

ARE YOU READY TO SELL YOUR BUSINESS?

A GUIDE TO THE LEGALITIES

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There are all kinds of reasons why someone may decide to sell their business and when someone does there is a lot of work to carry out in order to complete the sale successfully. The legal work involved can be complicated and often involves three firms of solicitors and other professional advisors such as accountants and a selling agent.

Our experience in these and other matters tells us that what most people want is;

- ✧ For the sale to go through as quickly as possible
- ✧ For the legal process to be kept as simple as possible and explained in plain English
- ✧ To be kept informed throughout without having to keep asking

The legal work in selling your business can be much more complicated than selling your house, especially if you lease your business premises.

The process can vary from transaction to transaction but usually follows the process below;

- ✧ Agreement of total sale price
- ✧ Apportionment of sale price between goodwill, fixture, fittings and premises
- ✧ Obtaining of landlord's consent (if necessary)
- ✧ Answering the buyer's enquiries
- ✧ Preparation of draft contracts
- ✧ Agreement of draft contract
- ✧ Formal consent from a landlord (if necessary)
- ✧ Completion of transaction including transfer of business premises and assignment of goodwill together with valuation of stock.

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SALE AGREEMENTS

If you are deciding whether to sell your business and you are a sole trader or a partnership you can only make an asset sale. However, if you run your business through a limited company or a limited liability partnership, then your first decision to make is whether to sell the assets of your company or your shares in the company.

ADVANTAGES

DISADVANTAGES

Asset Sale Agreement	Asset Sale Agreement
Generally involves your buyer in fewer risks, making the contract and the transaction more straight forward and less involved.	It is harder to keep the deal discreet. The buyer is an entirely separate legal entity, so you must ensure all the various parts of the business are legally transferred such as properties, intellectual property rights and contracts.
The seller is usually your company therefore unless there is an express arrangement to the contrary any warranties or guarantees you give are given by your company, not you personally.	The company will still be yours at the end of the transaction and you must deal with this properly (for example by closing the company down), which could involve you in further work such as chasing unpaid debts owed.
Share Sale Agreement	Share Sale Agreement
The buyer steps into your shoes as shareholder/director but everything else remains in the company's ownership. Therefore the sale can often be completed without any third-party involvement making the transaction much more discreet.	It is a bigger risk for your buyer therefore the contract and transaction are more involved and more warranties (including warranties relating to payment of tax) will be requested.
At the end of the transaction the company is no longer yours, so your buyer will usually inherit any problems (such as outstanding debts) that exist at the date of the sale.	You are the seller, not the company therefore any warranties or guarantees that you give are given by you personally.

There are advantages and disadvantages to both. Whichever one you decide to go for will depend on the issues that are important to you such as keeping the deal discreet, time and tax implications.

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IMPORTANT MATTERS TO CONSIDER

Confidentiality Agreements

If the information you are set to disclose is sensitive, consider asking the buyer to enter into a confidentiality agreement. This is something that we would always seek to negotiate at the outset on your behalf as it could prove difficult to do so once the process has begun.

Due Diligence

Any buyer will want to carry out a due diligence check. This means that they will enquire about every aspect of the business including legal, tax implications, existing employees, existing debts and the future of the industry your business is in.

Warranties

Warranties are given by the owner of the assets or shares being sold and are legally enforceable promises made by you, the seller, to confirm that the information provided to the buyer about the business is true. You therefore have an ongoing liability to the buyer of the business even after the business purchase is completed. If the buyer suffers loss because of a warranty that turns out to be untrue or inaccurate then they can claim the damages from you. There are several ways you can limit your liability.

It is therefore very important that warranties should go no further than they need to and should be worded clearly and precisely so that there is little or no room for argument. Unless stated in the contract there is no limit to your financial liability, so it is therefore important to include financial limits in the contract.

You will not be liable for a breach of warranty if you have properly and in the correct legal format told the buyer about the breach beforehand. Disclosures can be general (e.g. anything held in public records) or specific. Specific disclosures relate to specific warranties, e.g. if a warranty states that all vehicles are roadworthy you may disclose that there is no MOT certificate for a particular van.

Anti-Competition Clauses (restricted covenants)

When you sell your business, the buyer is likely to ask you to agree restrictions concerning your future business operations. Restrictive covenants should be carefully negotiated to ensure they do not hinder your future plans. Buyers are likely to require more security, in particular in relation to:

- ✧ poaching existing customers or suppliers
- ✧ employing existing employees
- ✧ competing generally with the business

Employees

A particular concern for the buyer when buying assets (but not shares) is that the TUPE regulations (Transfer of Undertakings (Protection of Employment) Regulations 2006) will almost always apply. These mean that the buyer takes on all the employees of the business together with all the seller's obligations to those employees and even to past employees. An employee dismissed because of a business sale is deemed to be automatically unfairly dismissed and entitled to claim compensation from both you as seller and the buyer (with certain exceptions).

As a seller there are certain legal procedures you must follow in order to transfer your employees to the buyer and the buyer will expect detailed warranties from you in respect of your obligations to all employees (past and current).

Financial Considerations

Deferred Consideration

This is used to describe any funds that you don't receive on the day of sale. There may be many reasons why you don't get the money sometimes because you have agreed (as part of contract) that a particular sum will only be payable upon a particular event happening, or it could simply be that your buyer does not have the whole asking price to pay.

Conditional Consideration

This is used to describe the scenario in which you agree with your buyer that a certain sum will be payable upon a particular event occurring.

Earn-out clause

This refers to a situation where part of the purchase price is linked to the future performance of the business. It is normally linked to profits but could also be linked to other financial measures such as turnover or net assets and may also increase the price beyond the immediate asking price. Of course there are downsides to this, the major one being that you don't get a clean break from the business but will continue to be significantly involved. It is therefore very important to define what rights and obligations you have so there is no argument later.

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STOCK

Stock can be a contentious issue when selling a business. If you are selling your business, it is likely that stock will form part of the deal but, when talking about asset sales it is usual for the purchase to be quoted as plus stock at value. It is advisable to draw up an asset purchase contract which will include an agreement as to what assets are to be sold and how they will be valued.

There are two main methods used to value stock.

Cost Value

The goods will be sold for the same price that they were originally bought for. Here, the seller will get back what he had originally paid.

Net Realisable Value

The value is calculated by deducting the acquisition cost from the now expected selling price of the goods.

Which method is better very much depends on your business. For example, prior to selling his business a grocer purchases a stock of vegetables. After two weeks, the goods would be in a less saleable condition and would therefore have decreased in value. The net realisable value will therefore be significantly less than the cost value.

On the other hand, stock can also increase in value. For example, a car dealer may have purchased vintage car parts at a low price but after many years, they may be worth triple in value. Therefore the net realisable value will be higher than the cost value.

Generally valuation by cost value is more advantageous to a seller but a clause could allow for the higher of the two amounts to be taken as the amount payable.

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CHOOSE LAWSON-WEST

As a Commercial Law Department, we work with business owners to protect and improve their businesses. Whether a sole trader, in partnership or as a Company Director, Lawson-West are here as your legal partner for any legal services necessary. From managing property deals via purchase or lease, acquiring or selling a business, landlord and tenant deals, company restructure or change, shareholder management, creating terms of business and dispute, our service levels remain exemplary.

Our team specialises individually in a variety of areas and our wide range of skills, disciplines and experience means we know what problems are likely to arise and how to solve them. Most importantly, we have a work ethic to simply get things done!

-  Business Sale and Purchase
-  Joint Ventures, Consortium and Partner Arrangements
-  Telecoms and Wayleaves
-  Asset and Share Management
-  Development Land Acquisition
-  Renewable Energy
-  Pension Fund Options
-  Employment Claims

Don't just take our word...

"You have been wonderful with us all through the process of selling our care home, we would recommend Lawson West Solicitors to anyone selling a business."