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DISCLOSURE OF THE COMPANY'S PRIVILEGED DOCUMENTS TO SHAREHOLDERS AS AN APPLICATION OF JOINT INTEREST PRIVILEGE

Operation and Justifications

Joint interest privilege is one of the exceptions to legal professional privilege, allowing privileged materials to be disclosed through discovery and inspection. Of the relationships that give rise to a joint interest, the company–shareholder relationship is perhaps of the greatest interest. While recognised under English law, US and Canadian laws have reached different conclusions on whether shareholders should be allowed access to the company's privileged materials. This article aims to highlight some of the issues concerning the operation and justifications of the company–shareholder joint interest relationship, and takes the position that this joint interest relationship is ultimately unjustifiable.

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I. Introduction

1 The necessity of legal professional privilege to secure the effective administration of justice is well established,[2] and it has also been described as a "fundamental human right" and a "basic tenet of the common law".[3] Consequently, every ground that permits privilege to be overridden ought to be justified by cogent reasoning.[4]

1 In writing this article the author has benefited greatly from discussion with two friends: Feng Zheyi and Joshua Chia. It goes without saying that all errors remain the author's alone.

2 *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd* [2007] 2 SLR(R) 367 at [23].

3 *Yap Sing Lee v Management Corporation Strata Title Plan No 1267* [2011] 2 SLR 998 at [42]; *Rahimah bte Mohd Salim v Public Prosecutor* [2016] 5 SLR 1259 at [66].

4 Thus it was noted in *Yap Sing Lee v Management Corporation Strata Title Plan No 1267* [2011] 2 SLR 998 at [41]–[43] that the courts employ a strict test in determining if a

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2 This article is concerned with a particular relationship that allows privilege to be overridden under English law: the company–shareholder relationship. Joint interest privilege is automatically established in such a relationship, and consequently the company cannot resist disclosure against a shareholder on the grounds of legal professional privilege unless specific exceptions apply.[5] However, not all common law jurisdictions take this approach. In many US states, shareholders must show good cause before they are allowed to override the company's privilege, whereas shareholders in Canada enjoy no additional advantage in accessing the company's privileged materials.[6] The issue remains open in other jurisdictions, including Australia and Singapore.[7]

3 The purpose of this article is twofold. First, how the company–shareholder joint interest operates under English law, and the difficulties in that regard, will be discussed. Second, the justifications for such a joint interest will be examined, with this article taking the position that the joint interest should not exist.

4 Most of the discussion focuses on English law, but where relevant Singapore materials will be cited to show that the principles referred to are equally applicable locally. Significant differences in US evidence and company law make any direct comparison difficult,[8] but cases and

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statute abrogates a claim to privilege. See also Paul Matthews & Hodge M Malek QC, *Disclosure* (London: Sweet & Maxwell, 5th Ed, 2017) at para 11.09.

5 *Sharp v Blank* [2015] EWHC 2681 (Ch) at [12]; Charles Hollander QC, *Documentary Evidence* (London: Sweet & Maxwell, 13th Ed, 2018) at para 19-02; Colin Passmore, *Privilege* (London: Sweet & Maxwell, 4th Ed, 2020) at para 6-021; Paul Matthews & Hodge M Malek QC, *Disclosure* (London: Sweet & Maxwell, 5th Ed, 2017) at paras 11.87–11.88.

6 Andrew Higgins, *Legal Professional Privilege for Corporations: A Guide to Four Major Common Law Jurisdictions* (Oxford: Oxford University Press, 2014) at paras 6.81–6.82.

7 In Australia, no case has directly considered the point and *dicta* has gone both ways: Andrew Higgins, *Legal Professional Privilege for Corporations: A Guide to Four Major Common Law Jurisdictions* (Oxford: Oxford University Press, 2014) at paras 6.83–6.85; John Dyson Heydon, *Cross on Evidence* (Chatswood: LexisNexis Butterworths, 11th Ed, 2017) at n 657. No reported Singapore decision has dealt with this issue.

8 A key difference is that in US law, directors owe fiduciary duties to shareholders, unlike the general position in English and Singapore law: Carsten Gerner-Beuerle & Michael Anderson Schilling, *Comparative Company Law* (Oxford: Oxford University Press, 2019) at p 469; Andreas Cahn & David C Donald, *Comparative Company Law: Text and Cases on the Laws Governing Corporations in Germany, the UK and the USA* (Cambridge: Cambridge University Press, 2nd Ed, 2018) at p 408. Contrast Paul L Davies & Sarah Worthington, *Gower Principles of Modern Company Law* (London: Sweet & Maxwell, 10th Ed, 2016) at para 16-5; and *Sharp v Blank* [2015] EWHC 3220 at [9]–[10]. This difference allows the shareholder's qualified right to bypass the company's privilege under US law to be considered as part of a broader exception on privilege based on the existence of a fiduciary duty: Paul R Rice *et al*, *Attorney-Client Privilege in the United States* (Lawyers Cooperative Publishing, 2018)

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commentaries with potentially relevant reasoning on this front will be discussed.

II. Terminology: Joint and common interest

5 It is necessary to first define the terms used in this article. According to *The Law of Privilege*, joint interest privilege is one of two forms of joint privilege, the other being joint retainer privilege.[9] Both forms of joint privilege have broadly the same effects, the most important of which is that the parties to the joint privilege cannot assert privilege against each other, but each can assert privilege against the rest of the world.[10] Thus, joint privilege can be seen as both a "sword" which negatives an assertion of privilege by other joint privilege holders, and a "shield" that protects all materials subject to the joint privilege from disclosure to the rest of the word. The "sword" aspect is the focus of this article.

6 A related form of privilege often discussed alongside joint privilege is common interest privilege.[11] Where a privilege holder shares a common interest with another party in relation to the privileged material, the privileged material can be voluntarily shared between them, and both parties can assert privilege to resist disclosure against the rest of the world.[12] Thus, common interest privilege acts as a "shield" that protects the privileged material from disclosure. Critically, common interest privilege does not act as a "sword": if the holder of privilege chooses not to disclose the material in question, the holder's assertion of privilege cannot be overridden by the common interest.[13]

at section 8:24; John Gergacz, *Attorney-Corporate Client Privilege* (Clark Boardman Callaghan, 3rd Ed, 2019) at section 6:17.

9 *The Law of Privilege* (Bankim Thanki QC ed) (Oxford: Oxford University Press, 3rd Ed, 2018) at para 6.01.

10 *The Law of Privilege* (Bankim Thanki QC ed) (Oxford: Oxford University Press, 3rd Ed, 2018) at paras 6.04 and 6.08.

11 *The Law of Privilege* (Bankim Thanki QC ed) (Oxford: Oxford University Press, 3rd Ed, 2018) ch 6; Colin Passmore, *Privilege* (London: Sweet & Maxwell, 4th Ed, 2020) ch 6; Charles Hollander QC, *Documentary Evidence* (London: Sweet & Maxwell, 13th Ed, 2018) ch 19.

12 *The Law of Privilege* (Bankim Thanki QC ed) (Oxford: Oxford University Press, 3rd Ed, 2018) at paras 6.20–6.21.

13 *The Law of Privilege* (Bankim Thanki QC ed) (Oxford: Oxford University Press, 3rd Ed, 2018) at para 6.21.

7 Sometimes, the cases also use "common interest" in its literal sense, *ie*, the interests of the parties are aligned. A good example can be seen in *Commercial Union Assurance Co v Mander*:[14]

> [I]t 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. [emphasis added]

Here, the first reference to "common interest privilege" is a reference to the technical concept of common interest, whereas the second reference to "common interest" refers to an alignment of interest with respect to the subject matter. To reduce confusion, common interest in the literal sense will be referred to as an alignment of interests.

8 Another point to note from the quoted passage is that an alignment of interests is being used to justify disclosure of privileged materials,[15] such disclosure reflecting the existence of a joint interest as defined above. Whether that justification is correct will be discussed later,[16] but an important consequence is that joint interest cases often focus their discussion on whether the parties' interests are aligned, and the phrase "joint interest" is not mentioned at all.[17] The terminology of joint interest is largely an invention of academics to make the discussion clearer, and has yet to be widely adopted by the case law.

9 Thus, it has been noted that a difficulty which befuddles this area of the law is that the key terminology mentioned has been used inconsistently and interchangeably in cases and textbooks.[18] The definitions adopted here will not apply to other materials,[19] and care must

14 *Commercial Union Assurance Co plc v Mander* [1996] 2 Lloyd's Rep 640 at 648.

15 The quote refers to "confidential" documents, but on the facts the court was concerned with privilege. This case is discussed at paras 58–59 below.

16 See para 52 *ff* below.

17 *Woodhouse & Co Ltd v Woodhouse* (1914) 30 TLR 559; *Winterthur Swiss Insurance Co v AG (Manchester) Ltd* [2006] All ER (D) 196 at [79]; *BBGP Managing General Partner Ltd v Babcock & Brown Global Partners* [2011] Ch 296 at [58]–[59].

18 Colin Passmore, *Privilege* (London: Sweet & Maxwell, 4th Ed, 2020) at para 6-002.

19 For instance, while recognising the concept of joint interest, Passmore considers it possible that some common interest relationships can be used as a "sword", which is impossible under the above definitions: Colin Passmore, *Privilege* (London: Sweet & Maxwell, 4th Ed, 2020) at para 6-093. Hollander QC distinguishes between joint privilege, joint interest privilege and joint retainer privilege: Charles Hollander QC, *Documentary Evidence* (London: Sweet & Maxwell, 13th Ed, 2018) at para 19-02. These terminological differences are inconsequential for the purposes of this article, which is focused on the justifications for bypassing privilege.

be taken. In relation to Singapore, a High Court decision has approved *The Law of Privilege*[20] on this front,[21] though Singapore authorities in general have yet to adopt a consistent set of definitions.[22]

III. Operation of company-shareholder joint interest relationship in English law

10 An appreciation and evaluation of the company–shareholder joint interest must necessarily start with its operation, and the difficulties in that regard.

A. Joint interest negatives assertion of privilege but is not a right to disclosure

11 Like other forms of joint interest privilege, the company–shareholder joint interest relationship is not an independent right to disclosure of the company's privileged materials.[23] Instead, the right to disclosure is to be found in the discovery provisions of the English Civil Procedure Rules 1998[24] ("CPR"),[25] or the Rules of Court[26] ("ROC") in the case of Singapore.[27] What joint interest privilege does is to prevent the privilege holder from asserting privilege to avoid disclosure.[28]

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20 *The Law of Privilege* (Bankim Thanki QC ed) (Oxford: Oxford University Press, 3rd Ed, 2018).

21 *CIFG Special Assets Capital I Ltd v Polimet Pte Ltd* [2016] 1 SLR 1382 at [74]–[75] and [80]. Discussed at para 68 below.

22 *United Overseas Bank Ltd v Lippo Marina Collection Pte Ltd* [2018] 4 SLR 391 at [114]–[116]; Jeffrey Pinsler SC, *Evidence and the Litigation Process* (Singapore: LexisNexis, 6th Ed, 2017) at paras 14.054–14.054A; Law Reform Committee, Singapore Academy of Law, *Report of the Law Reform Committee on Reforming Legal Professional Privilege* (October 2011) at p 29 (Chairman: Harpreet Singh Nehal SC); all of which described common interest privilege as a "sword".

23 *The Law of Privilege* (Bankim Thanki QC ed) (Oxford: Oxford University Press, 3rd Ed, 2018) at para 6.55; Andrew Higgins, *Legal Professional Privilege for Corporations: A Guide to Four Major Common Law Jurisdictions* (Oxford: Oxford University Press, 2014) at para 6.72.

24 SI 1998 No 3132 (UK).

25 The provisions are in Part 31.

26 Cap 322, R 5, 2014 Rev Ed.

27 Rules of Court (Cap 322, R 5, 2014 Rev Ed) O 24.

28 This is slightly oversimplified. This is the function of joint interest privilege in most cases because privilege is generally a right to resist compulsory disclosure: Colin Passmore, *Privilege* (London: Sweet & Maxwell, 4th Ed, 2020) at para 1-001; Charles Hollander QC, *Documentary Evidence* (London: Sweet & Maxwell, 13th Ed, 2018) at para 12-01. However, in some cases privilege can be relevant to whether a party who already possesses the materials can inspect them, and who the materials can be disclosed to: *BBGP Managing General Partner Ltd v Babcock & Brown Global Partners* [2011] Ch 296 at [8] and [58]. This case is discussed at paras 44–47 below,

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12 This means that the company–shareholder joint interest relationship only offers practical utility when there is litigation between them, such that the CPR/ROC is applicable. The shareholder cannot normally compel disclosure of the privileged materials otherwise.[29]

B. Joint interest does not apply in hostile litigation between company and its shareholders

13 While litigation is required for joint interest to have effect, there is no joint interest between the company and its shareholders in hostile litigation between them. As noted in *Sharp v Blank*:[30]

> 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.

14 Thus, if the company obtains advice for an action against an ex-director and current shareholder concerning misappropriation of funds, the advice is privileged against the shareholder.[31]

15 It may seem that the practical utility of joint interest is eviscerated if it only operates during litigation but ceases to exist once there is hostile litigation, but that is not so for two reasons. First, even in hostile litigation no privilege can be asserted for advice obtained before the litigation was "actual, threatened or in contemplation". This is because the issue of joint interest privilege is determined at the time the privileged material comes into existence, and not at the time privilege was asserted.[32] Second, hostile litigation does not include litigation where the company is a nominal party. These are typically shareholder actions such as oppression where

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but these other aspects of joint interest privilege will not be considered further since it has very little to do with its function as a "sword".

29 Charles Hollander QC, *Documentary Evidence* (London: Sweet & Maxwell, 13th Ed, 2018) at para 5-04. Hollander QC considers that this makes the company–shareholder joint interest a "curiosity", since other joint interest relationships would normally give rise to an independent right of access that does not rely on the Civil Procedure Rules 1998 (SI 1998 No 3132)/Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("CPR/ROC"). However, there is no principled reason why a right which affects disclosure under the CPR/ROC can only exist alongside some other right to disclosure independent of the CPR/ROC.

30 [2015] EWHC 2681 (Ch) at [12].

31 *Woodhouse & Co Ltd v Woodhouse* (1914) 30 TLR 559.

32 *The Law of Privilege* (Bankim Thanki QC ed) (Oxford: Oxford University Press, 3rd Ed, 2018) at paras 6.07–6.08; Colin Passmore, *Privilege* (London: Sweet & Maxwell, 4th Ed, 2020) at para 6-060; Charles Hollander QC, *Documentary Evidence* (London: Sweet & Maxwell, 13th Ed, 2018) at para 19-11.

the company has no interest in the outcome and is only added to be bound by the judgment.

16 Both will be discussed in more detail below, but it is convenient to note at this point that two consequences arise from this. First, joint interest is of greater importance to legal advice privilege than litigation privilege, since materials covered solely by the former are always disclosable, whereas materials covered by the latter would not be disclosable unless the company is a nominal party.[33] Second, since the company is typically a nominal party in shareholder actions, joint interest is critical in such actions by allowing all relevant privileged materials to be disclosable.

(1) Requirement that hostile litigation is at least "in contemplation"

17 Since joint interest cannot be asserted for privileged materials once hostile litigation is "actual, threatened or in contemplation", the question of when that occurs is of critical importance. The main issue is when litigation is "in contemplation", which is a rather amorphous concept. It appears that this requirement is analogous to proving that litigation was reasonably contemplated (as opposed to being a mere possibility) when claiming litigation privilege,[34] even though the cases have not drawn this link.

18 This requirement took centre stage in *Sharp v Blank*,[35] where it was argued that advice received by the Lloyds Banking Group was privileged against its shareholders once it announced the plan to acquire the Halifax Bank of Scotland, since litigation would be in contemplation from that moment. This argument was rejected by Nujee J, who remarked that:[36]

> It is one thing to say the board could reasonably have expected some dissentient shareholders to be unhappy with a decision; it is quite another thing to say that litigation was in the circumstances reasonably contemplated.

19 Odd results could, however, arise if litigation being "in contemplation" means the same thing in litigation privilege and joint interest privilege. Consider the litigation privilege case of *United States of*

33 Joan Loughrey, "Privileged Litigants: Shareholder Rights, Information Disclosure and Corporate Privilege" [2007] JBL 778 at 781–782.

34 Charles Hollander QC, *Documentary Evidence* (London: Sweet & Maxwell, 13th Ed, 2018) at para 18-01; *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd* [2007] 2 SLR(R) 367 at [70].

35 [2015] EWHC 2681.

36 *Sharp v Blank* [2015] EWHC 2681 (Ch) at [20].

America v Philip Morris Inc.[37] Companies associated with British American Tobacco group ("BAT") engaged English solicitors for advice on potential claims by smokers.[38] By that time (1985), increasing tobacco litigation in the US made BAT aware of the need to make preparations.[39] However, the assertion of litigation privilege was rejected. While litigation was possible, it was not reasonably in prospect; the last time the company was sued was in 1969, and there were no precursors of contentious litigation during the period of advice, even though those fears later came true.[40] This is unobjectionable, since the advice on potential litigation would be protected under legal advice privilege anyway. Litigation privilege was relevant only because some of the communications were not advice.[41]

20 The same result could, however, be disastrous if applied to the question of whether a company's advice is privileged against its shareholders. Consider the facts in *Sharp v Blank* again. If the board of Lloyds Banking Group realised that there were significant dissentient voices on the merger, but there was no indication that anyone was seeking advice or taking action, it could probably be said that litigation was possible but not reasonably in prospect. Yet it would have been entirely reasonable for the board to take advice on how best to proceed given this risk. After all, their hard work would bring about little benefits if shareholders managed to claim significant damages or stop the deal altogether. But once litigation starts, shareholders would be entitled to disclosure of all these communications concerning litigation strategy – they can claim joint interest privilege, and the exception would not apply. The reasonable actions taken by the board would backfire entirely.

21 Given that the purpose of the litigation exception is to allow a company to obtain confidential advice in litigation against its shareholders,[42] it might make more sense for the rule to be a subjective rather than an objective one, *ie*, the advice should be privileged if it was obtained for the purpose of litigation, even when litigation was

37 [2004] All ER (D) 448; [2004] EWCA Civ 330. Discussed in Colin Passmore, *Privilege* (London: Sweet & Maxwell, 4th Ed, 2020) at paras 3-169–3-174. Cited with approval in *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd* [2007] 2 SLR(R) 367 at [72].

38 *United States of America v Philip Morris Inc* [2004] All ER (D) 448; [2004] EWCA Civ 330 at [26].

39 *United States of America v Philip Morris Inc* [2004] All ER (D) 448; [2004] EWCA Civ 330 at [50].

40 *United States of America v Philip Morris Inc* [2004] All ER (D) 448; [2004] EWCA Civ 330 at [51] and [69].

41 For example, those concerning "collecting and collating, listing, spring-cleaning, storing, transporting and warehousing documents": *United States of America v Philip Morris Inc* [2004] All ER (D) 448; [2004] EWCA Civ 330 at [80].

42 *Woodhouse & Co Ltd v Woodhouse* (1914) 30 TLR 559 at 560, *per* Lush J.

not reasonably in prospect. Even if an objective likelihood of litigation is retained as a consideration, perhaps a lower standard compared to litigation privilege is appropriate for joint interest privilege. This is justifiable because the requirements of litigation privilege must be tightly controlled to limit the loss of probative evidence to the courts,[43] but this concern is less relevant where the issue is the right to access, by virtue of a relationship, advice that is privileged. Indeed, a lower bar appears to have been adopted in *Re Hydrosan Ltd*,[44] where litigation was treated as having been reasonably contemplated the moment the company was committed to a course of action and disclosed it to shareholders via a circular.[45] However, this decision was distinguished in *Sharp v Blank*, on the basis that it did not establish any general principle and should be confined to its facts.[46]

(2) Proceedings are not hostile if company is nominal party in litigation

22 Where the company is a nominal party with no substantive interest in the litigation, and the "real" litigants are the shareholders and directors instead, the proceedings are non-hostile with respect to the company. Consequently, all of the company's relevant privileged materials are disclosable to its shareholders.[47] Focusing on whether the interests of the company are engaged makes sense because a company with an independent interest in the litigation would have to advocate for its own cause, and its position would be undermined if privileged materials have to be disclosed to shareholders.

23 Three categories of actions (the "shareholder actions") have been recognised by English courts as involving the company as a nominal party: (a) oppression actions;[48] (b) just and equitable

43 *Three Rivers District Council v Governor and Company of the Bank of England* [2005] 1 AC 610 at [86].

44 [1991] BCLC 418.

45 *Re Hydrosan Ltd* [1991] BCLC 418 at 422–423.

46 *Sharp v Blank* [2015] EWHC 2681 (Ch) at [15]–[18].

47 *Re Hydrosan Ltd* [1991] BCLC 418 at 421; *Arrow Trading & Investments Est 1920 v Edwardian Group Ltd* [2004] BCC 955 at [25], *per* Blackburne J; *CAS (Nominees) Ltd v Nottingham Forest plc* [2001] 1 All ER 954 at [12] and [19].

48 Victor Joffe QC *et al*, *Minority Shareholders: Law, Practice and Procedure* (Oxford: Oxford University Press, 6th Ed, 2018) at para 8.48; *Arrow Trading & Investments Est 1920 v Edwardian Group Ltd* [2004] BCC 955, *per* Blackburne J; *CAS (Nominees) Ltd v Nottingham Forest plc* [2001] 1 All ER 954 at [12]. Note that oppression is termed unfair prejudice in the UK, and was based on s 459 of the UK Companies Act 1985 (c 6), before being replaced by s 994 of the Companies Act 2006 (c 46). The equivalent section in Singapore is s 216 of the Companies Act (Cap 50, 2006 Rev Ed). All references to unfair prejudice in the cases and materials will be changed to oppression for consistency.

winding-up actions;[49] and (c) derivative actions at the leave stage (when the shareholder seeks permission to proceed with the claim on behalf of the company).[50]

24 Loughrey explains that joint interest is not lost for the first two types of actions because they are disputes concerning the distribution of powers, control and wealth within the company; the company's interests (reflected in the collective interests of shareholders to maximise profits) are not engaged and therefore the company has no independent position in such a dispute.[51] This is to be contrasted with cases where shareholders rely on their rights as creditors or employees to sue the company, as the company's potential liability engages its interests.[52] While derivative actions attract some special considerations,[53] it also concerns control over the company (for a particular cause of action), and can be dealt with together. As Higgins puts it, the question is whether the shareholders are suing "*qua* shareholder",[54] and all three types of actions involve reliance upon specific shareholder rights.

25 It bears emphasis that whether the company's interests are engaged is not the same inquiry as whether the litigation affects the company. A just and equitable winding up obviously affects the company. However, following the logic of Loughrey,[55] the collective interests of the shareholders, and by extension that of the company, are not served or harmed by a winding up. The interests which are affected are that of the

49 *Re Hydrosan Ltd* [1991] BCLC 418 at 421. This is an application under s 122(1)(g) of the UK Insolvency Act 1986 (c 45). The Singapore equivalent is s 254(1)(*i*) of the Companies Act (Cap 50, 2006 Rev Ed).

50 *CAS (Nominees) Ltd v Nottingham Forest plc* [2001] 1 All ER 954 at [12]. Contrast *Harley Street Capital Ltd v Tchigirinsky* [2006] BCC 209, discussed at paras 38–42 below. While the cases do not make this clear, joint interest is only relevant at the first stage; see paras 94–95 below.

51 Joan Loughrey, "Privileged Litigants: Shareholder Rights, Information Disclosure and Corporate Privilege" [2007] JBL 778 at 793–794, citing *Arrow Trading & Investments Est 1920 v Edwardian Group Ltd* [2004] BCC 955, *per* Blackburne J.

52 Joan Loughrey, "Privileged Litigants: Shareholder Rights, Information Disclosure and Corporate Privilege" [2007] JBL 778 at 794, citing *Re Hydrosan Ltd* [1991] BCLC 418 at 421.

53 See paras 35–42 below.

54 Andrew Higgins, *Legal Professional Privilege for Corporations: A Guide to Four Major Common Law Jurisdictions* (Oxford: Oxford University Press, 2014) at para 6.74.

55 *Cf Re Hydrosan Ltd* [1991] BCLC 418 at 422, justifying this outcome on the basis that a just and equitable winding up involves "wrongs by those in control of the company against a shareholder rather than by the company itself in any real sense". However, Joan Loughrey, "Privileged Litigants: Shareholder Rights, Information Disclosure and Corporate Privilege" [2007] JBL 778 at 792 notes that this reasoning is unsatisfactory because wrongs of the company can also form the basis of an oppression action.

individual shareholder, based on whether the company remains a good investment that serves that shareholder's needs.

26 One question that the case law has not directly grappled with is whether the type of action is conclusive of whether the company is a nominal party. It is suggested that this cannot be so, even though the phrasing of some authorities suggests otherwise.[56] Even in a shareholder action, the company's interest may be engaged.

27 A strong case that the company's interests are engaged in a shareholder action arises when some shareholders allege that the board (typically accused to be acting in concert with majority shareholders) behaved improperly, while the board justifies its actions by arguing that they advance the company's interests.[57] This difficulty can be seen in the facts of *CAS (Nominees) Ltd v Nottingham Forest plc*.[58] There, the claimant shareholders sought to set aside a subscription agreement for new shares in an oppression action, on the basis that the agreement's structure reflected an improper purpose to deprive the minority of protection provided by the relevant regulations.[59] The defendants argued that the agreement had the proper purpose of raising urgent funds,[60] which should be an issue that has a direct impact on the interests of the company. However, the claimants' application for specific disclosure of privileged documents in connection with the share subscription agreement succeeded.[61] On the nominal party point, the court seemed to have assumed that the company is necessarily a nominal party in all oppression actions,[62] and the point was not argued. The question is whether such an assumption can be justified.

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56 *Re Hydrosan Ltd* [1991] BCLC 418 at 421 (stating that the rule allowing privilege to be asserted when there is hostile litigation "does not … have any application to documents for a members' just and equitable petition"); *CAS (Nominees) Ltd v Nottingham Forest plc* [2001] 1 All ER 954 at [12]; Derek French, *Applications to Wind Up Companies* (Oxford: Oxford University Press, 3rd Ed, 2015) at para 8.515; Joan Loughrey, "Privileged Litigants: Shareholder Rights, Information Disclosure and Corporate Privilege" [2007] JBL 778 at 803 (treating non-hostile litigation as covering all intra-corporate litigation); Andrew Higgins, *Legal Professional Privilege for Corporations: A Guide to Four Major Common Law Jurisdictions* (Oxford: Oxford University Press, 2014) at para 6.74 (stating that the test is whether the shareholders are suing "qua shareholder", which renders the type of litigation conclusive).

57 An issue identified in Joan Loughrey, "Privileged Litigants: Shareholder Rights, Information Disclosure and Corporate Privilege" [2007] JBL 778 at 795.

58 [2001] 1 All ER 954.

59 *CAS (Nominees) Ltd v Nottingham Forest plc* [2001] 1 All ER 954 at [4]–[7].

60 *CAS (Nominees) Ltd v Nottingham Forest plc* [2001] 1 All ER 954 at [5].

61 *CAS (Nominees) Ltd v Nottingham Forest plc* [2001] 1 All ER 954 at [8]–[10] and [19].

62 *CAS (Nominees) Ltd v Nottingham Forest plc* [2001] 1 All ER 954 at [12].

28 Loughrey provides two possible justifications as to why even in such situations, the company's interests are not engaged and disclosure should be ordered.[63] First, the challenged action cannot be said to further the collective interest if it benefits one group of shareholders at the expense of another. Second, it is arguably in the collective interest for the company not to infringe upon shareholder rights in the search for profits.

29 Those justifications are unsatisfactory. They do not show that the company's interests are unaffected. Instead, they show that what advances the company's interests is uncertain. If the allegations of the claimant shareholders are correct, the suit advances the company's interests by enhancing corporate governance and should not be defended. If they are not, the company's interests suffer because the board's business judgments are unnecessarily hampered, and the company should oppose such an action. But uncertainty does not mean that the company is incapable of determining what is most likely to serve its interests; all litigants face uncertainty but are still able to decide whether to sue or vigorously defend.

30 Further, the suggestion that the company's interests are uninvolved in all shareholder actions is inconsistent with a closely related line of authorities which established that it is a breach of director's duties to expend company funds on disputes that are in substance between shareholders, and the company may be injuncted from doing so ("rule against company participation of shareholder disputes").[64] Under this rule, a company can only actively participate in shareholder actions with its funds if it is expedient and in the interests of the company as a whole, with a heavy presumption that it is not.[65] Critically, there is no blanket rule against participation.

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63 Joan Loughrey, "Privileged Litigants: Shareholder Rights, Information Disclosure and Corporate Privilege" [2007] JBL 778 at 794.

64 Robin Hollington QC, *Hollington on Shareholders' Rights* (London: Sweet & Maxwell, 8th Ed, 2017) at para 9-78; *Company Directors: Duties, Liabilities, and Remedies* (Simon Mortimore QC ed) (Oxford: Oxford University Press, 3rd Ed, 2017) at para 23.98; David Chivers QC *et al*, *The Law of Majority Shareholder Power: Use and Abuse* (Oxford: Oxford University Press, 2nd Ed, 2017) at para 9.77; Margaret Chew, *Minority Shareholders' Rights and Remedies* (Singapore: LexisNexis, 3rd Ed, 2017) at para 4.242.

65 *Re a company (No 1126 of 1992)* [1994] 2 BCLC 146 at 156 (stating the principle in an oppression action); Robin Hollington QC, *Hollington on Shareholders' Rights* (London: Sweet & Maxwell, 8th Ed, 2017) at paras 6-103 and 9-79 (oppression and derivative actions); *Company Directors: Duties, Liabilities, and Remedies* (Simon Mortimore QC ed) (Oxford: Oxford University Press, 3rd Ed, 2017) at paras 23.99 and 23.113 (oppression and just and equitable winding up).

31 Thus, the key question in both rules is whether the company has some independent interest to protect in the shareholder action, and logically the treatment of this issue must be the same. Were it otherwise, the company may be entitled to participate in the action but must disclose its advice to the shareholders, which would make nonsense of its entitlement to participate. The close relationship between the two rules has also been demonstrated by the case law.[66]

32 Consequently, there cannot be a blanket rule that the company cannot assert privilege against its shareholders in shareholder actions.

33 The question which naturally follows is when the company's interests are engaged in shareholder actions, such that the company can expend funds on the action and maintain privilege. This is a fact-specific issue.[67] A clear case would be where the company is participating for the limited purpose of resisting a relief that affects its assets, *eg*, an order for the company to purchase the minority's shares.[68]

34 There is some analogy here to the exercise undertaken by Singapore courts in determining if a statutory derivative action is "*prima facie* in the interests of the company",[69] since they are all concerned with whether active participation by a company in an action is consistent with its interests. Thus, the views of independent directors on participation are

66 See, *eg*, *Arrow Trading & Investments Est 1920 v Edwardian Group Ltd* [2004] BCC 955 where Sir Francis Ferris granted an order restraining the company from expending its assets to participate in an oppression action because the company had no separate and independent position on the issues raised, and Blackburne J adopted this finding to hold in a subsequent application that the advice which the company obtained was not privileged against its shareholders; and *Re Hydrosan Ltd* [1991] BCLC 418 where Harman J justified treating the company as a nominal party for privilege purposes in an application for just and equitable winding up because the same was done in *Re A & BC Chewing Gum Ltd* [1975] 1 WLR 579 at 592, which concerned the rule against company participation in shareholder disputes.

67 *Re a company (No 1126 of 1992)* [1994] 2 BCLC 146 at 156. Some examples are given in *Company Directors: Duties, Liabilities, and Remedies* (Simon Mortimore QC ed) (Oxford: Oxford University Press, 3rd Ed, 2017) at para 23.100.

68 *Re a company (No 004502 of 1988), ex p Johnson* [1992] BCLC 701 at 703; Victor Joffe QC *et al*, *Minority Shareholders: Law, Practice and Procedure* (Oxford: Oxford University Press, 6th Ed, 2018) at para 8.196; Robin Hollington QC, *Hollington on Shareholders' Rights* (London: Sweet & Maxwell, 8th Ed, 2017) at para 9-80. Even those who take the position that the type of action is conclusive of whether the company is a nominal party agree that reliefs are a different matter: Joan Loughrey, "Privileged Litigants: Shareholder Rights, Information Disclosure and Corporate Privilege" [2007] JBL 778 at n 66.

69 Companies Act (Cap 50, 2006 Rev Ed) s 216A(3)(*c*).

important to both inquiries.[70] In *Re a company (No 1126 of 1992)*,[71] the court refused to rule that participation was in the interest of the company, holding that it was insufficient for the board to assert that it reached such a view on legal advice when the board was not independent.[72] However, the same case noted that while the board's independence is relevant, it is neither necessary nor sufficient.[73] Thus, in *Arrow Trading & Investments Est 1920 v Edwardian Group Ltd*,[74] Blackburne J allowed the application for disclosure of privileged advice, holding that the company had no independent position in the litigation, even though the independent directors had their own views on the matter.[75] This was because the independent directors were unable to specify how the company's interests were affected, and desired intervention only to adduce evidence without appearing to be partisan.[76]

(3) Special considerations on whether company is nominal party in derivative actions

35 Thus far, derivative actions at the leave stage have been treated in the same way as other shareholder actions.[77] The applicable principle is the same: the inquiry is whether the company's interests are engaged. However, a derivative action should be treated differently in the application of the principle, because it involves a claim of the company rather than a personal claim.[78] The company's interests are much more likely to be engaged as a result.

36 Since the claim belongs to the company, the costs and benefits of pursuing the claim would primarily accrue to the company. Whether

70 Margaret Chew, *Minority Shareholders' Rights and Remedies* (Singapore: LexisNexis, 3rd Ed, 2017) at paras 6.074–6.076 (discussing granting of leave for a statutory derivative action); Robin Hollington QC, *Hollington on Shareholders' Rights* (London: Sweet & Maxwell, 8th Ed, 2017) at paras 6-103–6-105 (discussing the rule against company participation in shareholder disputes in the context of derivative actions).

71 [1994] 2 BCLC 146.

72 *Re a company (No 1126 of 1992)* [1994] 2 BCLC 146 at 157.

73 *Re a company (No 1126 of 1992)* [1994] 2 BCLC 146 at 156.

74 [2004] BCC 955.

75 *Arrow Trading & Investments Est 1920 v Edwardian Group Ltd* [2004] BCC 955 at [25].

76 *Arrow Trading & Investments Est 1920 v Edwardian Group Ltd* [2004] BCC 955 at [18]–[19], *per* Sir Francis Ferris.

77 See also *Singh v Anand* [2006] All ER (D) 153 at [11], noting in *dicta* that the rule against company participation of shareholder disputes, though first expressed in the context of oppression actions, "may also be found expressed in relation to derivative actions".

78 *Carlisle & Cumbria United Independent Supporters' Society Ltd v CUFC Holdings Ltd* [2011] BCC 855 at [24].

a net gain to the company is likely depends on considerations such as the size and strength of the claim relative to the costs that will have to be incurred; the possibility that pursuing the claim would disrupt other company activities; the commercial value of maintaining a relationship with the defendant; and so on.[79] For that reason, the company may often legitimately interfere in a leave application to prevent itself from bringing an unprofitable claim, especially if participation was decided by an independent board.

37 In dealing with derivative actions then, it will not make sense to impose the heavy presumption against active participation found in oppression actions.[80] In fact, the company should almost always have a sufficient interest to participate, unless the directors are all non-independent and cannot prove that participation was for the company as opposed to themselves. Indeed, the procedure for statutory derivative actions under English law anticipate company participation.[81] The current practice for Singapore cases is consistent with this view as well. Reported cases regularly feature company counsel actively arguing against granting leave in a derivative action,[82] but such representation for the company has been said to be unnecessary where the only directors were non-independent.[83]

38 Unfortunately, the only modern case concerning disclosure of privileged communications to shareholders in a derivative action is *Harley Street Capital Ltd v Tchigirinsky*,[84] which has not followed this line of logic and has attracted some criticisms. There, a minority shareholder contended that one company director and shareholder was preventing

79 Victor Joffe QC *et al*, *Minority Shareholders: Law, Practice and Procedure* (Oxford: Oxford University Press, 6th Ed, 2018) at para 2.91; Margaret Chew, *Minority Shareholders' Rights and Remedies* (Singapore: LexisNexis, 3rd Ed, 2017) at para 6.059.

80 Victor Joffe QC *et al*, *Minority Shareholders: Law, Practice and Procedure* (Oxford: Oxford University Press, 6th Ed, 2018) at para 2.140. The "heavy onus" with respect to oppression actions was established in *Re a company (No 1126 of 1992)* [1994] 2 BCLC 146 at 156.

81 Victor Joffe QC *et al*, *Minority Shareholders: Law, Practice and Procedure* (Oxford: Oxford University Press, 6th Ed, 2018) at para 2.141.

82 *Jian Li Investments Holding Pte Ltd v Healthstats International Pte Ltd* [2019] 4 SLR 825 at [1]; *Chong Chin Fook v Solomon Alliance Management Pte Ltd* [2017] 1 SLR 348 at [76]; *Fong Wai Lyn Carolyn v Airtrust (Singapore) Pte Ltd* [2011] 3 SLR 980 at [84]–[85].

83 *Ozak Seiko Co Ltd v Ozak Seiko (S) Pte Ltd* [2019] SGHC 34 at [29].

84 [2006] BCC 209. The only other relevant cases are *CAS (Nominees) Ltd v Nottingham Forest plc* [2001] 1 All ER 954 at [12] (which was *dicta* on this point); and the 19th century case of *Gouraud v The Edison Gower Bell Telephone Company of Europe* (1888) 57 LJ Ch 498. See Joan Loughrey, "Privileged Litigants: Shareholder Rights, Information Disclosure and Corporate Privilege" [2007] JBL 778 at 799.

investigations into his wrongdoing. At the suggestion of the court, the company's independent chairman procured a solicitor's report concerning whether there was a *prima facie* case of such wrongdoing, with the chairman reporting that there was no such case.[85] The minority sought disclosure of the report. The court rejected the application, holding that the report was privileged because it was sought in the context of hostile litigation.[86]

39 The court's reasoning was underdeveloped. The court concluded that, since the solicitor's report was obtained in connection with the allegations that led to the dispute and derivative action, it was obtained for the purpose of hostile litigation.[87] However, there was no analysis as to why the litigation was hostile as between the shareholder and the company. Loughrey therefore correctly pointed out that the judgment is problematic because it assumed that privilege can be asserted if the material was prepared for the purpose of any litigation against a shareholder, when what is required is hostile litigation.[88]

40 That said, maintenance of privilege in that case could have been justified. The solicitor's report concerned whether the company had a good cause of action; this directly affects the company's interests and position at the leave stage. If the company had no good cause of action, it would be in its interest to oppose the applicant shareholder, to prevent itself from wasting time and effort on a weak case. Consequently, the leave application was hostile litigation between the applicant shareholder and the company, and so the company should be able to assert privilege over the report.

41 On this view, other criticisms of the decision are misplaced. Loughrey argued that the company is the true claimant in a derivative action and so there is no litigation against the company.[89] However, this ignores the point that at the leave stage, the company may legitimately take a position contrary to the applicant shareholder.

42 Loughrey and Zuckerman also suggested that the report should be disclosable since it concerned whether the majority shareholder committed a wrong, and there was no hostility between the applicant

85 *Harley Street Capital Ltd v Tchigirinsky* [2006] BCC 209 at [65].
86 *Harley Street Capital Ltd v Tchigirinsky* [2006] BCC 209 at [73].
87 *Harley Street Capital Ltd v Tchigirinsky* [2006] BCC 209 at [73].
88 Joan Loughrey, "Privileged Litigants: Shareholder Rights, Information Disclosure and Corporate Privilege" [2007] JBL 778 at 800.
89 Joan Loughrey, "Privileged Litigants: Shareholder Rights, Information Disclosure and Corporate Privilege" [2007] JBL 778 at 800.

shareholder and the company on this point.[90] These arguments equate hostile litigation to hostile motives, which is incorrect. The applicant shareholder and the company (through its independent chairman) may have shared the same motive of determining whether there was an actionable wrong which should be pursued. However, if they reached different conclusions, the leave application was nonetheless hostile litigation: the applicant and the company would be trying to convince the court to reach opposing outcomes. The company's advocacy in this respect would be undermined if it was compelled to disclose its advice. Besides, in such cases, hostility of motives is always possible; the applicant might want to obtain leave for a collateral purpose regardless of whether there is an actionable wrong.

C. Shareholders of corporate shareholders do not share joint interest with company

43 Another question is how far the company–shareholder joint interest extends – if company A is a shareholder of company B, would shareholders of company A also have a joint interest with company B?

44 This issue arose in *BBGP Managing General Partner Ltd v Babcock & Brown Global Partners*.[91] That case involved legal advice to Global (an English limited partnership) obtained by one of its partners, General (a Cayman company). The court noted that every partner in Global was entitled to the advice.[92] However, the partners cannot disclose that information to third parties and allow them to use it.[93] The exception to this was that General could disclose the advice to its direct shareholders, due to the operation of joint interest privilege between them.[94] Finally, there is the question of whether the direct shareholders of General can

90 Joan Loughrey, "Privileged Litigants: Shareholder Rights, Information Disclosure and Corporate Privilege" [2007] JBL 778 at 800; Adrian Zuckerman, *Zuckerman on Civil Procedure: Principles of Practice* (London: Sweet & Maxwell, 3rd Ed, 2013) at para 13.26.

91 [2011] Ch 296. The facts are also discussed in Andrew Higgins, *Legal Professional Privilege for Corporations: A Guide to Four Major Common Law Jurisdictions* (Oxford: Oxford University Press, 2014) at paras 6.76–6.80; and Colin Passmore, *Privilege* (London: Sweet & Maxwell, 4th Ed, 2020) at paras 6-032–6-034.

92 *BBGP Managing General Partner Ltd v Babcock & Brown Global Partners* [2011] Ch 296 at [51].

93 *BBGP Managing General Partner Ltd v Babcock & Brown Global Partners* [2011] Ch 296 at [56]–[57].

94 *BBGP Managing General Partner Ltd v Babcock & Brown Global Partners* [2011] Ch 296 at [58].

share the privileged material with their own shareholders. Norris J dealt with the issue thus:[95]

> 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.

45 The logic of this position is undeniable if the company-shareholder joint interest is predicated on an alignment of interests between them.[96] However, Norris J reached his conclusion with no analysis as to why the extent of interest alignment was insufficient for holding companies and their ultimate shareholders. The fact that it decreased does not automatically lead to a conclusion of insufficiency. That may be why some suggest that the decision is incorrect in so far as it suggests a blanket rule against joint interest between ultimate shareholders and a subsidiary of the holding company.[97]

46 At the same time, it is difficult to see how the extent of interest alignment can be meaningfully evaluated. The only requirement for the company–shareholder joint interest is the existence of shareholding. Consequently, other factors would not be relevant in extensions of that relationship. If shareholding is the only relevant fact, either shareholding of the holding company is sufficient to create a joint interest or it is not: the issue must be determined by a blanket rule.

47 Given the above difficulties, Norris J's blanket rule can be justified. However, these difficulties may also indicate that a joint interest relationship arising out of shareholding alone does not make much sense. That is the focus of the next section.

IV. Joint interest privilege: General part

48 To determine whether the company–shareholder joint interest relationship can be justified, it is necessary to elucidate the nature of joint interest relationships first.

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95 *BBGP Managing General Partner Ltd v Babcock & Brown Global Partners* [2011] Ch 296 at [59].

96 Whether that is correct is discussed at para 52 *ff* below.

97 *The Law of Privilege* (Bankim Thanki QC ed) (Oxford: Oxford University Press, 3rd Ed, 2018) at para 6.13; Andrew Higgins, *Legal Professional Privilege for Corporations: A Guide to Four Major Common Law Jurisdictions* (Oxford: Oxford University Press, 2014) at para 6.80.

A. Common thread underlying joint interest cases: Privilege holder acting on behalf of another

49 Though the terminology of joint interest privilege is more popular with academics than judges, the concept that it represents is not new. In Bray's 1885 treatise on discovery, many relationships that justify disclosure of privileged materials were identified.[98] The main example provided involved the beneficiary–trustee relationship, but other cases also dealt with partnerships,[99] local government authority and its ratepayer (where the legal advice concerned raising or expenditure of rates),[100] landlord–tenant (where the legal advice was taken by the tenant for the mutual benefit of both),[101] and so on.

50 The list of joint interest relationships is not closed, and other such relationships were subsequently identified. Examples include the company–director relationship,[102] participants in a joint venture,[103] the insurer–reinsurer relationship,[104] and of course the company–shareholder relationship.

51 Some of these relationships, such as trustee–beneficiary, company–shareholder, and the partners of a partnership, are by themselves sufficient to give rise to a joint interest for materials relating to that relationship ("status-based joined interest").[105] The other relationships will only give rise to a joint interest on particular facts ("*ad hoc* joint interest").[106]

52 There is some controversy as to what unifies these cases,[107] and there is no logical necessity for all of the cases to have a common

98 Edward Bray, *The Principles and Practice of Discovery* (London: Reeves and Turner, 1885) at pp 379–383.

99 *Pearse v Pearse* (1846) 1 De G & Sm 12.

100 *Mayor and Corporation of Bristol v Cox* (1884) 26 Ch D 678. This was *dicta* and doubted in Colin Passmore, *Privilege* (London: Sweet & Maxwell, 4th Ed, 2020) at para 6-035.

101 *Attorney-General v Berkeley* (1820) 2 J&W 291.

102 *The Law of Privilege* (Bankim Thanki QC ed) (Oxford: Oxford University Press, 3rd Ed, 2018) at para 6.09; Charles Hollander QC, *Documentary Evidence* (London: Sweet & Maxwell, 13th Ed, 2018) at para 19-03; *R v The Financial Services Authority* [2012] 1 All ER 1238.

103 *CIA Barca de Panama SA v George Wimpey & Co Ltd* [1980] 1 Lloyd's Rep 598; see also *Yunghanns v Elfic Pty Ltd (No 2)* [2000] VSC 113 at [38].

104 *Commercial Union Assurance Co v Mander* [1996] 2 Lloyd's Rep 640.

105 Colin Passmore, *Privilege* (London: Sweet & Maxwell, 4th Ed, 2020) at para 6-021.

106 See, *eg*, *R v The Financial Services Authority* [2012] 1 All ER 1238 at [40], setting out a test on when directors can claim joint interest privilege with the company.

107 Charles Hollander QC, *Documentary Evidence* (London: Sweet & Maxwell, 13th Ed, 2018) at para 19-02.

basis. From the definition adopted, the existence of joint interest is determined by the outcome that privilege cannot be asserted against specific parties; it is possible that the reasons for such an outcome can differ amongst different categories of cases.[108] The cases certainly have not been concerned with identifying a single principle which applies to all joint interest relationships, and have instead focused on analogising the situation to a precedent.[109]

53 That said, and leaving aside the company-shareholder relationship, joint interest cases do involve a broadly similar core scenario. They involve situations where the disclosure applicant had an interest in the subject matter of the advice, and the privilege holder obtained the advice at least partly on behalf of the applicant. The logic of denying privilege in such situations is straightforward – if the advice was obtained for another, it would be nonsensical for the advice to be denied to that very person.

54 This justification was utilised by Knight Bruce VC, who commented that the older cases involved situations where the privilege holder was deprived "of the right to say, for any effectual purpose, that he consulted counsel, upon the subject on which he did consult counsel, on his sole and exclusive behalf, for his single and separate interest".[110]

55 This view was also referred to and adopted by Bray.[111]

56 Similarly, Higgins noted that the common thread in these cases is that the substantive law requires the privilege holder to act in the interests of the disclosure applicant.[112] This formulation makes substantially the same point in a different way: if a privilege holder obtained advice for a matter in which he must act in the interests of the disclosure applicant, he is effectively obtaining the advice on behalf of that applicant.

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108 The view adopted in Charles Hollander QC, *Documentary Evidence* (London: Sweet & Maxwell, 13th Ed, 2018) at para 19-16.

109 Thus, in the context of the company-shareholder relationship, analogies to trusts have been relied upon by the courts. See paras 79–87 below.

110 *Pearse v Pearse* (1846) 1 De G & Sm 12 at 24, referring to *Radcliffe v Fursman* 2 Bro PC 514; *Richards v Jackson* 18 Ves 472; *Attorney-General v Berkeley* (1820) 2 J&W 291. See also Edward Bray, *The Principles and Practice of Discovery* (London: Reeves and Turner, 1885) at p 370.

111 Edward Bray, *The Principles and Practice of Discovery* (London: Reeves and Turner, 1885) at p 379. He adds that this creates a property interest in the documentary advice. However, the property view makes no sense. This is discussed at para 83 below.

112 Andrew Higgins, *Legal Professional Privilege for Corporations: A Guide to Four Major Common Law Jurisdictions* (Oxford: Oxford University Press, 2014) at para 6.72.

57 This principle can be seen in the status-based joint interest relationships. Where a trustee obtains legal advice concerning trust property,[113] he is necessarily doing so partly on behalf of the beneficiaries, since the trust property is managed for their benefit. The same is true of a partner: in general, every partner acts as principal and as agent for all the other partners when dealing with partnership matters; owes a duty to display complete good faith towards the other partners in partnership matters; and also shares a beneficial interest in partnership assets with all the other partners.[114] Actions taken with respect to partnership matters are therefore taken on behalf of all the other partners, and advice on those actions would necessarily be obtained on their behalf as well.

58 The same point can be demonstrated with cases that found an *ad hoc* joint interest relationship. In *Commercial Union Assurance Co v Mander*[115] ("*Commercial Union*"), the plaintiff insurer settled a claim under a policy by making certain payments, and it subsequently claimed against the reinsurer. The reinsurer applied for inspection of privileged documents concerning the insurer's liability under the policy. Moore-Bick J noted that because of a "follow settlements" clause in the reinsurance contract, the reinsurer was bound by the insurer's handling of the claim so long as it was businesslike and in good faith.[116] Consequently, he pointed out that:[117]

> For practical purposes, therefore, the insurer in his handling of the original claim is acting as much on behalf of the reinsurer as on his own behalf. That being so … where the contract includes a clause of that kind insurers and reinsurers do have a common interest in the investigation and defence of the original claim.

59 Moore-Bick J later went on to conclude that a joint interest existed because the "follow settlements" clause created a "community of interest between insurer and reinsurer".[118] The reasoning was therefore based on an alignment of interests,[119] but the critical underlying fact was that the insurer was acting on behalf of the reinsurer.

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113 As opposed to situations where the advice was obtained to protect his own interests: Paul Matthews & Hodge M Malek QC, *Disclosure* (London: Sweet & Maxwell, 5th Ed, 2017) at para 11.86.

114 Roderick I'Anson Banks, *Lindley & Banks on Partnership* (London: Sweet & Maxwell, 20th Ed, 2017) at paras 2–14 and 16–01.

115 [1996] 2 Lloyd's Rep 640.

116 *Commercial Union Assurance Co v Mander* [1996] 2 Lloyd's Rep 640 at 645.

117 *Commercial Union Assurance Co v Mander* [1996] 2 Lloyd's Rep 640 at 645.

118 *Commercial Union Assurance Co v Mander* [1996] 2 Lloyd's Rep 640 at 646.

119 This reasoning is unsatisfactory, and is discussed at paras 62–63 below.

60 The earlier case of *CIA Barca de Panama SA v George Wimpey & Co Ltd*[120] ("*CIA Barca*") demonstrates the same. There, the plaintiff, Barca, and defendant, Wimpey, were involved in a joint venture through De Long Wimpey ("DLW"), with each having 50% shareholding in DLW. The parties decided to terminate the joint venture, and the termination agreement had provisions on payments between Barca and Wimpey that depended on the quantum which DLW could claim from its contracting counterparty Aramco. Wimpey, representing DLW, settled the claims with Aramco in a manner that was unsatisfactory to Barca, leading to litigation where Barca sought disclosure of privileged documents concerning the DLW-Aramco claims. The English Court of Appeal unanimously held that privilege could not be asserted against Barca for those documents.

61 In reaching this conclusion, Stephenson LJ placed emphasis on section 10.15 of the termination agreement, which provided for Wimpey and Barca's agreement that DLW would press its Aramco claims "with vigour", and that Wimpey and Barca would render DLW all reasonably required assistance in the matter.[121] This clause, along with the pleadings, was held to indicate "that the Aramco claims were being made … by the defendants acting on behalf of themselves and the plaintiffs jointly".[122] Thus, he found that regardless of how the relationship between the parties was defined and whether it might have fallen under a specific head of status-based joint interest relationships, Barca had a direct interest in the outcome of the Aramco claims which was emphasised by section 10.15, and that interest entitled Barca access to the privileged documents.[123]

62 A competing view of joint interest privilege is that it arises because there was an alignment of interests between the parties with respect to the subject matter of the privileged communications.[124] However, this

120 [1980] 1 Lloyd's Rep 598.

121 *CIA Barca de Panama SA v George Wimpey & Co Ltd* [1980] 1 Lloyd's Rep 598 at 603.

122 *CIA Barca de Panama SA v George Wimpey & Co Ltd* [1980] 1 Lloyd's Rep 598 at 614.

123 *CIA Barca de Panama SA v George Wimpey & Co Ltd* [1980] 1 Lloyd's Rep 598 at 614–615.

124 Paul Matthews & Hodge M Malek QC, *Disclosure* (London: Sweet & Maxwell, 5th Ed, 2017) at para 11.89, treating joint interest cases as those where one party takes advice which benefits another because he is "in the same interest"; Joan Loughrey, "Privileged Litigants: Shareholder Rights, Information Disclosure and Corporate Privilege" [2007] JBL 778 at 785–788; *Winterthur Swiss Insurance Co v AG (Manchester) Ltd* [2006] All ER (D) 196; [2006] EWHC 839 (Comm) at [114], treating the issue as whether there was a "sufficient community of interest" in the privileged documents; *BBGP Managing General Partner Ltd v Babcock & Brown Global Partners* [2011] Ch 296 at [59], referred to at para 44 above; *Commercial Union Assurance Co v Mander* [1996] 2 Lloyd's Rep 640 at 646 and 648, referred to at paras 7 and 59 above; *CIFG Special Assets Capital I Ltd v Polimet Pte Ltd* [2016] 1 SLR 1382 at [116], requiring an "identity of interests" between the parties.

formulation of the concept is inadequate. An alignment of interests is also the requirement for common interest privilege, and the two concepts would be rendered indistinguishable. As *Commercial Union* pointed out, tenants in dispute with their landlord have aligned interests which allows legal advice shared with one another to remain privileged, but such interest would not allow one tenant to compel disclosure of privileged material from another.[125] An interest-based analysis would be unable to explain why.

63 Besides, a joint interest can arise even if the parties' interests are not completely aligned.[126] Consider again *CIA Barca*. In that case, there was a possibility that Wimpey settled the DLW-Aramco claims unfavourably because it had other business dealings with Aramco.[127] Would it make a difference to the outcome if Barca knew that Wimpey had such business dealings, and that their interests were therefore not completely aligned? That seems doubtful. Wimpey's actions with respect to the DLW-Aramco claims were necessarily partly on behalf of Barca by virtue of section 10.15 of the termination agreement and that should be conclusive; the contract would be undermined if Wimpey's interests can determine whether privileged advice on those claims need to be disclosed.

64 Admittedly, focusing on whether the privilege holder obtained the advice on behalf of the disclosure applicant will not lead to easy answers either. Since the concept of "acting on behalf of" in this context does not involve agency, it is always a question of judgment on whether the parties' relationship is appropriately classified as one effectively acting on behalf of another. In *Commercial Union*, the "follow settlements" clause was the key to the joint interest, but the clause did not state that the insurer was acting on behalf of the reinsurer. That is a conclusion reached based on the reality of the situation: the claim under the policy affects both the insurer and reinsurer, and given the need to settle it in a good-faith and businesslike manner, the insurer could not be dealing with the claim purely for itself. Even so, this focus would at least make the analysis more intelligible, compared with merely asking whether the parties' interests were aligned.

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125 *Commercial Union Assurance Co v Mander* [1996] 2 Lloyd's Rep 640 at 647–648.

126 This was also the view taken in *Sharp v Blank* [2015] EWHC 2681 (Ch) at [10]. However, that case dealt with the company–shareholder joint interest relationship, and is therefore of limited persuasive value if one accepts the subsequent argument that the company–shareholder relationship should not be treated as one of joint interest at all.

127 *CIA Barca de Panama SA v George Wimpey & Co Ltd* [1980] 1 Lloyd's Rep 598 at 603–604.

B. Joint interest privilege in Singapore

(1) Case law

65 Joint interest privilege has also been recognised in Singapore, though no reported cases have applied the concept to the company–shareholder relationship. What is available has followed the English position.

66 The first joint interest case in Singapore appears to be *The Oriental Insurance Co Ltd v Reliance National Asia Re Pte Ltd*.[128] There, the applicant, Oriental Insurance Co ("OIC"), applied to set aside an independent adjudicator's decision on the proof of OIC's debt in Reliance National Asia Re's ("RNA") solvent scheme.[129] The debt arose because a policy issued by OIC was reinsured with RNA, the quantum being unliquidated because it was dependent on litigation in India between the insured and the underwriters.[130] Though OIC was named as the defendant in India, RNA managed the legal proceedings and appointed the solicitors under a claims control clause.[131]

67 OIC made the argument that the rules of natural justice were breached by the independent adjudicator because disclosure of legal and expert opinions concerning the Indian litigation was not ordered.[132] One of RNA's responses was that the documents were privileged, and this argument was rejected. Approving English cases concerning joint interest in the insurance context,[133] the court held that at the time the legal opinions were obtained by RNA for proceedings against OIC in India, the parties shared a joint interest and therefore legal privilege could not be asserted against OIC.[134] That is clearly correct, since RNA was essentially managing OIC's defence on its behalf.

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128 [2009] 2 SLR(R) 385.

129 Under s 210 of the Companies Act (Cap 50, 2006 Rev Ed).

130 *The Oriental Insurance Co Ltd v Reliance National Asia Re Pte Ltd* [2009] 2 SLR(R) 385 at [2] and [4]–[5].

131 *The Oriental Insurance Co Ltd v Reliance National Asia Re Pte Ltd* [2009] 2 SLR(R) 385 at [9].

132 *The Oriental Insurance Co Ltd v Reliance National Asia Re Pte Ltd* [2009] 2 SLR(R) 385 at [187].

133 *Commercial Union Assurance Co v Mander* [1996] 2 Lloyd's Rep 640; *Winterthur Swiss Insurance Co v AG (Manchester) Ltd* [2006] All ER (D) 196; [2006] EWHC 839 (Comm).

134 *The Oriental Insurance Co Ltd v Reliance National Asia Re Pte Ltd* [2009] 2 SLR(R) 385 at [188]–[192]. The court used the phrase "common interest" and "joint interest" interchangeably here.

68 The most widely cited authority on joint interest in Singapore is *CIFG Special Assets Capital I Ltd v Polimet Pte Ltd*.[135] There, the plaintiff, CIFG, and first defendant, Polimet, entered into several convertible bond subscription agreements with the effect that funds were disbursed by CIFG to Polimet. The remaining defendants were shareholders of Polimet who secured the obligations. Subsequently, the parties discussed the possibility of suspending the obligations. A Malaysian solicitor was appointed to draft the proposed agreement, but this agreement was never concluded. The defendant sought disclosure from the plaintiff of communications between the plaintiff and the Malaysian solicitor concerning the proposed agreement.

69 On the defendant's argument that there was joint interest privilege between the plaintiff and defendant, the court accepted the definitions and examples of joint interest privilege set out in *The Law of Privilege*.[136] The court then rejected the argument, on the basis that the parties' interests were not sufficiently aligned since they were essentially in a lender and borrower relationship, with the borrower being incapable of carrying out its repayment obligations.[137] Again this result is correct, although the reasoning is based on alignment of interests. Generally speaking, it would not make sense to say that a lender sought advice on a debt on behalf of the borrower.

(2) Whether joint interest privilege is consistent with Evidence Act

70 Surprisingly, none of the above cases referenced the Evidence Act[138] ("EA"), which should have been the starting point for the analysis.[139]

71 This issue was touched upon by the SAL Law Reform Committee, which noted that the concept of joint interest privilege was not included in the EA.[140] However, the Committee was of the view that joint interest

135 [2016] 1 SLR 1382. See *Singapore Civil Procedure 2019* (Hon Justice Chua Lee Ming ed) (Sweet & Maxwell, 2018) at para 24/3/10; Jeffrey Pinsler SC, *Singapore Court Practice 2017* (LexisNexis, 2017) at para 24/3/10.

136 *The Law of Privilege* (Bankim Thanki QC ed) (Oxford: Oxford University Press, 3rd Ed, 2018); *CIFG Special Assets Capital I Ltd v Polimet Pte Ltd* [2016] 1 SLR 1382 at [74]–[75].

137 *CIFG Special Assets Capital I Ltd v Polimet Pte Ltd* [2016] 1 SLR 1382 at [76].

138 Cap 97, 1997 Rev Ed.

139 *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd* [2007] 2 SLR(R) 367 at [27]; *Gelatissimo Ventures (S) Pte Ltd v Singapore Flyer Pte Ltd* [2010] 1 SLR 833 at [28].

140 Law Reform Committee, Singapore Academy of Law, *Report of the Law Reform Committee on Reforming Legal Professional Privilege* (October 2011) at p 29, para 82 (Chairman: Harpreet Singh Nehal SC). Joint interest is referred to as common interest here.

privilege could be applied through s 2(2) of the EA, stating that it "is intrinsically consistent with the statutory legal advice privilege".[141] Nonetheless, it was of the view that some codification should take place as s 2(2) should be reserved for truly residual matters.[142]

72 It is not obvious why joint interest is at all consistent with legal advice privilege as codified under ss 128 to 131 of the EA.[143] The relevant sections provide that neither the client nor their advisers can be compelled to disclose privileged communications, unless specified exceptions apply.[144] Since joint interest is not a specified exception, and yet allows for compulsory disclosure of such privileged communications, it cannot be consistent with the plain meaning of those sections.

73 That said, the interpretation of s 2(2) is not straightforward, and on one view specific exceptions under the common law to general rules provided by the EA can still be applied.[145] Ultimately, the interpretation of s 2(2) of the EA is a wide-ranging issue best explored and discussed elsewhere. It suffices for the moment to note that in practice, local courts have not been troubled by this issue when dealing with joint interest privilege, though it would be helpful for them to point out why in the future.

V. Whether company-shareholder relationship can be justified as one of joint interest

A. Joint interest rationale: Do companies act on behalf of their shareholders?

74 If the above analysis is correct, then whether the company–shareholder relationship is one of joint interest depends on whether companies can be said to act on behalf of their shareholders in making the privileged communications. It may seem that the answer is obviously

141 Law Reform Committee, Singapore Academy of Law, *Report of the Law Reform Committee on Reforming Legal Professional Privilege* (October 2011) at p 29, para 84.

142 Law Reform Committee, Singapore Academy of Law, *Report of the Law Reform Committee on Reforming Legal Professional Privilege* (October 2011) at p 29, para 84.

143 Jeffrey Pinsler SC, *Evidence and the Litigation Process* (Singapore: LexisNexis, 6th Ed, 2017) at para 14.004B.

144 Jeffrey Pinsler SC, *Evidence and the Litigation Process* (Singapore: LexisNexis, 6th Ed, 2017) at para 14.020.

145 Benny Tan Zhi Peng, "Reflections on S 2(2) of Singapore Evidence Act and Role of Common Law Rules of Evidence" (2018) 30 SAcLJ 224 at 234, para 50.

not, since the company is a separate legal entity distinct from its shareholders.[146]

75 Perhaps surprisingly, however, English case law tends to ignore this fundamental principle without explaining why when providing other justifications for the company-shareholder joint interest.[147] The reason for this must be sought elsewhere, and one explanation can be found in the leading US case of *Garner v Wolfinbarger*,[148] which explained that with respect to the assertion of privilege by a company against its shareholders:[149]

> [I]t must be borne in mind that management does not manage for itself and that the beneficiaries of its action are the stockholders. Conceptualistic phrases describing the corporation as an entity separate from its stockholders are not useful tools of analysis. They serve only to obscure the fact that management has duties which run to the benefit ultimately of the stockholders.

76 The point appears to be that directors are in substance acting for the benefit of shareholders, the form of the company notwithstanding. If that is correct, when directors obtain legal advice for the company, they are arguably doing so on behalf of shareholders. On this view, the company-shareholder joint interest in fact arises out of a direct relationship between the directors and the shareholders.

77 Whatever the merits of this view under US law, however, it cannot be correct under the company law of England and Singapore. 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".[150] That such a duty exists is unsurprising on two levels. First, as Higgins has noted, a joint interest relationship is typically a facet of some other legal relationship (partners in a partnership, insurer–reinsurer *etc*) which creates corresponding legal duties.[151] Second, the act of obtaining legal advice on behalf of another in itself involves assumption of responsibility and reliance with respect to

146 *Walter Woon on Company Law* (Tan Cheng Han SC ed) (Singapore: Sweet & Maxwell, 3rd Ed, 2009) at para 2.31 *ff*.
147 See paras 83 and 86 below.
148 430 F2d 1093 (5th Cir, 1970).
149 *Garner v Wolfinbarger* 430 F2d 1093 at 1101 (5th Cir, 1970).
150 *Pitt v Holt* [2012] Ch 132 at [124]. See also *Pitt v Holt* [2013] 2 AC 108 at [80] (advice must be "apparently competent" for trustees to avoid breach of duty when the advice received was wrong).
151 See para 56 above.

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 interests of the other party relying on that advice.

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.[152] Given the rule in *Foss v Harbottle*,[153] only the company can enforce this duty, 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 the 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 the shareholders if the advice turned out to be obtained incompetently.

B. Other justifications in case law

79 The above discussion indicates that the company–shareholder relationship does not fall within the core scenario that gives rise to a joint interest. However, the cases have not approached the issue in the same way. Instead, English courts have generally justified their decisions by drawing various analogies to the law of trusts, where joint interest is also recognised. As will be seen, however, these justifications are also unconvincing.

(1) Legal advice and privilege as property of shareholders who paid for them

80 The traditional justification for the company–shareholder joint interest is that, since the funds for the advice came from shareholders, the advice cannot be privileged against them. In the earliest decision on this front, the 1888 case of *Gouraud v The Edison Gower Bell Telephone*

152 *Green v Walkling* [2008] 2 BCLC 332 at [34].

153 (1843) 2 Hare 461; 67 ER 189. *Walter Woon on Company Law* (Tan Cheng Han SC ed) (Singapore: Sweet & Maxwell, 3rd Ed, 2009) at para 2.46.

Company of Europe,[154] Chitty J justified his order granting disclosure in the following terms:[155]

> [T]he 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. 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.

81 This reasoning was later adopted by the Court of Appeal in *Woodhouse & Co Ltd v Woodhouse*.[156] The principle enunciated by Phillimore LJ was reported as follows:[157]

> [I]f 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.

82 This statement of principle has been repeatedly cited by more modern English authorities.[158]

83 This reasoning is obviously problematic. First, it ignores the fact that since the company is a separate legal entity, its funds are not to be equated with that of the shareholders.[159] Canadian cases have rejected the English position for this reason.[160] Further, if that rationale is correct, shareholders should have access to all corporate documentation at any time by virtue of their property interests in those documents,[161] but that does not reflect the law.[162] This view is also inconsistent with the rule that privileged documents need not be disclosed if they are created for the purpose of hostile litigation between the company and its shareholders,[163]

154 (1888) 57 LJ Ch 498.
155 *Gouraud v The Edison Gower Bell Telephone Company of Europe* (1888) 57 LJ Ch 498 at 499–500.
156 (1914) 30 TLR 559.
157 *Woodhouse & Co Ltd v Woodhouse* (1914) 30 TLR 559 at 560.
158 *Cadogan Petroleum plc v Tolley* [2011] EWHC 2286 (Ch) at [56]; *Sharp v Blank* [2015] EWHC 2681 (Ch) at [5].
159 Joan Loughrey, "Privileged Litigants: Shareholder Rights, Information Disclosure and Corporate Privilege" [2007] JBL 778 at 784.
160 *Ziegler Estate v Green Acres (Pine Lake) Ltd* [2008] AJ No 1081 at [43]–[45].
161 Joan Loughrey, "Privileged Litigants: Shareholder Rights, Information Disclosure and Corporate Privilege" [2007] JBL 778 at 785.
162 Charles Hollander QC, *Documentary Evidence* (London: Sweet & Maxwell, 13th Ed, 2018) at para 5-04.
163 See para 13 above.

since such documents are invariably paid for using company funds.[164] Finally, resolving privilege issues by recourse to concepts of property is doubtful in principle, when legal professional privilege is a creation of the common law to serve specific policies unrelated to property, such as encouraging candour between counsel and client.[165]

(2) Disclosure as consequence of fiduciary duties owed

84 On the other hand, the case of *CAS (Nominees) Ltd v Nottingham Forest plc*[166] has put the point slightly differently, with Evans-Lombe J focusing on the fiduciary duties owed by both directors and trustees:[167]

> As the authorities show the rule [on disclosure to shareholders] 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 purposes of the company.

85 As noted previously, the existence of a fiduciary duty can be relevant if it indicates that the advice was not obtained by the privilege holder for himself, but partly for the party to whom the duty is owed.[168] However, since such indicators are missing in the company–shareholder context, it is difficult to see how the existence of a fiduciary duty automatically creates an entitlement to bypass privilege.[169]

86 More importantly, the fiduciary duty relied upon by Evans-Lombe J simply does not exist under English and Singapore law, where director duties are owed to the company and not to shareholders.[170] Further, since the privilege holder is the company and not its directors, the relevant fiduciary duty should be the one owed by the company to its shareholders, which also does not exist. So even if the fiduciary duty basis is correct it cannot apply to the company–shareholder relationship.

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164 Colin Passmore, *Privilege* (London: Sweet & Maxwell, 4th Ed, 2020) at para 6-072. It is also not possible to justify this result by the need for privilege in litigation, because privilege is irrelevant if the right of access is based on property rights and not the right of discovery under the Civil Procedure Rules 1998 (SI 1998 No 3132)/ Rules of Court (Cap 322, R 5, 2014 Rev Ed): Paul Matthews & Hodge M Malek QC, *Disclosure* (London: Sweet & Maxwell, 5th Ed, 2017) at para 11.93.

165 *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd* [2007] 2 SLR(R) 367 at [23]–[26].

166 [2001] 1 All ER 954.

167 *CAS (Nominees) Ltd v Nottingham Forest plc* [2001] 1 All ER 954 at [17].

168 See para 56 above.

169 Joan Loughrey, "Privileged Litigants: Shareholder Rights, Information Disclosure and Corporate Privilege" [2007] JBL 778 at 783.

170 See n 8 above.

87 English case law therefore offers no adequate explanation for treating the company–shareholder relationship as one of joint interest.

C. Other policy considerations justifying joint interest treatment

88 The final question is whether there are other policy reasons that nonetheless justify the shareholders' right to disclosure of privileged materials. The policy reasons that have been suggested fall short.

(1) Allowing disclosure to enhance corporate governance generally

89 From the above discussion on operation of the company–shareholder joint interest, it can be seen that it has the most importance in shareholder actions.[171] Consequently, it has been suggested that shareholders should have access to the company's privileged materials to enhance corporate governance and minority shareholder remedies.[172]

90 However, protection of such interests cannot justify shareholder access. A key property of privilege is that communications which could have served as important evidence are rendered unavailable to the court,[173] prejudicing the attainment of a just decision. Therefore, for privilege to exist at all it cannot be overridden for the sake of substantive justice in the absence of exceptional circumstances, since it would always be overridden otherwise. The defence of accused individuals may fall within the exceptional category;[174] it is difficult to see how corporate governance and shareholder rights can do the same.[175]

91 Besides, in the long run, using such disclosure to improve corporate governance would be self-defeating. The fundamental assumption underlying legal advice privilege is that full candour between clients and their lawyers cannot be achieved without protecting their

171 See paras 16 and 22–42 above.

172 Say Hak Goo, *Minority Shareholders' Protection* (London: Cavendish Publishing, 1994) at p 114; H Richard Dallas, "The Attorney-Client Privilege and the Corporation in Shareholder Litigation" (1977) 50(2) S Cal L Rev 303 at 325; F Hodge O'Neal & Stephen R Thompson, "Vulnerability of Professional-Client Privilege in Shareholders Litigation" (1976) 31(7) Bus Law 1775 at 1784.

173 *Regina v Derby Magistrates' Court, ex p B* [1996] AC 487 at 510. Cited with approval in *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd* [2007] 2 SLR(R) 367 at [25].

174 Jeffrey Pinsler SC, *Evidence and the Litigation Process* (Singapore: LexisNexis, 6th Ed, 2017) at paras 14.075–14.082.

175 Joan Loughrey, "Privileged Litigants: Shareholder Rights, Information Disclosure and Corporate Privilege" [2007] JBL 778 at 790.

communications from disclosure.[176] The necessary corollary to this is that, once shareholder access becomes established law, directors would take care to avoid saying anything to the company's solicitors that might prejudice themselves in a shareholder action.[177] Not only would the litigating shareholders' chances of success not improve significantly, they might be made worse off overall because the company's solicitors would be unable to advise the company properly in the absence of full disclosure.[178] This damage to free and open discourse between a company and its solicitors is also partly why the company-shareholder joint interest is not recognised in Canada.[179]

92 Admittedly, it has sometimes been suggested that regulations governing companies are so numerous and complicated that management would have no choice but to consult counsel, with or without privilege.[180] But even so, there are steps which directors can take to minimise the amount of disclosable materials if they are aware that shareholder action is possible. The most straightforward would be for the directors to engage separate solicitors to act for them directly. The client would be the directors in that scenario, and shareholders cannot compel disclosure by relying on their relationship with the company.[181] Another safeguard would be to ensure that all key advice is given orally, so that there are no disclosable documents which are incriminating. The advice could be discovered by interrogatories, but interrogatories would not be administered unless the existence of such oral advice was known.[182] The shareholders' right of disclosure is therefore most useful against directors who are unfamiliar with the law or who did not foresee that their actions would be challenged, and it is difficult to see why the law should discriminate against this group relative to those planning to act in a dubious manner.

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176 *R v Derby Magistrates' Court, ex parte B* [1996] AC 487 at 510. Cited with approval in *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd* [2007] 2 SLR(R) 367 at [25].

177 Stephen A Saltzburg, "Corporate Attorney-Client Privilege in Shareholder Litigation and Similar Cases: Garner Revisited" (1984) 12(4) Hofstra L Rev 817 at 838–839.

178 Stephen A Saltzburg, "Corporate Attorney-Client Privilege in Shareholder Litigation and Similar Cases: Garner Revisited" (1984) 12(4) Hofstra L Rev 817 at 839.

179 *Ziegler Estate v Green Acres (Pine Lake) Ltd* [2008] AJ No 1081 at [46]–[47].

180 Robert R Summerhays, "The Problematic Expansion of the *Garner v Wolfinbarger* Exception to the Corporate Attorney-Client Privilege" (1995) 31(2) Tulsa LJ 275 at 281, fn 25; Jack P Friedman, "Is the *Garner* Qualification of the Corporate Attorney-Client Privilege Viable after *Jaffee v Redmond*?" (1999) 55(1) Bus Law 243 at 257–258.

181 David Chivers QC *et al*, *The Law of Majority Shareholder Power: Use and Abuse* (Oxford: Oxford University Press, 2nd Ed, 2017) at para 9.76.

182 In any event, interrogatories are being abolished under the Proposed Reforms to the Civil Justice System: see the Civil Justice Commission, *Civil Justice Commission Report* (29 December 2017) at p 18, para 7 (Chairman: Tay Yong Kwang J).

93 The final point to emphasise is that shareholders are not powerless in the discovery process even if they have no right to disclosure of privileged materials.[183] If the directors are planning to act fraudulently, their communications are not subject to legal professional privilege.[184] Facts concerning the challenged transaction remain generally disclosable; legal advice privilege applies primarily to communications and not facts,[185] while litigation privilege will not apply unless litigation was reasonably contemplated and the material was created for the dominant purpose of litigation.[186]

(2) Special considerations applicable to derivative actions

94 There is some academic discussion about whether disclosure to shareholders is justified in derivative actions specifically.[187] The answer depends on whether disclosure was sought in the first stage of the derivative action, where shareholders obtain permission from the court to prosecute the company's claim on its behalf;[188] or the second stage where the claim proceeds after permission has been granted.

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183 Discussed in the context of US law in Stephen A Saltzburg, "Corporate Attorney-Client Privilege in Shareholder Litigation and Similar Cases: *Garner* Revisited" (1984) 12(4) Hofstra L Rev 817 at 834–837; and Jack P Friedman, "Is the *Garner* Qualification of the Corporate Attorney-Client Privilege Viable after *Jaffee v Redmond*?" (1999) 55(1) Bus Law 243 at 258.

184 Jeffrey Pinsler SC, *Evidence and the Litigation Process* (Singapore: LexisNexis, 6th Ed, 2017) at para 14.056 *ff*; *The Law of Privilege* (Bankim Thanki QC ed) (Oxford: Oxford University Press, 3rd Ed, 2018) at para 4.37 *ff*; Colin Passmore, *Privilege* (London: Sweet & Maxwell, 4th Ed, 2020) at para 8-001 *ff*.

185 *The Law of Privilege* (Bankim Thanki QC ed) (Oxford: Oxford University Press, 3rd Ed, 2018) at para 2.44.

186 *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd* [2007] 2 SLR(R) 367 at [69]–[77].

187 Joan Loughrey, "Privileged Litigants: Shareholder Rights, Information Disclosure and Corporate Privilege" [2007] JBL 778 at 783; Robert R Summerhays, "The Problematic Expansion of the *Garner v Wolfinbarger* Exception to the Corporate Attorney-Client Privilege" (1995) 31(2) Tulsa LJ 275 at 321; Benjamin Cooper, "An Uncertain Privilege: Reexamining *Garner v Wolfinbarger* and Its Effect on Attorney-Client Privilege Note" (2014) 35(3) Cardozo L Rev 1217 at 1245 (Cooper's reasoning is, however, completely irrelevant to Singapore, as it relates to duties not recognised here). Contrast Bryson P Burnham, "The Attorney-Client Privilege in the Corporate Arena" (1969) 24(3) Bus Law 901 at 910; Stephen A Saltzburg, "Corporate Attorney-Client Privilege in Shareholder Litigation and Similar Cases: *Garner* Revisited" (1984) 12(4) Hofstra L Rev 817 at 840; and John Gergacz, *Attorney-Corporate Client Privilege* (Clark Boardman Callaghan, 3rd Ed, 2019) at section 6:16.

188 Companies Act (Cap 50, 2006 Rev Ed) s 216A(2); Companies Act 2006 (c 46) (UK) s 261(1). The need for permission also applies to a common law derivative action: Margaret Chew, *Minority Shareholders' Rights and Remedies* (Singapore: LexisNexis, 3rd Ed, 2017) at paras 3.012–3.015. The mechanics of US law on this front is quite different but serves the same purpose; see Jack P Friedman, "Is the *Garner* Qualification of the Corporate Attorney-Client Privilege Viable after *Jaffee*

(cont'd on the next page)

95 There is general agreement amongst academics that shareholders should have access to the company's privileged materials at the second stage. This is because the shareholders would be acting as the representatives of the company for the action, and it does not make sense for the company's privileged materials to be effectively denied to itself.[189] Consequently, disclosure at the second stage has got nothing to do with joint interest. The inquiry at that stage is who represents the company, and not who has a joint interest with the company.

96 However, there are no special considerations applicable to the first stage which supports disclosure to shareholders. At the permission stage, it is impossible to tell if the derivative action will be in the interests of the company. The litigating shareholders are ultimately self-appointed, and primarily concerned with their own interests.[190] That derivative actions involve a two-stage process is in itself a recognition that while some shareholders do have a legitimate grievance, others harass the directors in an unreasonable manner for private benefit.[191] To allow access to privileged materials at the first stage would give shareholders acting in bad faith a powerful new weapon.

(3) Equality of arms, and use of company's funds to advance majority's position

97 Loughrey has argued that the principle of equality of arms codified under r 1.1(2)(a) of the CPR, and the right to a fair trial under

v Redmond?" (1999) 55(1) Bus Law 243 at 274–278; and Carsten Gerner-Beuerle & Michael Anderson Schilling, *Comparative Company Law* (Oxford: Oxford University Press, 2019) at pp 703–704.

189 Say Hak Goo, *Minority Shareholders' Protection* (London: Cavendish Publishing, 1994) at p 114, fn 67; Joan Loughrey, "Privileged Litigants: Shareholder Rights, Information Disclosure and Corporate Privilege" [2007] JBL 778 at 797–799; David Chivers QC *et al*, *The Law of Majority Shareholder Power: Use and Abuse* (Oxford: Oxford University Press, 2nd Ed, 2017) at paras 10.78–10.79 (strangely, authorities concerning joint interest privilege between companies and their shareholders were cited, which involve very different reasoning). See also, in relation to US law, Jack P Friedman, "Is the Garner Qualification of the Corporate Attorney-Client Privilege Viable After Jaffee v Redmond?" (1999) 55(1) Bus Law 243 at 278–280.

190 Bryson P Burnham, "The Attorney-Client Privilege in the Corporate Arena" (1969) 24(3) Bus Law 901 at 910; John Gergacz, *Attorney-Corporate Client Privilege* (Clark Boardman Callaghan, 3rd Ed, 2019) at section 6:16.

191 *Pang Yong Hock v PKS Contracts Services Pte Ltd* [2004] 3 SLR(R) 1 at [19]; Margaret Chew, *Minority Shareholders' Rights and Remedies* (Singapore: LexisNexis, 3rd Ed, 2017) at para 6.053; Carsten Gerner-Beuerle & Michael Anderson Schilling, *Comparative Company Law* (Oxford: Oxford University Press, 2019) at p 703.

Art 6 of the European Convention of Human Rights,[192] justify disclosure to shareholders under English law.[193] The argument is that shareholder actions are in reality disputes between the shareholders which do not involve the company. In such scenarios, allowing the majority shareholders access to the company's privileged documents by virtue of their control of the board, and denying the same to the minority shareholders, creates an unfair advantage in favour of the majority. Of course, neither the CPR nor the European Convention of Human Rights applies to Singapore,[194] but in so far as policy is concerned there is no reason why fairness cannot be considered.

98 To discuss fairness in this context, it is necessary to divide the company's privileged materials into those covered by legal advice privilege only, and materials covered by litigation privilege. For shareholder actions, the former normally relates to the planning of the challenged transaction, focusing on whether it should be, and how it can be, carried out. They are not privileged against shareholders under current English law.[195] The latter would typically focus on how the challenged transaction can be justified in litigation. Such advice is privileged against shareholders unless the company is a nominal party.[196]

99 It is easier to start with materials covered by litigation privilege. In shareholder actions, a key concern is that majority shareholders (and any non-independent directors acting in concert) should not be allowed to use their control of the company to advantage themselves in the litigation, such as by causing the company to actively oppose the action and fund such opposition. This would be unfair to the minority shareholders, both in terms of the amount of funding available to each side, as well as the fact that the value of the minority's shares would be diminished to fund an action opposing them.

100 Viewed in this light, disclosure to shareholders can be viewed as part of a two-pronged approach to prevent the majority from abusing their control of the company. The first prong is the rule against company

192 Convention for the Protection of Human Rights and Fundamental Freedoms (Eur TS No 5, 312 UNTS 221, 1953 UKTS No 71) (4 November 1950; entered into force 3 September 1953).

193 Joan Loughrey, "Privileged Litigants: Shareholder Rights, Information Disclosure and Corporate Privilege" [2007] JBL 778 at 795–797.

194 See *Lau Hwee Beng v Ong Teck Ghee* [2007] SGHC 90 at [26]–[27], noting that the Rules of Court (Cap 322, R 5, 2014 Rev Ed) does not set out its governing philosophy in the same way as the UK Civil Procedure Rules 1998 (SI 1998 No 3132), but the same principles may nonetheless apply to particular provisions.

195 See para 16 above.

196 See paras 16 and 22 *ff* above.

participation of shareholder disputes.[197] The second prong is that the minority can then compel disclosure of any privileged material obtained through company funding. These two rules prevent the majority from gaining any advantage in the litigation through use of company funds.[198]

101 The problem, however, is that the second prong involving disclosure is unnecessary for this purpose. If the majority paid for the advice, there would be no objection towards it being privileged, and so the appropriate remedy should be for the costs to be refunded by the majority to the company. This could be achieved in an oppression or derivative action.[199] Consequently, the advice would eventually be paid for by the majority, and the majority should not be denied from asserting privilege to their advice.

102 As for materials covered by legal advice privilege only, payment by the company is legitimate since it helps the company to decide whether and how to proceed. However, if a shareholder dispute which does not concern the company subsequently arises, arguably the majority should not be able to control the company's privilege with respect to the earlier advice, asserting and waiving it as they deem fit. Otherwise, the company's privilege will end up as a majority tool. Since neither the minority nor the majority can be assumed to be acting for the interests of the company,[200] arguably the fairest outcome would be for the advice to be disclosed to both sides.

103 While there is some force to this argument, it seems insufficient to overcome the policy underlying the privilege. As discussed earlier,[201] if directors realise that their communications with legal advisers may be disclosed subsequently, a full and frank discussion would not occur in the first place. Disclosure would therefore serve little purpose, and the company may suffer as a result. The unfairness of the company's privilege being used as a majority tool would, on this view, be a necessary evil.

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197 See para 30 above.

198 David Chivers QC *et al*, *The Law of Majority Shareholder Power: Use and Abuse* (Oxford: Oxford University Press, 2nd Ed, 2017) at paras 9.76–9.80.

199 *Re a company (No 004502 of 1988), ex parte Johnson* [1992] BCLC 701 at 703 and 706–707. Another way to remedy the injustice is to take the expenditure into account when crafting the buy-out order granted as relief for oppression, which was sought in *Arrow Trading & Investments Est 1920 v Edwardian Group Ltd* [2004] BCC 955 at [15], *per* Blackburne J.

200 This issue was alluded to in the context of US derivative actions in Bryson P Burnham, "The Attorney-Client Privilege in the Corporate Arena" (1969) 24(3) Bus Law 901 at 910–911. Burnham suggested that a neutral party, such as an independent director, should decide on the assertion of privilege. However, that option may not always be available.

201 See para 91 above.

VI. Conclusion

104 Joint interest relationships, being an exception to the fundamental right of legal professional privilege, give rise to many interesting issues that have yet to be fully explored in Singapore or even England. Other than the uncertainty of the underlying principle discussed earlier,[202] some remaining issues include whether the trust beneficiaries' right to disclosure is a question of joint interest at all;[203] whether director-company joint interest relationships are better characterised as implied joint retainer relationships;[204] the extent to which source of funds for the advice is relevant once a joint interest relationship has been identified;[205] and so on.

105 However, what is hopefully clear from the discussion above is that 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 for joint interest make sense. With respect to policy, allowing disclosure of privileged materials would deter frank discussion between directors and the company's solicitors, and the disclosed material would ultimately be of little assistance. The policy underlying legal advice privilege would be undermined.

106 That said, the wide-ranging views of courts and academics are perhaps an indication that there is no obviously correct answer on this front.[206] Leaving aside the potentially thorny issue of the EA,[207] Singapore courts are uninhibited by binding precedent on this front. A local court faced with a company's assertion of privilege against its shareholders is free to choose from the English, US and Canadian approaches, or even

202 See para 52 *ff* above.

203 Colin Passmore, *Privilege* (London: Sweet & Maxwell, 4th Ed, 2020) at paras 6-022–6-030; Kevin O'Loughlin, "It's a Privilege" (2015) 21(4) *Trusts & Trustees* 358.

204 Paul Matthews & Hodge M Malek QC, *Disclosure* (London: Sweet & Maxwell, 5th Ed, 2017) at para 11.90.

205 Colin Passmore, *Privilege* (London: Sweet & Maxwell, 4th Ed, 2020) at paras 6-069–6-074.

206 Andrew Higgins, *Legal Professional Privilege for Corporations: A Guide to Four Major Common Law Jurisdictions* (Oxford: Oxford University Press, 2014) at para 6.87 (supporting the US approach); Charles Hollander QC, *Documentary Evidence* (London: Sweet & Maxwell, 13th Ed, 2018) at para 5-04 (supporting the Canadian approach); Joan Loughrey, "Privileged Litigants: Shareholder Rights, Information Disclosure and Corporate Privilege" [2007] JBL 778 (supporting a modified version of the English approach).

207 See paras 70–73 above.

strike out its own path by modifying them. The local developments in this area would be interesting to watch.