SUPREME COURT OF QUEENSLAND

CITATION:	*Mallonland Pty Ltd & Anor v Advanta Seeds Pty Ltd* [2023] QCA 24
PARTIES:	**MALLONLAND PTY LTD** ACN 051 136 291 (first appellant) **ME & JL NITSCHKE PTY LTD** ACN 074 520 228 (second appellant) **v** **ADVANTA SEEDS PTY LTD** ACN 010 933 061 (respondent)
FILE NO/S:	Appeal No 5214 of 2021 SC No 4103 of 2017
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane – [2021] QSC 74 (Jackson J)
DELIVERED ON:	28 February 2023
DELIVERED AT:	Brisbane
HEARING DATE:	19 and 20 October 2021
JUDGES:	Morrison and Bond JJA and Williams J
ORDERS:	**1. Appeal dismissed.** **2. The appellants pay the respondent's costs of and incidental to the appeal, to be assessed on the standard basis.**
CATCHWORDS:	TORTS – NEGLIGENCE – PURE ECONOMIC LOSS: NEGLIGENT ACTS, OMISSIONS OR REPRESENTATIONS – DUTY OF CARE: EXISTENCE – DISCLAIMERS AND ASSUMPTION OF RESPONSIBILITY – where the appellants brought proceedings under Part 13A of the *Civil Proceedings Act 2011* (Qld) on behalf of a group of commercial sorghum farmers – where the respondent manufactured sorghum seed under the brand name "MR43 Elite" – where the respondent supplied MR43 Elite only to distributors, either by sale or consignment – where, between 2010 and 2014, the appellants purchased MR43 Elite from distributors – where MR43 Elite was contaminated with a seed known as shattercane – where the appellants suffered pure economic loss due to planting of contaminated MR43 Elite – where the primary judge found that the seed was sold

in bags with a prominent and clear disclaimer of liability printed on it – where the case was run not as one where physical damage was suffered but only that pure economic loss was suffered – where the only element of negligence in issue was the duty of care – where the primary judge found that no duty of care was owed to the appellants – whether the primary judge erred in finding that the disclaimer was on the bags at the time the appellants purchased them – whether the disclaimer was effective as a clear and prominent disclaimer of a duty of care which might be owed by the respondent to the appellants – whether a duty of care was owed to the appellants in the circumstances

TORTS – NEGLIGENCE – PURE ECONOMIC LOSS: NEGLIGENT ACTS, OMISSIONS OR MISREPRESENTATIONS, DUTY OF CARE: EXISTENCE – GENERALLY – where the respondent manufactured sorghum seed under the brand name "MR43 Elite" – where the respondent supplied MR43 Elite only to distributors, either by sale or consignment – where the appellants purchased MR43 Elite from distributors – where MR43 Elite was contaminated with a seed known as shattercane – where the appellants suffered pure economic loss due to planting of contaminated MR43 Elite – where the respondent had not assumed responsibility to the end users of MR43 Elite – where the respondent had disclaimed responsibility for loss suffered by the ultimate consumer of MR43 Elite – where the alleged duty of care was a duty to take reasonable precautions during the production of a product to avoid a risk that the end user of a product might suffer pure economic loss upon the use of that product – where the legislative regime in the *Australian Consumer Law* contemplates protections for end consumers as distinct from commercial consumers – whether the common law should recognise a duty of care in the circumstances

LIMITATION OF ACTIONS – LIMITATION OF PARTICULAR ACTIONS – SIMPLE CONTRACTS, QUASI-CONTRACTS AND TORTS – ACCRUAL OF CAUSE OF ACTION AND WHEN TIME BEGINS TO RUN – TORTS – OTHER TORTS AND MATTERS – where the respondent manufactured sorghum seed under the brand name "MR43 Elite" – where the respondent supplied MR43 Elite only to distributors, either by sale or consignment – where the appellants purchased MR43 Elite from distributors – where MR43 Elite was contaminated with a seed known as shattercane – where the appellants suffered pure economic loss due to planting of contaminated MR43 Elite – where the claim was initiated on 24 April 2017 – where the MR43 Elite was purchased, planted, and germinated at a point prior to 24 April 2011 – where the respondent pleaded that the action was brought outside the applicable six year limitation period

under s 10(1) of the *Limitation of Actions Act 1974* (Qld) – where the limitation period begins to run from the date on which the cause of action "arose" or "first accrues" – where the primary judge found that the appellants did not suffer any damage when the planting or germination of the contaminant seeds occurred, but suffered damage to their financial interest in lost cash flows – where the primary judge found that the occurrence of the damage comprising the loss of those cash flows was when the cause of action arose or first accrued – where the primary judge rejected the argument that proceedings were out of time –whether the primary judge erred in finding that no loss had been suffered by the appellants prior to 24 April 2011 – whether the primary judge erred in finding that the negligence claim was not statute barred

Australian Consumer Law 2011 (Cth), s 3(2)(b)(i), s 54, s 271
Limitation of Actions Act 1974 (Qld), s 10(1)

ABN AMRO Bank NV v Bathurst Regional Council (2014) 224 FCR 1; [2014] FCAFC 65, cited
AIU Ins Co v Superior Court 51 Cal.3d 807, 274 Cal.Rptr 820, 799 P.2d 1253 (1990), cited
Alcan Gove Pty Ltd v Zabic (2015) 257 CLR 1; [2015] HCA 33, distinguished
Barclay v Penberthy (2012) 246 CLR 258; [2012] HCA 40, cited
Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288 (2014) 254 CLR 185; [2014] HCA 36, considered
Bryan v Maloney (1995) 182 CLR 609; [1995] HCA 17, considered
Burnie Port Authority v General Jones Pty Ltd (1994) 179 CLR 520; [1994] HCA 13, cited
Caltex Oil (Australia) Pty Ltd v The Dredge "Willemstad" (1976) 136 CLR 529; [1976] HCA 65, considered
Caltex Refineries (Qld) Pty Ltd v Stavar (2009) 75 NSWLR 649; [2009] NSWCA 258, considered
Crimmins v Stevedoring Industry Finance Committee (1999) 200 CLR 1; [1999] HCA 59, considered
*Dovuro Pty Ltd v Wilkin*s (2003) 215 CLR 317; [2003] HCA 51, considered
Dovuro Pty Ltd v Wilkins (2000) 105 FCR 476; [2000] FCA 1902, considered
Esanda Finance Corp Ltd v Peat Marwick Hungerfords (1997) 188 CLR 241; [1997] HCA 8, cited
Graham Barclay Oysters Pty Ltd v Ryan (2002) 211 CLR 540; [2002] HCA 54, cited
Hawkins v Clayton (1988) 164 CLR 539; [1988] HCA 15, considered
Hedley Byrne & Co Ltd v Heller & Partners Ltd [1964] AC 465; [1963] UKHL 4, cited
Howard Smith & Patrick Travel Pty Ltd v Comcare [2014]

NSWCA 215, considered
Junior Books Ltd v Veitchi Co Ltd [1983] 1 AC 520; [1982] UKHL 12, considered
Marsh v Baxter (2015) 49 WAR 1; [2015] WASCA 169, cited
Martindale v Burrows [1997] 1 Qd R 243; [1996] QSC 113, considered
Minchillo v Ford Motor Co of Australia (1995) 2 VR 594; [1995] VicRp 78, considered
Morrison Steamship Co Ltd v Greystoke Castle (Cargo Owners) [1947] AC 265, considered
Perre v Apand Pty Ltd (1999) 198 CLR 180; [1999] HCA 36, considered
Pullen v Gutteridge, Haskins & Davey Pty Ltd [1993] 1 VR 27; [1993] VicRp 4, cited
Ranger Insurance Co v Globe Seed & Feed Company 865 P 2d 451 (1993), considered
Smith v Eric S Bush (a firm) [1990] 1 AC 831; [1990] UKHL 1, cited
Suosaari v Steinhardt [1989] 2 Qd R 477, considered
Sutherland Shire Council v Heyman (1985) 157 CLR 424; [1985] HCA 41, cited
Swick Nominees Pty Ltd v LeRoi International Inc (No 2) (2015) 48 WAR 376; [2015] WASCA 35, considered
The Commonwealth v Cornwell (2007) 229 CLR 519; [2007] HCA 16, considered
University of Wollongong v Metwally [No 2] (1985) 59 ALJR 481; [1985] HCA 28, followed
Vairy v Wyong Shire Council (2005) 223 CLR 422; [2005] HCA 62, cited
Wardley Australia Ltd v Western Australia (1992) 175 CLR 514; [1992] HCA 55, considered
Williams v Network Rail Infrastructure Ltd [2019] QB 601; [2018] EWCA Civ 1514, cited
Woolcock Street Investments Pty Ltd v CDG Pty Ltd (2004) 216 CLR 515; [2004] HCA 16, considered
Zabic v Alcan Gove Pty Ltd (2015) NTLR 209; [2015] NTCA 2, cited

COUNSEL: J T Gleeson SC, with N M Bender and B A Hall, for the appellants
P J Dunning KC, with E J Goodwin and M Y Barnes, for the respondent

SOLICITORS: Creevey Russell Lawyers for the appellants
Clifford Gouldson Lawyers for the respondent

[1] **MORRISON JA:** The appellants brought representative proceedings under Part 13A of the *Civil Proceedings Act 2011* (Qld) on behalf of a group of commercial sorghum farmers.

[2] Between 2010 and 2014 those sorghum farmers purchased sorghum seed manufactured by the respondent, Advanta.[1] The farmers grew sorghum for two purposes, animal feed and bio-fuel.

[3] The particular brand of seed purchased was known as MR43 Elite.

[4] The MR43 sold to the farmers had a contaminating seed in it, known as shattercane, which competed with the normal sorghum. The difficulty with shattercane was that its head would shatter, spreading the contaminated seed, which would then grow vigorously.

[5] An adverse consequence of having shattercane in the sorghum crop was that its effects can be felt over many seasons, and ultimately the only way to prevent it from disrupting the sorghum growing business was to stop growing sorghum and to remediate the fields.

[6] The appellants purchased the contaminated seed from intermediate suppliers or distributors. None purchased directly from Advanta.

[7] They all claimed to have suffered economic loss as a consequence of their crops being contaminated by shattercane. The claim was based in negligence and sought only pure economic loss. That loss was framed in two ways. One was the cost of roguing and applying insecticides and herbicides once the shattercane was discovered. The second was having to leave land lie fallow for a number of seasons or turn to less remunerative crops.

[8] At trial that claim failed on the ground that the appellants had not established that Advanta owed a duty of care in the circumstances. The learned trial judge found that had a duty been established, the appellants had succeeded on all other relevant aspects of the claim in negligence, for example, breach, causation and loss.

[9] The appellants challenge the finding that no duty of care was owed by Advanta. For the reasons which follow the appeal must be dismissed.

The pleaded facts

[10] A number of facts were pleaded and relevantly admitted, or ultimately not in issue. Those that are relevant to the issues in the appeal are set out below.

[11] Sorghum is a crop commercially grown and sold in Queensland and New South Wales for the provision of animal feed, and for the production of biofuels.

[12] MR43 is a treated sorghum hybrid variety of seed sold and produced by Advanta and used by the crop farmers for purpose of commercial cultivation and sale of sorghum.

[13] MR43 can only be used for cropping purposes. It cannot be fed directly to stock.

[14] Advanta:

(a) was engaged in the business of the commercial production of seed, including sorghum seed, for sale and distribution to growers;

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[1] At that time it was called Pacific Seeds.

(b) produced or caused to be produced MR43 seed for the purpose of commercial planting and harvesting by growers; and

(c) made MR43 seed available to be sold and distributed to growers for planting during the period of the claim.

[15] The production of commercial hybrid sorghum seed for commercial sale to farmers was a four-year process from initially increasing the desired hybrid parents to production of sufficient seed for Advanta to supply its distributors in bags.

[16] The production of the relevant hybrid became a rolling process whereby the four-year production cycle was initiated and continued over the commercial lifetime of the hybrid.

[17] Once established, that process continued on a rolling basis subject to expected demand and inventory levels. The desired hybrid characteristics could not be maintained by simply taking and planting a percentage of the commercial hybrid, as there would be a reversion to other genetic characteristics and a loss of type.

[18] The MR43 production process included controls to obviate and preclude, or alternatively, minimise the occurrence of contamination by reason of outcross occurring.

[19] The MR43 controls included: (i) commercial seed production; and (ii) commercial grow outs.[2]

[20] Commercial seed production involved engaging commercial seed producers in areas considered to be free of wild sorghums and sub-weeds. Growing plants were inspected a minimum of seven times at the Pre-Basic, Basic and Commercial Seed production stages to confirm that undesirable plants were not present. Any undesirable plants, such as wild and weedy sorghums, found inside the isolation zones but outside the production area, were rogued (i.e. manually removed from the ground and destroyed). Any undesirable plants, such as outcrosses, found inside the production area were rogued.

[21] A "commercial grow out" is an expression that refers to planting and growing a sample of seed from a production batch to assess whether, *inter alia*, the batch is contaminated with off-type or weed seed. Grow outs involved an inspection by Advanta during the growing stage, at each stage of production (i.e. Pre-Basic Seed, Basic Seed and Commercial Seed), for undesirable plants, including off-types.

[22] Advanta admitted that in 2010 and 2011, and in the balance of the Claim Period to 2014, it knew that contamination of the MR43 seed by an off-type sorghum with shattering characteristics may cause damage to the growers or to the owners of land upon which the seed was planted.

[23] Advanta admitted that in 2010 and 2011, and in the balance of the Claim Period to 2014, it knew that the production of grain sorghum seed required production processes to be implemented and followed in order to:

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2 Although Advanta contended, for reasons which do not presently matter, that a grow out was impractical in this case.

(a) minimise the risk of contamination of the seed by reason of outcross occurring;

(b) seek to identify, by testing of a reasonable kind, contamination of the seed by reason of outcross occurring; and

(c) as far as reasonably practicable, prevent the supply to distributors, and ultimately growers, of contaminated seed.

[24] Advanta admitted that:

(a) it knew, in 2009, that sorghum off-types had been identified in three varieties of commercial grain sorghum it produced and sold, namely in MR Buster, MR Striker and MR43;

(b) its Territory Manager, Tony McCumstie: (A) noted that the presence of this off-type was a concern; and (B) had seen some off-type sorghum in MR43 crops for several years prior to 2009;

(c) it knew, in 2009, that a sorghum off-type with a shattering characteristic would be more difficult to control or eradicate if such plant germinated, matured and dropped seed;

(d) it knew, in 2009, that a grower was likely to have greater difficulty in controlling a sorghum off-type with a shattering characteristic in a sorghum crop.

[25] Advanta admitted that it knew or ought to have known that, in 2010, if roguing was not used then there was a risk of harm to growers who purchased and planted the marketed MR43 seed, that in the absence of reasonable care being taken in and about production of the seed for marketing, the seed might contain an AGOTS[3] with a shattering characteristic.

[26] 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.

Method of sale

[27] Advanta did not sell bags of seed directly to the farmers. Instead MR43 and other seeds were sold or supplied to distributors who were also referred to as resellers, suppliers or agents.

[28] There were hundreds of such distributors around Australia who sold Advanta's seeds. Some were independently owned businesses and others were nationally owned by companies such as Elders Ltd, Landmark Ltd or Rural Co Ltd.

[29] Advanta supplied MR43 seed to distributors in two categories – by straight out sale or on consignment.

Plea of vulnerability

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[3] AGOTS is a term used for the weedy off-type sorghum otherwise called shattercane.

[30] The defence pleaded a lack of vulnerability on the part of the growers, in paragraph 34AA:[4]

> "(e) says that the Label and the bag terms and conditions made clear the position in respect of the content of each bag of MR43, and the purchasing grower's and Defendant's obligations respectively in respect thereof, and in this regard refers to and relies upon the matters pleaded above in this Defence in paragraphs 18 and 19;
>
> …
>
> (i) says each Plaintiff, or any Group Member, as a grower which or who planted MR43 seed following purchase of the same, was not so vulnerable in that such Plaintiff or other grower was able to protect his or her interests from damage by:
>
> (i) reading the Labels and bag terms and conditions and acting in response thereto; …"

[31] The only pleading by the growers of vulnerability was in the Second Amended Reply and in response to those paragraphs set out above. It consisted of a denial of a lack of vulnerability:[5]

> "denies that the Plaintiff and Group Members were not vulnerable as they were able to protect their interest from damage by reading the Label or taking the benefit of implied or express warranties from the distributor on the basis that no terms and conditions were provided either on the Label or with the bags, and the Plaintiffs and Group Members vulnerability was not reduced merely because of an implied or express warranty of statutory guarantee."

Finding of breach

[32] The learned primary judge found that, assuming a duty of care, there were two breaches of the duty of care.

[33] The first was that there had not been comprehensive roguing and crop inspection at each stage of the production process to ensure purity of the seed produced.

[34] The second was failing, before the seed produced was supplied to growers, to conduct a commercial grow out which would have prevented contaminated seed from being supplied to growers.

The conditions on the bags

[35] The learned primary judge made a number of findings as to the content and positioning of the notice on the bags of MR43. Those findings were necessary because of a dispute at trial as to whether the terms and conditions were actually on the bags sold in 2010/2011.

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4 AB 240, 241-242.
5 Paragraph 25(g), AB 283.

[36] Advanta's pleaded case was that the bags of seed were clearly and prominently marked with the terms and conditions set out in paragraph [37] below, and that because the buyers could, *inter alia*, read the terms and conditions, they were not vulnerable.[6] The appellants' pleaded response (in the Reply) was a denial that the buyers were not vulnerable, relevantly on the basis that "no terms and conditions were provided either on the Label or with the bags".[7]

[37] The terms themselves are as follows:

> **"*ATTENTION***
>
> ***CONDITIONS OF SALE AND USE***
>
> *Upon purchasing this product and opening the bag, the purchaser ("you") agrees to be bound by the conditions set out below. Do not open this bag until you have read and agreed with all the terms on this bag. If, before opening the bag, these conditions are not acceptable to you, the product should be returned in its original condition to the place of purchase immediately, together with proof of purchase, for a refund. The product contained in this bag is as described on the bag, within recognised tolerances.*
>
> ***CONDITIONS***
>
> ***You agree that:***
>
> - You acknowledge that, except to the extent of any representations made by Pacific Seeds' labelling of the product in this bag or made in official current Pacific Seeds literature, it remains your responsibility to satisfy yourself that the product in the bag is fit for its intended use;
> - If the product in this bag does not comply with its description, within recognised tolerances, the liability of Pacific Seeds Pty Ltd ACN 010 933 061 will be limited, at Pacific Seeds' option, solely to the cost of replacement of the product or the supply of equivalent goods or the payment of the cost of replacing the goods or of acquiring equivalent goods;
> - Pacific Seeds Pty Ltd will not be liable to you or any other person for any injury, loss or damage caused or contributed to by Pacific Seeds Pty Ltd (or its servants or agents), directly or indirectly arising out of or related to the use of the product in this bag, whether as a result of their negligence or otherwise;
> - All warranties, conditions, liabilities or representations in relation to the product, whether expressed or implied, are excluded by Pacific Seeds to the extent permitted by law.
> - Without limiting any of these terms, if you chemically treat the product in this bag, Pacific Seeds Pty Ltd will not be liable for any loss or damage whatsoever you might suffer, howsoever caused, and this warranty is void as a consequence; and

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[6] AB 222, 242; paragraphs 18(i) and 34AA(i) of the Ninth Amended Defence.

[7] AB 283; paragraph 25(g) of the Second Amended Reply.

- You may only use the product in this bag for planting and growing crops. You must not use it for any form of plant breeding, genetic manipulation, genetic isolation, genetic analysis or genetic sequencing; and
- You must not and will not export this seed from Australia without the express written permission of Pacific Seeds Pty Ltd."

Formulation of duty of care

[38] Before this Court, Mr Gleeson SC, appearing for the appellants, articulated the contended duty of care in this way: a manufacturer of a mass-produced product, owes, in favour of end users who use the product as intended in the course of their business, a duty to take reasonable care in the production process to ensure that the product is free of hidden defects, which, if they later emerge, are likely to cause a particular kind of financial loss, or relevant financial loss to the business interest of the end user.

[39] I pause to note that the duty so formulated was different from that advanced at trial, and as revealed in the reasons of the learned trial judge. In the appellants' pleading there was no allegation of a duty of care.[8] Rather, the statement of claim assumed one by pleading breaches of a duty of care. That remained the case, leading the learned trial judge to observe that "the postulated duty is not identified with precision".[9]

[40] At trial the appellants framed the duty as a "duty of care to the Plaintiffs and group members to take reasonable care to avoid injury [by way of pure economic loss] arising from the sale of contaminated seed",[10] and "to take reasonable care to avoid the Group Member's suffering the economic losses that they suffered as a result of using the contaminated MR43 seed".[11]

[41] Ultimately it seems his Honour understood the duty being advanced as: "a duty of care to the plaintiffs to take reasonable care to avoid the risk of economic loss of increased expenses of farming operations and decreased revenue from sorghum sales if MR43 seed was contaminated by shattercane or other off-type grassy sorghum plants".[12]

[42] As articulated before this Court the duty would be stricter than that run at trial. It requires Advanta to take reasonable care to "**ensure** the product is **free of hidden defects**".

[43] Accepting that relevant loss could vary, it was then submitted that it was sufficient that the defects, if they emerge, will damage, or interfere with the productive capacity of other core assets of the business, which, in turn, will require the business owner to suffer increased cost of working or reduced production and revenue during the period the damaged assets are being remediated.

[44] The appellants submitted that the duty was established for a number of reasons:

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8 Reasons below at [105]-[106].
9 Reasons below at [194].
10 Plaintiffs' written submissions paragraph 223, AB 545.
11 Plaintiffs' written submissions paragraph 260, AB 556.
12 Reasons below at [206].

(a) first, it either falls within the established category of duty of care of a manufacturer to an end user or arises by close analogy with it because the reasonable assumptions of the parties are the same;

(b) secondly, while the duty is to take care to avoid farmers suffering economic loss, the primary concern with economic loss, which is indeterminacy, is not present;

(c) thirdly, reasonable foreseeability of the kind of loss being suffered absent due care is clearly established; and

(d) fourthly, and perhaps most critically, the farmers were vulnerable to a lack of care by Advanta in at least four ways.

   (i) Advanta had all of the means to prevent contaminated seed getting to market, and the farmers had none;

   (ii) it was unrealistic with this type of transaction to expect the farmers to negotiate for or obtain a relevant warranty or indemnity from Advanta or the distributer for these kinds of losses;

   (iii) if the seed was contaminated it would likely damage the fundamental income producing asset upon which the business depended; and

   (iv) in terms of timing, because the seed is planted shortly after purchase, but its shattering qualities do not emerge for some time, by the time the contamination emerges it is simply too late for the farmers to readily or cheaply reverse its effects on the productive capacity of the land; and

(e) fifthly, for the same reasons, Advanta was the person with control of the risk coming home to the substantial exclusion of the farmers; there was known reliance and there was assumption of responsibility.

The nature of the damage claimed

[45] The framing of the case before this Court was that the damage caused by the contaminated seed was to the productive capacity of the land as an asset in the business.[13]

[46] As it was put the appellants case was:[14]

> " … you are the owner of a business, and in your business you draw upon the productive capacity of different assets. And one of those assets clearly enough is the land. If someone negligent who supplies you with a product that you put into that land, if that does damage the productive capacity of that asset and there's relevant foreseeability and there's vulnerability, so it's a kind of financial loss which can give rise to a duty of care."

[47] However, it was accepted that the case run at trial was not as a damage to property case, but rather as pure economic loss. Further, on appeal it was not sought to recast the case.

Basis for a duty of care in respect of economic loss only

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[13] Appeal transcript T1-16 lines 38-40.

[14] Appeal transcript T1-18 lines 1-7.

[48] The case as put below, and before this Court, was one of economic loss only. The learned trial judge examined the development of the law in Australia in relation to claims for economic loss only where the cause of action is negligence.[15] In doing so his Honour identified the questions that have centrally informed the development of principle for such claims of loss, particularly where the liability was that of a manufacturer of goods and the loss is sustained by an end user who has purchased goods via intermediate purchasers.

[49] By reference to authority commencing with *Caltex Oil (Aust) Pty Ltd v The Dredge "Willemstad"*,[16] and progressing through *Bryan v Maloney*,[17] *Suosaari v Steinhardt*,[18] *Minchillo v Ford Motor Co*,[19] *Swick Nominees Pty Ltd v Leroi International Inc (No 2)*,[20] *Perre v Apand Pty Ltd*,[21] and thence to *Woolcock Street Investments Pty Ltd v CDG Pty Ltd*[22] and *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288*,[23] his Honour examined the development of the principles held to be relevant to determining whether a duty of care was owed in this case.

[50] Specifically, his Honour identified the case as one where the issue was whether a manufacturer of a product owed a duty of care for pure economic loss, where that loss was caused by negligence in the manufacture of the product, and the loss was sustained by an end user who purchased the product from intermediaries but was not in a direct contractual relationship with the manufacturer.[24]

[51] In the course of that analysis his Honour examined a number of salient features relevant to the duty of care issue, including:

(a) whether the particular sort of loss was reasonably foreseeable;[25]

(b) the state of authority revealing the type of relationships where a duty was found or not found as between a manufacturer and an end user; thus:

(i) where it was owed: *Bryan v Maloney*, where a duty was held to be owed by a negligent house builder to a subsequent purchaser from the owner of the land; *Junior Books Ltd v Veitchi Co Ltd*,[26] by a negligent sub-contractor to the building owner; *Suosaari v Steinhardt*, by a negligent designer of trailers to the owner of the trailer; and

(ii) where it was not: *Minchillo v Ford Motor Company*, a negligent truck manufacturer where excessive vibration caused loss to an end user; *Swick Nominees*, negligent manufacturer of air compressors where economic loss was caused to an end user;

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15 Commencing at [142] of the reasons below.
16 (1976) 136 CLR 529; [1976] HCA 65.
17 (1995) 182 CLR 609; [1995] HCA 17.
18 [1989] 2 Qd R 477.
19 [1995] 2 VR 594.
20 (2015) 48 WAR 376 ('*Swick Nominees*').
21 (1999) 198 CLR 180; [1999] HCA 36.
22 (2004) 216 CLR 515; [2004] HCA 16 ('*Woolcock Street Investments*').
23 (2014) 254 CLR 185; [2014] HCA 36 ('*Brookfield Multiplex*').
24 Reasons below at [141].
25 Reasons below at [145] referring to *Caltex Oil*, and [160] referring to the reasons of Hayne and Callinan JJ in *Dovuro Pty Ltd v Wilkins* (2003) 215 CLR 317; [2003] HCA 51.
26 [1983] 1 AC 520.

(c) whether liability would be indeterminate;[27]

(d) the protection of the autonomy of individuals;[28] the common law regards individuals as autonomous, able to make their own choices and be held responsible for those choices; therefore, as long as a person is legitimately protecting or pursuing their social or business interests, the common law will not require that person to be concerned with the effect their conduct on the economic interests of other persons; and

(e) the extent to which the defendant knew of the particular risk and its magnitude.[29]

[52] It is evident from his Honour's approach that he was conscious of the fact that a multifactorial approach should not be treated as providing a list of factors, much less an exhaustive list, all of which must have application in a particular case. To the contrary, it merely identifies a number of potentially relevant factors that should be considered, depending on the particular case.

[53] The learned trial judge then identified several "salient features"[30] that warranted particular discussion in terms of establishing a duty of care in cases of pure economic loss.

[54] The first was vulnerability, by which is meant that it concerns the ability of a plaintiff to protect itself from economic loss or damage caused by the defendant's failure to take care.[31]

[55] The second was the coherence of the disputed duty of care having regard to the existing legal frameworks that regulate or affect the relationships among the parties and others.[32] Here Advanta sought to exclude liability for contaminated seed by its contractual terms with stockist distributors and the terms on the bags. That raised the question of coherence as a salient feature. As his Honour noted:[33]

> "The incoherence in question is that between refusal of the defendant to undertake contractual responsibility for the quality of the contaminated MR43 seed to the distributor as buyer of the seed from the defendant, which it may legally do, with the conclusion that it has assumed or should be subjected to the same excluded liability to a sub-buyer who is a non-contracting party *vis a vis* the defendant."

[56] The third was the assumption of responsibility, which his Honour noted,[34] had been a salient feature in determining the existence of a duty of care since *Hedley Byrne & Co Ltd v Heller & Partners Ltd*.[35] The assumption of responsibility was an important feature of the finding of a duty of care in *Bryan v Maloney*, and the lack

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27 Reasons below at [160] referring to the reasons of Hayne and Callinan JJ in *Dovuro Pty Ltd v Wilkins*.

28 Reasons below at [162] referring to *Woolcock Street Investments* at [164].

29 Reasons below at [162] referring to *Woolcock Street Investments* at [164], and *Barclay v Penberthy* (2012) 246 CLR 258; [2012] HCA 40 at [173].

30 To use the term from case such as *Brookfield Multiplex* at 193 [4], 203 [30] and 224 [115].

31 Reasons below at [163], citing *Brookfield Multiplex* at 229 [130]; [185].

32 Reasons below at [192].

33 Reasons below at [192].

34 Reasons below at [201].

35 [1964] AC 465.

of it was a reason why no duty of care existed in *Woolcock Street Investments*. The learned trial judge noted that an assumption of liability can be negated by an express disclaimer of responsibility.[36] As his Honour rightly noted:[37]

> "The substance of the point of the defendant's reliance on the terms on the bags, in my view, is that they may negate the defendant's assumption of responsibility, as a salient feature, in determining whether there is a duty of care to avoid economic loss only in the circumstances of this case."

[57] The learned trial judge concluded that the present case was one where it may be unrealistic to expect the seed buyers to extract warranties from Advanta that might protect them; the goods were sold by brand name by a retailer or distributor who had acquired them from Advanta, and they were supplied in a packaged condition that meant they were not examinable.[38] Thus his Honour's conclusion was that the buyers were vulnerable in the relevant sense.[39] Before this Court both parties construed that finding as being that the aspect of vulnerability was neutral. For reasons explained below at paragraphs [205] to [211]. I consider that his Honour found there was vulnerability.

[58] As to incoherence, his Honour noted that Advanta excluded or sought to exclude liability for contaminated seed by its contractual terms with stockist distributors and the terms on the bags. Based on *Brookfield Multiplex* there was incoherence with the postulated duty of care, which, though framed imprecisely, could be understood as a duty to take reasonable care that the MR43 seed was free of any contamination by shattercane. As with *Dovuro Pty Ltd v Wilkins*,[40] the seed was not being sold as free of any weeds, as it was sold on the basis of a minimum purity[41].

[59] As was noted above in paragraph [51], the learned trial judge identified salient features beyond the three his Honour expressly dealt with. Given that his Honour concluded that the feature which denied the existence of a duty of care in this case was the evidence concerning Advanta's disclaimer of responsibility, it may be taken that his Honour found the other features neutral. The central finding on the issue of whether a duty of care arose in this case was whether there was a disclaimer of such a nature as to negate the assumption of responsibility.

[60] The resolution of that question involved two aspects. First, were the terms and conditions on the bags sold in 2010 and 2011? The learned trial judge found they were. Before this Court there was a sustained attack on the evidentiary foundation for that finding. Secondly, was the disclaimer in the terms and conditions enough to negate the assumption of responsibility? It is to those questions that I now turn.

Were the conditions on the bags in 2010 and 2011?

[61] The learned primary judge referred to the evidence as to the presence of that notice on the bags of seed, summarizing it in these terms:

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36 Reasons below at [203].
37 Reasons below at [200].
38 Reasons below at [190]-[191].
39 I shall deal with the terms of that finding in greater detail later in the reasons.
40 (2003) 215 CLR 317. At first instance, (2000) 105 FCR 476.
41 Reasons below [192]-[196].

> “[130] Barry Croker said that the terms were part of the artwork provided to the manufacturer of the defendant’s bags for MR43 seed in 2010. He said that he can recall the size of the bag and design and layout on the bags used in 2010. He can recall the font of the conditions of sale and use that were printed on the bag in 2010. He said there is no discernible difference between the artwork and terms printed on MR43 seed bags in 2010 and that on the bag in a photo of the MR Buster variety hybrid grain sorghum seed that is attached to his statement. That photograph contains terms on the bags as set out above.
>
> [131] From 2006, Liam Anderson was employed by the defendant as a marketing support manager, reporting initially to Gregg Supple and then to Nick Gardner. He was responsible for the artwork and branding that was printed on the bags of MR43.
>
> [132] In 2007/2008 the defendant changed its label artwork including the seed bag labels and markings. The terms on the bags set out above were part of the artwork that was printed directly onto the bags when they were produced in China. They were printed on the bags for MR43 seed produced for the 2010/2011 summer season.
>
> [133] Mr Hemmings and Mr Perkins said that there was no warning or disclaimer on the label of their bags of contaminated MR43 seed. But they did not deal specifically with the terms alleged by the defendant to have been printed on the bags. Mr Morrice identified the label attached to his statement as being in the same form as on the bags that he purchased but did not deal specifically with the alleged terms on the bags. Mr Jenner said that he did not read the label but did not deal specifically with the alleged terms on the bags. Otherwise, the plaintiffs’ witnesses did not deal with the question.”

[62] His Honour described the evidence on this topic, on all sides, as not “completely satisfactory”, commenting that on Advanta’s part, one might have expected direct evidence from those responsible for producing the bags that the terms were applied to them. His Honour also commented that on the part of the growers it might have been expected that their attention and evidence would have been drawn specifically to the terms on the bags.[42]

[63] His Honour’s ultimate finding was expressed thus:[43]

> “[135] In the result, in my view, on this evidence, it is more likely than not that the contaminated MR43 seed bags did bear the terms alleged.”

[64] Before this Court the appellants spent considerable effort in attacking the quality of the evidence given on this topic and challenging the findings above. For that

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42 Reasons below [134].
43 Reasons below [135].

reason, it is necessary to examine the evidence with a view to determining if his Honour's conclusion was open.

Advanta's evidence

Croker

[65] Mr Croker was the Managing Director of Advanta, having been appointed Acting Managing Director in September 2009, and Managing Director from April 2010.

[66] His statement,[44] which was admitted into evidence said this concerning the bag and label issue:[45]

> "285. After the seed is released by QC,[46] it is bagged into labelled bags.
>
> 286. A bag containing seed produced by Advanta always had a label printed or stencilled onto the actual bag as well as either a sticker or a bag tag attached to the labelled seed bag.
>
> 287. In 2010, the seed bags used by Advanta were labelled and also had a bag tag attached to them via a plastic connector. The bag tags were made from untearable plastic material.
>
> 288. In 2010, Advanta had seed bags produced under a contract with a manufacturer in China or Thailand.
>
> 289. That manufacturer also printed a label directly onto the bag. Advanta provided the manufacturer with the artwork or get up that was required to be printed on the bag.
>
> 290. Exhibited to me at DEF.300.000.000.004A is the artwork provided to the manufacturer of Advanta's bags for MR43 Elite in 2010.
>
> 291. The Conditions of Sale and Use were part of the artwork or get up.
>
> 292. That artwork was designed by the marketing team at Advanta at the time and the Conditions of Sale and Use were incorporated into the artwork which was provided to the manufacturer.
>
> 293. Exhibited to me at DEF.400.000.000.0147E, DEF.400.000.000.0147F and DEF.400.000.000.0147G are copies of photographs I took of the current bag used by Advanta for the MR Buster variety of hybrid grain sorghum seed.
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> 294. I can recall the size of the bag used and the design and lay out on the bags used in 2010. I can also recall the of the font of the

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44 Exhibit 21, AB 1012.

45 AB 1065-1066.

46 AA reference to Quality Control ("QC").

Conditions of Sale and Use that ·were printed on the bag label in 2010.

295. There is no discernible difference in size between what I can recall about the label used in 2010 and, in particular, the size of the font used in 2010, and that on the bag in my photo. The bags hold the same volume of seed although the dimensions may differ very slightly."

[67] In summary the relevant parts of that evidence were:

(a) a bag containing seed produced by Advanta always had a label printed or stencilled onto the actual bag;

(b) in 2010, the seed bags used by Advanta were labelled;

(c) in 2010 the bag manufacturer printed the label directly onto the bags;

(d) the artwork used in 2010 was that in DEF.300.000.000.004A,[47] in the terms set out in paragraph [37] above;

(e) he recalled the size of the bag used and the design and lay out on the bags used in 2010;

(f) he recalled the font of the Conditions of Sale and Use that were printed on the bag label in 2010; and

(g) the size of the label and the font used in 2010 were no different from that shown in the exhibited photos of the bag currently used by Advanta for a particular type of sorghum seed.[48]

[68] Mr Croker was cross-examined extensively but not as to what he said above. Nor was it put to him that the Advanta bags had no terms and conditions provided either on the label or with the bags.[49]

Anderson

[69] Mr Anderson was the Media and Promotions Officer of Advanta. He was responsible for the artwork and branding on Advanta's seed bag labels.[50] His statement[51] said:

"36. In 2007/2008, Advanta changed its label artwork and consequently, all packaging including labels and seed bag tags were rebranded with the new artwork.

37. Annexure **LJA8** (DEF.300.000.000.0004A) is a true and correct depiction of the 2009 Elite Hybrid Sorghum Seed label, which was created in June 2008 by my marketing team and commenced being used on seed bags in 2009. This label is printed directly onto the bag when it is produced in China.

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47 AB 1179.

48 AB 1180-1182.

49 That is, the positive case pleaded in paragraph 25(g) of the Reply.

50 AB 1109, paragraph 35.

51 Exhibit 56, AB 1105.

38. Annexure **LJA9** (DEF.300.000.000.0056) is a true and correct copy of the conditions of sale as they appear on the above seed label at LJA8. These conditions are saved in a separate document.

39. I cannot recall who provided me with the conditions of sale details for the artwork. These were the conditions printed on the bags of Advanta seed in 2010/2011."

[70] In summary, the main points of his evidence were:

(a) DEF.300.000.000.0004A showed[52] the 2009 Elite Hybrid Sorghum Seed label, which was created in June 2008 by his marketing team; it commenced being used on seed bags in 2009;

(b) that label was printed directly onto the bag when it was produced in China;

(c) the label contained the conditions; and

(d) those conditions were printed on the bags in 2010/2011.

[71] Mr Anderson was not cross-examined.

Short

[72] Mr Short was the Marketing Manager for Advanta. He had been the Territory Manager for North West New South Wales from July 2010. In his statement he said:[53]

"46. When I started as a Territory Manager, and during the 2010/2011 season, there was a paper tag attached to the bag with a plastic tie. The tag had the relevant batch number and quality information printed on it. Over time this has evolved to now be a sticker that is physically adhered to the bag. **During my time with Advanta the terms and conditions of sale have always been printed directly on the bag**."

[73] Mr Short was the only witness cross-examined on the labelling and conditions aspect of the case. The entire exchange is:[54]

"You started at Advanta in April 2010 and you say - - -?---July, I believe it was, yes.

July 2010. And you say during your time with Advanta the terms and conditions of sale have always been printed directly on the bag?---Correct.

Can I suggest to you that that may not have been the case in that season of 2010/2011?---That would surprise me.

But you have no specific recollection of it that year?---I have no recollection of it – them ever not being on the bag."

[74] Two things may be noted about that exchange. First, the questions stopped short of putting the positive pleaded case, i.e. that no terms and conditions were provided

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52 Exhibit 27; the photograph at AB 1179.
53 Exhibit 48; AB 938; emphasis added.
54 AB 1532 lines 36-45.

either on the Label or with the bags. Secondly, Mr Short's response was that the terms and conditions were on the bags, and he could not recall them ever not being on the bags.

Appellants' evidence

[75] The evidence from the appellants consisted of Mr Perkins, Mr Hemmings, Mr Burns, Mr Ruhle, Mr Morrice, Mr Jenner and Mr Cook. All of them were growers or former growers.

Perkins

[76] Mr Perkins' statement relevantly said:[55]

> "62. I remember that I looked at the label on the bags of MR43 when I purchased them because I texted the telephone number on the label to confirm the germination percentage of the seed. This was my usual practice because the germination percentage is critical to the population being achieved (that is, how many seeds I would need to plant per hectare) and I would have texted this number on most, if not all, occasions that I purchased MR43. It was an automated system and I got a text back. I did not speak to anyone. In all the years that I planted sorghum, this was the only sorghum that I ever marked in my diary as being of low germination which would have been from the text that I received back. Marked and attached at EXH BP-02 is a copy of a page from my planting diary showing the MR43 planted at the Hill being "LOW GERM".
>
> 63. I no longer have any of the bags of MR43 that I bought in about 2010. Nor did I retain copies of any of the labels from these bags. Marked and attached at EXH BP-03 is a copy of a photograph of a label which has been provided to me by my solicitors and which, to the best of my recollection, is in the same form as was on the bags of MR43 that I purchased (save that I cannot now recollect the specific batch numbers of the seed that I purchased).
>
> 64. I did not receive any warning or written conditions of sale at the time I purchased the MR43. I have been shown a copy of written conditions of sale as contained in paragraph 18(g) of Pacific Seed's defence in this Proceeding. I am certain that I did not receive anything like this at the time that I purchased the seed because it was my practice to read any such warnings or conditions if they were provided to me and I would remember if this was the case. I was not provided with any such warning."

[77] Several matters are apparent from what Mr Perkins said:

(a) the "label" to which he referred was the item that contained germination rates; that was what others called the bag tag; in paragraph 63 he identified a

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[55] Exhibit 19, AB 702.

June 2010 label with germination information;[56] germination information is not part of the conditions;

(b) his focus was on the germination information as that was "critical to the population being achieved";

(c) his usual practice was to look at the germination information;

(d) he would almost invariably text the number on the germination label;

(e) that practice colours acceptance of what he said in paragraph 64; and

(f) his certainty about not receiving a "warning" was because it was his "practice to read any such warnings or conditions if they were provided to me".

Hemmings

[78] Mr Hemmings was a farm manager and grower of sorghum. His statement relevantly said:[57]

> "32. I do look at the labels of the bags of seed I purchase, including MR43 because it is important to read the germination percentage. Pacific Seeds usually give a guarantee regarding the germination of the seeds. I cannot recall what that is exactly, but I believe it is around a minimum of 85%. The germination tells me how many seed I should be planting per hectare. It is my practice to plant with a precision planter and use GPS to track my rows to ensure it is all accurate. I try and grow approximately 50,000 plants per hectare. I also recall that the label said that the seed had 99 percent purity.
>
> 33. I have no memory of any form of legal disclaimer on the label. As discussed above, I focussed on the germination, but would also note the variety, to ensure I had been provided with the right seed, and the other planting information like the date of production and seeds per kilo. If there was anything different about the label, it would have been obvious to me given the number of times I have purchased MR43 in the past and I am confident there was no warning attached to the label on this occasion because I have never seen a warning attached to a bag of MR43. Nor was I provided with any warning at the time of purchase.
>
> 34. I was never provided with any form of warning or disclaimer with the MR43, I would certainly remember if I was given one."

[79] Mr Hemmings, too, was focussed on the germination data, and that was on what he called the "label". If that was what he referred to in paragraph 33, it is not surprising that there was no legal disclaimer on it, as that label was not part of the conditions. He then refers to the absence of a "warning". In context he was referring to a warning of something wrong with the seed.

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56 AB 743.

57 AB 811.

[80] Those matters colour acceptance of his evidence as a basis to find that the bags did not have conditions attached or printed on them.

Burns

[81] Mr Burns' statement relevantly said:[58]

> "21. Nobody at the distributor and nobody from Pacific Seeds told me that there might be a problem with the seed or that it may not be safe to use. Nobody said anything like this to me. I simply ordered and collected the seed like I did every year. I remember that the seed had a label on it that the label was similar or the same to the copy of the label attached and marked **"EXH RJB- 02"** to this statement (this copy was provided to be by my solicitors). There was no other documentary warning provided to me with the seed. I know this because it would have been unusual and would have concerned me and I would remember if this had occurred."

[82] Mr Burns' statement exhibited the germination label from June 2010.[59] The thrust of his statement is that there was no documentary warning, which in context meant a warning of something wrong with the seed. Like others, Mr Burns was focussed on the germination data.

Ruhle

[83] Mr Ruhle's statement was succinct on this topic:[60]

> "21. When I purchased the MR43, no one at the Distributor said to me or told me in any manner that there could be a problem with the MR43 or that it might not be safe to use. I remember that the MR43 had a label on it. I recall this because I often reviewed the label for the percentage rate of germination and the seeds per kilo which informs farmers as to the rate of planting. I do not recall seeing any form of disclaimer."

[84] He was focussed on the germination information on that label. He was not told there might be a problem, and he could not recall seeing a disclaimer.

Morrice

[85] Mr Morrice's evidence on this topic was also short:[61]

> "24. I recall that there was a label on the MR43 because it was my usual practice to check the germination and how many seeds per hectare to plant. However I do not recall ever reading any disclaimer on the label. I did not keep the labels from the bags of MR43 that I bought in 2010. Marked and **attached at "EXH AM-02"** is a true copy of a photograph of a label which has been provided to me by my solicitors and which, to

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58 AB 901.

59 Ex RJB-02 to his statement; AB 924.

60 AB 843, paragraph 21.

61 AB 1149, paragraph 24.

> the best of my recollection, is in the same form as was on the bags of MR43 that I purchased."

[86] Like others he was focussed on the germination data. That was on the only label he recalled and identified. Not surprisingly, he could not recall reading a disclaimer on that label. He did not address at all, the question of conditions printed on the bag itself.

Jenner

[87] Mr Jenner's evidence was to the effect that he did not read labels as a matter of habit and relied on his contractor to read anything that was pertinent, such as to germination or a warning that the seed was unsafe:[62]

> "33. I know from experience there is a label on all bags of seed, but it was never my practice to read them. I hired contractors on behalf of Mallonland to plant the seed. While I did not read the label it was a part of the role of the contractor to work out the correct planting rate and this is determined by the germination percentage on the label, so I believe the contractor who planted the seed for me in spring 2010 would have read the label. I further expected that if the label had included some warning to the effect that the seed may not be safe to use or may contain a contaminant, the contractor would tell me that when he read the label. This did not occur."

Cook

[88] Mr Cook's evidence was to the effect that he only, but not always, looked at the germination data:[63]

> "48. I know from my experience and general practice that all of the bags of seed from Pacific Seeds come with a label. However, I only looked at the label to check the quantity of seeds per kilogram and the rate of germination. That being said, I would not always look at the label because in general, the distributor would mention to me that a particular seed had a particular germination percentage and that I needed to plant at a certain rate given that germination percentage."

Photographic evidence

[89] The photographic evidence revealed the appearance of the artwork on the 20kg bags of seed.

[90] The first photo[64] was a printout of the artwork done for the 2010 bags. Mr Croker's evidence was that the size of the label and the font used in 2010 were no different from that shown in exhibited photos of the bag currently used by Advanta.

[91] The second photo[65] is of one of Advanta's current bags. It shows that the portion of the artwork which highlighted the type of seed, nett weight of the bag, and

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62 AB 759, paragraph 33.
63 AB 965, paragraph 48.
64 AB 1179; DEF.300.000.000.0004A.
65 AB 1180; DEF.400.000.000.0147E.

germination data was on the front of the bag, and the artwork covered the whole of the front.

[92] The third photo[66] is of the label containing the germination data one of Advanta's current bags. That label contains the words:[67]

"Minimum Germination:	85	%
Minimum Purity:	99	%
Maximum Other Seeds:	0.1	%
Maximum Inert Matter:	0.5	%"

[93] The fourth photo[68] is of the back of one of Advanta's current bags. It shows that the "WARNING" which appears on the 2010 artwork[69] was next to the conditions when the artwork was printed on the bag. The "conditions" artwork occupies the bulk of the rear of the bag. On any view the words "ATTENTION" under which followed "CONDITION OF SALE AND USE", were prominently displayed, and in a font much larger than the terms of the conditions themselves.

The learned primary judge's finding

[94] The learned primary judge's finding that it is more likely than not that the 2010 seed bags did bear the "conditions" set out in paragraph [37] above, contains an implicit acceptance that the font, positioning and prominence of the conditions were as revealed in photographs.[70]

[95] In my respectful view, there was an ample evidentiary foundation for the finding that the 2010 and 2011 bags had the "conditions" printed on them, and in the manner shown in the photographs at AB 1179-1182.

[96] Moreover, as will appear, the attack made in this Court on the evidence of Mr Croker, Mr Anderson and Mr Short suffers from several difficulties. First, none of the suggested deficiencies in the evidence was identified as such at the trial. Secondly, none of the suggested deficiencies was put to any relevant witness. Thirdly, no such deficiency was made the subject of submissions to the learned primary judge, nor was his Honour asked to weigh the evidence with those deficiencies in mind.

The specific challenges to the factual findings

Croker

[97] It was suggested that Mr Croker's evidence had difficulties that impacted upon its acceptance. These were said to be such that there was a substantial deficiency in proof of the 2010 conditions and whether they were on the 2010 bags:

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66 AB 1181; DEF.400.000.000.0147F.
67 The 2010 label was exhibited to Mr Morrice's statement, AB 1176.
68 AB 1182; DEF.400.000.000.0147G.
69 AB 1179.
70 AB 1179-1182.

(a) his evidence as to what was printed or stencilled onto the bag was ambiguous, in that:

(i) it was not clear if he meant printed or stencilled on the whole bag or only part of it;

(ii) it was not clear what the white box shown on AB 1179 was for, and one possibility was that the terms and conditions were to go in that space;

(b) that there was a problem because the terms of the conditions on the current bag[71] were different in some respects from those on the 2010 bag;[72]

(c) the terms on the 2010 sticker[73] did not match the terms on the current sticker,[74] in that they did not refer the reader to the conditions on the bag.

[98] I consider there was no such ambiguity or difficulty in terms of proof. Mr Croker distinguished between what was printed or stencilled on the bag, and what was on a "sticker or bag tag" attached to the bag. The bag tags were made from untearable plastic. The artwork at AB 1179 was to be printed on the bag. The conditions were part of the artwork, and thus to be printed onto the bag. Those conditions matched those found by the learned primary judge: see paragraph [37] above. Mr Croker said he could remember the size of the bag used in 2010, the font and size of font used for the conditions in 2010, and the design and layout on those bags. He said there was no discernible difference between what is shown at AB 1179, and what he recalled of the 2010 bags.

[99] Mr Croker was not deposing that the various items from the artwork in 2010 were identical to the current bags, but rather that there was no discernible difference between the bags used in 2010 when compared to the current bags, especially as to the size of the font used for the conditions in 2010, and the design and layout of the label printed on 2010 bags.

[100] A similar submission was made in respect of Mr Anderson's evidence. Here it was said that Mr Anderson's statement exhibited a set of conditions[75] which he said were the 2010 conditions, but they were, in fact, the 2020 conditions.

[101] In my view, the evidence does not suffer such deficiencies that it meant that it was not open to the learned primary judge to make the findings he did. Mr Anderson was the person responsible for the new artwork developed by 2008.[76] That artwork was used on bags from 2009. He identified that artwork as the photo at AB 1143. That is the same artwork separately identified by Mr Croker. More importantly, as with Mr Croker, Mr Anderson said the artwork was printed directly onto the bags in 2010, and the artwork "were the conditions printed on the bags of Advanta seed in 2010/2011". Even if the document at AB 1144 was wrongly identified as the conditions that appeared on the 2010 bags, the artwork was identified by him, he

71 AB 1182.
72 AB 1179.
73 AB 924, 1176.
74 AB 1181.
75 At paragraph 38, AB 1109, and the document at AB 1144.
76 Paragraph 35, AB 1109.

was responsible for it at the time, and he deposed it was used from 2009 on Advanta bags. The error does not destroy the balance of the evidence.

[102] Finally, one cannot leave the evidence of Mr Short out of account on this issue. He deposed that during his time (which included 2010/2011) the terms and conditions of sale were always printed directly on the bags. He was indirectly challenged as to that in cross-examination but adhered to his evidence: see paragraphs [72] to [74] above.

[103] Further, in respect of each of Mr Croker and Mr Anderson, there was no cross-examination on this issue. If it were to be argued that their evidence was fatally flawed by the errors referred to, they were entitled to have that put to them, so they had a chance to respond. That was not done, and the criticisms raised above were not advanced at the trial.

[104] In fact, the case put by the appellants at trial was that the primary judge should find that there were no conditions on the bags, but only by reference to the evidence given by the appellants' witnesses.[77] No submission was made by the appellants below as to what should be made of the evidence of Mr Croker, Mr Anderson and Mr Short as to the question of the labels on the bags.

[105] That approach by the appellants at trial must also be seen in light of an exchange had between Senior Counsel for the appellants at the trial and the learned primary judge. Senior Counsel objected to that part of Mr Croker's statement which dealt with the labelling issue, i.e. paragraphs 285 to 300 of Exhibit 21[78]. The basis of the objection was that those matters had not been put to the appellants' witnesses, and that infringed the rule in *Browne v Dunn*, to such an extent that the paragraphs should be excluded. The objection failed, but in the course of submissions Senior Counsel for the appellants accepted that: (i) it had always been expressly pleaded that the bags contained such conditions, in paragraph 18 of the defence; (ii) that pleaded issue came as no surprise to the appellants, i.e. they were always on notice as to that issue; and (iii) the appellants' witnesses had not dealt with the paragraph 18 conditions in those terms. In those circumstances the failure to cross-examine Mr Croker or Mr Anderson, and the indirect challenge to Mr Short, followed by the absence of any submission as to their evidence on this issue, provides no proper basis to attack their evidence in the way now attempted before this Court.

Conclusion on the factual challenge

[106] In my respectful view, the challenge to the factual finding by the learned trial judge, namely that it was likely that the pleaded conditions were on the bags sold by Advanta at the relevant times, fails.

Negating the assumption of responsibility

[107] The learned primary judge correctly understood the thrust of Advanta's case based upon the fact that the conditions were printed on the bags:

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77 Plaintiffs' closing submissions, paragraphs 359-365, AB 592-594. An alternative basis was that the allegation in paragraph 18 of the defence was inconsistent with a pleading in a different case: paragraphs 361-363, AB 593.

78 AB 1400 line 27 to AB 1403 line 2.

> "[200] The substance of the point of the defendant's reliance on the terms on the bags, in my view, is that they may negate the defendant's assumption of responsibility, as a salient feature, in determining whether there is a duty of care to avoid economic loss only in the circumstances of this case."

[108] The learned primary judge accepted authority that the assumption of responsibility was one of the salient features in establishing a duty of care.[79] His Honour also accepted authority that assumption of authority may be negated by an express disclaimer of responsibility.[80]

[109] Neither of those two propositions were challenged by the appellants. Rather, their contention was that, assuming the conditions were printed on the bags, the disclaimer was not clear enough or prominent enough to negate the assumption of responsibility.

[110] His Honour's conclusion on the issue of disclaimer of the assumption of responsibility was expressed:[81]

> "[205] In my view, the defendant's submission that the terms on the bag operated as a disclaimer of an assumption of responsibility to negate the existence of a duty of care to avoid economic loss that the MR43 seed supplied would be free of contamination by shattercane or grassy off-types should be accepted.
>
> [206] It follows that the plaintiffs do not establish that, for the tort of negligence, the defendant owed a duty of care to the plaintiffs to take reasonable care to avoid the risk of economic loss of increased expenses of farming operations and decreased revenue from sorghum sales if MR43 seed was contaminated by shattercane or other off-type grassy sorghum plants."

[111] The appellants formulated the following as the test for determining whether the disclaimer had the type of clarity and prominence that, they contended, would be sufficient:[82]

> " … the disclaimer needs to be so explicit as to destroy all of the assumptions which would otherwise arise in the circumstance; what a disclaimer would need to do is to overwhelm every other message on the attractive bag and say to the consumer, "Beware, this product may contain contaminated seed, and if it contains contaminated seed and you suffer grievous losses, don't come back"."

[112] The case was then put a little more strongly, seeking to draw a distinction between negligent statements and negligent conduct:[83]

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79 Reasons below [201]-[202], referring to *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465, 529; *Bryan v Maloney* (1995) 182 CLR 609, 625; and *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515, 532 [26].

80 Reasons below [203], referring to *Hedley Byrne* at 492, 504 and 533; *Esanda Finance Corp Ltd v Peat Marwick Hungerfords* (1997) 188 CLR 241, 250-251; *ABN AMRO Bank NV v Bathurst Regional Council* (2014) 224 FCR 1, 117 [603]; and *Smith v Eric S Bush (a firm)* [1990] 1 AC 831, 856, 872-873.

81 Reasons below [205]-[206].

82 Appeal transcript T 1-13 lines 29-35.

83 Appeal transcript T 1-29 lines 25-28, 36-40.

> "… where it's negligent conduct, the question must be does the alleged disclaimer contain sufficient prominence and clarity of meaning to destroy the entire set of features of the case and the reasonable assumptions of the parties which otherwise ground the duty.
>
> …
>
> So for the disclaimer to defeat the duty of care, it must convey, we would submit, the clear message to the consumer, "You should be aware this product may contain contaminants which could cause substantial losses to the business, and you must be aware that if losses emerged, they're at your risk, not ours. And if you buy our product, you must take on the risk it may be so contaminated.""

[113] That formulation was to emphasize that there were two elements: (i) clarity of content, and (ii) prominence. As to that, the appellants submitted that where the bag of seeds was packaged attractively, from a known supplier whose brand and label was on the bag and contained messages about seeds that were familiar because they had been used previously, "the work … a disclaimer will have to do to defeat that message is going to be quite strict – quite severe".[84]

[114] The test has to be capable of being articulated in a way that then responds to the differing fact situations. Use of language such as "strict" or "severe" are not, in my view, helpful. Nor is it helpful to phrase the test as requiring the disclaimer to "destroy the entire set of features of the case and the reasonable assumptions of the parties".

[115] Rather, the test can be articulated in a way that responds to variable cases. It is that the disclaimer must be of such clarity and prominence as to convey that the manufacturer is not accepting responsibility for the product supplied in the event it causes relevant loss.

[116] In my view, that is to be assessed objectively. It cannot be the case that a clear and prominent disclaimer could be ineffective simply because the user has a subjective view about its meaning or clarity or prominence. Mr Gleeson SC accepted that if the disclaimer was sufficiently clear and prominent the end user could not escape its effect by not seeing it.[85]

[117] The assessment of the effectiveness of the disclaimer cannot depend upon subjective views about its characteristics, such as size of font, colour, clarity or prominence. The impact of a printed disclaimer on the bags cannot be diminished, much less negated, just because the particular buyer is: illiterate; blind; colour-blind; too lazy to be bothered reading it; too impatient to be bothered reading it; impatient and reads it hurriedly, missing parts; distracted and stops reading; or indifferent to the fact that terms and conditions are on the bag.

[118] A party's assumption of responsibility is a fact found from evidence relating to the relationship between the parties, their conduct, and the reliance of the other party. So, too, the question whether conduct has the effect of negating the assumption of responsibility is a question of fact based on evidence.

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84 Appeal transcript T 1-30 lines 11-12.
85 Appeal transcript T 1-30 lines 3-8.

[119] The appellants submitted that if Advanta was going to signal its disclaimer of responsibility it should have done so in a way more prominently than was done, and with greater clarity.

Were the conditions on the bags clear and prominent?

[120] The learned trial judge plainly accepted that the conditions were of such a quality that they evidence a disclaimer of responsibility. Though his Honour did not make specific findings as to clarity and prominence, that does not stand as a bar to this Court making those findings. There is no disputed evidence that needs to be considered, and the appellants' approach to the factual challenges on the appeal compel it.

Clarity

[121] The headline "**ATTENTION**" used a common word, easily understood. The use of that word has long been a standard way to focus the attention of the reader on what is to follow.

[122] The next headline "**CONDITIONS OF SALE AND USE**" used very common words, easily understandable without legal knowledge. The use of the word "**CONDITIONS**" plainly signified that what followed was not just some sort of advertising but words that mattered. Moreover, they mattered not just to the sale of the product in the bag, but also to its use.

[123] The next paragraph of text made a number of points in language which are not legal or convoluted:

(a) if you buy this product and open the bag, you agree to be bound by the conditions set out underneath;

(b) do not open the bag until you have read and agreed with all the terms on the bag;

(c) if these conditions are not acceptable to you, return the bag in its original condition to where you bought it for a refund; and

(d) the product contained in the bag is as described on the bag, within recognised tolerances.

[124] That paragraph of text was followed by another headline (albeit in smaller font than the previous headlines), "**CONDITIONS**". And that was immediately followed by discrete paragraphs.

[125] The first stated: you (the buyer) acknowledge that, except to the extent of any representations made by the labelling of the product in this bag, it remains your responsibility to satisfy yourself that the product in the bag is fit for its intended use.

[126] The second stated: if the product in the bag did not comply with its description, within recognised tolerances, the liability of Pacific Seeds will be limited to the cost of replacement of the product or the supply of equivalent goods.

[127] The third stated that: Pacific Seeds[86] will not be liable to you for any loss or damage caused or contributed to by Pacific Seeds, arising out of or related to the use of the product in this bag, as a result of Pacific Seeds' negligence.

[128] The fourth stated that all warranties, conditions, liabilities, or representations in relation to the product, whether expressed or implied, are excluded by Pacific Seeds to the extent permitted by law.

[129] The wording of the conditions was not phrased in an archaic or overly legalistic way; rather, it used relatively plain words to convey several clear propositions. Those stated clearly were:

(a) the bag must only be opened if the buyer had read and agreed with the conditions;

(b) return the bag if the conditions are not acceptable;

(c) if the product in the bag did not comply with its description, within recognised tolerances, Pacific Seed's liability would be limited to the cost of replacement of the product; and

(d) Pacific Seeds would not be liable for loss and damage caused by the use of the product, including by its negligence.

[130] The reference to "tolerances" would have been readily understood by buyers. The evidence from buyers, as outlined in paragraphs [75] to [88] above, showed that they concentrated on the germination data which was contained on its own label.[87] But that data also contained three statements as to the contents of the bag: (i) the "Minimum Purity" was 99%; (ii) the "Maximum Other Seeds" was 0.1%; and (iii) the "Maximum Inert Matter was 0.5%.

[131] All of those paragraphs referred to simple concepts and were delivered in plain words without any complicated syntax or legalistic terms. All were, in my view, easy for a lay person to understand. All of them stated plainly that the risk of using the product lay with the buyer and that Pacific Seeds was not accepting any responsibility for loss and damage caused by negligence on its part.

[132] These paragraphs do not fall to be tested as though they were part of a contract between the buyer and Pacific Seeds. As the learned trial judge recognised,[88] it was no part of the case advanced by Advanta that "by a plaintiff or group member opening the bag and using the seed, a contract was made between the plaintiff or group member and the defendant under which the plaintiff or group member agreed to those terms".

[133] Rather, they are to be examined for whether they reveal a clear disclaimer of an assumption of responsibility. In my view, they do so.

Prominence

[134] The conditions section on the 2010 bags was, in my view, quite prominent.

86 The then name of Advanta.
87 For example, AB 924.
88 Reasons below [128]-[129].

[135] It occupied a substantial proportion of the rear of the bag, immediately under some designs and words that would have drawn attention.

[136] First, there was a blue logo at the top with the words "Powered by CRUISER, Concep II". Directly under that was the following text, in bold type:

"Treated with

Cruiser 600-Active Ingredient "Thiamethoxam"

Concep 2 -Active Ingredient "Oxabetrinil"

Suitable for use with Dual and Primextra herbicides".

[137] Then followed the headline "**ATTENTION**". That word was not only in a much larger font than the other words, but it was also in bold type.

[138] That headline was immediately followed by another, in the same size font, saying "**CONDITIONS OF SALE AND USE**". That, too, was in bold type. The word "**CONDITIONS**" was repeated in bold type shortly thereafter, albeit in a slightly reduced font size.

[139] It is difficult to see how the conditions could have been made more prominent. They occupied the bulk of one side of the bag; they could not have been made bigger.

A deliberate step

[140] In my view, the prominence and clarity of the words on the bags must also be seen in light of the fact that they did not get there by accident. Rather their presence was the consequence of deliberate steps taken by Advanta:

(a) in 2008 Advanta went to the trouble and expense of developing new artwork intended to be printed on the seed bags;

(b) that was to replace already existing artwork on seed bags;

(c) that new artwork included words disclaiming responsibility for loss and damage, even for negligence;

(d) the artwork was sent to the overseas manufacturer of the bags;

(e) the manufacturer was instructed that the artwork was to be printed on every bag;

(f) from 2009 the artwork was printed on every bag;

(g) it can be inferred that the above process was at some cost to Advanta; and

(h) the position and size of the artwork on the bags meant it could hardly be missed; moreover, the conditions were intended to cover a considerable portion of one side.

[141] That Advanta took those steps to publish words disclaiming responsibility on every bag of seeds is a significant matter in assessing its assumption of responsibility, or more accurately, its disclaimer of an assumption of responsibility. In effect Advanta was plainly saying that its preparedness to engage in commerce was on the basis that the terms and conditions applied.

[142] The words were on every bag. They were there to be seen and read if people could be bothered to do so. The words were plain and clear, not buried in legalistic or archaic terms. They conveyed the clear message set out in paragraph [129] above.

[143] In my view, adopting for present purposes the formulation by the appellants, the words did deliver the clear message to the consumer: "You should be aware this product may contain contaminants which could cause losses to the business, and you must be aware that if losses emerged, they're at your risk, not ours. And if you buy our product, you must take on the risk it may be so contaminated."

[144] It follows, in my view, that the learned trial judge was correct to conclude that there was no duty of care in this particular case.

Duty of care – appeal issues

[145] The appellants contended that this Court should conclude that there was a duty of care owed by Advanta. The appellants submitted that the duty was established for a number of reasons which will be examined below.

[146] **The first contention** was that this case either fell within the established category of duty of care of a manufacturer to an end user or arose by close analogy with it because the reasonable assumptions of the parties were the same.

[147] This proposition was articulated by the appellants in this way:[89]

> "… the law of tort has long recognised as an established category the duty of a manufacturer to take reasonable care to protect the consumer or end user from risk of injury when using the product as intended, at least where the risk of injury is to person or property. The Appellants then urge that, when regard is had to the close physical relationship between the parties, and *Caltex* and the observations of the Full Court and High Court in *Dovuro*, it is but a short step to recognise that the category of manufacturer/end user duty extends to a case where the risk of injury is to the business interest or cashflows of the end user when that person uses the product as intended on land being worked by it."

[148] The contention as to the alleged "close physical relationship" will be dealt with later. For the present I turn to the support sought to be drawn from *Dovuro Pty Ltd v Wilkins*,[90] both in the High Court and the Full Court.

Impact of *Dovuro v. Wilkins*

[149] The appellants contend that the two decisions in *Dovuro v Wilkins*,[91] strongly support the conclusion that a duty of care should have been found in the present case.

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89 Appellants' Outline in Reply, paragraph 13.

90 Federal Court: *Dovuro Pty Ltd v Wilkins* (2000) 105 FCR 476. High Court: *Dovuro Pty Ltd v Wilkins* (2003) 215 CLR 317. In these reasons I shall refer to the High Court decision as *Dovuro*, and differentiate the Full Court decision as needed.

91 (2003) 215 CLR 317. At first instance, (2000) 105 FCR 476.

[150] The learned trial judge made three points about *Dovuro* concluding that as a matter of precedent, neither judgment was a binding authority on the question of the existence of a duty of care, because:[92]

(a) the way the case was run, and dealt with in the High Court, it is no part of the *ratio decidendi* that the seed merchant owed a duty of care to the end users of the seed; the appeal to the High Court was allowed and the judgment in favour of the plaintiff in the court below was set aside, so it is no part of the *ratio decidendi* in the High Court that the defendant seed merchant owed a duty of care to the end users of the seed;

(b) the appeal was allowed by the High Court, so no part of the reasons in the Full Court is part of the *ratio decidendi* for the final judgment; and

(c) at trial the defendant seed merchant admitted the existence of a duty of care, although it sought to withdraw the admission on appeal and to raise as a ground of appeal that no duty of care was owed.

[151] Nevertheless, his Honour said the reasoning in both courts may be of persuasive authority in the present case.

[152] The facts of Dovuro must be noted:

(a) Dovuro was a producer and distributor of agricultural seed, including Karoo canola seed;

(b) Cropmark entered into a contract with Dovuro under which Cropmark agreed to cultivate and sell approximately 250 tonnes of Karoo canola seed to Dovuro;

(c) the canola seed was cultivated in New Zealand and was harvested in March 1996;

(d) the seed was then cleaned and packed into 25 kg bags by a contractor to Cropmark, and delivered to Dovuro at sites in Melbourne and Fremantle;

(e) a label attached to each bag contained the statement: "Minimum 99% Purity; Minimum 85% Germination";

(f) Cropmark informed Dovuro of the presence of three weed varieties, cleavers, redshank and field madder, in the canola seed; those weeds were common in New Zealand and not prohibited there;

(g) analysis certificates issued by the New Zealand authorities certified that the Karoo canola seed was 99.8 per cent or 99.9 per cent pure (depending on the sample taken) and that it "[c]omplie[d] with the Seeds Acts of all Australian States";

(h) of the total quantity of 168 tonnes (6,720 bags) sent to Dovuro from New Zealand, 67.5 tonnes (2,700 bags) were made available in Western Australia and were resold to local suppliers, including Elders;

(i) the Wilkins conducted a farming and grazing business in Western Australia; in May 1996, Elders supplied 40 bags of the Karoo canola seed to Wilkins;

92 Reasons below at [158].

Wilkins sowed 278 hectares with the seed and 238 hectares eventually returned a good Karoo canola crop;

(j) in June 1996 Agriculture Western Australia (“AgWest”) became concerned about the presence of the three weeds varieties in the seed distributed by Dovuro;

(k) on 5 July 1996 the Agricultural Protection Board declared each of these species to be prohibited from importation and sale in Western Australia; the declarations also required the eradication of such weed plants;

(l) on 9 July 1996, AgWest issued an information package to Western Australian canola growers, including Wilkins;

(m) the package enclosed a letter indicating that the Karoo canola seed imported from New Zealand by Dovuro had been found to contain “undesirable weeds” including cleavers, redshank and field madder;

(n) the information package also included a booklet setting out AgWest’s recommendations as to the most effective methods for controlling the three weeds; these methods involved the thorough cleaning of windrowers and headers used in affected paddocks, the cessation of livestock grazing in the affected paddocks, and the destruction of seed derived from the affected paddocks for a period of at least five years;

(o) work was done by Wilkins to comply with the recommendations;

(p) despite many growers planting the canola seed, none reported the growth of the weed plants;

(q) in 1998 the declarations were cancelled;

(r) Wilkins instituted proceedings against Dovuro in the Federal Court of Australia alleging negligence and contravention of the *Trade Practices Act 1974* (Cth); and

(s) Wilkins brought the proceedings on behalf of themselves personally and as representative of other farmers who, in 1996, purchased and seeded Karoo canola seed supplied by Dovuro to distributors in Western Australia, and which allegedly included cleavers, redshank and field madder seeds.

[153] At the conclusion of the trial at first instance (on liability only) Dovuro made a concession that it owed Wilkins a duty to take reasonable care. Though it appears there was some confusion as to the precise terms of the concession,[93] Gummow J recorded the position:[94]

> “It is apparent that both the primary judge and the Full Court proceeded on the assumption that Dovuro had conceded that it owed a duty to the consumers of the seed to exercise reasonable care not to expose those consumers to a risk of injury of which Dovuro knew or ought to have known.”

[154] At first instance Dovuro was found to be negligent because it (i) had not, before importing and selling the canola seed, checked with the authorities as to their

[93] As to which see the reasons of Gummow J at [48]-[49], and Hayne and Callinan JJ at [148].

[94] *Dovuro* at [49].

reaction to the three weeds; and (ii) did not inform growers of the exact contents of what they were buying.[95]

[155] In the Full Court there were differing approaches to the resolution of the appeal. Branson J did not deal specifically with the finding that Dovuro was negligent in failing to check with the Western Australian authorities. However, her Honour attached importance to the apologetic communications from Dovuro, construing them to indicate that something else might have been done.[96]

[156] Finkelstein J disagreed with the trial judge's findings of negligence. As to first checking with the authorities, his Honour said there was an air of unreality in suggesting the enquiries should have been made, as it would have been to five separate departments, the likely content and timing of any responses were unknown, and there was no basis to assume that the departments would have responded negatively to the three weeds.[97]

[157] As to the failure to warn, Finkelstein J said: (i) it was practically impossible for crop seed to be completely free of contamination by other seeds; (ii) the label alerted growers to the fact that the bags did not contain pure canola seed; and (iii) in the absence of actual knowledge that the weeds were a risk to growers, Dovuro did not have to put further information on the bags. His Honour held it was not reasonably foreseeable that the authorities would act as they did.[98]

[158] Gyles J agreed with Finkelstein J, subject to one qualification.[99] On the duty of care he agreed with Finkelstein J that it was not reasonably foreseeable that the authorities would act as they did. The qualification related to the apologies and admissions by Dovuro. His Honour concluded:[100]

> "[222] Thus, whilst the analysis of this issue by Finkelstein J would persuade me as a judge of fact to reject the [growers'] case, in my view the decision below was open to the trial judge and should not be disturbed."

[159] The result in the Full Court was accurately summarised by Gleeson CJ:[101]

> "[17] In the result, therefore, in the Full Court, Finkelstein J, having analysed the facts, rejected the claims of negligence. Gyles J would have done the same "as a judge of fact" but he considered the trial judge's finding was "open ... and should not be disturbed" because of the apologies and admissions. Branson J upheld the second finding of negligence on the basis of the apologies and admissions."

[160] On the appeal in the High Court, Dovuro sought to withdraw the concession as to the duty of care.

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95 See the summary in the reasons of Gleeson CJ at [8].
96 See the summary in the reasons of Gleeson CJ at [9].
97 See the summary in the reasons of Gleeson CJ at [11]-[12].
98 See the summary in the reasons of Gleeson CJ at [13]-[14].
99 See the summary in the reasons of Gleeson CJ at [15]-[16].
100 (2000) 105 FCR 476 at 540 [222].
101 *Dovuro* at [17].

[161] The problem confronting the High Court and the nature of the loss claimed was encapsulated by Gleeson CJ:[102]

> "[4] The case presented an unusual problem. The canola seed distributed by the appellant was not sold as being free of weeds. It was sold as of "minimum 99% purity". It conformed to that description. There is nothing unusual about such a product containing small quantities of weed seeds. This canola seed contained small quantities of three kinds of plant, cleavers, redshank and field madder. As Gyles J pointed out, they "occur naturally and are not poisonous, noxious or diseased in themselves, and do not transmit disease or noxious qualities to stock or humans or even to the canola seed either as part of the seed mix or in the ground". His Honour also pointed out that "seeds and weeds are the subject of a comprehensive system of international, national and state regulation", and there was no prohibition on the importation or sale in any part of Australia, including Western Australia, of canola seed containing weeds of the type, and in the quantity, in question. No actual harm to the crop, or the land, of the growers who bought and sowed the seed was shown to have occurred. Their financial loss resulted from the fact that, after they bought and planted the seed, the Western Australian agricultural authorities became concerned about possible harm, and declared the weeds as prohibited species. Those declarations required the growers to take certain precautionary measures. Subsequently, the declarations were cancelled. In the meantime, the farmers suffered financial loss and expense which they sued to recover."

[162] There were differing approaches taken in the High Court.

[163] Gleeson CJ, who dissented, would have refused the withdrawal of the concession as to the existence of a duty of care.[103] His Honour examined the trial judge's findings on the question of negligence, specifically from the point of view (urged by Dovuro) that it was reasonable for Dovuro to have relied upon the regulatory system, and unreasonable to have required it to foresee the department's response. His Honour also examined the differing views expressed in the Full Court. And, his Honour examined the admissions said to be made by the apologies. His Honour's position was expressed thus:[104]

> "[26] In the result, as in the case of *Graham Barclay Oysters Pty Ltd v Ryan*, while I accept the force of the dissenting opinion in the Full Court, I am not satisfied that the majority view involved clear error or injustice, and I would not disturb the concurrent findings of negligence."

[164] McHugh J was of the view that Dovuro could not withdraw its concession as to the duty of care and the only question to be decide was whether there was a breach of

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102 *Dovuro* at [4]; internal citations omitted.

103 *Dovuro* at [3].

104 *Dovuro* at [26].

that duty. And, his Honour did not consider it to be a case where a special duty of care to prevent economic loss had to be established:[105]

> "[29] Dovuro also seeks to raise an issue as to whether it did owe any duty of care to the Wilkins interests. I would not permit it to raise that issue. 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, Dovuro's position was identical in principle with that of such a manufacturer. Because that is so, the only issue for determination at the trial – as the concession of Dovuro acknowledged – was whether it had breached that duty. 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 Wilkins interests could succeed only on proof of a special duty to prevent economic loss to them."

[165] Beyond that observation McHugh J did not examine the question of whether a duty of care arose. His Honour joined with Gummow, Hayne and Callinan JJ in finding that there was no breach of duty because the risk of damage to the Wilkins interests was not foreseeable.[106]

[166] Gummow J did not need to consider whether a duty of care arose because of the concession at trial, the only question being that of the findings of breach.[107] Further, his Honour held that the admissions relied upon by Branson and Gyles JJ in the Full Court, and Gleeson CJ, "provide no basis for a finding of negligence in this case".[108]

[167] Kirby J held that there was no error in the Full Court's refusal to permit Dovuro's concession as to a duty of care to be withdrawn.[109] To the extent that Kirby J felt the need to express a view about the duty of care notwithstanding that the concession stood, it was this:[110]

> "[96] The foregoing conclusion establishes, by Dovuro's concession, that it owed the Wilkins a duty of care. Trial counsel for Dovuro should not be criticised for making that concession. Whilst I accept that this Court has not yet provided a clear and simple formula to be applied to ascertain the existence, or absence, of a duty of care (nor even a simple methodology that commands general assent) I agree with Branson J in the Full Court that it would be difficult to reconcile a contrary conclusion about the existence of a duty of care in this case with this Court's holding in *Perre v Apand Pty Ltd*."

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105 *Dovuro* at [29].
106 *Dovuro* at [30]-[35].
107 *Dovuro* at [50], [58].
108 *Dovuro* at [71].
109 *Dovuro* at [94].
110 *Dovuro* at [96]; internal citations omitted.

[168] That contribution has to be tempered, though, because of what his Honour said when embarking upon consideration of breach:[111]

> "[101] Two basic points differentiate the approach that I would take from that favoured by the majority. First, it follows from what I have already said that it is impossible to decide negligence questions without having substantial familiarity with the trial evidence, and all of it. In the present appeal this means familiarity with the six volumes of appeal papers presented to this Court. Conclusions about the reasonableness or otherwise of imposing a *duty* of care of a given scope on Dovuro and whether Dovuro was in *breach* of the duty so specified, are not safely made without a thorough understanding of those facts. A primary judge, sitting through and receiving all of the evidence, is obliged to consider that material in sequence as it is adduced. In the nature of later consideration of such evidence (but especially in this Court) appellate judges are taken in argument to selected passages only. Normally, those extracts constitute the passages deemed specially favourable to the parties who call them to notice.
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> [102] Of nearly 1,400 pages of the record of the proceedings, this Court was taken during oral argument to but twenty-one. The burdens on appellate judges are such as to limit their ability to absorb, and reflect upon, all of the remaining pages. In the nature of things, the reasons of primary judges can only explain some of the main considerations that have led them to their judgment. It follows that appellate judges cannot easily substitute for primary judges, at least in trials with long and complex evidence. I have always thought that it was in this respect that primary judges enjoy advantages over appellate judges in decisions on the facts rather than in the oft repeated references to the assessment of witness credibility."

[169] Kirby J dissented on the question whether breach of duty had been established.

[170] Hayne and Callinan JJ expressly acknowledged that it was unnecessary to say anything about the duty of care because of their conclusion that breach was not established:[112]

> "[150] Because we hold that no breach of duty was established it may be thought unnecessary to consider whether Dovuro should, or should not, have been permitted to make the contentions it did about duty of care. But the point is not unimportant and it is as well to say something briefly about it.
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> …
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> [154] Because this matter should be resolved at the level of breach of duty, not duty of care, it is not necessary to decide whether Dovuro should be held to have been prevented by its

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111 *Dovuro* at [101-[102]; internal citations omitted.

112 *Dovuro* at [150], [154].

concession at trial from advancing the arguments about duty which it did. Nonetheless, in order to understand what is said about breach of duty, it is desirable to say something more about Dovuro's contentions about duty, and to begin by noting some facts relevant to the question of duty."

[171] As to the duty of care, their Honours offered these observations:[113]

"[159] Since *Caltex Oil (Australia) Pty Ltd v The Dredge "Willemstad"* it has been clear that there is no absolute rule denying a duty to take reasonable care to avoid pure economic loss. Those who claimed to have suffered loss, in this case, were farmers who had used the seed which Dovuro had imported. They were, in effect, the users or consumers of the seed which Dovuro had distributed. If Dovuro failed to act with reasonable care, it was reasonably foreseeable that there could be circumstances in which those farmers may suffer economic loss as a result of their using the seed. The class likely to be affected, being those who used the seed, would not be an indeterminate class and they would be persons vulnerable to loss if care were not taken, although it may be that assumptions about the respective vulnerabilities of experienced large scale farmers and a seed supplier should not be made too readily. All this being so, a duty to exercise reasonable care not to expose the farmers (as users or consumers of the seed) to a risk of injury of which they knew or ought to have known *could*, in some circumstances, extend to the risk of purely economic loss. But as the Wilkins' case was presented at trial, the critical question in this matter was to identify whether Dovuro knew or ought to have known that there was a risk of the sort of injury which it was alleged had been suffered – financial loss occasioned by pursuing a course of action recommended by government authorities to guard against the possible emergence of plants which had been declared to be harmful only after Dovuro had distributed the seed and the farmers had acquired it. Only if *that* sort of loss was reasonably foreseeable by Dovuro would the duty asserted by the Wilkins have been engaged."

[172] In my view, the appellants' contention that *Dovuro* strongly supports the conclusion that a duty of care is owed in the present case should be rejected. There are several reasons for that:

(a) first, anything that was said was overshadowed by the fact that a concession as to the existence of a duty of care was made at trial, and Dovuro was not permitted to withdraw it; as Hayne and Callinan JJ acknowledged, that meant examination of whether a duty of care existed was not called for;

(b) secondly, Kirby J's contribution can be put to one side; the self-confessed constraints his Honour felt under render his comments of little utility;

[113] *Dovuro* at [159]; internal citations omitted; emphasis in original.

(c) thirdly, McHugh J did not embark on any considered examination of the question;

(d) fourthly, whilst the comments of Hayne and Callinan JJ appear favourable, there are internal limitations of their scope; there was a caution against high level assumptions as to vulnerability when experienced farmers and suppliers are concerned; the extension of the duty to pure economic loss was conditioned by the word "could", not "would" or "should";

(e) fifthly, the comments of Hayne and Callinan J are the only ones concerning vulnerability as a feature to be weighed in the examination of whether a duty of care arises; no other judge considered vulnerability; given the prominence of vulnerability in later cases, the omission severely impacts upon the utility of the decision overall;

(f) sixthly, the factual situation in *Dovuro* was different from the present case in some important respects; there was no warning or conditions on the bag such as there is here; therefore no argument arose about rejection of an assumption of responsibility; and, Dovuro knew for a fact that the canola seeds contained the weed seeds, whereas Advanta only knew there was a risk that contaminated seeds might be present;

(g) seventhly, the sort of injury alleged to have been suffered was different from that in the present case; in *Dovuro* it was that financial loss would be occasioned by pursuing a course recommended by government authorities only after Dovuro had distributed the seeds and farmers had acquired it, and only after the farmers had planted the seeds; and

(h) eighthly, *Dovuro* was decided in 2003, before the more recent statements in *Woolcock Street Investments Pty Ltd v CDG Pty Ltd*,[114] *and Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288 & Anor*.[115]

[173] For these reasons, in my view, Dovuro offers no real support for the existence of a duty in the present case. At best it suggests that a seed manufacturer might owe a duty of care to end users, in respect of economic loss, in a different factual scenario.

Close physical relationship?

[174] The second contention was that in this case indeterminacy (the primary concern with economic loss) was not present. As to that the appellants contended that his Honour wrongly failed to address the evident close physical relationship between Advanta's conduct in producing and distributing the contaminated seed and the kinds of losses suffered by the appellants (and the group members) which followed from the planting of that very seed on the very land being farmed by them. It was framed thus:[116]

> "His Honour ought to have concluded that the kinds of losses claimed by the Appellants and Sample Group Members … arose in their entirety from the planting of contaminated seed produced and distributed by the Respondent onto the land farmed by them in the

114 (2004) 216 CLR 515.

115 (2014) 254 CLR 185.

116 Appellants' outline paragraph 21.

> very manner intended by the Respondent. Recognition of the asserted duty would thereby strictly limit the Respondent's liability for economic loss. Neither the class of claimants nor the kinds of claimed loss (which … was the cost of eradicating and managing the off-type plants and the profits lost as a result of their interference with the use of the farmland for commercial cultivation) was indeterminate."

[175] The appellants sought to draw support from various comments in *Caltex Oil* as to the effect of physical propinquity, and in *Perre v Apand* as to the fact that there the plaintiffs' farms were in close geographical proximity to the defendant's farm, and that was a critical aspect of the court concluding that the defendant had knowledge of the plaintiffs' vulnerability.

[176] In *Caltex Oil*,[117] a dredge negligently cut an undersea pipeline which carried oil from a refinery to a terminal. The refinery and the pipeline were owned by Australian Oil Refining Pty Ltd. The terminal was owned by Caltex.

[177] By reason of the damage to the pipeline Caltex lost its normal means of obtaining deliveries of petroleum products at the terminal while the pipeline was being repaired and restored to service. In order to obtain deliveries for the refinery Caltex arranged for petroleum products to be taken from the refinery to the terminal either by ship or by road transport. Since low sulphur fuel oil could not be sent to that terminal, it was necessary to deliver supplies of low sulphur fuel oil by ship to another terminal and to supply Caltex's customers with fuel oil by road transport from that terminal.

[178] Caltex sued for economic loss in the form of increased expenditure in transporting oil from the refinery to the terminal.

[179] Gibbs J stated the question as:[118]

> "In these circumstances it becomes necessary to consider whether a person is entitled to be compensated in damages for economic loss sustained by that person as a result of damage negligently caused to the property of a third party. The further question arises whether a person whose property has been physically damaged as the result of a negligent act may recover compensation for economic loss which was not a consequence of that physical damage but which happened to be caused by the negligent act that caused the physical damage."

[180] Gibbs J examined the development of the law relating to recovery of economic loss. His Honour concluded:[119]

> "In my opinion it is still right to say that as a general rule damages are not recoverable for economic loss which is not consequential upon injury to the plaintiff's person or property. The fact that the loss was foreseeable is not enough to make it recoverable. However, there

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[117] *Caltex Oil (Australia) Pty Limited v The Dredge "Willemstad"* (1976) 136 CLR 529; [1976] HCA 65.

[118] *Caltex* at 544.

[119] *Caltex* at 555.

> are exceptional cases in which the defendant has knowledge or means of knowledge that the plaintiff individually, and not merely as a member of an unascertained class, will be likely to suffer economic loss as a consequence of his negligence, and owes the plaintiff a duty to take care not to cause him such damage by his negligent act. It is not necessary, and would not be wise, to attempt to formulate a principle that would cover all cases in which such a duty is owed; to borrow the words of Lord Diplock in *Mutual Life & Citizens' Assurance Co. Ltd. v. Evatt* (1970) 122 CLR 628, at p 642; [1971] AC 793, at p 809 : "Those will fall to be ascertained step by step as the facts of particular cases which come before the courts make it necessary to determine them." All the facts of the particular case will have to be considered. It will be material, but not in my opinion sufficient, that some property of the plaintiff was in physical proximity to the damaged property, or that the plaintiff, and the person whose property was injured, were engaged in a common adventure."

[181] As Gibbs J identified, the question in Caltex was whether X is entitled to be compensated in damages for economic loss sustained by X as a result of damage negligently caused by Y to the property of Z. That is not the case here. As the appellants put it: is X entitled to be compensated in damages for economic loss sustained by X as a result of damage negligently caused by Y to the property of X.

[182] Gibbs J held there was a duty of care on the part of the owners and operators of the dredge, and those who marked the position of the pipeline on maps used by the dredge to navigate. Factors relevant to that finding were:[120]

(a) they knew the pipeline led from the refinery to the terminal;

(b) they should have known that the pipeline was the physical means by which the products flowed from the refinery to the terminal;

(c) the pipeline appeared to be designed to serve the terminal particularly and was not serving the public generally; in these circumstances they should have had Caltex in contemplation as a person who would probably suffer economic loss if the pipes were broken; and

(d) those navigating the dredge had an obligation to avoid damaging the pipeline; it was marked on maps for that purpose; those marking the maps also owed a duty to take care.

[183] Stephens J concluded that reasonable foreseeability was an inadequate control mechanism in cases of recovery of economic loss.[121] Instead his Honour concluded that a better formulation of control might be the need for sufficient proximity between the tortious act and compensable damage.[122] As to that his Honour said:[123]

> "Some guidance in the determination of the requisite degree of proximity will be derived from the broad principle which underlies

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[120] *Caltex* at 555-556.
[121] *Caltex* at 573-574.
[122] *Caltex* at 574-575.
[123] *Caltex* at 575.

liability in negligence. As Lord Atkin put it in a much-cited passage from his speech in *Donoghue v. Stevenson* the liability for negligence "is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay" (1932) AC, at p 580. Such a sentiment will only be present when there exists a degree of proximity between the tortious act and the injury such that the community will recognize the tortfeasor as being in justice obliged to make good his moral wrongdoing by compensating the victims of his negligence."

[184] Stephens J then articulated the salient features that led him to find that there was sufficient proximity to entitle recovery:[124]

"(1) the defendant's knowledge that the property damaged, a set of pipelines, was of a kind inherently likely, when damaged, to be productive of consequential economic loss to those who rely directly upon its use. To damage an item of productive equipment or an item used in conveying goods or services, such as power or water, is inherently likely to cause to its users economic loss quite apart from the physical injury to the article itself. Moreover the nature of a pipeline, used in conveying refined products from a refinery to another's terminal, is such as to indicate very clearly the existence of something akin to Lord Roche's common adventure, the person to whom the petroleum products are being delivered through it having a very real interest in its continued operation as a means of conveyance, whether or not possessing a proprietary or possessory interest in the pipes themselves;

(2) the defendant's knowledge or means of knowledge, from certain charts then in use on the dredge, that the pipelines extended across Botany Bay from the A.O.R. refinery to the plaintiff's Banksmeadow terminal, leading to the quite obvious inference that their use was to convey refined products from refinery to terminal, the plaintiff being in this sense a user of the pipeline.

These two factors lead to the conclusion that Caltex was within the reasonable contemplation of the defendants as a person likely to suffer economic loss if the pipelines were cut. Now, because the facts referred to in (1) and (2) above were within the reasonable contemplation of the defendants, it should have been apparent to them that more than one party was likely to be exposed to loss should the pipelines be severed by the defendants' negligence; accordingly, the tortious infliction of property damage on any one of these parties becomes relevant; hence the significance of the following factor:

(3) the infliction of damage by the defendant to the property of a third party, A.O.R., as a result of conduct in breach of a duty of care owed to that third party.

There are two other relevant factors:

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[124] *Caltex* at 576-577.

(4) the nature of the detriment suffered by the plaintiff; that is to say its loss of use, in the above sense, of the pipeline;

(5) the nature of the damages claimed, which reflect that loss of use, representing not some loss of profits arising because collateral commercial arrangements are adversely affected but the quite direct consequence of the detriment suffered, namely the expense directly incurred in employing alternative modes of transport."

[185] Stephens J also compared the Caltex case to *Morrison Steamship Co Ltd v Greystoke Castle (Cargo Owners)*,[125] a case where a delivery truck carrying the plaintiff's goods was disabled because of the defendant's negligence. The loss sought there was the costs of unloading the disabled truck, reloading another, and the cost on on-carriage on the new truck. His Honour said:[126]

> "In each case the economic loss is reasonably foreseeable and the incurring of cost in moving by other means the stranded goods is directly attributable to the tortious act of disabling the existing mode of transport. A close degree of proximity exists which is no doubt enhanced if the defendant knows that the lorry, like the pipelines in the present case is and can be employed for no purpose other than the carriage of goods to the plaintiff's premises."

[186] Mason J identified the difficulty posed by indeterminate liability in economic loss cases:[127]

> "The problem is to yield compensation to the individual who suffers financial loss not necessarily consequential upon damage to his property when that loss is closely connected with the failure to take care and yet at the same time to deny compensation "in an indeterminate amount ... to an indeterminate class", in particular, to a large class of persons whose loss arises because their use of a public utility or facility has been interrupted."

[187] Mason J rejected the proximity formulation by Stephens J, and preferred a solution based on a duty of care that avoids indeterminate loss:[128]

> "It is preferable, then, as Mr. P. P. Craig suggests in his illuminating article, "Negligent Misstatements, Negligent Acts and Economic Loss" *Law Quarterly Review*, vol. 92 (1976), p. 213, that the delimitation of the duty of care in relation to economic damage through negligent conduct be expressed in terms which are related more closely to the principal factor inhibiting the acceptance of a more generalized duty of care in relation to economic loss, that is, the apprehension of an indeterminate liability. A defendant will then be liable for economic damage due to his negligent conduct when he can reasonably foresee that a specific individual, as distinct from a general class of persons, will suffer financial loss as a consequence

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125 [1947] AC 265.
126 *Caltex* at 580.
127 *Caltex* at 591.
128 *Caltex* at 592-593.

of his conduct. This approach eliminates or diminishes the prospect that there will come into existence liability to an indeterminate class of persons; it ensures that liability is confined to those individuals whose financial loss falls within the area of foreseeability; and it accords with the decision in *Rivtow* (1973) 40 DLR (3d) 530."

[188] Jacobs J largely agreed with Stephens J, but framed the duty of care differently:[129]

> "The relevant duty of care in the present case is the duty of care owed to those whose persons or property are in such physical propinquity to the place where an act or omission of the defendant has its physical effect that a physical effect on the person or property of the plaintiff is foreseeable as the result of the plaintiff's act or omission. The damages for the breach of such a duty of care are those which result from the physical effect on the plaintiff's person or property of the defendant's act or omission.
>
> A question of central importance in the present case is whether the physical effect in this context is limited to actual physical injury. In my opinion it is not. Person or property may be injured not only physically but also by physical effect thereon short of physical injury: e.g. by an act or omission which prevents physical movement of a person or which prevents physical movement or operation of property.
>
> The damages for immobilization of property may frequently be quantified as the cost of mobilizing the property and the loss of the use of the property during its immobilization. Such damage may be called pecuniary or economic loss. However, it is an error to concentrate attention on the question whether a particular loss is pecuniary or economic. Rather it is necessary to examine the circumstances of the loss. If the loss arises from the physical effect of an act or omission on the person or property of a plaintiff and that physical effect is one which was foreseeable and that foreseeability gives rise to a duty in the defendant to take reasonable care to avoid that physical effect, it is no answer to the plaintiff's claim for damages that his loss was pecuniary or economic."

[189] Murphy J acknowledged that there was "no satisfactory general principle governing recovery of economic loss caused by negligence", agreed there was a duty of care and could find no basis to limit recovery just because it was for economic loss.[130]

[190] I do not consider that *Caltex* stands for the proposition attributed to it by the appellants. They contend that in *Caltex* "The close physical aspects of the relationship between the parties and the owner of the refinery were critical to the resolution of the appeal".[131] In my view, the passages from *Caltex*, referred to above, do not support that conclusion. It was the fact that the pipeline was damaged by the dredge but the pipeline was not owned by *Caltex*, and it was only used by it in the sense that by contractual arrangement the oil it purchased was sent via the

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129 *Caltex* at 597.
130 *Caltex* at 606.
131 Appellants' outline paragraph 23.

pipeline to the terminal. And, under that contract the risk of damage or loss was not borne by *Caltex*, but by the pipeline owner. Physical proximity as between the plaintiff's property and the damaged property was a matter that Gibbs J thought was material but not sufficient. Stephen J relied on a concept of "proximity" but as between the tortious act and the injury. Mason J relied on reasonable foreseeability of injury to an individual coupled with lack of indeterminate liability. Jacobs J was the only one who expressed a view close to that espoused by the appellants, but even he did not express it as a close physical relationship. His Honour held that the duty of care was that "owed to those whose persons or property are in such physical propinquity to the place where an act or omission of the defendant has its physical effect that a physical effect on the person or property of the plaintiff is foreseeable as the result of the plaintiff's act or omission".

[191] Further, given that *Caltex* was a case where there was, in fact, a close physical relationship between *Caltex* and the owner of the refinery and pipeline, and between those responsible for controlling the dredge's operation and those concerned with the pipeline's operation, it is difficult to see how that was critical to the reasoning. It was an inescapable fact but not determinative.

[192] The appellants then contend that in *Perre v Apand Pty Ltd*,[132] the High Court confirmed the use of a physical connection as a control against concerns about indeterminate liability. In support of that contention reliance was placed on statements by Gleeson CJ, Kirby J and Callinan J.[133]

[193] In my view that contention goes too far. It was the undisputed fact in *Perre v Apand* that the claimants' land was close to where the contaminated potatoes had been planted.[134] Gleeson CJ referred to the fact that the Full Court's reasoning had been strongly influenced by concerns about indeterminacy. As to that his Honour said:[135]

> "[15] … the combination of circumstances involving the use and ownership or enjoyment of land, the physical propinquity of such land to the Sparnons' land, the known vulnerability of people in the position of the appellants, and the control exercised by the respondent over the relevant activity on the Sparnons' land, is unlikely to apply to an extent sufficient to warrant an apprehension of indeterminate liability."

[194] The comments of Kirby J were no less case specific:[136]

> "[296] ...There was no risk of indeterminacy in this case. The ambit of the reasonably foreseeable, indeed known, vulnerability was measured by precise considerations of geographical proximity. The outer boundary was relevantly circumscribed by potato growing interests within a radius of 20 km from a farm to which the non-certified seed was sent for planting."

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132 (1999) 198 CLR 180; [1999] HCA 36.

133 Gleeson CJ at [15], Kirby J at [295]-[296] and Callinan J at [410]-[411].

134 No further than three kilometres from the property and well within the 20km circle the subject of the Government regulation.

135 *Perre v Apand* at [15].

136 *Perre v Apand* at [296].

[195] As for Callinan J, I do not consider his Honour was addressing indeterminacy at all in the passages relied on, as opposed to merely saying geographical propinquity was a feature to be taken into account:[137]

> "[410] The geographical propinquity of the property to which the respondent caused the Saturna seed to be introduced (the Sparnons' property) to the appellants' property is relevant.
>
> [411] So too, the commercial propinquity, that is to say the facts that the appellants and the respondent were both involved in the same industry in the same year and had been so involved for some time, is relevant. Both this and the preceding matter to which I have referred bespeak, in a real sense, proximity."

[196] It cannot be doubted that the court in *Perre v Apand* considered the physical closeness of the claimant farms to the farm where the potatoes had been planted as a relevant matter. However, it was then but one of a number of matters to take into account. The subsequent adoption of the salient features approach means that the "close physical relationship" is merely one matter to weigh in the balance, but its importance will vary from case to case.

[197] Indeterminacy is one of the recognised aspects of the current approach to determining whether a duty of care arises in cases of economic loss, namely by having regard to the appropriate salient features. But it must be recognised that the salient features identified in the various authorities are not an exhaustive list, nor will every feature apply in each case.[138] Whilst indeterminacy is one of the salient features it has not been tied to a close physical relationship.

[198] In the present case it was not pleaded that there was a close physical relationship that supported the existence of a duty of care, nor was that case run at the trial. It should therefore not be allowed to be raised now.[139]

[199] In any event, I doubt that the postulated close physical relationship here was of relevance to the question of indeterminacy. True it is that Advanta supplied contaminated seed which was planted by the farmers on their land. But that is to say no more than the end user of a manufactured object used the object as intended. Such a relationship does not necessarily give rise to a duty of care for economic loss,[140] and says little, of itself, as to indeterminacy.

[200] Further, the existence of a physical connection is not determinative. The concept of "proximity" is a thing of the past in determining if there is a duty of care, and the fact that loss may flow from a physical defect in property does not convert the loss from other than pure economic loss.[141]

[201] The appellants' approach gives the salient feature of indeterminate liability a determinative quality. In effect, they contend that the fact that there was no indeterminate liability should have led to a finding that there was a duty of care. In

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137 *Perre v Apand* at [410]-[411]. This evident, in my view, when the cited support for the first paragraph was what was said by Jacobs J in *Caltex* at 601-602.

138 *Caltex Refineries (Qld) Pty Ltd v Stavar* [2009] NSWCA 258; (2009) 75 NSWLR 649, at 676 [104].

139 *University of Wollongong v Metwally [No 2]* [1985] HCA 28; (1985) 59 ALJR 481 at 483.

140 *Swick Nominees Pty Ltd v Leroi International Inc (No 2)* [2015] WASCA 35; (2005) WAR 376, at 404 [113]; *Marsh v Baxter* [2015] WASCA 169; (2015) 49 WAR 1, at 115 [705].

141 *Woolcock Street Investments* at 529, [19]-[20].

my view, however, it is plain that the salient features are simply considerations that may lead to that conclusion, but do not mandate it. As was said by Allsop P in *Caltex Refineries*:[142]

> "104 There is no suggestion in the cases that it is compulsory in any given case to make findings about all of these features. Nor should the list be seen as exhaustive. Rather, it provides a non-exhaustive universe of considerations of the kind relevant to the evaluative task of imputation of the duty and the identification of its scope and content.
>
> 105 The task of imputation has been expressed as one not involving policy, but a search for principle: see *especially Sullivan v Moody* at 579 [49]. The assessment of the facts in order to decide whether the law will impute a duty, and if so its extent, involves an evaluative judgment which includes normative considerations as to the appropriateness of the imputation of legal responsibility and the extent thereof. Some of the salient features require an attendance to legal considerations within the evaluative judgment."

[202] In my view, the fact that the learned trial judge did not discuss the feature of indeterminate liability does not signify error. Given that the class of claimants were limited to those farmers who had purchased contaminated seed, a known number of claimants all with the same characteristics in terms of their relationship to Advanta, his Honour obviously did not consider the issue of indeterminate liability to be an influential one. Further, the central feature that led his Honour to conclude that there was no duty of care was that the assumption of responsibility had been negated by the disclaimers on the bags. Once that finding was reached, discussion of indeterminate liability was of no utility.

Reasonable foreseeability

[203] The third contention was that reasonable foreseeability of the kind of loss being suffered absent due care was clearly established. The matters set out above in paragraphs [23] to [26] make that conclusion inevitable. Even though the learned trial judge did not make an express finding as to whether the loss was reasonably foreseeable, his Honour did examine the evidence and admissions by Advanta that compel that conclusion. Had his Honour made the contrary finding, that would have been a powerful reason to conclude that no duty of care arose. The central reason for finding there was no duty was not the question of foreseeability, but the negation of any assumption of responsibility.

Vulnerability

[204] The fourth contention, said by the appellants to be the most critical, was that the farmers were vulnerable to a lack of care by Advanta in at least four ways;

(a) Advanta had all of the means to prevent contaminated seed getting to market, and the farmers had none;

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142 *Caltex Refineries (Qld) Pty Ltd v Stavar* at [104]-[105].

(b) it was unrealistic with this type of transaction to expect the farmers to negotiate for or obtain a relevant warranty or indemnity from Advanta or the distributer for these kinds of losses;

(c) if the seed was contaminated it would likely damage the fundamental income producing asset upon which the business depended; and

(d) in terms of timing, because the seed is planted shortly after purchase, but its shattering qualities do not emerge for some time. By the time the contamination emerges it is simply too late for the farmers to readily or cheaply reverse its effects on the productive capacity of the land.

[205] The learned trial judge observed that the concept of "vulnerability" was used in at least two senses in authorities such as *Caltex Oil (Australia) Pty Ltd v The Dredge "Willemstad"*,[143] *Woolcock Street Investments Pty Ltd v CDG Pty Ltd*,[144] *Perre v Apand Pty Ltd*,[145] *Burnie Port Authority v General Jones Pty Ltd*,[146] *Esanda Finance Corp Ltd v Peat Marwick Hungerfords*,[147] and *Brookfield Multiplex Ltd v Owners Corp Strata Plan 61288*.[148]

[206] First, in some contexts, it is used to refer to the plaintiff's exposure to the risk of damage if the defendant does not exercise care. Secondly, "vulnerability" is used in the sense of the inability of the plaintiff to protect itself against exposure to the risk of economic loss caused by the defendant's failure to take care, as a factor supporting the existence of a duty of care, or as negativing the existence of a duty of care, if the plaintiff does not demonstrate vulnerability.[149]

[207] His Honour found that, used in its first sense, the appellants were vulnerable.[150]

[208] More relevant to the present case is the concept of vulnerability used in its second sense, namely the inability of a plaintiff to protect itself against exposure to the risk of economic loss caused by the defendant's failure to take care. As to that his Honour observed that it was for the appellants to plead and prove the relevant facts that gave rise to a duty of care. His Honour then observed that in the present case there were facts "which are or may be relevant to whether any of the plaintiffs could have protected themselves by appropriate contractual terms", and referred to a contention urged by Advanta, that an example of the ways in which the appellants could have protected themselves was by insurance against loss.[151]

[209] His Honour said that it may be unrealistic to expect a consumer in the appellants' position to extract a warranty from the seller against a defect in the quality of the goods purchased that would protect against economic loss. Factors such as the consumer's limited bargaining position, the retailer's inability to obtain a similar warranty from its supplier, and the fact that the goods may not be examinable before purchase, were relevant to that conclusion.[152]

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143 (1976) 136 CLR 529.
144 (2004) 216 CLR 515.
145 (1999) 198 CLR 180.
146 (1994) 179 CLR 520.
147 (1997) 188 CLR 241.
148 (2014) 254 CLR 185.
149 Reasons below at [185].
150 Reasons below at [186].
151 Reasons below at [189].
152 Reasons below at [190].

[210] It was in that context that his Honour said:[153]

> "[191] In other words, an everyday commercial transaction of sale of goods, like the purchase of seed for agriculture by a grower from a distributor, may test the logical utility or limits of the concept of vulnerability as a salient factor in determining whether a duty of care is owed by the producer of seed to the grower as end user against economic loss if the seed is contaminated."

[211] In my view, notwithstanding the use of the phrase "in determining whether a duty of care is owed", his Honour was expressing that view in terms of the utility or limits of the concept of vulnerability in negating a duty of care in consumer-like cases. In my view, that was a finding of relevant vulnerability on the part of the appellants.

[212] In this Court it was contended for Advanta that there had been no pleading of an inability on the part of the growers to protect themselves.[154] It is true to say that the appellants' pleaded case was sparse in that area. It was limited to alleging that Advanta knew or ought to have known that:[155]

> "20(a): MR43 seed would be sold to growers and/or planted by growers for the purpose of cultivating commercial sorghum crops for sale; and
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> ...
>
> 20(c): it was unlikely that the MR43 seed would be further tested by the growers."

[213] However, the defence put vulnerability directly in issue, and the learned trial judge was obliged to deal with it. Beyond rehearsing the pleading point, and then only to explain the way the case at trial developed, Advanta did not seriously contend that the finding of vulnerability was not open.[156] But that is to say no more than that vulnerability was one salient feature to assess in the whole process.

Known reliance and assumption of responsibility

[214] The fifth contention was that, for the same reasons, Advanta was the person with control of the risk coming home to the substantial exclusion of the farmers; therefore there was known reliance and there was assumption of responsibility.

[215] This contention cannot be separated from the findings as to the terms and conditions placed on each bag, and the conclusions I have reached on the question of whether those terms and conditions constituted a rejection of an assumption of liability.

[216] There are difficulties confronting acceptance of the contention that there was, in this case, known reliance and a consequent assumption of responsibility.

[217] The appellants did not plead a case based on known reliance, that is, that Advanta knew the appellants relied on Advanta to protect them against the risk of economic

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153 Reasons below at [191].
154 Respondent's outline, paragraph [28].
155 Paragraph 20 of the statement of claim.
156 Appeal transcript T 2-29 line 35 to T 2-30 line 7.

loss. Nor was such a case put to Advanta's witnesses at the trial. That being the case the appellants should not now be permitted to reinvent the case run below.[157]

[218] The appellants submitted that known reliance and assumption of responsibility was adequately put in issue by various pleaded facts.[158] In summary they pleaded that at the time when MR43 seed was sold Advanta knew or ought to have known that:

(a) 20(a): MR43 seed would be sold to growers and/or planted by growers for the purpose of cultivating commercial sorghum crops for sale;

(b) 20(c): it was unlikely that the MR43 seed would be further tested by the growers;

(c) 20(d): any contamination of the seed by shattercane would cause loss and damage to the growers; and

(d) 20(kk): an infestation of shattercane would be difficult to control or eradicate if the contaminated land was used to grow sorghum back-to-back after the first year of contamination.

[219] The next allegation was that in paragraph 20AAA, that Advanta had been reckless in not warning the growers or purchasers:

> "(g) [Advanta] knew that growers who planted MR43 seed contaminated with the off-type would have particular difficulty in eradicating shattercane particularly if they planted sorghum back-to-back;
>
> (h) if the identified off-type was shattercane, it would be a major problem for growers;
>
> (i) if the identified off-type was shattercane, then the off-type plants would be distinguishable only when the crop matured to the flowering stage; and
>
> (j) growers would be unable to distinguish the off-type seed in bags of purchased MR43 and would not by that means be able to tell that bags of MR43 contained the off-type."

[220] The other paragraphs referred to pleaded that there was a risk of which Advanta knew.

[221] In my view, if it was intended to plead known reliance, that is to say that Advanta knew the appellants relied on Advanta to protect them against the risk of economic loss, or that Advanta assumed responsibility in the way referred to in authority, the words would have reflected that. For example, one would have seen a plea such as "Advanta knew the purchasers relied upon it to protect them against the risk of economic loss". Or, "Advanta assumed responsibility for ensuring there was no shattercane in the bags". That does not emerge from the pleaded paragraphs. The plea of recklessness does not advance matters. At best the paragraphs referred to

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157 *University of Wollongong v Metwally [No 2]* [1985] HCA 28; (1985) 59 ALJR 481 at 483.

158 Appellants' outline in reply, paragraphs 11-12; referring to paragraphs 20(a), 20(aa), 20(c), 20(d), 20(kk), 20AAA(g) to (j), 33(b) and 33A of the relevant statement of claim.

above plead it was unlikely that the MR43 seed would be further tested by the growers. That does not establish known reliance.

[222] That said, the case was conducted on the pleaded basis, and on an evidentiary basis, that Advanta undertook thorough processes to guard against contaminants in the seed. Therefore, whilst the case did not encompass a case based on known reliance, it did encompass a case based on assumption of responsibility. It is in that respect that the learned trial judge's findings as to the disclaimer negating the existence of a duty of care come into sharp focus.

[223] For the reasons explained in paragraphs [35] to [105] and [107] to [144] above the disclaimer negated an assumption of responsibility and, therefore, the existence of a duty of care.

Conclusion – duty of care

[224] The High Court has shown a reluctance to expand the general concepts of duty of care to novel cases, and especially where they claim only pure economic loss.

[225] Thus, in *Brookfield Multiplex* French CJ said:[159]

> "**Abstracting the reference to proximity in *Bryan v Maloney*, the decision adverted to factors adverse to the recognition of a duty of care for pure economic loss other than in special cases. The special cases would commonly, but not necessarily, involve an identified element of known reliance or dependence on the part of the plaintiff, or the assumption of responsibility by the defendant, or a combination of the two**. The contract between the prior owner and the builder in that case was "non-detailed and contained no exclusion or limitation of liability". The subsequent owner would ordinarily be unskilled in building matters and inexperienced in the niceties of real property investment. Any builder should be aware that such a subsequent owner would be likely to assume that the building had been competently built and that the footings were adequate. Those considerations may be seen as elements of the notion of "vulnerability", which has become an important consideration in determining the existence of a duty of care for pure economic loss. In this context, it refers to the plaintiff's incapacity or limited capacity to take steps to protect itself from economic loss arising out of the defendant's conduct."

[226] Crennan, Bell and Keane JJ said in *Brookfield Multiplex*,[160] referring to *Woolcock*:

> "In *Woolcock Street Investments*, Gleeson CJ, Gummow, Hayne and Heydon JJ accepted that 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. Their Honours said:
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> > "In *Caltex Oil (Australia) Pty Ltd v The Dredge Willemstadt*, the Court held that there were circumstances in which damages

[159] *Brookfield Multiplex* at [22]. Emphasis added; internal citations omitted.
[160] *Brookfield Multiplex* at [127]; internal citations omitted.

> for economic loss were recoverable. In *Caltex Oil*, cases for recovery of economic loss were seen as being exceptions to a general rule, said to have been established in *Cattle v Stockton Waterworks*, that even if the loss was foreseeable, damages are not recoverable for economic loss which was not consequential upon injury to person or property.""

[227] None of the contentions referred to in paragraphs [145] to [223] rise to the level that, weighing the salient features applicable to this case, the disclaimer in the terms and conditions on the bags is deprived of its effect in negating the existence of a duty of care. Moreover, the fact that Advanta went to the lengths it did to make the disclaimer makes this case distinctly inapt as one where this Court might expand the categories where a duty of care has been held to exist where the loss is pure economic loss.

[228] The appeal should be dismissed.

The limitation point – Notice of Contention

[229] Advanta pleaded a limitation point, contending that from the time of its planting and growth before 24 April 2011, the shattercane caused immediate and inevitable damage to the appellants' farming interests. Therefore it was said that damage was sustained outside the six year time limit under s 10(1) of the *Limitation of Actions Act 1974* (Qld) and s 14(1) of the *Limitation Act 1969* (NSW). Under those provisions, the limitation period is six years from the date on which the cause of action "arose" or "first accrues".

[230] The learned trial judge rejected the argument that the proceedings were out of time, reasoning:

(a) the alleged losses of each of the appellants were cash flow losses; they were additional expenses incurred in managing and eradicating the off-type plants, comprising additional herbicide expenses and additional labour expenses for spraying herbicide or rogueing off-type plants; they were also losses of sales of sorghum seed that would have been produced;[161]

(b) there was no allegation or evidence that any of the appellants made any increased cash outflow or expenditure for labour for rogueing the off-type plants or for spraying before 24 April 2011;[162]

(c) there is also no allegation or evidence that any of the appellants suffered any loss of cash inflow or income from sorghum seed sales prior to 24 April 2011;[163]

(d) the plaintiffs and group members did not suffer any damage when the planting or germination of the contaminant seeds happened; Advanta did not plead nor prove that the value of any interest of the appellants in the land on which the planting and germination of the contaminant seed occurred was decreased;[164]

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161 Reasons below at [492].
162 Reasons below at [495].
163 Reasons below at [496].
164 Reasons below at [499].

(e) the interest said to be infringed was the financial interest in the lost cash flows; it was when the damage comprising the loss of those cash flows first occurred that the cause of action in negligence arose or first accrued, unless some other non-negligible loss was suffered earlier;[165] and

(f) relying on *Ranger Insurance Co v Globe Seed & Feed Company*,[166] the planting of the contaminated MR43 seed that included the contaminant seed was not physical loss or damage suffered by any of the appellants.[167]

The opposing submissions

[231] Mr Dunning KC, appearing for Advanta, contended that the learned trial was in error for three reasons:

(a) first, his Honour's analysis ignored the pleadings, closing submissions, and other evidence about the detrimental impacts of shattercane on the appellants' farming interests; that was to the effect that the planting of the seed itself was detrimental and harmful to the appellants' business interests as farmers; the introduction of the contaminant through the MR43 seed meant the land on which it was planted could not be used to its full potential, in the sense that farming practices had to be changed; those detrimental effects were neither contingent nor speculative;[168]

(b) secondly, no regard was had to the submissions made as to *Alcan Gove Pty Ltd v Zabic*;[169] in particular, reliance had been placed on a passage where the High Court addressed the limitation of the cause of action for damages in negligence where, with the benefit of hindsight it can be seen that the damage now suffered led inevitably and inexorably from a cause that occurred prior to the limitation date;[170] the use of hindsight in determining when a cause of action arose was approved in *Zabic* in the Court of Appeal, and the High Court agreed;[171] on that basis the planting of the seed (which occurred prior to 24 April 2011) inevitably and inexorably changed farming practices, increased expenditure and decreased income; and

(c) thirdly, his Honour should not have relied upon *Ranger Insurance Co v Globe Seed & Feed Co*,[172] in preference to *Williams v Network Rail Infrastructure Ltd*,[173] and the obiter dicta in the Full Court in *Dovuro Pty Ltd v Wilkins*;[174] those cases establish that the mere planting of contaminated seed on land is a form of physical damage to the land.

[232] For the appellants Mr Gleeson SC urged that there was no error in the learned trial judge's approach. The relevant points were:

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165 Reasons below at [504].
166 865 P 2d 451 (1993), at 459.
167 Reasons below at [511].
168 Respondent's outline, paragraphs 41-47.
169 (2015) 257 CLR 1.
170 Respondent's outline paragraphs 48-59, referring to *Alcan Gove* at [48].
171 *Zabic v Alcan Gove Pty Ltd* [2015] NTCA 2; (2015) NTLR 209 at 220 [47].
172 865 P 2d 451.
173 [2018] EWCA Civ 1514; [2019] QB 601.
174 (2000) 105 FCR 476 at [124]-[125] per Finkelstein J, Branson J at [11], and Gyles J at [197].

(a) Advanta, who bore the onus of proof on this issue, could not establish that the damage claimed was the inevitable result of planting the seed; nor was proof of inevitability a necessary element of the way in which the appellants put their case; those parts of the appellants' pleadings and arguments relied on for this point were directed to potentialities and risks, not damage for the purposes of the limitation point; the appellants' loss was not "inevitable" from the time of planting because they could have honestly sold their businesses (and whatever interest they had in the land) without discount while the contamination remained undiscovered;[175]

(b) if the asserted duty were owed, the risk which summoned it up was the risk that, if Advanta did not take reasonable care in the supply of seed, the growers might suffer loss in the form of damage to their ability to earn income off the now contaminated land; it was that interest which grounded the damage necessary to complete the cause of action; damage to that interest was neither ascertained nor ascertainable prior to the causative impact of the contamination emerging and the growers suffering the actual impacts on their cashflows, which did not occur until there was a need to change farming practices in seasons after 24 April 2011;[176]

(c) the claim was for what would traditionally be regarded as special damages, that is specific financial outlays or losses arising either by reason of steps taken to mitigate loss from the tort or as reasonably foreseeable losses flowing from the tort; special damages could not be pleaded until the outlays had commenced to occur; no claim was advanced by the appellants for anything but special damages; a property damage claim was doubtful where the relevant claimant did not own the land; the first appellant owned its land but the position with other appellants or group members was not so clear;[177]

(d) reliance on *Alcan Gove* was mistaken; it concerned a claim for personal injuries in respect of mesothelioma contracted after inhaling asbestos fibres in the course of employment; the plaintiff's cause of action accrued "when the initial mesothelial cell changes occurred shortly after [his] inhalation of asbestos fibres"; the claim was for damages for loss of expectation of life; the personal injury context influenced the result, in terms of identifying the precise interest protected by tort; once the mesothelial changes had started to occur, there was nothing the person could do to prevent their ultimate catastrophic impact on health and life; *Alcan Gove* did not stand for the wider proposition for which Advanta contended;[178] and

(e) reliance by his Honour on *Ranger Insurance Co v Globe Seed & Feed* was not central; and *Williams v Network Rail Infrastructure* was correctly distinguished.

Consideration

[233] The question when a limitation period begins to run was considered by the High Court in *Hawkins v Clayton*.[179] The majority reaffirmed the ordinary rule that a

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175 Appellants' outline in reply, paragraph [34]-[35].
176 Appellants' outline in reply, paragraph [36]-[37].
177 Appellants' outline in reply, paragraph [39]-[41].
178 Appellants' outline in reply, paragraph [42].
179 (1988) 164 CLR 539.

cause of action for negligence accrues when the plaintiff first suffers damage caused by the defendant's breach of duty.[180] Gaudron J said:[181]

> "The various and complex economic relationships which are a feature of present day economic organization suggest that loss may manifest itself in various forms, and it is for this reason that there may be occasions when it is necessary to identify precisely the interest which has been infringed."

[234] That passage was subsequently adopted in *The Commonwealth v Cornwell*,[182] where the court said:[183]

> "[16] In *Hawkins v Clayton*, Gaudron J emphasised the importance for actions for negligence causing economic loss in identifying the interest said to be infringed, whether it be the value of property, the physical integrity of property, or the recoupment of moneys advanced."

[235] The court continued in *The Commonwealth v Cornwell*:[184]

> "[16] … Thereafter, in *Wardley Australia Ltd v Western Australia*, Mason CJ, Dawson, Gaudron and McHugh JJ observed:
>
> > 'To compel a plaintiff to institute proceedings before the existence of his or her loss is ascertained or ascertainable would be unjust. Moreover, it would increase the possibility that the courts would be forced to estimate damages on the basis of likelihood or probability instead of assessing damages by reference to established events. In such a situation, there would be an ever-present risk of undercompensation or overcompensation, the risk of the former being the greater.'
> >
> > …
> >
> > The kind of economic loss which is sustained and the time when it is first sustained depend upon the nature of the interest infringed and, perhaps, the nature of the interference to which it is subjected. With economic loss, as with other forms of damage, there has to be some actual damage. Prospective loss is not enough.'"

[236] As the learned trial judge noted,[185] the interest said to be infringed by the appellants was the financial interest in the lost cash flows which were alleged and claimed as damages.

Appellants' pleadings, closing submissions and other evidence

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180 *Hawkins v Clayton* at 561, 588 and 599.
181 *Hawkins v Clayton* at 601.
182 (2007) 229 CLR 519.
183 *The Commonwealth v Cornwell* at 525 [16]; internal citation omitted.
184 *The Commonwealth v Cornwell* at 525-526 [16]; internal citation omitted.
185 Reasons below at [504].

[237] The appellants' pleadings, closing submissions and evidence do not compel the conclusion that for the purposes of the limitation point they were contending that the planting of the seeds created an immediate and inevitable detriment to the land in the sense of physical damage. Advanta submitted that the appellants did so by reason of a combination of the pleaded case, closing submissions and the common questions put forward as part of the representative proceedings. For a number of reasons I do not consider that submission should be accepted:

(a) first, paragraphs 31 and 32 of the statement of claim[186] pleaded a description of the features of shattercane, rather than a definition of the damage alleged to have been sustained; that is made clear in paragraphs 26A and 26E, where it is alleged that damage was first suffered in May 2012 when for the first time there was a measurable impact on the yield of sorghum harvested caused by the presence of shattercane; paragraph 33(b) pleaded matters to do with the risk of harm, not damage;

(b) secondly, common questions 2 and 11-18[187] do no more that state matters to be jointly agitated, and in that case the characteristics of shattercane, rather than the damage alleged to have been sustained or when it was first sustained; and

(c) thirdly, the closing submissions did not take the matter further; paragraph 230[188] dealt with the prospect of risk of harm; paragraphs 333 and 334[189] were directed to the nature of the harm for the purpose of assessing whether there was a duty; paragraph 339[190] dealt with the nature of the activity affected by the alleged conduct; none were submissions of the kind urged by Advanta.

Reliance on Alcan Gove

[238] *Alcan Gove* concerned a claim brought by Mr Zabic, for damages for mesothelioma caused by the inhalation of asbestos fibres whilst employed by Alcan Gove in 1974 to 1977.

[239] The trial judge found the cause of action did not accrue until a time when the symptoms of mesothelioma were first experienced. The Court of Appeal held that with the benefit of hindsight it was possible to find that Mr Zabic's cells were so damaged shortly after inhalation in the 1970's that they "inevitably and inexorably" lead to the eventual onset of the malignant mesothelioma. Therefore the damage done to the mesothelial cells shortly after inhalation was non-negligible compensable damage sufficient to found a cause of action and that the subsequently developed malignant mesothelioma was part of the damage arising in that accrued cause of action.

[240] The proposition accepted by the Court of Appeal came from *Martindale v Burrows*,[191] where Derrington J reasoned that, because it was possible to look back in hindsight on the basis of the evidence and infer that the initial mesothelial cell changes occurred shortly after the inhalation of asbestos fibres, and that they were

186 AB 164-165.
187 AB 123-124 and 126.
188 AB 548-549.
189 AB 586.
190 AB 587.
191 [1997] 1 Qd R 243.

the initial step in a natural progression which led inexorably to the mesothelioma which the plaintiff had developed by the time of trial, the initial cell changes were compensable damage.

[241] The two propositions that ground this line of reasoning are: (i) that there were cell changes and (ii) they were the initial step in a natural progression which led inevitably and inexorably to the mesothelioma itself.

[242] The cell changes were considered by the Court of Appeal and the High Court to constitute physical damage. Thus the High Court said:[192]

> "… it is clear that the Court of Appeal approached the matter on the basis that it was not the risk of mesothelioma but rather 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."

[243] Then, dealing with the question whether it could be inferred in hindsight that a cause of action had accrued before it could have been detected, the Court said:[193]

> "[41] In point of principle, there is no reason why that could not be inferred. As was established in *Cartledge*, there is nothing illogical or otherwise exceptionable about drawing an inference after symptoms of a disease first appear that, because of what is known of the aetiology and pathology of the disease, the disease is likely to have begun at an earlier point of time when there were no symptoms or other means of detecting its presence.
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> [42] On the evidence which was available in this case, there is also no reason in fact why it could not be inferred that there were initial molecular changes in the mesothelial cells which preceded the appearance of symptoms of mesothelioma, and that those initial cell changes led inevitably and inexorably to mesothelioma."

[244] In my view, *Alcan Gove* is different from the present case. Central to the finding in that case was that the cell changes themselves were physical damage that gave rise to the cause of action.

[245] Advanta submitted that the learned trial judge erred by preferring *Ranger* to *Williams* and the obiter dicta in the Ful Court in *Dovuro*.

[246] The learned trial judge's reference to *Ranger* and *Williams* occurred in his Honour's analysis of the struggle revealed in authority when trying to establish when damage was suffered for the purpose of a pure economic loss claim. His Honour contrasted the building defect cases (where conflicting views were expressed until *Bryan v Maloney* which settled the loss as economic loss, not physical damage) with other cases where "it may be that the answer to the question of whether the loss is physical or economic is not clear".[194] One example was that in *Williams* where the spread of knotweed to the plaintiff's land was held to be damage for the purpose of

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192 *Alcan Gove* at [36].

193 *Alcan Gove* at [41]-[42]. Internal citation omitted.

194 Reasons below at [508]-[510].

the tort of nuisance. The court held that the mere presence of its rhizomes imposes an immediate burden, although the fact of damage in nuisance is interference with the use or enjoyment of land.

[247] The alternative view was that in *Ranger*, where the court held that the presence of a weed is not physical damage because the soil is not damaged, per se. The specific passage relied on was:[195]

> "An infestation of weeds, by itself, does not damage anything. A weed is merely a plant that grows from a seed, like any other… the cost of removing weeds is not a loss that is a consequence of damage to the soil or any other property. It is merely the consequence of planting seeds that fail to conform to the variety specified. In that regard, a claim for losses that result from growing unwanted weeds is at least arguably the same as a claim for losses that result from growing unmarketable agricultural crops which has been held not to constitute 'property damage'."

[248] His Honour's reference to each of *Ranger* and *Williams* must, in my view, be seen in its proper context.

[249] First, neither of those cases were binding authority and his Honour was not relying on them as binding authority for any question. They were used merely as illustrations of the difficulty of identifying whether loss is physical or economic.

[250] Secondly, in *Williams* the claim was for damages for nuisance. The cause of action for interference with the amenity value of the land, namely the right to use and enjoy it, was complete without physical damage.[196] The court there held that the amenity value of the land was immediately affected by the knotweed. Moreover, *Williams* was different to the present case when one considers the nature of the knotweed. The facts were that:[197] (i) each claimant had land adjoining that of NR; (ii) on NR's land there was a stand of knotweed, a bamboo-like perennial plant that grows quickly and strongly, and spreads through its underground roots or rhizomes; (iii) rhizomes are underground stems that can extend up to seven metres horizontally; (iv) knotweed could affect structures such as outbuildings, drains, retaining walls, driveway slabs, and brick paving; (v) the most severe risk from knotweed was when it was within seven metres of a habitable space; (vi) the particular knotweed rhizomes had encroached onto the land of each claimant and under their bungalows, up to the foundations; (vii) however, there was no physical damage to the properties nor any change in soil structure.

[251] That synopsis is sufficient to demonstrate that *Williams* was a case where the "weed" had invaded the claimants' land but did not cause physical damage, though that was likely in the future. That is well removed from a case where the damage being analysed in that resulting from planting seeds to grow a crop. Further, when that factual background is understood the court's finding that the knotweed was an immediate burden on the owner of the land[198] is understandable but not analogous to the present case.

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195 *Ranger* at 459.
196 *Williams* at [43].
197 *Williams* at [3], [13]-[15], [20]-[21].
198 *Williams* at [55].

[252] Thirdly, his Honour's use of *Ranger* was simply as a source of factual reasoning, refer to paragraph [247].[199]

[253] There are important limits on the utility of the passage of reasoning from *Ranger*. The contaminated seeds in that case were sold to the Forestry Service and sown to provide erosion control. The seeds produced an infestation of yellowstar thistle, a noxious weed. The Forest Service incurred eradication costs in the first year, and further eradication costs were likely to be required in subsequent years. However, there was no suggestion that the land was unable to be used for any of its normal purposes, that the infestation reduced the erosion control capability of the planting, nor that the land's enjoyment by the Forestry Service was restricted in any way.

[254] The passage cited by the learned trial judge was part of a response to a line of argument by the insurer, namely that for the purposes of deciding if the infestation was "property damage" within the terms of the insurance policy, the weed infestation could be likened by analogy to pollution. The Californian Supreme Court had held, in *AIU Ins Co v Superior Court*,[200] that the liability for cleaning up hazardous waste from disposal sites, groundwater beneath those sites, the aquifers beneath adjoining property and surrounding surface waters was property damage. A similar form of property damage was the effect of methylamphetamine vapour permeating porous materials, such as curtains, carpet and walls.[201]

[255] It was in that factual context, and in response to that argument, that the comments set out in paragraph [252] were made. But that is well removed from the present case. Further, given that there was no case put in *Ranger* that the productivity of the land had been adversely affected, the line of factual reasoning that it affords is of little utility here.

[256] The obiter dicta statements in the Full Court's decision in *Dovuro* are in a different category. As with the present case contaminated canola seed was sold to canola growers who planted it. It grew weeds that were, after the planting, prohibited by the Government. Those weeds, while prohibited and subject to the requirement to take steps to eradicate them, were not, of themselves, harmful. The same cannot be said of shattercane. The appellants' case was that any contamination of the seed by shattercane would cause loss and damage to the growers because the profitability of any crops grown on the land would be impacted by the presence of shattercane, in that shattercane was vigorous and competes with commercial crops planted on the land.

[257] Branson J considered that it "may have been possible to treat this case as one involving physical damage to land by the introduction of exotic seeds".[202]

[258] In the course of examining the question of indeterminate liability Finkelstein J turned to two questions, first whether the three weeds were actually harmful to the canola crop, and secondly, if they were reasonably believed to be harmful, but were not. His Honour said:[203]

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199 Reasons below at [511]; *Ranger* at 459.
200 51 Cal.3d 807, 274 Cal.Rptr 820, 799 P.2d 1253 (1990).
201 *Ranger* at 461.
202 (2000) 105 FCR 476 at [11].
203 (2000) 105 FCR 476 at [124]-[125].

> "[124] If the weeds were harmful the case would present no difficulty. Once the weed seeds were sown, the claim would not be for pure economic loss but one that could properly be characterised as loss resulting from property damage. In other words, when farming land is sown with weed seed that makes the land either unsuitable or less suitable for growing, the land has been "damaged" in a relevant sense.
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> [125] However, in this case it could not be said that the Wilkins' land was damaged because Wilkins did not establish that the weeds adversely affected farming. Thus the expense incurred by Wilkins in complying with the Department's advice can be characterised as "pure economic loss" in the sense that this expression is understood in negligence cases. The question that arises is whether there can be liability for the negligent infliction of pure economic loss caused by a threat of physical damage to Wilkins' land and canola crops? This question itself must be considered in different situations, first, where the threat is real and second where the threat is reasonably, but wrongly, believed to be real."

[259] Of course, Finkelstein J's comments were not made in the context of a debate about a limitation point, as no such issue arose in that case. However, those comments show, in my respectful view, that were his Honour dealing with shattercane, the answer would have been that the planting caused physical damage to the land as it made the land either unsuitable or less suitable for growing.

[260] Gyles J referred to the reasons of each of Finkelstein J and Branson J, saying:[204]

> "Each of their Honours refers, by analogy, to the issue of avoidance of physical damage by the expenditure of money or the taking of action which leads to monetary loss. This, itself, is a controversial question which, in my opinion, provides an inadequate springboard for solution of the present problem. Analogy is a good servant, but a bad master. If planting a seed of a plant which is regarded as a weed, but which has no other deleterious qualities, can be regarded as physical damage to property at all, it is physical damage of a peculiar kind, quite unlike some of the more striking examples which can be given, such as the escape of fire."

[261] It can be noted that the position referred to by Gyles J was like that in *Ranger*. That said, had the weeds been shattercane, and not the prohibited but innocuous weeds in that case, his Honour's characterisation of the loss as physical damage to the land would have been more easily drawn.

[262] However that may be, obiter comments in a case where a limitation point was not considered, and when nothing similar was said in the High Court, form an inadequate foundation for this Court to adopt a similar view.

[263] In my respectful view, the approach of Advanta to the limitation point fails to adequately grapple with the requirement laid down in *Hawkins v Clayton*, *Cornwell*

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[204] (2000) 105 FCR 476 at [197]. Emphasis added.

and *Wardley*, namely that it is important to identify the interest said to be infringed, and the nature of the interference with it.

[264] Where some of the appellants or group members did not own the land that they were using to grow the crops, it is difficult to see how the interest that was infringed was one related to physical damage to the land. It is their use of the land or, as it was put by the appellants, the loss of the productivity of the land, that is the relevant interest.

[265] Even where the appellants or group members owned the land the pleaded interest was loss of revenue from farming, or increased costs of farming, or both. But it was not pleaded as loss of value in the land caused by physical damage. And, as the learned trial judge pointed out,[205] Advanta did not plead or prove that the value of any interest of the appellants or group members in the land on which the planting and germination of the contaminant seed occurred was decreased.

[266] Turning to identification of the nature of the interference, that was the disruption caused by having to deal with the product of the contaminated seed, namely the shattercane which grew as a result of the seed being planted.

[267] Here the learned trial judge was, in my respectful view, correct to identify that the financial interest in the lost cash flows which are alleged and claimed as damages. It follows that it is when the non-negligible damage comprising the loss of those cash flows first occurred that the cause of action in negligence arose or first accrued.[206]

[268] The approach of Advanta is also confronted by what was said in *Wardley*, namely that to compel a plaintiff to institute proceedings before the existence of loss is ascertained or ascertainable is both unjust and would create an ever-present risk of under-compensation or over-compensation.[207] There was no suggestion in the evidence that any grower realised they had shattercane before the time point for the limitation question, i.e. 24 April 2011. The impact upon cash flows did not occur until farming practices had to alter to account for the shattercane. That was after 24 April 2011. Any damage prior to that time was unknown and unknowable. Though the learned trial judge did not make a finding that it would be unjust to compel the appellants to institute proceedings before the existence of loss is ascertained or ascertainable, in my view that finding must follow.

[269] Even if the damage could be said to be damage to the land, the same result would, in my view, follow. No grower ascertained or could have ascertained that shattercane was present before 24 April 2011. The situation was, therefore, similar to those latent building defect cases where damages are suffered when the defect is "known or becomes manifest",[208] "first becomes manifest",[209] or "first became known or manifest".[210] On any such test the growers did not know, and could not have known, about the shattercane contamination of the crop until after 24 April 2011.

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205 Reasons below at [499].
206 Reasons below at [504].
207 *Wardley* at 527, 532.
208 To use the phrase in *Wardley* at 540.
209 To use the phrase in *Bryan v Maloney* at 623.
210 To use the phrase in *Pullen v Gutteridge, Haskins & Davey Pty Ltd* [1993] 1 VR 27 at 71.

[270] In my respectful view, the learned trial judge was correct to find that the claims were not statute barred.

Reasons of Bond JA

[271] Since writing the above, I have had the benefit of reading the draft reasons of Bond JA with which I agree.

Conclusion

[272] For the reasons above the appeal must be dismissed with costs. I propose the following orders:

1. Appeal dismissed.
2. The appellants pay the respondent's costs of and incidental to the appeal, to be assessed on the standard basis.

[273] **BOND JA:** I have had the advantage of reading in draft the reasons for judgment of Morrison JA.

[274] I respectfully adopt his Honour's identification of the pleaded facts and of the evidence. I agree with his Honour's rejection of the challenges made to the factual findings made by the primary judge and with his Honour's reasons for so doing.

[275] His Honour's reasons enable me to express my views on what I regard to be the dispositive issue in a relatively summary way.

[276] I will refer to the appellants as "the farmers" and the respondent as "Advanta".

The definition of the alleged duty of care

[277] Advanta's business did not involve selling seed directly to the farmers. The primary judge found that it sold seed to distributors either by straight out sale or on consignment and later the distributors sold the seed to the farmers.[211]

[278] The primary judge found that it was more likely than not that the seed thus sold was in bags which bore the "conditions" set out in the judgment of Morrison JA at [37].[212] Those conditions recorded, amongst other things, that Advanta disclaimed any liability for loss directly or indirectly arising out of or related to the use of the seed, whether as a result of its negligence or otherwise. As mentioned, I agree with Morrison JA for the reasons advanced by his Honour that the challenge to that finding fails.

[279] Putting to one side the terms printed on the bags, the evidence did not permit the primary judge to make findings as to the terms of the contracts made by Advanta with distributors who purchased by straight out sales.[213] However, the primary judge did make findings as to the terms of the contracts made by Advanta with the

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211 *Mallonland Pty Ltd v Advanta Seeds Pty Ltd* [2021] QSC 74 (**Primary judgment**) at [112].

212 Primary judgment at [135].

213 Primary judgment at [113]. The primary judge did not address whether the terms on the bags should have been regarded as contractual terms as between Advanta and the distributors who purchased by straight out sales.

distributors who took seed on consignment.[214] Amongst other things, those distributors were obliged to sell the seed to customers on the following terms:

(a) The customer agreed that Advanta and the distributor excluded all implied conditions and warranties and limited their liability to any condition or warranty that could not be excluded to refunding the purchase price of the goods, or replacing them.

(b) The customer acknowledged that it remained the customer's responsibility to satisfy itself that the goods were fit for their intended use.

(c) The customer agreed to release and indemnify Advanta and the distributor from all liability and costs (including negligence) directly or indirectly arising out of or related to the delivery or use of the goods.

(d) Advanta and the distributor accepted the promises made by the customer for Advanta's benefit (in accordance with s 55 of the *Property Law Act 1974* (Qld)).

[280] As the evidence did not permit the primary judge to make findings as to the terms of the contracts by which the farmers purchased the seed from the distributors, it was unclear whether those distributors who had taken stock on consignment had complied with their promise to Advanta.[215]

[281] The primary judge found that the present case may be compared with a "string" or "chain" of contracts for the sale of goods, where Advanta as producer of the seed sold it to a distributor who re-sold it to one of the farmers.[216] That finding was not challenged on appeal. The farmers did not submit that there was privity of contract between any of them and Advanta. To the contrary, the farmers' argument on appeal accepted that the distributors must have been intermediate purchasers of seed from Advanta but contended that the farmers could ignore whatever were the terms of the contracts between Advanta and the distributor and between the distributors and the farmers because Advanta owed to each of them – as the ultimate end users of the seed – a duty of care in tort.[217]

[282] It must first be noted that the question whether Advanta owed a duty of care to the farmers who planted the seed cannot be resolved in the abstract, and as so framed. As Gageler J recognised in *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* "[a] duty of care at common law is a duty of a specified person, or a person within a specified class, to exercise reasonable care within a specified area of responsibility to avoid specified loss to another specified person, or to a person within another specified class."[218] Any contended for duty of care must be capable of definition at least by reference to (1) the person or persons who owe the duty, (2) the person or class of persons to whom they owe the duty, and (3) the kind of risks of harm they must take reasonable care to minimise or avoid.[219] These

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214 Primary judgment at [115] to [123].

215 Primary judgment at [114] and [124] to [126].

216 Primary judgment at [164].

217 The farmers also advanced a misleading and deceptive conduct case, but it is not necessary to consider that case further.

218 *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* (2014) 254 CLR 185 [169] (***Brookfield Multiplex***).

219 Cf *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 487 per Brennan J. See also *Swick Nominees Pty Ltd v Leroi International Inc (No 2)* (2015) 48 WAR 376 (***Swick Nominees***) per Buss JA at [115] to [116].

elements at least must be clear before a determination can be made as to whether the duty exists.[220]

[283] Although the primary judge was correct to criticise the farmers' pleading as failing to articulate the alleged duty of care with precision, the nature of the duty of care which they must be taken to have advanced was nevertheless capable of being discerned with reasonable clarity. I observe:

(a) The farmers' pleaded case was that Advanta was required to take reasonable precautions during the processes of seed production to avoid a risk of harm to the farmers through the sale of seed during the claim period (namely between 2010 and 2014).

(b) The pleading may be taken to have defined the relevant content of the duty by suggesting that discharge of the duty required the adoption of production processes which included:

(i) comprehensive rogueing and crop inspection at each stage of the production process to ensure purity of the seed produced;

(ii) complying with isolation distances sufficient to prevent cross-pollination with wild sorghum, including seed-shattering forage-type sorghum plants; and

(iii) testing the seed to determine whether it did contain shattercane[221] seed and/or any other off-type contaminant similar to shattercane.

(c) The kind of risk of harm which was to be avoided was that which the farmers alleged actually came to pass, namely the risk that the farmers would purchase and then plant contaminated seed with the result that shattercane would mature within the sorghum crop and drop seed and the farmers would suffer economic loss in the form of:

(i) reduced income in particular years because the farmers had to change farming practices (including, in some cases, by changing to crops other than sorghum) in response to the shattercane infestation and those changed farming practices resulted in less profits than would have been obtained if the farmers had continued to grow sorghum; and/or

(ii) increased expenditure in the form of the cost of shattercane mitigation and eradication measures; and/or

(iii) a diminution in the present value of their farming businesses caused by the alleged permanence of the adverse impact on income and expenditure of the businesses.

[284] Accordingly, at trial (and as the primary judge recognised) the contended for duty of care was a duty:

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220 It has also been said that if the content of the duty cannot be articulated with reasonable clarity, that may cast doubt on the existence of the duty: see *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 (***Crimmins***) at [5] per Gleeson CJ; *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 at [8] per Gleeson CJ; *Vairy v Wyong Shire Council* (2005) 223 CLR 422 at [59]-[60] per Gummow J. In the present case the content of the duty was capable of being so articulated, so that issue does not need to be considered further.

221 The term "shattercane" is here used as only as a convenient shorthand for the type of contamination of which the farmers complained.

(a) owed by Advanta, who produced a seed product and introduced it into the chain of commerce by supplying it to distributors in the contemplation that the distributors would sell it to the farmers who would plant it for the purpose of sorghum production and sale as part of their farming businesses;

(b) owed to the farmers, who were the contemplated end users of the seed product who purchased it from distributors and who used the product in their farming businesses in the way contemplated; and

(c) which required Advanta to take reasonable precautions during the production of the product to avoid the risk that, by using the product, the farmers might suffer economic loss in the form of increased farming business expenses and decreased farming business revenue.

[285] Each of these elements was present in the formulations of the duty of care expressed in the farmers' amended notice of appeal and by senior counsel for the farmers during the course of argument.

[286] It is notable that the alleged duty was a duty to take reasonable precautions during the production of a product to avoid a risk that the farmers might suffer pure economic loss consequent upon the use of the product. The farmers did not advance a case in which the duty was said to be a duty to avoid a risk of injury to the farmers' person or property. Nor was injury of that nature alleged to be the mechanism by which the alleged economic loss was suffered. The farmers must be held to that case.

The requisite incremental approach

[287] The dispositive issue in this case is whether the common law should recognise the existence of such a duty of care.

[288] It is clear enough, as the primary judge recognised, that "… recent binding statements of principle by the High Court relevant to the existence of a duty of care in the present case require identification of the 'salient features'".[222]

[289] What is less clear is the methodology which should be employed in the consideration of those "salient features".

[290] It would certainly be wrong to treat the question of the recognition of a duty of care in a novel case as a mere exercise of discretion, unreviewable so long as the judge has had regard to the "salient features". As Gageler J observed in *Brookfield Multiplex* "[w]hether or not a particular duty of care should be recognised in a novel category of case is determined on the understanding that '[t]here are policies at work in the law which can be identified and applied to novel problems, but the law of tort develops by reference to principles, which must be capable of general application.'"[223]

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[222] Primary judgment at [162], citing *Brookfield Multiplex* at [4], [30] and [115]; *Barclay v Penberthy* (2012) 246 CLR 258 at [173]; *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515 (***Woolcock Street Investments***) at [122], [123], [149], [159] and [164]; and *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at [201] and [203].

[223] *Brookfield Multiplex* at [169], citing *Sullivan v Moody* (2001) 207 CLR 562 at [49].

[291] A similar point was recognized in *Howard Smith & Patrick Travel Pty Ltd v Comcare*, when Basten JA (with whom Beazley P and Sackville AJA agreed), made the following observations at [36]:[224]

> "The statements of principles to be applied in determining whether a defendant owes a plaintiff a duty of care have undergone a degree of linguistic metamorphosis over the last two decades. It is now common in this country to require reference to the "salient features" of the relationship between the plaintiff and the defendant. In *Caltex Refineries (Qld) Pty Ltd v Stavar* [2009] NSWCA 258; 75 NSWLR 649, Allsop P provided a list or catalogue of some 17 salient features, described as "a non-exhaustive universe of considerations of the kind relevant to the evaluative task of imputation of the duty and the identification of its scope and content": at [103] and [104]. However, the value of such a catalogue is limited. As noted by McHugh J in *Crimmins* at [77]:
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>> 'Since the demise of any unifying principle for the determination of the duty of care and the general acknowledgment of the importance of frank discussion of policy factors, the resolution of novel cases has increasingly been made by reference to a 'checklist' of policy factors. The result has been the proliferation of 'factors' that may indicate or negative the existence of a duty, but without a chain of reasoning linking these factors with the ultimate conclusion. Left unchecked, this approach becomes nothing more than the exercise of a discretion ... There will be no predictability or certainty in decision-making because each novel case will be decided by a selection of factors particular to itself. Because each factor is only one among many, few will be subject to rigorous scrutiny to determine whether they are in truth relevant or applicable.'"

[292] In the passage quoted from *Crimmins*, McHugh J went on to express the opinion that "… adherence to the incremental approach imposes a necessary discipline upon the examination of policy factors with the result that the decisions in new cases can be more confidently predicted, by reference to a limited number of principles capable of application throughout the category."[225] Hayne J also expressed a preference for proceeding, in that manner.

[293] McHugh J had earlier explained what he meant by "the incremental approach". At [73] his Honour observed:

> "The policy of developing novel cases incrementally by reference to analogous cases acknowledges that there is no general test for determining whether a duty of care exists. But that does not mean that duties in novel cases are determined by simply looking for factual similarities in decided cases or that neither principle nor policy has any part to play in the development of the law in this area. On the contrary, the precedent cases have to be examined to reveal

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224 *Howard Smith & Patrick Travel Pty Ltd v Comcare* [2014] NSWCA 215 at [36].

225 *Crimmins* at 34.

their bases in principle and policy. Only then, if appropriate, can they be applied to the instant case. A judge cannot know whether fact A in the instant case is analogous to fact B in a precedent case unless he or she knows whether fact B was material in that case and, if so, why it was material. Only then can the judge determine whether the facts of the current case are sufficiently analogous to those in an apparently analogous precedent to treat the precedent as indicating whether a duty of care did or did not exist in the current case. By this means, reasons of principle and policy in precedent cases are adapted and used to determine new cases. Very often, the existence of additional facts in the current case will require the judge to explain or justify why they are or are not material. In this way, the reasons in each new case help to develop a body of coherent principles which can be used to determine whether a duty of care does or does not exist in novel cases and which also provide a measure of certainty and predictability as to the existence of duties of care."

[294] Accordingly, in order to determine whether the common law should recognise the existence of an alleged duty of care in a novel case, the appropriate course is to seek to identify appropriate starting points in terms of principle and policy from existing case law and then to discern, having regard to salient features of the novel case, whether there is reason to recognise a duty in that case. As Murphy JA and Edelman J observed in *Swick Nominees* at [387]:[226]

> "… McHugh J [in *Crimmins*] favoured, and the law has developed, an incremental approach where reasoning proceeds by reference to analogous cases. As Lord Devlin said of the extension of duties of care in *Hedley Byrne*, 'the first step in such an enquiry is to see how far the authorities have gone, for new categories in the law do not spring into existence overnight'."

The starting point

[295] The appropriate starting point in terms of principle appears in the judgment of Crennan, Bell and Keane JJ in *Brookfield Multiplex* at [127], where their Honours observed (citations omitted):

> "In *Woolcock Street Investments*, Gleeson CJ, Gummow, Hayne and Heydon JJ accepted that 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. Their Honours said:
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>> 'In *Caltex Oil (Australia) Pty Ltd v The Dredge Willemstadt*, the Court held that there were circumstances in which damages for economic loss were recoverable. In *Caltex Oil*, cases for recovery of economic loss were seen as being exceptions to a general rule, said to have been established in *Cattle v Stockton Waterworks*, that even if the loss was foreseeable,

226 (2015) 48 WAR 376.

> damages are not recoverable for economic loss which was not consequential upon injury to person or property.'

In *Woolcock Street Investments*, the plurality noted that the exception to the general rule for negligent misstatement recognised in cases such as *Mutual Life & Citizens' Assurance Co Ltd v Evatt* and *L Shaddock & Associates Pty Ltd v Parramatta City Council [No 1]* depends on proof of an assumption of responsibility by the defendant and known reliance on the defendant by the plaintiff.

In *Woolcock Street Investments*, *Bryan v Maloney* was explained as an example of a decision based on "notions of assumption of responsibility and known reliance". The plurality said that *Bryan v Maloney*:

> 'depended upon considerations of assumption of responsibility, reliance, and proximity. Most importantly, [the principles that were engaged] depended upon equating the responsibilities which the builder owed to the first owner with those owed to a subsequent owner.'"

[296] The significance of that articulation of principle for the present case is that it establishes that the recognition of the alleged duty of care would be to recognise an exception to that general rule. That must be so because (as discussed at [283] to [286] above) the farmers' claim is for damages for economic loss not consequential upon damage to person or property. It follows, therefore, that the examination of the salient features of the present case is a search for justification for departure from that general rule.

[297] Some propositions concerning the policy of the law may also be usefully identified as starting points.

[298] This is a case in which each of the farmers sought to advance their economic interests by contracting with a distributor to acquire a seed product which the farmer hoped could be used to produce a crop which would in turn generate profit for the farmer's farming business. The essence of the farmers' case is that their expectations were disappointed because the seed product which they purchased carried with it a risk that shattercane might also mature within the sorghum crop generated by the use of the seed. Consequently, sorghum yield would be reduced, they might even have to change crops, business income would be down, business expenditure would be up because of remediation and eradication measures, and, accordingly, business profits would be reduced.

[299] One policy question is whether the common law of the tort of negligence should provide the farmers a remedy by enabling them to leapfrog up the contractual chain to look to the product manufacturer for a remedy rather than to the distributor.

[300] It may be noted that statute law has effectively permitted that course in certain circumstances:

(a) Where a person supplies goods in trade or commerce to a "consumer", s 54 of the *Australian Consumer Law* creates a statutory guarantee that the goods are of "acceptable quality" and s 271 permits that guarantee to be enforced

against the manufacturer of the goods. "Acceptable quality" is defined in s 54 in these terms:

> "(2) Goods are of **acceptable quality** if they are as:
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> (a) fit for all the purposes for which goods of that kind are commonly supplied; and
>
> (b) acceptable in appearance and finish; and
>
> (c) free from defects; and
>
> (d) safe; and
>
> (e) durable;
>
> as a reasonable consumer fully acquainted with the state and condition of the goods (including any hidden defects of the goods), would regard as acceptable having regard to the matters in subsection (3).
>
> (3) The matters for the purposes of subsection (2) are:
>
> (a) the nature of the goods; and
>
> (b) the price of the goods (if relevant); and
>
> (c) any statements made about the goods on any packaging or label on the goods; and
>
> (d) any representation made about the goods by the supplier or manufacturer of the goods; and
>
> (e) any other relevant circumstances relating to the supply of the goods."

(b) But the *Australian Consumer Law* also reveals that the legislature has made the public policy choice not to extend the benefit of the guarantee of acceptable quality to all end users of goods, but to differentiate between end users on the basis of their purpose for acquiring the goods. Thus a person will not be taken to have acquired goods as a "consumer" if the person acquired the goods for the purpose of using them up or transforming them, in trade or commerce in the course of a process of production or manufacture.[227] That constraint would have proved problematic for the farmers in this case because their express purpose for acquiring seed was to plant the seed for the purpose of sorghum production as part of their farming businesses.

[301] Accordingly, a further policy question is whether the common law of the tort of negligence should extend the legal protection available to end users of manufactured goods notwithstanding the limitations imposed by the legislature by the definition of "consumer" or by the considerations adverted to in ss 54(2) and 54(3) of the *Australian Consumer Law*.

[302] The judgment of Crennan, Bell and Keane JJ in *Brookfield Multiplex* also provides an appropriate starting point in relation to each of the policy questions just mentioned. Their Honours acknowledged –

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227 See s 3(2)(b)(i) of the *Australian Consumer Law*.

(a) at [121]:

> "Economic interests are protected by the law of contract and by those torts that are usually described as the economic torts, such as deceit, duress, intimidation, conspiracy, and inducing breach of contract."

(b) at [132]:

> "… the primacy of the law of contract in the protection afforded by the common law against unintended harm to economic interests where the particular harm consists of disappointed expectations under a contract."

(c) at [133] and [134]:

> "Statutory provisions may supplement the common law of contract by providing for special protection to identified classes of purchasers on the ground, for example, that they may not be expected to be sufficiently astute to protect their own economic interests. Part 2C of the *Home Building Act 1989* (NSW) is an example of such a statutory regime.
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> By enacting the scheme of statutory warranties, the legislature adopted a policy of consumer protection for those who acquire buildings as dwellings. To observe that the Home Building Act does not cover claims by purchasers of serviced apartments is not to assert that the Act contains an implied denial of the duty propounded by the respondent. Rather, it is to recognise that the legislature has made a policy choice to differentiate between consumers and investors in favour of the former. That is not the kind of policy choice with which courts responsible for the incremental development of the common law are familiar; and to the extent that deference to policy considerations of this kind might be seen to be the leitmotif of this Court's decision in *Bryan v Maloney*, the action taken by the New South Wales legislature served to relieve the pressure, in terms of policy, to expand the protection available to consumers."

[303] Although it would be wrong to suggest that there is some form of neat compartmentalisation between contract and tort,[228] these passages suggest the primacy of the law of contract as the remedial response provided by the common law in circumstances such as those revealed by the present case. They also recognise that the fact that a particular area of commercial conduct has been the subject of legislative regulation may influence the choices made by judges in the development of the common law. Common law courts should eschew the temptation to encroach into areas which would require a claim to political legitimacy and, accordingly, are more properly the purview of the executive or legislative arms of government.[229]

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228 *Brookfield Multiplex* at [56] to [59] per Hayne and Kiefel JJ.

229 See Stevens, *Torts and Rights* (2007), p 312 *et seq*, cited in *Brookfield Multiplex* at footnote [201].

[304] Notably, in *Brookfield Multiplex*, Gageler J observed:

> "[T]he plurality in *Woolcock Street Investments* noted that the actual decision in *Bryan v Maloney* had by then been "overtaken, at least to a significant extent, by various statutory forms of protection for those who buy dwelling houses which turn out to be defective". The Court of Appeal in the present case referred in detail to the current statutory regime in New South Wales. If legal protection is now to be extended, it is best done by legislative extension of those statutory forms of protection."

Analogous cases

[305] Against the starting points just identified it is appropriate first to turn to a consideration of analogous cases.

[306] The Australian appellate cases which have most directly considered issues concerning a manufacturer's liability in tort for economic loss caused by negligently produced products are:

(a) *Suosaari v Steinhardt*[230];

(b) *Minchillo v Ford Motor Company of Australia*[231];

(c) *Dovuro Pty Ltd v Wilkins*[232]; and

(d) *Swick Nominees*.

[307] *Suosaari* was concerned with negligently manufactured goods which were dangerous to the user and had in fact caused personal injury. The economic loss claimed was consequent upon the personal injury. The case may be distinguished on that basis. It concerned a situation not caught by the general rule expressed in *Woolcock Street Investments* and *Brookfield Multiplex.*

[308] *Minchillo*, however, directly concluded that, putting to one side circumstances in which the product caused personal injury or property damage, a manufacturer of a product does not owe a duty of care to the ultimate consumer of the product to take reasonable care to guard against economic loss to the consumer arising out of a defect in the product rendering it unmerchantable or useless of limited assistance. The Court distinguished *Suosaari* in the manner referred to in the previous paragraph.[233] Although the reasoning adopted in *Minchillo* predated that of *Woolcock Street Investments* and *Brookfield Multiplex*, it does stand as a decision which is directly against the recognition of the alleged duty of care in the present case.

[309] I agree with Morrison JA for the reasons expressed by his Honour that this Court should reject the farmers' contention that *Dovuro* strongly supports a finding of the existence of the alleged duty.

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230 *Suosaari v Steinhardt* [1989] 2 Qd R 477 (***Suosaari***).

231 *Minchillo v Ford Motor Company of Australia* (1995) 2 VR 594 (***Minchillo***).

232 *Dovuro Pty Ltd v Wilkins* (2003) 215 CLR 317 (***Dovuro***), and in the Full Court (2000) 105 FCR 476.

233 *Minchillo* at 599 (Brooking J) and at 618-619 (Ormiston J, with whom Fullagar J agreed).

[310] *Swick Nominees* is the case analogous to the present which contains the most detailed analysis of the relevant law, including by examining *Suosaari*, *Minchillo*, and *Dovuro*. It is appropriate to consider it in a little detail.

[311] Swick carried on business in Western Australia as a drilling contractor engaged principally in mineral exploration drilling. LeRoi was a company incorporated in the United States of America, which carried on business as a designer, manufacturer and supplier of air compressors. Norncott carried on business in Western Australia as a supplier, distributor and repairer of drilling equipment, including as a distributor of LeRoi air compressors.

[312] Swick purchased a LeRoi air compressor from Norncott. The compressor was to be used to supply compressed air for a drilling rig. The air compressor failed on multiple occasions with the result that Swick could not use it until it had been repaired. Swick claimed damages from Norncott and LeRoi for the losses which it suffered as a result of alleged defects in the air compressor, including losses in the form of lost profits during the period when the compressor was unserviceable.

[313] LeRoi's pleading did not admit the existence of the alleged duty, but at trial the written closing address of counsel for LeRoi had accepted that LeRoi did owe Swick a duty of care but had submitted that LeRoi in fact exercised reasonable care. Accordingly, the primary judge did not examine the question of the existence of the duty. In the result, the primary judge agreed with LeRoi that negligence had not been proven and Swick's case against LeRoi failed.

[314] On appeal, Buss JA formed the view that counsel for LeRoi had not attempted to resile from the concession as to the existence of duty and concluded that it was unnecessary to consider the correctness of the proposition that the alleged duty was owed. His Honour went on to consider Swick's challenge on appeal to the rejection of its breach of duty case on the assumption that the alleged duty was owed. His conclusion was that the appeal should be dismissed.[234]

[315] For their part, Murphy JA and Edelman J acknowledged that the issues on appeal all focused upon breach of duty. Their Honours were prepared to dispose of the appeal on premises which they expressly did not necessarily accept, namely that LeRoi had conceded that it owed a duty of care to end users to manufacture or design an air compressor that was of merchantable quality. They concluded that the primary judge was correct to reject the breach of duty case.[235]

[316] Although Murphy JA and Edelman J were content to dispose of the appeal on that basis, they had expressed the view that an assessment of breach of duty first required an answer to the anterior question of the nature of the duty of care.[236] Their Honours persuasively analysed the law affecting that question in an extended *obiter* discussion about which the following points might be made:

(a) Their Honours started with the observation that in *Woolcock Street Investments* McHugh J said that since "the decision of the House of Lords in *Hedley Byrne & Co Ltd v Heller & Partners Ltd*, confusion approaching chaos has reigned in the law of negligence" (citations omitted) in

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234 *Swick Nominees* at [110] to [155] and [347].
235 *Swick Nominees* at [431] to [467].
236 *Swick Nominees* at [358].

circumstances where a plaintiff suffers economic loss that does not result from injury to the plaintiff's person or other property.[237]

(b) They acknowledged that in *Brookfield Multiplex*, Crennan, Kiefel and Keane JJ had said that "the expanded liability for economic loss established by *Hedley Byrne & Co Ltd v Heller & Partners Ltd* depended upon proof of the fact of assumption of responsibility by a person giving advice to another, and that other having relied upon the advice".[238]

(c) But their Honours thought that although assumption of responsibility lay at the core of the speeches in *Hedley Byrne*, their Lordships had also made remarks which could be seen to support an expansion of liability for pure economic loss beyond cases of assumption of responsibility. Their Honours thought that the difficulty came in determining the principle by which any expansion should occur.[239]

(d) Their Honours noted that the Australian approach as endorsed in *Caltex Oil (Australia) Pty Ltd v Dredge Willemstad*[240] and subsequent High Court cases had been to focus on the "salient features" of each particular case to determine whether a duty of care existed.[241] After pointing out difficulties in that approach, their Honours reached a conclusion favouring the incremental approach identified at [294] above.[242]

(e) Their Honours then turned their attention directly to the considerations which might affect the recognition of a duty of care where the claim was by an ultimate purchaser against a manufacturer of defective goods for pure economic loss.

(f) They acknowledged that one circumstance in which a duty of care to avoid pure economic loss might be recognised was where the supplier had assumed direct responsibility to the ultimate purchaser or client, albeit that there was no direct contractual relationship between the two. They noted that the decision in *Junior Books Ltd v Veitchi Co Ltd*[243] had been analysed as a case in which a nominated subcontractor had assumed a direct responsibility to a building owner. And they thought that the concept of assumption of responsibility had been endorsed by the High Court in *Brookfield Multiplex*, citing amongst other passages those which highlighted the significance of notions of assumption of responsibility.[244]

(g) Their Honours expressed the view that beyond cases of assumption of direct responsibility there was limited scope for a duty of care being owed by a manufacturer to non-contracting parties to avoid carelessly inflicting pure economic loss.[245] They addressed *Suosaari* noting that it had been distinguished in the subsequent decision of *Minchillo* in the way already

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237 *Swick Nominees* at [368].
238 *Swick Nominees* at [373].
239 *Swick Nominees* at [374].
240 *Caltex Oil (Australia) Pty Ltd v Dredge Willemstad* (1976) 136 CLR 529.
241 *Swick Nominees* at [375] to [384].
242 *Swick Nominees* at [375] to [387].
243 *Junior Books Ltd v Veitchi Co Ltd* [1983] 1 AC 520.
244 *Swick Nominees* at [389] to [391], citing *Brookfield Multiplex* at [22], [27] per French CJ, [50] per Hayne and Kiefel JJ, [115], [122], [128]-[129], [137], [143],[150] per Crennan, Bell and Keane JJ, [180] per Gageler J.
245 *Swick Nominees* at [392].

mentioned.[246] They noted that *Minchillo* had preceded *Bryan v Maloney* and addressed whether the latter decision could be regarded as supporting the recognition of a duty of care, observing:[247]

> "The decision in *Bryan* might have afforded some hope for an action in negligence by ultimate purchasers against manufacturers. The hope would be based upon a loose analogy between, on the one hand, the "salient features" of a relationship involving a builder of premises and the ultimate purchaser of the land on which the premises are built and, on the other hand, the "salient features" of a relationship between a manufacturer of chattels and an ultimate purchaser."

(h) Their Honours concluded that the scope of the analogy was limited for four reasons. First, *Bryan v Maloney* relied heavily on now rejected concept of "proximity" as a conception determinant for the extension of the duty of care to the builder.[248] Second, the nature of the subject matter (namely a house rather than an ordinary chattel) had been regarded as significant in the case.[249] Third, the subsequent decisions of *Woolcock Street Investments* and *Brookfield Multiplex* had distinguished *Bryan v Maloney* on the basis of the presence of legislation in the area, drawing attention to the passages from *Brookfield Multiplex* quoted at [302](c) and [304] above.[250] Their Honours observed that "[t]his reasoning also applies to cases involving the liability of manufacturers to ultimate purchasers, where liability is governed by legislation including detailed provisions in the *Australian Consumer Law 2011* (Cth) concerning liability of manufacturers to consumers."[251] Fourth, *Bryan v Maloney* had not considered the significance of the terms of the initial contract to which the builder had been subject. Their Honours thought that "[a]n assessment of any duty of care between a manufacturer and an ultimate purchaser of goods would also require attention to be directed to the terms of any contract between the manufacturer and the seller of the goods."[252]

(i) Their Honours ultimately did not find it necessary to express a view as to whether they would have recognised a duty of care owed by LeRoi to Swick.[253]

[317] The foregoing examination of analogous cases does not provide support for recognition of a duty of care where the claim is by an ultimate purchaser against a manufacturer of defective goods for pure economic loss, unless the case can be characterised as a case in which manufacturer has assumed direct responsibility to the ultimate purchaser.

The salient features in this case do not justify departure from the general rule

246 *Swick Nominees* at [396].
247 *Swick Nominees* at [400].
248 *Swick Nominees* at [401].
249 *Swick Nominees* at [402] to [403].
250 *Swick Nominees* at [405] to [407].
251 *Swick Nominees* at [408].
252 *Swick Nominees* at [411].
253 *Swick Nominees* at [431] to [432].

[318] In my view, the salient features in this case do not justify departure from the general rule.

[319] First, given the findings that Advanta sold seeds to the distributors in bags marked with a specific disclaimer of responsibility for loss suffered by the ultimate consumer, Advanta most assuredly had not assumed direct responsibility to the farmers. I agree with Morrison JA's objective assessment of the effect of the conditions on the bags and with his Honour's conclusion that they operated as a clear and prominent disclaimer of liability. This is not a case where the farmers have demonstrated assumption of responsibility by Advanta. The question whether it would be possible to advance a case of known reliance notwithstanding the disclaimers (if, say, Advanta could have been shown to know that the end users paid no regard to the conditions despite their prominence) need not be considered because such case was neither pleaded nor put to any Advanta witness.

[320] Second, the conclusion about assumption of responsibility is supported by a consideration of the terms of the contracts to which Advanta had made itself subject, at least insofar as the evidence shed light on that subject. I have mentioned that the primary judge made no findings as to the terms of the contracts made by Advanta with distributors who purchased by straight out sales,[254] but that his Honour did find that there was evidence of the terms of contracts applicable to distributors who took stock on consignment.[255] Those proposed terms too were inconsistent with any relevant assumption of responsibility.

[321] Third, as has been mentioned, the Commonwealth parliament has expanded the legal protection available to end users of goods supplied in trade and commerce, including by creating a remedy directly against manufacturers with whom the end user might have no contractual remedy. But the legislation has made a public policy choice to differentiate between types of end users, in favour of those who meet the statutory definition of "consumer". And the legislature has specified other relevant considerations. I would apply to the present circumstances the observations made by Gageler J in *Brookfield Multiplex* quoted at [304] above. If legal protection is now to be extended to end users who do not meet the statutory criteria, it is best done by legislative extension of those statutory forms of protection.

[322] Fourth, the farmers' argument contended that a feature of the present case was that recognition of the duty of care for which they contended would not amount to recognition of an indeterminant liability for economic loss. The farmers argued that that feature should be regarded as a conceptual determinant for the recognition of a duty of care in a case such as the present. I agree with Morrison JA's rejection of that argument.

[323] Finally, I acknowledge that it was suggested that recognition of the duty of care was justified because the farmers should be regarded as relevantly "vulnerable" to a want of care by Advanta and that this feature would justify recognition of the duty of care for which the farmers contend. I am unable to accept that proposition.

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254 Primary judgment at [113].
255 Primary judgment at [115] to [123].

[324] The primary judge found each of the relevant transactions of sale by a distributor to a farmer was a "sale" and an "acquisition" of goods under applicable *Sale of Goods Acts* because it was a "contract of sale" within the meaning of that legislation.[256] The primary judge found that each of the farmers was a buyer under a sale that was subject to sale of goods legislation that implied a condition that goods bought by description should be of merchantable quality, unless such a term was excluded by the agreement.[257] He found that if the seed was not of merchantable quality, any loss or damage suffered by a farmer caused by breach of the implied term of merchantable quality may have been recoverable from the distributor as seller of the seed as compensatory damages, unless that term was excluded by agreement.[258]

[325] As identified at [280] above, the evidence did not permit the primary judge to make findings as to the terms of the contracts by which the farmers purchased the seed from the distributors. The farmers did not seek to prove that implied terms as to merchantable quality were excluded. The primary judge concluded:[259]

> "On this analysis, at least in theory, each of the plaintiffs might have been able to protect itself from the risk of the loss or damage they allege that they have suffered by an appropriate contractual term in the contract under which it purchased or acquired the contaminated MR43 seed from the relevant distributor."

[326] Even if "vulnerability" was a feature capable of justifying recognition of a duty of care in a case such as the present, it was for the farmers to prove the facts at trial which would justify their suggestion of vulnerability and they did not.

[327] In any event, there are difficulties, as the primary judge recognised[260], with using vulnerability as a conceptual determinant for the recognition of a duty of care in a case such as the present. The vulnerability argument relies in one way or another on the farmers' exposure as end users to the risk caused by Advanta placing into the chain of commerce a product which, unbeknownst to end users who chose that product for their farming businesses, had undesirable characteristics, namely shattercane contamination. But Advanta placed its product into the chain of commerce in bags which physically bore conditions advising that Advanta had disclaimed any liability for loss directly or indirectly arising out of or related to the use of the seed, whether as a result of its negligence or otherwise. That disclaimer was just as much a characteristic of the product (in the sense of a potential impairment on the utility of the product to the end user) as its other undesirable characteristics, yet that characteristic was not latent. An objective analysis would conclude that the disclaimer was just as much a characteristic of the product affecting the end users' choice to acquire that product over other crop seed choices as its other characteristics. In any form of vulnerability analysis in this case, it is artificial to dissociate the undesirable characteristic of shattercane contamination from the undesirable characteristic of prominent disclaimer clauses. In those circumstances, it is difficult to see why any formulation of "vulnerability" should be regarded as a salient feature operating as a conceptual determinant for the recognition of the duty of care alleged in this case. The law of tort should not be

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256 Primary judgment at [166].
257 Primary judgment at [168] to [169].
258 Primary judgment at [168] to [169].
259 Primary judgment at [170].
260 Primary judgment at [191].

turned into a remedy for inequality of bargaining power, not least because, again, that area of commercial unfairness has been the subject of legislative regulation and any increased protection for persons in such a position is best done by legislative extension of such protection.

[328] The result is that I conclude that the examination of the salient features of the present case does not provide justification for the expansion of the protection available to commercial actors in the position of the farmers beyond that which they might have obtained in contract, or under applicable statute law. The common law of tort should not recognise the duty of care for which the farmers contend.

[329] As the contention that the trial judge erred by failing to recognise that Advanta owed a duty of care to the farmers was the only issue pressed on appeal, the appeal must fail.

The notice of contention

[330] As the appeal has failed, it is not necessary to determine the questions raised by the notice of contention.

[331] However, for completeness, I record that I agree with Morrison JA. If, contrary to my view, Advanta did owe the farmers a duty of care to take reasonable precautions during the production of the seed to avoid the risk that, by using the seed, the farmers might suffer economic loss to their farming businesses in the form of increased expenses and decreased revenue, the farmers' cause of action for damages for breach of that duty would have accrued when harm of that nature was suffered. On that analysis, the primary judge's conclusion that the farmers' cause of action was not statute barred must have been correct. Advanta's argument on the notice of contention invited the Court to consider when a different cause of action founded upon a duty to avoid causing a different sort of harm might have accrued. That was not to the point.

Disposition of the appeal

[332] I agree with the orders proposed by Morrison JA.

[333] **WILLIAMS J:** I agree with the reasons of Morrison JA and the additional reasons of Bond JA. Further, I agree with the orders of Morrison JA.