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THE MAGISTRATES COURT OF

WESTERN AUSTRALIA

CIVIL

BU GCLM 316 of 2015

ANDREW LAUGHTON

and

SHARYL MARSH

and

JAMES GLYNN MARSH

MAGISTRATE M. PONTIFEX

TRANSCRIPT OF PROCEEDINGS

AT BUNBURY ON WEDNESDAY, 17 AUGUST 2016, AT 10.47 AM

MR A. LAUGHTON appeared in person.

MR I. MORISON appeared for the defendants.

JSO: In the matter of 316 of 2015, Andrew Laughton, respondents Sharyl Marsh and James Glynn Marsh.

HER HONOUR: Please come in. Take your time to set up. You will be going back in the witness box. So yes.

LAUGHTON, MR: Okay. I've arranged for that - - -

HER HONOUR: Can we just wait till the other side comes in before we talk further. Thank you. Just have a seat for the minute.

MORISON, MR: Thank you for that, your Honour.

HER HONOUR: All right. Thank you. Okay. Yes. Good morning, parties. We're here to continue the trial today and we've reached the point where Mr Laughton is still under cross-examination, but you've got some news about your contractor. Is that right?

LAUGHTON, MR: Yes. I've arranged for him to come in at 11.

HER HONOUR: Okay.

LAUGHTON, MR: Yes. To be a witness and hopefully it can be arranged so that - - -

HER HONOUR: Yes. All right. That's only a few minutes away. So we might have a short break. We will start with your contractor and then we will do the cross-examination. All right. Thank you. There's not much point you getting in the stand and starting on with cross for five minutes. Okay. All right. Thank you.

(Short adjournment)

JSO: In the matter of 316 of 2015, Andrew Laughton, Sharyl Marsh and James Glynn Marsh.

HER HONOUR: All right. Thank you. Who's your witness, Mr Laughton?

LAUGHTON, MR: Alex, from Bunbury Concrete.

HER HONOUR: Stand up. Will you come into the stand, please. Mr Laughton will need his quote back. Remain standing, sir.

DHU, MR: Okay.

HER HONOUR: Can you tell me your full name.

DHU, MR: Alex John Dhu.

HER HONOUR: Can you spell the last bit.

DHU, MR: D-h-u.

HER HONOUR: Yes. Dhu?

DHU, MR: Yes. As in fish.

HER HONOUR: All right. Thank you.

DHU, ALEX JOHN sworn:

HER HONOUR: All right. Mr Laughton, stand up. Mr Dhu is your witness. What do you want to ask him?

LAUGHTON, MR: He was brought in specifically to validate the quote.

HER HONOUR: You will need to ask him about that. Ask him who he is, what he does. Show him the receipt.

LAUGHTON, MR: Okay.

HER HONOUR: Okay. I gave it back to you. I handed it back?---Can I shed this coat.

Yes?---It's hot in here. Yes.

LAUGHTON, MR: Yes. And you wrote that quote?---I wrote that quote. Yes.

Yes. And yes, no further questions.

HER HONOUR: You have to ask him who he is, what he does and - - -?---Well, do you want me to just tell you?

Yes?---Yes.

You can just - - -?---I've been a concreter for 60 years. I've been in the trade all my life. Done multi high rise to pouring this floor that you're standing on right at this moment. My other partner that I work with has got 40 years of experience. And that's a quote we gave Andrew, or part of a section of it because of the inherent risks and complications of getting concrete to and from the site and

the risks involved in excavating. And then future to this will be to remove the props and form the concrete wall, the retaining wall.

MORISON, MR: Your Honour, I've had no notice of any of that evidence, which is quite crucial really. I wonder if I can have that evidence again in relation to risks. And I reserve my rights.

HER HONOUR: Okay. So you gave Mr Laughton a quote?---Yes.

And the quote was for what, sir?---The - the quote is to dig and pour the footings - - -

Yes?--- - - - for the retaining wall, to then form and pour a concrete retaining wall.

Okay. And so what was the length of the wall that that was for?---The length of wall was approximately about 6.6 metres.

Okay. And what was the price that you quoted for that work?---The price I quoted to do the complete job is 18,000 plus GST.

Okay. Now, sir, we can't write as fast as you can talk. So you mentioned something about "risks" and "site". Can you repeat to us what you said about that?---Yes.

And slowly, if you wouldn't mind?---And slowly. Okay. In obviously doing any quotation, you take in complications, difficulty in accessing the area, the necessary works that need to be undertaken, whether concrete can be got close to the site, whether it needs to be pumped, whether it needs to be craned and kibbled in.

MORISON, MR: I didn't catch that.

HER HONOUR: Craned - - -?---Crane and kibble.

Yes?---Yes. And in this instance, the site, with a very, very steep slope and twist on top of the brickwork, the
- - -

MORISON, MR: Sorry. I've put "very steep slope".

HER HONOUR: And a twist, did you say?---And it twists as well as the slope.

Yes?---On - on brick paving which then - then causes its own complications for getting concrete to and from the site, as well as the chances of risk and injury, of either injury to the workers or the risk of a spillage and then the complications of cleaning that to make it - who's writing fast - to make it satisfactory. And then the inherent risks of excavating next to a wall that is already fractured. And they - they are some of the considerations you take in when doing a quote.

Okay. So those considerations are - - -?---Were all - - -
- - - the general considerations that underpin your quoting?---Yes. And in this instance, they all applied to that job.

All right. Is there anything else you want to ask the witness?

LAUGHTON, MR: Yes. You stated the quoted length was 6.6, I think?---Or 6.5. I'm not sure of the length offhand. 5.6 metres approximately, but without the plans, I'm not sure.

Yes. Yes. It's - - -?---Yes.

I would suggest it is 5.6.

MORISON, MR: I object to that.

HER HONOUR: No. You can't do that. It's this person's evidence.

LAUGHTON, MR: Well, can you read what's on the quote, please?---Yes. Yes. I've got just, "Length approximately 5.6 metres. Quote is valid for 60 days."

Thank you?---And that was written on 26 June 1915.

Thank you.

HER HONOUR: 2015?---2015. Sorry.

Right. Do you need some time to consider before you cross?

MORISON, MR: Well, I do. And, in fact, it could very well be the case that we're going to need a witness to respond to some of that evidence. So my application would be for the trial to be adjourned in order that we can proceed with taking instructions, considering the new

evidence and considering whether we need expert evidence on the point.

HER HONOUR: On the cost of a wall?

MORISON, MR: Yes.

HER HONOUR: Okay. Is there any reason why? Obviously, you weren't on notice that this witness would be called. All right. You don't want to cross-examine him to that extent now?

MORISON, MR: Well, I could. I could do that and, as it were, reserve my rights.

HER HONOUR: Just it's going to be very difficult for me to return.

MORISON, MR: Yes. Of course.

HER HONOUR: And that's going to deprive you of your rights about adjourning it or to ask for an adjournment. If you're able to stand down and make a cross after a short time, and we can complete it, and reserve your rights, then well and good. I would prefer that course to be undertaken before we jump in holus bolus to an adjournment application, Mr Morison.

MORISON, MR: I agree, your Honour. I will do that.

HER HONOUR: Mr Dhu, you can stay for another 10 or 20 minutes?---Yes.

Thank you. All right. This is being occasioned because you were put on notice to have the concreter here and you chose not to do that originally, until yesterday. Okay?

LAUGHTON, MR: Mmm.

HER HONOUR: And what should have happened was a statement of evidence should have been obtained, just as has been exchanged with the other witnesses. And because that wasn't complied with, the defendants, if they suffer any prejudice as a result of the procedural requirements not being undertaken, can seek an adjournment, and I have to decide whether that's required if they are unable to be in a position to properly cross-examine Mr Dhu. And he has given a lot of evidence today which went beyond the cost of a wall for that metrage. Okay. All right. Mr Dhu, if you wouldn't mind staying around for - how long do you want, Mr Morison?

MORISON, MR: Perhaps 15 minutes, if that's possible.

HER HONOUR: 15 minutes?---Yes.

And, Mr Laughton, please don't discuss anything with Mr Dhu in the meantime. Thank you. The court will stand down.

(Short adjournment)

JSO: Matter 316 of 2015, Andrew Laughton, Sharyl and James Glynn Marsh.

HER HONOUR: Yes. Mr Morison, how did you get on?

MORISON, MR: Yes, your Honour. I haven't had a lot of feedback from my clients, but I'm happy to proceed on the basis that we were discussing.

HER HONOUR: Thank you.

MORISON, MR: Now, what plans were you working from in doing this quote?---The supplied engineers' plans.

Right. Could I have the Bunbury City Council file, please.

HER HONOUR: Do you want exhibit 13?

MORISON, MR: Sorry, your Honour?

HER HONOUR: Do you want exhibit 13?

MORISON, MR: Actually, I'm going to go for the original now of the building permit and put that to the witness, but it is exhibit 11, I believe.

HER HONOUR: Okay. This is the one, the building permit. That's the one for the works, 14 Trinity Rise.

MORISON, MR: Right.

HER HONOUR: The building permit that Mr Laughton got, I think, is exhibit 13, which we had to get back today. Did you put it up here?

JSO: Yes.

HER HONOUR: That's the one you're chasing. This is the one that Mr Woodhouse identified yesterday.

MORISON, MR: That could be. Yes.

HER HONOUR: Can I hand that to Mr Morison so he can look at that, please.

MORISON, MR: Thank you, your Honour. Yes. Thank you, your Honour. So I wonder if you could look at this document, please. Now, the evidence is that this is the building permit for the construction of a retaining wall the length of the existing retaining wall on the eastern side of 11 Keble Heights. Now, are there plans attached to this building permit?---Yes. Sorry.

And are they the plans that you did your quote from?---Yes.

Have you got with you the plans that were given to you to enable you to quote?---Have I got the plans with me? No.

No. Do these plans show that the retaining wall was to remain, but to be reinforced?---Yes.

So you weren't building a new retaining wall, a new concrete retaining wall, were you? You were involved in a renovation of the existing retaining wall. Is that correct?---To put it correctly, there is an existing limestone wall there, retaining wall. We were - according to the plans, we were forming and pouring a new concrete wall in front of that.

And is the new concrete wall the thing that's hatched with - - -?---No. The hatched section is a option of brickwork.

All right. So can you just hold up the plan and show what is the section that is to be the subject of the concrete you were to provide?---Phase 3.

Say again?---Phase 3. What is written is Phase 3.

Right. Just hold up the relevant plan, will you, and point, if you will, to what you're referring to? Okay.

HER HONOUR: That's the third diagram in from the bottom left-hand corner?---Left-hand side. Yes.

Yes.

MORISON, MR: Phase 3. I see. And where does phase 3 show the concrete that you would be supplying?---Where does phase 3 show the concrete?

Yes?---In the diagram that's there.

All right?---And in the - the appendix or in the instructions, written on the right-hand side, that has got all the details of the concrete and specifications that is required.

All right. Now, pick up the plan again. Direct yourself to phase 3. Can you pick up the plan again, phase 3, and can you point to where it is on phase 3 that your concrete was going to be?---The concrete is there and up there.

Up there, is it?

HER HONOUR: Sorry. Just for the transcript, Mr Dhu is pointing along the base?---To the footing.

And up the wall, are you?---The footing and up the wall.

The footing and up the wall.

MORISON, MR: I thought I had a shading pen. All right. And you were saying that you went on the words on the right
- - -

HER HONOUR: Do you want a highlighter, do you?

MORISON, MR: Yes, actually.

HER HONOUR: Yes. It will have to be yellow so it doesn't show on the computer.

MORISON, MR: Thank you. This can go to the witness. Your Honour, I'm going to ask whether - thank you. Now, that can go to the witness. Thanks. Can you just shade in phase 3 where it is you say the concrete that you would be supplying is. Now, turning to the words under the heading Concrete and Concrete Retaining Wall, which words are relevant, Concrete or Concrete Retaining Wall?---Which part are you talking about?

The part that you directed us to, the wording in the
- - -?---It doesn't say anything. It just says, "Construct new retaining wall."

All right. Are we talking about the same thing? We're talking about that box there?---Yes. You are talking about the amendment now, or the appendix on that.

All right?---Okay.

Right. So which is relevant in that - - -?---Both. The drawings and the - and the information.

Just let me finish the question. You see there's a heading Concrete?---Yes.

And you see there's a heading Concrete Retaining Wall?---Yes.

So which of those topics were relevant, because you said that identifying what you were supplying was a combination of looking at phase 3 and these words in what you call the appendix. So which one are you talking about? The words under Concrete or the words under Concrete Retaining Wall?---Obviously, both.

Obviously, both. Right?---That's fairly obvious from reading the plans. The appendix there is applicable to every part of the drawing that's on these sheets.

Now, if you could go to the front of the building permit now, please, that you have. I think it will be the second page. It's the BA4. Have you got BA4 there?---No. Yes. A4.

BA4, that one there?---BA4.

Yes?---I haven't got a telescope, but it's - I've got page 2.

2 of 7?---2 of 7.

Yes. So can you go to the section that says, "(2) details of building work"?---"Details of building work." Yes.

Right. And there's words down the bottom, "Estimated value of building work as determined by permit authority." What's the figure shown there?---The figure there is 13,500.

So the estimated value, according to the City of Bunbury, of the whole of the work the subject of these plans is \$13,500?---So?

Well, the point is obvious, isn't it? You're trying to charge \$18,900 for doing the concreting when the whole work is \$13,500?---No. Two reasons: what a person estimates something is going to be is not what the cost is. I could count - you can count 100 million different situations where cost overruns occur.

All right. Let's just proceed on the basis that, according to the permit authority, their estimate is \$13,500. So we may take that as the estimate of the Bunbury City Council.

So how do you justify a quote of some \$18,900
- - -?---Quite easily.

- - - given that the estimate for the whole of the job is that figure?---The estimate, the quotation figure I gave was, as I said, in your written notes that you took, is to take into consideration the risk, the damage or situation if, in digging those excavations, the wall moved. This is not - this wouldn't have been written in what is estimated.

But what's estimated, because you've shown us on phase 3
- - -

HER HONOUR: Sorry. Are you making an objection, are you, Mr Laughton?

LAUGHTON, MR: I would like to - - -

HER HONOUR: Please stand when you address me, sir.

LAUGHTON, MR: I would like to make - - -

HER HONOUR: You need to stand up.

LAUGHTON, MR: Sorry. I would like to make a clarification, if I can, that may have (indistinct) sort of some time.

HER HONOUR: No. You can object to a question asked, but you can't. You can clarify something with Mr Dhu in re-examination. You're about to give some evidence about how that thirteen and a half thousand dollars got on the form. That's not proper at this stage. Is that what you're about to do?

LAUGHTON, MR: Basically. Yes.

HER HONOUR: Okay. Have a seat. Thank you?---Yes. No. I've got no issue with that.

MORISON, MR: Okay. So you were telling us something about how - you were repeating essentially, weren't you, the factors that you say you took into account in doing the quote? Is that right?---Yes.

I suggest this quote is a sham?---Well, I suggest you don't know building procedures and risks.

All right. Now, the original quote you gave was a quote that was given in April, was it? Can I have the original,

please?---I think it's on that table. It was April. I've got it. It's on the floor.

Okay. I will just have it, please. So your original quote was written in blue pen. Correct?---Yes. There's two colour pens on that paper, blue and black.

Yes. And the original quote you gave, what, on 10/4/15?---Correct.

And then you changed that date to 26/6/15 in black pen. Right? Yes?---I don't know. You've - you've got the paper in front of you.

All right. Sure?---It's 12 months ago.

Sure. All right. Well, I will give it back to you then. So you agree with the change of date. The new date in black pen is what date?---The new quote in black pen is 26 June 1915.

All right. And there are some additional words that you've written in black pen, are there?---Yes. That is, on the bottom, the, "Length approximately 5.6 metres. Quote is valid for 60 days."

And there are some other words at the foot, are there?---On the foot, "80 per cent on pour of wall. Remaining 20 per cent on removal of forms. Approximately 28 days."

All right. And these changes were made, were they, because Mr Laughton approached you and asked you to do something?---No. The other written in black is because that original structure as shown there, there was three different sections of how to do it. One is shown in phase 4, one is shown in phase 3 and there was an amendment, amended copy of a wall on - in itself.

You will have to go over that for me again. One was shown? Just repeat that for me, will you?

HER HONOUR: Could you repeat what you were saying?---I will repeat. I just don't like being asked to repeat something twice when I've already told you.

Well, sir, you have to understand everyone needs to make careful notes?---Yes. Yes.

And things that sound extremely clear and sensible to you we're hearing for the first time, and sometimes it takes more than one go for us to get it right?---Yes. Okay. You

will notice phase 3 drawing. You will notice phase 4 drawing is different. You will notice phase 2 shows the existing section at present.

MORISON, MR: Well, it shows what it shows. Yes?---Correct. The additional page on section A shows a further section or a similar section to phase 3. And that is the work we quoted on.

All right. Now, you're saying that in response to my question about whether you changed the quote with a black pen as a result of something Mr Laughton asked you to do. And so what's the relevance of these aspects of the plans that you've just referred to?---The relevance is nothing. It's just the same as the drawing. The reason written on in black on this was just a further clarification of the quote in detail.

All right. So what does it have to do with phase 3 and section A and then those other phases?---It's just the same. It's what we're doing.

Did you have the plans when you did the original quote of April?---I looked at the plans when I did the original quote.

So are you saying that the subsequent or the handwritten amendments you put on there as a result of, what, reviewing the plans again?---Having a look at the plans again and for clarification of what we were doing.

And how did that come to you, that further clarification?---It's no further clarification. It's just - just a more detailed quote.

And do you deny that Mr Laughton approached you and asked you to write 5.6 metres on the quote?---He didn't ask me to write 5.6 metres. It was taken off the plan.

The quote is in fact a quote for the concreting of along the entire length of the retaining wall, wasn't it?---No.

Now, when you were asked about the length of the retaining wall to which this concreting was relevant, you said it was 6.6 metres, and then you suggested it was 6.5 metres and then, when you were shown the quote, you said it was 5.6 metres approximately. Is it the case that the length of wall the subject of the quote is in fact 6.6 metres?---You - I quoted figures over 12 months ago since I looked at them. Would you remember a measurement after you've done hundreds of plans of what you looked at 12 months ago?

All right. So you're saying that you didn't remember offhand what was on the quote?---No.

Right. Now, you said that the wall was fractured. The wall wasn't fractured, was it?---The limestone wall is fractured.

How?---By pressure against it.

But what is it that you see or ascertain - - -?---A giant great crack and movement.

All right. And so there's a crack and movement. What's the nature of the movement you're referring to?---The movement is on the limestone retaining wall.

And how, if at all, did you measure the movement?---You don't have to measure a movement when you can see it.

You could see the movement, could you?---Yes.

So what did you see?---You could see one - a crack line through the mortar and a brick protruding - a section of wall protruding past the other. So there's fracture and pressure against the wall.

Right. So you're saying there's actually a section of the wall obstruding from the rest of the wall, is there?---Yes.

Right. What, in the 5.6 metre approximate section - - -?---Yes.

- - - you're referring to? I suggest there's no such obstrusion. You say there is. And I suggest that there's not a wide crack in the wall?---What would you suggest?

All right. You say it is?---I would say it's a wide crack.

All right. So in your evidence, you've indicated that you've been concreting for 60 years?---I've been concreting for about 45 years.

45 years. You're 60, are you?---Yes.

And your partner has 40 years experience, I think you said, did you?---Yes.

And you said this was a quote to dig and pour the footings?---Yes.

All right. And also to form and pour the concrete retaining wall?---Correct.

All right. And then you said that it was \$18,000 plus GST for the complete job. Correct?---Correct.

And by "complete job", you mean, don't you, the entire retaining wall?---No. This section of wall that I was quoting, the 5.6 metres.

Okay. So then you gave us a list of reasons, it seems, as to why the quote is as it is. The first matter you mentioned was complications, and then you mentioned difficulty accessing the area. Firstly, complications, what complications are you referring to?---Complications that could have arisen from excavating next to a wall that is already showing movement, and also the complication on the slope, the brick paving, the risk of injury.

I'm coming to those?---Right.

Yes. So what's the difficulty accessing the area?---The difficulty is that you can't get a truck near it.

All right. So how is it that you're going to do it?---The option was whether we pump it, whether we barrow it about 200 metres from the road, whether we use a crane and kibble. They were all options that would have to be considered and worked out if it was possible.

So how much extra did you allow for in the quotation for the difficulties in accessing the area?---It was all written within a sum.

Well - - -?---I don't - - -

- - - presumably, the sum is a sum of sums, isn't it?---It's a sum of sums. You don't add \$1000 in case a boy slips over with a barrow. You don't add \$1000 if a boy tips a barrow and then the concrete has to be cleaned, the brickwork has to be cleaned, etcetera. It is all in an incorporated cost and pricing that we did when we did the quote.

You said that the work was going to be near - I'm sorry. The concrete, you mentioned the concrete would have to be got close to the site. What did you mean by that, or have I imperfectly translated that, "Concrete can be got close to the site"? That's the same point you were making, was it, about the difficulties in access?---"Concrete got to

the site" is not real English. My words were that concrete had to be accessed to the site.

Thanks. And then you mentioned pumping the concrete, and I think you've just - - -?---We regarded things that we had to consider if one - one section didn't work.

All right. And this work, has it been done?---The footing has been poured.

The footings have been done, have they? You said something about a crane and a kibble. Is that correct?---That was another option.

That was an option, was it?---That was an option.

All right. But it wasn't a necessary part of the work?---It could have been if the pump - we considered the pumping too far because associated work with using the pump is it has got to be - the line has got to be broken apart. Every pipe has got to be emptied. The concrete then would then make a mess on the brickwork. It would then have to be cleaned up, carted away, and they're associated costs that are incorporated in making a quotation.

Why didn't you put 5.6 metres as the length of the retaining wall that you would be working on in the original quote?---Because originally I looked at the plans on - on the section. I was shown the section. Andrew - when we first - when I first looked at the site, and just like in any quote, I quote, "Remove grass, concrete driveway." I don't necessarily specify how many cubic metres of grass I'm going to move. I don't specify how much sand I'm going to move. I do not specify, usually in my quotes, how much concrete I'm going to pour.

Why did you feel the need to add the length in your amended quote when you hadn't put it in your original one?---Because I had another look at it on the site and, just to make sure that we were talking about the same thing, I put that figure in.

And why did you have another look at it on the site?---Because I took my partner to have a look at it as well, for an extra variation, or an extra - not a variation, but just an extra assurance of what we were looking at.

And you took him because Mr Laughton had asked you to?---No. I took - he - Mr Laughton might have asked me to

come again, but he - it was because of the risks involved in this project.

All right?---It's extremely critical.

Okay. So he asked you to come again because of the risks associated with the project. What did he say?---I wouldn't have a clue now, to be honest.

But you said that he asked you to come again because of the risks associated with the project. So did he say to you then that there were risks associated with the project and that you ought to come back?---No. He - he wouldn't have said that. I - I have a history of seizures. I have no memory. I wanted a second opinion when I talked the wall over with my partner. And we went and had another look at it.

So if Mr Laughton had asked you to come back and write in the length, you may have no memory of it due to seizures?---Yes. But the - the second look was not to change the original quote or distance. It was just purely as a second opinion from the other partner of what was required.

You changed it because Mr Laughton asked you to, didn't you?---No.

You said that, in this instance, there was a very steep slope. What steep slope are you referring to?---Have you looked at the site?

What steep slope are you referring to?---Have you looked at the site?

HER HONOUR: Sorry. Sir, you - - -?---I have to answer it?

Yes, please?---Right. The slope is (a) the initial slope into the common driveway. Then from the common driveway, it turns to brick paving, which is extremely steep and twists and turns to the right, into the area where the wall was to be poured.

Now, when you say "twists and turns", you just mean that the - - -?---The cambers and - and slopes.

Well, aren't you just referring to the fact that there's an angle in the boundary?---No. No. I'm talking about the slope of the ground.

Slope of the ground, are you? And what is the slope of the ground?---Extremely steep.

Sorry. What is the slope of the ground along that section of 5.6 metres that you say the quote was for?---You - you obviously haven't looked at the site because the slope of the ground is - - -

I just need to ask you this?---Right.

The 5.6 metres that you say the quote is for, what is the slope of the ground at that point?---At that point it is reasonably level.

It's level, isn't it?---Yes. Of course it is.

So in doing a quote for that section, you wouldn't be saying that there was a steep slope, because it's perfectly level, isn't it?---No.

This was a quote for the entire length of the retaining wall, and the only reason that the slope that wasn't there in the 5.6 metres would be relevant is because you were dealing with the entire length. Isn't that so?---No. The entire length of the wall is flat, but the driveway - down to it - is where the slope is where concrete had to be gotten into.

You referred to brick paving and then you referred to something causing its own complications for getting the concrete to and from the site?---Yes.

What did you mean by that?---By where the concrete had to be shipped - transported over.

What, from the street to site?---From the end of the common driveway to the site.

And what was the complication - - -?---I've already - - -

- - - in getting it from there?---I've already told you the complication.

The complication was the slope. Is that correct?---The complications of the slope and there's also the complications of when you excavate next to an existing wall that has already shown movement, there is a risk of that moving.

And there was a risk of movement along the entire length of the wall, wasn't there?---There was movement if you went along the higher - along the complete wall, maybe. Well, we were excavating this section.

You - you saw columns along the retaining wall?---Yes.

Risk of injury to workers or risk of a spillage - how - could you explain that? How did that come into your quotation?---Have you - have you ever tried to burrow concrete on a slope like that and not spill it?

Again, you're referring to a slope?---Yes.

All right. Because there's no slope, is there, on the 5.6 metre section? It's not to do with the - - -?---It - it - - -

- - - 5 point metre section?---It is. It - - -

It's to do with the whole retaining wall where the slope is?---No. It is - I will say it once more for you. For us to place and pour the concrete on that level section of retaining wall, the concrete had to be transported over a very difficult sloped hard-to-access area.

The risk in injury to workers or the risk of a spillage?---Yes.

How did that affect the figure you produced?---Have you spilt concrete on a driveway and then had to clean it up?

HER HONOUR: Sir?---Yes.

I know it's difficult. This is - - -?---This is just being silly.

This is evidence, sir?---Okay.

And this is - Mr Laughton has put the case?---Yes.

And then the other people have the right to defend it?---Yes.

And the way they do that is that the lawyer asks questions. That's his job?---Yes.

He's not being deliberately obstructionist or anything?---Well, I believe he is.

Well, that's beside the point. You've been brought here as a witness?---Yes.

And if you could just answer the questions, and that's not by asking another question unless you're clarifying what was asked. Okay?---Okay.

So if you wouldn't mind just answering the questions and then we will be out as soon as we can?---Okay. All right. Cool.

MORISON, MR: So let us just confine it to the risk of the spillage. What was the risk of the spillage that you took into account?---Extreme.

All right. The - just explain what spillage. Spillage from where to where?---From transporting the concrete from the truck into foot.

And the risk of excavating next to a wall. I think you've explained that already - already fractured, you say. And those were some of the considerations. Those are my questions, your Honour.

HER HONOUR: All right. Just stay there for a minute. Thanks, Mr Dhu. Now, Mr Laughton, if you've got questions to clarify any answers Mr Dhu has given, you can now ask him those.

LAUGHTON, MR: Okay. Do I stand or sit?

HER HONOUR: You stand.

LAUGHTON, MR: Okay. Okay. Now, I've got to do it in a non-leading way.

HER HONOUR: That's correct. You were wanting to - no, sorry, go on.

LAUGHTON, MR: Okay. The - it would be fair to say that the - - -

MORISON, MR: Objection. Leading.

LAUGHTON, MR: Okay. Would you consider the entire length of the retaining wall to be reasonably level?---Yes. I think, to my memory. Just on memory.

It's a year ago. I can understand that?---Yes.

And the drop from the street to the base of the retaining wall would be estimated at - - -

HER HONOUR: Ask him?---Ask me. Yes. Ask me. I would assume it would be somewhere in the distance of about 3.5 to 4 metres.

LAUGHTON, MR: Metres vertically?

MORISON, MR: Objection. Assumption?---Vertical lower.

HER HONOUR: Sorry. What as that, Mr Morison?

MORISON, MR: Objection. An assumption. So speculation is irrelevant.

HER HONOUR: Just clarify what the witness - - -

MORISON, MR: He's made an assumption - - -

HER HONOUR: Clarify with your witness how he comes to say that that's the distance that he has to - of the drop. You're meaning the drop in the height?---No.

LAUGHTON, MR: The access to the retaining wall is - - -

HER HONOUR: Yes. Don't you give us answers. Ask your witness how he knows that.

LAUGHTON, MR: Yes. Well, yes - and you're aware of that drop because?---When I came and looked at your - your job to give you your quotation, I walked down the common driveway which has got a big slope on it.

Yes?---I then walked down the brick section, which has got a fall of I would say two metres at least, plus a metre-odd fall in the common driveway, and then we walked down through the car port to have a look at it where it was down another further - say it's 300. So yes. I took into consideration the difficulty and the slope.

That's fair enough.

HER HONOUR: Any other questions?

LAUGHTON, MR: No, there's no other questions.

HER HONOUR: All right. Thank you, Mr Dhu, for your time today. You're free to go?---Okay. Where would you like these plans?

I would like you to give them back to the orderly just here in the blue shirt?---Okay. All right.

Thank you. Do you now wish to tender the quote as an exhibit?---The - the quote is there.

Yes. Thank you. You can go, sir?---Okay.

(THE WITNESS WITHDREW)

LAUGHTON, MR: It did have a plastic sleeve. I don't know.

MORISON, MR: It's just there.

HER HONOUR: If you pass those back to me. Thank you, Mr Orderly. Bunbury Concrete Contractor's quote 0482 is now exhibit 16.

EXHIBIT 16 Plaintiffs
Bunbury Concrete Contractor's quote
0482

HER HONOUR: All right. Yes. Thank you. Now, are we ready to continue Mr Laughton's cross-examination?

MORISON, MR: Yes, your Honour.

HER HONOUR: All right. Thank you. Could you go back into the box, please, Mr Laughton?

LAUGHTON, ANDREW:

HER HONOUR: Just have a seat. And just reminding you, sir, you remain under oath. Thank you. Yes.

MORISON, MR: Would you have a look at this document, please. Is that an email that you wrote to the Building Commission?---Yes.

And what's the date of the email?---Wednesday 8th - 28 - sorry - 28 May 2014.

And did you tell the Building Commission that the wall's height was 1.665 metres?---As measured from the current surface, yes.

And did you tell them that the - that there was - - -

HER HONOUR: Can you repeat, which wall's height was 1.66 metres?

MORISON, MR: The - did you - were you referring this email to the height of the wall on the common boundary with the Marshes?---At the boundary retaining wall. Yes.

The boundary retaining wall as in the whole retaining wall or the section that was common?---The boundary retaining wall is level for the bulk of its length and it was measured at the boundary between 14 Keble and my property. Yes.

All right. And did you inform the Building Commission that there was no backing blocks for the retaining wall at that point?---I did not inform them that, partly because firstly it's not true and secondly I had not dug down.

All right. But did you tell them that that was so?---Tell them - - -

Look at the email. Did you tell them that that was so?---Can you rephrase the question, please?

Look at the bottom of the first page?---Yes.

And then the top of the second page?---Yes.

At the foot of the first page, did you write:

It is possible/probably this original retaining wall did not meet building standards when it was built, and it may not meet current standards either as a one metre probe failed to find any backing blocks.

Did you write that to the Building Commission?---I wrote that after - - -

Did you write that to the Building Commission?---If I may reply in full.

No. I'm asking you - - -

HER HONOUR: Just answer the question, and then - - -?---Yes. I wrote this email.

MORISON, MR: Right. And then did you write:

This point is unclear as the retaining wall also has posts which are not shown on the plans and backing blocks may of interfered with a sewerage pipe.

?---I wrote the entire email.

Right. And that's the case, isn't it, that there was a probe done that failed to find any backing blocks and that there were no backing blocks, in your opinion, because they might have interfered with a sewerage pipe?---There was a probe done which apparently I did not realise at the time was done between the face of the retaining wall and the backing blocks. There's a gap there caused by the tilt of the retaining wall and as I was advised. I did not realise - the structural engineer had advised me - had a vested interest in telling me. I did not realise the structural engineer that told me that had a - was not neutral and - does that cover your question? What was the question?

The question was, is it the case that you believed and that you believe now that the original retaining wall that was possible or probable - in fact the original retaining wall didn't meet building standards when it was built and might not meet current standards now either because a one metre probe failed to find any backing blocks and - - -?---I did - sorry.

Sorry. Go ahead?---I did write that when I was under the belief of the structure - basically, I was echoing what the structural - structural engineer had told me.

You go onto say that backing blocks may have interfered with a sewer pipe. So you are of the opinion and were then, weren't you, that there were no backing blocks because of the existence of the sewerage pipe. Is that right?---I was suggesting it may have been a possibility. I - I don't have that expertise.

Look at the top of the next page. Did you write - so you've conceded you wrote the whole of this document. So you wrote:

The original approval of drawings show a reference pointing 10 metres. I'm guessing this is above sea level, and I've not been corrected by anybody yet. The original contour survey shows 10.4 metres and 10.15 - sorry, 10.14 metres and 10.15 metres at points near the retaining wall failure.

You've seen those soil contour - contour surveys that were put to you yesterday, and those - those heights of 10.14 metres and 10.15 metres - those were all within the section of the common boundary, weren't they?---I would need to look at the - the basic, though, that was taken off the original building permit and the 10.14 was at one extreme

of the five metre boundary, and the 10.15 metres was taken at the other extreme of that five metre boundary.

All right. Well, that will be sufficient, then. And then you said in the next paragraph, the top of the original retaining wall appears to be approximately 400 millimetres lower than the original contour survey at this point. And that's the case, isn't it?---I'm not sure of the measurements, but it does appear to have been put in lower than it - the original ground level, yes.

I tender that.

HER HONOUR: Thank you. Can be exhibit 17. Exhibit 17 is an email from Mr Laughton to Department of Commerce dated 28 May 2014.

EXHIBIT 17 Defendants DATE 28/05/2014
Email from Mr Laughton to Department of
Commerce

HER HONOUR: Can I just pause while I read that? Thank you.

MORISON, MR: Certainly. Can I clarify the yellow shading and anything else is - - -

HER HONOUR: 39.

MORISON, MR: Sorry?

HER HONOUR: 39.

MORISON, MR: Yes. Is there any shading on that?

HER HONOUR: There's yellow shading on the back.

MORISON, MR: Can I just clarify that that's my shading and not that of the witness?

HER HONOUR: Yes. All right. Thank you. Yes. Thank you.

MORISON, MR: Thank you, your Honour. Now, you had email communication with the water corporation, did you?---Probably. I don't remember specifically.

Have a look at this document, will you, please. Now, that's an email from the water corporation to you. Is that correct?---It appears to be. Yes.

And who at the water corporation was writing to you?---It appears to be Dave Taylor.

The date of the email?---11 September 2015.

Okay. And that indicates that the water easement was built in 1991, does it?---Yes.

I tender that.

HER HONOUR: Thank you. That would be exhibit 18. Exhibit 18 is an email from Taylor to Mr Laughton, 11 September 2015.

EXHIBIT 18 Defendants DATE 11/09/2015
Email from Taylor to Mr Laughton

HER HONOUR: Thank you.

MORISON, MR: Thank you. Now, Mrs Marsh would give evidence about having received this document from the council. Could you have a look at this document, please. Now, is that a plan which bears the name and title of the City of Bunbury?---Yes.

And is there a date on that? Is there a date of - - -?---Tuesday 3 April 2012.

And do you recognise the - the location of 14 Trinity Rise shaded in pink there?---Yes.

And do you see contour lines through the - - -?---Yes.

And those contour lines, starting from left to right - just quickly describe the contour lines - the numbers?---From left to right, as it's written - - -

Lowest to highest, if you wouldn't mind?---The lowest is to the west, and the highest is to the east.

Thanks for that. And does it bear a certificate of compliance stamp on it?---Yes.

And what's the date of that?---8 May 2012.

I tender that.

HER HONOUR: And that's exhibit 19, and that's what we're up to, is it? Exhibit 19. Exhibit 19 is certificate of design compliance dated or issued 18 May 2012, number 30022.

EXHIBIT 19Defendants DATE 18/05/2012
Certificate of design compliance number
30022

MORISON, MR: Would you look at this document, please - photograph. If you could just hold that up to her Honour. And are you able to describe - and perhaps I will help you here. That photograph - you can now look at it, if you would like. That photograph is a photograph of the strip of land between the common boundary and the 14 Trinity Rise retaining rise, is it?---Yes.

And beyond that, further back, is a - a section of the - is the section of the strip in front of 15 Keble Heights?---That is showing a section basically of the - you know - I think it's 15 Keble. Yes. It's an adjoining property.

Adjoining property?---Yes.

Yes. Do you know the name? Is it Daryl, the name of the owner of that property?---Off the top of my head, no.

All right. And the object that's coming out of the ground - what is that?---That is connected to the sewer.

All right?---I believe.

And - well, you've been on the property, haven't you? What makes you say you believe it but you would not know it?---Because I don't know for certain. I haven't dug it up and looked at it.

All right?---So it lines up pretty much exactly with the sewerage drains.

And - now the photograph shows, doesn't it, that in the strip in front of 15 Keble Heights, it has been excavated away from the boundary right through to the retaining wall of 15 Keble Heights?---Some of the build-up of dirt between 15 Keble and 11 Keble has been excavated, yes.

And did you do that?---I did do some of it. Yes.

You did all of it, didn't you?---The extreme shall we say southern end of Keble Heights - that strip in there - that was still original and the extremely - where it abuts to 14 Trinity, there had been a bit of overflow and that section - or a large part of it - I did excavate. Yes.

So - perhaps you just hold onto that, and I will just show you this other photograph. And that shows the same sewer pipe, does it, in that photograph?---Yes.

And can you look at this photograph, please. And is that a photograph taken north to south between the - between 14 Trinity Rise and the lower neighbour of Trinity Rise?---Yes.

And does it show a concrete object there?---Yes.

What is that?---I believe it's a sewerage manhole.

All right. And that's levelled with the ground?---Approximately.

All right. I tender those three photographs.

HER HONOUR: Do you want to mark them for identification? Are they going in through Ms Marsh?

MORISON, MR: Yes. Yes.

HER HONOUR: They probably shouldn't go in through this witness. All right. Those three photos are MFI 3. They're three photos with the numbers 28, 29 and 27 in the corners.

MFI 3

Defendants

Three photos with numbers 27, 28 and 29 in corners

HER HONOUR: So just so you understand that process, they go in through the person who is the witness to present those. They are being shown to you in anticipation of the going in. So they're not yet exhibits. I've marked them for identification. When Ms Marsh gives her evidence, they will be tendered through her. Okay? That's the process?---Okay.

MORISON, MR: Would you look at these two photographs, please. Do you recognise the location that's being photographed?---I recognise the approximate location. Yes.

All right. Do you see that in one of the photographs, there's a shovel put against the external face of a wall and then there's some metal bracing there?---I - on this one. Yes. Yes.

Right. And so the metal - there was metal bracing on - - -?---Yes.

- - - upon the wall on the common boundary?---Yes.
So this is now showing - you would agree, would you - a section of the common boundary?---Yes.

And then it shows a whole does it, on the 14 Trinity Rise side of the common - of the wall?---Yes.

And do you see that the - that the shovel is almost to the ground level on 11B Keble Heights?---It's a little bit hard to tell from the photo, but it looks like it's probably enough for me to rebuff the ground level.

And do you see in the other photograph that there's an object there with a white wrap around it, which is put into the hole?---Yes.

And that would be the same white wrap as on the other photograph along the wall, would it?---I assume so.

Yes. And then you see there's a distance and the white wrap is, as it appears, level with the level of the ground. Would you agree with that?---Approximately, yes.

And then there's a section on top of the - of the pole which is being held by hangers. Is that right?---The top of the hanger was being held by someone's hand. Yes.

I mark those for identification. I seek to have that done.

HER HONOUR: All right. That can be MFI 4. Thank you.

MFI 4 Defendants
Two photographs

MORISON, MR: Would you look at this document, please. Is that a copy of your title and the strata plan of which your title is part?---It would appear to be so. Yes.

I tender that?---Sorry, I didn't look at that bit. Is that part of it or not.

Yes?---Okay.

HER HONOUR: Just give Mr Laughton back that that other sheet, thank you, Mr Orderly?---Sorry. Yes. I only looked at the first page. Yes. It has certainly, yes.

MORISON, MR: Did you - - -

HER HONOUR: Just two minutes. Exhibit 20. Exhibit 20 is the certificate of title, volume 2064 folio 162. Exhibit 20.

EXHIBIT 20 Defendants
Certificate of title, volume 2064,
folio 162

HER HONOUR: Thank you.

MORISON, MR: Did you post on the internet an eight page document entitled "11B Keble Heights Retaining Wall Program - Problems"? Would you like to see this document?---Yes. Okay.

Is that something that you posted on the internet?---Yes.

And in that did you accuse Mrs Marsh of wetting you with a hose?---I stated a number of facts. Quite probably, yes.

It's not so, is it?---Yes. It is so.

Now, did you post on the internet another document - a 60 page document comprising some documents and photographs? Did you do that?---I posted a number of photographs. There was - this particular document was a single page. The photos were on a single page.

A single web page, you mean?---Yes.

Right. And I just wonder, have we - I just wonder, Madame JSO, whether I handed back any of the subpoenaed documents.

JSO: (indistinct) Bunbury.

MORISON, MR: Those other one - may I have those, please, if it please the court. Would you look at this document, please. This document is from subpoenaed documents provided by the - the water authority and indicate that - perhaps I will just ask you. Is that a document that you sent to the water authority?---I - I doubt it with enthusiasm. In fact, no.

Sorry. You doubt with what sorry?---I doubt that I would have sent this document to the water authority.

All right. Can you explain how it is that they have it on their file?---I would have sent a link to a dark - how do I explain this - a dark link to the water authority to try and lay out as much information as I knew to basically try to be as open and honest as I could with them.

All right. So is that document there - is that the document that was the subject of the link you provided them?---This was on a separate page linked to from the first page.

What do you mean, from the other one you just looked at?---Yes.

Yes. We've established, I think, haven't we, that that was a different web page?---Yes.

Now I'm asking you about this. Was this document here the subject of a second web page? Web - - -?---That's what I just said. Yes.

Yes. All right. And is that document there the document subject to the link you sent to the water corporation?---Sorry. Run that through again.

Sure. Is that document there that has just been given to you - - -?---Yes.

- - - the document which is the subject of the link you gave to the water corporation?---This would have been linked to at the time the water corporation received it. Yes.

All right. So that's what you had on the internet, wasn't it?---Yes.

And that - the document you have contains a number of photographs. Is that correct?---Yes.

And none of those photographs were discovered or disclosed to the defence. Is that correct?---No. That is not correct.

Well, then, how - how do you say that they were discovered or disclosed?---That was disclosed on - there's paperwork - these are all the documents that I have and it was declared on that.

All right. When were the photographs taken?---At various times from the original problem. I don't know when the last one was taken, but it was over a number of years.

So you're referring, are you, to your affidavit of discovery? Is that where you say that you gave a list of the photographs? Perhaps you could just have a look at this document, please?---I'm - I'm really foggy on that.

Now, what's the date of the affidavit you've sworn there?---Hang on. This appears to be it. This is dated 9 September 2015.

Right. Were any of the photographs that are in the document that has just been given to you before that one - are any of the photographs that were taken then taken after that date of your affidavit?---I don't know.

You don't know. All right. Look at - look at the seventh page of that document. Does that show handwriting - - -?---Are you referring to this?

- - - at the top? Does that show handwriting at the top beginning 7.7.94 and I'm looking at - if I can assist - that one?---Yes.

All right. And where did you get that from?---The Bunbury City Council.

Right. Did you disclose that in your affidavit of discovery?---I'm not sure.

All right. And underneath that, there's some footing detail for a retaining wall. Is that correct?---Yes.

So what - what's the relevance of those two documents - the handwritten document and the footings of the retaining wall?---The handwritten document is part of the collection of paperwork I had, and the bottom one, the footing detail, is a generic footing detail applied to a variety of building permits. Not all of it applies to mine. That's just a - yes. It's a generic.

So you're making an assumption now, are you, about generic footing details?---No. I can actually read what's written on it. It says "limestone face" on this drawing, "Donnybrook stone face" on a different drawing. It's sort of hard to read on this. Mass rock as an example on that drawing.

So is this a - what - a footing detail for the western boundary for Keble Heights or the eastern boundary?---I believe it would be both.

Both. And the next page is a page that contains contour surveys in relation to Keble Heights. Correct?---Yes.

Which shows the location of retaining walls on the western side?---Yes.

And then there's the next page, stormwater storage requirements?---Yes.

That refers to a wonder wall. Do you know what a wonder wall is?---The stormwater storage requirements - the wonder wall, I'm not real sure, no.

And it contains other documents with contour surveys on it, doesn't it? The next page is another one?---It's exact same contour survey with other information that have been placed on top of it.

Right. And then there's another - the next page, there's a plan and at the bottom it says "sewerage pipes in area"?---Yes.

"Original pdf." Is that something you typed there at the foot of that?---I put the label on. Yes.

Yes. You put the label "sewerage pipes in the area" et cetera, did you, at the foot?---Yes.

All right. And the rest of the documents are - the rest of the documents are photographs of the site, are they?---Yes. Well - - -

I tender that document?---I assume so. Yes.

I tender that document.

HER HONOUR: Right?---Which one?

Not the affidavit of discovery. The other bundle, I suspect, Mr - - -

MORISON, MR: That's right.

HER HONOUR: Yes.

MORISON, MR: That's right. Thank you.

HER HONOUR: All right. This is exhibit 21. And exhibit 21 is a 48 page document. Can I describe that as a download of your webpage - of a web page?---A print out.

A print out of your web page?---Yes.

So it's a print out of Mr Laughton's web page.

EXHIBIT 21 Defendants
Print out of Mr Laughton's web page

HER HONOUR: Thank you.

MORISON, MR: Sorry. In one with the photographs, there was a - there was a person sitting on one of the retaining walls.

HER HONOUR: In this bundle?

MORISON, MR: No. I'm sorry. I'm doing another matter now. There was a photograph of somebody sitting on a retaining wall. One of the retaining walls on 14 Trinity Rise?---No. I don't.

HER HONOUR: It was the exhibit 7? Yes?

MORISON, MR: It could be. We've got several exhibits with photographs.

HER HONOUR: I - this one has got someone on the wall.

MORISON, MR: Thank you, your Honour.

HER HONOUR: It might be this one.

MORISON, MR: That's right. Yes.

HER HONOUR: Do you want Mr Laughton shown this?

MORISON, MR: Yes. If you would, please.

HER HONOUR: Okay. You can keep those together, thanks, John. Goes with that. So this is a photo which is in a bundle for exhibit 7, for the transcript.

MORISON, MR: Thank you, your Honour?---Yes.

Now, do you recognise the person sitting on the ledge there?---I'm sort of 70 per cent sure it would be Daryl Marsh.

Daryl Marsh, is it? Right?---James Marsh, sorry.

James Marsh, you say?---That wasn't (indistinct) - - -

Sorry. It's not Mr Marsh, is it?---Yes. Well - - -

It's somebody you invited on, isn't it?---No.

No. All right. That can go back to the court. Now, in the course of Mr Woodhouse doing his investigations - - -

HER HONOUR: Could you just pause there? I just have to get all of these. We're going to get terrible out of order.

MORISON, MR: Yes.

HER HONOUR: Thank you.

MORISON, MR: Thank you, your Honour. Now, in the course of Mr Woodhouse doing his investigations for the remedial plans and for the report for this court, did he go upon 14 Trinity Rise - - -

HER HONOUR: Sorry. Did who?

MORISON, MR: Did Mr Woodhouse.

HER HONOUR: Mr Woodhouse?---I don't believe Mr Woodhouse did. No.

MORISON, MR: All right. Is it the case that if the retaining wall had complied with the building regulations that it would have been possible to have raised its height by putting more bricks on top?

HER HONOUR: Sorry. Can I just - that's the common retaining wall?

MORISON, MR: I'm sorry. Yes. Yes. Is it the case that if the retaining wall - that section on the common boundary - had complied with the building regulations then it could have been built up by adding bricks to it?---I'm not a structural engineer, but you can indefinitely add height to a retaining wall. No.

All right. Did you not tell the Marshes that if the wall had not - if the wall had complied with the building regulations, it could have been raised?---I did not tell her any such thing. No.

Your Honour, those are my questions.

HER HONOUR: Now, Mr Laughton, if there was a lawyer here, you could do what's called re-examination which I gave the opportunity with the other. Is there anything you wish to say by way of explanation further to what you've been asked by Mr Morison. So is there anything you need to clarify? It has to arise out of what you were asked in cross

examination?---Okay. Regarding the web page, which I believe was a dark link - - -

What's a dark link, just for my information?---Something that the search engines don't index.

Okay. Thank you?---Basically not available to the public unless you happen to know precisely what the URL is. When I was selling my house, one of my duties is the duty of disclosure saying this - there's a problem in this area. I had a page up saying these are the rates, this is how much I need to pay for termite treatment, this how much I need to pay for water bills, this is how much I need to pay for electricity and a lot of other information. On the bottom of that page, I originally had a link to a brief description of what the problem was, of the - trying to explain in as much detail as I possibly could what the - what the problem is.

By the problem, you mean the retaining wall issue?---Yes. As I - I don't remember the exact dates. When I went to go and visit a lawyer to see where I stood and what my options were, I updated my page with as much building permits and other information as I could, and again at an unknown date, I removed the one and only link to that - the 11B Keble Heights retaining wall timeline, so that it could not be discoverable by search engines. Unfortunately, it appears I've either failed to update the robots.txt file, or I've updated it and I've reverted back from an earlier version accidentally. These webpages should not have been available to the public, and they definitely should not have been available to the defence.

MORISON, MR: Your Honour, I tender the search engine search which caused the - which caused the web page to come up. That has been provided, Mr Laughton.

HER HONOUR: That can be exhibit 22, which is - what do we call this?

MORISON, MR: A photocopy - a print-screen of a Google search.

HER HONOUR: Print-screen of Google search.

MORISON, MR: Perhaps the words Frank Cavaldi "Bunbury" could be included in the description.

HER HONOUR: Frank Cavaldi "Bunbury". All right. That's exhibit 22.

EXHIBIT 22

Defendants
Print-screen of Google search Frank
Cavaldi "Bunbury"

HER HONOUR: Thank you. Anything else you need to clarify?---As far as the quote to the retaining wall goes, the - the number - the 13,500 I think it was - being in relation on the 5 metre - 5.6 metre retaining wall section - that was not done by the City of Bunbury. That was done by me. And it was based purely on materials with no labour, with no cost of hiring a concrete pump, with no cost of racing, with no cost of formwork. Just pure materials needed to do that 5.6 metre section.

Yes. All right. Thank you. That's it?---Yes.

All right. You can return to your seat?---Okay.

(THE WITNESS WITHDREW)

HER HONOUR: That can go back to Mr Morison's - Morison's court - I would say that's a court document. Is that the affidavit of discovery, is it?

MORISON, MR: That's right, your Honour.

HER HONOUR: Okay. All right. Now, that concludes your case, Mr Laughton. You've not - you've finished your case?

LAUGHTON, MR: Yes. There is also the case of - which is partially relevant - the post and rail retaining wall built on the sewerage easement.

HER HONOUR: Right. So the - why are we - - -

LAUGHTON, MR: Well, it's a continuation of the exact same retaining wall. I haven't actually - - -

HER HONOUR: So are you trying to put in some further evidence for yourself, are you, now? I'm not sure what you're saying. Have you got another witness coming, have you?

LAUGHTON, MR: No.

HER HONOUR: So what is it you're saying now. Just tell me what you're trying to do. Okay?

LAUGHTON, MR: I'm trying to - well, the claim is - well, I haven't actually claimed it. It was just asked for proof that there was sand against the fence. They haven't

actually claimed that there was no sand against the fence, but as part of that proof, there's a post and rail retaining wall - - -

MORISON, MR: Objection. This is evidence.

LAUGHTON, MR: Say again.

HER HONOUR: So are you giving me further evidence about the case, are you?

LAUGHTON, MR: Yes. Sort of.

HER HONOUR: Well, you either are or you - sorry. So you are or you aren't. Generally speaking - - -

LAUGHTON, MR: That's fine. Yes. Okay.

HER HONOUR: Yes. Generally speaking, your evidence-in-chief has been given, you've been cross-examine on that and you've re-examined on that, and it would only be - it's very rare for that to be opened again. Do you see what I mean?

LAUGHTON, MR: Not really. But that's okay.

HER HONOUR: That's the process - in other words, to recall yourself as a witness to give extra evidence is not often done. Okay?

LAUGHTON, MR: Okay.

HER HONOUR: Yes.

LAUGHTON, MR: Yes.

HER HONOUR: I'm not requiring you to withdraw that, I'm just explaining the process. This is what you're saying is something that should have been - that you should have said earlier. Is that right?

LAUGHTON, MR: I thought I did say it earlier, but that's okay. Yes.

HER HONOUR: Okay. All right. Now, five to 1. You're ready to open your case?

MORISON, MR: Yes, your Honour.

HER HONOUR: And how many witnesses have you got?

MORISON, MR: One.

HER HONOUR: One. Okay. And that's Ms Marsh?

MORISON, MR: Yes.

HER HONOUR: Look, I'm very keen that we finish the evidence today, so perhaps we will take a half an hour break, if that suits everyone. Does that suit orderly and Madame JSO?

JSO: Yes, your Honour.

HER HONOUR: And we can come back at 1.30 and start Ms Marsh's evidence. Now - thank you. Now, Ms Marsh will give her evidence and she has put a written statement in which will probably go in as her evidence-in-chief. Now, your job - and you need to do - this is a legal rule, okay, which I'm explaining to you. It's called the rule in *Browne v Dunn*. And that is that if Ms Marsh's evidence contains something that you think is wrong or incorrect or that you have said happened differently, you need to challenge her about that in cross-examination. Okay?

So you will probably need to refresh your memory over the lunch break of her statement and give some thought as to whether you have cross-examination for her. Also, you may have some original material that you want to put to her - things that she might have said or done that you think are relevant, and that's your opportunity to put those things to her. Okay?

LAUGHTON, MR: Okay. So when do you get a copy of the statement?

HER HONOUR: That has already been provided to you. It's part of the case. Like - you know you put in your statement 32A.

LAUGHTON, MR: Yes.

HER HONOUR: Ms Marsh did too.

LAUGHTON, MR: I don't believe I've received that.

MORISON, MR: You did.

HER HONOUR: It was attached to the listing conference memorandum. It was filed in February of this year, and it's a three-page document.

LAUGHTON, MR: Okay. Let me just find it.

HER HONOUR: There's only the one. It was never amended, Mr Morison, or anything?

MORISON, MR: No, your Honour. There was an affidavit done in similar terms to support the application to set aside a default judgment, but we did it in a different - on 32A.

HER HONOUR: Form 32A is what will be going into evidence as the evidence-in-chief.

MORISON, MR: Yes. There will be a few deletions, your Honour, as a result of - I can deal with that now - as a result of some of the evidence that has occurred.

HER HONOUR: Well, I think we will deal with it after.

MORISON, MR: Deal with that - yes.

HER HONOUR: Mr Laughton hasn't found his copy yet.

MORISON, MR: No. While we're just waiting, I wonder if I could just, for the record, hand back - - -

HER HONOUR: Yes.

MORISON, MR: - - - all three bundles of those documents.

HER HONOUR: You don't happen to have a spare copy for Mr - of the 32A?

MORISON, MR: I might do. I might do.

HER HONOUR: It's just, it's very difficult to get it off a - - -

MORISON, MR: Yes.

HER HONOUR: - - - a spiked court file.

MORISON, MR: Yes, indeed. Actually, I don't.

HER HONOUR: Right.

MORISON, MR: But I'm happy to have this photocopied.

HER HONOUR: Is that a marked - is that marked up?

MORISON, MR: Well, it - it has been marked up in - - -

HER HONOUR: Well, I tell you what. I'm going to annoy my assistant greatly and take that off the file. That's the court's statement - that's the court's copy. Could you make two copies? One for Mr Laughton and I would - it would be useful if I've got a separated-out copy for myself.

Okay. So that - this will be, essentially, the - the evidence given, Mr Laughton. You - as - you may make some objections if you want, as - as objections were taken to yours, and you will have the right to question Ms Marsh about her evidence, and any other matters that you consider need to be raised after what I've just told you about needing to challenge her evidence, and put to her your side of the case. Okay? All right. Thank you. Can you photocopy that, and give me a copy as well?

JSO: Yes.

(LUNCHEON ADJOURNMENT)

HER HONOUR: All right. Now, before we get ahead - don't get ahead of ourselves, Mr Laughton's statement of evidence needs to be tendered and struck-through, otherwise there will be no - it won't be on the - so tendered into evidence is the statement of evidence of Mr Andrew Laughton. It's a form 32A, as amended. That's exhibit 23.

EXHIBIT 23 Plaintiffs
Statement of evidence of Mr Andrew
Laughton

HER HONOUR: So that's - that's exhibit 23. Now, Mr Laughton, have you read through Ms Marsh's statement?

LAUGHTON, MR: Yes.

HER HONOUR: Do you wish to make objections to any passages in that statement?

LAUGHTON, MR: There are references to a structural - to a - sorry. There are - - -

MORISON, MR: It might assist if I just indicate what we propose to take out of the statement.

HER HONOUR: First?

MORISON, MR: Yes, please.

HER HONOUR: And then you can object to anything that's left in that is - yes, okay. Thank you.

MORISON, MR: Thank you. Firstly, we propose that paragraph 16 at the foot of the first page be removed.

HER HONOUR: Yes. So 16/9?

MORISON, MR: Yes. Yes. The numbering is strange there, but 16 or 9.

HER HONOUR: Right.

MORISON, MR: We propose that 20 aka 13 be removed.

HER HONOUR: Yes.

MORISON, MR: 21A, 22B.

HER HONOUR: Yes - they come out?

MORISON, MR: Come out, please.

HER HONOUR: Yes.

MORISON, MR: 35 aka 11, on the third page, can stop after, in the second line, "along the common boundary" and the rest of the paragraph, which begins "annexed here to and marked" - - -

HER HONOUR: Yes.

MORISON, MR: - - - down to the end can come out.

LAUGHTON, MR: Sorry. Run that through again, sorry.

MORISON, MR: Yes.

HER HONOUR: Paragraph 35.

LAUGHTON, MR: Yes.

HER HONOUR: The only part of is - staying in is the words, "My husband and" - and I presume - "and I built retaining walls on our property in 2012 but this did not result in any extra soil being placed on the common boundary." The - all the rest were just hearsay about the Pathos letter is coming out.

MORISON, MR: And then finally, paragraph 41 aka D to come out, please.

HER HONOUR: Right. All right. Thank you. Now, Mr Laughton, do you wish to go through and make objections to other paragraphs in the matter?

LAUGHTON, MR: Sorry. Yes.

HER HONOUR: Yes. Which one?

LAUGHTON, MR: Point 3(i).

HER HONOUR: Yes.

LAUGHTON, MR: "Damage to the retaining wall by" - "was caused by its defective state." Is there any proof of that?

HER HONOUR: Yes. This - I think 2, 3 and 4 are, really, sort of statements which then refer to the subsequent heading, so I think the - so 2 is then picked up and run with - it's the preamble, if you like, to paragraph 7, but it can come out, if you wish.

LAUGHTON, MR: Yes, that's - I - I would like it to be removed, yes.

HER HONOUR: Okay.

MORISON, MR: Which was that, your Honour?

HER HONOUR: It's paragraph 3 - it's "the damage was caused by its defective state."

MORISON, MR: Yes, your Honour.

HER HONOUR: So - yes.

MORISON, MR: Yes.

HER HONOUR: So do you want 4 and 5 to come out on the same basis? They are amplified later in the statement. That would just - it's obviously just a - - -

LAUGHTON, MR: Yes, 4 can come out.

HER HONOUR: Yes.

LAUGHTON, MR: 5 can probably stay there for the moment. 6 can stay. 8 and 9 can stay. 10 can stay. 11 can stay. 12 can stay. 13 can stay. 14 can stay. 15 can stay. 16 has already been scrubbed. 17 - - -

HER HONOUR: That has already gone into evidence, I think. It's exhibit - is it, or not?

LAUGHTON, MR: I believe so.

HER HONOUR: Maybe not.

LAUGHTON, MR: Perhaps not.

HER HONOUR: No, I don't think - that's not gone in.

LAUGHTON, MR: No.

MORISON, MR: No. It - it will come from the water or the City of Bunbury files.

HER HONOUR: All right. So just - so is there objection to that paragraph? Can you say why?

LAUGHTON, MR: 17, yes.

HER HONOUR: On the basis that?

LAUGHTON, MR: The structure report is not admitted as evidence.

HER HONOUR: Yes.

MORISON, MR: Your Honour, business records - - -

HER HONOUR: It can't be evidence - - -

MORISON, MR: No.

HER HONOUR: - - - of the facts contained in it.

MORISON, MR: No.

HER HONOUR: I don't think it takes it any further.

MORISON, MR: No. No, your Honour. I - I consent to that.

HER HONOUR: All right. Paragraph 17 comes out.

LAUGHTON, MR: Paragraph 18.

HER HONOUR: I think that is in already. That's - exhibit 18. What's that one? No. Just bear with me. Exhibit 18 is - no, that's the water authority one. But exhibit 17
- - -

MORISON, MR: Yes, I think it's exhibit 17, actually.

HER HONOUR: "To the Building Commission, info dated 28 May" - yes, that's already in as evidence - exhibit 17. So that will stay.

LAUGHTON, MR: Sorry, 17 or 18?

HER HONOUR: That's exhibit 17. That email, which is referred to in paragraph 18, is exhibit 17.

LAUGHTON, MR: Okay. So 17 and 18 are both staying?

HER HONOUR: No, 17 is out.

LAUGHTON, MR: Yes.

HER HONOUR: But 18 - - -

LAUGHTON, MR: The email itself?

HER HONOUR: Yes, is exhibit 17, so that's already in.

LAUGHTON, MR: Okay.

HER HONOUR: Because you - and you were asked about that in - - -

LAUGHTON, MR: Yes. Yes. Yes. 19 can stay. 20, 21, 22 is already out. 23, I object to. It's - - -

HER HONOUR: What basis?

LAUGHTON, MR: Well, the only structural engineer's report that claimed it was a problem was the structural engineer's report that's been - not been admitted as evidence.

HER HONOUR: Well, the only issue with that, sir, is that your own expert refers to a tree being - - -

LAUGHTON, MR: He does.

HER HONOUR: So if that comes out, it may be that there isn't any evidence to support that part of your structural engineer's report.

LAUGHTON, MR: Yes. That's fine.

HER HONOUR: So I think you should - you want - still want it to come out?

LAUGHTON, MR: Yes. The only reason it's in that report is because it was mentioned in the structure report, so it comes out of both, that's fine.

HER HONOUR: Mr Morison?

MORISON, MR: It's an admission, and if it's hearsay, then it's an admission which is exception to the rule against hearsay.

HER HONOUR: What was exhibit S - annexure SM6? Because I actually didn't see that.

MORISON, MR: It's - it was the same as exhibit - same as exhibit 17. I don't mind it coming out, because the exhibit is in.

HER HONOUR: All right. Just - that's Mr Laughton's. Marsh affidavit. I will just check to see what - yes, SM6 is the email, which is already in exhibit 17. So that can come out - paragraph 23.

LAUGHTON, MR: Yes, your Honour.

HER HONOUR: Yes.

LAUGHTON, MR: Hang on. 25 can stay. 26 can stay. 27 can stay. 28 can stay. 29 is assumed - yes, I will object to 29 as well.

HER HONOUR: Mr Morison.

MORISON, MR: The claimant has given evidence himself that the sewer main was built after the construction of - of 11A and 11B Keble Heights, so I don't see that - - -

HER HONOUR: Has he?

MORISON, MR: I believe so.

HER HONOUR: Wasn't - the sewer main was - the evidence was the sewer main was put in 1991 - - -

MORISON, MR: That's right.

HER HONOUR: - - - and this - and the Keble was 1994?

MORISON, MR: Yes.

HER HONOUR: You said it was after just then.

MORISON, MR: Well, his evidence was, and it might even in his witness statement, that - that the sewer main went in after the Keble Heights units were built.

LAUGHTON, MR: Yes.

MORISON, MR: There was something - something in there about - one would normally think that it would be the other way around, but in this case, I believe what happened was - and so on. Perhaps if I just look at his witness statement.

LAUGHTON, MR: Yes, I will - I will leave that - leave that one to stay. That's okay.

HER HONOUR: I think that's - that's provable by the - by the documentary evidence, anyway.

LAUGHTON, MR: 30 can definitely go.

HER HONOUR: Why?

LAUGHTON, MR: The ground has been proved to be sloping by various contour diagrams.

HER HONOUR: Mr Morison?

MORISON, MR: Well, this is a personal observation, your Honour.

HER HONOUR: Yes. It was a common statement of fact. It can stay in. Next matter.

LAUGHTON, MR: 31 can stay. 32 can stay. 33 can stay. 34 can stay. The remaining part of 35 can stay. I'm not sure what annexures SM8 and SM9 are.

HER HONOUR: Okay. I will tell you. I've got those. They were - I think made cross-reference to an affidavit filed by Ms Marsh on 27 November last year. The - you know, set aside things, and they are - - -

MORISON, MR: That's actually coming - coming out, the SM8 part?

HER HONOUR: Because it refers to the - hang on, Mr Laughton wants to know what they are. At most, he could look it up. Okay. Well, SM6 is that affidavit. I don't - but the others - the next one in my pile is SMS10. There is documents in between, but one of them - I think they

look they're drawings, footing drawings, but they're not specified in my copy.

LAUGHTON, MR: Yes. The statement at 37 is wrong, but we will leave that in for the moment.

HER HONOUR: So I think you should have to clarify what - I will clarify those, Mr Morison because they're not marked on my copy of the affidavit.

MORISON, MR: Right.

HER HONOUR: 8 and 9.

MORISON, MR: Yes. 8 and 9 - 8 is - I don't know if this assists, but 8 is coming out because 21 is coming out.

HER HONOUR: Right.

MORISON, MR: 9 is the - the three photographs that I think Mr - - -

HER HONOUR: That are marked for identification?

MORISON, MR: Yes, that's right.

HER HONOUR: Yes. All right. Okay.

LAUGHTON, MR: They can stay.

HER HONOUR: Yes. 39.

LAUGHTON, MR: 39 can go.

HER HONOUR: Yes. That seems to be hearsay, Mr - - -

MORISON, MR: I agree, your Honour.

HER HONOUR: 39 is struck through.

LAUGHTON, MR: 40, 41 has already been struck out. 42, I object to.

HER HONOUR: Yes, that's probably a matter of submission.

MORISON, MR: Yes, your Honour.

HER HONOUR: 42 with the little e comes out.

LAUGHTON, MR: 43 is not relevant.

MORISON, MR: I disagree, your Honour.

HER HONOUR: It's probably a statement of fact. That can stay in.

LAUGHTON, MR: Okay. 44 can stay. 45, I'm not sure. That's a - - -

MORISON, MR: I'm happy for 45 to come out.

HER HONOUR: Thank you. 45 comes out. All right. Now, that can be - that statement can be taken as the - admitted into evidence.

MORISON, MR: Yes, your Honour.

HER HONOUR: And that will be following on from Mr Laughton's own statement, and it will be exhibit 23. Exhibit 23 is the statement of evidence - 24, yes, thank you, Madam JSO - of - so it's exhibit 24 of Sharyl Marsh, form 32A as struck through. I should have probably been a bit more technical and said "as redacted" but struck through will do. So that's exhibit 24.

EXHIBIT 24 Defendants
Statement of evidence of Sharyl Marsh,
form 32A as redacted

HER HONOUR: All right. Now, do you wish to call Ms - - -

MORISON, MR: I call Sharyl Marsh.

HER HONOUR: Thank you. Now, remembering what I said - when she has completed her evidence, you will have the opportunity to ask her questions, okay, so you will need to make a note so you don't forget.

LAUGHTON, MR: Yes. I didn't do that last time.

MARSH, SHARYL sworn:

MORISON, MR: Could the witness see MF1, please?

HER HONOUR: She could, because I'm running out of room. MF11 was the quote. Was it MF12 - is it the plans?

MORISON, MR: Yes, please. Yes. Sorry. Yes. Are those the - are those the plans of two pages of proposed

retaining wall plans from civil and structural engineers?---Yes.

Yes. And how did you come into possession of those?---For 48B Keble Heights or 48 Keble Heights, through the water authority, I think. I'm not sure.

I tender that.

HER HONOUR: Thank you.

LAUGHTON, MR: It's the building permit for the new retaining wall.

HER HONOUR: No. Just show Mr - please show Mr - this is one from 1994.

LAUGHTON, MR: '84?

HER HONOUR: '94.

LAUGHTON, MR: '94. All right. Yes. Okay.

MORISON, MR: The yellow shading is mine, your Honour.

HER HONOUR: Exhibit 25, previously MF11, is some engineering drawings with the water authority stamp, 15 April 1994.

EXHIBIT 25 Defendants DATE 15/04/1994
Engineering drawings with the water authority stamp

HER HONOUR: Okay. Can you - that's 25. Is it 25? Can you - actually staple them, please?

JSO: (indistinct)

HER HONOUR: Yes. Thanks.

MORISON, MR: Could the witness now see MF13, please. Can you describe what those photographs are there?---This first one here is where the sewer pipe is. That's just on the other side of our property.

All right. So that's - - -?---At Keble Heights.

Right. So that's on - on the property of - of your next-door neighbour - - -?---Yes.

- - - 15 Keble - - -?---Keble Heights.

- - - Heights? Right?---And that's Andrew's property down there, and that's where Andrew started to dig away when he first started, removing all that area of soil and grass stuff.

HER HONOUR: And just for the transcript, you say that's Andrew's property down there. You're talking - - -?---Down the bottom here? Yes.

- - - about the area on the top right-hand corner of the photo?---Yes. This one here is another one just showing the sewer main there. That's the neighbouring property at Keble Heights, and that's our wall there.

MORISON, MR: So that's basically the same - same place, except the photograph is now taken from the south looking north?---Yes.

Is that right?---Yes.

All right. So that photograph is taken on the property of Darryl of 15 Keble - - -?---Yes.

- - - Heights. Is that right?---Yes. And that was before all the soil was removed away.

Before the soil was removed?---Yes, because there's a sewer line which runs straight along the property.

Right?---That's a pipe, sorry.

Right. Yes. Thank you. And - - -?---And this one is just from our property, showing the first sewer pipe after the - well, the hole after the end of the driveway, and that's a manhole, and the little - or there was in another picture, there's a little mark, and it just runs straight along to this other sewer main.

Right. Now, is there a short retaining wall to the right?---Yes. That's that one there that runs along there.

All right. Now, Ms Walsh, you can put that down now, if you would, and I will tender that.

HER HONOUR: All right. Pass them back, thanks, Mr Orderly?---Thank you.

They can be - exhibit 26 is three photos of the - can I call that the sewer easement?

MORISON, MR: Yes.

EXHIBIT 26

Defendants

Three photographs of the sewer easement

HER HONOUR: Thank you.

MORISON, MR: Just on the issue of that short retaining wall you've just identified, Mr Laughton has given evidence that the retaining wall along the eastern boundary of Keble Heights continues just right through to Trinity Rise?---No. It doesn't.

What do you say about that?---No.

What's the position?---It stops at the corner of Keble Heights property, Andrew's property, and ours, and then there's actually no retaining wall that runs along. There's a garden bed made out of stone, and then the retaining wall starts at - for 12 Trinity Rise, at the top of our driveway.

And how is it that that short retaining wall came to be - the one that you saw in the photograph that was just on the right there, just inside property?---Okay. Yes. Sorry. The - the - the sheet and the pillar one.

The post and rail, I think it's called?---The neighbours only got - when he did his retaining wall, he never retained, so they've just used the grey fence sheeting stuff, and it had fallen over a couple of times. Just a couple of sheets had broken, and he was about to sell his house, so he came and asked us if he could remove some soil from right along in front of the fence line, and put in that little wall there, and we said, "As long as you are happy to do it, we're happy to pay for our sheets of the grey stuff to go back up."

And we were quite happy, because a big truck had been up and put a couple of cracks in our tarmac stuff when the neighbouring property had put in a pool. So he put that in. It's not very deep. It's just enough to hold that soil, and he removed a whole strip of soil between the fence line and that retaining wall.

Right. Just on another subject now. Did you observe the retaining wall on your property being built?---Yes.

You weren't there, presumably, all the time?---No.

Did you observe vehicles there or Bobcats or any machinery?---After I got home, after work, yes.

And where were they located when you saw them?---They were in the strip on our property.

All right?---I am - I have to be really honest and say I don't know if they went on to the other side or not, but they were always on our side. He had a big swing arm - - -

Yes?--- - - - on the front of the dozer, and that's how he was moving the bricks - - -

Right?--- - - - into place, because it's only a strip and he was just driving down and using the swing arm to move the big stones.

So when you say it was on your side of the property, what do you mean?---He didn't go onto Darryl's side of the property at all.

No. And what about - did you notice how far he went onto - how close the machinery went to the - to your western boundary?---No.

No. Did you ever see any machinery close to the common boundary between Mr Laughton's property and yours?---No.

Could the witness please see MFI4. What - what are - can you describe what they are, those - those photographs?---That's the hole James - this is the hole James dug on the side - by our side of the wall.

Just point it towards me, will you?---This one?

Yes. I see. Yes?---Yes. James - sorry. James dug that hole.

Yes?---This is a long-handled shovel.

Right?---And that's where he's putting it down the hole to show the depth that he dug down.

Now, do you know who took that photograph?---I did.

Right. And whose fist is shown there?---That is actually - - -

Just the one that you're looking at there?---That one is James's.

James' first. Right. And did you see the hole being dug?---No. I got home from work and James said he had dug

a hole, and I says, "I better take a picture of that", so that's what we did.

And what's the location of that hole?---That's on the - at the middle of the wall between that joint wall - that's
- - -

The common boundary?--- - - - on Andrew's property. Yes. Yes.

That's in the middle, is it?---Yes.

And - and it's on the 14 Trinity Rise side - - -?---Yes.

- - - of the retaining wall?---Yes.

And is the wall hard against the retaining wall? Is the hole - - -?---Yes, it's right against the retaining wall.

Okay. And pick up the other photograph, if you will. And what does that show?---That - that's showing the shovel against Andrew's side of the wall.

Right. And you took that photograph - - -?---Yes, I did.

- - - did you? Okay. Can you approximate the length of the shovel? What - how long was it? If you don't know, you don't have to say?---I don't know. But it is a long-handled - - -

HER HONOUR: (indistinct)?--- - - - it's a special long one. I'm sorry. And I can't - - -

Mr Marsh was going to assist. I'm just telling him not to.

MORISON, MR: No?---I really don't - it's - it's quite a long - it's a really long-handled shovel.

Okay?---I think it's a fencing - a proper fencing shovel.

Right. I tender those.

HER HONOUR: Exhibit - they will be - those two photos will be exhibit 27, formerly MFI4.

EXHIBIT 27 Defendants
Two photographs of hole dug on property
(formerly MFI4)

HER HONOUR: Thank you.

MORISON, MR: Now, just going to the annexures. We already had - have SM1, 2 and 3 in as exhibits there - the CTs and the strata plan. Exhibit - sorry, SM5, email - "Claimant to Bruin 20 April '14." I might just ask if I can have the Council's subpoenaed documents, please.

HER HONOUR: Green file.

MORISON, MR: I think it's the green file, actually.

HER HONOUR: It's in the green file.

MORISON, MR: Sorry, it's the City of Bunbury, is what I meant. Yes. Sorry about that. I'm sorry, your Honour. I've got it somewhere. Perhaps I will come to that - back to that if I may. It's - it was in my possession quite recently. Now, the WML plans - I think they're - they've been submitted now as an exhibit.

HER HONOUR: As an annexure to exhibit - to exhibit 13.

MORISON, MR: Thank you, your Honour.

HER HONOUR: A missing exhibit, which has now been found.

MORISON, MR: Thank you. SM8 might, in fact, have come out. Yes, that's out now. SM9 - those three photographs are in. SM10 - water corporation to claimant 11/09/15 is exhibit 18. SM11 - no need for that. Well, that has been taken out. The building permit - I will (indistinct) building permit. You referred in your witness statement to a building permit. Could you look at this document, please. Is that the building permit for the retaining wall at 14 Trinity Rise?

HER HONOUR: Is that already exhibit 11? I've got a - is this - is it building permit - at the top, Madam, has it the blue numbers BP62012.30022.1?---BP6 - yes.

I think that might already be exhibit 11.

MORISON, MR: All right. My description of exhibit 11 is "Building permit 8512." Is the building permit there dated the 8th of the 5th - - -

HER HONOUR: Yes.

MORISON, MR: Is it?

HER HONOUR: Yes.

MORISON, MR: All right. Thank you. There's no need for that, then. Thank you. That can come back. Thank you. The quotation is already in. The T and V quotation, I will put to the witness now. Could you look at this document, please. Is that the T and V fencing quotation that you refer to in your witness statement?---Yes.

I tender that.

HER HONOUR: Thank you. That is exhibit 28. It's a T and V fencing quotation.

EXHIBIT 28 Defendants
T and V fencing quotation

MORISON, MR: You're refer in - - -

HER HONOUR: Stapled, thanks.

MORISON, MR: You refer in your witness statement to an exchange by email with Mr Laughton about the quotation (indistinct) document. Is that the email exchange - the email chain relating to the T and V quotation?---Yes, it is.

If I can tender that.

LAUGHTON, MR: Can I just have a quick - - -

HER HONOUR: All right. That can be exhibit 29, and exhibit 29 is an email exchange on 7 July between Mr Laughton and Ms Marsh. It's in July '14. Okay. Thanks.

EXHIBIT 29 Defendants DATE 07/07/2014
Email exchange between Mr Laughton and Mr Marsh

MORISON, MR: Now, that just leaves the email SM5 - the email claimant to Bruin, 20 April '14. Your Honour, may I just sit down while I find - - -

HER HONOUR: Yes.

MORISON, MR: - - - that.

HER HONOUR: Well, that's out. Paragraph 17 is out.

MORISON, MR: I see. All right.

HER HONOUR: Because it referred to the struck tier - that was Mr Laughton's objection, and we - and that was - it came out by agreement.

MORISON, MR: So SM5 is out?

HER HONOUR: Yes.

MORISON, MR: Yes. Very well. Now, just a couple of questions. Did you give Mr Lawton permission to go onto your property at any time?---No.

Did you squirt him with a hose?---No.

That's the evidence of Mrs Marsh.

HER HONOUR: Yes. All right. Thank you. Mr Laughton, you can now stand up and cross-examine Mrs Marsh by - - -

LAUGHTON, MR: Okay. Can I get the evidence item 27 back, briefly?

HER HONOUR: Which one?

LAUGHTON, MR: Photos of the hole at the face - at the base of the retaining wall.

HER HONOUR: Sure.

LAUGHTON, MR: 27, I think it is.

HER HONOUR: The ones with the shovel?

LAUGHTON, MR: Yes. Yes. Just if you needed to refresh your memory. I'm not sure how to say this without suggesting.

MORISON, MR: Mr Laughton seems to think he can't lead.

HER HONOUR: You can - you can ask what you like in cross.

LAUGHTON, MR: Okay.

HER HONOUR: You can put to her propositions, and ask her, for example, if she agrees or disagrees with it. Sorry, it's only when you're - you're a witness you can't lead.

LAUGHTON, MR: Okay.

HER HONOUR: So you can put to her, "Look, isn't it right that that's a shovel?" or whatever - you know.

LAUGHTON, MR: Okay.

HER HONOUR: I'm just giving you an example.

LAUGHTON, MR: Yes, yes, yes. Yes. I probably should have also had - yes. Okay. The gap between the face of the retaining wall and the foundation of the retaining wall - sorry. That hole appears to be between the foundation - the backing and the face, which has moved since it was built. Is there any reason why you would think that was not the case?---I think that the - I don't think the wall has moved that much, and James dug straight down the side of the bricks so that he could get a true - a true reading on how far down there were no backing bricks. I went and I took the photo and I saw that it's straight down beside the wall. The wall has not moved very much. It's only slight. It's - you've got to look very hard to see it, and James dug straight down the side of the wall.

It's basically a black hole?---But you can see the length of that.

Yes. And that was held against the outside face of the wall. How far from the ground was it?---Well, you can see it's on the ground. It's - that - that shovel is just about - it's very - I - I don't dig with it, because it's just about as tall as me. Well, it might be as tall as me, because it's a fencing shovel.

Okay. I - I can see it, but I can't see that it's on the ground?---It - it was on the ground.

Okay. Yes. That's - that's about all.

HER HONOUR: You don't want to ask her about anything else she said? If you don't, you're taken to accept it, okay?

LAUGHTON, MR: Okay.

HER HONOUR: Do you want to bring that exhibit back?

LAUGHTON, MR: No, that should be fine.

HER HONOUR: All right. Any re-examination?

MORISON, MR: No, your Honour.

HER HONOUR: All right. Ms Marsh, you can return to your seat. Thank you.

(THE WITNESS WITHDREW)

MORISON, MR: Your Honour, I have prepared some notes for closing in the short luncheon adjournment, and if I can hand those up to your Honour. It's a skeleton argument.

HER HONOUR: Just so Mr Laughton understands. Now, the evidence is closed, so they have finished their evidence; you have finished yours. Both parties are allowed to make - well, not - are permitted to make submissions on the facts, the law and how the law fits the facts.

LAUGHTON, MR: Okay.

HER HONOUR: Okay?

LAUGHTON, MR: Yes.

HER HONOUR: And you will get your opportunity, obviously, to do this - do that.

LAUGHTON, MR: Yes.

HER HONOUR: So you can tell - so Mr Morison is going to go first, and he's going to tell me why he says you have, essentially - you haven't proved your case, and then you will get the chance to say why you have. All right? Okay. Thank you.

MORISON, MR: Your Honour, there's no evidence that 700 millimetres of sand was against the fence when it broke. Mr Laughton conceded that that was not something of his personal knowledge, and there was no other witness of fact than him, and - so that - that is a central part of his case. The expert evidence - number 2, the expert evidence is dependent upon the court finding, as a fact, that there was 700 millimetres of sand against the fence.

The expert report doesn't allow for other - for other alternatives. It doesn't allow the court to say what would be the position if there was 500 millimetres or a metre or 200 millimetres, so that, in that respect, the expert evidence as to the effect of the fence and the soil against the fence upon the wall is irrelevant, and is not now based upon - and is not based upon a fact that was vital to the opinion since that fact hasn't been proven.

This is in no particular order but dealing still with the expert evidence number 3, the expert evidence as to the movement of vehicles is speculation, and is largely contradicted by Mrs Marsh in the sense that she never saw any vehicles there, near the common boundary.

The part of the expert's report dealing with machinery was - was simply - was simply stating what vehicles may have been involved and where they may have gone, and it wasn't really clear in any case about how far they needed to go to that short common boundary before they would have an effect on it. But in any event, it's not part of the claim of negligence that there was a - that they negligently put machinery near the wall.

Number 4, I say there is unsatisfactory evidence that the retaining wall was defective. I suggest the claimant's case never really got down to indicating what were the defects, which leads to number 5 - there's unsatisfactory evidence that the alleged soil against the fence actually caused the fence to collapse.

All that the expert's report indicates or would have indicated, if the 700 millimetre of sand fact had been established is that the - that that could have an effect on the - on the wall, but it hasn't - it hasn't gone so far as to indicate that that did cause the - the damage to the wall, and the evidence was unsatisfactory about where these cracks - when these cracks came about. It's not quite clear what cracks are deemed to be the damage and when they occurred.

Number 6, there's - I've dealt with that. Perhaps 6 - I didn't. There's unsatisfactory evidence that the collapse of the fence caused damage to the retaining wall, and that's an element of the case, and there's - again, without the court being quite persuaded about the damage that the fence - that the wall had, if any, before the collapse of the fence, and its damage after the collapse of the fence, then causation is - is not established.

Number 7, there's evidence that the retaining wall did not comply with building regulations when built. That's evidence that's referred to in various email correspondence. There's no evidence that the retaining wall then complied with building regulations much later, at the time of the alleged damage.

The - the expert sought to indicate that it was a - a good wall that was well backed, but it seems to be no escape for the claimant from the photographs showing that -

that - in quite a reasonably big hole, and quite deep - in fact, the whole depth of the - of the height of the retaining wall, there was nothing whatever, which led to the builder, the engineer acknowledging that it was only at two points where they encountered something there.

In any event, what - what appears to be the case is that the civil and structural drawings were verified by Mr Laughton in cross-examination to have been the drawings - the generic drawings - that he understood were applicable for both the eastern and the western retaining walls, and those civil and structural drawings show that the wall was entirely dependent upon aggregate being behind the wall.

There's also email correspondence suggesting that before the Council could inspect the backing, some soil had been placed upon it. So I would invite the court to reject the evidence of the engineer that the wall was well-backed, and indeed, certainly his evidence that it was essentially backed across the entire length of it is - is disproven. I go, in paragraph 8, to deal with a matter of damage. Perhaps I will come back to that, since it is a matter of quantum. 11, if I may go to, a liability issue.

HER HONOUR: Yes.

MORISON, MR: The evidence is clear, and this was admitted by Mr Woodhouse and by the claimant, that the retaining wall along the common boundary was the highest point of the block at Keble Heights. That was - that was where the soil contour line intersected the boundary between - or the common boundary between Keble Heights and the property north of it, which is called 12 Trinity Rise.

And so this corner, which is pretty much precisely the corner where the common boundary was, was the very highest point, and - and about 8, 10 metres along, the soil natural ground level dropped down by another contour - or at least, dropped down below 10 metres, which means that since the retaining wall was level, it was too low at the 10-metre contour line, which was the area of the retaining wall. And in fact, Mr Laughton has conceded that it was probably built too low and below the natural soil level.

I would submit that once it's established that the retaining wall that's the subject of this action was too low, that it was built below the natural ground level, and the claimant can't succeed. And what I would invite the court to conclude - although I don't think it's necessary -

but clearly, what seems to have occurred is that the developer ran a retaining wall along the eastern boundary.

It may have been sufficient to - sufficiently high to retain some of the soil on the eastern boundary that he had excavated away, but it certainly wasn't sufficiently high to retain the soil that he had excavated in that corner, where the common boundary is, and instead of building a high enough wall, it appears that he built a wall and then put a fence on top of it and was - and hoped that the fence would do the retaining.

Number 12 - the claimant has not proven that the defendants personally built up 700 millimetres against the fence, and Mrs Marsh has specifically said they didn't, and there's no claim that they're vicariously liable for any negligence by their engineers (indistinct) or by the builders, and in any event, I would suggest that there is no such liability in this case.

Number 13 - it cannot be ignored that the tree did contribute to the pressure on the wall, albeit excepting or accepting the engineer's view that there was less pressure that the alleged soil against the fence.

Number 15, if I can go to that, the claimant's claim suffers from too much remoteness. The wall was damaged, the court is invited to conclude, because of its defective state. If it was not in a defective state, it could have been increased in height, and if it had been increased in height, then you would have had a retaining wall retaining the - the natural ground level.

But the claimant's case seems to be, "All right, the wall was defective - nevertheless, you having a fence which had some soil against it caused the defective wall to fall over." In other words, "You have a duty of care to avoid my" - "my defective wall suffering the consequences of my wall being defective."

Your Honour, in terms of - of further evidence of the natural ground level, your Honour sees that there are inspection points for the sewer main. There's one just on the - on the neighbour's side - 15 Keble Rise - which is the - one of the other properties adjoining 11 Keble Rise to the east, and then your Honour sees in photographs that there is a - a cement structure for the sewer line, and one sees another - another port, or another plastic object coming out of the ground, and one sees that - and one knows, it's proven, that the sewer easement went in first.

And therefore, it being the level that's shown there, that was evidently the natural ground level. It could hardly have been the height of the retaining wall, because if that was so, the sewer pipe would have been either been suspended in mid-air or almost all above the ground.

Your Honour, I just say in relation to - just to clear up loss and damage quantum, I say that most of what's being claimed is not claimable - hire cars, interest on mortgage, plane tickets, and there's - there's little that is claimable. Even if liability was established, the main item, it seems, the single most expensive part of the loss and damage is the concreting work, and so I would now look to address you on the quotation.

And I go back to paragraph 8, and I submit that the evidence of the quote for the concrete work for the retaining wall on the common boundary should be viewed by the court with great caution. Firstly, because as is apparent from the building licence, which incorporates WML's plans - that's Mr Woodhouse's plans - the building licence was issued for work to be done along the entire length of the retaining wall, and that was confirmed, I submit, by Mr Woodhouse.

Secondly, therefore, the claimant's claim that \$13,500 was the value of work on the retaining wall only for 5.6 metres cannot be correct. And thirdly, the claimant's claim that the estimate of the value of the work was not that of the Council but his own estimate must be rejected, because the estimate is shown as that of the Council, and if the Council took it from the claimant that that was the value, they would have required that he certify that fact, in which case the effect of the claimant's evidence is that he misrepresented the value of the work to the Council.

And then I submit in 9 that it's more likely than not, the court should find, that the quote from Bunbury Concrete contractors is a sham. There were two quotes, and the first, without any explanation, made no reference to any distance. The witness tried to explain why he would set out the distance in an amended quote when he hadn't done so before. That evidence was unsatisfactory, and ultimately, he did admit that he had spoken to the claimant and that had led to he and apparently his partner returning the site.

In para 10, it should be found, in my submission, that the quotation is not a fair value of concreting work for the retaining wall on the boundary between the two

properties - at least, that that has not been proved on the balance of probabilities.

Just final remarks in relation to the expert's report. Your Honour, I wonder if I could see exhibit number - the expert's report.

HER HONOUR: 14.

MORISON, MR: 14. Thank you, your Honour.

HER HONOUR: Yes.

MORISON, MR: Your Honour, I did file objections to this, but I made it clear at the outset that I would not oppose the admission of this report into evidence, but I would reserve the right to press the objections upon the court as a matter of weight rather than admissibility.

HER HONOUR: Yes.

MORISON, MR: And I would ask the court to consider the objections that I've made to admissibility, because a good deal of those objections go to the issue of weight. If something is inadmissible, then it's - it's often also not deserving of much weight. So I just observed that he is entirely dependent upon instructions as to a number of matters that he did not personally observe, and there's little guidance to be obtained from his report. I would particularly refer to a plan that he has got at the back of his report.

HER HONOUR: Yes.

MORISON, MR: And - - -

HER HONOUR: That is an assumption as to original ground level.

MORISON, MR: Quite. And - and a number of assumptions are made in that plan which I say are not borne out. Your Honour, those I propose to be my submissions.

HER HONOUR: Yes. I just have a few questions - - -

MORISON, MR: Certainly.

HER HONOUR: - - - for you, Mr Morrison. It's with reference to the Civil Liabilities Act. I assume that - I'm assuming that the Marshes do not dispute they owe a

duty of care, the duty of care being that of a reasonable neighbour in a suburban location.

MORISON, MR: Is that - is that derived from the Civil Liability Act, is it, your Honour?

HER HONOUR: No, no. The - so the - the first - there has to be a duty of care owed? Yes.

MORISON, MR: Well - - -

HER HONOUR: It's quite clear.

MORISON, MR: What I - - -

HER HONOUR: Are you disputing that you owed - it's not the case that you're not saying - you're saying that you owed no duty of care?

MORISON, MR: I'm saying that we - that the duty of care has not been properly defined, and that - that I - and I don't concede as a matter of law that a duty of care arises, generally speaking, between neighbours. It would have to be a fact-based analysis.

HER HONOUR: Right.

MORISON, MR: I'm not - I'm not aware of any doctrine that
- - -

HER HONOUR: I would have thought the whole basis of Tort is the good neighbour principle, but anyway.

MORISON, MR: Literally. Yes.

HER HONOUR: I - my view is - looking at the case is that neighbours owe each other duty of care, a - you know, subject to all the reasonable tests, not to harm, but it's a reasonable - the duty of care is that of a reasonable neighbour in that location and circumstances.

MORISON, MR: Yes, your Honour.

HER HONOUR: And then - and then it's dealt with under - that - that - the duty of care then becomes as discussed in section 5 of the Civil Liabilities Act, where a person is not liable for the harm caused by their fault in failing to take precautions against a risk of harm. The risk - unless the risk was foreseeable, the risk was not insignificant, and in the circumstances, a reasonable person, the person

in this position - that's what I'm saying to you - is a reasonable neighbour in a suburban location - - -

MORISON, MR: Yes.

HER HONOUR: - - - would have taken those precautions.

MORISON, MR: Yes.

HER HONOUR: And then that has to be weighed against the probability that the harm would occur if care was not taken, and the likely seriousness of the harm and the burden of taking precautions to avoid the risk of harm. Do you agree that that's the legal analysis?

MORISON, MR: Yes, your Honour.

HER HONOUR: Okay.

MORISON, MR: I'm just - may I just make a submission arising from that?

HER HONOUR: Yes.

MORISON, MR: Putting those considerations into effect in this factual situation, the evidence indicates that the Marshes bought their block, built a house, and that before they had done so - done either, in fact - a developer of 11 Keble Heights had got to what was a sloping surface, and had levelled it by excavating at the eastern boundary. The court should find that the developer then built a wall which was too low to hold up the - the ground at the north-eastern corner, so he built a fence on top of that and allowed the soil to - - -

HER HONOUR: Well, we don't - there's no evidence at all
- - -

MORISON, MR: No.

HER HONOUR: - - - as to who put that fence - - -

MORISON, MR: No.

HER HONOUR: - - - and even when it was built.

MORISON, MR: No. There's not. But looking at it from the other point of view, from the point of view whereby the onus is upon the claimant to prove negligence, the claimant is unable to make any submissions, in my - about the - the - what was or wasn't done by the - by the Marshes.

There's no evidence, for example, that the Marshes built the fence. There's no evidence that they built the fence and then looked over and then piled sand up against it, or that they built the fence and looked over to see what the height of the retaining wall was.

They obtained a - a design of their retaining wall from structural engineers, consulting engineers and had the wall built by a builder. There was no reason for them to conduct an analysis of the ground level, particularly when they could easily see that the water easement inspection points were where they are, therefore the likelihood was that there wasn't going to be an undermining of them.

So that there's, really, from the claimant's point of view, nothing that can advance his position regarding what the Marshes had a duty to do or not to do, because there's simply no evidence that - that they did or didn't do anything that - that was reasonable for them to - to do or not.

HER HONOUR: Yes. And - so - so putting that in terms of section 5B, you're saying any risk that there was, there was not foreseeable?

MORISON, MR: Yes, and I go back to the whole creation of the duty of care, because the - the duty of care is very fact-based, I would submit, and - and I would say that what was the - what was their duty here? Their duty here in the context of buying a property, which it can't be said that they built the fence or piled soil against the fence. In those - in those circumstances, what was their duty? Was - did they have an active duty to second-guess their engineers or their retaining wall builders, or to check the natural ground level, or even to look over the fence, which was - there's no evidence that it was constructed by them or constructed after they went into ownership of the property.

HER HONOUR: Yes, and I don't think it's a case of a duty not to interfere with right to lateral support, simply because the party who made the original excavations was the claimant's predecessors, and once those excavations were made, then that breaks the link, and I think there's authority for that - that's Tirrett House case.

MORISON, MR: Right. Dalton v Angus is something that I've cited in my - - -

HER HONOUR: Yes

MORISON, MR: - - - earlier written submissions.

HER HONOUR: So - so an owner in a natural state has a right to lateral support, okay. But the - and there's a duty not to interfere with the right to lateral support, but that duty is broken once the land has been excavated by the - and the party who - who made the original excavation, which was - the original excavation here was to the Keble Heights property. That party is responsible, then, for consequences, and that's the - the case - - -

MORISON, MR: Rather than the - rather than the buyer.

HER HONOUR: No, rather than - than the person who - who - the dominant land.

MORISON, MR: Yes. Yes.

HER HONOUR: So in that Tirrett House case, it says the - "The easement support does not amount to a positive duty to support the dominant land. It only amounts to a negative duty not to interfere with the natural support possessed by the land. This negative duty is broken once and for all by him who originally made the excavation, and he alone is responsible" - "remains responsible for the consequences of his act whenever those consequences ensue."

MORISON, MR: Yes.

HER HONOUR: So the original explanation was made not by these people but - - -

MORISON, MR: No.

HER HONOUR: - - - by others.

MORISON, MR: And - and - - -

HER HONOUR: So - so it remains a simple negligent case
- - -

MORISON, MR: It does.

HER HONOUR: - - - not a lateral support matter.

MORISON, MR: But may I just say, arising from that, that further - a further matter to be put into the matrix of the negligence calculus, as it were, is that there was actually an undermining of 14 Trinity Rise by the developer of 11 Keble Heights, which makes a negligence claim such as this one very difficult, I would suggest.

We haven't counter-claimed against Mr Laughton for the loss of support, because in line with that Tirrett's case, our only claim could be, I think, against the original developer, who - who had excavated and undermined. But in terms of - of the claimant making a negligent case against us, it's a very difficult case to run, where in effect, it's a - the result of a wall and - and in effect, the breaking of the wall and the - and the soil, whatever amount that was, coming onto their side, was the effect of a withdrawal of support.

So what I would say is that if you've got a wall that's too low and the soil comes over, then that's - that's in fact that the loss arising from a withdrawal of support. So in effect, what's happened is, we could have brought a claim against somebody - not necessarily the claimant - but against somebody for building a wall that's too low. Yes.

HER HONOUR: Yes. All right. Thank you. Okay. Mr Laughton, would you like to stand up, sir. I think perhaps you may have gathered, from my exchange there, it's - these matters are legally complex, and in your case, factually complex, because as you are the claimant, you have the onus of proving the facts that support your claim, and the facts that support the - and the facts that your expert relied on to reach conclusions in that report. Okay. So what - what would you like to say in conclusion?

LAUGHTON, MR: The 700 mil sand against the fence has never been denied.

HER HONOUR: Well, it's never been admitted.

LAUGHTON, MR: Okay. It's never been admitted or denied. There's photos I've provided that show when it was recently - sand was recently removed from the fence, and if you look at the engineer's report, section 3, on the second, sort of, half of the page - - -

HER HONOUR: Yes.

LAUGHTON, MR: - - - "On my second visit I observed - - -"

HER HONOUR: Sorry, where - second visit. Yes.

LAUGHTON, MR: The third bullet point down, it basically describes the natural angle of repose, whatever that is, of the sand. Basically, that - you can't - well, sand by itself will not actually just stand there indefinitely with no support. It needs support of some sort.

HER HONOUR: All right. So if it's accepted that there were 700 mils of sand there, who put it there?

LAUGHTON, MR: That's an unknown.

HER HONOUR: Well, isn't that the end of your case?

LAUGHTON, MR: Well, if - - -

HER HONOUR: You're suing these people because you're saying they put it there.

LAUGHTON, MR: They allowed it to remain in place.

HER HONOUR: Why is that negligence, even if that's accepted? Because it's - the evidence is, and it's verified by the water authority, that says that the - there's been no change in height of that land that the sewer goes through. It's always - if there's been no change in height since 1991, why does it make the - I have to be brutal and ask you these questions.

LAUGHTON, MR: Yes, yes, yes, yes, yes, yes.

HER HONOUR: Why does it make the Marshes responsible?

LAUGHTON, MR: The height at the sewer line and the height at the fence line are different. That was never flat. That was sloping. The - - -

HER HONOUR: Well, that wasn't - that's not been in evidence. You're just saying that now.

LAUGHTON, MR: There's contours on different contour maps, on different drawing maps, that have already been submitted that say the land was sloping.

HER HONOUR: Right.

LAUGHTON, MR: Okay.

HER HONOUR: So when did the sand get there?

LAUGHTON, MR: After the fence was built.

HER HONOUR: When was the fence built?

LAUGHTON, MR: In 1994 I believe.

HER HONOUR: So the fence was built on top of the wall in 1994, but you don't - so there's no evidence of that, is there, of even when the fence was built?

LAUGHTON, MR: There's evidence of when the retaining wall was built.

HER HONOUR: Yes. There's no evidence of when the fence was built, is there?

LAUGHTON, MR: The boundary fence? No.

HER HONOUR: No. All right. And so we don't know when that soil went there - if it was the natural level, if it wasn't the natural level when it was put there. There's no real - there's nothing on which the court can draw that conclusion.

LAUGHTON, MR: I've already submitted the original building plans for the retaining wall.

HER HONOUR: Yes.

LAUGHTON, MR: And on that it gives a height datum of 10 metres - - -

HER HONOUR: Yes.

LAUGHTON, MR: - - - and it shows the - the contours along these lines.

HER HONOUR: Yes.

LAUGHTON, MR: I believe - I'm not an expert - I believe the brickwork and, according to the engineer's report, it could have gone up an extra block.

HER HONOUR: So your position, is it, taken to its logical conclusion, is that in 2003, when the Marshes moved in, that sand was there.

LAUGHTON, MR: I don't know.

HER HONOUR: Okay. Well, when were they supposed to remove all this sand, and why were they supposed to remove it?

LAUGHTON, MR: To prevent causing a problem to the neighbouring properties.

HER HONOUR: All right. When was that supposed to have been done?

LAUGHTON, MR: Before it caused damage.

HER HONOUR: Okay. And how is the damage caused, do you say?

LAUGHTON, MR: The weight of the sand.

HER HONOUR: All right. So you agree, do you, sir, that you have not proven that they put the sand there - that they put an extra 700 mils of sand there, but you're saying they - they had a positive duty to remove it?

LAUGHTON, MR: Yes.

HER HONOUR: Yes. All right. Please continue.

LAUGHTON, MR: The - the photo of the 700 mils sand, just by general engineering principles, would not be self-supporting by an angle of more than 32 degrees, therefore it's reasonably obvious that the photo that you see, it has been there for a very short period of time.

The expert evidence - if I may draw an analogy, if you see a car wrapped around a - a car wrapped around a tree, but you don't see the actual accident, it would be reasonable to assume that the car hit the tree. You can't prove it, but it's a reasonable assumption.

In this particular case, seeing the sand both on 12 Trinity Rise and the photos, it's - it would be a very hard conclusion not to draw that 700 millimetres of sand was not placed against the fence. Sorry. I think I went double negatives there, but - - -

HER HONOUR: All right. So just assuming that that sand was against the wall, and you're agreeing that you haven't - can't say that they proved that, and we've come back to the point, then, that you say they had some positive duty to remove sand. That it was - we don't need to know how long it's been there.

LAUGHTON, MR: No.

HER HONOUR: Okay. And the evidence seems to say it's remained at the same level since 1991.

LAUGHTON, MR: No, the evidence does not suggest that at all.

HER HONOUR: Well, that's what the water authority email says.

LAUGHTON, MR: The water authority email refers to the sewer - - -

HER HONOUR: Yes.

LAUGHTON, MR: - - - and not to the boundary fence.

HER HONOUR: No, but the - that says that they have - that has remained at the same height, that that infrastructure - and we've seen the pictures of the manholes on the top of the soil, have remained at the same level - - -

LAUGHTON, MR: Yes.

HER HONOUR: - - - and have not changed. So - - -

LAUGHTON, MR: Yes.

HER HONOUR: - - - those - that is at the same level it was in 1991, that land.

LAUGHTON, MR: If - - -

HER HONOUR: So after 1991, along comes the developer of your - - -

LAUGHTON, MR: '94.

HER HONOUR: '94. And they excavate and make a retaining wall across the back.

LAUGHTON, MR: Yes.

HER HONOUR: All right. So where does the duty of anybody then to remove soil from their - from what they've created where the levels remained the same come from?

LAUGHTON, MR: Okay. Well, let's - sort of, first go back a bit. There has never been any proof that the original, sort of, line that was put in at the original ground level.

HER HONOUR: Well, we've got level - what we have got is that it was put in, in 1991 - - -

LAUGHTON, MR: Yes.

HER HONOUR: - - - and the email that says - - -

LAUGHTON, MR: Yes.

HER HONOUR: - - - its level has not changed since that time.

LAUGHTON, MR: Its level. But - - -

HER HONOUR: The - the infrastructure.

LAUGHTON, MR: Yes, the infrastructure. But what I'm saying is, there's no reference from the infrastructure to the original ground level.

HER HONOUR: No. But that - we know - so we've got pictures of that strip of land.

LAUGHTON, MR: Yes.

HER HONOUR: And the only thing we do know is that that hasn't changed since 1991.

LAUGHTON, MR: The infrastructure hasn't changed.

HER HONOUR: Well, it - if that - if the - the infrastructure includes the manholes that we had seen along - doesn't it.

LAUGHTON, MR: Yes, yes, yes.

HER HONOUR: And they're showing in all the pictures everyone has shown me, they're in the pictures.

LAUGHTON, MR: Yes. Yes.

HER HONOUR: And they're on the top of the ground.

LAUGHTON, MR: Yes.

HER HONOUR: So if they're on the top of the ground, and they had never changed, then that level of the ground must be where it was in 1991, mustn't it?

LAUGHTON, MR: Yes. But the original ground level may have changed prior to 1991.

HER HONOUR: Yes. But, I mean, you've got no proof of that at - - -

LAUGHTON, MR: No, there's no proof either way.

HER HONOUR: The only proof I've got of - is where it has been since 1991.

LAUGHTON, MR: Yes.

HER HONOUR: So what you're saying is that when they moved in, in 2003, they had a duty to change ground level which had been there since 1991 which contained the sewer infrastructure.

LAUGHTON, MR: I'm sorry, can you repeat that?

HER HONOUR: Well, we know that the ground level - that strip - has been - remained the same.

LAUGHTON, MR: Yes. Yes, yes, yes, yes.

HER HONOUR: Since 1991.

LAUGHTON, MR: Yes.

HER HONOUR: And they moved in in 2003, I'm sorry if I got that date wrong but it's (indistinct)

LAUGHTON, MR: Yes, yes.

HER HONOUR: And you - so that that ground level has been the same. We don't know when the fence went in.

LAUGHTON, MR: Yes.

HER HONOUR: And that could have been put in after the ground level and - had abutted - it could have been put in and abutted the soil there. There's no reason to assume that the soil came - came after the fence.

LAUGHTON, MR: No.

HER HONOUR: That's right. So we've got a fence. We've got a soil, we've got a fence. We don't know when the fence went in. We know when the soil has been there for. So you're saying that these people came along in 2003. After we - and they - at the back of their property was this easement.

LAUGHTON, MR: Yes.

HER HONOUR: And that - and it had a fence up against it.

LAUGHTON, MR: A boundary fence.

HER HONOUR: Yes. Boundary fence against it.

LAUGHTON, MR: Yes, yes.

HER HONOUR: And so they were there - they were under some duty to then excavate away from the boundary fence in the sewer easement.

LAUGHTON, MR: In a word, yes.

HER HONOUR: Okay.

LAUGHTON, MR: I would also like to point out that the (indistinct) of the original boundary retaining wall, even if it had been built lower than the ground level which is quite possible, the original ground level is still not 700 mil higher than the top. It would have been, at most, 400. So there's still an overburden. The only question being how much extra overburden.

MORISON, MR: I think that's evidence the 400 millimetre submission.

HER HONOUR: It's the - but it's the same argument though, isn't it?

MORISON, MR: Yes.

LAUGHTON, MR: Similar, yes. Yes, yes.

HER HONOUR: It's the same principle - we're coming back to the principle of well, who's fault was that?

LAUGHTON, MR: Yes. Yes, yes. But there's a difference at least, sort of, 300 millimetres since 1994 at least. (indistinct) Expert evidence as to the movement of the vehicles, it is speculation. As far - - -

HER HONOUR: And that wasn't the basis that you opened your case on, either.

LAUGHTON, MR: No. No, no, no. That was basically to counter the claim that the sapling was a significant factor. I would like to mention that if, for some reason, vehicles were not allowed on the sewerage easement, that their driveway would be not be usable. And a lot of other - this - the sewerage network covers a lot of territory and there would be a lot of ground that you wouldn't be able to drive vehicles on:

It's unsatisfactory the evidence that the retaining wall is defective.

I would like to refer to the building permit for that retaining wall, if I may.

HER HONOUR: This is the original one.

LAUGHTON, MR: The - the new - two new ones that caused the problem.

HER HONOUR: Right.

LAUGHTON, MR: Of 2003.

HER HONOUR: This is the 2012 building permit.

LAUGHTON, MR: Sorry, it could be 2012, yes.

HER HONOUR: Okay. And - - -

LAUGHTON, MR: And just, like, I'm just sort of guessing a little bit, but there would be a requirement in there that states that it should not adversely affect other structures or buildings.

HER HONOUR: Yes.

LAUGHTON, MR: And I think it's reasonably obvious it has affected other structures or buildings.

HER HONOUR: Why? What evidence is it that these - this retaining wall has affected other structures or buildings?

LAUGHTON, MR: The fact that the retaining wall has failed and also the fact that the - - -

HER HONOUR: Yes. But linking - how do you link the two?

LAUGHTON, MR: The foundation of the new retaining wall is some - approximately 500 mils higher than the abutting retaining wall. Which has not caused the same problems.

HER HONOUR: So I've got to infer - it's an inference I'm supposed to make, is it? That them putting up this retaining wall is what has caused the problem?

MORISON, MR: That's not how the claimant opened.

HER HONOUR: Yes. First of all, it's not the way you opened the case. And I don't - - -

LAUGHTON, MR: No. Let's - - -

HER HONOUR: - - - I'm just - I'm very - finding difficult to see what evidence you've presented to me. Other than speculation.

LAUGHTON, MR: Well, to take the - well - - -

HER HONOUR: I mean, really, isn't it in the back of your mind, you're saying, "They put these up in - some time after 8 May and my fence got problems in October, and therefore they're related".

LAUGHTON, MR: Not merely because of the dates.

HER HONOUR: No. But that - there - you're saying this that is what - that this is what happened. That them doing
- - -

LAUGHTON, MR: Yes. They are closely related, yes:

Unsatisfactory evidence that the collapse of the fence caused damage to the retaining wall.

I've - not claiming that the collapse of the fence caused damage to the retaining wall. It's the actual loading of the soil that caused damage to the retaining wall. Yes, sorry:

There's evidence that the retaining wall did not comply with the building regulations when built.

I'm guessing he's referring to the original boundary retaining wall. Because - - -

HER HONOUR: Yes. That's - that's the boundary wall that he's referring to there.

LAUGHTON, MR: Yes. There's - it was probed at two different places, linear-wise, just how far in the backing blocks go. And there was found to be backing blocks to 800 millimetres from the retaining wall face. The retaining wall itself, to comply with the building regulations, only needed 400 as per the building permit. The - evidence of the quote for the concreting work - the building licence may well have been for the entire length but I only ever intended to do that particular stage at that particular time.

That's what my pricing was for. My pricing did not include the hire of the concrete pump, the hire of any

other equipment. Well, it did not include the cost of labour, did not include the cost of bracing the retaining wall, did not include the cost of any formwork, it was just purely for the materials. And that 13,500 does line up quite well if you allow for those things, for the 19 thousand odd - nearly \$20,000 for the quote. They're very closely aligned:

Because the estimate is shown as that as the Council.

No, that - it's not shown - the estimate is not shown as that of the council, at all. The - the Council has echoed what I was told them. They have not visited at the site. They - they've accepted the drawing permits. That's not how the process works. It's easy enough to ascertain by going to - visiting the Council themselves. I don't believe it's a misrepresentation of the value of the work because I was doing the labour myself.

I - I believe it was accurate. The value of the work that the quote was for was - included the hire of the concrete pump, the hire of the labour, the hire of a variety of other things - - -

MORISON, MR: Objection. Evidence. I don't think that evidence was given by the man from Bunbury Concrete Constructions.

LAUGHTON, MR: I disagree. It - not only did it include that, it included the element of risk. When the concrete contractor and his sidekick, or as the - the two of them came along to actually specify more accurately the quote, I don't believe that's unreasonable, or unsatisfactory as the wording is. I believe the - yes, the quote routine is pretty much, sort of, covered by what I've just said. It is possible that the original retaining wall was built too low. However, additional building on after that needs to take into account its original level. And I believe it was common practice to do - to build them slightly low, taking advantage of - - -

HER HONOUR: There's no - no evidence of that.

LAUGHTON, MR: There is in the engineer's report.

HER HONOUR: Where? He says that it was unlikely that was built lower than it should have been. That's his conclusion.

LAUGHTON, MR: Yes.

HER HONOUR: So it's - he's - not going to say there - so it doesn't say that it was common practice to build them lower than it should have been.

LAUGHTON, MR:

I am of the opinion that the - one of the earlier homes development subdivision, the - builder/owner had the opportunity to minimise the cost of the build by keeping the wall to its minimum viable height.

I'm sorry, section 5, the first (indistinct) quote.

HER HONOUR: Yes. Where did that say it was common practice in the building industry to build them too low? Happy to be corrected on that, but don't recall that statement.

LAUGHTON, MR: I'm reasonably sure I've read it. It's just a matter of finding it. I'm reasonably sure I've read it. It's just a matter of finding it, sorry.

HER HONOUR: All right. Can you move on. Perhaps it will come to you.

LAUGHTON, MR: Okay. Okay. The quotation is reasonable. The build-up of soil at 700 millimetres is higher than the original ground level as taken from the contour drawings of the original building permit for the - boundary retaining wall. As far as the tree contributed to the pressure on the wall, I would like to point out that it was actually 2.4 metres from the crack in the wall. And at most, 100 kilograms at - pressure.

That should be in the - engineering report. As far as the credibility goes, it was an accident. I had no intentions of allowing the defence access to my legal documents. And it's a minor - was yes, a trivial mistake on my part to - I didn't stop the search engines from indexing that properly. The duty of care - I forget what the argument was about that now.

HER HONOUR: Generally speaking, before you get to first base, in the negligence claim, it has to be shown that there's a duty of care. They (indistinct) - you can't just - two strangers for no good reason at all, there's no duty of care. It's established circumstances. So for example, a motorist has a duty of care to drive reasonably and not injure people.

LAUGHTON, MR: Yes.

HER HONOUR: In some cases there is no duty of care at all. For example, when I was looking at this point for this matter, there was a case not long ago - you may have remembered - where the - it was a case involving - the grape producers took the DEC to court over smoke damage to their grapes because they had allowed - they said they had been negligent in allowing smoke burn-offs. And it damaged the grapes. And the full court said, "Well, there's not even any duty of care there". You don't even get to first base. Okay.

LAUGHTON, MR: Okay.

HER HONOUR: So - and to put your case in a legal context, it has got to fit within section 5B of the Civil Liabilities Act, which you had there before, I noticed. And that says:

A person is not liable for harm caused by the person's fault in failing to take precautions against a risk of harm unless the risk was foreseeable. That is, it is a risk of which the person knew or ought to have known. The risk was not significant and in the circumstances, a reasonable person in the person's position -

This is a neighbour in a suburban - that you're - the relationship is a neighbour's, okay. So it would be a reasonable neighbour in a suburban area:

...would have taken those precautions.

And then it goes on say:

In determining whether a reasonable person would have taken precautions against the risk of harm -

Which is you're saying they should have:

...the court is to consider the following, amongst other relevant things, the probably that harm would occur if the care was not taken, the likely seriousness of the harm, the burden of taking precautions to avoid the risk of harm and the sociable utility of the activities that create risk of harm.

And they've all got to be weighed together to come out of the pipe at the other end, if you want - - -

LAUGHTON, MR: Yes.

HER HONOUR: - - - put the facts into the legal pipe and they come out as a conclusion at the end. So - and 5C is also relevant to some extent. Because you've to:

Determine in an appropriate case in accordance with established principles -

You know, whether a particular harm is the fault of a particular (indistinct) of this causation. So as I spoke to you as a self-represented person right at the beginning, it's a difficult - it's not simply a - saying, "Well, I've suffered the damage and - must be them".

LAUGHTON, MR: Okay. I'm a bit tongue-tied at the moment. I guess it boils down to - not even that. The duty of care - basically the risks of applying 287 per cent of the loading on the original boundary retaining wall would have been foreseeable. And the consequences of that action would have been foreseeable. And the appropriate - yes, basically, the consequences of that would have been foreseeable. The - yes, the consequences of building the foundation of the new retaining wall would have been foreseeable - the the foundation's too high. And yes - that's - that's - that's about it.

HER HONOUR: All right. Thank you. All right. Now, there has been a lot of information, but - and I realise people are keen to be - keen to have this resolved. I'm going to deliver a decision. I'm going to do it as soon as possible. It will be orally delivered. I propose to do that at about 3.30 on Friday afternoon. Is there any reason why a decision can't be given at that time?

LAUGHTON, MR: Yes.

HER HONOUR: (indistinct)

MORISON, MR: No, your Honour.

HER HONOUR: Well, I'm - then I'm not going to be here.

MORISON, MR: Sorry. What were you asking? Whether 3.30 on Friday was suitable?

HER HONOUR: Yes.

MORISON, MR: That's fine, yes.

LAUGHTON, MR: Yes. I will be on my - half way - half way home back to South Australia.

HER HONOUR: Well - - -

LAUGHTON, MR: Can it be done in writing?

HER HONOUR: No. The - there's - I don't have sufficient time between cases to write reasons. I do them when I deliver them orally and their transcribed.

LAUGHTON, MR: Okay. Can I get a copy of the transcription?

HER HONOUR: Well, you have to be here. Because if it is the case that you lose, they will seek cost orders against you, which are significant.

LAUGHTON, MR: Okay.

HER HONOUR: Are - you booked - airfares have you?

LAUGHTON, MR: Yes.

HER HONOUR: Well, where do you - so will you be at home?

LAUGHTON, MR: I'm not sure the actual time of the flight. It's Friday afternoon. And I would need to get to Perth from here before that happens and I - yes, I don't think I would have time to get - go from here to the airport to be in time to catch the flight.

HER HONOUR: Well, I can't deliver my decision any earlier
- - -

LAUGHTON, MR: Yes, that - - -

HER HONOUR: I can't do it on the spot.

LAUGHTON, MR: Yes. That's okay.

HER HONOUR: There's too much evidence. Too important. I'm in court all day tomorrow.

LAUGHTON, MR: Yes.

HER HONOUR: It has to be given, I think, appropriately. I'm a Perth magistrate, I return to - I've got a few days in Busselton the following week but then I'm back in Perth. I can't return to Bunbury for a - probably five or six months. So I want to give it at 3.30 on Friday. That - you will have - you can participate by phone if you want, but there will be - if you are - you need to be aware, that

if you are unsuccessful, I'm expecting a costs application for costs from the - from the defendants.

And if you are successful, you may want to make an application for such legal costs of - you've incurred. And there may be consequential orders. It's up to you, really. You can have liberty to appear by phone. But if you're not here I will probably still deliver my decision.

LAUGHTON, MR: Yes. Is there - half a chance I will be in - actually in the air and I won't have any way of making a phone call.

HER HONOUR: Well, what time is your - you don't - can't even remember what time your flight is, can't you?

LAUGHTON, MR: The flight to Adelaide is at 2.30.

HER HONOUR: Sorry.

LAUGHTON, MR: The flight to Adelaide is at 2.30.

HER HONOUR: Okay. Well, I could - I will deliver a decision this afternoon, but it will be with very - the minimal bare bones reasons. And I won't be providing further and better reasons. The - do you wish that to - occur?

LAUGHTON, MR: Yes. If it's - yes, okay. That's - that's
- - -

HER HONOUR: You need to understand that the reasons will be delivered extempore and they will deal with the bare bones of the matter.

LAUGHTON, MR: Yes.

HER HONOUR: Yes.

LAUGHTON, MR: Yes.

HER HONOUR: All right. Not before 5.00 pm. I'm sorry, Madam JSO and Mr Orderly, are you able to be here for 5.00? Okay. Thank you. If you return at 5.00 I will deliver my decision.

(Short adjournment)

JSO: Calling the matter of Andrew Laughton and Sharyl Marsh and James Glynn Marsh.

HER HONOUR: All right. This is a - I'm going to deliver my decision in respect to Magistrates Court general procedure claim, Bunbury 316 of 2015. The parties being Mr Andrew Loughton as claimant, and Mr and Mrs Marsh as defendants. Mr Loughton appeared unrepresented at trial and Mr Ian Morison, of counsel, represented Mr and Mrs Marsh.

The trial has proceeded over two days. Witness evidence has been called from Mr Loughton and from his expert witness, Mr Woodhouse and Mr Alex Dhu of Bunbury Concreting. Mrs Marsh gave evidence on behalf of the defendants. All parties have been present in the court listening to that evidence and I do not intend to reiterate word for word the evidence given at the trial. For the purposes of these extempore reasons it has been deemed prudent to deal with the matter today, due to the commitments of the parties, and I intend to provide my decision with reasons for decision dealing with those particular matters which have borne upon - in which have borne up my decision to - in this matter today.

So the reasons for decision are addressed to those issues only today. Now, Mr Loughton owns a property at 11B Keble Heights in College Grove. Mr and Mrs Marsh own a property at 14 Trinity Rise, College Grove. Those two properties share a common boundary of about five and a half metres in length. Mr Loughton's property lies downhill from, and is on a much lower level than, the Marsh's property. On or about 4 September 2012 the fence between their respective properties fell over. That fence sat atop a retaining wall which supports the higher ground on the common boundary.

At some point that retaining wall between their properties was also damaged, taking on a slight curve and lean into the property of Mr Loughton. Mr Loughton says that the damage to the fence and the retaining wall is due to the actions of the defendants, Mr and Mrs Marsh. Mr Loughton's claim against the Marshes is for the cost of replacing the fence, for reinforcing the - or making good the retaining - damaged area of the retaining wall between their properties. And for certain other heads of consequential damage which he sets out in his affidavit as to damages, which was filed 9 August.

The defendants say they are not liable for the sums he has claimed against them. As I said at the commencement of these reasons Mr Loughton was self-represented at the trial. At the opening of the trial he confirmed that his claim is made in negligence. This not having been clear

from the documents that he had filed to date in the matter. As the claimant Mr Loughton has the onus of proof and he must prove his claim; that being the factual basis of his claim and the fact that the - those facts provide him with a remedy. And the standard of proof which he must exercise is the balance of probabilities. That is that he must prove his claim and the liability of the Marshes is more likely than not being the test.

Now Mr Loughton opened his case. When asked by me on the - at the opening of trial, on the basis that the Marshes were negligent because they had allowed 700 mils of sand to build up against the fence, which was not suitable for retaining it, causing the fence to fail and an increased loading on the retaining wall causing it damage. During closing submissions, when it was suggested that there was actually no evidence in the trial that the Marshes had placed that 700 mils of soil against the fence, Mr Loughton stated that his case was also that they had allowed the sand to remain in place.

This - the Marsh's dispute that they breached any duty of care that may be owed to Mr Loughton. They do not admit that they allowed 700 mils of sand to build up against the fence, which is therefore a matter to be proved by Mr Loughton, and say they cannot be shown to have caused his damage. It is also said that the retaining wall was built by the developer of the Loughton lot, who excavated the boundary between the properties to create a level lot and that that retaining wall was defective in that it was not constructed high enough to retain the land in its natural state.

The additional soil was not a surcharge on the land, but rather the actions of the original developer withdrew the natural support from the property. The issues in dispute for determination by this court today are that, firstly liability, whether the Marshes owe Mr Loughton a duty of care and whether they then breached that duty of care.

Secondly, if it can be shown that they were negligent, the next issue to determine is whether their negligence caused or contributed to any loss or damage suffered by Mr Loughton. And finally, if liability and causation are established, an assessment of an amount of any loss or damage suffered by Mr Loughton must be made. And it is also - there is also some onus on the court to determine damages in any event in - and I will return to that matter later in this decision.

It is important to place Mr Loughton's claim within the proper legal and statutory context. And as the claim raises the issue of negligence, the Civil Liability Act (2000) or CLA, applies to the claim. Pursuant - division 2 of part 1A of the CLA is headed, "Duty of care". And that section - that division sets out the general principles in respect to harm, and these are principally in section 5B of the Act as follows. And that section states, and of course parties can have reference to the actual enactment, but for the purpose of these reasons it's important that those principles be set out:

A person is not liable for harm caused by that person's fault in failing to take precautions against a risk of harm: (a) unless the risk was foreseeable. That is it is a risk of which the person knew or ought to have known, and (b) the risk was not insignificant, and (c) in the circumstances a reasonable person in the person's position would have taken those precautions.

Subsection 2 says:

That in determining whether a reasonable person would have taken precautions against a risk of harm, the court is to consider the following amongst other relevant things: (a) the probability that the harm would occur if care were not taken, (b) the likely seriousness of the harm, (c) the burden of taking precautions to avoid the risk of harm, and (d) the social utility of the activities that create the risk of harm.

Causation in matters to which the Civil Liability Act apply, must be dealt with according to the general principles set out in section 5C of that Act. The term harm is defined in section 3 of the Civil Liabilities Act and means harm of any kind, and includes damage to property and economic loss. Pursuant to section 5B of the CLA then the Marshes, as neighbours of Mr Loughton, will only be liable for harm caused by the fault in failing to take precautions against a risk of harm in the circumstances set out in that section.

The standard of care which they are required to exercise is, I consider, that of a reasonable neighbour in a suburban area. And I will return to this point again later in these reasons. In a large number of cases, for example the Department of Housing and Works v Smith (2010) WASCA 25. Justice Buss expressed a view that section B of the Civil Liability Act does not modify or supplant common law principles. When considering the general principles

enunciated in section 5B of the CLA, and what a reasonable person in the position of the Marshes would have done, it must be determined prospectively - that is without the benefit of hindsight.

And again there are a number of decisions which are binding on myself, including the Road and Traffic Authority of New South Wales v Dederer 207 - 234 CLR 330 and Adeels Palace Pty Ltd v Najem (2009) HCA 49 at 31. In the case of Regrowth Karri Pty Ltd v Daynite Towing Service (2015) WA DC44. Stavrianou DCJ, again a judicial officer whose determinations are binding on myself, stated the following at paragraphs 32 and on:

In Kelly v Humanis Group, I identified the following principles from the judgment of Pullin JA in Southern Properties v Executive Director of the Department of Conservation and Land Management (2012) WASCA 79. (1) Whilst harm is defined to include damage to property, section 3, fault is not defined. This expression must include a breach of duty of care imposed by law. (2) Section 5B(1)(c) is directed to the conventional inquiry about what a person is required to do once it is established that a duty of care exists. Precautions must be taken - which must be taken are those, which in the circumstance, a reasonable person in the defendants' position would have taken. (3) Section 5B(2) outlines what must be considered in determining whether a reasonable person in the defendants' position would have taken the precautions under consideration. This is, in effect, a statutory statement of what is sometimes called the shirt calculus with minor adjustments.

And the reference there is to the well-known decision of Wyong Shire Council v Shirt.

(4) The considerations in section 5B(2)(a) and section 5B(2)(b) are to be weighed against the considerations referred to in 5B(2)(c) and 5B(2)(d). And this construction is confirmed by Ipp, in report 7.9. The higher the probability that the harm would occur and the more serious the harm, the more likely that those factors will outweigh the other factors, and the more likely that the determination will be that a reasonable person would have taken precautions. If the factors in section 5B(2)(c) and 5B(2)(d) exceed the weight given to those in 5(2)(a) and 5(2)(b), then it is likely that a determination will be to the contrary. (5) Section 5B(1) and 5B(2) require an identification of the harm and the precaution which it is alleged the defendants

should have taken and then the balancing of the relevant things referred to in 5B(2).

In *Wyong Shire Council v Shirt* (1979) 146 CLR 40, Mason J explained the approach to be adopted at common law in deciding whether a defendant has breached a relevant duty of care as follows:

In deciding whether there has been a breach of the duty of care the tribunal of fact must first ask itself whether a reasonable man in the defendant's position would have foreseen that his conduct involved a risk of injury to the plaintiff or to a class of persons including the plaintiff. If the answer be in the affirmative, it is then for the tribunal of fact to determine what a reasonable man would do by way of response to the risk. The perception of the reasonable man's response calls for a consideration of the magnitude of the risk and the degree of probability of its action, and any other conflicting responsibilities which the defendant may have. It is only when these matters are balanced out that the tribunal of fact can confidently assert what is the standard of response to be ascribed to the reasonable man placed in the defendant's position.

Now, Mr Loughton's case against the Marshes is, in my view, factually weak. He stated that the basis of his claim is that they allowed 700 mils of sand to build up against the common fence, which was not suitable for retaining it. As I said earlier, he also now states that they allowed the sand to remain in place. His own evidence was that the 700 mils of sand was stacked against the fence with no other support. He tendered some photos in proof of this, being exhibit 1, which showed the sand higher than the retaining wall on the Marsh's side of the boundary, after the fence collapsed.

It is common ground that the strip of land between the Loughton and Marsh properties is a sewerage easement containing a sewer and inspection points, and nothing is built on it. There is no evidence that the lay of that strip of land has changed over time. The fact that the level of the land on the sewerage easement has not changed since 1991, is available to be found for a number of reasons. First of all 1991 is the year that the sewerage was installed and that is shown by exhibit 2A. Exhibit 16 is a email from Mr Taylor, the civil team leader of the south-west region of the Water Corporation, dated 11 September 2015.

Mr Taylor says to Mr Loughton:

We have checked our infrastructure on the easement at 14 Trinity Rise and are confident that it has not moved or been raised since 1991. This also reflects the information on BuilderNet and the fact that there are no updated ascons. When installed the top of the manhole was 39.94 AHD. Should you wish to survey the height you are welcome to do so.

Now, this email is potentially hearsay of a documentary kind. However, it was received into evidence with the mutual consent of both parties. And it is quite clear that the receipt of hearsay evidence to which no objection is taken, is in the ordinary incidents of a regularly conducted trial. And the practice in Western Australia, at least in civil proceedings, is that hearsay evidence which is tendered or adduced at trial, generally and unequivocally, which is the case in this matter, is in evidence for all purposes. In general, inadmissible evidence which is tendered or adduced in civil proceedings without objection may be given such probative value as the court thinks it is worth. And from there I'm quoting Buss JA from *Kupang Resources Ltd v International Litigation Partners* (2015) WASCA 89.

In my view that email which is not disputed, clearly has a significant weight in establishing certain matters for this trial. The photos tendered in evidence, in fact, by both parties show that the sewerage infrastructure is still in place at ground level. Based on that combination of facts I find as a fact that the ground level of the land on the - in the sewerage easement is as it was in 1991.

Now, there is no evidence at all of when the fence, which fell down, was erected. Indeed, it is in my view impossible to make a finding of fact as to whether the sand that was put against the fence, or in fact the fence - it was always there and the fence was erected to that level of the land. In that respect the contours demonstrated in exhibit 5 show that the Marsh land is an - or obviously always has been - higher placed than Mr Loughton's land. The Marshes became owner of their land in 2003, Mr Loughton became owner of his land in 2011. It is also clear from exhibit 6 that when the common retaining wall was construction in or about 1994, the contours at that point was 10 metres high and the wall was only constructed at 1.7 metres high. It is also common ground that the wall was built too low.

The Marshes erected a new retaining wall on their property in 2012 at some time before the wall - the common boundary fence collapsed and damage was observed to the retaining wall. Now, Mr Loughton called an expert to give evidence in this matter. And in respect to expert evidence, the court is permitted to have regard to expert evidence. In *Baynes v MSR Agrimotives (WA) Pty (2013) WADC 85*, McCann DJC stated:

In addition to giving direct evidence of circumstantial facts, a witness is permitted to give evidence of an opinion which would otherwise be hearsay in respect of a factual issue, which requires expert elucidation if he or she is qualified by training or experience or both, to do so. The evidence is admissible for the purposes of assisting the judge to make findings of fact. The judge is entitled to accept all of a particular expert's evidence or none of it, or accept some and reject the rest, or simply put it to one side. In this way, findings can be drawn from evidence and opinions received from more than one expert, irrespective of who adduced the evidence. Opinion evidence must be based upon facts which are properly proven and must be explained in such a way that the judge can understand it and make the necessary findings or at least understand why he or she should adopt it or defer to it.

And in that particular case, his Honour relies on the well-known authority of *Pollock v Wellington (1996) 15 WAR 1*. So again, those are the principles which the court deals with expert evidence. Now, clearly Mr Woodhouse is an excellently qualified expert witness. He is an experienced engineer and his qualifications are set out in the preamble to his report. And the court accepts his opinion as an expert witness on those matters. However, as I have just said, the - his - his opinion is only as good as the facts upon which it relies - he has relied to - in - arrive at his opinion.

Now, section 5 of that report - I think it's important to read the matter out, because it does encapsulate his opinions which are drawn - extrapolated from his findings earlier in his report. He says:

It is not within my remit to speculate upon the history of the issues that have arisen in relation to the damage to the retaining wall and fence. I have formed some opinions with regard to the retaining wall and undertaken calculations to demonstrate the significant affect that may be perceived as small changes, can have

on the loams applied to retaining walls. The following points are opinions I have formed: it is unlikely that the wall to 11B Keble Heights was built lower than it should have been. It was most likely built to the pre-existing slope. I am of the opinion that as one of the earlier homes developed in the subdivision, the builder/owner had an opportunity to minimise the costs of the build by keeping the wall to its minimal viable height. The property at 14 Trinity Rise -

And I insert there that's the Marsh's property -

Was built after its neighbours at 16 Trinity Rise and 12 Trinity Rise. And 11B Keble Heights -

And again I insert, that's Mr Loughton's property -

As it is a requirement of the latter building work to take into consideration the surrounding building and structures. The property of 15 Keble Heights appears to have been the most recent house to have been constructed in the vicinity, however its retaining wall which pre-dates those at 14 Trinity Rise is set at a lower level, so as not to surcharge the wall to 11B Keble Heights. The retaining walls at 14 Trinity Rise do not appear to take into consideration the proximity of the neighbouring walls. The cost of retaining walls built at 14 Trinity Rise was minimised by constructing the base level where it is currently. To construct at the most appropriate level would have required two additional courses of blocks equating to eight additional blocks per metre.

And he asked the court to refer to the sketch in the appendix. He says that:

The following statements are based upon engineering, judgment and observation. A fence does not have the structural capacity to act as a retaining wall. The 700 mils of sand would have caused the fence to fail. The load from the vehicles during construction phase may have hastened the failure. The additional height of soil has significantly increased the overturning moments to the retaining wall. I am unaware of when the cracking to the wall first occurred, however that increased in load to the wall with the additional 700 millimetres of soil; could have been a major contributor to the damage seen. The vehicle loading may also be a contributor.

Now, it is noted and it is clear from the sketch of the cross-section which Mr Woodhouse helpfully provided. At the last page of the report is that his opinion, as an expert, is based on the - his assumptions as to the original soil levels being at the same height as the retaining wall as clearly drawn on his diagram. And I found that this is not correct. Further, there is no other evidence of the original soil levels to support the expert's assumptions on that matter. And this also underlines - undermines the conclusion of the first dot point, however, 5.0.

Again, there does not appear to be any factual basis for - in the evidence which was able to be produced at trial, upon which this conclusion could be reached. Or that the soil was in particular the wording used, an additional 700 millimetres of soil, as he has said in the fifth bullet point. There is no factual basis to support any contribution at all by heavy vehicle usage on the Marsh's land. I know that the expert's opinion was based on an assumption, probably correct, that the mechanical means - a mechanical means would have been in - required to lift the blocks in the Marsh's new retaining walls on 14 Trinity.

However, there was no evidence as to how or when the mechanical assistance took place, or that it was from the claimant's side of the Marsh's retaining wall. And this, of course, I - I note, is not the basis of the - Mr Loughton's claim now, in any event. Now, as I have said, I accept that Mr Woodhouse is an expert. I accept and have no issues with the conclusions which he has reached in his report. However, the factual basis underlying that has not been made out. And, in fact, I can - will be not relying on any conclusion that there was additional soil of 700 mils which could have caused or been the major contributor to the damage seen, as Mr Woodhouse has said.

Now, in this matter I also note the submissions made by the Marshes, that the evidence is clear and was agreed. Mr Woodhouse agreed with it, and as did Mr Loughton, that the retaining wall on the common boundary was on the highest point of the block at 11 Keble Heights. And yet the wall is no higher than it is a - along the remaining length of the retaining wall where the natural ground level was lower. And the defendants have submitted that there can be no negligence by the defendant where the build-up of soil is not proven to have raised the natural ground level of the earth, and I do accept that submission on that

particular point. Now, given there is no evidence that the Marshes put extra soil against the fence - and certainly not any evidence that they placed or caused to be placed 700 mils more of soil, then any claim against them must fail on that particular basis because, simply, the factual assertion underpinning that claim is not being proven.

Now, Mr Laughton was - as he was self-represented, I have turned to his other claims, albeit made at the conclusion of the trial, that the Laughtons' failure to remove 700 mils of soil from against the fence was the cause of his loss. He said that they had - or he agreed with me when I asked him whether he was saying that they had a positive duty to remove sand from the sewage easement area where it came against the fence.

Now, there are, in my view, a number of difficulties with this proposition. First, I do not accept that the standard of care that the owners of adjoining properties in a suburban area owe each other includes a duty to assess any potential difficulties in a boundary - on an adjoining boundary in a pre-emptive fashion.

Such a duty would require persons who purchased properties with retaining walls to get engineering reports on fencing and retaining walls at the time of the purchase and then take all steps to remedy any defects, and this is clearly not the standard of a duty of care of a reasonable person - neighbour. Certainly, it is, in my view, not the standard of care of the person in the defendant's position.

Further, the situation no the Marshes' property has been in existence, on my findings, since at least 1991 and has apparently not changed since they purchased the property in 2003. There was no evidence, for example, of any complaints being made to them by Mr Laughton or, indeed, anyone; no evidence that there any problems or evidence with the defence that could be identified before it collapsed, and within the wording of section 5B(1)(a) there was - such risk was not one that they did know about.

There's no evidence that they knew about it, or that they ought to have known about it and, therefore, it was not a foreseeable risk, and in the circumstances no precautions against a risk of harm would have suggested themselves and been in the circumstances precautions that a reasonable person would have taken.

They are in the circumstances of this matter not liable when the principles of 5B are applied to the facts of this matter. Now, for the sake of completeness, my view is that this is not a case of infringement by the Marshes of a right lateral support. I raise this matter because it can potentially, perhaps, have been a matter which may have been raised but, in my view, it does not apply. Now, in - the law says that where an - that an owner of land in its natural state has a right to lateral support of that land by his neighbour's land, and there are a number of authorities there, for example, *Byrne v Castrique* (1965) VR 171 or *Kebewar Proprietary Limited v Harkin* (1985) 3 BC or 15 NSW.

The right to natural support is one that arises as an incident of ownership and is a natural right which exists automatically. A neighbour is not entitled to excavate so close to the boundary as to cause subsidence or collapse. However, the duty not to interfere with a right to lateral support is broken by the party who originally made the excavations, and that party is responsible for whatever consequences ensue, and in that respect I refer to the tort text - *Salmond on Torts*, ninth edition, and also as was approved in the case of *Torette House v Berkman* (1940) 62 CLR 637 at pages 658 to 659, and at that case - in that matter *Dicks and Jay* - this is a High Court case - said:

It seems, however, that the case of interference with the right of support does not, in truth, fall within the same principle. There is here no continuing injury, no continuing duty remaining with the land to supply artificial support for the natural support which has been taken away by the act of a predecessor in title. The easement of support does not amount to a positive duty to support the dominant land. It only amounts to a negative duty not to interfere with the natural support possessed by land. This negative duty is broken once for all by him who originally made the excavation and he alone is and remains responsible for the consequences of his act, whatever those consequences ensue.

Now, in my view, this isn't the case of removal of lateral support from Mr Laughton's land in any event, but even if it was, clearly, the original excavation was on 11 Keble Heights and thus this authority to which I have referred suggests that the Marshes cannot be liable on that (indistinct) now, those back-findings, Mr Laughton, I consider are fatal to your claim, and your claim will be dismissed.

Now, although I found against you on the issue of liability in this matter, I'm nonetheless required to make a provisional assessment of your damages to cover the situation where if, for example, my decision on liability is varied by a higher court, such that it is not necessary for them to be - remit the matter to this court for assessment of damages, and I - there the decision is to occur in the Ministry for Health (2009) WASCA 32 at 10. So I have then proceeded to make a provisional damages assessment. This is as I'm required to do. Just so you understand, this isn't damages being awarded. It's a provisional assessment.

Now, clearly, Mr Laughton set out his damages at some length in that affidavit which was filed on 9 August, and I've had recourse to that. I've had recourse to the tendered matters in support of damages. Now, he has put forward a number of bases for claims for damages, resulting from alleged loss, and I would state at this point that I don't share the claimant's views - sorry - the defendant's views of the unreliability of evidence of Mr Dhu from Bunbury Concrete.

I actually found him to be a honest witness and, in fact, he was quite put out by the fact that someone might suggest that he wasn't, and I did not form the view that his evidence as to his costs and the basis of arriving at his costs was not reasonable, and I have relied upon them. In my view, the allowable costs which are allowable as a direct result would be the sum of \$4576 for the WML drawings, the \$500 for the survey, the \$132.50 for the council building permit, \$19,800 for retaining wall repairs and a sum I have allowed by averaging costs of \$2000 for the replacement of the boundary fence.

Now, that totals \$27,08.50. Now, many of the other costs, in my view, which are contained in that affidavit have not been adequately proved or are too remote to be allowed as damages for the alleged negligence. Some are actually of the nature of party and party costs, in any event. Now, first of all, I turn to the stress claim. Mr Laughton sought \$20,000 for all of the stress that these matters have caused him. In that respect, I refer to section 5T of the Civil Liability Act 2002, which says that the liability - deals with the liability for pecuniary loss for consequential mental harm.

A court cannot make an award of damages for personal injuries damages for pecuniary loss for consequential mental harm unless the harm consists of a recognised psychiatric illness. Now, there was no evidence of a

recognised psychiatric illness and, in any event, for a damages for non-pecuniary loss, which this would be, the Civil Liability Act imposes what is commonly called a deductible at section 9 and section 10 of the Act, and, certainly, any such deductible would preclude - by operation of those sections - an award of such in the amount for that head of damage.

As for the other heads of damages, such as the (indistinct) interests, storage costs, rates and taxes, airfares, car hires and the other matter due to - said to be due to the inability to sell 11B Keble Heights, these are all an example of what is known generally as loss of chance damages.

In my view, one would have expected expert evidence from - such as a real estate salesman, etcetera, to establish the factual basis for the claim of those damages. I don't accept that there is again a factual basis made out between the claimed loss and any negligence by the Marshes, and would disallow those claims from any assessment of damages. So the total I would assess damages at provisionally is \$27,008.50. Right.

MORISON, MR: Your Honour, an order was made on 15 January 2016 that the defendants pay - for the defendant to pay the claimant's costs of the application to be assessed, if not agreed, and that was the application to set aside the default judgment. So that cost order has already been made. I don't know that there has been any costs reserved. In any event, I would seek the defendant's costs - the defendants have their costs, including any reserved costs.

HER HONOUR: Mr Laughton, sir, if you stand up. In civil matters, the rule is that costs follow the event, so the unsuccessful party is required to pay the successful party's costs. They will be taxed. They have to be taxed. They have to be itemised in a bill which is presented to you for comment and potential objection then is subsequently taxed by a taxing officer of the court. So their claim is dismissed. There is an order that the claimant pay the defendant's costs to be taxed. Is it prudent to include "in default of agreement" or should it proceed straight to taxation?

MORISON, MR: Straight to taxation.

HER HONOUR: To be taxed such costs to include any reserved costs. It may also be that there was no order that the defendants had to meet any allowable court costs in respect to the default judgment.

MORISON, MR: There was no such order, no. No.

HER HONOUR: All right. Okay. Thank you.

MORISON, MR: Thank you, your Honour.

AT 5.52 PM THE MATTER WAS ADJOURNED ACCORDINGLY

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