SUPREME COURT OF QUEENSLAND

CITATION:	*Lake Laurel Pty Ltd & Ors v Nichols Constructions Pty Ltd & Ors (No 2)* [2019] QSC 145
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:	Trial
DELIVERED ON:	6 June 2019
DELIVERED AT:	Brisbane
HEARING DATE:	20, 21, 23 and 24 May 2019
JUDGE:	Bowskill J
ORDER:	**Judgment for the third plaintiff on his claim against the first and second defendants for payment of the principal sum under the loan agreement and the mortgage in the amount of $3,775,000.00 with interest and costs to be agreed between the parties or, failing agreement, to be determined by the court.** **The parties are directed to provide a draft form of judgment reflecting the court's decision, and addressing interest and costs. If interest and costs are not agreed, the parties are to file and serve written submissions in relation to those issues within 7 days.**

CATCHWORDS: CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – IMPLIED TERMS – GENERALLY – where the parties were involved in a project to subdivide land – where the first plaintiff and the first defendant entered into a loan agreement, with the second defendants as guarantors, which was secured by a registered mortgage, under which the first defendant agreed to pay the principal sum of $3,775,000.00 to the first plaintiff, by incremental instalments on the sale of each lot in the proposed subdivision, with the balance to be repaid 12 months from registration of the plan(s) of subdivision – where the debt under the loan agreement and mortgage were later assigned to the third plaintiff – where the third plaintiff claims the debt has become due and payable, as a consequence of the first defendant's breach of express and implied terms of the loan agreement and mortgage, by allowing the development approval for the land to lapse, and failing to obtain registration of the plan(s) of subdivision within a reasonable time – where the defendants do not challenge the contention that the first defendant breached the loan agreement and/or the mortgage in the ways contended by the third plaintiff, but argue the principal sum has not become payable because of an earlier breach by the first plaintiff of the implied obligation under the loan agreement and the mortgage to cooperate – whether the implied obligation to cooperate required the first plaintiff to take steps to ensure that plan(s) for subdivision of the land were registered, or not to hinder or obstruct the first defendant's efforts in that regard – whether such a breach, even if established, could be relied upon to defend the claim by the third plaintiff, as assignee, to recover the principal sum – whether the first plaintiff breached the implied obligation to cooperate – whether the principal sum under the loan agreement is due and payable to the third plaintiff

Baldwin v Icon Energy Ltd [2016] 1 Qd R 397
Butts v O'Dwyer (1952) 87 CLR 267
Concrete Pty Ltd v Parramatta Design & Developments Pty Ltd (2006) 229 CLR 577
Hart v MacDonald (1910) 10 CLR 417
IW & CA Price Constructions Pty Ltd v Australian Building Insurance Services Pty Ltd & Ors [2017] QSC 39
Norton v Angus (1926) 38 CLR 523
Perri v Coolangatta Investments Pty Ltd (1982) 149 CLR 537
Provident Finance Corporation Pty Ltd v Hammond [1978] VR 312
Rudi's Enterprises Pty Ltd v Jay (1987) 10 NSWLR 568
Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd (1979) 144 CLR 596
Southern British National Trust Ltd v Pither (1937) 57 CLR

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Telina Developments Pty Ltd v Stay Enterprises Pty Ltd [1984] 2 Qd R 585
Wellington v Huaxin Energy (Aust) Pty Ltd (formerly Cuesta Coal Limited) [2019] QSC 18
York Air Conditioning and Refrigeration (A/sia) Pty Ltd v The Commonwealth (1949) 80 CLR 11

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

The remaining dispute: recovery of the principal sum under the loan agreement

[1] As a result of the parties' effective efforts to resolve this proceeding without a trial what remains to be determined is the claim by the third plaintiff, Mr 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, as the principal sum under a loan agreement originally made with the first plaintiff, Lake Laurel Pty Ltd, and in respect of which the second defendants are guarantors. The loan agreement is secured by a registered mortgage. The debt the subject of the loan agreement and the mortgage were assigned to Mr Ryan by Lake Laurel.

[2] On 23 May 2019, I delivered my reasons for answering two separate questions as to the construction of the loan agreement: *Lake Laurel Pty Ltd & Ors v Nichols Constructions Pty Ltd & Ors* [2019] QSC 129. The answers to those two questions did not resolve the dispute, and so the trial proceeded.

[3] There are three remaining bases on which Mr Ryan contends the principal sum is due and payable now under the loan agreement:

1. First, that Nichols Constructions breached clause 9(k) of the mortgage, by allowing the development approval for Lot 261 to lapse on 13 March 2017, which is something "that might lower the value of the Mortgaged Property". Consequently, under clause 10 of the mortgage, all monies owing under the mortgage became due and payable on that date.

2. Second, that it was an implied term of the loan agreement and the mortgage that the registration of the plan(s) for subdivision of Lot 261 (the trigger for repayment of the principal sum) would occur within a reasonable time; that a reasonable time has well and truly passed, and so the principal sum has become due and payable.

3. Third, that it was an implied term of the loan agreement and the mortgage that the parties would cooperate and do all such things as are necessary to enable the other party to have the benefit of the loan agreement and the mortgage; in breach of that implied term, Nichols Constructions allowed the development approval for Lot 261 to lapse, such that it is not presently possible to register the plan(s) of subdivision of Lot 261, and consequently the monies owing are due and payable.

[4] As matters evolved by the end of the trial, following delivery of the decision on the separate questions, the defendants did not challenge the contention that Nichols Constructions has breached the loan agreement and/or the mortgage in each of the three ways contended by Mr Ryan. The defendants' argument is that Lake Laurel was in breach of the loan agreement prior to any breach by Nichols Constructions, and therefore the principal sum is not payable.[1]

The facts

[5] Although the relevant factual framework was set out in [8]-[28] of the decision on the separate questions, there are some additional facts which are relevant to determination of the remaining issues. For ease of reading, the facts are reiterated below, supplemented by the additional matters. Most of this is uncontroversial and agreed between the parties.[2]

[6] At relevant times, Lake Laurel carried on business as a civil works contractor, for subdivisions of land, under the name Berger Contracting. The second plaintiff, Mr Berger, was the sole director, secretary and shareholder of Lake Laurel.

[7] In March 2008, Lake Laurel purchased land at 284 Patrick Street, Laidley for $4.4 million, with the intention of subdividing it for residential purposes. The project was financed by Nichols Constructions, which entered into a written loan facility with Lake Laurel for $6.25 million and took a mortgage over 284 Patrick Street as security, in May 2008.

[8] Lake Laurel lodged an application for a development approval for the 284 Patrick Street land with the Lockyer Valley Regional Council in May 2008. Also at that time, Lake Laurel entered into a put and call option deed with Choice Homes (Qld) Pty Ltd, for the sale of all the residential lots within the 284 Patrick Street subdivision, for $98,000 per lot.

[9] 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, for $2.2 million. In exchange for an immediate release of the $50,000 deposit, 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. Mr Berger explained in his evidence that he

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1 Defendants' closing submissions at [3].
2 See the third plaintiff's submissions at [3]-[38], with which the defendants agreed (T 4-20).

needed the Ziebarth Land "to make Patrick Street work", because fill was required from the higher Ziebarth Land, to fill the Patrick Street land, which was below the flood level.[3]

[10] In July 2008, Lake Laurel made an application for development approval for a proposed material change of use of Lot 261 and to reconfigure the lot (by subdividing it into 231 lots) (exhibit 9).

[11] In February 2010, Lake Laurel purchased another, smaller, block of land adjacent to the other two properties, called the Breuer Street land.

[12] On 2 March 2010, Lake Laurel obtained development approval from the Council for the 284 Patrick Street land, approving a development permit for a material change of use (changing the zoning from rural landscape to urban residential) and reconfiguration of the lot into 173 residential lots, to be developed in two stages (exhibit 18). The development approval was subject to a number of conditions, including a condition required by the Department of Transport and Main Roads (DTMR), a concurrency agency in relation to the proposed development, in the following terms:

> "CONDITION 3: STORMWATER
>
> **Issue/Concerns**
>
> Laidley Plainlands Road and the proposed Grandchester to Gowrie High Speed Rail Corridor may be affected by this development if it changes the location, level or flow rate of water run-off.
>
> **Condition of Development for the subject Application**
>
> Prior to the commencement of any works occurring on site and thereafter:
>
> (i) The applicant shall not increase the peak intensity of the stormwater run-off to Laidley-Plainlands Road nor adversely impact on stormwater quality.
>
> (ii) The development must not cause an increase in stormwater flows onto the proposed Grandchester to Gowrie High Speed Rail Corridor ("The Future Rail Corridor") or interfere with stormwater flows from or within the corridor, generally in accordance with Stormwater Catchment Plan – Developed 08-1962/103, prepared by Michael Samms and Associates dated 05/09/2009"

[13] The development approval for 284 Patrick Street was also subject to a stormwater condition, requiring construction of two detention basins (condition 45 (stage 1) and

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[3] T 3-33.

condition 29 (stage 2)). In addition, condition 58 (stage 1) and condition 55 (stage 2) required that, prior to "plan sealing" the applicant provide the Council with evidence of compliance with the conditions of the approval, including RPEQ[4] supervision certificates.

[14] Due to cash flow problems, on 15 March 2010 Lake Laurel entered into a contract to sell the 284 Patrick Street land to Nichols Constructions, for just over $8.9 million. The conditions of this contract included that Nichols Constructions would engage Lake Laurel to undertake the civil works for the 284 Patrick Street subdivision.

[15] On the same date, Lake Laurel also entered into a contract to sell Lot 261 to Nichols Constructions for just over $6 million (exhibit 10). The contract was conditional upon the completion of the purchase of Lot 261 by Lake Laurel from Ms Ziebarth (special condition 7) (remembering that the settlement date under that contract was 30 June 2010).

[16] Also on 15 March 2010, Lake Laurel and Nichols Constructions entered into a joint development agreement, the purpose of which was to establish a joint venture between them to subdivide and sell the part of 284 Patrick Street and Lot 261 which comprised the proposed rail corridor running through the two properties (exhibit 11).

[17] On 6 May 2010, Lake Laurel obtained an operational works approval from the Council for the bulk earthworks for the 284 Patrick Street subdivision.

[18] On 24 June 2010, Lake Laurel (as mortgagee) entered into the loan agreement with Nichols Constructions (as mortgagor) and the second defendants (the directors of Nichols Constructions) (as guarantors) (exhibit 2). This is the loan agreement that Mr Ryan, as assignee from Lake Laurel, seeks to enforce against the defendants.

[19] As recorded in [16] and [21] of the decision on the separate questions, 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. The parties also 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, referred to in paragraph [23] below.

[20] Under the loan agreement the principal sum of $3,775,000.00 was agreed to be repaid by Nichols Constructions to Lake Laurel "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" (clause 6(a) and item 5 part one (1) of the schedule to the loan agreement). The Ziebarth Subdivision was defined in clause 1 of the loan agreement to mean "the

[4] Registered Professional Engineer of Queensland.

prospective subdivision of Lot 261 … into residential lots awaiting DA and Operational Works Certificates…".

[21] The payment of the principal sum under the loan agreement is secured by a mortgage over Lot 261, which was registered on 20 July 2010 (exhibit 3). The deed of mortgage records that both the "term of loan" and the "date of repayment" is "12 months from registration of the plan(s) of subdivision for the Ziebarth Subdivision". Clause 9 of the standard conditions of the mortgage included, in clause 9(k), an obligation on the mortgagor (Nichols Constructions) "to do nothing that might lower the value of the Mortgaged Property". Under clause 10 of the standard conditions, "upon default by the Mortgagor in performance of the Mortgagor's obligations hereunder all moneys owing shall immediately become due and payable".

[22] On 26 June 2010, Lake Laurel (as contractor) and Nichols Constructions (as principal) entered into a civil works contract in relation to the residential subdivision of 284 Patrick Street. A substantial part of these proceedings concerned 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. This included a claim by Nichols Constructions for damages for breach of the civil works contract by Lake Laurel. Those matters were resolved by agreement between the parties, reflected in the consent judgment entered at the commencement of the trial, on 20 May 2019.

[23] On 30 June 2010, 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.

[24] Nichols Constructions became the registered owner of Lot 261 on 7 July 2010.

[25] At some time in 2010, Mr Berger (Lake Laurel) started carrying out earthworks on Lot 261, in order to dig up the fill needed for the 284 Patrick Street subdivision. The area on Lot 261 where this earthwork was done is referred to as the "borrow pit", which is within the rail corridor part of Lot 261.[5] Mr Berger's evidence was that he had permission from the owner of the land, Ms Ziebarth (with whom Lake Laurel then had a contract to purchase Lot 261) to use the land for that purpose. The effect of his evidence was that the borrow pit was in place for about 12 months before the development approval for Lot 261 was granted (referred to in the next paragraph).[6] This is consistent with the evidence of Mr McAnany, a civil engineer, who gave evidence that the borrow pit was created between April and August 2010.[7]

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5 See exhibit 19, as marked in yellow by Mr McAnany. See also exhibit 22 (drone footage, taken on 12 April 2019, showing the borrow pit) and T 3-100.

6 T 3-49 to 3-51.

7 T 3-68.

[26] 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). The Lot 261 development approval was subject to a condition A3, which provided that:

> "The plan of survey for the proposed development shall not be signed by Council prior to the Plan Sealing of the residential development (Stage 1 and 2) located on Lot 2 RP 25657 [284 Patrick Street] which is conditioned in DA01340C"

[27] The Lot 261 development approval was also subject to a DTMR stormwater condition, in the same terms as the condition which applied to the 284 Patrick Street development approval (set out in paragraph [12] above).

[28] The Lot 261 development approval was for the period ending on 13 March 2016.[8] On 1 March 2016, the Lot 261 development approval was extended by the Council, at the request of Nichols Constructions, for one year to 13 March 2017. In their defence, the defendants admit that Nichols Constructions allowed the development approval to lapse on that date, say that Nichols Constructions "inadvertently allowed" it to lapse, and refer to proceedings commenced in the Planning and Environment Court in 2017 seeking an extension of time.

[29] The contract for the sale of 284 Patrick Street from Lake Laurel to Nichols Constructions, entered into in March 2010, was rescinded by the parties in December 2011, at the request of Mr Nichols (one of the second defendants), a director of Nichols Constructions. The parties entered into a new contract for the sale of both 284 Patrick Street and the Breuer Street land from Lake Laurel to Nichols Constructions. Nichols Constructions became the registered owner of the 284 Patrick Street land and the Breuer Street land in March 2012.

[30] On 6 November 2012, the Council conducted an "on maintenance" inspection for stage 1 of the 284 Patrick Street subdivision (stage 1 comprising 100 residential lots, to the south of the railway corridor).

[31] On 12 November 2012, the superintendent under the civil works contract (Michael Samms & Associates) sent an email to Mr Berger, setting out a "list of items required to be completed in order to gain practical completion and on maintenance" (exhibit 14). This included work required to the "detention basin" and the "open channel to Patrick Street", which is discussed below. Mr Berger's evidence, in cross-examination, was that all the work referred to in this email was done, except for the "basin" and the "channel", and that the Council agreed to this work being done "after Ziebarth land

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[8] This is a fact agreed between the parties (see paragraph 10H(a)(i) of the 8th amended defence; admitted in paragraph 1AAD(a) of the reply); although in exhibit 5, the relevant period for the development permit is said to be four years (which would expire in July 2015). I have proceeded on the basis of the agreed fact.

started".[9] There was no contradictory evidence called by the defendants in relation to this. It is apparent from the next two matters referred to (which are uncontroversial) that the items referred to in exhibit 14 (whether they were all completed or not) did not prevent the work in relation to stage 1 being certified or the plans for stage 1 being sealed and registered.

[32] On 19 November 2012, Samms, as superintendent under the civil works contract, issued compliance certificates for the constructed stage 1 284 Patrick Street subdivision roadworks, stormwater infrastructure, water supply reticulation and sewer reticulation.

[33] In December 2012 Lake Laurel completed the civil works for stage 1, and the Council accepted stage 1 as "on maintenance" (meaning that the Council took over responsibility for maintenance of the constructed infrastructure within the subdivision). The plans for stage 1 of the 284 Patrick Street subdivision were sealed by the Council and registered on 10 December 2012 (exhibit 21).

[34] Mr Berger's evidence at the trial was that the civil works for stage 2 were completed at the same time as stage 1. In his written statement, tendered by the defendants, Mr Berger says that in December 2012 he was "still finalising small tasks on the second stage" (exhibit 12 at [32]). Mr Berger's oral evidence was that the plans for both stage 1 and stage 2 were lodged with the Council at the same time. Mr Berger said that the plans for stage 2 were not registered, and stage 2 was not put "on maintenance" by the Council, because Mr Nichols, the director of Nichols Constructions (which was by then the owner of the land) did not want that to happen; he only wanted to register stage 1. Mr Berger said Mr Nichols wanted to sell all of stage 1 first, before going into stage 2.[10] Mr Berger was not challenged on that evidence; and no evidence to the contrary was called by the defendants. There was no explanation proffered for why Mr Nichols was not called to give evidence. It is open to infer that any evidence Mr Nichols, if he had been called, could have given would not have assisted the case for the defendants. I accept Mr Berger's evidence about this.

[35] Similarly, Mr Berger's evidence was that Mr Nichols did not want to continue on with the subdivision of the Ziebarth land (Lot 261), until he had sold all of stage 1 of the 284 Patrick Street subdivision. Having obtained the development approval (in July 2011), Mr Berger said he did not proceed with operational works applications in relation to the Ziebarth land because "Mr Nichols didn't want to go"; "he was the landowner, and I only had a mortgage on it. So I needed his signature to do all the paperwork and he didn't want to go on with it". As Mr Berger said, that put him in a precarious position, financially.[11] Again, Mr Berger was not challenged on this, and no contrary evidence was called. I accept Mr Berger's evidence about this also.[12]

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9 T 3-45 and T 3-47.
10 T 3-34 to 3-35, 3-37.
11 T 3-35.

[36] In January 2013, the Lockyer Valley was affected by severe flooding, which caused damage to the civil works already constructed as part of the 284 Patrick Street subdivision.

[37] After the floods, Mr Berger said that he and Mr Samms, and someone from the Council, walked around the 284 Patrick Street site, to see what damage had been done.[13] He said he got a list from the Council of defects to be repaired, and was in the process of doing that when he was ordered off the site, by Mr Nichols and an engineer, Mr Kel Howard, who was there "disputing Mr Samms' [the superintendent under the civil works contract] work".[14] He said this happened "way before" the civil works contract was terminated by Nichols Constructions in October 2014.[15] Mr Berger's evidence was that he (I infer Mr Nichols) said "he wasn't doing any more work on the project until they do another flood study on the project".[16] Mr Berger said that was the last day he was on the site. I accept Mr Berger's evidence about this.

[38] This proceeding was commenced in April 2014. It is reasonable to infer Mr Berger had been ordered off the site prior to this.

[39] In early 2015 Nichols Constructions, by an agent, lodged the plans for stage 2 of 284 Patrick Street with the Council for sealing. The plans were not sealed, but the Council issued an action notice, outlining the conditions "which are outstanding and must be complied with before the plan can be sealed" (exhibit 25).[17]

[40] The defendants led no other evidence of any work undertaken by or on behalf of them to progress the development, or registration of the plans for subdivision, of stage 2 of 284 Patrick Street; and led no evidence at all about any steps taken to progress the development of Lot 261, in accordance with the development approval granted in July 2011.

[41] There was a plan of subdivision of Lot 261 registered on 29 January 2018 (exhibit 4). This registered plan records the subdivision of Lot 261 into lots 804 (part of the proposed rail corridor) and 805 (in two parts, on either side of lot 804). It is uncontroversial that this plan of subdivision 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 (see paragraph [16] above). 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 part of Lot 261 comprising the proposed rail corridor. That contract was

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12 See also exhibit 8, the letter of demand for payment under the loan agreement dated 16 June 2017, in which reference is made to Mr Nichols "orally instructing the former Mortgagee [Lake Laurel] through Mr Berger not to obtain Operational Works".
13 T 3-36.
14 T 3-35 and 3-45
15 T 3-46.
16 T 3-35, 3-45 to 3-46.
17 T 4-5.

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.

[42] In my decision in relation to the separate questions, I found that the plan of subdivision registered on 29 January 2018 (exhibit 4) was not a plan of the Ziebarth Subdivision within the meaning of item 5 of the schedule, and the definition of Ziebarth Subdivision, in the loan agreement: [2019] QSC 129 at [61]-[66]. No other plan of subdivision of Lot 261 has been registered.

[43] At some stage, Lake Laurel had borrowed money from Mr Ryan (the third plaintiff), who is a director of Ryan Earthmoving Pty Ltd, in relation to the project concerning 284 Patrick Street and Lot 261. Lake Laurel subsequently assigned to Mr Ryan the debt owed to it under the loan agreement and the mortgage. This occurred in two stages, as to half the moneys secured, in December 2012, and as to the remaining half, in February 2016. The transfers of the mortgage were registered in July 2013 and March 2016 (exhibit 23). The assignment of the debt and the mortgage was later recorded in a deed of assignment of debt, made on 20 November 2017 (exhibit 24). No issue is taken by the defendants with the efficacy of the assignment. Mr Ryan also became the registered owner of the portion of Lot 261 comprising the rail corridor (I infer, lot 804) in March 2018.

The defendants' case

[44] As already noted, the defendants do not challenge Mr Ryan's three bases for claiming the principal sum has become due and payable.

(i) breach of clause 9(k) of the mortgage

[45] The defendants accept that Nichols Constructions breached clause 9(k) of the mortgage, by allowing the development approval for Lot 261 to lapse on 13 March 2017.

[46] Clause 9(k) of the mortgage provides that the mortgagor (Nichols Constructions) agrees "to do nothing that might lower the value of the Mortgaged Property". In support of his argument that allowing the Lot 261 development approval to lapse is something that might lower the value of that land, the third plaintiff relied upon *Concrete Pty Ltd v Parramatta Design & Developments Pty Ltd* (2006) 229 CLR 577, in which Callinan J (at [161]) expressed the view that it was "unthinkable" that the grant of a development approval did not increase the value of the land and Kirby and Crennan JJ (at [100]) likewise found there was "clear benefit" in holding a development approval; even if the actual value added by a development approval could not be determined without expert evidence. By corollary then, allowing a development approval to lapse is something which *might* lower the value of the subject land.

[47] In addition, there is no contention that, by operation of clause 10 of the mortgage, subject to the defendants' argument of a prior disentitling breach by Lake Laurel, all moneys secured by the mortgage became due and payable.

(ii) breach of the implied term that registration of the plan(s) of subdivision for the Ziebarth Subdivision would occur within a reasonable period of time

[48] The defendants do not challenge a finding that it was an implied term of the loan agreement and the mortgage that the plan(s) for the "Ziebarth Subdivision", as that term is defined in clause 1 of the loan agreement, was required to be registered within a reasonable time.[18]

[49] Nor do the defendants challenge the argument(s) of the third plaintiff as to what constituted a reasonable time. There were effectively three time periods identified by the third plaintiff:

1. By 13 August 2012, on the basis of Mr Berger's evidence, that it would take about 13 months after obtaining the development approval, to obtain operational works approval, to construct the civil works, and then to register the plan of subdivision.[19]

2. By 13 April 2014, on the basis of the evidence of Mr McAnany, civil engineer, that he would estimate about 2 years and 9 months from the obtaining of development approval, to registration of the plans.[20]

3. By 8 April 2013, which is 12 months before the proceedings were commenced (because payment was required 12 months from registration of the plan(s) of subdivision).

[50] What is a reasonable time is a question of fact, to be determined having regard to all the circumstances, including those which are known or foreseeable at the time of the contract as well as subsequent circumstances and events.[21]

[51] On the evidence I find that a reasonable time, for registration of the plan(s) of subdivision of Lot 261, was about three years from the January 2013 floods. I adopt the time periods estimated by Mr McAnany (a total of 2 years and 9 months, including 13 months for design and operational works approval, 12 months for civil works construction, 2 months for plan sealing and 6 months for slippage), round this up to three years, and calculate it from the time of the January 2013 floods, having regard to the evidence of Mr Boheim, a town planner with the Council.

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[18] This is supported by *York Air Conditioning and Refrigeration (A/sia) Pty Ltd v The Commonwealth* (1949) 80 CLR 11 at 62; and *Perri v Coolangatta Investments Pty Ltd* (1982) 149 CLR 537 at 543.

[19] T3-34 and 3-38.

[20] Exhibit 20 and T 3-74 to 3-76.

[21] *Hart v MacDonald* (1910) 10 CLR 417 at 421-422; *Telina Developments Pty Ltd v Stay Enterprises Pty Ltd* [1984] 2 Qd R 585 at 587 and 591-592; *Rudi's Enterprises Pty Ltd v Jay* (1987) 10 NSWLR 568 at 575-576.

[52] Mr Boheim gave evidence that both the 284 Patrick Street and Lot 261 sites were affected by floodwaters as a result of the January 2013 floods. He said that following the floods, Council developed "an awareness of issues with the design" of drainage and flooding requirements in relation to these sites, "that we weren't previously aware of". He said the Council requires the owner/developer of those sites to address those issues before the Council will seal any further plans. He confirmed that even if everything was constructed in accordance with the original development approval, the Council still would not seal the plan for stage 2, until these other drainage design issues are addressed.[22]

[53] There was no evidence led by the defendants to challenge this aspect of the case; and no submissions advanced contrary to the third plaintiff's contention.

(iii) breach of the implied term of the loan agreement and mortgage that the parties would cooperate and do all such things as are necessary to enable the other party to have the benefit of the loan agreement and mortgage

[54] The implied term as pleaded in the statement of claim is admitted by the defendants. The third plaintiff relies upon Nichols Constructions' conduct, allowing the development approval to lapse, as a breach of this implied term. The defendants accept that Nichols Constructions was in breach of the mutual cooperation term, by allowing the Lot 261 development approval to lapse.

[55] But, in the case of (i), (ii) and (iii) above, the defendants argue that Mr Ryan cannot rely upon any breach of the loan agreement and/or the mortgage by Nichols Constructions, because Lake Laurel was already in breach of the implied obligation under the loan agreement and the mortgage to cooperate, either to assist Nichols Constructions to obtain registration of the plans(s) of subdivision of (Lot 261) the Ziebarth Subdivision, or at least not to hinder or obstruct Nichols Constructions from doing so.

The content of the implied obligation to cooperate

[56] The defendants admit that it was an implied term of the loan agreement and the mortgage that the parties would cooperate and do all such things as are necessary to enable the other party to have the benefit of the loan agreement and the mortgage.[23] That general proposition is supported by *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* (1979) 144 CLR 596 at 607, on which both parties relied. The question is what constitutes the benefit of the loan agreement and the mortgage.[24]

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22 T 4-8.

23 See paragraph 10E of the third further amended statement of claim and paragraph 10E of the eighth amended defence.

24 *Baldwin v Icon Energy Ltd* [2016] 1 Qd R 397 at [69].

[57] For Mr Ryan, it is submitted the benefit to Lake Laurel (and, following the assignment, Mr Ryan) is the receipt of the principal sum owing under the loan agreement; and the benefit to Nichols Constructions is the deferment of paying the principal sum until a specified event (registration of the plan(s) of the Ziebarth Subdivision). He contends the benefit is not the registration of the plan(s) of the Ziebarth Subdivision, and emphasises that there is no express obligation on either party, under the loan agreement or the mortgage, to obtain registration of the plan(s).

[58] For the defendants it is submitted that the implied term obliged Lake Laurel to make reasonable efforts to assist Nichols Constructions to progress the Ziebarth Subdivision to registration of the plan(s) of subdivision (or sealing of the plans by the Council), or at least not to obstruct or hinder Nichols Constructions from doing so. The defendants argue that even though achieving registration of the plan(s) of the Ziebarth Subdivision is not something the loan agreement expressly requires to happen,[25] because the obligation of Nichols Constructions to pay the principal sum under the loan agreement is conditional upon that contingency (registration of the plan(s) of the Ziebarth Subdivision) there is an implied obligation on both parties to do what is reasonable to bring about that event.

[59] The recent decision of Jackson J in *Wellington v Huaxin Energy (Aust) Pty Ltd (formerly Cuesta Coal Limited)* [2019] QSC 18 contains a detailed consideration of authorities in relation to the implied duty to cooperate, and the principles to be extracted from them, relevantly at [41] and [48] to [82].[26] The authorities referred to in [61] to [63] and [82] of *Wellington*[27] support the conclusion in this case that the implied duty to cooperate does extend to the conditional obligation to pay under the loan agreement, which is subject to the contingency of registration of the plan(s) of the Ziebarth Subdivision.

[60] In *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* (1979) 144 CLR 596 at 607 Mason J referred to the statement of principle by Griffith CJ in *Butt v M'Donald* (1896) 7 QLJ 68 at 70-71, that:

> "It is a general rule applicable to every contract that each party agrees, by implication, to do all such things as are necessary on his part to enable the other party to have the benefit of the contract."

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[25] See the earlier decision in relation to the separate questions at [45] and [46], in which I rejected the defendants' argument that the loan agreement contained an express obligation to cooperate to progress the development.

[26] See also *IW & CA Price Constructions Pty Ltd v Australian Building Insurance Services Pty Ltd & Ors* [2017] QSC 39 at [52] to [56] per A Lyons J (as her Honour then was).

[27] Including, for example, *Norton v Angus* (1926) 38 CLR 523 at 535 (in relation to a contract of sale of perpetual leases, where the transfer of the leases was by statute subject to the Minister's approval, each of the parties was impliedly obliged "to do all that was reasonable" to secure the lawful transfer); and *Butts v O'Dwyer* (1952) 87 CLR 267 at 280 (a lease and option to buy, where the transfer of land was subject to Ministerial consent, was found to be subject to an implied condition that the transferor would do all that was reasonable on his part to ensure the Minister's consent might be obtained).

And then went on to say (at 607-608):

> "It is easy to imply a duty to co-operate in the doing of acts which are necessary to the performance by the parties or by one of the parties of fundamental obligations under the contract. It is not quite so easy to make the implication when the acts in question are necessary to entitle the other contracting party to a benefit under the contract but are not essential to the performance of that party's obligations and are not fundamental to the contract. Then the question arises whether the contract imposes a duty to co-operate on the first party or whether it leaves him at liberty to decide for himself whether the acts shall be done, even if the consequence of his decision is to disentitle the other party to a benefit. In such a case, the correct interpretation of the contract depends, as it seems to me, not so much on the application of the general rule of construction as on the intention of the parties as manifested by the contract itself."

[61] Because registration of the plan(s) of the Ziebarth Subdivision is not a fundamental obligation under the loan agreement, this is not the "easy" case identified by Mason J; it is a case falling into the latter category.

[62] I accept that the benefit of the loan agreement, to Lake Laurel, is payment of the principal sum; and, to Nichols Constructions, deferment of payment of the principal sum, until registration of the plan(s) of the Ziebarth Subdivision had been effected.

[63] Having regard to the surrounding circumstances at the time the loan agreement was entered into, it may objectively be presumed that the parties intended that in relation to the contingency – that payment of the principal sum was required to occur, incrementally, on the sale of each lot in the Ziebarth Subdivision, with the balance to be paid 12 months after registration of the plan(s) of the Ziebarth Subdivision – there was an (implied) obligation on Nichols Constructions to cooperate in doing acts necessary to enable Lake Laurel to obtain the benefit under the loan agreement (namely, payment); and a complementary obligation on Lake Laurel not to obstruct those efforts.[28]

[64] The loan agreement is not the source of any contractual obligation (express or implied) for Lake Laurel to do anything to obtain development approval, operational works approval or the other steps necessary to achieve registration of the plans of subdivision. If there was such an obligation on Lake Laurel, within the complex arrangements between these parties, it must be found elsewhere. But it is appropriate to construe the loan agreement as including an implied obligation on Lake Laurel not to hinder Nichols Constructions' efforts to do the things which are necessary to secure the benefit to Lake Laurel.

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[28] *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* (1979) 144 CLR 596 at 602 per Mason J.

[65] The articulation of the implied obligation in these terms is consistent with the uncontroversial implied term that registration of the plan(s) of subdivision would occur (by the actions of Nichols Constructions) within a reasonable time.

Rival contentions as to breach of the implied obligation of cooperation

[66] As already discussed, Mr Ryan relies upon the fact that Nichols Constructions allowed the development approval for Lot 261 to lapse as evidence of the breach by Nichols Constructions of the implied obligation to cooperate.

[67] The defendants rely on two circumstances as evidencing Lake Laurel's *earlier* breach of the implied obligation. The first is the (admitted) breach of the civil works contract by Lake Laurel, by failing to construct overflow weirs (the basins) and the overland flow channel.[29] The claim for damages for breach of the civil works contract, including these breaches, was a part of this proceeding, which was resolved by the consent judgment entered at the start of the trial on 20 May 2019. The second is the excavation of fill from the rail corridor land within Lot 261 (the borrow pit).

[68] The argument that Lake Laurel breached the implied obligation relies upon condition A3 of the development approval for Lot 261, which provided that "the plan of survey for the proposed development [of Lot 261] shall not be signed by Council prior to the Plan Sealing of the residential development (Stage 1 and 2) located on Lot 2 RP 25657 [284 Patrick Street]…". The defendants argue:

1. First, that as a consequence of Lake Laurel's breach of the civil works contract, in the two respects discussed above, stage 2 of the 284 Patrick Street development could not be sealed; and therefore, because of this condition A3, the plans for subdivision of Lot 261 could not be sealed.

2. Second, that the excavation of the borrow pit resulted in a breach of the DTMR condition 3(ii), as a consequence of which the plans for stage 2 of the 284 Patrick Street development could not be sealed; and again, because of condition A3, this meant that the plans for subdivision of Lot 261 could not be sealed. But in addition, it is said the excavation of the borrow pit would also be a breach of the equivalent DTMR condition 3(ii) of the development approval for Lot 261, preventing registration of the plans for subdivision of Lot 261.

[69] The defendants rely upon Lake Laurel's breach of the civil works contract, and alleged breach of the DTMR condition, as a breach of the implied obligation of cooperation under the loan agreement, occurring before any breach by Nichols Constructions of the loan agreement. The defendants contend that, by its conduct in these two respects, Lake Laurel breached the implied obligation under the loan agreement not to hinder the

[29] In the material, sometimes referred to as the overland flow path.

ability of Nichols Constructions to progress the development of Lot 261, to registration of the plan(s) of subdivision.[30]

[70] There was an argument at the trial about whether any breach by Lake Laurel of the civil works contract could be relied upon by way of defence to enforcement of the loan agreement by Mr Ryan, the assignee of the debt. The defendants accept that they cannot set off the damages claimed for breach of the civil works contract against the debt owing under the loan agreement. However, the defendants rely upon the breach of the civil works contract by Lake Laurel not directly, by way of set-off, but indirectly, as evidencing a breach of the implied obligation to cooperate under the loan agreement. The excavation of the borrow pit is relied upon in the same way. As so articulated, I accept that the circumstances relied upon by the defendants could, as a matter of principle, be defences which burden the assignment to Mr Ryan.[31]

Did Lake Laurel breach the implied obligation to cooperate, by hindering Nichols Constructions' efforts to attain registration of the plan(s) of subdivision of Lot 261?

[71] On the evidence before the court, I am not persuaded as a matter of fact that on either basis a prior breach by Lake Laurel of the implied obligation to cooperate, by hindering Nichols Constructions' efforts to attain registration of the plan(s) of subdivision of Lot 261, has been established.

[72] The first reason for this conclusion is that there is no evidence of any efforts made by Nichols Constructions to attain registration of a plan of subdivision of Lot 261, as contemplated in the development approval granted in July 2011. There is evidence, as at late 2012 and early 2013, of Nichols Constructions determining that it would not progress either stage 2 of 284 Patrick Street, or Lot 261, pending either the sale of all lots in stage 1, or further flood studies (see paragraphs [34] to [37] above). Although there is evidence of a request to seal the plans for stage 2 in early 2015; there is no evidence of any steps taken in relation to the development of Lot 261. It is difficult to see how it can be argued Lake Laurel hindered or obstructed efforts which there is no evidence Nichols Constructions made.

[73] The two circumstances of breach relied upon by the defendants do not lead to a different conclusion.

(i) the admitted breaches of the civil works contract

[74] The failure to construct the overflow weirs (the basins) affects stage 1 and stage 2 of the 284 Patrick Street development. The civil engineering experts relied upon by the parties, Mr McAnany (for the plaintiffs) and Mr Holstein (for the defendants), agreed

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[30] Oral submissions at T 4-13.

[31] Cf *Southern British National Trust Ltd v Pither* (1937) 57 CLR 89 at 102 and *Provident Finance Corporation Pty Ltd v Hammond* [1978] VR 312 at 319 to 321.

that the cost to complete this work was approximately $64,000.[32] Of that, about $45,000 is said to be attributable to stage 1, and $19,000 attributable to stage 2.[33] The experts agreed this work would take no more than about three weeks to complete, and that it could be done independently of any subdivision work on Lot 261.[34]

[75] The fact that the weir was not completed did not prevent the sealing of the plans for stage 1 of the 284 Patrick Street subdivision. Mr McAnany's evidence was that it would not prevent the sealing of the plans for stage 2 either, because even if it was not completed, the Council would most probably accept a bond. On the other hand, Mr Holstein said he would not be prepared to give an RPEQ certificate for stage 2, with those works not completed.[35] On balance, I accept Mr McAnany's evidence about this; supported as it is by the objective fact that the plans for stage 1 were sealed.

[76] The work involved in repairing the overland flow channel is far more substantial. The civil engineers were not in agreement as to the cost of this work, because their opinions differed significantly in terms of the length of the channel required to be constructed. Mr Holstein estimated a cost of just over $863,000 for this work; Mr McAnany estimated just over $383,000.[36] They were in agreement that, even on the basis of the longer length, the work would take about 10 weeks to complete; and again that it was completely independent of any subdivision work in relation to Lot 261.[37]

[77] Mr McAnany's evidence was that the overland flow channel is "totally within stage 1 [of the 284 Patrick Street development]. So it doesn't have any impact on the stage 2 certification".[38] Once again, it is clear that the fact the overland flow channel was not completed, or compliant, did not prevent the plans for stage 1 being sealed by the Council. Mr McAnany's evidence was that the Council "took a bond for that", to the value of about $7,500.[39] Mr Holstein said he was surprised the plans for stage 1 were sealed, and that he "would anticipate that … those works would have to be done before … stage 2 was sealed".[40] He did not explain why.

[78] There is evidence that Nichols Constructions lodged the plans in relation to stage 2 of 284 Patrick Street with the Council for sealing, which was refused (see the action notice which is exhibit 25). One of the conditions said to be outstanding is condition 29, relating to the detention basin (the weir); but there were a number of other conditions also said to be outstanding, most of which relate to payment of contributions. As far as I can tell from exhibit 25 there is no reference to the overland flow channel (and there

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[32] See exhibit 17 (joint expert report dated 8 March 2019) at [6.23].
[33] Mr McAnany at T 3-80; Mr Holstein at T 3-99.
[34] Mr McAnany at T 3-64 to 3-65; Mr Holstein at T 3-94 and 3-109.
[35] T 3-97.
[36] See exhibit 17 at [6.25].
[37] Mr McAnany at T 3-65 to 3-66; Mr Holstein at T 3-94 and 3-109.
[38] T 3-80; see also exhibit 19, on which Mr McAnany marked the location of the overland flow channel in green (T 3-81).
[39] T 3-80.
[40] T 3-97.

was no reference to this in the evidence of Mr Boheim, through whom exhibit 25 was tendered). Neither Mr McAnany nor Mr Holstein were asked about exhibit 25.

[79] The location of the overland flow channel, wholly within stage 1, was not controversial. Mr McAnany's evidence that it would not impact on stage 2 certification is logical and persuasive, and I accept it.

[80] I do not accept that Lake Laurel's admitted breaches of the civil works contract, in these two respects, are such as to establish a breach by Lake Laurel of the implied obligation to cooperate, in the sense of not obstructing or hindering Nichols Constructions from securing registration of the plan(s) of subdivision of Lot 261.

(ii) the borrow pit

[81] There are a number of reasons why the conduct of Lake Laurel excavating the borrow pit is also, in my view, not evidence of a breach by Lake Laurel of the implied obligation to cooperate, in the sense of not hindering efforts by Nichols Constructions to attain registration of the plan(s) of subdivision of Lot 261.

[82] It is apparent from the evidence that the borrow pit was in existence for about 12 months before the development approval for Lot 261 was issued by the Council in July 2011. It was clearly visible, including from the adjacent development.[41] It is reasonable to infer the Council was aware of the borrow pit, before granting the development approval for Lot 261.

[83] In so far as stage 2 of the 284 Patrick Street development is concerned, I do not accept that excavating the borrow pit on the adjacent Lot 261 can be said to be part of "the development" the subject of the development approval for 284 Patrick Street (see exhibit 18). The development which is approved, and for which a development permit was granted, was for reconfiguring a lot and material change of use, of the land at 284 Patrick Street (Lot 2 on RP 25657).[42] DTMR condition 3(ii) provides that "the development must not", relevantly, "interfere with stormwater flows from or within the [rail] corridor, generally in accordance with" the Samms drawing (see exhibit 19). The development is what occurs on the land at 284 Patrick Street; not on Lot 261.

[84] In any event, the existence of the borrow pit did not prevent the plans for stage 1 of 284 Patrick Street being sealed in December 2012. The sealed plans were sent to DTMR on 10 December 2012 (exhibit 26). In addition, there is no reference to the borrow pit in the "action notice" issued in relation to stage 2 in 2015 (see exhibit 25). There is a generic reference to requiring evidence that the DTMR condition has been satisfied, but no reference to the excavation on the adjacent part of Lot 261 as relevant to this condition.

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41 Mr Holstein at T 3-105 to 106.

42 See the definition of "development" in s 7 of the *Sustainable Planning Act* 2009 (Qld) (now repealed).

[85] The third plaintiff argues that even in relation to Lot 261, something done on the rail corridor is not part of "the development", because the development excludes the rail corridor land. More fundamentally, in my view, the excavation is not part of "the development" the subject of the approval in relation to Lot 261, because it is something that was done before the grant of the development approval. The development approval is for a material change of use, and for reconfiguration of Lot 261, by subdivision into 215 residential lots. The pre-existing (that is, before the grant of the development approval) state of the part of Lot 261 comprising the future rail corridor, which was not to form part of the subdivision, and on which no development (in the sense of reconfiguration, operational or building work) was proposed to occur, is not logically within the scope of "the development" in DTMR condition 3(ii).

[86] But even if it could be said that the extraction of fill from Lot 261 is part of "the development" of 284 Patrick Street, or Lot 261, I am not persuaded, on the evidence, that digging the borrow pit on the railway corridor part of Lot 261 could have caused an increase in stormwater flows onto the future rail corridor; nor that it "interfere[d] with stormwater flows from or within the corridor, generally in accordance with" the Samms drawing referred to in the condition. As to the first point, that was the consistent opinion of Mr McAnany and Mr Holstein.[43] As to the second point, the experts differed; but on balance I prefer Mr McAnany's evidence about this.

[87] As Mr McAnany explained, the Samms drawing contains scant detail. However, it does provide for catchments, on the northern side of the future rail corridor; and then separate catchments, on the southern side of the future rail corridor – from which it can be concluded that the stormwater catchment plan, as depicted in the Samms drawing, proposes that all the water from the northern side is dealt with without it coming onto the rail corridor, and likewise, in relation to the southern side. What the plans do not show is how water that comes off the rail corridor itself is to be dealt with. However, by reference to the contours on the Samms drawing, Mr McAnany explained that the water would flow (perpendicular to the contours) from the north, in a south westerly direction as it approaches the rail corridor, and then south into the southern property. Mr McAnany's evidence was that, despite the borrow pit, the water would flow in exactly the same direction as it is shown to flow in the Samms drawing. He says the DTMR condition is only referring to stormwater flow issues, and the existence of the borrow pit does not "interfere with the stormwater flows from or within" the rail corridor, as those stormwater flows are shown in the Samms drawing.[44] Mr McAnany says that if the borrow pit is empty, it will act as a detention basin and actually reduce the flows from or within the property beside it; and if it is full, it will have no impact at all, as the water will just flow across it and onto the southern property. In either case, it will not change the flows.[45] Mr McAnany's evidence is that the borrow pit "certainly

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[43] Mr McAnany at T 3-70; Mr Holstein at 3-95 and 3-104.

[44] Mr McAnany at T 3-71 to 3-72, 3-82 to 3-83, 3-85, 3-88. See also exhibit 13 (joint expert report dated 20 May 2019) at [3.10]-[3.14].

[45] T 3-88 to 3-89.

doesn't interfere" with the flows in the part of the railway corridor which is within 284 Patrick Street; nor does it interfere with the flows in the part of the railway corridor which is within Lot 261 (where the borrow pit is), when the Samms drawing is the baseline.[46] Mr McAnany said he believed a certification could be provided, in relation to DTMR condition 3(ii).[47]

[88] On the other hand, Mr Holstein's evidence was that the excavation of the borrow pit clearly interfered with the stormwater flows from or within the rail corridor.[48] He refers to the significant earthworks involved in excavating the borrow pit, and also the "prolific stockpiling of topsoil, and earthworks material" as interfering with the stormwater flows from or within the corridor, and states that he could not provide certification that the DTMR condition 3(ii) had been met.[49]

[89] Both Mr McAnany and Mr Holstein are experienced civil engineers. The difference in their opinions on this point reflects a different approach. Mr McAnany's approach is to construe the DTMR condition strictly, by reference to the Samms drawing which is the baseline referred to in condition 3(ii). Mr Holstein's approach is to consider more broadly the potential impact of the excavation on the flow of water on the rail corridor. In my view, Mr McAnany's approach, of construing the condition according to its terms, is to be preferred. The condition directs attention to the stormwater flows, "generally in accordance with" the Samms drawing.

[90] I am not persuaded, on the evidence, that the existence of the borrow pit on the railway corridor within Lot 261 (now privately owned, by Mr Ryan) would prevent sealing of the plans for stage 2; nor that it would prevent sealing of the plans for subdivision of Lot 261.

[91] There is no basis, in the evidence before the court, to conclude that the fact of the borrow pit, on this part of Lot 261, obstructed or hindered, or for that matter could have obstructed or hindered, Nichols Constructions in any efforts to obtain registration (or sealing) of the plans for subdivision of Lot 261.

(iii) new requirements after the floods

[92] In any event, the evidence of Mr Boheim is that even if Nichols Constructions complied in every respect with the development approval for stage 2 of 284 Patrick Street, the Council would not seal the plans for stage 2 until the drainage design issues, of which the Council developed a new awareness after the flood, were addressed. It cannot be concluded that anything Lake Laurel did, or failed to do, has hindered Nichols Constructions from obtaining registration and sealing of the plans for stage 2. That is a

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46 T 3-92.
47 T 3-93.
48 T 3-94 to 3-95 and 3-108; exhibit 13 at [3.7].
49 Exhibit 13 at [3.5]-[3.8].

combined consequence of Nichols Constructions' own failure to act, and the changed circumstances following the floods.

[93] In this regard, I note Mr McAnany's evidence, in the joint expert report dated 20 May 2019 (exhibit 13) (in which he is referred to as MM), at [3.12]-[3.14] as follows:

> "MM believes that there are no compliance issues with DTMR condition 3(ii).
>
> As far as MM is aware, there were no compliance issues raised by either LVRC [the Council] or DTMR during the sealing process for Stage 1 of the development, and the survey plans for Stage 1 of the development were sealed.
>
> As far as MM is aware, there have been no compliance issues raised by either LVRC or DTMR during the sealing process for Stage 2 of the development, and although the survey plans for Stage 2 of the development have not to date been sealed, this lack of sealing is solely due to flooding issues and the damage caused by the 2013, Australia Day flood event."

[94] That is supported by the evidence of Mr Boheim, already referred to.

(iv) prior breach by Lake Laurel not established

[95] For the reasons given above, the implied obligation of cooperation did not positively require Lake Laurel to take steps to ensure registration of the plans of subdivision for the Ziebarth Subdivision. The implied obligation did require Lake Laurel not to hinder or obstruct such steps taken by Nichols Constructions.

[96] But there is no evidence before the court from which it could be concluded Lake Laurel did, or failed to do, anything that had that effect.

[97] On the evidence, Lake Laurel had no involvement in either the 284 Patrick Street subdivision, or the Lot 261 subdivision, from, at the latest, October 2014 (when the civil works contract was terminated). In fact, its involvement ended earlier, when Mr Nichols gave Mr Berger a direction to leave the site, and not to do any further work on the project. It is reasonable to infer this was before these proceedings were commenced, in April 2014.[50]

[98] The evidence before the court, which I accept, is that Mr Nichols told Mr Berger that he did not want to progress stage 2, or the Ziebarth land, before the lots in stage 1 were sold.[51] In the face of that direction, it cannot be said that Lake Laurel hindered Nichols Constructions in its efforts to do that which Nichols Constructions, by its director Mr Nichols, had told Mr Berger he did not want to do.

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[50] See paragraphs [37]-[38] above.
[51] See paragraphs [34]-[35] above.

[99] Mr Ryan submits that "the obligation to obtain registration of the plan(s) of the Ziebarth Subdivision could only have been that of Nichols particularly in circumstances where that act is inextricably linked to its ownership of the Ziebarth Land and its fundamental obligation to pay monies owed under the" loan agreement and mortgage. I accept that submission. There was no positive obligation (express or implied) on Lake Laurel, under the loan agreement, to obtain registration of the plan(s) of subdivision of Lot 261.

[100] Further, Mr Ryan submits that Nichols Constructions' inaction, by allowing the development approval for Lot 261 to lapse, is consistent with its failure to progress stage 2 of the 284 Patrick Street subdivision up until the time of the lapse of the Lot 261 development approval. He emphasises the absence of any evidence from the defendants of any attempts to progress the works on stage 2 of 284 Patrick Street, or Lot 261, prior to the lapse of the development approval. Mr Ryan relies upon that failure as constituting a breach of the implied term to cooperate, as Nichols Constructions has not done all things as are necessary to enable Mr Ryan to have the benefit of the loan agreement and the mortgage.[52]

[101] I accept these submissions for Mr Ryan. I find that Nichols Constructions has breached the implied term of the loan agreement, which required that it cooperate and do all such things as are necessary to enable the other party, Lake Laurel, to have the benefit of the loan agreement, namely payment of the principal sum. I am not persuaded, on the evidence before me, that anything Lake Laurel did, or did not do, obstructed or hindered Nichols Constructions in doing that.

Conclusion and orders

[102] It follows that I find Mr Ryan has made out his case, that the principal sum under the loan agreement, has become due and payable. On the basis of my findings above, the earliest date the principal sum became payable was in or about January 2017 (12 months from what I have determined was a reasonable time for the plans of subdivision to be registered).

[103] There will be judgment for the third plaintiff on his claim against the first and second defendants[53] for payment of the principal sum under the loan agreement and the mortgage in the amount of $3,775,000.00. I will direct the parties to provide a draft form of judgment, reflecting this decision, and addressing interest and costs. If interest and costs are not agreed, the parties will be directed to file and serve written submissions in relation to those issues within 7 days of delivery of this decision.

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[52] Third plaintiff's submissions at [70]-[74].

[53] Apart from the issues already addressed in these reasons, no issue was raised by the defendants in relation to the liability of the second defendants as guarantors under the loan agreement.