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Your Ref:

30 October 2017

VIA EMAIL ONLY: *laughton.andrew@gmail.com*

Andrew Laughton
11B Keble Heights
COLLEGE GROVE WA 6230

Dear Andrew,

RE: Appeal Matter – Marsh – Reserved Decision
BUN 316 of 2015 – Appeal BUN 1 of 2017

Registrar Melville gave his decision on the 30 October 2017.

A copy of the 17 page decision is **enclosed**.

As for the Application to adduce further evidence, that has to eventually get before a Judge.

As to the Application to strike out, grounds 6, 7, 8, 11 and 16 were all to be struck out with ground 9 partly struck out.

You have to pay $13,000 into Court by way of security for costs of the Appeal, within 28 days.

Until then, the Appeal is stayed.

A Cost Order was made in favour of the successful Respondent on the Applications before the Court.

You can speak to Mr Gell at the Bunbury Court quoting your Court number about the lodgement of money into Court and how to go about it.

An appeal from a Registrars decision to a Judge has a general time limit of 10 days (rule 15 of the District Court Rules). I do not advise an appeal.

Regards,

Per: Max Owens

JURISDICTION	:	DISTRICT COURT OF WESTERN AUSTRALIA IN CHAMBERS
LOCATION	:	PERTH
CITATION	:	LAUGHTON -v- MARSH [2017] WADC 141
CORAM	:	PRINCIPAL REGISTRAR MELVILLE
HEARD	:	21 JULY 2017
DELIVERED	:	30 OCTOBER 2017
FILE NO/S	:	APP BUN 1 of 2017
BETWEEN	:	ANDREW LAUGHTON Appellant AND SHARYL MARSH First respondent JAMES GLYNN MARSH Second respondent

ON APPEAL FROM:

Jurisdiction	:	MAGISTRATES COURT OF WESTERN AUSTRALIA
Coram	:	HIS HONOUR MAGISTRATE PONTIFEX
File No	:	BUN 316 of 2015

Catchwords:

Striking out grounds of appeal - Frivolous and vexatious - Security for costs of appeal

Legislation:

District Court Rules 2005

Result:

Grounds 6, 7, 8, 11, 16 be struck out and ground 9 partly struck out
The appellant pay $13,000 into court by way of security for costs

Representation:

Counsel:

Appellant	:	In person
First respondent	:	Mr I A Morison
Second respondent	:	Mr I A Morison

Solicitors:

Appellant	:	Not applicable
First respondent	:	Morison Legal
Second respondent	:	Morison Legal

Case(s) referred to in judgment(s):

Barclay Mowlem Construction Ltd v Dampier Port Authority [2006] WASC 281
Browne v Dunn (1893) 6 R 67
Frigger v Clavey Legal Pty Ltd [No 2] [2015] WASCA 258
Glew v Frank Jasper Pty Ltd [2010] WASCA 87
Sims v Suda Ltd [No 2] [2015] WASCA 180
Stone v Braun [2015] WASCA 103

1 **PRINCIPAL REGISTRAR MELVILLE**: On 23 January 2017 Mr Laughton filed an appeal notice, appealing the decision of the Bunbury Magistrates Court made 17 August 2016.

2 In this appeal notice he stated that an extension of time was required and in the field in which Mr Laughton was required to state his grounds of appeal, he said:

> 1. As per appendix marked 'general form of affidavit' dated 4th January 2017.

3 The document to which he referred appears also to have been filed on 23 January 2017. It is in the form of an affidavit and its purpose is said to be 'affidavit to support appeal against decision on BUN/GCLM/316/2015 for reasons of fact, law and fairness'.

4 Procedurally there was no need for Mr Laughton to file an 'affidavit' except in so far as it may have supported the application he needs to make for an extension of time. The document he filed serves no purpose other than to explain his appeal and there is no doubt in my mind that whilst the document is entitled an affidavit, it is really his grounds of appeal and I have treated it as such.

5 By an application filed 25 May 2017, the respondent sought orders striking out the appeal notice and, alternatively, security for costs. It was supported by an affidavit of Mr James Marsh filed 25 May 2017 and his solicitor Mr Morison filed 11 July 2017.

6 The affidavit of Mr Marsh contains information more relevant to the application for security for costs. It also contains some evidence that appeared to support the respondent's concern about the regularity of service, more particularly, in respect of how long it took to serve the appeal notice and the manner in which it was served. By *District Court Rules 2005* (DCR) r 51(4) an appeal notice is required to be served on a respondent personally. This, according to Mr Marsh, was not done. However, a notice of respondent's intention has been filed and signed by the respondents and if there was any irregularity in service, it is thereby cured. In any event the application to strike out the appeal notice is not grounded on this complaint.

7 I would also observe at this point that Mr Laughton also filed his own application seeking leave to adduce further evidence in the appeal that was not before the magistrate. This is a matter that must be addressed by a judge and I refer to it only in so far as some of the grounds of appeal

advanced by Mr Laughton appear to address issues that might arise in the appeal in the event the application to adduce further evidence is successful.

The Strikeout application

8 The respondents firstly submit that there is no valid appeal notice because the Form 6 contained no grounds of appeal and that the affidavit did not constitute grounds of appeal. In this regard, and being mindful of the fact that the appellant is unrepresented, a matter to which I shall return later in these reasons, it is my view that the appeal notice and the 'affidavit' together sufficiently constitute a valid appeal notice.

9 The respondents further submit that the DCR by r 51(3) require that a ground of appeal must not merely allege that an appealable decision is against the weight of the evidence or that it is wrong in law, it must specify the particulars relied on to demonstrate that the decision is against the weight of the evidence and specific reasons why it is wrong in law. It is submitted that the grounds of appeal are intended to be simply and shortly put, multiple grounds stating the same points in several ways should be discouraged and the grounds of appeal should be formulated with clarity. The submissions generally complain that the purported grounds of appeal fail to do this and are frivolous and embarrassing.

10 The grounds of appeal are challenging to understand. However, I need to be mindful that the appellant is a self-represented litigant both in this court on the appeal, and was also in the Magistrates Court. In this regard the Court of Appeal has said in ***Stone v Braun*** [2015] WASCA 103 as follows:

> 63 I adopt and apply the observations of Pullin, Newnes and Murphy JJA in ***Moleirinho v Talbot & Olivier Lawyers Pty Ltd*** [59]:
>
> > 'What a judge ought do to assist a litigant in person depends on the litigant, the nature of the case, and the litigant's intelligence and understanding of the case: ***Abram v Bank of New Zealand*** [1996] FCA 635; (1996) ATPR 41-507, 31; ***Tobin v Dodd*** [2004] WASCA 288 [14]. The boundaries of intervention are flexible but the lodestar is a fair and just trial. It is clear, however, that a judge must not intervene to such an extent that he or she cannot maintain a position of neutrality or as to give an unrepresented litigant a positive advantage over another party. The advice and assistance which a litigant in person ought to receive from the court should be limited to that which is necessary to diminish, so far as this is possible,

> the disadvantage which that litigant will ordinarily suffer when faced by a lawyer, and to prevent destruction from the traps which the adversarial procedure offers to the unwary and untutored: ***Rajski v Scitec Corporation Pty Ltd*** [1986] NSWCA 1, 14; ***Minogue v Human Rights and Equal Opportunity Commission*** [1999] FCA 85; (1999) 84 FCR 438 [26] - [29]'.

11 In my view, the duties a court owes an unrepresented litigant pursuing an appeal are the same as the duties the court owes an unrepresented litigant at trial. In ***Glew v Frank Jasper Pty Ltd*** [2010] WASCA 87 the Court of Appeal said [10]:

> Due allowance must, of course, be made for the fact that Mr Glew is unrepresented. A court should always be careful to see that the rights of an unrepresented litigant have not been 'obfuscated by their own advocacy': ***Neil v Nott*** [1994] HCA 23 [5]; (1994) 121 ALR 148, 150. It must be alert to the possibility that beneath inadequately expressed and often irrelevant material there may lurk an arguable case. And some leniency may be required in relation to compliance with the rules. But in the end the allowances that can be made for a litigant in person are necessarily limited, both as a matter of fairness to the other party, who must be adequately informed of the case they have to meet, and because the provision of acceptable grounds of appeal is fundamental to the exercise of the appellate function by the court.

12 In that case the Court of Appeal had been considering the adequacy of the grounds of appeal. It had earlier said [9]:

> It is readily apparent that none of the grounds of appeal comply with the requirements of r 32(4) of the Court of Appeal Rules. The grounds fall a long way short of what is required. That is not simply a matter of form. As Owen JA (Miller and Newnes JJA agreeing) pointed out in ***Avsar v Binning*** [2009] WASCA 219 [37], on an appeal to this court an appellant must demonstrate that there has been error of a recognised genre that falls to be corrected and which entitles the appellant to the orders sought. The grounds of appeal are a critical part of the process because they are the vehicle which guides the review process. His Honour referred to the following observations of Kirby J in ***Gipp v The Queen*** [1998] HCA 21; (1998) 194 CLR 106:
>
> > 'The jurisdiction of a court of appeal ordinarily depends on the grounds of appeal that can be legally raised in support of the appeal. Under the common law system of justice, jurisdiction is the authority to decide issues between parties. In the case of an appellate court, that authority is governed by the issues raised in the notice of appeal and any notice of contention relied on to support the judgment against which the appeal is brought. In the absence of a special statutory regime, a notice of appeal that does not

> specify a ground of appeal is invalid and the appellate court in which it is 'filed' has no authority to determine any issue affecting the parties [58].' (footnotes omitted)

13 The grounds of appeal serve a similar function in the context of an appeal as pleadings do in the context of a trial. In relation to pleadings and the adequacy thereof, it has been said in ***Barclay Mowlem Construction Ltd v Dampier Port Authority*** [2006] WASC 281 [4]:

> It is, I think, important when approaching an issue of that kind to bring to mind the contemporary purposes of pleadings. The purposes of pleadings are, I think, well known and include the definition of the issues to be determined in the case and enabling assessment of whether they give rise to an arguable cause of action or defence as the case may be, and apprising the other parties to the proceedings of the case that they have to meet.

14 The court said [7]:

> In my view, it follows that provided a pleading fulfils its basic functions of identifying the issues, disclosing an arguable cause of action or defence, as the case may be, and appraising the parties of the case that has to be met, the Court ought properly be reluctant to allow the time and resources of the parties and the limited resources of the Court to be spent extensively debating the application of technical pleadings rules that evolved in and derive from a very different case management environment.

15 In order to file a valid appeal notice for the purposes of the DCR, it is necessary to include in the appeal notice the grounds of appeal. However, this does not require slavish adherence to the form. A departure from the form not materially affecting the substance nor likely to mislead shall not invalidate the form used: see *Interpretation Act 1984* (WA), s 74. In this case it is my view there has been no departure from the form prescribed under the DCR for the appeal notice. The field in the prescribed form for inserting the grounds of appeal is very small and in most cases will be insufficient to enable multiple grounds of appeal to be inserted. To insert in this field words requiring the reader to read an attachment in order to have a full understanding of the grounds of appeal is either not to deviate from the form, or if it is to deviate, not to materially affect the substance of the form and to not likely mislead. In my view the appeal notice is valid.

16 The next issue is whether the grounds of appeal are sufficient and I approach this question mindful of the comments in the cases above and the possibility that beneath inadequately expressed and often irrelevant material presented in the grounds of appeal there may lurk an arguable case. To this end the court is concerned to see that it sufficiently appears

from the grounds as drafted there is an error of a recognised genre that falls to be corrected and whether it is sufficiently apprises the respondents of the case they have to meet.

Ground 1

17 By this ground, Mr Laughton refers to s 30 of the *Magistrates Court Act 2004* and then goes on to complain he was not given an opportunity to object to material being presented as evidence. He has not assisted himself by referring to s 30 of the *Magistrates Court Act* which appears to be the statutory version of the common law rule in ***Browne v Dunn*** (1893) 6 R 67 (HL), which requires a party when cross-examining the witness to put to that witness evidence that is to be adduced that will contradict the witness's evidence where the witness is not on notice of this, and are consequences of not doing so. This rule does not support Mr Laughton's complaint that he was not given an opportunity to object to evidence being presented. however, I see the ground of appeal as essentially complaining that he was denied procedural fairness and natural justice, in that the magistrate had a duty to advise him that procedurally he could object to evidence (which is very different to saying that any objection would be successful) and what the consequences were of not doing so. In the circumstances I find this ground of appeal sufficient.

Ground 2

18 By this ground it appears that Mr Laughton is complaining that he was denied natural justice and procedural fairness in that he was not given a fair hearing, more particularly, that his 'statement of fact in law submitted on 8 August 2016 was totally ignored, and ignored without reason'. The ground may or may not be destined to failure. However, it is not appropriate to strike it out.

Ground 3

19 By this ground Mr Laughton complains about a document, apparently being a plan showing contours of 14 Trinity Rise being tendered into evidence without him ever having been given the opportunity to see it. He complains the document was not listed in the documents provided by the defence on 19 January 2016, which more particularly appears to be a complaint the document did not appear in the respondents list of discoverable documents.

20 Although inelegantly drafted, the gravamen of the complaint is this document was a document that ought to have been discovered and he was

taken by surprise by its production and introduction into evidence at the trial.

21 In essence he is complaining that the introduction of this document into evidence was unfair. In other words he is complaining that for these reasons he was denied procedural fairness and natural justice. I would not strike out this ground.

Ground 4

22 By this ground Mr Laughton appears to complain that he was given inadequate opportunity to consider documents that were produced under summons from the City of Bunbury. He says he was given 10 - 15 minutes to consider the document which, he says was insufficient time and further complains that he did not know that he had the ability to object to these documents.

23 It is implicit in his complaint that Mr Laughton is saying he ought to have been informed by the court whether or not as a matter of procedure and process he could have objected to the use of the documents or applied for an adjournment. The grounds may or may not be successful on appeal but in my view they adequately put the respondents on notice of the case they had to meet. I would not strike it out.

Ground 5

24 This ground raises the same or similar concerns in respect of documents produced by the Water Board. I would not strike it out.

Ground 6

25 By this ground Mr Laughton complains that he has 'a pink A4 paper dated 10 August 2016 listing plans, diagrams, correspondence and emails held by Structerre Engineering. This has never been received, but may have been in the folder I was not given access to'. At point 6.2 he expands on his complaint, explaining that this potentially holds critical information about who accepted responsibility for the height of the new retaining walls at 14 Trinity Rise and for not complying with the building regulations, which in turn has resulted in the damage and this court case.

26 I am unable to discern from this ground what it is that the court is alleged to have done that it ought not to have done, or what it has failed to do that it ought to have done. In other words, it is not clear to me what error of fact or law the court is said to have made or why. It is not clear whether the folder is a folder in possession of the court or a folder in the

possession of the respondent. If it was a folder in the possession of the court, then his complaint would appear to be the court should have given him access to the folder. No particulars of how and why he was not given access to the folder are given. If it is the folder was in the possession of the respondents, the complaint may be that it had not been discovered. None of this is clearly spelled out in the grounds of appeal and that ground should be struck out

Ground 7

27 This ground raises a similar complaint but in respect of a different piece of pink paper dated the 10 August 2016 listing 'various plans and pictures of the property situated at 14 Trinity Rise'. For the same reasons given in respect of ground 6 this ground is struck out.

Ground 8

28 This ground has been abandoned by the appellant.

Ground 9

29 This ground is headed 'incorrect statements made under oath by Sharyl Marsh'.

30 It is difficult to understand precisely what it is that Mr Laughton is complaining of here. The grounds of appeal under this heading refer to two statements. The first statement is alleged to be a statement made by Sharyl Marsh to the effect that they dug a hole behind the retaining wall all the way to the base of the retaining wall and found no evidence of backing blocks. The other statement appears to be that the boundary retaining wall did not extend to the north between 12 Trinity Rise and 14 Trinity Rise and instead, 12 Trinity Rise had a raised garden bed.

31 Notwithstanding the lack of precision, it is clear that Mr Laughton's ground of appeal is essentially that that evidence of Sharyl Marsh should not have been accepted by the Magistrate. Mr Laughton does not particularise why the Magistrate should not have accepted that evidence and this ground of appeal in my view does not comply with DCR r 51(3). That being said, he does say these statements will be disproved by photos, which I understand from the grounds of appeal were not in evidence before the magistrate. He makes reference to photos for inspection that he says might demonstrate the inaccuracy of those statements of Ms Marsh but it is not clear from the particulars whether that information was evidence that was presented to the magistrate either by the appellant himself or by the respondents, whether it is information has become

available since the trial, or whether its information that became available to him at the trial but was never tendered either by he or the respondents and that he was denied procedural fairness or natural justice by the magistrate. I am left guessing what exactly it is that Mr Laughton says the magistrate did wrong other than seemingly accepting evidence which Mr Laughton contends was not correct.

32 However his application for leave to adduce evidence in the appeal that was not before the magistrate includes a photo alleged to demonstrate the boundary retaining wall did not extend to the north between 12 Trinity Rise and 14 Trinity Rise and that instead, 12 Trinity Rise had a raised garden bed. Mr Laughton does not appear to seek to leave to adduce evidence in respect of the backing blocks. In these circumstances I would strike out this part of this ground and allow that part dealing with the boundary wall to remain.

Ground 10

33 By this ground Mr Laughton appears to complain that the court took into account evidence, namely an email from the Water Board to himself, expressing an opinion that the height of the sewerage manhole had not changed from the original. He goes on to complain that any admission on his part about the email was only in respect of who was the author, not an admission as to the correctness of its content. He then says that the other evidence, namely photos, show the manhole to be a different height to the other sewerage reference points and concludes that any assumptions the court made about the ground level are most likely incorrect as point of fact.

34 In other words, it seems to me Mr Laughton is saying that any findings of fact the court made about the ground level are errors of fact and or law produced by either taking into account irrelevant evidence (the email) or failing to understand the nature and quality of the evidence constituted by the email and the photos, or that the magistrate failed to take into account relevant evidence (the photos). This ground of appeal may or may not be successful but it sufficiently puts the respondents on notice of the case they need to meet. I would not strike out this ground of appeal.

Ground 11

35 This ground constitutes a complaint that Mr Laughton could not afford $1,000 for a copy of the entire transcript. Essentially it constitutes Mr Laughton's averment that he is unable to detail the various errors of

fact and law and denials of procedural fairness without the transcript. The notice of appeal is not an appropriate place for this complaint. It seems to me that any concerns in this regard should properly be addressed, if they are to be addressed at all, by obtaining a copy of the transcript in the appeal process and then seeking leave to amend the grounds of appeal if necessary. The transcript of the proceedings in the Magistrates Court form part of the record of this court and Mr Laughton can thereby obtain a copy at no charge: DCR r 52(7) and r 71(4). This ground should be struck out.

Ground 12

36 This ground challenges the magistrate's finding as to the ground level being the same at the date of trial as it was in 1991 when the contours show the ground falling about 200 mm every horizontal metre. In my view the appellant is endeavouring to say that the magistrate erred in finding the ground level remain the same as a result of failing to appreciate or take into account relevant evidence constituted by the contours showing the sloping ground. In other words Mr Laughton complains that the magistrate either failed to understand the nature of the evidence or made findings in the absence of evidence or failed to take into account relevant evidence. I would not strike out this ground.

Ground 13

37 Mr Laughton complains that the Magistrate's reasons for decision found in the last paragraph on page 90 of the transcript do not make sense and as part of his grounds of appeal poses what seems to be a rhetorical question, 'Did the Court expect the retaining wall to be 10 meters tall?'. Mr Laughton goes on to challenge the proposition contained within that paragraph and asserts that contrary to the view taken by the Magistrate it was not common ground that the retaining wall was built too low. This ground needs to be considered with ground 17 which is intended to be particulars of ground 13. In my view, on a proper reading of this proposed ground of appeal the appellant appears to be saying that the magistrate failed to provide proper reasons for decision and made an error of fact in proceeding on the basis that it was common ground the retaining wall was built too low. This ground should not be struck out.

Ground 14

38 By this ground the appellant complains in respect of the magistrate's reasons for decision found at pars 4, 5 and 6 on page 94 of the transcript. There the magistrate rejected any proposition that any duty was owed by

persons who purchased properties with retaining walls, to get engineering reports on fencing and retaining walls at the time of purchase, and then take all steps to remedy any defects. The appellant says such a proposition is wrong at law. In my opinion, that ground of appeal is easy to understand and respond to.

Ground 15

39 By this ground the appellant appears to be complaining that when assessing damages on a provisional basis, the magistrate failed to have regard to the costs associated with reinforcing, bracing and relocating the soak well that had been displaced by the new foundations. If there is evidence of these costs then it seems to me the court would have been required to have regard to that evidence and any failure to do so would constitute an error of law.

40 Further, the appellant goes on to complain about the methodology adopted by the magistrate in assessing the costs associated with replacing the damaged boundary fence, by 'averaging costs between two different dates by the same company'. Having regard to the reasons for decision, it may be arguable that the magistrate did not provide adequate reasons for why this approach was taken. Finally, the appellant complains the court did not allow for the cost of the engineering reports, witness costs or costs of attending the court from interstate. Clearly some of those costs are legal costs and do not form part of a claim for damages. However, apart from the legal costs, the magistrate appears to have dismissed some of the claim in this regard on the basis that the damages have not been adequately proved or are too remote to be allowed. In my view, properly considered, the appellant's grounds for appeal in this regard are that the magistrate erred in law in concluding that on the facts before the court the only legal conclusion was the damages were too remote, or otherwise failed to give adequate reasons for arriving at that conclusion. This ground should not be struck out.

Ground 16

41 By this ground the appellant complains about a decision in respect of a default judgment given much earlier in the proceedings. I am unable to see how this possibly can bear on the correctness or otherwise of the magistrate's decision delivered 17 August 2016. This ground should be struck out.

Ground 17

42 As observed above, this needs to be read with ground 13. No injustice is done by leaving it as is.

Application for security for costs

43 Generally a court will not make an order for security for costs against an individual appellant solely on the grounds of impecuniosity. That being said, a respondent to an appeal who applies for security is in a stronger position than a defendant at first instance. This is because the respondent has a judgment that is presumed to be correct until displaced. In ***Frigger v Clavey Legal Pty Ltd [No 2]*** [2015] WASCA 258 [29] it was said the ordinarily the considerations that a court will take into account are the following.

(a) the appellant's capacity to satisfy an order for costs if the appeal is unsuccessful;

(b) the appellant's prospects of success on the appeal;

(c) the fact the appellant had already lost at first instance on the merits, that being a circumstance which fails the exercise of the discretion in favour of an order for security for costs;

(d) whether the appellant would be shut out of the appeal if security for costs were ordered; and

(e) whether there has been any delay by the respondent in filing the application for security for costs.

44 In his affidavit filed 25 May 2017, Mr Marsh drew the court's attention to a number of matters that are apparent from the court record and statements made by the appellant in court. Relevant details were that in the appeal notice the appellant had given his geographical address as no fixed address, that in an affidavit sworn 4 January 2017 Mr Laughton stated he could not afford the $1,000 to copy the transcript, that in an affidavit filed 30 March 2017 Mr Laughton again described himself as of no fixed address, that a notice of change of address for service of 20 April 2017 had Mr Laughton's geographical address as 11B Keble Heights, Bunbury and that he informed the court on the 20 April 2017 that he was unemployed but may be employed as of the 25 May 2017.

45 It was also submitted from the bar table that the costs in the Magistrates Court action had been assessed in the sum of $22,507.95 and

that these costs had not been paid. However, I have no evidence before me to this effect and I disregard it.

46 By way of response to the application, Mr Laughton filed an affidavit made 8 June 2017. He suggested he was able to provide security for costs by way of land at 98 Proper Bay Road or by way of a house and land at 11B Keble Heights. These broad propositions were not particularised. For example, he has not indicated the nature and extent of his interest in those properties. Mr Laughton also proposed that this matter be delayed until he managed to save enough to pay 'security to the court'. Mr Laughton then says that if he is required to pay the amount sought by the defendants as security for costs, being the sum of $13,767, this would make it hard for him to obtain justice or fairness because it would make it harder for him to pay a lawyer, would cause delays in repairing damage that had been caused (presumably by the respondents) delay the ability to sell his house which in turn is said to be costing him over $1,700 per month in mortgage payments and would prevent him from moving to and working in Port Lincoln.

47 At the hearing of this application, Mr Laughton advised from the bar table he could obtain the sum $14,000 in cash but was reluctant to offer it up by way of security because he wanted to use it to engage a lawyer to progress this appeal.

48 In light of that background, I turn to consider the matters referred to in ***Frigger v Clavey Legal***:

1. <u>The appellant's capacity to satisfy an order for costs if the appeal is unsuccessful.</u>

49 While there is no obligation on an appellant to do so, where there is evidence to suggest that an appellant would be unable to meet a court's order if the appeal were to be unsuccessful and the appellant fails to provide evidence to the contrary, the court will more readily draw the inference that the appellant does not have that capacity: see ***Sims v Suda Ltd [No 2]*** [2015] WASCA 180 [20].

50 In this regard it appears Mr Laughton has interest in real estate. It also appears the property or properties are encumbered. Although, the nature and extent of any encumbrance is not known, I consider it more probable than not that Mr Laughton does have some equity in them.

51 From Mr Laughton's admission that he can raise $14,000 in cash, along with his proposals that this matter be delayed until he could save

sufficient money to pay security for costs I infer he is working. However, I have no evidence as to the nature and extent of his work or how much income he is earning.

2. The appellant's prospect of success on appeal

52 It is not appropriate for the appeal to be examined and scrutinised as closely as one would if the appeal was in fact being heard.

53 Any assessment or prospects of success on appeal must necessarily be of the preliminary kind: see ***Sims v Suda Ltd [No 2]***. That being said, on a preliminary view of the grounds of appeal as I discern them, it appears to me that there are 'prospects' of success. Some of the remaining grounds of appeal are very doubtful but others have stronger prospects.

3. The fact the appellant has already lost at first instance

54 This is a factor that counts in favour of making an order for security for costs.

4. Will an order shut the appellant out of the appeal?

55 In my view Mr Laughton's admission that he owns property and can raise $14,000 in cash, along with one of his proposals that this matter be delayed until he could save sufficient money to pay security for costs, leads me to the conclusion he would not be shut out of the appeal if security for costs were ordered and he be given time to pay this sum into court. Mr Laughton has been unrepresented both in the trial before the Magistrates Court and up to now in the conduct of this appeal. He has had opportunity to obtain legal representation and had not availed himself of that opportunity (at least until after this application had been argued). I conclude it was his intention to represent himself and any requirement to pay security for costs will not prevent him prosecuting his appeal.

5. Has there been any delay in the respondent filing an application for security for costs?

56 In this regard it is to be observed the application was filed on 25 May 2017 after the appeal notice was said to have been served on or about 6 March 2017. Applications for security for costs should be brought promptly for the purpose of minimising the expenditure incurred by the parties in the interim. The greater the delay, the more likely increasing costs have been incurred by both parties, which costs might be wasted if it be the case an appellant for any one of a number of good reasons did not

wish to appeal or continue with the appeal if he had known he was obliged to find the money up front in order to do so, or if he simply did not have the money to provide security. However, in this case, Mr Laughton is unrepresented and there is nothing to suggest by way of evidence from the court file or otherwise that any significant sums have been expended by him between the filing of the appeal notice and the application for security for costs.

Conclusion

57 In short, the respondents have been successful in the court below and the decision is presumed correct. Mr Laughton has the capacity to make some payment by way of security for costs and to require him to do so will not stymie the appeal. Any delay associated with bringing the application for security for costs is minimal and does not prejudice Mr Laughton.

58 In the above circumstances, it is my view that Mr Laughton should be required to pay the sum of $13,000 into court by way of security for costs of the appeal. Irrespective of the criticisms that can be made of the manner in which Mr Laughton has drafted his grounds of appeal, I have found he has drafted a number of them with sufficient clarity so as to enable an understanding of the legal points he wishes to make and I am satisfied he will be able to present his case. Further, he has indicated willingness for this appeal to be delayed so he can save sufficient funds to provide security for costs.

I certify that this and the preceding 15 pages comprise the reasons for the judgement of Registrar ..... /20..... Associate