

# BUYING & SELLING A CRECHE

5<sup>th</sup> March 2020



**WILLIAMS**

SOLICITORS LLP  
SOLICITORS & NOTARIES PUBLIC

1. What are you selling / buying?

2. Valuing a business

3. Finding a buyer/seller

4. Leases

5. Timescale

6. Preparing for sale/purchase

7. De-Registration

8. Summary Advices

# OVERVIEW

- ▶ Asset sale or share sale? Check whether premises is held in name of a company or the registered provider?
- ▶ Locate deeds – either with your solicitor, held by you personally or with lending institution.
- ▶ Majority of registered service providers are sole traders as a consequence, sales tend to be asset sales i.e. assignment of leasehold interest and sale of fixtures and fittings or transfer of freehold premises and sale of fixtures and fittings
- ▶ Staff will transfer with the business under the Transfer of Undertakings Regulations. Under TUPE, there is a legal obligation on new employer to take on existing staff if part or all of the business is acquired by another entity. In practice, family members who are employees don't generally transfer over.



# 1. WHAT ARE YOU SELLING/BUYING

- ▶ Make a list of assets to be included in the sale e.g. toys, educational materials, children's records, appliances, furniture, outdoor play materials, electronic devices.
- ▶ Be clear about what is not included: Assets which are held under Hire Purchase Agreements or leased e.g. Vans/cars, security cameras, computers/software held under a licence.
- ▶ Solicitor should look at title and address any title issues in advance of creche being put up for sale.
- ▶ Your solicitor will need: original stamped & registered lease or copy Deed of Conveyance/Folio, copies of all planning permissions, fire safety certificates, commencement notices, BER Certificate, original architect's certificate of compliance with planning permission and building regulations, a copy of your latest rates demand, details of managing agent if your premises is part of a multi-unit development.
- ▶ Full disclosure required in relation to planning: if work has been done to premises since original construction or since fire safety certificate has been granted, you should bring this to the attention of your solicitor.

# 1. WHAT ARE YOU SELLING/BUYING



- ▶ Most common issue is overvaluing a creche business
- ▶ Childcare industry is in a state of flux – there are a lot of creches up for sale.
- ▶ Chains tend to look for larger, purpose built premises.
- ▶ Formula used by accountants – 3 x EBIDTA (Earnings before interest, tax, depreciation and amortization). EBIDTA seen as a measure of business's operating performance.
- ▶ If buying a creche, query whether owner's salary has been factored in/out of salaries/net profit.
- ▶ Other factors important: look at maximum number of children under fire certificate/planning permission/Tusla registration to ensure profits do not exceed what is possible under regulations i.e. business could be profitable but in breach of fire safety/childcare regulations.
- ▶ Length of lease/ staff redundancies / TULSA inspections also a factor.
- ▶ Not all businesses operating at capacity, particularly as people are looking to exit on account of retirement.
- ▶ Look for potential to develop business e.g. open afterschool, re-profile business by not taking under 2's, extend physically to increase numbers.

## 2. VALUING A BUSINESS

- ▶ **Confidentiality a key issue** – Most creche owners selling do not want to tell staff or parents until binding contracts are exchanged. Creche owners are particularly concerned about staff leaving if they find out creche is changing hands.
- ▶ **Direct approach** – often owners are approached by their competitors or by chains. Disadvantage: Reluctance to share commercially sensitive information. Chains tend to be looking at 1. location 2. Room size when making direct approaches.
- ▶ **Advertising through auctioneers** – Advantage: potential to attract buyer outside industry. Disadvantage: very difficult to maintain confidentiality. Auctioneer's usually charge a % commission which can vary hugely.
- ▶ **Advertising through Canavan & Byrne:** Advantage: Targeted to childcare industry, confidentiality maintained through non-disclosure agreement.

## 3. FINDING A BUYER/SELLER



- ▶ Length of lease & statutory right of renewal are key factors if selling a creche held under a lease.
- ▶ Landlord's permission will be required for an assignment of the lease.
- ▶ Tenants acquire a statutory right of renewal if in possession for 5 years or more under Section 13(1)(a) of the Landlords and Tenant (Amendment) Act 1980 as amended by Section 3 of the 1994 Act.
- ▶ Tenants can disclaim/waive the statutory right of renewal and in practice, most Landlords insist that a Deed of Renunciation is executed at the start of the lease waiving the right to a renewal.
- ▶ Sometimes waiver/renunciation is included in the body of the lease so it is important to read Lease carefully or drop it into your solicitor to check.
- ▶ If a Deed of Renunciation has been signed, the buyer will want to recoup their investment during the rest of the term. In practice, you would want another 8 years + to run on the lease if the tenant doesn't have a right of renewal.
- ▶ The Landlord can refuse to assign the lease – tenant must be as good of a financial standing as the current tenant.

## 4. LEASES



- ▶ There will be a clause in your lease which prohibits the assignment or alienation of the premises without the Landlord's consent. Seller is responsible for Landlord's legal/professional costs in executing Licence to Assign.
- ▶ In order to get consent, buyer will be asked to provide a statement of financial affairs and vouching documentation e.g. copy ID, proof of address, 3 months' bank statements, 2 trade references, personal guarantee etc so the Landlord can make an informed decision on whether to assign the lease.
- ▶ There will be a special condition in the contract for sale to the effect the sale is conditional on the Landlord executing a License to Assign in respect of the assignment of the Lease.
- ▶ Sellers should ensure all rates and rent are paid up to date and any repairs under the lease have been attended to.
- ▶ Difficulty is often encountered when Landlord is trying to negotiate with their own lender/property is in NAMA.
- ▶ If a rent review is due under the terms of the Lease, an approach should be made to Landlord to discuss revised rent before property is put on the market. Impending rent reviews may deter buyer from making an offer.
- ▶ Rent reviews i.e. increased in rent should be signed off properly. A memorandum of rent review should be executed by the Landlord and Tenant noting the agreed rent, signing it and dating it.

## 4. LEASES



- ▶ Realistic timescale – 6-12 months depending on how quickly a buyer can be found
- ▶ Once purchaser has been found, seller's solicitor will issue Contracts for Sale, copy title etc and Purchaser's solicitor will raise pre-contract queries. Approach made to Landlord for consent to assign lease. Information gathered for submission of Notification of Circumstances Form. [In practice, this takes 4-6 weeks].
- ▶ Contracts are exchanged & closing date fixed. [1 -2 weeks depending on whether Purchaser is getting a loan themselves].
- ▶ Notification of change of circumstances form submitted to Tusla [90 days notification required although this can be abridged in exceptional circumstances]. Tusla may look for further information or indicate a fit for purpose inspection is required.
- ▶ Information and consultation period with staff commences [usually 30 days notice required]. Staff formally notified of transfer at end of period. If redundancies are envisaged, notice of redundancy usually given.
- ▶ Seller's solicitor gathers closing documentation / Purchaser's solicitor gets in money.
- ▶ Seller notifies Pobal – funding can switch from quarterly to week to week.
- ▶ Parents notified 1-2 weeks before creche is due to change hands. Useful to introduce parents to new owner at information evening.
- ▶ Date of completion arrives: staff paid up to date by seller [incl. any arrears of pay, public and annual holiday entitlements which might be due]. Buyer has new employees set up on payroll. An apportionment of fee income/funding between seller/buyer may be required if parents tend to pay monthly.
- ▶ Rates are apportioned based on the date of completion e.g. 1<sup>st</sup> January 2020-5<sup>th</sup> March 2020 [seller], 6<sup>th</sup> March 2020-30<sup>th</sup> June 2020. Seller will pay 1<sup>st</sup> Moiety and get a contribution from buyer on completion.

## 5. TIMESCALE

- ▶ Seek tax advice early on in terms of how to structure the sale. There are a number of tax reliefs available to reduce Capital Gains Tax liability e.g. entrepreneur relief and retirement relief.
- ▶ The more issues you can deal with in advance, the more seamless the transaction. All issues should be dealt with pre-contract if possible. Planning queries take up a lot of time e.g. opening hours not matching planning permission, changes made to premises since last fire certificate and very often it is necessary to get further planning documents.
- ▶ Rates & rent should be paid up to date. Landlord may want to inspect premises so ensure any repairs have been attended to [check lease to see what repairs are tenant's responsibility].
- ▶ Ensure any non-compliances on latest Tusla report have been addressed. Purchasers will go online to look at inspection reports.
- ▶ List of employees [initials only] furnished pre-contract together with hourly rate, job title, FETAC Qualification, minimum contracted hours and start date/length of service.
- ▶ Disclose any local arrangements e.g. family members in creche paying reduced creche fees.
- ▶ Issue of projected fee income not matching year end accounts.
- ▶ Purpose built creches co-located with family home are more difficult to sell – commercial premises may/may not be parcelled off and sold separately. If preparing for sale, you may need to arrange to have water/electricity/sewerage connected separately and Land Registry compliant map drawn up for commercial premises to be sold separately. Wayleaves may need to be put in place if there is a private well/septic tank or bio cycle.
- ▶ Any litigation pending or threatened will have to be disclosed.



## 6. PREPARING FOR SALE/PURCHASE

- ▶ Frequency and speed of de-registrations has increased considerably in last 12 months. This has had a knock on effect on selling creches i.e. creches which might otherwise not be on the market, now up for sale with opportunities to pick up creches for less than market value.
- ▶ Letter notifying registered provider gives the creche owner 21 days to appeal to the District Court. There is often a gap between date of de-registration and hearing date for appeal.
- ▶ During the gap, if the creche stays open, creche is trading illegally which means creche owner is uninsured and Pobal funding is stopped. Creche owner will not be able to recoup funding even if successful on appeal.
- ▶ Purported de-registrations now publicised & register of service providers will show creche has been de-registered. This will lead to queries from employees, parents and also possibly offers from other providers to buy service.
- ▶ As an alternative to appealing the decision, some creche owners have decided to sell up. Tusla have agreed to short extensions in the past to facilitate a sale of the creche subject to certain conditions. Tusla will deal with these requests on a case by case basis.
- ▶ Timeline to complete sale before de-registration is very tight but can be done. If other issues arise e.g. difficulty in securing Landlords' consent to assign lease or a rent review falls due, it will be difficult to complete sale before creche is removed from register.
- ▶ Creche can still be sold with vacant possession i.e. no children/no employees but at a greatly reduced price.

## 7. DE-REGISTRATION



- ▶ Be clear about what you are buying & selling. Consider position carefully before entering into onerous contracts or renewing contracts i.e. check termination clause.
- ▶ Try and regularise any one off, ad hoc arrangements e.g. reduced rates for family members.
- ▶ If creche is not operating at capacity e.g. a room is closed, show projected fee income for that room or projected fee income for afterschool so buyer knows development potential.
- ▶ Make sure Landlord is paid up to date for rent and insurance before an approach is made for consent to assign the lease.
- ▶ Get tax advice early on so the sale can be structured in the most tax efficient way.
- ▶ Don't tell parents/staff until you have to i.e. unconditional contracts to sell the business have been exchanged otherwise you will end up answering the same queries over and over again. Also, there is a risk the staff will move on.
- ▶ Consider a 'deep clean' by a commercial cleaning company before arranging an open viewing [or pre-approval inspection].
- ▶ If major changes are notified to Tusla when the notification of change of circumstances form is sent in, a pre-approval inspection may be required.
- ▶ Ensure creche operates at capacity until sale is complete. If you have a waiting list, keep taking names. If a staff member leaves, advertise position and discuss potential new hire with buyer.



## 8. SUMMARY ADVICE

Williams Solicitors LLP  
Solicitors and Notaries Public  
3 Dawson Street  
Dublin 2  
Phone: 01-675 3000  
Email: [nicola@williamssolicitors.ie](mailto:nicola@williamssolicitors.ie)

[www.williamssolicitors.ie](http://www.williamssolicitors.ie)

CONTACT US

