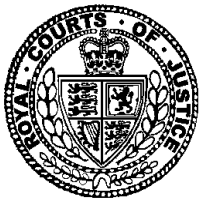

Neutral Citation Number: [2024] EWHC 3046 (Comm)

Case No: FL-2022-000024

IN THE HIGH COURT OF JUSTICE
BUSINESS & PROPERTY COURTS OF ENGLAND & WALES
FINANCIAL LIST (KBD)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27 November 2024

Before:

MR JUSTICE PICKEN

- -

BETWEEN:

AABAR HOLDINGS S.À.R.L.

Claimant

- and -

(1) GLENCORE PLC
(2) IVAN GLASENBERG
(3) ANTHONY BRYAN HAYWARD
(4) STEVEN FRANK KALMIN **Defendants**

- -
- -

Bankim Thanki KC, Nicholas Damnjanovic and Kit Holliday (instructed by **Quinn Emanuel Urquhart & Sullivan UK LLP**) for the **Claimant**.
Richard Hill KC, Tony Singla KC and Kyle Lawson (instructed by **Wilmer Cutler Pickering Hale and Dorr LLP and Clifford Chance LLP**) for the **First Defendant**.

Hearing dates: 15 & 16 October 2024.
Judgment provided in draft: 25 November 2024.

- -

JUDGMENT

Mr Justice Picken:

Introduction

1. This judgment follows a hearing at which a number of important privilege-related issues were addressed. As explained shortly, foremost amongst these are whether the so-called Shareholder Rule is valid and, if so, whether it applies not only to legal advice privilege and litigation privilege but also to without prejudice privilege.

2. The context in which these issues arise is a claim brought by the Claimant, Aabar Holdings S.à.r.l. ('Aabar') against Glencore Plc ('Glencore') and certain individuals.

3. Glencore is a global natural resources company and the ultimate parent company of the Glencore Group. Glencore was incorporated on 14 March 2011 under the laws of Jersey and is domiciled in Switzerland. Glencore's shares were the subject of an Initial Public Offering (the 'IPO') on 19 May 2011 and Glencore subsequently acquired Xstrata Plc on 2 May 2013 (the 'Merger'). Glencore's shares are listed on the London Stock Exchange, with a market capitalisation of around £50 billion.

4. Aabar, otherwise known in this litigation context as the 'QE Claimant' reflecting the fact that it is represented by Quinn Emanuel Urquhart & Sullivan UK LLP, is a private company incorporated in Luxembourg which is ultimately owned by the Government of the Emirate of Abu Dhabi (or its sovereign wealth fund).

5. Aabar is not, and never has been, a shareholder in Glencore. It was (or alleges that it was), rather, the sole shareholder in another Luxembourg company, Commodities S.à.r.l. ('Commodities') between 29 March 2012 and 20 December 2021. That company (so it is alleged) was the ultimate beneficial owner of shares in Glencore in that it held intermediated securities through CREST between 24 May 2011 and 28 December 2020 when it is alleged to have sold any interest which it may have had in any Glencore shares to another company called ATIC Second International Investment Company LLC ('ATIC'). Commodities was dissolved on 20 December 2021 (after it had allegedly sold any interest it may have had in any Glencore shares) and Aabar claims that, immediately upon that event, all of the assets and liabilities of Commodities transferred to Aabar under Luxembourgish law.

6. Aabar is one of a number of a claimants who have brought claims against Glencore and (in some cases also) the Second to Fourth Defendants (the 'Director Defendants'), each of whom are former directors of Glencore. In addition to Aabar, there are three other separately represented Claimant groups (viz. the 'Pallas Claimants', the 'Stewarts Claimants' and the 'BCLP Claimants') whose claims are being case managed and are to be tried together with the claims brought by Aabar (together, the 'Co-Managed Claims'). In addition to the Co-Managed Claims, there is also a further group of Claimants (the 'Fox Williams Claimants') who have issued claims against Glencore which overlap very substantially with those of the Claimants in the Co-Managed Claims, but whose claims are not currently being case managed with the Co-Managed Claims.

7. The claims brought by the Claimants in each of the Co-Managed Claims relate to alleged (and, in some cases, admitted) misconduct by certain subsidiaries in the Glencore Group in certain countries in Africa (viz. the Democratic Republic of the Congo, South Sudan, Nigeria, Cameroon, the Ivory Coast and Equatorial Guinea) and South America (viz. Brazil and Venezuela), as well as admitted oil price manipulation

in relation to the fuel oil market at certain US ports. To date, the misconduct alleged (or some of it) has led to the confiscation of funds, disgorgement and the imposition of fines against Glencore totalling approximately US$1.4 billion.

8. The various Claimants say that, as a result of the alleged and/or admitted misconduct on which they rely, certain documents issued by Glencore contained misstatements and/or omitted matters which they should have included and that each of the Claimants have incurred losses on their alleged investments in Glencore as a result.

9. Specifically, although only by way of summary, all of the Claimant groups in the Co-Managed Claims bring claims under s. 90 of the Financial Services and Markets Act 2000 ('FSMA') in relation to the contents of the prospectus issued by Glencore on 4 May 2011 in relation to the IPO (the 'IPO Prospectus') and (save for Aabar) the prospectuses issued by Glencore on various dates between 31 May 2012 and 5 March 2013 in relation to the Merger (together, the 's. 90 Claims'). Aabar brings claims under s. 90A of FSMA in relation to the contents of certain Annual Reports, Half-Yearly Reports and Sustainability Reports issued by Glencore between 2010 and 2019. The BCLP Claimants also bring claims under s.90A (albeit that their claims are confined to alleged dishonest delay in the publication of certain information) (together, the 's. 90A Claims'). Aabar, the 31st Stewarts Claimant and the 44th Pallas Claimant (the 'Cornerstone Investors') bring contractual claims against Glencore under the terms of three separate 'Cornerstone Investment Agreements' (the 'Cornerstone Claims'). Aabar brings common law claims in the torts of deceit and negligence (the 'Common Law Claims'). Aabar and the Pallas Claimants also bring claims against the Director Defendants, namely Mr Glasenberg and Mr Kalmin and (in the case of Aabar only) Mr Hayward.

10. The first CMC in the Co-Managed Claims took place on 21-23 May 2024. In the run-up to that hearing, a dispute arose in correspondence as to whether (and, if so, in what circumstances) Glencore would be entitled to assert privilege against the Claimants in these proceedings. The parties, therefore, agreed directions for the determination of the relevant issues, and those directions were approved by Bryan J at the CMC.

11. Those issues are these:

(1) Does the Shareholder Rule exist in English law? ('Issue 1').

(2) If so, does the Shareholder Rule apply to each of (i) legal advice privilege; (ii) litigation privilege; and (iii) without prejudice privilege? ('Issue 2').

(3) Does the Shareholder Rule extend to Aabar notwithstanding that it:

(a) was not a registered shareholder of any shares in Glencore at any material time, but, rather, claims to be the successor to the rights of an ultimate beneficial owner of shares in Glencore that held intermediated securities through CREST between 24 May 2011 and 28 December 2020; and

(b) does not currently hold any interest in any Glencore shares? ('Issue 3').

(4) Does the Shareholder Rule extend to privileged documents belonging to subsidiary companies within Glencore's corporate group? ('Issue 4').

(5) Is Glencore entitled to withhold inspection against Aabar of documents created during the period in which Aabar claims to have had an interest in Glencore shares (i.e. between 24 May 2011 and 28 December 2020) in categories 1 to 6 and 8 to

15 listed in the schedule to the letter from Clifford Chance dated 28 June 2024? ('Issue 5').

12. On 28 June 2024, in accordance with those directions, Glencore produced a list identifying (as best it can at this stage in proceedings and prior to having completed its Extended Disclosure document review exercise): (i) each of the categories of documents which it asserts that it will be entitled to withhold from production on the grounds of privilege; (ii) the likely nature of the privilege in each case; and (iii) the likely date ranges of the documents in each category.

13. On 12 July 2024, the Pallas, Stewarts and BCLP Claimants changed their positions. Each of these Claimant groups indicated that, upon further reflection, they did not *"presently"* intend to challenge any of Glencore's claims to privilege on the basis of the Shareholder Rule, whilst reserving their rights to do so *"in the event that there is any future decision (in these proceedings or otherwise) which upheld or extended the scope or application of the [Shareholder Rule]"*. Aabar indicated, however, that it did intend to challenge Glencore's claims to privilege, and that is why only Aabar was represented at the hearing before me on 15 and 16 October 2024.

14. I turn, then, to the various Issues, noting nonetheless that, in the event, it was common ground at the hearing that it is not currently feasible to address Issue 5.

Issue 1: Does the Shareholder Rule exist in English law?

Aabar's position

15. Aabar's position is that there is a principle, known as the Shareholder Rule, that a company cannot assert privilege against its own shareholder, save in relation to documents that came into existence for the purpose of hostile litigation against that shareholder. This principle, Mr Bankim Thanki KC notes on behalf of Aabar, has existed in English law for over 135 years and has been approved by both the Court of Appeal and the Supreme Court.

16. Mr Thanki referred to the principle having first been applied in ***Gouraud v Edison Gower Bell Telephone Co of Europe Ltd*** (1888) 57 LJ Ch 498 by Chitty J (as he then was). Mr Thanki observed that the Shareholder Rule has subsequently been applied, including by the Court of Appeal in ***Woodhouse & Co Ltd v Woodhouse*** (1914) 30 TLR 559, where Phillimore LJ described the relevant principle as having previously been *"well settled"*, and that it has been applied in numerous cases at first instance, most recently by Nugee J (as he then was) in ***Sharp v Blank*** [2015] EWHC 2681 (Ch) and (albeit with doubt expressed) by Michael Green J in ***Various Claimants v G4S Plc*** [2023] EWHC 2863 (Ch). At the appellate level, in particular, Mr Thanki referred to the Court of Appeal having referred approvingly to the principle in ***CIA Barca de Panama SA v George Wimpey & Co Ltd*** (1980) 1 Lloyd's Rep 598, to the Supreme Court having approved the principle in certain remarks made by Lord Lloyd-Jones in ***James-Bowen v Comr of Police of the Metropolis*** [2018] 4 All ER 1007, [2018] UKSC 40 and to the Court of Appeal in ***Dawson-Damer v Taylor Wessing LLP*** [2020] 3 WLR, [2020] EWCA Civ 352 having relied on the existence of the Shareholder Rule as part of the ratio for a decision concerning trustees and beneficiaries. Mr Thanki additionally pointed to a recent decision of the Bermudian Court of Appeal, ***Oasis Investments II Master Fund Ltd v Jardine Strategic Holdings*** [2024] CA (Bda) 7 Civ, where it was held that the Shareholder Rule is well-established in English law.

17. It was Mr Thanki's submission that these and other relevant authorities establish a number of propositions:

    (1) First, that the Shareholder Rule applies regardless of the size of the company and whether it is public or private (***CAS (Nominees) Ltd v Nottingham Forest plc*** [2001] 1 All ER 954 at [17] per Evans-Lombe J).

    (2) Secondly, that it applies to all documents obtained in the course of the administration of the company's affairs (***Dawson-Damer*** at [32]) or in the common interest of shareholders (***Woodhouse***) or on behalf of the shareholders (***James-Bowen*** at [42], citing ***W Dennis & Sons Ltd v West Norfolk Farmers' Manure and Chemical Co-operative Co Ltd*** [1943] Ch 220 at pages 222-3 per Simonds J (as he then was).

    (3) Thirdly, that the Shareholder Rule does not apply to documents that came into existence for the dominant purpose of actual, threatened or reasonably contemplated hostile litigation between the company and the shareholder in question (the so-called 'litigation exception') (***Woodhouse***, ***Arrow Trading Investments Est 1920 v Edwardian Group Ltd (No 2*****)*** [2005] 1 BCLC 696 at [24] per Blackburne J and ***Sharp v Blank*** at [11]-[13]).

    (4) Fourthly, that the principle is not a feature of company law but an emanation of a more general principle of procedure which applies in the context of litigation and where parties have a joint interest in the relevant communication, as in cases between trustee and beneficiary, partners, and those in a variety of other relationships (***Woodhouse***, ***CIA Barca*** at pages 614-615, ***James-Bowen*** at [42] and [45], ***Dawson-Damer*** at [45] and ***Jardine*** at [124]-[130], [147], [179] and [183].

18. Picking up on the last of these points, Mr Thanki went on to submit that, whilst in some earlier cases, the Shareholder Rule appears to have been justified on the basis that the shareholder has a proprietary interest in the company's assets and the advice taken by the company had been paid for from the company's funds, properly understood, the principle has *"morphed"* (as Mr Thanki put it) into an emanation of what he describes as joint interest privilege, a more general principle that is applicable in a number of relationship contexts.

19. *Thanki, The Law of Privilege* (3rd Ed.) describes this concept as arising where (i) even though there was never any joint retainer between Party A and Party B (i.e. only one of them was party to the relevant lawyer-client relationship); and (ii) even though Party A and Party B had never shared their privileged documents with each other, they nonetheless had a joint interest in the subject matter of the relevant privileged documents at the time that they came into existence (see §4.84, §6.01 and §6.07).

20. The consequence of this joint interest is said to be that the same principles generally apply as if there had been a joint retainer between Party A and Party B and that, as a result:

    "… neither party can assert privilege as against the other in respect of communications coming into existence at the time when joint interest subsisted; hence, each party to the relationship can obtain disclosure of the other's (otherwise privileged) documents so far as they concern the joint purpose or interest."

21. Joint interest privilege, Mr Thanki submitted, is, however, distinct from joint retainer privilege. Joint retainer privilege applies when two parties instruct the same lawyer

with respect to a certain subject matter and prevents either party from asserting privilege against the other with respect to communications within the scope of the retainer. However, even without a joint retainer, Mr Thanki observed, two parties may have a sufficient joint interest in the subject matter of a privileged communication so as to prevent one from asserting privilege against the other: this is joint interest privilege.

22. Mr Thanki's submission was that, on analysis, it can be seen from the authorities, including those pre-dating ***Gouraud***, that joint interest privilege is the foundation of the Shareholder Rule.

23. In this context, he pointed to the trustee-beneficiary analysis contained in ***Dawson-Damer*** at [27]-[30] and, in particular, to the fact that in an early case, ***Talbot v Marshfield*** (1865) 2 Drew & Sm 549, it was held that *"all the cestuis que trust have an interest in the due administration of the trust, and in that sense [the relevant legal opinion] was for the benefit of all, as it was for the guidance of the trustees in their execution of their trust"*, whereas where a trustee takes an opinion *"on their own behalf"*, privilege can be asserted as against the beneficiaries (see ***Thomas v Secretary of State for India in Council*** (1870) 18 WR 312 cited in ***Dawson-Damer*** at [29]).

24. Mr Thanki noted, furthermore, that the same principle applied, pre-***Gouraud***, as between partners – as made clear in ***Re Pickering*** (1883) 25 Ch D 247 at page 249 where Cotton LJ described the relevant documents (or *"books"*) as being *"the books of the partnership, in which the Plaintiff as well as the executors of the deceased partner and the surviving partner has an interest"*. Accordingly, Mr Thanki suggested, the decisions in ***Gouraud*** and ***Woodhouse*** are to be understood as having been based on the joint interest privilege principle.

25. Similarly, so Mr Thanki submitted, more recent authorities have entailed application of that principle. Thus, in ***CIA Barca*** the Court of Appeal held that there was a joint interest as between joint venture partners because the party seeking inspection had a direct interest in the litigation to which the relevant communications related, as well as the profit and loss arising out of the relevant business operations. Likewise, in ***Commercial Union Assurance Co Plc v Mander*** [1996] 2 Lloyd's Rep 640 joint interest privilege was held to apply as between a reinsurer and reinsured who had agreed a 'follow settlements' clause, in the context of the insurer's handling of a claim under the policy. Moore-Bick J (as he then was) holding at pages 645 and 646 that there was a *"community of interest … of a kind similar to that which was recognised in **CIA Barca v Wimpey**"* and that *"for practical purposes …the insurer in his handling of the original claim is acting as much on behalf of the reinsurer as on his own behalf"*.

26. Mr Thanki also, in this respect, pointed to ***R (Ford) v FSA*** [2012] 1 All ER 1238, [2011] EWHC 2583 (Admin), in which Burnett J (as he then was) had the following to say at [18]:

> *"The origins of joint interest privilege can be seen from nineteenth century decisions of which **Gouraud v. Edison Gower Bell Telephone Co. of Europe Ltd.** (1888) 57 LJ Ch is an example. Shareholders in the defendant company challenged a claim to privilege advanced on behalf of the defendant on the basis that when the directors obtained the advice in question, they did so on behalf of the company as a whole. They could not, therefore, assert privilege in the advice as against the shareholders. Chitty J held that the shareholders were entitled to discovery of the documents in question by analogy with the practice that applied in partnership cases (and those*

concerning trustees and beneficiaries) where advice had been obtained for the benefit of the partnership or trust estate. The rationale of such cases is that there is no distinction between the interests of the partnership and the individual partners and the trust and its beneficiaries. … ."

27. More recently and by way of summary, Mr Thanki cited Sir Christopher Clarke P in ***Wang v Wong*** [2021] CA (Bda), another Bermudian Court of Appeal decision, at [139], as follows:

"There are a number of cases in which a right to obtain access has been held to exist by reason of the nature of the existing relationship between A and B. The classic examples are where A and B are partners. The list includes (a) partners; (b) joint venturers or those who are party to something like a joint venture, e.g. because they have an entitlement to a share in the fruits of a development, or at least a claim to that effect; (c) beneficiaries and trustees; (d) shareholders and companies in relation to the property of the company; (e) parents and subsidiaries; (f) insured/reinsured and insurer/reinsurer (g) beneficiaries under a will and executors; (h) principal and agent."

28. Mr Thanki suggested that in each of these various cases, the relevant communications were held to be made for the benefit of, or on behalf of, both parties, and not for the sole purpose or benefit of the person who made or received the communication. Privilege could not, therefore, Mr Thanki explained, be asserted against the party for whose mutual benefit the communication was made; in other words, the joint interest privilege covers all communications made in furtherance of the joint interest or purpose, e.g. those made in the administration of the trust or partnership affairs.

29. Furthermore, Mr Thanki went on to suggest, the Shareholder Rule as an example of joint interest privilege was recognised by the Court of Appeal in ***CIA Barca*** and in ***Dawson-Damer***, where the Court of Appeal (Floyd, Newey and Arnold LJ) referred at [43] to *"joint privilege" as being "correctly characterised as … procedural law rather than trust law"*, before adding this at [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' – see paragraph 26 above). … ."

30. This is also the manner, Mr Thanki submitted, in which the Supreme Court understood the principle in ***James-Bowen*** and the basis on which the Bermudian Court of Appeal applied it in ***Jardine***.

31. English law, in Mr Thanki's submission, thus treats the shareholder as having a joint interest with the company in communications concerning the administration of the company's affairs and such communications as being made for the mutual benefit of

company and shareholders. The shareholders' interests are in general aligned with the company's, they have invested their capital in the company which is at risk if the company fails, have the primary and a direct economic interest in the company's performance and the application of its assets (at least while the company is solvent), and are those for whose benefit a company is primarily run because if the company succeeds it will produce funds distributable to shareholders.

Glencore's position

32. Mr Richard Hill KC, on behalf of Glencore, took issue with Mr Thanki's submissions. He submitted, first, that the origins of the Shareholder Rule in the late 19th century and its subsequent development do not support the propositions now advanced by Aabar; secondly, that the rule is anomalous, unprincipled and should no longer be applied; and, thirdly, that the concept of joint interest privilege cannot be relied on as an alternative or substitute justification for the Shareholder Rule.

Discussion

33. As will appear, it is clear that the Shareholder Rule is not (or can no longer be) founded on the principle that a shareholder has a proprietary interest in the company's assets and, therefore, in advice taken by the company and paid for out of the company's funds. Mr Thanki, in fact, accepted this.

34. The critical question, in these circumstances, is whether Mr Thanki was right when he submitted that the Shareholder Rule exists not on a proprietary interest basis but on the basis that a joint interest privilege arises as between a shareholder and a company.

Proprietary interest

35. I start with the authority to which Chitty J in ***Gouraud*** made reference, namely ***Mayor and Corporation of Bristol v Cox*** (1884) 26 Ch D 678. This was a case which concerned a claim by the Mayor and Corporation of Bristol against Mr Cox, the President of the Law Society of Bristol, to restrain the Law Society from publishing information concerning the corporation's activities. In the course of the proceedings, Mr Cox sought disclosure of the corporation's privileged legal advice. Pearson J said as follows at page 683 (in relation to what he termed a *"curious and ingenious argument"* by Mr Cox's counsel):

> *"He says ... Mr. Cox ... is also a ratepayer of the city of Bristol, and being a ratepayer he has contributed towards paying for [the privileged documents], and having done that the case comes within the authorities of those cases where trustees have taken counsel's opinion at the expense of the trust estate and the cestuis que trust are entitled to see it. He says that the corporation are trustees for Mr. Cox, that they have got these [privileged documents] practically at the expense of Mr. Cox, and Mr. Cox is therefore entitled to see them.*
>
> *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 ...".*

It must be open to some doubt, had the action been by Mr Cox in his capacity as a ratepayer, that he would have been entitled to see the documents concerned; in fairness, Pearson J only raised the possibility that this would have been his entitlement. Even then, however, it is not overly clear on what basis Mr Cox would have (possibly) been entitled to see them. Pearson J did not explain why. I agree with Mr Hill when he submitted that there is nothing in this case to support the notion that what matters in the present context is whether there is a joint interest.

36. Turning next to ***Gouraud***, this was a case in which shareholders were seeking to prevent a merger on the basis that it was a fraud on the shareholders. This, it appears, entailed the bringing of a common law derivative action by the plaintiff shareholder, Mr Gouraud, personally *"on behalf of himself and all other shareholders"* (see e.g. ***Wallersteiner v Moir*** (No. 2) [1975] Q.B. 373 at pages 390-391 per Lord Denning MR) for an injunction to restrain the defendant company and its counterparty from acting upon the merger agreement. It was in this context that Mr Gouraud was seeking disclosure of privileged advice relating to the merger agreement. The company asserted privilege in response and Mr Gouraud's argument was that *"the company is not entitled to privilege, as the directors, when obtaining professional advice, were acting on behalf of the company as a whole, and made payment out of the funds of the company for the communications alleged to be privileged"*. In addressing this submission, Chitty J approved Pearson J's *obiter dictum* in ***Bristol v Cox*** in holding that the company was not entitled to withhold disclosure of legal advice obtained in connection with the subject matter of the action. At page 499 he said this:

"[Pearson J] founds that statement, as I understand him, on the general principle that obtains in partnership actions, and also in actions by a cestui que trust against a trustee – namely, that 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".

Over the page, at page 500, Chitty J went on to say this:

"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. I hold that the principle applies between a shareholder and the managing directors of a company".

37. Mr Hill submitted, and I agree, that, as with ***Bristol v Cox***, there is nothing in ***Gouraud*** that supports the proposition that what is important is whether there is a joint interest as between the shareholder and the company. On the contrary, it is clear that Chitty J's focus was on the fact that, as Chitty J analysed matters, the company was managing the property of the shareholders, allied with the fact that the advice was paid for out of property which belonged to the shareholders. That this is the case is demonstrated by Chitty J's reference to his understanding that, in ***Bristol v Cox***, Pearson J had in mind the position where a beneficiary brings a claim against a trustee. That, indeed, is what Chitty J said about ***Bristol v Cox*** in terms. Furthermore, he went on to refer, again expressly, to the relevant (allegedly privileged as against the shareholders) documents having been *"obtained by means of payment from the moneys belonging"* to the shareholders. This, in short, is a case that was decided on proprietary grounds.

38. Significantly, after ***Gouraud***, the House of Lords famously decided in ***Salomon v A Salomon & Co Ltd*** [1897] AC 22 that a company is a separate legal entity that is distinct from its shareholders. In doing so, the analogy with the position in relation to

a trust, to which both Pearson J in ***Bristol v Cox*** and Chitty J in ***Gouraud*** referred and which found favour with the Court of Appeal in ***Salomon***, was specifically rejected.

39. Despite this, however, in the next reported case after ***Salomon*** in which the Shareholder Rule was applied, ***Woodhouse***, the only reported appellate decision directly concerning the Shareholder Rule, a two-person Court of Appeal (Phillimore LJ and Lush J) did not address ***Salomon*** (indeed, it does not appear even to have been cited), albeit when distinguishing ***Bristol v Cox*** and ***Gouraud*** and holding that the defendant (a shareholder and former director sued by the company for misapplication of company funds) was not entitled to see the legal advice that had been obtained by the company in connection with the litigation.

40. At page 560, Phillimore LJ said:

"The principle was that if people had a common interest in property, an opinion having regard to that property, paid for out of the common fund, i.e., company's money or trust fund, was the common property of the shareholders, or cestui que trust. But where the parties were sundered by litigation such an opinion obtained by one of them was privileged."

Lush J, then, went on to say this, also at page 560:

"Where a company obtained advice in the common interest and paid for it out of the common fund, undoubtedly the shareholder would have a right to see it. But that did not apply where the interests of the company and the shareholder were adverse."

41. Although, as previously observed, Phillimore LJ described the Shareholder Rule as being *"well-settled"*, to repeat, it is plain that there was no analysis of the Shareholder Rule in ***Woodhouse*** either by Phillimore LJ or by Lush J. Their focus, instead, was on the fact that the relevant legal opinions had been obtained in the context of litigation against the defendant shareholder, so that what has been called the 'litigation exception' applied and the company was entitled to withhold inspection.

42. ***Woodhouse***, specifically Lush J's observations concerning *"common interest"*, should not, in my view, be taken as providing support (or, as Mr Thanki puts it, describing *"a nascent concept"*) for the joint interest-based case which Aabar now puts forward. On the contrary, Lush J's reference to payment being made *"out of the common fund"* is plainly inspired by the same proprietary approach adopted by Chitty J in ***Gouraud***. In any event, what he had to say was *obiter* since the focus of the decision was on the 'litigation exception'. This is important because, as will appear and despite the absence of any analysis of the Shareholder Rule in ***Woodhouse***, it is a case that has been cited in subsequent cases at first instance which have assumed, apparently without question and anyway without analysis, the existence of the Shareholder Rule.

43. Thus, in ***Dennis*** Simonds J held that privilege in an accountants' report could not be asserted against the claimant shareholder. In doing so, he cited ***Gouraud*** at page 222 (as referred to in the Annual Practice, 1943) for what he described as the *"general rule, which applies equally as between a company and its shareholders and as between a trustee and his beneficiaries"*. He went on, over the page, to refer to the company in the case before him having instructed the accountants as part of their duty to administer the affairs of the company and thereby do *"something on behalf of all the shareholders"*. He concluded that the 'litigation exception' had no application and so, applying the Shareholder Rule, the company could not assert privilege as against

the claimant. There was, it can be seen, no analysis of the rationale for the Shareholder Rule.

44. The same applies to ***In Re Hydrosan Ltd*** [1991] BCLC 418, in which Harman J held that a petition for the just and equitable winding up of a company under s. 459 of the Companies Act 1985 did not bring the 'litigation exception' into play. In reaching this decision, he referred to ***Dennis*** and ***Woodhouse*** but without analysis and basing himself on existence of a *"general rule that all documents obtained by the company in the course of the administration of the company, or by trustees in the course of administration of the trust, are producible to the shareholders or the beneficiaries, sometimes called cestui que trust, but where there is hostile litigation proceeding between them that rule does not apply"*.

45. Similarly, in ***CAS***, at [11] to [15], Evans-Lombe J referred to ***Dennis*** and ***Woodhouse***, as well as to ***Hydrosan***, before going on to note that the submission that was being made on behalf of the company, Nottingham Forest PLC, was that the Shareholder Rule was confined to small private companies with limited shareholders. He said this at [16]:

*"In the present case Miss Roberts for the Defendants, while accepting, as she was bound to, that the rule as to disclosure found in the **Woodhouse & Co** case was applicable to small private companies with limited share holdings, argued that it should not be applied to companies such as the first defendants, a plc with substantial numbers of shares on issue, quoted on a stock market. She pointed out that all the authorities cited in the **Re Hydrosan Ltd** case were about small private companies with limited issues of shares. To apply the **Woodhouse & Co** rule to companies such as the first defendant would be impractical and an unjustifiable extension."*

Evans-Lombe J rejected this submission, saying as follows at [17]:

*"I am unable to accept that submission. Nothing in the **Woodhouse & Co** case or the subsequent authorities down to and including **Re Hydrosan Ltd** supports the proposition that the rule is to be differently applied depending on the size and importance of the company concerned. As the authorities show the rule is based on principles of trust law, an analogy being drawn between the position of directors as fiduciaries and trustees. As the authorities show, directors though not properly described as trustees of the assets of the company within their charge, none the less owe fiduciary duties to the shareholders which prevent them from applying those assets save for the purpose of the company. Directors are subject to the same duty to shareholders regardless of the size of the company concerned."*

It should be noted, therefore, that Evans-Lombe J treated the Shareholder Rule (described by him as *"the Woodhouse rule"*) as being long established and of universal application. What is also apparent is that, although he engaged in some analysis of the rationale for the Shareholder Rule, this was somewhat limited. Moreover, I agree with Mr Hill when he submitted that what Evans-Lombe J had to say on this issue is open to some question since it was based on the erroneous notion that company directors owe fiduciary duties not to the company but to shareholders directly.

46. In ***Arrow Trading***, another unfair prejudice petition case, Blackburne J applied the Shareholder Rule. Again, he did so citing ***Hydrosan*** and ***CAS*** at [24] but with only limited analysis at [24]:

"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: see ***Re Hydrosan Ltd*** *[1991] BCLC 418 and* ***CAS (Nominees) Ltd & others v. Nottingham Forest Plc & others*** *[2001] 1 All ER 954. The essential distinction is between advice to the company in connection with the administration of its affairs on behalf of all of its shareholders, and advice to the company in defence of an action, actual, threatened or in contemplation, by a shareholder against the company."*

He continued at [25], as follows:

"Here, ... the company is a nominal although essential defendant. It has no independent position in relation to the issue of remuneration which lies between the petitioners on the one hand and the shareholder respondents on the other alone. The fact that the so-called independent directors have a view on the matter is neither here nor there. The advice sought and obtained was in connection with what, if any, action the company should take in response to the petition in the interests of all of its shareholders."

Again, the focus here was on whether the 'litigation exception' was applicable. Blackburne J decided that it was not, and so privilege could not be asserted by the company.

47. ***Harley Street Capital Ltd v Tchigirinsky*** [2006] BCC 209 is another such case, albeit that Peter Smith J reached a different decision on the facts in refusing to order disclosure of legal advice which had been provided in the context of hostile litigation between the company and its shareholder: see [70] to [79]. There was no analysis of the rationale that lies behind the Shareholder Rule.

48. The same applies to ***BBGP Managing General Partner Ltd v Babcock & Brown Global Partners*** [2011] Ch 296, [2010] EWHC 2176 (Ch). This was a case in which Norris J had to decide whether legal professional privilege could be claimed as between members of a limited partnership. He said this at [52]:

"... I consider that the authorities establish that where a solicitor accepts a joint retainer from parties with potentially conflicting interests one client cannot insist as against the other that legal professional privilege attaches to any of what passes between the solicitor and that client during the currency and in the course of the retainer: ***Baugh v Cradocke*** *(1832) 1 Mood & R 182;* ***Perry v Smith*** *(1842) M&W 681;* ***Shore v Bedford*** *(1843) 5 Man & Gex 271;* ***Ross v Gibbs*** *(1869) LR 8 Eq 522 and* ***Re Koenigsberg*** *[1989] 3 All ER 289. (I note that there is no question here of a separate and exclusive retainer of Slaughter and May by some only of the joint clients). I agree with this statement of the law in Thanki 'The Law of Privilege' para 6.12:-*

'... in order for joint privilege to arise the joint interest must exist at the time that the communication comes into existence. If the parties subsequently fall out and sue one another, neither of them can claim privilege as against the other in respect of any documents that are caught by the joint privilege, as the original joint interest is not destroyed by a subsequent disagreement between the parties ...'

I consider that the authorities also establish that privilege cannot be asserted as between partners in relation to any documents concerning the partnership's affairs:

Re Pickering *(1883) 25 Ch D 247. Slaughter and May's advice was undoubtedly sought and tendered in relation to the partnership's affairs and forms part of the books and records of the partnership."*

Norris J went on at [57] to say this:

"I hold that although no limited partner can claim legal professional privilege as a ground for withholding material from General or the Second and Third Claimants, yet each may assert confidence and claim privilege against anyone else (save only the direct shareholder in General)."

He, then, added as follows at [58]:

"The right to confidentiality and privilege is a joint right of all the individual clients of Slaughter and May. No one partner can waive it: Phipson on Evidence 17th ed. para 24-01. This general principle is reinforced in the case of the Second and Third Claimants by the specific obligation they entered into in the Deed not to disclose to anyone or use to the detriment of any of the other partners (other than in connection with claims by the Second and Third Claimants against such partners) any confidential information concerning the affairs of the partnership. The one exception to the principle is that General may disclose the material to its direct shareholder. That is because the shareholder is entitled to see all documents obtained by a company in the course of the administration of its affairs (including legal advice obtained by the company on behalf of all shareholders, though not legal advice obtained by a company in response to an actual or contemplated claim by the shareholder against the company) in which it has a common interest: see ***Woodhouse & Co Ltd v Woodhouse*** *(1914) 30 TLR 559,* ***Re Hydrosan Ltd*** *[1991] BCLC 418,* ***CAS Nominees Ltd v Nottingham Forest FC plc*** *[2002] BCLC 613 and* ***Arrow Trading v Edwardian Group****."*

He continued at [59] by asking whether a direct shareholder could in turn share the material with its shareholders upon the same principle, saying this:

"I answer that question in the negative, on grounds of policy rather than principle. Bringing within the ring of privilege the shareholder of the company which was the actual client of the solicitor on the ground of common interest is well settled rule. But I see no reason to extend the entrenchment upon the basic rule of privilege all the way up the chain of holding companies notwithstanding the steady dilution of that common interest."

Mr Thanki relies on these observations in support of his submission that what lies behind the Shareholder Rule is the joint interest principle. It should be noted, however, that Norris J merely cited ***Woodhouse***, ***Hydrosan***, ***CAS*** and ***Arrow*** without seeking to analyse the Shareholder Rule in any detail.

49. In ***Cadogan Petroleum plc v Tolley*** [2011] EWHC 2286 (Ch), Newey J (as he then was) likewise cited ***Woodhouse*** and ***Arrow*** as authority for the principle, described at [55], that *"a company is not in general entitled to assert privilege against a shareholder"*. Again, he did so without independently analysing the Shareholder Rule, but, rather, by quoting from what Blackburne J had to say in ***Arrow*** at [24] and what Phillimore LJ had to say in ***Woodhouse*** at page 560.

50. Nugee J (as he then was) did, however, analyse the Shareholder Rule in ***Sharp v Blank*** [2015] EWHC 2681 (Ch), a case involving group litigation by a large number of investors against Lloyds Banking Group in which the claimants claimed to have

suffered losses as a result of Lloyds' acquisition of Halifax Bank of Scotland Plc in 2007/2008 and alleged that a shareholder circular published by Lloyds prior to the acquisition contained a number of misstatements and/or material omissions. Nugee J had to consider at a CMC whether Lloyds was entitled to assert privilege against the claimants in relation to legal advice that it had obtained at the time of takeover. In an impressive *ex tempore* judgment, in which he cited ***Dennis*** at [2] and [3] in support of what he described as the *"general rule"* that a company is not entitled to claim privilege against its own shareholders unless, as Simonds J put it in ***Dennis***, advice was sought by the company *"for the purpose of their own defence in litigation against themselves"* by the shareholders. Nugee J went on at [4] to refer to ***Woodhouse***, describing that as a decision which was binding on him, and at [11] to refer to ***Arrow***, in each case focusing on what was stated in those cases concerning the 'litigation exception', before saying this at [12]:

"So far it seems to me that the authorities are all consistent. There is a general rule that no privilege can be asserted by the company against its shareholders. The general rule is subject to an exception where the advice taken by the company is in relation to litigation - that litigation being actual, threatened or in contemplation."

Nugee J added this at [13]:

"It is worth going back to the various phrases which run through the authorities that I have referred to which all consistently refer to the advice which is subject not to the general rule, but to the exception, as being advice in relation to the particular litigation in question. So starting with the earliest case, ***Woodhouse****, Lush J. said that the effect of the contention would be to make it absolutely impossible 'for a company in litigation for shareholders to obtain confidential advice' and referred later to 'if the opinions were obtained by the company to enable it to carry on the litigation'. In* ***Dennis*** *Simonds J. referred to a shareholder not being entitled to seek counsel's opinion taken by the company 'in respect of the matter in dispute between them' and, later, on the fact of that case said that the directors 'did not seek the report because some action was threatened against them' and, later still, says the report 'was not a document obtained by the defendants for the purpose of defending themselves against hostile litigation'. Then Blackburne J. in* ***Arrow Trading****, referred to 'where the advice relates to hostile proceedings between the company and shareholders', and then to advice to the company 'in defence of an action actual, threatened or in contemplation'. Those citations are all, it seems to me, consistent statements to the effect that the foundation of the exception is the fact that not only the interests of the parties have diverged, but that litigation, actual, threatened or in contemplation, has caused the company to take advice in defence of, in connection with, or relevant to, that actual, threatened or contemplated litigation."*

Earlier, however, Nugee J rejected suggestions that the Shareholder Rule was an example of *"common interest privilege"*, holding at [9] that:

"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."

He also rejected the suggestion that the application of the Shareholder Rule depended on *"whether the interests of the company and the interests of its shareholders are wholly aligned or not"*, saying this at [10]:

*"The decision in **Woodhouse** does not, I think, give any support to the notion that the determining question of whether the general rule or the exception applies is whether the interests of the company and the interests of its shareholders are wholly aligned or not. Like all other judgments, statements of principle must be read on the basis of the facts in each case and on the facts of that case there had been actual litigation, and it is quite clear from the way in which Phillimore L.J. approached the judgment that the opinions were written in connection with the actual litigation either after it had been brought or in preparation for it. It is not surprising that in those circumstances he referred to the parties having been sundered by litigation, or that Lush J. referred to the parties' interests as adverse. The foundation of the exception is still, it seems to me, the existence of actual or threatened litigation, and the taking of advice in connection with the actual or threatened litigation."*

51. What Nugee J was dealing with was the 'litigation exception', specifically the suggestion that this included advice obtained before litigation was actually or reasonably in contemplation (see [18] and [19]). That this is the position is confirmed by his conclusion, at [21], that:

"In my judgment, for the reasons I have sought to express it is only advice of the latter type, advice which was obtained by the company to enable it to carry on with litigation, advice which was in connection with that dispute, advice in defence of the contemplated litigation, which falls within the exception to the general rule, and that is privileged against the shareholders."

Nugee J was not expounding some broader, joint interest type rationale for the Shareholder Rule. On the contrary, to the extent that he was addressing the issue at all, as opposed to describing the 'litigation exception', as I see it, he ought to be taken as having rejected this as the rationale.

52. This brings me, again concentrating at the moment on cases in which the Shareholder Rule has been central to the decision rather than commented upon or referred to in the context of non-company cases, to another equally impressive *ex tempore* decision again made at a CMC, namely ***G4S***.

53. This was a shareholder group action similar to the present claims in which investors brought claims against G4S under s. 90A of FSMA, and the claimants sought to obtain disclosure of G4S's privileged advice in reliance upon the Shareholder Rule. Michael Green J dismissed the application, concluding that since only three of the 90 or so claimants would have been entitled to disclosure of the company's privileged documents, even on the assumption that the Shareholder Rule were to have applied, and since those three claimants had acquired their shares at different times, so as to mean that some documents would potentially have been disclosable to one or other of them but not to all of them, to order disclosure would *"be impossible to manage and potentially highly disruptive to the imminent trial"*: see [56].

54. Earlier in the judgment at [21], however, he adverted to the fact that on behalf of G4S it was submitted that the Shareholder Rule is *"anomalous and should no longer be followed"*, noting nonetheless that it was accepted at the hearing that there was insufficient time for that submission to be fully considered. He did, however, go on to address the further submission that was put forward, namely that, if the Shareholder Rule exists, it applies only to registered shareholders of a company, together with

another submission that it applies only to legal advice privilege and not also to litigation privilege or without prejudice privilege. These further submissions arise in relation to Issues 3 and 2 respectively and so will be addressed later. However, what matters at this juncture is that, whilst not having to determine whether the Shareholder Rule exists at all, Michael Green J nonetheless (and clearly on an *obiter* basis only) expressed certain reservations which are worth having in mind. He referred to ***Woodhouse*** in particular, noting at [19] that, whilst Nugee J in ***Sharp*** had described the case as binding upon him, *"that rather depends on what its ratio was"*, adding that *"it is a curiously insubstantial case upon which to found this apparent doctrine of no privilege between shareholder and company"*.

55. Michael Green J went on at [25] to say this:

*"It is difficult to discern how the principle arose, but it has clearly been recognised in a number of cases, the latest of which is **Sharp v Blank**. It would be bold and perhaps churlish of me to suggest that these are all misplaced. I do have a great deal of sympathy with the points made by Mr Rabinowitz [on behalf of G4S] as to the logic and basis of the principle. Mr Rabinowitz referred to a critique of it in Hollander's Documentary Evidence (14th ed) where it is explained that the principle emerged before the seminal case of **Salomon v A Salomon & Co Ltd** [1897] AC 22 and other cases, which assert the separation of the company and its shareholders. ... Shareholders have no actual interest in the assets of a company. Nor can they gain access to documents, including privileged documents, save in the course of litigation between them and the company. That is what produces the anomalies and why it is suggested that the foundations of the principle, which was originally brought about in the context of partnership law, but also by analogy with the relationship between trustee and beneficiary, seem so shaky now as between shareholder and company. That is clearly not a relationship of trustee and beneficiary. Even directors have been held not to be trustees of company property."*

He, then, at [26], referred to what Nugee J had had to say in ***Sharp*** at [19] concerning the foundation for the Shareholder Rule being the same as that applicable in the trusts context, before continuing at [27] with this:

*"**Woodhouse** was actually concerned with the exception to the principle, as was **Sharp v Blank**, the Court of Appeal finding that the legal opinions were obtained in the context of proceedings that had already been contemplated and begun against the shareholder. Mr Rabinowitz therefore submitted that the principle was not the ratio as the exception was applied. But while that is so there is no escaping the fact that the Court of Appeal was considering an exception and had therefore accepted that there was such a principle from which there was an exception."*

At [28] he quoted from Phillimore LJ and Lush J's judgment in ***Woodhouse***, specifically the reference by Lush J to payment being made out of the *"common fund"*, and then at [29] said this:

*"This basis might also be open to attack now as there is no 'common fund', as such, to which shareholders are entitled and, as I have said, the analogy with trustees and beneficiaries is not a particularly strong one. But, as I also said, it has been recognised - for example in a case such as **Re Hydrosan Limited** [1991] BCC 19 by Mr Justice Harman and in **Sharp v Blank** itself, and many other authorities - and even in Hollander on Documentary Evidence, where it is said that the rule is so well established that it is now probably for the Supreme Court to overturn it."*

He added at [30]:

"I, therefore, as a lowly first instance judge, and even though I have my doubts as to the justification now for such a principle, cannot say, particularly after the short argument I have had at this CMC, that the principle does not exist or should be got rid of. I think that would require a higher court to say that."

He, then, albeit when addressing the matter covered by Issue 3, to which I will return, said this at [42(1)]:

"as I have already said, 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."

In short, Michael Green J was sceptical about the existence (in any event, the continued existence) of the Shareholder Rule.

56. I share Michael Green J's scepticism. Indeed, as previously noted, Mr Thanki himself did not suggest that the Shareholder Rule can any longer be justified on the basis of there being a proprietary interest. Whatever historical similarities there may once have been between the positions of an investor in a company, and partners or trust beneficiaries at the time that ***Gouraud*** was decided, when unincorporated joint stock companies were still prevalent in which trustees held the company's assets on trust for investors who had an equitable interest in the assets, those similarities (and so the analogy with a partnership or a trustee/beneficiary relationship) ceased to exist with the decision in ***Salomon***, as followed by ***Macaura v Northern Assurance Co Ltd*** [1925] AC 619 and most recently described by the Supreme Court in ***BTI 2014 LLC v Sequana SA*** [2024] AC 211, [2022] UKSC 25.

57. It should be noted in this connection that there have been a number of cases where Canadian courts have held that the reasoning in those cases is inconsistent with ***Salomon***: see ***McPherson v Institute of Chartered Accountants of B.C.*** (1988) 32 B.C.L.R. (2d) 328 at [10]-[17]; ***McKinlay Transport Ltd v Motor Transport Industrial Relations Bureau of Ontario (Inc.)*** (1991) 3 W.D.C.P. (2d) 478; ***Discovery Enterprises Inc v Ebco Industries Ltd*** (1999) 58 B.C.L.R. (3d) 105 at [18]-[23]; ***FCMI Financial Corp v Curtis International Ltd*** (2003) O.T.C. 1020 (Ont. S.C.) at [30]-[31]; and ***Ziegler Estate v Green Acres (Pine Lake) Ltd*** (2008) ABQB 552 at [33]-[39] and [42]-[52]. As for Australia, Olsson J in the Supreme Court of South Australia in ***State of South Australia v Barrett*** (1995) 64 SASR 73 stated at page 78 that he had *"some doubt"* as to whether the decisions in ***Gouraud*** and ***Woodhouse*** could still be regarded as good law in light of "*more recent authorities"*, adding that this was all *"the more so"* given that the reasoning in the older English cases was:

"... said to be based upon partnership law and actions against trustees by a cestui que trust, the principle being that 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. With all due respect, it is difficult to perceive a parity of logic between that situation and the position of shareholders vis-à-vis a corporation, where the legal relationships are quite different".

58. The same also applies to the Bermuda Court of Appeal, since in ***Jardine*** at [148] Kawaley JA observed that the *"notion that shareholders have a proprietary interest in a company's assets, first posited before the now trite principles of separate*

corporate personality had been established in ***Saloman v Saloman*** [sic] *[1897] AC 22 is no longer the basis for the modern common law rule"*, and Sir Christopher Clarke P said this at [183]:

"… 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. …".

59. The same point is made in *Hollander on Documentary Evidence* (15th Ed.) at §5-05d:

"The principle was established in the 19th century before cases such as ***Salomon*** *and* ***Macaura*** *drew a clear distinction between a company and its shareholders and held that shareholders have no interest in the property of the company. Arguably, once the separation between company and shareholders had been established, the law should have changed course. But it did not. The alternative view is that it can be justified as a form of joint interest privilege rather than because of the interest of the shareholder in the property of the company. … ."*

Joint interest privilege in the company/shareholder context: the cases

60. As to Mr Thanki's submission that the modern rationale for the Shareholder Rule (the *"alternative view"* described by *Hollander on Documentary Evidence*) is joint interest privilege (or, as he puts it, *"a concept of commonality or joint interest"* that emerged post-***Woodhouse***), as has been seen, nothing in ***Gouraud*** even hints at a joint interest privilege rationale, and nor does ***Woodhouse*** do so. On the contrary, both these cases were plainly premised on there needing to be a proprietary interest.

61. The same applies to ***Dennis***, ***Hydrasan***, ***CAS***, ***Arrow Trading***, ***Harley Street*** and ***Cadogan Petroleum*** since none of these cases proceeds on the basis of there needing to be a joint interest: they simply follow the cases that have gone before without any separate analysis.

62. Nor, in my view, do the two cases in the shareholder/company context where there is some further analysis, ***BBGP*** and ***Sharp***, support the joint interest analysis.

63. As previously explained, in ***BBGP*** Norris J referred to *"common interest"* and, in that context (at [58]), referred to ***Woodhouse***, ***Hydrasan***, ***CAS*** and ***Arrow Trading***, before going on to refer to *"common interest"* again (at [59]) when addressing the question of whether a direct shareholder could share the privileged material with its own shareholders. Assuming that Norris J intended to be referring not to common interest but to joint interest, it does not follow that what he had in mind was, in fact, joint interest privilege since, if he did have that in mind, it is curious that he merely referred to ***Woodhouse***, ***Hydrasan***, ***CAS*** and ***Arrow Trading*** without explaining what it was that he understood those cases to have decided.

64. The position in relation to ***Sharp*** is, if anything, even clearer since, again addressing a submission that there was a common (as opposed to a joint) interest, Nugee J was emphatic in his rejection of that submission, holding at [10], as has been seen, that:

*"****Woodhouse*** *does not, I think, give any support to the notion that the determining question of whether the general rule or the exception applies is whether the interests of the company and the interests of its shareholders are wholly aligned or not."*

65. This is an explicit rejection of the joint interest rationale – and in the context of a judgment which proceeds very much on the footing that the foundation for the Shareholder Rule is proprietary-based, as made clear by Nugee J at [9].

66. This is not to say that there has been no authority in which reference has been made to the Shareholder Rule and to what is stated about that in *Thanki, The Law of Privilege* since, as Mr Thanki submitted, there are cases (***James-Bowen***, ***Dawson-Damer*** and ***Jardine***) where reference has been made (even if the language may have been somewhat loose) to the joint interest privilege concept arising in a shareholder/company context albeit that those cases have not themselves involved application of the Shareholder Rule.

67. In ***James-Bowen***, the issue before the Supreme Court was whether the Metropolitan Police Commissioner owed a duty of care to her officers in the conduct of proceedings against her based on the alleged misconduct of those officers. This entailed a discussion as to whether the Commissioner would be compelled to waive privilege in legal advice which she had received in relation to the underlying litigation if the alleged duty of care was found to exist. As Lord Lloyd-Jones explained at [39]:

> *"It is also necessary to say something about the issue of legal professional privilege. At first instance, it was submitted on behalf of the Commissioner that legal professional privilege was a further policy consideration for not imposing a duty of care in these circumstances. It was submitted that if such a duty of care existed an employer would in effect be compelled to waive privilege in circumstances where he would otherwise be entitled to assert privilege, because the correctness or reasonableness of his conduct of the underlying litigation could not be properly examined without relevant legal advice being properly exposed to judicial scrutiny. The response on behalf of the officers was that the relationship between the parties gave rise to a joint or common interest with the result that the Commissioner would, in any event, be unable to rely on legal professional privilege against the officers to the extent that common interest privilege applied."*

He continued at [41] as follows:

> *"The judgments below have established that the legal advisers who defended the claim brought by BA were instructed on behalf of the Commissioner only and that neither those lawyers nor the Commissioner undertook responsibility to the officers for the conduct of the litigation. The officers attended conferences with counsel in the capacity of witnesses not clients. The officers do not seek to appeal those conclusions. Accordingly, there can be no question of legal professional privilege belonging jointly to the Commissioner and the officers. However, the officers rely on common interest privilege and seek to employ it as a sword in asserting an entitlement to disclosure of material in the possession of the Commissioner which is privileged against disclosure to others. Whether the officers have such an entitlement will depend on whether such a claim is consistent with the underlying relationship of the Commissioner and the officers. (See Phipson on Evidence, 19th ed (2017), para 24-11.) In my view it is not."*

68. It is clear that here Lord Lloyd-Jones was referring not to common interest privilege in the strict sense but to joint interest privilege. He was doing the same when he went on at [42] to say this:

> *"If one sets to one side the decided cases which turn on contractual access rights, the cases show that something more than a shared interest in the outcome of litigation is required before common interest privilege can be used as a sword in the manner proposed here. For example, in* ***Dennis & Sons Ltd v West Norfolk Farmers Manure***

and Chemical Co-operative Co Ltd *[1943] Ch 220 Simonds J held that shareholders were entitled to disclosure of an accountants' report concerning the rights and duties of the board commissioned by the directors, notwithstanding that by the time the report was received the shareholders had commenced proceedings against the company in relation to the conduct of the company's affairs. The report had been commissioned by the directors on behalf of all the shareholders and not for the purpose of defending themselves against hostile litigation. The judge observed (at p 222) that the general rule applied equally as between a company and its shareholders and as between a trustee and his beneficiaries. A claim to privilege between the company and its shareholders would have been inconsistent with the nature of the relationship."*

This is Lord Lloyd-Jones, therefore, describing the Shareholder Rule, and doing so in the context of his consideration of the joint interest privilege for which Mr Thanki in the present case contends.

69. Moreover, Lord Lloyd-Jones went on at [43] and [44] to refer to ***CIA Barca*** and ***Mander***, as to which he quoted Moore-Bick J (as he then was) saying as follows:

"Both as a matter of principle and authority ... it is not enough that the person seeking disclosure of confidential documents can show that he has an interest in the subject matter which would be sufficient to give rise to common interest privilege if the documents had been disclosed to him; he must be able to establish a right to obtain access to them by reason of a common interest in their subject matter which existed at the time the advice was sought or the documents were obtained."

Again, in these paragraphs Lord Lloyd-Jones was describing joint interest privilege, as made all the more clear by what he went on to say at [45]:

"In the present case the Commissioner and the officers are likely to have had a shared interest in successfully defending the claim brought by BA against the Commissioner, at least initially. It may well be that, had privileged documents been disclosed in confidence by the Commissioner to the officers at that stage, that shared interest would have enabled the officers to defeat an application for disclosure by a third party on grounds of common interest privilege. However, before the officers could compel disclosure of privileged material in the hands of the Commissioner, considerably more would be required. Although the relationship between the Commissioner and the officers is closely analogous to that of employer and employees, there is nothing in the present situation which resembles the relationship between a company and its shareholders, or between a trustee and his beneficiaries, or between parties to a joint venture agreement. Here the relationship between the Commissioner and the officers does not require or justify such an entitlement of access to legally privileged material."

70. Although these observations on the part of Lord Lloyd-Jones plainly provide support for Mr Thanki's more general submission that there is a species of privilege which is joint interest privilege, I am unpersuaded nonetheless that they should be regarded as anything other than *obiter dicta* in respect of the Shareholder Rule specifically. Mr Thanki submitted nonetheless that, even if *obiter*, what Lord Lloyd-Jones had to say *"at the very least provides compelling guidance as to the continued existence of the [Shareholder Rule] as an aspect of joint interest privilege"*. However, there appears, unsurprisingly in the circumstances given the very different nature of the dispute that was before the Supreme Court, to have been no argument on the legitimacy of, or the rationale for, the Shareholder Rule. I, therefore, and with respect to Lord Lloyd-Jones, do not agree with Mr Thanki about this.

71. As for ***CIA Barca***, Lord Lloyd-Jones had this to say at [43], after referring at [42] to ***Dennis***:

> *"Similarly, in* ***CIA Barca de Panama SA v George Wimpey & Co Ltd*** *[1980] 1 Lloyd's Rep 598, Barca and Wimpey each held half the shares in a joint venture company, DLW, which had claims against Aramco. Wimpey settled the claims without authority from Barca. In the resulting proceedings brought by Barca against Wimpey the Court of Appeal held that Barca was entitled to disclosure of privileged documents of Wimpey generated in the original litigation as the Aramco claims had been made by Wimpey on behalf of itself and Barca (per Stephenson LJ at p 614)."*

In my view, however, this provides no support for a joint interest rationale in the shareholder/company context. The Court of Appeal in ***CIA Barca*** held that, on the particular facts of that case, the defendants were not entitled to assert privilege against their former joint venture partners in relation to documents relating to litigation with a third party which had been pursued *"by the defendants acting on behalf of themselves and the plaintiffs jointly"* (see page 614), in circumstances where the contractual arrangements in that case provided, amongst other things, for the costs of the litigation to be shared between the two joint venture partners and for the parties mutually to assist in the prosecution of a claim against a third party. The case was not concerned with the entitlement to assert privilege as between companies/shareholders. The fact that, in his judgment at page 614, as noted by Lord Lloyd-Jones, Stephenson LJ quoted a passage from *Phipson on Evidence* (12th Ed.) stating that *"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 ..."* does not justify a conclusion that what he had in mind in the Shareholder Rule context (not the context which he was considering) what matters is whether there is a joint interest. Not only was what Stephenson LJ had to say plainly *obiter*, but furthermore it entailed no independent analysis.

72. I come on, then, to consider ***Dawson-Damer***. This was a case in which the Court of Appeal considered the right of a beneficiary to obtain privileged documents from trustees. In doing so, Floyd, Newey and Arnold LJJ accepted that this right was an example of what they referred to as *"joint privilege"* or *"joint interest privilege"*, citing *Thanki, The Law of Privilege* at §4.83 (see [26]) and explaining at [27] that this privilege *"has its origins in cases concerned with the extent to which a beneficiary could insist on seeing trust documents"*. This was amplified at [28] to [30] by reference to authorities which were premised on the same proprietary-based rationale that was adopted in ***Gouraud***. Thus, at [28] reference was made to ***Wynne v Humberston*** (1858), in which Sir John Romilly MR said this at pages 423-424:

> *"There can be no question that the rule is that, where the relation of trustee and cestui que trust is established, all cases submitted and opinions taken by the trustee to guide himself in the administration of his trust, and not for the purpose of his own defence in any litigation against himself, must be produced to the cestui que trust. They are taken for the purpose of administration of the trust, and for the benefit of the persons entitled to the trust estate, who will have to pay the expense thereby incurred."*

73. There was, then, reference to ***Talbot v Marshfield*** (1865) 2 Dr & Sm 549, in which Sir Richard Kindersley V-C distinguished between advice which the defendant trustees had taken as to whether they should exercise a power of advancement and advice which they had obtained following the institution of proceedings, before saying this at pages 550-551:

"The first case and opinion, the production of which is sought, were respectively stated and taken by the Defendants to guide them in the exercise of a power delegated to them by the trusts of the will, and which, if exercised, would affect the interests of the other cestuis que trust. The opinion was taken before proceedings were commenced or threatened, and in relation to the trust. Under these circumstances it appears to me that all the cestuis que trust have a right to see that case and opinion. It was contended that it was not taken for the benefit of all the cestuis que trust; but all the cestuis que trust have an interest in the due administration of the trust, and in that sense it was for the benefit of all, as it was for the guidance of the trustees in their execution of their trust. Besides, if a trustee properly takes the opinion of counsel to guide him in the execution of the trust, he has a right to be paid the expense of so doing out of the trust estate; and that alone would give any cestuis que trust a right to see the case and opinion.

The other case and opinion, however, stands on a totally different footing. This was not to guide the trustees in the execution of their trust; but, after proceedings had been commenced against them, they took advice to know in what position they stood, and how they should defend themselves in the suit. It appears to me that the cestuis que trust have no right to see this case and opinion, unless they can make out that the trustees can charge the expense thereof on the trust funds. As to this there is no proof; the trustees may themselves have to bear the expense of this case and opinion, as having been stated and taken by them as litigant parties with the cestuis que trust.

The trustees must be ordered to produce the first case and opinion; but not the second."

74. The Court of Appeal continued at [30] by referring to ***O'Rourke v Darbishire*** [1920] AC 581, a case in which the plaintiff sought production of documents on the basis that he was a beneficiary of a trust but in which relief was refused on the ground that it had not been established that he had that status, Lord Wrenbury explaining at pages 626-627 that:

"If the plaintiff is right in saying that he is a beneficiary, and if the documents are documents belonging to the executors as executors, he has a right to access to the documents which he desires to inspect upon what has been called in the judgments in this case a proprietary right. The beneficiary is entitled to see all trust documents because they are trust documents and because he is a beneficiary. They are in this sense his own. Action or no action, he is entitled to access to them. This has nothing to do with discovery. The right to discovery is a right to see someone else's documents. The proprietary right is a right to access to documents which are your own. No question of professional privilege arises in such a case. Documents containing professional advice taken by the executors as trustees contain advice taken by trustees for their cestuis que trust, and the beneficiaries are entitled to see them because they are beneficiaries. …".

75. Having cited these authorities, the Court of Appeal went on at [31] to say that *"Similar principles had by then long been applied as between a company and its shareholders"*, citing ***Gouraud*** and ***Woodhouse***, before coming on at [32] to refer also to ***BBGP*** and, in the joint venture context, to ***CIA Barca***.

76. The Court of Appeal, then, returned at [34] *"to the trust cases"*, specifically ***In re Londonderry's Settlement*** [1965] Ch 918 (at [34] to [36]), ***Schmidt v Rosewood Trust Ltd*** [2003] 2 AC 709 (at 37) and ***Breakspear v Ackland*** [2009] Ch 32 (at [38]). They did so when considering whether, as considered by the Privy Council in ***Schmidt***, there must be a proprietary basis if a beneficiary is to obtain disclosure, and

Lord Walker in that case at [54] (as noted in ***Dawson-Damer*** at [37]) said that a proprietary right *"is neither sufficient nor necessary"*.

77. The Court of Appeal's conclusion at [43] was as follows:

"…we have in the end concluded that the question whether 'joint privilege' exists is correctly characterised as one of procedural law rather than trust law. It seems to us that, whilst "joint privilege" may have its origins in authorities concerned with trusts, it does not represent part of trust law. A principle of procedure and evidence has evolved."

They explained that their reasoning was twofold. First, at [44] they said this:

"In the first place, the Courts have distinguished disclosure in litigation from a beneficiary's rights under trust law in a number of the more modern authorities. In ***O'Rourke v Darbishire****, Lord Wrenbury said that a beneficiary's 'proprietary right' to see trust documents 'has nothing to do with discovery'. In* ***Schmidt v Rosewood Trust Ltd****, Lord Walker saw Lord Wrenbury's observations as 'a vivid expression of the basic distinction between the right of a beneficiary arising under the law of trusts (which most would regard as part of the law of property) and the right of a litigant to disclosure of his opponent's documents (which is part of the law of procedure and evidence)'. In* ***Breakspear v Ackland****, Briggs J said that, where disclosure of a wish letter is sought from the Court in existing litigation to facilitate the determination of an issue to which it is alleged to be relevant, 'different considerations' arise which are 'governed by the law and practice as to disclosure in civil proceedings'."*

Secondly, at [45] the Court of Appeal said this:

"…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' – see paragraph 26 above). That view is also supported by Stephenson LJ's endorsement in ***CIA Barca de Panama SA v George Wimpey & Co Ltd*** *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 …'."

78. It is understandable that Mr Thanki should place heavy reliance on ***Dawson-Damer***; indeed, he began his submissions by taking the Court to it and suggesting that Mr Hill had avoided dealing with the decision because it is unhelpful to Glencore. The fact remains, however, that this is a case in which the Court of Appeal was not considering

the position that applies as between companies and shareholders; it was a case which was concerned only with the rule that applies between trustee and beneficiary.

79. It would appear also that there was no real challenge in that case to the proposition that the trustee/beneficiary position attracts the type of joint interest privilege described in *Thanki, The Law of Privilege* and submitted by Mr Thanki before me. This is clear from the Court of Appeal's description of the parties' respective submissions, as set out at [23]-[25]: both sides accepted that there is a concept of joint interest privilege; the issue was whether this was an aspect of trusts law or part of procedure.

80. The Court of Appeal's subsequent analysis of this issue, in such circumstances, takes essentially as read that there is a concept of joint interest privilege, which is why at [26] there is reference to what *Thanki, The Law of Privilege* has to say concerning the existence of that privilege without comment as to whether what is said is right or wrong. It is also why in what, then, follows the Court of Appeal explores what was in issue, namely whether the privilege is substantive or procedural, before concluding at [45] that it is the latter rather than the former.

81. There is, moreover, something of an oddity about what is stated at [45] since, in my view, it is not right to suggest that *"'joint privilege' has long been held to exist between company and shareholder"*. On the contrary, as has been seen, none of the cases dealing with the Shareholder Rule has sought to justify the rule on the basis of joint interest privilege – as opposed to the proprietary basis that Mr Thanki accepts is no longer sustainable in the wake of ***Salomon***.

82. In truth, as Mr Hill submitted, ***Dawson-Damer*** is only *"optically helpful"* to the submissions advanced on Aabar's behalf in the present case. Nothing that is contained in the decision directly addresses the issue now before the Court, which is hardly surprising given that the issue between the parties in ***Dawson-Damer*** was different: to repeat, whether as between trustees and beneficiaries joint interest privilege is substantive or procedural.

83. Turning to ***Jardine***, this was a case in which the claimant hedge fund had acquired a large number of shares in the defendant company following the announcement of a proposed amalgamation between the defendant and another company. The claimant then brought a claim under s.106 of the Bermuda Companies Act 1981 for the determination of the *"fair value"* of the shares which it had acquired and, in that context, sought to rely on the Shareholder Rule in order to challenge the company's claims to privilege over various documents. As previously noted, the Bermudian Court of Appeal (Sir Christopher Clarke P, Bell JA and Kawaley JA) rejected the notion that the Shareholder Rule is founded on any proprietary interest principle. In fact, this was accepted on behalf of the claimant in that case. As made clear at [103], the claimant sought to justify the Shareholder Rule on the basis that *"both the shareholders and the Company clearly had a shared or common interest"* so as to mean that a *"joint interest privilege"* arose. In advancing this submission, reliance was placed on *Thanki, The Law of Privilege*, on ***Arrow Trading***, on ***Sharp*** and on ***James-Bowen***, together with ***Wang***. As to Sharp in particular, at [111] Bell JA noted Mr Howard KC's submission on behalf of the claimant as being this:

> *"Mr Howard then turned back to **Sharp v Blank**, and the judgment of Nugee J. The judge was obviously aware of the **Saloman*** [sic] *principle, but recognised the reality of the situation, that although shareholders do not own the assets of the company, indirectly they are paying for the advice because it comes out of the assets of the company in which ultimately they are interested. Once the position is properly*

analysed it is clear that the principle of joint interest of shareholders in the advice obtained by a company is good law in England, and it is inconceivable that the Supreme Court would seek to reverse this, not least because it is not based on some fundamental misunderstanding of the position that started late in the 19th century; in modern law it is based upon an analysis of joint interest."

84. Bell JA's conclusions were briefly expressed. He noted at [128] that *Hollander on Documentary Evidence* describes the Shareholder Rule as *"being ripe for review"*, explaining, however, that:

"Hollander was looking at the position separately from the right which exists in the course of litigation. But we are concerned with the litigation position, so arguments based on the fact that ***Gouraud*** *should not have survived* ***Saloman*** [sic] *do not arise. The Court is considering the right in a litigation context, which means that the right is based on joint interest privilege, and not on 19th century case law. And that means that there is no need to scrutinise many of the cases to which Mr Moore referred. ... ."*

I have to say that I struggle with this reasoning somewhat since, as Michael Green J put it in ***G4S*** at [27], the 'litigation exception' only falls to be considered if the Shareholder Rule is regarded as having validity in the first place; it is not something that can be viewed in isolation. Furthermore and in any event, it is simply not right to suggest that what *Hollander on Documentary Evidence* has to say is unrelated to the litigation context since, quite obviously, that is the very context in which the point is addressed. Be that as it may, Bell JA went on at [129] to say this:

"Suffice to say that I accept the arguments put forward by Mr Howard as to the ambit of joint interest privilege, and would hold that joint interest privilege applies in this case to the legal advice secured by the Company, relating to appraising the fair value of the shares, subject of course to the further arguments put forward by the Company in relation to the position of former shareholders, and those who subsequently became shareholders."

85. Agreeing with Bell JA, Kawaley JA addressed this issue at [144] to [179]. He rejected the suggestion that a shareholder has an automatic and absolute joint interest in every privileged document generated by a company in the course of its business. As explained at [147], in his view, what is required is *"a purposive, context-sensitive approach"* in looking at the relevant authorities. Adopting such an approach, he described at [147(a)] the *"current English common law position"* as being *"that the relationship between a company and its shareholders is such as to confer standing on a shareholder to claim a joint interest in any legal advice a company obtains in relation to its general business affairs"*, adding that *"Whether such a claim is recognised as legally enforceable depends on the circumstances of each case"*. He went on at [147(b)-(d)] to say this:

"(b) the relevant rule has been recognised in England for over 130 years, albeit that the precise basis for and scope of the rule has evolved. The Bermuda common law rule is essentially the same as the English common law position;

(c) the applicant will generally be required to demonstrate 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. Any joint interest a shareholder succeeds in establishing will nonetheless still be potentially overridden if the company is able to show that litigation privilege attaches to the relevant legal advice;

(d) where joint interest privilege is asserted in the context of adversarial civil proceedings, the applicant will have to establish not just that the relevant advice is subject to joint interest privilege, but also that the advice is relevant to the issues in controversy and that production is 'necessary'. Where the claim is made by a shareholder pursuing a statutory remedy, the statutory regime will potentially be relevant to the existence of the asserted joint interest;".

He, then, analysed what he described as the *"true contents and scope of the rule"*, making the point at [148] that:

"The Company's submission that the distant historical origins of the rule are no longer sustainable was something of a 'straw man' argument. The notion that shareholders have a proprietary interest in a company's assets, first posited before the now trite principles of separate corporate personality had been established in ***Saloman v Saloman*** [sic] *[1897] AC 22, is no longer the basis for the modern common law rule."*

Nonetheless, he agreed at [149] that counsel for the company *"was broadly right to contend that it is impossible to identify any clear or convincing basis for the joint interest rule as it appertains to any legal advice received by a company about its general business activities"*, rejecting the notion that *"the rule is an absolute one which merely requires a shareholder to establish their status as such to be able to access any company legal advice"*.

86. Kawaley JA came on, at [152], to refer to ***Dawson-Damer*** at [45], in particular the passage where the Court of Appeal described it as having *"long been held"* that there is a joint interest as between a shareholder and the company, explaining that he found what was there stated to be *"instructive both as regards the characterisation of the rule and its scope"*, and not apparently querying whether it is right to say that it has, indeed, *"long been held"* as suggested, before going on at [154] to say this:

"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."

87. Kawaley JA's primary focus, therefore, was as to whether the Shareholder Rule is an absolute rule or something more nuanced, as confirmed by what he had to say at [158], as follows:

"But the proposition that a joint interest arises automatically and without more from the status of shareholder is impossible to justify in principled terms in the face of the powerful arguments advanced by Mr Moore KC. Any such absolutist rule is in my judgment untenable for the following three main 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."

88. Kawaley JA went on to consider ***Sharp*** (at [161]-[162] and ***CAS*** (at [164-165]), his focus again being on the nature of the Shareholder Rule (whether it is absolute or not) rather than on whether the Shareholder Rule exists at all, before (at [166]) referring to ***Dawson-Damer***, describing that decision as providing the *"clearest support"* for the conclusion that when *"the generally applicable requirements for joint interest privilege are met in relation to advice received by a company which a shareholder seeks to inspect by way of an application for discovery, the company will not be permitted to assert privilege against the applicant shareholder"*.

89. He, then, referred to ***Wang v Grand View Private Trust Company*** [2021] CA (Bda) 3 Civ, noting that [141] Sir Christopher Clarke P described the question of whether *"joint privilege may in fact be asserted"* as being a question that *"will depend on the circumstances"*, before concluding as follows at [178]:

"(a) the mere relationship of shareholder and company only potentially gives rise to a joint interest in any legal advice a company obtains which is not protected by litigation privilege. Contexts may, perhaps, arise in which it is self-evident that the fact that the applicant is a shareholder of the respondent company is enough to establish the claim;

(b) a company seeking legal advice will be deemed to know that its shareholders possess the standing to assert a joint interest privilege in the advice by virtue of their status in relation to the company;

(c) in what circumstances will a joint interest likely arise? The advice will generally have to have been obtained by the company in respect of a matter which engages the interests of one or more shareholders in a direct way which is reasonably discernible when the relevant legal advice is received;

(d) advice in relation to the merits of any matters or transactions which potentially engage the rights of shareholders in some specific way will generally attract joint interest privilege. Advice relevant to the fair value of shares in the event of an amalgamation or merger would potentially qualify because of the rights conferred by section 106 of the Companies Act. So too would legal advice in relation to any transaction which a shareholder could potentially challenge as being in breach of the company's constitution or the Companies Act;

(e) advice in relation to how a company should defend proceedings which are not yet in contemplation, but are merely possible, or indeed in relation to a vast array of 'administrative' matters which have no direct impact on shareholder rights would not ordinarily be likely to attract joint interest privilege; and

(f) what the company's articles or bye-laws provide about access to information may often be relevant to the analysis of whether joint privilege exists although this is unlikely to be dispositive in relation to statutory claims, cases of fraud or claims analogous to fraud."

90. Sir Christopher Clarke P in ***Jardine*** agreed with both judgments, saying this at [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****."*

He added at [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."

91. ***Jardine*** is not, of course, binding on this Court. It is, however, a decision in which the Shareholder Rule has been in at issue and where the validity and scope of the rule has been considered in some depth. Nonetheless, as previously observed, the real focus in that case, at least in the detailed analysis entered into by Kawaley JA, was not so much as to whether the Shareholder Rule exists at all but, rather, assuming that it does, as to its scope. The references to what is stated in *Thanki, The Law of Privilege* and to what the Court of Appeal in ***Dawson-Damer*** stated at [152] about it having *"long been held"* that there is a joint interest as between a shareholder and the company together demonstrate that this was the case were not accompanied by a separate analysis of whether the Shareholder Rule exists and, if so, on what basis.

92. In my view, therefore, ***Jardine*** is a decision which should be regarded with some care. In any event, it is not a case which supports Mr Thanki's primary (and wider) submission that the Shareholder Rule will apply in all cases since, on the contrary and at a minimum, I agree with both Kawaley JA and Sir Christopher Clarke P that the position should be viewed by reference to the particular circumstances and context, and not in a blanket-type way.

93. In conclusion on this aspect, there is no binding authority which decides that the Shareholder Rule can be justified on the basis of joint interest privilege. What there is, in truth, amounts to little more than passing (and anyway *obiter*) comment in cases where the Shareholder Rule was not in issue – often by reference to what is said about joint interest privilege in *Thanki, The Law of Privilege* – and without independent analysis of the underlying basis for the Shareholder Rule.

Joint interest privilege more generally: the cases

94. Although I recognise that there are appellate cases, most notably ***CIA Barca***, ***James-Bowen*** and ***Dawson-Damer*** (as well as ***Jardine*** and ***Wang***), where the joint interest privilege principle appears to have met with approval, it is unclear to me, on analysis, whether this is a concept which has any independent existence. On the contrary, in my view, Mr Hill was right when he submitted that the joint interest privilege concept is 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.

95. It is worth noting in this respect that *Thanki, The Law of Privilege* at §§6.08 and 6.09 describes joint interest privilege as being *"not a rigidly defined concept"*, explaining that it is *"less well developed or defined in the case law than joint retainer"* and that the Courts have not *"worked through all the consequences of the existence of the joint interest"*. Examples of joint interest privilege are, then, provided of instances where *"a joint interest has been held to arise"*. These are listed as being: a trustee (properly so-called) and beneficiary; a parent company and its wholly owned subsidiary; a company and its shareholders; a limited liability partnership and its members; a company and its director; and partners.

96. Various authorities are given in the footnotes in support of each of these categories. In relation to the first, the trustee/beneficiary relationship, reference is made to cases such as ***Talbot***, ***O'Rourke*** and ***Schmidt*** which, as has been seen, do not proceed on the basis of a joint interest privilege (as opposed to a proprietary) analysis. However, in the light of ***Dawson-Damer***, it must be recognised that there is, at least on the face of things, now support for the joint interest privilege concept in the trustee/beneficiary context - albeit that in that case the Court of Appeal invoked what was stated in *Thanki, The Law of Privilege* in support of the conclusion that there is a joint interest privilege concept, and so there is something of a circularity here.

97. As for the second category, concerned with a parent company and its wholly owned subsidiary, the case cited is ***Surface Technology PLC v Young*** [2002] FSR 387. That, however, as Mr Thanki acknowledged during the course of his reply submissions, is a decision which was based on there having been a joint retainer in respect of the legal advice obtained: there were joint instructions provided to the lawyers concerned by both the parent company and the subsidiary: see [17], [25] and [26]. It is not an authority which supports the existence of a separate joint interest privilege category.

98. The third example given relates to a company and its shareholders. The cases in the footnote relating to this category are those which have already been addressed. As previously pointed out, they are not cases which establish that the Shareholder Rule is based on a concept of joint interest privilege.

99. As for the fourth category identified, a limited liability partnership and its members, the case cited is ***Hilton v D IV LLP*** [2015] EWHC 2 (Ch), a decision of HHJ Pelling KC. There is nothing in his judgment, however, that supports the proposition that there is a freestanding joint interest privilege concept. At [51], he merely said the following:

> *"Finally it is suggested that the category T documents are privileged. Mr Knox accepted in Para. 63(5) of his skeleton submissions that this point was not a 'conclusive' answer to the application. In reality it is not an answer at all. Just as shareholders are entitled to see material that is privileged in the hands of a company of which they are a shareholder, so in my judgment are members of LLPs. The general principle as it applies to shareholders was assumed in* ***Woodhouse & Co v. Woodhouse*** *(1914) 30 TLR 559, was stated by Simonds J (as he then was) in* ***Dennis & Sons Limited v. West Norfolk Farmers Manure and Chemical Cooperative Company Limited*** *[1943] 1 Ch 220 at 222 and has been applied consistently ever since as was demonstrated by Evans-Lombe J in* ***CAS (Nominees) Limited v. Nottingham Forest plc and others*** *[2002] BCC 145 at [14]-[17]. There is no justification for treating the members of LLPs any differently from shareholders of limited companies in this context and none has been suggested. In those circumstances, I do not accept that privilege is material. Had the exception to the rule identified in* ***Woodhouse & Co v. Woodhouse*** *(ante) applied then that would have been an answer to the application but it does not apply."*

100. As to the fifth example, a company and its director, reference is made to several cases. It suffices, however, to refer only to ***Ford***, in which Burnett J said this at [18]:

> *"The origins of joint interest privilege can be seen from nineteenth century decisions of which* ***Gouraud v Edison Gower Bell Telephone Co. of Europe Ltd.*** *(1888) 57 L.J. Ch is an example. Shareholders in the defendant company challenged a claim to privilege advanced on behalf of the defendant on the basis that when the directors obtained the advice in question, they did so on behalf of the company as a whole. They could not, therefore, assert privilege in the advice as against the shareholders. Chitty J held that the shareholders were entitled to discovery of the documents in question by analogy with the practice that applied in partnership cases (and those concerning trustees and beneficiaries) where advice had been obtained for the benefit of the partnership or trust estate. The rationale of such cases is that there is no distinction between the interests of the partnership and the individual partners and the trust and its beneficiaries.* ***Rochefoucauld v Boustead*** *(cited by Rix J in* ***The Sagheera****) was a case which involved a joint venture between two individuals. The first invited the second to consult a solicitor on their joint behalf. There were proceedings against both. The first waived privilege but the second was entitled to insist upon it."*

As *Thanki, The Law of Privilege* at §§6.10 and 6.11 itself goes on to explain and notwithstanding Burnett J's reference to the rationale being one of joint interest privilege (reference having been made in this context, again, to *Thanki, The Law of Privilege*), what Burnett J was addressing was not the general position as between a company and its directors but something rather more specific and restricted, as explained at [16] when describing the submission being advanced by Mr Thanki in the case before him, namely that he should not adopt an approach which is *"too loose"* and should instead decide that *"joint interest privilege should not be available to directors or executives of a company which has entered into a retainer with solicitors unless the individuals concerned satisfy the test adopted in the Courts of the United States"* and the directors satisfy these five elements:

(1) that he/she approached the lawyer for the purpose of seeking advice;

(2) that, when he/she approached the lawyer, he/she made it clear that he/she was seeking legal advice in an individual capacity rather than as a director;

(3) that the lawyer saw fit to communicate with him/her in that individual capacity, knowing that a possible conflict with the company could arise;

(4) that the communications with the lawyer were confidential; and

(5) that the substance of the communications with the lawyer did not concern matters within the company or the general affairs of the company.

101. It is difficult, in the circumstances, to see how Burnett J's observations in ***Ford*** support the proposition that there is some relatively broad joint interest privilege concept that exists independently in the company/director context. On the contrary, what Burnett J was here describing are circumstances not falling far short of those applicable in a joint retainer context. The same can probably also be said in relation to a case such as ***CIA Barca*** where, in a joint venture context, one party instructed a lawyer on its own behalf and as the agent for another party.

102. As to the last category, partners, the position is again straightforward: there is no need for a categorisation of joint interest privilege to explain why privilege is shared in the

partnership context and cannot be asserted as between partners. All partners have a share in the assets of the partnership and, furthermore, under s. 24 of the Partnership Act 1890 have an unfettered right of access in respect of all the partnership's information. As has been seen, that is, indeed, the basis on which one of the cases cited by *Thanki, The Law of Privilege* in the relevant footnote, ***Re Pickering***, was decided; nothing was said about there being joint interest privilege.

103. I agree, in short, with Mr Hill when he submitted that cases involving claims between partners or between trustees and beneficiaries, in which it is well-established that privilege may not be asserted by one party against the other, either on the basis of a proprietary right to the relevant documents or (in the trust context) on the basis of the court's inherent jurisdiction to supervise the administration of trusts, or cases where a party has an express or implied contractual right of access to another party's privileged and non-privileged documents (such as ***Mander***), provide no support for the existence of a wide-ranging general principle. Those cases are better explained on narrower and more orthodox grounds rather than on the broader, joint interest privilege basis suggested by Mr Thanki.

104. Indeed, the differing justifications for any right to inspect privileged documents within the various categories of relationship identified in *Thanki, The Law of Privilege* at §6.09 demonstrate that it is not possible to conclude that a privilege which may arise in one category (e.g. trustee and beneficiary) can be read across to apply in another (e.g. company and shareholder). The most that might be said is that to refer to there being a joint interest privilege is a convenient shorthand with which to group various disparate categories of case where privilege has been held to apply. I agree with Mr Hill that it would be wrong to conclude that there was something intrinsic in the fact of a shared interest that is of itself sufficient to prevent the parties from asserting privilege against each other since, as can be seen, those cases (described by Mr Hill as an *"ad hoc grouping"*) where privilege has been found to exist have involved a justification going beyond the mere sharing of an interest in the documents. There is nothing in any of the cases which would justify a read across to the company/shareholder situation. There is nothing by way of a unifying set of characteristics which are definitional or sufficient to enable it to be said that a joint interest privilege, because it arises in one situation, should be taken as arising also in another, different situation.

105. It follows that, in my view, the concept of joint interest privilege as a freestanding or standalone species of privilege is not supported by the authorities. What there are are cases where privilege arises on other, case-specific grounds that provide no concrete justification for the suggestion that there is an overarching joint interest privilege concept.

Joint interest privilege in the company/shareholder context: as a matter of principle

106. However, even if I am wrong about this and there is such a concept, nonetheless I see no justification, as a matter of principle, for a conclusion that it applies, at least in any generalised sense, to the relationship between companies/shareholders. There are a number of points that fall to be made in this context.

107. First, as observed, the authorities, on analysis, provide no support for joint interest privilege being the basis for the existence of the Shareholder Rule. Moreover, none of the textbooks relied on by Aabar explains why the company/shareholder relationship should give rise to joint interest privilege or why shareholders have any (or any sufficient) joint interest in company documents. There is no real analysis. Rather, as pointed out in *Khaw, Time to Wipe the Slate Blank? The Shareholder Exception to*

Legal Professional Privilege: Various Claimants v G4S Plc [2023] EWHC 2863 (Ch), CJQ 2024, 43(3) at page 206, the argument that the Shareholder Rule is a species of joint interest privilege *"provides neither justificatory force for why the privilege should exist nor confirmatory force that previous recognition that the company-shareholder relationship gives rise to privilege is, in fact, correct"*. He goes on to say that this explanation simply seeks *"to lift the 'shareholder principle' up by its bootstraps"* and that *"[t]o say that joint interest privilege arises from the relationship between shareholder and company is to state what the 'shareholder principle' is, not justify its existence"*. I tend to agree.

108. Secondly, focusing on what, specifically, is suggested by Aabar in the present case, Mr Thanki, Mr Damnjanovic and Mr Holliday in their skeleton argument submit that communications concerning the administration of a company's affairs are *"for the mutual benefit of [the] company and its shareholders"*, that *"shareholders' interests are in general aligned with company's"* and that shareholders have *"a direct economic interest in the company's performance and the application of its assets"*. I agree with Mr Hill, however, that none of these reasons can be a sufficient justification for overriding a company's fundamental right to privilege since, if they were, then, a company would be unable to assert privilege in a variety of other situations and against numerous other parties; indeed, to describe the Shareholder Rule in such terms would unduly limit its scope.

109. There are also, thirdly, important points of distinction between the company/shareholder relationship and the other categories of relationship such as partners, trustees/beneficiaries and joint venturers. There is nothing in the company/shareholder relationship that justifies a conclusion, at least as a general matter, that the company should be deprived of its otherwise inviolable right to keep its confidential legal advice private and privileged.

110. These differences include, perhaps most fundamentally and as previously noted, the fact that shareholders have no proprietary interest in their company's assets. Furthermore, it is not to the shareholders that directors owe their duties. It is to the company that such duties are owed, and shareholders cannot generally take action in respect of a breach of duties by directors: see s. 170(1) of the Companies Act 2006, and ***Peskin v Anderson*** [2011] 1 BCLC 372. On a related aspect, whilst directors are required to exercise their duties in order to promote the success of the company pursuant to s. 172 of the 2006 Act, the fact that the company's interests may be equated with the interests of its members as a whole, and that the directors must take account of those interests, cannot be a sufficient basis for granting shareholders a right to inspect the company's privileged documents. Indeed, as Mr Hill notes, when a company is insolvent, or of doubtful solvency, the directors must take account of the interests of the company's creditors (see ***BTI 2014 LLC***), but that does not mean that creditors would have an equivalent right to inspect the company's privileged documents (see e.g. ***GE Capital Commercial Finance Ltd v Sutton*** [2004] 2 BCLC 662).

111. Fourthly and in contrast to the position in relation to partnerships and trusts, outside of the litigation context shareholders do not generally have any rights to access the company's documents (whether such documents are privileged or non-privileged). Rather, as Lord Reed explained in ***Marex Financial Ltd v Sevijella*** [2021] AC 39, [2020] UKSC 31 at [31]:

"*A share is not a proportionate part of a company's assets … Nor does it confer on the shareholder any legal or equitable interest in the company's assets … a share is a right of participation in the company on the terms of the articles of association*."

Accordingly, a shareholder's legal and economic interest is comprised of its contractual rights against the company under the company's articles of association. In the present case, given that Glencore's Articles of Association contain the usual provision that *"... no member of the Company ... shall have any right of inspecting any account or book or document of the Company except as conferred by the Law or ordered by a court of competent jurisdiction or authorised by the Directors"*, Glencore and its shareholders (including Aabar subject to the answer to Issue 3) are to be taken as having agreed that they (the shareholders) are not entitled to inspect Glencore's documents. It would, as a result, be anomalous if Aabar and its fellow shareholders could subvert that agreement by commencing litigation against Glencore, thereby creating some joint interest that would not otherwise exist; indeed, not only does it not exist but to require Glencore to provide what is now sought would entail Glencore being required to do something that is at odds with what has been contractually agreed.

112. Fifthly, whilst in cases in which a relevant joint interest has been found to exist the relevant communications were held to be made for the benefit of (or on behalf of) both parties and not for the sole purpose or benefit of the person who made or received the communication, that cannot be said to be the case in relation to the company/shareholder relationship. As pointed out in *Kiu, Disclosure of the Company's Privileged Documents to Shareholders as an Application of Joint Interest Privilege* (2020) 32 SAcLJ 36 at §53:

"The logic of denying privilege in such circumstances is straightforward – if the advice was obtained for another, it would be nonsensical for the advice to be denied to that very person".

However, as *Kiu* goes on to explain at §77, the position is different in the company/shareholder context:

*"... Where there is a joint interest relationship, the party obtaining legal advice will normally be subject to a duty not to obtain that advice in a negligent fashion. Thus, while trustees are not in breach of their duties only because they exercised their discretion on the wrong advice, the same cannot be said if 'the process of taking and acting on the advice is itself open to challenge in some way' [**Pitt v Holt** [2012] Ch. 132 at [124]]. That such a duty exists is unsurprising on two levels. First, ... a joint interest relationship is typically a face of some other legal relationship (partners in a partnership, insurer-reinsurer etc) which creates corresponding legal duties. Second, the act of obtaining legal advice on behalf of another in itself involves assumption of responsibility and reliance with respect to the process by which the advice is obtained; it would be surprising if the party obtaining the advice is free to act in ways that damage the interest of the other party relying on that advice."*

Kiu continues at §78:

"This duty, characteristic of joint interest relationships, cannot exist between directors and shareholders under English and Singapore law. Currently, such a duty not to obtain advice incompetently is owed by directors towards the company, as a facet of the common law duty of skill, care and diligence, ... unless it can be said that a concurrent and identical duty is owed towards the shareholders. It is not possible to recognise such a concurrent duty, because there is no principled reason that can distinguish that act of obtaining advice from the variety of other activities directors perform on behalf of companies which does not generate corresponding duties towards shareholders. Consequently, the company-shareholder joint interest makes no sense: it would be self-contradictory to say that legal advice was obtained on

behalf of shareholders such that they can inspect it, but no cause of action vests in shareholders if the advice turned out to be obtained incompetently."

113. Sixthly, there is also the point that, whilst it probably is the case that a company and its shareholders might have a joint interest in the ultimate success of the company and profit maximisation, as noted in *Loughrey, Privileged Litigants: Shareholder Rights, Information Disclosure and Corporate Legal Professional Privilege* [2007] JBL 778 at page 787 (observing that this seems to be the only basis on which a joint interest could potentially be said to arise as between companies and their shareholders), this is hardly a justification for concluding that there is a blanket-type rule which operates to prevent companies from asserting their fundamental right to legal professional privilege.

114. Seventhly, following on from this last point, that would be all the more unlikely to be a justification bearing in mind that a company like Glencore is a large public company. Such companies will have thousands or even hundreds of thousands of dematerialised shareholders, who will be changing all the time. How, in such circumstances, there can really be said to be a joint interest is difficult to fathom. The more so, in view of the fact that the interests of such shareholders will vary widely not only as between themselves as shareholders but also as between themselves and the company. Examples of this are when a company acquires shares in a competitor or an 'activist' shareholder acquires shares to pursue a political agenda or to gain access to company meetings, or (as between shareholders) where there are short and long term investors or majority and minority shareholders or voting and non-voting shareholders. It is simply unrealistic to suppose that the interests of all shareholders and the company will, in general, be aligned. It would, in such circumstances, indeed, be startling to expect that a company would be unable to assert privilege against such a potentially vast and differing group of shareholders, subject only to operation of the 'litigation exception'.

115. I agree in these respects with *Loughrey* at pages 805-806 where she makes the point (albeit referring to common interest privilege when she clearly means to refer to joint interest privilege) that *"Shareholders in companies with a dispersed share-ownership do not, usually, possess a sufficient unity of interest to legitimate a claim to common interest privilege, and so … should not be able to inspect privileged corporate documentation on that basis"*. I agree also that the suggestion that the Shareholder Rule can be justified as a species of joint interest privilege *"is conceptually indefensible, and cannot provide a legitimate justification for the harm and disruption which might be caused by the exercise of the right in large companies"* and that legal professional privilege is *"too significant to be discarded because of misconceptions about the role of shareholders in the company"*.

116. Lastly, to extend joint interest privilege (assuming that it exists as a freestanding concept at all) to the company/shareholder relationship risks undermining the public policy rationale for legal professional privilege. This is because it would potentially discourage directors from seeking legal advice when to do so would be consistent with the duties owed by them to their company, because of concerns on their part that any advice obtained might be seen by a large number of third parties and, indeed, third parties whose identities may not even be known at any given point in view of the ever-changing make-up of the shareholder community. As *Kiu* puts it at §105:

"… the company-shareholder joint interest privilege cannot be justified as a matter of principle or policy. From the perspective of principle, once the separate legal personality of a company is accepted, none of the justifications make sense. With

respect to policy, allowing disclosure of privileged materials would deter frank discussion between directors and the company's solicitors."

As a result, he concludes:

"The policy underlying legal advice privilege would be undermined".

117. For all these various reasons, my conclusion is that the Shareholder Rule is unjustifiable and should no longer be applied. Its original rationale no longer applies, as Mr Thanki accepted; and the suggested joint interest privilege rationale is neither supported, at least in the shareholder/company context, by authority nor warranted as a matter of principle. It follows that the answer to Issue 1 is 'no'.

118. Alternatively, if the Shareholder Rule does exist, I am clear that it only does so in the manner described by Sir Christopher Clarke P and Kawaley JA in ***Jardine***, namely as Kawaley JA put it at [184] on the basis that the question of whether a joint interest existed as between company and shareholder *"depends on the circumstances of each individual case"* and that *"the joint interest principle does not extend to give the shareholder an absolute right to access any company legal advice whatever …"*. That, as he himself noted in ***Jardine***, is how Sir Christopher Clarke P previously put it in ***Wong*** where he noted at [139]-[141] that, although there were *"a number of cases in which a right to obtain access has been held to exist by reason of the nature of the existing relationship between A and B"*, even in those cases *"the question whether joint privilege may in fact be asserted will depend on the circumstances"*.

Issue 2: Does the Shareholder Rule apply to each of (i) legal advice privilege; (ii) litigation privilege; and (iii) without prejudice privilege?

119. Issue 2 does not, strictly speaking, arise in view of the answer to Issue 1. However, it is appropriate that I go on to consider it – and, indeed, also Issues 3 and 4.

120. Glencore accepts that, if the Shareholder Rule exists, it would be capable of applying to both legal advice and litigation privilege. There is, therefore, no issue as to this aspect of Issue 2. There is, however, an issue as far as without prejudice privilege is concerned.

121. Mr Thanki submitted that the Shareholder Rule should be treated as applicable also to without prejudice privilege, namely written or oral communications which are made for the purpose of a genuine attempt to compromise a dispute. In advancing this submission, he acknowledged that there does not appear to be a case in which the Shareholder Principle has been applied to without prejudice privilege, but points out that *Hollander on Documentary Evidence* at §20-24 suggests that it should be regarded as doing so. However, no reasons are given in *Hollander* as to why that should be the case and in ***G4S*** at [49] Michael Green J took the view that the Shareholder Principle does not apply to without prejudice privilege, observing at [48]-[50] that such documents raised different considerations and had *"the complication of a third party being involved"*.

122. Mr Thanki submitted, nonetheless, that the fact that a third party is involved does not affect the operation of joint interest principles:

(1) First, he submitted, that if a shareholder has a joint interest with the company in a dispute, it follows that he and the company have a joint interest in the communications concerning that dispute just as much as any other communication pertaining to the administration of the company's affairs. Permitting inspection by

the shareholder in this context is entirely consistent with the application of the Shareholder Principle.

(2) Secondly, he submitted, the fact that the communications are confidential as between the company and the third party is not itself a barrier to inspection by the company's shareholder in the litigation process: confidentiality would not ordinarily be a reason to refuse disclosure, still less when the parties involved share a joint interest.

(3) Thirdly, he submitted that it would be *"absurd"* if a shareholder were able to see the legal advice that the company has received concerning without prejudice negotiations with as third party but not also the without prejudice negotiations themselves.

(4) Lastly, as to authority, Mr Thanki's submission was that it appears that in both ***Mander*** and in ***CIA Barca*** the Commercial Court and the Court of Appeal respectively were prepared to order disclosure under the joint interest principle of legal advice in respect of settlements reached with third parties. In those circumstances, he suggested, it would be nonsensical to exclude without prejudice privilege materials from the ambit of the joint interest principle, and thus the Shareholder Principle, where advice relating to such settlements with third parties is not so excluded.

123. I cannot accept these submissions for various reasons.

124. First, documents which are subject to without prejudice privilege necessarily engage the interests of more than one party: the company and the counterparty to the relevant document. Even if the interests of a shareholder could be said to be aligned with those of the company, it does not follow that there is also an identity of interest between the shareholder and the third party. Indeed, as Mr Hill rightly notes, it is much more likely that the interests of the shareholders will be adverse (or at the least different) to the interests of the third party.

125. Secondly, the third party will be aware that it is entering into without prejudice negotiations not with the company's shareholders but (consistent with ***Salomon***) with a separate entity, namely the company. In such circumstances, for those without prejudice negotiations to be shared with the shareholders is not something that the third party should be taken, at least ordinarily, to have contemplated.

126. Thirdly, the extension of the Shareholder Rule to without prejudice privilege would also be inconsistent with both of the well-established bases for that specific form of privilege, namely that it arises based on an implied agreement between the parties to the relevant communications and/or the public policy of encouraging parties to negotiate openly with each other and to settle their disputes without resorting to litigation: see e.g. ***Muller v Linsley and Mortimer*** [1996] 1 PNLR. 74 at page 77 (per Hoffmann LJ, as he then was); and ***Cutts v Head*** [1984] Ch 290 at pages 306-307 (per Oliver LJ, as he then was) and page 314 (per Fox LJ). To the extent, in particular, that without prejudice privilege is based on an implied agreement, the relevant agreement is an agreement between the company and the other party to the relevant communications – not also the shareholders in the company who were not privy to the relevant communications at the time and cannot, on any view, have been parties to any such agreement, not least because they (as opposed to the company) are not parties to the dispute with which the without prejudice communications are concerned.

127. As to public policy, the proposed extension of the Shareholder Rule to without prejudice privilege would deter parties from engaging in settlement negotiations with companies by the knowledge that any such negotiations would not be privileged vis-à-vis the company's shareholders and would be disclosable in subsequent litigation. This point can be tested by positing a situation where the third party is also a shareholder in the company. It is distinctly unlikely, particularly if the third party/shareholder is in competition with other shareholders in the company who are also engaged in the same business, that that the third party/shareholder would expect that its without prejudice communications with the company would be seen by its fellow shareholder competitors. The same applies even if the third party is not also a shareholder. It would be somewhat surprising if in this situation the without prejudice material were to be seen by those others and, if it was appreciated by the third party that this was to be the case (or that there was risk that it might be the case), the third party might well decide not to engage in negotiations which would otherwise (or might otherwise) result in a settlement. In other words, the public policy objective that underpins the without prejudice concept would not be met.

128. Fourthly, it seems to me that Mr Thanki's submissions overlook, or at least underplay, the fact that it is not for one party to waive without prejudice privilege but for both to decide whether without prejudice communications can be disclosed to others. There is no room, in such circumstances, for a company to act unilaterally and reveal the content of those communications to its shareholders.

129. Lastly, as to the suggestion that there is support for Aabar's case to be derived from ***Mander*** and in ***CIA Barca***, that is not the position. Those were cases where there was disclosure of certain settlement communications, but it does not appear that these were communications covered by without prejudice privilege. There is no suggestion that they were, and there was no determination of the present issue which rather confirms that they were not covered. Certainly, neither case is authority for what is now suggested on Aabar's behalf.

130. It follows that the answer to Issue 2 is 'yes' inasmuch as legal advice privilege and litigation privilege are concerned but 'no' in relation to without prejudice privilege.

Issue 3: Does the Shareholder Rule extend to Aabar?

131. Issue 3 arises because, as previously explained, Aabar is not a direct/registered shareholder in Glencore, and nor has it previously been a direct/registered shareholder in Glencore. Aabar was, rather, between 29 March 2012 and 20 December 2021, the sole shareholder in Commodities, which was not itself a direct/registered shareholder in Glencore but which is alleged by Aabar to have been the ultimate beneficial owner of 99,299,065 shares in Glencore, between 24 May 2011 and 28 December 2020, which it held indirectly through the CREST system.

132. Issue 3 raises three points. The first is whether Aabar is entitled to invoke the Shareholder Rule given that it is not a direct/registered shareholder in Glencore; the second is whether it matters that Aabar is not a current shareholder; and the third is whether Aabar can bring the claim that it does in view of the fact that it stands as successor to Commodities.

Aabar not being a direct/registered shareholder

133. As to the first of these points, Mr Hill noted that each of the previous cases in which the Shareholder Rule has been applied, in England and Wales at least, has involved a challenge to claims for privilege by a direct/registered shareholder in a company.

134. Furthermore, he pointed out that it is well-established that companies do not recognise trusts, and that only persons who are registered on the register of members of a company are shareholders in the company and the legal owners of its shares. Thus, s. 112 of the 2006 Act provides that:

> *"(1) The subscribers of a company's memorandum are deemed to have agreed to become members of the company, and on its registration become members and must be entered as such in its register of members.*
>
> *(2) Every other person who agrees to become a member of a company, and whose name is entered in its register of members, is a member of the company."*

135. Similarly, in ***Enviroco Ltd v Fatstad Supply A/S*** [2011] 1 WLR 921, [2011] UKSC 16; Lord Collins said at [37] that it was:

> *"… a fundamental principle of United Kingdom company law … that, except where express provision is made to the contrary, the person on the register of members is the member to the exclusion of any other person, unless and until the register is rectified".*

136. In addition, in ***Various Claimants v Tesco Plc*** [2020] Bus LR 250, [2019] EWHC 2858 (Ch) Hildyard J said at [3] explained that:

> *"The Uncertificated Securities Regulations 2001 [2001 No. 3755] …, which have enabled and prescribed the basis for title to securities to be evidenced otherwise than by a certificate and transferred other than by written instrument through CREST as the 'relevant system' make clear that the legal owner is the person whose name appears on the CREST register (who must be a member of CREST). It is not the CREST member's client or anyone else in the chain of intermediaries."*

He went on at [19] to say this:

> *"The key feature of intermediated securities held in a custody chain is that the ultimate investor (meaning the person for whose account the securities are ultimately held) is given the benefit of a right without holding the right itself. … It has a 'right to a right'. An investor in intermediated securities cannot enforce the rights attached to the shares (or other securities) against the issuer, although it is entitled to expect that those rights will be exercised in accordance with its wishes as expressed through the chain of interests."*

He added at [75] that:

> *"… As will already be apparent, I readily accept that where there is a chain of intermediaries, the investor at the end of the chain does not have any direct proprietary interest in the underlying security, nor can it enforce any rights held in the chain of sub-trusts directly against the issuer."*

137. Furthermore, as Mr Hill also observed, Glencore's Articles of Association confirm at Article 2 that a *"member"* means *"A person whose name is entered in the Register or a Branch Register as the holder of shares in the Company"*, Article 14 going on to state that, subject to certain exceptions:

> *"… no person shall be recognised by the Company as holding any shares upon any trust, and the Company shall not be bound by or compelled in any way to recognise any equitable, contingent, future or partial interest in any share, or any interest in*

any fractional part of a share, or … any other right in respect of any shares, except an absolutely right to the entirety thereof in the holder."

Mr Hill submitted that, in the circumstances, Aabar ought not to be permitted to invoke the Shareholder Rule (if it exists) since that would involve Aabar, an entity which has no contractual entitlements under Glencore's Articles of Association, being afforded rights as a shareholder which it would not otherwise have.

138. He submitted also that for Aabar to invoke the Shareholder Rule would entail an illegitimate expansion which would be contrary to previous authority. Specifically, Mr Hill submitted that in ***BBGP*** Norris J held at [59(a)] that a parent company was not entitled to rely on the Shareholder Rule in order to inspect privileged documents belonging to a company in which its subsidiary was a shareholder, saying this:

"Can the direct shareholder in turn share the material with its shareholders upon the same principle? I answer that question in the negative, on grounds of policy rather than principle. Bringing within the ring of privilege the shareholder of the company which was the actual client of the solicitor on the ground of common interest is well settled rule. But I see no reason to extend the entrenchment upon the basic rule of privilege all the way up the chain of holding companies notwithstanding the steady dilution of that common interest."

Likewise, Mr Hill observed, in ***G4S*** Michael Green J concluded at [42(6)] that:

"… the right to privilege should only be removed where it is necessary to do so and in strictly defined circumstances. The old authorities all concerned legal owners of shares and I do not think it is for me to broaden that category and thereby expand the relationships concerned … ."

139. Whilst Mr Hill is right that consideration of this aspect in the authorities is limited, nonetheless I do not agree with him that the Shareholder Rule should be regarded in the restricted way that he suggested. This is because, in my view, it over-emphasises form over substance.

140. The way in which CREST operates was summarised by Hildyard J in ***Tesco*** at [12] to [25], but in summary it is as follows:

(1) Where securities are dematerialised or uncertificated, there is no share certificate: title is instead recorded on an electronic system operated by a central securities depositary ('CSD'). In the UK, that system is CREST, which is operated by Euroclear UK and International Ltd ('EUI'), who is the only CSD that has been approved to operate in the UK by the Treasury. In most countries, the CSD also holds the securities, but in the UK EUI does not.

(2) Under the CREST system, shares are registered in the name of a CREST member who is the legal owner of the securities. Members are either 'direct members' (typically large custodian banks that have invested in the hardware and software to connect to the CREST system) or 'personal'/'sponsored members' that operate through a direct member and rely on them to interface with CREST. Members can set up multiple accounts.

(3) Although it is possible for investors to become CREST members, the vast majority rely on intermediaries, i.e. custodians or nominees, who are CREST members to hold their securities on their behalf. Moreover, there are often further sub-custodian intermediaries (e.g. financial institutions who offer custodial

services, including prime brokers) in a chain between the custodian or nominee who is the registered shareholder in the CREST system and the ultimate investor.

(4) At any stage in the chain of intermediaries, an intermediary may hold pooled securities on behalf of two or more investors in a single account. This is known as an 'omnibus account', and they may contain millions of securities, with shares held on behalf of different clients, which may include other intermediaries. Each of these intermediaries may, in turn, hold shares for their own clients (including other intermediaries), and so on, until the interests are held by the ultimate beneficial owners. Although an intermediary can theoretically hold a specific number of securities for an individual client in a 'segregated' account, it is far more common for intermediaries to manage a larger pool of securities of the same type in one CREST account on behalf of multiple clients.

(5) Dematerialised securities are transferred by way of computerised book-entry transfers within the accounts of different CREST members, at any stage of the intermediary chain. When trades are performed, there is a matching of instructions being given and received by the buyer's and seller's respective custodians. Where the seller and buyer have the same custodian (or their sub-custodians have the same custodian), the trade can be settled internally by the custodian/sub-custodian by a simple internal book transfer, bypassing the need to notify or involve CREST at all. The result is that most trades involving CREST members are consolidated among a few large custodian participants. These trades, in turn, may be netted off every day to further reduce the number of transfers and so, as Hildyard J put it at [25], *"whether or not legal title to shares changes as the result of a share purchase or sale is largely a matter of mathematical fortuity"*.

141. It is worth also having in mind the extent to which shares are held on intermediated basis since, as Mr Thanki noted, approximately 88% of UK securities are held through CREST, and this is only likely to increase as time passes not least because of the advantages that the use of intermediated security chains within CREST has for investors, the Law Commission's 2020 *"Intermediated Securities: Scoping Paper"* explaining that they have made trading and settlement of securities *"significantly quicker, cheaper, and more convenient"*. That same paper stated that by 2020 there were 4,172 individual members of CREST, compared to 2,394 corporate members, and that individual members held only a very small fraction of holdings on CREST by value: in 2018 some £1.3 billion or so compared to approximately £5.2 trillion held by corporate members. As Mr Thanki observed, given the small number of corporate members and the collective size of their holdings, it is very likely that they hold the vast majority of shares as custodians for others.

142. Mr Hill submitted that none of this justifies extending the scope of the Shareholder Rule to the ultimate beneficial owners of shares or for abrogating a company's fundamental right to assert privilege in relation to its internal documents. I agree with him that it would be wrong to arrive at a conclusion which is unjustified as a matter of principle. It would also be wrong, however, to ignore practical reality.

143. Immediately after the passage in ***Tesco*** at [75], relied upon by Mr Hill, Hildyard J went on to refer to the judgment of Briggs J in ***In re Lehman Brothers International (Europe)*** [2012] EWHC 2997 (Ch), at [163], as follows:

"It is an essential part of the English law analysis of the ownership of dematerialised securities that the interests of the ultimate beneficial owner is an equitable interest, held under a series of trusts and sub-trusts between it, any intermediaries and the depository in which the legal title is vested … ."

144. Deciding that the ultimate beneficial owner had an *"interest"* in securities for the purposes of s. 90A and Schedule 10A of FSMA. Hildyard J went on to explain his thinking in this way at [82] to [85]:

> *"82. Put another way, there seems to me to be semantically no real doubt that the investor has an 'interest' in the securities; and similarly, there is legally no doubt that such interest is equitable/proprietary; those are the hallmarks of beneficial ownership, as Briggs J terms the interest of the investor; and their presence suffices to qualify as "any interest in securities" for the purpose of Schedule 10A.*
>
> *83. It would, to my mind, be odd to deny that the ultimate investor has such an interest. No one but the investor can claim any right of ownership beneficially, nor is the property in the share available in the event of the bankruptcy of any intermediary to any of its creditors: only to the investor whose 'property' in reality it is.*
>
> *84. In the result, I have concluded that the expression 'any interest in securities' can, by application of established distinctions between rights which are merely economic, contractual or personal, and rights which are in equity at least 'proprietary', be given sufficiently certain meaning to confine the class of potential claimants so as not to expose the issuer to indeterminate liability to an indeterminate class whilst also ensuring proper vindication consistently with the admitted objectives of both the domestic legislature and the Transparency Directive.*
>
> *85. In my judgment, the expression denotes something more than a mere personal or contractual right; the expression 'ultimate beneficial owner' captures the position of the investor as the owner of 'a right to a right' held through a waterfall or chain of equitable relationships which is unaffected by the insolvency of his intermediary, and enables it ultimately, even if indirectly, to enjoy the benefit of the bundle of rights which the securities represent to the exclusion of others (unless the ultimate beneficial owner has transferred them away, for example to a chargee)."*

Accordingly, even if the ultimate investor's proprietary interest is such a 'right to a right', in reality, that investor holds an equitable interest in the securities and the exclusive beneficial ownership of the shares.

145. Mr Hill disagreed, submitting that the fact that Aabar brings claims under ss. 90 and/or 90A of FSMA is irrelevant given that such a right is not limited to registered shareholders. In this respect, Mr Hill highlighted the fact that in ***G4S*** at [42(5)] Michael Green J observed that *"it would be quite an extension to say that all such claimants are automatically entitled to privileged documents from the company"*.

146. In arriving at this conclusion, to repeat in an *ex tempore* judgment at a case management conference where time was limited, Michael Green J gave a number of reasons why he was deciding as he was: see [42(1)-(6)]. It is unnecessary to go through each of those reasons, but the first is worth mentioning since it was that the Shareholder Principle *"has a somewhat shaky foundation in the light of the current ways of viewing the position of shareholders and their company"*, an implicit reference to ***Salomon*** and the matters discussed earlier in this judgment in the context of Issue 1. Since, however, Issue 3 only comes to be considered on the hypothesis that (contrary to the conclusion that I have reached) the Shareholder Rule exists, this is not a reason which assists in the present context.

147. The second of the reasons given, although encompassing both [42(2)] and [42(3)], was that the Shareholder Principle is *"based on the relationship between shareholders and their company"* and:

> *"it is therefore a right that is an incidence to the legal ownership of shares. Other such rights are the right to receive dividends or a distribution on a solvent liquidation. The rights under the articles which govern the relationship between shareholders and the company are limited to registered shareholders and can only be enforced by them."*

Again, however, I do not agree. On the contrary, whilst the principle is based on the relationship between shareholder and company, the relationship is not confined to legal owners of shares since, as decided in ***Dawson-Damer***, the Shareholder Principle (assuming that it exists) is not an aspect of company law but instead involves asking whether the shareholder and company have a sufficient joint interest in the relevant communication. That may be because the shareholder has legal title to the shares, but it may be because there is a joint interest that arises through having beneficial ownership of the shares rather than legal title. That is the point which Hildyard J was making in ***Tesco*** at [83] when he noted that *"No one but the investor can claim any right of ownership beneficially"*, and I agree with Mr Thanki when he submitted that this right of beneficial ownership is relevant, and perhaps more relevant than having a bare legal title, when deciding whether there is a sufficient joint interest as to give rise to the joint interest privilege asserted.

148. Any joint interest between a shareholder and a company is predicated on the fact that the relevant communications are made for the company and the shareholder's mutual benefit in circumstances where shareholders have a shared economic interest in the company's performance and the administration of its affairs, and this applies irrespective of whether the shareholder is the legal owner of the securities in question or is beneficially interested in those shares without also being their legal owner. That is the point which was made by Bell JA in ***Jardine*** at [134] when he said this:

> *"… the joint interest which existed between a company and its shareholders was the same whether those shareholders were the beneficial owners of the shares, or whether they were held through nominees, seems to me to be an obvious one. What matters is the interest, not the legal mechanics of how the shares were in fact held."*

149. Furthermore, if there were in this context the suggested distinction between registered owners and intermediated securities holders, it could lead to somewhat arbitrary consequences. It would mean, for example, that two claimants in the same proceedings against a company, with the same beneficial interest in shares, would be able to access different materials purely as a result of the mechanism by which they held those shares. In the modern world and given the proliferation of intermediated shareholdings, this would make little sense.

150. It would similarly make little sense, as intermediated holdings become ever more prevalent, were the Shareholder Rule to apply only to those few individuals and companies that are members of CREST and are recorded as shareholders on the CREST register, even though they may hold no beneficial interest in those shares and have no economic interest in any litigation where the company's disclosure obligation arises, but would not apply to the beneficial owners who, in fact, have the relevant joint interest with the company and the right to bring (and, indeed, economic interest in bringing) a claim.

151. Far from there being a dilution of interest, as Mr Thanki put it, *"as one travels up the custody chain for intermediated security holders to the ultimate investor"*, since it is the ultimate investor who has the beneficial interest in the shares, the opposite is actually the case. Put differently, the person with the bare legal interest is at the more dilute end of the relevant spectrum, with the beneficial owner of the share being the party who has the real and meaningful interest in any advice received by the company.

Aabar not being a current shareholder

152. This brings me to the second of the points that arise in the context of Issue 3, namely whether it matters that Commodities (Aabar's predecessor) sold its shares in Glencore on 28 December 2020.

153. I am clear that, in considering joint interest privilege, as Moore-Bick J explained in ***Mander*** at page 646, the time for assessing whether or not there was a relevant joint interest is when the communication was made. As a result, the fact that at a later date the parties have fallen out does not entitle a party to assert privilege over a prior communication that was subject to joint interest privilege. It follows that the Shareholder Rule applies to communications made during the period in which Commodities was a shareholder and it makes no difference that Commodities subsequently ceased to be a shareholder.

Aabar as successor to Commodities

154. As to the third point, this was no longer in dispute since by the time of the hearing before me Glencore had accepted that a successor in title, whether generally or in relation to a relevant cause of action, stands in the shoes of its predecessor with respect to privilege, and so that the Shareholder Principle (if it exists) applies to Aabar, as Commodities' successor in title to the cause of action that it enjoyed as against Glencore.

155. The principles relating to the position of successors in title under the law of privilege were recently considered by the Court of Appeal in ***Travelers Insurance Co Ltd v Armstrong*** [2022] 1 All ER (Comm) 1366, [2021] EWCA Civ 978, a case in which it was held that an insurer had no right to maintain privilege against the assignee of a cause of action belonging to the party with whom the insurer had jointly retained solicitors. Coulson LJ summarised the relevant principles at [37] in this way:

> *"(a) In respect of privileged documents, a successor in title stands in the shoes of his or her predecessor: see Schneider v Leigh and Crescent Farm. Thus, if the predecessor in title is entitled to the disclosure of privileged documents, so too is the successor in title.*
>
> *(b) 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 and Winterthur.*
>
> *(c) Of course, the scope of the rights of a successor in title will always depend on precisely what it is that has been passed on or assigned to him: see as far back as Minet, and the analysis in Surface Technology. Thus if a solicitor was jointly retained to deal with an IP claim and a fatal accidents claim, and the successor in title is an assignee of claims consequential upon the IP claim*

only, the successor in title is not entitled to see the privileged documents relating to the fatal accidents claim."

156. Coulson LJ went on at [37(e)] to refer with approval to the approach adopted by Arnold J (as he then was) in ***Twin Benefits Ltd v Barker*** [2017] 4 WLR 42, [2017] EWHC 177 (Ch) saying this:

"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."

Unlike ***Travelers***, which involved joint retainer privilege, ***Twin Benefits*** was a case involving joint interest privilege, in which the claimant claimed as the assignee of two minors, T and F, who were beneficiaries under a trust. The claimant sought third party disclosure from a solicitor who had acted for another minor beneficiary, E, in separate proceedings. Although the solicitor disputed that there was a joint retainer between E, T, and F, they conceded there was a joint interest between them. It was held that the solicitor could not claim privilege against T and F, or the claimant as their successor in title.

157. Lastly as to Issue 3, it should be noted that it is common ground, notwithstanding that in ***Jardine*** at [133] to [135] and [186] it was held that a new shareholder is entitled to be treated as successor in title to a previous shareholder and thus is entitled to see documents created before they were a shareholder, that the Shareholder Rule cannot be invoked by a subsequent purchaser of shares in relation to documents created prior to the date on which the purchaser acquired its shares.

158. Accordingly, subject only to this last point, the answer to Issue 3 is 'yes' both to (a) and (b).

Issue 4: Does the Shareholder Rule extend to privileged documents belonging to subsidiary companies within Glencore's corporate group?

159. Issue 4 is concerned with whether Glencore is entitled to withhold privileged documents belonging to subsidiaries within the Glencore Group, Glencore being the ultimate parent company for the Glencore Group. Specifically, Glencore is the sole shareholder of Glencore International, a Swiss company which is one of the main operating entities of the group. Glencore International is, in turn, the holding entity, and sole shareholder, for many of the Glencore Group's operating and finance subsidiaries, including Glencore Finance and Glencore UK Ltd.

160. Mr Hill observed that there is no previous authority in England and Wales in which the Shareholder Rule has been found to apply to subsidiaries' documents. In this respect, Mr Hill noted that in ***BBGP*** Norris J held at [59(a)], as has been seen, that a parent company was not entitled to rely on the Shareholder Rule in order to inspect privileged documents belonging to a company in which its subsidiary was a shareholder.

161. Mr Hill also referred to ***Medlands (PTC) Limited v Commissioner of the Bermuda Police Service*** [2020] SC (Bda) 20 Civ, in which the Chief Justice of the Supreme Court of Bermuda similarly decided, at [54], that *"the rule that a company cannot assert privilege against a shareholder does not apply to [the claimant] as he is not a shareholder in the relevant company"* and the *"rule does not, in my judgment, extend to a shareholder of a shareholder"*.

162. Accordingly, it was Mr Hill's submission that the Shareholder Rule (if it exists) is limited to the privileged documents of the company in which the claimant claims to hold (or to have held) shares and that it does not extend to privileged documents of subsidiary companies within a corporate group. To decide otherwise, Mr Hill submitted, would entail the type of *"steady dilution"* to which Norris J in ***BBGP*** was referring and would undermine the separate legal personality between a company and its subsidiaries through conferring rights of access to documents of companies in which the claimant was never a shareholder.

163. I do not agree with Mr Hill about this. On the assumption, again, that (contrary to the conclusion which I have reached in relation to Issue 1) the Shareholder Rule exists and is justified on the basis of joint interest privilege, in my view, if there is a chain of holding companies and each shares the requisite joint interest in a communication, meaning that none can assert privilege against the other, then, the ultimate subsidiary company should not be able to assert privilege against any of them including the ultimate holding company.

164. I agree, in particular, with Mr Thanki when he submitted that the Shareholder Rule should not be treated as being restricted to applying only between a company and their direct shareholders on the basis that its indirect shareholders (further up the chain of holding companies) cannot hold the requisite joint interest with the company. It seems to me that to the extent that a communication is relevant to the administration of the affairs of a subsidiary, then, it is relevant to the affairs and prospects of its direct shareholder since a shareholder of that direct shareholder will likely, depending on the facts of the particular case, have a joint interest in both the affairs of the direct shareholder and the subsidiary. That is what a chain of shareholdings entails: communications made for the mutual benefit of a company and a direct shareholder are also made for the mutual benefit of the shareholders of that direct shareholder.

165. Thus, in the present case Glencore is the sole shareholder of, and holding company for, Glencore International. As an investor in Glencore, Aabar is concerned with the economic success of Glencore International, which is the holding company for the group's financial and operational activities, and the activities of Glencore International are in reality conducted as much for the benefit of Glencore's shareholders as for Glencore itself. The same considerations apply to the subsidiaries of Glencore International, which conduct the actual operations of the Glencore Group, since investors in Glencore are ultimately and really concerned with the administration of the affairs and economic success of those subsidiaries. Glencore's shareholders, Glencore and Glencore International all share a joint interest with the subsidiaries in the administration of those subsidiaries' affairs.

166. As for what Norris J had to say in ***BBGP***, he himself noted at the start of [59] that no relevant authority had been drawn to his attention, adding that what he had to say was based *"on grounds of policy rather than principle"*. Furthermore, it seems to me that to the extent that Norris J was saying that an indirect subsidiary can always assert privilege against a parent company, then, that is a conclusion which, as Mr Thanki put it, is too hard edged and inconsistent with cases such as ***CIA Barca*** and ***Jardine***, which show that the question whether there is a sufficient joint interest to preclude the assertion of privilege is a factual question to be ascertained on a case by case basis.

167. For these reasons, the answer to Issue 4 is, at least in principle, 'yes'.

Conclusion

168. It follows that the answers to the matters raised are these:

(1) Does the Shareholder Rule exist in English law? ('Issue 1'):

Answer: no.

(2) If so, does the Shareholder Rule apply to each of (i) legal advice privilege; (ii) litigation privilege; and (iii) without prejudice privilege? ('Issue 2'):

Answers: (i) yes; (ii) yes; and (iii) no.

(3) Does the Shareholder Rule extend to Aabar notwithstanding that it:

(a) was not a registered shareholder of any shares in Glencore at any material time, but, rather, claims to be the successor to the rights of an ultimate beneficial owner of shares in Glencore that held intermediated securities through CREST between 24 May 2011 and 28 December 2020; and

(b) does not currently hold any interest in any Glencore shares? ('Issue 3').

Answers: (a) yes; and (b) yes.

(4) Does the Shareholder Rule extend to privileged documents belonging to subsidiary companies within Glencore's corporate group? ('Issue 4').

Answer: (at least in principle) yes.

169. I end by expressing my gratitude to all counsel and solicitors. The preparation for the hearing and the advocacy at the hearing were of the highest quality.