

# Selling your business?

When you're starting a business, it's easy to forget that at some point you're going to leave. Everything you've built, your legacy, is either going to be sold or handed down to someone else. The decisions you make early on can help when it comes to walking away.

Our lawyers help you protect your investment, whether you're selling or preparing for retirement.

# Good business is an art form. *It requires skill and dedication.*

We know what it takes to succeed. We've built our reputation on the work we've produced for local, national and international companies.

If exiting a business, we're here to help plan your succession - minimising disruption, protecting your legacy and maximising value, whether you are selling the business or shares.

## Succession and exit planning strategies

Whether you are selling your business, planning to retire or both, a business exit can involve substantial personal and financial consequences.

If you are retiring as part of a business exit, you'll need to consider succession planning and also your personal retirement planning. Most business owners are keen to build a legacy, looking after loyal staff and leaving behind an ongoing business for the future.

Good succession planning is essential to ensure that your business continues to thrive when you step aside. A planned management succession minimises disruption and ensures that you have the right people, with the right skills to take the business forward.

Our corporate lawyers will develop a clear business exit strategy with you, taking into consideration the overall management structure and culture of your business, identifying any key values and business priorities you want the business to retain and ensuring you make the right decisions to maximise the value of your business.

Ideally your business exit plan should be developed and put into action years before the business exit happens. Advance planning helps you get the business into shape (if you are selling it) and groom a successor (if you are retiring).

Working alongside other trusted advisers, our corporate lawyers will determine a long-term business exit plan that also lets you maximise tax planning opportunities.

## Selling shares or business and assets

Our corporate and commercial team has particular strength in transactional work and regularly successfully completes share and asset deals ranging in enterprise value from £1m to £150m.

We can call upon experts in our commercial property, employment law and litigation teams to assist the process and utilise the experience of our private client lawyers to assist with protecting any personal wealth created by the deal.

For any business looking for a buyer, it is vital to ensure any refinancing activity, share buyback or forays into international or new markets have been correctly managed and completed. Potential buyers will undertake rigorous due diligence prior to acquisition and problems will not only delay the sale but could result in a drop in price or, in the worst case, a lost sale.

Successfully completing a transaction always requires good team work and advisers who understand that your business needs to continue operating whilst the commercial, financial and legal process progresses. Our corporate lawyers will help achieve your goals as quickly as possible, calmly working with all parties involved in a constructive way to deliver the result you are seeking.

We will seek to ensure the consideration is secured and your liability is minimised with limits on the warranties and a comprehensive disclosure exercise. We are skilled at dealing with complex financing including loan notes, earn-outs, ratchets and completion account adjustment mechanisms.

A black and white photograph of three men in chef uniforms standing together in a kitchen. The man on the left has glasses and a beard. The man in the middle has a full beard. The man on the right has a mustache and a goatee. They are all looking towards the camera. The background shows kitchen equipment and framed pictures on the wall.

## Management buy-outs and buy-ins

Management teams buying out shareholders or buying in to join existing shareholders are usually backed by private equity, bank funding and/or venture capital and our corporate team is well-versed in negotiating reasonable terms.

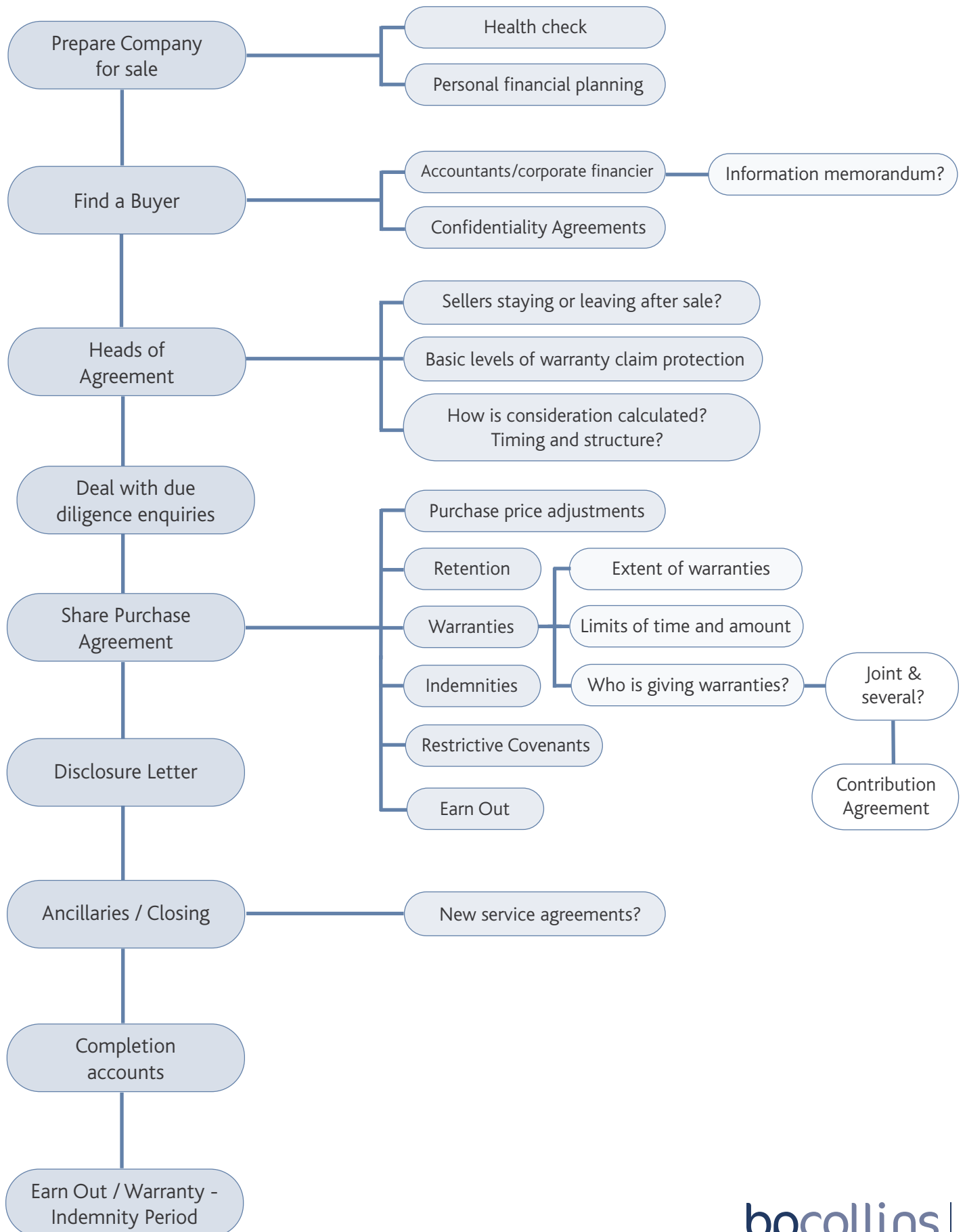
## Legal due diligence

As part of a transaction, legal due diligence is an important process designed to elicit any challenging issues early in the process, thus enabling negotiated resolution between the parties before a deal concludes, rather than fighting warranty and indemnity claims post-completion.

Our corporate team regularly carries out vendor and buyer due diligence, from full report exercises on major transactions to more limited exceptions reporting exercises where we look for key issues.

When acting for sellers, the due diligence exercise is an important precursor to the disclosure process, whereby we endeavour to give peace of mind to sellers, helping them to avoid any post-completion warranty and indemnity claims.

# The share sale process.



# Selling a business.

## *Frequently asked questions.*

### 1. Who should I sell my business to?

You will want to ensure that any potential purchaser has the finance in place to make the purchase. You might ask a potential purchaser to show indications of support from investors or banks who will finance the purchase.

Ideally, you will only negotiate with potential purchasers who have a serious interest and are willing to negotiate constructively. For example, you will want to judge whether a trade purchaser is simply using the opportunity to find out about your business.

Similarly, a purchaser might be interested only in part of your business, or not prepared to take responsibility for all the existing liabilities. If this is unacceptable, you will need to find another purchaser.

### 2. What advisers will I need?

A corporate finance adviser can help you groom the business, identify potential purchasers and market the business to them.

As your corporate lawyers we will draft and negotiate the transaction documents and help you with the due diligence and disclosure processes. You might also want us to be involved in preparatory work such as formalising contractual relationships with customers, suppliers and key employees in preparation for the sale. It is sensible to discuss your plans with your lawyer before taking any other steps.

You will also need advice from an accountant with expertise in minimising tax liabilities.

### 3. How can I make sure my advisers work well together?

We can act as a "central hub" for you, coordinating all advisers and project managing the transaction.

### 4. How much will my business be worth?

There are many different ways of valuing a business, depending on the circumstances: for example, based on earnings, cash flow, turnover or asset value. A growing business in a sector with good prospects will be more highly valued than a mature business in a declining industry. Your corporate finance and accountancy advisers will be able to provide a broad indication of what you can expect.

Ultimately, however, your business will be worth what a purchaser is prepared to pay for it, and is subject to negotiation. Your advisory team can help you prepare arguments to support a high valuation. You are more likely to be able to negotiate a higher sale price if you can interest more than one potential purchaser.

### 5. What alternatives are there to an immediate cash payment and should I be prepared to accept them?

Purchasers may want to defer part of the payment. Clearly this puts you at risk of the purchaser becoming insolvent during the interim period. However, accepting deferred payment may increase the price purchasers are willing to offer, and can be a useful part of your own tax planning. You should ensure that you negotiate suitable security for any deferred amounts. Along with deferred payment, buyers sometimes wish to negotiate an 'earn-out', where part of the price paid is based on the future performance of the business.

Again, this exposes you to risk - if the business underperforms - but may increase the price the purchaser is prepared to offer. It is common to negotiate your continued involvement in running the business as part of any earn-out arrangement. Such provisions need careful drafting to ensure that the business has the best possible chance of meeting its targets to ensure the anticipated price is achieved. Careful consideration needs to be given to the tax consequences of such an arrangement.

Purchasers may wish to use shares in their company to pay for the purchase. In effect, they are asking you to swap your shares in your company for shares in their company. If so, you will need to establish how much those shares are worth to you. Accepting a minority shareholding in an unquoted company can be risky.

You will need to check their company's articles of association to see what rights the shares give you, and for any restrictions on sale of the shares in future, and may want to negotiate a suitable shareholders' agreement. Otherwise you could find that you have no control over how they run their business, are unable to sell shares when you wish to, and cannot obtain a good price for them.

## 6. How much will it cost to sell my business?

The extent of your advisers' fees will depend of the size and complexity of the deal. We are flexible and are prepared to offer a number of fee structure options, including hourly rates, fixed fees, capped fees and modular fees. Some advisers (such as a corporate finance adviser) may work on a monthly retainer together with a success fee charged as a percentage of the sale price.

## 7. How long will it take to sell my business?

The first step to selling your business is often to start grooming it for sale. The longer you have available for this process, the easier it will be to get the business in the best possible shape for sale.

Once you begin the actual sale process, you will need to identify and attract potential buyers. This can take anything from a few weeks to several months. The other main phase will be negotiating and completing the sale. This is likely to take a minimum of six weeks, but can take longer.

Negotiations and 'due diligence' (verifying financial and commercial information by checking records and asking questions - to make sure that, for example, the business owns everything the owner says it does, and that there are no potential liabilities or disputes hidden away) tend to fill the time available. Your advisers will be able to tell you what information they need at the outset, particularly from third parties, which can speed up the process.

## 8. How do I market my business?

You usually work with a corporate finance adviser to market your business. As well as having relevant expertise, it is easier for the adviser to protect the identity of your business in the early stages of the marketing process. You generally cannot advertise shares of a private company to 'the public'.

Start by preparing a sales memorandum: a marketing document you can send to interested parties. It should make the business sound an attractive prospect, and provide key information for buyers such as financial performance. It should not, however, include detailed confidential information. Your corporate finance adviser can help you to identify possible purchasers: for example, other businesses in the same industry, your management team, and venture capital investors.

Ask interested buyers to sign a short confidentiality agreement. Then send the full sales memorandum and arrange meetings. Ask buyers for indications of interest and opening offers. If none of the top prospects appear credible purchasers, approach further names on your list.

## 9. How can I protect myself while the business is being marketed?

Simply allowing the fact that your business is for sale to become known can damage your business. Business partners and employees can find the information unsettling, and competitors may try to take advantage. Competitors may also want to make use of confidential information on your business which you make available during marketing and negotiation.

Requiring potential purchasers to sign an appropriate confidentiality agreement can reduce these problems. Even so, information often leaks. At some point during the process, it may be a good idea to talk to key customers, suppliers and employees about what is going on. The other main risk is that you become distracted by the sale process. It is essential to continue to manage the business until it is sold, both to maintain its value to potential purchasers and in case any sale falls through. Delegating responsibility for the sale to an individual manager leaves the rest of the management team as free as possible to focus on running the business.

## 10. Am I free to carry on running the business as I choose until the sale is completed?

Unless you have signed any agreement to the contrary, yes.

However, you should think about the sale implications of any decisions you make. For example, entering into long-term commitments could make your business less attractive to a purchaser who wishes to pursue a different strategy. On the other hand, your business might be more attractive if you have arranged suitable incentive schemes to retain key employees.

## 11. What do I need to find out about buyers?

Your primary concern may be to ensure that they have the financing in place to make the purchase. If any part of the purchase price is likely to be deferred you will need to evaluate the creditworthiness of the purchaser. Similarly, if any part of the payment will be in alternatives to cash - such as shares in their company - you will need to establish their value to you.

Make sure that you know what their expectations of you are: for example, whether you will be required to stay involved with the business, and what warranties or indemnities they are likely to require.

You may want to find out how they plan to run the business. For example, you may be concerned whether any employees will be made redundant. The price you receive may also be affected if part of the purchase price is deferred and is based on future profits or sales. Try also to find out about the buyer's reputation as a purchaser. If a potential purchaser has a reputation as a difficult and demanding negotiator, you may prefer to look for an alternative.

## 12. Should I give my preferred buyer an exclusive negotiating period?

This is often a good idea. It allows you to focus on one buyer, and prompts that buyer to proceed quickly during the period of exclusivity.

Before giving any buyer exclusivity, make sure you have covered all the key points to ensure that they really are your preferred buyer. You would normally have agreed

heads of terms before giving an exclusive negotiating period, and you may want a financial commitment from the buyer before doing so.

## 13. What are heads of terms?

'Heads of terms' are a signed agreement setting out the main points of the deal. Once you feel that the major negotiating points have been agreed, we can help you prepare heads of terms. Completion of the deal is then dependent on 'due diligence' - verifying key financial and legal information, checking legal ownership of business assets and so on - and negotiation of the sale documentation.

Heads of terms can include legally binding terms. For example, you may agree to an exclusivity period, or you might require the buyer to cover your legal costs if he decides not to go through with the purchase.

## 14. Can a buyer pull out after signing heads of terms?

This depends on what the document says. In most cases, the heads of terms are non-binding in a legal sense.

The buyer will usually be able to pull out after signing heads of terms. But the heads of terms may include some form of commitment - such as requiring the buyer to pay your legal fees in these circumstances.

Even without a legal commitment, in practice the buyer becomes increasingly committed to the transaction the more time and money he invests in negotiating. Both you and the buyer will also find it more difficult to negotiate a change to an issue which has already been covered in the heads of terms, so it is important to take legal advice in the early stages. But a buyer will almost always be able to renegotiate or pull out if unexpected information comes to light during due diligence.

## 15. What role do I have in the buyer's due diligence?

You will want to ensure that the buyer's due diligence (their checking and verification of key financial and legal information, legal ownership of business assets

and so on, by going through your records and asking you questions) doesn't produce any surprises which threaten the deal. Before due diligence even begins, you should ensure that the buyer is aware of key legal and financial issues affecting the business. One option is to carry out your own due diligence process in advance.

This will allow you to identify and, where appropriate, deal with issues which will otherwise turn up during the purchaser's due diligence.

You will then want to make the due diligence process as smooth as possible. Your role will include making documents available and authorising the disclosure of confidential information to the purchaser, and keeping an accurate record of all documents and information that has been provided.

Finally, the due diligence process usually leads the purchaser to ask for a variety of warranties and indemnities. At the same time, we will help you to produce a disclosure letter, providing evidence of all the information you have made available to the purchaser.

## 16. Do I have to tell the buyer about any business problems I am aware of?

As part of the process, the buyer is almost certain to require you to make various warranties which we would help you to negotiate to minimise your risk. These may cover financial, legal or commercial matters. For example, you may be required to warrant that the company is not involved in any litigation and hasn't been threatened with litigation.

Giving false warranties can have serious consequences. The buyer may be able to sue you for any losses suffered. You will have the opportunity of disclosing exceptions to the warranties in a disclosure letter. We will help you to produce the letter, including evidence of all the information you have made available to the purchaser, and the letter then acts as your shield against future claims by the buyer about the matters referred to in it.

## 17. Will I have any responsibilities or liabilities after the sale?

If you continue to be involved with the business - as an employee or as a director - you will retain the responsibilities and liabilities associated with your role. If you have given personal undertakings you will need to ensure that these no longer apply. For example, if you have personally guaranteed the debts of the business, you should negotiate an end to the guarantee as part of the sale transaction. Otherwise you will remain potentially liable.

You will also have potential liabilities under the warranties and any indemnities that you have given.

## 18. What warranties and indemnities will I need to give?

Typically, the buyer will ask you to give an extensive list of warranties covering a range of financial, legal and commercial information. You warrant that the information you have provided is true, and may be held liable if this is not the case.

Broadly speaking, you will be asked to give warranties where the buyer cannot know the true position otherwise. For example, it is not possible for a buyer to know whether your business is involved in litigation or has been threatened with litigation. You would normally be asked to warrant that this is so (and to disclose details of any lawsuits or threatened legal action).

Similarly, you will warrant that the financial information you have provided is true, and so on. The full list of warranties required can be very long.

Indemnities tend to relate to more specific items. For example, if the business is currently being sued, you might indemnify the purchaser against any damages which might be awarded against the business as a result of that lawsuit. Typically you will also give an indemnity for any tax liability relating to the period prior to the sale.

Warranties and indemnities are a matter for negotiation. The more warranties and indemnities you give, the greater the degree of confidence the buyer can have that there will be no unpleasant surprises. This can



help to increase the price the buyer is willing to pay. At the same time, we can advise you as to a number of steps you can take to minimise your potential liability.

### 19. How can I limit my liability under the warranties I give?

You can limit your liability under the warranties by disclosing information. For example, you might be asked to warrant that equipment is in good condition. If you then disclose that in fact an asset is in poor condition, the buyer could not bring a claim against you in respect of that matter. Of course, the purchaser may wish to renegotiate the purchase price as a result of your disclosure. It is important to keep a record of all information that is disclosed and we can help you to do that.

We can also try to negotiate limitations on your liability under the warranties. For example, we could negotiate a maximum liability cap (often equal to the price the purchaser pays for the business). We may also try to negotiate a minimum level of claims - so that the purchaser cannot claim for trivial amounts - or an 'excess' where you are only responsible for the amount by which claims exceed a set level.

We would also negotiate time limits on any warranties and indemnities. These would specify that you are only liable until a set date, and that any claims against you must be made within a limited time.

A large part of our role is to negotiate your giving as few warranties as possible, and including as many limitations as possible.

### 20. Will I have to sign any covenants or other agreements?

It is common for the purchaser to require a restrictive covenant which prevents you from competing with the business you have sold for a period of months or years. If you control assets or other businesses on which the business relies, you may also be asked for other agreements. For example:

- leasing the business premises which you personally own
- licensing intellectual property you own to the business

- entering into a supply agreement for components which another business you own produces
- agreeing to distribute the sold business's products through your distribution network

As with most other aspects of a sale, everything is negotiable. By entering into the agreements, you will be increasing the value of the business to the purchaser - and will aim to have that reflected in the price the buyer pays.

### 21. What happens on completion?

At completion, control of the business and assets will pass to the purchaser. Unless you are remaining as a director or employee, your resignation will normally take effect at the same time.

You will be entitled to receive payment in accordance with the terms of the sale agreement. There will usually be some further accounting work to be done - for example, calculating the value of stock - as the price paid often depends on this.

### 22. How can I minimise my tax liability on the money I receive from the sale?

The tax treatment depends on whether the transaction has been structured as a share transfer, the sale of assets or sale of a business as a going concern. Different methods of extracting money - for example, through paying a dividend to yourself, or making contributions to your pension scheme prior to completion - will also have different tax implications.

There are also ways of deferring tax liabilities. For example, part of the purchase payments can be deferred, or you can reinvest the proceeds in another (qualifying) business and claim reinvestment relief. At the same time, you will need to consider the risks of any tax mitigation strategy. The way the transaction is structured and paid for will also have implications for the purchaser, and so will form part of your negotiations. We can work with your tax advisers and try to agree the most tax effective structure with the buyer.

# Dedicated to *delivering* the best legal advice.

"Cementing the firm's status as a "regional heavyweight", our Corporate and Commercial team was chosen from thousands of law firms in eight regions across England as the best regional team by Legal 500 UK, the country's leading guide to the legal industry.

"B P Collins stood out for us because it attracted exceptional feedback from clients and punched massively above its weight."

The Legal 500 - The Clients' Guide to the UK Legal Profession

The team is also top-ranked for their lower-mid market corporate/M&A activity in the Thames Valley by the Chambers UK annual guide.

"Professional and user-friendly, providing a high level of service at a competitive rate"

Chambers UK - A Client's Guide

"When we first engaged with B P Collins, it was about creating a partnership that would continue for years and to ensure that the contract was right for us to work within; not just from a legal point of view but practically too. We had the formula for a great partnership. The business has grown exponentially since then and the exit of the shares has been like clockwork.

"One thing that really struck us about B P Collins is their forward thinking – the team was already thinking ahead to issues in the final stages of our business, whilst we were still trying to get our heads around day one. We're really thankful now that they raised these points at the time, as we now realise how important they were."

James Hilton, Global CEO, M&C Saatchi Mobile



## Alex Zachary | Partner

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Alex is a highly regarded business lawyer, adopting a commercial approach to problem solving and known for his strong technical and negotiating skills.

His transactional expertise spans 16 years and includes advising: NTR plc on the £135m sale of the Greenstar Group to Montagu Private Equity and Global Infrastructure Partners; the lead shareholders of Cliniserve Limited on the disposal of Cliniserve to the Stericycle Group; and the Sealwood Group on the sale of Helifix Limited to the CRH Group.