

NAVIGATING THE MAZE OF SHAREHOLDER PRIVILEGE: A RECENT RULING AND ITS IMPLICATIONS

Background

In a recent judgment, the High Court dismissed an application brought by shareholders seeking access to certain documents that a company had withheld from disclosure on the grounds of privilege.

The judgment arose following the third case management conference in *Various Claimants and G4S Limited (formerly G4S PLC)* [2023] EWHC 2863 (Ch) which took place on 8 November 2023. This is a claim in which institutional shareholders in G4S Limited (formerly G4S PLC) ("**G4S**") brought a claim under s.90A and s.10A of the Financial Services and Markets Act 2000 ("**FSMA**"), through which the public companies can be forced to pay compensation to shareholders who have suffered a loss as a result of misleading statements or dishonest omissions in the company's published information, or a dishonest delay in publishing such information.

The Claimant shareholders argued that, in light of the "**Shareholder Principle**" (as described below), G4S should not be allowed to withhold certain privileged documents from disclosure.

What is the Shareholder Principle?

The Shareholder Principle is a legal doctrine under which a company cannot assert privilege against its own shareholders, unless the relevant documents came into existence for the dominant purpose of actual or threatened proceedings between the company and its shareholders. This principle was previously recognised in *Sharp v Blank* [2015] EWHC 2681.

In *Sharp v Blank*, Mr Justice Nugee (as he then was) concluded that legal advice taken by the directors of a company should be treated as part of the administration of the company for the benefit of its shareholders, by analogy to the position as between trustees and beneficiaries of a trust. The shareholders, therefore, should not be prevented from seeing such advice which was obtained at their expense and for their benefit.

In G4S, Counsel for G4S noted the "*somewhat shaky foundation*" of the Shareholder Principle. The Court in G4S did not consider the trustee-beneficiary analogy to be a strong one. However, Mr Justice Michael Green concluded that it was not for him to decide on the validity of the Shareholder Principle.

Rather than deciding whether the Shareholder Principle exists, Mr Justice Michael Green considered the types of privilege to which it attaches and to whom the Shareholder Principle should apply.

What types of privilege does the Shareholder Principle attach to?

The Court in G4S held that documents subject to legal advice privilege or litigation privilege may become disclosable to shareholders under the Shareholder Principle. However, Mr Justice Michael Green held that the Shareholder Principle should not extend to 'without prejudice' privilege, due to the involvement of a third party (i.e. the party with whom the company was discussing a potential resolution of a dispute or investigation).

To whom does the Shareholder Principle apply?

Mr Justice Michael Green found that the Shareholder Principle should only apply to those shareholders who were direct registered shareholders of the relevant company at the time the documents came into existence. In the G4S case, the majority of the Claimants were not registered shareholders, but were said to be the ultimate beneficial owners of G4S' shares through CREST, and therefore the Shareholder Principle did not apply to them. The Shareholder Principle was only applied to three Claimants who were direct registered shareholders of G4S.

The Court's reasoning for this was as follows:

1. It was assumed in *Sharp v Blank* that the Shareholder Principle exists, but there was no attention given in that decision as to how far the principle should extend.
2. The Shareholder Principle itself is "*shaky*" and it would be inappropriate to expand the scope of a "*shaky*" principle.
3. Privilege is a fundamental right. It is safer not to override the right to privilege unless the Court is bound to do so.

Further, the Court in G4S held that each shareholder would be entitled to different documents (as they were shareholders at different times during the relevant period). Mr Justice Michael Green concluded that this would result in a near impossible position for the Claimants' lawyers in G4S, in terms of maintaining confidentiality and privilege of documents when using the documents for the benefit of some Claimants and not others.

The Judgment

The Claimants' application was dismissed on case management grounds on the basis that it would not be "*reasonable or proportionate*"¹ to order disclosure at such a late stage in proceedings (less than three months before trial was due to begin) and given the practical difficulties described above (particularly where the Claimants all had the same solicitors and counsel).

Comment

As matters stand, under *Sharp v Blank*, companies may be unable to assert privilege against their own shareholders in shareholder claims, where the claim to privilege is based upon litigation or legal advice privilege. However, the Shareholder Principle has received very little scrutiny in light of the modern relationship between shareholders and companies (in particular in relation to publicly listed companies). The idea that thousands of shareholders could access the privileged confidential information of a company, while holding

¹ PD 57AB, Paragraph 17.B

perhaps a single share in the company, has very significant ramifications in an environment where shareholder litigation, particularly 'stock-drop' cases such as the G4S case, are becoming more common in the English Courts. If shareholder claimants attempt to compel the disclosure and production of privileged documents in future, this issue appears set for determination by an appellate court. We understand that no appeal has been lodged in relation to the G4S decision.

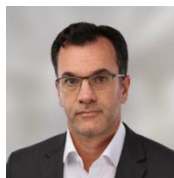
Clifford Chance and Group Litigation

Clifford Chance has a market-leading practice specialising in defending companies and individuals in class actions and group litigation around the world. We have significant experience in defending clients facing group litigation. In recent years, we have been instructed on a number of high-profile claims in the UK. This experience includes acting for corporate and financial institutions across a variety of sectors. We understand the strategic considerations of defending group litigation, including the roles of claims managers, third party litigation funders and after-the-event insurers. Where cases go to trial, we bring to bear our market-leading trial practice and deliver results for our clients. To find out more about Clifford Chance's global Group Litigation and Class Actions offering, please visit our dedicated page.

CONTACTS



Luke Tolaini
Partner
London
T: +44 207006 4666
E: Luke.Tolaini@cliffordchance.com



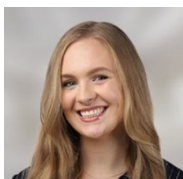
Kelwin Nicholls
Partner
London
T: +44 207006 4879
E: Kelwin.Nicholls@cliffordchance.com



Lydia Tuckey
Senior Associate
London
T: +44 207006 2270
E: Lydia.Tuckey@cliffordchance.com



Roy Appiah
Senior Associate
London
T: +44 207006 3819
E: Roy.Appiah@cliffordchance.com



Ella Fellows Moore
Trainee Solicitor
London
T: +44 207006 1452
E: Ella.Fellows-Moore@cliffordchance.com

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

www.cliffordchance.com

Clifford Chance, 10 Upper Bank Street,
London, E14 5JJ

© Clifford Chance 2023

Clifford Chance LLP is a limited liability partnership registered in England and Wales under number OC323571

Registered office: 10 Upper Bank Street,
London, E14 5JJ

We use the word 'partner' to refer to a member of Clifford Chance LLP, or an employee or consultant with equivalent standing and qualifications

If you do not wish to receive further information from Clifford Chance about events or legal developments which we believe may be of interest to you, please either send an email to nomorecontact@cliffordchance.com or by post at Clifford Chance LLP, 10 Upper Bank Street, Canary Wharf, London E14 5JJ

Abu Dhabi • Amsterdam • Barcelona • Beijing • Brussels • Bucharest • Casablanca • Delhi • Dubai • Düsseldorf • Frankfurt • Hong Kong • Houston • Istanbul • London • Luxembourg • Madrid • Milan • Munich • Newcastle • New York • Paris • Perth • Prague • Riyadh • Rome • São Paulo • Shanghai • Singapore • Sydney • Tokyo • Warsaw • Washington, D.C.

AS&H Clifford Chance, a joint venture entered into by Clifford Chance LLP.

Clifford Chance has a best friends relationship with Redcliffe Partners in Ukraine.