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COMPANIES CAN CLAIM PRIVILEGE AGAINST THEIR SHAREHOLDERS

COMMERCIAL COURT REVISITS "SHAREHOLDER RULE"

In a landmark judgment, the Commercial Court has decided that a company's shareholders have no freestanding entitlement to see the company's privileged documents. The decision, which revisits what many considered a long-established rule of English law, could have wide ramifications for companies of all kinds, not least listed companies defending shareholder securities law claims. An appeal seems likely, but the judgment's detailed review and analysis of a confused area of law will give it significant weight.

The shareholder rule

For over 135 years, the so-called shareholder rule or principle provided that a company could not assert privilege against its own shareholder. The only exception was where documents had been created for the dominant purpose of hostile litigation between the company and the relevant shareholder.

In recent years, the increasing number of claims by shareholders against listed companies under s.90 and s.90A/sch.10A, FSMA has led to a renewed focus on the shareholder rule. Investor-claimants have deployed it to seek wide-ranging disclosure of sensitive materials from corporate defendants.

The legal basis, rationale and scope of the shareholder rule have always been cloudy. The principle has never been the subject of detailed analysis by the higher courts and it has evolved in piecemeal fashion. Yet despite recent judicial concern at its "shaky foundation", the rule's long history had led judges and litigants to consider it as a settled principle of law that only the Supreme Court could overturn.

The Glencore litigation

A number of institutional investors have brought claims against Glencore Plc (and, in some cases, certain of its directors) under s.90 and s.90A/Sch.10A of FSMA, seeking compensation for allegedly misleading statements and/or omissions in prospectuses and other market publications. The statements and omissions complained of relate to alleged (and in some cases admitted) bribery and corruption in several Glencore subsidiaries.

Key points to note

- The shareholder rule is a longstanding principle of English law that a company cannot assert privilege against its own shareholder, save in relation to documents created for the dominant purpose of hostile litigation against that shareholder.
- A new Commercial Court judgment says the shareholder rule has no principled justification in the case law and should no longer be applied.
- Although likely to be appealed, the judgment is the first systematic analysis of the shareholder rule and builds on recent judgments that were sceptical of its basis and existence. A judge in a separate securities law claim, brought against Barclays, is expected to give a ruling on the same subject shortly.
- For now, companies of all sizes - listed and unlisted - will welcome the judgment: it increases the chances that legal advice sought and received will not need to be disclosed to shareholders, in litigation or otherwise.
- *Aabar Holdings Sàrl v Glencore Plc and others* [2024] EWHC 3046 (Comm), 27 November 2024

Earlier this year, Glencore said that it would ask the court for a declaration that it would be entitled to withhold privileged documents from the claimant

shareholders - in other words, it sought to challenge the shareholder rule.

The judgment

In a 46-page judgment handed down on 27 November 2024, Mr Justice Picken concluded that the shareholder rule is "unjustifiable" and "should no longer be applied". The effect is that a shareholder has no right to inspect a company's privileged material.

Other first instance judges have shied away from such a bold conclusion, holding that the rule is well-established and can only be interfered with by an appellate court. But Picken J considered that, on a proper analysis of the case law, it did not bind him. The key points of his judgment are set out below.

Shareholders have no proprietary interest in company's privilege

Much of the old case law in support of the shareholder rule was premised on a shareholder having a proprietary interest in the privileged advice, on the basis that the company had procured it with the company's funds, in which the shareholder had an interest. The company-shareholder relationship was said to be analogous with that of a trustee and a beneficiary.

But Picken J noted these decisions reflected a view that was long since obsolete: the 1897 case of *Salomon v Salomon* established that a company and its shareholders are separate legal entities; shareholders have no claim on their company's assets, and directors owe duties to the company, not the shareholders. Accordingly this foundation for the shareholder rule had fallen away long ago.

No joint interest privilege

Some later decisions have appeared to explain the shareholder rule as a species of joint interest privilege, whereby a commonality of interest between a shareholder and company deprives the company of the right to assert privilege against its shareholder. But in the Judge's view none of those decisions had attempted any principled analysis of the nature of the joint interest and how the privilege arose.

More broadly, the Judge considered that the whole idea of joint interest privilege was an unhelpful umbrella term for a ragbag of different concepts; that it continued to be referred to was a testament to its inclusion in a leading textbook on privilege, not any principled analysis.

A rule built on sand

Notwithstanding a considerable body of case law which purports to establish the existence of the shareholder rule, the Judge found that on analysis the rule lacked any solid foundation. Earlier judges had inferred its existence from previous cases without seeking to examine how and why it existed. The idea of shareholders having a proprietary interest in privileged advice, as a beneficiary of a trust would, had persisted well past its sell-by date; "joint interest" privilege was a spurious concept invented by academics to try to bring cohesion to a range of very different cases; and many of the more recent cases had in reality been concerned with separate questions that took it as read - without analysis - that the shareholder rule had any proper legal basis.

In the circumstances, Picken J felt able to declare that the shareholder rule had no basis in law and no justification in practice.

Other points to note

Several subsidiary questions, relating to the scope of the shareholder rule, also arose. They were not strictly relevant given the Judge's decision that there is no shareholder rule, but he addressed them anyway in case he was wrong. Notably, he found that:

- The shareholder rule, if it exists, applies to legal advice privilege and litigation privilege, but not without prejudice privilege. This is not a surprise: it is in line with a 2023 decision of Michael Green J in *Various Claimants v G4S Plc*.
- The rule is not confined to shareholders with legal title, and thus extends to those who hold a beneficial interest (e.g. those who hold intermediated securities via CREST). Nor was it necessary that a claimant was still a shareholder. This would be a significant extension of the rule, and is a departure from the decision in *G4S* mentioned above.
- The rule extends to a company's subsidiaries, such that a company can withhold inspection by its shareholders of privileged documents belonging to a subsidiary - again this is a new and significant departure and it is not clear whether it would apply only to wholly-owned subsidiaries.

Implications of the judgment

Picken J's decision is likely to be appealed, but before then we can expect another first instance decision on the same subject: on the day this judgment was handed down, Barclays - the defendant in a separate case

brought by shareholders under s.90 and s.90A/sch.10A - was in court arguing that they should be able to claim privilege over documents sought by investor-claimants. Market participants will watch closely to see whether and to what extent a different judge decides to adopt Picken J's detailed survey of the case law and arrives at the same conclusion.

In the meantime, the decision will be welcome news for defendants in other high-value, group claims brought by shareholders. More broadly, if and to the extent the judgment is followed by other courts and/or upheld on appeal, companies of all kinds, both listed and unlisted, will welcome a development which enhances their ability to interrogate and understand their legal position without fear that their legal advice will later be used against them - a fundamental principle of English law that underpins the justice system.

CONTACT

RICHARD SWALLOW
PARTNER
T:+44 (0)20 7090 4094
E: Richard.Swallow@slaughterandmay.com

JONATHAN CLARK
PARTNER
T: +44 (0)20 7090 4039
E: Jonathan.Clark@slaughterandmay.com

SMRITI SRIRAM
PARTNER
T: +44 (0)20 7090 3718
E: smriti.sriram@slaughterandmay.com

ROBERT BRITTAIN
PSL COUNSEL
T: +44 (0)20 7090 3683
E: Robert.Brittain@slaughterandmay.com

588228645

London
T +44 (0)20 7600 1200
F +44 (0)20 7090 5000

Brussels
T +32 (0)2 737 94 00
F +32 (0)2 737 94 01

Hong Kong
T +852 2521 0551
F +852 2845 2125

Beijing
T +86 10 5965 0600
F +86 10 5965 0650

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