

BUYING AND SELLING COMPANIES AND BUSINESSES

Garry Richards, Partner and Head of Company and Commercial Department, outlines some of the more important aspects of the legal process involved in this momentous transaction.

The sale of a private company or business is often the most significant event in the business life of its owners. Equally, the acquisition of a company or business can have far reaching strategic and other consequences for the buyer.

In a company sale all of the company's issued share capital is usually sold to the buyer, while under a business sale, the business itself and its related assets are sold. It is crucial that the tax and other implications are carefully considered before deciding which route to follow. This particularly applies where a company sells its business as that could give rise to a double tax charge. The company may have to pay corporation tax on the sale and then the sale proceeds may also be subject to tax in the hands of the shareholders if they are paid to them as a dividend or in the liquidation of the company.

In a sale of any substance a seller will have to make extensive representations (known as warranties) to the buyer concerning the company or business and assets to be sold. More extensive warranties are required in a company sale than in a business sale because a buyer of a company will buy it with the benefit of its assets but subject to its liabilities at the time of completion. Consequently, appropriate warranties will have to be given by the seller, and the seller will also have to enter into an agreement with the buyer concerning the tax liabilities of the company. Breach of the warranties will entitle the buyer to claim damages in respect of the breach from the seller and, in certain cases, to cancel the sale agreement.

The buyer will receive further protection through the legal, tax and accountancy investigations (called due diligence) carried out by the buyer's solicitors and accountants. However, before any confidential information concerning the company or the business is disclosed to the buyer or his advisers, the buyer should enter into a confidentiality agreement with the seller.

• look before you leap

Anyone wishing to sell a company or a business should carry out a legal, tax and accountancy review of the company or business before seeking a buyer so that any problems that might be caught by the warranties or the tax agreement can be identified and dealt with. The tax consequences of the sale for the seller should also be considered before the sale process begins so that any steps that need to be taken to avoid or reduce a tax liability can be taken.

Heads of agreement setting out the principal terms

of the transaction are usually drawn up so that the parties are clear as to what they are. However, the transaction will be "subject to contract" so that neither party will be bound until a formal sale and purchase agreement is entered into.

The sale documentation will normally be prepared by the buyer's solicitors and be reviewed by the solicitors acting for the seller. The seller's solicitors will seek in particular to remove or modify unacceptable warranties or other provisions and to reduce the seller's potential liability under the sale documentation.

The seller's solicitors will also prepare a document, known as a disclosure letter, containing information qualifying the warranties to prevent claims being brought against the seller under the warranties in respect of that information.

• protection

The sale agreement will also usually have provisions to protect the seller. These will include a limit (normally the amount of the sale price) on the seller's liability for claims under the warranties and the tax agreement and a restriction against any claim being brought until the total value of all claims under the warranties and the tax agreement exceeds a certain amount. Time limits for bringing claims will also be imposed.

Sales and acquisitions can be very time consuming for the seller and the buyer. So it is essential that the seller does not allow the business to be adversely affected by the amount of time and effort required for the sale. It is also very important that buyers and sellers take appropriate advice from solicitors and accountants who are used to dealing with these types of transactions. It is sometimes thought that advice can not be obtained in Shropshire and that advisors in Birmingham or elsewhere have to be used. That is not the case however, as the Commercial Team at Lanyon Bowdler has the expertise and the experience to deal with the legal aspects of these transactions, and there are accountancy firms who can handle the tax and accountancy side. ■

Garry is head of the firm's Company and Commercial Department. Having practised in London for 20 years, he came to Shropshire, joining Lanyon Bowdler, in 1990.

Garry specializes in company and commercial work, including corporate finance, sales and acquisitions of companies and businesses, joint ventures, business start ups, employment and consultancy agreements and a wide variety of commercial agreements. His clients range from international groups to small and medium sized businesses.