DISTRICT COURT OF QUEENSLAND

CITATION:	*Goldthorpe v Limcids Pty Ltd & Anor* [2019] QDC 270
PARTIES:	**BARRY MARK GOLDTHORPE and JORDAN LEANN GOLDTHORPE** (plaintiff) **v** **LIMCIDS PTY LTD** ACN 126 376 841 (first defendant) **MICHAEL JOHN GOODIN** (second defendant)
FILE NO:	24 of 2017
DIVISION:	Civil
PROCEEDING:	Trial
ORIGINATING COURT:	District Court
DELIVERED ON:	22 October 2019, ex tempore
DELIVERED AT:	Toowoomba
HEARING DATE:	22 October 2019
JUDGE:	Porter QC DCJ
ORDER:	**1. Judgment in favour of the plaintiffs against the first and second defendants in the amount of $414,548.54.** **2. The first and second defendant's counter-claim is dismissed.** **3. The first and second defendant to pay the plaintiffs' costs in the proceedings on the standard basis.**
CATCHWORDS:	CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – where the plaintiffs sold a bakery business and the land on which it operated to the first defendant – where the plaintiffs provided a loan to the first defendant to finance the sales – where the second defendant was guarantor to the loan agreement – where the plaintiffs allege that the first defendant breached obligations in the loan agreement to provide documentation and failed to remedy the breaches – whether the plaintiffs are entitled to sue for the loan amount and interest.

COUNSEL:	D Topp for the plaintiff The second defendant appeared on his behalf and on behalf of the first defendant
SOLICITORS:	Groom and Lavers Solicitors for the plaintiff The second defendant appeared on his behalf and on behalf of the first defendant

[1] By written contracts dated 20 June 2014, the plaintiffs contracted to sell their bakery business and the land from which it was conducted to the first defendant (**Limcids**). There were separate contracts for the sale of the business and the sale of the land. The contracts were subject to finance. It became evident in the executory period that Limcids could not obtain sufficient finance to complete both contracts. Accordingly the plaintiffs agreed to provide vendor finance for part of the sale price under the business contract in the order of $235,000.

[2] The terms upon which the finance was provided were contained in the loan agreement between the plaintiffs and the first defendant which was guaranteed by the second defendant. The business and land contracts settled on 22 September 2014. The first defendant paid weekly amounts, more or less, of $1,331.54 after completion of the sale contracts on account of the vendor finance amount until mid-December 2014. No subsequent amounts have been paid. It might be thought that the capital sum under the loan agreement would be due by now, given there has been no payment since December 2014 and the first defendant has had the benefit of the business and the land since then.

[3] However the key question in the plaintiffs' case is whether they are in fact entitled to sue for the loan amount plus interest. Whether the plaintiffs are entitled to do so depends on the construction of various terms included in the loan agreement which dealt with deferral of the obligation to pay the loan amount and the financial reporting requirements imposed on the first defendant during the deferral period. Whether the first defendant breached those obligations, properly construed, determines the plaintiffs' entitlement to sue.

[4] The next question arising in the proceedings is whether the first defendant had a counter-claim against the plaintiffs arising out of the condition of the equipment sold as part of the business contract.

[5] In that regard, Limcids allege in a counter-claim that a number of items of plant and equipment were defective such that they breached the warranty in the business contract that the plant and equipment, at completion, would be in good working order and condition. Limcids also allege that it spent some $74,305.06 putting those items into good working order. It also alleged that the defective equipment prevented them from operating the bakery at capacity with a loss of profit of the extraordinary amount of $123,984. I say extraordinary because the sale price of the business was of the order of $300,000 to $400,000 making the amount of profit claimed seem rather large. The allegation is not further particularised in the counter-claim.

Background

[6] The plaintiffs are a married couple. As at March 2014 the plaintiffs were the owners of the bakery business known as LeMars Bakery along with the freehold on

which the premises were located. Mr Goldthorpe was not a trained baker nor, do I infer, was Mrs Goldthorpe. While he was not a baker, Mr Goldthorpe worked actively in the business, as I infer his wife also did. He gave evidence that he was present most mornings, if not every morning, to assist his three employed bakers to get out the day's production. He was also responsible, amongst other things, for maintenance and repairs to the equipment. He relied on his staff to inform him if they had issues in that regard and it was his job to attend to such matters.

[7] The business was not insubstantial. As I have observed, it employed three bakers along with a number of other staff as demonstrated in the schedule to the business sale contract. In about early 2014 the plaintiffs began negotiating to sell the bakery business and freehold to Limcids. Mr Goodin is the sole director of Limcids. It appears that contracts were initially executed in about March 2014. Those contracts were not tendered before me because they were superseded by another version signed on 20 June 2014, seemingly to permit a different apportionment of the total consideration.

[8] The original contracts, like the final versions, were subject to finance. The business agreement also contained a due diligence special condition. Between 25 March 2014 and 10 June 2014 the finance and due diligence dates and settlement dates were extended on a number of occasions. As I have said, on 20 June 2014 the parties executed the final form of the land sale contract and the business sale contract that were ultimately settled. Both contracts remained subject to finance. Looking at the contracts, it appears that although the finance date was 11 June, that date had already been extended to 25 June (exhibits 13 and 14). Nothing was said to turn on this.

[9] The business agreement that was ultimately signed also contained a due diligence special condition in the following terms:

> **2. Due Diligence**
>
> 2.1 This Contract is conditional on the Buyer's inquiries about the Business and all related matters being satisfactory to the Buyer within 14 days of the Date of Contract;
>
> 2.2 The Buyer's enquiries are at the Buyer's costs and risk;
>
> 2.3 If special condition 2.1 is not satisfied, or waived by the Buyer, within 14 days of the Date of Contract, either party may terminate this Contract by giving written notice to the other party in which event the Deposit must be promptly refunded to the Buyer.

[10] Ultimately it emerged that Limcids could not obtain finance for the whole of the purchase price under the two agreements. The plaintiffs therefore agreed to provide vendor finance for a maximum amount of $235,000 funding for the business sale contract. The contract settled on 22 September 2014.

[11] At around the time of settlement, Mr Goldthorpe had worked in the business with Mr Goodin to assist in the handover. He gave evidence that during that period he was only aware of one problem with the plant and equipment which involved a defect in the freezer which he repaired at the plaintiffs' cost. I observe this problem may have become apparent soon after settlement. Mr Goldthorpe was not aware, in any event, of any other relevant defects in the plant or equipment at the time of settlement. He gave evidence that the business generally operated at a high tempo

and that defects tended to quickly become obvious. He gave no evidence of other complaints about the plant and equipment in the period after settlement from Mr Goodin.

[12] At settlement the vendor financed the amount of $233,329.08. This amount is shown on exhibit 18 which Mr Goldthorpe said was correct to the best of his recollection as a settlement statement. He specifically recalled carrying out the stocktake on the eve of the settlement which led to the stock figure in exhibit 18 of $12,976.35 and which explained why the vendor finance amount at settlement was below $235,000.

[13] As I have discussed below, Mr Goodin did not challenge any of this on evidence of his own. He also tendered only two documents which were not relevant to Mr Goldthorpe's evidence. He therefore did not challenge Mr Goldthorpe's evidence in any meaningful way, either by his own evidence or by cross-examination in respect of these matters and indeed the others.

The Loan Agreement

[14] The loan agreement, read as a whole, was plainly prepared to take account of the fact that Mr Goodin and Limcids could not obtain finance from their financier, Westpac, to complete the business sale contract and land contract. Repayment of the vendor finance would require Westpac's agreement unless they were paid out completely first. The loan agreement therefore deferred any obligation to repay the vendor finance until Westpac had either been repaid or agreed to repayments being commenced. Such a condition on repayment of a relatively large sum obviously left the lender exposed. Accordingly, the loan agreement required the borrower to provide financial information in considerable detail and to request annually that Westpac consent to repayments commencing and to give notice of that occurring to the lender vendor.

[15] It also provided for the payment of the whole of the loan amount plus interest if there was a breach of a covenant or provision of the loan agreement following failure to comply with a notice to remedy such breach. The relevant provisions of the loan agreement are as follows.

[16] Clause 1(1), provided the following definitions:

> '*Default interest rate*' means a rate of fifteen percent (15%) per annum; …
>
> '*Interest rate*' means a rate of ten percent (10%) per annum; …
>
> '*Repayment date*' means the date specified in Clause 6 or such other date as the lender and borrower agree in writing, subject to the provisions of this agreement relating to accelerated repayment of the loan; …

[17] By clause 4, headed Payment of Interest, as follows:

> (1) *Rate of interest*
>
> Interest is payable by the borrower on the loan at the interest rate and will be calculated on the daily balance of the loan on the basis of a 365 day year.
>
> (2) *Payment of interest*

Subject to Clause 6, the borrower must pay interest in arrears in equal monthly instalments on the interest payment date.

(3) *Default interest*

Where any sum, or any part of any sum, payable by the borrower under this agreement is not paid to, or as directed by, the lender on or before its due date for payment, default interest will accrue on the outstanding amount. Accrued default interest must be paid by the borrower to the lender upon demand by the lender. Default interest will be calculated at the default rate for the period for which the outstanding amount is overdue. Accordingly, default interest will accrue on and from the due date for payment of the outstanding amount up to but excluding its date of payment. It will be compounded on a daily basis for actual days elapsed and will be compounded on the last day of each month.

[18] By clause 6, relevantly dealing with repayment:

(1) Subject to clause 6(2), the borrower must repay and finally discharge the loan on the repayment date (see clause 6(3)(d) and clause 6(4)). The borrower must also pay any interest accrued on the loan and not then paid, and all other amounts payable under this agreement and unpaid, to the lender on or before the repayment date.

(2) The borrower shall not be required to make any repayments of interest or capital to the lender whilst the borrower has any amount outstanding to Westpac Bank or until such time as Westpac Bank gives written authorisation to the borrower that payments can be made to the lender. The borrower shall, no less than every twelve (12) months make written request to Westpac Bank for consent to commence repayments. The Borrower shall provide a copy of the written request to the lender upon demand.

(3) Upon the borrower:-

(a) repaying the amount owing to Westpac in full; or

(b) receiving consent from Westpac to make repayments to the lender; or

then

(c) the borrower shall commence making repayments on the next Interest Repayment Date; and

(d) the borrower shall pay interest each Interest Repayment Date on the amount then outstanding; and

(e) the repayment of the principal amount is to be made within two (2) years of the satisfaction of Clause 6(2) or (3) which ever is the earlier.

[19] By clause 9(2):

(2) *Undertakings and agreements*

For as long as the loan remains outstanding under this agreement to the lender, the borrower undertakes with the lender as follows: …

(b) **accounts:** to provide to the lender copies of:

(i) all audited annual reports and annual accounts, and half-yearly financial statements of the borrower and any

guarantor (both consolidated and individual) not later than 14 days after the end of the period to which they respectively relate; and

(ii) all reports and information, as soon as available, issued at any time and from time to time by the borrower or any guarantor to its or their shareholders.

…

(o) **provision of documents:** to provide the Lender with the following:-

(i) a copy of all monthly loan statements from Westpac Bank for each loan within seven (7) days receipt;

(ii) a copy of any written review undertaken by Westpac of the business within seven (7) days of receipt;

(iii) a copy of the integrated client account from the Australian Taxation Office for all entities involved with the running of the business every two (2) months, the first statement to be provided two (2) months from the drawdown date;

(iv) provide to the lender a copy of the major creditors statements via email.

[20] By clause 10:

(1) *Consequences of default*

If any of the events described in cl 10(2) occurs, the loan, together with all interest accrued on the loan and not then paid and all other amounts payable under this agreement and unpaid shall, at the option of the lender and notwithstanding any delay or previous waiver of the right to exercise that option, immediately, become due and payable without the necessity for any demand or notice to the borrower. In addition, if the lender exercises that option, the security will become immediately enforceable.

(2) *Events of default*

Each of the following events is an event of default:

(a) **payment default:** if the borrower fails to repay the loan on the repayment date or fails to pay any instalment of interest on the relevant interest payment date or fails to pay any other month payable under this agreement on the due date for payment of that money and such failure continues for more than five (5) business days; or

(b) **other default:** if the borrower fails to perform or observe any of the covenants or provisions of this agreement on the part of the borrower to be performed or observed (other than a failure of the type contemplated by cl 10(2)(a) and (if capable of remedy) such default continues for more than 10 business days (or such longer period as the seller in its absolute discretion permits) after notice from the lender requiring the borrower to remedy the default, unless the non-performance or non-observance has been waived or excused by the lender in writing;…

Events Post Settlement

[21] Mr Goldthorpe gave evidence that while some amounts were paid, to his knowledge none of the financial documents or Westpac letters requesting permission were provided after settlement. The exception was bank statements. He gave evidence that some but not all monthly loan statements had been provided. Accordingly, exhibit 19 contains a notice of default in respect of certain obligations that arose under clause 6(2) in respect of notice to Westpac, and clauses 9(2)(b) and 9(2)(o)(i) to (iv) in respect of other financial documents. Exhibit 19 articulates the alleged breaches as follows:

> 1. In respect of a Loan Agreement dated 22 September 2014 ("the Agreement") between the borrower, Guarantor and Barry Mark Goldthorpe and Jordan Leann Goldthorpe as lenders ("the lenders") the borrower has failed to comply with the terms of the Agreement and in particular:
>
> (a) Failed to provide to the lender a copy of all monthly loan statements from Westpac Bank within seven (7) days of receipt (Clause 9(2)(o)(i)).
>
> (b) Failed to provide to the lender a copy of any written review undertaken by Westpac within seven (7) days of receipt (Clause 9(2)(o)(ii)).
>
> (c) Failed to provide to the lender a copy of the integrated client account from the Australian Taxation Office for all entities involved in running the business every two (2) months (Clause 9(2)(o)(iii)).
>
> (d) Failed to provide to the lender a copy of the major creditors statements via email (Clause 9(2)(o)(iv)).
>
> (e) Failed to make written request to Westpac for consent to commence repayments (Clause 6(2));
>
> (f) Failed to provide to the lender copies of all audited annual reports and accounts of the borrower and the guarantor no later than 12 days after the end of the period to which they relate (clause 9(2)(b))

[22] It is relevant that Mr Goodin's solicitors responded on 26 September 2016. That letter disputed that the notice of demand in exhibit 19 was a notice to remedy default as required by the contract and contended that, therefore, no acceleration event could occur. As a matter of construction of the notice of default and the loan agreement, in particular clause 10(2)(b), that seems correct. However it is notable that no denial of any of the alleged defaults was asserted in response to the notice of default. This has some relevance given, as will be seen, Mr Goodin gave no evidence about the matter.

[23] The plaintiffs' solicitors wisely reissued the notice of default, this time in a form calling for remedy of the alleged breaches, which appears at exhibit 21. There is no evidence of any challenge to the efficacy of that document to meet the contractual requirements of clause 10(2)(b). I find that the document does respond to the contractual description in that clause. That document raised the same breaches as those in the notice of default in exhibit 19.

[24] Thereafter, on 8 December 2016, the plaintiffs' solicitors wrote to Mr Goodin's solicitors (exhibit 22) noting specifically there had been no response to the notice to

remedy breach and relying specifically on three of the six issues raised in the notice to remedy breach.

[25] In exhibit 22, the defendant's solicitors relied, in particular, on the failure to provide all monthly loan statements and noted that, whilst some had been received, the plaintiffs had not received all of them, evidence that was confirmed by Mr Goldthorpe. Further, the defendant's solicitors relied on the failure to provide an integrated account from the Australian Tax Office (**ATO**) and, finally, the failure to provide copies of written requests to Westpac for consent to commence payments. The plaintiffs' solicitors chased the matter again on 31 January 2017. There is no evidence of any subsequent compliance with the obligations or any payment of the loan amount.

The Pleaded Cases

[26] The plaintiffs' case, as pleaded, was that the loan amount had become due and payable under clause 10(2) because of the failure to remedy the breaches identified in the notice to remedy breach. The defendant sought to answer these allegations by saying that, in some cases, no such financial documents existed and that, in other cases, compliance had been undertaken:

> 10. As to paragraph 10 of the Statement of Claim the Defendants:
>
> a. admit that the Defendants responded to the 28 September 2016 notice;
>
> b. otherwise deny the allegations in that paragraph because they are untrue as:
>
> i. loan statements received by the First Defendant from Westpac were provided to the plaintiffs;
>
> ii. the First Defendant did not have any integrated client account with the ATO and as such was not required to be provided;
>
> iii. there were no 'major creditors' for which statements had to be provided;
>
> iv. a written request was made to Westpac; and
>
> v. no audit had been completed and as such no report or account was required to be given.

[27] The defence also sought to set off a counter-claim for damages for breach of warranty that the plant and equipment under the business agreement would be, at the date of completion, in good working order and condition. It then listed, in paragraph 4, the following items as not meeting that contractual warranty and the amount it cost apparently to put them into the requisite condition:

> 4. In breach of the Business Contract all of the plant and equipment was not in good working order and condition at the date of Completion in that the following plant and equipment was defective and required repair:

Initial repair to seal on salad bar fridge	$170.00
Additional repair to seal on salad bar fridge	$718.66
Exhaust Fan repairs	$1,626.35
Bread Slicer repairs	$58.70
Building repairs	$940.00

Painting repairs	$890.00
Repairs to cake counters, salad bar and pie warmer	$21,000.00
Bain Maree repairs	$1,800.00
Coffee Machine and Grinder Replacement due to fault	$930.00
New Food Processer	$400.00
New Pastry Sheeter	$630.00
Replacement Proofer	$10,000.00
Rack Oven Wiring repairs	$4,000.00
Septic Tank repairs	$785.00
Replacement Bread Slicer	$7,000.00
Replacement Prover	$9,500.00
Repairs to Pastry Sheeter	$950.00
Replacement Bearings	$309.10
Oven Repairs	$2,409.17
Additional Oven Repairs	$247.72
Replacement Utensils	$1,699.02
Freezer repairs	$4,487.23
Fridge repairs	$2,073.92
Replacement parts for Oven Repairs	$292.19
Pump repairs	$220.00
Oven motor repairs	$825.00
Repairs	$343.00
TOTAL	$74,305.06

[28] It also advanced an unparticularised case for loss of profits of $123,984 for lost profit from those breaches. No particulars were provided and no expert report was tendered to sustain that figure.

The Trial

[29] The matter came on before me for trial on 22 October 2019. It had been listed for trial some time before then by Judge Richards. On 11 October 2019 I brought the matter on for directions. At that time, Mr Goodin appeared by telephone. Prior to that hearing, I had prepared a document called "Guide to Conduct of a Trial for Unrepresented Litigants, Goldthorpe v Limcids & Goodin". I made that document exhibit 25 in the proceedings. In the course of the directions hearing, Mr Goodin told me he had read that document. There was some discussion at the directions hearing of its content, and the issues at trial and how he might prepare to run the trial. The matter then came on before me today. There had been no application for an adjournment or one foreshadowed by the defendants.

[30] Mr Topp, for the plaintiffs, called only Mr Goldthorpe at trial. Mr Goldthorpe's evidence in chief was over by mid-morning, where he gave the evidence that I have already referred to in my summary of the background to the matter. I took a break for approximately 15 minutes, so Mr Goodin could prepare himself to cross-examine. After asking a couple of questions about Mrs Goodin's access to the customer service area and the lead up to settlement, which seemed to me to be irrelevant, and a general question about a problem with the bread prover, Mr Goodin said he did not wish to ask any more questions in cross-examination.

[31] Thereafter I endeavoured to encourage him to ask questions which put his case as to the allegedly defective items of plant and equipment. I assisted Mr Goodin to formulate questions to Mr Goldthorpe in that regard in respect of all the alleged defects, at least those said to give rise to larger sums for repair. It is fair to say that Mr Goldthorpe was unable specifically to exclude the possibility that some

problems with temperature in the cake counter, salad bar and pie warmers might have existed but did not give evidence to support the conclusion that such problems did exist. He otherwise rejected the submission that any of the items put to him were defective in the way suggested by Mr Goodin at settlement. None of the evidence given by Mr Goldthorpe itself made good any of the defects, much less the cost of repairing them, much less that they existed at the time of settlement.

[32] Mr Goodin then said he did not intend to further cross-examine. He put no case for loss of profits. I asked Mr Goldthorpe to leave the room and tried to establish then, from Mr Goodin, what his case was on the loss of profits. It appeared he had obtained previously some form of report of an accountant, though never disclosed so far as I could tell, which made good the figure. His ability to articulate how that loss arose, however, was limited. It is sufficient to note that after establishing, so far as I could, the case to be put on loss of profits, I sought to put the propositions to Mr Goldthorpe. He accepted some aspects and disputed others as to the background to the loss of profits claim I extracted from Mr Goodin, but Mr Goldthorpe gave no evidence which sustained any specific loss for any specific reason and cavilled with the amounts which Mr Goodin suggested were monthly purchases for some of the key clients he identified.

[33] After I put those matters to Mr Goldthorpe, on Mr Goodin's behalf, Mr Goodin said he did not want to further cross-examine. Mr Goldthorpe was excused and Mr Topp closed the plaintiffs' case. I then asked Mr Goodin to begin his case. He told me he did not want to go into evidence or lead evidence. It was 12.30pm. He said he knew how the case would turn out. I told him I did not know how the case would turn out and I was waiting to hear his evidence but that it was likely he would be in difficulty if he led no evidence. I adjourned the case until 2.30pm and urged him to think about his decision not to lead evidence.

[34] At 2.30pm Mr Goodin tendered two documents, without objection from Mr Topp, and then confirmed again he would not lead or give evidence. I did not press him further. At no stage did he seek an adjournment. I was therefore left with Mr Goldthorpe's evidence, and the documents tendered through him as the only relevant evidence. It did not seem to me the further assistance to the defendants would be consistent with my duty to ensure a fair trial not only to the unrepresented defendants but also to the represented plaintiff. .

Counter-Claim

[35] I will deal first with the first defendant's counter-claim. As I have said, there is no evidence which could sustain any of the matters alleged in the counter-claim. Further, I should say that, to the extent I was able to extract Mr Goodin's case on those items, it appeared to be vague and not persuasively connected to the situation necessarily at the date of settlement. For example, he complained about the bread slicer having a difficulty with blades in mid-2015, or at least he put those propositions to Mr Goldthorpe at my urging, in circumstances where the bread slicer presumably was working for nine months after settlement of the business agreement. In any event, there is no evidence to make good any of the matters alleged in the counter-claim, including the loss of profits claim and it is dismissed. I now turn to the plaintiffs' claim.

Plaintiffs' Claim

[36] In my view, the plaintiffs have made good their contention that the loan amount, plus interest, became payable by reason of the failure of the defendants to remedy breaches of the financial disclosure and, most compellingly, the obligation to write to Westpac called for by clause 6(2) of the loan agreement. It should be noted that Mr Topp, in submissions, did not press the breaches in paragraphs 1(b), 1(d) and 1(f) of exhibit 21, largely on the basis that there was no evidence that documents which met the description in the relevant parts of the loan agreement relating to those paragraphs of the notice of default actually existed, and there was no sufficient basis for me to infer, on the evidence that was before me, that they did. In my view, he rightly made those concessions.

[37] However, he pressed the other three breaches. I find that Limcids breached each of those obligations in the manner articulated in paragraph 1(a), (c) and (e) of exhibit 21. I explain the basis for those findings, because of their centrality to the case, briefly as follows. In respect of paragraph 1(a), the articulated breach was the failure to provide the lender a copy of all monthly loan statements from Westpac within seven days of receipt in breach of clause 9(2)(o)(i). I find that the borrower did fail to do so.

[38] Even if some statements had not been disclosed, I would have been willing to infer that some such documents existed because the uncontested evidence before the trial is that there were facilities with Westpac in respect of at least settling the land sale contract and the business sale contract. Indeed Mr Goodin tendered a document showing the offer of that finance. The probability that monthly loan statements were not created seemed to be fanciful but, in any event, Mr Goldthorpe gave evidence that some had been provided. This was confirmed in exhibit 22 which demonstrates that if some such documents exist, there must have been many more. There was therefore a breach of the obligation in clause 9(2)(o)(i).

[39] The second breach I found made out was a failure to provide to the lender a copy of the integrated client account from the ATO for all entities involved in running the business every two months, in breach of the express obligation to do so in clause 9(2)(o)(iii). It is true to say that there is no specific evidence before me that those documents exist. However, the bakery business was, and is still, being carried on, or at least there is no evidence that it is not being carried on. It would be a very serious breach of the law for it to be carried on without income activity statements and business activity statements being tendered. It is a matter that I take judicial notice of that the ATO creates an integrated client account for all entities with ABNs on which credits and debits are entered.

[40] It may be that Limcids had not set up an online account with the ATO but, in circumstances where they were required to provide a copy of it and I am willing to infer such a document existed, that seems to carry with it an implied obligation to take the very modest step of obtaining electronic access to it and providing a copy.

[41] Even if I am wrong in that proposition, there remains the third breach which is the failure to make written requests to Westpac for consent to commence repayments. There is no evidence before me that any such written requests have been made, much less that notice of them had been given as required by clause 6(2). Those three breaches were made out.

[42] Once that finding is made, the entitlement to accelerate otherwise arises under clauses 10(1) and 10(2) where a notice to remedy breach in respect of those breaches was given, and the election under clause 10(1) was confirmed, as stated in exhibit 22. I note that clause 10(1) is drafted in a rather odd way. It provides that there is, in effect, acceleration if one of the events under clause 10(2) occurs (in this case under 10(2)(b), that is failure to comply with a notice to remedy default for other than non-payment "at the option of the lender") but, at the same time, specifies that the amounts accelerate "without the necessity for any demand or notice to the borrower".

[43] Read as a whole, that seems to provide that the option is exercised by the lender subjectively deciding to do so without any specific obligation that it be communicated to the other side. This rather peculiar provision could have been met of course by Mr Goldthorpe giving evidence that, quietly by himself or together with his wife, he decided they were going to accelerate the amount payable. But, in any event, those musings are irrelevant because notice was given on the 8th of December 2016 of the choice to accelerate. And Mr Topp did not submit to me I should infer or find that the choice to accelerate was made any sooner than that.

[44] Accordingly, the plaintiffs are entitled to judgment for the loan amount and interest calculated under the loan agreement. In my view, where the acceleration occurred on 8 December 2016, that involves interest at 10 per cent until that date, then interest at the default rate of 15 per cent compounding on monthly rests from them until today.

[45] I order judgment in favour of the plaintiffs against the first and second defendants in the amount of $414,548.54. I dismiss the counter-claim. I order the first and second defendant to pay the plaintiffs' costs in the proceedings on a standard basis.