Ashtons LEGAL

Small Business Sale Seller

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Introduction

Ashtons Legal is an award-winning law firm with a strong focus on excellent customer service.

The legal teams provide a wide range of advice to both businesses and private individuals alike, on a regional, national and international basis from our offices across East Anglia and Leeds. We are one of the largest law firms in the Eastern region with offices in Bury St Edmunds, Cambridge, Ipswich, Norwich. We are a broad service firm, which currently employs over 400 people.

We aim to stand out from other firms by acting as technically and commercially astute lawyers, whilst retaining a friendly and approachable ethos. We ensure that our clients are served by an excellent range of high quality lawyers who share a common desire to do their best for our clients and for the firm.

Our philosophy is that our clients are absolutely at the heart of everything we do. The way that people and organisations want legal services to be delivered continues to evolve. We understand this and have a flexible approach to meeting our clients' needs and to ensuring that we deliver the service they need. We recognise that each business owner is different and the level of support which each buyer of a business needs varies depending on each buyer's experience, business skills and budget.

Depending on your circumstances, and the proposed acquisition, there are a number of key areas on which you may need assistance:

Heads of Terms

These set out the main commercial terms of the deal and are to be agreed ahead of moving on with the transaction. This document is useful for providing a framework for the key terms of the proposed transaction, although they are not legally binding apart from in a couple of parts, such as confidentiality and any exclusivity period. We will work with you to prepare the Heads if required and ensure that they reflect the key terms of the deal that you have discussed.

Due Diligence

When you are looking to sell a business, the buyer will most likely want to carry out some level of due diligence to ensure that the assumptions that they have made, as to what they are buying, are correct. The level of due diligence undertaken by the buyer will vary depending on whether you are selling the assets of the business or you are selling shares in a company which operates the business.

In the case of the latter the buyer will be acquiring all assets and liabilities of the business and therefore a higher level of investigation will be required.

The due diligence process essentially takes two forms. The first is a physical inspection of the business and any significant assets you are considering selling (e.g. stock, machinery, vehicles, etc) and the second is a paper exercise – answering the buyer's questions and providing any requested documentation about the business. For example – if you are selling a business that depends on regular, repeat work you will be asked to provide copies of all of these contracts.

We will work with you to help answer these questions and provide the relevant supporting document to the Buyer. Your accountants may also help you with providing information and documentation about tax, accounts and other financial matters.

Purchase Agreement

The purchase agreement may be in the form of either a share purchase agreement, or an asset purchase agreement (which is also sometimes referred to as a business transfer agreement), depending how the transaction is to be structured. The agreement will give legal effect to the commercial terms of the deal that are contained in the Heads of Terms, or that have otherwise been agreed by the parties, and will set out exactly what each party is buying or selling, how the purchase price is to be paid, any mechanism for price adjustments after completion and will also detail the mechanism of completion.

It has become increasingly more common for the purchase price to be paid over a period of time (known as deferred consideration), and the seller may request some form of “security” from the buyer that can be called upon if the buyer does not pay the deferred consideration when due.

One of the most substantial elements of the purchase agreement is the schedule of warranties to be given by the seller to the buyer. Warranties are essentially contractual promises made in the form of statements. which the seller is asked to give about the operations of the business, the associated business assets, and the employees. Should it transpire, after completion, that any of the warranties are untrue then the buyer may have the ability to sue you as the seller for breach of warranty and seek to claw back part or all of the purchase price. Warranties tend to be more comprehensive in a share purchase agreement because the company’s liabilities are also taken on. These can be very extensive and run for many pages.

As the seller, you will want to ensure that there is a suitably drafted limitation of liability clause in the purchase agreement in order to give you some protections against a breach of warranty claim.

A share purchase agreement will also contain a detailed tax covenant, under which you as the seller will agree to pay to the buyer an amount equal to any tax liability of the company, which relates to the period up to completion which is unpaid and not provided for in the company accounts.

It is usual that the first draft of the purchase agreement is prepared by the buyer’s solicitors. We will advise you on the terms of the purchase agreement and work with you to help negotiate its terms so that you are happy with the purchase agreement says before you sign it.

Disclosure Letter

The disclosure letter is the document which gives you as the seller the chance to disclose certain information to the buyer to qualify the warranties, which are detailed in the purchase agreement. The seller cannot be sued by the buyer in relation to information they have 'disclosed' to the buyer prior to completion.

By way of example, the purchase agreement may contain a warranty to the effect that the business is not involved in any litigation. To the extent that the business is involved in litigation then the seller can disclose details of it, along with any supporting documentation, to the buyer and the buyer cannot subsequently claim that the warranty is untrue.

Where required, we will put together a disclosure letter for you and help ensure that all relevant disclosures have been made to the buyer.

Employees

Employees are a key aspect of any business, as many businesses would not survive without them. English law offers employees certain legal protections when it comes to transactions. Where a transaction involves the sale and purchase of the assets of a business (as opposed to the shares in a company), the employees of that business will automatically transfer to the buyer on their existing terms of employment, as a result of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE). There are certain procedural hoops that need to be completed by both parties in order to comply with TUPE.

The seller must provide 'employee liability information' (details of transferring employees' main terms of employment, rights, and liabilities) to the buyer at least 28 days before the transfer. Having received this information, the buyer must inform the seller of any measures it envisages taking in relation to the transferring employees, and there must be appropriate information and consultation of the affected employees or their representatives about the transfer and any proposed measures. This will usually be conducted by the seller and the buyer may often be involved too.

In limited circumstances, a buyer can propose certain changes to the employees' terms of employment however, TUPE significantly restricts variations. Any variation to a contract of employment where the sole or principal reason for the change is the transfer itself will be void.. The buyer would be required to inform the employees about any such changes prior to completion but generally in practice the employees are transferred without any changes being made.

The requirements of TUPE vary according to the circumstances of each business, the number of transferring employees, whether there are existing employee representatives or a recognised trade union, and if any changes are proposed. It is important to get the procedure right as the financial implications for failure to do so can be significant.

TUPE does not generally apply to a sale of shares, because the employer remains the same. However, TUPE may apply where you are buying shares in a company, for example, where part of the business is being transferred out of the company immediately before or after the sale of shares in the company.

Where the seller is also an employee of the business, it is common for their employment to be terminated upon completion. In such circumstances you may want the seller to enter into a settlement agreement, dealing with the termination of their employment and confirming that the seller agrees not to bring any employment related claims against the business.

Property

In many businesses, one of the key assets is the property from where the business is operated. You may own the freehold of the property, or more likely, you will occupy the property under a lease.

Where a transaction involves the sale and purchase of the assets of a business, arrangements will need to be made for the existing lease to be transferred to the buyer, which will usually require the landlord's consent.

Where a transaction involves the sale and purchase of the shares of a company, the buyer would need to check whether the lease contains what is known as a "change of control" clause. If it does, the company's continued occupation of the property under the lease will likely require the landlord's consent.

Transaction Management

We will manage the transaction for you and be the first point of contact for any enquiries from the buyer's solicitors. You will be given the name of the person who will be your main point of contact throughout the transaction, maintaining an oversight of the entire process and who will be supported by a team of lawyers from across the firm who you will be able to speak to directly as well.

Fees

As we recognise that each business owner is different and the level of support which each seller of a business needs varies, we have developed a number of packages which can be tailored to suit your needs. We set out below the key elements of a transaction which are included within each package together with an indication of our costs for each package.

As a regulated law firm, Ashtons Legal LLP is under an obligation to understand where the funds that are being used for a specific transaction have come from and the source of the overall volume of wealth of the people whom those funds belong, to verify that funds used in a transaction are legitimate. The obligations exist to counter increasing risks associated with and the effects of money laundering, financial crime and fraud i.e. any situation where money is linked to illegal activity.

As a result, the indications of our costs for each package as set out below all assume that we are able to satisfy our source of wealth and source of funds requirements swiftly and easily and that things do not become protracted in this regard.

WHERE YOU ARE SELLING THE ASSETS OF A BUSINESS

	Basic	Standard	Premium
Corporate Elements			
Drafting (if necessary), amending and negotiating the asset purchase agreement	x - but no substantial negotiation/re drafting of the asset purchase agreement.	x	x
Purchase Price paid in full on completion or in simple instalments (with no security over the deferred consideration)	x	x	x
General transaction management and dealing with completion	x	x	x
Warranties	Limited	Full	Full
Legal due diligence		Limited	Full
Deferred consideration (more complex than simple instalments)		x	x
Drafting, amending and negotiating the disclosure letter		x	x
Preparation of associated ancillary documents		x	x
Advising on the Heads of Terms			x
Price adjustment mechanism			x

	Basic	Standard	Premium
Security for deferred consideration			x
Dealing with change of control elements as part of the major contracts of the business			x
Commercial Property Elements:			
Review the lease and prepare a basic lease report*		x	x
Agree the licence to assign with the landlord and buyer*		x	x
Agree a contract and transfer of the property with the buyer.		x	x
CPSE's*			x
Investigating title*			x
Carrying out searches and reporting on results*			x
Employment Elements:			
TUPE advice with 9, or less employees, to be taken on by the buyer with no changes to their employment terms	x	x	x
Settlement Agreements		No more than 2	No more than 2
TUPE advice with more than 10 employees. to be taken on with no changes to their employment terms			x
Fee indication	Circa £5,000 plus VAT	Circa £10,000 plus VAT	Circa £15,000 plus VAT

*All property work set out above assumes a single leasehold property.

Excluded Items

Excluded items (if any of these are required we can quote separately for these services):

- Advice on any banking facilities or security;
- No contracts to be assigned;
- No consultancy agreements are required to be prepared;
- The transfer of any freehold property;
- There are no complications with the lease,
- Any references that are needed are provided directly without our involvement;
- We are not required to negotiate the terms of any renewal lease,
- There is only one leasehold title to review and no more than one superior title to review;
- There are no material title, planning, environmental, contamination or construction issues arising which will need to be resolved prior to completion; and
- No authorised guarantee agreements.

WHERE YOU ARE SELLING THE SHARES OF A COMPANY

	Basic	Standard	Premium
Corporate Elements			
Drafting (if necessary), amending and negotiating the share purchase agreement	x - but no substantial negotiation/re drafting of the share purchase agreement	x	x
Purchase Price paid in full on completion or in simple instalments (with no security over the deferred consideration)	x	x	x
General transaction management and dealing with completion	x	x	x
Warranties	Limited	Full	Full
Legal due diligence		Limited	Full
Deferred consideration (more complex than simple instalments)		x	x
Drafting, amending and negotiating the disclosure letter		x	x
Preparation of associated ancillary documents		x	x
Advising on the Heads of Terms			x
Price adjustment mechanism			x
Security for deferred consideration			x

	Basic	Standard	Premium
Commercial Property Elements:			
Review the lease and prepare a basic lease report*		x	x
Dealing with the landlord regarding any change of control*		x	x
CPSE's*			x
Investigating title*			x
Carrying out searches and reporting on results*			x
Employment Elements:			
Settlement Agreements		No more than 2	No more than 2
Fee indication	Circa £5,000 plus VAT	Circa £11,000 plus VAT	Circa £17,000 plus VAT

*All property work set out above assumes a single leasehold property.

Excluded items (if any of these are required we can quote separately for these services):

- Advice on any banking facilities or security;
- No contracts with change of control clauses that need to be dealt with;
- No consultancy agreements are required to be prepared;
- The transfer of any freehold property;
- There are no complications with the lease;
- We are not required to negotiate the terms of any renewal lease;
- There is only one leasehold title to review and no more than one superior title to review;
- There are no material title, planning, environmental, contamination or construction issues arising which will need to be resolved prior to completion; and
- No authorised guarantee agreements.