HIGH COURT OF AUSTRALIA

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

ON APPEAL FROM THE COURT OF APPEAL OF THE
SUPREME COURT OF QUEENSLAND

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

APPELLANTS' REPLY

Part I: Certification

1 These submissions are in a form suitable for publication on the internet.

Part II: Submissions in reply

A The effect of the disclaimer

2 Advanta's first argument is that an "express disclaimer of responsibility is not the true obverse of an implied assumption of responsibility, nor synonymous with the bare absence of the assumption of responsibility" (RS [10]). That is a departure from the reasoning of the courts below, which treated the question as being whether the disclaimer printed on the bags of MR43 seed "negated" an assumption of responsibility by Advanta and therefore a duty of care (AJ [59], [108], [223], [227], [319]; CAB 127, 138, 162, 163, 185; J [200], CAB 44).

3 Rather than supporting the reasoning of the courts below, Advanta now contends that an "express disclaimer of responsibility goes further — it defines the basis on which the parties are choosing to deal with the matter or thing" (RS [10]). The effect of the disclaimer printed on bags of MR43 seed is therefore said to give the farmers a take-it-or-leave-it choice: open the bag and be bound by the terms printed on it (including the disclaimer of liability for negligence), or return the bag for a refund (RS [23]).

4 The flaw in Advanta's argument is that it seeks to impose an agreement — which then defines the totality of the legal relationship the manufacturer has with the end-user of the goods — where there is none. Advanta acknowledges that it could not "control, by contract, the terms on which the product is supplied" to farmers (RS [21]). It also appears to accept that the existence of a common law duty of care cannot depend solely on the unilateral act of printing a disclaimer on its product packaging (RS [23]). Advanta therefore apparently considers it necessary to identify some act on behalf of the farmers that gives mutuality to the legal relationship. Thus, it contends that the law will not permit a farmer who chooses to open a bag with the disclaimer printed on it to "disregard the terms on which it was supplied" (RS [23]). Advanta thereby asks the Court to accept that a printed disclaimer that formed no part of a contract between Advanta and a purchaser of a bag of MR43 seed nonetheless formed the terms on which the seed was supplied.

5 Contrary to Advanta's attempt to cast this reasoning as a mere "analogy" with contract (see RS [26]), the essence of contract law is that terms that are offered are only binding if accepted and consideration is exchanged. It is not how the tort of negligence is to be approached. Advanta's argument can be tested simply. Assume that, at the time the seeds were manufactured, Advanta owed a duty of care to avoid contamination by off-types that reasonably foreseeably would lead to economic loss. Advanta's argument is that, by prominently printing the words "You agree that … [Advanta] will not be liable to you" for any loss "caused or contributed to by [Advanta] … whether as a result of … negligence or otherwise" on the seed bag, and by offering a refund upon return (J 127; CAB 29), the duty will cease to exist upon the purchaser opening the bag — even though the purchaser did not "agree" to those terms as a matter of contract.

6 To state the argument in these simple terms demonstrates that for the common law of negligence to recognise and enforce an agreement where the common law of contract does not would be to generate incoherence. Advanta's submission to the contrary (RS [41]) should be rejected. The fact that Advanta cannot enforce the disclaimer as a term of a contract with end-purchasers is merely the consequence of its choice to distribute its product through intermediaries. To give the disclaimer force outside contract on the basis that it represents some sort of non-contractual agreement would allow the law of tort to sweep away the doctrine of privity.

7 This is not to say that words printed prominently on packaging are irrelevant. The label on the bags of MR43 conveyed information about the seed, including the possibility of "Maximum Other Seeds: 0.1%" (J [444]; CAB 78), which is doubtless relevant to analysing whether a duty of care arose. In contrast, the disclaimer (J [127]; CAB 28–29) conveyed no information about the MR43 seed, but only what Advanta desired the legal position to be. The Appellants do not rely on any categorical or taxonomical distinction between a warning and a disclaimer (cf RS [13]). Those labels are no more than shorthand for the different effects on the parties' legal relations that the text printed on the bags was capable of having.

10 8 Advanta's emphasis on the opportunity to return the bag to the place of purchase for a refund is misplaced. Advanta does not explain the basis upon which the text printed on the bag could give rise to an obligation on distributors to give a refund in exchange for a return. More importantly, it overlooks the undisputed findings that the farmers *were* vulnerable in the relevant sense (see AS [46]). Any significance of a farmer's decision not to return the MR43 seed is attenuated by that vulnerability.

B Duty of care and Advanta's knowledge

9 Leaving aside the effect of the disclaimer of liability, nothing printed on the MR43 bags or labels was sufficient to put the Appellants on notice of the risk of which Advanta was aware: that, in the absence of reasonable care being taken in and about
20 production of the seed, the seed might contain an off-type with a shattering characteristic, which gave rise to a risk of harm to growers (AJ [25]; CAB 120). In particular, as Morrison JA said, Advanta was admittedly aware that "a sorghum off-type with a shattering characteristic would be more difficult to control or eradicate" and "a grower was likely to have greater difficulty in controlling a sorghum off-type with a shattering characteristic" (AJ [24(c)–(d)]; CAB 120). Advanta's submission that these do not amount to admissions that the off-type would be more difficult and costly to control than other off-types cannot be reconciled with the findings of the Court of Appeal (Morrison JA (cf RS [32])).

10 Advanta also contends that its admissions were not enough to show that it "knew or
30 ought to have known that there was a risk of an off-type in MR43 which could cause damage of the kind and magnitude claimed" (RS [30], see also at [32]). Respectfully, it is not possible to see how Advanta's knowledge that an "off-type with a shattering

characteristic would be more difficult to control" if it dropped seed, and the foreseeability of diminished commercial potential to the land (AJ [24(c)], [26]; CAB 120), *does not* amount to knowledge of the *kind* of harm to which farmers were exposed (namely, economic loss in the form of the costs of eradicating shattercane, and associated diminished revenue). Advanta's knowledge of the kind of harm to which the farmers were exposed is a weighty factor in favour of recognition of a duty of care (AS [37]–[43]). The disclaimer did not overwhelm these matters.

C Limitations (Notice of Contention)

11 This Court's reasoning in *Alcan Gove Pty Ltd v Zabic* (2015) 257 CLR 1 does not apply to the facts of this case in the way suggested by Advanta. In *Alcan*, it was "*the physical injury* constituted of the initial mesothelial cell changes that amounted to compensable damage sufficient for the respondent's cause of action to accrue".[1] The Court did not hold that, because personal injury in the form of malignant mesothelioma was an inevitable consequence of the initial mesothelial cell changes, the cause of action accrued upon occurrence of those cell changes. Rather, the Court held that, because malignant mesothelioma was an inevitable consequence of the initial mesothelial cell changes, the occurrence of those cell changes itself constituted injury.

12 We analyse this in more detail. Mr Zabic inhaled asbestos fibres between 1974 and 1977. Common law actions in negligence for workplace injuries were abolished in the Northern Territory on 1 January 1987. Mr Zabic contracted malignant mesothelioma between one and five years before 2013–2014.[2] The evidence was that molecular changes occur in the mesothelial cells soon after inhalation of asbestos fibres, but do not necessarily lead to mesothelioma.[3] The expert evidence showed, however, that, if a person contracts mesothelioma, the disease results from a combination of these initial cell changes and an unknown "trigger" present within those cells; hindsight therefore allowed the conclusion that the "initial mesothelial cell changes were from the moment of their occurrence bound to lead inevitably and inexorably to mesothelioma".[4] It followed that Mr Zabic had a cause of action for personal injury from the time the

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1 (2015) 257 CLR 1, 17 [36] (the Court) (emphasis added).

2 (2015) 257 CLR 1, 5 [1]–[2].

3 (2015) 257 CLR 1, 6 [5].

4 (2015) 257 CLR 1, 14–15 [22]–[27].

initial mesothelial cell changes occurred.[5]

13 Advanta attempts to draw an analogy with *Alcan* by arguing that the farmers' economic losses were inevitable upon the planting of the MR43 seed (RS [53]). That submission conflates injury with loss. *Alcan* did not hold that Mr Zabic's cause of action arose at the date his *losses* became inevitable. *Alcan* held that Mr Zabic's cause of action arose on the date he suffered *physical injury* in the form of initial changes to his mesothelial cells, because those changes made *disease* inevitable and therefore comprised compensable injury.

14 A cause of action in negligence is generally complete when the damage caused by the breach of duty is sustained.[6] In *Wardley*, the plurality accepted that, where an agreement drawn by a solicitor lacks the qualities it is represented to have, the client's cause of action may accrue on entry into the agreement if the contractual measure for damages applies.[7] That is because, at that time, the plaintiff has something of lesser value than what was bargained for; if, on the other hand, the losses were contingent, no damage is sustained until the contingency is fulfilled.[8]

15 Here, it is impossible to conclude that the farmers suffered any damage to their economic interests upon the planting of the MR43 seed. The farmers did not press any claim for loss of value to their business or property that arose upon planting of the seed. Rather, they claimed cash-flow losses in the form of reduced income and increased expenditure as a result of the effects of the shattercane contamination and the steps required to eradicate it. Those losses were not suffered until after 24 April 2011 (J [495]–[496]; CAB 87); in the next season.

Dated: 30 January 2024

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5 (2015) 257 CLR 1, 20 [45]–[47].

6 *Hawkins v Clayton* (1988) 164 CLR 539, 561 (Brennan J), 587 (Deane J).

7 *Wardley Australia Ltd v WA* (1992) 175 CLR 514, 531 (Mason CJ, Dawson, Gaudron and McHugh JJ).

8 See (1992) 175 CLR 514, 529 (explaining *Forster v Outred & Co* [1982] 1 WLR 86) and 532; cf RS [48] n.77.

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ANNEXURE TO APPELLANTS' REPLY

For the purposes of Practice Direction No.1 of 2019, the Appellants state that no constitutional provisions, statutes or statutory instruments are referred to in these submissions.