



Last month we saw Cleaver Fulton Rankin help to negotiate the Heads of Agreement for its US technology client, as it gears up to acquire an indigenous operation, and how the firm handled the seller's responses to the legal due diligence questionnaire.

Finalising the Due Diligence



Scott Kennedy, corporate partner at Cleaver Fulton Rankin.

In this issue CFR continues to advise the company on the legalities of setting up shop in Northern Ireland. Scott Kennedy, corporate partner and project manager on the deal, gives us an insight into the firm's work via his blog diary:

Thurs 19th:

Spent most of today clarifying and evaluating an important issue picked up by the due diligence exercise.

It transpires that parts of the target's key software were written by a consultant who at that time was also a close friend of the target's major shareholder. Due to their close relationship no formal agreement was in place for these services. After the work was completed, there was a falling out over the fees charged by the consultant and the pair haven't spoken since. We understand though that the level of fees claimed is fairly modest, around £5k. Our concern is that if the consultant became aware of our client's interest in the target he could choose to make life very awkward by suddenly asserting copyright over the parts of the software he wrote. Litigation regarding such a key product could be a deal breaker for our client.

As part of the due diligence exercise we've been provided with all correspondence between the target and the consultant and, whilst there is nothing which states unequivocally that the consultant

had waived any copyright he may have, neither did he, in any of the correspondence, dispute ownership of or claim that the target was not entitled to use the software. Indeed, one letter actually confirms that he merely wants to be paid a fair fee for the work done and that he's not seeking any royalties.

We've chatted the issue through with our client. Whilst the software written by the consultant is important to the product our client has actually developed software modules itself which could be adapted and used to 'plug' this gap if they had to stop using the consultant's. Whilst this would involve extra cost to our client they are confident it could be done quickly and time is of the essence here.

We therefore gave the vendor an option: pay the consultant the sums demanded and get him to waive all other claims in advance of the deal completing or, indemnify our client against the cost of our having to adapt the software to incorporate our client's own modules and, more importantly, any other claims which might subsequently be made

by the consultant. This indemnity would be secured by a significant retention of part of the purchase price for a three year period. Not surprisingly the vendor has taken the first option which is the one our client also preferred – if there is a problem at least we will be aware of it before we sign up.

With just 10 days left to close the deal, we need to start drafting the contract documentation. A few late nights beckon...

The main document is the sale and purchase agreement (SPA) which reflects what was agreed in the heads of agreement. It clearly details what the client is buying (in this case all of the shares in the target) and what is being paid for those shares (here it being a mixture of cash and share options granted by our client).

A typical SPA can run to about 60 – 80 pages and the bulk of this is made up of contractual statements or promises known as 'warranties'. Every conceivable aspect of the target's business needs to be covered by the warranties so all our specialists from property to employment have had some input. As well as confirming information

L-R Cleaver Fulton Rankin partners Karen Blair, Kathryn Collie and Scott Kennedy



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received through the due diligence exercise, warranties can be used to apportion risk between buyer and seller in certain areas.

A key warranty always sought, for example, is that the target has not been, is not, nor is even likely to be involved in any litigation or claims.

We’ve been working closely with the client’s in-house legal team in the US which, given the tight timeframe, has been really helpful because they have been able to identify to us the areas where the client habitually requires protection. It’s great working with a client who knows exactly what they want.

Interestingly, because part of the purchase price is being satisfied by issuing share options in our client to the vendor, the vendor has itself sought warranties from our client as to its own financial position and prospects. Whilst you can see the logic behind the request, our client is listed on NASDAQ and subject to all of the exchange’s and the US’s

stringent securities regulations. It’s our client’s legal duty to keep the market fully informed as to their business and prospects so for us to provide more information to the vendor than the “market” received could result in allegations of market abuse or insider dealing by either them or us. To be honest our clients are more afraid of not complying with these regulations than they are of breaching a warranty to the vendor! Thankfully the vendor took the point on this one.

Fri 20th:

A long couple of days – the US time difference works in our client’s favour more than ours! Worked into the night to get the SPA and new contracts of employment drafted for the sellers and senior management which are in line with our client’s US templates. Documents are now all with the target’s solicitors who are going to work on them over the weekend and get comments

to us by close of play Monday.

In the meantime, Jim Houston popped in to give me an update on the property side of things. At the outset he recommended a number of local agents to help the client identify new trading premises. They are now negotiating with one particular landlord and hope to agree commercial terms within the next seven to 10 days. The client is keen to drive this through asap so they can forge ahead with their expansion plans immediately on completion.

Eye

Join the CFR team next month for more on the property aspects and the employment contracts as the deal progresses to its final stages.