



**IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION**

FSD CAUSE NO 134 of 2022 (NSJ)

**IN THE MATTER OF THE COMPANIES ACT (2022 REVISION)
AND IN THE MATTER OF UPHOLD LTD**

BETWEEN:

- 1. WILLIAM LAGGNER**
- 2. BEARING VENTURES LLC**
- 3. WEST END CAPITAL II LLC**
- 4. CHARLES SIMMONS**
- 5. PETER KEARNS**
- 6. MICHAEL ZAITSEV**

PETITIONERS

- 1. UPHOLD LTD**
- 2. ADRAN STECKEL**
- 3. UPHOLD HOLDINGS LLC**
- 4. ASP CAPITAL SUB I INC**
- 5. AMHERST HOLDINGS LIMITED**

PROPOSED RESPONDENTS

Before: The Hon. Mr Justice Segal

Appearances: Mr Ian Huskisson and Mr Bhavesh Patel of Travers Thorp Alberga
appeared for the Petitioners

Mr Luke Stockdale of Maples and Calder LLP appeared for the
Company

Heard: 19 July 2022 – in Chambers

**Further
evidence filed:** 20 July 2022

Draft judgment: 21 July 2022

**Judgment
delivered:** 27 July 2022



HEADNOTE

Contributory's winding up petition – petitioners unable to locate an address for service of one of the company's shareholders who they wished to join as respondents - power of the Court to order the company to disclose the address of the shareholder for the purpose of facilitating service of the petition

RULING ON APPLICATION FOR AN ORDER DIRECTING THE COMPANY TO DISCLOSE THE PROPOSED FIFTH RESPONDENT'S ADDRESS

Introduction

1. On 14 June 2022, the Petitioners (*qua* contributories) had issued a winding up petition (the *Petition*) against Uphold Limited (the *Company*) together with a summons for directions (the *SFD*).
2. In the Petition (at [7]), the Petitioners stated that they intended to serve the Petition on the Company and various shareholders (the *Proposed Respondents*) who they considered had either participated in or benefitted from the conduct complained of in the Petition and against whom alternative relief was sought. These were Mr Steckel, Uphold Holdings LLC, ASP Capital Sub I Inc and Amherst Holdings Limited (*Amherst*).
3. The Petition was served on the Company on 14 June 2022, in accordance with O.3, r.11 (3)(a) of the Companies Winding Up Rules, 2018 (*CWR*).
4. The SFD was listed to be heard on 19 July 2022. However, the Petition and the SFD had not been served on the Proposed Respondents. This was because the Petitioners did not have and had been unable to obtain the addresses of the Proposed Respondents.
5. Following correspondence and discussions with the Company, the Petitioners have been able to contact the First, Second, Third and Fourth Proposed Respondents who have confirmed that they have appointed, or are in the process of appointing, attorneys with authority to accept service of the Petition. The Petition and the SFD has now been, or will shortly be, served on the First – Fourth Defendants.
6. However, there is still an issue as regards service on the Proposed Fifth Defendant, Amherst Holdings Limited (*Amherst*). Amherst is a company that the Petitioners believe to be controlled

by Mr James Chen (*Mr Chen*). The Petitioners do not know and have been unable to obtain Amherst's address. The Company has said that it is only able to provide the address for Amherst which it has (in, I assume, the Company's register of members) if Amherst gives its consent and that while such consent has been sought it has not been given. Accordingly, the Petitioners applied, at the hearing on 19 July 2022, for an order requiring the Company to disclose that address.

7. Prior to the hearing, the Petitioners had indicated, in their Written Submissions, that they hoped to reach agreement with the Company on this point before the hearing but that if there was no such agreement they would apply for an order requiring the Company to disclose the address which it holds for Amherst. Paragraph 4 of the SFD sought, in the normal way, "*an order regarding service of the Petition on those of the Second to Fifth Respondents who are all located outside the jurisdiction and who have not yet responded to the Petition.*" On 18 July, the Petitioners filed a draft order which included an order that the Company disclose the address of Amherst's registered office by 4pm on 20 July 2022. The draft order also dealt with various consequential matters, namely the date by which the Petitioners would need to serve the Petition and the SFD on Amherst, an order adjourning the hearing of the other relief sought in the SFD to a suitable date to be fixed and no earlier than twenty-eight days after service on Amherst, and a validation order in respect of payments made by the Company in the ordinary course of business.
8. At the hearing on 19 July 2022 the Petitioners were represented by Mr Ian Huskisson of Travers Thorpe Alberga (*TTA*) and the Company was represented by Mr Luke Stockdale of Maples and Calder LLP (*Maples*). Mr Huskisson at the outset noted that despite the Petitioners' hope that agreement could be reached, this had not been possible and therefore he needed to apply for an order requiring the Company to disclose the address which it holds for Amherst.
9. The Petitioners had not dealt in their Written Submissions with the legal basis for their application. Nor had they filed any evidence setting out what they know about Amherst and what steps they had taken to find out Amherst's address.
10. During the hearing, Mr Huskisson made his submissions on the legal basis for the application and explained his understanding of the relevant facts and in particular why the Petitioners had been unable to locate Amherst's address. At the end of the hearing, I directed that the Petitioners file by 4pm Cayman time on 22 July 2022 an affidavit putting in evidence the facts

referred to and the account given by Mr Huskisson during his submissions. Mr Stockdale indicated, in response to a question from me, that the Company did not wish to have the opportunity to file any evidence or to respond to the Petitioners' further evidence. I said that I would consider the application after having seen and in light of the Petitioners' further evidence and then notify the parties of my decision as soon as possible, probably on 25 July 2022.

11. On 20 July 2022, the Petitioners filed and served on the Company an affidavit sworn by Mr Huskisson setting out the steps that had been taken by his firm on behalf of the Petitioners to identify an address for service of Amherst. On that date, the Petitioners also filed an amended draft order, to reflect points made by Mr Stockdale and me during the hearing. The Company did not consent to the making of the order as it considered that it was a matter for the Court to decide whether it had jurisdiction to and otherwise should make it, but confirmed that if the Court decided that the Petitioners' application should be granted, the latest form of order was acceptable.

The Petition

12. The Petitioners claim that the central issue raised in the Petition concerns a transaction entered into by the Company on 30 June 2016 known as the Steckel Transaction (as subsequently amended and implemented). Under the Steckel Transaction, the Company borrowed US \$15,000,000 at an annual interest rate of 24% and committed to issue a controlling stake in the Company at a nominal price of \$0.01 per share to a company. The Petitioners assert that the loan was made by and the right to receive the controlling stake was given to Mr Adrian Steckel (*Mr Steckel*) and that Mr Steckel and others derived improper benefits from the Steckel Transaction which was not for the benefit of the Company and should never have been approved by the Company's directors.
13. The Petitioners aver that the conduct of the board in approving the Steckel Transaction and subsequently, demonstrates that they have behaved with a lack of probity and acted in breach of their fiduciary duties by engaging in a series of actions tantamount to a conspiracy to allow Mr Steckel to gain de facto control of the Company to the detriment and prejudice of the Petitioners. As a result, the Petitioners have justifiably and irretrievably lost all faith and confidence in the directors and consider that their rights and interests have been oppressed, willfully disregarded, and undermined.

14. At [33] of the Petition, the Petitioners aver that Amherst is a shareholder of the Company and is controlled by Mr Chen (underlining added):

“At some point between July and December 2016 Mr Steckel reached an agreement with one of Mr Laggner’s investors, another existing shareholder Mr James Chen, pursuant to which the benefits of the Steckel Transaction would be shared between them. In the event Mr Steckel (acting through Uphold Holdings LLC) was allowed to advance \$10m and Mr Chen (through Chen International Holdings Ltd and subsequently Amherst Holdings Limited) was allowed to advance \$5m and subscribe for 42 and 21 million shares in the Company respectively. They were both also allowed to deploy the interest accrued at the extortionate rate of 24% to settle the already heavily discounted price payable per share of under the Warrant of \$.01. Further they were allowed to subscribe for preference shares, which carried additional rights to the ordinary shares that they were to receive under the terms of the Warrant agreed in June 2016. In approving these terms, the board paid no regard to the interests of the Company or its shareholders other than Messrs. Steckel and Chen and their companies. There was for example no attempt to comply with the [Investment Rights Agreement] or to secure better terms from any other shareholders or new investors. Instead Mr Steckel was permitted to amend the terms of his transaction with the Company to suit his needs at the time without reference to the interests or rights of the Company and its other shareholders.”

15. At [36] of the Petition, the Petitioners say that they consider it just and equitable that the Company be wound up pursuant to section 92(e) of the Companies Act and that alternative relief be granted pursuant to section 95(3) of the Companies Act for the purchase of the Petitioners’ shares (which the Petitioners seek as their primary remedy).
16. It is worth adding that the Petitioners have previously filed a winding up petition in similar terms in proceedings dealt with by Mr Justice Parker. That petition was, however, I am told withdrawn on confidential terms.

The Petitioners’ evidence and submissions

17. In his affidavit, Mr Huskisson has briefly set out what steps have been taken by his firm to find an address for service for Amherst.
18. He explained that his firm had asked the Petitioners to check their records and provide his firm with any information they may have had in relation to Amherst. Searches were undertaken but nothing was forthcoming. TTA carried out internet searches using variations of the words "Amherst", "Chen" and "Amherst Holdings Limited" but these did not reveal any relevant

information. The closest matches were a Cypriot company that has been dissolved since 2016 and a Texas real estate company which did not appear to have any connection. After the Petition was issued, Mr Huskisson emailed Maples to seek their assistance in identifying an address for service on Amherst or if that presented confidentiality issues he asked whether the Company would be prepared to serve the Petition on Amherst. Maples responded on 8 July 2022 to confirm they had asked Amherst for an address for service and would forward it if Amherst agreed. TTA agreed with Maples to contact Mr Chen to seek his assistance and an email was sent on 11 July 2022 to the last email address that the Petitioners had for Mr Chen and his assistant. No reply was received and nothing further was heard from either Maples. Mr Huskisson said that the Petitioners and TTA had no further information regarding the jurisdiction in which Amherst was incorporated.

19. Mr Huskisson submitted that the Petitioners had done everything they could do to locate an address for service for Amherst. There were no further searches that they could sensibly make that would realistically provide any chance of locating Amherst and finding an address for service. In these circumstances, the Petitioners, who were required to serve the Petition (and the SFD) on Amherst pursuant to CWR O.3, r.11 (3)(b) (as the Petitioners intended to join Amherst as a respondent) needed the assistance of the Court to enable them to do so. Mr Huskisson argued that an order directing the Company to disclose the address for Amherst which it held was the most appropriate way of ensuring that the Petition could be served. The Company clearly had an address and contact details for Amherst and requiring the Company to disclose that address could cause the Company no prejudice. Mr Huskisson exhibited Maples letter dated 8 July 2022 to TTA in which they confirmed that:

“The Company has been in contact with representatives of the Proposed Respondents ... to seek their consent to the Company providing your clients with their contact details to enable your clients to communicate with those parties directly regarding this matter. The Company is awaiting a response from the Proposed Respondents and will provide their contact details if they consent to the Company doing so....”.

20. Mr Huskisson submitted that the Court’s order would ensure that the Company could not be liable for breach of confidentiality and noted that the Company had not claimed that it would suffer any prejudice if the order sought was made.

21. Mr Huskisson was unable to find any Cayman Islands, English or other authority on the question of whether the Court could make an order requiring a company subject to a winding up petition to disclose the address of one its shareholders to allow the petitioner to serve that shareholder. He did however refer to and rely on a passage at C6.3 in the FSD Users Guide (Second Edition, August 2015) which he said evidenced the fact that the Court could and in appropriate cases would assist petitioners to effect service of a petition. Section C6.3 is in the section dealing with contributories winding up petitions and refers to the Court's practice, in a case where a mutual fund is treated as a respondent to the petition, of directing the fund's administrator to send copy of the petition to registered shareholders:

“C6.3 Directions — proceeding against the company

If the company is treated as the respondent to the petition, it follows that the Judge must always consider how the petition will be drawn to the attention of the shareholders (other than the petitioner) who are entitled to be heard. The Court may direct that the other shareholders be served and/or that the petition be advertised. In the case of a mutual fund, the Court will normally direct that its administrator send copies of the petition and affidavits to the registered shareholders by whatever method of communication is normally used in the ordinary course of business....”

22. Mr Huskisson argued that the Court must have the power to make orders to facilitate the service of a contributories petition otherwise the proceedings would be paralysed and the petitioner would be prejudiced.

The Company's position

23. As I have already noted, the Company did not consent to the making of the order as it considered that it was a matter for the Court to decide whether it had jurisdiction to and otherwise should make the order sought.
24. Mr Stockdale at the hearing did, in my view properly, object to the Petitioners' failure to file any evidence explaining what steps they had taken to locate Amherst's address. He submitted that even if the Court had the power to do so, it should not make an order unless the Petitioners could demonstrate by evidence that despite having undertaken reasonable searches they were still unable to find an address for service on Amherst. He argued that it could be expected that searches would be made in the jurisdictions in which Mr Chen was based as it was likely that

Amherst would be incorporated or operate in the same jurisdiction. He also noted that section C6.3 of the FSD Users Guide only dealt with the giving of notice of the petition after the Court had decided that the mutual fund should be treated as the respondent to petition, and not with the issue of service of the petition before such a decision was made.

The applicable provisions of the CWR

25. CWR O.3, r.11 (3)(b) provides that (underlining added):

“(3) Every contributory’s petition and the summons for directions relating to it shall be served immediately after having been presented/issued upon –

.....

(b) every member of the company whom the petitioner has named or intends to name as a respondent to the petition, who may be served out of the jurisdiction without the leave of the Court.

26. CWR O.3, r.12 (1) deals with the Court’s powers on hearing the SFD as follows (underlining added):

“Upon hearing the summons for directions, the Court shall give such directions as it thinks appropriate in respect of the followings matters –

- (a) whether or not the company is properly able to participate in the proceeding or should be treated merely as the subject-matter of the proceeding;
- (b). whether the proceeding should be treated as a proceeding against the company or as an inter partes proceeding between one or more members of the company as petitioners and the other member or members of the company as respondents;
- (c). service of the petition upon persons other than the company (as may be appropriate having regard to the directions give under paragraphs (a) and (b) of this Rule);

.....”

Discussion and decision

27. I have concluded that the Court does have the power to and that in the circumstances of this case I should make the order sought.

28. There are three issues that arise. First, does the Court have the power, and is there jurisdiction, to make the proposed order? Secondly, if there is, should the Court exercise its discretion to make an order in this case? Thirdly, if so, what order should be made?
29. Pursuant to CWR O.3, r.11 (3)(b), the Petitioners were required to serve Amherst. They were required do so immediately after the Petition was presented and issued and therefore before the first hearing of the SFD. But their failure to do so does not prevent the Court from being able to make an order relating to and needed to allow for the service of the Petition at a hearing of the SFD.
30. CWR O.3, r.12 (1), as I have noted, sets out the Court’s powers on hearing the SFD. The Court “shall give such directions as it thinks appropriate in respect of” certain matters. One of those matters (set out in paragraph (c)) is “*service of the petition upon persons other than the company (as may be appropriate having regard to the directions give under paragraphs (a) and (b) of this Rule).*” The words in parenthesis indicate that paragraph (c) of the rule is intended to allow the Court to make orders for service of the Petition consequential on a prior decision as to whether the petition is to be treated as a proceeding against the company or an *inter partes* proceeding between certain shareholders, where further parties need to be served (see the FSD Users Guide at C6.3 and C6.4 and my judgment in *In the Matter of China Shanshui Cement Group Limited*, unreported, 21st January 2021 and Justice Richards’ judgment in *Madera Technology Fund (CI) Ltd*, unreported, 4 May 2021). It follows that CWR O.3, r.12 (1)(c) should be understood and interpreted as only applying to an order for service in that situation.
31. However, CWR O.3, r.12 (1) (k) gives the Court the power to give such directions as it thinks appropriate in respect of “*such other procedural matters as the Court thinks fit.*” This is a very broad power, and it seems to me that it is intended to allow the Court to deal with any other procedural matters that properly arise on the summons for directions, and which need to be dealt with to allow for the proper conduct of the petition. This must be taken to include making an order relating to the service of the petition, which is needed to allow service to be effected and which is otherwise justified and appropriate having regard to the overriding objective. I therefore consider that the Court has the power to make an order requiring a company to disclose the address of a shareholder for the purpose of allowing the Petition to be served. Whether it should do so will depend on the facts of the case and whether there is a genuine

need for such an order, whether the order will cause any prejudice to the company, or require it to incur material expense or cause it to become subject to any liability and whether there is a more cost-effective or less damaging alternative available.

32. The SFD in this case included an application (at [4]) for “*An order regarding service of the Petition on those of the Second to Fifth [Proposed] Respondents who are located outside of the jurisdiction, and who have not yet responded to the Petition*” and (at [8]) for “*Such further or other directions as the Court thinks fit.*” I take it that the Petitioners’ application for the order they seek, in advance of a determination as to the characterisation of the proceedings and of the relief generally sought in the SFD, is to be treated as an application under [8].
33. In my view, the Petitioners’ evidence shows that there is a genuine need for the order they seek. They have averred in the Petition that Amherst is a shareholder, and the Petition seeks alternative relief against Amherst and the other Proposed Respondents. There is therefore at least a proper justification for seeking to join Amherst as a respondent. The evidence also shows that the Petitioners have made reasonable inquiries and it appears that there are no further inquiries that can be made that are likely to result in Amherst’s address for service being located (at least inquiries and searches that can realistically be made at a reasonable cost and in a reasonable period). I note and have some sympathy with Mr Stockdale’s criticisms of the Petitioners’ approach. Mr Huskisson in his evidence did not explain what the Petitioners knew about the whereabouts of Mr Chen or their prior dealings and communications with him or Amherst and what might be inferred from these as to Amherst’s place of incorporation or operations, which might assist in focusing a further search for Amherst’s address. To that extent, the Petitioners’ evidence is rather thin. But it has not been controverted or challenged by the Company (I did, as I have noted, give the Company an opportunity to file evidence in opposition if it wished to do so and it did not) and is in my view sufficient in this case to justify the order sought.
34. As Mr Huskisson submitted, the evidence indicates that the company has an address for Amherst and that requiring it to disclose the address to the Petitioners will not cause it any prejudice or material expense. The letter from Maples dated 8 July 2022 to TTA makes it clear that the Company have been in contact with Amherst. Of course, the Company is required to have a register of members which includes an address for Amherst as a shareholder (see section 40(1) of the Companies Act) although, as an exempted company, the register is not open to inspection by members (see section 44(2) of the Companies Act). I have taken this into account

when considering whether to exercise the jurisdiction to make the order sought against the Company but do not consider that it precludes me from doing so or is a factor of substantial weight against making the order. Where a winding up petition has been (*bona fide*) presented and there is a real need for the purpose of the proceedings for the petitioner to have the address of a member whom it wishes to join as a respondent, the need to ensure that the winding up jurisdiction can be properly exercised trumps the policy behind or at least is to be taken to be an exception to section 44 and the absence of a statutory right for members to inspect the members' register of an exempted company.

35. The order sought is also consistent with the overriding objective and will rapidly and in a cost-effective way ensure that the Petition can be served.
36. I am therefore satisfied that I can and should make the order sought in the following terms (with Amherst's address to be disclosed by 4pm Cayman time tomorrow):

“The Company shall by no later than 4pm on 22 July disclose to the Petitioners’ attorneys the current or latest address which the Company holds for the Proposed Fifth Respondent. “



Mr Justice Segal
Judge of the Grand Court, Cayman Islands
27 July 2022