THINKING OF BUYING A BUSINESS?

Buying a business is often a difficult and time consuming project. Careful planning and management, together with a team of experienced advisers, can make all the difference. Rishi Ladwa, a lawyer in the Corporate and Commercial team at Withy King's Swindon office, advises on navigating the risks of acquiring a business, the best way to approach an acquisition and how the right support and guidance can make or break a deal.

This year we have seen a growing appetite for deals in Swindon and other parts of Wiltshire with businesses looking to grow their market share through acquisitions. Financing transactions remains challenging and buyers are often taking a cautious approach, conducting particularly thorough due diligence to uncover any issues which could cause cash flow issues post-completion. This means that deals are often taking a long time to complete. Time invested at the outset however, planning an acquisition, structuring it carefully and allocating responsibilities, is time well spent and can assist in managing the timescale of the transaction.

From a legal perspective, a buyer can choose to purchase the assets of a business or, where the business trades through a company, the shares of that company. An asset purchase means that the buyer can choose what assets it wants to acquire, leaving any unwanted liabilities behind. However, it is sometimes difficult for a buyer to identify all of the desired assets. There may also be a lot of post-completion work transferring contracts to the buyer and the risk that customers object to the transfer of their contract. Purchasing the shares often results in a neater post-completion position as the entire business is acquired. This means, in theory at least, that the business can continue to operate in the same way as pre-completion and integration into the buyer's existing business can be done in a phased way, if desired. When purchasing shares however, buyers should be aware that they are purchasing all liabilities of the company, known and unknown.

The structure of any deal requires careful consideration of the tax position. Buyers should consult sophisticated tax specialists and corporate finance experts to ensure that the transaction is being structured tax effectively. These specialists will then work alongside the buyer's solicitor to guide the matter through to completion.

Purchasing a business involves the buyer carefully identifying where the value in the target is and what the most important issues are. For example, if the target's brand is crucial to the target business, the buyer will need to carefully investigate

Rishi Ladwa, Associate, Withy King

the intellectual property that the target has, ensure that the intellectual property rights are owned by the seller and that it is adequately protected. It is surprising how often careful due diligence reveals that the seller's website is owned by the developer, for example.

The value of a business is often its employees and the employees will be crucial in ensuring a smooth integration into the buyer's business post-completion. If the sellers themselves are key individuals within the business and the buyer needs them involved post-completion to ensure a smooth transition, they should be tied down on special terms. The structure of the deal can assist with this. For example, with an acquisition of shares from individuals who will remain involved post-completion, a proportion of the purchase price could be payable based on the performance of the business for a specified period after the sale, providing the sellers with extra motivation.

The terms of the purchase will be set out in an acquisition agreement (either for the business or the shares). An experienced corporate solicitor will draft detailed warranties from the seller regarding the business being acquired. If a warranty proves to be untrue, the buyer can sue for damages.

The buyer should also ask for indemnities for specific issues (such as any tax liability of the target). An indemnity provides for compensation on a pound for pound basis. A prudent buyer will seek to retain a proportion of the purchase price for a period post-completion so that it has a pot to dip into for any claims for breach of warranty.

Buyers should consider imposing restrictive covenants on the seller preventing them from competing with the business post-acquisition or poaching customers or key employees. Careful thought must be given to these restrictions to ensure that they are enforceable.

Lauren Harkin, an employment law specialist at Withy King, has the following tips for anyone thinking of buying a business with staff.

- A full and thorough due diligence process is imperative on the basis that if you are purchasing a business you will, as a general rule, inherit the business' employees.Employees will transfer under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) on their current terms and conditions of employment. These employees are protected from dismissal and anything else that might be detrimental to them as a result of the business transfer.

Lauren Harkin, Senior Associate, Withy King

- Both the buyer and the seller are under a joint duty to meaningfully inform and consult with employees about the business transfer, and any envisaged measures which may result, including place of work, pay dates or other similar arrangements.

BUSINESS AGENDA

withy king

Lawyers ahead of the curve

- The value of a business is often its employees. If you are the buyer, having sight of key employees' contracts of employment is critical so that you can establish the level of their pay, their notice periods and any post termination restrictions that they may be subject to. Business transfers can be unsettling for employees, so having the relevant information will enable a buyer to protect their new business from unfair competition.
- Business sales can also often result in redundancies, so understanding how much potential redundancies could cost a buyer or a seller, as well as agreeing early on in negotiations who will be responsible for such costs, is very important before agreeing a purchase price.

SELLERS' CHECKLIST

- Think about your key objectives. For example, do you want to sell by a certain date? Do you have a target price? Do you want to continue to run the business?
- Then assess what steps you can take to make the business as attractive and low risk as possible to potential buyers. For example, can you demonstrate a good, solid financial record? Do you have robust systems in place? Are your employment contracts and policies up-to-date?
- Once your house is in order, you will need to begin marketing your business to potential buyers. Identify potential candidates and establish the best ways to contact them, directly or through an intermediary. You will need to prepare a sales memorandum as part of the process.
- Ensure you ask potential buyers to sign a confidentiality agreement before you start discussions. Weigh up a good offer against a properly financed offer. Establish whether the buyer will pay for the business up front or in deferred payments.
- The buyer will undoubtedly instruct accountants and solicitors to inspect your business. The deal will need to be properly and thoroughly documented. Be careful to choose advisers who specialise in selling businesses and can guide you through the process.

www.withyking.co.uk · 01793 847777

withy king Lawyers ahead of the curve