RESISTING JUST AND EQUITABLE WINDING UP ON BASIS OF ADEQUATE ALTERNATIVE REMEDIES

(A) Introduction

At least since 1889,[1] the Singapore courts have had the power to wind up a company on the ground that it is just and equitable to do so. However, for over a century, there was uncertainty whether the Singapore courts would wind up a company on the just and equitable ground (assuming a case had been made out), where there exists another remedy which the petitioner (for the winding up) should reasonably have pursued instead of winding up.

One view is that the court has a discretion whether or not to order a winding up, where suitable alternative remedies exist. An opposing view is that where a case has been made out for the winding up of the company on the just and equitable ground, it should not matter that the petitioner has an alternative remedy. In other words, if the petitioner has made out his case for winding up, the remedy of winding up should *ipso facto* follow.

In the 1990s, or more than a century later, there has been three cases (2 from Singapore and the other from Malaysia) which, at first sight, suggest that the court has no discretion to refuse winding up, merely because there exists a suitable alternative remedy which the petitioner has refused to pursue. These cases are *Tang Choon Keng Realty (Pte) Ltd and others* v *Tang Wee Cheng*[2] ("*Tang Choon Keng*"), *Chong Choon Chai and Anor* v *Tan Gee Cheng and Anor*[3] ("*Chong Choon Chai*"), and *Tien Ik Enterprises Sdn Bhd and others* v *Woodsville Sdn Bhd*[4] ("*Tien Ik*").

It is, however, submitted for the reasons given in this Paper that the better view is, as far as Singapore is concerned, that it remains open to the local courts to consider the existence of an alternative remedy at the hearing on the merits (i.e. at trial) of a just and equitable petition. Next, this Paper shall consider the juridical basis for allowing a Singapore court

1 In 1889, the Companies Ordinance (Ordinance V of 1889) was enacted in the Straits Settlement (of which the then Colony of Singapore was a part of) to replace the Indian Companies Act 1866 and Imperial Acts relating to Joint Stock Companies as may have been extended to apply in Singapore by virtue of the Civil Law Ordinance 1878. The Companies Ordinance 1889, through a colourful history, is the predecessor of the current Companies Act. Section 131(e) of the Companies Ordinance 1889 provided for the court to wind up a company where it is "just and equitable" to do so. Section 254(1)(i) of the current Companies Act preserves the availability of the "just and equitable" ground for winding up.

2 [1992] 2 SLR 1114.

3 [1993] 3 SLR 1.

4 [1995] 1 MLJ 769.

to take into account alternative remedies. Finally, this Paper considers some issues relating to the manner in which a Singapore court will evaluate the suitability of alternative remedies.

(B) The trilogy of cases

The first in time of these cases is *Tang Choon Keng*.[5] In *Tang Choon Keng*,[6] disputes arose between shareholders (who were also directors) of a company. One of the shareholders, P, then threatened to present both a winding petition on the just and equitable ground ("just and equitable petition") and a petition under s216 of the Companies Act ("s216 application").[7] The opposing shareholders, O, then applied for and obtained *ex parte* an injunction to restraint P from presenting the petitions. P, thereafter, applied to set aside the injunction. The injunction was set aside by Chan Sek Keong J. (as he then was).

In arriving at his decision, Chan J. noted that the basis for the grant of the interim injunction to prevent a litigant from pursuing his statutory remedies (and in particular, a just and equitable petition) was to prevent an abuse of process.[8] A litigant should, however, not be restrained from exercising them, except on clear and persuasive grounds.[9] In other words, a litigant should only be restrained where the pursuit of the statutory remedies is bound to fail.[10]

On the facts, Chan J. held that a case had not been made out that the winding up petition and the s 216 application were bound to fail. More important, for the purposes of this Paper, Chan J. held that "*the law in Singapore is that* ***a member's right to present a winding-up petition against his company cannot be restrained even if his complaint is sufficient to found another action for which another remedy is available.*** *so long as the complaint, if substantiated, is also a sufficient ground to wind up the company.*"[11] (emphasis added)

5 *Supra*, n. 2.
6 *Supra*, n. 2.
7 Under Ord. 88 r 2(2)(c) of the Rules of Court, an application under section 216 of the Companies Act is to be by way of Originating Summons.
Section 216 in essence confers on members of the company a statutory remedy where it can be shown that the acts of the company, or those in control of the company, have been conducted in an oppressive manner, in disregard of members' rights, and in a discriminatory or otherwise prejudicial manner. Where a case is made out under the section, the court has wide powers to put an end to the matters complained of.
8 *Supra*, n. 2, at 1124 I, 1125G, 11271, and 1128E, citing Bryanston Finance Ltd v de Vries (No. 2) [1976] Ch. 63.
9 *Supra*, n. 2, at 11271 to 1128A, and 1131B.
10 *Supra*, n. 2, at 1131B.
11 *Supra*, n. 2, at 1137B-C.

In reaching the decision on this point, Chan J. distinguished several English[12] and Australian[13] authorities which supported the view that the court could take into consideration the existence of suitable alternative remedies, in refusing to wind up a company on a just and equitable petition.

In this respect, Chan J. noted that both England and Australia had statutory provisions which entitled the court to refuse to wind up a company, where suitable alternative remedies should reasonably have been pursued.[14] For instance, section 225(2)(b) of the UK Companies Act 1948 (which was considered by Chan J.) provided that, "*Where the [winding up] petition is presented by members of the company as contributors on the ground that it is just and equitable that the company should be wound up, the court if it is of the opinion……that…. it would be just and equitable that the company should be wound up ...., shall make a winding up order, unless it is also of the opinion both that some other remedy is available to the petitioners and that they are acting unreasonably in seeking to have the company wound up instead of pursuing that other remedy.*"[15]

Similar provisions exist in Australia.[16]

The absence of such provisions under the Singapore Companies Act prompted Chan J. to hold that the position in Singapore was different, in that under Singapore law, the courts were not obliged to consider the existence of alternative remedies.[17]

The second case is *Chong Choon Chai*.[18] In that case, an application was brought to strike out a just and equitable petition *inter alia* on the basis there were "suitable alternative remedies" which should be pursued. The Court of Appeal understood that by the use of the term "suitable alternative remedies", the applicants meant the reliefs under s216 of the Companies Act. However, as no arguments were addressed to the court on the issue, the court merely said, "*Suffice it here to say that* ***the mere existence of a suitable alternative*** *remedy as provided in s 216* ***is not a***

12 *Charles Forte Investments Ltd* v *Amanda* [1964] Ch. 240 ("*Charles Forte*").

13 *Fortuna Holdings Pty Ltd* v *Deputy Commissioner of Taxation* (1976) 2 ACLR 349, and *Mincom Pty Ltd* v *Murphy* [1983] ACLC 749.

14 *Supra*, n.2, at 1135 to 1137B.

15 This provision is now found in section 125(2) of the UK Insolvency Act 1986.

16 The current Australian provision which permits an Australian court to consider alternative remedies is section 367(4) of the Australian Corporations Law.

17 *Supra*, n. 2, at 1135 to 1137. In addition, Chan J. held that a section 216 application was different from a just and equitable petition, with the consequence that it could not be said at the interlocutory stage that a action 216 application necessarily provided an adequate alternative remedy to a just and equitable petition.

18 *Supra*, n 3.

good ground for striking out a winding up petition *which on the face thereof is founded on substantial grounds.*"[19] No reference was made to *Tang Choon Keng*[20] in the decision of the Court of Appeal.

The Malaysians have gone further.[21] The Malaysian Supreme Court, in the case of *Tien Ik Enterprises Sdn Bhd and others* v *Woodsville Sdn Bhd*[22] ("*Tien Ik*"), has held that it is not obligatory for a court to consider the existence of an alternative remedy at the trial stage of a just and equitable petition. In arriving at its decision, the Supreme Court approved of and followed the decision of Chan J in *Tang Choon Keng.*[23]

(C) Neither *Chong Choon Chai*[24] nor *Tang Choon Keng*[25] prevents the consideration by the Singapore courts of alternative remedies during the hearing on the merits of a just and equitable petition

Both *Chong Choon Chai*[26] and *Tang Choon Keng*[27] involved interlocutory hearings to *inter alia* strike out, and to prevent the presentation, respectively, of a just and equitable petition. As such, any suggestion in those cases in respect of the proper treatment of alternative remedies at the trial stage of a just and equitable petition, is at best *obiter dicta.* In this respect, there is a significant difference when considering the question of reasonableness of pursuing suitable alternative remedies, as between the trial stage and the interlocutory stage.[28] In addition, the comments of

19 *Supra*, n 3, at 7 D–E.
20 *Supra*, n 2.
21 Section 218 (1) (i) of the Malaysian Companies Act 1965 similarly gives the Malaysian court the discretion whether or not to wind up a company on the ground that it is just and equitable to do so.
22 [1995] 1 MLJ 769. There are two subsequent Malaysian cases decided after *Tien Ik*, where a just and equitable petition and an application pursuant to the Malaysian equivalent of s216, were taken out concurrently. In the first case, *Lyn Country Sdn Bhd* v *EIC Clothing Sdn Bhd & Anor* [1997] 4 MLJ 198, Kamalanathan J.C. (sitting in the High Court of Malaya in Kuala Lumpur) held that it was not an abuse of process to present the processes concurrently. In *Eddie Lee Kim Tak* v *JK Development Sdn Bhd & Ors* [1997] CLJ 894, Abdul Aziz Mohammed J. (also sitting in High Court of Malaya in Kuala Lumpur) declined to follow Kamalanathan J.C.'s decision. Abdul J. held that where a statute (in this case the Malaysian Companies Act 1965) provided for two or more causes of action, the actions could only be pursued for *bona fide* reasons and for a *bona fide* purpose. However, in neither of the cases was the decision of the Malaysian Supreme Court in *Tien Ik*, or *Tang Choon Keng*, *supra* n.2 (which was approved in *Tien Ik*), cited. Given that *Tien Ik* is a decision of a higher court, its decision is more likely to be reflective of the current state of Malaysian law.
23 *Supra*, n.2.
24 *Supra*, n. 3.
25 *Supra*, n. 2.
26 *Supra*, n.3.
27 *Supra*, n.2.
28 *Re A Company (No. 001363 of 1988)* [1989] BCLC 579. In that case, which involved an application to strike out a just and equitable petition, Warner J said at 586h:

the Court of Appeal in *Chong Choon Chai* were made without the benefit of arguments,[29] and hence would not constitute binding precedent.[30]

That having been said, the reasoning of Chan J. in *Tan Choon Keng*,[31] may have wider implications (beyond interlocutory proceedings) affecting the relevance of alternative remedies to a hearing on the merits of a just and equitable petition. The Malaysian court in *Tien Ik*,[32] for one, applied *Tang Choon Keng*[33] in reaching its decision on the merits.

(D) The courts have taken into consideration alternative remedies prior to the enactment of the English and Australian provisions

The underlying premise of the decision in *Tang Choon Keng*,[34] is that because Singapore does not have statutory provisions (as in England and Australia) which enables the court to take into account the existence of alternative remedies which the petitioner should reasonably have pursued, in deciding whether or not to wind up a company on the just and equitable ground, the position in Singapore is that their existence may not be taken into account.

It is the writers' views, however, that the introduction of the statutory provisions in England and Australia did not alter the law.

In *Charles Forte*,[35] Cross J. expressed the opinion that section 225(2) of the UK Companies Act did not alter the law.

Likewise in **McPherson, The Law of Company Liquidation,**[36] which was written from the Australian perspective, the author takes the view in respect of the Australian provision "*that it represents no more than a legislative expression of a principle which has always been recognized at general law.*"

Accordingly, it is submitted that the non existence of similar provisions in the Singapore Companies Act, does not preclude the Singapore courts from considering the alternative remedies.

"*True, at the hearing of the petition the judge may, on the full facts when they are found, hold that it would be unreasonable to grant him the remedy of a winding up and that he should pursue his remedy under s459 [similar to s216 of the local Companies Act], but it is a very strong thing to say, on an application to strike out, that it is plain and obvious that a petitioner is behaving unreasonably in seeking a winding up order.*"

29 *Supra*, n. 3, at 7 D–E.

30 *Precedent In English Law*, Cross & Harris, 4th Ed. (Clarendon, 1991) at 158 to 161.

31 *Supra*, n. 2, at 1135 to 1137.

32 *Supra*, n. 4, at 778G to 779E.

33 *Supra*, n. 2.

34 *Supra*, n. 2. See the discussion in Part B of this Paper.

35 *Supra*, n. 12, at 263.

36 J. O'Donovan, 3rd. Ed. (The Law Book Company Limited) at page 140.

If, however, the English and Australian provisions altered the law, it is submitted that the law was altered only to the extent of introducing the test of reasonableness as the criterion of determining the relevance of alternative remedies.[37] In this respect, there is some authority to suggest that the previous position in England was that the court would ordinarily not make a winding up order based on the "just and equitable" ground in cases where the petitioner had, or was thought to have, another remedy, and it did not matter that the alternative remedy was inadequate.[38] This is a far stricter approach as compared with the test of reasonableness.

This stricter approach does not detract from the fact that alternative remedies were previously considered (i.e. prior to the enactment of the statutory provisions in Australia and England) when hearing a just and equitable petition. The difference of opinion relates only to the degree to which alternative remedies provides a basis to resist a just and equitable petition, but this is a separate matter altogether.

Given that alternative remedies had been taken into account by courts prior to the enactment of the statutory provisions in Australia and England, and the views which have been expressed that these statutory provisions do not alter the law, the reasoning of Chan J. in *Tang Choon Keng*[39] insofar as it premised on the differences resulting from the absence

37 See e.g. the text of s225(2)(b) of the UK Companies Act 1948, quoted in the body of this Paper prior to *supra,* n.15.

38 See **Palmer, Company Law** Vol. 1 (Sweel & Maxwell) at paragraph 8.1008 citing *Re Professional etc. Building Society* [1871] 6 Ch App 856, **Buckley On The Companies Acts,** 12th Ed. (Butterworths) at page 478. For example, in *Re Kitson & Co Ltd* [1946] 1 All ER 435 (which was decided prior to the enactment of the relevant English statutory provisions), Lord Greene said (at 441F-G):

> "*It is to be remembered that the winding up procedure does not exist for the purpose of keeping boards of directors in order, or indeed of preventing them from misapplying the funds of the company. It may very well be (I express no opinion) that in cases where directors have complete control of the company and are impossible to control, those circumstances, coupled perhaps with others, may make it just and equitable for a company to be wound up, although in these days of minority actions it would not seem that winding up proceedings in order to prevent that kind of thing are likely to be so necessary as before minority actions became common. But, apart from that,* ***it seems to me that the winding up procedure ought to not to be used for regulating the internal affairs of the company. If directors are misbehaving themselves, there lies a remedy to the shareholders to stop it, and It would be quite wrong to my mind that the partnership between shareholders, so to speak, should be dissolved merely because the persons carrying on the business on behalf of the company, namely the directors, are misbehaving themselves. It is for the shareholders to stop them. They can get rid of the directors or stop them by means of an injunction if they are doing anything improper, and, therefore. I do not think it is putting it too high to say that in the ordinary way of things winding up is not the proper procedure for dealing with that type of situation."*** (emphasis added)

39 *Supra,* n. 2.

of the statutory provisions in Singapore, may have to be reconsidered.[40]

One final point worth noting is that the English authorities in respect of the applicable principles at the interlocutory stage is not necessarily inconsistent with *Chong Choon Chai*.[41] The position in England appears to be that the court will strike out a winding up petition on the basis of the existence of an adequate alternative remedy only in plain and obvious cases.[42] The Court of Appeal in *Chong Choon Chai*[43] did not exclude the possibility of striking out when it said, "*the **mere existence** of a suitable alternative remedy as provided in section 216 is not a good ground for striking out a winding up petition which on the face thereof is founded on substantial grounds.*" (emphasis added) The point to be made is then that the decision of the Court of Appeal leaves open the possibility that the availability of a section 216 remedy or any other alternative remedy, may then form the basis of striking out at the interlocutory stage in plain and obvious cases.

It is, however, not the intention of this article to consider the relevance of adequate alternative remedies at the interlocutory stage. The question of the proper approach at the interlocutory stage is, however, worth reconsidering in the future.

(E) Source of jurisdiction or right to consider alternative remedies

Assuming that alternative remedies may be taken into account, the issue which next arises is the source of the jurisdiction or right enabling the courts to take into account alternative remedies. One possible source is that it is intrinsic in the phrase "just and equitable" that the courts may consider the availability of alternative remedies. In this connection, the courts have in recent times given a broad interpretation to the phrase "just and equitable".[44] Thus, in *Ebrahimi*[45] Lord Wilberforce said that the "*general words [just and equitable] should remain general and not be reduced to the sum ofparticular instances.*" Given the broad interpretation, there is no reason why alternative remedies may not be part of the matters

40 It should be mentioned in passing that although *Charles Forte, supra,* n.12 (further discussed in the text to n.35), was referred to in *Tang Choon Keng, supra,* n.2, the argument that alternative remedies could and had always been taken into account prior to the enactment of the English and Australian statutory provisions, was not fully considered, if at all such an argument was made.

41 *Supra*, n. 3.

42 *Minority Shareholders' Rights*, Hollington, 2nd Ed. (Sweet & Maxwell), at paragraphs 3–034 to 3–037. See further *Re A Company (No 001363 of 1988)* [1989] BCLC 579, *supra,* n.28.

43 *Supra*, n.3, at 7E.

44 See e.g. *Ebrahimi* v *Westbourne Galleries* [1973] AC 360 ("Ebrahimi"), and *Tien Ik, Supra*, n. 4.

45 *Ibid*, at 374.

for consideration in determining what is just and equitable. Also, given that winding up is a drastic remedy, it may make little sense to an enquiry of what is just and equitable to exclude the consideration of alternative remedies.

That having been said, it should be pointed out that in *Tien Ik*,[46] the argument that the phrase "just and equitable" enabled the court to consider the availability of alternative remedies was glossed over. In doing so, the court in *Tien Ik*,[47] simply adopted the reasoning in *Tang Choon Keng*[48] without dealing directly with the argument whether the phrase "just and equitable" was wide enough. Given that *Tang Choon Keng*,[49] may have to be reconsidered, and the argument based on the scope of the phrase "just and equitable" had not been directly dealt with, *Tien Ik*[50] poses little problem to the view taken above as to the phrase being a possible source of the courts' right or jurisdiction to consider alternative remedies.

An alternative source for the discretion of the court is the use of the word "may" in s254(1).[51] In this respect, s254(1) of the Companies Act provides that "*The court **may**[52] order the winding up if* any of the grounds set out in 254(1) of the Companies Act itself is satisfied. The word "may" *prima facie* suggests that the court has a discretion as to whether to wind up a company.

However, in *Tang Choon Keng*,[53] Chan J. repeated the view which he took in *Re Chong Lee Leong Seng Co (Pte) Ltd*[54] that where the petitioner proves his case for a winding up, he is *ex debitio justitiae* entitled to a winding up order.

If Chan J. was suggesting that the court had no discretion but to wind up the company once a case was made out for winding up, this view is not universally shared. Other cases have taken the view that the court has a discretion in the matter.[55]

46 *Supra*, n. 4, at 778B.
47 *Supra*, n. 4.
48 *Supra*, n. 2.
49 *Supra*, n, 2.
50 *Supra*, n. 4.
51 Section 254(1) of the Companies Act provides that "*The court **may** order the winding up if*" (emphasis added) any of the grounds set out in 254(1) of the Companies Act itself is satisfied.
52 Emphasis added.
53 *Supra*, n. 2, at 1141C.
54 [1989] 3 MLJ 343.
55 See e.g. *Re Crigglestone Coal Co Ltd* [1906] Ch D 327, *Krextile Holdings Pty Ltd* v *Widdows* [1974] VR 689, *Kim Wah Theatre Sdn Bhd* v *Fahlum Development Sdn Bhd* [1990] 2 MLJ 511 and *Pilecon Engineering Bhd* v *Remaja Jaya Sdn Bhd* [1997] 1 MLJ 808.

It is more likely that Chan J's remarks meant no more than that, unlike a s216 application, the only remedy which a court could grant on a just and equitable petition, is a winding up order. In contrast, in the case of a s216 application, the court has a discretion as to the appropriate remedy. Such an understanding of Chan J's remarks is consistent with the context in which the learned judge stated his view (that the petitioner is *ex debititio justltiae* entitled to a winding up order) was made. In both *Tang Choon Keng*[56] and *Re Chong Lee Leong Seng Co (Pte) Ltd*,[57] the view was stated in the context of distinguishing winding up petitions from s216 applications.

If such is the proper understanding of Chan J's remarks, Chan J could not have been dealing with the issue of whether there is a discretion to wind up. The question of whether the court has a discretion to wind up is quite different from whether the court has the right to order remedies (other than winding up) on a winding up petition.

In the result, the discretion of the court whether to wind up a company is an alternative basis for the court to take into account the existence of suitable alternative remedies.

It would probably not matter in most cases whether the basis of the court's taking into account alternative remedies is the conferred by the width of the words "just and equitable" or the word "may" in s254(1) of the Companies Act, since in either case these words give the court wide latitude in determining the relevance of the alternative remedies available.

(F) Evaluation by court of availability of alternative remedies when hearing a just and equitable petition on the merits

Assuming the Singapore courts have the right to consider alternative remedies, it is worthwhile considering a few issues relating to the manner in which the Singapore courts should evaluate alternative remedies.

(1) *Reasonableness the main criterion of evaluating alternative remedies*

The extent to which reasonableness features in an evaluation of alternative remedies by a Singapore court depends in part on whether the English and Australian statutory provisions alter the law.

If the provisions do not alter the law, the approach which a Singapore court should take towards alternative remedies should be similar to that taken by its English and Australian counterparts. In these countries, the reasonableness of pursuing the alternative remedies is the main criterion

56 *Supra*, *n.* 2, at 1141C.
57 *Supra*, n. 54, Ihc H.

in determining the relevance of alternative remedies ("the reasonableness test").[58]

However, as seen above, there is a possibility the English and Australian provisions may have altered the law,[59] in that the law which existed prior to the enactment of these provisions was that the court would rarely wind up a company on the just and equitable ground where there was an alternative remedy and it did not matter that the alternative remedy was inadequate ("the availability test").

Which of these two tests would be adopted in Singapore is unclear. However, given the view by the Court of Appeal in *Chong Choon Chai*[60] that the mere existence of an alternative remedy is not in itself ground to prevent the presentation of a winding up petition, the reasonableness test is to be preferred as being more consistent with the decision of the Court of Appeal. In other words, if the applicable test is the availability test, mere availability of an alternative remedy would have been a strong ground for the court to refuse winding up, and therefore strike out the just and equitable petition. This was, however, not the case.

That having been said, the point was never argued in *Chong Choon Chai*,[61] with the consequence that the case provides only limited support in support of the former position. However, in addition to this limited support, it is the writers' views that the reasonableness test accords more with the phrase "just and equitable". It would be just and equitable that a petitioner be denied a winding up order where he unreasonably refuses to pursue viable alternative remedies. The mere availability of an alternative remedy, however, does not lead to the conclusion that a winding up order is not just and equitable; a result which follows from adopting the availability test.

(2) *Whether an alternative remedy must be actionable*

In two throw away sentences in *Tang Choon Keng*,[62] Chan J. may have suggested that an alternative remedy must be actionable before it may be relied upon to resist winding up on the just and equitable ground. This is what Chan J. said:[63]

> "*TWC has not claimed that he has a contractual right to acquire the hotel premises. There is therefore no question of an alternative remedy being available to TWC in respect of the hotel premises.*"

58 See the discussion in Part D of this Paper.
59 See the discussion in Part D of this Paper.
60 *Supra*, *n.* 3.
61 *Supra*, *n. 3*, at 7E.
62 *Supra*, n. 2, at 1137 F–G.
63 *Supra*, *n.* 2.

In contrast, it has been held in England that an out of court offer to purchase the shares of the petitioner may be relied upon as an alternative remedy. A mere offer to purchase shares is not actionable. The cases on point include *In Re A Company* (*No. 002567 of 1982*)[64] and *Re a Company (No 003843 of 1986)*.[65] The English position was assumed to be correct in *Bernhardt* v *Beau Rivage Pty Ltd*,[66] an Australian case.

In principle, there is no reason given the broad scope of the phrase "just and equitable", to limit the enquiry of what is just and equitable only to actionable alternative remedies but not other solutions which are not actionable. This is especially so when the governing determinant of the alternative determinant is, as suggested above,[67] the question of reasonableness. In this respect, there may well be an out of court offer to purchase the shares of the petitioner which gives the petitioner far higher returns as compared to winding up the company. In such a situation, and in the absence of any other factors, it may not be just and equitable that the company be wound up.

Another reason why the court should not limit itself only to actionable causes of actions, is because the courts have taken into consideration non actionable rights when ordering winding up a just and equitable petition. For instance, the courts have held that breaches of legitimate expectations and loss of confidence (which may not be based on actionable rights) may in appropriate cases form the basis of an application to wind up the company on the just and equitable ground.[68]

If non actionable rights may ground a just and equitable petition, there is no reason why non actionable alternative remedies may not correspondingly be considered when resisting such a petition.

For completeness, the view that alternative remedies must be actionable is not entirely without support. In *Bernhardt*,[69] Young J. doubted whether non actionable rights may properly be treated as alternative remedies to resist winding up. That having been said, his honour was prepared to assume for the purposes of the case that the English position was correct.

64 [1983] 1 WLR 927. Vinelott J. said at 933H that, "*What section 225(2) of the Companies Act 1948 contemplates is, I think, a situation in which the continuance of the company would be unjust to the petitioner and where that injustice cannot be remedied by any step reasonably open to the petitioner. If an offer is made to purchase his shares he is thereby provided with an alternative course; the question is whether he is acting unreasonably in rejecting it.*"

65 [1987] BCLC 562 at 571c.

66 (1989) 7 ACLC 638 at 643 ("Bernandt").

67 See the discussion in part E(i) of this Paper.

68 See e.g. *Hollington*, *supra*, n.42, at 3–015 to 3–027.

69 *Supra*, n. 64, at 643.

(G) Conclusion

The recognition of adequate alternative remedies as a basis for resisting winding up on the just and equitable ground where the petitioner acts unreasonably in not pursuing the alternative is a logical step to be taken by the Singapore courts. Such recognition accords with the concepts of justness and equity.

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