



Buying at the Bottom: Business Acquisition in a Recession

SILVERMAN SHERLIKER LLP
SOLICITORS



Corporate Challenges

Christopher J Sherliker, MA (Cantab)

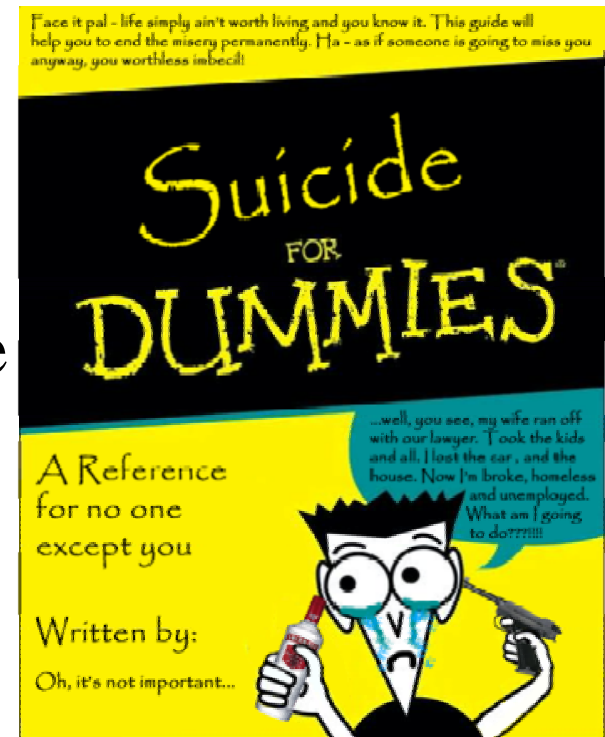
Partner

Silverman Sherliker LLP



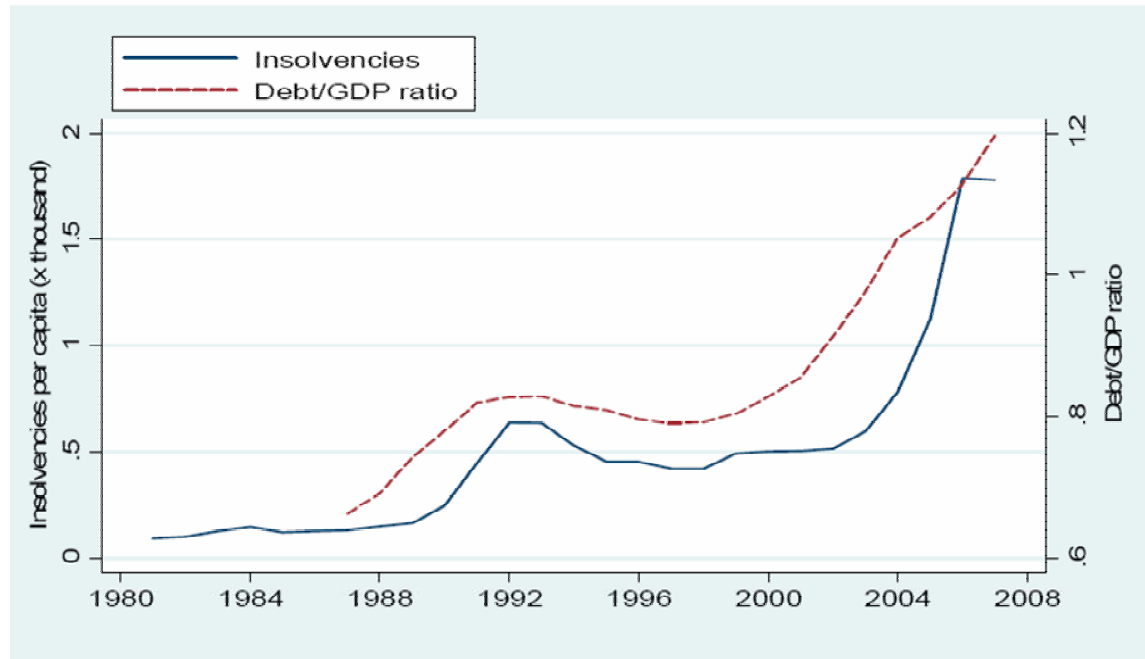
The Opportunity

- The Credit Crunch
- Are we too late?
- Eager Sellers – Why?
 - The ‘Just Had Enough’ Brigade
 - Retirement
 - Waning Business Value
- Avoid ‘Stitch up’ Merchants

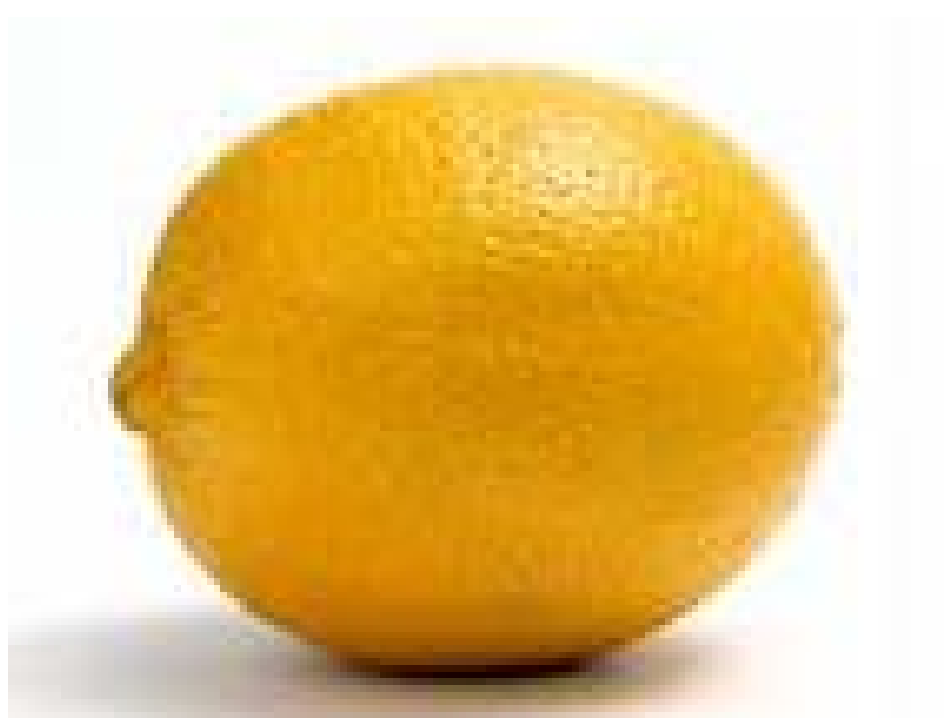




Debt and insolvencies in the UK: 1981-2007



1990's recession...Green Shoots Opportunities



How To Avoid The Lemons!



Risk Management

- Very limited protection
- Shares or Assets?
- Payment Structure
- Due Diligence
- Insist on Disclosure
- Legal Terms are KEY!





What's in the Suitcase?

- Shares or Assets?
- Specify, specify, specify!
- “Specified Assets”
- “Specified Liabilities”
- Plus Indemnities





Have a Good Look Inside the Business First

“Excluded Assets”.....”Excluded Liabilities”



Payment Structures

- Cash or shares?
- Cash over time
- Conditional Cash
- Earn-outs
- Retentions
- Escrow Accounts





Kicking the Tyres

- Due Diligence
- Due Diligence Questionnaires
- Paper Trawl
- Accountants
- Surveyors
- Lawyers
- You will recoup the cost on the price





Seller Warranties

- Warranties and Indemnities
- Disclosure
- What is a Warranty?
- Absolute Warranties
- BOK Warranties
- Breach of Contract

**I
PROMISE**



The 5 Price Pressure Points

- Heads of Agreement
- Due Diligence
- Disclosure
- Legal Terms
- Timing and Completion





Resist Seller Limitations

NO LIMITS

- Narrow Definition of “Claims”
- Joint and Several Liability
- Cap or No Cap
- Refuse to accept “General Disclosure”
- Maximise your right of recourse



Set-Off Mechanics

- What is a 'right of set-off'?
- No automatic right of 'set-off' in UK law.
- Set-off against 'Claims'
- What is a 'Claim'?
- Withholding Cash
- Reducing or cancelling deferred payments
- Refuse 'escrow' for deferred payments





Final Thoughts

- Deferred Payment...Immediate Liability
- Wide Warranties
- Earn-Outs with no Seller Control
- Basis of Accounts Preparation

Good Luck!



Employment Law Challenges

Part I

Martin D Donoghue

Partner

Silverman Sherliker LLP



**The Transfer of Undertakings
(Protection of Employment)
Regulations 2006 (TUPE)**



- What are they?
- When do they apply?
- What are the consequences of their application?



What are they?

- A set of legal rules, which, in certain circumstances, protect on employee's employment and preserves their employment contract



When do they apply?

- In two circumstances,
 - 1) When a business or undertaking or part of one is transferred to a new employer (a Business Transfer)
 - 2) When a new service provider is appointed, whether on the initial contracting out of services or to replace an existing external provider or when services are insourced (a Service Provision Change)



A Business Transfer – some definitions

- A transfer of an undertaking, business or part of an undertaking or business situated immediately before the transfer in the United Kingdom to another person, where there is a transfer of an economic entity which retains its identity

Regulation 3 (1) (a)

- An economic entity is an organised grouping of resources which has the objective or pursuing an economic activity, whether or not that activity is central or ancillary.

Regulation 3 (2)



A Business Transfer – when does it transfer?

- A question of Fact.
- Look for an economic entity which retains its identity.
- Some useful factors:
 - What type of business is it.
 - Do tangible assets transfer.
 - Do customers transfer.
 - Are the majority of staff ___ on.
 - How similar are the activities of the outgoing and incoming business.
 - What is the duration of any interruption of the business

Spijlcers Gebroeders v Benedik

Abbator CV EO Ccsc 24185

(1986) CMCR 296



Service Provision Change

- TUPE applies to
 - First time outsourcing
 - Subsequent outsourcing
 - Insourcing
- If conditions are met.
 - Must be organised group of employees situated in Great Britain which has as its principle purpose the carrying out of the activities concerned on behalf of a client.
 - The activities do not consist wholly or mainly of the supply of goods.
 - The activity is not for a single specific event or task of short term duration

Regulation 3.



Consequences

- Seller has to provide buyer with specified employment information
 - Employees' identities and ages.
 - Employees' terms.
 - Certain disciplinary and grievance information.
 - Certain court or tribunal claim details.
 - Details of collective agreements.
- Failure to comply – compensation up to 13 weeks' pay.

Regulations 11 and 12.



- Duty to arrange election of employee representatives, provide information to them, and consult with them on specified matters
 - Fact of transfer, reasons for it, and proposed date.
 - Legal economic and social implications.
 - Measures employer envisages it will take in relation to the transfer.
 - If employer is the seller, measures it envisages the buyer will take.
- Must consult on envisaged measures, with a view to agreeing them.
- Failure to comply – compensation up to 13 weeks pay.

Regulations 13-15.



- Employees transfer to buyer, with employment contracts, and any claims they may have.
 - Irrespective of wishes of buyer and seller.
 - Employee can opt out.

Regulation 4.



- Very difficult to vary employment contracts if the reason is the transfer or a contracted reason.
 - Even with the employee's consent.

Regulation 4.



- Transfer related dismissals are unfair, unless, for example, are redundancies

Regulation 7.



Employment Law Challenges

Part II

Nicholas C J Lakeland

Partner

Silverman Sherliker LLP



Constructive Dismissal



Discrimination

HR Challenges

- **What did you buy?**
- **What might you end up with?**

Tim Hurst July 2009

www.talentflow.co.uk

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A merger made in heaven?

Or

Will it give you problems from hell?



Join the Club

- Sports (rugby) clubs often merge with each other
 - Their Objectives?
 - to take advantage of greater strength in depth
 - more players, better teams
 - less local competition
 - better economics
 - a brighter more successful future



What Happened?

- The reality?
 - almost all within a very short space of time end up with –
 - the same number of players and teams (if not less)
 - the same problems
 - often a completely different atmosphere – why?
 - and
 - many struggle for the success they hoped for



Reality Check

- *Because*
 - There can only be one first team
 - Competition is very hot for the second team
 - The third team is a law unto itself
 - The fourth team isn't worth competing for
 - ***The fifth team doesn't matter***
 - There is only one selection committee
 - There is only one bar!



Unfortunate Results

- So -----
 - Some 'retire' – it's not their club any more
 - Some leave in disgust at the new committee and 'new direction'
 - Some are no longer good enough for the first and second team
 - Nobody trusts the selection committee
 - Some still want to do things their way & their face no longer fits
 - The fourth team gets forgotten about
 - ***Nobody takes any notice of the fifth team***

and

– The bar is now too crowded and full of cynics



But a business isn't like a club - is it?



Where are we now?

- *Except that*
 - People often join a company because they like it
 - They feel useful – they do a ‘good’ job
 - They could make their way up the ladder
 - Some aren’t the best team players
 - but you need them to keep things going
 - They like the people they work with
 - The rewards are quite good
 - They feel ‘secure’
 - They are ‘loyal’



Where will we be next week?

- - **And what happens after a merger?**
 - Some 'retire' – it's not *their* business any more
 - Some get axed, given 'life opportunities', 'fired'
 - Some leave in disgust at the new management and 'new direction'
 - Some are no longer good enough for the first and second team
 - ***Nobody trusts the management***
 - Some still want to do things their way & their face no longer fits
 - ***Nobody cares about the workers!***
 - Everyone is fearful
- ***The bar is now far too crowded and full of cynics***



HR Challenges

- **Optimising your investment in people**
 - What are you buying? Skills, experience, attitude, different motivations, aspirations fears,
 - Get the messages right – beware the cynics – avoid clichés and too much rosy ‘vision’ stuff
 - Be honest, open, realistic, supportive
 - Try to avoid losing hearts and minds – you’ll end up with a very different business

HR Challenges

- **Restructuring**

- Do you have the management capability?
 - If not – what do you need to import?
- Can you sell the value of change to both sides?
- Who do you involve in the change process?
 - Ignore key players at your peril
- Don't act on assumptions – find out
- If it ain't broke---(their way *might* be better than yours)
- Keep the best practice, capitalise on strengths
- Use the locals, make friends, find champions

HR Challenges

- **Redundancy**

- Select carefully, avoid old scores
- Act legally, but think morally
- Don't let the line abdicate responsibility
 - (Don't let the bosses avoid theirs)
- Support / train the messengers
- Support & train the leavers
 - Personal confidence, 'selling' themselves, moving on
–(Career Coaching, Job Search Coaching, Outplacement)
- Draw the line, try not to drip feed

HR Challenges

- **Retention** - Keeping & motivating the people you need for the business you thought you bought
 - Transitional retention & reward strategy
 - Engage / re-engage the survivors
 - Explain the opportunities *and* the risks
 - Up-skill, train, involve
 - Invest in individuals
 - Invest in teams
 - Be seen doing the right thing for those that go
 - Beware ‘big picture’ painting – cynics about!
 - Be prepared for ‘trivia’ to dominate



HR Challenges

- **Remember**

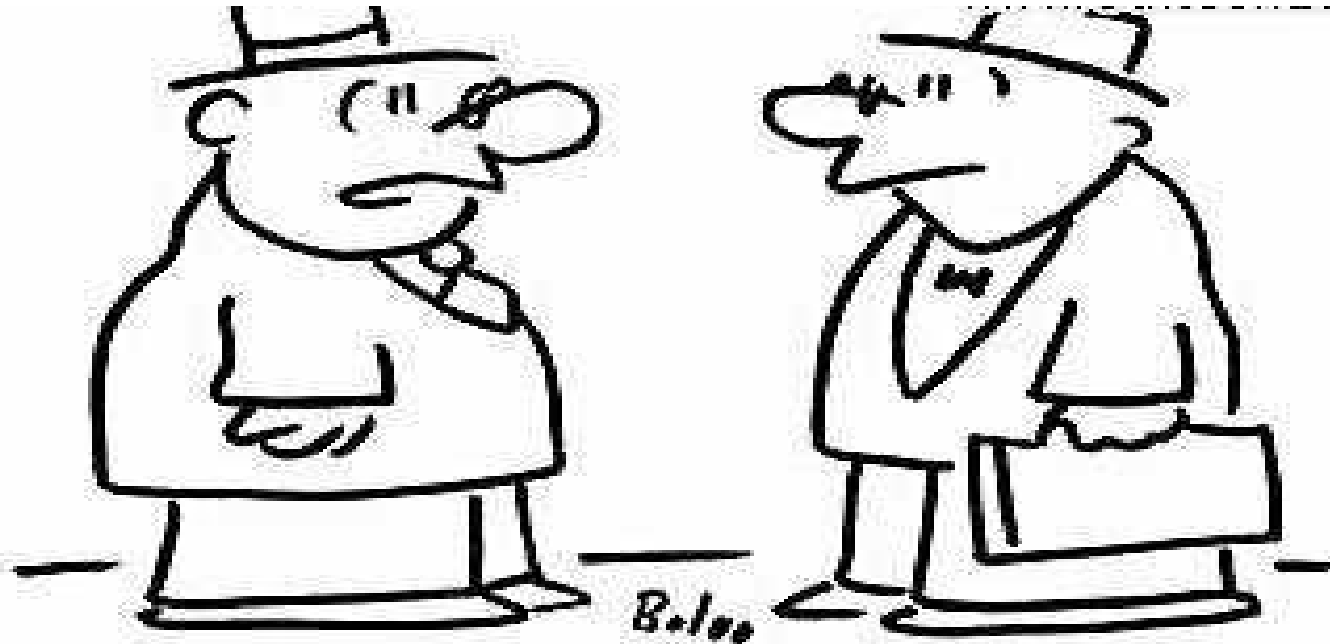
Whatever you do – buying or selling

you will never ever, ever get it ‘right’!

But you should at least try



Planning!



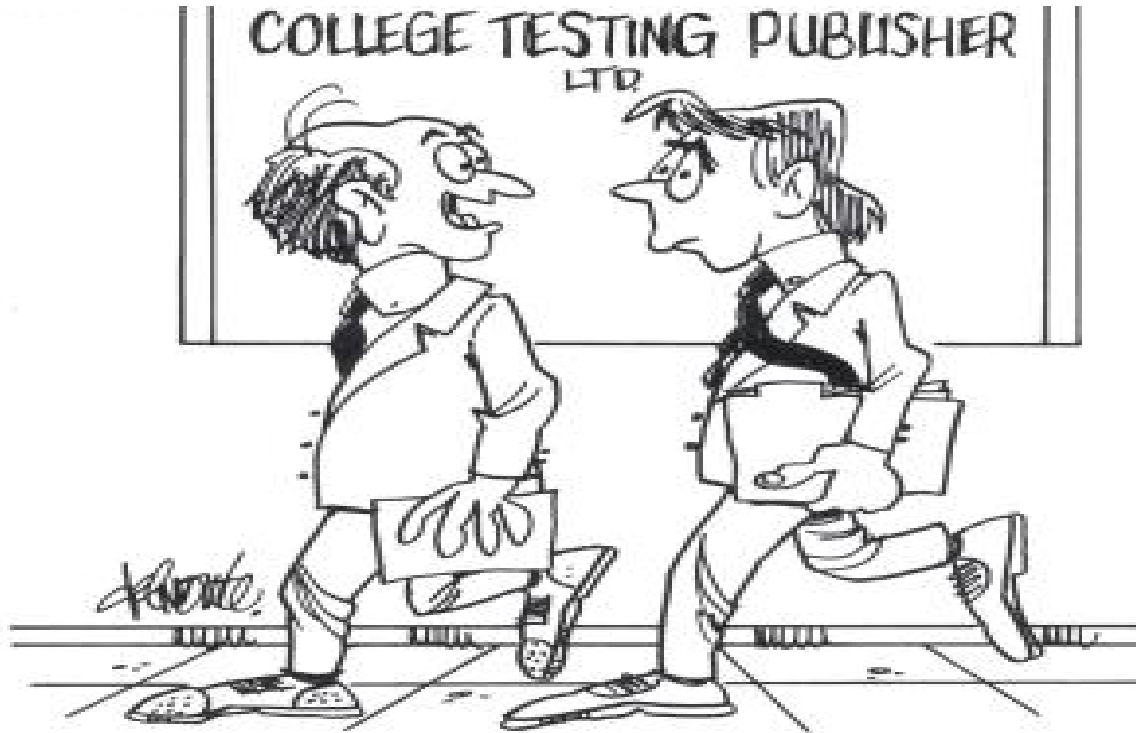
"I lost track of all my business mergers, and accidentally laid myself off!"

Managing the Message



"TELL ALL EMPLOYEES TODAY'S DOWNSIZING ALERT STATUS WILL BE RAISED FROM MODERATE TO SEVERE."

Selection Methodology



"Layoffs 'll be scientific. Aptitude tests will determine who's best suited for unemployment."

Explain your decision?



Management Capability?



"There's no easy way to say, 'You're Fired,' so I'm sending you an e-mail instead."

The Personal Touch?



"Although you've been a loyal employee here for a long time, I've decided to let you go. I trust you'll understand this is nothing personal, mother."

Think about the future



Providing support is a good investment



WITH THE REDUNDANCY AND THE DIVORCE
I'M STRUGGLING TO REMAIN MR HAPPY.



Contacts

- Silverman Sherliker LLP
7 Bath Place
London EC2A 3DR
- Tel. 020 7749 2700
- www.silvermansherliker.co.uk
- Christopher J Sherliker – cjs@silvermansherliker.co.uk
- Martin D Donoghue – mdd@silvermansherliker.co.uk
- Nicholas C Lakeland – nl@silvermansherliker.co.uk
- Tim Hurst – tim@hbs-mc.com