

# Blake Laphorn Tarlo Lyons' nursery and childcare news

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## buying a failing business

**There is a growing trend for buyers to consider purchasing failing settings or settings in financial difficulties. This can be a good strategic plan if you have the vision and drive to turn the setting around however there are significant pitfalls in buying a business that is in a precarious financial state.**

### liabilities

If possible, avoid buying the shares in the company and purchase the assets and business from the company instead. If you buy the shares:

- you take on all its liabilities (current and historic) whether you know about them or not
- hidden liabilities (such as an uninsured personal injury claim or undisclosed tax liabilities) could wipe out the value of the assets

### financial claims

It's important to note that the seller is required to make representations about the business. If those are shown to be untrue the buyer has a financial claim against the sellers. That financial claim will be worthless if the sellers have no money or unencumbered assets.

Furthermore, you should not buy shares or assets on the assumption that you can recover any loss from the sellers after the event. Although you may legally have the right to do so, actually getting recompense can be difficult and expensive.

### due diligence

Although quite a lot can be discovered through the investigations made by your solicitor and accountant, many of their findings are dependent on what they are told by the sellers. If the sellers do not answer the questions fully, or don't provide documents requested, you will have an incomplete picture of what you are buying.

### liquidation

If the company running the business is insolvent (its liabilities exceed its assets) it may be put into liquidation soon after the sale. Your purchase may come under scrutiny by the liquidator:

- you must be able to show that you have paid a reasonable price for the business and assets. Therefore, obtain valuations and pay a price broadly in line with them. A buyer is allowed to get a good deal so long as it is within the bounds of reasonableness. If the purchase is found to be at an undervalue it may be reversed if the buyer is unable to pay the shortfall to the purchase price
- if you are asked to satisfy part of the price by assuming some (but not all) of the seller's liabilities to its creditors that may be a preference, allowing the liquidator to challenge those payments. It is preferable to pay the whole of the purchase price to the seller.

It may be preferable for the sellers to put the company into liquidation or another insolvency procedure to ensure purchase of the business from the insolvency practitioner. This avoids the potential for preferences and buying at an undervalue however, the insolvency practitioner will not give any representations about the business. Moreover, you will have no redress against the insolvency practitioner if you later discover problems of which you were unaware.

### additional points to consider:

- if an insolvency practitioner has been appointed you will often have a very short period in which to make investigations as they will want to sell quickly
- speak with Ofsted and the Early Years Unit to be sure that you have their support
- parents may not be prepared to leave their children at a failing setting, so you may have to start again from scratch



### CONTACT

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