

Privy Council Rules Companies Can Assert Legal Advice Privilege Against Shareholders

Companies have the right to assert legal advice privilege against their shareholders, the Privy Council (sitting in respect of Bermuda) has held in *Jardine Strategic Limited v Oasis Investments II Master Fund Ltd & Others* No. 2 [2025] UKPC 34.

This decision will be welcomed by directors of Cayman Islands companies and should resolve any doubt about the existence of the so-called 'Shareholder Rule' under which it was previously thought that companies did not have the right to assert legal advice privilege against their shareholders to withhold documents when the company was otherwise required to produce them. The Privy Council held that the Shareholder Rule, which traces its roots in case law back to the 19th century, does not exist and should never have existed. This is because the conceptual underpinnings on which it was based were not applicable to the relations between companies and their shareholders.

Jardine concerned appraisal litigation brought by dissenting shareholders in Bermuda under Section 106 of the Bermudan Companies Act 1981 (which is analogous to the appraisal right under Section 238 of the Cayman Islands Companies Act (As Revised)). The case arose out of the amalgamation of two entities within the Jardine Matheson group, one of which was listed on the London Stock Exchange with that entity determining that US\$33 per share was the fair value to be given to the

shareholders in exchange for the cancellation of their shares. The amalgamated company (the "Company") was the appellant to this appeal. More than 80 shareholders (the "Dissenters") exercised their appraisal right to have the Bermudan Supreme Court determine the fair value of their shares.

It was not disputed that the Company was required to provide discovery of relevant documents to the Dissenters. In appraisal cases, the burden of discovery on the company is often extensive as a great many of the company's documents will be relevant in some way to what the company is worth. The Company argued it should be permitted to withhold certain documents from production to the Dissenters because they were not at the time of production shareholders of the Company (the Dissenters' shares having been cancelled during the amalgamation). The Chief Justice rejected that argument on the grounds that the Dissenters were shareholders at the time the documents were created and the later cessation of the relationship did not affect the application of the Shareholder Rule to those documents. However, in the same decision, the Chief Justice noted that the Shareholder Rule appeared to rest on questionable foundations but considered that if it were to be rejected, that rejection would need to be made by a court of higher authority than a court of first instance. The Court of Appeal (the "Court") of Bermuda rejected the Company's appeal on the

privilege question leading the Company to appeal to the Privy Council.

The Privy Council (judgment given by Lord Briggs and Lady Rose) allowed the Company's appeal. A thorough review of the roots of the Shareholder Rule and its application in other common law jurisdictions was undertaken. The Shareholder Rule had its genesis in 19th century cases which based its application on the principle that where documents have been obtained by payment from a common fund, the parties to that common fund cannot assert privilege in the documents as against each other as they each have a proprietary interest in those documents. As the Privy Council noted, these cases pre-date the celebrated decision in *Salomon v Salomon* [1897] AC 22 which definitively established that a company has a separate legal personality distinct from its shareholders.

As the Shareholder Rule was found to be based on the mistaken assumption that shareholders have a proprietary interest in a company's assets (they do not), the Privy Council discarded it. With a literary flourish, the Lord Briggs and Lady Rose concluded:

"Like the emperor wearing no clothes in the folktale, it is time to recognise and declare that the Rule is altogether unclothed."

The Court also rejected the Dissenters' alternative argument that the Shareholder Rule could be based on joint interest privilege but decided that the rule as formulated was premised on the (flawed) assumption of a proprietary interest of shareholders in a company's assets and in any event, the relationship between company and shareholder was not in the nature of the relationships where joint interest privilege existed. Companies and their shareholders often have diverging interests as do shareholders as between themselves.

Further Information

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