

Pictons Guide to: Buying & Selling a Company

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A buyer can purchase a company by either buying all of the assets of that company, or by buying the shares in the company itself. In the former case the assets (contracts, equipment, premises, employees, etc) transfer from the target company to the buyer. In the latter case, the target company remains the owner of the individual assets, but the buyer becomes the owner of the target company itself.

There are various differences that will influence the decision of a buyer in which route to follow. The main differences relate to the transfer of liabilities and the tax payable for each method.

Due diligence

The first step is always "due diligence" which is the name given to the investigations carried out by the buyer into the state of the target business. This process is akin to the searches and enquiries made by a buyer in the purchase of a house. There is a basic principle of English Law that goes: 'let the buyer beware'. In other words, it is the buyers responsibility to make appropriate enquiries and not the sellers responsibility to draw the buyer's attention to issues relating to the target company that it should be aware of.

The due diligence process will help the buyer decide whether it wants to press ahead with the purchase and if so, what price it is prepared to pay for the company.

Heads of Terms

The first document for the buyer and the seller to agree is a 'heads of terms', which is also sometimes called a heads of agreement, memorandum of understanding, statement of intent, or a variation on any of those. The heads of terms will contain all of the main commercial terms, such as price, method of payment, list of included assets, etc. The idea is to work out the sticking points or 'deal breakers' at an early stage before much time and money has been spent. The parties will want to avoid having to debate significant commercial terms at a stage when the deal is advanced and the legal contracts are drafted and the fine detail is being negotiated – as this adds time, which adds cost to the transaction.

Confidentiality Agreement

In order for the buyer to complete its due diligence it will have to be provided with a lot of sensitive and confidential information about the business by the seller. It is in the sellers interests, therefore, to require that the buyer enters into a confidentiality agreement before the process starts, to protect against employees, customers or suppliers finding out that negotiations are taking place for the sale of the business.

Purchase Agreement

The purchase agreement is the main agreement dealing with the transfer of the assets or shares of the target company. It will contain all of the main commercial terms as well as the legal detail, trying to cover who bears the risk in the event of any given scenario.

It will also contain a series of promises by the seller as to the state of the company. These promises or warranties will reflect the information that has emerged during the buyers due diligence enquiries. Each promise is in the form of a statement which the buyer wants to be true in order to justify the price that is being paid for the business. If any statement turns out later to be untrue, then the buyer may have grounds for subsequently claiming back a portion of the purchase price.

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In summary...

Buying or selling a company can be one of the toughest 'events' in the life of a business or an entrepreneur. But the rewards can be significant – it can provide a great opportunity to enter into a particular industry and a fast way of growing a business. Often it is not possible to simply start a business from scratch, because of the time involved or cost of breaking into an established market.

The key is to take advice at an early stage. An experienced business lawyer will be able to identify the big issues so that you are ready for them before they crop up in negotiations. As with most things, it takes less time and less money to identify a potential problem and solve it before it becomes a problem, than to fix it after the event.