

## The Implications of the Marsh v Baxter Decision on the uses of farming land and property rights

### Overview

The Supreme Court's decision in *Marsh v Baxter* [2014] WASC 187 on 28 May 2014 has revisited the issue of pure economic loss and the duty of care one neighbour owes to the other.

### Executive Summary

In 2010, Mr Baxter planted and harvested a new variety of genetically modified (**GM**) canola crops on his farm in Kojonup, Western Australia. His neighbour and close friend, Mr Marsh, brought an action against Mr Baxter, alleging that he had unreasonably failed to contain the GM crops, which contaminated Marsh's adjoining organic farm. This contamination, it was alleged, caused it to lose organic certification from the National Association of Sustainable Agriculture (Australia) Ltd (**NASAA**).

70% of the Marsh farm was de-certified, meaning that the crops had to be sold at a lower mainstream price. Marsh sought compensatory damages of \$85,000 and a permanent injunction against Baxter, to restrain him from planting and swathings GM canola in proximity to his land, claiming pure economic loss and private nuisance.

Interestingly, this case did not give rise to any physical damage to the people or animals on Marsh's property or the property itself. There was no change to the physical nature or the quality of the crops Marsh produced, nor was there a change to the physical nature or quality of the neighbour's produce. There was no evidence of any genetic transference risks posed by the GM canola swathes which blew onto Marsh's property, and Marsh had never grown Canola in the particular paddocks in question. The damage was purely financial.

The claim was dismissed, and Marsh is considering an appeal.

### What Was the Rationale?

The loss in this case was determined to have arisen when NASAA withdrew its certification of the crops, *not* when the crops infiltrated Marsh's land. Marsh, the Court determined, exposed himself to "self-inflicted contractual vulnerability" and had failed to mitigate it at various stages. The decision by NASAA to de-certify the organic status was a decision made pursuant to a private contract, for which Baxter could not be held responsible.

Growing GM canola crops is a legitimate activity, and harvesting by swathings has agricultural justification. Neither method was novel, and the decision to swath was considered informed. Further, Baxter had complied with all rules and regulations in relation to the planting and harvesting of GM crops. As a result, the planting and harvesting of GM crops was not considered unreasonable.

### Future Issues

The Court was critical of the role and assessment method of NASAA in applying its organic standard. As noted above, this was what was considered to cause the damage and it will be interesting to see how the industry responds.

In the meantime, land owners must continue to take reasonable precautions to avoid interference to their neighbour's quiet enjoyment of their land. The Court has maintained that it is physical damage to person, animal or land which will be considered unreasonable.

### Key Points

- If a land owner is seeking economic benefit from a contract to receive any sort of accreditation according to a premium standard, it is that land owner's responsibility to understand the nature of the standard and what must occur in order to achieve it.
- In the alternative, landowners should put reasonable measures in place to ensure that activities undertaken on their land do not adversely affect their neighbours.

### Contact

#### Margie Tannock

Partner

T +61 8 9429 7456

E [margie.tannock@squirepb.com](mailto:margie.tannock@squirepb.com)