

# Buying or selling a business

Frequently asked questions



## About Martin Tolhurst Solicitors

Martin Tolhurst is one of Kent's leading law firms. With our award winning and modern approach, all of our clients can benefit from our years of experience and vast array of specialisms.

Our clients' cases will be handled thoroughly, professionally, in an approachable and understandable way.

### As our client you can benefit from:

- The wide spectrum of experience and knowledge our experts have
- Friendly and approachable teams who care
- Our efforts to minimise 'legal jargon'
- A dedicated 'New Enquiries' team when you have a new legal matter
- Free Initial Advice - 15 minutes, general advice
- Fixed Fee Consultations - 45 minutes, no obligation specific legal advice sessions for just £99!

### What's more:

- We are members of the Association of Leasehold Enfranchisement Practitioners (ALEP)
- The firm is 'Lexcel' Accredited by The Law Society - The Legal Practice Quality Mark, and have ISO9001 accreditation
- We are accredited under the Conveyancing Quality Scheme by the Law Society
- We are members of The Conveyancing Association

## Other services:

We also offer advice in:

- Residential Property
- Family Law
- Wills & Probate
- Disputes
- Commercial Property
- Lease Extension
- Business Law
- Equity Release

## Buying or selling a business

Businesses come in different forms and sizes and the process of buying or selling a business can appear daunting at the beginning. We aim to simplify that process as far as possible and guide you through the legal process. The corporate section of our Commercial Department has specialist lawyers dealing with the sale and purchase of businesses across many sectors.

Our specialism is in small and medium sized businesses (SME) which makes up a vast majority of all businesses in the England.

We can advise people going into business on their own for the first time as well as people who have been running businesses for many years. Our aim is to work with you to ensure you are well advised and protected in the transaction and to conclude the matter in the most efficient way possible.

This brochure attempts to answer some common questions about the process of buying or selling a business.

## What is an Acquisition and Disposal?

You may have heard the term 'Acquisition' and 'Disposal' when it comes to selling or buying a business. Acquisition simply means the purchase of a business and Disposal is the sale of a business.

Whether you have decided to sell your business or you wish to purchase a business, an important consideration is how will the sale or purchase be structured? A Share Sale and an Asset Sale are two structures used to effect the sale and purchase. Your requirements and business model will assist in establishing which structure is most appropriate.

## Share purchases/sales

### What is a share purchase?

This is where the shares in a Limited Company are sold/transferred from the seller to the buyer. Ownership of the business is transferred when all of the shares are transferred to the buyer. You can purchase some of the shares, however the business will not be wholly owned by the buyers. If the sale of some of the shares is the desire of the parties, a Shareholders Agreement should be entered into, which will deal with many potential issues.

### How do I purchase shares?

A document called a Share Purchase Agreement (SPA) is entered into by the buyer and the seller. The SPA will contain the crucial elements of the share sale, such as the purchase price, the timing and transfer of money and the warranties the seller will provide. The sale/purchase is completed on the completion date specified in the SPA.

A stock transfer form will need to be entered into by the seller of the shares, which will be dated on the same day. This is the instrument used to legally transfer the shares whereas the SPA sets out the terms of the sale which are very important.

There are many important elements that need to be considered, such as legal due diligence, warranties and indemnities and disclosures. It is in your best interest when buying or selling a business that you engage a solicitor as early as possible.

## Can I not just use a Stock Transfer Form?

Strictly speaking you can use a stock transfer form to transfer the shares as this is the document which will change the legal and beneficial ownership of the shares, however as a buyer this is not advisable. When buying a company you are buying everything that comes with it. It is important that an agreement is put in place via the SPA which keeps the seller liable for any issues which arise as a result of the operation of the company prior to the purchase, for example any pending or threatened litigation.

In the event there is pending litigation against the company, when you become the owner of the company through the share purchase you are then liable to deal with the litigation. Any pending litigation should be established at the legal due diligence stage of the transaction and if the seller states there is no pending litigation you will want the seller to provide a warranty stating that is the case, if there is undisclosed pending litigation and the seller has provided a warranty you will be able to pursue the seller for breach of warranty and breach of contract.



## What is due diligence?

Due diligence is the process that takes place before buying a company to establish information about that company from a commercial, legal and financial perspective. Information obtained from the seller during this process is vital to the decisions that need to be made surrounding whether to proceed with the purchase, any re-negotiation of the terms of the transaction and agreeing buyer protections such as warranties and indemnities.

## Why would I want to buy or sell a business through a share sale or purchase?

A share sale transfers the business as it is, including all assets, employees, contracts, debts, liabilities and custom. Subject to liabilities in connection with warranties and indemnities given by the seller, the seller is able to step away from the business without any further connection to it.

As it is essentially new shareholders stepping into the shoes of the current shareholders, there should be less disruption to the business when compared to an asset sale. The business will look the same from the outside although the ownership has changed inside.

## Why would I want to use a different method to buy or sell a business?

With a share purchase, you are buying the company as it is, including debts and liabilities. If you were to proceed with an asset purchase, a buyer would be able to cherry pick the assets of a business they want. The buyer can be more selective to their needs and leave items that they do not want. Likewise if you are selling a business you may find it easier to find a buyer by offering more desirable items such as plant and machinery or a customer base.

A share may not be an available option in all circumstances. Partnership or a business operated by a sole trader can only be purchased through an asset sale, as they are not separate legal entities like a company and have no shareholders to facilitate a share sale.

## Asset sales/purchases

### What is an asset sale?

An asset sale is where the assets of a business such as stock, equipment goodwill and customer lists are sold/transferred to a buyer. Partnerships or a business operated by a sole trader can only be purchased through an asset sale. An asset sale can be used to sell the business of a Limited Company if this is a more suitable structure.

This might be the case where a company carries on more than a single business under the same company umbrella and only wishes to sell one part of the business.

Asset can be cherry picked from a business by a buyer to reflect what the buyer requires from the business and leave undesirable assets such as liabilities. A seller can also elect to sell certain assets of the business in the same way. If the whole or a large majority of the assets of the business are purchased, this is what is known as 'a going concern' and means that the business can carry on as it did before the transfer.

### How do I carry out an asset sale?

The instrument used to facilitate an asset sale/purchase is an Asset Purchase Agreement (APA) Each of the assets will be transferred individually and the APA will set out a schedule of the assets included in the sale. Other instruments may be required to effect the transfer of the

individual assets depending on what the assets are. If a building was part of the asset sale for example, either the lease or the freehold would need to be transferred to the buyer.

## Why would I want to use an asset sale to buy or sell a business?

A buyer can choose which assets to purchase, strategically leaving behind the debts, liabilities and litigation to the selling company, partnership or individual.

## Buying and selling a business with Martin Tolhurst

### Why would I not want to use an asset sale/purchase?

A buyer being able to choose which assets to purchase, will leave the seller with all of the unwanted assets. The transfer of individual assets can be lengthy and time consuming due to various documentation needed as well as permission for the assignment or novation of contracts, intellectual property rights or debtors intended to be transferred. Permission may not be granted, and in requesting it the seller will make third parties aware of the asset sale which could negatively affect the business post transfer.

## What should I do?

Call us and arrange a free no-obligation telephone conversation with one of our experts.

 01634 728111

## How long will it take?

The time it takes to see a sale or purchase through to the end is largely influenced by how accurately the heads of term have been agreed, how well the parties cooperate and how expediently each party deals with their part in the transaction. Your accountant will need to be consulted to review and provide advice on the financial and tax elements of the due diligence and SPA/APA.

It is important to be realistic when anticipating the duration of a transaction. There are a lot of elements that need to be dealt with so if you are diligent and expedient with your part in the process, this could influence the duration. Each transaction is different but the average sale/purchase takes no less than 3 months to complete.

## How much will it cost?

The legal fee for dealing with a business sale/purchase will be determined by the complexity of the instructions and the time it will take to implement them. The sale/purchase price of the shares or assets is not the only factor that will determine the legal fees as it can take just as long to deal with a complex sale for a low purchase price as it would a high value sale that is less complex. Each matter is assessed on an individual basis therefore you should contact us to obtain an initial estimate.

## What are the tax implications or advantages?

You will need to consult your accountant as early as possible in the transaction to provide you with advice regarding financial and tax implications of the sale or purchase of the shares or assets. The tax implications are likely to be unique to the type and size of the business. Martin Tolhurst Solicitors does not provide financial or tax advice on acquisitions or disposals.

# Please contact your Martin Tolhurst Solicitors branch to discuss Buying or Selling a Business

## Martin Tolhurst Solicitors

### Contact us

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We offer a wide range of business services, including:

- Shareholders agreements
- Directors Loan agreement
- Partnership and LLP agreements
- Franchise advice
- Advice on exiting a business
- Commercial litigation and dispute resolution
- Debt recovery
- Commercial Property

