Neutral Citation Number: [2024] EWHC 2649 (ChD)

Case No: BL-2023-000300

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

7 Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 21 October 2024

Before:

Mr Justice Thompsell

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Between:

Alphier Capital LLP	**Claimant**
- and -	
Blyvoor Gold Capital (Pty) Ltd	**Defendant**

- -
- -

Ms Kate Gardiner (instructed by **Three Graces Legal**) for the **Claimant**
Mr Richard Power (instructed by **Lewis Silkin LLP**) for the **Defendant**

Hearing dates: 3 October 2024

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APPROVED JUDGMENT

This judgment was handed down in open court at 10.30 on 21 October 2024 by circulation to the parties or their representatives, by email and release to The National Archives

Mr Justice Thompsell:

1. BACKGROUND

1. This hearing has involved various applications that relates to an action being bought by the Claimant for the payment of a debt alleged to amount to $2,625,000 (the "**Putative Debt**") which the Claimant alleges has been assigned to it and is due from Blyvoor Gold Capital (Pty) Ltd, (which I shall refer to as the "**Defendan**t" or as "**Blyvoor**").

2. The Putative Debt is said to arise under two agreements.

3. First, on or around 6 March 2018, Exotix Group LLP ("**Exotix**") entered into an agreement with Blyvoor (the "**Exotix Engagement**"), by which the Defendant engaged Exotix to arrange investment of up to $50 million for Blyvoor or an associated company, to fund Blyvoor's intended recommencement of production at a gold mine in South Africa. It should be noted that, Exotix has undergone a name change and is now called Alphier Capital Two LLP. However within this judgment, for consistency, I will continue to refer to it as Exotix.

4. Secondly, after Exotix learned that another investment adviser, Legacy Hill Capital Limited ("**LHC**") had entered into a similar agreement with Blyvoor on 29 March 2018, Exotix, LHC and Blyvoor entered into the so-named "**Tripartite Agreement**", by which the parties were to jointly pursue $70 million of funding from Orion. Whilst this agreement could be said to have replaced the Exotix Engagement, it applied by reference the terms and conditions of the Exotix Engagement as regards the relationship that it created between Exotix and the Defendant.

5. On 21 April 2018, an indicative term sheet was signed between the Defendant and Orion Resource Partners ("**Orion**"), under which Orion was to provide $60 million in funding (the "**Orion Funding**"). According to the Case Summary provided to the court as a case management tool and without prejudice to the parties' pleaded cases, funding from Orion (totalling US$60 million) was provided in instalments from September 2018 to August 2019. As I discuss in more detail below, the dates on which the Orion Funding was first received remains a matter for dispute.

6. Clause 3 of the Tripartite Agreement provided that Blyvoor was to pay Exotix:

    i) an initial fee, in the amount of 3% of the principal aggregate amount of the Orion Funding, upon receipt of the Orion Funding; and

    ii) a subsequent fee, in the amount of 0.75% of the principal aggregate amount of the Orion Funding, upon the eighteen-month anniversary of payment of the initial fee.

7. The Claimant's case is that:

i) Exotix duly performed the relevant services in accordance with the Exotix Engagement and/or the Tripartite Agreement, and was instrumental in Blyvoor receiving the Orion Funding and that, consequently, a fee of $2,625,000.00 became due, being what I am now referring to as the Putative Debt.

ii) The Putative Debt was assigned by Exotix to Tellimer Limited ("**Tellimer**") by a deed dated 7 January 2020 (the "**Deed of Transfer**") and Blyvoor was provided with notice of this was provided in an email from Exotix to the Defendant on 24 April 2020;

iii) The Putative Debt was subsequently assigned by Tellimer to the Claimant by a written assignment dated 29 May 2020 (the "May 2020 Assignment").

iv) Notice of the May 2020 Assignment was given to the Defendant on 2 December 2020 by way of the Letter Before Action.

8. The Claimant therefore claims in its position as the assignee of the Putative Debt and makes its claim in debt, or alternatively, in damages plus interest.

9. The Defendant denies liability on the basis that (in summary): (i) the purported assignment to the Claimant is invalid; (ii) Exotix allegedly played no (or no substantial) role in negotiating or securing the Orion Funding and therefore was not entitled to payment under the Tripartite Agreement; and (iii) the Defendant's entrance into the Tripartite Agreement was procured by misrepresentations by Exotix.

2. THE APPLICATIONS

10. On 31 October 2023, the Defendant issued an application to strike out the Claimant's case or alternatively to give summary judgment against the Claimant, on the alleged grounds that the Claimant is not entitled to the Putative Debt because the chain of assignments between Exotix, Tellimer, and the Claimant was ineffective and/or ineffective as against the Defendant; and in the alternative if the Court did not grant that application, for the Claimant to provide security for costs.

11. On 5 March 2024 the Claimant made an application for Tellimer to be added as a further claimant to the claim and on 15 August 2024, (following a delay occasioned by the need to restore Exotix to the Register of Companies), made an application for Exotix to be added also as a further claimant to the claim.

12. The matters above were part heard at a hearing on 3 October 2024. This was adjourned to allow some further submissions to be made on points that arose late in the proceedings and that hearing has resumed today.

13. On the basis of the argument made at the earlier hearing and in subsequent paper submissions, I am able to provide judgment on a number of these matters but will invite further argument before deciding some of these matters.

As became apparent on the first hearing date, these matters are interrelated. I will deal first with the Defendant's strike-out application.

3. LEGAL PRINCIPLES RELEVANT TO STRIKE OUT AND SUMMARY JUDGMENT

14. The legal principles relevant to Strike Out and to Summary Judgment are well-established. Both parties referred me to the often-quoted summary by Lewison J in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15] which confirms that:

    i) The Court must consider whether the respondent to the application has a "*realistic*" as opposed to a "*fanciful*" prospect of success i.e. one that carries some degree of conviction - a claim that is more than merely arguable.

    ii) The Court must not conduct a "*mini-trial*". This does not mean that the Court must take at face value and without analysis everything that a respondent to the application says in his statements before the Court.

    iii) The Court must take into account not only the evidence actually placed before it upon the application, but also the evidence that can be reasonably expected to be available at trial.

    iv) Although a case may turn out at trial not to be complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus, the Court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case.

    v) On the other hand, it is not uncommon for an application under CPR Part 24 to give rise to a short point of law or construction and, if the Court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should "*grasp the nettle*" and decide it. If the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be.

4. THE DEFENDANT'S ARGUMENT IN RELATION TO STRIKE OUT

15. The Defendant's argument in relation to strike out is based squarely on the prohibition on assignment contained in Clause 17.6 of the terms and conditions of the Exotix Engagement.

16. Clause 17.6 of the terms and conditions of the Exotix Engagement provides that:

> "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."

17. This provision is also applicable to the Tripartite Agreement as the Tripartite Agreement provides, at Clause 1.1 that:

> "Unless otherwise specified or modified, herein the terms and conditions of the …. Exotix Engagement shall apply to this Tripartite Agreement insofar as it relates to the relationship between Blyvoor and Exotix".

18. It is common ground that no such consent (whether written or otherwise) has been provided by Blyvoor.

19. The Defendant's argument is that the transfer of the Putative Debt by Exotix to Tellimer and the further transfer from Tellimer to the Claimant were therefore each ineffective as a result of this clause. The Claimant therefore has no standing to make a claim and its claim should be struck out. This argument has been referred to as the "**Entitlement Issue**".

20. The Claimant has sought to deploy two lines of argument against this proposition.

(i) The distinction between rights under the agreement and the fruits of the agreement

21. The Claimant's first argument is that a distinction can and should be drawn between the transfer of rights to performance and the transfer of the fruits of performance (in particular the Putative Debt) , and that clause 17.6 does not bar the latter.

22. There is authority that such a distinction may, in appropriate cases be made. In *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1993] 1 A.C. 85 ("***Linden Gardens***"). At page 105C 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."

23. Despite this hypothetical possibility, the court in *Linden Gardens* refused to apply that reasoning to the case before it. Lord Browne-Wilkinson explained that the parties to a complicated building contract cannot have intended to distinguish between "rights" and "fruits" because a contractor would want only to deal with the particular employer given the nature of building contracts, which by their nature are "*pregnant with disputes*".

24. Ms Gardiner, for the Claimant points out that the same circumstances do not apply in the case before me, and pointed me to *Barbados Trust Co v Bank of Zambia* [2007] EWCA Civ 148 [2007] 1 C.L.C. 434, ("***Barbados Trust***"). This was a case dealing with debts arising under a banking facility. Here it was said (see paragraphs 68-72)

that much of the particular reasoning relating to building contracts does not apply to established debts under a facility.

25. I accept this point, but must note that, despite distinguishing the facts in that regard, the court nevertheless went on (at [73]) to determine that the prohibition on transfer did apply to debts that had already arisen as a result of the past performance of the banking facility.

26. In fact, Ms Gardiner was unable to refer me to a single case where the court had found an instance of the "*hypothetical possibility*" noted in *Linden Gardens.*

27. The nearest we got to this was in *Masri v Consolidated Contractors International Co SAL* [2007] EWHC 3010 (Comm) [2008] I.L.Pr. 14 where it was said at [123] that:

> "a clear distinction has to be drawn between the right to receive something under a contract (here, the oil) and the fruits of the sale of the oil".

28. This was not, however, drawing a distinction between rights to performance of the contract and the fruits of the performance of the contract. In this case the fruits of the contract were oil and had already been received and what the court was dealing with was a question about whether the transfer of that oil was constrained.

29. I should deal also with an argument raised on behalf of the Claimant that the very fact that Blyvoor permitted assignments within the Exotix Group is also relevant to this point. I fail to see the relevance of this to the argument that the parties meant to make a distinction between rights of performance and the fruits of performance. If anything, this shows that they did turn their mind to exceptions but nevertheless did not allow an exception based on this distinction.

30. Having reviewed the case-law put to me on this point, I consider it clear that whether the "*hypothetical possibility*" noted in *Linden Gardens* needs to be approached in the same manner as any other contractual provision.

31. As regards the case-law relating to principles of contractual interpretation, the parties agreed with my proposition that the principles to be followed have been adequately summarised in two decisions.

32. The first, is the authoritative statement in *Wood v Capita Insurance Services Ltd* [2017] AC 1173 at [10]-[13] by Lord Hodge. It is worthwhile quoting from the following passages at [10] and [12] in full:

> "10. The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning."

> …..
>
> "12. This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated... To my mind once one has read the language in dispute and the relevant parts of the contract that provide its context, it does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each."

33. The second is the further convenient summary of general principles given by HHJ Pelling at first instance and adopted and endorsed by the Court of Appeal in *Lamesa Investments Ltd v Cynergy Bank Ltd* [2020] EWCA Civ 821 at [18] and in particular to the following relevant passages within that paragraph (which I have further condensed by removing the citations justifying the various conclusions):

> "i) The court construes the relevant words of a contract in their documentary, factual and commercial context, assessed in the light of (i) the natural and ordinary meaning of the provision being construed, (ii) any other relevant provisions of the contract being construed, (iii) the overall purpose of the provision being construed and the contract or order in which it is contained, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions …; …. iv) Where the parties have used unambiguous language, the court must apply it…; v) Where the language used by the parties is unclear the court can properly depart from its natural meaning where the context suggests that an alternative meaning more accurately reflects what a reasonable person with the parties' actual and presumed knowledge would conclude the parties had meant by the language they used but that does not justify the court searching for drafting infelicities in order to facilitate a departure from the natural meaning of the language used …; vi) If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other …but commercial common sense is relevant only to the extent of how matters would have been perceived by reasonable people in the position of the parties, as at the date that the contract was made; … and viii) A court should not reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight, because it is not the function of a court when interpreting an agreement to relieve a party from a bad bargain …"

34. With these principles in mind, I turn back to the wording of Clause 17.6:

> "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."

35. Taking first the natural and grammatical meaning, I note that:

    i) the restriction is worded disjunctively to apply to the transfer of "rights *or* obligations" so a transfer of *either* obligations (which is anyway legally impossible except by means of a novation) *or* of rights is restricted;

    ii) there is some ambiguity as to whether the restriction on transfer of "rights" in the plural is effective to restrict the transfer of one particular right or applies only where there is a blanket disposal of all rights. I will discuss this point further below; and

    iii) the exception for transfers into the other members of the Exotix Group, however, is worded conjunctively to allow such transfers of Exotix's rights **and** obligations suggesting that what is allowed without consent is an effective novation of all rights and obligations to a single entity within the Exotix Group.

36. Points (ii) and (iii) in the previous paragraph are of less importance than it might seem as regards the transfer to Tellimer, because the transfer from Exotix to Tellimer was a transfer of the whole of the Tellimer-branded element of Exotix's business, and in particular included, according to Schedule 1 of the relevant Deed of Transfer of Assets dated 7 January 2020, the "Advisory Investment Banking mandate for Blyvoor Gold".

37. The itemisation of this asset as one being transferred is additional to the one that the Claimant has drawn the court's attention in Schedule 2, which recorded the transfer of Trade Debtor', D – with a sum of £1.69 million, which the Claimant avers that is a reference to the Putative Debt.

38. Thus, the purported transfer was indeed a transfer of all (remaining) rights and duties under the Exotix Engagement/Tripartite Agreement, and not merely the Putative Debt. This is not a meaningless distinction. Whilst by this time the services to be provided by Exotix had been performed, there were various continuing rights and obligations, that continued to have effect:

    i) a right under clause 2.1 of the Terms and Conditions to be notified if Blyvoor finds out that information provided for the Offering turns out to be untrue or misleading;

    ii) rights and obligations of confidentiality under clause 6 of the Terms and Conditions;

    iii) a right under clause 7 of the Terms and Conditions to prevent advice given by Exotix being shared with third parties;

iv) rights under clause 8 of the Terms and Conditions to protect intellectual property rights;

v) the benefit of warranties and undertakings under clause 9; and

vi) the benefit of indemnities and limitations on liability provided under clause 11 of the Terms and Conditions.

39. It may be noted that under clause 13.3 of the Terms and Conditions, although the engagement of Exotix itself may have been time-limited:

> "The termination or expiry of this Engagement Letter will be without prejudice to any accrued rights or obligations of the parties and will not affect the provisions of the following clauses, which shall survive any such termination or expiry and will remain in full force and effect: <u>Cover Letter</u>: paragraphs 2 (Fees), 3 (Expenses), <u>Terms and Conditions</u>: Clauses 1 (Role of Exotix). 4 (Payment Terms}, 6 (Confidentiality), 7 (Materials Provided by Exotix), 8 (Intellectual Property), 10 (Conflicts of Interest), 11 (Liability and Indemnity), 12 (Non-Circumvention), 13.3 (Termination and Survival), 15 (Publicity), 18 (Governing Law and Jurisdiction, and 19 (Defined Terms)."

40. Applying all the above considerations to the arguments raised by the parties on this point, I reach the following conclusions:

i) it is clear that clause 17.6 prohibited the transfer of all rights or all obligations except to another member of the Exotix Group; and

ii) the Deed of Transfer of Assets dated 7 January 2020 purported to transfer all rights and, I think also purported to transfer all obligations, and therefore fell foul of this restriction - unless Tellimer was at this time another member of the Exotix Group.

41. Having regard to what the Deed of Transfer actually purported to do, there really is no room for any argument that what was to be transferred was merely an accrued debt, amounting to the fruits of the contract, rather than to a right under the contract and that such a transfer fell outside the clause 17.6 prohibition. The transfer was a transfer of all aspects of the mandate and not merely the transfer of a debt.

42. I will add however that even in the absence of this point I cannot accept the Claimant's "fruits" argument in the way that it is made. The Claimant is looking to exercise a right to sue in debt based on the Tripartite Agreement, taken with the Terms and Conditions of the Exotix Engagement. This is a "right" – indeed for Exotix, its key and most important right - and there is nothing in the language of Clause 17.6 to say this right is to be treated differently to any other right. Given that the parties did consider the possibility of an exception to clause 17.6 (to deal with transfers within the Exotix Group) it must be taken that had they wished to allow the assignment of accrued rights in debt they would have made that clear also.

43. *Linden Gardens* allowed for the possibility of a distinction being made between contracts and the performance of the contract, but there is nothing in the drafting here to suggest that that distinction was in fact made by the parties in the case before me.

44. I have considered whether the Defendant's point could be made in a different way based on the point I have noted above, that clause 17.6 constrained a transfer by either party of "its rights or obligations" in the plural – not the transfer of any one right in the singular- creating some ambiguity as to whether the restriction on transfer of "rights" in the plural is effective to restrict the transfer of one particular right or applies only where there is a blanket disposal of all rights. I note that there is no clause of the type frequently seen in commercial contracts to the effect that references to the plural include references to the singular and the parties could have included such a clause if they meant this or could have used language that clearly restricted the transfer of any right, had they meant this.

45. However, looking at the matter in context, I consider that this argument to must be dismissed. The problem with this argument since it would appear to allow the transfer of individual rights, such as the right to confidentiality and it is highly unlikely that this was intended.

46. Having dismissed the "fruits" argument, I need next to consider the Claimant's second argument as regards the clause 17.6 restriction.

(ii) The Group argument

47. The Claimant's second argument is that both transfers were covered by the exception to the restriction on transfer allowing transfers to any other member of the Exotix Group if notice thereof is provided to Blyvoor.

48. The phrase "Exotix Group" is not separately defined in the Exotix Engagement. However, the words "Exotix" and "Group" are defined terms. "Exotix" is defined as Exotix Partners LLP. The term "Group" is defined as follows:

> "Group means a party's holding companies and subsidiaries, from time to time. The terms "holding companies" and "subsidiaries" will be construed in accordance with section 1159 of the Companies Act 2006. In the case of a limited liability partnership which is a subsidiary of a company or another limited liability partnership, section 1159 of the Companies Act 2006 will be amended so that: (I) references in sub sections 1159(1)(a) and (c) to voting rights are to the members' rights to vote on all or substantially all matters which are decided by a vote of the members of the limited liability partnership: and (ii) the reference in sub section 1159(1)(b) to the right to appoint or remove a majority of its board of directors is the right to appoint or remove members holding a majority of the voting rights."

49. Section 1159 of the Companies Act 2006 provides relevantly as follows:

> (1) A company is a "subsidiary" of another company, its "holding company", if that other company—

(a) holds a majority of the voting rights in it, or

(b) is a member of it and has the right to appoint or remove a majority of its board of directors, or

(c) is a member of it and controls alone, pursuant to an agreement with other members, a majority of the voting rights in it,

or if it is a subsidiary of a company that is itself a subsidiary of that other company.

50. The Defendant argues that the reference to "the Exotix Group" must be derived from applying the definition of "Group" to Exotix and therefore (in short) means Exotix, and subsidiaries of Exotix and any holding company of Exotix, from time to time.

51. I understand it to be the common understanding that under this definition of Group Tellimer was not in the same "Group" (as so defined) Exotix at the time of the Transfer of Assets (7 January 2020).

52. This is confirmed by Mr Pearson (a solicitor representing the Claimant) in his witness statement dated 21 December 2023 says that, at the relevant time, Tellimer Limited was a "sister company" of Exotix Partners LLP and that both companies were "a 100% wholly owned subsidiary of Exotix Holdings Limited". In other words, Mr Pearson's evidence is that Tellimer Limited was not a subsidiary or holding company of Exotix Partners LLP but rather that, instead, Exotix Holdings Limited was the holding company of each of Tellimer Limited and of Exotix Partners LLP.

53. It follows that the transfer to Tellimer Limited would not have been a transfer to a member of Exotix's "Group" within the meaning given by the Terms and Conditions.

54. Neither was Alphier Capital LLP a part of a Group within this definition with Exotix at the time of the May 2020 Assignment. The records at Companies House show Exotix to have resigned as a member on 30 November 2019 and it is possible that the actual date of resignation was earlier than this.

55. The Claimant, however, argues that the phrase "the Exotix Group" meant something different than the formulation "Exotix's Group (which would have brought in the more restrictive definition of Group).

56. The Claimant deploys various points to bolster this argument.

57. First, it prays in aid the background to the events. Andrew Moorfield was the head of the Investment Banking Natural Resources ("**IBNR**") team at Exotix between 3 May 2016 and 30 September 2019 and dealt with Blyvoor. According to his witness statement dated 18 December 2023, he regarded Exotix as acting effectively as a 'host' - providing administrative resources and FCA cover to a number of autonomous teams, which included the IBNR and the financial arrangements in his view reflected this. In his view the 'spin off' of teams such as the IBNR was a natural progression given the structure of Exotix's business In early 2019, Exotix Partners LLP 'rebranded' as 'Tellimer'. I understand to be in preparation for divestment of the IBNR business to a more autonomous company. Tellimer Limited was formed on 27

March 2019 and, as we have seen acquired the Tellimer branded business of Exotix on 7 January 2020.

58. I place no reliance on this background having any effect on the understanding of the parties at the point that the Terms and Conditions were written in March 2018. Whilst at this time the reorganisation might have been a gleam in the eye of Andrew Moorfield and others in his team, its implementation was a year away. There can be no assumption and the Defendant has produced no evidence that these nascent plans would have affected Exotix's drafting in relation to an engagement in March 2018 that was originally expected to last for a period of four months according to its terms.

59. Importantly, there is no evidence whatsoever that these plans were shared with Blyvoor so that they would have had a common intention on this point. The Claimant has been aware of this issue for some considerable time and if it had any such evidence, it may be expected that it would have deployed it. There is no documentary evidence supporting this proposition and the only witness evidence supporting it is in the witness statement dated 21 December 2023 of Mr Aaron Pearson, a solicitor representing the Claimant in this action, where he asserts (at paragraph 37) that:

> "…, the reference to "the Exotix Group" in Clause 17.6 is a unique term, which embraces any sibling company or company from the "same generation" as Exotix by reference to the corporate structure. Clause 17.6 refers to "the Exotix Group" and uses the definite article. That is a reference to a specific and known collection of entities in which Exotix Partners LLP was a part. Alternatively, by way of legal submissions it will be demonstrated that the reference to holding companies and subsidiaries in Clause 19.1 extends to include, either as a matter of construction or as an implied term, sibling companies or entities."

60. This is an assertion by a lawyer, after the fact, of the legal effect of the drafting rather than any evidence of the understanding of the parties at the time the Terms and Conditions were settled.

61. The Claimant argues that, as there has not yet been disclosure, it is possible that new evidence will emerge that demonstrates that the parties had a shared understanding as to the meaning of the phrase "the Exotix Group" and points to the dictum in *Easyair* that the Court must take into account not only the evidence actually placed before it upon the application, but also the evidence that can be reasonably expected to be available at trial.

62. However, I consider this argument is taking that principle too far. Mr Power, on behalf of the Defendant referred me to the judgment of Cockerill J in *King v Steifel* [2021] EWHC 1045 (Comm) at paragraph [21] and [22] and, in particular, her memorable phrase at [23] that:

> "when faced with a summary judgment application it is not enough to say, with Mr Micawber, that something may turn up."

63. This phrase is particularly appropriate where the question is one of contractual interpretation, and there is no evidence before the court of a common understanding

that the parties had agreed or understood a different meaning of the phrase to that appearing on the face of the agreement.

64. The Claimant's second argument to support its contention that Clause 17.6 in referring to "*the Exotix Group*", means something other than the Exotix's Group" is based on the fact that both terms appear within the Terms and Conditions and therefore must be taken to mean something different. The Claimant gives as an example, the definition of "Delegate" in clause 19.1, which refers to "*Exotix's Group*". This, it argues, does not contain the definite article and can be understood to refer to the contractually defined terms "*Exotix*" and "*Group*".

65. In my view, an analysis of the Terms and Conditions shows the opposite. First there is no logic in a clause dealing with Delegates using a narrower definition of a Group than that in other clauses. Secondly, and perhaps more importantly within Clause 10 (which deals with conflicts of interest) the terms "the Exotix Group"; "Exotix and another member of its Group" and "Exotix Group" are clearly being used interchangeably in a way that is completely incompatible with the notion that these terms were meant to have had different meanings.

66. In oral argument I challenged Ms Gardiner to explain the definition of "the Exotix Group" that she was contending for. She was unable to come up with a precise definition, and certainly not one that was capable of encompassing the Claimant. She suggested rather that this might be a matter for evidence and therefore not something to be determined in strike-out proceedings.

67. This response, I consider shows the unsatisfactory nature of her argument. It would be of prime importance for the parties to have known what the references to "the Exotix Group" referred. This is particularly the case when you consider the provisions in clause 11.5, that provide an indemnity to all members of "the Exotix Group". The agreement included a definition of "Group" that was intended to clarify this. In my view it is fanciful to believe that the parties meant something different when the word "Group" was used in the phrase "the Exotix Group". If they had meant something different they would have explained this in the drafting.

68. I reject the Claimant's contention that the strength of its argument that Exotix and Tellimer were members of "the Exotix Group" is one to be determined by evidence as to the function and reality of the corporate relationships which can only emerge at trial, so that pending having all the evidence it would be inappropriate to determine the question. The meaning of the term "the Exotix Group" is not one that depended on how Exotix was run. Certainly this could not have been determinative of how to treat for the purposes of this definition Tellimer and the Claimant, which did not even exist at the time.

69. Having dismissed after careful consideration both arguments made on by the Claimant in relation to this point, I must agree with the Defendant that both the First Transfer and the Second Transfer were in breach of the clause 17.6 restriction.

70. The Defendant points out that if legal assignment was prohibited, an equitable assignment would also be ineffective: see *First Abu Dhabi Bank PJSC (formerly*

National Bank of Abu Dhabi PJSC) v BP Oil International Limited [2018] EWCA Civ 14.

71. The Claimant does not dispute this, but makes a distinction between an equitable assignment and a declaration of trust. It argues that where a contract prohibits assignment, a party can still by a declaration of trust or otherwise make himself the trustee of the benefit of that contract. Authority for this proposition can be found in the Court of Appeal decision in *Don King Productions Inc v Warren* [2000] Ch 291 at page 321. In *Don King* the court reasoned at page 319E, *inter alia*:

> "A declaration of trust in favour of a third party of the benefit of obligations or the profits obtained from a contract is different in character from an assignment of the benefit of the contract to that third party"; and (at page 303G)
>
> "If one party wishes to protect himself against the other party declaring himself a trustee, and not merely against an assignment, he should expressly so provide."

72. In *Don King* the court held that where a purported assignment was rendered invalid (in law and in equity) by a contractual prohibition, the effect of the purported assignment was to create a trust of the contract and the rights thereunder. This was the court's finding despite the fact that, in that instance, there was no express declaration of trust or other language from which intention could be inferred (meaning that the trust was a constructive).

73. This principle was considered by the Court of Appeal in *Barbados Trust*. In that case the court, having cited *Don King* as above, considered the Court of Appeal decision in the same case, which approved that reasoning, as well as examining the reasoning in *R v Chester* upon which the Defendant relies. Crucially, at [43] Waller LJ held that whilst a contractual bar on assignment was a bar on both legal and equitable assignments, a distinction must be drawn between an equitable assignment and a declaration of trust:

> "…a declaration of trust is not an equitable assignment. An equitable assignment if in writing can be converted into a legal assignment under Section 136 of the Law of Property Act and that is simply not true of a declaration of trust. The language of [the clause prohibiting assignment] does not in terms include within the prohibition a declaration of trust, and it seems to me that since one is concerned with the question whether a restriction should be placed on the transfer of a piece of property, an acknowledged debt, the court should be slow to contemplate that the parties ever intended such to be within the prohibition."

74. The Claimant's argument that the Deed of Transfer created a trust has backing from Clause 6.2 of the Deed of Transfer, which provides:

> "6.2 In so far as any Assets are not delivered or formally transferred, novated, or assigned to [Tellimer] at the Effective Date and until such time as they are formally assigned."

75. This I think is conclusive in demonstrating that, if the assignment of the assets was not effective to transfer any of the Assets, then the Assets were indeed the subject of a trust in favour of Tellimer.

76. A question arises then as to what was transferred between Tellimer and Alphier. The Claimant argues that what was assigned was the benefit of the trust created by the Deed of Transfer insofar as it relates to the Putative Debt. This may well have been the intention of the parties viewed with hindsight, but it is not what the May 2020 Assignment provided for. That document recited that:

> "(a) Blyvoor Gold Capital (Pty) Ltd (Blyvooor) is indebted to tell Emma in the principal sum of US dollars 2.1 million (Debt)
>
> (b) Tellimer wishes to assign to Alphier the Debt and all rights relating thereto in order that Alphier may pursue Blyvoor for repayment (Proposed Claim)".

77. Clause 3 provided for an assignment of the Proposed Debt and the Proposed Claim.

78. There was, therefore, a false assumption underlying the May 2020 Assignment that Tellimer was the direct creditor of Blyvoor, and that it was its claim as creditor that was being assigned to Alphier.

79. Whether this misunderstanding can be corrected through purposive construction or could be the rectification was not a matter that was argued before me and may depend on evidence such that it is not appropriate for consideration in relation to an application for striking out. Bearing this in mind I consider that I should proceed on the following basis:

    i) that it is my finding that the Deed of Transfer was not effective not as a legal assignment, but was effective to cause Exotix to become a trustee of the Putative Debt for Tellimer;

    ii) for the purposes of the current hearing but without determining the matter, I should proceed on the basis that the Claimant has a realistic prospect of establishing that the effect of the May 2020 Assignment was to operate as assigning the benefit of that trust from Tellimer to Alphier.

80. With or without a trust, I think it is clear that the chain of assignments are effective to create obligations as between Exotix, Tellimer and Alphier (see *Snell's Equity* at 3-050:

> "The default rule at common law is that a contractual provision prohibiting assignment makes the assignment ineffective as against the debtor… If despite the prohibition, the creditor purports to assign the contract, then the assignment may be valid between himself and the assignee. But it cannot make the debtor liable to the assignee."

81. This echoes *Linden Gardens* at p108D):

> "A prohibition on assignment normally only invalidates the assignment as against the other party to the contract so as to prevent a transfer of

> the chose in action: in the absence of the clearest words it cannot operate to invalidate the contract as between the assignor and assignee and even then it may be ineffective on the grounds of public policy".

82. With these findings in mind as regards the chain of assignments I turn to Claimant's application to join Exotics and Telemark as parties.

The Claimant's Application to join Exotix and Tellimar as parties

83. Ms Gardiner has drawn my attention to the legal principles relevant to the addition of parties.

CPR 19.2(2) provides that:

"*The court may order a person to be added as a new party if –*

(a) It is desirable to add the new party so that the court can resolve all the matters in dispute in the proceedings; or
(b) There is an issue involving the new party and an existing party which is connected to the matters in dispute in the proceedings, and it is desirable to add the new party so that the court can resolve that issue."

84. The policy objective of enabling parties to be heard if their rights may be affected, and the overriding objective are both relevant to the question of whether it is desirable to add a party – see the commentary in the White Book at 19.2.2 and the decision in *Re Pablo Star Ltd* [2017] EWCA Civ 1768; [2018] 1 W.L.R. 738, CA.

85. The power under CPR 19.2 is "a very wide power to enable parties who may be affected by a finding in any proceedings to be joined" (*Davies v Department of Trade & Industry* [2006] EWCA Civ 1360 [2007] 1 WLR at [12].

86. No party can be added or substituted as a claimant unless they have given written consent, and that consent has been filed with the court (CPR 19.4(4)). On 15 August 2024, Exotix provided its written consent thus complying with this requirement CPR 19.4(4). I have not been referred to any document in which Tellimer has provided its consent, but I think it is clear from all the circumstances that it intends to. I will take representations as to how to deal with this point after delivering this judgment**.**

87. In *Cohen v Lorrells LLP* [2019] EWHC 32 (QB) the Court observed at [47] the "*very wide terms of CPR 19.2(2)*" and held that the proposed addition of a party should not be viewed any differently to any such proposed amendment to a case. It would be inappropriate and disproportionate to require the party to be added to instead start a new claim from scratch.

88. I turn first to the Claimant's application (by means of a notice dated 15 August 2024) to add Exotix as a co-claimant to these proceedings pursuant to CPR 19.2(2)(b) on the basis that there is an issue involving the new and existing parties which is connected to the matters in dispute and it is desirable to add the new party so that the court can resolve this issue.

89. Having found what I have found (or consider that I should assume at this stage) regarding the chain of purported assignments, I consider that it is clear that Exotix is affected by a finding in these proceedings, assuming that I allow them to continue. As the original creditor, holding the assets in trust for others Exotix has a clear interest in the proceedings.

90. I accept the Claimant's argument that Exotix would pursue the Claim on precisely the same basis and using the same pleadings. Even with Exotix as a Claimant, Mr Moorfield (of Alphier) would be the true force behind the Claim, as he is the party that had the responsibility for the Blyvoor contract (both during his time at Exotix and later at Alphier).

91. I accept also the Claimant's argument that adding Exotix to the claim is a more efficient use of the Court's and parties' resources. If the Court were to strike out the Claim on the bases that clause 17.6 bars assignment, Exotix and the Claimant would bring a new claim (in which limitation could be tried) as soon as practicably possible. This would involve new pleadings and directions, despite the fact that the subject matter would be materially the same. Exotix's Claim is on materially the same terms as the Claimant's Claim, save that it involves no issues relating to clause 17.6. It relies on the same factual matrix and would require no investigation beyond the scope of the Claimant's Claim.

92. I therefore consider that I should join Exotix as a claimant absent any rule or legal consideration to the contrary.

93. In reaching this conclusion, I have accepted the Claimant's submission that this would not pose a threat to the trial date or the trial timetable. The addition of this Claimant creates no new issues, so as to require a greater scope of disclosure or in relation to witness statements except in relation to limitation as discussed further below. No trial timetable has yet been finalised – the only confirmed detail is that it is a three-day trial. Given that the timetable was not yet set, the parties can accommodate this within their scheduling. The Claimant estimates that approximately one day of this trial would have been on the Entitlement Issue (with the remaining two days allocated the question as to whether Exotix was an effective cause of the Orion Funding being secured and to the Defendant's arguments of misrepresentation). With the addition of the Exotix as a claimant, the Entitlement Issue becomes an issue among the Claimants, one on which they appear to be in agreement and certainly one of no importance to the Defendant. It should be possible to curtail the time spent at trial on this point, and this will allow more time during which any new issues concerning limitation could be addressed.

94. Absent points raised by the Defendant, for the reasons given by the Claimant, I would have no hesitation in joining Exotix to the action and allowing the Particulars of Claim to be amended to reflect this.

95. However, the Defendant submits that this application should be dismissed, and that the appropriate course is that Exotix issue a new claim.

96. I will take together the first two grounds argued. These are that

    i) the application itself seeks the addition of a party (not a substitution); and

    ii) if Alphier's claim is struck out there is no extant claim to which Exotix can be added.

97. In relation to these points, I prefer the argument of the Claimant that it should be given the opportunity to add (or substitute) Exotix *before* the Court considers strike out. The Claimant draws my attention to *Soo Kim v Young Geun Park & Ors* [2011] EWHC 1781 (QB) as authority for the proposition that a party should be given the opportunity to amend its pleading against an existing party before the court exercises its power to strike out. I agree with this point.

98. The Defendant's next argument is that even if the Court might have permitted a substitution at an earlier stage of proceedings, before the strike out application was issued, Exotix's delay in being restored to the register and in seeking to advance this claim is such that it should not now be able to take advantage of the delay in dealing with Blyvoor's strike out application.

99. As regards this point, I do not think that it is fair to blame the Claimant for delay. Exotix had been dissolved in August 2022, but the Claimant subsequently successfully applied for its restoration to the register and became its controlling member. This inevitably took time. As to delaying hearing the strike out application, this was entirely the correct procedure having regard to *Soo Kim.*

100. The Defendant's next argument is that were Exotix to be added to the existing Claim Form then Blyvoor would be deprived of a limitation defence. This defence arises because (in the Defendant's argument) Exotix's alleged entitlement to payment arose in September 2018 when the Orion Funding was secured- see para 19 of the Defence [51]). Since the change of parties would take place after the end of a period of limitation, Exotix is required to show that it is *necessary* to substitute them within the meaning of CPR 19.6(3).

101. The relevant parts of CPR 19.6 are as follows:

> "19.6 (1) This rule applies to a change of parties after the end of a period of limitation under –
>
> (a) the Limitation Act 1980;
>
> ….
>
> (2) The court may add or substitute a party only if –
>
> (a) the relevant limitation period was current when the proceedings were started; and
>
> (b) the addition or substitution is necessary.

> (3) The addition or substitution of a party is necessary only if the court is satisfied that –
>
> (a) the new party is to be substituted for a party who was named in the claim form in mistake for the new party;
>
> (b) the claim cannot properly be carried on by or against the original party unless the new party is added or substituted as claimant or defendant; or
>
> (c) the original party has died or had a bankruptcy order made against them and their interest or liability has passed to the new party.

102. It is necessary first to consider the limitation point raised. Under section 5 Limitation Act 1980:

> "An action founded on simple contract shall not be brought after the expiration of six years from the date on which the cause of action accrued."

103. The Defendant argues that the six-year limitation period started to run from the date that Orion agreed to provide the Orion Funding, which must be taken as being before September 2018.

104. According to the Defence (which was submitted by a statement of truth by Mr Alan Smith, the Executive Chairman of the Defendant) Orion made payments which would have triggered commission as follows:

Orion Payments Received

Initial $5m Loan against the Share Subscription	US$5,000,000	September 2018
Remainder of Share Subscription after the repayment of the Loan	US$ 18,000,000	Paid in two transfers: November and December 2018
First "Stream" Drawdown	US$ 18,500,000	April-2019
Second "Stream" Drawdown	$ 18,500,0000	Aug-2019

105. The references to 'Stream Drawdowns" refer to an arrangement whereby, the Defendant sold future production or revenues in return for an up-front cash payment by Orion.

106. Fees were payable to Exotix under paragraph 3 of the Tripartite Agreement by reference to "*any funding that is sourced from Orion and shall cover the aggregate principal amount of all funding including both equity funding and debt funding ("Orion Funding")*". Fees were payable in two tranches:

> "An Initial Fee payable upon the receipt of the Orion Funding of 3% (three percent) of the aggregate principal amount of the Orion Funding and a Subsequent Fee, payable on the 18 (eighteen) month anniversary of the Initial Fee payment, of 0.75% (zero point seven five percent) of the aggregate principal amount of the Orion Funding."

107. Mr Power put forward an argument that for the purposes of limitations, time started to run in relation to all the Putative Debt as soon as Orion agreed to provide funding, but I do not consider this can be the case. Exotix's entitlement to payment under paragraph 3 was linked to the receipt of money. It could not sue for its commission until Orion had received the particular tranche of Orion Funding on which that commission is based, and even then it could not sue for the Subsequent Fee until 18 months later. I consider this to be the case as it had no cause of action in relation to any amount of commission until that amount was due for payment and the Defendant had failed to pay it.

108. Accordingly, even if the Defence is correct on the timings of the receipt of the Orion Funding (which has yet to be tested in evidence), at the time of making this judgment (October 2024) a new action on behalf of Exotix would face a defence of limitation in relation to the 3% Initial Fee arising out of the US$ 5 million loan made by Orion in September 2018, but not the 0.75% Subsequent Fee payable on the same amount and not any of the further Initial Fees or Subsequent Fees payable in relation to later receipts by the Defendant of Orion Funding.

109. In fact, the timings put forward by the Defence are challenged by the Claimant. The Claimant reaffirmed in its Reply to the Defence the timing for tranches of the Orion Funding put forward in its Particulars of Claim, each document also being the subject of a statement of truth by Andrew Moorfield. In summary, the Claimant's case is that the first Tranche of the Orion Funding was drawn down in the sum of $60 million in December 2018 and a further $10m was drawn down later. If this timing is correct then none of the Putative Debt is statute-barred at the present time.

110. In support of the Claimant's contention Ms Gardiner referred me to:

    i) the Claimant's Letter before action dated 7 February 2019 which included an assertion that the first tranche of the Orion Funding was drawn down in December 2018 taken with the fact that the reply made by the Defendant's solicitor on 15 February 2016 did not dispute this;

    ii) a letter from a further firm of solicitors representing the Claimant's Letter before action dated 7 February 2019 which again included an assertion that the first tranche of the Orion Funding was drawn down in December 2018 and which again was not disputed within that reply;

    iii) the affidavit from Steve Roberts of Exotix Partners dated 6 June 2019 which again asserts states that that the first tranche of the Orion Funding was drawn

down in December 2018;

iv) the Defendant's answering affidavit dated 6 June 2019 made by the Claimant's CEO Alan Smith which includes an admission that the first tranche of the Orion Fund was received in December 2018; and

v) an affidavit by Michal Barton and Guy Wilkes confirming the truth of Alan Smith's affidavit.

111. Whilst the solicitors' correspondence is not of itself that persuasive, taking this with the affidavit evidence from both sides leads me to consider that there are real doubts at this stage as to the Defendant's account of the timings.

112. When or if this matter goes to trial it is likely that more evidence will emerge on this point, so it is not one for me to determine finally.

113. In my view on the basis of the evidence currently available (i) it is more likely than not that Exotix is not at this point statute-barred from any of its potential claim in relation to the Putative Debt, and (ii) it appears clear that it is not statute-barred for the entirety of its claim.

114. As to point (i), I have not heard argument on whether the requirement of CPR 19.6(3) to be "satisfied" takes a higher test than the usual requirement of "more likely than not". As to point (ii), I am not sure (and have not heard argument on) how to apply CPR 19.6(1) where part of the claim might possibly be subject to limitation but a substantial part of the claim on any argument is not.

115. However, it appears to me that there is an easy way of finessing this point. The Claimant, has confirmed on behalf of itself, Exotic and Tellimer that they are each willing to provide an undertaking not to pursue any part of the Putative Debt if the court finds, after seeing the relevant evidence, that the Defendant would have had a limitation defence in relation to that part of the Putative Debt had Exotix pursued it through a new action commenced on the date that it is joined to the proceedings. In my view it is appropriate that the court should accept such an undertaking, and that having done so there is no objection based on CPR 19.6(3). The rule is not engaged because the CPR 19.6(1) does not apply since no claim is being pursued that is affected by limitation.

116. Mr Power objects to this solution on the basis that such a solution would be an answer in every case where there is a reasonably arguable limitation defence. I see his point that allowing this approach does, in effect, lower the bar set by the CPR as to what the party that may be subject to limitation arguments needs to show. It may be on this basis that this solution is not one that the court should be quick to accept generally. Nevertheless, I think that the solution is one that the court should be willing to accept in the current case where it is clear that some at least some of the debt that Exotix would be claiming is not currently subject to limitations and, on the current evidence, it is more likely than not that all the debt may not be subject to limitations. In the current case this solution meets, in my view, both the letter and the spirit of CPR 19.6 and appropriately balances the interests of both parties.

117. Having provided my judgment on the above points, I will pause to entertain further representations from the parties arising out of these points, in particular in relation to:

i) whether it is necessary or appropriate still to strike out Alphier as a claimant, given its indirect interest in the proceeds of a Claim;

ii) whether it is still necessary or appropriate to join Tellimer as a party (or possibly as a Part 20 party;

iii) Whether the Claimant should be afforded an opportunity to amend its pleadings in the form filed with the Court on 29 September 2024 or to make further amendments consequent on the court's findings.

iv) the Defendant's application for security for costs;

v) Costs in this hearing; and

vi) Any other matter the parties wish to raise.