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Founder Thesis

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Money in the Bank

Thesis: A countersigned offer feels like the end of a process. It is the beginning of the part the founder does not control. A non-binding offer obliges nobody to complete, and a signed sale agreement, where signing and completion are separated, still leaves conditions to be satisfied before the money moves. Buyers withdraw for reasons that are frequently legitimate and sometimes have nothing to do with the seller. The consequence is never symmetrical. Preparation cannot stop a board changing its mind. It decides how much of the damage is his to explain afterwards.

01 The Man Who Had Already Left

The buyer's Non-Binding Indicative Offer was countersigned on a Thursday afternoon in November, and Andrew went home early.

He had spent nine years building an EDI platform for a niche industry. Getting it to the point where anybody else could look at it had taken another ten weeks: a teaser, an information memorandum, four years of management accounts rebuilt until they said the same thing twice, and a list of the questions a buyer would ask, with the answers written down before anybody asked them.

The teaser went out in the first week of September, to twenty companies. Five signed a confidentiality agreement and received the memorandum. Three came back with questions and wanted to meet Andrew, his chief technology officer, and his chief financial officer. Two made an offer. Twenty, five, three, two. Andrew had assumed that selling a company meant finding a buyer. It turned out to mean finding twenty and losing eighteen.

By week seven both offers were in, and for the next three weeks his adviser worked on the two of them together, pushing the price up and pulling more of it forward to completion. One was always ahead. That is the usual case, and it is not the one founders picture, in which two buyers are held nose to nose and made to bid against each other. The second offer was worth having anyway. It was worth having somewhere to go.

In week ten the buyer that was ahead amended its offer, and Andrew countersigned it. Exclusivity ran for six weeks from that afternoon.

The data room had been built in the fortnight before. It could not have been done any other way. Somebody has to assemble four years of restated accounts, every customer contract, the employment records and the technical documentation, and that somebody is not the founder. His chief operating officer built it. His chief financial officer prepared the numbers. Two engineers spent four days answering questions from a man described only as a technical adviser, and worked out what was happening before lunch on the first day.

The document signed at this point goes by several names, and the name matters far less than what it does. This one set out the total price, the amount payable at completion, and the amount payable a year later once the revenue and the customer contracts had been confirmed to be what the memorandum said they were. Andrew had not granted exclusivity until all of that was agreed, and his adviser had not let him. What the offer did not do was oblige anybody to complete. His adviser had said so plainly, and his lawyer had said it twice. Andrew understood it in the way a person understands the safety card in the seat pocket in front of him.

What did bind him was the exclusivity. For six weeks he could not solicit or negotiate with anybody else. The second buyer was told the business was no longer available.

If nothing went wrong, the rest of it had a known shape. Under the timetable his adviser had negotiated, the buyer had six weeks to complete diligence and to confirm in writing that it was satisfied, with the lawyers drafting the sale agreement in parallel rather than waiting for diligence to finish. Then a list. Not the buyer's list of things to check, but Andrew's list of things to go and get, and most of it depended on people who did not work for the buyer yet. Key staff agreeing the arrangements the buyer required. Customers giving any change-of-control consent their contracts called for. Four to six weeks for that, and for the lawyers to finish. Completion in the second half of January. Twenty-one weeks from the teaser. Seven months from the day he engaged an adviser.

That weekend he told his wife they should start looking at the rural property they had talked about for years. He stopped interviewing for a head of product, because the buyer already had one. None of it was money in the bank. In November that distinction did not seem to matter.

The diligence was thorough and, by the standards of these things, unremarkable. The room held, and the effort that had gone into it showed in the first fortnight.

Five weeks into a six-week exclusivity, on a Tuesday in mid-December, Mark sent an email. Mark was the buyer's corporate development director, which meant he ran its acquisitions in-house, and he asked for a call the following day with Andrew and his adviser. Nobody sleeps well between an email of that kind and the call that follows it.

Mark was courteous, and he was brief. The group had reallocated capital to a larger opportunity in North America. There was no criticism of Andrew's business. He hoped they might speak again in the future. The part that mattered took four minutes. The questions afterwards took another fifteen and settled nothing, because there is no satisfying answer to why a transaction that has run well between two willing parties simply stops.

Andrew said very little. His adviser said less, because there was nothing to say at that moment that would have helped.

> *He had countersigned the offer.*
> *In his own mind, he had sold the company.*

02 Why Buyers Walk

It is tempting to read that call as bad faith, and founders who have received one often do. The temptation should be resisted, because it produces the wrong lesson.

Buyers withdraw for reasons that are usually real. Diligence finds something the seller did not know was findable. The acquirer's own results move, and the board that approved a mandate in February is a different board in October. The deal sponsor inside the buyer, the one person whose enthusiasm was carrying the transaction, leaves for another firm. A better asset appears, and capital allocated to a business of Andrew's size is redirected to one three times larger. An earlier acquisition goes badly, and everything in the pipeline is paused while it is fixed.

And sometimes the reason has nothing to do with either party.

In 1994 one of my own software companies was the Australian reseller of an accounting system called Prophecy, which was built on the Ingres relational database. We had spent six months on a licence sale to a large Australian buyer. Every barrier had been crossed: the proposal, the terms, a diligence exercise the buyer had completed to its own satisfaction. We were deep in implementation planning. My team was assembled and ready to start configuring the software. We were, by any reasonable reading, days from signature.

Ingres was then owned by the ASK Group, and in 1994 Computer Associates acquired the ASK Group. Our buyer, reasonably enough, decided it did not wish to commit to a product whose ownership had just changed hands, and terminated a purchase that had nothing to do with us. Hundreds of thousands of dollars in licence and consulting fees evaporated because of a decision taken on the other side of the world by people who had never heard of my company, or of the buyer who was ready to sign.

Nobody behaved badly. The transaction simply ran out of time. Had we closed two months earlier, the acquisition of ASK would have been somebody else's problem.

Time kills deals. I learned that selling software, nearly twenty years before I learned it selling companies, and I have repeated it to every client since.

It also marks the line this issue is really about. You cannot prepare for a buyer's board changing its mind. You can prepare for what diligence finds when it looks at your company.

> *You cannot prepare for a buyer's board changing its mind.*
> *You can prepare for what diligence finds when it looks at you.*

03 The Asymmetry

Readers of past issues met exclusivity in Issue 18, where Helen discovered in week seven that her recurring revenue had been rebuilt by the buyer's accountants, and she had no market to walk back to. That issue was about a buyer who stayed and moved the price. This one is about a buyer who leaves, and it produces a different kind of damage, because there is no transaction at the end of it to absorb the cost.

Consider what each side lost when that call ended.

The buyer lost external legal and accounting fees, several hundred hours of a corporate development team's time, and some of the internal credibility of the sponsor who had championed the transaction. Those costs were real. They were also survivable, which is the whole difference. The transaction became a line item in an acquisitions pipeline review, was briefly discussed, and then removed. Nobody was dismissed. The team moved to the larger opportunity that had displaced Andrew, and by April had largely stopped thinking about him.

By the time the call came, Andrew had spent fifteen weeks of the twenty-one the transaction had been given, on top of the ten weeks of preparation before the teaser. He had spent three quarters of the timetable and owned none of the outcome. It was April before the company was running on its own agenda again. Ten months, for a transaction that had been designed to take seven and did not happen at all.

The process had taken most of his attention across those ten months. He lost adviser and legal fees that were not contingent on completion. He lost a head of product he did not hire and a partnership he did not pursue, because both had been deferred until after a transaction that did not happen. And he lost the private certainty that he was finished, which is harder to price than any of it. There was also a conversation to be had at home about a rural property that was no longer being bought.

There is a second asymmetry underneath the first one, and it is the more important of the two. Andrew held a countersigned document. The transaction terms in it were expressly non-binding. There was no obligation to buy that he could enforce. His anger did not turn a non-binding offer into an enforceable sale. The binding obligation that mattered ran the other way.

That is the point that settles it, and it is not about what each side spent. The buyer could put its capital somewhere else that month, and did. Andrew could start another process. What he could not do was reassemble the one he had. Twenty companies had been approached in September. By December the two that made offers had moved on, and a founder going back to a buyer he turned down in November is not standing where he stood the first time. The second offer had been worth having. It was worth having right up to the afternoon he signed it away.

In a small number of transactions a seller negotiates a reverse break fee, so that the buyer pays an agreed amount if it withdraws in specified circumstances. The circumstances matter, because not every withdrawal triggers one. In the middle market the fee itself is uncommon, and what a founder is more likely to obtain is a capped reimbursement of agreed costs, set well below what a failed process actually costs him. It is worth asking for. It is not worth relying on.

> *The buyer kept its alternatives.*
> *Andrew had traded his for six weeks of exclusivity.*

04 What a Collapse Leaves Behind

The damage that matters is not the fees. It is what remains inside the company afterwards.

People knew before the offer was signed, and that is not a failure of discretion. It is arithmetic. The data room could not have been built without them. What a collapse changes is not who knows. It is what they now know.

Some of them will be doing arithmetic of their own. A founder who tried to sell once may try again, and the second attempt may not include them. Nobody says this out loud. It sits in the room for months.

Customers sometimes know too. Where reference calls are permitted, and many sellers restrict them until very late for precisely this reason, a large customer asked to speak with a stranger about its satisfaction levels rarely fails to draw the obvious conclusion.

Then there is what the buyer takes with it. A confidentiality agreement can require the return or destruction of everything the buyer was given, and it can restrict how the information is used. It cannot do anything about the fact that a group with businesses adjacent to Andrew's has now seen his customer concentration, his contract terms, his churn by cohort and his margin by product line.

And there is Andrew, standing in his own building in front of a team that had watched him try to leave, running a company he had already said goodbye to.

> *A buyer can return every document.*
> *It cannot return what it learned.*

05 The Next Buyer's First Question

Eighteen months later a second buyer approached Andrew's adviser.

The first substantive question in the first meeting was not about growth, margin or product. It was this: we understand you ran a process last year and it did not complete. What happened?

A failed process is not always known to the next buyer. Confidential ones sometimes stay confidential. But once it is known, it becomes part of the company's transaction history, and there is no version of that conversation in which the answer does not matter. "They got cold feet" is not an answer. "It was not the right fit" is not an answer. Any response that sounds like an explanation invented afterwards invites the buyer to assume diligence found something, and to price the assumption.

The best answer to that question is one that already existed before the failure. A founder who had the revenue rebuilt, the contracts reviewed and the technical debt documented before the first buyer arrived can show the work, dated. That does not prove what the buyer did or did not find. It does establish what was already known and disclosed, giving the next buyer something more than the founder's recollection to assess.

Which is the strange part of Andrew's year. The work he had done to make the company ready was the part that survived. The buyer process had to be run again. The preparation did not.

There is a second record, and it is the one almost nobody keeps. A process that ends without a transaction still has to be closed properly. What the buyer said when it withdrew, and when. Which diligence workstreams were finished and which were still open. Whether any material issue had been raised, and what answer was given to it. Whether price or structure moved during exclusivity. A contemporaneous note cannot prove that the buyer told the whole truth. It can show what the buyer said, what diligence had raised and what remained open. A founder answering those questions eighteen months later from memory is defending himself. A founder answering them from a note written while the process was still running is reporting what happened.

The visible work of a sell-side adviser is finding the buyer and negotiating the number. The less visible work is the sequencing: what is tested before exclusivity is granted, what is found before a buyer finds it, and how long the seller is left standing in a room with one door. When a process ends without a transaction, the last piece of that work is the record it leaves behind.

None of that guarantees a completion. Buyers will still withdraw, boards will still change their minds, and companies will still be acquired at inconvenient moments on the other side of the world. What preparation changes is the size of the hole a withdrawal leaves, and how much of it the founder has to explain later.

Andrew's second process completed. He answered the question in the first meeting calmly and with documents, because this time the answer existed before the question was asked.

06 Money in the Bank

There is a conversation I have in almost every process, and it always arrives at roughly the same point: late, with diligence behind us and the lawyers close to finishing the sale agreement. The founder has started to relax. He puts it to me as a statement rather than a question.

"So we are effectively done. Once the lawyers finish the agreement, I am free."

I answer it the same way every time, and I answer it as a founder before I answer it as an adviser. I have sat on the other side of that table in my own companies, waiting on money that had been agreed, documented and quietly celebrated. So I tell him what I actually believe. Optimism is useful. It keeps a founder upright through the weeks when almost nothing is in his hands. But optimism is not information, and it should never be mistaken for progress. A little paranoia is the more reliable instrument. The deal is not done when the lawyers finish. It is not done when the agreement is signed. It is done when the money is in the bank.

Some transactions sign and complete on the same day, and all of it happens inside a few hours: the conditions precedent proved, the executed agreements exchanged, the first payment made. Others sign first and complete later, once the conditions have been satisfied. The legal position differs. The founder's bank balance does not. The weeks leading up to that day feel like a slope, confidence accumulating week by week. They are not a slope. They are a step. Everything on the near side of it is the same amount of nothing, whether it is week one or week twenty.

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A transaction is legally complete on completion day.
It is finished when the last of the money is in the bank.

THE EXCLUSIVITY TEST

Five questions worth answering before an offer is countersigned, not after.

1. What will diligence find that you have not already found yourself, and where is your written answer to it?
2. How many weeks of exclusivity have you granted, what ends it early, and is any extension automatic?
3. If this buyer withdraws in the fifth week of a six-week exclusivity, who else knows your business well enough to move?
4. Which of your people will necessarily know a process is running, and what have you decided to tell them?
5. If the buyer materially changes the price or the structure during exclusivity, what happens to the exclusivity?

The last question is the one too many signed offers leave unanswered.

THE ACQUIRABILITY ASSESSMENT

Nothing prepares a founder for a buyer's board changing its mind. What preparation addresses is the other category: the findings that are already inside the business, waiting for somebody else to discover them first.

The Nexxit Acquirability Assessment is 18 questions on where those risks currently sit in your company. It takes about 10 minutes and there is no cost.

Begin at nexxit.ai

Cube Capital advises founders and boards of Australian software and technology companies on strategic options, exit preparation and cross-border M&A transactions. In a transaction the firm acts for sellers, not buyers, and is retained by founders who want an independent view of how buyers will price their business, where value may be lost, and what can be done before a transaction begins.

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Sources

Computer Associates International, Inc. agreed on 18 May 1994 to acquire The ASK Group, Inc., the owner of Ingres, and commenced a cash tender offer at US$13.25 per share on 25 May 1994. Shares were accepted for payment on 23 June 1994. Computer Associates International, Inc., Form 8-K, event date 23 June 1994, filed 1 July 1994.

I have found no reliable public dataset recording how often signed offers fail to complete in private transactions. Estimates in circulation are not derived from any audited source and are not relied upon here.

Andrew and the transaction described are illustrative, and are constructed from patterns common to Australian software M&A rather than from any single client or deal. The Prophecy and Ingres events described are the author's own experience.