HIGH COURT OF AUSTRALIA

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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

# APPELLANTS' OUTLINE OF ORAL SUBMISSIONS

**Part I: Certification**

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

**Part II: Outline of argument**

***Duty of care, 'assumption of responsibility' and disclaimers (AS[16]–[32]; AR[2]–[8])***

2. The law imposes any duty of care. The modern Australian "salient features" approach in pure economic loss cases requires consideration of objectively ascertained features of the parties' relationship in the facts of the particular case (*Sullivan v Moody* (2001) 207 CLR 562 (**JBA V2 Tab 13**)). Duty does not depend on the tortfeasor's agreement.

3. It was an error of principle to hold that a non-contractual disclaimer of liability affixed to packaging after negligence in the course of manufacturing negated 'assumption of responsibility', and therefore prevented a duty of care arising. Even if that was a salient feature that was absent, its absence does not lead to the conclusion that the totality of the relationship may not give rise to a duty of care.

4. 'Assumption of responsibility' is to be seen as a fact which may exist in the parties' relations (typically in negligent misstatement cases). It may be a sufficient feature to give rise to a duty, but it is not necessary (*Caltex Oil (Australia) Pty Ltd v The Dredge "Willemstad"* (1976) 136 CLR 529 (**JBA V1 Tab 7**); *Brookfield Multiplex Ltd v Owners Corp SP61288* (2014) 254 CLR 185 (**JBA V1 Tab 4**)). It means assuming responsibility for the task performed negligently, and it is not always the same as assuming legal liability for that task (*Hill v Van Erp* (1997) 188 CLR 159 at 231 per Gummow J (**JBA V1 Tab 9**)). The courts below erroneously treated the manufacturer's desire not to assume responsibility for liability (evidenced by the disclaimer) as controlling the existence of duty (**CAB 142–143, CAB 45**). The task Advanta assumed responsibility for was the manufacture (**CAB 162**).

5. A disclaimer of liability might be relevant to whether a duty to take reasonable care in manufacture has been discharged (e.g., if it amounted to taking reasonable steps to protect against the risk), or to other defences (e.g., voluntary assumption of risk). Appropriate disclosure by the defendant, and appreciation and acceptance by the plaintiff, of the relevant risk would have been required to be shown. Advanta did not raise them here; its contention was that the disclaimer answered the duty question.

6. The existence of the disclaimer affixed to packaging after the negligent manufacture is

not determinative of whether a duty of care in manufacture existed to begin with. That approach permits duty to be self-defined by the manufacturer. Questions would arise as to the cogency of such an approach more generally. Would a disclaimer on packaging of goods negate duty where, eg, physical injury was caused by consuming them?

***Resolution of the duty question in the present case (AS[33]–[54], AR[9]–[10])***

7. While there is no rule governing in all cases the relative importance of salient features in the duty analysis, where carelessness occurs during production processes, knowledge of risk and the vulnerability of a non-indeterminate class of persons have been given special weight (*Perre v Apand* (1999) 198 CLR 180 (**JBA V2 Tab 10**); *Dovuro v Wilkins* (2003) 215 CLR 317 (**JBA V1 Tab 8**)). In a case of negligent manufacture for a market, the relationship begins when the manufacturer engages in production with the class of end-users in contemplation; excessive focus on times after sale and supply is unsatisfactory.

8. Here, freed of the error of giving the disclaimer determinative force, the salient features together strongly supported the existence of a duty of care:

   8.1. As to reasonable foreseeability and knowledge, Advanta was found to have had knowledge of the relevant risk of harm to which the farmers were exposed if reasonable care was not taken in seed production, and it undoubtedly had the means to control that risk of harm by careful manufacture (and knew that) (**CAB 119–120**). Those findings have not been challenged.

   8.2. As to vulnerability, the farmers were found to have been relevantly vulnerable, in the sense that they could not protect themselves from the consequences of want of reasonable care in manufacture by Advanta in a way which would cast the consequences on it (**CAB 160**). Those findings have not been challenged.

   8.3. As to indeterminacy of liability, there was no suggestion the farmers were in an indeterminate class. As the intended consumers of the product, they were the primary (first line) victims of the careless manufacture.

9. Neither the absence of 'assumption of responsibility' nor the presence of the non-contractual disclaimer could here outweigh the other salient features. The disclaimer neither intersected with Advanta's knowledge (ie, it was not a warning of the risk of which Advanta was aware), nor attenuated the farmers' vulnerability. Given it was affixed to packaging after manufacture, the disclaimer could not have affected whether

Advanta assumed responsibility for that task. Even if positive 'assumption of responsibility' by Advanta were not proven, the totality of the relationship as between the farmers and Advanta was one in which the law would impose a duty.

10. Having manufactured and put seed into the marketplace for sale by distributors, Advanta could not impose a contract of adhesion on the end-user farmers via the packaging. The legal basis for the farmers' supposed ability to return the seed if they did not accept the terms has not been identified. Advanta attempted via its contracts with some (but not all) distributors to require them to pass the disclaimer down, but the contracts between the farmers and those distributors did not incorporate those terms (**CAB 25–26, 28, 120**), nor were the farmers on notice of them upon purchase (**CAB 31**).

11. The approach to incoherence of Bond JA was erroneous (if it independently supports the Court of Appeal's judgment). Statutory warranties or guarantees as to quality are different in nature to duties to take reasonable care, and the existence of the former benefitting some persons is not a reason to deny the latter is owed to the farmers who do not have that benefit. *Brookfield Multiplex* (2014) 254 CLR 185 (**JBA V1 Tab 4**) is not analogous. There was no contract between Advanta and the farmers. Holding that the non-contractual disclaimer operated to negate duty of care involves incoherence with the law of contract and other tortious doctrines, because it subjected the farmers to a broad and generic exclusionary provision which was not bargained for or shown to have been consented to.

***Advanta's Notice of Contention on limitations (AS[55]–[59]; AR[11]–[15])***

12. *Alcan Gove Pty Ltd v Zabic* (2015) 257 CLR 1 (**JBA V1 Tab 3**) does not stand for the proposition that time runs if loss is inevitable, but rather that time runs from the first injury (the initial mesothelial cell changes). Here, the farmers' losses were unknown and unknowable prior to 24 April 2011 (*Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514 (**JBA V2 Tab 15**)), and were not inevitable. Advanta did not prove actual damage was suffered before the farmers incurred cashflow losses associated with the change of farming practices (and increased expenditure) in the following season.

13. Accordingly, as each of the judges below held, the farmers' claim was not statute-barred.

Dated: 5 March 2024

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**W A D Edwards KC**