Capital Trust Investment Ltd. v Radio Design AB & Ors [2002] EWCA Civ 135 (15th February, 2002)

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Case No: A3/2001/0542

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
The Hon Mr Justice Jacob

Royal Courts of Justice
Strand,
London, WC2A 2LL

15 February 2002

B e f o r e :
LORD JUSTICE SCHIEMANN
LORD JUSTICE CLARKE
and
LADY JUSTICE ARDEN

CAPITAL TRUST INVESTMENT LIMITED
Claimant/
Appellant

- and -

RADIO DESIGN AB and Others
Defendant/Respondent

(Transcript of the Handed Down Judgment of
Smith Bernal Reporting Limited, 190 Fleet Street
London EC4A 2AG
Tel No: 020 7421 4040, Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

Mr Stephen Smith QC (instructed by Gouldens for the Appellant)
Mr Alan Steinfeld QC (instructed by Reynolds Porter Chamberlain
for the First Respondent)

_____
HTML VERSION OF JUDGMENT
AS APPROVED BY THE COURT

_____

Lord Justice Clarke:

This is the judgment of the court.

Introduction

This is an appeal brought by permission of Chadwick LJ against an order of Jacob J dated 16th February 2001 dismissing the appeal of the claimant ("CTIL") against an order of Master Bowman dated 27th June 2000 ordering a stay of the proceedings against the first respondent ("Radio Design") under section 9(4) of the Arbitration Act 1996 ("the 1996 Act"). The stay was granted on the ground that the parties had agreed that Radio Design's claim should be submitted to arbitration in Sweden.

Three issues arise for determination on this appeal. The first is whether Radio Design was a party to an agreement with CTIL containing an arbitration clause. This issue was determined in favour of Radio Design by both the master and the judge. Chadwick LJ said that, if it had stood alone, he would not have granted permission for a second appeal. The second issue is whether, if the answer to the first question is yes, the parties agreed, on the true construction of the agreement, to submit all or some of the claims in this action to arbitration in Sweden. This point was not taken before the master or the judge, but has been advanced because of the terms in which Chadwick LJ granted permission to appeal. The third point is whether, if the parties agreed to submit some or all of these claims to arbitration, CTIL has taken a step in the proceedings such as to deprive it of its right to seek a stay by reason of section 9(3) of the 1996 Act. This point was taken before the judge, but not before the master. Chadwick LJ expressed the view that it was a point of principle of sufficient general importance to merit the consideration of this court on a second appeal.

The action is brought in order to advance claims for damages for deceit and/or negligent misrepresentation in connection with an allotment of 33,333 B3 preference shares in Radio Design for which CTIL paid SEK 1200 a share, and thus a total of SEK 40 million (about £2.6 million), in August 1998. CTIL says that the shares were worth no more than about SEK 200 per share. The alleged misrepresentations related essentially to the state of readiness of Radio Design's mobile telecommunications product for commercial production and to the use to which the proceeds of the allotment of the shares would be put. As the judge colourfully put it, CTIL's case is that the picture painted to it was knowingly and deliberately false since the system was "no more than an inchoate heap of junk and the company and its directors knew that".

This appeal is concerned only with CTIL's claim against Radio Design, but CTIL also sues a number of other defendants, namely four individual directors and two corporate investors. As far as we are aware, none of those defendants seeks a stay of the proceedings. None of them could do so under the agreement relied upon by Radio Design.

The Amended Particulars of Claim

In the amended particulars of claim CTIL relies upon a number of oral representations made at various meetings in London in February to July 1998 and upon written representations contained in various financial projections,

but in particular upon written representations contained in a document entitled Confidential Information Memorandum. The representations are said to have been made fraudulently and/or negligently and to have induced CTIL to buy the shares.

Confidential Information Memorandum

The memorandum ("CIM") is dated 27th May 1998 and is in effect a prospectus. It is a substantial document of some 83 pages in length. It was sent to individual potential named investors including CTIL. On the first page, under the headings "Radio Design AB Excellence in Radio System Concepts" and "Private Placement of Series B3 Preferred Shares" the placement agent is named as Enskilda Securities, which is or was a division of a Swedish bank and which we shall call "Enskilda". The CIM begins by saying that it does not constitute an offer to sell, or a solicitation of an offer to buy, any securities or any of the businesses or assets described in it.

Thereafter, the first section of the CIM is entitled "Notices to Investors". It begins by stating that Radio Design is furnishing the CIM solely for the consideration of institutional and sophisticated investors who have sufficient knowledge and experience to evaluate the merits and risks of such an investment and who have no need of liquidity in their investment and can afford to lose the whole investment. It makes clear that it is not intended that there should be a public placing and includes the following:

> "Radio Design and its directors (being ….) accept responsibility for the information contained in this Memorandum, including the information contained in this Memorandum that relates to Radio Design. To the best of the knowledge, information and belief of Radio Design and its directors (who have taken reasonable care to ensure that such is the case), the information contained in this Memorandum is in accordance with the facts and does not omit anything likely to affect the import of such information.
>
> No person has been authorised to provide any information or to make any representation with respect to the company or the Placing Shares which is not contained in this Memorandum and, if given or made, such information or representation may not be relied upon as having been authorised by the company. Prospective investors may not rely on any information not contained in this Memorandum.
>
> ….
>
> Radio Design has engaged the Placement Agent to act as placement agent and financial advisor with respect to the Placing Shares. The Placement Agent is not advising any person other than Radio Design with respect to the Placing, and will not be responsible to any subscriber of the Placing Shares for the protections afforded to customers of the Placement Agent or otherwise. The Placement Agent holds warrants to subscribe for 10,000 new common B shares at SEK 650 per share before 31 December 2000.
>
> Any prospective investor will be required to acknowledge in the purchase contract that it has itself been and continues to be solely responsible for making its own independent investigation and appraisal of the business, operations, financial conditions, prospects, creditworthiness and affairs of the Company and the Placing Shares, and has not relied on and is not relying on any person to provide it with any information relating to such matters or to check or enquire into the adequacy, accuracy or reasonableness of any representation, warranty or statement, projection, assumption or information provided by or on behalf of the Company, including any contained in this Memorandum.
>
> No representation or warranty, express or implied, is made by the Placement Agent or any of its affiliates or any of its or their directors, officers or

employees as to the accuracy or completeness of the information contained herein …. ”

The “Notices to Investors” part of the CIM also makes it clear that Radio Design and Enskilda as placement agent reserved the right to reject any offer to subscribe for the shares for any reason. The body of the CIM sets out what it describes as risk factors and specifies the use which Radio Design intended to make of the proceeds of the subscription. It then sets out a considerable amount of detail about Radio Design. The CIM was signed by the directors of Radio Design.

It is we think plain (and not in dispute) that both parties will wish to rely upon the contents of the CIM at any trial of the merits. CTIL will rely upon the representations contained in it, whereas Radio Design (and the directors) will rely upon the qualifications or exemptions. Examples both of the kind of representation likely to be relied upon by CTIL and of the kind of qualification and exemption likely to be relied upon by Radio Design can be seen in the extracts from the CIM quoted above.

It is clear from the terms of the CIM, and indeed from other documents which were put before the court, that as placing agent Enskilda was acting as the agent for Radio Design in connection with the placement or proposed placement of the shares. In that capacity it prepared an application form and sent it to interested investors including CTIL. We now turn to the application form because, for present purposes, it is the most important document in the case.

The Application Form

The copy of the application form which we have was signed by CTIL on 29th July 1998. It is described as an application form for subscription of shares in Radio Design, to be submitted by 22nd July to Enskilda. It then states:

“With reference to the CIM …. we hereby subscribe for 33,333 Shares, issued at a price of SEK 1,200 per share.”

On its face that is a curious statement because it is plain that the form is itself an application form and not (without more) a contractual document as between CTIL and Radio Design.

The form continues, so far as relevant:

“CTIL acknowledges and accepts that:

This application for shares is binding and irrevocable;

By submitting this application for shares we irrevocably authorise Enskilda …. to subscribe for the above indicated number of Shares on our behalf;

We have read and understood the information included in the CIM, dated 27 May 1998 and the letter entitled “Revisions to the intended placement”, dated 16 July 1998;

The Articles of Incorporation, Section 3, of Radio Design, are to be amended in respect of the amount payable on liquidation of the Shares, from SEK 950 to SEK 1,200 (the “Amendment”) and that the Amendment must be resolved upon by an extraordinary general meeting of shareholders of Radio Design (the “EGM”);

….

Due to the Amendment, the issuance of shares (the “New Issue”) is subject to the approval of the EGM;

Radio Design has further confirmed that it will take the necessary steps to execute the Amendment and the New Issue, immediately after (i) we have deposited SEK 40 million into an escrow account of Enskilda …. held with Skandinavska Enskilda Banken (the “Escrow Account”), the details of which are set forth below), and (ii) Brummer …. , Pictet Global …. , Telecom Partners …. and Global Equity …. have together deposited an amount equal

to or in excess of SEK 88 million into the Escrow Account;
…."

The matters stated to be expressly acknowledged and accepted by CTIL continue with a number of particular points, including the steps to be taken by Radio Design to effect an EGM and the steps to be taken by Enskilda to refund the SEK 40 million deposit in the event, for example, that approval by an EGM was not registered by the Swedish authorities. They also include an express authorisation to Enskilda to subscribe for shares on CTIL's behalf subject to two conditions, namely the EGM approving the Amendment and the New Issue and Enskilda obtaining a valid certificate from Skandinavska Enskilda Banken ("SEB") confirming that the investors had together deposited an amount equal to or in excess of SEK 128 million into the Escrow Account.

After the matters expressly acknowledged and accepted by CTIL, the form continues:

"In connection with the submission of this application form we agree to arrange for an amount of SEK 40 million to be deposited in the Escrow Account, on a date yet to be determined but not later than 29 July 1998, in order that Enskilda …. can, on our behalf, subscribe for the Shares as agreed above."

There follows the provision which formed the basis of Radio Design's application to the master, as follows:

"Applicable Law, Arbitration

This application for subscription of shares in Radio Design …. shall be governed by and construed in accordance with the laws of the country of Sweden with regard to the conflict of laws. Any dispute arising out of this application for shares in Radio Design …. shall be settled exclusively by arbitrators in accordance with the Swedish Arbitration Act. …. The arbitration proceedings shall take place in Stockholm."

The application form then sets out details of the escrow account and provides a box in which appear the date, namely 29th July 1998 and the signature of CTIL. Finally the following appears above the date and two signatures on behalf of Enskilda:

"Confirmation by escrow account manager

We, Enskilda …. , hereby agree to abide by the terms and conditions set forth above and to perform in accordance therewith."

The Subscription

The EGM contemplated in the application form was held on 10th August 1998. It carried the "Amendment" and approved an increase in capital by subscription to new B3 shares on the following conditions:

"1. The right to subscribe for the new shares – deviating from the shareholders' preferential right – shall be exclusive to legal entities that have given Enskilda …. power of attorney to subscribe for the new shares. There shall be no over-subscription.

2. The new shares shall be issued at a price of SEK 1,200 per share, when the issue price has been fixed on the basis of the estimated market value of the new share.

…."

A document entitled "Subscription List" was then issued which recited the resolutions passed at the EGM on 10th August and added:

"The board of directors of Radio Design …. may hereby invite to subscribe for shares in accordance with the resolution."

The following appears at the foot of the document:

"Enskilda …. hereby, by proxy, subscribe for 106,666 shares of series Preference B3.

> Stockholm 11 August 1998.
> Enskilda ….”

The document was signed on behalf of Enskilda.

During the hearing of the appeal it was not clear what happened then. It was agreed that the parties should be permitted to put further limited information before the court in that regard. As a result we received a letter from Reynolds Porter Chamberlain on behalf of Radio Design dated 14th December explaining the position as follows:

> “We have now ascertained that the allotment of shares took place electronically and there is no physical document recording the registration of shares following the allotment. ….
> We understand that, as a matter of practice in Sweden, it is not possible for a company to hold its own issued but unallotted shares. We are informed by Osa Kjellander, in house counsel for Enskilda, that on the 19th August 1998 (4.43 pm) an account was opened with SEB (of which Enskilda was at that time a part) in which the issued shares were notionally “created”. At 4.50 pm the shares were “allotted” into the names of companies and individuals. This was, in effect, a book keeping exercise. Ms Kjellander informs us that Enskilda is unable, due to issues of confidentiality, to confirm the identity of those companies and individuals but she was able to confirm that the shares were not registered to Enskilda.”

We subsequently received a letter from Gouldens on behalf of CTIL accepting that account as accurate. It thus appears that, of the total of 106,666 shares referred to in the subscription list, CTIL received 33,333 shares in the manner described.

Was Radio Design party to an Arbitration Agreement?

Both the master and the judge held that Radio Design was a party to an agreement on the terms of the application form and that it was a party to the arbitration clause contained in it. Mr Smith submits that they were wrong so to hold. In a compelling argument he submits that the purpose of the application form was to give Enskilda authority on behalf of CTIL to subscribe for the shares at SEK 1200 per share and to set up the terms upon which Enskilda were to operate the escrow account, but that there is nothing in the form to suggest that Radio Design was or was to be a party to a contract based upon it. Mr Steinfeld accepts that the form did indeed have the two purposes relied upon by Mr Smith, but submits that it had a further purpose, namely to apply to Radio Design for 33,333 of the new shares at SEK 1200 per share.

At one stage during the course of the argument it was thought that the form might evidence an agreement between CTIL and Radio Design from the time it was signed by CTIL, on the basis that the form was proposed to CTIL by Enskilda as placing agent for Radio Design and that it contains or evidences obligations on the part of Radio Design, as for example to hold an EGM. However, we are persuaded that that is not correct, especially since neither counsel espoused such an analysis.

Mr Steinfeld’s submissions, which were in essence accepted by the judge, may be summarised in this way:

i) The application form was drawn up by Enskilda as Radio Design’s placement agent as the form which had to be used by any person or entity who or which wanted to subscribe for the shares.

ii) The form contained an irrevocable offer to Radio Design to subscribe for the shares at SEK 1200 per share subject to certain conditions being satisfied. Some of those conditions had to be satisfied by Radio Design, but failure to do so would not be a breach of contract but would simply deprive Enskilda of authority to subscribe for the shares on CTIL’s behalf.

iii) The offer was accepted when the shares were duly allotted, which was when Radio Design accepted Enskilda's offer contained in the subscription list to subscribe for 106,666 shares on behalf of those, including CTIL, who had given it authority to do so. It now appears that that occurred on or before 19th August when the 33,333 shares were, as it were, created and allotted to CTIL. As stated above, it is common ground that the application form, which was signed by CTIL and Enskilda both had the effect of creating Enskilda CTIL's agents by giving Enskilda irrevocable authority to subscribe for the shares on CTIL's behalf and had the effect that Enskilda bound itself as a principal to set up and operate the escrow account in accordance with the terms of the application form. Moreover, we entirely accept Mr Smith's submission that those agreements came into effect on 29th July 1998 when the form was signed on behalf of CTIL. It does not, however, follow that the form was not also an offer to Radio Design. It is agreed that Enskilda was wearing two hats when signing the form. The question is whether it was also wearing a third hat, as agent of Radio Design, and, if so whether a contract came into existence between Radio Design and CTIL on the terms of the form as found by the master and the judge.

Mr Smith submits that the form was not an offer to Radio Design to do anything and that Radio Design was not interested in the rights and obligations to which the form gave rise, which (he says) no doubt explains why there is no evidence that Radio Design ever saw the form or asked to see it. He submits that the subscription relationship between CTIL and Radio Design commenced on 11th August 1998 when Enskilda signed the subscription list on CTIL's behalf. Mr Smith further the submits that the judge paid too much attention to the form of the document and insufficient regard to its substance.

There is, in our judgment, considerable force in Mr Smith's submissions and we would not reject them as emphatically as the judge did when he said that the answer to the question whether the arbitration clause was part of a contract between Radio Design and CTIL was 'obviously so'. The form must be construed as a whole and set against the surrounding circumstances. Approaching the matter in that way, we have reached the conclusion that the master and the judge were correct and that Mr Steinfeld's submissions are to be preferred to those of Mr Smith. Our reasons are shortly as follows.

The form is described as an application form for subscription of shares in Radio Design. It was prepared by Enskilda as Radio Design's placing agent. We do not think that there can be any doubt that Radio Design was aware that investors were being asked to apply for shares on a form designed by Enskilda as its agent. The form was to be submitted to Enskilda. It seems to us that the natural meaning of the form in these circumstances is that it was what it was stated to be, namely an application for shares to Radio Design and that the application was to be made by submitting the form to Enskilda as Radio Design's agent. Thus the expression "this application for shares" in the form was an application to Radio Design for shares in Radio Design made by submitting the form to Enskilda as Radio Design's agent. At the same time, by its signature on the form, CTIL created Enskilda its agent for the purposes of subscribing for the shares. We accept Mr Steinfeld's submission that that was essentially a matter of mechanics, which was a sensible arrangement, given that Swedish company law requires a subscriber to sign a subscription list, so that Enskilda was authorised to sign the subscription list on behalf of the investors. It is plain that Radio Design was aware what was happening because, as set out above, it was resolved at the EGM that the right to subscribe to the new shares should be exclusive to the legal entities which had given Enskilda power of attorney to subscribe for the new shares. That power of

attorney or authority was conferred on Enskilda by the application form.
The escrow arrangement was also essentially a matter of mechanics to ensure, on the one hand, that the investors provided the money which would be available to Radio Design if it accepted the offer and, on the other hand, that the money would be repaid to the investors if for any reason the offer became ineffective because of failure of a condition precedent or because Radio Design did not accept the offer. The escrow arrangement thus protected the company and the investors and it was natural that Enskilda should act as principals with regard to it.
It seems to us that it is important to have in mind the underlying purpose of the application form, namely to apply to Radio Design for its shares. As the judge said, significantly it was for Radio Design to accept or refuse the offer. He added that once one appreciates that the document is an offer document there is really only one answer to the question 'to whom is the offer made?'. Mr Smith submits that that is an entirely inappropriate question. He submits that a perusal of the form as a whole shows that the form did not contain an offer to Radio Design and that Enskilda was not acting as the agent of Radio Design but only in the two capacities to which we have already referred. However, we do not agree.
As we see it, Mr Smith's argument disregards the underlying, and indeed express, purpose of the form, namely as an application form for the shares. That application could only be made to Radio Design or, in this case, to its placing agent Enskilda. The application could not be being made to Enskilda as agent for CTIL. Nor could it be being made to Enskilda as principal. If it was an application at all, it must have been made to Enskilda as agent of Radio Design. It was an integral part of the whole subscription process, as evidenced by the condition that other investors should contribute SEK 88 million to the escrow account.
We have set out above some of the matters expressly acknowledged and accepted by CTIL by signing the form. It is we think plain that those provisions were intended to have contractual effect. If that is correct, it seems to us to be a pointer to the conclusion that it was intended that Radio Design should be a party to the contract to be evidenced by the form if it accepted CTIL's offer to subscribe to the shares. For example, the express statement that CTIL had read and understood the information contained in the CIM would not be relevant if the purpose of the form were simply to appoint Enskilda as CTIL's agent and to create the escrow. It only makes sense as a term in a contract with Radio Design upon which Radio Design could, if necessary, rely if it accepted CTIL's irrevocable offer to subscribe for the shares and a dispute subsequently arose.
Finally, we should say a word about what Mr Smith described as CTIL's timing point to which we have already referred. It is that a contract came into existence between CTIL and Enskilda when the form was signed by CTIL and that the arbitration agreement thus came into effect at that time. Mr Smith submits that it is a strained and unrealistic approach to the form to conclude that a contract on the terms of the form also came into existence between CTIL and Radio Design much later, namely on allotment of the shares. He submits that such an approach overlooks the fact that there is no evidence that Radio Design was informed of the terms of the form, and in particular of the arbitration clause, and that it appears to proceed on the assumption that at one and the same moment Enskilda could be making an offer on behalf of one principal and accepting an offer on behalf of another.
However, we do not think that there is any difficulty about such an analysis once it is appreciated that the underlying purpose of CTIL in filling in the

form was, as the form says, to apply for subscription of shares in Radio Design because the only way in which the form could itself be an application for such subscription would be on the basis that it was an application to Radio Design, either directly, or, as in this case, to its placing agent Enskilda.

This analysis seems to us to be supported by the terms of the applicable law and arbitration clause itself, which is quoted above. The clause expressly provides for "this application for subscription for shares" to be governed by Swedish law "with regard to the conflict of laws" and that "any dispute arising out of this application for shares in Radio Design …. shall be settled exclusively by arbitrators" in Sweden. Since the application for shares is being made to Radio Design, those words naturally cover disputes between the applicant, CTIL, and the company, Radio Design. Indeed they are more apt to cover such a dispute than a dispute as to the terms of the agency agreement between CTIL and Enskilda or as to the terms upon which Enskilda was agreeing to operate the escrow account. They are no doubt sufficiently wide to cover all three classes of dispute, but they most naturally cover a dispute between CTIL and Radio Design.

In his skeleton argument, Mr Smith submits that the judge's conclusion renders meaningless the formal assumption of responsibility by Radio Design in the CIM for the information provided in it. That is because of the immunity from suit for misrepresentations inducing a subscription for shares which (as we understand it) Swedish law confers on Swedish companies. That immunity is similar (if not identical) to the rule which previously applied here, as established by Houldsworth v City of Glasgow Bank (1880) 5 App Cas 317. Mr Smith points to the facts that the CIM was prepared by Linklaters & Paines and that it was given to CTIL in London, considered by CTIL in London and acted on by CTIL in London.

However, we see no reason not to accept Mr Steinfeld's submission that it will be open to CTIL to argue before the Swedish arbitrators that the clause only applies the principles of Swedish conflicts of law and that, by the application of those principles, the misrepresentations complained of should be determined according to English law. However, whether that is so or not, the terms of the agreement seem to us to be reasonably clear.

In all the circumstances we have reached the conclusion that the judge was right and would only add a word on the material sent to us after the argument was concluded. Reynolds Porter Chamberlain enclosed a page of the shareholders agreement asserting that it was plain from it that the identities of CTIL and the other proposed investors referred to in the application form were well known to Radio Design. In response Gouldens took issue with that conclusion, enclosed a complete copy of the shareholders agreement and drew attention to the jurisdiction clause in it, which provided that any matter arising out of or in connection with the agreement should be brought before the Swedish courts, which should have exclusive jurisdiction. Gouldens submitted that it was strange indeed that a dispute between the parties to the agreement (of which Radio Design was one) should be the subject of litigation whereas, on Radio Design's case, a dispute between each individual subscriber and Radio Design arising out of the allotment must proceed to arbitration.

We agree that there are some oddities in the position, but these considerations do not seem to us to alter the conclusion that Radio Design became a party to a contract on the terms of the application form, including the arbitration clause, when it allotted shares in acceptance of the offer. We have not seen a copy of the shareholders' agreement signed by CTIL, but the draft, which names CTIL and the other investors as a party, expressly refers

to “an Application Form of even date herewith” and thus supports the conclusion that Radio Design, which signed the copy of the agreement which we have seen, was, as we would have expected, but contrary to Mr Smith’s submission, aware of the application form.

We do not know why the jurisdiction clause in the shareholders’ agreement was in different terms from the jurisdiction clause in the application form, but no-one has suggested that its effect is that CTIL and Radio Design agreed that the claims being advanced by CTIL in this action should be submitted to the exclusive jurisdiction of the courts of Sweden.

For the reasons which we have given, our conclusion is that the judge was right to hold that the application form was an offer to Radio Design to subscribe for shares on certain terms, which had contractual effect when the offer was subsequently accepted by allotment of the shares to CTIL. Since the form included the arbitration clause, the next question is whether, on the true construction of the clause, the parties agreed to submit to arbitration all or some of the claims which CTIL seeks to make in this action.

True Construction of Arbitration Clause

As we indicated above, this point was not taken either before the master or before the judge. Nor was it contained in CTIL’s appellant’s notice or in its skeleton argument in support of its application for permission to appeal. It has now been raised because, in giving permission to appeal, Chadwick LJ said that the question whether CTIL’s claim that it was induced to subscribe for shares in Radio Design by fraudulent and/or negligent misrepresentation falls within the arbitration agreement was at least arguable. Radio Design raised no objection to the point being taken for the first time on appeal to this court and, accordingly, we have decided to permit it to be raised. It has been treated as a question of English law.

After receiving Chadwick LJ’s reasons, there followed some speculation on the part of Radio Design as to how the point might be put. One possibility suggested was that it might be said that a claim for rescission would be outside the clause, but, whether that is so or not, as Mr Steinfeld observed in his skeleton argument, it is not relevant here because CTIL does not seek rescission of the agreement but claims damages for negligent or fraudulent misrepresentation. In any event Mr Smith does not espouse it, very fairly observing that it would be a difficult point to argue in the light of section 7 of the 1996 Act.

A second possibility might have been an argument that a claim for damages for negligent or fraudulent misrepresentation inducing a contract does not give rise to a “dispute arising out of this application for shares” within the meaning of the clause. However, as we understand it, Mr Smith does not advance a submission along these lines. He is, in our opinion, right to adopt this stance. He fairly draws attention to evidence of Swedish law that the words “arising out of” are in principle wide enough to encompass a claim based on pre-contractual representations. We would simply add that it seems to us that, if the matter were to be determined under English law, such a claim would, as a matter of language, be held to arise out of the application for shares since CTIL’s case is that it was induced to make that very application by the misrepresentations alleged. It is not necessary to discuss this point further given the concession made by Mr Smith.

The question as formulated by Mr Smith can be stated in this way: whether (1) assuming that CTIL and Radio Design were parties to the arbitration agreement and (2) even though the words of the agreement are so wide that, read literally, they would encompass pre-contractual misrepresentations, (3) the parties are therefore to be taken to have intended that the agreement should

extend so far, (4) even though the innocent party could not possibly have been aware at the time that it might have a claim in deceit and/or for negligent misrepresentation. Mr Smith submits that the answer to that question is no. Mr Smith concedes that he can point to no case which is directly in point. However, he refers to two. The first is S Pearson & Son Ltd v Dublin Corporation [1907] AC 371, which is authority for the proposition that it is not possible to exclude liability for one's own fraud. However, as we think Mr Smith recognises, that principle has no direct application here because the clause relied upon by CTIL does not exclude liability for fraud but simply refers the dispute to arbitration in Sweden for determination in accordance with the principles of Swedish conflicts of law. It does not, in our opinion, assist CTIL.

More importantly, Mr Smith relies upon the approach recently adopted by the House of Lords in BCCI v Ali [2001] UKHL 8, [2001] 2 WLR 735, where the question was one of construction of a settlement agreement which released BCCI from

> "all or any claims whether under statute, common law or in equity of whatsoever nature that exist or may exist and, in particular, all or any claims rights or applications of whatsoever nature that the applicant has or may have or has made or could make in or to the industrial tribunal, except the applicant's rights under [the bank's] pension scheme."

The question for decision was whether the employee was prevented by that agreement from advancing a claim for what have become known as stigma damages, that is damages caused by his association with BCCI as a bank of ill-repute. The claim was put both as a claim for the breach of an implied term of his contract of employment under which BCCI owed him a duty not to carry on a dishonest or corrupt business and as a claim in deceit on the basis that he had been induced to work for the bank by the false representation that it was an honest and creditworthy financial institution: see per Lord Bingham at [4] on page 738C.

The correct approach to the construction of the release can we think be clearly seen from the following passages from the speech of Lord Bingham:

> "[8] I consider first the proper construction of this release. In construing this provision, as any other contractual provision, the object of the court is to give effect to what the contracting parties intended. To ascertain the intention of the parties the court reads the terms of the contract as a whole, giving the words used their natural and ordinary meaning in the context of the agreement, the parties' relationship and all the relevant facts surrounding the transaction so far as known to the parties. To ascertain the parties intentions the court does not of course enquire into the parties' subjective states of mind but makes an objective judgment based on the materials already identified. The general principles summarised by Lord Hoffmann in Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 896, 912-913 apply in a case such as this.
>
> [9] A party may, at any rate in a compromise agreement supported by consideration, agree to release claims or rights of which he is unaware and of which he could not be aware, even claims which could not on the facts known to the parties have been imagined, if appropriate language is used to make plain that that is his intention. ….
>
> [10] But a long and in my view salutary line of authority shows that, in the absence of clear language, the court will be very slow to infer that a party intended to surrender rights and claims of which he was unaware and could not have been aware."

Lord Bingham then considered a number of the decided cases in that line of

authority and concluded:

> "[17] …. I think these authorities justify the proposition advanced in paragraph [10] above and provide not a rule of law but a cautionary principle which should inform the approach of the court to the construction of an instrument such as this. …. the judges I have quoted expressed themselves in terms more general than was necessary for the decision of the instant case, and I share their reluctance to infer that a party intended to give up something which neither he, nor the other party, knew or could have known that he had."

The majority of the House of Lords (Lord Hoffmann dissenting) held that the employees' claims were not precluded by the release. Lord Browne-Wilkinson simply agreed with Lord Bingham. Lord Nicholls and Lord Clyde made speeches in which, as we read them, they adopted what was essentially the same approach as that adopted by Lord Bingham. It is perhaps of note that Lord Nicholls was struck by the fact that neither party could have been aware of the possibility of a claim for stigma damages when they agreed the release because the possibility of such a claim only arose when, as Lord Nicholls put it (at [33] on page 747F), the House of Lords changed the law in Mahmud v BCCI [1998] AC 20.

Mr Smith submits that a similar approach leads to the conclusion that CTIL's claims for damages for negligent and fraudulent misrepresentation were not intended by the parties to be submitted to arbitration. He recognises that this is a very different case from BCCI v Ali, but he submits that when the contract was made the parties (and in particular CTIL) could not have contemplated that CTIL might be able to advance a claim for damages of this kind. In this regard he relies upon this passage in the speech of Lord Clyde (at [86] on page 764):

> "…. Even without formulating any definition of the precise scope of the agreement, it seems to me that if the parties had intended to cut out a claim of whose existence they could have no knowledge they would have expressed that intention in words more precise than the generalities which they in fact used. In so far as Mr Naeem may also seek to present a claim in tort for fraudulent misrepresentation inducing him to start the employment in the first place or to continue in it thereafter, while the legal basis for such a claim may not be particularly novel, the idea of such a claim at the time when the parties made the agreement at the termination of the employment seems to me to be correspondingly remote from what the parties might reasonably be taken in the circumstances to have contemplated."

Mr Smith submits that much the same can be said here, but we are unable to accept that submission. This seems to us to be a very different situation from that being considered by the House of Lords in BCCI v Ali. It is true that CTIL was unaware of facts giving rise to the possibility of a claim for negligent or fraudulent misrepresentation. However, it was also unaware of facts which might give rise in the future to a claim for damages for breach of contract. That will almost always be the case at the time the contract is made.

An arbitration or jurisdiction clause is very different from a general release. The purpose of such a clause is to provide a machinery for the resolution of disputes which might arise in the future. It is not we think suggested that the clause would not be wide enough to include claims for breach of contract, whether committed negligently or fraudulently or otherwise. In any event, the clause is in our judgment plainly wide enough to include such claims. As we see it, the purpose of using the wide words "arising out of" is to ensure that all claims which can fairly be said to

arise out of the application are included. The parties would be likely to have in mind the possibility of claims for negligent misrepresentation arising out of the CIM, not because CTIL was aware of such a claim at the time it signed the form or at the time the contract was made but because experience suggests that such claims do sometimes arise out of prospectuses where the investment proves less advantageous than the investor had hoped. It is also not unknown for claims based on alleged fraudulent misrepresentation to be made in such circumstances.

In our judgment the parties would be likely to have wanted one tribunal to determine all such claims. It seems to us to be far more likely than not that the parties intended that claims for damages for deceit or negligent misrepresentation and claims for damages for breach of contract should all be determined by one tribunal. In these circumstances we see no sensible basis upon which it could be held that, although the parties used language which it is conceded is wide enough to include such claims, they must be taken to have intended to exclude them.

In Ashville Investments Ltd v Elmer Construction Ltd [1989] QB 488 and Harbour Assurance Co (United Kingdom) Ltd v Kansa General International Insurance Co Ltd [1993] 1 Lloyd's Rep 455, claims for rectification of a contract and claims for a declaration of non-liability under a contract on the ground of illegality were respectively held to be within arbitration clauses using similar language to that used in the instant case. In both those cases the court emphasised the likelihood that the parties would have wanted one-stop adjudication. Thus Bingham LJ said in Ashville Investments at p 517,

> "…. I would be very slow to attribute to reasonable parties an intention that there should in any foreseeable eventuality be two sets of proceedings."

See also to the same effect per Hoffmann LJ in Kansa, quoting that passage, at p 470.

In all these circumstances we reject Mr Smith's submission and hold that the claims advanced in this action are all within the arbitration clause, when construed in accordance with the principles summarised by Lord Bingham in paragraph [8] of his speech in BCCI v Ali quoted above.

Step in the Proceedings

As indicated above, CTIL asserted before the judge, but not before the master, that Radio Design was not entitled to apply for a stay of this action because it took a "step in the proceedings" within the meaning of section 9(3) of the 1996 Act. Section 9(3) and (4) provides as follows:

> "(3) An application may not be made by a person before taking the appropriate procedural step (if any) to acknowledge the legal proceedings against him or after he has taken any step in those proceedings to answer the substantive claim.
>
> (4) On an application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed."

It is common ground that, on the assumption that these claims are within the arbitration agreement to which both Radio Design and CTIL are parties, Radio Design is entitled to a stay unless it took a step in the proceedings within the meaning of section 9(3). Section 9(3) is for present purposes in similar terms to section 1(1) of the Arbitration Act 1975 and section 4 of the Arbitration Act 1950. The question what amounts to a step in the proceedings has been considered a number of times under those sections and their predecessors: see eg Pitchers v Plaza [1940] 1 All ER 151, Eagle Star Insurance Co Ltd v Yuval Insurance Co Ltd [1978] 1 Lloyd's Rep 357, Kuwait

Airways Corporation v Iraq Airways Corporation [1994] 1 Lloyd's Rep 276 and Patel v Patel [2000] QB 551.

In the Yuval case, in a passage which was subsequently followed in the Kuwait Airways case, Lord Denning MR put the underlying principle in this way (at p 361):

> "On those authorities, it seems to me that in order to deprive a defendant of his recourse to arbitration a "step in the proceedings" must be one which impliedly affirms the correctness of the proceedings and the willingness of the defendant to go along with a determination by the Courts of law instead of arbitration".

More recently , this court considered section 9(3) of the 1996 Act in Patel v Patel. Lord Woolf MR said (at p 555G) that the old law was conveniently summarised in Mustill & Boyd, Commercial Arbitration, 2nd edition (1989) p 472, where the editors said:

> "The reported cases are difficult to reconcile, and they give no clear guidance on the nature of a step in the proceedings. It appears, however, that two requirements must be satisfied. First, the conduct of the applicant must be such as to demonstrate an election to abandon his right to stay, in favour of allowing the action to proceed. Second, the act in question must have the effect of invoking the jurisdiction of the court. "

As we read Lord Woolf's judgment, a similar approach should be adopted under the 1996 Act. In the same case (at p 558B) Otton LJ approved the following statement at paragraph 6.19 of Merkin, Arbitration Law:

> "The old authorities, which remain good law under the Act of 1996, established the following propositions …. (e) An act which would otherwise be regarded as a step in the proceedings will not be treated as such if the applicant has specifically stated that he intends to seek a stay."

Applying those principles, the judge held that Radio Design had not taken a step in the proceedings within the meaning of section 9(3) of the 1996 Act. We entirely agree. The facts are shortly these. Radio Design issued an application for a stay on 6th December 1999. On 22nd February 2000 the application was amended to refer expressly to section 9 of the 1996 Act and to make the assertion that Radio Design had filed an acknowledgment of service but that it had "not taken any step in the action (such as filing a defence) to answer the substantial claim". Both parties served evidence including evidence of Swedish law, although by the time the matter came before the judge it was agreed that there was no difference between English and Swedish law as to the principles applicable to the questions who were parties to the agreement and what the agreement meant.

Before the application was heard by the master, on 2nd May 2000, Radio Design issued a further application notice in which it recited the fact that an application for a stay had been made and continued:

> "In the event that its application for a stay is unsuccessful, the first defendant [ie Radio Design] applies for summary judgment against the claimant …."

The ground was that under Swedish law the claim had no real prospect of succeeding because under Swedish law a company is not liable for misrepresentations made on its behalf in connection with an issue of shares.

It appears to us that that application was not a "step in the proceedings" on the basis of the principles set out above. Thus, it did not (in the words of Lord Denning) express the willingness of Radio Design to go along with a determination of the courts instead of arbitration. On the contrary, it made it clear that the application for summary judgment was only advanced "in the event that its application for a stay is unsuccessful". In Merkin's words,

approved by Otton LJ, the application made it clear that it was specifically seeking a stay, with the result that a step which would otherwise be a step in the proceedings, namely an application for summary judgment, is not so treated.

Thereafter the master heard evidence of Swedish law which covered the issues raised in both summonses, which were heard at the same time. It was no doubt thought by both parties and the court that that was a sensible step because there was a considerable overlap between the issues. No-one objected and CTIL did not assert that Radio Design could not now make its application for a stay because it had taken a step in the proceedings within the meaning of section 9(3) of the 1996 Act. Radio Design's skeleton argument before the master made it clear that the application for summary judgment was only being made "in the event of the Court refusing such stay".

The hearing took place before the master on 14th and 15th June 2000 and he reserved judgment. He gave judgment on the stay on 27th June and asked the parties whether in view of that judgment either party wanted him to deliver judgment on the summary judgment application. Both parties invited him to do so in case his judgment on the stay was set aside on appeal. He handed down his judgment on that question on 31st July 2000. He made an order dismissing the action, but it is now agreed that that order should not have been made because the action had been stayed.

The judge heard the appeal against the stay on 18th and 19th January 2001. He handed down his judgment on 16th February and refused to hear an appeal against the master's second order. He did, however, expressly discharge the order, no doubt in the light of his decision that CTIL's claim must be heard by arbitration in Sweden.

We have already expressed our view, in agreement with the judge, that Radio Design did not take a step in the proceedings when it made its application for summary judgment on 2nd May. Nor, in our judgment, did it do so thereafter. The hearing before the master was conducted on the same basis as set out in the summons, namely that Radio Design's application for summary judgment was being made only if a stay was refused. We do not think it can fairly be held that that position changed when the parties asked the master to deliver a judgment on the summary judgment application because they only did so in case an appeal against the stay failed. There was equally no change before the judge.

In short, Radio Design has at no stage indicated a willingness that the courts should determine CTIL's claims instead of arbitrators. On the contrary, it has asserted throughout that the action should be stayed under section 9(4) of the 1996 Act. We would therefore dismiss the appeal on this ground.

Conclusions

For the reasons set out above we dismiss CTIL's appeal on all three grounds and uphold the order of the master and the judge that the action be stayed under section 9(4) of the 1996 Act so that it can be arbitrated in Sweden.

Order: Appeal dismissed; first defendant awarded costs of the appeal; costs to be subject to detailed assessment by a costs judge if not agreed.

(Order does not form part of the approved judgment)