

# Alternatives to just and equitable winding up

PINPOINTING WHAT THEY ARE AND WHEN THEY CAN BE AUCTIONED

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In this penultimate article, we consider the available alternatives to just and equitable winding up, including the gateway to be met before any alternative orders can be made. In addition, we also consider derivative actions, including general rule and exceptions, as well as recent guidance on the ‘fraud on the minority’ exception. (Part 2 of 3)

**THIS IS PART 2 OF A THREE-PART SERIES WHICH CONSIDERS SOME OF THE ALTERNATIVES TO A JUST AND EQUITABLE WINDING UP UNDER SECTION 95 OF THE COMPANIES LAW (2018 REVISION) (LAW), AS WELL AS RECENT DEVELOPMENTS.**

In Part 1, we provided an overview of the jurisdiction to order just and equitable winding up, as well as a review of the status of case law on the test for ‘loss of substratum’ – often the basis for seeking an order for just and equitable winding up. We now consider the available alternatives, as well as the ‘gateway’ to such relief. We also consider derivative actions, where shareholders can take action against wrongdoers who are in control of a company.

## **Available alternatives to winding up under s 95(3)**

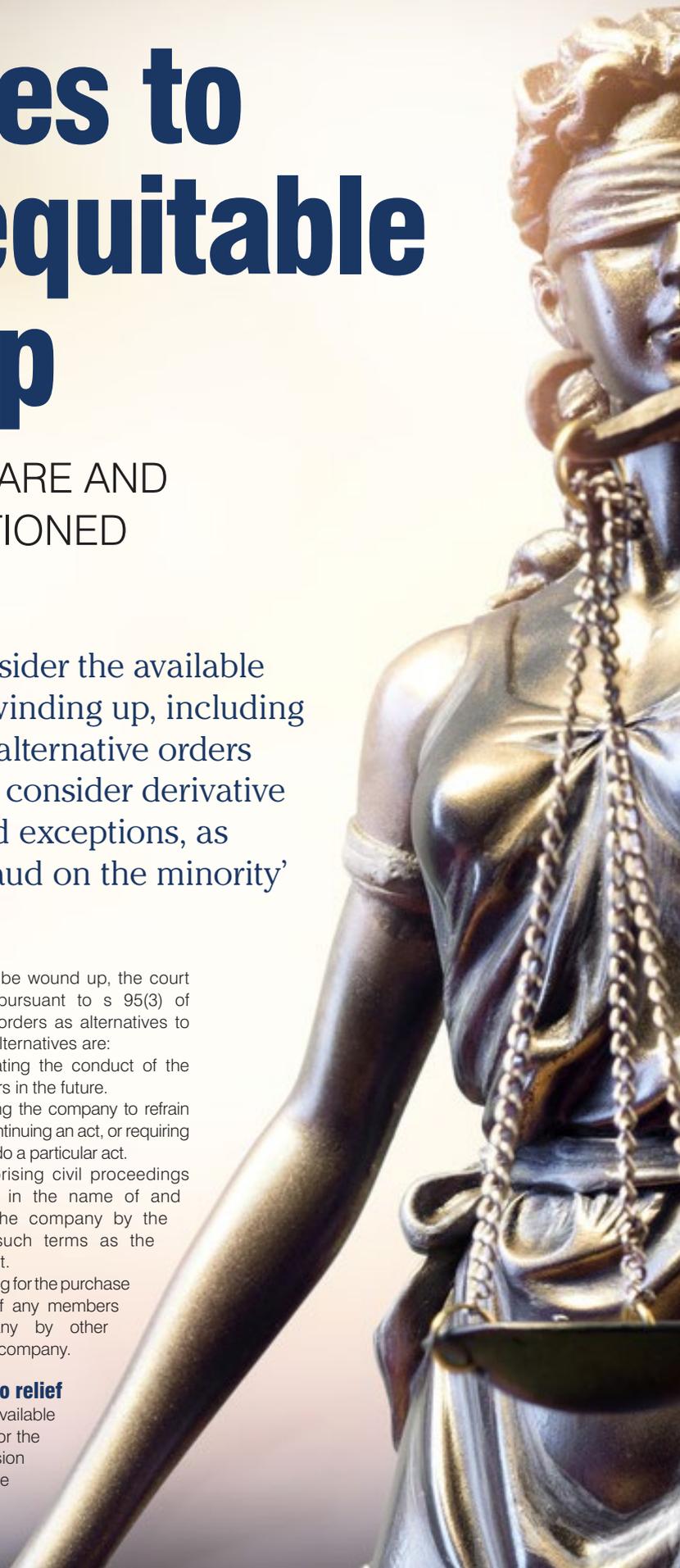
Where a petition is presented by members of a company as contributories on the ground that it is just and equitable that the

company should be wound up, the court has jurisdiction pursuant to s 95(3) of the law to make orders as alternatives to winding up. The alternatives are:

- An order regulating the conduct of the company’s affairs in the future.
- An order requiring the company to refrain from doing or continuing an act, or requiring the company to do a particular act.
- An order authorising civil proceedings to be brought in the name of and on behalf of the company by the petitioner on such terms as the court may direct.
- An order providing for the purchase of the shares of any members of the company by other members of the company.

## **The ‘gateway’ to relief**

The remedies available under s 95(3) mirror the typical oppression remedies available





to shareholders in other Commonwealth jurisdictions. However, in the Cayman Islands there is no free standing unfair prejudice regime.

The Court cannot make any orders under s 95(3) unless satisfied that, if there were no alternative remedy available, it would be just and equitable to wind up the company in any event. A petition will in all likelihood be dismissed where the conduct

complained of does, 'not cross the forbidden line so as to constitute a visible departure from the standards of fair dealing and the conditions of fair play which a shareholder is entitled to expect'.

This is referred to as the 'gateway' to relief under s 95(3). For example, the Court has no freestanding jurisdiction to make a buy-out order independently of a winding-up petition, the petitioner must first establish that it is just and equitable for the company to be wound up.

This has obvious practical drawbacks to a petitioner who does not wish for the company to be wound up, but must nevertheless establish there are grounds to do so, before alternative relief can be considered.

**Other remedies for shareholders: derivative actions**

The general rule is that where a wrong is done to a company, only the company may sue for the damage caused to it; a shareholder has no right to bring an action on behalf of the company in order to protect the value of its his or her shares. Derivative actions are an exception to that rule. If a shareholder can bring himself or herself into one of the exceptions to the rule in *Foss v Harbottle* (1843) 2 Hare 461, he or she may be able to bring a derivative action.

The exceptions are: (i) where the act complained of is ultra vires, (ii) an irregularity in the passing of a resolution which requires a special majority infringes the personal rights of an individual shareholder, or (iii) fraud on the minority where the wrongdoers themselves are in control of the company. Where such an action is allowed, the member is not really suing on his own behalf or on behalf of members generally, but on behalf of the company. Only a registered shareholder may bring proceedings to vindicate shareholder rights. A mere beneficial owner of shares cannot maintain a derivative action on behalf of a company.

An action for fraud on the minority will generally be against directors. The decision on whether or not to sue a 'third party' who is not a director is one for the board. If the directors breach their duty in deciding not to pursue the claim, then subject to leave of the Court, a derivative action can be brought against them. The question has arisen as to whether a derivative action can be brought against an 'independent third party' who is not a director and where the claim is not closely connected with a breach of duty by a director. The answer, at least for now, seems to be no – the fraud (on the part of the director) whose existence justifies the derivative action must give rise to the third party's liability. ●

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