

**IN THE SUPREME COURT OF WESTERN AUSTRALIA
COMMERCIAL AND MANAGED CASES LIST**

CIV. 1561 of 2012

B E T W E E N :

STEPHEN WILLIAM MARSH

First Plaintiff

SUSAN GENEVIEVE MARSH

Second Plaintiff

- and -

MICHAEL OWEN BAXTER

Defendant

**AFFIDAVIT OF STEPHEN WILLIAM MARSH
AND ATTACHMENTS "SM1" TO "SM48"
SWORN THE 12TH DAY OF APRIL 2012
IN SUPPORT OF ORDERS FOR AN INTERLOCUTORY INJUNCTION**

Date of document: 12 April 2012

Filed on behalf of: Plaintiff

Prepared by:
SLATER & GORDON
Lawyers
Level 2, Council House
27 – 29 St Georges Terrace
PERTH WA 6000

Telephone: 9223.4800
Facsimile: 9223 4850
Reference: MJW1: M236495

I N D E X

Document	Description	Pages
Annexure "SM1"	Certificate of title for Eagle Rest	Not tendered
Annexure "SM2"	Certificate of title for Seven Oaks	Not tendered
Annexure "SM3"	Map with boundaries of each farm	TB 0001-0022
Annexure "SM4"	National Standard for Organic and Bio-Dynamic Produce	TB 1408-1480
Annexure "SM5"	NASAA Standard	TB 1293-1407
Annexure "SM6"	Letter regarding certification	TB 0209
Annexure "SM7"	Certificates from NASAA	TB 0114, 0054, 0053, 0052, 0051, 0036, 0035, 0023
Annexure "SM8"	Sign regarding organic status	Exhibit 8
Annexure "SM9"	2010 Sign regarding organic status	Exhibit 9
Annexure "SM10"	Letter to Minister Redman	Not tendered
Annexure "SM11"	GMO Declarations	TB 0212, 0214
Annexure "SM12"	Exemption order from WA <i>Government Gazette</i>	Not tendered
Annexure "SM13"	DAFWA Farm Note 407	TB 0226-0229

Annexure "SM14"	DAFWA Farm Note 409	TB 0230-0231
Annexure "SM15"	DAFWA Fact Sheet	TB 0216-0218
Annexure "SM16"	DAFWA GM Technology FAQs	Not tendered
Annexure "SM17"	DAFWA Fact Sheet	TB 0219-0221
Annexure "SM18"	Notice delivered to defendant	TB 0246-0252
Annexure "SM19"	Articles from "Bleat" newspaper	TB 0259-0264, 0267-0270, 0281-0284
Annexure "SM20"	Articles from "Kojonup News"	TB 0271-0280, 0265-0266
Annexure "SM21"	Copy notice from "Darkin Bleat"	Not tendered
Annexure "SM22"	Map showing swathed canola	TB 0018
Annexure "SM23"	Print out of GPS locations	TB 0012
Annexure "SM24"	DAFWA report 24 December 2010	Not tendered
Annexure "SM25"	DAFWA report 7 February 2011	TB 0348-0366
Annexure "SM26"	Photograph taken from Eagle Rest	Not tendered
Annexure "SM27"	Notification to NASAA	TB 0292
Annexure "SM28"	Letter from NASAA to plaintiff	TB 0337-0338
Annexure "SM29"	Report from DTS dated 29 December 2012	TB 0339-0340
Annexure "SM30"	NASAA press release	TB 0343-0344
Annexure "SM31"	Letter from NASAA to Minister for Agriculture	Not tendered
Annexure "SM32"	Certificate of Registration for Eagle Rest	TB 0125
Annexure "SM33"	NASAA inspection report	TB 0385-0408
Annexure "SM34"	Report from DTS	TB 0414-0415
Annexure "SM35"	NASAA letters to plaintiff	TB 0422-0425
Annexure "SM36"	December 2010 grain prices from MarketAg	Not tendered
Annexure "SM37"	CBH 2010/2011 grower charges	Not tendered
Annexure "SM38"	Morton's account	Not tendered
Annexure "SM39"	CBH Grain Daily Contract Price	Not tendered
Annexure "SM40"	Letter from Organic Meat Coop	Not tendered
Annexure "SM41"	WAMMCO Schedule	Not tendered
Annexure "SM42"	Tasmanian DPI study	TB 2905-2907
Annexure "SM43"	Letter from defendant's solicitors 15 March 2011	Not tendered
Annexure "SM44"	"Farm Weekly" article	TB 2911
Annexure "SM45"	Letter from plaintiff's solicitors seeking undertaking	Not tendered
Annexure "SM46"	Market prices from www.efarming.com.au	Not tendered
Annexure "SM47"	Map showing areas for canola cultivation	Not tendered
Annexure "SM48"	DAFWA information sheet on co-existence	TB 0285-0288

* * * * *

I, Stephen William Marsh, of RMB 555, Old Collie Road, Kojonup 6395, in the State of Western Australia, farmer, being duly sworn make oath and say as follows:

Eagle Rest and Organic Farming

1. I am the registered proprietor of the whole of the land comprised in certificates of title volume 1725 folio 197 and volume 1900 folio 363, which is located in Kojonup in the State of Western Australia, and is known as “Eagle Rest” farm (**Eagle Rest**).
2. Annexed to my affidavit and marked with the letters “**SM1**” is a copy of the certificate of title for Eagle Rest.
3. Eagle Rest is a farm of approximately 480 hectares in size, of which 355 hectares is available for pasture or arable land. It is located approximately 45 kilometres North West of Kojonup.
4. I have lived and worked on farms in and around the Kojonup area all of my life. My family has farmed in the Kojonup / West Arthur District for generations.
5. I bought Eagle Rest in 1990. Since purchasing Eagle Rest in 1990, my wife Sue and I have cultivated both grain and livestock on the farm. We have produced many grains whilst working on the farm. These grains include oats, wheat, spelt, barley, rye and lupins. We also produce meat and wool from sheep.

6. I have never grown canola.
7. I believe that the defendant Michael Baxter is the registered proprietor of the whole of the land comprised in certificates of title volume 1344 folios 1 and 2, volume 1300 folio 362, volume 1213 folio 216 and volume 1099 folio 992 which is known as “Sevenoaks” farm (**Sevenoaks**).
8. Annexed to my affidavit and marked with the letters “**SM2**” is a copy of the certificate of title for Sevenoaks.
9. Eagle Rest and Sevenoaks are neighbouring properties and share a boundary separated by the road reserve for Qualeup North Road and Glenorchy South Road. The western boundary of Eagle Rest adjoins the eastern boundary of Sevenoaks. Those boundaries are separated by the road reserve for Qualeup North Road and Glenorchy South Road. The distance between the boundary fences is about 20.4 metres from fence to fence. I measured the distance myself with a tape measure.
10. Annexed to my affidavit and marked with the letters “**SM3**” are 2 copies of maps which set out the boundaries of each of the farms drawn on to them.
11. I would describe my approach to farming as “sustainable agriculture”. I first experimented with natural farming systems, limiting and reducing where possible, the use of artificial pesticides, chemicals, synthetic fertilisers and sprays in the 1990s. I choose to farm in a sustainable fashion because of my belief that the modern, industrialised system of farming (involving heavy

chemical use and use of genetically engineered biological products) is financially and ecologically unsustainable over the long term.

12. I would describe myself as committed to the principles of organic farming. There is a strong market for organically grown produce and if it is done properly, organic farming can be a very profitable form of farming.
13. In or about 2002, I started to take the necessary steps to obtain certification as an organic farmer pursuant to the standards set by the National Association of Sustainable Agriculture Australia (**NASAA**). This stage of the process is known as pre-certification (or “pre-cert”).
14. I required NASAA certification so I could prove that the produce I cultivated on the farm at Eagle Rest was legitimately farmed in an organic fashion. It is a form of quality assurance which also ensures that I can attract a premium price for the organically grown produce that we sell.
15. NASAA is (and has at all relevant times been) accredited by the Australian Quarantine Inspection Service (**AQIS**) as an authorised certifier of organic and biodynamic produce.
16. The standards for certification by NASAA are those stipulated in the NASAA standard and the National Standard for Organic and Bio-Dynamic Produce (**the National Standard**) which is administered by AQIS.
17. At all times, the National Standard required that any person producing, preparing

or labelling produce as “certified organic”, to be certified for the relevant production activity by an approved certifying organisation.

18. Annexed to my affidavit and marked with the letters “SM4” is a copy of the 2009 National Standard. Clause 6.2.1 of the National Standard confirms that any person producing, preparing or marketing produce as “certified organic”, must be certified for the relevant production activity by NASAA.
19. The National Standard provides the framework for the organic industry covering production, processing, transportation, marketing, labelling and importation.
20. The National Standard also states that:
 - (a) Products that are derived from genetic modification are not compatible with the principles of organic and biodynamic agriculture.
 - (b) The use of GM organisms or their derivatives is prohibited.
 - (c) Products known to be contaminated by genetically modified organisms, or their by-products must be excluded from sale.
 - (d) Where GM crops or livestock have been grown or used on a production unit other than a landless system, a minimum of at least 5 years must have elapsed before products grown in or on the land can be certified according to this standard.
 - (e) The certification of organic crops, livestock or agricultural products will be withdrawn where genetically modified crops, livestock or agricultural products are grown or produced on the same farm.
 - (f) Sanctions are imposed on certified operators for any breach of this standard. The sanctions will vary upon the severity of the breach. They

may include suspension of operations or decertification where the infringement is significant.

- (g) Where an operator is decertified by an approved certifying organisation for an infringement against this standard, the operator will not be eligible for recertification until all requirements of this standard are met.
 - (h) Operators shall implement a risk management process to assess how they will avoid the accidental introduction of GM organisms.
21. Annexed to my affidavit and marked with the letters “**SM5**” is a copy of the 2008 NASAA Standard.
22. In about early August 2002, as part of the process of obtaining certification, I wrote to Michael Baxter (**Baxter**) at Sevenoaks and told him of my intention to obtain certification for organic production on Eagle Rest. At about that time I asked that he take care to avoid contaminating Eagle Rest by chemicals or by genetically modified organisms (**GMO’s**).
23. I hand delivered the letter to Baxter. I did not keep a copy of the letter, or it is possible I have misplaced it. I do, however, have a copy of a letter that I sent to my parents at the same time. It is annexed to my affidavit and marked with the letters “**SM6**”. The wording of the letter I hand delivered to Baxter is exactly the same as the letter at annexure SM6, except it was addressed to him instead of my parents. I gave the same letter to a number of my other neighbours.
24. By 10 December 2004 I gained full certification from the NASAA for the production of certified organic crops and livestock on the whole or any part of

Eagle Rest, in accordance with the NASAA Organic Standard.

25. Each year from 2004 (and from 2005 for paddock 13) until and including 2010, I held certification from NASAA for the production of certified organic crops (cereals, grains and pulses) and livestock (sheep) on the whole or any part of 476 hectares of Eagle Rest, in accordance with the NASAA standard. Annexed to my affidavit and marked with the letters “SM7” is a bundle of copies of my certificates from NASAA for the production of certified organic crops (cereals, grains and pulses) and livestock (sheep) from 2004 until 2010.
26. From 2004 (and from 2005 for paddock 13) until and including 2010, I have cultivated certified organic crops and livestock on Eagle Rest.
27. Since about 2004, I have erected signs giving notice of the organic status of Eagle Rest around the external boundaries of Eagle Rest, including on the western boundary of Eagle Rest which adjoins the eastern boundary of Seven Oaks.
28. Annexed to my affidavit and marked with the letters “SM8” is a photocopy of one of the signs to which I refer above.
29. In about late 2010 I replaced the signs at annexure SM8 and erected signs measured approximately 60cm by 45cm and stated:

“CERTIFIED ORGANIC FARM. STRICTLY NO ENTRY BY VEHICLES OR

PERSONS. TAKE NOTICE.

- *This farm is subject to 24 hour surveillance.*

- *This farm is currently subject to a bio-security declaration.*
 - *This farm is declared GM Free, chemical free and artificial fertilizer free.*
 - *This farm is an environmentally sensitive area.*
 - *Strictly no entry or access without prior authority of the owners.*
 - *Unauthorised access by vehicles or persons resulting in any contamination or forfeiture of GM free accreditation will result in a court action for compensation.*
 - *Phone the owner on (phone number).*
30. Annexed to my affidavit and marked with the letters “SM9” is a photograph of one of the signs that I refer to at paragraph 29 of my affidavit.
31. Baxter has grown canola on Sevenoaks for some years.
32. In about November 2008 I discovered that a number of conventional canola plants that had self-sown on Eagle Rest, in an area quite close to our respective boundaries.
33. Shortly after discovering the canola plants on Eagle Rest, I pulled some of them up and took them around to Sevenoaks and showed them to Baxter.
34. I told Baxter that because of the location of his canola crop (being right alongside the boundary between Sevenoaks and Eagle Rest), I believed that the canola plants had come from Sevenoaks. I said to him that he was welcome to inspect the canola plants still present on my property. Baxter did not dispute that

the canola plants came from Sevenoaks but he declined the invitation to come and have a look for himself.

35. We then spoke generally about whether he was thinking about growing genetically modified (**GM**) canola.
36. I said to Baxter that if the cultivation of genetically modified (**GM**) canola was permitted in Western Australia in the future and was grown by Baxter and blown or carried onto Eagle Rest, my organic certification may be affected or lost, because genetically modified organisms are not allowed in a certified organic system.
37. Baxter responded by saying to me words to the effect that if it (growing GM canola) becomes legal he would probably grow GM canola on his farm.
38. The conversation occurred at Sevenoaks in or about November 2008.
39. Because I was worried about the impact of contamination on my organic certification status, I hoped the Western Australian Government would help me. On or about 10 February 2009 I hand delivered copies of photographs I took of the canola that had come from Sevenoaks, had landed and grown on Eagle Rest to Minister Redman, the Minister for Agriculture in the State of Western Australia. Annexed to my affidavit and marked with the letters “**SM10**” is a copy of the letters and photographs I hand delivered to Minister Redman.
40. Because I was growing increasingly worried about the prospect of GM canola

jeopardising my organic certification, in about April 2009 I hand delivered GMO (Genetically Modified Organism) Declarations to the local Shires, the Western Australian Department of Agriculture and others, stating that Eagle Rest was certified organic and has a zero tolerance of GMO's. Annexed to my affidavit and marked with the letters "SM11" is a copy of the GMO declaration I sent to various organisations in 2009.

41. On or about 25 January 2010 I believe the Minister for Agriculture of Western Australia issued an exemption order under section 6 of the *Genetically Modified Crop Free Areas Act 2003* (WA) exempting any person cultivating GM canola in any part of Western Australia from the application of s.5(1) of that Act, if the GM canola in question was licensed for intentional release into the environment under the *Gene Technology Act 2000* (Cth).
42. Annexed to my affidavit and marked with the letters "SM12" is a copy of the exemption order, published in the Western Australian Government Gazette dated 29 January 2010.
43. Annexed to my affidavit and marked with the letters "SM13" is a copy of a Department of Food and Agriculture Western Australia (DAWFA) Farm Note 407 dated January 2010. The note states:
 - (a) "An exemption order has been issued to permit the cultivation in Western Australia of GM canola that is licensed for release into the environment under the Gene Technology Act 2000 (Cth). Growers should be aware that GM and non-GM crops need to be managed differently. ... Roundup Ready canola will produce volunteer plants in

the same way as non-GM varieties. Plants should be controlled in areas where GM canola was grown and any other places where physical movement of seed may have occurred. Particular areas for attention include ... areas adjacent to where the GM crop was grown.”

44. Annexed to my affidavit and marked with the letters “**SM14**” is a copy of a DAWFA Farm Note 409 dated January 2010. It states:

(a) “Once canola crops are swathed and awaiting harvest, there is a risk that strong winds can move the drying plants into adjacent paddocks. It is necessary to plan for this before planting and develop a plan to manage any resulting GM volunteer plants. The management plans should be discussed with neighbours when planning to grow GM canola in boundary paddocks.” (DAFWA Farm Note 409, January 2010);

45. Annexed to my affidavit and marked “**SM15**” is a copy of a DAFWA Fact Sheet – Organic Farming and Genetically Modified Crops dated January 2010. It states:

(a) “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. The national standard for organic and biodynamic produce specifies the minimum requirements for organic certification.”

(b) “Throughout the world, standards for organic farming prohibit the use of GM materials in the production or processing of organic products. Australian standards also prohibit the use of GM material in organic products.”

- (c) “Under organic certification in Australia: the use of GM inputs is prohibited, growing GM crops is prohibited, the presence of GM in product is prohibited, neighbours must be notified of the organic status of the farm, organic operators must notify their certifier of any GM crop within a 10km radius and any GM contamination may alter the organic certified status.” (DAFWA Fact Sheet – Organic Farming and Genetically Modified Crops, January 2010).
46. Annexed to my affidavit and marked with the letters “**SM16**” is a copy of a DAWFA GM Technology Frequently Asked Questions, January 2010, which states:
- (a) “Organic producers require strict separation distances from non-organic crops to meet certification requirements. ... During review of the Commonwealth Gene Technology Act 2000 ... it was concluded that common law allows effective remedies for persons incurring damage from GM crops.”
47. Annexed to my affidavit and marked with the letters “**SM17**” is a copy of a DAFWA Fact Sheet – Genetically Modified Crops and Farmer Liability, January 2010, which states:
- (a) “Liability for GM crop related issues may occur if there is damage to another party. For example if GM seed spreads from a GM farmer to a non-GM farmer, the GM farmer may face negligence actions ... For GM crops the tort of private nuisance may be relevant because the spread of GM seed or pollen to a non-GM neighbour could compromise the neighbour’s non-GM or organic status.

48. I believe that each of the statements if have referred to above can also be found in the identified Farm Notes and Fact Sheets published on the internet site www.agric.wa.go.au .

GM Canola on Baxter's Property

49. In or about May 2010 I believe Baxter sowed GM canola on Sevenoaks, including in paddocks on the property closest to Eagle Rest along the Qualeup North Road boundary of Sevenoaks.
50. From that time onwards I became very worried that my farm would become contaminated by GM Canola coming over from Baxters property, since the GM Canola had only been planted a matter of metres from our boundary at Eagle Rest.
51. It was my belief that the GM Canola on Baxter's property was likely to be harvested by about mid December 2010.
52. On or about 1 October 2010 I hand-delivered a notice to Baxter which stated, that:
- (a) The use of GMO's including GM canola seed has the potential to cause catastrophic commercial losses to non-GM farmers who have been accredited as being organic, if GMO's enter upon and contaminate a non-GM farm or a non-GM farm production cycle;
 - (b) The principal cause of commercial losses to organic farmers as a consequence of GMO's contaminating a non-GM farm or a non-GM

farm production cycle is the forfeiture of the price premiums attached to the sale of produce grown by organic farmers, and/or the withdrawal of their accreditation as organic farmers; and there may also be other costs incurred as a direct consequence of such contamination;

- (c) Most public risk policies of insurance for farmers have a specific exclusion for claims arising from contamination by GMO's;
- (d) Eagle Rest is an accredited organic farm;
- (e) There is zero tolerance for non-GM farms in Australia which means that any level of contamination of a non-GM farm by GMO's or GM canola will render the affected land as GM contaminated.
- (f) As part of the notice I provided to Baxter, I also gave him a copy of Chapter 3.2 the NASAA Organic Standards.

53. Annexed to my affidavit and marked with the letters "SM18" is a copy of the notice I hand delivered to Baxter, together with additional material I gave to Baxter at the time.

54. In or about October 2010 and November 2010 I also published a series of notices in local newspapers which in each case described Eagle Rest and stated that it was declared GMO-free, and that contamination with GMO's resulting in any forfeiture of GM free accreditation or organic certification may result in court action.

55. Annexed to my affidavit and marked with the letters "SM19" are copies of articles that appeared in the "Bleat" community newspaper, on or about 25 October 2010, 8 November 2010 and 22 November 2010.

56. Annexed to my affidavit and marked with the letters “**SM20**” are copies of articles that appeared in the “Kojonup News” community newspaper, on or about 5 November 2010, 19 November 2010 and 3 December 2010.
57. Annexed to my affidavit and marked with the letters “**SM21**” is a copy of the notice that appeared in the “Darkan Bleat” community newspaper on or about 14 November 2010.
58. In November 2010 I believe Baxter swathed all the GM canola crops growing on Sevenoaks, except those growing in the north-eastern corner of Lot 100 on certificate of title volume 1900 folio 362. Annexed to my affidavit and marked with the letters “**SM22**” is a marked copy of where I believe Baxters’ GM Canola crops were swathed.
59. Swathing is a process designed to make the Canola crop ripen evenly for harvesting. The standing canola plant is cut in half by the swather or harvester, and fed into the machine. The cut (swathed) canola comes out the rear end of the swather in rows. These are known as windrows.
60. The swathed canola lays on top of the stalks. The effect of this is to allow the air to circulate around all of the canola windrow (because it is sitting on top of the stalks, off the ground. The swathed canola typically sits on the windrows generally for a few weeks, depending upon the weather and how long the swathed canola takes to dry out. It can stay there for a month or longer.

GM Canola on Eagle Rest

61. On and shortly after about 30 November 2010 I observed a significant number of swathed canola plants on paddocks 7, 8, 9, 10, 11, 12 and 13 of my property at Eagle Rest.
62. Paddocks 9 and 10 of Eagle Rest are situated on the Qualeup Road North boundary of the property. Paddocks 7, 8, 11, 12 and 13 adjoin paddocks 9 and 10.
63. The swathed canola plants were too many to count. They were everywhere. I inspected and recorded the GPS location of as many of the plants as was possible. Annexed to my affidavit and marked with the letters “**SM23**” is a print out of some GPS locations where I discovered swathed canola plants.
64. I arranged for samples of the swathed canola from Sevenoaks that I found on Eagle Rest to be tested by DAFWA.
65. DAFWA inspected Eagle Rest on or about 3 December 2010 and reported its findings in written reports dated 24 December 2010 and 17 February 2011. The samples of swathed canola were found to have been genetically modified.
66. Annexed to my affidavit and marked with the letters “**SM24**” is a copy of the DAFWA report dated 24 December 2010.
67. Annexed to my affidavit and marked with the letters “**SM25**” is a copy of the

DAFWA report dated 17 February 2011.

68.

- (a) I had a conversation with Baxter in about March 2010 in which he told me he was intending to plant GM canola along the Qualeup North Road opposite Eagle Rest.
- (b) The GM canola that had landed in our paddocks was swathed canola, Baxter had swathed his canola, and I could even see the swathed canola in Baxters' paddock from our property, as it was only a distance of 20 – 30 metres from the boundary of Eagle Rest and Sevenoaks (annexed to my affidavit and marked with the letters “**SM26**” is a copy of a photograph taken from Eagle Rest which shows Baxter’s canola in the background);
- (c) The only other property of which I am aware on which GM Canola was grown at the time was a farm known as Tothills, which is (at its nearest point) 3 kilometres away and at its outer reaches, 10 kilometres away. There are also 2 other farms and a river between Eagle Rest and Tothills. The distance and the topography mean that the GM canola I found on my property in such numbers could not have travelled from Tothills.

Loss of Certification

69. I notified NASAA of the presence of the canola on my land, by fax on 2 December 2010. Annexed to my affidavit and marked with the letters “**SM27**” is a copy of my notification to NASAA.

70. On or about 29 December 2010 NASAA notified me that:
- (a) Because of the GM contamination, 325 Ha of Eagle Rest (paddocks 7, 8, 9, 10, 11, 12, and 13) was de-certified, and all crops on de-certified land were also de-certified and could no longer be considered or classified as organic;
 - (b) de-certified areas would remain de-certified until it could be verified that the GM material had been entirely removed, and for the land to resume organic status, paddocks must be eradicated of GM material;
 - (c) 128 Ha of Eagle Rest remained certified and 6.6Ha was quarantined.
71. Annexed to my affidavit and marked with the letters “SM28” is a copy of the letter from NASAA to myself dated 29 December 2010.
72. Annexed to my affidavit and marked with the letters “SM29” is a copy of the laboratory report commissioned by NASAA in relation to the type of canola found on Eagle Rest dated 29 December 2010. The sample showed a positive result for Roundup Ready GM Canola
73. I am aware that on about 3 January 2011 NASAA issued a press release to the effect that:
- (a) 325 Ha of Eagle Rest (paddocks 7, 8, 9, 10, 11, 12, and 13) were now de-certified, and all crops on de-certified land were de-certified and could no longer be considered or classified as organic;
 - (b) de-certified areas would remain de-certified until it could be verified that the GM material had been entirely removed, and for the land to resume organic status, paddocks must be eradicated of GM material;

(c) 128 Ha of Eagle Rest remained certified and 6.6Ha was quarantined.

74. Annexed to my affidavit and marked with the letters “SM30” is a copy of the press release from NASAA dated 3 January 2011.

75.

76.

77.

78. To this day, paddocks 7, 8, 9, 10, 11, 12 and 13 at Eagle Rest remain de-certified. As a result, 332 Ha of Eagle Rest can only be used to grow or raise conventional produce and 128Ha (or 134.6HA including the quarantine area) is available for certified organic crops or livestock.

79. Annexed to my affidavit and marked with the letters “SM32” is a copy of the certificate of registration for Eagle Rest dated 16 January 2011 (expiring on 4 March 2012). The certificate states that 134.6 Ha are certified for growing certified organic cereals, grains and pulses (oats). Eagle Rest was inspected by NASAA on or about 24 October 2011. Annexed to my affidavit and marked “SM33” is a copy of NASAA’s report on inspection that NASAA provided to me after the inspection.

80. Since the incident in 2010 canola has germinated in paddocks 10, 12 and 13 on Eagle Rest. Four GM canola plants found in paddock 10 on about 23 February 2011. One GM canola plant was found in paddock 12 on or about 12 August 2011, one on about 13 September 2011, one on about 22 September 2011 and one between that date and about 7 October 2011. One GM canola plant was found in paddock 13 on about 7 October 2011.

81. I tested the self sown canola plants initially with a TRAIT RUR test strip. Each tested positive to GM canola. I did this by taking leaf material from the canola plant, crushing the leaf material in a little water and inserting the test strip into the mix. After a few minutes the appearance of two pink lines the strip indicates a positive result for GM canola. When NASAA did its annual inspection for 2011 the NASAA inspector took samples of the self sown canola to test officially with DTS Food Laboratories for the GM trait. The tests were positive for the presence of GM. Annexed to my affidavit and marked with the letters “SM33” is the report I received from DTS dated 4 November 2011 showing a positive result for Roundup Ready GM Canola.

Effect of loss of certification

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

83. First, crop rotation. Species diversity in crop production is a fundamental principle of organic farming (and sustainable agriculture more generally). This means that diverse crops must be regularly rotated through each paddock or production area. Among other things, this allows the land to regain lost fertility and provides the opportunity to break pest and disease cycles and to manage weeds. NASAA standard 4.1 provides that annual crops of the same species, family or similar characteristics shall not be planted more than 2 years out of 5 in a given field and that (subject to some exceptions) in any three year period at

least one year is to be used for a pasture ley phase, a green manure crop or an annual legume. From the time I commenced organic farming I have divided the arable land into three blocks of three paddocks of about the same acreage. The first block comprises paddocks 1 to 6. The second block comprises paddocks 7 to 10 and the third, paddocks 11 to 13. Each block consists of about the same area of arable land. This results in a 2 in 6 year rotation cycle. A ley period for the purposes of crop rotation does not refer to the absence of livestock on the paddock, rather to the absence of crops.

84. Second, organic seed propagation. Organic crops must be grown from organic seed.¹ An important part of managing my farm is to maintain a critical mass of organic seed. It is more economical for me to grow the seed on the farm than it is to buy it. It is also often difficult to obtain sufficient quantities commercially. As a result, some crops grown on certified land need to be dedicated to seed production.

85. Third, it is necessary to feed certified stock using certified feed. This is a basic principle that is reflected for example in NASAA standard 6.5 (“organic animals are fed on certified organic feeds and/or pasture sourced primarily from the farming unit ... the diet must comprise 100% organic feed, be balanced according to the needs of the animal, be sufficient and of good quality...”). It is therefore necessary that part of my available land be dedicated to feeding my sheep. Another consideration concerning sheep feeding is that sheep excrete and spread the seeds they consume on the land on which they are kept. Seed spread on organic land, must be organic.

¹ See for example, NASAA standard 4.1.1

86. The effect of loss of certification for paddocks 7 to 13 is that there is substantially less arable land on which I can grow or raise certified organic produce. Produce or livestock grown on de-certified land cannot be sold as certified organic. The remaining certified land (paddocks 1 to 6) must accommodate the maintenance of organic seed stock and growing livestock feed for certified livestock. I have recently (from 4 April 2012) been granted an exemption from NASAA for the application of organic standard 4.1.2 (crop rotation) for my remaining certified land. The exemption is valid for 12 months, subject to NASAA's annual inspection for renewal of my licence. Annexed to my affidavit and marked with the letter "SM35" is a copy of NASAA's letters to me dated 3 and 4 April 2012.
87. Since the contamination I have done whatever I can to have my farm and resources ready to re-commence certified organic production on the presently de-certified land, as soon as certification is re-instated.
88. Operating an organic system within the much reduced area of land comprising paddocks 1 to 6 is increasingly difficult. The contamination occurred at a time at which I had developed a strong, stable market for my organic oats, was developing and expanding the market for organic lamb, and had obtained a new opportunity to supply grain and flour to a commercial bakery. Each of those opportunities has been severely compromised by the contamination.
89. I have supplied certified organic oats to Mortons Seed and Grain Merchants since 2004. Every year since then Mortons have bought the majority of my organic oats. Mortons take all of the oats I can supply and would take substantially greater quantities from me, if I were able to supply. In short, I

have been able to sell more certified organic oats than I can produce, since 2004.

90. The volume sold the percentage sold to Mortons varies with the season and the crop yield, which is influenced by environmental conditions. For example, during drought yields are reduced and more of the crop needs to be used for livestock feed.
91. Each year I sell a relatively small quantity of oats to other organic farmers so they can use them for seed. I achieve a commercial price for those sales. I usually obtain \$50 a ton above the base price paid by Mortons, which covers cleaning and bagging of the oats. I also retain about 12-15 ton for use as seed and about 30 to 50 ton for livestock feed and sell all surplus to Morton's after seeding and break of the season. If I did not use my oats for seed and feed I would have to buy an equivalent amount, which I would not necessarily be able to do readily, because generally speaking the demand for certified organic oats for export, outstrips supply.
- 92.
93. Because of the contamination the land available to me for the production of certified organic oats has been substantially reduced. As a result, I have lost the opportunity to obtain the premiums available to me for the sale of certified organic oats.
94. We have grown only small quantities of each in the past, but cannot exploit this opportunity to develop spelt and rye crops with such limited certified organic land.

95.

96.

97. I had also agreed with Bodhis that I would supply between 1.5 and 2 ton a month of rye flour at \$1500 a ton. The supply of flour was to commence as soon as I had finished putting production facilities in place at Eagle Farm. I expected to have this done during 2010 and to be ready to supply during the second half of 2011. At the time of the contamination I had purchased three flour mills, a bag sewer and pallet trolley and 1 ton of organic rye seed from in preparation to supply flour to Bodhis. To be ready to supply flour I needed to connect three phase industrial power (via a diesel generator) to my existing shed (at a cost of about \$2000 to \$3000), re-cement the floor of the gain shed where the flour mills would be placed, apply for health & safety accreditation and obtain a set of registered scales. I would have done each of those things had the contamination not occurred.

98.

99. Sheep have been part of our business since we first commenced farming, before we gained organic certification. Before we gained certification we raised sheep mostly for wool. We continued this practice until 2009 when we commenced moving into raising sheep mostly for meat (rather than wool). I have found that organic meat attracts better premiums than organic wool because there is greater demand for organic food. In preparation for moving into meat we started changing our flock from merinos to dorpers, in order to supply organic fat lambs for meat. Dorpers have a high lambing percentage,

high meat yield and a robust constitution. We completed that changeover in 2011.

100. The prices for both organic and conventional lamb fluctuate from season to season. In 2011 we had 484 lambs from 628 ewes (77% lambing). We would have sold those lambs as certified organic but could not do so because our livestock and land were decertified following the contamination. One lamb yields on average 18 to 20kg of dressed weight.
101. At the time of the contamination we had the capacity to deliver a dozen sheep each week for sale.
102. When the contamination occurred we were (together with other organic growers) developing a market for the sale of organic lamb. The infrastructure necessary to support the demand (access to killing space and facilities) is in a development phase.
103. As a result of the contamination and until we are re-certified, our ability to develop our organic sheep production has been significantly curtailed.

Relief sought

104. I am seeking an injunction to prevent my land from being contaminated again.
- 105.
106. I am seeking to avoid two consequences. The first is contamination of the remaining certified land. The second is further contamination of the land that was de-certified in 2010.

107.

108. In March 2011 Baxter told me that he had no plans to cultivate GM canola on Sevenoaks in 2011.

109.

110.

111.

112.

113. If Baxter planted conventional rather than GM canola on his land, the risk of activities on his land contaminating my land with GMOs would be eliminated.

114.

115.

116. Annexed to my affidavit and marked with the letters “SM47” is a copy of the map on which I have marked those areas, in which I believe it would be feasible for the Baxters to cultivate canola. If the canola was planted there, I believe it would make a significant difference to the risk of contamination occurring again and to the extent of any contamination occurring if it did occur at all.

117. Second, Baxter could harvest his GM canola by direct heading rather than swathing.

118.

119.

120.

121.

Stephen Marsh

Sworn: 12 April 2012

Amended: 11 February 2014