SUPREME COURT OF CANADA

CITATION: Earthco Soil Mixtures Inc. *v.* Pine Valley Enterprises Inc., 2024 SCC 20

APPEAL HEARD: October 17, 2023
JUDGMENT RENDERED: May 31, 2024
DOCKET: 40197

BETWEEN:

Earthco Soil Mixtures Inc.
Appellant

and

Pine Valley Enterprises Inc.
Respondent

- and -

Canadian Chamber of Commerce
Intervener

CORAM: Wagner C.J. and Côté, Rowe, Martin, Kasirer, Jamal and O'Bonsawin JJ.

REASONS FOR JUDGMENT: (paras. 1 to 115) Martin J. (Wagner C.J. and Rowe, Kasirer, Jamal and O'Bonsawin JJ. concurring)

DISSENTING REASONS: (paras. 116 to 185) Côté J.

Earthco Soil Mixtures Inc. *Appellant*

v.

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Present: Wagner C.J. and Côté, Rowe, Martin, Kasirer, Jamal and O'Bonsawin JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Sale of goods — Contracts — Interpretation — Exclusion clauses — Requirements to negative or vary statutory implied conditions — Provincial legislation providing for implied condition in contract for sale of goods by description that goods

will correspond to description — Legislation allowing parties to negative or vary implied condition by express agreement — Exclusion clause in contract between buyer and seller providing that seller not liable for quality of material — Whether exclusion clause was express agreement to oust liability for breach of implied condition that goods must correspond with description — Sale of Goods Act, R.S.O. 1990, ss. 14, 53.

The buyer was hired to work on a municipal project to remediate flooding, which included the removal and replacement of topsoil for drainage. The buyer contacted the seller, a topsoil provider, to obtain topsoil with a specified composition. The seller provided the buyer with laboratory reports from different topsoil samples taken about six weeks prior, and warned against purchasing the topsoil without updated test results. However, the buyer had already missed project deadlines and urgently wanted delivery of the topsoil so as to avoid the imposition of liquidated damages. The buyer therefore waived its right to test the soil and insisted on immediate delivery. The buyer and seller agreed to add two exclusion clauses to the standard purchase order, which stated that the buyer had the right to test and approve the material before it was shipped, and that if the buyer waived those rights, the seller would not be responsible for the quality of the material once it left its facility. After the topsoil was delivered and placed on the project site, water ponding was noted. Testing revealed that there was substantially more clay in the topsoil than the test results had indicated, and the buyer had to remove and replace the topsoil. The buyer sued the seller for damages, alleging that it did not receive topsoil within the range of compositional properties that had been indicated in the test results.

The trial judge dismissed the buyer's action. He found that the contract was for a sale of goods by description within the meaning of s. 14 of Ontario's *Sale of Goods Act* ("*SGA*"), which sets out an implied condition that goods must correspond with their description. He further found that the buyer did not get the topsoil it bargained for, because of the variation between the topsoil that was promised and the topsoil that was delivered. However, he found that the exclusion clauses were an express agreement, pursuant to s. 53 of the *SGA*, to contract out of the implied condition under s. 14 of the *SGA*, despite the fact that the exclusion clauses did not explicitly mention that they were to oust statutorily implied terms and conditions. The Court of Appeal held that the trial judge erred on three extricable questions of law, by: (1) failing to account for how the implied condition in s. 14 of the *SGA* relates to the goods' identity (or description) and not their quality; (2) failing to properly interpret the requirement for explicit, clear and direct language to exclude a statutory condition; and (3) considering the contract's factual matrix beyond its permissible use in interpreting the exclusion clauses. The Court of Appeal held that the term "quality" cannot include "identity" and that the reference in the exclusion clauses to "quality" was not a reference to the implied condition in s. 14 relating to the goods' identity. In the court's view, because the exclusion clauses did not contain words that explicitly, clearly and directly covered the identity of the topsoil, they were insufficient to oust liability under s. 14 of the *SGA*. The Court of Appeal allowed the appeal and substituted a judgment requiring the seller to pay damages.

Held (Côté J. dissenting): The appeal should be allowed and the trial judge's judgment restored.

Per Wagner C.J. and Rowe, **Martin**, Kasirer, Jamal and O'Bonsawin JJ.: To be sufficient for the purposes of s. 53 of the *SGA*, an "express agreement" must be comprised of an agreement to negative or vary a statutorily implied right, duty or liability and such an agreement must be expressly set forth within the parties' contract. The determination as to what qualifies as an express agreement must also be informed by principles of contractual interpretation and the law concerning exclusion clauses, and the paramount consideration must be the objective intention of the parties. In the instant case, the trial judge made no error of law with respect to the exclusion clauses at issue. The objective meaning of the parties' express agreement is that the buyer accepted the risk that the topsoil would not meet the previously supplied specifications concerning its composition if it failed to test what it knew was an organic and changing substance.

The law governing the sale of goods is subject to various legal rules from different sources. While subject to a host of statutory provisions in the *SGA* or other such statutes across the country, a sale is also an agreement that sits within the general common law of contracts and the *SGA* mandates that it be interpreted in conjunction with current contract law principles. Sale of goods statutes were never intended to be exhaustive or comprehensive codes; they ought not to be applied too rigidly or to the exclusion of the freedom of parties to contract within the general limits of the law.

Statutory rules stemming from sale of goods legislation must be related to the law of contract as a whole and such legislation must be interpreted in light of the common law as it stands from time to time and in the present day. In particular, the principles in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, and *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69, which give priority to the parties' intentions, apply to the contracts subject to the *SGA*.

The *SGA* provides statutory protections to contracting parties by implying various rights, duties and liabilities into contracts for the sale of goods, including conditions and warranties. When goods are sold by description, s. 14 of the *SGA* provides an implied condition that the goods correspond with their description. By deeming this to be a condition, the *SGA* provides that correspondence with description is fundamental to the purpose of a contract. When this implied condition is in play, it becomes very important to determine what aspects of the goods form part of the goods' description, which is a fact-specific determination. Not every statement made about the goods is a protected part of its description under s. 14: description is tied to the identity and only protects those terms which identify the subject-matter of the sale. The case law has distinguished between traits that go to the identity of the goods (which pertains to description), and those which go to the quality of the goods (which pertains to merchantability and fitness for purpose). The identity of a good should be limited to words whose purpose is to state or identify an essential part of the description of the goods. The question to be asked for the purpose of s. 14 is whether the buyer could

fairly and reasonably refuse to accept the physical goods proffered to them on the ground that the failure of the goods to correspond with that part of what was said about them in the contract makes them goods of a different kind from those the buyer had agreed to buy.

Despite the importance of implied statutory conditions, parties remain free to take their contracts outside the presumptive provisions of the *SGA*. Section 53 permits parties to vary or negative obligations imposed by the *SGA*, including by express agreement. To qualify under the "express agreement" branch of s. 53, there must be both an agreement to vary or negative a liability under a contract of sale, and that agreement must be express. An agreement will be express if made in distinct and explicit terms and not left to inference. The parties must have expressly and unambiguously used language that signals their intention to override the *SGA*. Despite the requirement for an express agreement, s. 53 does not require express language; there is no requirement for particular magic words. It cannot be said that s. 53 is only satisfied if parties who agreed to an exclusion clause use the words "condition" and "identity" to oust the implied condition of correspondence to description. Applicable case law mandates a shift away from a method of contractual interpretation dominated by technical rules of construction and requires that words be understood in their factual matrix, with the paramount goal of ascertaining the parties' objective intention.

The "agreement" part of s. 53 is often the crux of the matter and it requires a meeting of the minds about what rights, duties or obligations are being changed and

how they are being varied or negatived. The terms of that agreement must also be certain and mutually agreed upon. The existence, extent and meaning of the statutory term "agreement" will be determined by reference to the common law principles concerning the formation, interpretation and enforcement of contracts. In *Sattva*, the Court stated how agreements should be interpreted and reviewed, and explained how the jurisprudence has shifted towards a more flexible, practical, and common-sense approach with a view to ascertain the objective intention of the parties. When seeking the meaning of a document, the focus of the court is properly on what the parties objectively intended and what they reasonably understood their words to mean. The meaning of the words of a contract can be derived from reference to various contextual factors from its surrounding circumstances, which are often referred to as the factual matrix.

Exclusion clauses, such as those under s. 53 of the *SGA*, are subject to their own set of legal rules because they raise distinct policy considerations. *Tercon* sets out three steps to help assess the enforceability of an exclusion clause. First, the court must determine whether an exclusion clause even applies in the circumstances, which necessarily depends on an assessment of the intention of the parties. It is at this step where a court should determine whether there is an express agreement between the parties that is sufficient to meet the requirements of s. 53. If the exclusion clause is found to be valid at the first step, the second step requires a court to consider whether the exclusion clause was unconscionable at the time the contract was made. Third, even if not unconscionable, a court may consider if there is some overriding public policy

consideration that outweighs the strong public interest in the enforcement of contracts and if there is, the court may refuse to enforce the otherwise valid exclusion clause. The modern contractual interpretation principles from *Sattva* apply to contracts containing exclusion clauses, especially at the first step of the *Tercon* test. *Sattva*'s direction to consider the surrounding circumstances when interpreting the terms of a contract means exclusion clauses must be analyzed in light of their purposes and commercial context.

In the instant case, the exclusion clauses exempt the seller from any statutorily imposed liability under s. 14 of the *SGA*. The word "quality" in the exclusion clauses must be interpreted in a manner that is consistent with the surrounding circumstances. The buyer was a commercial purchaser with years of experience in buying large quantities of topsoil. Both parties were aware of the changing nature of topsoil and that the existing test results were dated. The parties were free to negotiate and allocate the risk of not testing the topsoil. The buyer was in a rush to receive the topsoil, given the looming threat of liquidated damages. The buyer deliberately assumed the risk through its own conscious strategic decision. The parties came to an express agreement about the allocation of risk, by using direct, clear and express language in their contract, which demonstrated that their objective intention was for the buyer to waive its right to pursue the seller for any liability relating to the topsoil. The trial judge made no error in making such findings.

Per **Côté** J. (dissenting): The appeal should be dismissed. The exclusion clauses are not an "express agreement" within the meaning of s. 53 of the *SGA* to exclude the seller's liability for a breach of the implied condition in s. 14 that goods sold by description will correspond with their description. An exclusion clause it not an express agreement under s. 53 with regard to a particular implied condition if it requires deviating from the text of the contract to determine what the surrounding circumstances would deem the parties to have written, instead of interpreting the meaning of the words actually used by the parties. The clear and direct language chosen by the parties in the exclusion clauses limited the exclusion of liability to defects in quality within the meaning of s. 15 of the *SGA*, and could not be expanded to cover any defects relating to the identity of the soil.

The *SGA* protects buyers by implying certain conditions into each contract for the sale of goods, such as the statutory conditions that the goods will correspond with their description (s. 14), will be fit for their purpose (s. 15 para. 1), and will be of merchantable quality (s. 15 para. 2). Each of these statutory conditions is distinct, and it is important not to conflate them. Section 14 sets out an implied condition that the goods delivered under a contract for the sale of goods by description will correspond with their description. Establishing a breach of s. 14 involves a two-step analysis. It is first necessary to determine whether the contract is a sale by description within the meaning of s. 14. If so, it is then necessary to determine whether the goods delivered corresponded with their agreed-upon description. This is a fact-specific determination that turns on whether a statement describing the goods being sold was made and

reasonably relied upon. Section 14 is to be distinguished from s. 15, which is broadly directed at the quality of goods. In particular, s. 15 para. 1 sets out an implied condition of fitness for purpose, and s. 15 para. 2 sets out an implied condition of merchantable quality.

The *SGA* does not restrict the parties' common law freedom to shape their agreement as they see fit. They are free to contract out of implied terms, and s. 53 precisely delineates the manner in which they may demonstrate their intention to do so. One route for ousting liability arising in the context of the *SGA* is that the parties are free to structure their own contract as they see fit by express agreement. As set out by the Court in *Hunter Engineering Co. v. Syncrude Canada Ltd.*, [1989] 1 S.C.R. 426, clear, direct, and unambiguous language is required to oust a statutory protection by express agreement. Any intention to exclude liabilities arising from the *SGA* must be expressed in language inconsistent with the specific content of the terms implied by the statute. Reference to a different legal duty will not suffice. Parties are not required to use magic words; rather, they must use language that is clearly and directly aimed at excluding the content of the conditions they purport to vary. Where only a particular duty is excluded by the parties' language, all other duties remain. Should the parties fail to use language that unambiguously encompasses the implied condition or warranty in question, no express agreement can be said to have been concluded. An attempted exclusion of liability may fail because the words used by the parties are directed at excluding liability with respect to the quality of the goods when the defect is instead related to their description.

In the sale of goods context, the exercise of contractual interpretation must proceed on the assumption that the parties objectively intended to accept the rights, duties, and liabilities arising under the *SGA*, unless the parties have clearly expressed their intention otherwise. Such an approach reflects the policy choice, enshrined in s. 53, to give primacy to legislative purposes, unless the parties have clearly expressed their intention for a different private ordering of their rights and obligations. The *SGA* represents the legislature's understanding of commercial efficacy or common sense in the sale of goods context, and its provisions are designed to promote certainty and predictability. There is nothing unfair or unrealistic in assuming that the parties knew their respective legal positions in entering into the contract. Given that the parties are taken to know their legal positions in entering into a contract of sale, they must also be presumed to intend the legal consequences of the words they use. Although interpreting the words used in an exclusion clause may require reference to the whole contract or the surrounding circumstances, the legislature has indicated that the rights, duties, and liabilities arising under the *SGA* must be considered a vital part of the setting in which parties contract. The exercise of contractual interpretation cannot be conducted in a manner that disregards the law governing the contract.

In the instant case, it was open to the trial judge to find that the parties' contract was a sale by description, and it was also open to the trial judge to find that the description of the topsoil for the purposes of s. 14 of the *SGA* included the composition established in the test results. However, the fact that the trial judge found that the composition of the topsoil went to the identity of the goods, while it could also

be relevant to the fitness of the topsoil for a particular purpose, does not mean that the parties objectively intended to shield the seller from any and all liability. The parties chose to put down their agreement in writing. The court's task is to determine what they meant by agreeing to exclude liability in relation to the "quality of the material". The exclusion clauses did not actually state that the seller would not be liable for "any" defects, including defects in the composition of the topsoil. Rather, the parties agreed that the seller would not be "responsible for the quality of the material". The ordinary and grammatical meaning of these words relates to the fitness for purpose of a good, within the meaning of s. 15 para. 1 of the *SGA*. The express agreement excludes liability only in relation to quality. In the present circumstances, the meaning of the word "quality" cannot be expanded to cover any defects relating to the identity or description of the topsoil; therefore, the language of the exclusion clauses does not express an objective intention to exclude the condition of correspondence with description in s. 14 of the *SGA*.

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By Martin J.

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of Upper Canada v. Guardian Insurance Co. of Canada, 2006 SCC 21, [2006] 1 S.C.R. 744; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *Corner Brook (City) v. Bailey*, 2021 SCC 29, [2021] 2 S.C.R. 540; *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748; *Ashington Piggeries Ltd. v. Christopher Hill Ltd.*, [1972] A.C. 441; *Bakker v. Bowness Auto Parts Co. Ltd.* (1976), 68 D.L.R. (3d) 173; *Bailey v. Croft* (1931), 40 Man. R. 146; *Rahtjen v. Stern GMC Trucks (1969) Ltd.* (1976), 66 D.L.R. (3d) 566; *Coast Hotels Ltd. v. Royal Doulton Canada Ltd.*, 2000 BCSC 857, 76 B.C.L.R. (3d) 341; *Joubarne v. Loodu*, 2005 BCSC 1340; *Thoms v. Louisville Sales & Service Inc.*, 2006 SKQB 447, 286 Sask. R. 90; *Baron v. Caragata*, 2004 SKQB 43, 245 Sask. R. 208; *Total Petroleum (N.A.) Ltd. v. AMF Tuboscope Inc.* (1987), 54 Alta. L.R. (2d) 13; *Palin v. Assie Industries Ltd.*, 2003 SKQB 57, 230 Sask. R. 234; *Clayton v. North Shore Driving School*, 2017 BCPC 198, 70 B.L.R. (5th) 49; *Koubi v. Mazda Canada Inc.*, 2012 BCCA 310, 352 D.L.R. (4th) 245; *Armak Chemicals Ltd. v. Canadian National Railway Co.* (1991), 3 O.R. (3d) 1; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *Schnarr v. Blue Mountain Resorts Ltd.*, 2018 ONCA 313, 140 O.R. (3d) 241; *British Columbia (Attorney General) v. Le*, 2023 BCCA 200, 482 D.L.R. (4th) 20; *Bank of England v. Vagliano Brothers*, [1891] A.C. 107; *Investors Compensation Scheme Ltd. v. West Bromwich Building Society*, [1998] 1 All E.R. 98; *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423; *Dow Chemical Canada ULC v. NOVA Chemicals Corporation*, 2020 ABCA 320, 17 Alta. L.R. (7th) 83; *Reardon Smith Line Ltd. v. Hansen-Tangen*, [1976] 3 All E.R. 570; *Chabot v. Ford Motor Co. of Canada Ltd.* (1982), 39 O.R. (2d) 162; *Gregorio v. Intrans-Corp.* (1994), 18 O.R. (3d) 527; *Rosenberg v. Securtek Monitoring*

Solutions Inc., 2021 MBCA 100, 465 D.L.R. (4th) 201; *Co-operators Life Insurance Co. v. Gibbens*, 2009 SCC 59, [2009] 3 S.C.R. 605; *National Bank of Greece (Canada) v. Katsikonouris*, [1990] 2 S.C.R. 1029; *Moldenhauer v. Alberta Powersports Inc.*, 2009 ABPC 118; *Conners v. McMillan*, 2020 BCPC 230.

By Côté J. (dissenting)

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APPEAL from a judgment of the Ontario Court of Appeal (Strathy C.J. and Simmons and Zarnett JJ.A.), 2022 ONCA 265, 161 O.R. (3d) 103, 468 D.L.R. (4th) 78, 26 B.L.R. (6th) 165, [2022] O.J. No. 1497 (Lexis), 2022 CarswellOnt 4054 (WL),

setting aside a decision of Nakatsuru J., 2020 ONSC 601, [2020] O.J. No. 405 (Lexis), 2020 CarswellOnt 1113 (WL). Appeal allowed, Côté J. dissenting.

Mark Klaiman and *Ian Klaiman*, for the appellant.

Vito S. Scalisi and *Dylan A. S. Bal*, for the respondent.

Jeremy Opolsky and *Lauren Nickerson*, for the intervener.

The judgment of Wagner C.J. and Rowe, Martin, Kasirer, Jamal and O'Bonsawin JJ. was delivered by

MARTIN J. —

TABLE OF CONTENTS

I. Introduction

[1] This appeal concerns a contracting party's ability to contract out of a statutorily implied condition under the *Sale of Goods Act*, R.S.O. 1990, c. S.1 ("*SGA*").[1] The buyer, Pine Valley Enterprises Inc., claims that the purchased topsoil involved a sale by description and seeks damages because the soil did not correspond to that description. The seller, Earthco Soil Mixtures Inc., says there was no breach of any statutory condition, arguing that the goods not only complied with their description, but also that the parties specifically excluded any such obligation by express written agreement. The *SGA*, like other such statutes across the country, provides that parties may contract out of any right, duty or liability that would otherwise arise by implication of law in a contract of sale (s. 53). The parties' contract contained a clause stipulating that if the buyer chose to waive its right to test the goods, then the seller would "not be responsible for the quality of the material" once it left its facilities (A.R., at p. 201). Because the buyer chose to waive its right to test and approve the goods before they

[1] The relevant provisions are reproduced in an appendix to these reasons.

were shipped, the seller claims this clause operates to exclude any statutory condition that the goods must meet certain compositional specifications.

[2] The Court's main task in this case is to set out the proper way to interpret exclusion clauses in contracts for the sale of goods. This involves determining what qualifies as an express agreement under s. 53 of the *SGA*, as informed by recent cases on the interpretation of contracts and the legal operation of exclusion clauses. The principles in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, and *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69, apply to the contracts subject to the *SGA*. These recent restatements of contract law principles give priority to the parties' intentions in a manner that modifies and relaxes some of the stricter and more technical approaches which found expression in certain prior cases. As this Court stated in *Sattva*, "the interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction. The overriding concern is to determine 'the intent of the parties and the scope of their understanding'" (para. 47, citing *Jesuit Fathers of Upper Canada v. Guardian Insurance Co. of Canada*, 2006 SCC 21, [2006] 1 S.C.R. 744, at para. 27). All contract terms, including exclusion clauses, "should be given their natural and true construction so that the meaning and effect of the exclusion clause the parties agreed to at the time the contract was entered into is fully understood and appreciated" (*Hunter Engineering Co. v. Syncrude Canada Ltd.*, [1989] 1 S.C.R. 426, at p. 510). Ultimately, when courts are faced with applying a combination of s. 53, the principles of contractual interpretation and the law

concerning exclusion clauses, it is the objective intention of the parties that must be the paramount consideration.

[3] I conclude that the trial judge made no error of law with respect to the exclusion clauses at issue in the case at bar. In the commercial circumstances of this case, the objective meaning of the parties' express agreement is that the buyer accepted the risk that the soil would not meet the previously supplied compositional specifications if it failed to test what it knew was an organic and changing substance. The appeal is allowed and Earthco has no liability to Pine Valley.

II. Factual Background

[4] Pine Valley, a municipal parks contractor, was hired in 2011 by the City of Toronto to address basement flooding in a residential area of North York. The remediation effort, called the Moore Park Project, included the removal and replacement of the existing topsoil with another topsoil more conducive to proper water drainage. While Pine Valley was responsible for the purchase and laying of the topsoil, the City's hired project consultant and construction supervisor, CH2M Hill ("City Consultant"), assisted in the selection of a suitable topsoil.

[5] The construction contract between the City and Pine Valley called for a substantial performance date of August 19, 2011. If that date was not met, Pine Valley would be required to pay liquidated damages of $500 per working day until the Project was completed. For various reasons, Pine Valley missed the deadline and requested a

series of extensions. The City extended the substantial performance date to October 3, 2011, after which liquidated damages would be imposed. Meanwhile, despite Pine Valley's efforts to secure a suitable topsoil from various suppliers, the City Consultant did not approve any of the samples it obtained. The substantial performance date of October 3, 2011 also passed without any topsoil having been purchased, delivered, spread or graded on the Project site. The City made one further and final concession and gave notice that as of October 15, 2011, it would enforce the liquidated damages clause.

[6] On October 3, 2011, Pine Valley contacted Earthco, a large custom topsoil provider, to request information about providing them with a topsoil with a specified range of composition percentages. The City required that the topsoil be 45 percent to 70 percent sand, 1 percent to 35 percent silt, and 14 percent to 20 percent clay. Earthco's Sales Manager, Richard Outred, provided Pine Valley's Project Manager, Rick Serrao, with laboratory reports from three different topsoil samples received in August of 2011. The City Consultant reviewed the reports and informed Mr. Outred that two of the proposed topsoil mixes would be acceptable with certain modifications: R Topsoil 2P1 would be acceptable if the chloride was less than 100 ppm and peat could be added to increase the organics, and R Topsoil would be acceptable if peat could be added to increase the organics.

[7] To the knowledge of all concerned, the samples on which the reports were based were about six weeks old at the time the reports were sent to Mr. Serrao and

reviewed by the City Consultant. Earthco and Pine Valley's agent discussed, on numerous occasions, the need to further test the soil before delivery to Pine Valley to accurately ascertain its properties at the time of sale. As topsoil is an organic substance with properties that may change over time, Earthco typically only sold its topsoil after a multi-stage process over a four- to six-week period. In the normal course, when Earthco would first receive an order with certain soil specifications, it would review soil test reports with these specifications in mind. Earthco would then send the relevant test reports to the customer, who would either accept or reject them. If the customer approved of a particular soil, Earthco would "batch" the soil from very large piles. Ten samples would then be taken from the soil piles and mixed together into one combined sample, which was sent to an independent third party laboratory for testing. Customers would receive these test results and decide whether their desired soil specifications were still being met and whether they would place an order. Generally, Earthco would deliver soil to a customer only after the batch was specifically approved as acceptable, often on the advice of a landscape architect.

[8] By contrast, because Pine Valley urgently wanted delivery of the soil, the process Earthco followed with Pine Valley was atypical. Before any contract of sale was signed, Mr. Outred confirmed that a chloride test would take five to seven business days to perform. He also warned against taking delivery before the updated test results were available to ensure the product delivered matched the desired specifications. On October 5, 2011, he told Pine Valley: "I think you should wait until the test is done but

if you would like to start shipping at your own risk please let me know" (A.R., at p. 136).

[9] Despite this advice, later that day, Pine Valley's agent signed a contract for 3,678 cubic yards of what was described as "Screened topsoil with extra Organics added" ("Contract") (A.R., at p. 201). The original Contract price was $66,168, and Pine Valley insisted on immediate delivery. Mr. Outred, who handled the negotiations for Earthco, personally prepared the Contract and added two specific clauses to the standard purchase order to reflect the discussions and agreement with Pine Valley in respect of the testing and delivery of the goods:

> 6) [Pine Valley] has the right to test and approve the material at its own expense at our facility before it is shipped and placed. Please contact Richard Outred to arrange.
>
> 7) If [Pine Valley] waives its right to test and approve the material before it is shipped, Earthco Soils Inc. will not be responsible for the quality of the material once it leaves our facility.
>
> (A.R., at p. 201)

[10] Delivery began on October 7, 2011 and Pine Valley requested that as many trucks as possible be available because "[w]e cannot have delays in [the] process" (A.R., at p. 167). By October 19, 2011, all of the R Topsoil had been placed on the Project site.

[11] In November 2011, water ponding was noted at the Project site. Testing revealed that there was substantially more clay in the soil delivered in October than the

August test results of the R Topsoil had indicated. The City was not satisfied with the construction on the Project, and eventually directed Pine Valley to remove and replace the topsoil it had purchased from Earthco. The Project was finally finished on July 27, 2012, and the City claimed liquidated damages from Pine Valley as of October 15, 2011.

[12] Pine Valley sued Earthco and initially filed a broadly worded statement of claim that raised various claims in contract and tort. Ultimately, Pine Valley sought damages of approximately $700,000 from Earthco for breach of contract. Overall, Pine Valley alleged that they did not receive topsoil within the range of compositional properties that had been indicated in the August test results and that Earthco was therefore liable for the loss they had incurred.

III. Judicial History

A. *Ontario Superior Court of Justice, 2020 ONSC 601*

[13] The core legal issue at trial was whether clauses 6 and 7 of the Contract were sufficient to oust the implied term of correspondence with description under s. 14 of the *SGA* such that Earthco was exempted from liability. Despite the wide wording of the statement of claim and the presence of other statutory conditions concerning the merchantability of the goods and their fitness for purpose, Pine Valley specifically argued only that the topsoil had failed to meet the implied condition in s. 14 that, in a sale of goods by description, the goods will correspond with the description given. It

further argued that clauses 6 and 7 were not sufficiently clear to oust or negative the implied statutory condition of correspondence with description. For its part, Earthco argued that there was no breach of s. 14 and that, in any event, the parties had negotiated the risk associated with the composition of the soil by shielding Earthco from any liability should Pine Valley choose not to test it.

[14] In resolving this core issue, the trial judge heard much competing evidence from both parties. His clear findings of fact, including his findings in relation to credibility and reliability, are not challenged in this appeal.

[15] The trial judge rejected the testimony of Rocky Bova, the President, Director, and sole shareholder of Pine Valley. Mr. Bova had maintained at trial that his only intention under the Contract had been to waive testing specifically for chlorides, and not all testing, when he instructed Earthco to ship the soil. The trial judge found Mr. Bova's testimony on this point to be internally inconsistent and implausible. He also found that it conflicted with the testimony of Pine Valley's Project Manager, Mr. Serrao, whom, by comparison, he found to be credible and reliable.

[16] The trial judge accepted Mr. Serrao's evidence that he knew it is generally unlikely for soil composition to remain static because soil is subject to change depending on the weather, when it is loaded onto the truck and when it is spread on the ground. Mr. Serrao also agreed that soil testing is recommended before soil is shipped, that it would be reasonable and prudent to perform testing in this case because soil is not a static good and that, in this case, the August test results would be old by October,

which is when the soil was scheduled to be delivered. Further, Mr. Serrao testified that, in his view, Mr. Bova was aware of Earthco's position on the risk of not testing (i.e., that Pine Valley would be assuming the soil at its own risk), but that Mr. Bova made a business decision to have the soil shipped right away so as not to further delay the Project. The trial judge found Mr. Serrao's account overall to be plausible and consistent with the available documentary evidence, and rejected the idea that testing was limited to testing for chlorides, as this issue did not affect the topsoil ultimately chosen by the City Consultant. The trial judge also accepted the evidence of Mr. Outred, Earthco's Sales Manager, and Orazio Valente, Earthco's Vice-President of Sales, which overall aligned with Mr. Serrao's account of events.

[17] Based on the whole of the evidence, the trial judge ultimately found that Mr. Bova understood that, on behalf of Pine Valley, in his capacity as the President, Director and sole shareholder of the company, he was waiving all testing of the soil and that he also understood the risk Pine Valley was taking by accepting the clear exclusion clause. Pine Valley did not want to incur the delay that soil testing would cause for economic reasons: it was under pressure from the City due to the delay in the Project's completion, and it risked incurring liquidated damages if it could not secure the product in time. As a result, the trial judge found that Mr. Bova was willing to have Pine Valley accept the untested soil in the circumstances.

[18] Applying these findings of fact to the core issue, first, the trial judge found this was a sale by description within the meaning of s. 14 of the *SGA*. Earthco was

promising to sell the R Topsoil with "the qualities set out in [the] test results" and not simply any soil with any composition (para. 100 (CanLII)). The trial judge also found it was clear Pine Valley did not get the soil it bargained for, because there was a significant compositional variation between the soil that was promised and the soil that was delivered (para. 103). Thus, there was a breach of the implied condition under s. 14 of the *SGA* that the goods must correspond with their description (para. 103).

[19] Turning to s. 53 of the *SGA*, the trial judge found that in order to oust a statutory entitlement under the *SGA*, contractual language needs to "be clear and unambiguous" (para. 112), as s. 53 requires an "express agreement" to contract out of implied terms. In this case, the other statutorily available methods under s. 53 for contracting out of implied terms, namely by the course of dealing between the parties or by usage, were not applicable. Despite the fact that the Contract did not explicitly mention statutorily imposed conditions or terms, relying on the surrounding circumstances of the Contract's formation, the trial judge found that clauses 6 and 7 of the Contract were nevertheless clear and unambiguous and served to negative Earthco's liability under s. 14.

[20] The trial judge found that Pine Valley was in a rush to receive the topsoil and, as a result, it waived its right to test it. Pine Valley was an experienced purchaser of soil; it knew the test results for the soil were dated, and it was aware of the fact that soil composition can change over time. The only purpose of testing the soil would have been to ensure it met the City's requirements, and there was a plain and obvious risk

that the soil delivered would not have the same composition as that of the dated test results. Thus, the trial judge found that Pine Valley's waiver of testing meant it deliberately assumed the risk that the soil would not meet the required specifications. The trial judge ultimately found that the very purpose of clauses 6 and 7 was to avoid the exact situation that transpired: where a customer failed to test soil purchased from Earthco, and then attempted to hold Earthco responsible for a loss due to unsatisfactory soil composition (para. 126).

[21] Accordingly, the trial judge dismissed Pine Valley's action. Had damages been warranted, he would have quantified them at $350,386.23.

B. *Court of Appeal for Ontario, 2022 ONCA 265, 161 O.R. (3d) 103*

[22] The Court of Appeal allowed the appeal, set aside the trial judgment, and substituted a judgment requiring Earthco to pay damages to Pine Valley of $350,386.23, as assessed by the trial judge.

[23] The only issue argued before the Court of Appeal was whether clauses 6 and 7 had been intended by the parties to protect Earthco from liability associated with delivering goods that failed to correspond with their description. The Court of Appeal proceeded on the basis that this was a sale by description and there was a breach of s. 14 of the *SGA*, and that the legal question involved exclusion clauses invoked to cloak a seller from what would otherwise be a breach of an implied statutory condition. It asked whether the trial judge erred by finding the exclusion clauses were "an express

agreement composed of explicit, clear and direct language sufficient to oust liability for breach of the implied condition in s. 14 of the [*SGA*] that the topsoil supplied correspon[d] to the contractual description" (para. 7).

[24] The Court of Appeal concluded that three extricable questions of law arose from the trial judge's interpretation of the Contract and that the trial judge erred on all of these extricable questions. Thus, no deference was owed and the standard of correctness applies (paras. 34-36). First, when interpreting the exclusion clauses, the trial judge failed to take into account the nature of the implied condition in s. 14, which relates to the *identity* of the goods rather than to their *quality*. Second, the trial judge failed to properly interpret the meaning of the requirement that "explicit, clear and direct language" must be used to exclude a statutory condition; as a result, he did not give proper effect to the exclusion clauses' failure to refer to the identity of the goods or to statutory conditions. Third, the trial judge erred by reading the language of the exclusion clauses in broader terms than their actual words and, in doing so, considered the Contract's factual matrix, also known as the surrounding circumstances, beyond its permissible use.

[25] The Court of Appeal held that in drafting s. 14, the legislature made a policy choice to imply the condition into all contracts involving sales by description without any requirement that purchasers negotiate for its inclusion or that the seller agree to it. In turn, the Court of Appeal articulated the standard for *ousting* such a condition as requiring the parties to "explicitly, clearly and directly" agree to its

exclusion (para. 67). In this case, this high standard was not met. The Court of Appeal emphasized that the implied condition in s. 14 relates to the identity of the goods sold, and not to their quality. This was a pivotal distinction in this case, as there was no language in the exclusion clauses that explicitly, clearly and directly referred to any statutory *conditions* or to the *identity* of what was being sold; the language of the Contract's exclusion clauses only disclaimed liability for the *quality* of the soil. Because clauses 6 and 7 did not contain words that explicitly, clearly and directly covered the identity of the soil, they were insufficient to oust liability under s. 14 of the *SGA*.

IV. Issues

[26] The primary issue on this appeal is what the legal requirements are for excluding an implied condition pursuant to s. 53 of the *SGA*.

V. Analysis

A. *The Applicable Standard of Review*

[27] This Court's jurisprudence firmly establishes that questions of contractual interpretation, which involve questions of mixed fact and law, are ordinarily afforded deference on appellate review. The exception set out in *Sattva* is for errors on extricable questions of law, which are reviewable on the more exacting correctness standard. It was the purported errors on extricable questions of law identified by the Court of

Appeal that enabled it to apply a standard of review of correctness. As I will explain below, the Court of Appeal erred in identifying these as extricable questions of law.

[28] In *Sattva*, this Court established that contractual interpretation "involves issues of mixed fact and law as it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix" (para. 50). Accordingly, deference is owed to the trial judge, who is best placed to make findings as to the nature of the factual matrix, and the predominantly applicable standard of review is palpable and overriding error (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 21). The search for an extricable question of law is, in my view, not consistent with *Sattva*'s holding that the interpretation of contracts and agreements are mixed questions of law and fact and that extricable questions of law will be "rare" and "uncommon" (para. 55; *Corner Brook (City) v. Bailey*, 2021 SCC 29, [2021] 2 S.C.R. 540, at para. 44). *Housen* expressly admonished that courts should "be cautious in identifying extricable questions of law in disputes over contractual interpretation" because ascertaining the objective intention of the parties, which is the prevailing goal of contractual interpretation, is an "inherently fact specific" exercise (*Sattva*, at paras. 54-55, citing *Housen*, at para. 36). The subsequent tendency of some appellate courts to use *Sattva* to elevate the standard of review, when it was intended to do the opposite, is to be resisted (the Hon. D. Brown, "Has Sattva spawned an era of less appellate deference?" (2023), 41:4 *Adv. J.* 26, at p. 27).

[29] Although this Court in *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, [2016] 2 S.C.R. 23, held that standard form contracts are an exception to *Sattva*'s ruling that contractual interpretation is generally a question of mixed fact and law, it was nevertheless acknowledged that even in that context, a court can look to "the parties' reasonable expectations" in order to ascertain the true meaning of a contractual term (para. 95). Consequently, the implication from *Ledcor* is that where meaningful evidence of the factual matrix does exist and where there is a contract of "utter particularity" due to a unique set of circumstances, the modern contractual interpretation approach from *Sattva* continues to apply (para. 42, citing *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, at para. 37).

[30] The facts of this case establish that the contract in question was one of "utter particularity" — indeed, the exclusion clauses at the centre of this appeal were drafted by the seller in response to the buyer's particular demand for speedy delivery of the goods without additional testing: because the buyer wanted to avoid incurring liquidated damages. Moreover, there were no errors on extricable questions of law. As I explain in greater detail below, the Court of Appeal read *Hunter Engineering* as requiring certain formalities not set out in s. 53 of the *SGA* and which are at odds with contemporary principles of contractual interpretation. By classifying the perceived deficiencies as errors of law, the Court of Appeal sought to create general principles of law that would govern the interpretation of all exclusion clauses ousting implied

conditions in a contract of sale, while also diminishing the role of the factual matrix in giving meaning to exclusion clauses.

[31] This derogation from the principles of appellate review laid down by this Court in *Housen* and *Sattva* was in error. The question of whether contracting parties came to an "express agreement" under the *SGA* involves a statutory component; however, where the parties' contract is in writing, as in this case, it will largely be based on the consideration of the specific written agreement between the parties, the words expressly employed to oust the liability and the surrounding circumstances. Accordingly, an express agreement capable of satisfying s. 53 might not look the same for different sets of parties and is likely to vary depending on who the contracting parties are and what their circumstances are. The inevitable variation between parties' circumstances means it would be of no use to prescribe a rigidly uniform description of what an express agreement must contain in every instance. This also means that findings by triers of first instance with respect to the factual matrix against which a given contract is struck will continue to be significant when a clause ousting a statutory condition is at issue.

[32] Further, the mere fact that the contractual interpretation in this case involves a consideration of a statutory provision does not automatically mean that a review must be on a correctness standard. While it is the statute that prescribes the requirement for an express agreement, it is still the common law of contracts that informs what an express agreement must look like for a specific set of parties. As a

result, the interpretive approach must be flexible enough to account for the parties' varying commercial circumstances and it follows that the appropriate standard of review must be that of palpable and overriding error, even where the analysis necessarily implicates s. 53 and implied statutory conditions. Thus, it was both the substance of the Court of Appeal's statements with respect to the perceived deficiencies in the trial reasons and how the Court of Appeal elevated those statements into binding legal requirements in all cases that, in my respectful view, led it into error.

[33] In conclusion, the standard of review for appellate courts concerning the "express agreement" requirement under s. 53 does not deviate from the general rule set down by this Court in *Sattva* — questions of mixed fact and law remain susceptible to a deferential standard of review, even where the analysis necessarily implicates implied statutory conditions. While errors on extricable questions of law, if properly identified, can be the basis for correctness review, reviewing courts should approach the task of identifying such errors cautiously, and with an eye towards the relative competencies of trial and appellate courts. However, as I explain below, the Court of Appeal did not identify errors on extricable questions of law that justified the application of the standard of review of correctness.

B. *The Sale of Goods Act*

[34] A sale of goods is a particular type of contract in which "the seller transfers or agrees to transfer the property in the goods to the buyer" in exchange for monetary consideration (s. 2(1) of the *SGA*). Not only are they crucial to commerce, they are

common, as many people buy and/or sell goods on a daily basis. Sales cover all types of goods, involve different amounts, may be a one-time purchase or a long-term arrangement and are agreed to by parties of varying degrees of knowledge and sophistication.

[35] All provinces and territories, except Quebec, have a sale of goods Act modelled on the United Kingdom's Imperial *Sale of Goods Act, 1893* (U.K.), 56 & 57 Vict., c. 71, which was itself a codification of the historical common law of sale established by the English courts during the 19th century.[2] These Acts contain a variety of statutory provisions dealing with many aspects of a sale transaction, including price, delivery and the transfer of ownership. Of particular importance to this appeal are three implied obligations that certain sellers may owe to buyers in relation to the characteristics or properties of the goods sold: fitness for purpose, merchantability and correspondence with description (ss. 14 and 15 paras. 1 and 2 of the *SGA*). The introduction of these legislated protections was likely intended to reverse the negative effects that arose when *caveat emptor* reigned and buyers were saddled with all of the

[2] For Alberta, see *Sale of Goods Act*, R.S.A. 2000, c. S-2, ss. 15, 16(2) and 16(4); for British Columbia, see *Sale of Goods Act*, R.S.B.C. 1996, c. 410, ss. 17(1), 18(a) and 18(b); for Manitoba, see *The Sale of Goods Act*, C.C.S.M., c. S10, ss. 15, 16(a) and 16(b); for New Brunswick, see *Sale of Goods Act*, R.S.N.B. 2016, c. 110, ss. 19, 20(a) and 20(b); for Newfoundland and Labrador, see *Sale of Goods Act*, R.S.N.L. 1990, c. S-6, ss. 15(1), 16(a) and 16(c); for the Northwest Territories, see *Sale of Goods Act*, R.S.N.W.T. 1988, c. S-2, ss. 17(a), 18(1)(a) and 18(1)(b); for Nova Scotia, see *Sale of Goods Act*, R.S.N.S. 1989, c. 408, ss. 16, 17(a) and 17(b); for Nunavut, see *Sale of Goods Act*, R.S.N.W.T. (Nu.) 1988, c. S-2, ss. 17(a), 18(1)(a) and 18(1)(b); for Prince Edward Island, see *Sale of Goods Act*, R.S.P.E.I. 1988, c. S-1, ss. 15, 16(a) and 16(b); for Saskatchewan, see *The Sale of Goods Act*, R.S.S. 1978, c. S-1, ss. 15, 16 para. 1 and 16 para. 2; for Yukon, see *Sale of Goods Act*, R.S.Y. 2002, c. 198, ss. 14, 15(a) and 15(b).

risks associated with the state of the goods, except when expressly agreed by the contracting parties.

[36] The *SGA* further protects buyers by elevating these statutory protections to the status of implied "conditions". Both the *SGA* and the common law draw a legal distinction between contract terms that constitute a "condition", and those that constitute a "warranty" (see s. 1(1) of the *SGA*; G. R. Hall, *Canadian Contractual Interpretation Law* (4th ed. 2020), at p. 166). A term is a "condition" if its performance is fundamental to the contract, whereas a "warranty" is collateral to the main purpose of the contract. While the breach of a warranty gives rise to a claim for damages, but not to a right to reject the goods and to treat the contract as repudiated, the breach of a "condition" is so serious that the innocent party also has the option either to treat the contract as repudiated, or to treat the breach of the condition as a breach of warranty and claim damages.

[37] These three implied conditions have separate areas of application, play distinct roles and protect different interests. Together, they provide important protections, but they are not mandatory provisions that apply in all cases. Each implied condition has its own set of internal requirements before the seller is affixed with that particular legal responsibility, meaning that the legislature did not choose to imply conditions concerning the state of the goods into every contract of sale — the *SGA* is much more selective. For example, the implied condition of fitness for purpose in s. 15 para. 1 makes its application contingent on three factors: 1) the course of the seller's

business; 2) knowledge on the part of the seller of the buyer's intended purpose for the goods; and 3) the buyer's reliance on the seller's skill or judgment (G. H. L. Fridman, *Sale of Goods in Canada* (6th ed. 2013), at p. 160).

[38] Importantly, s. 14 of the *SGA*, the one implied condition at issue in this case, applies only to those contracts in which goods are sold by description. When this implied condition is in play, it becomes very important to determine what aspects of the goods form part of their description, which is a fact-specific determination. The *SGA*, like the Imperial Act on which it was modelled, was not meant to "provoke metaphysical discussions as to the nature of what is delivered, in comparison with what is sold" (*Ashington Piggeries Ltd. v. Christopher Hill Ltd.*, [1972] A.C. 441 (H.L.), at p. 489). Not every statement made about a good is a protected part of its "description" under s. 14, and case law shows just how narrow that protected description is. Description is tied to identity and only protects those terms which identify the subject matter of the sale (see *Ashington Piggeries*, at pp. 467, 470, 486 and 503; see also E. McKendrick, "Sale of Goods", in P. Birks, ed., *English Private Law*, vol. II (2000), 223, at para. 10.30; *Bakker v. Bowness Auto Parts Co. Ltd.* (1976), 68 D.L.R. (3d) 173 (Alta. S.C. (App. Div.)), at p. 178; *Bailey v. Croft* (1931), 40 Man. R. 146 (C.A.), at p. 152; *Rahtjen v. Stern GMC Trucks (1969) Ltd.* (1976), 66 D.L.R. (3d) 566 (Man. C.A.), at pp. 568-69; *Coast Hotels Ltd. v. Royal Doulton Canada Ltd.*, 2000 BCSC 857, 76 B.C.L.R. (3d) 341, at paras. 32-34; *Joubarne v. Loodu*, 2005 BCSC 1340, at para. 33 (CanLII); *Thoms v. Louisville Sales & Service Inc.*, 2006 SKQB 447, 286 Sask. R. 90, at paras. 52-53; *Baron v. Caragata*, 2004 SKQB 43, 245 Sask. R. 208, at paras. 16-17;

Total Petroleum (N.A.) Ltd. v. AMF Tuboscope Inc. (1987), 54 Alta. L.R. (2d) 13 (Q.B.), at p. 32; *Palin v. Assie Industries Ltd.*, 2003 SKQB 57, 230 Sask. R. 234, at paras. 7-9; *Clayton v. North Shore Driving School*, 2017 BCPC 198, 70 B.L.R. (5th) 49, at paras. 84-86).

[39] As the Court of Appeal correctly observed, the case law has thus distinguished between traits that go to the identity of the goods (which pertains to description), and those which go to the quality of the goods (which pertains to merchantability and fitness for purpose). The identity of a good should not be conflated with all the words used as descriptors and instead should be limited to "words whose purpose is to state or identify an essential part of the description of the goods" (C. Twigg-Flesner, R. Canavan and H. MacQueen, *Atiyah and Adams' Sale of Goods* (13th ed. 2016), at p. 128 (emphasis added)). While the quality of the goods amounts to a term of the contract, the identity of the goods connotes something that is "an essential part" of the goods themselves. Words in the contract that "merely point out the goods being sold while not actually constituting a substantial ingredient" of them do not form part of their identity (p. 128; M. Bridge, ed., *Benjamin's Sale of Goods* (12th ed. 2024), vol. 1, at pp. 570-71). The question to be asked for the purpose of s. 14, therefore, is "whether the buyer could fairly and reasonably refuse to accept the physical goods proffered to [them] on the ground that [the] failure [of the goods] to correspond with that part of what was said about them in the contract makes them goods of a different kind from those [the buyer] had agreed to buy" (Fridman, at p. 157, citing *Ashington Piggeries*, at pp. 503-4 (emphasis added)).

[40] Despite the importance of implied statutory conditions, parties remain free to take their contracts outside the presumptive provisions of the sale of goods legislation. While the legislature made a policy choice that the starting point is that buyers should receive these statutory protections, by enacting s. 53, the legislature also expressly allowed parties to contract out of certain provisions of the *SGA*. Section 53 is clear, expansive, and lies at the core of the case at bar:

> Where any right, duty or liability would arise under a contract of sale by implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties, or by usage, if the usage is such as to bind both parties to the contract.

A similar provision appears in all of the common law provincial and territorial equivalents of the *SGA*, and it clearly shows "that the Act was never designed to be comprehensive and inward-looking"; rather, it establishes a framework of rules that in many cases are optional, subject to exclusion by the parties themselves (M. G. Bridge, *The Sale of Goods* (4th ed. 2019), at p. 7).

[41] The co-existence of implied conditions and s. 53 demonstrates that in enacting the *SGA*, the legislature did not have a singular purpose in mind — but rather, dual purposes of both protecting buyers and safeguarding freedom of contract. If the parties are silent on the issue, a statutory condition like s. 14 will be implied into their dealings, but if the parties wish, they may allocate their risk accordingly and contract out of whichever presumptive provisions they so choose. These dual purposes are to be balanced and should be approached more like a rebuttable presumption than a general

rule with a limited exception. In the final analysis, if any primacy is to be given, the legislature has privileged private ordering over statutory prescription.

[42] In assessing what qualifies as an express agreement under s. 53, the scope of exclusion clauses — like clauses 6 and 7, and the impact of such clauses on otherwise legally enforceable obligations, one must first understand how the law governing the sale of goods is subject to various legal rules from different sources. While subject to a host of statutory provisions in the *SGA*, a sale of goods is also an agreement that sits within the general common law of contracts. Section 57(1) of the *SGA* expressly provides that "except in so far as they are inconsistent with the express provisions of [the] Act", "[t]he rules of the common law, including the law merchant, . . . continue to apply to contracts for the sale of goods". For example, general common law principles about contractual interpretation, offer and acceptance, agency, the legal treatment of exclusion clauses, unconscionability and other limits or doctrines grounded in equity, continue to apply to a contract of sale. Thus, on its own terms and as a general rule, the *SGA* mandates that it be interpreted in conjunction with current contract law principles.

[43] Accordingly, sale of goods law is best seen as "a specialized branch of the general law of contract" from which statutory prescriptions are not sealed off (Bridge (2019), at p. 1). Sale of goods Acts were never intended to be exhaustive or comprehensive codes; they ought not to be applied too rigidly or to the exclusion of the freedom of parties to contract within the general limits of the law (pp. 7-8; see also

K. C. T. Sutton, "The Reform of the Law of Sales" (1969), 7 *Alta. L. Rev.* 130, at p. 130). As a result, the sale of goods "cannot be studied in isolation from the rest of contract law" and the statutory rules stemming from sale of goods legislation must be related to the law of contract as a whole (K. P. McGuinness, *Sale & Supply of Goods* (2nd ed. 2010), at §1.17). Such legislation must be interpreted in light of the common law as it stands from time to time and in the present day (*Koubi v. Mazda Canada Inc.*, 2012 BCCA 310, 352 D.L.R. (4th) 245, at para. 72; see also McGuinness, at §1.14).

[44] Thus, to determine whether Earthco was exempted from liability in relation to its sale of soil to Pine Valley by express agreement under s. 53, this Court must consider not only the relevant provisions of the *SGA* but also the current common law relating to contracts, including the modern principles of contractual interpretation and the legal treatment of exclusion clauses.

C. *Section 53 and Express Agreements*

[45] At the centre of this appeal is the following question: just how express does an agreement need to be to oust an implied statutory condition? As a contract with the added dimension of falling under the purview of the *SGA*, a contract for the sale of goods is "a contract lying beside a statutory obligation which represents [the legislature's] policy statement" (see *Armak Chemicals Ltd. v. Canadian National Railway Co.* (1991), 3 O.R. (3d) 1 (C.A.), at p. 17; see also Hall, at pp. 179-80 and 336-37). Does the fact that the state has provided buyers with presumptive statutory protections also mean there are special rules of law that govern the interpretation of

exclusion clauses under s. 53? Is a more express agreement, with specific language over and above that which may otherwise meet the standards set out in s. 53, *Sattva* and *Tercon*, required?

[46] The Court of Appeal answered those questions in the affirmative by mandating, as a matter of law, the use of explicit, clear and direct language to expressly negative liability for a "condition" that involved the "identity" of the goods. It performed an exacting review of the language used and held that a simple reference to a different legal obligation, namely "quality", is not sufficient to oust the liability implied by s. 14 (para. 56). The Court of Appeal not only distinguished between conditions and warranties, it applied the same reasoning to the distinction between a good's identity and qualities: because the exclusion of implied *warranties* does not exclude implied *conditions*, excluding responsibility for the *quality* of the goods does not exclude an implied statutory condition for its *identity* (para. 59). The Court of Appeal thus says, based on fine legal distinctions drawn in often complex Commonwealth case law, the term "quality" cannot capture "identity" and parties must expressly state they are negativing implied statutory *conditions*.

[47] Before this Court, Pine Valley argues that the Court of Appeal was correct to require explicit, clear and direct language and to conclude that clauses 6 and 7 did not exclude liability for "conditions" and the "identity" of the soil. Earthco argues this approach to the interpretation of an express exclusion clause is rigid, narrow, legalistic and technical to the point of requiring "magic words" to yield particular legal results

(A.F, at p. 21). They argue it strains s. 53 and is antithetical to *Sattva*'s practical, common-sense approach and *Tercon*'s emphasis on the intention of the parties.

[48] While the law draws distinctions between conditions and warranties, and the quality of goods under ss. 13 and 15 and their identity under s. 14, I do not accept that s. 53 is only satisfied if parties who agreed to an exclusion clause use the words "condition" and "identity" to oust the implied condition of correspondence with description. Applicable case law mandates a shift away from a method of contractual interpretation "dominated by technical rules of construction" and requires that words be understood in their factual matrix, with the paramount goal of ascertaining the parties' objective intention (*Sattva*, at para. 47; cf. C.A. reasons, at para. 55).

[49] In this next section, I articulate what amounts to an express agreement under s. 53, address the various propositions argued before us, and comment on the opinions expressed by the Court of Appeal. In the final section of the judgment, I apply the relevant principles to clauses 6 and 7 of the sales Contract at issue.

(1) Section 53 of the *Sale of Goods Act*

[50] Section 53 of the *SGA* permits parties to vary or negative statutorily imposed obligations. To ascertain what words or actions take the parties outside of the *SGA* involves a question of statutory interpretation. This calls for a reading of the text of s. 53 "in [its] entire context and in [its] grammatical and ordinary sense harmoniously with the scheme of the [*SGA*], the object of the [*SGA*], and the intention of [the

legislature]" (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21, citing E. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87).

[51] The text of s. 53 is broad and permissive: it provides that *any* right, duty or liability arising by implication of law may be altered by the parties. This includes s. 14 and the other implied conditions concerning the state or condition of the goods. It also expressly contemplates that the parties may not only vary any right, duty or liability, for example by adding to them, but that they may also "negative" or exclude them entirely. The ability of the parties to bargain away the presumptive protections in the implied conditions under the *SGA* represents an explicit policy choice by the legislature and can be compared with certain consumer protection legislation, in which selected implied conditions have been elevated to the status of mandatory provisions. In Ontario, for example, in a consumer contract, any term purporting to negate or vary any implied condition or warranty under *either* sale of goods or consumer protection legislation is deemed void (*Consumer Protection Act, 2002*, S.O. 2002, c. 30, Sch. A, s. 9(3); see also *Schnarr v. Blue Mountain Resorts Ltd.*, 2018 ONCA 313, 140 O.R. (3d) 241, at paras. 75-81; *Consumer Protection Act*, R.S.A. 2000, c. C-26.3, s. 2(1); *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2, s. 3).

[52] Thus, among the circumstances s. 53 was intended to address was the exact scenario of parties wanting to remove the presumptive statutory protections given to buyers. There are no surprises here — the legislature definitely understood that some parties may want to contract out of the implied conditions and bargain accordingly. The

text, scheme and objectives of the *SGA* all illustrate that the legislature not only specifically contemplated this scenario but that it unmistakably permitted parties to do so.

[53] Section 53 also specifies how parties may exempt themselves from statutory liability: ". . . by express agreement or by the course of dealing between the parties, or by usage . . . ." These three separate routes to exemption illustrate the intended breadth of s. 53 and convey that, at its core, s. 53 is concerned with the parties' intention to remove themselves from the application of certain *SGA* provisions — however that intention is conveyed. The parties are free to contract out of any such obligations, whether by words, conduct or usage; not only can their intention be communicated in multiple ways, the latter two are based on actions, conduct and commercial custom. According to recognized principles of statutory interpretation, these three clauses inform each other (see *Rizzo*, at paras. 21 and 36; see also *British Columbia (Attorney General) v. Le*, 2023 BCCA 200, 482 D.L.R. (4th) 20, at para. 160). Given this inter-relationship, when assessing what qualifies as an "express agreement", it is important to remember that s. 53 permits parties to contract out of the *SGA* in ways that are not tied to language at all.

[54] To qualify under the "express agreement" branch of s. 53, there must be both an *agreement* to vary or negative a right, duty or liability under a contract of sale, and that agreement must be *express*. These two elements, though referenced together

as part of a composite phrase, are conceptually distinct and necessarily involve different considerations.

[55] Some confusion has arisen about what it means for an agreement to be "express" under s. 53. Some think "express" speaks to specific language that must be used to remove the parties from the *SGA*. I do not think that is the correct approach. The term "express" qualifies the word "agreement" and is directed to *how* that agreement must be made. Express does not define *what* the agreement must say or the required level of clarity of specific contractual clauses. Because s. 53 requires an "express *agreement*", and not the use of "express *language*", it does not constitute, let alone call for, a qualitative requirement about the specificity of language that is needed to vary or negative an otherwise applicable legal liability. While s. 53 insists that the agreement must be express, it imposes no prerequisite about the precision of the words used to manifest such an agreement. The clarity of the language will, however, guide the interpretation of the agreement.

[56] In terms of *how* the agreement is made, it will be "express" if it is made in distinct and explicit terms and not left to inference. In contrast with the other available avenues to oust the *SGA* contemplated by s. 53, an express agreement cannot be implied, inferred or imputed from conduct. Neither silence nor omission will suffice. The agreement must be clearly communicated: for the purposes of s. 53 of the *SGA*, something that is express must be declared in terms and set forth in words (*Black's Law Dictionary* (6th ed. 1990), at p. 580; see also *Black's Law Dictionary* (11th ed. 2019),

at p. 726). The parties must make their mutual intention unmistakably evident. The parties must not be ambiguous or dubious and should be clear, definite, plain and direct. Thus, the "express" component of an express agreement means that the exclusion clause must be plainly laid out and contemplated within the agreement at issue. It must have "been specifically mentioned" (G. H. L. Fridman, *The Law of Contract in Canada* (6th ed. 2011), at p. 433).

[57] The "agreement" part of s. 53 is often the crux of the matter and it requires a meeting of the minds about what rights, duties or liabilities are being changed and how they are being varied or negatived. The terms of that agreement must also be certain and mutually agreed upon.

[58] The existence, extent and meaning of the statutory term "agreement" will also be determined by reference to the common law principles concerning the formation, interpretation and enforcement of contracts. While this Court is required to interpret s. 53 according to the rules of statutory interpretation, the statute itself also calls upon us to interpret s. 53 with reference to the common law of contracts. By choosing the word "agreement", a term left undefined in the *SGA* yet widely known in the law, the legislature reinforces the relevance of the common law principles of contract and invites their use. In addition, the statutory term "agreement" must be read harmoniously and in the context of the statute as a whole. This includes s. 57(1) which clearly states that, unless "inconsistent with the express provisions of [the] Act", the rules of the common law as they exist from time to time apply to contracts for the sale

of goods. Section 53 does not, by express provision or otherwise, preclude recourse to the common law to give meaning to the term "express agreement". Interpreting s. 53 against the backdrop of contemporary contract law jurisprudence is also consistent with the general purpose and scheme of the *SGA*, which is built upon an inter-relationship between the *SGA* and the common law of contracts and which situates the former squarely within the latter.

[59] In *Bank of England v. Vagliano Brothers*, [1891] A.C. 107 (H.L.), Lord Herschell set out the proper approach for the interpretation of a codifying statute (pp. 144-45), and while the essence of this approach significantly curtailed the ability of courts to go outside the code to resolve interpretative difficulties, the approach was not literally followed by the courts (McKendrick, at para. 10.01). Professor McKendrick notes that examples can be found of cases where the courts have had regard to pre-1893 case law when interpreting the *Sale of Goods Act, 1893* and that, "in more recent times, the courts have been more creative or liberal in their interpretation of the legislation and refused to allow it to 'fossilize the law': see, for example, *Ashington Piggeries*" (para. 10.01, fn. 3 (emphasis added)).

[60] Based on these principles of statutory interpretation, the common law pertaining to agreements, contractual interpretation and exclusion clauses does not serve to "fill gaps" in the statute but, instead, is better viewed as being purposefully incorporated into the *SGA*. No improper conflation between the interpretative approaches to legislation or contracts arises when, as here, the statute calls for reliance

upon governing common law principles. Such principles include the modern approach to contractual interpretation and, if the parties intended to exclude or negative something like an implied statutory condition, the three-step approach to exclusion clauses in *Tercon* will also apply. According to the terms of s. 53 and these cases, the objective intention of the parties will be the paramount consideration, which will be determined by the words used and the surrounding circumstances.

(2) The Modern Principles of Contractual Interpretation

[61] The principles governing the interpretation of contracts, including the enforceability of exclusion clauses, have undergone significant change over the years, and the *SGA* requires the use of common law principles as they exist from time to time. Technical and legalistic formulations and complex doctrines have been softened in favour of an interpretive approach that focuses on the objective intention of the parties, how the words used were reasonably understood by the parties, and how, subject to limits such as unconscionability, the parties sought to allocate contractual risk.

[62] In *Sattva*, which concerned a dispute over an agreement to pay a finder's fee, this Court clearly stated how agreements should be interpreted and reviewed. The Court explained how the jurisprudence has shifted towards a more flexible, "practical, common-sense approach" to contractual interpretation and has retreated from an archaic approach dominated by technical rules of construction (para. 47). Such changes reflect and reinforce the overriding concern of contractual interpretation, which is to

determine the parties' intention and the scope of their understanding (para. 47, citing *Jesuit Fathers*, at para. 27).

[63] The actual words chosen are central to the analysis because this is how the parties chose to capture and convey their contractual objectives. To determine their true intent, decision-makers "must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract" (*Sattva*, at para. 47). While "[t]he facts surrounding the formation of a contract are relevant to its interpretation" (*Corner Brook*, at para. 19), they "must never be allowed to overwhelm the words of that agreement" or cause courts to create brand new agreements (para. 20; *Sattva*, at para. 57; see also D. Bertolini, "Unmixing the Mixed Questions: A Framework for Distinguishing Between Questions of Fact and Questions of Law in Contractual Interpretation" (2019), 52 *U.B.C. L. Rev.* 345, at pp. 402-3; D. Bertolini, "Releasing the Unknown: Theoretical and Evidentiary Challenges in Interpreting the Release of Unanticipated Claims" (2023), 48:2 *Queen's L.J.* 61, at p. 65; D. Bertolini, "Unpacking Entire Agreement Clauses: On the (Elusive) Search for Contractually Induced Formalism in Contractual Adjudication" (2021), 66 *McGill L.J.* 465, at p. 500).

[64] While the language used is central, courts recognize that words are not ends in themselves: they are a means to demonstrate, discern and determine the true intention of the parties. The jurisprudence seeks certainty but acknowledges the limits of language. This Court recognized how "words alone do not have an immutable or

absolute meaning" and cannot, by themselves, convey the commercial purpose of a contract (*Sattva*, at para. 47). When seeking the meaning of a document, the focus of the court is properly on what the parties objectively intended and what they reasonably understood their words to mean. This is because the "meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean" (*Sattva*, at para. 48, citing *Investors Compensation Scheme Ltd. v. West Bromwich Building Society*, [1998] 1 All E.R. 98 (H.L.), at p. 115).

[65] Courts are therefore directed "to have regard for the surrounding circumstances of the contract — often referred to as the factual matrix — when interpreting a written contract" (*Sattva*, at para. 46). The meaning of the words of a contract can be derived from reference to various contextual factors, which include the purpose of the agreement and the nature of the relationship created by the agreement (para. 48). *Sattva* allows courts to interpret contractual terms in light of the contract as a whole and with reference to objective evidence that illustrates what was within the parties' knowledge at or before the time of their contract's formation (para. 58). Ultimately, ascertaining the objective intent of the parties involves not only a consideration of the actual words used in a contract but also a consideration of the factual matrix surrounding the contract.

(3) The Legal Treatment of Exclusion Clauses

[66] When parties seek to limit or negative any right, duty or liability by an express agreement under s. 53 of the *SGA*, they are effectively attempting to insert an exclusion clause into their sale of goods contract. Clauses that exclude legal liabilities, including implied statutory conditions, are subject to their own set of legal rules because they raise distinct policy considerations. Such clauses can be used to both uphold and challenge the principle of freedom of contract. While they allow parties to allocate risk and bargain for desired terms, they may also be used by stronger parties, in circumstances of unequal bargaining power, to secure an unfair or unreasonable advantage.

[67] For this reason, the case law on exclusion clauses has undergone various transformations over the years in an attempt to balance freedom of contract, commercial certainty and contractual fairness. The course of this transformation can be traced by reference in part to the doctrine of fundamental breach, which has evolved towards an approach that gives primacy to the objective intention of the contracting parties.

[68] The doctrine of fundamental breach arose in the English courts during the 1950s as a rule of common law that operated where a defendant had so seriously breached the contract that the plaintiff was denied substantially the whole of the contract's benefit (Hall, at p. 367). While the doctrine was introduced to address certain injustices, there has been a full retreat from it as it had a questionable conceptual basis, "reflected an inherent hostility to [exclusion] clauses that was not justified" and

undercut the parties' intention by rendering exclusion clauses inapplicable even if they were unobjectionable from a policy perspective (Hall, at pp. 367-68).

[69] In *Hunter Engineering*, this Court was evenly divided on whether the doctrine of fundamental breach should continue in its then current form but concluded that exclusion clauses could only be enforced if they were not unconscionable (at pp. 455-56, per Dickson C.J.) or unfair or unreasonable (p. 517, per Wilson J.; see also *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423). All judges expressly highlighted the centrality of the interpretation of the exclusion clause and the need to preserve the integrity of the parties' bargain. Dickson C.J. understood that in the commercial context, "clauses limiting or excluding liability are negotiated as part of the general contract" and "[a]s they do with all other contractual terms, the parties bargain for the consequences of deficient performance" such that the exclusion clauses ultimately end up being reflected in the contract price (p. 461). He preferred "to interpret the terms of the contract, in an attempt to determine exactly what the parties agreed" and if "on its true construction the contract excludes liability for the kind of breach that occurred, the party in breach will generally be saved from liability" (p. 462). Wilson J. also warned against giving exclusion clauses a strained or artificial interpretation and stated that the effect of such exclusion clauses is said to depend in each case on the true construction of the contract (p. 509).

[70] The problem-plagued doctrine of fundamental breach was finally "laid to rest" in *Tercon*, in which this Court favoured a modern and holistic approach that

focused on "the real question of what agreement the parties themselves intended" (para. 108, per Binnie J., dissenting, but not on this point). *Tercon* sets out three steps to help assess the enforceability of an exclusion clause. First, the court must determine whether an exclusion clause even applies in the circumstances, which necessarily depends on an "assessment of the intention of the parties" (para. 122). Post-*Tercon*, interpretation is thus the initial analytical step when a court is faced with an exclusion clause and this includes "a search for intent using the general rules of contractual interpretation" (A. J. Black, "Exclusion Clauses in Contracts and their Enforceability Following the Decline of Fundamental Breach" (2015), 44 *Adv. Q.* 139, at p. 163; see also p. 150).

[71] If the exclusion clause is found to be valid at the first step, the second step requires a court to consider "whether the exclusion clause was unconscionable at the time the contract was made" (*Tercon*, at para. 122). Third, even if not unconscionable, a court may consider if there is some overriding public policy consideration that outweighs the strong public interest in the enforcement of contracts and if there is, the court may refuse to enforce the otherwise valid exclusion clause (para. 123). Thus, concerns of potential unfairness that the doctrine of fundamental breach attempted to remedy are now addressed in the second and third step of the *Tercon* test (see also C. Pike, "Now We're Talking: Revisiting the Canadian Approach to No Oral Modification Clauses" (2021), 47:1 *Queen's L.J.* 1, at p. 31; J. D. McCamus, "The Supreme Court of Canada and the Development of a Canadian Common Law of Contract" (2022), 45:2 *Man. L.J.* 7, at pp. 16-17; S. O'Byrne, "Assessing Exclusion

Clauses: The Supreme Court of Canada's Three Issue Framework in *Tercon Contractors Ltd v British Columbia (Transportation and Highways)*" (2012), 35 *Dal. L.J.* 215, at pp. 231-32). Establishing unconscionability and the public interest as limits on freedom of contract has returned the focus onto the true contractual intention of the parties.

[72] The modern contractual interpretation principles from *Sattva* clearly apply to contracts containing exclusion clauses, especially at the first step of the *Tercon* test. *Sattva*'s direction to consider the surrounding circumstances when interpreting the terms of a contract means exclusion clauses must also be analyzed "in light of [their] purposes and commercial context" (*Tercon*, at paras. 64-65; see also *Dow Chemical Canada ULC v. NOVA Chemicals Corporation*, 2020 ABCA 320, 17 Alta. L.R. (7th) 83, at paras. 47 and 50). Accordingly, "[i]n a commercial contract[,] . . . the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context [and] the market in which the parties are operating" (*Sattva*, at para. 47, citing *Reardon Smith Line Ltd. v. Hansen-Tangen*, [1976] 3 All E.R. 570, at p. 574; see also Hall, at pp. 34-35 and 89-90).

[73] As a result, when interpreting an exclusion clause, like the express agreements contemplated under s. 53, "bright-line rules of construction are infrequent" and have been replaced by a contextual inquiry into what the parties objectively intended based on the text and surrounding circumstances (Black, at p. 164). Courts

can review such clauses for unconscionability and may refuse to enforce the exclusion clause if there is an overriding public policy reason that outweighs the public interest in the enforcement of contracts (*Tercon*, at para. 123).

(4) Explicit, Clear and Direct Language as Applied to Statutory Conditions and Identity

[74] In compiling its standard of explicit, clear and direct language, the Court of Appeal cited Dickson C.J.'s statement from *Hunter Engineering* about how contracting out of statutory protections "must be done by clear and direct language" (para. 51); relied on the 1982 Ontario High Court of Justice decision in *Chabot v. Ford Motor Co. of Canada Ltd.* (1982), 39 O.R. (2d) 162, for the requirement that "conditions and warranties implied by sale of goods acts may be excluded only by explicit language" (para. 50); and invoked its own decision in *Gregorio v. Intrans-Corp.* (1994), 18 O.R. (3d) 527 (C.A.), which restated the need for "explicit language" (para. 52). The Court of Appeal said it was bound to apply this legal standard and that it was a principle of law to be enforced on a standard of correctness.

[75] Language that explicitly, clearly and directly ousts a protection that the legislature has presumptively bestowed on a party to a contract is an optimal way to ensure the parties' mutual objectives are being carried out. As a drafting technique, it is the gold standard for contractual certainty and its presence is to be encouraged. However, with respect, this approach should not be elevated into a binding prerequisite, the absence of which would not only create a stand-alone error of law, but would lead

to the inapplicability of an express exclusion clause at the first step of the *Tercon* test. In the case at bar, this binding prerequisite would lead to the non-enforceability of the exclusion clauses because the parties did not expressly refer to conditions or to identity to demonstrate their intention to contract out of s. 14 of the *SGA*.

[76] While *Hunter Engineering* is the only authoritative case cited by the Court of Appeal in relation to the standard of explicit, clear and direct language, its lessons are many and are tied to the particular nature of the legal issue being addressed at various parts of the judgment. While it has been widely cited in relation to true exclusion clauses, its discussion of clear and direct language arose in a very different legal and factual matrix: one that did not involve parties expressly trying to restrict liability in a written exclusion clause. The nature of the contractual term being considered at this part of the judgment was an express contractual warranty limiting Hunter U.S.'s liability to either 24 months from the date of shipment or 12 months from the date of start-up, whichever occurred first. The issue was the legal significance, if any, of an express contractual warranty on the seller's implied statutory obligations. Hunter U.S. claimed that its act of inserting the express contractual warranty was enough to render the implied statutory warranty inapplicable (p. 449). In rejecting this argument, Dickson C.J. said, at pp. 449-50:

> The mere presence of an express warranty in the contract does not mean that the statutory warranties are inconsistent. If one wishes to contract out of statutory protections, this must be done by clear and direct language, particularly where the parties are two large, commercially sophisticated companies.

[77] In light of the contractual provision at issue, Dickson C.J. was principally concerned with exactly what was agreed to by the parties. Requiring "clear and direct language" makes real sense when the issue is whether the seller's express warranty about the goods overrode the implied statutory terms. In considering whether the existence of the former precluded the application of the latter, the parties would need to speak clearly to the intended interrelationship between these two types of legal responsibilities and directly address whether the express warranty was meant to be in addition to, or in substitution of, the implied statutory conditions.

[78] Dickson C.J.'s statement was *not* made in reference to situations where parties have intentionally and expressly included an exclusion clause. Indeed, the Hunter U.S. contract contained no words of exclusion at all. Under s. 53, there was therefore no "express agreement" excluding legal liabilities and the issue was what inference could be drawn from their unexpressed intention about the operation of a contractual warranty. To insist that direct and clear language is also or always needed when words of exclusion are actually employed by the parties takes this dicta out of its context and risks unnecessarily extending it at the expense of the objective intention of the parties, in a manner that is at odds with broader principles of contractual interpretation. When buyers and sellers have directed their minds to the allocation of risk and inserted words like those contained in clauses 6 and 7 of the impugned Contract, the same approach should not simply be transposed or apply as strictly or in the same way in this different factual matrix. The very presence of words excluding liability shows that the parties' intention is "express".

[79] I therefore do not read *Hunter Engineering* as binding authority for the general proposition that "explicit, clear and direct language" — a strict, formulaic requirement — must be used, as a matter of law, by any party seeking to exempt themselves from statutory liability under the *SGA*. Dickson C.J.'s comments were not meant to establish universal legal rules or rigid verbal formulas, especially when the parties have agreed to an exclusion clause. It would be stretching *Hunter Engineering* to overlay the additional requirement that to successfully secure their stated intention the parties must, as a matter of law, also employ certain words to do so.

[80] *Hunter Engineering* must instead be read as a whole, including the importance it placed on interpreting the parties' intentions. Even if that decision stood for what the respondent says at the time that it was rendered, moreover, it would now need to be read in light of the evolution towards the "practical, common-sense approach" set out by this Court subsequently in *Sattva*, *Tercon* and their progeny. Notably, that passage from *Hunter Engineering* underscores the importance of the nature of the contractual term at issue and the circumstances of the contracting parties, two factors that are relevant to determining the existence of an express agreement under s. 53. This recognition of how the circumstances of the parties may be taken into account predated and is entirely consistent with how *Sattva* made the surrounding circumstances relevant to what the parties objectively intended and with how *Tercon* underscored the importance of the commercial context for the interpretation of exclusion clauses.

[81] In addition, Dickson C.J. did not insist on "explicit" language, and he certainly did not call for explicit language which tracks the legal characterization or content of the term sought to be excluded. No problems arise if "explicit" is just another way of saying the agreement must be express or apparent, and cannot be implied, imputed or inferred. However, difficulties surface if the standard of "explicit" language is taken too far and is turned into a principle of law employed to insist that something must always be referred to by name. This is what happened when the Court of Appeal held that the term "quality" cannot capture "identity" and parties must expressly state they are negating implied statutory *conditions*. They reasoned, based on *Chabot*, that because the exclusion of implied *warranties* does not exclude implied *conditions*, excluding responsibility for the *quality* of the goods does not exclude responsibility for an implied statutory condition for their *identity* (para. 59).

[82] With respect, while the Court of Appeal cited *Sattva*, it did not give full effect to its direction that the overriding concern of contractual interpretation is determining the objective intention of the parties. *Sattva* mandated a shift away from technical rules of construction and required that words be understood in their factual matrix (para. 47; C.A. reasons, at para. 68). By insisting on a specific type of language, such as terms with distinct legal meanings, the Court of Appeal tended to fixate on the precision of the language required to negative liability rather than focus on the objective intention of the parties.

[83] The Court of Appeal was correct that there is a recognized distinction, in both the *SGA* and the case law, between warranties and conditions. In *Chabot*, the trial judge took into account the nature of the exclusion clause and the status and sophistication of the parties in deciding that "words excluding implied warranties are sufficient only to exclude implied warranties, and do not also exclude implied conditions" (p. 175). The court was mindful that there was no opportunity for negotiation: the plaintiff purchased a vehicle and was required to sign the seller's standard form agreement that excluded "warranties" implied under the *Sale of Goods Act*, R.S.M. 1970, c. S10. Because of a defect, the car burst into flames, was destroyed, and the buyer sought damages. Before *Tercon* and consumer protection legislation, courts often interpreted clauses against the superior party who insisted on their insertion or held them tightly to the precise terms of their claimed exemption. Depending on the words used, the surrounding circumstances and the intention of the parties, such an approach is consistent with s. 53, *Sattva* and *Tercon*.

[84] Conditions should be distinguished from warranties "unless there is something in the context to displace the presumption that [those terms were] intended to carry [their] technical meaning" (*Rosenberg v. Securtek Monitoring Solutions Inc.*, 2021 MBCA 100, 465 D.L.R. (4th) 201, at para. 98, citing S. K. Lewison, *The Interpretation of Contracts* (7th ed. 2021), at p. 284). The cardinal principle requiring courts to interpret a contract in accordance with the parties' objective intention allows space for what the parties objectively intended those terms to mean. The contracting parties may not have intended to invite the legal ramifications that can accompany the

usage of particular terms and thus a strict enforcement of the legal distinction may not always be in keeping with the parties' objective intention. Thus, a consideration of the surrounding circumstances necessarily means that the words used by the parties cannot always be interpreted in a uniform way because the meaning of even legal terms may depend on who the contracting parties are, their relationship to each other and whether they are sophisticated at contracting.

[85] The same rigour applied to the distinction between warranties and conditions need not be extended to a term like "quality", which is often used in general parlance. The term "quality" is not exhaustively defined in the *SGA* and is less likely to be thought of as a word that carries with it a similar significant legal meaning, especially when used by individuals contracting without legal assistance.

[86] The law continues to recognize a distinction between the identity and qualities of goods, but courts should not impose a very high, and often unrealistic, burden on contracting parties to be aware of and fully understand the legal characterization and consequences of the words they use to express themselves. In some circumstances, sophisticated parties negotiating through lawyers may know all about the legally significant differences between conditions and warranties, and between identity and quality. However, in many situations, such a rigid and rigorous review may thwart the parties' objective intention, especially when their words have different meanings and admit of multiple interpretations. In *Co-operators Life Insurance Co. v. Gibbens*, 2009 SCC 59, [2009] 3 S.C.R. 605, this Court held that

words in a contract must be given their ordinary meaning "as they would be understood by the average person . . ., and not as they might be perceived by persons versed in the niceties of [the] law" (para. 21, citing *National Bank of Greece (Canada) v. Katsikonouris*, [1990] 2 S.C.R. 1029, at p. 1043 (emphasis added)).

[87] Further, the logic underlying the proposition that the terms "conditions" and "warranties" are presumed to carry their established legal meaning is actually significantly weaker when applied to the terms "identity" and "quality". Unlike "conditions" and "warranties", the terms "identity" and "quality" will generally not be applicable to most contracts and they also do not form a substantial part of the entire structure and basis of the *SGA*. While a considerable portion of the *SGA* is premised on the distinction between "conditions" and "warranties", the relevance of the distinction between "identity" and "quality" is confined to the applicability of s. 14. The demarcation between a good's "identity" and a good's "quality" is not so easily discernible, arises from the case law and is not even mentioned in the *SGA*. Finally, the term "quality" is used frequently in everyday conversation such that it has a much wider and more colloquial meaning as compared to the terms "conditions" and "warranties".

[88] An approach requiring the strict and unwavering application of a legally established distinction between terms is also inconsistent with case law that has held, for example, that goods sold "as is" oust the statutorily implied conditions even though they do not refer to "conditions" or the defining feature of the implied condition at issue, like "identity", or "fitness" or "merchantability" (see *Moldenhauer v. Alberta*

Powersports Inc., 2009 ABPC 118, at paras. 33-37 and 48 (CanLII); *Conners v. McMillan*, 2020 BCPC 230 (CanLII), at paras. 67-68). These cases also underscore how s. 53 requires only an express agreement and not express language.

[89] With respect, the Court of Appeal placed too great an emphasis on the explicit language that was not used, instead of asking what the parties intended by the words they did employ in their commercial context. Little consideration was given to what the words would have reasonably meant to two parties who had discussed both the changing nature of the soil's composition as well as its testing and delivery.

[90] The requirement that as a matter of law, the express agreement must be that "explicit", direct and clear, is inconsistent with the broad language and wide purpose of s. 53 and to *Sattva*'s flexible approach to contractual interpretation in which the overriding concern is to determine "the intent of the parties and the scope of their understanding" (para. 47).

[91] Section 53 does not say that express language referring to specific legal terms is necessary to capture the parties' intention to oust legal liabilities under the *SGA*. In this context, an express agreement means that a court is able to reasonably ascertain the parties' intention after reading the words of the contract in light of the factual matrix. *Sattva* and *Tercon* give priority to the parties' objective intention and promote a more flexible approach better suited to assessing whether, and the extent to which, parties intended to negative implied statutory conditions. This is so because sometimes buyers and sellers may seek to displace all such conditions, or may select

among them. They may replace them with other contractual terms or remove them entirely. The ousting of the statutory protection may be absolute or only arise conditionally when something else, like inspection, was not done. Further, the *SGA* and s. 53 apply to a broad spectrum of contract types, from those dealing with millions of dollars' worth of equipment as in *Hunter Engineering*, to the simple sale of a used bicycle taking place in a seller's backyard. This range of circumstances and sophistication in contracting must be duly accounted for when interpreting a sale of goods contract. A proper application of the principles from *Sattva* and *Tercon* account for the varying contracting scenarios that can arise between different sets of parties.

[92] If an express provision in a contract protects a party and the court concludes the provision was intended to operate in the circumstances which have occurred, the provision is to be given full effect. That is because commercial certainty is best served by the law giving effect to what was actually agreed to by the parties. Searching for the parties' objective intention furthers that purpose, whereas the overly technical and legalistic interpretation of exclusion clauses does not.

D. *Summary of the Proper Approach to Interpreting Exclusion Clauses Under Section 53 of the Sale of Goods Act*

[93] In conclusion, because s. 53 requires an express agreement and s. 57(1) confirms the applicability of the common law as it exists from time to time, the principles from *Sattva* and *Tercon* extend to contracts for the sale of goods. While recognizing the need to balance protections for parties, freedom of contract and

commercial certainty, exclusion clauses in sales contracts are not categorically distinct or subject to different or stricter rules of construction. The *SGA* must be read as a whole and while the legislature wanted to provide presumptive protections to parties, it also expressly allowed parties to opt out entirely from the implied statutory conditions. The "express agreement" contemplated by s. 53 of the *SGA* is to be interpreted and applied accordingly.

[94] It is at the first step of the *Tercon* test where a court should determine whether there is an express agreement between the parties that is sufficient to meet the requirements of s. 53. To do so, a court must apply the principles of modern contractual interpretation, which involves, among other things, a consideration of the words used in the contract, the surrounding circumstances, who the contracting parties are and their level of contracting sophistication. The overall goal is to ascertain whether it was the objective intention of the contracting parties to exempt one party from statutorily imposed liability as permitted by s. 53.

[95] Courts tasked with deciding whether implied statutory conditions have been excluded from a contract will seek to ascertain the objective intention of the parties as manifested by the words chosen and the surrounding circumstances (*Sattva*, at para. 47). A flexible approach, focused on the objective intention of the parties, will allow courts to give effect to the parties' bargain while taking into account the nature of the contract and the contracting parties, what the parties would have reasonably understood their words to mean and to ensure the parties' objective intention is not

thwarted by strict rules of interpretation and to control for unfairness by unconscionability and public policy considerations.

[96] As the prevailing goal of contractual interpretation is to ascertain the objective intent of the parties, this necessarily requires a decision-maker to refer to the surrounding circumstances of a contract while at the same time ensuring that the surrounding circumstances do not "overwhelm the words of [the] agreement" (*Sattva*, at para. 57). This is so because using a "sterile textual analysis of a contract's language without regard to the surrounding circumstances . . . is apt to lead to indeterminacy and brings a significant risk of inaccurate results" (Hall, at p. 30). A consideration of the surrounding circumstances in this respect necessarily means that the words used by the parties cannot always be interpreted as having a meaning that has been well established in law. The meaning of the words used can largely depend on who the contracting parties are, their relationship to each other and their degree of contracting sophistication. The principles emerging from *Sattva* require this interpretive flexibility to account for the varying contracting scenarios that can arise between different sets of parties.

[97] If the contract, by express provision, protects a party by ousting implied statutory terms and the court thinks the provision was intended to operate in the circumstances which have occurred, the provision is to be given full effect unless it is found, at steps two and three of the *Tercon* test, respectively, to have been unconscionable at the time the contract was made or if there are overriding public

policy concerns that would compel a court to refuse to enforce it. That is because it was the objective intention of the parties and because commercial certainty is best served by the law giving effect to their actual bargain. Searching for the parties' objective intention furthers that purpose, whereas an overly technical and legalistic interpretation of exclusion clauses does not.

[98] An "express agreement" under s. 53 requires that the parties have expressly and unambiguously used language that signals their intention to override the statute. This means that silence or omission does not suffice. Nor can the court imply, impute or infer intention to opt out of the statute based on parties' presumed intention. Section 53 requires an "express *agreement*", not "express *language*", and is far removed from setting a legal standard that insists on explicit, clear and direct language which speaks to the legal characterization of the terms at issue. There is no requirement for "magic words". While the words of the agreement itself are undoubtedly important, *Sattva* allows a court to read these words with the surrounding circumstances in mind and does not mandate that words be strictly attributed with a singular, prescriptive meaning. It simply requires that any intention of the parties to exclude the *SGA* be grounded in the text, if the contract is a written one. To have an effective express agreement that satisfies s. 53, the parties' joint intention must be declared and the exclusion clause must unambiguously vary or negative the statutorily implied obligation, based not only from the words of the contract itself, but also from an analysis of the surrounding circumstances (*Sattva*, at paras. 58-61).

[99] In sum, any express agreement sufficient for the purposes of s. 53 must be comprised of an agreement to negative or vary a statutorily implied right, duty or liability and such an agreement must be expressly set forth within the parties' contract. One must be able to point to the contract and say, "that exclusion clause ousts the operation of an implied term of the *SGA*".

E. *Clauses 6 and 7 Exempt Earthco From Liability Under Section 14*

[100] Under this approach to interpreting an "express agreement" under s. 53, it is clear that clauses 6 and 7 exempt Earthco from any statutorily imposed liability under s. 14 of the *SGA*. I conclude that the interpretation advanced by Pine Valley is at odds with s. 53 of the *SGA*; is out of step with the modern approach to both contractual interpretation and the legal treatment of exclusion clauses; and overstates the need for explicit language that refers to the precise legal character of the obligation at issue.

[101] Although the trial judge did not explicitly consider *Sattva*, his interpretation of the Contract is grounded firmly in the evidence and respects the objective intention of the parties. As stated previously, this stage of the analysis is placed squarely within step one of the *Tercon* test, which addresses whether a particular exclusion clause is applicable (para. 122). Step one from *Tercon* asks whether the exclusion clause at issue applies to the circumstances established in the evidence and includes a "Court's assessment of the intention of the parties as expressed in the contract" (para. 122). In this case, it is ultimately an exercise of determining if the parties had an express agreement, sufficient for the purposes of s. 53 of the *SGA*, as to

what liability was being exempted by clauses 6 and 7. To determine as much, the modern contractual interpretation principles emerging from *Sattva* must be applied at this stage of the *Tercon* test. A court must ascertain the parties' objective intention and look to the surrounding circumstances in order to determine if the exclusion clause is applicable. In order for an exclusion clause to be applicable in a case such as this, a court must conclude that the parties came to an express agreement sufficient to meet the requirements of s. 53 of the *SGA*. As I have previously stated, such an express agreement need not be comprised of particular or explicit language and what is deemed to be a sufficiently express agreement will vary depending on the contracting parties and the circumstances. Once it is determined that an exclusion clause is applicable and that it successfully exempts a party through s. 53 from any statutorily implied liability, the courts then ask whether the exclusion clause was unconscionable, and if it is not, whether the courts should decline to enforce it due to public policy considerations.

[102] The starting point is that the parties must be taken to have some intention because they decided they needed to add bespoke exclusion clauses to the Contract. They had precise concerns that arose from this particular sale and its specific nature and they explicitly addressed them. The clauses they added are in simple language and were the product of their individual conversations and negotiations. These two clauses are contractual terms of "utter particularity" (*Ledcor*, at para. 41). Pine Valley and Earthco purposively inserted two express written clauses into their agreement to say that if the buyer waived its right to test and approve the goods, then the seller would not be responsible for their quality. Unlike the contract with Hunter U.S. in *Hunter*

Engineering, the parties in the case at bar sought to negative liability and conveyed their intention about their legal relationship through words clearly directed to their agreed upon allocation of contractual risk. They have unequivocally expressed an objective intention to contract out of certain statutory protections.

[103] Looking to the words the parties chose, clause 6 can only mean that Pine Valley had the right to both test and approve the soil before delivery. On its face, clause 7 says that if the right to test and approve is waived, Pine Valley, not Earthco, will be responsible for the "quality of the material" once it leaves Earthco's facility (A.R., at p. 201). In this sense, the plain meaning of clauses 6 and 7 of the Contract was to explicitly, directly and clearly protect Earthco from liability for any defects should Pine Valley fail to test and approve the topsoil before shipping.

[104] "Quality" cannot be construed in isolation and must be interpreted as the parties reasonably intended and within their commercial context. "Quality" does not have an immutable or absolute meaning. These parties reasonably understood the word "quality" to describe and include all the attributes of the soil, including its ultimate composition. In this case, the parties clearly knew, or ought to have known, that by exempting liability for the "quality" of the soil, they were exempting liability for any percentage-based compositional deficiency. They used the word "quality" in its colloquial and commercial sense, and not in its legal sense. When ascertaining what the parties truly intended to exempt liability for, *how* those parties classify it is not as crucial as enforcing what the parties objectively intended to contract out of. In my view,

they did not need to explicitly refer to "conditions" or "identity" to effect their desired result.

[105] The term "quality" must be also interpreted in a manner that is "consistent with the surrounding circumstances known to the parties at the time of formation of the contract" (*Sattva*, at para. 47). Pine Valley was a commercial purchaser with years of experience in buying large quantities of soil. Pine Valley had direct input into the formation of the Contract based on the advice of Mr. Serrao, who also had significant training and experience with different soils, as well as access to the City Consultant. Both parties were aware of the changing nature of the topsoil, that the soil was sold in large bulk qualities and that the existing test results for it were dated.

[106] Earthco and Pine Valley used plain language in their bespoke contractual edits and there is no evidence these clauses were reviewed by legal professionals before the Contract was signed. It is unrealistic to expect these parties to know about the legal distinction between the terms "identity" and "quality" or, for that matter, between "conditions" and "warranties". To further expect the parties to then explicitly include proper legal reference to these terms without knowing the legally significant difference between them is a commercially impractical expectation and takes the focus away from where it should be: how the parties reasonably understood, or ought to have understood, the words they used.

[107] In this case, the parties were free to negotiate and allocate the risk of not testing the soil prior to delivery as they saw fit. Before the Contract was formed, Pine

Valley was advised that Earthco was not taking responsibility for the quality of the soil once it left its facilities and that Pine Valley should have the soil tested before delivery. Mr. Outred wrote to Mr. Serrao and said: "I think you should wait until the test is done but if you would like to start shipping at your own risk please let me know" (A.R., at p. 136 (emphasis added); trial reasons, at para. 25). Mr. Valente specifically insisted on including the exclusion clauses in the Contract because they reflected the discussions that Earthco had had with Pine Valley up until that date outlining that if Pine Valley were to waive its right to pre-shipment testing of the soil, Earthco would assume no liability for the quality of the soil once it left its premises (trial reasons, at para. 75). Other post-contract evidence, which can only be used to assess what the parties objectively believed their agreement was at the time it was made, also shows that Earthco was "no longer responsible for the material once it [left their] yard" (A.R., at p. 151; trial reasons, at para. 29) and without testing, "all risks would be assumed by Pine Valley" (trial reasons, at para. 73; see also para. 29).

[108] A key surrounding circumstance which helps to ascertain the objective intention of the parties is that Pine Valley was in a tremendous rush to receive the soil, given pressure from the City about ongoing delays and the looming threat of the imposition of liquidated damages. Pine Valley deliberately assumed the risk that the soil would not meet the Project's requirements, and chose not to test or approve the product before delivery simply because it needed the soil *fast*. It made its own conscious and strategic decision, based on its assessment of the possible risks

associated with taking delivery before testing versus the near certain obligation of having to pay the City for every further working day of delay.

[109] In the commercial context of the agreement, there was no unfairness in refusing to find Earthco liable for what the trial judge called Pine Valley's "expensive but calculated mistake": the very purpose of clauses 6 and 7 was to avoid the exact situation in which a customer failed to test the product and then attempted to hold the supplier responsible for a loss (trial reasons, at para. 127). Interestingly, in *Hunter Engineering*, Wilson J. recognized, at p. 509:

> The exclusion clause cannot be considered in isolation from the other provisions of the contract and the circumstances in which it was entered into. The purchaser may have been prepared to assume some risk if he could get the article at a modest price or if he was very anxious to get it.

[110] Ultimately, the trial judge did not err by finding that Pine Valley knowingly chose to accept the risk of not testing the R Topsoil in favour of expediting the soil's delivery so as to avoid liquidated damages for delaying the Project (para. 125). Having done so, Pine Valley cannot now claim liability for variations in the soil composition against Earthco after Pine Valley knowingly accepted the possibility that this could occur but refused to perform soil tests. To allow Pine Valley to do so would be to not give effect to the parties' objective intention at the time of the Contract's formation, which would amount to a rejection of the principles of modern contractual interpretation post-*Sattva* and *Tercon*.

[111] The parties' stated intention and the surrounding circumstances of the Contract's formation all strongly support the conclusion that Pine Valley clearly accepted the risk that the soil might not be consistent with the August test results when it chose not to test the soil intended for delivery. That this was the parties' true and overarching objective intent is demonstrated by the words used, how they were reasonably understood by the parties and the surrounding circumstances. The trial judge's thorough and well-reasoned approach, which considered the exclusion clauses in harmony with the rest of the Contract and in light of its purposes, the surrounding circumstances and the commercial context, was clearly in line with the modern approach to contractual interpretation as developed by cases such as *Sattva* and *Tercon* (*Sattva*, at para. 47; *Tercon*, at para. 64).

[112] The trial judge made no error in finding that the exclusion clauses agreed on by the parties were "clear and unambiguous" and worked to insulate Earthco from all liability because to hold otherwise would have defeated the parties' objective intention (paras. 117 and 126). Ultimately, the parties in this case came to an express agreement about the allocation of risk, by using direct, clear and express language in their contract, which demonstrated that their objective intention was for Pine Valley to waive its right to pursue Earthco for any liability relating to the soil.

[113] As mentioned, the Court of Appeal erred by holding that there was an extricable question of law in the case at bar meriting a correctness review. On the applicable deferential standard of review, I am of the view that the trial judge made no

palpable and overriding error in his findings of fact. The principles from *Sattva* were properly applied by the trial judge to support his finding that the parties had an express agreement that Earthco would not be liable for any issues relating to the composition of the soil. I wish to reiterate that the context and surrounding circumstances certainly do not serve to change or replace the words used in the agreement; rather, they are used as helpful interpretive tools, which is exactly how the trial judge used them in the case at bar.

[114] Before concluding, I note an alternative argument advanced by the seller before this Court, but not before the Court of Appeal, that the sale between Earthco and Pine Valley was not in fact a sale by description and consequently, the failure to supply soil with the specified percentages of sand, silt and clay was not a breach of s. 14 but rather a breach of a contractual promise relating to the *quality* of the goods, which fell squarely within the scope of the exclusion clauses (see C. Bangsund, "Two Wrongs Don't Make a Right: A Case Comment on *Pine Valley Enterprises Inc. v. Earthco Soil Mixtures Inc.*" (2023), 67 *Can. Bus. L.J.* 476, at p. 499). While Pine Valley does not object to this Court addressing this new argument, I nevertheless decline to do so in light of my ultimate conclusion that the exclusion clauses were sufficient to exempt Earthco from liability under s. 14 of the *SGA*.

VI. Disposition

[115] For the reasons above, I would allow Earthco's appeal, set aside the Court of Appeal's order and restore the trial judge's judgment, with costs throughout.

The following are the reasons delivered by

CÔTÉ J. —

TABLE OF CONTENTS

I. Overview

[116] This appeal concerns the interpretation of certain provisions of the *Sale of Goods Act*, R.S.O. 1990, c. S.1 ("*SGA*"), and their application to a contract for the sale

of topsoil. More specifically, it involves determining whether and how parties can contract out of an implied condition under that Act.

[117] The appellant, Earthco Soil Mixtures Inc. ("Earthco"), and the respondent, Pine Valley Enterprises Inc. ("Pine Valley"), entered into a contract for the sale of topsoil with a composition agreed upon on the basis of test results ("Contract"). In clauses 6 and 7 of the Contract ("Exclusion Clauses"), the parties agreed that Earthco, the seller, would "not be responsible for the quality" of the topsoil if Pine Valley, the buyer, waived its right to test the topsoil before it was shipped. After the topsoil was delivered, it was discovered that it did not have the composition Pine Valley had bargained for. Pine Valley now seeks damages arising from this breach.

[118] The main issue in this appeal is whether the Exclusion Clauses together constitute an "express agreement" within the meaning of s. 53 of the *SGA* so as to exclude liability for a breach of *any* statutory condition arising under a contract for the sale of goods, including the conditions in ss. 14 and 15 of the *SGA*. Section 14 implies a condition that the goods delivered will correspond with the description agreed upon in the contract. The condition in s. 14 is distinct from the condition in s. 15, which pertains to the quality or fitness for the purpose of the goods. The answer to the question of whether the Exclusion Clauses expressly exclude liability for a breach of the implied condition in s. 14 or 15 turns in part on the proper interpretation of the requirement, set out in s. 53, that parties intending to contract out of a statutorily implied condition arising do so by "express agreement".

[119] There is no reason to depart from our Court's previous interpretation in *Hunter Engineering Co. v. Syncrude Canada Ltd.*, [1989] 1 S.C.R. 426, regarding what is required to exclude liability where the *SGA* applies. As our Court held in that case, if parties wish to exclude liability for a breach of a statutorily implied condition by "express agreement", they must do so using "clear and direct language" (p. 450). Although this legal standard does not require the use of any "magic words", it does require the parties to express their intention to exclude liability for a statutorily implied term with language inconsistent with that term. This is the conclusion that must be reached when the words "express agreement" are read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme and purpose of the *SGA*. The decisions of our Court in *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69, and *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, have not altered this statutory requirement.

[120] In my view, the Exclusion Clauses are not an "express agreement" within the meaning of s. 53 of the *SGA* to exclude Earthco's liability for a breach of the implied condition in s. 14 that goods sold by description will correspond with their description — in this case, that the soil supplied would have the composition established in the test results from August 2011, as bargained for by the parties. An exclusion clause is not an express agreement under s. 53 with regard to a particular implied condition if interpreting it as such requires deviating from the text of the contract and asking what the surrounding circumstances would deem the parties to have

written, instead of interpreting the meaning of the words actually used by the parties. Interpreting the surrounding circumstances in isolation from the text of the contract is inconsistent with *Sattva*. The trial judge also misdirected himself in interpreting and applying the standard imposed by s. 53. The trial judge improperly relied on the factual matrix to change the meaning of the word "quality" used by the parties in the Exclusion Clauses from its ordinary and grammatical meaning to a meaning that included the "identity" of the goods. This was unsupported by the text of the Contract and inconsistent with the scheme of *SGA*, which was a vital part of the commercial setting in which the parties contracted. Such an approach, which disregards the law governing the sale of goods contract, was inconsistent with the well-established "clear and direct language" requirement articulated by our Court in *Hunter Engineering*. This constitutes an error of law reviewable on a standard of correctness, as established in *Sattva*.

II. Context

[121] On the whole, I agree with my colleague's description of the factual background and summary of the decisions below. However, I wish to highlight certain points that circumscribe the issue in the present appeal.

[122] At first instance, the trial judge determined that while Pine Valley had waived its right to test the soil, it had not waived its right to receive the soil it had bargained for, namely R Topsoil with the composition established in test results from August 2011 — 46 percent sand, 36 percent silt, and 18 percent clay. The trial judge noted that Pine Valley had not received soil with the composition established in those

tests results, given the "significant variation between the soil promised and the soil delivered" (2020 ONSC 601, at para. 103 (CanLII)).

[123] The trial judge found that the Contract entered into by the parties was a sale by description and that the soil supplied by Earthco did not match the agreed-upon description. In determining whether the parties intended to exclude Earthco's liability for failing to supply topsoil corresponding with the agreed-upon description, the trial judge proceeded in two steps.

[124] At the first step of the analysis, he examined whether, under the test established in *Tercon* with regard to the enforceability of exclusion clauses, the Exclusion Clauses applied to the circumstances of the dispute. In this respect, the trial judge found that the parties had contemplated that Earthco would not be contractually "responsible for the quality of the material once it left its facility" if Pine Valley failed to test and approve the soil before it was shipped (para. 89). According to him, the word "quality" included "all aspects of the soil that could be subject to testing . . . includ[ing] the texture or the composition of the soil" (para. 91).

[125] At the second step of the analysis, the trial judge examined whether the implied condition in s. 14 of the *SGA* was ousted by the Exclusion Clauses. He concluded that the Exclusion Clauses, because they removed Earthco's responsibility for "quality", could exclude "any" statutory liability, if Pine Valley failed to test the soil before it was shipped (para. 119). Therefore, the Exclusion Clauses ousted liability for a breach of the condition implied by s. 14 of the *SGA* that the goods would

correspond with their description. But for the Exclusion Clauses, the trial judge would have awarded damages assessed at $350,386.23 (para. 142).

[126] The question before our Court is whether the trial judge misdirected himself in determining whether the Exclusion Clauses were an express agreement within the meaning of s. 53 of the *SGA* to exclude the implied condition in s. 14. This was the main focus of the Court of Appeal's decision. Pine Valley argued that the Exclusion Clauses were not an express agreement within the meaning of s. 53, because this provision requires the parties to use explicit, clear, and direct exclusionary language. According to Pine Valley, given the distinction between the "identity" and the "quality" of the goods under ss. 14 and 15, the parties, by using the word "quality", had not expressly agreed to exclude statutory liability in relation to soil that did not match its contractual description.

[127] Before the Court of Appeal, Earthco did not challenge a number of the trial judge's findings: that the Contract was a sale of goods by description within the meaning of s. 14 of the *SGA*; that the soil being sold was described as R Topsoil with the composition established in the August 2011 test results and was not just "any soil"; and that the soil supplied did not correspond with that description (2022 ONCA 265, 161 O.R. (3d) 103, at paras. 3, 9, 18, 26 and 43, quoting trial reasons, at para. 100). The outcome of the dispute therefore turned entirely on the interpretation and application of ss. 14, 15 and 53 of the *SGA*.

[128] Zarnett J.A., for a unanimous court, determined that the trial judge had erred in concluding that the Exclusion Clauses ousted all statutory liability under the *SGA*, including for breaching the statutory condition that the soil would correspond with the description agreed upon on the basis of the test results for R Topsoil. Zarnett J.A. identified three extricable questions of law: the legal nature of the condition in s. 14 of the *SGA*, the standard imposed by the "express agreement" requirement in s. 53, and the use of the factual matrix to inform the meaning of the express exclusionary language (paras. 35-36). In his view, s. 53 requires parties to use "an express agreement[, i.e.,] composed of explicit, clear and direct language" to exclude statutorily implied conditions (para. 7).

III. Analysis

A. *Standard of Review*

[129] In a civil litigation context like this one, it is well established that statutory interpretation — which is distinct from contractual interpretation — is a question of law subject to the standard of review of correctness (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 8; *Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32, [2017] 1 S.C.R. 688, at paras. 75-76). In contrast, a trial judge's interpretation of a contract is owed deference on appeal; unless there is an extricable question of law, the standard of review is that of palpable and overriding error (*Sattva*, at para. 53). Where an extricable question of law is identified, the applicable standard of review is correctness.

B. *The Principles of Statutory Interpretation Apply*

[130] The provisions of the *SGA* under scrutiny in the present appeal are ss. 14, 15 and 53. The meaning of these provisions must be determined first and foremost by applying the relevant principles of statutory interpretation. The interpretation of the "express agreement" requirement in s. 53 is distinct from the interpretation of the Contract. What *constitutes* an express agreement may vary, but what an express agreement *requires* does not. Any legal standard that s. 53 creates applies equally to all contracts that fall within the ambit of the *SGA*.

[131] The *SGA* was first enacted in 1927. Like its other provincial counterparts, it is closely modelled on the Imperial *Sale of Goods Act, 1893* (U.K.), 56 & 57 Vict., c. 71. The Imperial *Sale of Goods Act, 1893* was built on and reflected many of the common law principles applicable to the sale of goods in England at the time. While its full title was "An Act for codifying the Law relating to the Sale of Goods", it did not completely displace the common law: ". . . the common law . . . has had and continues to have a significant impact upon the development of the law [on the sale of goods]" (E. McKendrick, "Sale of Goods", in P. Birks, ed., *English Private Law*, vol. II (2000), 223, at para. 10.02). The purpose of the *Sale of Goods Act, 1893* was, as its drafter wrote, to "lay down clear rules" in an area of the law where "the certainty of the rule is often of more importance than the substance of the rule" (M. D. Chalmers, *The Sale of Goods Act, 1893, Including the Factors Acts, 1889 & 1890* (2nd ed. rev. 1894), at pp. v-vi).

[132] The *SGA*, like the Imperial *Sale of Goods Act, 1893*, may not be a complete codification of the law on the sale of goods, but it remains a codifying statute. Lord Herschell wrote in *Bank of England v. Vagliano Brothers*, [1891] A.C. 107 (H.L.), at p. 145, that the object of a codifying statute has been said to be "that on any point specifically dealt with by it, the law should be ascertained by interpreting the language used instead of . . . roaming over a vast number of authorities". As with all statutory interpretation, the first step is to interpret the language of the statute to ascertain the expressed legislative intent. While legislation must be interpreted in light of the context of the common law, developments in the common law cannot override the express language of a statute. This is especially plain in view of s. 57(1) of the *SGA*, which provides that "[t]he rules of the common law, including the law merchant, except in so far as they are inconsistent with the express provisions of this Act . . . continue to apply to contracts for the sale of goods". The *SGA*'s provisions must be read in light of the common law of contract, but they are to be given precedence where any inconsistency arises.

[133] As a result, the issue before us is, first and foremost, one of statutory interpretation. The legal standard that the legislature intended to impose for ousting any statutorily implied condition arising under a contract for the sale of goods must be determined by reading the words "express agreement" in s. 53 of the *SGA* and the conditions in ss. 14 and 15 of the *SGA* "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of [the legislature]" (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27,

at para. 21, quoting E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26). When the words of a provision are "precise and unequivocal", the ordinary meaning of the words plays a dominant role in the interpretive process (*Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601, at para. 10; *Celgene Corp. v. Canada (Attorney General)*, 2011 SCC 1, [2011] 1 S.C.R. 3, at para. 21).

C. *The Legal Standard for Ousting an Implied Condition Under the SGA*

(1) Terms Arising Under Contracts for the Sale of Goods by Implication of Law

[134] The *SGA* provides protections to buyers in the sale of goods context by implying certain conditions into each contract for the sale of goods. The codification of such conditions, which were originally implied at common law, is "[t]he final stag[e]" in the journey of their development, "when a baleful eye is cast on attempts to exclude or limit [them] in the contract" (M. G. Bridge, *Sale of Goods* (1988), at pp. 428-29; see also M. G. Bridge, *The Sale of Goods* (4th ed. 2019), at p. 388). Most relevant to this appeal are the statutory conditions that the goods will correspond with their description (s. 14), will be fit for their purpose (s. 15 para. 1), and will be of merchantable quality (s. 15 para. 2). Each of these statutory conditions creates distinct rights, duties, and liabilities for the parties to a contract for the sale of goods, and it is important not to conflate them.

[135] Section 14 sets out an implied condition that the goods delivered under a contract for the sale of goods by description will correspond with their description:

> **14** Where there is a contract for the sale of goods by description, there is an implied condition that the goods will correspond with the description, and, if the sale is by sample as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.

[136] The purpose of s. 14 of the *SGA* is to protect the buyer's reliance on the seller's representations going to the description of the goods by incorporating into the contract an implied condition that the goods will correspond with that description. Establishing a breach of s. 14 involves a two-step analysis. It is first necessary to determine whether the contract is a sale by description within the meaning of s. 14. If so, it is then necessary to determine whether the goods delivered corresponded with their agreed-upon description (Bridge (2019), at pp. 389-92; C. Bangsund, "Two Wrongs Don't Make a Right: A Case Comment on *Pine Valley Enterprises Inc. v. Earthco Soil Mixtures Inc.*" (2023), 67 *Can. Bus. L.J.* 476, at pp. 499-500). I agree with my colleague that this is a fact-specific determination that turns on whether a statement describing the goods being sold was made and reasonably relied upon (*Ashington Piggeries Ltd. v. Christopher Hill Ltd.*, [1972] A.C. 441 (H.L.), at p. 503, per Lord Diplock, cited in *Bakker v. Bowness Auto Parts Co. Ltd.* (1976), 68 D.L.R. (3d) 173 (Alta. S.C. (App. Div.)), at p. 178).

[137] While s. 14 of the *SGA* offers protection to the buyer with regard to the identity of the goods sold, this provision is to be distinguished from s. 15 of the *SGA*,

which is broadly directed at their quality. In particular, s. 15 para. 1 sets out an implied condition that the goods sold will be reasonably fit for their purpose, and s. 15 para. 2 sets out an implied condition that they will be of merchantable quality:

> **15** Subject to this Act and any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows:
>
> 1. Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description that it is in the course of the seller's business to supply (whether the seller is the manufacturer or not), there is an implied condition that the goods will be reasonably fit for such purpose, but in the case of a contract for the sale of a specified article under its patent or other trade name there is no implied condition as to its fitness for any particular purpose.
>
> 2. Where goods are bought by description from a seller who deals in goods of that description (whether the seller is the manufacturer or not), there is an implied condition that the goods will be of merchantable quality, but if the buyer has examined the goods, there is no implied condition as regards defects that such examination ought to have revealed.

[138] The conditions in ss. 14 and 15 of the *SGA* arise under all contracts of sale by implication of law unless the contracting parties "have taken the pains to exclude or limit them" (Bridge (1988), at p. 427; see also Bridge (2019), at p. 387). In the present case, given that a breach of the implied condition in s. 14 is alleged and that exclusion clauses are raised as a defence, it is necessary to determine whether and how parties can contract out of an implied condition under the *SGA*.

(2) Section 53 of the *SGA*

[139] The common law of contract is fundamentally committed to respecting the freedom of the contracting parties to shape their agreement as they deem fit (see *Printing and Numerical Registering Co. v. Sampson* (1875), L.R. 19 Eq. 462, at p. 465). The *SGA* does not prevent the parties from doing so. On the contrary, they are free to contract out of any "right, duty or liability" arising under a contract for the sale of goods by implication of law. However, s. 53 precisely delineates the manner in which the parties can demonstrate their intention to vary or exclude statutory liability:

> **53** Where any right, duty or liability would arise under a contract of sale by implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties, or by usage, if the usage is such as to bind both parties to the contract.

[140] This provision sets out three distinct routes for ousting liability arising in the context of the *SGA*, namely usage, the course of dealing between the parties, and express agreement. First, usage, in appropriate circumstances and when proven, can be considered part of the contract for the sale of goods so as to negative or vary any right, duty, or liability arising by implication of law (see *Produce Brokers Co., Ltd. v. Olympia Oil and Cake Co., Ltd.*, [1916] 1 A.C. 314 (H.L.)). Second, the parties can be taken to have agreed, through their conduct in previous transactions, that a right, duty, or liability arising by implication of law will be varied or excluded (*Continental Tyre and Rubber Co. Ltd. v. Trunk Trailer Co. Ltd.*, 1985 S.C. 163 (1st Div.), at pp. 169-70, citing *McCutcheon v. David MacBrayne Ltd.*, 1964 S.C. (H.L.) 28, at p. 35). This requires the parties to have conducted business together before. Third, in keeping with freedom of contract, the parties are free to structure their contract as they see fit by

express agreement (K. P. McGuinness, *Sale & Supply of Goods* (2nd ed. 2010), at §6.6).

[141] In the present case, it is not contended that the implied condition in s. 14 was negatived or varied by the course of dealing between the parties or by usage binding on both parties. Pine Valley and Earthco did not have a pre-existing business relationship, and the Contract was their first agreement. No evidence of usage was presented. Earthco is arguing only that its liability for the breach, if any, of the implied condition in s. 14 was negatived by express agreement, in the form of the Exclusion Clauses. The focus must therefore be on the meaning of the words "express agreement".

[142] While s. 53 is broadly directed at allowing parties to contract out of statutorily implied conditions, this does not mean that the legislative intent is to permit them to contract out of statutory liability whenever they may have intended to do so, *regardless of how their intentions are expressed*. By delineating three distinct routes for departing from the rights, duties, and liabilities arising under a contract of sale by implication of law, the legislature has set clear standards for ousting liability for breaches of statutory conditions. That the routes are distinct is made clear by the use of the word "or" to separate each of them textually ("by express agreement or by the course of dealing between the parties or by usage"). The availability of distinct routes, besides that of an express agreement, does not dilute the requirement that there be an express agreement, but instead reinforces it. It is not incongruous that s. 53 allows the parties to exclude liability without recourse to an express agreement in some

cases — that is, where this is implied by the course of dealing between the parties or by usage — but not in all.

(3) The Meaning of "Express Agreement"

[143] Turning now to the meaning of "express agreement", I am of the view that this expression requires the parties to manifest their intention to exclude liability using clear and direct language, that is, language inconsistent with the terms the legislature sought to imply in the contract. This interpretation of the requirement in s. 53 of the *SGA* is the one that must prevail when the words "express agreement" are read in their entire context — including the common law as it currently stands — and in their grammatical and ordinary sense, in light of the scheme and purpose of the *SGA*.

(a) *Clear and Direct Language*

[144] An "express agreement" requires that statutory liability be excluded through *language*, not merely implicitly through inferences drawn from the surrounding circumstances of the contract. This much is clear from the ordinary and grammatical meaning of the words "express agreement" when read together and separately as well as in their broader context. In determining the meaning of the words "express" and "agreement", it is helpful to keep in mind that s. 53 of the *SGA* is a simple application of the general legal maxims "*[e]xpressum facit cessare tacitum*" and "*[m]odus et conventio vincunt legem*" (Chalmers, at pp. 103-4). The scheme of the *SGA* itself distinguishes between what is "express" and what is "implied" (ss. 12(3), 15,

16(1) and 28(1)). What is express, in this context, is contrasted with what is silent or left unspoken. It necessarily involves either spoken or written language.

[145] It is true that s. 53 refers to the necessity of an express "agreement" rather than express language. While "agreement" relates to the legal content that the parties objectively contemplated, and not merely the language of the contract, the parties are dependent on words to express that content (F. Wilmot-Smith, "Express and Implied Terms" (2023), 43 *Oxford J. Leg. Stud.* 54, at p. 60; S. M. Waddams, *The Law of Contracts* (8th ed. 2022), at p. 103). The requirement that the agreement be "express" indicates that the parties must manifest their intention to exclude liability through language, and this intention cannot be inferred from conduct or from other terms of their contract.

[146] Generally, an agreed-upon term will be "express" if it has "been specifically mentioned" by the parties (G. H. L. Fridman, *The Law of Contract in Canada* (6th ed. 2011), at p. 433). This is consistent with the ordinary and grammatical meaning of the word "express". An "express" agreement is "[d]irectly and distinctly stated", "[d]eclared in terms" and "set forth in words" (*Black's Law Dictionary* (6th ed. 1990), at p. 580). Put simply, it requires "direct and appropriate language"; what the parties agreed upon must be "[c]lear; definite; explicit; plain; direct; unmistakable; not dubious or ambiguous" (p. 580). Again, what is "express" is distinguished from what is ambiguous, implied, or inferred from conduct.

[147] Any inquiry to determine whether the parties expressly agreed to negative or vary a right, duty, or liability must focus on the words of their agreement. Indeed, an express agreement is clearly distinguished, within the scheme of the *SGA*, from the intention of the parties as revealed by a contextual analysis. In the sale of goods context, where the legislature intends the circumstances of the contract to govern the determination of whether a right, duty, or liability applies, it provides so expressly. For example, certain provisions of the *SGA* apply only "in the absence of evidence to the contrary" (ss. 20(2), 31(1), 48(3), 49(3) and 51(3)) or "[u]nless otherwise agreed" (ss. 21, 27, 28(5), 30(1), 32, 33(2) and 35). Other provisions expressly call for the court to look at the "circumstances of the case" in ascertaining the parties' intentions with respect to the timing of the transfer of property (s. 18(2)); determining whether a breach of contract is a repudiation of the whole contract or severable (s. 30(2)), and determining what is a "reasonable" contract for the delivery of the goods (s. 31(2)).

[148] This interpretation of "express agreement" in s. 53 of the *SGA* emphasizing the importance of the words chosen by the parties is further supported by a distinction that applies in the context of ss. 13, 14 and 15 of the *SGA*. Whereas any liability arising from ss. 14 and 15 must be ousted by express agreement, the rights, duties, and liabilities provided for in s. 13 apply "[i]n a contract of sale, unless the circumstances of the contract are such as to show a different intention". I do not take this to mean that the parties cannot oust any liability arising from ss. 14 and 15. However, in order to grasp the meaning of "express agreement" and what it requires, the distinction drawn by the scheme of the *SGA* between an express agreement and the surrounding

circumstances of the contract must be taken into account. In particular, the common law of contract, if it were incompatible with this distinction, could not be relied upon to set it aside. This would be inconsistent with the express provisions of the *SGA*. The legislature "does not speak in vain" (*Attorney General of Quebec v. Carrières Ste-Thérèse Ltée*, [1985] 1 S.C.R. 831, at p. 838; *Canada (Attorney General) v. JTI-Macdonald Corp.*, 2007 SCC 30, [2007] 2 S.C.R. 610, at para. 87; *R. v. Morrison*, 2019 SCC 15, [2019] 2 S.C.R. 3, at para. 89).

[149] The foregoing is in line with *Hunter Engineering*, a binding precedent of our Court. In the context of s. 53 of the *SGA*, "express agreement" requires the use of language that is sufficiently clear to indicate that the parties objectively intended to oust the liability imposed by the *SGA*. In *Hunter Engineering*, a conflict arose in the context of two contracts for the supply of gearboxes, which had failed. The supplier could not be held contractually liable for the design fault because the failure was discovered after the contractual warranty period specified in the two contracts had expired. The first contract provided that the express contractual term represented the supplier's "only warranty" and that "no other warranty or conditions, statutory or otherwise shall be implied" (p. 439). The second contract had no clause of that sort. The supplier argued that the mere presence of the express warranty sufficed to render the implied condition of fitness for purpose contained in s. 15 para. 1 of the *Sale of Goods Act*, R.S.O. 1970, c. 421, inapplicable.

[150] Dickson C.J. rejected this argument in light of both ss. 15 para. 4 and 53 of the Act, which are identical in content to the equivalent provisions of the *SGA* now in force. According to s. 15 para. 4, "[a]n express warranty or condition does not negative a warranty or condition implied by this Act unless inconsistent therewith" (p. 487). On the basis of this provision, Dickson C.J. correctly held that "[t]he mere presence of an express warranty in the contract does not mean that the statutory warranties are inconsistent" (p. 449). Turning his mind specifically to s. 53, he added that while the parties can "contract out of statutory protections, this must be done by clear and direct language, particularly where the parties are two large, commercially sophisticated companies" (pp. 449-50). The express warranty clause in the second contract did not meet that standard. However, the exclusion clause in the first contract was "sufficient to exclude the operation of the implied warranty" (p. 449). Wilson J., dissenting, but not on this point, also found that the implied warranty in s. 15 para. 1 was not excluded by the express terms of the second contract, because "clear and unambiguous language is required to oust an implied statutory warranty" (p. 497).

[151] With respect, there is no reason to depart from the interpretation of "express agreement" in s. 53 of the *SGA* that was established by our Court in *Hunter Engineering*. This interpretation is consistent with the grammatical and ordinary meaning of the words "express agreement", construed in light of the scheme and purpose of the *SGA*. Put simply, in the context of the *SGA*, an express agreement is distinct from what can be inferred from the conduct of the parties (in both previous and present dealings), usage, or the surrounding circumstances of the contract. The

legislature has established such a standard to protect the reasonable expectations of both contracting parties in an area of the law where certainty and predictability are most important. As the drafter wrote in his commentary on the Imperial *Sale of Goods Act, 1893*, commercial parties are taken to know their respective legal positions before entering into a contract of sale (see Chalmers, at pp. v-vi). If they intend to negative or vary any statutory "right, duty or liability", they must express this intention using clear and direct language.

(b) *Language Inconsistent With the Terms the Legislature Sought To Imply*

[152] An express agreement to exclude statutory liability in a contract for the sale of goods is one in which the language used by the parties is clear and direct having regard to the subject matter of the purported exclusion. In other words, the language must be inconsistent with the terms the legislature sought to imply in the contract by way of the *SGA*.

[153] The Court of Appeal was right to emphasize the difference between ss. 14 and 15 of the *SGA* (paras. 39 and 43). Much turns on the distinction between the two in the present case. The implied condition in s. 14 that the identity of the goods will correspond to their description in the contract is not interchangeable with the implied conditions in s. 15 paras. 1 and 2 that the goods will be reasonably fit for their purpose and will be of merchantable quality. The delivery of defective goods may breach one or more of the conditions set out in ss. 14 and 15 as a matter of fact, but the conditions have distinct legal content; "the two sections are to some extent mutually exclusive"

(M. Bridge, ed., *Benjamin's Sale of Goods* (12th ed. 2024), vol. 1, at p. 572). If the goods delivered correspond with their description, the fact that they are of poorer quality than promised will not be relevant in determining whether there was a breach of s. 14 (C.A. reasons, at para. 40). On the other hand, if the goods delivered do not correspond with their description, the fact that their quality is equivalent to that promised will not absolve the seller from liability under s. 14 (para. 42).

[154] Any intention to exclude liabilities arising from both ss. 14 and 15 must be expressed in clear and direct language, that is, language inconsistent with the content of the conditions in those sections. In this respect, the Court of Appeal was correct in stating that clear and direct language means "at the very least that the language must refer to the type of legal obligation the *SGA* implies — reference to a different legal obligation will not suffice" (para. 56). Indeed, s. 53 expressly refers to negativing or varying a *particular* "right, duty or liability" arising under a contract of sale by implication of law.

[155] This is not to say that the parties are required to use "magic words", such as "condition" or "warranty", or to make explicit reference to a specific section of the *SGA* or to the "statutory" nature of the liability. But when the parties choose to write down what they have agreed upon — as the parties decided to do here — courts will "attribute precise legal meaning to technical terms" used (C. Twigg-Flesner, R. Canavan and H. MacQueen, *Atiyah and Adams' Sale of Goods* (13th ed. 2016), at p. 204). The parties must use language that is clearly and directly aimed at excluding

the content of the conditions they purport to negative or vary. Where only a particular duty is excluded by the language used by the parties, all other duties remain. Conversely, when the parties intend to exclude one or more of the conditions implied by the *SGA*, the language used must encompass the legal content of all the relevant conditions. Should the parties fail to use language that unambiguously encompasses the implied condition or warranty in question, no express agreement can be said to have been concluded (see *Benjamin's Sale of Goods*, at pp. 682-83).

[156] In *Wallis, Son & Wells v. Pratt & Haynes*, [1911] A.C. 394 (H.L.), the House of Lords held that a clause that excludes all express or implied liability for a breach of warranty does not exclude liability for a breach of condition. Referring to the relevant provisions of the Imperial *Sale of Goods Act, 1893*, Lord Alverstone C.J. wrote that legal effect must be given to the distinction between "warranty" and "condition" and to "the different consequences flowing from . . . one stipulation [or] the other" (p. 398). The parties could not be taken to have expressly agreed to negative or vary any liability arising from a breach of condition by using the word "warranty". This reasoning has been consistently applied ever since, including recently by apex courts in other jurisdictions where a legal regime derived from the Imperial *Sale of Goods Act, 1893* applies (see *Advance Rumely Thresher Co. v. Lester*, [1927] 4 D.L.R. 51 (Ont. S.C. (App. Div.)), at pp. 59-60; *McNichol v. Dominion Motors Ltd.* (1930), 24 Alta. L.R. 441 (S.C. (App. Div.)), at p. 444; *Gregorio v. Intrans-Corp.* (1994), 18 O.R. (3d) 527 (C.A.), at pp. 535-36; *Cork v. Greavette Boats Ltd.*, [1940] O.R. 352 (C.A.); *Murray v. Sperry Rand Corp.* (1979), 23 O.R. (2d) 456 (H.C.J.), at p. 464; *Chabot v.*

Ford Motor Co. of Canada Ltd. (1982), 39 O.R. (2d) 162 (H.C.J.), at p. 175; *Keefer Laundry Ltd. v. Pellerin Milnor Corp.*, 2008 BCSC 1119, 49 B.L.R. (4th) 222, at paras. 102-4; *Kobelt Manufacturing Co. v. Pacific Rim Engineered Products (1987) Ltd.*, 2011 BCSC 224, 84 B.L.R. (4th) 189, at para. 150; *IPEX Inc. v. Lubrizol Advanced Materials Canada Inc.*, 2012 ONSC 2717, 4 B.L.R. (5th) 148, at paras. 40-41; *Brantford Engineering and Construction Ltd. v. Underground Specialties Cambridge Inc.*, 2014 ONSC 4726, 33 B.L.R. (5th) 239, at paras. 119-20; *Haliburton Forest & Wildlife Reserve Ltd. v. Toromont Industries Ltd.*, 2016 ONSC 3767, at para. 77 (CanLII); see also *Herbert Construction Company Ltd. v. Carter Holt Harvey Ltd.*, [2013] NZHC 780, at para. 46 (NZLII)). This is because the scheme of such legislation firmly distinguishes contractual terms that constitute "conditions", the performance of which is fundamental to the contract, from those that constitute simple "warranties", which are collateral to the main purpose of the contract (see, e.g., *SGA*, s. 1(1) "quality of goods" and "warranty").

[157] Likewise, an attempted exclusion of liability may fail because the words used by the parties are directed at excluding liability with respect to the quality of the goods when the defect is instead related to their identity (G. H. L. Fridman, *Sale of Goods in Canada* (6th ed. 2013), at p. 249). This is why a contract for the sale of goods "as is" or "with all faults" will generally exclude liability for defects in the quality of the goods but not for discrepancies with their description (see *Benjamin's Sale of Goods*, at p. 686). For instance, the context of the decisions in each of *Moldenhauer v. Alberta Powersports Inc.*, 2009 ABPC 118, and *Conners v. McMillan*, 2020 BCPC

230, makes clear that the implied terms excluded by a clause providing that the goods were sold "as is" pertained only to their quality, not to their description. In this respect, I can put it no better than Zarnett J.A. did: "Just as an exclusion that speaks to implied warranties does not exclude implied conditions because of the legal difference between those terms, an exclusion of responsibility for quality cannot exclude an implied statutory condition imposing responsibility for the identity of the goods, which covers different legal territory" (C.A. reasons, at para. 59). The common law of contract does not make it possible to erase the statutory distinction between the correspondence of the goods with their description (their identity) and their merchantable quality or fitness for purpose (their quality).

D. *The Role of Modern Principles of Contractual Interpretation*

[158] Recent developments in the common law of contract cannot alter and have not altered the requirement that parties intending to contract out of a statutorily implied condition do so by "express agreement". Any rule of the common law that is inconsistent with the provisions of the *SGA* must be set aside, as explained above (s. 57(1)). This is not to say that modern principles of contractual interpretation play no role in determining whether an exclusion clause constitutes an express agreement to exclude a given statutorily implied condition, or that a departure from these principles is necessary. No one is suggesting that s. 53 of the *SGA* has "fossilized" the law of contractual interpretation. But the exercise of contractual interpretation cannot be conducted in a manner that disregards the law governing the contract.

[159] In *Sattva*, Rothstein J. was careful not to suggest that the surrounding circumstances of the contract can be relied upon as an alternative way to ascertain the objective intention of the parties. The interpretation of a written contract must "always be grounded in the text", and contractual provisions must be "read in light of the entire contract" (para. 57). The facts surrounding the formation of a contract can be considered to clarify what the parties objectively intended by elucidating the meaning of the words used (*Corner Brook (City) v. Bailey*, 2021 SCC 29, [2021] 2 S.C.R. 540, at para. 19). This is not an invitation for a reviewing court to deviate from, modify, or contradict the words used in the contract, however compelling or fair the result may seem: "While the surrounding circumstances will be considered in interpreting the terms of a contract, they must never be allowed to overwhelm the words of that agreement . . ." (*Sattva*, at para. 57 (emphasis added)). This would defeat the reasonable expectations of the parties with respect to the meaning of the contract — contrary to "[t]he principal function of the law of contracts", which is to protect such expectations — and create great commercial uncertainty (Waddams, at p. 97; see also *Resolute FP Canada Inc. v. Ontario (Attorney General)*, 2019 SCC 60, [2019] 4 S.C.R. 394, at para. 74; *Elias v. Western Financial Group Inc.*, 2017 MBCA 110, 417 D.L.R. (4th) 695, at paras. 76-77).

[160] To interpret a written contract, a reviewing court must give the words used in the contract "their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract" (*Sattva*, at para. 47). The goal of this exercise is to ascertain the objective

intentions of the parties, that is, to determine what the parties reasonably understood the words to mean at the time. The surrounding circumstances serve to "deepen a decision-maker's understanding of the mutual and objective intentions of the parties as expressed in the words of the contract" (para. 57).

[161] The same "practical, common-sense approach" (*Sattva*, at para. 47) prevails with regard to exclusion clauses. The law recognizes that contracting parties are free to shape their agreement and allocate risks, including the consequences of deficient performance, as they deem fit. The relevant question is whether, as a matter of ordinary contractual interpretation, "the exclusion clause . . . applies to the circumstances established in evidence" (*Tercon*, at para. 122 (emphasis deleted)).

[162] In the sale of goods context, however, the analysis must proceed on the assumption that the parties objectively intended to accept the rights, duties, and liabilities arising under the *SGA*. Such an approach reflects the "policy choice", enshrined in s. 53, "to give primacy to legislative purposes, unless the parties have clearly expressed their intention for a different private ordering of their rights and obligations" (G. R. Hall, *Canadian Contractual Interpretation Law* (4th ed. 2020), at p. 179). Terms implied by the *SGA* do not depend on "the actual intention of the parties but on a rule of law, such as the terms, warranties or conditions which, if not expressly excluded, the law imports" (*Luxor (Eastbourne), Ld. v. Cooper*, [1941] A.C. 108 (H.L.), at p. 137, per Lord Wright). The purpose of the *SGA* is to provide commercial certainty for the contracting parties. There is nothing unfair or unrealistic in assuming

that the parties knew their respective legal positions in entering into the contract. This was emphasized by Lord Diplock in *Photo Production Ltd. v. Securicor Transport Ltd.*, [1980] A.C. 827 (H.L.), at pp. 850-51, as follows:

> Since the presumption is that the parties by entering into the contract intended to accept the implied obligations exclusion clauses are to be construed strictly and the degree of strictness appropriate to be applied to their construction may properly depend upon the extent to which they involve departure from the implied obligations. Since the obligations implied by law in a commercial contract are those which, by judicial consensus over the years or by Parliament in passing a statute, have been regarded as obligations which a reasonable businessman would realise that he was accepting when he entered into a contract of a particular kind, the court's view of the reasonableness of any departure from the implied obligations which would be involved in construing the express words of an exclusion clause in one sense that they are capable of bearing rather than another, is a relevant consideration in deciding what meaning the words were intended by the parties to bear. But this does not entitle the court to reject the exclusion clause, however unreasonable the court itself may think it is, if the words are clear and fairly susceptible of one meaning only.

[163] This principle was recently reaffirmed by Lord Leggatt J.S.C. in *Triple Point Technology Inc. v. PTT Public Co. Ltd.*, [2021] UKSC 29, [2021] A.C. 1148, at paras. 106-13. In keeping with such an approach, a court must bear in mind that a reasonable person would not take commercial parties to have intended to exclude rights, duties, and liabilities implied by the *SGA* unless that intention has been expressed in sufficiently clear words (paras. 108-10; see also *Stocznia Gdynia S.A. v. Gearbulk Holdings Ltd.*, [2009] EWCA Civ 75, [2010] Q.B. 27, at para. 23; *Whitecap Leisure Ltd. v. John H. Rundle Ltd.*, [2008] EWCA Civ 429, [2008] 2 Lloyd's Rep. 216, at para. 20; *Seadrill Management Services Ltd. v. OAO Gazprom*, [2010] EWCA Civ 691, [2011] 1 All E.R. (Comm.) 1077, at paras. 27-29). The requirement of an

express agreement in the context of the *SGA* means that precise legal meaning must be attributed to the terms used in exclusion clauses purporting to oust statutorily implied conditions (Fridman (2013), at p. 249; Twigg-Flesner, Canavan and MacQueen, at p. 204).

[164] This is not to say that "certain formalities" or the use of "magic words" by the parties is required, as my colleague suggests. There is no contradiction between attributing precise legal meaning to the terms used in exclusion clauses in the context of the *SGA* and applying the modern principles of contractual interpretation. This is plain from *Hunter Engineering*, where our Court articulated the clear and direct language standard, all the while recognizing the importance of applying ordinary principles of contractual interpretation to exclusion clauses (see p. 450, per Dickson C.J., and p. 497, per Wilson J.). The same can be said of Lord Diplock's approach in *Photo Production*. Although interpreting the words used in an exclusion clause may require reference to the whole contract or the surrounding circumstances, the legislature has indicated that the rights, duties, and liabilities arising under the *SGA* must be considered a "vital part of the setting in which parties contract" (*Triple Point*, at para. 108, per Lord Leggatt J.S.C.; see also E. Peel, "Whither *Contra Proferentem*?", in A. Burrows and E. Peel, eds., *Contract Terms* (2007), 53, at pp. 66-74).

[165] Again, the *SGA* represents the legislature's understanding of commercial efficacy or common sense in the sale of goods context, and its provisions are designed to promote certainty and predictability. In this context, a contextual analysis must be

more restricted, unless otherwise provided by statute, and it does not allow a reviewing court to change the meaning of the words used, as was made clear in *Sattva* (para. 57). Given that the parties are taken to know their legal positions in entering into a contract of sale, they must also be presumed to intend the legal consequences of the words they use (Hall, at p. 120, citing *Eli Lilly & Co. v. Novopharm Ltd.*, [1998] 2 S.C.R. 129, at para. 56). This is so regardless of the parties' level of sophistication, even though this is particularly the case where the parties are two large, commercially sophisticated companies (*Hunter Engineering*, at pp. 449-50); ignorance of the law is no excuse.

[166] Contractual interpretation remains concerned with giving effect to what the parties objectively agreed to (*Sattva*, at paras. 49, 55 and 57). Where the *SGA* applies to an exclusion clause, the reviewing court must determine whether the specific right, duty, or liability arising under the contract by implication of law was excluded by "express agreement". In so doing, the court must be particularly cautious in assessing the meaning of the words used by the parties in the contract. If the parties did not use sufficiently clear language, they must have to have objectively intended to accept the right, duty, or liability in question. In considering the surrounding circumstances of the contract, the reviewing court must keep in mind that the provisions of the *SGA* are a vital part of the commercial setting in which the parties negotiated and contracted. It is insufficient that the parties intended in some sense to exclude liability in certain circumstances or that they used language that could shield a party from all contractual liability, having regard to the surrounding circumstances. Instead, it must be clear and

unambiguous that the parties agreed to exclude liability for a breach of the specific condition.

IV. Application

[167] Before the Court of Appeal, Earthco never argued that the trial judge had wrongly characterized the Contract as being a sale by description or that the soil composition had not properly been considered part of the identity of the goods. On appeal to our Court, Earthco is now arguing for the first time that the Contract falls outside the scope of s. 14, either because the Contract was a "sale by inspection" (A.F., at para. 43) — as opposed to a sale by description within the meaning of that provision — or because the soil composition was not part of the "description" of the soil but rather related to the quality of the soil. Earthco is alleging extricable errors of law in the trial judge's decision.

[168] I am of the view that, under the cover of extricable questions of law, Earthco is trying to challenge the trial judge's findings of mixed fact and law. Earthco has not pointed to any reviewable error in the trial judge's characterization of the Contract as being a sale by description or in the determination of the identity of the goods bargained for by Pine Valley (A.F., at para. 44). Let me explain.

[169] First, it was open to the trial judge to find that the Contract was a sale by description within the meaning s. 14 of the *SGA*. Sales by description are either sales of unascertained goods as being of a certain kind of class or sales of specific goods

bought by the buyer in reliance upon the description given (see *Leggett v. Taylor* (1965), 50 D.L.R. (2d) 516 (B.C.S.C.), at p. 518; see also *Benjamin's Sale of Goods*, at pp. 566-67). In the present case, the trial judge found that Pine Valley, in entering into the Contract, had relied on Earthco's description of the soil, as evidenced by the tests provided and the exchanges between the parties (trial reasons, at para. 100). The mere fact that the parties contractually provided an opportunity for the buyer of the goods to inspect them before they were shipped does not change the fact that the parties agreed to a sale by description.

[170] Second, the trial judge correctly relied on the relevant authorities to find that what constitutes the "description" of goods turns on the intention of the parties, as objectively ascertained (*Ashington Piggeries*, at p. 502, per Lord Diplock; *Bakker*, at pp. 178-79). The statements making up the description of the soil on which Pine Valley reasonably relied in entering into the Contract with Earthco are a matter of contractual interpretation, in respect of which the trial judge is owed deference. While the composition of the soil may be relevant to assessing its quality, this does not mean that the trial judge could not, in this case, find that it went to the identity of the goods. In *Ashington Piggeries*, the dispute was over whether the seller's statement that the goods sold, namely herring meal, would be "fair average quality of the season" was part of the description of the goods (p. 470). In finding that the seller's statement went to the quality of the goods, Lord Hodson wrote that "[a]lthough quality could be used, no doubt, as part of a description it is, I think, not so used in this case" (p. 470). Again, this is a fact-specific determination. It was therefore open to the trial judge to find that

the goods had been described as R Topsoil with the composition established in the August 2011 tests and that, as a result, Pine Valley had not received what it had bargained for (trial reasons, at para. 100). Earthco has failed to demonstrate any reviewable error in the trial judge's assessment of the description of the soil.

[171] Accordingly, the question in this case is not whether the Contract was a sale by description or whether the soil composition formed part of the identity of the goods as reasonably contemplated by the parties at the time they entered into the Contract, but rather whether the implied condition in s. 14 of the *SGA* was properly excluded by the Exclusion Clauses. This inquiry must focus on the words used by the parties:

> 6) [Pine Valley] has the right to test and approve the material at its own expense at our facility before it is shipped and placed. Please contact Richard Outred [(an Earthco representative)] to arrange.
>
> 7) If [Pine Valley] waives its right to test and approve the material before it is shipped, Earthco Soils Inc. will not be responsible for the quality of the material once it leaves our facility. [Emphasis added.]
>
> (A.R., at p. 201)

[172] The trial judge concluded that "clauses 6 and 7 of the Contract are clear and unambiguous and oust the liability for the seller created by s. 14 of the *SGA*" (para. 127). He described the Exclusion Clauses as stating that "Earthco cannot be held responsible for any defects" and that "Earthco will be absolved of liability" if Pine Valley failed to test and approve the topsoil before it was shipped (paras. 119 and 127). This conclusion turned entirely on the trial judge's understanding of the

commercial purpose of the agreement. In his view, the "only . . . purpose" of testing the soil was for Pine Valley to ensure that it had the composition bargained for (para. 125). According to the trial judge, by accepting the Exclusion Clauses as part of its bargain, Pine Valley assumed all risks associated with the composition of the soil should it fail to test and approve the soil before it was shipped.

[173] With respect, the Court of Appeal was justified in setting aside the trial judge's conclusion in this regard. There are two legal errors in the trial judge's approach. First, in concluding that the Exclusion Clauses were sufficiently clear and direct to exclude s. 14 of the *SGA*, the trial judge departed from the words used by the parties in a manner that allowed the surrounding circumstances to overwhelm those words.

[174] As a general rule, appellate courts should be cautious in identifying extricable questions of law in matters of contractual interpretation, because "[t]he circumstances in which a question of law can be extracted will be uncommon" (*Corner Brook*, at para. 44). That being said, our Court stated in *Teal Cedar* that interpreting the surrounding circumstances in isolation from the text of the contract, thereby effectively creating a new agreement between the parties, constitutes an error of law (para. 62; see also *Rosenberg v. Securtek Monitoring Solutions Inc.*, 2021 MBCA 100, 465 D.L.R. (4th) 201, at para. 83; *Ecoasis Resort and Golf LLP v. Bear Mountain Resort & Spa Ltd.*, 2021 BCCA 285, 53 B.C.L.R. (6th) 343, at para. 34; *Mann v. Grewal*, 2023 BCCA 88, at para. 44 (CanLII)).

[175] I agree with the Court of Appeal that the trial judge made an error of this sort in his analysis of the Exclusion Clauses (C.A. reasons, at paras. 60-62). While the trial judge was correct in stating that the focus of the analysis must be on "the plain language of the Contract between the parties", this was not what he did (trial reasons, at para. 118). He did not explain what the parties had *meant* by using the words "responsible for the quality of the material", but rather determined what the parties had to be taken *to have written* based on his understanding of the purpose of the agreement. According to the trial judge, the Exclusion Clauses clearly and unambiguously stated something that the parties had not written down. By deviating from the text of the Contract to determine what the parties must be taken to have written given the surrounding circumstances, the trial judge effectively created a new agreement.

[176] Second, the trial judge's approach in departing from the ordinary and grammatical meaning of the words used by the parties did not comport with the requirements of s. 53 of the *SGA* (C.A. reasons, at paras. 65-69). As the Court of Appeal noted, the clear and direct language standard does not turn on the "sophistication" of the contract and therefore cannot be deviated from simply because the language used by the parties is not "sophisticated" (para. 57). There was no basis in this case to deviate from this standard. The parties are sophisticated commercial corporations that must be taken to have known their legal positions in entering into a contract of sale and to have intended the legal consequences of the words they used. Again, the determination of whether the parties expressly agreed to negative or vary a

statutory right, duty, or liability must focus on the words of their agreement, as required by s. 53.

[177] I respectfully disagree with my colleague that the Court of Appeal erred in identifying errors on extricable questions of law in the trial judge's approach and that giving legal effect to the distinctions established by the *SGA* is contrary to *Sattva*. Once it was determined that the trial judge had interpreted the surrounding circumstances in isolation from the text of the Contract, it was open to the Court of Appeal to intervene. I acknowledge that the mere fact that contractual interpretation involves consideration of a statutory provision does not mean that review must be on a correctness standard. However, applying incorrect legal principles in the interpretation exercise is one of the errors identified by Rothstein J. in *Sattva* as warranting a correctness review (para. 53). The Court of Appeal determined that the trial judge had erred in assessing whether the Exclusion Clauses constituted an express agreement by failing to follow this Court's precedent in *Hunter Engineering*. This is consistent with *Sattva*. As I explained above, the requirement of clear and direct language is not incompatible with the modern principles of contractual interpretation and, even if it were, precedence must be given to the provisions of the *SGA*, as is clear from s. 57(1): the rules of the common law apply "except in so far as they are inconsistent with the express provisions of this Act". The legislature can set aside the requirement in s. 53 of the *SGA* or the distinction between "quality" and "identity" established by the *SGA*, but courts simply cannot do so.

[178] It is noteworthy that the parties in this case chose to put down their agreement in writing. Thus, our task is to determine what they meant by agreeing to exclude liability in relation to the "quality of the material". In doing so, we must keep in mind that, in the present case, we are interpreting a contractual term governed by the *SGA*. The surrounding circumstances of the contract cannot change the meaning of the statute. The starting point is that the Exclusion Clauses did not actually state that if Pine Valley did not test and approve the soil before it was shipped, then Earthco would not be liable for "any" defects, including defects in the composition of the soil. Rather, the parties agreed that Earthco would not be "responsible for the quality of the material". The ordinary and grammatical meaning of these words relates to the fitness for purpose of a good, within the meaning of s. 15 para. 1 of the *SGA*. In this case, "quality of the material" refers to the ability of the soil to perform the agreed-upon function in the Moore Park Project (A.F., at para. 2). The reference to "the material" also indicates that the parties did not objectively intend the Exclusion Clauses to exclude liability if the identity of the material was different from the one agreed upon. I agree with the Court of Appeal that, on their face, the words used by the parties do not constitute clear and direct language excluding liability under s. 14 (para. 10). The "express agreement" excludes liability only in relation to "quality", not in relation to "identity".

[179] The fact that the trial judge found that the composition of the soil went to the identity of the goods, while it could also be relevant to the fitness of the soil for a particular purpose, does not mean that the parties objectively intended to shield Earthco from any and all liability. Excluding liability for defects affecting the soil's fitness for

its purpose is not incompatible with maintaining liability for failure to deliver soil matching the agreed-upon description, because these are distinct conditions. As the Court of Appeal correctly pointed out, ss. 14 and 15 of the *SGA* cover "different legal territory" (para. 59). A failure to deliver goods of a particular quality is distinct from a failure to deliver goods having the agreed identity. While the trial judge seems to have been alive to the distinction between the identity and the quality of the goods — finding that the sale was by description and that the description went to the identity of the goods — he ultimately failed to appreciate the effect of this distinction in interpreting the Exclusion Clauses. This was an error of law.

[180] The Court of Appeal was correct to hold that the requirement of clear and direct language to exclude terms arising by implication of law under the *SGA* is superimposed on other principles of contractual interpretation (para. 65). The exercise of interpreting an exclusion clause in the context of the *SGA* cannot and should not be limited to an analysis of the meaning of the words used, having regard to the surrounding circumstances known to the parties at the time of formation of the contract. Rather, the legislative purposes of the *SGA* must be taken into account. The distinction between the identity of the goods (based on their description) and the quality of the goods was a vital part of the commercial setting in which the parties contracted. Had the parties objectively intended to contract out of the implied condition in s. 14, they would have done so by express agreement, i.e., using clear and direct language. The fact that a word may be used colloquially does not divest that word of its legal meaning,

especially where no evidence suggests that the parties intended to use the word differently from that meaning.

[181] In the present context, the meaning of the word "quality" cannot be expanded to cover any defects relating to the "identity" of the soil, as the trial judge concluded. While I recognize that Pine Valley was in a rush to receive the soil, this in itself does not mean that it objectively understood that it would assume the risk of not receiving what it had bargained for. A reasonable person would not understand Pine Valley to have intended to contract out of the implied condition in s. 14 of the *SGA* by accepting the terms of the Exclusion Clauses at the time of formation of the Contract (i.e., before its subsequent exchange with Earthco). The duty to deliver goods corresponding with their description is fundamental to a contract of sale by description; it is the seller's main contractual duty. Failure to perform this duty amounts to a "total failure to perform the contract" (*Benjamin's Sale of Goods*, at p. 565; see also Bangsund, at pp. 501-2; E. McKendrick, *Goode and McKendrick on Commercial Law* (6th ed. 2020), at para. 11.06). It had to be made sufficiently clear that the parties intended to contract out of such a fundamental condition of the Contract. This is not to say that parties cannot agree on a sale of specific goods while excluding any liability that would arise from the goods not corresponding with their description. In this case, however, the language of the Exclusion Clauses does not express the parties' objective intention to exclude the condition of correspondence with description in s. 14 of the *SGA*. Pine Valley may have accepted the risk that the R Topsoil with the agreed-upon

composition would not be fit for its purpose, but it did not waive its right to receive the soil it had bargained for.

[182] Earthco may have been under the impression that it would be protected from any and all liability arising from their sale agreement as a result of the bespoke changes made to the Contract, as evidenced by the broader terms it used in the email sent to Pine Valley before the soil was shipped (A.R., at pp. 150-52). But this is not what the parties objectively agreed to. In this respect, I fully endorse Lord Neuberger P.S.C.'s view in *Arnold v. Britton*, [2015] UKSC 36, [2015] A.C. 1619, at para. 19, that "[t]he mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language." The parties objectively agreed that Earthco would not be liable for defects in the "quality of the material", but not that it would be shielded from its statutory duty to supply Pine Valley with R Topsoil with the composition established in the August 2011 test results.

[183] The foregoing does not mean that the Exclusion Clauses served no purpose. It is clear that if Earthco had supplied Pine Valley with the soil it had bargained for, i.e., soil with the composition established in the August 2011 test results, but the soil had failed to properly capture excess water in the neighbourhood, any liability under s. 15 of the *SGA* would have been excluded.

V. Conclusion

[184] In summary, the trial judge erred in concluding that the Exclusion Clauses clearly and directly stated that Earthco would be protected from any liability if Pine Valley failed to test the soil before it was shipped (para. 119). The clear and direct language chosen by the parties in the Exclusion Clauses limited the exclusion of liability to defects in quality within the meaning of s. 15 of the *SGA*. In contrast, the Exclusion Clauses did not contain any express agreement to exclude liability for a breach of the implied condition in s. 14.

[185] Therefore, the legal standard in s. 53 of the *SGA* was not met. The appeal should be dismissed and the Court of Appeal's decision ordering Earthco to pay Pine Valley damages in the amount assessed by the trial judge, $350,386.23, should be upheld, with costs before our Court.

APPENDIX

Relevant Statutory Provisions

***Sale of Goods Act*, R.S.O. 1990, c. S.1**

1 (1) In this Act,

. . .

"quality of goods" includes their state or condition;

. . .

"warranty" means an agreement with reference to goods that are the subject of a contract of sale but collateral to the main purpose of the contract, the breach of which gives rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated.

12 . . .

. . .

(3) Where a contract of sale is not severable and the buyer has accepted the goods or part thereof, or where the contract is for specific goods the property in which has passed to the buyer, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty and not as a ground for rejecting the goods and treating the contract as repudiated, unless there is a term of the contract, express or implied, to that effect.

13 In a contract of sale, unless the circumstances of the contract are such as to show a different intention, there is,

(a) an implied condition on the part of the seller that in the case of a sale the seller has a right to sell the goods, and that in the case of an agreement to sell the seller will have a right to sell the goods at the time when the property is to pass;

(b) an implied warranty that the buyer will have and enjoy quiet possession of the goods; and

(c) an implied warranty that the goods will be free from any charge or encumbrance in favour of any third party, not declared or known to the buyer before or at the time when the contract is made.

14 Where there is a contract for the sale of goods by description, there is an implied condition that the goods will correspond with the description, and, if the sale is by sample as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.

15 Subject to this Act and any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows:

1. Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description that it is in the course of the seller's business to supply (whether the seller is the manufacturer or not), there is an implied condition that the goods will be reasonably fit for such purpose, but in the case of a contract for the sale of a specified article under its patent or other trade name there is no implied condition as to its fitness for any particular purpose.

2. Where goods are bought by description from a seller who deals in goods of that description (whether the seller is the manufacturer or not), there is an implied condition that the goods will be of merchantable quality, but if the buyer has examined the goods, there is no implied condition as regards defects that such examination ought to have revealed.

3. An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade.

4. An express warranty or condition does not negative a warranty or condition implied by this Act unless inconsistent therewith.

16 (1) A contract of sale is a contract for sale by sample where there is a term in the contract, express or implied, to that effect.

18 (1) Where there is a contract for the sale of specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

(2) For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case.

20 . . .

(2) Where goods are shipped and by the bill of lading the goods are deliverable to the order of the seller or the seller's agent, the seller in the absence of evidence to the contrary reserves the right of disposal.

27 Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions, that is to say, the seller shall be ready and willing to give possession of the goods to the buyer in exchange for the price and the buyer shall be ready and willing to pay the price in exchange for possession of the goods.

28 (1) Whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer is a question depending in each case on the contract, express or implied, between the parties, and apart from any such contract, express or implied, the place of delivery is the seller's place of business, if there is one, and if not, the seller's residence, but where the contract is for the sale of specific goods that to the knowledge of the parties, when the contract is made, are in some other place, then that place is the place of delivery.

. . .

(5) Unless otherwise agreed, the expenses of and incidental to putting the goods in a deliverable state shall be borne by the seller.

30 (1) Unless otherwise agreed, the buyer of goods is not bound to accept delivery thereof by instalments.

(2) Where there is a contract for the sale of goods to be delivered by stated instalments that are to be separately paid for and the seller makes defective deliveries in respect of one or more instalments or fails to deliver one or more instalments or the buyer neglects or refuses to take delivery of or pay for one or more instalments, it is a question in each case depending on the terms of the contract and the circumstances of the case whether the breach of contract is a repudiation of the whole contract or whether it is a severable breach giving rise to a claim for compensation but not to a right to treat the whole contract as repudiated.

31 (1) Where in pursuance of a contract of sale the seller is authorized or required to send the goods to the buyer, the delivery of the goods to a carrier whether named by the buyer or not, for the purpose of transmission to the buyer, is, in the absence of evidence to the contrary, delivery of the goods to the buyer.

33 . . .

(2) Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, the seller shall, on request, afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract.

35 Unless otherwise agreed, where a buyer refuses to accept delivery of goods and has the right to do so, the goods are not bound to be returned to the seller, but it is sufficient if the buyer intimates to the seller that acceptance of the goods is refused.

48 . . .

. . .

(3) Where there is an available market for the goods in question, the measure of damages is, in the absence of evidence to the contrary, to be ascertained by the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted, or, if no time was fixed for acceptance, then at the time of the refusal to accept.

49 . . .

. . .

(3) Where there is an available market for the goods in question, the measure of damages is, in the absence of evidence to the contrary, to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver.

51 . . .

. . .

(3) In the case of breach of warranty of quality, such loss is, in the absence of evidence to the contrary, the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty.

53 Where any right, duty or liability would arise under a contract of sale by implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties, or by usage, if the usage is such as to bind both parties to the contract.

57 (1) The rules of the common law, including the law merchant, except in so far as they are inconsistent with the express provisions of this Act, and in particular the rules relating to the law of principal and agent and the effect of fraud, misrepresentation, duress or coercion, mistake or other invalidating cause, continue to apply to contracts for the sale of goods.

Appeal allowed with costs throughout, CÔTÉ J. *dissenting.*

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