"Shareholder Principle" Exception to Privilege Overturned as "*Unjustifiable*"

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Summary. In its recent decision in *Aabar Holdings S.á.r.l. v Glencore Plc* [2024] EWHC 3046 (Comm), the English High Court directly considered for the first time in more than a century the "Shareholder Rule"—an exception to the law of privilege that prevented a company from asserting privilege against its own shareholders. In his judgment, Picken J overturned the Shareholder Rule, holding that it is today "*unjustifiable*", based on erroneous interpretations of English company law and "*should no longer be applied*".

The case confirms that English companies, as entities that are legally distinct from their shareholders, are generally entitled to claim privilege as against those shareholders. This protection is likely to be of particular importance for companies in an era of increasing shareholder activism.

Background. Legal advice privilege and litigation privilege are fundamental principles in English law, allowing individuals and corporations to seek and obtain legal advice, and to prepare their cases in litigation and arbitration proceedings, by protecting such advice and preparatory documents from disclosure to any other party.

The "Shareholder Rule" was, however, an exception to these principles. Established in the 19th-century case *Gourard v Edison Gower Bell Telephone Co of Europe Ltd* (1888) and subsequently applied in the case of *Woodhouse & Co Ltd v Woodhouse* (1914), the Shareholder Rule said that a company was not permitted to assert privilege against its own shareholders and that instead shareholders would be entitled to seek disclosure of legal advice obtained by the company, save where there was a dispute between the shareholder and the company. The principle was based on the 19th-century understanding that shareholders, having contributed capital to the company, had a proprietary interest in the company's assets, including any legal advice the company had received.

The Shareholder Rule had, however, been criticised. Since the decision in *Gourard*, English company law developed to recognise that companies are legally distinct from their shareholders, and that shareholders do not have any direct interest in their

company's property (notably in the 1897 case *Salomon v A Salomon & Co Ltd*). Last year, in *Various Claimants v G4S Plc* [2023] EWHC 2863 (Ch), Michael Green J indirectly considered the Shareholder Rule as part of a decision made on other grounds and expressed that the rule had a "*somewhat shaky foundation*" and that he had "*doubts as to the justification now for such a principle*". The rule had also been described as "*anomalous*" by commentators.

The Decision. The issue arose for direct consideration in the context of a claim brought by Aabar Holdings S.á.r.l ("Aabar") against Glencore Plc ("Glencore") and other individuals pursuant to s.90 and s.90A of the Financial Services and Markets Act 2000, as part of a shareholder group litigation against Glencore. The parties disputed whether Glencore was entitled to assert privilege against the claimant shareholders or whether it was prevented from doing so by the Shareholder Rule.

In a detailed judgment, Picken J noted at [18] that in earlier cases "*the Shareholder Rule appears to have been justified on the basis that a shareholder has a proprietary interest in the company's assets and the advice taken by the company had been paid for from the company's funds*", akin to the position in respect of trustees and beneficiaries. Picken J held, however, that this "proprietary interest basis" was no longer correct in law, following the decision of the House of Lords in *Salomon v A Salomon & Co Ltd* that a company is a separate legal entity distinct from its shareholders (at [33]-[59]).

Aabar had argued in the alternative that the "modern rationale" for the Shareholder Rule was found in principles of "joint interest privilege". However, Picken J. also rejected this argument. He held at [93] that "*there is no binding authority which decides that the Shareholder Rule can be justified on the basis of joint interest privilege. What there is, in truth, amounts to little more than passing (and anyway obiter) comment in cases where the Shareholder Rule was not in issue…*"

The Judge continued to question whether "joint interest privilege" was a concept which had any independent existence in English law. He held (at [94]) that the concept is "*an umbrella term that has been used to describe a variety of different situations in which one party is unable to assert privilege against another, not because of there being any such freestanding concept but on other, narrower and more conventional grounds*". Picken J concluded at [105] that the concept of joint interest privilege "*as a freestanding or standalone species of privilege is not supported by the authorities*" but that in any event there was no justification for such a concept to apply to the relationship between shareholders and companies, which could restrict a company from asserting privilege against a shareholder.

Picken J therefore concluded at [117] that the "*Shareholder Rule is unjustifiable and should no longer be applied*." Instead, he confirmed that English law permits companies

to assert privilege against their own shareholders in the same way as privilege can be asserted against any third party.

Comment. This case brings welcome clarification to an important aspect of privilege law, which companies and shareholders are often required to grapple with in the context of litigation. The judgment reiterates the importance of the right to privilege from which the courts will not readily detract and confirms that the companies are able to benefit from the protections of legal privilege when seeking legal advice or preparing their positions for litigation or arbitration.

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