IN THE SUPREME COURT OF WESTERN AUSTRALIA
COMMERCIAL & MANAGED CASES LIST

BETWEEN: CIV 1561 of 2012

STEPHEN WILLIAM MARSH First Plaintiff

SUSAN GENEVIEVE MARSH Second Plaintiff

and

MICHAEL OWEN BAXTER Defendant

DEFENDANT'S OUTLINE OF OPENING SUBMISSIONS
(For trial commencing Monday 10 February 2014)

Case Manager:	The Hon Justice Kenneth Martin
Date of document:	6 February 2014
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NEGLIGENCE

Foreseeability

1. In order for a duty of care to avoid pure economic loss to arise, as with physical damage, the loss must be reasonably foreseeable. Reasonable foreseeability is not, however, in itself sufficient to ground a duty:

Woolcock Street Investments Pty Ltd v CDG Pty Ltd (2004) 216 CLR 515 [21]; *Perre v Apand* [1999] HCA 36; (1999) 198 CLR 180 at [27], [70] and [329].

2. It is not necessary that the particular type of damage that eventuates be reasonably foreseeable but the class of damage must be foreseeable as a possible consequence of the defendant's conduct. The test is not considered to be a demanding one: *Hardie Finance Corporation Pty Ltd v Ahern (No 3)* [2010] WASC 403, Pritchard J at [357]

3. The plaintiffs submit that two risks were foreseeable to the defendant namely:

   3.1 the risk that GM canola would be carried from Sevenoaks to Eagle Rest; and

   3.2 the risk that, if GM canola was carried from Sevenoaks to Eagle Rest, Eagle Rest's certified organic status would be endangered: cf. paragraph 21 of the plaintiffs' submissions

4. However, the risk pleaded by the plaintiffs in paragraph 31 of the amended statement of claim (statement of claim) is that, in the event that the defendant did not take reasonable care to ensure GM canola was not blown or carried from Sevenoaks to Eagle Rest:

   4.1 the plaintiffs would lose their organic certification; and

   4.2 the plaintiffs would suffer loss.

5. The plea (cf. the plaintiffs' submission) reflects the reality that a finding that a reasonable man in the defendant's position would have foreseen that GM canola from Sevenoaks could be blown onto Eagle

Rest, would not be sufficient, without more, to warrant a finding that the loss was foreseeable.

6. In summary, the plaintiffs allege that it was reasonably foreseeable that, if GM canola was found on Eagle Rest, the organisation certifying Eagle Rest (NASAA) could withdraw the plaintiffs' organic certification with the consequence that the plaintiffs would be obliged to sell their produce at lower prices and thereby suffer loss: paragraph 31 statement of claim.

7. The basis upon which it is alleged that it was reasonably foreseeable that this loss could occur is, essentially, that it was a matter within the defendant's knowledge, by reason of the matters pleaded in paragraphs 14, 28, 29 and 30 of the statement of claim.

8. Whilst reference is made to the quantity of GM canola deposited on Eagle Rest (paragraph 21 statement of claim and paragraph 8 plaintiffs' submissions), the plea in relation to foreseeability concerns the risk that certification may be lost if GM canola *per se* is found on Eagle Rest: (paragraph 31 statement of claim).

9. The defendant's evidence will be that he knew nothing of the detail of the plaintiffs' certification: paragraph 42, defendant's statement dated 28 August 2013.

10. To the extent that the first plaintiff gave the defendant information about the consequences of decertification, that information can only be relevant to the issue of foreseeability to the extent that the information was factually correct. It is submitted, therefore, that inaccurate statements made by the first plaintiff, or inaccurate information contained elsewhere, cannot be relied on to determine what is foreseeable by a reasonable man in the defendant's position.

11. The plaintiffs are, accordingly, unable to rely on the defendant having been informed that certifying organisations had a zero tolerance for the accidental presence of GMO within an organic produce system, which is not caused by producer, which, it is submitted, was not true according to the facts.

12. A reasonable person in the defendant's position, with the defendant's knowledge, would not foresee that the accidental presence of any amount of GM canola on Eagle Rest could result in the plaintiffs' certification being affected or lost. In fact, a reasonable person with greater knowledge than the defendant had, who had read the NASAA and Australian Standards, would not foresee that result.

13. The actual position was (and remains) that on a proper construction of the National Standard and the NASAA Standard, there was only a risk of decertification by reason of the accidental presence of GM plants and seeds on Eagle Rest if there was an unacceptable risk of contamination of the products produced by the plaintiffs from Eagle Rest and which were intended to be labeled as certified organic. This was not a reasonably foreseeable consequence in the circumstances given that there was no risk of cross-pollination of GM canola with the plaintiffs' crops and any GM seed or plant material could be removed from the product before it left the farm gate.

Significant Factors

14. In addition to foreseeability there must be a factor, or factors, of special significance, that bring the plaintiff and defendant into such a close and direct relationship as to warrant the imposition of a duty of care. *Perre*, per Gummow J at [217] and Callinan J at [430].

15. In *Perre*, McHugh J said ([105]) that five factors were always relevant in determining whether a duty exists in cases for liability for pure economic loss, namely:

15.1 reasonable foreseeability of loss;

15.2 indeterminacy of liability;

15.3 autonomy of the individual;

15.4 vulnerability of risk; and

15.5 the defendant's knowledge of the risk and its magnitude.

16. McHugh J repeated these principles in *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* [2004] HCA 16; (2004) 216 CLR 515 at [74], which was apparently approved by the High Court in *Barclay v Penberthy* [2012] HCA 40; (2012) 246 CLR 258 at [42].

17. Allsop P in *Caltex Refineries (Qld) Pty Ltd v Stavar* [2009] NSWCA 258, enunciated 17 different "*salient features*" or factors as being relevant to a consideration of whether a duty of care in negligence should be imputed in a novel case. Of the factors listed by Allsop P, both he [104] and Basten J [172] said that not all these factors to be present in any particular case. Rather each of these factors was to be considered as potentially relevant, depending on the type of case. Allsop P said that the list was not intended to be exhaustive [104].

18. The salient features immediately before, and not after, the conduct of the defendant said to be negligent are relevant: *Hardie Finance Corporation v Ahern [No 3]* at [360] (Pritchard J citing *Vairy v Wyong Shire Council* (2005) 223 CLR 422 at [49] (Gleeson CJ and Kirby J) and [145] (Hayne J)).

19. A retrospective rather than prospective analysis may lead to the undesirable consequence of mixing questions of duty with questions of breach and causation: *Gunnerson v Henwood* [2011] VSC 440 at [302].

20. The plaintiffs rely, in the statement of claim, on forseeability and four additional features to establish the duty of care, namely:

    20.1 Physical proximity: paragraphs 35 and 3;

    20.2 the plaintiffs' vulnerability: paragraph 33;

    20.3 the defendant's control over the risk of economic loss faced by the plaintiffs: paragraph 32; and

    20.4 the defendant's knowledge of the likely harm to the plaintiffs: paragraph 34.

21. The defendant accepts that there is physical proximity between Sevenoaks and Eagle Rest. However, this factor in itself is not sufficient to ground a duty of care. This must be so particularly where there are no factual circumstances that would negate the defendant's right to autonomy as an individual (*ie*, the third significant factor identified in *Perre*).

Autonomy

22. This factor involves a consideration of whether the imposition of a duty in a competitive commercial environment would be inconsistent with community standards in relation to what is ordinarily legitimate in the pursuit of personal advantage. It was put this way by McHugh J in Perre at [115]:

> *"As long as a person is legitimately protecting or pursuing his or her social or business interests, the common law will not require that person to be concerned with the effect of his or her conduct on the economic interests of other persons. And that is so even when that person knows that his or her actions will cause loss to a specific individual."*

23. In this case, it is clear and highly significant that the defendant was at all times operating within the law in the pursuit of his own commercial interests. His entitlement to do so was not relevantly "attenuated" (by which the plaintiffs appear to mean 'limited') by contemporary DAFWA publications: cf. paragraph 24 of the plaintiffs' submissions. Those publications had no legal force and were apparently issued by DAFWA on a "no liability" basis. The plaintiffs offer no evidence as to the purpose of DAFWA in releasing those publications.

24. A number of the cases where a person pursuing a legitimate activity has been held to owe a duty of care have the additional element, not present in this case, of wrongdoing by the defendant in relation to duty owed to another person. The relevance of this element appears to be that it negates the relevance and significance of the defendant's right to autonomy as militating against the existence of a duty owed to the plaintiff: *Perre,* per McHugh J at [117] and *Woolcock*, per McHugh J at [79].

25. The relevance of the existence of a duty to a third party has been considered in *Perre, Woolcock*, *Bryan v Maloney* [1995] HCA 17; (1995) 182 CLR 609; *Hill (T/As) RF Hill & Associates v Van Erp* [1997] HCA 9; (1997) 188 CLR 159 and *Caltex Oil (Australia) Pty Ltd v The Dredge 'Willemstad'* [1976] HCA 65.

26. In each case other than *Woolcock*, in finding for a duty, it was relevant that the defendant owed a pre-existing duty to person other than the plaintiff. In *Woolcock*, the plurality rejected the existence of the duty on other grounds. McHugh J [79] in that case considered the issue relevant to the question of whether the autonomy of the individual required rejection of the existence of the duty.

Vulnerability and Control of Risk

27. These two factors probably embrace similar concepts, if not the same concept: *Perre*, per McHugh J at [127].

28. The plaintiffs plead that the defendant exercised control over whether they lost their certificate or suffered economic loss, and the plaintiffs were thereby vulnerable to that risk, because the defendant decided to, and where to, plant GM canola and the manner in which he harvested it: paragraphs 32 and 33 statement of claim.

29. There was no significant vulnerability in the plaintiffs to the identified risks arising from the control the defendant had over those decisions. That is because in the circumstances there was no risk of cross-pollination of GM canola with the plaintiffs' crops and any GM seed or plant material could be removed from the plaintiffs' product before it left the farm gate. Accordingly, the risk of decertification under either the National Standard or the NASAA Standard, if they were construed and applied correctly, was minimal.

30. In the event that there was a risk of decertification from NASAA acting unreasonably, this was not a risk within the defendant's control and the plaintiffs had the power to protect themselves from the consequences of that risk if it eventuated by exercising their right to appeal the NASAA decision.

Knowledge of risk of harm

31. For the reasons submitted above in relation to the issue of foreseeability, there is no basis in this case to find that the defendant knew of the risk of decertification because of the growing and swathing of GM canola close to the plaintiffs' farm. The defendant knew nothing of the content of the applicable Standards. If he had, he would not have appreciated any real risk of decertification if those Standards were properly and reasonably applied.

32. For these reasons, there is no basis for the Court to find the existence of a duty of care owed by the defendant to the plaintiffs.

Allegation of Breach of Duty

33. For the reasons already outlined above, the risk of harm was neither foreseeable by the defendant nor significant and, therefore, s 5B(1)(a) and (b) of the CLA are not satisfied.

34. As to s 5B(1)(c), a reasonable person in the position of the defendant would not have refrained from planting GM canola, including near to Eagle Rest, and would not have refrained from swathing the resulting crop.

35. If the relevant Standards were correctly and reasonably applied, the risk of decertification from the adventitious introduction of GM canola plants and seeds to Eagle Rest was minimal, if it existed at all.

36. The burden of having to refrain from planting GM canola and/or swathing the resultant crop to avoid the risk of decertification is too great to warrant the imposition of liability upon the defendant. The planting of GM canola in paddocks near to Eagle Rest was of benefit

to the defendant in so far as it was (and remains) an effective method of managing wimmera rye grass. The swathing of a crop is of benefit in that it reduces the risk of pod shattering and therefore seed loss. The defendant is able to achieve better yields by planting GM canola than by planting conventional canola. There is therefore evident social utility in the continuing ability of the defendant (and others in the same position) to plant and grow GM canola.

Causation

37. Section 5C of the *Civil Liability Act 2003* (**CLA**) divides the determination of whether a tortfeasor's fault caused the loss claimed (legal causation) into two separate and distinct issues, that is:

37.1 factual causation; and

37.2 the scope of liability.

Wallace v Kam [2013] HCA 19; (2013) 297 ALR 383 at [11] and [12]; and *Adeels Palace Pty Ltd v Moubarak* [2009] HCA 48; (2009) 239 CLR 420 at [42].

38. The attribution of legal causation is determined with the benefit of hindsight, that is, with the knowledge of how the loss actually occurred: *Wallace v Kam* at [23].

Factual Causation

39. Under s 5C(1)(a) of the CLA, the court is required to reach the "*entirely factual*" determination that the loss would not have occurred had it not been for the negligent act or omission; that is that the negligent act or omission is a necessary condition for the harm (the

'but for' test of causation): *Wallace v Kam* at [14], [15] and [16]; and *Adeels v Moubarak* at [45] and [54].

40. The defendant's negligent act or omission is a necessary condition of the harm suffered if it must be present in order for the harm to occur. The test for factual causation will, however, be satisfied if the defendant's negligent act or omission is a necessary component of a number of conditions which must be present in order for the harm to be suffered (in other words, it contributes to the occurrence of the harm): *Strong v Woolworths Limited T/As Big W* [2012] HCA 5; (2012) 246 CLR 182 at [20], per French CJ, Gummow, Crennan and Bell JJ.

41. The plaintiffs submit that it is sufficient to satisfy the test for factual causation that the presence of GM canola swaths on Eagle Rest was a necessary condition of the harm complained of and that those swaths originated from Sevenoaks: paragraph 37 statement of claim.

42. The presence of the GM canola swaths on Eagle Rest is not, however, the negligent act complained of. That presence is the alleged consequence of the negligent acts of growing and swathing GM canola: paragraphs 36 and 37 statement of claim.

43. Accordingly, it is submitted that the plaintiff must prove that it is more probable than not that NASAA would not have withdrawn the plaintiffs' organic certification with the consequence that the plaintiffs would be obliged to sell their produce at lower prices and thereby suffer loss if the defendant had not:

43.1 planted GM canola in a paddock near Eagle Rest;

43.2 planted GM canola at all;

43.3 swathed GM canola.

44. Other than the allegation that the defendant ought not to have planted GM canola in a paddock near Eagle Rest, there is no allegation the defendant was at fault in the way in which he planted the crop, or in the way in which he swathed the crop.

45. The plaintiffs' witness statements are to the effect that the decision makers at NASAA exercised a discretion whether to withdraw certification and, in the exercise of that discretion, they relied on the presence of canola swaths, and the seeds derived from those swaths, on Eagle Rest: statements of Ayachit at paragraphs 14 and 17, Denham at paragraphs 66 and 68 and Goldfinch at paragraph 27.

46. It is not alleged that the mere presence of GM canola crops growing on Sevenoaks would cause the NASAA to withdraw the plaintiffs' organic certification nor did that presence actually give rise to the decision to withdraw certification, either directly or indirectly.

47. Accordingly, it cannot be said that growing GM canola on Sevenoaks was factually causative.

48. The defendant concedes, however, that, if a finding is made that it is more probable than not that the swathed canola originated from Sevenoaks, a case for factual causation may arise by reason of the swathing of the GM canola being a necessary component leading to the presence of the swaths on Eagle Rest. That finding alone is not, however, sufficient to support a finding that the swathing of the GM canola crop was legally causative.

Scope of liability

49. By s 5C(1)(b) CLA, the court is required to determine, in addition to factual causation, that it is appropriate for the scope of the tortfeasor's liability to extend to the loss so caused.

50. By s 5C(4) CLA, when determining the scope of liability, the court is required to determine, among other relevant things, whether or not and why responsibility for the harm should be imposed on the negligent party.

51. In a novel case, where precedent does not provide a guide, the Court is required to make an evaluative judgment with reference to the purposes and policy of the relevant part of the law, including the policy considerations relevant to the imposition of a particular duty: *Wallace v Kam* at [22].

52. The question for the court in cases where the intervention of some act or decision of a third party or the plaintiff constitutes a more immediate cause of the plaintiff's loss, is whether, despite the intervening cause, the defendant's wrongful act or omission may still, properly, be seen to be the cause of the loss: *Medlin v State Government Insurance Commission* [1995] HCA 5; (1995) 182 CLR 1; (1995) 127 ALR 180 at 183, per Deane, Dawson, Toohey and Gaudron JJ

53. In relation to the issue of whether the scope of the defendant's liability should extend to the plaintiffs' economic loss the plaintiffs submit (paragraph 38) that:

53.1 the presence of GM canola on Eagle Rest rendered the plaintiffs' non compliant with the National Standard and the NASSA Standard and liable to decertification;

53.2 the decision of NASAA was open to it and "inevitable".

54. It is an important element of the defendant's case that he contests both of those propositions: cf. paragraphs 26[5]-[6] re-amended defence.

55. Decertification was not permitted under the NASAA Standard because the plaintiffs were not responsible for the presence of the GM canola and there was no evidence or identifiable risk of contamination of products produced by the plaintiffs and intended to be labeled as organic. In those circumstances, there was no infringement of the Standard and therefore no power to decertify. It was therefore unreasonable for NASAA to do so.

56. Decertification was not permitted and was therefore unreasonable under the National Standard or the Australian Standard for the same reasons.

57. Alternatively, if there was a discretion to decertify under either of those Standards, there was nothing "inevitable" about the decision to withdraw certification based upon the accidental presence of GM canola on Eagle Rest and it was unreasonable for NASAA to do so in circumstances where NASAA ought to have realised, had proper consideration been given to the matter, that:

57.1 there was little risk of the GM canola seed on Eagle Rest either germinating, or entering into the plaintiffs' organic produce;

57.2 any GM canola seed intermingled with the plaintiffs' organic grain, which was not removed by the harvester screens, could be removed by seed cleaning;

57.3 the essential purpose of the NASAA Standard is to allow the certified operator to advertise and label their products as having been produced in accordance with the methods of agricultural production set out in the NASAA Standard;

57.4 in circumstances where there was little if any risk of any intermingling of the GM canola seed with the plaintiffs' produce, the sanction of decertification was unnecessary to achieve that purpose.

58. It is submitted that, if the Court finds on the evidence that NASAA acted unreasonably in determining to withdraw the plaintiffs' certification, the defendant's negligence, if any, as a factual contribution to the loss, should be disregarded. In those circumstances it is submitted that the Court should find that it is not appropriate to extend the scope of the defendant's liability to the plaintiffs' loss: *Medlin v State Government Insurance Commission* at 184, per Deane, Dawson, Toohey and Gaudron JJ.

59. In this case the rationale behind the imposition of a duty of care not to swath GM canola, or to plant GM canola, if such duty exists, must be to avoid the risk of NASAA withdrawing certification of Eagle Rest in accordance with the proper exercise of its powers as governed by the contractual relationship between NASAA and the plaintiffs and the NASAA Standards. The scope of the liability ought not extend to the consequences of the unauthorised or unreasonable exercise of that power.

Plaintiffs' Claim in Nuisance

60. A private nuisance involves an infringement of the plaintiffs' interest in land without direct entry by the defendant: *Clerk & Lindsell on Torts*, 19th Ed at 1162 [20–02].

61. The law is unclear as to whether a mere licensee, such as one in the position of the second plaintiff, has a sufficient interest in land to sue in nuisance. Earlier authority suggested not, although later authorities indicate to the contrary: *Oldham v Lawson (No 1)* [1976] VR 654 at 657; cf. *Toll Transport Pty Ltd v National Union of Workers* [2012] VSC 316 at [28], citing *Deasy Pty Ltd v Montrest Pty Ltd* (unreported Qld CA, 11 November 1996, BC 96055947, per Pincus JA); *Vaughan v Shire of Benalla* [1891] VLR 129 and *McLeod v Rub-A-Dub Car Wash (Malvern) Pty Ltd* (Unreported SC Vic, Stephen J, 29 February 1972).

62. There are three types of interference that are recognised in law as constituting a private nuisance. The plaintiffs rely upon an alleged undue interference with a neighbour in the comfortable and convenient enjoyment of his or her land: *Robson v Leischke* [2008] NSWLEC 152; (2008) 72 NSWLR 98 at [54], per Preston CJ; paragraph 43 statement of claim.

63. In *Elston & Ors v Dore* (1982) 149 CLR 480, the High Court (per Gibbs CJ, Wilson and Brennan JJ, Murphy J agreeing) adopted at 487, the following statement of Lord Wright in *Sedleigh-Denfield v O'Callaghan* [1940] AC 880 at 903, as the proper test:

> "A *balance has to be maintained between the right of the occupier to do what he likes with his own and the right of his neighbour not to be interfered with. It is impossible to give any*

> *precisely universal formula, but it may broadly be said that a useful test is perhaps what is reasonable according to the ordinary usages of mankind living in society, or more correctly in a particular society.*"

64. In making a judgment as to what is reasonable regard is had to a variety of factors including the nature and extent of the harm or interference, the social or public interest in the defendant's activity, the hypersensitivity (if any) of the user or use of the claimant's land, the nature of established uses in the locality (eg, residential, industrial, rural), whether all reasonable precautions are taken to minimise any interference, and the type of damage suffered. The exercise involves weighing the respective rights of the parties in the use of their land to make a value judgment as to whether the interference is unreasonable: *Southern Properties (WA) Pty Ltd v Executive Director of the Dept of Conservation and Land Management* [2012] WASCA 79, per McLure P at [118]-[119]; see also *Oldham v Lawson (No 1)* at 655.

65. Accordingly, what is reasonable does not fall to be considered exclusively by reference to the impact on the plaintiff: cf. paragraph 46 plaintiffs' submissions.

66. Fault of some kind is almost always necessary in order to find a nuisance but a deliberate act on the part of the defendant will only be wrongful if it is not reasonable in the sense to which Lord Wright refers: *Elston v Dore* (per Gibbs CJ, Wilson and Brennan JJ, Murphy J agreeing) at 488.

67. The plaintiffs allege that the presence of GM canola plants and seeds on Eagle Rest constituted an unlawful interference with their use of that land, in so far as there was a "*consequential loss*" of certification: paragraph 43 statement of claim.

68. At least two relevant points can be made about that allegation.

68.1 first, the plaintiffs' loss of certification was not a consequence of the presence (in whatever quantities) of GM canola plants and seeds on Eagle Rest.

68.2 rather, the loss of certification was due to the unreasonable actions of NASAA and/or the plaintiffs in respect of the certification and decertification of Eagle Rest, in the manner described at 55 to 59 of these submissions.

69. Secondly, it was not "wrongful" in the sense referred to by Lord Wright, for the defendant to sow GM canola on Sevenoaks in paddocks closest to Eagle Rest and swath the resultant crop because, amongst other things:

69.1 it was lawful for him to do so;

69.2 it was reasonable for him to sow the crop to address the wimmera rye grass problem in those paddocks (whether or not that use ultimately proved to be successful);

69.3 it was reasonable for him to swath the crop to reduce the risk of pod shattering which would cause the loss of seed and increase the production of volunteer plants;

69.4 the defendant took all reasonable precautions when producing the GM canola, including taking the advice of an agronomist and advising the first plaintiff of his intentions;

69.5 the alleged interference in the form of the presence of GM canola seeds and plants on Eagle Rest did not damage the

land or livestock or crops on the land and did not affect the plaintiffs' ability to farm according to organic principles. The nature and extent of the alleged interference was limited to a consequential loss of certification from one incident occurring in November 2010 in which it is alleged GM canola plants and seeds blew from Sevenoaks across to Eagle Rest;

69.6 Sevenoaks is located in a commercial agricultural area where conventional farming predominates and organic farming is less common;

69.7 the activity of growing canola, whether GM or conventional, is undertaken on a large scale in Australia and is of benefit to the community in providing export revenue and/or produce for domestic consumption;

69.8 the farming community benefits from the production of RR GM canola in that it has potential economic benefits from improved yields and is a useful tool in the management of weeds in crop production.

70. The nuisance complained of, being the presence of GM canola plants and seeds on Eagle Rest and the consequential loss of certification, is not continuing: (cf. paragraph 43(ii) statement of claim). Eagle Rest has now been recertified. While the plaintiffs allege at paragraph 47 of the statement of claim, that the defendant intends "*to continue to commit the nuisance*" by reference to paragraph 27 of their pleading, that paragraph does not allege a nuisance in terms consistent with paragraph 43(ii) and, in any event, only alleges that the defendant refused to undertake not to plant a GM canola crop in 2012. In those circumstances, the entitlement of the plaintiffs to seek any injunctive relief is not apparent. Likewise, there appears to be no basis for the

plaintiffs to seek equitable damages "*in lieu of an injunction abating the nuisance*": paragraph B of the prayer for relief.

71. Further, the plaintiffs apparently does not intend to adduce any evidence to support the necessity or reasonableness of the permanent injunction they seek in the terms set out in the plaintiffs' minute of orders dated 24 August 2012.

72. To the extent that the plaintiffs claim common law damages for loss suffered by reason of the alleged nuisance, the defendant denies that he caused any such loss. The defendant refers to without repeating his submissions at 37 to 57 above, noting however that it is questionable whether the provisions of the CLA apply in respect of nuisance: *Southern Properties (WA) Pty Ltd v Executive Director of the Dept of Conservation and Land Management* at [126], [330] and [336].

Patricia Cahill

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PATRICIA CAHILL

Fiona Vernon.

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FIONA VERNON

DEFENDANT'S LIST OF AUTHORITIES

Written laws

1. **Civil Liability Act 2003*, ss 5B(1)(a) and (b), 5C(1)(a) and (b), 5C(4)

Judgments

2. **Adeels Palace Pty Ltd v Moubarak* [2009] HCA 48; (2009) 239 CLR 420 at [42], [45], [54]

3. *Barclay v Penberthy* [2012] HCA 40; (2012) 246 CLR 258 at [42]

4. *Bryan v Maloney* [1995] HCA 17; (1995) 182 CLR 609

5. **Caltex Refineries (Qld) Pty Ltd v Stavar* [2009] NSWCA 258, Allsop P at [104] and Basten J [172]

6. *Caltex Oil (Australia) Pty Ltd v The Dredge 'Willemstad'* [1976] HCA 65

7. *Deasy Pty Ltd v Montrest Pty Ltd* (Unreported) Qld CA, 11 November 1996, BC 96055947, Pincus JA

8. **Elston & Ors v Dore* [1982] HCA 71; (1982) 149 CLR 480, Gibbs CJ, Wilson and Brennan JJ (Murphy J agreeing) at 487 and 488

9. **Gunnerson v Henwood* [2011] VSC 440 at [302]

10. *Hardie Finance Corporation v Ahern [No 3]* [2010] WASC 403 at [357] and [360]

11. *Hill (T/As) RF Hill & Associates v Van Erp* [1997] HCA 9; (1997) 188 CLR 159

12. *McLeod v Rub-A-Dub Car Wash (Malvern) Pty Ltd* (Unreported) SC Vic, Stephen J, 29 February 1972

13. **Medlin v State Government Insurance Commission* [1995] HCA 5; (1995) 182 CLR 1; (1995) 127 ALR 180, Deane, Dawson, Toohey and Gaudron JJ at 183 and 184

14. *Oldham v Lawson (No 1)* [1976] VR 654 at 655 and 657

15. **Perre v Apand* [1999] HCA 36; (1999) 198 CLR 180 at [27], [70], [329]; McHugh J at [115] and [127]; Gummow J at [217]; Callinan J at [430]

16. **Robson v Leischke* [2008] NSWLEC 152; (2008) 72 NSWLR 98, Preston CJ at [54]

17. *Sedleigh-Denfield v O'Callaghan* [1940] AC 880, Lord Wright at 903

18. **Southern Properties (WA) Pty Ltd v Executive Director of the Dept of Conservation and Land Management* [2012] WASCA 79, McLure P at [118]-[119], [126], [330] and [336]

19. **Strong v Woolworths Limited T/As Big W* [2012] HCA 5; (2012) 246 CLR 182, French CJ, Gummow, Crennan and Bell JJ at [20]

20. *Toll Transport Pty Ltd v National Union of Workers* [2012] VSC 316 at [28]

21. *Vairy v Wyong Shire Council* (2005) 223 CLR 422, Gleeson CJ and Kirby J at [49] and Hayne J at [145]

22. *Vaughan v Shire of Benalla* [1891] VLR 129

23. **Wallace v Kam* [2013] HCA 19; (2013) 297 ALR 383 at [11], [12], [14], [15], [16], [22] and [23]

24. **Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515 [21]; [2004] HCA 16, McHugh J at [74] and [79]

Legal Texts

25. *Clerk & Lindsell on Torts*, 19th Ed at 1162 [20–02]

* **Cases to be read from**