Whitehead Monckton
the Kent law firm

Briefing Note

Selling your Business

We have extensive experience of acting for clients who want to sell their business. They may be an owner/manager or significant shareholder and they may be selling all or part of their shares or just the assets. In this Briefing Note we would like to share our experience to benefit anyone thinking of selling their business. This Briefing Note should be read in conjunction with our Guide to the Sale and Purchase of Shares and Assets.

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1. Structuring the sale

The first considerations are whether you want to sell all or part of your business, the sale price, how to increase the sale price prior to the sale, and the timeframes. Consequently, you will need to discuss the sale with your accountants so that you can assess the tax implications and identify an appropriate sale price. The second considerations will need to be discussed with an experienced corporate solicitor and include how to structure the sale (for example a straight sale versus deferred payments), and specific relevant issues (such as how to successfully handover the business), and what are the key terms of the transaction.

2. Preparing for a sale

It is vitally important that you prepare yourself and the business for sale so that the business can be seen in the best possible light, and so that you can quickly and easily deal with any questions the buyer might have.

(a) **Tax:** It is our view that you must take tax advice on the proposed sale at the earliest stages as it can be difficult to unwind a transaction or renegotiate a structure at a later date. The tax advice should cover all aspects of the sale including the structure, share versus assets, and the tax implications of the sale proceeds in your hands.

(b) **Accountants and financial information:** Some of the first information which a potential purchaser will want to see is financial information relating to the business. This will include the most recent accounts and management accounts preferably up to the current trading period.

(c) **Regulatory approval and authorisations:** Consider any regulatory approvals or authorisation which may be required and whether they can be transferred as a part of the sale.

(d) **Contracts:** Review any contracts to see if they will be affected by the sale, for example, change control provisions.

(e) **Key staff and Ownership of assets:** Assess whether the buyer will take over all employees, all key management will be retained, and check the ownership of the assets in the business being sold.

(f) **Borrowings and loans:** Check the terms of any loan documents and security documents to see if a sale will affect them.

3. Due diligence

Due diligence is the opportunity for the buyer to obtain information from the seller about the business. This will include financial, legal, and, if applicable, property due diligence. The process involves the investigation of all aspects of the business being sold, and if there is negative information then this may affect the purchase price the buyer is willing to pay. Normally, documents about the business provided by the seller are put into an online data room. The general legal position is that the onus is on the buyer to ask questions about the business and to make its own investigations. Our view is that the seller provides the information requested and is honest about the current state of affairs in the business.

4. Documents

(a) Heads of terms

Heads of terms are usually one of the first documents negotiated by the parties. Although it is an optional document, we consider the negotiation and agreement of the Heads to be a very useful process in terms of agreeing the core elements of a transaction, and for the parties to assess the goals and intentions of the other party. The purpose of the Heads is to set out the key terms of the deal normally without them being legally binding (although some clause can be legally binding such as confidentiality and exclusivity). We recommend that your solicitor is involved during the negotiation of the Heads.

(b) **Acquisition agreement.** The acquisition agreement is the main legal document in the transaction. Its purpose is to document what is being sold, how much for, and any conditions that may be linked to the sale. It will also contain a number of provisions designed to protect the buyer, including:

- **Warranties.** These are, in effect, contractual statements that the buyer requires from the seller about the business. If they are inaccurate or untrue, the buyer can sue for damages (unless the seller has disclosed against this to the buyer – see Disclosure letter below) making warranties one of the most important (and often longest) sections of the agreement. It is vital to make sure you agree to every warranty in the agreement before signing.

- **Indemnities.** These require the seller to pay the buyer for specific liabilities which have been identified but the amount is not yet known such that in the event that they occur the seller will have to make a cash payment.

- **Restrictive covenants.** These are typically requirements for the seller to not do certain things. The most common covenants prevent the seller from competing with the buyer or poaching customers or employees for a certain period of time, say 12 or 18 months.

- **Limitation on claims:** It is advisable as a seller to limit the claims that can be made under warranties and indemnities as far as possible. It is common to try to put a cap on the amount that can be claimed, but other limits are possible.

(c) Disclosure letter

The disclosure letter is often a crucial supporting document. A disclosure prevents the buyer from making a claim against the seller for a breach of a warranty if that warranty has been disclosed against. In other words, if you tell the buyer about a particular issue or problem then they can't sue you even if it causes a breach of warranty. It is our view that a seller should make as many disclosures as possible in order to limit their risk.

Contact

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