Share/Asset Sale and Purchase Agreements: Bolts & Nuts

In the last article we reviewed pro's and cons for an asset or share deal. We looked at the various reasons why clients' choose to structure a company acquisition by purchase of assets or rather than purchase of shares or vice versa. When this decision is taken (usually after a due diligence has been conducted) the next step for the Purchasers Solicitor is to prepare some necessary documents. There are several documents which may be required depending on the transaction. These may include Board Resolutions, Power of Attorney, Tax Covenants, Deed of Indemnity, and more. The major one however is the Sale and Purchase Agreement and we shall review some highlights of a typical Share/Asset Purchase Agreement.

WHAT IS THE ESSENCE OF THE SALE AND PURCHASE AGREEMENT?
The agreement sets out the terms for sale of shares or assets from a seller. The Agreement details the consideration for the deal applicable conditions, warranties, indemnities, guarantees, vendor protection provisions and more.

THE SALE & PURCHASE AGREEMENT: PRACTICAL ISSUES

1. Interpretation and definition
Care should be taken in defining relevant terms in the agreement as important provisions may be interpreted by reference to the defined terms. For example issues relating to a specific date within which a event should be accomplished should be careful to state whether the date count is inclusive or exclusive of the first and last days. Sometimes the inclusion of phrases like: "working days" "clear days" or "inclusive of date of delivery" can be helpful. Definitions can sometimes be more of a problem than a tool if the definition itself is difficult to understand – or perhaps needs its own definition. Many solicitors believe that the more grandiose a definition the better. But the key in recent times is simplicity. I have come across very many simple definitions but this one is a classic: 'Business Day' *means a day other than Saturday, Sunday or a day on which banks are authorised to close in London*. The major definition that needs to be looked at with care is the definition of "Assets". This is particularly so when stating the items that are not included in the list of assets. Remember that anything not specifically excluded may be interpreted to be included or be the seed of a dispute. One advice here is to place a rider after the list of excluded items that "any item not specifically listed in the schedule as part of the assets is taken as excluded by the parties".

2. Proper parties and their respective capacities
Where the agreement is being entered into under a Power of Attorney it should clearly state so and quote the details of the Power of Attorney. It should also clearly state after the named person "as Attorney for XYZ". Corporate parties should be identified by names and registration numbers because names of companies may be changed in the future.

3. Consideration

When the consideration is simply cash and it is to be paid in a fell swoop it is uncomplicated. However it gets more interesting when the purchase is being paid for with a mix of cash, shares, assets and loan notes or where the purchase price for a core investor is going into reactivation of the company instead of into the seller's pocket. Even more complicated when the some of the payments are deferred or in instalments. One must understand the payment dynamics and it must be presented in a manner that is of unequivocal interpretation with clear dates and time lines.

4. Conditions for Closing

Sometimes there are conditions for closing the transaction or paying the balance of the Purchase price. It is not untypical to have an agreement trying to lump these conditions for closing into one clause made of sentences broken by the usual punctuations. For such an important piece of information this is the height of inelegance. The conditions should be numbered and separated with each action required of the Seller standing on its own. It is also advisable that they should be sequenced in the order of expected performance. This not only helps the parties know the obligations with precision but is useful for a third party who awaits a particular item to be performed. For example: a Bank who has standing instructions to remit a payment when an event occurs. Omnibus conditions for closing like "all other items which are necessary for the final closing…." are not very useful here and do not replace the need for specificity.

5. Penalties for Failure

The usual attitude with a failure on the part of the seller to perform its part of the conditions is for the Purchaser to say – "then we would not close the deal". This is all well and good – but not so good! Why? The purchaser has lost the time and financial resources in doing a due diligence and is invariably saddled with legal and professional fees (Solicitors sell time and effort). Very often the reason why the Seller is simulating a problem with meeting the conditions is that there is a better offer lurking and they now wish the Purchaser away. It is advisable for a Purchasers solicitor to include in the Agreement realistic deadlines for performance of these conditions and "break fees" attached to failure on the part of the seller. Break fees are an agreed penalty (usually a percentage of the consideration) paid by the seller to the prospective purchaser once the deal goes beyond a certain point (usually after due diligence) and the seller reneges or goes to sleep on the sale.

6. Warranties & Indemnities

One should understand the difference between these concepts. A warranty is an assurance that a particular state of affairs exists, and if it turns out not to be as stated the warrantor will be liable. An indemnity on the other hand is a contractual obligation by which one party agrees to keep the other protected from a specific loss. In terms of compensation, the normal rules of breach of contract apply to damages claimed under a warranty, whilst an indemnity typically provides a penny compensation for a penny lost. However where one is uncertain on these issues it is better to specify consequences that follow an event. Therefore on the occurrence of that event it becomes a liquidated money demand. The buyer should seek comprehensive warranties to force disclosures by the seller as well as provide for relevant protection including compensation in the event of a breach. Specific warranties or relevant indemnity should be sought by the buyer in relation to matters

discovered from the due diligence exercise. If necessary, the buyer should insist that specific replies are warranted by the seller. The buyer in a share purchase should consider an acquisition of the assets in the event that the seller is not able or willing to provide extensive or sensible warranties. The buyer may also wish to expressly exclude the limitation

period under the Limitation Act in relation to certain claims where the Statute of Limitation may apply. The buyer may wish to obtain indemnities in respect of: specifically disclosed liabilities; missing documents; litigation outcome, and liability for tax.

Ayuli Jemide is a partner with Detail Solicitors