More than approval

25 November 2016

Mostyn Bullock and Adam Monaghan examine the fire engineering issues of responsibility and liability

---

"It's fine because it was signed off by building control." As fire engineers, we hear this said in design team meetings, on site and, increasingly, in the domain of the expert witness.

Yet the construction industry appears unaware that the position carries little if any weight at all in terms of liability, while the fact that it is uttered with any sort of conviction shows how pervasive a misconception it has become.

Building control approval is, of course, important. It assures the occupiers of new buildings that the works have received independent regulatory scrutiny. However, despite what project teams often believe, this does not amount to certification of design and construction.

The root of the problem is the lack of understanding about who is responsible for the adequacy of the design, its proper construction and, subsequently, its fitness for use as a building. It should be noted that building control approval offers no certification that works comply with the Building Regulations .

Project team liability

Liability for building defects almost always rests with the project team. This often comes as a bit of a shock to designers, who remain legally responsible for the adequacy of the design, and contractors, who are likewise responsible for the adequacy of construction.

Figure 1 shows a common arrangement proposed by architects that nevertheless fails to comply with current fire safety guidance because the exit from the stairs is via a lobby. The architect remains liable for this design even if a building control body (BCB) approves it; if the lack of compliance is picked up subsequently, it is for the architect to justify, failing which the costs of redesign and remedial works may be sought.

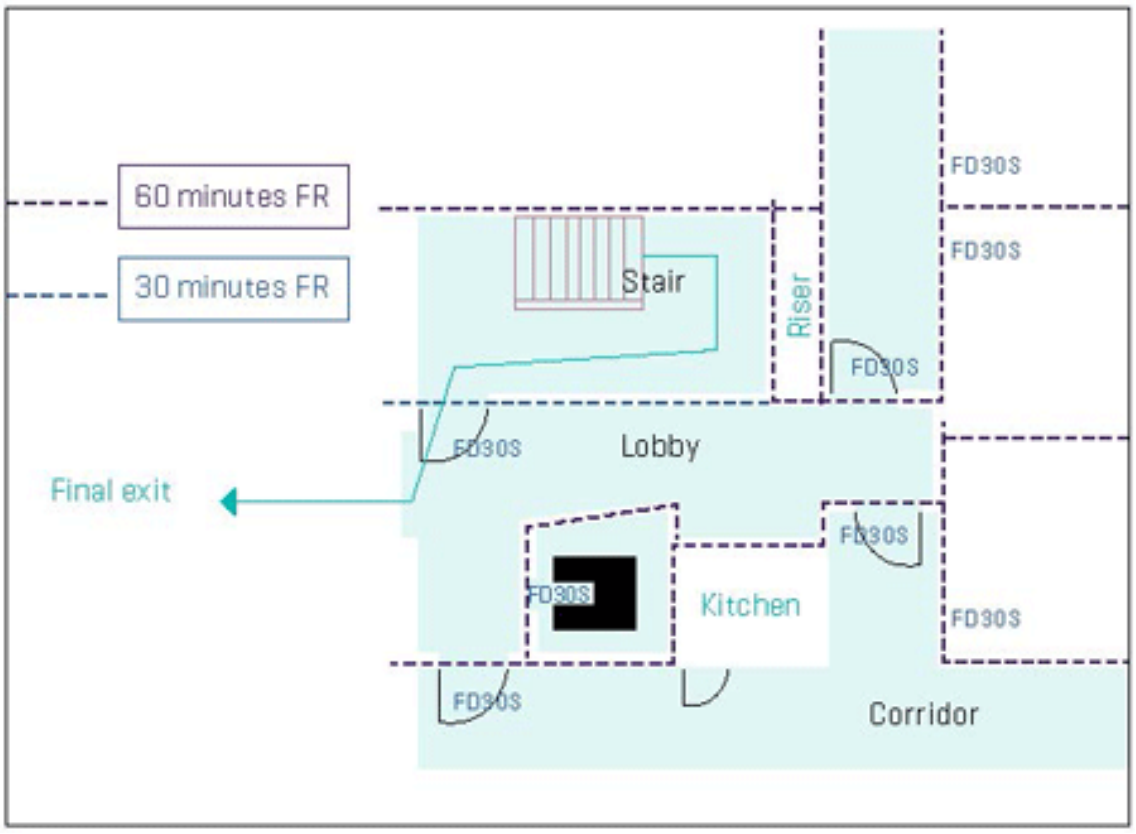

Figure 1. Design showing fire compartmentation ? 30- and 60- minute fire resistance ? that does not comply with fire safety guidance

It is important to note that the liability is not transferred to or shared with the BCB. When carrying out its approval role, the BCB is acting neither in the capacity of a designer nor a contractor. As such, the Construction (Design and Management) Regulations 2015 do not apply to the BCB, which carries professional indemnity insurance for the approved inspector function but not for design or construction.

While a suitably qualified fire safety designer should have sufficient confidence in a design that they will assume responsibility for it, there is, unfortunately, considerable pressure to design on the erroneous assumption that the only objective is securing BCB approval under the Building Regulations. The mistaken inference is that the designer is not expected to worry about whether a design is safe or not because that is the BCB's responsibility. If those responsible for the execution of projects thought logically about what the BCB actually has to do, and for what fee, they might realise the folly of this attitude.

Designers' responsibility

A designer should understand that they remain responsible for the adequacy of their design, but in practice, this is given insufficient thought.

Designers are always liable for any advice they provide from the project's outset. On

appointment, contractual documentation outlines their ongoing accountability for a significant period, often by means of collateral warranties.

While this may be quite straightforward for practitioners in the built environment to understand, it then gets more complicated. Who is responsible when no fire engineer is engaged? Who is responsible for fire safety design if the architect acts on the BCB's suggestions? At what point could this 'advice' begin to attract liability?

Put very simply, if no fire engineer is engaged on the scheme then the lead designer ? usually the architect ? is both responsible and liable for the fire safety design. If the lead designer acts on advice from someone who is not a designer ? that is, the BCB ? then they are still responsible and liable for the outcome, irrespective of their competence in relation to fire safety engineering. Many lead designers are unaware of this.

A designer should understand that they remain responsible for the adequacy of their design, but in practice, this is given insufficient thought

The basic fact is that BCB approval is important because it protects applicants from prosecution under the terms of the Building Act 1984 . But it is certainly not the only consideration.

How will the client use the building? What other constraints apply? How will the building be constructed and then maintained, and have the associated risks been controlled and mitigated? Who is responsible for fire safety during
construction? Who will be responsible for managing general and process fire precautions required under the Regulatory Reform (Fire Safety) Order 2005 ?

The point is that BCB approval is of course needed, but does not provide the single defining criterion for the building's
adequacy. Neither should it. There are other misconceptions, such as the following.

- "We've done this previously and it was fine." There is a danger of this being received wisdom.
- "It's got a certificate so it must be all right." This is fine if the scope of the certification is relevant to the specific fire safety requirements of the project. However, the design is often outside the field to which the certification applies, and there is a failure to check this.
- "No one has ever told us this was not appropriate before." Once again, there is a real danger of this received wisdom being wrong.
- "The product brochure says it has achieved the right level of performance." Most product brochures reflect accurate performance and manufacturers also offer, on request, fire test evidence of performance. But there are some brochures that do not provide this information, while there are others that drift dangerously close to misrepresenting the performance.

Project teams need better understanding of these misconceptions, which take root in a lack of appropriate competency. The fire engineering profession must do more to educate and to stand up for the right product, system and built arrangement, rather than give in to flawed thinking, decision-making or marketing.

Test of adequacy

Like it or not, we increasingly find ourselves in situations where clients believe a BCB's approval is an acceptable measure of adequacy. Such approval is not certification and does not discharge the designer of their responsibility for the adequacy of the design, either contractually or ethically. The ethical imperative for a professional fire engineer is to ensure that anything they are submitting for approval passes their own test of adequacy.

This requires a certain toughness: the competent fire engineer needs to be prepared to tell people what they need to rather than want to hear. If the client does not want to listen, or the relevant authority is prepared to approve something that the fire engineer does not believe adequate, then the engineer must have the strength to walk away.

Mostyn Bullock is a director at Tenos **and Adam Monaghan is a director at** Design Fire Consultants

Further information

- Related competencies include: Fire safety
- This feature was taken from the RICS *Building control journal* (September/October 2016)