# TOP TEN TIPS FOR ACQUIRING A BUSINESS AND ASSETS

You want to buy a business, but do you want to buy the business and assets or do you want to buy the shares of the company which owns the business/assets? It is an important distinction.

Going down the asset purchase route means you can, to an extent, pick and choose the assets and liabilities you take on. A share purchase involves purchasing the company in its entirety, both assets and liabilities - "warts and all".

There are advantages and disadvantages to both, particularly in relation to tax, so take advice before coming to a decision.

If you decide to proceed with an asset purchase, then read on for our top ten tips to make the process run smoothly.

## 1. WHAT DO YOU WANT TO BUY?

Identify the essential assets of the business at an early stage. One of the main benefits of an asset purchase is the ability to cherry-pick the assets you need and ensure that certain liabilities are not transferred.

## 2. PRICE AND FUNDING

Consider not only the price you want to pay but how you want to pay it. Are you intending to pay cash in full at completion or will there be deferred elements, possibly subject to performance of the business post-acquisition? You will need to give consideration to issues such as valuing and paying for stock and work-in-progress and how you will deal with debtors and creditors. You might be paying cash only, or you may have agreed to issue shares or loan notes in your own company to the seller. You may intend to use a mix of the two. Be sure you have funding in place: if you want your offer to be taken seriously you may have to demonstrate that.

## 3. HEADS OF TERMS

Sign up to Heads of Terms, recording the basic terms you and the seller have agreed. This should be done before beginning the process of due diligence and negotiating the fine detail of the asset purchase agreement. Although most provisions in Heads of Terms are not legally binding, they set out in black and white the main commercial points of the deal. The process of negotiating the Heads of Terms should highlight deal breakers at an early stage and before you incur significant costs. They can be shown to prospective funders when seeking finance. Insist on an exclusivity clause which prevents the seller negotiating with any other potential parties for a defined period.

## 4. DUE DILIGENCE

Investigate the target business with the assistance of your advisers. The purpose of this is for you to obtain as much information as possible about the business and the assets you want to buy. The seller may have prepared an information memorandum summarising the key points, but this is unlikely to be sufficient. Search publically available information on the business and its assets and engage the seller in discussions as much as possible, while your accountant and solicitor carry out financial and legal due diligence.

## 5. NEGOTIATE

Use the information obtained in the diligence process. You will now have a good idea of the nature and condition of the assets and any liabilities attached to them. Use this knowledge to negotiate the price and contractual protections against areas of perceived risk. In an extreme case, you may want to pull out of the transaction altogether.

## 6. THIRD PARTY APPROVALS

Identify early on the contracts that the business will require. Existing contracts such as leases, hire purchase or asset purchase agreements, IP licences and customer and supplier contracts will not transfer to you automatically. Your solicitor will review contracts to check for any restrictions on transfer e.g. approval may be required from the landlord or other contracting party.

## 7. EMPLOYEES

In most cases employees transfer along with a business bought as a going concern and they will do so on their current terms of employment. This transfer occurs as a matter of law: the buyer cannot cherry-pick who comes and who stays. It is therefore important at the due diligence stage to investigate which employees will transfer and any associated liabilities, such as claims, employee benefits and pension liabilities. These will also transfer and you need to understand what you are taking on. Another point to consider is whether there are key employees you need to keep. You can't pick who comes - but those who do transfer are not obliged to stay. So how might you incentivise them to stay?

## 8. EXTERNAL LICENCES AND CONSENTS

Obtain any necessary licences and consents. What is required will depend on the nature of the business. For example, if the business discharges effluent, an environmental licence from SEPA may be required. If a bank is funding the acquisition then they will normally require all licences to be in place at completion, so ensure that you apply for them at an early stage. Your solicitor will also be checking whether there are any competition law issues which may involve seeking consent to the deal from the UK or other competition authorities.

## 9. RESTRICTIVE COVENANTS

Insist on restrictive covenants to protect the business going forward. The terms of these clauses vary and are often heavily negotiated, but in essence they prevent the seller competing with the business for a period after the sale goes through. Without those protections, the seller could undermine the value of the business you have acquired by diverting customers or suppliers away from the business, as well as poaching staff.

## 10. DIVISIONS

What if you are buying only part of a business? There are additional issues to keep in mind during the negotiation process. For example:

a. Do you need to negotiate and agree any transitional arrangements to deal with shared premises, IT provision and head office functions, such as HR or finance?
b. If there are employees who work across all the businesses, is it clear that they are "wholly or mainly assigned" to the part of the business that you are buying? You don't want to be saddled with the seller's selection if there is any doubt.
c. Who gets to use the "name" going forward? If the name is common to the whole business, it may have significant goodwill value.