsupportable, as indicated above, was not in fact accepted by the defendant in these proceedings. Before me, Mr Uddin's fundamental complaint was that he had been misled by Mr Flavell, in his pre-contractual dealings, in the content

of the reports on condition and the oral evidence given to the court about his claimed expertise. Mr Uddin complains that that misrepresentation - and the ignominious defeats in his two section 82 cases - resulted in a face to face meeting on 6 June 2007. I accept Mr Uddin's evidence that he had not, in fact, been told by Mr Flavell that he, Mr Flavell, considered the defects in his report to be insignificant or minor and that he, Mr Uddin was concerned by the apparent lack of expertise on the part of Mr Flavell.

12. It was Mr Uddin's evidence, which I accept, that at that meeting the issue of section 82 qualification was expressly discussed. Indeed, it was the subject matter of the meeting. He said that it was agreed that the claimant would withdraw his invoices in respect of the section 82 cases and work and he, Mr Flavell, would not thereafter be instructed on such work. Thereafter, the defendant instructed a properly qualified expert and Mr Flavell for the claimant, would concentrate solely on cases arising under section 11 of the Landlord and Tenant Act 1985.

13. Yet, until the concession was made before me, it was Mr Flavell's evidence that the defendant's version was wholly wrong and that his expertise and ability to undertake section 82 work had not been questioned or adversely affected.

14. Documents within the bundles show that Birmingham City Council, through their solicitors, in Mr Azoun's case by a letter dated 25 April 2007 had given notice that Birmingham City Council did not regard Mr Flavell as competent

to address statutory nuisance issues - nor was he so whilst in their employment.

15. Thirdly, that Mr Flavell had allowed himself to be unduly influenced by his instructing solicitor, that is either defendant or Michael Vaux (initially a trainee solicitor, now a solicitor who was then in the employ of the defendant and, indeed, after June 2008 as an equity partner), asked or instructed him to change or insert additional material matters into his report and that he duly obliged. That much was evidenced, for example, by an email adduced in evidence before from Mr Vaux to Mr Flavell in June 2007 in the case of McKenzie.

16. Fourthly, it was submitted that the explanation for such conduct was not an active intention to mislead the court. It was submitted (but not openly conceded by Mr Flavell) that Mr Flavell was "out of his depth" and without insight as to the impropriety evidenced in these proceedings by his own testimony. As indicated earlier, the closing submissions of both counsel were concerned with damage limitation and mitigation on behalf of their respective clients.

17. Finally, Mr Evans was given instructions during his closing submissions to abandon the submission that Mr Flavell was entitled to hold himself out as "a quantity surveyor". I had indicated that there was no evidence to justify that assertion of professional qualification and expertise. Indeed, that assertion had been made by him, Mr Flavell, in his witness statements (including a fresh

statement put in during the trial to bolster his alleged qualifications and expertise) to the court and that he was indeed a quantity surveyor.

18. For his part Mr Uddin eventually conceded through Mr Rogers that his conduct in this case, on his own evidence, in entering into a conditional fee arrangement with the claimant, through Mr Flavell, supported and condoned by Mr Vaux on 5 June 2007, was in breach of his professional duties and that such agreement insofar as the court accepts the defendant's evidence, was professionally objectionable.

19. In mitigation, Mr Rogers also submitted that Mr Uddin had not sought actively to mislead the court, nor did he act with bad faith or dishonesty. In short, it was submitted he too was out of his depth and lacked insight into the impropriety of what he was doing or allowing. I accept the general thrust of that submission save that Mr Uddin must have known, or closed his eyes to the fact that Mr Flavell was willing to assert expertise which he plainly did not possess and yet he continued his engagement in theses cases, doubtless because of the expected benefits of the arrangement they had devised. It was at that point that his focus on his professional duty was lost.

20. So far as that issue is concerned, Mr Uddin had asserted and maintained throughout these proceedings, both in his amended defence which contains the declaration of truth, and his witness statements (and of course an officer of the court), that the arrangement he had made with the claimants certainly contrived in part and expressly condoned by Michael Vaux was an

arrangement which would be within any known definition of a conditional fee agreement and which could not be justified pursuant to his code of conduct as a solicitor and the requirements of CPR 35 and the Practice Direction to CPR 35 (which in turn incorporates the relevant protocol as to which there is no disagreement between counsel as to its terms and which expressly prohibits or prescribes such an arrangement).

21. Mr Rogers was thus faced with a forensic difficulty in suggesting that perhaps this arrangement might somehow (not explained) be regarded as, although undesirable, not legally objectionable. In that respect the decision of the Court of Appeal in Factortame Limited & Others v Secretary of State [2002] EWCA Civ 932 was cited and particular paragraphs 70 and 73 were referred to.

22. At paragraph 70 the Court of Appeal authoritatively confirmed that which practitioners understood from their own code of conduct and CPR 35 and the Practice Direction, in which it is stated:

> "Expert evidence comes in many forms and in relation to many different types of issue. It is always desirable that an expert should have no actual or apparent interest in the outcome of the proceedings in which he gives evidence, but such disinterest is not automatically a precondition to the admissibility of his evidence. Where an expert has an interest of one kind or another in the outcome of the case, this fact should be made known to the court as soon as possible. The question of whether the proposed expert should be permitted to give evidence should then be determined in the course of case management. In considering that question the judge will have to weigh the alternative choices open if the expert's evidence is excluded, having regard to the overriding objective of the Civil Procedure Rules."

23. There was placed before me a summary of part of the findings or guidance given in 1999 by the Court of Appeal in Hill v Leeds City Council, a housing case which featured in the evidence before me in that it was said by the

defendant that that decision had been expressly considered by Mr Vaux and himself and their understanding of it somehow justified or supported the arrangement made with the claimant. Any reasonably competent practitioner having read the decision in Hill simply could not have come to that conclusion.

24. At paragraph 73 in Factortame the Court of Appeal said:

> "To give evidence on a contingency fee basis gives an expert, who would otherwise be independent, a significant financial interest in the outcome of the case. As a general proposition, such an interest is highly undesirable. In many cases the expert will be giving an authoritative opinion on issues that are critical to the outcome of the case. In such a situation the threat to his objectivity posed by a contingency fee agreement may carry greater dangers to the administration of justice than would the interest of an advocate or solicitor acting under a similar agreement. Accordingly, we consider that it will be in a very rare case indeed that the court will be prepared to consent to an expert being instructed under a contingency fee agreement..."

25. The court then indicated what "back up services" were in fact performed by that expert which the court observed might more prudently have been undertaken by the appropriate service providers. On the facts of that case, the court could not conclude that there was any offence against public policy.

26. Mr Rogers drew attention to the commentary to Part 35 and the reference to Davies v Stenner(?) a first instance decision of Jacob J (as he then was):

> "There was a claim concerning a fatal accident at C to which the claimant ... (Reading to the words)... had been instructed initially on a contingency fee basis. The solicitor and expert were unaware that this was not allowed. The defendant applied at the start of the trial, by which time the expert was instructed on a deferred fee basis. The claimant's expert evidence had been excluded. The judge decided that

> the consequence of adjourning would add significantly to the costs and cause delay, but that the expert could be cross-examined on his independence and credibility."

27. That case is clearly different to the facts of this case. The initial taint had been removed, the expert was instructed on a proper footing which complied with the obligations imposed upon both professionals, the expert and the solicitor and that fact had been made known to both the opposite side and the court. Thus, the facts were known and the expert was rendered vulnerable to cross-examination, not least, as to his capacity to provide independent and objective evidence. The facts of that case and the guidance provided by the Court of Appeal in Factortame lend no support to Mr Rogers's submission that perhaps the arrangement was unobjectionable.

28. The defendant maintained his unequivocal position that this was indeed a CFA. There was no suggestion from him (though counsel put some questions to suggest litigation services were being provided) that he thought Mr Flavell and his company were merely providing 'litigation service'.

29. Mr Vaux is now a qualified solicitor, practising with restriction, pursuant to an adjudication of the Solicitors Regulation Authority (SRA). According to him he first met Mr Flavell in October 2004. He first met the defendant at Mr Flavell's request in March 2007. He then was taken on as a legal clerk on 30 April 2007. From 1 November 2007he was a trainee with the defendants until March 2008. He was an active partner between 16 June 2008 and 16 October 2008 for a period of four months when in acrimonious circumstances the partnership was terminated.

30. All three protagonists gave evidence in the witness box over two days. Were the issues not so serious, particularly in the context of maintaining the good administration of justice and maintaining it free from pollution by the admitted misconduct of these individuals, the case bears all the hallmarks of a comedy of errors. Notwithstanding the implications for them professionally both parties were determined to see this case through to its bitter end.

31. For the reasons explained later in this judgment, it is clear to me that so far as Mr David Flavell is concerned whatever his experience and ability to inspect and report on run-of-the-mill housing defects cases within section 11, he had had no training and no expertise in respect of section 82 matters. Moreover, he demonstrably lacked the necessary training, experience and understanding of the role and responsibilities expected of an expert witness. Without these attributes he should not be permitted to hold himself out as a forensic expert witness. He plainly was in ignorance of or simply chose to ignore the essential duties and responsibility of an expert witness in a civil case. His evidence was wholly unreliable and in my judgment worthless in the absence of independent support from an alternative credible source.

32. As for Michael Vaux, he was fully aware of the deficiencies in Mr Flavell's conduct referred to earlier. He was fully aware of the basis and the nature of the arrangement which the defendant had asserted had been made in the boardroom meeting on 6 June 2007. Mr Vaux sought to explain away or otherwise justify Mr Flavell's conduct and performance, both out of and in

court, on the occasions to which I have referred, on 14 May 2007 and 6 June 2007, by asserting (in his witness statements and repeated in the witness box) that those matters were very simply explained by the learned District Judge simply making a "judgment call" which happened to differ with the opinion expressed by Mr Flavell. Mr Vaux either did not appreciate the impropriety of Mr Flavell's admitted conduct (see paragraph 9 above) or he was seeking to persuade me to agree with his interpretation of those same facts. He appeared to be a thoroughly unreliable witness.

33. That explanation ('judgment call') was the same explanation given by Mr Flavell. Even if that explanation was sincerely believed in, which I find it was not, he did not address the issues of professional impropriety and misconduct of which he was and should have been aware. Like Mr Flavell, Mr Vaux's performance in the witness box showed that he too was wholly unreliable and I would not accept his evidence on any material issue without credible independent support elsewhere. I reject his evidence.

34. I have a particular unease that Mr Vaux as a solicitor and an officer of the court sought to minimise the unacceptable conduct of Mr Flavell. I am concerned that he should be allowed without proper control to be involved in contested litigation.

35. Thirdly, Mr Uddin, also a solicitor and officer of the court. It has been suggested and submitted on his behalf that he had simply been foolish and had been taken in by Messrs Flavell and Vaux. Whether Mr Uddin is naive or

foolish is beside the point. He was, on any view, out of his depth and unable to meet the minimum standards expected of him by his profession.

36. I referred to this case as resembling a comedy of errors. On the one hand the claimant presented his claim on the basis of Mr Flavell's purported expertise and yet, inevitably, scrutiny of the claim would demonstrate the absence of expertise, certainly in relation to nuisance and as a forensic witness. On the other hand the defendant is a solicitor whose defence relies upon his failure to comply with basic principles governing a solicitor's relationship with an expert witness and, importantly in the context of this case, the effect which it could have upon the administration of justice.

37. I was concerned to see that when this litigation loomed Mr Uddin sought to obtain from Mr Flavell a document to show that he was in fact an in-house expert. Mr Flavell described himself as a 'quasi in – house' expert.

38. It is clear on the evidence before me is that there was an unhealthy relationship between the claimant and the defendant. That relationship was based upon the expectation that through their joint efforts they would create and generate a substantial amount of fees involving a substantial amount of cases which might, though probably would not, find their way to a court for determination. Yet it is clear that looking at the open correspondence passing between them that there is no hint or reference to this close relationship. Contrary to the true facts they posed as reputable independent professional offices at arm's length. I am quite sure that should a case go before the court neither the claimant nor

the defendant, at the earliest opportunity or otherwise, would disclose formally to the other side or to the court the fact of this close relationship. It obviously gives rise at the very least to a risk of compromising the independence of both. The nature of that close mutual relationship was such that early disclosure should have been made.

39. In their attempt to gloss over what had happened before the Magistrates' Court both Mr Flavell and Mr Vaux sought to persuade me that really it all was something about nothing and that in the end whether or not there was a statutory nuisance was simply a matter of common sense, not so much, if at all, expertise. These parties should know and understand that this relationship would or might compromise their independence and judgment and that as such it was one which required to be put in the public domain so that the opponent and the court would be informed (see, for example, paragraph 27 above). As it turned out, so far as Birmingham City Council were concerned they were aware, not of the relationship between these two parties, of the history of Mr Flavell, a former employee.

40. When Mr Flavell's report and expertise in such matters were questioned, Mr Vaux on behalf of Mr Flavell gave him clean bill of health and asserted that such expertise had been recognised in open court. This was at best misleading if not false. Before the debacle in the magistrates' court Mr Flavell had not given evidence in court.

41. Before I deal with the primary facts it is necessary to consider Mr Flavell's assertions as to his competence and expertise.

42. Mr Flavell has variously described himself as: a "qualified contractor's quantity surveyor" (see for example his witness statement before the court); a "quantity surveyor" (see his witness statement); an "expert surveyor" (in the Re-amended Particulars of Claim); a "surveyor" (in another witness statement). In his witness statements in the statutory demand proceedings he stated that he was a practising member of the Academy of Experts and a quantity surveyor who was 'fully trained' to give expert in relation to housing disrepair action. As to the latter quality, he had had no such training and he is not fit to act as a forensic expert in court without it.

43. Mr Evans was unable to identify anywhere in the evidence apart from that assertion that Mr Flavell had any such training. That is, not training on housing disrepair matters but training to conduct work including evidence to the court as an expert witness in relation to housing disrepair action matters.

44. In his CV Mr Flavell asserted, correctly, that he is the managing director of the claimant company. His company provided experts to act as single expert witnesses in litigation cases under section 11 of the Act and section 4 of the Defective Premises Act 1972, common law nuisance and negligence and those brought under the express terms of a tenancy agreement or a let for lease. He states that whilst with Birmingham City Council he was involved principally with the 1985 Act. He explains in his CV how he decided to set himself up as

a housing consultant specialising and an expert within the field of the pre-action protocol for housing disrepair cases. He was a practising Associate Member of the Academy of Experts which is not, of course, a professional body such as the Royal Institute of Chartered Surveyors (RICS).

45. With his first report in the case of Azoun, Mr Flavell went to the Magistrates Court in May 2007. In it Mr Flavell sets out his qualifications and background and states:

> "By profession I am a qualified contractor's quantity surveyor."

46. He says whilst at Birmingham City Council he was their senior litigation surveyor. He was their technical adviser, dealing with disrepair cases under the 1985 Act and section 79 to 82 of the 1990 Act. In that report, as will appear, he purported to identify defects which would trigger the statutory nuisance provisions within the 1990 Act and he concluded that those premises were indeed a significant risk to the health of the occupants as defined by the Act and constituted a statutory nuisance. He added:

> "The landlord may be in breach of section 11 and may be in breach of section 4."

47. By email dated 14 March 2007 that the claimant by Mr Flavell introduced himself to the defendants enclosing a copy of his CV, his current terms and conditions, a typical section 11 report and a typical section 82 report. He concluded that (by trade) "I am a builder's quantity surveyor so my construction knowledge is second to none."

48. By an email dated 26 June 2007 Mr Vaux enclosed, for Mr Flavell, an amended CV of Mr Flavell. That amended CV has not been produced before me. The email refers to the report of Mr Flavell in the case of McKenzie. This is the report to which I have previously referred when a request or direction to alter it was made. This report is dated 14 June 2007 and contained a similar resume of his qualifications and background in which he states:

> "Periodically I was asked to do cases [this is whilst at Birmingham] brought under section 79 to 82 of the 1990 Act."

49. There is no statutory regulation of qualifications and practice as a surveyor. Since 2001 the RICS, a surveyors' professional body has recognised 16 faculties which represent the different specialties within that profession. Each represents a distinct area of practice with its own training and assessment syllabus (and is recognised in reported cases). Care is required before describing or accepting without enquiry a 'surveyor' as an expert for the purpose of a particular case. The need of such care is well established when having regard to the different specialists.

50. Mr Flavell is not within any of those specialties and, as it emerged in the evidence, he has no qualifications at all which could bring him within quantity surveyor, surveyor or otherwise. His qualifications as such are set out in his CV and in his report. Following his evidence in this case (the following day) he sought permission to put in evidence a third statement without objection which reiterated the assertion that he was 'a quantity surveyor'.

51. Whilst it may be acceptable for Mr Flavell it is not in fact acceptable to hijack or assume recognised professional qualifications which carries with it the implicit understanding that the holder of that qualification has followed a recognised period of training, assessments and syllabus and is subject to a professional code of conduct overseen by a professional body. The continued use of this recognised qualification in his reports and/or statements was to cloak Mr Flavell with the standing and expertise of a quantity surveyor which he did not possess.

52. The expert evidence is founded on his training and experience and demonstrates that he has acquired by study and experience sufficient knowledge of the subject to render his opinion of value in resolving the issue before the court. Guidance as to the duty and responsibility of an expert in civil cases is given authoritatively by Cresswell J in National Justice Compania Naviera SA v Prudential Assurance Company (The "Ikarian Reefer") [1993] Lloyd's Rep. 68. (The relevant principles are neatly summarised in the CPR 35 commentary).

53. The primacy of the expert's relationship with the court is fundamental in this area of practice. It is shown in the Code of Practice to Experts June 2005 which identifies the minimum standard of practice to be maintained by all experts. I refer to paragraphs 1, 2 and 3 of that code. The Protocol for the Instruction of Experts to give evidence in civil claims is within the Practice Direction for CPR 35. It indicates good practice but does not replace the

provisions of CPR 35 and the Practice Direction. Paragraphs 7.6 and 7.7 of that protocol prohibit the payment of fees contingent upon the outcome of a case. Agreement to delay payment until conclusion is permissible, but must not depend on outcome.

54. Paragraph 7.1(a) and (b) of the Protocol requires that it should be established that the expert has the appropriate expertise and experience and is familiar with the general duties of an expert.

55. Such criteria were earlier identified in the case of Hill v Leeds City Council, to which I have referred. In that case the employer's Housing Department employees could properly act as housing disrepair experts. It was argued that the independence of the expert would appear to be compromised. The Court of Appeal held that the mere fact of an employee and employer relationship is not of itself sufficient to compromise the independence of an expert or to disqualify that witness from giving expert evidence for the employer.

56. However, the court had to be satisfied that such person had the relevant expertise in the area in issue and, crucially in the present context, that such person was fully aware of an expert's duty to the court. In this respect it was incumbent upon the parties seeking to adduce such evidence that the witness in question had full knowledge of his duties to the court and in particular the requirement of objectivity.

57. Thus the fact of employment or in the present case Mr Flavell being a 'quasi in-house expert' would not of itself render his evidence inadmissible. It was plain that in the case where there was such close non- arm's length relationship

between expert and instructing solicitor such had to be disclosed to the court and to the other side. This was all well-known long before this arrangement between the parties before me was made.

58. The CV and employment history of Mr Flavell (and in particular assuming for present purposes his assertions to be true in relation to employment with Birmingham City Council) suggest that he may well have the practical experience and training in housing disrepair matters to have established the first of the above cited requirements of the protocol. I say 'may well' because that issue has not arisen in these proceedings and was not tested.

59. The question before me, however, is whether it is shown that Mr Flavell met the second requirement of the protocol, namely that he is or was at the material time fully aware of the primacy of an expert's duty to the court, what those duties were and the requirement for objectivity. (for example, see Hill v Leeds City Council).

60. I am satisfied that this latter requirement has not been demonstrated by Mr Flavell on the evidence before me in that his knowledge and purported expertise as an expert forensic witness fell far below the minimum standard rightly to be expected of an expert, whether he be independent, in-house, employed or otherwise in civil cases. The concession made in this respect by Mr Evans was realistic and properly made.

61. On 22 March 2007 Mr Flavell received instructions from the defendant to inspect a client's home to prepare a section 82 report for the forthcoming hearing and to attend court the following Monday (the 26th) to give evidence

in accordance with that report on behalf of the defendant's client. Mr Flavell accepted those instructions, undertook his inspection on the Friday and produced his report (to which I have referred earlier). He duly attended court on the Monday to give evidence before the District Judge, but the case was adjourned until 14 May.

62. On 14 May the parties duly attended court. Mr Flavell maintained the opinion set out in his report. He gave evidence in his purported capacity as an expert witness qualified to give evidence concerning section 82 issues. His evidence was challenged. The District Judge found that he lacked sufficient qualification and expertise to give that evidence. The proceedings were dismissed.

63. In fact, that was Mr Flavell's first appearance in court, notwithstanding on his evidence the many, many hundreds of inspections he had done hitherto. In closing submissions (not evidence) it emerged that there was apparently an earlier occasion 'sometime in 2004'. Mr Flavell had asserted that he had prepared hundreds of section 82 reports in his witness statement. At paragraph 14 he explained why that case failed. That is because the defect identified as being within section 82 was not serious. He said that the District Judge simply made a 'judgment call'. I have already commented on the deficiency in that explanation.

64. Mr Vaux, in my judgment, dutifully supported Mr Flavell's explanation for the dismissal of that case at paragraph 8 of his witness statement. He repeated

that analysis and explanation in the witness box. The explanation was, as I have said, patently misleading and incomplete. It avoided dealing with the point in issue before me. Mr Flavell had adduced a report in the first place asserting that the defect was serious and asserted it was sufficiently serious to establish a breach of section 82. That much is clear from the conclusion in the report. It became clear in Mr Flavell's evidence that in his opinion was that it was a minor matter which would not trigger section 82.

65. Mr Flavell's explanation went further in the witness box. He sought in effect to shift the responsibility to the defendant as a solicitor with the carriage and conduct of the case. Mr Vaux in evidence did exactly the same thing. Their evidence was intended to induce me to accept that patently superficial and unacceptable explanation and to ignore the fact that the expert had said one thing in his report, allegedly stated the opposite outside of court and then gone into court to make good the report, and, having done that, to ignore the fact that he lacked the necessary expertise in the first place. Both Mr Flavell and Mr Vaux were, in my judgment, wholly unreliable witnesses whose oral testimony simply could not safely be accepted. These are not the attributes of a reputable expert or solicitor.

66. The same debacle occurred in Mr Flavell's next case, another section 82 case, again before the Birmingham Magistrates Court on 6 June 2007. That case was also dismissed. Mr Flavell's evidence was rejected. No defect sufficient to establish, even arguably, a section 82 breach as asserted in the report was

accepted or established. Again, Mr Flavell, supported by Mr Vaux, sought to explain away that failure in the same way.

67. What is worrying is that he again went into the witness box and gave evidence to attempt to persuade the judge to his viewpoint when he knew he lacked the necessary expertise.

68. It might just be possible to suggest though not in this case having regard to my assessment of Mr Vaux and Mr Flavell as witnesses of fact that had the matter ended there, that the District Judge perhaps took a harsher view than another judge might do. That is not open to Mr Flavell in these proceedings by reason of the fact that he conceded in his evidence to me that he did think it was a minor matter. As I have already indicated, his approach was an attempt to shift the responsibility to the solicitor. He accepted it he had put the point in his report so as to set the tone for a successful section 82 case yet, on his own evidence, did so knowing that it was minor. In breach of all the basic principles governing an expert witness' duties, he then went into the witness box and stated, on oath, to the contrary.

69. In that context Mr Vaux stood shoulder to shoulder with Mr Flavell in seeking to justify the unjustifiable.

70. From an early stage I had considerable unease as to the reliability of Mr Flavell as a witness of fact and certainly as an expert witness. The same is

true for Mr Vaux when he went in the witness box. The more I listened to and observed him, the more unease I had about his evidence and character.

71. The upshot is on the evidence before this court, there is no evidence whatsoever of any training as an expert. The assertion contained in the witness statement of Mr Flavell is a broad and unsupported assertion which I reject. It is quite clear that so far as that second quality of an expert is concerned (at paragraph 7.1(b) of the protocol), Mr Flavell did not have any proper understanding of the duties of an expert in giving evidence in litigation. Mr Evans submitted that Mr Flavell was simply out of his depth. I am not satisfied that the issue may be defined quite so simply as that.

72. The motivation for Mr Flavell and Mr Vaux in conjunction with the defendant was the generation of cases on a large scale and substantial sums by way of professional fees. Mr Flavell and Mr Vaux may well have seen the possibilities which opened up in the light of the defendant's apparent incompetence and willingness not to challenge the proposed arrangement.

73. The SRA adjudication on the evidence before its adjudicator exonerated Mr Uddin of any failure adequately to supervise Mr Vaux. Then on the somewhat chequered history of Mr Vaux, in particular the limited knowledge that the defendant had of Mr Vaux, Mr Uddin ought to have made it his business, in my judgment, to have ensured that there was at all times proper supervision of Mr Vaux I am satisfied that there was not and that the defendant was content to leave matters to Mr Vaux and Mr Flavell.

74. It is clear that Mr Flavell was, certainly by the meeting post-June 2007, operating as the in-house expert. He was given an interest in ensuring that the defendant's clients had a case which if successful would generate fees for them both. He provided reports and altered them as requested. It is clear there was an unhealthy relationship from the outset motivated by the expectation of a large number of cases with potential for substantial fees.

75. So far as the legal objection to operating under a CFA between a solicitor and an expert is concerned, I need not elaborate the facts or detail the objection in any greater detail. The first question which arises is whether there was any such agreement at the meeting of 6 June 2007 as alleged by the defendant, or, as alleged by Mr Flavell, supported by Mr Vaux, was there was no such discussion let alone agreement on that basis at all?

76. As both Mr Flavell and Mr Vaux state in their witness statements, the Defence (and then Amended Defence) raise "serious allegations of misconduct and impropriety by an expert witness", which if true directly contravenes those very duties and responsibilities referred to previously.

77. I accept Mr Uddin's version of the discussion and agreement reached on 6 June 2007. I reject the account given by Messrs Flavell and Vaux.

78. The reason why both parties were willing to enter into that arrangement was because each party had the expectation that due to the skills about which Mr Vaux boasted in evidence the arrangement would produce substantial rewards. The sheer numbers of expected cases, the relative ease in which Mr Flavell

anticipated he could 'drive by' and quickly assess a case and produce a report to generate fees was expected by all three concerned to secure a substantial stream of revenue.

79. The rejection in its entirety of the evidence by Mr Flavell and Mr Vaux, would itself explain why I preferred the evidence of Mr Uddin of the defendants. There are other reasons as well.

80. The claim to which I now return was commenced by a claim form issued in the small claims track on 10 November 2008. That is within a matter of days or weeks of the initial notification of a substantial claim which the claimant was making against the defendants. At that stage it concerned the first four cases in the sum of £3,405. Certainly so far as the cases of Azoun and Langdon were concerned, both were section 82 cases, though the last case concerned was a section 11 case. At that stage, there was no mention of any other work done.

81. The substantial part of the present claim, however, is in the sum of £24,410 in respect of instructions received between March 2007 and October 2008, which were made up out of alleged additional work. That substantial part of the claim was not on, the defendant's evidence, made known to him until the email of 16 October attachments and a subsequent letter from the claimants on or about 27 or 25 October or thereabouts.

82. The defendant says he never saw them and had no knowledge of them until that time. I accept that evidence. I reject the evidence of Mr Flavell and Mr Vaux that that which was disclosed in October 2008 comprised statements issued regularly during those months. In his witness statement Mr Flavell refers to him submitting on a monthly basis to "employees of the defendant". This was a very small firm, a few employees – which 'employees'?

83. In evidence only was it conceded that the employee was Mr Vaux. The defendant's concern is that those statements were produced at the time were kept from him by Mr Vaux or more likely, as I find, that were not in fact produced until it was clear to Mr Flavell that this scheme was eventually dead in the water because he had just been given information by Mr Vaux that he Mr Vaux and the defendant were parting company in their partnership.

84. It was not until after May 2009 in these proceedings that without any proper explanation it was asserted that the second part of the claim and the third part in the sum of £4,750 allegedly due under a clear agreement understood by all concerned were not first raised until much later. It still remains to be explained why such matters were left until they were.

85. The difficulty with the claimant's position here is that it in the statutory demand proceedings and with his focus on other matters (at paragraph 14 of that witness statement),it is asserted that there since there was no clear agreement the claim had to be limited. That assertion is consistent with the

defendant's case before me that there had not been in place any clear agreement.

86. Whatever the explanation may be, it is clear that that statement is not consistent with the witness statement provided in these proceedings on the evidence of Mr Flavell in which he asserts there was a clear understanding on 6 June in the terms set out in his witness statement. Moreover, the fact is that there is evidence to show that the defendant's version was in practice adhered to. (For example, in the cases of Webb and Paul White, where Mr Flavell agreed lower fees in line with the arrangement described by Mr Uddin).

87. That such was happening from time to time is consistent with the defendant's case and evidence, which confirmed the defendant's version without explanation from Mr Flavell.

88. Another matter of concern is that when these statements which make up the second and third part of the claim were specifically drawn to the attention of the defendant by Mr Flavell at a time when he had obviously been given notice by Mr Vaux that the partnership was at an end and this arrangement was dead, he indicated, for example, on the records of 15 October that (out of the blue) 2,204 units outstanding where "I have acted as your in-house expert. These units are still to be invoiced".

89. In his covering email on 16 October 2008 (Bundle 1/242 in which those statements were attached to the email), Mr Flavell concluded in these terms:

> "I have maintained ... (Reading to the words)... section 11 report. I have, however, always invoiced for joint inspections. This is also attached to this email."

90. That is, he recognised that he had not invoiced for these new items. In my judgment, he was seeking to explain the absence hitherto of any proper notice or record of such charge for such (a large number of) units. There was no basis for such claim.

91. Another factor that led me to prefer the defendant's evidence as to what was agreed on 6 June concerns what is otherwise an inexplicable promise, offer or undertaking to pay to Mr Flavell £100 per hour for this work.

92. That does not sit comfortably with the fact that in his own terms and conditions the claimant claimed an hourly rate of only £75 an hour. This was a small one man firm operating on a shoe string with a few low paid staff (on the evidence at or slightly above the minimum hourly wage). There is no evidence anywhere of any reference to units or to £100 an hour, until 16 October.

93. Against the assertion by the claimant is of course that there had been prior warnings to the provision of monthly statements to Mr Vaux. For the reasons I have given I reject in its entirety Mr Vaux's evidence that there was any lodging of such monthly statements in this way. Far more likely by reason of the bitterness which erupted as between Mr Vaux and the defendant and then the claimant, was that on 16 or 15 October seeing that this particular ship as it were was sinking, the claimants sought to limit the damage and make good

any such damage by lodging then for the first time the second and a third part of the present claim.

94. So far as the agreement is concerned, I accept the defendant's evidence that this agreement was prompted solely by the debacle which had occurred in court. I am satisfied that in coming to that arrangement with the claimant because of what had happened a commercial decision was made by Mr Flavell with Mr Vaux to drop the section 82 invoices.

95. The initial terms of engagement were altered by agreement on 6 June, whereby the slate as it were was wiped clean. That in my judgment would be the only way in which the claimant, supported by Mr Vaux, could possibly present to the defendant however naive and out of his depth he was, to continue to work with them. It is absurd to suggest that having witnessed those two court cases under section 82 that the defendant would continue with the claimant under section 82. I am satisfied that so far as section 82 is concerned the defendant was content to and did instruct the other qualified expert.

96. At that meeting on 6 June in order to ensure that the scheme which both Mr Vaux and Mr Flavell had in mind, which the defendant was quite happy to go along with from his perspective for good commercial reasons, the section 82 cases were merely a loss leader. The claimant's toe was in the door now with the defendant firm and he was at least able to present in a plausible manner his large experience, supported by Mr Vaux, of section 11 cases. I am satisfied that because the defendant's confidence had been dented and because there

was no certainty for him as to when the fees would be recovered in these claims the CFA which he, Mr Uddin, has proclaimed all along was entered into.

97. There is no evidence that this CFA was revealed to the outside world. So I am not convinced matters are easily or entirely explained away by simple naivete as Mr Rogers urges.

98. I am satisfied that the defendant through his own state of ignorance put himself in breach of his code of conduct and the provisions to which I have already referred. It was on that basis thereafter that the claimants then undertook his so-called drive by inspections, made his reports, submitted his invoices and was content, as the facts show, to await settlement based on outcome. The claimant not unreasonably envisaged the vast majority, if not all, of these cases at some stage sooner or later to settle. His desire was to do all he could to see that they did have a favourable outcome.

99. It follows that the basis of the arrangement between these parties, as I so find, in relation to the three aspects of the claim were all subject to this new arrangement put in place in June 2007, which, as I have indicated already, with certain pieces of evidence which have emerged demonstrate that is how in fact the matter was progressed. That explains why it is that, for example, the very first invoices were never paid after 30 days or otherwise because of the events complained of by the defendant in June and why, thereafter, there was never, as the claimant accepts, chasing of any such fees.

100. The whole basis of this claim arises out of a legally objectionable arrangement which of itself renders the claim unenforceable and in any event, for the reasons which I have had to set out at length, would offend public policy.

101. Mr Evans invited the court to consider where it was possible to retrieve some of the section 11 claim notwithstanding other parts were tainted with illegality.

102. There is no proper basis on the evidence for me to attempt to sever any such part of this arrangement. There is no incentive for the court to do so in light of the findings made concerning Mr Flavell and Mr Vaux.

103. I am not persuaded, despite the submissions of Mr Evans, that Mr Uddin, the defendant, was acting at all times in a dishonest way. Such is no comfort to the public or to the court; nor should be any comfort to him because what is inescapable is that he too, for the reasons given, fell far below the standard reasonably to be expected of him. That failing is explained by his lack of competence and experience.

104. Thus, in these circumstances and for those reasons I dismiss the claim in its entirety.

105. It remains to be seen as to what should be done with fees paid innocently and in good faith by landlords, which have been retained by the defendants and not provided to the claimants. I will hear counsel. My inclination is that if as I

find the arrangement and contract or series of contracts between these parties is unenforceable that is where the matter would end, subject to ensuring that money which would now stand in the hands of the defendant which he is not legally obliged to pass over to the claimant he is equally unable to retain the benefit of any such wrongly received monies which be returned to the innocent payer.

106. I am also minded to refer the defendant to the SRA to consider his conduct in light of this judgment. I make no further comment about it save that I am sure these proceedings have taught Mr Uddin valuable lessons which would be taken into account. Mr Uddin was, to some degree, taken in by Messrs Flavell and Vaux.

107. I am minded also to make the same direction in relation to Mr Vaux for the reasons I have given. I have considerable unease at the thought of the general public being exposed to Mr Vaux in his capacity as a solicitor without close supervision.

108. The irony is, had Mr Flavell been a member of any reputable professional body (say, RICS) he too would be reported without delay. It may well be that the SRA will consider the position of Mr Flavell and the claimant in any event upon consideration of this judgment.

109. I will hear from Mr Evans, but my understanding of the role of the Academy of Experts in the present context is that they do not count. The member pays a

fee and he is then included in the list. Certainly major housing authorities involved in housing repair cases of the kind Mr Flavell purports to specialise in, such as Birmingham City Council should in my judgment be alerted to the contents of this judgment. I shall direct that this judgment be copied to the Birmingham City Council, Housing Department and their Legal department.

110. For those reasons, I dismiss the claim. I shall make the referrals to which I have alluded.

Postscript: the judgement was delivered 30 July 2010. The parties delayed until 26 October 2010 (following notice from the court that the matter would be listed for further directions) in obtaining the transcript for approval.

RO

5.11.10