For Business

CASHFLOW

Head of the commercial department, Peter Allen, comments on this newsletter's theme of cashflow:

"At last we are out of the recession and good growth is forecast. However that does not mean there will not be challenges. For many businesses, the most daunting will be cashflow as they start to grow again. There is a risk of over trading and stretching finances too far.

In this issue we focus on cashflow, how to improve it and what to do if you have problems. We hope it gives you some ideas"

Wrongful trading

Poor cash flow may be a sign of a struggling business and in those circumstances directors need to proceed cautiously otherwise they could potentially find themselves in all sorts of trouble.

Directors of limited companies are not always aware that their personal assets could still be at risk if their business folds leaving a stream of creditors.

If it can be proven that a director ignored the warning signs his firm was about to fold and carried on trading whilst amassing debt, the director could be penalised out of their own pocket. This is known as wrongful trading. When a company goes under, the directors may be at risk of the liquidator bringing a claim against them under section 214 of the Insolvency Act 1986 alleging they have engaged in 'wrongful trading'. If found liable, they may be ordered to make a contribution to the company's assets.

What directors often fail to realise is that there is a lower burden of proof needed to prove wrongful trading than there is to prove fraudulent trading, which theoretically makes it easier for the liquidator to gain an order for wrongful trading.

That said, it is still a difficult claim to bring, but that won't eliminate the risk of allegations being made which need investigating and rebutting. This places directors in a tough position and there is evidence that some start insolvency proceedings before they are perhaps necessary.

If your business is in financial crisis you should :

1. Hold regular board meetings and report the commercial decisions of directors in full in the company's minutes;
2. Ensure you have up-to-date information on your financial affairs – don't wait for telltale signs such as a demand from a creditor, a winding up petition or notice from the bank of an interest payment; and...
3. Carefully monitor your lender's financial compliance covenants.

As ever, seeking early legal advice is always a director's best option. Getting things wrong can be disastrous.

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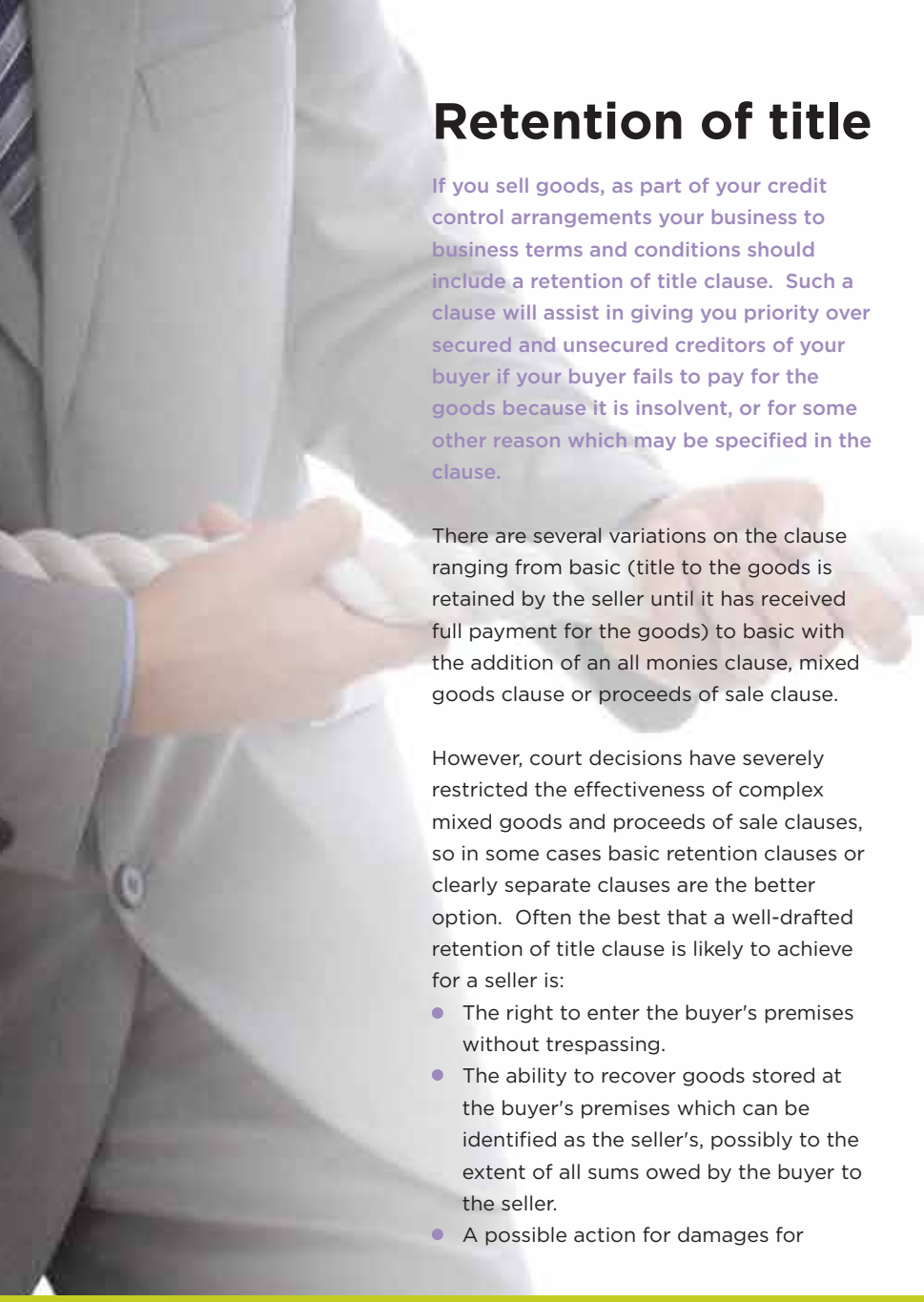

Retention of title

If you sell goods, as part of your credit control arrangements your business to business terms and conditions should include a retention of title clause. Such a clause will assist in giving you priority over secured and unsecured creditors of your buyer if your buyer fails to pay for the goods because it is insolvent, or for some other reason which may be specified in the clause.

There are several variations on the clause ranging from basic (title to the goods is retained by the seller until it has received full payment for the goods) to basic with the addition of an all monies clause, mixed goods clause or proceeds of sale clause.

However, court decisions have severely restricted the effectiveness of complex mixed goods and proceeds of sale clauses, so in some cases basic retention clauses or clearly separate clauses are the better option. Often the best that a well-drafted retention of title clause is likely to achieve for a seller is:

- The right to enter the buyer's premises without trespassing.
- The ability to recover goods stored at the buyer's premises which can be identified as the seller's, possibly to the extent of all sums owed by the buyer to the seller.
- A possible action for damages for conversion against a receiver or liquidator personally who sells goods which were identifiably the seller's.

In some circumstances this may actually be quite valuable, especially if you are providing large quantities of products, or the products are particularly valuable. However, the effectiveness of a retention of title clause may be affected if its operation is inconsistent with the overall trading relationship between the parties and will be of little or no benefit where the goods supplied are perishable or supplied in completed form for immediate resale.

When including a retention of title clause a seller should also be aware that in standard terms of sale, risk in the goods is usually stated to pass at the time of delivery of the goods. This is on the basis that the seller will not wish to remain responsible for loss or damage to the goods up to the time when title passes, given that the effect of the basic retention of title clause is that title does not pass until the buyer has paid for the goods. The result is that, if the goods are destroyed after delivery, the buyer will remain liable for the price.

To guard against the risk of the buyer being unable to pay, the seller should include a provision requiring the buyer

Bare essentials

Maintaining a steady cashflow

Steady cashflow is vital to all businesses and ensuring that debts are recovered promptly and efficiently is a crucial part of that. We can assist you in this process.

Instructing a solicitor to recover a debt does not need to be the start of a lengthy or costly process. Birkett Long offers a quick and cost-effective debt recovery service on a fixed-fee basis and, in the majority of cases, we find that debts are paid on receipt of a letter before action without the need for any claim to be issued.

For undisputed debts of over £750 the service of a statutory demand can also be a highly effective tool for obtaining payment as it allows the debtor just 21 days in which to pay the debt or face the prospect of insolvency proceedings being issued against them.

If you would like assistance with recovering a debt please get in touch.

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upon delivery to insure the goods with a reputable insurance company and to ensure that the seller's interest in the goods is noted on the policy. If due to the value of the goods such a provision is key to a seller, it should be aware of the battle of the forms, since the buyer's purchase terms may provide for the passing of risk to be delayed until, for example, payment has been made, which would leave the risk with the seller.

Other credit control arrangements to help protect cashflow, particularly where there are doubts as to the financial viability of a buyer, which a seller might consider include:

- Reducing the period of credit allowed to the buyer, or the amount of credit, or both.
- Taking alternative forms of security, such as a bank guarantee or letter of credit.
- Obtaining credit insurance. Note, it is likely to be a precondition to obtaining such insurance that you have a satisfactory set of standard terms of business in place.

Retention of title is an area which is regularly considered by the courts, with the result that particular clauses are liable to become ineffective by a court decision at any time, so a review of retention of title clauses is a particularly important aspect of the overall review of standard terms which sellers should be carrying out on a regular basis.

For further information on retention of title contact Tracey Dickens. If you have questions about contract terms and conditions, please contact Claire Hunt on 01206 217623.

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Meet the team

Tracey Dickens

Tracey is a partner advising on all aspects of company, partnership and limited liability partnership (LLP) law. She also heads the firm's commercial and corporate finance team.

Along with her team, Tracey assists clients with transactions (buying and selling companies and businesses), shareholder and joint venture agreements, company and share restructuring, and review and preparation of commercial agreements. Tracey also specialises in partnerships and LLPs, advising on agreements (including those for doctors and other health professionals) and dealing with partnership disputes; seeking to negotiate settlements in accordance with the agreements.

> "Tracey was both thorough and professional as well as persistent on our behalf in achieving the best outcome for the partnership moving into the corporate business environment, and guided us with clarity through the complexities of due diligence and contracts to the ultimate completion of the merger and then sale."
> *A client recommendation*

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employment law

When can an employer withhold wages?

Only in exceptional circumstances can an employer withhold wages. The fundamental terms of an employment contract are that the employee provides his services and the employer pays him for those services.

Sometimes the employee is entitled to be paid even when he has been absent. For example, all employees and workers are entitled to 5.6 weeks' paid statutory leave and statutory sick pay (if they qualify). Where an employee has been suspended he will be entitled to be paid full pay.

Employers may lawfully withhold wages in the following circumstances:

- Where there is a written express contractual right to do so.
- Where the employee refuses to work, is on strike or will only "work to rule" (industrial action short of a strike) where he withdraws his goodwill and only provides part service. For an employee to be entitled to pay he must comply with the terms of his employment contract by undertaking all his duties.
- Where the employer has previously overpaid the employee. For example, if on 1 February the employer miscalculated the employee's wages and overpaid him by £500, the employer is entitled to deduct that £500 from his next pay packet.

Where the employer withholds wages, other than in the circumstances above, an employee (or worker) has the right to make a claim in a tribunal for unlawful deduction from wages.

Before an employee can bring such a claim an actual deduction must have been made. The employee cannot bring a claim on the basis that the employer has merely threatened to deduct wages. However, should an employer threaten to unlawfully deduct money from his employee's pay or not to pay him at all, that threat would entitle the employee to claim an anticipatory breach of contract, allowing him to resign and claim constructive dismissal.

Employers must be careful where the employee's contract is terminated but he or she still owes the employer money (a season ticket loan for example), as the employer does not have a contractual right to deduct that money from the employee's wages. If the employer deducts, say £1,000, from the employee's final wages in settlement of the loan, and the employee makes and wins a claim for unlawful deduction, the employer will have to pay that £,1000 back to the employee. The sting in the tail is that the law prevents an employer recovering that £1,000 from an employee in the civil courts.

In summary, an employer will have to have a good reason to withhold wages. If there is such a reason, there should be a clear unequivocal clause in the employment contract, which will have been signed by the employee, that allows the employer to do so.

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Forthcoming events

- **Employment breakfasts**

  Across all offices on 8, 9 and 10 July. For more details or to register your interest and free place, email seminars@birkettlong.co.uk or visit www.birkettlong.co.uk/events

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Reference: NEWS/FORBUSINESS16/2014