

# Dignified exit

When it comes to negotiating a director's exit from a company, each case should be considered on its own facts, says **Jonathan Silverman**, but there are basic principles that apply to all

**O**ne of the most delicate issues facing business clients is where a director employee with a shareholding either indicates a desire to leave the business or is found by the board to be wanting and is then asked to leave. Either situation needs to be dealt with very carefully to avoid sustaining long-term damage to the business and as practitioners we need to be thoughtful as to the way in which we advise the client.

**I**deally, advice is sought early in the process so that one can assist clients in mapping the exit in an organised and considered fashion rather than being faced with a situation where the director shareholder has already left and is simply making demands on the company or the other shareholders to acquire his shares - usually at an unrealistic price.

In practice, dealing with the buyback of the shares should be part of an overall discussion which will cover a considerable number of aspects. It is important to look at the matter in the round to ensure that a properly negotiated settlement is achieved which covers the other matters, whether they extend to non-compete covenants, or the notice period or garden leave and the like.

The first port of call must be the company's articles of association and any shareholders agreement entered into by the parties, which may need to be read in conjunction with a service agreement.

In most instances in dealing with a private company pre-emption rights will apply and is essential for the practitioner to look at each case on the facts. It is not that unusual for one to find that pre-emption rights are lacking or alternatively are structured somewhat differently from the norm. Moreover, when it comes to valuation, the situation can be very different if one is dealing with a case where 'good leaver/bad leaver provisions' apply.

Obvious as this may sound, it is crucial to look at the documentation before giving any opinion to the client as to the approach to adopt with an exiting director shareholder whether the parting is cordial or not.

It is almost inevitable that the parting director shareholder will have unrealistic aims when it comes to realising his shares, expecting a price which may well try to take into account future value or failing to take account of the discount for a minority shareholding or present market conditions.

The key will be to try to keep any negotiations on an even keel, ideally from the company's perspective ensuring that the employment side of the negotiations is covered off even if the negotiations on the shareholding remain outstanding. However, it will be preferable to have first secured at least an option for the company or the existing shareholders to acquire the shares of the departing director shareholder, if pre-emption rights are not in place.

Whenever one is asked about valuing shares in private company the adage of 'how long is a ball of string' comes to mind and inevitably negotiations will likely start from very different positions. Whether or not the articles, shareholders agreement or service agreement make reference to valuation by the auditors or an expert, valuations will differ for many different commercial reasons and it is important to ensure that your client understands that there is no simple answer to valuing the shares.

It is however, dangerous simply to focus on the share price negotiations in a vacuum. If the outgoing shareholder director is not prohibited from competing in his ability to damage the value of the company from which he's departing, then the danger is a real one and needs to be reflected in the negotiations on the premise that he cannot have his cake and eat it.

In many cases it may be to everyone's advantage to agree a higher share price in return for effective restrictive covenants if the same had not previously been negotiated, although much will depend on the intentions of departing director. Some judgement call may be necessary on the part of the company as to whether or not the person concerned presents any real challenge to the business once he has left.

If there is one area in practice where mediation readily comes to mind it is with regard to this type of negotiation where share valuations are as much an art as a science and a swift conclusion if it can be reached may well save a considerable amount of time and effort from all concerned and enable everyone to go forward rather than look backwards.



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