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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 THURSDAY, 27 FEBRUARY 2014, AT 11.33 AM

Continued from 20/02/14

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: Yes. Mr Niall.

NIALL, MR: Just before my learned addresses your Honour, can I hand to your Honour a copy of our submissions in two forms, and just explain what we've done, your Honour.

KENNETH MARTIN J: Certainly.

NIALL, MR: We've noticed that due to my poor proofing skills, there's some typographical errors.

KENNETH MARTIN J: Fix the typo in line 1.

NIALL, MR: Some typographical errors. The one with the red tab attached to it - - -

KENNETH MARTIN J: Yes.

NIALL, MR: - - - is in mark up. The other one is clean, your Honour. The only substantive change - well, not substantive change, but the only changes are to paragraph 54, page 15. We have just inserted a reference in the footnote to some evidence.

KENNETH MARTIN J: Thank you.

NIALL, MR: And at paragraph 306 on page 75, we've added a sentence to paragraph 306 just to explicate the proceeding sentence. Apart from that, the errors are just clerical, and I apologise for that, your Honour. And also, we were a little late with our submissions yesterday.

KENNETH MARTIN J: That's all right.

NIALL, MR: Which we apologise to our friends and to your Honour.

KENNETH MARTIN J: Thanks, Mr Niall. Before we get into the nitty gritty, just housekeeping wise, is everyone happy for these closing submissions to go up on the website immediately?

CAHILL, MS: Yes. We are, your Honour.

KENNETH MARTIN J: All right. Well - - -

NIALL, MR: Yes, your Honour. We will send an electronic of the corrected version.

KENNETH MARTIN J: Consolidated. That would be great.

NIALL, MR: As we speak.

KENNETH MARTIN J: And hopefully, they can be up, then, within a couple of hours.

NIALL, MR: If your Honour pleases.

KENNETH MARTIN J: All right. Ms Cahill.

CAHILL, MS: If it please your Honour, we have indeed provided those detailed submissions in writing.

KENNETH MARTIN J: You have indeed. Thank you.

CAHILL, MS: We rely on those. So the purpose of our oral submissions today on behalf of Mr Baxter is firstly to provide something of an overview and a context for those written submissions. Secondly, to respond to any queries or issues that your Honour may wish to raise with us in relation to the matters your Honour is now required to determine. And second – and thirdly, to respond to a couple of matters raised in the plaintiff's written submissions. Can I first begin with some comments in relation to the overview.

The plaintiff's pleaded case is as simple as it is broad, and it consists, essentially, of six contentions in sequence. The first is if you grow canola next to me, some of it is going to find its way onto my property. That is inevitable. The second contention is I'm a certified organic farmer, and you know that. The third is the mere presence of GM canola on my farm, in however small quantities, puts me at risk of decertification by my certifier. The fourth is I've told you about that risk. The fifth is you've grown GM canola next to me, and that risk has eventuated.

The sixth is I've suffered economic loss as a result. Now, those six contentions, we say, could never be enough to establish alone liability for economic loss either in negligence or nuisance. And the reason is quite plain. It comes back to that well-accepted principle that was articulated by Buss JA in the Apache Energy case, in which we've set up a quote in relation to – in our submissions. Generally, a person doesn't owe a duty in tort to another

person to take care not to cause reasonably foreseeable economic loss.

That includes a next door neighbour, but more of that a little later, your Honour. Something more than reasonable foreseeability is required. And in that something more, notions of reasonableness and the value judgments that are inherent in the notion of reasonableness looms very large. Whether one is considering it in terms of a duty of care, a breach of the duty of the care, or an assessment of whether, for the purposes of acclaiming nuisance, there has been an unreasonable interference with a proprietary interest.

Now, your Honour, that notion of reasonableness and how integral it is to the formulation of those matters has posed an obvious problem for the plaintiff's case as it was pleaded and run up to the point that the defendant went into evidence. The claim, as pleaded, was ambitious, but its purpose was clear. It was to argue that generally, the planting of GM canola next to an organic farm, or at all, and/or then swathing that GM canola crop, was unreasonable, and therefore amounted to negligence or a nuisance.

The problem was, of course, with that very generic and general proposition, that the plaintiff's own witnesses vouched for the reasonableness of both of those activities. So Mr McInerney in particular was the plaintiff's witness who asserted, at the very least, that the production of RR canola was a strategic tool to manage herbicide resistant rye grass, and that swathing was a preferred practice to direct harvesting. And that was notwithstanding that there's a known risk of the movement of swath material in strong winds.

So against that background, we say, it would be very unlikely for a court to ever find that the fact of growing an RR canola crop and swathing it, whether next to an organic farm or otherwise, was unreasonable in a way which would amount to negligence or nuisance. We say that that is why we have witnessed such a late and seismic shift in the plaintiff's focus in this case. When we say late, we say apparently after the openings by each party, and after the plaintiff had closed their evidence.

The focus has moved away from complaint about the reasonableness of the activity generally of growing RR canola and swathing it, and has moved now onto the particular reasons that Mr Baxter had in 2010 for growing RR canola and swathing it. I will return to this in a moment, your Honour, but can I begin with some observations

on the pleaded case. In opening, senior counsel for the plaintiff described Mr Baxter's conduct in growing and swathing RR canola as reckless and indifferent. The descriptor now given to that conduct in the written submissions is that it was cavalier.

We say that there is no foundation for just pejoratives. There was no foundation for them before the evidence was heard, and there is certainly no foundation for such pejoratives now that the evidence has been heard. The actual position was this. It is not, as the plaintiffs put it, that Mr Baxter had a fixed and firm view since 2008 to grow RR canola once it was legalised. His evidence was that he didn't make a final decision until it was - until it became lawful, and he hoped to plant it if it would benefit his farming practice.

He discussed what to grow and where to grow it at the beginning of 2010 with his agronomist, Mr Robinson, as was his practice. He was aware of Mr Marsh's concerns and raised with the agronomist, when the recommendation was made, to grow RR canola on that boundary, those concerns. And the plaintiffs don't dispute that at least, to that extent, Mr Robinson and Mr Baxter had that conversation. These are not the actions, your Honour, of someone who is reckless, indifferent or cavalier. Mr Baxter went further.

He took into account the fact that Mr Marsh was not growing canola on his property, so there was no risk of cross-pollination. A reckless, indifferent or cavalier person would not have cared less one way or the other. Mr Baxter allowed a five metre buffer between the two paddocks on each neighbouring side, even though - - -

KENNETH MARTIN J: It's really a 25 metre - - -

CAHILL, MS: Well, I was about to say - - -

KENNETH MARTIN J: - - - buffer if you add the road reserve. So it's five metres on his land, plus over 20 metres road reserve before you get to the boundary of - - -

CAHILL, MS: Yes.

KENNETH MARTIN J: - - - (indistinct) on the west.

CAHILL, MS: Yes. Yes. Indeed, your Honour. The point I was seeking to make there is that he allowed the five metre buffer, and then, notwithstanding, had took into account the additional road buffer with the trees on each side of

the roadway. Now, importantly, he told Mr Marsh of his intention before planting what he was about to do. Our submission is a reckless, indifferent or cavalier person certainly would not do that. The response from Mr Marsh was not to say that he shouldn't or couldn't, or to re-emphasize a risk of decertification.

No. What Mr Marsh said was, well, I will grow my crops further north, away from that boundary. Which he did. And it was a wise move, as it turned out, because there was no evidence of contamination, as the inspector tried to describe it, in paddock 11 where the organic wheat crop had moved from paddock 10 once the incursion had eventuated. So, so far in this scenario, your Honour, Mr Marsh and Mr Baxter, each and together, are a model of reasonable coexistence, taking into account and consideration each other's positions and arriving at a workable position to minimise the risks of coexistence together.

The complication comes when the NASAA certification regime is overlaid on this scenario. Now, without that certification the movement of GM canola to a neighbouring conventional farm would be unremarkable on both sides for both neighbours. The conventional farmer's sheep, if he had them, might eat the canola. If there were a crop in the paddock, it would be treated, the GM canola swathes would be treated like any other weed or plant, presumably, any debris that has been blown into the paddock and would be screened out at harvest time, if that were necessary to do so.

And perhaps as far as it would go between two such farmers would be a commiseration over a drink or a cup of tea as to the loss of yield that Mr Baxter might have suffered because of the blowing of the swathes and the seed in that strong wind. Importantly though here, the plaintiffs have submitted themselves to the strictures, limitations and burdens of the NASAA certification regime and compliance with the NASAA standards.

And now the plaintiffs say, with NASAAs support, that what would otherwise be a very benign, normal incident of agricultural production and coexistence has, by reason of this voluntary regime between NASAA and the plaintiffs, caused or created the potential to, in the future, cause the plaintiffs' economic loss. Now, we take issue with that proposition, of course. We say that the standards do not create that risk at all.

And that's because they neither require nor permit decertification in the circumstances of adventitious presence of canola swathes and seed in the way in which occurred in late-2010. Let us assume for a moment that the plaintiffs are right about the effect of the standards and the regime. Mr Baxter has grown a crop that he is legally entitled to grow which the government has adjudged as safe and there is no evidence to suggest otherwise.

The effect of Professor Rudelsheim's evidence was that the GM canola has been adjudged as safe as conventional food, conventional food that is available to the public. So some swathes and seeds of this legal, safe food blew onto the plaintiffs' land. It didn't affect anything that it came into contact with, whether that was land, livestock or plants. The only thing that it had the potential to affect was another canola crop where there was a potential for crosspollination and, therefore, GM transfer, none of which was relevant or applicable here.

So in the absence of that, the position was this. This incursion, the blowing over of these safe, legal swathes and seed was no different from any other transfer of weed or plant from one neighbouring farm to another.

KENNETH MARTIN J: Like a leaf blowing in from a neighbouring gumtree.

CAHILL, MS: Indeed, in a storm but certainly no different from a conventional canola crop having been grown next door and exactly the same event having occurred. Mr Marsh conceded in his evidence at page 298 of the transcript that his product didn't have any GM in it, as far as he knew. So that's important, we say, your Honour. It hadn't affected his right to grow a GM free product. It hadn't affected his right to sell a GM free product. And it hadn't affected the right of consumers who bought products from Mr Marsh to purchase GM free products.

And the plaintiff's case is nevertheless, notwithstanding all that, that they have a principled approach to agricultural production, the adherence to which principles includes submitting themselves to a regime the consequences of which are that their land, in whole or part, can be decertified for the mere presence of any amount, however small, of this safe, legal material on their land. Having created that risk themselves, the plaintiffs say, in substance, that by informing Mr Baxter of that risk they can pass the burden and consequences of their choice onto him.

It's not quite clear how far this argument extends beyond GMOs, your Honour. The plaintiffs make much of the NASAA standards and the effect of them is that all that is not permitted expressly under their system is thereby prohibited. Now, does this mean, therefore, we ask rhetorically, that conventional canola, conventional wheat grains, any type of conventional agricultural production that might find its way into their farming system is to be treated as a prohibited substance and, therefore, to be equated with contamination?

KENNETH MARTIN J: Well, certainly a pesticide or a herbicide.

CAHILL, MS: Indeed, and that was my next point, your Honour, the herbicides and pesticides. Now, the law is quite clear on this. Even herbicides and pesticides which are not – except in respective of certain applications, generally regarded as always safe and legal. They need to be used in accordance with their regulations and their approved applications and at certain times. But could it then be said, we ask rhetorically, by these plaintiffs or people in a similar position to them that, notwithstanding the absence of any normally understood want of reasonable care in the application of pesticides, an entirely accidental – I think the NASAA certifiers described it as "overspray" on an organic farmer's property.

That there is, by reason of the NASAA standards and the requirement for decertification, the creation of a duty of care that means that the farmer who sprays, otherwise with reasonable care and in accordance with their duties that exist otherwise, duties of care that exist and are owed to others, that nevertheless there is this hyper-duty, if you like, the hyper-reasonable standard of care in relation to organic farmers. Why? Because they have entered into a consensual arrangement with their certifier that these things, unlike the situation in the ordinary agricultural context, are simply not allowed and lead to decertification.

There's a very heavy focus, your Honour, in the plaintiffs' case about what Mr Baxter was told about the risks of de certification and, therefore, what is said he is supposed to have known as a consequence. Now, the pleaded knowledge is said at paragraph 31 of the statement of claim to have made it reasonably foreseeable to Mr Baxter that if he didn't take – the words are used – "reasonable care" to ensure that GM canola was not blown or carried from Seven Oaks onto Eagle Rest that the plaintiffs

would be at risk of losing certification of all or part of Eagle Rest.

The high point of that case must obviously be the conversation that Mr Marsh and Mr Baxter had in 2008 where Mr Marsh – and we admit this – said words essentially to the effect of there was a risk of de certification for the presence or the blowing over of GM canola from Seven Oaks to Eagle Rest.

KENNETH MARTIN J: That's when he brought over the conventional canola plant – – –

CAHILL, MS: The conventional swathe, yes.

KENNETH MARTIN J: – – – which had obviously grown as a volunteer somewhere – I'm not sure where – on Eagle Rest.

CAHILL, MS: And there was some suggestion, I think, that it may have been brought in by a rabbit.

KENNETH MARTIN J: Well, that's indeed the context of the letter written to Minister Redman some months later – – –

CAHILL, MS: Indeed.

KENNETH MARTIN J: – – – whereby it's suggested that there was a distance involved.

CAHILL, MS: Yes.

KENNETH MARTIN J: A rather short distance, from memory.

CAHILL, MS: Yes.

KENNETH MARTIN J: And that the seed transfer which had actually germinated the conventional plant was not by wind but it was carried by a rabbit or by some means.

CAHILL, MS: Yes, presumably rabbit droppings would be the most plausible, or a non-country person's perspective would seem to be the most likely alternative. Your Honour will remember Mr Marsh sought to resile somewhat from that in his evidence under cross-examination, so he equivocated and said, well, he wasn't sure, and thereby left open the possibility that it could have come in by some other means, whether that's wind or whatever. But the evidence, at the end of the day, went no higher than this, that he had told the Minister for Agriculture what he thought, at that point, was the – – –

KENNETH MARTIN J: Couple of months later.

CAHILL, MS: - - - means of conveyance. And otherwise he couldn't be completely sure whether that was, in fact, the case or not. We say that - - -

KENNETH MARTIN J: Yes, the conversation is in November 2008 at Seven Oaks. The letter to Minister Redman at volume 1 to 11 is 10 February 2009.

CAHILL, MS: Yes.

KENNETH MARTIN J: And it says,

> Paddock 10 -

- which we know is on the road -

> - contaminated organic spelt. Source of contamination, rabbits. Distance from the contaminating source, 75 to 150 metres across a road.

CAHILL, MS: For the reasons that we set out in our written submissions in some detail - and I won't rehearse here - the various other means of knowledge that the plaintiffs allege Mr Baxter had by the publication of guidance notes from DAFWA, signs on the fence boundaries, those sorts of things, we say, for the reasons that are set out, simply don't articulate the risk in the form that is set out at paragraph 31 of the statement of claim, and could not reasonably have alerted Mr Baxter to the risk of that nature and character that is set out in the 2008 conversation. That's why we say his 2008 conversation is the high point.

So when we look at that 2008 conversation we say, on behalf of Mr Baxter, there are two immediate questions. The first is, "Is it correct? Is the articulation of the risk correct?" Secondly, "If it was, what did it actually convey in terms of the true nature and magnitude of the risk that the plaintiffs were facing in relation to potential decertification?" Now that first question, "Was it correct?," the correctness of what Mr Marsh told Mr Baxter depends obviously on what the standards say.

One thing we say that should be cleared up straight away is that there is plainly no general position of zero tolerance for GMOs under either the National standard or the NASAA standard. That is plain. What the - both standards do is provide for very limited situations in which there is a strict no questions asked consequence of

decertification, or an inability to sell product. And that is where there is, in the case of accidental presence, known contamination of the product. That's 3.1.9 little b. of the National standard. And the – what we say are the mirror provisions in 3.2.11 and 12 of the NASAA standard.

This point about there being no zero tolerance is also made plain by the very standard 3.2.9 that the plaintiffs rely upon as supporting the decertification in the event of this incursion. What that provision provides is for decertification where there is considered by NASAA to be an unacceptable risk of contamination. What that connotes of course is that there will be instances in which NASAA determines that there is an acceptable risk, and decertification will not follow in those circumstances.

KENNETH MARTIN J: And would you read that as unacceptable risk of contamination of product?

CAHILL, MS: We do, certainly. And it must be so, we say, for all of the reasons that we advanced in opening, in terms of the construction, and we set out in our submissions today. And – – –

KENNETH MARTIN J: So you would look at the spelt. You would look at the rye, the wheat and the sheep, and make that contamination assessment.

CAHILL, MS: Yes, and to do otherwise, especially when it comes to accidental presence, makes it very difficult to read 3.2.9 conformably with 3.2.11. I'm not sure if your Honour would actually wish to go to that to see the point that I'm endeavouring to make there at volume 5 page 1419. Sorry, that's the National standard. The NASAA standard is at – – –

KENNETH MARTIN J: 1419?

CAHILL, MS: 1318, sorry. I had the National standard reference there, and I meant to take your Honour to the NASAA standard. 1318. The short point is this, your Honour, if I just might develop that slightly orally, although it is in the written submissions, you remember that much was made by the NASAA officers who gave evidence about the requirement for conformity between the National standard and the NASAA standard, and that doesn't appear to be in issue in any way between the parties. Of course, with the National standard you have this very plain and clear articulation in 3.1.9.b., which is at 1419, your Honour, of the consequences for the accidental presence of GMOs.

KENNETH MARTIN J: So 3.1.9.b.?

CAHILL, MS: Yes.

KENNETH MARTIN J: Products known to be contaminated by genetically modified organisms, or their by-products, must be excluded from sale.

CAHILL, MS: And the prefatory words of 3.1.9 are so important because this is the provision that deals with accidental presence, and it is sitting there in stark, contrary distinction to the balance of the standards, both at 3.1 and at 3.3, the broad section on genetic modification, which all otherwise deal with two things, use or negligent introduction by the certified operator – so some act or omission on their part – or, the second broad category, risk management practices required by the certified operator to minimise the risk of the introduction accidentally of GMOs.

So what 3.1.9 b. says, "Well, you haven't been negligent, you haven't deliberately used GMOs and you have – nevertheless, you have done – taken all the appropriate risk management steps required under these standards to minimise the risk of introduction. Nevertheless, if something happens outside your control, through no fault of your own, and GMOs are present, these are the circumstances in which you will be excluded for sale." Know contamination, not suspected. Known contamination of the product. And that, we say, for the reasons we have set out in our submissions and in our oral opening submissions, is completely in conformity with the overriding objectives of the standard.

It is, for the purpose of labelling product, for export. And the objective is not to guarantee that products will be free of GMOs, pesticides, residues, call it what you will, unpermitted substances; rather, it is to minimise the risk that they will be through the adherence to specified agricultural practices. That explains plainly why section 3.1.9 b. picks out and deals with, on its own, different consequences for the accidental presence, versus the consequences of the certified operator not having practiced organic principles in a way to minimise those risks.

Now the point about 1317 to 1318, your Honour, is this which deals – this is the National Standard dealing with GMOs. One sees again this same breakdown between the categories of standards with a focus upon:

> …prohibiting the use or negligent introduction by the certified operator of GMOs.

Secondly,

> …obliging the certified operator to engage in risk management practices that will minimise the risk of the introduction of GMOs adventitiously –

and that can be not just – we're not just talking about crops here. We're talking about whether there might be GMOs in a vaccine, for example, that might be used in relation to livestock, that sort of thing, the various inputs that are used in the agricultural process.

But when it comes to 3.2.11 and 3.2.12 the language is imperfect. We don't criticise the draftsperson for it. It's not a statute but it's tolerably clear that, when those two provisions are read together, what they are intended to achieve is the effect of clause 3.1.9(b) of the National Standard. And the difficulty is to read 3.2.9 as having an application in relation to the accidental presence of GMOs on the land and to be "contaminating" – to use the words of 3.2.9 – anything other than product gives it a scope of operation that just doesn't sit feasibly and easily with the operation of 3.2.11 and 3.2.12.

KENNETH MARTIN J: Well, 3.2.11 – acknowledging what 3.2.9 says about shall – then uses the word "may."

CAHILL, MS: Exactly and there's certainly no zero tolerance there.

KENNETH MARTIN J: But and explicitly invokes the exculpatory phrase:

> …contamination of organic product by GMOs that results from circumstances beyond the control of the operator –

which would tend to suggest that that's the specific case being addressed and what has gone before it – if we use the old – the specific overrides the general line of construction.

CAHILL, MS: Exactly.

KENNETH MARTIN J: Is that where the use is deliberate or negligent and intended then, axiomatically, if you do that in an organic practice then you stand at some risk.

CAHILL, MS: And it make sense, your Honour, when your Honour reminds yourself of what this is about. The NASAA standard has the same objectives as the National Standard. It's to label product for export. It's to label product and it contains the same caveats. It's not guaranteeing purity of product. It's saying the practices that are adhered to in this standard mean that the risks of impurities or prohibited substances, non-permitted substances is minimised.

The other important point, of course, about the NASAA standard - I'm sorry, if I just go back. The other point, just to add to that analysis of the proper construction, is that, of course, the evidence that your Honour has heard and is not disputed is that the intention is to read the NASAA standard conformably with the National Standard. Now, if that's so there's no scope to apply 3.2.9 of the NASAA standard in a way that would give it an extended operation above and beyond 3.1.9(b) of the National Standard in the event of accidental presence.

But it goes further, of course, because, as I mentioned in my opening submissions, your Honour, those general principles that are set out at the beginning of each of these sections are intended to be a statement of intention and there's much in that. Two things are very important in relation to the National Standard. The first is that there is a discussion about them having no place in the organic production and processing systems. But this second point is very important:

> Even where the evidence of GMOs is not detected in finished organic product the deliberate or negligent exposure -

so we must be talking about the certified operator there -

> of the systems or finished products to GMOs is outside organic production principles.

So that's a further explanation as to why there is a different and more limited consequence where the "contamination," so-called, occurs without any act or omission of the certified operator, completely outside their control. The recommendations, your Honour, recommendations are very important. The reason why is that they reveal that the focus for contamination is genetic contamination. What operators should do, it is recommended, is:

> …familiarise themselves with the vectors and modes of potential transfer of material with modified DNA to avoid –

there's that word, "contamination."

Well, that can only sensibly be read as referring to GM transfer as constituting contamination. Now, GM transfer might occur other than in a finished product by, for example, the mixing of permitted substances, the mixing of substances to make up a vaccine or some kind of treatment for livestock. So it might not be – result in or be limited to genetic contamination of product but it must still be limited to genetic contamination. That's the focus.

So for that additional reason there is simply no basis, no reasonable basis on an objective reading of these provisions, to give the language of these standards the broad and – I'm constrained to say – counterintuitive construction that is contended for by the plaintiffs and was contended for by NASAA at the time. So where I began with that, your Honour, is to reiterate this point that there is no general zero tolerance under either of these standards.

The true position is that there is very limited situations where there is an automatic consequence of decertification. Otherwise, there's no defined tolerance. That's the reality of these standards. So we have NASAA deciding what is or is not an acceptable risk of contamination. You have, in relation to herbicides, the circumstances in which there will be certain maximum limits that are or aren't allowed. But in relation to GMOs it is a matter for NASAA, on a case by case basis, as to whether it considers decertification or not is the appropriate consequence.

And can I just be clear here. It's an appropriate juncture to make this point that arises from the plaintiffs' written submissions at paragraph 209. It was suggested in that paragraph or is suggested that Mr Slee's evidence was advanced for the purpose of arguing that there was or ought be a tolerance of .09 per cent for adventitious presence of GM material in organic product. Certainly, no intention at all to advance that proposition, nor was the evidence to that effect or certainly not intended to be to that effect.

The purpose of Mr Slee's reference to the oilseed standards which are exhibits 36 and 37, your Honour, was

simply to point out that in relation to the marketing of non-GM canola in a system of coexistence and where, in recognition of the fact that albeit that segregation practices are put in place, zero tolerance for the adventitious presence of GM into non-GM is simply not achievable. Those standards allow for a .09 per cent adventitious presence in relation to GM to non-GM canola.

We say the construction of the National Standards and the NASAA standards are quite plain. It's revealing, your Honour, that the plaintiff can't offer a tenable argument for decertification of the land for the accidental presence of GM material on it under the National Standard. It can't do that. And your Honour will recall how the NASAA officers who gave evidence struggled to find a provision under the national standard that would permit decertification. Remember, they - - -

KENNETH MARTIN J: Well, as I understood it, it was 3.2.9, essentially.

CAHILL, MS: Well, that's the NASAA's standard.

KENNETH MARTIN J: NASAA.

CAHILL, MS: But under the national - - -

KENNETH MARTIN J: Under the national. Yes.

CAHILL, MS: Under the national one, the closest we got there was 3.2.1, I think it was, where it was suggested that the use of the - the prohibition upon the use of GMOs had an extended meaning to include presence. That was what was seriously put by Ms Denham. And when I say seriously, I don't mean that in a pejorative sense. She - I accept that she genuinely believed that that was a reasonable construction. But plainly, it wasn't on any objective view.

KENNETH MARTIN J: But if you're talking of contamination by GMOs in the relevant context of Seven Oaks and Eagle Rest, bearing in mind there's no neighbouring canola crop, you can put a line through pollen mediated transfer. That basically leaves seed as the potential spread of the DNA.

CAHILL, MS: Yes.

KENNETH MARTIN J: So relevantly, that's a germinated seed growing in the soil somewhere.

CAHILL, MS: Which would still have to cross-pollinate with another compatible plant in order to have any GM trait transfer.

KENNETH MARTIN J: Longer term.

CAHILL, MS: Indeed. Which - - -

KENNETH MARTIN J: Well, if you harvested your Spelt crop or your rye crop, or your wheat crop, or killed your meat from a sheep that ate a swath, there's no trait transfer - - -

CAHILL, MS: Exactly.

KENNETH MARTIN J: - - - DNA scenario.

CAHILL, MS: Yes. This, can I say, your Honour, comes back to the final point I wanted to make about the construction of the standards. I regret that it comes last, because it's probably the most important point. Even if we were going to ignore all of the matters that I have just made submissions about, the lack of zero tolerance, the inconsistency between the different provisions if one is going to read them in the way which is contended for by the plaintiffs, there's still one big problem.

And that is this construction of the word contamination in each of the standards. What the construction depends on is construing the word contamination against its natural and ordinary meaning such that a safe legal plant, resting on the ground, and with seeds to the extent that they're in the soil, constitute contamination of land and/or soil. That must mean therefore that conventional canola on a proper construction of the national standard, the NASAA standard, must contaminate land. So must wheat or other grains.

And as your Honour said, gumtrees. Fallen branches. Any sort of weed carried over by a bird, any sort of seed that might be brought in. Anything that's not permitted under the standards.

KENNETH MARTIN J: What about the petal off the flower of a canola plant, blown on the wind?

CAHILL, MS: Well, whether it's GM or not, if it's not permitted in that system, it's prohibited, and therefore, it must mean contamination because that is the logic of reasoning that is applied to get to the point where the plaintiffs argue that contamination equals safe legal plant

resting on the land, safe legal seed in the soil, and germinating. And your Honour, that was the leap of logic that each of the NASAA people who gave evidence made. When asked in these various scenarios whether they regarded that as contamination, very often, their response was, "Well, yes, because GM is prohibited in an organic system". So it went because it's prohibited, therefore if it's there, it equals contamination. Of course - - -

KENNETH MARTIN J: Of the land.

CAHILL, MS: Well, of whatever. We won't go into the sheep examples that - - -

KENNETH MARTIN J: (indistinct)

CAHILL, MS: I went through with Ms Goldfinch. But of course, there's no foundation to make that leap of logic without understanding why something might be prohibited in a particular context. There is no evidence to suggest that the prohibition arises here because GM canola is toxic or unsafe. The evidence is all to the contrary. That it is safe. So rather, the point must be that it is prohibited because it's unnatural. Remember, the expression of organic principles at the - in the definition section of - at the front of each of those standards, talks about what organic is and means is a method of agricultural production that emphasizes certain principles and philosophies, sustainability, the use of natural resources and products, often elements of social justice, these sorts of considerations and principles.

So when it comes to wondering why GM is prohibited in this system, acknowledging that the GM is safe and it's legal, the only plausible reason for prohibition is because it's not natural.

KENNETH MARTIN J: But that's just a matter of definition.

CAHILL, MS: Indeed.

KENNETH MARTIN J: And the definition of GM, in - certainly in the NASAA standards, supports that because it talks about the way in which the genetic breeding happens through reasons other than natural ones. So the short point is this, your Honour. Against that background, it strains all ordinary use of language to suggest that a piece of canola, whether it's GM or not, a piece of wheat, lying on the land, on organic land, certified organic land, is contamination within the meaning of either the national standard, or the NASAA standard.

And if we go down that path, as the NASAA certifiers did, and as the plaintiffs urge your Honour to do, we come into all sorts of absurd and uncertain consequences, and unreasonable consequences, as a result. Whereas here, in paddock 11, there were three swaths in a corner, and the whole paddock was decertified on the basis that it was contaminated. As Ms Goldfinch would have it, one swath on a sheep's back, the sheep and its wool is contaminated. Ms Denham struggled with some of those scenarios because, in my submission, she started to appreciate the difficulty in drawing a line once that (indistinct) had been crossed, had prohibited equals contamination if present in some of these more absurd examples.

And that's when Ms Denham was driven to say well, if there's one swath, it might depend whether that's contamination or not. You would have to consider all of the circumstances.

KENNETH MARTIN J: Wasn't there some evidence of a phone call to Mr Marsh with Ms Goldfinch passing on from Rodd May, the chairman of NASAA, that the definition of contamination was genetic contamination?

CAHILL, MS: Page 289, volume 2. And also exhibit 11. I was just about to come to that point, your Honour. Can I just make this point before I get there, that – just finishing off on the absurd and unreasonable consequences that follow from equating the presence of a prohibited substance with contamination, is that when it's – we're talking about wheat, and canola, and GM canola, and gumtrees, the contamination is inevitable in an agricultural region where you have farmers next door to you going about their business. You have bushland and so forth.

These substances are prohibited, and therefore amount to contamination if present. And there's a lot of contamination going on on organic farms every day of the week. Your Honour anticipated, with respect, what I was about to come to, which was this. It's difficult to see how NASA got to this point. How Mr Marsh got to this point of considering that the mere presence of GM canola on the land amounted to contamination within the meaning of each of the standards. And that's because not only was there that phone call where Ms Goldfinch in 2010, having been asked in the context of the wheat crop, it would seem, having been about to be planted or having been planted, whether there would be contamination of that if there were volunteers or swaths blew over.

That's the reasonable inference to draw from that conversation, and she said no. Genetic contamination is what it's concerned with. We also have exhibit 11, where Mr Marsh asked for guidance in 2009 about the effect of the standards. And what did Ms Goldfinch refer to? Standard 3.1.9, 3.1.9 b. of the National standard, which does nothing more than exclude from sale product known to be contaminated. Now - - -

KENNETH MARTIN J: At the very worst, under the National standard, if you sample the product and found it to have the genetically modified material in it, then you would decertify the product.

CAHILL, MS: Exactly. Or what the National standard really seems to be saying is - and maybe I'm agreeing with your Honour here - that the first port of call is to prohibit sale, so you would have to have a breaching act on the part of the certified operator in attempting to sell product that he or she knew to be contaminated before - - -

KENNETH MARTIN J: This is in the context of standards set up to protect the export market, so people aren't misled about Australian agriculture overseas - - -

CAHILL, MS: Yes.

KENNETH MARTIN J: - - - being organic when it's not.

CAHILL, MS: Exactly.

KENNETH MARTIN J: That tends to put the focus on the product that's being exported.

CAHILL, MS: That's our submission.

KENNETH MARTIN J: I understand.

CAHILL, MS: So there is a real questions about how the ground shifted so dramatically between the time of exhibit 11, the phone call at page 289 of the trial bundle, and this decision in relation to decertification in late 2010. But of course the question in terms of proper construction and reasonable foreseeability is, "What would a reasonable person make of those standards, what they meant and how they were to apply?"

And in relation to this word contamination, and what is meant by that in respect of GMOs, one can readily accept and acknowledge that there are people in the community,

probably more likely – or most of them involved or interested in the organic industry, who have very strongly held views about GMOs and their place in agricultural production generally. But the NASAA standard is an AQIS approved document. It's approved by our quarantine service in respect of the certification of products for labelling for export as organic.

We say that when one has regard to that it can't possibly be suggested on any reasonable construction that AQIS has approved a standard that has such a wide and ultimately limitless and absurd construction as: contamination equals three swathes in the corner of a paddock and therefore automatic contamination and decertification. It couldn't possibly mean to a reasonable person reading those standards that an unacceptable risk of contamination, is the phrase, would be constituted by any presence in whatever quantity of safe legal plant material such as GM canola on an organic farm, even just one swathe, whether with or without seeds.

And then there would be all these rhetorical questions if that, in fact – if that then were to be the case: "What is being decertified? The land? The product? If it's the land, how much of the land? Part of a paddock? The whole? The whole operation? How long is it decertified for? Is it a permanent thing such that one can never regain certification status? And if not, on what possible basis does one ascertain how long the decertification will last for, when what we are talking about is the presence of material on the land?"

"What would a reasonable person make," we ask rhetorically, "of those standards in assessing the nature and extent of the risk of decertification, which a certified operator was confronting if contamination were construed in this way?" Now, that's a length submission for which I apologise, your Honour, but the point of it is to say this. That despite reasonable foreseeability apparently being the centrepiece of the plaintiff's case, the one thing that the plaintiffs believe they have going for them, by reason of their signs and letters and conversations in 2008, despite reasonable foreseeability being the centrepiece of the plaintiff's case, it is still very fraught.

And it is fraught because it doesn't bear scrutiny as an accurate depiction of the true risk confronted under the standards on an objective reading. Secondly, once we dip our toe into this very extended and unreasonable construction of contamination equals the presence of canola

- GM canola in any quantity, the extent, nature and magnitude of the risk of decertification is complexly unquantifiable and unascertainable, and that's so even if one carefully goes through the standards and reads them line by line.

So reasonable foreseeability is fraught, and that's before we even begin to start considering the additional factors, such as the salient factors that one considers in relation to a duty of care, or the factorial approach that is irrelevant in terms of deciding whether or not there is an unreasonable interference with land for the purposes of a claim in nuisance. Can I deal first with the duty question in terms of salient factors, your Honour? It would seem that on both sides the lawyers agree, in effect, that Perre v Apand is a useful ready reckoner, if your Honour likes, as to how to adjudge the existence or otherwise of a duty here, by way of comparing and contrasting the salient factors that were or were not present there, and how the court treated them.

The obvious and completely expected point though is that we each come to different conclusions about how one compares and contrasts Perre v Apand, and what one makes of it. Our submissions in relation to that are set out at paragraph 114 of our written submission. We highlight a few key points, which we say are really quite clearly determinative against there being the existence of a duty of care in this case. The first is that in Perre v Aphand the risk of economic loss was created by a law that prevented the sale of potatoes that were within a 20 - produced within a 20 kilometre radius of the infected seed.

We don't have a law here. What we have is a consensual contract between NASAA and the plaintiffs. And this, of course, is very important in relation to the issue of control of risk and vulnerability, those two salient factors which are, in some respects, two sides of the same coin. There was nothing the plaintiff in Perre v Apand could do to avoid the application of the law, and therefore the economic loss that flowed as a consequence of the application of the law. But here these plaintiffs have had, and continue to have, many choices.

First of all, they have the choice to certify at all. Secondly, they have the choice of whom to certify with. Your Honour heard from Ms Goldfinch that she now works with AUS-QUAL, who apply the National standard, they don't have their own standard. And for the reasons that I've already submitted, whatever one might say about the construction of the NASAA standard, there is no tenable argument for any

breach of the National standard in the circumstances of this incursion. Just not possible. There's also the ACO, Australian Certified Organic.

And we have tendered, and there is in evidence, the standard there. I think that's at exhibit 38, I think it is. But, in any event, a plain reading of the ACO standard makes clear that there would be no decertification in these circumstances, so these plaintiffs had choice about how – it's 35, I'm sorry. Exhibit 35, your Honour. These plaintiffs certainly had choice and control over the nature and extent of the risk of decertification that they are assuming here, but it goes much deeper than that.

I invite your Honour's attention to paragraphs 155 to 157 of the plaintiff's outline of – or written closing submissions. Those paragraphs are very interesting because what they suggest is that there is only a limited opportunity for Mr Baxter to challenge the correctness of NASAA's decision to decertify. The basis upon which that is articulated it seems primarily is because both NASAA and the plaintiffs agree as to how the standards operate. So because they both agree that 3.2.9 applied here, and decertification followed as a result, it's really not open to Mr Baxter to query that, to challenge the reasonableness of the decision.

Now, if that's right, how can it possibly be said that these plaintiffs, and not Mr Baxter, are the vulnerable ones? It's Mr Baxter, rather than the plaintiffs, who control the risk. The plaintiffs control the risk together with NASAA in terms of the way in which they intend these standards are to apply. On an objective construction, on a sensible construction and on a reasonable construction there was no basis at all, no entitlement to decertify any part of this land by reason of that incursion. And far be it for Mr Marsh and Ms Marsh to have simply said, well, we accept that result. They should have appealed the decision. The rights of appeal were entrenched in the standard and in their licence agreement and, had they been unsuccessful, they should have enforced the contract in a court of law.

That is the way in which they control the risk. It is simply not open to them to say, well, Mr Baxter is the one in control because he plants the RR canola. The risk of decertification lies entirely within the hands of the Marshs and NASAA and the consensual arrangement into which they have entered. Otherwise, the position is this. The plaintiffs can simply come to the court and any person in

the position of the plaintiffs can come to the court and say, well, look, this is the arrangement we've decided to enter into.

It has got risks but that's really your problem, not ours, because we can offload that to you just by telling you that we have assumed these risks. That's just such a distortion of the application of the salient factors and the articulation and application of them in Perre v Apand that it is simply just not justifiable, we say. Now, in relation to the salient factor of autonomy, your Honour, the key point here is this, that the law and the law of negligence works - the law generally and the law of negligence particularly works in this very basic way.

A person has a right to do what they see fit as long as it is lawful and reasonable. Mr Baxter has a right to grow a legal, safe crop and he decides when and in what circumstances and where he does that. That right, that autonomy he has is ameliorated only where there are other sufficient indicia of duty or duty owed to another that would restrain, relevantly here, his right to plant and swathe an RR canola crop on his boundary.

Now, the plaintiffs here point to the licence that Mr Baxter had with Monsanto to use the seed to grow the crop and his crop management plan. But the short point is this. None of these relevantly affect the right to grow the RR canola crop on the boundary and to then swathe it. What those restrictions, as the plaintiffs like to call them, are concerned with and deal with is the management of glyphosate resistance on a farm and, secondly, the segregation from non-GM canola crops which is required for the purposes of marketing to ensure that there's no crosspollination and the amount of adventitious presence in non-GM canola crops is - - -

KENNETH MARTIN J: Unlike Western Canada where it doesn't matter anymore.

CAHILL, MS: Indeed, indeed. That's what it's directed to. Now in Perre v Apand the position was completely different because already the defendant owed a duty to the party who had actually suffered, who had been provided with the infected seed, and where the potato blight had in fact - - -

KENNETH MARTIN J: The bad Victorian potatoes that ended up in South Australia that didn't so much affect the person who got them but the guy within the 20 k radius who exported to Western Australia found himself locked out.

CAHILL, MS: yes, yes.

KENNETH MARTIN J: Not because his potatoes were infected by the potato blight but because he was in the radius of disqualification imposed in the west.

CAHILL, MS: Yes, because of a law.

KENNETH MARTIN J: Yes.

CAHILL, MS: Yes. But the point, of course, was this, that in relation to the chap who did suffer the potato blight there was already a duty of care imposed - - -

KENNETH MARTIN J: In that - - -

CAHILL, MS: - - - to take reasonable care to avoid that. And the point made - - -

KENNETH MARTIN J: A physical consequence of disease in potatoes.

CAHILL, MS: Indeed, indeed, and so the point made - I think it was mainly by McHugh J - was, well, where the pre-existing duty is there, where you're already constrained - I say in parenthesis - obviously, constrained in a relevant way which is to not - to take reasonable care not to introduce the potato blight into that area or into those farms then it's much easier to find a consequential duty to someone who hasn't suffered direct physical damage but, nevertheless, has suffered economic loss.

Well, we don't have that here and you can't take up something like the licence agreement - I'm sorry, I will go back a step. There is no duty of care that Mr Baxter owes to anybody to not swathe - sorry, to not grow RR canola or swathe on a boundary or at all. It just doesn't exist and none has been identified. And so resort cannot be had to such things as the licence agreement with Monsanto of which there is only - no, there is evidence of the agreement between Mr Baxter and Monsanto in the crop management plan.

KENNETH MARTIN J: But the Monsanto agreement says nothing about swathing.

CAHILL, MS: No.

KENNETH MARTIN J: And in terms of distance it says five metres from your boundary.

CAHILL, MS: Yes, and five metres for a quite different reason from the one - - -

KENNETH MARTIN J: In circumstances of potential pollen mediated transfer concern, crop to crop.

CAHILL, MS: Exactly, yes. And, therefore, it simply has no application and can't be used to ground the existence of a much wider and more onerous duty where none would otherwise exist. The salient factor of autonomy here in relation to the growth of a safe legal crop is, we say, a very important feature of the case which weighs against the finding of duty and is a very significant difference from the Perre v Apand situation.

KENNETH MARTIN J: Because there was no autonomy to the Victorian potato exporter to send potatoes infected by potato blight to South Australia - - -

CAHILL, MS: It didn't have a right to do that.

KENNETH MARTIN J: - - - with whatever knock-on consequences there were for growers marketing their potatoes anywhere.

CAHILL, MS: That's it. Yes. Indeterminacy is - and knowledge of risk can also - are also important, knowledge of risk of harm, that is, are two salient factors which can be dealt with together. When one is comparing and contrasting this situation with that in Perre v Apand this situation is very different because here, in terms of what the risk of harm is and what Mr Baxter could reasonably have known about it, is really in the hands of NASAA, as the witnesses revealed in their evidence.

The reason that Mr Baxter could not have known the nature and magnitude of the risk with any reasonable and necessary specificity is because NASAA itself didn't know. And to this day, it seems that it still doesn't know as to what would amount to decertification, decertification of what and for how long. Your Honour saw how different the evidence was from each of the NASAA witnesses as to what might constitute contamination, what might not. And each of the witnesses, in particular Ms Denham who now chairs both NASAA and the certifier NCO, was at pains to point out, was that each case is unique and is dealt with in its own terms and having regard to its particular circumstances.

So not only is it impossible to answer any hypothetical scenario with any precision that's put to you

but it's also very difficult to give any clue going forward as to how any future incursion might be treated. Now, in contrast, in Perre v Apand there was a law in place. It was clear in its term that the potatoes couldn't be sold where they had been grown within a 20 kilometre radius of the introduction of the infected seed. And the defendant was a player in that industry and knew well the existence of the law and the extent of its application.

So those are stark differences. Mr Baxter is not an organic farmer. He would struggle to work out anything from reading the National standards or the NASAA standards in terms of what could possibly be meant by an unacceptable risk of contamination or whatever provision they might try to find under the National Standard, and what the consequences would be even if there were that breach. There's no guidance on any website that he could go to. Even the certifiers don't have any guidance as to how to approach these things uniformly. And one would be left guessing as to what might happen in the future. But it does seem to be the effect of the evidence. That your Honour can have no - can draw no conclusions that were this exact same circumstances of incursion to occur tomorrow, how NASAA would react to that.

Can I discuss, your Honour, finally, in relation to Perre v Apand, the limits of the physical propinquity argument. Now, here, of course, the High Court was dealing with the issue that there had been no physical damage of the - to the plaintiff. All of the physical damage, if one could describe it, the infection in that way, had occurred in the neighbouring farm. The relevant difference here, of course, is that there is no physical damage to a neighbour. There is no physical damage at all. What you have is a safe legal plant and some safe legal seeds lying on the ground of the - in the organic farm.

You don't have potato blight. Anything that can cause an infection, anything that's illegal, that is in any way infecting or contaminating anything in the vicinity. And the other point is this. That - and there was a point that was made in Perre v Apand when it was discussing physical propinquity. There, the economic loss was inevitable as a result of the infection of the neighbouring farm. But here, it's not. And the reason that the economic loss arises is because of this frankly unusual arrangement insofar as it has been construed and applied by the Marshes and NASAA in this instance that deems the presence of GM canola material on an organic farm, in any amount

whatsoever, as contamination, and therefore leads to the consequence of decertification.

Those are the two essential reasons why it cannot be suggested here, as it was in Perre v Apand, that there is a relationship of physical propinquity between the act of growing RR canola and the economic loss that was suffered as a result. Your Honour, can I deal with the issue of breach of duty?

KENNETH MARTIN J: Certainly.

CAHILL, MS: I won't rehearse all that we've said in the submissions in writing. I just wanted to highlight three points very briefly, your Honour. If we're – the – one of the key issues is whether or not it is open to your Honour to find that there is a breach of duty applying the provisions of section 5B of the Civil Liability Act. 5B. And the plaintiff bears an onus in that regard, your Honour, in persuading your Honour that those provisions are satisfied in the preconditions.

Now, if we're right about the proper construction of the standards, the plaintiff cannot, and has not – cannot demonstrate, and has not demonstrated, that the risk of harm was not insignificant. That's the short point. There can be no breach of duty in circumstances where there was no significant risk if the standards were applied on a proper construction and reasonably.

KENNETH MARTIN J: I hate double negatives, but does that – 5B(1)(b) mean against a risk of harm unless the risk is significant?

CAHILL, MS: Well, I've gone through the same conundrum as your Honour in trying to work out why it's cast in that way. But the way I worked it through was this. It sets out the circumstances in which a person is not liable. The general position is that a person is not liable. So the exceptions must all be proved, and they're conjunctive. So each one of those.

KENNETH MARTIN J: I suppose not insignificant takes the language of Sir Anthony Mason in Shirt.

CAHILL, MS: Yes.

KENNETH MARTIN J: And applies it.

CAHILL, MS: But whether or not it means anything more than unless the risk was significant, it's hard to see.

It's either significant – if it's not insignificant, then presumably it's significant. It would seem to be a logical reading of it. But perhaps whether or not there is any semantic distinction, it's unnecessary to determine here because, as I say, if we're right that there was no permission, there was no entitlement to decertify under either the National Standard or the NASAA standard, the risk of decertification was either not significant or was not insignificant. Was either not significant or cannot be demonstrated that it was not insignificant.

KENNETH MARTIN J: Well, I suppose the counterargument, applying Midland's case, is the plaintiff's submissions shows that you put him in harm's way, so that everything, even if it's negligent and unforeseeable, the fact that you sort of started the ball rolling, is enough to embrace what comes afterwards.

CAHILL, MS: The problem with – – –

KENNETH MARTIN J: Even if it's totally unjustifiable.

CAHILL, MS: The problem with that is that there needs to be some pejorative characterisation of the initial conduct. So here, we are just going about our business. We're growing a crop, a lawful crop, and here's this consensual arrangement which his not only voluntary and outside anything to do with us, but it is also unreasonable. And Midland does talk about – because that was a case where the chap retired and there were two – there was the initial injury, but then there were their different reasons for – which, arguably, may have been the – ultimately, the determinative reasons for his retirement.

But the point that the court made there was that it nevertheless had to be reasonable for him to retire. And it was. It was reasonable, in the circumstances, for him to do that. The very significant difference here is it's not reasonable to decertify. Why isn't it? Because they're not allowed to. And it's inconceivable that a defendant could be held liable, or harm that has been caused by the – a breach of contract by somebody else, and the failure of the plaintiff to remedy that.

KENNETH MARTIN J: Even though he fatalistically predicted it.

CAHILL, MS: Well, that's – – –

KENNETH MARTIN J: In a conversation a long time before.

CAHILL, MS: That's – well, perhaps he did. Perhaps he fatalistically predicted it. But that doesn't make it any more – sorry. I will go back a step. The fact that he predicted something that was false does not create a duty. So if we're right, your Honour, there's no power – – –

KENNETH MARTIN J: He predicted an outcome – – –

CAHILL, MS: That – – –

KENNETH MARTIN J: – – – which was right in terms of he predicted it accurately. But – – –

CAHILL, MS: But you can't create risk and duty in that way, we say, through a consensual arrangement. So these – – –

KENNETH MARTIN J: Are there any cases on that?

CAHILL, MS: We've looked, and we've not found any such cases. And I think the reason why that's so is because the risk here is something that has been created rather than exists without the involvement of the plaintiff or another party. So in Perre v Apand, you had the law there. That was a consequence. In many other cases, it's simply – well, in all other cases, we've been able to find. It's external factors which operate to create the risk. Here, the plaintiff has created the risk themselves with NASAA. And they've done that in a couple of ways. One, by signing up to this certification regime themselves in the first place.

KENNETH MARTIN J: Regime is not so much the risk. I mean, he signs up to an accredited regime. Fatalistically predicts an outcome in terms of an application of the standards which you say is absolutely untenable on any rational reading of the standards. But nevertheless, he's right in terms of his prediction.

CAHILL, MS: But I think that that's the difficulty, that's the novelty in the case. But it's also the fundamental difficulty for the plaintiff because to entertain that argument then allows for the possibility that a plaintiff can do two things. It can create reasonable foreseeability on a false premise, and then it can effectively create a duty where none would reasonably exist otherwise. And the law of negligence is not about plaintiffs creating duties of care for others to owe to them.

That, I think, is the essential novelty, and yet, difficulty with the point. So – and the strangeness of it is the way in which the prediction came true. But why it's strange – sorry, why the strange happened here is because of the cooperation, if you like, and the consensual conduct of NASAA on the one hand, and the plaintiffs on the other. Because if the plaintiff had been simply enforcing a reasonable construction of the standards, this wouldn't have happened. And that's where the plaintiffs control over the risk becomes very clear. I might pause there.

KENNETH MARTIN J: Right. 2.15?

CAHILL, MS: Thank you.

(LUNCHEON ADJOURNMENT)

KENNETH MARTIN J: Please be seated. Ms Cahill.

CAHILL, MS: If it please, your Honour. Your Honour left me before lunch with the question of what your Honour described as the "fatalistic prediction" and what your Honour is to make of that, in terms of what happened subsequently and – – –

KENNETH MARTIN J: Foreseeability.

CAHILL, MS: Indeed. And in reflecting on that over the lunch adjournment, these are the submissions. And, first of all, one has to be careful about what one is actually assessing in terms of thinking about how one deals with it. So in terms of duty, of course, the cases tell us that the question of duty is a prospective analysis, not a retrospective one. And so one can't look to what in fact transpired to then inform whether or not the duty was foreseeable.

KENNETH MARTIN J: You can't reverse engineer a duty.

CAHILL, MS: Indeed. And we've provided your Honour with some authority on that at paragraph 33 of our written submissions. And when it comes to breach, we're in the realm of section 5B of the Civil Liability Act. And your Honour has the task of looking, first of all, at the question of whether or not the risk was foreseeable. That's what 5B(1)(a) talks about. Now, the 2008 conversation is obviously relevant to the question of the foreseeability of the risk.

But the submissions that we've made in writing and that I've endeavoured to make this morning orally are to the effect of but what can they actually - what can that conversation actually do to inform foreseeability in circumstances where it's based on a false premise as to the reasonable effect and construction of the standards. And, secondly, leave so much unanswered as to the nature, scope and magnitude of the risk that is said to flow from the mere presence in any amount of GM canola on the plaintiffs' land.

Those things, relevantly, inform the question of whether or not the risk was foreseeable. When we come to the next component which is whether or not the risk was not insignificant that's a qualitative assessment, of course, and whether or not it's foreseeable or, should I say, in the event that it's foreseeable one then has to look at an assessment qualitatively of whether it was not insignificant. And that's where we come again back to the point of, well, what do the standards reasonably say?

What is the significance of the risk in the context of a set of standards, read reasonably, that do not permit decertification in these circumstances? And that's where I think your Honour then came in and asked that question of, well, how do I deal with the fatalistic prediction? It's fundamentally irrelevant in terms of assessing the qualitative nature of the risk. There's another aspect to that qualitative assessment and that's a complete lack of evidence that your Honour has about the strong wind event. So your Honour knows - - -

KENNETH MARTIN J: Strong wind from the south, is it?

CAHILL, MS: Your Honour does know that it's - I put that too broadly. I accept that. Your Honour knows that there was a strong wind. Your Honour knows that it was from the south. But here are the things your Honour doesn't know. Was it an annual sort of thing? Was it typical for this time of year? Was it a one in five-year event, a one in 10-year event, a one in 50-year event? Was it a relatively strong wind? Was it a very strong wind? And what sort of range was this strong wind in terms of kilometres per hour?

None of those things your Honour knows because there was no attempt to adduce any evidence of the strength of the wind in the region. There was an attempt to put some Katanning weather data - - -

KENNETH MARTIN J: MFI25 didn't make it.

CAHILL, MS: Exactly, nor should it have, given that it told us what the wind might have been like on the day 43 kilometres away. But that still wouldn't have given your Honour any sense of relativity as to the significance of the risk, even if your Honour had known the strength of the wind that had blown on the day or days around the incursion. And this must go, we say, to whether or not your Honour can be satisfied that the risk was not insignificant when your Honour has no basis to make an assessment of what the actual wind conditions typically are at that time of year in that region.

So that adds to the problems, together with the difficulties in terms of significance of risk that attend this very unreasonable construction of the standards for which the plaintiffs contend.

KENNETH MARTIN J: It's probably enough for me to infer if it's a southerly wind that the incoming swathes to Eagle Rest, more likely than not, came from Range rather than Two Dams.

CAHILL, MS: That would – we don't admit that but we don't offer any evidence to controvert that. But, certainly, that would seem to be the case. If it came from a southerly direction there would seem to be no – – –

KENNETH MARTIN J: Anything from Two Dams would head northwards.

CAHILL, MS: Exactly. As you would have expected the swathes from Range to have done so which is why you have a concentration of swathes in paddocks 10 and 12, presumably.

KENNETH MARTIN J: Boundary paddocks.

CAHILL, MS: Now, your Honour, just on this point of breach. You know, there's this issue of the foreseeability of the risk, whether or not the risk was not insignificant. And then the final point about which your Honour must additionally be satisfied is that, in the circumstances, a reasonable person in the defendant's position would have taken the precautions. Now, relevantly, those precautions here are not growing canola on that boundary – in those boundary paddocks, Range and Two Dams and/or not swathing the resultant crop.

Those are the acts that are complained of. And your Honour assesses that by reference to the criteria, amongst others, in subsection (2) of section 5B. And we come back again to the question of the standards and what

your Honour does or doesn't know about the circumstances of the incursion, particularly in terms of the wind strength at 5B(2)(a), the probability that the harm would occur if care were not taken. B is interesting, of course, the likely seriousness of the harm. That has got two aspects of it.

One is, again, the likely seriousness of the harm. We say that if the standards are applied properly there's either no or minimal harm because, even at its highest, one could only ever imagine product that is known to have been contaminated to – with – or with GMOs being excluded from sale. But – – –

KENNETH MARTIN J: How are we reading "harm?" Are we reading "harm" as – – –

CAHILL, MS: The economic loss.

KENNETH MARTIN J: – – – the landing of the swathes? Probably not.

CAHILL, MS: The economic loss that applies.

KENNETH MARTIN J: Or the actual lesser prices obtained on products sold by reason of an inability to stamp them with "NASAA certified organic."

CAHILL, MS: Which arises from the decertification.

KENNETH MARTIN J: Yes.

CAHILL, MS: Yes. So it's the decertification that leads to economic loss would presumably be the harm that your Honour would need to look at there.

KENNETH MARTIN J: So it's decertification of my product.

CAHILL, MS: Well, the land here. It's not put against us that there was a risk of decertification of products. It's here that there was a risk of decertification of any or part of Eagle Rest.

KENNETH MARTIN J: But in terms of the dollar loss, it's because the products sell for less that – – –

CAHILL, MS: Well, I think there's two aspects to it. That's one of them. And, presumably, the other is, well, with so much of my land decertification it then restricts the way in which I can farm on what remains. And so I am limited, in terms of how I rotate crops and how I undertake

my normal organic practices. And that might also have some perhaps - - -

KENNETH MARTIN J: So my yield is less, ergo, there's less product which, even if it doesn't have the certified stamp on it, means my income is less.

CAHILL, MS: Is less than it might otherwise be. I think that might be how it's put.

KENNETH MARTIN J: I'm just trying to put my finger on "the harm" that sort of - in the context of economic harm.

CAHILL, MS: The yield shouldn't be less because a crop in the ground is a crop in the ground whether it's organic or not certified organic. But it might be that the - - -

KENNETH MARTIN J: But you can't practise crop rotation if 70 per cent of your area is out of commission.

CAHILL, MS: Yes. So it wouldn't affect yield so much unless your Honour means in the broad sense of I would get twice as much yield from two paddocks than I would as from one.

KENNETH MARTIN J: Exactly.

CAHILL, MS: Yes. Well, then I'm in agreement with your Honour, with respect, yes. But that's the first aspect of how probable that is in - or, sorry, how serious that is in terms of the standards if they're applied reasonably. The second thing is we have some understanding now of the likely seriousness of the harm against the background of the agreed damages for, in effect, three years of decertification, which comes out at a relatively modest $85,000. So your Honour can see there the relativities in terms of the likely seriousness of the harm. The burden in Small Sea of taking precautions to avoid the risk of that harm then needs to be measured and weighed against that seriousness.

So in order to forestall the incurring of those losses, it is suggested that we must refrain from growing RR canola in those adjoining paddocks, and/or swathing it, notwithstanding the evident strategic benefits to us in our agricultural practices in terms of management of weeds, and the preference of swathing in order to preserve yield, deal with weeds and so forth.

Those are things that we are to assume the burden of refraining from doing. That, we say, is something that should be answered as against finding a breach of duty in these circumstances. Your Honour, can I mention social utility in particular. This is why. The contention was put to your Honour in the course of evidence by the plaintiffs that your Honour should, in effect, not conclude that there is any social utility in Mr Baxter farming RR canola. That is, with respect, a most surprising submission, given the strong agricultural tradition and history Australia has.

The idea that a farming activity of crop production is not of social utility is something that is quite counterintuitive. We have cited some authority in our written submissions, your Honour, where it has been concluded at appellate level that a paintball activity is an activity of social utility insofar as it enables children to get out into the fresh air, and be physically active. The idea that crop production could not have social utility where paintballing does would be a very odd result.

The foundation for this counterintuitive submission seem to rest of the idea that because Mr Baxter was engaged in crop production for profit, it could not therefore have social utility. But there is, with the greatest of respect, no logic to that submission, that proposition. The fact that any activity is engaged in for a fee does not remove the social utility of the activity any more than education in a private school is of any less social utility than education offered by a public school.

So it would seem plain that crop production, agricultural production, is an activity that is socially utile. There is no warrant to then look beyond that and to try and make some distinctions as to whether the production of RR canola is more or less socially utile than any other legal canola crop, and any variety that is able to be grown in Western Australia, and indeed, Australia. We say that it is a fairly obvious relevant point that mitigates against the finding of a breach of duty in these circumstances.

Now, your Honour, can I come to the plaintiff's unpleaded case. We have made some submissions about this in our written case. It's interesting to see the plaintiff's written submissions because of the various unpleaded issues that were raised in the cross-examination of Mr Baxter, and then subsequently, Mr Robinson. The focus of the written case becomes a lot more narrow, and

that seems to be saying that there were not herbicide resistant weeds in the Range and Two Dams paddocks, and therefore, the use of RR canola or the growing of RR canola in those paddocks was not justified.

When I – that seems to be what's put. Not justified, and therefore, not reasonable. No word in this in opening, of course. We didn't hear about this in the plaintiff's opening case. Nor did the witness, who you might expect on behalf of the plaintiff to have made some observation and comment upon it. Mr McInerney, he didn't deal with it at all. You will remember his – your Honour, his evidence was focussed much more on criticism of Mr Baxter's failure to test weeds, but went no further than that. Now, we imagine that it is said, but we don't know because we haven't seen a pleaded allegation, and we have not had the case articulated in opening, but we imagine that it is said that all that this is doing is rebutting the positive case of reasonableness of Mr Baxter's activities that has been pleaded at paragraph 23 of the amended defence.

A point we make is this, of course. Paragraph 23 of our defence. Mr Baxter denies that he failed to take reasonable care when he planted and swathed the RR canola. And then he goes further, and says that for a number of additional reasons, he acted reasonably. So he argues all the more strongly that the position wasn't unreasonable because it was, in addition, reasonable for other reasons. And there are several of them. That it was a lawful activity, it was in accordance with the ordinary usage of land in Kojonup, and the point about paragraph 23(d) is that it identifies that his use of the – or growing of RR canola, and the swathing of it, was purposeful on this occasion insofar as it treated – it addressed a weed problem that was in those two paddocks, in particular, a herbicide resistant Wimmera rye grass problem.

Having articulated that positive case, it doesn't then shift the burden of proving the unreasonableness of the defendant's conduct from the plaintiffs to the defendant. The burden remains on the plaintiffs to prove to your Honour that the defendant acted unreasonably. And even were the plaintiffs to disprove this aspect of positive reasonableness advanced on behalf of the defendant, it would not otherwise compel a conclusion that the defendant has acted unreasonably.

We do, however, quite strongly, rebut the suggestion that there was no basis because the weeds weren't herbicide resistant to plant and swath RR canola in Two Dams and Range. The case theory is a curious one that the

plaintiffs posit, with respect. Your Honour, no doubt, with respect, is very familiar with the Fox v Percy articulation of principle in terms of fact finding. Your Honour works on the objectively established facts. The contemporaneous documentation, and the logical probability of events.

Now, in terms of the objective facts, it's a very objective fact, uncontroversial, that RR canola is a tool that has strategic benefit in managing paddocks where there is a weed burden of herbicide resistant Wimmera rye grass.

KENNETH MARTIN J: By enabling the use of glyphosate.

CAHILL, MS: Exactly. And your Honour knows that Mr Baxter sought advice from his agronomist who recommended that the canola be planted in those paddocks in the year 2010. Your Honour knows that Mr Baxter went through the training course for – to be licensed to grow this canola. He entered into a stewardship agreement, and he did these things – I'm sorry. I withdraw that. I will say this. He used seed which was more expensive. It was an expensive seed to purchase. And he submits himself to the requirement of segregating that crop from his non-GM canola crops in the 2010 year in which they're grown.

He does this on the plaintiff's case not because he has a weed problem in those paddocks. So the question is why would he do it? Why would he buy an expensive seed, sign up to a stewardship agreement, take a training course? Why would his agronomist recommend that he grow RR canola in those paddocks as Mr Robinson gave evidence? Why would he do it? Otherwise, if they didn't have a weed problem, they wouldn't have planted RR canola in those paddocks.

The difficulty with this proposition late in the piece, unformed, without notice, is it's undeveloped, and it is entirely counterintuitive. It is completely contrary to the logical probability of events to suggest that Mr Baxter would engage in an exercise of planting RR canola, when it wasn't commercially efficacious for him to do so. You will recall that Mr Robinson gave evidence about IT canola being the most profitable canola crop and remains so for farmers to grow in the area.

Your Honour has document 97 in volume 3 of the trial bundle which shows the clethodim was purchased by Mr Baxter in the years 2006, 2007, 2008, 2010, in 2010 in quantities of about 30 litres, in the previous years, about 10 litres each. Now, you put all of that evidence together and it

compels of only one conclusion which is that Mr Baxter planted RR canola for exactly the reasons he has told your Honour in his witness statement and under cross-examination, to deal with the Wimmera rye grass problem and evidence that conforms to the evidence given by Mr Robinson.

So and there would have to be some plausible explanation, some case theory that the plaintiff could offer as to why the agronomist would advise otherwise and why Mr Baxter would be interested in planting otherwise than for the commercial benefit that the RR canola would give them - would give him. So the attack on Mr Baxter's and Mr Robinson's credibility against that background - and it is an attack on their credibility - the plaintiffs now ask you to find, in effect, Mr Baxter and Mr Robinson lied to your Honour about the reasons for planting the RR canola.

That attack, we say, is most unfair. It was approached by putting pre-cropping programs to Mr Baxter who was clear that they were simply pre-cropping programs and that what happened every year is that, once the crop was planted, he walked the paddocks with his agronomist and then made decisions about what was to be sprayed on the paddock to deal with what had emerged. Clethodim is a post-emergent herbicide. It was never put to Mr Baxter that he was making this up but yet in the written submissions you are asked to find that the evidence should be rejected.

Mr Baxter and Mr Robinson were both consistent in their evidence and here, this insinuation that Mr Robinson contrived his evidence with encouragement of, quote, "someone else," unquote, by amending on the Sunday before he gave evidence his witness statement, we say that is a most unfair insinuation. The defendant's case did not go into evidence until the Tuesday. There was no possibility of knowing that this, with the greatest of respect, unusual proposition that what seems quite plain and self-evident, that the RR canola was planted for the reason for which it has been invented or patented, was somehow not the real reason and that there were reasons or reasons unexplained that motivated Mr Baxter to plant the canola.

Well, none of that was known till the Tuesday. And it could not have been in anybody's mind, let alone Mr Robinson's as a witness - he is not a party, a witness - to apprehend this unusual case. And there is a real concern about the way in which a witness has taken great care to review their witness statement close to giving

evidence, as he explained to you, to ensure that it was precise, having been advised by the solicitor for the defendant that he could make amendments, and for that then - what should have been a virtue of his desire to make sure that his statement was the truth, the whole truth and nothing but the truth, that is then sought to be taken and used against him to attack his credibility.

We say that is most unfair and it's also an approach that we say, with the greatest of respect, should not be encouraged insofar as it seeks to, in effect, punish a witness for taking the most proper and appropriate course of ensuring that their evidence is entirely correct before it is deposed to. We make the point that even if this odd proposition were right how, we ask rhetorically, could it affect the question of the reasonableness of Mr Baxter's conduct.

And this goes very much to the question of the reversal of the burden of proof. Why would it be unreasonable, we ask, to plant RR canola in a field, even if it didn't have a heavy weed burden, to see, for example, if it was something that suited your paddocks, if it was something that enabled you to get better yields in your particular situation than other varieties of canola that you had tried in the past. There might be - - -

KENNETH MARTIN J: So, for instance, here is a new product, it's just on the market, it's said to have advantages, let's try it out.

CAHILL, MS: Yes.

KENNETH MARTIN J: So what?

CAHILL, MS: Yes. And, indeed, how could that be unreasonable, we ask. The fact that Mr Baxter has quite truthfully and obviously identified the purpose that he had in mind for using it - which is to address his weed problem - doesn't detract that it would - from the fact that it's a reasonable activity to undertake for other reasons, absent those. What if there is, for example, a benefit in dry sowing so that there's a late break in the season, you don't want to take the risk, you can dry sew and then apply your herbicide post-emergent.

KENNETH MARTIN J: Afterwards.

CAHILL, MS: So we say that simply goes nowhere, your Honour. As late as it comes and unannounced as it comes, it is an unfair attack that is unnecessary because

of the way in which it is irrelevant to the essential question of the reasonableness of Mr Baxter's conduct in growing and swathing RR canola. Can I then just deal very briefly with the issue of nuisance. The short point, as we've made in our written submissions, is that when the factorial approach, the weighing up of the various factors is done, they all point one way in this case which is against a finding of unreasonable interference with land.

The question of hypersensitivity obviously looms very large, is highly significant here because of the way in which, if the standards have the construction for which the plaintiffs contend, they expose the plaintiffs to a hypersensitive risk of decertification where no ordinary producer would be - agricultural producer would be subject to that for the incursion of benign and legal substances onto their property. The three things that - in addition to that that we identify and in particular and highlight is that here, of course, we are in an agricultural production area and it is an ordinary usage of the land in the Kojonup area to grow crops.

That's what Mr Baxter did. RR canola was legal. It was safe. There was no basis for saying that it was not in accordance with the ordinary usage of land in Kojonup to grow a variety of canola that has been legalised for production in our State. In terms of continuing nuisance, it's now three years since the incursion and the take-up of RR canola, on the evidence, is reflected in the fact that 15 of 50 independent clients Mr Robinson has now, in this season just gone, grew RR canola.

And you have the evidence of Professor Powles who explained that in 2012 there were a million hectares of canola production in the State, eight per cent of which was RR canola, which, on any view, is sizeable. Your Honour, the permanent injunction is finally something that I - that's been addressed in our written submissions at length but I mention these points. There has been no serious attempt to substantiate the claim for the permanent injunction by the plaintiffs.

The point that I made a moment ago about the absence of wind data gives your Honour no clue as to whether and in what circumstances it is likely that swathes might move by strong winds from Seven Oaks to Eagle Rest in the future. Your Honour knows that the crop rotation is such that RR canola would only be planted in those boundary paddocks once every three years, I think it would be. And your Honour knows not - - -

KENNETH MARTIN J: I think it goes canola, crop, crop, canola, crop, crop, so - - -

CAHILL, MS: Yes, yes. But if we - - -

KENNETH MARTIN J: Every Olympics.

CAHILL, MS: Yes. But it's certainly not consecutive years.

KENNETH MARTIN J: No.

CAHILL, MS: That's the point. And your Honour knows not whether the strong winds that moved the swathes, allegedly in 2010, was a wind that can be expected every year, every five years, every 10 years, every 50 years. There has been absolutely no attempt to substantiate that aspect of the case.

KENNETH MARTIN J: Well, the terms of the permanent injunction, as I understood them just after lunch on day 1, effectively seek a buffer distance of one kilometre as against planting and as against swathing. So the question is, "What is there in the case in terms of an empirical basis for one kilometre buffer zone on Seven Oaks, as opposed to 50 metres, 100 metres, two kilometres, whatever?"

CAHILL, MS: And the point we made in the written submissions - - -

KENNETH MARTIN J: Is there anything - - -

CAHILL, MS: Well - - -

KENNETH MARTIN J: - - - that I've missed?

CAHILL, MS: Well, there's nothing. And the point we make in the written submissions is you would at least have to know how strong the winds are, and then what the distance is that a swathe is likely to move in such strong winds, before you could have any sense of whether one kilometre, versus 50 metres versus a greater or larger distance is - would be justifiable, or justifiable at all if the wind event is sufficiently - insufficiently frequent. But the problems go further because you will remember exhibit 10, your Honour, which is the one with all the - - -

KENNETH MARTIN J: Is that the dots?

CAHILL, MS: - - - one with all the locations.

KENNETH MARTIN J: Yes.

CAHILL, MS: (indistinct) exhibit 10. No one on the plaintiff's side, your Honour, has bothered to tell you what those distances might be where all those dots are concentrated. Now, we know - the one piece of information that you did have, your Honour, in relation to one inspection report was that the farthest reach from range, which is down the range paddock in the bottom - we established with Mr Marsh that that was in the corner - to the furthest location and paddock 13 was 1.4 kilometres. But what we don't know is what these distances are. No one has bothered to measure them.

KENNETH MARTIN J: These were plotted in April.

CAHILL, MS: Yes, 2011.

KENNETH MARTIN J: Five months after the incursion.

CAHILL, MS: Indeed. That's the best evidence you have. And no one has given you any distances to see - to explain where the preponderance of swathes - what the distance for the preponderance of swathes is. And, as I say, we don't know whether this was a rare event because the winds were particularly strong, your Honour doesn't know how the wind usually blows in Kojonup, and what one can expect in terms of the likely movement of swathes in such winds, in terms of the distance, in those circumstances.

Now, this is fundamental, your Honour. Somebody is seeking a permanent injunction. The idea that you don't bother, you don't make any attempt to try and establish to the court that there is a reasonable basis in the one kilometre that you have chosen, that it's justified because the risk is sufficiently high, in terms of an enduring and permanent situation, to warrant the imposition of a permanent injunction. It goes further: we don't know how long Mr Marsh plans to continue to farm organically.

He never told your Honour. We don't know whether he has any intentions of changing certifier. Maybe go off to AUS-QUAL where there's a National standard and clearly no prospect of decertification. Maybe go off to the ACO. We have no idea whether the standards will change, whether the standards will actually - - -

KENNETH MARTIN J: I think they have changed, haven't they, since - - -

CAHILL, MS: The NASAA standards - - -

KENNETH MARTIN J: - - - 2010? The NASAA standards - - -

CAHILL, MS: - - - haven't changed.

KENNETH MARTIN J: - - - haven't?

CAHILL, MS: Have not.

KENNETH MARTIN J: I thought - I got the impression in the forward to the - Mr Rodd somebody says that - - -

CAHILL, MS: Talks about a living document - - -

KENNETH MARTIN J: Yes.

CAHILL, MS: - - - I think, doesn't he?

KENNETH MARTIN J: Organic document - - -

CAHILL, MS: Yes, yes.

KENNETH MARTIN J: - - - which was anticipated to change in 2008, I think was what he said.

CAHILL, MS: Yes, but I don't think that has happened. I will just check.

KENNETH MARTIN J: Well - - -

CAHILL, MS: I'm not sure that that has happened.

KENNETH MARTIN J: Probably not necessary.

CAHILL, MS: In any event, your Honour, there are lots of things your Honour doesn't know that your Honour would need to know before your Honour could be satisfied that there was a proper equitable basis to impose an injunction on a permanent arrangement to preclude Mr Baxter from farming RR canola within one kilometre, that would preclude a sizeable chunk of the range in Two Dams paddocks no doubt in order to achieve that. Now - - -

KENNETH MARTIN J: There would have to be a threat in regard to Two Dams on the evidence - - -

CAHILL, MS: Yes.

KENNETH MARTIN J: - - - in terms of some potential incursion. And, on the basis of the evidence before me,

which is strong southerly wind, I don't actually see how there's any evidence of a potential threat, unless there's some evidence of westerly winds, or south-westerly winds, or something of that kind.

CAHILL, MS: But here we have the grounding of the jurisdiction of the Supreme Court to hear this matter, because otherwise this is a claim for damages at an agreed amount of $85,000, which I think just nudges it into the District Court, but then only just. Instead we have it here, in the Supreme Court, because a permanent injunction was claimed where there has been no endeavour to actually substantiate the basis for that claim.

KENNETH MARTIN J: The permanent injunction can only be issued on the nuisance cause of action - - -

CAHILL, MS: Indeed.

KENNETH MARTIN J: - - - in the ancillary jurisdiction of equity to enforce the common law remedy.

CAHILL, MS: That's right. And that's one of the points that we have made about how it is said that there is a - - -

KENNETH MARTIN J: Which is discretionary.

CAHILL, MS: Well, it is discretionary, but your Honour needs to have something to work on. Your Honour needs to have some evidence that would provide a basis to justify such a permanent injunction. Apart from the great paucity of - well, just the absence of any evidence in favour of the injunction, your Honour has this very modest claim for damages arising from the three years of decertification. And one would have to conclude that a permanent injunction could not be an equitable response in circumstances where that remedy is - the remedy of damages in that sum is available where the decertification has occurred. And that's all without even considering whether there could be established a continuing nuisance on the basis of these standards reasonably construed, and, for the reasons we have submitted, that that simply can't be established either. Can I have a moment please, your Honour?

KENNETH MARTIN J: Yes.

CAHILL, MS: Nothing further, your Honour. Those are our submissions.

KENNETH MARTIN J: Can I just ask you one thing about causation which - - -

CAHILL, MS: Yes.

KENNETH MARTIN J: - - - you have covered heavily in your written submissions, and this concept of factual causation - - -

CAHILL, MS: Yes.

KENNETH MARTIN J: - - - which the Civil Liability Act under 5C delivers? Bearing in mind that the damage, which is the essence of the tort both in negligence and nuisance, appears to derive solely from the swathe incursions of 30 November, possibly early - - -

CAHILL, MS: Early December.

KENNETH MARTIN J: - - - December 2010, post-swathing, post-wind growing, post-wind, from the perspective of the first limb of the causation test under the Act, isn't the only real factual causation a swathing event making the anterior growing event irrelevant - - -

CAHILL, MS: Yes, I - - -

KENNETH MARTIN J: - - - on this basis, because if, having planted the crop and having got it to maturity, there's no prospect of any swathes being blown anywhere if you direct harvest and don't swath, then isn't applying the but for test, or the effective cause test or even the common sense test of causation the cause of the problem, which is the landing incursion of the swathes next door, the laying out of the swathes in the windrow, exposing them to the wind for two weeks in the swathing process, which didn't have to happen if you direct head it, so, on that basis, doesn't that eliminate growing from the equation at a - on a causation level?

CAHILL, MS: We do say that. We don't accept though that swathing is factually causative for all of the reasons that we have - - -

KENNETH MARTIN J: Absolutely, I know you have - - -

CAHILL, MS: - - - articulated, yes.

KENNETH MARTIN J: - - - got obvious arguments about swathing, but just in terms of the pointy end of the case - - -

CAHILL, MS: Yes.

KENNETH MARTIN J: - - - from a causation perspective, and I think Mr Marsh was even cross-examined on this basis, I mean if he direct headed rather than swathed, then the prospect of swathes being exposed to the wind in a windrow and blowing next door wasn't a prospect at all.

CAHILL, MS: Yes, and I think your Honour - and I apologise if it's not apparent, but that was the intention of the submissions at paragraphs 130 through to 135 of our written submissions.

KENNETH MARTIN J: Right. Yes. I remember you dealing with this in opening as well. But so if we just shift the focus from growing as potentially non-legally causative or "factually causative," as the Act says, to the act of swathing and then put a line through "negligence" and concentrate on "nuisance," "private nuisance," then we ask ourselves, in that context, was it an unreasonable interference with Mr and Ms Marsh's use of the property to engage in the act of swathing in November 2010.

CAHILL, MS: Yes, yes.

KENNETH MARTIN J: As to which your answer - bearing in mind nuisance is a no fault, strict liability tort as - unlike negligence, the question is, is just a social evaluative examination of the reasonableness on both sides.

CAHILL, MS: Indeed. And in very basic, simplistic terms it comes down to the fact that these are ordinary, every day - swathing is an ordinary, every day agricultural activity which would not amount to unreasonable interference in any other coexistent agricultural situation. The only difference here is the hypersensitivity of the plaintiffs, hypersensitivity which stems from an unreasonable construction and application of those standards.

KENNETH MARTIN J: So you've still got all your causation and damage arguments in regard to nuisance but they really line up under the framework of what is an unreasonable interference with the Marsh's use of their property for organic purposes.

CAHILL, MS: Yes, exactly.

KENNETH MARTIN J: Right. I understand.

CAHILL, MS: Those are my submissions, your Honour.

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

NIALL, MR: If your Honour pleases. Your Honour will have had a copy of our closing submissions.

KENNETH MARTIN J: I have and thank you very much for those.

NIALL, MR: If your Honour pleases. For the purpose of my oral address, I propose to firstly start with the facts, then I will deal with negligence and then I will deal with nuisance. Just to flag where I'm going to go, your Honour, in relation to the facts I will seek to concentrate on what was known to Mr Baxter at various points in time, particularly in early-2010 prior to his decision to plant and again in later-2010 when the decision to swathe was made. And I will concentrate on what was known to Baxter and also, what was within - what Stevens J in the Caltex case refers to, of his "means of knowledge" and the surrounding - - -

KENNETH MARTIN J: Caltex v Willemstadt.

NIALL, MR: Yes.

KENNETH MARTIN J: Yes.

NIALL, MR: So what was within his knowledge and within his means of knowledge. I will also, as part of that factual analysis, examine precisely what NASAA was told and what it acted on. And that's essential, your Honour, because my learned friend throughout her cross-examination constantly returned to the single swathe on the sheep's back and its analogy and in closing address made reference to single swathes.

It's important when one comes to look at what NASAA actually did that the court is engaged - and I will develop this in due course - with looking at NASAAs contractual position where it applied a contractual term to the facts, as it existed. The task is not one of construction of a single word. Rather, the question will be whether, as a matter of contractual entitlement, NASAA were permitted to do what it did on the facts, as it knew them to be.

And as part of that we will also look at the broader factual context and I will return to that, your Honour. Because the construction argument of the standards has been

divorced from the reality of what was involved which was an application of a standard in a particular factual setting and I will return to that. Then in terms of negligence, your Honour, I propose to take your Honour by way of oral submissions through each of three steps, the duty of care, breach and causation.

Now, in our submission, the defendants' submissions start from a couple of fundamental flaws. One is that they invite your Honour to look for antecedent fault, most strikingly when they address your Honour by reference to something that McHugh J said in Perre v Apand, that you effectively need to have an existing breach of duty to some other party or at least an existing duty of care in negligence to some other party. So one starts from the proposition that you look for existing fault.

Now, that's wrong as a matter of general principle because one doesn't start with a proposition of fault, divorced. What one is looking – is does the law of negligence impose responsibility or liability for certain events and that requires careful attention to each of the elements. My learned friend criticised us for pleading the case on a generalised basis which says that – as if our case had been because Baxter knew what he knew in 2008 he is liable.

That is, we've offloaded liability simply by telling him something in '08. That's not our case at all, your Honour. We go through each of the steps of duty, breach and causation. So the first problem is that antecedent problem of fault. And the second problem, we submit with respect to our friends, is the collapsing of the three elements. We understand, as a matter of argument, the proposition that if NASAA were not entitled to do what it did it might be relevant to the scope of liability when your Honour comes to look at causation.

But the shoehorning it into duty and breach is inapt. Even, for example, when my learned friend just not long ago looked to the likely seriousness of harm under section 5B(2)(b) which your Honour will recall is essentially dealing with breach. The likely seriousness of harm was tested by what actually happened. And there is a collapsing of the after event back into each of the sequential steps that need to be undertaken.

Now, we appreciate that there is, for both plaintiffs and occasionally defendants, a desire to reverse engineer and work back from a result for the purposes of crafting a duty of care or for looking at what a reasonable person

should have done. You should have done it because I was injured. But our submissions, in our respectful submission, don't suffer from that vice at all. We propose to take your Honour quite clearly through each of the three elements of the cause of action and, in doing so, expose the two vices that I've just identified.

KENNETH MARTIN J: Why the emphasis on negligence when nuisance is a no fault tort?

NIALL, MR: I was just coming to that, your Honour.

KENNETH MARTIN J: I'm sure you were.

NIALL, MR: Nuisance is a very strong cause of action here at present and it is patent that there was an unreasonable interference and the facts will show why that is so in many ways. But, nevertheless, your Honour, the High Court has indicated that the two causes of action remain coexistent.

KENNETH MARTIN J: Yes.

NIALL, MR: And it's convenient, your Honour, because nuisance will also have aspects of causation and damage but I will approach it in the way – in the sequence that my learned friend did.

KENNETH MARTIN J: Well, as regards economic loss, I mean, nuisance has never been bedevilled by the terribly complex Perre v Apand sort of analysis in terms of whether the law, as a matter of policy, tolerate a duty of care where the loss is entirely financial and not physical.

NIALL, MR: No. Yes, yes. And that's because, as a matter of principle, what one sees in nuisance is an interference in the loss – loss of enjoyment or interference in land.

KENNETH MARTIN J: Yes.

NIALL, MR: Now, the law has never had any difficulty with loss where there's physical damage. And in many respects, when one comes to look at the construct of the duty in this particular case, it's heavily informed by the fact that there was a physical transmission of property and an interference with land, something that Callinan J observes in Perre. So the problems that your Honour refers to of bedevilling economic loss, indeterminate liability the most pronounced – – –

KENNETH MARTIN J: All the things Sir Ninian Stephen spoke about in his classic judgment in Caltex.

NIALL, MR: In the (indistinct). It doesn't have the problem where one is dealing with transmission of a physical substance from one person who has no right to put it on my client's property, causing a loss of the productive capacity to the land in the way that the plaintiff would seek to exploit it. So in many senses, as your Honour rightly puts, those flavours of nuisance also demonstrate why this is a very, very strong case for a duty of care to exist. Not just because of the knowledge which Baxter had, but because of the nature of the risk, and the nature of the movement of his property, of his swaths, over - onto his neighbour's property, for which he had no entitlement.

Now, whether one looks at it in negligence, or one looks at it in nuisance, it's not the give and take of neighbours in the particular context in which the Marshes found themselves in late 2010. So that's the construct of the oral submissions, if it please your Honour. Facts, negligence, and nuisance. Can I start, then, with the facts.

KENNETH MARTIN J: Yes.

NIALL, MR: And start with the defendant, Mr Baxter. Your Honour, of course, and I will endeavour not to labour them, is an established cropping farmer growing canola, wheat, and barley, for many years. And since year dot, he has been heavily reliant on glyphosate. Now, that's relevant, your Honour, for something I'm going to come to, about his decision to use Roundup-Ready in a moment. There's nothing implausible or improbable about our explanation of why he used it in 2010, because what Mr Baxter had seen and observed was that glyphosate was effective.

It worked for him. He understood how it was to applied, and he understood its effectiveness. Now, in our submission, he was somewhat naive as to its continued availability, both as a matter of science, and as a matter of good agronomic practice. But he appreciated the strength of the herbicide as a knock down herbicide, and used it as often and as widely as he could. Unfortunately, he couldn't spray his crops with it until things changed. Now, throughout the late 2000s, but certainly, 2007/2008, both Baxter and Marsh were aware, although from different perspectives, of the potential for the legal embargo of GM canola to be lifted.

So both of them appears to be looking forward. One with trepidation, and one with opportunity. Probably at about 2007/2008. Now, although Baxter didn't appear to know a lot about GM canola in 2008, he knew enough to realise that it would enable him to use glyphosate on his canola crop, post emergent. So immediately, he would have perceived, and we submit your Honour should find that he perceived, that there was a real attraction to him, given his method of farming, once GM canola came onto the market.

KENNETH MARTIN J: Well, except that he pretty much said that in November 2008, isn't it?

NIALL, MR: It is, your Honour.

KENNETH MARTIN J: When - - -

NIALL, MR: But, it's important - - -

KENNETH MARTIN J: If it comes on the market, I will probably grow it.

NIALL, MR: Exactly, your Honour. We would submit it was higher than that, or what you should infer, that in fact, the decision was made proleptically to use it. Now, on the other side of the fence, literally, Marsh had a different perspective. He had been certified organic since 2004, which was - I think the time - the chronology will show, or the evidence will show, it was a time when there was the 2003 express embargo under the Western Australian legislation. So at the time he started, it was an entirely unlawful product in Western Australia. Now, from - the evidence shows that from about 2002, Marsh believed that GMOs were not permitted within the organic system. Your Honour will see that in the letter - - -

KENNETH MARTIN J: To his parents.

NIALL, MR: - - - that he wrote to his parents. Now, there's an issue on the evidence, probably not that material, about whether Baxter got a copy of it. We would invite your Honour to find that he did. Marsh's evidence on that score was to the effect that he went it in the light of his obligations under the certification process. And one of the things that your Honour, in our submission, will have observed from the material is that Mr Marsh is a fairly assiduous and conscientious applicant of the strictures. So it makes sense that he would have sent it. But your Honour, the letter is not found, and Baxter denies receipt, or he doesn't recall receiving it.

KENNETH MARTIN J: So I'm asked to find that he sent something along the lines of the letter he sent to his parents in 2002?

NIALL, MR: Yes.

KENNETH MARTIN J: To all the neighbours including Mr Baxter?

NIALL, MR: Correct. And - - -

KENNETH MARTIN J: Who says he doesn't remember getting any such letter.

NIALL, MR: That's so. That's so. Now, your Honour doesn't need to go to it, but it is demonstrative of an understanding by Marsh. It's page 209, your Honour.

KENNETH MARTIN J: Yes.

NIALL, MR: And it's demonstrative of a knowledge, understanding, of Mr Marsh as to - that GMOs, in particular, don't have a place and avoid contamination with chemicals or GMOs. Now, after this - later in 2008, and certainly, before November - sorry, later - after 2002, and certainly, before November 2008, Baxter knew that Marsh - the Marsh family was organic. That is, that they were certified, or that they were practising as an organic farmer.

Now, he didn't have a lot of detail about what that meant, but he acknowledged in evidence that he appreciated that that meant that there would be some standards, some rules, and some process. Now, with that context of both having an interest in GMO canola, which was not legal but on the horizon, Marsh observes 11 canola volunteers from Seven Oaks in paddock 10, the evidence discloses. Now, he went to see Baxter, and the critical pieces of evidence that he told Baxter was that canola volunteers had been found on Eagle Rest.

But that's an important fact that he was told. He was told that he was concerned that if genetically modified material was on his property, it would threaten his certification as organic. So he has told two fundamental pieces of information. One is the volunteers had grown and come from Seven Oaks. And two, he had a significance for the plaintiff's certification. Now, Baxter knew also, apart from what he was told, that volunteer canola is produced by seed. That's an obvious enough proposition.

That movement of seed was the means by which it had gone from his farm to Eagle Rest.

KENNETH MARTIN J: Rabbits seem to be designated culprit in 2008.

NIALL, MR: Well, not to Mr Baxter. Not to Mr Baxter.

KENNETH MARTIN J: Well, the whole conversation is pretty sketchy in terms of how it happened.

NIALL, MR: Yes. But there was - - -

KENNETH MARTIN J: Reading it by reference to what's written to the Minister.

NIALL, MR: But there's nothing in the evidence to suggest that Marsh gave him an explanation of the mode. But when your Honour goes to look at the evidence at page 758 of the transcript, and Baxter was not sketchy, in our respectful submission, about the conversation because he adverted to it in his statement. And if your Honour goes to page - does your Honour have the transcript?

KENNETH MARTIN J: I do. Indeed.

NIALL, MR: And if your Honour goes to 758.

KENNETH MARTIN J: Yes. I'm there.

NIALL, MR: And up at the top of the page, it was put to him that Marsh had brought a canola plant which was in his hand, and that Marsh had said that it had come from Seven Oaks. And he said that's what he said. And it was put:

> It must have - if it had come from Seven Oaks, it must have come from seed. That it had come over from Seven Oaks, you would agree with that?---Well, I presume so.
>
> Well, there's no other means?---Well, that's right. It could only grow from seed.
>
> So Marsh told you and what Marsh showed you was clear to you that seed could be transported from Seven Oaks over to Eagle Rest, and could lead to germination of canola, isn't that right?---That's correct.
>
> And the concept - the idea that canola might grow out, apart from the crop as a volunteer, was something you were familiar with? You had seen volunteer canola plants on your property, you would have seen them -

volunteer canola plants on the roadside, and here was an example of a volunteer canola plant on Eagle Rest?---That's correct.

So there's no doubt that Baxter's knowledge, borne of both what he was told, and his own experience, was the movement of seed was a realistic and obvious consequence. Then - - -

KENNETH MARTIN J: I think there was some cross-examination of Mr Marsh about this in terms of the rabbits and the conversation as well.

NIALL, MR: I think that was directed to my recollection - I will find it - about his understanding of contamination. But if your Honour - just before your Honour leaves that page, I'm sorry, because I wanted to just - - -

KENNETH MARTIN J: It's all right.

NIALL, MR: - - - take you to the bottom of 758:

> You understood that what had grown on Eagle Rest, the volunteer canola plant, it came from seed from your crop?---Well, it could have come from anywhere, but I presume it came from my place.
>
> You assumed or you proceeded on the basis that it had come from Seven Oaks, didn't you?---Most probably.

And then over on the next page, he's cross-examined about his knowledge, and right in the middle - about the fourth paragraph down:

> And you knew that if you did have a genetically modified organism on an organic farm, that could jeopardise the certification?---I knew it could.

Now, it's clear that what then transpired was Baxter's response, which was:

> I hoped to plant it if it was going to help my farming practice.

He says that at 757, your Honour. Now, in our submission, your Honour should draw a number of conclusions about his response.

The first is that it's demonstrative of his faith in glyphosate. So it explains an enthusiasm. He practice

with glyphosate explains the enthusiasm for the product. Secondly, we would submit that he had made up his mind to plant it. The third point, we would say, your Honour, was that it demonstrates a tin ear with respect to the position of Marsh. Marsh is going to his neighbour and saying, "Look, I've got those – I've got these two problems on the horizon". No discussion, no exploration of what that might mean.

But what he – (indistinct) was response was, well, "That's what I'm going to do for my farming practice". And the fourth point that arises from 2008 is that he wasn't looking for more information. Either on Roundup-Ready canola, or on organic certification. So at that point, Baxter is fixed with the knowledge that canola could be carried or blown onto Eagle Rest, and that it could imperil certification. Now, that is important when one comes to duty, because that's the knowledge that Baxter is fixed with in November 2008.

Now, can I step back now, your Honour, and look at the context between 2008, or a little bit earlier, and 2010. Because although we submit that Baxter had made a decision and was awaiting its release, the context for the release of GM canola is important to a number of aspects of the case, your Honour. And I will just identify what it is. And we set it out starting at paragraph 13 of our written submissions. And I won't read it. But 13 through 24, your Honour, explains the – or seeks to develop the legal regulatory framework.

13 to 24. And your Honour will see that at 13 to 24, there was both Commonwealth and then, subsequently, State regulation which prohibited the cultivation of genetically modified canola. And then only permitted it under a license to Monsanto. So you're dealing with a product which has been prohibited, and then can only be exploited under a commercial – a licensed arrangement. The decision to exclude genetically modified canola from Western Australia was expressed – and this is tender bundle 210 – for the purposes of preserving the identity of non-genetically modified crops for marketing purposes.

The whole of the State is designated an area of genetically crops must be cultivated. Now, that's demonstrative of a reason of regulation. At 201, your Honour.

KENNETH MARTIN J: Sorry. Page 210?

NIALL, MR: 210. Yes.

KENNETH MARTIN J: Okay. It's the other volume, that's why.

NIALL, MR: Now, that's demonstrative of a couple of things, your Honour: one, the prohibited nature of GM canola at this point, and also this concept of one of the risks is the interruption of the identity of the non-genetically modified crops for marketing purposes. Now, segregation is a constant theme, your Honour, in the discourse. And segregation, for the purposes of protecting market segments, market interests, market differentiation, is also a recurring theme.

Now, your Honour will recall that there were some trials in 2009 at which Mr Stretch participated. They were associated with containment, and Mr Stretch explained that he had planted his crop far away from his neighbours. Now, the order for release of GM canola in Perth was 25 January 2010 - we put it in our submissions - and so we are dealing with a window from late January, and the decision to plant was probably made in February.

Now, the process of - by which a farmer like Mr Baxter has to engage in order to be permitted to purchase and grown Roundup Ready Canola is certainly distinct from any other form of agricultural purchase, that is, he just doesn't go down to the supplier obviously and buy a truckload of seed. He is required to enter into a licence and stewardship agreement. The very concept of a stewardship agreement, your Honour, suggests some restrictions or responsibilities towards not just Monsanto but towards other people, in respect of whom might be influenced, or interfered with, or come into contact with your cultivation of GM. Can I take your - - -

KENNETH MARTIN J: Doesn't it just mean the vice like grip of the licensor over their intellectual property, which, in some notorious cases has been completely lost or eroded, so this is just one way of somebody who invents something unique protecting it to the ultimate degree?

NIALL, MR: That explains some, but not all, of the aspects of the stewardship and licence agreement, because in many ways the stewardship and licence agreement identifies the protection of other parties, not just Monsanto and not just the grower who purchases Monsanto's product. And one can speculate as to Monsanto's motivation, but it's not a fruitful exercise because we have the stewardship agreement in its terms. And if your

Honour goes to the crop management plan, just so that I can isolate a couple of points.

KENNETH MARTIN J: Yes, of course. Just give me the reference again.

NIALL, MR: It's page 12 - 1225, and it's in volume 4, your Honour.

KENNETH MARTIN J: Four.

NIALL, MR: This document is also relevant to the state of Baxter's knowledge at the time that he becomes involved in the process to acquire and then plant genetically modified canola, and if your Honour goes to page 26, your Honour will see that page is headed Crop Management Plan and if your Honour turns over, the next page refers to the Resistance Management Plan, and over on 1232 there's the Management of Open-pollinated Canola.

Now, going back to the first of those, your Honour - and your Honour saw this in evidence - but if your Honour goes to page 1226, the crop management plan - first line - details strategies that can be implemented on-farm to manage risks to the integrity of grain crop supply chains and the sustainability of agricultural production. So immediately, the reader is told that there are risks to the integrity of grain crop supply and sustainability of agricultural production and there's means to manage it.

If your Honour looks at the three strategies - no - the outcome of those strategies would be to contribute to long-term development, etcetera, and number 3:

> Enable different production markets and systems to concurrently operate in a profitable and sustainable way in response to changing markets and non-market requirements.

Now, Mr Baxter conceded that his knowledge was that that included organic systems. So Baxter is proceeding on the basis that part of the risks which strategies needed to be worked on is product market systems including organic to concurrently operate the profitable way and your Honour will see specifically - and this is important, your Honour, in our respectful submission - growers - that's Baxter - is required to implement on-farm management practices. They're not specified, your Honour. In some respects they are; in some respects they're not.

The requirement under contract is to implement management practices that aim to, number 2:

> Control Roundup Ready Canola volunteers and minimise the risk to the integrity of grain supply chains.

So the gravamen of the obligation to which Baxter assumed was the implementation of management practices that will deal with those two things. The next page deals with resistance management, but I won't trouble your Honour with it at the moment. Over on 1232, your Honour will recall some evidence about this and it's pretty clear that this is principally directed to pollen-mediated transfer.

KENNETH MARTIN J: As the phrase "open-pollinated canola" would tend to suggest.

NIALL, MR: I'm not sure whether it does suggest that or - I think "open-pollinated" refers to the manner in which the canola that's planted is produced, but it may do. I don't think there was any evidence on it. But, yes, your Honour. But there's an identification here of pollen-mediated disruption.

KENNETH MARTIN J: Well, the heading to table 1 Requirements for Growing Roundup Ready Canola near other Canola in Australia to Minimise the Occurrence of Off-types.

NIALL, MR: Precisely, your Honour. So there are strategies in relation to that. Over on the next page, 1233, there's some points about the identification and control of volunteer canola. Now, there's:

> The primary aim of volunteer management should be to limit spatial and temporal distribution of Roundup Ready Canola by preventing pollen movement and seed setting in years subsequent.

There's a reference to "volunteers". Now, we note that, your Honour, because Monsanto's view was that volunteers are likely to be found three years after growing the crop. Now, that's relevant because part of the evidence - it's pretty much universally accepted in the evidence, your Honour, but part of NASAAs decision-making was to have two clear years and Denham gave an explanation for that based on some data that she had read about survivability of seed and Bishop gave some evidence about three years and Preston gave some evidence that you would, in order to get - - -

KENNETH MARTIN J: The Tasmanian person?

NIALL, MR: No.

KENNETH MARTIN J: Sorry, that's - - -

NIALL, MR: That - - -

KENNETH MARTIN J: - - - Bishop.

NIALL, MR: Bishop was Tasmanian and he gave some evidence about the definition of "clear farm". You know, you would get a clear paddock - two years, no volunteers.

KENNETH MARTIN J: Yes.

NIALL, MR: And Preston said if you wanted to get a clear paddock you wouldn't pick a figure of less than two years.

KENNETH MARTIN J: Not many after two and absolutely none after three.

NIALL, MR: Yes. So he said in the evidence you wouldn't pick a figure of less than two and - - -

KENNETH MARTIN J: But that's a paddock that has been intensively sowed with canola seed and then reviewed subsequently to see whether any volunteers spring up when it's not sown with canola seed. But why is that analogous to a blown volunteer in a non-intensively sown canola field?

NIALL, MR: No. In our submission, the indicator, and I will come to this in some detail, but what happened was that the seed is on a farm which is being used as pasture which will then be cultivated as crop so the presence of the seed on the ground - it doesn't matter whether it came from a previous - - -

KENNETH MARTIN J: Well, if we're just talking probabilities and numbers, if you sow a million canola seeds in a paddock with a view to growing a crop and then you leave it to pasture the next year, the probabilities are that you're going to get some volunteers whereas if you have the crop next door which is pasture and you're reviewing that for volunteers in subsequent years the probabilities are that, given it hasn't been intensively sown in previous years, it's not going to - it's only going to be the odd strayer, basically.

NIALL, MR: But if you know that that paddock has had thousands of canola seeds distributed over it and it is a

paddock, it is to be cultivated, then you would expect volunteers. You see - - -

KENNETH MARTIN J: Well, it depends on what you're doing with it.

NIALL, MR: Well, you can manage them but - - -

KENNETH MARTIN J: You're cropping that as opposed to whether you're running sheep on it or whatever.

NIALL, MR: Well, running sheep, you will get volunteers and the sheep will eat them.

KENNETH MARTIN J: But until they germinate, so what?

NIALL, MR: Well, the sheep will eat them after they germinate. It's part of the parcel. But I will come - - -

KENNETH MARTIN J: But it passes through and eventually it ends in the sort.

NIALL, MR: I will come to this. But the point is that you've got, as a proposition, that if you've got a canola seed you can expect not that that particular seed, but from a population sort of basis, on a volunteer basis, you would expect that you might see volunteers for three years. Now, and that's consistent with both Preston and Bishop. And your Honour will see there that the following - going back to 1233, and this is the knowledge of Baxter reinforced:

> The following situations must be assessed for the presence of volunteers in a paddock immediately adjacent to where Roundup Ready Canola is being grown.

And then in the bottom one:

> Any areas where physical movement of seed may result in volunteers.

Now, the concept of seed movement producing of volunteers was well understood by Baxter. It was clear in the documents that he had subscribed to and the problem of the volunteer canola, the GM canola, was that the production of GM canola volunteers could be something which needed to be managed because of the risks to the integrity of supply chains.

KENNETH MARTIN J: Well, what does that actually mean in a real sense?

NIALL, MR: That means that - - -

KENNETH MARTIN J: Spread of the DNA - of the genes?

NIALL, MR: Well, it might be. It depends on the supply chain that you're talking about and the standard with which you're talking about - "by standard" I mean. So in some contexts, the interruption to the supply chain could be cross-pollination.

KENNETH MARTIN J: Yes.

NIALL, MR: In other contexts the significance might be the intermingling into seed. Now, for many standards it may not be a significant one. It may well be within any margin of - acceptable. And in other contexts - and we put organic here - that it might interrupt the supply chain or interfere with the integrity of the supply chain by being incorporated into pasture, by being fed to animals.

KENNETH MARTIN J: Only if it germinates and, you see - - -

NIALL, MR: Well, it's incorporated into pasture if it germinates.

KENNETH MARTIN J: Yes.

NIALL, MR: So it's incorporated into the seed bank and Professor Powles says that is exactly what he would expect to happen.

KENNETH MARTIN J: But in terms of the spread of the gene, it's not going to happen.

NIALL, MR: Yes, the spread of the gene - on the evidence, it does not seem that there would be any transfer of genetic material or genetically modified material by reason of the ingestion of paddock into animal.

KENNETH MARTIN J: Yes.

NIALL, MR: We accept that on the evidence. So the movement of genetically modified traits would appear to depend on the fact or the existence of something to receive those traits. So obviously, canola is the most obvious. The evidence is that some weeds can cross-pollinate, brassicas weeds. But the important thing is that this

recognises that volunteers will grow, they will subsist and that there is a potential implication for supply chains and that management options are mandated.

Not prescribed, in the sense of this is what you have to do. There are some prescriptions in relation to pollen mediated gene flow and then there is some advice – if your Honour goes over to 1234 – about seed hygiene, planting, storage and transport of harvest:

> Attention to seed hygiene, storage and transport when planning and harvesting assists in effective weed management and volunteer control.

And then there's discussion about intermingling which I won't read to your Honour. And then over on the next page, 1235, there's requirements for monitoring.

Now, that is all relevant to the state of knowledge of Baxter but it's also part of the knowledge that a person in Baxter's position would have.

KENNETH MARTIN J: Well, anyone who has ever grown a crop in the wheatbelt would know about the potential for a volunteer scenario and that's just part of cropping.

NIALL, MR: Yes, your Honour.

KENNETH MARTIN J: So, yes, it happens in a canola scenario as well and, sure, a GM canola – it's just another plant, really.

NIALL, MR: That's so.

KENNETH MARTIN J: The same volunteer scenario. So, I mean, it's not really that challenging a concept to anybody who farms.

NIALL, MR: But what's new, your Honour, is the segregation.

KENNETH MARTIN J: Yes.

NIALL, MR: One of the things that Robinson said was I know all about volunteers and they're managed. This was a new regime in which segregation was an integral aspect of its introduction.

KENNETH MARTIN J: So we're talking segregation of canola crops to keep the products distinct.

NIALL, MR: Yes, yes. So when your Honour says or raises this, that volunteers are well known - - -

KENNETH MARTIN J: The concept of a volunteer crop plant is, you know, ages old.

NIALL, MR: Yes. So and we're now dealing with two different things in relation to Baxter. One is his knowledge of the importance of segregation and that that's an important aspect of it. And the second is we're now dealing with Baxter in a state of knowledge about his understanding of the risk that it would have to organic farming. That was his understanding, your Honour. That's what his knowledge was.

KENNETH MARTIN J: Well, he knows - in terms of if we're now concentrating on the risk, moving on from segregation, he knows what Mr Marsh tells him in the November 2008 conversation which is, as you take me to that passage, my organic standing could be jeopardised if GM canola gets on my place.

NIALL, MR: Yes. So he knows that there's a risk - - -

KENNETH MARTIN J: There's a risk if you grow it in the future.

NIALL, MR: There's a risk and he knows - the risk - the very risk that eventuated he is on notice of, he has knowledge of. Because, your Honour, our learned friends say, well, there's an issue about NASAAs decision-making. But the critical issue is that he was on notice that a fact that might follow - that there's a risk to follow, is that I will be decertified and - - -

KENNETH MARTIN J: Well, the word is "jeopardised."

NIALL, MR: Well, "threaten," in - I will get Mr - - -

KENNETH MARTIN J: But 759, the passage you took me to:

> That could jeopardise the certification, I knew it could.

NIALL, MR: And his evidence in his statement was, paragraph 41:

> His organic certification would be affected or lost because genetically modified canola was not allowed on an organic farm.

And that in 759, he knew that he was:

You were not allowed to have GMO –

genetically modified material "on an organic farm." So he knew all of that.

KENNETH MARTIN J: Well, he knew that that's what Mr Marsh had said to him. Whether he knew that that was actually true or not is another thing, isn't it?

NIALL, MR: Well, his evidence was that that was his knowledge. That's what he believed to be true. Now, he could have said, well, I'm going to investigate this because it sounds like a significant issue for me. He didn't do that, your Honour. He proceeded on the basis and he accepted that that was his knowledge. That was his understanding. Now, it may be that, at the end of that process, we come to the causation issue and the scope of liability.

In fact, it wasn't the canola presence that did it, but was some misunderstanding of NASAA's standards. We will address that. But there's no doubt what Baxter's state of mind was. None at all, your Honour. And more broadly, your Honour, more broadly, and I will come to, your Honour, what he says he told Robinson in January or February 2010.

KENNETH MARTIN J: What Baxter – – –

NIALL, MR: What Baxter told – – –

KENNETH MARTIN J: Yes. All right.

NIALL, MR: What he said that he told Robinson. I will come to that in a minute. But before I do that, your Honour, can I take your Honour to exhibit 31.

KENNETH MARTIN J: Yes.

NIALL, MR: That was the Farmanco facts. That's March 2010. Mr Robinson wasn't the author of it, but he had worked, or worked with one of the two authors. Well, he worked with both of them, but had spoken to one of the two authors. Over on page 10, your Honour will recall that the Farmanco – so that's Robinson's company. They were advising farmers as to the fact of – to the control of RR canola volunteers. And that first paragraph with the six dot

points, your Honour – I won't read it all to your Honour – – –

KENNETH MARTIN J: Page 10?

NIALL, MR: Yes.

KENNETH MARTIN J: Yes.

NIALL, MR: But over on the bottom of the dot point, areas. So this is areas that require monitoring for volunteers are areas where there could have been physical movement of seed, windblown swaths. So this concept of windblown swaths was not something that was completely unimaginable. A completely insignificant risk. This was something that agronomists in the area were identifying as a place where you should look for volunteers. And then over on the next paragraph, next column, the advice was:

> Where your GM crop is on a boundary fence, you will need to discuss management options for this scenario, and also for the possibility of strong winds moving swaths onto your own and your neighbour's paddocks. This is unlikely to affect – – –

This is the last sentence, your Honour.

> …the (indistinct) of any non-GM canola crops. But you should be aware of this happening, and monitor access of your groups.

So the state of knowledge at the time was that swathing would be a means by which there would be a movement of seed. Farmanco is identifying them for the benefit of their clients. It was something that Robinson had in mind, and the view was it was unlikely to affect the status of any non-GM canola crops.

So that brings to mind the more usual case of a canola farmer's, or other farmers more generally. But it doesn't deal with organic farmers. That was something that Baxter knew about because of what he had been told. Now, it's suggested to your Honour, as we appreciate our learned friend's submissions, that this concept of – I withdraw that. So the first part of the state of knowledge about risk of swathing being moved across the paddock, that is no more than an acceptance of physics, and movement, and known experience. And it was something – – –

KENNETH MARTIN J: Well, if you've got a wind grow of swathed material stacked up, exposed to the elements for

two weeks, which is not so much the cutting, but the aftermath of the process, then ergo, if you get a strong wind or a storm, it's not your intention that you lose your crop, obviously. But sometimes, the elements can't be controlled, and obviously, the wind does its work sometimes.

NIALL, MR: And here, they're being told, "Be careful with GM canola in these two contexts". That is, you look for volunteers, and you've got to be careful on the boundary. Now, that's part of the knowledge of Baxter. And then the other bit, which I've just raised with your Honour, is the knowledge of organic farming.

KENNETH MARTIN J: So we would attribute, for the Farmanco document, exhibit 31, via Robinson to Baxter, that knowledge?

NIALL, MR: We attribute – firstly, Robinson had the knowledge of those things.

KENNETH MARTIN J: Yes.

NIALL, MR: He said he did. Robinson said he didn't tell those things to Baxter. But of course, a person in the position of Baxter, faced with what he was told, ought to have known it. It was part of that which was in his means of knowledge. Now, before I come to that – those critical conversations, the other aspect – this risk to organic farming. It seems to be implicit, if not, expressed in our friend's submissions, that somehow, this concept of threats to organic farmers through GM canola was pretty much something that Baxter and NASAA had sort of reached a consensus about, and that they're really off with the pixies.

Now, the state of knowledge, your Honour, was also evidenced by documents from the State, which were available to farmers, and which Baxter identified as being of the type of documents that he had seen. Can I take your Honour just to a few of those. If your Honour goes to page 216 of volume 1. Yes. Now, this is a fact sheet from the State Department of Agriculture and Food dealing with organic farming and genetically modified crops. It's dated, at the end, January 2010. And your Honour will see there that organic, in the second paragraph, organic farmers are certified to ensure their farming methods comply with standards for organic production and to reassure wholesalers, retailers and consumers that their produce is truly organic.

There's a reference in the next paragraph to AQIS, and then - I won't read it all to your Honour, but over on the next page, under organic farming and genetically modified crops, there's a reference to standards, and then it says:

> Some standards such as in Australia have no defined tolerance, whereas the European Union Standards limit the accidental presence of up to .9 per cent GM material. And some Western Australian organic producers are concerned that GM canola may lead to accidental presence of GM material and their farming systems and organic products. The experience from Canada provides some information relevant to these concerns.

And the issue is discussed, and over on the next page, under organic certification, there's evidence about - sorry. There's a statement about what happens under organic certification in Australia.

Reference to common law liability and talking to your neighbours since the grains industry has formulated a range of stewardship programs and codes of practice for both GM and non-GM crops. Organic certification organisations provide details and procedures of how to manage any issues, and all producers have a duty of care towards their neighbours. And over on the next document, at 219, your Honour, there's the example given by the State in another document headed genetically modified crops and farmer liability under the heading negligence. Liability for - this is 219, your Honour. Down the bottom of 219.

KENNETH MARTIN J: Yes.

NIALL, MR:

> Liability for GM crop related issues may occur if there is damage to another party. For example, if GM seeds spreads from a non - from a GM farmer to a non-GM farmer, the GM farmer may face negligence actions if all of the following conditions are met.

Failure to observe a duty of care. And there's various statements, and then references to private nuisance. Now, that's relevant to show that as part of the discourse in this area there was identification of the very risk which Baxter had been warned of in 2008. So it's not - it couldn't be said that looking prospectively that the risk of decertification, or lost certification, was insubstantial or remote, or perceived to be insubstantial

or remote. It was identified as a live, not insignificant risk, by the State. And over on page 226 there's a farm note, number 407. And there's a reference to, over at 229, under management of volunteers, there's more evidence about management of volunteers. And at the top of that column on 229,

Most volunteer plants will emerge within three years.

Now, the state of knowledge of Baxter, and more generally in this area of discourse, including of the agronomist, Robinson, and from the State, was that both the risk of movement of genetic material on to a neighbour's property and the loss of certification were identified at this stage. Now that background, or context, takes us, your Honour, to the decision to plant in 2010. So this is the discussion principally between Robinson and Baxter.

Now, the statements that were filed by both Mr Marsh and Mr Baxter have a very clear narrative, your Honour, and that narrative is – was for 2005 to 2009 we developed – we observed an increasing problem with herbicide resistance of rye grass to group A clethodim. That showed that rye grass was not properly being controlled by existing herbicide modes of action, and therefore – and it got to the point where a number of paddocks there were a problem. Nine paddocks were identified. And then the significant herbicide resistant weed load was found in – and three paddocks were identified for Roundup Ready Canola, although only two were ultimately planted.

Baxter's evidence was that he had run out of seed for the third one. And the third one was Mailbox, which is along the range next to. Now, we are criticised quite strongly by our learned friends, which we accept that our friends are entitled to do that, but it's an important part of their case, your Honour, which we sought to challenge, and we sought to challenge quite vigorously, that that narrative, on which their case, and a number of pleaded elements, sought to pivot about. And the result of that challenge, your Honour, is that your Honour simply could not be satisfied on the evidence that the purported justification was in fact a real and motivating factor.

Now my learned friend says, "Well, what other possible reason could there be for planting Roundup Ready Canola in 2010?" Now, there are two separate issues here, your Honour. One is there is no doubt that glyphosate is effective as a herbicide, therefore there was a very real reason to plant – to use Roundup Ready Canola, regardless

of whether the other herbicides had been successful or not. It didn't require a failure on the part of existing herbicides for Mr Baxter to turn to an additional load of glyphosate. So it wasn't so much overcoming a deficiency, we would submit, on the evidence, but rather a positive desire to use glyphosate, which had been known to be effective.

Now, the conversation that Baxter says that he had with Robinson, Baxter says that it took place in January 2010. And, in his evidence, he said that there was a discussion about planting Roundup-Ready canola to deal with the problem of herbicide resistant rye grass. And Baxter told your Honour in cross-examination that he told Mr Robinson about the 2008 visit from Marsh.

KENNETH MARTIN J: I think Mr Robinson said he already knew that Mr Marsh was organic anyway.

NIALL, MR: He knew that Marsh was organic - - -

KENNETH MARTIN J: Yes.

NIALL, MR: - - - but that wasn't the gravamen of what Mr Baxter's evidence was. The gravamen of his evidence was that Marsh had come to see him and told him that he was concerned that, if GM canola had come onto his property, Stephen's place may lose his certification. So, Baxter's evidence was that, in early 2010, he tells his agronomist, "I want to minimise the impact for my neighbour. He told me that he's concerned that, if GM gets on his property, he will lose his certification."

Now, in our submission, your Honour should not accept that evidence for a number of reasons. It was given in a context where Baxter was obviously concerned to explain how he dealt with the 2008 information. So he has got some information in 2008. That 2008 information, in our submission, never surfaced as part of the decision making process.

KENNETH MARTIN J: But the decision making process, on the evidence, before crops are planted on Seven Oaks every year, he is very methodical and planned. He has a meeting with his agronomist. He says, "All right. We're going to prepare a crop plan. Here are the paddocks we're going to do this year," and away goes the agronomist, works it all up, and comes back with the hard copy. So the focus of that is not so much on the neighbour; the focus is how I'm going to use my land, this year, to make a living in terms of the crops that I produce. Now, as an incidental

component of that major objective, there might be discussion about the neighbour, but the neighbour is not the focus of the meeting of the conversation; it's an incidental component at best.

NIALL, MR: But – I accept that, your Honour. But, in the context of this case – – –

KENNETH MARTIN J: Was Mr Marsh's position mentioned in the planning conversation, whether it was January, February or early March, whatever – – –

NIALL, MR: (indistinct) – – –

KENNETH MARTIN J: – – – or not? You say I shouldn't believe Mr Baxter in terms of there being any discussion about it at all. What does it actually go to?

NIALL, MR: Well, it goes to this, your Honour. It goes to a number of things. The fact that Mr Baxter gave evidence about it is acknowledgement of what his knowledge was. So it's a reprise of what he's told.

KENNETH MARTIN J: Well, it's in the context of a line of cross-examination which is along the lines of – and this is not literally – "You didn't care about what was going on on Stephen's place at all, did you?"

NIALL, MR: That's right.

KENNETH MARTIN J: To which the response is, "Well, actually, I did."

NIALL, MR: Not only, "I did," your Honour – – –

KENNETH MARTIN J: And then you didn't talk about it with Robinson, your agronomist, did you, and he's probed, and then out it comes.

NIALL, MR: Your Honour – – –

KENNETH MARTIN J: You're suggesting, well, it should have been in his witness statement because it's of such importance.

NIALL, MR: That's one of the aspects because it's pleaded, your Honour. It's a pleaded part of their case that he relied on agronomist's advice. In – – –

KENNETH MARTIN J: Well, in terms of where he planted - - -

NIALL, MR: In deciding to plant, and where.

KENNETH MARTIN J: And swathing.

NIALL, MR: In 2010.

KENNETH MARTIN J: Yes.

NIALL, MR: Right. Now, he says, in his evidence, that I'm acting reasonably because I got - I acted on advice. And in his cross-examination, for the first time, he says, "And I also sought advice on the basis that the neighbour was organic, might lose his certification, and that he was concerned about it, and he wanted to minimise the risks". And the agronomist's advice was follow the Monsanto protocol. Now - - -

KENNETH MARTIN J: Along the lines of, look, if you follow what these guys have elaborately laid out in their acronym named plans, you should be all right.

NIALL, MR: Well, but Robinson - - -

KENNETH MARTIN J: Which is five metres and, you know, follow the general objectives of the stewardship agreement and the subcomponents.

NIALL, MR: Well, Robinson's advice said it was - that his advice would have been different had he been told.

KENNETH MARTIN J: In terms of - - -

NIALL, MR: He - Robinson says - - -

KENNETH MARTIN J: Growing or swathing?

NIALL, MR: Both. He says that he would have - Robinson's advice, and I will get the passage, your Honour, it is at 941. And Mr - this starts over at 940, which deals with Robinson's knowledge of organic standards and his belief that it wouldn't likely affect - that genetically modified (indistinct) straight onto a neighbour's property it was unlikely to affect the status of any crops. Yes. And he says:

> And Mr Baxter didn't tell you that in 2008, Marsh had come to see him with a volunteer canola plant that - if

it happened with a GM canola plant, his certification was at risk?---No. I'm not aware of that. No.

There was no discussion about a 2008 volunteer incident, was there?---Not that I'm aware of. No. No.

And he told you that, that he said Marsh could lose his certification if the GM canola plant went on his property, and that there had been canola volunteers in the past - - -

Sorry:

Had he told you, you would have told him he had to be careful planting on the boundary, wouldn't you?---Yes.

And you would have told him that if you plant on the boundary, there was a risk of swathing which (indistinct) moving onto your neighbour's property?---Yes. A small risk. Yes.

And you would have told him that?---Yes.

And you didn't tell him because these topics about certification wasn't raised, and there was no reason for you to tell him, was there?---No.

KENNETH MARTIN J: Well, there was no reason for you to tell him.

NIALL, MR: Well, there was no reason for him to tell him because Baxter didn't raise it with him. He didn't tell him, that is, Baxter didn't tell him, if you go over to 940:

He didn't tell you that his neighbour was concerned about losing his organic certification, did he? He didn't want the Roundup-Ready growing on that farm?---Yes.

But he didn't - Baxter didn't tell you anything about the neighbour losing certification?---Not that I'm aware of. No.

And there was no discussion of organic standards?---No.

And at that point, you didn't have any knowledge about organic standards, did you?---No.

Now, in our submission, it's quite clear that the agronomist was not told about Baxter's knowledge. Baxter

had knowledge of the impact that GM canola might have. That was his state of mind, your Honour. And our criticism, when one looks through the case, is that he knew about this thing. He had a duty of – that was part of the element of the duty of care, and he didn't take reasonable precautions to minimise against the risk.

KENNETH MARTIN J: So Baxter didn't tell his agronomist, "I've got a neighbour who is very edgy about GM material on his property". That's the deficiency, isn't it?

NIALL, MR: And didn't tell him that his certification would be at risk. Now, in our submission, Robinson was keen – Mr Baxter was keen to – in his cross-examination, was keen to deal with the 2008 information – to explain what he did, but, in fact, he did nothing with it, your Honour.

KENNETH MARTIN J: Sorry. Baxter did nothing in terms of telling his agronomist?

NIALL, MR: Yes. Or altering his practice, considering to not to plant on the boundaries, considering not to swath; he had that knowledge, and, in our submission, he did nothing with it at that point, including not telling his agronomist. Now, in a context where – – –

KENNETH MARTIN J: This goes to reasonableness, is that – – –

NIALL, MR: Well, it goes to a number of aspects, your Honour. It goes to – in the context of negligence, it's relative to – its – its – his acknowledgement in evidence is further evidence of what his knowledge was. So that goes to relevant – to duty. The – it goes to identifying what alternatives could have been adopted, that is, it goes to a lack of reasonable care in his decision to plant on the boundary and to swath.

KENNETH MARTIN J: I just put to you what I put to Ms Cahill at the end of the submission on behalf of the plaintiff. If it's just a question of the windrow material being blown, in a scenario that wouldn't have happened had you direct harvested the GM canola, isn't, from a causation position, that's all that's relevant, isn't it? The growing decision becomes irrelevant. It's historically relevant, but, in a causative sense, if you could have direct harvested the GM canola without the slightest risk of any of it being blown because , axiomatically, you don't have a swath to be blown, the focus should be on the

decision to swath rather than to direct head, shouldn't it, from a causation perspective?

NIALL, MR: Well, from a factual causation perspective, the – the decision – – –

KENNETH MARTIN J: Yes. Exactly.

NIALL, MR: – – – the decision to plant was a critical condition for the – – –

KENNETH MARTIN J: Well, only historically. As in, a sense of post-ergo crop to hock, but that's not even but for.

NIALL, MR: The swathing, of course, was only one of the necessary conditions, in a sense. In a sense, the planting was also a necessary condition.

KENNETH MARTIN J: But you need the stuff in the windrow – – –

NIALL, MR: Well, you need the – – –

KENNETH MARTIN J: – – – cut from the stem of the soil – – –

NIALL, MR: And – – –

KENNETH MARTIN J: – – – so that the elements are capable of sending it across in the wind, which isn't there when it's direct headed.

NIALL, MR: Direct harvested. Certainly, your Honour. Certainly, the risk of blowing was – and the cause – was substantially advanced by the – leaving at a metre high, metre wide windrow for three – two or three weeks, and deliberately exposing it to the elements for the purposes of – of making it ripen. Now, your Honour, if that's a convenient time.

KENNETH MARTIN J: Yes, it is, Mr Niall. How are we going for time? Do we need to start a little early tomorrow, or are we okay, or?

NIALL, MR: I think we're going okay, your Honour.

KENNETH MARTIN J: All right. So usual time then? Half past 10 tomorrow.

AT 4.14 PM THE MATTER WAS ADJOURNED UNTIL

FRIDAY, 28 FEBRUARY 2014

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