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

CIV 1561 of 2012

B E T W E E N:

STEPHEN WILLIAM MARSH Plaintiff

and

MICHAEL OWEN BAXTER Defendant

PLAINTIFF'S OUTLINE OF OPENING SUBMISSIONS

Introduction

The background to the proceeding

1. The plaintiff, Stephen Marsh (**Marsh**), has owned the farm known as "Eagle Rest" in Kojonup, since 1991.[1] The defendant, Michael Baxter (**Baxter**), owns the neighbouring farm "Sevenoaks". The farms share a common boundary: the western boundary of Eagle Rest adjoins the eastern boundary of Sevenoaks; along that boundary the properties are separated only by a road reserve.[2]

2. Since 2002, Marsh has farmed Eagle Rest organically, cultivating grain and livestock.[3] He does so in partnership with his wife, Sue Marsh. As a legal requirement for export[4], and as a practical requirement domestically, it is necessary for organic producers to be certified by an accredited certifying body. Eagle Rest has been certified as an organic farm by the National Association of Sustainable Agriculture, Australia (**NASAA**).[5] NASAA is an organic certification organisation accredited by the Australian Quarantine and Inspection Service (**AQIS**) (now the Department of Agriculture and Food).[6] The certification standards applied by NASAA are the NASAA Standards (**the NASAA Standards**) and the National Standard for Organic and Bio-Dynamic Produce (**the National Standard**).[7] Certification relates to an organic farming system and prescribes that which is permissible to be used within that system.

3. Throughout the period when Eagle Rest was in the process of converting to an organic farming system, and since Eagle Rest was certified organic by NASAA in 2004, Marsh has told local authorities and his neighbours about the organic status of Eagle Rest and has erected signs around the external boundary of Eagle Rest notifying of that status.[8]

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[1] CB 0142-0418.
[2] Affidavit of Stephen Marsh dated 12 April 2012 (**First Marsh Affidavit**) at [9].
[3] First March Affidavit at [13].
[4] *Export Control (Organic Produce Certification) Orders* (Cth) made under regulation 3 of the *Export Control (Orders) Regulations 1982* (Cth) and ss.7 and 23 of the *Export Control Act 1982* (Cth)
[5] First March Affidavit at [24]; CB 0051-54; see also CB 0035; CB 0024-0034.
[6] First witness statement of Janet Bourke Denham dated 14 February 2013 (**First Denham Statement**) at [20]ff.
[7] CB 1293-1406 and CB 1407-1480, respectively.
[8] First March Affidavit at [27].

4. Baxter has grown canola varieties on Sevenoaks since 2003 and has also since that time engaged a consultant agronomist, Christopher Robinson, to assist him to devise crop rotation and weed management strategies for Sevenoaks.[9]

5. Up until the 2010 plaintiff season, it was unlawful to plant genetically modified (**GM**) canola in Western Australia[10]. However, from some time before 2010 the possibility of a relaxation of the embargo emerged. The evidence of both Marsh and Baxter is that in November 2008 Marsh visited Baxter and told him that if he grew on Sevenoaks and it got onto Eagle Rest, his organic certification would be affected or lost because GM organisms (**GMOs**) are not permitted in organic farming.[11] As at that time, and today, even the most cursory examination of the publically available standards would demonstrate that GMOs have no place in the system of organic agriculture.

6. In May 2010, Baxter sowed GM canola in the paddocks known as Range and Two Dams, which are adjacent to Eagle Rest. The GM canola was a variety known as Roundup Ready® (**RUR**), developed and owned by Monsanto. Baxter had purchased the RUR seed after attending a seminar hosted by Monsanto in March 2010 and signing a licence agreement. At that time, Baxter read the Roundup Ready Canola Revolution Information Guide and the Monsanto Crop Management Plan.[12] Marsh then signed a Monsanto Roundup Ready Canola Grower Licence and Stewardship Agreement.[13]

7. Baxter harvested the RUR canola in early November 2010. For the first time since he started to grow canola on Sevenoaks, Baxter chose to harvest the crop by swathing it, rather than direct harvesting (or "direct-heading").[14]

8. On 30 November 2010, Marsh observed canola swaths on each of paddocks 7-13 of Eagle Rest.[15] Paddocks 9 and 10 are situated on the boundary shared with Sevenoaks and paddocks 7,8 and 11-13 adjoin paddocks 9 and 10.[16] The canola swaths, each containing probably thousands of seeds, were too numerous to count but Marsh recorded the locations of as many as he could with a GPS device.[17]

9. Marsh informed NASAA of the presence of the canola swaths on Eagle Rest by fax on 2 December 2010.[18] Kathe Purvis and Claire Coleman of NASAA each inspected Eagle Rest that month, and each made a report of her observations of the extent of the presence of canola swaths.[19] Testing of samples of the swaths revealed them to be GM, having traits consistent with RUR canola.[20]

10. On 10 December 2010, Stephanie Goldfinch, a food safety and organic auditor employed by NASAA and its certification arm, NASAA Certified Organic Pty Ltd

[9] Witness Statement of Michael Baxter dated 28 August 2013 (**Baxter Statement**) at [19[2]] and [22].
[10] Some lawful experimental trials had been conducted in WA prior to 2010
[11] First Marsh Affidavit at [36] and Baxter Statement at [41[3]].
[12] CB 1237-1244] and CB 1225-1236, respectively.
[13] CB1258-1261.
[14] Baxter Statement at [59[1] and [8]].
[15] First Marsh Affidavit at [61].
[16] Ibid, at [62].
[17] CB0017
[18] First Marsh Affidavit at [69.
[19] CB 0293-0309 and CB0332.
[20] Statement of Stephanie Goldfinch dated 24 February 2013 (**Goldfinch Statement**) at [22-24].

(**NCO**)[21] decided to suspend the organic certification of Eagle Rest.[22] On 29 December 2010, Ms Goldfinch, for NCO, decided to de-certify Eagle Rest.

11. As a result of the loss of certification, Marsh was unable to obtain the premium prices that attach to certified organic produce. He regained certification in November 2013. By then he had suffered significant financial loss.

Marsh's case

12. Marsh commenced the present proceeding in April 2012. Marsh seeks relief against Baxter in the form of a permanent injunction in order to abate a nuisance arising from the incursion of GM canola swaths onto Eagle Rest in November 2010. Marsh also seeks to recover damages from Baxter arising from negligence – failing to ensure that GM canola swaths were not blown or carried on to Eagle Rest and failing to ensure that Marsh did not suffer loss (including economic loss) in consequence - and from the nuisance.

Negligence

Duty of care

13. Baxter owed a duty to take reasonable care to ensure that GM canola was not blown or carried from Sevenoaks onto Eagle Rest and to ensure that Marsh did not suffer loss (including economic loss) as a result.[23] The following salient features support the existence of the duty.

Neighbourhood

14. The connection between Marsh and Baxter was primarily physical and temporal, in that they occupy neighbouring farms. Their propinquity implies "nearness in a physical, temporal or relational sense". It follows that the imposition of such a duty will not entail "potential indeterminacy of liability".[24]

15. A duty of care has been held to extend to the protection of interests which are purely economic and derived from characteristics of land: see, e.g., *Perre v Apand* (1999) 198 CLR 180 at [423]. These factors weigh in favour of the imposition of the duty of care as sought by Marsh.

Foreseeability

16. As early as 2002 Marsh and Baxter discussed the risk that the presence of GM canola on Eagle Rest could result in the loss of his organic certification.

17. In late 2002 Marsh commenced converting Eagle Rest to an organic farm[25] and notified his neighbours and the local shires of this.[26] After Eagle Rest gained

[21] Goldfinch Statement at [1].
[22] Goldfinch Statement at [15].
[23] Statement of Claim filed 3 April 2012 at [35] (**SOC**).
[24] C.f., *Perre* at [107] per Gummow J.
[25] First Marsh Affidavit at [13].
[26] CB 0209; and CB 0212; First Marsh Affidavit at [22-3].

certification from NASAA in July 2004, Marsh erected signs around the external boundary of Eagle Rest, including on the boundary shared with Sevenoaks.[27]

18. In November 2008, when Baxter was growing conventional canola on Sevenoaks, Marsh visited him,[28] bringing canola plants he had found on Eagle Rest. Marsh told Baxter that he believed the plants had come from Sevenoaks.[29] On the same occasion, Marsh also told Baxter that if in the future it became lawful to grow GM canola in Western Australia, and if Baxter grew GM canola and it was carried onto Eagle Rest, the organic certification of Eagle Rest might be lost because GM material is prohibited in a certified organic farming system.[30] By 2008, Baxter had knowledge that cultivation of canola on Seven Oaks could produce volunteer canola plants on Eagle Rest.

19. In May 2010, Baxter sowed GM canola on Sevenoaks, including in paddocks bordering Eagle Rest. In September 2010 Marsh erected signs on his property identifying the property as certified organic and 'strictly GM-free'.[31] In late September 2010, Marsh hand-delivered a notice to Baxter notifying him of the potential for the incursion of GM material into a certified organic farm to cause commercial losses to the farmers from the loss of the premium prices payable for certified organic produce, attaching a copy of relevant parts of the NASAA standard.[32]

20. By at least October 2010 Baxter was aware of signs erected on the common boundary between Eagle Rest and Sevenoaks.[33] Baxter's evidence is that Marsh told him of the very risk against which Marsh claims Baxter had a duty to safeguard. It is apparent from the history of encounters between Marsh and Baxter dating from 2002 that the risk of an incursion of GM canola carried from Sevenoaks onto Eagle Rest, and the risk that such an incursion would endanger the farm's certified organic status, were foreseeable to Baxter.

Baxter's control of the risk of GM canola incursion onto Eagle Rest

21. Baxter had the choice of which crop to plant and where, and the method of harvesting it. Baxter was not constrained in his choice of cropping alternatives for the Two Dams and Range paddocks. There were effective and worthwhile cropping alternatives available to be used in the Two Dams and Range paddocks which did not involve planting RUR canola.[34]

22. The expert evidence of Peter McInerney is to the effect that Baxter could have contained wimmera rye grass on the Two Dams and Range paddocks had he chosen a hay crop in 2010, followed by crop-topped lupins in 2011 and hay again in 2012. Had he done so, the presence of WRG in the seedbank would have been reduced by 80-90% at the start of 2013.[35]

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[27] First Marsh Affidavit at [27].
[28] First Marsh Affidavit at [32] and [37]; Baxter Statement at [41[1]] and [41[3]].
[29] Baxter Statement at [44[1-2]].
[30] Baxter Statement at [41[3]].
[31] First Marsh Affidavit at [29]; CB 0244-0245.
[32] Amended Defence dated 29 November 2013 (**Amended Defence**) at [9]; First Marsh Affidavit at [52]; CB 0246-0252.
[33] Amended Defence at [5]; Baxter Statement at [58].
[34] Report of Peter McInerney dated December 2013 at p 8.
[35] Ibid.

23. Marsh took a measure of protection of Eagle Rest by notifying Baxter of the probable consequence of the loss of organic certification as a result of such an incursion. However, in the absence of a physical barrier between the two properties, Marsh was then exposed to the risk that NASAA would revoke the certification of Eagle Rest pursuant to the terms of NASAA's agreement with the Partnership.[36]

The nature of the activity undertaken by Baxter

24. At the time when Baxter sowed GM canola on Eagle Rest in May 2010, it was not a common farming operation in the Kojonup area.[37] It was a new technology introduced in areas in which established organic farms existed and subject to a agreement with Monsanto which were different in nature and extent to any other conventional seed, including, among other things, to observe the segregation requirements and pay the technology fees specified in the Stewardship Agreement. The freedom of farmers to employ that new technology was attenuated by the giving of notice by the local regulator that the use of GM canola may affect others. Its use was accompanied by clear and direct information from the Western Australian Government.

Breach

Principles

25. Whether there has been a breach of duty is to be determined according to the principles set out in Part 1A of the *Civil Liability Act* (**CLA**) and in particular section 5B(1).[38] That section requires the plaintiff to identify the risk of harm in question; the three elements of the section must then be considered.[39]

26. The risk of harm may be described as the risk of the class, kind or type of injury which the plaintiff suffered, as distinct from the particular injury[40]. In the present case Marsh identifies the risk of harm and Marsh's vulnerability to the harm in paragraphs 31 and 33 of the SOC.

Foreseeability of the risk of harm

27. Having identified the risk of harm, the first question under s 5B(1) is whether the risk was foreseeable. Baxter knew or ought to have known of the risk of incursion and that the incursion of GM canola could endanger the organic certification of Eagle Rest.

28. There were numerous publications regarding GM canola cultivation which Baxter and his consultant agronomist, Mr Robinson, could be expected to have read. All of those publications expressed the requirement that farmers of GM canola take care to prevent their farming from compromising the farms of their neighbours.

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[36] CB0024-0034.
[37] C.f., Baxter statement at [24-5].
[38] *Eades v Formbys Lawyers* [2011] WADC 125 (**Eades**) per Derrick DCJ at [123].
[39] *Adeels Palace Pty Ltd v Moubarak* (2009) 239 CLR 420, 437 (French CJ, Gummow, Hayne, Heydon and Crennan JJ); cited in *Eades*.
[40] *Gunnersen v Henwood* [2011] VSC 440 at [361]; *Ultra Thoroughbred Racing Pty Ltd v Those Certain Underwriters* [2011] VSC 589 at [282].

29. For instance, after the cultivation of GM canola was legalised in January 2010,[41] the Department of Food and Agriculture, Western Australia (**DFAWA**) published advice regarding the cultivation of genetically modified canola.[42] DFAWA made specific mention of the sensitivities of organic farmers like Marsh for whom "under organic certification in Australia … the use of GM inputs is prohibited" and who therefore "require strict separation distances from non-organic crops to meet certification requirements".[43] The DFAWA publications also noted the risks that swathing GM canola plants could enable the drying plants into adjacent paddocks".[44]

30. Similarly, a stated objective of the Monsanto Crop Management Plan was to "enable different production/market systems to concurrently operate in a profitable and sustainable way in response to change in market and non-market requirements". [45] To that end, the Crop Management Plan required the contemplation of neighbours' interests by requiring that where a farmer grows RUR canola along a boundary adjacent to a neighbouring canola crop the farmer should notify the neighbour and 'discuss any relevant matters'. The plan required the farmer to agree to adopt 'appropriate management strategies', 'when there is a plan to grow a specialty crop which requires specific management to maintain product integrity (e.g. GM free or organic canola)'.

Significance of the risk

31. Marsh was exposed to the risk that he would lose his organic certification, and consequently the premiums achievable on the price for his certified organic produce.[46] Marsh could not enjoy those premiums without certification. The risk was thus not insignificant.[47]

Precautions required

32. The test in paragraph 5B(1)(c) of the CLA is elaborated upon in subs 5B(2). Subsection 5B(2) addresses the practical question whether the likely effectiveness of a precaution in avoiding the identified risk of harm was such that, having regard to the seriousness of the consequences if the risk eventuated, reasonable care required the taking of the precaution despite the burden involved.

33. A reasonable person in Baxter's position, having been informed on a previous occasion (November 2008) of the appearance of volunteer canola plants thought to have originated from Sevenoaks, would have been alerted to the probability of endangering the organic certification of Eagle Rest if care were not taken in the choice of where to plant and how to harvest GM canola.

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[41] First Marsh Affidavit at [41].
[42] CB 0232-0236; CB0216-0218 ; CB 0226-02298 and CB 0230-0231.
[43] CB 0232-0236.
[44] CB 0230-0231.
[45] CB1225-1236.
[46] Witness Statement of Frederick Davies dated 15 January 2014 at [10]; and Witness Statement of Jonathan Danton Morton dated 15 January 2014 at [2-3].
[47] The "not insignificant" test has been found to set the threshold higher than the common law "not far-fetched or fanciful" test, "but not much higher": *Ultra Thoroughbred* at [286] citing *Shaw v Thomas* [2010] NSWCA 169 [44]. In the context of the provisions of New South Wales and Victorian *Wrongs Acts*, relevantly similar to the provisions of the CLA.

34. In light of the serious consequence for Marsh of the incursion of GM material onto Eagle Rest, to which Marsh had alerted Baxter, a reasonable person in Baxter's position would not have planted the GM canola in the Two Dams and Range paddocks given their proximity to Eagle Rest. Alternatively, having done so, a reasonable person in Baxter's position would not have swathed that crop and left it in windrows exposed to wind which could carry GM swaths and seeds to Eagle Rest.

35. There were effective and appropriate weed management strategies and crop rotations available to Baxter which did not involve planting RUR canola. There was no significant economic advantage for Baxter in swathing his RUR canola crop.[48] In his expert witness statement, Peter McInerney suggests that direct harvesting is likely to be effective in preventing seed movement by wind from harvested canola plants.[49] This evidence resolves in Marsh's favour the remaining question of whether Baxter escapes a finding of negligence because of considerations of the burden involved in selecting different crops to plant in Range and Two Dams and direct heading the RUR canola once planted in those paddocks.

36. The "social utility of the activity that creates the risk of harm" does not factor heavily in the application of the subs 5B(2) calculus to the case of a new agricultural technology, with the recognised potential to compromise non-GM and organic farming practices. Applying that calculus to this case, Baxter was negligent in failing to ensure that GM canola was not blown or carried onto Eagle Rest from Sevenoaks.

Causation

The necessary condition of the harm

37. For the purposes of s 5C(1)(a) of the CLA, the presence of the GM canola swaths on Eagle Rest was the "necessary condition" of the harm of which March complains. The GM canola swaths present on Eagle Rest in November 2010 were discovered by Marsh shortly after Baxter swathed his RUR canola crop.[50] The swaths were then tested and found to be GM, with a genetic profile consistent with RUR canola.[51] Only one other farm in the Kojonup region known to have planted GM canola at the same time was three kilometres away at its nearest point.[52] The question then becomes whether the scope of Baxter's liability extends to cover that consequence for the purposes of s 5C(1)(b).[53]

The scope of liability

38. The presence of GM canola on Eagle Rest, incorporated as it was into the pasture, stock feed and potentially crops, rendered Eagle Rest and Marsh non complaint with the National Standard and the NASSA Standard and liable to decertification. The decision of NAASA to decertify was open to it, and inevitable.

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[48] Baxter Statement at [59[8]].
[49] Report of Peter McInerney dated December 2013 at pp 12-13.
[50] First Marsh Affidavit at [68].
[51] Goldfinch Statement at [25]; and Amended Defence at [12[2].
[52] First Marsh Affidavit at [68].
[53] See *Strong v Woolworths Limited trading as Big W & Anor* [2012] HCA 5 at [32] (French CJ, Gummow, Crennan and Bell JJ).

39. The NASAA Standards prohibit the introduction of GMOs into organic farming. The reference to 'farming' in this context comprehends both the farming systems used by the farmer and the product it yields.[54] The NASAA Standards relevantly provide:
    a) 3.2 Organisms, which are derived from recombinant DNA technology, are genetically modified organisms and have no place in organic production and processing systems;
    b) [3.2] Even where evidence of GMOs is not detected in the finished organic product, the deliberate or negligent exposure of organic production systems or finished products to GMOs is outside organic production principles;
    c) 3.2.1 The deliberate use and or the negligent introduction of genetically engineered organisms or their derivatives to organic farming systems or products are prohibited;
    d) 3.2.3 The certification of organic crops will be withdrawn where genetically engineered crops are grown on the same farm;

    e) 3.2.9 Organic certification shall be withdrawn where NASAA considers there is an unacceptable risk of contamination from GMOs or their derivatives; and
    f) 3.2.11 Contamination of organic product by GMOs that results from circumstances beyond the control of the operator may alter the organic status of the operation.

40. The standards of the International Federation of Organic Agriculture Movements[55] and the National Standard contain similar provisions, and both prohibit the use of GMOs in all stages of organic farming.[56] Neither set of standards permits or tolerates any adventitious presence of GMOs.[57]

41. At the time of decertifying Marsh NASAA knew that there had been many swaths found on Eagle Rest, and by implication, that there was an unknown quantity of possibly viable canola seed spread throughout the affected paddocks of Eagle Rest.[58] The expert evidence of both parties is to the effect that GM material was likely to persist on Eagle Rest for around at least 3 years after the incursion on an organic farm volunteer GM canola would have to be removed by hand and while numbers may be low they could be difficult to eradicate entirely.[59]

42. NASAA acted on the basis that GM material had been present in large quantities.[60] It would be many months until NASAA could see whether volunteers would emerge in the next growing season.[61] In that context it found non-compliance on the grounds of the presence of a prohibited input and advised Marsh that he would remain decertified until the GM was eradicated.[62] NASAA's decision to continue to de-certify Eagle Rest from late 2011 to late 2012 was

[54] Supplementary statement of Janet Bourke Denham (**Second Denham Statement**) at [9, 11 and 14].
[55] "IFOAM"; First witness statement of Andre Leu dated 22 February 2013 at [1-2] and [15].
[56] CB 1407-1380 and CB 1908-2041; see also CB 1819-1850.
[57] Ibid.
[58] Goldfinch Statement at [27]; see also Second Denham Statement at [30].
[59] Supplementary report of Rene Van Acker dated 13 January 2014 at pp 4,5 and 6; Report of Dr Christopher Preston dated 4 December 2013 at p 4; see also Witness Statement of Stephen Marsh dated 13 February 2013 at [9] and Witness Statement of Stephen Marsh dated 15 January 2014 at [38-9].
[60] Goldfinch Statement at [27].
[61] CB 0337-0338.
[62] Ibid.

based on the appearance of volunteers, as reported by Marsh to NASAA inspectors.[63]

43. Without certification from an organisation such as NASAA, Marsh could not have sold his crops as 'organic' in Australia and attract the price premiums paid for certified organic produce.[64]

44. Baxter's liability arising from his breach of duty should extend to the harm occasioned to Marsh by the incursion onto Eagle Rest of GM canola.

Nuisance

Principles

45. The presence of GM canola plants and seeds on Eagle Rest constituted a nuisance.[65] The requirement is that the defendant not create an *unreasonable* interference in the plaintiff's use or enjoyment of its interest in land.[66]

46. Unreasonableness of the impact on the plaintiff is the relevant consideration in this tort, not unreasonableness in the conduct of the defendant. Negligence on the defendant's part is not an element of the cause of action. In *Elston v Dore*[67] the High Court described this element of the tort as follows: "Where a defendant's act is deliberate and injures the interests of his or her neighbour, it will be wrongful if it was not reasonable in the sense of reasonable according to the ordinary usages of mankind living in a society or a particular society".

47. Baxter's cultivation and harvesting of RUR canola was a deliberate act.. By swathing the RUR canola he had planted in the Range and Two Dams paddocks adjacent to Eagle Rest, Baxter cut the canola plants from their tethering roots and then concentrated them in windrows. Baxter did not secure the windrows but left them exposed to movement by wind.[68] In this way, Baxter's conduct is analogous to that complained of in *Gartner v Kidman*[69], concerning a neighbour who caused water to be concentrated on his neighbour's land.

Unreasonableness for Marsh

48. The presence on Eagle Rest of Baxter's GM canola plants and seeds[70] which led to the loss of organic certification interfered with the use of land by the Marshes because while the GM material remained on the land it could not be used for the cultivation of crops consistently with the organic standard. The unreasonableness of that interference had several facets.

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[63] First Marsh Affidavit at [80]; Witness statement of Claire Coleman at [16]; Witness Statement of Diane Gore dated 15 February 2013 at [11(c)].
[64] Witness Statement of Frederick Davies dated 15 January 2014 at [10]; and Witness Statement of Jonathan Danton Morton dated 15 January 2014 at [2-3].
[65] SOC at [38]ff.
[66] *Overseas Tankship (UK) Ltd v The Miller Steamship Co Pty; The Wagon Mound (No 2)* [1967] 1 AC 617; *City of Richmond v. Scantelbury* [1991] 2 VR 38; *Premier Building and Consulting Pty Ltd v Spotless Group Limited* [2007] VSC 377 at [401].
[67] (1982) 149 CLR 480 at 488
[68] Baxter Statement at [62[2]], [67] and [69]; First Marsh Affidavit at [59].
[69] (1962) 108 CLR 12.
[70] SOC at [43].

49. Organic agriculture was a pre-existing, well-established farming practice in Western Australia.[71] More particularly, Marsh was (as Baxter knew) an established organic farmer whose certification could be put at risk, with real economic consequences, if Baxter cultivated RUR canola.

50. Baxter was not cultivating conventional canola but a new species of crop whose legalisation was attenuated by cautions in DFAWA and Monsanto publications released at the same time about the potential for RUR canola to contaminate neighbouring non-GM properties and affect organic certification and by the requirement that neighbour's interests be accommodated. The Monsanto Crop Management Plan specifically required that the need to protect GM free and organic crops be contemplated by farmers licensed to use RUR canola.[72]

51. Baxter took no precautions to minimise the risk that swathed GM canola might be carried on to Eagle Rest,[73] even though:
    a) the risk of escape was greater in the case of swathing rather than direct harvesting; and
    b) direct harvesting was a common and acceptable alternative to swathing.

Permanent injunction

52. In light of the clear and significant consequences for Marsh of the loss of his organic certification in the event of the presence of GM material on Eagle Rest, Marsh is entitled to a permanent injunction preventing Baxter from planting GM canola in paddocks adjacent to, and from swathing GM canola planted within a minimum distance of, Eagle Rest.

Richard Niall

Lisa Nichols

Catherine Pierce

3 February 2014

[71] Australian Organic Report, CB2912 at 2928-2929

[72] CB 1225-1236; see, e.g., under the headings "Identification and Control of Volunteer Canola"; and "Management of Outcrossing Events".

[73] Baxter Statement at [59]ff. Taking reasonable precautions is not a defence to an unreasonable interference with a plaintiff's interests but may feature in an analysis of whether an interference is unreasonable so as to constitute a nuisance in the first place: See e.g. *Challen v The McLeod Country Golf Club* (2004) Aust Torts Reports 81-760; [2004] QCA 358 [39] (Mullins J with McPherson and Davies JJA agreeing).