



For Business

BUYING AND SELLING YOUR BUSINESS

Head of the commercial department, Peter Allen, comments on this newsletter's theme of buying and selling your business:

"During the last six months we have seen an explosion of work, involving the buying and selling of companies. Birkett Long has advised on deals worth approximately £75 million, including management buyout, private equity investment, share sales and asset sales.

This edition of For Business therefore focuses on some of the issues involved, and will help if you are intending to undertake a similar transaction."

Confidence has returned and local businesses are proving to be prime targets for purchasers who are ready to invest. Transactions, whether sale or purchase, have been continuous for the last 12 months.

Buying

From a legal perspective, when purchasing a business the deal will either be for the purchase of the business or the company that operates the business (a share purchase). Your solicitor will: advise you on the legal due diligence you should undertake before committing to the purchase; confirm the property ownership arrangements, e.g. leasehold or freehold; and deal with your bank's or investor's lending requirements to enable you to obtain the funds for the purchase. Solicitors with expertise in transactional work will ensure that the right questions are asked about the business and an appropriate contract negotiated to give you comfort that, from a legal perspective, the business is a sound purchase and includes all that you expect.

Selling

When selling a business, preparation is key. Pre-planning allows owners to capitalise on their hard work and ensure the best value is obtained for the business or shares.

Your solicitor will: guide you through any restructure needed to get the business in line for sale; advise you of the best preparation to get your business in order to maximise value (business value will be boosted by efficient operations, with up to date documents and policies that are effective for contracting with staff and customers); guide you on employment law issues arising from the transaction; negotiate a suitable contract that ensures you only give appropriate warranties and limit future liability in relation to them; and assist you (along with your accountant) with tax and investment planning – as these considerations could affect decisions you make about your exit process and should be part of the planning stage.



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Employment essentials before you sell

The sale of a business is likely to be subject to the Transfer of Undertakings (Protection of Employment) Regulations 2006, known as TUPE.

If TUPE applies, the buyer in most cases acquires all of the employees employed in the business at the time of the transfer on their existing terms of employment, together with any rights and liabilities relating to them.

Any employees, unless they are only temporarily assigned to the business, will transfer under TUPE. Both parties might want to ensure that anyone else working for the business who is not transferred under TUPE, including workers and consultants, will pass to the buyer under the terms of the asset purchase agreement. If TUPE does apply, the parties will need to agree how any liabilities relating to the employees will be apportioned between the seller and the buyer, it may be necessary to include appropriate indemnities in the asset purchase agreement.

The parties will need to consider if the standard warranties would be appropriate or if it is necessary to put in additional protection. In a simple transaction the transfer date is likely to be the completion

date, but when the actual TUPE transfer takes place will be a question of fact.

The seller will want to identify any liabilities relating to the transferring of employees and that it will retain following the transfer.

It will be necessary to inform all affected employees of the proposed transfer and if it is envisaged that any measures/changes will take place, consultation will be necessary with the affected employees.

The parties should note that the definition of "affected employees" is wide enough to cover employees who will remain with the seller and the existing employees of the buyer, provided they will be affected by the transfer. Both parties will need to check if appropriate representatives of the affected employees already exist and if not it will be necessary to carry out elections.

If the buyer envisages taking any measures in relation to the transferring employees it should notify the seller of those measures as soon as possible so that the seller can comply with its information obligations under TUPE.

The seller must provide the buyer with certain information about the transferring employees, called the employee liability information. If it doesn't, an Employment



Bare essentials

Collect your debts and maximise your price

If you are considering selling your business you will be keen to maximise its value and the sale price that it will ultimately achieve.

One factor that can have a significant impact on the price that a purchaser is willing to pay for a business is the level of unpaid and overdue debts. A purchaser will not want to pay for overdue debts and they are therefore likely to reduce the sum that you will receive for your business. It is important to recover as many overdue debts as possible prior to selling.

It is not usually necessary for court proceedings to be issued to recover

payment of undisputed debts. Birkett Long offers a quick and cost-effective debt recovery service on a fixed-fee basis and, in the majority of cases, we find that debts are paid on receipt of a letter before action.

For debts of over £750 a highly effective tool can be to serve a statutory demand which then allows a debtor just 21 days in which to pay the debt or face insolvency action being taken.

For further information please contact Keith Songhurst on 01245 453821 or email keith.songhurst@birkettlong.co.uk

Tribunal could award compensation to the buyer.

The buyer and the seller will need to consider whether it is necessary to make redundancies and, if so, which groups will be affected, if the dismissals will take place before or after completion and who will bear the costs. With this in mind it may be sensible to include appropriate indemnities in the agreement.

The buyer must consider whether it wishes to change the terms of employment of the employees. It should be noted that any detrimental change will be void if the sole or principle reason for the changes is the transfer itself. In practice, it is not easy to lawfully change transferring employees' terms and conditions of employment. A further consideration for the buyer is whether arrangements should be put in place to keep any key workers with the business after the transfer.

TUPE is a tricky piece of legislation and its implications must be considered by both seller and buyer well before the sale takes place.



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Meet the team

Peter Allen

Peter is experienced in contentious and non-contentious construction matters and commercial litigation. He advises a wide variety of clients, such as businesses, manufacturers, contractors, developers, sub-contractors, local authorities, health authorities, educational establishments, consultants and construction professionals. He is experienced in dealing with business disputes, particularly relating to commercial contracts. He also deals with adjudications and is widely experienced in mediations, arbitrations and court proceedings. Peter advises clients on breaches of contract, non

payment, extensions of time, loss and expense, and valuation claims. He advises clients on claims regarding professional negligence, taking actions against professionals and defending proceedings for professionals.

Legal 500 and Chambers directories recognise Peter as a leading lawyer, best known for his expertise on contentious matters.

“ Peter gives clarity to knotty legal problems and takes time to understand our business needs. ”
A client recommendation



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commercial property

Property matters!

Every business operates out of a property – whether a spare bedroom or enormous sites scattered across the globe. However, for perfectly understandable reasons, those running many businesses concentrate on the business and overlook the premises out of which it operates.

This can cause delays – or worse – when the business comes to be sold, depending on the value attributed to, or the importance of, the premises. Lack of documentation, missing planning permissions and no landlord consents needed to comply with lease requirements occur regularly.

Whether the transaction is a share sale or an asset purchase, it is important to establish early on whether the buyer will be relying on warranties given by the seller, or undertaking its own full due diligence exercise – in which case the warranties from the seller can be considerably reduced. If the matter is a share sale, then warranties are used to put the buyer in the position that it would have been in had the deal been an ordinary property transaction – for example, warranties on the title.

Whether the property is freehold or held under a lease, the seller must deal with such things as title matters, planning and building regulation approvals, Energy Performance Certificate, fire risk assessment, asbestos report, compliance with statutory requirements and regulations and, depending on the type of property and/or business, environmental and energy matters.

If, as is the case with many businesses, the property is held under a lease, the buyer will also want to know that the terms of the lease have been complied with. The most important will be those on alterations, repair of the building, payment of rent, the insurance and, if relevant, service charge. If the transaction is an asset purchase, then the lease will have to be transferred to the buyer – or an underlease be granted.

That will normally require the consent of the landlord and various hoops must be jumped through to obtain that, possibly including the buyer providing a guarantor or a rent deposit. The seller will usually have to give a guarantee to the landlord that the buyer will observe and perform the tenant covenants in the lease.

Consequently the seller could find itself “on the hook” in a few years’ time for a property of which it thought it had disposed.

Finally, environmental issues are far more important today than they once were, and the well advised seller will make sure that it has a grip on liabilities and potential liabilities to ensure that it can negotiate from a position of strength and knowledge.



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Forthcoming events

- **Going for growth - 23 April 2014**
Does your business have growing pains? Find out how to develop a successful growth strategy at this free seminar.
 - **Employment breakfasts**
Keep up to date with employment law, held monthly at all three offices.
- For more details or to register your free place, email seminars@birkettlong.co.uk or visit www.birkettlong.co.uk/events

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Reference: NEWS/FORBUSINESS15/2014

