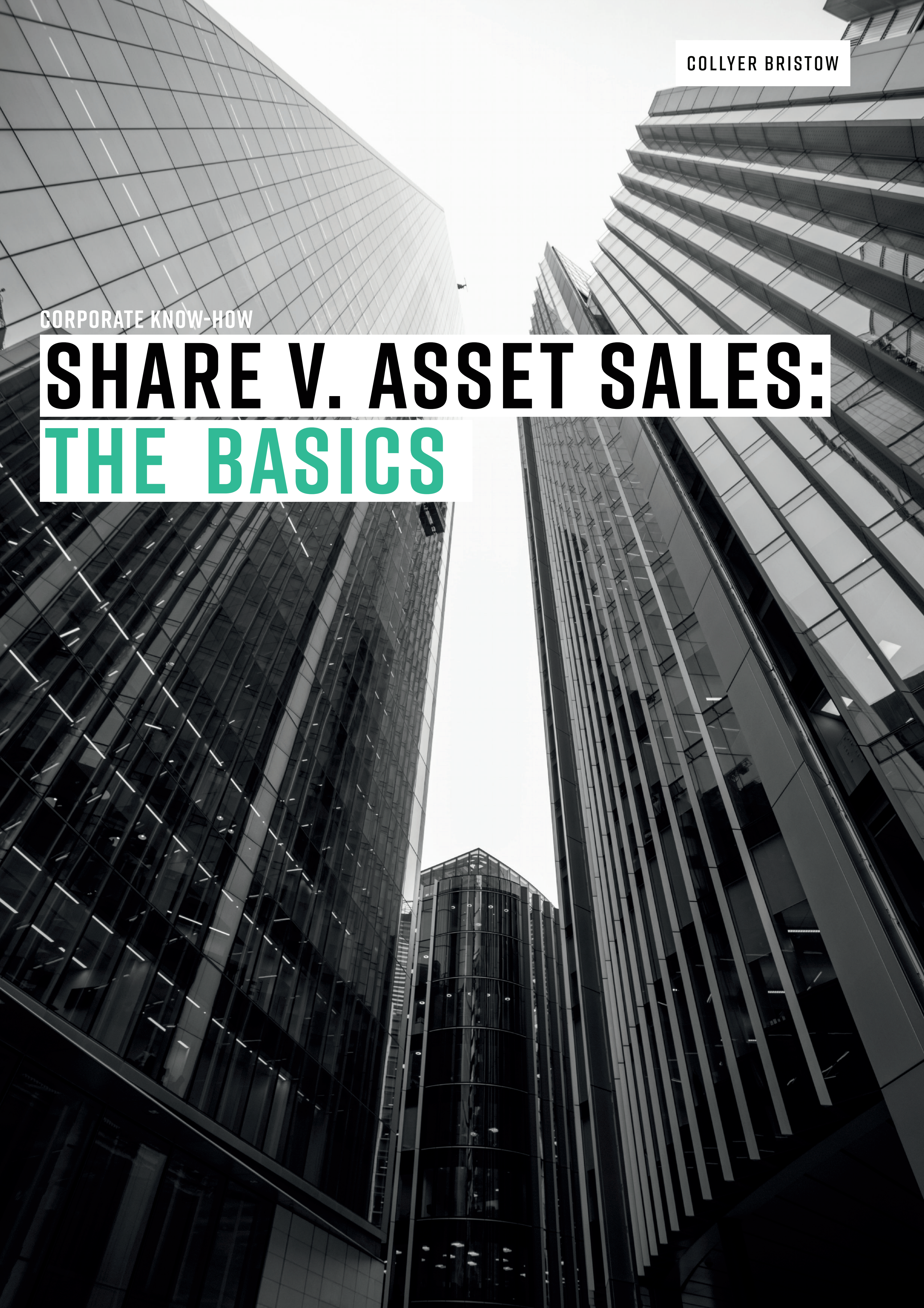
COLLYER BRISTOW

CORPORATE KNOW-HOW

SHARE V. ASSET SALES: THE BASICS



COLLYER BRISTOW

WHAT ARE THE DIFFERENCES?

SHARE V. ASSET SALES: THE BASICS

WHAT IS IT?

Share and asset purchases are the two methods of acquiring a business in the UK. The business of a sole trader or unregistered partnership can only be acquired through an asset purchase as there is no owning entity for the assets which can be acquired, while a share purchase can be used for the acquisition of all or part of the shares in a company which owns and operates a business.

If I buy all the shares in a company do I acquire all the assets?

Not directly, as the assets will remain owned by the company. However, as the sole shareholder (whether individually or through a holding company) you would have absolute control over decision making, including the appointment and removal of directors. Following the acquisition, assets of the target business could be transferred to other entities within a larger corporate group, (subject to some restrictions to protect creditors of the original company).

Do I have to buy all the assets of a business in an asset purchase?

No, which is one of the key benefits of an asset purchase for buyers. A buyer can "cherry pick" the most desirable assets and rights of a target, leaving behind any unwanted assets and avoiding liabilities that are tied up with the business itself. Contrastingly from a seller's perspective, it may be preferable to sell a business as a complete package via a share sale, rather than selling specific assets piecemeal and having to deal with the disposal of undesirable assets or problematic liabilities.

How do I move customers over to my business following an asset purchase?

The process of moving customers and suppliers acquired as part of an asset purchase depends on the provisions set out in the relevant contracts between those third parties and the selling business (if any). Even where assignment of a contract to a third party by the selling business is permitted under a contract, a customer has the choice of taking their business elsewhere and choosing to find a new supplier when the contract expires or by giving notice under the contract, making such relationships a risky target for buyers. Nevertheless, an asset purchase agreement can require that the seller actively assists with any handover process for customers, avoids future competition with the buyer and terminates their relationships with customers or suppliers whose contracts have been acquired, whether they agree to move across to the buyer or not.

A good way for a buyer to mitigate risk when acquiring third party relationships is to incentivise the seller to assist with the transition by linking payment of the purchase price to successfully signing up customers or suppliers to new contracts with the buyer. This can ensure that a buyer only pays for the contracts actually acquired while ensuring the seller has greater encouragement to actively engage with the transfer of those relationships.

SHARE V. ASSET SALES: THE BASICS

How can I guard against historic liabilities when acquiring a company?

If you are buying a company as opposed to its assets, you are acquiring all aspects of the business, including anything from commercial contracts to active litigation. Due diligence is vital to understanding the business as a whole – warts and all. Nevertheless, there are a number of different ways to protect yourself against these potential liabilities and ensure the seller retains some element of the risks arising from their actions with the business pre-sale. Within a share purchase agreement, you can require the sellers to give warranties, which are enforceable promises about the state of the business at the point of sale, and indemnities, which promises to repay to the buyer all costs incurred in relation to a particular issue or situation on a £ for £ basis. By pairing such seller promises with a part retention of the purchase price, a buyer can ensure that there is a ready source of funds for future liabilities of the seller that may arise.

How do I make sure to only get the assets I want?

Once again, due diligence is key to a successful transaction for both parties. A buyer should ensure they have clear answers from the seller on exactly what assets are owned, how they are held and any restrictions on their transfer. Importantly, a prospective buyer should take advice on any legal or regulatory formalities that are required to formally complete a transfer, which can be crucial for assets such as registered intellectual property. Warranties and indemnities, and purchase price retentions can again be used to compensate the buyer for anything unexpected being transferred (or not transferred).

What happens to employees?

When undertaking a share purchase, employees remain in their positions, employed by the same entity and performing the same duties. Whether a buyer wishes to change these arrangements, by relocating employees, changing responsibilities or restructuring the business is a matter for the buyer to consider with management of the company post-completion.

What happens to employees on an asset purchase is entirely dependent on the nature of the transaction proposed. The acquisition of certain assets making up a distinct business can entitle the associated employee(s) who work in that part of the business to transfer to the buyer and continue to perform their same jobs. Contrastingly, it may be possible to acquire specific assets not used by an active business, thereby leaving all employees continuing to work on the seller's main offering.

The appropriate structure for a business sale depends on a wide variety of factors and sometimes the nature of the target business can limit the options available to a prospective buyer. Likewise, there is wide flexibility in how an agreement in relation to a share or asset purchase is drafted and obtaining specialist legal advice at an early stage can identify more options when negotiating purchase terms.

SHARE V. ASSET SALES: THE BASICS

Whether you are considering acquiring a business, selling a business or you are advising on such matters, our specialists in the Corporate team at Collyer Bristow would be happy to provide you with the support you need.

ROBERT WATSON

Senior Associate

+44 20 7468 7293
+44 7949 520363
robert.watson@
collyerbristow.com

RAGAVAN ARUNACHALAM

Partner

+44 20 7470 4419
+44 7974 370824
ragavan.arunachalam@
collyerbristow.com

For more information please visit

COLLYERBRISTOW.COM / BUSINESS