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The end of the Shareholder Privilege Rule

On 24 July 2025 the Privy Council handed down 2 judgments dealing with appeals from Bermuda arising out of a dispute over a merger in 2021. The second of these involved an attack on the long-established rule that a company could not assert legal advice privilege against its shareholders to prevent inspection of disclosable documents (the Shareholder Rule). Both the first instance Judge (the Chief Justice of Bermuda) and the Court of Appeal upheld the Rule on the basis that although there was no binding Bermudan authority to that effect, as the Rule was a long-accepted part of English law it should also apply in Bermuda.

Between the Bermudan Court of Appeal's decision and the hearing before the Privy Council (in March 2025), Aabar Holdings v Glencore [2024] EWHC 3046 (Comm) decided that there was no binding authority that the Rule was a part of English law and Picken J declined to do so. However, he unsurprisingly granted permission to appeal and also authorised the little-used "leapfrog" procedure by which permission can be sought to appeal direct to the Supreme Court. However, the Supreme Court declined permission because the Privy Council was very soon to hear argument on the issue in the appeal from Bermuda, and that it could, having done so, make a Willers v Joyce order, which would resolve the issue under English law.

The Privy Council's analysis of the supposed existence of the Shareholder Rule began with the acknowledged fundamental importance of legal professional privilege and the commensurate need for exceptions (even if provided by statute) to be clearly identified [20-25]. The particular issues that arise where there is a joint retainer (and hence a joint privilege) were set out at [26-27].

The inception of the Shareholder Rule in the late 19th century, its basis in the (flawed) analogy with the position between Trustees and Beneficiaries, and its subsequent acceptance over time is dealt with at [28-44], the final paragraphs recording Picken J's decision which "probably came as a considerable surprise". However, given that the cases cited by the Privy Council almost entirely mirror those relied on by Picken J (who also quoted extensively from the Bermudan Court of Appeal's judgments), any surprise can only have been that it was a first instance Judge who (adopting the Privy Council's terminology at [82]) declared that "like the emperor ,,,it [was] time to recognise and declare that the Rule is altogether unclothed."

It was accepted before the Privy Council (as it had been before Picken J) that the original basis on which the Shareholder Rule had been based (a supposed proprietary interest of shareholders in

the company's assets) could no longer apply [80-81]. What required decision was whether the Rule (in some form) remained justified by a joint interest privilege arising out of any joint interest shared by the company and the shareholder(s) concerned.

The Privy Council rejected this alternative argument (also rejected by Picken J). It held that there was "no, or at least no sufficient analogy with those [relationships that have been recognised as attracting joint privilege] to justify its inclusion within the joint interest family of relationships" [84]. To argue that what is good for the company is generally good for shareholders is a "serious oversimplification" not least because it assumes that the interests of all shareholders are always (or even usually) aligned, when that is evidently not so [85]. It is a function of the directors to navigate such tensions, and they should be free to seek legal advice without the risk of it being disclosed [88]. The Shareholder Rule would not only fall foul of principled legal objections but would inhibit that role [89].

A final point against the Shareholder Rule was that it tended to work against the contractual relationship between a company and its members. That relationship usually sets out the limits on the shareholder's right to company documents and arguing that the same relationship gives rise to the right to see privileged documents (which would otherwise not be accessible) struck the Privy Council as "strange" [90].

On these bases the proposition that the shareholder/company relationship justified a joint privilege was rejected [91].

In the Bermudan Court of Appeal, it had been suggested that a more nuanced approach was required because the true rationale of the Shareholder Rule was an "equitable tempering of the strict consequences of the separate personality of a company".

The Privy Council roundly rejected both the rationale and the approach. The "insuperable problem with that approach" was that it deprived the company (and its directors) of any degree of certainty as to what legal advice would or would not be disclosable, leaving "a sea of uncertainty" [93-98].

This left the question of how the Privy Council's decision should apply in English law. There was some doubt whether the classic conditions for a Willers v Joyce declaration were satisfied, because it was unclear whether there was binding Court of Appeal authority contrary to the judgment being handed down, but the perceived risk – which must have been no more than theoretical - that an appeal against Picken J's decision might succeed, led to a declaration that "this decision should be regarded by courts of England and Wales as abrogating the Shareholder Rule for the purpose of litigation in those courts" [108-113].

So, in less than 8 months, Picken J's judgment has received endorsement at the highest judicial level and the Shareholder Rule is no more.

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