

SUPREME COURT OF QUEENSLAND

CITATION: *Lake Laurel Pty Ltd & Ors v Nichols Constructions Pty Ltd & Ors (No 3)* [2019] QSC 152

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: 14 June 2019

DELIVERED AT: Brisbane

HEARING DATE: On the papers

JUDGE: Bowskill J

ORDERS: **There will be judgment for the third plaintiff against the first and second defendants, as follows:**

- 1. The first and second defendants pay to the third plaintiff the amount of \$3,775,000.00 for the Principal Sum under the 2010 Loan Agreement and the Ziebarth Mortgage, and the amount of \$1,259,015.13 for interest on the Principal Sum from 1 January 2017 to this day, a total of \$5,034,015.13.**
- 2. The first and second defendants pay the third plaintiff's costs of the proceedings to be assessed on an indemnity basis.**

CATCHWORDS: COSTS – where at the commencement of the trial an application was made for the separate determination of two questions of construction of a loan agreement, which were determined adversely to the third plaintiff, but where the third plaintiff was ultimately successful at trial in establishing his claim for payment of money under the loan agreement on the basis of other arguments – whether the successful third plaintiff should be ordered to pay the defendants’ costs of the hearing of the separate questions

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

- [1] The trial of this proceeding commenced on 20 May 2019. Only one issue remained to be determined at trial, namely, the claim by the third plaintiff against the defendants for recovery of money under a loan agreement secured by a mortgage. The third plaintiff identified five bases on which he said the money was payable. At the start of the trial, the third plaintiff sought to have three of those, which involved questions of construction of the loan agreement, determined separately under UCPR r 483. The defendants agreed to that, in relation to two of the issues. The hearing proceeded on 20 and 21 May in relation to those two issues. On 23 May 2019, I delivered my reasons for answering the two 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, on 23 and 24 May.
- [2] On 6 June 2019, I delivered my reasons in relation to the overall claim by the third plaintiff; in essence, dealing with the remaining three bases on which he said the money was payable under the loan agreement. The third plaintiff was successful: *Lake Laurel Pty Ltd & Ors v Nichols Constructions Pty Ltd & Ors* [2019] QSC 145.
- [3] The parties are in agreement as to the appropriate form of judgment which flows from my reasons, save in one respect. There is agreement as to the calculation of interest, and as to an order that the defendants pay the third plaintiff’s costs of the proceedings, on the indemnity basis. The latter flows from a contractual provision in the loan agreement.
- [4] The one area of disagreement is the costs of determining the separate questions. The defendants contend the third plaintiff should pay their costs of that process. The third plaintiff says he should not.
- [5] As it turns out, given the answers that I gave to the separate questions, the matter could have been dealt with in one hearing, with all five issues being argued and addressed in one judgment. Had that occurred, I would not have considered it appropriate to

apportion costs, on the basis of wins and losses in relation to those various arguments. There was really one issue – whether or not the third plaintiff had made out his claim for recovery of the money under the loan agreement and the mortgage. The fact that there were five legal arguments raised to support that claim, and only three were accepted by the court, would not warrant any departure from the ordinary rule under UCPR r 681 that costs follow the event.¹ The event is the outcome of the third plaintiff's claim to recover the money.

- [6] So the question is, does the fact that two of the five arguments were dealt with as separate questions under r 483, at the start of the trial, support a different exercise of the costs discretion? On balance, I consider it does not.
- [7] A different exercise of the discretion might be indicated if the hearing of the separate questions had added to the length of the trial. The third plaintiff positively submits that it did not delay or extend the duration of the trial; the defendants do not submit that it did.
- [8] The hearing of the separate questions proceeded on 20 and 21 May (but not the whole of either day). It could not be said the whole of 20 May was attributable to the separate questions, as part of the hearing on that day represented the opening of the overall case for the third plaintiff, and there was an overlap in terms of the relevant factual basis for the separate questions, and the remaining issues. The court did not sit on 22 May, as I was considering my decision on the separate questions. The remainder of the trial was completed on 23 and 24 May. It would be speculation to say whether the trial may have finished in less time, if all five issues were dealt with together. Perhaps it would; but perhaps it would not. Trials are often moveable feasts and in this case, even after the decision on the separate questions, there were further amendments sought to be made to the defence, and shifts by both sides in terms of the witnesses proposed to be called, and then ultimately called.
- [9] I am not persuaded, and indeed the defendant does not submit, that separating out the two construction questions for determination added to the duration of the trial. Accordingly, I am not persuaded, in the exercise of my discretion as to costs, that there should be any separate order for the costs of determining those questions.
- [10] The orders will be as agreed between the parties in orders 2 and 3 of the draft judgment submitted by the third plaintiff, without the additional costs order sought by the defendants. For completeness, I note that the draft judgment submitted by the third plaintiff included, at paragraph 1, the answers to the separate questions. I regard that matter as having been addressed in the judgment published on 23 May 2019 ([2019] QSC 129). It is therefore unnecessary to repeat that in the orders made giving effect to the judgment published on 6 June 2019 ([2019] QSC 145).

¹ See *Firebird Global Master Fund II Ltd v Republic of Nauru (No 2)* (2015) 327 ALR 192 at [6]; and *Callide Power Management Pty Ltd v Callide Coalfields (Sales) Pty Ltd* [2016] QSC 229 at [5] and [6] per Flanagan J.