LEVEL TWENTY SEVEN CHAMBERS

Mallonland Pty Ltd & Anor v Advanta Seeds Pty Ltd [2021] QSC 74

First decision under class action regime in QLD - guidance to manufacturers and producers on duty of care and product information disclosure

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Facts of the Case & Decision

The Supreme Court of Queensland dismissed the plaintiff farmers' claim for damages for negligence and misleading or deceptive conduct. The defendant produced seeds for commercial planting, including a variety referred to as MR43. The plaintiffs purchased MR43 seed through a distributor. The MR43 seeds sold to the plaintiffs were contaminated with an off-type plant variety known as "shattercane". The plaintiffs asserted that the presence of shattercane increased their farm operating expenses and decreased grain production, causing damage. While the Court accepted that damage had occurred, it ultimately ruled that no duty of care was owed.

What was the producer's duty of care to the end user?

The Court considered whether a duty of care was owed to the plaintiffs to avoid the risk of economic loss through the supply of contaminated MR43 seed. The plaintiffs submitted that the defendant failed to: ensure the implementation of production processes; conduct a grow out of the contaminated seed before supplying to the public; undertake scientific testing; and warn the plaintiffs about the need to remove the shattercane. The defendant denied that a duty of care was owed on the basis that the damage alleged was pure economic loss and was not reasonably foreseeable, and the warning label attached to the bag of MR43 seeds excluded a duty of care.

While the liability of a producer or manufacturer of goods to an end user for physical loss or damage is well established in the law of negligence, the position in relation to pure economic loss is less clear. Importantly, in the present case, the defendant as the producer of the seeds was not in a direct contractual relationship with the plaintiff.

The Court drew an analogy between *Bryan v Maloney*[1] and the present case. In *Bryan*, the High Court found that a builder of a house owed a duty of care to subsequent purchasers against loss or damage suffered as a result of inadequate footings. However, this case considered the now abandoned principle of proximity and failed to consider the relationship between a manufacturer and a subsequent chattel owner.[2]

The Court also considered *Dovuro Pty Ltd v Wilkins*,[3] which the plaintiffs had relied upon in establishing the duty of care. In *Dovuro*, the relationship between the farmers and Dovuro was one of consumer and manufacturer. Hayne and Callinan JJ indicated that a duty to exercise reasonable care not to subject those consumers (farmers) to risks of injury of which Dovuro had knowledge or ought to have known could extend to the risk of purely economic loss.

However, the Court held that the "salient features" of vulnerability and coherence with existing legal frameworks did not support the existence of a duty of care in this case. The Court accepted the defendant's submission that the terms attached to each bag of seed amounted to a disclaimer of an assumption of responsibility. This negated the existence of a duty of care to avoid economic loss in the event of contamination.

The Court went on to consider the issues of breach, causation and quantum in the event that duty could be established. The Court concluded that factual causation was established on the basis that if the defendant had conducted a grow out of MR43, and had adequately rogued (that is, weeded) the production block, the plaintiffs would not have suffered loss.

Does silence amount to 'misleading or deceptive conduct'?

The plaintiff alleged that multiple non-disclosures and representations made by the defendant constituted misleading or deceptive conduct. However, the Court considered that mere fact of the defendant's silence as to the potential contamination did not establish a state of knowledge that would support an allegation of misleading or deceptive conduct. Further, the plaintiffs failed to lead evidence that the labels attached to the bags of seed misrepresented the varieties contained. The defendant was not expected to notify users of the differences between the 2010/2011 batch of MR43 seeds with previous cultivations of the seed, nor was the defendant obliged to advise

[1] *Bryan v Maloney (1995)* 182 CLR 609, 630.
[2] Bryan v Maloney (1995) 182 CLR 609, 630.
[3] *Dovuro Pty Ltd v Wilkins* (2003) 215 CLR 317.

users of the seed when to remove shattercane or off-type varieties. There was no finding of misleading or deceptive conduct.

Weeds do not constitute property damage

The defendant argued that the loss suffered by the plaintiffs was property damage suffered no later than when the seed was planted, and that the claim was therefore brought out of time. The Court dismissed this defence. The Court applied the reasoning in *Ranger Insurance Co v Globe Seed & Feed Company*[4] to find that a weed infestation does not, of itself, damage anything as the soil remains undamaged.

Group member loss too variable for aggregate damages

The claim was commenced as a representative proceeding under Part 13A of the *Civil Proceedings Act* 2011 (Qld) (CPA). The plaintiffs sought an order under s 103V of the CPA for aggregate damages to compensate the entire group. Under the section, such an order cannot be made unless "a reasonably accurate assessment can be made of the total amount to which group members are entitled under the judgment." The Court found that unlike a representative action in which all members have suffered the same loss, such as where an illegal fee has been charged, the fact and quantum of damage suffered by the group members in this case was individual. Accordingly, an award of aggregate damages would not be appropriate.

Implications for manufacturers and producers

Mallonland Pty Ltd & Anor v Advanta Seeds Pty Ltd provides guidance to manufacturers and producers on the extent of their duty of care to the end users of their products. The judgment also clarifies what methods of product information disclosure are appropriate.

The case is the first decided under the class action regime in Queensland, although discussion of Part 13A is fairly limited in the judgment.

The plaintiffs filed a notice of appeal on 7 May 2021.

Nicholas Andreatidis QC (with D Campbell QC and B Hall) appeared for the plaintiffs, instructed by Creevey Russell Lawyers.

Mei Ying Barnes (with P Dunning QC, G Beacham QC, E Goodwin, L Judd and M Brooks) appeared for the defendant, instructed by Clifford Gouldson Lawyers.

[4] *Ranger Insurance Co v Globe Seed & Feed Company* 865 P 2d 451 (1993).

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