

# Johnsons of Whixley Conditions of Sale

## 1 Interpretation

### 1.1 In these Conditions the following definitions apply:

**Business Day** means a day other than a Saturday, Sunday or public holiday in England;

**Buyer** means the person who agrees to purchase Goods from the Seller;

**Conditions** means the conditions of sale set out in this document;

**Contract** means the agreement between the Seller and the Buyer for the sale and purchase of Goods incorporating these Conditions;

**Delivery Date** means the date stated in the Order for delivery of the Goods or if none the date on which the Goods are delivered to or collected by the Buyer;

**Delivery Location** means the address for delivery of the Goods as set out in the Order;

**Description** means the description of the Goods set out in the Order;

**Force Majeure** means an event or sequence of events beyond a party's reasonable control preventing or delaying it from performing its obligations under the Contract including (but not limited to) an act of God, fire, flood, lightning, earthquake or other natural disaster; war, riot or civil unrest, strike, lockout or boycott or other industrial action; interruption or failure of supplies of power, fuel, water, transport, equipment or telecommunications service; or material required for performance of the Contract, except any party's failure to pay shall not be an event of Force Majeure in any event;

**Goods** means the nursery stock plants and associated sundries included in an Order;

**Order** means an order from the Buyer for Goods from the Seller;

**Seller** means Johnsons of Whixley Limited (company number 00616324) of The Nurseries, Whixley, York, North Yorkshire, YO26 8AQ;

**Specification** means in relation to plants included in an Order, the relevant British Standard and HTA Certification Scheme where applicable;

**VAT** means value added tax under the Value Added Taxes Act 1994 or any other similar sale or fiscal tax applying to the sale of the Goods.

### 1.2 Unless the context otherwise requires:

**1.2.1** references to the Contract include these Conditions and the Order;

**1.2.2** references to persons include individuals, unincorporated bodies, government entities, companies and organisations;

**1.2.3** clause headings do not affect their interpretation; and

**1.2.4** references to any legislation will be construed as a reference to that provision as amended, re-enacted or extended at the relevant time.

## 2 Application of these terms and conditions

**2.1** These Conditions apply to and form part of the Contract. They supersede any previously issued terms of sale.

**2.2** No terms or conditions endorsed on, delivered with, or contained in the Order or any other document will form part of the Contract.

**2.3** No variation of a Contract will be binding unless expressly agreed in writing by the Seller.

**2.4** Each Order by the Buyer to the Seller will be deemed to be an offer to purchase Goods and subject to these Conditions.

**2.5** The Seller reserves the right at all times to reject any Order, in whole or in part, at its sole discretion.

**2.6** Any quotation by the Seller for the supply of Goods will be an invitation to treat (and shall not be an offer) by the Seller to supply Goods on the terms of the quotation or at all.

## 3 Basis of Sales

**3.1** The Seller will only accept orders from persons:

**3.1.1** who have an open and ongoing account with the Seller and are bona fide horticultural businesses or official purchasers on behalf of a local authority or other organisation; or

**3.1.2** are purchasing Goods in person from the Seller's Plant Centre.

**3.2** The Seller shall sell and the Buyer shall purchase the Goods in accordance with a Contract formed only when the Seller informs the Buyer that the Seller accepts an Order.

**3.3** Any advice or recommendation given by the Seller or its employees or agents to the Buyer or its employees or agents as to the storage, application or use of the Goods whether given orally or set out in the Customer Charter or other documentation provided by the Seller, is given in good faith as a guide only and does not form part of the Contract.

**3.4** The Seller reserves the right to:

**3.4.1** substitute any type or species of plant specified in the Order, if the variation or substitution does not materially affect the characteristics of the Goods, and the substituted plants are of a quality equal or superior to those originally specified; or

**3.4.2** cancel the whole or any part of an Order if suitable plants are not available at the Delivery Date.

**3.5** The Goods will be supplied with appropriate labels unless the Buyer's requirements for labels are set out in the Order. Large numbers of the same plant will be batch labelled.

**3.6** The Seller may set and vary credit limits from time to time and withhold all further supplies for as long as the Buyer exceeds such credit limit.

## 4 Price

**4.1** The price for the Goods will be as set out in the Order or if not will be calculated in accordance with the Seller's standard prices in force on the date of the Contract.

**4.2** The price for the Goods:

**4.2.1** does not include delivery which will be charged in addition unless the Goods are collected by the Buyer, and

**4.2.2** does not include VAT which will be charged in addition at the then applicable rate.

**4.3** The cost of delivery will be the amount stated on the Order or if none:

**4.3.1** the cost to the Seller of delivery by carrier;

**4.3.2** if delivery is by the Seller's vehicles such cost, up to the actual cost of delivery, as the Seller considers appropriate; or

**4.3.3** if the Goods are purchased from the Seller's Plant Centre the amount set out in the current edition of the Seller's Stock List.

**4.4** If with the agreement of the Buyer the Seller makes a site visit in connection with any Order then, unless the visit is to inspect plants which are not in accordance with the Order, the Seller shall be entitled to charge for all costs incurred in connection with the visit.

**4.5** The Seller reserves the right to increase the price for any undelivered Goods:

**4.5.1** by giving 28 days' written notice to the Buyer, such increase to take effect in respect of any relevant Goods delivered after the expiry of such notice; or with immediate effect by written notice to the Buyer, where such increase arises as a consequence of any increase in the direct cost to the Seller of supplying the relevant Goods which is due to any factor beyond the control of the Seller.

**4.6** If the Buyer does not agree with any increase in the price notified in accordance with clause **4.5** then the Buyer may terminate the Contract in respect of any undelivered Goods by giving the Seller 14 days' notice, such notice to expire no earlier than the date on which the price increase was due to take effect provided always that the Buyer shall accept delivery (and shall, where applicable pay the increased price for) any Goods referred to in clause **4.5.1** in respect of which the Seller had (at or prior to the time of receiving such notice) entered into an irrevocable commitment to purchase or subcontract from any third party.

## **5 Delivery**

**5.1** On or about the Delivery Date the Goods will be:

**5.1.1** delivered by or for the Seller to the Delivery Location; or

**5.1.2** made available for collection by the Buyer at the Seller's premises provided that no Goods shall be removed from the Seller's premises unless they have been paid for in full.

**5.2** Unless stated otherwise on the Order the Goods may be delivered in articulated lorries and trailers up to 18m long. It is the Buyer's responsibility to:

**5.2.1** ensure that the delivery vehicles can access the Delivery Location;

**5.2.2** provide suitable staff and equipment for offloading the Goods; and

**5.2.3** provide the Seller with adequate instructions for delivery of the Goods.

**5.3** On arrival of the Goods at the Delivery Location the Buyer:

**5.3.1** is responsible for offloading the Goods from the delivery vehicle;

**5.3.2** must provide appropriate staff and equipment to offload the Goods from the delivery vehicle.

**5.4** The Goods will be deemed delivered:

**5.4.1** if delivered by or for the Seller under clause

**5.1.1**, on arrival of the Goods at the Delivery Location or as close to the Delivery Location as it is practicable for the delivery vehicle to approach;

**5.4.2** if collected by the Buyer under clause 5.1.2, on completion of loading onto the Buyer's vehicle.

**5.5** If the Buyer asks the Seller to delay delivery while it locates suitable equipment or staff:

**5.5.1** the Seller shall be under no obligation to agree to the request;

**5.5.2** if the Seller does agree then the Seller may charge the Buyer at the rate of £30 per hour for vehicles up to 20 tonnes and £50 per hour for vehicles over 20 tonnes.

**5.6** The Goods may be delivered by instalments. Any delay in delivery or defect in an instalment will not entitle the Buyer to cancel any other instalment.

**5.7** The Seller will use its reasonable endeavours to deliver or make the Goods available for collection on the Delivery Date but such dates are approximate only, and time of delivery/availability for collection is not of the essence.

## **6 Crates etc.**

**6.1** All crates, pallets and stillages used to supply the Goods remain the property of the Seller.

**6.2** The Buyer must empty the crates, pallets and stillages and make them available in the same condition as when delivered for collection by the Seller between 5 and 30 Business Days after delivery.

**6.3** If the Buyer does not comply with clause **6.2** the Seller will charge the Seller:

**6.3.1** £15 for each wooden crate or pallet;

**6.3.2** £240 for metal crates/stillages (or £10 per day if less); and

**6.3.3** £25 for each crate, pallet or stillage that is not empty when collected by the Seller.

## **7 Cancellation**

**7.1** The Buyer may cancel the whole or part of an Order in writing at any time up to the Delivery Date.

**7.2** If the Buyer fails to accept delivery of the Goods or to collect the Goods within 30 days of their being made available the Seller may cancel the Contract.

**7.3** If the Buyer or the Seller cancel the whole or part of an Order in accordance with clause

7.1 or 7.2 the Seller may dispose of the Goods and invoice the Buyer for liquidated damages calculated as follows:

**7.3.1** if plants have been purchased by the Seller specifically for that Order: the whole of the price;

**7.3.2** in the case of other plants:

**(a)** if the Delivery Date is between 1st January and 28th February: 50% of the sale price of the plants;

**(b)** if the Delivery Date is between 1st March and 30th September: 100% of the sale price of the plants; and

**(c)** if the Delivery Date is between 1st October and 31st December: 30% of the sale price of the plants;

**7.3.3** in the case of associated items: 50% of the sale price of the associated items.

## **Payment**

**8.1** The Seller shall issue invoices:

**8.1.1** for the Goods when the Goods have been delivered or collected or deemed to have been delivered or collected;

**8.1.2** for crates etc. at any time after the period for collection by the Seller has expired.

**8.2** The Buyer will pay all invoices in full, without deduction or set-off, in cleared funds within the period from the date of each invoice specified in the account opening form supplied to the Buyer or if none on the date of the invoice.

**8.3** Payment may be made by:

**8.3.1** bank transfer to the Seller's nominated bank account specified in the Order;

**8.3.2** credit card or debit card (not American Express).

**8.3.3** cheque provided the Buyer has a current a/c with the Seller but not otherwise; or

**8.3.4** Cash.

**8.4** Time of payment is of the essence and:

**8.4.1** where goods valued at over £650 are collected by the Buyer and paid for on collection the Buyer may deduct a 2.5% early payment discount; ( Not applicable to Cash and Carry customers)

**8.4.2** where sums due are not paid in full by the due date the Seller may, without limiting its other rights, charge:

**(a)** a credit surcharge of 10% for the total of all invoices not paid in full on the due date;

**(b)** interest on the outstanding sums at 2% a year above the base rate of HSBC Bank from time to time in force. Interest will accrue on a daily basis, and apply from the due date for payment until actual payment in full, whether before or after judgment; and

**(c)** if a cheque does not clear on presentation or a credit card payment is countermanded the Seller may make an administration charge.

**8.5** Sums due under clause 8.4.2 may be invoiced at any time and are payable within 7 days of the date of the invoice.

## **9 Title and risk**

**9.1** Title to and risk in the Goods will pass to the Buyer when they are deemed delivered or collected under clause 5.4.

## **10 Warranty**

**10.1** Plants are natural products and subject to variation in growth, appearance, grading and survival rates and may be subject to or carry diseases. Accordingly any descriptions, illustrations, specifications, figures as to performance, drawings, and particulars of weight and dimensions submitted by the Seller or contained in the Seller's catalogues, price lists or elsewhere represent a general concept of the Goods and do not form part of the Contract.

**10.2** The Seller warrants that, subject to clause 10.1, on delivery or collection the Goods will:

**10.2.1** conform in all material respects to their Description and any relevant Specification; and

**10.2.2** be of satisfactory quality within the meaning of the Sale of Goods Act 1979, as amended.

**10.3** The Seller will, at its option, replace or refund the price of defective Goods, provided that and subject to clause 5:

**10.3.1** the Buyer informs the Seller in writing within 5 Business Days after delivery that some or all of the Goods do not comply with clause 5.1;

**10.3.2** the Buyer gives the Seller a reasonable opportunity to examine the defective Goods; and

**10.3.3** if the Seller so requests the Buyer allows the Seller to collect the defective Goods from the Delivery Location at the Seller's expense.

**10.4** These Conditions will apply to any Goods replaced under clause 10.3.

**10.5** The Seller will have no liability to the Buyer as there is no breach of clause 10.2 if:

**10.5.1** plants fail by reason of weather or other conditions occurring after delivery or collection of the Goods;

**10.5.2** the Goods are not suitable for any particular purpose or under any specific conditions unless that purpose or those conditions are set out in the Order;

**10.5.3** plants fail due to the Buyer not handling the plants to the standards set by the Committee on Plant Supply and Establishment Code of Practice for plant handling;

**10.5.4** plants fail due to the Buyer's failure to comply with the Seller's instructions as to: (i) transport, storage, planting or care of the Goods, or (ii) good practice in relation to the transport, storage, planting or care of the Goods;

**10.5.5** plants fail due to the Seller following any special requirement of the Buyer in relation to the Goods; or

**10.5.6** the Buyer plants or otherwise uses any of the Goods after notifying the Seller that they do not comply with clause 10.1

**10.6** Except as set out in this clause 10 or in the Order the Seller:

**10.6.1** gives no warranty in relation to the Goods;

**10.6.2** will be under no liability for their failure to comply with the warranty in clause 10.110.1;

**10.6.3** the conditions implied by ss 13–15 of the Sale of Goods Act 1979 are expressly excluded.

**10.7** Without prejudice to the generality of this clause liability for errors in labels will be limited to replacement of the labels and the Seller will not be responsible for applying the replacement labels to the relevant Goods.

## **11 Obligations of the Buyer**

**11.1** The Buyer will:

**11.1.1** place all Orders on these Conditions and ensure that the contents of any Order are complete and accurate; and

**11.1.2** co-operate fully with the Seller in relation to delivery or collection of the Goods.

## **12 Liability**

**12.1** The Seller does not exclude its liability:

**12.1.1** for death or personal injury caused by its negligence;

**12.1.2** for breach of the terms implied by s 12 of the Sale of Goods Act 1979 and by s 2 of the Supply of Goods and Services Act 1982; or

**12.1.3** for fraud or fraudulent misrepresentation.

**12.2 Neither party will be liable for:**

**12.2.1** any form of indirect, consequential or special loss; or any loss of or failure to realise expected profit, revenue or savings or any other form of pure economic loss, whether any such loss is direct or indirect; and, in each case, however arising.

**12.2.2** Other than as set out above, the Seller limits its liability (however arising) in respect of or in connection with any Contract to the price of the defective items included in that Contract.

## **13 Force Majeure**

**13.1** A party will not be liable if delayed in or prevented from performing its obligations due to an event of Force Majeure, provided that it:

**13.1.1** promptly notifies the other of the event of Force Majeure and its expected duration; and

**13.1.2** uses reasonable endeavours to minimise the effects of that event.

**13.2** If, due to an event of Force Majeure, a party:

**13.2.1** is or will be unable to perform a material obligation; or

**13.2.2** is delayed in or prevented from performing its obligations for a continuous period exceeding 30 days then the other party may terminate the Contract on immediate written notice.

#### **14 Termination**

**14.1** The Contract may be terminated forthwith at any time by the Seller on written notice to the Buyer if:

**14.1.1** the Buyer commits a material breach, or series of breaches resulting in a material breach, of the Contract and such breach is not remediable or if capable of remedy is not remedied within 7 days of written notice to do so;

**14.1.2** the Buyer suspends or threatens to suspend payment of its debts, or is unable to pay its debts as they fall due;

**14.1.3** the Buyer (a) negotiates with its creditors for rescheduling of its debts, (b) makes a proposal to or compounds with its creditors in respect of its debts other than solely by way of solvent amalgamation or reconstruction or (c) makes an application to court for protection from its creditors generally;

**14.1.4** the Buyer passes a resolution for winding-up or for the appointment of an administrator, or a liquidator or administrator is appointed in relation to the other, or a winding-up order is made in relation to the other than solely in relation to a solvent amalgamation or reconstruction;

**14.1.5** a receiver or administrative receiver may be or is appointed in relation to the Buyer or any of its assets;

**14.1.6** any creditor of the Buyer attaches, takes possession of, or any distress, execution or similar process is levied or enforced against, all or any part of the Buyer's assets, and such attachment or process is not discharged within 14 days;

**14.1.7** the Buyer takes or suffers any action similar to any of the above in any jurisdiction;

**14.1.8** there is a material change in the management, ownership or control of the Buyer;

**14.1.9** the Buyer suspends trading, ceases to carry on business, or threatens to do either;

**14.1.10** the Buyer, (being an individual) dies or ceases to be capable of managing his own affairs; or

**14.1.11** the Buyer is subject to an event of Force Majeure under clause 14.

**14.2** In addition to its rights under clause 14.1 the Seller may terminate the Contract at any time immediately on written notice to the Buyer if the Buyer has failed to pay any amount due under the Contract within 3 Business Days of the due date.

**14.3 On termination of the Contract for any reason:**

**14.3.1** the Buyer will immediately pay all invoices of the Seller then outstanding and not disputed in good faith;

**14.3.2** the Seller will, within 5 Business Days, invoice the Buyer for all Goods delivered or collected but not yet invoiced and the Buyer will pay such invoice within a further 5 Business Days (unless the invoice is disputed in good faith);

**14.3.3** Buyer will allow the Seller to collect any crates or other any materials of the Seller then in its possession or control; if it fails to do so, the Seller may enter onto any premises owned by or under the control of the and take possession of them; and may charge the appropriate value of any non-returned packaging materials; and

**14.3.4** the accrued rights and liabilities of the parties will not be affected.

#### **14.4 Time**

Unless stated otherwise, time is not of the essence of any date or period specified in these Conditions, the Order or otherwise in the Contract.

#### **14.5 Severability**

If any part of the Contract is found by a court, tribunal or other administrative body of competent jurisdiction to be unenforceable or invalid for any reason, that provision is to be severed from the Contract and the remaining provisions of the Contract will otherwise remain in full force.

#### **14.6 Notices**

Notices under the Contract will be in writing and sent to the persons and addresses set out in the Order. They may be given, and will be deemed received:

**14.6.1** by first-class post: two Business Days after posting;

**14.6.2** by hand: on delivery;

**14.6.3** by facsimile: on receipt of a successful transmission report from the correct number; and

**14.6.4** by e-mail: on receipt of a delivery or read receipt mail from the correct address.

#### **14.7 Waiver**

No delay, act or omission by either party in exercising any right or remedy will be deemed a waiver of that, or any other, right or remedy.

#### **14.8 Rights of Third Parties**

The Contract is not enforceable by any third party under the Contracts (Rights of Third Parties) Act 1999 or otherwise.

#### **14.9 Priority**

In the event of conflict, the terms of the Order prevail over those of these Conditions.

#### **14.10 Entire Agreement**

The Contract constitutes the entire agreement between the parties in relation to its subject matter. No other terms apply.

#### **14.11 Succession**

The Contract will bind and benefit each party's successors and personal representatives.

#### **14.12 Governing Law & Jurisdiction**

**14.12.1** The Contract and any dispute or claim arising out of, or in connection with, it, its subject matter or formation (including non-contractual disputes or claims) shall be governed by, and construed in accordance with, the laws of England.

**14.12.2** The parties irrevocably agree that the courts of England shall have non-exclusive jurisdiction to settle any dispute or claim arising out of, or in connection with, the Contract, its subject matter or formation (including non-contractual disputes or claims).

**10<sup>th</sup> November 2018**