



## High Court refuses to strike out \$2.625m debt claim

**Arnold Ayoo & Kate Gardiner**

In *Alphier Capital LLP v Blyvoor Gold Capital (Pty) Ltd* [2024] EWHC 2649 (ChD), the High Court refused to strike out a claim brought by an assignee, notwithstanding a contractual bar on assignment. Instead, it allowed the addition of the original assignor who could pursue the claim at trial.

Mr Justice Thompsell rejected the Claimant's argument that the contractual prohibition on assignment, whilst preventing the transfer of the "rights to future performance" (of the contractual terms) did not prevent the transfer of the "fruits of performance" (i.e. the debt claim). Though the Claimant had no entitlement to pursue the claim, the Defendant's attempt to strike it out failed. That was not proportionate given the assignor could be added to proceedings and pursue the pleaded claim.

In his Judgment ([available here](#)), Thompsell J provided helpful guidance on the construction of contractual prohibitions on assignment, addition/substitution in the face of a strike out application, and limitation.

Kate Gardiner (instructed by Three Graces Legal on behalf of the Claimant) appeared in the application hearing and will be led by Arnold Ayoo at trial.

## THE FACTS

1. The Claimant (“**Alphier**”) brought a claim for \$2,625,000 (the “**Debt**”) owed by the Defendant (“**Blyvoor**”), to which the Claimant said it was rightfully entitled.
2. In 2018, Blyvoor contracted with a company known as “**Exotix**”. Under that agreement (the “**Exotix Engagement**”), Exotix was to provide advisory services to help secure funding for Blyvoor’s intended recommencement of production at a gold mine in South Africa.
3. Exotix soon learnt that another investment adviser (“**LHC**”) had entered into a similar arrangement with Blyvoor, and that LHC was in contact with the same potential investor as Exotix, “**Orion**”. Thereafter, Exotix, LHC, and Blyvoor all entered into an agreement (the “**Tripartite Agreement**”), by which the parties were to jointly pursue funding from Orion, and which incorporated the terms and conditions of the Exotix Engagement.
4. In April 2018, an indicative term sheet was signed between Blyvoor and Orion, under which Orion was to provide \$60 million in funding (the “**Orion Funding**”). The terms of the Tripartite Agreement stated that the receipt of the Orion Funding would trigger fees payable to Exotix (the “**Debt**”).
5. The Claimant’s case was that:
  - a. Exotix duly performed its services under the Tripartite Agreement such that the Debt became due;
  - b. The Debt had been assigned by Exotix to Tellimer Limited (“**Tellimer**”) by a Deed of Transfer, and subsequently assigned by Tellimer to the Claimant (Alphier) by a written assignment.

6. The Defendant's case was that a contractual prohibition prevented the chain of assignments (between Exotix, Tellimer, and the Claimant) from taking effect against it.

### CONSIDERING INTERRELATED APPLICATIONS

7. The Defendant brought an application for strike out, contending that the assignments relied upon by the Claimant were invalid. Its argument relied upon Clause 17.6 of the Exotix Engagement, which stated:

*“Neither party may assign, transfer or delegate its rights or obligations under this Engagement Letter except with the prior written consent of the other party, save that Exotix may transfer its rights and obligations to any other member of the Exotix Group by providing notice to the Client. This Engagement Letter shall be binding upon and enure to the benefit of each party to this Engagement Letter and its or any subsequent successors and assigns [sic].”*

8. In response, the Claimant brought an application to add Exotix (as the original party with entitlement to pursue the claim) as a co-Claimant.<sup>1</sup>
9. The Defendant argued that its application should be heard first, such that the Claim should be struck out, because the merit of the claim brought by the Claimant was an entirely separate question to whether the original assignee also had a claim. However, the Court helpfully confirmed at [97] that the principle in *Soo Kim v Youg Geun Park & Ors* [2011] EWHC 1781 (QB) – that a party should be given the opportunity to amend its pleadings before the court exercises its power to strike out – naturally includes giving a party the opportunity to add another party.

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<sup>1</sup> There was also an application to add Tellimer, on the basis of an alternative argument that an assignment was equitable, which fell away in light of the Court's findings.

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10. Further, the Defendant argued that the Claimant’s application to add Exotix should be dismissed because it had a reasonably arguable limitation defence (which is the test in circumstances where the doctrine of relation-back means that an added party would be treated as if it brought its claim on the same date as the existing claimant, thus depriving a defendant of the limitation argument it would have had if the added party instead brought a new claim). The Court concluded [115] that it was appropriate to accept an undertaking from the Claimant that, if the court were to find at trial that any part of the Debt claim would have been time-barred, Exotix would not pursue its claim in relation to that part. The Court added Exotix on that basis. It is notable that the Court considered that such an undertaking was preferable even though it had serious doubts over the feasibility of the Defendant’s limitation arguments.
11. As such, the Claimant succeeded in its application to add Exotix to the proceedings.

### **CONTRACTUAL PROHIBITIONS ON ASSIGNMENT**

12. In response to the Defendant’s strike out application, the Claimant contended that the contract did not bar the assignments in question, because:
- a. A distinction could be drawn between the transfer of rights to performance and the transfer of fruits of performance; and
  - b. The phrase “Exotix Group” had a specific meaning which included Alphier and Tellimer.

13. As to the Claimant's argument regarding a distinction in types of transfer:
- a. The Claimant relied upon the obiter dicta in *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1993] 1 A.C. 85 at 105C, where Lord Browne-Wilkinson held that “it is at least hypothetically possible that there might be a case in which the contractual prohibitory term is so expressed as to render invalid the assignment of rights to future performance but not so as to render invalid assignments of the fruits of performance. The question in each case must turn on the terms of the contract in question.”
  - b. The Court concluded that this instance was not one such hypothetical possibility – meaning that actual authority on this dicta remains lacking. In particular, the Court relied upon the fact that the Deed of Transfer contained a schedule which purported to transfer the entire mandate between Blyvoor and Exotix, rather than just the Debt.
14. As to the Claimant's argument regarding the construction of “Exotix Group”, the Court considered that there was sufficient evidence before it to determine its true meaning and concluded that the Defendant's suggested interpretation was the correct one.
15. Whilst the parties agreed that a contractual prohibition on assignment bars both equitable and legal assignment, the Court endorsed the Claimant's contention that such a prohibition would not bar the declaration of a trust of the benefit of that contract (following *Don King Productions Inc v Warren* [2000] Ch 291). This was clearly the case in circumstances where a clause in the Deed of Transfer provided that where any of its intended assignments failed, the relevant assets were to be held on trust by Exotix for Tellimer. Under this analysis, the legal title to the Debt remained with Exotix.
16. In light of these conclusions, the Court considered that Exotix, rather than Alphier, was the party legally entitled to the Debt. As such, at the consequential hearing at which judgment was handed down, the Court

ordered that Alphier's claim be struck out – but thanks to the Claimant's addition application, Exotix was by then a party to the proceedings and is able to progress its legally simplified claim, without assignment issues, to trial. The trial will take place in April 2025.

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