

How Expert is your Accommodation or Buildings Expert?

The Civil Procedure rules set out what is expected of an expert witness by the Court, however given the disparate nature in respect the subject matter requiring expert opinion, understandably there is no stipulation for specific qualifications for experts in their areas of expertise.

Area of Expertise refers to the knowledge, skills, and experience developed by the individual which enables them to act as an expert in the field. (Source: EWI)

How do courts determine whether an expert witness is qualified?

Ultimately the courts decide whom they accept Expert Witness evidence, however legal practitioners have an element of choice when selecting an Expert Witness.

Although it is hoped that no legal practitioner would appoint an expert who was not medically qualified to give evidence in medical matters, the situation is less clear for other areas of expertise as has been identified in the case of C [2023] EWHC 345 Fam dealing with a psychologist expert.

The President considered the issue of experts' qualifications in the judgment and noted: "HCPC regulation or Chartered status in the BPS provide a reliable, one-stop method of authentication" In that judgement, it was made clear that registration or Chartered status can be taken as sufficient evidence of qualification.

Relevance to Accommodation or buildings expertise

This factor is now particularly pertinent in respect of building specialisms given the recent coming into law of the Building Safety Act 2022 and amendments to the Building Regulations defined by the Building Regulations etc. (Amendment) (England) Regulations 2023.

These are quite dry documents, however the changes have been prompted by the Grenfell disaster.

The tragedy that occurred was completely avoidable and 6 years later due to multiple failings with the UK fire and buildings safety regulatory environment, together with the industry as a whole has resulted in this new legislation and regulatory regime.

The public enquiry exposed the incompetence and in some instances misconduct within the UK's government organisations and within the construction industry.

Essentially what went wrong in the Grenfell disaster, has prompted the largest change in statutory regulation of buildings in decades.

I think that there are many reasons for what occurred, however let's start with the decades of deregulation. It appears to me that the de-regulated UK system has brought about significant problems over the last few

decades in terms of the skills of both building designers and in procuring appropriately skilled tradespeople. This is because there has previously been no pre-requisite for proving "competency" to undertake many construction or design tasks within the industry.

The idea that a tradesperson was obliged to attend many years apprenticeship with formal training and qualifications is long gone and strict training and qualification criteria have been largely restricted to gas and electrical trades. Most other areas of the construction process are completely de-regulated as are areas for those usually involved in the design process. As a result I believe that there has been a drive to the bottom in respect of skills within the industry as a whole.

It may be uncomfortable to hear, however until the new Act, there was no legal requirement for any person in the building design process to have any technical qualification whatsoever.

As a result the idea that an Architect or Chartered Building Surveyor, Chartered Engineer or other technical professional be employed was not mandatory, no matter how complex the work. It is pertinent to note that even many large value projects in the past were sometimes procured without an overriding qualified design professional guiding and managing the process. Following the Grenfell enquiry, this factor, the lack of accountability and the lack of skills in the sector as a whole has meant that maintaining the status quo has now become untenable.

Where are we today in the light of the new Act?

Although prompted by the catastrophe in a high rise residential building, the new regulations actually apply to ALL projects where the building regulations apply. The statutory duties imposed on the various parties in any project cannot be avoided.

There is now a regulatory requirement for professionals to be competent to carry out their duties and for clients to satisfy themselves that those they appoint are competent.

From now on competence is the key word involving all elements of the building industry. New duty holders have to be in place from October 2023 as part of revised Building Regulations. These duty holders include clients, designers and contractors. There are new enhanced roles for the Principal Designer, who must plan, manage and monitor design work to achieve compliance and for the Principal Contractor in managing those who undertake the work itself.

What is competent?

Duty holders are required to ensure they have competence (the necessary skills, knowledge, experience and behaviour) to carry out the design and building work they are engaged to do. They are also required to only undertake work within the limits of their competence.

The client, meanwhile, must take all reasonable steps to satisfy themselves that the duty holders are competent, and the duty holders must refuse to accept an appointment for works they are not competent to deliver.

Coincidentally this mirrors what the courts would expect of an expert witness who should not stray outside their area of expertise.

There is a significant shift in duties, however for professionals familiar with the CDM regulations (The Construction (Design and Management) Regulations 2015), many professionally qualified designers are already working under the auspices of the main professional bodies, and therefore such a role should be second nature. It is the untrained or unregulated designers which it may be imagined may have difficulties proving their competence in the design role.

In this regard the HSE (Health and Safety Executive) has published guidance on what “competence” is and refers directly to the British Standards Institution guidance PAS 8671:2022 Built environment – Framework for competence of individual Principal Designers – Specification

However the PAS does not explicitly cover individuals’ required prior learning, or eligibility criteria in the form of formal qualifications.

The PAS is obviously aimed at the main intended users to be the built environment industry’s various competence assessors and awarding bodies.

In the building design sector, such bodies include the main technical professions such as the Architects Registration Board, the Royal Institution of British Architects, the Royal Institution of Chartered Surveyors, the Chartered Association of Building Engineers, the Chartered Institute of Architectural Technologists, the Institution of Structural Engineers and others.

Therefore although the skills levels in the PAS are not aligned to the UK’s national qualifications frameworks, it states that *“in the interests of consistency, it is highly desirable that qualifications that meet the levels through educational courses and examinations for awards that include Principal Designer competence should be so.”* The documents further confirm that *“it is highly desirable that educational qualification assessors’ and awarding bodies’ awards are accredited and recognized by the relevant national statutory regulator, and schemes that certify the competence of people are assessed for conformity with this PAS”*

Whilst the Act falls short of mandatory registration of qualifications for design individuals involved in the construction design process as is required in some other countries, the requirements are still extensive.

As a result many of the established Professional Institutions are assessing the scope of the regulations as far as their own membership are concerned

In the de-regulated UK system which we have however, there remains no requirement for candidates to undergo formal assessment to demonstrate their Principal Designer competence.

Notwithstanding those statements the onus is on the employer as a duty holder to ensure that a principal designer is competent and whilst no-one can know everything, it is expected that all designers should “understand the purpose, structure and scope of technical guidance, and standards governing building design and construction compliance”.

These requirements are already embedded within most Chartered and professionally qualified practitioners roles, however I strongly suspect that if employing an unqualified practitioner in such a role, proving “competence” may be problematic in the absence of a significant period of training, relevant technical qualifications and proof of continuous professional development (CPD).

It is in my view inconceivable that an untrained or non-technical “designer” could interpret the complex current Building Regulations, British Standards, materials testing criteria and technical data together with the extensive requirements of both this new Act and the existing Construction (Design and Management) Regulations 2015. These encompass the gamut of what is an extremely technical role with very onerous obligations and duties even for what could be considered to be “minor projects”.

Ultimately, any person involved in the process should be able to evidence how their skills, knowledge and experience meet or are equivalent to those in the regulations and ultimately any expert witness appointed in such a technical area of expertise should in my view reasonably be expected to be able to do the same.

I suspect that not knowing what the new roles, duties and competency requirements are, will almost by definition demonstrate inadequate knowledge of the regulations and be evidence of inappropriate behaviours, and so a failure to be competent or compliant.

I touched upon the assumption that an expert witness be professionally qualified in an earlier article in 2015 in respect of Conflicts of interest (See APIL PI Focus - October 2015), In that article I stated that *“The architecture and surveying professions have become ever more specialised, due to growing complexity in modern design and construction processes. Many of today’s technically complex legal cases are not resolved without expert evidence, particularly when it comes to quantum. The courts rely on these experts to provide objective, unbiased professional expert opinions, and the value of good expert witnesses should not be overlooked.”* I believe that those statements are truer today than ever before.

In summary, the direction of travel is clear and the industry as a whole now needs to “upskill” both in the designers roles and in the construction process as a

whole which includes contractors and tradespersons themselves to ensure that another disaster does not occur again.

In the role of Expert Witness it is therefore more important than ever that anyone involved in the design and construction process - or I believe those advising the court on those matters, can clearly demonstrate their technical competence in what is an extremely technical role and ultimately always has been.

This is surely why a Court would need that special expertise in the first place and it is interesting to note that in a recent Bond Solon survey 79% of respondents believed that experts should be registered with a recognised professional body and hold a current membership/registration with them.

In the field of accommodation and buildings it can be difficult to ensure that the experts you are using have the expertise expected. This is because with the exception of the title "Architect", other areas of professional practice in this field are not protected, and instructing parties run the risk of instructing an unqualified expert.

Whilst no guarantee, a building designer or an expert witness who is an Architect, Chartered Building Surveyor or other Chartered building design professional who has the relevant professional qualification and membership which requires significant study, training, ethics and continuing CPD may go some way in assuring both the litigation parties and the court where evidence in respect of building design is concerned that their expert witness really is an expert in the matter at hand.

In the light of the judgment noted above, the effects of the Building Safety Act 2022, and the likely direction that this issue is taking, judges are likely to be scrutinising the qualifications of the experts before them much more closely than previously and experts need to be ready for that scrutiny. Experts should therefore set out their status and their relevant qualifications and experience clearly.

Author

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