SUPREME COURT OF QUEENSLAND

CITATION:	*Lake Laurel Pty Ltd & Ors v Nichols Constructions Pty Ltd & Ors* [2019] QSC 129
PARTIES:	**LAKE LAUREL PTY LTD ACN 010 7023 511 TRADING AS BERGER CONTRACTING** (First Plaintiff) **LUTZ BERGER** (Second Plaintiff) **PETER JAMES RYAN** (Third Plaintiff) **v** **NICHOLS CONSTRUCTIONS PTY LTD ACN 010 763 505** (First Defendant) **LESLIE EDWIN NICHOLS and LESLIE EDWIN NICHOLS AS PERSONAL REPRESENTATIVE OF JUDELLE CHRISTINE NICHOLS** (Second Defendants)
FILE NO/S:	BS No 3368 of 2014
DIVISION:	Trial Division
PROCEEDING:	Determination of separate questions
DELIVERED ON:	23 May 2019
DELIVERED AT:	Brisbane
HEARING DATE:	20 and 21 May 2019
JUDGE:	Bowskill J
ORDER:	**The answer to the separate questions 1 and 2 is "no".**
CATCHWORDS:	INTERPRETATION – GENERAL RULES OF CONSTRUCTION OF INSTRUMENTS – GENERAL MATTERS – determination of separate questions under r 483 of the *Uniform Civil Procedure Rules* 1999 (Qld) – construction of provisions of a loan agreement dealing with time of payment *Uniform Civil Procedure Rules* 1999 (Qld) r 483 *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337 *Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd* (2017) 261 CLR 544

COUNSEL:	P Hackett and D Ferraro for the plaintiffs D Thomae for the defendants
SOLICITORS:	Roberts Law for the plaintiffs Parker Simmonds for the defendants

Introduction

[1] The dispute between the parties to this proceeding was quite convoluted and involved many issues. The trial, set down for 10 days, was scheduled to start on 20 May 2019. Commendably, most of the issues were able to be resolved by negotiation and agreement, culminating in judgment being entered by consent at the start of the trial, resolving all claims and counter-claims between the first and second plaintiffs and the first and second defendants. That judgment is an order that the first and second plaintiff pay to the first defendant the amount of $1,241,436.58 for claim, inclusive of interest, with no order as to costs.

[2] What remains to be determined is the claim by the third plaintiff, Mr Peter Ryan, for payment of an amount of $3,775,000.00 which he says is payable to him by the first defendant, Nichols Constructions Pty Ltd, under a loan agreement, in respect of which the second defendants are guarantors. The loan agreement is secured by a registered mortgage.

[3] At the commencement of the trial, counsel for Mr Ryan identified five bases on which he contends the money is due and payable. Three of those were said to involve questions of construction of the loan agreement and/or the mortgage, in respect of which no additional evidence needed to be called, in light of documents tendered by agreement and admissions made in the pleadings. The remaining two issues involve allegations of breach of implied terms of the loan agreement, in relation to which evidence would need to be called. An oral application was made, at the commencement of the trial, for the separate determination of the three questions of construction, under rule 483 of the *Uniform Civil Procedure Rules*, on the basis that determination of any one of those questions favourably to the third plaintiff would resolve the remainder of the proceeding, without the need for a trial of any of the other issues.

[4] Counsel for the defendants agreed that it was appropriate to separately determine the first and third of the construction issues under rule 483; but not the second issue, as it was submitted that would depend on evidence proposed to be called in the trial.

[5] Accordingly, I made an order, by consent, under r 483(1) for the determination of the following questions (reflecting the first and third issues), separately from and before proceeding with the trial:

1. Is the effect of clause 6 of the loan agreement and/or[1] item 5 in the schedule to the loan agreement (exhibit 2) that the principal sum under the loan agreement is payable upon demand?

2. Was the registration on 29 January 2018 of the plan of subdivision creating lots 804 and 805 on SP300510, and cancelling lot 261 on CH311056 (exhibit 4) "registration of the plan(s) of the Ziebarth Subdivision" within the meaning of item 5 in the schedule to the loan agreement, such that it triggered the obligation to repay the principal sum under clause 6 and item 5 (part one (1)) in the schedule to the loan agreement and the mortgage within 12 months of registration?

[6] For the following reasons, the answer to each of question 1 and question 2 is "no".

Relevant principles

[7] The relevant principles of construction are uncontroversial. The loan agreement is to be construed objectively, by reference to what a reasonable person in the position of each of the mortgagor and the mortgagee would have understood it to mean, having regard to the language used by the parties, the surrounding circumstances known to them at the time of the transaction and the commercial purpose or objects to be secured by the agreement.[2] As articulated by Mason J in *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337 at 352:

> "… [w]hen the issue is which of two or more possible meanings is to be given to a contractual provision we look, not to the actual intentions, aspirations or expectations of the parties before or at the time of the contract, except in so far as they are expressed in the contract, but to the objective framework of facts within which the contract came into existence, and to the parties' presumed intention in this setting."

Relevant factual framework

[8] At relevant times, Lake Laurel Pty Ltd carried on business as a civil works contractor, under the name Berger Contracting.

[9] In March 2008, Lake Laurel purchased land at 284 Patrick Street, Laidley, with the intention of subdividing it for residential purposes. The purchase was financed by Nichols Constructions. In May 2008, Lake Laurel lodged an application for a development approval, for a material change of use of the 284 Patrick Street land, with

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1 This should read simply "and". The inclusion of "or" was on the basis of a misapprehension of the third plaintiff's argument (that it included an alternative argument on the basis of clause 6(b) of the loan agreement), which was clarified in the course of argument, after the order was made.

2 *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451 at [22]; *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640 at [35]; *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104 at [46]-[47]; *Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd* (2017) 261 CLR 544 at [16], [17] and [73].

the Lockyer Valley Regional Council. Also in May 2008, Lake Laurel entered into a loan facility with Nichols Constructions, which was secured by a mortgage over 284 Patrick Street. Money was advanced by Nichols Constructions to Lake Laurel, under the finance facility.

[10] In June 2008, Lake Laurel entered into a contract to purchase an adjacent block of land, Lot 261 Boundary Road, West Laidley, from Ms Ziebarth. The purchase contract was subject to a lengthy settlement period, ending on 30 June 2010. This land is referred to either as Lot 261 or the Ziebarth Land.

[11] In July 2008 Lake Laurel, by an agent, made an application for a development permit, for a proposed material change of use of Lot 261 (to change the zoning from rural landscape to urban residential) and lot reconfiguration (to subdivide the lot into 231 lots) (exhibit 9).

[12] From about March 2010 to June 2011 Lake Laurel applied for, and obtained, various development permits from the Council, in relation to the subdivision and development of the land at 284 Patrick Street. In late 2011 or early 2012, Lake Laurel sold the land at 284 Patrick Street, and another lot referred to as 1 Breuer Street, to Nichols Constructions. In due course, approval was obtained for a 169 lot residential development on the land at 284 Patrick Street. The land was subdivided, construction work was carried out, and some of the lots were sold.

[13] There were various disputes between the first and second plaintiffs, and the defendants, arising from the various contractual arrangements between them, and the construction works carried out, in relation to the development of 284 Patrick Street. It is unnecessary to address those matters further, as they have been resolved by agreement between the parties, reflected in the consent judgment entered at the commencement of the trial, on 20 May 2019.

[14] On 24 June 2010, Lake Laurel (as mortgagee) entered into a loan agreement with Nichols Constructions (as mortgagor) and the second defendants (the directors of Nichols Constructions) (as guarantors) (exhibit 2). The loan agreement records, in clause 4, that:

> "4. LOAN
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> The Mortgagee [Lake Laurel] has agreed to lend to the Mortgagor [Nichols Constructions] the sum specified and referred to in the Schedule hereto as 'the principal sum' and the Mortgagor hereby acknowledges that it has on the date hereof received adequate consideration for payment of the principal sum from the Mortgagee or the principal sum has otherwise been paid in accordance with the Mortgagor's authorization or agreement between the parties."

[15] Item 3 in the schedule to the loan agreement describes the "principal sum" as follows:

> "$3,775,000.00 this day lent or agreed to be lent to the mortgagor by the mortgagee in the amounts or at the times as follows:
>
> > $3,775,000.00 on or after the 30th June, 2010 or settlement of the purchase of Lot 261 Boundary Road West, Laidley North."

[16] There was in fact no advance of money by Lake Laurel to Nichols Constructions. Rather, it is agreed between the parties that the true nature of Nichols Constructions' obligation under the loan agreement was to pay the sum of $3,775,000.00 to Lake Laurel.

[17] The loan agreement was entered into in the following context.

[18] On 15 March 2010 Lake Laurel entered into a contract for the sale of Lot 261 to Nichols Constructions for $6,025,000.00 (plus GST) (exhibit 10). The contract was conditional upon the completion of the purchase of Lot 261 by Lake Laurel from Ms Ziebarth (remembering that the settlement date under that contract was 30 June 2010). Special condition 6 of the contract provided for payment of the purchase price within 14 days of the seller (Lake Laurel) obtaining "DA and Operational Works" from the Council "or upon the day which is 18 months from the date hereof whichever shall last occur". However, this contract also included a "sunset clause" (special condition 4), under which the seller could terminate the contract, and recover all deposit moneys, if the seller had not obtained Development Approval within 2½ years from the date of the contract. Thankfully, it does not fall to this court to try to reconcile special conditions 4 and 6.

[19] Also on 15 March 2010, Nichols Constructions and Lake Laurel entered into a Joint Development Agreement, the purpose of which was to establish a joint venture between them to subdivide and sell part of the 284 Patrick Road land and Lot 261 which comprised the area of a proposed railway line running through the two properties (exhibit 11).

[20] On 30 June 2010, the Lake Laurel and Nichols Constructions rescinded the purchase contract between them in relation to Lot 261; and Nichols Constructions entered into a contract to purchase Lot 261 directly from Ms Ziebarth. Nichols Constructions became the registered owner of Lot 261 on 7 July 2010.

[21] The parties agree that the "loan" from Lake Laurel to Nichols Constructions the subject of the loan agreement represents the consideration for the rescission of the purchase contract between Lake Laurel and Nichols Constructions.

[22] The money owing under the loan agreement was secured by a mortgage given by Nichols Constructions to Lake Laurel over Lot 261, which was registered on 20 July 2010 (exhibit 3).

[23] On 13 July 2011, the Council approved the development application in relation to Lot 261, for a development permit for a material change of use (to change the zoning to urban residential) and to reconfigure the lot (from one lot into 215) (exhibit 5). This development approval was later extended to 13 March 2017, but lapsed on that date.

[24] No plan of subdivision of Lot 261 was registered until 29 January 2018 (exhibit 4). The registered plan records the subdivision of Lot 261 into lots 804 (part of the proposed future rail corridor) and 805 (in two parts, on either side of lot 804).

[25] It is uncontroversial that the plan of subdivision which is exhibit 4 was prepared for the purpose of giving effect to the negotiated settlement of earlier proceedings in this Court between Lake Laurel and Nichols Constructions, in relation to the Joint Development Agreement. Under the deed of settlement made on 8 February 2016 (exhibit 6), among other things, it was agreed that the parties would enter into a contract for the sale of the rail corridor on part of Lot 261. That contract was entered into in July 2016, recording the sale by Nichols Constructions to Lake Laurel of "proposed Lot 804, being part of Lot 261" (exhibit 7). The plan of subdivision (exhibit 4) was prepared in order for there to be a separate lot 804 to transfer in accordance with the contract.

[26] Lake Laurel assigned its rights under the loan agreement and the mortgage to Mr Ryan in two stages, as to half the moneys secured, on 15 December 2012, and as to the remaining half, on 10 February 2016. There is no issue raised by the defendants about the assignment to Mr Ryan.

[27] It is Mr Ryan who now seeks to recover the money he says is owed, under the loan agreement and the mortgage, from Nichols Constructions, and from the second defendants as guarantors.

[28] It is not disputed that, on 16 June 2017, a demand was made for payment of the money owing under the loan agreement and the mortgage (exhibit 8).

Relevant provisions of the loan agreement

[29] Clause 4 has been set out above.

[30] Clause 6 provided:

> "6. REPAYMENT
>
> The Mortgagor hereby covenants with the Mortgagee:
>
> (a) To repay to the Mortgagee the principal sum on the day and in the manner specified in the Schedule hereto and otherwise in accordance with the provisions of this Agreement.
>
> (b) In addition to repaying to the Mortgagee the principal sum as aforesaid to pay any other moneys hereby secured or due

> hereunder to the Mortgagee in accordance with any Agreement in respect of the payment thereof made between the Mortgagor and Mortgagee and in default of such Agreement being made upon demand."

[31] It is not contended that clause 6(b) has any relevance to question 1. Clause 6(a) directs attention to the schedule, item 5 of which is central to question 1.

[32] In clause 1 (definitions) "Principal Sum" is defined to mean the amount of $3,775,000.00.

[33] By clause 11, time was of the essence in respect of all of the Mortgagor's [Nichol Constructions'] obligations under the loan agreement, unless otherwise agreed in writing by the Mortgagee.

[34] Clause 13 provided for the immediate repayment of the principal sum, without the need for any notice or demand, in the event of default by the Mortgagor "in the due and punctual payment of the principal sum or any part thereof or any interest thereon…" (and various other circumstances which are not relevant here).

[35] The schedule to the loan agreement includes item 3 (principal sum), which is set out above. Item 4 deals with the rate of interest, which is said to be "12% unless varied pursuant to Item 6".

[36] Item 5 reads as follows:

> "5. PAYMENT OF THE PRINCIPAL SUM: The Mortgagor will pay to the Mortgagee the principal sum at the times and in the manner (if any) specified in Part One (1) as set out hereunder, and unless otherwise expressly provided therein (or unless otherwise expressly agreed in writing between the Mortgagor and the Mortgagee) and if not (or to the extent not specified or so agreed) shall pay the same, forthwith upon demand.
>
> PART ONE (1)
>
> By payment of equal instalments of $25,000.00 on the sale of each lot of the Ziebarth Subdivision in exchange for a partial release of mortgage for each one and any balance then

> outstanding by one payment on the day which is 12 months from registration of the plan(s) of the Ziebarth Subdivision."

[37] In clause 1 of the loan agreement, "Ziebarth Subdivision" is defined as follows:

> "'Ziebarth Subdivision' means the prospective subdivision of Lot 261 Boundary Road West, Laidley North into residential lots awaiting DA and Operational Works Certificates from the Lockyer Valley Regional Council."

[38] Also in clause 1:

(a) "DA" is defined to mean "Development Approval issued from the Lockyer Valley Regional Council"; and

(b) "Operational Woks" is defined to mean "Operational Works Certificate issued by the Lockyer Valley Regional Council".

[39] Item 6 of the schedule dealt with interest. Item 6 provides (relevantly):

> "The Mortgagor will pay to the Mortgagee interest on the Principal Sum if it is not paid in accordance with Item 5 Part One (1) on so much thereof as shall from time to time, be or remain owing hereunder, at the rate per centum per annum specified in Part Two (2) as set out hereunder, as the Required Rate, calculated and charged on the rests and payable on the days and computed all as specified in Part Two (2) as set out hereunder …
>
> PART TWO (2)
>
> Interest provision:
>
> (i) REQUIRED RATE: 12% per annum calculated and payable on monthly rests in advance and to be commenced as and from the day which is 12 months from the date that DA and Operational Works is obtained by the Mortgagee (for and on behalf of the Mortgagor, and at the direction of and with the assistance of the Mortgagor) for the Ziebarth Subdivision from the Lockyer Valley Regional Council.
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> (ii) EFFECTIVE RATE: 12% per annum calculated and payable on monthly rests in advance and to be commenced as and from the day which is 12 months from the date that DA and Operational Works is obtained by the Mortgagee (for and on behalf of the Mortgagor, and at the direction of and with the assistance of the Mortgagor) for the Ziebarth Subdivision from the Lockyer Valley Regional Council."

Question 1: is the effect of item 5 that the principal sum is payable upon demand?

[40] The third plaintiff contends that on a proper construction of item 5 of the schedule, the principal sum is payable upon demand. He argues that the opening paragraph of item 5 ought to be read as follows:

> The Mortgagor will pay to the Mortgagee the principal sum at the times and in the manner (if any) specified in Part One (1) as set out hereunder, *and* [*in addition to that*] unless otherwise expressly provided therein [*that is, in Part One (1)*] (or unless otherwise expressly agreed in writing between the Mortgagor and the Mortgagee) and if not (or to the extent not specified or so agreed) *shall pay the same, forthwith upon demand*.

[41] That is, the third plaintiff contends that item 5 provides for two triggers for payment, one being set out in part one (1), and the other being "upon demand". He contends that the words following the word "and" (underlined, in the second line) explain and qualify the words "upon demand" (underlined, in the last line); not the words which precede it.

[42] The defendants contend that item 5 ought to be construed as follows:

> The Mortgagor will pay to the Mortgagee the principal sum at the times and in the manner (if any) specified in Part One (1) as set out hereunder, and unless [*the times and manner of payment of the principal sum is*] otherwise expressly provided therein [*that is, in Part One (1)*] (or unless [*the times and manner of payment of the principal sum is*] otherwise expressly agreed in writing between the Mortgagor and the Mortgagee) and if not (or to the extent not specified or so agreed) shall pay the same, forthwith upon demand.

[43] That is, the defendants contend the effect of item 5 is that it is only where the times for and manner of payment of the principal sum are not expressly provided in part one (1) (or otherwise expressly agreed) that the principal sum is payable "forthwith upon demand". As part one (1) does expressly provide for a time and manner of payment, the latter part of the first paragraph of item 5 does not apply, and the principal sum is not payable upon demand.

[44] The defendants further argue that the loan agreement is in the form of a "standard form", containing general conditions, to which the parties have added provisions in respect of their particular transaction. They rely upon the principle of construction that where there is inconsistency between standard form general conditions, and the written conditions of the parties, the latter prevail.[3] The defendants contend the opening paragraph of item 5 of the schedule is a "standard form" provision, and "Part One (1)" has been written in by the parties. I do not consider the application of this principle assists in the construction of item 5. It is not at all clear that any part of item 5 is a "standard form". Even if that is the case, I do not accept that the answer to the

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[3] Referring to *McVeigh v National Australia Bank* (2000) 278 ALR 429 at [40].

construction question is to simply disregard the opening paragraph on the basis of an inconsistency with the following paragraph.

[45] The defendants further argue that a construction of item 5 in the schedule which would make the principal sum payable upon demand would mean it was so payable upon demand any time after the date the loan agreement was entered into, on 24 June 2010. The defendants also submit that construction is "inconsistent with the express mutual obligations" in item 6, subparagraphs (i) and (ii) (dealing with interest), "to cooperate to obtain the development approval and operational works for the Ziebarth Land to progress the development to sealing, thereby triggering the obligation to pay the principal".

[46] A difficulty with this argument is that the loan agreement does not contain "express mutual obligations" of the kind described. The only reference to the Mortgagee (Lake Laurel) obtaining "DA and Operational Works" (for and on behalf of the Mortgagor [Nichols Constructions]) is in the definitions of "required rate" and "effective rate" of interest, in item 6. That cannot be construed as a substantive provision of the loan agreement imposing mutual obligations on the parties to do certain things.

[47] Lastly, the defendants contend that, having regard to the surrounding circumstances, it is apparent that repayment of the principal sum was agreed to be deferred until an event occurred, namely, the registration of the plan of the Ziebarth Subdivision. As part of the "surrounding circumstances" the defendants point to the sale contract between Lake Laurel and Nichols Constructions of 15 March 2010 (exhibit 10) under which the purchase price was not required to be paid until 14 days after Lake Laurel obtained "DA and Operational Works" from the Council, or 18 months from the date of the contract, whichever shall last occur. The defendants submit the arrangements for payment (in item 5 of the schedule) "reflect the risk the parties were assuming on the uncertainty of the progression of the development process for the Ziebarth Land".

[48] On the other hand, the third plaintiff says it is not unusual for a commercial loan agreement to provide for alternate triggers for payment, and submits, in effect, that it would not make commercial sense for the parties entering into an agreement in contemplation of a prospective subdivision to either take the risk of never being paid (if, as appears to be the case here, the subdivision does not go ahead) or wait, as in this case, nine years to be paid.

[49] The wording of item 5 in the schedule to the loan agreement was aptly described by the legal representatives, variously, as appalling and difficult. Notwithstanding the difficulty, the task of the court is to give it meaning, consistently with the principles referred to above.

[50] As observed in *Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd* (2017) 261 CLR 544 at [17], the court is entitled to approach the task of construction on the

basis that the parties intended to produce a commercial result, one which makes commercial sense.

[51] I accept that the wording of item 5 is susceptible of more than one meaning;[4] and therefore that it is appropriate to have regard to the surrounding circumstances at the time the loan agreement was entered into, to assist in the interpretation of it.

[52] In the context of this loan agreement, having regard to the surrounding circumstances, it does not make commercial sense that the parties would, on the one hand, agree upon a time and process of incremental payment, in the terms set out in part one (1) of item 5 of the schedule; which is reflected also in the interest provision in item 6 (delaying the obligation to pay interest until 12 months from the date that "DA and Operational Works" is obtained by the Mortgagee) and, at the same time, agree to repayment of the whole of the principal sum "forthwith upon demand".

[53] In my view, the proper construction of the words used in item 5 is as contended by the defendants, namely, that the provision for payment to be made "forthwith upon demand" only applies where the time and manner for payment of the principal sum is not "otherwise expressly provided" in "Part One (1)", and not "otherwise expressly agreed in writing between the Mortgagor and the Mortgagee". As the time and manner of payment has been expressly provided for in part one (1), the principal sum is not payable "forthwith upon demand".

[54] This was not a "loan agreement" in the ordinary sense of the word. The principal sum was not advanced by Lake Laurel to Nichols Constructions (contrary to the description of the "principal sum" in item 3 of the schedule). The principal sum is agreed to represent the consideration for the rescission of the purchase contract between Lake Laurel and Nichols Constructions (exhibit 10). The parties were involved in a complex set of arrangements in relation to the sale, purchase, development and proposed development of the 284 Patrick Street land and Lot 261. In that context, the agreed arrangement for payment of the principal sum, which appears in item 5 of the schedule, makes commercial sense. An additional trigger for payment, namely "forthwith upon demand" does not make commercial sense. As counsel for the defendants said, on that construction, the money could be demanded the day after the agreement was entered into. That would be inconsistent with the express terms of item 5, part one (1); and the specific provisions in relation to interest in item 6. It would also be inconsistent with clause 13 of the loan agreement, which does provide for the principal sum to become immediately due and enforceable – but, relevantly, only where there is default by the Mortgagor in the due and punctual payment of the principal sum.

[55] For those reasons, the answer to question 1 is "no".

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[4] *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337 at 352.

Question 2 – was the registration on 29 January 2018 of the plan of subdivision creating lots 804 and 805 on SP 300510 "registration of the plan(s) of the Ziebarth Subdivision" within the meaning of item 5 in the Schedule to the Loan Agreement?

[56] In my view, the answer to this question 2 is also "no".

[57] As already noted, "Ziebarth Subdivision" is defined in clause 1 of the loan agreement to mean "the prospective subdivision of Lot 261 Boundary Road West, Laidley North into residential lots awaiting DA and Operational Works Certificates from the Lockyer Valley Regional Council".[5]

[58] The defendants submit that the meaning of "the prospective subdivision" of Lot 261 "into residential lots" is informed by the application for development approval which had been made in 2008 (exhibit 9), as that was the contemplated subdivision of Lot 261.

[59] The third plaintiff submits that was not the only "prospective subdivision" at the time of entering into the loan agreement. He refers to the Joint Development Agreement, under which Lake Laurel and Nichols Constructions had agreed, by way of joint venture, to subdivide and sell the part of Lot 261 and 284 Patrick Street which comprised the rail corridor into 77 lots. The third plaintiff submits that is also a "prospective subdivision" of Lot 261 into residential lots.

[60] The third plaintiff then submits that, in that context, the plan of subdivision of Lot 261 which was registered in January 2018 (exhibit 4) is the (or a) "registration of the plan(s) of the Ziebarth Subdivision" within the meaning of item 5 of the schedule, and the definition of "Ziebarth Subdivision" in the loan agreement.

[61] I do not accept that argument, for the following reasons.

[62] Having regard to the material which is before the court, it is reasonable to infer that, objectively, the reference to the "prospective subdivision" of Lot 261 "into residential lots" was a reference to the proposal, at that time, to subdivide the whole of Lot 261 into a number (whether that be 231[6] or 215[7] or some other number) of residential lots.

[63] That this is what was contemplated by the term "Ziebarth Subdivision" is also supported when regard is had to the second paragraph of item 5 of the Schedule, which provides for repayment of the principal sum by payment of equal instalments of $25,000 on the sale of each lot of the Ziebarth Subdivision. Plainly, subdivision into substantially more than two or three lots was contemplated.

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5 Underlining added.
6 As proposed in the application for development approval in 2008 (exhibit 9).
7 As approved in 2011 (exhibit 5).

[64] The proposal under the Joint Development Agreement was for subdivision and sale of only part of Lot 261, being the part within the rail corridor. The plan of subdivision of Lot 261 that was eventually registered in January 2018 was not a subdivision of Lot 261 into residential lots, as contemplated by the 2008 application for development approval, or even as contemplated by the Joint Development Agreement. It was a subdivision only for the purpose of carving out the rail corridor land (what became lot 804) from Lot 261, to facilitate the sale and transfer of that land to Lake Laurel under the deed of settlement.

[65] The registration of this plan of subdivision did not record or give effect to any material change of use (in terms of the zoning applicable to lot 805, which remained as rural landscape) or any reconfiguration of the lot, beyond the carving out of lot 804. The fact that, under the planning scheme, lots 804 and 805 could be used for a residential purpose (just as Lot 261 could) does not, in my view, enable that plan to be described as a "subdivision of Lot 261 … into residential lots".

[66] Objectively, in my view, registration of the plan of subdivision in January 2018 is not "registration of the plan(s) of the Ziebarth Subdivision", being the prospective subdivision of Lot 261 into residential lots. Accordingly, registration of that plan did not trigger repayment of the principal sum under item 5 (part one (1)) or the mortgage.

[67] In light of the answers to questions 1 and 2, it is appropriate to proceed with the trial, in order to deal with the third plaintiff's three remaining arguments for recovery of the money said to be owing under the loan agreement.