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ALERT MEMORANDUM

The Emperor Unclothed — The Abolition of The Shareholder Rule

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In its landmark decision in *Jardine Strategic Ltd v Oasis Investments II Master Fund Ltd and Others (No 2)*, the Judicial Committee of the Privy Council ("JCPC") has abolished the longstanding "Shareholder Rule" exception to the law of privilege.[1] The JCPC held that the Rule — which prevented a company from asserting legal advice privilege against its shareholders, save in relation to documents produced for the dominant purpose of litigation between the company and those shareholders — is, and always has been, "*a rule without justification*" and "*Like the emperor wearing no clothes in the folktale, it is time to recognise and declare that the Rule is altogether unclothed.*"

The decision of the JCPC is the latest, and likely last, in a run of recent decisions concerning the existence and scope of the Shareholder Rule as a matter of English law.[2] Although an appeal concerning Bermudian law, the JCPC accepted the appellant company's invitation to issue a *Willers v Joyce* direction, thereby declaring that the domestic courts of England and Wales should treat the JCPC's decision in *Jardine* as also representing the law of England and Wales. As such, the Shareholder Rule no longer forms any part of the laws of England and Wales and companies are entitled to assert legal advice privilege against their shareholders, save where the usual exceptions apply. An appeal from the English High Court's decision regarding the Shareholder Rule in *Aabar Holdings SARL v Glencore Plc*[3] has now been vacated, the outcome of that appeal having been rendered academic.

[1] Jardine Strategic Ltd v Oasis Investments II Master Fund Ltd and Others (No 2) [2025] UKPC 34
[2] See, in particular, Various Claimants v G4S Plc [2023] 2863 (Ch) and Aabar Holdings SARL v Glencore Plc & Ors [2024] EWHC 3046 (Comm)
[3] Ibid. See further Cleary Gottlieb, High Court Removes Shareholders' Right to Inspect a Company's Privileged Documents (6 December 2024), https://www.clearygottlieb.com/-/media/files/alert-memos-2024/high-court-removes-shareholders-right-to-inspect-a-companys-privileged-documents.pdf and Cleary Gottlieb, Developments in UK Disputes: Implications for 2025 and Beyond (28 February 2025), https://www.clearygottlieb.com/-/media/files/alert-memos-2025/developments-in-uk-disputes-implications-for-2025-and-beyond.pdf. The High Court had authorised a "leap-frog" appeal to the UK Supreme Court, but the Supreme Court rejected the leap-frog owing to the pending Privy Council appeal.

Factual Background

The case arose from the amalgamation of two companies within the Jardine Matheson corporate group — Jardine Strategic Holdings Ltd and JMH Bermuda Ltd — resulting in the formation of the appellant company, Jardine Strategic Limited (the "Company").

The amalgamation led to the cancellation of all shares in Jardine Strategic Holdings Ltd, with those shareholders who had voted against the amalgamation being offered $33 per share as "fair value". Dissatisfied with this valuation, a group of shareholders initiated appraisal proceedings under the Bermuda Companies Act 1981, seeking a judicial determination of the fair value of their shares. As part of the litigation, the claimant shareholders sought disclosure of legal advice received by the Jardine Matheson group during the valuation process. The Company resisted inspection of these documents on the basis that they were covered by legal professional privilege, in particular legal advice privilege.

The claimant shareholders accepted that the advice received by the group was of a type that would ordinarily be protected by legal advice privilege from production to the other party in litigation, but relied on the Shareholder Rule as an exception to the Company's right to assert privilege.

Decisions of Lower Courts

At first instance, the Chief Justice held that the Company was not entitled to maintain legal advice privilege in respect of the advice on the basis of the Shareholder Rule. This was upheld on appeal, with the Bermudian Court of Appeal holding that the Shareholder Rule was an established class of joint interest privilege in the application of which there was no reason why Bermuda should not follow England and Wales.

The decision of the JCPC

The issue before the JCPC

The Company's appeal to the JCPC did not simply challenge the transposition of the Shareholder Rule into Bermudian law, but argued that the Rule should no longer be recognised as forming part of English law.

The central issue for the JCPC was therefore whether the Shareholder Rule should continue to exist in some form. The JCPC noted that this issue had been carefully framed "*to accommodate any possible basis by which legal advice privilege might be resisted*" between the claimant shareholders and the Company. This was necessary because over the course of its almost 140 year existence, the stated justification for the Shareholder Rule had evolved. Historically, the Rule had been justified on the basis that shareholders in a company were in an analogous position to beneficiaries under a trust and that the shareholders therefore had a proprietary interest in the company's assets, including funds used to pay for the legal advice. More recently, however, the Rule had been justified on the basis of joint interest privilege — in other words, that the company-shareholder relationship should be treated akin to relationships such as trustee-beneficiary, principal-agent, or partners, and therefore benefit from the joint interest privilege that such relationships attract. This was, as noted, the basis on which Bermudian Court of Appeal had upheld the Chief Justice's first instance decision in *Jardine.*

Analysis and conclusions

The JCPC undertook a comprehensive review of the origins and justifications for the Shareholder Rule, both under English law and the law of other common law jurisdictions.

Following this review, the JCPC concluded that the Shareholder Rule forms no part of the law of Bermuda, and that it ought not to continue to be recognised in England and Wales either:

- The JCPC rejected the historical proprietary justification for the rule, observing that it was wholly inconsistent with modern company law, which recognises the company as a separate legal entity such that shareholders have no proprietary interest in the funds used to pay for the advice.

- The JCPC also rejected the joint interest privilege justification for the Rule, noting that this was not the original justification and that in any event it could not sensibly be said that there was always a community of interest between a company and its shareholders. The JCPC noted that the interests of companies and shareholders are not always aligned and that shareholders are not a homogeneous group with a single shared interest. *Jardine* was a case in point, given the fundamental divergence of interest between the minority shareholders (who were to be paid out at fair value) and the majority shareholders (who were to receive shares in the Company and were therefore, in effect, paying for the minority's shares): while the minority's interests would be favoured by a high valuation, the majority's and the Company's interests favoured a low price. The JCPC therefore held that the company-shareholder relationship should be removed "*from the growing family of relationships qualifying for what is now called joint interest privilege*".
- The JCPC also considered and rejected a more nuanced, case-by-case approach, advanced by the Bermuda Court of Appeal for occasionally depriving a company of legal professional privilege in litigation with its shareholders. This approach would allow shareholders to override privilege where, on the facts, there was a "*sufficient joint interest*" in the subject matter of the legal advice. The JCPC found this approach to be problematic as it would introduce unacceptable uncertainty. Directors and companies would be unable to predict, at the time they seek legal advice, whether that advice would be protected from disclosure in future litigation with shareholders. The JCPC observed that the need for certainty as to whether legal advice will be privileged or not demands a bright line, otherwise it will fail to serve the objective of encouraging the taking of legal advice.

Practical implications

The result of the High Court's decision in *Aabar* was a patchwork of first instance decisions regarding both the existence and scope of the Shareholder Rule. The decision of the JCPC in *Jardine* brings certainty and clarity for companies, shareholders, and their advisors while at the same time re-emphasising a fundamental tenet of company law — that the company is a separate legal entity.

As noted by the JCPC, the directors of a large modern sophisticated companies have "*the constant and difficult task of finding their way to a reliable perception of their company's best interests while paying appropriate attention to the interests and wishes of their many different classes of stakeholders, when making decisions, large and small, about the management and direction of the company's business. Many of those decisions will need, or at least benefit from, candid, confidential, legal advice*". As a result of the decision in *Jardine*, companies can now seek and receive that legal advice safe in the knowledge that it will not by default be disclosable in the event of future litigation with its shareholders.

The judgment will be well-received by companies currently facing shareholder claims, since it removes a route for accessing a company's privileged documents which was previously potentially available to shareholders. The decision will be especially impactful for large public companies, who were particularly exposed to risks from the exercise of the Shareholder Rule. Shareholders pursuing litigation against a company will now need to find supporting evidence for their claim in non-privileged documents, and will not be able to delve into the company's legal advice.

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