Controversial ‘Shareholder Rule’ no longer holding weight

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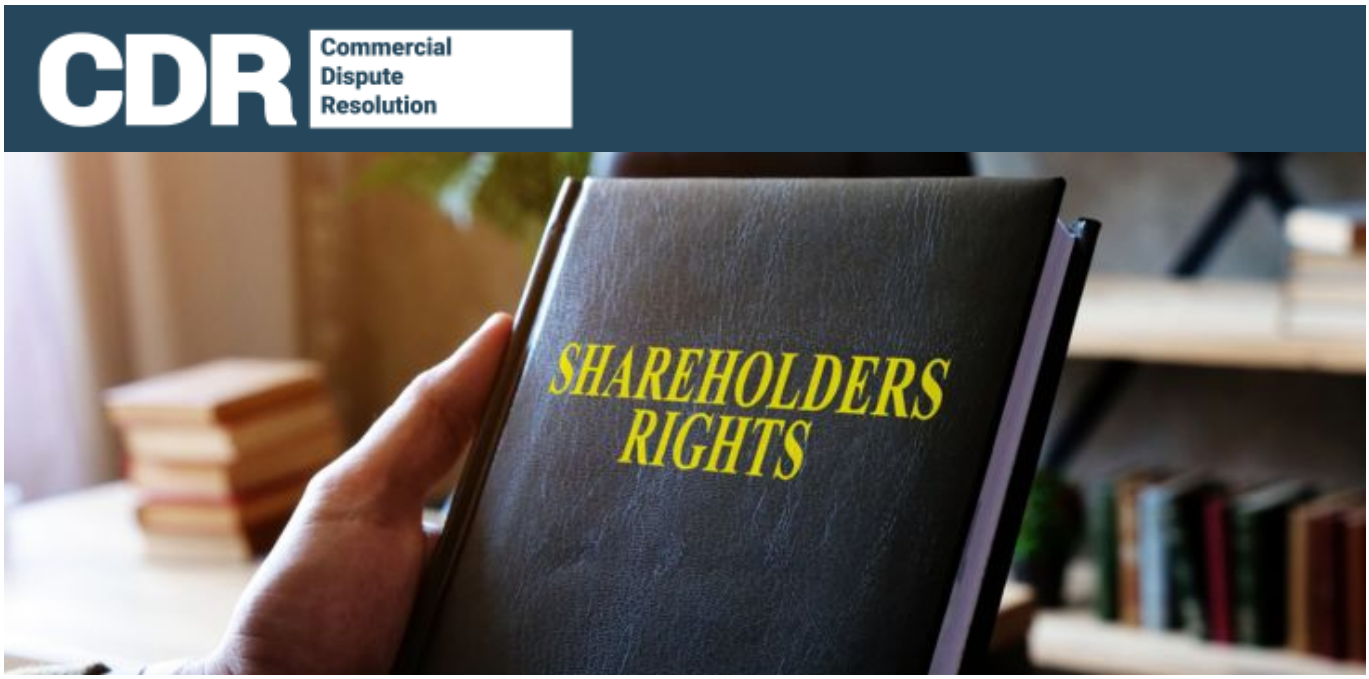

A landmark Privy Council judgment handed down last year killed off the Shareholder Rule in England and Wales. Leading lawyers in London weigh up the ruling’s rejection of a near 140-year-old doctrine.

A divisive legal principle that was established in 1888, the Shareholder Rule – which allows shareholders to inspect a company’s privileged legal documents – has, over the years, tested many courts over whether it should continue to be applied.

In 2024, Justice Picken of the High Court in London ruled in *Aabar Holdings v Glencore* that the Shareholder Rule does not exist in English law and was “unjustifiable”. This marked the first time a judge had held that the rule does not exist in the country.

Then in July 2025, a landmark ruling was handed down by the UK’s Privy Council in which it held that the Shareholder Rule forms no part of the law of Bermuda, and that it should not continue to be recognised in England and Wales either.

In *Jardine Strategic Ltd v Oasis Investments & Others,* which was on appeal from the Bermuda Court of Appeal, the shareholders had sought various orders for discovery, including to see the legal advice that was given to Jardine when it was deciding what it would offer as fair value to dissenting investors who had their shares cancelled. The shareholders contented that, as a matter of Bermudian law, a company cannot in the course of litigation between it and shareholders, or former shareholders, withhold documents from inspection on the ground that the documents are covered by legal advice privilege.

At first instance, the Chief Justice of Bermuda held that the company was not entitled to maintain

legal advice privilege because the claimants had been shareholders in the company, with the Court of Appeal subsequently dismissing Jardine's appeal.

Privy Council's stance

In its ruling, the Privy Council was resolute in its rejection of what it viewed as an antiquated rule, stating: "The Board is satisfied 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 Board considers that its disadvantages easily outweigh [its] advantages." The Board emphasised that the rule's original justification was proprietary, but that this basis was "wholly inconsistent with the proper analysis of a registered company as a legal person separate from its members", such that the members have no proprietary interest in the funds of the company used to pay for the advice.

The ruling continued: "The status-based automatic Shareholder Rule is therefore now, and in truth has always been, a rule without justification. Like the emperor wearing no clothes in the folktale, it is time to recognise and declare that the Rule is altogether unclothed."

While the Shareholder Rule still effectively exists in several common law jurisdictions, including the Cayman Islands, Hong Kong and Ireland, the *Jardine* ruling could sound the death knell for the doctrine in these remaining regions given the Privy Council's influence and authority.

End of the road

Hannah Field, partner and London head of dispute resolution and litigation at Shoosmiths, says as it stands, the Shareholder Rule is now dead in England and Wales. "After *Aabar* and, decisively, the Privy Council's ruling in *Jardine*, the courts of England and Wales are now bound to treat companies as fully entitled to assert legal professional privilege against their shareholders. Companies and their advisers can now rely on privilege with greater confidence, while shareholders must pursue their claims within the established confines of litigation privilege. There is no surviving 'status-based' shareholder exception."

Alexander Lerner, a partner at Stewarts in London, notes that the Privy Council's conclusion would ordinarily have been highly persuasive rather than strictly binding. However, the Privy Council went a step further. "Using the exceptional power identified by the Supreme Court in *Willers v Joyce (No 2)* [2016], it expressly directed that its decision should be treated as binding by the courts of England and Wales. The effect is therefore decisive. Subject to any future intervention by the Supreme Court or legislation, the Shareholder Rule can now be regarded as abolished in England and Wales, which brings greater clarity and certainty to this area of law."

'No scope for doubt'

The Privy Council's wording that the Shareholder Rule "ought not to continue to be recognised" might suggest that the decision could be open to interpretation.

However, Lerner says, taken as a whole, the judgment does not leave much, if any, scope for doubt. "It is right that the phrase 'ought not to' could, if read on its own, sound cautious. But once read in the wider context of the judgment […] it is difficult to argue that the Privy Council was expressing anything other than a firm conclusion."

Just as importantly, the Privy Council was clearly alive to the risk of lingering uncertainty, given that previous cases and academic commentary had tended to assume the rule existed, Lerner adds. "That is why the judgment goes further in its concluding sections. The board expressly states that its

decision should be regarded by courts in England and Wales as abrogating the Shareholder Rule, and formally declares that to be the case."

That declaration is significant. Lerner highlights that all members of the board were also Supreme Court justices who used a rarely used mechanism for ensuring the ruling would have binding effect in England and Wales. "In doing so, they left little scope for arguing that the wording was merely aspirational or open to reinterpretation."

What stood out most from the ruling was the Privy Council's clarity and its commercial, no-half-measures approach, Lerner continues. "For instance, the Privy Council could have taken a more nuanced, case-by-case 'joint interest' approach, allowing shareholder inspection of otherwise privileged documents in limited circumstances. That option was firmly rejected. The Privy Council concluded what was required was reasonable certainty at the point legal advice is sought, and that adopting a fact-sensitive approach would undermine that certainty. The result is deliberately stark: there is no Shareholder Rule."

From a practical perspective, that clarity will be welcome and should reduce the scope for satellite disputes and provide greater confidence around privilege in shareholder litigation, Lerner anticipates.

'Joint interest' also off the table

Indeed, the Privy Council also clarified that joint interest privilege – which protects confidential communications between parties who share a mutual legal interest or retain the same counsel – is not an avenue open to shareholders seeking access to privileged company documents. London-based Tim West, partner in Ashurst's disputes resolution practice, comments: "The [Privy Council] not only rejected the application of joint interest privilege applying to the shareholder/company relationship, but also [rejected] a more nuanced exception which would allow shareholders the opportunity to demonstrate a sufficient joint interest on the facts and circumstances when a dispute arose." To find otherwise would, in the Privy Council's view, undermine the directors' ability to seek legal advice on company affairs confident in the knowledge that it would be privileged from production to shareholders in the event of subsequent litigation, West adds.

However, the Privy Council made clear in its ruling that it was not laying down the law about joint interest privilege generally, but rather in the context of the company-shareholder relationship.

Lerner says the judgment isnot without its critics, with some arguing that concerns about uncertainty were overstated, and that a more nuanced approach could have evolved over time, as happens in other areas of privilege. "There is also a residual question as to whether the Privy Council's reasoning might, in future cases, be relied on to test the boundaries of joint interest privilege more generally – something practitioners will be watching closely," he posits.

What now for shareholders?

Commenting on whether shareholders could still put forward certain arguments to try and employ the Shareholder Rule, Field says that while established exceptions – such as express or implied waivers, common interest and joint retainer situations, and the crime and fraud exception – still exist and can be relied upon by shareholders, these are all orthodox privilege doctrines rather than shareholder-specific carve-outs.

"Whilst it will not necessarily stop shareholders, particularly those with a strong appetite for litigation, from trying to fight to invoke the Shareholder Rule, given the strength and certainty of the *Jardine* ruling, and of course its binding nature, it is unlikely that the rule will still be justified or warranted in

certain circumstances," Field states.

West does not foresee shareholders invoking the Shareholder Rule. In addition, he cannot see how a shareholder would succeed in arguing that joint interest privilege applies on the particular facts and circumstances. He continues: "It is noteworthy that the UK Supreme Court denied permission to leapfrog the appeal of *Aabar Holdings v Glencore,* partly on the basis that the issues would likely be resolved, or at least clarified, by the Privy Council decision in *Jardine*. Originally due to be heard by the Court of Appeal in January 2026, the appeal appears to have been dropped – no doubt as a result of the Privy Council decision."

Nevertheless, there may be other arguments that could be deployed by shareholders, West remarks. "If, for example, directors were to share legal advice with shareholders in order to justify their decisions, arguments on waiver could be raised."

London-based Mishcon de Reya partner Shona Coffer agrees, highlighting that the most immediate practical impact of *Jardine* concerns directors accused of wrongdoing wishing to rely on legal advice taken when making the impugned decision. "Since complaining shareholders no longer have a right to see that advice, the director must decide strategically whether to disclose it – and, if so, whether doing so risks collateral waiver over the entirety of the advice obtained," she remarks.

Other notable rulings

As matters stand, there is no post-*Jardine* authority which goes against that ruling and supports the Shareholder Rule, Field notes, adding that while historically, cases such as *Sharp v Blank* [2015] have applied the Shareholder Rule and treated it as established, more recent cases including *Various Claimants v G4S Plc* [2023] have openly questioned its coherence with modern company law.

West points out that Justice Green had doubts about the Shareholder Rule in *Various Claimants v G4S Plc,* but he felt unable to rule on the principle as a "lowly first instance judge" and on the basis of limited argument at a case management conference.

Field says recent judgments such as *Various Claimants* no doubt help to explain why the High Court and Privy Council ultimately felt able to sweep the rule away for good. "*Aabar* supplied the doctrinal analysis that cases heard before it had lacked, and *Jardine* finally closed the door," she concludes.