HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

BETWEEN: **MALLONLAND PTY LTD ACN 051 136 291**
First Appellant

ME & JL NITSCHKE PTY LTD ACN 074 520 228
Second Appellant

and

ADVANTA SEEDS PTY LTD ACN 010 933 061
Respondent

RESPONDENT'S OUTLINE OF ORAL SUBMISSIONS

Part I: Certification

1. This outline of oral submissions is in a form suitable for publication on the internet.

Part II: Propositions to be advanced in oral argument

Important factual circumstances in this case

2. Prior to the season in question, there was no relevant history (and therefore knowledge) of the problematic off-type (J [439]-[442] **CAB 77**). The first knowledge of that problematic off-type was in January 2011 (J [417] **CAB 74** and [474] **CAB 83**).

3. That position is incomparable to cases such as *Perre v Apand Pty Ltd* (1999) 198 CLR 180 (**JBA V2, Tab 10**), where the plaintiff propounded the existence of a duty by proving the defendant knew of the exact risk and the economic damage which could result from its materialisation (256-258 [211]-[213] (Gummow J); 208 [68]-[69], 233 [141] and 236 [150] (McHugh J), 298 [325] (Hayne J) and 311 [363] (Callinan J); RS [29]-[35]).

Duty of care

4. It is for the plaintiff to prove the existence of the novel duty of care to found a negligence claim (J [188] **CAB 42**). Reasoning based on an assumption of duty, and then asking whether something displaces that assumed duty should be deprecated (cf AS [29], ARS [5]).

5. As the Court of Appeal correctly observed (AJ [227] **CAB 163** and AJ [296] **CAB 179**), the law treats the recovery of pure economic loss as a special category of case (RS [15]-[16]; *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288 & Anor* (2014) 254 CLR 185 (***Brookfield***) at 228 [127] **JBA V1, Tab 4**). There are two reasons why the particular facts of this case do not warrant a departure from the general rule that damages are not recoverable.

6. ***First***, the respondent (**Advanta**) made objectively clear via its disclaimer that it did not take any responsibility in respect of the MR43 seed, including for its own negligence. The disclaimer made clear this was the basis on which the goods were provided, and if the appellants were not prepared to take the goods on that basis, they could avoid the risk by returning the bag (RS [7], [8], [23]). The disclaimer had no

contractual effect as against the appellants. However, it fundamentally influenced the *nature of the relationship* between the parties, which lies at the heart of the duty question (RS [10], [26]). The trial judge and Court of Appeal were correct to find that this was a powerful factor pointing against the imposition of a duty of care. The disclaimer did not negate a duty of care which was otherwise owed up until the point at which the bag was opened (ARS [5]); it prevented a duty of care from arising at all.

7. ***Second***, the remaining salient features in this case either weigh against the imposition of a duty of care, or in the case of vulnerability is of little utility. In particular, the absence of any assumption of responsibility or known reliance is decisive.

8. *Vulnerability* (RS [36]): Advanta does not seek to disturb the finding below that it may be unrealistic to expect a purchaser in the appellants' position to extract a warranty from the producer or seller, but that in transactions for sale of goods such as seed for agriculture by a grower from a distributor such vulnerability is of limited utility as a salient factor (J [187]-[191] **CAB 42**; AJ [208]-[213] **CAB 160-161**). That finding reflects the specific context of this case. The appellants were experienced commercial farming enterprises who understood that the purity of the seed was not guaranteed (AJ [130] **CAB 141**; see also RS [22] and [27]). They planted the seed despite the prominent warning as to the basis on which it was supplied. The vulnerability so found reflected the risk that the manufacturer was explicitly unwilling to accept.

9. Further, the vulnerability inquiry is concerned "…importantly, with the inability of the plaintiff to take steps to protect itself from the risk of the loss." (*Brookfield* at 228-229 [130] (Crennan, Bell and Keane JJ), see also 200 [22] (French CJ, citing Stapleton 'Comparative Economic Loss: Lessons from Case-Law-Focussed "Middle Theory"' (2002) 50 UCLA Law Review 531 (**Stapleton**)), and 200-201 [57] (Hayne and Kiefel (as her Honour then was) JJ); Stapleton at 558-559 **JBA V5, Tab 24**). The plaintiffs had other measures of securing some self-protection such as returning the seeds, considering what seed was available from the competitor and in what circumstances, planting seed from both suppliers and/or planting from different batches. The "degree of vulnerability" is usually relevant (*Caltex Refineries (QLD) Pty Ltd v Stavar* (2009) 75 NSWLR 649 (**JBA V4, Tab 17)** at 676 [103(d)] (Allsop P

(as his Honour then was), Simpson J agreeing at 705 [241])). The Court of Appeal was correct to conclude that it was a relevant feature, but was not decisive in this case (AJ [213] **CAB 161**). Consequently there was little practical difference between the conclusion of Morrison JA to the effect that there was vulnerability of the kind just described, and Bond JA's conclusion that the appellants could not be regarded as vulnerable because the disclaimer was ultimately a characteristic of the product (AJ [323]-[327] **CAB 186-187**).

10. *Coherence*: Advanta sold the seeds via distributors under a standard stockist agreement. The trial judge found that the stockist agreement excluded consequential damage and negligence (J [115]-[124] **CAB 26-28**). Consistent with this Court's reasoning in *Brookfield* (at 214 [69]), it would create incoherence if Advanta was found to owe a greater liability to the appellants than to the distributors to whom the seed was supplied, and by whom Advanta was paid for the product (RS [41]).

Notice of contention: Limitations

11. The appellants claim damages for financial losses to their farming enterprises as a result of having to eradicate the MR43 off-types from the land. Those losses arise from changed farming practices, increased expenditure and decreased income. Hindsight is permitted in determining when a cause of action accrues: *Zabic v Alcan Gove Pty Ltd* (2015) 34 NTLR 209 (**JBA V4, Tab 23**); *Alcan Gove Pty Ltd v Zabic* (2015) 257 CLR 1 (**JBA V1, Tab 3**) (RS [48]-[52]).

12. It is clear with the benefit of hindsight that it was the sowing of the MR43 seed on the land used by the appellants between September and December 2010 which inevitably and inexorably changed their farming practices, increased their expenditure and decreased their income (RS [53]-[55]). The harm was inevitable and not contingent, and was sufficient to found a cause of action prior to 24 April 2011 (RS [56]-[60]). In economic loss cases damage crystallises even if the plaintiff is not required to advance any money until a later date: *Wardley Australia Ltd v State of Western Australia* (1992) 175 CLR 514 (**JBA V2, Tab 15**) at 528-529.

Dated: 5 March 2024

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Peter Dunning KC