

**MAGISTRATES COURT of WESTERN AUSTRALIA
(CIVIL JURISDICTION)
GENERAL FORM OF AFFIDAVIT
FORM 2**

Registry: 3 Stephen street Bunbury, WA, 6230	Case number: BUN/GCLM/316/2015
Phone:	
Fax:	
Claimant	Andrew Laughton
Defendant	Sharyl Marsh and James Glynn Marsh

I Andrew Laughton of 98 Proper Bay Road, Port Lincoln, South Australia, formally of 11b Keble Heights, College Grove. Electrician
(occupation)

having been duly affirmed say on affirm the following:

1. I am the Claimant (*description of party*) in this case.
2. This affidavit is a written submission for the court hearing on 16th – 17th August 2016 as ordered by the court on 2nd March, 2016. Submitted on 8^h August, 2016.
3. Statement of the issues of fact and law that the Claimant contends will need to be determined at the trial, followed by the proof for easier reading.
 - 3.1. That the super six boundary fence was never designed or intended to retain any soil or sand.
 - a) Proof
 - WML engineering report confirming the above statement
 - Expert witness from WML
 - Product guild for this type of fence found at HYPERLINK
"<http://www.jameshardie.com.au/products/fencing/hardiefence-easylock-system/>"<http://www.jameshardie.com.au/products/fencing/hardiefence-easylock-system/> and HYPERLINK
"<http://www.jameshardie.com.au/uploads/files/HardieFence%20Install%20Guide.pdf>"<http://www.jameshardie.com.au/uploads/files/HardieFence%20Install%20Guide.pdf> PDF page 8, numbered page 6, very last paragraph under heading "Retaining walls"
 - 3.2. That 700mm of sand was allowed to build up and remain against the boundary fence.
 - a) Proof.
 - Photos of the affected area.
 - Structerre engineering report confirming the above statement.
 - WML engineering report confirming the above statement.
 - Expert witness from WML.
 - Emails regarding removal of excess sand.

- 3.3. That the boundary fence failed as a direct result of the Marsh's negligence.
- a) Proof
- Photos of the affected area.
 - WML engineering report confirming the above statement.
 - Expert witness from WML.
- 3.4. That 700mm of overburden was on the boundary retaining wall.
- a) Proof Same evidence as point 3.3 above.
- 3.5. That the 700mm of overburden, and / or the bobcat used in the construction of the Marshes new retaining walls damaged the boundary retaining wall.
- a) Proof Same evidence as point 3.3 above
- 3.6. That the Marshes are liable for all of the costs and damages caused by their actions or negligence.
- a) Proof.
- Civil Liability's Act 2002. HYPERLINK
"http://www.austlii.edu.au/au/legis/wa/consol_act/cla2002161/"http://www.austlii.edu.au/au/legis/wa/consol_act/cla2002161/
 - HYPERLINK
"<http://www.austlii.edu.au/au/journals/UWALawRw/1968/6.pdf>"<http://www.austlii.edu.au/au/journals/UWALawRw/1968/6.pdf>
 - BUILDING ACT 2011 - SECT 77
http://www.austlii.edu.au/au/legis/wa/consol_act/ba201191/s77.html
- 3.7. That the Marshes built or allowed to remain in place a post and rail retaining wall on a sewerage easement close to a boundary retaining wall.
- a) Proof
- Photos of this post and rail retaining wall.
 - Maps of the sewerage easement.
- 3.8. That the retaining wall in point 3.7 was built without a building permit.
- a) Proof, The list of building permits issued to 14 Trinity Rise.
- 3.9. That the retaining wall in point 3.7 is adding loading to the original boundary retaining wall beyond the design limits of the original boundary retaining wall.
- a) Proof, expert witness opinion.
- 3.10. That Structerre engineering designed and approved the Marshes new limestone block retaining walls.
- a) Proof, the Structerre name on the building permit.
- 3.11. That Structerre engineering also authored the engineering report dated on or near 6_11_2012 on behalf of the claimant.
- a) Proof, the Structerre letterhead on the engineering report.
- b) Proof, Structerre invoice.
- 3.12. That Structerre engineering, acting on behalf of both the claimant and the defendant, had a conflict of interest.
- a) Proof, expert witness opinion.

- 3.13. That a condition of the building permit for the Marshes new limestone block retaining walls includes “being reasonably expected not to apply loading on existing structures beyond their design limits”, and that this condition has not been met.
- a) Proof, the building permit and expert witness opinion.
- 3.14. That a condition of the building permit for the Marshes new limestone block retaining wall is that a balustrade or fall restraint system of some type is needed for potential falls of greater than 1 meter, and that the maximum fall is greater than 1 meter, and that no balustrade or fall restraint has been fitted, and that this building permit condition has not been met.
- a) Proof, The building permit form BA3 point 10
- A Balustrade shall be provided if any level is more than 1 meter above the surface level below, with a {*balustrade*} minimum height above finished floor level (FFL) of 1 meter or 865mm above the nosing line on stair.
- b) Proof, The building permit plan showing 7 steps 190mm high = 1.33 meter drop on both levels.
4. A complaint made to the Ombudsman about the conduct of representatives of the Bunbury City council, and their biased privacy breaches and exemptions resulted in being told that it needs to be done after the court hearing. I would like the court to comment in writing about the following points for the benefit of the Ombudsman and any inquiry into possible corruption.
- 4.1. That Bunbury City council, on visiting the building site and seeing the post and rail retaining wall on the sewerage easement, acted in a biased manner for not asking them to remove it.
- a) Proof, expert opinion.
- 4.2. Someone from Structerre appears to have gained access to the building permits for 11b Keble Heights, against privacy regulations, and somehow convinced the council that the original boundary retaining wall building permits are not valid, leaving me with no explanation as to why, and no right of reply.
- a) Proof, circumstantial evidence, Somewhere between emails and letters on 25 March 2014 trying to get overburden removed and emails on 8 April 2014 the council went from trying to help resolve the problem to offering no help at all, and even went so far as to tell the Marshes that I had no building permits. An additional Structerre engineering report was done on 15 April 2014, but did not cover its primary scope of the effects of removing the additional overburden from the boundary retaining wall, and no follow up appears to have been done. I did not find out any of this until 2016.
- 4.3. That Bunbury City council, in advising the Marshes that no building permit exists for the original boundary retaining wall violated privacy regulations, and did not inform me that they had done so. This email also happened to be flat out wrong. The building permit may not appear in the computer, but this permit pre-dates the councils computer system.
- a) Proof, email from Bunbury City council, mentioned in “Listing conference memorandum” dated 17th February, 2016. referring to email from the city of Bunbury to Sharyl Marsh dated 28th May 2015, but not yet seen by me as of 7/8/2016.

- 4.4. That Bunbury City council, in refusing to provide information to me in the exact same circumstances regarding a continuation of the exact same retaining wall, with the written permission of the Marshes, acted in a biased manner.
- a) Proof, expert witness, myself.
- 4.5. That Bunbury city council normally require a contour map to be made as part of the building permit requirements for retaining walls. No such drawing has been produced or admitted to. Exempting the Marshes from this requirement is biased not only against me, but against everybody else that needs to meet these requirements.
- a) Proof, expert witness
b) Proof, Bunbury City guidelines on applying for a building permit.
<http://www.bunbury.wa.gov.au/pdf/Planning%20and%20Building/ChangesToGroundevlRetainingWalls.pdf> Page 5, point 5.6.a.
- 4.6. I obtained a building permit to reinforce the damaged boundary retaining wall on my property, and due to a slight misunderstanding the building permit included a much bigger section of retaining wall than the 5.6 meters that was damaged. Gary Bruhn from Bunbury council sent the Marshes an email stating that they would not allow only the damaged section to be reinforced. I contacted the council to see what the story was, and was told that the council do not confirm if buildings are finished to the appropriate standard or not, the builder needs to fill in form "BA3" and then it is considered complete. Worst case for any building that is only partly complete is it may need a structural engineer to give final approval. The email that Gary Bruhn sent the Marshes was not only a breach of privacy, it was also wrong.
- a) Proof, Email from Gary Bruhn to Marshes dated 28th May 2015 that I have requested but still not seen as of 7/8/2016.
b) Proof, expert opinion.
- 4.7. For the purpose of assisting the Ombudsman, it would be very useful to have a report done by the WA Building Commission, or similar neutral body. This is not going to happen without a court order, and so a court order is requested. I would like the following points to be highlighted to that building commission.
- a) That Structerre acted on my behalf in creating the original engineering report on damage to the boundary retaining wall, without informing me of the conflict of interest.
b) That Structerre reported no backing to at least a depth of 1000mm, when in fact there was backing at a depth of 600mm.
c) That Structerre highlighted the effects of an avacardo tree attached to the wall 2.4 meters from the crack, when in fact this effect was very minimal.
d) That Structerre neglected to make any comment at all on the effects of construction machinery when the nearby retaining walls were built.
e) That Structerre was commissioned to report on the possible effects removing the overburden on the original boundary retaining wall would have on the new retaining wall, and instead merely confirmed that the new retaining wall was OK with the overburden still in place.
f) That Structerre appear to be responsible for this whole mess in the first place.

5. *Statement of the issues of fact and law that the Defense contends will need to be determined at the trial.*
 - 5.1. *Did the Claimants predecessor undermine the Defendants property or did the Defendant's surcharge the Claimants property ?*
 - a) The Claimants property was excavated before the house on 11b Keble Heights was built in 1994, and was probably excavated at the same time as 12 Trinity Rise, as they share the same retaining wall.
 - 5.2. *Was the Claimants wall defective ?*
 - a) If the defense assumed the retaining wall was defective before it was damaged then they should have a greater responsibility to avoid damaging it in the first place.
 - b) The building permit asks for a minimum of 400mm backing. The retaining wall has been found to have 800mm backing, twice as much as required.
 - c) Given that the boundary retaining wall has not totally collapsed despite being loaded to 281% , it is reasonable to assume that this retaining wall was built much stronger than the design minimum.
 - 5.3. *What is the cause of the loss and damage ?*
 - a) As per the Claimants form 32, Listing Conference Memorandum, the 700mm of overburden that damaged both the boundary retaining wall and the boundary retaining fence has caused the original damage. Because this has occurred at a time when I was trying to sell the house, and that I have been unable to sell the house while this issue is unresolved, the amount of loss has greatly increased.
 - 5.4. *What was the natural ground contour ?*
 - a) The original ground contour is not relevant to this case as the "Limitation Act 2005", or the statute of liabilities expired 6 years after the original boundary retaining wall was built in 1994, or in the year 2000, or over 15 years ago.
 - b) The only document available that shows the original contour is building permits for 11b Keble Heights.
 - 5.5. Not included in the defendants statement, but included here in case of last minute changes. The Marshes were told by Bunbury City council, in breach of privacy regulations, that the section of original boundary retaining wall between our properties did not have a building permit, when in fact it does.
 - a) Proof, This building permit exists as building approval 11489 issued on 7/7/1994.
 - b) Proof, This boundary retaining wall continues on unbroken between 12 Trinity Rise and 14 Trinity Rise, and has a separate building permit.
6. Invitation to admit facts. As of the date of this document, no response has been received to my "Invitation to admit facts", form 37, submitted on 22 February 2016.
 - 6.1. Admitting to any of these facts may reduce the overall cost, and the necessity of having an expert witness present at the trail.
7. Missing documents. As of the date of this affidavit, the following documents have been requested, but not yet received or sighted, and this document may be amended if and when they are received;
 - 7.1. On request for documents dated 25 January, 2016.
 - a) Point 11. The weight of the bobcat used to build the new retaining wall was requested, but never received. This weight was guesstimated based on the most likely model used, and the engineering report was based on this guesstimate.

- b) Point 17. A copy of any building permits or drawings showing contour lines on or near the Marshes property.
 - c) Point 18. A list of building permits issued to 14 Trinity Rise.
- 7.2. Email request for documents on 26 February, 2016, referring to “Listing conference memorandum” dated 17th February, 2016.
- a) Point 8. Email from the city of Bunbury to Sharyl Marsh dated 28th May 2015.
 - b) Point 11. Unsigned letter from Agiuras to James Marsh dated 7th May, 2015.
- 7.3. Email request on 26 Feb 2016 for a document for the defense.
- a) A hand written letter from Defendant to WA Building commission.
8. Payment for expenses incurred due to the failed default judgment. I would like the statement to support the default judgment ruling submitted on 5th January, 2016 to be considered, highlighting the following points;
- 8.1. Point 19. **The deadline to appeal the default judgment was missed by 10 days.**
 - 8.2. The defense were fully aware that the delays were costing me about \$500 per week in mortgage payments, and the only reason given that the defense missed these deadlines is because they were busy.
 - 8.3. The deadline to submit any documents defending the case was **missed by 42 days**, and the reason for the requested default judgment.
 - 8.4. The deadline to submit the list of documents available was **missed by 40 days**.
9. **Attachments.**
- 9.1. The Ombudsmans reply that it needs to be done after the court hearing.
 - 9.2. Page 5 from <http://www.bunbury.wa.gov.au/pdf/Planning%20and%20Building/ChangesToGroundevlRetainingWalls.pdf> showing retaining wall building permit requirements.

AFFIRMED

At Bunbury this 8th day of August 2016 in the presence of

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

.....
Deponent

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

Tick [✓] appropriate box

Lodged by	<input checked="" type="checkbox"/> Claimant or claimant's lawyer <input type="checkbox"/> Defendant or defendant's lawyer <input type="checkbox"/> Other			
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