CA. before Evans LJ, Mrs Justice Hale. 19th June 1998.

**JUDGMENT LORD JUSTICE EVANS:**

1. This is a renewed application for leave to appeal from a judgment given in the Stoke-on-Trent County Court by Mr Recorder Onions (now I think Queen's Counsel) dated 18th December 1997. The plaintiff claims sums due under what was called a *"marketing and agency agreement"* dated 9th September 1992 which he entered into with the defendants. The goods in question are not described in the agreement itself but, as the learned judge said, everybody knew what they were talking about.

2. Both parties were in the business of designing and manufacturing items for use in the fishing industry. The learned judge's findings were these. First, that on 29th November 1993 there was an angry meeting between the plaintiff and Mr Brownsword, one of the defendants. The judge found:
*"... what Mr Brownsword said was capable of amounting to a repudiation."*

3. That is to say a renunciation of the contract. The learned judge found, secondly, that that renunciation or repudiatory breach was not accepted by the plaintiff as it should be in order to bring the contract to an end. He considered whether there was any express acceptance during the following six months and he found that there was not. He then found that the agreement was terminated on 10th May 1994 by reference to a letter from the defendants' solicitors. That letter reads:
*"In addition we understand that your client has not undertaken any of his contractual duties since late November. ...*

4. By this letter our client accepts you client's repudiatory breaches of contract and is thereby absolved from any future performance of his obligations under the contract."

5. I should add by way of background that the learned judge found that following the November meeting both parties bided their time, each waiting for the other to move first. That seems to have been the basis on which the defendants' solicitors on their behalf in the following May alleged that the plaintiff had been in repudiatory breach of the agreement by failing to perform any of his duties under it. The learned judge then considered whether the plaintiff was entitled to any commission under the agreement. He held that he was not. First, because in respect of two particular transactions involving customers called Leeda and Pyramid, the plaintiff had been in breach of his fiduciary duties owed to the defendants, and thereby forfeited any right to commission on those transactions. It seems that the plaintiff had notified the defendants of the Leeda case but not of Pyramid.

6. The learned judge then considered whether the plaintiff was entitled to commission in respect of other transactions and he held not, on the authority of **Andrews v Ramsay** [1903] 2 KB 635.

7. Finally, the learned judge rejected a contention that Clause 11.1 of the agreement permitted the plaintiff to recover remuneration notwithstanding termination of the agreement "for any reason".

8. It seems to me that three issues of law, and they may well be substantial issues, do arise. The first is whether the learned judge was right to apply the case of **Andrews v Ramsay** without regard to the later judgment of Neville J, to which Mr Crowther in his helpful skeleton argument has drawn our attention. That is **Niterdals Taendstikfabrik v Bruster** [1906] 2 Ch 671. There Neville J said, after referring to **Andrews v Ramsay ,** that in his view the doctrine there laid down:
*"... does not apply to the case of an agency where the transactions in question are separable, ..."*

9. That essentially was the argument advanced by Mr Crowther in the present case. The second issue is as to the meaning and effect of Clause 11.1. There is recent authority of this court in two cases, **Rock Refrigeration v Jones [**1997] 1 All ER 1, particularly pages 18-20, and **Hurst v Bryk [**1997] 2 All ER 283 which have a bearing on the question of whether Clause 11.1 does preserve the right for remuneration under the contract, notwithstanding a repudiatory breach by the plaintiff if he committed one.

10. The third point is, in my view, equally substantial. It is this: the learned judge's finding that there was a renunciation of the contract by the defendants on 29th November 1993 could suffice to discharge the plaintiff from further performance of the agreement. In fact he did treat himself as so discharged by simply failing to perform it, a matter which did come to the attention of the defendants. It was on that ground that they sought to terminate of the agreement in May 1994. It is at least arguable that his

failure to perform the agreement was not a repudiatory breach, but rather that in legal terms it counted as an acceptance of the earlier renunciation of the agreement by the defendants. In those circumstances it would be unnecessary for the plaintiff to establish an express acceptance by him of the defendants' earlier renunciation. That appears to have been a point not dealt with by the learned judge, and maybe it was not argued. But it seems to me that it arises on the learned judge's findings of fact.

11. For those reasons I would give leave to appeal; direct that the Notice of Appeal be served within seven days and that the costs of this application be costs in the appeal.

12. I would add that this case could result in a substantial appeal hearing which, if unsuccessful, would be very costly for Mr Crowther. The case seems to me to cry out for mediation, and in particular for the services of a body such as CEDR which can provide those services. It seems to me Mr Crowther would be well advised to take advantage of them.

**MRS JUSTICE HALE**: I agree.

**ORDER:** Application allowed; Notice of Appeal to be served in 7 days; costs of the application to be costs in the appeal. (Order not part of approved judgment)

THE APPLICANT APPEARED ON HIS OWN BEHALF
THE RESPONDENTS DID NOT APPEAR AND WERE NOT REPRESENTED