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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 WEDNESDAY, 19 FEBRUARY 2014, AT 10.35 AM

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

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

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

KENNETH MARTIN J: Ms Cahill.

CAHILL, MS: Your Honour, just a couple of things before we get going. First of all, in relation to your Honour's direction yesterday, mentioning that the outlines of opening, or the opening arguments of each counsel, were posted on the court website.

KENNETH MARTIN J: Indeed.

CAHILL, MS: It occurred to me overnight that your Honour might wish to consider whether it would also be useful to upload the written outlines of submissions insofar as counsel spoke to those, insofar as the oral outline wasn't the full gamut of the opening on each side.

KENNETH MARTIN J: I think that's an excellent idea.

CAHILL, MS: And I've just mentioned that to my friend.

KENNETH MARTIN J: But I wouldn't do it without counsel's mutual concurrence.

CAHILL, MS: I've just mentioned it to my friend, and he indicated he had no concern with it, but you might wish to
- - -

KENNETH MARTIN J: Then my following question is, do we have them in electronic form so they can be - - -

CAHILL, MS: I believe you do, but we can certainly check that.

KENNETH MARTIN J: And then the other thing, having thought about that also is, not so much you, but, Mr Niall, in the plaintiff's opening submissions there is that little error about me granting an injunction - - -

NIALL, MR: Yes, your Honour.

KENNETH MARTIN J: - - - of an interlocutory kind, which I didn't.

NIALL, MR: Yes.

KENNETH MARTIN J: Can that just either be fixed or corrected, or - - -

NIALL, MR: Yes. Perhaps we will fix that, provide it to our learned friends - - -

KENNETH MARTIN J: Yes.

NIALL, MR: - - - and, once they're happy with it, we will provide it to the court.

KENNETH MARTIN J: Otherwise - - -

NIALL, MR: And that can be done today, and - - -

KENNETH MARTIN J: Subject to correcting that, I'm more than happy to have them both up there as soon as possible.

NIALL, MR: If your Honour pleases.

KENNETH MARTIN J: Thank you.

CAHILL, MS: And I'm reminded that your Honour does have ours in PDF form, so - - -

KENNETH MARTIN J: All right. I will just get my associate to check that and do what we need to do.

CAHILL, MS: Now, your Honour, we did endeavour to accommodate our friends, both in trying to move Dr Preston, but, unfortunately, we weren't able to do that. So he needs to proceed now, and what we've done is have Mr Baxter remove himself from the courtroom. He will sit outside during Dr Preston's evidence.

KENNETH MARTIN J: All right. I will note that Mr Baxter will stay outside for the duration of the video evidence of Professor - is it Professor or Doctor?

CAHILL, MS: Dr Preston.

KENNETH MARTIN J: Dr Preston. Yes.

CAHILL, MS: Now, your Honour, just in relation to Dr Preston's report, we can save you the burden of dealing with any objection arguments if we approach it in this way, as I understand it. If we go to page 8 - - -

KENNETH MARTIN J: Yes.

CAHILL, MS: And in the section that commences with the question number 7.

KENNETH MARTIN J: Yes.

CAHILL, MS: The last paragraph that commences, "This value," and ends with, "Canola seed".

KENNETH MARTIN J: Yes.

CAHILL, MS: If those three lines are struck through.

KENNETH MARTIN J: Two lines?

CAHILL, MS: The two sentences, three lines, is how I identify them.

KENNETH MARTIN J: All right. Two sentences, three lines, are gone.

CAHILL, MS: Yes. Thank you. And then, as I understand it, the - if your Honour goes to page 7.

KENNETH MARTIN J: Yes.

CAHILL, MS: And there's a reference in the second paragraph that commences, "I concluded from this trial". If you have that paragraph there - - -

KENNETH MARTIN J: I have that.

CAHILL, MS: - - - there's a reference to the EU tolerances for adventitious presence limits of 0.9 per cent for non-GM canola. See that there? Just in the middle of that second - - -

KENNETH MARTIN J: I've got 0.9 per cent for non-GM - - -

CAHILL, MS: Yes.

KENNETH MARTIN J: - - - canola as stipulated by the EU. Yes.

CAHILL, MS: Yes. This evidence is tendered not on the basis that Dr Preston is opining or concluding as to what those limits are; he is assuming that that is what the limits are in his evidence when - and opinions are referable to that assumption. The evidence in relation to that, your Honour, appears in volume 6 of the book of documents. I'm sorry I can't say this with more precision, but documents 148, 152 and 153 deal with the EU regulatory framework, and it's somewhere within those documents, and I will be more precise by closing, your Honour, though the facts supporting that assumption - - -

KENNETH MARTIN J: All right.

CAHILL, MS: - - - are there. Now, at the same - - -

KENNETH MARTIN J: Are those documents currently in, or (indistinct) - - -

CAHILL, MS: Yes. Yes. They're tendered.

KENNETH MARTIN J: Yes. All right. Yes. Thank you.

CAHILL, MS: And then the other point, I think, is at page 6. Yes. Thank you. Yes. Does your Honour see, in the second half of the page, the paragraph commencing, "My co-authors and I concluded"?

KENNETH MARTIN J: I do.

CAHILL, MS: And, in the third line, there's a reference there to market thresholds for adventitious presence, and that's evidently from the second line in the context of the Australian Agricultural Environment. The same point is made here, your Honour, that Dr Preston - we're not seeking to tender this as evidence of Dr Preston's opinion or conclusions about what those market thresholds are. That evidence is at page 8, your Honour, in the first two paragraphs at the top of the page.

KENNETH MARTIN J: Sorry. Page 8, the top two paragraphs - - -

CAHILL, MS: Yes. So - - -

KENNETH MARTIN J: - - - is dealing with the Australian Oil Seed Federation. Is that the source?

CAHILL, MS: Yes. The standard that sets out the tolerance for an adventitious presence between - in non-GM canola, you can have up to that threshold of adventitious presence - - -

KENNETH MARTIN J: I see.

CAHILL, MS: - - - of GM in non-GM.

KENNETH MARTIN J: I understand.

CAHILL, MS: According to that standard, that there's reference to there. So that's the assumption that underpins page 6, when the reference is to market thresholds.

KENNETH MARTIN J: Got it. Thank you.

CAHILL, MS: Thank you. So, with those explanations and the excision on page 8, your Honour, my friend can let your Honour know, but I understand that there's no objections.

KENNETH MARTIN J: All right. So now we should swear Professor Preston and adduce his - - -

CAHILL, MS: Dr Preston. Yes.

KENNETH MARTIN J: I beg your pardon. Dr Preston. All right. Dr Preston, I see you there on the video. Can you hear us without difficulty?

PRESTON, DR: Yes, I can hear you.

KENNETH MARTIN J: Yes. All right. Well, I think good afternoon there. And I will now ask you either to take an oath or an affirmation via my orderly, as you so choose.

PRESTON, CHRISTOPHER affirmed:

KENNETH MARTIN J: Yes, Ms Cahill.

CAHILL, MS: Thank you, your Honour. Dr Preston, could you please state your full name and address for the court?---My full name is Christopher Preston. Do you want my home address or my working address?

Your home address, please?---My home address is 15 Vera Street, Paradise, South Australia, 5075.

Thank you, Dr Preston. And can you please identify - you've got in front of you, haven't you, your report that you prepared for the purposes of these proceedings, dated 4 December 2013?---I do.

And that's signed by you at page 15?---Yes.

Could you go to page 8, please. And, under question 7, could you please, with a pen, strike through the last paragraph, commencing, "This value was set". Thank you. Now, in relation to your report, Dr Preston, are the statements of fact that are contained in it true and correct?---As far as I'm aware, they are true and correct.

And insofar as your report contains your opinions, are those opinions honestly and reasonably held by you?---They are honestly and reasonably held by me.

Thank you. I tender the report, your Honour.

KENNETH MARTIN J: Yes. Very well. Dr Preston's expert report, which, on page 15, I see he has signed on 4 December 2013, with the excisions now identified, will be exhibit 27.

EXHIBIT 27 Defendants DATE 04/12/2013
Export report of Dr Christopher Preston

CAHILL, MS: Thank you, your Honour. I have nothing further.

KENNETH MARTIN J: Thank you. Cross-examination?

NIALL, MR: Thank you, your Honour. Dr Preston, my name is Niall, and I appear for the plaintiff. Can you hear me clearly?---I can hear you.

And can you see me?---I cannot see you.

All right. Sometimes there's a disembodied voice can be a bit disconcerting. So, if you have any difficulty hearing me, please let me know, Dr Preston. In this proceeding, his Honour has heard some evidence from an Andrew Bishop from the Tasmanian Department of Primary Industries. Are you familiar with Mr Bishop?---I am familiar with Mr Bishop.

Yes. And, in his evidence, he referred to some trials conducted in Tasmania, in the 1990s up into 2000, in relation to genetically modified canola at various locations in Tasmania. Are you familiar with those trials?---I am familiar with those trials.

And one of the aspects - in general terms, the trial involved looking at paddocks over time that had been sowed with a single season of genetically modified canola. Isn't that right?---That's typically the case. Yes.

KENNETH MARTIN J: Apologies, Mr Niall, but we've got a transcribing problem that needs to be addressed by just a short adjournment.

NIALL, MR: If your Honour pleases.

KENNETH MARTIN J: It's holding up the transcription process. A short adjournment to restart the machine will apparently fix it. So we will just adjourn briefly pro tem.

(Short adjournment)

PRESTON, CHRISTOPHER:

KENNETH MARTIN J: Yes, please be seated. Now, Mr Niall, I understand we're all functioning again. Yes.

NIALL, MR: Thank you.

KENNETH MARTIN J: Professor Preston, can you hear us all right?---Yes, I can hear you.

Yes, thank you.

NIALL, MR: Dr Preston, just before we paused, I was just asking you some questions about a trial that had - or some evidence that Mr Bishop had given about a trial in 1990s to 2000 and you indicated that you were familiar with those trials that Monsanto had conducted. Is that right?---Yes, that's correct.

Now, one of the aspects of the trial was to identify when the sites would be regarded as cleared of GM canola volunteers. Do you understand that?---Yes.

So at the conclusion of the trial the - in that case, the Department of Agriculture in Tasmania would sign off in circumstances that the site had been cleared of GM canola volunteers. Now, the criterion that the department used in that context was that there had been - a site would be regarded as clear if over a period of two years for a site that had been cultivated at least twice and for no GM canola to have emerged. That was the evidence of Mr Bishop. Now, if that was the criteria for determining whether or not the site had been cleared, you would regard that as a reasonable criteria, wouldn't you?---Well, they are the criteria that was set for those trials.

Yes. And just looking at the period of time, a period of two years with no GM canola to emerge would be a reasonable criteria to apply to describe a site that had been cleared of GM canola volunteers. Agree with that?---Well, that actually depends on what had gone before.

All right. But certainly it's reasonable for a period of not less than two years with no GM canola to have emerged would be a reasonable time as assessing that area as being cleared of GM canola volunteers?---Well, you wouldn't want to use a time of less than two years. Is that the question you're asking me?

Yes?---Okay. I would agree with that.

And that period of not less than two years clear of canola volunteers accords in general terms with the research that you published in 2008 with Janine Baker, which you refer to on page 4. That's right, isn't it?---That research demonstrated that under normal farming practices practiced by the growers in that region, after that period of time they had no viable canola seed left in the seed bank as we could measure in the test that we did. So the time is somewhat coincidental but it's similar.

Yes. Now, in - have you got page 4 of your report, Dr Preston? Do you have that, Dr Preston?---I have that here.

Sorry?---It's in front of me.

Thank you. Just to position the point, you will see the question that you were asked in bold as question 3?---Yes.

And at the bottom of that page in the last sentence - sorry, at the start of the last paragraph you reach a conclusion that volunteer canola would occur in crop fields in the years after canola production but the seed bank would decay rapidly. Do you see that?---Yes.

And you conclude in the last sentence that at 3.5 years no germinable seed - canola seed remained?---That is correct.

And that was the result that the report or the research arrived at, wasn't it, there would be no germinable - - -?---They were the - - -

No germinable seed at 3.5 years?---They were the results of that research, yes.

So above that paragraph about the second paragraph below the bit involved where it says, "This research determined." Do you see that paragraph?---Yes, yes.

Continuing:

This research determined that canola seeds banks in the commercial fields decayed quickly after canola harvest and no viable seed remained after 2.5 years.

That should be 3.5 years, shouldn't it, Dr Preston?---No, because the two things are actually slightly different. So we measured at two and a half years and at three and a half years and after two and a half years, we found no viable canola seed. We measured at three and a half years. The seed that we did find was not germinable. So one is after and one is at, so the only point we had after was at three and a half years.

Wasn't it the case that at 2.5 years in a no tillage environment, the percentage of recovered seeds germinating was nine per cent?---That was the case at 2.5 years.

Yes?---But not 3.5 years.

No. So as at 2.5 years there was recovered seeds germinating, wasn't there?---There was at 2.5 years but not afterwards.

All right. So at 2.5 years viable seed remained in the seed bank?---That is correct.

Thank you. But it wasn't until 3.5 years that that research determined that there was no germinable canola seed remaining?---That is correct.

Now, could you - I'm going to take the witness to exhibit 10, your Honour.

KENNETH MARTIN J: Yes. Does - - -

NIALL, MR: I think the witness has it and I will just - Dr Preston, do you have a document which has been tendered in the proceeding and given exhibit number 10, which is an aerial photograph with some red notations and then following pages - some letters and numbers describing GPS coordinates in various paddocks. Do you have that?---That was sent to me late this morning.

All right. Can I just identify it for you, Dr Preston, so that we have got the same document. The front page is the aerial photograph with various dots on it and numbers - - -?---Yes.

- - - letters. And then what follows is nine pages of handwritten GPS coordinates?---My version has three aerial

photographs followed by one, two, three, four, five, six - nine pages of handwritten notes.

All right. Thank you. Now, just if you take the front page of that - - -

KENNETH MARTIN J: As I understand this exhibit, the front page is actually a better copy of the - - -

NIALL, MR: The succeeding - - -

KENNETH MARTIN J: What's now page 2. So hopefully there's no distinction - - -

NIALL, MR: Yes.

KENNETH MARTIN J: - - - except that the first page is a - - -

NIALL, MR: Clearer version. I think that's - - -

KENNETH MARTIN J: - - - more legible and clearer aerial photograph.

NIALL, MR: I think that's right, your Honour.

KENNETH MARTIN J: Is that right, Dr Preston?---Yes, that's correct.

Yes, excellent.

NIALL, MR: Just looking at the front clearer version of the document, now, what I want to ask you to assume is that this records the locations on which canola swathes were found on the Eagle Rest farm belonging to the plaintiff in - - -?---So that would be the dot?

Yes. So each of those dots - - -?---(indistinct) location - - -

Each of those - - -?---(indistinct)

I'm sorry, Dr Preston, I cut you off?---Sorry. So each of those dots is a location where a swathe - - -

Correct?--- - - - or (indistinct) what was found.

And they number about 243 or about - just rounding up to 250. I just ask you - - -?---(indistinct) 242. Is that correct?

Let's assume 242, Dr Preston, and that's recorded in April 2011. And what I want to ask you to assume is that the event that led to the swathes being on Eagle Rest occurred in late November or early December 2010. Do you understand that assumption?---Yes.

So - and I will ask you to assume that what happened was that the swathes - a certain number of swathes blew over in late November, early December, and in April 242 were observed on the property in this location. Do you follow that assumption?---Yes, I'm working on that assumption.

Thank you. Now, you would agree with me that the process by between the time they left their starting point on the adjoining farm and April involves a dynamic process. Would you agree with that?---Dynamic in what way?

Well, they have been moved, in this case, by the wind?---Okay.

And they would be exposed between December and April to the elements on the farm during that period. Would you agree with that?---Okay.

Or you are asked to assume. In that context the elements would vary from day to day?---Well, they would.

Things like the wind speed would vary from day to day?---Well, I assume it would.

And so you would agree that on those assumptions, at April when this data was collected, 2011, that represents a snapshot of a process that commenced at an earlier point in time?---In that it commenced when the canola was harvested?

Yes. Do you agree with that?---Yes. Yes.

And the snapshot that's taken in April 2011 would not necessarily - in fact, it would be unlikely to be exactly the same as the circumstances that existed, for example, in the middle of December 2010. Do you agree with that?---I cannot actually answer that because I don't have the information to address that point.

What information would you need?---Well, I would need to know where they were in December 2010.

And you can't necessarily rely precisely on what you observe in April 2011 to know what the position was in December 2010. Do you agree with that?---Well, he may not

- they may have all moved in one event or they may have moved in more than one event. This provides us no information on that so I cannot answer.

All right. And if each of these dot represents the location of a swathe in April 2011 and there had been blown across from the farm on the southern side, across the road and into the farm where they find their resting spot in April 2011, there's no scientific way of determining precisely the seed bank that the swathes might have deposited on Eagle Rest, is there?---Well, there would be if somebody had gone and done it.

Done what?---If they had gone and measured the seed bank.

Well, how would they have done that?---Well, you would take cores out of the soil and then you would extract the seeds out of those cores and from that you can estimate what the seed bank is.

But you would have to do that across a very large percentage of the potential area, wouldn't you, to get some accurate picture of the seed bank.

Yes. If you wanted an accurate picture of the seed bank, you would have to take lots of samples. Yes.

And you would have to take them over many areas and not just the areas in which the swathes were found in April 2011. You agree with that?---Well, presumably you would also, if you were wanting to ask - answer that question, you would look at the areas between where the swathes were in 2011 and where they started at harvest.

And it's unlikely, I suggest, that the distribution across the farm or the effected paddocks in Eagle Rest would be uniform?---It's highly unlikely it would be uniform, that's as regards seed distribution.

As regards seed distribution?---That's correct. It's highly unlikely it would be uniform.

And, again, simply knowing where a swathe is at a particular point in time, wouldn't enable you to conclude as to whether or not seeds from that swathe might have been distributed other than at its resting point. You agree with that?---That would be an unsafe conclusion to make.

Thank you. Now, another way to examine or consider the seed bank would be to await and see whether there's germination. Do you agree with that?---That is correct.

And that would be from a farm perspective, the usual way you would determine whether or not there was a seed bank of certain weeds on your property?---Some farmers do that but today, many farmers actually take the approach of looking in their crops at or before harvest to see what weeds they have in their crops so they can estimate what the seed bank is likely to be in that paddock next year.

But that process requires germination, doesn't it?---No, it doesn't.

Well, how do you - - -?---You go out and look in the crop and you see weeds in your crop set in seed, you know that you are going to have seed in that place next year.

I understand that, Dr Preston. But in order to count - what you are doing is counting the weeds that have, in fact, germinated?---Not at that stage you are not, no.

Well, just make - so that I understand it. You go into a crop and you count the weeds that you see?---Well, the sort of approach that vendor growers take is that they look in their crops at or before harvest to see what weeds they have left in their crop because they are the weeds they are most likely going to be dealing with next year. If they want to determine what they have got in their crop for next year, yes, they would go out and look in their crop but the problem most of our - most of the growers in Australia currently have is that if weeds come up in their crop, they have a limited number of tools to use to control it. They mainly rely on pre-emergent herbicides, in which case you need to know what was in the field the year before.

I understand, Dr Preston, but can I just put this to you - when the farmer goes into the paddock to look at see what weeds they have got, they look at weeds that have germinated. Correct?---They will do so at that stage, yes.

Well, prior to germinating, prior to the word germinating, there is nothing to see by a visual inspection, is there?---Well, unless you can see the seed heads from last year.

Yes. Right. So the seed heads from last year would give you an indication that you are likely to have some seeds of that type in your seed bank?---Absolutely.

Thank you. But, in terms of managing weeds, what a farmer does, I take it, is that - a good farmer, as you describe it - is that they go through a paddock and look at weeds

that have germinated in amongst their crop. That's right?---No. Typically by the time they do that, it's too late.

Well, it's not too late to count the weeds at that point?---Yes. But it's too late to take any management action.

Yes. But it would give you an idea as to what the seed load is likely to be in the succeeding year?---No. Not if you looked at what was sitting in your crop as a seedling. What you need to do is look what you've got towards the end of the season.

Well, looking at the end of the season, what you're still looking for is germinated weed plants, correct?---What you're looking for is seed heads of flower - or seed pods, because that's the thing that we focus on, not so much the number of plants. We will look at the number of seed heads they've got, because that determines the likely seed rain that's going to go down onto that paddock.

All right. But you would agree with this proposition, is that when you're looking to manage a weed problem, you - a farmer would look at least some point after the weeds have germinated on their property?---They would generally do that to assess how well their weed control management had been up to that point.

And then if they see weeds that have germinated, they can then manage them, correct?---That depends on what tools they have available.

Yes?---I explained before that the vast majority of broad acre farms in - farmers in Australia, for many of their weeds, actually no longer have a way to manage them at that seedling stage; they have to either manage them before the crop goes in, or they need to take management at the end of the season to stop seed going into the seed bank.

And management tools in conventional farming would usually be, or would include a herbicide approach?---Herbicides would be a major management tool for conventional farmers.

Now, you refer then to - well, you referred in your evidence to the word "weeds", and I just want to ask you a couple of questions about the definition of a weed. A weed is something growing on the property that is not wanted or intended to be there. Is that a definition of a weed?---The usual definition of a weed that we would use

would be that it is a plant out of place or a plant that is not wanted at that time and place.

So, to give you an example that's the subject of some evidence in this case, you're obviously familiar with rye grass?---Yes.

Yes. And rye grass is used as a valuable component of pasture, isn't it?---It is.

And indeed, some farmers sow rye grass into their pasture paddocks, don't they?---They do.

And it's a desirable in a pasture because it provides good feed for grazing stock?---That is correct.

The same plant in a crop might be considered a weed, mightn't it?---It would be.

It would be. So rye grass in one paddock is desirable, and in an adjoining paddock, it's a weed. Correct?---That is correct. That could be correct.

Yes. And in the context - I withdraw that. So looking in the context of agriculture, at this concept of weeds, much turns on what's intended or accepted within that particular agricultural area, and it might be a farm?---Well, it all - it all turns on whether you desire to have that plant growing in that place at that time. So a farmer, for example, who rotates between pasture and crop, might like rye grass one year but not the next year.

And where it's not wanted, that requires - the plant will require to be managed?---That's correct.

And the management tools that are available to farmers - I withdraw that. Now, in page 6 of your report, Dr Preston, you make some references, in the third last paragraph, to market thresholds for adventitious presence of GM canola. Do you see that?---Yes.

In expressing that paragraph, you didn't turn your mind to the question of the organic market, did you?---No, because, as far as I'm aware, there's no organic canola market.

All right. And so the only market you're considering there is the market for canola, is that right?---That is - that is indeed, because that's the only market I'm aware of in Australia.

All right. Thank you. They're the only questions I have. Thank you, Dr Preston?---Thank you.

KENNETH MARTIN J: Yes. Thanks, Mr Niall. Any re-examination?

CAHILL, MS: Yes. Just briefly. Dr Preston, at page - you were asked some questions about page 4 of your report?---Yes.

The studies that you refer to there, the research was in respect of areas where canola had been deliberately planted, is that right?---That is correct. So these were farmer's fields where they had sown a canola crop.

You were asked some questions about the fourth last paragraph, where you refer to a conclusion about no viable seed remaining after 2.5 years, and then the last paragraph, where there was a conclusion that there was no germinable canola seed remaining after - at 3.5 years. Can you explain to his Honour what the difference is between viable seed and germinable seed?---Well, we measured viable seed by germinating it - by getting the ability to germinate, but we also had a look at some tetrazone in tests, which determined viability. But I think the crucial point about those two statements is that one's talking about after two and a half years because we found viable seed at two and a half years, and the other one is the actual measurement that we made.

All right?---But, for the purposes of the work that we did, you can assume that viable and germinable are equivalent.

Now, in relation to viable - the viability of seed, if weed seeds are left on the top of a pasture between December and April in Southern Australia, what effect do you expect that to have on the viability of the seed?---If they're left on the top of the pasture, you will have some reduction in viability of that seed, but the pasture itself would actually tend to protect that seed a little from the elements.

All right. Why is it that you look at seed heads rather than the weeds themselves? Can you explain "to assess the weed rain", I think you said?---So the work that we do around weed management, and increasingly because of the way farmers are running their farms, we would look at seed heads because that tells us how much seed is likely to fall into that field in that year. If you don't look at it that

time of the year, you have to go back next year and count germination. And, as I explained in the - when the point was raised earlier, that the majority of farmers growing wheat, for example, in Australia had very few products that they can use against some of their key weeds at that time, because they no longer work. So they're principally using herbicide before they put their crop in. So in order to make a good choice about which herbicide or which herbicide combination you use at that time and point, you need to know how much of the weeds you're targeting is likely to be there, which is why you really need to know what's setting seed the year before.

All right. And is that the primary determinant, what seed head or quantity of seed head has been there the year - has been present the year before, rather than in years prior to that?---The majority of agricultural weeds we have, not all of them, but the majority of agricultural weeds we have, have a relatively short weed seed bank, that is, they decline typically anywhere from 50 to 90 per cent in one year. So the vast majority of what you have in the field in one year has been weed set the previous year rather than weed coming from the seed bank. There are some weeds that are exceptions to that rule because they have extended dormancy and will come up in later years in larger numbers.

And where does GM - sorry. Where does canola fit in relation to that?---Canola is a species that typically has low levels of seed dormancy, and you would expect that most of the canola seed that was shed in one year would germinate in the next 12 months.

All right. And GM canola is no different from conventional canola in that regard?---Not as far as I'm aware.

Thank you. You were asked some questions about determining these - the seed bank in the paddocks that you were shown in that map. Mr - sorry. I beg your pardon. Dr Preston, if you had no information other than that map and the fact of there having been an incursion of GM canola swathes across paddocks 7 to 13, are you able to say about how many samples, approximately, might need to be taken in order to assess the quantity of the seed bank in those paddocks?---If - well, that's a little bit difficult question to answer, actually, because it depends on what level of information you know. Do you want to know the average seed bank across the paddock? If that's the answer, then we would look at probably taking 50 samples.

All right. And what other - - -?---If you wanted to know the distribution across the paddock, we would take a much larger number of samples.

And could you say, approximately, how many you would want to take in order to ascertain the distribution?---How accurate would you like that distribution to be?

Well, what sort of a range would you consider to be acceptable?---Well, I think the reason I ask that question, it actually boils down to experimental design. You take a number of samples depending upon the level of accuracy that you would like to have in the final result. So if you don't know what level of accuracy you want in your final result, you can't actually design an experiment properly.

All right?---So if you were interested just was there likely to be low, medium and high, and a distribution across that, we might look at 150 samples.

I see. Thank you?---If you wanted actual numbers we would do a lot more.

All right. Thank you. Nothing further, thank you, your Honour.

KENNETH MARTIN J: Yes. Thank you very much. Right. Dr Preston, thank you very much for assisting us over the video from Adelaide today. That completes your evidence and you're now excused?---Thank you.

(THE WITNESS WITHDREW)

KENNETH MARTIN J: Now, we revert to Mr Baxter's cross-examination?

CAHILL, MS: That's it.

KENNETH MARTIN J: All right. If we could have Mr Baxter back, please.

BAXTER, MICHAEL OWEN:

KENNETH MARTIN J: Yes. Thanks, Mr Baxter. Take a seat, and we will now resume your cross-examination. Yes, Mr Niall.

NIALL, MR: Thank you, your Honour. Mr Baxter, would you take up volume 3, please. Volume 4, I'm sorry, Mr Baxter.

I beg your Honour's pardon. (indistinct). Page 1225, Mr Baxter. Do you have it there?---Yes.

Thank you. Now, yesterday I was asking you some questions about this document which was provided to you when you attended the seminar in relation to Roundup-Ready, correct?---That's correct.

Are you able to put a date on the seminar?---It would have been March/April. I think it was some time around there. March, I think.

2010?---Correct.

Now, if you go over to page 1227, you agreed with me yesterday that the two issues that the management plan was looking at was, firstly, glyphosate resistance, and second, segregation, wasn't it?---Yes.

And here at page 1227, the document is dealing with some issue about glyphosate resistance. And you will see at the top of 1227, paragraph 1, it says:

Aim to enter Roundup-Ready canola phase of the rotation with a low weed burden.

- - -?---Yes.

Now, by January, you were intending to enter into a Roundup-Ready phase in three paddocks, weren't you?---Yes.

That was Range?---Yes.

Mailbox?---Yes.

And Two Dams?---Correct.

You didn't take any steps prior to 2010, in the preceding two years, to ensure that you had a low weed burden to commence Roundup-Ready sowing, did you?---Yes, I did.

What did you do?---Prior to those years - prior to those years we were using double nox before we always planted our crops. We were using incorporation - incorporating chemicals to stop those weeds coming up afterwards. In the summertime, before we - when we were burning our stubbles, we were using hot burns to try and burn the seed. And, in other paddocks, at times, we would spray through some barley crops to try and stop the weed burden.

Do you say that those three paddocks that you had identified in January had a low weed burden?---They weren't low; they would have been medium weed burden.

Well, in paragraph 45 of your statement - do you have that there?---Yes.

You identify there that Range and two paddocks had a severe problem with HRWR in those paddocks. Now - - -?---Yes. They had problems with rye grass resistant - yes - with chemicals (indistinct) the - - -

But there was a low weed burden in those paddocks, was there?

CAHILL, MS: He says medium.

THE WITNESS: Medium weed burden.

NIALL, MR: I beg your pardon?---I would have had medium - well, medium weed burden (indistinct) always control the weeds as much as you can, every time we plan the crop. And the rye grass resistance went with the Roundup.

You knew there was methods - prior to March 2010, you knew there were methods other than herbicide to reduce the weed burden, didn't you?---Other methods, as in?

Well, did you consider there were other methods, apart from herbicide, in March 2010, to reduce the weed burden?---Well, I know there are other ways you can reduce weed burden.

Yes. Which ones had you adopted prior to March 2010?---Prior to March 2010, I just set - you mean apart from chemicals?

Yes, apart from chemicals?---Well, apart from chemicals, like I said, we were hot burning stubbles.

Did you hot burn Range?---I would have done it before I planted it, yes.

When?---That would have been in the March period.

I thought you put your stock on the paddocks?---I do, yes.

Well, do you both hot burn and put the stock on, is it?---Well, the stock run the stubbles after you finish harvesting. And it would be in the March, April, probably

March is when you're permitted to burn, especially when you start getting your paddocks ready for sowing.

So when did you burn Range paddock?---It would have been in March.

2010 you burnt it, did you?---Yes, that's part of all my - well, most of my cropping - most of my paddocks.

And Two Dams?---Yes.

All right. Well, apart from burning, was there any other non-herbicide methods that you adopted?---No non-herbicide. Sheep are (indistinct) sheep don't really control your weeds.

Now, if you look down to point 7 on that page?---Which one are we looking at, sorry?

1227?---Yes.

And you will see it goes - numbered 1 through to 7. It said:

Test weed population for herbicide resistance status as part of ongoing integrated weed management.

Now, you didn't do that, did you?---No, I didn't.

Why not?---Well, I didn't say it was - it didn't say it was a - you had to do it. It was just part of it.

Is the reason you didn't do it because Monsanto didn't tell you that you had to?---No.

Well, why didn't you do it?---Because it was more a choice and I didn't feel I had to.

You were confident that you had an understanding of your weed resistance profile?---I had a reasonable understanding of it.

And that was limited to FOPs and DIMs - - -?---That's correct. There was no resistance to glyphosate that I know of.

And no resistance to atrazine as far as you were aware?---That's correct.

So atrazine was effective in controlling the weeds?---Fairly effective, yes.

Yes. Now, at this time, through 2005 to 2010, you were planting what's called TT canola, weren't you?---That's correct.

And TT canola is immune to atrazine, isn't it?---Immune to atrazine, TT canola?

Yes?---No, I don't think so.

Well, you can spray atrazine over - - -?---I see what you mean.

Over a TT crop after it has emerged, can't you?---Yes, you can.

KENNETH MARTIN J: That's a post-emergent herbicide.

NIALL, MR: Yes. So atrazine is a post-emergent herbicide, isn't it?---I would use and buy pre and post.

Yes, and you can spray a TT canola crop with atrazine after it has emerged - - -?---Yes.

- - - because it's tolerant of atrazine, isn't it?---That's right.

But conventional canola, and I'm using the conventional not in the - distinction to genetic but fewer conventional canola, that's not resistant to atrazine, is it?---Does conventional mean, like - I've lost, yes, what you mean about conventional.

Yes. Well, you have got some forms of canola that are not immune to atrazine?---That you mean you cannot apply - - -

Yes?--- - - - to some canolas.

Yes?---Yes.

The only ones you can apply it to are TT canola?---That's correct.

And between 2005 and 2010, you had planted TT canola, hadn't you?---Yes.

And you had used atrazine?---Yes.

As a post-emergent herbicide?---As well as a pre, yes.

Pre and post-emergent herbicide, correct?---Yes.

And it was effective in controlling weeds?---Yes, it was.

Thank you. Now, over on the next page - sorry, 1229 of this document, you will see up at the top of 1229 under the heading PRAMOG Directions for Use. Do you see paragraph 123?---Yes.

And paragraph 1 says:

All farmers must complete a PRAMOG assessment, regardless of whether or not they intend to use glyphosate herbicide in the year following Roundup.

See that?---Yes.

And you did that in relation to the two paddocks in 2010?---Yes.

In the next paragraph it says:

Glyphosate herbicide should not be applied in the year following Roundup-Ready canola unless this is not feasible or practical.

Now, every time you have planted Roundup-Ready canola you have used glyphosate in the following year in that paddock, haven't you?---That's right.

So you ignored, did you, the advice of Monsanto that glyphosate should not be applied in the year following Roundup-Ready?---Yes, it only says if it's feasible.

Well, why was it not feasible for you to use something other than glyphosate?---Yes, it was also feasible but it was my choice to use glyphosate.

Well, why did you chose to use it?---Because it was still an effective herbicide.

Yes. It was still effective at that point, was it?---It still is and it will be for a long time.

If you use it every year on your farm, your understanding is it will still be effective for a long time?---Correct.

You are not concerned about herbicide - glyphosate-resistance on your farm?---Well, it's always a concern to everybody, but as far as I'm concerned, if you make sure you have eliminated all your weeds and most weeds as possible, well, in jeopardy, it will be for a long time.

And you eliminate all the weeds by using glyphosate, don't you?---That's not the only tool.

Yes, but certainly, always glyphosate?---It's one of the tools I use, yes.

And it's one that you use every year?---Yes, one of the tools.

And you are not concerned that that might lead to glyphosate-resistance?---Not for a long time, no.

How - over what period?---Well, that period is unknown. It is certainly going to be for a long time. There is no evidence of any rye grass, any glyphosate-resistance in the south west of WA yet.

Did you - you didn't have any of your weeds tested for glyphosate-resistance, did you?---No.

Why do you think - what was your understanding of why it was recommended that you should not use glyphosate in the year following?---The recommendation is - the recommendation is because - to try and use less of the glyphosate.

Why?---Why? Well, because of the overuse of glyphosate.

And what was the problem with that, Mr Baxter?---Well, as we have been discussing, the resistance to it.

Yes. So you were getting advice that continued use of glyphosate was likely to lead to resistance, weren't you?---Advice?

Yes?---There was advice that you could get resistant to it.

Yes. But you ignored that, didn't you?---No.

Now, over on the next page - or, perhaps, those two pages, 1229 and 1230, they describe the process of you completing a PRAMOG profile, doesn't it?---That's right.

And you will see over on 1230, you see that there's table there?---Yes.

And it says, in the top - in the left-hand column, Glyphosate-Resistance Index. Do you see that?---Yes.

And then Herbicide Bode Resistance Status?---Yes.

And it said under the column:

It is recommended that the farmers seek advice from their technology service provider or other expert sources to ensure an integrated weed management plan is established for all paddocks.

Did you seek that advice from Mr Robinson?---Yes.

And do you say that he gave you an integrated weed management plan?---Yes.

And that consisted of what?---Well, we would have sat down together and went through what we used and what we are planning on growing and, well, what different tools we can use.

And so the crop plans, that's the evidence of the integrated weed management plan that Mr Robinson suggested for you, is it?---That's just a preliminary plan of crop stage.

Well, anything else in writing where he has recorded an integrated weed management plan?---Not in writing, no.

And you will see that if you get a score of one under this table, which you will fill out, and I will take you to the one you filled out in a minute. You say:

A minimum of one additional managed practice must be nominated and implemented.

Do you see that?---That's in number 1?

Yes.

One equals a minimum of one additional management practice must be nominated and implemented.

?---Yes. I can see that.

Yes. And the next line is:

2. A minimum of two additional management practices must be nominated and implemented.

You see that?---Yes.

And then there's an asterisk that footnotes down two lines or three lines, where it says:

It is recommended that farmers seek to voluntarily leave glyphosate out of their herbicide program for at least one year in the next three years following Roundup-Ready canola.

You don't agree with that recommendation, do you?---Well, it's only a voluntary recommendation.

You haven't accepted it, have you?---Well, not at this stage. I have been doing other management practices.

Now, if you go over to page 1263 - pardon me, your Honour.

KENNETH MARTIN J: Yes. 1263, was it?

NIALL, MR: 1263, your Honour. My copy is quite unclear, so I can hand a more legible - I'm not sure how your Honours' or the witnesses' fares, but I will hand up - - -

KENNETH MARTIN J: Similarly deficient.

NIALL, MR: While I'm at it, your Honour, I will hand up 1262.

KENNETH MARTIN J: Thank you.

NIALL, MR: Now, I want to take you, Mr Baxter, firstly, to the PRAMOG summary sheet, the coloured one that I've just handed to you?---Yes. I've got that.

You see that? And was that completed by you or was it completed by someone else? 1263?---No. It wasn't completed by me.

Do you know who completed it?---It would have been my Kojonup Agriculture Shop, where I purchase my seed from. We did that together.

KENNETH MARTIN J: Sorry. The Kojonup Agricultural Shop, is that the - - -?---That's correct.

Thank you.

NIALL, MR: Did you just ask them to fill it out for you?---No.

Well, what were the circumstances where the Kojonup Agriculture Shop came to fill out this form?---What were the circumstances?

Mmm?---Well, that's where I've always purchased my seed from, and chemicals. Originally they used to employ agronomist that I used to use - or Chris Robbo used to work with them originally. So we have a very close relationship of our farming practice.

Did you tell them what to put on this, or did you leave it for them?---No. It was what happened at home, so it had nothing to do with them.

I beg your pardon?---I said it's what happens on my farm, so it wasn't their decision of what had go to on here.

Well, did - so, do I take it from that, that you told whoever filled it in what to say on it?---No. That's not quite right. Well, I suppose I did, because the form was - well, they had the form; that was how - I had to be in their - in their shop, and that's how it got filled out.

But did you tell them what to write on the form?---Yes. We worked it out and wrote it on there.

Well, who? You and who?---I - I - well, I worked it out with - well, there's no agronomist (indistinct) at that stage, but I worked it out to what - - -

KENNETH MARTIN J: With someone in the shop?---That's correct. They wrote it down, but I - - -

You're the source of the information that they write down?---That's correct. Yes.

In the shop?---That's correct.

NIALL, MR: You knew this was an important document, didn't you?---Yes.

What happened to it once it was completed?---What happens? It gets - one lot gets sent back to Monsanto, and - I think I keep one myself and one goes to Monsanto, as far as I'm aware.

And why did you - what was your understanding as to why you needed to give it to Monsanto?---Monsanto, because I would resume that they have a look at it to make sure you're following your protocol.

So it was important for Monsanto, was it, as far as you understand, that it be given an accurate representation of your farm practice?---An accurate view? You would try to.

An accurate - - -?---You would try to give an accurate one.
Yes.

Now, this is the one for Two Dam, isn't it? You see down
the bottom right?---Yes. I can see that.

Can you see Two Dam?---Yes.

You needed to fill out one of these for each of Range and
Two Dam?---Yes.

Did you also do one for Lyle's Mailbox?---No. Because I
didn't plan the Lyall's Mailbox.

Okay. Now, just going up to the top, step one, you had to
calculate the glyphosate resistance index. And you've
said:

Knockdown -

third column down -

Knockdown with minimal or no soil disturbance, followed
by paraquat and/or seed set control practice 8.

And then you've got:

Knockdown, followed by full soil disturbance, 4 -

and that's a total of 12 years. My understanding of your
evidence yesterday was that you didn't engage in full soil
disturbance in your cropping rotation?---No. That's
correct.

Then why did you instruct whoever wrote this to put 4 down
in that column?---Not sure, really. Must have missed -
misunderstanding of what was written down.

Your misunderstanding or someone else's?---Well, I gave
them the information, so it must have been my
misunderstanding.

So it understated the glyphosate resistance index, didn't
it?---With that written in there, it will do, yes.

Were you attempting to get the glyphosate resistance index
down to a low figure?---No. It wouldn't have been done on
purpose.

Just an accident?---Yes.

What you told them that you had always done knockdown with minimal to no soil disturbance, followed by paraquat, and somehow they've come to the conclusion that you actually full disturbance for four occasions. Is that what happened?---That wasn't what happened, but I can see that's what's written on this piece of paper.

Well, how do you explain the mistake?---I can't explain it, your Honour.

Now, go down into step 2. You see:

Determine the glyphosate herbicide resistant risk profile -

Do you see that?---Yes.

That's a bit hard to read, so I will just read it. It says up the top:

Glyphosate resistance index -

and then in the next one it says:

Herbicide mode resistance status.

Do you see that?---I can't really read it, Mr Niall, but I'll take your word for it.

Perhaps I can read it to you. It says:

Herbicide mode resistance status.

?---I can see that.

And underneath that it says:

Choose the number of herbicide groups that's resistance has been confirmed for rye grass in the paddock.

Do you see that?---I can see it but I can't quite understand. Could you read it again so I can understand what's said?

Yes, I can. I will do it. Continuing:

Choose the number of herbicide groups that's resistance has been confirmed for rye grass in the paddock.

Do you see that?---Yes.

And someone has ticked zero for Two Dams, haven't they?---That's in that little section there?

Yes?---Is that the one with the number 2 circled?

Yes?---Is that the one I'm looking at?

Yes?---Yes, I can see that.

And above that it says zero. Do you see that, 0123?---I can see the zero.

And this is under the zero column?---Yes.

So this document says that there were no herbicide groups that were resistant that had been confirmed for Two Dams?---Well, none had been confirmed because none of it had been tested.

Is that why you put a zero there?---Well, what it says, nothing has been confirmed so it hadn't been confirmed. Well, it has only been a visual assessment.

So you didn't think it was necessary to put down one for the FOPs and DIMs?---FOPs and DIMs. Well, as I said, it was only a visual assessment.

All right. We'll just have a look at the other document next - the other document I handed up to you and that's copied, your Honour - slightly more legible copy of 1262.

KENNETH MARTIN J: Thank you.

NIALL, MR: And this is the paddock - this is the same document in relation to Range, isn't it, Mr Baxter?---That's correct.

And if you go to the same point about herbicide mode resistance, that's step 2, you have put under 1. You have circled or you have asked someone to circle under 1 herbicide resistance mode. Do you see that?---That's in the step 2?

Yes?---With the - or a circle around the number 2?

Yes, and that's in column 1, isn't it?---That's correct.

So why did you circle or have column 1 circled for Range?---Well, the number 1, what was the mode of number 1? I can't quite read on the top of this one.

It says:

Choose the number of herbicide groups that resistance has been confirmed for rye grass in the paddock.

And you have asked someone to tick 1 or circle 1?---Yes, circle - yes, well, circle 2. I was 2 under the number 1.

Yes, but the number 1 at the top of that column stands for the number of herbicide resistant groups, doesn't it?---That's correct.

Well, a few moments ago you said you put zero for Two Dams because none had been confirmed but at the same time you circled 1 for Range. Why is that?---Well, on my understanding of it, like I said, it was actually day 1 of the - do you say that it - assumption of your tests and stuff, and I knew that in that paddock I probably applied more FOPs and DIMs for the visual.

So you thought that this was proceeded on the assumption that you had done some testing?---On the assumption - - -

Yes?--- - - - this was formed. That was what it was asking.

Yes?---And that's what I presumed it was under the assumption of something that was tested.

You just made it up, didn't you?---No.

The zero for Two Dams and the one for Range?---No, I didn't.

Go up to step 1 on Range. You have put 10 down for knockdown with minimal or no soil disturbance and 5 for knockdown followed by full soil disturbance. Why did it record 5 for knockdown followed by full soil disturbance?---Well, I'm not quite sure what you mean, Mr Niall.

Step 1 for Range, it identifies five choices. The fourth choice down, it says:

Knockdown followed by full soil disturbance -

And someone has written "five." Do you see that?---I can see that.

And that means five applications of glyphosate in the context of full soil disturbance. Correct?---I'm not sure.

Does that mean give applications in that year? Is that what you're trying to tell me?

No, five - well, you have got to put in based on the past 20 years of glyphosate application in the paddock. Do you see that? Because that's what the words below the table says?---Based on the 20 years of glyphosate - in the last 20 years. Is that what it's based on? Is that what you're trying to get at, Mr Niall?

Well, what did you understand when you asked someone to fill it in for you?---Well, on the last 20 years - well, if that's working on the last 20 years or for five, you're obviously going to use more than five in the last 20 years.

Now, you just regarded these forms as things that you needed to fill in, didn't you?---No, I didn't.

You regarded the whole process as simply a box ticking exercise to enable you to plant the Roundup-Ready canola in two paddocks in 2010, didn't you?---No, I didn't.

Now, if you go over to 1229, Mr Baxter, point 5 on the page, number 5 at 1229.

KENNETH MARTIN J: So back to 1229.

NIALL, MR: Yes. Thank you, your Honour.

KENNETH MARTIN J: All right.

NIALL, MR: Do you see that, Mr Baxter?---Yes, I can see that.

And just see that paragraph beginning number 5. It says:

The top row of the matrix in figure 2 shows the number of herbicide groups to which herbicide resistance has been suspected or confirmed for rye grass within the paddocks intended for planting.

Did you read that?---I kept - did I read it now did you say?

No, did you read it back then?---I would have read it, yes

So you knew that you had to stick the number of herbicide resistant modes that had been suspected or confirmed, didn't you?---Yes, I would have.

Then why did you stick zero for Two Dams?---Well, as I said, it was an assumption of testing, that was mostly all visual.

You didn't care at all whether the use of Roundup-Ready canola and the associated use of glyphosate might lead to glyphosate-resistance on your farm, did you?---Yes, I did.

You took no steps to protect your farm against glyphosate-resistance, did you?---I am always taking steps, Mr Niall.

And you didn't test for glyphosate-resistance?---No, I have never tested for glyphosate-resistance.

You regarded this entirely as a process that you had to go through, but you had already made up your mind to plant Roundup-Ready canola regardless of the information you got Monsanto. That's right, isn't it?---No, it's not right.

Now, the other aspect of the management plan, Mr Baxter, is the segregation. You recall I asked you some - you agreed that there was two essential issues. One is resistance and one is segregation. I want to ask you some questions about segregation. If you go over to 1232, please. Now, at the top of that page it says:

A key objective of the Roundup-Ready canola stewardship strategy is to maintain product integrity within the Roundup-Ready canola crop and that of surrounding crops.

Do you see that?---Yes, I do.

And the product integrity, that means segregation, doesn't it, from GM canola from other crops?---That's correct.

And one of the things that was recommended was a buffer zone of five metres from grain production. You remember that, don't you?---Yes.

What did you understand the purpose of the five metres was?---The five metres was the purpose of a - well, a buffer or border zone from your next crop.

And the segregation of five metres was to keep the GM canola separate from other crops, wasn't it?---That's correct.

And not only other crops, but other farms which chose not to grow GM canola. You agree with that?---Yes.

KENNETH MARTIN J: Sorry, are we just talking about the five metre box?

NIALL, MR: Yes, we are. Yes, your Honour.

KENNETH MARTIN J: Isn't that canola to canola?

NIALL, MR: I will ask the witness. Is it - - -?---Canola, for canola its five metres just for harvesting and it's 400 metres if you want to collect seed to replant.

KENNETH MARTIN J: That's the box to the right?---That's correct.

Yes.

NIALL, MR: In your statement you refer to - this is paragraph 48 subparagraph (v). Do you have that, Mr Baxter?---Yes, I do.

You refer to a five metre buffer zone and a 50 metre buffer zone between GM canola crop and another type of canola crop which was being grown for seed. That's a mistake, isn't it?---That's correct.

It's actually 400 metres?---That's correct.

So if your next door neighbour, farmer, was growing canola for seed, you understood that your minimum distance would be 400 metres?---Well, I understood that, yes.

So if Mr Marsh had been planting GM - sorry, had been planting canola for seed, you agree that you wouldn't plant within 400 metres. Is that right?---If he had canola next to me, is that what you - - -

Yes. He's planting canola for seed?---Yes.

You would agree that you wouldn't plant within 400 metres?---That's right.

Why?---That's what you are meant to do.

What was the purpose of that, as far as you understood?---To stop the cross-pollination with canola to canola.

Stopped your crop contaminating another crop?---That's correct.

Now, over in that table, it refers to:

Minimum distances for managing adventitious presence of GM grain to be less than .9 per cent between GM canola and non-GM and...

You see how it works, Mr Baxter?--Which section are you looking at?

Table 1.

KENNETH MARTIN J: So just go to the left-hand box of the three?---You are looking at page 1232?

1232.

NIALL, MR: In that table at the top?---Yes.

And what this table shows is:

Minimum distances for managing adventitious presence of GM grain to be less than .9 per cent between GM canola and-

and then the first box deals with grain production, non-GM canola and all other canola. You see that?---Yes.

So you - did you read that at the time?---Yes.

So you understood that this was dealing with a threshold level of .9 per cent?---That's correct.

KENNETH MARTIN J: Point 9 per cent of what?

NIALL, MR: Adventitious presence. Well, perhaps I will ask the witness. Point 9 per cent of what?---Yes, well, that's - I mean, .9 per cent of anything that shouldn't be - another grain.

So was it in order to ensure that grain that's produced on another farm contained less than .9 per cent GM canola?---Well, I'm just not - - -

CAHILL, MS: Perhaps my friend should break it down and identify the - how he says it could be contained.

KENNETH MARTIN J: Well, it can only be Mr Baxter's interpretation of the document - - -

CAHILL, MS: Indeed.

KENNETH MARTIN J: - - - at best, but that might have some relevance to the case. So assuming that's understood, yes, I think it is a little complicated. It probably does need to be broken up, Mr Niall.

NIALL, MR: Thank you, your Honour. Now, you see that this table identifies minimum distances between a GM crop and another canola crop?---Canola crop?

Yes?---I think it's to do with all crops.

Well, just dealing with canola and canola crop?---Okay.

This describes the minimum distance between the GM canola crop and another canola crop?---Yes.

And it says a minimum distance from managing adventitious presence of GM grain to be less than .9 per cent?---That is correct.

Now, did you understand that the object of the distances was to ensure that any GM grain mixed up with non-GM grain, canola grain, would be less than .9 per cent?---That was the - yes, well, that was the acceptance allowance of .9 per cent.

When you say an acceptable allowance, what do you mean by that?---Well, point - well, 0.09 per cent is the acceptable allowance for no other material being in another material.

And did you think that applied to everything, all crops and - - -?---It applies to all grains, yes.

Well, just read below the box, Mr Baxter, where it says:

Where an alternate standard, ie lower threshold for non-Roundup-Ready canola is required in response to market requirements and product specifications or there is a plan to grow a specialty canola crop that requires specific management to maintain product integrity, eg high oleic, high urisic, GM-free or organic canola, appropriate management strategies applicable to the growing and processing of the crop should be incorporated as deemed and communicated by the supply chain for the specified product.

Do you see that?---Yes, I do.

Did you read it at the time?---Yes.

Well, what did you understand it to mean?---I understood it to mean that there are some other products that have different standards.

And that would include organic, wouldn't it?---That's right.

So did you understand that the organic standard was different to the .9 per cent that you have just referred to?

CAHILL, MS: Organic as to what, your Honour, having regard to the paragraph?

NIALL, MR: The witness adopted organic.

KENNETH MARTIN J: Do we need the witness out to explore this but I think I understand what you are getting at. I think, Mr Baxter, if you could just leave us - - -

NIALL, MR: I will rephrase the question, your Honour.

KENNETH MARTIN J: Right.

NIALL, MR: Now, you knew that there were other lower thresholds for - in standards, part from the .9 per cent?---Only what I - - -

CAHILL, MS: I object, your Honour, and I think the witness better leave the room.

KENNETH MARTIN J: Yes. All right. If we are going to thrash this out. Mr Baxter, would you just leave us for a few moments, if you wouldn't mind, and wait outside and we will have you back very shortly.

(THE WITNESS WITHDREW)

KENNETH MARTIN J: Thank you. Ms Cahill.

CAHILL, MS: Your Honour, I think this line of questioning, in order to be fair, needs to be very clear as to what's being presented. Now, Mr Baxter's attention is being drawn to this document, especially at page 1232. And, of course, the context and purpose of it, especially at the paragraph that Mr Baxter has just been taken to, is segregation that is required by reason of the risk of cross-pollination and the way in which that can result in a GM trait transfer into another canola crop, including an

organic canola crop, which is expressly mentioned there.
As - - -

KENNETH MARTIN J: So when we see "GM free" in the third line, after high urisic - - -

CAHILL, MS: Yes.

KENNETH MARTIN J: You read that as a GM free canola crop?---Indeed, because, logically, having regard to table 1 and then the paragraph that comes after it - - -

KENNETH MARTIN J: The heading to table one - - -

CAHILL, MS: Yes.

KENNETH MARTIN J: - - - Minimise the Occurrence Near Other Canola in Australia.

CAHILL, MS: Yes. And so, when my friend just puts the very broad proposition to Mr Baxter, "Well, you knew about other standards that had a lower threshold," that embraces a whole range of possibilities that Mr Baxter can't fairly be assumed to understand lies within the question. So we need to know whether Mr Niall is putting to Mr Baxter simply the knowledge of standards that have a different threshold or a lower threshold - higher threshold - I can't - not sure which way that would go - in relation to cross-pollination and GM trait transfer into the product, whether we're talking about the intermingling of GM material in another product, or whether we're talking about a threshold of a plant not being allowed to lie on the land, there no - being no threshold.

KENNETH MARTIN J: Well, the precise question that you're objecting to is in regard to - - -

CAHILL, MS: "You knew that there were standards" - - -

KENNETH MARTIN J: - - - the hypothesis of other standards that may be lower.

CAHILL, MS: Yes, but lower in respect of what? And applicable to - - -

KENNETH MARTIN J: So it's the lack of precision targeted by reference to the subject matter.

CAHILL, MS: Indeed.

KENNETH MARTIN J: Yes. All right. Mr Niall.

NIALL, MR: I'm happy to make it more precise, your Honour.

KENNETH MARTIN J: Yes. All right. I think that's appropriate. We will have Mr Baxter back.

BAXTER, MICHAEL OWEN:

KENNETH MARTIN J: Thanks, Mr Baxter. Mr Niall will now ask you another question.

NIALL, MR: Mr Baxter, if you go to the - immediately below the table, it says:

Where an alternate standard, i.e., a lower threshold for non Roundup-Ready canola is required in response to market requirements and product specifications -

do you see that?---Yes.

Just pausing there. The lower threshold that it's referring to is a threshold less than 0.9 per cent, isn't it?---I would gather lower threshold would be less than 0.9 per cent.

You didn't turn your mind to whether there might be thresholds that are lower than 0.9 per cent?---Yes.

You didn't?---I did.

You did turn your mind?---Yes.

Well, do you agree that where it says:

An alternate standard, lower threshold, for non Roundup-Ready canola -

it's talking about a standard less than 0.9 per cent?---Yes.

And then it says:

...is required in response to market requirements and product specifications.

- - -?---Yes.

Do you see that?---Yes.

You knew, did you, that some market requirements or product specifications required a lower threshold for the presence of GM canola than 0.9 per cent?

CAHILL, MS: In what, your Honour, is my objection. The product needs to be specific.

KENNETH MARTIN J: I think it does need to be, by reference to subject matter, more targeted, Mr Niall.

NIALL, MR: Thank you, your Honour. The threshold that is referred to there is a threshold of adventitious presence of GM grain. Do you see that?---Yes.

And it's 0.9 per cent?---That's correct.

All right. 0.9 per cent of what?---0.9 per cent of - - -

CAHILL, MS: I object, your Honour. The question was framed without reference to the subject matter with which that table is concerned, and it was unfair for that purpose - for that reason.

KENNETH MARTIN J: Mr Niall, what - do you press the question?

NIALL, MR: Your Honour, it's quite precise. The witness has identified that he had read the document.

KENNETH MARTIN J: Yes.

NIALL, MR: The 0.9 per cent is identified as adventitious presence of GM grain to be less than 0.9 per cent. And I'm asking in that context what that witness understood the percentage was.

CAHILL, MS: Well, you have to read the table for completion, your Honour, which then provides the subject matter.

KENNETH MARTIN J: I think it just needs that finishing touch, to be fair.

NIALL, MR: Mr - if your Honour pleases. I will approach it this way. The - see the top of the table, it says:

Table 1: requirements for growing Roundup-Ready canola near other canola in Australia, to minimise the occurrence of off-types.

Do you see that?---Yes. Yes.

What is your understanding of the word "off-type"?---To minimise the occurrence of off-type. "Off-type", not quite sure what it means, Mr Niall. The minimum off-type - off-type - well, off-type of canola.

Now, when you read this part of the management plan, you knew that Mr Marsh was conducting an organic farm next door, correct?---Yes.

And he had told you in 2008 that the presence of GM might threaten his certification?---He said it - yes - to some words like that. I can't remember what words he said, but he would said it would affect his certification.

And your evidence yesterday was that you discussed that with Mr Robinson in 2010?---That's right.

Now, did you consider any management strategies for reducing the possibility that your canola would go from your farm to Mr Marsh's farm?---Well, we had a five metre buffer - well, probably further than five metre buffer. There was a road in-between us with two tree lines. Because I let Mr Marsh know where I was going to grow my canola.

And that was it, the five metres and the road?---Well, it was - it was plus five metres.

And you relied on that because of what you understood this Monsanto document?---Yes.

Now, having read this document, did you ask Mr Robinson for any advice as to whether you could engage in any other strategies that might reduce the chance of your GM canola going onto Eagle Rest?---Well, I thought we had pretty well covered, to the best of ability, to how we could - - -

And that was that - - -?--- - - - minimise it.

That was because of the five metres?---Well, the five metres was just advice. I said we took further than five metres, plus you got a road in between two tree lines.

And you didn't think, having read this document, that you should consider any other management strategies?---Well, Mr Marsh wasn't growing canola.

So the answer to my question is no?---Well, I thought we had taken all the precautions that we needed to take.

You didn't consider any other management strategies that you could adopt?---Not at this stage.

You didn't consider planting Roundup-Ready further away from Eagle Rest, did you?---No, because that's where I proposed to plant it that year.

Now, if you just go back for a moment to the Two Dam PRAMOG sheet. This is 1263. Down the bottom of that document you refer to glyphosate resistance index of 20, herbicide mode resistance at a zero, PRAMOG category 2, and then nominated management practice 1, windrow burned. Do you see that?---Yes.

So had you decided by the time that you completed this document that you would swathe the canola?---No, not at that stage.

You don't have a windrow for direct harvest, do you?---Not for direct harvest, no.

No?---I - sorry, just can you clarify? How do you mean windrow?

Well, here you have referred to a windrow burn?---That's after you have harvested.

Doesn't that depend on swathing?---No, it has got nothing to do with it.

So you describe a windrow burn where you direct harvest?---A windrow burn is after you have harvested.

But does it include in circumstances where you direct harvest?---No.

It's - a windrow burn is limited to where you have swathed the crop, isn't it?---A windrow burn is behind a swathe or behind a header.

Do you have a - - -?---I've both - you both go through the same machine. That harvester harvests the windrow and we direct head it. So it still puts it in the same spot.

So you can have a windrow burn in circumstances where you direct harvest?---Well, what my understanding is, a windrow burn is a hot burn after you have harvested. And obviously it will be in March, when you're allowed to harvest, not in December.

I understand.

KENNETH MARTIN J: Sorry, I'm just trying to understand that. You're speaking of burning in March - - -?---Yes.

- - - the surviving stubble of what's left even if you've direct headed the canola?---Yes, a windrow burn is what I understand it to be or what I know it is. Behind the harvester you can put a sheet on the back of your harvester; it puts all your grain into a small skinny narrow line, if you like to say. Then we can burn it in March. It's a very hot fire and it tends to kill the seed as well.

I see. All right, and that's why you get the line of combustible material that can be set fire to?---That's correct.

Thank you.

NIALL, MR: In 2011 - I will just complete these Monsanto documents, Mr Baxter. In 2011, you identified with Mr Robinson some paddocks to plant RR canola?---Yes.

But, in fact, you didn't plant any RR canola in 2011?---I did but not on Seven Oaks.

You had planted Baxter's block?---I planted at Baxter's block.

Thank you. Now, if you go over to page 1285, you identified for - this is a PRAMOG summary sheet for 2011, isn't it?---2011 is written on the top.

Well, I'm not sure but do you remember - - -

KENNETH MARTIN J: Top right.

NIALL, MR: Yes, I see that. Do you remember completing PRAMOG sheets for a number of paddocks at the commencement of 2011?---I can't remember doing them but we would have filled them in.

The crop plan for 2011, if you go to page 866 but just keep - if you could keep the two open, page - - -?---866.

Yes.

KENNETH MARTIN J: I think we have to go to another volume, do we?

NIALL, MR: I'm sorry, your Honour. You might need that earlier volume - volume 3. Do you have page 866?---Not quite yet.

Thank you, Mr Baxter?---Yes, I've got 866.

Thank you. This is the farm plan for 2011. It starts at 862, a couple of pages further back, and this is the rotation summary. And if you look at the column for 2011 - do you have that, Mr Baxter?---Yes, I do.

You will see that canola is being recommended for some paragraphs - some paddocks. You will see that for Hay Shed. Do you see that?---Yes.

And if you go down to that line, you will see:

Roundup-Ready canola at shed.

?---Yes.

House?---Yes.

Winjadi?---Yes.

Triangle, No Dam. Do you see that?---Yes.

And Bush and Back?---Yes.

So I think seven paddocks were recommended for Roundup-Ready in 2011 on Seven Oaks?---On Baxter's block, you mean?

No, seven paddocks were recommended in the farm plan to be planted to Roundup-Ready canola?---On the farm plan?

Yes?---That's correct.

But as it turned out, none of those paddocks were planted to Roundup-Ready canola, were they, in that year?---Yes, all these paddocks were on Baxter's block.

KENNETH MARTIN J: So you're telling us that Shared House, Triangle, No Dam, Bush and Back are Baxter's block paddocks?---That's correct.

NIALL, MR: Okay. Thank you. So none of those paddocks that were identified were on Seven Oaks?---No, they were all on Baxter's block, those paddocks.

Thank you. Now, after you - you planted the two paddocks in 2010?---That's right.

And you had a discussion with or spoke to Mr Marsh at the Busy Bee - at the Marinoni's property?---That's right.

And did you tell him that you wanted to plant on the range?---I did, yes.

Yes, and that wasn't a reference to the Range paddock but it was a reference to the area that includes both the Range paddock and Mailbox. Isn't that right?---No, the paddock - well, Range is one paddock and Mailbox is the paddock right next to it.

But at the time you spoke to him you were intending to plant both, weren't you?---Yes.

So is it the case that you described it as the range rather than the Range paddock?---Well, Range is just the name of the paddock.

Now, in September or October Mr Marsh provided you with a notice. If you go to - - -

KENNETH MARTIN J: Are you all done with those - - -

NIALL, MR: Yes, I am.

KENNETH MARTIN J: Thank you.

NIALL, MR: You can put those aside.

KENNETH MARTIN J: So you can close those up.

NIALL, MR: Thank you. Thank you, your Honour. If you take volume 1, Mr Baxter, please, and turn to page 253 and then go over through to 155, there was a document with 12 paragraphs. See that?---Yes.

And that was faxed to you?---Faxed to me?

Yes?---No. Mr Marsh - we met with Mr Marsh on the road.

Where did you say you met him?---On the Glenorchy (indistinct) road between his property and my property.

Yes. And he handed it to you?---Yes.

And he also faxed it to you, didn't he?---I don't think so.

And have a look at the next page. There was schedule A. Do you see that?---Yes.

And that was part of the document that he gave to you?---Yes.

And also the next document, which is headed NASAA Organic Standards. That was also part of the document he gave to you?---Yes. Just that one page.

Yes. Well, did it go over onto the next page, which is at - a copy of which is at 252. See how that continues to 3.27, down to 3.2.12?---252. Yes. (indistinct) got 257.

252?---Yes. I've got 3252.

And that's a continuation of the document that starts at 257, isn't it?---3.26 - yes.

And you got that page as well, and Mr Baxter gave it to you?---Yes. I got those two pages.

Yes. And, finally, at 258, you got that document, didn't you? That page?---Yes.

Did you read - going back to 253 - did you read the document?---I roughly (indistinct) answer it. I didn't read it thoroughly.

And what did you do with the document when he gave it to you?---Took it home and put it in my office.

Yes. And did it just sit in your office, or did you do anything with it?---No. I looked at it at that stage and read through it, then that was about all I did with it.

So you read through it in detail?---Not thoroughly.

But did you think it was important?---It was important to Stephen. Yes. It was important.

What about important to you? Did you think it was something that you should pay attention to?---Well, I had already taken some attention before that stage.

So - I beg your pardon?---I had already taken some attention before that stage.

So you didn't think you were going to give it any more thought?---Well, I had done all I could possibly do.

Well, you hadn't harvested the crop at this stage, had you?---No.

No?---The crop was nearly finished flowing by that stage.

Yes. But it hadn't been harvested?---No.

And did you read paragraph 5 of the document? Page 524?---Paragraph 5?

Yes?---I would have read it then.

And do you see that, there, the document states that:

We have been informed or otherwise understanding that you will be directly or indirectly involved in the seeding -

Now, the crop had already been planted at that stage, hadn't it?---That's right. Yes. It was nearly ready to swath.

Swathing hadn't occurred?---Not at that stage.

Harvesting hadn't occurred?---No.

So you didn't turn your mind to whether you should consider your harvesting technique at that point?---No. It was still ongoing at that time.

When you say "still ongoing", what do you mean by that?---I was still in discussion with Mr Robinson.

So you hadn't made your mind up as to how you were going to harvest?---Not by then. No.

No. Did you tell Mr - did you give a copy of this to Mr Robinson?---I never gave a copy of them to. No.

Did you tell him?---Yes. He would have read it at home.

Mr Robinson would have read it at home?---Yes.

At whose home?---My place.

When did you give it to him?---I never gave him a copy.

Well, when did you show it to him?

KENNETH MARTIN J: Well, I think there's a distinction in terms of giving it to him to read, as opposed to giving him his own copy.

NIALL, MR: Thank you, your Honour. When did - did you show it to him?---Yes.

When did you do that?---That would have been in the, probably October/November period.

All right. Before or after harvest?---Before harvest.

You sure about that?---Yes.

Where did you do that?---Would have been at the house.

Where at your house? Were you sitting down?---Not 100 per cent sure, but would have been at the house.

Yes. And what was the purpose of showing it to him?---Well, obviously the same reason why Mr Marsh gave it to me.

What was your purpose in showing it to Mr Robinson?---Well, obviously he's my agronomist. To make him aware of the facts as well.

But a few moments ago you had said you had already - the effect of your evidence was, by the time you got this you had already made your mind up - you were already proceeding. So why did you go and tell Mr Robinson about it?---Preceding - we haven't decide whether we were going to swath or harvest by that stage.

Are you saying that you gave this Mr Robinson to discuss swathing or harvesting?---Well, we're always discussing things right up until harvest time.

Did you discuss this document in the context of your decision to swath?---Would have been very briefly.

Well, what did you say?---Well, what do you mean, what am I saying?

Well, you said you had a very brief discussion. What did you say in the context of the decision to swath, to Mr Robinson?---Well, the swathing process was a decision we made to best effect our harvest.

And this didn't have any influence on you at all, did it?---Not to our decision of swathing. No.

You ignored this when you came to your swathing decision, didn't you?---No. We didn't.

Now, when do you say you made the decision to swath?---When did we?

Yes. No, when did you, Mr Baxter?---When did I, or - - -

Yes?--- - - - me and Mr Robinson?

No. When did you make your decision to swath?---Would have been in October - end of October.

End of October. You had to retain a swather - someone to come and do the - contractor?---That's correct.

Yes. And when did you retain that person?---Would have been the end of October.

Who was it?---Mr Meredith.

Now, I just want to ask you some questions about swathing. The process is that the machine - the swathing machine - is that towed by another machine, or is it self-propelled?---This one's - both. This one was self-propelled.

And what it does is that it goes over the paddock and cuts the stalk of the canola plant?---That's correct.

And then brings it together into a windrow, or a line?---That's correct.

Does that to it in the centre of the swather, or to one side or the other?---This one was in the centre, this swather.

And over what width is the swather?---I think it's - it's either 25 or 30 foot.

And the one - - -?---All swathers are different, I think. This was 25/30, but I can't exactly remember what size it was.

Somewhere between 25 and 30 feet?---Yes.

So what's the spacing distance between each canola plant?---Each canola plant? As in, when it's growing?

Yes?---It all varies depending how the density of your seeding population.

Well, in 2010, what sort of density was Range?---Well, 2010 was quite a dry year, so the germination wasn't the best.

You want them a square metre, or you want sort of centimetres together? How do you want me explain that?

Well, in a line? So the swather goes along in a line, doesn't it, and then it cuts the stalk and then concentrates them?---Yes. That's correct.

Just trying to get some idea of how many canola plants would be cut as it moves along on each - - -?---That's pretty hard to explain. Like, 30 metres into - well, it's just about impossible to describe.

So it's 30 metres of crop?---Yes.

Brought together into a windrow. And what's the diameters of the windrow?---The windrow would be probably a metre/metre and a half width.

Yes?---With a - off the ground that high, with a - quite a large - - -

So about a metre and a half wide and about a metre high?---Yes. Some are - - -

And goes for the length of the paddock?---Yes. Well, some go around and around, and others go up and down.

KENNETH MARTIN J: In a straight line?---Well, usually - well, with a self-propelled, I would normally do two laps of the paddock. Then I would go up and back. Up one way and turn around and come back the other way, so you're still in a straight line roughly.

A bit like mowing the lawn?---Yes.

Up and down?---Yes.

NIALL, MR: Thank you. So at the end of the process you have a very long line about a metre and a half wide and about a metre high?---Yes, approximately about that height and width.

And the purpose of leaving it - I withdraw that. How long in 2010 did you understand the windrow would stand before it would be collected by the harvester?---It's usually around your four weeks.

So - - -?---Depending on your weather conditions.

So what would be the distance between the initial - what you expected in 2010 between the initial cutting - - -?---Yes.

- - - and the harvesting?---How long did I expect?

Yes?---Well, usually between your three and four weeks. Sometimes it could get up to five weeks.

And the purpose of it, as you understood in 2010 before you did it, was to leave the windrow exposed to the elements. Correct?---The reason I swathed? Is that what you're trying to - - -

No, I'm just - the purpose of swathing - not the reason you swathe - - -?---Okay.

But the purpose of swathing is to concentrate the crop in a long line. Do you agree with that?---Yes.

And then leave that line exposed to the elements for a period of time?---Yes. Well, the purpose of swathing is to fasten the process up of drying and also to help control weeds as well.

And it does that by leaving them in the sun?---That's right.

To dry them out?---Yes.

And that reduces the moisture content?---That's right.

And makes them light?---Yes, they will get dry, yes.

Yes. And then it's also part of it to expose them to the wind, isn't it, to assist in drying and keeping the windrow dry?---Well, obviously there's wind around you.

Yes, but that's part of the exercise, isn't it, to leave it exposed to the wind and the sun to help ripen and - - -?---Well, yes, when you swathe it ripens faster.

And when you - and you knew before you swathed that that's what was involved, didn't you?---Knew before I swathed? That's - - -

Yes?---I knew it was going to dry out faster.

Yes?---(indistinct)

Well, you knew it was going to dry out and you knew what the swather was going to do to the crop. (indistinct) in a long windrow and you were going to leave it there for a couple of weeks or longer?---Yes.

And it would have been obvious to you, wouldn't it, that by leaving the windrow crop in that way that it might get blown about by the wind?---Well, it's not obvious but there's always some little chance it can move a bit.

Well, move a bit. You knew then that one of the things that could happen would be that the windrow would be disturbed by the wind and the swathes would be blown?---Well, they can always move a little bit, the swathes, with a bit of wind blowing.

Yes. And once they're dislodged, you knew that they could be then blown further?---There's always a chance.

Yes. And given that the Marsh property was next door, you knew that there was a chance that the - over the weeks that it's left there, that the windrows would be dislodged by the wind and blow on to Eagle Rest?---Well, with our buffer zones and our road and the tree lines, I expected we had a further enough distance.

You knew that there was a real chance that the windrow canola swathes would be blown from your property, across the road, onto Eagle Rest, wasn't there?---No, there was a real chance.

There was a real chance that it would blow off your property?---No.

You didn't think that there was a real chance that it would blow off your property?---No.

Why is that?---Well, I had never swathed before. It's the first time I had swathed. I hadn't noticed in previous years windrows blowing around and with the buffer zones and the border lines I left between Mr Marsh, I presumed nothing would get on his property.

Now, certainly, if you direct harvested in 2010, the risk of it being of any canola - GM canola being blown from Seven Oaks onto Eagle Rest would be very much reduced, wouldn't it?---It could possibly be reduced.

Well, there would be no doubt about that in your mind?---There's always some doubt. It doesn't have a certainty.

Well, pretty close to a certainty that if you direct harvested, the chance of any canola blowing on to Eagle Rest would be substantially reduced?---There would be a less - - -

Sorry?---There would be less.

Now, you observed during the swathing period - after you had swathed and before you had harvested, you observed that some windrows had been disturbed by the winds, did you?---Had I observed?

Yes?---I - just a little bit, yes.

Yes. And once disturbed, it was likely - there was a real chance that that would blow onto - off your property and onto the road. Do you agree with that?---Well, no, not necessarily.

Well, when you say not necessarily, it was a real prospect that that would happen, given that - - -?---Not a real prospect.

You took the chance, did you, Mr Baxter, that it wouldn't happen?---Yes.

Did you turn your mind to the fact that it might happen?---No.

You didn't care whether it happened or not, did you?---Yes, I did.

Well, what did you do to stop it, the chance that it would happen?---What do you mean stop it, Mr Niall?

Well, once you had swathed, there wasn't much you could do to stop the wind blowing on the windrow, was there?---No, that's right, once you swathed.

Yes. You were - the windrow was subject to the elements, wasn't it?---That's correct.

If you wanted to avoid the chance of the windrow blowing off your property and onto Eagle Rest, you could have direct harvested, couldn't you?---Well, I'm not sure what you mean by that phrase. Repeat the question please.

Yes. You could have - in order to avoid that chance that swathed canola had blown onto - from your property onto Eagle Rest, you could have directly harvested those paddocks, Range and Two Dams, in 2010?---I could have

direct harvested but by direct harvesting, I couldn't have had as much weed control and management as I would have liked.

Did you discuss the potential for the windrows to be blown from Seven Oaks to Eagle Rest with Mr Robinson?---Yes, we did.

When did you discuss that?---That would have been at the time. The end of - when did we swathe - end of October
- - -

And what did he tell you?--- - - - when we made the decision.

Did he tell you that it wasn't a problem?---Well, under their protocol, we left plenty of room around near the tree lines and thought that distance could have been far enough.

Did he say, "Look, you've got your five metre buffer, that's okay under the protocol. Don't need to worry about anything else"?---No.

That was your view, wasn't it?---No.

Now, in 2010 you planted conventional canola in Lyall's Mailbox, didn't you?---Yes.

And that's an adjoining paddock. That's next to Range, isn't it?---That's right.

And that was a paddock that you had identified - that you identify in your statement in paragraph 34(4) as a paddock that had problem - herbicide resistant rye grass, wasn't it?---34(4).

Yes?---Sorry, I'm in the wrong one. Yes, Mailbox was used - Lyall's Mailbox. It has got Mailbox written there.

Yes, but the reference in 34(4) to Mailbox is Lyall's Mailbox?---Yes.

That's the same paddock?---That's correct.

And the position was this, was it, that that's a paddock that you were concerned about herbicide resistant rye grass?---That's correct.

That's a paddock that you had been identified as one to plant Roundup-Ready canola?---Yes.

You had intended to plant up Roundup-Ready canola in 2010 in that paddock?---That was the plan, yes.

You had run out of seed?---Yes.

So you planted a conventional canola?---Yes.

And you direct harvested that, didn't you?---I did.

And you used your own harvester to do that?---Yes.

Now, I want to ask you about your canola crop in 2011, you planted conventional canola on Seven Oaks?---Yes.

In some paddocks?---Yes.

And Roundup-Ready - - -?---Sorry, some IT as well, canola.

Thank you. And you planted RR canola on Baxter's block?---That's correct.

Were all of the paddocks on Baxter's block which had been planted to canola, were they all Roundup-Ready canola?---Yes.

And when did you make a decision to swathe or not swathe Baxter's block?---When did we make the decision? I think it was sort of an agreement between Mr Marsh's lawyer and my lawyer.

For Baxter's block?---There was an undertaking that there was a distance apart.

Is your evidence that you didn't swathe Baxter's block in 2011, was because of an agreement?---Well, no, I'm not quite sure because I don't think it was an agreement, but, yes, there was some sort of process before that.

Yes. But that didn't cover Baxter's block, did it?---No, it didn't. I don't - there was something going on but it never - it never came about.

So you were free to harvest Baxter's block in 2011, whichever way you chose?---that's right.

Yes. When did you make the decision as to harvest method in 2011?---That would have been the same time, end of October.

And when did you swathe - sorry, when did you harvest?---Harvesting would have been done early December. Yes, it would - no, probably - yes, early December of middle of December.

Why didn't you - why did you direct harvest in Baxter's block in 2011?---Why did I?

Yes?---Well, it was our choice, or mine and Mr Robinson, decided that year to direct harvest. As I said, in previous years I still got to hire a (indistinct) and get contractors in to do it.

So you decided because that's what you had always done with canola?---Pretty well, yes.

And you had had your own harvester to do it?---Yes.

And you thought that was the reason?---Well, that wasn't the real reason. The year before we was trying to obtain a correct or actual proper yield.

I'm not talking about the year before, Mr Baxter. I'm just talking about 2011?---Yes, well that's how the decision come from the previous year.

Yes. So you were comfortable in 2011 to direct harvest your Roundup-Ready canola?---That was a decision we made that year.

Now, in 2010, when GM canola blew off Seven Oaks onto Eagle Rest, Eagle Rest wasn't the only farm on which your GM canola blew, was it?---Well, I don't know it did blow, Mr Niall.

Did any other farmers complain about having your GM canola on their property?---No.

Mr Maginnis - Magenie?---No.

He didn't talk to you at all?---Not about any canola blowing on his property.

He didn't come to see you and ask you about the fact that he had observed some canola swathes on his land?---Not that I can recall.

You sure about that?---Yes.

Now, could - Mr Baxter, could you go to volume 1 page 219. 219. Do you see that document there, Mr Baxter?---Yes, I can.

Is it your - was it your practice back in 2010 to look at fact sheets from the Department of Agriculture for Western Australia?---No, it wasn't.

Did you ever do that?---To look at fact sheets?

Yes?---I did say that publications did come through now and then. Every now and then I would flick through and read a few of the publications.

Yes. What about farm notes, are you familiar with those, published by the Department of Agriculture and Food?---I'm not familiar with them but I know they do send them out in - to some places.

And they send them to you, do they?---No, I don't think so.

When you say they send them to some places, what's your - - -?---Well, I know people get them sent to them.

Who?---Well, farmers.

Yes. But you don't - you never have them sent to you?---I do get some at times, yes.

What, they just come in the mail?---Yes.

And what do you do with them?---Just flick through them at times.

Yes?---When you get time to read them.

So they regularly come to you?---Not regularly, no.

So just have a look - perhaps go over to page 222. That's a farm note, note number 406. Is that the sort of document that's sent to you?---I can't recall receiving exactly that type.

Well, what sort of farm notes do you get?---Well, sorry, I get a few farm notes coming through but I don't take a lot of notice of them at times. I just - so I think I have a look and read through them or - all the time you don't get time to read things.

Now, if you go back to page 219, have you seen that document before?---I have seen a document similar. I'm not sure if this is the exact same one.

When did you first see that?---It would have been - if this is the same one that I have seen, it would have been after 2010 - would have been 2011.

Someone gave it to you or you got it in 2011?---I - I might have Googled it or found it somewhere, I'm not sure.

Did you have access to the internet in 2010?---Yes.

Now, do you remember reading this document at all in 2011?---In 2011 I read through it and that would have been the reason I probably found the document and read it.

Now, perhaps if you go to 216. Have you seen that document before?---No, Mr Niall.

Not even in the preparation of this case?---No, I can't say, Mr Niall.

Over on page 217, under the heading Organic Farming And Genetically Modified Crops, could you just read that paragraph to yourself please?---Yes, Mr Niall.

As you sit there today, does that reflect your understanding?

CAHILL, MS: At what point in time, your Honour. I object to the question without that definition.

KENNETH MARTIN J: I think the question needs to be understood when.

NIALL, MR: As at today, does that paragraph reflect your understanding?

CAHILL, MS: I object on the grounds of relevance.

KENNETH MARTIN J: Well, I think I uphold the first objection in terms of understanding when. Presumably, the question is your understanding back in the date of whatever this was. Now, in terms of relevance, I wouldn't uphold that objection but I'm upholding the first objection. So it's not clear, I think, in the question in terms of his understanding at a point in time by reference to this document. That just needs to be clarified, Mr Niall.

NIALL, MR: Thank you, your Honour. As at today, do you have an understanding in relation to organic standards?---I had some understanding. I don't have a thorough understanding of it, yes.

Yes, and does this - - -

KENNETH MARTIN J: Right. So - sorry, clarified by reference to his understanding today in 2014, now that I understand that, now I would uphold Ms Cahill's objection.

CAHILL, MS: I'm sorry, your Honour, we were at cross-purposes. I had heard Mr Niall already say "as of today" which was why I objected on the grounds of relevance.

KENNETH MARTIN J: Sorry, I obviously didn't get that. That's - - -

CAHILL, MS: I'm sorry.

KENNETH MARTIN J: My apologies. But, Mr Niall, what does his understanding in the midst of litigation, vis-à-vis this, bear upon - - -

NIALL, MR: One of the aspects, your Honour, will be the position of and knowledge of the defendant going forward. Part of that case, as we apprehend it, is that the defendant had a certain state of knowledge in 2010 which is part or the matrix of facts which explain his decision both to sow and harvest.

KENNETH MARTIN J: All right. So it wouldn't go to the negligence action for damages but it would go to the permanent injunctive relief that you seek?

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

KENNETH MARTIN J: All right. In that limited context, I can see some arguable relevance.

CAHILL, MS: Could I just be heard on that, your Honour.

KENNETH MARTIN J: Yes, of course.

CAHILL, MS: It's hard to see how it could be relevant to the issue of nuisance because that's an objective exercise which weighs up a variety of factors about social utility, reasonableness of interference, in all the circumstances, those sorts of things. Nowhere on my understanding of the law in relation to nuisance is there a relevant factor of

how the person who is - the defendant feels about or believes that the situation in relation to subject matters, such as this, to be. Surely that must be objectively assessed - - -

KENNETH MARTIN J: There are a couple of cases, I think, in terms - there's a case where the - managed to let off his gun next to the fox farm.

CAHILL, MS: But that's still the reasonable foreseeability test, your Honour, which would be objective. It can't be relevant, we would say, in any way, shape, or form to ask Mr Baxter what his personal understanding of the situation in relation to the organic standards is presently in order to - - -

KENNETH MARTIN J: As of 19 February 2014.

CAHILL, MS: In order to grant an injunction.

KENNETH MARTIN J: Well, I'm not sure if it's the standards. It's the paragraph under the heading and it's sort of like a - - -

CAHILL, MS: That's the - - -

KENNETH MARTIN J: - - - potpourri of - - -

CAHILL, MS: Standards.

KENNETH MARTIN J: - - - world information there, including some standards such as in Australia in the last line. I think this isn't a question of weight, it's a question of arguable relevance in the context of a gamut of factors. In that context I can see an arguable potential relevance, vis-à-vis the cause of action for private nuisance. Weight is, of course, a totally different thing. So I will allow the question.

NIALL, MR: Does that paragraph reflect your current understanding?---Well, it's a bit hard - - -

CAHILL, MS: Can we just be clear, understanding about what, your Honour?

KENNETH MARTIN J: Well, do you need to break up the concepts derived in that paragraph to make the question fair? I think that's probably a reasonable point. It is quite a long paragraph and there's quite a lot of matters in there.

NIALL, MR: Your Honour, I note the time. It may be convenient - - -

KENNETH MARTIN J: Yes.

NIALL, MR: - - - that I can rephrase the question - - -

KENNETH MARTIN J: Yes, of course.

NIALL, MR: - - - over lunch - - -

KENNETH MARTIN J: Of course.

NIALL, MR: - - - and save everyone some time.

KENNETH MARTIN J: How much time do you think you'll need?

NIALL, MR: About 15 minutes, your Honour.

KENNETH MARTIN J: About 15 minutes, all right, and you will be some time in re-examination no doubt?

CAHILL, MS: Probably only about 15 minutes, your Honour.

KENNETH MARTIN J: All right. And then is the plan Mr Robinson?

NIALL, MR: And Mr Stretch.

CAHILL, MS: Mr Stretch. Mr Stretch.

KENNETH MARTIN J: Mr Stretch, then Mr Robinson.

CAHILL, MS: Yes.

KENNETH MARTIN J: Yes, all right. Thank you. I will just point out that I do need to stop pretty close to 4 o'clock today due to my other commitment. All right. Thank you. Mr Baxter, you are still under cross-examination. We would be grateful if you didn't talk to anybody about the case over lunch and we will see you back at 2.15. We will adjourn until then.

(LUNCHEON ADJOURNMENT)

KENNETH MARTIN J: Yes please. Be seated. Mr Niall.

NIALL, MR: If your Honour pleases, I have used the time over lunch productively. I have no further questions.

KENNETH MARTIN J: Thank you very much. Re-examination?

CAHILL, MS: If it please, your Honour. Now, Mr Baxter, at page 750 of the transcript yesterday, it was put to you that you weren't able to say which of the nine paddocks you mention at paragraph 34(iv) of your witness statement, you sprayed with FOPS and DIMS between 2005 and 2010. Your answer was, "I can" but then you went on to talk about your cropping program. Now, the question is this - can you - sorry, are you able to say which if the nine paddocks at paragraph 34(iv) of your witness statement you sprayed with FOPS and DIMS between 2005 and 2010?---I think so, because 2005 and 2010 all those paddocks would have been on a rotation of canola, barley and wheat. And, as I said, we will (indistinct) the cropping program which we did originally with my agronomist. We walk over those paddocks with that - with all those paddocks I would have used the FOPS and DIMS on.

All right. What is the purpose of a pre-cropping program?---The pre-cropping program is a program you draw up with your agronomist to, sort of, guide and make decisions. That's just sort of the basis of your program, it's not - you don't - you don't always stick to it. You can make changes or - during the year or you make changes close to that time.

Right. Do you ever apply herbicides to your paddocks that are not mentioned in the pre-cropping program?---We do that all the time.

And you mentioned walking your paddocks with Mr Robinson each season regularly from about May. What's the purpose of that?---Just mainly for your weed management, seeing how many weeds are growing, whether your crops are diseased or whether they need more nutrients.

KENNETH MARTIN J: So, by May, would you have your crop in or not?---May. Well, May is - we usually start at the beginning of May.

So you might or you might not, depending on whether - - -
-?---Well, May, it depends on the season, but, normally the beginning of May we would start putting canola in.

Right. Thank you.

CAHILL, MS: How effective is Atrazine compared to glyphosate as a post-emergent herbicide?

NIALL, MR: I object to the question. It doesn't arise out of cross-examination and, secondly, it's not clear as to the basis upon which this witness can attest to the differences between the two herbicides.

CAHILL, MS: The first point is that Mr Baxter was asked about Atrazine and that he could use it as an alternative to glyphosate and he was asked about whether he considered it to be effective and he said, "Fairly effective." And the second thing is I'm asking Mr Baxter, obviously, in terms of his own experience. I'm happy to preface the question in that way.

KENNETH MARTIN J: Subject to that preface, I will allow the question.

CAHILL, MS: Mr Baxter, based on your own experience on your farm, and I am speaking only about your farm, how effective is Atrazine compared glyphosate as a post-emergent herbicide?---Well, Atrazine is not really a - well, it's a post - post herbicide, but it's not - it's a root uptake; it is not a, like a knock down. It's just a top up to your first initial Atrazine which just tops up your soil with an uptake on the roots. So it's not - actually doesn't kills the plant. It's just a root uptake.

And how does - - -

KENNETH MARTIN J: A root, what, uptake, is it?---An uptake, like, your - before you sew your crop, you use Atrazine as a - like, a pre-application. And it's incorporated in the soil and it's like a - in the soil, and it's like a - the plant takes it up from the roots.

I see?---It's not a contact and, further, after you planted your crop, you put some more Atrazine down to, sort of, keep the Atrazine up in the soils to kill any smaller rye grasses that come up.

Thank you.

CAHILL, MS: And how effective is that in terms of weed control compared to glyphosate, in your experience on your farm.

NIALL, MR: Well, I object to the question. The witness has already answered that question and this is cross-examination, in my submission. He was asked that question and he gave his answer.

KENNETH MARTIN J: I will allow the question.

CAHILL, MS: How effective is Atrazine compared to glyphosate in your experience on your farm?---Well, glyphosate, in my experience on the farm, is 100 per cent kill anything it contacts with. Atrazine has to be moisture activated, so if the moisture is not on the ground, the Atrazine won't activate and it will not kill the plant.

Right. Thank you. Do you consider that it's practical for you to not use glyphosate in a paddock on your farm in the year following an RR canola crop being grown in that paddock?---No, it's not practical in my - not to use it.

And why is that?---Because of the rotations I use. Maybe you would have to put it back to sheep, which in my cropping paddocks, I don't use sheep as a - apart from after I have cropped. There are - well, that is the main reason, because it's 100 per cent effect so I still want to keep using it.

Do you do anything on Seven Oaks to try to reduce the risk of developing glyphosate resistance in your weeds?---In my weeds, we make sure we got 100 per cent kill when we spray the weeds, that they actually contacted, make sure the conditions are just right. We had - previous years, like I said, we use these DIMS and - FOPS and DIMS to try and kill the weeds and at times we do spray, type, like a barley crop, you can spray - spray freeze it, kill the weeds underneath it as well. So virtually just try and eliminate all the possible weeds that have had any contact with glyphosate.

Now, at transcript page 738 yesterday, you were asked if you used the minimum till method of seeding since - if you had used the minimum till method of seeding since 2002 and you answered "yes". Between 1990 and 2002, had you ever used the deep till method?---Yes. I used to be full cultivation before that.

All right. Now, you were asked today about the precautions that you took in 2010 in growing GM canola at Eagle Rest - next to the boundary with Eagle Rest, and you gave evidence that you had allowed a five metre buffer, there was the roadway in between, two tree lines of buffer - I assume you mean there, on either side of the road?---Yes. That's right.

You had let Mr Marsh know where you were going to grow the canola, and he didn't grow the canola?---That's correct.

You were then asked whether you considered doing anything else to reduce the risk of presence of GM canola on Mr Marsh's farm and you said no. Why didn't you consider doing anything else?---About the presence of GM canola on Mr Marsh's property?

Yes?---Well, I didn't know Mr Marsh had any canola on his property, apart from what he had told me, and none had grown on Mr Marsh's property by then. I'm not quite sure about anything else.

All right. All right. Now, page 254, volume 1. 253, I beg your pardon. You were taken to the document that begins at page 253 of volume 1 of the court bundle. This is my question, Mr Baxter: what regard did you have to that letter and the accompanying documents when deciding to swath or direct harvest RR canola in 2010?---What regard did I have?

Mmm?---As in to whether I was going to swath or - - -

Yes?---After I read this letter?

Yes?---Well, I obviously read this letter and - well, obviously we had made no decisions by then, and whether practice of - or not the practice - with me swathing, was a practice that me and my agronomist decided to do for maximum weed control. And - yes, that's about all I can probably say.

All right. So weed control. Was there anything else - - -

NIALL, MR: I object to the question, your Honour. It's plainly - - -

KENNETH MARTIN J: Leading.

CAHILL, MS: What were your reasons for swathing RR canola in 2010?

NIALL, MR: Well, a question that broad, your Honour, does not arise out of cross-examination.

CAHILL, MS: Well - - -

KENNETH MARTIN J: What do you say?

CAHILL, MS: Well, it clearly does arise out of cross-examination, your Honour, because there were a series of questions to the witness regarding his decision to swath and what motivated it, and whether there were alternatives.

NIALL, MR: Your Honour, it's not a subject matter opportunity to re-examine. It has to be directed to a particular question and it has to be for the purposes of clarifying or eliciting evidence in response to cross-examination. A question as broad as that is plainly well beyond the permissible limits of re-examination.

KENNETH MARTIN J: I was alive to the way this was cross-examined about as it happened, and I think it was very carefully cross-examined upon, and I think the objection is rightly taken in terms of it not arising out of the way that issue was dealt with in a very careful way. Having said that, if you want leave to lead that evidence, you can make that application and I will consider it.

CAHILL, MS: Why did you direct harvest Mailbox rather than swath it in 2010, Mr Baxter?---With the Mailbox paddock, I could desiccate the paddock before I harvested, which you can't do with RR canola.

And what do you mean - - -

KENNETH MARTIN J: Sorry. I didn't understand that.

CAHILL, MS: Yes.

THE WITNESS: Well, the IT or TT canola - - -

KENNETH MARTIN J: Yes?---Before you harvest it, you can desiccate it.

Desiccate it?---Which is you can spray it out about the same time as you swath. And by spraying it out you can kill all the weeds under your crop, which is another method of controlling your weeds, and the crop will tend to harden up and not shatter.

Okay?---Whereas you couldn't do that with the GM canola because you can't apply another Roundup.

Thank you.

CAHILL, MS: Nothing further, your Honour.

KENNETH MARTIN J: Yes. Thank you, Ms Cahill. That completes your evidence, Mr Baxter. Thank you very much. You're free to leave the witness box and, obviously, as a party, you're free to remain and listen to the evidence?---Thank you.

(THE WITNESS WITHDREW)

CAHILL, MS: Now, Mr Stretch is next, your Honour, and there is a series of objections to his witness statement.

KENNETH MARTIN J: All right. Just give me a moment to clear away the debris and I will find that statement. Yes, Ms Cahill.

CAHILL, MS: So if I can first identify the concessions, your Honour.

KENNETH MARTIN J: Yes, by all means.

CAHILL, MS: We can strike through paragraph 13(6).

KENNETH MARTIN J: 13(6) is deleted.

CAHILL, MS: 13(8), the words "common with other farmers" are to be deleted.

KENNETH MARTIN J: Right. The words in paragraph 13(8), "common with other farmers" are excised.

CAHILL, MS: 14(2), the words "from so that fathers" through to "wild radish", inclusive. So I think there should be a full stop after 1990s for the sentence to now - paragraph to now make sense.

KENNETH MARTIN J: And to "wild radish". Okay. So the last sentence, "TT canola is resistant to the herbicide triazine" remains?

CAHILL, MS: Yes.

KENNETH MARTIN J: All right. So the component of 4, subpara (2), "so that farmers had another weapon to control herbicide resistant Wimmera rye grass, HRWR, which was the main problem in cereal and canola crops, and the wild radish" are excised.

CAHILL, MS: And then 18(1), that's struck through in its entirety.

KENNETH MARTIN J: 18(1) is excised.

CAHILL, MS: I just have to check, there's a - something in 23, I think - 27(3). Yes. Entirety goes. I beg your pardon. Yes. Paragraph 20 - can I just have a moment please, your Honour.

KENNETH MARTIN J: Yes. By all means.

CAHILL, MS: I will just have to - sorry, your Honour. I just have to check with - - -

KENNETH MARTIN J: Would you like me to rise for a couple of minutes so you could do this?

CAHILL, MS: Yes. Would you mind, please? Thank you. I'm sorry about that.

KENNETH MARTIN J: Yes. We will just adjourn pro tem while this unfolds.

(Short adjournment)

KENNETH MARTIN J: Yes. Please be seated. Ms Cahill.

CAHILL, MS: Sorry about that, your Honour. That's just something that slipped through. So it's 23, subparagraphs (2), (3), to (5) can be struck through.

KENNETH MARTIN J: All right. So only 23, subpara (1) survives.

CAHILL, MS: Yes. Now, my friends have other objections, as I understand it.

KENNETH MARTIN J: All right. Yes, Ms Nichols.

NICHOLS, MS: Your Honour, can I provide your Honour with a document that might assist. I gave it to your Honour's team this morning, but I haven't - - -

KENNETH MARTIN J: Is that - is that the one? The - maybe not. Perhaps we will get it anyway. Yes. Yes. That actually is the one that came to me, so I've got it.

NICHOLS, MS: Thank you, your Honour. Objections really are made in two parts. The first type of objection, if you like, is an objection to relevance, and I object to most of Mr Stretch's statement, and it would be convenient, I think, if I deal with that objection first and then return to the more particular objections after that.

KENNETH MARTIN J: Yes.

NICHOLS, MS: And that objection really falls in two parts. The first part of the objection relates to the part of Mr Stretch's statement which deals with, what I will call, weed resistance. And I might just take your Honour briefly through the structure of the statement, because

that will assist, I think. Does your Honour have that there?

KENNETH MARTIN J: I do.

NICHOLS, MS: You can see at paragraphs 1 to 9 are really a description of Mr Stretch's farm, and something brief about his rotation pattern. At paragraph 10 he commences to speak about Wimmera rye grass, and thereafter, starting at paragraph 13, he discusses his growing of conventional canola on his farm of 1997, his use of the herbicides FOPs and DIMs. He then says he noticed resistance, and, over the page, at 14, he states that he started growing TT canola around 1997, and by 2000 he had ceased growing conventional canola.

In that context, he discusses his use of triazine, and says that that became less and less effective. The bottom of that page, he says that in the years 2009 and 10, the Wimmera rye grass problem in a number of paddocks had become extremely difficult to control. Paragraph 18(2) onwards, he discusses the fact that he participated in the 2009 Roundup-Ready canola trials run by DAFWA. And he goes on in that paragraph to mention the yields he obtained. Paragraph 19, he discusses what he did on his farm in 2010, which was to plant Roundup-Ready.

He discusses his yields in paragraph 20. Paragraph 23, he makes a conclusion about the yields he obtained. Across the - over the page, rather, paragraph 24, he mentions what happened in 2012. And, if I can ask your Honour to skip over a moment, at paragraph 27, if you could go to paragraph 27, he continues the narrative and talks about what happened on his farm in 2013. And, over the page, he gives some information about particular costs arising on his farm. Just going back to complete the statement, at paragraphs 25 and 26 he gives some evidence about his experience of swathing.

So I appreciate that was a very quick tour through the statement, but your Honour will see he really addresses two subject matters. One concerns weed resistance on his farm; the other concerns swathing. And I would like to take those two in turn. If I can deal firstly with weed resistance. Mr Stretch's evidence is he did certain things on his farm, certain paddocks which are not named, and that he had a weed resistance problem, and, in effect, he used Roundup-Ready to deal with that problem, and he got certain outcomes.

I anticipate that it will be said that this is evidence that goes to the defendant's proposition at paragraph 23 of his defence, that Mr Baxter acted reasonably in planting Roundup-Ready. Your Honour will recall from yesterday that that's said for two reasons: firstly, because canola in 2010 - rather Roundup-Ready canola in 2010 was in accordance with the reasonable use of land, in accordance with the ordinary usage of farmers in the Kojonup region. The second proposition that's advanced in the defence is that Mr Baxter planted Roundup-Ready canola so that he could use glyphosate in the paddocks in which Roundup-Ready was grown to manage weeds in those paddocks.

So those were the two contentions in the defence about Baxter's use of Roundup-Ready canola. That appears to me to be the context in which this evidence is put. In relation to the evidence about wind resistance - does your Honour want me to take you to that paragraph of the defence?

KENNETH MARTIN J: No. I'm actually looking at 23 of the defence again.

NICHOLS, MS: Yes. Yes.

KENNETH MARTIN J: So - - -

NICHOLS, MS: Your Honour will see those two paragraphs.

KENNETH MARTIN J: I do.

NICHOLS, MS: In that context, I have four short points to make. The first is that this is evidence about what one farmer did on his farm in particular paddocks, to deal with a particular weed problem, about which he purports to give evidence. It's not survey evidence. It's not evidence about general usage in the area. It's not evidence, for example, from DAFWA about the uptake rate of Roundup-Ready canola and the use of, for example, glyphosate used in in-crop applications in the Kojonup area.

It's simply evidence from one farmer about what he did on his farm. Your Honour can't, in my submission, properly extrapolate from that anything about ordinary usage; it's just evidence from one farmer. Second point is that even if your Honour was to regard it in a very limited fashion as being evidence as usage because it comes from a farmer in the Kojonup region, you couldn't, in my submission, properly form any conclusions from that by reference to such a small sample. One can't look at what one farmer did

on his land and draw an inference about the reasonable land use of farmers in the Kojonup area.

But, more to the point, even if you were tempted to do that, which, in my submission, you ought not be tempted to do, that could not be probative of the reasonableness of Mr Baxter's use of Roundup-Ready on his land. It could not be probative in the sense that it would not be a proper way to set up a standard against which to judge the reasonableness of Mr Baxter's conduct which is in issue in this case. My third point is that even if - leaving those points aside, general conceptions of reasonableness, in this context, really do strain the boundaries of relevance.

As your Honour will have no doubt detected from the cross-examination of Mr Baxter, weed resistance is very much a paddock by paddock proposition. The use of Roundup-Ready canola, in any given case, will concern the farmer's individual circumstances and his particular reasons for using that tool in a paddock or paddocks. And you have seen that Mr Baxter's particular use has been subject to testing through cross-examination. That is because that is an issue in this case, and, in my submission, on this set of facts, one doesn't derive any proper assistance by looking at the particular factors - about practices of one other farmer. General propositions such as glyphosate when used in standing crop post-emergence applications is good for farming don't, in my submission, assist your Honour to draw any conclusions about whether or not Mr Baxter's conduct is reasonable in this circumstance. And it's got no - can be of no probative assistance in your Honour deciding those questions.

My fourth point is that when one looks at the actual character of this evidence one must conclude that, in addition to the reasons I have already advanced, this evidence can't be properly probative because the way that it has been set out, it's not really possible to properly test it. As I have indicated before, the questions of weed resistance are really paddock by paddock proposition and Mr Baxter could be tested on this question because, as the plaintiff - the defendant, rather, he was required to produce his paddock plan and other documents relating to the use of weed resistance and he's given fairly extensive evidence about that.

Mr Stretch has not attached a single document to his statement. There are no farm plans. There's no documentary evidence whatsoever. There are general references in the statement to paddocks. The paddocks are

not identified. There's an assertion about comparable paddocks. They are not identified. One doesn't even have a map of his property. And I can illustrate that by asking your Honour to look at the statement. Just simply by way of example, if your Honour goes to paragraph 18 subparagraph (vi).

KENNETH MARTIN J: 18(vi), yes.

NICHOLS, MS: This paragraph falls in the context of a discussion of the 2009 trial and you will see at sub (vi) it says - sub (v) rather:

The RR canola yielded 1.6 tonnes per hectare. A TT canola crop grown on my farm in a comparable nearby paddock yielded 0.8 tonnes per hectare.

It goes on to say that:

The increased yield was due to the Roundup spray killing all late germinating rye grass plants in the paddock, apart from a few plants which were missed by the sprayer. On the other hand, a large number of late germinating plants in the TT paddock survived and competed to the extent the yield was reduced by 0.8 tonnes.

Now, evidence about what is a comparable paddock, one needs to be - that would need to be established rather than being asserted. And to the extent that it was even regarded as a permissible assertion because he might be presumed to know his farm because he is a farmer, the difficulty with it is that it can't be probed in cross-examination because there's nothing by which to test it. We don't know anything other than what Mr Stretch has said about his farm.

And if your Honour will also have a look at paragraph 20 sub (3) as an illustration of the same proposition, Mr Stretch says that - halfway down the paragraph:

I achieved well above average yields with cereal crops in the same paddocks.

And he give the reason, namely the cleaning up of the rye grass problem. Well, we don't have the paddock history so we can't test that proposition. We don't know what is meant by above average yields because we don't have anything by which to test that. Similarly, subparagraph

23(1), the conclusion that he achieved an excellent yield is drawn. Just one final illustration, paragraph 27, in that paragraph there's various statements about the costs that were incurred and the savings that were made. And we really are in a position where none of those assertions can be tested by any material produced by anyone in this case.

Self-evidently, this case is not a trial about Mr Stretch's farm and so it's unsurprising that we're not seeking to test those propositions, but if he gives that evidence, in fairness, we should be able to. But really, I'm advancing this in the context of relevance. So the character of the evidence is a further reason why your Honour ought consider that. It can't be probative on the relevant questions in this trial. That deals with the weed resistant point.

The remaining part of the statement is at paragraph 25 - 26. That concerns swathing and Mr Stretch has said, "This is what I do. I've swathed for a number of years. This is what happens on my farm and in my experience, these are the benefits of swathing." The difficulty about this on the question of relevance is that Mr Baxter has given very particular evidence about his experience of swathing, why he did it, what his concerns were.

For example, he said at transcript 736 yesterday that up until 2010, he had never had a problem with pod shattering prior to harvest. His answer was, "Not a huge amount, no." To have in that context separate evidence by Mr Stretch, that he finds it useful for seed pod cracking, in my submission that evidence, given the evidence that Mr Baxter has already given about swathing, can't assist your Honour to decide whether Mr Baxter's decision to swathe involved a lack of reasonable care or unreasonableness in the context of nuisance.

If your Honour imagines how you would deal with this in your judgment, in my submission it would be impermissible to find that Mr Baxter's conduct was reasonable in respect of swathing because another farmer found it useful. There is one aspect of the evidence that is slightly different and that is at paragraph 26 sub (8) and Mr Stretch says:

In my observation, the majority of canola crops in the Kojonup area are swathed.

Now, in my submission, having regard to the other matters I have raised, this contention in all of its generality is just not sufficiently probative on the

question of Mr Baxter's reasonableness to be considered relevant. It's extremely general evidence. It doesn't go to the reasons why these farmers, whoever they might be, swathe or do not swathe. And for that reason, it's not probative on the question of Mr Baxter's conduct. Thank you, your Honour.

KENNETH MARTIN J: All right. That's the submission. Thank you, Ms Nichols. Ms Cahill.

CAHILL, MS: If it please, your Honour, that submission, with the greatest of respect, fundamentally misapprehends the legal issues that your Honour has to decide in this case, both in negligence and in nuisance. The issues in terms of the reasonableness - I'm reluctant to use that label to cover the myriad of topics that fall within that in relation to Mr Baxter's farming activities - cannot possibly be limited to just Mr Baxter's situation without consideration more broadly.

Now, he is alleged to have breached his duty in negligence by cropping RR canola next to the boundary with Mr Marsh, rather than further away, and by swathing rather than direct harvesting that crop. The nuisance, the substantial interference, is expressed in the same way: cropping RR canola on the boundary, rather than further away; and swathing rather than direct harvesting. There may be, latent within those particulars, a further if not a first complaint that Mr Baxter cropped RR canola at all and that that amounted to a breach of duty or substantial interference.

Now, whether one is looking at this in terms of a breach of duty or whether one is looking at it in terms of nuisance, a central issue that is relevant to either cause of action is whether there is social utility or benefit in the activity that is said to constitute the breach or constitute the unreasonable interference. In relation to negligence, of course, that arises expressly under section 5B(2)(d) of the Civil Liability Act.

It arises even - it arises in any event explicitly on the pleadings because of the way in which we have pleaded out reasonableness, both in response to the negligence plea and the nuisance plea because we identify that growing RR canola is a reasonable usage of the land in Kojonup, ordinary, accepted and reasonable usage, and that swathing has particular benefits. Now - not just limited to Mr Baxter but more broadly and that, again, invokes this concept of social utility or social value benefit.

Now, when the defendant comes to discharging its evidentiary onus in this regard, we don't say to your Honour that you're limited to just listening to experts who don't actually ever farm themselves in the Kojonup region as to the benefits of swathing, as Mr McInerney gave evidence about last week or the benefits of RR canola. He gave evidence about that as well last week. Now, that's important, of course. Having heard that particular submission from the plaintiff, it's the plaintiffs themselves who volunteered evidence last week.

This is the evidence that they adduced through Mr McInerney, that RR canola has a strategic benefit generally, not specific to Mr Baxter. That was the evidence in his report. It has a strategic value in the management of herbicide resistant Wimmera rye grass. And that swathing, not just swathing for Mr Baxter but swathing generally, is the preferred method of harvesting canola because of the myriad benefits that Mr McInerney identified in his report and then expanded upon in cross-examination. So we don't limit it to that sort of expert evidence.

What we have considered your Honour would be assisted by, and we press for this, is that your Honour hears from a farmer, Mr Stretch. He actually farms in Kojonup and he has farmed there for the last 30 years, the last 20 of which he has farmed canola. And he speaks not beyond his own observations and experiences on his farm. He doesn't purport to speak for the district as a whole. He speaks for a farmer in Kojonup, who is very experienced in growing canola. And he tells your Honour what his observations and experiences have been in relation to herbicide resistant weed management, how that has influenced his decision to grow RR canola and what the consequences of having done that has been.

KENNETH MARTIN J: The contention is that perhaps at a deeper level than that, that it's unverifiable because the paddock information is not there. So, whereas it was with Mr Baxter and it was probed and probed legitimately, this - accepting that I was with you in terms of the general concept of its potential relevance, there's a functional prejudice in terms of its verification by reason of the generalised way in which that conclusion is expressed.

CAHILL, MS: That's a - - -

KENNETH MARTIN J: That's troubling me, I have to say.

CAHILL, MS: Well, that's a different submission because you will see that the broadest objection on the table in front of you, your Honour, is in relation to relevance alone. It's the specific paragraph, the additional particular objections, whereas we understood it, this complaint or conclusion without basis was articulated. But let's accept that the objection is now much broader than it has been previously articulated, we are prepared to meet that. We say this - that's a question of weight and degree to which your Honour can rely upon the evidence in light of the particularity of it.

Now, sometimes, evidence will be expressed in such a broad and general conclusionary way that it is plainly of so little probative weight and so incapable of any probing by cross-examination that it ought not be allowed. So if Mr Stretch, for example, had said in his witness statement, "I have farmed canola for 20 years and I am telling you that with RR canola I just get vastly better yields than I do with other forms." Well, that, of course - - -

KENNETH MARTIN J: "I got an excellent yield this year which - - -"

CAHILL, MS: Yes. But he actually specifies the amounts by comparison with other paddocks. He's not talking in the abstract to the extent that would either make the evidence valueless or incapable of any probing whatsoever. He doesn't just say, "Well, I got .8 in one paddock and 1 point -" I just don't have it in front of me - - -

KENNETH MARTIN J: 1.9 tonnes fence to fence in 23(i).

CAHILL, MS: He talks about the comparability of paddocks, so he actually puts that forward. You have a look at paragraph 27, if it please your Honour, when he's talking about the herbicide costs. He just doesn't say, "Well, it's a lot cheaper and I don't use as much herbicide." He goes on with specificity to identify the costs and how they are incurred or not, as the case may be with RR canola.

Now, it might be put against us and there may be some force in the contention that without the benefit of discovery, as one would have against a party that the plaintiff is not in the position to probe these statements to the extent that they would, in relation - had Mr Baxter made them because there's no obligation on discovery - of discovery upon Mr Stretch. But that doesn't mean that this is inadmissible. It might mean that your Honour would

subordinate the weight of this evidence relative to other evidence but it certainly doesn't make it inadmissible, in my submission. It was 18(vi) I think I was - - -

KENNETH MARTIN J: 18(vi).

CAHILL, MS: Yes, 18(v) and 18(vi). So there you had the comparison of the two 2009 - the TT crop and the RR crop. He just doesn't say, "Well, the RR canola, I got a better yield." He actually says what the yield was in each case and he says that the TT canola crop was both in a comparable paddock and it was nearby. Now, having said that, there's an opportunity to probe what is meant by comparable in cross-examination.

No, it's not as - you don't have the full range of discovery that you have if Mr Stretch were the defendant and not Mr Baxter, but we all understand the limits of both the evidence and its weight and how far it can be tested in cross-examination. Nothing about that is new and, in our submission, it just doesn't make it inadmissible, it's just a question of the weight that your Honour records. And my friends can make submissions on that at the end of the day. Those are my submissions.

KENNETH MARTIN J: All right. Thank you, Ms Cahill. Anything out of that, Ms Nicholls?

NICHOLS, MS: Yes. It's those paragraphs and others, are just untestable. It's not correct to say that there is not the full extent of discovery. There is not a single document produced and, in my submission, that kind of evidence, because it cannot be tested in any sensible way, it's just so insufficiently probative as to be irrelevant. Can I just respond very briefly on the point about social utility. Can I provide your Honour with a short extract from the Civil Liability Act.

KENNETH MARTIN J: Actually, I've got the whole Act here, so - - -

NICHOLS, MR: Your Honour, this question of social utility - well, the words "social utility" have been mentioned several times in this case already, but without really any definition, and I just - I understand your Honour probably wants to deal with this quickly, so I will be very brief.

KENNETH MARTIN J: That's all right. I mean, I consider this to be a fundamental point in the case, so the time is warranted.

NICHOLS, MR: Thank you, your Honour. If your Honour will go to paragraph 5B of - section 5B, sorry, of the Act. Do you have that there?

KENNETH MARTIN J: I do.

NICHOLS, MR: You will see that the heading of division 2 is Duty of Care, and, under 5B, there are some general principles, and the first is that a person is not liable for the harm caused by the person's fault in failing to take precautions unless the risk was foreseeable, the risk was not insignificant, and, in the circumstances, a reasonable person would not have taken those precautions. And subparagraph (c) is elaborated by sub - major sub (2). And your Honour is directed to take into account, in determining sub (c), the probability of the harm, the likely seriousness of the harm, the burden of taking precautions to avoid the risk, and the social utility of the activity that creates the risk of harm.

Now, just to put this in context, the High Court in the case of Adeels in 2009 on the identical provision in the New South Wales Civil Liability Act, said that this part - subsection (2) is relevant to the question of breach, although it is entitled Duty of Care.

KENNETH MARTIN J: Sorry. What was the case?

NICHOLS, MR: It's the case of Adeels - the case of Adeels - A-d-e-e-l-s Palace Proprietary Limited, and Moubarak - M-o-u-b-a-r-a-k, and it's 2009 HCA 48. That's really just context for your Honour; it doesn't change my point. On the issue of social utility, that expression is not defined in the Act - Civil Liability Act. There has been very little consideration of it, but there is relevant consideration in the case I've handed to your Honour. And that is the case of Southern Properties (Western Australia) Proprietary Limited v The Executive Director of The Department of Conservation and Land Management, a 2012 decision of the Full Court of this court. And I just want to direct your Honour to one paragraph, and that is at paragraph 256. And I apologise for giving you a large bunch of paper.

KENNETH MARTIN J: No. I think everyone cites this case extensively in their submissions.

NICHOLS, MR: Yes.

KENNETH MARTIN J: So it's helpful to have.

NICHOLS, MR: Just to give you a little bit of background, that case was one in which a syndicate of local vigneronns sued the Department for smoke taint. And her Honour McClure P declined to consider the question of social utility, because it was considered that that would involve, on the facts, an impermissible examination of the reasonableness of statutory functions. Newnes J agreed with that, but Pullin J dissented, and therefore felt it was necessary, for the purposes of his decision, to consider the question of social utility. His Honour made the observations at that paragraph, and if I might read them to your Honour:

The phrase "social utility" is not defined in the Act. The word "social" appears only in one other section of the Act, section 5U, which defines "policy decision". There's nothing in the second reading speech or the explanatory memoranda about the meaning of that phrase. In the Ipp Report the only reference to "social utility" is a footnote on page 103, which reads, "Some activities are more worth taking risks for than others - a plaintiff may be required to submit to a risk for the sake of some greater good that they would not be expected to accept if some lesser interest were at stake. A common situation in which precautions that would normally be thought reasonable need not be taken is where an emergency vehicle is speeding an injured or sick person to hospital".

The expression "social utility" is likely to take on the compound effect of the ordinary meaning of the two words. "Utility" means "usefulness" and "social" means "of or relating to the life and relation of human beings in a community." ... Social utility is therefore the usefulness accruing to a community rather than to the benefit of individuals.

Accepting that judicial consideration of this concept is relatively limited, nevertheless, in my submission, that exposition of the concept, with great respect, makes a great deal of sense. Looking at the words of the text of the statute, one must address them, and they are social and utility. In the context of his case, where the complaint is that Mr Baxter swathed, and, in breach of a duty of care towards Mr Marsh, caused him injury, there does not arise any kind of balancing act between steps Mr Baxter took and a harm - and the utility that his activity might have

delivered to society, because that action, in this context, was about serving his own interests, and it was either done in breach of care or it was not.

But it wasn't, to use the example there, something like rushing through traffic lights, potentially causing danger to others in order to get somebody sick to hospital. Now, I'm not suggesting by my submission that one needs to be confined by that analogy, but it does inform the question of the considerations that arise when one speaks of society. Was Mr Baxter serving a social purpose when he swathed the canola crops? Clearly not. It's not suggested that, in any other sense, that is a question one needs to ask, but it's not the kind of activity that, although it might be said one other farmer does it, has a relevant social meaning.

It was not contributing to the agriculture of anyone else's farm. It's not said that - it couldn't reasonably be said that because Mr Baxter swathed, that was somehow enabling other people to swath, and therefore contributing to some kind of benefit to society. So your Honour need not decide this as a legal point to conclude that, really, the concept of social utility is not, in this circumstance, a black box into which one can throw questions of relevance and say, "Well, it might be relevant in the end because of social utility." It just doesn't fit - that paradigm does not fit these facts on the particular point to which my submissions are directed. Thank you, your Honour.

KENNETH MARTIN J: Yes. All right. Thank you.

CAHILL, MS: May I say one more thing, your Honour?

KENNETH MARTIN J: Yes, you can.

CAHILL, MS: If you don't - if your Honour - - -

KENNETH MARTIN J: Yes. I will give Ms Nichols an opportunity to respond. You mentioned social utility - - -

CAHILL, MS: I did.

KENNETH MARTIN J: She came back with social utility in context. If you want to say something more about that, then that's fine.

CAHILL, MS: I do, just about that.

KENNETH MARTIN J: Yes.

CAHILL, MS: Your Honour, the issue of social utility, my learned friend is quite right, with respect. It's not a legal point that your Honour ought finally determine for the purposes of these proceedings now. But the suggestion that social utility could not conceivably extend to the work of a farmer in producing food for the domestic market and export, and that the way in which that food is produced so as to maximise yields, either through the minimisation of weed burdens in paddocks or the use of a variety of canola that maximises yields in those circumstances, and the use of swathing techniques that, again, maximise yields; we say that that just simply cannot, in any conceivable way, be so inarguable that your Honour could exclude this evidence at this point in time. If it please your Honour.

KENNETH MARTIN J: All right. I'm just going to adjourn briefly to review the potential statement of Mr Stretch in context by reference to the provisions of the Act, and to just look over the submissions that have been made. I won't be very long.

(Short adjournment)

KENNETH MARTIN J: Yes, please be seated. The defendant proposes to lead by a witness statement and then make available for cross-examination a farmer from the Kojonup district, Mr Digby Stretch, whose farm is 53 kilometres south-west of Kojonup and who has farmed in the area for over 30 years.

There are a number of in principle objections raised at a macro level against the receipt of this evidence, but there's also some what I might describe as micro objections rooted in asserted prejudice by reason of (a) the generality of the evidence proposed to be led in certain paragraphs and (b) the lack of verifiable information supporting generalised assertions, indicating that it's impossible to test the voracity of broad-based assertions without a documentary base and thereby rendering the value of such evidence, even if its weight is a matter for the court and always will be, so light in terms - negligible in terms of its assistance that it should not simply be received.

Let me deal with the objections at a macro level then before I descend to the more direct minutia of what's complained about. The first point I want to make is that the objection based upon irrelevance is as to the receipt of the evidence on a preliminary basis. It is not a

question about the weight of the evidence ultimately used by the court. The evidence, at the end of the day, will either be received or not received but if it is received, then it's a question of where it sits overall. And the fact that it is accepted doesn't mean that it's going to be receiving any weight or a great deal of weight or even that the evidence will be accepted. So those sorts of weighing considerations are not relevant at this time. It's just a question of whether the evidence comes in or not as framed.

The second point is that although this is a case about negligence or alleged breach of a reasonable duty of care contended for with manifestations of that duty in relation to (a) the growing of GM canola in the first place and (b) after that in a temporal sense towards the mode of harvesting that GM canola by the method known as swathing, that the law of negligence in Australia proceeds on an incremental basis. In other words, there's distinct categories of cases well known to the law of - common law of negligence, such as diving cases, medical negligence cases, fire cases of that ilk.

But there are also cases at the margins in terms of their facts that have to be evaluated on a case-by-case basis and very carefully. In those situations, the underlying facts are very important and therefore the courts are cautious about eliminating evidence because at the end of the day it might just be a piece of the overall jigsaw in terms of an ultimate evaluation. If that evidence is shut out then it might bear upon, in some prejudicial way, the value of exercise that the court is asked to perform. Hence, courts take a cautious approach at the illumination of such evidence.

Nevertheless, in the case of a pure negligence argument, where it's a case about economic loss and at the end of the day the economic loss was at a small - in a relatively economic sense amount, the court would weigh proportionality considerations and case management considerations in terms of its overall utility. Sometimes in cases like this the court will receive the evidence subject to relevance. So it will be taken and then evaluated in the overall picture at the end of the day. Western Australian courts, generally speaking, are reluctant to follow that practice because the receipt of the evidence on that provisional basis can sometimes undermine the way the cross-examination proceeds.

There are authorities, particularly the Computer and Accounting Tax decision in the Court of Appeal, which suggests that the court, inconvenient as it may be and

difficult as it may be, needs effectively to rule instantly upon these objections rather than deferring them. That's the approach I propose to take. Were this simply a case about professional negligence - I withdraw that - common law breach of a duty of care in the context of argued negligence, it may be that I would lean highly towards rejecting the evidence on the basis that it is another farmer some distance away and peculiarly unique considerations would apply to considerations in relation to that particular farm.

But it isn't just a case about negligence, it's a case about nuisance as well. And in that sense the arguments that open up for the court to consider arise not just in terms of what happened in 2010, as regards planting and swathing by Mr Baxter, but it also involves arguments about abating the nuisance for the future and, indeed, arguments about a perpetual injunction against Mr Baxter which is sought, restraining him from growing GM canola up to a kilometre away from the Marsh farm and also from swathing such canola within that one kilometre range.

Now, when it comes to evaluating the tort of private nuisance in the context of an argument about an unreasonable use of land, the neighbourhood in which this activity is happening becomes very important. And, because we are dealing here with farmers in the Kojonup region of the south west of Western Australia who make their living from their respective farms, it seems to me that an overall part of the jigsaw puzzle might be assisted by evidence in terms of the practice as regards growing GM canola and swathing GM canola, not only in 2010 but now because of the injunction that's sought to receive admissible evidence, as regards growing and swathing of GM canola.

So, at a macro level and, particularly, by reason of the private nuisance considerations in the somewhat porous criteria of what's reasonable and what's not reasonable in the neighbourhood, I am, at a macro level, persuaded to receive the evidence and not to reject it at this point. I can't emphasise enough, however, that that says nothing about what weight it will ultimately be given or whether, indeed, it will even be received. The novel case argument also bears upon that but to a much smaller degree.

At a micro level, however, once we get through the threshold of accepted relevance, it seems to me that the evidence has got to be in admissible form. And, just quickly, it seems to me that a paragraph like subparagraph 26(viii) in terms of that generalised observation is simply

too generally formulated without an empirical basis as to be of any assistance to the court. I'm not sure that the micro attack on the evidence has really been developed fully because we have been, at a plenary level, concerned with the in-principle attack on the evidence.

So what I indicate is that I will, at a macro level, accept that the evidence can be received but in terms of a paragraph by paragraph basis and having indicated my disdain for 26(viii) - that's obviously out - but if further submissions are made in regard to particular paragraphs, then I will receive those submissions.

NICHOLS, MS: If your Honour pleases.

CAHILL, MS: Can I just be - sorry - - -

KENNETH MARTIN J: Yes.

CAHILL, MS: - - - can I just be heard first on that?

KENNETH MARTIN J: Yes, by all means.

CAHILL, MS: Your Honour, one of the difficulties we have in proceeding in that way is, to take 26(viii) as an example, that wasn't objected to on the basis that is now advanced orally by my learned friend. If you see that table, the additional particular objections were as the four that are set out there. And I had, in fact, made an error with that paragraph 23, that I conceded. The concession was intended to be in relation to that 20 subparagraph (iii).

KENNETH MARTIN J: Sorry, I'm a bit - - -

CAHILL, MS: You see the table that my learned friend gave you?

KENNETH MARTIN J: Yes.

CAHILL, MS: See the remaining objections. There was a general objection, which your Honour has just ruled on and then there were particular objections of which there were only four.

KENNETH MARTIN J: Yes.

CAHILL, MS: That top one was the one I was intending to concede.

KENNETH MARTIN J: So it's 20 subpara (iii).

CAHILL, MS: Yes. And - - -

KENNETH MARTIN J: Which I haven't, I must say, given much attention to.

CAHILL, MS: Well, I was prepared to concede it on the basis that it was a conclusion there and I remain of that view. It wasn't my intention to concede the whole of 23, because it didn't remain as an objection based on this table. If my friend wants to now expand the grounds - - -

KENNETH MARTIN J: So, just to be clear - 20 - paragraph 23, subparas (ii) through (v)?

CAHILL, MS: Yes.

KENNETH MARTIN J: Which I had actually put a line through are back.

CAHILL, MS: I had not intended to. If my friends have an issue with that because I made the concession and they are not happy for me to withdraw it, then we will live with the consequences. But we will still concede 20 subparagraph (iii) because we always intended to do that.

KENNETH MARTIN J: Well, let's assume we can jump that.

CAHILL, MS: Yes.

KENNETH MARTIN J: What are you saying about the one I didn't like? 26(a).

CAHILL, MS: I beg your - it wasn't objected to on that basis, your Honour. The objections, in terms of a conclusion without basis were limited to the four that were set out here. If my friend is intending to now expand the particular objections more broadly then we think it most efficient that we be given notice of that so we can consider, (a) whether we are prepared to concede the objection; (b) whether we would seek your Honour's leave to lead evidence from Mr Stretch about those matters.

KENNETH MARTIN J: All right. Thank you. Ms Nichols?

NICHOLS, MS: Yes.

KENNETH MARTIN J: Descending into the minutiae - - -

NICHOLS, MS: Yes.

KENNETH MARTIN J: - - - what are the ones that you take issue with?

NICHOLS, MS: I do accept that there is some overlap in that I was submitting that the earlier submission was supported by a foundation objecting to a number of paragraphs.

KENNETH MARTIN J: I do. I mean, it was your fourth point, your character submission.

NICHOLS, MS: That's right. So I will just work through the statement, if your Honour pleases. And I accept that I probably could have been clearer in my communication with Ms Cahill. So I am going to tell your Honour what I object to and we will see where we get to. If your Honour will pardon me just a second. Paragraph - the one I mentioned when I was taking your Honour through the statement before, paragraph 18 subs (v) to(viii) concern the comparable paddock point. And I have addressed the reasons why that doesn't have any proper basis and is conclusionary.

KENNETH MARTIN J: All right. 18 subpara (v) through (viii).

NICHOLS, MS: Yes.

KENNETH MARTIN J: All right.

NICHOLS, MS: That's the first one. Does your Honour want to deal with them in turn or - - -

KENNETH MARTIN J: No. I think if you just take me through and indicate what's in the spotlight then I will
- - -

NICHOLS, MS: Right.

KENNETH MARTIN J: - - - decide on a course of action thereafter.

NICHOLS, MS: All right. Thank you, your Honour. Paragraph 20, subparagraph - subparagraph (iii) is - which I object to - - -

KENNETH MARTIN J: I think 20 subpara (iii) is conceded as gone.

NICHOLS, MS: No, I beg your pardon.

CAHILL, MS: For the words - the words that were complained of. If we go back to my friend's table where she identified the objections. The objection in relation to 23, which was the one I was intending to concede, was as to the words "and in 2011 to accept RR canola". So, basically, from the words "and in 2011" through to the balance of the sentence.

NICHOLS, MS: Ms Cahill is quite correct. That is - those are the words to which objection is taken, starting with the word "and" and going down to the word "canola".

CAHILL, MS: That's conceded, your Honour.

KENNETH MARTIN J: So even - right, okay. So that sentence should end, "despite the challenging conditions."

NICHOLS, MS: Yes, it should, your Honour. In paragraph 23, I think Ms Cahill and I have been using different forms of 23 and we had a miscommunication, but the whole paragraph is objected to. I think rather only 23 sub (i) remains. If that is the case, then 23 sub(i) is objected to. If any of - if any of the balance of the paragraph remains, the entirety of that paragraph is objected to.

KENNETH MARTIN J: All right.

NICHOLS, MS: Paragraph 26(viii) is objected to on the basis that I advanced before.

KENNETH MARTIN J: I think the response is that that wasn't notified, in which case you would seek leave to challenge it anyway.

NICHOLS, MS: That's right. I do, your Honour.

KENNETH MARTIN J: All right.

NICHOLS, MS: And I accept that I could have been clearer about that.

CAHILL, MS: Can I just - just so that we don't lose the track of it. I'm sorry to interrupt my friend, but neither 18(v) through (viii) nor 23 were signalled in the most recent objections. We had understood that any objections in relation to 23(ii) through (v) had been withdrawn and that there had never been any objection to 23(i). I can't tell your Honour the status previously of 18(5) though (6) but that certainly wasn't most recently maintained.

NICHOLS, MS: I can certainly say that paragraph - the objection to paragraph 23 in its entirety was in fact notified and I had misunderstood Ms Cahill when she said - took 23 this morning, which was - she intended to mean, I think, 20(3) - - -

KENNETH MARTIN J: Yes.

NICHOLS, MS: So we had notified an objection to the entirety of paragraph 23. Paragraph 27 I think we're up to, your Honour. We object to paragraphs 4 through to 10 - subparagraphs (4) through to (10).

KENNETH MARTIN J: All right. Just give me a moment to re-evaluate those paragraphs - - -

NICHOLS, MS: Thank you, your Honour.

KENNETH MARTIN J: - - - in this perspective before I hear from Ms Cahill. And I will give you an opportunity, come what may, to address the merits of this but I just want to see where it's taking us. All right. Ms Cahill, can I just indicate that by reference to the paragraphs as foreshadowed by Ms Nichols in terms of where unresolved objections currently lie, and I appreciate - well, I'm not attributing blame on either side - that there might have been late notice to you or misunderstandings that have not enabled you to respond properly and you can have whatever opportunity you need.

It seems to me they fall into this bracket. 18(5) to (8) I am troubled by because there is a lack of underlying information and until that information emerges, I detect an unfairness in terms of an inability to properly cross-examine on it. So I am prima facie troubled about 18(5) to (8). The next one is 23. 23(1) can stand; I'm not troubled by that. But for the same essential reason in terms of a lack of underlying empirical detail and the fairness of the process in terms of allowing it to be tested, I am troubled by 23(2) to (5).

Next, 26(8), it will come to you as no surprise that I remain troubled by that, simply in terms of its sweeping character. Having said that, if you wanted leave to adduce as much viva voce evidence as was admissible on the point, then I wouldn't be adverse to letting you have that opportunity. And then finally, paragraph 27. In terms of paragraphs 4, 5, and 6 and 7 are objected to, but I am troubled by them in the context of swathing. Paragraph 8 I think again I am troubled by. That needs some underlying detail.

CAHILL, MS: So that's 5, 6 - all of them, your Honour, then?

KENNETH MARTIN J: No, 27. 4 is fine, 5 is fine, 6 is fine, 7 is fine, 8 troubles me, 9 and 10 are fine.

CAHILL, MS: So just 8 in 27.

KENNETH MARTIN J: Just 8 - - -

CAHILL, MS: Thank you.

KENNETH MARTIN J: - - - that I'm troubled about. So just to sum up, 18(5) to (8), so paras 23(2) to (5) and 26.

CAHILL, MS: Eight.

KENNETH MARTIN J: Eight and - - -

CAHILL, MS: 27(8).

KENNETH MARTIN J: 27(8).

CAHILL, MS: So, your Honour, it might - - -

KENNETH MARTIN J: Should I give you some time overnight to think about that?

CAHILL, MS: Yes, thank you. Yes.

KENNETH MARTIN J: All right. Now, is there anything we can usefully do between now and 4.00?

CAHILL, MS: I don't think so, your Honour. Dr Rudelsheim is here from Canada and we would like to have him tomorrow morning so that he can return home tomorrow.

KENNETH MARTIN J: Yes.

CAHILL, MS: I'm sorry, he's from Belgium. He's not from Canada, he's from Belgium, your Honour. I'm sorry. In any event, we would still like him to return home.

KENNETH MARTIN J: We haven't really started with Mr Stretch so - - -

CAHILL, MS: That's right. So - - -

KENNETH MARTIN J: - - - probably not inconvenient to start with Dr Rudelsheim.

CAHILL, MS: It might be an inconvenience to Mr Stretch but I think in the scheme of things we are just going to have to juggle that.

KENNETH MARTIN J: All right. So we will deal with your expert.

CAHILL, MS: Then Mr Stretch, then Mr Robinson.

KENNETH MARTIN J: Yes.

CAHILL, MS: And then that leaves Professor Powles and Mr Slee.

KENNETH MARTIN J: Mr Slee. All right, and then that's your case?

CAHILL, MS: That's it. All right. Anything from your perspective, Mr Niall?

NIALL, MR: I was just trying to assist your Honour and our learned friends with some estimates from our side on those matters in that sequence. We've got no difficulties with Dr Rudelsheim going first.

KENNETH MARTIN J: Yes.

NIALL, MR: Then we would have four witnesses remaining on my count.

KENNETH MARTIN J: Yes.

NIALL, MR: Stretch, Robinson, Powles, and Slee.

KENNETH MARTIN J: Well, we might get through them all. We might span - - -

NIALL, MR: We might, your Honour.

KENNETH MARTIN J: - - - span into Friday.

NIALL, MR: Yes, your Honour. I think we probably will go very close to finishing evidence tomorrow. If there's - your Honour indicated a grant of - proleptically, a grant of leave in relation to paragraph 26(8), I think, of Mr Stretch.

KENNETH MARTIN J: Yes. Look - - -

NIALL, MR: Perhaps my learned friend - - -

KENNETH MARTIN J: - - - in terms of whether anything is capable of being adduced viva voce that's admissible, we will have to hear the question and evaluate the answer, but I didn't want to close that off.

NIALL, MR: No. My learned friend, Ms Nichols, might just address your Honour on that - her witness.

NICHOLS, MS: Your Honour, the concern is - don't want to receive a brand new statement overnight and have to deal with it with virtually no notice. If - I'm not sure what your Honour has in mind. If it's short viva voce evidence then that's mainly fine, but the notice issues work both ways, and I would rather be in a position - I think it's fairer if the statement stays in and I cross-examine in that form. But I'm obviously in your Honour's hands, but
- - -

KENNETH MARTIN J: Well, obviously there can be conferral by counsel overnight, and I'm sensitive to your position in terms of potential prejudice, depending on what's framed. I've got to say that it strikes me as something of a challenge to fashion an admissible question out of what's there, but perhaps not beyond the realms of - - -

NICHOLS, MS: But this evidence has been in - and I will check our records, but we had conceded a number of objections, and I can't tell your Honour right now whether we had objected to that, but I can check it.

KENNETH MARTIN J: See, I think I've already got some quantum evidence as swathing as a phenomenon, from Mr McInerney and pretty sure Mr - sorry - Professor Van Acker as well. So - no, no. It depends on what the basis of personal information reposed within this witness is. It's currently not there in 26(8), that's why it's not admissible. But, I don't know. I just leave the prospect open of that being opened up.

NICHOLS, MS: I understand - I don't want to revisit matters on which your Honour has already ruled, but there is a fairness concern about substantive evidence being introduced on that point at this stage, and the objection to it is one thing. It is changed in its form and, at this late stage, there may be some fairness considerations. That's really all I'm saying.

KENNETH MARTIN J: All right. And what I'm saying is I'm alive to your concerns, but I think I have to hear the question, if in fact the opportunity is taken up.

NICHOLS, MS: And - - -

KENNETH MARTIN J: Whether it is or it isn't remains to be seen.

NICHOLS, MS: We closed our case and we've not - anyway, I've said what I've said.

KENNETH MARTIN J: Ms Cahill.

CAHILL, MS: Your Honour, it's - we've got the luxury of - we're towards the end of the evidence in this matter, and we have through until next week. So we do have the luxury of a little bit of time on our hands. And one of the difficulties - I appreciate my friend's position, but, of course, the difficulty we have is that, for example, 26(8) was flagged to us as an objection; that's what we were advised in the document that you were (indistinct) on the day before the trial started, the 9th. That was the signalling of plaintiff's objections in accordance with your Honour's direction, but then it was withdrawn.

So now it's being reinstated just this afternoon, so we're grappling with that. If it means that we have to adduce vive voce evidence, if we want to pursue that point - and I haven't worked out in my own mind yet; that's the task for overnight, whether we do wish to pursue it - but I think there just needs to be a bit of recognition all round as to the way in which the point has evolved. And if these objections have been reinstated at the last minute, then there will need to be some last minute addressing of them.

KENNETH MARTIN J: Yes. All right. Well, I will deal with that - - -

CAHILL, MS: If that - - -

KENNETH MARTIN J: - - - as I need.

CAHILL, MS: Yes. My point is simply this: is if my friend needs notice and that puts us over into Monday or Tuesday with giving evidence - Mr Stretch giving evidence, then that may be the consequence, but we do have the benefit of that time.

KENNETH MARTIN J: I think what Ms Nichols might be trying to foreshadow is that if there's a large amount of evidence adduced - - -

CAHILL, MS: She wants some notice of it.

KENNETH MARTIN J: - - - that it might be better to formulate it into a supplementary statement and give them some notice of it.

CAHILL, MS: Yes. And that's my - if that be the case, then my point is simply this: we've got the time next week to allow that to happen.

NICHOLS, MS: Your Honour, if that's in prospect, I withdraw the objection to that paragraph.

KENNETH MARTIN J: All right. Well, Ms Cahill, the objection to the paragraph is now withdrawn.

CAHILL, MS: Well, I'm obliged. I will have to think about the others overnight and how we might want to deal with them.

KENNETH MARTIN J: Yes.

CAHILL, MS: But the same issue might arise in relation to those paragraphs, but, obviously, we're happy to confer with our friends.

KENNETH MARTIN J: Okay. I will just make a note of that. All right.

NIALL, MR: One other matters before your Honour rises.

KENNETH MARTIN J: Yes, Mr Niall.

NIALL, MR: I know - use those - one of those minutes before your Honour goes. In terms - we anticipate the evidence will close tomorrow, if not Friday morning. But we will endeavour to close it tomorrow. Submissions, your Honour; for our part, we've had - - -

KENNETH MARTIN J: You want a break before, do we?

NIALL, MR: Yes, your Honour. We were hoping that your Honour might entertain submissions on Thursday and Friday of next week.

KENNETH MARTIN J: Ms Cahill, has that been run past you?

CAHILL, MS: I can't say I - yes, it has, your Honour, and I can't say I will be anywhere else; we're listed through till Thursday/Friday next week, so we think that that's a sensible suggestion, and - - -

KENNETH MARTIN J: On the basis that each side has a day each, or - - -

CAHILL, MS: We wouldn't have thought we would need a day each. Your Honour, I was - I had canvassed with my friend half a day each, initially, but I think most recently my friend has suggested that if one allowed half to a day - half a day to a day for the plaintiffs closing - I would assume we would go first, given we're the defendant.

KENNETH MARTIN J: You're in evidence.

CAHILL, MS: Yes. And as best I can estimate at this stage, I would say we would probably only need half a day. But I anticipate, your Honour, that, certainly from our side, we would like to give you some submissions which have the necessary evidence references, so that we're not bogging down the oral submissions. In the usual way, your Honour, we would like those written submissions from our side to be as fulsome as possible so that it's really an opportunity for your Honour to focus on the things your Honour is interested in.

KENNETH MARTIN J: So would I have them some time, say, on Wednesday, so that I can - - -

CAHILL, MS: That's the idea, is that - - -

KENNETH MARTIN J: - - - read them - - -

CAHILL, MS: Exactly.

KENNETH MARTIN J: - - - be in a position to question on Thursday and Friday.

CAHILL, MS: Exactly. Yes.

KENNETH MARTIN J: All right. So, Mr Niall, would you anticipate, say, Thursday the defendant would give its closing position and then after that was done we would adjourn to Friday, and then - or you would run on.

NIALL, MR: Or run on.

KENNETH MARTIN J: Or run on, depending on - - -

NIALL, MR: We will see. Depending on the time of day - - -

KENNETH MARTIN J: - - - where we're placed.

NIALL, MR: - - - and the - - -

KENNETH MARTIN J: Yes. Yes. All right. Well look, I think that would work. I'm happy with that. I'm always assisted by counsel's considered written submissions in closing, and if we finish the evidence tomorrow or early Friday, then it seems to me that that would all fit in very well, so - - -

NIALL, MR: If your Honour pleases.

KENNETH MARTIN J: - - - let's finesse the fine detail once we finish the evidence, but, in principle, I think that's a good idea.

NIALL, MR: If your Honour pleases.

KENNETH MARTIN J: All right. Anything else?

CAHILL, MS: No (indistinct)

NIALL, MR: No, thank you, your Honour.

KENNETH MARTIN J: Very well. We will - can I just mention there's a CMC list in here, which hopefully should be pretty brief, at 9.15 tomorrow. If counsel could just clear the bar table a little bit, we will deal with that. But, otherwise, we will adjourn until 10.30 tomorrow.

AT 3.56 PM THE MATTER WAS ADJOURNED UNTIL
THURSDAY, 20 FEBRUARY 2014

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