

Company & Commercial Newsletter

Corporate Recovery & Insolvency

"We haven't been paid for goods we have supplied – What can we do?"

The harsher economic climate in which we currently find ourselves has led to an increased number of enquiries to Rollits' Corporate Recovery and Insolvency Team from clients who have supplied goods to customers where the customers are in financial difficulties and won't be able to pay for the goods. The first question clients ask us is usually *"can we get these goods back as they surely still belong to us?"*. Difficulties arise because, in the absence of contrary agreement, ownership will have passed to the buyer at the time of delivery.



In these circumstances a client may seek to rely on a Retention of Title ("ROT") clause which will (hopefully!) be found in its Terms and Conditions of Business. Such clauses seek to ensure that the seller retains title in the goods supplied until such time as the goods are fully paid for. ROT clauses can be an effective form of quasi security; however there are a number of considerations which must be borne in mind.

Is an ROT clause effective?

Whilst an ROT clause may be suitable, in some circumstances the clause will be of little practical benefit. An example would be where you are selling goods which are perishable, such as fresh food, and by the time you come to enforce the clause the goods have become valueless.

You will generally be unable to reclaim goods which have been resold by your customer. If the goods are mixed with other goods, such as pigment which is mixed with a solvent to produce paint, then unless your goods can be extracted without causing damage to the finished product it is unlikely that you will be able to recover your goods.

Where you are dealing with an overseas customer you should bear in mind that your ROT clause may not be recognised and that it may not always be possible to enforce the clause against your customer. Depending on the value of the goods in question, it may also not be financially viable to try and recover goods which have gone overseas.

Incorporation and Mechanics of an ROT clause

Where you decide that an ROT clause would be beneficial you need to make sure that the clause is properly drafted, that it forms part of your terms and conditions, and that you have effective procedures in place to ensure that the terms and conditions are incorporated into each contract. Including terms and conditions only on an invoice is unlikely to be sufficient.

In its most simple form an ROT clause will provide that ownership of goods you supply under a contract does not pass to your customer until those goods have been paid for and that you will be able to reclaim the goods if the full price is not paid. An "all monies clause" can be added which reserves title in the goods until all sums owed to you by your customer are paid, although care needs to be taken to avoid creating an unenforceable charge over goods or

book debts which may endanger the clause in its entirety. There are also additional terms of an ROT clause which may assist in the recovery of goods.

Summary

A properly drafted and incorporated ROT clause can be a useful tool for recovering goods which have not been paid for. In an insolvency situation an Administrator may try to deny your rights under a valid ROT clause so you need to be willing to 'fight your corner', backed up with the right paperwork and appropriate advice if needed. If a valid ROT clause can be established, an Administrator will frequently wish to pay for the goods held to prevent their repossession and, in such circumstances, the consequences of a failure of a customer can be mitigated.

John Flanagan

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Deal Alerts

Over the past 12 months, transactions we have acted on include the following:-

CRANSWICK plc

Acquisition of Bowes of Norfolk Limited for a cash consideration of £17.2m. Bowes is a significant operator in the pig-meat processing sector and the acquisition reinforces Cranswick's position in that industry.

The Norfolk-based family owned business has been involved for many years in arable farming, pig rearing and pig-meat processing. Certain members of the Bowles family have retained the arable farming business together with a portfolio of properties. The pig rearing business has been sold to a management buy-out team comprising certain members of the Bowes family and certain members of Bowes' management and a pig supply agreement has been entered into covering the supply of pigs by the MBO to the Cranswick-owned Bowes.

Disposal of Cranswick's pet activities, Cranswick Pet Products and Tropical Marine Centre, for a consideration of £17m to a management buy-out backed by Lloyds TSB Development Capital. The management buy-out team comprises of main board director Derek Black, TMC managing director Paul West and certain other members of the respective management teams. In addition Cranswick retained a 5.5 per cent share in the business going forward.

Cranswick is now wholly focused on its food activities and will continue with its strategy to grow both organically and through acquisition as demonstrated by the acquisition of Bowes of Norfolk.

The Cranswick group, which is based in East Yorkshire, is an award winning food supplier whose range includes pork, bacon, ham, sausages, charcuterie and sandwiches. For further information on Cranswick, please visit www.cranswick.co.uk



Advising Camberwell in relation to its new MyCatalyst centres – places to work, network and share ideas, combining high-quality, flexible pay as you go business accommodation with a managed network of business support. Each centre also operates as a central point of activity for a wide range of local social programmes.

Camberwell is a high profile organisation whose primary aim is to use business for social benefit.



Advising the Angling Trust on the merger of six of the largest angling and conservation bodies in England.

Angling Trust has been created out of the merger of the Anglers' Conservation Association, Fisheries and Angling Conservation Trust, National Association of Fishing and Angling Consultatives, National Federation of Anglers, National Federation of Sea Anglers and Specialist Anglers Alliance. The new body will build on the benefits that the legacy organisations delivered to their members and will be a unified, powerful voice to protect fisheries, the sport they offer, and the environment on which they depend.



Acquisition of Harrogate College from Leeds Metropolitan University. Following a decision taken by Leeds Metropolitan University and Harrogate College, responsibility for education and training opportunities in the Harrogate area has been transferred to Hull College.

The move will allow both institutions to deliver a varied and outstanding educational service to the community and students within the Harrogate area. It also provides an opportunity for Hull College to further develop close relationships with other educational partners in the region.



Acquisition of Gretna-based Solway Veg, one of the country's leading quality processors and suppliers of freshly prepared vegetables. The acquisition increased WJFG's market share in this sector following its acquisition of Parrisak Foods in 2006.

The family owned William Jackson Food Group is home to some of the UK's major food businesses including Aunt Bessie's – which makes a range of traditional English products; Jackson's Bakery – bakers of high quality sandwich and other baked products; restaurant quality chilled food business Kwoks Foods and salad processor Hazeldene Foods. For further information on the group, please visit www.wjs.co.uk.



Investment in French Freedom Holidays – a specialist in mobile home and camping holidays with a portfolio of 500 letting units located throughout France; the business is based in Lincolnshire and is one of the largest independent companies of its type in Britain.

Secondary investment in The Denby Dale Pie Company (following up a previous investment on which Rollits also advised) – a Yorkshire based frozen meat pie making company with a national customer base.

PIF is a £37 million loan and equity fund for Yorkshire, The Humber and North Lincolnshire set up to provide loans and equity funding for small and medium sized businesses (SMEs) unable to raise money from traditional sources.

Corporate

Memorandum and Articles of Association and the Companies Act 2006

The final implementation of the Companies Act 2006 ("the Act") is due to occur on 1 October. The Act significantly affects memoranda and articles of association.

Each company is, of course, different but the key factors that are likely to affect memoranda and articles of association include:-



General meetings – a private company does not need to hold an AGM (unless its articles require one to be held). Also 21 days' notice is needed for an AGM but all other general meetings can be convened on 14 days' notice. However, existing articles may require 21 days notice.

Electronic and website communication – a company can now send notices etc to members in electronic form or make them available on a website (subject to certain conditions being satisfied).

Company secretary – a private company does not need to appoint a secretary (unless its articles require it to have one).

Objects clause in the memorandum – a company's memorandum contains the objects clause which sets out the scope of the activities a company is authorised to undertake. From October an objects clause is no longer required and (subject to any restrictions in articles) companies will have unrestricted objects. However,

for existing companies, the objects clause will be deemed to be contained in a company's articles, and so act as a restriction on what it can do, unless removed by special resolution.

Authorised share capital – the Act abolishes the concept of authorised share capital. However, provisions in a memorandum or articles which specify the authorised share capital will continue to act as a cap on the number of shares the company can allot until the articles are amended to remove these provisions.

Duty of directors to avoid conflicts of interest – the Act puts a director under a new duty to avoid a situation where he has, or can have, a direct or indirect interest that conflicts, or possibly may conflict, with the company's interests. The Act allows directors to authorise conflicts in advance. It is useful for articles to include provisions allowing such authorisation and provisions relating to confidential information, attendance at board meetings and availability of board papers to protect a director from being in breach of this duty.

Share transfers – articles often give the directors discretion to refuse to register a transfer of shares without giving a reason. The Act now requires reasons to be given for refusing to register a transfer.

Change of company name – currently a company can only change its name by a shareholders' special resolution. From October, the Act will allow articles to give the directors power to change the name or require only an ordinary resolution.

More information on this area can be found in an article by Tom Farrington on the Rollits website at www.rollits.com/n_articles.php

Tom Farrington

Pensions & Corporate

A word of warning from the Pensions Regulator



A recent determination notice issued by the Pensions Regulator has highlighted the role of the Regulator in relation to corporate activity and pension schemes. This determination notice contained an order that an independent trustee company be appointed with immediate effect as trustee of a pension scheme in exclusion of all the other trustees of the scheme.

The Regulator received information that the principal employer of the scheme was intending to strip out assets of the employer and then buy back the employer's remaining assets in a pre-pack arrangement but excluding the pension liability. The Regulator acted swiftly and under its special procedures to make a determination as it felt that immediate action was needed to protect members' interests.

This is a warning, not only to employers seeking to avoid a pensions liability that the Regulator will be on the watch for such actions, but also a warning for trustees and advisers to be alert to such attempts to avoid pensions liabilities. Trustees who become aware of such a potential situation are under a duty to notify the Regulator as soon as reasonably practicable after they become aware of the situation.

More information on this area can be found in an article by Craig Engleman on the Rollits website at www.rollits.com/n_articles.php

Craig Engleman

Commercial

New Information Commissioner to be appointed

Richard Thomas, the current Information Commissioner, is to retire from post in June and is to be replaced by Christopher Graham who is currently the Director General of the Advertising Standards Authority. Mr Graham takes up his post at a time when the Information Commissioner's Office is looking to get tough on businesses which flout data protection legislation by issuing them with fines known as Monetary Penalty Notices. The legislation to give the ICO this power has been passed and we are awaiting details of how the fines will be administered. In the meantime the Government has confirmed that the ICO is to be given increased funding to facilitate its enforcement activities.



Consumer Protection from Unfair Trading Regulations

These Regulations came into force last year to little fanfare but have now started to be used in anger by Trading Standards to take businesses to task over their selling techniques. What may once have seemed a legitimate method of enticing customers to purchase goods or services may now fall foul of the new regime, and the number of enforcement actions seems to be on the increase. The Regulations impact on all businesses, not just those which are traditionally seen as consumer facing, and they replace or amend significant pieces of trading legislation including the Trade Descriptions Act. Following on from our recent seminar on the subject we will shortly be issuing a short Guide to the Regulations.

Tom Morrison

Tax & Corporate



Stop winding me up

How do you bring a company to an end? This can be done formally by appointing a liquidator who pays off the creditors and returns any surplus assets to shareholders. Alternatively, it is possible to apply to Companies House to have the company struck off. That can be cheaper than appointing a liquidator, but it requires a period of inactivity for the company. There is also the issue of how any surplus assets are distributed to shareholders if the informal procedure is used.

Companies cannot simply dole out assets to shareholders, even if all its creditors have been paid off. If a dividend is declared then that will be subject to income tax in the hands of an individual shareholder. A better tax outcome might be achieved if the value is received as capital and so subject to capital gains tax.

Great reliance is often placed on a concession in which HM Revenue & Customs say they are happy (subject to certain safeguards) to treat distributions to shareholders as capital for tax purposes even if the informal striking off procedure is used. That concession is based on a fiction that the company is in formal liquidation. The reality of course is that no liquidator has been appointed. The return to shareholders is likely to be unlawful if it involves an element that could not be distributed by way of dividend.

It was convenient for everyone to ignore the unlawful aspect of informal striking off. That is until last year, when HM Treasury said that any return to shareholders above £4,000 is liable to be treated as unlawful, repayable to the dissolved company and could be claimed as Crown property.

A possible solution is to return capital to shareholders using the new, streamlined Companies Act 2006 procedure which has been in force since October last year. The requirement to go to Court and advertise a proposed reduction in share capital is no longer necessary. A private company can reduce its share capital by passing a special resolution supported by a solvency statement made by its directors.

However, the new procedure does not always achieve the best outcome. If the company has assets greater than the amount originally subscribed for its shares (including share premium), then the excess might be treated as an income distribution unless a liquidator is appointed.

Nasim Sharf

Information

If you have any queries on any articles in this newsletter or other corporate or commercial matters please contact: Keith Benton or Tom Farrington on (01482) 323239

This newsletter is for the use of clients and will be supplied to others on request. It is for general guidance only. It provides useful information in a concise form. Action should not be taken without obtaining specific advice. We hope you have found this newsletter useful. If, however, you do not wish to receive further mailings from us, please write to Mrs. Pat Coyle, Rollits, Wilberforce Court, High Street, Hull HU1 1YJ.

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