MAGISTRATES COURT of WESTERN AUSTRALIA
(CIVIL JURISDICTION)
DEFENDANT'S OUTLINE OF SUBMISSIONS ON APPLICATION TO SET ASIDE DEFAULT JUDGEMENT

Registry: BUNBURY **Phone:** **Fax:**	**Case number:** BUN/GCLM/316/2015

Claimant	ANDREW LAUGHTON
Defendant	SHARYL MARSH

SEE ANNEXURE "A"

Ian Morison 7 December 2015.

Tick [✓] appropriate box

Lodged by	☐ Claimant or claimant's lawyer ☒ Defendant or defendant's lawyer ☐ Other .....
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ANNEXURE "A"

SUBMISSIONS

1. On 28 April 2015, the Claimant signed a General Procedure Claim (Form 3). The description of claim alleges:

> "11B Keble Heights and 14 Trinity Rise shre a common boundary fence.
>
> That boundary fence is sitting on top of a 1.7 metre retaining wall.
>
> 700mm of sand was stacked against a fence which runs along our common boundary.
>
> On 4 September 2012 the fence collapsed and a bulge appeared in the top course of retaining wall bricks.
>
> An engineer's report shows that the extra loading of 700 mm of sand could cause the retaining wall to collapse.
>
> The claim is for the replacement of the boundary fence, the cost of reinforcement of the retaining wall, and also to remove the extra overburden loading that still has the potential to cause any new boundary fence and the reinforced retaining wall to fail a second time."

2. It is unclear whether the document entitled "Sheet 2 – Cost for Retaining Wall 6/4/2015" was an attachment to the form 3. No reference is made in the text of the description of claim to any annexure.

3. On 8 May 2015 the Defendant signed an Intention to Defend General Procedure Claim and notice was given requiring the Claimant within 14 days of the receipt of the Defendant's response and a request for a Registrar to list the case for Pre-Trial Conference and pay the hearing fee.

4. A Pre-Trial Conference took place on 18 June 2015. A second Pre-Trial Conference took place on 30 July 2015 at which time orders were made for the Claimant to lodge and serve a Statement of General Procedure Claim (Form 19) within 21 days and the Defendant to lodge and serve a Statement of Defence to General Procedure Claim

(Form 21) within 21 days of service of the Statement of General Procedure Claim. The parties were ordered to provide discovery by 2 October 2015 and each party was to lodge a Listing Conference Memorandum on or before 23 October 2015.

5. On or about 30 July 2015, the Claimant signed a Form 19. The facts were summarised by the Claimant as follows:

> *"The boundary fence between 11B Keble Heights and 14 Trinity Rise, both in College Grove, was retaining 700 mm of sand, and this was the major cause of not only the fencing breaking, but also the boundary retaining wall directly below the fence to crack and bulge due to the additional weight of the sand."*

The legal basis of the Claimant's claim was:

> *"The owners of 14 Trinity Rise have a responsibility to avoid adding additional load to both the fence and the original boundary retaining wall."*

(Note that the Claimant refers to the owners of 14 Trinity Rise in the plural.)

The Claimant's basic contention were:

> *"To determine who needs to pay the costs due to the damage caused by the Marshes at 14 Trinity Rise, College Grove."* The remedy or relief claimed by the Claimant was *"to pay for the costs incurred, and the cost of reinforcing the section of boundary retaining wall that is damaged and needs to suit a new ground level at 14 Trinity Rise"*.

It follows the Claimant's basic contention was that there was a need by the Court to determine who was liable to pay the costs due to the damage caused by the Defendants at 14 Trinity Rise, College Grove.

6. On 9 September 2015, the Claimant swore a Form 35 together with a List of Documents (Form 36). The form 35 was amended in hand. In the List of Documents, the Claimant ruled out Items 2, 3 and 4. Item 1 of the Affidavit, referring to those paragraphs, was ruled out.

7. On 6 October 2015, a Registrar of this Court issued a Notice of Hearing of Application to assess amount of claim. The notice reads,

"No Statement of Defence has been lodged. The Registrar has given default judgment. The amount of the claim in this case, will be assessed at the Magistrates Court held at 3 Stephen Street, Bunbury on Wednesday, 16 December 2015 at 10 am. The Claimant must lodge and serve a supporting affidavit at least 14 days before the hearing of the application."

8. On 3 November 2015, the Claimant lodged an Application (Form 23) ("set-aside application") seeking these orders:

> *"1. Set aside default judgment entered 6 October 2015.*
>
> *2. Vacate assessment of damages listed for December 2015.*
>
> *3. Give the Defendant leave to file the Statement of Defence (Form 21) out of time."*

9. An amended set-aside application has been filed which also seeks:

- *(pursuant to Rule 5) leave to extend the time under Rule 29 for filing this application.*
- *leave to file the Statement of Defence form 21 out of time.*
- *Leave to file the forms 35 and 36 out of time.*
- *An order for costs if the Judgement is set aside for irregularity, otherwise an order to pay costs.*

10. Accompanying the set-aside application was an affidavit of the writer of these submissions sworn 2 November 2015 referring to the cause of the delay and annexing a proposed Defence (Form 21). On 6 November 2015, the Claimant filed a Response to Application (Form 24) objecting to the orders sought in the set-aside application and attaching an affidavit supporting his objection. In paragraphs 3 to 30 of the affidavit the Claimant comments on the course of the proceedings and returned to that topic in paragraphs 42, 43 and 44. In paragraphs 40 and 41 the Claimant refers to his proposed sale of his unit; and in paragraphs 44 and 50 he refers to urgency. In paragraphs 60 to 63 the Claimant deals with some aspects of the merits of the case.

11. On about 24 November 2015 the Defendant filed a Form 35 and Form 36 affidavit and list of documents.

12. On 26 November 2015, the Defendant swore an affidavit in support of the Application which was filed on 27 November 2015 ("Marsh affidavit").

13. On 25 November 2015, the Claimant swore an Affidavit for the assessment of damages hearing listed on 16 December. The stated object of the affidavit is:

> *"To define the costs incurred by Andrew Laughton because of the damage caused to the boundary retaining wall between 11B Keble Heights and 14 Trinity Rise, College Grove by the Marshes".*

Relevant provisions of the Act and Rules

14. Under s.19(2) of the *Magistrates Court (Civil Proceedings) Act 2004* ("Act"), the Court may, if the parties do not comply with the Act, rules of Court or an order or direction made by the Court, either order the party to pay the costs of non-compliance in any event or *"give judgment against the party without a trial"*.

15. Under s.19(3), the Court may set aside a judgment given under sub-section (2) and may do so on conditions as to the payment of costs or as to other matters.

16. Under s.41B, if the Registrar at the Pre-Trial Conference orders a party to lodge and serve a Statement of Defence, that the party must do so in accordance with this rule. (The Registrar made that order on 30 July 2015.)

17. Section 41B(2) provides that the Defendant must lodge and serve its Statement of Defence within 14 days after being served with the Statement of Claim.

18. Rule 20 of the *Magistrates Court (Civil Proceedings) Rules ("Rules")* provides that Part 5 applies if an application for default judgment is made against a Defendant because the Defendant has not lodged and served a Statement of Defence in accordance with s.41B (Rule 20(b)).

19. Thus Rule 20 contemplates an application for default judgment. The Act s.25 also refers to an application for default judgment.

20. Under Rule 21, except as provided in Rule 24, a Registrar may in the absence of the parties give default judgment against the Defendant for a specified amount if (Rule 21(a)) the claim or the relevant part of it is for a liquidated amount or, (Rule 21(b)) the claim or the relevant part of it is for an unliquidated amount of $5,000 or less or, (Rule 21(c)) the claim or the relevant part of it is for an unliquidated amount of more than $5,000 but not more than the minor cases jurisdictional limit, *if the Registrar is able to assess the amount from any supporting material lodged in relation to the claim.* It is submitted that the supporting material must be lodged on or before the date default judgment is given.

21. The following definitions under Rule 4 are relevant:

- "application" means an application made under Part 18;
- "approved form" means the form approved by the Chief Magistrate;
- "default judgment" means a judgment given under the Act (s.19(2)(b)), and includes a dismissal of a claim for want of service without consideration of its merits;
- "lodge" has the meaning effected by Rule 95.

22. Rule 31 provides that an affidavit (of disclosure) lodged under Rule 30 must state that, to the best of the deponent's knowledge and belief, every document required to be disclosed under an order of a registrar or the Court, has either been disclosed or is the subject of an objection under rule 32.

23. Rule 43 provides that privilege applies to anything said or done by a party for the purpose of attempting to settle a case at a Pre-Trial Conference.

24. Rule 79 provides that an application for an order under s.19(3) of the Act to set aside a judgment must be made within 21 days after the date of the judgment. The Rule does not provide for an extension of the 21 days but it is submitted an extension may in effect be given under Rule 5(1) which provides that unless the Court in a particular case orders otherwise these rules apply in every case except in a minor case.

Irregularity

25. In more recent times, the entitlement to have a judgment set aside *ex debito justitiae* and without terms if the judgment is irregular, has been qualified depending on the significance and circumstances of the irregularity.[1]

26. The default judgment is invalid by reason of these irregularities:

(i) the Statement of General Procedure Claim (Form 19) is irregular in that:

(a) the Claimant failed to set out properly his **basic contentions,** alternatively the Claimant's contentions are embarrassing in that they propose in effect an inquiry;

(b) the **remedy or relief claimed** is not properly specified; or is embarrassing in that the words, *"to pay for the costs incurred"*, are unfinished and unrelated to the cost of reinforcing a section of boundary wall;

(ii) the proceedings are wholly invalid because a necessary party, the co-owner of 14 Trinity Rise, was not joined;

(iii) no "application" (ie form 23) for default judgment was "lodged";

(iv) in these proceedings the Claimant's claim is for an inquiry;

(v) the Registrar lacked any power to enter default judgment because he had no material or no sufficient before him to determine the damages as required by Rule 20;

(vi) as expressed the judgment is uncertain; it is described as "default judgment" without indicating whether it is:

(a) for damages; or

(b) for an enquiry arising from the question asked by the Claimant, who needs to pay the "costs incurred and the cost of reinforcing the section of boundary wall damaged";

[1] *Starrs v Retravision (WA) Ltd* [2012] WASCA 67.

(vii) the Affidavit and List of Documents (Forms 35 and 36) are irregular because they do not comply with Rule 31 in that the statements required by the Rule and by the forms are omitted;

27. Taking into account the significance and circumstances of these irregularities the Defendant is entitled *ex debito justitiae* to have the judgment set aside.

28. If an irregularity is found there is no need for inquiry as to the merits of the case.

29. A plaintiff will usually be ordered to pay the defendant's costs of setting aside an irregular judgment.[2]

Merits of the Defence

30. If the Court does not find that the judgment was irregular such that the Defendant has an entitlement to set it aside, the Defendant has a reasonable prospect of succeeding in her defence.

31. The Court in *Shilkin v Taylor* [2011] WASCA 255 did not deal with irregularity because none was alleged.[3] The issue was the merits of the defence. Newnes JA referred to s.19 of the Act and also to s.18(2) which provides: *"The Court may give judgment in favour of a claim without a trial if the party defending the claim does not satisfy the Court that the defence has a reasonable prospect of succeeding."* His Honour held the discretion of the Court to set aside default judgment under s.19(3) must be exercised judicially but it is otherwise unfettered.[4] His Honour held that ordinarily, no purpose would be served in setting aside default judgment if the Defendant is unable to satisfy the Court that the defence has a reasonable prospect of succeeding. It is therefore an important issue on an application to set aside default judgment under s.19(3) as to whether the Defendant can satisfy the Court that the defence has a reasonable prospect of succeeding. His Honour considered two matters concerning s.18(2) to be clear. First, the power summarily to terminate proceedings must be exercised with caution. Secondly, the expression, *"a reasonable prospect of succeeding"* ... still requires a high degree of certainty about the ultimate outcome of the proceedings if it were allowed to go to trial.

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[2] *Civil Procedure Western Australia* [13.10.5].
[3] *Shilkin v Taylor* at [22].
[4] *Shilkin v Taylor* at [25].

32. The Defendant swore a comprehensive affidavit on 26 November 2015 ("Marsh affidavit") which provides cogent evidence for the following findings. Page numbers referred to are those of the affidavit and annexures:

(1) as a step in the sub-division of the suburb now known as College Grove, the Water Corporation installed sewer mains;

(2) in 1991 the Water Corporation installed a section of the sewer main through what is now the property owned by the Defendant and her husband – 14 Trinity Rise (see Water Corporation email 11 September 2015, Marsh Affidavit at p.30).

(3) the sewer main is oriented north-south and is near the Defendant's western boundary in particular the common boundary between 14 Trinity Rise and 11B Keble Heights.

(4) the sewer main on the Defendant's property has a manhole and inspection port (the Claimant refers to an access point and inspection point at page 20 of Marsh's Affidavit);

(5) the ground level of the manhole and the inspection port determined the level of the ground at that time because the sewer main had to be supported by earth on both sides.

(6) in 1993, a developer of what became 11A and 11B Keble Heights, College Grove excavated at the common boundary and erected a retaining wall and a boundary fence on top of it.

(7) the developer built the retaining wall too low. The retaining wall as can be seen from photographs is lower than the inspection port at the surface level of the sewer main.

(8) the soil against the fence on the Defendant's side was not a surcharge but the ground level when the sewer main was built;

(9) the retaining wall built by the developer was defective and was built without council approval which was needed.

33. Determining the timeline is assisted by the certificates of title and the strata plan included in the Marsh affidavit. The Defendant's property (that of the Defendant and her husband, James) was registered in their name on 14 April 2003. The original title it appears having been issued on 20 August 1991 (Marsh Affidavit at p.6). The developer of 11 Keble Heights registered the strata plan on 24 January 1996 (Marsh Affidavit at p.9) and Lot 2 (11B) was registered in the name of the Claimant on 11 March 2011.

34. Thus the timeline is:

- In 1991 the sewer main was constructed.
- In or before 1996 the developer of lots 1 and 2, 11 Keble Heights excavated at the common boundary with 14 Trinity Rise and built a retaining wall near the sewer main;
- In 1996 the developer registered a strata plan of subdivision for 11A and 11B Keble Heights.
- In 2003 the Defendant and her husband James became proprietor of 14 Trinity Rise.
- In 2011 the Claimant became proprietor of Unit 11B Keble Heights.

35. The defective state of the developer's retaining wall is confirmed by the following evidence:

(a) at page 15 of the Marsh affidavit an engineer comments that the boundary wall was not constructed with enough backing blocks to meet the Structerre minimum detail (as to the engineer's assertion about a surcharge on the Defendant's side, the engineer certified the Defendant's retaining wall within her property which had a base higher than the retaining wall on the common boundary, see [40] below);

(b) the Claimant at page 17 of the Defendant's Affidavit concludes there were no backing blocks behind the developer's retaining wall and it was not built to standard;

(c) the Claimant notes that further along the retaining wall it had iron rods to support the wall with bracing pillars but that was no so in the section of retaining wall along the common boundary between the Claimant's unit and the Defendant and her husband's property;

(d) an page 18 of the Marsh affidavit, the Claimant contends that the council apparently allowed the developer's retaining wall to be built below standard.

(e) at Marsh page 17 the Claimant suggests that the developer's retaining wall was not designed and built to the appropriate standards;

(f) on page 19 of the Marsh Affidavit, the Claimant writing to the Building Commission stated it was possible or probable that the developer's retaining wall did not meet building standards when it was built and that it might not (at the time of the email) meet current standards either.

36. The Claimant at page 17 of the Marsh affidavit contends that the sewerage cover was placed 700 mm higher than it should have been, but that cannot be so since the sewer main was built in 1991 before the excavation of the common boundary by the developer of 11B Keble Heights, and registration of the strata plan in 1996.

37. The evidence that the developer's retaining wall did not have council approval includes: at page 25 of Marsh's Affidavit a council officer, the team leader of building certification of the council, states that the council's building records (for the Claimant's property) indicate that the only retaining wall approval shown is for a recent retaining wall. The building permit for which was issued on 2 December 2014; that was the building approval issued to the Claimant for the proposed new retaining wall thus there was no approval on the council records for the developer's retaining wall.

38. Evidence that the approval is for the whole length of the retaining wall between 11 Keble Heights and (on the other side) the Defendant's land and her southern neighbour's land, includes page 25 of Marsh's Affidavit where the council officer states that the retaining wall for which approval is being given *"runs along your western boundary and continues across your southern neighbour's block"*.

39. The inspection point for the sewer main is shown in the photograph on page 27 of Marsh's Affidavit. It should be found that the ground level on the common boundary at the time the developer built the retaining wall in around 1996, was the level of the inspection point of the sewer main. It is unlikely the Water Corporation would have left a slope immediately on one side of its main. This is supported by the statement on 11 September 2015 by the civil team leader of Water Corporation that, *"Our infrastructure on the easement of 14 Trinity Rise has not been moved or raised since 1991."* (Marsh Affidavit at p.30).

40. The Claimant criticises the Defendant's retaining wall. The Claimant states that the base of the retaining wall is higher than the top of the retaining wall. That is so, but the photographs show that the base of the retaining wall is the same height as the inspection port for the sewer main, thus the base of the Defendant's retaining wall is the ground level at the time that the developer excavated at the common boundary to build the retaining wall; and the top of the retaining wall is below the ground level at that time. There is no basis for any other criticism of the Defendant's retaining walls – see the letter of the builder who built it – Marsh Affidavit at p.31; the building permit at pp.32-33; the certificate of design compliance at pp.34-38; the engineer's plans at p.39 (the same engineer who contends that the Defendant caused a surcharge of soil at the boundary, despite the soil level alleged to be a surcharge being at the base of the retaining wall designed by that engineer); a layout of the retaining walls is set out at p.40 with the council building permit approval stamped on it.

41. As to causation, it should be found that the alleged moving forward of the retaining wall was due to its defective state and the movement during a storm of the tree anchored to the wall.

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7 December 2015