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

BETWEEN: CIV 1561 of 2012

STEPHEN WILLIAM MARSH First Plaintiff

SUSAN GENEVIEVE MARSH Second Plaintiff

and

MICHAEL OWEN BAXTER Defendant

DEFENDANT'S CLOSING SUBMISSIONS

Case Manager:	The Hon Justice Kenneth Martin
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Table of Contents

Proper Construction of the Organic Standards

1. The question of whether and in what circumstances NASAA was entitled to decertify paddocks on Mr Marsh's land because of the mere presence of GM canola material (in any amount) is a central issue in this case. The issue is directly relevant to:

    1.1 whether the defendant owed the plaintiffs the relevant alleged duty of care – the plaintiffs must demonstrate that the risk of decertification because of the mere presence of GM canola material was, in 2010, reasonably foreseeable by the defendant;

    1.2 whether the defendant breached that alleged duty – pursuant to s 5B(1)(b) of the *Civil Liability Act*, the plaintiffs must persuade the Court that the risk of decertification was not insignificant;

    1.3 whether for the purposes of the plaintiffs' claim in nuisance, there has been and is likely to be in the future an unreasonable interference with the plaintiffs' land arising from the mere presence of GM canola material on the land;

    1.4 in respect of the plaintiffs' claims in both nuisance and negligence, whether the defendant caused the plaintiffs' loss arising from the decertification;

    1.5 whether the risk of decertification in the future is sufficient to support the plaintiffs' claim for a permanent injunction.

2. Whether NASAA was entitled to decertify paddocks 7-13 because of the presence of GM material upon it primarily falls to be determined

by regard to the proper construction of the NASAA Standard and the National Standard.[1]

3. NASAA is accredited jointly by AQIS and IFOAM.[2]

4. As an AQIS accredited certifier, NASAA must ensure as a minimum compliance with the National Standard. In fact, NASAA itself regards both Standards to be uniform in their content and that NASAA and NCO are both bound to apply the National Standard.[3] NASAA considers that there should not be any situation where a certified operator could be decertified under the NASAA Standard but not under the National Standard.[4]

5. NASAA's IFOAM accreditation requires it to ensure that its NASAA Standard is consistent with the IFOAM Norms and the IFOAM accreditation requirements.[5]

The IFOAM Norms

6. The IFOAM Norms are comprised of the IFOAM Basic Standards (IBS) and accreditation criteria.[6] The purpose of the IBS is to provide a framework for certification bodies to develop their own standards.[7] Version 2005 of the IBS applied at the time of the incursion in 2010.

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1 Doc 142, Vol 5/1293; Doc 143, Vol 5/1408
2 Doc 142, Vol 5/1300
3 Exhibit 20B, para 23; Denham T619, T644-5
4 Denham T645
5 Exhibit 20A, para 44
6 Ex 4 Doc 149, Vol 6/1582
7 Ex 4 Vol 6/1588

7. The IBS sets out in section 2.3 the requirements for standards in respect of genetic engineering.[8] It is relevant to note that the recommendation preceding the list of required standards provides that GMOs and their derivatives should be excluded from organic production processing and handling "*to the fullest extent possible*".

8. The required standards are set out at 2.3.1 – 2.3.7 and, with the exception of 2.3.6, all prohibit or limit the use by the certified operator of GMOs or their derivatives in the course of organic production, processing and handling. 2.3.6 is the only required standard dealing with the introduction of GMOs from circumstances beyond the control of the operator and is in these terms:

> "*Contamination of organic **product** by GMOs that results from circumstances beyond the control of the operator **may** alter the organic status of the operation and/or product.*" (emphasis added)

9. "*Contamination*" is defined in the IBS[9] as meaning:

> "*Pollution of organic product or land; or contact with any material that would render **the product** unsuitable for organic certification*" (emphasis added)

10. Three things are therefore clear from these provisions. The first is that the required standards are intended to be concerned only with the contamination of product and not land in circumstances where GMOs are present for reasons outside the control of the operator. Secondly, the use of the word "*may*" in 2.3.6 reveals that the IBS does not intend

[8] Ex 4 Vol 6/1596
[9] Ex 4 Vol 6/1590

for certifying bodies to provide in their standards for zero tolerance in respect of the presence of GMOs in either the certified operation or the certified product, even where the product is "*contaminated*" as defined.

11. Section 4.6 of the IBS deals with avoiding contamination.[10] The recommendations contained in that section include that the certifying body should promulgate standards that establish a procedure on how to evaluate organic products in the case of reasonable suspicion of pollution based on due expert consideration and the "*precautionary principle*". The precautionary principle is articulated in the appendices to the IBS.[11] In this context, it is relevant to note that RR canola has been assessed and approved for release in Australia by the OGTR as not being a risk for human health or the environment.[12]

The National Standard

12. The purpose of the National Standard is clear: it stipulates the minimum criteria that must be met before any certified product intended for export can be labeled as, relevantly, "*organic*": clauses 1.1 and 1.2.[13] The intent is that if a certified operator complies with the National Standard, this will ensure the "*lowest possible risk of contamination*" of organic produce: clause 1.6.

13. Although the National Standard is concerned fundamentally with the labeling of agricultural products as "*organic*", the detail of the Standards is directed more to the method of production. This is a

[10] Ex 4 Vol 6/1605
[11] Ex 4 Vol 6/1637
[12] Ex 32A, Parts 2-5; Exhibit 28, section 3.2
[13] Ex 4 Doc 143, Vol 5/1413

consequence of the fact that the definition of "*organic*" is concerned not with the agricultural end product but rather with a specific philosophical approach towards agricultural production: see the definition of "*organic*" at p8 of the National Standard.[14]

14. The National Standard distinguishes between "*General Principles*", "*Standards*" and "*Derogations*". The qualitative difference between each descriptor is explained in the introduction to the Standard.[15] In short, the General Principles are a statement of intention or objective. They therefore inform the proper construction of the Standards. The Standards themselves define and confine what must be complied with by the certified operator. Importantly, it is only the breach of a Standard that can result in the imposition of a sanction.[16]

15. Section 3.3 of the National Standard deals with genetic modification. The General Principles make clear that the purpose of the section is to minimise the risk of agricultural products or by-products being derived from or contaminated with GMOs. The Standards must be construed in that context. Similarly, the Standard does not define what constitutes "*contamination*". Nevertheless, having regard to the overarching purpose of the National Standard to provide for the minimum requirements when labeling an agricultural product as "*organic*" and bearing in mind the objectives of the Standards in relation to genetic modification specifically, contamination can only properly be concerned with the contamination by GMOs of agricultural product or by-products or, at the most, so much of the agricultural process (eg, land) as in the circumstances has the potential to in turn contaminate an agricultural product or by-product.

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[14] Ex 4 Vol 5/1416
[15] Ex 4 Vol 5/1409
[16] Ex 4 Vol 5/1451-2

16. Standards 3.3.1 – 3.3.5 do not prohibit the accidental presence of GMOs on the certified operator's land. Importantly, Standard 3.1.9b is the only standard that deals expressly with the scenario of accidental "*contamination*". It provides that:

> "*Product known to be contaminated by genetically modified organisms, or their by-products must be excluded from sale.*"

17. It is entirely in accordance with the objects of the National Standard and, particularly, the objectives of the Standards regulating the use and management of risks in respect of GMOs that such "*zero tolerance*" as there is in respect of the accidental presence of GMOs is limited to known contamination of agricultural product. The only other instance of "*zero tolerance*" within the National Standard with respect to GMOs would appear to be, relevantly, Standard 3.3.5 which deals with the growing or production of genetically modified agricultural products on the same farm as one that is certified under the Standard.

18. Several points are therefore uncontroversial with respect to the proper construction and application of the National Standard.

19. The first is that the plaintiffs self-evidently did not cease to comply with the National Standard simply because the GMO canola swathes were present on their land after the 2010 incursion. The second point follows from the first: there is no tenable basis upon which the plaintiffs can contend that NASAA was <u>required</u> to decertify paddocks 7-13 because of the incursion. The third point is significant: because the plaintiffs had not ceased to comply with the National Standard,

NASAA was not entitled to decertify those paddocks where the GM canola was present.

20. Although that position is plain from an objective construction of the National Standard, it is revealing that when the relevant NASAA witnesses were asked to identify the relevant provision of the National Standard which in their view had been breached as a result of the incursion, they each pointed to Standard 3.3.1.[17] That standard in its terms plainly does not apply to the event of accidental incursion. Ms Denham argued most implausibly that the word "*use*" in Standard 3.3.1 would include "*presence*".[18] Ms Goldfinch also suggested Standard 3.3.4 applied by reason of the incursion because the plaintiffs' sheep had eaten some of the canola.[19] She was clearly wrong about that. The sheep were not genetically modified as a result of eating GM canola and the plaintiffs had not used genetically modified crops to feed them.

21. If, as NASAA has said in evidence, it is bound to apply the National Standard and there should not be any situation where a certified operator could be decertified under the NASAA Standard but could not be decertified under the National Standard, NASAA was not permitted to decertify paddocks 7-13 because of the accidental incursion of GMO swathes, and it was wrong of it to do so.

The NASAA Standard

22. The NASAA Standard mirrors the National Standard in terms of the aims and principles of organic farming and the overarching purpose of

[17] Denham T644, Goldfinch T593-4
[18] Denham T644
[19] Goldfinch T594

the standard to label agricultural products as meeting its minimum requirements: clauses 1.3 and 1.4.[20]

23. The General Principles articulated in section 2.12 make it clear that decertification is a sanction to be imposed "*as a result of ongoing non-compliance with the Standard following a period of suspension*". Therefore, there appears to be no facility for NASAA (or NCO) to decertify otherwise than for non-compliance: Vol 5/1312.

24. Section 3.1 focuses upon the obligations of the certified operator to reduce the risks of contamination (whether from GMOs or other substances): Vol 5/1316-7. "*Contamination*" is not defined in the NASAA Standard but presumably must be read conformably with the definition in the IBS.

25. The Recommendations in section 3.1 expressly provide that, in respect of contamination occurring for reasons outside the control of the certified operator, there will not necessarily be a consequential effect upon the organic status of the operation. Clearly, therefore, there is no intention under the NASAA Standard for there to be "*zero tolerance*" in respect of accidental contamination. By way of contrast, Standard 3.1.12 provides for mandatory decertification where prohibited substances have been applied intentionally (cf. contamination) to certified **products** or there is a demonstrable failure to take reasonable precautions against contamination: Vol 5/1317.

26. The only express reference to "*zero tolerance*" in the NASAA Standard appears to be at Standard 3.1.6. The focus of that Standard is upon chemical residues and the requirement for the testing of

[20] Ex 4 Doc 142, Vol 5/1305-6

product (ie, tissue testing) where soil tests reveal contamination with the specified chemical.

27. Section 3.2 of the NASAA Standard deals specifically with genetically modified organisms. The General Principles are important. They evidence that the intention or objective of the section is to preclude the use of genetically modified organisms in organic production and processing systems. Further, the recommendations suggest that the type of "*contamination*" that is relevant for the purposes of the section, is limited to genetic contamination through the transfer of GM traits from one organism to another.

28. Standards 3.2.1 – 3.2.5, on a natural and ordinary reading, are concerned only with the deliberate use or negligent introduction of GMOs by the certified operator. In particular, Standard 3.2.1 must be read conformably with Standard 3.2.5. Further, the terms of required Standard 2.3.6 of the IBS precludes Standard 3.2.1 being construed as prohibiting the introduction of GMOs through the negligence of third parties.

29. Standards 3.2.6 – 3.2.8 and 3.2.10 are directed towards obliging the certified operator to take steps to reduce the risk of contamination by GMOs.

30. Standards 3.2.11 and 3.2.12 read together appear to reflect Standard 3.1.9b of the National Standard. A plain reading of Standard 3.2.11 precludes the conclusion that there is "*zero tolerance*" in respect of contamination of **product** for reasons outside the control of the certified operator. If that is so, Standard 3.2.9 cannot be sensibly read as requiring decertification for "*contamination*" that occurs outside of

the control of the certified operator, in respect of something other than an agricultural product, and where the so-called "*contamination*" has not resulted in the demonstrated presence of GMOs in agricultural products.

31. Accordingly, on a proper construction of the NASAA Standard there is no non-compliance with Standard 3.2.9 by reason of "*contamination*" that occurs for reasons outside the control of the certified operator and which does not result in demonstrated contamination of an agricultural product.

32. Against this background, NCO's conclusions in December 2010 that that the presence of only one canola swathe in a paddock amounted to an unacceptable risk of contamination and therefore a breach of Standard 3.2.9 was:

32.1 wrong on a proper construction of the NASAA Standard;

32.2 inconsistent with the objectives of the IBS;

32.3 inconsistent with the relevant provisions of the National Standard;

32.4 for any or all of these reasons, patently unreasonable.[21]

Duty of Care

33. The issue of whether a duty of care is owed is to be assessed on the basis of a prospective rather than a retrospective analysis, in order to

[21] Goldfinch T549-554, 572-6

avoid confusing questions of duty with questions of breach and causation.[22]

Foreseeability

34. In order for a duty of care to avoid pure economic loss to arise, as with physical damage, the loss must be reasonably foreseeable. A risk is reasonably foreseeable if it is not far-fetched or fanciful.[23]

35. The issue of reasonable foreseeability, in the context of a duty of care, is "*bound up with the question whether it is reasonable to require a person to have in contemplation the risk of injury that has eventuated*": *Tame v New South Wales; Annetts v Australian Stations Pty Ltd* (2002) 211 CLR 317 at [12] per Gleeson CJ.

36. Reasonable foreseeability is not, however, in itself sufficient to ground a duty.[24] The position is this:

> "It *is well established that, in general, a person does not owe a duty in tort to another to take care not to cause reasonably foreseeable economic loss": Apache Energy Ltd v Alcoa of Australia Ltd* [No 2] [2013] WASCA 213, per Buss JA at [109].

37. It is not contended by the plaintiffs that their loss was foreseeable simply because it was reasonably foreseeable that GM canola from Seven Oaks could be blown onto Eagle Rest. The transfer of GM canola swaths from Seven Oaks to Eagle Rest would be unremarked upon and unremarkable, were it not for the alleged effect on the organic certification of Eagle Rest.

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[22] *Gunnerson v Henwood* [2011] VSC 440 at [302]
[23] *Wyong Shire Council v Shirt* (1980) 146 CLR 40 per Mason J
[24] *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515 [21]; *Perre v Apand* [1999] HCA 36; (1999) 198 CLR 180 at [27], [70] and [329]

38. Whilst reference is made to the number of GM canola plants deposited on Eagle Rest ([21] SoC), the plea concerns the risk that certification may be lost if GM canola *per se* is found on Eagle Rest, that is in any quantity: ([31] SoC). It is not alleged that it was foreseeable that GM canola would be blown or carried from Seven Oaks to Eagle Rest in any substantial number.

39. The test of reasonable foreseeability is an objective test. In circumstances such as these, what is reasonably foreseeable must be determined by reference to the defendant's knowledge of the possible consequences of the accidental presence of GM canola to Eagle Rest's certification (in any amount).

40. '*Knowledge*' is relevantly defined as acquaintance with a fact or facts.[25] A '*fact*' is something that is known to be true.[26] Something that is not true may be believed, but it cannot be known, and such belief cannot amount to the required knowledge.

41. Accordingly, to the extent the information the defendant was said to have, as to the consequences of the transfer of GM seed and material from Seven Oaks to Eagle Rest, was inaccurate, that information cannot be relied on to establish that those consequences were reasonably foreseeable to a reasonable person in the defendant's position.

[25] The New Shorter Oxford English Dictionary 1993 Clarendon Press Oxford
[26] The New Shorter Oxford English Dictionary 1993 Clarendon Press Oxford

Evidence of the defendant's knowledge

42. It is not in dispute that:

42.1 Seven Oaks and Eagle Rest are neighbouring farms;[27]

42.2 the defendant knew that canola volunteer plants could be found a short distance from where a crop had been planted;[28]

42.3 the defendant knew that there was a chance that swathes could be dislodged from windrows by strong wind and that the dislodged swathes could be blown further by the wind. The evidence was, however, that he did not believe that swathes would be blown onto Eagle Rest, given the provision of a buffer zone, including the road, and the tree lines on either side of the road.[29] The defendant's evidence was also that he had not seen the swathed canola on Seven Oaks being blown around in 2010;[30] and

42.4 before growing GM canola on Seven Oaks, the defendant knew that the plaintiffs were organic farmers,[31] or that they had some type of organic certification.[32] The defendant also understood that there were rules associated with being an organic farmer, although he did not know what these rules were.[33] The

[27] [1] Further re-amended defence (defence); Ex 1 at [3]
[28] Ex 26A [72], T758
[29] T758 and T829
[30] Ex 26A [65], [71][2]
[31] Ex 26A [39], T753
[32] Ex 26A [41][3],
[33] Ex 26A [42][2] and [3], T754, 755

defendant's evidence was that he knew nothing of the detail of the plaintiffs' certification.[34]

43. Finally, it is not in dispute that Mr Marsh told the defendant that in about November 2008, that if GM canola got onto Eagle Rest from Seven Oaks, the plaintiffs' organic certification would be affected or lost because GMOs are not allowed on an organic farm.[35] For the reasons outlined in paragraphs 1 to 32 of these submissions, this was not a true statement of the position either under the National Standard or the NASAA Standard. The defendant's erroneous belief in the truth of this statement cannot, therefore, support a finding that the risk of decertification of all or part of Eagle Rest, was reasonably foreseeable.

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

45. The plaintiffs are unable to rely on the defendant having been informed that certifying organisations had a zero tolerance for the accidental presence of GMO within an organic produce system, outside the producer's control. For the reasons set out in paragraphs 1 to 32 above, that was not true according to the facts.

46. The actual position was (and remains) that on a proper construction of the National Standard and the NASAA Standard, there was only a risk

[34] Ex 26A [42], T754
[35] [6] Defence, Ex1 [14], T756 to 757

of decertification by reason of the presence of GM plants and seeds on Eagle Rest if that presence was **not** accidental or outside the control of the operator, and posed an unacceptable risk of contamination of the products produced by the plaintiffs from Eagle Rest. The prospect of an unacceptable risk of contamination of product was not a reasonably foreseeable consequence in the circumstances given that there was no risk of cross-pollination of GM canola with the plaintiffs' crops,[36] any GM seed or plant material could be removed from the product before it left the farm gate,[37] and the defendant was informed by Mr Marsh in April 2010 that he would move his crops further away from the proposed GM canola crops, as a consequence of being informed of the defendant's intention to grow GM canola on Seven Oaks near the boundary of the road between Seven Oaks and Eagle Rest.[38]

47. The information relied on by the plaintiff as establishing the requisite knowledge that if any GM canola seed or material was found on Eagle Rest, the plaintiffs would be at risk of losing their organic certification with the consequence that the plaintiffs would suffer loss, and therefore the reasonable foreseeability of those matters is pleaded in [31] Amended Statement of Claim (**SoC**) and comprises the following matters, in addition to the matters referred to in paragraphs 42 and 43 above:

47.1 The contents of a letter sent to the defendant in terms of the letter dated 5 August 2002[39] (**2002 Letter**) sent by Mr Marsh to his parents and brother: [4] SoC;

47.2 Signs erected on the boundary of Eagle Rest:[40] [8] SoC;

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[36] Ex 17B and 17C
[37] Exhibit 27, p15, Exhibit 13C, p11, Ex17A, p2
[38] Mr Marsh T222, 223, 274 and 275; Ex 26A 46[4]
[39] Ex4 Vol2/0209

47.3 A number of Department of Agriculture and Food Western Australia (**DAFWA**) publications ([16] SoC) (**DAFWA Documents**);[41] and

47.4 for the period from October 2010:

a. a letter dated 1 October 2010 from Mr Marsh to the defendant[42] ([18] SoC); and

b. notices published in local newspapers.[43]

2002 Letter

48. The defendant does not recall receiving a letter in the form of the 2002 Letter.[44] Even if he did recall receiving such a letter, it could not reasonably support the existence of a duty of care nearly eight years later to any greater extent than it evidences the defendant's knowledge of the plaintiffs' certified organic status (which is not in dispute).

49. There is nothing in the content of the 2002 Letter that says, either expressly or implicitly, that, after certification of Eagle Rest, there could be a loss of organic certification of all or part of Eagle Rest if any GM seed or plant was found on Eagle Rest. The 2002 Letter expressly states that in circumstances where the recipient of the letter

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40 Ex4 Vol1/0244 and 0245

41 Ex4 Vol2/0216 to 0218, 0219 to 0221, 0222 to 0225, 0226 to 0229, 0230 to 0231 and 0232 to 0236

42 Ex4 Vol2/0246 to 0252

43 Ex4 Vol2/0260, 0262, 0264, O265, O266, 0270, 0272, 0273, 0275 and 0278. The contents of letters to the Shires of Kojonup and West Arthur (**Shires**) dated 23 April 2009 (Ex 4 Vol 2 pp 0212 and 0214), which were referred to in evidence are not relied on in the SoC as relevantly affecting the defendant's knowledge and neither could they. Those letters are not addressed to the defendant and there is no evidence he was aware of them.

44 T753 to 754

grows GMO, the plaintiffs will change their management practices. Implicit in this is the acceptance by the plaintiffs of the responsibility to do so in order to maintain certification.

Signs

50. Mr Marsh's evidence was that the signs were erected in 2002/3[45] and 2010.[46] The defendant's evidence was that he knew that the signs were erected in October 2010 but not before.[47] The content of the signs cannot have any bearing on the state of the defendant's knowledge before he became aware of them.

51. The signs:

51.1 say nothing more than what the defendant already knew, which was that Eagle Rest was a certified organic farm. The statement that Eagle Rest was "*declared GMO free*" referred to a declaration by the plaintiffs themselves and adds nothing to the statement concerning certification;

51.2 give no information as to what is meant by '*contamination*'; and

51.3 issue warnings to people proposing to enter onto Eagle Rest about the risk of "*contamination*" from that entry. This could not be expected to affect the defendant's knowledge of the risk of accidental entry of GMO onto Eagle Rest in circumstances other than by way of the defendant's deliberate entry onto

[45] T187 to 188, Ex 8
[46] T189, Ex 9 and 10
[47] [5][1] Defence

Eagle Rest. The defendant's evidence was that he had not been on Eagle Rest for many years.[48]

DAFWA Documents

52. The defendant's evidence is that in 2010, and the years before, he rarely read DAFWA publications and did not recall reading publications concerning GM crops in the vicinity of organic farms.[49] The defendant believes that he had read a document similar to the Fact sheet entitled "*Genetically Modified Crops and Farmer Liability*" some time in 2011.[50]

53. Further there is no evidence that there was any obligation on the defendant to either read the DAFWA Documents or to act upon them. To the contrary, each of the DAFWA Documents, other than the document entitled "*GM Technology Frequently Asked Questions*", contains DAFWA's express disclaimer as to reliance on the contents of the document in the following terms, "*The Chief Executive Officer of the Department of Agriculture and Food and the State of Western Australia accepts no liability whatsoever by reason of negligence or otherwise arising from the use or release of this information or part of it.*"[51]

54. Even were there evidence that the defendant had read the DAFWA Documents, their contents could not, in any event, form the basis for a finding that the defendant owed the plaintiffs the claimed duty of care.

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[48] Ex 26A [43][1]
[49] Ex 26A [42][5]
[50] Ex 26A [42][5], T834 and 835
[51] The disclaimer in these terms appears in Ex 4 Vol 2/0218, 0221, 0222, 0226, 0230

55. The plaintiffs allege that, as a result of the contents of the DAFWA 2010 Documents, amongst other matters, that the defendant knew the following:

55.1 Organic producers require strict separation distances from non-organic crops to meet certification requirements: [30(iv)] SoC. If this information is to be derived from the DAFWA Documents, it cannot be relevant to the issue of reasonable foreseeability in the absence of identification of an obligation on the defendant to maintain a separation distance. In particular:

a. The references to segregation in DAFWA Farm Note 407[52] refer to segregation between GM and non-GM canola, and not other crops. These references must be read in light of the reference to the canola grain standards,[53] by which the Australian Oilseeds Federation established a trading standard for non-GM canola, which must contain less than 0.9% adventitious presence of an approved GM canola.

b. DAFWA Farm Note 407[54] advises that Roundup Ready (**RR**) canola growers should comply with licensing requirements, including informing neighbours of plans to grow the GM crop and maintaining a minimum 5m separation between GM and non-GM crops.[55] The evidence is that the defendant complied with the

[52] Ex4 Vol2/0230
[53] Ex 4 Vol 2/0230
[54] Ex 4 Vol 2/0226 to 0229 at 0226 and 0229
[55] Ex 4 Vol 2/0227

requirement to inform his neighbour and exceeded the requirement that he maintain a minimum 5m separation.

c. The control of volunteers[56] in DAFWA Farm Note 407 refers to the control of volunteers after they have appeared, and by reference to the use of appropriate herbicides. Accordingly this farm note does not contemplate the prevention of volunteers.

d. The reference to separation distances in the document entitled "*GM Technology Frequently Asked Questions*"[57] is a reference to separation distances maintained by the organic farmer.

55.2 Organic farmers are certified to ensure that their farming methods comply with standards for organic production and to reassure wholesalers, retailers and consumers that their produce is truly organic: [30(v)] SoC. This allegation is so generalised that it could not on its own, or when read with other allegations of knowledge, relevantly convey knowledge to the defendant such as to found the alleged duty of care.

55.3 Australian Standards prohibit the use of GM material in organic products: [30(vi)] SoC, the use of GM inputs and the growing of GM crops: [30(vii)] SoC. This could convey only that there is a prohibition on the deliberate use of GMOs by operators of organically certified operations. In particular, it is submitted that a reasonable person in the defendant's position could not be expected to understand the references to "*use*" of GM products or inputs or the growing of GM crops as having any

[56] Ex 4 Vol 2/0229
[57] Ex 4 Vol 2/0232 to 0236

relevance to the consequences of the accidental presence of GM canola on Eagle Rest;

55.4 Under organic certification in Australia, organic operators must notify their certifier of any GM crop within a 10 km radius: [30(viii)] SoC. This statement conveys no information about the effect of accidental presence of GM crop on the organic certification of Eagle Rest;

55.5 Legal remedies and liability for losses to neighbouring farmers exist: [30(ix)] SoC. This appears in the document entitled "*GM Technology Frequently Asked Questions*" [58] and is a matter for determination by this Court. The assertion that those remedies exist cannot form the basis of a finding that the defendant owed the alleged duty of care to the plaintiffs.

56. The only matters of alleged knowledge referred to in the statement of claim which could be arguably relevant to the establishment of the required element of reasonable foreseeability are those pleaded in:

56.1 paragraph 30(iii) namely that the spread of GM seed or pollen to a non-GM neighbour could compromise the neighbour's non-GM or organic status; and

56.2 that part of paragraph 30(viii) which refers to the defendant's alleged knowledge that any GM contamination may alter organic certified status.

57. The contents of the DAFWA Fact sheet entitled "*Genetically Modified Crops and Farmer Liability*" says that the spread of GM seed or pollen to a non-GM neighbour could compromise the neighbour's

[58] Ex 4 Vol 2/0235

non-GM or organic status: [16(g)] and [30(iii)] SoC.[59] The defendant makes two submissions in relation to this:

57.1 The Fact sheet provides the following advice in relation to a claim of negligence, "*A breach of duty could result from failing to adhere to 'good practice' in GM crop cultivation (such as keeping buffer zones between GM crops and plantings of non-GM neighbours. GM farmers should be careful to comply with, and carefully document compliance with, any licence conditions associated with their GM crop*." Whilst the advice cannot be determinative of whether the defendant owed the plaintiffs a duty of care, a reasonable person reading this Fact sheet as a whole would form the view that there could be no compromise of a neighbour's organic status if the farmer complied with their licence conditions and otherwise acted reasonably.

57.2 The reference, in relation to a potential claim of private nuisance, that the spread of GM seed could "*compromise the neighbour's non-GM or organic status*" provides no specific information of what that "*compromise*" may comprise and under what circumstances it could occur.

58. The DAFWA Fact sheet entitled "*Organic farming and genetically modified crops*" [60] states, "*any GM contamination may alter the organic certified status*". That Fact sheet does not identify the basis for this statement. There is no such provision in the National Standard.[61] The Fact sheet may intend to refer to NASAA Standard 3.2.11. If so it is inaccurate as only contamination of organic <u>product</u>

[59] Ex 4 Vol 2/ 0219 to 0221
[60] Ex 4 Vol 2/0216 to 0218
[61] Ex 4 Vol 5/1421 to 1422

by GMOs may result in an alteration of the organic status under 3.2.11.[62] Neither does the Fact sheet say what organic status may be affected (ie, product or the organic farm) or in what way that organic status may be affected.

Notice in local papers

59. These notices, which were published in October, November and December 2010, cannot inform the scope of the duty insofar as it concerns the planting of GM canola on Seven Oaks in April 2010.

60. Whilst the publication of the Notices is admitted,[63] the only fact relied on to infer that the defendant was aware of the notices is the fact of their publication.[64] There is no plea that the defendant was aware of the contents of any of the notices, or that he ought to have been so aware, nor was he cross-examined on his knowledge of the notices.

61. The reference in the notices to "*GM Free Accreditation*" adds nothing to the reference to "*Organic Certification*". Neither do the notices define what is meant by contamination other than "*contamination of the farm production cycles generally*".

62. To the extent that the notices intend to convey that the accidental presence of GMO onto Eagle Rest alone could result in the decertification of Eagle Rest itself, this is incorrect for the reasons outlined in paragraphs 1 to 32 above.

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62 Ex 4 Vol 5/1318. See also submissions at paragraph 30 above.
63 Ex 1 [19] and [20]
64 [19] SoC and the particulars to [30] SoC

October 2010 Letter

63. The contents of the October 2010 Letter are not claimed to be relevant to the establishment of reasonable foreseeability before October 2010. Accordingly, that letter cannot inform the issue of reasonable foreseeability of the consequences of planting GM canola in April 2010.

64. It is not in dispute that the defendant received the October 2010 Letter or its attachments.[65]

65. The references in the October 2010 Letter to strict liability for the escape of dangerous things is not relevant to the issue of the reasonable foreseeability, as there is no evidence that GM canola constitutes a dangerous thing, and the evidence was to the contrary.[66]

66. The relevant content of the October 2010 Letter appears to be contained in paragraphs 6, 9 and 12 and Schedule A. That content is incorrect to the extent that it intends to convey that the discovery of any amount of GM canola, which was not brought deliberately onto Eagle Rest, will amount to contamination of Eagle Rest, with the possible loss of certification.

Significant Factors

67. In addition to foreseeability, the plaintiffs must establish a factor, or factors, of special significance, that bring the plaintiffs and the defendant into such a close and direct relationship as to warrant the imposition of a duty of care in relation to claims for pure economic

[65] Ex 1 [18], [9] Defence, Baxter T822 and 823
[66] Ex 32A Prof. Powles

loss: *Perre v Apand* [1999] HCA 0036; (1999) 198 CLR 180 per Gummow J at [217] and Callinan J at [430].

68. In *Perre*, McHugh J said[67] that five factors were always relevant in determining whether a duty exists in cases for liability for pure economic loss, namely:

68.1 reasonable foreseeability of loss;

68.2 indeterminacy of liability;

68.3 autonomy of the individual;

68.4 vulnerability of risk; and

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

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

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

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

71.1 physical proximity: [35] and [3] SoC;

[67] [105]

71.2 the plaintiffs' vulnerability: [33] SoC;

71.3 the defendant's control over the risk of economic loss faced by the plaintiffs: [32] SoC; and

71.4 the defendant's knowledge of the likely harm to the plaintiffs: [34] SoC.

72. Clearly Seven Oaks and Eagle Rest are physically proximate. However, this factor in itself is not sufficient to ground a duty of care. This must be so particularly where there are no factual circumstances that would negate the defendant's right to autonomy as an individual (*ie*, the third significant factor identified in *Perre*).

73. The plaintiffs' right to practice organic farming has been referred to. The plaintiffs are entitled to do that and the defendant does not contend otherwise. That said, the defendant does not owe the plaintiffs a duty merely because his conduct may defeat or impair that entitlement: *Perre* McHugh J at [84].

Autonomy

74. Consideration of autonomy involves consideration of whether the imposition of a duty in a competitive commercial environment would be inconsistent with community standards in relation to what is ordinarily legitimate in the pursuit of personal advantage. It was put this way by McHugh J in *Perre*:[68]

> *"As long as a person is legitimately protecting or pursuing his or her social or business interests, the common law will not require that person to be concerned with the effect of his or her*

[68] [115]-[116]

conduct on the economic interests of other persons. And that is so even when that person knows that his or her actions will cause loss to a specific individual. ... however where other indicia of duty are present, the cloak of immunity cannot extend to conduct which cannot be fairly described as legitimate pursuit or protection of a person's interest."

75. The plaintiffs opened their case at trial on the basis that the defendant's autonomy will not be interfered with because:

75.1 GM canola is heavily regulated by contract;

75.2 GM canola was banned until 2010;

75.3 The use of GM canola is accompanied by strict segregation protocols;

75.4 Users of GM canola are required to adhere to strict use controls addressing volunteers and resistance; and

75.5 There were other reasonable alternatives available to the defendant.[69]

76. The defendant was, at all times, operating within the law in the pursuit of his own business interests, and the plaintiffs do not assert the contrary.

77. The plaintiffs have not pleaded the existence of limitations on the defendant's autonomy on the basis referred to in opening or, indeed, on any basis. The only reference to the basis on which the defendant

[69] T94

was entitled grow GM canola is made in relation to the element of control: [32(iii)] SoC.

78. It is not open to the plaintiffs now to rely on the alleged limitations in the absence of such a plea.

79. Further, the factors referred to in opening do not have the effect of limiting or negating the relevance of the defendant's autonomy in determining whether the alleged duty of care exists.

80. There is no basis upon which the plaintiffs may rely on the terms of the Stewardship Agreement, and the obligations of the defendant thereunder, to establish a duty of care to the plaintiffs in different terms.

81. A number of the cases where a person pursuing a legitimate activity has been held to owe a duty of care have the additional element of wrongdoing by the defendant in relation to duty owed to another person. The relevance of this element appears to be that it negates the relevance and significance of the defendant's right to autonomy as militating against the existence of a duty owed to the plaintiff: *Perre*, per McHugh J at [147] and *Woolcock*, per McHugh J at [79].

82. In *Perre* at [147] McHugh J said:

> "*where the defendant is already under a restraint by reason of the duty owed to another, the rationale of that immunity rule disappears in respect of that conduct within the ambit of that duty. Here Apand was already under a duty to take steps to protect the Sparnons [to whom it had supplied the seed] against the consequences of bacterial wilt. That being so Apand's autonomy and freedom of action is not relevantly impaired if it*

were held to owe the same duty to the Perres. The case would be one of extending liability for the same activity, not one of creating a new liability of a different kind with respect to different conduct."

83. The contractual duties as between the defendant and Monsanto are, however, different from the duty pleaded to exist as between the plaintiffs and the defendant and cannot, therefore, be relied on to negate the defendant's autonomy.

84. The Stewardship Agreement[70] governs the defendant's contractual right to grow RR canola. The terms of the Stewardship Agreement are largely, and obviously, directed at enabling the licensee to grow RR canola whilst protecting Monsanto's ownership of the Roundup Ready gene technology.[71]

85. The Stewardship Agreement could not have been intended to prevent the defendant:

85.1 growing the crop at all in circumstances where it was to be grown near to an organic farm (in which case one would expect Monsanto to require its licensees to identify whether there were any organic farmers near to the land on which the licensed crop was to be grown and not to license the use of the seed in those circumstances); or

[70] Ex 4 Vol 4/1258 to 1261
[71] Ex 4 Vol 4/1258 to 1259 – see for example clauses 1.1 to 1.6 and 1.9 to 1.11, 1.13, 1.17 and 1.18

85.2 swathing the crop (in which case one might have expected Monsanto not to recommend swathing,[72] or to specifically prohibit swathing in the vicinity of any organic farm).

86. The Stewardship Agreement requires compliance with the RR Canola Crop Management Plan (**CMP**).[73] The CMP did not, however, impose any obligation on the defendant to ensure that no seed made its way onto another farm, let alone an organic farm.

87. The defendant in his evidence conceded his understanding that the reference in the CMP to alternative market systems included reference to organic market systems and the reference to the integrity of grain supply chains was a reference to organic supply chains.[74] This concession must be read in light of the CMP as a whole. The provisions of the CMP dealing with co-existence[75] concern the segregation of GM canola from non-GM canola, and not other non-GM crops. The CMP's stated concern, for example, in recommending minimum planting distances is to prevent the occurrence of "off types" through cross pollination.[76] The CMP does provide for circumstances where RR canola shall not be grown. None of these concern proximity to organic crops.[77]

88. The provisions of the CMP concerning the control of volunteers are apparently concerned with the prevention of pollen movement and

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[72] Ex 4 Vol 4/1235 Figure 4, where swathing/windrowing is recommended as an additional weed management practice that farmers should aim to incorporate where possible and appropriate. See also the reference to swathing and windrowing on p 1231 (last 2 paragraphs).
[73] Ex 4 Vol 4/1259 – clause 1.7. The CMP appears at pp 1225 to 1236.
[74] Ex 4 Vol 4 p1226, Baxter T767 and 768
[75] Ex 4 Vol 4 pp 1332 to 1234
[76] Ex 4 Vol 4 p 1232
[77] Ex 4 Vol 4 p 1234 under the heading "Situations where Roundup Ready canola should not be grown"

seed set.[78] They self-evidently refer to the control of volunteers after they have emerged and do not concern the prevention of those volunteers.

89. The CMP provisions concerning the plan to manage the development of glyphosate resistance (under the heading Resistance Management Plan) have no bearing on the issue of the transfer of seed from one farm to another and cannot, therefore, be relevant to the submission that the defendant's autonomy to grow and swathe GM canola on Seven Oaks as he chooses has already been limited by reason of those provisions.

90. The CMP requires only that the licensee to "*aim*" to enter the RR canola phase with a low weed burden, and does not prohibit the planting of RR canola unless there is a low weed burden.

91. The reference to segregation protocols and use controls in the plaintiffs' opening do not appear to refer to the contents of the DAFWA Documents. In any event, those publications are irrelevant to the issue of any restraint on the defendant's autonomy. Those publications had no legal force and were apparently issued by DAFWA on a "*no liability*" basis. In addition, the plaintiffs have led no evidence as to the purpose of DAFWA in releasing those publications.

92. The fact that 2010 was the first year in which GM canola could lawfully be used in Western Australia by the general farming community (other than the 17 or 18 farmers who were permitted to use it in 2009[79]) cannot add to the plaintiffs' argument that the defendant's autonomy would not be restricted if he were held to owe a

[78] Ex 4 Vol 4 p 1233
[79] Stretch T901

duty not to grow or swathing GM canola. The legislature in Western Australia has determined that all farmers in WA are permitted to grow GM canola. The evidence is that a number of farmers have taken the opportunity to do so.[80] The defendant was, and was entitled to be, one of those farmers.

93. There is little evidence of the purpose of the "strict segregation protocols" referred to by the plaintiffs in opening (which may have been led had the matter been pleaded). The segregation provided for in the Monsanto documents is obviously between GM and non-GM canola, not other crops.[81] It is not in dispute that the plaintiffs do not grow canola.[82] A purpose of segregation is clearly to limit adventitious presence of GM canola seed in non-GM canola seed to 0.9%, in order to comply with the trade parameters for non-GM canola.[83] In addition, a purpose appears to be to facilitate Monsanto's collection of a "per tonne technology fee": clause 1.6 Stewardship Agreement.[84]

94. The existence of alternatives is irrelevant to the issue of autonomy. The relevance of autonomy in assessing whether a duty of care will lie is that that a person is generally entitled to make their own choices as to how best to pursue their legitimate interests as they see fit.

Vulnerability and Control of Risk

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

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[80] Ex 30 [14]
[81] Ex 4 Vol 4/1264 – Letter from Monsanto to Michael Baxter
[82] Ex 1 [12]; Ex 5A [6]
[83] Ex 4 Vol 4/1264 – Letter from Monsanto to Michael Baxter. See also Ex 4 Vol 4/1232 CMP Table 1
[84] Ex4 Vol 4/1259

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

97. There was no significant vulnerability in the plaintiffs to the identified risks arising from the control the defendant had over those decisions. That is because in the circumstances there was no risk of cross-pollination of GM canola with the plaintiffs' crops and any GM seed or plant material could be removed from the plaintiffs' product before it left the farm gate.

98. Accordingly, the risk of decertification of Eagle Rest or a part of Eagle Rest under either the National Standard or the NASAA Standard, if they were construed and applied correctly, was minimal.

99. In the event that there was a risk of decertification from NASAA acting unreasonably, this was not a risk within the defendant's control and the plaintiffs had the power to protect themselves from the consequences of that risk if it eventuated by exercising their right to appeal the NASAA decision. The plaintiffs were also entitled to legally enforce the proper and reasonable application of the National Standards and the NASAA Standard pursuant to the terms of their contract with the NASAA.[85]

100. Mr Marsh offered no evidence as to the reasons for his failure to challenge the decision other than his acceptance (it is submitted erroneously) that the NASAA decision was correct and justified in the

[85] Ex 4 Vol 1/0040 to 0050

circumstances.[86] He conceded that in hindsight he may have asked NASAA in April 2011 to reconsider the decision to de-certify paddocks 7, 8, 9, 11 and 13 in light of his having found only 23 swathes in those paddocks.[87] He then did nothing to pursue the re-certification of the de-certified paddocks.[88]

101. The ultimate control over the choice of NASAA as an organic certifier was in the plaintiffs' hands. The plaintiffs have voluntarily entered into a contract with NASAA and thereby subjected themselves to the NASAA Standard, and its future incarnations.[89] There were alternatives available to them, which included seeking certification with Aus-qual and Australian Certified Organic.[90]

102. The plaintiffs' vulnerability is attributable to the position apparently taken by NASAA, that any accidental incursion of GMO onto an organic farm in any quantity will not be tolerated, without regard to the outcome of that incursion on the organic integrity of product. A system of co-existence was created by the legislature of WA in allowing GM crops to be planted. Such a system requires tolerances if it is to be sustainable.[91]

Knowledge of risk of harm

103. The additional element of knowledge as a salient factor in establishing a duty of care requires proof of the defendant's actual knowledge of the extent and magnitude of the plaintiffs vulnerability to the risk of

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86 Marsh T 274, 276, 325
87 Marsh T292
88 Marsh T303 to 304
89 Ex 4 Vol 1 clause 6.1 at 0041, Schedule 2 at 0050 definition of 'Relevant Standard', clause 7.6 at 0042 regarding notice of changes to the relevant Standard.
90 Goldfinch T497-8; Exhibit 35, p21 (cll 3.3.4-3.3.13) and p43 (cll. 4.8.16-4.8.20)

91 Bishop T355, Van Acker T482, 484 and 485

losing their organic certification by reason of an undefined amount of GM canola seeds or swaths being blown onto or otherwise being carried to Eagle Rest from Seven Oaks.

104. For the reasons submitted above in relation to the issue of foreseeability, there is no basis in this case to find that the defendant had any knowledge of the actual extent or magnitude of this risk. The defendant knew nothing of the content of the applicable Standards. The information he had been given, such as it was, was insufficient to give the defendant any idea of the how much canola would be required to be blown onto Eagle Rest before the risk of decertification arose, or precisely what that risk of decertification related to, whether land (and how much land) or crop or livestock or all of these, or how long the decertification of any of these things was likely to last.

105. If the defendant had been aware of the Standards, and had received advice on their interpretation, he would not have appreciated any real risk of decertification if those Standards were properly and reasonably applied.

106. In any event, the defendant had no prospect of comprehending the magnitude of the risk of decertification, even in full knowledge of the NASAA Standard, by reason of the idiosyncratic approach that the NASAA apparently takes in relation to incidences of "*contamination*" and how to deal with those incidences.

107. The evidence was that each case is treated as "*unique*" and dealt with on a case-by-case basis. It was and is not possible for NASAA/NCO to say in advance of the occurrence of a relevant event, what the consequences might be.[92] NASAA does not provide any guidance to

[92] Goldfinch T517, 525; Denham T633-7; Ayachit T678

the public as to the likely consequences to an operator's certification status in advance of the event of an accidental incursion arising. NASAA has no policy or guidelines to which it adheres concerning its approach to certification and does not provide any guidance to its own certifying officers about how to approach the issue, apart from referring them to the NASAA Standard.[93]

108. Possibly as a consequence of this lack of policy or guidance, it appeared that each NASAA officer involved in the decertification and re-certification process took an individualistic and distinct approach to the question of what constituted contamination and what the consequences of that contamination should be, although Ms Gore and Ms Denham agreed with the decision to decertify (Mr Ayachit did not express a view).

109. Ms Goldfinch, the certifying officer at the time of the decision to de-certify considered that a single swathe of GM canola was an unacceptable risk of contamination.[94] It did not make any difference to her decision to de-certify a paddock whether there was one seed or hundreds on that paddock.[95] She did not consider that it was necessary to have regard to the National Standard.[96] To her, what was relevant was "*the whole, as a whole*"[97].

110. Ms Gore also considered that contamination included the mere presence of GM canola swathes on land and that any GM presence would invoke automatic decertification although she was uncertain

[93] Denham T633-4, 637, 639; Ayachit T679
[94] Goldfinch T507, 576
[95] Goldfinch T573
[96] Goldfinch T519, 522, 545, 594
[97] Goldfinch T552

whether, in the case of accidental incursion, this would be for three or five years.[98]

111. Ms Denham considered that contamination should be given a dictionary definition, being the pollution of a system by bringing harmful or objectionable products into it.[99] She did not attempt to apply the IFOAM IBS definition. She confirmed her understanding that NASAA was bound to apply the National Standard.[100] Ms Denham considered that Goldfinch's decertification decision was correct on the basis of there having been a non-compliance with National Standard 3.3.1 because the term "*use*" included accidental presence of GM canola.[101] Ms Denham considered that the de-certification should continue until the GM canola seed was eradicated "*to a manageable level*" which she said in evidence was two growing seasons.[102] Whilst conceding that one could not say something was contaminated if the contamination was not detected[103], Ms Denham went on to say that the decision to de-certify paddock 11 in its entirety on the basis of three swathes of GM canola was justified because there may be seed that could not be seen.[104]

112. In contrast to Ms Goldfinch's approach, Mr Ayachit considered that assessing the risk posed by GMOs on the land required consideration of the quantity of GMO, as well as the likelihood of a continued presence on the land, the management practices of the farmer and the likelihood of future GMO contamination.[105] These considerations were not, however, to be found in any document and the certifying

98 Gore T424, 429, 430, 432, 436, 437, 438, 452, 455, 456
99 Denham T629
100 Denham T645
101 Denham T 644
102 Denham T652
103 Denham 630
104 Denham T657
105 Ex 21 [11] and Ayachit T679

officers under his control would be expected to refer to the NASAA Standard (and not the National Standard).[106]

Indeterminancy

113. The uncertainty of the factors that may or may not be taken into account by any particular NASAA officer deciding to de-certify Eagle Rest on any particular occasion of accidental incursion was apparent from the evidence of those officers called to give evidence, referred to at paragraphs 106 to 111 above. That uncertainty means that the liability of the defendant is, indeed, indeterminate.

Perre v Apand

114. *Perre* is the authority which could be said to bear most similarity with the current case. That arguable similarity does not, however, bear close analysis. In particular the case for imposing a duty in *Perre* was significantly stronger than this case for the following reasons:

114.1 *Perre* concerned the operation of a Western Australian law on the economic interest of the plaintiffs, rather than the contractual terms between the plaintiff and a third party;

114.2 the operation of the WA law was actually known to Apand[107] and was clear cut[108], in contradistinction to the operation of the National Standards, and the NASAA standards, let alone the determination of how those standards will be applied in any given case;

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106 Ayachit T679

107 *Perre v Apand* at [41] per Guadron J; [141] per McHugh J; [212] per Gummow J (Gleason CJ agreeing), [290] per Kirby J; [343] per Hayne J; [412] per Callinan J

108 *Perre v Apand* at [216] per Gummow J (Gleason CJ agreeing)

114.3 the defendant, Perre, was a major participant in the potato industry in Australia and knew the value to SA potato farmers of the WA market.[109] The defendant has no participation in organic farming or organic certification of farms;

114.4 Apand recognised it was in its commercial interests not to sell infected seed.[110] The defendant considers it to be in his commercial interests to grow GM canola;

114.5 Apand to its knowledge breached the law of South Australia in introducing uncertified potato seed into the Sparnons' property.[111] The defendant in this case has breached no laws;

114.6 Apand owed a duty, which it breached, to the Sparnons' not to infect their property with potato blight.[112] The defendant owes no relevant identical duty to another party, and did not damage to any property.

115. The area of similarity between *Perre* and the current case is the defendant's control in the sense that both Apand and the defendant controlled what was selected to be planted on the land in each case. That said, however, the relevant control was not in relation to the planting of the crop but to the economic loss. That must be viewed in the context of the clear operation of the WA law, Apand's knowledge of operation of that law in circumstances where they chose to plant uncertified seed selected from a location known to be affected by potato blight, knowing the risk that seed would be affected by potato

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109 *Perre v Apand* at [214] per Gummow J (Gleason CJ agreeing), [299] per Kirby J; [407], [409] and [430] per Callinan J

110 *Perre v Apand* at [211] per Gummow J (Gleason CJ agreeing)

111 *Perre v Apand* at [141] per McHugh J; [212] per Gummow J (Gleason CJ agreeing); [300 and 301] per Kirby J; [349] per Hayne J; although Callinan J did not take this into account as it was discovered after the hearing [429]

112 Perre v Apand at [147 and 148] per McHugh J; [299] per Kirby J

blight. Unlike the plaintiffs in this case, there was no way Perre could protect itself from the operation of the WA law once potato blight was confirmed on the Sparnons' farm. [113]

116. For these reasons, *Perre* provides no basis for the Court to find the existence of a duty of care owed by the defendant to the plaintiffs.

Allegation of Breach of Duty

117. In relation to the issue of breach of duty, section 5B of the Civil Liability Act 2002 (**CLA**) provides that"

> *"(1) A person is not liable for harm caused by that person's fault in failing to take precautions against a risk of harm unless –*
>
> *(a) the risk was foreseeable (that is, it is a risk of which the person knew or ought to have known;*
>
> *(b) the risk was not insignificant; and*
>
> *(c) in the circumstances, a reasonable person in the person's position would have taken those precautions.*
>
> *(2) In determining whether a reasonable person would have taken precautions against a risk of harm, the court is to consider the following (amongst other relevant things) –*
>
> *(a) the probability that the harm would occur if care were not taken;*
>
> *(b) the likely seriousness of the harm;*

[113] Perre v Apand at [42] per Gaudron J; [149] per McHugh J; [215 and 216] per Gummow J (Gleason CJ agreeing); [408], [415 and 416] per Callinan J

(c) the burden of taking precautions to avoid the risk of harm; and

(d) the social utility of the activity that creates the risk of harm."

118. Three particulars are given in support of the allegation that the defendant breached the alleged duty namely that:

118.1 he grew RR canola on the part of Eagle Rest which adjoins Qualeup North Road, when he could reasonably have grown it further away;

118.2 he swathed the RR canola crop, when he could reasonably have harvested it;

118.3 [he grew RR canola] when he could have grown conventional canola instead.

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

120. Mason J said in *Wyong Shire Council v Shirt* (1980) 146 CLR 40:

> "*The perception of the reasonable man's response calls for a consideration of the magnitude of the risk and the degree of the probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which the defendant may have. It is only when these matters are balanced out that the tribunal of fact can confidently assert what is the standard of response to be*

> *ascribed to the reasonable man placed in the defendant's position*."

See also *Tame* at [99] per McHugh J

121. As to s 5B(1)(c), a reasonable person in the position of the defendant would not have refrained from planting GM canola, including near to Eagle Rest, and would not have refrained from swathing the resulting crop in light of the minimal risk that some canola would find its way onto Eagle Rest. If the relevant Standards were correctly and reasonably applied, the risk of decertification from the adventitious introduction of GM canola plants and seeds to Eagle Rest was minimal, if it existed at all.

121.1 With respect to the failure to grow conventional canola rather than RR canola, McHugh J said in *Dovuro Pty Ltd v Wilkins* [2003] 215 CLR 317 (330):

> "*A defendant is not negligent merely because it fails to take an alternative course of conduct that would have eliminated the risk of damage. The plaintiff must show that the defendant was not acting reasonably in failing to take that course. If inaction is a course reasonably open to the defendant, the plaintiff fails to prove negligence even if there were alternatives open to the defendant that would have eliminated the risk."*

121.2 Relevantly to the issue of swathing, McHugh J said in *Dovuro Pty Ltd v Wilkins*, (329) that:

> *"compliance with common practice is powerful but not decisive evidence that the defendant did not act negligently although cases will arise where despite the common practice in a field of endeavor a reasonable person in a defendant's position would*

have foreseen and taken steps to eliminate or reduce the risk that had caused harm to the plaintiff."

122. A reasonable person could not have envisaged that a decision to de-certify a large portion of Eagle Rest would be made on the basis of the mere presence of GM canola on that portion without regard to its quantity (as was apparently the case: Goldfinch T573) and, therefore, could not be expected to make a decision not to plant GM canola on his farm or not to swathe that crop with that prospect in mind.

123. Attempts were made to undermine the defendant's evidence and that of his agronomist, Chris Robinson, as to the rational for planting GM canola based on the premise that the paddock plans prepared in advance of each season would identify all the herbicide used on any paddock in that year.[114] Three points may be made about this.

123.1 The defendant and Chris Robinson gave consistent evidence the effect of which was that the paddock plans do not specify all the herbicide used in any year, but were a guide.[115] The defendant's evidence was that he used "*FOPS and DIMS*" on his paddocks every year;[116] Robinson's evidence was that he knew that clethodim had been used on Seven Oaks between 2003 to 2005 or 2006.[117] Robinson also said that nine times out of 10 they used clethodim on canola.[118]

123.2 The benefits to farmers both of growing RR canola and swathing it, in relation to the control of weeds, were acknowledged by the plaintiffs' own experts and confirmed by

[114] Baxter 745 to 752
[115] Baxter T 745, 746, 750, 751 and 752; Robinson T953
[116] Baxter T839
[117] Robinson T944
[118] Robinson T953

the defendant's experts.[119] It is obvious that an agronomist in Robinson's position, in giving advice to farmers growing canola in the Great Southern, would advise a person who indicated that they had a herbicide resistant weed problem to grow a crop designed to allow the application of glyphosate and that a farmer in the defendant's position would accept that advice.

123.3 The burden of having to refrain from planting GM canola and/or swathing the resultant crop to avoid the risk of decertification is too great to warrant the imposition of liability upon the defendant. The planting of GM canola in paddocks near to Eagle Rest was of benefit to the defendant in so far as it was (and remains) an effective method of managing wimmera ryegrass. The defendant has also indicated that he has achieved good yields in relation to the plantings in 2013.[120] In contrast, the risk of decertification is minimal if the Standards are applied correctly and reasonably, is of uncertain scope and content if they are not, and in any event results in only relatively modest economic loss to the plaintiffs if it eventuates.

124. There is evident social utility in the continuing ability of the defendant (and others in the same position) to plant and grow canola including GM canola. An expert witness called by the defendant, Prof Powles said that in 2012 approximately one million hectares of canola were under cultivation in the WA grain belt, with 8% of that being GM canola.[121] That social utility, which attaches to the activity of farming, is not negated by the fact that the individual farmer derives

[119] McInerney T392, Powles Ex 32B, Rudelsheim Ex 28
[120] Ex 26B
[121] Ex 32A at point 10

his income from the activity, any more than the social utility of any activity such as the provision of education or medical services would change depending on whether or not a fee was charged: see *Action Paintball Games Pty Ltd (in liq) v Barker* [2013] NSWCA 128 at [36] per Basten JA (Holbein and Ward JJA concurring) where it was held there was social utility in providing physical activity for children in a natural environment, in circumstances where that activity was provided for a fee.

Causation

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

34.1 factual causation; and

34.2 the scope of liability.

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

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

Factual Causation

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

negligent act or omission is a necessary condition for the harm (the 'but for' test of causation): *Wallace v Kam* at [14], [15] and [16]; and *Adeels v Moubarak* at [45] and [54].

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

129. The plaintiffs submit that it is sufficient to satisfy the test for factual causation that the presence of GM canola swaths on Eagle Rest was a necessary condition of the harm complained of and that those swaths originated from Seven Oaks: [37] SoC.

130. The presence of the GM canola swaths on Eagle Rest is not, however, the negligent act complained of. That presence is the alleged consequence of the negligent acts of growing and swathing GM canola: [36] and [37] SoC.

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

131.1 planted GM canola in a paddock near Eagle Rest;

131.2 planted GM canola at all;

131.3 swathed GM canola.

132. Other than the allegation that the defendant ought not to have planted GM canola in a paddock near Eagle Rest, there is no allegation the defendant was at fault in the way in which he planted the crop, or in the way in which he swathed the crop (although the plaintiffs have attempted to raise some new issues in the course of the trial, which are addressed at paragraphs 185-205 below).

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

134. Accordingly, it cannot be said that growing GM canola on Seven Oaks was factually causative.

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

Scope of liability

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

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

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

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

140. In this case the rationale behind the imposition of a duty of care not to swathe GM canola, or to plant GM canola, if such duty exists, must be to avoid the risk of NASAA withdrawing certification of Eagle Rest in accordance with the proper exercise of its powers as governed by the contractual relationship between NASAA and the plaintiffs and the NASAA Standards. The scope of the liability ought not extend to the consequences of the unauthorised or unreasonable exercise of that power, including in circumstances where the plaintiffs have taken no steps to address that (by, for example, appealing NCO's decision). If the Court finds on the evidence that NASAA acted unreasonably in determining to withdraw the plaintiffs' certification, the defendant's

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

141. For the reasons outlined above, on a proper construction of the National Standard and the NASAA Standard, decertification was not permitted because the plaintiffs were not responsible for the presence of the GM canola on Eagle Rest and there was no evidence or identifiable risk of contamination of products produced by the plaintiffs and intended to be labeled as organic. In those circumstances, there was no infringement of the Standard and consequently no power to decertify. It was therefore unreasonable for NASAA to do so.

142. Even if there had been a discretion to decertify under either of those Standards, there was nothing "*inevitable*" about the decision to withdraw certification based upon the accidental presence of GM canola on Eagle Rest and it was unreasonable for NASAA to do so because:

142.1 There was little risk of GM canola seed or plant material entering into the plaintiffs' organic produce. The only certified crop potentially affected by the incursion was the wheat growing in paddock 11. Any GM canola seed intermingled with the wheat, which was not removed by the harvester screens, could be removed by seed cleaning;[122]

[122] Exhibit 27, p15; Exhibit 13C, p11

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

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

143. Further or alternatively, if NASAA had had an entitlement to decertify paddocks for the accidental presence of GM canola, it was unreasonable for it to do so in respect of those paddocks where little, if any, canola had been detected. In particular, at the time of decertification, the evidence before the review officer, Ms Goldfinch, was that the wheat crop in paddock 11 appeared to be free of contamination and there were only three canola stems found elsewhere in the paddock.[123] No consideration was given to the quantity of canola material found in other paddocks, or its location because of Ms Goldfinch's unreasonable approach to decertification; she considered that the presence of only one canola swathe in a paddock amounted to an unacceptable risk of contamination.[124] Ms Goldfinch also acted unreasonably by omitting to consider whether only parts of a paddock only could be decertified. She suggested in her evidence that this was unusual to the extent that she had no experience of it.[125] That evidence is at odds with the evidence of Mr Ayachit.[126]

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[123] Ex 4 Vol 2/0326
[124] Goldfinch T549-554; 572-576
[125] Goldfinch T524-5, 596
[126] Ayachit T704

144. The indication from the recording by Mr Marsh in April 2011 of the locations of all of the swathes he could locate on paddocks 7-13 at that time, suggests that it was unreasonable for NASAA to decertify the whole or substantial parts of paddocks 7-9, 11 and 13.[127]

145. It was unreasonable in any event for paddocks 7-13 to remain decertified after October 2011.

146. It was apparent by the time of NASAA's inspection on 24 October 2011 that only nine volunteer plants had germinated since the incursion in late November/early December 2010.[128] The witness called by the defendant, Dr Preston, is an expert in herbicide resistant weeds. His evidence was to the effect that seed banks of canola decline rapidly with time and that canola is a species that typically has low levels of seed dormancy. As a consequence, large populations of volunteer canola do not persist from year to year and one would expect that most of the canola seed that was shed in one year would germinate in the next 12 months. [129]

147. Further, the primary means of controlling the development of further volunteers is by hand removal, in particular, prior to the plant developing pollen and seeds.[130]

148. The combination of those two factors means that as at October 2011 the existing volunteers, small in number, could be easily removed by the plaintiffs and there was little prospect of any further volunteers developing in future years, and certainly only very minimal risk of

[127] Exhibit 10
[128] Ex4 Vol 2/379, 387
[129] Exhibit 27 at pp 1-4 and 7, Preston T794
[130] Van Acker T481

volunteers developing in any significant number. It was therefore unreasonable for NASAA to delay its decision on decertification until 30 March 2012[131] and to then take the position that, notwithstanding the small number of volunteers and the way in which they could be managed, there was no possibility of recertifying at that time.[132]

149. It was even more unreasonable for Ms Denham to not recertify paddocks 7-13 at the time of her review in May 2012.[133] The person who had inspected Eagle Rest in April 2012 had reported that the plaintiffs were relevantly compliant with the NASAA Standard.[134] Ms Denham took the unreasonable position that the GM canola had to be "*eradicated*". She appears to have meant (although she did not convey to any person) that there would need to be a minimum of two growing seasons elapse without the germinating of any more volunteers.[135]

150. The plaintiffs' farm was inspected again in October 2012. There was no evidence of any more volunteers germinating on any paddock. The inspector reported that the plaintiffs were relevantly compliant with the NASAA Standard and sought guidance for the plaintiffs as to the earliest possible time they might return to full certification. The inspector requested that the report be considered and dealt with as a matter of urgency in the NASAA office.[136] Notwithstanding that request, there was no substantive decision made in respect of the certification status of paddocks 7-13 until 10 September 2013. Mr Ayachit, under cross-examination, suggested that there must have

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131 Ex4 Vol 2/419
132 Gore T462
133 Ex4 Vol 2/450
134 Ex4 Vol 2/433, 444
135 Denham T652
136 Ex4 Vol 2/452-472

been a prior letter of communication to the plaintiffs but none was produced.[137]

151. Ultimately, paddocks 7-13 were recertified in November 2013.[138] Inconsistently with the conditions that had been flagged in its letter of 10 September 2013, NASAA no longer required a GM test of weed screenings at the conclusion of the 2013/14 harvest. That was because NASAA was satisfied by reason of the absence of new volunteers germinating and the plaintiffs' vigilant monitoring of germination that the risk of contamination was acceptable.[139] That was a conclusion that was reasonably and properly open to NASAA and should have been reached at least by the end of October 2011.

Plaintiffs' Claim in Nuisance

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

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

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137 Ex4 Vol 2/480, Ayachit T697
138 Ex4 Vol 2/513
139 Ex4 Ayachit T699, 703

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

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

> "A *balance has to be maintained between the right of the occupier to do what he likes with his own and the right of his neighbour not to be interfered with. It is impossible to give any precisely universal formula, but it may broadly be said that a useful test is perhaps what is reasonable according to the ordinary usages of mankind living in society, or more correctly in a particular society.*"

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

157. In making a judgment as to what is reasonable regard is had to a variety of factors including the nature and extent of the harm or interference, the social or public interest in the defendant's activity, the hypersensitivity (if any) of the user or use of the claimant's land, the nature of established uses in the locality (eg, residential, industrial,

rural), whether all reasonable precautions are taken to minimise any interference, and the type of damage suffered. The exercise involves weighing the respective rights of the parties in the use of their land to make a value judgment as to whether the interference is unreasonable: *Southern Properties (WA) Pty Ltd v Executive Director of the Dept of Conservation and Land Management* [2012] WASCA 79, per McLure P at [118]-[119]; see also *Oldham v Lawson (No 1)* at 655.

158. As to the nature and extent of the harm or interference, there was and remains no opportunity for RR canola to cross-pollinate with any of the plaintiffs' crops because the plaintiffs do not grow organic canola.[140]

159. There are no potential public health or safety concerns that have been identified in respect of or associated with RR canola.[141]

160. Apart from circumstances where there is the opportunity for cross-pollination, RR canola has no effect or impact upon soil, crops or livestock with which it comes into contact.[142]

161. Accordingly, the nature and extent of the "*harm*" caused by the growing and/or swathing of RR canola adjacent to Eagle Rest is limited to the risk of decertification if GM canola is blown onto Eagle Rest. If NCO had between December 2010 and November 2013 applied the National Standard and the NASAA Standard reasonably and in accordance with a proper construction of each, there would have been minimal if any risk of decertification. The risk remains minimal if NCO applies those Standards reasonably and properly in the future.

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[140] Exhibit 27, pp 5-7, Exhibit 28, section 4.2.2
[141] Exhibit 32A, Parts 2-5; Exhibit 28, section 3.2
[142] Exhibit 32A, Parts 2-5, Exhibit 28, section 4.2

162. Similarly, the type of damage suffered by the plaintiffs is limited to economic loss arising from decertification. The quantum of that loss over the three years of decertification between 2010 and 2012 was relatively modest ($85,000) and in any event unlikely to have been attributable in its totality to the presence of GM canola on Eagle Rest: see paragraphs 142-151 above. Accordingly, the prospect is that any economic loss flowing from any alleged interference with the plaintiffs' land in the future is likely to be only very small. If the Standards are applied correctly and reasonably, the plaintiffs should not be at risk of suffering any economic loss at all.

163. There is a clear social or public benefit in the defendant's activity of agricultural production. See paragraph 124 above, in relation to the social utility of farming, including farming canola and GM canola.

164. To the extent that the plaintiffs are exposed to a risk of decertification by reason of the mere, accidental presence of GM canola on Eagle Rest, they are hypersensitive to suffering that harm. The risk of harm arises only because:

164.1 the plaintiffs have voluntarily entered into a contractual arrangement with NASAA;

164.2 NASAA, through its certifying arm NCO, has misapplied the National Standard and the NASAA Standard and otherwise acting unreasonably in decertifying paddocks 7-13 in the circumstances of the incursion of November/December 2010: see paragraphs 1-32 and 108 above;

164.3 the indications from the evidence is that there is a risk NASAA may continue to misapply those Standards and act unreasonably in the future when considering the

consequences to the plaintiffs' organic status if GM canola is present on Eagle Rest for reasons outside the plaintiffs' control: see paragraphs 107-112 above.

164.4 it is open to the plaintiffs to obtain certification through another body such as Ausqual or Australian Certified Organic (**ACO**). Ausqual applies the National Standard. ACO has its own Standard, the terms of which would clearly not permit decertification in the circumstances of the November/December 2010 incursion.[143] The plaintiffs have not sought alternative certification.

165. It is uncontroversial that the Kojonup area is a rural, agricultural region. Canola is one of four main crops grown in the Shire of Kojonup and surrounding environs.[144] It has only been lawful to grow RR canola since 2010. As at March 2010, the potential benefits of RR canola production were being notified to farmers in agricultural areas, including Kojonup.[145] In that year about seven of the 35 independent clients of the agronomist Mr Robinson grew RR canola. Based on Mr Robinson's experience, there would appear to be increasing interest in RR canola amongst farmers in the area to the extent that about 15 of his now 50 independent clients have grown that crop in the 2013/14 season.[146]

166. In contrast, at least as at January 2010, organic farming was a niche market in Australia, with only 120 certified organic producers in Western Australia with most organic farms involved in horticulture[147]. There are only two organic farms in the vicinity of Seven Oaks of

[143] Goldfinch T497-8; Exhibit 35, p21 (cll 3.3.4-3.3.13) and p43 (cll. 4.8.16-4.8.20)
[144] Exhibit 30, paragraph 12
[145] Exhibit 31, p7; Robinson T928
[146] Exhibit 30, paragraphs 9[1] and 14
[147] Vol 1/216

which the defendant is aware.[148] The plaintiffs do not contend that organic farming is common, or more common than conventional farming, in the Kojonup district.

167. All of the relevant evidence the Court has received is clearly to the effect that the growing RR canola on the Range and Two Dams paddocks in 2010 and then swathing the resultant crop were reasonable activities for the defendant to undertake. This is so for at least three reasons.

168. First, it is plain that the defendant had a problem with herbicide resistant wimmera ryegrass (**HRWR**) in those and other paddocks.[149] It is likely that the resistance of weeds on the defendant's farm to clethodim (otherwise called Select) was a widespread problem in the Kojonup district. Mr Stretch had observed the same issue on his farm.[150] A *Farmanco Facts* newsletter of March 2010 observed that the planting of a crop of RR canola did appear to offer significantly better rye control "*where Select is failing*".[151]

169. The expert witness for the plaintiffs, Mr McInerney, was critical of the fact that the defendant had not had the weeds in the relevant paddocks tested to identify and confirm their herbicide resistance. However, that is not normal practice in the Kojonup region.[152] In accordance with usual practice, the defendant drew conclusions about the development of specific herbicide resistance from his observations of weeds that were not being killed after the application of a specific

[148] Exhibit 26A, para 43[4]
[149] Exhibit 26A, paras 35[2] and 45[1]; Exhibit 30, paras 27[1]-[3] and 28[3])
[150] Exhibit 29, para 13[1] and [4]
[151] Exhibit 31 at p10
[152] Exhibit 32B, Part 7

herbicide.[153] The plaintiffs did not for the purposes of these proceedings request Mr McInerney to inspect the defendant's paddocks or to request that weed samples be tested. Against that background, it must be concluded that there was HRWR in the defendant's paddocks, particularly the Range and Two Dams, at the commencement of the 2010/11 growing season.

170. Secondly, in paddocks where there is an HRWR problem, the evidence is plain that the growing of RR canola is, at the very least, a useful strategic tool to be used in conjunction with other tools, to manage those weeds.[154]

171. Thirdly, it is plain that the swathing of a canola crop is the preferred practice to direct harvesting. Swathing is in itself a weed management tool. Although there is a "*small risk*" of swathed canola moving in strong winds, swathing allows the crop to mature evenly, allows for the manipulation of the harvesting time to accommodate other crops and reduces the incidence of pod shatter which can significantly reduce the yield of the crop.[155] The defendant was not cross-examined to contradict his evidence that swathing was of benefit to him.

172. Further, the defendant took all reasonable precautions in carrying out those reasonable activities. He took into account that the plaintiffs were not growing canola on Eagle Rest and that there was therefore no risk of cross-pollination with RR canola pollen. He allowed for a five metre buffer that was required by the terms of his licence to grow RR canola if the RR canola crop was being grown next to a non-GM

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153 Baxter T742, 798
154 Exhibit 13B, pp9-10; Exhibit 28, p8; McInerney T392
155 Exhibit 32B, pp4-5 and 12; Exhibit 26A para 59[3]-[7]; Exhibit 30, paras 23[1]-[5] and 29[2]-[4]; Exhibit 29, para 26; Robinson T941

canola crop.[156] He took into account that additional buffers were provided by the road between the two farms and the line of trees on each side of the road.[157] The defendant spoke to Mr Marsh in April 2010 and advised him of the defendant's intention to grow RR canola in paddocks along the boundary between the two farms.[158] As a consequence the plaintiffs decided to move their planned wheat and rye crops for that season from paddock 10 to paddocks 11 and 12. The plaintiffs grew spelt and rye in paddock 12, although this crop was destined for decertification in any event because it was grown within 12 months of sheep having been drenched on that paddock.[159] The plaintiffs grew an organic wheat crop in paddock 11 and provided a further 6.4 ha buffer within paddock 11 between the fence and the crop.[160] It is relevant that after the incursion in November/December 2010 there was no evidence of contamination of the crop in paddock 11.[161] The defendant was sufficiently concerned and cautious to raise the position of the plaintiffs with his agronomist.[162]

173. Regard to all of these circumstances compels the conclusion that there has not been, and will not be in the future, any unreasonable interference with the plaintiffs' land by reason of the defendant's growing and swathing of RR canola adjacent thereto. Those activities are themselves lawful and reasonable, and were carried out with reasonable precaution. There is no basis to suggest that the defendant will not exercise similar caution in the future. The alleged "*harm*" suffered by the plaintiffs and to which they claim to be exposed going

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156 Baxter T818; Vol 4/1232
157 Baxter T818
158 Exhibit 26A, para 46; Exhibit 5A, paragraph 68(a); Marsh T219-20; Baxter T818
159 Ex4 Vol 2/323; Marsh T222, 270
160 Marsh T220, 223
161 Ex 4 Vol 2/326
162 Baxter T760-1, 824; Robinson T936-40, 955

forward, would not arise at all if NASAA acts reasonably and correctly in applying the National Standard and the NASAA Standard.

174. To the extent that the plaintiffs claim common law damages for loss suffered by reason of the alleged nuisance, the defendant denies that he caused any such loss. The defendant refers to without repeating his submissions at 125-151 above, noting however that it is questionable whether the provisions of the CLA apply in respect of nuisance: *Southern Properties (WA) Pty Ltd v Executive Director of the Dept of Conservation and Land Management* at [126], [330] and [336].

Plaintiffs' claim for a permanent injunction

175. The plaintiffs have not seriously attempted to advance or substantiate their claim for a permanent injunction, either in the terms of the minute dated 10 February 2014 or at all.

176. The evidence given by the plaintiffs' expert, Mr McInerney, was to the effect that swathed canola or stubble (which one would presume to contain seeds) could be moved by "*a willy willy or strong wind"*.[163] The OGTR's 2011 publication on the biology of canola referred to the lack of data that exists on the wind dispersal of canola windrows but concluded that it was reasonable to expect that seeds and pods of low moisture content may be transported to adjacent fields during periods of "*unusually high winds*".[164] The defendant's expert witness, Prof Powles, reiterated the absence of research studies of wind-impelled physical movement of canola stems from windrows but

[163] Exhibit 13B, p13
[164] Exhibit 28, p16

believed that "*only strong winds*" could move swathed material to an adjacent field.[165]

177. The plaintiffs have not adduced or attempted to adduce any evidence of:

177.1 the actual wind speeds in the area of Eagle Rest and Seven Oaks in late November/early December 2010 which are alleged to have caused swathed canola material to move from Seven Oaks to Eagle Rest;

177.2 the range of actual or relative wind strengths likely to be necessary to move swathed material or stubble from one paddock to another;

177.3 the average amount of swathed material or stubble likely to be moved in such wind conditions;

177.4 the average distance that amount of swathed material or stubble is likely to move in such wind conditions;

177.5 how frequently such wind conditions can be expected in the vicinity of Eagle Rest and Seven Oaks.

178. Absent evidence addressing these issues, the Court cannot be satisfied that there is any justification for the imposition of a permanent injunction in the terms proposed by the plaintiffs or at all.

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[165] Exhibit 32A, Part 14

179. In this regard, it is relevant that Mr Marsh previously flagged to the Court the intention to adduce expert evidence from a Dr Snow about the dispersal of seed by wind relevant to the question of a suitable distance between distinct cropping or grazing operations: *Marsh v Baxter* [2013] WASC 209 at [3].

180. Additionally, in November 2013, NASAA decided that it did not require the plaintiffs as a condition of recertification to maintain a buffer between their farming operations and the defendant's. The reason was that Mr Marsh had persuaded NASAA that by reason of the actions he was prepared to undertake in the circumstances that existed on Eagle Rest, he could manage acceptably the risk of GMO incursion.[166] In those circumstances, there is no basis for the imposition of an injunction for the purpose of requiring the defendant to maintain such a buffer.

181. In any event, it must be borne in mind that the only purpose of imposing an injunction would be to guard against the risk of decertification in the event that GM canola material moved from Seven Oaks to Eagle Rest.

182. For the reasons already outlined, if the National Standard and the NASAA Standard are properly construed and applied by NASAA in the future, there is no risk of decertification merely because of the presence of GM canola on Eagle Rest for reasons outside the plaintiffs' control.

[166] Ex 4 Vol 2/503, 512; Ayachit T702

183. Further and in any event, it is not possible to draw any conclusions about the nature and magnitude of any risk of decertification going forward for the reasons identified in paragraphs 102-112 above.

184. It is therefore not possible to predict whether in the event of any future incursion NASAA is likely to decertify at all or, if it does, whether it will decertify the whole or only parts of paddocks. The length of time that the decertification will remain in place is also incapable of being predicted. Having regard to this and the fact that the monetary damage suffered as a consequence of decertification is relatively modest (in this case only $85,000), it is clear that damages are the more appropriate remedy than a permanent injunction.

The plaintiffs' attack on the defendant's farming practices and his agronomist's advice

185. The plaintiffs now seek to raise several new matters going to the defendant's farming practices and the advice in 2010 of his agronomist, Mr Robinson, to grow RR canola in the Range and Two Dams paddocks and to then swathe the resultant crop.

186. The first contention appears to be that the defendant had then and still has alternatives to growing RR canola available to him for the purpose of managing HRWR on the Range and Two Dams paddocks and that certain of his alleged farming practices encourage the development of glyphosate resistance in the weeds in those paddocks. The plaintiffs appear to allege in this regard that the defendant does not rotate crops sufficiently, uses too much glyphosate to control weeds and does not have a sufficiently diverse weed management plan.

187. Secondly, the plaintiffs focus upon the fact that the defendant has not had the weeds in the Range and Two Dams paddocks tested for herbicide resistance. The significance of this allegation to the plaintiffs' case is not clear but the defendant assumes that the plaintiffs now contend that without such tests, there is no reasonable basis for the defendant to have concluded that the weeds in those paddocks were developing a resistance to herbicides other than glyphosate, such as to justify the growing of RR canola.

188. It is not clear but the cross-examination of the defendant in respect of the 2010 CMP[167], suggests that the plaintiffs may also seek to contend either that there was a low weed burden in the Two Dams and Range paddocks in 2010, such that the growing of RR canola in those paddocks was not justified or, perhaps, that the defendant did not observe the recommendations contained in the CMP because he entered the RR canola phase of production with something other than a low weed burden.

189. The fourth contention appears to be that Mr Robinson's advice to grow RR canola in those paddocks in 2010, was not reasonable and ought not to have been relied upon by the defendant. That contention appears, in turn, to be based upon the contentions set out above.

190. Finally, the plaintiffs appear to contend that Mr Robinson's advice both as to the growing of RR canola and to then swathe the crop was unreasonable because it did not take into account (because Mr Robinson was not told by the defendant) that the plaintiffs were at risk of decertification if GM canola in any amount was present on their land.

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[167] In particular at Ex 4 Vol 5/1227

191. The plaintiffs have not pleaded any of these matters. They should have done so, at paragraphs [36] and [44] of the amended statement of claim, alternatively, by way of reply to paragraphs [23] and [26] of the amended defence.

192. Further, none of these contentions were mentioned by the plaintiffs' counsel in opening, save for a statement that the defendant is "*heavily reliant on herbicide use, including glyphosate".*[168]

193. The plaintiffs should not be permitted to advance allegations and contentions that have not been pleaded or otherwise sufficiently notified to the defendant in advance of the trial. The potential for prejudice to the defendant is self-evident. He is held out of the opportunity to fully investigate those matters and adduce at trial such evidence about them as he may wish. The opportunity to cross-examine the plaintiffs' witnesses about those matters is similarly compromised. An attack on the reasonableness of advice given by third parties (ie, Mr Robinson), would normally lead a defendant to consider whether there is a basis to issue third party proceedings and the merit of doing so, but that opportunity has been denied the defendant in this case.

194. The contention that there was an alternative course to growing RR canola available to the defendant to manage the HRWR on the Range and Two Dams paddocks in 2010 is irrelevant to the plaintiffs' claims in negligence and nuisance. A defendant is not negligent merely because he fails to take an alternative course of action that would have eliminated the risk of damage. The plaintiff must show that the defendant was not acting reasonably in failing to take that

[168] T62

course: *Dovuro Pty Ltd v Wilkins* (2003) 215 CLR 317, per McHugh J at [38]. Similarly in nuisance, the balance between the right of the defendant do what he likes with his own land and the right of the plaintiffs not to be interfered with would not permit a finding of nuisance simply because an alternative course was available to the defendant, if he were otherwise acting reasonably.

195. For the reasons set out at paragraphs 168-172 above, it is clear that the defendant acted reasonably in growing RR canola on the Range and Two Dams paddocks in 2010 and then swathing the resultant crop. He was not therefore obliged to refrain from engaging in that activity, merely because there may have been alternatives available to mitigate the risks to the plaintiffs of decertification.

196. To the extent that the plaintiffs may seek to contend that the new allegations they have raised bear upon the reasonableness of the defendant's conduct, those allegations are, in any event, without substance.

197. The defendant's use of glyphosate in the course of his farming activities is not unreasonable or otherwise than in accordance with ordinary farming practice. There is no evidence that the defendant relies solely on glyphosate to manage weeds. The defendant's primary method of weed management is through a diverse selection and application of <u>different</u> herbicides.[169] It is not unreasonable for a farmer to rely solely on a diverse herbicide program to manage weeds, without including non-herbicide methods.[170] Ultimately, the diversity

[169] Ex 4 Vol 3 Docs 96, 98, 99, 100, 101, 103, 106, 108, 110; Exhibit 30, para 15[7], 27; Exhibit 26A para 35[1]; Baxter T737-8

[170] Powles T972; Rudelscheim T891; Exhibit 28, p10; cf. Exhibit 13B at p4

used is a matter of economics for the individual farmer.[171] The defendant has used a range of chemical techniques to manage weeds including the "double knock" (application of herbicides before seeding) and different post emergent chemical applications. In addition, the defendant in 2010 and now continues to use other non-herbicide weed management tools, such as crop rotation (which allows for the application of different herbicides), swathing on occasion and windrow or "hot" burning.[172]

198. The defendant does use glyphosate in the same paddock in consecutive years. It is not practical for him to do otherwise.[173] A great majority of crop farms in Australia are using glyphosate every year. Where it is used with sufficient diversity it has a good chance of being sustainable.[174] The plaintiffs' have not adduced evidence which would suggest that the defendant is not using glyphosate with sufficient diversity.

199. As to the fact that the defendant did not have the weeds in the Range and Two Dams paddocks tested for herbicide resistance, the defendant refers to paragraph 169 above.

200. There is no evidence to support the contention that the defendant's crop rotation program is unreasonable. Whether or not it may be ideal to return paddocks to fallow from time to time for the long-term sustainability of the farming operation, economic exigencies can influence the decision whether to pursue that ideal.[175]

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171 Powles T972
172 Ex 26A, para 59[6]; Ex 30, para 29[4]; Baxter T737, 751, 796-8, 819-20, 841, 842
173 Baxter T841
174 Powles T972
175 McInerney T389

201. Before sowing the RR canola in the Range and Two Dams paddocks, the defendant aimed to have a low weed burden in those areas and elsewhere on his farm. Nevertheless, the paddocks he identified for growing RR canola had a medium weed burden as at January 2010.[176] If the plaintiffs contend either that there was insufficient weed burden in those paddocks to justify the growing of RR canola or that the defendant did not observe the recommendations in the CMP[177], both of those contentions are without foundation; see also paragraph 90 above. As to the contention that Mr Robinson's advice to grow RR canola in the Range and Two Dams paddocks and then swathe the crop was unreasonable, it is only the defendant and not Mr Robinson who is alleged by the plaintiffs to have been negligent. The issue must therefore be confined to whether it was unreasonable for the defendant to rely upon Mr Robinson's advice. Given the clear benefits of RR canola as a means of managing HRWR and the preferred practice of swathing over direct harvesting, the advice itself was plainly reasonable. There is nothing to suggest therefore that the defendant's reliance upon that advice was unreasonable. The defendant was not in any event cross-examined about that.

202. Finally, the contention that Mr Robinson's advice was "*based on a false premise*" or that Mr Robinson was misinformed by the defendant before giving his advice, is irrelevant to the matters in issue in these proceedings.

203. The defendant and Mr Robinson had differing recollections of the content of their discussion prior to sowing and then swathing about the plaintiffs' farming operation.[178] In particular, Mr Robinson did

[176] Baxter T796-7
[177] Ex 4 Vol 2/1227
[178] Baxter T760-1, 824; Robinson T936-40, 955

not recall the defendant informing him of the plaintiffs' warning that there was a risk of decertification if GM canola was present on their land. Neither witness had a good recollection of their discussion on the topic.[179] Differing recollections some three to four years hence are understandable in the absence of any contemporaneous documentary record from which a witness might refresh their memory. Indeed, the fact of those differences reflects well on the credit of each witness.

204. Importantly however, the fact of that discussion and its content is of no significance in terms of adjudging the reasonableness of the defendant's actions in planting and swathing the RR canola. If the defendant did inform Mr Robinson of the detail of all he had been told by Mr Marsh, Mr Robinson, like the defendant, would have been misinformed. On a proper construction of the NASAA Standard and the National Standard, there was no risk of decertification because of the accidental presence of GM canola on the plaintiffs' land. Even if that information had been true, whether or not Mr Robinson's advice to plant and/or swathe would have changed as a result does not affect the question of whether or not the defendant owed the duty of care alleged, or whether the defendant breached that duty, other whether his conduct in doing so amounted to an unreasonable interference with the plaintiffs' land. In other words, Mr Robinson would stand in no different position from the defendant were he apprised of the Mr Marsh's statements about the risk of decertification. Mere knowledge of that risk (even if it were true) would not make the growing and/or swathing of RR canola unreasonable and therefore negligent or a nuisance.

[179] Baxter T760-1; Robinson T936

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DEFENDANT'S LIST OF AUTHORITIES

Written laws

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

Judgments

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

3. *Apache Energy Ltd v Alcoa of Australia Ltd* [No 2] [2013] WASCA 213 per Buss JA at [109]

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

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

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

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

8. *Deasy Pty Ltd v Montrest Pty Ltd* (Unreported) Qld CA, 14 October 1996, 22 November 1996, BC 96055947, Pincus JA

9. *Dovuro Pty Ltd v Wilkins* (2003) 215 CLR 317, per McHugh J at [34] and [38]

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

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

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

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

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

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

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

17. **Perre v Apand* [1999] HCA 36; (1999) 198 CLR 180 Gaudron J at [27], [41] McHugh J at [70], [115], [127], [141], [147], [148]; Gummow J at [212], [214], [215], [216], [217]; Kirby J at [290], [299], [300], [301]; Hayne J at [329], [349]; Callinan J at [407], [408], [409], [412], [415], [416], [429], [430]

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

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

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

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

22. **Tame v New South Wales; Annetts v Australian Stations Pty Ltd* (2002) 211 CLR 317 at [12] per Gleeson CJ and [99] per McHugh J

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

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

25. *Vaughan v Shire of Benalla* [1891] 17 VLR 129

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

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

28. *Wyong Shire Council v Shirt* (1980) 146 CLR 40 per Mason J at 47 to 48

Legal Texts

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

* **Cases to be read from**