


The end of the Shareholder Rule: Aabar Holdings SARL v Glencore Plc

16 December 2024  Andrew Woolsey

On 27 November 2024 the Commercial Court in *Aabar Holdings S.á.r.l. v Glencore Plc* handed down an important judgment, which concluded that the so-called Shareholder Rule should no longer be applied.

This decision will be of interest to both shareholders and boards of directors engaged in adversarial disputes under which the shareholder(s) seek disclosure of company documents. Previously, the Shareholder Rule, which arose in the case of *Gourand v Edison Gower Bell Telephone Co of Europe Ltd* [1888 57 LJ Ch 498], prevented companies from asserting privilege against its own shareholders, with the exception of documents arising from litigation between the shareholder and the company.

Background

The historic justification for the Shareholder Rule, advanced in *Gourand*, was that the position of a shareholder was seen as analogous to that of trust beneficiaries, thereby granting a shareholder a proprietary interest in the company's assets (as a beneficiary does in a trust's assets), which included any privileged legal advice taken by the company, which was paid for using those assets. Privilege did not, therefore, prevent shareholders from accessing such advice.

The decision in *Aabar Holdings S.á.r.l. v Glencore Plc* arose in the context of a class action against Glencore Plc and certain of its former directors relating to alleged misconduct by certain of Glencore's subsidiaries in Africa and South America, and oil price manipulation in relation to the fuel oil market at certain US ports. Ahead of the first case management conference in the action, a dispute arose as to whether Glencore was entitled to assert privilege against the claimants, or whether it was prevented from doing so by the Shareholder Rule.

The end of the Shareholder Rule

The High Court held that the Shareholder Rule does not exist under English Law.

Mr Justice Picken noted that the seminal House of Lords decision of *Salomon v Salomon* [1897] AC 22, which confirmed that a company is a separate legal entity which is distinct from its shareholders, meant, according to Mr Justice Picken, that the previous analogy advanced in *Gourand* between shareholders and trust beneficiaries no longer applied.

At [117] Mr Justice Picken found that the Shareholder Rule is "unjustifiable and should no longer be applied", thereby explicitly rejecting the application of the Shareholder Rule.

Aabar also submitted an alternative view that, following the decision in *Salomon*, the principle had "morphed", and the Shareholder Rule had become a manifestation of joint interest privilege (which Aabar submitted operates as a freestanding form of privilege), i.e., the privilege that arises between a shareholder and a company. Mr Justice Picken rejected the argument that joint interest privilege is a separate freestanding form of privilege, on the basis that:

- There was no binding authority for the position that the Shareholder Rule can be justified on the basis of joint interest privilege; and
- Joint interest privilege was not a concept "which has any independent existence" but was "merely an umbrella term that has been used to describe a variety of different situations in which one party is unable to assert privilege against another, not because of there being any such freestanding concept but on other, narrower and more conventional grounds." [94].

Notwithstanding Mr Justice Picken's rejection of the Shareholder Rule, and the alternative argument formulated by Aabar, he noted, that in case the Shareholder Rule did exist in some form it would not be an absolute rule and would be subject to the following limitations:

- it would not apply to without prejudice privilege;
- the relevant point of time for the shareholder is when the communication was made, and it made no difference whether the claimant had later ceased to be a shareholder; and
- it would apply to privileged documents belonging to the subsidiary of the company, and the Shareholder Rule should not be treated as applying only between a company and its direct shareholders in which the shareholder held its shares.

Comment

This is an important decision, which strengthens the ability of companies to protect confidential legal advice from being disclosed to shareholders. Without the ability to rely on the Shareholder Rule, it will clearly be far more difficult for shareholders to obtain a company's privileged documents, which will reduce shareholders' ability to hold company boards to account, and could have a significant bearing on shareholder actions, including group shareholder actions.

It is important to exercise a degree of caution however, as given the wider significance of this decision, the judgment may be subject to an appeal. Until higher courts provide further clarification, companies and shareholders will need to navigate these issues with caution.

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