THE SUPREME COURT OF

WESTERN AUSTRALIA

COURT OF APPEAL

CACV 67 of 2014

STEPHEN WILLIAM MARSH

and

SUSAN GENEVIEVE MARSH

and

MICHAEL OWEN BAXTER

McLURE P
NEWNES JA
MURPHY JA

TRANSCRIPT OF PROCEEDINGS

AT PERTH ON MONDAY, 23 MARCH 2015, AT 10.34 AM

MR M. McCUSKER QC, with him MS L.M. NICHOLS and MS C.M. PIERCE, appeared for the appellant.

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

THE ASSOCIATE: In the Supreme Court of Western Australia, Court of Appeal, Marsh and another v Baxter, CACV/67/2014.

McLURE P: Mr McCusker.

M. McCUSKER QC, MR: May it please, your Honours, I appear with my learned friend MS NICHOLS and MS PIERCE for the appellants.

McLURE P: Yes, thank you. Ms Cahill.

P.E. CAHILL SC, MS: May it please the court, I appear with my learned friend MS VERNON for the respondent.

McLURE P: Yes, thank you. Mr McCusker.

McCUSKER, MR: Your Honours, before proceeding to the grounds specifically, may I just make a few opening points. The first I think is important to be made. There are two controversial issues, whether GM products are harmful to the health of livestock or humans and whether organic foods are better for you, and his Honour referred to that issue in his reasons at paragraph 235, but they do not fall for determination in this case and never have.

Although Martin J commented on the evidence given canola is benign, we say that was not relevant to any issue in this action. There was evidence put before the court. There was no evidence called by the appellants as to whether it was benign or not because that wasn't, as we see it, the issue. At the heart of this clash between two neighbours in Kojonup is a question of how two different systems of agriculture may co-exist, and we say the answer is they can if reasonable care is taken.

Your Honours, if I can just give you a short summary of the events that are relevant, starting at the end. In December 2010, the organic certifying body, NASAA -N-A-S-A-A – certified – or decertified the organic status of Eagle Rest, a farm owned by the appellants. It considered that because of the widespread disposal or dispersal of GM canola seeds and swaths, as they're called, on Eagle Rest, there was "an unacceptable risk of contamination".

And I'm referring there to standard 3.2.9 – I will take your Honours to it shortly – which provides for decertification in that event. The decertification resulted in the appellant suffering a loss, the quantum of which has been agreed at $85,000. There was in this action originally, in fact, right to the end of the trial, a claim

for injunction. That's not pursued. All we seek is to set aside the judgment of his Honour and so obtain a judgment for damages.

It was found by the trial judge that the GM swaths – the GM canola swaths had been blown from two paddocks on Seven Oaks, which is the neighbouring farm of the respondents at Eagle Rest, and they had sown that farm to what is called Roundup Ready Canola, and we don't take issue with that. The appellants don't take issue with the fact that they had sown it, but it was the manner in which they harvested it which has caused the problem.

Swathing carried the danger that swaths as they dried out would blow away into neighbouring paddocks, and there is considerable evidence of that danger occurring. If I could just take you to some of it. A Mr McInerney gave evidence in - - -

McLURE P: Just on that, Mr McCusker. On both sides there are claims about wrong findings of fact or the failure to make findings of fact, and as you know, there is a requirement in the Court of Appeal Practice Direction that if you're going to challenge a finding of fact or you want to seek a finding of fact, you are required to identify all of the evidence in support of the finding and all of the evidence again. Now, there appears to have been a misunderstanding of practice direction 7.4 in your client's preparation and in the respondent's preparation.

So your reference to part of the evidence has caused me to raise this issue because it causes great difficulties for an appellate court, who is not present to hear all of the evidence and is only taken to a part of it. So if you want to establish a finding of fact or you want to prove that the trial judge erred in making a finding of fact, then we need to have all of the relevant evidence identified, not just bits and pieces of it.

McCUSKER, MR: Yes. Yes.

McLURE P: Now, I know the trial judge made a finding relating to the wind in the relevant locality at the time of the harvest.

McCUSKER, MR: Yes.

McLURE P: I don't know that that's expressly challenged, is it, that finding? Or perhaps it is. It's - - -

McCUSKER, MR: The finding as to wind?

McLURE P: Yes.

McCUSKER, MR: Well, I think your Honour is referring to the - - -

McLURE P: Well, there's a suggestion that there was no evidence before the court as to the strength of the wind at the relevant time and - - -

McCUSKER, MR: Yes. We don't challenge that finding, your Honour, no.

McLURE P: You don't?

McCUSKER, MR: No.

McLURE P: All right.

McCUSKER, MR: Because there was no evidence of it.

McLURE P: No.

McCUSKER, MR: No.

McLURE P: No. But the broader point is this, that selective reference to the evidence is really not going to help this court in its functioning of determining the grounds of appeal, so if you could just be mindful of that.

McCUSKER, MR: Yes.

McLURE P: If and when you come to findings that you challenge or that you seek – and the other side – the court is going to request compliance with practice direction 7.4, which is a schedule identifying all of the relevant evidence for and against.

McCUSKER, MR: Yes.

McLURE P: But when you get to that I will - - -

McCUSKER, MR: Thank you, your Honour. I don't think we challenge any findings of fact, and - - -

McLURE P: Well, you do in ground 7 in relation to breach, which is said to be a finding against the weight of the evidence and it relates to the evidence, I think, of the – what Mr Robinson and the respondent discussed.

McCUSKER, MR: Discussed, yes. Yes.

McLURE P: So at some stage you're going to meet, I think, or come up against this requirement.

McCUSKER, MR: We will make sure we meet that, your Honour.

McLURE P: Yes. Thank you, Mr McCusker.

McCUSKER, MR: Could I refer you, given that caution, to the evidence of Mr McInerney, which is a report at three green appeal book, page 1260. There wasn't really, I should interpolate, any evidence that I could see which suggested to the contrary, that there was no danger in swathing, and this evidence is at line A to B at page 1260, where he says:

> I would consider direct heading to be considerably safer in preventing seed movement. With a windrowed crop –
>
> That's the result of swathing –
>
> there is the potential for strong winds or a (indistinct) to dislodge a stem or stems with pods and seeds attached.

And Mr Van Acker at three green appeal book, page 1291 - - -

McLURE P: Are you seeking this court to make a finding that Swathing – the risk of seed movement from the GM farm to the organic farm is greater when you swath them when you direct head?

McCUSKER, MR: Yes. Yes.

McLURE P: Well, that's a finding that was made, wasn't it?

McCUSKER, MR: I think it was - - -

McLURE P: I mean, I would prefer to identify the factual findings made rather than selective reference to the evidence.

McCUSKER, MR: Thank you, your Honour.

McLURE P: Otherwise we won't know where we're going.

McCUSKER, MR: Your Honour is correct, and there is a finding to that effect at paragraph 672 of his Honour's reasons.

McLURE P: Yes. Now, that appears to be accepted by both parties, notwithstanding that in 2008 you had volunteer canola from a conventional crop.

McCUSKER, MR: Yes. Yes.

McLURE P: But that's the finding, is it? A greater risk of seed movement from the respondent's to the appellants' farm if you swath.

McCUSKER, MR: Yes. Yes.

McLURE P: Or "swathe"; how do you say it?

McCUSKER, MR: I call it "swath", but I'm not sure about that. I can tell you what a swath is but - - -

McLURE P: Well, I think "swath" is the American and "swathe" is the English, so I was just wondering which one we're going to use.

McCUSKER, MR: It's "swatch" as a verb and "swathe" as a noun, I think.

McLURE P: Right.

McCUSKER, MR: That finding is there, your Honour, but I would like to take you also to Mr Van Acker's evidence at three green appeal book, 1291, where he says at the top of that page:

> In the case of containing GM canola, swathing facilitates the potential movement of GM canola to where it's not intended, expected or wanted. The movement of canola swaths by wind –

He says swaths –

> is common and known by canola farmers to occur regularly. Growers wishing to prevent such movement will roll their swaths as the canola is being cut. The roller, pulled behind the swather, pushes the swath into the canola stubble, helping to hold it there in the wind. This doesn't guarantee that the swaths won't move in the wind but it can help reduce the chance of swath moving in the wind. In places where GM canola needs to be contained, direct combining of the canola

would be considered the better and more responsible practice.

MURPHY JA: Mr McCusker, I think you introduced this by saying that the mere growing of the GM crop wasn't an issue in the appeal; is that right?

McCUSKER, MR: It wasn't an issue. His Honour found that the blowing – no, you're right, your Honour. I'm sorry, I have understood.

MURPHY JA: No. There were three particulars of negligence. One is growing it - - -

McCUSKER, MR: We don't - - -

MURPHY JA: The other is swathing it.

McCUSKER, MR: Yes, quite.

MURPHY JA: And the third was he could have grown conventional canola.

McCUSKER, MR: Yes, he could have, and - - -

MURPHY JA: And then is it just the second of those that we're concerned with in this appeal?

McCUSKER, MR: We're only concerned with the swathing, yes, your Honour.

MURPHY JA: I see.

McLURE P: As I understood the particulars, they were more confined than that. The particulars were the nature of the harvest, swath or direct, and the location of the crop, which was away from the boundary.

McCUSKER, MR: Yes.

McLURE P: But the particulars in the statement of claim aren't as wide as Justice Murphy suggests. But in any event, I don't suppose it matters, although there appeared to be confusion below as to the scope of case.

McCUSKER, MR: There was, yes.

McLURE P: But the appeal is concerned solely with the manner of harvesting, isn't it?

McCUSKER, MR: It is, your Honour.

McLURE P: Breach, I mean. The breach of alleged duty.

McCUSKER, MR: But the breach is concerned with the manner of harvesting, and put simply, the appellants' case is, "You knew" – saying to the respondent, "You knew that we had an organic farm. You knew that we were concerned about the possibility of GM coming onto our property. You did nothing to prevent it and you could have. You could have done so without any undue burden being imposed on yourselves". That's in short the case for the appellants. They say that Mr Baxter knew of the risk – and this is just – it's in his Honour's judgment – because he refers to the notice given to Mr Baxter in September 2002, a written notice.

His Honour described that as it's written by someone else, but it doesn't really matter. It was a very clear notice of concern about the possibility of his genetic certification being affected by GM canola coming across to him. And took no steps whatever. In fact, oddly enough, quite paradoxically, really, Mr Baxter had always direct harvested all of his crops. On this occasion, he chose to swath, and create the risk, only the GM crops. The rest of the crops on his property, he continued to harvest directly, and the crops that – the GM crops that he harvested by swathing, leaving the drying plants on the ground, were contiguous to his neighbour's property.

McLURE P: Well, he only swathed the RR canola, not the conventional canola.

McCUSKER, MR: Well, that's right. Yes. And could I just add there – I'm sure your Honours have seen it. There is no reason because it's RR to swath. It makes no difference. It can be RR or it could be conventional, but there's no magic about the fact that it was RR to require swathing.

McLURE P: Isn't there something in the Monsanto licence that talks about swathing?

McCUSKER, MR: It talks about it, your Honour, but not as a basis for something you must - - -

McLURE P: To differentiate between non-GM canola and GM canola.

McCUSKER, MR: Yes. Yes, it does. I will take your Honours to that. That's at page 1675 of the fourth green book:

> It's essential to monitor and manage the appearance of voluntary canola in both crop and non-crop situations. The primary aim of volunteer management should be to limit the spatial and temporal distribution of Roundup Ready - - -

McLURE P: Yes. What I was thinking of was 1677 where it talks about weed management strategies, and swathing is referred to there in the context of what was said to be anyway a weed problem on Seven Oaks.

McCUSKER, MR: Yes. Yes. There was evidence of a weed problem not confined to the two paddocks which were swathed, but there was evidence of a weed problem in various parts of the property. But there was no evidence to say it had to be swathed to control a weed problem. The real control was the spraying of Roundup on the growing crop, which killed – or should kill most of the weeds.

The swathing only has the benefit that the swathing can take place earlier than conventional farming, so that if there is any appearance as the crop is swathed of any weeds, then the swathing is likely to knock the heads off the weeds. And that's the only benefit. But it's a benefit that applies to all swathing, and the question is what is the burden – what burden is imposed upon the farmer if he just simply conventionally harvests the two paddocks where the GM canola was planted.

McLURE P: Are there findings made by the trial judge on these matters?

McCUSKER, MR: There was a - - -

McLURE P: Because we really need to understand the scope of his findings as to the difference between swathing and direct harvesting of the canola at that stage.

McCUSKER, MR: He did find – I will see if I can refer it to - - -

McLURE P: I mean, he concluded that there were legitimate concerns that supported the swathing. Now, as I understood it, he was talking about the herbicide-resistant rye grass.

McCUSKER, MR: Yes.

McLURE P: But in any event, we're going to have to tie everything down to factual findings, so it would be of assistance when you're making these submissions that you identify for us the precise factual finding.

McCUSKER, MR: Yes.

McLURE P: Because in the absence of a ground that challenges the factual finding, then that will govern - - -

McCUSKER, MR: Understood, your Honour. Yes. I can say this. His Honour referred to the evidence – I will see if we can find it – of the fact that when you have a canola crop and you swath it, there is, as I said, a better weed control, but the question is how much – what greater advantage is there – there's a line of advantage in taking the tops off any weeds that may have appeared, notwithstanding the spraying with the Roundup. And his Honour found at reason 713 - - -

McLURE P: His Honour appears to accept that evidence, doesn't he? That swathing methodology assisted his weed control of problematic rye grass in two dams and a range of paddocks.

McCUSKER, MR: Yes. And as he says, again, this is not a lone determinative.

McLURE P: No, no, but I think your submission was it didn't make any difference to the respondent and whether he swathed or he didn't, and I didn't think that was consistent with the trial judge's finding, which I thought he accepted the evidence that it assisted in weed control.

McCUSKER, MR: Your Honour, I have probably not conveyed our submissions accurately. I don't contend that there was no benefit whatever from swathing.

McLURE P: From swathing.

McCUSKER, MR: There was clearly the benefit of lopping off the – as evidence was given, of lopping off the tops of any weeds that weren't already killed by the Roundup. But the question then is, well – his Honour says that's not determinative. This wasn't an imperative; it was just something that helped. And there was no evidence given by Mr Baxter or anyone else that this was something that would be an enormous or of significant benefit, as distinct from the spraying of the Roundup itself on the Roundup Ready canola.

McLURE P: And while we're on that page, another thing that struck me in the findings, you couldn't reasonably anticipate airborne GM canola incursion because of a wholly unexpected series of events of strong winds. Now, that's a

really – that's a finding that's strongly against you, I would have thought. And is it directly challenged?

McCUSKER, MR: Well, yes, it is, your Honour. A challenge to it – there was no evidence of – well, there were probably strong winds in order to move the canola swaths, and so that's not challenged. The question is whether there was no reason to anticipate - - -

McLURE P: Well, that's what he found.

McCUSKER, MR: Yes.

McLURE P: In fact, you do. No.

McCUSKER, MR: I thought we did. What we - - -

McLURE P: Yes, you do. Ground 6C.

McCUSKER, MR: Yes.

McLURE P: So that's one where you're going to have to refer to all of the evidence for and all of the evidence against at some stage. Anyway, sorry.

McCUSKER, MR: We also refer to it, your Honour, at ground 3 in an oblique way perhaps, and that is in paragraph 31 at page – 21, sorry. At page 21, where we say:

> Having so found, the learned trial judge ought to have concluded the respondent had actual knowledge of the risk.

Now, I say it's slightly oblique because we don't specifically address what his Honour said, that the respondent could not have anticipated the strong winds. But the evidence was very clear, and his Honour's finding was clear, that there was a danger in swathing because of its susceptibility to winds which blow, and if his Honour was simply finding he couldn't have anticipated there would be a strong wind to blow it, the question is – well, perhaps not.

But it's a notorious fact that you get winds, and so the question is if it was blown, as his Honour has found, by winds and it's known that there is a danger, a risk, that swathing will do that, is it enough to say, well, he couldn't have anticipated or didn't anticipate that it would happen? The risk is there. And the risk – and I have referred your Honours to the notice to Mr Baxter. That's notice of the susceptibility of the opposite

property, Eagle Rest, to the incursion of canola swaths. Mr Baxter himself said at - - -

McLURE P: Well, it wasn't of swaths, was it? Because at that stage it was pre-October and he hadn't swathed, so - - -

McCUSKER, MR: I should say susceptibility of the - - -

McLURE P: To the risk of decertifying.

McCUSKER, MR: Of contamination, yes.

McLURE P: Yes.

McCUSKER, MR: Yes. No, it wasn't swaths as such because no decision had yet been made to swath or to direct harvest.

McLURE P: Anyway, my point remains, that if you want a serious attempt at challenging a finding, which you do in ground 3, then all of the relevant evidence has to be identified, not just that which confirms or supports the appellants' side.

McCUSKER, MR: Yes. Right. Could I also mention, your Honours, the DAFWA factsheet. There was no challenge to what was said there. It's at three green appeal books at page 1389.

McLURE P: Did these go in on a limited basis? Well, they didn't go in as evidence of truth of the facts, did they? Wasn't that - - -

McCUSKER, MR: No, they didn't go in as evidence of the truth of the facts, but they went in as material that was available, and as an important aspect to that. It's not suggested that this material was proof of the contents, but it's proof of what was being circulated to farmers at the time that – in January 2010 at the time that finally GM became lawful – GM canola became lawful.

McLURE P: Sorry, what page again?

McCUSKER, MR: We're at page 1389, your Honour. And if I could take you in particular to – I'm mindful of the fact of course this is not proof of what's said there, but at 1390 it is said:

> Organic livestock must be raised on organic pastures, fed on organic feeds. GM canola can potentially cross-pollinate with –

We don't contend that in this case there was a cross-pollination problem, I should mention, except to the extent that some weeds – wild radish may cross-pollinate, but it's a minor matter. And:

> In the interest of mutual co-existence of GM and organic farming, it is important that farmers discuss management of this remote possibility with their neighbours.

They're talking there about the remote possibility not of incursion of swaths but of the possibility of cross-pollination. And at page 1392, at the foot of that page, perhaps rather prophetically:

> Liability for GM crop-related issues may occur if there's damage to another party. For example, if GM seeds spreads from a GM farmer to a non-GM farmer, a GM farmer may face negligence actions –

And it sets out the conditions of failure to observe duty of care. So in a sense, that's a very important message that's being sent to GM farmers, if they weren't already conscious of it, that there is an important distinction to be drawn, or a division to be drawn between GM and non-GM.

McLURE P: What was the distribution of these factsheets? I couldn't see anywhere in the evidence. This is from the State Department of Agriculture, or is it the Australian - - -

McCUSKER, MR: The Department of Agriculture.

McLURE P: The Commonwealth one, is it?

McCUSKER, MR: No, it's the State one, your Honour. Yes. DAFWA, as it's called. Your Honour, the distribution – Mr Baxter was questioned on this and he said yes, he did receive some DAFWA publications. Sometimes if he had the time he would read them. Couldn't say definitely whether he had read this one, but this was a special fact sheet, because at the time of its publication in January 2010, the legalisation of growing GM canola had just taken place, so it was to coincide as a warning to those proposing to grow GM canola. And at page GAB-1400, top of the second column:

> Once canola crops are swathed and awaiting harvest, there is a risk that strong winds can move the drying plants into adjacent paddocks. It's necessary to plan for this before planting and develop a plan to manage any resultant GM volunteer plants. A management plan should be discussed with neighbours when planning to grow GM canola in boundary paddocks.

And if I could take you now to green appeal book 1291 - - -

McLURE P: This is focusing on cross-pollination, isn't it?

McCUSKER, MR: I don't think so, your Honour, not when they're talking about swathing.

McLURE P: Well, it just –

> …develop a plan to manage any resultant GM volunteer plants.

McCUSKER, MR: Yes.

McLURE P: So this is focused on volunteers.

McCUSKER, MR: But volunteers coming from seed.

McLURE P: Yes, yes, I understand that, but seeds that then germinate into a GM – into a plant, yes.

McCUSKER, MR: Into a plant, which would be a GM canola plant, yes. So what they're talking about is they have gone away from pollination as such and moved into GM canola plants. Because with the non-GM farmer but not an organic farmer, that of itself carries a risk, but with an organic farmer the risk is greater because any presence of GM products in the process, that is, on the property, may give rise to decertification.

McLURE P: Well, that sort of begs the central question, doesn't it, really, in the appeal, which is the trial judge found against you on that, based on his - - -

McCUSKER, MR: Yes.

McLURE P: Based on his construction of the standard.

McCUSKER, MR: That's right, your Honour. Yes. I noticed that the respondent's primary contentions – not the only ones, but the primary contentions relate to what is a

proper construction of the NASAA standard. Perhaps I could also refer you while I'm talking about DAFWA, your Honour, to green appeal book 1390. I'm sorry about that, your Honour. It's not what I intended to refer to. If I could refer – I was going to do it before – to Mr Van Acker's evidence or report at GAB-1291.

McLURE P: What volume?

McCUSKER, MR: Again, it's the same volume, number 3, your Honour. He refers there to:

> …swathing facilitating the –

At the top of that page –

> …facilitating the potential movement of GM canola to where it's not intended, expected or wanted. The movement of canola swaths by wind is common and known by canola farmers to occur regularly.

So that is evidence which was not cross-examined on. And then he said:

> Growers wishing to prevent such movement will roll their swaths as the canola is being cut.

McLURE P: Yes. It's in the context of you referring to this previously that I raised this issue of where are the findings.

McCUSKER, MR: I know, yes.

McLURE P: You know, if you want to seek a finding of fact then it has to be a ground of appeal that identifies it.

McCUSKER, MR: Yes.

McLURE P: And his Honour – I suppose in the context of your challenge to – in ground 3C, it might come up in that respect, I suppose, as to whether you would reasonably expect the transport of seeds and pods and swaths from one farm to another.

McCUSKER, MR: Yes. It also is in the context of the reasonableness of what occurred, the reasonableness of Mr Baxter swathing when there were alternative – one, of course, was direct harvesting, and the other was if you swath, at least take some steps by a canola roller. So there were alternatives available.

McLURE P: Well, the trial judge cuts this off at the path because he says it wasn't reasonably expected that you would have a strong wind to blow this onto the adjacent farm.

McCUSKER, MR: I know, yes. Yes.

McLURE P: So really, you have to set aside that finding.

McCUSKER, MR: We do, your Honour. Yes. We say that on the evidence it's clear that there was known to be a risk that wind could blow canola, and indeed, Mr Baxter himself said at two green appeal books, page 778, starting at line B – I wouldn't say it's the strongest evidence, your Honour, but at line B he says:

> Once they are dislodged –
>
> The question –
>
> you knew that they could then be blown further?
>
> He said:
>
> There's always a chance.

But then he goes on to say when answering the question:

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

And the answer given – and this is taken up by his Honour in his reasons:

> Well, I had never swathed before. This is the first time I have swathed. I hadn't noticed in previous years windrows lying around, and with the buffer zones and the border lines I left between Mr Marsh, I presumed that nothing would get on his property.

But to say, "I hadn't swathed," doesn't answer the question of whether it was reasonable for him to have expected that the – or at least reasonable that there was a chance, a real chance, that winds could blow it off the property. So we do say that his Honour's finding – we do challenge his Honour's finding that it wasn't anticipated

or couldn't have been anticipated. Yes. And so we come, I think, really to this question – and we're dealing with negligence, of course, not nuisance.

Given the fact that clearly winds can blow canola swaths about, would not a reasonable person in his position – in Mr Baxter's position have realised that there was a risk that this would occur? He said there's always a chance, but that's as far as he was prepared to go. We say that on the evidence his Honour should not have found that he didn't anticipate, or couldn't reasonably have anticipated. His Honour should have found that a reasonable person in his position ought to have anticipated that this could happen; not that it would but that it could.

Now, your Honours know that the Marshes have operated – the factual matters, and I don't know how far I need to go in this, but the factual matters are that the Marshes had operated Eagle Rest as an organic farm since 2006, well before the growing of GM canola became lawful. They applied for certification in 2003, and at the end of the process they got certification under a contract with NASAA and a subsidiary, NCO, which is at three green appeal books, page 1377, and there are a number of relevant clauses reproduced in the reasons at paragraphs 195 to 213.

MURPHY JA: Mr McCusker, there was the NASAA contract concerned with licensing of the product.

McCUSKER, MR: Yes.

MURPHY JA: And then - - -

McLURE P: Licensing of the land, I think, which is a really important distinction.

McCUSKER, MR: Very important, your Honour. Extremely important. The product itself isn't licensed.

McLURE P: It's the land.

McCUSKER, MR: It's the farm. Yes.

MURPHY JA: Yes. Well, yes, it's the land and facilities, I think. Yes.

McCUSKER, MR: Correct.

MURPHY JA: And then there's the NASAA organic standards.

McCUSKER, MR: Yes, which are incorporated.

MURPHY JA: Well, where do you see the incorporation in the contract?

McCUSKER, MR: Well, I can take you through it. His Honour so found, in fact - - -

MURPHY JA: I understand that.

McCUSKER, MR: Yes.

MURPHY JA: But I just didn't see where in the contract it appears.

McLURE P: Clause 6.1:

> The licensee must comply with the relevant standard.

McCUSKER, MR: That's right.

McLURE P: As it has developed from time to time.

McCUSKER, MR: That's right, yes.

McLURE P: And the evidence was that that's the NASAA standard in the - - -

McCUSKER, MR: That's the NASAA standard. No issue about that.

MURPHY JA: That's about compliance, but the 3.2.9 is not about compliance, is it? That's just purporting to say that organic certification will be withdrawn in certain circumstances. What's - - -

McCUSKER, MR: Well, I think it was common ground that clause 3.2.9 was in effect incorporated in the contract for what it's – because that's part of the standards. Otherwise it would be nonsensical to say, well, you must comply with the standards. One of the standards is 3.2 and under that 3.2.9, and therefore – I think compliance with a standard can be said to be simply this, your Honour. If you have got an organically certified farm and there is a risk of contamination, then you may find that it is decertified, and that really is the standard we're talking about. It's perhaps slightly unwieldy language, but nevertheless that's the effect of it.

McLURE P: Well, except the standard places all sorts of detailed obligations on you, what you can and you can't use, etcetera.

McCUSKER, MR: Yes.

McLURE P: So it's the document that guides your conduct of your farming operations from go to woe, what you can use, what you can't use, etcetera, etcetera.

McCUSKER, MR: Yes.

McLURE P: And the sanction or the consequences of any departure from them are identified in the standards, save for suspension which is referred to in the contract.

McCUSKER, MR: Yes. Yes. Incidentally, while we're at that page of the contract under the heading Licensee's Obligations, 6.4 says:

> The licensee must notify NASAA in accordance with paragraph 18 of this contract if the licensee's facility or the specified products or processes are contaminated or potentially contaminated by any substance or method not specifically allowed under the relevant standard.

Contaminated or potentially contaminated, and it's the farm – the facility, that is, which is the licensed – the certified organic licence that's held there. And that's what Mr – when Mr Marsh found that all of these canola swaths had got onto his property, he in accordance with that provision notified NASAA as he was bound to do. A number of relevant clauses are, as I say, incorporated in the reasons at 195 to 213. And I certainly won't – I don't propose to take you through them all.

But what is important to appreciate there is that clause 2.4 certifies the land and/or facilities, as your Honour the President has pointed out. It's the land or facilities that's certified. And the clause or standard 3.2.9, which your Honour Justice Murphy has referred to, appears in the reasons at paragraph 220, and in particular, the standard 3.2.9 around which this case very much revolves. His Honour said at paragraph 221:

> The proper meaning of that provision needs to be viewed and assessed in overall context. It can be viewed against the surrounding context of provisions in the National Standards as regards genetic modification and GMOs.

And he then referred to National Standards, noting that the terminology of "unacceptable risk" cannot be found in the National Standards. And I just pause there. That's true, but what is required by the National Standards is that as a minimum the certifying organisation should follow what is required as a minimum. There's no prescriptive or restrictive provisions in the National Standard other than to make sure that the certifying organisation at least observes those National Standards.

McLURE P: There's some interesting regulatory aspects of this. All of this comes about because of the Commonwealth legislation relating to exported organic products.

McCUSKER, MR: Yes, it does.

McLURE P: And so the Commonwealth system is focused on export for constitutional reasons.

McCUSKER, MR: Yes.

McLURE P: But as I understand the evidence at least, that this is also the standard for domestic attribution of organic source.

McCUSKER, MR: Of organic – that's so, yes.

McLURE P: So the National Standard is concerned with expert.

McCUSKER, MR: Yes.

McLURE P: This – and I assume if you comply with the National Standard you can still use the description "organic". But this standard applies as a matter of fact to both export and domestic distribution of organic product.

McCUSKER, MR: As a fact. It does, your Honour, yes.

McLURE P: Is that right?

McCUSKER, MR: That's right, your Honour. Yes. And that's because the contract under which the licence was granted requires that these standards – that's the NASAA standards – be observed. And one of the issues – I think one of the arguments raised by the respondent is, well, 3.2.9 goes over and above what the National Standard says, but the answer to that is that the National Standard, as I said, simply prescribes a minimum observance. It doesn't say that there can't be engrafted onto that additional

requirements. And on the question of the domestic importance, his Honour said in his reasons at paragraph 261:

> For the sale of Australian domestic organic produce, the real underlying constraint against products being misleadingly sold under a label of organic or certified organic, when in truth they're not organically grown in Australia, is that such sales may be assessed as misleading or deceptive conduct.

McLURE P: But the real problem is, isn't it, that the large retailers requires adherence to the certification.

McCUSKER, MR: Yes.

McLURE P: So it goes beyond this question of misleading or deceptive conduct. You can't get your product into the big retailers unless you comply with these standards, or some other standard that governs organic.

McCUSKER, MR: Unless you get – and you cannot label it or hold it out as being organic unless you adhere to the standards.

McLURE P: As organic.

McCUSKER, MR: And they're quite rigid standards. And the reason for that is not some idiosyncrasy. Customers, people who buy organic food, are entitled to be assured that it truly is organic, so there's a fairly rigid control of the term "organic" before food can be sold – produce can be sold.

McLURE P: That's because there's a significant price premium, anyone who goes shopping.

McCUSKER, MR: There is. There is, your Honour. And in the case of crops, there's a significant price premium paid for organic and a deduction made for GM canola because of the controversy, I think, about the - - -

McLURE P: Well, it's three-tiered, isn't it? It's organic, conventional non-GM, and then GM.

McCUSKER, MR: Yes, that's right.

McLURE P: That's the categories.

McCUSKER, MR: And in terms of the pricing, it goes organic, top of the list, then non-GM, and some products

are labelled non-GM, and then below that there is GM, and each one has a lower price. So the GM as distinct from the non-GM.

McLURE P: I don't know that there's an express finding in the reasons about the economic aspects, is there?

McCUSKER, MR: There was a reference to the value or the price that may be a higher price – that's all he said – for an organic product. He didn't go so far as to deal with the specifics of how much higher the price might be.

McLURE P: No.

McCUSKER, MR: If I could take your Honour to green appeal book volume 3, 1152. There's a statement at paragraph 20 of this report, which is in evidence, the report of Janet Denham, at paragraph 20:

> The organic market in Australia and large and growing. I believe it's one of the fastest-growing industries in Australia and the best performing agricultural industry over the past five years, worth more than $AU1.276 billion to the Australian economy.

McLURE P: Yes.

McCUSKER, MR: And so there is that, but also his Honour made a passing reference to the fact that organic produce is likely to attract a higher price.

McLURE P: But the economic ramifications are important in a broader context. I mean, I know the focus can sometimes go to the rights and wrongs of how you go about farming, but the reality – there's an economic dimension that seems to have been sidelined, at least in the judgment.

McCUSKER, MR: There is. There has been, your Honour. Yes. It's a very important dimension. Mr Marsh pointed out his concerns in that letter of September of 2010, but there is a very important economic dimension. On the one hand, if you have got organic certification, then it's of great value. It costs – obviously it's much more difficult to grow organically because you can't use various sprays and so forth, but once you have got it, it's important to be able to adhere to it and with all its restrictions.

McLURE P: When you lose certification you can still dispose of your product in the conventional market.

McCUSKER, MR: You can still sell it. Yes.

McLURE P: It's just that you lose the price premium.

McCUSKER, MR: That's right. That's right. If you lose the certification – although if you lose the certification as a result of more than 0.9 per cent GM infusion, then you can't label it as a non-GM product. So it's a difficult situation for an organic farmer. We're not saying here though that there was that kind of situation.

MURPHY JA: Mr McCusker, was the contract ever terminated? The contract seems to talk about suspension then termination, and then 10.7 says:

> Terminates a licensee's certification.

The termination of the licensee's certification might be thought, perhaps, to be really the termination of the contract.

McCUSKER, MR: Yes.

MURPHY JA: What happened here?

McCUSKER, MR: There was decertification but ultimately certification was renewed retrospectively. In fact, the certification was removed, decertified in 2010, so that the crop – or the product from that time on couldn't be sold as organic. In 2013, the NASAA people were satisfied that it had now got rid of the concerns about GM product because it takes about two years for GM canola seeds to – not necessarily two years but it can take up to two or three years for GM canola seeds to germinate, and by 2013 NASAA was satisfied that this hadn't occurred.

McLURE P: But isn't the answer to the question is that the contract was never terminated? There's no provision in the contract for decertification. The decertification is provided for in the NASAA standard.

McCUSKER, MR: Quite.

McLURE P: So the contract remained on foot for the entire period.

McCUSKER, MR: Of course.

McLURE P: There was initially suspension, then there was decertification. The decertification lasted for some years and then they were recertified, but the contract remained on foot the whole time.

McCUSKER, MR: Correct, your Honour. Yes.

McLURE P: Yes.

McCUSKER, MR: But the contract wasn't terminated by the decertification.

McLURE P: No. The standard provides for that consequence in the event of contamination or a risk of contamination.

McCUSKER, MR: Yes, but it simply provides for that possibility.

MURPHY JA: And decertification is defined, isn't it? Yes, it is.

McCUSKER, MR: Yes, it is. Yes. Yes. Could I just mention too - - -

McLURE P: It's defined in the standard. It's not – just to make it clear.

McCUSKER, MR: It's defined in the standard, yes.

McLURE P: In the NASAA standard.

MURPHY JA: Yes, page 1735.

McCUSKER, MR: Yes. It's at – decertification in essence means you can't sell as organic.

McLURE P: Well, your land and facilities cease to be certificated.

McCUSKER, MR: Cease to be organic, yes.

MURPHY JA: Well, it means total withdrawal of certification, total.

McCUSKER, MR: Yes. Yes. Well, total withdrawal in the sense that you can't - - -

McLURE P: Well, of the paddocks.

McCUSKER, MR: Of the paddocks which were - - -

McLURE P: Because they weren't entirely decertified.

McCUSKER, MR: No, no.

McLURE P: Paddocks 1 to 6 remained certified.

McCUSKER, MR: That's right, your Honour. And that again makes the point that it is the land or the process that's just as important as the product for the purpose of the organic certification. And if I could take this example, suppose a sheep was sold and it was from a paddock which had contamination, and even though it doesn't affect the sheep in the sense of any ascertainable content in its stomach or elsewhere of GM product, nevertheless because it has been on pasture where there has been GM product, then it can't be sold as organic.

McLURE P: So the meat can't and - - -

McCUSKER, MR: The meat can't be sold as organic.

McLURE P: And the wool, I assume. So no - - -

McCUSKER, MR: I'm not sure about wool actually, your Honour.

McLURE P: The animal – well, yes, I know. It's clear that – well, from the evidence anyway, that the meat - - -

McCUSKER, MR: Yes.

McLURE P: You can't sell it as organic meat, even though there's nothing in the product, nothing in the animal itself that tests positive for GM.

McCUSKER, MR: That's right, that tests in any way. No.

McLURE P: No.

McCUSKER, MR: No. It's just – so the emphasis really is upon the property itself and the process that is used for the purpose of producing a product. The certification is not simply – or is not of the product, as such.

MURPHY JA: Yes. 3.2.9 just talks about withdrawal. 3.2.12 uses the word "decertify", which is total withdrawal.

McCUSKER, MR: Yes. The decertification in this case, as her Honour has pointed out, was not of the entire farm, but it was of a number of the paddocks where the GM canola had landed.

MURPHY JA: But 3.2.9 doesn't talk about decertification, does it, as a term? As a term.

McCUSKER, MR: Well – no, it's – I'm sorry. It doesn't say in those words, "decertification". It's "withdrawal of certification", which I think means the same thing.

McLURE P:

Organic certification shall be withdrawn.

McCUSKER, MR: Yes. Yes.

MURPHY JA: But "decertification" is a defined term, or "decertify" is anyway. Yes, "decertification" is. Yes.

McCUSKER, MR: Yes. Well, if certification is withdrawn then we took that as a synonym for – as a shorthand way of saying - - -

McLURE P: Well, we know the context. We know a number of paddocks, 7 to 13 - - -

McCUSKER, MR: Yes.

McLURE P: Their status as certified was withdrawn, and that's consistent with the standards, because you can have in your conversion period, you can have non-organic and organic as part of the same farm in that transition through to certification, and then you can have certification withdrawn from some parts from time to time, it would appear.

McCUSKER, MR: Yes.

McLURE P: Anyway, that's what happened.

McCUSKER, MR: Yes, that's what did happen, and there's no reason why it shouldn't happen because – apart from the fact that if you have got certification for the whole of a farm and then a paddock is – or certification is withdrawn from that paddock because you have got a GM product growing on it, that may affect the certification of an adjoining paddock. May affect it. But that's all a matter for NASAA to consider and decide at the end of the day whether there's a reasonable risk of contamination of the adjoining paddocks.

Can I just come back briefly to this question of the financial benefit. His Honour at page 52, paragraph 233 and 234 dealt with that, as well as the importance of ensuring that – at 235, ensuring that it was truly organic. In 619, his Honour refers to the evidence of Davies – a

witness statement of Mr Davies, and he spoke there and appears to have accepted the evidence:

> His evidence by telephone essentially addressed the higher prices his business was prepared to pay for organic linseed which had been cleaned via a machine process. He spoke of an almost threefold value of that product in terms of prices paid to suppliers in contrast to non-organic. This evidence may be accepted, although its utility –
>
> He says –
>
> is marginal.

Perhaps it was marginal because it was oilseed – well, no, it wasn't. It was oilseed from a number of sources. Well, can I just come back to the legislative outline of all this. At GAB-1700 to 726, the administrative arrangements appear, and they require – and this is the Commonwealth administrative arrangements. They require AQIS - - -

McLURE P: Sorry, what page are you on?

McCUSKER, MR: I'm at page 1700, your Honour.

McLURE P: 1700?

McCUSKER, MR: 1701.

McLURE P: So volume 4?

McCUSKER, MR: Volume 4, I'm sorry. Yes. And that requires that every certifying organisation – or rather it requires AQIS – which is Australian Quarantine and Inspection Services – to maintain a quality management system compliant with the Commonwealth legislative regime, in particular that it complies with the National Standards.

McLURE P: Are you able to assist about where these administrative arrangements fit within the regulatory framework? Because you have the Act and the Act entitles you have to have regulations, and the regulations entitle you to have orders. And so you have the Export Control (Organic Produce Certification) Orders, and AQIS, or now DAFF, it's called, have these administrative arrangements. Do you know the status of the administrative arrangements?

McCUSKER, MR: In the sense of the length of - - -

McLURE P: Where they fit in under the powers of the Commonwealth.

McCUSKER, MR: Excuse me a moment, your Honour. Well, it goes this way, I think, your Honour. The Australian Quarantine and Inspection Services in turn produces administrative – and it's the competent authority for the Australian organic - - -

McLURE P: No, I'm just wondering, the source of the power for AQIS to have these administrative arrangements. Is that just a – they have no statutory underpinning like an order or a regulation? They're just administrative arrangements, are they?

McCUSKER, MR: The export is governed by the export – the Commonwealth export control.

McLURE P: No, I understand that. And the regulation – your Export Control Act, there are regulations made under the Commonwealth Act.

McCUSKER, MR: Yes.

McLURE P: Then there are orders made under the regulations, but these administrative arrangements seem to be quite separate from that structure.

McCUSKER, MR: Well, the orders require AQIS to – that's the orders made under the Export Control (Organic Produce Certification) Orders.

McLURE P: Yes.

McCUSKER, MR: They require AQIS to conduct audits of approved certification organisations.

McLURE P: I understand that. I'm just wondering where the administrative arrangements come from.

McCUSKER, MR: Regulation 4 of the Export Control Orders Regulations 1982 provides under three, regulation – sorry – orders:

> The Minister may by instrument in writing make orders not inconsistent with regulations made under the Act.

McLURE P: Yes, and they're the orders that I referred to, the Export Control (Organic Produce Certification) Orders. I'm just wondering where the administrative arrangements – that must be a non-statutory source then.

McCUSKER, MR: It's a non-statutory source because they are administrative orders made by AQIS. So it has got the responsibility of ensuring that there's compliance with the quantity - - -

McLURE P: Orders.

McCUSKER, MR: The orders, yes. Yes, I will see whether I can come back to that, your Honour. The administrative arrangements do require AQIS to ensure that the certifying organisation, every one that it allows to be a certified organisation, maintains a quantity – QM system compliant with the Commonwealth regime, in particular with the National Standards. And they're set out at green appeal book 1842. Relevant extracts from that appear in the reasons at 222 to 235.

McLURE P: Are we on the National Standards now?

McCUSKER, MR: Yes, we are, your Honour. And his Honour sets out the relevant extracts from the National Standards at 222 to 235. And National Standard 14.2.3 of the - - -

McLURE P: National Standard what?

McCUSKER, MR: Sorry.

McLURE P: It only goes to 7.6, doesn't it?

McCUSKER, MR: Sorry. Clause 14.2.3 of the administrative arrangements. This is the chain of – so you will start off with the Commonwealth statute. There was an order made, a regulation, and the National Standard, which is at 1843, provides in the third paragraph, the introduction, that:

> It provides a framework for the organic industry, covering production, processing, transportation, labelling and importation, and to ensure conditions of fair competition. Use of the standard provides transparency and credibility.
>
> And at standard 14.2.3 - - -

McLURE P: No, there's no 14.2.3. That's why I raised it with you. 14.2.3 might – it might be the administrative arrangements. Is that what you're talking about?

McCUSKER, MR: I'm sorry, they are. Yes. So I have lost it there, but - - -

McLURE P: The National Standards I think end at seven point something.

McCUSKER, MR: They do, your Honour, and the administrative arrangements - - -

McLURE P: Go to 14.

McCUSKER, MR: Yes.

McLURE P: And 14 deals with inspections, I think.

McCUSKER, MR: Yes, it does. Yes. Sorry, your Honour. 14.2.3 says:

> As a minimum, the approved certifying organisation shall inspect products and systems of the operator against the relevant sections of the National Standard.

Which is the point I was making a bit earlier. So it's a minimum requirement that there be compliance with the National Standard. This goes to the question of the respondent's reliance on the proposition that if it's not found in the National Standards then it can't be something that the NCO could use to withdraw certification. So that's a minimum standard. Clause 2.3 of the contract, which I have taken you to, provides that certification programs offered by NASAA are governed by the requirements that are accredited.

That is, NASAA – that is, the licensee, which in this case is NASAA, must comply with – are governed by NASAAs compliance with accredited compliance, and these include compliance by the licensee with the published relevant standard. And the relevant standard is to be found at 1387, which is referred to as the National Standard. Sorry, the NASAA Organic Standard. So the standards corresponding to the AQIS program include the NASAA standards, and clause 2.4 of the contract records that NASAA has certified the licensee's facilities under – that's under the schedule, item 4 of the schedule.

And 14.2.3 of the administrative arrangements, which I have taken your Honour to, provides that NASAAs – well, that 14.2.3 obliges as a minimum – I'm repeating myself. So there is a constraining effect only by stipulating minimum requirements. If I could also while I'm on this subject to the International Federation of Organic Agriculture Movements. In addition to AQIS, NASAA is accredited by that body called IOAS, but that doesn't form

part of the mandatory Commonwealth legislative regime governing export of organic produce.

So it's voluntary on the part of NASAA. The NASAA standards correspond with both the IFOAM accreditation as well as accreditation by AQIS. Your Honours, the ministerial order – that's at page GAB-1387, the NASAA Organic Standard. The ministerial order that was issued on 25 January 2010 authorised cultivation of GM canola in Western Australia if licensed for international release under the Commonwealth Gene Technology Act. It was common ground that Roundup Ready canola was so licensed. And then it was then that the DAFWA factsheet that I have taken you too was issued, which referred inter alia to – at 1400.

McLURE P: Didn't the way it work was that Monsanto got licensed by the Commonwealth Office of the Gene Regulator.

McCUSKER, MR: Yes.

McLURE P: That licence permitted it to distribute Roundup Ready canola for dissemination into the environment.

McCUSKER, MR: Yes.

McLURE P: At the relevant time, there was a State prohibition, not a Commonwealth prohibition - - -

McCUSKER, MR: State, yes.

McLURE P: A State prohibitional moratorium on the growing of GM crops, and on 25 January, the State Minister under the State Act permitted the cultivation of the RR – the Roundup Ready canola as an exemption under section 5(1) of the State Act. Is that how it works?

McCUSKER, MR: That's how it worked, yes, your Honour. There was banning in several states. In fact, two remain, in South Australia and Tasmania.

McLURE P: Well, the Genetically Modified Crops Free Areas Act 2003 contained a blanket moratorium on all GM crops.

McCUSKER, MR: All GM, yes.

McLURE P: Until January 2010 when the state excluded it for Monsanto's licence for RR canola.

McCUSKER, MR: For Monsanto's licence. There was I think one other. It doesn't – it's not particularly relevant, but there was one other licensee as well from another

product. I have taken you to – briefly to the letter. I will come back to that. But before we go to that, in 2008, as your Honour would have seen, and it's referred to in his Honour's reasons, Mr Marsh called on Mr Baxter to point out that he had got some non-GM canola on his property. There is no relevance in that so far as the danger of windblown swaths go.

The relevance is that he emphasised then that it was important to realise that he was an organic farmer and there was always a risk of decertification if there was any contamination. So he wasn't warning about windblown swaths as such. Then in September 2010, we get to the letter. I should mention, in early 2010 the evidence is, and his Honour found, before seeding, Marsh told Baxter he was probably going to go GM, as he put it. He hadn't said he was definitely but going to. That's all that amounted to. In September, Marsh erected signs, and these are referred to in his Honour's reasons at paragraphs 95 and 96.

McLURE P: Mr McCusker, I don't know that any of these facts are really in issue, and we understand them, and you have got 10 grounds of appeal, some of which are very lengthy.

McCUSKER, MR: Yes.

McLURE P: And you have got a day each, haven't you, for that?

McCUSKER, MR: Yes, your Honour. So if you like, I will come straight to the grounds of appeal.

MURPHY JA: Is ground 1 a rhetorical flourish?

McCUSKER, MR: I wasn't going to call it that, your Honour, but I don't – it's not entirely a rhetorical flourish, as your Honour has put it, because it does perhaps emphasise what his Honour's approach to this was. That is, he took the view that a claim for economic loss where there was no physical injury was a wholly novel claim, and in that, we say he was in error, and we point to his Honour mentioned in his reasons to the case of Perre v Apand as clearly contrary to that view.

NEWNES JA: That will emerge from the other grounds of appeal, won't it?

McCUSKER, MR: Yes, it does. So I don't intend to dwell on that really any further. It's clear. Stephen J – we have noted in our submissions at paragraph 3 at page 16 of

the white book, Stephen J made the comment in Caltex Oil that a requirement that there be some injury to person or property, that requirement operated to confer, he said, upon physical injury a special status, unexplained by either logic or by common sense – common experience, I should say. So there was no basis for his Honour saying that this was a wholly novel claim; that is, pure economic loss without physical injury of some sort. And unless your Honours wish me to expand on that, I will proceed to ground 2.

McLURE P: Well, can you – before – you have got a couple of grounds on duty of care, but nowhere in your submissions or elsewhere do you attempt to really formulate a duty. Are you able to do that now?

McCUSKER, MR: Yes. The duty was to take reasonable care. It wasn't a duty to ensure, and that's, I think - - -

McLURE P: No, no. Well, that's – you're only about a third of the way through. Can you just tell me what the duty - - -

McCUSKER, MR: The duty - - -

McLURE P: The scope of the duty that you seek is.

McCUSKER, MR: The duty was a duty to take reasonable care.

McLURE P: To do what?

McCUSKER, MR: To ensure – as far as reasonably practicable, to ensure that his GM product didn't in some way contaminate his neighbour's – or affect adversely his neighbour's organic status. There are various ways it has been put, but that, I think, is essentially what is being said.

MURPHY JA: That's not interfering with his neighbour's contract.

McCUSKER, MR: No. Not his – it doesn't interfere with his neighbour's contract with Monsanto, no.

MURPHY JA: No, no. When you say it doesn't affect his neighbour's organic status, his neighbour's organic status was contractual.

McCUSKER, MR: Well, it was a licence, yes. Yes.

MURPHY JA: Yes, under the contract. So it's not to affect the contractual relationship between the plaintiff and the licensor.

McCUSKER, MR: No. It's to affect his organic certification, in the sense that if something – if there is contamination by GM product on the neighbour's property, this would cause him loss.

MURPHY JA: But that's – the loss arises through the suspension or termination of this contract.

McCUSKER, MR: I see your Honour's point. No, well - - -

McLURE P: It's not from the termination of the contract.

McCUSKER, MR: No.

McLURE P: It's from the loss of the certification.

McCUSKER, MR: The loss of certification.

McLURE P: Which is a – it derives its power, I suppose, from the contract, but it's not a termination of the contract.

McCUSKER, MR: No, it's not. No. It's a duty to take reasonable care, I suppose, coming right down to the practical, to avoid GM canola going from his property to his neighbour's property.

MURPHY JA: Well, only insofar as it affects his position under the contract to be organically licensed.

McCUSKER, MR: I don't think, your Honour, that the contractual side of it really is the point. The point is that he was told that the organic certification may be lost or affected if GM canola in some way got onto Eagle Rest. So the duty was to take reasonable care to ensure that that didn't happen.

MURPHY JA: But normally you wouldn't be liable for a negligent interference with a contract.

McCUSKER, MR: No, but it's not interference with the contract. It's causing the organic farm to cease to be certified organic by reason of the GM product going on to Eagle Rest. So it wasn't put to him in terms of, "You must take all reasonable steps to ensure that our contract isn't in some way affected". It's down to earth, really, "Take

reasonable care to ensure that your canola doesn't get onto our property".

MURPHY JA: But ultimately only because if it does, "We may face sanctions under a contract".

McCUSKER, MR: Well, yes, but that would be the consequence. So it wasn't a duty to take reasonable care to ensure that sanctions weren't imposed on the contract. It was a duty to take reasonable care to take – well, in fact, in the particulars of the claim at blue appeal book, page 168, the duty pleaded there at paragraph 35, it is to ensure that they, the respondents, didn't – sorry – that they, the appellants, didn't suffer loss, including economic loss, as a result of GM canola being blown or carried from Seven Oaks onto Eagle Rest. Now, it's not a duty to ensure that we don't lose organic certification. That can't be the duty and it wasn't. The duty is to ensure that the GM canola would not go onto the property of his neighbour. Simple as that.

MURPHY JA: But you said a moment ago to not contaminate or affect the neighbour's organic status. The organic status is purely through the contract.

McCUSKER, MR: It is, your Honour, yes. But I just want to avoid any suggestion that we're saying, "You have a duty to take reasonable care to ensure that we don't get decertified," because that would be putting it far too broadly. It's a duty to take reasonable care to avoid the canola going onto the neighbour's property.

MURPHY JA: But why would that be, unless it's bound up with the organic status of that property?

McCUSKER, MR: Because what – yes. But it is bound up. So the organic farmer says, "I will lose – or could lose, my certification as organic, which will cause me a great loss, if any of your GM product goes over to my property". Not, "I will lose," but, "I could lose". It's a risk.

MURPHY JA: But that's saying, "I may lose the benefit of my contract".

McCUSKER, MR: Yes, "I may lose the benefit of my contract". Certainly.

McLURE P: Well, you don't lose the benefit of the contract because it's not a - - -

McCUSKER, MR: You lose the benefit of the licence.

McLURE P: It's not contractual in the sense of, "You're putting me in breach or otherwise". You are the recipient of an entitlement to label your goods in a particular way, which entitlement will be lost in the event of certain circumstances. So to think of it in terms of contract and obligations and breaches is the wrong way you might think to put it.

McCUSKER, MR: But with respect - - -

McLURE P: Because it's a consequence that flows from conduct that you might not have any control over, for example. So it's just a compliance with the standards that are incorporated into the contract.

McCUSKER, MR: That's right, your Honour. Yes.

McLURE P: You might think – I mean, I don't know. It needs to be sorted out, but it seems to me none of this was given any serious consideration below.

McCUSKER, MR: The duty to take reasonable care.

McLURE P: Well, the formulation of the duty. I couldn't – apart from what you have got in the statement of claim, which I understand has that two-pronged aspect to it which the blowing of the GM canola on your client's farm and the decertification of the paddocks that resulted.

McCUSKER, MR: Yes. And as I said to his Honour Justice Murphy, we don't say, "You had to take reasonable care to ensure that we don't get decertified". The reasonable care was limited to, "Don't let your GM canola" – or, "Take reasonable" - - -

McLURE P: "Don't you engage in conduct that puts at risk my certification to use the description organic, which has significant economic consequences for me".

McCUSKER, MR: Yes. Yes. But the – but not any conduct; simply the conduct of allowing your GM to - - -

McLURE P: Yes, onto my farm.

McCUSKER, MR: Onto my property, yes. And in all of that, certainly there's a warning that that could put him at risk of losing his organic status. But obviously, you can't ask him to take reasonable care to ensure that he doesn't lose it.

McLURE P: No, no. Well, that's not how it was framed, was it?

McCUSKER, MR: No, it's not. So that is the duty of care that we say was carried by – and we say it for a number of reasons, and we have set this out in our grounds. But if I could just very quickly say the reasons why there was such a duty of care was that the respondents were put on notice that this was – this could be a major problem for the organic farm. There was no – it wasn't after the event. There was no reason why some steps couldn't have been taken to carry out that duty of care, but none in fact were taken.

McLURE P: So you rely on the knowledge.

McCUSKER, MR: We rely upon the knowledge because that's - - -

McLURE P: The knowledge, his knowledge of the risk of contamination if GM canola went onto his farm.

McCUSKER, MR: If GM canola blew across, yes. It really is – we rely upon knowledge for the purpose of the negligence claim. We say that in the case of the nuisance claim, knowledge in any event is unnecessary, because there is an absolute liability if it's find that there was an unreasonable interference with the neighbour's property – or use and enjoyment of the neighbour's property.

MURPHY JA: Anything besides knowledge to rely on for the duty of care?

McCUSKER, MR: Yes, your Honour. Can I take you through a few of the things that we say, starting at - - -

McLURE P: Well, are they the things listed in your ground 2 of your grounds of appeal?

McCUSKER, MR: They are, your Honour. Yes.

McLURE P: And that's all of them?

McCUSKER, MR: Well, that is – there was a risk which was foreseeable, it was a risk that – there was the physical propinquity of the parties, and we say that's important, and that is a very relevant consideration, that physical propinquity. And then there is the question of the fact, and it comes back to the same, I think, knowledge, that the respondent knew about the risk of harm to the appellants, and the findings were to the effect that the respondent had

actual knowledge of the risk because he was told of that risk.

Then to the extent that it's relevant, there is vulnerability. It seems to have been the subject of some debate, and I notice that your Honour, the President, referred to the question of vulnerability in Apache Oil, I think it was – Apache Energy as being not determinative, even though it's a salient factor. I think your Honour was talking more in terms – speaking more of whether there was no vulnerability than – but in any event, clearly if the appellant in this case weren't vulnerable it's difficult to see how one could ever be vulnerable, because they had a particular industry organic which clearly could be affected by the neighbour growing and swathing GM canola.

In his notice to the respondent, to – Marsh's notice to Baxter, he actually pointed out that as far as he could find out, there was no way that he could insure against the loss of organic status due to something like that occurring. So I don't think that there's any question – and I should say – and I submit that there was no question that the trial judge said at paragraph 321 that if there was contractual vulnerability, as his Honour put it, this was a self-initiated – and he repeated – he said the same thing in fact at 45, I think it was. So he said that if there was vulnerability it was self-initiated vulnerability, and therefore it wasn't vulnerability in the true sense.

McLURE P: But wasn't he talking about what's really the elephant in the room, which is the proper construction of the NASAA standards and what they require?

McCUSKER, MR: Yes, he was.

McLURE P: I mean, it seems to me that's at the heart of his Honour's decision. He thought that – he concluded that the NASAA standards were unreasonably and inappropriately applied to the circumstances here, and that the appellants were involved in that unreasonable application of the standard.

McCUSKER, MR: Yes.

McLURE P: Really, isn't that really what his – well, I mean, I know he found against you at every turn.

McCUSKER, MR: Yes.

McLURE P: But that seems to be what was driving his approach, namely he thought that the standard didn't apply to the incursion of GM grain – swaths in this case.

McCUSKER, MR: Yes. Yes. Now, there are several – there's a couple of prongs to that. One is did 3.2.9 have any efficacy at all? That is – and was it part of the regime under which the appellants operated? And we say clearly it was. It was – the fact that it wasn't found in the National Standard doesn't matter because the National Standard sets minimum-only requirements, or rather the orders only require that as a minimum. But second, and this is the important one, the most important, were the facts such as to give rise to the application of 3.2.9?

And on that point, his Honour really looked at what had happened and concluded essentially that in his view it didn't amount to contamination, because he took the view that contamination was genetic contamination. And with respect, that's not to be found anywhere in the provisions of the contract or the standards, and moreover, it's contrary – that view is contrary to what actually does appear. Whereas we have discussed earlier, the - - -

McLURE P: Well, it really does depend upon the proper construction of contamination.

McCUSKER, MR: It does, yes. It does. But it's contamination which is not confined to genetic contamination, because the whole process, the land and the process is all rigidly governed.

McLURE P: But whether it is or it isn't depends upon the proper construction of the standards. It's an objective test, isn't it?

McCUSKER, MR: It is an objective test.

McLURE P: So I don't know why everyone was being cross-examined about what it means.

McCUSKER, MR: No.

McLURE P: Because what it means is to be determined objectively.

McCUSKER, MR: Certainly, your Honour. We were going to mention that, but I think my learned friends in their submissions have raised some views that were expressed by some of the witnesses, but in the end it's an objective test. What is meant by contamination in the context, in

the context of this – the contract and the standards and the fact that there is clearly an underlying requirement that the genetic – that the organic process be protected so that it can be safely said that the product of that process is itself the product of an organically approved process.

MURPHY JA: Well, 3.2 talks about production systems or finished products. Now, there was no contamination of a finished product, was there?

McCUSKER, MR: No. No, there wasn't. No. It was the production system.

MURPHY JA: And in what sense was the production system contaminated on your case?

McCUSKER, MR: Because of the presence of the canola, the GM canola, on the land and the dispersal of seeds, and the inspectors from NASAA who inspected I think on three occasions realised that there was a scattering of seed. There wasn't just a few isolated stalks, as it were. There was a scattering of seed and a likelihood - - -

McLURE P: Does it work this way? There are, what, 245 swaths or something?

McCUSKER, MR: Yes. Yes.

McLURE P: Each swath has a number of pods, each pod has a multiple number of seeds; is that how it works?

McCUSKER, MR: That's right, your Honour. A large number of seeds, which – and when the pods crack open, as many of them had, the seeds disperse.

McLURE P: And it's the seed that germinates?

McCUSKER, MR: Germinates, yes.

McLURE P: And it's the seed that the sheep eat?

McCUSKER, MR: Yes.

McLURE P: And then their waste products become - - -

McCUSKER, MR: Scatter around the farm.

McLURE P: Scatter around.

McCUSKER, MR: Yes. It can't be – we don't say that the product that was contaminated was the sheep, because in

fact the sheep at that time, having been drenched with a chemical drench had already been removed from organic certification. But we have still got the land, and the land with all of the seeds scattered around, as your Honour said - - -

McLURE P: But how does the scattered seeds work? What, is it the possibility of them becoming part of the soil, or is it the possibility of their being harvested with the wheat crop and the rye crop? How does it work?

McCUSKER, MR: Not the first part in the sense of becoming part of the soil. Only in the sense that the seeds if they germinate can produce of course vegetation.

McLURE P: So the only concern about the seeds is volunteers then, is it?

McCUSKER, MR: Volunteers which could take up to two or three years to appear.

McLURE P: Yes, but all I'm wanting to know is what the problem is. If it's just volunteers, that's fine, because we know that was a finite number in the next three years.

McCUSKER, MR: Yes.

McLURE P: If it's seeds getting mixed up with the other organic product on the farm, well, then that's another issue, but it's not clear to me what the scope of the contamination that you rely on is.

McCUSKER, MR: Well, in physical terms, your Honour, the scope of it is the scattering of the seeds which could ultimately cause germination, if not in 2011 then in 2012.

McLURE P: So you're only concerned with volunteer canola plants.

McCUSKER, MR: The possibility of – yes.

McLURE P: That's all.

McCUSKER, MR: So it's important to appreciate we're not concerned solely with volunteer canola plants in 2011.

McLURE P: No, I understand that.

McCUSKER, MR: Yes. That's all. Yes.

McLURE P: So it's only volunteer canola plants.

McCUSKER, MR: Otherwise you would have a situation where you could never become recertified, because there would always be the potential perhaps for some seeds to be in the soil but not germinating, never germinating. But given the evidence that they would germinate in two to three years, at the end of the second year the inspector just said, "Well, we're satisfied now that the risk is gone".

McLURE P: That the risk is gone, the risk of the volunteer canola.

McCUSKER, MR: The risk of contamination, yes. And that's what's – so the contamination itself is the scattering of the seeds and it's contamination because of the potential, the risk that those seeds will germinate. Now, it's true that if the seeds do germinate and plants are produced, it's unlikely – in fact, it's impossible that there would be cross-pollination. But what is quite possible is that sheep coming onto the paddock to feed may eat these GM canola plants, and indeed the seeds. So there has to be a period of, as it were, quarantine, and that's - - -

McLURE P: But is it no risk to the other crops then?

McCUSKER, MR: There's no risk to the other crops.

McLURE P: No crossing risk with the other crops?

McCUSKER, MR: No, there's not. No, we accept that. There was evidence before the court that there couldn't be any risk of the GM being genetically transferred to any of the other crops.

McLURE P: All right. So it's just a matter of keeping an eye out for volunteers.

McCUSKER, MR: Yes, that's one way of putting it, your Honour, the possibility of volunteer canolas appearing.

McLURE P: But don't you just pull them out? I mean, isn't that the evidence? You just keep your eyes open and when they – when the volunteer arrives you remove it?

McCUSKER, MR: Well, you could – yes, your Honour. There was evidence that you could remove it if you found it, but the plants – and it was said, well, when they flower there was a vivid yellow flower, which indeed there is, but it doesn't mean that they're going to flower straight away as they germinate, and the concern of the certifying authority, NASAA, was that in the interim there might be some concern about stock eating GM product.

MURPHY JA: But you're saying on the facts of this case that the eating would have led to a problem because the sheep were - - -

McCUSKER, MR: For a period, your Honour, yes. But they weren't – they weren't decertified organically forever and - - -

McLURE P: I thought it was the paddock that they decertified, number 13.

McCUSKER, MR: Yes, it was. Yes.

McLURE P: And did they decertify the sheep as well who had been drenched?

McCUSKER, MR: The sheep – the sheep lost the – yes, that's right. They did. Now - - -

MURPHY JA: So you say that's the production system that has been - - -

McCUSKER, MR: Contaminated.

MURPHY JA: - - - exposed.

McCUSKER, MR: To a non-organic product, yes.

MURPHY JA: And the system of production is the volunteer plants appearing.

McCUSKER, MR: Yes.

MURPHY JA: And that becomes part of the system of production.

McCUSKER, MR: That's right, yes. And you may say, "Well, they could go along every day and check to see if there's a GM canola plant starting to emerge," but the certifying organisation had to be very careful. It had to ensure as far as possible that there was no interference with the organic nature of the production, in this case the farm. And it concluded that there were still viable canola seeds on the property when they inspected, and that the extent of that could not really be ascertained then.

So they weren't saying the farm is contaminated or the paddocks are contaminated. They were saying, "Having looked at the whole situation, we consider that there is a reasonable risk of contamination". No more than that. And that – you might say that's Draconian because it means that

even if there wasn't contamination they can take the view there's a reasonable risk and suspend the certification.

McLURE P: Does it apply only to - - -

McCUSKER, MR: And I should say an unacceptable risk, because it's not – the point unacceptable risk. And it was unacceptable to NCO.

MURPHY JA: And just pausing there, the risk of contamination is not the risk of contamination to any of the wheat or the rye or the other crops.

McCUSKER, MR: No. No.

MURPHY JA: It was only a risk of contamination to the sheep.

McCUSKER, MR: Well, it was a risk of contamination in the sense that GM products might grow – GM plants might grow on the property.

MURPHY JA: Yes.

McCUSKER, MR: And then the consequence of that might be that the sheep would eat them.

MURPHY JA: Yes.

McLURE P: But you say contamination goes beyond cross-pollination.

McCUSKER, MR: Yes, it does.

McLURE P: I mean, it's fundamental to your case. Because the question put by Justice Murphy said contamination of the other crops. Well, that meant crossing.

McCUSKER, MR: Yes.

McLURE P: But you say contamination is wider than crossing.

McCUSKER, MR: Yes.

McLURE P: Includes but is wider than.

McCUSKER, MR: Yes. Yes, that's - - -

McLURE P: But what we're struggling with is to articulate really the substance of the contamination. It might be in the system but it's not in – what is the contamination?

McCUSKER, MR: The contamination is – initially it's the – take it step by step. The first part of the contamination is the fact that there are GM canola seeds scattered around.

McLURE P: Now, has it got to do with the GM aspect or - - -

McCUSKER, MR: Yes. Yes.

McLURE P: So if a conventional canola had come over as it did in 2008, that's not a problem?

McCUSKER, MR: Didn't come to that, your Honour. I don't know.

McLURE P: Well, it obviously – people had a completely different attitude to the conventional canola volunteers in 2008 than they did in 2010.

McCUSKER, MR: I think the - - -

McLURE P: I'm just trying to understand why.

McCUSKER, MR: Yes, I understand. Well, because there were only a couple of conventional plants, which have probably come across, they thought, with rabbits' droppings. So nothing was made of that. It's the extent of the incursion by the GM canola swaths.

MURPHY JA: But it has to become part of the production system, doesn't it? It can't just be that it's there. If it's not part of the production system or doesn't contaminate the production system, there's no scope, is there, for 3.2.9 to begin to apply, is there?

McCUSKER, MR: The system is the farm and the system is a system of organic farming, and if there is intruded into that any GM product which has been said to be incompatible with organic production – that's the starting point. What are you going to do about it? You have got GM canola seeds scattered over the place. What might happen? So all that the - - -

McLURE P: And what might happen? Let's finish that off. The sheep might eat it and you might get volunteers, but there's nothing else can happen.

McCUSKER, MR: No, there's not.

McLURE P: Okay.

McCUSKER, MR: There's no concern because he wasn't growing canola.

McLURE P: Yes, I know.

McCUSKER, MR: No concern about genetic transfer.

MURPHY JA: So that would never lead to a production system involving canola on this property.

McCUSKER, MR: No. No, it wouldn't. No.

MURPHY JA: So we're talking about a production in the system for growing sheep on the property.

McCUSKER, MR: Yes. Yes. The possibilities that these paddocks, because they had – they (indistinct) a rotationary farm, that he would sow wheat or oats or barley on the paddocks, which had within them GM canola, and the Gm canola might germinate at the same time. So it is conceivable that there would be a mixture.

McLURE P: So that's what I was asking you, to identify precisely what the potential ramifications were. We knew about the sheep, we knew about the volunteers, then I asked whether the seed could get into other crops with a mixture that's an admixture of some genetically grown – or some seeds or – and wheat.

McCUSKER, MR: Yes. Yes. I misunderstood your Honour. I thought you were talking about genetic transfer to the crops. But no.

McLURE P: No, no, no.

McCUSKER, MR: No.

McLURE P: I understand that there's no realistic prospect of genetic transfer in this case. I'm just wanting to know what the full consequences of seeds landing on the appellants' property is, as a practical matter.

McCUSKER, MR: As a practical matter, all that I can say is that – perhaps I should refer you to the inspection reports of the people who ultimately were the (indistinct) on the decision, or – and they appear – the inspection reports are of Kathe Purvis, green appeal book 1408.

MURPHY JA: I mean, this – I don't want to dissuade you, but we have got to say that this evidence tells us what it means, on the proper application of 3.2.9 there's some difficulty with that submission, isn't there, because it's ultimately an objective test that we have to apply.

McCUSKER, MR: Well, to the extent that it says anything about what it means, I agree it's irrelevant. But I was really referring your Honour to the comments which appear at 1409.

McLURE P: And which particular comments?

McCUSKER, MR:

> Extensive incidents of canola swath plants with full and broken seed heads sighted in paddocks 7, 8, 10 and 12. Sheep grazing in paddock 7. Canola heads obviously been eaten with only stalks remaining in place. Paddock 10, canola plants noted on the fence line. Paddock of origin was said by Steve to contain a GM variety of canola –
>
> Etcetera. And:
>
> This was not the only paddock canola – a strong southerly wind was blowing at the time.

I think what one can extract from that is that there was clearly a lot of evidence of canola seeds being scattered over the property. Then at page - - -

McLURE P: But, you see, that doesn't tell you anything. Nobody – we want to know what the consequences of the seeds are, and we want an exhaustive statement of what those consequences are so we can then make a determination as to what the meaning of contamination is and whether it conceivably applies to what you say it does. Like, in the production system; well, at the moment, we don't really know what the consequences are. We know you might get a volunteer canola plant. We know that the sheep might eat them, but - - -

McCUSKER, MR: And you may have – you may put a crop on into which the canola plants intermingle.

McLURE P: So you might have a wheat crop with a canola plant – a volunteer canola plant that has grown that you don't know of, and you harvest the wheat and the canola; is that it?

McCUSKER, MR: That's possible, yes. And there is a rigid approach taken, I know, by - - -

McLURE P: Well, no, really it's a proper construction of contamination. Unless we have some idea of what you mean by in-system contamination and what the potentialities are, you really can't make a decision. His Honour was focused to a large extent on genetic transfer.

McCUSKER, MR: He was, yes.

McLURE P: Which was ruled out in this case. Now, does contamination mean something other than genetic transfer? If so, yes, well, what's its scope and what are the potentialities here? We really need to understand sort of the farming aspect.

McCUSKER, MR: Yes.

McLURE P: And it's not obvious anywhere where you try and look to find what the consequences actually will be.

McCUSKER, MR: Well, if you have got – if you have got GM seed which is incompatible with organics on the farm, that of itself can be viewed as contamination, the mere presence of it. Your Honour quite understandably says, "Well, what are the consequences of that?" As far as I can see, they could be twofold. There's the consequence that stock may eat it. There's a consequence that - - -

McLURE P: Stock might eat it, and then it might germinate somewhere else.

McCUSKER, MR: Yes. Yes.

McLURE P: Yes.

McCUSKER, MR: Yes. So there's that possibility. There's the possibility that it will not only eat the plant but of course before it germinates, eat the seed, yes. And there's the possibility of a crop being put on there two years hence and the canola appearing at that time.

McLURE P: Okay. So you're harvesting the canola with the wheat.

McCUSKER, MR: Yes.

McLURE P: And you have contaminated your product in that broader sense.

McCUSKER, MR: Yes. That's a very broad - - -

McLURE P: Not a genetic transfer but of an admixture of canola – genetically modified canola with your wheat crop or something.

McCUSKER, MR: That's so, your Honour. Yes.

McLURE P: Are you able to assist? In these NASAA standards it tells you all of the products you're allowed to use, and you're allowed to use some genetically-derived products. Can you explain the difference between a GMO – a genetically modified organism – and the derived products that you're allowed to use in the system?

McCUSKER, MR: I will see if I can find out, your Honour. It doesn't say in the NASAA standards itself.

McLURE P: So what I'm thinking is if you have genetically modified canola seed and you make canola oil, I assume the canola oil after the processing is the derived product, not the organism; is that how it works? And that the seeds are always the organism?

McCUSKER, MR: No. If you have got genetic – GM - - -

McLURE P: Anyway, you can have a think about it.

McCUSKER, MR: I will have a think about it.

McLURE P: Because the prohibition applies to GMOs.

McCUSKER, MR: Yes.

McLURE P: And in the NASAA standard, you're allowed to use GMO-derived things – products.

McCUSKER, MR: Well, can I just take you, your Honour, to page 1751 of green appeal book - - -

McLURE P: 1751?

McCUSKER, MR: 1751, green appeal book 4, where the standards start at 3.2. And then 3.2.6, the reference you made:

> Inputs, processing aids and ingredients shall be traced back one step in the biological chain to the direct source organism from which they are produced to verify they are not derived from GMOs.

And then - - -

McLURE P: Sorry, where are you reading from?

McCUSKER, MR: 3.2.6, the top of page - - -

McLURE P: 3.2.6 on the following page.

McCUSKER, MR: Top of page 1752.

McLURE P: Yes. Except you're allowed – they specify in the annexures what you're allowed to use and what you can't use, and if you look at, say, page 1824, the products for control of pests, you can use non-GMO or GMO-derived input product.

McCUSKER, MR: I see, yes.

McLURE P: So I was just wondering why you have got – 3.2 relates to organisms, and your annexures tell you what you can use in organic farming, and it's clear that, at least in respect of some matters, you can use GMO-derived products.

McCUSKER, MR: Yes. Yes. But when you go through the list, your Honour, I must say it's a bit difficult to see how, for example, oil derived from GM canola could possibly cease to be an - - -

McLURE P: Look, I don't know. I'm just trying to understand the NASAA standard.

McCUSKER, MR: Yes. Yes.

McLURE P: You have got a prohibition against genetically modified organisms, and you go to the material and products that you can use and some of the things you can use are GMO-derived, and I'm trying to understand how all this works. That's all.

McCUSKER, MR: But none of it, your Honour – I will come back to that. But as I see it, none of it is referring to something which is capable of being converted into a GM product, as distinct from spraying weedicide, that kind of thing. It's very limited.

McLURE P: Well, I would have thought the genetically modified – and is a thing that's capable of genetic transmission, and that something that's derived might be sterile. But anyway, I don't know. I'm just guessing.

McCUSKER, MR: Yes.

McLURE P: Anyway, I will leave it to you.

McCUSKER, MR: I will come back to that, if I may, your Honour. It's, with respect, a valid point. It wasn't one that was raised.

McLURE P: No, no, but you have got to construe the standards.

McCUSKER, MR: You do indeed.

McLURE P: You have got to understand how it all hangs together.

McCUSKER, MR: Yes.

McLURE P: And at the moment I'm just trying to work it out.

McCUSKER, MR: Yes. Can I just mention a few other things that were referred to in the reports, because it was the reports that led to the view that there was an unacceptable risk of contamination of the process. And there's – I have referred you to Kathe Purvis. Claire Coleman at 1426 gives a very full report of what she saw, and I think it all really adds up to the fact that there was a wide dispersal on those two paddocks of - - -

McLURE P: And the capacity for a wider even dispersal as a result of the waste from the sheep.

McCUSKER, MR: That's right, yes. And then there was evidence of – well, his Honour accepted at reasons 642 the likely persistence of a canola seed bank for two and a half years. That's at reasons 652. Yes, 642, your Honour:

> Researched and determined canola seed banks and commercial (indistinct) quickly. After a canola harvest, no viables should remain after two and a half years.

And a conclusion was drawn at a rate of seed viability (indistinct) that at three and a half years no germinal canola seed remained, and those observations may be accepted. So there's the potential appearance of canola volunteers for between two and a half years, and refer also there – and I'm here looking at WAB-32, your Honour, footnoting at page – at footnote 110, the report of Rene Van Acker. And there were volunteers. Not many, I must

say, but there were volunteers which appeared during the growing season. His Honour found that at reasons, paragraph 611.

So the question is not whether this was contamination, and I urge your Honours – this was a view taken by the certifying authority which had the responsibility for ensuring that not only product but processes conformed rigidly to the requirements of the organic certification. And so the question then is, well, having regard to the – if there was no incursion at all on the property, one would say, well, you couldn't possibly reach the conclusion that there was an unacceptable risk of contamination. But it's our submission that it's not for the court, with respect, to superimpose its view of what's an unacceptable risk.

McLURE P: No, no. We have got two roles. We have got – the first one is to construe the standard, and if the – if NASAA – if the organisation got it wrong, well, then they got it wrong and you have to live with that. The respondent also says that even if it was within the power to decertify some of those paddocks, it was unreasonable to do so. So we have to look at those two things, don't we?

McCUSKER, MR: Two, yes. Yes. But bearing in mind that it is the question of whether a certifying authority in this context was acting unreasonably.

McLURE P: Well, I assume unreasonably means the sort of Wednesbury-type unreasonableness.

McCUSKER, MR: Yes.

McLURE P: So it's not some little hurdle they would have to – it's a big hurdle to jump.

McCUSKER, MR: It's a big hurdle, your Honour, yes, because it's for the certifying authority to determine whether it thinks there's unacceptable risk. And it took that view. The question was is that view so unreasonable as to be untenable, effectively. And there was a lot of work went into it to – the certifying authority sent a number of inspectors to see what the problem was, and they concluded – and I agree – their conclusion that this was contamination doesn't mean that it was contamination. Well, they concluded that due to the incursion of all these seeds, there was an unacceptable risk of contamination.

Now, it's not, "Was there contamination?" It's was there a risk of it? And we say it's a view on which – I suppose a subject on which reasonable minds may differ, but

that's not the point. If there was a risk in the reasonable view of the authority of contamination, that's enough. It may be said by others, "Well, we don't think it was a risk," but the question is whether this authority acting under a very rigidly-controlled organic regime was unreasonable in the Wednesbury sense, as your Honour said, in taking the view that there was a risk which was unacceptable to it. So although his Honour said, "Well, contamination" – being genetic contamination, and we would accept that if that's what it meant then it would be difficult for the certifying authority to say, "Well, there was an unacceptable risk".

McLURE P: Well, it would be impossible, wouldn't it? Once the trial judge has found that there was no risk of crossing, and if contamination means crossing, then end of story.

McCUSKER, MR: Yes, that's it. That's the end of story.

McLURE P: And there's no challenge to that aspect of the decision. It's just the scope of the meaning of contamination.

McCUSKER, MR: That's right, yes. Yes. Now, I have taken your Honours to ground 2, and we set out in – in paragraph 17 of page 20 - - -

McLURE P: Are these your submissions?

McCUSKER, MR: These are our submissions, I'm sorry, your Honour. WAB-20.

McLURE P: So ground 3 is foreseeability?

McCUSKER, MR: It is.

McLURE P: These are the ones where you're challenging findings of fact?

McCUSKER, MR: Yes.

McLURE P: And these are the ones where your schedule doesn't comply with 7.4

McCUSKER, MR: That's right.

McLURE P: Because we want to see all of the evidence that supports the finding or the finding that you challenge or the finding that you're seeking, and all the evidence to

the contrary. And that doesn't mean we get, you know, an undifferentiated number of transcript quotations.

McCUSKER, MR: No.

McLURE P: We want the substance of the evidence for and the substance of the evidence against.

McCUSKER, MR: Understood, your Honour. Ground 4 was – I will come back to ground 3. There's no point in going through it until I get you that material, your Honour.

McLURE P: Yes.

McCUSKER, MR: Ground 4, vulnerability, self-inflicted. We say it can't be maintained, for reasons I have already mentioned. Unless your Honours wish to hear further on that, I don't propose to pursue it. Duty to take reasonable care. We – in ground 5, misconstrued. I have taken your Honours to that. Misconstruction of what the pleading was.

McLURE P: What the pleading of the scope of the duty was.

McCUSKER, MR: Yes. His Honour took it that it was a duty to ensure, and we certainly don't say that. It's just a duty to take reasonable care.

McLURE P: Reasonable care.

McCUSKER, MR: Yes. Ground 6 is very short, but his Honour took the view – or expressed the view that common law negligence actions in Western Australia have been rendered more difficult by the introduction of the Civil Liability Act. His Honour didn't actually explain why he took that view. We say that the Civil Liability Act doesn't present a barrier at all, and in fact to the contrary. When one analyses the requirements of section 5B of that Act, those requirements are well and truly satisfied in the present case.

McLURE P: Well, I have yet to see a case where the common law and the statutory requirements would produce a different outcome, so that might be a reliable test.

McCUSKER, MR: I think so, your Honour. Yes. Ground 7 deals with the Civil Liability Act, and - - -

McLURE P: No, ground 7 is breach. This is where you want further facts.

McCUSKER, MR: Yes.

McLURE P: And you say it's against the weight of the evidence.

McCUSKER, MR: Yes.

McLURE P: In paragraph 23, for example. No, no, it's - - -

McCUSKER, MR: I don't think so, your Honour. No, it's – in ground 7 we are challenging the learned judge's finding that there was no breach of a duty of care.

McLURE P: But you also challenge some findings as being against the weight of the evidence.

McCUSKER, MR: Yes. Yes.

McLURE P: Which is a challenge to a finding of fact.

McCUSKER, MR: Fact, and I think - - -

McLURE P: A breach is of course a finding of fact.

McCUSKER, MR: Of course, but it - - -

McLURE P: But there are elements here of - - -

McCUSKER, MR: It's the question – I understand your Honour's point entirely. What are the facts which give rise to the challenge to the duty of care finding?

McLURE P: Yes.

McCUSKER, MR: But some of those facts, your Honour, are not in issue.

McLURE P: Some aren't, but the finding that he had legitimate agricultural reasons to swath were, you say, against the weight of the evidence. Now, that's what you took us to this morning, I suppose.

McCUSKER, MR: Well, your Honour, it's a finding which we don't challenge directly. We accept that in one sense of that term there was a legitimate agricultural reason for swathing, because swathing, we accept, was a fairly common – in fact, a very common way of harvesting.

McLURE P: Can I just draw your attention to paragraph 24 of your submissions.

McCUSKER, MR: Sure.

McLURE P:

The judge erred in finding that the respondent had legitimate agricultural reasons –

And you go on to say why he made that error.

McCUSKER, MR: Is that paragraph 39, your Honour?

McLURE P: 24.

McCUSKER, MR: 24 is the ground. Sorry, yes. I was looking at the submissions.

McLURE P: Sorry, paragraph 24 of the very lengthy grounds.

McCUSKER, MR: Yes.

McLURE P: Which approximate to submissions anyway, but - - -

McCUSKER, MR: Yes.

McLURE P: Anyway.

McCUSKER, MR: Let me deal with that, if I may, your Honour. We accept that there were legitimate agricultural reasons for swathing.

MURPHY JA: So you don't press the first part of paragraph 24.

McCUSKER, MR: What we – well, no, we don't, in the sense that - - -

MURPHY JA: No error in that finding, but you want to go on and talk about its significance, do you?

McCUSKER, MR: No. It's the weight that's given to it that really – we don't challenge the finding that there were legitimate - - -

McLURE P: See, this is the odd thing about these grounds of appeal. Grounds of appeal against findings of fact are not done by reference to weight or relevant considerations. This is not an administrative decision appeal. You have to say, "This finding is wrong because it's against the weight of the evidence, and here's the evidence". Now, these

grounds of appeal tend to sit on the fence and don't understand the task that's required, but the task that's required is either the finding is right or it's wrong.

McCUSKER, MR: Yes.

McLURE P: And if it's wrong, you have got to say why it's wrong and you have to refer us to all the evidence. So it's really a question of making it clear to us what facts you say he found that are wrong and tell us why they're against the weight of the evidence, or for any finding that you are seeking that he didn't make, you have to do the same thing. Now, I know the grounds of appeal aren't structured like that, but at the end of the day, we can't intervene unless there was an error made in his findings of fact.

McCUSKER, MR: Yes.

McLURE P: So we need to see all of the relevant evidence, as you are aware.

McCUSKER, MR: Certainly, your Honour. But could I take you to that legitimate agricultural reason, just to – we accept that the – or I accept that there was a legitimate agricultural reason for swathing.

McLURE P: Was there a legitimate agricultural reason for this man swathing at this time? Is that the difference?

McCUSKER, MR: That's the difference because of the impact that was likely to have on his neighbour. We say that swathing as such is certainly something that is commonly done, but the question is what care should be taken when you're swathing a crop immediately opposite an organic neighbour? So legitimate agricultural reasons is capable – there's a certain ambiguity, in that it is certainly legitimate to do it and it's a well-accepted agricultural operation, but does that mean that you can do it regardless of the impact on your neighbour?

McLURE P: Well, I thought the appellants' argument was that there are two ways of harvesting, one is direct harvesting, one is swathing. The risk of contamination in the broad sense, as you use it, is higher with swathing and non-existent with direct harvesting. Therefore, in the circumstances of this case, it was unreasonable to swath. That's it, isn't it?

McCUSKER, MR: That's it.

McLURE P: Yes.

McCUSKER, MR: Yes. Your Honour just very quickly summarised what really is the - - -

McLURE P: That's it, isn't it?

McCUSKER, MR: That's what it's all about, yes.

MURPHY JA: That's the appeal, is it?

McCUSKER, MR: Well, that's the appeal, but then you have got to – the other point we're going to discuss.

McLURE P: Not unless you – not unless contamination is a bit wider than genetic crossing.

McCUSKER, MR: That's right.

McLURE P: Yes.

McCUSKER, MR: Yes. And in relation to, I suppose, the breach of the duty of care, we do point out at paragraphs 39 and 40, 41, the relevant fact, that Mr Baxter had direct harvested all of his other crop. He had not experienced any - - -

McLURE P: Well, he had never swathed ever before because he didn't have a swathing machine and he had to hire a frontend something-or-other to – for his harvester.

McCUSKER, MR: He had never swathed – no. He did. Well, he had never swathed before and he never swathed after.

McLURE P: Well, that might be because of the legal issues that have arisen, so it was unclear in that regard. It didn't seem that that may have been a choice that was unaffected by the existence of this litigation, which you might think is understandable.

McCUSKER, MR: His answer to the question of why he direct harvested was simply, "That's the way I have always done it". There was no question of saying, "Well, I wanted to see what happened in this case".

McLURE P: See, paragraph 39 of your written submissions challenge this legitimate agricultural reasons for swathing, and saying – and giving weight to it has been decisive and that was against the weight of the evidence. That's what your ground – that's what your written submission is saying.

McCUSKER, MR: Yes.

McLURE P: Anyway.

McCUSKER, MR: Well, I want to make it clear, your Honour. We say that in the present case, he shouldn't have swathed.

McLURE P: It was unreasonable.

McCUSKER, MR: It wasn't – yes, because of a number of circumstances. One was the impact on the neighbours. The other is – well, how important was it to swath? It's still legitimate to swath, but how important was it when he had direct harvested his other crops? And he conceded that he had never had any real problems with cracked grain, which is one of the reasons for swathing, to avoid that. They are all those things that are listed here in paragraph 40: (a), that he had never swathed before. He had always directly harvested. The evidence of the respondent, that he had always direct headed, and he had not experienced a significant problem with pods shattering and could achieve an evenly-ripened crop.

And that was his evidence at 685. And it's still legitimate to swath, but the question is balancing the interests – and it's always a balancing question. Balancing the interests of his swathing against the interests of the organic neighbour having the risk of losing his certification, how heavy in the scheme of things and the balance is the importance of swathing? Because certainly it's legitimate to say if you swath you're going to get rid of more of the weeds if they have grown and you take the heads off.

It's also legitimate to swath because you might reduce the incidence of cracked heads, if that has been a problem. But he has said, "Well, I have direct harvested before and since, and I haven't experienced any real problem with cracked heads". Or with an evenly-ripened crop, which was the other point made about swathing, that if you swath a crop you're going to swath some pods which are in the ripening stage as well as ripened pods, and so by leaving them on the ground to dry you're going to get a more even result in the end. But he said, "I have never experienced a problem with that anyway".

McLURE P: Do they lay on top of the stalks, do they, that have been cut?

McCUSKER, MR: Yes, they do. And Professor Van Acker said, "Well, if you're going to do that, you have got a

problem with possible wind dispersal. You should use a canola roller to press them down into the stalks and that way you will have less of a wind problem". So we say although – and in fact, 41 of our submissions, paragraph 41 at appeal book 25 really makes the point that there were agricultural advantages but they were theoretical. There's an agricultural advantage in swathing, but in this case it wasn't such an advantage as to outweigh the importance of taking reasonable care to ensure that his neighbour's organic status was not imperilled.

So if you have got – for example, if he had come to court and said – which he didn't – "Look, I had an enormous problem in all of my paddocks when I was direct harvesting. I only had the money to do swathing of these two paddocks, but at least with these two I didn't have the problems I had with the other paddocks". It was nothing like that. To the contrary. He said, "I never had any real problem with direct harvesting". So if you have got someone who has that experience, even if he wants to try out swathing, why do it on the two paddocks adjacent to his organic-farmer neighbour?

So as your Honours appreciate, when looking at the situation, you really have to look at the balance of the interests of each party, and it's not a case where, in this case, the Baxters can say, "Well, it's our land; we can do what we like with it". The question is whether refraining from swathing and simply direct harvesting, as he had always done, would be to impose too much of a burden on him compared with the distinct benefit of avoiding the risk to the organic farmer.

And note on this point at paragraph 43 of our submissions, your Honour, at page 25, his Honour found that the adjacent paddock called Mailbox, which the respondent regarded as having an herbicide-resistant rye grass problem, was planted with conventional canola and direct headed. So it lends credence to the view – and we don't say that his Honour was wrong in talking about legitimate agricultural reasons for swathing, but we say it lends credence to the view that although there were some reasons, they weren't so important as to outweigh the necessity or the duty to take reasonable care. And it was clear that on all the evidence there was a real risk that the swaths sitting on top of the stalks could be blown over to the neighbouring property.

McLURE P: Well, the trial judge found that swathing assisted his weed control problems.

McCUSKER, MR: I think it did, your Honour, yes.

McLURE P: Anyway, you challenge some of these findings in the written submissions, the finding about – that there were weighty agricultural considerations that informed his decisions – informed and supported his decisions – decision to swath the Roundup Ready canola. Anyway - - -

McCUSKER, MR: We don't – we certainly challenge them as being weighty in the scheme of things, but we say – but we don't challenge the finding that swathing is a legitimate agricultural means of harvesting.

McLURE P: Well, but the point I'm trying to make is if he has got compelling farming reasons to do what he did, for example, to address the herbicide-resistant rye grass, and his Honour said, "Well, it's not then unreasonable to swath". That's what his Honour did. Now, you – in your written submissions, you challenge that analysis of the trial judge going to rye grass existence and other things as well.

McCUSKER, MR: We don't challenge the view that it's legitimate in agricultural scenes to swath. There's no question about that. And we don't challenge the view that swathing assists with a weed problem. What we do say is that it wasn't a compelling action. He wasn't compelled to do it and it wasn't a weighty consideration. It was something he could have done or not done.

McLURE P: Well, that's just a departure from the written submissions, that's all, and if you're intending to depart from your written submissions we will accept you at what you say and ignore those aspects of the grounds.

McCUSKER, MR: Well, we certainly – I certainly don't submit that there was no good reason at all to swath. We say that the reason that you swath in this circumstance is far outweighed – the benefits of swathing – far outweighed by the duty of care owed to his neighbour, and the benefits were not weighty at all in this case. He could have, without any imposition of any kind, simply direct harvested elsewhere.

McLURE P: Is that a convenient time, Mr McCusker?

McCUSKER, MR: Yes, your Honour. Certainly.

McLURE P: The court will adjourn til 2.15.

(LUNCHEON ADJOURNMENT)

McLURE P: Mr McCusker.

McCUSKER, MR: Thank you. I've had the opportunity to look up what your Honour, the President, raised this morning about the schedule and the question of use of products which are derived from GMA. It starts at page – green appeal book 1821. It's green appeal book 4. And if I could take you to the various pages.

McLURE P: Is there just a short explanation, because I've been through it and I've seen it all.

McCUSKER, MR: Okay.

McLURE P: Is it?

McCUSKER, MR: Well, yes, it's a short explanation. There's no permission for any GMO or GMO derived products.

McLURE P: All right. You better, then.

McCUSKER, MR: I think. Page 1822, the second of those:

> Algae, not genetically modified

Then chelates – about halfway down:

> Chelates are non-GMO derived

McLURE P: No, no. But I've marked all the ones that say GMO derived. Rather than go through the negatives, it might – go to annexure 2 on page GAB1824. And you will see the first one; it says:

> Source and specifications, non-GMO or GMO derived

Does that – is that the negative? You can't have - - -

McCUSKER, MR: The negative.

McLURE P: - - - GMO or GMO derived.

McCUSKER, MR: That's right. Yes. And, just to top that off, at page 1826 - - -

McLURE P: Just to make it clear, so, non-GMO or GMO derived means you can't have - - -

McCUSKER, MR: You can't do it.

McLURE P: You can't - - -

McCUSKER, MR: You can't have it.

McLURE P: Yes, at all.

McCUSKER, MR: Non-GMO and non-GMO derived.

McLURE P: Non-GMO is not genetically modified - - -

McCUSKER, MR: That's right.

McLURE P: - - - right, but, surely, you can have not genetically modified.

McCUSKER, MR: You can't have either: non-GMO and you can't have GMO - - -

McLURE P: Non-GMO is not GMO, isn't it?

McCUSKER, MR: That's right. And you can't have GMO or GMO derived, and the same applies to the top of the next page:

> Non-GMO or GMO derived

and, over at page 1826 - - -

McLURE P: Okay.

McCUSKER, MR: - - - there's a prohibition:

> All synthetic pesticides and weedicides and any product derived from genetically modified organisms

McLURE P: Okay. So, the source and specification is the negative, not the positive.

McCUSKER, MR: It's the negative.

McLURE P: It's a very odd – okay.

McCUSKER, MR: Yes, that's right. It appears, too, at the foot of page 1829. I won't take you right through it, but through this – 1833, halfway down:

> Non-GMO or GMO derived

That's about a third of the way down at 1833. So, and that's a negative, non-GMO or GMO derived. It doesn't

mean, well, you can't have GMO, you can have GMO derived, so the contrary. And, at 1837, at the foot of the page:

> Socioeconomic considerations, consumers' perception. Inputs must not meet resistance or opposition from consumers of organic products. Input might –

McLURE P: No, no. It's just the – that third column, where you say non-GMO - - -

McCUSKER, MR: Yes.

McLURE P: - - - it's just an odd way of putting - - -

McCUSKER, MR: It is. It's a - - -

McLURE P: - - - things, but that's what the explanation is, is it?

McCUSKER, MR: That's what it is, yes. Sorry. Can I also just take a little further on the question of the contamination of the production system, and give your Honours a couple of references. Goldfinch, who was one of the inspectors, at page 474, between (a) and (b), where she talks about the issue – when she inspected it, thousands of seed lying on the soil which is the base of the current and future crops, and there was so much, you couldn't pick it up and remove it.

McLURE P: Well, she wasn't one of the inspectors. She was the - - -

McCUSKER, MR: She was one of - - -

McLURE P: She was one of the - - -

McCUSKER, MR: - - - the final deciders, the decision-maker.

McLURE P: Yes, who got severely criticised by the trial judge.

McCUSKER, MR: Yes. Yes.

McLURE P: But that, really, doesn't answer the issue either. I mean, we were looking for what the actual practical consequences were, not just the mere presence on the - - -

McCUSKER, MR: No.

McLURE P: - - - in the system.

McCUSKER, MR: And all that I can say in that regard is that sheep were observed by the inspector eating the canola. It was likely, therefore, that the sheep would spread the seed further. It was impossible to calculate how far it would go and to what extent it would be spread. It would germinate, at some stage, maybe a week's time or so, maybe longer. Some of it wouldn't germinate for two and a half years or thereabouts, so you've got this ongoing concern about the possibility of GM canola growing in this organic area. And possibly – one of the – yes – at Goldfinch, again, at 473, there was – at the top, she says:

> There were thousands of seed lying all over –

more than half of the property, and, further, she was asked:

> There was no genetic transfer to another organism? I believe some sheep had transferred GM material down their throats.

And, then, towards the foot of the page, between (c) and (d):

> The certification is a comprehensive package, comprising the soil, the plants, the crops, the weeds, the livestock, the manure and the water.

And Marsh gave evidence of his concerns at GAB280. It talks about the fact that it's in the production system. Now - - -

McLURE P: I think part of the generality of this is quite unhelpful, from your client's perspective. You've specified it to the extent that you can.

McCUSKER, MR: Yes. I don't think I – it's - - -

McLURE P: That's – that's - - -

McCUSKER, MR: That's as far as one can - - -

McLURE P: That's as far as it went, wasn't it?

McCUSKER, MR: Yes. That's as far as it went in terms of what might be the possible impact. And, if that did happen, then there's ground for concern that there's an unacceptable risk of contamination.

McLURE P: Well - - -

McCUSKER, MR: Unless contamination is confined to genetic transfer.

McLURE P: And contamination meaning no more than the growth of volunteer canola plants, GM canola plants.

McCUSKER, MR: Well, that's right, ultimately, but – although the sheep can eat the seed and therefore the sheep are then eating genetically modified food.

McLURE P: But these sheep weren't organic sheep - - -

McCUSKER, MR: No, but there again - - -

McLURE P: - - - because they had been drenched.

McCUSKER, MR: No. These sheep weren't but - - -

McLURE P: But the next lot.

McCUSKER, MR: - - - the next lot could be, yes. So, look, this is – to use the sheep term – a bit woolly perhaps, it might sound, but the real question was: looking at all this, the thousands of seeds scattered, the sheep eating and dispersing them even further, can it be said that it was unreasonable, in the Wednesbury sense to take the view that there was an unacceptable risk of contamination, and that's all they said; no more than that. Your Honour, on the factual question your Honour raised with me, and a very – I might so – very valid point about the question of whether there's a schedule - - -

McLURE P: There is a schedule. It just doesn't comply with - - -

McCUSKER, MR: Doesn't – doesn't give it.

McLURE P: No.

McCUSKER, MR: No. No.

McLURE P: Well – and nor does the respondents, which must have followed this template, it seems to me.

McCUSKER, MR: Yes. Now, it don't know what I can do on my feet at the moment about that.

McLURE P: Well, I don't know that there's anything anyone can do on their feet, and, subject to hearing from the

respondent when we get to that, I think all of those claims that seek a finding that the trial judge erred in making a finding, or seeks a finding that the trial judge didn't make - - -

McCUSKER, MR: Yes.

McLURE P: - - - subsequently file schedules identifying in summary form the substance of the evidence supporting the finding that you seek - - -

McCUSKER, MR: Yes.

McLURE P: - - - and the evidence that's against the findings, so that the court has all of the material, which is crucial in a case like this, which is so fact intensive.

McCUSKER, MR: It is. Thank you, your Honour, for that. Could I move, then, to the ground 7. I don't propose to go right through this, your Honour, but, in ground 7, we're saying that the learned judge erred in holding the respondent in breach in duty of care, and we set out a number of errors. And, indeed, at para 34, we refer to the section 5B factors and the CLA, and list what we say are the relevant factors that should be taken into account.

The learned trial – we're not, as it were, differing with the learned trial judge's analysis of the factors because, with respect, he didn't make any analysis of the 5B factors, but there are a number of matters there that we say – I take you, however, to paragraph 40, which your Honour raised with me, the multiple agricultural advantages. We don't seek to differ on the question of whether swathing confers advantages. It is merely a question of the weight in these circumstances, looking at the balance between the parties.

McLURE P: So, we're to accept, are we, that there was a significant infestation of herbicide-resistant rye grass on the – on the two areas of the respondent's property where they sowed the GM canola?

McCUSKER, MR: We – I don't know that I would use the word "significant", your Honour, but there was certainly an infestation of rye grass there and elsewhere. The question was, or is, whether departing from the usual practice that he adopted over 10 years of direct – direct heading, which seemed to have been satisfactory, was, in all the circumstances, compelling – I think your Honour used this morning – in the situation. There's no evidence from which

you could conclude that it was really compelling that he should swath.

McLURE P: All right. So, you don't press, say, paragraph 44 of your written outline, which says:

> There was no satisfactory evidence that the respondent had a problem in those paddocks with herbicide-resistant weeds.

McCUSKER, MR: No. We accept there must – there's some evidence that there was a weed problem. There was everywhere. What we do say, however, is that the weed problem was not such it needed to have the swathing, because the weed problem was really first and foremost dealt with by the spray of the Roundup. So, the swathing – the benefit of the swathing was then comparatively minor.

McLURE P: Well, there's no finding to that effect by the trial judge, and paragraphs 44 and 45 – 45 is continuing on to say that there were other herbicides that were available to address this resistant – herbicide-resistant weed. But I assume we just ignore all that, do we? You really – we ignore these aspects of your written submissions?

McCUSKER, MR: No, your Honour. I'm afraid we don't, because those matters are relevant to consider whether – whether it was necessary to swath, although, I must say, having – just looked more closely at it, we don't – we don't contend that deciding to use Roundup was wrong. Clearly, it was a sensible thing to do. What we do say is – can I just – I've heard a muttering from the right, so I would perhaps reserve my - - -

McLURE P: I'm just looking at these submissions that direct our attention to - - -

McCUSKER, MR: To the use.

McLURE P: The factual foundation for the decision to use swathing, which is the existence of the herbicide-resistant rye grass, and 44 and 45 go to the alternatives available - - -

McCUSKER, MR: For weedicide.

McLURE P: - - - for weed - - -

McCUSKER, MR: Yes.

McLURE P: - - - control of that herbicide, and, so, I just really need to know whether we have to look at that or not.

McCUSKER, MR: Yes. I will just give that a bit more thought - - -

McLURE P: Yes. Okay.

McCUSKER, MR: - - - your Honour. Causation, really, comes back, your Honour, to the question we discussed earlier. It's at para – around 8. Our submissions are at page 28. And, essentially, I think this comes to the question of whether the loss, which the appellant suffered, was caused not by the incursion but by the wrongful decertification. In other words – at the risk of repeating myself, in other words, the NCO was not entitled to form that view.

McLURE P: Yes, but his Honour does appear to decide that there was no factual causation, which must be wrong.

McCUSKER, MR: And the respondents, I see, concede that that's wrong.

McLURE P: So, his analysis is wrong.

McCUSKER, MR: Yes.

McLURE P: So, the question is: was there factual causation? The answer is: yes. Was there legal causation which goes to the broader policy implications and, indeed, whether there was an intervening act that broke the chain of causation - - -

McCUSKER, MR: That's right.

McLURE P: - - - being the wrongful or unreasonable decertification of a number of the paddocks.

McCUSKER, MR: Yes. Yes. So, that's what it focuses on. Legal causation is an issue. Factual is common ground, there was. And legal causation raises the question of whether – even if a different view might be taken of whether there was an unacceptable risk, whether that's sufficient.

McLURE P: Well, I think they run it on two grounds. As a matter of construction, it wasn't open, and, if it was open, it was unreasonable.

McCUSKER, MR: Yes. Yes. Grounds 8 and – or, sorry, ground 9 and 10 deal with this question of the construction of the NASAA standards and the application. We agree that the question of the meaning of contamination is a contractual construction point, but it must – and it must have regard to NASAA standards as a whole. So, we start with a statement of incompatibility between GMOs and organic production systems in part 3.2, which appears at GAB1751. Thanks. And it's not just finished products, of course; it's production systems.

MURPHY JA: That says the deliberate or negligent exposure of organic production systems or finished products is outside outside organic production principles.

McCUSKER, MR: Yes.

MURPHY JA: There's no deliberate or negligent exposure here, is there?

McCUSKER, MR: Well, we say – well, there is exposure, whether it's deliberate or negligent. It's certainly not deliberate, but if you've got a property on which – which is certified organic and, then, someone brings in, via negligence, some GMO product, then – it doesn't matter how it comes, and I put it shortly. It doesn't matter how it gets there because all that the certifier is concerned about is is there any GMO there.

MURPHY JA: But is this not talking about the deliberate conduct or the negligent conduct of the operator?

McCUSKER, MR: With respect, no. That couldn't be the case because that would mean that if some third party were to put – accidentally or deliberately – some form of GM product or material in an organically certified property, that wouldn't call for decertification, no matter how extreme it was.

MURPHY JA: Well, there may be a good reason for that, because the operator, in that case, can't do anything about it. But isn't 3.2 essentially about managing the property, managing the operation?

McCUSKER, MR: It goes, in our respectful submission, much deeper than that. These standards are intended to protect the consumer who wants to buy organic product. The consumer doesn't care how the mixture of GMO got onto the property, and nor to NASAA. Their concern is whether or not there is GM material on the property – if it is; doesn't matter who took it there.

MURPHY JA: A non-negligent but inadvertent introduction or exposure; that's not covered, is it?

McCUSKER, MR: Non-negligent or inadvertent.

MURPHY JA: Non-negligent but inadvertent - - -

McCUSKER, MR: But inadvertent.

MURPHY JA: - - - exposure.

McCUSKER, MR: No. No, it's not.

MURPHY JA: Well, that would suggest, doesn't it, that it's not simply the exposure.

McCUSKER, MR: Well, it does - - -

MURPHY JA: It must be something more.

McCUSKER, MR: Yes. With respect, you've got to look at what the aim of these provisions is. The aim is not to deal with some kind of fault on the part of the operator. It's to deal – it's not directed to the operator, really. It's directed to how to ensure that the organic farm remains organic, otherwise you would have the extraordinary situation – so, say, if someone brings GM product on – no fault of the operator. So, the operator says, "NASAA, you can't decertify me. I didn't do it."

MURPHY JA: Well, in your argument, the words "deliberate" or "negligent" really don't have any work to do, do they?

McCUSKER, MR: Don't have much, no. They're a guide, but that's all there is. It's not an exclusive definition of what the problem is. It's simply saying that's one instance where it will be a problem, but – and that's even where evidence of GMOs is not detected in the finished product. And, then, in part 3.2, there is – if I can take your Honours to the introduction to the national standard.

McLURE P: So, we're finished with the NASAA standard, now?

McCUSKER, MR: Not yet. I want to come back to it, your Honour, if I can. Page 1843 and the introduction.

McLURE P: Is there anything contextual that you want to refer to in the proper construction of 3.2 of the NASAA standards, because I envisage you going off to the next issue of about whether it's supplementary or - - -

McCUSKER, MR: It's – it's complementary, yes, it is.

McLURE P: So there's – you've finished with your construction point of the NASAA standard?

McCUSKER, MR: No, I haven't, your Honour. Sorry.

McLURE P: Okay. Just - - -

McCUSKER, MR: No. The other point that I wish to make is that, if you look at the guiding principles in 3.2, you have to come to the conclusion that what is aimed at there is an insurance that GMO, in any form at all, doesn't become admixed with an organic system. And that's to read the whole of it, and that doesn't matter – the causation of the admixture, or the bringing onto the property. Merely having it on the property, even if it's not detectable in the product, of itself, can give rise to a problem of decertification.

Now, 3.2.10 refers to the decertification – sorry, the risk of contamination; any sites known to be within the radius. So, there is a real concern that anything within a radius of 10 kilometres where there's a genetically modified product or crop is perceived to be at risk of contamination. And, then, 3.2.11:

> Contamination of organic product by GMOs that results from circumstances beyond the control of the operator may alter the organic status of the operation.

So, it doesn't matter. It doesn't say absolutely, because it depends upon the degree of contamination, but it doesn't matter whether it's beyond the control of the operator or not. Coming back to the main point, the guiding principle is how do we ensure that the product itself comes from an organic system. So, if you have an unintended exposure to a GMO, then, NASAA standard 3.2.5 would apply. Operators – I'm sorry, 3.2.5. No. I'm sorry, I misread that. I withdraw that.

Pass on to ground 10, if I may. I don't think I can say any more about ground 9 other than the NASAA standard has, as its central objective, to ensure that the organic system is protected. It doesn't matter how it happens. And the learned trial judge at – just mentions at page 508 – paragraph 508 – said:

> The second paragraph of NASAA's general principle 3.2 is expressed on a basis that even a non-detection of GMOs is not decisive.

Which is – we agree. This principle is expressed on a qualified basis there has been deliberate or negligent exposure. With the, we don't – if, by that, his Honour means that this is confined to deliberate or negligent exposure by the organic operator, in our submission, it's much broader than that. It's only if you look at the rules and the standards in the sense of only applying to certain faulty or – actually which are the fault of the operator, you can get to that situation. It doesn't matter where it comes from.

Ground 10, standard 3.2.9 – (indistinct) before you – operates where there's a risk of contamination. It doesn't require contamination to be established or even likely. 3.2.9 doesn't depend upon whether there's any improper conduct or default on the part of the organic operator. The standard simply operates where there's an unacceptable risk of contamination, wherever it comes from. And I think that deals with the point that I think, your Honour, Justice Newnes raised with me. It does matter – it's not qualifies by the fault of the operator or words to that effect.

So, I think I've dealt, your Honours, with all of the evidence dealing with what the impact of this seed – dispersed canola seed would have. I will just mention very quickly – and it's in our grounds, in our submissions, so I won't repeat them – but at paragraph 77, where we say:

> NCO was entitled to conclude the continued presence entailed an unacceptable risk of contamination

and we've given you the footnote reference, but, having regard to the extent of the contamination, which was widespread, the absence of a practical and reliable means of ascertaining the extent of the seed bank, and that's, of course, because, first, it was impossible to detect these tiny seeds which had been dispersed by the wind; second, when the sheep ate them, as they were eating them, then the question of dispersal becomes even more difficult. Evidence to the likely persistence – I've taken your Honours to; seed bank for two and a half years. Potential there for canola volunteers; we're looking at the time in 2010. The fact is that only a few volunteers apparently surfaced doesn't matter. The question is: was there an unacceptable risk at the time.

And we say that it cannot be said that the view taken was unreasonable, having regard to the importance. I turn to ground 11, which is the ground of nuisance, the alternative plea of nuisance. That was said, in our

submissions, refers to an unreasonable interference in the use or enjoyment of some interest or right with land, but physical or material interference is not necessary.

McLURE P: Has that actually been – well, ordinary, nuisance is divided into physical damage and then loss of amenity, which is noise and other impacts on a person's interest in land. Has it ever been held that economic loss that occasions no physical damage falls within the category of nuisance? Because it's not really an amenity loss that is being complained of. It's complained – what you're complaining of is economy loss occasioned by something that didn't produce physical damage, i.e., there's no relevant genetic transfer or anything that you might even come close to saying that. So - - -

McCUSKER, MR: Well, your Honours, with respect, the landing of the seed on this property – the land of the seeds or the swaths on the property is just as much physical damage as in the case of dust settling on a property or - - -

McLURE P: Is there just authority that you've got for that, Mr McCusker?

McCUSKER, MR: I've got a list of authority – where are they. The lists. I'm told that the industry of my learned friends has produced a bundle of authorities and they deal, conveniently, that they've got a list tagged with the relevant authorities, and I will just hand them up to you, if I may.

McLURE P: Well, we've got them. It's just that they don't address this issue, I don't think. So, I'm just wondering whether you've located any authority particularly on point that would describe this as physical damage. Are you suggesting that the landing of the swaths on the land itself - - -

McCUSKER, MR: Is physical damage. Yes.

McLURE P: Are you?

McCUSKER, MR: That's what we say.

McLURE P: This has been exercising courts' minds around the world, and no one – as far as I can see, there's no authority to that effect, so - - -

McCUSKER, MR: Well - - -

McLURE P: - - - where are you getting – what's the basis for the proposition that you're putting, then?

McCUSKER, MR: Well, may I start by referring – perhaps, your Honour will correct me, but, in Southern Properties, your Honour said that - - -

McLURE P: That was a case of property damage. The grapes had gone through a chemical - - -

McCUSKER, MR: Change. Yes, but it was the smoke.

McLURE P: - - - change so that there was accepted to be physical damage in that case, not just smoke.

McCUSKER, MR: Although your Honour did say that the question of whether nuisance has taken place – your Honour said at – in Southern Properties – I'm just trying to find the page. You referred to a variety of factors to be considered in determining whether - - -

McLURE P: That's whether it's unreasonable user interference.

McCUSKER, MR: Yes.

McLURE P: I'm talking to the anterior question. Ordinarily, nuisance is either physical damage or it has some amenity impact.

McCUSKER, MR: Yes.

McLURE P: Amenity impact being enjoyment of the land, rather than its use. This is a novel case where there's no – well, arguably, no physical damage.

McCUSKER, MR: No, but - - -

McLURE P: And I know that around the world, this is giving rise to a conceptual difficulty with nuisance. So, I'm just asking you: are you relying on anything in particular other than a mere assertion?

McCUSKER, MR: Yes, your Honour. Yes. First, we do refer, with respect, to what your Honour said in Southern Properties where – as a statement of principle – you said there's a variety of factors to be considered.

McLURE P: I said that in the context of determining whether there was an unreasonable interference with the use - - -

McCUSKER, MR: True.

McLURE P: - - - and enjoyment of land. That's what I was talking about.

McCUSKER, MR: True.

McLURE P: That was a case where it was conceded there was property because there had been damage to the grapes caused by smoke, so the issue didn't arise for determination there. That's a question of where there's unreasonable user. There's a logically anterior question of whether you can recover a nuisance where there has been no physical damage and no amenity impairment. This is - - -

McCUSKER, MR: Yes.

McLURE P: Anyway, that's the issue, I - - -

McCUSKER, MR: I – I appreciate that, your Honour, but your Honour did say in that case that, in making a judgment where there has been an unreasonable interference, whether – and then you interpolated whether physical or non-physical.

McLURE P: Well, that's the amenity side.

McCUSKER, MR: Yes. Yes.

McLURE P: And this isn't an amenity case. Amenity case is noise and can be smoke if it doesn't cause damage; anything that impairs your enjoyment of the land.

McCUSKER, MR: Yes.

McLURE P: Anyway.

McCUSKER, MR: So, for example, dust falling on a property can be a nuisance.

McLURE P: So, you say this is an analogy with dust.

McCUSKER, MR: Yes.

MURPHY JA: And the analogy is the 245 swaths that – bits of plant material that flew across.

McCUSKER, MR: And with all their seeds, yes. Not just 245 swaths; it's what they brought with them is the physical - - -

MURPHY JA: Well, they are part of the swath.

McCUSKER, MR: Part of the swath, yes. Sure. But that's enough. This is not a case where there is – I appreciate there are various views being expressed and concerns, but appreciate that there are those issues as to whether there can be nuisance without any physical impairment at all, but we say if that is the case, if there's no nuisance without physical impairment, there is physical impairment here. There's involvement just as much as there is in the case of dust or noise or smell, and we have provided a bundle of authorities dealing with things like noises and smells and so forth, but your Honour is probably aware of them anyway.

McLURE P: There's no question. There is no question that there are two categories.

McCUSKER, MR: Yes.

McLURE P: One, of physical damage, and all of the others are non-physical damage - - -

McCUSKER, MR: But still - - -

McLURE P: - - - and some aspects of non-physical damage give rise to a nuisance.

McCUSKER, MR: Yes.

McLURE P: Noise is a prime example.

McCUSKER, MR: Yes.

McLURE P: But this doesn't fit neatly into either category, you might think.

McCUSKER, MR: Well, I thought that it probably fits into the category referred to in Hunter v Canary Wharf, your Honour, by Lord Hoffmann, where – and that case concerned the depositing of dust, and then – and can I hand up a bundle, since – remind you that there is a bundle of cases we've gathered together.

McLURE P: Okay. These are in addition to what you had already provided. Yes, all right.

McCUSKER, MR: We've provided my learned friends last week, I understand, with a list of them.

McLURE P: So, any in particular that you want to asterisk? That's what you're obliged to do in this court, as you know. Do you want us to look at - - -

McCUSKER, MR: Well, I don't - - -

McLURE P: - - - anything in particular?

McCUSKER, MR: I don't want you to read anything in particular – it's up to your Honours – but we just summarised the – in brackets, against each case, what it's about - - -

McLURE P: Right.

McCUSKER, MR: - - - just to show the range of matters which have been treated.

McLURE P: I don't think there's any doubt that amenity is something you need protected.

McCUSKER, MR: Yes. Well, amenity or the use and enjoyment of the land, and the use and enjoyment of the land in this case was its use as an organic farm, and what happened, if it were necessary to show some kind of physical involvement, is the deposit of these swaths on the land.

McLURE P: These issues have been washing around the world since 2000, 2002. Is there no court that has had – has ruled on this or we don't know.

McCUSKER, MR: Not that I could find – or not that my learned junior, I should say, could find. If we can, by further research, but, at the moment, that's where it sits. And we say, well, if the current view of the law is that there must be some kind of physical involvement, we don't - - -

McLURE P: No, no, no. No one is suggesting that. It's just the two categories - - -

McCUSKER, MR: Yes.

McLURE P: - - - and it's a question of where this would fall, if you say there's no physical damage and, prima facie, that would appear to be the case. So, you would have to put it into the amenity category, which it doesn't really fit all that well. So, maybe it's just a new category of classification.

NEWNES JA: Did you – I'm sorry.

McCUSKER, MR: Possibly so – yes.

NEWNES JA: I was going to say, did you say that there was something in the judgment of Lord Hoffmann in Hunter v Canary Wharf that assisted you? I thought you were - - -

McLURE P: That was the dust one, wasn't it?

McCUSKER, MR: The dust one, yes.

NEWNES JA: I thought you were about to take us to a passage, but I might have misunderstood you.

McCUSKER, MR: No, I wasn't going to.

NEWNES JA: No. All right. Thank you. I'm sorry to interrupt.

McCUSKER, MR: I haven't asterisked any of those, but – well, we say we fall into both situations, in fact. It's a destruction of amenity in the sense that the farm was being used organically and that's an amenity, and, in any event, there is a physical interference with that amenity. And it's very difficult, in my submission, to differentiate this kind of a case from the cases about dust and noise and smells and so forth. They all come into the category of unreasonable interference with the proper use and enjoyment of the land. In answer to your - - -

McLURE P: You're not seeking the injunctions, so what damages are you seeking in nuisance?

McCUSKER, MR: The same, $85,000.

McLURE P: Well, ordinarily, common law damages would be available in relation to physical damage and, for amenity, you ordinary get injunctive relief or equitable damages as an alternative. So, you want common law damages that you ordinarily associate with a nuisance where there has been physical damage.

McCUSKER, MR: Yes.

McLURE P: Yes.

McCUSKER, MR: Yes. And the physical damage is the deposit of the seeds, resulting in loss. Your Honour is correct; I don't seek an injunction. I don't know that there is any point, unless your Honours would like me to,

to run through in detail what we've said in our submissions on nuisance, but - - -

McLURE P: No, we can read.

McCUSKER, MR: Yes. The relevant factors that his Honour listed at appeal book – or at paragraphs 710 to 752 – if I can just briefly turn – no physical damage. We say that that's not necessary for the reason discussed. That swathing helps weed control; we say that doesn't matter in nuisance. It may help weed control as a relevant factor, perhaps, but that's all.

McLURE P: Well, you see, different – different tests apply according to whether there's physical damage and amenity loss, and that may be to your disadvantage if it's amenity-style approach because, then, the focuses changes from the effect to some sort of balancing and - - -

McCUSKER, MR: Balance.

McLURE P: - - - weighing.

McCUSKER, MR: Yes. And I think your Honour mentioned that in Southern Properties. In fact, the balancing requirement. So – and that's why I said this morning it's important to consider that although there is some benefit in weed control, the major benefit, of course, has already gone before the swathing, and that is the spraying of the weedicide. At page – at paragraph 705, could I just mention, in the reasons, his Honour said:

> The more relevant question, then, is whether the swathing harvest methodology was an unreasonable interference with the Eagle Rest paddocks on which Mr and Mrs Marsh, to whose knowledge conducted their organic farming operations.

In our submission, that's not the relevant question. The question is whether the result of the swathing, when it went – when it sent or dispersed seeds and so forth was an unreasonable interference – not the swathing. It's focussed on the wrong question. Even though swathing may be a reasonable agricultural process, the question is not that, but was the result, the depositing of the seeds, something which was an unreasonable interference. And if it was, it doesn't matter whether it was an accepted agricultural process or not.

His Honour also said, at 714, that swathing is not a novel or aberrant harvesting method. In our submission,

that's not relevant either because nor is direct harvesting.

McLURE P: Well, it would be relevant if it was. It just doesn't – it's not determinative even if it is - - -

McCUSKER, MR: No. No. There's other alternative methods. The swathing was on Robinson's advice. In our submission, that's not relevant either because the question is not whether he was careful in decided whether or not to swath, the question is whether the result of the swathing was an unreasonable interference. Incidentally, as the judge himself said, Robinson may have given different advice had he been told of
Mr Marsh's warning notice of 1 October 2010, which set out very plainly all his concerns about the possibility of his organic certification being lost:

> That an airborne incursion of swaths –

he says at 717 –

> from Seven Oaks was not reasonable anticipated or expected by Baxter, and it was not deliberate conduct

That, in our submission, is again relevant and refer there to paragraph 92 of our submissions. An interference may be a nuisance, even if it's not foreseen by the author of the nuisance. It doesn't have to be foreseen or, of course, intentional, and the – his Honour focussed, again, on the reasonableness of Mr Baxter's conduct at 727:

> While it was not reasonable conduct by Mr Baxter in November 2010

His Honour at paragraph 718 referred to it as being a "first time novelty", the novelty being the GM, presumably, or it might have been the swathing too, but the - - -

McLURE P: I think it was the swathing.

McCUSKER, MR: Yes. Must have been.

McLURE P: In that he hadn't used it before.

McCUSKER, MR: He had never used it before, but certainly not a first time novelty in the sense of people – it was something that burst on the scene for the first time. And if a builder who had never built a house before created a dust nuisance, not much use in saying, "Well, I've never done one before. I didn't realise this would happen." He

still created the nuisance. His Honour also referred to the fact that when
Mr Marsh delivered his notice on 1 October, the GM canola was already flowering or about flowering stage, and, in our submission, that's not relevant because we're talking here not about the sowing of the seed, we're talking about the harvesting.

McLURE P: Are you able to point to where that letter is in the appeal books? 1 October - - -

McCUSKER, MR: Yes.

McLURE P: - - - two thousand and - - -

McCUSKER, MR: Yes.

McLURE P: 2010, is it?

McCUSKER, MR: 2010. 1401. Thanks.

McLURE P: 1401.

McCUSKER, MR: His Honour also – yes, 1401. It's quite a lengthy letter, but – and I won't read it through to your Honours, but, in particular, draw your attention to paragraphs 1, 2, 3, 5, 6 and 10, and all of this alerts Mr Baxter to the concerns that Mr Marsh had about the possibility of genetic material going onto his property and causing him to be at least at risk of losing his certification. His Honour also referred to the fact that there is no reasonable – or there was no recommended distance from a boundary to a swath crop, swath GM crop, and there was no evidence given of what was the recommended distance.

But, again, in our submission, that really is not to the point. What happened here was that the swathing took place to within five metres of the boundary, and, of course, there is a road – over the road, and I think, in all the distance, it was about 26 metres – 20.9 the road and five metres, then – so, it's not much of a distance and, given that there was likely to be winds, even though Mr Baxter says he didn't actually foresee the winds, that's not the point that there was no recommended distance.

And so, your Honours, dealing with the question of nuisance in short, we say focusing, as his Honour did, on the reasonableness in this context of Mr Baxter's conduct in swathing, Mrs – the real question of whether what he did caused unreasonableness interference, albeit you may take

into some consideration whether there was, for example, a compelling reason – there was certainly no public policy reason involved or anything of that nature, as there was in the Southern Properties case.

So, there was no compelling reason to swath. He could have directly headed. He didn't do it. So, knowing the risk, he took no steps to fulfil we say what the duty of care was. May it please your Honours, they're our submissions.

MURPHY JA: Just before you sit down, do we have the decertification letter of 29 December?

McCUSKER, MR: I will see if I can get it out for your Honour, yes.

McLURE P: Perhaps if you let us know in due course, Mr - - -

McCUSKER, MR: I will, your Honour. Yes.

McLURE P: - - - McCusker. Ms Cahill.

CAHILL, MS: If it please the court, can I just begin with a small matter regarding the pronunciation of swath or swathe, recognising the derivation that her Honour, President McLure, mentioned, all I can offer to assist is that during the course of the trial and in the course of the preparation for the trial, universally, without exception, all of those who were called as witnesses or whom one dealt with from the Kojonup region described them as swaths – as the noun – and swathing as the verb, and we, in the course of the trial – at least on our side, and I'm sure on the other side as well – deferred to that regional pronunciation.

Can I begin, your Honours, with our broad overview of the reasons – key reasons why we say the claims in negligence and nuisance cannot succeed, and the appeal must be dismissed. In doing so, I recap, but only to the extent necessary, on some facts that have been canvassed this morning. First of all, the position of the parties: we have here two farmers side by side. Importantly, both farming legitimately; one conventionally, the other organically. As to what it means to farm organically, your Honours will find evidence of this in the national standard and in the NASAA standard in volume 4 of the green appeal books at pages 1850 for the national standard and 1740 for the NASAA standard, respectively.

Essentially, we say it's important to understand that what it means to farm organically is to generally follow a method of agricultural production that is based on certain principles. So, it's a method of farming, an agricultural method. The national standard emphasises certain things at page 1850, these principles being the conservation of the environment and natural resources, an agricultural method that has limited impact on the environment, it uses renewable resources, and it also pays attention to and emphasises animal welfare.

You find these same sorts of principles expressed in the NASAA standard at 1740, and it adds a few further principles to which the agricultural method of organically farmer adheres. It emphasises social justice issues, traditional indigenous and indigenous farming methods, and the emphasis and value on local production and distribution. Now, it's important to recognise, we say, that the role of certification of an operator or an operation is not to permit or licence it to engage in this method of agricultural production. It doesn't licence organic farming.

Any farmer is at liberty to farm organically. It's important and uncontroversial, we say, on the facts of the case that the certification process has a commercial focus of permitting products to be produced – that are produced organically to be labelled and sold as "certified organic" in the domestic market and "organic" in the export market. And that's a slight variation on, I think, what was being discussed between your Honour, President McLure, and Mr McCuster this morning. In the domestic context, one is at liberty to market a product as organic. What one may not do is market it as certified organic, obviously, without one of these accredited certifiers certifying - - -

McLURE P: And the evidence was that the big retailers - - -

CAHILL, MS: Exactly.

McLURE P: - - - require certified organic, so that there were economic ramifications both domestically and in the export market, so this - - -

CAHILL, MS: Yes. Practically - - -

McLURE P: Yes.

CAHILL, MS: - - - it came to the same thing.

McLURE P: Yes.

CAHILL, MS: But we just identify that it's that certification and being able to call yourself certified organic that becomes important in the domestic market commercially, and, as was discussed this morning, attracts this price premium over similar conventional agricultural products which is alluded to at paragraph 235 of the trial judge's reasons for decision. And we say an analysis of the nature of the incursion event that led to these proceedings is also important. This is where we recap briefly on some of the facts that were canvassed by my learned friend this morning.

Now, the swaths of GM canola that blew from Seven Oaks to Eagle Rest contained stalks – several stalks on each canola swath, and on these stalks were seed pods, so there were a varying number of seedpods on each swath, and, within each seedpod, the evidence was that there was something between 20 to 80 seeds. These seeds look like – they were very small, like poppy seeds. That evidence – if your Honours wish to have the reference – is at the second volume of the green appeal book, between pages 923 and 4.

McLURE P: I think we've got an exhibit.

CAHILL, MS: Yes.

McLURE P: Which is very helpful to look at.

CAHILL, MS: Yes. The uncontested finding of the trial judge was that there was no contamination or sensible risk of contamination of any organic crop that was being grown on Eagle Rest at the time.

McLURE P: You mean genetic contamination?

CAHILL, MS: Yes.

McLURE P: Yes.

CAHILL, MS: There was no genetic – or intermingling either because - - -

McLURE P: Well, we have to – the use of "contamination" is highly contested, so it's really hard to know what people are talking about - - -

CAHILL, MS: Yes.

McLURE P: - - - except I think I know you're talking about genetic contamination, but you say even further, do you?

CAHILL, MS: Yes. Now, your Honour, I'm there when I use the expression "contamination", quoting directly from the trial judge at paragraph 532. The next question is: what he means by that.

McLURE P: Yes, but, I mean, his is contested, so it would be really useful if we know the sense in which each counsel is referring to contamination - - -

CAHILL, MS: Yes.

McLURE P: - - - rather than the highly contested definition.

CAHILL, MS: Yes. I understand, your Honour. So we say two things were not contested: one, that there was any genetic contamination of a wheat crop – of the wheat crop, which was the only relevant organic crop on the farm at the time. Your Honour will remember that there was some oat crops - - -

McLURE P: There was rye.

CAHILL, MS: But the rye was decertified because - - -

McLURE P: It was on the - - -

CAHILL, MS: - - - it was being grown on a quarantined paddock - - -

McLURE P: Paddock 13.

CAHILL, MS: - - - where sheep had been drenched the previous season, so there was only the wheat crop. There was a couple of oat crops further up in paddocks 1 to 6 which were unaffected. They remained certified and nothing was affected. But we say that there was certainly no evidence of any intermingling of the GM canola swaths into that wheat crop. Your Honours will remember that the evidence was that Mr Marsh, in fact, moved that crop from paddock 10 to paddock 11 after the conversation he had with Mr Baxter in April 2010.

McLURE P: Are you talking about the swaths or the seeds or the pods or what?

CAHILL, MS: Both. There was nothing in the wheat crop, and that was the uncontested evidence.

McLURE P: Well, I'm not sure - - -

CAHILL, MS: So there were three - - -

McLURE P: - - - that I understand the evidence in that way, because it's hard to identify where the seeds are, and paddock 11 was decertified.

CAHILL, MS: Yes.

McLURE P: I know there was a swath caught in a gate or something.

CAHILL, MS: There were three swaths on paddock 11 in the buffer zone.

McLURE P: Yes, but there are the seeds, aren't there?

CAHILL, MS: Well, the three swaths in paddock 11 were in the buffer, the tree buffer, and your Honours will remember that that was the purpose of Mr Marsh planting in the northern part of the paddock rather than in the southern, to leave that buffer from where the GM crop was being – a further buffer from where the GM crop was being grown. So, we say the evidence was to the effect that there was no intermingling of GM in the wheat crop.

McLURE P: And, by that, you mean there were no seeds in the wheat crop.

CAHILL, MS: Yes. There was no evidence to suggest that at all. And, in fact, the inspection report – and I will have my learned junior pull that up – made some comment about the lack of – may use the word "contamination" but I will check that – about the lack of GM material in the wheat crop. I will come back to that.

MURPHY JA: Does the $85,000 loss relate solely to the wheat crop?

CAHILL, MS: No. So, it's the future loss of premium over the subsequent years. It flows from the decertification of those paddocks, so it was the future sheep, the future crops that were to be - - -

McLURE P: Because organic farming required rotation and the absence of those six or seven – whatever the number of

paddocks – impaired the way they would ordinarily have farmed.

CAHILL, MS: Yes. And I – I will come to this in a moment. I don't think their operation continued as it would have but for the decertification. There were – there was a rearrangement of the way in which the farming - - -

McLURE P: Within the six paddocks - - -

CAHILL, MS: Yes. In order to - - -

McLURE P: - - - that were certified. Yes.

CAHILL, MS: - - - deal with the certification.

McLURE P: They got a special exemption, didn't they.

CAHILL, MS: So, as far as the wheat crop is concerned, our position is this: that – or was as it was before, after the incursion event. This left, then – if we put the wheat crop to one side – the stalks and the seeds that were lying in the paddocks. There were a couple of cases, as your Honour, President McLure mentions, where they were stuck in fences, in bushes or trees in buffer zones, but otherwise in paddocks. And the seeds would either have been in enclosed seed pods or, if the seed pod had opened up, the seeds would have been scattered and spilled out onto the ground.

Relevantly, here, there's another unchallenged finding of the trial judge, that there was no evidence of harm to land, vegetation on the land or sheep grazing on the land by reason of contact with the GM material, whether it was the swath or the seed.

McLURE P: But he uses "harm" in a very narrow sense, the trial judge, doesn't he?

CAHILL, MS: Well, to the extent that there's no physical - - -

McLURE P: Yes.

CAHILL, MS: - - - harm. It's not toxic or dangerous - - -

McLURE P: No, no. He regards GM canola or probably GM anything as being entirely safe to humans and animals and the environment.

CAHILL, MS: That was his finding.

McLURE P: That was his finding.

CAHILL, MS: And there was plenty of evidence to support that at trial.

McLURE P: Anyway, it's not really – it's not really the issue here, is it?

CAHILL, MS: Well - - -

McLURE P: It's accepted - - -

CAHILL, MS: - - - I mention it by way of deduction, because we look at the event of these swaths coming onto the land, and I've dealt with the wheat crop, and now I'm looking at the position of contact with the elements of the organic farm, the physical elements of land, vegetation on the land, and – which can either include crops or trees, natural vegetation, and livestock. And this finding, that there's no physical harm or physical damage to any of these elements, we say, is another important - - -

McLURE P: But why? I mean, that was accepted, as far as I see. I mean, the licensing of Monsanto by the Gene Regulator followed very extensive research on those very issues.

CAHILL, MS: Yes.

McLURE P: And, so, you wouldn't be running – you would be – and the case was run on that basis: this is what the Gene Regulator is letting Monsanto distribute this under licence for dissemination into the environment because we say it's safe in all relevant respects.

CAHILL, MS: Yes. And the relevance of this then comes to looking at the system and the question of what might be meant by contamination of the organic system for the purposes of 3.2.9. But can I just mention in passing that where there was no possibility of harm to a sheep through eating this – it simply passes through its digestive tract and is expelled at the end – and there were numerous evidentiary references, and in the reasons for decision, to the ability to clean any crop of any seed that might be intermingled with it, and there was certainly no risk of any genetic contamination. Then, we are left with the consequence that, as far as this incursion of GM canola onto the farm, there was no relevant difference from an incursion of conventional canola.

McLURE P: Well, except there's this huge economic difference, which is what you adverted to earlier. Everyone knows that the gene regulators had their role, and there was very significant opposition throughout the world, really, to genetic modified crops. And so the economic side was left to the states, not the Commonwealth, and they opened the door a weeny bit to let in GM canola. So, what you say is correct, but, at the end of the day, it's the genetic modification to which the organic industry take exception, and it has the economic consequence, a very significant economic consequence, so - - -

CAHILL, MS: Yes, I will deal with that. If I might just mention this further point to deal with the system. Now, what might be meant by an organic system, of course, it can embrace such things as the constituent elements of the land, the livestock, the vegetation on the land, and I've sought to address those things. Beyond that, the organic system, we say, is more obviously comprised of the method of production, the pursuit of these particular agricultural practices that are based on the sorts of principles that I identified a moment ago.

McLURE P: But what goes into the soil is clearly - - -

CAHILL, MS: Well, I will come to that in a moment.

McLURE P: - - - very important.

CAHILL, MS: Yes, and there can be no inputs of certain types. You can't actually - - -

McLURE P: You can't use genetically - - -

CAHILL, MS: Well, you can't input.

McLURE P: In any event, I mean, at the end of the day, if you look at – for a reason that's probably historical, genetically modified anything is sort of quite a significant feature of the organic industry.

CAHILL, MS: Yes.

McLURE P: And that's – that's, really, where it comes down to, isn't it.

CAHILL, MS: Exactly, and where that develops it here – if I can just leave this point about the agricultural system, this method of principled agricultural production. There's nothing suggested here and there's nothing on the evidence to suggest that the swaths or seeds, these GM swaths or

seeds themselves, affected or needed to affect the appellant's methods of agricultural production. The decertification of their land because of the presence of the GM canola swaths might well have done so, and there was some evidence to support that, but that – in order to regain certification in particular, but that's qualitatively quite a different thing.

In the absence of the decertification, the mere presence of the GM swaths and seeds would not prevent or affect the ability of the appellants to farm organically.

McLURE P: But, you see, that's the issue. We're not here to decide GM versus non-GM, are we?

CAHILL, MS: No.

McLURE P: I mean, to some extent, it has been decided by the Commonwealth authorities and by the state insofar as it has opened the door, but the organic industry can say, well, you can say what you like about it, we will not have GM material in our system. Now, if that's what they say, on its proper construction - - -

CAHILL, MS: Yes.

McLURE P: - - - then that's important, isn't it, from the appellant's perspective - - -

CAHILL, MS: It's – it's - - -

McLURE P: - - - regardless of the merits - - -

CAHILL, MS: Yes.

McLURE P: - - - of the pro-GM and anti-GM positions.

CAHILL, MS: Can I say it's certainly relevant to the issues that the court needs to decide in relation to the existence of a duty of care and whether or not the normal remedies in nuisance are available. If I can just recap on where I've come to, to this point. Our submission is that when you break those things down and analyse them, the product, the elements of the farm and the organic system of agricultural practice – we say you look at the effect of the mere presence of the swaths and seeds, and we are, up to this point – and it's because of the absence of the economic implication that your Honour, President McLure, has described – we are still in the same ballpark, if you like, of – the same consequences as if this had been an

incursion of conventional canola rather than organic. So, it's the decertification that is all here - - -

McLURE P: Well - - -

CAHILL, MS: - - - and - - -

McLURE P: - - - except what – you're putting it – if you look at what the organic certification requirements are, the difference between genetically modified and conventional canola is crucial.

CAHILL, MS: Yes. That's right.

McLURE P: Now, you might say this is silly, but that, really, is not going to determine - - -

CAHILL, MS: We don't say - - -

McLURE P: Who knows – we're not here to adjudicate that.

CAHILL, MS: We don't say anything is silly, your Honour. The NASAA standards are what they are, and they are there - - -

McLURE P: Correct.

CAHILL, MS: - - - presumably for reasons, and I will come directly to that. 3.2.9, of course, NASAA standard 3.2.9 is the foundation upon which the appellants' case rests, to the extent that that provides the asserted basis for decertification. Now, obviously, I will develop and I will come to grounds 9 and 10 immediately after this overview, and the question of the proper construction of the NASAA standard as the first and most important part of the appeal.

I will develop it a little more at that point, but can I just, in overview and briefly here, the short point is this: 3.2.9 doesn't address in its terms the position of mere presence of GM canola – GM anything – on an organic farm. If it had intended to permit decertification for mere presence as opposed to something more in the nature of contamination, then one would expect it would have said so.

More importantly, on any sensible view, against the background of a proper understanding of the elements of the organic farming system and the consequences of the mere presence upon that system, and the lack of consequences of the mere presence of GM canola, it cannot be sensibly said that there was any risk of contamination of product, land,

vegetation or the system of production in any normally understood meaning of the word “contamination”. Now, absent a power, in the alternative – sorry, I will pause there.

McLURE P: In the presence of a power - - -

CAHILL, MS: Yes.

McLURE P: Yes, the unreasonable point.

CAHILL, MS: Yes. But, before I get there, in the absence of a power to decertify under 3.2.9, of course, there’s obvious issues in respect of causation under either claim, negligence or nuisance, and, obviously, we would say, then, the loss is caused by the wrongful decertification, not the incursion. But the absence of a power to decertify, of course, is going to bear very directly on the assessment of the duty of care reasonable foreseeability of risk.

McLURE P: Well, I’m not sure about the duty of care. I understand the causation, quite clearly. So, I’m not sure, yet, that I understand how it intrudes into the assessment of the duty of care, maybe even the breach, and maybe the breach because you have to descend into the facts.

CAHILL, MS: Yes.

McLURE P: But, in any event, you will get there - - -

CAHILL, MS: Yes. Well, there’s a - - -

McCUSKER, MR: - - - and I will raise them when you make your submissions on your - - -

CAHILL, MS: Yes. As far as nuisance is concerned, then, one has no relevant interference with the land as such by reason of either the swathing or the incursion. It occurs, and that, essentially, must follow if there’s no permissible decertification under the standard. Can I turn to the alternative position, where one contemplates the scenario where 3.2.9 does permit decertification. We say there’s still no viable claim either in negligence or nuisance for these essential reasons.

If standard 3.2.9 permits decertification for the mere presence of GM material on the appellants’ land, it does so in the absence of any evident deleterious effect on the agricultural product that they are selling, on their land, or on their system of production, their method of agricultural practice. So, the purpose of decertification

and the objective that it is designed to achieve in this situation of the GMO merely being present on the land must lie elsewhere.

And while the appellants, through their witnesses at trial, were never able, in our submission, to be very precise about this, the inference was – and it was alluded to by the trial judge in his reasons for decision – that it was because of an adoption of or adherence to a stance of what was described as zero tolerance of genetically modified organisms or genetically modified material. That is, no tolerance of the presence of any GM material on an organic farm in any way, shape or form.

That must flow from a matter of conviction of NASAA or the appellants or both as to what is an appropriate method of agricultural production, if one is farming organically, or because it is perceived by one or both of them as something which, if it is pursued, this stance of zero tolerance to GM, it may be attractive to consumers and may encourage them to buy NASAA certified products. That - - -

McLURE P: But if the NASAA standard provides for zero tolerance, as it does if you read through it as a whole, whether or not you agree with it, really, doesn't make – that's not this court's role, is it? I mean, if it's certified and it has the power to decertify and that causes a loss, then it's not this court's role to say that the standard is wrong or the standard is unreasonable. You say it is.

CAHILL, MS: Well, we say that there's - - -

McLURE P: You say the genetic engineering is not something to be feared and they're acting unreasonably. Is that the position?

CAHILL, MS: We don't say that the standard is unreasonable. We say it is – to use the trial judge's words, and they're not – I would like to find a better word to use, but his Honour uses the word "idiosyncratic". That 3.2.9 construed in that way is idiosyncratic, at least to the extent that the national standard doesn't provide for decertification in the event of mere presence of GM on the land, and we don't say that the standard, if it does permit decertification in those circumstances, is either unreasonable or silly or unwarranted or out of touch with the community.

We don't say any of those things. We simply say that it is idiosyncratic to the extent that it is not something

that is widely shared with even the national standard or, on the evidence, the other certifying standards that were before the court. So, when we – and we strive, then, to understand the objective behind that – having 3.2.9 in that way, and that's the conclusion, the necessary inference which was alluded to by the trial judge, that there's this either personal conviction or commercial benefit in terms of the image of NASAA certified products to maintain a zero tolerance stance to the mere presence of GM on an organic farm.

McLURE P: But, see, if you approach the construction on the basis that all good lies one way and all silliness lies the other, that that's a self-fulfilling sort of outcomes, isn't it?

CAHILL, MS: I'm not sure I - - -

McLURE P: And at the end of the day, we're not – we're not here to judge the merits, are we, or - - -

CAHILL, MS: We're not here to judge the - - -

McLURE P: Merits of GM versus non-GM.

CAHILL, MS: No, and we certainly don't ask the court to do that. But what we are motivated to do by that analysis - - -

McLURE P: Well, it comes pretty close if you think – if you want us to describe this as a very – as an idiosyncratic approach that is contrary to common sense, which is - - -

CAHILL, MS: No. I certainly don't put that.

McLURE P: No, you don't? No.

CAHILL, MS: Your Honour, the idiosyncratic – as I think I said – it's not a word of choice. I'm striving for one better. It's individualistic. It's certainly not something that's reflected in the national standard, and it represents something beyond a protection of the integrity of the product. It goes to a conviction that is individualistic – to the extent that it's not shared with the national standard – about what is and isn't appropriate in an organic system, and it takes a view that there is a zero tolerance to GM.

Now, when we come to negligence and we're trying to identify the risk of the harm, but, more importantly, the

harm that the respondent is alleged to have owed a duty in respect of. Against this background, we identify it as the risk of decertification of an organic operation in order for NASAA, and perhaps the appellants, to uphold a personal or individual stance of zero tolerance to GMOs. That seems to be - - -

McLURE P: That's pretty hard to run, when you look at all of the – I mean, without knowing – judging the merits, if you read widely on the furore created by GM engineering throughout Europe, throughout the States, throughout Canada, it's pretty hard to say that one little person had an idiosyncratic view. It might be that your client takes the view that the view is idiosyncratic, and without – we can't judge it. We don't – that was not in issue, really, at trial, was it?

CAHILL, MS: Well - - -

McLURE P: Or is it?

CAHILL, MS: Well, I think it was, your Honour, because, you see, his Honour, the trial judge, certainly - - -

McLURE P: Well, I know the trial judge – that permeates the reasons.

CAHILL, MS: Yes. But his Honour – I think it was at both 321 and 741. He talks about – he's expressing it in terms of vulnerability and the - - -

McLURE P: In terms of sorry?

CAHILL, MS: The vulnerability salient feature. And focussing on vulnerability, he describes this self-initiated, if you like, economic – risk of economic loss, and this idiosyncratic contract. He seems to be, we think, describing not only the misapplication of 3.2.9 in the event that it was – the proper construction did not permit decertification, but, also, the scenario in the alternative where it did, and he was identifying how someone in the position of the appellants could not be relevantly vulnerable in these circumstances.

What we're trying to do here is analyse and break down that reasoning to identify the point of principle which renders harm of that type, not actionable harm for the purposes of a duty of care owed to prevent pure economic loss. And the point about the risk of decertification of that character and for those purposes is, in our submission, that it is a qualitative world away from the

harm or the risk of harm in Perre v Apand where one had the inability to sell potatoes into WA because of not a unique contractual arrangement between – consensually arrived at between two parties, but because of a government regulation.

And that government regulation was not designed to uphold a personal conviction but, rather, was designed to prevent the introduction of potato blight into this state. And one can see the very significant and qualitative differences between the two types of harm that - - -

McLURE P: Well, can I just put – the background to this reflects the great division amongst the population about GM. You look at the statutory architecture and you see that you've got an Office of Gene Regulator that's set up purposefully to identify all of the relevant risks. And it's not as though the person – the distributor can go off and do it. They have to be licensed and there have to be licence conditions. So – and then the state puts a prohibition on all GM farming and it opens the door to GM canola.

CAHILL, MS: RR canola.

McLURE P: And - - -

CAHILL, MS: RR canola. RR canola.

McLURE P: RR canola, and it says: everyone has got to be careful, you've got to accommodate everyone's interests here. So, that's the background. Now, that background suggests that the views are not properly characterised as idiosyncratic, but a reflection of a view that's prevailing amongst a group of people in the community, and the people's rights and interests have to be taken into account in deciding what happens. Now, against that background, it's really hard, I think, to say idiosyncratic.

I might be that the science is all in favour of GM. You would think that's what the decision of the Gene Regulation was, but the economic aspects were left to the state because this is such a highly contentious point. So, it's to be a bit dismissive, isn't it, to say idiosyncratic view that you're anti-GM?

CAHILL, MS: I think I've already fallen on my sword on the - - -

McLURE P: All right.

CAHILL, MS: - - - idiosyncratic language.

McLURE P: So, what word can we use?

CAHILL, MS: Well, I've used "individualistic".

McLURE P: Well, see, I'm not sure it's even that.

CAHILL, MS: Well, we would say it was, and I will – overnight, I will try to think of an ever better word - - -

McLURE P: No, no.

CAHILL, MS: - - - but individualistic to this extent, because my goal is to take the court to both the NASAA standard and the national standard. And your Honours will see the way in which these standards are very clear as to what they do and what they don't do. And what they are about are they are about the operator, primarily, as to what he or she does and doesn't do, what he or she must and must not do in the performance of an organic farming operation.

As an aside – and this is the nod to the fact that it's a certification of products that are then sent out to consumers – the ancillary goal is to ensure, to the best of one's ability, that the risk of prohibited materials, such as chemicals, prohibited chemicals, in products that are marketed are minimised. That's it.

McLURE P: And – and into the inputs.

CAHILL, MS: Yes, but inputs are the inputs that the farmer himself or herself - - -

McLURE P: Absolutely.

CAHILL, MS: - - - puts in.

McLURE P: Puts into the soil.

CAHILL, MS: So, your Honour – your Honours will see, for example, in section – I think it's around 6.5 of the NASAA standard, there is a relevant distinction to be made between the organic feed that must be fed to livestock and the grazing and pasturing of livestock, and that's sensible. An organic farmer can't be responsible for everything that a sheep eats in a paddock that might have come from a bird dropping something in the paddock or kangaroos' faeces or whatever.

So, there is this repeated emphasis in both standards to the actions and omissions of the operator to conform to what is – and this is why we emphasise this – a method of agricultural practice that is organic farming. So, when we come to 3.2.9, which, if, on this alternative argument, does permit decertification for the mere presence of GM material, where there is no risk of contamination to product, to end product, and that's - - -

McLURE P: Well, no risk of gene transfer.

CAHILL, MS: Yes, and the evidence was there was no risk of - - -

McLURE P: Well - - -

CAHILL, MS: - - - intermingling because of all the seed cleaning. That was – that was fairly clear on the evidence, your Honour. So, here, we say it was very clear that there was no risk to product.

McLURE P: Well, we will have to go and find the evidence on that.

CAHILL, MS: Yes.

McLURE P: I don't remember reading something quite so clear cut in the trial judge's reasons, which would be pretty difficult if you've got hundreds and hundreds of seeds spread throughout the area, but, in any event - - -

CAHILL, MS: Does your Honour mean in terms of intermingling of - - -

McLURE P: Well, I would have thought if you get seeds into the wheat crop or wherever the next crop is going to be - - -

CAHILL, MS: No, so - - -

McLURE P: - - - you could have intermingling.

CAHILL, MS: So, your Honour – and we will get the references overnight, but, your Honour, the short point on the evidence was this: that the canola, if it germinated – the volunteers, if they germinated in a crop that had been planted out to organic, they would be highly visible because they have these very distinctive yellow flowering heads, and they can be identified easily and pulled out before seed sets, which, of course, is the significant

point in terms of them developing seeds that then have the genetic trait.

Up and to that point, the actual plant itself differs no – is no different in terms of its makeup from a conventional plant, if you looked at the two of them under a microscope. It's the seed that has the genetic modification in it. So, you could pull out the volunteers - - -

McLURE P: Well, you go – pull out the volunteers.

CAHILL, MS: - - - from a crop, and if there was - - -

McLURE P: There's some evidence about there being a yellow flower on a weed and you can't – anyway, but - - -

CAHILL, MS: I don't think that was – if you - - -

McLURE P: I'm not sure about the findings. I was - - -

CAHILL, MS: Yes.

McLURE P: Perhaps you will need to just take us to the findings that are unchallenged, and that will short-circuit all this.

CAHILL, MS: Yes. We will do that, your Honour, and, then, the second aspect is that if there was any risk of the canola seeds finding their way into the harvested seed product, the wheat seed or oats or whatever, and the evidence was fairly – well, it was all one-way before the trial judge about the way in which the seed – the seed that was to be sold could be cleaned to remove that. Of course, you don't have the problem that you have with – if Mr Marsh had been farming conventional canola where you wouldn't be able to tell a conventional seed from a GM seed, so that wasn't a problem here.

As far as the livestock eating – any future livestock eating canola plants, presumably – you know, sheep don't eat dirt so there's no risk of them eating a – snuffling through the soil and just eating seeds.

McLURE P: They were eating the swaths, weren't they?

CAHILL, MS: They could eat swaths, and they could eat volunteer canola plants, but there's no suggestion that that had any biological significance other than that they would then excrete the - - -

McLURE P: Other than if you're an organic lamb, it prevents you from being an organic lamb.

CAHILL, MS: No. We - - -

McLURE P: Well, that's what I thought Mr McCusker said.

CAHILL, MS: Well, we can't see that on our reading of - - -

McLURE P: You - - -

CAHILL, MS: - - - 6.5.

McLURE P: An organic lamb can't eat non-organic – or it can't eat non-GM material.

CAHILL, MS: You can't feed it GM material.

McLURE P: Yes.

CAHILL, MS: But in terms of what else might be in your paddock, whether it's a chemically sprayed week that a bird has brought in or a piece of conventional canola.

McLURE P: But they have to be – the sheep – as I read the standards, the sheep have to be grazed on paddocks that are certified.

CAHILL, MS: Yes.

McLURE P: So, you don't have chemicals, you don't have anything that's not specified in the annexures.

CAHILL, MS: You don't spray your paddocks with chemicals, you don't drench your sheep with chemicals, you don't grow GM canola in order to feed or graze or sheep, but my point is this: I don't see anything in section 6 – which I think is the livestock section of the NASAA standards – that expressly or impliedly suggests that an organic farmer has to walk their paddocks daily to ensure that there has been no incursion of any non-organic material. That's the point. So, in terms of just a grazing inadvertently on swaths that haven't been collected, for example, or a volunteer plant that hasn't been detected in the ordinary course of not being negligent to minimise the risks, we can't see how that would in any way affect the organic status of the sheep. Mr McCusker may have a - - -

McLURE P: Anyway, there's either a finding or there's not, and, if there's not, I suppose, then - - -

CAHILL, MS: Now, if I can come back to this point I was endeavouring to make about the limits of actionable harm in cases of pure economic loss, I think it was in Perre v Apand at paragraph 5, Gleeson CJ spoke of three considerations that are constraining influences on the acceptance of a duty of care in particular cases of economic loss. The first point that he made was that a duty to avoid any reasonably foreseeable financial harm does need to be constrained by some intelligible limits, to keep the law within the bounds of some common sense and practicality.

And the second constraining influence, as I understand it, amounts to, essentially, the risk to autonomy where legitimate conduct in a commercial setting exposes a person to liability for economic loss simply because the risk of harm is foreseeable.

McLURE P: That's a very unhelpful test because you don't know what "legitimate" means. It turns out that, when it's recoverable, it's not legitimate, and when it isn't recoverable, you know, it's legitimate.

CAHILL, MS: But in Perre v Apand it wasn't legitimate because it was uncertified seed.

McLURE P: Well, it's just a very slippery concept that they use that's really unhelpful, I think.

CAHILL, MS: Well, to the extent that there may be uncertainty as to its bounds, your Honour, we would say that necessarily
Mr Baxter, his conduct must fall within the bounds of legitimate activity. It was a lawful activity to grow the RR canola, and every aspect of compliance with his licence was met.

McLURE P: But most tortious conduct is lawful.

CAHILL, MS: I beg your pardon?

McLURE P: Most tortious conduct is lawful.

CAHILL, MS: Yes.

McLURE P: So the fact that it's lawful is not going to help, particularly where the breach is not the mere growing - - -

CAHILL, MS: Yes.

McLURE P: - - - but the means of harvesting that increase the risk of escape when there was a feasible alternative, the direct harvesting.

CAHILL, MS: So, what I was going to go onto to say is that you've got entirely lawful behaviour in accordance with government – the government exemption, and then the requirements of his contract and licence with Monsanto. But, then, beyond that, the swathing was carried out by a professional swather. There is no suggestion – although Mr McCusker raised this morning some question about the swaths not being rolled into the stubble – there was nothing about that at trial. There was no suggestion by the plaintiff that the swathing was done anything – in any way other than the ordinary practice followed by swath – farmers who swath in the region.

So, when we have a – and Mr McCusker also made a very concession, in my respectful submission, that there was recognition of the virtue of Mr Baxter using the swathing method in those two paddocks in 2010 to deal with the rye grass issue that he had there and to control those weeds. So, when one puts those four factors together, we say, then, clearly, the only conclusion that can be reached about this aspect of the facts is that Mr Baxter engaged in a legitimate activity.

Now, against that background, one comes to the normal articulations of the autonomy principle in relation to duty of care for pure economic loss - - -

McLURE P: Well, it's really not – the focus, it seems to me, in any duty of care case is whether you acted unreasonably, and if – if there is a duty of care, then, the issue is the reasonableness of your conduct, clearly, and so the question becomes if you can avoid the risk to the organic farmer by direct heading and there's no significant detriment to yourself or breach is follow as night follows day. But we're at the earlier stage at the moment, the broader question of whether there's a duty of care, aren't we? Which doesn't really go to the question of the method of harvesting; it goes to the broader question raised by the fact that this is pure economic loss.

CAHILL, MS: Yes. I will come to breach in a while, of course, but can I just touch on something that your Honour said there. Of course, the case that was put against us at trial was not that it wasn't reasonable to swath in all the circumstances but, rather, there was an alternative and therefore we breached. Because direct harvesting was a

method that was available to us and would have reduced the risk, then, to have swathed amounted to a breach. That was the pleaded case against us.

McLURE P: Well, the pleading is: you did it too close. You could have done it someone else in your paddock, and you swathed instead of direct harvested.

CAHILL, MS: Yes. But it's only the - - -

McLURE P: They're the particulars of breach.

CAHILL, MS: It's only the swath instead of direct harvesting that's now pursued.

McLURE P: Yes. Yes. Yes.

CAHILL, MS: Yes. But that case – and, as it has been narrowed – is a case that could never have succeeded on the law. Dovuro v Wilkins is plain that - - -

McLURE P: Couldn't have succeeded – what?

CAHILL, MS: On – on the law, because Dovuro v Wilkins is authority for the proposition that the mere fact that an alternative was available to you that would have minimised or obviated the risk of harm does not, in the absence of any other features, amount to breach - - -

McLURE P: Well, it goes a very long way. If you – if I am doing something lawfully and I do it in a way that gives rise to a foreseeable risk of harm which eventuates, then, the fact that I could have done something legitimate in another way which didn't carry the same risk is always relevant in the assessment of breach.

CAHILL, MS: Well, we say that that really – well, when we come to breach tomorrow, I will - - -

McLURE P: All right.

CAHILL, MS: - - - cite the authorities for your Honour. Can I come back, then, to drawing the threads of this issue about the duty of care that exists in relation to pure economic loss against the background of the submissions that I've made. Our proposition is that a risk of economic loss from the respondent's legitimate conduct arising because of an agreement between the appellants and a third party based on matters of conviction personal to the plaintiff or the third party or both does not amount to

actionable harm for the purposes of recovery of pure economic loss in negligence.

And, were it otherwise, one can put it in terms of policy as a limiting factor, or in terms of an assessment of the salient factor of vulnerability, as his Honour, the trial judge, did. But it can be tested by considering the ways in which a different form of contractual provision or standard could operate. So, let's assume, for example, then, instead of 3.2.9 saying what it says, it says, instead, that an organic operations will be decertified if GM canola is grown in an adjacent property and, similarly, Mr Marsh tells Mr Baxter and Mr Baxter decides, in any event, to grow the GM canola and there is this decertification.

There would need to be, we would say, without any judgment about the rights and wrongs of standard in that form, there would need to be an analysis of whether or not that is actionable harm for the purposes of the law relating to recovery of pure economic loss.

McLURE P: And the other side is what I've put to you earlier. This is not a matter of pure contract. This is a matter that really comes with the imprimatur of the Commonwealth regulatory regime which says that if you're going to sell overseas, you have to have certified including NASAA, and, so, this is what you have to comply with and we, AQIS now DAFF, look at you and audit your standards and permit you to go out into the industry and say, right, in order to export this product as organic, this is what you have to do and you have to comply if you're a member of NASAA with these standards.

So, it's not personal, it's not idiosyncratic. It stands behind a regulatory framework that recognises the integrity of the label secured by all of these requirements. Now, that's the – that's the regulatory framework that's relevant to the NASAA standards, isn't it?

CAHILL, MS: That regulatory framework is more limited, with respect - - -

McLURE P: All right. I know your - - -

CAHILL, MS: - - - than your Honour has articulated - - -

McLURE P: I know your position, that the NASAA standards are inconsistent with the national standards, but just leaving that to one side at the moment – no doubt you will develop that – but it's wrong to describe this as purely

idiosyncratic or personal or just a contractual arrangement.

CAHILL, MS: No, but – well, we respectfully disagree, for this reason: that when one looks at the AQIS regulatory environment, it is not as broad as, with respect, your Honour is identifying. All that AQIS does in terms of approving the NASAA standards is it puts its imprimatur to the fact that these meet the minimum requirements of the national standard. They don't go on to confer any status upon a standard that goes over and above the minimum standard. So, that's the limit of the AQIS approval, if you will - - -

McLURE P: I think - - -

McCUSKER, MR: - - - and I can take your Honour to the - - -

McLURE P: Yes. But the NCO and NASAA is approved by AQIS to perform this very function, which is the yardstick by which we Australians can export our product - - -

CAHILL, MS: Yes.

McLURE P: - - - and label them as organic and gain a very significant economic premium for doing so.

CAHILL, MS: But they - - -

McLURE P: And the same in the domestic market, so – but - - -

CAHILL, MS: They only approve, though, the standard to the limited extent that I have identified, and I will take your Honour tomorrow to that part of the standard. Your Honour is looking at the time. I'm not sure - - -

McLURE P: No, no, no. I thought you were looking at the time, so I'm happy to sit through and - - -

CAHILL, MS: Now - - -

McLURE P: - - - till quarter past.

MURPHY JA: You say that there are other licencing arrangements available which didn't have 3.2.9 if it's construed in the way that the appellant suggests it - - -

CAHILL, MS: Yes, so, and - - -

MURPHY JA: - - - should be. Is that the - - -

CAHILL, MS: - - - and that - - -

MURPHY JA: - - - ACO one, is it?

CAHILL, MS: There's the ACO one and then, also, your Honour, this is effectively contention 3, I think, of our - - -

MURPHY JA: Yes, I understand that.

CAHILL, MS: - - - notice of contentions. There's the other certifier, AUS-QUAL, that Ms Goldfinch gave evidence about, who just uses the national standard. And so, to the extent that the national standard doesn't contain a permission to decertify in these circumstances, that seems to be a relevantly different position. So, that reinforces, if you like, this concept that we seek to develop about the consensual nature of the arrangement between Mr Marsh – Mr and Mrs Marsh on the one hand and NASAA on the other, and the way in which that then bears upon an analysis of whether or not there is actionable harm. So, as I said, obviously, whether that's in terms of the assessment of duty, one considers that as a policy issue, or - - -

McLURE P: But I think we are – the court is going to have to go through each aspect. So, we're going to have to talk about the duty of care - - -

CAHILL, MS: Yes.

McLURE P: - - - and the breach - - -

CAHILL, MS: Yes.

McLURE P: - - - and the causation. So, I think we need to address our submissions to each issue that's going to be addressed - - -

CAHILL, MS: Absolutely.

McLURE P: - - - because I think it's probably going to have important - - -

CAHILL, MS: Yes.

McLURE P: It will be important in any event, so - - -

CAHILL, MS: Yes. One hour in, I'm only in my overview. I apologise, your Honour.

McLURE P: No, no, no. I didn't want you to think that, you know, you can just throw it all together and it doesn't matter whether it's breach or causation or duty, because I think we're going to have to go through each - - -

CAHILL, MS: Yes.

McLURE P: - - - separately, in any event, so.

CAHILL, MS: We certainly understand that, your Honour.

McLURE P: Yes.

CAHILL, MS: Yes. So, yes, in this environment of the alternative case where 3.2.9 does permit certification in respect of the claim in nuisance, of course we simply say that a risk of decertification for these sorts of reasons that we've articulated does not amount to an interference with the ordinary use or enjoyment of the land in the way in which is actionable under that – under that head. I just pause here to just headline briefly, your Honour, the conversation between your Honour and my learned friend, Mr McCusker, in relation to nuisance and the two categories of case, physical damage and loss of amenity.

Mr McCusker was saying no research had thrown up in any case of like nature, and certainly none for us, too. We just headline two points. First of all, we think that Victoria Park Racecourse v Taylor is quite an analogous case.

McLURE P: Thought you might.

CAHILL, MS: It's also illuminating to think that in Perre v Apand there was no even attempt to run a nuisance case there. That speaks volumes, we think, for how this doesn't amount to interference.

McLURE P: There's lots of European academic writing, isn't there, on the subject.

CAHILL, MS: Well, that, I don't know, your Honour.

McLURE P: Yes, there is, and it didn't seem to go beyond much the middle of 2000, and I assume that's because the Europeans haven't opened up genetically modified agriculture – I assume, because otherwise they would have – we would be inundated in cases, and I just can't find any.

So, if you can have a look, both – if everyone can have a look, but it has been contentious in the academic sphere for over a decade. Everyone has been positing about whether negligence is available and, if so, why or why not in the context of the European Union and Canada, but everything went quiet, so I assume there is no genetically modified agriculture there, or perhaps that assumption is just wrong. I don't know.

CAHILL, MS: No, I don't know either, your Honour.

McLURE P: No.

CAHILL, MS: Can I turn to grounds 9 and 10. This deals with the construction of 3.2.9. Can I begin, first, with an explanation. I think your Honour may have – President McLure may have – and not so implied – expressly been critical this morning of the cross-examination of witnesses about their understanding.

McLURE P: Yes, the proper construction.

CAHILL, MS: It certainly didn't go to the proper construction of – that wasn't the purpose of the - - -

McLURE P: No. I'm just wondering why - - -

CAHILL, MS: Why.

McLURE P: - - - if there's a construction issue - - -

CAHILL, MS: It went to about three issues. One was - - -

McLURE P: The unreasonableness.

CAHILL, MS: Well, that was the last one. The first two, though, were it bore upon an assessment of the knowledge of the magnitude of the risk, because a lot of that cross-examination revealed, in our submission, that there was a lot of uncertainty within NASAA itself about how the rule was to be applied, when it would and when it wouldn't, and what the consequences would be.

McLURE P: Was Western Australia the first one to let in – no, it wasn't.

CAHILL, MS: I beg your pardon?

McLURE P: Was Western Australia the first state to permit - - -

CAHILL, MS: No.

McLURE P: No, it wasn't, was it.

CAHILL, MS: No. New South Wales, I think, was.

McLURE P: So - - -

CAHILL, MS: It also went to that issue of indeterminacy of liability, where one has – can't foresee, if you like, what the actual scope of the liability is likely to be in the position of the defendant. So, it certainly wasn't intended to go to the question of what 3.2.9 says, which, of course, is an objective exercise.

MURPHY JA: Can you just remind me, was the respondent given the NASAA organic standard?

CAHILL, MS: Three – just 3.2, so that section. There's a finding about that, your Honour.

MURPHY JA: Yes. No, that's all right. So, he was given 3.2.

CAHILL, MS: Yes, there is a finding - - -

MURPHY JA: Or they were given 3.2.

CAHILL, MS: - - - that he was given section 3.2. Can I take the court to appeal book – green appeal book volume 4, page 1734.

NEWNES JA: I'm sorry – I'm sorry, Ms Cahill, what number was that?

CAHILL, MS: 1734 - - -

NEWNES JA: Thank you.

CAHILL, MS: - - - your Honour. We say it's important to just remind ourselves in the construction task about the purpose of the general principles, where they appear, because you've got those two paragraphs at the start of section 3.2. Of course, it described, here, general principles behind the architecture of organic agriculture. That is to be properly understood, we say, as disclosing the objective or the intention behind what a particular section of standards or a particular standard is designed to achieve. We also draw the court's attention at line B to what the introduction identifies as the standard purporting to do, and outlines – your Honours can read it:

> …practices, materials that are allowed, restricted or prohibited for use

We focus on the word "use" there in order to be certified by NASAA. That – obviously, that focus on the word "use" is to be considered in contradistinction to the mere presence by accident of products, materials and so forth that find their way onto the organic operation accidentally. At 1740, section 1.4, there are these aims and principles, and this reinforces that point that I was making at the outset of my submissions about the way in which organic farming is really a set of methods – principled methods of agricultural production that focus on these objectives which are subparagraphed here. There is an emphasis – your Honours will read – on healthy soil, but paragraph – subparagraph 8 is the - - -

McLURE P: Before – and before you go, can I just draw your attention to something you can respond tomorrow. I thought the definition of "buffer zone" was interesting. It talks about an organic:

> …an identifiable boundary area that is established to limit the applicable of or contact with prohibited substances from an adjacent area

So, that's another - - -

CAHILL, MS: Yes.

McLURE P: - - - pointer. I don't know whether it's inconsistent but - - -

CAHILL, MS: I think it might be consistent with an argument we will put to you about the contradistinction in the language of section 3.1 and 3.2, between contamination, on the one hand, and exposure to prohibited products on the other – or prohibited materials. I was just talking about this emphasis on healthy soil which is identified in the prefatory words, and your Honours will see, in subparagraph 8, the specific aims and objectives of the organic production. It's really talking about fertility and biological activity of soils and minimising input reliance which, presumably, means fertilisers and that sort of thing. It doesn't talk about keeping prohibited products out of soil. It's more about the fertility of the soil.

McLURE P: I think it is. If you have a look at what you can put into the soil, it's very highly regulated what you can put in and how you make it natural and - - -

CAHILL, MS: Well, and livestock as well. What I'm – is very limited what you can put into your livestock as well.

McLURE P: It seems to be a highly regulated system, that's all, if you look at the annexures.

CAHILL, MS: It is, but what I'm endeavouring to show the court here is that the aims and principles as they're set out here mention only, in paragraph 12, genetic engineering.

McLURE P: Yes. Yes.

CAHILL, MS: And, again, there's this emphasis on the use of genetic engineering rather than the accidental or mere presence of it.

McLURE P: Well, that's – that's linked with what's – one of the objects of the Monsanto licence, which is the effect on diversity of overuse of herbicides. So, if RR canola results in the use of Roundup with gay abandon so that there becomes an inability to react to – whatever – glyphosates, or whatever they're called, that impacts on diversity. So, I think it's the use of that – the presence, if you like – the broader use of genetically modified crops.

CAHILL, MS: Well, I think, your Honour, what it's describing here is that it promotes genetic diversity but one may not – one may not achieve diversity through the use of genetic modification.

McLURE P: I think it's the other way. I think it is the use of genetically modified crops that impact on conduct which can reduce diversity, but, you know, this is the difficulty, isn't it. It's quarter past, Ms Cahill. Is that a convenient time?

CAHILL, MS: Yes, thank you.

McLURE P: Yes. We will adjourn until 10.30 tomorrow. The court will now adjourn.

AT 4.11 PM THE MATTER WAS ADJOURNED UNTIL
TUESDAY, 24 MARCH 2015

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