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TRANS TRADE RK SA V STATE FOOD AND GRAIN CORPORATION OF UKRAINE [2025] EWHC 1803 (COMM)

WHEN CAN A SELLER CLAIM THE PRICE? A CLARIFICATION OF SECTION 49(2) OF THE SALE OF GOODS ACT 1979

OVERVIEW

In a significant judgment for international commodities trading, the High Court has partially set aside three awards rendered by the GAFTA Board of Appeal (the "**Awards**"), clarifying the circumstances in which a seller can claim the contract price under section 49(2) of the Sale of Goods Act 1979 ("**SGA**"). In coming to a decision, the judge reviewed all relevant case law, reaffirming the orthodox position that a seller's right to recover the price where property in the goods has not passed only arises if payment is not conditional on delivery.

CONTRACTUAL BACKGROUND

Trans Trade RK SA ("**Buyer**") and State Food and Grain Corporation of Ukraine ("**Seller**") entered into three contracts for the FOB sale of Ukrainian feed corn under GAFTA Form 49.

The contracts included a retention of title clause, stating that property in the goods would not pass to the Buyer until full payment was received, in effect modifying the FOB Incoterm. The clause stated:

"*4.4 Title to the Goods shall remain vested in the Seller and shall not pass to the Buyer until 100% of the value of the Goods has been paid and received by the Seller.*"[1]

Payment was to be made cash against documents (CAD), with scanned shipping documents to be provided before payment:

[1] Paragraph 11 of the judgment

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"6.1 100% of the value of the part of the Goods delivered to fulfilment of the Contract... shall be paid by the Buyer via bank transfer on CAD (cash against documents) basis, in full accordance with a commercial invoice from the Seller."[2]

There was a further amendment to the standard form, which provided for a specific date by which payment should be made, referable to the submission of documents and therefore contingent on a future event, i.e. shipment of the goods.

Under contracts that provide for payment on CAD terms and contain a reservation of title clause, such as these, a seller will retain ownership of the cargo until their buyer pays the price in full, even if the buyer has received the shipping documents and/or the cargo itself.

THE DISPUTE

A total of 104k metric tons of Ukrainian feed corn was loaded and shipped on board four different vessels and the requisite documentation was sent to the Buyer. Two of the cargoes were paid for, but the Buyer failed to pay for the other two (one of which was shipped in two parts). The Seller claimed the unpaid price in three GAFTA arbitrations, relying on section 49(2) SGA, which states:

"*Where, under a contract of sale, the price is <u>payable on a day certain irrespective of delivery</u> 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.*" (emphasis supplied)

In the first tier GAFTA arbitrations, the Buyer argued that since (a) the contract was on FOB terms, (b) payment was CAD, and (c) property had not passed, the Seller could not claim the price under section 49(2) and therefore was only entitled to claim damages. The Buyer also raised defences of frustration and the Seller's failure to mitigate its damages.

The Seller relied on the terms of the payment clause, arguing that a "day certain" for the payment of the price had been agreed.

The Seller obtained three first tier awards for the price of the unpaid cargo. The Buyer appealed those decisions to the GAFTA Appeal Board (the "**Board**"), again raising the Seller's failure to mitigate and also claiming that the Seller could not bring itself within the scope of section 49(2) SGA.

The Board dismissed the Buyer's submissions and upheld the first tier awards. The Buyer appealed all three Awards to the High Court under s.69 of the Arbitration Act 1996 on points of law.

ISSUES BEFORE THE COURT

The Court was asked to determine:

1. Whether a seller under a FOB contract, where payment is said to be against documents and which contains a retention of title clause, can claim the price under s.49(2) SGA, or whether its claim is limited to damages;
2. What is meant by “a day certain” in s.49(2) SGA;
3. Whether, on the facts, the Seller’s claim for the price should have succeeded.

In addition, the Seller sought to plead an alternative case that, if the High Court held that the Board erred in concluding that the Seller had good claims for the price then the case should be remitted back to the Board so that an award on damages could be issued. There was no alternative claim for damages, either in the first tier arbitration or before the Board.

COURT'S DECISION

Mr Justice Andrew Baker allowed the appeals and partially set aside the Awards.

The Court held that in FOB contracts, where payment is conditional on the presentation of documents (and those documents that were required to be presented were contingent on shipment, i.e. the time of an FOB delivery) and property has not passed, a seller cannot claim the price under section 49(2) SGA. The phrase “*payable on a day certain irrespective of delivery*” means the obligation to pay must not depend on delivery.

[2] Paragraph 12 of the judgment

Here, payment was conditional on delivery, by virtue of the documents required, so section 49(2) did not apply. The judge stated:

"The contract provided for the price to be payable 'cash against documents' and, on a true analysis, the documentary delivery that would oblige the buyer to pay the price was (the completion of) the seller's delivery obligation in respect of the goods. The specified latest date for payment in the amended payment clause did not remove that conditionality of the payment obligation. It remained an obligation to pay (only) 'cash against documents'."[3]

On the meaning of "a day certain", the Court did not consider it necessary to make a finding. The judge noted that the contracts did specify a fixed payment date, which would have satisfied the "day certain" requirement, but found that this was irrelevant in this case because the "irrespective of delivery" requirement was not met.

In these circumstances, the Seller's claim for the price was bad in law. The judge commented:

"The Board of Appeal, with respect, misdirected themselves as to the meaning of s.49(2) of the Sale of Goods Act 1979 in such a way as to eliminate the key requirement that by the subject contracts for the sale of goods, the price had to have been payable 'irrespective of delivery'"[4]

The judge considered that the legislation was meant to consolidate the common law position. The settled position in older case law had been that an action for the price when property in the goods has not passed was a narrow exception and many of the cases cited in the judgment rightly capture the traditional restrictive nature.[5]

However, recent High Court decisions had taken a broader approach and did not properly interpret the meaning of "irrespective of delivery", instead focussing on the timing of payment rather than the conditionality of payment.[6]

For those reasons, the Seller's only remedy would have been a claim for damages.

No claim had been advanced on that, alternative basis in arbitration, on the basis of which the Court rejected the Seller's request to have the matter remitted to the Board in order to make an award in damages. The Court found that a new claim could not be advanced for the first time at the appeal stage:

"It is not open to the seller in response to these appeals, leave having been granted, to seek through s.69(7) of the Arbitration Act 1996 to introduce a different claim not made in the arbitration, for which it would need findings of fact it did not seek from the Board of Appeal."[7]

The relevant parts of the Awards were set aside and substituted with a dismissal of the Seller's claim. No remission to the Board was made.

COMMENT

In coming to its determination on the relevant points of law, the Court reverted to principles established by long standing authorities, which should now serve as a road map for similar cases.

This judgment emphasises that section 49(2) SGA contains two, separate, requirements, "a day certain" and "irrespective of delivery" and what is needed to comply with them. Having a payment date in the contract is not enough in and of itself to trigger recovery under s.49(2). That payment date must be completely independent of delivery, with the contractual language clear in that respect. If, in construing the contract as a whole, it is apparent that payment would not be possible without delivery happening first, then an action for the price must fail and a seller's recourse will be a claim in damages alone.

The judgment also highlights the importance of careful drafting to ensure that a valuable contractual right is not lost inadvertently.

In relation to dispute strategy, the case serves as a reminder to run alternative cases to account for the possibility of one's first argument failing.

[3] Paragraph 75 of the judgment
[4] Paragraph 98 of the judgment
[5] Caterpillar (NI) Ltd (formerly known as FG Wilson (Engineering) Ltd) v John Holt & Co (Liverpool) Ltd [2013] EWCA Civ 1232, [2014] 1 WLR 2365;
[6] Readie Construction Ltd v Geo Quarries Ltd [2021] EWHC 3030 (QB);
[7] Paragraph 63 of the judgment

In this case, the Seller's failure to advance an alternative claim for damages in the first tier arbitration proceedings prevented it from recovering on that alternative basis after the s.69 appeals were allowed.

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