

## COMPANY ACQUISITIONS: Should we do a share or asset purchase?

Very often in negotiating the acquisition of a company you would hear parties talk about a “share deal” or an “asset deal”. A share deal means the purchaser is buying into the share capital of the company. In other words it is a purchase of the whole or part of the share capital of the company being purchased – usually referred to as “the target company”. The end result of any share deal is that the purchaser becomes a full or part owner of the target company. The asset deal on the other hand is where the purchaser pays for all or some of the assets of the company rather than the shares. The assets may include real estate, machinery, intellectual property, goodwill and more. In the asset deal scenario, the target company continues to exist or is wound up, but the end result sees the purchaser owning the assets and not the target company.

### What are the key considerations in deciding for a share or asset deal?

#### 1. What is the reason for the Purchase?

From a broad picture perspective the parties or at least the dominant party has an end in mind whilst making the purchase. The deal structure must actualise that end. For example if the purchaser is an existing company with its own known brand and sees the purchase from a perspective of **business expansion** - say acquiring a new location rather than a new business, then an asset deal would be typical. On the other hand if the goal is **diversification** where a company is moving into a new area of business and requires the existing brand, goodwill and customers of the target company then only a share deal will put all this in the shopping basket.

#### 2. How does the asset and liability scale tilt?

With the share deal the purchaser becomes a shareholder in the company, and in a ratio to shareholding assumes ownership of the assets and a corresponding responsibility for the liabilities. Very often therefore the prospective purchaser would after the due diligence place the assets and liabilities on an imaginary scale - to see where it tilts. A discerning buyer in previewing assets should typically go beyond real property, plant/machinery, bank balances, and prepayments. Assets for such a purchaser could include; a trained work force, a good brand image, customer profile, existing contracts or potentials and more. Likewise the liabilities examined go beyond the creditors profile or the claims and litigation. Where a target company is insolvent but has a viable business the Purchaser is more likely to make an offer for the assets and business rather than the shares of the target.

#### 3. What is the state of the Target Company?

Apart from the asset and liability tilt (the books of account) other aspects the company are often viewed. Does the company have: An erratic labour union? Poor market image? Shareholder squabbles? Conflicts or large litigation portfolio? Overstaffing? Any other problems that make it difficult for a purchaser of shares to get a smooth sale? It follows that the books may be good and proper but these extraneous issues may sway the deal to an asset deal instead of a share deal – the Purchaser trying to avoid foreseeable hassles.

**4. What speed is required for closing?**

For some other parties their major concern is the **speed of transaction**. All they ask is: What is the fastest way to do the deal? The decision as to whether an asset or share deal is faster to consummate will depend on the transaction. Simple share purchases in a privately held small company can be as easy as drafting a share purchase agreement and signing the stock transfer forms, but this would not be the case where it is a larger company and a PLC quoted on the Stock Exchange, or a company subject to any other regulatory authority as the Central Bank of Nigeria oversees the Banks.

**5. Is Asset or Share deal default?**

Sometimes a deal has to be asset or shares because of the existing regulation or laws. For example where the target company is already in the process of winding up then the sale it is invariably an asset deal because the shares cannot be on offer for a company in liquidation. Another example is the Central Bank of Nigeria Guidelines on Bank Consolidation that simply prohibits the stripping of assets and insists on a share deal in which no money is exchanged – shares are simply allotted in the new entity based on valuation of the constituent banks.

**6. What is the prognosis from Tax Planning?**

Looking ahead at tax implications before choosing a deal structure is what is called tax planning. This is the Achilles heel on many transactions because a poor understanding of the available options for legally reducing incidental costs results in unnecessarily high transaction costs. For example in doing an asset deal where the company is eventually going to be liquidated it is advisable to start the liquidation process and allow the liquidator sell the assets to the purchaser rather than doing the sale before liquidating the shell company. Why? – The sale of assets by a liquidator is Stamp Duty exempt (S513 of Companies & Allied Matters Act).

**7. What is the relationship between the parties?**

They are a myriad of relationships that come into play here. From sister companies to non competing alliances, In a situation where for example the target company is a major competition to the Purchaser and the Purchaser is a stronger or equal brand, then in all likelihood the Purchaser may want a deal that eventually winds up the name of the target company. They may do a share deal and later a change of name or an asset deal which would buy the going concern to acquire the assets with an agreement to wind up the target company and a non compete agreement signed with the shareholders/directors of the target to be effective for a few years.

**SUGGESTED AIDS IN CROSSING DEAL BREAKERS.**

In several transactions the client is faced with a make or break situation – hurdles to cross or no deal. The Solicitor may “aid” the transaction by providing a workable solution. These aids help to smoothen out the rough edges of a deal and unlike “shortcuts” they are enduring, giving the Purchaser legal recourse in any event. It is advisable to explain the issues and the solutions to the client and obtain the clients’ consent (usually the Purchaser) to proceed as proposed. Let the client take an informed decision. Some of these aids are as follows:

### **1. INDEMNITIES CAN SAVE A DEAL**

In appropriate situation an Indemnity given by one or more directors and/or shareholders of the target company can be the dealmaker. For example in one transaction the due diligence revealed from the corporate documents a previous foreign shareholding with no evidence that the foreign company had divested. The shareholders of the target company insisted that the foreign shareholder and the board parted ways amicably but they did not follow through with a formal divestiture and share transfer. The foreign shareholder has wound up years ago and the directors were willing to give personal indemnities to cover any eventualities. They are people of considerable substance with a good reputation in the marketplace. A simple Deed of Indemnity, and it is done.

### **2. CONTRACT FOR SALE WITH CONDITIONS FOR CLOSING**

In many acquisitions the Purchaser is willing “but”! But what? – Certain prerequisites for a smooth acquisition need to be emplaced. One of such prerequisites may be where approvals need to be obtained from the Board of Directors or regulatory body; or certain titles to assets require some registrations to enable the transfer – lands registry being a case in point. In such situations the parties can enter in a Contract FOR Sale (not a Contract OF Sale) which is a binding agreement between the Purchaser and the target company wherein the Purchaser agrees to do the deal for an agreed consideration and it is agreed that the payment (or the balance of it) shall be paid after the identified bottlenecks have been removed. In other words after the “Conditions for Closing” are satisfied. This mode firstly satisfies the intent of the parties – to buy and sell. It also forecloses competitors from the acquisition until the Purchaser reneges due to a failure on the target company’s part to meet the conditions. It is a nice way of closing a deal without actually closing it.

### **3. THE HIVE DOWN**

A hive down method allows a Purchaser to buy the company shares with minimal liabilities. It is recommended where the Purchaser desperately wants a share deal but the books of accounts of the target company are unattractive and the liabilities are king. How is it done? The target company will sell its assets to a wholly owned subsidiary, usually and preferably a newly incorporated company. The price would usually be left outstanding in an unsecured inter company loan account. The Purchaser then acquires the shares of the new hive down company and obtains the assets in that manner. It can get more complicated from situation to situation!

### **Conclusion**

Transactions are simpler wherever the parties know what they want to achieve, seek advise on how to achieve it and they all go for it.

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