Buying Or Selling A Business

FACT SHEETS

Basis of sale

The ownership of a business can be transferred in the following ways:

- **Business sale.** The owners agree to sell their business as a going concern including all its assets and the goodwill of the business to the buyer. Ownership and control of the business will then pass to the buyer along with responsibility for the employees of the business.

- **Share sale.** Where the business is conducted through a limited company the owners of the company may agree to sell their shares to the buyer. Ownership and control of the company will pass to the buyer but the business will continue to be carried on through the company.

Buyers will often prefer a business sale as they can select those assets of the business that they want and leave the Seller with the liabilities. Sellers may prefer a share sale so that all the assets and liabilities of the company effectively pass to the Buyer.

Pre-Contract Stage

Heads of Agreement

At the outset it is best to record the main points of agreement. This ensures that both parties are clear as to the terms of the transaction and avoids fundamental disagreement at a later stage. Although most of the terms of the Heads of Agreement are not legally binding, it is common to include binding obligations covering exclusivity and confidentiality. The cost of acquiring a business can be considerable and so the Buyer will want the Seller to agree not to deal with anyone else for a reasonable period of time and may even require the Seller to reimburse the costs and expenses incurred by the Buyer if the Seller does so. On the other hand, a Seller will not wish to disclose valuable commercial information to the Buyer unless the Buyer has agreed to keep it confidential and not to use it to compete with the Seller if the transaction does not proceed. This enables the Seller to co-operate in the Buyers due diligence with reasonable confidence.

Due Diligence

Buyers will want to obtain as much information about the business as possible to help them to decide on what terms they are willing to proceed. This process, called due diligence, is undertaken by the Buyers solicitors who check the Seller's title to its business and assets and the terms of its contracts with customers, suppliers and employees and by the Buyers accountants who ensure that the financial information provided to the Buyer is correct. Due diligence is usually more extensive on a share sale as it is also necessary to investigate the liabilities of the company.

The Contract Stage

The Acquisition Agreement

The Acquisition agreement is usually drafted by the Buyers solicitors. It will incorporate all of the points specifically agreed in the Heads of Agreement as well as the usual warranties. These warranties are essentially promises by the Seller as to the state of its business and affairs. Ordinarily, a Seller will not be liable under these warranties for a particular issue if the Buyer was made aware of it beforehand and so the Sellers solicitors will prepare a disclosure letter setting out all of the facts and matters of which the Buyer should be aware. On a share sale, the Seller will also be required to give a tax covenant promising that any tax for which the company is liable has either been paid or provided for in the company's accounts.

Completion

Before completion, the Buyer will do final checks on the Sellers ledgers and accounts. At completion care must be taken to ensure that everything is properly attended to such as handing over title deeds, appointing new directors, changing bank mandates etc. The Buyer will then pay the purchase price.

Post Completion

On a share sale the parties' accountants will prepare completion accounts to determine the exact value of the assets and liabilities of the company at completion.

On a business sale the parties will agree the value of stocks and the apportionment of any payments that relate to both before and after completion.

All relevant persons and authorities will have to be informed of the transfer and any stamp duty must be paid.

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