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THE SUPREME COURT OF

WESTERN AUSTRALIA

CIV 1561 of 2012

STEPHEN WILLIAM MARSH

and

SUSAN GENEVIEVE MARSH

and

MICHAEL OWEN BAXTER

KENNETH MARTIN J

TRANSCRIPT OF PROCEEDINGS

AT PERTH ON TUESDAY, 11 FEBRUARY 2014, AT 10.31 AM

MR R.M. NIALL SC, with him MS L.M. NICHOLS and MS C.M. PIERCE, appeared for the plaintiff.

MS P.E. CAHILL SC, with her MS F. VERNON, appeared for the defendant.

THE ASSOCIATE: In the Supreme Court of Western Australia, civil matter 1561 of 2012, Marsh and Baxter.

KENNETH MARTIN J: Mr Niall.

NIALL, MR: If your Honour pleases. Can I just deal with a couple of matters before we deal with the evidence of Mr Marsh.

KENNETH MARTIN J: Indeed.

NIALL, MR: Firstly, your Honour should have a copy of an agreed statement of facts - a consolidated statement of facts agreed and not agreed. Does your Honour - - -

KENNETH MARTIN J: Just a moment. Was that in your papers for the judge? Yes. Okay. I do, under cover of the letter of 10 October 2012, I received that.

NIALL, MR: Yes, your Honour. I tender that, if your Honour pleases.

KENNETH MARTIN J: All right. No objection, Ms Cahill?

CAHILL, MS: No.

KENNETH MARTIN J: Very well. The - - -

CAHILL, MS: Bit late for that, I think, your Honour.

KENNETH MARTIN J: Indeed. The consolidated statement of facts agreed and not agreed, dated 10 October 2012, will be exhibit 1.

EXHIBIT 1 Plaintiffs DATE 10/10/2012
Consolidated statement of material
facts agreed and not agreed

NIALL, MR: If your Honour pleases. Secondly, your Honour, the parties have agreed a fact in relation to the damages point. I had to hope to have an engrossed copy; it's just one paragraph, but I might just read it to your Honour - - -

KENNETH MARTIN J: (indistinct)

NIALL, MR: - - - and then we will engross it in due course and provide it. And that is, the parties agree that by reason of the absence of certification of Eagle Rest farm between 29 December 2010 and 25 November 2013, the

NIALL, MR: Now, the position in relation to the documents that are the subject of blank, might fall into one of three categories, and your Honour will see it as we arrive - as we arise at - as we arrive at those documents. One is the witness will prove the documents in the witness box. The second will be that the defendant has taken an objection to the tender of the documents absolutely, but not tender for a limited purpose of the fact that the documents were made and published. For example, if your Honour goes to the farm notes published by the department, which your Honour will see on document 27, 28, 29, 30, on the second page.

KENNETH MARTIN J: Yes.

NIALL, MR: Your Honour will recall I took your Honour to those documents in opening.

KENNETH MARTIN J: You did.

NIALL, MR: The objection to those is they're - no objection to their tender, but the defendant says only for a limited purpose, and we will identify those to your Honour in due course.

KENNETH MARTIN J: At some point, but maps there should be a further column to the right that says "LP" or something like that, that - - -

NIALL, MR: If your Honour pleases. Yes.

KENNETH MARTIN J: - - - signifies that indicia.

NIALL, MR: Yes. And then the other category is an objection on the basis of relevance or such thing. Some of them have been resolved, and we will indicate, your Honour, what they are.

KENNETH MARTIN J: All right. Well, look, I will work on the basis that the trial bundling aggregate will be, eventually, exhibit 4, and its contents will essentially thrash themselves out under this regime.

NIALL, MR: Yes, your Honour.

KENNETH MARTIN J: And the various volumes will be, effectively, subsets of exhibit 4.

NIALL, MR: If your Honour pleases. We will endeavour to keep your Honour up to date with that, but it - certainly by the close of our case, we will identify the documents that are in evidence and not in evidence.

KENNETH MARTIN J: Very good.

NIALL, MR: The next point - something I haven't discussed with my learned friend - but we would seek an order that witnesses be out of court. I imagine that's not opposed.

KENNETH MARTIN J: That's not controversial, Ms Cahill?

CAHILL, MS: No.

KENNETH MARTIN J: All right. Well, I will just ask if my orderly could make that announcement. Before she does, I will just explain what that means. In civil cases, generally speaking, the parties remain in court and can listen without constraint to all the evidence. In terms of other witnesses, the position is that, generally speaking, those witnesses remain outside and don't hear the evidence until they come to court to give their evidence and be cross-examined.

There are some exceptions in that respect concerning expert evidence, but I don't need to elaborate on that. Having said that, if you're not a witness and you're a member of the general public and you're here to listen, then you have absolute right and freedom to remain, but you should not, of course, communicate to any witness what you hear in the courtroom, because they should come to court unappraised

of that evidence. All right. Well, I ask my orderly to make that announcement.

USHER: Ladies and gentlemen, witnesses in this case are now required to leave the court until called on to give evidence.

KENNETH MARTIN J: All right. That order is made.

NIALL, MR: Thank you, your Honour. That concludes the prefatory remarks that I wanted to make. I'm not sure if my learned friend has anything to raise.

KENNETH MARTIN J: I have just two housekeeping matters to raise. One is, we have had a couple of complaints from the audience yesterday in terms of an inability to hear parts of the dialogue, which is unfortunate. Because of that, I've made arrangements to move to court 14.1 from tomorrow morning and onwards for the duration of the trial. That courtroom, which is directly above us, has better acoustics, and, hopefully, that problem will be alleviated.

Regrettably, it's in occupation today, so I couldn't make the move today, but from tomorrow we will operate from court 14.1 directly above. The second point is, I would be very grateful if we could try and break about 10 to 1 today, as I've got a meeting at the old building I need to attend. So if we could time that, I would be appreciative.

NIALL, MR: If your Honour pleases. That's the housekeeping matters, your Honour. The first witness for the plaintiff will be Mr Marsh. There are some objections to his evidence.

KENNETH MARTIN J: Yes.

NIALL, MR: We might, if it's convenient, your Honour, resolve those before Mr Marsh enters the witness box.

KENNETH MARTIN J: Yes. Let's do that.

NIALL, MR: What we had - that is, we - our side of the bar table had contemplate is that, as your Honour rules, one of my juniors will make the annotations on the copy of the statement, which could then be provided to the witness, if that's convenient, your Honour.

KENNETH MARTIN J: Yes. All right. Well, let's see how it goes. Another thing that troubles me, of course, is witness statements are a very efficient modern tool in terms of adducing evidence-in-chief, but for people trying to follow it, it makes things very difficult indeed. What I would like to see is copies of the witness statements once we resolve any issues about them, made available freely to the press and to members of the public so that they can actually understand what the evidence adduced in the trial actually was.

NIALL, MR: If your Honour pleases, we will, for our part, endeavour to do that or we shall do that I should say.

KENNETH MARTIN J: Thank you.

NIALL, MR: The - can I just identify the affidavits and witness statements first, your Honour, and then - - -

KENNETH MARTIN J: By all means.

NIALL, MR: The first is an affidavit of Mr Marsh of 12 April 2012.

KENNETH MARTIN J: Yes, I've got that.

NIALL, MR: And the way the parties have dealt with the attachments to those statement is that to the extent that they will be in evidence, they will be in evidence through the tender bundle rather than through the affidavit.

KENNETH MARTIN J: Yes. So I would need some sort of cross-referencing tool to the trial bundle by reference to the 83 paragraph - - -

NIALL, MR: We have provided at - we have prepared a table and I will see if I could hand that to your Honour shortly. That's the first. The second is a witness statement of Mr Stephen Marsh, dated 13 February 2013.

KENNETH MARTIN J: 13 February 2013. Yes, I have got that.

NIALL, MR: Yes, and the third is a supplementary witness statement of Stephen William Marsh of 15 January 2014.

KENNETH MARTIN J: I have got that as well.

NIALL, MR: They're the witness statements and affidavit sought to be read by the plaintiff.

KENNETH MARTIN J: I will just check that we have got the originals.

NIALL, MR: The annotated cross-references should be with your Honour.

KENNETH MARTIN J: Thank you, yes.

NIALL, MR: And a table cross-referencing that we have provided, which we have given to the other side, I can hand up to your Honour.

KENNETH MARTIN J: Thank you.

NIALL, MR: Dealing with the first affidavit, your Honour, it may be, if my learned friend makes the objections and will indicate - - -

CAHILL, MS: Ms Vernon will deal with the issue of objections, your Honour.

KENNETH MARTIN J: All right. Thank you. Now, Ms Vernon, I have got your document, I think, of today.

VERNON, MS: Thank you, your Honour. That document was prepared on the basis that the - it consolidated the

defendant's understanding of the objections that had been made, the response that had been given, and it also includes a column which sets out in brief form a submission made in relation to each of the matters that have not been conceded that continue to be pressed by the defendant. In relation to the totality of the objections, a number of the objections have been withdrawn and I don't propose to address your Honour on those. They are noted in the document you have.

The plaintiffs have made a number of concessions and I might, if your Honour will bear with me, just summarise what all those concessions are now and my friends can correct me if I have misunderstood anything. In relation to the affidavit of 12 April 2013, concessions have been made in relation to paragraph 61, the first line of paragraph 68, paragraphs 75 to 78 inclusive, paragraphs 95, 96, and 98, paragraph 100 as to the fifth and ninth sentences - sorry, fifth to ninth sentences. I will just check that, your Honour, before I - paragraph 105, 107, 108, 109 as to the first and second sentences, and 110. In relation to the statement - that's all for the affidavit, your Honour. In relation to the statement of 13 February 2013 - - -

NIALL, MR: Your Honour, I'm sorry to interrupt my learned friend - - -

KENNETH MARTIN J: Yes, Mr Niall.

NIALL, MR: But it may be more convenient if I just identify the paragraphs we don't read.

KENNETH MARTIN J: Yes.

VERNON, MS: Okay.

NIALL, MR: And then my learned friend can deal with the remaining objections.

VERNON, MS: All right.

NIALL, MR: If your Honour starts with the affidavit of 12 April.

KENNETH MARTIN J: I have got that.

NIALL, MR: If your Honour goes to paragraph 15.

KENNETH MARTIN J: Yes.

NIALL, MR: We don't read the first three words.

KENNETH MARTIN J: All right. So the words "I believe that" are struck from paragraph 15.

NIALL, MR: Yes. Yes, your Honour. And at paragraph 17 we don't read the words "I believe that."

KENNETH MARTIN J: All right.

NIALL, MR: Paragraph 61 - - -

KENNETH MARTIN J: Yes.

NIALL, MR: The words in the first line "I believe a"
- - -

KENNETH MARTIN J: Yes.

NIALL, MR: - - - be struck. And the words "were blown by the wind from Seven Oaks," we don't read, and we make it clear that that paragraph simply records the observations of Mr Marsh.

KENNETH MARTIN J: So that paragraph would read:

On about 30 November 2010 a significant number of swath
canola plants - - -

NIALL, MR: "Were observed" - sorry:

I observed a significant number of swath canola plants
on paddock 7, 8, 9, 10, 11, 12, and 13 in my property.

So the witness will clarify that in the witness box if
your Honour pleases.

KENNETH MARTIN J: Are you going to lead that from - in
viva voce? Is that the plan?

NIALL, MR: Yes.

KENNETH MARTIN J: All right.

NIALL, MR: Just to clarify the basis for that. Paragraph
68, we don't read the first line, the words "I believe" to
"because."

KENNETH MARTIN J: All right.

NIALL, MR: Paragraph 75 to 77 we don't read.

KENNETH MARTIN J: All right.

NIALL, MR: And paragraph 95 and 96 we don't read.

KENNETH MARTIN J: All right, 95 and 96 are out.

NIALL, MR: 98 we don't read.

KENNETH MARTIN J: 98 is out.

NIALL, MR: And then 100 on the fifth line down, beginning with the words "the price that I would have obtained" through to the end of that paragraph is not read.

KENNETH MARTIN J: All right, that's excised.

NIALL, MR: 105 is not read.

KENNETH MARTIN J: 105 is out.

NIALL, MR: 107 is not read, your Honour.

KENNETH MARTIN J: 107 is out.

NIALL, MR: 109 through to 112.

KENNETH MARTIN J: 109 to 112 are out.

NIALL, MR: And 114 to 116 is not read.

KENNETH MARTIN J: 114 to 116 are out.

NIALL, MR: 114 to 116. Down to the - sorry, 116, your Honour, down to the word "contamination" in the fourth line. I beg your Honour's pardon.

KENNETH MARTIN J: All right. It's only part of 116 that's excised. So commencing from the third line:

Annexed to my affidavit and marked with the letters
SM47 -

That remains to the end of that paragraph.

NIALL, MR: And then 118 through to 121 are not read, your Honour.

KENNETH MARTIN J: 118 to 121 are out. All right.

NIALL, MR: Perhaps we might resolve the balance of that, and then I will come to the next statement. Would that be a convenient way, your Honour?

KENNETH MARTIN J: Yes. Ms Vernon, is that convenient to deal with what remains contentious in the affidavit in light of those excisions?

VERNON, MS: There will be some repetition in relation to my submissions, but I'm happy to deal with it - - -

KENNETH MARTIN J: Well, once it's resolved - - -

VERNON, MS: Yes.

KENNETH MARTIN J: - - - then presumably there will be a flow-over ruling.

VERNON, MS: It will fall away. Yes. There are a number of the objections that fall into - I will start again, your Honour. In relation to this affidavit, the largest category of objection is on one point, which is that the paragraph relates solely to the issue of quantum of loss, which is no longer in issue as between the parties. Some paragraphs are objected to on other grounds and will need to be dealt with if your Honour does not accept the objection on the grounds of relevance. But in relation to the affidavit, the paragraphs that are objected to on the grounds of their being relevant only to the quantification of the loss, are paragraphs 82, which is on page 22 of the affidavit, 88 to 94 - - -

KENNETH MARTIN J: 82, 88 to 94.

VERNON, MS: - - - and 97 - - -

KENNETH MARTIN J: Yes.

VERNON, MS: - - - and 99 to 103.

KENNETH MARTIN J: All right. Let me just have a look at those. Have a seat while I do that. Yes. All right. Ms Vernon, what would you like to say in augmentation to your concerns about those paragraphs?

VERNON, MS: Well, simply, your Honour, that the evidence in those paragraphs relates to the issues concerning the premium price that Mr Marsh claims he can obtain for organic produce, that how he has operated - well, essentially, that they all go purely to the issue of the calculation of the loss over the period of the three years

of decertification, and to no other issue, and that that matter is no longer a matter in issue between the parties by reason of the agreement.

KENNETH MARTIN J: All right. Mr Niall, what do you say?

NIALL, MR: A couple of points, your Honour. Firstly, some of those paragraphs, but not all, were subject of objection prior, but some have been added to on this basis of loss. Now, the plaintiff brings his case for two - essentially, two aspects of relief: one is damages, and one is an injunction. One of the aspect of damages will be that you would have to show the loss, and it was relevantly for the period of decertification, which was 10, 11, 12 and 13. That exercise required proof of the type of loss, but also the quantum, and that quantum has been agreed.

But one of the aspects of the case, and a significant aspect of the case, is that the plaintiff seeks an injunction to abate future - or the ongoing nuisance, and to that question, it's entirely relevant as to the type and nature of the loss that was occasioned during the period of decertification. So that it's not just the quantification, the dollar figure, but it's also relevant to the question of the nature and extent and significance of the loss, for when your Honour looks, prospectively, as to whether the court might be persuaded, in the event that a wrong is established, to grant injunctive relief. So, in our submission, it's plainly relevant to the second of those things. If your Honour pleases.

KENNETH MARTIN J: Thank you. Ms Vernon.

VERNON, MS: That, your Honour, is a ground which my friends not previously raised for supporting the inclusion of the paragraphs. It's our submission that the agreement that my friend read to you this morning set out that there was a loss, by reason of the decertification, and the nature of the loss is also agreed. In those circumstances, there can be no probity of reason for having a great deal of evidence about whether the sort of sheep Mr Marsh grew on the - raised on the property, what he had planned for, linseed, the raising of organic linseed, what plans he had for the rotation of his crops, in the period from 2013 to 2018 - which is the period, which evidence, and I'm in fact referring to some of the evidence that's in the other statements, but on the same ground - where the decertification has no longer - is no longer a result.

Those issues can't be relevant to the question of whether there should be an - sorry, an injunction, a permanent injunction granted.

KENNETH MARTIN J: All right.

VERNON, MS: Thank you, your Honour.

KENNETH MARTIN J: Thank you. I think I will need to rule paragraph by paragraph in respect of the objections that are raised, and I will also do so by reference to the helpful document that has been provided this morning in regard to the objections that had been taken. First of all, paragraph 82 is objected to, in which Mr Marsh proposes to give this evidence:

In operating my farm at Eagle Rest, I have aimed to obtain good yields of certified organic produce, which will attract premium prices (meaning better income than if sold as conventional produce from the available land). Use of my land for certified organic production (both before and after the contamination) means I must accommodate three important requirements.

Those three important requirements are then identified in paragraphs 83, 84, and 85, which they're not objected to. It seems to me that the generality of the observation in paragraph 82 concerning the objective of certified organic produce is relevant and relevantly benign in the scheme of things. So I would allow paragraph 82 to stand.

The next series of paragraphs in contention are paragraphs 88 to 94. I think they will need to be evaluated one by one. Taking 88 first, in this point Mr Marsh is speaking of the inconvenience and difficulties which he contends he has faced in the light of the alleged contamination of his property, Eagle Rest, by the GM material, which was the subject of a first incursion around November 2010 and led to the, on his case, issues with NASAA and subsequent decertification. In paragraph 88 he speaks of how that has affected the farming operation and says:

Operating an organic system within the much reduced area of land, comprising paragraphs 1 to 6, is increasingly difficult. Contamination occurred at a time at which I developed a strong stable market for my organic oats, was developing and expanding the market for organic lamb, and had obtained a new opportunity to supply grain and labour to a commercial bakery. Each

of these opportunities has been severely compromised by the contamination.

Now, it's true that the parties have agreed the quantum of the plaintiff's damages in the event that the plaintiff succeeds in making out his common law causes of action of negligence or private nuisance. However, very significant aspects of those causes of action remain in contention, including the claim for relief, which I understand is grounded primarily in the private nuisance cause of action, which seeks a permanent injunction against Mr Baxter to restrain either the growing or the harvesting by swathing of a GM canola crop on Seven Oaks, to the extent that that happens within a kilometre of Mr Marsh's boundary.

Paragraph 88, as I read it, bears upon arguments in terms of the appropriateness of a future injunction restraining what is argued to be a private nuisance, and hence, although not directly relevant to putting a dollar number to damages, bears upon the sort of inconveniences and disruptions which Mr Marsh has faced on his case and which one might anticipate to occur again in the future if similar events come to pass. Viewed from that perspective, it seems to me that it has a relevance above and beyond a pure dollar number, which is now agreed, and accordingly I would allow paragraph 88 to stand.

Similar considerations apply in respect of what Mr Marsh says at paragraph 89 concerning his sale of organic oats to Morton Seed & Grain Merchants since 2004 and his state of knowledge concerning his ability to find a buyer for his certified organic oats. All of this, of course, is within the province of the defendant to challenge and cross-examine upon should it choose to do so.

Paragraph 90, in terms of sales of oats to Morton's, deals with environmental conditions and seasons as regards crop yield. So that seems to me to be within the province of a farmer's expertise, to talk about and also to explain their personal experience in terms of seasonal yields and the like and drought conditions. So 90 stands.

I now deal with 91. Again, it seems to me in the context of dealing with the subject matter of oats and seed and how Mr Marsh farms and disposes of his surplus oat crop or keeps some seed for future planting that it's relevant to know how he does that, and so paragraph 91 can stand. Paragraph 92 is more specific in relation to comparison between conventional and organic prices. Paragraph 92 doesn't seem to me to have any function other than go to

the quantification of the plaintiff's loss of damage, which is now agreed. So in respect of paragraph 92, I would uphold the objection.

Paragraph 93 is expressed in very general terms, by reference to the character of the loss, by reason of the asserted contamination of Mr Marsh's land and the impact of that as regards his production of certified organic oats, in terms of the land area being substantially reduced. He expresses a causative consequence in terms of opportunity in a general way. I think that's relevant to the character of his damage as well, above and beyond its pure quantification. So I would allow paragraph 93.

94. I would uphold the objection in respect of the first sentence of paragraph 94, given its generality and lack of foundation in terms of substantive fact to characterise that observation. However, the second sentence of paragraph 94 speaks as to Mr Marsh's personal experience in terms of organic Spelten rye, and I would allow that to stand. So the second sentence of paragraph 94 stands; the first sentence is removed. Now, the next objection is to paragraph 97?

CAHILL, MS: 99, you Honour.

KENNETH MARTIN J: 97 is okay?

CAHILL, MS: Sorry, your Honour, you're right.

KENNETH MARTIN J: 97 is all right?

CAHILL, MS: You're right, I'm wrong.

KENNETH MARTIN J: Paragraph 97 I would allow on the basis that it seems to me to go beyond the question of dollars to the character of the loss, particularly assessed in the context of an argument for a permanent injunction in terms of restraining the defendant. It has a potential relevance, it seems to me, to arguments in terms of the consequences in the future relevant to that argument. So I would allow 97 to stand. Next is paragraph 99. Paragraph 99 I would allow to stand.

The only potentially problematic sentence I see there is the sentence, "I have found that organic meat attracts better premiums than organic wool, because there is a greater demand for organic food." That's an assertion that's not supported by any facts in that paragraph to provide a foundation for it. But in the context of Mr

Marsh overall in that paragraph, explaining his move towards sheep for meat rather than for wool, it's tolerable. So, in overall context, paragraph 99 can stand. Now, paragraph 100 has had some surgery to it, so it's really only the first two lines I'm concerned with - three lines.

CAHILL, MS: I think, your Honour, it's actually up to the words, "dressed weight" - - -

KENNETH MARTIN J: Correct.

CAHILL, MS: - - - (indistinct)

KENNETH MARTIN J: Yes. Yes. I will allow the first three sentences of paragraph 100, the balance of the paragraph being conceded. It seems to me that it has a potential application in the context of the argument for injunctive relief in the future, predicated upon what happened in the past as regards lambs and ewes, and Mr Marsh, as a farmer, is obviously qualified to talk about what his yield was of lambs from ewes in 2011.

Any contention on the balance of it can be addressed by cross-examination. Paragraph 101. I think paragraph 101 falls within the parameters of Mr Marsh's experience as a farmer to discuss. Again, it seems to me to potentially bear upon the claim for injunctive relief, predicated upon private nuisance. In paragraph 102, I would allow the first and last sentences to stand. The second sentence:

In my experience, the demand for organic lamb is high - is an assertion or conclusion without any fact given in that paragraph to support it in its generalised statement. On that basis, it can't stand, but the balance - the first and third sentences, in terms of what was happening vis-à-vis markets and the development phase of infrastructure, can stand. Paragraph 103 predicated upon the contention of continuing interference potentially as a threat in the future relevant to a claim for a permanent injunction. Paragraph 103 seems to me to have some relevance to that and can stand.

CAHILL, MS: Your Honour, perhaps I could ask some guidance on how you would like to deal with the objections from now on. There are, given that your Honour has been dealing with the objections in the affidavit concerning this issue of relevance to a matter in issue - - -

KENNETH MARTIN J: Do you want to go to similarly - - -

CAHILL, MS: Would you - yes.

KENNETH MARTIN J: - - - conceptual matters in the other statements?

CAHILL, MS: Would it be - - -

KENNETH MARTIN J: Happy to do that.

CAHILL, MS: That may be the more convenient way to deal with it, although I'm entirely in your hands in that respect. There are a number of objections on this ground in relation to the statement of 13 February 2013. And I might - I will just state what they are - what the paragraph numbers are.

KENNETH MARTIN J: They're in your memo though, aren't they?

CAHILL, MS: Yes, they are. They're paragraphs 21, 22, 43 to 46, 48 to 55, 57, 58, 61, 65, 74 to 79, 83 to 88, 90 to 92, 100 to 160, and 166 to 167.

KENNETH MARTIN J: All right. So, Mr Niall, shall we work as we did before? Namely, you can tell me what's accepted and what isn't, and - - -

NIALL, MR: Yes, your Honour. If your Honour has the witness statement in front of you, if your Honour goes to paragraph 37.

KENNETH MARTIN J: Yes.

NIALL, MR: Second line, beginning the word "because" to the end of that sentence, ending with the words "prices for it", we don't read.

KENNETH MARTIN J: Yes. That's conceded?

NIALL, MR: Yes, your Honour. Paragraph 56 we don't read.

KENNETH MARTIN J: All right. 56 is out.

NIALL, MR: Paragraph 59 we don't read. And paragraphs 66 to 73, and - - -

KENNETH MARTIN J: 66 to 73 are out?

NIALL, MR: Yes, your Honour.

KENNETH MARTIN J: All right.

NIALL, MR: And 80 to 82.

KENNETH MARTIN J: All right. 80 to 82 are out.

NIALL, MR: The next one is 128.

KENNETH MARTIN J: In its entirety?

NIALL, MR: Yes, your Honour.

KENNETH MARTIN J: All right. 128 is out.

NIALL, MR: 133 is out.

KENNETH MARTIN J: 133 is out.

NIALL, MR: And 148 to 149 is out.

KENNETH MARTIN J: 148 and 149 are out.

NIALL, MR: Yes. And 161 to 165. May have missed one.

KENNETH MARTIN J: 161 to 165 are out.

NIALL, MR: Pardon me one moment, your Honour. I'm just checking. My learned friend - we don't read 154.

KENNETH MARTIN J: 154 is out.

NIALL, MR: And - I've given your Honour 160 to 165, I think.

KENNETH MARTIN J: 161 to 165 you gave me.

NIALL, MR: 160, I beg your Honour's pardon - 160 to 165.

KENNETH MARTIN J: All right. So we will add 160 to that excision.

NIALL, MR: And we may have missed one more, your Honour. 89. 89, your Honour.

KENNETH MARTIN J: 89 is out.

NIALL, MR: The first - - -

VERNON, MS: I think, your Honour - - -

KENNETH MARTIN J: Sorry, Ms Vernon.

VERNON, MS: - - - on the basis of your earlier rulings we could - - -

NIALL, MR: Just before my learned friend - - -

KENNETH MARTIN J: Right.

NIALL, MR: I just wanted to make a submission, your Honour. The first notice we had as to most of those paragraphs was at about 9.30 this morning, your Honour. In terms of the loss, certainly, for example, no objection has been taken to 21, 22, 57, 74 to 78, 83 to 88 and 100 to 160, apart from a couple of ones which we've - but most of them, your Honour. I just need to - if I may, your Honour - just have some time to read those - - -

KENNETH MARTIN J: Yes, of course, Mr Niall.

NIALL, MR: - - - additional paragraphs before responding. It may be that some of them go further than simply the injunction point, but go to the competing reasonableness of the two operations, in effect, which will be one of the considerations that your Honour might need to consider. So if I could have just a few minutes to read those, your Honour. But I'm in a position to resolve - - -

KENNETH MARTIN J: All right. Would you like me to adjourn for, say, 10 minutes, so that that could take place?

NIALL, MR: I would be indebted to your Honour.

KENNETH MARTIN J: Yes. All right. Well, court will adjourn for 10 minutes to allow that process to unfold.

(Short adjournment)

KENNETH MARTIN J: Please be seated. Thank you, Mr Niall.

NIALL, MR: Thank you for the time, your Honour, I'm indebted. Your Honour, my learned friends have made a submission on those paragraphs, which my learned friend, Ms Vernon, indicated to your Honour on the basis of vocational loss. Can I - I have already put a submission about loss in terms of the injunction. These paragraphs go to an additional point and can I describe what that point is at the moment and then take your Honour to the paragraph to explain why it's so. One of the issues in the case is whether there is an unreasonable interference.

KENNETH MARTIN J: Yes.

NIALL, MR: And another issue in the negligence case is whether there was a breach of a duty and the circumstances in which that duty arose, including, we say, knowledge, going to foreseeability. One of the issues in our submission that will be in issue is the reasonableness of Baxter's conduct, pursuing a commercial interest by sowing and harvesting GM canola. One of the interferences that we identify is our enjoyment and use of the land as certified organic, in circumstances where we were a pre-existing and substantial farming operation.

So the relevance of what we do with the land, how we have cultivated and used the land over the proceeding years is plainly relevant, in our respectful submission, to the reasonableness and the competing reasonableness. So when your Honour goes now with that general background by way of submission, if your Honour goes to the statement of 13 February, and your Honour will see that paragraph 2 commences with the heading, Canola on Eagle Rest, and there's some paragraphs which describe the observations of canola and some other related matters.

Paragraph 13 is headed Loss and paragraph 16 describes the organisation of the statement as part a background overview a farming business. Paragraphs 17 right through to 85 give evidence about the way the farm has been used as a certified organic farm. Going specifically to the paragraphs objected to, 21 deals with a particular aspect of the purchase of flour mills, which goes to the manner in which the farmer will exploit his organic grain.

Paragraph 22 describes directly how he has used the land, including by reference to crop rotation, seed propagation, and certified stock. Now, that's directly relevant to how the farmer has used it and the extent of interference and it's also directly relevant to the extent of future interference that may be the subject of an order by way of injunction. So he describes there, relevantly in our submission, that crop rotation is one of the important aspects of his cultivation, as is seed propagation. So in our submission 21 and 22 are plainly relevant to describing his farming practice and also plainly relevant to the extent to which there might be interference.

If your Honour goes on to 43 to 46, which is the next paragraphs, Mr Baxter - Mr Marsh, I beg your Honour's pardon, having set out his farming history both in his affidavit and in this statement, describes his observations as a farmer of yield that he has achieved, and expected

yield in the future. In our submission, a farmer is capable of giving evidence as to those matters, and his experience, which he deposes to, provides the basis for it, and again, the manner in which it's exploited - or has been exploited in the past (indistinct) relevant to the injunction. That's 43 to 46.

48 through to 55 deal with oat sales and describes how he sold oats to the Mortons in the past. And in 50, he describes that it took some years to develop the market and how he attracted Morton's interest. Mr Morton and Mrs Morton will be giving evidence before your Honour. And then in 51 to 54 he gives some evidence of the sales of organic oats. So that will be evidence going to the size and nature of his undertaking, the manner in which he has exploited the farm, the extent to which the Baxter conduct has interfered with his use, and the competing reasonableness of the uses of the two farms; in our submission, plainly relevant on that basis, and will also give your Honour a factual basis for the type and nature of the injury for which we seek an injunction.

57 explains what he has done in relation to how he proposes to exploit organic rye through the preparation of flour mills; in our submission, relevant on the same basis. And 58, a similar assessment to those in 43 to 46, but concerning rye. The next paragraph, your Honour, is 61, and he gives some evidence there by way of observation that - this is, of course, dealing with livestock - in his experience, the organic argument offers a premium price in relation to livestock, in particular, sheep, and explains that justified or basis is explained in 75 through to 77, but he indicates in 61 itself:

...experience in selling lambs into a conventional market.

He explains in 62 that sheep have been part of the business since he first commenced farming, and that it has been moved mainly from wool to meat. 65, a similar basis, your Honour, that he explains why he farms meat rather than wool, and he explains his particular breed of sheep that he prefers. 74 to 79 gives evidence about the manner in which he, and the reason for which he has, in the past, operated his lamb farming, and that would be factual basis about what he intends to do in the future, as through to 83 to 88.

Now, in terms of 89 and 90, your Honour, we've made a mistake for which we apologise. We advised the defendant

that we do not read 89, but we would read 90. We've got those the wrong way around, your Honour, because 89 sets our what Mr Marsh indicates he intends to do if he's re-certified. And your Honour knows that that's the factual scenario established by the evidence. So it's relevant because table 3 will indicate, as at 2014, at least at the state of this statement, what he intended to do, which is what's to be interfered with, whereas table 4, which we don't rely on, works on an assumption which has been falsified by circumstances.

KENNETH MARTIN J: Yes.

NIALL, MR: So we apologise to that, your Honour - - -

KENNETH MARTIN J: I understand.

NIALL, MR: - - - but we seek to read 89 and table 3, but not 90 and table 4. 100 to 160, your Honour, explains - the objection here, your Honour, is that it goes to loss. But, your Honour, what it goes to is, it explains how he has used his land over the period to date. So he describes in 93 through to 99, which no objection is taken to, the factors - some factors affecting land use. And then at 100, he commences explaining what he did as a fact in relation to the events that transpired.

KENNETH MARTIN J: 100 seems to have been overtaken.

NIALL, MR: That's so, your Honour. But what 101 starts with is - explain how he has operated his land since 2010.

KENNETH MARTIN J: Yes.

NIALL, MR: And, indeed, going back a little earlier. So if your Honour goes over to 111, there's a summary of the events in 2007, describing how he exploited the land. In 2008 - sorry, in - he gives a summary of events in 114 to 118. And the only objection, of course, is that it goes to loss. But it describes how he operated the farm during that period, as does 119 through to 121, in relation to the 2009 year. In 122, he explains what in fact he did in 2010, how he operated the farm. He describes in 122, for example, that it was a drought year. He explains the program that he adopted, for example, in 126, your Honour, he says:

Our wheat and rye program was complicated and impacted in 2010 when Baxter informed us he intended to grow GM canola.

Now, that fact, or the fact on which my learned friend opened - my learned friend opened the case on the basis that Baxter told Marsh in May - I think it was May - 2010, that he told him that he was going to plant GM canola, and there was a response. So - - -

KENNETH MARTIN J: Planting in paddocks 1 to 6?

NIALL, MR: That's so, your Honour.

KENNETH MARTIN J: Yes.

NIALL, MR: And so it can't be right that that evidence is somehow irrelevant by going to the question only of loss. He explains what he did, and why he moved his planting, in 127. We don't press 128. But, 129 through 132, he explains again what happened in fact in 2010, which is the very interference on which he sues. In 2011, 134 through to 144, he describes what he did in 2011, for example, in paddock 5 - this is paragraph 136, your Honour - he says - he deposes to the fact that he grew organic oats, wheat and barley in paddock 5.

Now, he explained why he grows oats. He explains why he grew them, in that paragraph, and he's giving evidence that - as to interference with the land in that year. I won't take your Honour to all, 138 through to 144, but they're of a similar direct evidence as to what happened, and are plainly relevant beyond the question of loss, for example, in 139, he gives evidence, in the second sentence, that he topped the pasture in paddocks 9 and 10 to deal with the contamination.

That's the direct - what he directly did, and, in our submission, it will be relevant at the conclusion of the case, that one of the things we will be addressing your Honour on is that in order to deal with seed that's contaminated pasture the method of dealing with it is to encourage germination, because it's not until they germinate that you're able to manage them. So, again, in our submission, all of that evidence is plainly relevant, as is 145 through to 160. Now, consistent with what I've informed your Honour in 154, I indicated to your Honour I didn't propose to read. That was a mistake. I do intend to read 154, with your Honour's leave, but not 155. I apologise to that, your Honour.

KENNETH MARTIN J: All right.

NIALL, MR: The question of reasonableness in competing farming activities is not easily determined. The relevance

to the question of reasonableness in this scenario, where the manner in which both farmers have operated their farming, will plainly be relevant, and, in our submission, your Honour ought not draw a line down in general evidence about the farming practices, given the breadth of those issues, both for the plaintiff's case and, in our submission, for the defendant's case. So in our submission none of the objections which were based on loss are sound and your Honour ought admit all of the evidence.

KENNETH MARTIN J: Yes.

NIALL, MR: If your Honour pleases.

KENNETH MARTIN J: All right. Thanks, Mr Niall. Ms Cahill.

CAHILL, MS: Your Honour, can I just rise before Ms Vernon deals with the reply to those submissions in order to submit to your Honour on an important point that my friend - that arises out of my friend's submissions that concerns the matters that are in issue in this case. My friend contends that it is an issue in the case to consider and assess the competing reasonableness of the farming activities of the plaintiffs on the one hand and the defendants on the other. We say that that can't be right for at least a couple of reasons.

One is, first, there is no legal support. There is no support in law for that submission. Both in respect of the cause of action grounded in negligence and the one in nuisance, there is discussion in the authorities that support the contention that a factor of social utility or benefit in the defendant's activities is a relevant consideration in order to determine whether or not there's a breach of a duty. That's section 5B under the CLA.

In terms of nuisance, the value judgment, which is based on a weighting of a number of different factors, social benefit in the defendant's activities is one of those but there is no support in the authorities in respect of either cause of action for making an assessment of is one activity more reasonable than the other. If they are both reasonable, that would seem to be nothing more to consider beyond that which the authorities call for. Secondly, it is not pleaded. Those are my submissions.

KENNETH MARTIN J: Did you want to respond on that, Mr Niall?

NIALL, MR: Well, I do, your Honour.

KENNETH MARTIN J: I thought you might.

NIALL, MR: Firstly, part of the - an essential aspect of the gist of the action of nuisance is an unreasonable interference with the use and enjoyment of land. It seems to be a consequence of my learned friend's submission that we are not entitled to adduce evidence as to how we are using and enjoying the land and the nature of the interference to that use and enjoyment. Now, it need only state the proposition in that way to demonstrate that it can't be right.

Now, we go further; plainly it's relevant, in our respectful submission, to say what the farmer did because that's his use and that's his enjoyment which is being interfered with. And in a commercial setting, he is entitled to say that I was using it and enjoying it in accordance with established farming practice in an organic setting.

Now, in terms of the comparative position, we say that that is also relevant because, on the one hand, your Honour has to determine whether the interests of the Baxter camp and what he did constituted unreasonable interference. Now, we are entitled to look at the entire setting on the boundary, both sides of the boundary. They put, that is the defendants put in issue, at a number of levels, the reasonableness of the conduct of Baxter. And in our submission we're entitled to compare and contrast and to challenge by reference to the conduct and behaviour of Mr - Mr Marsh. So, in our submission, it's plainly relevant. And, in our submission, it's relevant on the pleadings.

KENNETH MARTIN J: Yes.

NIALL, MR: But even if it didn't go to that comparative exercise, if ultimately your Honour was persuaded that that comparative exercise is not to be undertaken, the first element, the reasonableness of the use of (indistinct) land would plainly be relevant, and it would be supported on that basis alone. If your Honour pleases.

KENNETH MARTIN J: Thank you. All right. Well, I don't think I need to make a ruling on that (indistinct) there is an issue at the end of the day in terms of private nuisance. The orthodox formulation of that tortious cause of action is predicated on an unreasonable use by a defendant of the defendant's land. Having said that, the

evaluation, in terms of the cause of action, is made on a neighbourhood basis by reference to whether it's in a domestic, rural, industrial context.

So it's necessary to evaluate the position of the plaintiff in terms of where they stand. Whether it's appropriate to characterise that as an issue of comparative reasonableness of conduct on each side is a matter, I think, more of semantics than law. But I don't think I need to say more than that at this time. All right. Ms Vernon.

VERNON, MS: All right. Your Honour, if I could just say at the outset, I accept what my learned friend said in relation to paragraphs 126 and a hundred and twenty - sorry, 139, and we don't press the objections in relation to those paragraphs.

KENNETH MARTIN J: Sorry. Let me just get that: 126 to
- - -

VERNON, MS: 12 - 126 and 139. 126 concerns the conversation between Mr Baxter and Mr Marsh. We concede that that is a relevant matter. And 139 is what was done in relation to the topping of the pastures. So it just
- - -

KENNETH MARTIN J: I see. Yes.

VERNON, MS: At the outset, I want to say we don't press those.

KENNETH MARTIN J: All right.

VERNON, MS: In relation to a number of - - -

KENNETH MARTIN J: Well, why don't we just rip through them?

VERNON, MS: I think, your Honour, that would be the best way to deal with it.

KENNETH MARTIN J: 21 is the first one?

VERNON, MS: I don't press 21 and 22.

KENNETH MARTIN J: All right. 21 and 22 are intact.

VERNON, MS: Paragraph 43, there was an objection to this on the ground that it's a conclusion about the yields. Well, the relevant evidence is the yields Mr Marsh actually

achieved, rather than what he aimed to achieve. And it

- - -

KENNETH MARTIN J: 33?

VERNON, MS: Sorry, 43, your Honour.

KENNETH MARTIN J: Sorry, 43. Okay. Yes.

VERNON, MS: The same - I would say, perhaps if I deal with 43, 44, 45 and 46 together, because they raise a similar issue. They all deal with Mr Marsh's beliefs about what a good yield would be, or what a bad yield would be. Those issues, I would submit, relate purely to the issue of the quantification of the loss, but - - -

KENNETH MARTIN J: Doesn't that deal with the productive capacity of his land in a historic sense?

VERNON, MS: But, in any event, your Honour, the evidence of what - the best evidence is the evidence of what the land actually produced, not the rules of thumb that Mr Marsh operated by. He - it's also not stated what the basis of the evidence is. It's simply a conclusion about, "Well, this is what I think is a good yield." Now, that may well be based on the actual yields that were achieved in the previous five years, or 10 years, or the last year, or what he's aware of other farmers in the area thought of as a good yield, but none of that is included in the paragraph or in those paragraphs.

KENNETH MARTIN J: But I think viewed from the perspective of a farming operation, which Mr Marsh would be expected to be intimately involved on a daily basis, in terms of setting the historic platform for how he operated, what he expected to get in terms of yield on an annual basis, you're right, it's general evidence and it's, of course, subject to cross-examination but I think in the scheme of things it goes beyond pure financial quantification of loss. I see it as having some general relevance in the context of the injunction that's sought for nuisance, so I will allow 43 to 46.

VERNON, MS: In relation to 48, the alternative objection was that the evidence referred to in the second and third sentences was hearsay evidence, and - - -

KENNETH MARTIN J: The Mortons are coming though, aren't they?

VERNON, MS: The Mortons are going to be giving evidence so - - -

KENNETH MARTIN J: Why worry?

VERNON, MS: Yes, your Honour.

KENNETH MARTIN J: So 40 - sorry, 47, 48 - all right. Now your objection is 48 to 55, isn't it?

VERNON, MS: That's right.

KENNETH MARTIN J: So 48 stands.

VERNON, MS: 49 is just generalised evidence about the amount of oats that were sold to the Mortons so I'm - we will take from what your Honour has said before that an objection on the ground of relevance would be likely to be overruled on the basis of what you've said before.

KENNETH MARTIN J: Yes. I'm saying nothing about the weight of the evidence but in terms of its arguable relevance to disrupting the farming operation that grows and sells oats, I think there's a basis there predicated upon the relief that's sought in - by way of permanent injunction.

VERNON, MS: The same point would apply to 50 but in relation to 51, the purpose of that appears to be to identify a storage payment price. 52 relates to or refers to a number of invoices that are not contained in the trial bundles.

KENNETH MARTIN J: I see.

VERNON, MS: 53 - - -

KENNETH MARTIN J: I would rather assume from 52 that they would have been, given they have all got a discovery number but - - -

VERNON, MS: No, none of those documents are in the trial bundles.

KENNETH MARTIN J: All right.

VERNON, MS: 54 concerns the price, a differential in price, again, which relates to quantification of loss - sorry, 53 that is. 54 attaches documents or refers to documents that are not contained in the trial bundle. 55

doesn't really say anything substantive at all but refers to another paragraph.

KENNETH MARTIN J: That's the reference back to the affidavit of - - -

VERNON, MS: Paragraph 92 of the affidavit.

KENNETH MARTIN J: Which is out.

VERNON, MS: Which is out so it should come out, your Honour.

KENNETH MARTIN J: All right. Well, then I think as regards paras 48 to 55, 55 is out and everything else can stay in, apart from 52 and 54, which seem to me to seek to put a dollar number by reference to invoices against earlier statements made about oat sales or the like. I'm rather surprised to hear those documents aren't in the trial bundle, which rather confirms where they sit in the scheme of things. So unless you want to make any submission, Mr Niall, about 52 and 54, they seem to me to be unnecessary.

NIALL, MR: Sorry, your Honour. No, I don't seek to press 52 and 54, your Honour.

KENNETH MARTIN J: Very well. So just to summarise, 52, 54 and 55 are out. The balance between 48 and 55 stays.

VERNON, MS: If it please, your Honour. I think the next paragraph - - -

KENNETH MARTIN J: 57 and 58.

VERNON, MS: 57 and 58. I think 57 falls within your earlier rulings.

KENNETH MARTIN J: Yes.

VERNON, MS: And as would 58.

KENNETH MARTIN J: Yes. 57 and 58 can stand.

VERNON, MS: 59 has been excised. The objection to this that was originally taken in relation to paragraph 61 was the basis for concluding the organic market always offered a premium price had not been stated. I understand my friend says - has submitted or if I'm understanding my friend's submission correctly, that evidence is the - that the evidence is relied on as the foundation for that is the

evidence at paragraph 74, 75, 76. Objection was taken to those paragraphs as well, on the basis that there was no factual support for them. There's a question - the relevance of Mr Marsh's expectation, he states no basis for his expectation or for any of the prices that are named there.

KENNETH MARTIN J: Well, in paragraph 61, can I just indicate that the last three sentences seem to me to be all right. So Mr Marsh is able to say he prefers to sell to the organic sheep market. I have a difficulty with the assertion:

The organic market always offers a premium price - because it's generalised and it doesn't have a foundation in fact, at least as formulated.

VERNON, MS: Your Honour, that was the only part of the paragraph that was objected to. It was the words:

In my experience the organic market always offers a premium price and so I prefer to sell to this market. However -

was the - until the word "however" was the objection that was raised.

KENNETH MARTIN J: Yes. Well, the preference to sell to the organic market for sheep seems to me to be okay but it's the premium price issue that seems to me to be the fatality in that, at least as currently formulated. So I uphold the objection in respect of:

In my experience the organic market always offers a premium price and so -

but the balance of that paragraph, read, "I prefer to sell to the organic market," and then he explains that sometimes he doesn't for various reasons. So that's - - -

VERNON, MS: Yes.

KENNETH MARTIN J: That can stand.

VERNON, MS: Yes. A similar objection was taken in relation to paragraph 65, your Honour. In relation to the first sentence of paragraph 65, which was objected to on the basis that there was - - -

KENNETH MARTIN J: Yes.

VERNON, MS: - - - no statement of the basis of the conclusion.

KENNETH MARTIN J: And I think that falls in harmony with that ruling, the first sentence, that is of 65.

VERNON, MS: The third sentence was objected to on the basis that - - -

KENNETH MARTIN J: "Dorplers have a high lambing percentage."

VERNON, MS: Yes. I would think - I withdraw that objection, your Honour.

KENNETH MARTIN J: Yes. 74 to 79 is next.

VERNON, MS: 74. Yes, your Honour. Again, there's no basis for the evidence set out in 74 - no factual basis is set out, and it seems to relate purely to the calculation of a loss derived from the sale - the inability to sell lambs as organic lambs.

KENNETH MARTIN J: Can I just say, evaluating all those paragraphs, 74 to 79, I can identify a problem with 74 and 79 in terms of a basis for the expectation quantified to the extent of those numbers. Ditto in 79 about a 60 per cent price differential. That's not to say if the paragraph hadn't been constructed by reference to a foundation of fact that that evidence would not be relevant, but, as constructed, it seems to me to be problematic. 75 to 78 seem to me to be relevant, bearing in mind the discussion we've had about effect.

VERNON, MS: Yes, your Honour, that on the basis of your earlier rulings, I have no more to say in relation to 75, 76, 77 and 78.

KENNETH MARTIN J: Yes. Yes. All right. Well, on that basis, 74 is out, 75 is fine; 76, 77, 78 stay; 79 is out.

VERNON, MS: The next paragraph is paragraph 83; paragraphs 80, 81 and 82 having been conceded. Paragraph 83, again, refers to documents which aren't contained in the trial bundle. Paragraph - - -

KENNETH MARTIN J: Yes.

VERNON, MS: Sorry, your Honour.

KENNETH MARTIN J: Well, on that basis, I don't see how 83 can stand.

VERNON, MS: 84 appears to fall within your earlier ruling, your Honour.

KENNETH MARTIN J: Yes. 84 can stand.

VERNON, MS: As perhaps does 85.

KENNETH MARTIN J: There's a hearsay component in the first line in terms of "other organic farmers" who aren't identified.

VERNON, MS: Yes. As is the evidence - - -

KENNETH MARTIN J: If it read, "I was" - - -

VERNON, MS: - - - about "most abattoirs are aligned with the big retailers, like Coles and Woolworths". There's no basis for that; it's not a matter within direct knowledge, one would have thought. "It's difficult to get killing space in certified organic abattoirs." That is evidence Mr Marsh could give. "The product has more health issues as a conclusion," so it's not clear what the basis of that conclusion is - well, presumably it's because - sorry. It's in comparison to grain; I hadn't picked that up, your Honour.

KENNETH MARTIN J: Yes. Perhaps one or two more.

VERNON, MS: Perhaps I'm prepared to agree that lamb needs to be handled more carefully than grain. And the last sentence is comment, your Honour, and the - - -

KENNETH MARTIN J: Yes. All right. Well, as regards 85, I think if it's confined to Mr Marsh's personal knowledge and personal activity in terms of developing a market, the first sentence without truncation can stand. Second sentence can stand; it's relatively benign. The third sentence seems to me to be speculative without a basis. The difficulty in terms of space and certified organic abattoirs can stand. The health issues and the care vis-à-vis grain can stand. The last sentence is too generalised to stand.

VERNON, MS: Now, paragraph 86 simply refers to the five tables that are attached to the statement, and therefore is inoffensive to the extent that the tables themselves are admissible.

KENNETH MARTIN J: Yes. Table 4, I think, is conceded, and table 3 has been rehabilitated.

VERNON, MS: That's right.

KENNETH MARTIN J: So 90 is out, as, inherently, is table 4.

VERNON, MS: The detail of what precisely Mr Marsh would have - well, plans now to produce on each of the paddocks on Eagle Rest for the next 5 years, I would submit - working my way up from the bottom on a page, your Honour - is in paragraph 89, and I would submit that level of detail is not relevant to the issues that my friend has said the matters refer to or the evidence refers to. The table that is in paragraph 88 says what would have been produced had the land not been decertified from 2011 to 2018.

KENNETH MARTIN J: So, what, proceeds on a false premise?

VERNON, MS: It does, your Honour, because - - -

KENNETH MARTIN J: In part.

VERNON, MS: - - - it has been recertified, and also the past is the period of time from 2011 and 12 and 13 is known now. So the - there's no need for the - there's no place for evidence about what might have happened. Paragraph - I don't have any objection to paragraph 87, your Honour.

KENNETH MARTIN J: All right.

VERNON, MS: And paragraph 91 sets out what Mr Marsh will be producing on Eagle Rest if he sells his flock in 2013, which presumably has been overtaken by events. But I - it's just difficult to see the relevance of that, your Honour. It's now a matter of history.

KENNETH MARTIN J: Well then, on the face of it, tables 2 and 5 just need some adjustment in terms of making them precisely relevant. Perhaps I will hear from Mr Niall about that.

NIALL, MR: If one looks at the tables, your Honour - so starting at table 1, the witness deposes to what actually happened between 2007, 2010; no objection is taken to that.

KENNETH MARTIN J: Yes.

NIALL, MR: The next one is hypothetical. What would have happened, had there been no contamination or decertification. So that's simply indicating what the plan or evidence was - what the plan or prospect was in 2010 looking forward, and the witnesses says, "Well, at the time of contamination, take that out, this is what I would have done." So that deals with the - - -

KENNETH MARTIN J: I think table 2 - the paragraph 88 then is just a question of grammar. I think Ms Vernon has read it on the basis of the land being decertified for an extra five years, whereas, I think, as framed, what's intended to be said is, "Here's what my plan was over that seven year period, had I not been decertified."

NIALL, MR: That's so, your Honour.

KENNETH MARTIN J: Yes. All right. Well, I think on that basis, table 2 is fine.

NIALL, MR: And table 3, the evidence is that there has been recertification, and this is what he says would be the - - -

KENNETH MARTIN J: Table 3 is fine.

NIALL, MR: Table 4, we don't press. And table 5 has been overtaken by 5(a) in the subsequent statement, so I don't need to read table 5, your Honour.

KENNETH MARTIN J: Thank you. All right. Well, 91 will come out on that basis.

VERNON, MS: Our - I think that 92 through to 99 on that page fall within your Honour's earlier ruling concerning relevance.

KENNETH MARTIN J: Let me just have a quick look. Yes.

VERNON, MS: 100 has been overtaken by events, but - - -

KENNETH MARTIN J: 100 should come out.

VERNON, MS: Yes. There would obviously be a need to make some adjustment to 101, in light of the reinstatement of the certification, but perhaps that's something - - -

KENNETH MARTIN J: Well, I guess at the time the statement is prepared - - -

VERNON, MS: Yes.

KENNETH MARTIN J: - - - it's accurate.

VERNON, MS: Yes, your Honour.

KENNETH MARTIN J: But we review it as having been constructed at that time rather than a living document. We will leave 101.

VERNON, MS: I think your earlier ruling applies to 102, 103, 104, 105, 106, 107, 108, 109 and 110.

KENNETH MARTIN J: Yes. They stand.

VERNON, MS: 111, 112, 113 through to paragraph 118. So up to 117 would appear to fall within your earlier ruling, your Honour. Paragraph 118 refers - - -

NIALL, MR: We don't press 118, your Honour.

VERNON, MS: Thank you.

KENNETH MARTIN J: All right. 118 is out.

VERNON, MS: Again, 119 and 120 would appear to fall within your earlier ruling, your Honour. But 121, I believe, relates to documents that are not in the bundle.

KENNETH MARTIN J: It's the second sentence of 121.

VERNON, MS: Yes.

KENNETH MARTIN J: Well, then, on that basis, it should be out.

VERNON, MS: 123, from the second sentence. 122 falls within your Honour's earlier ruling.

KENNETH MARTIN J: 122 stands?

VERNON, MS: On the basis of your Honour's ruling.

KENNETH MARTIN J: Yes.

VERNON, MS: I make no further submissions on that. 123, from the second sentence - well, the second sentence in the paragraph refers to documents that are not in the bundle.

KENNETH MARTIN J: All right. Mr Niall, subject to you, the second sentence of 123 is excised.

NIALL, MR: If the court pleases.

VERNON, MS: One - the rest of that page appears to fall within your earlier ruling, your Honour.

KENNETH MARTIN J: Yes.

VERNON, MS: 128 has already been taken out. 129 falls within your earlier ruling. 130, the second sentence and the third sentence refer to the price obtained for the wheat, which was - relates to the quantum, and the document - in support of that submission, the document that's referred to is not in the bundle.

KENNETH MARTIN J: On that basis, the last sentence of 130 should be excised.

VERNON, MS: Your Honour, it should be the second sentence as well, because the last - - -

KENNETH MARTIN J: You say that just goes to dollar figures?

VERNON, MS: Yes. And the dollar figures are referred to in the invoices which aren't enclosed in the - which aren't in the bundle.

KENNETH MARTIN J: I will excise the words "for \$200 per tonne", so that sentence can end "the remaining 2.28 tonne of decertified wheat was sold to Mortons full stop".

VERNON, MS: Paragraph 131 falls within your earlier ruling, and I make no further submissions in relation to that. Paragraph 132, the documents referred to in the second sentence are not included in the trial bundle.

KENNETH MARTIN J: On that basis, the last sentence of paragraph 132 is out.

VERNON, MS: 134 to 136, I make no further submissions on the basis of your earlier ruling, your Honour. 137, say - clearly does relate to the issue of loss, certainly the second sentence, which attaches documents that are not in the bundle.

KENNETH MARTIN J: Well, the second sentence in para 137 is obviously out, based on what I've said previously. The first sentence, I think, can stand. It's a matter for cross-examination.

VERNON, MS: The second sentence in 138, your Honour, is a document which is not in the bundle.

KENNETH MARTIN J: On that basis, it should be excised.

VERNON, MS: 139, I make no further submissions, your Honour. 140, the document attached, or referred to, in that paragraph are not in the bundle.

KENNETH MARTIN J: All right. The last sentence of paragraph 140 is out.

NIALL, MR: Your Honour, we don't press the last sentence of 142, 143; we don't press 144 in its entirety. Paragraph 150 will stop at the word "Mortons".

KENNETH MARTIN J: Yes.

NIALL, MR: Paragraph 152, we don't read the last sentence.

KENNETH MARTIN J: Yes.

NIALL, MR: Paragraph 153, we don't read the sentence "I refer to".

KENNETH MARTIN J: Yes. All right. That material is all excised.

NIALL, MR: Paragraph 160, don't read the last sentence.

KENNETH MARTIN J: I think 160 has gone, on my - - -

NIALL, MR: I beg your Honour's pardon. I think that's the additional matters, I think.

KENNETH MARTIN J: Right.

VERNON, MS: Your Honour, if I could draw your - if I could go back to paragraph 129 - - -

KENNETH MARTIN J: Sorry, I didn't catch that - one - - -

VERNON, MS: Hundred and twenty nine.

KENNETH MARTIN J: Twenty nine. Yes.

VERNON, MS: The first - this is not an objection that has been raised before, and I apologise, your Honour, for that. But the first six words, up to the comma, up to the word

"block 2", are a conclusion about what is in issue in these proceedings.

KENNETH MARTIN J: So the precatory phrase "as a result of the contamination."

VERNON, MS: Yes, your Honour.

KENNETH MARTIN J: I think I have seen lots of references in the affidavit - in the statement to the contamination and I understand your position about that.

VERNON, MS: It's - the use of the word "contamination" is not the issue because we can address your Honour and will on what that does and ought to mean. It's the causation - the conclusion that the contamination caused the decertification that is a concern.

KENNETH MARTIN J: Well, I understand that's furiously in dispute. Causation, however, is a question of fact. I think for what it's worth, and I'm saying nothing about the weight, but in terms of the relevance, I think it's really a matter for cross-examination.

VERNON, MS: Okay.

KENNETH MARTIN J: I think Mr Marsh would have his views about that as a matter of fact and they can be tested and probed in the usual way.

VERNON, MS: Thank you, your Honour. Did I understand my friend was deleting the last sentence in 153 as well?

NIALL, MR: Yes, your Honour.

KENNETH MARTIN J: Indeed, that's my record.

VERNON, MS: I hadn't made a note of it. Now, the issue with the - given your Honour has ruled on the admissibility of table 4, I would make no further submission in relation to paragraph 155. I think table 4 was allowed in or am I wrong about that? No, table 4 is gone, so 155 should come out.

KENNETH MARTIN J: Table 4 is gone. 155 is out but 154 is back.

VERNON, MS: 154 is back in. 158 refers to table 4 as well.

KENNETH MARTIN J: So consequentially 158 should go in, Mr Niall.

NIALL, MR: Yes, I apologise, your Honour. Yes, that should come out.

KENNETH MARTIN J: Yes, 158 is out.

VERNON, MS: 159 seems to purely relate to the numbers that were generated by operating Eagle Rest. They must therefore go to the issue of quantum of the loss or the quantification of the loss.

KENNETH MARTIN J: I had sort of assumed that was a historic compilation of underlying material.

VERNON, MS: It doesn't say so. The financial statements are - of Mr Marsh are included in the bundle and will be admitted by consent, I believe that's right.

KENNETH MARTIN J: Well, the former paragraph 160 used to say:

The above table is based on data extracted from our financial statements.

VERNON, MS: And that has come out.

KENNETH MARTIN J: And there's a number referred to but that seems to have gone.

NIALL, MR: I think I have misspoken, your Honour, because 160 - the documents at 160 are in evidence.

KENNETH MARTIN J: Yes.

NIALL, MR: They're the subject of a consent tender. So in order to make 159 explicable - - -

KENNETH MARTIN J: Yes. Well, 160 - - -

NIALL, MR: - - - we would probably need 160 - - -

KENNETH MARTIN J: Yes.

NIALL, MR: - - - if it doesn't face the problem of the other objections to the reference to documents.

KENNETH MARTIN J: Yes, all right.

NIALL, MR: All right.

KENNETH MARTIN J: Well, I think, Ms Vernon, to the extent that it's said 159 is a table summarising data from material that's actually in the trial bundle and it's historic for 2004 to 2011, I think it's relevant to the economic operation of that farm as a historic event in the context of the argument about it being affected for the future. So, on that basis, I will allow 159 and 160 to stand; all of which, of course, doesn't inhibit you in the slightest from probing it in cross-examination.

VERNON, MS: Yes. If it please your Honour. That leaves 166 and 167, which, in my view, would appear to fall within your Honour's earlier ruling. And, on that basis, I make no further submission in that regard.

KENNETH MARTIN J: Yes. All right. 166 and 167 can stand.

VERNON, MS: That would deal with the statement.

KENNETH MARTIN J: That's the statement?

VERNON, MS: That's the statement. In total, there's still the statement of Mr Marsh, dated 15 January 2014, in respect to which a number of these paragraphs are to - in paragraph 2 and 3, there's reference to paragraphs that I believe your Honour has allowed in, if not in total, then in part. Paragraph 4 would appear to fall within your earlier ruling. Paragraph 5 would also appear to fall within your earlier ruling.

Paragraph 6 is about the witnesses' - the variety of oats planted, but - and it's difficult to see the relevance, but I don't propose to make any further submissions on that. I believe that the document referred to in paragraph 7 is no longer in the bundle or is not in the trial bundle, in which case, the whole paragraph should come out.

KENNETH MARTIN J: All right. Well, para 7 - I will hear from Mr Niall, but para 7 on that basis has got the sword of Damocles hanging over it.

NIALL, MR: I don't press 7, your Honour. In one of them, I think we've indicated to our friend (indistinct) paragraph 10, we don't press the second sentence.

KENNETH MARTIN J: Second sentence of paragraph 10 is

- - -

NIALL, MR: "As a result of this" - - -

KENNETH MARTIN J: Yes.

NIALL, MR: We don't press that sentence, if your Honour pleases.

KENNETH MARTIN J: All right. So that's out.

VERNON, MS: That's the only concession (indistinct).

KENNETH MARTIN J: So 7 is gone and second sentence of 10 are gone. Anything else, Ms Vernon?

VERNON, MS: Paragraphs - I will deal with these as a lot job. Paragraphs 13 to 33, the relevance of the growing of linseed on this property was not apparent before the matter went to - before the issue of quantum of loss was resolved. But if your - on the basis of your Honour's previous ruling, I would make no further submissions in relation to those.

KENNETH MARTIN J: All right. Well, I think those paragraphs should stand. It's difficult to assess contextual relevance without the context. It may be that something will emerge that will indicate where the linseed aspect goes, but in terms of the capacity of the property to grow that crop, that may bear upon the overall nuisance and injunction argument.

VERNON, MS: Paragraph 41 - sorry. My friend has just drawn my attention to paragraph 34, which was not referred to, but which did - concerns a matter that has - is the subject of a concession that was made in relation to the source of the swathed canola. It refers to paragraph 80, which has been amended by the objection, which has been amended. So all that needs to - the words "from Seven Oaks" being excised would remedy that.

KENNETH MARTIN J: Sorry. I don't think we've dealt with that, have we, paragraph 80?

VERNON, MS: Paragraph 80 - sorry, of the - - -

KENNETH MARTIN J: In the affidavit.

VERNON, MS: - - - of the notes - sorry. I've misspoke. It's - no, I didn't misspeak. Paragraph 80 of the affidavit - is it paragraph 80? If you bear with me for a moment, your Honour. I beg your pardon, your Honour; it was 61.

KENNETH MARTIN J: 61.

VERNON, MS: Of the affidavit, where the paragraph - - -

KENNETH MARTIN J: Yes. That's right. Which now reads:

I observed a significant number of swathed canola plants on paddock seven - - -

VERNON, MS: On paddock seven, etcetera.

KENNETH MARTIN J: - - - etcetera. Yes.

VERNON, MS: So the - on the basis of that, the words "from Seven Oaks" in paragraph 34 should be excised.

KENNETH MARTIN J: All right. So the word - the concluding two words of that sentence in paragraph 34, "from Seven Oaks" are excised.

VERNON, MS: Objection was taken to the words in paragraph 41, after the words, "I do not own a professional seed cleaning system," the balance of the paragraph, "because" is objected to. There's a reference to the expense of such a system, but there's no direct evidence of that expense.

KENNETH MARTIN J: Second next sentence?

VERNON, MS: Continuing:

I understand those systems can cost from tens up to hundreds of thousands of dollars.

There's no basis for that assumption or that understanding.

KENNETH MARTIN J: All right. I think, subject to Mr Niall - well, I should hear you on 41.

NIALL, MR: Thank you, your Honour. The first - there's no objection to the fact he's giving evidence that he doesn't own one. The reason he doesn't own one being his belief as to the price, or that it's too expensive for him, is relevant, because one of the things that were - is suggested in this case is that he should have a professional seed cleaning - sorry, I withdraw that - he should clean the seed. And he says, "Well, I can't, and I believe it's too expensive to do so." Now, that's an explanation which would go to the state of facts and the reasonableness of his conduct in not cleaning the seed, or the practicability. He can be cross-examined on that, but,

in my submission, his belief as to the question is relevant.

KENNETH MARTIN J: All right. Paragraph 41 can stand. Seems to me it's a matter for cross-examination. I think it's within the range of expertise of a farmer to know, in broad terms, the cost of farming equipment. It says nothing, of course, of the weight of that evidence, but in terms of its relevance, in the context of an antidote, so to speak, to the alleged nuisance, where one can stand.

VERNON, MS: The objections that were referred to in the document that you have, your Honour, in 42 and 43, are not pressed. So - - -

KENNETH MARTIN J: So 42 and 43 can stand.

VERNON, MS: That leaves paragraph 44, which would appear to fall within the ruling your Honour has just made in relation to 41.

KENNETH MARTIN J: Quite so.

VERNON, MS: And - - -

KENNETH MARTIN J: So 44 and 45 can stand.

VERNON, MS: That completes - - -

KENNETH MARTIN J: All right.

VERNON, MS: - - - dealing with the objections, your Honour.

KENNETH MARTIN J: So we have dealt with everything in the affidavit as well?

VERNON, MS: Yes - perhaps I could just check that, your Honour. Yes, I believe - but there is a group of documents in the affidavit that haven't been dealt with, which were objected to on the basis that they are secondary evidence of the contents of the documents and that the documents - these are documents that have been tendered by consent. And these paragraphs were - - -

KENNETH MARTIN J: So these are paragraphs that sort of set out quotes from documents and the like?

VERNON, MS: That's right, your Honour. The paragraphs
- - -

KENNETH MARTIN J: If they are in by consent, the documents that is, can we proceed on the basis that we will work, for all intents and purposes, on the basis that this is the belief about what the document says and the reliable evidence is actually found in the document?

VERNON, MS: I am happy to proceed on that basis, your Honour.

KENNETH MARTIN J: All right. Are you happy with that, Mr Niall?

NIALL, MR: Yes, indeed, your Honour.

KENNETH MARTIN J: All right. Well, we will deal with those objections that way.

NIALL, MR: I beg your Honour's pardon.

KENNETH MARTIN J: Of course.

NIALL, MR: My learned friend - I think the only paragraphs that are objected to which haven't been dealt with in the affidavit are paragraphs 39 and 40.

VERNON, MS: Yes, sorry. It is, your Honour.

NIALL, MR: Apart from that, I think the totality of the affidavit has been addressed but my learned friend hasn't addressed your Honour on those two, your Honour.

KENNETH MARTIN J: 39 and 40, thank you.

VERNON, MS: I'm grateful to my friend for pointing that out. Paras 39 and 40 concern communications between - in relation to 39, Mr Marsh and the minister for agriculture, and 40, between Mr Marsh and the Department of Agriculture and local authorities. On reconsideration however, your Honour, I don't press those objections.

KENNETH MARTIN J: Very well, those objections not being pressed, paras 39 and 40 in the affidavit of Mr Marsh will stand. All right. Just in a pragmatic sense, for the purpose of Mr Marsh giving some coherent evidence across three amended truncated witness statements and then being cross-examined, how are we going to handle that?

NIALL, MR: We will provide to our friends now a copy of the three statements with the excisions we have made. We will give that to the witness and we will explain what has

been removed and we will just see how we go in terms of cross-examination and picking up documents - - -

KENNETH MARTIN J: All right.

NIALL, MR: - - - and the like, and I note the time, your Honour.

KENNETH MARTIN J: Yes, all right. Well, perhaps if we can have some extra copies, if that's possible, available as well, as no doubt members of the public and the press will be interested in following that evidence.

NIALL, MR: Indeed, your Honour.

KENNETH MARTIN J: Yes, all right.

CAHILL, MS: Can I just make a - - -

KENNETH MARTIN J: Ms Cahill, are you happy with that?

CAHILL, MS: I'm just offering for assistance. It might help the witness if there were a clean copy, rather than having to trawl through a lot of excised material. That might be of assistance.

KENNETH MARTIN J: Yes. If that's feasible that would be obviously desirable.

NIALL, MR: The difficulty with that will be that the witness will be reading a statement which is not in evidence and it may confuse the situation when he is being cross-examined on a document which he's the only one who realises - - -

KENNETH MARTIN J: Yes.

NIALL, MR: Metaphysically, it doesn't include a paragraph.

KENNETH MARTIN J: I think we will work on the premise that the affidavit and the statements as amended will be tendered as exhibits. It would be helpful for posterity if they could be clean exhibits in due course. Now, that might take some time.

NIALL, MR: If your Honour pleases.

KENNETH MARTIN J: But if we could work off what we have for the purposes of getting on with the cross-examination and then supplement it in due course so much the better.

NIALL, MR: Yes, your Honour.

KENNETH MARTIN J: All right. On that basis we will adjourn to commence with Mr Marsh's evidence at 2.15 pm.

(LUNCHEON ADJOURNMENT)

THE ASSOCIATE: Please be seated.

NIALL, MR: If your Honour pleases, I call Steven William Marsh.

MARSH, STEVEN WILLIAM sworn:

KENNETH MARTIN J: Yes. Mr Marsh. Mr Niall.

NIALL, MR: If your Honour pleases. Mr Marsh, you will need to keep your voice up, and direct your answers to his Honour. Can you tell his Honour your full name, please?---Steven William Marsh, your Honour.

And your address?---RMB 555, Kojonup.

And your occupation?---Farmer.

And for the purposes of this proceeding, have you prepared some affidavits and witness statements?---Correct.

Can I hand the witness a copy in a folder of the three statements and we've provided to your Honour's associate.

KENNETH MARTIN J: Thank you.

NIALL, MR: And we will attend to the excision in due course, your Honour.

KENNETH MARTIN J: Yes. Very well.

NIALL, MR: Mr Marsh, in front of you, the first document should be an affidavit of yours of 12 April 2012?---Correct.

Yes. And you will see, if you look at the version that's in front of you, that various paragraphs have been the subject of some striking through. Do you see that?---Yes.

Yes. And apart from those blacked out exclusions, is that a true copy of your affidavit?---Yes.

I just want to ask you a couple of questions arising from the debate and rulings of his Honour. Could you go to paragraph 61, please?---Okay.

And you recall - you say there, "On or shortly after about 30 November 2010," and then there's some words deleted, "a significant number of canola plants on paddock 7, 8, 9, 10, 11, 12 and 13." Does that paragraph record your observations at that date?---Yes. That is true.

Thank you. And if you go to - that's the only matter in that statement, your Honour.

KENNETH MARTIN J: Very well.

NIALL, MR: Does your Honour seek to - wish to receive those as an exhibit or - - -

KENNETH MARTIN J: Yes. My plan was to receive them all as exhibit 5, making the affidavit exhibit 5A, the substantive witness statement 5B, and the supplementary witness statement 5C.

EXHIBIT 5A Plaintiffs
Affidavit of Steven William Marsh

EXHIBIT 5B Plaintiffs
Substantive witness statement of Steven
William Marsh

EXHIBIT 5C Plaintiffs
Supplementary witness statement of
Steven William Marsh

NIALL, MR: Thank you. I take you now to the next document in that bundle. If you go through there should be a statement, Steven Marsh Witness Statement?---Yes. All right.

Do you have that, Mr Marsh?---Yes.

And that goes through for - through to page 19, 167 paragraphs, and on the 20th page it's dated 13 February 2013?---Correct.

And is that your signature?---Correct.

And again, except for the exclusions of blacking out, have you read that statement recently?---Yes.

And are the contents of it true and correct?---Yes.

I tender that, if your Honour pleases.

KENNETH MARTIN J: Yes. Well, Mr Marsh's witness statement of 13 February 2013, will be exhibit 5B.

EXHIBIT 5B Plaintiffs DATE 13/02/2013
Mr Marsh's witness statement

NIALL, MR: If you go to paragraph 61 of that witness statement, Mr Marsh - - -?---Yes.

- - - may not be clear, but perhaps if you read that paragraph, and you refer in the second line to:

I prefer to sell to this market, however, sometimes if I need to sell a number of lambs quickly because of their teeth are coming in, resulting in a lower price in both markets, I can readily sell to the conventional market.

In that second line when you refer to "this market", which market are you referring to?---The organic - - -

Thank you?---- - - market.

And could you go to table 2 on - which is at the conclusion of the document. There should be a number of tables, and I would ask you to go to table 2. Do you have that?---I do.

Are you able to identify that document to his Honour and explain what it is?---Yes. It's my planned rotations for that period of time, your Honour, as from 2011 to 2018.

Yes. Thank you. Now, moving onto the supplementary statement, if you just flick over a couple of pages, Mr Marsh, do you have there a supplementary witness statement of Stephen William Marsh?---Correct.

And that's of 47 paragraphs, and, at the end of it, it's dated 15 January 2014. Do you see that?---Yes.

And is that your signature?---Yes.

And again, leaving aside the matters that have been removed, are the contents of that supplementary witness statement true and correct?---Yes.

I tender that, if your Honour pleases.

KENNETH MARTIN J: Yes. The supplementary witness statement of Mr Marsh of 15 January 2014, will be exhibit 5C.

EXHIBIT 5C Plaintiffs DATE 15/01/2014
Supplementary witness statement of Mr Marsh

NIALL, MR: Just some additional matters if I may, your Honour.

KENNETH MARTIN J: Yes.

NIALL, MR: Could the witness be shown this document, please. Showing the witness the one with the two farms in blue and yellow, with no hatching on it, your Honour. Now, Mr Marsh, looking at the area that's described as Eagle Rest, does that aerial photograph reflect the boundaries of your property, Eagle Rest, and also the paddock divisions within the property?---Yes, contained within the blue is a description of our paddocks on the property. Yes.

Thank you. I tender that, if your Honour pleases.

KENNETH MARTIN J: Any objection, Ms Cahill?

CAHILL, MS: No, your Honour.

KENNETH MARTIN J: All right. The aerial photograph, which shows the delineation of Eagle Rest and Seven Oaks, and within the blue boundary for Eagle Rest, the 13 different paddock areas and the named areas in Seven Oaks in yellow, will be exhibit 6.

EXHIBIT 6 Plaintiffs
Aerial photograph showing delineation of Eagle Rest and Seven Oaks

NIALL, MR: Mr Marsh, the document - the photograph that you have also has in yellow a reference to Seven Oaks and some names attached to some paddocks. As at December 2010, what knowledge did you have of the names of the paddocks of Seven Oaks?---I didn't know the names of Seven Oaks.

Thank you?---Not the paddocks.

Would you have a look at these, please. I'm just handing the witness a copy of some photographs - the photographs that I handed up to your Honour and my learned friend in opening. Just have a look at those photographs please, Mr Marsh. First dealing with the photographs of the paddocks,

are you able to say who took those photographs?---I took those photographs.

Right. Can I just take you through them. Are you able to describe to his Honour by reference, if it helps, the paddock numbers on exhibit 6, the aerial photo, what each photo represents?---The first - - -

KENNETH MARTIN J: Can we make sure we've all got the same photo?

NIALL, MR: Yes, your Honour. I beg your Honour's pardon.

KENNETH MARTIN J: All right. So, yes, what's that one?---That's a picture overlooking paddock 6, looking across - it's - it's of oats - an oat crop - Carrolup oats. It overlooks paddock 3, and then it continues to overlook paddock 4 and 5. They are all oats. The first paddock is Carrolup oats; the other paddocks have got Swan oats - different variety.

NIALL, MR: Thank you. And the next photo in your bundle, if you could hold that up to his Honour, please. That's a photograph with a paddock and some sheep in it.

KENNETH MARTIN J: Yes.

NIALL, MR: Are you able to describe what that shows, Mr Marsh?---That's a picture of our sheep, taken in the lower portion of paddock 8, and looking over paddock 7, and those sheep are Dorper crosses, your Honour.

And is the area portrayed in the photograph, is that just your farm, or does it extend beyond your farm boundaries?---No. That's predominantly our farm. The tree line is an old road, and that ends the boundary. So we can predominantly see Eagle Rest.

Thank you. Would you have a look at the next photo, please? Are you able to identify that photo?---Yes.

KENNETH MARTIN J: Is that yellow canola flowers in the
- - -

NIALL, MR: Yes, your - - -?-----No, your Honour.

KENNETH MARTIN J: Maybe not?---I'm sorry. It's Capeweed.

NIALL, MR: What does - - -

KENNETH MARTIN J: What is that?---That is Capeweed flowers.

Capeweed?---Yes.

NIALL, MR: And what paddocks does that photo picture?---That's taken looking across paddock 7, and over paddock 10, and 9 in the distance.

KENNETH MARTIN J: So in 7, looking over 10?---Yes, your Honour. It's - I can't show you clear enough on my little blue map.

So, basically, west?---Basically, your Honour, in a westerly direction, yes.

NIALL, MR: And what time of the year was this photograph taken?---Around September, October.

And what year was it taken?---2011.

KENNETH MARTIN J: 2011?---Yes, your Honour.

NIALL, MR: If you look at that photo, the foreground drops down to a - what appears to be a lower area of some trees. Would you be able to identify that lower area on exhibit 6, please? You will need to hold it up to his Honour?---Your Honour, you will see a gully running down, looking in that westerly direction, where we said, there is a gully running down through here. That tree line is sloping down into that gully. It's just in front of my paddock. The photo was taken about here, looking across in this direction.

So in the foreground, what paddock is that, Mr Marsh?---In the foreground is paddock 7.

And as it goes - the photo appears to go up, a rise on the far side of the photograph. What paddocks are they?---That is still a continuation of paddock 7, until you get to what is a sheep camp, your Honour, which is just up - just up here, and then there's paddock divides running down there to the fence to that other creek. That is paddock 10. And on this side, it goes back into paddock 9, your Honour.

Thank you. And what height were the - was the Capeweed at the time that you took the photograph?---It's about six inches high, so - your Honour - so high.

The next photo has what looks like a rocky outcrop in the foreground. Are you able to describe what that photograph

shows?---That's a picture looking, again, slightly north-west, or in a westerly direction. It's taken in paddock 13. It's looking towards the South Glenorchy Road, and Baxter's property in the background.

So you've got what looks like some cultivated ground on the flat where the rocky outcrop stops. What's that paddock?---That is correct. That had been planted to crop in - - -

KENNETH MARTIN J: What sort of crop is that?---That would have been oats.

That's oats?---Yes.

NIALL, MR: And can you just point to, on the photograph, where South Glenorchy Road is?---It is just down - that is actually - I don't mean to disrespect. Mr Niall, that's actually a slight going down towards the South Glenorchy Road, and there's a gully line running along just in front of that road, your Honour.

So do those - what about those trees, what are they?---The trees running along here is the South Glenorchy Road, that tree line.

So the trees follow the road?---Correct.

And on the other side of those trees, you see some property. Whose property is that?---That's Mr Baxter's, Michael's.

Yes. And the next photo is a standing crop. What is that, Mr Marsh?---These were rye, your Honour.

KENNETH MARTIN J: That's rye?---Yes.

NIALL, MR: And where is that - where was that photo taken?---In paddock 6.

And the next photo?

KENNETH MARTIN J: Sorry. When was that taken?---2013, your Honour.

Last year?---Yes.

NIALL, MR: What time of year was it taken?---It was taken about October, around October.

The next photo, if you can identify the paddock and what's in the photo and the date?---Again, that's in paddock 6, your Honour. That is again rye in the foreground, some linseed and some wheat. It's - it was in paddock 6, your Honour.

KENNETH MARTIN J: Paddock 6?---Correct.

Taken last year?---Yes, your Honour.

NIALL, MR: In which direction is the photograph heading?---It's looking in a westerly direction.

Thank you. And then the next and last photograph, what is that? That's the photo with some sheep in the foreground?---Yes, your Honour. It was taken in paddock 13.

And the trees that start at about the middle of the photograph?---Yes.

What are they?---That's a creek line, your Honour, the trees in the middle of that photograph. That's taken overlooking paddock - it was taken in paddock 13, overlooking paddock 12, and in this corner is a portion of paddock 10. And Mr Baxter's property in the background, your Honour.

Are you able to see, or identify to his Honour - for his Honour where South Glenorchy Road would be in this photograph?---Your Honour, we have a tree line running here, the South Glenorchy Road is running up just on that portion there, if you can see that.

KENNETH MARTIN J: So towards the right-hand side?---It's more to the west - yes, to the right-hand side.

To the west.

NIALL, MR: Yes. What appears to be some red or object or machinery right in the middle of the photo, in the top part of it, what is that?---That's Mr Baxter's harvester, your Honour.

KENNETH MARTIN J: Mr Baxter's harvester?---Yes.

And what year was this taken?---This was taken - sorry, I just - yes, look, I think it was 2012, your Honour - or 13. Yes.

KENNETH MARTIN J: 2012. Okay.

NIALL, MR: I tender those photographs, if your Honour pleases.

KENNETH MARTIN J: Yes. Very well. The - - -

THE WITNESS: Could - if you mind, your Honour - - -

KENNETH MARTIN J: I beg your pardon?

THE WITNESS: Sorry. Sorry to interrupt, your Honour. Just in that photograph, the North Glenorchy Road continues on that side. I don't know if that's relevant or not, your Honour.

KENNETH MARTIN J: All right. Thank you?---Yes. Sorry.

The series of seven photographs as described by Mr Marsh, taken by him at various times and explained in terms of paddock areas and the like, will be exhibit 7.1 through to 7.7, respectively.

EXHIBIT 7.1 Plaintiffs
 Photograph taken by Mr Marsh

EXHIBIT 7.2 Plaintiffs
 Photograph taken by Mr Marsh

EXHIBIT 7.3 Plaintiffs
 Photograph taken by Mr Marsh

EXHIBIT 7.4 Plaintiffs
 Photograph taken by Mr Marsh

EXHIBIT 7.5 Plaintiffs
 Photograph taken by Mr Marsh

EXHIBIT 7.6 Plaintiffs
 Photograph taken by Mr Marsh

EXHIBIT 7.7 Plaintiffs
 Photograph taken by Mr Marsh

NIALL, MR: If your Honour pleases. The next photo that you have there is a photo of a sign, saying, "Environmentally sensitive area." Do you see that?---Yes.

Are you able to tell his Honour what that is?---That's a photo of the original signs we erected on Eagle Rest, back in about 2002/3.

NIALL, MR: And then the next document, Mr Marsh, are you able to identify that for his Honour?---Yes. Your Honour, these are the signs that we replaced those older signs with in 2010.

And - - -

KENNETH MARTIN J: Just hold that one up if you would be so kind?---Sorry.

Thank you. Right. Got it.

NIALL, MR: And did you erect those signs anywhere on Eagle Rest?---Yes, we did.

And where did you erect those signs?---We erected two down this corner, so where the North (indistinct) Road first joins Eagle Rest at the end of paddock 9. We had - - -

So the bottom south tip of paddock 9?---Yes. We had two there.

Two there?---We had one at the junction just described, between paddock 10 and 9.

Yes?---We had one - your Honour, this is the Wongarup Road that comes around, that joins - it's a T-section that joins the North - North (indistinct) and the South Glenorchy Road. We put one there.

KENNETH MARTIN J: On paddock 10?---Correct. We had one in paddock 12. We had one - there's some dams - I don't know if you can clearly see them - right on the edge on the west side of paddock 13, not far up from the junction to paddock 12, we had one sign there, and down towards the other boundary we had another sign. We had one on each of the entrance to the Western Power major power line, where that entered in through paddock 13 and exited through paddock 7. We had one there. Against paddock 14. We had one right in the northwest corner of paddock 4, and we had one on our main entrance in paddock 2, your Honour.

All right.

NIALL, MR: I tender that, if your Honour pleases.

KENNETH MARTIN J: The 2010 sign in the areas as described by Mr Marsh, entitled Certified Organic Farm, Strictly No Entry, and the other writing that follows, will be exhibit 9.

EXHIBIT 9

Plaintiffs

2010 sign in the areas as described by
Mr Marsh, entitled Certified Organic
Farm, Strictly No Entry

NIALL, MR: Your Honour, I just need to, if your Honour pleases, identify some documents through this witness. Next to you there should be a series of - well, you see the series of folders. If you go to volume 1, please. And in the bottom right hand corner, there is numbers appearing in black, once you open it up. Do you see numbers in black?---Yes.

If you can go to page 211. Do you have that?---Yes, I do.

Are you able to identify that document, please?---It was a photo that we took back in 2008.

And the writing, are you able to identify that, Mr Marsh?---Yes.

Well, could you tell his Honour what it is?---It is a - it was a - it was a - a- a- some writing for a document I give the Minister.

So is that your handwriting?---Correct.

And what did you do with the document?---I gave it to Mr Edmond.

And when did you do that?---That was in about February 2009, I think.

Two thousand and?---9.

I tender that, if your Honour pleases.

KENNETH MARTIN J: Is it significant that I be able to read the writing that's on there or not?

NIALL, MR: We will get you a colour legible copy, your Honour.

KENNETH MARTIN J: All right. Any objection, Ms Cahill?

CAHILL, MS: No, your Honour.

KENNETH MARTIN J: All right. Well, by reference to the index to volume 1, the document at page 211, which is document 22, is now part of the trial bundle.

NIALL, MR: If your Honour pleases. Could you then turn to page 214?---Yes.

Can you identify that document, please?---It was a - a letter that I supplied to the Shire of Kojonup - West Arthur, sorry. My apologies, your Honour.

I tender that, if your Honour pleases.

CAHILL, MS: No objection, your Honour.

KENNETH MARTIN J: All right. What's described in the index as document 25, being found entirely at page 214 of volume 1, will be part of the trial bundle.

NIALL, MR: If you then go to page 290 - that's volume 2, I think. Start of volume 2, Mr Baxter - Mr Marsh, I'm sorry.

KENNETH MARTIN J: Yes.

NIALL, MR: Are you able to identify that document, please?---Yes.

What is it?---It's a - a letter I give to the Kojonup Shire.

I tender that, if your Honour pleases.

KENNETH MARTIN J: Any objection, Ms Cahill?

CAHILL, MS: No, your Honour.

KENNETH MARTIN J: All right. The document in volume 2 indexed as number 47 at page 290, will be part of the trial bundle.

NIALL, MR: Now, on that letter, Mr Marsh, the date appearing at the top right-hand corner is 29 November 2010?---Yes.

At the time that you sent that letter to the Shire of Kojonup - Kojonup, I beg your pardon - had you observed any canola swathes within the boundary of your property?---No.

Now, could you go to page 318, please?---Yes.

Are you able to identify that document for his Honour?---Yes, that's a map, your Honour, that I, yes, I prepared.

Beg your pardon?---That's a map I prepared.

And are you able to tell his Honour when you prepared it?---That was prepared in 2010, your Honour.

When in 2010?---Just - that would have been prepared in December.

Can you recall when in December?--- Not exactly, no.

All right. And what does that - when you say a map you prepared, what does it show, Mr Marsh?---It identifies in black, your Honour, the area where Mr Baxter had planted GM, and it demonstrated an area of the contamination of Eagle Rest. And, of course, it identified our property by the paddock numbers.

And just to be clear, when you say that it identifies the area contaminated, how does the diagram show that?---With the - where I've got the lines - - -

KENNETH MARTIN J: Diagonal hatching?---Yes, your Honour.

NIALL, MR: And how did you come to the conclusion that that was the area that had been contaminated?---We could physically see the canola plants swathes.

I tender that if your Honour pleases.

KENNETH MARTIN J: Thank you. The document in volume 2 which in the index is number 54, comprising the map prepared by Mr Marsh at page 318, is now part of the trial bundle.

NIALL, MR: And, sorry to do this, Mr Marsh, but if you go back to volume 1 at page 12, you will see a diagram with some handwriting on it, and down the bottom right corner some numerals. Are you able to identify the handwriting?---That is my writing.

And what does that document show, Mr Marsh?---It shows the area of contamination. It identifies the paddock involved on Mr Baxter's property where the GM was - canola was grown. It identifies Eagle Rest paddocks by number. It also identifies some GPS locations where we'd recorded the canola incursion on the property.

I tender that if your Honour pleases.

KENNETH MARTIN J: Yes. The one-page document in volume 1 at page 12, which forms part of a bundle of maps as

document 1 within the proposed tender bundle at page 12, dated 19 December 2010, will be included as part of the trial bundle.

NIALL, MR: Thank you. Would you have a look at this, please, Mr Marsh, and I have a copy for your Honour. It's not in the trial bundle, your Honour. Just look through the document in its entirety, Mr Marsh, including the numbers and letters that appear in the following pages. Are you able to identify that document for his Honour?---Yes, your Honour, I did.

Looking at the front page, there is some numbers in - or letters and numbers in red. Are you able to tell his Honour who put those on the document?---I did, your Honour.

And what do they represent?---Each location where we picked up GM canola plants.

KENNETH MARTIN J: So each location where you picked up what, Mr Marsh?---A swathe canola plant.

A swathe canola plant?---Yes.

NIALL, MR: And when did you make this record?---This was done around March, April 2011.

And if you go in, three pages in, there's the words "paddock 7, 3042011" and some letters and numbers?---Correct.

Are you able to tell his Honour what they represent?---It identifies the paddock, your Honour, the date and it identifies each location with reference back - it identifies each GPS location with a reference back to a lettered - how would you say - a point on the map, your Honour, if I - - -

KENNETH MARTIN J: So if we just look at the first one, A1. So it's south 33 degrees, 14894 east, 116 degrees, 48762. And somewhere on that first one I should be able to find an A1. Is that - - -?---Yes, if you go to page 7 and then go to A13 on the map and that identifies the location. It's on the side here - just on this side, your Honour. It's actually in that bit of bush.

In that bit of bush?---Yes, that sheep camp.

Okay.

NIALL, MR: And when you observed the canola in these locations and made the annotations, what happened to the canola?---I picked it up and I put it in a drum - a seal drum.

And how many canola swathes did you pick up?---In this case there was about 250.

And you said you put it in a drum. Was that one drum or more - - -?---No, there was two drums.

Thank you?---I'm sorry, your Honour.

Now, this records - I think your evidence was - well, if you go back to that first one in paddock 7 and the date 03.04.2011. What does that date represent?---That would represent when we were picking them up at that time.

Now, the - you notified NASAA, your evidence shows, in December and you were decertified on 29 December. What happened between 29 December and 4 April on the farm?---Well, between that time, obviously, we had to prepare a lot of documents in December and so on because of the incursion and - but after that time we had to then go about our harvesting, which was delayed, until into January and February. After we got - even during that harvest, your Honour, what I did, I used my good header to take off the organic crops and that was in paddock 1 to 6. We then prepared an old header to harvest the decertified or the contaminated paddocks, your Honour, so we didn't cross-contaminate anything at that time.

Was there any time pressures in terms of harvesting the crops that were growing on Eagle Rest?---Yes, there was. It had become paramount that we get them off because the longer they were left standing unharvested, your Honour, we were exposed to a lot of vermin and other issues because we were also having some storms and that type of thing in 2011.

Thank you. I tender that document if your Honour pleases.

CAHILL, MS: Not so much an objection as - well, in a roundabout way. I'm lucky, your Honour. I have been given a version of that top document I think on your bundle. It is much clearer than the version that you have because just I think the way - its exposure. And I would ask that my friends substitute that in just so that it's easier to
- - -

KENNETH MARTIN J: Well, I did have that loose one from the tranche of material that was given yesterday and I hadn't quite matched it up with what we have just been looking at, but if it is it certainly is clearer.

CAHILL, MS: Perhaps if the witness could just identify that they're the same and then we can work off this better copy, that would be very helpful.

NIALL, MR: Perhaps if Mr Marsh could be shown that document?---Thank you. Yes, that's a bit better.

Are you able to identify that document, Mr Marsh?---Yes.

Is that the document that you described a few moments ago in your evidence - - -?---Correct.

- - - that was in the bundle that I handed to you?---Yes.

KENNETH MARTIN J: So that's a clearer copy.

NIALL, MR: Thank you?---Yes, it is much clearer, your Honour.

KENNETH MARTIN J: All right?---Yes.

Well, why don't we - - -

NIALL, MR: Substitute that, your Honour.

KENNETH MARTIN J: Aggregate - - -

NIALL, MR: Aggregate, your Honour.

KENNETH MARTIN J: - - - that additional one, recognising that it's a clearer copy of the first page of the bundle that was handed. And the GPS locations as recorded longhand by reference to the two pages of aerial map together will be exhibit 10.

EXHIBIT 10 Plaintiffs
Clearer copy and the GPS locations by
reference to two pages of aerial maps

NIALL, MR: The next document - there's just two more, your Honour. Page 377, which is volume 2 Mr Marsh?---That was 377?

Thank you, Mr Marsh?---Yes.

Now, it may not be easy to identify but if you go down give lines, there's the words:

From Steve Marsh, Saturday, 8 October 2011, 11.29 am,
to Diane Gore, subject: Contamination and derogation."

?---Yes.

Do you see those words?---Yes.

And there what follows - are you able to identify that part of the document that follows?---Yes.

What is it?---It's an email I sent NASAA.

And what did it record?---It recorded - sorry, it recorded how we went about cleaning up the GM canola source.

Yes. I tender that if your Honour pleases.

CAHILL, MS: No objection, your Honour.

KENNETH MARTIN J: Very well. The email found at volume 2 page 377 being document 76 in the trial bundle will be accepted as part of the trial bundle. It contains, significantly, the email from Mr Marsh to Diane Gore, subject Contamination and Derogation, dated Saturday, 8 October 2011.

NIALL, MR: And if you go back, Mr Marsh - I'm indebted, your Honour. Go back to 374, Mr Marsh, and I will just ask you to look at 374, 375, and 376. Are you able to identify that document please?---Yes.

What is it?---It's records of when we were searching and picking up the canola source.

Would you just have a read through it, Mr Marsh. Who wrote that record?---I did.

And what was the dates on which you wrote that record?---It was 2011. 2000 - - -

And what does it record?---It records when we searched
- - -

For what?---For the canola - the GM canola.

I tender that if your Honour pleases.

CAHILL, MS: No objection, your Honour.

KENNETH MARTIN J: All right. The three pages of longhand notes commencing at page 374 going through to 376, which Mr Marsh has identified, bearing commencement date 29 September 2011 and identified in the index as document 75 will be in as part of the trial bundle.

NIALL, MR: If your Honour pleases, that's the additional evidence (indistinct) your Honour.

KENNETH MARTIN J: Yes, all right. Thanks, Mr Niall. Cross-examination.

CAHILL, MS: If it please, your Honour. Mr Marsh, I am going to refer to those files on your right-hand side as the trial bundle. So if you could take up volume 1 please of the trial bundle. Now, you started on the path of certification in 2002, didn't you?---Correct.

And you wrote to your parents and is it your brother, Gary?---Correct.

Have a look at page 209 please. You recall that letter, no doubt?---Yes.

That's a letter you wrote in August 2002 to your parents and your brother Gary, yes?---Yes.

Now, to your knowledge the production of GMO crops was not lawful in any shape or form as at 2002, was it?---Correct.

And so, when you wrote here in the second paragraph:

In future, if you decide to grow a GMO crop, could you please inform us so we can change our management accordingly -

were you just writing that in anticipation that GMO crops might be legalised at some time in the future?---No. As I recall, I only referred to what was in the standard at that time. That's the only (indistinct) I would have towards that, because - - -

Right. So can I understand your evidence then. You were aware - sorry, I withdraw that - your understanding was that the production of GMO crops was not lawful at all in WA at that time, is that right?---That is correct.

But you had read the NASAA standard, yes?---Yes.

And you had seen something in there that referred to the production of GMO crops?---I don't know if it referred to the production of GMO crops, but it was just - - -

Or relevant to it?---Yes.

And that's why you wrote that sentence in the letter?---It was only - it also referred to chemical and spray drift. So it was just - it's just - as I say, it was just referred to in those standards, and that's - I just wrote it as a part of the letters that I give as a part of my requirements to achieve certification.

All right. Was that part of your risk management practices?---We're required under the certification to give notice to our neighbours.

All right. Now, you do refer there, in the - you see the second paragraph in that first line at the end, you say:

It would be greatly appreciated if care is taken to avoid contamination of Eagle Rest.

You mention:

chemical spray drift, etcetera, or GMOs in particular.

See that?---Yes.

What did you understand - sorry. When you used the expression "contamination" in that letter, what did you understand that to mean at the time?---I couldn't - can't really recall what I meant at that time, because - - -

What you meant by that?----- - - it's a long time ago, with due respect. You know, it's - - -

And it might have meant something different to you then than it does now?---Look, I can't recall in what reference I used that - - -

All right?----- - - that - - -

And you can't remember whether you were intending to refer to contamination of land or contamination of product, or both?---No. I certainly couldn't recall that in that detail at that time.

All right. Thank you. Now, I think it was in 2004, wasn't it, that you started to get some level of certification from NASAA; I think some in conversion accreditation and

part of your farm was certified as organic, is that right?---Yes. 2004, we achieved - - -

All right?---2004 and 5 we achieved certification.

Now, in 2007, you signed a licence agreement with NASAA. You had had one before in 2003, but you signed a new one in 2007, didn't you? Can't remember?---Well, I - - -

Would you like me to show you it? Page 40?---Yes. Page 40. See that handwriting in the top right hand corner of page 40? 0907, do you see that?---Yes.

Is that your handwriting or someone else's?---That doesn't look to be my handwriting.

Okay. If you go to page 49, your signature - is that the one that appears second: S.G. Marsh? Or was yours the first one?

KENNETH MARTIN J: S.W. more likely, Ms - - -

CAHILL, MS: I beg your pardon?---We're talking on the left hand top - - -

Yes?---- - - side? That is my signature, as S.W.

Yes. And over the date is - over the right hand side is 14 September '07?---Correct.

Does that remind you that this is the licence agreement or contract you had with NASAA that you entered into in 2007?---Correct.

You didn't enter into another agreement with NASAA before the incursion of GM canola onto your property in November/December 2010, did you?---Not that I recall.

Now, this contract, when you signed it in 2007, did you read it before you signed it?---Yes. I would presume I would have.

Do you recall reading it carefully or just skimming through, or somewhere in-between?---Look, I can't recall in what detail I read the document in 2007.

Have you ever read it in any detail?---I would believe I would have read it. Yes.

Okay. Did you read it in detail after - sorry - shortly after the GM canola blew into your property in November/December 2010?---I can't recall.

Now, in your statement of claim - your amended statement of claim in these proceedings, you mention about some conventional canola blowing into your property in 2008. Do you recall that reference in your statement of claim?---Did I recall that it blew onto the property?

No. All I'm asking you about - - -?---I didn't - I don't - there was - - -

Sorry. I beg your pardon. I beg your pardon?---There was an incursion of conventional canola in 2008 on the property.

Yes. I'm sorry. That was my mistake. There was, let's say an incursion, exactly, of conventional canola in 2008. And that's what you refer to at page 211 Mr Niall just took you to, is that right?---Correct.

And the reason that you corrected me there was because your - the inference you drew at the time was that that canola had been - got there, if you like, by wild animals?---I had no evidence of that at the time, and I did not really know how it occurred on the farm.

No. I wasn't suggesting that you did know. What I was putting to you is that that was the inference that you drew at the time, that it must have been animals?---I questioned that quite a lot, for two reasons: there was a lot of rabbits on that road, but at the same time, the equipment Mr Baxter using was a highly - a seeder combine, and that had a blower. But I couldn't appreciate how a animal could find a seed for that incursion to happen at that same time that year. So I was not sure, and, even though I did apply that here, I wasn't - I didn't really know how that incursion occurred.

So let me understand your evidence. Even though you say here, four lines from the bottom, "source of contamination: rabbits", and what was what you wrote in your letter to the Minister for Agriculture at the time, you weren't sure in your own mind whether that was in fact the origin of the conventional canola?---I didn't have proof on how it incurred; I presumed. That's all.

Now, nevertheless, you regarded this as contamination of Eagle Rest, didn't you?---Yes.

And can I just understand then what you meant by "contamination"?---It's a foreign plant now - or it's an incursion of this conventional canola in my crop.

In your crop?---Yes.

Right. Not on the land; in a crop?---Well, specifically, that canola would have to grow from the land.

Let me just understand that. What was - what do you say the conventional canola contaminated in 2008?---Well, it had to contaminate the land to which it grew - - -

All right?---- - - onto the - into - well, which it grew from.

So you found a volunteer conventional canola plant in 2008, is that right?---I found a number.

All right. And was it the fact that the volunteer plant grew that constituted contamination, in your view?---It was the fact that that canola plant was growing on my land within that particular crop.

So it was growing in a crop; that's what constituted contamination?---It was growing - it has now transferred onto my land - - -

Yes - - -?---- - - and it was growing within that crop.

Right. But it wasn't growing on pasture?---This - no.

So what I'm trying to understand here is what you meant by "contamination" at the time. Do I understand from your answer, Mr Marsh, that if the volunteer conventional canola plant or plants had been growing on pasture, that would not have been contamination, in your view, at that time?---I don't think you can come to that conclusion, because we had found it, in this particular case, in that particular location. So I couldn't come to - I can't agree with you on that point.

What I'm trying to get to is what your understanding of contamination by conventional canola was in 2008. Did it require a volunteer plant to grow in a crop, or did it simply require a volunteer plant to grow anywhere on your farm?---In this particular case, it was growing - - -

Just talk generally, please, Mr Marsh?---Well - - -

In 2008 - - -?---- - - it would be - I would deem it on my land.

All right. So even in pasture?---Yes.

And in any amount? A single plant growing on pasture would constitute contamination of your land, is that right?---My understanding is that, if that incursion - in this particular case, it had grew within a crop, and therefore it was what we had to deal - they're the facts we had to deal with at that time - - -

All right?---- - - and I would appreciate to stay - - -

Thank you for that. Thank you for that. I understand what you understood to be contamination to the extent that there was a volunteer plant in the crop?---Can I just state, there was a number of plants here; there wasn't one. If I recall correct - - -

How many?---- - - there was around 12.

12, in a crop, yes?---In this particular case, yes.

So 12 volunteer plants in a crop constituted contamination in your view?---It's a different variety - it's a different plant within that - - -

Yes. I understood. It's contamination of your crop by conventional canola, isn't it, in your view?---It is only relative for that first year as - as contamination.

Only relevant - - -?---Look - - -

Just explain that statement. It's only contamination for a year, is that what you mean?---No. It - under the - as I understand the standards, if a plant grows there from another source on an organic farm, after that 12 months that plant is, as long as it's from a natural source, of course, is deemed as being a natural - a natural plant, and then it fits in with that certification.

I see. So what you're saying is that a volunteer conventional canola plant contaminates when it grows on the land for the first 12 months, but after that, it becomes, in effect, part of the organic pasture?---Can I just say something, your Honour - - -

Sorry. Could you answer my question first, please?---Could you repeat the question, please.

Is your evidence that if a conventional canola volunteer plant germinates on your land, that is contamination of your land for 12 months, after which time that canola plant becomes part of the organic pasture?---The issue raised
- - -

Can you answer my question, please.

NIALL, MR: Well, with respect, your Honour, the witness was about to answer the question.

KENNETH MARTIN J: Yes. All right. Well, we will hear a little more of the answer. But it didn't seem promising.

THE WITNESS: I deemed it - yes, for 12 months.

CAHILL, MS: After that, it became part of the organic pasture?---Well, it fitted into that. Yes.

Yes. But before that, it was contamination?---In my view.

As you understood the standards?---Look, you know, as my view that entering the property, that - - -

Yes?---- - - I deemed that contamination of the land. Yes.

Yes. All right. And, just to be clear, that doesn't matter whether the volunteer plant germinates in the crop or on pasture?---What relevance - - -

I'm asking the question. You would have considered in 2008, a volunteer plant germinating in a crop and a volunteer plant germinating in a pasture to both be contamination of your land?---We're dealing with a conventional canola plant, and if it grew in the pasture, obviously, it would be controlled either through the stock or some means.

So it's not contamination if it's in the pasture?---It's still contamination of the property.

I see. And does it matter how many plants germinate - volunteer plants germinate? Can there be contamination from just one?---Obviously, the more - more plants that germinate, the greater the contamination, or the more plants - - -

Yes. That's not my question. Can you have contamination, in your view, from one volunteer plant germinating on your land?---That would depend in - in one conventional canola plant.

Yes. Is your answer yes or no?---No.

No. So you need to have more than one, yes? How many, Mr Marsh, before it constitutes contamination?---If we've had an example of this, yes, one would deem to be a contaminant. So - - -

So one volunteer plant on your whole farm is enough to constitute contamination?---One canola plant.

Thank you. Now, you didn't report this contamination in 2008 to NASAA, did you?---We had had - not as I recall.

Thank you. You didn't think you needed to, did you?---I removed those plants and - yes. I removed those plants.

Did you think you needed to - - -

KENNETH MARTIN J: When you say you removed the plants, did you pull them out?---I did, your Honour.

All right. Thank you.

CAHILL, MS: Did you think you needed to report it to NASAA under the standards?---We had discussed this with NASAA - - -

Was that with Stephanie Goldfinch?---Look, I can't recall.

It could have been Stephanie Goldfinch?---Could have been.

But you had discussed about the incursion of conventional canola onto your property before 2008 with NASAA, had you?---Yes. I can't recall exactly when.

Was it before this event of incursion?---I can't remember when. Sorry.

So you might not have had a conversation with NASAA at this point?---We had had a discussion about what would happen in regard to seed when it grows. As I said, there's that 12 months window that it has to be controlled.

Was that before this incursion or after?---I can't recall. I can't recall.

You can't recall. Did you think that, at the time, in 2008, that NASAA had a zero tolerance approach to conventional canola?---No.

You didn't?---No.

Did you think that NASAAs approach was that there was some tolerance for conventional canola on an organic farm?---Look, I can't speak on behalf of NASAA. I don't know.

I'm just asking what your understanding was at the time?---I - - -

NIALL, MR: I object on the basis of relevance, your Honour.

THE WITNESS: I don't - - -

KENNETH MARTIN J: Do you press the question, Ms Cahill?

CAHILL, MS: I can leave it, your Honour.

KENNETH MARTIN J: All right.

CAHILL, MS: Now, 2009, if we roll forward a year, Mr Marsh, there was talk of the West Australia Government allowing GM canola to be grown commercially, wasn't there, and you were aware of that?---Yes.

And there was some trials being conducted in 2009 in the Great Southern region, wasn't there?---That's correct.

Including in and around Kojonup, and the West Arthur Shire?---Yes. I'm not sure about West Arthur, but I was aware.

That concerned you, didn't it?---In 2009?

Yes?---Only - yes.

And it concerned you because you don't agree with GM farming, do you?---How a farmer farms his land, that's his - his business.

You don't agree with GM farming, do you?---How a farmer approaches, I do not believe I've a right to interfere. That's - - -

That's not my question. My question is whether you agree with GM farming?---No. No, it's against - - -

And was that one of the reasons why you were concerned about the trials and the possibility of GM canola

production becoming lawful in Western Australia?---Could you repeat that question, please?

Was the fact that you don't agree with GM farming, one of the reasons why you were concerned about the trials that were being conducted in 2009, and the possibility that GM canola could be legalised for production in Western Australia?---Sorry, I'm just having a bit of trouble hearing, your Honour, sorry.

KENNETH MARTIN J: Yes.

NIALL, MR: Can't hear me?

KENNETH MARTIN J: Yes, I think it is a little difficult with the roar, so perhaps - - -

CAHILL, MS: The air-conditioner.

KENNETH MARTIN J: - - - if you could repeat the question.

CAHILL, MS: Mr Marsh, you've said that you didn't agree with GM farming? Yes?---Yes.

And you don't agree with it, do you?---It's - it's different to where I want to farm.

You don't agree with it, do you?---It's a different system of farming than I wish to participate in.

I thought we had established you don't agree with it?---Okay.

Is that right?---Correct.

You would prefer it if it were illegal. Isn't that right?---I have no decision over that.

I'm not suggesting you do?---That's - - -

What I'm asking you about is your preference. Your preference would be that it - it be illegal?---Your Honour, I really feel that how a farmer farms his land, I don't make the decisions of government, or whatever, and if somebody wishes to farm GM and that, that's their choice, your Honour. I find that question a little bit out of - out of - out of context to - to what we're trying to establish, your Honour.

I will move on, your Honour.

KENNETH MARTIN J: All right.

CAHILL, MS: Page 212 of the book in front of you, please, Mr Marsh. This is the letter that you wrote to the Shire of Kojonup in April 2009?---Correct.

And you say here, in the first paragraph, third line, formally notifying the shire that - that's a description of your farm lots, isn't it, there in the second line?---Correct.

You say, "Formal - - -" - "This is to formally notify property of Eagle Rest," etcetera, "are formally declared genetic modified organism free." You wrote that?---Correct.

Who had made that declaration?---I did.

You? And what was the formal part of it? How had you done that formally, or was it by this letter that you sought to do that?---It was by this letter.

So this letter was intended to be a formal declaration that your farm was GM free. Is that right? Yes?---Yes.

And what did you mean by "GM free"?---Exactly what it said, to keep the property GM free.

Did you mean that there would be - there would not be a single volunteer GM plant on your property ever? Is that what you meant?---Look, I wouldn't - I don't believe you could come to that conclusion, because I don't know.

So just - just trying to understand what you meant by "GM free"?---It was to try and protect the property and my farming system.

Yes. But what you meant by GM free. There was - that you would never permit a single volunteer plant on the property. Is that what you meant by formally declaring it to be GM free?---It's - when I wrote these letters, obviously the State Government was looking at releasing GM. There was a lot of discussion. I just wished to keep the property, as I read the standards, GM free.

In the second paragraph you talk about NASAA, and you say there, you tell the shire it has zero acceptance of GMOs. See that?---Yes.

That was your understanding at the time of the standards, was it?---Correct.

And what did you mean by that? What did you mean by "zero acceptance of GMOs"?

NIALL, MR: I object to the question, your Honour, somewhat belatedly. The document speaks for itself. If the question is what did you mean to convey by it, it conveys it by the words on the letter. If the witness is being asked what did the witness understand to be "zero acceptance", it's not relevant.

CAHILL, MS: I asked him what he meant by "zero acceptance". It's his letter, your Honour.

KENNETH MARTIN J: I think I will allow the question, in the context of what's at issue.

CAHILL, MS: What did you mean by "zero acceptance of GMOs" when you wrote it here, Mr Marsh?---I was just concerned about if GM was - canola was growing nearby, and that affected the property. I just wanted to protect the property in case.

I understand what your evidence about the purpose of the letter. I'm trying to get to the bottom of the statements that you made to the shire. You've told the shire that NASAA has zero acceptance of GMOs, and I'm trying to understand what you meant by that, when you said that. What did you mean by "zero acceptance of GMOs"?---I can't speak for NASAA, or the standards.

I'm not asking you to do so. I'm asking you to tell his Honour what you meant when you wrote that NASAA had zero acceptance of GMOs?---As I read the standards, there was no tolerance of GMOs in a organic certification system like ours.

In an organic certification system. So no GMOs in the crop. Zero tolerance for that. Is that right? That was your understanding?---Yes.

Zero tolerance of any - - -?---On the land - - -

On the land?---Not the crop because the crop is going to grow from the land.

Yes. But even in a pasture, there would be zero tolerance of any GMOs in the pasture? That was your understanding, was it?---Presume so, because the sheep are going to graze those places.

So this comes back to a single volunteer plant would - would be inconsistent, or incompatible, with this zero tolerance?---I - I can't comment for NASAA, that - - -

No. I'm asking for your understanding, Mr Marsh. I just reiterate that?---I was concerned what the implications would be if - if my property became contaminated.

I'm not asking you about that. I'm asking what you meant when you told the shire NASAA had zero tolerance for GMOs. And we've established zero tolerance in the crop and in the land - - -

NIALL, MR: Zero acceptance, your Honour.

KENNETH MARTIN J: I beg your pardon?

NIALL, MR: The word is zero "acceptance".

KENNETH MARTIN J: Yes.

NIALL, MR: If my learned friend is going to - - -

CAHILL, MS: I'm sorry. I beg - - -

NIALL, MR: - - - cross-examine on a document, it should be done accurately.

CAHILL, MS: Yes. I accept that, your Honour. So my friend is quite right. It says "zero acceptance". What I would like to understand is what you meant by that. So zero acceptance in the crop of GMOs, is that right?

NIALL, MR: Well, it's a misleading question, in my submission. Whether it's being asked zero acceptance in the crop completely or as one item.

KENNETH MARTIN J: I think the witness can be probed in terms of his understanding of what he wrote, using that phrase, so I will allow the question.

CAHILL, MS: Thank you. Is that what you meant, Mr Marsh?---Could you repeat that again, please.

Where you wrote here that there was zero acceptance by NASAA of GMOs, you meant to include, didn't you, zero acceptance of any GMOs in the crop?---At the time I wrote this, I was just concerned.

I understand the purpose and the reasons behind writing the letter. What I'm exploring with you is the statements you made and what you meant by them; not the purpose behind them, but what you meant by them. The meaning you were intending to convey. So, here I'm asking you about the meaning you intended to convey by the phrase "zero acceptance of GMOs" with reference to NASAA?---Yes. I can't - - -

So - - -?---- - - recall.

You meant that NASAA had zero acceptance for GMOs in crop, is that right?---I - these letters were based on as I read the standards, that - that is - that's all, your Honour. I - - -

Did you mean zero acceptance of any GMOs on your land at all?---I read it as if the land was contaminated by GMOs, that it could impact on my certification.

All right. So - - -?---That - so I endeavoured to make this known to the shire and so on - the people.

And is that the best answer you can give me as to what you meant by the phrase, "zero acceptance of GMOs"?

NIALL, MR: It's not for the witness to gauge whether it's his best answer or his worst answer, with respect, your Honour.

KENNETH MARTIN J: I think you need to rephrase, Ms Cahill.

CAHILL, MS: I withdraw it, your Honour. Now, contamination, Mr Marsh, at this stage, you use the language of "contamination" in the last sentence of this letter. You talked before about your understanding of contamination in 2008, in the context of volunteer plants growing on the land - on your farm - your farm land. Did contamination extend to just canola material resting on the land but not having germinated?---I think we can only deal with the facts of what occurred, which was swathed canola - sorry - - -

Looking at before then. I'm sorry to interrupt you, Mr Marsh, but I'm just trying to make things move a little quickly. I'm talking about a letter that you wrote in 2009, before the incursion - - -?---Yes.

- - - and your reference to contamination there and what you meant by it. Did it extend, when you used the language

of "contamination" there, in your mind, would contamination extend not only to the growing of volunteer GM canola on your property, but also just GM canola material resting on your property or touching it?---Look, in 2009, you know - I can't recall - it only referred to the fact, your Honour, of - yes. (indistinct) explain.

It's a simple question, Mr Marsh. In 2009, did you think that contamination under the standards extended to GM canola material just lying on your property and not actually growing there?---I read the standard said if the property was impacted or an incursion of GM material come on the property, I didn't know what form NASAA would deem decertifiable.

Did you think it possible that NASAA could take the position that contamination had occurred where the plant material just rested on the property and wasn't growing there?---I couldn't - I'm sorry, but I can't form opinion of what NASAA would have done.

I'm not asking you about that. I'm asking you about what was in your mind at the time, when you wrote this letter to the shire?---I can't recall in that detail.

Right. Now, at around the time that you were writing to the West Arthur Shire - West Arthur Shire in the Kojonup Shire, you had a telephone conversation with NASAA, didn't you, a Ms Susan Shelton. Do you recall that, April 2009?---No, I don't recall.

You asked her, didn't you, if she would, or if NASAA would write a letter to you, advising that NASAA's standards had zero tolerance to GMOs in organics?---This is in 2009?

Yes?---Yes. The - - -

Your answer is yes?---Sorry. Sorry. Could you just repeat that again, sorry.

You had a telephone conversation with Susan Shelton of NASAA. Do you know who Susan Shelton is?---I've never met her, but - yes.

You've spoken to her on the phone though, haven't you?---No. I can't recall.

Do you know who Susan Shelton is?---Yes. She works for NASAA.

I beg your pardon?---Yes.

She works for NASAA, doesn't she?---Yes.

Yes?---Yes.

Now, in April 2009, didn't you have a phone conversation with her, in which you told her that one of the shires had suggested that NASAA write a letter, advising that NASAA's standards has zero tolerance to GMOs in organics. And you said that you would like that letter to be sent to you preferably that day?---I don't recall that conversation.

You don't recall that?---No.

You recall though, don't you, asking for a letter from NASAA about their attitude to GM canola contamination?---No.

No. All right.

KENNETH MARTIN J: You're shaking your head. Just for the transcript, that's a negative answer.

CAHILL, MS: Just show you a document that I will ask you to identify, Mr Marsh. You recognise this letter, don't you?---Yes. Yes. It's 23 April.

That's a letter that you asked NASAA to provide to you, isn't that right?---Yes. True.

Yes. You asked NASAA to write this letter to you, didn't you?---I don't know that that's the right context. I inquired to NASAA of what the impacts - I just asked for clarification, that's all.

Sorry. You asked for - - -?---I've asked for clarification on what - what - yes. I just asked for clarification. That's all.

About what? What did you ask for clarification about?---Just if - if they could be a risk to the property.

GM canola?---Yes.

So can I be clear about your evidence. Are you telling his Honour that you asked NASAA for clarification about whether GM canola could be a risk to your property, and this was the response you got. Is that your evidence?---Yes.

Thank you. Now, they write to you on 23 April 2009 - that's Stephanie Goldfinch - talks about your concerns and that was the position, wasn't it? You had concerns at that

time for the risks to your livelihood posed by the potential GMO trials in WA? That was your position; you had concerns?---No. Not for the trials.

All right. But for any future legalisation of GM canola?---It become commercial.

Now, Ms Goldfinch tells you:

The issue of contamination from GMO is a risk to your certification -

And you took that on board, did you? You took that on board, that sentence?---Yes.

Right. And then she refers to the national standard, and you were familiar with the national standard, weren't you?---I hadn't read the national standard in detail.

But you knew what the national standard was?---My understanding is that the NASAA standards reflected the national standard.

All right. And then she says that that national standard is quite clear. Products known to be contaminated with GM cannot be sold as organic. You read that when you received this letter, didn't you?---I would have done, yes.

And that was the clarification that you had sought that - and you understood from that obviously that what NASAA was concerned about was contamination to product. Would you agree?---No.

No. You read it differently, did you?---The organic - I'm sorry.

Sorry, you were about to explain your answer as to why you disagreed with what I put to you, that you must have appreciated from the second paragraph of this letter that NASAA's concern was with contamination of product. Did you want to expand on your answer or not?---I can't expand more than that.

All right. Quite clearly, Mr Marsh, from this second paragraph, NASAA was only concerned with product that was going to be sold and what was contaminated.

NIALL, MR: I object to the question, your Honour. This witness can't possibly - - -

KENNETH MARTIN J: On the basis of NASAA's concern.

CAHILL, MS: Yes.

NIALL, MR: And only.

KENNETH MARTIN J: I uphold the objection.

CAHILL, MS: Sorry, I will rephrase. You could have only understood it in one way I suggest, Mr Marsh.

NIALL, MR: Well, I object to that. I mean, the letter speaks for itself. How many ways or individual ways - I mean, we have had about half an hour of an understanding of what this witness has - in our submission it has gone beyond the question of relevance and we don't seek at all to cavil with your Honour's ruling a few moments ago, but in our submission it could not possibly be relevant as to what this witness perceived to be the meaning of the standards or what this witness perceived to be NASAA's understanding.

CAHILL, MS: This witness's state of mind as to what constituted contamination, zero tolerance, and what NASAA's response to an event of incursion would be are all highly relevant to what then unfolded from November/December 2010, your Honour. What I would like to do is get that evidentiary record very clear before we get to the incident of incursion so that your Honour has the opportunity to assess both the actions of NASAA and, more particularly in the context of this witness's evidence, his response to NASAA's response and that's why this inquiry is relevant, your Honour.

KENNETH MARTIN J: Well, I understand the line that you're taking but I think in terms of how far you can go with this letter - - -

CAHILL, MS: Yes.

KENNETH MARTIN J: - - - vis-à-vis NASAA's state of mind - - -

CAHILL, MS: It's - - -

KENNETH MARTIN J: - - - or his understanding of NASAA's state of mind back in 2009 is fairly limited, but I will let you ask a few more questions.

CAHILL, MS: Thank you, your Honour. So let's just understand this, Mr Marsh. This is the clarity - the

clarification that you were seeking as to NASAA's position. Can we go to the third paragraph. You read that paragraph when you received the letter, didn't you?---Correct.

And you understood from that, didn't you, that if there was an incursion of GM canola on your property, what NASAA would - or even if GM canola crops were just being grown in close proximity, NASAA would have tests conducted of the crop. Isn't that so?---I don't see how I can formulate an opinion of what NASAA would - - -

I'm focusing on what you got from this letter, what you understood when you read it. What was in your mind?---You're talking about the third paragraph that refers to pollen?

Yes?---But isn't that irrelevant to - - -

Just answer my questions, Mr Marsh. Did you regard that as irrelevant to your circumstance because there was no risk of cross-pollination with your existing or future intended crops? Is that how you read the letter?---No.

I beg your pardon.

KENNETH MARTIN J: The answer was no.

CAHILL, MS: You read it differently. Is that right?

KENNETH MARTIN J: Perhaps the last line might - - -

CAHILL, MS: Yes.

KENNETH MARTIN J: - - - focus attention, Ms Cahill.

CAHILL, MS: Yes. Just read the last paragraph, Mr Marsh?---Yes.

You well understood from reading this letter that NASAA's sole interest was in contamination of product destined for sale. Isn't that so?

NIALL, MR: I object to that question on the same basis, that - how can this witness identify what the sole interest of NASAA was by the letter?

CAHILL, MS: It's his understanding.

KENNETH MARTIN J: All right, he was asked for his understanding of what was communicated on behalf of NASAA. And I think in the context of what follows, there may be

some relevance in that so I will allow the question. Do you remember the question, Mr Marsh?---Yes. Please repeat it again, please.

CAHILL, MS: I beg your pardon?---Please repeat the question again, sorry.

Having regard to the last paragraph of this letter?---Yes.

After reading it, Mr Marsh, you well understood, didn't you, that NASAA's sole interest was in contamination of product that was destined for sale?---I didn't come to that conclusion, no.

All right. I suggest to you not only was it only in relation to contamination of product and nothing else but also only genetic contamination, not intermingling of product. That's what you understood, wasn't it?---In referring to this letter - - -

Yes?---Yes. That's what this letter refers to.

That's what this letter refers to. Thank you. I tender the letter, your Honour.

KENNETH MARTIN J: The letter of 23 April 2009 to Mr Marsh from Stephanie Goldfinch, the executive officer of NASAA, will be exhibit 11.

EXHIBIT 11 Defendants DATE 23/4/09
Letter to Mr Marsh from Stephanie
Goldfinch, the executive officer of
NASAA

CAHILL, MS: Thank you, your Honour. Now, if you go to page 215 of the book, Mr Marsh, armed with this clarification you sent it to Mr Stretch, didn't you, Mr Digby Stretch? 215?---I can't recall if I sent that letter to - - -

Well, this is your letter to Digby Stretch, isn't it?---That's correct.

And Digby Stretch is a local farmer in Kojonup?---He's in Kojonup, yes.

Yes, and he farms reasonably close to you, doesn't he?---He farms to the south of Kojonup.

And in the first line of this letter, you say:

Digby, I have faxed you a copy of a letter that I've received from our certifying body regarding how GMOs are going to affect us as organic farmers.

See that?---Yes. I see that.

And that's a reference to the letter I've just shown you, isn't it?---I can't recall what letter I sent with - with that.

So there might be another letter out there, might there?---I can't recall.

CAHILL, MR: Now, in the next sentence, where you say:

Clearly the industry has zero tolerance of GMOs -

Do you see that?---Yes.

Do you mean zero tolerance for genetic contamination in product, there?---No.

You mean something broader than that, do you?---I can only reflect as I read the standards and understood the standards.

Yes. But you had had them clarified now, Mr Marsh. That's your evidence. Clarified by this letter.

NIALL, MR: That's not his evidence, your Honour. To say you had it clarified is not the evidence. It's not a fair summary - the totality of the evidence about what this witness gave in relation to that letter of 23 April 2009.

KENNETH MARTIN J: I suppose the preface of the question in terms of obtaining clarification of the standards by the letter is potentially problematic, having read the letter. So, perhaps you would like to alter the preface, Ms Cahill.

CAHILL, MR: Having read the letter, you had a better understanding of the standards, didn't you?---It give me some clarification. Yes.

So in relation to this statement, "The industry has zero tolerance of GMOs", were you referring to the NASAA standards or somebody else's standards?---I can't recall.

And you meant something more than genetic contamination of product, did you?---The only - the only reason I sent this letter to Digby was to just ask him to be careful of what he was doing, because at that time - that's - that's all.

Thank you for that, Mr Marsh. I'm not asking

- - -?---Because - - -

- - - about the purpose for which you sent the letter; I'm asking about what you meant to convey by the statements made within. Here, I'm focusing your attention on the statement that you made to Mr Stretch, that "clearly the industry has zero tolerance of GMOs". When you wrote this letter, did you understand that that accurately reflected what had been told to you by NASAA in the letter of 23 April 2009?---It was my understanding, yes, they had a zero tolerance.

That it was consistent with that?---It had a zero tolerance to GMOs. Yes.

You go onto say:

We, as organic farmers, will be decertified if any genetic modified material is found in our crops.

See that? It's a reference back to the requirement for testing and testing revealing the presence of GMOs, leading to decertification of the crop?---To testing?

Yes, as was stated in the 23 April letter. That's what you were intending to refer to there, wasn't it? Not decertification of your farm, but decertification of product? Isn't that right?---I - no.

No? You meant something else?---I didn't know how NASAA would interpret the standards. All this was wrote was to warn Diggy my understanding, as I read the standards, that it had a zero tolerance to GMOs. Now, how that was to be implemented by NASAA, I don't know.

Except for what you were told on 23 April 2009?---And what I read in the standards.

But do I understand your evidence correctly. The letter of 23 April 2009 aided your understanding of what was provided for in the standards?---In conjunction with how I read the standards. That's - - -

You read the letter with the standards?---Yes.

And it helped you to understand the standards, didn't it? Yes?---I'm not an expert on the standards or the implications of the standards. I - as I read the standards, they had a zero tolerance to GMOs.

And NASAA had told you something about its attitude to GM canola in the letter of 23 April, hadn't it?---Yes.

And you took that on board, didn't you? Yes?---Yes, I can't recall in 2009 whether I took it all on board.

And that helped you to understand what the standards meant and how they operated. Isn't that so?---As I explained, I only referred to the standards in that letter but the standards is what I understood.

Now, just coming down to the last - the third last line of this document. You say:

We know that beyond doubt contamination will occur to non-GMO crops.

Was it your view at the time that the incursion of GM canola onto your property, if GM canola was allowed to be grown in the district, was inevitable?---I couldn't come to that conclusion.

You say here - I will read the whole sentence:

This evidence has been given personally to Terry Redman and we know that beyond doubt contamination will occur to non-GMO crops.

?---It's only based on what happened in 2008 and the contamination of Eagle Rest from non-GM.

Did you regard it as inevitable that there would be, in your words, contamination of your farm if GM canola was grown in the district?---I couldn't form the opinion inevitable because we don't know at that point in time.

You thought it very likely?---Well, the evidence of what happened in 2008 demonstrated that it was possible, yes.

All right. Now, 2010 we have the exemption that enables GM canola to be grown in the Great Southern and in April 2010 Mr Baxter told you, didn't he, in a verbal conversation that he was going to plant GM canola?---That's correct.

And he told you that he was going to plant it in Two Dams and Range paddocks?---That's incorrect.

That's incorrect?---Yes.

You understood in any event, didn't you, that he was going to plant GM canola close to the boundary with your property?---Correct.

All right. And you said to him at the time that you would grow your crops to the north end of Eagle Rest, away from his GM canola, didn't you?---I said as a part of my rotation that I would be planting my oats in the northern portion of Eagle Rest, yes.

That's in paddocks 1 to 6?---Correct.

You actually changed your rotation this year in 2010, didn't you, in order to accommodate the fact that Mr Baxter was growing his GM canola close to your property? Isn't that so?---It was a part of my normal rotation to grow in 1 to 6. So as that rotation on the third party come around.

All right. So you never told - - -

KENNETH MARTIN J: The question was whether you changed your rotation or not to accommodate the GM next door. What was your answer to that, yes or no?---The answer is I did change paddock 10. So, yes, your Honour.

CAHILL, MS: You did change your plans for that year - your cropping plans for that year?---No, not the - sorry, your Honour. We work on a two in six-year rotation. One to six was going in as a part of our normal rotation. Because we'd established an agreement, discussion with Bodeys, we were going to put in paddock 10. It is paddock 10 that I did change to paddock 11 and 12.

Can you just repeat that. I'm having trouble hearing you. What did you just say?---I did not change the rotation on paddocks 1 to 6 for our oats. To fit in with our program, we did change - we were going to put in paddock 10 to wheat rye. We changed that to 11 and 12.

And you say that wasn't to do with Mr Baxter. That was to do with Bodeys, is that right?---No. That was because Mr Baxter informed us he was going to go GM.

KENNETH MARTIN J: So there was no alteration to the plans in respect of 1 and 6, by reason of GM next door, but there was an alteration in terms of changing from paddock 10 to paddocks 11 and 12, by reason of having GM in 2010. That's was - that's as I understood the answer.

NIALL, MR: It was 1 to 6, rather than 1 and - I think his evidence was 1 to 6, rather than 1 and 6.

KENNETH MARTIN J: Yes, 1 to 6.

NIALL, MR: I'm sorry, your Honour.

KENNETH MARTIN J: Yes, inclusive.

NIALL, MR: Yes.

CAHILL, MS: And you never suggested anything different to a NASAA inspector who came to inspect the Eagle Rest after the incursion?---Sorry, the - - -

You never suggested to the contrary to any NASAA inspector subsequently, did you?---In what regard?

That you had changed your crop rotation by putting your oats in paddocks 1 to 6, to accommodate Mr Baxter's GM canola on your boundary?---I don't recall having to.

You don't recall having to?---Sorry. Just don't understand your point.

I'm not sure you need to worry about my point, Mr Marsh. You just need to answer my questions?---Okay. Sorry.

Your evidence is that you didn't change where you planted your oats that year to take account of where Mr Baxter's GM crop was going in?---Correct.

All that you changed was the movement of a paddock of intended crop from, is it 10, to 11 and 12?---Correct.

Now, your farm works on this basis: you mainly grow oats, don't you?---Predominantly, yes.

And you only grow a very little bit of wheat?---Relatively small, yes. It's - it's new, yes.

What's that wheat used for? What do you do with it?---It - it - it - we supply some private clients, and we were looking at developing a market with Bodeys.

But you only grew a paddock every year or so, didn't you, of wheat, at the most, up until this point?---Up until that point. Correct.

And that was to just supply private buyers?---Generally. Yes. It was a smaller amount.

And then - and that - so that went into paddock 11 at this - in 2010?---Yes. Correct.

And then paddock 12 you had Spelten rye in there?---Correct.

And that was a quarantine paddock?---Correct.

And there was a question in your mind, when that crop went in, as to whether you were going to be able to sell the product as certified, wasn't there?---Well, I wouldn't be able to sell it certified because that - that paddock was quarantined.

So you were clear in your mind that you wouldn't be able to sell it as certified product?---In paddock 11, yes.

Paddock 12?---Sorry. Paddock 12, yes.

And the reason that was a quarantine paddock was because you had drenched sheep in 2009, and put them in that paddock for a month after the drenching. Is that right?---That's correct.

And then, under the standards, as far as you understood them, you weren't able to sow and grow a certified crop in that paddock for at least 12 months?---Correct.

And so that's paddock 12. Paddock 11 had the wheat in it and then paddocks 7 to 10 were just pasture in 2010 for grazing. Is that right?---Correct.

And do you say, therefore, that apart from paddock - the movement of the wheat crop from paddock 10 to paddock 11, there was no other management of your crops or rotation of them that you adjusted as a risk management strategy in light of what Mr Baxter had told you?---Well, I increased a buffer zone against where I believed Mr Baxter's GM was.

So how did you do that?---As I said, I changed the crop.

Sorry, we're just talking about buffer zones at the moment so - sorry, was that part of the answer? Where did you increase the buffer zone?---I - as I said, we had changed the paddock from 10 to paddock 11 and 12.

Yes, so that was the buffer zone?---Well, that increased the distance in case there was an incursion from Mr Baxter's crop.

And you didn't plant out the whole of paddock 11, did you?---No.

And that was part of increasing the buffer zone?---Correct.

I think there were - was there about 6.4 hectares, was there, of paddock 11 - - -?---Approximately.

- - - that you left as pasture as a buffer zone to take account of Mr Baxter growing his GM canola?---Correct.

Is that right?---Yes.

Now, can you go to - just bear with me a moment. You went to see Terry Redman in 2010, didn't you?---It was - I thought it was 2009.

Did you only see him the once?---As I recall, a meeting with him, yes.

In August 2010, did you go and see a Mr Steve Penny from the Department of Agriculture and Food in Katanning?---Correct.

You did?---In 2010.

10?---August.

Yes?---Yes.

You did?---Yes.

And you remember that meeting, do you?---Yes.

His position, do you recall, was a wheat development officer?---Yes. I can't recall exactly what his position was in the department.

Did you go to see him because you were concerned about the wheat in paddock 11 and the risk of GM canola incursion?---I was concerned about, yes, at this stage knowing that Michael had planted GM canola on my boundary, the implications of that.

Yes, but was it the wheat - was it the wheat you were concerned about?---It was the - it was - no, it wasn't. It was about protecting the property. I was concerned about the GM canola affecting the property and contaminating the property.

Even paddocks 1 to 6 that year?---Well, obviously they're substantially further away from - - -

Were you concerned about risk to paddocks 1 to 6?---I was concerned about the effect on the property but given that that was a long way - - -

I'm asking you about paddocks 1 to 6. Please answer the question in relation to paddocks 1 to 6?---I didn't have the concern to those.

So your concern in 2010 was limited to paddocks 7 to 13?---Well, they were the closest paddocks to Mr Baxter, yes.

Or was it really only about paddock 11?---No, it was about those paddocks.

Now, you provided Mr Penny with a copy of the standard, didn't you - the NASAA standard?---Only on GM.

So just the section that dealt with GMOs?---Yes.

And you drew his attention to certain parts of the standard, didn't you?---Well, I can't recall. I had just - give him a copy.

And did you give him a copy of that letter from NASAA of 23 April 2009?---I - I can't recall.

And did you tell him, Mr Penny, that the - given the current NASAA standards, you were of the opinion that decertification of some organic growers due to the risk of GM contamination was inevitable?---I can't recall that I said it was inevitable.

Did you think that it was inevitable?---I just went to Mr Penny to express that I was concerned about the risks posed.

I'm not interested to know why you went to him. I'm asking here a question about whether you thought that decertification was inevitable for some organic growers due to the risk of GM contamination?---Yes. Well, I - I - I had serious concerns that if they got contaminated they could lose their certification.

Did you think it was inevitable?---I - I - I can't speak on behalf of what NASAA would ultimately do.

Did you tell Mr Penny that legal action would result, and several organisations representing organic growers have involved lawyers to prepare for this scenario?---No. I don't recall saying that.

You didn't say that?---No.

Now, Stephanie Goldfinch, she rang you at around this time, August 2010, didn't she? Stephanie Goldfinch from NASAA, August 2010?---Yes. Sorry, I can't recall exactly.

KENNETH MARTIN J: So the answer was, "I can't recall exactly."

CAHILL, MS: Do you recall a phone call from Ms Goldfinch some time around the - let's call it the period between July and September 2010?---Between around July/August.

I beg your - - -?---Yes. I - I - I - I can't recall that - that.

Are you saying you can't recall any conversation with Ms Goldfinch?---Look, I'm not saying I didn't have one; I just don't recall it at this point in time.

Did she call you to say that the definition of contamination is genetic contamination? Do you recall the conversation in which she said that?---No. No. I can't recall it.

Do you recall a conversation in which she said to you, "We," meaning NASA, "doubt that canola will contaminate wheat"?---If that's what she said.

I'm asking you if you remember such a phone conversation?---As I previously said, I just don't recall it.

Is it possible that you had a conversation with her in those terms?---It could be possible that I had a phone call with Stephanie at that time.

Do you recall that in about August 2010, you had some concerns about GM contamination of your wheat crop in paddock 11?---Yes. I had concerns; that's why it was shifted - changed out - shifted from paddock - - -

From 10 to 11?---Yes.

And with that reminder, do you recall having a discussion with Stephanie Goldfinch of NASAA about that topic?---I just don't recall that. No.

Now, did you tell Ms Goldfinch in any telephone conversation, at any time prior to the incursion, that growers wanted certainty and standards to aid in suing if necessary?---I certainly don't recall that conversation.

When you say you certainly don't recall, do you mean that you didn't make that statement to her?---I don't - certainly - no.

You didn't?---Sorry?

You didn't make that statement?---I don't - certainly don't recall making a statement like that. No.

KENNETH MARTIN J: "I certainly don't recall making that statement." Is that your answer?---Yes. I don't - yes. I don't recall. Certainly don't.

CAHILL, MS: Now, can I take you to that sign that you were identifying - in fact, I probably should stop for today, I think, if I'm going to move onto something else, your Honour. Unless you would like to go on.

KENNETH MARTIN J: No. If that's a convenient point for you.

CAHILL, MS: Thank you.

KENNETH MARTIN J: How are we doing, Ms Cahill?

CAHILL, MS: We've got a lot of slack in the timetable, which is good, I think, given today we got a little delayed with those objections.

KENNETH MARTIN J: Yes. Probably lost half a day on objections.

CAHILL, MS: Yes. If your Honour is asking me how long we will be with Mr Marsh - - -

KENNETH MARTIN J: I was, subtly, as usual.

CAHILL, MS: I might just have to - I think I will probably be about one and a half to two hours tomorrow morning.

KENNETH MARTIN J: All right. That's helpful.

CAHILL, MS: He was estimated to be three hours, and I think I've had a little under an hour as we - I'm not sure when I actually started - started at 3 o'clock; I've had more than an hour.

KENNETH MARTIN J: All right. So I'm just looking at the - what's to follow in terms of - Coleman, Goldfinch, Gore, possibly McInerney. All right. Do you want to start a little earlier tomorrow, or should we - - -

CAHILL, MS: I can do that, your Honour.

KENNETH MARTIN J: Is that convenient perhaps to start at 10.15 tomorrow?

NIALL, MR: Yes, you Honour.

KENNETH MARTIN J: Yes. All right. Just remind everybody, we're going to move to court 14.1, one floor above, tomorrow, which is a similar sized courtroom but with better acoustics. And we will start at 10.15 rather than 10.30 so that we can make up a little bit of time. Mr Marsh, we're going to need you back tomorrow for further cross-examination, starting at 10.15 am. You're under cross-examination at the moment. That's an important phase of the case. It means you shouldn't talk to anybody involved in the case about your evidence. Do you understand?---Okay. Yes.

Yes. All right. Thank you. All right. We will adjourn until 10.15 am tomorrow in court 14.1.

AT 4.16 PM THE MATTER WAS ADJOURNED UNTIL
WEDNESDAY, 12 FEBRUARY 2014

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