Trinity Term
[2025] UKPC 34
Privy Council Appeal No 0077 of 2024

JUDGMENT

Jardine Strategic Limited (Appellant) *v* Oasis Investments II Master Fund Ltd and 80 others (Respondents) No 2 (Bermuda)

From the Court of Appeal for Bermuda

before

Lord Briggs
Lord Leggatt
Lord Burrows
Lady Rose
Lord Richards

JUDGMENT GIVEN ON
24 July 2025

Heard on 6 March 2025

Appellant
Martin Moore KC
Anna Scharnetzky
Andrew Blake
John Wasty
(Instructed by Linklaters LLP (London))

Respondent
Mark Howard KC
Stephen Midwinter KC
Delroy Duncan KC
Ryan Hawthorne
Matthew Watson
Laura Williamson
(Instructed by Charles Russell Speechlys LLP (London) as agent for Carey Olsen (Bermuda) Limited, Trott & Duncan Limited and Kennedys Chudleigh Limited)

LORD BRIGGS AND LADY ROSE:

1. Introduction

1. The amalgamation on 14 April 2021 of two companies within the Jardine Matheson corporate group has given rise to important issues heard in two separate appeals before the Board on consecutive days in March 2025. The appellant company, Jardine Strategic Limited ("the Company"), is the company that was formed from the amalgamation of Jardine Strategic Holdings Ltd ("Jardine Strategic") and JMH Bermuda Ltd.

2. The result of the amalgamation was that all the shares in Jardine Strategic were cancelled. According to the statutory provisions discussed below, the Company is required to pay fair value for those cancelled shares to shareholders who voted against the proposed transaction at the special general meeting held on 12 April 2021. Some of those shareholders, the respondents in this appeal, were not satisfied with the figure that the group offered them, US$33 per share, as the fair value for their shares. They have triggered the statutory mechanism set out in the Companies Act 1981 under which the court is required to determine the fair value of those shares for the Company to pay ("the appraisal actions").

3. The first appeal heard by the Board concerns whether the plaintiff shareholders fall within the class of shareholders who are entitled under the legislation to seek such a determination of fair value from the court. The Company argues that they are not, broadly because they bought their shares in the knowledge that the amalgamation was going to take place even if they opposed it and they knew further that all shareholders were being offered $33 per share. The Court of Appeal held that the plaintiffs were entitled to bring proceedings: see judgment of 24 March 2023 [2023] (Bda) 7 Civ (CA) (Sir Christopher Clarke P, Sir Maurice Kay and Geoffrey Bell JJA). The Company's appeal from that decision was heard on 5 March 2025 and is the subject of a separate judgment of the Board being promulgated today.

4. This judgment concerns a different question, namely whether the claimants now litigating against the Company are entitled to see the legal advice that was given to the Jardine Matheson group when it was setting that $33 value which it offered as fair value to dissenting shareholders who had their shares cancelled. On 10 August 2022 the plaintiffs issued a summons in the proceedings seeking various orders for discovery from the Company including an order that the defendants produce relevant documents created before 12 April 2021. The Company asserted that those documents, which it had listed in its discovery but not made available for inspection, were covered by legal professional privilege, in particular by legal advice privilege.

5. The plaintiffs accept that the advice received by the pre-amalgamation companies was of a type which would ordinarily be protected by legal advice privilege from production to the other party to the litigation. But they rely on what they say is an exception to that rule which overrides privilege when the party seeking access to the documents is a shareholder in the company or at least was a shareholder at the time that the advice was sought or received. The Chief Justice held that the Company was not entitled to maintain legal advice privilege in respect of legal advice received by Jardine Strategic because the plaintiffs had been shareholders in that company. The Court of Appeal dismissed the Company's appeal.

6. The issue before the Board is therefore whether there is, as the plaintiffs assert, a rule in Bermudian law that 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. This judgment refers to that rule as "the Shareholder Rule".

7. It is important at the outset to establish the boundaries of the scope of the Shareholder Rule for which the plaintiffs contend. First, they accept that legal advice which is sought by the Company once the litigation has started or is in contemplation is protected from inspection and is not covered by the Shareholder Rule. This was the subject of the supplemental judgment delivered by the Chief Justice. It gives rise to the issue about exactly which date represents the point at which the parties shifted into adversarial mode so that the Shareholder Rule would not override privilege for legal advice sought or received thereafter.

8. Secondly they accept that the Shareholder Rule only applies to override privilege in the context of a discovery exercise in litigation in which the company and the shareholders or former shareholders are involved. The plaintiffs are not asserting that all shareholders have a right at any time to see company documents, including legal advice received by a company, in the ordinary course of their relationship with the company as shareholders.

9. It was common ground before the Board that there is no prior Bermudian authority on this point. The Court of Appeal held that the Shareholder Rule exists as a matter of English law and that there is no reason why it should not also apply in Bermuda. The Company's appeal does not simply challenge the transposition of the Rule into Bermudian law but argues that the Shareholder Rule should no longer be recognised as forming part of English law. They invite us, if the Board decides that the Shareholder Rule does not exist, to give a direction of the kind described by Lord Neuberger in *Willers v Joyce (No 2)* [2016] UKSC 44, [2018] AC 843. That is a direction that the domestic courts of England and Wales should treat this decision as also representing the law of England and Wales.

10. The two appeals arising from these facts have been the subject of separate proceedings before the Board, raising entirely discrete issues. The judgment promulgated today in the other appeal dismisses the Company's appeal and confirms that the plaintiffs are entitled to bring proceedings. The issues dealt with in this judgment therefore continue to be relevant to the discovery exercise in those proceedings going forward.

2. The relevant legislation and the amalgamation

(a) The Companies Act 1981

11. Part VII of the Companies Act 1981 ("the Act") deals with arrangements, reconstructions, amalgamations and mergers. Section 104 provides that two or more companies which are registered in Bermuda may amalgamate. Section 105 provides that each company proposing to amalgamate must enter into an agreement setting out the terms and means of effecting the amalgamation and must include in that agreement, amongst other things,

> (i) Section 105(1)(d): "the manner in which the shares of each amalgamating or merging company are to be converted into shares or other securities of the amalgamated or surviving company";
>
> (ii) Section 105(1)(e): "if any shares of an amalgamating or merging company are not to be converted into securities of the amalgamated or surviving company, the amount of money or securities that the holders of such shares are to receive in addition to or instead of securities of the amalgamated or surviving company".

12. Section 106 is the key provision for this appeal. The subsections that determine what happens before and at the meeting required by the section provide as follows:

> (i) Subsection (1): that the directors of each amalgamating company shall submit the amalgamation agreement for approval to a meeting of the shareholders of the amalgamating company.
>
> (ii) Subsection (2): that a notice of a meeting of shareholders shall be sent to each shareholder. That notice must include or be accompanied by a copy or summary of the amalgamation agreement, it must also state the fair value of the shares as determined by each amalgamating company and state further that a dissenting shareholder is entitled to be paid the fair value of his shares.

(iii) Subsection (4A): that unless the bye-laws of the company provide otherwise, the resolution of the company must be approved by 75 per cent of those voting at the meeting.

(iv) Subsection (5): the amalgamation agreement is deemed to have been adopted when it has been approved by the shareholders as provided for in the section.

13. The remaining subsections of section 106 then deal with the rights of dissenting shareholders who are not satisfied with the fair value that they have been offered. They provide (as amended in 1994 and 2011) as follows:

> "(6) Any shareholder who did not vote in favour of the amalgamation or merger and who is not satisfied that he has been offered fair value for his shares may within one month of the giving of the notice referred to in subsection (2) apply to the Court to appraise the fair value of his shares.
>
> (6A) Subject to subsection (6B), within one month of the Court appraising the fair value of any shares under subsection (6) the company shall be entitled either—
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> (a) to pay to the dissenting shareholder an amount equal to the value of his shares as appraised by the Court; or
>
> (b) to terminate the amalgamation or merger in accordance with subsection (7).
>
> (6B) Where the Court has appraised any shares under subsection (6) and the amalgamation or merger has proceeded prior to the appraisal then, within one month of the Court appraising the value of the shares, if the amount paid to the dissenting shareholder for his shares is less than that appraised by the Court the amalgamated or surviving company shall pay to such shareholder the difference between the amount paid to him and the value appraised by the Court.
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> (6C) No appeal shall lie from an appraisal by the Court under this section.

(6D) The costs of any application to the Court under this section shall be in the discretion of the Court.

(7) An amalgamation agreement or merger agreement may provide that at any time before the issue of a certificate of amalgamation or merger the agreement may be terminated by the directors of an amalgamating or merging company, notwithstanding approval of the agreement by the shareholders of all or any of the amalgamating or merging companies."

(b) The amalgamation

14. The Jardine Matheson group of companies is a multinational conglomerate comprising a broad portfolio of companies operating principally in China and South-East Asia. Prior to the amalgamation, Jardine Strategic had a primary listing on the London Stock Exchange and secondary listings in Singapore and Bermuda. The ultimate holding company of the group is Jardine Matheson Holdings Ltd ("Jardine Matheson") which had and maintains those same listings. Jardine Matheson is incorporated in Bermuda.

15. Before the amalgamation, Jardine Matheson held about 85 per cent of the shares in Jardine Strategic. The other party to the amalgamation, JMH Bermuda Limited, was indirectly wholly-owned by Jardine Matheson. The shares in Jardine Strategic which were not already held directly or indirectly by Jardine Matheson, that is about 15 per cent of Jardine Strategic's issued share capital, were cancelled and converted into a right to receive US$33 per share from Jardine Matheson.

16. The chronology of the amalgamation is important for some of the issues in this appeal:

(i) 19 February 2021: Jardine Strategic's board of directors passed a resolution delegating responsibility for considering the proposed amalgamation to a committee of directors who were not also directors of Jardine Matheson. This was called "the Transaction Committee" and was advised as to financial matters by Evercore Partners International LLP and on legal matters by Slaughter and May.

(ii) 8 March 2021: Jardine Strategic announced the proposed amalgamation to the market ("the announcement").

(iii) 17 March 2021: Jardine Strategic's board gave notice ("the Notice") to its shareholders of a special general meeting to be held on 12 April 2021 to consider

and, if thought fit, pass a resolution approving the proposed amalgamation. The Notice stated that the fair value of the shares in Jardine Strategic had been determined by Jardine Strategic to be $33 per share. Included in a schedule to the Notice was the draft amalgamation agreement.

(iv) 12 April 2021: the special general meeting was held and a requisite majority of Jardine Strategic's members voted to approve the amalgamation and the amalgamation agreement. Some of the plaintiffs filed their appraisal actions with the court immediately on that day.

(v) 14 April 2021: the amalgamation became effective; the property, rights and assets of Jardine Strategic and JMH Bermuda Limited became the property, rights and assets of the Company and all shares in Jardine Strategic (that is the shares held by Jardine Matheson and by the shareholders of the remaining 15%) were cancelled.

17. Each of those independent shareholders has received the $33 per share that it was entitled to under the amalgamation agreement.

18. The Company is incorporated in Bermuda. Its bye-laws include the following provision:

> "132. (A) Accounting records sufficient to show and explain the Company's transactions and otherwise complying with the Statutes shall be kept at the Head Office, or at such other place as the Directors think fit, and shall always be open to inspection by the Directors provided that such records as are required by the Statutes shall also be kept at the Office. Subject as aforesaid no Member of the Company or other person shall have any right of inspecting any account or book or document of the Company except as conferred by statute or ordered by a court of competent jurisdiction or authorised by the Directors."

3. Legal professional privilege

19. The cases to which the Board was referred during the hearing of this appeal were primarily aimed at defining the scope of the Shareholder Rule as an exception to legal advice privilege. In the Board's judgment, any consideration of whether such an important inroad into the privilege is justified must start with a consideration of the scope and importance of the legal professional privilege itself.

20. The early history of legal professional privilege was set out in the speech of Lord Taylor of Gosforth CJ in *R v Derby Magistrates' Court, Ex p B* [1996] AC 487, 504 onwards. In his speech, with which all the other members of the appellate committee of the House of Lords agreed, Lord Taylor (at p 507D) described privilege as a fundamental condition on which the administration of justice as a whole rests, and (at p 507H) he acknowledged it is a fundamental human right. That characterisation of legal professional privilege was confirmed in *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2002] UKHL 21, [2003] 1 AC 563. Lord Hoffmann said at para 7 that it was common ground that the privilege is a fundamental human right long established in the common law and a necessary corollary of the right of any person to obtain skilled advice about the law. He said that such advice cannot be effectively obtained unless the client is able to put all the facts before the adviser without fear that they may afterwards be disclosed and used to his prejudice.

21. Among the many subsequent decisions in the UK courts on the scope of legal advice privilege, one of the leading cases is *Three Rivers District Council v Governor and Company of the Bank of England (No 6)* [2004] UKHL 48, [2005] 1 AC 610 ("*Three Rivers (No 6)*"). The claimants in that case brought proceedings against the Bank of England alleging misfeasance in public office in respect of the Bank's supervision of a bank which collapsed in 1991. The communications of which disclosure was sought in those proceedings were those that had passed between the Bank and its lawyers in the course of an earlier inquiry into the Bank's supervision, conducted by Lord Justice Bingham. The issue raised was whether legal advice privilege was, as the Court of Appeal had held, limited to obtaining advice as to legal rights and liabilities and did not extend to advice about how the Bank should best present its case to the Inquiry which was investigating its conduct. The House of Lords rejected any such limitation.

22. Lord Scott of Foscote summarised the modern case law on legal professional privilege as dividing the privilege into two categories, legal advice privilege and litigation privilege. Litigation privilege covers all documents brought into being for the purposes of litigation. Legal advice privilege covers communications between lawyers and their clients whereby legal advice is sought or given: see para 10 of Lord Scott's speech. He described the features of legal advice privilege as being, first, that it arises out of a relationship of confidence between lawyer and client. Secondly, if the communication qualifies for legal professional privilege, the privilege is absolute. It can be waived by the person, the client, entitled to it and it can be overridden by statute but there is no balancing exercise that has to be carried out – it cannot be set aside on the ground that some other higher public interest requires that to be done: see para 25. Thirdly, the effect of legal advice privilege is to give the person entitled to it the right to decline to disclose or to allow to be disclosed the confidential communication in question. It does not matter whether this is a substantive or a procedural right; in legal proceedings it justifies the refusal to answer certain questions or produce for inspection certain documents. Fourthly, legal advice privilege is related to litigation privilege but can arise in circumstances which have nothing to do with litigation. A connection with litigation is not a necessary condition for legal advice privilege to arise and conversely, litigation privilege can apply

to any documents that come into existence for the dominant purpose of being used in litigation including communications between the client and a third party. Thus, Lord Scott said: "The connection between legal advice sought or given and the affording of privilege to the communication has thereby been cut": para 27.

23. The principal discussion in their Lordships' speeches in *Three Rivers (No 6)* concerned the outer boundaries of the kind of material passing between lawyers and their clients which counts as "legal advice" and hence attracts privilege. That discussion is not relevant to the present appeal since it is accepted for the purposes of this appeal that the material withheld by the Company is prima facie covered by legal advice privilege. But Lord Scott, with whom Lord Rodger of Earlsferry and Lady Hale agreed, also described the policy behind the privilege. Lord Scott posed the question at para 28 why all other classes of confidential communications are protected only up to a point but not given the absolute protection allowed to communications between lawyers and their clients. Having considered cases from across the common law world, he said at para 34:

> "They recognise that in the complex world in which we live there are a multitude of reasons why individuals, whether humble or powerful, or corporations, whether large or small, may need to seek the advice or assistance of lawyers in connection with their affairs; they recognise that the seeking and giving of this advice so that the clients may achieve an orderly arrangement of their affairs is strongly in the public interest; they recognise that in order for the advice to bring about that desirable result it is essential that the full and complete facts are placed before the lawyers who are to give it; and they recognise that unless the clients can be assured that what they tell their lawyers will not be disclosed by the lawyers without their (the clients') consent, there will be cases in which the requisite candour will be absent. It is obviously true that in very many cases clients would have no inhibitions in providing their lawyers with all the facts and information the lawyers might need whether or not there were the absolute assurance of non-disclosure that the present law of privilege provides. But the dicta to which I have referred all have in common the idea that it is necessary in our society, a society in which the restraining and controlling framework is built upon a belief in the rule of law, that communications between clients and lawyers, whereby the clients are hoping for the assistance of the lawyers' legal skills in the management of their (the clients') affairs, should be secure against the possibility of any scrutiny from others, whether the police, the executive, business competitors, inquisitive busybodies or anyone else…."

24. There are some statutory exceptions to the privilege, although the courts have been reluctant to construe a statute as overriding privilege and have applied a strong presumption against any such Parliamentary intention: see for example *Bowman v Fels* [2005] 1 WLR 3083 (CA). Privilege can of course be waived and it may in some circumstances be lost by inadvertent disclosure to the opposing party: see the cases discussed in Thanki, *The Law of Privilege,* 3rd edn (2018), paras 4.80 – 4.83.

25. The most frequently invoked common law exception is the principle that privilege does not exist in a document which comes into existence in furtherance of a fraud, crime or other iniquity. In the recent case of *Al Sadeq v Dechert LLP* [2024] EWCA Civ 28, [2024] KB 1038, Popplewell LJ in a comprehensive and scholarly judgment reviewed the origins and development of this exception from cases in the 19th century such as *R v Cox and Railton* (1884) 14 QBD 153 to more recent authorities such as *Barrowfen Properties v Patel* [2020] EWHC 2536 (Ch).

26. A further exception, if it can properly be so called, to legal professional privilege is joint retainer privilege which arises where the parties have jointly instructed the lawyers. Joint retainer privilege is different from both joint interest privilege and common interest privilege, as discussed at paras 49 onwards, below. The scope and limits of joint retainer privilege have been described in Hollander, *Documentary Evidence*, 15th edn, (2024) as follows:

> "19-02 Persons who grant a joint retainer to solicitors retain no confidence against one another; if they subsequently fall out and sue one another, neither can claim privilege against the other for documents generated in respect of the joint retainer. The trustee or successor stands in the shoes of the original party. Against the rest of the world, however, either can maintain a claim for privilege in respect of such documents. Because the privilege is joint it can be waived only jointly and not by one party alone…
>
> 19-05 Privilege may be claimed by a party or his successor in title. The death of a client does not destroy his privilege since it may be asserted by his heirs. A trustee in bankruptcy is not a successor in title for this purpose. The principle has been extended beyond a personal right: where it can be regarded as an incident of a property right, it may be asserted by a successor in title to that property…"

27. The authorities on joint retainer privilege were considered by the Court of Appeal of England and Wales in *Travelers Insurance Co Ltd v Armstrong* [2021] EWCA Civ

978, [2022] 1 All ER (Comm) 1366. Coulson LJ, with whom King and Asplin LJJ agreed, summarised the principles to be derived from the case law at para 37 of his judgment. The following elements of that summary are relevant to the present appeal:

> (i) In respect of privileged documents, a successor in title stands in the shoes of his or her predecessor: see *Schneider v Leigh* [1955] 2 QB 195 and *Crescent Farm (Sidcup) Sports Ltd v Sterling Offices Ltd* [1972] (Ch) 553. Thus, if the predecessor in title is entitled to the disclosure of privileged documents, so too is the successor in title.
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> (ii) The right of a successor in title to disclosure of such documents, and to assert privilege in such documents as against third parties, is not a matter of the terms of a particular assignment or deed. It is a right that passes as a matter of law: see *Surface Technology plc v Young* [2002] FSR 25 and *Winterthur Swiss Insurance Co v AG (Manchester) Ltd (In Liquidation)* [2006] EWHC 839 (Comm).
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> (iii) Legal professional privilege is a fundamental right. In a case of joint retainer privilege, it is therefore a fundamental right of each party who has jointly retained the solicitors in question.
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> (iv) Whilst neither party can claim privilege as against the other in respect of any documents created pursuant to the joint retainer, as against any third party (other than a successor in title, who stands in the shoes of the original party), both parties can maintain a claim for privilege in respect of any such documents.
>
> (v) As the privilege is joint it can only be waived jointly and not unilaterally: see *Winterthur* and para 19.01 of *Documentary Evidence*.

4. The Shareholder Rule – a history

(a) England and Wales

28. The first reported case in which the Shareholder Rule appears to have been applied is *Gouraud v Edison Gower Bell Telephone Co of Europe* (1888) 57 LJ Ch 498, a decision of Chitty J. This was an action brought by a shareholder in the defendant company seeking to set aside an agreement made by the company in fraud of his rights as a shareholder. The company claimed privilege against production of professional advice received by the company, but the judge rejected the claim. His reasoning may be extracted from the following passage, at pp 499-500:

> "… a party cannot resist production of documents which have been obtained by means of payment from the moneys belonging to the party applying for their production. I think that that is the general principle, and one which, to my mind, applies as between a shareholder and the directors who manage his property, when the documents are paid for out of his property."

29. The only authority relied upon by the judge, or cited by counsel, was *Mayor and Corporation of Bristol v Cox* (1884) 26 Ch D 678. The city corporation sued Mr Cox, who was the president of the Bristol Law Society, for an injunction restraining him from publishing statements casting doubt on the city corporation's title to some surplus land. The city corporation disclosed documents recording the opinions of counsel about the dispute, but claimed litigation privilege from their production. This was upheld by Pearson J but, in passing, he referred to the submission of counsel for Mr Cox that, since he was a ratepayer of Bristol, privilege could not be claimed against him in relation to opinions of counsel for which he had paid, by analogy with the by then settled rule that trustees could not claim privilege against their beneficiaries for materials which they had obtained at the beneficiaries' expense ("the Trustee Rule"). He continued at p 683:

> "I think that if this was an action by Mr Cox as a ratepayer against the corporation of the city of Bristol with regard to some matter or other which related to the raising of the rates, or to the expenditure of the rates, it may be quite possible, and it is very probable, that Mr Cox would have a right to see them, but this is an action by the mayor, alderman, and burgesses of the city of Bristol, not as against Mr Cox in any way whatever as a ratepayer, but as a corporation really defending the interests of the ratepayers themselves against the Defendant, who they say is injuring those interests. That is a totally different case altogether, and I am of opinion that that argument cannot prevail."

30. It is unnecessary to trace back to the origins of the Trustee Rule. It was founded upon the twin propositions that beneficiaries collectively had an interest in the due administration of the trust, and collectively own the trust fund out of which the trustees pay for legal advice. It followed that legal advice privilege in relation to legal advice taken before the litigation commenced to guide them in the exercise of their powers cannot be claimed by the trustees against the beneficiaries in subsequent litigation between them. However, the beneficiaries had no right to see advice taken by the trustees once the litigation had commenced, at least where there was no proof that the trustees had charged the cost of the advice to the trust funds: see *Talbot v Marshfield* (1865) 2 Dr & SM 548. A city corporation, like other corporations created by statute or royal charter, was undoubtedly a body corporate with legal personality separate from its members. It was therefore analogous to a limited company rather than an unincorporated body of trustees.

It is, therefore, the *Mayor of Bristol* case which seems to have formed a sort of stepping stone in the migration of the exception from privilege from the trust vis-á-vis the beneficiaries to the company context. That was on the basis that shareholders had their own proprietary interest in the company's money from which legal advice is paid for.

31. The *Gouraud* case was expressly decided on the basis that there was a true analogy with the Trustee Rule, as between a company and its shareholders, on the basis that the shareholders could be said to be the beneficial owners of the company's property, so as to have paid for the legal advice of which they were seeking disclosure, even though the company was a separate entity, and because the directors could therefore be said to be trustees for the shareholders. But whatever may have been the thinking to that effect among some judges and lawyers in the late 19th century, it has been recognised for at least 100 years that this is not so. A company is both the legal and beneficial owner of its property, as was trenchantly stated by Lord Halsbury LC in *Salomon v Salomon* [1897] AC 22, although the contrary was not suggested as a general proposition, but only in relation to one-man companies. It was confirmed most recently in *BTI 2014 LLC v Sequana SA* [2022] UKSC 25, [2024] AC 211. As that case also demonstrates, the same misapprehension about the beneficial ownership of a company's property led to misunderstanding as to whether directors were trustees for the company's shareholders, eg in *In Re Wincham Shipbuilding, Boiler, and Salt Co* (1878) 9 Ch D 322 (sometimes called *Poole, Jackson and Whyte's case*). It has for long been established that directors owe their fiduciary duties to the company alone, although they must take into account the interests of the shareholders and, when insolvency intervenes, the company's creditors.

32. Nonetheless, the approach of Chitty J in the *Gouraud* case was accepted without question in *Woodhouse & Co Ltd v Woodhouse* (1914) 30 TLR 559. It was on its facts another case in which litigation privilege was claimed by the company against its shareholder and upheld, but the absence of any such entitlement to legal advice privilege, based upon the shareholders having, in effect, paid for the advice, was regarded as having hardened into a rule. Lush J, sitting in the Court of Appeal, said at p 560:

> "Where a company obtained [legal] advice in the common interest and paid for it out of the common fund, undoubtedly the shareholder would have a right to see it."

33. Thereafter until very recent times a rule it remained, generally going unchallenged and therefore with no further examination of the justification for it. Meanwhile the original proprietary justification for the Shareholder Rule just faded quietly away, without anyone apparently noticing. *W Dennis and Sons Ltd v West Norfolk Farmers' Manure and Chemical Co-operative Co Ltd* [1943] Ch 220 shows that it had come to be described as a general rule, and enshrined as such in the 1943 Annual Practice, by reference to *Gouraud.* In *Re Hydrosan Ltd* [1991] BCC 19, at 21, Harman J was content to describe the Shareholder Rule as:

> "the general rule that where a company takes the opinion of counsel and pays for it out of the funds of a company a shareholder has a right to see it…"

34. In *CAS (Nominees) Ltd v Nottingham Forest plc* [2002] BCC 145 it was submitted without success that the Shareholder Rule was inapplicable to public companies, although no challenge was made to its application to all other companies: see per Evans Lombe J at paras 16-17. The judge wrongly drew a by then outdated parallel between companies and trusts by saying that company directors owe fiduciary duties to their shareholders. As already noted, directors owe those fiduciary duties to the company and not to their shareholders: see *Sequana*. But he was right to say that the Shareholder Rule did not depend upon the size of the company, or the number of its shareholders. It must stand or fall as a general rule by reference to its applicability to all companies or to none.

35. In *Arrow Trading & Investments Est 1920 v Edwardian Group Ltd* [2004] BCC 955, at 968, para 25, Blackburne J dealt summarily with the company's claim for legal professional privilege against its shareholders by saying:

> "It is well established by authority that a shareholder in the company is entitled to disclosure of all documents obtained by the company in the course of the company's administration, including advice by solicitors to the company about its affairs, but not where the advice relates to hostile proceedings between the company and its shareholders…"

36. Other reported cases in which the Shareholder Rule was taken as read without challenge include *Harley Street Capital Ltd v Tchigirinsky* [2006] BCC 209; *BBGP Managing General Partner Limited v Babcock & Brown Global Partners* [2010] EWHC 2176 (Ch), [2011] Ch 296, per Norris J at para 58; and *Cadogan Petroleum plc v Tolley* [2011] EWHC 2286 (Ch), [2015] WTLR 1505, paras 55-60.

37. In *Sharp v Blank* [2015] EWHC 2681 (Ch) the dispute related to the boundary between the Shareholder Rule (which was not being challenged) and the exception to it where litigation was threatened or contemplated. But it contains a useful review by Nugee J of the history and supposed justification for the Rule itself. He rejected the submission that the Shareholder Rule was based upon what he called common interest privilege. At para 9 he concluded:

> "The foundation, as I understand it, of the general rule is the same as the foundation of the similar general rule that applies in the case of trustees and beneficiaries. Just as a trustee who takes advice as to his duties in relation to the running of a trust,

> and pays for it out of the trust assets cannot assert privilege against the beneficiaries who have, indirectly, paid for that advice, so too a company taking advice on the running of the company's affairs and paying for it out of the company's assets cannot assert a privilege against the shareholders who, similarly, have indirectly paid for it."

38. It will be necessary to return to other cases which address analogous exceptions to legal advice privilege in considering the main submission made on this appeal that, contrary to the dictum of Nugee J in *Sharp v Blank*, the Shareholder Rule really is a sub-set of joint interest privilege, and justifiable on that ground regardless of the fading away of the original proprietary basis for its creation. But the overview of cases on the Shareholder Rule will first be continued to its conclusion.

39. Serious doubt about the soundness of the justification for the Shareholder Rule was expressed by Michael Green J in *Various Claimants v G4S plc* [2023] EWHC 2683 (Ch). He said, at para 42:

> "the principle itself, while well-recognised in the authorities, has a somewhat shaky foundation in the light of the current ways of viewing the position of shareholders and their company, and whether they are akin to beneficiaries under a trust. It is clear that a company is totally separate from its shareholders and holds its property for itself. Shareholders have no direct interest in the company's property. Therefore, the common fund basis is now dubious."

40. Nonetheless he regarded the Shareholder Rule as too well settled to be capable of being set aside other than by the Supreme Court. Meanwhile he found a different reason for refusing the production of the allegedly privileged documents. Only three of the 90 claimants were shareholders in the defendant company, and the lateness of the application made a limited production to them impossible fairly to case manage.

41. In the light of this long list of authorities applying or at least recognising the Shareholder Rule, the success of the first full-frontal challenge to it in the English courts (subject to pending appeal) mounted in *Aabar Holdings SARL v Glencore plc* [2024] EWHC 3046 (Comm), [2025] 2 WLR 763 before Picken J probably came as a considerable surprise. The claimant Aabar Holdings was the indirect holder (through one or more intermediate companies) of shares in Glencore, a listed public company. It sought compensation under sections 90 and 90A of the Financial Services and Markets Act 2000, and at common law, arising from alleged misstatements in prospectuses and other documents issued by Glencore. Aabar sought production of documents from Glencore for

which Glencore claimed legal professional privilege. Aabar relied on the Shareholder Rule, to which Glencore boldly responded by denying its existence. The judge described issue 1 before him as:

> "Does the Shareholder Rule exist in English law?"

42. Following the tentative lead provided by Michael Green J in *G4S*, Picken J concluded that the Shareholder Rule should be abandoned. He did so for two main reasons. First he concluded that the Shareholder Rule could no longer be supported by reference to its traditional proprietary justification, as described above. From this counsel for Aabar, Mr Bankim Thanki KC did not seek to dissuade him. Rather, Mr Thanki relied on the analysis in his own book *The Law of Privilege* (3rd ed), seeking to uphold the Shareholder Rule as one example of relationships covered by joint interest privilege. Other examples of joint interest privilege (apart from cases where the lawyer was retained jointly) are trustee and beneficiary (the Trustee Rule), partners, joint venturers, companies and their directors and their wholly owned subsidiaries.

43. But Picken J rejected that alternative justification as well. It was not the basis on which the Shareholder Rule had been erected. There was in his view no overarching "joint interest privilege". That term was merely a convenient label to apply to various different relationships, each of which had something that the company shareholder relationship did not have, namely a separate justification for the disallowance of privilege. Finally, there was not, either generally or even typically, a sufficient joint interest between a company and its shareholders to bring it within any such category, or to justify the refusal to a company of such a basic right. Picken J did not regard himself as bound by any contrary authority to decide otherwise.

44. Picken J gave leave to Aabar to appeal and authorised a leap-frog to the Supreme Court. That court declined the leap-frog, taking the view that the same issue would probably be resolved in the current appeal to the Board, which could if appropriate make a *Willers v Joyce* order so that its decision would be binding in England and Wales.

(b) Overseas common law jurisdictions

45. The Shareholder Rule has not fared well in comparable overseas common law jurisdictions other than the Cayman Islands and Bermuda, where the decision of the Court of Appeal adopted a nuanced version of the joint interest justification when enforcing the Rule against Jardine.

46. A number of reported decisions in Canada have declined to apply the Shareholder Rule, mainly on account of the inconsistency between its original proprietary justification

and the proper analysis of a registered company as a legal person, separate from its members, with its own assets and liabilities. In *McPherson v Institute of Chartered Accountants of British Columbia* (1988) 32 BCLR (2d) 328 at 331-332, Hinkson JA giving the leading judgment of the Court of Appeal of British Columbia said that both *Gouraud* and *Woodhouse* proceeded on the erroneous basis, contrary to *Salomon*, that shareholders had a proprietary interest in the company's documents. It should not therefore be followed. In *Ziegler v Green Acres (Pine Lake) Ltd* [2008] ABQB 552 the Court of Queen's Bench of Alberta (EA Hughes J) declined to follow the English Shareholder Rule after a full review of the authorities including those on joint interest privilege, in particular because its effect would be to dissuade companies from taking legal advice. To the same effect is *McKinlay Transport Ltd v Motor Transport Industrial Relations Bureau of Ontario (Inc),* 3 WDCP (2d) 478 (1991).

47. In Australia, Olsson J sitting in the Supreme Court of South Australia in *State of South Australia v Barrett* (1995) 64 SASR 73, at 78 said that the *Woodhouse* line of authority was of doubtful validity since the relationship between trustees and beneficiaries, and between partners, was quite different from that of shareholders vis-à-vis a corporation.

48. The Board was referred to the ruling of Kawaley J in the Grand Court of the Cayman Islands in appraisal proceedings, in *In re 58.Com Inc* (unreported) 22 March 2003, FSD 275 of 2020. It adds little to the present debate because it was conceded by counsel for the company that, however unsatisfactory, the Shareholder Rule could not be treated at first instance as no longer in force. Rather the submission (which failed) was that Cayman legislation had deprived shareholders of recourse to it in appraisal proceedings. Nonetheless Kawaley J set out his own explanation of the justification for the Rule (which he called "the rule in *Woodhouse*"), at para 48:

> "The common law rule therefore is that shareholders will generally have a joint interest in any legal advice which the company whose shares they hold takes about the general administration of the company, because the company is deemed in a very general sense to be obtaining the relevant advice on the shareholders' behalf. Because an analogy has traditionally be drawn with the position of beneficiary and trustee, the rule in *Woodhouse* may in my judgment be viewed as deploying an equitable approach to mitigate the consequences of applying a strict legal approach based on the separation of legal personality between company and shareholders. On this basis, criticism of the rule for failing to take account of the modern legal view of the separate identities of company and shareholders overlooks the enduring practicalities underpinning the rule."

(c) Joint interest privilege: some authorities

49. The central reasoning of the Court of Appeal and the main submission of the respondents on this issue is that this case is covered by joint interest privilege, rather than by an automatic Shareholder Rule applicable in every case. It is therefore convenient at this stage to review some joint interest privilege cases about relationships other than company and shareholder, before returning to the decision of the Bermudian court under appeal. They are the principal authorities relied upon by the respondents for the applicability of joint interest privilege to the company shareholder relationship. Nothing in this judgment should be taken as laying down the law about joint interest privilege generally, in Bermuda or elsewhere, save to the very limited extent to which it may throw light upon its application to the particular corporate relationship with which this appeal is concerned. Nor is the Board here concerned with the difference between joint interest privilege and common interest privilege, as described by Clarke P in *Wang v Grand View Private Trust Co Ltd* [2021] BdA LR 29 ("*Wang*") at para 136; although the descriptors "joint" and "common" seem sometimes to be used interchangeably in the principal authorities, and at other times by way of distinction.

50. The earliest of cases about joint interest privilege in other contexts *is Cia Barca de Panama SA v George Wimpey & Co Ltd* [1980] 1 Lloyd's Rep 598, where the relevant relationship was between commercial joint venturers. The question was whether one party could claim legal professional privilege in relation to legal advice obtained about matters of common interest before the joint venture terminated in acrimony which led to litigation. The particular question was whether an exception to privilege had to be founded upon recognised relationships, such as principal and agent, trustee and beneficiary or company and shareholder, or whether it extended to any relationship where the joint interest existed as a matter of fact: see Stephenson LJ's summary of the rival submissions at p 614 (rc).

51. The Court of Appeal favoured the latter contention, calling it a "broad general principle" (p 615 (rc)). It is to be noted that, although Stephenson LJ mentioned *Gouraud* in passing, he founded his analysis upon the trustee-beneficiary relationship examined in *Talbot v Marshfield*, finding "a parallel between this case and that": p 614 (rc). He continued:

> "So here, it seems to me, however you define the relationship which their joint interest creates, it is enough to entitle the plaintiffs whether as beneficiaries, cestui que trust, or as partners in a joint venture, or as principals, to the same inspection of documents relating to the Aramco claims as the defendants themselves had."

It may be no more than fortuitous, but reference to the company and shareholder relationship is conspicuous by its absence. It was assumed that the company shareholder relationship was an established category, but there is no examination of it.

52. *Formica Ltd v Secretary of State acting by the Export Credits Guarantee Department* [1995] 1 Lloyd's Rep 692 was about the relationship between creditor and guarantor, in relation to legal advice taken about third party recoveries. In holding that privilege could not be claimed between them, Colman J said (at p 699) that if the relationship was such that an earlier disclosure of the legal advice would have been subject to confidentiality in the recipient's hands, then privilege could not be claimed. But that analysis of a possible test for the existence of a sufficient joint interest (Colman J called it common interest) says nothing about the company shareholder relationship, save perhaps that it could not possibly be satisfied as between a public listed company and its very large, constantly changing, body of shareholders.

53. The next two authorities can quickly be mentioned. The first, *Commercial Union Assurance Co plc v Mander* [1996] 2 Lloyd's Rep 640, was about the relationship between reinsurer and reinsured. The second, *Winterthur Swiss Insurance Co v AG (Manchester) Limited* [2006] EWHC 839 (Comm) was about a liability insurer and its insured. The latter included this observation from Aikens J upon which the respondents relied, at para 80:

> "The questions of what type of relationship between the two parties can give rise to a 'common interest' in the communication concerned has been considered in a number of cases. Amongst the types of relationship that can give rise to a 'common interest' are those of insured and insurer and insurer/reinsured and reinsurer. The cases have refused to be prescriptive about the circumstances in which the two parties will have a sufficient 'common interest' in the particular communications concerned. The issue has to be decided on the facts of the individual case."

Again there is no illuminating reference to the company shareholder relationship.

54. There is a brief passing reference to the Shareholder Rule in *James-Bowen v Commissioner of Police of the Metropolis* [2018] 1 WLR 4021 per Lord Lloyd-Jones JSC at para 45, as one of a group of exceptions to privilege which he may have assumed shared a common or joint interest justification. But he did so not to address any challenge to the Shareholder Rule, but rather to distance the lower degree of common interest in the case before him from any of that group, which included trustee and beneficiary and parties to

a joint venture agreement. So, although part of the unanimous decision of the Supreme Court, it adds nothing of substance to the present debate.

55. *Dawson-Damer v Taylor Wessing llp* [2020] Ch 746 was about the relationship between trustee and beneficiary under a trust governed by Bahamian law, so far as affecting a claim in English proceedings under the Data Protection Act 1998. That Act contained an express preservation of legal professional privilege. Unlike English law, Bahamian law recognises no joint interest privilege between trustee and beneficiary. Reversing the trial judge, the Court of Appeal held that the applicable law was that of the forum, so that, applying English procedural law, no privilege could be claimed. The particular problem dealt with in that case does not of course arise in this appeal, because the law regulating the company shareholder relationship and the law regulating claims for privilege in legal proceedings is the same: namely Bermudian law.

56. Nonetheless the respondents placed the following passage in the judgment of the Court of Appeal at the forefront of their submissions: (para 45)

> "… it is significant that 'joint privilege' has been recognised in contexts other than trusts. The fact that it applies as between shareholder and company is especially important. As Mr Taube accepted in submissions, the fact that a company engaged in litigation with a shareholder must disclose documents which, as against third parties, would attract LPP cannot be explained as merely a reflection of a right which a shareholder would have anyway. Absent litigation, a shareholder's rights to access any company documents, let alone those within the scope of LPP, are extremely limited …. That strongly suggests that the 'joint privilege' which has long been held to exist between shareholder and company should not be regarded as an aspect of company law. It is more plausibly seen as one emanation of a wider principle of procedure to the effect that 'privilege cannot be claimed in circumstances where the parties to the relationship have a joint interest in the subject matter of the communication at the time that it comes into existence' (to use the formulation in Thanki, *The Law of Privilege*…. That view is also supported by Stephenson LJ's endorsement in *Cia Barca de Panama SA v George Wimpey & Co Ltd* [1980] 1 Lloyd's Rep 598 of the passage from the then-current edition of *Phipson on Evidence* reading:
>
> > 'No privilege attaches to communications between solicitor and client as against persons having a *joint interest* with the client in the subject matter of the

> communication, e g as between partners; a company and its shareholders; trustee and cestui que trust …'"

57. It will be necessary to return to this dictum in due course, when dealing directly with Issue 1. But there was no challenge in that case to the submission that the company shareholder relationship was a settled example of joint interest privilege. The relevance of the analogy with the company shareholder relationship was that company law, like Bahamian trust law, greatly restricted the rights of shareholders to have access to company documents outside the context of disclosure in litigation.

58. The focus now moves from the Bahamas to Bermuda. In *Wang* privilege was unsuccessfully claimed between the trustees of four Bermudian purpose trusts and the youngest son of Mr Wang. The legal advice in issue related to the execution of a power of attorney by the father under which substantial property had been settled upon the trusts. The judgments of Subair Williams JA and Clarke P contain a wealth of analysis of joint interest privilege, something which Clarke P described, at para 135, as a "somewhat poorly charted sea". Apart from following Mr Thanki's exegesis of the nature and extent of joint interest privilege, the judgments have little or nothing to say about its operation (if that is the right word) in the context of the company shareholder relationship.

5. The claims brought by the plaintiffs and the proceedings below

59. Prior to the announcement of the amalgamation to the market on 8 March 2021, none of the plaintiffs were members (that is, shareholders of record) of Jardine Strategic, although some of them held a beneficial interest through depositary receipts in shares in Jardine Strategic. Other plaintiffs first acquired a beneficial interest in Jardine Strategic shares either following the announcement on 8 March or following the Notice issued on 17 March 2021 of the special general meeting. In any event, all the plaintiffs became members of Jardine Strategic (that is, shareholders of record) between the date of the announcement on 8 March 2021 and the date when the special general meeting was held on 12 April 2021. Those acquiring shares after 8 March 2021 acquired their shares at an average price of $33.66 per share.

60. Shortly after the amalgamation was approved at the special general meeting on 12 April, a group of 90 plaintiffs commenced claims pursuant to section 106(6) of the Act seeking an appraisal of the fair value of the shares in Jardine Strategic. By the time of the hearing before the Board the number of plaintiffs had reduced to about 70.

61. The plaintiffs issued a discovery summons on 10 August 2022 focusing on two points. The first was that the disclosure given had been limited to documents held by Jardine Strategic and its successor, the Company, whereas the plaintiffs asserted that they had in their possession, custody or power documents held by ten other entities within the

group including Jardine Matheson. The second was that the plaintiffs sought an order that the defendants produce documents over which they asserted privilege where the documents were created before 12 April 2021. That date was the date on which the first plaintiffs brought their claims for a court appraisal of fair value.

62. That discovery summons was one of a number of pre-trial applications that were heard by the Hon. Chief Justice Hargun during a five day hearing in December 2022. He handed down judgment on 14 February 2023 [2023] SC (Bda) 8 Civ.[1]

63. The Chief Justice dealt first with the possession, custody or power issue. He rejected the plaintiffs' assertion that the defendants had possession, custody or power over documents held by other entities in the group. He held in his conclusions at para 199 that he was not satisfied on the evidence that there was an arrangement or understanding the effect of which was that Jardine Strategic had in practice free or unfettered access to the documents held by the other companies in the group.

64. The Chief Justice then turned to the privilege issue at para 132 of his judgment. The Company's assertion of privilege was resisted before him on the then conventional basis that the Shareholder Rule was a simple, long established and complete answer to any assertion of legal professional privilege by a company against its shareholders. At para 143 he concluded:

> "As the cases reviewed above demonstrate, it is established under English law that a company may not claim privilege against its shareholders. The rule was originally based upon the proprietary interest of the shareholder in the property of the company expended on obtaining legal advice. The justification of the rule has changed to the discharge of the fiduciary duties owed by a director to the shareholders (Evans-Lombe J in *CAS (Nominees) Limited v Nottingham Forest plc* [2001] 1 All ER 954) and the existence of a joint interest in the subject matter of the communication (Thanki: *The Law of Privilege* (3rd ed))."

65. The defendants' first argument before him was that the Shareholder Rule did not extend to past shareholders because once a shareholder had disposed of its shareholding he can no longer be described as having any proprietary interest in the company's assets. The Chief Justice rejected that argument at para 152. The documents had come into

[1] The Board notes that the Chief Justice adopts the term "the Company" to refer to Jardine Strategic Holdings Limited, that is the pre-amalgamation company. The Court of Appeal and the Board, however, refer to Jardine Strategic Limited, the post-amalgamation company as "the Company" and the pre-amalgamation company Jardine Strategic Holdings Ltd as "Jardine Strategic".

existence when the plaintiffs were still shareholders of Jardine Strategic. The fact that they later fell out and that relationship ceased did not affect the communications which had taken place and the documents which had already come into existence during the shareholder relationship.

66. At para 155 the Chief Justice considered the date after which documents were to be regarded as having been created at a time when litigation was contemplated. The defendants argued that the prospect of litigation had been contemplated since the amalgamation was first considered because Jardine Strategic was advised that shareholders would have a right to have the value of their shares appraised. The plaintiffs argued for a later date, submitting that there was no conflict between the position of Jardine Strategic and the dissenters until 12 April 2021, the date on which the first appraisal actions were commenced. He held at para 169 that, bearing in mind the factual background, litigation under section 106 was in contemplation by the time the Transaction Committee was established on 19 February 2021. As a result, any legal advice sought and received on or after 19 February 2021 by Jardine Strategic or by the Transaction Committee in defence of or in connection with the contemplated section 106 proceedings would fall within the exception to the Shareholder Rule and so would be privileged against inspection by the plaintiffs.

67. The Chief Justice then turned to whether the Shareholder Rule should be imported into Bermudian law. He considered many of the points that the Board sets out above as regards the shaky foundations of the Rule and its rejection in several overseas jurisdictions. He concluded that having regard to the references to the Rule in certain Bermudian Court of Appeal cases which appeared to accept that it represented Bermudian law, the appropriate court to revisit that issue was the Court of Appeal.

68. The Chief Justice handed down a supplemental judgment on 21 April 2023 to clarify a point that had arisen from the main judgment: [2023] SC (Bda) 37 Civ. The parties had asked him to clarify whether the end date for the application of the Shareholder Rule overriding privilege was, as a matter of law, the date after which litigation privilege rather than legal advice privilege arose or whether it was a date on which the joint interest between the shareholder and the company diverged such that their interests were henceforward adverse, whether or not litigation was in contemplation. He concluded that the date when litigation privilege was triggered was indeed the date on which the joint interest dissipated so that the company could re-assert privilege against the shareholder in documents created after that date: para 14. He confirmed that the relevant date for this purpose was 19 February 2021; that meant that the defendants could not assert privilege against the plaintiffs in relation to legal advice received prior to that date.

69. The plaintiffs appealed against the Chief Justice's decision on the defendants' possession, custody or power over documents of other group entities and the defendants appealed against the privilege ruling. The Court of Appeal handed down its judgment on

5 March 2024: [2024] CA (Bda) 7 Civ. They dismissed the plaintiffs' appeal and dismissed the cross-appeal although they adjusted the date which had been set in the Chief Justice's supplemental judgment.

70. The hearing in the Court of Appeal followed the reporting of Michael Green J's judgment in *G4S*. That judgment was relied upon by the Company as casting doubt upon the continuing validity of the Shareholder Rule in England and hence as supporting its submission that the Rule should not be applied (for the first time) in Bermuda. However, the Chief Justice's decision to apply it was upheld on the basis that the Shareholder Rule was an established class of joint interest privilege in the application of which there was no reason why Bermuda should not follow England and Wales.

71. Bell JA, who gave the main judgment, recognised that the Shareholder Rule had not been applied in any decision in Bermuda but that the Court of Appeal had clearly operated on the basis that the Rule did exist in Bermuda in at least one case: para 124. He regarded the Rule, if it existed, as clearly now "based on joint interest privilege and not on 19th century case law". He held that joint interest privilege applied in this case to legal advice relating to the appraising of the fair value of shares and that this was applicable in Bermuda so as to prevent the Company asserting privilege against its shareholders in relation to that advice: paras 129 and 130.

72. He upheld the Chief Justice's rejection of the argument that the privilege only applies to parties who were shareholders at the time they requested inspection of the documents: para 131. Similarly, he rejected the argument that the Shareholder Rule did not apply to documents which were created at a time before the person requesting inspection had become a shareholder: para 135. Finally, Bell JA held that the formation of the Transaction Committee on 19 February 2021 was too early a date for holding that litigation privilege took over from legal advice privilege. He therefore held that the Shareholder Rule applied up until the announcement was made to the market on 8 March 2021: para 141.

73. While expressing agreement with Bell JA's judgment, Kawaley JA reached a much more nuanced conclusion. He rejected the traditional view that the company shareholder relationship was enough on its own to establish an exception to privilege, although it gave the shareholder standing to seek to do so. Whether the shareholder could succeed in overcoming the company's assertion of privilege would be dependent upon all the circumstances, and was a flexible and context-based rule rather than a status-based rule. Generally, it would be necessary for the shareholder to show that the advice "was received in circumstances which directly engaged the shareholder's legal or commercial rights in a way which was reasonably discernible at the time" (para 147(c)). At para 154 he said:

> "Whether joint privilege exists, in such circumstances, is far from an 'unruly horse'. The critical analysis will almost invariably be whether, having regard to the particular purpose for which the legal advice was obtained and the particular legal purpose in relation to which the applicant seeks to deploy it, the respective parties' interest in the advice may fairly be said to be a joint or common one. The scope of the rule understood in this way is flexible and not a rigid status-based rule at all."

74. Returning to the subject at para 158, Kawaley JA rejected the traditional status-based rule (which would automatically disapply privilege between company and shareholder) for the following three reasons:

> "(a) it unreasonably restricts the freedom of companies to access the protection of legal professional privilege, save when litigation is in contemplation;
>
> (b) it implicitly [ignores] the separate legal personality of the company from its shareholders; and
>
> (c) it presumes that the company-shareholder commercial relationship translates into a commonality of interests whenever the company seeks legal advice, when the real commercial and legal relationship may be entirely different."

75. Kawaley JA concluded, at para 174:

> "A shareholder has standing to assert a joint interest in legal advice a company has received. This is because there will potentially be various contexts in which a joint interest will arise, not because of any single overarching principle which applies in all cases without further analysis. Whether or not a shareholder's joint interest will be recognised by a court depends on the legal and factual circumstances of the proceedings in which the joint interest claim is advanced."

76. Clarke P agreed with both judgments, and added, at paras 183-184:

> "183 As to the issue of privilege, I decline to declare that the principle of joint interest privilege is, so far as it relates to

> companies and shareholders, inapplicable in Bermuda. Insofar as an entitlement to see privileged material was once based on the notion that the shareholder had some form of interest in the property of the company that foundation has collapsed. But the joint interest principle, applicable to defeat what would otherwise be a successful claim to legal advice privilege, has a firm foundation in the recognition by the courts that the shareholder and the company may have a joint interest in the subject matter of the relevant communications, in like manner as a joint interest in communications may arise in the case of other relationships: see those summarised at 6.09 of *Thanki* and by me at [139] of *Wong*."
>
> 184. Whether such a joint interest exists depends on the circumstances of each individual case. I would accept that the joint interest principle does not extend to give the shareholder an absolute right to access any company legal advice whatever, and would respectfully endorse the observations of Kawaley JA on the limits of the right."

77. The issues arising on this appeal are as follows:

Issue 1: Did the Court of Appeal err in concluding that the plaintiffs have a joint interest in legal advice received by Jardine Strategic relating to the determination of the fair value of the shares for the purposes of section 106 of the Act?

Issue 2: Alternatively, did the Court of Appeal err in concluding that a former member continues, after the cessation of its membership, to be entitled to rely upon such joint privilege in relation to advice obtained during the period of its membership?

Issue 3: Alternatively, did the Court of Appeal err in concluding that such joint interest can be relied upon by (a) a beneficial owner of shares, not being a member holding legal title to the shares and/or (b) a person who acquires shares after the date when the relevant advice was received?

Issue 4: Did the Court of Appeal err in concluding that the joint interest ceases to apply from the date when the company can establish a claim to litigation privilege, rather than from the date when the interests of the company and the shareholder become adverse?

6. Issue 1 – Should the Shareholder Rule continue to exist in some form?

78. Issue 1 has been carefully framed to accommodate any possible basis by which legal advice privilege might be resisted between the shareholder parties to this litigation and Jardine. That would include, first, the traditional status-based Shareholder Rule as mechanistically applied for over a century in England and Wales. Secondly, it would include the joint interest version under which the company shareholder relationship is a generally but not invariably sufficient example of joint interest (as one of a growing family including principal and agent, trustee and beneficiary, joint venturers and various insurance-based relationships). Thirdly, it would accommodate Kawaley JA's much more nuanced circumstances-based analysis in which the burden would lie on a shareholder to establish a sufficient joint interest on the particular facts of the case.

79. The main emphasis of the respondents' submissions in seeking to uphold the order for production affirmed by the Court of Appeal was on the second basis, which the Board will refer to for convenience as joint interest privilege. But it is first necessary to decide whether there is a strict status-based Shareholder Rule, as formerly applied in England and Wales, until departed from (subject to appeal) by Picken J in *Aabar v Glencore*.

80. 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. Its only two advantages were its ancient lineage and its creation of a bright line. But the Board considers that its disadvantages easily outweigh those two advantages. The first is that its original justification was proprietary, but this basis for the Rule is 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 proprietary basis for the Rule was not supported by counsel for the respondents and has not for some time been supported either in reported cases or academic writings as a valid justification for the refusal to extend to companies a fundamental right to seek and receive legal advice in confidence.

81. Nonetheless the Board agrees with Nugee J (as he then was) in *Sharp v Blank* that the original justification for the Rule was the proprietary basis, not joint interest. The latter has been prayed in aid by those seeking to explain the continued existence of the Shareholder Rule in the light of the collapse of its original justification. In the Board's opinion, and this is its second main disadvantage, it cannot sensibly justify an automatic status-based denial of legal professional privilege between every company and all its shareholders. The reasons for this will become apparent in the conclusions expressed below about the second and third asserted versions of the denial of privilege as against shareholders. In short it cannot sensibly be said that there is always a community of interest between every company and its shareholders, either as a class or *a fortiori* individually.

82. 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.

83. Turning to the second basis for denying privilege to Jardine Strategic (now the Company), namely joint interest privilege, the central thrust of the submissions of Mr Mark Howard KC for the respondents was not that joint interest privilege would automatically apply to support every claim for production of relevant documents by a shareholder against a company. Rather he submitted that the company shareholder relationship was an established type of relationship where joint interest generally existed, like that of trustee and beneficiary, principal and agent and as between partners, joint venturers and certain insurance relationships. Although there might be exceptions where the interests between shareholder and company were insufficiently aligned at the time of the obtaining of the legal advice, this case was not one of them.

84. The Board has already made it clear that this is not the occasion for a general review of what has come to be known as joint interest privilege. The only matter which requires to be decided is whether the company shareholder relationship falls within that supposed general principle. For the reasons which follow, the Board considers that it does not. When the company shareholder relationship is looked at squarely on its own, it is clear that there is no, or at least no sufficient, analogy with those other relationships to justify its inclusion within the joint interest family of relationships.

85. Mr Howard's best point was that there is force in the proposition that for as long as a company is solvent, its interests as a separate legal person are, in a very general sense, frequently aligned with those of its shareholders. What is good for the company's business is, he says, usually good for shareholder value. Reference was made to the detailed description in *Sequana* of the way in which the focus of the directors' proper concerns shifts from the interests of the company's shareholders towards those of its creditors as insolvency approaches. In the present context the Company's solvency is not remotely in doubt.

86. But this is a serious oversimplification. It first assumes, wrongly, that the interests of the shareholders themselves are always aligned amongst themselves. In reality, particularly in a large company, the interests of different classes of shareholders may diverge. Even within a single class, there may be real differences in outlook between, for example, those who wish to maximise dividend return and those who would prefer long term capital growth. Further, as the present case vividly demonstrates, there may be sharply divided views (presumably based upon differing perceptions of their best interests) between shareholders in the same class supporting, and opposing, a particular step such as a merger or an amalgamation. Shareholders are simply not a homogeneous block with a single shared interest which may coincide with, or diverge from, the interests

of the company. Even in a small family-owned company there may be sharp differences in view between different generations as to the best way forward for the company.

87. Yet further, even a solvent company has stakeholders other than just its shareholders whose interests have to be taken into account, such as its workforce. And the maintenance of solvency may depend upon keeping happy the company's principal providers of finance and working capital, whose perceptions as to the best choice for the company to make between competing business objectives may be quite different from, and generally more cautious than, those of its shareholders.

88. The directors of a large modern sophisticated company have the constant and difficult task of finding their way to a reliable perception of their company's best interests while paying appropriate attention to the interests and wishes of their many different classes of stakeholders, when making decisions, large and small, about the management and direction of the company's business. Many of those decisions will need, or at least benefit from, candid, confidential, legal advice.

89. A broadly based exception from legal advice privilege as between company and shareholders, founded upon a supposed joint interest between them would fall foul of all the three objections rightly identified by Kawaley JA in the Court of Appeal, and quoted above. It would discourage companies from obtaining candid legal advice in confidence. It would ignore the separate personality of the company and it would wrongly assume a simple coincidence of interests contrary to the typical commercial reality.

90. The Board also agrees with Kawaley JA that it is material to bear in mind that the relationship between a company and its shareholders is essentially contractual, and that the terms of that relationship typically (as in this case) greatly restrict what a shareholder is entitled to see of, or be told about, the company's documents: see the bye-law set out at para 18, above. It is accepted by the parties that this would prevent a shareholder from demanding sight of the company's legal advice in any situation outside the context of a discovery exercise conducted in the course of later hostile litigation between them. While of course the desirability that court proceedings should get at the truth means that relevant documents have to be disclosed to a party with no other right to see them, production is normally subject to legal professional privilege. So it is strange that an exception to that same privilege can be mounted on the basis of a special relationship (company and shareholder) when the express contractual terms of that relationship point clearly in the opposite direction.

91. There are numerous authorities, the main examples of which have been cited above, in which the company shareholder relationship is included within the growing family of relationships qualifying for what is now called joint interest privilege. But the foregoing survey of those cases (most of which are not themselves about the company

shareholder relationship) shows that this inclusion has been made almost an unthinking habit, based upon *Gouraud* and *Woodhouse*, both of which adopt the discredited proprietary basis for doing so. It has not been based on any in-depth analysis of whether that inclusion is really merited. In the Board's view, the company shareholder relationship should now be removed from that family. The dictum in *Dawson-Damer* to the contrary quoted above should not be regarded as good law.

92. There remains the much narrower, more nuanced, basis for occasionally depriving a company of legal professional privilege in litigation with its shareholders, namely that advanced by Kawaley LJ in the Court of Appeal. That approach would regard the existence of the relationship as only a threshold to entry upon the question whether the shareholder can demonstrate a sufficient joint interest in the obtaining and receiving of the advice, on the particular facts of the case. The Board is unable to accept Kawaley JA's formulation, still less his conclusion that it applies to disentitle the Company to legal professional privilege on the facts of this case.

93. The approach adopted by Kawaley JA requires an open-textured assessment to be made as to whether the interests had been joint in the particular circumstances. The very uncertainty whether, in relation to a particular matter for decision, there was or was not the coincidence of interest between company and shareholders sufficient to engage the exception from privilege would make it all but impossible for directors to know, when deciding whether or not to seek legal advice, whether the advice once received would be privileged from production to shareholders in the event of subsequent litigation between them. In order for privilege to deliver its intended objective, there must be reasonable certainty as to whether it will or will not apply on a particular occasion for the taking of legal advice. A general rule that privilege would not be available, subject to fact-sensitive exceptions, would be even worse. Directors would just have to make the general assumption that they could not obtain legal advice in confidence.

94. The Board would respectfully disagree with Kawaley JA's earlier conclusion in *In Re 58.Com Inc* (sitting in the Cayman Islands) that the Shareholder Rule is a form of equitable tempering of the strict consequences of the separate personality of a company. In the Board's view the availability or otherwise of legal professional privilege has nothing to do with equity's role in tempering the rigidities of the common law. On the contrary the need for certainty as to whether legal advice will be privileged or not demands a bright line, otherwise it will fail to serve the objective of encouraging the taking of legal advice.

95. It is not clear whether this perception animated the nuanced approach adopted by the same judge in the Court of Appeal in the present case. But his solution does in the Board's view suffer from the same fatal dose of uncertainty in its application. It depends on a review of all the circumstances of each case. Kawaley JA said, at para 174, that:

> "Whether or not a shareholder's joint interest will be recognised by a court depends on the legal and factual circumstances of the proceedings in which the joint interest claim is advanced."

96. The insuperable problem with that approach is that the directors need to know with reasonable certainty whether confidence can be maintained in the legal advice at the time when a decision is made whether or not to seek it. At that time (by definition) litigation with shareholders is neither threatened nor contemplated. But how can the directors, when they decide whether or not to seek legal advice, know what (if any) litigation with shareholders may later ensue, and therefore what may be the legal and factual circumstances of the later proceedings?

97. The Board would therefore respectfully reject Kawaley LJ's alternative, more nuanced test. While it might lead to fewer cases where a shareholder could override the company's claim to privilege than the joint interest privilege test which has already been rejected, it nonetheless suffers from unacceptable uncertainty in its application.

98. Any attempt to apply either of the two tests advanced by the respondents to the facts of the present case illustrates the sea of uncertainty to which either of them would give rise.

99. Mr Howard boldly submitted that legal advice about the fixing of a fair price for the shares to be compulsorily acquired from minority shareholders in the Jardine Strategic amalgamation was plainly a matter about which Jardine Strategic (now the Company) and its shareholders shared a joint interest. The Court of Appeal appears to have agreed. The Board fundamentally disagrees. Jardine Matheson, a related group company (in which Jardine Strategic itself had a majority shareholding) owned more than 85% of the shares to be cancelled by the proposed amalgamation, and the less than 15% minority had no means of resisting the proposal. Their shares, but not those of the Jardine Matheson majority, were to be compulsorily purchased at 'fair value'. The result was that that there was a fundamental divergence of interest between the minority and the majority. The former were to be paid out at fair value, while the latter were to receive shares in the Jardine newco (the Company) created by the amalgamation, and were therefore, in effect, paying for the minority's shares. Plainly the minority's interests would be favoured by a high valuation, whereas both the majority's and the other Jardine companies' interests (including those of the Company) favoured a low price. The notion that all the shareholders and Jardine group had joint interests in the subject matter of the advice strikes the Board as unrealistic, even though the Court of Appeal seems to have been persuaded by it.

100. That is not to say that the Transaction Committee of independent directors were not duty bound to fix a value which they genuinely believed was fair. Arriving at such valuations is a complex task and an inexact science which will inevitably result in a range of values all of which could be justified on reasonable grounds. The Company and the shareholders going forward after the amalgamation will have an interest in the chosen figure being towards the lower end of the range of reasonable fair values and the departing shareholders will have an interest in the highest reasonable value being adopted.

101. In any event the fact that such divergent submissions could be made about whether there was or was not a qualifying joint interest in the subject matter of the legal advice clearly demonstrates how unsatisfactory and uncertain such an inevitably multifactorial test for the availability of legal advice privilege is bound to be, and therefore how unsuitable it is, at least in the corporate context, as marking the boundary of a fundamental right to seek legal advice in confidence.

102. The Board would therefore advise His Majesty to allow the appeal on Ground 1.

7. Other Issues raised by the appeal

103. The other issues raised by the appeal before the Board concern the more detailed application of the Shareholder Rule.

104. Issue 2 was whether the Court of Appeal had erred in holding that the plaintiffs could still rely on the Shareholder Rule after their shares in Jardine Strategic were cancelled so that they were no longer members of that company. As discussed above in relation to joint retainer privilege, the case law establishes that an assignee of a cause of action acquires the right to see documents created as a result of the joint retainer between the assignor and another in relation to that cause of action. It is not, however, a right of property that automatically vests in the trustees of the assignor's estate on bankruptcy under the English Insolvency Act 1986: see *Avonwick Holdings Ltd v Shlosberg* [2016] EWCA Civ 1138, [2017] Ch 210. Since the Board has concluded that the Shareholder Rule does not apply and that the plaintiffs have no right of access to the privileged documents, the Board leaves that issue to be determined in the context of joint retainer privilege in a future case.

105. Issue 3 raises two questions. The first is whether the plaintiffs who were beneficial owners of shares in Jardine Strategic rather than legal owners of the shares and whose names did not therefore appear on the share register can rely on the Shareholder Rule. The second question raised by Issue 3 relates to whether a shareholder needs to be a member of the company at the time that the advice is received in order to benefit from the Shareholder Rule or whether it is sufficient to have acquired the shares at some later point.

106. Neither of those questions now arises. The difficult problems that addressing them would clearly raise confirm the Board's view that the Shareholder Rule should be abolished.

107. Finally, Issue 4 asks on what date the Shareholder Rule would cease to apply to advice: is advice no longer covered by the Shareholder Rule if it was covered by litigation privilege rather than by legal advice privilege or is the advice outside the Rule and so privileged if received at a time at which the interests of the plaintiffs and Jardine Strategic had become adverse? This issue has also become otiose.

8. A *Willers v Joyce* direction

108. In *Willers v Joyce (No 2)* [2016] UKSC 44, [2018] AC 843 nine Justices of the UK Supreme Court sat to consider the important issue of the status of decisions of the Board in the courts of England and Wales. The issue had arisen because of an apparent conflict between a decision of the House of Lords and a more recent decision of the Board which led to a different conclusion. Lord Neuberger with whom the other Justices agreed, stressed the importance of the doctrine of precedent to the coherent clarity and predictability of the law.

109. Although the Judicial Committee of the Privy Council is not a court of any part of the United Kingdom, it almost always applies a variant of the common law and either all or most of the Privy Councillors sitting on an appeal will be Justices of the Supreme Court. The logical consequence of this, Lord Neuberger said, was that decisions of the JCPC cannot be binding on any judge of England and Wales but that a decision of the JCPC, at least on a common law issue, should be regarded by courts at every level as being of great weight and persuasive value: see para 12. He summed up the position as follows:

> "16. There is no doubt that, unless there is a decision of a superior court to the contrary effect, a court in England and Wales can normally be expected to follow a decision of the JCPC, but there is no question of it being bound to do so as a matter of precedent. There is also no doubt that a court should not, at least normally, follow a decision of the JCPC, if it is inconsistent with the decision of a court which is binding in accordance with the [normal rules of precedent]."

110. He concluded that the latter rule, namely that a lower court should not follow a JCPC decision which is inconsistent with an otherwise binding authority, should be regarded as an absolute rule. That rule should be followed even if the lower court

considered it was very likely that the conflicting but binding England and Wales authority would be overruled if the matter progressed up to the Supreme Court.

111. However, the court then stated that where, in an appeal to the JCPC, the Board decides that an earlier decision of the Supreme Court or the Court of Appeal on English law was wrong, the procedure that Lord Neuberger then described should be followed. When applying to the Board for permission to appeal or commencing an appeal before the Board, a party should indicate that the appeal will involve inviting the JCPC to depart from a decision of the House of Lords, of the Supreme Court or of the Court of Appeal of England and Wales. If the Board then thinks it appropriate, it may not only decide that the earlier decision was wrong but may also expressly direct that domestic courts should treat the decision of the JCPC as representing the law of England and Wales.

112. It is not clear whether the current appeal formally requires a *Willers v Joyce* direction since it is uncertain whether there is authority at the level of the Court of Appeal of England and Wales which would otherwise bind lower courts in England and Wales and so require such courts to continue to treat the Shareholder Rule as applicable in disclosure exercises in litigation in England and Wales. In the *Aabar v Glencore* case Picken J thought not, but he granted permission to appeal, and that appeal remains to be heard by the Court of Appeal in England. So there is still the possibility that the Court of Appeal in England might conclude that it was bound by earlier authority to maintain the Shareholder Rule.

113. The nearest to a binding decision of the English Court of Appeal on the Shareholder Rule is probably the *Woodhouse* case, which is often cited as the leading authority on the Rule. But there are several others, including one in the Supreme Court, where some variant of the Rule is assumed to exist, and its existence in some form is assumed in most of the relevant text books and academic writings, albeit not without some criticism. No-one has submitted that the common law of Bermuda is different from the common law of England and Wales in this context. To avoid such doubts, and bearing in mind what was said by the Supreme Court about the *Aabar* case when refusing a leap-frog appeal (see para 44, above), the members of the Board in the present appeal, all also being Justices of the Supreme Court, are firmly of the view that this decision should be regarded by courts in England and Wales as abrogating the Shareholder Rule for the purpose of litigation in those courts, and the Board so declares.