Neutral Citation Number: [2021] EWHC 3030 (QB)

Case No: QA-2020-000247

HIGH COURT APPEAL CENTRE
AT THE ROYAL COURTS OF JUSTICE
ON APPEAL FROM THE COUNTY COURT
AT CENTRAL LONDON
ORDER OF HHJ JOHNS QC DATED 18 DECEMBER 2020

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/11/2021

Before :

MR JUSTICE MARTIN SPENCER

- -

Between :

Readie Construction Limited	**Appellant/ Defendant**
- and -	
Geo Quarries Limited	**Respondent/ Claimant**

- -
- -

Mr Seb Oram (instructed by **Birketts LLP**) for the **Appellant**
Mr David Lascelles (instructed by **Shoosmiths**) for the **Respondent**

Hearing dates: 22 October 2021

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MARTIN SPENCER

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives and BAILII by email. The date of hand-down is deemed to be as shown above.

MR JUSTICE MARTIN SPENCER :

Introduction

1. With permission of Linden J, the appellant, Readie Construction Limited ("Readie") appeals against the judgment of His Honour Judge Johns QC dated 11 December 2020 whereby he granted summary judgment in the sum of £224,091.52 in favour of the respondent, Geo Quarries Limited ("Geo"). This was the price of Goods sold and delivered by Geo to Readie in the period 10 September 2018 to 15 October 2018. It is Readie's case that the Goods delivered were not of the type promised and that, having discovered this, they were under no obligation to pay the price. Two issues arose before the judge in respect of which he found against Readie and in relation to both of which Readie now appeals:

    i) Whether, in the light of the contractual terms agreed between the parties, Readie have no real prospect of success in relation to two grounds of defence pleaded namely

        a) The price had not fallen due; and

        b) Abatement; and

    ii) Whether Geo can bring this claim within the terms of section 49(2) of the Sale of Goods Act 1979 so as to be able to claim the price.

    It was Readie's position before the judge, which it now maintains on this appeal, that the price never fell due and therefore the debt never existed, alternatively they are entitled to rely on abatement. Alternatively, it is Readie's position that this contract does not come within the true construction of s.49(2) of the Sale of Goods Act 1979.

The background facts

2. By an exchange of emails on 11 July 2018 Readie ordered, and Geo agreed to supply, a quantity of "GSB Type 1" aggregate at a standing price of £19.50 per tonne to be delivered to a construction site at Marston Vale, Wootton, Bedfordshire. On the same day, Readie signed an application for credit with Geo, the effect of which was to incorporate Geo's standard terms and conditions of sale, to which I shall return.

3. Pursuant to the agreement, on 17 August 2018 Readie sent a purchase order for 31,000 tonnes of "GSB Type 1" aggregate at a total cost of £604,500 (excluding VAT). The position was that quantities of that order would be called off by Readie as required and delivered in batches by Geo to the construction site. This material was to be used to lay a sub-base between the ground-bearing slab of a new warehouse and associated hard-standings that Readie was constructing and which required 80,507 m^2 of Type 1 to be laid at depths of 200-320 mm.

4. In the period up to 10 September 2018 Geo delivered quantities of the Type 1 aggregate for which Readie paid in full, a total of £543,533.63 (excluding VAT). Then, between 10 September and 15 October 2018 Geo delivered a further 9,576 tonnes of aggregate for which it issued an invoice in the sum of £224,091.52. However, before that invoice was paid, it is Readie's case that they discovered the aggregate was defective: thus, over

the weekend of 13/14 October 2018 there was heavy rainfall at the Marston Vale site and when Readie's workers returned to the site on Monday 15 October 2018 it discovered that the aggregate had liquified and turned into slurry. At that stage, Readie suspended all further payments to Geo. By this time Readie had already laid 34,000 tonnes of the aggregate amounting to approximately 87% of the total required for the site. As stated, it had paid for all the previous consignments, but not the final batch.

The terms and conditions

5. On 11 July 2018, Readie's finance director, Jessica McCarthy, signed a credit application form at 30 days from month end. The form included the words:

> "Please note on signing our credit application form, you agree to our terms and conditions (overleaf)."

The terms and conditions, so far as relevant, provided as follows:

> "1. DEFINITIONS
>
> 6. "The Goods" The Goods which the Company is to supply in accordance with these conditions
>
> 2. ORDERS
>
> 2.1 All orders are deemed to have been made by the Customer and accepted by the Company upon and subject to the terms and conditions which are complete and exhaustive and override any other terms and conditions and provisions referring or purporting to refer to the Goods and which shall not be capable of being varied, supplemented, qualified or interrupted by reference to any prior course of dealings between the two parties. All other terms and conditions, warranties, guarantees and reservations (expressed or implied statutory or otherwise) are hereby excluded.
>
> 2.2 Every contract for the sale of Goods shall be deemed to be concluded only when the Goods have been delivered or collected …
>
> 3. PRICES
>
> 3.1 The price for the Goods shall be as set out in the written quotation provided by the Company and confirmed by the order. …
>
> 4. PAYMENT
>
> 4.1 **The Customer shall make payment in full without any deduction or withholding whatsoever on any account by the end of the calendar month following the month in which the relevant invoice is dated**. If

payment is not received in full when due the Customer shall pay interest on the unpaid amount at a rate per annum which is 8% and above Bank of England base lending rate from time to time and the Customer shall pay to, or reimburse the Company on demand, on a full indemnity basis, all costs and liabilities incurred by the Company in relation to the suing for, or recovering, any sums due including, without limitation the costs of any proceedings in relation to a contract between the Company and a Customer incurred in or suffered by any default or delay by the Customer in performing any of its obligations. Payment shall only be made to the bank account nominated in writing by the Company on the invoice. Time of payment is of the essence. (*Emphasis added)*

…

5. PROPERTY RISK AND TITLE

5.1 Upon delivery the Goods shall be at the Customer's risk.

5.2 Notwithstanding 5.1 above and subject to 5.5 below both the legal and equitable title in the Goods will remain with the Company until the Customer has paid in all monies owed by it to the Company under any contract or otherwise including all VAT and interest where applicable.

…

5.5 Title of the Goods shall not pass to the Customer until the earlier of:

5.5.1 the Company receiving payment in full (in cash or cleared funds) for the Goods and any other Goods the Company has supplied to the Customer, in which case title to the Goods shall pass at the time of payment of all such sums; or

5.5.2 The Customer reselling the Goods in the ordinary course of business. …

6. DELIVERY

6.2 The Customer shall inspect (and test) the Goods on delivery to ensure the Goods meet any relevant specification (or, if none, the description set out on the order) and in the event that the Customer believes there is any failure to meet the specification it will use its best endeavours to inform the Company by telephone or

> email within 48 hours of delivery or collection. A failure to notify the Company within 48 hours of such delivery or collection will be a deemed acknowledgment that the Goods meet the specification.
>
> 8. WARRANTIES
>
> 8.1 The Company warrants that the Goods comply with the specification or sample (if any) in all material respects in accordance with the testing data submitted up to and including the point they leave the quarry. …
>
> 8.3 The Company's obligation under this warranty is limited to replacement of any Goods or parts thereof which are delivered with material defects under normal and proper use."

It is clause 4.1 above which is at the heart of this dispute between the parties, and this appeal.

The judgment below

6. Judge Johns QC, having set out the principles to be applied on an application for summary judgment, first considered the construction of clause 4.1. He identified the key question to be: does this clause exclude the remedy of abatement? He then found that clause 4.1 is effective to exclude abatement even where it is said the Goods delivered are different in substance to those contracted for. That had been a necessary submission on behalf of Geo given that it is Readie's case that what was supplied was not GSB Type 1 aggregate at all because the Goods had liquified in heavy rainfall and turned into slurry. For the purposes of a summary judgment application, it was necessary for the court to assume that Readie's case was true.

7. The learned judge set out his reasons for finding that clause 4.1 was effective to exclude abatement. First, the clause includes the word "deduction" and that is how the defence of abatement operates, relying on the judgment of Buxton LJ in *Mellowes Archital Limited v Bell Products Limited* [1997] 58 Con LR 22. Furthermore, clause 4.1 is in comprehensive terms, including the words "whatsoever on any account" and Judge Johns QC ruled that sufficiently comprehensive terms can exclude abatement, including any argument that something different from that contracted for was supplied, adopting the judgment of Christopher Clarke J (as he then was) in *Totsa Total Oil Trading SA v Bharat Petroleum Corporation* [2005] EWHC 1641 (Comm) (hereinafter "*Totsa*"). The learned judge found that the words used in the *Totsa* case and in the present case were similarly comprehensive and therefore could be expected to produce a like result. He rejected reliance on the cases relied on by Readie on the basis that the contractual clauses in those cases featured significantly different terms from those in this case and that explained why abatement was not, on the basis of those different contractual conditions, excluded. As all these cases, and the arguments based on them, have arisen on this appeal I shall consider them below.

8. The learned judge therefore considered that clause 4.1 was, on its true construction, effective to exclude abatement. Furthermore, he found that this was fair and reasonable

within the terms of section 3 of the Unfair Contract Terms Act 1977 and there has been no appeal from this part of the judgment. It may be relevant to note, though, the factors relied upon by the judge in pointing to reasonableness:

> "1. The payment in full clause can be said to be the quid pro quo for credit being extended by Geo to Readie.
>
> 2. The purpose of a payment in full clause is a legitimate and important one, being concerned with cashflow, which has been called the lifeblood of business.
>
> 3. The clause is of limited effect in that it does not prevent cross-claims. It is simply that argument about such claims is deferred in that payment must be made whether or not there is such an argument. It is a 'pay now, argue later' regime.
>
> 4. Readie is a substantial concern. It had annual turnover of almost £140 million.
>
> 5. The agreement was one signed by its finance director. Readie certainly therefore should have been aware of the clause at the most senior level."

9. Judge Johns QC then turned to the issue arising under section 49(2) of the Sale of Goods Act 1979. Section 49 provides:

> "(1) Where, under a contract of sale, the property in the Goods has passed to the buyer and he wrongfully neglects or refuses to pay for the Goods according to the terms of the contract, the seller may maintain an action against him for the price of the Goods.
>
> (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 a price, the seller may maintain an action for the price, although the property in the Goods has not passed and the Goods have not appropriated to the contract."

As has been recognised at all times, section 49(1) does not apply because of the Retention of Title clause (see clause 5 above). Thus, it was necessary for Geo to bring itself within section 49(2) in order to maintain its action for the price by fulfilling the words that the price was "payable on a day certain irrespective of delivery" and the buyer had wrongfully neglected or refused to pay the price.

10. The learned judge decided that the claim was within section 49(2) relying on the judgment of Longmore LJ in *FG Wilson v John Holt* [2014] 1 WLR 2365. There was further support in the judgment of Males J (as he then was) in *PST Energy 7 Shipping LLC v OW Bunker Malta Limited ("The Res Cogitans")* [2015] EWHC 2022 (Con). In the *FG Wilson* case, the contract provided for the buyer to pay "within 30 days of the

date of invoice" and this was held to be a day certain for the purposes of section 49(2). In *The Res Cogitans*, payment was due 30 days after delivery and again this was held to be on a day certain. On that basis, the learned judge held that payment "by the end of the calendar month following the month in which the relevant invoice is dated" satisfied the provisions of section 49(2). He also considered that Readie's interpretation of section 49(2) would lead to what appeared to him to be a surprising result, namely that there are no circumstances in which Geo could maintain a claim for the price as opposed to damages within their contractual terms.

Readie's arguments on this appeal

The "construction" argument

11. Mr Oram firstly submitted that, on its true construction, clause 4.1 of the terms and conditions is concerned with how payment is to be made, not what has to be paid: thus it does not identify the obligation of what has to be paid. He submitted that, to identify the obligation to pay, it is necessary to turn to clause 3.1 which provides "the price for the Goods shall be set out in the written quotation provided by the Company and confirmed by the order". He referred to the definition of "Goods" in Clause 1 (See above).

12. Thus, Mr Oram submitted that the error into which the judge fell was that he failed to consider the prior question, namely against what is deduction under clause 4.1 not permitted. He submitted that the error is illustrated by paragraph 15 of the judgment where the learned judge referred to the argument on behalf of the respondent:

> "15. Mr Lascelles made clear that his case was that the clause covered the situation not only where a defect in quality was said to render the Goods less valuable or valueless but where Goods different in substance to those contracted for were supplied. That submission was a necessary one on this application as Readie's case was what was supplied was not GSB Type 1 aggregate at all."

Thus, said Mr Oram, the respondent would be entitled to the price, on their case, if there was no delivery at all.

13. In the above context, Mr Oram referred to paragraphs 12 and 14.1 of the defence where it is pleaded:

> "12 In breach of the contract (or contracts) between the parties resulting from the Purchase Order, the Delivered Material was not Type 1 Granular Sub-Base. The Delivered Material failed to comply with the Specification in the following respects: [3 breaches of specification are then set out]

> 14.1 To the extent that the claimant's claim is for the price of the delivered material, it has never fallen due. The claimant did not deliver the Goods ordered by the defendant, namely Type 1 granular sub-base but different, non-conforming Goods. Paragraph 12 above is repeated. The claimant has consequently failed to perform the contract."

In his submissions before the learned judge, Mr Oram had reminded the judge of the way Mr Lascelles put his case, which was that the claimant could have delivered anything, for example that Readie could have received 30,000 tonnes of sand, and would still have been liable to pay the price.

14. Mr Oram submitted that the learned judge never grappled with this point in the judgment. Certainly, however, the learned judge confronted Mr Lascelles with the point in argument where it was said:

> "THE JUDGE: … the two possibilities I suppose is what gets delivered is not very good Type 1 aggregate and therefore they say they are able to abate the price. The second possibility is what is delivered is not Type 1 aggregate at all and, therefore, they say they can abate the price or it is not payable. Now, do you say both of those are excluded by the clause?
>
> MR LASCELLES: Yes we do."

15. Turning to clause 4.1, Mr Oram submitted that there are two possible meanings of the words "the Customer shall make payment in full …":

    i) The Customer shall pay the price in full; or

    ii) The Customer shall pay the sum stated in the invoice in full.

    He submitted that by reference to clauses 1-3 of the terms and conditions, the first of those interpretations is correct but the learned judge erred by finding that the second interpretation was correct.

16. Mr Oram submitted that his distinction between an obligation to pay the price and an obligation to pay whatever is stated on the invoice is supported and substantiated by reference to two cases: *Totsa* and *Shell-Mex Limited v Elton Cop Dyeing Co. Limited* [1928] KB 39. *Totsa* was a case of an "on demand" contract where the claimant was entitled to claim whatever was in the invoice. Thus, the clause in that case provided:

> "We irrevocably and unconditionally undertake to pay on due date without any set-off, deduction or counter-claim whatsoever, and free of all charges, the full amount of seller's invoice covering the above mentioned purchase by telegraphic transfer exclusively as per seller's instructions." *(emphasis added)*

Mr Oram submitted that, under that contract, it was not the price that was due but whatever sum was stated on the invoice. By contrast, in the *Shell-Mex* case, the contract provided the following provision:

> "Sellers have the right at any time to invoice to buyers the due quantities of oil not taken up and to demand payment of the invoice amounts …".

It was held that as there had been no delivery of the Goods, payment of the price had not become due under section 28 of the Sale of Goods Act 1893. It was contended on behalf of the plaintiffs (sellers) that they had the right to invoice the oil in respect of which the defendants had not given delivery instructions in due course and thereafter recover payment of the invoice price as a debt as opposed to merely having the right to sue in damages. Wright J rejected this argument stating:

> "No doubt parties may bind themselves by any lawful promise so long as the words are clear enough, but I have to consider if they have here used words so clear as to justify Mr Le Quesne's contention. I do not think they have. I think clause 15 remains a term in a contract for the sale of Goods, and the price invoiced under it still remains the price as of Goods sold and delivered. … Under clause 9 it is admitted that if the buyers refuse to pay and then refuse delivery the sellers cannot claim the price but only damages for non-acceptance. I think, likewise under clause 15, if the buyers say they will neither pay nor take the Goods and thus repudiate the contract, the sellers can still only claim damages for non-acceptance of the Goods or for repudiation of the contract. Clause 15 does not in terms say that the buyers have to pay the invoice price as a debt at any specified time or on delivery of the invoice, or at any specified time after delivery. What is invoiced under clause 15 is still the price payable under the contract, which includes the sellers' services in actually delivering the Goods to the buyers' works. The sellers have never earned the price as such, and can only claim damages because they have been prevented from fulfilling their contract. It may be that clear words giving the effect claimed by the sellers can be framed; for example there might be an expressed provision for payment on a date certain, as in the *nisi prius* case of *Dunlop v Grote*, where it was held that the whole sum was recoverable as a debt as it was agreed to be paid on a day certain, which indeed is now provided in section 49(2) of the Sale of Goods Act. "

Thus, Mr Oram submitted that the sellers in *Shell-Mex* were unable to claim the price because none of the three conditions for paying the price were satisfied, namely property had passed, payment was due at a time certain or there had been delivery. He further submitted that, as in *Shell-Mex*, so here this is a contract for sale and delivery of Goods. The learned judge's interpretation of clause 4.1 is, he submitted, inconsistent, with or contradicted by, clause 4.2 (see above). He submitted that it is unlikely that the reference to the price in clause 4.1 was intended to mean something different to the reference to the price in clause 4.2 and thus the words "the price of the Goods delivered"

shows that the Goods need to be delivered. This gainsays the submission on behalf of the respondent before the judge that the price would be due if there was no delivery at all. Mr Oram submitted that there is consistency throughout the clauses in the terms and conditions whereby the obligation is to pay the price, not merely the amount stated in the invoice.

17. Building on the above, Mr Oram submitted that the defence of abatement remained open to Readie to plead as a defence. Abatement operates to reduce the amount due from the buyer to the seller where the seller's breach of contract renders the very Goods sold of less value or valueless to the buyer. He relied upon the following dictum from the judgment of Lord Denning MR in *Henriksens Rederi A/S v P H Z Rolimpex* [1973] 3 All ER 589:

> "In every such case it is plain that the plaintiff, not having completed the agreed work in accordance with the contract, is not entitled to the whole of the agreed sum. He ought not, therefore, to recover judgment for that sum, but only for the lesser sum. When the defendant says: 'You have not done the work to the agreed standard, and you are, therefore, not entitled to the agreed price' that is a matter of defence in law and not of set-off or counter-claim."

Mr Oram submitted that the provisions in the terms and conditions are not inconsistent with the common law principle of abatement which only operates to reduce the price to the extent that the seller does not deliver conforming Goods. He draws a distinction between complaints made by the buyer that affect the value of the very things sold (which are not excluded) and those that rely on collateral losses sustained by the buyer. The contract prevents the latter, but not the former. He submitted that this is a commercially sensible interpretation which recognises that the objective of clause 4.1 is to preserve the seller's cash flow.

18. Mr Oram further submitted that his interpretation of clause 4.1 is supported by the legal background and that the parties can be seen here to have contracted against a background of a consistent line of appellate authority. Thus, in *Mellowes Archital v Bell Products* (1997) 58 Con LR 22 (hereinafter, "*Mellowes*") the Court of Appeal treated as well-founded a concession that a contractual prohibition on set-off "does not exclude a defence or plea of abatement". Similarly in *Rohlig (UK) Limited v Rock Unique Limited* [2011] 2 All ER (Comm) 1161 (hereinafter "*Rohlig*") the Court of Appeal considered a clause which required payment "of all sums when due, immediately and without reduction or deferment on account of any claim or counter-claim or set-off" and it was held that this clause did not prevent the Customer from withholding payment on the grounds the sum claimed had not fallen due at all. Finally, Mr Oram relied on *NH International (Caribbean) Ltd v National Insurance Property Development Co. Ltd* [2015] 162 Con LR 183 (hereinafter "*NH International*") where the Privy Council considered a clause which restricted a contractor's entitlement "to set-off against or make any deduction from an amount certified". The Privy Council held that such a clause did not preclude the Employer from raising an abatement argument, namely that the work for which the contractor was seeking payment was so poorly carried out that it did not justify any payment or was so defective that it was worth significantly less that the contractor was claiming. Mr Oram submitted that the learned judge was wrong to distinguish those authorities on their wording and to

conclude that the reference to "deduction" in clause 4.1 amounted to a clear and unequivocal exclusion of the defence of abatement.

19. Turning to the issue arising from section 49(2) of the Sale of Goods Act, Mr Oram started by referring to paragraph 28 of the Sale of Goods Act 1979 which provides that payment and delivery are concurrent conditions:

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

Then one comes to section 49 which provides that an action for the price of the Goods may only be maintained where property has passed (sub-section 1). Then, as an exception to sub-section 1, it is provided that an action for the price may be maintained even where property has not passed where the price is payable on a day certain irrespective of delivery, pursuant to the contract. Mr Oram submitted that whilst such an agreement has the effect of severing interdependence between the seller's obligation to deliver the Goods and the buyer's obligation to pay the price, it does not modify the essential character of the contract as a sale of Goods with the consequence the seller must be able and willing to deliver Goods in conformity with the contract. Accordingly, he submits, where during an agreed credit period the buyer discovers that the seller has delivered not-conforming Goods entitling the buyer to reject them, the buyer does not act wrongfully in refusing to pay for the Goods after the credit period has expired.

20. Mr Oram submitted that it is important to distinguish between the three cumulative components of sub-section 2:

i) Payment must be required "on a day certain"

ii) Payment must be made due "irrespective of delivery" and

iii) The buyer must have "wrongfully" neglected or refused to pay the price.

21. He conceded, as he did below, that the first component is satisfied, namely that payment was required on a day certain. However, he contended that, under this contract, payment was not due irrespective of delivery and that Readie had not wrongfully neglected or refused to pay the price.

22. Mr Oram referred to a dictum of Lord Keith in *White and Carter (Councils) Ltd v McGregor* [1962] AC 413 where Lord Keith said at page 437:

> "I would refer first to contracts for the sale of Goods which was touched on in the course of the debate, for the reason that one of the remedies provided to the seller by the Sale of Goods Act 1893 is an action for the price. This, however, applies only in two cases. One is where the property in the Goods has passed to the buyer … the only other case is where parties have contracted for payment on a day certain, irrespective of delivery or the passing of property. This is a clear case of a contractual debt

> unconditioned by any question of performance by the other party …"

Mr Oram submits that this explanation whereby section 49(2) has the effect of severing the interdependence of the parties' respective obligations of delivery and payment, is supported by academic authority. It is also supported, he submitted, by the case of *Muller, MacLean and Co. v Leslie and Anderson* [1921] WN 235 where Roche J held (at page 330) that where a contract of sale was to be performed by the delivery of documents, section 49(2) was not satisfied where a payment of the price was due against delivery of those documents.

23. A claim on similar facts was rejected in *Stein Forbes and Co. v County Tailoring Co*. [1916] 86 LJKB 448 because, in those circumstances, the price would be dependent on delivery. In *Stein Forbes*, the plaintiffs had agreed to sell, and the defendants to buy, "about 12,000 dressed sheepskins for prompt shipment and about 33,000 ditto for shipment as quickly as possible … cif. London or Liverpool. Payment: net cash against documents on arrival of the steamer." The Goods were shipped by three different steamers. The first two shipments were taken up and paid for, but the defendants refused to take up the documents for the third shipment on the ground that they had never been tendered to them, and that they were not informed of the vessel's arrival until a date outside the contract date for delivery. The question was whether the plaintiffs were entitled to the price of the Goods within section 49(2) of the Sale of Goods Act 1893 which in turn depended upon whether the price was payable "on a day certain irrespective of delivery". Atkin J (as he then was) rejected the claim and held that the price was payable expressly against delivery. Roche J, in *Muller MacLean*, interpreted Atkin J's decision as being based on the fact that "when payment is to be made on arrival of a ship against delivery of documents, and delivery of documents was the delivery in question, you could not say that payment was to be made irrespective of delivery."

24. Mr Oram further relied upon the judgment of Potter LJ in *Otis Vehicle Rentals Limited v Ciceley Commercials Ltd* [2002] EWCA Civ 1064 where the plaintiffs entered into a hire-purchase agreement with a finance Company in respect of a number of tractor units which provided that the defendants would re-purchase the vehicles from the plaintiffs at the plaintiffs' option after either two or three years a "buy-back agreement". The plaintiffs sued for the price of the tractor units, pleading that they remained ready and willing to deliver the tractor units to the defendants. However, by the time of trial, all the vehicles had in fact been disposed of elsewhere by the plaintiffs. At first instance, the judge held that the plaintiffs were entitled to payment of the buy-back price but this was overturned on appeal. Potter LJ held that the judge had been wrong to give judgment for the price rather than make an award of damages he said:

> "The agreement that a buy-back at the price agreed would take place three years after the date of the original sale did not in my view amount to an agreement that the price was payable on a day certain *irrespective of delivery*. The commercial reality is that, had the buy-back preceded, the payment, paperwork and arrangements for the delivery of the vehicles would all have been co-ordinated and dated so as to have simultaneous affect as a matter of routine co-operation between the claimants, the defendants and [the finance Company]. Even if that be wrong,

> however, by the time the proceedings were heard there was a fatal obstacle to the claimant obtaining judgment for the price. It is clear from long-established authority that, even if where the conditions prescribed in section 49(2) exist, if the Goods agreed to be sold have not been delivered to the buyer, the seller's entitlement sue for the price nonetheless depends upon his continuing willingness and ability to deliver the Goods to the buyer … When the matter was before the judge, the claimants had long since disposed of the vehicles and put it out of their power to tender them against payment of the buy-back price. In those circumstances the only claim could be one of damages."

Mr Oram submitted that, on the basis of this decision, a contract cannot be "irrespective of delivery" if delivery and payment are interdependent and the seller must remain able to perform his obligation to deliver the Goods. He submitted that His Honour Judge Johns QC should have considered the true effect of the statutory requirement for payment to be made "irrespective of delivery" and had he done so would or should have concluded that the contract did not satisfy this. The fact that Geo was entitled to raise an invoice did not have the effect of making Readie's obligation to pay entirely independent of Geo's obligation to deliver conforming Goods. On the contrary, he submitted, clause 2.2 of the terms and conditions made clear that the two were interdependent in that no contract would come into being until the Goods were delivered.

25. Mr Oram further drew support for his argument from Commonwealth authorities: *Ledger v Cleveland Nominees Pty Limited* [2001] WASCA 269, *Garmin Australasia Pty Ltd v B & K Holdings (Qld) Pty Ltd* [2018] QCA 353 and *Pala v BTC Group Ltd* [2015] NZCA 487. He submitted that no support for the opposite contention could be obtained by the respondent from the cases of *FG Wilson* or *The Res Cogitans* (whether at first instance or in the Supreme Court).

26. Finally, Mr Oram submitted that the requirement in section 49(2) of "wrongful" neglect or refusal to pay the price was not satisfied in this case. He referred to *Wayne's Merthyr Steam Coal and Iron Co v Morewood and Company* [1877] Queen's Bench, Common Pleas and Exchequer 746 where the plaintiffs had contracted to deliver iron of a certain quality to the defendants and had agreed to receive payment for each delivery, either in cash for discount within a month or by bills of four months according to the defendants' option. Upon application by the plaintiffs in July for payment for iron delivered in June, the defendants elected to pay by bill. However, before the bill was given, the defendants discovered the iron was of inferior quality to the sample and was useless to them and refused to accept any more or to pay for the June shipment. It was held that, the contract having been broken by the plaintiffs' delivery of the iron of inferior quality and it consequently being their fault that the bill for the invoice price was not given, the plaintiffs were not entitled to sue for the contract price. In the course of his judgment Lush J said:

> "If [the defendants] had not discovered the inferiority of the bars they would have given a bill for the amount of the invoice and this would have been the entire amount and an amount compounded of the sample bars and of the bars in question, which the plaintiffs were willing to accept and those the

> defendants very properly refused to pay for. It was therefore the fault of the plaintiffs that they did not get the bill, and that being so they were not entitled to demand payment for the Goods and the verdict must be entered for the defendants on this part of the case."

Mr Oram submitted that, in contradistinction to the cases relied upon by the respondent, here there was an issue in relation to the quality of the Goods and if the buyer discovers that the Goods are defective before the time for payment arrives, they can reject the Goods and are entitled not to pay. On that basis, he submits that Geo are not entitled to the price in this case.

The submissions on behalf of the respondent (Geo)

27. For the respondent, Geo, Mr Lascelles submitted that, as was found by Judge Johns QC, the different provisions in the terms and conditions do not support Readie's construction but in fact support Geo's contention. He said that Readie's construction involves Readie being entitled not to pay under the invoice if the Goods are not up to specification. However, there are other provisions intended to deal with Goods not meeting specification and he relied on clauses 6.2, 8.1 and 8.3 (see above). On that basis, Mr Lascelles submitted that it is plain that goods can be goods for the purposes of the contractual terms and be delivered even if they are not up to specification.

28. In response to Readie's first argument, Mr Lascelles submitted that this does violence to the express wording of clause 4.1. First, the restriction on deductions and on withholdings does not come later in the clause than a requirement that the sum be paid when due. He submits that it is necessary to read the clause as a whole and that Readie's interpretation involves altering the meaning of the clause and creating a new clause to which the parties did not agree. Read as a whole, it is clearly intended that Readie should make payment in full without deduction or withholding whatsoever on any account when payment is due and payment is due by the end of the calendar month following the month in which the relevant invoice is dated. The reference to the consequences of Geo not receiving payment in full when due refer back (as one would expect) to what has gone before, that is payment being received as specified in the first sentence of clause 4.1. Thus, Mr Lascelles submitted that the price is payable in this case for three reasons:

    i) As a matter of language, clause 4.1 does exclude abatement;

    ii) That interpretation is consistent with the authorities;

    iii) Geo's construction is more business-like: the most likely dispute to arise in such a contract is that the Goods are defective and the buyer should not have to pay for them. The essence of this commercial deal is that Geo was granting Readie credit so that Readie did not have to pay in advance but received up to two months' credit. The *quid pro quo* for this is that Geo is as protected as if Readie had paid in advance or on delivery.

29. So far as the authorities are concerned, Mr Lascelles submitted that *Mellowes* strongly supports Geo's construction of clause 4.1. In that case, the Court of Appeal referred to the "seminal" judgment on abatement of Parke B *in Mondel v Steel* [1835] All ER Rep

511 where Parke B stated that an abatement was "a deduction from the agreed price" according to the difference between the goods as were and the goods as they ought to have been according to the contract. Thus, the reference in clause 4.1 to the Customer making payment in full "without any deduction" was appropriate to exclude abatement. In *Mellowes,* the Court of Appeal cited and approved the dictum of Lord Denning in *Henriksens Rederi A/S v P H Z Rolimpex* where the Court of Appeal had similarly characterised abatement as a "deduction". Thus, Mr Lascelles submitted that it is clear that the authorities characterised a plea in abatement as a plea to make deductions from the price and the use of the words "without any deduction" in paragraph 4.1 is a clear indication by the parties, given the legal context, that they were intending to exclude abatement.

30. Mr Lascelles placed particular reliance, as did the judge in his judgment below, on the decision of Christopher Clarke J in *Totsa*. Mr Lascelles submitted that the reasoning of Christopher Clarke J to exclude abatement in that case applied equally here, so that here, as there, the clause prevented deduction from the price and therefore abatement was excluded. Christopher Clarke J stated, in the course of his judgment:

> "24. … it seems to me whenever a buyer declines to pay the full amount of the invoice upon the ground that not all of the oil that he contracted for has been shipped, what he is doing is seeking to deduct from his payment to the seller such proportion of the invoice as he declines to pay and to withhold payment of that amount. That is exactly what the buyers have undertaken not to do."

Mr Lascelles submitted, as he did in the court below, and as the judge below accepted, that, in this case, Readie is seeking to do just what the buyers sought to do in *Totsa* and it is as illegitimate in the present case and it was in that case. He submitted that the fact that payment in *Totsa* was by reference to the invoice and payment in the present case is by reference to the price makes no difference.

31. Again repeating his submissions in the court below, Mr Lascelles submitted that the other authorities relied on by Readie could be distinguished. Thus, in each of *Acsim (Southern) Ltd v Danish Contracting and Development Co. Ltd* [1989] 47 BLR 55 and *Mellowes*, the court held that a prohibition on "set-off" did not prevent abatement, an unsurprising result as abatement is not, in law, the same as set-off. In *Rohlig* the clause was materially different because it required payment "of all sums due, immediately and without deduction or deferment on account of any claim, counter-claim or set-off", wording which was not apt to exclude abatement. In *NH International*, clause 2.5 of the construction contract required the employer to notify the contractor if the employer considered itself "to be entitled to any payment" from the contractor. Mr Lascelles submitted that, it is again, unsurprising that the employer's failure to notify would not prevent it advancing a defence of abatement which would enable the employer to make deductions from a payment which the employer would otherwise have to make to the contractor.

32. Turning to the defence under section 49(2) of the Sale of Goods Act 1979, Mr Lascelles referred to a potential issue as to whether it is necessary to bring oneself within section 49 in order to maintain an action for the price. This was the effect of the decision of the Court of Appeal in *F G Wilson v Holt* where the court held that no claim for the

price lies outside the circumstances set out in section 49. In *The Res Cogitans* the Supreme Court indicated, obiter, it would have overruled *F G Wilson v Holt* on this point but Geo accepts that, for present purposes, *F G Wilson v Holt* remains binding authority, the discussion in *The Res Cogitans* having been obiter, and therefore Geo must bring itself within section 49(2) (it being accepted that the Retention of Title clause takes it outside clause 49(1)).

33. Mr Lascelles characterised the key question for this purpose as being whether payment is due "irrespective of delivery" where payment was to be paid by the end of the calendar month following the month in which the relevant invoice was dated. He submitted that such payment is in fact due irrespective of delivery because:

i) Payment is specifically linked to invoicing rather than delivery;

ii) Even if Geo's invoice followed delivery, payment was not concurrent with delivery as envisaged by section 28 of the Sale of Goods Act and delivery prior to payment had the effect of breaking the linkage between the two.

iii) Mr Lascelles submitted that this construction of section 49(2) makes better commercial sense, best accords with case law and is the better construction in the context of the Sale of Goods Act as a whole, including section 28.

34. So far as commercial sense is concerned, Mr Lascelles submitted that, on Readie's interpretation, where a contract provides both a Retention of Title clause and a period of credit, then despite the benefits of such clauses to both parties the case would always be outside section 49(2) and the seller would never be able to maintain an action for the price. He submitted that it makes much better commercial sense that the seller should still be able to sue for the price.

35. So far as the authorities are concerned, Mr Lascelles submits that Geo's position and interpretation is amply supported by the dicta of experienced commercial judges. Thus, in *F G Wilson v Holt*, Longmore LJ stated (obiter) that he would have held that the following clause satisfied section 49(2):

> "… seller may invoice buyer on at any time after delivery for any amounts still due … a buyer shall pay within 30 days of the date of invoice".

When he made this statement, Longmore LJ had had cited to him the authorities relied on by Readie: *Stein Forbes*, *Muller MacLean*, *Otis Vehicle Rentals* and *White and Carter v McGregor*. *Wayne's Merthyr* was not cited in *F G Wilson* but Mr Lascelles submitted that *Wayne's Merthyr* takes matters no further when the case turned on the question whether, on the particular terms in question, the period of credit had expired at the date of the suit. Mr Lascelles submitted that Geo's position is also supported by the dicta of Males J (as he then was) in *The Res Cogitans* at first instance. There, where the clause provided for "payment within 60 days from date of delivery on presentation of invoice", Males J was of the view that this satisfied the requirements of section 49(2) stating:

> "… provision for payment to be made within a fixed period after delivery is sufficient to satisfy the requirement in section 49(2).

> Rightly or wrongly … the shipbuilding contract in *Workman Clark* was clearly treated by the Court of Appeal as a contract of sale, and the claim was viewed as a claim for an instalment of the price under section 49(2). I do not see how the tentative view expressed in *Benjamin* can stand with the decision in the case, albeit that the point now in issue does not appear to have been the subject of argument. That conclusion accords also with the comment by Longmore LJ in [*F G Wilson*] at [44] that payment due a fixed number of days after the seller's invoice would satisfy the sub-section, albeit this was an obiter, in a dissenting judgment. Moreover as [counsel for the Owners] acknowledged, the consequence of his submission is that [the supplier] would never be able to sue for the price under section 49: by the time payment becomes due, some or all of the bunkers would have been consumed with the result that property in them cannot be transferred to the Owners so that section 49(1) is not available, while an obligation to pay a fixed number of days after (or even upon) delivery does not satisfy section 49(2). That seems an uncommercial result. Although (counsel for the Owners) canvassed other possible means by which the supplier might get paid, such as an action for specific performance of the obligation to pay or a Restitutionary claim, these seem to be unnecessarily exotic where Goods have been delivered on credit and subsequently consumed. There ought to be a straightforward claim in debt."

Mr Lascelles noted that, in the Supreme Court in *The Res Cogitans*, Lord Mance noted with approval both Longmore LJ's approach in *F G Wilson* and Males J's approach at first instance.

36. So far as the commonwealth authorities are concerned, Mr Lascelles conceded that the Australian and New Zealand authorities cited by Mr Oram are inconsistent with Geo's case, those authorities interpreting statutory provisions in those jurisdictions which are identical to the terms of Sale of Goods Act. His position was that those decisions are wrong and he preferred to rely on the decision of the High Court of Singapore in *Mitsubishi Corp RTM International Pte Ltd v Kyen Resources Pte Ltd* [2019] SGHCR 6 where the payment clause provided that the defendant was to make payment of "100% net cash by wire transfer within 30 working days after seller's presentation of the documents". Counsel for the defendant submitted that the payment clause was not "irrespective of delivery" because presentation of documents required delivery. Rejecting this argument, the court (Judge Yang) held:

> "62. … in my opinion the requirement of payment 'on a day certain irrespective of delivery' does not mean that the time for payment <u>cannot be</u> dependent on or otherwise associated with delivery or the time for delivery. Rather, the phrase 'irrespective of delivery' means that the time for payment <u>may be, but need not be</u> 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). "

Then, in the following paragraphs of the judgment, Judge Yang sets out his reasons and arguments substantiating those three reasons. This is adopted by Mr Lascelles who submits that the reasoning is compelling and should be followed. He further submitted that *Doherty v Fannigan Holdings Ltd* [2018] EWCA Civ 1615, which is relied on by Readie, does not affect the analysis in *Mitsubishi* but turns on its own facts.

37. Finally, Mr Lascelles submitted that the further ground relied upon under section 49(2) namely that Readie has a real prospect of establishing that its non-payment of the price was not "wrongful" because the Goods delivered by Geo did not conform to the contract, in fact adds nothing to the other grounds. Whether the non-payment of the price is or is not "wrongful" depends on the construction of clause 4.1 and the other clauses of the contract and therefore adds nothing to the first ground of appeal.

Discussion

38. The first question to be decided is whether, on the true construction of the contract, Readie was entitled to withhold payment on the basis that the goods delivered were defective or whether the contractual terms meant, as the learned judge held, that Readie were obliged to pay the amount on the invoice irrespective of the quality of the goods delivered.

39. The starting point is, as Mr Oram submitted, that this contract is one which provides that delivery of the goods is a "condition precedent" to payment of the price. For confirmation of this, it is necessary to look no further than clause 2.2 which provides: "Every contract for the sale of Goods shall be deemed to be concluded only when the Goods have been delivered or collected …". Thus, this is not one of those contracts such as in *Totsa,* where the obligation to pay arose on delivery of documents, irrespective of delivery of the goods. Furthermore, it is important to recognise that, by clause 1, "Goods" are defined as "The Goods which the Company is to supply in accordance with these conditions". Thus, I agree with Mr Oram 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.

40. However, it seems to me that this is not the end of the matter and it does not follow that if the buyer considers that the goods do not meet with the specification and are therefore not compliant with the contract, it can withhold payment. In my judgment, Mr Lascelles is also right that it is necessary to construe this contract as a whole and endeavour to reach a construction which gives meaning and effect to all the clauses. Thus, as Mr Lascelles submitted, clauses 6 and 8 are intended to cover a situation where the goods

fail to comply with the specification or sample in some material respect, and should be read together with clause 4.1 which provides for payment in full without deduction etc by the end of the calendar month following the month in which the relevant invoice is dated. The provisions in 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. Furthermore, I consider that, in this context, the matters referred to by the learned judge in ruling that the contractual clauses were reasonable within the Unfair Contract Terms Act are highly pertinent, particularly the first 3:

> "1. The payment in full clause can be said to be the quid pro quo for credit being extended by Geo to Readie.
>
> 2. The purpose of a payment in full clause is a legitimate and important one, being concerned with cashflow, which has been called the lifeblood of business.
>
> 3. The clause is of limited effect in that it does not prevent cross-claims. It is simply that argument about such claims is deferred in that payment must be made whether or not there is such an argument. It is a 'pay now, argue later' regime.

41. Again, as Mr Lascelles submitted, these purposes make good sense in terms of business efficacy and the court would be loath to interpret the contract in a way which deprives the contract of such clearly intended business efficacy in the context where Geo was extending credit to Readie.

42. How, then, is this to be squared with the suggestion that, on Geo's interpretation, the obligation to pay would arise even if there had been no delivery, for example sand instead of aggregate? 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. This also resolves the potential conflict with the terms of clause 4.2 referred to by Mr Oram in argument (see paragraph 16 above). It follows that I do not agree with the submission of Mr Lascelles that payment would be due even if there had been no delivery (or even purported delivery) at all, but once the seller has purported to deliver the goods, the price becomes payable.

43. In my judgment the learned judge was right when he ruled that the terms of clause 4.1 were apt to exclude, and were intended to exclude, a plea in abatement. It seems to me that what the parties have sought to do, by agreeing these terms and conditions, was to put this contract on a par with the contract in *Totsa* where the obligation to pay was on presentation of the documents. Once there has been bona fide, purported delivery, then the obligation to pay arises, that being an obligation to pay the price as set out in the

quotation and confirmed in the Order (see paragraph 3.1). On that basis, the learned judge was right to rely on and apply what Christopher Clarke J said in *Totsa*:

> "21. In my judgment, the meaning and effect of the contract and the payment undertaking taken as a whole is clear. On receipt of the bills and an invoice, the buyers are to pay whatever is the amount stated in the invoice and not a dollar less. If the buyers have a claim that they should only have to pay less than what the invoice calls for, the restrictive conditions preclude them from doing so. In a contract of this kind, although there are no doubt other claims that a buyer might have, the most likely claims are in respect of short delivery, or delivery of cargo that does not answer to the contractual description or is of the wrong quality. In legal terms those claims may be put forward as counterclaims, claims to equitable set-off or claims to abate a price.
>
> 22. Each of such claims seems to me to come within the restrictive conditions. Set-off and counterclaim are dealt with expressly, and a claim by way of abatement involves claiming a deduction from the price. But as Mr Baker for the buyers points out, the nature of his client's defence in this case does not have to be expressed as a claim to abatement, set-off or counterclaim. He contends that because up to 45,000 barrels of what was due as oil was delivered as water, the buyers are under no liability in respect of that quantity. The restrictive conditions, he submits, tell you what you cannot deduct, but tell you nothing about what the contract requires to be paid in the first place.
>
> 23. On the assumed facts, the buyers are required to pay the contract price per barrel, multiplied by the number of barrels of oil shipped, and not the number of barrels of oil plus the number of barrels of water. No question arises of any deduction from the price since there is, in respect of the water, no price to be paid. In order for the position to be different, the buyers would have to point to some provision of the contract which bound them to accept that the amount specified in the bills had been shipped, or which entitled them to be paid even if part of the cargo were water.
>
> 24. Whilst I see the force of this submission, which was cogently and attractively argued, I do not accept it. It seems to me that when a buyer declines to pay the full amount of the invoice upon the ground that not all of the oil that he contracted for has been shipped, what he is doing is seeking to deduct from his payment to the seller such proportion of the invoice as he declines to pay and to withhold payment of that amount. That is exactly what the buyers have undertaken not to do."

44. It can be seen that the argument for the buyers in that case was very similar to Mr Oram's argument in the present case, and I reject it for the same reason that Christopher Clarke J rejected it in *Totsa*, as did the learned judge, rightly, in the court below.

45. In the light of the above, the decisions in *Mellowes*, *Rohlig*, *NH International* and *Acsim* do not avail Readie. I can do no better than adopt what Judge Johns QC said at paragraphs 21 to 26 of his judgment where he explained why the contractual clauses in those cases were significantly different from those in the present case, which explains why abatement was not, on those different contractual provisions, excluded.

> The contractual clauses in the cases relied on by Mr. Oram seem to me to have features significantly different from those in this case and which explain why abatement was not, on those different contractual provisions, excluded.
>
> 22. Clause 2.5 in *NH International (Caribbean) Ltd v National Insurance Property Development Co. Ltd* [2015] 162 ConLR referred to payment due to the employer. That was apt to refer to a cross-claim operating by way of set-off but not abatement.
>
> 23. In *Acsim (Southern) Ltd v Danish Contracting and Development Co Ltd* [1989] 47 BLR 55 (CA), clause 15 provided expressly for limited rights of set-off and continued "no other rights whatsoever shall be implied as terms of this subcontract relating to set-off." Again, the terms of that clause refer clearly to set-off but not to abatement. Abatement is not a defence operating by way of set-off.
>
> 24. The relevant clause in *Mellowes Archital Ltd v Bell Products Ltd* was this: "No set-off under this clause may be made unless such set-off has been quantified in detail and with reasonable accuracy by the contractor and the contractor has given to the subcontractor notice in writing specifying his intention to set off the amount so quantified together with the details referred to above and the grounds on which such set-off is claimed to be made. Such notice should be given not less than three days before the date upon which the payment from which the contractor intends to make the set-off becomes due under earlier provisions of the contract."
>
> 25. Yet again, that clause is concerned clearly with set-off but, as I have said, abatement is not set-off.
>
> 26. Finally, *Rohlig (UK) Ltd v Rock Unique Ltd* [2011] 2 All ER (Comm) 1161. The relevant clause in that case referred expressly to "any claim, counterclaim, and set- off" by way of limitation to those matters on account of which there could be no deduction. But clause 4.1 contains no such limitation. On the contrary, the lack of any such limitation is underlined by the words "whatsoever on any account".

Thus, in none of those cases did the contractual clause forbid "deduction" as in clause 4.1. Here, and as Mr Lascelles 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.

The Section 49(2) argument

46. As section 49(1) of the Sale of Goods Act 1979 cannot be relied on because of the Retention of Title clause, it is conceded on behalf of Geo that they need to bring themselves within section 49(2) in order to be able to bring an action for the price.

47. In my judgment, the argument in relation to section 49(2) centres on the words "irrespective of delivery": the reference to the buyer wrongfully neglecting or refusing to pay the price must be a reference to the particular contractual terms agreed between the parties, and once it is decided that Readie had an obligation to pay the price, as I have decided, they cannot re-import the arguments about defective delivery for the purposes of this sub-section.

48. If Mr Oram's interpretation of section 49(2) is correct, and the words "irrespective of delivery" are self-standing and independent of the rest of the section, it would follow that the fact I have held that delivery, or purported delivery, is a pre-condition to the obligation to pay the price under this contract would mean that section 49(2) is not fulfilled. However, in my judgment that interpretation is not correct and I can do no better than adopt the judgment and reasoning of Judge Yang in *Mitsubishi*. I would only add the following: it seems to me that section 49(2) must be read both as a whole and in conjunction with section 28. Section 28 provides that payment and delivery are concurrent conditions so that, unless otherwise agreed, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price and the buyer must be ready and willing to pay the price in exchange for possession of the goods. When read in conjunction with section 49(2), it can perhaps be seen that they assume, or imply, that payment and delivery will normally occur at the same time. If that is right, and if one reads the words "the price is payable on a day certain irrespective of delivery" together, then it can be seen that 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.

49. Furthermore, I agree with Mr Lascelles' submissions in this regard as set out in paragraph 34 above: this interpretation of the contract and section 49(2) is supported by what was said by Longmore LJ in FG Wilson and Males J at first instance in *The Res Cogitans*. The arguments were fully considered by Judge Johns QC in the court below and I agree with, and adopt, his conclusion and his reasons for reaching it, which merit being cited in full:

> 37.Longmore LJ said, at paragraph 44 of *FG Wilson*:
>
> > "It is no doubt true that retention of title clauses were less common in 1893 than they are today. But if a seller is happy to allow a buyer use of the goods without

> paying for them but wishes to ensure that he retains property in the goods and that he can sue for the price, he only has to provide for payment to be due on a day certain. That is what one would usually expect a seller to do, indeed that is what FG Wilson's terms and conditions do under the heading 'Prices and Payments' where it is provided that the buyer is to pay within 30 days of the date of the invoice. It is only the subsequent variations that have muddied the waters."

38. I prefer that view first because it has received weighty judicial support. There is the *Res Cogitans* case at first instance before Males J. He said this at paragraph 73:

> "If necessary I would have held on this point disagreeing with the arbitrator as the provision for payment to be made within a fixed period after delivery is sufficient to satisfy the requirement in section 49(2). Rightly or wrongly, the shipbuilding contract in *Workman Clark* was treated by the Court of Appeal as a contract of sale and the claim was viewed as a claim for an instalment of the price under section 49(2). I do not see how the tentative view expressed in Benjamin can stand with the decision in the case albeit that the point now in issue does not appear to have been the subject of argument. That conclusion also accords with the comment by Longmore LJ in *Caterpillar v John Holt* at 44 that payment due a fixed number of days after the seller's invoice would satisfy the subsection albeit this was an obiter comment in a dissenting judgment."

39. Then Longmore LJ's treatment of section 49(2) is referred to by Lord Mance, in the Supreme Court in *Res Cogitans*, without criticism, as follows at paragraph 50:

> "Section 49(2) relaxes only partially the strictness of section 49(1) and depends on the price being payable on a day certain. These are words which can no doubt be construed liberally as Longmore LJ was minded to but are not of indefinite expansion."

40. I prefer the view of Longmore LJ second because Readie's interpretation of s.49(2) seems to me to lead to a surprising result, namely that there are no circumstances in which Geo could maintain a claim for the price as opposed to damages."

50. For these reasons, I consider that Geo were able to bring themselves within section 49(2) SGA and maintain their action for the price. Thus, I have reached the conclusion that HHJ Johns QC was right to give Geo summary judgment, and this appeal must be dismissed.