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THE SUPREME COURT OF

WESTERN AUSTRALIA

CIV 1561 of 2012

STEPHEN WILLIAM MARSH

and

SUSAN GENEVIEVE MARSH

and

MICHAEL OWEN BAXTER

KENNETH MARTIN J

TRANSCRIPT OF PROCEEDINGS

AT PERTH ON TUESDAY, 18 FEBRUARY 2014, AT 10.42 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.

(Reporter's note: Audio commences at 10.42.55)

NICHOLS, MS: ...transmitted last night so I will need to go through those omissions - - -

KENNETH MARTIN J: Yes.

NICHOLS, MS: - - - very briefly with him.

KENNETH MARTIN J: All right. We do have you on the video. Mr Ayachit, can you hear us there without difficulty?

AYACHIT, MR: Yes, I can.

KENNETH MARTIN J: Excellent.

AYACHIT, MR: Yes, I can.

KENNETH MARTIN J: All right. Now, would you like to be sworn or affirmed?

AYACHIT, MR: Affirmed, thank you.

KENNETH MARTIN J: Affirmed, all right. I will just ask my orderly to - - -

AYACHIT, SACHIN PRAKASH affirmed:

KENNETH MARTIN J: Yes, Ms Nichols.

NICHOLS, MS: Mr Ayachit, can you please tell his Honour once again your full name and also your address?---My full name is Sachin Prakash Ayachit. My address is unit 10, 2-4 Glen Osmond Road, Parkside, SA.

What is your occupation, Mr Ayachit?---I work as the certification manager at NASAA Certified Organic.

Mr Ayachit, do you have a copy of a witness statement that you've prepared in this matter, which is signed and dated 26 February 2013?---Yes, I have it.

There have been some arguments about the admissibility of certain parts of your statement and small parts of it have been redacted. Can I ask you to mark those up on the statement now?---Yes.

Can you please go to paragraph 10 of your statement?---Yes.

Can you mark - can you please delete the word "strict" that appears in the first line. Can you go to paragraph - - -?---Yes, done.

Thank you. Can you go to paragraph 14 now please?---Yes.

And in the second sentence which begins with the words, "The NASAA standards," can you delete the words, "is inherently flexible too," please?---Done.

At paragraph 15 on the third line, after the words "production and processing," can you delete the words, "and other domestic and international standards," please?---Yes, done.

And, finally, can you go to paragraph 26?---Yes.

And can you delete the words in the first line, "As well as all major international standards"?---Done.

And, Mr Ayachit, do you wish to make a correction to paragraph 25D of your statement? Should the word "New Zealand" read "Argentina"? Is that correct?---Correct.

And that's a correction that you wish to make to your statement?---Yes, thank you.

Have you had the opportunity to recently reread your statement?---Yes.

And with that correction, are the contents of your statement true and correct?---Yes.

I tender the statement.

KENNETH MARTIN J: Yes, very well. Mr Ayachit's amended statement, which was dated 26 February 2013, with the identified corrections to paragraphs 10, 14, 15, 25D as corrected and 26 will be exhibit 21.

EXHIBIT 21 Plaintiffs DATE 26/2/13
Mr Ayachit's amended statement

NICHOLS, MS: Thank you, your Honour.

KENNETH MARTIN J: And, Ms Nichols, could we make arrangements for a signed copy to wend its way in due course - - -

NICHOLS, MS: Yes.

KENNETH MARTIN J: - - - from India to the court's record in due course.

NICHOLS, MS: Will do. Thank you, your Honour.

KENNETH MARTIN J: All right. Now, cross-examination.

CAHILL, MS: Thank you, your Honour. Mr Ayachit, your role is a certification manager, you have just described. Does that put you in charge of the certification officers at NCO?---Yes.

Thank you. You supervise their work?---Yes.

And do you provide guidance to them as to how to discharge their duties?---Yes.

Thank you. Can I take you to paragraph 14 of your witness statement?---Yes.

The point that you make here is that the NASAA standard itself doesn't dictate the consequences where there has been a noncompliance with the standard. Is that right?---Yes.

And there are a range of possible sanctions and those - that range is considered in each case on a case-by-case basis to determine what is the appropriate sanction in that situation?---Correct, yes.

So do you regard NCO as having a discretion as to which sanction it will impose in any given case?---Yes.

And is it the same situation in relation to the point you make at paragraph 17, where there has been decertification and the question of when and in what circumstances recertification will be granted?---Yes.

So that too will depend very much on the circumstances of any individual case?---Yes.

And NCO has a discretion in that regard about when and on what conditions to recertify?---Yes.

Thank you. Now, in relation to assessing the risk posed by GMOs on land, you identify what NCO will consider at

paragraph 11 of your witness statement. You see that?---Yes.

Are you talking there about assessing the consequences in the event that an actual or potential risk has been identified in terms of sanctions or are you talking about the recertification in the event of decertification or both?---Both.

Thank you. And are you setting out there what in your view are the factors that will normally be considered by a certification officer in either of those circumstances?---Yes.

Must the certification officer consider all of those factors?---Not only limited to these four points but, yes.

Yes. But they are obliged to consider each of these four points?---Yes.

I see. And is that set out anywhere in a document to the certifying officers so that they know what they must take into account?---They refer to the NASAA organic standard.

I beg your pardon?---They refer to the NASAA organic standard.

So do you say that these factors and the obligation on the part of the certifying officer to take them into account is apparent from reading the standard itself?---Yes.

I see.

KENNETH MARTIN J: Is that the NASAA standard?

CAHILL, MS: I will just clarify. You mean the NASAA standard do you, Mr Ayachit?---Yes.

Not the national standard?---No.

All right. And if we come to 18(a), you say that NCO will consider the quantity of GMOs on the land. Is that right?---Yes.

In every case?---Yes.

And does that mean that NCO will consider the quantity of GMOs in a particular paddock?---Yes.

And within an area of a particular paddock?---Yes.

So, for example, if there is a concentration of GMOs in only a very small portion of a paddock then that will be relevant to the decision as to how much of the land might be decertified. Is that right?---Correct.

Thank you?---Yes.

And when we come to (b), the likelihood of a continued presence of GMOs on the land, does that include a consideration of whether there might be any ability to remove the material?---Yes.

And in the case of GMO volunteers, whether they can be removed before seed setting?---Yes.

So if they could be removed before seed setting, that would be a factor mitigating against decertification. Is that right?---Can you please repeat that?

Yes. So if we take the example that we have in the case that's presently before the court where the GMO material was canola swathes, GM canola swathes that blew into the organic farm, if I can take it in two steps, Mr Ayachit. First of all, there would just be the plant material that blew over, that if that could be removed that could be a mitigating factor against decertifying.

NICHOLS, MS: I object to the question. It needs to be clarified. The question is put if it could be removed. It needs to be stated in terms of this case when it could be removed, how long it might take to remove it and so on. So put in the abstract like that in the context of this case, in my submission, it's not an accurate representation of the evidence and therefore it doesn't have a proper basis.

KENNETH MARTIN J: Well, what do you say about that?

CAHILL, MS: Well, I'm not putting the facts of this case; I'm just putting the GM canola scenario. That's all I'm putting. That's a hypothetical - - -

KENNETH MARTIN J: I think removal is a vague. You mean picked up and taken away?

CAHILL, MS: I can put that to the witness.

KENNETH MARTIN J: I think that needs a bit more precision.

CAHILL, MS: All right.

KENNETH MARTIN J: Subject to that, it's okay though.

CAHILL, MS: Yes. Mr Ayachit - - -

KENNETH MARTIN J: Sorry, did you want to say something else, Ms Nichols?

NICHOLS, MS: I did, I'm sorry, your Honour. Ms Cahill is trespassing very, very close to the facts of this case with slight variations and in my submission it's not a fair way to frame the question. If she wants to ask about the facts of this case, they should squarely put. But a hypothetical, which is closely analogous but not identical to, is apt to mislead the witness.

CAHILL, MS: This witness didn't decertify, your Honour. I'm not asking him - - -

KENNETH MARTIN J: Yes. Look, I wouldn't allow that objection on a plenary basis at this time; I think it's got to be evaluated question by question and I think the distinction between an actual set of circumstances and a hypothetical situation does need to be made very explicit, but subject to that, I think I will just hear the question as it comes. It obviously can't be misleading and that's a proper concern but I think the territory that we are presently in with the clarification as to the basis of removal is satisfactory.

NICHOLS, MS: Thank you, your Honour.

CAHILL, MS: I have not suggested that this is the facts that occurred in 2010, your Honour. There's no intention to mislead the witness in any - - -

KENNETH MARTIN J: No, I understand.

CAHILL, MS: - - - way, shape or form. Mr Ayachit, if we can just take the example of GM canola and swathes blowing into an organic farm, when the question of how to respond to that falls to the NCO, the ability of the farmer, the certified operator, to pick up the material that had blown in and remove it from the farm, would that be a relevant consideration mitigating against decertification?---No.

No. All right. And why is that?---Because we are not sure about the emergence - - -

All right?--- - - - of any plants in future.

Yes. So there would be other factors that might weigh in favour of decertification notwithstanding that. Is that your evidence?---Can you please repeat that.

So there might be other factors like the possibility of volunteers that would lead to - - -
?---Yes.

- - - a decision of decertification, notwithstanding the fact that the plant material could be removed?---Yes.

Thank you. So when it comes to volunteers, would the ability of the farmer to remove the volunteers before they set seed, would that be a factor for or against decertifying?---Can you please elaborate?

So some plant material has blown in; an NCO is concerned about the possibility for the seed from that material germinating at a subsequent time. If the farmer were able to pull out any volunteers as they germinated and before they set seed, and agreed to do that, would that be a factor weighing for or against decertification?---We will have to consider the possibility of future re-emergence of volunteers at that stage.

Yes. So even if that - a farmer did agree to do that, it might still not be enough is what you are saying?---Correct. Yes.

Because you would have to assess, notwithstanding that, whether there might still be more volunteers?---Correct.

I see. What about a farmer's agreement to clean and test his harvested product? Would that be a factor weighing for or against decertification of the certified operation?---It would be considered as one - one of the aspects.

Yes. Would that favour decertification or would it be against it?---You mean testing the seed or - - -

Testing the product, cleaning and testing the product?---That's just one aspect. Yes. Yes. That will - if they are ready to test the product, final product, that will be one of the points that will be considered for reinstating the certification.

But it wouldn't preclude decertification if the operator agreed to do that?---Correct.

And why is that?---Because we will have to complete a risk analysis at that stage - - -

Yes?--- - - - about - about the potential risks, and we are not sure why just couple of aspects, that whether that risk analysis gives us a confidence to reinstate the certification.

Yes. So just at the point that you're thinking about whether to decertify or not, if the operator offered or agreed to clean and test their product for any GM presence before sale, that wouldn't be enough to prevent decertification, is that right?---Correct. Correct.

And why is that?---Because presence of GMOs in the final product is not the only thing; it is the entire organic production system that we need to take into consideration.

All right. So when we come to 18(d), the last one on your list:

The likelihood of future GMO contamination of the property -

What are you referring to there as the property? The actual land?---Yes.

And contamination in what way? How is it contaminated?---By the presence of GMO seed in the vicinity.

In the vicinity, not actually - - -?---And how the - - -

Sorry. I cut - - -?---And how the farmer is going to manage that risk.

So presence in the vicinity or actually on the land itself of the certified operator?---No. In this particular case, the GM contamination has already happened. So point (d), it's referring to the neighbouring farms - - -

I see?---Not on the property.

I see. I understand what you're saying. So that will be taken into account in determining both whether to decertify and whether to reinstate certification?---Yes.

The risk from neighbouring properties that is yet to eventuate, is that right?---Yes.

Thank you. And the contamination you're speaking of there, the likelihood of future contamination is contamination of the land by presence of GMO material on or in the land, is that right?---Sorry. What point are we referring to? Can you please repeat.

I'm trying to understand 18(d), where you talk about GMO contamination of the property and what you mean by that. So do you mean contamination of the land of the operator by the presence of GMO material in or on it?---Both.

Yes. Thank you. Now, can you go to paragraph 15 of your witness statement, please. You say that - - -?---Yes.

- - - the NASAA standard prohibits GMOs anywhere in the production or processing of certified organic material. Can you go to document 142, please, and just point me to the standard that contains that prohibition that you're referring to? This is volume 5, page 1293, your Honour.

KENNETH MARTIN J: The NASAA standards?

CAHILL, MS: Yes.

THE WITNESS: Can you please repeat the page number.

CAHILL, MS: The document number is 142, and I'm - that - you should have the NASAA standard there?---Yes.

And so if you can just tell me which standard or standards you're referring to in the first sentence of paragraph 15 of your witness statement?---The document is loading.

Okay?---Can we please go to 3.2, Genetically Modified Organisms.

Yes. Thank you. At page 1317?---Yes.

Thank you?---The section - - -

So which standard or standards are you referring to in the first sentence of paragraph 15?---3.2.1.

Yes. Any others?---No.

Now, you say that this is consistent with the IFOAM norms for organic production and processing. Are you referring to the 2012 norms or the 2005 ones when you say that?---2005.

All right. Now, you began with the - with NCO in August 2012, didn't you?---Yes. Correct.

And, at or some time after you joined, did you read all of the inspection reports and review matters - review forms dealing with Mr Marsh's decertification?---Yes.

So you were aware of the inspection report of 24 October 2011?---Yes.

And you were aware that there had been no decision with respect to that inspection until 30 March 2012?---Yes.

Were you concerned about the time that had elapsed between the inspection report and the review decision?---At that stage, I was - I was not aware of any delays. I just started working on the file at that stage, so I - not sure.

All right. When you found out about the delay, were you concerned about it?---Delay in?

Between the inspection report of 24 October 2011 and the decision with respect to that report, which was dated 30 March 2012. So when you found out about that delay, did you - did that concern you?---I'm just trying to recall this delay in making the decision and the inspection report.

NICHOLS, MS: Your Honour, I object. The premise in the question is that Mr Ayachit knew about it. It's in a different period of time.

KENNETH MARTIN J: Well, Mr Ayachit - - -

NICHOLS, MS: So it perhaps - - -

KENNETH MARTIN J: - - - gets there in August 2012, as I understand it.

NICHOLS, MS: Perhaps the question could be rephrased so that - - -

KENNETH MARTIN J: So he is being asked about events that happen five months before he gets there.

NICHOLS, MS: Yes. So - - -

CAHILL, MS: I asked him if he had learnt about it and he said yes.

NICHOLS, MS: No, he was - - -

KENNETH MARTIN J: Learnt about it?

CAHILL, MS: The delay, the time between the inspection report and the review decision, and he said several questions ago that he did learn about that by reading the file.

KENNETH MARTIN J: I think he said he was familiarising himself from the time that he got there.

CAHILL, MS: Yes, and then - - -

KENNETH MARTIN J: Which is August.

CAHILL, MS: And I asked him if he had read the inspection report.

KENNETH MARTIN J: Yes.

CAHILL, MS: And then the review decision.

KENNETH MARTIN J: Yes.

CAHILL, MS: And then I said, "So you appreciated that there was that delay," and he said yes.

KENNETH MARTIN J: I wasn't so sure that he was agreeing with that proposition.

NICHOLS, MS: That's not - our note of the evidence was that he was not aware of any delays. He has certainly read the inspection report and was aware of the subsequent decision.

KENNETH MARTIN J: Yes, absolutely.

NICHOLS, MS: That's our recollection of the evidence.

KENNETH MARTIN J: Absolutely. I think the premise in terms of delay needs to be solidified before the question can continue.

CAHILL, MS: Mr Ayachit?---Yes.

You read the inspection report of 24 October 2011, didn't you?---Yes.

And then you read the decision with respect to that inspection report, dated 30 March 2012, didn't you?---Correct. Yes, I read that. Yes.

And you appreciated, didn't you, that there was a several month gap between the inspection report and the review decision?---That may happen in organic certification.

Sorry, did you appreciate - - -?---Because - - -

Did you appreciate that there was that several month gap between the inspection report and the review decision?---There is a gap, yes.

And did you appreciate that when you looked at the file?---I didn't think about that at that stage, no.

All right. Did you ascertain when you reviewed the file whether that review decision of 30 March 2012 had been communicated to Mr Marsh?---But that was prior to my commencement at NASAA Certified Organic so that was before August 2012.

Yes, I appreciate that. I'm asking you that when you reviewed the file, did you ascertain whether or not that decision had been communicated to Mr Marsh?---Yes, I didn't review the file. I read through the documents.

All right. And so you read the inspection report of 19 April 2012?---Yes.

And did you notice that within that report the inspector had reported that the operator was fully compliant?---Yes.

Now, I don't think you mentioned in your witness statement the review that Ms Denham carried out in April 2012. Did you read that document?---Yes, I have.

You have - - -?---So who reviewed that, can you please repeat. It must - - -

Ms Denham?---It may not be Denham.

Ms Denham in April 2012 at document 86, Mr Ayachit?---Yes, thank you.

Page 448 of volume 2, your Honour. Have you read that document?

KENNETH MARTIN J: I'm not sure he has got it yet on his computer.

CAHILL, MS: Sorry.

KENNETH MARTIN J: We better just check that out.

CAHILL, MS: Do you have it up yet, Mr Ayachit?---Yes, I have, sorry. Yes.

So did you read that document?---I don't recall reading this document, sorry.

So are you seeing that for the first time?---Probably not but I don't recall whether I have. I may have read it.

So you may or may not be seeing it for the first time, you're not sure?---Correct, yes.

Thank you. So do you have page numbers in the bottom right-hand corner of document 86?---Yes, I do.

So at page 450?---Yes.

You're not sure whether you have seen the Information to Client set out at the bottom there. You're not sure whether you have seen that before?---Sorry, I don't recall but I have read these two points in some other document.

I see. Can you recall what other document?---Usually after the review suspended imprisonment completed, there is a letter sent to the operator. I may have read that in that document. I will have to have a look.

All right. Are you looking at something now or - - -?---If time permits or - - -

Have you got a computer with NCO information on it in front of you, have you?---No, I have the dashboard which has all the documents that all of you can access.

I see, I see?---So - - -

I don't think you will find a letter communicating this decision in those documents, Mr Ayachit. That's right, isn't it? So I will just move on. Did Ms Denham ever mention to you her view that two growing seasons should elapse before recertification of Mr Marsh's operation was considered or granted?---There has been a research paper published and we did have - not 100 per cent sure when we discussed that but, yes, we may have had some communication about that.

Obviously after you joined in August 2012?---Yes.

Now, paragraph 21 of your witness statement, you talk about the annual inspection of October 2012?---Yes.

If you go to document 87 please?---Yes.

Which is volume 2, page 467, your Honour. Now, just to take you back here so that you get to the front of the documents so you understand what it is, it begins at - - -?---It's loading. I have that document in front of me now.

All right, thank you. So that's the inspection report and then if you go to page 467. Do you have that?---I'm just getting there. Yes.

You see down the bottom, Residue Sampling?---Yes.

And the comment right at the very bottom:

The inspector did not note any weed that closely resembled canola so did not feel the need to send stem and leaf samples taken to a laboratory for testing. The inspector's recommending that screened out weed seed is sent for testing after the 12/13 harvest to rule out any GM canola being present in the organic system.

See that?---Mmm.

Do you recall when you first saw this report?---Yes. When the review of this report was completed by the certification officers, I believe.

That was the first time you saw this inspection report?---Sorry. Not sure. I don't recall when I first saw this, but I - - -

Do you think it's likely - - -?---We definitely had discussion with - - -

Sorry?---Yes.

Go ahead?---Now, it's definitely around the review of this inspection report.

All right. Thank you. Now, just come back to the report, and if you go to page - back to page 468?---Yes.

Continuing:

Any other issues not mentioned -

There's reference there - you see that - to - - -?---Yes.

- - - the Marshes wanting some guidance on the timeframes for the earliest possible return to full certification. Then if you go to 471 - - -?---Yes.

- - - you will see there the reference to "some urgency in the situation"?---Yes.

Now, this inspection report is dated 18 October 2012. The review report that you're referring to is - you see - document - might be document 88. I just have to check that. Is document 88 the review sheet?---No. I think it's - - -

Can you try document 89 for me, please. 90. Try 90?---Yes.

Have you got that?---Yes.

If you go to page 479 - - -?---Yes.

- - - and you will see there that the two certification officers completed their reviews in December 2012 and January 2013 respectively. You see that? Mr Ayachit, do you see page 479? I think we might have a problem.

KENNETH MARTIN J: Give him some time.

CAHILL, MS: I thought the - it was frozen.

THE ASSOCIATE: We do have a problem.

KENNETH MARTIN J: Right. We will just try and re-establish that video link which, for the record, seems to have dropped out at 11.25 am. All right. We might have to call Telstra in Sydney to re-establish the link or at least find out where the problem lies. So we will just adjourn pro tem while that happens.

(Short adjournment)

KENNETH MARTIN J: Yes, please be seated. Yes, Mr Ayachit, we have established the link back to you?---Thank you.

Yes, thank you?---And apology for the inconvenience.

Certainly. Ms Cahill will continue to question.

CAHILL, MS: Thank you, Mr Ayachit. I think you were on document 90?---Yes, I am.

And I'm not sure if you heard me directing you to page 479?---No, I didn't.

So, if you could just go there please?---Yes.

And you will see the two certifiers completed their review in December 2012 and January 2013 respectively?---Yes.

So do you think that you received the inspection report and this document sometime around December 2012, January 2013?---Yes.

Right. Why were there two reviewers used on this occasion?---In many cases where there has been a decertification or there are some complex issues, usually it is second reviewed by a second certification officer.

All right. So it was because it was a decertification or there was some - and there was some unusual features about it. Is that fair?---Yes.

All right. Now, if you are still on 479, can you see that the top - - -?---Yes.

- - - there's a box and in the middle of it it says Inquiries?---Yes.

The first one:

Timeframe for GMO canola contaminated paddocks to be certified yet to be determined by OABC below.

?---Yes.

Did you understand that reference to OAB to be a reference to the Organic Advisory Board?

RECORDED MESSAGE: Hello, welcome to the conferencing system. To join a conference, you may use the far end camera controls on your remote. Please enter the conference number followed by the pound key, or press star to create a new conference.

KENNETH MARTIN J: If I could hold that person in contempt.

THE WITNESS: All right. I think we're back.

KENNETH MARTIN J: We back with you?---Yes.

CAHILL, MS: Page 479, Mr Ayachit, under Inquiries, the reference to AOB?---Yes.

Did you understand that to be a reference to the Organic Advisory Board?---Yes, correct.

And to your knowledge, was the Organic Advisory Board actively considering at this point in time what the timeframe for the contaminated paddocks to be recertified should be?---No.

They weren't?---No.

Who was on the Organic Advisory Board at this point in time?---It's a committee of four members. Two of them are the NASAA board members and two are external experts.

Can you name them, who was on the board the point - that - - -?---Jan Denham.

Yes?---Phil Rowe and the external experts, I don't recall the names, sorry.

Right. And did the Organic Advisory Board have some involvement in the consideration of when Mr Marsh's farm should be recertified?---Actually, that decision-making process is the certification team's responsibility.

Yes. Was - did the Organic Advisory Board have any input at all, whether by expressing a view or offering some guidance in relation to the question of when the farm should be recertified?---There may have been in the past but not at this stage.

Right?---Not sure.

So are you able to explain what that reference to the OAB there is from your knowledge?

NICHOLS, MS: I object to the question. It's not Mr Ayachit's document. He can't speculate about what was in the mind of the author of that document.

CAHILL, MS: I haven't asked that question at all, your Honour. I have asked for that - - -

KENNETH MARTIN J: You have asked him to explain what the reference to the OAB is on someone else's document.

CAHILL, MS: I have asked him if he could explain from his knowledge what that reference would be.

CAHILL, MS: OB, yes.

KENNETH MARTIN J: Well, we have already talked about the Organic Advisory Board.

CAHILL, MS: Yes.

KENNETH MARTIN J: So it's not to explain the acronym.

CAHILL, MS: Well - - -

KENNETH MARTIN J: What else is it?

CAHILL, MS: Mr Ayachit was supervising the two review officers who prepared this report. There's a reference to the OAB in there - - -

KENNETH MARTIN J: Yes.

CAHILL, MS: - - - which implies that the OAB was being consulted. I am asking - - -

KENNETH MARTIN J: You have asked some questions about that - - -

CAHILL, MS: Yes.

KENNETH MARTIN J: - - - to which he has responded no - - -

CAHILL, MS: Yes, and - - -

KENNETH MARTIN J: - - - and not at this stage.

CAHILL, MS: And I have then asked - what I would wish to ask him is whether, being the supervisor of these two review officers and having reviewed the report and the review document after this was prepared, in effect, whether he can shed any light on what that is a reference to. I don't - in my submission, that's not a - - -

KENNETH MARTIN J: That's a different question to the one objected to I think.

CAHILL, MS: Well, I have asked him from his own knowledge what that is a reference to, your Honour.

KENNETH MARTIN J: Well, can you - well, now you've trespassed back to the point of objection, which I think has to be upheld. But if you phrase it on the basis of whether he at the time was able to cast any light on what's said there, then that would be allowed.

CAHILL, MS: All right. I will ask that question. Mr Ayachit, can you shed any light on what is stated there in reference to OAB?---Sorry, I can't comment on that because I'm not sure why there's a mention of OAB. Sorry.

As far as you were aware at this point in time, which is late December, early January 2013, was it open to NCO to recertify the operation - the paddocks that had been decertified at that point in time or was it too early?---Please repeat.

Was it too early as at December 2012, January 2013 to recertify the farm or not?---We were contemplating different aspects of recertification.

Yes. Was it open to NCO - - -?---And it was prudent to - - -

Sorry?---Yes.

Was it open to NCO to consider recertifying the farm as at December 2012, January 2013?---To consider, yes.

So it was possible that there might have been circumstances at that time that would have enabled the farm to be recertified then. Is that right?---Yes. No, because 2012 report was the first report where in the inspection report it was mentioned that there are no volunteers. It was prudent at that stage to wait for another season to make that decision.

All right. So how many seasons in all do you say it was prudent to wait?---At least until 2013.

So how many seasons in total were you saying that you should wait before considering recertification?---At least two.

Yes, at least two. Is that your evidence?---Yes.

All right. When you mean a season, you mean a growing season that runs from April of one year through to December of that year or January of the next. Is that right?---Yes.

At paragraph 25 of your witness statement you talk about reviewing the certification officer's recommendation. So they were or were they not actually making a decision?

KENNETH MARTIN J: Sorry, who is they?

CAHILL, MS: The certification officers that are referred to in paragraph 25.

KENNETH MARTIN J: So Denham and Wingpang You - Luke You.

CAHILL, MS: Not Ms Denham, it was Ms Gore and Mr You.

KENNETH MARTIN J: All right.

CAHILL, MS: Mr Ayachit?---Yes.

They weren't making a decision, were they? They were just making a recommendation in their report?---Yes.

Is that usual?---Yes, in these kinds of situations, yes.

And what do you mean by these kind of situations, unusual ones?---Where there is a decertification.

All right. But normally a certification officer would simply make a decision one way or the other about certification status, wouldn't they?---Yes, correct.

Yes. But because this was unusual and it involved decertification, they simply made recommendations and you were the one who was going to make the decision about status. Is that right?---Yes, correct.

All right. So at paragraph 27 you talk about a three year period that can be used as guidance for a suitable period before - to elapse before recertification. Is that right?---Yes.

And you say there that you considered that NCO considers that that period provides appropriate guidance for Mr Marsh's situation because the contamination of the affected part of the farm was extensive. Do you see that?---Yes.

And do you mean by extensive that the quantity of or the amount of contamination was great? There was a lot of contamination?---Yes.

Of plant material do you mean?---Yes.

And seeds?---Maybe.

You're not sure?---No.

Okay. So it was extensive because there was a lot of plant material across the entire affected area?---Yes.

That's what you understood?---Yes.

So it wasn't concentrated in particular parts of the affected area as far as you were aware?---From the inspection reports, yes.

All right. Now, paragraph 28 of your witness statement you refer to a decision that you made to recertify as of October 2013. Is that right?---Yes, correct.

And that decision must have been made sometime between the date of the report of Ms Gore of 15 January 2013 and your witness statement, which is 26 February 2013. Is that so?---Yes, correct.

And you identified in paragraph 29 of your witness statement the conditions to which that recertification would be subject?---Yes.

And is it the case that you did not communicate this decision to Mr Marsh in the usual format that NASAA communicates decisions about certification to operators until September 2013?---Sorry, don't recall.

Have a look at document 91 please?---Yes.

Is that the first time that you communicated the decision - communicated to Mr Marsh the decision that is referred to at paragraph 28 of your witness statement?---Correct. That decision should have been communicated after the review is completed.

But it wasn't done until September 2013. Is that right?---Correct.

Did you consider that it was of assistance to Mr Marsh in these legal proceedings that he remain decertified for as long as possible?---Sorry. Can you please repeat.

Did you think it was of assistance to Mr Marsh in these legal proceedings that he remain decertified - (indistinct) understand he remain decertified for as long as possible?---Sorry. Don't understand.

Yes. You waited seven months before communicating the decision to Mr Marsh, do you agree?---Mmm.

Do you agree?---I will have to go back to the letter that was sent after the review in January.

Well, that's the document that's at 91, isn't it?---No.

So there was another - - -?---There should be one more letter.

All right. That you wrote to Mr Marsh?---It may not be me. It may have been communicated by one of the certification officers.

All right. Now, in this letter of - that's number 91 at page 480 - you identify the matters that NCO will need to have in place to consider changing the status of the decertified areas. Do you see at numbered paragraph 2:

A GM test of the weed screenings following the 13/14 season.

Do you see that?---Document is loading. Yes. The document is loading.

I'm sorry. Sorry. I thought you had already had it there. I apologise?---Yes. That's correct.

So, at this stage, you were not contemplating any recertification prior to December 2013 or January 2014. Do you agree?---No.

It says there:

A GM test of the weed screenings following 2013/14 is to be carried out.

Do you see that?---No.

Do you see that?---Yes.

And what you were putting forward on behalf of NCO is that it would be necessary after the harvest in 2013/14 to do a - to screen the product - the grain for weeds and then test

them. Is that right?---If there is a re-emergence, probably. I was contemplating getting the weed screening done after the harvest if there is any re-emergence of volunteers.

Well, Mr Ayachit, if there were volunteers that emerged, you could just test those, couldn't you?---That point too will depend upon the inspection report and the recommendation by the inspector as well.

This was the point, wasn't it, Mr Ayachit: because there had been no germination of volunteers since 2011, the only thing that could be tested were the weeds screened out of the product, isn't that so? Do you agree?

NICHOLS, MS: The question needs to be clarified. The question is, "Because there had been no volunteers, the only thing that could be tested was weeds." Timeframe needs to be posed. Mr Ayachit referred to the contemplation of there being further volunteers, so the question needs to be asked in respect of the timeframe.

KENNETH MARTIN J: What do you say to that, Ms Cahill?

CAHILL, MS: I will just rephrase it, your Honour.

KENNETH MARTIN J: Yes. All right. Very well.

CAHILL, MS: Mr Ayachit, let's go back a step. You say here in this document, at page 480:

For NCO to consider changing the status of the decertified areas: (1) the next standard inspection is to be during flowering time to visually inspect for canola plants.

Do you see that?---Yes.

So if there were volunteer plants that emerged, the idea that you had in your mind was that they would be tested to see if they were - contained any GMOs, is that right?---Sorry. I'm just thinking about my decision making process. I'm sorry. Can you please repeat the question.

The idea that you had behind numbered paragraph (1) - what are you writing there, Mr Ayachit?---Yes.

Sorry. What are you writing there?---I'm just - just clarifying your question.

Right. Could you put your pen down, please. Thank you. Now, the idea behind numbered paragraph (1) of your letter was that if further volunteers germinated and were apparent at the next inspection, they would be tested for GMO presence, isn't that so?---Correct.

And if they tested positive, you were not expecting to recertify the property at that time. Is that right?---Correct.

But because there had not been any germination since 2011, it was quite possible that there would be no volunteers at the next inspection. That was what you were thinking, wasn't it?---Yes.

Is your answer - - -?---Correct.

- - - yes? Yes. Thank you. In fact, that was your expectation as to what was going to be more likely. It was more likely than not - - -?---Yes.

- - - that there would be no volunteers at the next inspection. Do you agree?---From the previous inspection reports, yes.

Thank you. And so the idea behind numbered paragraph (2) which you had was that the weeds would be screened from the harvested product and tested for GMO presence. Do you agree?---Yes.

And the logic behind that was that if the weeds did not demonstrate any GMO presence, then it would imply that there was no viable seed left in the soil. Would you agree?---Yes. Yes.

And the converse would also be true; that if it tested positive, that might indicate that there is some viable seed left in the soil?---Yes.

Thank you. Now, it's the case, isn't it, that although you weren't there at the time - and I'm not suggesting you were, or that you had any input into the decision making process - in your opinion, it would have been open to NCO to have imposed such a condition, or made such a requirement of the operator from the outset of this incursion, to screen and test weeds from the harvested product?---Not sure.

Right. Now, if you go to document 93, please.

KENNETH MARTIN J: Sorry, before you leave that document, in reference to condition 1, "The next standard inspection is to be during flowing time." Can you just tell me, Mr Ayachit, what you meant by "flowering time" in condition 1?---Flowering time to monitor whether there is any re-emergence of canola plants volunteers.

Yes. So what - what time of the year in 2013 are you talking about? Spring time?---Yes, I mean, October - yes.

Okay. So you write the letter in September, which is spring time, early spring, so you are expecting flowering around that time of your letter, or shortly thereafter, is that right?---Yes, correct. Yes.

Right. Thank you.

CAHILL, MS: Thank you, your Honour. And that's why Ms Purves then did an inspection three days after this letter, is that right? That's document 92, I think, Mr Ayachit?---I'm just looking at that document now. Loading. That inspection may not be as a result of that letter but I will have to look into this document.

All right. In any event, you would accept that that was an inspection during flowing time?---Yes.

Thank you. And then there was a review of that report and that, I think, is document - it's either 90 - I think it's 94, which is page 505, your Honour?---Loading. Yes, I have that document in front of me now.

All right. If you go to page 512 please. Do you have that?---Yes.

There were three review officers involved in the review?---Mm.

It seems as if Mr You was not involved in the GMO issue. Is that right?---Correct.

And what about Mr - do you say it, Ms Dukania?---No, she - she has worked on, only administrative part, creating the certificate and letter.

I see. So it was only you who dealt with the recertification issue?---Yes.

And you made that decision alone, did you?---Yes.

Thank you. At page 512, where we are, can you explain - - -?---Yes.

- - - numbered paragraph 1 under Additional Review Notes Not For Publication?---Yes.

What is that a reference to? The requirement of 1.5 kilometres?---In the - one of the previous inspection reports, there was a mention that the operator and the neighbour had an agreement in place for 1.5 kilometre buffer zone.

Yes. And that's now been downgraded, why?---Due to the ongoing monitoring by the operator.

See, it says here:

As per the robust risk assessment by the operator.

Did you write those words?---Yes.

And the operator is obviously - - -?---Yes.

- - - a reference to Mr Marsh?---Yes.

And so that was - what are you saying here, Mr Ayachit, that without the one - - -?---That is - - -

Sorry. You go - - -?---No, that's fine.

No, you go, please. What were you about to say?---That is in reference to one of the questions asked by the inspector in the inspection report.

Yes. Which was what?---That - let's go back to the inspection report document.

Yes. I think it is at page 503, you might be referring to?---Loading. Still loading.

That's okay?---Correct.

So if we go to five of - - -?---Page five - - -

Sorry, I beg your pardon. Go ahead?--- (indistinct) page 503.

Yes. And there was feedback sought in the third box from the top:

The buffer zone, 1.5 ks to be maintained as required previously and ongoing monitoring of your property for any potential risk of contamination by GM canola.

And guidance was sought in relation to that?---Mm.

So do I understand that previously Mr Marsh had to maintain a 1.5 kilometre buffer between his farming operations and the neighbour. Is that right?---No, it was not mandatory but it was mentioned in one of the reports.

But in any event, your decision as reflected in document 94 at page 512 was that that requirement was downgraded because of a robust risk assessment by Mr Marsh?---Yes.

Was it downgraded to zero kilometres?---No.

What was it downgraded to?---The risk assessment and monitoring done at that time, the management practices by Steve was acceptable. So it doesn't mean that it is downgraded to zero.

Okay. But what was your requirement for a buffer between Mr Marsh's farming operations and the neighbour at this point in time? Was there any requirement?---There's no specific requirement in the standard.

All right. And you didn't require that of him as a condition of recertification?---Correct.

And that was because of the robust risk assessment by Mr Marsh?---Yes.

And do you mean by that Mr Marsh had persuaded you that by reason of the actions he was prepared to undertake and the circumstances that existed on his farm, he could manage acceptably the risk of GMO incursion?---Yes.

Thank you. Now, if we come to document 95 please. Just tell me when it's loaded, Mr Ayachit, please?---Thank you. It's loading now.

Thank you?---It's open.

Thank you?---I have that document now.

That's your document, isn't it?---Yes.

And this was the notification of the decision to recertify?---Yes.

Which you actually made on that day, didn't you?---On that day, sorry?

You had made that decision as is evident from the review report on that day that you communicated it?---Yes.

It appears that you no longer required the screening and testing of weed from the harvested product at the end of the 2013/14 season. Is that so?---I'm just looking at the document. He may have to, as per the point numbered 3 under Feedback.

Are you looking at the - can you give me the page number that you're looking at, please?---514.

Yes?---The last point, which is a feedback.

Do you mean where it says standard 3.2.7?---Correct. Where it says that maintaining the samples of testing of crops perceived at risk.

Yes. But that's - - -?---It is not a requirement, but it's a feedback.

Yes. So you had abandoned the condition that was identified - I put that badly. The matter that you said was necessary for you to consider recertification, expressed in your September letter, that there be screening and testing of weeds from the 13/14 harvest?---I was - yes - I was contemplating about that at that stage, after reading through the inspection report and the management of that organic property. Yes.

All right. So it wasn't necessary to test for the existence of any GMO weeds from the harvested product because there had been no germination of volunteers. Is that right? Since - - -?---Yes, but not only that aspect. But - yes.

That was one thing?---There are other points. Correct.

And another point was Mr Marsh's vigilant monitoring of germination of volunteers, is that right?---Yes. Yes.

And another factor was the way in which he was removing the volunteers when they set up or putting - when they germinated, or putting a fence around them. Is that right?---Not sure about that one.

All right. Now, just coming to the front of the document at 513, do you see the bold type in the middle of the page?---Yes.

What are the corrective actions that you're referring to in that first bolded paragraph?---Sorry. I'm going back to the document. Actually, that should refer to the letter sent by Wingpang You, and not the letter sent in September.

I see. So that's a mistake?---Yes.

And Wingpang You was writing about PIBO non-compliance, is that right?---Correct. Yes. Yes.

Are you sure, Mr Ayachit, because the next paragraph says:

Also refer to the non-compliance re the use PIBO.

?---Yes. And - yes. That's why the - the date of the letter is not 10 September, because this issue has emerged after that date.

All right. And you thought it was well within NCOs power to decertify a portion of a paddock, as it did here for the - by reason of the PIBO non-compliance?---Yes.

And, in your experience, is that unusual to decertify only part of a paddock?---No.

It's not unusual?---No.

Thank you. Now, just finally, if you could go to document 142. It's volume 5, page 1315, your Honour. It will be in the middle of the NASAA standards. Back to the NASAA standards, Mr Ayachit?---It's loading. It's loading. Still loading. Yes. I have a copy of NASAA organic standards.

All right. Would you mind turning to page 1315?---1315. Can you please tell me the section in the standards? That's easier to find.

I see?---It doesn't have the number.

2.20?---Thank you. Getting there. Yes. 2.20, Labelling.

And if you can go to page 1315, which is 2.20.12 is the standard I want to take you to?---Yes.

2.20.12, can you tell me what your understanding is - - -?---Yes.

- - - of the purpose behind that standard?---Okay. This requirement may have been reference to the IFOAM norms - - -

Yes?--- - - - in 2005.

Yes. And can you tell me what, on your understanding, is the purpose of the IFOAM standard that is reflected here in standard 2.20.12?---I think it's pretty clear - clearly worded, that all the GMOs are prohibited in the organic production methods. When it comes to labelling, that labelling should only refer to the organic certification, not the GMO free status.

I see. All right. Nothing further. Thank you, your Honour.

KENNETH MARTIN J: All right. Thank you, Ms Cahill.

CAHILL, MS: Thank you, Mr Ayachit.

KENNETH MARTIN J: Re-examination.

THE WITNESS: Thank you.

NICHOLS, MS: Just briefly, your Honour. Excuse me for a moment. Mr Ayachit, can you please look at document 86?---I'm sorry, I have just lost the connection here but I have a hard copy if that - - -

Do you have a hard copy of - what do you have a hard copy of, Mr Ayachit?---All the documents that are available on the dashboard.

Do you have - - -?---Almost all of them.

Do you have page numbers? Do you have page numbers on the documents?---No.

All right. Mr Ayachit, I really - if you don't have the connection, I really don't need to go to the document. I won't trouble the witness, your Honour. It's not an important point.

KENNETH MARTIN J: All right.

NICHOLS, MS: May Mr Ayachit be excused please.

KENNETH MARTIN J: That completes the re-examination.

NICHOLS, MS: Yes, it does.

KENNETH MARTIN J: All right. Thank you. All right. Thank you, Mr Ayachit. That completes your evidence. Thank you for assisting us today by video link from India. You are now excused?---Thank you.

(THE WITNESS WITHDREW)

NIALL, MR: If your Honour pleases, the next witness is Ms Janine Morton.

KENNETH MARTIN J: Yes.

NIALL, MR: And my learned friend Ms Pierce will take that witness if your Honour pleases.

KENNETH MARTIN J: Yes, very well.

PIERCE, MS: Your Honour, before we call the witness, I understand that my learned friend, Ms Vernon, has come objections to notify your Honour about.

KENNETH MARTIN J: All right. Well, we will just - if you could have the person tell Ms Morton to wait outside until we resolve this and then we will see if we can get straight to her.

PIERCE, MS: Thank you.

KENNETH MARTIN J: Yes. What's objected to, Ms Vernon?

VERNON, MS: Paragraph 6, your Honour, firstly, on the basis that - - -

KENNETH MARTIN J: Sorry, let me just find this. Sorry, what's the - how many paragraphs in the Janine Morton statement?

VERNON, MS: 13.

KENNETH MARTIN J: 13. I'm missing a page on the latest cut for some reason. Just a minute, I will get my previous one.

PIERCE, MS: Your Honour, I have one that I can hand to you if that's convenient.

KENNETH MARTIN J: That would be helpful. Thank you. Thanks very much. All right, now that I've got it, what's the objection?

VERNON, MS: It's paragraph 6, your Honour, at the bottom of the first page. The first question we say is hearsay as to the desires of the clients or the demands of the clients, and the second sentence is conclusion without foundation, other than, apparently, the hearsay that appears in the first sentence.

KENNETH MARTIN J: Yes, all right. Ms Pierce, what do you say about that?

PIERCE, MS: Paragraph 6 is an observation that Ms Morton makes about her experience of what the customers of Morton Seed & Grain require. The basis of the observation can be found in paragraphs 1 and 2, which relevantly set up that Morton's is a specialist seed and grain merchant, that Janine Morton is the administrator of it, and that she - I beg your pardon, that Morton's offers processing of organic grains.

They have an export business relating to organic rolled oats. That makes up approximately 95 per cent of the volume of their business and at paragraphs 3 to 4, with reference to their experience of the organic market in particular, Morton's refers to its own certification by NASAA and to its compliance with export requirements. So the basis for the observation, which is not sought to be led for any purpose other than that it's an observation of what their customers ask for them, is readily found in the other statements that I have taken your Honour to.

KENNETH MARTIN J: Well, the difficulty with paragraph 6 is that it's expressed very generally.

PIERCE, MS: Yes.

KENNETH MARTIN J: And it's expressed on the basis of, "Our clients demands." Now, that's a conclusion. It's not formulated by reference to words expressed or documents that can be tested. It's, in fact, incapable of being tested by cross-examination if it's relied on for the truth of the fact that people do actually say that. So (a) the generality and (b) the unverifiable nature of the statement is - puts it within the realm of a hearsay objection I think. I mean, she can certainly speak in terms of what she sells and what the business does - - -

PIERCE, MS: Yes.

KENNETH MARTIN J: - - - but I think 6 must fall as formulated.

VERNON, MS: Your Honour, there were two other minor objections. Paragraphs 12 and 13 are objected to on the basis that the witness's feelings about Mr Marsh's decertification and the effect generalised as - the generalised expression as it is in paragraph 13, the effect on the Mortons business is not relevant to any matter in issue.

KENNETH MARTIN J: All right. Let me just look at that again in context. All right. Ms Pierce, what do you say about 12 and 13? They are objected to on the basis of relevance.

PIERCE, MS: Paragraph 12 is evidence of the Morton's demand and continuing demand for organic oats and in particular the oats that Mr Marsh is able to supply them if he is certified. Its relevance in the case is, we say, related to the relief Mr Marsh seeks in the form of a permanent injunction and these paragraphs should be read in the context of the commercial relationship of which there is evidence in the earlier parts of Ms Morton's statement such that - - -

KENNETH MARTIN J: Because I understand the evidence in 2010, which was the problem year, there was an oat crop growing in paddocks 1 to 6, which - and that wasn't the area of decertification. So presumably, the oat crop could still have been sold as organic. Hence, what we are talking about is subsequent seasons - - -

PIERCE, MS: Yes.

KENNETH MARTIN J: - - - when presumably oats were not grown in the decertified 70 per cent of the property that lost its status.

PIERCE, MS: That's true, your Honour, but the focus of this evidence is as to the future rotations of the crop, including certified organic oats, which Mr Marsh intends to sell to Morton's. There is evidence of the market for those oats in this witness statement and it goes, in my submission, to the kind of inconvenience which Mr Marsh has faced and will face in future if confronted with a similar situation. So it's relevant for my submission to the question of whether or not a permanent injunction is appropriate.

KENNETH MARTIN J: All right. Ms Vernon.

VERNON, MS: Well, the paragraph doesn't - neither paragraph goes to Mr Marsh's inconvenience. The first - - -

KENNETH MARTIN J: Well, I suppose in the sense of - - -

VERNON, MS: The first sentence - - -

KENNETH MARTIN J: - - - it's Mr Marsh's purchaser of organic oats to the extent that he's capable of growing them.

VERNON, MS: The first - - -

KENNETH MARTIN J: In terms of where he would sell them.

VERNON, MS: The first sentence of paragraph 12 goes to Ms Morton's emotions.

KENNETH MARTIN J: Yes. Let's get over that.

VERNON, MS: Second sentence goes to their efforts to get oats elsewhere.

KENNETH MARTIN J: Yes.

VERNON, MS: They have already - the evidence that they did buy oats from Mr Marsh and they like his oats is still in the statement. They had to source grain from elsewhere and that was difficult and costly. All that goes to the Mortons' business. It's got nothing to do with Mr Marsh's business other than the evidence that's already there, which is the Mortons were a market for Mr Marsh's oats.

KENNETH MARTIN J: And then if he could grow certified organic oats in subsequent years to 2010 - - -

VERNON, MS: They would buy it.

KENNETH MARTIN J: - - - and sell them to Mortons who would very much like to take his oats.

VERNON, MS: Yes.

KENNETH MARTIN J: All right. I see.

VERNON, MS: But - but - thank you, your Honour.

KENNETH MARTIN J: Yes. I think in the circumstances, paragraphs 12 and 13 must fall. Paragraph 12 is expressed

there is a bit of a point that you can't really understand the evidence without the foundation stones upon which the trial has proceeded.

So what I want to flag is the question of the redacted witness statements cleaned up and excised of material that has been ruled out, being publicly available. I think I have foreshadowed that at the start of the trial but bearing in mind our transcript proposal, I wanted to sound out counsel about whether there would be any objection to witness statements going on the website as well at the appropriate time.

NIALL, MR: Yes, your Honour. In terms of that, the statements have been read into evidence and adopted.

KENNETH MARTIN J: Yes.

NIALL, MR: They should be available, or there's no reason to be - for them not to be available in terms - - -

KENNETH MARTIN J: Well, only to the extent that there's orders for witnesses out of court at the moment and - - -

NIALL, MR: Yes, your Honour. I will come to that in one moment, your Honour, just the timing. At the moment the witnesses have adopted in that form - and it wouldn't be appropriate, in my respectful submission - - -

KENNETH MARTIN J: I agree.

NIALL, MR: - - - for that in that form. We will remove them, the paragraphs - might leave some blanks or it might be truncated in a word document.

KENNETH MARTIN J: Well, I think, to the extent that a whole paragraph, say 23, is out then the number 23 should stay with dot, dot, dot and - or maybe (excised) so that we don't lose the ability to backtrack in terms of what people were questioned about.

NIALL, MR: So we will attend to that, your Honour, on our part.

KENNETH MARTIN J: All right. That will be helpful.

NIALL, MR: And, perhaps, I might just keep your Honour informed as to the - - -

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

CAHILL, MS: Yes. The only question I had in my mind is when your Honour says "make publicly available" I assume your Honour means if anyone requests a copy of it, then we will give it to them. We don't have to - - -

KENNETH MARTIN J: Well, what I have in mind is that but also putting them on the website as well - - -

CAHILL, MS: I see. I see. Yes.

KENNETH MARTIN J: - - - with the transcript as a searchable documents.

CAHILL, MS: We don't have any objection.

KENNETH MARTIN J: Now, just in terms of when that might happen, I have been thinking about our discussion yesterday morning and where I am at, I think, is that probably that shouldn't happen until the evidence is finished on both sides. I can see no reason why, as of now, the opening statements by counsel on day one, before there was an order for witnesses out of court, should not go up on the website unless anyone has got any vigorous objection to that. But what I would foreshadow then, in response to many requests that have been received by the registry for a transcript and also now witness statements is that once the evidence is finished on both sides, they will go up, be publicly available - capable of being scrutinised. But we would put up the counsel's opening statements on day one immediately that that was feasible. Any difficulty with that?

NIALL, MR: No, your Honour.

KENNETH MARTIN J: All right. Excellent. Thank you for that. Now, the second housekeeping matter is this, due to an unfortunate series of meetings this week, I need to be wrapped up basically here by 4.15 today and by 4 o'clock tomorrow. So if counsel could just bear that in mind, I just have to be at the other building for those commitments. All right. Now, so, who is next?

NIALL, MR: Thank you, your Honour. The next witness is Mr Johnny Morton and, again, my learned friend, Ms Pierce - it's Jonathon Danton Morton and my learned friend Ms Pierce will take that witness, if your Honour please.

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

PIERCE, MS: Thank you, your Honour. I understand that there are some more objections to Mr Morton's evidence, so perhaps - - -

KENNETH MARTIN J: All right. Paragraph 3, I think, is notified on mine - - -

VERNON, MS: Yes, that's the one. Your Honour, second - - -

KENNETH MARTIN J: And it's the second sentence?

VERNON, MS: Second sentence in paragraph 3 on the grounds that it's - - -

KENNETH MARTIN J: I will just have a quick look at that.

VERNON, MS: - - - conclusionary and hearsay.

KENNETH MARTIN J: It's the same philosophical - - -

VERNON, MS: Yes, your Honour.

KENNETH MARTIN J: - - - objection as was raised in terms of the earlier paragraph in Mrs Morton's statement.

VERNON, MS: Yes, your Honour.

KENNETH MARTIN J: Particularly as regards what the customers want with certainty and comfort. All right. Ms Pierce?

PIERCE, MS: Again, this is relied upon as an observation of Mr Morton's experience and that experience is described in the earlier parts of his witness statement. In particular, the reference in paragraph 2 to the sale of organic products. It ought as well, in my submission, to be read in the context of the sale of certified organic products, having regard to the evidence which follows that - that, I should say, is in paragraph 3 - the inability to sell what are effectively uncertified organic oats. So this sentence that's objected to relates to the particular importance to the customers of certification and, in my submission, the basis for the observation can be found in the other paragraphs of the witness statement.

KENNETH MARTIN J: Yes, all right. The only objection that's raised in terms of admissibility to Mr Morton's proposed evidence in a 16 paragraph witness statement is on the second line of paragraph 3. Paragraph 3 commences:

Morton's customs in Australia do not purchase organic grains which are not certified organic.

That's not objected to but this sentence is. The second sentence reads:

From my experience of the organic grain market of Australia, wholesalers and retailers want the certainty and comfort that the goods they sell to their customers are certified.

The difficulty with that sentence from an evidentiary perspective is that it strays into the subjectivity of the mind of purchasers of Mortons grain, particularly by the phrase:

Retailers want the certainty and comfort.

And as to that, Mr Morton is certainly well qualified to speak of his experience in terms of what he sells, the demand for his product, and the level of turnover for organic as opposed to non-organic product and he has done that in his statement. When, however, that sentence strays into observations about the mind of purchasers in terms of what they want, that's a conclusion and it's not capable of being empirically tested by cross-examination because the purchasers are not giving evidence and on that basis it infringes the hearsay rule and can't stand. So paragraph - sorry, the second sentence only of paragraph 3 will be excised.

PIERCE, MS: If your Honour pleases.

KENNETH MARTIN J: Very well.

PIERCE, MS: I call Mr Morton.

KENNETH MARTIN J: All right. If we can have Jonathan Morton. Yes, come through please, Mr Morton.

MORTON, JONATHAN DANTON sworn:

KENNETH MARTIN J: Yes, thank you. Have a seat. Yes, Ms Pierce.

PIERCE, MS: Mr Morton, I am going to have handed to you a copy of a witness statement that you have made?---Thank you.

Could I ask you to tell his Honour your full name please?---My name is Jonathan Danton Morton.

And what is your address?---51 Duke Street, East Fremantle.

Would you please tell his Honour your occupation?---I'm a seed merchant.

You've prepared a witness statement of three pages?---Yes, yes.

And you have that before you?---Yes, I do.

Have you had an opportunity to read your witness statement recently?---Yes, I have.

And that's the witness statement dated 14 January 2014?---Yes, it is.

Thank you. Can I ask you just to note at paragraph 3 the second sentence has been redacted or ruled out?---Yes, I can see that.

So subject to that redaction, are the contents of your witness statement true and correct?---Yes, they are.

Thank you. I tender that, your Honour.

KENNETH MARTIN J: Yes, very well. Mr Morton's witness statement of 14 January 2014 with the noted excision of the second sentence in paragraph 3 only will be exhibit 23.

EXHIBIT 23 Plaintiffs DATE 14/1/14
Mr Morton's amended witness statement

KENNETH MARTIN J: That's the evidence-in-chief.

PIERCE, MS: Yes, sir. Thank you.

KENNETH MARTIN J: Yes. Well, cross-examination?

CAHILL, MS: Ms Vernon will take the witness.

KENNETH MARTIN J: Ms Vernon.

VERNON, MS: Thank you, your Honour. Now, Mr Morton, I understand - it's correct, isn't it, that the majority of your sales are for export?---That's correct.

So it would also be true - your business involves organic and conventional seeds. Is that right?---That's correct, yes.

And largely oats?---Oats is a fairly large part that we do amongst others.

So the - is it correct that it's 95 per cent of your business would be the export market?---Yes, that's correct.

And a smaller proportion of that is the organic - - -?---That's correct.

- - - export market?---Mmm.

And in relation to that, in order to export it as organic, you're required to have organic produce certification?---That's correct.

And you're required to - if you're buying oats from sources, you're required to ensure that the sources of your oats have organic produce certification as well?---Yes.

So if 95 per cent of your business is export, then would it be fair to say that five per cent of your business deals with the Australian market?---Yes.

And of that a smaller percentage again is organic?---We don't do any domestic organic, all export.

It's all export. So essentially where you say in paragraph 3 that Morton's customers in Australia do not purchase organic grains, which are not certified organic, you mean Morton's customers - export customers?---We have got export customers in Australia who buy organic products for export.

All right, and they have - in order to sell those for export, you have to have organic - - -?---Yes.

- - - certification.

KENNETH MARTIN J: Of the product or Morton's or both?

VERNON, MS: Well, your organic certification covers Morton's and the product, does it not?---That's correct, yes.

So when you talk about trying to sell - you say you tried to sell chemical free oats?---Yes.

And you've tried to sell in-transition oats?---Yes.

And is that for export?---Yes.

Not for the Australian market?---No, for export.

So when you say at the bottom of paragraph 3 that you would not now bother trying to sell uncertified grain to your Australian customers at prices above what you sell non-organic grain for, you were talking about your export customers?---Yes.

I have no further questions, your Honour.

KENNETH MARTIN J: Yes. Any re-examination, Ms Pierce?

PIERCE, MS: Just one question. Mr Morton, it was put to you that you need to buy oats for your organic export from certified sources?---Yes.

And you answered that, yes, those sources did need to be certified?---Yes.

How do you satisfy yourself that the sources from whom or from which you buy your oats are certified?---There's a procedure - a records procedure for all organic grain, both from the grower through transport into storage and then processing and then transport again to packing and then export, and that trail of information has to be accounted for and signed off. And then during our audit process with NASAA, they will review that everything has been properly documented and recorded so far as oats received from growers through to where - what storage was used, what trucks were used, and what processing records are maintained to have the traceability right through to the end customer.

I see. And you referred to it as a records process. Would you please tell his Honour what kind of documents you received from the growers of the oats in particular?---Well, certified documentation, which we'll record which paddocks the oats have come from, what silo storage the oats have been stored on a farm.

Thank you. I have nothing further, your Honour.

KENNETH MARTIN J: Yes, all right. Thank you. Thank you, Mr Morton. That completes your evidence?---Okay.

You are now excused?---Thank you.

We will keep your witness statement. Thank you.

(THE WITNESS WITHDREW)

KENNETH MARTIN J: We will keep your witness statement, thank you. Yes, Mr Niall.

NIALL, MR: Your Honour, the next and last witness is Frederick Evan Davies. He is with the - - -

KENNETH MARTIN J: Telephone.

NIALL, MR: Yes. (indistinct) Would your Honour just give us an opportunity to establish that link?

KENNETH MARTIN J: Yes. How long will we need for his cross-examination?

VERNON, MS: I would have thought five minutes, your Honour.

KENNETH MARTIN J: Five minutes. All right. We will try and do that now then. There's a couple of objections though, aren't there?

VERNON, MS: Yes, your Honour. Well, there is - in fact, I don't press the second objection that I've listed there.

KENNETH MARTIN J: So that was to 9, and that's all right.

VERNON, MS: That's to 9, and that's all right. So the only objection is paragraph 8, the last sentence:

Our customers would not accept a non-organic substitute.

PIERCE, MS: Excuse me, your Honour. I'm sorry to interrupt my learned friend.

KENNETH MARTIN J: Yes, Ms Pierce.

PIERCE, MS: We won't read the paragraph in - - -

KENNETH MARTIN J: It's only the last sentence.

PIERCE, MS: - - - excuse me, the sentence in paragraph 8 is objected to.

KENNETH MARTIN J: Last sentence of 8 will be excised.

PIERCE, MS: Thank you, sir.

DAVIES, MR: Hello?

KENNETH MARTIN J: Hello, Mr Davies. This is Justice Martin in the Supreme Court of Western Australia. How are you?

DAVIES, MR: Yes. Fine, thank you.

KENNETH MARTIN J: We're just in a position to take your evidence now if you're ready to proceed with that.

DAVIES, MR: Yes.

KENNETH MARTIN J: Very good. I will just ask my orderly to administer to you, at your choice, either an oath or an affirmation as regards your witness statement.

DAVIES, MR: Yes. Doesn't matter to me.

KENNETH MARTIN J: All right. On that basis, I think we will, I think, administer the affirmation.

DAVIES, MR: Yes.

KENNETH MARTIN J: Could you just repeat after my orderly the words that she's now going to read you.

DAVIES, FREDERICK EVAN affirmed:

KENNETH MARTIN J: All right. Thanks, Mr Davies. I will now ask counsel for the plaintiff, Ms Pierce, to lead your evidence.

PIERCE, MS: Mr Davies, are you able to hear me clearly?---Yes. A bit slightly, but clearly.

I will try to speak up, Mr Davies?---Thank you.

Do you have a copy of a witness statement in front of you? It's the witness statement of four pages in length, and it's dated 15 January 2014. Do you have that in front of you?---Yes.

May I ask you firstly to turn over to page 2, please?---Yes.

Right. Do you have a pen with you?---Yes.

Could you please pick up your pen and put a line through the last sentence of paragraph 8, which is the sentencing

?---That's correct.

So is it the case that you do not try to sell product labelled organic unless it is certified organic?---We are certified, so we do not attempt to sell anything as certified organic if it is not certified organic.

So when you say in paragraph 9 that - in the last line, you say:

We cannot sell non-certified products at the higher price available to certified organic products -

I take it there's a word missing there, and you mean "we cannot sell non-certified organic products at the higher price available to certified organic products"?---No. In that paragraph, "non-organic" means conventionally grown. And we do process non-organic as a parallel production, but that is sold in a different market and under a different label.

So, in fact, when you say, "We cannot sell non-certified products," you mean conventionally grown products?---Yes.

You're not talking about products that may be grown in an organic production system which isn't certified?---No. That means nothing to our production, because to be organic it has to be certified - it must be certified.

As far as your business is concerned?---Well, as far as our business is concerned as far as our market is concerned, we are accredited to produce and sell a certified organic product, and, if we were to do otherwise, we would soon be found as fraudulent and we wouldn't be able to survive as a company.

So your understand is that you couldn't sell a product in Australia as organic unless it was certified organic?---Absolutely.

I have no further questions, your Honour.

KENNETH MARTIN J: Yes. Any re-examination?

PIERCE, MS: No re-examination, your Honour. May Mr Davies be excused, please.

KENNETH MARTIN J: Yes. By all means. All right. Thank you very much for assisting the court over the telephone with that brief evidence, Mr Davies. That completes your evidence and you're now excused?---Thank you very much.

Thank you.

(THE WITNESS WITHDREW)

KENNETH MARTIN J: How, Mr Niall, what's next?

NIALL, MR: Your Honour, the position is that concludes all the witnesses that the plaintiff seeks to call in this case. I seek to tender some documents. May I do that at 2.15, your Honour?

KENNETH MARTIN J: Yes. Yes. Let's do that. And how long do you think that we will need for that?

NIALL, MR: Not very long, your Honour.

KENNETH MARTIN J: Not very long. And so that will close your case?

NIALL, MR: It will, your Honour.

KENNETH MARTIN J: And then we will get straight into the evidence of Mr Baxter. All right. Excellent. All right. Court will adjourn till 2.15 pm.

(LUNCHEON ADJOURNMENT)

KENNETH MARTIN J: Please be seated. Yes, Mr Niall.

NIALL, MR: If your Honour pleases. Can I hand to your Honour a copy of what your Honour proleptically marked as exhibit 2, which was the supplementary statement of agreed facts.

KENNETH MARTIN J: Thank you.

NIALL, MR: Sorry, your Honour, I should have also handed to your Honour's orderly the - just the next document, not related to the first, your Honour.

KENNETH MARTIN J: All right. So we are going to add this to exhibit 2. Is that the plan?

NIALL, MR: That is exhibit 2 I think, your Honour.

KENNETH MARTIN J: That is exhibit 2. Exhibit 2 might have been a little more extensive than that. Let me just check. I see, this is the minute.

NIALL, MR: Yes.

KENNETH MARTIN J: Yes, yes, yes, yes.

NIALL, MR: So your Honour - - -

KENNETH MARTIN J: The putative minute has now arrived.
All right.

NIALL, MR: Yes.

KENNETH MARTIN J: That will be exhibit 2.

NIALL, MR: Yes, your Honour. The next document I handed to your Honour, it was four documents which were the National Variety Trials that Mr McInerney referred to in evidence and I am not sure that your Honour had a copy.

KENNETH MARTIN J: I see.

NIALL, MR: So they could - - -

KENNETH MARTIN J: Do you remember which one of his - what's actually - - -

NIALL, MR: I think it was exhibit 13.

KENNETH MARTIN J: 13A was his first report.

NIALL, MR: 13A. Sorry, your Honour. Sorry, your Honour, they were the annexures to 13C, supplemental 2.

KENNETH MARTIN J: Yes, all right. Thank you for those.

NIALL, MR: Next, your Honour, to take your Honour to the - some documents in the tender bundle which has not yet been identified.

KENNETH MARTIN J: Should we do that by reference to the index or - - -

NIALL, MR: Yes, your Honour, I think that - - -

KENNETH MARTIN J: All right, we will do that.

NIALL, MR: - - - would be convenient if your Honour pleases.

KENNETH MARTIN J: Yes, by all means.

NIALL, MR: Document 21, your Honour, that's - - -

KENNETH MARTIN J: Ms Cahill, you let me know if there's any contention over this.

CAHILL, MS: Yes.

NIALL, MR: Page 210.

KENNETH MARTIN J: All right. So 21 is in.

NIALL, MR: Documents 27 through to 31, my learned friend objects to the - doesn't object to the tender but seeks that they be limited to the fact that they were made rather than the truth of the contents.

CAHILL, MS: To put it another way, we object to them going in on the - as truth of the evidence of the contents - as to the truth of their contents.

KENNETH MARTIN J: Yes, I understand. So the fact of their publication is said to be relevant in some way to - it was knowledge or whatever.

NIALL, MR: Yes, your Honour.

KENNETH MARTIN J: All right.

NIALL, MR: That's 27 to 31.

KENNETH MARTIN J: 27 to 31 in on that limited basis then.

NIALL, MR: 40 to 44, same basis, your Honour, but they're of a different sort of document. They are notices placed by the plaintiff in newspapers and the like; your Honour will recall that.

KENNETH MARTIN J: I do.

NIALL, MR: And 45 is another one on a limited basis. It's of similar ilk to 27 to 31.

KENNETH MARTIN J: All right. So on that basis 40 to 45 are in.

NIALL, MR: 64, your Honour.

KENNETH MARTIN J: Yes.

NIALL, MR: The next one, your Honour, is 94.

CAHILL, MS: That was referred to this morning anyway, your Honour, so it would have already been - - -

NIALL, MR: So - - -

KENNETH MARTIN J: All right. 505 to 512 of volume 2, as the post inspection review sheet of 25 November, which is 94 in the index, will be in.

NIALL, MR: Over at page - well, number 141, your Honour, which is the administrative arrangements. Your Honour will recall being taken to those.

KENNETH MARTIN J: Yes. All right. Document 141 in volume 5 is in.

NIALL, MR: Document 145 and 146 are referred to in Ms Denham's third statement. So they have been referred to in the statement, but I don't think your Honour was taken to them at all. But - - -

KENNETH MARTIN J: All right. Well, they can be in, as the documents are referred to.

NIALL, MR: Then - - -

KENNETH MARTIN J: 145 and 146 in volume 5 are in.

NIALL, MR: Thank you, your Honour. And then if your Honour goes over to document 165.

KENNETH MARTIN J: Yes.

NIALL, MR: I just identify the documents which were referred to by Ms Bishop, by number, and they are 165 to 167.

KENNETH MARTIN J: Yes.

NIALL, MR: 169 to 170. 172 to 177. We would seek them to go in.

CAHILL, MS: I think these have already gone in over our valiant objection, your Honour, when Mr Bishop was giving his evidence. You will remember there was the ruling.

KENNETH MARTIN J: I do. I do.

NIALL, MR: And then the last document is document 179, which was in, again, through Ms Denham over an objection, your Honour.

KENNETH MARTIN J: All right. That's 179 is in through Ms Denham.

NIALL, MR: Now, can I indicate one additional matter, your Honour - - -

KENNETH MARTIN J: Yes.

NIALL, MR: - - - in relation to the trial bundle. Your Honour will recall I invited my learned friend to tender some inspection documents, and there was a short exchange with your Honour about Walker v Walker.

KENNETH MARTIN J: Yes.

NIALL, MR: Can I make - - -

KENNETH MARTIN J: Document 50, I think.

NIALL, MR: Yes. Can I make it clear, your Honour, that we would also support the tender of all of the inspection reports as business records under section - - -

KENNETH MARTIN J: 79C? 79C of the Evidence Act?

NIALL, MR: 79C of the Evidence Act, your Honour. So the documents are slightly unusual submission in the sense, because the documents are in, your Honour, and we would say they're in for all purposes. But my learned - I apprehend that my learned friend may have something to say about that in relation to the documents on which my learned friend cross-examined, so - - -

KENNETH MARTIN J: This would be a tender by you - - -

NIALL, MR: It would be, your Honour.

KENNETH MARTIN J: - - - as opposed to a tender by that side.

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

KENNETH MARTIN J: Yes.

NIALL, MR: So if there's any doubt about it, we tender all of the inspection reports as business records under section 79C. Would your Honour be assisted if I identified them?

KENNETH MARTIN J: Yes. Why not.

NIALL, MR: Starting document 50, 51 and 52.
Document - - -

KENNETH MARTIN J: 51 and 52 have got a tick next to them anyway.

NIALL, MR: Yes. Yes.

KENNETH MARTIN J: So they are uncontroversial.

NIALL, MR: Document 50, your Honour. Document 59 - - -

KENNETH MARTIN J: My note is that is already in.

NIALL, MR: If it pleases. We understood that that was one that may have been subject to some argument.

KENNETH MARTIN J: One of the witnesses identified that and - - -

NIALL, MR: Yes, your Honour.

KENNETH MARTIN J: - - - it was tendered.

NIALL, MR: I think all of the documents were cross-examined on, your Honour. The next one is 78 and 92.

KENNETH MARTIN J: 92 is already in, on my note.

NIALL, MR: 94, your Honour.

KENNETH MARTIN J: 94 is - - -

NIALL, MR: And my learned friends refer to 84, but we understand - I understood that to be already in, your Honour.

KENNETH MARTIN J: 84 has got a tick next to it.

NIALL, MR: And 94. 92 and 94, your Honour.

KENNETH MARTIN J: 92. Yes, I think 92 has actually been tendered already, so that's in.

NIALL, MR: And 94, your Honour.

KENNETH MARTIN J: 94 is now in.

NIALL, MR: I think they are the - pardon me one moment, your Honour. Yes, they are the inspection reports and

documents we seek to tender as business records, to the extent that it's necessary to do so.

KENNETH MARTIN J: All right. Well, is there any submission against the fact that they are business records?

CAHILL, MS: No, your Honour.

KENNETH MARTIN J: No. All right. Well, they can be admitted on that basis.

NIALL, MR: If your Honour pleases. And, finally, just one document which is a spreadsheet which is a document obtained - it has been provided to our friends - it was also provided and referred to by Professor Van Acker and it's a document from the Bureau of Meteorology at Katanning, Wind Data From October November 2010.

CAHILL, MS: We object to that, your Honour, on the basis that it's at Katanning. It purports to be, on its face, wind data in relation to Katanning and not Kojonup that is 40 kilometres away and irrelevant.

KENNETH MARTIN J: Katanning, not Kojonup. Might be out of your territory here, Mr Niall.

NIALL, MR: Well, I will do my best, your Honour. This is the closest weather station which records gusts data closest to Kojonup.

KENNETH MARTIN J: There's nothing more - there's an Act that deals with this because I have had weather information tendered in quite a few cases, effectively by a statutory provision which makes it permissible.

CAHILL, MS: That's not the objection, your Honour, as to - - -

KENNETH MARTIN J: No, you say it's too far away, I understand that.

CAHILL, MS: Yes. I had assumed it would get in under the - if it were relevant, it would get in under the public documents section of the Evidence Act, if nothing more specific. But the problem is it's 40 kilometres away, measuring gusts of wind in that place, not in Kojonup.

KENNETH MARTIN J: Well, if there was some evidence that this was the best that you could get, then I would be minded to receive it and then it would just be a question of its weight and reliability but - - -

NIALL, MR: Well, they are my instructions, your Honour. Would your Honour simply mark it for identification at this stage.

KENNETH MARTIN J: Yes. Well, I will give you liberty to augment the plaintiff's evidence by reference to this issue - - -

NIALL, MR: Thank you.

KENNETH MARTIN J: - - - by further inquiry as you require.

NIALL, MR: If your Honour pleases.

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

KENNETH MARTIN J: Yes.

CAHILL, MS: Merely to come back to your Honour and say, "Well, that's the closest weather station at which data could be collected" in my submission - - -

KENNETH MARTIN J: No, I would imagine there would be a witness from the Bureau of Meteorology or someone of that kind, who would either put in a statement that would be uncontroversially received or might even need to be called. But I'm not going to deal with it on the basis of assertion.

CAHILL, MS: No. I'm sorry, your Honour. I've put that badly. It's more than that. It's that it couldn't simply be admitted as relevant evidence on the basis that this is the nearest place that one has wind data about. There would need to be some evidence that would enable your Honour to draw some conclusions relevant to Kojonup from this data, and - - -

KENNETH MARTIN J: Well, I hear evidence about that. I mean, this is a computer printout with about 25 columns across the page. Someone will have to explain it to me.

CAHILL, MS: About what happens in - in what has happened in Katanning.

KENNETH MARTIN J: All right. Well, the one page spreadsheet from the Bureau of Meteorology, Katanning wind data for October to November 2010, will be MFI 24.

CAHILL, MS: 25.

KENNETH MARTIN J: Just give me a moment to turn up his material, which is presently well buried.

CAHILL, MS: I think your Honour had yesterday a copy, with the trial bundle references, of the statement that was given to you through your associate.

KENNETH MARTIN J: Just let me check that. I (indistinct) something with those references. (indistinct) something new. Yes. I've got the statement and the amended supplementary statement.

CAHILL, MS: Yes. So - - -

NIALL, MR: Your Honour, in light of your Honour's ruling, we don't press the objection.

KENNETH MARTIN J: Very well.

CAHILL, MS: I call Mr Baxter.

KENNETH MARTIN J: All right. We will have Mr Baxter.

CAHILL, MS: It shouldn't be an amended supplementary statement, I don't think, your Honour, should it?

KENNETH MARTIN J: It's an amended supplementary statement of evidence.

CAHILL, MS: I see. Had the trial bundle references. I was at cross-purposes with my team, your Honour.

BAXTER, MICHAEL OWEN affirmed:

KENNETH MARTIN J: Ms Cahill.

CAHILL, MS: Thank you. Mr Baxter, I'm just going to hand you a copy of your statement and the supplementary statement. I have here a version for your Honour that was signed this morning, which is the copy that - the version that Mr Baxter is now looking at.

KENNETH MARTIN J: All right. Thank you. We will probably make that the formal exhibit.

CAHILL, MS: Now, your full name is Michael Owen Baxter?---That's correct.

And you live at Seven Oaks, which is a farm at Baxter Road in Kojonup?---That's correct.

And you're a farmer?---That's right.

You've got in front of you your statement of evidence?---That's right.

And that's - your first document, the statement of 27 pages you have in front of you, which you have signed and dated today at the last page?---That's correct.

Are there any amendments that you want to make to that statement, Mr Baxter?---No, I don't think so.

In paragraphs 12 and 18, you refer to carrying on the farming business with your wife, Zanthly, and working the farm with the assistance of your sons and your wife. Can you just tell his Honour about your personal circumstances, which have changed since you signed this witness statement?---That's right, since - - -

Sorry, I - sorry, since you first signed this witness statement?---That's right, I'm no longer farming with my wife now. We have been separated for over 12 months now.

KENNETH MARTIN J: Thank you.

CAHILL, MS: Now, you have read your statement of evidence this morning?---Yes, I have.

Do you swear that the - do you affirm that the contents is true and correct?---I do.

I tender that statement, your Honour.

KENNETH MARTIN J: Yes. Mr Baxter's witness statement, signed by him today, 18 February 2014, formerly signed by him on 28 August 2013 of some 82 paragraphs will be exhibit 26A.

EXHIBIT 26A Defendants DATE 28/8/13
Mr Baxter's witness statement

CAHILL, MS: Thank you, your Honour. Just take up the supplementary statement, please, Mr Baxter. Again, you have signed a version of that document with the trial bundle references earlier today. It's of four pages, isn't it?---That's correct.

And there's no amendments that you want to make to that document?---No, there isn't.

Do you affirm that the contents of it is true and correct?---Yes, I do.

I tender the statement, your Honour.

KENNETH MARTIN J: Yes. The second statement as identified and signed by Mr Baxter today, 18 February 2014, will be exhibit 26B.

EXHIBIT 26B Defendants DATE 18/2/14
Second signed statement of Michael Owen
Baxter

CAHILL, MS: Thank you, your Honour. Nothing further.

KENNETH MARTIN J: Cross-examination.

NIALL, MR: If your Honour pleases. Mr Baxter, you identify in paragraph 7 of your first statement the passing of your parents, with your mother passing in October 1989. Since that date, you have been farming Seven Oaks in your own right?---That's correct, yes.

And over that 24 year period, the farmer is comprised - at least Seven Oaks is comprised of about 900 hectares?---The initial farm was 900 hectares and we have purchased more since.

You have purchased more as part of - incorporated into Seven Oaks or separately?---Separately.

And that's Baxter's block?---That's correct.

And how big is Baxter's block?---It's approximately about 200 hectares.

Okay. Now, just looking at Seven Oaks, you have farmed over the last 24 years a mixture of livestock and cropping?---That's correct.

Basically, at the ratio of about two-thirds sheep, pasture and one-third crop?---In which period are you talking?

From 1990?---1990. I originally used to be - normally sheep in the first part of it, then in probably the last 10

or 15 years I have (indistinct) predominantly sheep - I mean, predominantly cropping, sorry.

Well, when did you move from predominantly sheep to predominantly cropping?---It would have to be at least between 10 and 15 years ago.

Can we put it - would it be about 2000 or before 2000?---Around 2000.

And from the year 2000, you have cropped continuously about 330 hectares of Seven Oaks?---Yes. Firstly, I had just slightly built up - firstly, I just slightly increased. Then probably in the last sort of five to 10 years, I've just predominantly, yes, increased my cropping a lot more. Yes.

When you started cropping, what were the crops that you put in?---It would have been a mixture of - probably it wasn't canola to start. It would have been wheat and barley and oats.

All right?---Predominantly - - -

When - sorry?---Excuse me. I had trialled peas and lupins just at that stage.

Yes?---And (indistinct)

When did you first plant canola?---I can't quite exactly remember what year. It would have been around the - - -

2002, 2003?---Yes, somewhere around there.

Earlier than that?---I don't think so.

So 2002, and you have continuously cropped canola since then, haven't you?---Pretty well, yes.

Yes. About 200 hectares or 170 to 200 hectares a year?---Yes, for the first (indistinct) it probably wasn't - no, it wasn't that much. Then I have in the last five, six, seven years about that amount.

Well, more than 5/6 years, isn't it, Mr Baxter?---Sorry. So about 2002. Would have been. Yes.

So since 2002 you've been about 170 to 200 hectares of canola every year?---Pretty well. Yes.

Okay. Now, over that time, since about 2002, when you've been growing canola, you describe yourself as a proficient canola farmer, wouldn't you?---Yes, I would. Yes.

And, over those, now, 12 or 13 years, you've grown and harvested canola yourself, haven't you?---That's correct.

And over those 12 years - 12 or 13 years, since 2002, in terms of your farm income, would be - more than half have been canola farming?---The half of the income, you mean?

Of the cropping income?---No, it wouldn't be.

What percentage of your cropping income? Just cropping income?---Just cropping - just canola income?

Yes?---Of the whole farm or just of the cropping?

Just of the cropping?---Just the cropping would probably be - it would have to be probably around the 35 per cent.

So it's a significant part of your cropping enterprise and has been for more than 10 years?---It has. Yes.

Yes. And each year you've grown canola, you've applied glyphosate to the paddock, haven't you?---That's right.

Yes. In fact, every time you've cropped, you've applied glyphosate to a paddock, haven't you?---That's correct.

And that includes - that - regardless of what crop you've sowed, you've always applied glyphosate?---That's right.

Yes.

KENNETH MARTIN J: Are we talking canola crops, or all cereal crops?

NIALL, MR: Well, that last question was all crops.

KENNETH MARTIN J: All crops.

NIALL, MR: All crops, every year, you apply glyphosate?---That's right.

And you've - every year, up until 2010, you've direct harvested your canola crop, haven't you?---That's correct.

Yes. And you've used your own harvester?---That's right.

Yes. What's the value of your harvester?---The current harvester?

Yes?---It's probably about 75, \$80,000.

Yes. So it's a substantial piece of infrastructure?---That's right.

Yes. And you've used it every year to harvest your canola, up until 2010?---Well, the harvester I've got now I've only had for two years, but, previous to that, I've owned other harvesters.

Yes. And up until 2010, you had never had a problem with pod shattering in harvesting canola, had you?---Not to a huge amount. No.

No. And you had never had a difficulty getting an even ripening of your crop, did you?---It has always been not even - it has always been stagnated.

But you've certainly been, seasons aside, able to get an evenly ripened crop for the purpose of harvest, haven't you?---Yes. Pretty well.

And when you used - when you direct harvest, up until 2010, you've been able to determine precisely when you will harvest the crop on a day to day basis, because you've been able to use your own machinery. Would you agree with that?---Won't be precisely, because every year is different.

No. But once you decide to harvest - - -?---Yes.

- - - you've got the machinery there, ready to go?---That's correct.

So you're not reliant on any one else - bring in anyone else in order to bring in the harvest?---No. That's right.

No. Now, in general terms - and I'm moving beyond canola, Mr Baxter, and dealing with cropping generally - you've engaged in rotation of cropping?---That's correct.

But, since 2002, you've separated the paddocks in which you've cropped, from the paddocks in those which you've run stock. Correct?---That's correct. In the cropping period, I did.

I beg your pardon?---In the cropping season, the paddocks are designated the crop, in that, when the crop is harvested, obviously the sheep are moved in.

All right. So you - once you harvest a crop, you graze your stock on the stubble, or what's left of the harvested?---That's correct.

And is that for all of your crops?---Yes, it is.

And with those paddocks that are designated cropping paddocks, you've engaged in a rotation which is essentially canola, then cereal, cereal, canola. Is that right?---That's correct.

And you are of the view that it would not be good farming practice, for example, to go canola then canola?---That's correct.

Why is that?---Because of disease issues.

And any other - and why do you go canola, cereal, cereal, canola, Mr Baxter?---That just suits my preference in my rotation.

And why do you rotate them?---Why? Because disease is the most reason for rotating and your chemical controls - I mean, your weed controls and different chemicals you can use on your pastures to kill you weed, or in your crop, sorry.

Now, the method that you use when you are cropping a paddock is, as I understand it and you will correct me, if I'm wrong, is firstly you apply a knockdown herbicide to clear the paddock?---That's correct.

Yes. And over the years that has been invariably glyphosated?---That's right.

And then, once it's knocked down, you seed the paddock?---Not necessarily, no.

Well, what happens after knockdown, Mr Baxter?---It depends on - well, the majority of the crops, I will do a double knock, so - - - .

All right. Well, what's a double knock?---A week or two weeks, I will do a spray, which will take - with the Roundup, will take every weed out that's growing at that stage. Then, depending whether it's canola or cereal, I

will come through with the paraquat and a - which will take out any other weeds that are growing at that stage and use an incorporating chemical into the ground to incorporate the killing weeds that are going to come up.

So let's just take that through steps. The first thing you do when you have got a paddock that you are going to crop is you knock it down with glyphosate?---That's correct.

Right. And then you do a double knock by applying another herbicide a few weeks later, is that right?---Can be a few weeks, can be a week. Preferably not longer than two weeks.

And that also serves to clear the paddock of weeds, is that right?---That's correct.

And do you use glyphosate - glyphosate in that process?---No, I don't.

What do you do?---I use paraquat.

All right. So your practice is glyphosate and then paraquat to clear a double knock?---Yes, well, double knock - double knocks mean you spray twice.

Yes. And then you seed?---Pretty well after your second knock you will probably seed within 24 hours.

Yes. And you use a minimal till or a no till method of seeding, don't you?---That's correct, yes.

And you have used that since 2002?---Yes.

And that minimum till, that means that you are not cultivating the soil, are you??---Not much, no.

No. I think you describe in your statement that effectively with the seed of it you use, you inject the seed at various points along the paddock?---That's correct. Just behind your (indistinct) and straight into the (indistinct) dirt.

KENNETH MARTIN J: What's the name of that piece of machinery that does the actual planting?---Air seeder.

Air seeder. Thank you.

NIALL, MR: And that process, of knock down air seeding, it doesn't matter where you are planting canola or cereal, does it?---That's right.

Yes. And then once the crop emerges, you spray it with another herbicide?---Which crop are we talking about.

Well, let's start with canola?---Yes.

Well, what - what - - -?---Well, what variety of canola?

All right. So your herbicide might depend on what canola you are planting?---That's correct.

All right. But you plant it with a herbicide - you hit it a herbicide?---That's correct.

And you do that with wheat as well, do you, after it has emerged?---After it's emerged?

Yes?---You can do, yes.

Well, you can. Do you do it?---I - you can use it post after you planted on cereal and canola.

Okay. And then do you engage another second spray post emergent crop or not?---You can do, at times.

You have, but not always?---I have, yes.

But not always?---Not always. You don't always need to.

And then you harvest, is that right?---Yes.

Right. So you don't - and that's the process that you have adopted since 2002, isn't it?---That's correct.

And that process doesn't involve any cultivation between the first knockdown application and harvest, does it?---No, it doesn't.

Right. Thank you. Now, you say in your first statement, Mr Baxter, that - and this is paragraph 25. Do you have that, Mr Baxter?---Yes, I do.

And you just say there that from 2003 you followed cropping plans prepared in consultation with your agronomist. Do you see that?---Correct.

So since 2003 the process has been that you've sought advice from an agronomist?---That's correct.

And that has been Mr Robinson?---That's correct.

And he has prepared a paddock plan?---Yes, he has.

And you have followed the paddock plan?---I have.

Thank you. Now, one of the problems of that faces cropping farmers is the problem of weed resistance, isn't it?---That's correct.

And what's your understanding of weed resistance, Mr Baxter?---When a weed is resistant to a chemical.

Yes, and what does that mean? What happens then?---Well, the weed was obviously sprayed with a chemical and sometimes it would kill it and sometimes it will nearly kill it.

Yes, and that's a problem, isn't it?---That is a problem, yes.

Yes. Why is it a problem?---Well, if the weed is not killed, well, it's obviously going to affect your crop.

Yes. What about the subsequent year, is there a problem in that?---There will be, yes.

Yes. What is it?---Well, it will set seed and then there will be more seeds.

Yes, and those seeds are likely to be resistance to the herbicide as well, aren't they?---It's always a possibility.

When you say a possibility, if a herbicide resistant plant survives the spraying of the herbicide - - -?---Yes.

- - - and then sets seed and produces weeds the next year, they will also be resistant, won't they?---Well, it will help to the resistance of it, yes.

When you say it will help the resistance, what do you mean by that?---Well, there's always climate or climate conditions which affect the plant for some reason why it doesn't do it. Your spraying conditions might not be correct.

Yes. So there are a number of reasons why weeds don't die when herbicide is applied to it, isn't there?---That's - that's right.

Yes. One of them is the climactic conditions?---That's right.

Yes, but I'm just asking you about herbicide resistance at the moment. And the point is once you get a herbicide resistant plant and it sets seeds and produces plants in the following year, those progeny or the following weeds will also be herbicide resistant, won't they?---That's right.

And that means that over time the herbicide will become completely ineffective in controlling that weed on the property?---That's correct.

Yes. And you say in paragraph 34, if you go to that, Mr Baxter, you talk about your crop rotation program involving weed control, including the control of a particular type of Wimmera rye grass known as herbicide resistant Wimmera rye grass. Do you see that?---Yes.

And then you say in paragraph - subparagraph (3) that between 2005 and 2010 in some paddocks crop yield is down 30 per cent?---That's correct.

Yes. Due to herbicide resistant rye grass, you say?---That's correct.

Is that right?---Yes.

All right, okay. And you identify the paddocks over on the next page, don't you?---That's correct.

And these are the nine paddocks that you identify as having had a problem between 2005 and 2010. Correct?---That's correct.

Yes, and it includes - putting aside Baxter's block, all the other paddocks are on Seven Oaks, aren't they?---That's correct.

Yes. And you identified - 35(1) you come to identify the position that paraquat and SpraySeed haven't been a problem for herbicide resistance on your property. That's right, isn't it?---That's correct.

And by that I take it you mean you have still been able to apply paraquat and SpraySeed with effectiveness?---I had, yes.

Yes, but the problem you identify is in 35(2), isn't it, and it's with FOPs and DIMs?---That's correct.

Do you see that?---Yes.

And you say that there has been a problem by 2010 in using FOPs and DIMs?---That's correct.

That's right, isn't it?---That's right.

And so when you talk about going back to herbicide resistant rye grass on 34(3) - paragraph 34(3), I'm sorry, what you're talking about there is the resistance to FOPs and DIMs, isn't it?---That's correct.

CAHILL, MS: Well, your Honour, if one reads 35(1) and 35(2), there's a difference between the point at which the herbicide is used. I don't think my friend has fairly put that to the witness in terms of the question that's being asked.

NIALL, MR: I'm not sure if that was an objection to the question which has been - - -

KENNETH MARTIN J: I assume it is an objection, but I overrule the objection.

NIALL, MR: If your Honour pleases. Now, Mr Baxter, this idea of herbicide resistance is very important to you, isn't it?---It is. Yes.

Yes. It's something that you were concerned about, was it, between 2005 and 2010?---Yes, I was.

Yes. You never sought to have any of your weeds tested for resistance, did you?---No, I didn't.

No. You knew between 2005, 2010 that that's something that could happen?---Yes, I did.

Yes. But you decided that you didn't think it was necessary to do so?---No, I didn't.

All right. You were confident, were you, that the resistance was to FOPs and DIMs?---Yes, I was.

Okay. Now, the - do you know that FOPs and DIMs are described as a group A mode of action?---Not (indistinct), no.

Have you heard about group A?---Yes.

And the various groups?---Yes.

Yes. Are you able to tell which herbicide you used - do you know which group it falls within?---No, I don't.

So you're not able to tell his Honour what group FOPs and DIMS falls within?---What group it falls in?

Yes?---As in - can you explain a bit more?

What group, describing a mode of action for the herbicide. Are you able to tell his Honour?---Which group it falls in?

Yes?---No. Not - can't.

Now, can you take up volume 2, please, and turn - now, I'm sorry. I might just have a different volume number. Just pardon me one moment, Mr Baxter. Sorry, your Honour.

KENNETH MARTIN J: That's all right.

NIALL, MR: Volume 3, I beg your pardon, Mr - I beg your pardon, Mr Baxter. Do you have that, Mr Baxter?---Yes, I do.

And at 516, can you identify that document please?---2005 cropping program.

So this is the cropping plan that you refer to - or one of the cropping plans you refer to in paragraph 25, isn't it?---25 - - -

25 of your statement?---From the statement.

I took you to it, and you've - perhaps if you go to it, just to make sure that we're talking about the same thing?--- (indistinct) just for me - I know what I'm talking about. Yes. Correct. Yes.

And this was prepared, was it, by Mr Robinson?---There was two years when I did have a different agronomist. I think that was 2006 or 7. I'm not quite sure of the dates, but I would imagine it would have written on it, "Chris Robinson".

I think the evidence was that it was 2007/8 that Mr Robinson was there?---7/8. I know there was two years when Chris was absent.

Mr Robinson - - -?---So it's two - - -

Sorry?---So it's 2005 (indistinct) Mr Robinson.

Thank you. And he was then an employee of Kojonup Agricultural Supplies, wasn't he?---That's correct.

And, for the purposes of preparing an annual cropping plan, how many times - would Mr Robinson visit the property?---Before we draw the cropping program up?

Yes?--- (indistinct) on the farm and we will sit down and make the cropping program together.

When would that happen?---Would probably happen - (indistinct) usually (indistinct) this time of year, but I probably done it in January this year.

So normally - - -?---Normally January.

- - - January/February?---Correct.

And Mr Robinson would come out, you would sit down, and you would do a cropping plan?---Yes, we would.

Yes. And then would he go - would he prepare it then and there, or would he go off and prepare it and return it to you?---No. He would - well, I - yes. He would go away and - we've really prepared it, then he will just return it to me.

And then, over the course of the year, how many times would he come to see you?---Probably every two or three weeks he would visit the farm. Not - that's when I start seeding, from probably May onwards.

Yes?---Once the crop is planted.

Every two or three weeks?---Two or three weeks from that time. Yes.

For how long?---Up until harvest is finished, pretty well.

And how long would he stay?---Probably up to hour, two hours at times.

Some trips would be shorter than that, or - - -?---I wouldn't have thought so. No.

And I just want to get you to identify the structure of the document first. So if you turn over to 517, the first table there is a rotation summary. See that?---Yes, I do.

And what this describes is the - this is the 2005 plan. So it describes in the 2005 column what is recommended or what you've determined to plant that year?---That's correct.

And if you go back, it also identifies, for the previous two years, what was planted?---That's correct.

And then if you go over to page 519, seed summary - do you see that, Mr Baxter?---Yes, I do.

That tells you how many seeds you're going to buy and what type, and how much it's going to cost?---That's correct.

Same for fertiliser?---Yes.

And same for chemical?---That's right.

And then over on the next page, it deals with the cost for each of the crops, correct?---Yes. Correct.

And then on the next page, gross margin?---That's correct.

And then what follows, Mr Baxter, I take it, is that there's a description as to what is going to happen in each paddock. Do you agree with that?---That's on the next page.

KENNETH MARTIN J: What page are we now, Mr Niall?

NIALL, MR: Starting at 522.

KENNETH MARTIN J: We're now at 522. All right.

NIALL, MR: Beg your Honour's pardon. So if you start at 522, Mr Baxter. That's a paddock - river paddock?---That's correct.

Yes. And that tells you what's going to happen with that paddock, isn't it?---It's just - well, it can't tell you exactly; it's just a guide.

Yes. But you've said earlier in your evidence that you following your cropping plans?---Pretty well. Yes.

Yes. And so, this shows the river is one of your paddocks which is used for pasture in '03, '04, '05. Correct?---That's correct.

And just to put it in a little bit of context, if you go over to 536, that's the cropping plan for Two Dam, isn't it?---That's correct.

Now - and that's the basic format for the cropping plan for each of the years, isn't it?---That's correct.

Now, I want to go back and ask you some questions, back to page 519. You see the chemical summary, Mr Baxter?---Yes, I can.

Yes. Are you able to identify, within that last, any that are FOPs or DIMs?---No, I can't, Mr Niall.

Yes. And if you go over to page 536, do you see that - that's Two Dam, yes? Agree with that?---That's correct.

Now, that doesn't identify any FOPs or DIMs either, does it?---No, it doesn't.

No. So for 2005, it appears that FOPs and DIMs wasn't used on Seven Oaks. Is that right?---Not necessarily because these cropping programs are drawn up prior to cropping. And quite often with inspections during the year, there may be a problem and that problem is adhered to at the time.

Yes. Well, what FOPs and DIMs did you apply in 2005?---I couldn't tell you at this stage.

All right. Now, just go over to 2006 please, and that starts at page 574. Do you have that, Mr Baxter?---Yes, I do.

Yes, and this is the cropping plan. You can take a look at - yourself if you would like, Mr Baxter, but that's the cropping plan for 2006?---That's correct.

And you will see on the front page at 574, that was compiled by Kojonup Agricultural Supplies and you will see Mr Robinson's name there?---That's correct.

Now, just go over to page 577. Any FOPs and DIMs in the chemical summary there, Mr Baxter?---No, I can't see any.

Yes. And if you go over to page 596, do you see a document in the top right-hand corner which refers to the 2007 plan?---Yes, I do.

Yes, and that doesn't have a coversheet but if you just look over the following pages, that's the plan for 2007, isn't it?---That's correct.

And you can't recall whether that was a Robinson plan or whether he had gone by that stage, can you?---Not off the

top of my head. I know there was two years he wasn't there. It might have been somewhere around that time.

I will see if I can help you with that, Mr Baxter?---It got written down somewhere in one of my - in evidence. 2007, 2008.

You think that wasn't Mr Robinson?---No.

All right. Well, just go over to page 599 and again you will see a chemical summary. Do you see that?---Yes.

Any FOPs and DIMs in that?---No, I can't see any.

Yes. And again you followed your cropping plan in '07, didn't you?---I did, yes.

Thank you. If you go over to page 618. Now, can you identify - if you go 618 through to 624, are you able to identify that please?---That's just another agronomy plan.

Yes. You will see that it starts - you know, page 618 and the copy in the court book, which was discovered by you, Mr Baxter, goes to page 624 but it only deals with Henri's and Hay Shed. Are you able to say whether that was the complete document?---I'm sorry, what was your question?

Yes, I'm sorry, Mr Baxter. The document that's in the court books starts at 618. Do you see that?---Yes, I do.

And it concludes at page 624?---Yes, I have got that.

But it only deals with two paddocks. Firstly, Henri's or Henri's - Henri's at 623 and Hay Shed at 624. And I'm just asking you whether that's the complete document or maybe it's an incomplete document?---If that's the only 2008 one, it's obviously not complete. That's the only two paddocks was written in there.

Is it - maybe - I withdraw that. Is it possible that Mr Moyes only gave you a short plan in '08?---It's possible.

Yes. And if you go over to page 619?---Back, you mean?
Sorry - - -

KENNETH MARTIN J: Yes, go back.

NIALL, MR: Do you have 619 there, Mr Baxter?---Yes, I do.

Are you able to identify - were there any FOPs or DIMs in that chemical summary?---Yes, I do.

Yes, which one?---Select.

Yes. Select is clethodim, isn't it?---That's correct.

Yes, and that's a DIM?---That's correct.

Yes. So when they're called FOPs and DIMs it's often the last chemical - the last few letters of the chemical name, isn't it?---I presume so.

Yes, and you see Select is a reference to clethodim?---Okay.

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

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

Clethodine?

NIALL, MR: I will give your Honour - - -

KENNETH MARTIN J: The transcript will just need to know that's - - -

NIALL, MR: I give your Honour the - c-l-e-t-h - - -

KENNETH MARTIN J: Yes.

NIALL, MR: O-d-i-m.

KENNETH MARTIN J: Clethodim.

NIALL, MR: Clethodim.

KENNETH MARTIN J: Thank you.

NIALL, MR: Now, the cropping plan indicated that use of some Select in '08, didn't it?---That's correct.

You're not able to tell his Honour which paddocks it was applied to, are you?---No, I can't.

All right. Now, if you go over to page 627 - sorry, 625?---Got it.

Yes, and that's the plan for 2009?---That's correct.

And that goes through to 632. Do you see that?---Yes.

Now, do you remember 2009, Mr Baxter?---Pretty well, yes.

Did you only sow wheat and oats in '09?---No, I didn't.

Well, just have a look at page 626?---Yes, I have got that.

And if you look at through this cropping plan, the only crops that are identified are wheat and oat. Do you see that?---I can see that, yes.

So was there no cropping plan in relation to any other crop?---There should have been, Mr Niall.

Yes. Do you know where it is?---No, I don't.

Well, when you were preparing for the case, you had - you were aware you had to identify documents which were relevant to the proceeding?---Yes, I did.

Yes, and you identified this as one, didn't you?---That's correct.

Did you find any other cropping plans for '09?---Not that I can remember. I thought I had got them all but obviously I must have missed this one.

Well, go back to page 627. Are there any FOPs or DIMs in there?---No, I can't see any.

So by the - and you followed your cropping plan in 2009 I take it?---I did, yes.

Yes. So the position is this, isn't it, Mr Baxter, between '05 and '09 the only occasion where a FOP or DIM was identified was 2008. Correct?---That's what's identified in this document.

Yes. And you have said that you followed your cropping plans?---I did.

Yes. And it's the position, isn't it, that you can't - withdraw that. That you can't tell his Honour in 2008 when Select was recommended what paddocks it was applied to, can you?---In 2008?

Yes?---No, I can't.

And go back to paragraph 35 of your statement - 35(2), Mr Baxter. You say there - have you got paragraph 35(2)?---Yes, I have.

You say there that, by 2010, FOPs and DIMs were not killing the herbicide resistant rye grass which germinated as the crop was growing. Do you see that?---Yes, I do.

And your - all of your - none of your cropping plans identified spraying FOPs or DIMs on any of the paddocks you identify at the top of that page, do they?---Do you mean in the cropping programs?

Mmm?---There's none described in those cropping programs. No.

So none of the cropping plans - I withdraw that. If you look at the paddocks in the top of that page - the nine paddocks that you've identified as causing problems?---Yes.

Do you see that?---Yes.

The cropping plans didn't identify spraying FOPs or DIMs on any of those paddocks?---Not in this cropping program, it hasn't.

Well, is there another cropping plan with FOPs and DIMs on it for those nine paddocks, between 2005 and 2010?---There's no cropping program during the year. I did say agronomist walked over the paddocks.

I beg your pardon?---I said during the year, agronomist walked over the paddocks during the growing season.

You're not able to tell his Honour whether FOPs or DIMs was applied to any of those nine paddocks between 2005 and 2010, are you?---Not by memory, no.

Well, there - you say in paragraph 35(2) that your observation was, by 2010, FOPs and DIMs was not killing the herbicide resistant rye grass in the paddocks you've identified. That was your evidence, wasn't it?---That was my evidence. Yes.

And you're not able to tell his Honour which of the paddocks - the nine paddocks had FOPs and DIMs sprayed on them during that period, are you?---Well, I can. But, like I've said, before then - in this cropping program is done before our cropping period. During the year, my agronomist be walk over the paddocks or drive over the paddocks, assessing the paddocks of what they need to be sprayed on during the year.

But - - -?---This is a pre-cropping program.

But the point I thought you were making in this part of your statement, Mr Baxter, was that FOPs and DIMs were being sprayed and were ineffective?---That's correct.

But the point I'm making to you is that none of your cropping plans identified a spraying FOPs and DIMs on those paddocks, did it? Do they?---That's because it is a pre-cropping program.

Well, I thought your evidence was that you follow your cropping plan?---I do.

Now, you knew that you had to justify planting Roundup-Ready in 2010, didn't you?---Justify it to who?

You knew it was important for you to provide an explanation as to why planted Roundup-Ready in 2010?---I would provide an explanation to when you did your accreditation for growing RR canola.

Yes. But when you prepared this statement, you referred in paragraph 35 to the problems with FOPs and DIMs, didn't you?---That's correct.

And you did that because that was relevant to your - the reason you planted Roundup-Ready canola in 2010, wasn't it?---Can you just repeat that bit, please.

I withdraw the question. Now, you identify in paragraph 34(3) this problem of herbicide resistant rye grass over a five year period. Do you see that?---Yes, I do.

And you attribute it to resistance to FOPs and DIMs. You do that in 35, don't you?---That's correct.

Now, what did you do between 2005 and 2009 to deal with your herbicide resistant problem?---Between 2005 and 2009?

Yes?---Would have been a rotation of crops and a few different chemicals.

All right. Well, let's just look at the rotation of crops. How did you rotate your crops differently in order to deal with this problem between '05 and '09?---Well, with canola and chemical, you obviously can use different chemicals.

No. We're just dealing with the crops now, Mr Baxter. How did you rotate your crops differently, between '05 and '09, to deal with your herbicide resistance problem?---I didn't alter the rotation.

So that wasn't one of the things you did to deal with the problem?---No.

All right. What did you do, between '05 and '09, to deal with the problem of herbicide resistance?---Well, there was a few different chemicals you could use at different rates.

All right. Well, what were they?---Well, like I said, this was a pre-seeding recommendation. During seeding we would walk over the paddocks - drive over the paddocks with the agronomist, and during that period we observed what is happening and work out different chemicals that we're going to apply to the crops.

So you say that you modified your chemical use between '05 and '09, is that right?---Between '05 and '09. There's a fair chance we would have used different sorts of chemicals at different rates.

What chemicals are you talking about, Mr Baxter?---As I said, we used the (indistinct) Select, Achieve.

Now, any of that recorded in your paddock plans?---Not in the pre-paddock plans, no.

Well, what - when you say not in the pre one, what about the following year one?---The following year ones? Like I said, during the year, we walk around with the agronomist - - -

Yes?--- - - - or drive around with the agronomist, and that is done on the day. Then those (indistinct) related.

But, presumably, if you identified a resistance problem in '05 or '06, it would be picked up somehow in the '07 plan. Isn't that how it works?---That's correct.

Yes. So do you say that the cropping plans changed over '05 to '09 to deal with this problem?---From '05 to '09?

Yes?---Well, when we draw the cropping program up, we try to minimise most chemicals as possible, and during the year we drive or look over the property, then we will make an assessment then.

Did you have an integrated weed management problem?---How do you mean by integrated?

Well, have you heard of the concept of an integrated weed - I withdraw that. I'm sorry, Mr Baxter. Have you heard of integrated weed management?---Yes, I have.

What's your understanding of that?---Integrated weed management would be - (indistinct) I understand it is are we using different ways of cropping. So you can use different herbicides.

So integrated weed management is just about using different herbicides, is that right?---It's probably not. It's probably a whole lot of things you can use to change - to - to - I don't know what you call the word.

Sorry?---Integrated weed management, it would be a whole array of things you could probably use - - -

Well - - -?--- - - - to help out your weeds.

What did you do between 2005 and 2010 as part of that?---As part of that?

Yes?---Like I said, I continued with my canola, wheat and barley rotation.

But you were convinced by 2010 that you had had a herbicide resistance rye grass problems to FOPs and DIMs, is that right?---That's correct.

Now, I want to ask you some questions about your understanding of organic farming, Mr Baxter. Now, in paragraph 39 of your statement - do you have that?---Yes, I do.

You say:

I was aware for some years before 2010 that Stephen Marsh was conducting organic farming on Eagle Rest.

?---That's correct.

Yes. Are you able to tell his Honour when you first became aware that Stephen Marsh was conducting organic farming?---Not specifically. We had known he had been organic.

For how long?---To what degree, I don't know. We always knew for a long time. Maybe five or six years.

Yes. What about 2002. Do you remember getting a letter in 2002?---No, I don't.

Could you open up volume 1. You can put aside that other volume for the moment, Mr Baxter. Now, do you recall

getting a letter addressed to you in this or a similar form in 2002?---What page are you on?

I'm sorry, 209?---No, I don't.

You don't remember any such letter coming from Mr Marsh or Mrs Marsh?---No, I don't.

Now, do you know any other organic farmers, Mr Baxter?---Yes, one not far from home.

Who is that?---Grant Lee Marinoni.

Any others?

KENNETH MARTIN J: Sorry, can I just get the last name?---Grant Lee Marinoni.

Marinoni?---Marinoni.

Thank you.

NIALL, MR: And how far is his farm from yours?---From the block or from Seven Oaks?

From Seven Oaks?---Seven Oaks, approximately 25 Ks.

Thank you. Now, down in paragraph 42 you say that 42 subparagraph (2), Mr Baxter:

In 2010 and in the years before, I knew nothing about the process to obtain organic certification but I had heard that organic farmers were not permitted to use chemicals, drenches, or artificial fertilisers.

Now, when do you think you were aware of that?---Well, there was no - we - it was only just talk.

But - - -?---I never actually knew.

You would have known well before 2008 that there were rules associated with organic farming?---There were some types of rules, yes, but I've never observed them or seen them.

No. You don't know the detail of them but you knew that there would be rules, that if you wanted to be an organic farmer, there would be rules that you would have to comply with?---That's correct.

Yes. And that you would have known that it's not simply - this is prior to 2008, not simply a matter of a farmer

saying, "Well, I'm organic." It would be necessary for that farmer to observe certain rules or standards in relation to the organic farming. You knew that, didn't you?---I would presume so, yes.

Yes, and that's why you say in 42(2) that they were not permitted to use chemicals, drenches or - - -

CAHILL, MS: Sorry, I'm rising a little late but for my friend to assert that it's not open to a farmer to just call him organic is wrong, with respect.

KENNETH MARTIN J: I think he has answered the question though. So that's too late I'm afraid.

NIALL, MR: And you knew that there would have to be - when you say were not permitted to use chemicals, you would have assumed or presumed that that would be set out somewhere, wouldn't you?---I didn't know they had guidelines so - yes, you said, you just presume.

All right. Now, when did you become aware that there were genetically modified versions of canola?---I'm not quite sure what you mean by that question, Mr Niall.

I didn't ask it very well. I will start again. Before 2008, did you know that Monsanto or any company had developed genetically modified canola?---No, I don't think so.

When do you think you first became aware of the - - -?---It would have been probably around - probably 2008 and maybe a bit before 2008, maybe 2007, but - - -

Yes?--- - - - I hadn't heard much about it.

By - towards the end of 2008, you knew that genetically modified canola existed?---Correct.

You knew it was banned in Western Australia?---Yes, I did.

Did you know whether or not trials were going to be held?---I didn't know at that stage, no.

Now, Mr Marsh - Stephen Marsh came to visit you in November 2008, didn't he?---That's correct.

And he brought a canola plant with him, didn't he?---That's correct.

Now, at that stage you knew that canola - genetically modified canola was banned in Western Australia?---Yes, I did.

But you thought that the ban might be lifted some time in the future, didn't you?---Well, it was only a matter of time it was going to be lifted.

Yes. Did you have an expectation of when it might be lifted?---No, I didn't.

And Mr Marsh brought over a canola plant to Seven Oaks?---He did, yes.

Had he been over to Seven Oaks before that in recent times?---I don't think so.

No. Had you been onto Eagle Rest before November 2008 in recent times?---Not in recent times, no.

You hadn't had much to do with the Marshes?---No.

Had you?---No, we hadn't.

So it was unusual in itself for Mr Marsh to come and see you, wasn't it?---Yes, I suppose.

Yes, and he brought a canola plant and you knew that he didn't grow canola on Eagle Rest, didn't you?---Yes, correct.

Yes. Because - I mean, you can see Eagle Rest or most of Eagle Rest from Seven Oaks, can't you?---That's correct.

And so from just observing - and you know the boundaries of Eagle Rest, don't you?---Pretty well, yes.

Yes. And you wouldn't have known the paddock names and the like, would you?---No.

But just from observation, you would know what crops were being cropped on Eagle Rest?---Only the ones on the road that you could see would be the only ones you would know.

Yes, all right. And Mr Marsh told you that if you grew genetically modified canola and it got onto Eagle Rest, his certification would be affected or lost because genetically modified canola was not allowed on an organic farm?---I can remember some sort of conversation along those lines.

And you were then told, weren't you, that if organically modified - I withdraw that. If genetically modified canola came from Seven Oaks onto Eagle Rest, Mr Marsh's certification might be in jeopardy?---That was some conversation along those lines.

Well, that's what he told you?---I can't be certain but somewhere along those lines.

Did you take that seriously?---What do you mean by seriously?

Well, did you take it as something that Mr Marsh was concerned about and he was coming to tell you the concerns he had in the event that you chose to plant genetically modified canola?---Yes, I did.

Yes. And you told him that if it became legal to grow GM canola, you would probably grow it?---That's correct.

Did you understand in November 2008 what the purpose of a genetic modification was?---The purpose of the what, sorry?

Yes, what the genetic modification did?---To?

The canola plant?---To the canola plant? I had a - at 2008?

Yes?---I had a reasonable assumption.

What was your assumption?---The reasonable assumption was they were adding a gene to the canola plant which would tolerate Roundup.

Yes, and you had used Roundup every year on every paddock, hadn't you?---On cropping paddocks, yes.

Cropping, yes. And so if the fact was that there was a gene that made canola tolerant to Roundup, you would plant it, wouldn't you?---That's correct.

And you had made your decision in 2008. You were going to plant it as soon as it came on the market?---Well, not necessarily but I would hoped to have plant it if it was going to benefit my farming practice.

Yes. Well, when Mr Marsh told you that the impact it might have if you did, that didn't deter you at all, did it? 2008?---No, I didn't.

And, just looking at 2008, didn't cause you to make any inquiries about organic farming?---Not really. No.

No. It would be fair to say - withdraw that. Now, the plant that Mr Marsh had in his hand and which he showed you, the canola plant, he said it had come from Seven Oaks, didn't he?---That's what he said. Yes.

Yes. And it must have - if it had come from Seven Oaks, it must have come from seed that had come over from Seven Oaks. You would agree with that, wouldn't you?---Well, I presume so.

Well, there's no other means by which it would have grown on Eagle Rest, was there?---No. Well, that's right. Seed - - -

Sorry?---That's right. Yes. It would only grow from seed.

Yes. So Mr Marsh told you, and what Mr Marsh showed you, was clear to you that seed could be transported from Seven Oaks over to Eagle Rest, and could lead to germination of canola on Eagle Rest, isn't that right?---That's correct.

And the concept of - or the idea that canola might grow out of the - apart from a crop, as a volunteer, was something that you were familiar with in 2008, wasn't it?---That's correct.

You had seen volunteer canola plants on your own property?---Correct.

You would have seen volunteer canola plants on the roadside?---In some roadsides. Yes.

And here was an example of a volunteer canola plant on Eagle Rest, wasn't it?---That's correct.

And you understood, and you accepted, that that was a volunteer canola plant that came from Seven Oaks and grew on Eagle Rest?---What did you say, sorry? Quality? I didn't quite hear what you said, sorry.

Yes. No. That's quite all right, Mr Baxter. I wasn't - back in 2008, you understood that what had grown on Eagle Rest, the volunteer canola plant, had come from seed from your crop on Seven Oaks, didn't you?---Well, it could have come from any where, but I presumed it come from my place.

Yes. You assumed, or you proceeded on the basis that it had come from Seven Oaks, didn't you?---Most probably.

Did he tell you how many canola plants he had found?---I don't recall. Not exactly, no.

So your understanding on 2008, from what Mr Marsh had told you, was that, firstly, you knew that organic farming had some rules or standards. You knew that, didn't you?---Yes, I did.

And you knew that one of the rules, according to Mr Marsh, was that you weren't allowed to have GMO - genetically modified material on an organic farm. You knew that?---That's right.

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

Now, moving forward, Mr Baxter. You say in your statement that in April 2010, you purchased some Roundup-Ready canola. Now - so we know you purchased it in April. When did you make the decision - actual decision to purchase Roundup-Ready seed for the 2010 season?---Probably at the time when I did the certification course to get it accredited.

Now, did Mr Robinson suggest that you plant RR canola in 2010?---Yes, he did.

But you had already decided to grow Roundup-Ready canola soon as it was legal, hadn't you?---Not necessarily, no.

Well, that was the view you had in 2008, wasn't it?---I said I would most probably grow it.

And, certainly, you were keenly waiting for it to become lawful, weren't you?---I wouldn't say "keenly waiting". I was waiting for it to become lawful, then make a decision then.

Well, when do you say you made the decision?---When?

Yes?---Well (indistinct) my agronomist, Chris Robin, pre-2010.

Before 2010?---Well, before that growing season. So probably January 2010 we done the agronomy program up.

Did you tell him that Mr Marsh had seen you in 2008 and brought a canola volunteer?---I think so.

Yes. When did you tell him that?---I might have discussed at that time when we were doing our agronomy program up.

When was that?---January 2010, that growing season.

So you told Mr Robinson in January 2010 that Marsh had come to see you in 2008 with a canola plant?---I would have thought so.

Are you sure about that?---Not 100 per cent sure. No.

What did you tell him?---I would have presumed I would have discussed it with him, about growing the GM canola.

What did you tell him about what Mr Marsh had said and done in 2008?---I would have said that Mr Marsh come across in 2008 and showed me some canola plants.

Is that all you told him?---Well, we would have (indistinct) discussion about our cropping program.

Did you tell him that Marsh was organic?---He knew that, and I knew that as well.

No. I didn't ask you what he knew and what you knew. Did you tell him that Marsh was organic?---Yes, I did.

When?---When we were doing the - well, he knew - knew prior to 2010.

Yes?---And on that day.

You discussed it?---Yes.

In January 2010, your evidence is that you discussed with Robinson a conversation that you had had with Marsh in '08?---yes.

You've got no doubt about that?---No.

No. And you told him - did you tell him that Marsh was concerned that if canola volunteers went on - GM canola volunteers went on his property, he might lose certification?---I was - I would have told him that I was - Mr Marsh was concerned if canola got onto his place he could have some damages to his property.

Right. So you told Mr Robinson in January 2010 that Marsh was concerned that if GM canola went onto Eagle Rest, he might lose his certification. Did you tell him that?---I did, to some sort of degree, yes.

Well, what sort of degree? What did you say about - about that?---Well, I would have told Mr Robinson of the discussion, if GM material of some sort gets onto Stephen's place, he may lose his certification.

So you say you told Robinson that in those terms in January 2010?---Yes.

And did you tell him that you wanted to avoid that?---Well, yes.

Yes. Did you tell - you told Robinson that you wanted to avoid any canola moving from Seven Oaks to Eagle Rest, did you?---To the best of our ability.

All right. Well, did you tell him that you wanted to avoid it?---Not completely. No. I've avoided - we obviously wanted to grow - you want to ask the question again - you're not happy with it.

Did you tell Mr Robinson that you wanted to avoid canola going from Seven Oaks to Eagle Rest?---Yes, I did.

In January 2010?---Yes.

Right. And why did you tell him that?---Because Stephen was organic and he had said he may lose his certification.

So did you want to take whatever steps you could to prevent that happening?---As much as possible. Yes.

Well, did you discuss with Robinson how that might happen?---To stop canola going on his property?

Yes?---Yes. Pretty well.

Did you discuss that with Robinson, how it might happen?---Yes.

What did he tell you?---What did he tell me?

Yes?---He said as long as we follow the protocols, well, there shouldn't be any problems.

Right. As long as you followed the protocol. That's the Monsanto protocols?---That's correct.

Now, how many discussions did you have with Robinson about planting GM canola in January or February 2010?---Well, obviously we discussed it in January when we made the program up, because it wasn't legal prior to that.

All right. Well, let's just identify the program if we could, Mr Baxter. If you go back to volume 3. Now, just have a look at that page 719. Do you see that?---Yes, I can.

Is it your evidence that Mr Robinson brought that out to Seven Oaks in January 2010?---No, that's when we would have discussed it at home. Then he would have brought it out - - -

Doesn't it usually - I thought from your earlier evidence, you're usually brought out a farm paddock plan and then you discuss it?---No, that's not correct.

Not correct. So he didn't - - -?---I've got a farm plan at home, and we look at previous years. We makes notes and then he comes back with a hard copy.

And you say the discussion was January 2010?---That's correct.

And is this the farm plan for 2010?---Yes, it is.

Yes. Now, you will see over on the bottom of page 721 that it's in a number of places, the date 16 March 2010. Do you see that?---16 March.

Right down the bottom, above the letters BAX, in small print?---Yes, I can see that.

Is that the date that Mr Robinson gave you the cropping plan for 2010?---We would have had - we would have discussed the cropping plan again in January and he normally gets his secretaries or assistants to write it up.

Okay?---And it's sent out or sometimes he might hand it but most times it's sent out in the mail.

Now, you - well, while I've got that open, Mr Baxter, Mr Robinson - if you go to page 723, Mr Robinson recommended Roundup-Ready canola in three paddocks, didn't he?---That's correct.

And he recommended canola in another four paddocks - conventional canola. Is that right?---Conventional canola was 2010.

If you have a look at Dog Leg?---Dog Leg canola, yes.

Hilly?---Hilly canola.

Montys?---Montys canola. Two Dam, canola.

Silo. Do you see that?---Yes, I'm just trying to find Silo.

Right in the middle?---Yes. I have got it, yes.

Yes. So three paddocks for Roundup-Ready canola and four paddocks of conventional canola. Is that right?---The recommendation was three canola and, consequentially, I didn't have enough seeds, so that's why I only planted the two paddocks in RR canola.

You ran out of seed to get to the two?---That's correct.

So it was your intention to plant three?---It was, yes.

All right. Now - - -

KENNETH MARTIN J: So the third paddock was - what's it called, something Mailbox?---Llyall's Mailbox.

Llyall's Mailbox, okay. Thank you.

NIALL, MR: Now, you knew that in order to plant Roundup-Ready canola you had to enter into an agreement with Monsanto?---That's correct.

You had to enter into a licence agreement?---That's correct.

And a stewardship agreement?---Yes.

You had been planting canola since 2002. You had never had to enter into a licence agreement before, had you?---No, you hadn't.

In fact, you have never entered into such agreements for any crop that you've grown?---No, I haven't.

And you had to go and have a seminar, didn't you?---That's correct.

And you had never done that before for any crop before you had purchased the seed?---No, not for purchasing seed.

No. So that was completely different to the way you had acquired seed before for other crops, wasn't it?---That's right.

And you knew, didn't you, that the two critical issues that you needed to deal with was segregation of the canola from other things?---That's right.

And also resistance to glyphosate?---That's right.

And, again, you had never had to look at those things as a condition of buying seed before, had you?---Not of a condition, no.

Can you go to volume 4, Mr - now, Mr Baxter, could you go to page 1225, please. Now, that's called - that's a document that's entitled 2010 Crop Management Plan. Do you see that?---Yes.

And it goes through to page 1236?---Yes, I got that.

Now, this was a document that was provided by Monsanto to you?---That's right.

Where did you get it? Did you get it at a seminar or beforehand?---At the seminar.

Where did you have the seminar?---In Katanning.

Did you have to pay to go to the seminar?---No, you didn't.

Thank you. And was it conducted by people from Monsanto?---Monsanto were in attendance.

Yes?---I'm not sure it was Monsanto or Ag Department or who actually ran the course.

Now, if you look at the top of page at 1226 under the heading Objective, do you see that, Mr Baxter?---Yes, I do.

And you will see it says:

The Roundup-Ready canola management plan details strategies that could be implemented on farm to manage risks to integrity of grain crop supply chains and the sustainability of agricultural production.

Did you read that?---Yes, I did.

Did you read the whole document when you were given it by Monsanto?---At the time of the course - - -

Yes?--- - - - we would have gone through it.

What did you understand by the concept or the words "integrity of grain crop supply"?---I'm not really sure what they mean by the - - -

Well, do you think it meant this, Mr Baxter, that the integrity of the grain crop supply chains was keeping GM canola segregated from other aspects of grain supply?---Yes, it would do.

Because that was an important part of this document, wasn't it?---That's correct.

Segregation - - -?---Indeed.

- - - of GM seed and GM product from other parts of the supply chain. You agree with that?---That's right.

Had you ever - prior to this, had you ever in relation to any other crop that you had grown been instructed about or told about integrity of supply chains?---You have never been instructed.

But this was quite different, wasn't it?---It is different, yes.

Now, and what about the sustainability of agricultural production? What was that about, Mr Baxter?---The sustainability of agricultural production?

Yes?---Well, sustainability is a long term.

Yes, and why were they talking about sustainability in the context of GM canola?

CAHILL, MS: I think my friend - if my friend's question is what did Mr Baxter understand by that - - -

KENNETH MARTIN J: Yes, I think there's an objection as to form there that's - - -

NIALL, MR: Thank you, your Honour.

KENNETH MARTIN J: - - - probably rightly taken.

NIALL, MR: Thank you, your Honour. The reason they were referring to sustainability of agricultural production was the danger of glyphosate resistance, wasn't it?---That's right.

And what was the danger of glyphosate resistance?---The danger of it would have been if it was - well, they would - obviously used too many times, plants would become resistant to it if you didn't use it in the right manner.

And you will see that the integrity of the supply chain was one aspect; sustainability was the other aspect, and it referred to strategies, and there are three strategies, and I want to ask you about the third one. Could you just read that to yourself, please, Mr Baxter. I may have misread that. I don't - and I'm happy to rephrase it. You will see, Mr Baxter, the reference to detail strategies that can be implemented to the integrity of grain crop supply chains, and the sustainability of agricultural production. Do you see that sentence?---That's number 3, is it?

No. I'm just reading at the top of the page. And then at the end of that, it says, "These strategies". Do you see that?---Yes.

And then one of the strategies identified is number 3?---Yes.

I would ask you to read that, please?---Okay.

Just - I will read - just read paragraph 3 and I will start again with the question?---Yes. I've read it. It's a bit hard to understand, but - - -

Did you ask any questions about this when you went to the seminar?---A number of people asked questions. I don't think I asked any.

Now, see how it's referring, in paragraph 3, to:

...different production market systems to concurrently operate in a profitable and sustainable way.

Do you see that?---Yes.

Now, one production market system was GM canola, wasn't it?---Yes.

And another production market system was conventional canola.

CAHILL, MS: The question is, is this how Mr Baxter understood this document.

KENNETH MARTIN J: I think the question is preparatory to that, and it's being done incrementally, as I understand it. Is that right, Mr Niall?

NIALL, MR: Yes, your Honour.

KENNETH MARTIN J: Yes.

NIALL, MR: Just trying to - did you - I withdraw that. I'm just trying to explore with you your understanding of paragraph 3?---It's just (indistinct) don't understand the - or the meaning of the paragraph.

All right. Well, putting aside the paragraph for a moment, Mr Baxter, you knew that one of the important aspects of the crop management plan was to separate the production and market of GM canola from other things?---That's right. Yes.

And one of the things that had to be separated from was the production and supply of conventional canola?---That's right.

And I suggest to you that it also covered production and market of organic systems. Do you agree with that? That's another thing - - -?---That would be another thing.

- - - that needed to be separated from GM canola?---That's right.

And if you read on, it says:

Specifically, growers of Roundup-Ready canola are required to implement on-farm management practices that aim to -

number 2:

Control Roundup-Ready canola volunteers -

Yes?---Yes.

And the next one is:

Minimise risks to the integrity of grain supply chain.

Do you see that?---Yes.

So as far as you were concerned, do you agree that you were required to implement on-farm management practices that

minimises the risks to the integrity of grain supply chains?---Yes.

And you would agree that that would include minimising risks to the integrity of organic supply chains?---Yes, it would.

And you were required to do that as part of your Monsanto crop management program, weren't you?---That's right.

Now, if you look at the bottom of that page, under PRAMOG, do you see that?---Yes.

Now, you were required to complete a paddock risk assessment management option guide - PRAMOG - weren't you?---Yes.

And what was the purpose of that exercise, as far as you understood it?---Purpose of that exercise, to work out what chemicals you were going to use, what chemicals you had used, and a way of sustaining the prolongedness of Roundup or glyphosate.

So that was principally concerned with glyphosate resistance?---That's correct.

And glyphosate resistance would be a real problem for you if you had glyphosate resistance, wouldn't it?---You could always use SpraySeed or paraquat - SpraySeed or paraquat. You wouldn't be able to grow, obviously, RR canola. You could grow it, but you wouldn't have the chemical to spray on top of it.

So if you've got glyphosate resistance on your property, you wouldn't be able to use glyphosate effectively, would you?---No.

And that's the most common herbicide that you've used over the last 15 years, isn't it?---That's right.

In fact, it's essential to your cropping program, isn't it, glyphosate?---It is at the moment, yes.

Just pardon me one moment, your Honour. If I could turn you over to page 1227. Under the Resistance Management Plan heading, it said:

Resistant management principles for Roundup-Ready canola: (1) -

Do you see that?---Yes.

Continuing:

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

Do you see that?---Yes.

Now, what attempts did you make prior to 2010 to reduce the weed burden on Range and Two Dams?

CAHILL, MS: I object to the question on the grounds of relevance, your Honour. There's nothing pleaded about any breach of duty arising from anything to do with weed management. The allegations of breach of duty are set out at paragraph 36 of the statement of claim as amended and particularised, and they are that we planted RR canola - planted it next to the organic farm and swathed rather than direct harvested.

KENNETH MARTIN J: Would you like Mr Baxter out when you respond to that objection, Mr Niall?

NIALL, MR: Yes, your Honour. I notice the time and I note your Honour has to leave at 4.15, and I - - -

KENNETH MARTIN J: Yes. We've got 10 minutes or so, if it can - - -

NIALL, MR: Perhaps if Mr Baxter could.

KENNETH MARTIN J: Yes. Mr Baxter, would you mind just leaving the witness box and waiting outside for a few minutes until we call you back in. There's a legal point we've got to address. Hopefully won't keep you for too long.

(THE WITNESS WITHDREW)

NIALL, MR: Your Honour - - -

KENNETH MARTIN J: Ms Cahill, just give me the paragraph you mentioned?

CAHILL, MS: 36, your Honour.

KENNETH MARTIN J: 36 in the statement of claim.

NIALL, MR: If your Honour goes to paragraph 36, it's pleaded that - your Honour will see the duty in 35.

KENNETH MARTIN J: Yes.

NIALL, MR: And the breach in 36, including the particulars of growing canola on the eastern side of lot 11. Could have grown it further away, and he swathed his canola crop. He could have grown conventional canola. For that, your Honour, paragraph 23 of the current form of the defence denies paragraphs 33 to 37 - paragraph 23, your Honour.

KENNETH MARTIN J: Just let me get there. 23. Yes. I'm there.

NIALL, MR: Now, it's denied, each of the paragraphs, and, in addition, paragraph 2:

Baxter acted reasonably in planting RR canola crop ... alternatively swathing the canola plant Baxter had planted. Planting RR canola was a reasonable use of the land; it was lawful.

(d):

He used it in order that he could use glyphosate in the paddocks in order to manage weeds, in particular, Wimmera rye grass, after being advised by an agronomist engaged to Baxter to advise him -

And then there's a reference to swathing. Now, in our submission, the defendant has positively put, as part of his case, the reasonableness of planting RR canola. In his evidence, he sets out at some length, your Honour, the development of herbicide resistance as a basis for the reason to plant in 2010, and he deals - and your Honour has heard some evidence about that. Then he relies positively on his evidence and in his pleading on the advice that he got from his agronomist.

And then he talks about using Roundup-Ready to control the severe problem that he has identified. And then in - for example, in 48 of his witness statement, he deposes to the seminar conducted prior to purchasing the seed. He says he obtained - this is 48(2) - he attended the licence to permit (indistinct) to purchase it. He considered various aspects, including buffer zones, cleaning, etcetera -

At the time I read the management plan issued by Monsanto -

He read the other documents, and he learned in the seminar about a buffer zone of five metres in 50, and then he goes on to describe. Now, in my submission, the defendant is

positively asserting reasonableness of his behaviour. He has adduced evidence which directly goes to it, and I'm seeking to challenge that aspect of his evidence and that aspect of the case. And in cross-examination, in my submission, given those facts and that pleading, in my respectful submission, I should be given some latitude to explore with the witness precisely the basis upon which he decided to plant, what he took into account, and whether he accurately identified his farming position in the Monsanto documents, which I will come to.

So it's directly relevant and then in looking at breach, the consideration of reasonableness of the conduct of the alleged tortfeasor, the ability to control risk, and the availability of alternatives are all relevant to the case that the plaintiff seeks to make and the defendant joins issue and positively puts a case in reply. So in my submission it is relevant as to the circumstances in which Mr Baxter came to make a decision to plant and in fact planted Roundup-Ready canola in those two paddocks in 2010.

KENNETH MARTIN J: Yes, very well. Ms Cahill.

CAHILL, MS: It plainly can't be relevant, your Honour, to the question of breach. Issues of salient factor control and vulnerability are questions that go to the issue or issues that go to the question of duty, not to breach, with respect to my learned friend. The breach of duty is plainly pleaded at 36 and the question that has just been asked plainly does not go to that. So it's not relevant to the question - - -

KENNETH MARTIN J: So the question is asked by reference to the first resistance management principle at page 1227 in terms of not using Roundup-Ready canola - - -

CAHILL, MS: In a certain way.

KENNETH MARTIN J: - - - in a rotation, that you do it in a paddock with a low weed burden first.

CAHILL, MS: Well, you aim to enter the canola phase of the rotation with a low weed burden.

KENNETH MARTIN J: Yes.

CAHILL, MS: Now, that can't be relevant to paragraph 36 because there's no allegation that even comes near the question that was just put. My friend tries to put it back on us and say, "Well, you have pleaded that what you have

done was reasonable." Well, we need to come back to 23 and have a look at what we have said.

KENNETH MARTIN J: Now, 36, the particulars, say he grew it on the eastern side.

CAHILL, MS: And - - -

KENNETH MARTIN J: In other words, in the paddocks that he did.

CAHILL, MS: Yes, but - - -

KENNETH MARTIN J: Which is Two Dams and Range.

CAHILL, MS: Yes, but nothing about the way in which he grew it there. All that's said is he grew it and he could have grown it somewhere else.

KENNETH MARTIN J: Yes.

CAHILL, MS: He swathed - - -

KENNETH MARTIN J: So the decision for - to put it in those two paddocks is asserted to be reasonable by reference to the weed problem. That question seeks to probe whether it really was reasonable by reference to principles that he signed up to.

CAHILL, MS: What we allege is that - in 23 is that he did it because of the resistance to weeds - sorry, the resistance of glyphosate that the weeds had in that paddock. So how many resistant weeds were there is neither here nor there, but more particularly, what the focus of this question is is whether or not Mr Baxter has done all that in accordance with the guidance that was issued under this plan. Now, that's absolutely not pleaded. That's an entirely new and different case, if my friend is seeking to attack Mr Baxter's compliance with the guidelines that were provided to him. That's a completely different case.

KENNETH MARTIN J: Well, I'm just looking at your 23(2)(d):

Baxter planted the RR canola crop in order that he could use the herbicide glyphosate in the paddocks
- - -

CAHILL, MS: Yes.

KENNETH MARTIN J: Continuing:

...in which RR canola crop was grown -

So that's Two Dams and Range.

CAHILL, MS: Yes.

KENNETH MARTIN J: Continuing:

...in 2010 in order to manage weeds in those paddocks, in particular, Wimmera rye grass.

CAHILL, MS: Yes.

KENNETH MARTIN J: Continuing:

...which Baxter had observed to demonstrate resistance to some other herbicides.

So by reference to the management plan to which he has committed, it contains criteria in terms of aims vis-à-vis the paddocks that you would use it in and one of those criteria is start with paddocks that have got a low weed burden.

CAHILL, MS: Yes.

KENNETH MARTIN J: Now - - -

CAHILL, MS: Not a glyphosate resistant - sorry.

KENNETH MARTIN J: Well, this is - - -

CAHILL, MS: A herbicide resistant burdening.

KENNETH MARTIN J: Yes, exactly.

CAHILL, MS: Yes, just a low weed burden. Now, nowhere has it been suggested that Mr Baxter has breached his duty by growing RR canola in a paddock with a lot of weeds or a few weeds. This is just completely irrelevant to the case.

KENNETH MARTIN J: The assertion of reasonableness on his part in the context of an argument of private nuisance carries with it the rather amorphous criterion of reasonableness which percolates down to the whole case. Now, that means every aspect of his conduct is up for review, including why he used it.

CAHILL, MS: It's not pleaded, your Honour.

KENNETH MARTIN J: Well, you have pleaded the antidote to the plea of - - -

CAHILL, MS: Negligence.

KENNETH MARTIN J: - - - negligence and affirmatively pleaded reasonableness by reference to what we have just discussed in depth.

CAHILL, MS: To the particulars, and the two things that we say are reasonable is, first of all, planting RR canola is reasonable because it has this strategic use, as Mr McInerney - - -

KENNETH MARTIN J: You can't just say planting it is reasonable. It's planting it in the context of where it's planted; ie, the paddocks.

CAHILL, MS: The reasonable use of the land in accordance with the ordinary usage of farmers in Kojonup, that's little (a), particular (a).

KENNETH MARTIN J: But (d).

CAHILL, MS: Yes.

KENNETH MARTIN J: "In the paddocks in which RR canola crop was grown to manage weeds."

CAHILL, MS: Yes. To manage herbicide resistant weeds.

KENNETH MARTIN J: Well, weeds.

CAHILL, MS: Well, the - it says to manage weeds in those paddocks, in particular Wimmera rye grass, that he had observed did demonstrate resistance to some other herbicides. So Mr Baxter can be asked about whether that was genuinely the case, that he had a weedy paddock, that it was herbicide resistant, but this is something very different. This is driving at some insinuation that he has done other than that which he ought to have in accordance with this plan that he has been shown, and that is a wholly different case, unrelated to anything that has been put in issue either on the pleadings or in opening. Those are my submissions.

KENNETH MARTIN J: I will allow the question. We will have Mr Baxter back. Actually, we might just have him back and adjourn, and put the question again first thing tomorrow.

NIALL, MR: If your Honour pleases.

BAXTER, MICHAEL OWEN:

KENNETH MARTIN J: Thanks for that, Mr Baxter. We're going to adjourn now until tomorrow morning, and the question is going to be put to you again first thing. So we're in the cross-examination phase of the case, which is important, so I would be grateful if you didn't talk to anybody about the case whilst you're - until tomorrow?---Yes.

Thank you. We will adjourn to half past 10.

AT 4.18 PM THE MATTER WAS ADJOURNED UNTIL
WEDNESDAY, 19 FEBRUARY 2014

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