A guide to buying and selling a care home

Care homes in financial distress - Buying a business out of administration

There are several stages to buying and selling a care home that involve a number of different parties. This guide helps to set out each stage of the transaction process and offers some top tips for protecting your investment.

Our five part guide is aimed at the participants in a care home sale or purchase to give them the heads up on what to expect. The transactions often have many factors to consider from commercial, regulatory, legal and due diligence perspectives. This guide helps to give you a clear idea from the outset of the care home sale process, giving you the peace of mind that your business will be protected from any unexpected issues.

Explore the various elements of the transaction from different perspectives, including the following:

- Who will be involved and what their roles are
- The stages of a transaction
- Enhancing the value of your business – tips for sellers
- Protecting your investments – a buyers guide
- Care homes in financial distress and safeguarding your business

We hope that this guide is useful and always welcome questions and enquiries from existing and future clients. This is an evolving guide and much of the content is derived from working on transactions, and we are open to suggestions to further enhance its usefulness.

If you would like any further advice on buying or selling care homes please get in touch with Dominic Travers or Alexander Wood directly.

Dominic Travers
Partner
Corporate
01273 034761
dominictravers@coffinmew.co.uk

Alexander Wood
Partner
Restructuring and Insolvency
020 3002 2892
alexanderwood@coffinmew.co.uk

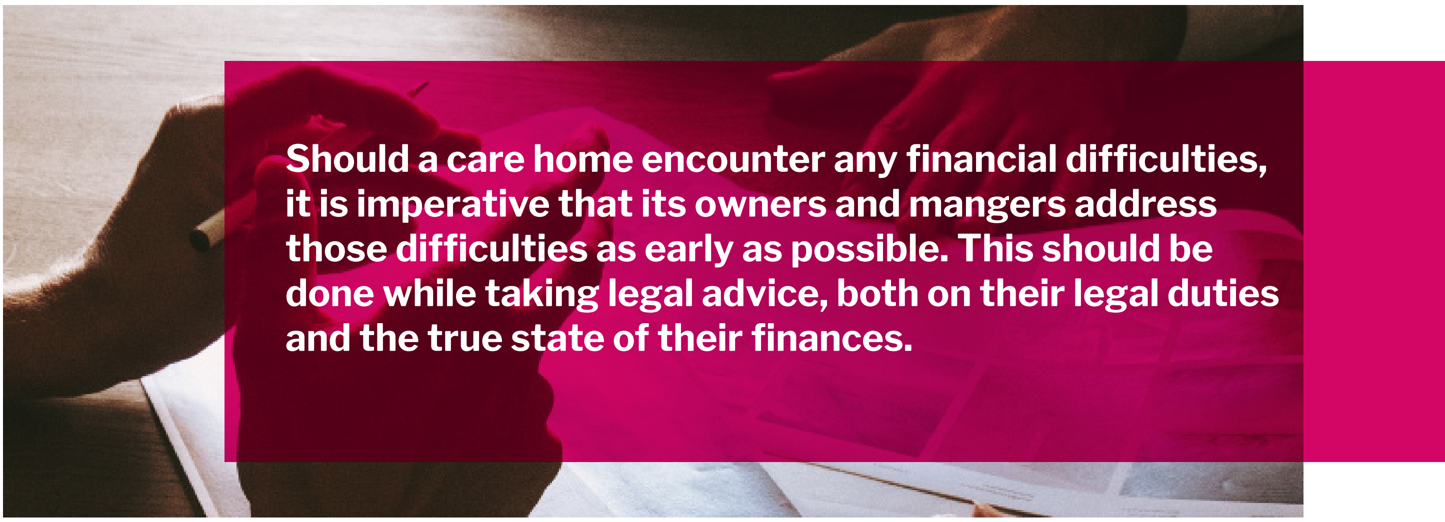
Care homes in financial distress - Buying a business out of administration

Some people seeing large monthly fees might assume that all care homes are making large profits, but a number of care homes have actually found themselves in financial distress.

When the costs of running a care home are analysed, it becomes apparent that profit margins can be tight. It is therefore not surprising that the sector has seen consolidation, as operators seek to acquire other businesses and absorb the central administration function, and then benefit from other economies operating as a larger group. This growing trend is one that's likely to continue for some time.

Should a care home encounter any financial difficulties, it is imperative that its owners and mangers address those difficulties as early as possible. This should be done while taking legal advice, both on their legal duties and the true state of their finances. Based on that advice, care home owners and managers can then enter into dialogue in an informed way with their lenders and other investors to work out the best way through the difficulties. Usually this would involve seeking enhanced support for existing lenders then, as appropriate, sourcing alternative lines of funding (whether debt or equity). If necessary, it may also involve making contingency plans to prepare the business to enter administration with a view to finding a buyer, or liquidation where the business is no longer viable.

If the business does need to be sold, we set out below some basic guidelines for a sale out of administration highlighting the differences between this type of sale and a usual, non-administration sale. Increasingly, care homes are sold shortly before its owning or operating company enters an insolvency process, in order to retain maximum value and minimise distress to occupants. Sales in those situations are carried out and structured in a very similar way, but without the involvement of an administrator.



Should a care home encounter any financial difficulties, it is imperative that its owners and mangers address those difficulties as early as possible. This should be done while taking legal advice, both on their legal duties and the true state of their finances.

The seller

Administration sale

A buyer would acquire the business and/or assets from the company acting through an administrator. Administration is a formal insolvency process that provides a legal stay against creditor action and is designed to help insolvent companies with viable business. Administrators are licensed insolvency practitioners appointed by the company, a charge holder (such as a bank), or the court to step into the business to try and recover what they can for creditors. The aim would be to continue to trade the business until a buyer is found. Sometimes, the business is sold immediately on appointment of the administrators in what is called a "pre-pack."

Usual non-administration

The owner of the business, usually a company is the seller in this case, as there are no other parties involved.

Price

Administration sale

The price of the business is likely to be considerably lower than what it could have been had it been solvent, and will probably be sold without the usual buyer protections (see below), which encourages a buyer to take a 'punt' on the business it is buying.

Usual non-administration

The price is usually market value and factors in protections given to the buyer under the transaction documentation.

Buyer protection: basis of sale

Administration sale

It is very much a case of 'buyer beware' as administrators will sell the assets on the basis of "such right, title and interest as the seller has", with no warranties in favour of the buyer. Essentially, this means that if there is an issue with title to or condition of the assets, the buyer will have no redress. Additionally, administrators will expressly exclude terms ordinarily implied by statute into sale and purchase contracts, such that assets are fit for their purpose or are of satisfactory condition. Therefore, the more due diligence that a would-be buyer can conduct on the state of the business and assets, the better.

Usual non-administration

The buyer can ask for the full set of warranties, indemnities, restrictive covenants, retentions and other protections to protect its investment.

Buyer protection: warranties

Administration sale

Unlike a purchase from a solvent company where the buyer can expect the seller to warrant that it owns the assets, the debts are recoverable, and there are no employee issues etc., and where the buyer may bring an action against the seller if any warranty is untrue, this is not the case in a purchase from administrators. Conversely, the buyer will warrant to the administrators that it and its advisers have relied solely upon their own opinion and/or professional advice as to the quality, state, condition, description, fitness and suitability of the assets.

Usual Non-administration

The buyer can ask for a full set of warranties.

Contracts

Administration sale

Contracts will often contain termination provisions on insolvency. Consider how relevant that is for the business and factor in obtaining consents and contract assignments as necessary.

Some suppliers or customers may be relieved that the business is effectively continuing and will present no issues. Others may see it as an opportunity to improve their contractual terms. Canny key suppliers often ask for a premium for outlined supplies in lieu of any debts they will have to the insolvent old company.

Usual non-administration

On a share sale, contracts will stay with the company being acquired. A minority of contracts may contain a 'change of control' provision, which gives the other party the right to terminate, so the buyer may need comfort in that regard.

On a usual non-administration sale of assets, some contracts will be freely assignable to the buyer. Where consent to assignment is required, assignment will need to be obtained before or after completion.

Communication

Administration sale
A care home business going into administration will understandably be of great concern to residents, their families, local authorities, employees, lenders, suppliers and the CQC. It is also likely to arouse interest in the local press. With that in mind, it is vital that constructive and timely communication is carried out to allay concerns and uncertainty as far as possible.

Usual non-administration
The parties usually want to keep the transaction confidential until it completes.

Employees

Administration sale
The appointment of an administrator would not automatically terminate any contracts of employment. The contracts will continue unless the administrator elects to terminate them. The Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE Regulations) apply in most instances where there is a sale of a business undertaking as a going concern. If the TUPE Regulations apply:

- all employees will automatically transfer to the buyer on their existing terms and conditions of employment, without a break in the continuity of their employment;
- there is a duty to consult with duly elected employees' representatives or recognised trade unions regarding the transfer, and failure to do so could lead to an award being made payable to the transferring employees by their new employer;
- if an employee is dismissed in connection with the transfer, it will be automatically unfair unless the buyer is able to demonstrate that the dismissal was for an economical, technological or organisational reason.

An administrator will be keen to conclude a sale, so as to dissuade employees resigning and finding positions elsewhere, not least the registered manager.

Usual non-administration
On a share sale, the buyer acquires a company with all its employees. On an asset sale, employees transfer under the TUPE Regulations.

Regulatory

Administration sale

The CQC is the government agency responsible for governance of quality in adult social care. It is wise to notify the CQC of any proposed restructuring, sale or closure of a care home as early as possible. As a result of the CQC's registration requirements, the time needed to complete a sale of a care home may be significant, and once a buyer is found, it will be necessary for them to obtain a new CQC registration for that specific care home before completion can take place. The process is likely to be shorter if the buyer is already registered with the CQC, but will still take several weeks. The use of pre-pack (or post-pack) sales in the restructuring of care homes is therefore impractical without incurring high levels of risk. Interim managers can be brought in to satisfy CQC concerns and corroborate the risks.

Usual non-administration

The process for non-administration sales is much the same as above, primarily because the regulations apply to the type of property, therefore the differences are generally quite minor.

Property

Administration sale

If the premises of the insolvent company or business are freehold, it may be transferred as part of the deal or sold elsewhere and leased to the buyer. If the premises are leasehold, an assignment of the existing lease will be required, which takes time and usually requires the consent of the landlord. Given the time constraints, it is common for a buyer to be granted a licence to occupy the premises for either a definitive period, or until notice is given by either the administrator or the landlord.

Usual non-administration

On a share sale, a freehold property owned by the company will form part of its assets. A leasehold property may be subject to a 'change of control' provision and the landlord's consent required for continued occupation. Outgoing directors of the company who are guarantors under the lease are very likely to insist on having the guarantee removed on completion. On an asset sale, a freehold property would need to be transferred to the buyer as part of the transaction. Given the longer time periods to plan and negotiate a transaction, the property side is likely to be a completion condition, and it is unlikely that a buyer would agree to occupy under licence.

There are a number of different stages involved in the process of selling or purchasing a care home, and each stage links to the next one.
For more information on buying and selling a care home, you can download our full guide to care home sales and purchases on our website: coffinmew.co.uk/carehomeguide