



Neutral Citation No. [2019] EWHC 2662 (Ch)

No: CR-2019-005164

**IN THE HIGH COURT OF JUSTICE  
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES  
COMPANIES LIST (ChD)**

The Rolls Building  
7 Rolls Buildings  
Fetter Lane  
London EC4A 1NL

Thursday, 26 September 2019

**IN THE MATTER OF BRICKVEST LIMITED  
AND IN THE MATTER OF THE COMPANIES ACT 2006**

Before:

**THE HONOURABLE MR JUSTICE MARCUS SMITH**

**B E T W E E N :**

**BERLIN HYP AG**

Applicant

- and -

**(1) EMMANUEL LUMINEAU  
(2) THOMAS SCHNEIDER  
(3) BRICKVEST LIMITED**

Respondents

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**MR S. HORNETT** and **MS A. HAWKER** (instructed by **Memery Crystal LLP**) appeared on behalf of the Applicant.

**THE FIRST AND SECOND RESPONDENTS** were not present and were not represented

**THE THIRD RESPONDENT** was present in court but was not represented

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**J U D G M E N T**

## MR JUSTICE MARCUS SMITH:

### Introduction

- 1 I have before me various applications by Berlin Hyp AG (the **Applicant**) against three Respondents. The Third Respondent is a company, Brickvest Limited (**Brickvest**). The First and Second Respondents, Mr Lumineau and Mr Schneider, are the founder shareholders of Brickvest. I shall use the term **Respondents** to refer to the First and Second Respondents only. It is they who – for purposes of this application, and light of the evidence adduced to me – I consider are in control of Brickvest. It is they who are causing Brickvest to act, or to fail to act, in certain ways that I consider further in the course of this ruling.
- 2 The Applicant is a minority shareholder in Brickvest. Brickvest has, as one would expect, articles of association (the **Articles**) stating (amongst many other things) how directors' meetings should be run and what a quorum for a directors' meeting is. The requisite quorum is defined both in numerical terms in that a certain number of directors (four) must be present; and in what I have described as *ad hominem* terms, in that the director nominated by the Applicant must be present.
- 3 These provisions in the Articles conform to the terms of a shareholder's agreement (the **Shareholders Agreement**) between, amongst others, the Applicant, the Respondents and Brickvest. The Shareholders Agreement makes provision for a number of matters, in addition to the identity of certain directors and the quorum for a directors' meeting. One of the most important of these matters is that there are certain **reserved matters** set out in Schedule 4 of the Shareholders Agreement which oblige Respondents and Brickvest to seek the written consent of the Applicant before taking certain actions. These actions include the allotment, issue, buyback or redemption of any share or loan capital or the granting of any options.

### The application for an injunction

- 4 The Applicant has commenced a petition under section 994 of the Companies Act 2006, alleging unfair prejudice by the Respondents. As is usual in such petitions, Brickvest is joined in order to be bound.
- 5 In support of the unfair prejudice petition, the Applicant seeks an interim injunction, which is made on proper notice to the Respondents, who have elected not to appear. Brickvest has representatives in court, but is not formally represented.
- 6 The Applicant seeks is to enjoin Brickvest from pursuing a proposed issue of new shares and loan notes (the **Issue**) by it is and, relatedly, also seeks the prevention of the operation of a data room that is associated with the Issue. The Applicant also seeks to enjoin the Respondents from causing Brickvest to do these things. The matter is urgent: it has been moved before me today, on 26 September 2019, because the proposed Issue appears, from the documents that I have seen, to be intended to take place tomorrow, on 27 September 2019.
- 7 The Applicant's contention is that the Issue of new shares is one that is contrary to the terms of the Shareholders Agreement in two respects:
  - (1) First, it is said that the process by way of which Brickvest has acted is in breach of its own internal rules. It is said that the resolutions by way of which it was determined to go ahead with the Issue was flawed, in that the directors' meetings, at which these things were considered and determined, were not quorate. For that reason alone, it is said, Brickvest should not be proceeding with the Issue.
  - (2) Secondly, it is said that the course resolved upon is also in breach of the Shareholders Agreement, because the Issue is a reserved matter, such that the written consent of the Applicant is required. That written consent has not been forthcoming.

- 8 Mr Hornett, who appeared for the Applicant, sought to articulate what points the Respondents might make in response to the Applicant’s contentions, given the absence of the Respondents (albeit that that absence was of their own making). One such point was that it might be said that the Applicant was obliged – when giving or withholding consent to a reserved matter – to act reasonably or in good faith. I do not consider that it is pointful, in the circumstances, of the present case, to consider this question. The question of the Applicant’s discretion in relation to reserved matters, and whether that discretion is fettered by considerations of reasonableness or *bona fides* is itself a difficult one. But even if I were to presume the existence of such a fetter, I do not see where it takes me. It is actually impossible, on the evidence before me today, to make even a provisional conclusion that the Applicant has behaved unreasonably or in bad faith, and I certainly cannot *presume* that such is the case. It seems to me that if there is a breach of the Shareholders Agreement, that is sufficient for me to conclude that there is a “serious question to be tried” within the meaning of the test in *American Cyanamid*, without exploring what may or may not be the Applicant’s thinking in withholding consent.
- 9 Mr Hornett did seek to tempt me into applying a different test to the “serious question to be tried” in *American Cyanamid*. In *Series 5 Software Limited v. Philip Clarke*, [1996] FSR 273 at 286, Laddie J suggested that it was possible to shortcut the later stages of *American Cyanamid* by focussing on the merits. The approach of Laddie J was that, in a clear-cut case, one could grant an injunction independently of the *American Cyanamid* criteria. I must say I have my doubts. As is well-known, in *American Cyanamid*, Lord Diplock sought to avoid the difficulties of conducting a “trial within a trial” at an interlocutory stage by articulated the “serious question to be tried” test.
- 10 It seems to me that Laddie J’s approach is one that is redolent with danger, in that it seeks to re-incorporate into the test for the granting of an interlocutory injunction precisely those elements that Lord Diplock was at pains to remove. Apart from the case where the court can conclude that it appropriate to order summary judgment in favour of the applicant for an injunction, it seems to me that the test to be applied – when considering the merits – is whether there is a serious issue to be tried.
- 11 It is to that question that I now turn. I am satisfied that there is a serious issue to be tried. I am satisfied that the test has substantially been exceeded in this case in that there appears to be an extremely clear breach of the Shareholders Agreement by Brickvest at the instance of the Respondents. It does not, as it seems to me, matter that I consider that the test has substantially or greatly been exceeded: the fact is the requirement that there be a serious issue to be tried has been met. It is clear, on that standard, that the Issue is an infringement of the rights of the Applicant.
- 12 I move to the next question, which turns on the adequacy of damages. At this stage, I must ask myself two questions:
- (1) First, were the injunction not to be granted, would there be prejudice to the Applicant that could not be compensated for in damages?
  - (2) Secondly, were the injunction to be granted, would the undertaking in damages by the Applicant (which is the price of the injunction) not be sufficient to hold the Brickvest and the Respondents harmless, if it is turned out at trial that the injunction had wrongly been made?
- 13 It seems to me that it is fairly clear that there is prejudice to the Applicant that would not be capable of being compensated for in damages in this case. The fact is that the course being pursued by Brickvest, unless enjoined, is an irreversible one which affects brings new shareholders and new debt into the company. To that extent, the Applicant’s position is

adversely being affected for all time by Brickvest's and the Respondents' failure to respect its rights.

- 14 Conversely, I cannot see any clear prejudice to Brickvest were the Issue to be enjoined. I certainly cannot presume that conduct that infringes the Shareholders Agreement and the Articles is conduct that is to the advantage of Brickvest. If anything, the point goes the other way: it is, as it seems to me, a real prejudice to Brickvest, if not to the Respondents, for Brickvest to pursue a course – the Issue - in breach of Brickvest's own Articles and in breach of the Shareholders Agreement, to which the company is a party.
- 15 I should point out that there is no evidence before me suggesting that the Issue is in the interests of Brickvest, nor any evidence as to what prejudice Brickvest and the Respondents might suffer were an injunction to be granted. No such prejudice has been identified, for the very good reason that Respondents have elected not to be present before the court. Ordinarily, if this were an *ex parte* application, I would seek to look for potential prejudice and Mr Hornett would be obliged to make full and frank disclosure as to what prejudice Brickvest and the Respondents might suffer. It is worth making clear that this is not an application *ex parte*, nor even an application *ex parte* on notice. It is an application that was properly notified to Brickvest and to the Respondents, and they have elected not to be present.
- 16 In an effort to head off this injunction, the solicitors for the Respondents have offered certain undertakings, which come some way to meeting the concerns of the Applicant. I do not consider that what has been offered comes sufficiently close to what the Applicant needs to persuade me that the order that the Applicant seeks is unnecessary or inappropriate. But what that offer by the Respondents does show is that it seems to be the opinion of the Respondents that there is no prejudice if the Issue is – at least temporarily – enjoined.
- 17 Accordingly, I find that the balance is a very one-sided one. There will be prejudice that cannot be compensated in damages to the Applicant if the injunction were not granted; and I do not see any prejudice to Brickvest and the Respondents that cannot be compensated by the undertaking in damages, should it prove to be the case that the injunction were wrongly granted.
- 18 I am satisfied that if there is any damage or harm incurred by the granting of this injunction, the undertaking in damages will be sufficient. I note in that regard that the undertaking offered is clearly a solid one, in that the Applicant has a positive balance sheet of some €26.9 billion and equity of €935 million.
- 19 So, for those reasons I am minded to grant the injunction sought by the Applicant. I do not consider that it is necessary for me to go into the “balance of convenience” test. The position is clear enough as it is. If I was obliged to, then I consider that maintaining the *status quo* in this case, that is to say in a case where there is a future section 994 petition to be heard, would be a strong matter to incline me at the final stage of *American Cyanamid* to grant the relief sought. But I actually do not think I get to that stage in this case. So, for the reasons given, I am prepared to grant an injunction in the terms sought by the Applicant, subject to some changes that I have debated with counsel.

### **Brickvest's accounts**

- 20 Brickvest is a company incorporated in England and Wales, and subject to the provisions of the Companies Act 2006. The Companies Act 2006 imposes upon Brickvest many obligations, one of which is an obligation to file accounts. That duty arises under sections 451 and 455 of the Act. Pursuant to those provisions, certain accounts must be filed.
- 21 In this case, Brickvest has filed accounts and, on the face of it, has complied with its obligations. The difficulty is that that compliance seems to me to be more apparent than real. Draft accounts were circulated to the directors of Brickvest for their approval, if thought fit,

for the year ended 31 December 2018, in July 2019. The draft accounts identify the present directors of the company, Mr Lumineau, Mr Schneider (the Respondents) and Mr Arnheiter (the Applicant's nominee). Throughout the accounts, there are statements making clear that it is the directors, plural – referencing back to the three directors I have identified – who are presenting the accounts, presenting the strategic report to the accounts, and putting forward the document as a whole as accurate and proper. Equally, the auditors, in their independent report, are clearly relying on the fact that the directors, plural, are putting forward a common view regarding the Brickvest, and they are basing their independent report on the directors' statements and sign-off of the accounts. It is, therefore, obvious that the approval of the accounts by the directors is a significant matter; and if that approval is not given or not properly given, that too is a significant matter. That is all the more so, given the prospect of third-party reliance on a company's published accounts.

- 22 The question of the accounts was raised at a board meeting of Brickvest on 6 August 2019. I have been provided with a draft set of minutes, no finalised version being available, at least to the Applicant. At this meeting, at which all three directors were present, one of the directors, Mr Arnheiter, raised a number of issues regarding the accounts. In particular he identified a series of queries that had been raised by the Applicant's solicitors, in a letter. He expressed the view that he wanted a response to the points raised in that letter. It is clear throughout the record of this meeting that Mr Arnheiter had issues regarding the accounts and was raising not procedural but substantive queries in relation to them.
- 23 I can form no view, one way or the other, about the force of the points that Mr Arnheiter was making. But I can form a view as regards Mr Arnheiter's approval of the accounts. When the question of approval of the accounts is mentioned in the minutes, a vote is recorded on the issue: "Do you approve the audited annual accounts in their final version as presented to the meeting?". Two of the directors say "Yes", but Mr Arnheiter is recorded as abstaining. So, even on the face of the minutes, he is not approving the accounts. In fact, the position is significantly worse than a mere abstention: it is quite plain that the reason Mr Arnheiter was abstaining was because he considered that the meeting was not quorate. Had the meeting been quorate, it is quite clear from the minutes that Mr Arnheiter would have voted against the approval of the accounts.
- 24 I should make it clear that the minutes that I see are unsigned and in draft. That is evident both from the absence of a signature, and from certain redline markings in the document before me. But I am satisfied that this is a proper record, or the best proper record, that can be adduced by the Applicant, not least because the document appears as part of the exhibit to the witness statement of Mr Dean Nicholls, who has given evidence before me, and who was in attendance at this meeting himself.
- 25 It is clear, therefore, that the accounts that have been filed on behalf of Brickvest with the Registrar of Companies are materially inaccurate. I find as a fact that they are materially inaccurate in their implication that Mr Arnheiter has approved them. That much is clear, even at this interlocutory stage. It was suggested that that inaccuracy could best be corrected by removing the references to Mr Arnheiter's agreement from the accounts and ordering that the accounts be so varied pursuant to section 454 of the Companies Act 2006.
- 26 I do not consider that to be the appropriate course: it achieves too little. As I have found, Mr Arnheiter did not approve the accounts, and for accounts to suggest (as they do) that he did is simply wrong. What is more fundamental, however, is why Mr Arnheiter was not approving the accounts. He was not approving them because of concerns that he raised at the meeting. It seems to me therefore that it would be entirely wrong for this court to permit the only correction to the accounts to be in relation to the assent of Mr Arnheiter. It would be wrong to allow these accounts to remain on the Register of Companies for all the world to see, subject only to this correction. It may be that the accounts are entirely fine, and that the concerns of

Mr Arnheiter are unfounded. But I have no idea as to whether that is right or not, and the fact is that one seeks the approval of all of the directors of a company to the accounts for a reason.

27 It therefore seems to me that the proper course is that an order be made under section 1096 of the Companies Act 2006 for the removal of this filing, that is to say for the removal of the accounts from the Register. I am conscious that I do not have Brickvest formally before me. Its representatives are in court, but there is no-one to make submissions. Therefore, although the temptation to make an immediate order is considerable, because of the risk of third parties being misled by accounts that are in one respect actually inaccurate and in other respects potentially inaccurate, I should nevertheless allow a short window in which Brickvest can assure this court that the accounts should in some way stand, and that more limited corrective action is possible.

28 Accordingly, I am directing that the Registrar shall remove from the Register the accounts unless by a date seven days from today Brickvest has satisfied this court that the order that I have made should be “unmade” because the accounts can properly be retained on the Register of Companies.

### Costs

29 I have before me an application for the Applicant’s costs, which I am invited summarily to assess. Before I do so, it is necessary to work out whether costs are properly to be awarded in this case. Although this hearing has all the appearances of a hearing *ex parte* on notice, it is not in fact a hearing *ex parte* on notice. There has been full and proper notice of the hearing to the Respondents, and the Respondents have chosen to absent themselves.

30 In other words, it seems to me that this is properly to be regarded as a case where there was an *inter partes* hearing regarding the grant of an interim injunction, where the applicant has prevailed and the respondent failed. I have granted the injunction sought by the Applicant, and it seems to me that it is appropriate that costs should follow the event. I pay no regard to the fact that an offer was made by the Respondents attempting to deal with the Applicant’s concerns. I pay no regard, because that offer fell far short of the sort of order that was appropriate in this case. And for that reason, it was necessary for Mr Hornett to take me through the detailed events that have resulted in the orders that I have made.

31 So, I consider that it is appropriate that an order for costs be made. I consider that an order is appropriately made against only the Respondents, and not against Brickvest. In summarily assessing costs, I must bear in mind that in general it is a question of proportionality that governs, rather than simply assessing the reasonableness of the costs on the page. That is true as much for summary assessment as it is for detailed assessment.

32 Applying that broad brush, I am going to reduce the grand total of £58,553 to £45,000, which seems to me to reflect more appropriately what this sort of heavy application ought to cost. I am going to order that those costs be paid within fourteen days.