SUPREME COURT OF QUEENSLAND

REGISTRY: BRISBANE

NUMBER: 4103/17

Amended on 13 July 2018 pursuant to the Order of Justice Mullins made on 8 June 2018.
Signed: [signature]

Plaintiff: **MALLONLAND PTY LTD**
ACN 051 136 291

AND

Second Plaintiff: **ME & JL Nitschke Pty Ltd ACN 074520228 (as trustee for the Nitschke Family Trust)**

Defendant

ADVANTA SEEDS PTY LTD
ACN 010 933 061

AMENDED REPLY OF THE PLAINTIFFS

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 Second Amended Defence filed 2 July 2018 (the **Defence**).

2. The Plaintiffs join issues with all matters which were either not admitted or denied in the Defence.

3. As to paragraph 1A of the Defence the Plaintiffs:

   (a) admit the facts pleaded in sub-paragraphs (a) to (c) and (e);

Creevey Russell Lawyers
Level 24, 300 Queen Street
BRISBANE QLD 4000

Ph: (07) 3009 6999
Fax: (07) 3009 6599
Ref: DCJ:170260

(b) do not admit the facts pleaded in sub-paragraph (d) as, despite enquiries, they are unable to determine the truth or otherwise of the facts pleaded therein.

4. As to paragraph 1B of the Defence the Plaintiffs:

(a) do not admit the facts pleaded in sub-paragraphs (a), (b), (d) to (f) as, despite enquiries, they are unable to determine the truth or otherwise of the facts pleaded therein.

(b) deny the facts pleaded in sub-paragraph (c) on the basis that it was not a common occurrence for a grain sorghum crop to contain an "off-type" of the type referred to in paragraph 1B of the Defence.

5. As to paragraph 1C of the Defence the Plaintiffs

(a) do not admit that the term "shattercane" is American in origin as, despite enquiries, they are unable to determine the truth or otherwise of this fact;

(b) say that the term "shattercane" is a taxonomic term in the sense that it is used by persons involved in the cultivation of sorghum to describe a type of grassy off-type sorghum;

(c) say that the term "grassy off-type sorghum" is descriptive of "shattercane";

(d) do not admit or adopt the term "Australian grassy off-type sorghum" or "AGOTS" as they are unaware of such a term or terms being used by persons involved in the cultivation of sorghum and are unaware of any difference between it and a "grassy off-type sorghum" pleaded in the Fourth Amended Statement of Claim (**4ASOC**);

(e) do not admit the facts pleaded in sub-paragraph (d) as, despite enquiries, they are unable to determine the truth or otherwise of the facts pleaded therein.

6. The Plaintiffs do not admit the facts pleaded in sub-paragraphs 4(c) to (j) of the Defence as, despite enquiries, they are unable to determine the truth or otherwise of the facts pleaded therein.

7. The Plaintiffs do not admit the facts pleaded in paragraph 4A as, despite enquiries, they are unable to determine their truth or otherwise of the facts pleaded therein.

8. As to paragraph 5 of the Defence:

   (a) to the extent that the paragraph is dealing with MR43 seed which is not "MR43 Elite" (which is defined as "MR43" in the 4ASOC) the Plaintiffs admits the facts pleaded in paragraph 5 of the Defence;

   (b) save as aforesaid the Plaintiffs do not admit the facts pleaded therein as, despite enquiries, they are unable to determine whether they are true or false.

9. As to paragraph 6 of the Defence, to the extent that the Defendant claims that any damage of whatever kind suffered as a consequence of the planting of MR43 seed was suffered more than 6 years prior to the filing of the Claim herein, the Plaintiffs say that they and the Group Members to whom these proceedings relates are growers who first suffered actual loss and damage in the form of reduced income and/or increased expenditure due to the presence of shattercane seed in MR43 seed no more than 6 years prior to the commencement of the present action.

10. The Plaintiffs do not plead to sub-paragraph 7(a) as no material facts are pleaded therein and only comments made

11. As to paragraph 17 of the Defence the Plaintiffs admit that the reference in sub-paragraph (b) to "sub-paragraph (g)"is a reference to "sub-paragraph 6(g)".

12. The Plaintiffs do not admit the facts pleaded in sub-paragraph 18(f) as, despite enquiries, they are unable to determine the truth or otherwise of the facts pleaded therein.

13. The Plaintiffs deny the facts pleaded in sub-paragraphs 18(g) because the bags of MR43 purchased by the Plaintiffs were not clearly and prominently marked as described in sub-paragraph 18(g) of the Defence.

14. The Plaintiffs do not admit the facts pleaded in sub-paragraphs 19(e) to (g) as, despite enquiries, they are unable to determine the truth or otherwise of the facts pleaded therein.

15. As to sub-paragraph 20(i)(i) of the Defence:

    (a) with regard to the Defendant's claim that "it was appropriate to test sorghum, but only by way of visual purity test and electrophoresis testing", the Plaintiffs do not admit such claims as, despite enquiries, they are unable to determine the truth or otherwise of the facts pleaded therein;

    (b) save as aforesaid the Plaintiffs adopts the admissions made therein.

16. The Plaintiffs do not admit the facts pleaded in sub-paragraph 22(f) as, despite enquiries, they are unable to determine the truth or otherwise of the facts pleaded therein.

17. The Plaintiffs deny the facts pleaded in sub-paragraph 26A(d) that "the MR43 seed purchased in 2010 caused the [First] Plaintiff actual loss and damage upon the planting, growing or alternatively harvesting of the crop in the 2010 – 2011 season, to an extent that was not negligible but still of sufficient measure to constitute loss and damage for the purposes of the relevant limitation statute" on the basis that:

    (a) the harvesting of the 2010-2011 crop took place on a date after 24 April 2011 and therefor within the relevant limitation statute period;

    (b) no actual loss and/or damages in the form of reduced income and/or increased expenditure arose due to the presence of shattercane on the First Plaintiffs' land prior to 24 April 2011;

    (c) no "sufficient measure", or any other measure, of loss and damage to the First Plaintiff arose prior to 24 April 2011caused by the existence of shattercane.

18. The Plaintiffs do not admit the facts pleaded in sub-paragraph 26C(f) as, despite enquiries, they are unable to determine the truth or otherwise of the facts pleaded therein.

19. The Plaintiffs deny the facts pleaded in sub-paragraph 26E(d) that "the MR43 seed purchased in 2010 caused the [Second] Plaintiff actual loss and damages, upon the planting, growing or alternatively harvesting of the crop in the 2010 – 2011 season, to an extent that was not negligible but still of sufficient measure to constitute loss and damages for the purposes of the relevant limitation statute" on the basis that:

    (d) the harvesting of the 2010-2011 crop took place on a date after 24 April 2011 and therefor within the relevant limitation statute period;

    (e) no actual loss and/or damages in the form of reduced income and/or increased expenditure arose due to the presence of shattercane on the Second Plaintiff's land prior to 24 April 2011;

    (f) no "sufficient measure", or any other measure, of loss and damage to the Second Plaintiff arose prior to 24 April 2011 caused by the existence of shattercane.

20. As to sub-paragraph 31(c) the Plaintiffs:

    (a) do not admit the use of the term "AGOTS" for the reasons explained at sub-paragraph 5(d) above;

    (b) deny that shattercane (or AGOTS or such other off-type contaminant as was contained in the MR 43 Seed), once emerged upon cultivation, was readily susceptible to treatment and early removal with a growing season or two growing seasons (by the steps identified at sub-paragraphs 31(c)(i) – (ii) of the Defence or at all) because shattercane (or AGOTS or such other off-type contaminant as was contained in the MR 43 Seed) has the characteristics described at paragraphs 31 and 32 of the 4SOC including a 12 year seed dormancy.

21. The Plaintiffs do not plead to sub-paragraph 33(d) as no material facts are pleaded and only conclusions of law raised which are not supported by the pleaded facts.

22. The Plaintiffs do not plead to sub-paragraph 34A(a) as no material facts are pleaded and the sub-paragraph only consists of comment.

23. The Plaintiffs do not plead to sub-paragraph 34A(b) as no material facts are pleaded, the sub-paragraph consists of comment, and to the extent that any conclusions of law are pleaded (if that be the case) no material facts are pleaded to support such conclusions.

24. The Plaintiffs deny the conclusion of law pleaded in sub-paragraphs 34A(c) on the basis that the Plaintiffs' claims cannot be properly categorised as claims for pure economic loss

25. As to sub-paragraphs 34A(d) to (i) ;

    (a) to the extent that the sub-paragraphs propose facts or matters which are different to those pleaded in the 4ASOC, the Plaintiffs join issue with the Defendant;

    (b) the Plaintiffs do not plead to any conclusions of law as no material facts in support of such conclusions are pleaded.

26. The Plaintiffs admit paragraph 35(b) of the Defence.

27. The Plaintiffs do not admit the facts pleaded in sub-paragraphs 35(h) (k) and (l) as, despite enquiries, they are unable to determine the truth or otherwise of the facts pleaded therein.

28. As to sub-paragraph 35(m) the Plaintiffs:

    (a) admit that no Distributor or any representative of a Distributor informed either of the Plaintiffs of a product notice and recall relating to MR43 seed;

    (b) say that (with regard to the First Plaintiff) in about mid-April 2012 (but prior to harvesting the MR43 crop) Maree Crawford (an agricultural scientist employed by the Defendant) and Mr Bill Smith attended the Wandavale property and after inspecting the sorghum crop told Mr Jenner that they were unable to name

the unusual plants noticed by him but there were a contaminant which had come from MR43 seed. They did not inform Mr Jenner of any product notice and/or product recall with regard to MR43 seed;

(c) save as aforesaid do not admit the facts pleaded therein as, despite enquiries, they are unable to determine the truth or otherwise of those facts.

29. The Plaintiffs do not admit the facts pleaded in sub-paragraph 39(e) as, despite enquiries, they are unable to determine the truth or otherwise of the facts pleaded therein.

30. The Plaintiffs deny that the facts pleaded in sub-paragraph 43(e) amount to an estoppel (in any form) on the basis that the Plaintiffs' reliance on the Representations and the Defendant's silence can be inferred from the nature of the Label and its placement on the bags of seed sold which meant that it was to be read by a purchaser or a person who was to use the seed, which included the Plaintiffs.

31. The Plaintiffs do not admit the facts pleaded in sub-paragraphs 46(g) to (i) as, despite enquiries, they are unable to determine the truth or otherwise of the facts pleaded therein.

32. As to sub-paragraph 46(k) the Plaintiffs deny the allegation that any claim for damages is statute barred under the *Trade Practices Act* 1974(Cth), *Competition and Consumer Act* 2010 (Cth) of state limitation statute on the basis that damage did not accrue until after 24 April 2011.

33. The Plaintiffs do not admit the facts pleaded in Annexures A or B of the Defence as, despite enquiries, they are unable to determine the truth or otherwise of the facts pleaded therein.

~~1. The Plaintiff adopts the admissions made by the Defendant in the Defence filed 5 June 2016 (the **Defence**).~~

~~2. The Plaintiffs joins issues with those facts which were either not admitted or denied in the Defence.~~

3. As to paragraph 2 of the 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.

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

(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;

(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 paragraph 5 of the Defence.

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

(a) denies the facts pleaded in sub-paragraph (e)(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 completes 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(c) 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);

(d) does not admit the facts pleaded in sub-paragraph (c)(ix)(B) as the full extent of the chemical or other processes by which MR43 seed was treated are presently unknown to the Plaintiff;

(e) save as aforesaid joins issue with those facts which the Defendant denies or does not admit.

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

8. As to paragraph 14(b)(ii) of the 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.

9. As to paragraph 17(c) of the Defence the Plaintiff denies that the effect of shattercane on commercial sorghum crops or on land on which commercial sorghum corps 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 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 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 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 therefor 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 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 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 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 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 Defence) for the reasons set out in paragraph 9 herein.

14. As to paragraphs 24 and 25 of the 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 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 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 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 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 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 Defence the Plaintiff:

(a) denies that neither the marketing nor the Misrepresentations (referred to in paragraph 42 of the Statement of Claim) did not amount to misleading and deceptive conduct for the reasons pleaded in paragraphs 39 to 45 of the Statement of Claim and this 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 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 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 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.

Signed: Bruce Russell Lawyers

Description: SOLICITORS for the PLAINTIFFS

Date: 13 July 2018

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