HIGH COURT OF AUSTRALIA

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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' SUBMISSIONS

Part I: Certification

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

Part II: Statement of issues

2 **Duty of care**: The issue on the appeal is whether the respondent, Advanta, owed a duty to take reasonable care in manufacturing MR43 sorghum seed to avoid the risk that the end-user appellant farmers, who purchased the seed from distributors, would suffer economic loss in the form of lost revenue and increased costs in connection with remediating their fields by reason of shattercane contamination. In particular, in circumstances where the salient features pointing towards a duty of care included reasonable foreseeability of the risk of economic losses arising from shattercane contamination to a non-indeterminate class of persons including the farmers, Advanta's awareness that if precautions were not taken in the manufacturing process its seed might be contaminated with shattercane, Advanta's ability to control that risk eventuating by taking reasonable precautions, and the vulnerability of the farmers, did a disclaimer of liability printed on the seed bags negate "assumption of responsibility" so as to preclude a duty of care arising?

3 **Limitations**: The issue raised by notice of contention is whether the appellants' loss was inevitable upon planting of the seed, such that the appellants' claim was statute-barred. Or, as the trial judge and all three judges of the Court of Appeal concluded, did the cause of action accrue when the appellants first suffered cashflow losses?

Part III: Certification under s 78B of the *Judiciary Act 1903*

4 No notice is required under s 78B of the *Judiciary Act 1903* (Cth).

Part IV: Citations of judgments below

5 The judgment at first instance is *Mallonland Pty Ltd v Advanta Seeds Pty Ltd* (2021) 7 QR 234 (**J**). The judgment of the Court of Appeal is *Mallonland Pty Ltd v Advanta Seeds Pty Ltd* [2023] QCA 24 (**AJ**).

Part V: Statement of relevant facts

6 The appellant farmers were commercial sorghum growers who, between 2010 and 2014, conducted the business of the planting and commercial cultivation and sale of

sorghum, which is a crop farmed for animal feed and bio-fuel purposes (AJ [2]; CAB 117). They bought commercial sorghum seed known as MR43 from the respondent for planting in the summer of 2010–2011. The first appellant did not own all of the land upon which it conducted its farming businesses; the same was true of other farmers (J [14]; CAB 14; AJ [264]; CAB 172).

7 Advanta (formerly known as Pacific Seeds) was one of two manufacturers of commercial grain sorghum seed in the Australian market (J [174]; CAB 39). It produced MR43 for the purpose of commercial crops (AJ 14(b); CAB 118).

8 Shattercane is a sorghum "off-type"—meaning a plant genetically related to sorghum used for grain crops, but not itself useable for grain crops. Its seed-head shatters and spreads the seed widely, with the effect felt over many future seasons (AJ [4]–[5]; CAB 118). When present in a sorghum crop, shattercane competes vigorously with the sorghum. Its eradication requires fields to be sprayed, rogued and ultimately left fallow or put to less remunerative crops for at least several seasons (AJ [2]–[7]; CAB 117–118).

9 The following matters were admitted or otherwise not in issue in the Court below (AJ [10]; CAB 118). In 2010, Advanta knew that contamination of MR43 seed by an off-type sorghum with shattering characteristics may cause damage to farmers or to the owners of land upon which the seed was planted. Advanta knew that the production of grain sorghum seed required production processes to be implemented in order to: minimise the risk of contamination of the seed by off-types; identify off-type contamination; and, as far as reasonably practicable, prevent the supply of contaminated seed (AJ [22]–[23]; CAB 119).

10 In 2009, Advanta knew that that sorghum off-types had been identified in three varieties of commercial grain sorghum it produced (MR Buster, MR Striker and MR43). It knew that a sorghum off-type with a shattering characteristic would be more difficult to control or eradicate if it germinated, matured and dropped seed, and as a result, a farmer was likely to have greater difficulty in controlling a sorghum off-type with a shattering characteristic in a sorghum crop (AJ [24]; CAB 120). Advanta knew or ought to have known that, in 2010, if "roguing" was not used then there was a risk of harm to farmers who purchased and planted MR43 seed, and that in the absence of reasonable care being taken in and about production of the seed, the seed might contain

an off-type with a shattering characteristic (AJ [25]; CAB 120). Advanta admitted that it was reasonably foreseeable that the eradication of shattercane would mean that the land on which it was located could not be used to its full commercial potential during the eradication period (AJ [26]; CAB 120). Based on these admissions, the Court of Appeal held that it was reasonably foreseeable that farmers would suffer economic loss if Advanta failed to take reasonable care in producing MR43 seed (AJ [203]; CAB 159).

11 "Roguing" and "grow-outs" were aspects of Advanta's seed production process used to control off-types. Roguing is hand-removal of off-types during cultivation (AJ [20]; CAB 119). A "grow-out" is where a sample of seed from a production process is planted to assess whether it is contaminated (AJ [21]; CAB 119). The trial judge found that the shattercane contamination originated in one particular production block for MR43 seed (J [339]; CAB 63). His Honour found that, if Advanta did owe the appellants a duty of care, it breached that duty by failing to cause that block to be rogued carefully enough, and by failing to conduct a grow-out (J [353], [367]; CAB 65, 67). These breaches caused the appellants loss (J [479]–[480]; CAB 85). None of these findings were challenged on appeal (AJ [8]–[9]; CAB 118).

12 The bags within which the MR43 seed was sold had text printed upon them and a label attached to them. The text printed on the bag stated, *inter alia*, that, if the "product in the bag does not comply with its description within recognised tolerances", Advanta's liability will be "limited … solely to the cost of replacement of the product or the supply of equivalent goods", and that Advanta "will not be liable to you or any other person for any injury, loss or damage caused or contributed to" by Advanta arising out of or related to the use of the product, "whether as a result of … negligence or otherwise". The label stated, *inter alia*, "Maximum Other Seeds: 0.1%". The full text cannot be set out here for reasons of space, but the trial judge set out the full text of the disclaimer at J [127]; CAB 28–29, and the relevant portions of the label at J [444]; CAB 78.

13 The farmers purchased MR43 seed from distributors, not directly from Advanta (AJ [27]; CAB 120). The disclaimer did not form a part of the contract of sale under which the farmers purchased MR43 seed (J [128], [140]; CAB 29–30, 31). Any

efficacy it had depended solely upon it being printed on the bags of MR43 delivered to the farmers.

14 The appellants planted the contaminated seed in late 2010 (J [411]; CAB 72–73). The shattercane contamination was not ascertained or ascertainable by the famers until after 24 April 2011. The impact upon cash their flows did not occur until farming practices had to alter to account for the shattercane, which, again, did not occur until after 24 April 2011 (AJ [268]–[269]; CAB 172–173); that is, in respect of the next season. These proceedings were commenced on 24 April 2017, hence the focus of 24 April 2011 for the purposes of limitations.

Part VI: Argument

15 In holding that Advanta did not owe the farmers a duty of care, the Court of Appeal made two errors of principle. First, it incorrectly held that the disclaimer negated any assumption of responsibility by Advanta and thereby negated a duty of care (AJ [227], [319]; CAB 163, 185). Secondly, it incorrectly allowed what it found to be an absence of assumption of responsibility to overwhelm an assessment of the totality of the salient features of the legal relationship between Advanta and the farmers (AJ [227], [318]–[328]; CAB 163, 185–187). Notice of appeal grounds 1 and 2 are directed to these errors, and the bulk of Sections A to C below is addressed to these grounds, with Ground 3 addressed briefly to the extent it arises. The notice of contention is addressed in Section D.

A The approach to determining whether a duty of care arose

16 There is no general test for recognising a duty of care at common law.[1] Rather, "[d]ifferent classes of case give rise to different problems".[2] Once the "relevant problem" is identified, it "will then become the focus of attention in a judicial evaluation of the factors which tend for or against a conclusion, to be arrived at as a matter of principle".[3] Those factors are described in the contemporary jurisprudence as "salient features" of the relationship between the plaintiff and defendant, noting that

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1 *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* (2014) 254 CLR 185, 201 [24] (French CJ).

2 *Sullivan v Moody* (2001) 207 CLR 562, 579 [50] (Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ).

3 *Sullivan* (2001) 207 CLR 562, 580 [50].

the totality of the relationship must be considered.[4] Analogies with established categories and decided cases will be relevant, but precedents must be "examined to reveal their bases in principle and policy".[5]

17 The "general rule of the common law is that damages for economic loss which is not consequential upon damage to person or property are not recoverable in negligence even if the loss is foreseeable";[6] something more than foreseeability is required.[7] That is because a duty of care to avoid pure economic loss has been thought to raise some additional considerations to those found in personal injury or property damage cases. Chief among these are the need to avoid imposing liability to an indeterminate class,[8]
10 and the need to avoid stifling legitimate commercial competition.[9] Coherence with contract and statute law is also relevant.[10] While the distinction between personal injury and property damage cases (on the one hand) and economic loss cases (on the other) is somewhat unsatisfactory, especially where the economic loss is closely related to the use of land, it has been said that where economic loss is concerned the common law requires control mechanisms in addition to reasonable foreseeability before a duty will be imposed.[11]

18 The Court of Appeal, however, approached the question on the footing that this Court has "shown a reluctance to expand" the principles set out above to cases involving pure economic loss (AJ [224], [318]; CAB 162, 185), and hearkened back to the

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4 See *Perre v Apand Pty Ltd* (1999) 198 CLR 180, 253 [198] (Gummow J); *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540, 597 [149] (Gummow and Hayne JJ); *Caltex Refineries (Qld) Pty Ltd v Stavar* (2009) 75 NSWLR 649, 676 [102]–[103] (Allsop P).

5 *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1, 32 [73] (McHugh J); see also *Perre* (1999) 198 CLR 180, 254 [199] (Gummow J), quoting *Ward v McMaster* [1988] IR 337, 347 (cautioning that restricting legal development by incremental analogies risks rights being "determined by accident of birth").

6 *Brookfield* (2014) 254 CLR 185, 228 [127] (Crennan, Bell and Keane JJ).

7 *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515, 534 [34] (Gleeson CJ, Gummow, Hayne and Heydon JJ).

8 *Caltex Oil (Aust) Pty Ltd v The Dredge "Willemstad"* (1976) 136 CLR 529, 568 (Stephen J); *San Sebastian Pty Ltd v Minister Administering the Environmental Planning and Assessment Act 1979* (1986) 162 CLR 340, 354 (Gibbs CJ, Mason, Wilson and Dawson JJ).

9 *Bryan v Maloney* (1995) 182 CLR 609, 618 (Mason CJ, Deane and Gaudron JJ); *Perre* (1999) 198 CLR 180, 199–200 [32]–[33] (Gaudron J), 219–220 [101]–[104] (McHugh J), 289–91 [298]–[301] (Kirby J), 299 [329] (Hayne J).

10 *Brookfield* (2014) 254 CLR 185, 214 [69] (Crennan, Bell and Keane JJ), cf at 211 [59] (Hayne and Kiefel JJ).

11 *Perre* (1999) 198 CLR 180, 254 [201] (Gummow J), 303 [335] (Hayne J).

language of "special duty" (AJ [225]; CAB 162).[12] That framing does not assist the analysis. The authorities in this Court do not impose a general presumption against recognising a duty of care to avoid pure economic loss, or require some burden of justification to be surmounted before recognising a duty. Indeed, in *Dovuro Pty Ltd v Wilkins* (the last occasion this Court dealt with a case similar to this), McHugh J expressly rejected the necessity of characterising the duty of care owed by a distributor of seeds to avoid pure economic loss to farmers as a "special duty".[13] The correct approach does not depend upon labels, but rather involves considerations that are unique to the context. As the plurality in this Court said of negligent misstatement,
10 "the treatment of the duty of care" in that context "is but an instance of the application of the principles governing the duty of care in negligence generally", and the "special complications" that arise "can only be unravelled in a variety of factual situations".[14] Negligent misstatement is one context; manufacture of distributed goods is another.

B Assumption of responsibility and the disclaimer

19 The trial judge and the Court of Appeal framed the critical issue as 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).

20 We emphasise three matters at the outset. First, no party nor any of the Courts below
20 cited any authority to the effect that a disclaimer that does not form part of a contract can negate a duty of care outside the context of negligence in providing information or advice (ie, negligent misstatement).[15] Secondly, nothing in *Bryan v Maloney*, *Woolcock* or *Brookfield* holds that assumption of responsibility is necessary before a duty of care to avoid pure economic loss arises, even if it is "commonly" present.[16] Thirdly, nothing in those cases requires the presence (or absence) of assumption of

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12 Citing *Brookfield* (2014) 254 CLR 185, 200 [22] (French CJ).

13 (2003) 215 CLR 317, 328 [29].

14 *San Sebastian* (1986) 162 CLR 340, 354 (Gibbs CJ, Mason, Wilson and Dawson JJ).

15 Cf AJ [108] (CAB 138), citing *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465; *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords* (1997) 188 CLR 241, 250–251 (collecting authorities on effect of disclaimers on statements); *ABN AMRO Bank NV v Bathurst Regional Council* (2014) 224 FCR 1, 117 [603]; *Smith v Eric S Bush (a firm)* [1990] 1 AC 831, 856, 872–873.

16 In *Brookfield* (2014) 254 CLR 185, French CJ said that assumption of responsibility would "commonly, but not necessarily" be involved: at 200 [22].

responsibility to be given a particular weight. Assumption of responsibility was not a feature present in *Caltex Oil*, *Perre* or *Barclay v Penberthy*. Thus, it has been said that a duty of care to avoid pure economic loss "plainly extends beyond cases involving an assumption of responsibility".[17] This is unsurprising when its origins are understood.

(i) Assumption of responsibility is not apposite to cases of manufactured goods

21 Assumption of responsibility in the context of duty of care to avoid pure economic loss first assumed prominence in cases involving negligent misstatement. In *Hedley Byrne & Co Ltd v Heller & Partners Ltd*, the House of Lords recognised that a bank could owe a duty to avoid careless errors in giving a reference regarding creditworthiness. 10 The duty would arise if giving the reference, in the words of Lord Devlin, "implied a voluntary undertaking to assume responsibility" for the accuracy of the reference.[18] Assumption of responsibility was central to this Court's decision in *Bryan v Maloney*. There, the plurality held that a builder of a dwelling owes a duty of care to a subsequent purchaser because the builder "undertakes the responsibility of erecting a structure on the basis that its footings are adequate" for a period of time that is likely to span several owners' tenure.[19] By contrast, the engineer in *Woolcock* did not undertake responsibility to a subsequent owner for the structural soundness of the building because the original owner refused to pay for the geotechnical investigations requested by the engineer.[20]

20 22 Is there a common thread between negligent misstatement and the building cases? In *White v Jones*, which concerned a solicitor's duty to intended beneficiaries under a will, Lord Browne-Wilkinson understood the relevant concept to be "assumption of responsibility *for the task*", not "assumption of legal liability."[21] This understanding was endorsed by McHugh J and Gummow J in *Hill v Van Erp*.[22] Understood in that way, the common thread is that a person with specialised skill, knowledge or expertise who performs a task or makes a statement may be taken to have assumed responsibility

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17 *Swick Nominees Pty Ltd v Leroi International Inc (No 2)* (2015) 48 WAR 376, 447–448 [384].

18 [1964] AC 465, 529.

19 (1995) 182 CLR 609, 627 (Mason CJ, Deane and Gaudron JJ).

20 (2004) 216 CLR 515, 531 [25] (Gleeson CJ, Gummow, Hayne and Heydon JJ).

21 [1995] 2 AC 207, 273 (emphasis added), see also at 274.

22 (1997) 188 CLR 159, 204–205 (McHugh J), 231 (Gummow J).

for applying that skill, knowledge or expertise, because they are generally in a better position than the person requesting the task to understand and minimise risks.[23]

23 Here, Advanta was not called upon to assume responsibility for applying skill and expertise to the provision of services or information. Advanta placed standardised mass-produced goods into in identified market so that end-users could buy them from distributors, according to their description (MR43 seed). The seed was going to be used once only by those end-users, and was not going to be the subject of multiple uses by a successive chain of end-users.

24 The notion of assumption of responsibility is not apt to describe the relationship between the manufacturer and purchaser of standardised goods.[24]

(ii) The disclaimer did not (and could not) "negate" the duty

25 Disclaimers have obvious significance in the context of making statements or providing information. If the circumstances of a statement might otherwise give rise to an assumption that the speaker is taking responsibility for its accuracy (usually where the speaker knows that the recipient will rely on the statement), but the maker of the statement says that he or she does not take responsibility for its accuracy, the assumption cannot be maintained.[25] A provision of a contract disclaiming liability will have the effect of passing the risk of loss to the counterparty. But holding a disclaimer on packaging of mass-produced goods to be effective to negate the common law duty of a manufacturer converts the imposition of duty by law based on a consideration of the totality of the features of a relationship into something entirely self-defined by the person who could have taken, but did not take, reasonable precautions.

26 A disclaimer of liability is different from a warning. An appropriately specific warning can discharge a duty of care by constituting a reasonable step to avoid the risk of harm.[26] A disclaimer may also tend against a duty if it accompanies a warning or disclosure that puts the recipient of a statement on notice that the speaker is relaying

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23 *Bryan v Maloney* (1995) 182 CLR 609, 628.

24 The position may be different, for example, where the product is designed by the manufacturer for a particular purpose for use by a particular customer, based on information provided by the customer.

25 *Hedley Byrne* [1964] AC 465, 486 (Lord Reid).

26 *Nagle v Rottnest Island Authority* (1993) 177 CLR 423, 430 (Mason CJ, Deane, Dawson and Gaudron JJ).

information provided by another.[27]

27 Here, however, the disclaimer was no more than a unilateral declaration of what Advanta wished the legal position to be. But even if Advanta did not want to assume legal responsibility, how could that overwhelm the other objectively ascertainable factors of the parties' relationship so as to achieve that result?

28 If the Court were to consider it necessary to evaluate the terms of the disclaimer in order to analyse its effect on the parties' relationship in this case, it could not be read as effectively shifting the risk of pure economic loss arising from shattercane contamination onto the farmers. The disclaimer printed on bags of MR43 stated that
10 Advanta "will not be liable to you or any other person for any injury, loss or damage caused" by Advanta's negligence (J [127]; CAB 29). It did not warn users of the seed of the risk of shattercane contamination that was known to Advanta. It did not disclose even in general terms any risk of that kind or magnitude. The conclusion of Morrison JA that the disclaimer negated assumption of responsibility and therefore duty of care (AJ [143]; CAB 143) appears to have been predicated upon consideration of the steps Advanta took to have the disclaimer printed on the bags (AJ [140]; CAB 142), but none of those steps were ones which were capable of being, or found to be, knowable by the farmers, or leading to a relevant difference in their relevant vulnerability to, or Advant's relevant control of, the risk of harm.

20 29 The matter can be tested this way. Suppose a builder of a dwelling house assumed responsibility to an owner to construct the building free of defects. It owes a duty of care to this first owner. The builder posts a sign next to the door that says "The builder of this building will not be liable to any purchaser of this building for any loss or damage caused by the builder's negligence". Would the duty owed to subsequent purchasers under *Bryan v Maloney* be "negated" by this statement? No. *Bryan v Maloney* held that the builder's assumption of responsibility to the original owner for constructing a structurally sound building, combined with a purchaser's limited opportunity to inspect for latent defects, gave rise to the duty to a subsequent purchaser.[28] A disclaimer in those terms to potential future purchasers conveys no

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27 See, eg, *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592, 609 [51] (Gleeson CJ, Hayne and Heydon JJ).

28 (1995) 182 CLR 609, 627.

information to them about the scope of the builder's task or how it performed it. The position might be different if the disclaimer were accompanied by a warning about risks known to the builder—for example, "The Builder relied on an engineer to design the footings, so accepts no responsibility for subsidence". But the disclaimer printed on bags of MR43 seed was not of that character. It contained no warnings about the potential for contaminants that could lead to loss beyond generically adverting (on the Label) to the possible presence of "other seeds".

30 The Court of Appeal and the trial judge erred by ascribing significance to the words on the packaging that they could only properly have if they were part of the contracts of sale between distributors and farmers. Again, it was common ground that the disclaimer was not part of those contracts. Morrison JA said that the effect of the disclaimer was that "Advanta was plainly saying that its preparedness to engage in commerce was on the basis that the terms and conditions applied" (AJ [141]; CAB 143). However, the fact is that Advanta sold the seeds to distributors, who sold them to farmers *without* those terms and conditions being accepted by farmers. Advanta may have wanted the disclaimer to bind farmers, but that wish cannot, in the absence of contract, displace the objectively ascertainable features of the relationship between manufacturer and farmer which give rise to a duty of care—including, importantly, Advanta's awareness of the risks.

31 Bond JA characterised the disclaimer as "just as much a characteristic of the product affecting the end users' choice to acquire that product over other crop seed choices". He said that it was "artificial to dissociate the undesirable characteristic of shattercane contamination from the undesirable characteristic of prominent disclaimer clauses." In his Honour's view, to recognise a duty to farmers in the face of the Disclaimer would be to turn the law of tort into "a remedy for inequality of bargaining power" (AJ [327]; CAB 187). That reasoning unsatisfactorily treats duty of care in tort as being something one has to agree to before it can arise, and disregards the fact that the farmers were free to (and in fact did) form a bargain with distributors that did not involve farmers accepting the "undesirable characteristic" of the disclaimer.

32 The Court of Appeal's holding that the disclaimer negates a duty of care owed to the farmers was wrong in principle. As Gummow J said in *Hill v Van Erp*, the "use of contractual analogies in development of new duties of care may make little sense

where what is involved is the attachment of responsibilities to relationships which in substance and form are non-contractual."[29] That was the case here.

C The salient features warrant recognition of a duty of care

33 The salient features of the relationship between Advanta and the farmers, absent the erroneous conclusion that negation of the assumption of responsibility overwhelmed them all, warrants imposition of a duty on Advanta to take reasonable care in manufacturing MR43 seed to avoid the risk that end-users would suffer economic loss in the form of lost revenue and increased costs in connection with remediating their fields from shattercane contamination. That is because Advanta had knowledge of and control over the risk, and the farmers were vulnerable to the risk in the relevant sense. The duty is not incoherent with relevant contractual or statutory obligations, and there is no prospect of indeterminate liability.

34 We first frame the context before considering the salient features in detail. Advanta sold seed for use in growing commercial crops. In *Dovuro*,[30] a farmer sued a distributor of canola seeds contaminated with weed seeds. Farmers suffered loss when the Western Australian government required the weeds to be eradicated. The distributor knew what was in the seed.[31] The distributor had conceded duty at trial and on appeal, but attempted to dispute it in the High Court. McHugh J did not permit the distributor to do so, saying:[32]

> It is beyond doubt that a manufacturer of any product owes a duty to a consumer to take reasonable care to prevent the product causing injury or loss to the consumer. As the facts in other judgments demonstrate, [the distributor's] position was *identical in principle with that of such a manufacturer*. … This was not a case where there was any basis for contending that the losses suffered by the consumers might fall outside the ordinary duty owed by a manufacturer to a consumer. It was not a case where the [plaintiffs] could succeed only on proof of a special duty to prevent economic loss to them.

35 Hayne and Callinan JJ said that the class of purchasers of seed was not indeterminate and was (at least presumptively) vulnerable to loss; and in those circumstances the duty of care could extend to the risk of pure economic loss and would have done so if

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29 (1997) 188 CLR 159, 233.

30 (2003) 215 CLR 317.

31 (2003) 215 CLR 317, 366 [155].

32 (2003) 215 CLR 317, 328 [29].

that kind loss were reasonably foreseeable.[33] In this case, the risk of loss was both reasonably foreseeable and in fact foreseen by Advanta.

36 *Dovuro* did not decide that a duty existed. But their Honours' approach and conclusions must dispel any notion that the circumstances here warrant particular caution or reluctance before recognising a duty, and do indicate the relative importance that ought be placed on other salient features. In particular, McHugh J readily recognised that the duty would be "identical in principle" with a manufacturer's general duty of care owed to customers. Against that, to approach the matter on the basis of reluctance to extend legal principle so as to find a duty of care here perhaps pays insufficient attention to the considered approach of three members of this Court in a closely analogous case. In what follows we examine what the authorities in this Court reveal about the relative importance, or weight, of those salient features.

(i) *Knowledge of, and control over, the risk*

37 A defendant's actual or constructive awareness of the risk to the plaintiff (or a class of persons including the plaintiff) is a factor that tends strongly in favour of a duty of care. As McHugh J said in *Woolcock*, the "case for imposing a duty is always strengthened if the defendant actually knew of the risk. It is strengthened further if the defendant knew the magnitude of the risk."[34] Here, Advanta knew there was a risk that its MR43 could contain an off-type with a shattering characteristic. And it knew that an off-type with a shattering characteristic would be difficult and costly to control (AJ [24]–[26]; CAB 120).

38 The defendant's knowledge was the dispositive feature in *Caltex Oil*.[35] The facts are well-known, concerning whether the owners of a dredge and supplier of its navigation charts were liable for economic loss that Caltex suffered after the dredge damaged a pipeline that supplied Caltex's oil terminal, but which was owned and operated by the supplying refinery. In finding a duty of care, Stephen J identified the "salient features" as being the defendants' "knowledge that the property damaged … was of a kind inherently likely, when damaged, to be productive of consequential economic loss to

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33 (2003) 215 CLR 317, 368 [159].

34 (2004) 216 CLR 515, 550 [87]. See also *Pyrenees Shire Council v Day* (1998) 192 CLR 330, 389 [168] (Gummow J).

35 (1976) 136 CLR 529. See *Woolcock* (2004) 216 CLR 515, 530 [22] (Gleeson CJ, Gummow, Hayne and Heydon JJ).

those who rely directly upon its use"; and their "knowledge or means of knowledge" that the pipelines fed oil from the refinery to Caltex's terminal.[36] Gibbs J and Mason J reasoned to similar effect.[37]

39 The defendant's knowledge of risk was also important in *Perre*.[38] Again the facts are well-known. Apand trialled cultivation of a new variety of potato seed at a farm in South Australia, where the crop suffered from bacterial wilt that was traced to Apand's seed supplier in Victoria. The Perres' neighbouring potato farm exported most of its produce to Western Australia, where legislation prohibited importation of potatoes grown within 20km of an outbreak of bacterial wilt, and they suffered economic loss.[39]

10 40 In separate judgments, each member of the Court held that Apand owed a duty of care to the Perres and all or some of their associated businesses.[40] Knowledge of risk and vulnerability of a non-indeterminate class of persons were given great weight in deciding whether the law imposed a duty of care. McHugh J said:[41]

> What is likely to be decisive, and always of relevance, in determining whether a duty of care is owed is the answer to the question, "How vulnerable was the plaintiff to incurring loss by reason of the defendant's conduct?" *So also is the actual knowledge of the defendant concerning that risk and its magnitude*. If no question of indeterminate liability is present and the defendant, having no legitimate interest to pursue, is aware that his or her conduct will cause economic loss to persons who are not easily able to
20 protect themselves against that loss, it seems to accord with current community standards in most, if not all, cases to require the defendant to have the interests of those persons in mind before he or she embarks on that conduct.

41 Gummow J considered it significant that Apand knew or ought to have known that the Perres were within 20km of the Sparnons, and that Apand knew of the effect of the Western Australian legislation, knew of the threat that bacterial wilt therefore posed to growers, and knew that wilt was present near the source of its experimental seeds.[42]

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36 (1976) 136 CLR 529, 576, see also at 577–578.

37 (1976) 136 CLR 529, 555–556 (Gibbs J), 593 (Mason J).

38 (1999) 198 CLR 180.

39 (1999) 198 CLR 180, 238–239 [158]–[159], [162].

40 McHugh J and Hayne J held that the duty was not owed to all of the plaintiffs associated with the Perres: (1999) 198 CLR 180, 234–235 [144]–[145] (McHugh J), 308 [352]–[353] (Hayne J).

41 (1999) 198 CLR 180, 220 [104] (emphasis added).

42 (1999) 198 CLR 180, 258 [213].

Gaudron J, Kirby J and Callinan J each reasoned to similar effect.[43] Hayne J expressly followed *Caltex Oil* in holding that the duty stemmed from Apand's knowledge that those who grew potatoes for sale in Western Australia (a determinate class of people) would suffer economic loss if Apand negligently introduced potatoes affected by bacterial wilt to a property within 20km.[44] Gleeson CJ summed up Apand's knowledge as "actual foresight of the likelihood of harm, and knowledge of an ascertainable class of vulnerable persons."[45]

42 In the context of provision of services, the defendant pilot in *Barclay v Penberthy* was held to owe a duty of care to the plaintiff.[46] The Court's consideration is short, but consistently with the approach in *Perre*, the pilot's knowledge of the company's commercial purpose in chartering the flight strengthened the trial judge's findings in support of recognition of a duty, including as to the plaintiff company's vulnerability.

43 Here, Advanta had actual foresight of the likelihood of harm arising from shattercane contamination, knew that farmers who purchased MR43 seed for the cultivation of commercial sorghum were vulnerable to that harm, and knew that it was of significant magnitude. Advanta knew that, if it failed to take reasonable care in producing MR43 seed, the seed might contain an off-type with a shattering characteristic (AJ [25]; CAB 120). It knew that other sorghum off-types had been identified in three varieties of the commercial grain sorghum it produced and sold (AJ [24(c)]; CAB 120). Advanta knew that contamination of MR43 seed by shattercane may cause farmers to suffer economic loss (AJ [22], [26]; CAB 119, 120). Specifically, in 2009, it knew that a sorghum off-type with a shattering characteristic would be more difficult than any other off-type to control or eradicate if it germinated, matured and dropped seed (AJ [24(c)]; CAB 120).

44 A defendant's knowledge of a risk to persons in the plaintiffs' position lends

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43 (1999) 198 CLR 180, 202 [41]–[42] (Gaudron J), 288 [294], 290 [298]–[299] (Kirby J) (emphasising the "specific foresight of potential damage to potato producers in the position of the Perres"), 327 [412]–[413] (Callinan J) ("I think it relevant that the respondent in this case had an especially heightened awareness of the dangers of bacterial wilt and the strict attitude of the Western Australian authorities towards that disease. … In this case the respondent assumed a risk of which it was well aware or should have been aware").

44 (1999) 198 CLR 180, 304–305 [342].

45 (1999) 198 CLR 180, 195 [13] (Gleeson CJ).

46 (2012) 246 CLR 258, 284 [43]–[44] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

heightened significance to a defendant's ability to exercise control over the creation or mitigation of the risk.[47] Here, the trial judge found that Advanta negligently failed to conduct a grow-out and to rogue the MR43 production block (findings that were unchallenged on appeal: J [353], [367]; CAB 65, 67; AJ [8]–[9]; CAB 118). Those findings show that Advanta was in a position of control regarding the farmers' exposure to the known risk of loss due to shattercane contamination of their seed.

(ii) ***Vulnerability***

45 "Vulnerability" in this context refers to "the plaintiff's inability to protect itself from the consequences of a defendant's want of reasonable care, either entirely or at least in a way which would cast the consequences of loss on the defendant".[48] The trial judge found that the farmers were vulnerable in that sense (J [190]; CAB 42). On appeal, Advanta did not seriously contest this finding (AJ [213]; CAB 161). Morrison JA refused to disturb it and Williams J agreed (AJ [211], [333]; CAB 160, 188). The Court of Appeal should therefore be taken to have affirmed the finding (notwithstanding Bond JA seemingly reaching a somewhat contrary conclusion (AJ [326]; CAB 187). Advanta does not, in this Court, seek to contend the farmers were not vulnerable.

46 In any event, the trial judge's finding of vulnerability was correct. The farmers had no opportunity to inspect or test the MR43 seed before purchase and could not detect the contamination until well after the seed was planted (AJ [269]; CAB 172–173; see also J [86]; CAB 22). Their only alternatives to avoid the risk of shattercane contamination (had they been aware of it) were to purchase seed from another manufacturer (of which there was only one (J 174; CAB 39)), attempt to negotiate contractual protections from the distributor, or plant another crop. In determining whether a plaintiff was able to protect against the risk of injury, the economic constraints on the plaintiff and market conditions are highly relevant.[49] The trial judge considered that there was an "air of

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47 *Perre* (1999) 198 CLR 180, 195 [14] (Gleeson CJ), 259 [215] (Gummow J). See also *Hill v Van Earp* (1997) 188 CLR 159, 198–199 (Gaudron J), 234 (Gummow J) (solicitor in position of control over realization of testatrix's intentions towards an intended beneficiary); *Pyrenees Shire Council v Day* (1998) 192 CLR 330, 389 [168] (Gummow J) (local authority's control over risk to the plaintiffs arising from its knowledge).

48 *Woolcock* (2004) 216 CLR 515, 530 [23] (Gleeson CJ, Gummow, Hayne and Heydon JJ); *Brookfield* (2014) 254 CLR 185, 209 [51] (Hayne and Kiefel JJ).

49 See *Woolcock* (2004) 216 CLR 515, 549 [80], 552–553 [95] (McHugh J).

impracticality" in the notion that the farmers could have negotiated contractual protection from distributors, especially because Advanta had excluded liability to distributors for defective seeds in its agreements with distributors. It was unlikely that a distributor would agree to provide a warranty to a buyer if it could not extract for itself an equivalent warranty from the producer (J [174], [190]; CAB 39, 42).

47 The trial judge remarked that the "logical utility" of vulnerability in a sale-of-goods transaction might be limited (J [191]; CAB 42). It is difficult to see why that would be the case. Most small business purchasers of packaged, standardised commodity goods on modest scales lack the bargaining power to negotiate contractual protections against defects. If it follows that such purchasers are vulnerable, it is simply a recognition of that commercial reality. The vulnerability of the farmers here pointed strongly in favour of a duty.

(iii) ***Indeterminacy***

48 Indeterminate liability was not in issue. Purchasers of MR43 seed are not an indeterminate class. They are the "first line victims" of Advanta's negligence; their economic losses are capable of being "realistically calculated".[50]

(iv) ***Coherence***

49 Coherence did not assume significance in the reasoning of Morrison JA. To the extent the trial judge considered it, his Honour appeared to conclude that there was no incoherence because the disclaimer did not form part of the contracts of sale between distributors and farmers (J [199]; CAB 44). That conclusion was correct.

50 The approach to incoherence that emerges in Bond JA's judgment was different. (Ground 3 is addressed to this, to the extent it might be an independent basis for the Court of Appeal's decision having regard to Williams J's agreement; and it is not clear that Advanta is so contending.) Bond JA considered that the availability of statutory remedies that permit consumers, but not commercial purchasers such as farmers, to "leapfrog up the contractual chain" to claim against the manufacturer rather than the distributor tended against a duty (AJ [299]–[304]; CAB 179–181). That should be rejected for the reasons given by Gummow J in *Perre*: "[l]egislative values may influence but do not necessarily dictate the content of the common law values which

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[50] *Perre* (1999) 198 CLR 180, 221, 223 [112] (McHugh J).

are in play. If this were not so, then there would be no recovery for negligently inflicted economic loss unless there was a breach of statute which justified placing the stigma of unacceptable business conduct upon the defendant's alleged tortious conduct."[51]

(v) ***Advanta owed a duty of care to the farmers***

51 The Courts below accepted that Advanta knew that there was a risk MR43 would be contaminated with shattercane. It knew MR43 seeds would be used in commercial farming. It knew that shattercane contamination would likely cause economic loss to the farmers. It knew that the risk was of significant magnitude in terms of the foreseeable lost revenue and increased costs incurred to remediate shattercane infestation. It had the means to control the realisation or mitigation of the risk by taking the reasonable steps of roguing the production blocks and performing a commercial grow-out. These matters of Advanta's awareness and control should have been given substantial weight, as they were in *Caltex Oil*, *Perre* and *Barclay*.

52 The Courts below also accepted that the farmers were vulnerable because they were not able to detect the contamination before purchasing the seed or in the course of using it, and were not in an economic position to extract contractual warranties to shift this risk back to Advanta or distributors. Vulnerability is not a "neutral factor". Rather, it tends strongly in favour of a duty.

53 It was not in contest that the farmers were a readily ascertainable class and their past and prospective losses could be realistically calculated. The lack of indeterminacy tended in favour of recognition of a duty. No question of incoherence arose.

54 Contrary to the approach of the Court of Appeal, to the extent it should be given any effect at all, the disclaimer could not have the effect of negating the duty of care. It did not bear on Advanta's knowledge of the risk nor the farmers' vulnerability in the relevant sense. It did not intersect with the objectively ascertainable features of the relationship that otherwise indicated a duty. An analysis of the totality of the relationship between Advanta and the farmers should have led the Courts below to the conclusion that Advanta owed the farmers a duty to take reasonable care in manufacturing MR43 seed to avoid the risk that farmers would suffer economic loss

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[51] (1999) 198 CLR 180, 239 [160]. See also *Brookfield* (2014) 254 CLR 185, 230 [134] (Crennan, Bell and Keane JJ).

in the form of lost revenue and increased costs in connection with remediating their fields from shattercane contamination.

D Advanta's notice of contention (limitations)

55 The nature of the appellants' interest infringed was the financial interest in the lost cash flows (AJ [267]; CAB 172; J [492], [504]; CAB 87, 89). The first of those cash-flow losses was not incurred by the appellants until the next summer sorghum growing season commencing in late 2011. There was no attempt by Advanta to prove a loss in valuation or diminution in value of the land upon which the shattercane seed was planted simply by virtue of that seed being present there (J [499]; CAB 88), bearing in mind the farmers did not own all the land upon which they farmed (AJ [264]; CAB 172). The question is whether the cash-flow losses were inevitable immediately upon planting of the seed, such that the appellants' claim was statute-barred.

56 The trial judge held that neither the planting of the contaminated seed, the germination and growth of the seed nor the dropping of seed by those plants was physical loss or damage suffered by the appellants or group members (J [512]; CAB 91).[52] Upholding the findings of the trial judge, Morrison JA considered that it was only when non-negligible damage comprising loss of those cash flows first occurred. His Honour further found that it would be unjust and would create an ever-present risk of under-compensation or over-compensation (as contemplated in *Wardley Australia Ltd v Western Australia*[53]) if the appellants were compelled to institute proceedings before the existence of loss is ascertained or ascertainable (AJ [267]–[268]; CAB 172). The other members of the Court of Appeal agreed (AJ [331], [333]; CAB 187–188).

57 This Court has been concerned to differentiate between a risk of loss and actual loss, and not to bar a plaintiff who has suffered the former rather than the latter. In *Wardley*, the plurality held that where a plaintiff enters into a contract which exposes them to a contingent loss or liability, "the plaintiff sustains no actual damage until the contingency is fulfilled and the loss becomes actual; until that happens the loss is prospective and may never be incurred."[54] *The Commonwealth v Cornwell* is an

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52 Consistently with the reasoning in *Ranger Insurance Co. v. Globe Seed & Feed Company*, 125 Or. App. 321 (Or. Ct. App. 1994); 865 P.2d 451.

53 (1992) 175 CLR 514.

54 (1992) 175 CLR 514, 532 (Mason CJ, Dawson, Gaudron and McHugh JJ).

example of the application of this principle. A painter was negligently misinformed he was not eligible to apply for certain retirement benefits and thereafter lost that opportunity. The Court held that his losses were contingent on his retirement, and until then the loss was not "necessarily and irretrievably sustained".[55]

58 Here, the first of the cash flow losses experienced by the appellants, being increased operating expenses associated with the eradication of the shattercane, were not incurred until the summer sorghum growing season of late 2011 to early 2012, being the summer after the contaminated seed was first planted (J [40]).

59 The respondent relies on *Alcan Gove Pty Ltd v Zabic*.[56] That was a mesothelioma case where it was proven that the injury, a change to cells in the lungs of the plaintiff, had definitively occurred prior to the limitation date.[57] There was nothing prospective or contingent about the loss in question, which had already been inevitably and inexorably sustained. Here, the interest infringed was the appellants' financial interest in the lost cash flows which were claimed by the appellants. It was not the case that these loses were inevitably and inexorably sustained upon the planting of the contaminated seed. They were prospective and contingent only.

60 The Court of Appeal was correct to hold that the claim was not statute-barred.

Part VII: Orders.

61 The appellants seek the orders set out in the Notice of Appeal.

Part VIII: Oral Argument.

62 The appellants estimate 2½ hours will be required for the presentation of the appellants' oral argument in chief.

Dated: 1 December 2023

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55 (2007) 229 CLR 519, 531 [36] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ).
56 (2015) 257 CLR 1.
57 (2015) 257 CLR 1, 6 [5], 15–16 [26]–[29], 20 [45]–[48] (the Court).

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

ANNEXURE TO APPELLANTS' SUBMISSIONS

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.