CA on appeal from Burnley County Court (His Honour Judge Appleton) before Simon Brown, LJ, Vice President of the Court of Appeal, Civil Division Lady Justice Hale. 22nd March 2002.

JUDGMENT : LADY JUSTICE HALE:

1. The defendants appeal against the order of His Honour Judge Appleton made in the Burnley County Court sitting at Lancaster on 15 May 2001. He gave judgment for the claimant on a claim for £5,850 plus interest and dismissed the counterclaim. The sum claimed was the balance of the price under a contract to supply and fit twelve double-glazed windows and a door and replace soffits, guttering and fascias at the defendant's home in Whitefield, north of Manchester. The contract price was for £6,350 and the deposit paid was £2,200. The work had not been completed and so a £320 allowance was made for the eight windows not fitted. The judge also ordered that on payment of the judgment sum those window frames were to be returned to the defendants.

2. The claimant's firm contracted with the defendants on 10 June 1999. The conditions of sale were printed on the back of the order form. The judge accepted that the first defendant, the husband, did not read them. One of the relevant clauses read as follows: *"Delivery and/or installation times are quoted in good faith but no liability for damages or otherwise will be incurred by the Company should delivery or installation not take place as arranged (Normal delivery and installation times are within 4/10 weeks)."*

3. Another clause read: *"Any defect attributable to bad workmanship or faulty material must be notified in writing by the Customer within 14 days of such defect becoming apparent. The Company will investigate and if liability is accepted the defect will be rectified by the Company at its own expense."*

4. The defence alleged that it was a condition of the contract that the work be completed in one week from the date of commencement. The evidence of Mr Snape, who is the claimant's partner, was that when asked how long the job would take he said it would take about seven days but he would not have given a firm time estimate. The evidence of the first defendant was that Mr Ashworth, for the claimant, when he came round later to take exact measurements, said that it would take a week at most. Mr Ashworth's evidence was that he made it clear that that could not be guaranteed.

5. There was a long delay before the work began on Monday 22 November 1999. There is a dispute about whose fault that delay was. There appeared also to be a dispute about which days were actually worked during that week. It was common ground that Mr Snape and Mr Ashworth were asked to call round during the week because of problems with the work, but there is a dispute about how serious those problems were. The second defendant's, Mrs Stewart's, evidence was that they came round on the Friday lunchtime and she agreed with them that the completion date could be extended to the following Tuesday, 30 November. The judge quoted (in paragraph 19 of his judgment) from Mr Snape's witness statement which said that when the workmen arrived on the Tuesday they were handed a letter telling them that they had run out of time and the defendants did not wish them to continue. That was obviously incorrect and was so acknowledged at the trial. The sequence was that work was done on that Tuesday but that there were telephone conversations between Mr Snape and both Mr and Mrs Stewart, and then between Mr Stewart and the claimant that afternoon. Mrs Stewart's witness statement says that Mr Snape asked her why the fitters could not continue after that date and she had said that, as discussed on the previous Friday, that was the last day to complete the work. Mr Snape became aggressive with her and put the phone down on her. Her husband returned home soon after that with a friend. The wife was distressed and so he rang Mr Snape. Mr Snape was still aggressive and said that two teams of fitters would arrive on the Friday, 3 December, to complete the job that day. There was a later telephone conversation between the husband and the claimant, in which the claimant attempted to be conciliatory and said that she would get Mr Snape to apologise. The claimant also explained that they needed to get the work finished that week because they were going on holiday, in fact to Australia, on the following Monday, 6 December.

6. The judge found that when the fitter arrived on Friday 3 December he was handed a letter for Mr Snape. That letter is dated Friday 3 December and it reads as follows:
"Dear Mr Snape
With Regards to your telephone conversation with my wife on Tuesday 30th Nov and subsequent conversation with myself on the same day. I would like to point [out] that you had no right what so ever to speak to us in such

an aggressive manner, and to blame us for the incompetence of your employees of which you are totally responsible for. Due to this we feel that we require a full apology in writing from yourself, and unless we receive one with a guarantee, that you will not do the same again. We are not prepared to do any further business with you or your company, and we will take up legal proceedings against yourselves immediately.
We would also like to point out that you are breach of your contract on at least three points. Namely:- You told us that the job would take a week ending 27th November you then agreed with us a following date for the completion of the work which again was not adhered to TUESDAY 30th NOVEMBER.
You also told us that all the work would be of a high standard, this also is not the case, due to this fact we do not want the existing fitter anywhere near our Property again. We also reserve the right on completion to have all the work and Materials inspected by a chartered Surveyor, and until this is done, no further Payment will be made to your Company. We would like to point out that we will be holding you responsible for any legal costs. Please Reply in writing only. No further verbal assurances will be acceptable. Yours sincerely.
N Stewart."

7. The fitter took this letter away and consulted his employers. Mr Stewart's evidence was that the fitter returned and told him that he had been told by the employers to remove the remaining materials and abandon the job. The fitter's evidence was that he was told to remove them for safe keeping and the matter would be sorted out by the claimant after the holiday, and he told Mr Stewart this. Abandoning the work was never mentioned. In cross-examination his evidence was that when he returned to collect the windows he found the gates locked on him. He was kept waiting for fifteen minutes. There was a subsequent telephone conversation between the claimant and Mr Stewart that morning, when Mr Stewart says that he told her that if she had anything to say it should be put in writing. The claimant said that she explained that they could not finish because they were going away and they would be unable to do anything this side of the New Year and that Mr Stewart said that was not his problem. "We had in any event run out of time."

8. A surveyor instructed by the defendants, a Mr Watson, inspected the work on 10 December 1999, although his report is dated 1 February 2000. Mr Stewart wrote again on 29 December 1999 as follows:
"Dear Sir or Madam
As you or any member of your staff has failed to reply to our recent letter Dated 3rd Dec 99 in writing, we now have no choice but to assume that you have abandoned the work that you had agreed to carry out at our home.
We now therefore reserve the right to exercise our statutory rights, and we write to inform you that we hold you and your company totally responsible for all additional costs incurred in resolving this matter, and for the distress and inconvenience caused to ourselves."

9. The claimant promptly wrote a reply, wrongly dated 30 January 1999. Clearly this was 30 December. She began by apologising for the delay in answering the letter because they had been on their annual holidays and had just returned. She also apologised for Mr Snape losing his temper with Mrs Stewart and said that it should not have happened. Her letter then made various points about the progress of the work and said that a new team of fitters would be at the property to finish the work on Monday week commencing 10 January and suggested what should happen if that was not convenient. She took this letter round personally but Mr Stewart would not discuss it with her and told her to deal with his solicitor. Mrs Stewart agrees that he told her he was seeking legal advice. Thereafter the claimant lost her temper and unwise things were said. Mr Stewart therefore followed this up with a letter of 4 January, saying that that they had *"no alternative but ... to rescind your contract effective immediately."*

10. The proceedings were therefore begun. The claim form is dated 6 January 2000, two days later. Although it is recorded that it was served in August, that cannot be right because the defendants' solicitors' notice of acting was dated 4 February 2000. The defence relied upon, firstly, an allegation that it was a term of the contract that the work would be done within a week and that the claimant failed to do it and denied any suggestion that that failure was the defendants' fault. It also relied on repudiatory breach through that failure and, as amended later, added a plea that the claimant had abandoned the work on 3 December. Various complaints were made about the standard of the work and a counterclaim for over £14,000 was made. The reply denied such abandonment or repudiatory breach and asserted that it was the defendants who had unlawfully terminated the contract so that the

claimant was unable to complete it and the claimant was were therefore entitled to the contract sum or a quantum meruit.

11. Evidence was obtained from two experts. Mr Watson had already surveyed the property on behalf of the defendants and his report dated 1 February 2000 details a long list of defects and values the work done at £600. Mr Williams was instructed on behalf of the claimant. His report, dated 19 July 2000, says that although the job looks unsightly most of the defects are minor and can be rectified quite easily. The total value of the work so far was in the region of £4,400. The value of the work left undone was £480. The experts were directed to put their heads together and their joint report is dated 16 August 2000. They mostly agree upon Mr Watson's list of defects as statements of fact but they cannot always say whether those defects were a breach of contract -- for example there was a dispute about whether it was agreed that instead of fitting new fascias, fascia boards would be placed over the existing ones -- or when the defect arose, for example in relation to a broken downpipe. They disagree about the value of the work done. Mr Watson now valued it at £800, on the basis that the work done to the soffits, fascias, barge boards and rainwater goods was worth nothing. So too was the work done to the porch. The quotation had not been broken down as between the various items of work, but he assigned some £3,000 to the windows. On that basis the work done to the windows was now in Mr Watson's view worth £800. The figures given respectively by Mr Williams were £600; £1,000; £1,465; plus the units left behind (by which I assume he means the glass units), £955, making a total of £3,920.

12. The case was due to take two days. The judge heard the lay evidence on the first day. He decided that the essential issue was why the work had not been completed -- put loosely, whose fault it was -- and he decided to determine that issue without hearing evidence from the two experts. He found that the defendants were responsible. They had wrongly thought that time was of the essence of the contract and that they were entitled to stop the work. After the conversations on 30 November, the Tuesday, they decided to shut the door on the claimant, hence the letter dated 3 December. The defendants had therefore brought about the situation where the works were not completed because they had refused to allow them to be completed. The allegation that the claimant had abandoned the works was an embellishment of their case. In his view it was plain that the works had not been abandoned. If they had been the claimant would not have written the letter proposing to complete them and taken it round to the defendants. He also found that it was not the defects which had caused the defendants' determination to end the contract. Even if the defendants had found out later about the defects, they were still not entitled to terminate the contract if those defects could have been put right. Finally, he concluded that the defects and the expert opinions were not relevant because, if defendants prevent the contractor from finishing the job, they deprive him of the normal opportunity to put right the snags and that, by implication, would have happened in this case. He therefore gave judgment for the claim and did not make any determination on the dispute between the experts or make any further rebate from the price.

13. The grounds of appeal in this case are, as is the defendants' pleading, not as clear and precise as they might have been. They run to some 10 paragraphs. However, these were refined somewhat in the skeleton argument and the points made come down to three.

14. The first is that the judge was wrong to find, on the facts, that the defendants had terminated the contract either on 3 December or on whatever date the judge did find that they had done that. That was contrary to the terms of the letter of that date, which contemplated that the contract might continue after receipt of a written apology and with a different fitter. The judge should not have placed so much weight on Mrs Stevens' evidence about 30 November, the Tuesday, being the last day and he says that the parties agreed that the work would be commenced on 3 December. Those were, however, all of them, points of fact. The judge was entitled, in my view, to find that the defendants had decided by 3 December that they wanted no more work done by the claimant and that the effect of their conduct in refusing to let the fitter in; handing over a letter in those terms which I have quoted in full; the subsequent telephone conversation with the claimant; and then, for that matter, backed up by the letter of 29 December, which I have also quoted, amounted to evincing an intention on the part of the defendants to bring the contract to an end. He was also entitled to conclude that the claimant, in

turning up to do the work on 3 December, which she wanted to do because she was due to go on holiday on the 6th, and then responding with a further offer to complete the work, had certainly not abandoned the job. On that ground I would not allow this appeal.

15. The second point raised is that, even then, the judge should have found that the defendants were entitled to rely upon the defects in the work discovered by Mr Watson as sufficiently grave to allow them to terminate the contract prematurely. It is common ground that: *"A party who is alleged to have repudiated a contract can subsequently rely on any defence notwithstanding that at the time of the alleged repudiation he gave other or no reasons by way of excuse, unless either had the reason been put forward at the time the party in breach could have rectified matters or he is estopped by his conduct or otherwise and the other party's reliance thereon from relying upon a reason different from that which he gave at the time of the alleged repudiation."* (Keating on Building Contracts, paragraph 6-77)

16. However, that submission depends upon the submission that the defects found by Mr Watson, and accepted as factually true by Mr Williams, would have amounted to a sufficiently serious breach of this contract to justify bringing it to an end. On this Keating is again relevant, at paragraph 6-85: *"Can omissions or bad work as they occur during the course of the work be treated as repudiation? It is submitted that in the ordinary course they cannot if they are not such as to prevent substantial completion, but that there is a repudiation where, having regard to the construction of the contract and all the facts and circumstances, the gravity of the breaches is such as to show that the contractor does not intend to or cannot substantially perform his obligations under the contract."*

17. That is a considerable hurdle to leap over in a contract such as this, which is prematurely brought to an end without an opportunity given to the contracting party to do, as normally happens in such contracts, their best to put it right; nor is it a case that was clearly made in the defendants' defence. For my part I would not consider that the defects, as found by Mr Watson, would be so likely to meet that test that the defendants would be entitled to have a retrial on that ground.

18. The third criticism made, however, is as to the quantum of the claimants' claim. This is much more difficult. Even if the defects found were not such as to justify premature termination of the contract, they might still have gone beyond that which would have been put right by the end of the contract; or they might have justified at least some elements of counterclaim or set off. The defendants' main point on this is that that was a sufficiently substantial issue that the defendants were entitled to have it tried. The judge must have concluded that the defects were of a snagging nature, but there is little in his judgment to indicate that he had grasped that Mr Williams had accepted that the defects listed by Mr Watson existed as a matter of fact and that Mr Williams himself had valued the work done at a considerable discount from the contract price. Furthermore, there were such disputes as whether it had subsequently been agreed to cover rather than completely replace the fascias and so on. All of those matters would have been relevant to whether the claimants were entitled to the whole of their claim.

19. It is with the greatest of reluctance that I conclude that the appeal must be allowed on that point. The reluctance is that this was in any event a comparatively small claim; the costs already expended upon it must be out of all proportion to its value; and the prospect of any part of it going back for trial in the county court is one which fills me with dismay. It is eminently a case which should be settled between the parties without further trial. The parties both have the benefit of legal advice and no doubt that legal advice can assist them in that respect. If, however, it is unable so to do, well then, some alternative method of dispute resolution should be attempted, as that is likely to be ultimately not only much cheaper but also in many respects more satisfactory for both parties. Therefore, in my view, in sending this back for retrial in the county court, which would have to be before a different judge -- I accept that the defendants would be unlikely to feel that it was appropriate for the case to go before the same judge -– we should direct that it should not be relisted until both parties certify that attempts to settle the matter, either by way of legal negotiation or by way of alternative dispute resolution, have failed. It is on that basis, and that basis alone, that I would allow the appeal. The retrial would simply be on quantum. It would not be on liability.

LORD JUSTICE SIMON BROWN:

20. I agree with all that my Lady has said and there is very little that I wish to add.

21. On the central issue in the case, the question as to which party was responsible for the premature termination of this contract, it would have been helpful had the judge felt able to conduct a rather more thorough and accurate analysis of the detailed written and oral evidence before him. Two obvious inaccuracies in the written evidence eventually came to be confusingly reproduced in the judgment as if they were accurate. There is first the reference in paragraph 19 of the judgment to the defendants handing a letter to the fitter, Colin Hughes, on Tuesday 30 November, whereas in fact that all-important event occurred on Friday 3 December; secondly, there is a reference in paragraph 29 of the judgment to Mrs Hayes on her and Mr Snape's return from Australia delivering the letter which she wrote, which was obviously wrongly dated 30 January 2000, on 29 December whereas it seems reasonably plain that it was on 30 December. Nor did the judge then seek to resolve the apparently relevant dispute as to whether Mrs Hayes had or had not by the time of writing her letter received the defendants' letter of 29 December.

22. These points and criticisms notwithstanding, there nevertheless seems to me a proper and sufficient basis in the facts and the judgment for the judge's clear conclusion that it was indeed the defendants rather than the claimants who had shown themselves intent on ending the contract. I refer to two letters in particular, those respectively dated 3 December 1999 and 4 January 2000. The letter of 3 December was written and handed to Mr Hughes without reference either to Mrs Hayes' emollient phone conversation with Mr Stewart on 30 November following Mr Snape's abusive phone conversation earlier that afternoon; nor to what Mr Stewart says was Mr Snape's assurance that two teams of fitters would arrive on 3 December. The letter of 4 January refused to accept Mrs Hayes' apology and her promise in the letter of 30 December to send "a new team of fitters" to finish the work on 10 January.

23. On the other aspects of the appeal, and in particular the unfortunate consequences of the judge's failure to resolve the dispute between the experts as to the condition and quality of the works, I have nothing to add, save my own emphasis, to what my Lady has already said as to how imperative it is that what remains of this dispute shall be resolved without incurring yet further substantial legal costs.

ORDER: The order for costs below remains in favour of the claimant respondents. There is no order for costs on the appeal so there will be a detailed assessment. The appellants' costs will be assessed under the legal aid scheme. (Order not part of approved judgment)

MR C TAFT (instructed by Betesh Fox & Co, 16-17 Ralli Courts, West Riverside, Manchester) appeared on behalf of the Appellants

MR A NOBLE (instructed by PHILIP CONN & CO, Parsonage Court, 1 North Parade, Parsonage Garden, Manchester) appeared on behalf of the Respondent