MAGISTRATES COURT of WESTERN AUSTRALIA
(CIVIL JURISDICTION)

GENERAL FORM OF AFFIDAVIT

FORM 2

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

Claimant	**Andrew Laughton**
Defendant	**SHARYL MARSH**

I Andrew Laughton of 11b Keble Heights, College Grove, Bunbury

(full name and address) (occupation) Electrician

(Delete as applicable)*

having been duly sworn say on oath the following:

1. I am the Claimant *(description of party)* in this case.

2. This affidavit is an **amendment** to the affidavit I submitted on 8th December 2015 to support the default judgement, originally due to be heard on 9h December but postponed till Jan 15th 2016 at 9:30am and is a reply to the defendants application to set aside default judgement.

3. This application to set aside default judgement received by email had not been sealed by the court, and so I am assuming it has been sealed by the court without any modifications as I have never received the sealed version.

4. This application to set aside default judgement was sent via email on 7th December at 15:14, or 3:14pm. Less than two days before the hearing at 9:30 on 9th December.

5. The application to defend the default ruling, submitted on 6th November 2015, states at the bottom that the response to the application must be made at least 3 working days before the hearing. This did not happen.

6. As per the application to attend the hearing via audio link, and notifying the defence, I was scheduled to be working from 30th November till 9th December. Due to factors beyond my control, this was changed at very short notice to fly home on 6th December, then fly back again on the 8th December till 12th December. If I had not been flown home when I was I would not have been able to make any reply at all, and as it was it was rushed and I nearly missed my flight back. This amended response has a few more details.

7. On 30th July, 2015 the registrar ordered the claimant to lodge a form 19 within 21 days.

8. The Claimant lodged a form 19, on that same day, 30th July 2015.

9. On 30th July the registrar ordered the defendant to respond within 21 days, or before 20th of August.

10. On 30th July the registrar ordered both parties to submit forms 35 & 36, declaring the list of documents they possess and a confirmation that documents had been received before 2nd October 2015.

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11. On 4th August I sent an email stating what documents I have, and what documents I would like.

12. On 9th of September, after receiving no reply from the Marshes I submitted forms 35 & 36 to the magistrates court, and the Marshes.

13. On 17th September I requested a default judgement due to lack of response from the Marshes, 28 days after the deadline.

14. On 2nd November, 46 days after I requested default judgement the Marshes opposed the default judgement.

15. The following bullet points are referring to the "Annexura 'A' Submissions document sent on 7th December 2015.

16. Point 2, It is unclear what annexure is referred to. The only document submitted was sealed by the court.

17. Points 8 and 9, The defence requested that I sign these pre-filled forms to forgo the default judgement, however I saw no reason to delay proceedings any more, and declined to sign them, and I did not submit them to the court.

18. Point 24, Rule 79 provides that an application for an order under s.19(3) of the act to set aside a judgement must be made within 21 days after the date of that judgement.

19. The default judgement was made on 6th October, 2015. Any request to deny default judgement needed to be made within 21 days, or the 27th of October, and instead was submitted 31 days later, or 10 days after the deadline.

20. Point 26(i)(a) I disagree with this statement that the basic contentions were unclear. Bullet point 13 in the defendants "Outline of Submissions" spells it out, and it is repeated here for convenience.

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.***"

I do not believe it is possible to get any clearer than this.

21. Point 26(i)(b) The statement "to pay for costs incurred" may be unclear out of context, but the full statement as shown on the prior point is clear. The cost of reinforcing a section of boundary retaining wall is directly related to the damage that has been caused to that retaining wall. This case is all about the damage caused by the overburden on the retaining wall, and the costs associated with fixing it and the cost of the delays to fix it.

22. Point 26(ii) I disagree that the other owner is a "necessary party", and in any case this has not been objected to prior to the default judgement.

23. Point 26(iii) A form 23, (application for default judgement), was lodged with the court on 17th September, 28 days after the deadline for the Marshes to submit their paperwork, proof of which is the default judgement itself.

24. Point 26(iv) The Claimants claim is to determine the amount of damages, not an inquiry.

25. Point 26(v) I have no idea what rule 20 states, but it would seem that is the entire point of the 16th Dec hearing.

26. Point 26(vi) It is not uncertain, the damages are defined by both (a) and (b), not one or the other. It is not possible to pay for damages without paying for the repairs to the retaining wall, nor is it possible to pay to fix the retaining wall without paying damages.

27. Point 26(vii) This is not relevant to the default judgement, and it is not even clear what is being referred to.

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28. Point 31. While no purpose would be served in setting aside a default judgement where the defence has no hope of wining, this does not mean that setting aside the default judgement should depend on the merits of the case, but instead only on the lack of merits. Ie, if the case has no merits nothing else matters and the default judgement should stand.

29. Point 32(7) If the retaining wall was built too low this issue needed to be raised before the statue of limitations expired over a decade ago.

30. If it was built too low, it would still be within the height of a single layer of blocks. Ie, if an extra layer was added the retaining wall would be too high.

31. Point 32(8) The engineers report states clearly that the 700mm of sand against the fence is overburden, and is beyond the specifications of both the retaining wall and the fence.

32. Point 32(9) No proof has been offered for the claim that the retaining wall is defective, and this section was built under building permit 11489 issued on 7/7/1994.

33. Point 35(a) The currant Structerre minimum standard is not relevant, the Australian standards in force at the time the wall was built are the only relevant standards. This sounds like raw advertising. The details shown in the building permit does not have any backing blocks as such, but instead uses mortared basalt rock, as approved by both the council and structural engineers.

34. Point 35(b)(d)(e)(f) The Claimant at the time was under the illusion that the Structerre engineer was both competent, and was completely neutral in their assessment and report. I have since found out that I was wrong on both counts, the building permit did not require backing blocks, which the Structerre engineer should have known, and they also had a vested interest in that they were at least partly, if not wholly responsible for this stuff up in the first place. Any assumptions I made at the time were based on what the Structerre engineer told me.

35. Point 35(c) This is very misleading, I noticed a rust patch and suggested that it may have been a metal rod, however the engineer did not think it was relevant and it was not investigated further.

36. Point 36. The Claimant has not claimed the sewerage manhole cover is 700mm higher than it should have been. The claim is that 700mm of sand was placed against the fence, and an engineers report backs that claim.

37. Point 37 Not only does the retaining wall on the Eastern side of my block have a building permit, the Western side of my property also has a separate building permit. This appears to be a miscommunication problem, not a building permit problem, or possibly a competence / corruption problem within the council. I had a similar problem in that I was told the one building permit covered both retaining walls, but when I purchased the entire collection of building permits I discovered that each retaining wall had its own permit. The list of building permits is marked as "**AL1**", the conditions of approval are marked as "**AL2**", a copy of the invoice is maked as "**AL3**", building permit 11489 for the disputed Eastern retaining wall is marked "**AL11489**" and "**AL11489d**" , and the building permit for the undisputed Western retaining wall is marked "**AL11335**".

38. Point 39. The retaining walls were built in 1994, and the contour diagrams clearly show a slope, regardless of the Marshes assumptions. Expecting the Water Corporation to do landscaping is unreasonable, any sloping ground would remain sloping. It has never been explained why the Marshes feel that the side of a terraced hill was not originally sloped. A detailed time line is attached and marked as "**AL Time**".

39. Point 40. This appears to be an admission that the Structerre engineer is at fault. The surcharge is not an alleged, it has been admitted to by Structerre in their report.

40. Point 41. The engineers report and follow up emails clearly states that the overburden is a major factor and needs to be removed. The alleged defective state assumed that backing blocks were part of the original design, where the building permit shows that this was not the

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case. The sapling tied to the wall was 2.4 meters away, and had negligible effect, calculated to be well below 0.5% of the loading of the overburden.

41. It is quite clear, and it has not been denied that 700mm of sand was stacked against the fence.

42. The super six fence was never designed to retain any sand, and this has not been denied.

43. This 700mm of sand is also above the design limits of the boundary retaining wall, and this has not been denied.

44. Not only have the Marshes placed overburden on the boundary retaining wall between 11b Keble Heights and themselves, they have also placed overburden on the boundary retaining wall between themselves and 12 Trinity Rise. No attempt has been made to remove the overburden on the boundary retaining wall of 12 Trinity rise.

45. The Marshes would need to prove that not only is the original boundary retaining wall between 11b Keble Heights and 14 Trinity rise is not valid for whatever reason, they would also need to prove the boundary retaining wall between 12 Trinity rise and 14 Trinity rise is also invalid for whatever reason. A copy of the extension of the boundary retaining wall building permit was requested on 10 December 2015.

46. The foundations of the abutting retaining wall to the Marshes South is 550mm lower than the Marshes new retaining walls, and this has not been denied.

47. It is clear that the top of the Marshes driveway has been raised since it was originally laid, and this has not been denied.

48. The only thing that has been denied is that the overburden has caused any damage, or that they placed the overburden where it is.

49. In the opinion of the claimant, myself, I am not all that concerned about how long the overburden has been in place, or the original ground level over 2 meters away from the fence, only that it has caused this problem, and I have a statement from the very same firm that caused this problem in the first place, if not the very same engineer, that this overburden has, and is continuing to cause problems. This anexure is marked "**AL report**"

Sworn

~~AFFIRMED~~

At Bunbury this 5th day

of January 2016 in the presence of

G. Zell

.....

Registrar/~~Justice of the Peace/other authorised witness~~

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Deponent

Each page is to be dated and signed by the person making the affidavit and the witness.

Tick [✓] appropriate box

Lodged by	☒ Claimant or claimant's lawyer ☐ Defendant or defendant's lawyer ☐ Other
Address for service	11b Keble Heights, College grove.

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as at 01/09/2008

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