High Court considers exclusion of abatement and the scope of section 49(2) of the Sale of Goods Act 1979

Readie Construction Limited v Geo Quarries Limited **[2021] EWHC 3030 (QB)**

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The decision in *Readie Construction*

Under a contract for the sale of goods, a seller's claim for the price requires more than simply the price becoming payable under the contract terms. Section 49 of the Sale of Goods Act 1979 prescribes the circumstances in which the seller is entitled to sue for the price. The seller has to demonstrate either that property in the goods has passed (which will be problematic if the contract contains a retention of title clause), or that the contract terms require payment "*irrespective of delivery*".

The High Court considered the meaning of that important requirement in *Readie Construction*. Against a conflict of approach between the appellate courts of Australia and New Zealand, and the High Court of Singapore, the English High Court has followed the latter. A contract will make payment due "*irrespective of delivery*" even if the entitlement to present an invoice *is* contingent on the delivery of the goods; the requirement means simply that the *time* for performance of the respective obligations of delivery and payment, must be divorced from each other. The court also considered the long-standing problem of whether a no-set-off clause precludes abatement.

Background

Readie Construction Limited ("Readie") had contracted with Geo Quarries Limited ("Geo") for Geo to supply granular sub-base type 1 ("GSB Type 1") aggregate to Readie. Supply was to be on Geo's standard terms and conditions of sale, which contained the following provisions:

> "2.2 Every contract for the sale of Goods shall be deemed to be concluded only when the Goods have been delivered or collected […]"

> "4.1 The Customer shall make payment in full without any deduction or withholding whatsoever or any account by the end of the calendar month following the month in which the relevant invoice is dated."

By 10 September 2018, Geo had supplied £543,533.63 (exclusive of VAT) worth of aggregate, which Readie had paid for and used on a construction site in Bedfordshire. Between 10 September 2018 and 15 October 2018, Geo supplied a further £224,091.52 (exclusive of VAT) worth of aggregate, for which it raised an invoice. Before that invoice was paid there was heavy rainfall at Readie's Bedfordshire construction site and it was discovered that the aggregate already used had liquified and turned into slurry. Readie suspended all further payment to Geo and Geo brought an action for the price and applied for summary judgment.

Decision at first instance

Geo's summary judgment application came before HHJ Johns QC. Geo argued that it was entitled to payment of the price on the basis of section 49(2) of the Sale of Goods Act 1979 ("the Act"), which provides as follows:

> "(2) Where, under a contract of sale, the price is payable on a day certain irrespective of delivery and the buyer wrongfully neglects or refuses to pay such price, the seller may maintain an action for the price, although the property in the goods has not passed and the goods have not been appropriated to the contract."

Readie resisted the application, essentially on 3 bases. First, the price had not fallen due contractually because what had been delivered was not GSB Type 1 aggregate. Secondly, the price was not due because the payment provision in Geo's terms did not fall within section 49(2) of the Act as the price was not "*payable on a day certain irrespective of delivery*". Thirdly, and alternatively, there was a breach of the contractual warranty of quality, and Readie could rely on the defence of abatement to extinguish the price.

The judge assumed, for the purposes of the summary judgment application, that what had been delivered was not actually GSB Type 1 aggregate. The judge held, however, that clause 4.1 excluded abatement, that it was reasonable under section 3 of the Unfair Contract Terms Act 1977, and that the payment provision fell within section 49(2) of the Act. Accordingly the judge granted summary judgment for Geo.

The appeal

Readie appealed the first instance decision and the case came before Martin Spencer J. Readie renewed its arguments on appeal, other than in respect of the finding of reasonableness of clause 4.1, which it did not challenge.

The construction argument: requirement for delivery of conforming goods

Readie argued that Geo's terms did not modify the essential character of the contract, under which payment of the price was only due against delivery of conforming goods. Thus, clause 2.2 of Geo's terms required delivery of GSB Type 1 aggregate and, as the judge had to assume that what was delivered was not actually GSB Type 1 aggregate, Readie had a real prospect of establishing that the price had not fallen due.

The judge noted, at [39], that "*the Goods*" in clause 2.2 was defined as "*The Goods which the Company is to supply in accordance with these conditions*". He accepted the submission of Mr Oram, who appeared for Readie, that "*if Geo had supplied sand rather than aggregate, the obligation to pay would not have arisen because the goods supplied would not be in accordance with the conditions of the contract*" ([39]).

However, the judge considered that clause 2.2 had to be read in the light of clauses 6, 8 and 4.1. Clauses 6 and 8 made provision for situations where the goods failed to comply with the specification or sample in some material respect. The judge found, at [40], that "*clauses 6 and 8 would be rendered otiose and the force of clause 4.1 would be nullified if, as Mr Oram submits, the buyer could pre-empt matters by refusing payment because of perceived non-delivery or defective delivery*." The judge resolved the issue as follows ([42]; emphasis in original):

> "In my judgment the answer is to be found in the concept of purported delivery. Had Geo delivered sand, or (in an example I put in the course of argument) teddy bears, this would not be purported delivery under the contract – indeed, by virtue of clause 2.2, without delivery, there is no contract at all because the contract is not concluded. However, where Geo delivers goods which are bone fide purported delivery under the contract (thus excluding situations of fraud), then in my judgment there has been delivery under the contract for the purposes of the terms and conditions and Readie cannot withhold payment on the basis that the goods do not come up to specification, or on the basis that there has been short delivery and the doctrine of abatement is excluded."

As Geo had effected purported delivery of GSB Type 1 aggregate, the judge rejected the argument that (as a matter of contractual construction) the price had not fallen due.

Abatement

Readie relied on a number of cases in which no-set off clauses were held not to extend to abatement. One example is *NH International (Caribbean) Ltd v National Insurance Property Development Co. Ltd* [2015] 162 Con LR 183, in which the Privy Council found that a clause that restricted a contractor's entitlement "*to set-off against or make any deduction from an amount certified*" did not exclude abatement (cited at [18]).

The judge distinguished the cases relied on by Readie, saying, at [45], that "*in none of those cases did the contractual clause forbid 'deduction' as in clause 4.1. Here, and as Mr Lascelles [counsel for Geo] submitted, the use of that word, in the legal context by reference to previous decisions, is to be taken to have been intended to exclude abatement.*"

Section 49(2)

Readie argued that as its obligation to pay the price was dependent upon Geo's obligation of delivery, or (as the judge found) purported delivery, Geo could not bring itself within section 49(2). The price was not payable "*irrespective of delivery*", because it was the fact of delivery that entitled the seller to raise an invoice for the price (even if the price was not finally payable, under clause 4.1, for around a month).

In considering that question, the judge declined to follow the approach taken by appellate courts in Australia and New Zealand, which focussed on the dependency of the two obligations. Instead, the judge followed the decision of the High Court of Singapore in *Mitsubishi Corp RTM International Pte Ltd v Kyen Resources Pte Ltd* [2019] SGHCR 6, which focusses on the concurrency of the obligations. In *Readie Construction* the judge held, at [48], that Readie's interpretation of section 49(2) was incorrect and that he could do "*no better than [to] adopt the judgment and reasoning of Judge Yang in Mitsubishi.*" The judge relied on the following passage from the judgment, cited at [36] (emphasis in original):

> "62. […] in my opinion the requirement of payment 'on a day certain irrespective of delivery' does not mean that the time for payment cannot be dependent on or otherwise associated with delivery or the time for delivery. Rather, the phrase 'irrespective of delivery' means that the time for payment may be, but need not be contingent on delivery or the time of delivery. Accordingly, a term requiring payment at a time that is ascertainable by reference to delivery or the time for delivery is

> capable of falling within the scope of section 49(2). I have reached this conclusion for three principal reasons. First, a contextual reading of section 49(2) demonstrates that the phrase 'irrespective of delivery' was meant to alleviate parties from the ordinary statutory condition that payment be concurrent with delivery. Second, the modern judicial preference has been for a less restrictive reading of section 49(2). Third, principle and policy do not support a requirement that parties must disassociate the time for payment from the seller's contractual performance of delivery in order to preserve potential claims under section 49(2)."

Martin Spencer J explained his approach to section 49(2) as follows at [48] (emphasis in original):

> "what is envisaged is a contract whereby delivery and payment on a day certain are divorced from each other, although the contract may still provide for delivery at some other time and, indeed, delivery (or purported delivery) may be a pre-condition for payment of the price, as here. In my judgment, Judge Yang was right to focus on the time of delivery and the time of payment. Once these are divorced from each other under the terms of the contract, the contract becomes one whereby the price is payable on a day certain irrespective of delivery."

He therefore held that Geo was able to bring itself within section 49(2).

Conclusion

There are two conclusions that can be drawn from this case. First, this case will make it easier for a party to bring itself within section 49(2) of the Act. Showing that the time for payment is other than the day of delivery may well be sufficient to show that "*the price is payable on a day certain irrespective of delivery*". Second, the courts may be more willing than they once were, to construe a no set-off clause as extending to abatement (particularly where the word "*reduction*" is used). That approach maintains the commercial effectiveness of such clauses, and is consistent with other recent, first-instance cases (e.g. *Shepherd Construction Ltd v Drax Power Ltd* [2021] EWHC 1478 (TCC), at [39]-[47]) suggesting that the older Court of Appeal cases should be approached simply as an illustration of the modern approach to construing exclusion clauses, rather than a separate principle limited to abatement.

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