

SUPREME COURT OF QUEENSLAND

REGISTRY: BRISBANE

NUMBER: 4103/17

Plaintiff:

MALLONLAND PTY LTD

ACN 051 136 291

AND

Defendant:

ADVANTA SEEDS PTY LTD

ACN 010 933 061

AMENDED REPLY OF THE PLAINTIFF

The Plaintiff relies on the following facts in reply to the Amended Defence of the Defendant:

1. The Plaintiff adopts the admissions made by the Defendant in its Amended Defence filed ~~5 June 2016~~ 28 November 2017 (the Amended Defence).
2. The Plaintiff joins issues with those facts which were either not admitted or denied in the Amended Defence.
3. As to paragraph 2 of the Amended Defence the Plaintiff:
 - (a) admits the facts pleaded in sub-paragraphs ~~(d)~~ and (e);
 - (b) denies that facts pleaded in sub-paragraph (f) and says that shattercane is recognised within the agricultural industry as being a noxious weed and is classified as an invasive and exotic species in North America;
 - (c) save as aforesaid joins issue with those facts which the Defendant denies or does not admit;
 - (d) denies the facts pleaded in subparagraphs 2(g)(i) and (ii) on the basis that the term "shattercane" is commonly used and understood by persons involved in

AMENDED REPLY

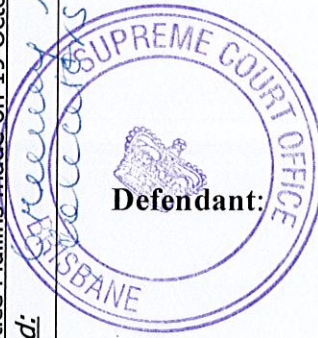
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Amended on 5 December 2017 pursuant to the
Order of Justice Mullins made on 19 October
2017. Signed:

*Creevey Russell
Lawyers for the Plaintiff*



the cultivation of sorghum as referring to 'sorghum bicolor' (subspecies drummondii) which is a plant which has the characteristics and attributes pleaded in paragraph 31 and 32 of the Third Amended Statement of Claim (3ASOC).

Particulars

A. The term "shattercane" was used by the Defendant in an Amended Statement of Claim (by which it sought contribution from another defendant) filed on 25 June 2015 in Griffiths and Ors v. Pacific Seeds Pty Ltd and anor (Supreme Court of Queensland, Brisbane Registry, Number 12345/13) in which the Defendant said that "the Plaintiffs allege that the quantity of Stock purchased from the Second Defendant was contaminated by Shattercane seed, a weed seed" thereby showing both an understanding of the meaning of the term "shattercane" and the general use of that term within the industry;

B. The term "shattercane" is identified by the Australian Government Department of Health, Office of Gene Technology Regulator in "The Biology of Sorghum bicolor (L.) Moench Subsp. Bicolor (Sorghum) Version 1.1: July 2017 at page 44 table 9:

[http://www.ogtr.gov.au/internet/ogtr/publishing.nsf/Content/5DCF28AD2F3779C4CA257D4E001819B9/\\$File/Sorghum%20Biology%20Version%201.1%20July%202017.pdf](http://www.ogtr.gov.au/internet/ogtr/publishing.nsf/Content/5DCF28AD2F3779C4CA257D4E001819B9/$File/Sorghum%20Biology%20Version%201.1%20July%202017.pdf)

C. The term "shattercane" is identified by Biosecurity Australia and the Australian Government Department of Agriculture and Water Resources in "Final IRA Report – Import risk Analysis for the Importation of bulk maize (Zea mays L.) from the United States of America" October 2002 at page 109:

http://www.agriculture.gov.au/SiteCollectionDocuments/ba/plant/ungroupeddocs/fin_ira_maize.pdf

(e) joins issue with the any conclusion pleaded in subparagraph 2(g)(iii).

3A. As to paragraph 2A of the Amended Defence the Plaintiff:

(a) does not admit the facts pleaded in subparagraphs 2A(b) and (c) so far as they relate to untreated seed as, despite enquiry, the properties of untreated MR43

seed and the use to which such untreated seed can be put are unknown to the Plaintiff;

- (b) denies the facts pleaded in subparagraph 2A(c) as MR43 is defined in paragraph 3 of the 3ASOC as being 'MR43 Elite' which is a type of seed which is treated with a number of treatments including the insecticide "Cruiser 600FS", the fungicide "Thiraflo", and the seed safener "Concep II";
- (c) admits the facts pleaded in subparagraph 2A(d);
- (d) says that, for the sake of clarity, the Plaintiff's action is restricted to MR43 seed (as that term is defined in the 3ASOC);
- (e) save as aforesaid joins issues with those facts which are denied therein.

4. As to paragraph 4 of the Defence the Plaintiff:

- (a) admits the facts pleaded in sub-paragraph (a);
- (b) denies that MR43 seed did not contain shattercane seed or that shattercane seed was not present in the MR43 seed distributed by the Defendant and says that the MR43 seed purchased by the Plaintiff and Group Members:
 - (i) did contained shattercane seed;
 - (ii) was purchased packaged in the manner set out in paragraph 7(d) of the Statement of Claim 3ASOC;
- (c) denies that the Plaintiff and each Group Member of Claimant did not suffer loss and damage due to the presence of shattercane seed in MR43 seed distributed by the Defendant for the reasons set out in paragraphs 6(f); 6(g)(iv), 6(h), 38, 46 and 47 the Statement of Claim 3ASOC;
- (d) denies that shattercane did not contaminate any Group Members' or Claimants' land or any land which the Plaintiff had an interest as such allegation is untrue.
- (e) save as aforesaid joins issue with those facts which the Defendant denies or does not admit.

5. The Plaintiff admits the facts pleaded in subparagraph 5(a) to (c) of the Amended Defence.

5A. As to subparagraph 5(d) of the Amended Defence the Plaintiff:

- (a) denies that it, or any Group Member, suffered actual loss when MR43 was first planted and repeats and relies on the facts pleaded in subparagraphs 6(f), 6(g)(iv) and paragraph 26A of the 3ASOC;

- (b) says that when the Shattercane seed was planted the Plaintiff and Group Members did not suffer any damage. Real (as opposed to nominal) damage was only suffered by the Plaintiff and Group Members when there was a measurable impact on the yield of sorghum harvested (such date being at its earliest May 2012).

6. As to paragraph 6 of the Amended Defence the Plaintiff:

- (a) ~~denies the facts pleaded in sub-paragraph (c)(iv) and says that the characteristics of shattercane are that it contaminates and infects land on which it is planted (or which it infests naturally) in that it germinates, propagates and multiplies on the land and thereby has an effect on the commercial farming of that land as it competes vigorously with any other planted crop and reduces their yield;~~
- (b) ~~denies the facts pleaded in sub-paragraphs (c)(v) and (vi) and says that the Plaintiff's land (described as "the Properties" in paragraph 11(e) of the Statement of Claim) was only infected with shattercane immediately after the land was planted with MR43 seed. To the extent necessary and for the purpose of its negligence case only the Plaintiff will also rely on the doctrine of *res ipsa loquitur*.~~
- (c) ~~admits the facts pleaded in sub-paragraph (c)(vii)(A);~~
- (f) ~~does not admit the facts pleaded in says with regard to sub-paragraph (c)(ix)(B) the Plaintiff says that MR43 seed (as defined in paragraph 3 of the 3ASOC) was treated with the insecticide "Cruiser 600FS", the fungicide "Thiraflo", and the seed safener "Concep II" with as the full extent of the chemical or other processes by which MR43 seed was treated are presently unknown to the Plaintiff;~~
- (g) save as aforesaid joins issue with those facts which the Defendant denies or does not admit and further says:
- (i) the characteristics of shattercane are that it contaminates and infects land on which it is planted in that it germinates, propagates and multiplies on the land and thereby has an effect on the commercial farming of that land as it competes vigorously with any other planted crop and reduces their yield;
- (ii) the Plaintiff's land (described as "the Properties" in paragraph 11(e) of the 3SOC Statement of Claim) was only infected with shattercane after the land was planted with MR43 seed. To the extent necessary and for

the purpose of its negligence case only the Plaintiff will also rely on the doctrine of *res ipsa loquitur*.

~~7. As to paragraph 9(e) of the Amended Defence the Plaintiff admits that MR43 seed was sold in Queensland only by retailers authorised by the Defendant to resell MR43 seed.~~

7. As to paragraph 9(b) of the Amended Defence the Plaintiff repeats and relies on the facts pleaded in subparagraphs 3A(b) and (d) herein

7A As to subparagraph 10A(d) of the Amended Defence, the Plaintiff says that the definition of "Group Members" found in paragraph 6 of the 3ASOC is restricted to persons who purchase MR43 seed from a Distributor who was authorised by the Defendant to sell MR43 seed or who were jointly engaged in farming activities with a person who so purchased MR43 seed.

7B As to subparagraph 12(b)(iv) of the Amended Defence the Plaintiff:

- (a) denies that the Label was prepared in conformity with the Code as it:
 - (i) did not set out the proportion of each species which was contained in the MR43 seed bags as the Label did not disclose that the bags also contained Shattercane seed;
 - (ii) failed to identify the presence of any shattercane seed in the bags of MR43 sold to the Plaintiff and Group Members;
- (b) denies the conclusions pleaded in subparagraph 12(b)(iv) (B) (C) and (D) on the basis that of the facts pleaded in paragraphs 19 and 20 of the 3ASOC
- (c) says that the Label did not identify the presence of Shattercane in the bags in the circumstances pleaded in paragraphs 19 and 20 of the 3ASOC.

8. As to paragraph 14(b)(ii) of the Amended Defence the Plaintiff denies that the causes of action accrued at the times pleaded therein and say that the relevant causes of action did not accrue until a time when the Plaintiff and/or Group Members would have become aware of the impact and/or existence of shattercane, which was when a sorghum crop was first harvested and a reduced yield was noticed due to the existence of shattercane.

8A. As to subparagraph 15A(b) of the Amended Defence the Plaintiff:

- (a) denies the facts pleaded in subparagraph 15A(b)(i) on the basis:
 - (i) that prior to the planting of MR43 seed on the land there was no shattercane present of the land;
 - (ii) of the facts pleaded in subparagraphs 7(e), 7(h), 35(a), 36(a) and 44(a) and paragraph 34 of the 3ASOC with regard to the existence of Shattercane in the MR43 seed sold and/or produced by the Defendant;
 - (iii) of the facts pleaded in subparagraph 6(g)(ii) of the Amended Reply;
- (b) save as aforesaid the Plaintiff joins issues with the facts which are denies or not admitted therein.

9. As to paragraph 17(c) of the Amended Defence the Plaintiff denies that the effect of shattercane on commercial sorghum crops or on land on which commercial sorghum crops are grown can be lessen or controlled by:

- (a) regular cleaning machinery;
- (b) regular crop rotation;
- (c) regular inspection of crops;
- (d) a regular weed control regime in crop and fallow

and says that:

- (e) shattercane is a weed which needs to be eradicated on land in order for that land to be used for sorghum production;
- (f) the eradication of shattercane involves a poisoning process which makes the land unavailable for other cropping during the time that this process is undertaken;
- (g) the eradication process usually is undertake in either spring or summer (when shattercane is active) and consequently land can be used to grow crops in winter or autumn;
- (h) the eradication process could take in excess of 12 up to seven years to complete with the result that the land may not be able to be used for cropping purposes during the whole of this time;
- (i) shattercane propagates naturally on the land but also its spread is increased by harvesting as that process permits an increased rate of the spread of seed;
- (j) the spread of shattercane on infected land is not decreased by the regular cleaning of machinery;

- (k) it is not possible to undertake crop rotation during the period of time when shattercane is being eradicated from the land due to the poisons involved in such process;
- (l) the regular inspection of crops does not eradicate shattercane, although it may cause early detection of an infestation which can be beneficial in the eradication process;
- (m) a normal regular weed control regime will not eradicate shattercane.

10. As to paragraph 18 of the Amended Defence the Plaintiff:

- (a) denies sub-paragraph (b)(i) and says that reasonable foreseeable harm was occasioned by the distribution of MR43 seed;
- (b) denies sub-paragraph (b)(ii) and says that if reasonable care had been undertaken in the manufacture of MR43 seed, such seed should not have contained shattercane seed;
- (c) denies sub-paragraph (b)(iii) for the reasons pleaded in paragraph 4 herein;
- (d) denies sub-paragraph (b)(iv) and for the reasons pleaded in paragraph 9 herein;
- (e) denies sub-paragraph (b)(v) and says that the Plaintiff only claims that a duty of care is owed to itself and Group Members;
- (f) denies sub-paragraph (b)(vi) and repeats and relies on the facts pleaded in paragraph 20 of the 3SOC Statement of Claim;
- (g) denies sub-paragraph (b)(vii) and says that the duty of care could have been discharged by the Defendant ensuring that MR43 seed was manufactured with reasonable care and in such a way that it did not contain shattercane seed;
- (h) denies the conclusion of law pleaded in sub-paragraph(b)(viii) on the basis that such conclusion is incorrect;
- (i) the Plaintiff does not understand and therefore does not plead to sub-paragraph (b)(ix);
- (j) save as aforesaid joins issue with those facts which the Defendant denies or does not admit.

11. As to paragraph 20 of the Amended Defence the Plaintiff:

- (a) admits that the Defendant managed the production of MR43 seed as pleaded in sub-paragraph (b)(iii);
- (b) denies that the MR43 seed purchased by the Plaintiff and Group Members was free of shattercane seed;

- (c) save as aforesaid joins issue with those facts which the Defendant denies or does not admit.
12. As to paragraph 22 of the Amended Defence ~~Defendant~~ the Plaintiff:
- (a) denies that the risk of harm associated with manufacturing MR43 seed which contained shattercane seed was not foreseeable as it was reasonably foreseeable that the risk of planting shattercane seed mixed with MR43 seed would cause the shattercane seed to grow and harm any sorghum crop that had been planted on the land and any future crop until the shattercane was eradicated from the land;
 - (b) denies that the risk of harm associated with manufacturing MR43 seed which contained shattercane seed was not insignificant as there was a real risk that by planting shattercane seed mixed with MR43 seed the shattercane seed would grow and harm any sorghum crop that had been planted on the land and any future crop until the shattercane was eradicated from the land;
 - (c) says that a reasonable person in the position of the Defendant would have taken precautions to ensure that the MR43 seed was manufactured in such a way that it did not contain shattercane seed having regard to:
 - (i) the probability that the harm would occur if care was not taken;
 - (ii) the likely seriousness of the harm; and
 - (iii) the burden of taking precautions to avoid the risk of harm
 - (d) says that consequently the provisions of ss. 9 and/or 10 of the *Civil Liability Act* 2003 (Qld) do not apply;
 - (e) save as aforesaid joins issue with those facts which the Defendant denies or does not admit.
13. As to paragraph 23 of the Amended Defence the Plaintiff denies sub-paragraph(b)(iii) and says that the loss and damage suffered by the Plaintiff and Group Members was caused by the Defendant's breach of its duty of care (as pleaded in paragraphs 33 to 38 of the 3SOC Statement of Claim) and that:
- (a) the breach of duty was a necessary condition to the occurrence of harm as, if the MR43 seed did not contain shattercane seed, the damage would not have occurred; and
 - (b) the scope of liability is appropriate as the loss and damages could not have been avoided by farming practices (as alleged in paragraph 17 of the Amended Defence) for the reasons set out in paragraph 9 herein.

14. As to paragraphs 24 and 25 of the Amended Defence the Plaintiff:
- (a) denies sub-paragraph 24(d) and 25(d) as there was a reasonable possibility that the MR43 seed might be contaminated or contain noxious weeds including shattercane for the reasons set out in paragraphs 14 to 45 of the 3SOC Statement of Claim;
 - (b) denies sub-paragraph 24(e) and 25(f) as by remaining silent as to the possibility of the existence of shattercane in the MR43 seed, the Defendant's conduct amounted to misleading and deceptive conduct for the reasons pleaded in paragraphs 39 to 41 of the 3SOC Statement of Claim;
 - (c) says that by remaining silent on the need to test the MR43 seed for shattercane seed the Defendant engaged in conduct which was misleading or deceptive or likely to mislead or deceived for the reasons pleaded in paragraphs 39 to 41 of the 3SOC Statement of Claim;
 - (d) save as aforesaid joins issue with those facts which the Defendant denies or does not admit.
15. As to paragraph 26 of the Amended Defence the Plaintiff:
- (a) denies sub-paragraph (b)(iv) and says that the silence did induce the Plaintiff and Group Members to believe that there was no shattercane contained in the MR43 seed, which was in fact not true;
 - (b) says that adopting the farming practices referred to in paragraph 17 of the Amended Defence would not have avoided the impact of planting the MR43 seed infected with shattercane for the reasons set out in paragraph 9 herein;
 - (c) save as aforesaid joins issue with those facts which the Defendant denies or does not admit.
16. As to paragraph 29 of the Amended Defence the Plaintiff:
- (a) denies that neither the marketing nor the MisrRepresentations (referred to in paragraph 42 of the 3 SOC Statement of Claim) did not amount to misleading and deceptive conduct for the reasons pleaded in paragraphs 39 to 45 of the 3SOC Statement of Claim and this Amended Reply;
 - ~~(b) did not amount to misleading and deceptive conduct for the reasons pleaded in paragraphs 39 to 45 of the Statement of Claim and this Amended Reply;~~

- (b) denies that the MR43 was properly tested as, if such testing had occurred it would have indicated the existence of shattercane in the MR43 seed;
- (c) save as aforesaid joins issue with those facts which the Defendant denies or does not admit.

17. As to paragraph 33 of the Amended Defence the Plaintiff:

- (a) denies the facts pleaded in sub-paragraph (a) and says that the loss and damages suffered by the Plaintiff and Group Members was caused by the alleged breaches by the Defendant of the TPA or the ACL;
- (b) says that adopting the farming practices referred to in paragraph 17 of the Amended Defence would not have avoided the impact of planting the MR43 seed infected with shattercane seed for the reasons set out in paragraph 9 herein;
- (c) denies that the conduct of the Defendant was too distant or remote from any breach of the TPA or ACL for the reasons pleaded herein.

18. As to paragraph 34 of the Amended Defence the Plaintiff denies that the loss and damage of the Plaintiff and any Group Members should be reduced or extinguished by the contributory fault or negligence of the Plaintiff and/or Group Members by virtue of s. 10 of the *Law Reform Act* 1995 (Qld) or, in relation to any claim under s. 52 of the TPA by virtue of s. 82(1B) of that Act, and/or in relation to any claim under s. 18 of the ACL, by virtue of s. 37B of that Act, as adopting the farming practices referred to in paragraph 17 of the Defence would not have avoided the impact of planting the MR43 seed infected with shattercane seed for the reasons set out in paragraph 9 herein.

19. As to paragraph 35 of the Amended Defence the Plaintiff:
- (a) repeats and relies on paragraphs 40 to 42, 44, 45 and 47 of the 3SOC;
 - (b) repeats and relies on the facts pleaded in paragraphs 2, 14, 15 and 16 herein;
 - (c) joins issue with the facts which are denied or not admitted therein.

Signed: *Greavey Russell lawyer*

Description: *Solicitors for Plaintiff*

Date: *5 December 2017*

This amended pleading was settled by D J Campbell QC and Blair Hall of Counsel