Supreme Court

New South Wales

Case Name:	Eden Co Construction Pty Ltd v Leed Engineering and Construction Pty Ltd
Medium Neutral Citation:	[2018] NSWSC 1882
Hearing Date(s):	5 December 2018
Date of Orders:	12 December 2018
Decision Date:	12 December 2018
Jurisdiction:	Common Law
Before:	Fagan J
Decision:	(1) Leave to appeal is granted so far as is necessary. (2) The summons is dismissed. (3) The plaintiff is to pay the defendant's costs of the summons. (4) I grant liberty to the Defendant to file an application for indemnity costs by Friday 14 December 2018. (5) The plaintiff to file any evidence in reply by 21 December 2018.
Catchwords:	CONTRACTS - termination - breach of term - summons seeking leave to appeal judgment for defendant in the Local Court - plaintiff engaged as subcontractor to undertake construction work - where clause of contact provided for procedure to terminate upon breach, including three-day notice period to allow for rectification of breach - plaintiff did not comply with safety policy and directions - where defendant terminated under common law - whether observance of safety policy essential condition or intermediate term - whether clause stipulating procedure for termination excluded common law right to terminate - summons dismissed

Legislation Cited:	Local Court Act 2007 (NSW)
Cases Cited:	Concut Pty Ltd v Worrell [2000] HCA 64 Koompahtoo Local Aboriginal Land Council v Sanpine Pty Limited (2007) 233 CLR 115;[2007] HCA 61 Stocznia Gdanska SA v Latvian Shipping Co [1998] 1 WLR 574 Tan Hung Nguyen v Luxury Design Homes Pty Ltd [2004] NSWCA 178
Category:	Principal judgment
Parties:	Eden Co Construction Pty Ltd (plaintiff) Leed Engineering and Construction Pty Ltd (defendant
Representation:	Counsel: J Cameron solicitor (plaintiff) R Perla (defendant) Solicitors: Johninfo Lawyers Pty Ltd (plaintiff) Fisher Jeffries (defendant)
File Number(s):	2017/375129
Publication Restriction:	No
Decision under appeal:	
Court or Tribunal:	Local Court Queanbeyan
Date of Decision:	27 September 2017
Before:	Antrum LCM
File Number(s):	2016/145044

JUDGMENT

1 **FAGAN J**: This is an appeal from a decision of Mr Antrum LCM sitting in the Local Court at Queanbeyan. The plaintiff is a construction contractor. On 16 February 2016 it entered into a subcontract with the defendant to construct manholes in a sewer line which the defendant was installing for Young Shire Council. On 13 March 2016 the plaintiff commenced work on the first of 27 manholes which were to be built. On 18 March 2016 the defendant notified the

plaintiff in writing that the subcontract was terminated for breach. In the Local Court the plaintiff contended that this termination was wrongful and claimed damages flowing from the loss of the subcontract. The learned magistrate held that the plaintiff had breached the agreement in fundamental respects and that the defendant had been entitled to give the notice of termination. His Honour dismissed the plaintiff's claim with costs.

2 The magistrate's decision was given on 27 September 2017. The plaintiff filed his summons to commence the appeal on 21 November 2017, approximately one month out of time. On 5 December 2018, on the plaintiff's application, I extended the time for filing the summons up to 21 November 2017 and proceeded to hear the appeal on its merits. The grounds of appeal may be paraphrased as follows:

(1) The learned magistrate ought to have found that cl 23 of the subcontract was the exclusive source of the right to terminate and therefore erred in holding that the defendant was entitled to terminate the contract on common law principles for breach of a condition which required strict observance of safety standards. This is an issue of construction of the contract and therefore involves only a question of law. The plaintiff's appeal on this ground is as of right pursuant to s 39 of the *Local Court Act 2007* (NSW).

(2) His Honour erred in failing to find that a prerequisite of termination under cl 23 (written notice of breach and an opportunity to remedy it) had been omitted. This is a question of mixed fact and law, involving both construction of cl 23 and findings of fact relevant to the application of the clause in the circumstances of the case. Leave is required to argue this ground under s 40(1) of the *Local Court Act*.

(3) Even if common law principles were applicable, his Honour erred in finding that the relevant breaches by the plaintiff were sufficiently serious to have justified the defendant terminating the subcontract. This again is a question of mixed fact and law, requiring leave.

3 Whether or not leave should be granted for grounds (2) and (3) depends at least in part upon how strongly the grounds are arguable. This is particularly so where the amount in issue is relatively substantial for a Local Court civil claim, namely damages in the order of $100,000. It is necessary for the Court to consider the merits of grounds (2) and (3) in some detail, even for the purpose of determining the question of leave.

4 The plaintiff's summons also contends that the learned magistrate erred in failing to assess damages. However this was clearly not an error given that his Honour found the defendant had been entitled to terminate the contract and that the plaintiff's claim for damages should be dismissed with costs. On the hearing of the appeal the plaintiff's solicitor accepted that if he succeeded on one or more of the other grounds, the appropriate order would be to remit the matter to the Local Court for assessment of damages.

5 The subcontract works were specified on the basis that the defendant, either itself or by other subcontractors, would excavate trenches for the laying of sewer lines and pits at intervals along the lines, where manholes were to be constructed by the plaintiff. The manholes were to be built by pouring mass concrete around formwork at the bottom of each pit, leaving a central square void into which the sewer line would connect. This mass concrete with the central void would constitute the base of the manhole, at a depth of approximately 4-6 m below ground level. Concrete walls would be built on top of the base, on all four sides, up to ground level. A concrete cover would be placed on the top of the walls at ground level, with an access port. The space below ground level enclosed by the walls and cover provided the means of access for maintenance purposes to the sewer line.

Material provisions of the subcontract

6 The subcontract took the form of a two-page formal instrument signed by the parties to which were annexed Conditions of Contract (31 pages), Special Conditions (14 pages) and various schedules of technical specifications, drawings and programs. Throughout the document the plaintiff is referred to as "the Subcontractor". The clauses of the Conditions of Contract relevant to the appeal are as follows:

> **4 Leed's representative**
>
> ...
>
> Directions
>
> 4.2 The Subcontractor must comply with any direction given by Leed.
>
> 4.3 Except where the Subcontract expressly provides for a written direction, Leed may give a direction to the Subcontractor either orally or in writing. Any oral direction will be confirmed by Leed in writing as soon as practicable.

5 Subcontractor's representative

The Subcontractor must have present on the Site at all times an authorised representative for the purpose of managing the Subcontract.

...

7 Site

…

Co-operation by the Subcontractor

7.2 The Subcontractor must co-operate with Leed, the Principal, other subcontractors of Leed, and their respective employees, consultants and agents in the execution of the SubcontractWork.

...

15 Safety

15.1 The Subcontractor is responsible for safety related to and during the performance of the Subcontract Work to protect the Subcontract Work, workers, the public and all other people, on or about the Site, and the property of third parties.

15.2 The Subcontractor must comply and must ensure all employees comply with:

> 15.2.1 Leed's occupational health, safety and environment policies; and
>
> 15.2.2 all occupational health, safety and environmental Law and if so directed by Leed, provide reasonable evidence of such compliance.

...

23 Default of subcontractor

23.1 If the Subcontractor:

> 23.1.1 fails to perform or observe any obligation, term, condition or stipulation contained in the Subcontract and on its part to be performed;
>
> 23.1.2 without reasonable cause, wholly or substantially suspends the performance of the Subcontract Work (except where the suspension is pursuant to clause 19.11);
>
> 23.1.3 fails to proceed with the Subcontract Work with due diligence or in a competent manner; or
>
> 23.1.4 fails to comply with a notice from Leed and by such failure the Subcontract Work or the time for completion is materially affected,

then Leed may by notice specify the default and state its intention to exercise all or any of the powers contained in clause 23.2.

23.2 If the Subcontractor fails to take steps to remedy such default in a manner satisfactory to Leed within three (3) Days after receipt of notice or fails to remedy such default within fourteen (14) Days of its receipt or within such other time as Leed may at its sole option and discretion reasonably nominate and notify in writing to the Subcontractor, Leed may at any time and from time

> to time (without prejudice to any other rights or remedies it has under the Subcontract) upon notice to the Subcontractor, effective upon its receipt, exercise all or any of the following powers:
>
> 23.2.1 suspend any payment due to the Subcontractor under the Subcontract or otherwise until the default has been remedied;
>
> 23.2.2 take the remaining Subcontract Work wholly or partly out of the hands of the Subcontractor or any of its subcontractors; or
>
> 23.2.3 terminate the Subcontract.
>
> Adjustment on Completion of Subcontract Work Taken Out
>
> 23.3 When Subcontract Work taken out of the Subcontractor's hand has been completed, Leed will assess the cost thereby incurred. To the extent that such cost exceeds the amount which would have been paid to the Subcontractor by Leed if such work had not been taken out of the Subcontractor's hands, such cost shall be a debt due and owing to Leed by the Subcontractor. Without prejudice to any other entitlements of Leed, Leed may deduct such cost from any security held by Leed.

7 The evidence before the Local Court showed that the defendant's "occupational health, safety and environment policies" referred to in cl 15.2.1 included a "Project Induction" manual of 63 pages. This included (at p 9) a list of nine "Golden Safety Rules" which were emphasised by the manner in which they were printed. The second of these was:

> SUSPENDED LOADS Never position yourself under a suspended load or move the load over a person.

8 Immediately under the list of Golden Safety Rules was a list of "Things You Must Know" which included these items:

> Everyone is responsible for ensuring these rules are followed.
>
> Any breach of the Golden Rules by a supplier, subcontractor, visitor or client may result in that person or company being refused entry to site.

9 Mr Ces Filardo was the managing director of the plaintiff. He prepared the quotation which became the basis of the subcontract. Mr Lee Marks was the defendant's construction supervisor for the sewer line works including the construction of the manholes by the plaintiff. During negotiations before the subcontract was entered into Mr Filardo told Mr Marks that the plaintiff would have only two men on site to construct the manholes being himself and his brother. An additional arrangement was made for the plaintiff to provide an excavator with an operator, at a charge per hour and a guaranteed minimum number of hours. That arrangement has no bearing on the issues in the appeal.

10 Mr Marks gave evidence that Mr Filardo was provided with the defendant's safety induction materials and that Mr Filardo read them and signed them. Mr Filardo did not admit that he had been given all the defendant's safety induction documents but accepted that the prohibition upon positioning oneself under a suspended load was an important rule of safety. He said that a copy of the "Golden Rules of Safety" was hung on the mess room wall. The learned magistrate found that Mr Filardo and his brother:

> were provided with the same documents as other subcontractors, and that it was expected that they would be read and understood by those persons. … Amongst the safety materials that were provided to all persons working on site, the defendant had cause[d] to be published what were described as the golden rules of safety [including the prohibition on workmen positioning themselves under suspended loads].

Breaches of the subcontract relied upon by the defendant

11 Mr Filardo commenced work at manhole 16 on 13 March 2016. The manhole pit and a trench leading into it had been excavated. According to Mr Marks' affidavit the trench had not been shored and it was therefore a safety requirement that workers on site should not enter the trench. Mr Marks deposed that Mr Filardo went into the trench and used it as access to the pit for manhole 16, in which he was to form up the base. Mr Marks instructed him not to walk through the trench as it was unsafe. Twenty minutes later he saw Mr Filardo walk through the trench again and repeated the instruction, this time in harsher terms. Shortly afterwards he observed Mr Filardo walking down the batter of the pit excavation and told him he would be removed from site for failing to follow a safety instruction if he did this one more time.

12 Mr Filardo acknowledged in his evidence that he was told not to use the trench as access but said this occurred only once and that he "duly obliged". He disputed that walking through the trench was an unsafe practice and said that the defendant's own employees walked through it.

13 On 14 March 2016 the concrete was poured for the base of manhole 16. The plaintiff's internal dimensions were 3 m by 3.2 m. The concrete was placed in a skip or kibble attached to the boom of an excavator. The width of the skip was about 1 m. It was lowered into the pit by the excavator. Mr Filardo stood in the bottom of the pit and gave directions to a spotter or dogman at the top of the

pit, to be relayed to the excavator operator who manoeuvred the skip into the correct position. Mr Filardo was required to stand in a corner of the pit to avoid being under the load as it was lowered in. When the skip was in position Mr Filardo released the hatch at the bottom of it to allow the concrete to pour into place.

14 In order to avoid being under the suspended load Mr Filardo was required to remain in the corner the pit until the empty skip had been lifted clear. According to Mr Marks' evidence, when the first load of concrete had been emptied Mr Filardo stepped forward while the skip was being raised. He did this in order to shovel and place the concrete. Mr Marks warned him to wait until the skip had been lifted right out of the pit. However Mr Filardo did the same thing on the next three skip loads, with Mr Marks' warnings becoming stronger each time. On the last occasion Mr Filardo was told that if he continued this practice his subcontract would be terminated on safety grounds.

15 The excavator operator, Mr Urquhart, confirmed that Mr Filardo had placed himself under the skip. According to Mr Urquhart, both Mr Marks and the spotter told Mr Filardo to get out from under the load to a safe position in the pit on several occasions but after each direction he did the same thing. Mr Urquhart was an independent contractor under subcontract to the defendant. He was concerned about the risk of a serious accident occurring as a result of Mr Filardo's unsafe conduct and his failure to desist from it when directed. He asked Mr Marks to speak with Mr Filardo about this.

16 On the morning of 15 March 2016 a pre-start safety meeting was held, with 14 workmen present. Mr Marks reminded all of those present of the importance of not working under a suspended load and of following the defendant's safety rules and instructions. The written record of this meeting included the following under the heading "Issues to Note":

> Concrete pour yesterday, personnel entering under shoring before skip clear. This is not to occur under any circumstances.

17 Mr Marks also spoke to Mr Filardo individually outside the meeting and said that moving under a suspended load as had occurred the preceding day could not happen again and would not be tolerated. The record of the pre-start

meeting recorded this under the heading “Directions and Instructions”, in these terms:

> Spoke to Ces and advised if this was to happen again he will be removed from site, he has already had verbal warnings.

18 In his affidavit sworn 19 December 2016 Mr Filardo disputed that he worked directly under the skip during the pour at manhole 16 on 14 March 2016. He disputed that he received warnings about it during the pour or at the pre-start meeting the next morning. Mr Filardo asserted that Mr Marks was overbearing in his supervision, that he gave unnecessary safety directions for no purpose other than to assert his own authority and that he had fabricated allegations of unsafe practice by Mr Filardo in order to drive the plaintiff off the job because of the conflict between the two of them as to whether the defendant was constructing the sewer line to proper specifications.

19 On 17 March 2016 concrete was poured in manhole 17. Mr Filardo was the only worker on site for the plaintiff, as his brother had travelled interstate for four days. Again Mr Filardo repeatedly placed himself in danger under the skip. Each time he was warned not to, initially by Mr Urquhart communicating with the spotter over a UHF radio and the spotter relaying the instruction. Mr Filardo disregarded these instructions. Mr Marks heard them over the radio and came to see what was going on. An hour later a second delivery of concrete was brought to the site and further skip loads were deposited into the pit. On two further occasions Mr Filardo moved under the suspended load and was reminded by Mr Marks of the earlier instructions and warned that he could be removed from the site. Mr Filardo disputed that these safety breaches occurred or that warnings were given in respect of them on 17 March 2016.

20 On the subject of Mr Filardo’s repeated unsafe positioning of himself under the suspended skip and his failure to abide by specific directions to desist from this practice, his Honour accepted the evidence of Messrs Marks and Urquhart, as follows:

> Mr Urquhart’s evidence was clear without adornment or exaggeration and corroborative of the concerns expressed by the defendant. Mr Marks, for the defendant, was not moved under cross-examination … .

> I am … satisfied on the evidence before this Court that Mr Ces Filardo continued to work under and around a suspended load despite frequent requests that he not do so and was indeed formally directed note to do so.
>
> There is no failure of notice to the plaintiff with respect to that breach and he was given a fair opportunity to rectify that conduct. He did not do so and that established a right to terminate in the defendant.
>
> … Despite the florid nature of Mr Filardo's objections [that is, his contrary evidence] they are insufficient to dislodge an overwhelming view that the defendant has responded to repeated safety breaches and has exercised its right to terminate.

By its grounds of appeal the plaintiff does not seek to contest this finding of persistent breach of safety instructions.

Termination of the subcontract

21 On 18 March 2016 the defendant delivered to Mr Filardo written notice of termination of the subcontract, citing three matters as the basis of this action. The third of them was:

> Safety concerns have been raised on several occasions by the site supervisor (Lee Marks), including failure to comply with excavation safety requirements, and working underneath a suspended load (concrete kibble). These items suggest a lack of competency in performing work safely.

22 The plaintiff's breaches of safety requirements, through the actions of Mr Filardo, were contraventions of cll 4.2, 7.2 and 15.2.1. Those contraventions fell within cl 23.1.1 and entitled the defendant to exercise its powers under cl 23.2. However there was no evidence that the defendant had given notice to the plaintiff to remedy its breaches, pursuant to cl 23.2, and hence the defendant did not become entitled under that clause to exercise the power of termination in cl 23.2.3.

23 In his reasons for decision the learned magistrate said that:

> the principal issue for determination is whether or not there was a safety breach and whether that is sufficient for the defendant to then rely upon its rights for termination as set out in the subcontract.

24 As referred to above, his Honour did find a "safety breach" and later in his reasons he quoted parts of cl 23. However his Honour did not purport to find that cl 23 had been implemented and instead held as follows:

> The common law grants a promisor right to terminate a contract in the situation of an actual breach of the condition of the agreement. The safety requirements stipulated in the subcontract are undoubtedly a condition of that agreement.

Ground 3 - finding of repudiation on common law principles

25 His Honour then cited *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Limited* (2007) 233 CLR 115; [2007] HCA 61 at [54] (Gleeson CJ, Gummow, Hayden and Crennan JJ) for the proposition that:

> at the time the contract is entered into, it may not be possible to say that any breach of a particular term will entitle the other party to terminate, but that some breaches of the term may be serious enough to have that consequence … .

26 This passage was concerned with intermediate terms of a contract. The plurality in the High Court explained such terms as those of which some breaches will deprive the innocent party of substantially the whole benefit intended to be obtained from the contract, thus constituting repudiation which may be accepted by the innocent party and entitle him or it to bring the contract to an end. Other breaches of intermediate terms will be of less seriousness and sound in damages only.

27 His Honour said:

> In this case, the contract itself has expressly conferred a right to terminate in certain circumstances. … [W]ith respect to whether or not the safety issue would be a term [that is a condition] of the contract, regard may be had to whether or not there is the potential for serious loss or damage that may result from a breach of the term.
>
> It is acknowledged that breaches of work, health and safety law do carry significant penalties and that the defendant as head contractor would be mindful of its exposure in this jurisdiction.

28 Later his Honour said he was satisfied that the subcontract "does identify safety compliance as a condition of that contract". Thus, although not entirely clear, it appears that his Honour determined the plaintiff's obligation of the subcontract to comply with safety policies and directions was a condition or fundamental term, such that any breach would entitle an innocent party to treat the contract as having been repudiated and to accept that repudiation and terminate.

29 I would respectfully disagree and classify the plaintiff's obligations with respect to safety, under cll 4.2, 7.2 and 15.2.1, as intermediate terms. Some breaches could be relatively minor. The test of whether a breach of such a term will entitle innocent party to bring the contract to an end was stated in *Koompahtoo*

Local Aboriginal Land Council v Sanpine Pty Limited at [44] in these terms (with some abridgment and with citations omitted):

> [Repudiation] may refer to conduct ... of a party which evinces an intention no longer to be bound by the contract or to fulfil it only in a manner substantially inconsistent with the party's obligations. It may be termed renunciation. The test is whether the conduct of one party is such as to convey to a reasonable person, in the situation of the other party, renunciation either of the contract as a whole or of a fundamental obligation under it. … Secondly, it may refer to any breach of contract which justifies termination by the other party. … There may be cases where a failure to perform, even if not a breach of an essential term … manifests unwillingness or inability to perform in such circumstances that the other party is entitled to conclude that the contract will not be performed substantially according to its requirements. … [U]nwillingness or inability to perform a contract often is manifested most clearly by the conduct of a party when the time for performance arrives. In contractual renunciation, actions may speak louder than words.

30 It is not material that his Honour found the contractual safety requirements to be conditions, meaning that any breach would be repudiatory. That is because in any event his Honour found that the particular breach was of that character. He was fully justified in this. Mr Filardo was one of only two people who were designated to perform the subcontract in the name of the plaintiff. At the time of the second round of egregious safety breaches, on 17 March 2016, he was the only person on site and that situation was to continue for the next two days as well. Further, Mr Filardo was the managing director of the plaintiff and was its on-site representative, in control of its manner of performing the subcontract. Persistent, apparently defiant, breaches of safe work practices by Mr Filardo were the actions of a person who for all practical purposes was the mind and will of the plaintiff. It was not as if the breaches were those of a casual or otherwise dispensable employee, who could be removed from the site to create a reasonable expectation that plaintiff would adhere to safety rules in future.

31 The breaches found by the learned magistrate created risk of serious injury to Mr Filardo but also created serious risk of exposure of the defendant and its other subcontractors, particularly Mr Urquhart, to liability in negligence and investigation and possible prosecution by WorkCover. In the event of serious accident the defendant could reasonably expect that the site would be shut down during investigation, with immediate economic impact under the defendant's head contract with Young Shire Council. Repeated breach of the safety obligations, of the nature found by his Honour, would reasonably be

taken by a party in the position of the defendant as evincing an unwillingness of the plaintiff to perform the subcontract substantially in accordance with its terms. Workplace safety assumes such prominence on construction sites, particularly in the performance of potentially dangerous work such as was being undertaken, that a refusal to work according to safety directions must be regarded as substantial nonconformity with obligations.

Ground 1 - cl 23 did not exclude the right of termination at common law

32 In *Stocznia Gdanska SA v Latvian Shipping Co* [1998] 1 WLR 574 at 585; [1998] 1 All ER 883 at 893 Lord Goff referred to:

> the familiar principle of construction that clear words are needed to rebut the presumption that a contracting party does not intend to abandon any remedies for breach of the contract arising by operation of law.

33 In *Concut Pty Ltd v Worrell* [2000] HCA 64 at [23] Gleeson CJ, Gaudron and Gummow JJ applied that principle. That case concerned an employment contract but the principle is of general application. Applying it to the present case I find no clear words to indicate that the parties intended to abandon the remedy of terminating the contract for repudiation which arises by operation of law. This is a question of construction. Far from there being any such clear words there are significant indications that there was no intention to confine the right of termination and the method of exercising it to the prescriptions of cl 23.

34 Most significantly, cl 23 fails to provide a mode of termination suitable to repudiatory breaches which may create an urgent situation on site. For such breaches an allowance of three days within which to commence corrective action would be unreasonable. With respect to safety breaches of the nature found by the learned magistrate in this case, it would mean the defendant would have to allow the plaintiff to continue its unsafe practices for three days before it could be expected to commence to remedy its default. Shortly stated, cl 23 is not in terms apt to cover situations which must be taken to have been in the contemplation of the parties when the subcontract was made. This is a strong counter-indication to the plaintiff's argument that cl 23 covers the field with respect to termination for breach.

35 The plaintiff cited *Tan Hung Nguyen v Luxury Design Homes Pty Ltd* [2004] NSWCA 178 as an example of a case in which it was held that an express

provision for termination of the contract provided the exclusive grounds and mode of such termination and excluded the right to terminate under the common law. The Court of Appeal's decision on a clause worded differently from cl 23 and located in a contract of a different type is obviously not binding as a precedent to the present case. The contract in that case was between an owner and a builder for the construction of a home. The clause in question empowered the owner to terminate the contract for certain events of default. It also governed financial adjustments between the owner and builder in the event of termination.

36 The builder had occupancy and control of the site under the contract considered in *Tan Hung Nguyen v Luxury Design Homes Pty Ltd*. That contract contained no clauses similar to 4.2, 7.2 and 15.2 of the subcontract before me in this appeal. The builder was not under an obligation to conform to safety policies and directives from the owner. There was no question of the builder having to conform to safety requirements for the protection of the owner or of other subcontractors on the site. The grounds of termination specified in the home building contract were only concerned with non-performance or unsatisfactory performance of the building work. That case is simply not comparable to the present and does not assist the plaintiff.

37 On a fair reading of the learned magistrate's decision he did not treat cl 23 as the exclusive source of the defendant's rights of termination for breach but instead applied the common law, in the manner referred to above. I consider that he made no error in this.

Ground 2 - failure to find that cl 23 was not complied with

38 I have concluded that the learned magistrate made no error determining the case on common law principles and that he did not purport to find that the prerequisites of cl 23 were fulfilled, or that it was necessary they should be in order for the termination to be valid. Therefore ground 2 does not arise for consideration.

Orders

39 For these reasons the orders the Court will be:

(1) Leave to appeal is granted so far as is necessary.

(2) The summons is dismissed.

(3) The plaintiff is to pay the defendant's costs of the summons.

(4) I grant liberty to the Defendant to file an application for indemnity costs by Friday 14 December 2018.

(5) The plaintiff to file any evidence in reply by 21 December 2018.

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