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## Refusal by the High Court to enforce the terms of a fee agreement

*Luxor Investments Limited & Ors v. Beltany Property Finance Limited [2015] IEHC 316*

### Introduction

In light of the High Court judgment delivered on 13<sup>th</sup> May, 2015 by McGovern J. in *Luxor Investments Limited & Ors v. Beltany Property Finance Limited*, it is clear that while the purchaser of a loan book will be bound by the terms and conditions of any agreement entered into between a borrower and the seller, a Court will not always enforce an exact interpretation of these terms but rather, where necessary, will apply the rules of construction to ascertain and give effect to the real intentions of the parties to the agreement and the underlying commercial realities.

### Background

This case related to whether an agreement dated 25<sup>th</sup> October, 2013 between Luxor Investments Limited and Luxor Leisure Limited (the two first named plaintiffs in the proceedings) and UBSIG (ROI) Limited (“**UBSIG**”), a subsidiary of Ulster Bank Ireland Limited (“**UBIL**”), (the “**Fee Agreement**”) was enforceable in circumstances where the plaintiffs subsequently proposed to redeem their loans (including all interest payments due) with the defendant at par.

The plaintiffs in the case are part of the Rhatigan Group of companies and had been clients of UBIL for approximately 17 years. In 2012, UBIL consented to a restructuring of the plaintiffs’ loan

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facilities and as part of this, the parties entered into the Fee Agreement. Pursuant to the terms of the Fee Agreement, the first and second named plaintiffs agreed to pay a fee to UBSIG, either upon the sale of certain Rhatigan Group property, or alternatively, if no property was sold then on a specified termination date in October, 2018. The Fee Agreement clearly provided for the payment of the fee independently of the repayment of the loans.

The defendant, Beltany Property Finance Limited (“**Beltany**”) then purchased the plaintiffs’ loans and related assets, including all rights under the Fee Agreement, from UBIL, on 14 October, 2014.

Subsequently, the plaintiffs secured the assistance of a financier who was prepared to restructure their loans in such a way as to enable them to redeem the loans with Beltany in full at par, to include all interest due. However Beltany refused to consent to the redemption of the loans, maintaining that it was entitled to a fee calculated on the basis of the Fee Agreement. On the other hand, the plaintiffs maintained that the Fee Agreement was no longer applicable as, when entering into it, the parties never intended for it to be applicable in circumstances where the loans were redeemed in full.

## The High Court decision

The High Court summarised the issues before it as being:

1. whether the Fee Agreement applied in the event of a redemption of the loans at par; and
2. whether the Fee Agreement was void as a clog on the plaintiff’s equity of redemption.

Notwithstanding the fact that the Court found the wording of the Fee Agreement to be clear and unambiguous, McGovern J. was satisfied that, as a judge, he could apply the rules of construction in this case to allow him to arrive at a different conclusion to that which one might reach by looking only to the literal terms of the Fee Agreement. He stressed the fact that the construction of a document is not merely a consideration of the text, but involves the Court carrying out an exercise to give effect to the agreement in such a way so as to reflect the true intentions of the parties and in a way that is most closely allied to business common sense.

Based on the evidence before it, the Court was satisfied that, at the time the Fee Agreement was concluded, the parties did not expect that the plaintiffs’ loans would ever be redeemed at par. In addition to this, the Court accepted that the likely reason why there was no express provision contained in the Fee Agreement specifying what would happen in the event of a redemption of the loan at par was that it was simply never contemplated by the parties that such a situation would arise.

The Court took a commercially practical view in noting that the purpose of the loan facility agreement, the Fee Agreement and other security documents were to ensure that UBIL was repaid its money with interest and accepted that it could not have been envisaged that UBIL would recover all the monies due plus interest and still be entitled to an additional fee. McGovern J. felt that if he were to make a ruling to that effect it would run counter to the true nature and purpose of the Fee Agreement.

In ruling that the Fee Agreement was not applicable or enforceable in circumstances where the plaintiffs proposed to redeem their loans with the defendant at par, McGovern J. noted that he was not seeking to rewrite the terms of the Fee Agreement, but rather he was of the view that if it had been intended that UBIL (or the defendant as the purchaser of the loans and the Fee Agreement) was to receive not only repayment of the borrowings in full together with interest, but also a substantial fee, this should have been clearly expressed in the Fee Agreement.

It was noted by the Court that the Fee Agreement contained a “*complete agreement*” clause. However, the Court held that this was irrelevant in this instance as the dispute between the parties related to matters outside the scope of the Fee Agreement itself.

In light of the finding that the Fee Agreement did not apply in the event of a redemption of the loans at par, the Court deemed it unnecessary to consider whether the Fee Agreement was void as a clog on the plaintiffs’ equity of redemption.

## Conclusion

This decision is likely to be of interest to purchasers of Irish loan books. While it does not displace the long standing principle that the purchaser of a loan book will be bound by the terms and conditions of the contractual loan documentation entered into between the seller and a borrower, it does clarify that a Court can and will apply the rules of construction to what would otherwise appear to be a clear and unambiguous agreement in order to ensure that the true intentions of the initial contracting parties are respected. Purchasers of loan portfolios must therefore seek to ascertain the commercial realities surrounding the entry by the original parties into the documentation in question.

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