

Wyevale Nurseries Ltd Terms & Conditions

DEFINITIONS

1. In these conditions the following terms shall have the following meanings.
- "Company" means WYEVALE NURSERIES LTD.
 - "Customer" means the non-domestic consumer customer of the Company.
 - "Contract" means any contract for the sale of Goods and/or services by the Company to the Customer.
 - "Goods" means any goods forming the subject of this contract including parts and components of or materials incorporated in them.

QUOTATION

2. Quotations by the Company unless otherwise stated in them shall be open for acceptance within 30 days of the date of the quotation and shall in any event be subject to availability. Quotations E&OE.

EXISTENCE OF CONTRACT

3. No Contract shall come into existence until the Customer has placed a written order with the company
- 3.1 These conditions shall be incorporated in the Contract to the exclusion of any terms or conditions stipulated or referred to by the Customer. These are the only terms and conditions on which the Company trades and no other terms or conditions whether written or oral are capable of incorporation herein.
 - 3.2 No variation or amendment of this contract or oral promise or commitment related to it shall be valid unless committed to writing and signed by or on behalf of both parties.
 - 3.3 The Company is contracted to the Customer as Principal and will not accept any Instructions whatsoever from any Agent of the Customer, including Architects, Specifiers and Landscapers unless such instructions are confirmed in writing by the Customer.
 - 3.4 Any valid instructions given to the Company by an Agent of the Customer shall bind the Customer in so far as it affects or alters in any way the Contract in particular where the Company is put to additional cost.
 - 3.5 The Company shall not be liable for any consequence, howsoever arising, which as a result of it accepting a valid instruction from the Customer's Agent has any adverse consequence upon the materiality of the Contract.
 - 3.6 In the event of any dispute arising in dealings with the Customer's Agents, the Company's liability shall be limited to the Customer as Principal.

PRICES

4. The prices for the goods are ex-nursery and exclude packing, insurance and carriage, VAT, and other taxes or duties
- 4.1 Prices invoiced are calculated in respect of the quantity of goods actually delivered irrespective of the quantity in respect of which any quotation was issued.
 - 4.2 The Company shall have the right [in respect of any uncompleted portion of the Contract] to adjust its prices for any increase in the price of any materials, labour, transport, changes in work or delivery schedules or quantities or any other costs of any kind arising for any reason after the date of the Contract.
 - 4.3 The Company has an absolute discretion to make a delivery charge. A standard £50.00 will be added to all deliveries or call off deliveries for any goods ordered.
 - 4.4 Where the Company is requested to delay or withhold delivery by the Customer for any reason the Company may in its absolute discretion charge for any costs arising therefrom including additional husbandry.

PAYMENT

5. All invoices are payable without discount or set-off of any kind in the quoted currency within 30 days of the date of invoice and in no circumstances shall the Customer be entitled to make any deduction or withhold payment for any reason at all, unless otherwise agreed in writing.
- 5.1 Where the Company makes a part delivery of the Customers order for any reason the Company may in its absolute discretion immediately invoice the Customer for the part order delivered.

TITLE

6. For the purpose of section 12 of the Sale of Goods Act 1979 the Company shall transfer only such title or rights in respect of the goods as the Company has and if the goods are purchased from a third party shall transfer only such title or rights as that party had and has transferred to the Company.
- 6.1 Notwithstanding the earlier passing of risk, title in the goods shall remain with the Company and shall not pass to the Customer until the amount due under the invoice for them (including interest and costs) has been paid in full.
 - 6.2 Until title passes the Customer shall hold the goods as bailee for the Company and shall store or mark them so that they can at all times be identified as the property of the Company.
 - 6.3 The Company may at any time before title passes and without any liability to the Customer repossess and remove and use or sell all or any of the goods and by doing so terminate the Customer's right to use, sell or otherwise deal in them, and (for that purpose or determining what if any goods are held by the Customer and inspecting them) enter any premises of or occupied by the Customer.

RISK, DELIVERY AND PERFORMANCE

7. The Contract shall be satisfied when the Company makes the goods available to the Customer or any agent of the Customer or any carrier (who shall be the Customer's agent whoever pays its charges) at the Customer's premises or other delivery point agreed by the Company.
- 7.1 Risk in the goods passes when they are put aside for the Customer.
 - 7.2 The Company may at its absolute discretion deliver the goods by installments in any sequence, unless otherwise agreed in writing.

- 7.3 Where the goods are delivered by installments, no default or failure by the Company in respect of any one or more installments shall vitiate the Contract in respect of the goods previously delivered or undelivered
- 7.4 The Company may deliver to the Customer and the Customer shall accept in satisfaction of the Contract a lesser number than the number of goods ordered.
- 7.5 Any dates quoted by the Company for the delivery of the goods are approximate only and shall not form part of the Contract and the Customer acknowledges that in the performance expected of the Company no regard has been paid to any quoted delivery dates, unless otherwise agreed in writing.
- 7.6 The Customer shall be responsible for providing unobstructed access to a clear and safe site for the purpose of off-loading.
- 7.7 Where root-ball trees or similarly sized or weighted goods are delivered by the Company it shall be the responsibility of the Customer to ensure that appropriate equipment is available for off-loading purposes and that such equipment and its operator comply with all relevant legislative requirements.
- 7.8 Where appropriate equipment and/or its operator are unavailable the Company shall be under no obligation to attempt to off-load.
- 7.9 Where through the unavailability of either appropriate equipment and/or its operator the Company is unable to effect a delivery or part delivery, the Customer shall be liable for all additional costs arising therefrom, including transport, storage and husbandry.
- 7.10 If the Customer fails to take delivery of the goods or any part of them on the due date and to provide any instructions or documents required to enable the goods to be delivered on the due date, the Company may on giving written notice to the Customer store or arrange for the storage of the goods, and on the service of the notice, risk in the goods shall pass to the Customer, delivery of the goods shall be deemed to have taken place, and the Customer shall pay to the Company all costs and expenses including storage and insurance charges arising from its failure, including handling and husbandry.
- 7.11 The Company shall not be liable for any penalty, loss, injury, damage or expense arising from any delay or failure in delivery or performance from any cause at all nor shall any such delay or failure entitle the Customer to refuse to accept any delivery or performance of or repudiate the Contract.
- 7.12 The Customer is responsible for all off-loading of goods and where necessary shall provide at the Customers own cost appropriate equipment and operators in accordance with any legislative requirements.
- 7.13 The Company may in its absolute discretion charge the Customer for standing time where off-loading is delayed for any reason.
- 7.14 Where the Company delivers goods to the Customer in returnable containers the containers must be empty when made available for collection. The Company has an absolute discretion to either not collect containers which contain rubbish or waste material, including packaging and pots, or to collect and charge the Customer for disposal of the contents, at a minimum rate of £10.00 per pallet.

CLAIMS NOTIFICATION

8. Any claim for non-delivery of any goods shall be notified orally by the Customer to the Company within 2 days of the date of delivery and in writing within 5 days thereafter.
- 8.1 Any claim that any goods have been delivered damaged, are not of the correct quantity or do not comply with their description shall be notified by the Customer to the Company verbally within 2 days of their delivery and confirmed in writing within 5 days thereafter.
 - 8.2 Any alleged defect shall be notified by the Customer to the Company verbally within 2 days of the delivery of the goods or in the case of any defect which is not reasonably apparent on inspection verbally within 2 days of the defect coming to the Customer's attention and in either event confirmed in writing within 5 days thereafter.
 - 8.3 Any claim under this condition must be in writing and must contain full details of the claim including the type and species of any allegedly defective goods.
 - 8.4 The Company shall be afforded reasonable opportunity and facilities to investigate any claims made under this condition and the Customer shall if so requested in writing by the Company promptly return any goods the subject of any claim and any packing materials securely packed and carriage paid to the Company for examination.
 - 8.5 Any claim in respect of which the Customer has not complied with the claims procedures in these conditions will not be accepted and the full invoice value will remain due.

SCOPE OF CONTRACT

9. Unless agreed otherwise in writing the Company shall under no circumstances have any liability of whatever kind for:
- 9.1 Any defects resulting from weather, accident, failure to tend, improper use by the Customer or use by the Customer except in accordance with the instructions or advice of the Company or the manufacturer of any goods or neglect or from any instructions or materials provided by the Customer.
 - 9.2 The suitability of any goods for any particular purpose or use under specific conditions whether or not the purpose or conditions were known or communicated to the Company.
 - 9.3 Any substitution by the Company of any materials or goods not forming part of any specification of the goods agreed in writing by the Company.
 - 9.4 Any descriptions, illustrations, specifications, figures as to performance, drawings and particulars of weights and dimensions submitted by the Company contained in the Company's catalogues, price lists or elsewhere since they are merely intended to represent a general idea of the goods and not to form part of the Contract or be treated as representations.

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- 9.5 Any technical information, recommendations, statements or advice furnished by the Company its servants or agents not given in writing in response to a specific written request from the Customer before the Contract is made.
- 9.6 Any variations in the quantities or dimensions of any goods or changes of their specifications or substitution of any type or species, if the variation or substitution does not materially effect the characteristics of the goods, and the substituted materials or components are of a quality equal or superior to those originally specified.
- 9.7 During periods of inclement weather including storm, freezing temperatures or excessive heat, the Company may in its absolute discretion, without bringing itself into breach of contract for failure to perform, withhold or delay indefinitely the delivery of any goods ordered by the Customer.

EXTENT OF LIABILITY

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The Company shall have no liability to the Customer for any loss or damage of any nature arising from any breach of any express or implied warranty or condition of the Contract or any negligence, breach of statutory or other duty on the part of the Company or in any other way out of or in connection with the performance or purported performance of or failure to perform the Contract except for death or personal injury resulting from the Company's negligence and as expressly stated in these conditions.

- 10.1 Notwithstanding the Company's due diligence the Company does not warrant that any goods supplied are free from infection, infestation or disease. Nor does it warrant that any goods supplied are not of a type known to be poisonous nor of a type having injurious, hazardous or irritating properties save as may be specified in the Customer's order or the Company's sales materials.
- 10.2 Where the Company either knowingly or unknowingly supplies any goods which have any harmful properties the Company shall not be held liable for damage or injury arising from the Customer's use of the goods save insofar as Clause 10 herein shall apply to the Company.
- 10.3 Where the Company supplies goods which have harmful properties which are capable of being transmitted, the Company shall not be liable for any consequential loss arising from such transmission.
- 10.4 If the Customer establishes that any goods have not been delivered, have been delivered dead or damaged, are not of the correct quantity or do not comply with their description the Company shall, at its option, replace with similar goods any goods which are dead, missing, lost or damaged or do not comply with their description, allow the Customer credit for their invoice value or tend any damaged goods.
- 10.5 If the Customer establishes that any goods are defective the Company shall at its option, replace with similar goods or tend any defective goods, allow the Customer credit for their invoice value or to the extent that the goods are not of the Company's produce, assign to the Customer (so far as the Company is able to do so) any warranties given by the grower of the goods to the Company.
- 10.6 The delivery of any tended or replacement goods shall be at the Customer's premises or other delivery point specified for the original goods.
- 10.7 Where the Company is liable in accordance with this condition in respect of only some or part of the goods the Contract shall remain in full force and effect in respect of the other or other parts of the goods and no set-off or other claim shall be made by the Customer against or in respect of such other or other parts of the goods.
- 10.8 No claim against the Company shall be entertained for any defect arising from any design or specification provided or made by the Customer or if any adjustments, alterations or other work has been done to the goods by any person except the Company.
- 10.9 The Company shall not be liable where any goods the price of which does not include carriage are lost or damaged in transit and all claims by the Customer shall be made against the carrier. Replacements for such lost or damaged goods will, if available, be supplied by the Company at the prices ruling at the date of dispatch.
- 10.10 In no circumstances shall the liability of the Company to the Customer under this condition exceed the invoice value of the goods.

GENERAL

11. The Company may sub-contract the performance of this Contract in whole or in part.
- 11.1 The Customer shall not assign or (without first obtaining the Company's written consent) sub-let this Contract in whole or in part and it shall be a condition of any such consent to any sub-letting of this Contract that the Customer shall:
- ensure and be responsible for the compliance by any sub-contractor with the terms of this Contract;
 - include in the sub-contract provisions consistent with these conditions for the benefit of and enforceable by the Company; and
 - furnish the Company with copies of any sub-contract upon the Company's request at any time.
- 11.2 The Company shall have a lien on Customer's property in the Company's possession for all amounts due at any time from the Customer and may use, sell or dispose of that property as agent for and at the expense of the Customer and apply the proceeds in and towards the payment of such amounts on 28 days' notice in writing to the Customer. On accounting to the Customer for any balance remaining after payment of any amounts due to the Company and the costs of sale or disposal the Company shall be discharged of any liability in respect of the Customer's property.

- 11.3 The Company may at its discretion suspend or terminate the supply of any goods if the Customer fails to make any payment when and as due or otherwise defaults in any of its obligations under the Contract or any other agreement with the Company or becomes insolvent, has an administrative receiver appointed to its business or is compulsorily or voluntarily wound up or the Company bona fide believes that any of those events may occur, and in case of termination the Customer may forfeit any deposit paid.
- 11.4 If the goods are grown in accordance with any design or specification provided or made by the Customer the Customer shall compensate the Company in full on demand for all claims, expenses and liabilities of any nature in connection with them, including any claim, whether actual or alleged, that the design or specification infringes the rights of any third party or falls within the ambit of the Plant Varieties and Seeds Act 1964 as may be amended from time to time.
- 11.5 Except for any which is expressly agreed to be included in the goods all tools, patterns, materials, drawings, specifications and other data provided by the Company shall remain its property and all technical information, patentable or unpatentable, copyright and registered designs arising from the execution of any orders shall become the property of the Company.

CONFIDENTIALITY

12. The Customer shall not at any time whether before or after the termination of this Contract divulge or use any unpublished technical information deriving from the Company or any other confidential information in relation to the Company's affairs or business or method of carrying on business.

CANCELLATION

13. Orders for goods which have to be grown or acquired especially for the Customer, or put aside especially for the Customer, may in the Company's absolute discretion be charged in full unless written notice of cancellation is received not later than the date on which the Company puts aside the goods for the Customer or the latest date on which the Company must place an order on a third party to fulfill the Customer's delivery date requirements, providing that such steps have not been taken at the date of that notice.
- 13.1 Orders for stock items may be cancelled by written notice at any time before the goods are allocated to the Contract but if a cancellation notice is received after the goods have been allocated to the Contract then a charge of 80% of order value will payable by the Customer.

FORCE MAJEURE

14. The Company shall not be liable for any act or omission arising which shall render performance of the contract impossible or shall in any way have the effect of frustrating the common cause where such an act or omission is beyond the control of either the Company or the Customer or was not reasonably foreseeable by either one or both of them. Such act or omission shall have the effect of automatically terminating the contract, save where the Customer has ordered stock seasonal goods:
- 14.1 Which unless expressly otherwise agreed in writing by both the Company and the Customer, shall be accepted by the Company as being expressly required for delivery during the relevant season.
- 14.2 Where for any reason whatsoever the stock seasonal goods are not delivered during the relevant season, the Customer accepts delivery of the stock seasonal goods at its own risk and the Company shall not be liable for any defect, deterioration or other material difference in the state or appearance of the stock seasonal goods.
- 14.3 All stock seasonal goods ordered by the Customer shall be invoiced for payment during the relevant season.

LAW AND JURISDICTION

15. This contract shall be interpreted in accordance with the laws of England and Wales and the Customer consents to the exclusive jurisdiction of the High Court of England and Wales in all matters regarding it except to the extent that the Company invokes the jurisdiction of the courts of any other country pursuant to the Brussels Convention, or alternatively elects to have any matter referred to an arbitrator in which case failing agreement between the Company and the Customer on the appointment of an arbitrator either one of them may apply to the Director General for the time being of The Horticultural Trades Association who shall make such an appointment and the decision of the arbitrator shall bind the parties to the same extent as an Order of the Court.

NOTICES

- 16 Service of Notices.
Any notice given under this Contract shall be in writing and may be served personally, by registered or recorded delivery mail, by telex or facsimile transmission, by any other means which any party specifies by notice to the other.

A notice shall be deemed to have been served:

- if it was served in person, at the time of service,
- if it was served by post, the day after the day after posting,
- if it was served by facsimile transmission, at the time of transmission.