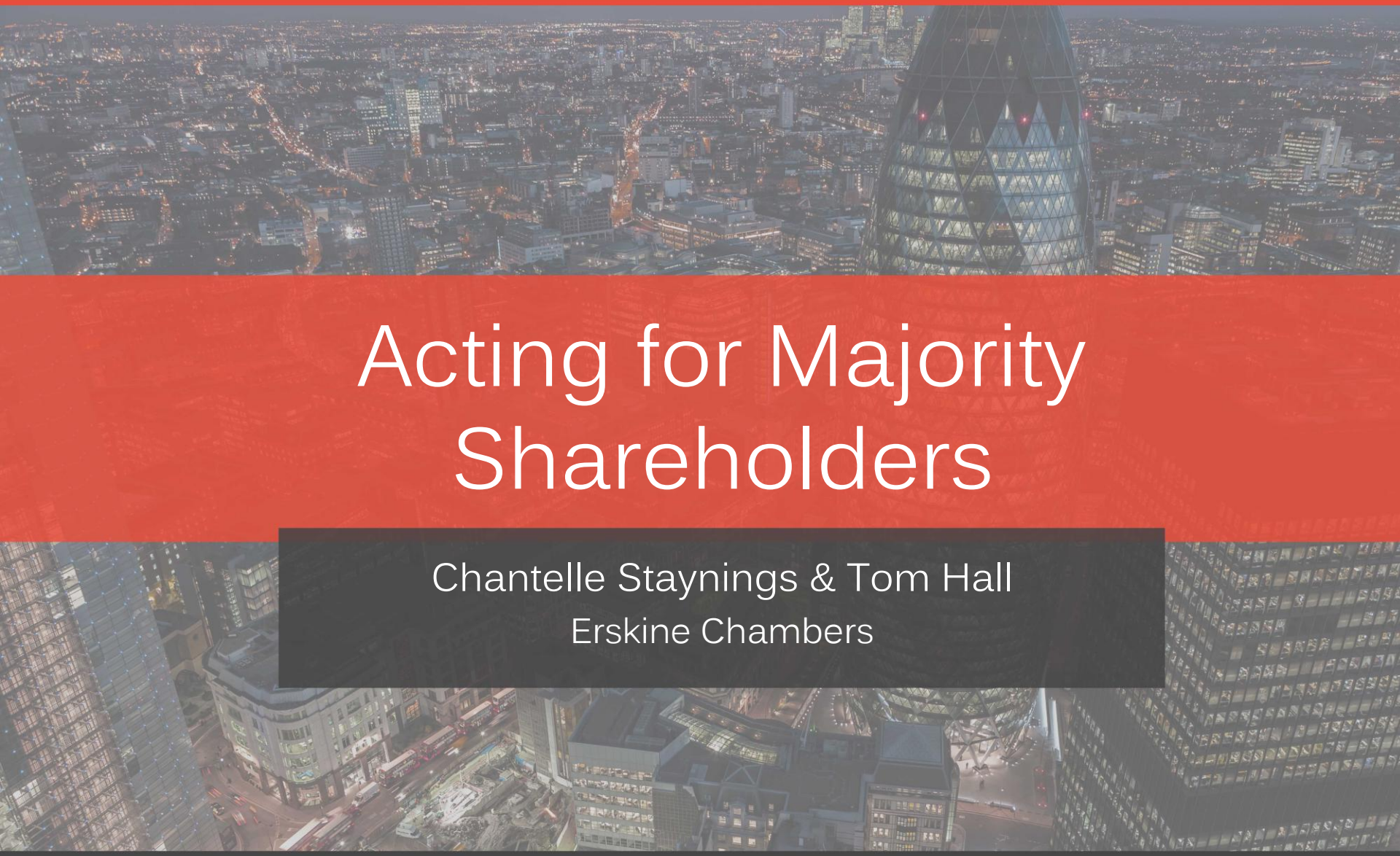
ERSKINE CHAMBERS



# Acting for Majority Shareholders

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Erskine Chambers

# 1. Nominee Directors

- Duties owed to company, not to shareholder (or group)
- Considerable scope to authorise conflicts
  - Resolutions: s. 180(4)
  - Pre-authorisation in articles
  - Unfair prejudice disputes rarely turn on s. 175
- But core duty of loyalty remains
- Risk of nominator being a shadow director

# 2. Acting for a proper purpose

- Particular risk for nominee directors or majority shareholder-directors
- Common pitfall areas:
  - Rights issues
  - Registration of share transfers
  - Response to requisitions
  - Dividends

# 3. Limits on the power to alter articles (1/2)

- General power to amend articles by special resolution: s. 21
- *Allen v Gold Reefs of West Africa Limited* [1900] 1 Ch 656
- Lindley MR laid down basic test of validity for amendments to a company's articles.
  - Introduction of lien on fully paid shares (only 1 holder)
- Whilst the statutory power to alter a company's articles is wide:
  - *". .. the power . . . must, like all other powers, be exercised subject to those principles of law and equity which are applicable to all powers conferred on majorities and enabling them to bind minorities. It must be exercised, not only in the manner required by law, but also bona fide for the benefit of the company as a whole, and it must not be exceeded."*

# 3. Limits on the power to alter articles (2/2)

- Whether amendment is *"bona fide for the benefit of the company as a whole"* is a subjective test
- Not for courts to determine whether amendment is for benefit of company, but for shareholders: *Re Charterhouse Capital Ltd* [2015] EWCA Civ 536
- Outer limit: if amendment so oppressive or extravagant no reasonable person would consider it for benefit of company: *Re Charterhouse Capital*
- For claimant to satisfy court – can be difficult to prove

# 4. Drag rights

- Possibility of unfair prejudice petition / invalidity / injunction
- Difficult to challenge if included from outset or if only streamlining or "tidying up" process (i.e. part of overall commercial bargain): *Charterhouse Capital*
- May also be valid even if beyond "tidying up" if makes company more attractive to investors
- More difficulty if introducing new provisions
  - Directors' duties engaged (can avoid by s. 303 requisition)
  - Term of takeover offer?

# 5. Expropriating minorities

- Introducing a drag right to expropriate minority particular risk (though still need to look at purpose / benefit to company)
- Other methods (with varying degrees of risk):
  - Rights issues
  - Lien / forfeiture provisions in articles
  - Good / Bad Leaver provisions
  - Deemed transfer notices
  - Statutory squeeze-out

# 6. Responding to unfair prejudice petitions (1/2)

- Section 994 CA 2006
- Can present opportunity for majority
  - Normal relief is buyout order on fair terms
  - Can enable majority to get rid of minority
  - But some risks involved, eg personal liability of directors; minority seeking different relief
- Consider early ADR:
  - Narrowing
  - Mediation
  - Tactical offers

# 6. Responding to unfair prejudice petitions (2/2)

- Generally, company is nominal respondent
- Company should only incur costs where "*necessary or expedient in the interests of the company as a whole*" (Re a Company (No. 001126 of 1992) [1994] 2 BCLC 146):
  - Giving disclosure
  - Submissions on form of relief / position of independent shareholders
- Directors should not use funds or assets of company to assist one group of members over another (or breach of duty / injunction)

# 7. O'Neill v Phillips offers (1/2)

- *O'Neill v Phillips* [1999] 1 WLR 1092 (HL) per Lord Hoffmann
  - Generally first thing to consider if acting for majority
  - Can found early strike out application
- Difficult if financial misconduct alleged / complex adjustments sought
- Success of offer depends on what relief is being sought:
  - Ordinary purchase order: court only concerned with whether offered terms are fair and give petitioner all could reasonably expect at trial
  - Wider relief (e.g. reverse buyout / directions relating to company): court will consider whether any realistic prospect of obtaining that relief. May be more complicated to strike out

# 7. O'Neill v Phillips offers (2/2)

- What should *O'Neill v Phillips* offer contain?
  - Company valued as a whole on basis of notional arm's-length sale of entire issued share capital to third party; generally no minority discount;
  - Fair date (normally as at date of valuation unless P seeks earlier valuation, in which case could offer election);
  - Independent expert, generally with costs borne equally;
  - Equality of arms in relation to information;
  - Proper opportunity for submissions to expert (often reply);
  - Offer to pay minority's legal costs on standard basis (unless at very early stage, or could leave issue to court);
  - Give minority all that could reasonably expect at trial.

# 8. Shareholder access to legal advice

- Company can now assert privilege against shareholder:
  - *Jardine Strategic Ltd v Oasis Investments II Master Funds Ltd & Ors No 2* (Bermuda) 2025 UKPC 34
  - *Aabar Holdings SARL v Glencore Plc* [2024] EWHC 3046 (Comm).
- Some uncertainties remain:
  - Quasi-partnership companies?
  - Document access rights under SHA?
- Potential advantages to tactical waiver

# 9. Derivative claims

- Understand your client (company / individual directors)
- Know when the Company should participate:
  - Not normally at phase 1: PD19A ¶2
  - Exceptions: *ClientEarth v Shell* [2023] EWHC 1897 (Ch)
- Costs indemnity
- Multiple/trust derivative claims: potential exposure to indirect/beneficial owners

# 10. Practical advice on minimising risks

- Be clear on who the client is (and who is paying for legal advice) at the outset
- Can you avoid board decision by requisitioning meeting under s. 303?
- Consider setting up sub-committee of board to consider certain issues (e.g. if directors might have conflict of interest, or if taking advice on claims involving particular directors)
- Consider extent to which board discussions and decisions should be documented (bearing in mind possible disclosure)
- Be aware that minority shareholders might obtain any legal advice
- Consider instructing separate solicitors for company if it will be actively participating in proceedings (e.g. in disclosure or if it is facing separate contractual claims). Solicitors will need to be properly authorized by majority of board

# Q&A?

- Over to you!

# Chantelle Staynings

Chantelle's main area of practice is company law, restructuring and corporate insolvency. She has a strong corporate advisory practice and regularly advises public and private companies on company law issues, including share buybacks, distributions, directors' duties and shareholder matters. She is regularly instructed on capital reductions, schemes of arrangement and numerous Companies Act applications.

Chantelle has appeared in the Supreme Court and Court of Appeal. Her litigation practice involves frequent instructions as sole advocate in the Companies Court and High Court, including in a large number of shareholder disputes, breach of duty claims, arbitrations and contentious insolvency applications.

# Tom Hall

Tom has a busy company and insolvency law practice. He is regularly led in substantial corporate disputes in this jurisdiction and offshore and is currently instructed by officeholders in high-profile insolvency processes in London and Bermuda.

Tom's unled High Court practice includes Commercial Court warranty litigation and several sets of unfair prejudice proceedings. He has developed particular expertise in shareholder disputes, frequently involving complex valuation questions and serious allegations.