DEFECTIVE WORK: TEMPORARY DISCONFORMITY, DELAY AND DAMAGES

By Peter Sheridan

When a contractor does work which is defective or non-compliant with specification, but there is time before the contractual completion date in which the problem could be fixed, is the contractor immediately liable in damages or is the defect merely a “temporary disconformity”, which the contractor will put right before the completion date; and which becomes actionable only if it remains a problem at the completion date?

The “temporary disconformity” theory is based on Lord Diplock saying in P & M Kaye Ltd v Hosier & Dickinson Ltd (1972): “provided that the contractor puts it right timeously I do not think that the parties intended that any temporary disconformity should of itself amount to a breach of contract by the contractor.” Ellis Baker and Anthony Lavers argued that such a principle should be embraced by English law in papers for the Society of Construction Law (2005 and 2007) and derived some support for their view from overseas cases.

However, the position is English law is still based on a decision of the Court of Appeal, Lintest Builders v Roberts (1980). It is made clear in Lintest that Lord Diplock was in the minority in P & M Kaye and his dictum does not represent the law. On the contrary, an employer does have a right to damages in respect of defective work, even if it could be remediated prior to the completion date. In the Lintest case, the contractor had terminated for non-payment; the arbitrator was found to have been correct in taking into account the amount due to the employer for defective work at the time of the termination. The temporary disconformity argument was run by the contractor, but unsuccessfully. The employer was entitled to damages, although the works were not the subject of a notice requiring remedial work and could have been rectified before the contractual completion date. (As always, the position in each case will depend on the facts and the contractual terms.)

The employer would not normally be entitled to damages arising from the defect which were delay-related, as the contractor would not, on the hypothesis under discussion, be in delay at this stage.

A related issue arises where the completion date passes, the contractor is in culpable delay and becomes liable to pay liquidated damages. The employer claims the liquidated damages, but also has further losses arising from defective work. These further losses may be delay-related, however, if the defective work is also a cause of delay. There is then a problem for the employer in that the liquidated damages are the limit of the contractor’s liability for delay.

This issue arose in the Biffa Waste case (2008), which concerned a PFI project for the collection, recycling and disposal of Leicester’s domestic waste. Leicester City Council engaged Biffa Leicester, who engaged an associated company Biffa Waste to undertake all
the obligations. Biffa Waste engaged MEH to design and build the relevant plant. A fire broke out causing substantial damage to a key element of the plant and other parts of the plant. Reinstatement costs were recovered from an insurance policy, but Biffa Waste and Biffa Leicester sought to recover losses suffered as a result of delay to the operation of the plant caused by the fire.

MEH was held liable to Biffa Waste (and to Biffa Leicester under a warranty) for the fire, on the facts and the applicable contractual terms of the case. MEH’s liability for delay was limited by a liquidated damages provision. Biffa accepted this, but sought to draw a distinction between an exhaustive remedy for “simple” delay, that is delay not caused by any breach of any obligation except failure to complete on time, and breach of other obligations. Biffa contended it could claim unliquidated delay damages for this second category of breach.

The judge did not accept this distinction and found that, while on the wording of the contract in question the contractor was not relieved by the payment of liquidated damages from other obligations, these other liabilities did not include a liability to pay unliquidated damages for delay caused by breach of other provisions of the contract.