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MAGISTRATES COURT, of WESTERN AUSTRALIA
(CIVIL JURISDICTION)
STATEMENT OF DEFENCE TO GENERAL PROCEDURE CLAIM
FORM 21

Registry: Bunbury		Case number: BUN/GCLM/316/2015
Claimant	Andrew Laughton	
Defendant	Sharyl Marsh	

Summary of the facts relevant to the defence:

1. The claim is defective because the Claimant has failed to join all proper defendants. The proper defendants are the defendant and her husband James Marsh who are the registered proprietors as joint tenants of 14 Trinity Rise College Grove.
2. In any event these are the alleged facts, known or inferred.
3. The Claimant is the registered proprietor 11B Keble Heights, College Grove which is lot 2 on Strata Plan 29201 ("the Claimant's property").
4. The Claimant's property was transferred to the Claimant on 11 March 2011.
5. The Defendant and James Marsh are the registered proprietors of 14 Trinity Rise College Grove being lot 26 on plan 18152 ("the Marsh's property").
6. The Marsh's property was transferred to them on 14 April 2003.
7. Part of the eastern boundary of the Claimant's property has a common boundary with part of the western boundary of the Marsh's property ("common boundary").
8. The natural ground level slopes down from east to west across Marsh's property down to the Claimant's property.
9. When College Grove was developed the Water Corporation built sewer mains throughout the development.
10. The sewer mains run through some of the properties in College Grove.
11. Against the title to those properties the Water Corporation has registered an easement to protect its interests in and arising from the sewer main.
12. The Marsh's property is one such property.
13. The sewerage main within the Marsh's property runs in a north south direction near the west boundary of the Marsh's property.
14. At the time the Marsh's became registered proprietors of the Marsh's property the ground level along the western boundary of the Marsh's property was the natural ground level.
15. In or about March 2011 the land partly bordering on the western boundary of the Marsh's property ("strata land") was subdivided into a two lot strata subdivision.
16. The Claimant's property is one of the two strata lots from the strata subdivision.
17. Prior to the registration of the strata plan the strata developer, in order to make the strata land level, cut into the downward slope from the Marsh's property to the strata land at the common boundary and constructed a retaining wall ("retaining wall") along a length which comprises the common boundary and the common boundary between the strata land and the neighbouring property south of the Marsh's property ("southern neighbour's boundary").
18. Prior to construction of the retaining wall the strata developer obtained an engineering design for the retaining wall ("engineer's detail").
19. The top of the retaining wall was built, and is, lower than the natural ground level at the common boundary.
20. The retaining wall was built defectively and is defective in that it lacked proper support and reinforcement behind the wall.
21. The retaining wall not constructed in accordance with the engineer's detail.
22. The construction of the retaining wall required approval from the City of Bunbury.
23. The retaining wall was built without any approval from the City of Bunbury.
24. The developer constructed a fence upon the retaining wall along the common boundary ("fence").
25. Further and in the alternative the fence retains the natural ground level above the retaining wall.
26. The Claimant or a prior occupant of the Claimant's property tied a tree to the retaining wall.
27. Before September 2012 the Marsh's constructed two retaining walls on their property.



La Mar

*J. La Mar
of Registrar*

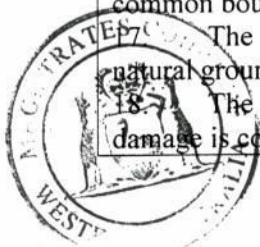
28. The base of the Marsh's retaining wall closest to the common boundary is at the natural ground level.
29. The Marsh's retaining wall was built in accordance with approved plans and an engineer's detail.
30. The Marsh's retaining wall was approved by the City of Bunbury.
31. In about September 2012, after a storm, the retaining wall moved by leaning toward the Claimant's property.
32. Some of the sand retained by the retaining wall fell onto the Claimant's property.
33. At or at around the same time the fence broke.
34. Some of the fence fell onto the Claimant's property.
35. The movement of the retaining wall was caused by the movement of the tree to which the retaining wall was tied.
36. The Marsh's agreed to pay half of the cost of replacement of the fence along the common boundary.
37. On 2 December 2014 the City of Bunbury issued to the Claimant a building permit for a retaining wall along the common boundary and the southern neighbour's boundary.
38. The Claimant had applied for, and the City of Bunbury had declined, to issue a building permit for a retaining wall confined to the common boundary.

Legal basis of the defence:

1. The Defendant did not build up soil against the boundary fence above the natural ground level.
2. The soil against the boundary fence was at the natural ground level.
3. The top of the retaining wall built by the developer of the Claimant's property is below the natural ground level and the wall is defective.
4. In building a retaining wall which was too low, and in building a defective retaining wall, the Claimant or his predecessor withdrew support of the Defendant's property.
5. The claim is defective because the Claimant has failed to join all proper defendants. The proper defendants are the defendant and her husband James Marsh who are the registered proprietors as joint tenants of 14 Trinity Rise College Grove.

The basic contentions of the party:

1. The Claimant in this action seeks to make the Defendant pay for the construction of a new retaining wall extending along the common boundary and the southern neighbour's boundary.
2. Alternatively the Claimant seeks to make the Defendant liable for construction of a new retaining wall extending along the common boundary.
3. The Claimant claims that the top of the retaining wall is the natural ground level.
4. The Defendant denies that and says the top of the retaining wall is below the natural ground level.
5. The Claimant claims that the soil against the fence on the Marsh's side of the Marsh's property is a surcharge above the natural ground level.
6. The Claimant claims that the surcharge caused the fence to lean over.
7. Further the Claimant says the leaning over of the fence caused to the retaining wall to lean over.
8. The Claimant admits the retaining wall is defective.
9. The Claimant wants the Marsh's to keep the soil level where it meets the common boundary at the height of the retaining wall.
10. The Claimant says it is impossible to raise the level of the retaining wall.
11. The Claimant says that is because of the defective state of the retaining wall.
12. The Claimant says the defective state of the retaining wall is irrelevant because the retaining wall would not have leaned over except that the fence leaned over taking the retaining wall with it.
13. The Claimant says the movement of the tree would have contributed to the retaining wall leaning over but to a negligible extent.
14. The Defendant says it was the movement of the tree which caused the retaining wall to lean over, and further the fence to break.
15. The Defendant says the strata developer withdraw the natural support of the Marsh's property at the common boundary by building a retaining wall lower than the natural ground level.
16. The Defendant says the strata developer withdraw the natural support of the Marsh's property at the common boundary by building a defective retaining wall.
17. The Defendant denies that and says the level of the soil against the fence on the Marsh's side is the natural ground level.
18. The Defendant says that if the Claimant establishes the Defendant's liability, the Claimant's loss and damage is confined to the cost of building a retaining wall along the common boundary.



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 J. G. Lallo
 D/Registrar