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A&R Legal Briefing

Care home sales - assets or shares?

Most care homes are operated through a company. When it comes to buying or selling a care home, therefore, a fundamental issue at the outset is whether it will proceed as a sale of the shares in that company or whether there are reasons why it would be an advantage to sell the business and assets and leave the company under the continued ownership of its existing shareholders.

Both structures have their advantages and disadvantages, depending on whether the transaction is being viewed from the buyer's or the seller's perspective.

Buying the shares in a company means a buyer effectively inherits all liabilities of that company – often this is referred to as taking on the company "warts and all".

Whilst this poses a risk for the buyer, there can also be advantages – for example, assuming the care home land and buildings are owned by the company, the buyer will not incur stamp duty land tax on a share purchase, but only stamp duty on the acquisition of the shares. The saving could be significant – stamp duty on share transfers is charged at 0.5% of the purchase price against up to 5% for stamp duty land tax. However, this has to be balanced against the increased professional costs incurred in investigating and documenting a more complex transaction.

An alternative structure is for a buyer to acquire the underlying business and assets of a care home. This allows the buyer to be selective as to which assets he wishes to purchase. The liabilities of the business (except those relating to employees) can generally be left behind with the company, something that is likely to be very attractive to a buyer. As there is less risk to a buyer in acquiring the assets rather than the shares, so too will the buyer's due diligence investigations into the business be less, which should result in a saving on professional costs.

Conversely, many sellers prefer to sell the shares in the company operating the care home. There are certain tax advantages of doing so, and a share sale won't leave the seller with an empty company to wind up.

But it isn't simply the case that buyers prefer to acquire assets and sellers prefer to sell shares. There can be disadvantages for a buyer in acquiring the assets. For example, a buyer of assets must make an application to CQC to become the registered provider of the care home in advance of the transaction completing. This process can take up to eight weeks and therefore needs to be factored into the acquisition timetable.

No such problems arise when acquiring the shares in a company, as the company will already be registered as the provider with CQC and only the nominated individual will need to be changed on completion of the sale.

A buyer of assets must also give thought to the transfer of existing residents' contracts, together with any other contracts that are of material importance to the business – for example, hire purchase or leasing agreements relating to assets. Some contracts may contain provisions preventing their transfer or assignment, and these should be checked as part of the buyer's due diligence investigations. These problems are unlikely to exist where the shares in a company are purchased.

Ultimately the structure of a sale comes down to a matter of negotiation between the parties and if one party has a greater degree of bargaining power than the other, that party may be able to impose their preferred structure. It is, however, important for both sides to understand the issues and risks involved.

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This article is not intended to be a full summary of the law and advice should be sought on all issues.

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