BUSINESS SALES MERGERS ACQUISITIONS

The Legal Aspects of Transactions

Guide 4

Avondale Business Guides Series

The legal aspects of transactions

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This Guide is not intended to be definitive, and the accuracy of its contents can not be guaranteed. Professional legal and financial advice from your regulated advisors should be taken on all aspects of transactions.

Warranties and Indemnities

In mergers, acquisitions and liquidations warranted statements and indemnities provided by the vending shareholders of a company to the purchaser or the financial advisor sponsoring the sale of shares to the public are used by the purchaser to paint a picture of the company which is being bought. They are a fundamental part of the due diligence exercise to contractually bind the vending shareholders to their statements in order to avoid the common law defence of *caveat emptor*.

If the buyers subsequently discover after the sale that any of these warranties or indemnities were incorrect, and that the company is worth less than they expected it to be, they can then make a claim against the vendors for breach of warranty. It is usually possible to claim under the warranties for up to seven years in relation to tax and up to two years for non-tax claims. Generally, the amount, which the purchaser can claim back under the share sale agreement, is the amount paid for the company. This leaves the vendors at risk for possibly the entire sale price for up to seven years. This is a risk many would prefer to transfer.

A warranties and indemnities insurance policy insulates the purchaser or vendor from the financial implications of incorrect statements in corporate take-over and merger documents. A policy can be tailored to fit the individual needs of the specific deal. Legal costs would be included and it is possible to match the policy period to the duration of the warranties. A policy can be drawn up for either individuals or corporations in a wide range of roles, including shareholders, trustees, management and guarantors.

There are, of course, certain warranties, which cannot be insured prudently, such as statements of hope, rather than fact without substantial evidence to support them - e.g. profit forecast warranties relating to unaudited accounts. Exclusions to an insurance policy would also include claims involving the fraud or dishonesty of the insured.

Sale of a business

When a business is sold, the purchaser undertakes in-depth investigations into the target company, which obviously include questions regarding its financial health. The statements and warranties provided by the vendor then become incorporated into the sale documents. The statements, which are made in relation to the company, can result in strict liability for the vendor, should they prove to be incorrect or misleading. The following are some issues, which should be considered.

- There might be forgotten guarantees, which could be subsequently activated.
- Can it be certain that all taxes have been declared and paid up to the point of sale?
- Might the tax authorities subsequently question the basis upon which returns have been made?
- Have all claims against the company been fully disclosed?
- Could any mistakes have been made in stocktaking?
- Intellectual property matters.
- Product liability matters.
- Pension liability.
- Environmental issues.

The consequences for uninsured vendors can be very expensive and could erode much of the capital that has been built up in the business. Furthermore, any misstatements may result in strict liability for the individuals or corporations involved in its sale. By purchasing warranties and indemnities insurance, the vendor will be in a position to use the proceeds of the sale without delay as it will not be necessary to set aside an amount in case of any breach of the warranties.

Purchase of a business

For the purchaser of a business, the cost of pursuing individuals for breach of promise may be expensive and difficult. Potential problems could include:

- Whether there are hidden sales proceeds in "offshore" or protective havens
- Whether or not the vendors could jump the legal jurisdiction limits
- The long-term financial solvency of the vendor or the management who have given the warranties and indemnities.

The purchase of a warranties and indemnities policy thus also has appeal if buying a business. As indicated above, the buyers will often be concerned as to whether or not they will be able to enforce a claim if what they bought turns out to be worth less than they were entitled to expect. If the buyers insist that the sellers take out insurance, they gain comfort that the vendors have a safety net in the event of a claim at a later date.

Examples

Solution for the seller

A chain of travel agencies is being sold to Company B. The latter requires warranties about the state of the company, which the owner of the chain gives. However, the owner wants a stress-free retirement. A warranties and indemnities policy is arranged to cover the warranties and tax indemnities for the same period as the warranties were given.

Solution for the buyer

Company A is taking over a mutual company. As part of the deal the mutual company insist on a blanket indemnity from Company A in the event of a problem over demutualisation. However, if the indemnities are realised, this would then have a serious effect on the balance sheet of Company A. Insurance is thus arranged to cover the indemnity that Company A provided to the mutual company and its directors with a limit of £300 million for the 6-year period.

Company C is purchasing Company D. However, it can only obtain warranties from the management accounting for 10% of the value of the company. The venture capitalist involved does not give warranties, as is commonly the position. In this case, the buyer arranges a policy to cover the full value of the purchase on the same basis as the warranties being provided by the management.

Solution for buyer or seller

Company Q is purchasing Company Z and requires warranties to be made for up to £1 million by the vendor. The vendor is happy to make the warranties but wishes to invest the proceeds in another entity. As a result of this, the vendor is unwilling to support the warranties with funds to be held in escrow. Either the buyer or the vendor arranging a warranties and indemnities policy can avoid the need for a full escrow.

Solution for the creditor

Liquidators have taken over Company E and, in order to obtain the best price for the creditors, they need to provide warranties when selling the company or its assets. However, as the warranties have five years to run, the liquidator is unable to distribute the proceeds of the sale to the creditors. The solution used is to purchase a warranties and indemnities policy to cover the warranties, thereby allowing the proceeds to be distributed.

Solution for specific indemnities

Company A is acquiring a food processing Company X. A piece of litigation had been disclosed whereby the plaintiff was suing for personal injury resulting from the ingestion of a product made by Company X. The liability of the company and the amount of damages are uncertain and therefore Company A requires an indemnity from the shareholders of X. The litigation is not or may not be covered by the product liability insurer of X due to a breach of policy conditions or exclusion. The underwriters assess the litigation and agree that the reserve held by the food processing company of £200,000 is probably inadequate. They therefore offer a policy for £2 million to back up the indemnity provided by the vendor.

Other areas of risk

Environmental
The majority of mergers and acquisitions involve the transfer of land, which can potentially pose severe environmental (and thus financial) risks. This is becoming an increasingly important issue - often giving rise to extensive indemnities in sale and purchase agreements. Sometimes, the possibility of further or new pollution conditions can make a transaction too much of a risk. The reason for this is that if the pollution on the site becomes apparent and the original polluter cannot be identified, then the responsibility for the clean-up process rests with the current owners or occupiers of the land. This will happen even if they were not in any way responsible for the original pollution. It is possible, however, to design an insurance programme that will cover both the known and the undiscovered pollution conditions.

Public offerings and prospectus liability
The prospect of increased shareholder litigation is a fact of life for UK companies, and especially those with US exposures. There is also an increased awareness of the responsibilities faced by directors and officers of companies, particularly in any public offering of a company's securities. As signatories of a public prospectus have a personal responsibility for its contents, they can be held personally liable for the losses of holders of those securities arising from inaccuracies or misrepresentations in the public prospectus.

It is possible to obtain protection that covers liability relating to the prospectus and listing particulars as well as negotiations, discussions and decisions in connection with the offering prior to their filing or issue. This would cover the directors and officers involved in preparing the prospectus together with the company for any securities claims brought against them. It is also possible to cover employees of the underwriters of the issue as well as solicitors and accountants. The solution can be tailored to cover equity or debt issues, both initial and secondary. One of the advantages of this type of policy is that it ring fences the exposure for the offering from the directors' and officers' liability insurance.

Types of claims
To conclude, the following are some examples of situations that have resulted in a claim under a warranties and indemnities policy.

Following the sale of a large UK restaurant chain, it was discovered that the air conditioning/extractor unit of one of the restaurants was overhanging a neighbouring property. The permission for this state of affairs had long since expired, as a result of which the neighbour was refusing to renew such permission. The restaurant now faces closure and it is expected that there will be claims of up to £2.5 million.

Following the sale of a UK company, one of the employees went on leave. After the discovery of an irregularity, there was a further investigation that led to the revelation that this employee had been writing cheques to a number of friends over many years. The initial investigations discovered losses of £460,000 and rising.

The role of a Director

When carrying out a transaction it is vital that the Directors act in the interests of the shareholders. Below is a reminder of the key roles of a Director.

The main difference between a limited company and a sole trader or partnership is that the shareholders of a company can separate their assets from that of the business. A sole trader or partner is directly responsible for the debts and liabilities of the business. With a limited company, broadly speaking the debts and liabilities of the company are the responsibility of the company and not the individual shareholders. The directors of a limited company are elected by the shareholders to look after their interests and run the company on their behalf. This separation is however conditional upon the responsible behaviour by the directors and there are a number of criteria that the directors must fulfil. It is also worth noting that very often, the shareholders of smaller limited companies elect themselves as directors, and however the distinction between directors and shareholders is an important one. Some of the duties and responsibilities of a director are:

- Must act in good faith and in the interests of the company.
- Must carry out duties diligently and honestly.

- Not carry on business with intent to defraud creditors or for any fraudulent purpose.
- Not knowingly allow a company to trade whilst insolvent.
- Not to deceive shareholders
- Have regard for interests of employees in general.
- To comply with the requirements of the Companies Act.

Financial assistance rules

The UK Companies Act 1985, s.151 prohibits a company from giving financial assistance for the purchase of its own shares. As most acquisitions are financed by using the target company as security this creates an issue that needs to be tackled and understood to carry out a transaction. Below is intended as an introduction, not a definitive guide to the issue. The two most common types of financial assistance both associated with the acquisition of all or most of a company's shares are:

(a) The target company offering security over its own assets to secure the borrowing of the purchaser, where that borrowing has been obtained in order to fund the purchaser's acquisition of the target;

(b) The purchaser borrowing cash from the target company in order to fund the purchase. This usually happens because the seller of a cash-rich target company has increased the purchase price in order to "take cash out of the company", without having to declare a dividend (this is generally done for tax reasons).

What are the implications of financial assistance?

- If a company gives financial assistance in breach of section 151, then the company is liable for a fine and directors liable for a fine or imprisonment;
- Transactions in breach of the prohibition on financial assistance are not enforceable, as they are illegal. Further, guarantees given for liabilities which would contravene the financial assistance prohibition may themselves be unenforceable;
- If financial assistance is not dealt with properly, a lender may find itself in a position where security or guarantees are not enforceable.

NB: the underlying share sale agreement, which the financial assistance was intended to fund, will still be enforceable. These considerations can affect any person or company involved in or funding the acquisition of shares in an English company.

The Whitewash- How can the prohibition on financial assistance be avoided?

S.155-158 of the UK Companies Act 1985 allows private companies (but not public companies) to overcome the prohibition against financial assistance. These sections set out a procedure to be followed, which is commonly called the whitewash procedure. Without it, many transactions simply cannot go ahead. There are four basic requirements:

(a) the financial assistance may only be given if the company has net assets, which are not thereby reduced, or, to the extent that they are reduced, if the assistance is provided out of distributable profits;

(b) the financial assistance must be approved by special resolution of the members in a general meeting;

(c) **all the directors** of the company must swear a statutory declaration setting out the nature of the financial assistance to be given, and that it is the directors' opinion that the company will be able to both pay its debts immediately after the financial assistance is given, and that the company will be able to pay its debts as they fall due during the year immediately after the financial assistance is given;

(d) the auditors of the company must prepare a report (addressed to the directors) stating that they have enquired into the state of affairs of the company and are not aware of anything to indicate that the opinion given by the directors in their statutory declaration is unreasonable.

These basic requirements are subject to the following considerations:

- The special resolution of the members must be passed on the same date as, or within one week after the directors make their statutory declaration;
- Assuming the special resolution is passed, the financial assistance may not be given less than four weeks after the date of the resolution, unless the resolution was passed unanimously by all the members of the company (which tends to be the case), in which case the financial assistance may be given immediately;
- The latest date for the giving of the financial assistance is eight weeks after the swearing of the directors' statutory declaration;
- In practice, it is normal to carry out the whitewash procedure simultaneously with the share purchase and ancillary documents.

Additional requirements

As well as the statutory obligations referred to above, there are various procedural requirements:

(a) A detailed board minute dealing with the financial assistance will be required;

(b) The lender will generally require a further report from the auditors, addressed to the lender, confirming that the company is solvent;

(c) A memorandum from the board of directors, to be presented to the shareholders in support of the draft special resolution, is usually prepared;

(d) The financial assistance must be permitted by the company's memorandum and articles, which will therefore have to be considered and amended as necessary;

(e) The current auditor, if not being retained by the new owner of the company, will generally refuse to give the reports. A new auditor will therefore have to be appointed and will have to carry out a "mini-audit" in order to have the requisite knowledge to provide the reports;

(f) The outgoing directors will generally refuse to give the statutory declaration, because of the criminal sanctions if the financial assistance is not properly whitewashed, so they will usually resign and new directors be appointed immediately before the whitewash is carried out.

Who does what?

Normally, the purchaser's lawyers prepare the documents dealing with the procedure. However, any lender will wish to know that the procedure is correctly followed, as failure to follow it might have serious consequences for the borrower and the target, and thus for the safety of repayments to the lender. It is therefore normal for the lender to appoint its own lawyers to inspect the whitewash documents. The lender's lawyer would also usually expect to examine the financial and legal due diligence, the purchase contract and any associated documents as well, as they often assist in assessing the likely solvency of the company after completion.

Because the whitewash procedure can be complex, it is wise for the lender to appoint lawyers who have experience in this area.

What deals are likely to be affected?

In terms of the size of the deal where a whitewash procedure might be followed, because it is a legal requirement there is technically no minimum. In practice, however, the smaller the deal, the more likely it is that the purchaser will be able to obtain funds from sources other than the target company. If the target company is offering security for the purchaser's borrowing, then the whitewash procedure cannot be avoided.

Some typical examples of where there was financial assistance and a whitewash procedure was therefore carried out:

(a) A purchaser with no assets of its own buys a company that owns substantial assets. The lender funding the acquisition requires security over the assets of the target (usually given by way of a guarantee by the target of the purchaser's liabilities, the guarantee then being secured over the target's assets). This is particularly common in the purchase of a real property owning company;

(b) A purchaser buys a company for, say, £1 million. The target company has £200,000 cash that is not required for its normal cash flow. The purchaser reduces its own outlay (and possibly, therefore, its own borrowings) by £200,000, borrowing that sum from the target and using it to fund the acquisition.

What are the probable whitewash costs?
The purchaser will pay its own legal fees for the preparation of the whitewash documents, as part of its normal acquisition costs. The lender's costs for this work can vary. In our experience, the lowest was £1,200 and the highest £18,000. The lower end of this scale would be typical.

However, it is entirely normal for the lender's lawyer's fees to be paid by the borrower, so for the lender, costs are usually an issue only in that one lender might be perceived as cheaper than another due to the expected costs/charges of the deal. Further, it is normal to put a ceiling on the lender's legal costs. These ceilings will vary according to the size and nature of the deal.

Guide to TUPE?

Current 10/7/05. The Transfer of Undertakings (Protection of Employment) Regulations 1981, known as "TUPE" applies to almost all transfers of businesses from one employer to another eg: where a business (or part of it) is sold and where services are outsourced. TUPE is **<u>not applicable</u>** for Share Transfer sales as there is no change of employer. The company remains the employer. The TUPE legislation means that.

Employees employed by the seller just before the sale, automatically become employees of the buyer, on their same terms and conditions of employment upon the transfer of the business. It is as if their contracts of employment had originally been made with the new employer / buyer. The new employer also inherits the responsibility for employees who would have been employed by the seller, if they had not been unfairly dismissed for a reason connected with the transfer. Therefore, the buyer cannot lawfully select which staff to take on. Representatives of employees affected have a right to be informed about the transfer. They must also be consulted about any changes planned by the buyer.

The consultation rules
Where employees are represented by a trade union the employer must inform and consult with the union about the proposed business transfer. Where the employees are not represented by a trade union, the employer must inform and consult employee representatives about the proposals. The employee representatives may be either existing representatives or new ones specially elected by the staff for the purpose. There are legal requirements that apply to the election process and rights of employee representatives etc.

What must the seller tell the employees who are due to transfer?

- that the transfer is going to take place, approximately when, and the reason for it;
- the implications of the transfer for the affected employees;

whether the new employer is planning to make any changes, such as reorganisation as a result of the transfer, and if so, what arrangements are being planned and how those will affect the staff. The obligation to inform staff about the changes applies to both buyer and seller. The consultation must be undertaken with a view to seeking agreement on the proposed changes.

ETO reasons
Neither the buyer or seller can fairly dismiss an employee because of the transfer or a reason connected with it, unless the reason for the dismissal is an economic, technical or organisational reason entailing changes in the workforce (known as an "ETO"), for example a redundancy situation. Dismissal because of a relevant transfer will be unfair unless an employment tribunal decides that an ETO was the main cause of the dismissal and that the employer acted reasonably in the circumstances in treating that reason as sufficient to justify dismissal.

This is a very technical and complicated area of law and buyers / sellers contemplating the need for redundancies must seek specialist advice, in order to avoid claims of automatically unfair dismissal being pursued by the affected employees.

Transfer related dismissals and Tribunal claims
Employees can complain to the Employment Tribunal regarding their treatment as a result of the transfer. An employee claiming to have been unfairly dismissed because of a transfer has the right to complain to an employment tribunal that their dismissal is automatically unfair. Employment tribunals may order reinstatement or re-engagement of the dismissed employee if the complaint is upheld, and/or make an award of compensation.

Transferred employees who find that there has been a fundamental change for the worse in their terms and conditions of employment as a result of the transfer generally have the right to terminate their contract and claim unfair dismissal before an employment tribunal, on the grounds that actions of the employer have forced them to resign.

Employee representatives also have various rights and protections, including the right to protection from detrimental treatment and paid time off to discharge their duties as employee representative.
Where the employer fails to properly consult with the employees under TUPE, complaints can be issued in the Tribunal and the employer who is at fault may be ordered to pay compensation to each affected employee, up to 13 weeks' pay. Due to the complexities of TUPE, it may be unclear whether claims should be made against the previous or the new employer. In such cases, employees often issue their claim/s against both employers.

Pensions
This year, there have been major changes to pension rights under TUPE. The Transfer of Employment (Pension Protection) Regulations 2005 came into force on 6 April 2005. Previously, pension rights did not transfer to the buyer following the sale of a business / outsourcing arrangement.
The position since April this year is that employees who were members of an occupational pension scheme before a TUPE transfer will be entitled to have a pension scheme provided by the buyer / new employer. The new rules on pensions provide the buyer with a lot of flexibility as to what type of pension scheme to offer.
Where the seller provides a money purchase scheme or stakeholder pension, the buyer is under an obligation to match the seller's employer contributions to the scheme up to a maximum of 6% of basic pay.

Practical TUPE tips for the seller:
- Ensure staff have up to date employment contracts reflecting their current terms and conditions.
- Do not change the work force terms in the lead up to a sale.
- Do not make people redundant if the buyer asks you to.
- Make sure you comply with the consultation rules.
- Timetable enough time to consult with the staff.
- Seek Advice regarding the TUPE consequences of the deal at an early stage, in order to determine the tactics / assess the risks involved with the proposals.

Practical TUPE tips for the buyer:
- Raise enquiries regarding the staff's existing terms and conditions, length of service, roles and functions etc in order to find out what employment liabilities you are taking on;
- Carry out a risk assessment regarding the employees;
- Make sure you comply with the consultation rules;
- Timetable enough time to consult with the staff;
- Ensure that the seller has complied with it's legal requirements under TUPE regarding consultation etc;
- Seek Advice regarding the TUPE consequences of the deal at an early stage, in order to determine the tactics.

Sample Heads of terms

The heads of terms is a summary, non legally binding in most respects of what the parties have agreed. Most parties will offer using a form of draft heads of terms. This saves time and creates clarity early on.

Sample

Date:
Ref:
This document outlines the 'head' terms agreed between the parties, prior to negotiation of a final sale and purchase agreement. Save in the respect of confidentiality and exclusivity; the terms are not legally binding, and are subject to due diligence and contract.

The parties are ("the Parties")

The Vendor	***The Purchaser***
XYZ Vendor/s, or key shareholder/s, name/s *C/o Co. name or home address if share sale* *Or Company name & no. of private* *Address In private town* *Postcode*	*Full name/s of individuals* *Or Company name c/o of individual/s* *Address of buyer town* *County* *Postcode*

1. The sale basis
Mr. / Mrs. Shareholders/XYZ Company ("the Vendor") will sell to Mr. / Mrs. Purchaser/ABC Company ("the Purchaser"), the business known as (XYZ name, of 00, XY Street, any town) (or company XYZ reg.no.123456678) and any associated names ("the Business"). The sale will be on a fixed asset and goodwill basis/share transfer basis.

2. Timescale
The parties will conduct their best endeavours to secure completion by (date XYZ).

3. Purchase Price/Terms To delete or insert rows click on table command.

The purchaser will pay the vendor as follows:			
Item	*Amount*	*Payable*	*Note*
Initial payment Share deal	*£*	*On completion*	*1.Share deal* *For the purchase of the entire share capital of the Business to include the net assets at completion to be at least £45,000. The Vendor may take a pre-sale dividend to reduce the net assets to this level if appropriate. OR to exclude the net assets see below.*
Other	*£*		*Add details here*
Net assets (estimated) Share deal	*£*	*On completion*	*Share deal (if not included above)* *A payment will be made for the net assets of the company on completion. The net asset value per accounts to 31-4-2001 is £45,000. It is estimated this will be materially similar at completion.*
Target	*£TOTAL*		

4. Protections for deferred or performance related/earn out
To protect the payments, the purchaser will provide the following protections to the vendor for the duration of the payments:

- *A personal guarantee*
- *A charge over the freehold property*
- *A debenture on the assets of the Company Not if preference shares are being used*
- *Key-man insurance or life assurance to protect outstanding payments in the eventuality of illness, incapacity, critical illness or death.*
- *Access to all the records, including legal, accountancy, ledger, and banking paperwork and documentation.*
- *The issuing of statements regarding the payments, and produce accounts.*
- *Undertakings that the business will be run materially the same as at the present time and for the duration of the earn-out period and that the accounts will be run according to UK accounting standards..*
- *Undertakings that the purchaser shall not in any way compete with the business during the earn-out period.*

5. Protections for part sale/mergers, vendors retaining minority shareholders

- *The shares in the Newco/oldco will be enhanced by a quality shareholders agreement with caveats that:*
- *The shares will be valued pro-rata*
- *Offer first refusal to 'buy each other out' either on a voluntary transfer or a deemed transfer (for example on death and bankruptcy or ceasing to be an employee)*
- *Cross options if the seller dies ensuring the estate benefits from cash not a minority shareholding. To ensure that the company or the other shareholder has the cash to acquire a deceased's shareholding it may be appropriate for a life policy to be put in place.*
- *A seat on the Board to reflect the shareholding*
- *Agreed minority shareholding protection to ensure that the minority shareholder has rights of veto over certain fundamental matters.*
- *In the event of the Vendor's death or mental incapacity during the period of the earn-out, then the shares should pass to the ownership of the Vendor's estate.*

6. Financial assistance (share transfers only)

The Company's Act 1985 states that the company shall not assist in its own purchase. Some deal structures or financing requirements of a purchase can constitute such financial assistance which may necessitate a legal and accounting procedure known as a 'whitewash' to be undertaken to allow the transaction to proceed. The Purchaser agrees that advice in this respect will be sought from their legal advisers early on.

The Purchaser will enter into covenants with the Vendors to preserve the asset value of the Company for as long as any consideration remains outstanding. The vendor shall remain as a signatory on the Company's bank account until the Deferred Consideration is fully repaid.

7. Premises And/Or as follows, or similar!

The current premises are XYZ address, anywhere
the Vendor will sell to the Purchaser the freehold premises at ("premises address").
The Business owns the freehold and it will be transferred by way of the share transfer

New or existing lease terms or licence terms			
Period:		*Terms:*	
Rent:		*Deposit:*	
Payment		*Costs:*	
Reviews		*Break clause:*	

8. Landlord's consent

Granting or assigning a lease or Director's guarantee is subject to the Purchaser's status and the landlord's consent (not to be unreasonably withheld). To confirm this status the Purchaser agrees to provide the Vendor's advisors Avondale the following:

9. Consultancy or handover

The Vendor agrees to provide the Purchaser a 2-week initial handover free of charge during office hours. Thereafter, they agree to be available by telephone or fax within reason for a further period of (six months.
As an Employee or Consultant, consider the following as applicable dependent on circumstances, age and expertise of Vendor. XYZE names and WXY names, shall on completion be employed by or provide consultancy services to the Purchaser. Final terms to be agreed between the Parties but to include:

Title:		*Expenses:*	
Salary:		*Car:*	
Hours:		*Holidays:*	
Benefits:	*Private Medical Insurance to include in-patient medical care with a maximum contribution by the employee of 15%. The Policy should be uunderwritten by a branded provider and be operative from day 1 of his/her duties as General Manager.*		
Benefits:	*A Company Pension Scheme will be made available to the General Manager and will be operative from day 1 of his/her start date. The Scheme should allow for Additional Voluntary Contributions and should provide for a final pension of not less than XYZ.*		

Commission:	*5% of all turnover introduced up to a maximum of £20,000 commission p.a.*
Duties:	*Recruitment of new Consultants, Business Development to existing and new client.*

10. Resignations share deals
The following shall resign as Directors on completion… XYZ and ABC exiting (Director's name/s).

11. Employees
The Vendor agrees to provide the Purchaser with a list of all staff to include: their names, ages, length of service, salaries, benefits and duties. The Parties also agree that:

- *Any redundancies will be the Purchaser's legal and financial obligation.*
- *During negotiations of the final sale & purchase agreement that no employees will be taken on or dismissed without the Purchaser's reasonable consent (except where the employee may be summarily dismissed).*

For fixed asset and goodwill sales only
- *Any obligations under the TUPE regulations to consult with the staff about the transaction will be met.*
- *Staff salaries and holiday pay will be apportioned between the Parties.*
- *Key staff retention idea*
- *To assist the Purchaser in continuation of goodwill the Vendor agrees to pay the staff listed below a loyalty bonus after ("six") months of successful service with the Purchaser of ("£2,000 each") in recognition of their endeavours and contributions to the business.*

12. Tax
The Parties agree to give fair consideration to each other's tax position in the negotiation of a final sale and purchase agreement. The following is for asset deals only The Parties will agree an apportionment of the sale price between ("goodwill, fixed assets and leasehold interest/freehold") for tax purposes.

13. Non compete and protection of goodwill
To protect the goodwill the Vendor will provide covenants that they will not for a reasonable period and within reasonable proximity enter into a competitive business or carry out an action that might materially affect the goodwill of the Business. The Vendor will also conduct the Business in its normal and ordinary course until completion.

14. Confidentiality, due diligence and disclosure
The Parties agree that the terms, negotiations and sale are confidential save in taking counsel from their professional advisors, or as required by the rules and regulations of the London Stock Exchange, or any TUPE obligation to consult with employees.

The Parties agree to disclose any facts material to the transaction. The Vendor will grant the Purchaser or their advisors and employees access to the Business, its operations and books in order to perform due diligence. Access will be provided consistent with the Vendor's requirement to protect confidentiality.

15. Representations and warranties
The Vendor agrees to provide and the Purchaser agrees to request warranties, indemnities and representations appropriate for a transaction of this size.

16. Advisors, fees and costs
The Parties agree to instruct early on appropriate advisors to complete a transaction of this size in the timescale proposed. Each party shall be responsible for their own advisor's fees and costs incurred in the transaction.

17. Exclusivity and deposit
The Vendor agrees to provide exclusivity to the Purchaser up to the target date for completion, subject to reasonable progress being made by the Purchaser. During such exclusivity the Vendor or their advisors will not before completion discuss, negotiate or provide assistance to any third party who may be interested in the Business.

18. Terms
English law will govern these Heads of Terms and the sale and purchase agreement.

Vendor's signature *Purchaser's signature*

Date: / /0 *Date: / /0*

Tax

The Capital Gains Regime is changing dramatically in April 2008. At the time of writing the full details are not known (Feb 08) and therefore we have left any references to the previous regime in these guides pending further edits when all the details are known,

New Regime (post April 2008): Tax considerations when selling a company are complex but need to be understood as they have a huge bearing on the sale and the amount of cash you will either pay or come away with. Ideally planning should take place before signing heads of agreement. There are various ways in which tax charges can be mitigated, or even eliminated. Here are some examples of the things that vendors might need to look at:-

- Be clear about what you are selling.
- Check your entitlement to Entrepreneur's relief which reduces the 18% Capital Gains Tax to 10% on the first £1 million capital gain.

To contact a specialist tax adviser please contact your local Avondale office.

Contacts

Birmingham
+44 (0)121 446 5151

Bristol
+44 (0)117 905 5007

Cambridge
+44 (0)1223 370 068

Chester
+44 (0)1244 893 159

Glasgow
+44 (0)141 427 7821

Leeds
+44 (0)113 242 5712

Oxford
+44 (0)1235 771 444

Reigate (HO)
+44 (0)1737 240 888

Southampton
+44 (0)2380 302 014

Watford
+44 (0)1923 431 650