Neutral Citation [2015] IEHC 316

THE HIGH COURT

COMMERCIAL

[2015 No. 1200 P.]

BETWEEN

LUXOR INVESTMENTS LIMITED, LUXOR LEISURE LIMITED,

ALMADA LIMITED, BALLINCASTLE CONSTRUCTION LIMITED, PADRAIC RHATIGAN, PSR PROPERTY COMPANY LIMITED, DRIFTVIEW ENTERPRISES AND PSR PROPERTY HOLDING COMPANY

PLAINTIFFS

AND

BELTANY PROPERTY FINANCE LIMITED

DEFENDANT

JUDGMENT of Mr. Justice Brian J. McGovern delivered on the 13th day of May, 2015

1. On 5th March, 2015, Fullam J. directed an expedited hearing of a discrete issue in these proceedings, namely:-

> *"Whether or not an agreement dated 25 October, 2013, made between Luxor Investments Limited and Luxor Leisure Limited (the 'UBSIG obligors') of the one part and UBSIG (ROI) Limited (the 'UBSIG Agreement') is applicable in circumstances where the plaintiffs propose to redeem their loans with the defendant at par."*

2. It appears, in fact, that this is the sole remaining issue in dispute in these proceedings. The UBSIG Agreement has the title *"Fee Agreement"* and for ease of reference I will use that term throughout this judgment when referring to the agreement.

Background

3. The plaintiffs are part of the Rhatigan Group of companies. Some of these companies have been customers of Ulster Bank Ireland Limited *("UBIL")* for approximately seventeen years. Facilities advanced by UBIL to the Rhatigan Group have included development finance, investment finance, life insurance policies, interest rate instruments, current accounts and deposit accounts. The plaintiff companies have been involved in land purchase and development and property management. Up until 2013, all accounts held by the Rhatigan Group with UBIL performed within the terms of their agreements. Loans were repaid on completion of relevant developments or on maturity and overdrafts operated within agreed limits.

4. Luxor Investments Limited (the first plaintiff) is a limited liability company and a wholly owned subsidiary of PSR Property Company Limited (sixth plaintiff). It is the owner of properties in Dublin City Centre. It is also the developer and owner of the Radisson Blu Royal Hotel, Golden Lane, Dublin 8 *("the hotel").*

5. Luxor Leisure Limited (second plaintiff) is a limited liability company which holds the occupational interest in the hotel pursuant to the terms of an occupational lease and is the operating company of the hotel. It is also the guarantor of a loan facility in respect of the hotel.

6. Almada Limited (third plaintiff) is a limited liability company and is the owner of a property at Ship Street, Dublin and three apartments known as Castleway Apartments at Castleway, Golden Lane, Dublin 8.

7. Ballincastle Construction Limited (fourth plaintiff) is a limited liability company and is the developer and owner of manufacturing units at Athlone, Co. Westmeath, developed in conjunction with the Industrial Development Authority. It is also the owner of premises known as the Atlantaquaria, Galway.

8. In 2012, UBIL, on instructions from its parent Royal Bank of Scotland ("*RBS*"), commenced a strategy designed to deleverage their loan book. At that time, they indicated to the plaintiffs that they were not prepared to extend further facilities and that the Rhatigan Group should seek new investors for their facilities. A number of proposals were put forward by the Rhatigan Group but were not acceptable to UBIL and this culminated in a restructuring of certain facilities and ultimately led to the fee agreement being concluded. In restructuring the Rhatigan Group, certain facilities were granted by UBIL in respect of the funding of loans connected to those properties other than the hotel. These are referred to as the *"non-hotel facilities"*. The *non-hotel facilities* are supported by First Legal Mortgages over Luxor properties, the Almada properties and the Ballincastle properties, together with various corporate guarantees and an extension of conditional personal guarantees provided by Mr. Padriac Rhatigan (fifth defendant). The *non-hotel facilities* are *"demand facilities"* repayable on or before 30th April, 2015.

9. The hotel was built between 2005 and 2007, and was funded by a combination of debt provided by UBIL, equity contributions provided by certain entities in the Rhatigan Group and a number of third party investors (the *"consortium"*). The funding provided by UBIL was (pursuant to a facility letter of 21st December, 2007) to two nominee companies established by agents of UBIL, namely Cassius Investments Limited and Tolamor Limited (the *"hotel borrowers"*). This was supplemented by a facility letter of 23rd September, 2009. The funding of the hotel was part of a tax efficient scheme whereby investors could avail of capital allowances. On 20th December, 2007, Luxor contracted to sell the hotel to the hotel borrowers on behalf of the consortium, who acquired and held the beneficial ownership of the hotel on trust for members of the consortium. The purchase price for the sale of the hotel to the hotel borrowers was €50m of which €39,854,000 was funded by the *hotel facility* with the balance being funded by equity mainly from the Rhatigan Group.

10. The *hotel facility* is secured by legal mortgages, charges and security assignments over the respective interests of the hotel

borrowers, Luxor and Luxor Leisure in the hotel, the occupational lease, an option agreement, a management agreement and co-ownership agreement and the assignment of contracts and collateral warranties entered into in respect of the construction of the hotel. In 2009, additional security for the *hotel facility* was provided to UBIL by the first plaintiff and Driftview Enterprises Limited (seventh plaintiff) which was a guarantor of the *hotel facility* and by Ballincastle, Almada and J.J. Rhatigan and Company. Notwithstanding this funding structure, the plaintiffs claim that it was always intended that the repurchase of the hotel by Luxor (on foot of a put and call option) would be funded by longer term property finance. When the original funding structure was put in place, it was not believed that it would be difficult to obtain such longer term finance.

11. From the establishment of the hotel in 2007, the *hotel facility* at all times continued to perform in accordance with its terms. And as of the year ending December 2014, the hotel returned an operating profit of approximately €2.8m.

12. In 2009, the *non-hotel facilities* were refinanced for a further three years on the basis that all income from non-hotel assets would be applied to service interest in the first place and that any surplus would be applied in reduction of capital. In the five years prior to these court proceedings, all interest on the *non-hotel facilities* has been fully serviced and the capital has been reduced by approximately €14m. When the *non-hotel facilities* fell due for review in 2012, UBIL informed the plaintiffs that they were not prepared to extend further facilities but were seeking to deleverage their loan book and that the Rhatigan Group should seek new investors and funding elsewhere. During 2012 and 2013, the Rhatigan Group sought new funders and discussions continued with UBIL culminating in a restructuring of *non-hotel facilities* in October 2013.

13. These restructuring facilities involved the existing UBIL loans granted to Almada, Ballincastle and Luxor being extended and a new facility letter dated 15th October, 2013, was signed. The 2013 facilities were *"demand"* facilities but repayable on or before 30th April, 2015. UBIL was pressing the Rhatigan Group to sell non-hotel assets and insisted on the appointment of selling agents and solicitors to engage in that process. The plaintiffs claim that they cooperated with UBIL in this process and were not made aware that the bank intended to sell their loans. It was agreed, that insofar as the relevant commercial properties were sold, the conditional personal guarantee which had been entered into by Mr. Padraic Rhatigan (fifth plaintiff) would be reduced by an agreed amount in respect of each property. The programme of property sales appears to have slowed down or ceased in the spring of 2014, but the Rhatigan Group continued to manage the assets on a day to day basis.

14. In March 2014, Mr. Rhatigan was advised by Mr. Gareth Fay of UBIL that it had discussed the possibility of the sale of the Rhatigan Group loans (including the *hotel facility*) to a potential investor representing an international private equity fund. These loans were eventually sold to the defendant and on 14th October, 2014, UBIL formally notified the Rhatigan Group that it had agreed the sale of the loans to the defendant. Both the *hotel facility* and *non-hotel facilities* were included in the sale.

The Fee Agreement
15. As part of the restructuring in 2013, the first and second named plaintiffs entered into a Fee Agreement with UBSIG, a subsidiary of UBIL. Under the Fee Agreement, the first and second named plaintiffs agreed to pay a fee to UBSIG on each completion date, the completion date being a date on which the property is either sold in whole or in part. In other words, there was to be the payment of either a single fee or – if there was a series of part disposals – a number of fees, either on the termination date in October 2018 or on an earlier termination date being not less than three years from the date of the agreement. So if there was no disposal of properties then, the fee became payable in October 2018.

16. It is clear that the agreement provided for the payment of the fee independently of the repayment of the loans. Counsel for the defendant argues that it was only if the loans were redeemed at par that the fee could be paid. There was to be a minimum fee of €1m. The fee was to be calculated on the disposal of the hotel or at the termination date by reference to the market value of the hotel at disposal or termination date against a base value.

Redemption at Par
17. The plaintiffs have secured the assistance of a financier who was prepared to restructure their loans in such a way as to enable them to redeem their loans in respect of the *hotel facilities* and *non-hotel facilities*. This would be a redemption at par to include all interest due.

18. Having purchased the loans and the Fee Agreement, the defendant has refused to consent to the redemption of the loans but maintains that it is entitled to a fee calculated on the basis of the Fee Agreement. In order to remove this obstacle, the plaintiffs have offered to place €2.1m into an Escrow account pending the determination of these proceedings. The €2.1m was calculated on the basis of a hotel valuation of €43m. That proposal was not acceptable to the defendant. The defendant indicated to the plaintiffs that it considered a sum of €8.4m would be required to protect its position in respect of the fee that would be payable in October 2016, but eventually it put forward a proposal that the sum of €7.35m would be paid into Escrow account by the plaintiffs to protect the defendant's position and that the plaintiffs' financial backer would take a second charge on the properties. The parties have been unable to reach any agreement on this.

19. In summary, therefore, the position is that the plaintiffs have a financial backer which will enable them to redeem their loans at par (including all interest payments due) but the defendant which has bought the plaintiffs' loans and the Fee Agreement is unwilling to discharge the plaintiffs from liability under the Fee Agreement.

Issues
20. The issues raised are as follows:-

(a) whether the Fee Agreement applies in the event of a redemption of the loans at par; and

(b) is the Fee Agreement void as a clog on the plaintiff's equity of redemption?

21. There was a consensus among the witnesses that at the time when the Fee Agreement was entered into, it was not anticipated that the loans would be redeemed at par. In his witness statement, Mr. Padraic Rhatigan stated that the Fee Agreement *"…was never intended to be, nor is, applicable in circumstances where we are redeeming the loans in full"*. He repeated this in his evidence. Mr. Gareth Fay, (formerly of Ulster Bank) stated in his witness statement that Mr. Rhatigan's statement was incorrect and that it was always intended that the fee would be payable in accordance with the written terms of the agreement regardless of the outcome with respect to the sale of the non-hotel assets. But he stated in evidence that the restructuring took place and the Fee Agreement was concluded on the assumption that there would be a sale of the non-hotel assets and that redemption at par was simply impossible (see answer 599, Day 2 of transcript).

22. His oral testimony to the court is supported by a letter of 27th May, 2014, which he wrote on behalf of the bank to the plaintiffs'

solicitors in which he stated:-

> *"Under the restructure, a significant portion of the commercial benefit of the restructure accrued to Padraic (in his capacity as personal guarantor) and his group of companies. The requirement to enter into a Fee Agreement with UB SIG (ROI) Limited in respect of the Radisson Hotel was a mechanism for the bank to capture an element of potential future equity value in the hotel which might, to some extent off set losses incurred by the bank in the settlement of the group company debt and the dilution of Padraic's personal guarantee position." (Emphasis added)*

23. In the course of the evidence, there were a number of references to the fact that the bank would be taking a loss on the restructuring and that the restructuring was, to some extent, an attempt to ameliorate the losses which would be suffered by the bank. This was the background or *"factual matrix"* against which the Fee Agreement was concluded.

24. I am satisfied on the evidence that at the time when the Fee Agreement was concluded, the parties did not expect that the plaintiffs' loans would ever be redeemed at par, notwithstanding the wording of the Fee Agreement, which I will discuss in more detail later. The facts of this case raise interesting and difficult legal questions. The plaintiffs collectively carry on a substantial business enterprise and in order to finance that business they have borrowed large sums of money from UBIL. The UBIL loan and the Fee Agreement have been purchased by the defendant. The plaintiffs have secured the support of a financial backer and are in a position to redeem their outstanding loans at par. But the defendant which has bought the loans and the Fee Agreement will not agree to this unless the terms of the Fee Agreement are adhered to. If the defendant is correct in the position it has adopted, it will effectively mean that it will recover a sum which could be any figure between €1m and €8.4m over and above the amount of the loans. In circumstances where the loans will be repaid at par this seems to impose a very harsh burden on the plaintiffs.

25. When the plaintiffs entered into the Fee Agreement it is clear that they had legal advice. They cannot repudiate the agreement nor have they sought to do so. They are simply challenging its enforceability or applicability in the circumstances which have now arisen and were never contemplated at the time when the agreement was concluded. In considering the Fee Agreement, I have to decide whether there are ambiguities in it or matters requiring a construction of the document. Having considered the document and the evidence and legal submissions, I am satisfied that there is no ambiguity in the words used in the Fee Agreement. The language of the Fee Agreement is clear. But as Lord Hoffman said in *Investors Compensation Scheme v. West Bromwich Building Society* [1998] 1 All E.R. 98 at p. 115:-

> *"The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean."*
>
> (Emphasis added)

26. In *Analog Devices B.V. v. Zurich Insurance Co. Limited* [2005] 1 I.R. 274, Geoghegan J. in delivering the judgment of the Supreme Court approved the principles set out by Lord Hoffman in *Investors Compensation Scheme* which he quoted at pages 280 – 281.

27. The words used in the Fee Agreement are clear. But there is a lack of clarity about the circumstances in which the agreement is enforceable due to omissions in the agreement. Under the agreement, the defendant will be entitled to a fee on the disposal of the hotel at the termination date whether this be October 2018 or an early date being not less than three years from the date of the agreement.

28. Mr. Denis Murphy of Deloitte and Touche gave evidence to the court. He was part of the advisory team that assisted the plaintiffs in negotiating with Ulster Bank in 2012 and 2013. He said that at the time of the restructuring it was generally accepted that there was going to be a loss on the sale of the assets. In conversations with Mr. Gareth Fay of UBIL in early 2013, it was accepted that there was a deficit in the non-hotel portfolio between €31.8m or €27.5m depending on which CBRE valuation was applied. Mr. Fay referred to the bank taking a *"big hit"* on the property portfolio and the restructuring negotiations centred around the bank taking equity in either the hotel or trading company, J.J. Rhatigan and Company. His evidence was that the Fee Agreement was not heavily negotiated but that the main change made was that the *"relevant percentage"* in the agreement was reduced from 95% to 70%. He said that the theme of an equity participation by the bank was repeated continuously over the course of the restructuring process. Clearly if the plaintiff group of companies was capable of paying off the debt in full, the restructuring would not have taken place.

29. The evidence at the trial establishes that the bank did wish the non-hotel properties to be sold off and while valuers were retained, it appears that this process stalled at some point and was never completed. At that time, the proposed sales would not have yielded full value in respect of the loans. In his evidence, Mr. Murphy said that at the time the Fee Agreement was concluded there was no prospect of repayment of the loans at par and that the assets had values of approximately €20m and the debts were around €45m to €48m.

30. Although the agreement contains a *"complete agreement"* clause, it seems to me that this is not of assistance in resolving the dispute between the parties because the dispute arises not out of some alleged agreement or collateral understanding but rather out of matters not covered by the agreement itself.

31. One of the curious features about this case is that while the evidence establishes that the parties to the agreement did not expect that circumstances would permit the loans to be redeemed at par, the agreement itself, on one reading, might suggest otherwise. The agreement prescribes a detailed and comprehensive mechanism for calculating the fee payable, principally by reference to two contractual constructs namely, a base value and the market value. It provides for a *"Minimum Fee"* of €1m, which begs the question as to how that minimum fee was to be paid if the loans could not be redeemed at par. The agreement recites that the first named plaintiff has outstanding debts to the bank of €76,227,609.17, including interest accrued to 15th October, 2013. While there was no evidence as to the exact sum currently outstanding on the loans, it is clear that the loans have been performing and the amounts due have been reducing. Nevertheless, on the basis of the evidence given to the court it is reasonable to assume that the sum outstanding on the *hotel facilities* and *non-hotel facilities* is considerably in excess of the fee payable under the Fee Agreement whether one takes the figures postulated by the plaintiffs or the defendant.

32. The defendant argues that the Fee Agreement has no meaning except in the context of redemption at par because that is the only circumstance in which there would be funds available to the plaintiffs to pay the fee. While this is an attractive argument, it seems to me to be somewhat simplistic. The agreement clearly anticipates insolvency events and events of cross default. (See clause 5) That clause does no more than reflect the state of mind of the parties who negotiated the Fee Agreement and entered into it since the parties to the agreement did not anticipate that the loans would be redeemed at par. I am satisfied that the Fee Agreement

was entered into to ameliorate the position of the bank when it extended the facilities to the plaintiffs. The agreement recites that the fee *"…has been calculated so as to reflect the additional interest which, in the light of the continuing and/or increased risk referred to above, the bank would reasonably require to continue and/or extend Luxor Investments facilities and those of the Principals"*. Giving the words of the Fee Agreement their natural and ordinary meaning, I have to decide whether or not the claim asserted by the defendant attributes to the parties an intention which they plainly could not have had, or did not have, to use the words of Lord Hoffman in *Investors Compensation Scheme* when he quoted remarks of Lord Diplock made in the case of *Antaios Compania Neviera S.A. v. Salen Rederierna A.B* [1985] A.C. 191 at p. 201; where he said:-

> *"…if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense"*

33. Taking the language of the Fee Agreement as written, it appears to encompass a situation where the loans will not be redeemed at par after the properties are disposed of. If there is a deficit then, under the agreement, the bank will be entitled to a minimum fee notwithstanding and the fee may be greater than the minimum fee in certain circumstances provided for in the contract. I do not believe such a reading of the contract puts a strain on the words used by the parties in the text of the agreement.

34. The question is whether or not I can, as a judge, apply rules of construction if there is no ambiguity in the language of the Fee Agreement. I believe I can. The construction of a document is not merely a consideration of the text, but involves the court in carrying out an exercise to give effect to the agreement in a way which reflects the intention of the parties as found in the document and is most closely allied to business commonsense. In *Mannai Investment Co. Limited v. Eagle Star Life Assurance Co. Limited* [1997] A.C. 749 at p. 775, Lord Hoffman said:-

> *"It is of course true that the law is not concerned with the speaker's subjective intentions. But the notion that the law's concern is therefore with the 'meaning of his words' conceals an important ambiguity. The ambiguity lies in a failure to distinguish between the meanings of words and the question of what would be understood as the meaning of a person who uses words. The meaning of words, as they would appear in a dictionary, and the effect of their syntactical arrangement, as it would appear in a grammar, is part of the material which we use to understand a speaker's utterance. But it is only a part; another part is our knowledge of the background against which the utterance was made. It is that background which enables us, not only to choose the intended meaning when a word has more than one dictionary meaning but also, in the ways I have explained, to understand a speaker's meaning, often without ambiguity, when he has used the wrong words."(Emphasis added)*

It is not suggested in this case that the wrong words were used but rather that no words were used to indicate what was to happen in the unforeseen event that the loans were redeemed at par.

35. In *Jumbo King Limited v. Faithful Properties Limited* [1999] 2 HKCFAR 279, while sitting as a member of the Hong Kong Court of Final Appeal, Lord Hoffman emphasised the practical approach which should be taken to the interpretation of documents, saying that:-

> *"The construction of a document is not a game with words. It is an attempt to discover what a reasonable person would have understood the parties to mean and this involves having regard not merely to the individual words they have used but to the agreement as a whole, the factual and legal background against which it was concluded and practical objects which it was intended to achieve. Quite often this exercise will lead to the conclusion that although there is no reasonable doubt about what the parties meant, they have not expressed themselves very well. Their language may sometimes be careless and they may have said things which, if taken literally, it means something different from what they obviously intended. In ordinary life, people often express themselves infelicitously without leaving any doubt about what they meant."*

36. In seeking to come to a conclusion as to how I should resolve this case, there is another matter which is appropriate to weigh in the balance. The lender of the various facilities offered to the plaintiffs was UBIL. The Fee Agreement was entered into by its subsidiary UBSIG. But it is clear from the evidence that the Fee Agreement and the loan facilities and other security documents were all complementary with a view to achieving one end. That is to secure, as far as possible, the lender's position with a view to the monies lent being recovered together with whatever interest was due.

37. When Mr. Gareth Fay (formerly employed by the bank) came to give evidence, he acknowledged that he was in court on foot of the subpoena as he was not willing to give a statement voluntarily because of the previous customer relationship with Mr. Rhatigan. In the course of his evidence, he stated that Mr. Rhatigan and his companies were one of the better performing clients that UBIL had and that interest was repaid on loans and capital was repaid in circumstances which were unusual during the downturn in the economy. In seventeen years that Mr. Rhatigan and his companies have been clients of the bank, not one demand for payment was made. He described how in 2012, the bank's parent company, RBS, instructed the bank in Ireland to deleverage even though this meant selling assets below their loan value.

38. It is a well established principle that in construing contractual documents, the courts must not rewrite the bargain made by the parties. The parties to an agreement must be held to it. It is true, of course, that the Fee Agreement does not state that it was not applicable if there was a redemption at par. Such a clause or statement is not to be found in the agreement because it was simply never in the contemplation of the parties that such a situation would arise. Now that the plaintiffs are in a position to redeem the loans at par is the agreement enforceable in its terms? I think not. For some considerable time, the courts have interpreted contractual provisions in a contextual and purposive manner in order to determine their application. In *Rainy Sky S.A. v. Kookmin Bank* [2011] 1 W.L.R. 2900 at p. 2908, Lord Clarke of the UK Supreme Court said:-

> *"The language used by the parties will often have more than one potential meaning. I would accept the submission made on behalf of the appellants that the exercise of construction is essentially one unitary exercise in which the court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. In doing so, the court must have regard to all the relevant surrounding circumstances. 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." (Emphasis added)*

39. At the end of the day, the purpose of the loan facility agreements, the Fee Agreement and other security documents were to ensure that the bank was repaid its money with interest. It is true that the Fee Agreement recites that *"…the basis of the fee has been calculated so as to reflect the additional interest which, in light of the continuing and/or increased risk referred to above…"* the

bank would require to continue the facilities to the plaintiffs. But there were no additional funds being advanced. And in the event of the property disposals creating a deficit, the fee structure provided for in the agreement would have mitigated the bank's losses. That is what the bank was getting out of the agreement. But it was never envisaged that the bank would recover all the monies due plus interest and still be entitled to an additional fee. If the court were to make a ruling to that effect it would run counter to the true nature of the agreement. The agreement never made provision for what was to happen in the event of a redemption of the loan at par. The court is being asked to do no more at this stage than fill in the gaps in the agreement having regard to the circumstances in which it was concluded. The court can do so on the basis of the evidence given in this case. In doing so, the court is not indulging in judicial adventurism and is not in any way seeking to rewrite the terms of the Fee Agreement. If it was ever intended that the bank (or the defendant as the purchaser of the loans and the agreement) was to receive not only repayment of the borrowings in full together with interest, but also, in addition, a substantial fee, I think it would have to be clearly expressed in the Fee Agreement and it is clear that this was not done.

40. In *Bromarin A.B. & Anor v. I.M.D. Investments Limited* [1999] S.T.C. 301, Chadwick L.J. in the Court of Appeal stated at p. 310 :-

> *"The difficulty with that approach is that it is commonplace that problems of construction, in relation to commercial contracts, do arise where the circumstances which actually arise are not circumstances which the parties foresaw at the time when they made the agreement. If the parties have foreseen the circumstances which actually arise, they will normally, if properly advised, have included some provision which caters for them. What that provision may be will be a matter of negotiation in the light of an appreciation of the circumstances for which provision has to be made.*
>
> *It is not, to my mind, an appropriate approach to construction to hold that, where the parties contemplated event 'A', and they did not contemplate event 'B', their agreement must be taken as applying only in event 'A' and cannot apply in event 'B'. The task of the court is to decide, in the light of the agreement that the parties made, what they must have been taken to have intended in relation to the event, event 'B', which they did not contemplate. That is, of course, an artificial exercise, because it requires there to be attributed to the parties an intention which they did not have (as a matter of fact) because they did not appreciate the problem which needed to be addressed. But it is an exercise which the courts have been willing to undertake for as long as commercial contracts have come before them for construction. It is an exercise which requires the court to look at the whole agreement which the parties made, the words which they used and the circumstances in which they used them; and to ask what should reasonable parties be taken to have intended by the use of those words in that agreement, made in those circumstances, in relation to this event which they did not in fact foresee." (Emphasis added)*

This is the task which the court must undertake in resolving this matter.

41. Adopting that approach and having regard to what I have set out above, I would answer the question directed to be tried by Fullam J. as follows:-

> *The agreement dated 25th October, 2013, made between Luxor Investments Limited and Luxor Leisure Limited (the 'UBSIG obligors') of the one part and UBSIG (ROI) Limited of the other part ('the UBSIG Agreement') is not applicable or enforceable in circumstances where the plaintiffs propose to redeem their loans with the defendant at par.*

42. In the circumstances it is not necessary for me to consider whether or not the Fee Agreement is void as a clog on the plaintiffs' equity of redemption.