Current Legal Issues in Finance/Investment Sector

Business Sales – Employee Issues

Transferring employees is key on any business sale. How do you deal with them in the sale and purchase agreement (**SPA**)?

The norm is for the purchaser to first select the employees (**Selected Employees**) whom it wishes to take into the purchaser's business and to offer employment to them. Usually (and necessarily for the vendor) the purchaser's employment offer is on terms no less favourable than currently enjoyed by the employees. If altogether different employment terms are offered, technical redundancy claims may arise for the vendor.

The purchaser's offer of employment is usually arranged to fall alongside notice of termination of employment given by the vendor to each of the Selected Employees. While this process for the most part overcomes technical redundancy concerns for the vendor, it also suits the purchaser by ensuring that key staff transfer with the business thereby facilitating a smooth transfer on settlement.

A difficulty is how to deal with leave entitlements. In many cases (eg sick leave, long service leave, holiday pay) these will not be presently due at the time of the SPA. It becomes necessary for the parties to put a value on them and for the purchaser to assume these liabilities and pay them out to the employee if and when they fall due. The purchaser is compensated for taking on these liabilities by way of a corresponding reduction in the purchase price.

An alternative approach is for the purchaser to refuse to offer the employees employment on terms no less favourable than they currently enjoy and instead to offer them employment on the purchaser's own terms. That may have consequences for the vendor which would need to be priced into the deal. A purchaser will choose this path where the existing employment contracts contain terms that are gallingly unattractive to the purchaser (specific or limited hours or live-in arrangements, for example). There is no one size fits all approach though in my experience the former of the two approaches above is preferred.

AML

Lawyers have, since 1 July 2018, become subject to the anti-money laundering rules. They apply where the services provided are a "captured activity".

Formation of trusts falls within this category. I recently had the most pathetic example of overreach of the AML rules requiring me to do due diligence on a long time friend for whom I established a trust for holding his home. The conveyancing solicitor had to do the same and so did the bank which took a mortgage of the trust property.

A second area (and more obvious one) where customer due diligence will now be required is trust account movements, no matter how big or small.

Capital Gains Tax on Business Sales

The Tax Working Group is presently tasked with reviewing the tax system. Their report is due in February 2019 and is almost certain to recommend a capital gains tax (**CGT**) on the sale of businesses (amongst other things).

How might the gain be established? Will sellers be taxed on the entirety of their gain, even if they acquired their business 20 or 30 years ago? Or will CGT be limited to gains arising post introduction of a CGT regime? If the latter, there is the obvious hurdle of establishing the value of the business at the time the CGT regime is introduced (if I am right that there will be one). Does this mean all businesses will need to be valued?

Pragmatism suggests some alternative will be proposed. This might entail, for example, a CGT at say 10% or 15% on the sale price. We can only wait and see.

Don't hesitate to contact me for further information.