



GETTING YOUR HOUSE IN ORDER AHEAD OF A SALE

AN EVOLUTION CBS WHITE PAPER

Special points of interest:

- *Statutory Books*
- *Seller's Due Diligence*
- *Key Contractual Documentation*

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Often shareholders wishing to sell give little priority to getting their "house in order" ahead of a sale and concentrate on the operational side of the business, and on growing sales and profits. But this should not be at the expense of corporate and legal housekeeping; overlooking this can lead to unwelcome price reductions once the buyer starts its due diligence and, in the worst case, the buyer walking away from the deal.

It is important to get advisers on board who have specialist experience in selling businesses. These will include business sales advisers, accountants, corporate lawyers and tax advisers, all of whom will be able to guide a seller in preparing for a sale, and then assist the seller on the transaction itself.

Although this may entail some

time and cost, it is worthwhile starting to think about this well in advance of any sale process as a buyer is much more likely to be impressed, and prepared to pay a fuller price, if the Company is well organised, is on top of its internal administration, and has anticipated in advance any areas which may give a buyer cause for concern.

Once the sale process starts potential buyers and their advisers will want information from you quickly, but if this information is wrong or incomplete, this will undermine the buyer's confidence in you and the process generally.

Further down the line, a well advised buyer will require the seller to give warranties in respect of the business, and it is essential that the information provided is, so far as possible,

accurate and not intentionally misleading, and when disclosing against the warranties, a seller should give as full and accurate disclosures as possible. Good preparation should enable a seller to do this.

So what sort of things, from a legal perspective, need to be looked at?



Statutory Books

It is surprising how many companies fail to maintain their statutory books, as required by the Companies Act, and some are not even aware of what or where they are! Although there is no legal definition of "statutory books", there is a definition of "company records" (which include the legally required register of members, register of directors and board minutes). A register of members is prima facie evidence of who the members of the Com-

pany are, and what shares they hold.

All companies must keep minutes of directors' meetings for ten years from the date of the meeting and copies of members' resolutions passed otherwise than at general meetings (which would include all written resolutions) and minutes of general meetings for ten years from the date of the resolution, decision or meeting. Likewise all limited and unlim-

ited companies, whether or not they are trading, must keep adequate accounting records.

A buyer will ask to see these as part of any due diligence exercise, so they should be complete and up to date, and reflect the current shareholdings and directorships. If these cannot be located or are incomplete this can lead to delays or a buyer refusing to complete until the position is rectified.

Seller's Due Diligence

Prior to any sale the buyer's solicitors will carry out a legal due diligence exercise (often alongside a financial review carried out by the Accountants). In advance of the sale process commencing it would be particularly



advantageous therefore, from both a timesaving and house-keeping point of view, for a seller to gather together the relevant information and to ensure that all material matters are properly documented

(and filed at Companies House, where appropriate) and are signed and dated. You should also talk to your tax advisers to make sure any potential sale will be structured in the most tax efficient way.

Typically this would cover areas such as the basic corporate history and current corporate information on the Company; the existing authorised and issued share capital and existing shareholders and details of any existing shareholders agreements; principal customers of and suppliers (including software and hardware) to the Company together with copy contracts (so that a review of such contracts can take place); details of

the ownership of the Company's assets and identification of any liabilities; service contracts between the Company or any subsidiary company and the directors and employment details for all employees; material contracts of the business entered into by the Company or any group company, and where these are subject to change of control clauses; any governmental, legal or arbitration proceedings being threatened or brought by or against the Company or any subsidiary; and any arrangements which are not on an arm's length basis.

Key Contractual Documentation

A SELLER NEEDS TO CLEARLY IDENTIFY WHERE THE REAL VALUE IN THE BUSINESS LIES, AND HOW IT IS CONTRACTUALLY PROTECTED.

A seller needs to clearly identify where the real value in the business lies, and how it is contractually protected. Often a Company will have entered into, or continued with, contractual commitments with third parties without written contracts having been put in place and/or without legal advice having been taken. Also it may be that the Company wants to reduce dependence on a particular customer or supplier, or that it is coming to the

end of a lease on its property and it would be sensible for the Company to get any new arrangements agreed well in advance.

Ideally all critical contracts should be reduced to writing well in advance of any sale, so that a third party cannot take advantage of its position to unreasonably improve the terms, which might be the case if it is aware that the contract is crucial to a sale. For example, if a Company has important IP, checks should be made to ensure that the Company has full rights to use and exploit this.

Any change of control/early termination

clause in any of these contractual arrangements needs to be carefully reviewed, to make sure these do not become a problem if the business is sold.

Don't forget key employees. The Company will need to have in place service agreements, particularly with the executive directors. Consideration should also be given to sensible incentive schemes to encourage key employees to stay with the business.

About the Author



Lance Feaver is an experienced corporate and commercial lawyer with over 30 years experience. Advising a wide range of clients from business start-ups, entrepreneurs and SME's through to large multinational companies, his areas of expertise includes Mergers and Acquisitions (shares and assets) and Strategic Alliances, Private equity transactions (including management advice), Corporate Finance, Legal due diligence/preparation for exit together with general company and commercial law.

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