

School Transactions:

Mergers, Acquisitions and Disposals

October 2020

A guide for school association members



School Transactions: Mergers, Acquisitions and Disposals

Contents

	Page no:
1	Introduction.....2
2	Health Warning3
3	Background: Reasons to Merge or Sell.....3
4	Merger Process.....4
	4.1 Charity Mergers4
	4.2 Acquisitions/Disposals5
	4.3 Similarities between Mergers and Acquisitions.....6
5	Due Diligence.....6
6	Communication and PR7
7	Golden Rules.....8
	7.1 Mergers8
	7.2 Acquisitions9
8	Inhibitors 10
	8.1 Mergers 10
	8.2 Acquisitions/Disposals 11
9	International Projects..... 11
10	Appendices..... 11

Appendix

Appendix 1	International School Projects..... 13
Appendix 2	Checklists..... 18
Appendix 3	Timetables..... 31
Appendix 4	Templates..... 38
Appendix 5	Advice for Schools on Taking Decisions to Close..... 48

School Transactions: Mergers, Acquisitions and Disposals

1 Introduction

This booklet focusses on the immediate issues facing decision makers at independent schools - Governors, members of the Senior Leadership Team and proprietors of proprietary schools - when faced with making some of the most important strategic decisions which affect their schools.

Those decisions can be made from a position of strength or relative weakness depending on the circumstances. Although the specific issues facing schools will all be different, there are common issues which will always apply.

This note was first published in 2012 (and subsequently updated in 2018). In the near decade since then, many things have remained constant, including the economic and political pressures being faced by the sector. Indeed, the current Covid 19 crisis has thrown many of these issues into stark relief. Lockdown saw schools working hard to provide online provision while absorbing falling fee income, and further periods of intermittent closures remain possible while the virus remains. Looking ahead the future remains uncertain - the impact of the recession on pupil roll remains unknown; difficult decisions on TPS will need to be made; while the threat of tax changes linger as politicians seek to balance the nation's finances. Schools need to remain vigilant and manage their situation carefully.

Alongside this, the last decade has seen a number of key developments in the market, including:

- The continued growth and success of commercial groups of school (some of which have acquired schools from charities).
- Increasing internationalisation of the market for independent schools including an increase in the number of overseas groups and investors actively seeking to invest in the UK independent school sector; and increased numbers of British independent schools licensing their brand and selling their educational expertise to international investors who establish British curriculum schools overseas (we have expanded our note to cover issues relevant to such projects).
- Increased acknowledgement and acceptance that arrangements with the commercial sector are a positive and viable opportunity available to schools, with a larger number of acquisitions being successfully completed and well-received.
- Consideration of more novel ways to undertake investment in schools.
- An increasing number of charity to charity mergers to create local or national groups of schools.

This latest edition of the booklet takes account of those issues. However a number of fundamental issues remain unchanged and, as has always been the case, the effective management of the strategic direction and development of the school is critical to its success, longevity and sometimes survival.

School Transactions: Mergers, Acquisitions and Disposals

With the financial pressures schools may now find themselves under, there is a need to think strategically and innovatively. Unfortunately, there will be times when permanent closure is the only option, but it should be a last resort having considered all other routes first.

There have always been mergers, acquisitions and disposals of schools and there are a very many success stories. The decision to undertake a merger, sale or even closure, should be a strategic one and taken early. Once the pressure is on, or worse still, the Bank calls in debt, then the options become much more limited and the timescales shorten dramatically. The key message in this document is to undertake the 'health check' and if there are warning signs, then act on them early. Get to know the market. Understand local and national demographics. Recognise economic trends and set realistic expectations on projected pupil numbers and income. In the case of proprietary schools, be aware of looming succession issues.

It takes courage to initiate the conversation, but it is a wise school that looks at the area it serves and determines that, being absolutely objective, if competing local schools combine, they may be better placed to meet the needs of the community and secure their long-term future, albeit in another form. A similarly difficult conversation about the status of a school - in particular whether a charity remains best-placed to operate a school or whether a for profit operator may be better placed to take it forward - may be the best way to ensure the future success and longevity of a school.

2 **Health Warning**

The information in this booklet is generic in nature and should therefore only be relied on for general guidance. Any school contemplating a merger, acquisition or disposal must take independent professional advice. We would always recommend specialist professional advisers with experience advising independent schools (and where relevant, charities). In particular please note that care should be taken in using the appendices that accompany this publication in order to ensure that they reflect your circumstances.

In addition, as highlighted above, we continue to see schools moving from the charitable sector to the for profit sector (and some instances, albeit fewer, of schools moving from the for profit sector to the charitable sector). It should be noted that there are nuances in applicable legislation and best-practice governance structures can also differ. Appropriate care, and advice, should therefore be taken in such situations.

Finally please be aware that this booklet was produced according to legislation and best practice in June 2018. You should check that the information is still current and relevant. You are also asked to respect VWV's copyright and not to make this document available to third parties without their prior written consent.

3 **Background: Reasons to Merge or Sell**

Schools have always needed to change with the times and in response to shifting demand for, and supply of, an independent education.

School Transactions: Mergers, Acquisitions and Disposals

Increased regulation and costs have made it harder for smaller schools to stand alone and it is noticeable that there has been an increased level of transaction activity in the independent school sector. Commercial groups have sought out economies of scale and have developed and grown by acquiring proprietor owned schools and, more frequently, buying schools from charities. Charitable groups have emerged and grown through acquisitions and charitable mergers.

Mergers between competitors have also become more frequent as demographic changes result in more intensive competition and local markets that cannot support as many independent schools as they used to.

The drivers for individual schools to consider strategic change, mergers and even a sale include

- over-supply as a result of demographic changes;
- competition from other independent schools or the state sector;
- under-investment in previous years;
- rising costs and the need to realise economies of scale;
- retirement of key staff;
- parental demand for a wider curriculum, more facilities, co-education, a wider age range, or simply for a larger school;
- other demands on parental income; and
- the burden of parental debt becoming unmanageable.

Some schools plan changes as part of a long term strategic approach. Others need to react quickly and decisively to sudden threats and opportunities. We have identified a number of warning signs that indicate a need for urgent strategic review (see Appendix 2).

4 Merger Process

4.1 Charity Mergers

The legal considerations for a charitable merger and a school acquisition are quite different in terms of the approach, timetable, structure and legal documentation. There are, however, similarities in the practical approach required to successfully complete a charity merger or acquisition.

There are also considerable differences between a merger or acquisition that leads to a school joining a charitable group or being bolted onto another school as a stand alone division; and a merger or acquisition that results in two schools being consolidated on one site.

Even between charities, "merger" is often a euphemism for "take-over": invariably one of the merger partners will be more dominant in terms of size,

School Transactions: Mergers, Acquisitions and Disposals

control, asset value, geographical position, market strengths or some other key factor. There are three main circumstances that precipitate a merger:

Active take-over: School A decides to take-over School B with School B's consent. Often this decision is taken with an understanding that both will benefit from the transaction but the outcome will nonetheless be an expanded School A.

Passive take-over: School B in effect puts itself up for sale because it can no longer invest to the extent necessary to sustain or improve its standards and facilities. This should not be seen as a weakness if it is a sound business decision. The resulting transaction will in reality be a take-over that expands the "buyer" (School A) but may not produce a "new school".

Merger: School A and School B decide to merge their strengths. The outcome will - or should - be to produce a "new school".

The legal mechanism for merging charitable schools will generally involve either:

- (a) one school transferring all its assets and liabilities to the other and then dissolving; or
- (b) a change of control of the "target" charity.

Group expansion: School B joins Group C. This may involve an acquisition or a charitable merger depending on legal structures, but will involve Group C taking control and usually ownership of School B.

However, there needs to be early consideration of the legal structures, objects and powers of both schools to determine the best legal structure as it may be necessary to consult with the Charity Commission or, in some cases, to create a new entity to take on the assets and liabilities of both schools. Schools should engage with their professional advisers at the earliest possible stage of the process.

4.2 Acquisitions/Disposals

In an acquisition/disposal, one party (the "Buyer") will acquire from the other (the "Seller") the target school's assets for a price. On occasions an acquisition may take the form of a share sale.

This is the process which will apply when proprietors of proprietary schools wish to sell.

In the past both Buyers and Sellers tended to be exclusively from the for-profit sector, but over the past couple of years we have seen a number of charitable groups of schools buy proprietary schools, particularly where there is a clear commercial "fit" and need.

We have also seen, with increasing regularity, the acquisition of charitable schools by those in the for-profit sector. In this situation, following completion, the Seller (the charitable trust that used to operate the school) may continue and use the sale proceeds to fulfil its charitable objects. If the

School Transactions: Mergers, Acquisitions and Disposals

original objects are no longer relevant then the Charity Commission may agree to a change of objects to something similar, perhaps to grant bursaries to pupils attending the target school or other schools. Alternatively the charitable trust may choose to dissolve.

When the Seller is a charity, the price must be a true reflection of the actual value of the assets being sold to the Buyer. The trustees (governors) of the Seller will have a duty under charity law to achieve full value for the assets. The procedure for the valuation of charitable property assets is set out in sections 119 and 120 of the Charities Act 2011 and is likely to require the production of a report in a specified format by a suitably qualified surveyor. Such procedure obviously will not apply in the sale of a proprietary school.

The roles of Buyer and Seller are clearer cut (there is more likely to be an "us-and-them" mentality) than in a charitable merger and the transaction process, in terms of pace and detail, will generally be driven by the Buyer unless there are specific issues affecting a proprietor Seller.

4.3 Similarities between Mergers and Acquisitions

Although, on the face of it, the two processes are very different, the net result is that two schools (if not the operators of those schools) are "joining forces". The schools will either operate on a single site or on separate sites.

All parties will want to see the new school (or school group) succeed and there are often common lessons as to how key stakeholders - parents and staff - can be made to feel part of the process. These are expanded on below.

5 Due Diligence

Due diligence is a vital step in any transaction. It is a process undertaken in order to find out as much about the other party as possible in order to assess whether sufficient "value" exists, whether there are potentially any hidden liabilities, whether any matters require further investigation and (ultimately) whether or not to proceed with a transaction.

In the case of a merger between two charitable schools the due diligence process should be "two way". Each party will want to find out as much about the other as possible: one party will require some certainty that the assets of the "target" school comfortably exceed its liabilities, whereas the other party will want to be sure that it is transferring assets to an undertaking that is viable and commercially sound.

In the case of an acquisition, the process will be "one way" (only being undertaken by the Buyer on the target school), and will be used to assess whether it is paying a fair price. If, having undertaken the process, the Buyer discovers facts or circumstances that cause it concern, it may seek to include specific provisions in the contractual documentation (by means of warranties, indemnities and/or financial retentions) to provide it with protection, or it may seek a reduction in the purchase price.

School Transactions: Mergers, Acquisitions and Disposals

Financial and legal due diligence is undertaken by accountants and lawyers respectively. In addition a school may want to undertake additional commercial due diligence to look at specific aspects of the school business, be they operational issues or issues, say, relating to the demographics in the relevant geographical area.

Legal due diligence will look into various aspects of a school business including, but not necessarily limited to, the following issues:

- Constitutional structure;
- Employment;
- Pensions;
- Property / Real Estate;
- Health & Safety;
- Contracts (including the parent contract);
- Disputes / Litigation;
- Insurance;
- Intellectual Property / IT; and
- School Compliance Issues.

6 **Communication and PR**

A good communication strategy is one of the key critical factors in determining the success of the merger. It is essential that the head, governors or proprietor present a consistently positive outlook to staff, parents and pupils in order to "win hearts and minds". The success of a merger can be jeopardised if the positions of parents, pupils and staff are not properly considered and dealt with.

Some schools choose to appoint a specialist public relations consultant to assist in developing and promoting positive key messages about the merger.

In the early stages of merger discussions finding the balance between the need for confidentiality and openness will be a challenge. Usually one or both of the parties will be advised not to make an announcement until contracts have been exchanged and make all efforts to maintain confidentiality. Once there has been an announcement there will be a continuing need for communication and consultation.

The fear of the unknown can be very damaging and so it is essential that the school maintains regular communications with stakeholders providing updates and information on progress and opportunities for parents and staff to discuss the practical impact the merger will have on them. Parents, pupils and staff will be concerned about detailed matters, for example: school uniform, timing of the school day, pupil tutors and teaching staff. If these

School Transactions: Mergers, Acquisitions and Disposals

matters are not handled well then confidence in the whole project will be undermined.

The advent of social media has added an interesting but sometimes problematic dynamic to the issue of communications and PR strategy in the context of school mergers. It has meant that groups of stakeholders (often parents) have a means of channelling any concerns, fears and discontent and are able to act in concert.

Unfortunately experience has shown that parents' fears may become exaggerated and, of course, given the nature of social media it is quite difficult for a school to correct any misapprehensions and misunderstandings. It is therefore vital that PR and key messages are in place at an early stage and that a school is assertive and drives the communication agenda clearly from the outset.

The communication strategy for acquisitions (as opposed to mergers) is not vastly different. The process will be driven by the Buyer but they will be just as concerned to ensure that parents and staff are supportive of the change in ownership and understand any changes that will be made. However, the Seller (particularly in the case of a proprietary school) is likely to be very concerned about confidentiality - it may be damaging for even a suggestion of a future sale to be made to parents - and will not want any announcements to be made prior to a legally binding exchange of contracts.

7 Golden Rules

There are a number of "golden rules" that all schools should consider before embarking on a school transaction.

7.1 Mergers

- Be clear-thinking and realistic about what kind of merger this is. Both entities should identify their strengths and ensure that these will be preserved in the merger, but be ready to shed their weaknesses. Much will depend on whether the merger partners can identify and agree their relative strengths and weaknesses.
- Merge complementary strengths, do not merge weaknesses.
For example:
 - schools, each with a strong pre-prep department and weak prep department should probably not merge unless there is a clear, viable plan that will produce a strong prep department post-merger.
 - two schools with falling rolls and long term debt should probably not merge unless assets can be sold to pay off the debt and produce a viable pupil roll that will withstand further reductions due to demographic or market changes.
 - schools equally determined to protect their own culture without compromise will probably not merge successfully, or at

School Transactions: Mergers, Acquisitions and Disposals

least not without many years of a corrosive "us and them" ethos.

- Be clear about the extent of market demand for the merged school. Much of the necessary market research can be done through a consultation process and by assessing the strengths of competitors.
- Take the staff and parents with you. You will need their support and commitment; this must never be taken for granted, and especially not if one of the schools will be relocating to a site several miles away. As mentioned above, a clear communication strategy is vitally important.
- A common "vision" is essential. Ideally, before talks begin, those who are driving the merger have formed a clear picture of how the merged schools will be on "M-Day". Once the vision has been shared and agreed it becomes much easier to discuss matters of detail. Detail that serves the vision can be kept; detail that does not serve it should be discarded. The alternative approach of discussing detail in the hope that a vision will emerge is much less likely to be successful. The vision itself need not be elaborate or too detailed. It could, for example, be:
 - a new day school (replacing the two former schools) for 350 boys and girls aged 3-13 on the *Willow* site with additional teaching block and sports facilities paid for by sale of the *Blueberry* site;
 - ethos: Christian but welcoming to all; non-selective academically;
 - reputation for sound academics; annual drama festival; strong sports and games ethos; distinctive smart uniform;
 - market: radius 15 miles; filling the gaps between X School and Y School; and
 - financial: mid-range fees; rationalise assets and costs; no long term debt.
- Where there is a more dominant school in the merger relationship, the Governors and management team of that school must work hard to ensure that the merger project (both up to and following completion) does not cause too much of a distraction or become a financial or management burden which detrimentally affects its core business. It should undertake a sensible analysis in order to be reasonably confident that the short-term burdens will be outweighed by the long-term benefits.

7.2 Acquisitions

- In the case of a school acquisition, the Buyer's foremost requirement is to ensure that it is paying an appropriate price for the target school and its assets. To do this it will likely need to have carried out its own valuation. It will need to have undertaken a thorough due diligence exercise to ensure that the performance of the target school has not

School Transactions: Mergers, Acquisitions and Disposals

been overstated and, to the extent that it is possible to do so, ensure that there are no hidden problems.

- It will also want to be sure that the school will fit within its existing operation and that it is able to operate it effectively (or more effectively by being able to benefit from economies of scale, central resources etc) post-completion.
- The principles of being clear-thinking and realistic, considering complementary strengths and taking staff and parents with you as mentioned above are equally applicable to an acquisition - the value of the school will be detrimentally affected if pupils ebb away from the school and staffing discontent can take considerable management time and effort to put right.
- The Seller's foremost requirement is likely to be to ensure that it receives a good price and that, if possible, a "clean break" can be made with minimal warranties etc. However, most Sellers are likely to take great efforts to ensure that the school is in "safe hands" and that its legacy is protected.

8 Inhibitors

8.1 Mergers

From experience the main inhibitors to progress in merger talks include:

- a failure by the weaker party to recognise that the only real alternative is to close the school, if not now, then within a year or two (or that a delay may mean that any merger is no longer on terms they can dictate);
- determination by the weaker entity not to be "taken over" or be seen to be taken over;
- excessive sentiment relating to past glories;
- not being sufficiently realistic about strengths and weaknesses;
- governance issues relating to control of the new school. Plainly a merger partner that is contributing major asset value is required by charity law to protect its assets;
- issues over headship, where neither head is ready to retire or give way to the other (avoid joint headships);
- lack of openness and transparency by one or both merger partners;
- lack of merger experience, or bad previous experience of a merger, on the part of one or both governing bodies;
- unrealistic expectations that merger will be easy;
- the practical effect of TUPE and the redundancy rules;

School Transactions: Mergers, Acquisitions and Disposals

- a particularly vocal and hostile parent body.

8.2 Acquisitions/Disposals

In acquisitions/disposals the main inhibitors are usually:

- finding a suitable Buyer. This is generally because a Seller will not want it to be known publicly that it is seeking to sell the school in question for fear of destabilising the relationship with parents and staff. Sellers and Buyers may want to consider using the services of a corporate financier or transfer agent;
- the Buyer and Seller agreeing an appropriate valuation for the school in question (valuations of schools should be undertaken by experts in the field: valuations are partly a science and partly an art - there are different methods for valuing schools, including by reference to the profitability of the school business or reference to a bricks-and-mortar valuation);
- the Buyer being able to arrange finance to fund the acquisition;
- the Buyer and Seller not reaching agreement on the terms of the deal, for example the extent of warranty protection provided to the Buyer by the Seller;
- the Buyer being unsatisfied with the result of its due diligence (in this regard, selling schools should consider undertaking a pre-sale due diligence audit to ensure that they are "ship shape" legally before putting themselves on the market).

9 International Projects

- 9.1 As mentioned in the Introduction, a development in the independent school sector has been increasing internationalisation and this has seen a number of UK schools being acquired by overseas buyers. It has also manifested itself through a number of schools working on projects to set up schools overseas and it seems timely to expand this note to cover this development as many schools may consider it to be an interesting strategic option. Appendix 1 sets out key issues to consider when such a project is contemplated.

10 Appendices

Appendix 1 covers key issues when contemplating an international project.

Appendix 2 is a "warning signs" checklist, which can be used by schools in order to assess whether they should review their strategy and, ultimately, whether a merger or acquisition may become necessary rather than simply desirable.

Appendices 3 and 4 are "typical" timetables for merger and acquisition/disposal transactions. Please note that each transaction will be different and the steps for implementation (and the timing of those steps) will be specific to each case.

School Transactions: Mergers, Acquisitions and Disposals

Appendix 5 contains a practical checklist of matters to consider when you are looking to successfully assimilate two schools. These have been prepared to be used in the context of merger transactions but again the principles can usefully be used in the context of school acquisitions.

Appendices 6 and 7 contain template Confidentiality Agreements which can be used at the outset of discussions between the parties. A confidentiality agreement (also known as a non-disclosure agreement or NDA) ensures that valuable commercial information exchanged in the due diligence process is kept confidential. It also ensures that the discussions themselves are kept confidential and is particularly important given that "leaks" are one of the gravest risks to a successful merger. Confidentiality is paramount for all involved in the process. We have provided two versions - one that applies to a charitable merger and a second which applies to an acquisition or disposal, more likely to affect a proprietary school.

The transaction itself will require a number of additional documents: heads of terms, memorandum of understanding, merger deed, acquisition agreement, disclosure letter etc. Professional advice must be taken on the terms of these at the appropriate time.

Veale Wasbrough Vizards LLP
October 2020

School Transactions: Mergers, Acquisitions and Disposals

Appendix 1 International School Projects

1 International school projects

- 1.1 This section focusses on the continuing potential for UK schools to license the establishment of schools overseas. We specifically focus on issues applying to charitable schools because, in our experience, they are most likely to undertake projects of this nature.
- 1.2 Most schools that embark on this type of international project do so primarily in order to generate revenue that can be reinvested into education in the UK. However, the strength of the other benefits can come as a pleasant surprise. They include a more international outlook, a world-wide alumni network, sporting and cultural exchanges, academic collaborations, and the secondment and retention of staff.
- 1.3 The paragraphs below describe:
 - some suggested questions to ask potential project partners; and
 - a typical contract journey.

2 Questions for potential project partners

- 2.1 It is important to get to know a potential project partner, to develop a relationship of mutual trust and respect and to engender enthusiasm about your school. It is perhaps not the best idea to fire a list of questions at a potential project partner within minutes of first meeting. Nevertheless, we hope that the questions below will help in the process of determining whether a third party's interests and expectations are sufficiently aligned to yours.
- 2.2 Contractual arrangements
 - Who do you envisage being the parties to the agreement(s)?
 - Please describe the entity that will operate the school.
 - Please describe how the project will comply with applicable regulations.
 - Who will be responsible for maintaining necessary licences?
 - What will be the management structure of the new school? Do you envisage that the new school will have a governing body? If so, who do you envisage the governors being?
- 2.3 The local market
 - Is there a draft business plan? If so, please could we have a copy?

School Transactions: Mergers, Acquisitions and Disposals

- Has market research been conducted? If so, please could we have a copy of the report?
- Do you have a detailed forecast of pupil numbers for forthcoming years in respect of each age group?
- We are looking for a long term commercial relationship. Is that your intention?
- What exclusivity obligations will exist between us?
- What are your plans (if any) in relation to future schools upon which we both might wish to collaborate?

2.4 The operation of the school

- What name would you like the new school to have?
- Please would you confirm whether the school will be co-educational?
- Please would you confirm whether the school will be boarding, day or both?
- Please would you confirm what age range of children the school will cover?
- Do you propose that there will be maximum class sizes at the school?
- We envisage that a key part of our role would be to set standards for the school Does that reflect your intentions?
- Do you intend that the new school's policies and procedures will reflect those of our school? We consider the following policies to be particularly important:
 - (i) behaviour and discipline;
 - (ii) equality;
 - (iii) safer recruitment;
 - (iv) anti-bribery; and
 - (v) child protection.
- What do you propose will be the new school's approach to corporal punishment?
- What do you propose will be the new school's approach to religion and freedom of religious expression?
- How do you propose that the new school will recruit staff?
- Do you envisage that the new school will provide the same balance between academic excellence and non-academic aspects of school life as is found in our UK school?

School Transactions: Mergers, Acquisitions and Disposals

- What is your approach to exchanges of staff, joint educational projects and sporting and cultural visits?

2.5 Infrastructure

- What is the timetable for completing the building works and fitting out the buildings?
- What facilities will the new school have?

2.6 Financial arrangements

- Approximately how much investment will be made in the proposed school?
- Who are the parties that have been, or will be, investing in the school financially?
- Transparency is important to us. Will we have access to financial records relating to the operation of the school?
- In what ways do you propose to pay us for our involvement in the project?
- What payments do you propose to make to us in advance of the school opening?
- Do you propose a minimum annual royalty?
- Do you propose to pay for our expenses incurred during our visits to the new school?
- Do you envisage any foreign exchange control problems? If so, how will you address those problems?

3 Chronology

3.1 No two projects are the same, and the intended contract journey may change over the course of a project as negotiations progress and the approach of local regulators to a specific project emerges. The contract journey will also depend substantially on the nature and approach of the project partners. Nevertheless, the following paragraphs provide an indication of the route taken on a typical project.

3.2 Register trade marks in appropriate territories

- This is an important step, which is best undertaken at an early stage.
- If your school's name is not registered as a trade mark in a territory, you won't have the right to stop a third party using it there. So a good trade mark registration is a very valuable thing.
- Unfortunately, there is no single global trade mark registration, and to register every one of a school's trade marks in every country for all relevant goods and services would be

School Transactions: Mergers, Acquisitions and Disposals

prohibitively expensive. So one has to prioritise carefully in order to get the right balance between cost and protection.

3.3 Memorandum of Understanding

- Project partners often expect a Memorandum of Understanding to be signed early on in discussions. Providing the document is appropriately drafted, a Memorandum of Understanding can be of advantage to both parties.
- Typically, the document will be largely non-binding, but will have certain legally binding elements. It is important that the document is very clear as to which parts are which.
- Avoid being bounced into signing a seemingly innocuous Memorandum of Understanding at short notice and without advice. Just because something is headed "Memorandum of Understanding" rather than "Agreement", it does not necessarily mean that it won't be legally binding or have enduring consequences.

3.4 Heads of Terms

- Following signature of the Memorandum of Understanding, it is useful to set down in Heads of Terms a summary of the main commercial points on which the parties agree in principle.
- That document should be written in plain English, and can be a good way of establishing whether the parties are aligned on the major points. The Heads of Terms should also save time when it comes to negotiating the detailed binding agreement. Nevertheless, some projects do go straight from the Memorandum of Understanding stage to the binding agreement stage without a Heads of Terms stage.
- As with the Memorandum of Understanding, it is important to establish clearly in the Heads of Terms which parts are legally binding and which are not. The majority of it will not be legally binding. However, it is important to consider carefully the non-binding aspects of the Heads of Terms, because it may be difficult subsequently to alter one's position on points agreed in principle.

3.5 Agreements between the charity and its subsidiary

- For tax and charity law reasons, UK schools invariably contract with project partners via trading companies.
- Although essentially "internal" documents, the agreements between the charity and its trading company must be on arm's length commercial terms.

School Transactions: Mergers, Acquisitions and Disposals

3.6 Binding project agreement

- The legally binding project agreement will be long and detailed. Matters that it will typically cover include (among many others):
 - (i) the rules under which the new school will operate;
 - (ii) the policies that the new school will adopt;
 - (iii) the new school's curriculum;
 - (iv) the engagement of the Head;
 - (v) the maintenance of quality at the new school;
 - (vi) the new school's values;
 - (vii) the use of trade marks;
 - (viii) payments;
 - (ix) the extent of the UK school's obligations;
 - (x) termination; and
 - (xi) the Bribery Act.

3.7 Framework agreement

- Where the intention is to open a series of schools with the same party, it can be useful to enter into a Framework Agreement. This would set out how the parties will work with each other in relation to subsequent schools and what exclusivity arrangements will apply.

4 Summary

- ### 4.1
- International projects can be hugely beneficial for a UK school. Of course there are risks, but every risk can be mitigated. Risk mitigation consists of far more than asking the right questions and agreeing robust agreements, but those things are important elements in the process.

School Transactions: Mergers, Acquisitions and Disposals

Appendix 2 Checklists

(A) Early indicators: a checklist

The school should be aware of the early indicators that merger or acquisition may well become necessary rather than simply desirable. The following checklist will help to determine whether such action is needed.

Warning Sign	Example		Score
1. Pupil Numbers	<ul style="list-style-type: none"> • Pupil numbers 10% below capacity • Numbers at the bottom of the school below normal • Number of enrolments / parent visits falling • Bad relations with feeder schools • Poor relations with schools you feed to • Failed strategic review (e.g.co-education or nursery) <p>If one of these applies to your school, score 1.</p>	<input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>	
2. Staff	<ul style="list-style-type: none"> • Reducing pupil to staff ratio • Redundancies in the last three years • Retirement of two or more key staff • Proprietors approaching retirement / succession planning • Staff turnover of more than 10% • Increasing occurrence of staff grievances <p>If one of these applies to your school, score 1.</p>	<input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>	
3. Fees	<ul style="list-style-type: none"> • Rising higher than the market norm • Increased number of cases of fee defaulters • Difficulties recovering fees • Rising number of fee discounts <p>If one of these applies to your school, score 1.</p>	<input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>	
4. Facilities	<ul style="list-style-type: none"> • Reduction in the curriculum offered • Parents asking for facilities not on offer • Competitor(s)' facilities are better than those on offer or planned 	<input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>	

School Transactions: Mergers, Acquisitions and Disposals

	<ul style="list-style-type: none"> Lease of school site coming to an end / review <p>If one of these applies to your school, score 1.</p>	<input type="checkbox"/>	
5. Funding	<ul style="list-style-type: none"> School has experienced repeated deficits Assets sold/borrowing increased to meet operating costs Bank losing confidence Accountants raising concerns over "going concern" status Fundraising appeals not performing as expected <p>If one of these applies to your school, score 1.</p>	<input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>	
6. Demographics	<ul style="list-style-type: none"> Reduced number of "target children" in the area Professional families moving out of the area. <p>If one of these applies to your school, score 1.</p>	<input type="checkbox"/> <input type="checkbox"/>	
7. Competition	<ul style="list-style-type: none"> New school in the area (academy/free school, newly merged school, new independent) or enhanced state provision Losing pupils to schools with better facilities / results / PR <p>If one of these applies to your school, score 1.</p>	<input type="checkbox"/> <input type="checkbox"/>	
8. PR	<ul style="list-style-type: none"> Bad PR Pupils not leaving to join usual "target schools" Inspection not as good as expected Pupils leaving the school for unknown reasons Failed marketing campaign Wrong perceptions (e.g. only provides for SEN, gifted and talented, the elite) Increased parent complaints <p>If one of these applies to your school, score 1.</p>	<input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>	
9. Strategic	<ul style="list-style-type: none"> Approached by another school / group Considering co-education / change in age range / catchment area <p>If one of these applies to your school, score 1.</p>	<input type="checkbox"/> <input type="checkbox"/>	

School Transactions: Mergers, Acquisitions and Disposals

10. Governance	<ul style="list-style-type: none"> • Unable to recruit skilled Governors (in relation to charitable schools) or members of an advisory board (for proprietary schools) • Dispute in the governing body • Dispute between the Governors and Head / Bursar, or between proprietors • Committee structures not working • Constitutional documents too restrictive <p>If one of these applies to your school, score 1.</p>	<input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>	
SCORE (if 4 or more, advice is likely to be required)			/10

School Transactions: Mergers, Acquisitions and Disposals

(B) Planning the assimilation of two schools: a practical checklist

Introductory note

- 1 This non-exhaustive checklist contemplates two schools (either following a merger or an acquisition) moving to a single site. It deliberately focusses on issues that affect a merger between two charitable schools, however many of the issues may apply equally in an acquisition or disposal of a proprietary school.
- 2 The preliminary paragraphs on Recommended Steps in Preparation for Negotiations will be particularly useful in the very early stages of merger negotiations.
- 3 We have deliberately placed emphasis on the practical issues that need to be considered as these will need to be uppermost in your minds if you are to make a success of the merged school. Although we have reduced the emphasis placed on legal issues, these remain important and all schools should ensure that they are properly advised in this regard.
- 4 The checklist is only partly appropriate in a case where two charities are merging without a site move or where a school acquires another school but intends to operate them separately. Nevertheless some principles may be extracted for use in those situations.

Recommended steps in preparation for negotiations		
1	Consider confidentiality. The need for confidentiality should be impressed on all members of the Governing body/proprietors and members of the SLT who were aware of the transaction, and all other parties involved in negotiations. Are e-mail addresses and other lines of communication secure?	
2	A well drafted confidentiality agreement should be put in place and signed by or on behalf of both Boards of Governors and all appropriate individuals.	
3	Consider whether an exclusivity agreement is necessary. Avoid a position where you are unnecessarily restricting your own potential to enter into further negotiations with third parties.	
4	Consider the most appropriate members of the working party and who will have the principal responsibility for negotiating the merger. Are people available and are all the skills needed covered? Are there any conflicts of interest? Draw up appropriate terms of reference and authority identifying to whom the working party will report and when. Also consider the team of professional and other advisers to whom they will have access.	

School Transactions: Mergers, Acquisitions and Disposals

5	Draw up a descriptive profile of each school.	
6	Identify clear objectives for the merger. These need to be based on strengths and opportunities but with weaknesses taken into account. Look for complementary strengths. Avoid a merger that will only merge and multiply weaknesses.	
7	Assess the pupil roll of each school at the present date and set a realistic fallout rate that can be withstood.	
8	<p>Prepare one or more models of the 'new school'. Conceptually, a genuine merger produces a 'new school'. Will this be a genuine merger or simply an add-on, ie. a take-over? Who will be the dominant party? For example:</p> <ul style="list-style-type: none"> • will this be a bolt on of a feeder school or an independent affiliated school? • will both schools move to a single site? If so, which site is most appropriate? Have permanent endowment and planning issues been considered? 	
9	Have future demographic, social and market trends and the impact of those on the existing schools and the new school been identified.	
10	Assess the present financial position of each school and in particular, the level of debt and other liabilities.	
11	Are the objects of both charities compatible? Do both charities have a power to merge? Will Charity Commission consent to the merger be required?	
12	Form an initial view of how complementary the cultures of the two schools may be, including senior management teams, common rooms and parent bodies. Are there any long-standing rivalries that could pose a threat?	
13	Consider the composition of the new Governing body and in particular key roles such as Chairman, Vice Chairman and Chairman of the Finance and General Purposes Committee. Are there personality clashes that need to be managed?	
14	Have a clear initial idea of all these matters before the serious merger talks begin.	
15	Prepare a draft statement to the press in case of need, on the assumption that news of the negotiations will leak and you will	

School Transactions: Mergers, Acquisitions and Disposals

	be ambushed by a telephone call from the local newspaper.	
16	Prepare a timetable for the negotiations, the date for reaching agreement, announcements and the stages of implementation.	
The objectives of the merger		
17	<p>These are some examples of the objectives that a merger will need to satisfy:</p> <ul style="list-style-type: none"> • the pupil roll will increase to [NUMBER] by [DATE]; • the merger will fill a gap in the services we can currently offer without creating significant over-capacity elsewhere; • the merger will enable us to improve the quality of our teaching and non-teaching staff; • we will be able to offer an improved product to parents and pupils in the following respects: <ul style="list-style-type: none"> • we believe they will in general welcome the merger; • we can offer better academic standards and better facilities than they have at present; and • we will be able to offer a better range of subjects. • We will be able to improve the school's competitive position by means of: <ul style="list-style-type: none"> • a wider catchment area; • more scholarships and bursaries; • economies of scale; • better facilities; and • a more competitive fee structure. • The merger will create opportunities: <ul style="list-style-type: none"> • to reorganise; • to develop; and • to improve our presentation and kerb appeal to current and prospective parents and pupils. • We will be able to make better use of: 	

School Transactions: Mergers, Acquisitions and Disposals

	<ul style="list-style-type: none"> • land, buildings plant and equipment; • management; • systems and administration; and • our marketing trust. <ul style="list-style-type: none"> • The merger will create opportunities for: <ul style="list-style-type: none"> • better management at the top and in the middle; and • better leadership. 	
Culture and ethos		
18	<p>Consider the post-merger culture and ethos of the "new school" and in particular compatibility and importance of:</p> <ul style="list-style-type: none"> • aims, objectives, standards and values. • policies and procedures. • rules, regulations and particular attitudes and behaviour of staff and pupils. • sports, arts and music traditions. • uniform/badge/emblem/colours/livery/school song. 	
19	<p>Consider the effect of:</p> <ul style="list-style-type: none"> • differences in the length of the school day or the six day week or the influence of boarding, or shorter/longer terms. • the new plan or vision for the school. • the size of the school and the way it is organised eg. "vertically" in physical houses or "horizontally" in year groups. 	
20	<p>What will be:</p> <ul style="list-style-type: none"> • the new focus areas of the "new school"? • the new marketing culture? • the new quality culture? 	

School Transactions: Mergers, Acquisitions and Disposals

Issues affecting parents		
21	<p>Consider the following list of concerns that parents may have and how they will be addressed in the early announcements of the merger:</p> <ul style="list-style-type: none"> • arrangements for those in common entrance or other exam years; • additional time spent travelling to and from school or other associated logistical problems; • changes/increases in fees and extras, particularly where the dominant school is perceived as more expensive; • whether the costs of the merger and any associated refurbishment and new build will be charged to parents in the form of large increases in fees during the next three years; • cynicism or suspicion about the reasons for the merger. Issues of confidence generally; • whether there will be redundancy or changes in the responsibilities of key members of staff; • the academic and cultural issues listed above and in particular the cost of new uniforms. 	
The constitution and legal status of the school		
22	Will the merger lead to updating the constitution of the dominant school? Will there be issues over permanent endowment?	
23	What changes will be made to the Board of Governors so as adequately to reflect the component parts of the new entity? Will any governors be asked to retire? Will nominating bodies be asked to forgo or reduce their nomination rights?	
24	Will the new entity inherit activities that need to be run by a trading company covenanting its profits up to the charity?	
The pupil roll and fee scales		
25	It will be necessary to harmonise the fee scales if they overlap. How best can that be done and over what period?	
26	Check which items of cost the fee scales of the two schools currently cover and which items are extras.	

School Transactions: Mergers, Acquisitions and Disposals

27	Also harmonise sibling discounts, staff discounts, scholarships, bursaries and any other allowances.	
28	Make projections for the next three years of the anticipated fall-out rate.	
Revision of legal documents and contracts		
29	Prepare a revision of the prospectus/statutory information/disclaimer and the letterhead.	
30	Revise the forms of parent contract, the fees list and the other fees forms (fees by instalments; fees paid by third parties and composition fees).	
31	Ensure that the parent contracts will be properly assigned to the new entity.	
32	Obtain advice about employees: the TUPE Regulations; necessary consultation; revision of the employment contracts and staff handbook; assignment of employment contracts.	
33	Harmonise the governors' policies and procedures for pupils and parents.	
34	Revision of documents relating to hire of school premises including consideration of contracts with third parties trading companies etc.	
35	Consider any onerous contracts which may be difficult to terminate or assign, such as catering, housekeeping and office equipment licences.	
Employment issues		
36	Staff cannot be dismissed by virtue of the transfer under the TUPE Regulations.	
37	The merger involves the transfer of accrued entitlements of all employees and liabilities under the TUPE Regulations. All employees transfer to the "new" school.	
38	Provide support for the staff in the period following the merger announcement. Some will be unsettled and may form opposition groups. This will form part of the formal TUPE consultation. The "soft" communication is however just as important as your obligations under TUPE.	

School Transactions: Mergers, Acquisitions and Disposals

39	Consider questions that may arise out of possible redundancies and associated questions of staff accommodation, staff allowances, benefits, staff discounts and staff pensions. This process must be properly managed and may involve collective consultation as well as TUPE consultation.	
40	Consider those in senior positions such as Heads, Bursars and Chaplains. It may be appropriate to offer a termination package under a compromise agreement to senior staff who are unlikely to be supportive of the proposal.	
41	Peripatetics: check which of them may be able to establish that they are employees with resulting employment law rights.	
42	Consider the position of caterers, cleaners and any other contracted staff.	
43	Ensure that the incoming staff have all been the subject of clear Criminal Records Bureau checks.	
Use of land, buildings and facilities		
44	Where refurbishment or new build is involved consider permanent endowment, planning permissions, building regulations, fire precautions and the CDM regulations.	
45	Identify all freehold/leasehold properties to be transferred. Check leasehold obligations and requirements for landlord consent.	
46	What new facilities will be required, e.g. for staff accommodation and on what terms they will be granted.	
47	Computer systems: consider ownership of hardware/software, finance agreements, service agreements and maintenance support.	
48	School vehicles: consider s.19 small bus and large bus permits.	
Financial matters		
49	Set a realistic budget for the merger itself.	
50	Identify all mortgages and charges affecting all assets including property and considering whether bank consent is required if, for example, bank facilities need to be novated or fresh security taken.	

School Transactions: Mergers, Acquisitions and Disposals

51	Are all statutory and management accounts up to date?	
52	Prepare a proposal or discussion paper for the school bankers. Be ready to satisfy the bank as to the stability of the pupil roll.	
53	Notification to insurers and re-arrangement of insurances.	
54	How will registration fees, deposits and lump sum prepayments of fees be dealt with?	
55	How will outstanding fees be dealt with? What litigation and what insurance claims are pending?	
56	Identify all finance agreement sand the liabilities that arise. Give notifications.	
Professional advisers and suppliers		
57	Consider the likely post-merger team of: <ul style="list-style-type: none"> • legal advisers; • accountants/auditors; • property advisers; • financial and investment advisers; • insurance brokers; • health and safety consultants; • public relations consultants. 	
58	School medical adviser and chaplain.	
59	Caterers: NB: the terms of any current catering contract and the TUPE Regulations.	
60	Check any other contractual obligations and notice periods generally.	
Consultation and notifications		
61	The Charity Commission.	
62	Department for Education (DfE) and (if relevant) UKVI.	
63	The press and other media.	

School Transactions: Mergers, Acquisitions and Disposals

64	The school associations, particularly with regard to membership.	
65	Staff and unions.	
66	The parent body.	
67	The school association and Friends and the alumni associations.	
Legal compliance		
68	Check that the merger is authorised by the governing instruments or seek authority from the Charity Commission.	
69	Notify the DfE.	
70	In the case of a boarding school, inform the local authority social services department in accordance with s.87 of the Children Act 1989 as amended.	
71	In other cases where the school holds a separate registration for its Early Years setting, OFSTED will need to be notified.	
72	Amendment of Data Protection Act registrations.	
73	Amendment of licence under Consumer Credit Act.	
74	Notifying changes of directors, company secretary, registered office and year end under Companies Act 2006.	
75	Notifications under Health & Safety legislation.	
76	Notifications required under the Education (Independent School Standards)(England) Regulations 2010.	
77	Religious designation for certain schools.	
78	Changes needed to any copy right licences granted by the CLA or otherwise in accordance with the Copyright, Designs and Patents Act 1988.	
Announcements and internal policies		
79	Appoint PR advisers who have experience of dealing with school mergers.	

School Transactions: Mergers, Acquisitions and Disposals

80	Maintain confidentiality but be ready to deal with leaks.	
81	Prepare the timetable for announcements. Announce to the staff on the same day but before parents are told.	
82	Expect one or more "staff/parent action groups" to be formed. Prepare to handle them, particularly their use of social media.	
83	Make arrangements for seeing parents on a one-to-one basis (particularly parents with children in or going into exam years).	
84	Announce mergers after entering into a merger contract.	
85	Establish good relationships with the press/media and run a positive PR campaign at the same time as the announcements.	

School Transactions: Mergers, Acquisitions and Disposals

Appendix 3 Timetables

(A) Timetable for Merger between charitable schools

This timetable assumes that discussions will begin during the Autumn Term. The process is designed to ensure that the merged school is given the best opportunity to be successful. In reality such a deliberate timetable may not be possible and will be affected by a number of external factors, which mean that the timetable needs to be compressed.

Step	Explanation	Likely timing
Initial discussions	<p>Initial discussions are likely to be at a Chairman-to- Chairman level. Before proceeding beyond this stage, the parties should enter into a Confidentiality Agreement and an Exclusivity Agreement. The former will ensure that the discussions themselves plus any commercially sensitive information released during the due diligence process (relevant to both acquisitions/disposals and charity mergers (see below) remains confidential. The latter will ensure that the negotiations are exclusive of others.</p> <p>Once the parties have reached broad agreement, they should enter into Heads of Terms which set out the agreed commercial terms and the proposed legal structure. Parties to a merger of charities should also consider negotiating and agreeing a Memorandum of Understanding ("MoU") which sets out a number of "soft issues" in relation to the operation of the merged school, such as the school's ethos etc.</p> <p>The parties should consider preparing an emergency announcement and/or press statement in case a leak occurs.</p> <p>The parties should also ascertain that there are no competition law issues relating to the merger.</p>	Autumn Term (October)
Two-way due diligence financial & legal	Each party will need to undertake due diligence on each other. This is necessary in order to ensure that the representations made about each school during the initial negotiations is true. School B will want to	Autumn Term (October- December)

School Transactions: Mergers, Acquisitions and Disposals

	<p>ensure that School A is a suitable school to which it is to transfer its assets and that School A is financially sound (particularly in order to ensure that the governors are fulfilling their responsibilities under charity law).</p>	
	<p>School A will want some comfort that the liabilities of School B are not too onerous and that there are no hidden liabilities.</p> <p>In addition an investigation will need to be undertaken to ensure that the merger is possible under charity law.</p>	
Merger documentation	<p>A Merger Deed will need to be prepared to reflect the skeleton terms agreed in the Heads of Terms.</p> <p>The first draft of the Agreement is normally prepared by the stronger school's solicitor and may be heavily negotiated and require redrafting on several occasions before being agreed. In addition it may be necessary to agree a new constitution for School A, particularly if any "legacy" from the operation of School B is to be retained.</p>	Autumn Term/ Spring Term (December/February)
Exchange of contract	<p>At a suitable point, provided that the merger documentation has been agreed, the Merger Deed can be exchanged subject to a number of conditions. In our experience this is the best time to announce the merger and the deal has already been "done" and cannot readily be unravelled.</p>	Spring Term (February - April)
Consultation	<p>It will be vital to:</p> <ul style="list-style-type: none"> - obtain advice from a PR professional with suitable experience; - announce simultaneously to staff and parents. 	
Dealing with conditions	<p>The "gap" between exchange and completion is to be used to ensure that the various conditions are complied with. These are likely to include Charity Commission consent, DfE consent and TUPE consultations (statutory consultations with staff that need to occur whenever there is a change of employer). Note</p>	Spring Term/Summer Term (April - August)

School Transactions: Mergers, Acquisitions and Disposals

	that school holidays are a close down period for consultations, which will need to be undertaken in term time.	
Legal completion	Provided that the conditions have been met, this is the date that legal title in the assets is transferred from School B to School A.	31 August
Preparing for physical completion	<p>In a situation where there is to be an assimilation of two schools, perhaps onto the same site, there are likely to be a number of steps that need to be undertaken. This may entail contracts being entered into in order to sell the redundant site and/or capital improvements being undertaken on the new school site. In addition some redundancies may be inevitable.</p> <p>It will therefore be useful to have a 12 month period in which these steps can be undertaken.</p>	Next 12 months
Physical completion	This will be the date of opening for the new school, and a day of celebration.	September (subsequent academic year)

School Transactions: Mergers, Acquisitions and Disposals

(B) Timetable for Acquisition/Disposal

The timetable for a school acquisition will typically be driven by the Buyer rather than the Seller, although this will not necessarily always be the case.

Although a school acquisition can follow the deliberate timetable in the manner described for a merger above (and in many cases such a handover process can be convenient if completion coincides with the end of a financial year/academic year and may improve the likely success of the school post acquisition), it is likely that the Buyer will want to reach completion as quickly as possible. There may also be other considerations affecting a proprietor seller (including a proprietors personal tax affairs) which will determine the transaction timetable.

The key steps in an acquisition timetable are as follows and assume that the process is undertaken as quickly as possible:

Step	Explanation	Likely timing
Finding a Buyer/Seller	<p>An introduction may be effected through personal contacts or even an unsolicited approach from either a potential Buyer or Seller.</p> <p>Sellers may choose to use a broker to put them in contact with prospective Buyers. This process may be conducted on a 'no names' basis to protect the Seller's identity until the Buyer has agreed to keep confidential all matters relating to the prospective transaction.</p> <p>A valuation of the school will need to be undertaken (in particular please note the obligation under charity law to receive a price that can be justifiable as being fair in light of market conditions).</p> <p>Thought will also need to be given to the structure of the transaction: is it an asset purchase or a share purchase, will the Buyer set up a new company specifically for the purpose of the transaction etc?</p>	
Pre-contract documentation	<p>The Buyer and Seller should enter into Heads of Terms to reflect the main commercial terms agreed between themselves.</p> <p>There will be the need for the parties to enter into a Confidentiality Agreement and the Buyer may insist on an Exclusivity Agreement.</p>	Week 0
Due diligence	<p>The Buyer will want to undertake a thorough due diligence exercise on the target school. This will be to ensure that the position is as</p>	Weeks 4-8

School Transactions: Mergers, Acquisitions and Disposals

	<p>represented to it by the Seller and that there are no hidden liabilities. It is likely to involve a financial due diligence exercise undertaken by accountants and a legal due diligence exercise undertaken by lawyers.</p> <p>The legal due diligence exercise will raise a number of enquiries dealing with all aspects of the school business including, but not limited to:</p> <ul style="list-style-type: none"> • compliance with legislation and regulation; • the condition of the assets used by the school; • whether there are, or have been any disputes with employees; • whether reports have produced any adverse findings; • whether any environmental issues affect the land and buildings used by the school; • whether any accidents have occurred for which the school or the employees could be liable; • information relating to fees, contracts with parents, scholarships and bursaries; and • any conditions placed on the use of the property used by the school. 	
Funding	<p>If the Buyer needs third-party finance (from a bank, for example) it will need to agree the terms of such funding and also ascertain what the funders conditions are. If the funder is taking security over property it will wish to undertake its own due diligence and require a report on title to be produced.</p>	Weeks 4-12
Negotiating and agreeing transaction documents	<p>Although there will be other ancillary documents, the two main transaction documents are as follows:</p> <p>The Acquisition Agreement</p> <p>This is the main document that sets out the key</p>	Weeks 6-12

School Transactions: Mergers, Acquisitions and Disposals

	<p>terms of the transaction, for example:</p> <ul style="list-style-type: none"> • who the parties are; • what is being acquired; • the price to be paid (known as "consideration"); • how the consideration will be paid and whether it will be partly contingent on the future performance of the target school; and • any other conditions that may apply to the sale and the practicalities involved in transferring ownership. <p>The first draft of the Agreement is normally prepared by the Buyer's solicitor and may be heavily negotiated and require redrafting on several occasions before being agreed. A significant part of the Agreement will be made up of warranties given by the Seller to the Buyer. Warranties are contractual promises relating to all aspects of the business being sold. Any breach of warranty may, to the extent that the relevant facts and circumstances have not been disclosed to the Buyer, result in a contractual claim for compensation by the Buyer against the Seller.</p> <p>The Disclosure Letter</p> <p>The Disclosure Letter is closely linked to the Acquisition Agreement. It is prepared by the Seller's solicitors on the basis of information provided by the Seller and makes disclosures qualifying the warranties contained in the Agreement. If a matter is properly disclosed in the Disclosure Letter it will prevent the Buyer bringing a warranty claim against the Seller and therefore anything disclosed by the Seller will help minimise the Seller's risk of liability as the Buyer will be deemed to have knowledge of the matter disclosed. Failure to disclose a relevant matter in respect of the warranties which subsequently proves to be untrue may conversely result in the Seller being sued by the Buyer for breach of warranty.</p> <p>A bundle of disclosure documents is usually</p>	
--	--	--

School Transactions: Mergers, Acquisitions and Disposals

	attached to the Disclosure Letter. The contents of any documents contained in that bundle are usually deemed to have been disclosed.	
Exchange	<p>At a suitable point, provided that the transaction documentation has been agreed, the Acquisition Agreement can be exchanged subject to a number of conditions. In our experience this is the best time to announce the sale as the deal has already been "done".</p> <p>The form of the announcement will be critical and it may be appropriate to involve PR consultants with relevant experience.</p>	Week 12
Dealing with conditions	<p>The "gap" between exchange and completion is to be used to ensure that the various conditions are complied with. These are likely to include DfE consent and TUPE consultations.</p> <p>Any conditions precedent of the funder also need to be dealt with.</p>	Weeks 12-16
Completion	Completion is the point at which the deal is concluded: the purchase monies are paid to the Seller and legal title to the assets transferred to the Buyer.	Week 16+

Appendix 4 Templates

Confidentiality Agreement (Merger)

Strictly Confidential

[Name of School]

and

[Name of School]

School Transactions: Mergers, Acquisitions and Disposals

This agreement is dated

20[]

Parties

- (1) [NameofSchool], [incorporatedandregisteredinEnglandandWaleswith company number [number] whose registered office is [address]], by its [Chairman of Governors]
- (2) [NameofSchool], [incorporatedandregisteredin EnglandandWaleswith company number [number] whose registered office is [address]], by its [Chairman of Governors]

Background

- (A) The parties are involved in highly confidential discussions and negotiations of a possible transaction between them and have provided, and will in future provide, confidential information to each other and their professional advisers for the purposes of the discussions and negotiations.

Interpretation

The following definition applies to this Agreement:

Confidential Information means information relating to either party, its undertakings, subsidiary charities, companies, businesses and property of all kinds and includes all information in written, oral, visual and electronic form, except for information which is in the public domain otherwise than resulting from a breach of this agreement.

Agreed Terms

- 1 In consideration of the provision of Confidential Information, the parties agree that the terms hereof shall apply to each party, and its Governors, employees, agents and professional advisers.
- 2 The parties will each maintain the Confidential Information in strict confidence and will not divulge any of it to any third party save as provided herein.
- 3 Neither party, without the prior written consent of the other, will communicate, indicate or suggest to any third party that discussions or negotiations are taking place between the parties or that consideration is being given to the sale or transfer of any property vested in or belonging to either party.
- 4 The parties will make use of the Confidential Information only for the purposes of the current negotiations.
- 5 The parties will restrict access to the Confidential Information to those Governors, employees, agents and professional advisers who need to have such access and will impose upon all such persons obligations of confidentiality equivalent to those contained in this agreement [by requiring them to sign the form attached to this agreement at Appendix 1].
- 6 The parties acknowledge each others' proprietary rights in the Confidential Information that is provided under the terms of this agreement.

School Transactions: Mergers, Acquisitions and Disposals

- 7 The parties shall only take such copies of the Confidential Information as are reasonably necessary for the purposes contemplated in this agreement. All copies taken and/or supplied to a third party shall if the negotiations are terminated be retrieved, returned or destroyed immediately on the request of the party to whom the Confidential Information belongs.
- 8 Each party will at any time on request made by the other give written confirmation of its compliance with the terms of this agreement.
- 9 The parties agree that the provision of the Confidential Information shall not constitute an offer or acceptance by either party to enter into a binding legal relationship or transaction of any kind.
- 10 The parties accept no responsibility or liability with respect to the accuracy or completeness of any Confidential Information provided unless and to the extent that the same is expressly incorporated into any legally binding contract between them.
- 11 The terms of this agreement shall continue in effect even if the negotiations are terminated but the provisions of this agreement shall cease to have effect on completion (if that occurs) of the transaction under discussion or if any of the terms of this agreement are expressly waived in writing.
- 12 The terms of this agreement shall not apply to Confidential Information in the following categories:
 - 12.1 information which has become or in the future becomes generally available to the public other than as a result of a disclosure made in breach of this agreement;
 - 12.2 information which one party can establish to the reasonable satisfaction of the other that it found out the information from a source not connected with the other party and that the source is not under any obligation of confidence in respect of that information;
 - 12.3 information which a party can demonstrate was lawfully in his possession prior to the date of disclosure in connection with the current negotiations;
 - 12.4 information which one party has given prior written approval to the other party disclosing (but only to the extent and for the purpose so approved) or pursuant to an order of a court of competent jurisdiction.
- 13 The provisions of this agreement shall be governed and construed by English Law and the parties agree to submit to the exclusive jurisdiction of the English Courts.

School Transactions: Mergers, Acquisitions and Disposals

This agreement has been entered into on the date stated at the beginning of it.

Signed by [name] for and on behalf of [Name of School]
 Name in full
Signed by [name] for and on behalf of [Name of School]
 Name in full

School Transactions: Mergers, Acquisitions and Disposals

[Appendix 1]

The Ancillary Confidentiality Agreement

This Undertaking is made this day of 20 by:

Name:of:

Address:

.....

.....

(the "Governor"¹)

to

[2]

(the "Charity"²)

Whereby the Governor agrees:

- 1 To treat as Secret and Confidential any Confidential Information received by the Governor during the confidential discussions and negotiations of a possible transaction ("the Transaction") between [Name of School] and [Name of School].
- 2 Upon the request of [Name of School / Name of School] to return to the Charity all documents containing Confidential Information or confirm that it has been destroyed confidentially, or in the event that relevant Confidential Information is in electronic format confirm that it has been deleted permanently from all computers and backup systems so far as is practicable.
- 3 That for the purposes of this undertaking:
 - 3.1 Confidential Information means:
 - 3.1.1 information relating to either party, its charities, companies, businesses and property of all kinds and includes all information in written, oral, visual and electronic form, except for information which is in the public domain otherwise than resulting from a breach of this Agreement; and
 - 3.1.2 the fact that the discussions and negotiations between the parties relating to the Transaction are taking place.
 - 3.2 Secret and Confidential means that the Confidential Information, save as required by law, shall not without the prior written consent of the Charity be disclosed or

¹ This is likely to be in relation to a governor, but this can be signed by any other third party to which confidential information is passed

² This should be the charity of which the Governor is a trustee

School Transactions: Mergers, Acquisitions and Disposals

permitted to be disclosed to any Unauthorised Person, or otherwise made use of or permitted to be made use of, other than for the purpose of fulfilling the legal obligations of the Governor towards the Charity.

- 4 An Unauthorised Person is any person who is under no continuing legal obligation to either party to hold Secret and Confidential the Confidential Information as set out in this undertaking.
- 5 The Governor warrants that he/she is under no obligation to any other person, firm or company, which in any way prevents or restricts them from entering into this undertaking and performing the obligations herein.
- 6 This agreement shall continue in force until the Transaction completes or for a period of two years after the date that [Name of School / Name of School] informs the Governor that the transaction process has been terminated.
- 7 The terms of this Agreement shall not apply to Confidential Information in the following categories:
 - 7.1 Information which has become or in the future becomes generally available to the public other than as a result of a disclosure made in breach of this Agreement.
 - 7.2 Information which a party can demonstrate was lawfully in his possession prior to the date of disclosure in connection with the current negotiations.
 - 7.3 Information which one party has given prior written approval to the other party disclosing (but only to the extent and for the purpose so approved) or pursuant to an order of a court of competent jurisdiction.
- 8 That this undertaking is to be governed and construed according to English law.

Signature:

..... Name:

..... Position: [Governor]

School Transactions: Mergers, Acquisitions and Disposals

Confidentiality Agreement (Acquisition)

Strictly Confidential

[Buyer]

and

[Seller]

School Transactions: Mergers, Acquisitions and Disposals

This agreement is dated 20[]

Parties

- (1) [Buyer], [incorporated and registered in England and Wales with company number [number] whose registered office is [address], [by its Chairman of Governors]] (the "Buyer")
- (2) [Seller], [incorporated and registered in England and Wales with company number [number] whose registered office is [address]] (the "Seller")

Background

- (A) The Buyer is negotiating with the Seller for the purchase of the Business (which may be structured as an asset sale or a share sale).
- (B) The parties wish to ensure that Confidential Information revealed by either party to the other and their professional advisors in the course of negotiations remains confidential and is not used by the other party other than for the purposes of the discussions and negotiations.

Interpretation

The following definitions apply to this Agreement:

Business: means the business of [business] [(the "School")] carried on by the Seller at the Premises.

Confidential Information: means information relating to either party, its charities (as applicable), companies, businesses and property of all kinds and includes all information in written, oral, visual and electronic form, except for information which is in the public domain otherwise than resulting from a breach of this agreement.

Premises: means [address].

Agreed Terms

- 1 In consideration of the provision of Confidential Information, the parties agree that the terms hereof shall apply to each party, and its Governors and directors (as appropriate), employees, agents and professional advisers.
- 2 The parties will each maintain the Confidential Information in strict confidence and will not divulge any of it to any third party save as provided herein.
- 3 Neither party, without the prior written consent of the other, will communicate, indicate or suggest to any third party that discussions or negotiations are taking place between the parties or that consideration is being given to the sale or transfer of any property vested in or belonging to either party.
- 4 [Neither party shall make an announcement to parents or others in relation to the future of [the School] without the prior written consent of the other.]
- 5 The parties will make use of the Confidential Information only for the purposes of the current negotiations.

School Transactions: Mergers, Acquisitions and Disposals

- 6 The parties will restrict access to the Confidential Information to those Governors and directors (as appropriate), employees, agents and professional advisers who need to have such access and will impose upon all such persons obligations of confidentiality equivalent to those contained in this agreement.
- 7 The parties acknowledge each others' proprietary rights in the Confidential Information that is provided under the terms of this agreement.
- 8 The parties shall only take such copies of the Confidential Information as are reasonably necessary for the purposes contemplated in this agreement. All copies taken and/or supplied to a third party shall if the negotiations are terminated be retrieved, returned or destroyed immediately on the request of the party to whom the Confidential Information belongs.
- 9 Each party will at any time on request made by the other give written confirmation of its compliance with the terms of this agreement.
- 10 The parties agree that the provision of the Confidential Information shall not constitute an offer or acceptance by either party to enter into a binding legal relationship or transaction of any kind.
- 11 The parties accept no responsibility or liability with respect to the accuracy or completeness of any Confidential Information provided unless and to the extent that the same is expressly incorporated into any legally binding contract between them.
- 12 The terms of this agreement shall continue in effect even if the negotiations are terminated but the provisions of this agreement shall cease to have effect on completion (if that occurs) of the transaction under discussion or if any of the terms of this agreement are expressly waived in writing.
- 13 The terms of this agreement shall not apply to Confidential Information in the following categories:
 - 13.1 information which has become or in the future becomes generally available to the public other than as a result of a disclosure made in breach of this agreement;
 - 13.2 information which one party can establish to the reasonable satisfaction of the other that it found out the information from a source not connected with the other party and that the source is not under any obligation of confidence in respect of that information;
 - 13.3 information which a party can demonstrate was lawfully in his possession prior to the date of disclosure in connection with the current negotiations;
 - 13.4 information which one party has given prior written approval to the other party disclosing (but only to the extent and for the purpose so approved) or pursuant to an order of a court of competent jurisdiction.
- 14 The provisions of this agreement shall be governed and construed by English Law and the parties agree to submit to the exclusive jurisdiction of the English Courts.

School Transactions: Mergers, Acquisitions and Disposals

This agreement has been entered into on the date stated at the beginning of it.

Signed by [name] for and on behalf of [Buyer]
 Name in full
Signed by [name] for and on behalf of [Seller]
 Name in full

School Transactions: Mergers, Acquisitions and Disposals

Appendix 5 Advice for schools on taking decisions to close

1 Introduction

- 1.1 Clearly a decision to close a school is likely to be a last resort and something that would only be contemplated if:
 - 1.1.1 cash flow forecasts mean that the School does not have necessary financial resources to continue trading and there are no other steps that can be taken to reduce operating costs; and
 - 1.1.2 there is no or limited prospect of finding a strategic solution such as a merger with another charitable independent school or disposal to a commercial operator.
- 1.2 No school should open at the start of a term unless there is certainty that it can continue to operate through the whole term and a closure at the end of a Summer Term is preferable to a closure mid-year and therefore any school re-opening for a new academic year in September must be confident that it can continue to operate until the summer.
- 1.3 Recognising that it is a very difficult decision - any closure will involve difficult conversations with staff, parents and pupils and is likely to be disruptive, particularly for pupils taking public or common entrance exams - decisive action needs to be taken to ensure that any closure is as measured as possible.
- 1.4 If a decision is made to close a school, great care needs to be taken about when and how it is announced. Particular care must be taken over issues of confidentiality, timing, communication and PR.
- 1.5 There are "good" closures and "bad" closures of schools. Examples of the latter have been:
 - 1.5.1 schools that simply failed to open at the start of term leaving everyone high and dry;
 - 1.5.2 schools that announced closure too early and faced mass withdrawals; and
 - 1.5.3 schools that allowed rumour to precede formal announcements.

2 Closure timetable

- 2.1 The timetable for closure is driven mainly by employment issues. Assuming it is intended to close the School at the end of the Summer Term, due notice must be given to the School's employees in time for their employment to terminate before the start of the Autumn Term. You also need to take into account the contractual relationship with parents.
- 2.2 Although parents and staff will have different notice periods, in practice they must be treated as one group. Some parents may also be members of staff. Rumour will spread quickly once an announcement has been made and it is important the School retains as much control over the process as possible.
- 2.3 In terms of the timetable, there typically broadly three ways to approach a closure:

School Transactions: Mergers, Acquisitions and Disposals

- 2.3.1 **Option 1** - announce closure early, normally early in the Spring Term, in time to give proper notice to parents and staff and avoid incurring liabilities to teaching staff beyond the end of the Summer Term;
 - 2.3.2 **Option 2** - announce closure before the start of the Summer Term, in time to give proper notice to parents, but too late to avoid liabilities to teaching staff for the Autumn Term;
 - 2.3.3 **Option 3** - announce closure later at a point in the Summer Term after it has been concluded that no sale or other rescue is possible and with a view to minimising disruption to pupils in exam years.
- 2.4 The issues that inform these options are explained in more detail below and there is a table which summarises the pros and cons of each option.

3 Employees

- 3.1 To minimise employment liabilities, and ensure that staff have the opportunity to find alternative employment, the School will be required to undertake a redundancy consultation process, followed by notice to terminate their contracts of employment. It is advisable that formal notices to staff should not be given on the last available day as complications can arise if a staff member is off sick, on holiday or does not receive the notice.
- 3.2 Depending on contracts, teachers are typically entitled to one term's notice to terminate the contract. The last date for giving notice will vary according to the wording of the contract, but may typically be as early as the last teaching day of the preceding term or as late as the day before the start of the next term or may be a fixed date. In the case of a summer closure, the Easter holidays dates are therefore often key - in this regard note that in 2021 Easter falls quite early.
- 3.3 Different categories of staff will have different notice entitlements. Support staff are likely to have shorter notice requirements and the Head and any other senior members of staff may have a longer notice entitlement. If so, it may be necessary to pay them in lieu of part of their notice.
- 3.4 Schools that propose to make more than 20 redundancies in a 90 day period will need to undertake both collective consultation and individual consultation with staff. Collective consultation will entail consulting with representatives of the staff for a period of at least 30 days (or 45 days if more than 99 redundancies) before the first redundancy takes effect i.e. when the notice periods expire. It is best practice to consult with the employees before serving them with notice.
- 3.5 If there is no recognised Trade Union or formal information and consultation body, staff must be given the opportunity to elect employee representatives, which typically takes one to two weeks and the consultation period cannot formally begin until the representatives have been elected and they have been provided with certain prescribed information.
- 3.6 If the School does not undertake a reasonable and fair consultation process prior to issuing notice of termination, staff with more than two years' service may seek to bring unfair dismissal claims against the School.

School Transactions: Mergers, Acquisitions and Disposals

4 Pupils and parents

- 4.1 For most schools, the terms and conditions of the parent contract require the School to give notice of closure of the School. Notice is generally required to be given before the end of the penultimate term before it takes effect. If the School is to close at the end of the Summer Term, notice must be given on or before the final day of the Spring Term.
- 4.2 However, if the School complies with its contractual obligation described above there are risks that parents may refuse to pay fees for the Summer Term believing that the School will not be in a position to pursue them; and/or withdraw their children with little or no notice and place them at another school.
- 4.3 Such actions will have an adverse effect on revenues and cash flow and may result in the School operating for the final term with many fewer pupils than were budgeted for.

5 Professional advisers

- 5.1 A "good" closure of the School can be greatly facilitated by taking specialist advice from professional advisers with experience in the independent schools sector. In particular, the Governors should consider whether or not PR advisers should be retained to assist with the announcements and publicity to parents and the local community.
- 5.2 Confidentiality is key - you do not want your closure plans to leak. You may also consider preparing an emergency press release in case of an inadvertent leak.
- 5.3 The School should also discuss its position with its accountants and auditors in order to ensure they are aware of the possibility of closure. If there is a reasonable prospect that the School may become insolvent, then specialist insolvency advice will need to be taken as the Governors will begin to owe personal duties to the School's creditors.

6 When to announce closure?

- 6.1 There is no "right or wrong" way to announce the closure of a school. The decision as to timing will depend on a number of factors including:
 - 6.1.1 the School's financial position and insolvency advice;
 - 6.1.2 whether there is a reasonable prospect of finding a rescue solution for the School;
 - 6.1.3 the impact of timing on the pupils and in particular those in examination years;
 - 6.1.4 staff notice periods - and liability to pay teaching staff salaries for the Autumn Term and/or protective awards if proper notice is not given;
 - 6.1.5 contractual notice required to be given to parents;
 - 6.1.6 the impact of timing on parents' ability to make alternative arrangements;

School Transactions: Mergers, Acquisitions and Disposals

6.1.7 the School's ability to maintain confidentiality if announcement is delayed; and

6.1.8 the risk of pupil withdrawals before the end of term and/or non-payment of fees.

6.2 Assuming the need to manage a closure at the end of the Summer Term, the pros and cons of the three options in light of these factors can be summarised as follows:

Factors	Option 1 (Announce closure before Half-Term in the Spring Term)	Option 2 (Announce closure before the start of the Summer Term)	Option 3 (Announce closure later in Summer Term)
Allows proper notice to be given to staff	√	X	X
Allows proper notice to be given to parents	√	√	X
Minimises disruption to pupils' education	√ / X	X	√ / X
Low risk of withdrawals of pupils and / or parents not paying Summer Term fees	X	√	√
Time to make alternative arrangements for pupils	√	√	X
Protects Governors' reputation (by giving as much notice as possible)	√	√ / X	X

If you would like to discuss any of the issues contained in this note, please contact:

Robert Collier

rcollier@vwv.co.uk | DD: 0117 314 5472 | M: 07769 696075

Barney Northover

bnorthover@vwv.co.uk | DD: 0117 314 5395 | M: 07973 423081