

COMMERCIAL LAW



Taylor Bracewell
Your solicitors | Your success



Warranties, Indemnities and
Representation: What do these mean in
context with of a business sale?

Depending on if you are buying or selling a business will influence how you feel about warranties, indemnities and representations. If you are buying a business, then you would want a 'full and comprehensive set' of them. If you are selling, then as you may expect, you would want to limit how many warranties, indemnities and representations that you provide. It does not matter if your transaction is a share purchase/sale or an asset purchase/sale, these provisions will still apply.

Why is this? What real impact do they have? I will explain what each of these mean and why they are an important part in any transaction.

WARRANTIES

A warranty is essentially a promise that a 'state of affairs' or situation exists. In terms of a business sale this would be made by the seller of any business. In a share sale, it is usual for the seller to provide more comprehensive warranties to a buyer than compared to an asset sale.

These 'promises' that the seller provides can range from the historical financial performance (accounts) of the business to the current employment position of the employees to past regulatory and compliance issues. Sometimes they can also be made on future performance of the business.

The purpose of warranties in a business sale agreement is twofold. Firstly, they are there to offer protection to the buyer of a business, as in the absence of any misrepresentation of facts or fraud there is little other protection for the buyer. Secondly, they allocate risk within the transaction between the buyer and the seller.

The seller can go through a process known as 'disclosure' where they provide relevant facts and matters of the business in a disclosure letter against specific warranties. Provided these facts and matters have been fairly disclosed then the buyer will not be able to bring a claim for breach of warranty in respect of those facts and matters. If a warranty is breached, then the buyer may sue the seller for damages for any diminishment in value of the business.



INDEMNITIES

An indemnity is a promise by the seller of a business to the buyer to compensate the buyer if a specific liability arises in the future. A common example may be if there is specific litigation risk that may materialise in the future.

These are similar to warranties as they provide a measure of protection to the buyer and the purpose of an indemnity is to provide guaranteed compensation to a buyer on a pound for pound basis in circumstances in which a breach of warranty would not necessarily give rise to a claim for damages or to provide a specific remedy that might not otherwise be legally available.

REPRESENTATIONS

A representation is a statement, which relates to a matter of fact made during contractual negotiations during a transaction, which the parties do not ordinarily intend will become a contractual term, but which may induce another party to enter into a contract.

Representations made during these negotiations, if they are false then it could give rise to a misrepresentation claim which could result in the buyer claiming damages. This could be mitigated by the what's known as an 'Entire Agreement' clause which excludes representations made that aren't part of either the share purchase agreement or the asset purchase agreement.

In short, whether you are buying a business or selling your business warranties, indemnities and representations and how they are drafted will form a huge part of it. This affects the liability of both parties moving forward and careful expert consideration needs to be provided.



OUR OFFICES ARE LOCATED:

17-23 THORNE ROAD, DONCASTER, DN1 2RP
1 RAILWAY COURT, TEN POUND WALK,
DONCASTER, DN4 5FB
11 PARADISE SQUARE, SHEFFIELD, S1 2DE

01302 341 414 AND 0114 272 1884
ENQUIRIES@TAYLORBRACEWELL.CO.UK
WWW.TAYLORBRACEWELL.CO.UK

