ALERT MEMORANDUM

# High Court Removes Shareholders' Right to Inspect a Company's Privileged Documents

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The Commercial Court has held that a long-established exception to privilege no longer applies[1]. The effect of the exception, known as the Shareholder Rule, had been that a company could not assert privilege against its own shareholder, save in relation to documents that came into existence for the purpose of litigation against that shareholder.

The Commercial Court rejected that joint interest privilege provided a rationale for the Rule, and found it a "*startling*" prospect that a large public company might be unable to assert privilege against a vast, diverse and mutable group of its shareholders on the purported basis that the interests of the company and its shareholders must generally be sufficiently aligned. The decision seeks to avoid the "*harm and disruption which might be caused by the exercise of the* [Shareholder Rule]…*in large companies*".

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In the alternative, if the Court was wrong in holding the Shareholder Rule was no longer to be applied, then the Rule: (i) was not a universal principle and its application would be fact-specific; (ii) could apply to both legal advice privilege and litigation privilege but not to without prejudice privilege; (iii) could apply regardless of whether or not a shareholder was a direct/registered and/or current shareholder in the company; and (iv) may extend to privileged documents belonging to subsidiary companies within a company's corporate group.

As shareholder claims continue to gain traction in this jurisdiction, there are significant consequences to the Court's finding that shareholders have no power to override a company's fundamental right to privilege. Although recent first instance decisions had highlighted the Shareholder Rule's "*shaky foundation*"[2] and narrowed its application, the principle remained in place and it had been considered it was "*probably for the Supreme Court to overturn it*"[3]. The Commercial Court has now grasped the nettle, although it remains to be seen whether this decision will be appealed.

[1] *Aabar Holdings SARL v Glencore Plc & Ors* [2024] EWHC 3046 (Comm)
[2] *Various Claimants v G4S Plc* [2023] EWHC 2863 (Ch)
[3] *Various Claimants v G4S*

## Factual Background

This decision arose in the context of a shareholder group claim brought against Glencore Plc ("Glencore") and its former directors, which relates to allegations of misconduct by certain subsidiaries in the Glencore group which took place in Africa and South America, as well as incidents of oil price manipulation. The various claimants contend that, as a result of the misconduct, certain documents issued by Glencore contained misstatements and/or omitted material matters and that the claimants have consequently suffered loss on their investments in Glencore. The claimants have brought the proceedings under ss90 and 90A of the Financial Services and Markets Act 2000.

Following a case management conference in May 2024, Glencore indicated it intended to withhold a range of documents from the claimants on the grounds of privilege. One of the claimants (Aabar Holdings S.à.r.l. ("Aabar")) sought to challenge Glencore's privilege claims on the basis they were a breach of the "Shareholder Rule". The Commercial Court convened a hearing to resolve the privilege dispute which focused on four questions:

— Does the Shareholder Rule exist in English law?

— If so, does the Shareholder Rule apply to each of (i) legal advice privilege; (ii) litigation privilege; and (iii) without prejudice privilege?

— Does the Shareholder Rule extend to Aabar notwithstanding that it:

  - was not a registered shareholder of any shares in Glencore at any material time, but, rather, claims to be the successor to the rights of an ultimate beneficial owner of shares in Glencore that held intermediated securities through CREST between 2011 and 2020; and
  - does not currently hold any interest in any Glencore shares?

— Does the Shareholder Rule extend to privileged documents belonging to subsidiary companies within Glencore's corporate group?

## The Parties' Arguments

### Aabar's Position

Broadly speaking, Aabar's position was that the Shareholder Rule is a well-established principle of English law that has existed for over 135 years and which has been approved by both the Court of Appeal and the Supreme Court. The principle's original justification was that a shareholder has a proprietary interest in a company's assets, and any legal advice taken by the company had been paid for from the company's funds. However, Aabar argued the foundation of the Shareholder Rule in modern times was the principle of joint interest privilege (which, Aabar contended, arises where two parties have a sufficient joint interest in the subject matter of a privileged communication so as to prevent one from asserting privilege against the other).

English law, in Aabar's submission, treats the shareholder as having a joint interest with the company in communications concerning the administration of the company's affairs and communications made for the mutual benefit of company and shareholders. The shareholders' interests, it was argued, are in general aligned with the company's; shareholders have invested their capital in the company which is at risk if the company fails, have the primary and a direct economic interest in the company's performance and the application of its assets, and are those for whose benefit a company is primarily run because if the company succeeds it will produce funds distributable to shareholders.

### Glencore's Position

Glencore argued the origins of the Shareholder Rule in the late 19th century and its subsequent development did not support Aabar's arguments, and that the rule is anomalous, unprincipled and should no longer be applied. Additionally, it argued the concept of joint interest privilege cannot be relied on as an alternative or substitute justification for the Shareholder Rule.

## The High Court Decision

### Does the Shareholder Rule Exist in English Law?

The Court held that the Shareholder Rule does not exist for the reasons set out below.

*No compelling rationale in the authorities*

Although Courts have often treated the Shareholder Rule as well-established and of universal application, the Court found there was no compelling rationale for the principle in the authorities. It was noted that some recent decisions[4] have cast doubt on the application of the principle, and that the only appellate authority directly addressing the Shareholder Rule[5] has been said to be "*a curiously insubstantial case upon which to found this apparent doctrine of no privilege between shareholder and company*"[6].

Aabar conceded the Shareholder Rule could no longer be justified on the basis of a shareholder's proprietary interest in a company's assets. That rationale had been established in the 19th century before the Courts drew a clear distinction between a company and its shareholders and held that shareholders have no interest in the property of the company[7].

*No basis for the "joint interest" justification*

The Commercial Court went on to say there is also no binding authority which decides that the Shareholder Rule can be justified on the basis of joint interest privilege. The authorities contain little more than passing (and anyway *obiter*) comments on this topic in cases where the Shareholder Rule itself was not in issue and without independent analysis of the underlying basis for the rule.

The Court not only doubted whether the Shareholder Rule was underpinned by joint interest privilege, but also whether the concept of joint interest privilege itself has any independent existence. The Court expressed agreement with Glencore's submission that the concept is "*merely an umbrella term*" that describes various situations in which one party is unable to assert privilege against another on "*narrower and more conventional grounds*" – *i.e.* not as a result of a freestanding concept of joint interest privilege.

The Court noted that the circumstances in which joint interest privilege has historically been recognised are simply instances where a joint interest has been held to arise, – for example, as between: a trustee and beneficiary; a parent company and its wholly owned subsidiary; a company and its shareholders; a limited liability partnership and its members; a company and its director; and partners. Yet the Court was unconvinced that the authorities provide a proper foundation for the conclusion that a joint interest privilege exists in these circumstances.

The Court further observed that the justification for a right to inspect privileged documents in one of the above categories of relationship (e.g. a partnership) could not be read across to apply in another (e.g. company and shareholder). For example, in a partnership context, there is no need for a categorisation of joint interest privilege to explain why privilege cannot be asserted as between partners, as all partners have a share in the assets of the partnership and, additionally under s24 of the Partnership Act 1890, have an unfettered right of access in respect of all the partnership's information. In other words, there were no defining or unifying characteristics sufficient to enable it to be said that a joint interest privilege which arises in one situation, should be taken as arising also in another, different situation.

In case it was wrong that joint interest privilege was not a freestanding concept and so was incapable of providing a rationale for the Shareholder Rule, the Court also identified a number of reasons why (if it existed) the concept should not apply in a generalised sense to the relationship between companies and shareholders, including that:

— the authorities and legal commentaries provide no support for that position;

— a company has a fundamental right to privilege which cannot be overridden just because shareholders' interests may be generally aligned

[4] For example *Various Claimants v G4S, Sharp v Blank* [2015] EWHC 2681 (Ch)
[5] *Woodhouse & Co Ltd v Woodhouse* (1914) 30 TLR 559
[6] *Sharp v Blank*
[7] *Salomon v A Salomon & Co Ltd* [1897] AC 22

with the company's and because shareholders have a direct economic interest in the company's performance and the application of its assets. If that were the case, a company would be unable to assert privilege in a variety of other situations and against a number of other parties;

— directors are required to exercise their duties in order to promote the success of the company. The fact that the company's interests may be equated with the interests of its members as a whole, and that the directors must take account of those interests, cannot be a sufficient basis for granting shareholders a right to inspect the company's privileged documents. By analogy, when a company is insolvent, or of doubtful solvency, the directors must take account of the interests of the company's creditors, but that does not give creditors an equivalent right to inspect the company's privileged documents;

— outside of a litigation context, shareholders do not generally have any rights to access the company's documents, whether or not they are privileged. A shareholder's legal and economic interest is comprised of its contractual rights against the company under the company's articles of association. Glencore's articles of association (to which Aabar was taken to have agreed) contained a provision specifying that shareholders are not entitled to inspect the company's documents. It would be "*anomalous if Aabar and its fellow shareholders could subvert that agreement by commencing litigation against Glencore, thereby creating some joint interest that would not otherwise exist*";

— although in some cases a joint interest has been found to exist where legal advice was obtained for the benefit of two parties and the party obtaining the advice owed a duty to the other party to do so in a non-negligent way, the company-shareholder relationship cannot give rise to a joint interest on this basis because there is no such duty owed by the company and/or its directors to the shareholders;

— a company and its shareholders may have a joint interest in the ultimate success of the company and in profit maximisation, but that is not a justification for concluding that there is a blanket rule which operates to prevent companies from asserting their fundamental right to privilege. Glencore has a vast and constantly changing number of dematerialised shareholders. As the interests of those shareholders will vary widely (as between themselves as shareholders but also as between themselves and the company), it is difficult to see how there could be a sufficient joint interest on a generic basis as between the company and its shareholders such as to override privilege. It would be "*startling*" to expect that a company would be unable to assert privilege against such a potentially vast and differing group of shareholders, save only for documents that came into existence for the purpose of litigation against those shareholders; and

— applying joint interest privilege to the company/shareholder relationship risks undermining the public policy rationale for privilege. It could discourage directors from seeking legal advice when to do so would be consistent with the duties they owe to their company, because of concerns that any legal advice might be seen by a large number of third parties.

The Court also noted that if its primary conclusion was wrong and the Shareholder Rule did in fact exist, the principle was not a blanket rule and its application would be fact-specific. It went on to consider the remaining issues relating to how the Shareholder Rule should be applied, although it was not strictly necessary to do so in light of its conclusions on this first question.

**Does the Shareholder Rule apply to (i) legal advice privilege, (ii) litigation privilege and (iii) without prejudice privilege?**

The Court found the Shareholder Rule (if it exists) applies to legal advice privilege and litigation privilege, but not without prejudice privilege.

It was common ground between the parties that the Shareholder Rule would be capable of applying to both legal advice and litigation privilege. Aabar argued that the Shareholder Rule should also be applicable to without prejudice privilege (specifically, to written or oral communications made for the purpose of a genuine attempt to

compromise a dispute). The Court was not persuaded, as:

— documents which are subject to without prejudice privilege necessarily engage the interests of more than one party (the company and its counterparty) and "[e]*ven if the interests of a shareholder could be said to be aligned with those of the company, it does not follow there is also an identity of interest between the shareholder and the third party*". Nor would a third party ordinarily expect without prejudice communications with a company to be disclosed to the company's shareholders;

— an extension of the Shareholder Rule to without prejudice privilege could deter parties from engaging in settlement negotiations with companies, as any such negotiations would not be privileged as against the company's shareholders and would be disclosable in subsequent litigation; and

— a company may not unilaterally decide to waive without prejudice privilege and reveal the content of without prejudice communications to its shareholders. It is for both parties involved in without prejudice communications to decide whether they can be disclosed to others.

**Does the Shareholder Rule Apply to Aabar?**

Aabar was, at the relevant time, the sole shareholder in Commodities S.à.r.l. ("Commodities"), which was not a direct/registered holder of shares in Glencore but, Aabar alleges, was the ultimate beneficial owner of such shares which it held through CREST. Aabar alleges that it assumed all of Commodities' assets and liabilities upon the dissolution of Commodities under Luxembourgish law.

The Court found that (if it exists) the Shareholder Rule would apply to Aabar notwithstanding that: (i) it neither is nor was a direct/registered shareholder in Glencore; (ii) it is not a current shareholder in Glencore; and (iii) its interest in Glencore is as the successor to the rights of an ultimate beneficial owner of shares in Glencore.

*Aabar not being a direct/registered shareholder*

The Court held that restricting the Shareholder Rule to legal owners of shares only would be to "*over-emphasise*[] *form over substance*". The relevant question is whether the shareholder and company have a sufficient joint interest in the relevant communication. Such joint interest may arise by virtue of a shareholder's legal title to the company's shares, but may equally arise through a shareholder's beneficial ownership of the company's shares (which an ultimate investor enjoys in respect of shares held on an intermediated basis via CREST).

Indeed, the Court held that "[a]*ny joint interest between a shareholder and a company is predicated on the fact that the relevant communications are made for the company and the shareholder's mutual benefit in circumstances where shareholders have a shared economic interest in the company's performance and the administration of its affairs*". This applies irrespective of whether the shareholder is a legal owner of shares or holds a beneficial interest in them.

Additionally, drawing a distinction between registered owners and intermediated securities holders could lead to arbitrary consequences. For example, two claimant shareholders in the same proceedings against a company, with the same beneficial interest in shares, would be able to access different materials purely as a result of the mechanism by which they held those shares.

Similarly (and noting that intermediated holdings are becoming ever more prevalent), it would make little sense to conclude the Shareholder Rule would apply:

— only to the relatively small number of individuals and companies that are members of CREST and are recorded as shareholders on the CREST register, even though they may hold no beneficial interest in those shares and would have no economic interest in any litigation where the company's disclosure obligation arises; and

— not to the beneficial owners who, in fact, have the relevant joint interest with the company and the right to bring (and, indeed, economic interest in bringing) a claim.

*Aabar not being a current shareholder*

The Court was clear that the time for assessing whether or not there was a relevant joint interest is when the communication was made. As a result, the fact that Commodities sold its shares in Glencore in 2020 was not material. The Shareholder Rule would apply to communications made during the period in which Commodities was a shareholder.

*Aabar as successor to Commodities*

By the time of the hearing, the parties were in agreement that a successor in title stands in the shoes of its predecessor with respect to privilege, and so the Shareholder Rule would apply to Aabar, as Commodities' successor in title to the cause of action pursued against Glencore.

However, it was also common ground that, although a new shareholder may be treated as successor in title to the previous shareholder, the Shareholder Rule could not be invoked by a subsequent purchaser of shares in respect of privileged communications preceding the date of its acquisition of shares.

**Does the Shareholder Rule extend to privileged documents belonging to subsidiary companies within Glencore's corporate group?**

The Court held that, in principle, the answer to this question was "yes".

If the Shareholder Rule exists and is justified on the basis of joint interest privilege, the Court held it would be wrong to restrict the application of the Rule to a company and its direct shareholders on the purported basis that its indirect shareholders (*i.e.* further up the chain of holding companies) could not hold the requisite joint interest with the company. To the contrary, if a communication is relevant to the administration of the affairs of a subsidiary, it will also be relevant to the affairs and prospects of the subsidiary's parent company. Thus, where there is a chain of holding companies, and contrary to the prior decision in *BBGP v Babcock & Brown*[8], the ultimate subsidiary should not be able to assert privilege against any of those companies up to and including the ultimate holding company.

## Practical Implications

The judgment will be well-received by companies facing shareholder claims and is perhaps particularly relevant in the context of securities class actions. It removes a route for accessing a company's privileged documents which was previously potentially available to shareholders. The decision will be particularly impactful for large public companies, who stood to face the most disruption 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, or alternatively, seek to mount other more robust challenges to a company's assertions of privilege.

Prior to this decision, although the Shareholder Rule had been called into question recently, with the Court acknowledging its "*shaky foundation*"[9], the Court had stopped short of concluding that the Rule did not exist (instead refusing disclosure on case management grounds).[10] The current judgment therefore marks a significant departure from the status quo, not least because only last year the Court remarked that it was "*probably for the Supreme Court to overturn*"[11] the rule.

It remains to be seen whether the judgment will be appealed although, given the tension between a number of first instance decisions regarding the Shareholder Rule, it is a distinct possibility.

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[8] *BBGP Managing General Partner Ltd v Babcock & Brown Global Partners* [2011] Ch 296
[9] *Various Claimants v G4S*
[10] *Various Claimants v G4S*
[11] *Various Claimants v G4S*