



CHARLES RUSSELL

Pharmacy business – A guide for
buyers and sellers

June 2011

INTRODUCTION

No ordinary business - no ordinary law firm

It is often said that medicines are not ordinary articles of commerce, and purchasers should speak to an expert - a pharmacist. In the same way, pharmacy businesses are not ordinary. Buyers and sellers alike can benefit from the added value of using solicitors familiar with pharmacy business and aware of the potential pitfalls. Charles Russell is the UK's only law firm specialising in providing legal services to the community pharmacy sector.

This edition takes into account the NHS Regulations that came into force on 1 April 2005 and the overhaul of company law effected by the Companies Act 2006. It also reflects the very helpful comments made by readers of previous editions, and other recent changes in the law (which is stated as at 1 June 2011) and applies to England and Wales. For convenience, references to Primary Care Trusts ("PCT") should also be treated as references to Local Health Boards in Wales. This Guide does not extend to Scotland..

I hope this guide will illustrate some of what Charles Russell LLP has to offer, and help buyers and sellers alike.

**David Reissner, Partner
Head of Healthcare
June 2011**

"Charles Russell's [Healthcare] group is 'very helpful, courteous and prompt', and is particularly highly regarded for its work in the pharmacy sector"

"Widely regarded as the only firm to use for issues relating to pharmacies... [Charles Russell] know the business better than anyone else in the UK"

(Chambers & Partners)

More information

Name: David Reissner

+44 (0)20 7203 5065

david.reissner@charlesrussell.co.uk

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“David Reissner at Charles Russell LLP is probably the leading adviser to the pharmaceutical sector on healthcare matters, including regulatory advice and cases against Primary Care and other Trusts. A second excellent strand is the Healthcare Property team. ”
(Legal 500)

The pharmacy transactions team is led by corporate partner Tim Jenkins who “receives particular praise for his work in the healthcare and pharmacy sector”
(Chambers & Partners)

OVERVIEW

Pharmacies may be owned by individuals (sometimes in partnership) or by corporate bodies. For convenience, we refer to corporate bodies as “companies”, but they may also be Limited Liability Partnerships (“LLPs”). The way a pharmacy is owned will normally dictate the nature of the sale and purchase transaction. Generally there are two types of transaction namely

- (a) the transfer of key assets of a pharmacy business from seller to buyer; or
- (b) the transfer of ownership of the company which operates the pharmacy business from seller to buyer (eg the transfer of the shares in the company).

Asset disposals involve a seller transferring the NHS pharmacy contract, goodwill, key assets (including premises) and material trading contracts (eg with staff) to the buyer.

Share sale transactions do not normally involve such a change - instead the pharmacy business continues to be owned and operated by the relevant company and ownership of the company itself is transferred from seller to buyer.

There are advantages and disadvantages (not just from a legal perspective but also from an accounting, tax and logistical perspective) associated with each of these options (for both buyers and sellers).

With transfers of shares in companies, continuity of business ownership is usually preserved and normally third party approvals are not required. That said, a buyer will inherit any pre-acquisition liabilities of the company which must still be paid out of the profits of the business post acquisition. For that reason buyers will typically undertake a more detailed process of investigating the historic operation of the business (including its tax history) with this type of transaction and seek a greater degree of protection in the legal documents governing the transaction.

The advantages and disadvantages to buyers and sellers associated with each of type of transaction are explored in greater detail in the following sections.

Our Transactions Team led by partner Tim Jenkins is experienced in dealing with these types of transaction for buyers and sellers of all types and sizes. We are able to offer a competitively priced, added-value service and we apply our experience and specialist knowledge to achieve speedy and cost effective completion of transactions in a commercially-driven, sympathetic and approachable way.

ONE STOP SERVICE

We believe we can add further value by making life simpler for clients and helping them meet their objectives by putting at their disposal a complete professional team with experience and expertise in pharmacy. This is our new "One-Stop" service that is available for all clients.

Our One-Stop service enables us not only to give specialised legal advice, but also to bring in and co-ordinate advice from valuers, surveyors, accountants or financial advisers, all of whom have specialist knowledge of community pharmacy. We can also put you in touch with possible lenders. For further advice on this service please contact David Reissner or Tim Jenkins.

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1 TERMINOLOGY

We hope you will find this Guide is written in plain English. We have tried to avoid technical terms. Where we have used some technical expressions, we hope the meaning will be obvious. For example, a reference to a PCT is to a Primary Care Trust. People commonly speak about pharmacies having an “NHS contract”. Strictly speaking, there is no such contract except where there is a scheme for Local Pharmaceutical Services, or an agreement to provide Enhanced Services. There is only a right to be included in a PCT’s pharmaceutical list and to be paid for providing NHS services. However, for convenience, we refer in places to NHS contracts. References to a buyer include a prospective buyer as well as someone who completes a purchase. References to buying include buying freehold or leasehold premises.

2 WHO MAY OWN A PHARMACY?

- 2.1 In most of the United Kingdom, only a pharmacist, a partnership comprised exclusively of pharmacists, or a company (or limited liability partnership (LLP)) may own and run a pharmacy business. In Scotland, non-pharmacists may be partners in a pharmacy business.
- 2.2 A sole trader has the sole right and responsibility for the management and conduct of his or her business. He or she may engage staff to assist but, ultimately, the responsibilities vest in him or her alone. Similarly, in the case of a partnership, it is a fundamental right of each partner, in the absence of any agreement to the contrary between the partners, to be involved in the management of the partnership business. A sole trader or partnership does not have a legal existence which is independent of the individuals themselves. Accordingly the individual sole trader or partners are liable to the fullest extent of their personal assets for all business liabilities incurred.
- 2.3 This contrasts with a limited company or LLP which is a separate legal entity with an existence independent of its owners (the shareholders) or directors. As a result, the limited company or LLP may own property, enter into its own contracts and incur its own debts. The shareholders or directors of the limited company, or the owners of an LLP, are not generally liable for the debts or other commitments of the company or LLP. If the shares are issued “fully paid” and the company or LLP incurs liabilities which exceed available assets, resulting in the liquidation or receivership of the company or LLP, then the directors, shareholders or members cannot generally be called on to contribute further to meet any shortfall to creditors. The value of their investment is lost, but their personal assets are not at risk – in other words, their liability is limited.

3 STRUCTURING THE SALE AND PURCHASE

- 3.1 If the seller of a pharmacy business is an individual or partnership, the bricks and mortar of the building can be sold. If the seller is a company, the seller can sell either the physical premises or shares in the company. The goodwill in the business can also be sold. The goodwill in a business will usually be reflected in the price, but goodwill – which may include the NHS pharmacy contract – can be sold separately.
- 3.2 At the outset, a company needs to consider whether a share sale or an asset sale is more appropriate. Each structure has its own advantages and disadvantages. A share sale involves the buyer acquiring some or all of the shares in the company that is running the pharmacy business (the target). An asset sale involves a buyer acquiring from the company selected assets which make up the pharmacy business, for example, the premises, the NHS Contract, goodwill, staff and stock in trade.
- 3.3 When a buyer acquires the shares in a company, the buyer also inherits all the company’s assets and liabilities (including the pharmacy premises or other property) unless they have been transferred out of the company prior to the sale. For this reason, a contract for the sale of shares often has a more extensive set of warranties and a tax deed to protect the buyer in respect of unexpected liabilities that may exist in the company.
- 3.4 If the assets are being bought from the company, the buyer chooses those assets and liabilities he wants to acquire, and leaves with the company the assets and liabilities the buyer

does not want to purchase. It is important to identify what the buyer wants to buy, because the ownership of assets (especially the property) does not automatically transfer to the buyer unless specific arrangements are made.

4

SHARE SALE

Advantages to a Buyer	Disadvantages to a Buyer
<ul style="list-style-type: none"> • Continuity of business - the business is carried on by the same company before and after acquisition, thereby giving an impression of continuity to the outside world. • No NHS delays - a change of ownership application will normally be unnecessary. • Premises - title to any premises held by the target company will normally automatically pass to the buyer with the target company. • Contract rights - contracts will normally automatically transfer with the target company (subject to any change of control provisions). • Stamp duty - stamp duty at the rate of 0.5% is payable on the transfer of shares. This compares favourably to the maximum 4% rate of stamp duty land tax payable if the transfer is of assets and includes UK land and buildings in commercial or mixed commercial and residential use. However, other assets typically transferred as part of a business are no longer within the charge to stamp duty. • Preservation of tax losses - trading losses will generally be available to be carried forward for use after the sale against the target company's profits provided there is not a major change in the nature or conduct of the trade. Tax losses would not be preserved with an asset sale although a pre-sale hive down of the assets to a company could be considered. • Fewer transfers - no need to transfer assets or contracts as these will be vested in the target company. • Employees - employees of the target company will remain employed by the target company and the new owner of the company will become their employer, usually without the need for prior consultation. 	<ul style="list-style-type: none"> • No cherry-picking - the buyer cannot cherry-pick assets and liabilities, and will automatically acquire all the assets and the liabilities of the target company. • Liabilities will be inherited - since liabilities will be inherited, a full due diligence exercise needs to be carried out to establish what the liabilities are. • Increased costs - carrying out due diligence can involve a higher level of professional fees. • No tax deduction for cost of assets - as the assets acquired are the shares in the target company rather than the assets of the business, the tax benefits available on a purchase of assets (see further below) will not be able to be utilised.

Share Sale (Continued)

Advantages to a Seller	Disadvantages to a Seller
<ul style="list-style-type: none"> • Liabilities to creditors - unless the seller has given personal guarantees or indemnities, debts and other liabilities of a company will become the responsibility of the new owner. • Premises - including any leasehold property, will remain with the target company. This will include any contingent liabilities attaching to any premises such as dilapidations. A share sale, therefore, enables the seller to avoid such liabilities. However, any personal guarantees will remain in force until released by the third party holder. • Security - by transferring the shares in a company a seller may be able to avoid the need to obtain consent to the sale from a bank which has a charge over the assets of the company. • Single tax charge - on a share sale, the proceeds of sale will be received directly by the shareholders of the target company, thus avoiding a potential double tax charge on the sale of assets (i.e. a tax charge in the target company on the disposal of its assets, followed by a tax charge on the shareholders on the extraction of the sale proceeds). • Entrepreneurs' Relief - individual shareholders may be able to benefit from the new entrepreneurs' relief on a share sale. The first £10 million of gains that qualify for relief will be charged to Capital Gains Tax ("CGT") at an effective rate of 10%. This is known as the lifetime allowance. Gains in excess of £10 million will be charged to CGT at two separate rates of 18% and 28% for basic and higher rate/additional rate tax payers. This relief would not be available on a sale of assets unless the target company is liquidated. 	<ul style="list-style-type: none"> • Increased costs - since the liabilities of the target company will be inherited by the buyer and the buyer will be carrying out a full due diligence exercise so as to establish the liabilities, the seller may be involved in higher level of professional costs in disclosing the documentation, identifying the liabilities and addressing the buyer's enquiries. • Liability of the seller - the buyer will probably require the seller to accept personal liability for any inaccuracy in the disclosure of information, and the seller may also be required to indemnify the buyer against any unforeseen liability for tax or other expenses which arise after the sale has been completed and which are referable to periods preceding the sale.

5 **ASSET SALE**

Assets in a pharmacy business may include the tangible assets (the bricks and mortar, fixed assets and material business contracts (including staff)) together with the goodwill, or just the tangible assets, or just the goodwill. The goodwill includes the value of an NHS contract.

Advantages to a Buyer	Disadvantages to a Buyer
<ul style="list-style-type: none"> • Liabilities - the buyer will not generally assume pre-existing liabilities of the business. These remain with the seller unless specifically transferred to the buyer. • Cherry-picking - the buyer will be able to select those assets and liabilities he wishes to acquire. But beware – this does not apply to employees. • Tax deduction for cost of assets - a tax deduction will normally be available in respect of the cost of goodwill and stock. Capital (depreciation) allowances should also be available in respect of the cost of plant and machinery. These deductions can be extremely valuable. 	<ul style="list-style-type: none"> • Premises - consent will usually be required from any landlord of leasehold property before it can be transferred to the buyer. This can prove costly and time consuming. Stamp duty land tax is also payable on transfers of property. • Business contracts - will need to be specifically assigned to the buyer (apart from employment contracts), which will often require the consent of a third party. The NHS contract will have to be subject to a change of ownership application while the seller is still providing services. • Tax losses - tax losses in the selling company will not be available for use after the sale.
Advantages to a seller	Disadvantages to a seller
<ul style="list-style-type: none"> • Apportionment of purchase price - although not strictly a benefit, the seller may be able to apportion the consideration payable between the assets being acquired. This may be important from a tax point of view in order to minimise tax charges arising on the sale and should be considered at an early stage on a business transfer. • Tax losses - if assets are sold at a loss, for tax purposes, these losses may be able to be used to reduce tax payable by the seller 	<ul style="list-style-type: none"> • Ensuring correct tax treatment - the fewer assets that are acquired by the buyer the more difficult it will be for a seller to argue that there has been a transfer of a going concern from a VAT perspective – in other words, the seller may have to charge VAT on the price for the assets. • Continuing liabilities - even if leasehold property is assigned to the buyer, the seller, as the original tenant, may remain liable in the event of breach of the lease by the buyer, for example if the buyer does not pay the rent. • Consent - consent may need to be obtained from the landlord for the transfer of leasehold property. Consent would normally also be required from the landlord before carrying out any work to the premises. • Double tax charge – if the seller is a company there is likely to be a tax charge in the company on the disposal of its assets followed by a tax charge on the shareholders on the extraction of the sale proceeds. This is avoided with a share sale. • Consultation - the seller will need to

	<p>inform and, in some cases, consult with employees prior to completing a sale.</p> <ul style="list-style-type: none"> • Energy Performance Certificate (“EPC”) – required as sale of a property asset. This can take time to organise and involve additional cost to the seller.
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6 BEFORE BUYING

6.1 Negotiations

At the outset a prospective seller and prospective buyer will agree in outline a price and general terms for the sale and purchase of the pharmacy business. It is extremely helpful to the solicitors if these can be written down in as much detail as possible, with apportionments of the sale price and with specific items which have been agreed between the parties. The discussions should be “subject to contract” and these words should be added to anything in writing. This is so that neither party is legally bound before solicitors have drawn up the full documentation after making the necessary checks and giving advice. If the buyer is relying on prescription figures or other financial information about a business, it is important to let his solicitor know. The information should be referred to in the contract. Above all, the buyer should avoid entering into a contract saying he does not rely on information given during negotiations, or that the contract represents the entire agreement between the buyer and the seller, if the buyer needs to rely on the accuracy of the information given. All such information should be disclosed by the seller’s solicitor.

6.2 Preliminary Deposit

Quite often a buyer is asked to place a preliminary deposit, or non-refundable deposit, with the seller’s solicitor. Care should be taken to ascertain the basis on which the seller’s solicitor holds the deposit. By way of example, it should be returnable to the buyer if he or she finds significant faults in the accounts of the seller, or if the seller withdraws from the transaction.

6.3 Finance

A buyer needs to consider how he will finance the purchase of the business. Historically, banks were often prepared to provide finance with loans being underwritten by pharmacy wholesalers (the “Loan Guarantee Scheme”). These types of scheme (under which buyers were required to commit to purchasing a certain minimum volume of stock from the wholesaler) are now less common. Any bank lending to the borrower is likely to require a first legal charge over the premises and in the case of a company, a debenture over its assets. If the premises to be purchased are leasehold then the landlord’s consent must usually be obtained before the first legal charge can be granted. Some leases allow the landlord to refuse consent. Beware using the target company’s assets as security for a Bank (on a share purchase) which can in certain circumstances still be unlawful.

6.4 Warranties and Due Diligence

6.4.1 Warranties and indemnities in the sale contract (under an asset or share sale) give a buyer a right to bring claims against the seller after completion. If the buyer has little confidence in the seller’s ability to pay compensation for any breach of warranty, the buyer will need to rely heavily on a due diligence exercise, checking in advance the truth of representations made by the seller and the state of the business. The buyer should also consider holding back a proportion of the price to meet any such claims (a joint solicitors’ account is the normal mechanism).

6.4.2 A buyer should also ensure that he or she carries out his or her own enquiries of the local PCT and doctors surgeries and residential or nursing homes (taking care however not to breach any confidentiality obligation owed to the seller in relation to the fact of sale of the business). A buyer should try to find out whether any third

party pharmacy relocations or applications for new NHS contracts are relevant and whether any local doctors are planning to relocate or whether any doctor is nearing retirement age. This may have an effect on the income of the business and the value of the goodwill he or she is paying. A detailed analysis of the prescription figures should also be undertaken by a buyer.

- 6.4.3 Consideration should be given to the treatment of prescriptions dispensed in part (owings) at the date of the completion. The seller may want to make sure he or she receives payment for the part that has been dispensed. The buyer may not want to have responsibility for supplying the undispensed balance without an arrangement for being reimbursed.

6.5 The Sale and Purchase Contract

When everything has been agreed in detail, the buyer and seller will both sign a sale and purchase contract. The contract becomes binding when both parties have exchanged signed copies via their solicitors. If premises do not already have an NHS contract, the contract of sale may need to be conditional on obtaining one.

6.6 Entire Agreement Clauses

It is common to include in contracts a clause that says the contract represents the entire agreement between the buyer and the seller. This will normally mean that after the contract is entered into, the seller cannot complain about or try to rely on any other pre-contract agreement or any representation made by or on behalf of the seller, even if the information previously given turns out to be wrong. This protects a seller. If a buyer wants to be able to rely on a representation or on information given before the contract is entered into, the buyer should ask for the details to be included in the contract.

6.7 PCT Consents

- 6.7.1 If the premises that are being bought or leased are not currently being used as a pharmacy and are not in the PCT's pharmaceutical list, the buyer will need to make sure that the premises can be used for providing NHS pharmaceutical services. An applicant who has secured premises will often find that this enhances the prospect of persuading the PCT to grant a pharmacy contract. However, most buyers will not wish to be committed to owning premises without knowing whether or not the PCT will grant an application. The prospective buyer can apply to the PCT for preliminary consent for inclusion of the premises in its pharmaceutical list, and the contract to buy the premises can be made conditional upon an application being granted by the PCT. If, after entering into a conditional contract of this kind, the application for inclusion in the pharmaceutical list is not granted, the buyer will no longer be under an obligation to buy or lease the premises.
- 6.7.2 If the premises are already included in the PCT's pharmaceutical list and it is the premises – not shares in a company – that are being bought, the buyer will need to apply to the PCT for a change of ownership. The application to the PCT for change of ownership must be made by the buyer (normally by way of a standard application form) while services are still being provided by the seller from the premises.
- 6.7.3 It is important to note that the NHS contract will not be transferred by an agreement between the buyer and seller. Forms have to be completed and lodged with the local Primary Care Trust before an existing pharmacy business changes hands. Care should be taken to ensure that the seller cannot require completion of the purchase until the buyer is to be included in the PCT's pharmaceutical list and the time for appealing has expired.
- 6.7.4 If the premises are already included in the PCT's pharmaceutical list and the prospective buyer intends to acquire the existing location and then relocate the pharmacy, a contract to purchase can be made conditional upon PCT relocation consent being granted.

- 6.7.5 Alternatively, if the buyer intends to relocate the pharmacy without operating in its existing location, then it may be best to require the seller to apply for relocation and to make the purchase conditional on PCT relocation consent being granted (in the case of a company sale) or implemented (in the case of an asset sale).
- 6.7.6 Care should be taken by sellers if the premises are held on a lease and there are covenants restricting their use only as a pharmacy, since selling the NHS contract to someone who relocates it would leave the seller with premises that cannot be used for any other purpose.
- 6.7.7 Any minor relocation application should be made while services continue to be provided at the original location.
- 6.7.8 Where the transaction involves the acquisition of an existing NHS contract, neither the buyer nor the seller will have any control over how long the PCT will take to update its pharmaceutical list. It is therefore common to have a separate agreement enabling the buyer to run the business in the name of the seller until the pharmaceutical list is updated. In this kind of agreement, the buyer would accept post-completion liabilities, and the seller would agree to account to the buyer for NHS remuneration relating to the period between completion and the date on which the buyer is included in the pharmaceutical list.

6.8 Premises Registration

New ownership and new premises must be registered with the General Pharmaceutical Council (“GPhC”). If existing premises are substantially altered, the local GPhC inspector should be consulted about whether new registration is necessary. Registration with the GPhC is not instant, so adequate time should be allowed for this process, especially if the purchaser is in a hurry to open.

6.9 VAT

Pharmacy businesses will usually be registrable for VAT. On an asset purchase, the buyer may not want to take over a seller's existing VAT number. If, on an asset purchase, the buyer is acquiring a business for the first time, he or she should apply to HM Revenue and Customs for VAT registration at an early stage so that the formalities have been completed before the buyer is ready to open for business.

6.10 Data Protection Registration

Buyers should check whether the business is required to be registered with the Information Commissioner for data processing by the business (normally the processing of for example Patient Medication Records will require registration).

7 IDENTIFYING THE ASSETS TO BE TRANSFERRED

7.1 Premises

7.1.1 The buyer's solicitor will carry out a full investigation of the title of the seller to the premises so as to ensure that the property is free from any mortgages or restrictions and can be used as a pharmacy. The process includes identifying whether the premises are freehold or leasehold. Enquiries of various local authorities and utility companies will be carried out to ensure that:

- the premises are directly accessible from the public highway;
- they are served by all necessary utilities;
- there are no nearby traffic schemes that might adversely affect the business; and
- the premises have the necessary planning consent.

- 7.1.2 Checks will also be made to ensure that the benefit of any important rights of way (for example, to use a loading bay or service yard) have been properly protected at the Land Registry.
- 7.1.3 The buyer's solicitor will raise preliminary enquiries of the seller's solicitors so as to obtain general information about the premises.
- 7.1.4 The buyer's solicitor will raise preliminary enquiries of the seller's solicitors so as to obtain general information about the seller. In particular, the buyer should find out if the seller is aware of any fitness to practise issues affecting the seller's ability to continue to run the business.
- 7.1.5 The buyer needs to be clear before agreeing to buy premises, what condition they will be in, particularly for new developments. For example, some contracts specify the premises will be completed to a "shell and core" finish. This is a very basic standard of finish, leaving the buyer with only a floor and four walls. One advantage to the buyer is that the buyer may obtain early access to the premises and be able to fit them out to his or her own specification. A disadvantage is that the buyer will have the expense, for example, of installing a ceiling and connecting up to utilities. This is something the buyer should be clear about before exchanging contracts.
- 7.1.6 The buyer should consider whether the premises comply with Fire Regulations, the Equality Act 2010 and the Control of Asbestos Regulations 2006 and take advice on whether any work will need to be carried out to meet the requirements of the Act and the Regulations.

(A) Freehold

If a seller owns the freehold interest in the property, there may be two approaches to dealing with the property:-

- (a) The freehold interest in the property could be bought by the buyer. If the buyer does this, he should consider the possibility of buying in his own name and, simultaneously with completion, granting a lease of the premises to a trading company. This is a form of pension planning. If, in the future, the buyer wishes to sell the pharmacy business and the lease, he can do so and retain the freehold interest in the premises, thereby generating an income through the rent that continues to be payable.
- (b) The seller may wish to retain the freehold interest in the property and may therefore only be prepared to grant a lease to the buyer. A well advised pharmacist may in that situation wish to have an option to acquire the freehold interest or right of first refusal to buy the freehold interest if it later becomes available. This can often be negotiated at the time a pharmacy lease is taken.

Quite often an interest in pharmacy premises is subject to a tenancy of the upper residential parts. If this is the case and the buyer wishes to occupy the flat, the buyer's solicitor will need to ascertain the basis of occupation of the residential tenant, and if the tenant can be required to vacate.

Care must be taken where the upstairs of the pharmacy property comprises two or more flats because sellers sometimes have to offer existing tenants first refusal over the pharmacy premises, and this can hold up a sale.

(B) Leasehold

If a seller occupies the premises under a lease then the landlord's consent to assign (sell) the lease (normally only on an asset rather than share sale) to the buyer will usually be required. The sale agreement would include a provision that

completion of the sale is conditional upon obtaining the landlord's licence to assign the lease.

The seller's solicitor would apply to the landlord for consent to the assignment. The landlord will want to consider the trading history and track record of the buyer. He would do so by looking at accounts and references. If the buyer is a first time buyer or his accounts do not show a satisfactory financial position, the landlord may request additional security before the landlord grants consent (for example a rent deposit or a guarantee), and may otherwise refuse consent. A buyer should note that leases usually contain restrictions preventing a tenant from sharing occupation or parting with possession of the property until the landlord's licence to assign is completed. If, therefore, a seller allows the buyer to take occupation before the landlord grants consent to the assignment, this will be a breach of the lease, and render it liable to termination by forfeiture.

A lease is often a long and complicated document placing numerous obligations on a tenant. The main items to look out for are:

- **Repair** – Usually it will be the tenant's responsibility to maintain the premises in "good and substantial repair and condition". If, therefore, the premises are not in good repair when a new lease is granted or a lease is assigned to the buyer, then it will be the buyer's responsibility to bring the premises into the proper standard of repair. On the grant of a new lease a tenant can sometimes agree with the landlord that a description of the current condition, ideally with a detailed written schedule and photographs, is attached to the lease and that the tenant is not required to put the premises in a better condition.
- **A structural survey** – It is always advisable to obtain a survey prior to entering into a new lease or taking an assignment of any existing lease. This will identify any disrepair which the landlord can require the tenant to carry out or the cost of which can be passed on to the tenant as part of a service charge.
- **Rent Review** – A lease will provide for the rent payable to be reviewed, often every three or five years. Commonly, the lease says the rent can only be reviewed upwards only.
- **Assignment/Underletting** – Usually a lease will prevent a tenant from assigning or underletting part of the premises, but assignment or underletting the whole of the premises may be allowed with the landlord's prior consent. If the lease started before 1st January 1996 then an outgoing tenant will continue to be responsible under the lease despite the assignment. If any assignee subsequently becomes insolvent/bankrupt or breaches the lease then a landlord can pursue the original tenant for any arrears of rent or for breaches of tenants' covenants. If the lease started after 31st December 1995 the landlord can, on an assignment, often require a tenant to enter into an authorised guarantee agreement. In this agreement the outgoing tenant (seller) guarantees the performance of the tenant's covenants in the lease but only until the assignee (buyer) subsequently assigns the lease with landlord's consent.
- **Use** – The lease will usually specify what business may or may not be carried on at the premises, or what goods may or may not be sold. The range of goods sold in pharmacies is now very wide, and issues can arise as to whether (for example) greeting cards or toiletries can be sold. Care needs to be taken if the use is restricted to pharmacy, especially if there are any future plans to relocate the business.
- **GPs** – If the buyer is acquiring premises at a health centre site or close to a GP practice, the buyer will want to consider what would happen if the

GPs were to move away. If the premises are owned by GPs, the buyer may be able to negotiate an agreement that the GPs will stay where they are or, alternatively, allow the lease to be brought to an end if the GPs move away.

- **Alterations** – Usually the landlord's consent is required before any alterations may be carried out to the premises. Quite often a landlord will not allow any structural and external alterations and may impose controls on the type of signage which is permitted.
- **Renewal** – Most business leases can be renewed on similar terms when they run out, but there are strict time limits that apply to the right to renew. It is important to check that the right to renew has not been excluded under the Landlord and Tenant Act 1954. However, even if the right to renew has not been excluded, there are certain grounds on which the landlord can nevertheless oppose a renewal. The most common ones are when the landlord wants to occupy the premises for his own use, or if the landlord wishes to redevelop the premises. In some cases it may be possible to negotiate a contractual right to renew the lease to guard against that risk.
- **Service Charge** – Where the premises form part of a larger building, the landlord may retain responsibility for the repair and maintenance of the roof and main structure and for the provision of other services. Where this is the case, the landlord will seek to recover its costs through a service charge. Unlike residential tenants, business occupiers do not have statutory rights to be consulted on proposed expenditure to be recovered through the service charge. Consequently, as well as checking the wording of the clause, it is useful for tenants to obtain an assurance that the landlord will comply with the voluntary code of practice for service charges.
- **Unattractive Lease Terms** - If the terms of an existing lease are unattractive to a buyer, particularly if the landlord wants personal guarantees, and if the landlord is receptive, it may be possible to negotiate a completely new lease.

7.1.7 Sellers are required to provide an "Energy Performance Certificate ("EPC") (relating to the pharmacy premises) to all buyers. An EPC is valid for 10 years and contains information relating to the energy efficiency of a property and recommendations for improvements to the property's energy performance. A poor rating may affect the value of the property. EPCs for qualifying premises will be required on any asset sale involving the grant of a lease, the transfer of a lease or the transfer of a freehold interest in premises. EPCs are not generally required if the sale proceeds as a sale of the company where the pharmacy premises are already vested in the company (ie where no separate property transfer is required). The statutory requirement is to provide an EPC to a buyer irrespective of whether the buyer requests one.

7.2 Equipment and Stock

7.2.1 In the case of an asset sale, an inventory is usually appended to the sale contract listing all the items and equipment which are to be transferred to the buyer on completion.

7.2.2 The sale agreement will also contain provisions for valuing the stock in trade which is to be bought. It helps if both parties can agree on a stock valuer to be appointed to carry out the stock take on the day of completion.

7.3 Goodwill and Protection of Goodwill

- 7.3.1 Goodwill is an intangible asset, but it is the asset which can have the highest value. Goodwill is a combination of a business's reputation in the marketplace, the location of its business and operations, and its market share in the range of goods and services in which it is involved. It will include a value for operating the NHS contract.
- 7.3.2 The transfer of the goodwill of the business normally confers on the buyer the right to carry on the business together with the exclusive right to use its trading name. However, in the absence of an express covenant against competition, the seller will be free to set up a competing business or solicit former patients and customers.
- 7.3.3 A buyer may have spent a large sum of money on goodwill and should ask for the contract to be worded in a way that stops this value from being eroded by the seller being able to open a competing business in his own name in the locality for an agreed period. The same consideration applies on a company share sale since the price paid for the shares will normally include an amount for goodwill.
- 7.3.4 It is common for a seller to agree that, for a specified period and/or within a certain radius of the premises, he will not compete with the business he has sold. Often, a buyer will agree that a restrictive covenant of this kind will not be infringed if the seller acts as a locum.

7.4 Special Pharmacy Clauses

A contract for the sale/purchase of a pharmacy business may need some or all of the following:

- A clause making it clear whether prescription figures or other business information are relied on.
- A clause dealing with owings/returns
- A clause making completion of any agreement conditional on an NHS contract application being finally granted.
- A clause providing for some of the price to be held back in case the circumstances prevailing at the time of the agreement change within a specified period, for example as a result of NHS reforms affecting control of entry.
- An indemnity from the seller to protect the purchaser from inheriting liability for a discount clawback relating to discounts obtained by the seller or other types of remuneration clawback (e.g. Category M).
- Arrangements to enable the business to be carried on after completion by the buyer in the name of the seller – until the PCT has put the buyer's name in its pharmaceutical list.

Some of these are dealt with in more detail elsewhere in this guide.

7.5 Completion

Completion of the contract for the sale of the assets of the pharmacy business may be expressed to be conditional. If the seller's interest in the premises is leasehold then the consent of the landlord may be needed before an assignment can be completed. Following exchange of contracts, an application may need to be made to the PCT for the transfer of the NHS contract to the buyer as detailed in section 6 above.

7.6 Employees

As a general rule on the sale of a business, the contracts of employment of the employees of the business immediately before the sale of the business are transferred automatically to the buyer on completion of the sale. As a result, the buyer becomes responsible for all the rights, obligations and liabilities of the seller under the employment contracts of all the employees. The buyer also generally inherits each employee's accumulated statutory rights. The employees' contracts of employment continue to have effect after the transfer as if they were originally made between the buyer and the employee.

7.7 Locums

Particular care needs to be taken with locums, especially in the case of long-term locums. A buyer will need to ask careful questions about any pharmacist or other worker who the seller has treated as a locum and obtain a copy of any locum contract. The buyer should establish whether the locum is likely to have employment rights or if there is a risk of a tax liability coming to light after the purchase has been completed.

From 1 October 2011, the Agency Workers Regulations 2010 will come into force, introducing new rights for workers used by a business and supplied via an agency (which may include agency locums). From day one of an assignment, such a worker will be entitled to equal access to collective facilities and amenities provided by the pharmacy (such as a canteen or childcare) and to information about job vacancies to a comparable employee or worker. Subject to completion of a 12-week qualifying period, such a worker will also be entitled to the same basic employment and working conditions (including pay, working hours, rest breaks and annual leave) as would have applied, had the individual been recruited as an employee/worker directly by the pharmacy. Completion of the qualifying period can be impacted by a number of factors, including time off between assignments, annual leave, sickness absence and a change of the job specification. However, the legislation incorporates a number of anti-avoidance provisions and pharmacists should be aware that attempts to circumvent the Regulations could lead to a fine of up to £5,000 in an Employment Tribunal. Buyers will need to be made aware of the risk and weigh up their options.

7.8 Material Contracts

As part of the seller's business he may have entered into a number of contracts with suppliers, nursing homes, software suppliers etc. If they are important to the future running of the business the buyer may wish to take transfers of these contracts on completion. The contract provisions will need to be carefully considered to ascertain whether they can actually be taken over by the buyer. It is also important for a buyer to consider whether he can avoid taking over some contracts and/or secure better trading terms with other suppliers. If so he may require the seller to terminate any contracts. The terms of these contracts are likely to mean that the third parties involved can withhold consent to any proposed transfer. These terms should be checked prior to completion of a sale. Sellers may find that early termination charges apply should any contracts need to be terminated.

7.9 Responsible Pharmacist

If the buyer intends to relocate the pharmacy there may be difficulties if the pharmacist is in personal control or the responsible pharmacist qualified elsewhere in Europe. Details of qualification should be obtained and advice should be sought about this if appropriate. *At the time of publication, this restriction is expected to be lifted in the near future.*

8 FITNESS TO PRACTISE

8.1 Disclosure

All applicants for an NHS pharmacy contract or for change of ownership must disclose in their applications:

- Any convictions or ongoing criminal charges.

- Any adverse findings or ongoing investigations by the GPhC.
- Any adverse findings or ongoing investigations by the NHS Counter Fraud and Security Management Service.
- Any ongoing investigations by another PCT.
- Details of any circumstances where the applicant has been removed or contingently removed from, refused admission to or conditionally included in another PCT's list.

8.2 References

When an application is made for a new NHS contract, the applicant (in the case of a company, the Superintendent and any pharmacist director) must provide the names and addresses of two referees. The referees should ordinarily be two people with whom the applicant has worked in the last two years for a period of more than 3 months.

Referees must be willing to provide a reference in respect of two recent posts (including the applicant's current post) as a pharmacist, and the posts must have lasted at least three months. If it is not possible to provide two referees willing to give references relating to two recent posts of at least three months, applicants should explain this fully and are then entitled to offer alternative referees.

8.3 Refusal on Fitness to Practise Grounds

The PCT can refuse an application where it considers that the applicant is unsuitable to be included in the list. It can also defer a decision until the outcome of any current investigation.

The applicant may appeal against the PCT's action within 28 days. Fitness to practise is a complex area and legal advice should be sought promptly if difficulties arise.

9 TAX ISSUES

9.1 In addition to the general factors outlined above, there may be specific tax issues which have an important bearing on which type of transaction is used. These include:

9.1.1 **Tax deduction for goodwill and other intangible assets:** A significant advantage of an asset purchase is the ability of a buyer, within the charge to UK corporation tax, to claim tax relief for accounting amortisation of the price paid for goodwill, intellectual property and other intangible fixed assets, provided (broadly) they are bought from an unconnected party. No such relief is available on share purchases. However, the sale of goodwill is likely to give rise to a tax charge in the hands of the seller.

9.1.2 **Capital (depreciation) allowances:** The buyer will often be entitled to claim capital allowances for the cost of plant and machinery, generally at the rate of 20% a year on a reducing balance basis (or 10% for certain assets which are classified as integral features or have an expected useful life of at least 25 years). Higher first-year rates may be available to small or medium-sized companies. Such allowances reduce the buyer's liability to corporation tax in respect of profits of the acquired business. From the seller's perspective, if the sale price exceeds the tax written down value of the relevant asset, this could give rise to a tax charge in respect of the difference.

9.1.3 **Higher acquisition cost:** The buyer will obtain a market value acquisition cost in the assets being purchased. Therefore, the profit on a subsequent sale of such assets would be calculated only by reference to the increase in value following acquisition. On a share purchase however, the assets remain owned by the target company and therefore continue to retain their historic acquisition cost which is likely to be low.

- 9.1.4 **Tax losses:** Trading losses will generally be available to be carried forward for use after a share sale and can be set-off against the target company's profits, provided there is not a major change in the nature or conduct of the trade. Tax losses would not be preserved with an asset sale although a pre-sale hive down of the assets to a company could be considered.
- 9.1.5 **Roll-over relief:** On the acquisition of certain types of assets, chargeable gains on the sale of certain other assets (either within the previous three years or which are expected to occur within the next year), may be deferred by the buyer by way of roll-over relief until the sale of the replacement assets.
- 9.1.6 **Stock:** An immediate tax deduction will normally be available to a buyer for the amount paid for any stock.
- 9.1.7 **Tax liabilities:** With an asset purchase, the buyer does not take on the tax liabilities of the seller. However, on a share purchase, the liabilities are transferred to the buyer together with the target company.
- 9.1.8 **Stamp duty and stamp duty land tax:** The transfer of shares is subject to 0.5% stamp duty. Other assets commonly transferred as part of a business purchase (for example, goodwill, book debts and contracts) are no longer within the charge to stamp duty. This may result in no stamp duty cost to the buyer of assets. However, transfers of property with commercial or mixed commercial and residential use will be subject to stamp duty land tax at a maximum rate of up to 4%.
- 9.1.9 **Individual seller – entrepreneurs' relief:** Individuals and trustees who dispose of shares in a trading company in which they have a qualifying interest may be able to benefit from the entrepreneurs' relief. Broadly the relief applies in relation to tax arising on capital gains made by individuals in respect of certain types of business sale.

Subject to meeting certain qualifying requirements the relief is available for the disposal of trading businesses on asset transfer as well as disposals of shares in trading companies (or the holding company of a trading group). The relief is also capable of applying on business disposals by pharmacy partnerships.

In the case of both asset and share disposals there are qualifying requirements in terms of the period during which the business assets or shares sold need to have been held by the seller. Additionally, in the case of share sales, there is a requirement that the individual making the disposal:

- (a) is an officer or employee of the company, or of a company in the same group of companies; and
- (b) owns at least 5% of the ordinary share capital of the company which enables the individual to exercise at least 5% of the voting rights in that company.

Broadly, the first £10 million of gains that qualify for relief will be charged to Capital Gains Tax ("CGT") at an effective rate of 10%. Gains in excess of £10 million will be charged to CGT at two separate rates of 18% and 28% for basic and higher rate/additional rate tax payers respectively.

An individual will be able to make claims for relief on qualifying disposals made on or after 6 April 2008. Claims may be made on more than one occasion up to a 'lifetime' limit of £10 million. Disposals on or before 5 April 2008 do not affect the lifetime limit. The £10 million limit will only begin to diminish when the relief is claimed.

Trustees will be able to claim relief on certain disposals where a "qualifying beneficiary" has a qualifying interest in the business in question. Trustees must

make claims jointly with the “qualifying beneficiary”. Any relief given on the trustees’ gains will reduce a beneficiary’s £5 million lifetime limit on relief.

9.1.10 **Corporate seller - substantial shareholdings exemption:** A gain on a sale of shares by a company is exempt from corporation tax where, throughout a continuous 12-month period beginning not more than two years before the sale, the selling company held a substantial shareholding (i.e. generally, at least a 10% interest) in the target company.

9.1.11 **Value added tax** - share sales are generally exempt supplies for VAT purposes. Transfers of assets that comprise a business or part of a business being transferred as a going concern (TOGC) are not VATable. However, care should be exercised where the buyer is “cherry picking” assets, as this may result in the acquisition of only a few assets of the business and the transfer may not qualify as a TOGC and may therefore be subject to VAT.

10 PURCHASE VEHICLE

10.1 A buyer of a pharmacy business (whether acquiring shares or assets) should consider whether he or she wishes to purchase the business in his or her personal name or, in the case of the purchaser being a number of pharmacists, through a partnership or, for any purchaser, as a limited company or LLP.

10.2 There are likely to be tax advantages and disadvantages with each approach and this is something on which advice should be sought at an early stage. If the business is not in the name of a limited company, buyers should seek advice on the advantages and disadvantages of incorporation because it is important to look ahead. Some of the advantages and disadvantages are mentioned in paragraph 2.3 and in sections 4 and 5 of this Guide.

10.3 The use of a company or LLP by a buyer may also simplify borrowing arrangements. Typically, lenders require security for the provision of finance, and the security arrangements can be simplified if the borrower is a company or LLP.

11 AFTER COMPLETION

11.1 Unless the buyer has acquired the shares in the company which runs the pharmacy, the buyer will need to make sure that the PCT has processed swiftly an application for change of ownership. The contract should have included arrangements for running the pharmacy after completion if the change of ownership has not been fully processed by then. Unless the buyer has acquired the shares in a company that runs an existing pharmacy, the buyer must give the PCT at least 14 days notice of the intention to commence the provision of services. The PCT will be able to supply a standard form for this.

11.2 A new owner of a pharmacy must be registered with the General Pharmaceutical Council. In addition, the buyer should make an application to the General Pharmaceutical Council as soon as possible to register any new pharmacy premises, bearing in mind that this process can take several weeks. Until registration has been completed, the buyer will not be able to use the new premises as a pharmacy.

11.3 If the premises have not been registered for 3 years the pharmacist in personal control or the responsible pharmacist may not be someone who qualified as a pharmacist elsewhere in Europe.

11.4 Upon the acquisition of premises already registered with the GPhC the buyer will need to notify the GPhC of change of ownership. This is not usually something that needs to be dealt with if the buyer has simply bought the shares in a company which will remain the registered owner of the premises. However, it is likely in such cases that a new Superintendent Pharmacist will need to be appointed and the relevant forms should be obtained from the GPhC.

12 **CONTACT US**

For any further information about our services or charges, please contact a member of the Charles Russell Pharmacy Team whose details are on the following pages. You can also visit our website at www.charlesrussell.co.uk/pharmacy.

BELOW ARE OUR KEY CONTACTS:

Key contacts

Pharmacy

REGULATORY - David Reissner, Partner

David is an expert in pharmacy law, administrative and public law (including Judicial Review) and healthcare law. He advises on a range of NHS and other legal and ethical issues. Clients include representative bodies such as the National Pharmacy Association, and the Pharmaceutical Contractors Committee (Northern Ireland), pharmacy owners, individual pharmacists, and other healthcare professionals.

David appears regularly as a solicitor advocate at NHS hearings and in disciplinary proceedings at the General Pharmaceutical Council. He heads up the firm's Healthcare practice and is listed in the main legal directories as a leading practitioner in his field. According to Chambers UK, David is "*one of the best practitioners in the pharmacy field*" and Legal 500 acknowledge his "*incredible knowledge of the industry.*"

David contributes regularly to a range of publications in the Healthcare field, including *Chemist & Druggist*, *Pharmacy* magazine, and *Pharmacy Business*. David edits a quarterly *Pharmacy Brief* sent free of charge to about 8,000 clients and contacts.

David is a member of the Pharmacy Law and Ethics Association (PLEA) and the Medico Legal Society. David has been appointed by the National Assembly for Wales as a Chairman of NHS pharmacy appeal panels. David was appointed a Deputy District Judge in 2000.



+44 (0)20 7203 5065

david.reissner@charlesrussell.co.uk

REGULATORY - Noel Wardle, Partner

Noel specialises in healthcare and regulatory law and, in particular, in Pharmacy Law. He advises clients on healthcare and pharmacy matters, including disciplinary proceedings, judicial reviews, prosecutions, inquests and applications for inclusion in Primary Care Trust pharmaceutical lists, including conducting advocacy at NHS Litigation Authority appeal hearings.

Noel also advises on the sale, supply, import and export of medicinal products, medical devices, veterinary medicines and alternative remedies and regularly deals with the Medicines and Healthcare products Regulatory Agency (the MHRA).

According to Chambers UK, Noel "*really knows his stuff, which is crucial with obscure pharmaceutical stuff.*"



+44 (0)20 7203 5395

noel.wardle@charlesrussell.co.uk



+44 (0)20 7203 5049

susan.hunneyball@charlesrussell.co.uk

REGULATORY - Susan Hunneyball, Associate

Susan has considerable experience in advising clients on healthcare and pharmacy matters. Work in this area includes advising on the framework governing control of entry to PCT pharmaceutical lists and appeals to the NHSLA (FHSAU), often acting as solicitor advocate, and acting for clients in disciplinary hearings before professional and health bodies .

Susan advises in relation to public and administrative law (including judicial review) and in relation to prosecutions, mainly high value fraud, brought by the CPS and other prosecuting agencies.



+44 (0)20 7203 5362

rachel.warren@charlesrussell.co.uk

REGULATORY - Rachel Warren, Associate

Rachel advises clients on healthcare, pharmacy and other regulatory matters. These include disciplinary proceedings, judicial reviews and advising clients in relation to applications for inclusion in Primary Care Trust pharmaceutical lists, including appeals to the NHS Litigation Authority. Rachel regularly advises clients on the regulatory regime governing care homes, and also acts for people being investigated or prosecuted by regulatory agencies such as the CPS (and other prosecuting agencies) in relation to NHS fraud, the Commission for Social Care Inspection (now the Care Quality Commission) and the Environment Agency.



+44 (0)1483 252529

tim.jenkins@charlesrussell.co.uk

COMPANY/COMMERCIAL - Tim Jenkins, Partner

Tim specialises in the sale and purchase of retail pharmacy businesses (both asset and share based). Tim's clients include retail pharmacy operators of all shapes and sizes including a number of regional multiples and he is used to handling transactions of varying size, value, volume and complexity.

"Tim...receives particular praise for his work in the healthcare and pharmacy sector" (Chambers UK, 2009)



+44 (0)1483 252530

jennifer.packer@charlesrussell.co.uk

COMPANY/COMMERCIAL Jenny Packer, Solicitor

Jenny regularly deals with the sale and purchases of pharmacy businesses. Jenny has experience acting for both buyers and sellers in transactional work as well as advising on general commercial matters.



+44 (0)1483 252523

lindsay.haig@charlesrussell.co.uk

COMPANY/COMMERCIAL Lindsay Haig, Solicitor

Lindsay deals with both the sale and purchase of pharmacy businesses (asset and share transactions) as well as advising on general commercial contracts.



+44 (0)1483 252630
debra.kent@charlesrussell.co.uk

PROPERTY - Debra Kent, Partner

Debra deals with the full range of pharmacy related property matters both as part of share and business sales and acquisitions as well as standalone pharmacies, health centres and those trading in shopping centres and retail parks. According to Chambers UK, Debra *“takes her clients’ interests extremely seriously”* and *“her exceptional understanding of complex real estate deals’ plays in completing deals successfully.”*



+44 (0)20 7203 5249
simon.davies@charlesrussell.co.uk

PROPERTY - Simon Davies, Partner

Simon handles commercial property transactions acting for buyers and sellers of pharmacies.



+44 (0)1483 252582
claire.timmings@charlesrussell.co.uk

PROPERTY - Claire Timmings, Associate

Claire’s experience includes property related corporate disposals, the grant of leases of pharmacy premises, lease renewals, acquisitions and disposals of pharmacy premises including new developments and LIFT schemes.



+44 (0)1483 252536
jennifer.hotston@charlesrussell.co.uk

PROPERTY – Jenny Hotston, Associate

Jenny has had experience acting for pharmacy clients in a range of property work including acting on the sale and purchase of businesses as well as dealing with purely property related transactions such as the acquisition or disposal of freehold and leasehold premises and the taking and granting of new leases. Jenny has also had experience of acting on behalf of pharmacists in the construction of new pharmacies both in the private sector and in conjunction with LIFT schemes.



+44 (0)1483 252522
michelle.rowe@charlesrussell.co.uk

PROPERTY - Michelle Rowe, Solicitor

Michelle is involved in a wide range of property work including commercial landlord and tenant work, lease renewals, acquisitions and disposals and corporate. In particular, Michelle assists on the property aspects of pharmacy acquisitions and disposals having undertaken this type of work for a major UK pharmacy retailer prior to joining Charles Russell.



+44 (0)20 7203 5080
amanda.solomon@charlesrussell.co.uk

TAX - Amanda Solomon, Partner

Amanda specialises in all aspects of corporate tax law and business-related tax matters. Her areas of expertise include mergers and acquisitions (both domestic and international), business transfers (including pharmacies), structuring venture capital investments, joint ventures, management buyouts, entrepreneurial tax reliefs, e.g. enterprise investment scheme, the tax efficient structuring of employee remuneration and benefits, film tax reliefs and the tax treatment of intellectual property.



+44 (0)20 7203 5009
duleep.sahni@charlesrussell.co.uk

TAX - Duleep Sahni, Associate

Duleep works in the corporate tax group advising on all aspects of corporate tax law. His areas of experience and expertise include advising on the structuring of offshore investment funds, international tax planning, M&A (including pharmacies), employment taxes, enterprise investment schemes, VAT and stamp duty/SDLT.



+44 (0)20 7203 5039
nick.hurley@charlesrussell.co.uk

EMPLOYMENT - Nick Hurley, Partner

Nick works on both contentious and non-contentious employment law issues. On the contentious side, Nick has broad experience both in the Employment Tribunals and in the High and County Courts. Nick's non-contentious experience covers a wide spectrum of work ranging from drafting employment agreements and policies to advising on employment law issues relating to the sale and purchase of businesses and outsourcing.

Nick is a regular contributor to newspapers and journals and also regularly lectures on employment law issues as well as being involved in radio broadcasts.



+44 (0)1483 252584
ben.smith@charlesrussell.co.uk

EMPLOYMENT - Ben Smith, Associate

Ben advises on a wide range of employment matters, both contentious and non-contentious. Ben has particular expertise in providing practical commercial advice to corporate clients on the whole range of HR issues, including disciplinary and grievance processes, redundancy and restructuring programmes, TUPE, discrimination and dismissals. Ben has substantial experience in dealing with Employment Tribunal litigation, assessing risks and engaging in commercial settlement negotiations on behalf of clients. He also drafts employment policies, consultancy and service agreements and advises on compromise agreements (on behalf of the individual or the employer). Ben regularly speaks at seminars and conducts internal client training sessions.

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