



Andrew Laughton &lt;laughton.andrew@gmail.com&gt;

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**FW: Instructions**

1 message

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**Simon Jacob** <simon@yy.com.au>

25 October 2018 at 19:38

To: "laughton.andrew@gmail.com" &lt;laughton.andrew@gmail.com&gt;

Dear Andrew

I have read some of the material on your website (link in your email below). I have a picture of the issues which were relevant to the trial hearing. I have read the reasons for decision and your appeal grounds (and affidavit in support). There is material in the affidavit in support which is irrelevant or unclear.

I hasten to add that it would cost thousands of dollars to review this material and advise you in greater detail in relation to prospects of success on the appeals. My comments in this email are preliminary, based on a cursory examination of the documents. I have endeavoured to give you some comments which might warrant further investigation or action by you.

It is apparent that your lack of legal representation has hindered your initial case, and your appeals. You have missed hearings and dates for filing documents and paying monies into court, which are significant omissions and will not automatically entitle you to a rehearing or a ground of appeal. Your lack of legal representation also limited the evidence which you presented to the Magistrates Court.

My understanding is that you have an appeal on foot to a judge of the District Court. This is an appeal of the decision of Registrar Harmon to dismiss your appeal from the decision of Magistrate Pontifex in the Magistrates Court.

**APPEAL 1**

You appealed to the District Court from the decision of Magistrate Pontifex.

An application was made to strike out your appeal grounds and, alternatively, for you to pay security for costs. Those applications were heard by Registrar Melville and his decision was given on 30 October 2017. Some of your grounds of appeal were struck out. An order was made that you pay security for costs into court within 28 days. Max Owens advised you not to appeal the decision.

It is not clear to me whether the appeal was stayed until you paid the security for costs (meaning that it would not proceed until you paid the security for costs). The letter from Max Owens to you dated 30 October 2017 says that the appeal is stayed, but I have not seen an order to that effect.

I assume that the appeal was not stayed, or that it was only stayed for 28 days to allow you to pay the security for costs into court within that time period, because the appeal was listed for hearing before Registrar Harmon, notwithstanding that you had not paid the security for costs (see below).

You filed an application (I see an affidavit, but not an application – but Registrar Melville refers to your application in his reasons for decision) to refer to evidence which was not considered at trial in the Magistrates Court. Registrar Melville said that this application can only be considered by a Judge and it has not been decided.

#### HEARING BEFORE REGISTRAR HARMON

I am not sure what this hearing was for. It may have been a Directions Hearing, or the hearing of the remaining appeal grounds. Your website does not include a link to any notice of this court date, so I do not know whether you received a notice of the court date, or what the listing was for (directions or hearing). You could contact the District Court and ask for a copy of the notice of that court date, and ask where it was sent.

You did not appear at the appeal hearing before Registrar Harmon on 24 May 2018 – because you say that you received an unsigned letter from the Court on 23 May 2018 advising that the Order filed by Mr Morison on 22 May 2018 (relating to Orders made on 30 October 2017) had been settled. In your Appeal Notice, you say that the letter ‘implied’ that the matter had been settled and that the hearing on 24 May 2018 had been cancelled – I don’t see how that implication can be made from the document which was sent to you. The letter and the Court Order attached do not refer to the hearing on 24 May 2018 being vacated, and refer to a date of 30 October 2017. I think a Court will find it difficult to justify your failure to attend the hearing on 24 May 2018 given that explanation.

I have listened to the recording of the hearing on 11 October which you emailed to me yesterday morning. Registrar Harmon says that there are no written reasons for his decision, but that his decision took account of the fact that Mr Morison was entitled to proceed in your absence, the Court made attempts to contact you by telephone (which you say you have no evidence of), you had not paid into Court the security for costs monies of about \$13,000, and the Registrar found that your grounds of appeal were weak and had no (or perhaps little) prospect of success. As Registrar Harmon said in the hearing on 11 October 2018, he established that you had only paid one amount of \$13,000, which you paid to the bailiff in respect of the costs payable by you in the Magistrates Court. You had to pay that amount because otherwise the bailiff would have sold your house. My understanding is that you had applied for a stay of execution in relation to payment of the Magistrates Court costs, but you were unsuccessful.

On that evidence, it is clear that you had not paid the security for costs money before the appeal hearing on 24 May 2018.

You say that you had paid, or had tried to pay the security for costs monies into Court. You paid \$13,000 to the bailiff – but that was clearly in respect of the costs order made in the Magistrates Court, and was not for security for costs. If you had tried to pay the security for costs monies to the District Court and the Court would not accept them because the payment was made after the due date, then you needed to apply to the Court for an extension of the time to pay the security for costs, and there is no evidence that you did that.

I have considered the grounds of appeal set out in your appeal notice relating to the decision of Registrar Harmon on 24 May 2018. I consider those grounds of appeal to be weak. It is a significant problem that you did not appear, especially if the Court file or a transcript of the hearing does show that the Court made efforts to contact you at the hearing.

However, I do not know why the appeal was listed before Registrar Harmon – whether for directions or hearing. In the recording of the hearing before Registrar Harmon on 11 October 2018 (regarding your appeal of the decision of Registrar Harmon to dismiss your appeal), Registrar Harmon indicated that he was reluctant to dismiss your appeal on the basis that you had not paid the security for costs monies into Court, and that it took some persuading by Mr Morison, and he only dismissed the appeal after considering the grounds of appeal which he thought had little prospect of success. If the appeal was before Registrar Harmon for directions only, it is arguable that he should not have dismissed the appeal based on any consideration of the merits of the appeal grounds. I consider that you should apply to amend your appeal grounds to add this additional ground of appeal (if the appeal was before Registrar Harman for directions only).

Have you since paid the security for costs sum into Court? It may not now matter if you have not paid the security for costs, because that order was made in the previous appeal proceedings which were dismissed. However, I suggest you seek clarification at the next directions hearing of the appeal (against the decision of Registrar Harmon) as to whether you need to comply with the security for costs order (or seek an extension of the time for payment) before the hearing of the present appeal proceedings.

#### MAGISTRATES COURT HEARING

For what it is worth, and based on a cursory reading of the documents, the evidence presented to the Court supported the decision of Magistrate Pontifex, at least in relation to her observations that:

1. The burden of proof lay with you, on the balance of probabilities (more likely than not);
2. The engineering report indicated a number of possible causes for the failure of the retaining wall;
3. There were no plans relating to the design of the retaining wall;

4. There was evidence that there may not have been adequate backing blocks;
5. There was no evidence that the defendants or a previous owner of their property had changed the lay of the land;
6. There was evidence that the lay of the land above your retaining wall had not changed since 1991 (I realise you dispute this evidence, but even without this evidence, the onus of proof was on you to prove that the defendants had changed the lay of the land);
7. You identified the cause of action as negligence, and specifically being either placing the surcharge soil on behind your fence (which you were unable to prove), or failing to remove the surcharge soil (in relation which the Magistrate found that there was no duty of care owed by the defendants to remove soil which abutted the fence if they did not put the soil there). As far as I can tell, you did not rely on any other allegations of negligence, and negligence was the only cause of action which you relied on;
8. You raised the issue that the defendants had allowed a 2.7t bobcat to be driven in close proximity to the retaining wall, but you were not able to provide any evidence to prove that the defendants had done so, and the Magistrate found that you had not met the burden of proof on this issue;
9. There was evidence of the original contours of the land (which you did not object to) which supported a finding that the retaining wall was not sufficiently tall at the highest point of the lot (I realise that you dispute this evidence too, and state that you were not given an opportunity to object to the document being admitted into evidence).

I have not considered whether the Magistrates explanations of the trial process and evidential requirements were adequate. That would require research of case law in relation to unrepresented litigants.

Although you were self-represented and the Magistrate was required to give you some leeway, my experience is that the law did not require her to advise you in relation to the evidence you needed to produce, and how you could get that evidence into Court. Ultimately, it seems to me that you failed to prove the required facts, including of the existence of soil behind the fence, the person/s responsible for placing it there, and surcharge being put on the wall by heavy machinery used in close proximity to the wall.

In particular, your failure to prove that the Marshes had changed the lay of the land was significant – because in the absence of such evidence, and given evidence that the retaining wall was not built tall enough, I consider it was reasonable for the Magistrate to find that the additional soil behind your retaining wall was not added by the Marshes but resulted from the builder of the retaining wall removing support for that soil (for which you subsequently become liable as later owner of your lot).

It is possible that the email from Mr Taylor of the Water Corporation should not have been accepted into evidence without Mr Taylor being present to confirm the email and its contents – but neither you nor Mr Morison objected to the email being admitted into evidence and, ironically, it was an email which was addressed to you. This was not the only evidence of a lack of change of ground level. Her Honour said (at page 89) “there is no evidence that the lay of that strip of land has changed over time”. Her Honour found that the level of the land on the sewerage easement had not changed since

1991 on a number of grounds – exhibit 2A recorded the date of installation of the sewerage infrastructure as 1991, the email from Mr Taylor, and the photos tendered into evidence which show that the sewerage infrastructure is still at ground level.

Page 25 of the transcript of day 2 of the hearing was not referred to by Her Honour in her reasons for decision, but it also relevant to your appeal. Mr Morison showed you contour drawings which were in the Water Corporation file provided to the Court under subpoena, and correspondence sent by you to the Building Commission. Mr Morison referred you to a statement in your correspondence where you said that the top of the retaining wall was about 400mm lower than the “original contour survey” at that point. You replied “I’m not sure of the measurements, but it does appear to have been put in lower than ... the original ground level, yes”. You seemed to make an acknowledgement in cross examination that the top of the retaining wall was lower than the original level of the soil behind the retaining wall. This is valid evidence which can be considered by the appeal court.

I acknowledge your point that there was no evidence showing that the sewerage inspection point was not built above ground level in 1991. However, it seems contradictory with your admission above regarding the retaining wall being built too low.

In relation to evidence considered in appeals, the decision of Eaton DCJ in *XU v*

GRIFFITHS BC201740066 (2018) says this about the consideration of trial evidence and new evidence on appeals from the Magistrates Court to the District Court:

Such an appeal must be conducted in accordance with the rules of this Court. I must decide the appeal on the materials and evidence that were before the Magistrates Court and on any other evidence that I give leave to be admitted. Leave may only be granted in exceptional circumstances.

Section 40(4) of the Magistrates Court Civil Proceedings Act 2004 confirms that new evidence cannot be considered without leave of the District Court:

The District Court must decide the appeal on —

- (a) the material and evidence that were before the Magistrates Court; and
- (b) any other evidence that it gives leave to be admitted.

#### BOUNDARY RETAINING WALL

In your email to me, you identify the boundary retaining wall provisions in section 89 of the Building Act as requiring the defendants to contribute equally to the cost of repair of the retaining wall. Subsection (2) states:

Unless otherwise agreed, if a party wall or a boundary retaining wall that is wholly or partly on the boundary of land needs maintenance or repair each owner of land on either side of the wall is liable to join in or contribute in equal proportions to the maintenance and repair of the wall.

This is a relatively new section, and it is not clear to me how it should be interpreted. I note that the sharing of costs relates to maintenance or repair – but not to alteration or reconstruction unless such works fall within the meaning of maintenance and repair. I would suggest that replacement of a wall is not covered, and nor is a change to the structure of the wall (such as increasing height). It remains to be determined whether maintenance and repair can cover incidental works such as propping, stabilising, grout injection and increasing the height of a wall.

Section 89 requires that the retaining wall be “wholly or partly on the boundary of the land” (whereas the definition of boundary retaining wall in the Building Act (see next paragraph below) only requires that the retaining wall be “on or close to the boundary” of your land. In any event, you need to have a survey of the boundary performed to determine whether the wall is wholly or partly on the boundary (or close to the boundary). You would need this survey to be accepted into evidence in the appeal (so you would need to carry out the survey now and add it to your application for leave to refer to new evidence).

Section 75 of the Building Act defines “boundary retaining wall” as a retaining wall on, or close to either side of, a boundary of works land. “Works land” means in relation to work, means land on which the work is done or is to be done. “Work” means building work, demolition work or the changing of ground levels of land to an extent that may affect other land.

If you apply those definitions, it is possible that:

1. The retaining wall is on or close to the boundary of your land (survey to confirm);
2. That your land is “works land”, because work (the construction of the retaining wall) was carried out on that land and the definition of “work” includes the past tense; and
3. The construction of the retaining wall was “work” to which section 75 applies because it is building work.

Although it may therefore be possible that your retaining wall is a “boundary retaining wall” pursuant to the Building Act, section 89 is still subject to any liability you have for loss or damage referred to in

section 91. I highlight in particular subsection (b), which means that you would remain liable for loss or damage (where the law otherwise makes you liable) caused by work (defined as building work, demolition work, or the changing of ground levels of land):

### **91 . Liability for loss, damage not affected**

Neither section 89 nor 90 affects any liability that a person has for loss or damage —

- (a) to land beyond the boundaries of the works land caused by work; or
- (b) otherwise arising from work; or
- (c) arising from a breach of an agreement entered into for the purposes of this Part; or
- (d) arising from a breach of an order made under section 86(2); or
- (e) arising from a breach of a building order.

As to whether you are otherwise liable at law in relation to the building works which comprised the construction of the retaining wall, I do not see how the law would make you liable because you did not carry out or supervise the works and no building licence was issued in your name. I do not consider that you are liable for the negligence of a prior owner or builder carrying out works on your land.

If you were able to prove that the works carried out by the Marshes on their land caused the failure of the wall (you failed in this regard at trial), you may have a case that they should pay for the cost of repairing or replacing the retaining wall to the extent that its failure was caused by the works carried out on their land.

I have not found any case law in relation to “boundary retaining walls” pursuant to the Building Act, or similar legislation. As far as I have been able to determine, no other legislation in Australia uses the phrase “boundary retaining wall”. This is new law which creates a statutory apportionment of liability in the absence of legal rights arising out of works against a party. I remain unsure how, in practice, the section will be interpreted.

You should:

1. Carry out a survey of the boundary to determine whether the retaining wall is on or near the boundary of the lots; and
2. If so, amend your appeal grounds to include the fact that Magistrate Pontifex did not consider

section 89 of the Building Act and the resulting requirement that the Marshes contribute equally to the cost of maintenance and repair of the retaining wall, irrespective of the cause of failure.

Even though Registrar Harmon dismissed your appeal, it may be worthwhile letting the Court know of the new ground of appeal in your appeal against the decision of Registrar Harmon, because the additional ground of appeal may add to the strength of the appeal grounds (given Registrar Harmon's comments that he considered the prospects of success of the appeal to be poor).

#### NEGLIGENCE OF BUILDER

One thing which you appear not to have considered is a cause of action against the builder of the retaining wall in negligence – subject to any limitation period not having expired. There is case law which has established that a builder owes a duty of care to future owners of property, and breach of that duty of care can amount to negligence (Bryan v Maloney – although the principle has been narrowed by subsequent case law, it still appears to apply in the case of residential developments). The limitation period of 6 years would run from the time you purchased the property, or from the time you discovered the defect in the retaining wall (if the defect was latent). The relevant date could be the date on which the fence broke, which was when you discovered (or ought, with reasonable inspection) have discovered the build-up of soil behind the fence. You may be out of time, but you should give that some thought. If you are out of time, the cause of action is lost.

#### NEGLIGENCE OF LOCAL GOVERNMENT AUTHORITY

Any action against a local government authority, such as the City of Bunbury, for breach of duty, would be likely to be unsuccessful. Inspections by local government authorities are not considered by case law to be approvals or consents, and the LGA does not assume responsibility for supervising building works, or checking building works against plans (even though the LGA may inspect).

#### COURT RECORD

Being on the Court record requires a solicitor to do more than pass on mail and notices. It would require me to ensure that someone appears at hearings. I am not prepared to go on the Court record and act in a limited capacity.

Given the manner in which the case has been conducted before now, I have decided that I am not prepared to act on an ongoing basis. Given my view of the merits of your appeals (and notwithstanding the possible application of section 89 of the Building Act), I am concerned about adverse costs orders. Even if I had a better view of the prospects of success, I would need to make myself more familiar with the detail of the evidence and consider the grounds of appeal in more detail, amendment of the grounds of appeal and the presentation of new evidence, so that I can fully

carry out my duty to advise you in relation to the merits of your claims, and the risks and consequences of any position you may (or may not) take.

I have incurred costs exceeding \$2,000 including GST, but I propose to charge \$2,000 including GST and disbursements and write off the balance of my costs. I have endeavoured to provide comments which might be of assistance to you and hope that you understand that my views are not based on an exhaustive analysis of the documents, but on an overview of the material I have read.

Regrettably, I cannot be of further assistance to you.

Regards

Simon

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**From:** Anne Bretag  
**Sent:** Wednesday, 17 October 2018 8:38 AM  
**To:** Simon Jacob  
**Subject:** FW: Instructions

Hi Simon, this is from the chap that is in Victoria at the moment but has a retaining wall issue here in Bunbury. See below.

Kind regards

Anne Bretag

Young & Young

Lawyers

5 Spencer Street

Bunbury WA 6230

T 61 08 9721 4144

F 61 08 9721 7006

E [anne@yy.com.au](mailto:anne@yy.com.au)

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**From:** Andrew Laughton [<mailto:laughton.andrew@gmail.com>]

**Sent:** Sunday, 14 October 2018 5:43 AM

**To:** Anne Bretag

**Subject:** Re: Instructions

Hi Anne

I made a silly mistake, I forgot to include details of the hearing I was appealing against.

I have a web page that is not linked to anywhere, and thus not indexed by the search engines, and not available to the general public.

<http://aquasate.com.au/R%20WALL%2017/>

Hopefully you can find all the details you need there.

The following is not urgent.

In case you are worried about the big picture, since the original Magistrates court hearing I found a law that would be very hard to lose against.

[http://www6.austlii.edu.au/cgi-bin/viewdoc/au/legis/wa/consol\\_act/ba201191/s89.html](http://www6.austlii.edu.au/cgi-bin/viewdoc/au/legis/wa/consol_act/ba201191/s89.html)

Part 2.

No money has ever been offered to maintain this boundary retaining wall, and I have emails that imply this.

The defense have lied under oath before, and so I am worried that they will lie again to get out of this.

I submitted a offer of settlement so that I would be able to prove it conclusively, but at a time where they thought the issue was closed, and so it may not be acceptable.

Andrew.

On Fri, 12 Oct 2018 at 11:39, Anne Bretag <[Anne@yy.com.au](mailto:Anne@yy.com.au)> wrote:

Hello Andrew, thank you for sending all of this through to us, Simon will have a look at it and contact you, probably by email.

Kind regards

Anne Bretag

Young & Young

Lawyers  
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**From:** Andrew Laughton [<mailto:laughton.andrew@gmail.com>]

**Sent:** Friday, 12 October 2018 1:03 AM

**To:** Anne Bretag

**Subject:** Instructions

Hi Anne

The first thing that needs to happen is that your name and address is registered with the court so that any court paperwork is sent to you.

You need to then scan it and email it to me.

I am working as casual labor on a solar farm job in Victoria. We are on site for 10 hour days, and need to travel over 30 min each way to our own accommodation.

We get one day off every two weeks until the project is completed or we are laid off.

Last week they laid 30 people off with no warning.

I am worried that if I give the court my current address that I will not still be here when it arrives.

I have given the court my Port Lincoln address, but I may not be able to check it for over a month, so I have redirected my mail from Port Lincoln to the caravan park where I am staying.

Sending any court post to you will solve this problem.

The second thing that needs to happen is to proof read the paperwork I have sent to the court.

My previous lawyer Max Owens not only failed to do it, he failed to tell me that he did not do it, and I ended up throwing something together as quickly as possible so that I did not miss any deadlines.

I am very worried that I have not done a very good job as I do not know what I am doing.

The stress of this also caused me to lose my job in Port Lincoln.

This case has got more twists and turns than a barrel full of corkscrews, and I am not expecting anyone that also needs to focus on any number of other cases to be able to keep track of it, so the best thing to do is to send any recommendations to me so that I can check it for accuracy before it is sent to the court.

Max Owens also recommended things that I do not think were in my best interests, so if you recommend a certain action please tell me the logic of why you think the way you do, what factors you have considered, and why you are advising what you are advising.

Attached are the relevant files.

I filled out the bulk of them before receiving the order from the district court, then asked Max Owens to fill in the bits I missed.

I believe that he did so, but for some reason his contact details are not registered with the court.

At this point in time nothing else needs to be done.

I can email you a recording of yesterdays court directions hearing if you wish.

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Andrew

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Andrew