WHAT THE BAKE-OFF AND TOP GEAR CAN TELL YOU ABOUT M&A TRANSACTIONS

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Unless you've been living a life of television-free bliss this year, you're probably aware of two big BBC "losses" recently. Firstly, Amazon poached the *Top Gear* hosting trio of James May, Richard Hammond and Jeremy Clarkson from the Beeb as an indirect result of a "fracas" between Jeremy Clarkson and a producer. Then Channel 4 outbid the Beeb for the rights to the next series of the *Great British Bake-Off*. Two rather different but highly valuable shows and two rather different outcomes.

By poaching the presenters Amazon essentially got "*Top Gear*" without paying for *Top Gear* leaving behind an empty husk of a brand name and an anonymous but recognisable figure in a white helmet. By contrast Channel 4 essentially bought the husk getting the name and format for *GBBO* and losing the hosting duo Mel and Sue and judge/"national treasure" Mary Berry.

What has any of this got to do with corporate law? Well it occurred to me that it provides a pretty good analogy for the importance of the due diligence process in M&A transactions and the risks and benefits of both asset and share purchases. Given the continued acquisition activity in the Channel Islands financial services market I thought it worth exploring the analogy.

By way of explanation – if one buys the entire share capital of a company, one might expect to get the entirety of the business, its assets and liabilities, the benefits and risks of its existing contracts but also any pre-existing problems. But how effective this is and whether it gets you what you really want is dependent upon a number of things and this goes to the importance of due diligence and warranty protection.

By buying a company you are buying it complete with any liabilities in it. If, to use a classic example, the company is the defendant in a huge piece of litigation, you are buying it with the risk it loses that litigation and has to pay damages and/or costs (or becomes economically unviable due to the cost of defending the litigation). Obviously doing thorough due diligence to identify these risk areas is vital as is obtaining suitable warranty or indemnity protection to mitigate them once identified.

As important however is ensuring the company actually owns (and will continue to own) what you think it owns. For example does your target company own key intellectual property or license it from someone else? Is its key retail location actually held on a short lease expiring next Wednesday? Can clients all terminate their contracts on a change of control? To go back to our starting point, does the *Bake-Off* production company have Mel, Sue, Paul and Mary locked-in on contracts for next season if the show moves channel (answer: apparently no)? Failure to ask the right questions at this stage can mean spending a lot of money and not getting what you really want. You can think of the *Bake-Off* purchase as analogous to a share purchase; you get the entity (but that doesn't mean the key staff will stay on).

Understanding a business' structure and asset holdings may let you get what you want without taking the risk of buying the whole company. Perhaps you can cherry pick key assets and avoid liabilities by buying IP, arranging for contracts to be assigned to your business or agreeing employment terms with a key team of employees. This is essentially what Amazon did by picking up the Top Gear hosts. They didn't have to pay for the brand, the format rights or any of the other intellectual property – rather than buy the entire enterprise, they simply acquired what they thought were key assets.

There are benefits and risks to both a share acquisition and an asset acquisition but my key point here is assessing those benefits and risks requires a really good commercial understanding of the business and industry you're looking at. By replacing "May, Hammond and Clarkson" with "major client mandate" or "Mel & Sue" with "highly rated local management team" in the above examples, we could be talking about pretty much any acquisition transaction and the risks become clear.

For that reason, an understanding of priorities between lawyer and client is vital on these kinds of deals. As always knowledge is power. Only by identifying where the necessary value sits in a target business can we ensure it comes with the transaction. Having done so we can ensure our transactional soufflé doesn't collapse when presented to the judges....

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