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S O L I C I T O R S

Metcalf Copeman & Pettefar LLP

A short guide to Business sale and purchase

INTRODUCTION

Selling or buying a business is not usually simple. It is a process most people in business only do once or twice in their working lifetime. It usually takes longer than expected and involves more people than anticipated but presents a lot of opportunities to enhance value.

This note is intended as a short summary. If you are contemplating or involved in buying, selling or merging your business with another, you will need to take professional legal and accounting advice.

MCP Hint – if you are selling a business, take professional advice before instructing Selling Agents. You need to avoid the trap of the Agent who charges to register you on their books and then seeks a long exclusive arrangement that costs a lot of money to break – he never needs to sell the business to make his money. In contrast, a good Agent will contribute enormously to a successful transaction.

BUSINESS SALE AND PURCHASE

The first question is what are you selling/buying? It will usually be a sale or purchase of either:-

- (i) shares in the company that runs the business; or
- (ii) the assets used in the business together with the goodwill of the business.

(i) A Share Sale/Purchase

This is often the most complex type of transaction. The sale of shares involves four key steps:-

1. Negotiation

It is important that you set out what you have agreed in principal. Do not worry about complicated documentation at this stage but work towards reasonably detailed “Heads of Terms”. This can avoid arguments later. The Heads of Terms are usually not legally binding but they summarise the commercial ‘deal’. It is also important to consider whether a Confidentiality Agreement should be entered into in order to protect both parties’ business information during negotiations.

2. Due Diligence

This is when the buyer raises questions of the seller to find out whether there are any hidden problems in the company that the buyer is proposing to buy. Some due diligence is straightforward, for example looking at Companies House records, making sure the company's statutory registers are up to date, checking employees details etc. Other parts can be complex, for example investigating on-going contracts and property matters. It can be a long process. We are always happy to provide a typical "Due Diligence Questionnaire" at the outset so you can have some idea of what is involved and what to expect.

MCP Hint – prepare early. Involve your Solicitors and your Accountants before you start the sale process. They will be able to help with a lot of these efforts. Sellers can also take advice as to what may be done prior to the process to make the due diligence process quicker and easier and with professional assistance be able to identify areas that are likely to give rise to disputes.

3. Negotiation and Documentation

Assuming Due Diligence does not throw up any problems, the buying party drafts the Contract for the sale and purchase of the shares. The Contract will deal with the price, and mechanism for any price variation (depending on net assets etc). It will also set out any restrictions to be imposed on the sellers (to protect the business going forward) and warranties that the seller will be expected to give.

The warranties are usually the main source of disagreement between the buyer and seller when the Contract is being negotiated. Warranties are promises by the Seller which, if they turn out to be incomplete, inaccurate or misleading, will give rise to a claim by the buyer against the seller. The warranties are necessary because the buyer is often buying the business without detailed knowledge of it. The seller may for example have committed the company to buy a Rolls Royce a week before with deferred payment, taken delivery of the Rolls Royce and left the company to pay for it a week after completion!

The seller can however avoid liability under the Warranties if the seller gives details of any claims, any liabilities (or anything else that is contrary to the Warranties that are being given). This information will be given in a "Disclosure Letter", which is in many ways the most important document that the seller has to prepare. The Disclosure Letter often gives the buyer a fuller picture of the business.

4. Completion

Depending on the size and complexity of the transaction it is sometimes sensible for the completion meeting to take place in person with the seller and the buyer present. Very often there are matters to negotiate and any outstanding issues can be most quickly resolved in person.

5. Additional documents

There will be a lot of “ancillary documents” for both the buyer and the seller that will be needed in the sale of shares. There should be records of board meetings held (eg those approving the sale/purchase), forms to be completed for Companies House (eg to change directors and registered office). There will also be changes to bank mandates and sometimes public announcements to be made etc. Don’t forget that the buyer will also need to pay stamp duty on the purchase of shares (generally 0.5% of the price paid for the shares).

MCP Hint – take tax advice early. A seller may be eligible for “Entrepreneurs” tax relief which reduces the tax the seller has to pay. Your Accountants will advise you on this. There are a number of conditions that need to apply in terms of length of ownership, future activities, which is being sold etc.

(ii) An Asset Sale

This is where a company, partnership or sole trader (whatever is the business form) sells the component parts of a business. For example a transport company may sell its vehicles and assign the Lease on its property to a buyer but retain the company that conducted the business. In those cases the legal transaction can be simpler, although will broadly follow the structure of a share sale, ie due diligence investigation, negotiation and preparation of documentation followed by completion. A schedule of items to be sold has to be produced, often with valuations of those items.

MCP Hint – in a company share sale everything is sold “lock, stock and barrel”. In a sale of assets (in whole or part) you are likely to be caught by the ‘TUPE regulations’ which mean that the staff engaged in the business prior to the sale pass over to the buyer automatically. There are processes that need to be undertaken to comply with your statutory obligations. Failure to undertake these can give rise to claims both from staff and from the buyer.

CURRENT ECONOMY

With the availability of bank funding still limited, very often the seller will be asked to or indeed expect to part fund the purchase of their business. Deferred payments, loans and even continued stakes in the business going forward have all been encountered. There may be consultancy work to do going forward, there may be restrictions to negotiate or acquire. All will impact on the form, shape and ultimate content of the transaction—we can assist to put workable solutions together to drive the transaction forward.

HOW WE CAN HELP

MCP has a dedicated Commercial team to deal with all types of commercial transactions. Our aim is to provide the good value for you. Whether you are a large public company or a small scale business, we can help. Sometimes the more complex of transactions are not necessarily those involving the greatest of value. Each case is important to us and needs professional attention.

We aim to help you reach a commercially sensible outcome. Very often it is essential to see the other person's point of view and perspective. For example if the buyer is using bank finance, it is important to understand the constraints and restrictions that the Bank will require. If there is property involved, the Bank (or indeed a seller who is helping with funding) may want a Legal Charge over that property and perhaps a personal guarantee from those behind the purchase. That can lead to further issues e.g. the position of wives, partners and dependants.

OUR ADVANTAGE

Our commercial team can provide ongoing commercial support for you and your business—we can assist with terms and conditions of business, contractual arrangements, Companies Act compliance, directors duties and obligations, Shareholders/Partnership Agreements, many intellectual property issues, Employment law (including HR service), regulatory law and commercial disputes.

We can also engage the expertise of our colleagues in other teams. If there is property involved in a transaction, we will involve one of our property lawyers to assist; essential if that property has to be secured to the Bank. If there are complex contractual matters relating to trusts owning shares etc we may need to involve our Will, Probate and Trust colleagues. They are also available to help prepare your Will which can protect your family and business.

MCP is a full service firm able to offer this care and support.

MCP Hint – if you do nothing else, speak to us early! Planning the transaction and dividing up responsibility will help ultimately and give better value. Sometimes that may not be possible, e.g. in the event of a sudden illness or unexpected death. Don't worry, let us know—in those circumstances time can be of the essence.

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