

CLARITY OVER BREADTH: THE COURT OF APPEAL REFUSES TO LIMIT LIABILITY UNDER SALE OF GOODS ACT

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Broad exclusionary language is not always effective in limiting liability under the *Sale of Goods Act* (“**SGA**”). As noted by the Court of Appeal in *Pine Valley Enterprises Inc. v Earthco Soil Mixtures Inc.*,^[1] contractual clauses that seek to limit liability must use “explicit, clear, and direct language”.

Background

In 2011, the City of Toronto engaged Pine Valley Enterprises Inc. (“**Pine Valley**”) to help prevent basement flooding in North York (the “**Project**”). To complete the Project, Pine Valley needed topsoil with a specific composition to allow for proper drainage.

Accordingly, Pine Valley engaged Earthco Soil Mixtures Inc. (“**Earthco**”), a custom topsoil supplier. Earthco gave Pine Valley lab tests showing the composition of various soil options (the “**Original Test Results**”). After seeing these results, Pine Valley signed a contract of sale with Earthco for “R Topsoil”, which appeared to have the necessary composition (the “**Contract**”).

The Contract contained the following exclusion clause (the “**Exclusion Clause**”):

“[Pine Valley] has the right to test and approve the material at its own expense at our facility before it is shipped and placed. ... 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.”

Pine Valley chose not to test the R Topsoil before delivery, and proceeded to use the soil for the Project.

The soil did not perform as expected. The City tested the soil and discovered that it lacked the required composition. In fact, the composition “differed significantly” from Earthco’s Original Test Results.^[2] Accordingly, the City required Pine Valley to remove and replace the soil at its own expense.

Pine Valley asked Earthco for compensation, but Earthco refused. Earthco took the position that, because Pine

Valley chose not to test the soil before delivery, Pine Valley “explicitly assumed all responsibility for the material once it left Earthco’s premises.”^[3]

Pine Valley filed a civil claim against Earthco for breach of the SGA. Pine Valley argued that Earthco breached the implied condition created by section 14 of the SGA, which provides that, 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...” (the “**Implied Condition**”).^[4]

Trial Decision

The trial judge found that Earthco breached the Implied Condition by not supplying soil with the proper composition – but that the Exclusion Clause protected the company from liability. Because Pine Valley did not test the soil prior to delivery, the Exclusion Clause “specifically absolved Earthco of liability in these circumstances.”^[5] The trial judge based this conclusion on the wording of the contract and the broader factual matrix.^[6]

Pine Valley appealed.

Court of Appeal Overturns Trial Decision

The Court of Appeal overturned the trial decision, finding that the Exclusion Clause was not sufficiently clear to oust the Implied Condition.

The Court found that the Implied Condition protects the “identity” of the soil, while the Exclusion Clause refers to the “quality”. The Implied Condition attaches to identity rather than quality because it requires a product to correspond with the description under which it was sold. In this case, the R Topsoil was described as having a specific composition and sold based on that description. That Implied Condition was breached because the soil was not as described.^[7] In contrast, the Exclusion Clause only excluded liability for the “quality” of the product. Accordingly, the clause could not be relied on to disclaim liability for product identity.

The Court took this opportunity to emphasize that exclusion clauses must be “explicit, clear, and direct.”^[8] The language of the clause must, at the very least, “refer to the type of legal obligation the [statute] implies – reference to a different legal obligation will not suffice.”^[9] In other words, since the Exclusion Clause refers to the quality of the product, it could potentially be used to oust an implied statutory *warranty* on the *quality*, but cannot be used to oust an implied *condition* as to the *identity* of the product.

Ultimately, the Court found in favor of Pine Valley on the grounds that “nothing in the language of the exclusionary clauses refers clearly, directly, or explicitly to any statutory conditions, let alone to one about the identity of what was sold. The express language of the exclusionary clauses disclaim[ed] responsibility only for

quality, not for identity. Although the language of a contract must be read in light of its factual matrix, the factual matrix [could] not be used to overwhelm the text and insert into the contract an explicit exclusion of liability for breach of the statutory condition in s. 14 of the SGA”.^[10]

Takeaway

This decision highlights the importance of carefully drafting an exclusionary clause in a sale of goods contract. The clause must be explicit, clear, and direct. It must refer to the specific *type* of legal obligation the parties wish to exclude. In *Pine Valley*, this meant referring to an implied *condition* instead of an implied *warranty*. If the clause does not meet this minimum threshold of clarity, a party will likely not be able to rely on it to protect itself from liability.

If you have any questions related to the above, please do not hesitate to contact a member of McMillan’s Litigation and Dispute Resolution team.

[1][ps2id id='1' target=''] 2022 ONCA 265 [*Pine Valley*].

[2][ps2id id='2' target=''] *Pine Valley*, para 21.

[3][ps2id id='3' target=''] *Pine Valley*, para 23.

[4][ps2id id='4' target=''] SGA, s 14; *Pine Valley*, para 25.

[5][ps2id id='5' target=''] *Pine Valley*, para 30.

[6][ps2id id='6' target=''] *Pine Valley*, para 30.

[7][ps2id id='7' target=''] *Pine Valley*, para 43.

[8][ps2id id='8' target=''] *Pine Valley*, para 49.

[9][ps2id id='9' target=''] *Pine Valley*, para 56.

[10][ps2id id='10' target=''] *Pine Valley*, para 10.

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A Cautionary Note

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