GIBSON DUNN–OSCOLA COMMERCIAL LAW MOOT

MOOT PROBLEM AND INFORMATION

Michaelmas Term 2021

IN THE SUPREME COURT OF THE UNITED KINGDOM
ON APPEAL FROM THE COURT OF APPEAL (CIVIL DIVISION)

BETWEEN:

CIRDAN SHIPPING LTD (Appellant)
– and –
MAGUS HOLDINGS PLC (Respondent)

STATEMENT OF AGREED FACTS

Cirdan Shipping Ltd

1. Cirdan Shipping Ltd ("Cirdan") is an Anglo-Russian integrated shipping company. It was established in 1906 in London and is currently one of the world's largest container shipping lines and vessel operators in the world. It has its main offices in London and Moscow.

Whitfoot & Co

2. Whitfoot & Co ("Whitfoot") is a leading American professional services firm that provides a range of services from business consultancy to accountancy. Whitfoot has offices in 84 locations all over the world, including national offices in London, Paris, Beijing, and Moscow. These offices work closely together on their different projects, with members of a national office often joining a team from another national office to provide specialist advice on a particular project.

Allegations of fraud

3. In 2020, the coronavirus pandemic resulted in a decrease in global shipping tonnage. Cirdan was badly hit by the pandemic and was facing liquidity issues. In a bid to stay afloat, it retained the services of Whitfoot to provide advice on how to obtain further liquidity. Cirdan has retained the professional services of Whitfoot over the course of ten years and continues to trust them on all professional matters. This time, however, instead of engaging the services of Whitfoot's London office as they had done in the past, they engaged the services of Whitfoot's Moscow office. To expedite matters, the Whitfoot team was seconded to Cirdan and was issued with temporary employee passes and email accounts.

4. The Whitfoot team on this project is headed by one Mr Dmitri Bryzgalov. None of the members on the Whitfoot team are registered members of the Russian bar. However, they have had much experience advising on short-term loans and are familiar with the legal intricacies surrounding such loans and have previously advised Cirdan on similar matters previously given that they have been attached to Whitfoot's London team to work on Cirdan's matters.

5. On 6 July 2020, Whitfoot advised Cirdan to obtain a short-term loan from the UK bank, Magus Holdings Plc ("Magus"), to tide over this period, amongst other measures. Cirdan took the advice and retained a regional solicitors' firm, Sackville, Cotton and Dain ("Sackville"), to advise them on the impending transaction. This is the first time Cirdan engaged the services of Sackville as they were unwilling to pay for the high rates of their usual solicitor. Sackville's structured finance partner Ms Dorothy Dimholt was in charge of the transaction.

6. On the morning of 13 July 2020, the head of Cirdan's legal team, Mr William Banks, sent an email ("Email 1") entitled "Cirdan's assets relating to Magus loan" to both Mr Bryzgalov and Ms Dimholt. The email reads:

> "Dear Dmitri and Dorothy,
>
> Thank you for agreeing to work on the transaction. As you know, in order to obtain the loan from Magus, we will need to prepare our financial accounts and list of our assets for Magus' review. It appears that one of our ships, *The Mirkwood*, has been included on our preliminary list of assets.

> However, *The Mirkwood* was due in Hong Kong two days ago and has not arrived yet. Its last reported location was off the coast of Sabah and we currently cannot establish any communications with her crew. There are indications that she has sunk although there is such no confirmation as of yet.
>
> Dmitri, could you please advise Dorothy on whether in your experience, companies have been sued for misrepresentation for including such assets in their list of assets such that Dorothy can better advise us on the matter? Thank you!"

7. At 2pm the same day, Mr Bryzgalov sent his reply to all parties ("Email 2"), stating:

> "Dear William and Dorothy,
>
> I see no problem given our previous experience."

8. At around the same time, Ms Dimholt sent her reply to all parties ("Email 3"), stating:

> "Dear William and Dmitri,
>
> According to our research, that might constitute misrepresentation."

9. Cirdan's legal team ultimately opted to follow the advice of Mr Bryzgalov. Records disclosed to the court indicates that the legal team reached the conclusion almost immediately and had "practically ignored" Ms Dimholt's advice given their "trust in Whitfoot given [their] long-term association with the firm.".

10. At 9am the next day, Cirdan's legal team sent off a list of assets to Magus which included *The Mirkwood*. The loan was subsequently approved on 20 July 2020 after lengthy negotiations with Magus.

11. On 27 July 2020, it was confirmed that *The Mirkwood* had indeed sunk. Cirdan immediately released a press release, stating:

> "We have received unfortunate news yesterday that *The Mirkwood* has sunk off the coast of Sabah with all hands. We would like to express our deepest condolences to the families of all sailors on board."

12. Cirdan's financial position deteriorated further, and Magus sought a way to recall their loan. Magus' legal team received Cirdan's press release and found out from the Marine Department of Hong Kong that *The Mirkwood* had not called into port on time three days before the list of assets were sent to Magus.

13. On 30 July 2020, Magus wrote to Cirdan, seeking to rescind the contract. They alleged that Cirdan had misrepresented the fact that *The Mirkwood* was in their possession when they had no reasonable ground to believe that it was. Cirdan replied on the same day, asserting that they had reasonable grounds to do so.

14. Magus then filed a suit in the High Court against Cirdan, alleging misrepresentation and seeking to rescind the contract. In doing so, they sought disclosure of Emails 1 and 2 as evidence of Cirdan's knowledge of the circumstances and that they had no reasonable grounds to believe that *The Mirkwood* was still in their possession. Cirdan argued that the emails should not be disclosed due to legal advice privilege, which would bar the disclosure of the emails, while Magus argued that legal advice privilege does not extend to Whitfoot.

15. Mr Justice Andrew Williams, who heard the case in the first instance, delivered the judgment on 2 November 2020. His Lordship held that legal advice privilege prevented the disclosure of the three emails. In particular, his Lordship held that:

    a. "I am bound by the case of *PJSC Tatneft v Bogolyubov* [2020] EWHC 2437 (Comm) ("*Bogolyubov*") and hold that Whitfoot's Russian team was acting in the capacity of a lawyer advising on legal issues. Even though they were not members of the Russian bar, this does not prevent legal advice privilege from applying."

    b. "In any case, even if I am wrong on the first point, I am bound by *Civil Aviation Authority v R (on the application of Jet2.com Ltd)* [2020] EWCA Civ 35 ("*Jet2*") and hold that the three emails here were multi-addressee emails where the dominant purpose was to seek legal advice from the lawyers from Sackville".

16. Magus was granted leave to appeal to the Court of Appeal. In the Court of Appeal, counsel for Magus argued that *Bogolyubov* should be distinguished from the instant case, and if the cases cannot be distinguished, *Bogolyubov* should be overruled. They further argued that the dominant purpose was not to seek advice from the Sackville lawyers, but to seek legal advice from Whitfoot which was not covered by legal advice privilege.

17. Counsel for Cirdan argued that there is no need to draw a distinction between the two cases and *Bogolyubov* should not be overruled. They argued that the dominant purpose test has been fulfilled.

18. On 29 March 2021, Lord Justice Rowland handed down a unanimous judgment of the court in favour of Magus. The court held that:

    a. "While *R (on the application of Prudential plc and another) v Special Commissioner of Income Tax and another* [2013] UKSC 1 ("*Prudential*") seems to provide support for the position in *Bogolyubov*, those statements were *obiter* and the issues were not fully explored. We are of the opinion that *Bogolyubov* potentially creates a loophole in the rule in *Prudential* where individuals could seek legal advice, as they did in this case, from the foreign offices of an English firm whose members are not qualified lawyers in that jurisdiction, and have such advice be potentially protected by legal advice privilege. This is inconsistent with the reasoning of the majority in *Prudential*,

which prizes legal certainty. Seeking advice from unqualified charlatans does not in any way promote legal certainty."

b. "For that reason, we hold that *Bogolyubov* should be distinguished from the instant case on the basis that in *Bogolyubov,* the in-house lawyers were at least legally trained whereas in the instant case, the members of the Whitfoot team had no formal legal training and it cannot be said that their function was to provide legal advice. If such a distinction is untenable, then *Bogolyubov* should be overruled. There is no need to prefer one solution over the other in the instant case—both will yield the same result."

c. "It cannot be said that the dominant purpose of Email 1 is to seek legal advice from the Sackville lawyers. Given Cirdan's close history with Whitfoot and how quickly they adopted Whitfoot's advice while rejecting Sackville's advice, it appears that Cirdan is merely abusing the judgment in *Jet2* to obtain legal advice privilege for communications with an advisor to which legal advice privilege would not have otherwise applied had they just written to Whitfoot directly. Cirdan did so by writing to both Whitfoot and Sackville and instructing Whitfoot to "provide information" to Sackville when in reality Cirdan had just adopted Whitfoot's opinion wholesale. Even if the dominant purpose test is fulfilled here, the very fact that legal advice privilege might apply to legal advice provided by an entity could perhaps necessitate a re-examination of the ambit of the rule in *Jet2*."

d. "As for Email 2, the nature of the content appears to be legal advice given by a non-lawyer. This does not appear to be "part of a rolling series of communications with the dominant purpose of instructing the lawyer". Therefore, legal advice privilege should not be granted."

19. On 14 July 2021, Cirdan was granted leave to appeal to the Supreme Court of the United Kingdom on the following grounds:

a. The Court of Appeal erred in holding that the instant case could and should be distinguished from *Bogolyubov,* and that *Bogolyubov* should be overruled.

b. The Court of Appeal erred in holding that the dominant purpose test as was laid down in *Jet2* was not fulfilled.

Competition Information and Rules

Registration Information

The Gibson Dunn-OSCOLA Commercial Law Moot ("the Moot") is open to all Oxford students (including law, non-law, undergraduate and postgraduate students). Winners of previous iterations of the Moot, members of the OSCOLA Committee involved in organising the Moot, and individuals approached to judge the Moot may not compete.

To register, each team of two should complete the registration form at https://forms.gle/159h35ba9N6zfWCb7. Registered teams will be assigned a team number by the Convenor.

Following registration, teams are to file their written submissions for **BOTH** the Appellant and the Respondent electronically by attaching the documents in PDF format to an email to info@oscola.org. The email should also specify the team's number as well as which team member will be mooting as Leading Counsel and which as Junior Counsel.

The deadline for receipt of written submissions is **Week 6 Sunday, 14 November 2021 at 11.59pm GMT**. Teams will be informed by **Week 6 Wednesday, 17 November 2021** whether they have progressed to the oral rounds of the competition.

Queries and clarifications are to be submitted by email to info@oscola.org.

Written Submissions

Participants should form teams of two and should prepare written submissions (skeleton arguments), due by **Week 6 Sunday, 14 November 2021 at 11.59pm GMT**. If participants are unable to find a partner, they may contact the OSCOLA Committee at info@oscola.org, which will do their best to find them a partner. Participants must prepare written submissions for **BOTH** the Appellant and the Respondent.

Citable cases

- *In Re Duncan* [1968] 2 WLR 1479
- *Balabel v Air India* [1988] 1 Ch 317
- *Three Rivers DC v Bank of England (No. 5)* [2003] EWCA Civ 474
- *Three Rivers DC v Bank of England (No 6)* [2004] UKHL 48
- *Dadourian Group International Inc v Simms* [2008] EWHC 1784 (Ch)
- *Director of the Serious Fraud Office v Eurasian Natural Resources Corporation Limited* [2018] EWCA Civ 2006

Participants are only allowed to cite the six cases listed above, in addition to any cases that have been cited in the Statement of Agreed Facts. Participants may cite any number of academic authorities or legislation.

The written submission for the Appellant and Respondent must each not exceed two A4 pages. Written submissions must be typed in 12 pt Times New Roman, with 1.0 line spacing and with margins of no less than 2.5cm.

Written submissions must be clearly labelled with the team's number (as assigned by the Convenor) but must not contain the names of the team members. This can be noted in the top margin of written submissions accompanied by 'A' or 'R' denoting that the submission is for the Appellant and Respondent respectively. For example, the Appellant submission for Team 10 should have "10A" typed in the top margin. Nothing else should be written in the margins.

Oral Rounds

The top eight teams (selected on the basis of their written submissions) will proceed to the preliminary oral rounds on **Week 6 Thursday and Friday, 18 and 19 November 2021**, and will be assigned either the Appellant or Respondent side to represent. Skeleton arguments will be used and scored in oral rounds.

The four winning teams in the preliminary oral rounds will proceed to the semi-final, which will be held on the evening of **Week 7 Monday, 22 November 2021**. If more than two teams representing the same side proceed to the semi-final, a coin toss will be used to determine the side they represent in the semi-final.

The two winning teams in the semi-finals will proceed to the final, which will be held on **Week 7 Friday, 26 November 2021,** from **5pm GMT**. If both winning teams represented the same side in the semi-finals, a coin toss will be used to determine the side they represent in the final.

The final will be judged by **Penny Madden QC**, Co-Partner-in-Charge of the London office and Co-Chair of the International Arbitration Practice Group at Gibson, Dunn & Crutcher. Other judges may be confirmed at a later date.

Participants should keep these dates as free as possible to ensure they are available to compete. The specific timing of each moot will be confirmed closer to the oral rounds with the availability of mooters and judges taken into consideration.

Format and Speaking Order

All moots, except the final, will run virtually on the Microsoft Teams platform. The final will be held on the Zoom platform.

For each oral round, each speaker shall have up to 10 minutes to make their submissions, and there shall be no right of reply or sur-reply. The speaking order shall be:

a. Leading Counsel for the Appellant
b. Leading Counsel for the Respondent
c. Junior Counsel for the Appellant
d. Junior Counsel for the Respondent

For the avoidance of doubt, Leading Counsel should make submissions for the first ground of appeal, while Junior Counsel should make submissions for the second ground of appeal.

Awards and Prizes

The prize for the winning team in the final shall be £200, with £100 for the runner-up. The judges of the final will also identify one mooter in the final as the Best Advocate.

Competition Documents

All documents received by competitors, including the moot problem, must not be distributed, reused or adapted after the Moot. The copyright in all documents is in the Oxford Society for Commercial Law.

OSCOLA is extremely grateful to Gibson, Dunn & Crutcher as the name sponsor of the Moot and Mr Tan Yan Shen as the author of the MT21 moot problem.