Jardine Strategic: Privy Council rejects efforts to shut dissenters out, abolishes 138-year old privilege rule with likely impact on Cayman Islands' Torchlight exception

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On 24 July 2025, the Judicial Committee of the Privy Council handed down two important decisions. Each decision concerned separate appeals and issues arising from the same matter, *Jardine Strategic Ltd v Oasis Investments II Master Fund Ltd & Others*, on appeal from the Court of Appeal of Bermuda.

In the first decision, the Privy Council held that the standing of dissenting shareholders to apply for a court appraisal under s.106(6) of Bermuda's Companies Act 1981 (**Act**) was not limited to shareholders registered at the date on which the notice of meeting is sent (**Notice Date**), at which the shareholders would vote on the proposed transaction. This right extends to those registered at the date of the meeting and includes post-notice shareholders.

In the second decision, the Privy Council abolished the long-standing 'shareholder rule', which prevented a company from claiming legal advice privilege against its shareholders in litigation between them. Although it remains to be decided in a future case, in the context of Cayman Islands limited partnerships, this decision is likely to cause the *Torchlight* exception being overturned. That exception has the effect that a general partner of a limited partnership cannot claim privilege against the limited partners in respect of legal advice provided to the partnership that is relevant to proceedings in which it is involved.

First decision: *Jardine Strategic Ltd v Oasis Investments II Master Fund Ltd & Others* [2025] UKPC 33

Facts

- Pursuant to s.104-109 of the Act, Jardine Strategic Holdings Ltd (**Jardine**) (85% owned by Jardine Matheson) amalgamated with a wholly-owned Jardine Matheson subsidiary (**Merger**).
- Jardine's public shareholders' shares were cancelled for consideration of US$33 per share.
- Section 106(6) of the Act allows dissenting shareholders to seek a court appraisal of the 'fair value' of their shares if dissatisfied with the Merger consideration.
- After the notice of meeting was sent (on 17 March 2021) at which the shareholders would vote on the Merger, but before the meeting itself took place (on 12 April 2021) (**Meeting Date**), many 'Short-Term Shareholders' bought shares in Jardine, anticipating that they would be able to obtain a higher court-determined value following a fair value appraisal under s.106(6) of the Act.

- Jardine sought to strike out those appraisal claims, arguing only shareholders registered as at the Notice Date (in this case, 17 March 2021) could seek an appraisal under s.106(6) of the Act.
- Both the Supreme Court of Bermuda and the Court of Appeal rejected that argument.
- Jardine appealed to the Privy Council.

Decision

The Privy Council dismissed the appeal, holding that a shareholder's standing is *not* restricted to only those shareholders who took their interest before the Notice Date; all shareholders on the register as at the Meeting Date who meet the statutory criteria can seek an appraisal.

In dismissing the appeal, the Privy Council noted that authorities in other jurisdictions with similar statutory regimes, including in particular Canada, Cayman Islands and Delaware, support including short-term purchasers within the 'fair value' appraisal regime; New York's more restrictive approach was neither binding nor persuasive.

From a practical perspective, the Privy Council considered that limiting appraisal rights to Notice Date shareholders would depress share liquidity, create nominee/holder complications, and arbitrarily exclude certain transferees, which are outcomes that are inconsistent with the text or purpose of the Act.

The Privy Council noted that acquiring shares after the Notice Date with the intention to seek a fair value appraisal is not an abuse of process, and that 'fair value' must be determined objectively for the class of dissenting shares, not adjusted by acquisition timing or motive. In this respect, the Privy Council's decision echoes the Bermuda Court of Appeal's comments that there is nothing wrongful, abusive or in bad faith in the motives or investment strategies of Short-Term Shareholders; arbitrage is a legitimate part of the market place and contributes to liquidity, the preparedness of others to purchase may be advantageous to existing shareholders in a variety of differing circumstances, and whatever deals are done in relation to shares will not mean that anything other than a fair value is to be paid.

Significance

This decision clarifies that any shareholder who otherwise meets the statutory criteria to seek a fair value appraisal of their shares as at the Meeting Date is entitled to have recourse to the statutory appraisal regime, regardless of when they acquired their shares.

It reinforces an objective, uniform valuation for all dissenting shareholders, and maintains market liquidity between the Notice Date and Meeting Date by protecting post-Notice Date purchasers' rights.

This decision is consistent with the well-developed fair value appraisal jurisprudence in the Cayman Islands under s.238 of the Companies Act. The Cayman Islands Court has consistently rejected arguments by companies that shareholders who acquired shares after the merger was announced should be treated differently than other shareholders.

Link to decision: https://jcpc.uk/cases/jcpc-2024-0009

Second decision: *Jardine Strategic Limited v Oasis Investments II Master Fund Ltd & Others (No 2)* [2025] UKPC 34

Overview

Regulatory | Real estate | Private client and trusts | Insolvency and restructuring | Dispute resolution | Corporate | Banking and finance

As part of the Jardine appraisal proceedings, the dissenters sought disclosure of legal advice obtained by Jardine before 12 April 2021 (the date of the shareholder meeting approving the Merger). The Company resisted, asserting legal advice privilege. The shareholders relied on the so-called **'Shareholder Rule'** from English case law, which prevented a company from claiming legal advice privilege against its shareholders in litigation between them. Traditionally, the Shareholder Rule rested on the idea that shareholders had a proprietary interest in the company's property and therefore in advice paid for from company funds.

The Bermuda Supreme Court and Court of Appeal accepted that the Shareholder Rule, re-cast as an instance of joint interest privilege, applied. They ordered disclosure for documents created before a cut-off date (later fixed at 8 March 2021 by the Court of Appeal). The Bermuda Courts' rulings were consistent with an analogous ruling by the Cayman Islands Court in the 58.com merger appraisal proceedings.

Before the Privy Council, the Company argued that:

1. The Shareholder Rule's proprietary rationale was incompatible with *Salomon v Salomon* —shareholders have no proprietary interest in company property.

2. The company/shareholder relationship is not inherently one of joint interest comparable to trustee/beneficiary or partners; shareholders' interests can diverge sharply.

3. Privilege is a fundamental right and should only be overridden where a shareholder proves a fact-specific joint interest in the advice at the time it was obtained.

Decision

Lord Briggs and Lady Rose, with Lord Burrows, Lady Rose, Lord Richards concurring, abolished the Shareholder Rule, holding that:

- Its original proprietary justification is irreconcilable with the principle of separate corporate personality in *Salomon v Salomon*. Shareholders have no beneficial ownership of company property, so the 'you paid for it' rationale collapses.

- The company/shareholder relationship is not intrinsically comparable to trustee/beneficiary, partners, or joint venturers. Shareholders' interests often diverge:
    - between classes (eg preference vs ordinary shares);
    - within a class (eg short-term dividend focus vs long-term capital growth); and
    - on specific corporate actions (eg mergers, acquisitions, restructurings).

These divergences undermine any presumption of a single 'shared' interest in all company legal advice.

- Legal advice privilege is a fundamental right. Exceptions should be strictly limited. To displace privilege, a shareholder must show:
    - a contemporaneous, specific joint legal or commercial interest in the subject matter of the advice; and
    - that this interest existed at the time the advice was obtained.

- In this case, the dissenting shareholders could not demonstrate such a joint interest in advice concerning the US$33/share valuation. They were, in effect, potential opponents of the Company in appraisal proceedings from the point the Merger

was announced.

In an extremely rare move, the Privy Council made a *'Willers v Joyce'* direction, requiring that English courts treat this decision as stating the law for England and Wales. While Privy Council decisions are automatically binding on the jurisdiction from which the appeal originated , the Privy Council is not itself part of the United Kingdom's domestic court hierarchy, and its decisions are not binding on UK courts (except in rare and exceptional circumstances).

However, pursuant to *Willers v Joyce* (No 2) ([2016] UKSC) the Privy Council has power to direct that one of its rulings is to be treated as binding on the courts of England and Wales, giving the decision binding effect as though it was made by the UK Supreme Court. This is a seldom-exercised power, and is reserved for instances where the same point of law arises in a Privy Council appeal which is also relevant in English law.

By making a *Willers v Joyce* direction in this case, the Shareholder Rule has been abolished in England and Wales as well as in Bermuda, bringing those jurisdictions into line with Canadian and Australian law.

Significance

The abolition of the Shareholder Rule, which has long been treated as part of English and Bermudian law, is a significant and substantial change in the law. Shareholders now face a more stringent test to be able to access privileged company documents. They must now prove a fact-specific joint interest to override privilege; simply being a shareholder when advice was obtained is insufficient. The practical consequences of this decision include that:

- Shareholder litigants will need to target other discovery routes or focus on non-privileged material unless they can show an exceptional factual basis for joint interest.
- Joint interest is confirmed as being a flexible, circumstance-dependent doctrine, not an automatic consequence of a corporate relationship.

Impact on limited partnerships: *Torchlight* Exception

In the Cayman Islands, in the context of limited partnerships, the Shareholder Rule has been applied by analogy as an exception to legal professional privilege, known as the *'Torchlight Exception'* (*In re Torchlight Fund L.P*, [2016] 1 CILR Note 9, McMillan J). Under the *Torchlight* Exception, a general partner of a partnership cannot claim privilege against the limited partners in respect of legal advice provided to the partnership that is relevant to proceeding in which it is involved. The limited partners have indirectly paid for the advice and the general partner is required to disclose it to them (In re Gulf Investment Corporation et al v The Port Fund LP et al, unreported, 16 June 2020, Parker J, [103]).

The *Torchlight* Exception is the limited partnership equivalent of the corporate Shareholder Rule, and was decided on authority of Woodhouse & Co. (Ltd) v Woodhouse, which was also the same foundation of the Shareholder Rule. Although they are distinct doctrines, both were decided on the same line of authority.

Although it remains to be decided by the courts, with the abolition of the Shareholder Rule, it seems likely that the *Torchlight* Exception will also be abolished for the same reasons. Limited partners and general partners of Cayman Islands limited partnership should be conscious of this development and of its likely application to legal privilege in the general partner and limited partnership relationship, in the same way as the company/shareholder relationship.

Link to decision: https://jcpc.uk/cases/jcpc-2024-0077

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