Shareholder Privilege Rule Abolished in England and Wales

The Shareholder Rule, which had been applied in England and Wales for over 100 years, has been abolished by the Privy Council.

The Shareholder Rule

Legal professional privilege generally entitles a person to refuse disclosure of certain confidential communications that may otherwise be required to be disclosed. Under the Shareholder Rule, a shareholder was entitled to seek disclosure of legal advice provided to the company unless that advice was given in the context of hostile litigation between the shareholder and the company.

In 2024, the English High Court held in Aabar Holdings S.à.r.l. v Glencore plc and others [2024] EWHC 3046 (Comm) that the Shareholder Rule should be abolished and certified a leap-frog appeal to the UK Supreme Court to settle the issue. However, the UK Supreme Court refused permission for the leap-frog appeal, noting that the issue was likely to be imminently resolved by the Privy Council in Jardine Strategic Ltd v Oasis Investments II Master Fund Ltd (No 2) (Bermuda) [2025] UKPC 34.

The decision in Jardine

The Privy Council was asked in *Jardine* to consider the foundations of the Shareholder Rule and whether it should continue to be recognised as a matter of Bermudan, as well as English, law.

The Appellant company in *Jardine* was formed from the amalgamation of two companies within the Jardine Matheson group in April 2021. The result of the amalgamation was that all the shares in one of the amalgamating companies were cancelled and under Bermudan law, the shareholders who dissented to the amalgamation were entitled to receive fair value for the cancelled shares. Certain dissenting shareholders (the Respondents in this case) were not satisfied with the determination of fair value and triggered a statutory mechanism requiring the court to determine fair value. As part of proceedings and relying on the Shareholder Rule, the Respondents sought disclosure of the legal advice issued to the Jardine Matheson group prior to April 2021 in relation to the setting of fair value.

The Privy Council determined that the Shareholder Rule should no longer be recognised on the basis of the following:

1. The notion that shareholders have a proprietary interest in the funds of the company used to pay for the legal advice is wholly inconsistent with the doctrine of separate legal personality.
2. There is not always a commonality of interest between a company and its shareholders and therefore it cannot be said that the shareholder-company relationship falls within the relationships attracting joint interest privilege.

The position in England and Wales now aligns with the prevailing position in other common law jurisdictions such as Canada, Australia and certain US states.

Implications for position in Ireland

Under Irish law, a shareholder may compel disclosure of legal advice provided to a company depending on the timing and nature of the legal advice.

In Carlo Tassara Assets Management S.A. v Éire Composites Teoranta & ors [2016] IEHC 103, the High Court held that a shareholder claiming that a company's actions constitute oppressive actions, is, in principle, entitled to disclosure of legal advice obtained by the company for the purposes of taking those actions, even when those actions might lead to litigation.

The rationale for this is that such a shareholder has a 'joint interest' with the company, the directors and management. However, legal advice sought after the company has taken the relevant action, for the dominant purpose of being used in connection with existing or contemplated litigation, is less likely to be of joint interest and will attract legal professional privilege and be protected from disclosure. The *Tassara* decision was cited with approval by the High Court in 2023 in *Delappe v Brock & Ors [2023] IEHC 318* and remains the current position in Ireland.

However, the decision in Jardine provides a strong basis for a different conclusion being reached were the issue to come before the Irish courts again. Although 'joint interest' was the basis for the decision in *Tassara*, the Privy Council held unanimously that the shareholders of a company do not always share a joint interest with the company, nor indeed even as amongst themselves. In removing the shareholder-company relationship from those relationships qualifying for joint interest privilege, the Privy Council was clear that otherwise companies would be discouraged from seeking legal advice, the separate personality of the company would be ignored and a commonality of interests assumed that is contrary to the usual commercial reality.

If the findings in *Jardine* are followed in Ireland, the courts may eliminate the joint-interest exception for shareholders which would then allow companies to refuse disclosure, including of even pre-litigation advice.

For more information on the above, or for further guidance and insight in respect of shareholders and the application of joint interest privilege generally, please contact David Fitzgibbon, Connor Cassidy, Aishlinn Gannon or your usual Matheson LLP contact.

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