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Guinness PLC: Managing Negotiations

Philip Yea, Group Finance Director at Guinness PLC, was frustrated by how major negotiations often were being conducted on behalf of the Guinness Group. By most measures, the Guinness Group was prospering, not only in Ireland and Great Britain—its traditional home base—but also in its operations in the United States, Latin America, and Asia.¹ Nevertheless, Yea worried that the Group's success might be as much a reflection of a buoyant market for premium beer and spirits, as it was the result of sound management.²

In particular, Yea and some senior colleagues were convinced that they had to fix the internal processes governing worldwide negotiations related to acquisitions, divestments, and distributions. Sitting in the Group's headquarters in Portman Square, London, how could he be sure that the Group's managers in the field did not overpay when they bought new businesses or undersell when they divested an existing business? Or if a decision were made to dissolve a joint venture or terminate a distributorship, how could he know that it was done on the best possible terms?

The nature of the Guinness Group's on-going business essentially meant that it was an engine for generating deals of various types. Smaller ones might involve two or three million pounds. Larger ones were 10 or even 100 times larger. If the Group's negotiators were not always effective, they could be leaving substantial value on the bargaining table.

Beyond maximizing value in specific transactions, Yea had to be concerned with how various deals might complement or contradict one another in the context of the Guinness Group as a whole. Managers in the field should be in the best position to assess local markets, know the key industry players, and understand the cultural norms of bargaining. Yet a deal that might seem to make sense to the parties directly involved, could have a negative impact on other negotiations. (For example, where doing business with Company A in one country could diminish the prospects of doing business with Company C in another.) Centralized oversight was also needed to insure compliance with complex international tax and trade laws.

In short, a delicate balance had to be struck between giving managers in the field enough discretion to respond to local needs and opportunities, while at the same time maintaining sufficient corporate control to achieve Group-wide strategic and operational objectives. Within this balance, moreover, the Group had to find some way of making sure that its negotiators were performing at their very best.

¹ See **Exhibit 1** for a chart illustrating Guinness PLC's operations.

² See **Exhibits 2 and 3** for information on Guinness PLC's financial performance.

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The 1995 Initiative

In 1995, Yea tried to address the problem of managing negotiations, principally by reorganizing reporting relationships between the Guinness Group's finance functions, corporate finance and business development functions, the legal function, and those in the field actually doing deals. In a memo explaining the changes, he recognized earlier efforts at better coordination,³ but he candidly noted that "there continues to be a high degree of frustration as to how the judgment calls should be made on specific issues, and a mutual mistrust between business development on the one hand and corporate finance on the other hand."⁴ The hardest negotiations, Yea implied, often turned out to be internal. "The decision to strengthen the quality of the Legal function has also thrown into sharp relief the relative inexperience of both the Corporate Finance and Business Development functions."⁵

As a response, Yea proposed modifying the procedures by which projects (whether acquisitions, divestments, or distributorships) would henceforth be developed. Specifically, he advocated creating a "single integrated Project Director/Manager role" responsible for every phase of a project from development to consummation. Depending on the project, the director might be from an operating company or from Guinness PLC, but would have to have "substantial experience of real transactions." The formal role of his own Corporate Finance function would be reduced. In turn, the Business Development function at United Distillers or Guinness Brewing World-wide, as the case may be, would become a support function, reporting to the project director.

These changes, along with others, were intended to minimize or eliminate layers of decision-making.⁶ Responsibility for commercial decisions would rest squarely with the appropriate operating committee. Decision-making in any negotiations would rest with the project director, drawing both on his or her experience and on the technical support provided by legal, tax and accounting specialists from the relevant head-office function. In the event of internal disagreements, committees were designated to resolve differences. Yea's memo urged that "teamwork rather than conflict" be the watchword in this new effort.

In June 1995, Yea convened a special meeting of the Business Development function, the Corporate Finance function and the legal function in order to refine and implement these new approaches to negotiation. The over-riding goals, he said, were to achieve the best possible deals and to do so efficiently. He likened the new role of project director to being "the head of the octopus," in that he or she would receive inputs from colleagues in production, marketing, accounting, financial evaluation, tax, and legal functions. The project director, however, would have ultimate responsibility for making many of the decisions.

Thus, the criteria for selecting the project directors would include process and interpersonal skills, plus considerable business experience. A project director need not, however, be a financial analyst or a lead negotiator. Yea concluded the session by expressing his hope that the new process would stimulate more "more preplanning, less noise, more fun, and better deals."⁷

³ "The previous procedure regarding the handling of such projects was rewritten in 1991 and was successful in recognizing that there were different stages in the development of a project, and also in recognizing the need to establish project teams with specific members of the team being responsible on the one hand for the coordination of Operating Company issues and a separate group coordinator for bring together of Group (mainly technical) issues." Internal Guinness memorandum, 1995.

⁴ Internal Guinness memorandum, 1995.

⁵ Ibid.

⁶ See **Exhibit 4** for a flow chart describing the procedures instituted in 1995.

⁷ Notes from Guinness Business Development meeting June 27, 1995.

Enhancing Negotiators' Effectiveness

If the new project directors were not necessarily going to be at the bargaining table themselves, it was important to have a skilled cadre of negotiators to carry out their strategy. Ken Mildwaters, head of Guinness PLC's legal function, Guinness Group General Counsel, and a long-time colleague of Yea's, designed a training program in collaboration with the Consensus Building Institute of Cambridge, Massachusetts.

Starting in 1996, 5 different groups of 24 people each went through an intensive two-and-a-half-day program. The curriculum focused on the analytic and process skills needed for value maximization in negotiation, but the workshops also served as forum for experienced negotiators to share their learning and to identify common concerns. Care was taken to include in each group managers from the Guinness Group's far-flung operations and senior people from the Group's London headquarters. The joint objectives were to enhance individual skills and also to increase organizational competence by creating a common conceptual framework for negotiation analysis.

The workshops were enthusiastically received. Informal follow-up studies found a number of subsequent cases where participants felt that deals had been salvaged or substantially improved because of the training experience. In one carefully documented transaction, Mildwaters identified a gain of £5 million that could be directly attributed to more rigorous negotiation analysis. "One deal more than paid for the entire training program," said Mildwaters.

Notwithstanding such successes, discussions at the workshops also uncovered continuing frustration over the internal processes governing deal authorization and approval. While the initiatives that Yea had launched in 1995 may have helped in some regards, there were still serious differences between managers operating in the field and senior people in the Group's London headquarters. The managers often complained about being second-guessed when they brought deals back for approval. In turn, those at headquarters still questioned whether people were negotiated as effectively as they might. To be sure, there was considerable comfort to be drawn from the fact that the Guinness Group's overall financial performance continued to be strong, but there was a shared sense that even if the glass were more than half-full, it was not up to the brim.

As a result, Yea and Mildwaters decided to convene a special meeting in early 1997 to reconsider the Group's deal-approval process. The session took place at Gleneagles Hotel, a Guinness Group-owned resort in central Scotland, and included two dozen of the most senior people who had attended the prior workshops. They knew the strengths and weaknesses of the ways in which the Group conducted its negotiations; they also would be centrally involved in any further effort to refine the deal-making process.

Mildwaters commissioned the Consensus Building Institute to document four recent negotiations, chosen specifically to illustrate different aspects of the internal procedures for authorizing, conducting, and reviewing negotiations on behalf of the company. (Two of the cases appear in distilled form in the **Appendices A** and **B**, respectively.)

Mildwaters wanted the group to take a hardheaded look at failures, as well as successes. Understandably, some people had initial reservations about being "studied"—particularly if it appeared as if their experience would be used as a lesson in what not to do. With Yea's solid support and the positive impressions of the prior workshops, however, Mildwaters persuaded people that it was in everyone's interest to take an unflinching view of what was—and wasn't—working in the Guinness Group's deal-making process. Some remained skeptical that doing so would lead to any useful change.

Revisiting the Deal Approval Process

During an unseasonably mild week in mid-January, the working group met at Gleneagles Hotel. Extensive background material describing the purpose of the meeting had been distributed in advance, but Yea cut short an international trip to deliver a mandate to the group personally. "The challenge is to take the existing process and to re-examine it," he said. "Perhaps the stages need changing: do extra stages need to be added; do stages need to be cut out? Be radical, by all means, but also consider whether improvements may be required not just in the formal process but perhaps also in some of the behaviors around it."⁸

Characterizing the changes that he had instituted two years earlier in the process for managing acquisitions and divestments, Yea said that the "intention at that time was to simplify and remove, or at least reduce, the sense of 'them and us' between the Portman Square Group and the Operating Company people"⁹; that is, between corporate headquarters and regional operations. The goal had been to push responsibility down the line, away from purely functional areas to the commercial arena.

Yea also noted that the rollout of the negotiation workshops had been in response to a sense that "the number of individuals with significant experience of transactions was patchy and limited." He also said that there had been "enormous organizational pressures just to get things done as originally agreed, quite often at the expense of re-examining whether new information or new insights actually invalidated the original strategy or tactics."¹⁰ While the workshops appeared to address the first problem, they may also have served to highlight the persistence of the second.

Yea promised that he had no preconceptions about what further changes were necessary, and that he would give serious weight to any recommendations the group generated. He cautioned, "Don't change for the sake of change; equally don't hold back from radical suggestions that you think will really make a difference."

He stressed that people see the issues in real world terms. By that, he meant "a world where Regional Managing Directors may not always be in their office just waiting for your call or news, a world where it's pretty unreasonable not to give Non-Executive Directors a clear week to consider proposals, a world where counterparties may be of dubious moral character, and last but not least a world where in many jurisdictions legal redress may take years, so saying 'it's covered in the contract' may mean nothing."

Yea concluded his charge by noting that he and his most senior colleagues would be "happy to adopt a phased programme for implementation" of the working group's recommendations. He then pledged that "we will not hesitate from rapid implementation where that is what is required."

The participants then rolled up their sleeves to debate what lessons about their Group's negotiation competence. From cases like those in **Appendices A** and **B**, they would have to draw specific recommendations on how Guinness PLC should do deals.

⁸ Philip Yea, "Opening Address to Negotiation Process Workshop," Gleneagles Hotel, Scotland, January 14, 1997.

⁹ Ibid.

¹⁰ Ibid.

Exhibit 1 The Guinness Group 1996**GUINNESS PLC****Headquarters**

- Group Finance
- Group Audit
- Group Legal
- Group Trademarks
- Group Secretariate
- Group Public Affairs
- Group Corporate Finance
- Group Personnel
- Group Tax
- Group Treasury

UNITED DISTILLERS**Headquarters**

- UD Finance
- UD Secretariate
- UD Business Development
- UD Technical/Production
- UD Marketing
- UD Personnel

UD NORTH AMERICA

UD ASIA

UD PACIFIC

UD EUROPE

UD LATIN AMERICA

GUINNESS BREWING WORLDWIDE**Headquarters**

- GBW Finance
- GBW Secretariate
- GBW Business Development
- GBW Technical/Production
- GBW Marketing
- GBW Personnel

GUINNESS AMERICAS & CARRIBEAN REGION

GUINNESS ASIA & PACIFIC REGION

GUINNESS BREWING GREAT BRITAIN

GUINNESS IRELAND

GUINNESS AFRICA

GUINNESS SPAIN

Exhibit 2 Guinness Group Consolidated Profit and Loss Accounts^a

	1997 £m	1996 £m	1995 £m	1994 £m
Turnover (continuing operations)	2,030	4,730	4,681	4,690
Net trading costs	(1,647)	(3,769)	(3,738)	(3,734)
Net reorganization costs	--	--	(64)	--
Profit before interest and taxation (excluding Möet Hennessy) (continuing operations)	383	961	879	956
Share of profit before taxation of Möet Hennessy	34	113	111	89
Disposal of investment in LVMH	--	--	--	(173)
Provision against investment in LVMH made in 1993	--	--	--	173
Profit before interest and taxation	417	1,074	990	1,045
Net interest charge	(45)	(99)	(114)	(130)
Profit on ordinary activities before taxation	372	975	876	915
Taxation on profit on ordinary activities	(100)	(259)	(251)	(243)
Profit on ordinary activities after taxation	272	716	625	672
Minority interests (equity)	(17)	(31)	(30)	(31)
Profit for the period year	255	685	595	641
Dividends	(93)	(295)	(302)	(279)
Retained earnings	162	390	293	362

Note: Data for calendar year-end 1994-1996; 1997 data for first six months of calendar year.

^aListing Particulars, Guinness PLC, 2 November 1997, p. 22; and Guinness PLC Interim Statement 1997, p. 6.

Exhibit 3 Guinness Group Consolidated Balance Sheet^a

	1997 £m	1996 £m	1995 £m	1994 £m
NET ASSETS				
Fixed Assets				
Acquired brands at cost	1,395	1,395	1,395	1,395
Tangible assets	1,705	1,750	1,811	1,784
Investment in Möet Hennessy	825	902	1,026	900
Other long-term investments	164	179	157	149
	<u>4,089</u>	<u>4,226</u>	<u>4,389</u>	<u>4,228</u>
Current Assets				
Stocks	1,926	1,867	1,899	1,858
Debtors—due within one year	931	1,245	1,097	1,159
Debtors—due after more than one year	163	148	164	113
Cash at bank and in hand	362	327	694	476
	<u>3,382</u>	<u>3,587</u>	<u>3,854</u>	<u>3,606</u>
Creditors (amounts falling due within one year)				
Short-term borrowings	(958)	(1,136)	(1,149)	(778)
Other creditors	(1,103)	(1,436)	(1,478)	(1,441)
	<u>(2,061)</u>	<u>(2,572)</u>	<u>(2,627)</u>	<u>(2,219)</u>
Net current assets	<u>1,321</u>	<u>1,015</u>	<u>1,227</u>	<u>1,387</u>
Total assets less current liabilities	<u>5,410</u>	<u>5,241</u>	<u>5,616</u>	<u>5,615</u>
Creditors (amounts falling due after more than one year)				
Long-term borrowings	(733)	(622)	(776)	(1,113)
Other creditors	(232)	(161)	(152)	(187)
Provisions for liabilities and charges	<u>(194)</u>	<u>(211)</u>	<u>(291)</u>	<u>(256)</u>
	<u>(1,159)</u>	<u>(994)</u>	<u>(1,219)</u>	<u>(1,556)</u>
Total net assets	<u>4,251</u>	<u>4,247</u>	<u>4,397</u>	<u>4,059</u>
EQUITY				
Capital and reserves				
Called-up share capital	474	483	506	505
Share premium account	619	590	569	544
	<u>1,093</u>	<u>1,073</u>	<u>1,075</u>	<u>1,049</u>
Other reserves	4,333	4,377	4,138	4,074
Goodwill	(1,294)	(1,298)	(1,298)	(1,321)
	<u>4,132</u>	<u>4,152</u>	<u>4,286</u>	<u>3,947</u>
Shareholders' funds	<u>4,132</u>	<u>4,152</u>	<u>4,286</u>	<u>3,947</u>
Minority interests (equity)	119	95	111	112
Total equity	<u>4,251</u>	<u>4,247</u>	<u>4,397</u>	<u>4,059</u>

Note: Data for calendar year-end 1994-1996; 1997 data for first six months of calendar year.

^aListing Particulars, Guinness PLC, 3 November 1997, p. 22; and Guinness PLC Interim Statement 1997, p. 7.

Exhibit 4 Guinness Group Project Approval Process for all Equity Investments, Acquisitions and Disposals

1. CONCEPT ENDORSEMENT

- Description of project
- Commercial rationale
- Brands involved
- Likely resources

SIGN OFFS

- Project sponsor
- UD/GBW Finance director
- General Counsel

2. NEGOTIATING BRIEF

- Price parameters and rationale
- Estimated free cash flow
- Possible downsides

SIGN OFFS

- Project director
- UD/GBW Finance director
- General Counsel

3. LETTERS/INDICATION OF INTENT

- If any letters of intent are required for outside parties, these must be approved

SIGN OFFS

- UD/GBW Business Development director
- General Counsel

4. INVESTMENT/ACQUISITION/DISPOSAL REQUEST

- Description of project with executive summary and rationale
- Specific price
- Key financial data and projections
- Three-year profit and cash targets
- Key assumptions
- Proposed structure and tax rationale
- Possible downsides/upsides
- Integration team

SIGN OFFS

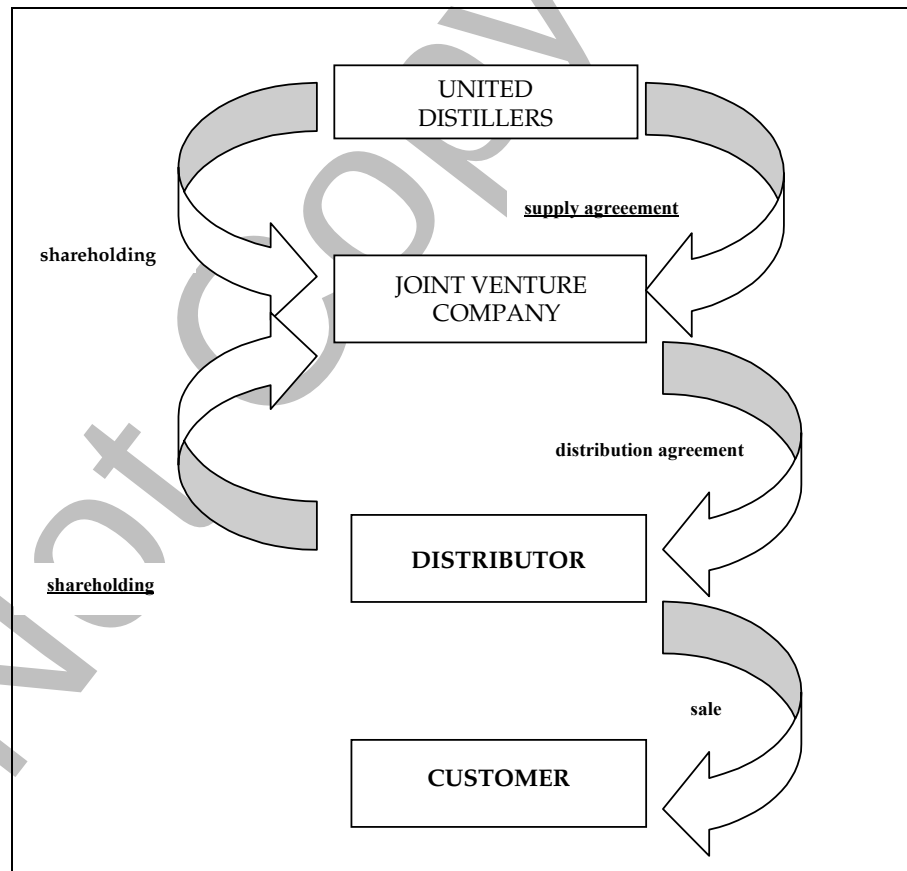
- Project sponsor
 - Project director
 - UD/GBW Finance director
 - UD/GBW Business Development director
 - General Counsel
 - Group Tax director
 - Treasury and Risk Management director
 - Group Finance director
-

Appendix A: Project Flat Fish¹¹

A Friendly Divorce?

Freedonia is among the top five whisky markets in the world of United Distillers (UD). A sophisticated population and an active nightlife in bars and discos has made Johnny Walker, in particular, a prestige drink.

In 1991, UD formed joint ventures with two different distributors in Freedonia. UD created a joint venture company with each distributor. UD sold their product to the joint venture company pursuant to a five-year exclusive supply agreement. The joint venture company, in turn, sold all the product to the distributor pursuant to a back-to-back five-year exclusive distribution agreement for resale to bars, nightclubs, and retail stores. This mechanism meant that UD split its portfolio of brands on a brand-by-brand basis between the joint venture companies; each distributor sold the relevant joint venture company's allocated brands to the Freedonia market in competition with one another.



¹¹The material in this appendix is distilled from a more extensive case prepared by Patrick Field, Senior Associate of the Consensus Building Institute, Cambridge, Massachusetts. The names of most of the parties in this case have been disguised, as has the name of the country in which this negotiation took place.

This mechanism allowed the joint venture company control over promoting the brands, while relying on the local distributors' special relationships with their customers.

In early 1994, UD, having gained experience in the Freedonian market, decided that it would be better off managing all of the brands itself and consolidating its Freedonian business under one in-market company, when the five-year supply agreements and distribution agreements expired in mid-1996. This would mean not renewing those agreements, even though as a matter of industry practice most distributorships are on-going, acquiring the distributors' interests in the joint venture companies, and then merging the operations of the joint venture companies under one in-market company.

UD obtained approval and in April 1994 successfully arranged the early termination of one of the two joint ventures arrangements by buying the distributor's shares in the joint venture company and terminating the supply and distribution agreements; it then launched its own UD-Freedonia company (UDF). Given the success of this new enterprise, UD concluded that it would be advantageous to seek termination of the other joint venture arrangement, as well. Combining the two businesses would achieve clear economies of scale, better management of its brands and recapture of distribution margin.

William Floore, soon-to-be head of UDF, knew it would not be easy to terminate the joint venture arrangements with the second distributor, however. Specifically, he was worried about potential problems with Miguel DeSilva, the president of the distributor. DeSilva had built his small distribution company up from almost nothing in 1980 when he first started to distribute UD's brands in Freedonia to a multi-million pound entity in 1994. Perhaps his success was due to hard work, but he also had a shady reputation. It was rumored, for example, that he would have his customers beaten if they did not pay their bills on time. DeSilva, however, had no qualms about running up large debts himself, £5 to £15 million from time to time, to UD.¹² In short, DeSilva was not someone with whom UD really wanted to continue doing business.

The option of just letting the current supply and distribution agreements run out was unattractive for two important reasons. First, UDF wanted to consolidate its business sooner, not later. Also, if it did not actively seek an extension of the joint venture arrangements soon, DeSilva would almost certainly conclude that UD wanted to end the business relationship. And if DeSilva came to this conclusion, he might well "trash" the UD brands, by either selling competing brands through his network, damaging the UD brand's image, failing to provide adequate in-market support for the UD brands, failing to push the UD brands so they lost market share, or simply degrading the value and quality of the brand to his customers. UD needed a smooth transition from DeSilva to UDF.

UD's problems with DeSilva were compounded by its suspicions that he was "paralleling" its brands into Freedonia. If true, this meant that DeSilva was buying the UD brands in other countries at a lower FOB (freight-on-board price) shipping them into Freedonia, and then capturing a higher profit margin than with the same brands bought through the joint venture. In the past UD could have threatened to revoke the supply agreement for such practices, but was now prevented from doing so under new free trade laws that came into effect with the European Union in 1992.

In addition, DeSilva's debt to the joint venture company, and hence the debt of the joint venture company to UD, stood at some £12.5 million and there were outstanding orders from him for an additional £2 million of product. Not only was this a source of tension in-market, it was also a source of tension between UDF and UD London, and UD London and Guinness PLC (GPLC).

¹² More specifically, DeSilva owed these sums to the joint venture company and the joint venture company owed like sums to UD.

Floore and his colleagues at UDF thus had to find some way of exiting the relationship with DeSilva so that he would not retaliate. Some sort of buyout was in order. As part of the deal, UDF wanted DeSilva out of the spirits market in Freedonia.

To prepare for negotiations, Floore calculated the expected increase in value that would come from consolidating the distribution of the brands under one in-market company controlled by the brand owner and also estimated the value of DeSilva not competing with UDF in Freedonia. With the supporting studies in hand, Floore obtained concept endorsement on September 12, 1994 and issued and discussed with GPLC corporate staff the negotiating brief on and October 6, and October 12, 1994 respectively. He received approval "in principle" from the chairman of GPLC on October 12, 1994, and formal approval (investment/acquisition/disposal request) in November 1994 for an expenditure of a little more than £8 million in total. This broke down to £2 million for the purchase of DeSilva's shares in the joint venture company (he owned 40% of the enterprise), another £4.4 million in total for expected profit from distribution to the end of the distribution agreement, and £1.75 million for a deferred payment tied to a three year non-compete agreement. The approval was conditional upon DeSilva settling his debt to the joint venture company, and the joint venture company to UD, prior to or at the same time as any agreement was completed.

Floore's team was confident they now had the wherewithal to exit the DeSilva relationship at relatively low cost, and be done with the on-going problems he was causing. As one UDF negotiator said: "We figured DeSilva wasn't that astute and would simply roll over." UDF would handle the negotiations itself, in-market.

At the Bargaining Table

In early February 1995, UDF's optimism was quickly dashed in the first negotiation session with DeSilva. UDF offered a sum of £8 million; £1.75 million deferred for two years and the balance payable on completion of the deal. The specifics of how UDF arrived at the sum were left out of the negotiation.

DeSilva clearly had done his homework. In particular, he was well aware of the leverage represented in the remaining years in the distribution agreement. He also knew the leverage UD had if he failed to reduce his debt to the joint venture company and the delivery of product was suspended. Moreover, DeSilva had hired Antonio Ferreira, probably the best spirits negotiators in the country. Ferreira had already completed several similar buyouts of joint ventures involving Seagrams, among others.

Ferreira made a compelling case that the £8 million UDF offered did not hold up when compared to other similar deals. Using those as benchmarks, DeSilva insisted on £15 million as his price for buyout. As one UDF negotiator later described it: "They were two inches from the table leaning over it, and we were three feet back, up against the wall."

The UDF negotiators walked out shaken, and divided. A heated discussion took place among the team of three. The country manager (soon to be leaving) tried to shed things in a positive light. After all, he argued, UDF had made the point that the other joint venture exit/distributor termination had involved a transfer of 120 people to the distributor as well as the sale of a brand to the distributor. Besides, DeSilva's reputation was certainly not that of his competitors. Surely DeSilva must realize that he does not deserve as much. The other two UDF negotiators saw it differently. They were convinced that UDF was in serious trouble. After a painful discussion, the team concluded that they lacked the seasoning and experience of DeSilva and Ferreira. Their initial expectations about them had been dead wrong.

The initial negotiating team for UDF had included one marketing person (Floore), one financial person, and one who did a bit of both (the country manager). None of them were expert negotiators. They decided to pull in a more seasoned veteran. They needed someone with weight, someone with distance from the in-market business so that they could be more objective about the broader strategy and goals; given the complexity of the deal, they probably could benefit by having someone with a legal background. UDF spoke to UD London. The head of UD Europe (to whom the country manager reported and to whom, through the country manager, Floore reported) was considered, but as he was coping with other major projects. Ken Mildwaters, the GPLC General Counsel, was chosen.

Before Mildwaters was engaged the UDF negotiating team returned to DeSilva. They now offered £11 million. This broke down to £3.7 million for the purchase of DeSilva's shares in the joint venture company (the then-estimated "net worth" of those shares), another £6.3 million in total for expected dividends from the joint venture company to the end of the supply agreement and profit from distribution to the end of the distribution, and £1.0 million for a deferred payment tied to a two-year non-compete agreement. This time the specifics of how UDF arrived at the sum were discussed.

Once again DeSilva said "no." He wanted £15 million, all payable on completion and no non-compete agreement. Whether this sum included the "net worth" of his shares in the joint venture company was not clear.

On February 16, 1995 Mildwaters flew to Freedonia to speak with the team members individually and together. UDF clearly wanted the deal done. If anything, Mildwaters sensed that they had too much zeal and might be willing to pay too high a price. The UDF negotiators put great priority on getting DeSilva to sign a non-compete agreement, fearful that if he were unhappy (or unconstrained), he would "trash" UD brands and parallel its products into the market, all to the detriment of the newly consolidated UDF's volume and profits. Mildwaters' experience had taught him not to put too much faith in non-compete agreements, however, as they can be hard to monitor and enforce. Instead of relying on a legal mechanism, he encouraged the team to consider some kind of financial incentives to lock DeSilva in. For instance, perhaps his final out-year payments might be linked to UDF's future sales volumes and profits. The financial analyst on team was asked to crunch numbers for various scenarios.

Working their way through issues such as this, the newly formulated team began to develop clear objectives and a strategy for meeting them. The team laid out their must-haves, their negotiable items, and give-aways that might sweeten the pie for DeSilva. The out-going head of UDF left the team, though agreed to provide advice when he could.

Turning the Tables

On February 28, 1995 Mildwaters and the UDF team walked into the next meeting with DeSilva and Ferreira with one over-riding purpose: to right the imbalance of perceived power. Mildwaters made clear that, while he was there as part of the UDF team and would do what he could to see that a mutually satisfactory deal was reached between UDF and DeSilva, he was also there to ensure that UDF was not bullied into something that wasn't good for the Guinness Group overall. He made it known he too was a seasoned negotiator. He was not afraid to talk tough, and he had the full support of the management and resources of his major international corporation back home in London. He increased the offer to £11.5 million, being an increase of £0.5 million deferred for "good behaviour" post completion and made clear that "net worth" was to be actual "net worth" as determined by UDF's and DeSilva's accountants. DeSilva insisted on £15 million, but agreed to reduce his indebtedness to the joint venture company (which he subsequently did). The team left this second meeting certain that they were now ready to negotiate on equal terms.

Away from the table, the UDF team set about learning as much as they could about DeSilva, using their own sales staff to build an information-gathering network. They learned, for example, that the professional sport team that DeSilva owned was teetering on bankruptcy. While he might appear content to let his joint venture with UD run its full term, the fact was that he needed ready cash. In its investigation, the team also came to a deeper appreciation of DeSilva's personal pride in building his business; he would need some sort of recognition. The team looked for potential allies and identified one: Olivia Salazar, who had long been one of DeSilva's trusted associates. A promise by DeSilva to compensate her at the termination of the joint venture arrangements made her much more interested in seeing the deal completed. Eventually, as the negotiations progressed, the UDF team was able to float possible proposals through Salazar. When the negotiations began in earnest, they centered around the following four issues:

- overall price of the deal;
- allocation and timing of the payment of the price;
- responsibility for payment of tax; and
- DeSilva's relationship with UDF in the future.

While Mildwaters had already increased UDF's offer to some £11.5 million, more than 30% higher than the approval it had originally obtained, this was without it having obtained the necessary approval from the Guinness Group. Meanwhile, DeSilva was still insisting on £15 million paid up-front.

There was some expectation at UDF that the deal ultimately would settle around £13 million. UDF discussed this expectation with the UD Finance director and obtained "in principal approval" to settle at up to £13.1 million. In the meantime between the March 17 and March 28, 1995, Mildwaters meets regularly with Ferreira to try to reach a deal. No agreement could be reached. There was stalemate on price, but draft agreements were prepared, exchanged and on commented on. Mildwaters took the view that time was on UDF's side. Thereafter there was silence until May 3, 1995 when DeSilva enquired about payment by the joint venture company of a dividend that had been declared earlier but not paid. This allowed the negotiations to begin again between Mildwaters and Ferreira.

The allocation and phasing of the payment became as important as the actual figure. Some portion was necessary to purchase DeSilva's 40% ownership in the joint venture; some portion was needed for the termination of the distribution agreement; and some was needed for the out-year deferred payments to keep the UDF volumes and profits safe. Furthermore, something had to be done about the balance of DeSilva's debt.

UDF also had to consider the tax implications, in particular, of the allocation of the price. Depending upon how this was done, there was a potential cost of up to £1.9 million to UDF.

While UDF wanted the out-year deferred payments linked to the in-market sales volumes and prices of its major brands, Ferreira continued to counter that DeSilva should not be responsible for the future sales and prices of a brand he no longer controlled. Mildwaters responded that UDF was more than willing to sweeten the pot with deferred payments bring the total price closer to £15 million, as long as the payments could ensure that DeSilva would support the brands in Freedonia and was not hurting business through "trashing" the brands.

By May 17, 1995, a formula was worked out that tied the out-year payments to future volumes and prices, with a fair margin for downturns in the Freedonia market. UD London and GPLC approved a revised price of, in effect, between £12.7 million and £13.8 million and other terms. UD

London also asked that a portion of the price be paid to bring down the by now reduced level of debt DeSilva then owed to the joint venture company.

Even as these issues were falling into place, another issue arose that almost exploded the deal. An outside consultant told UD London that if UDF or UD London did not deduct tax at the rate of 30% from certain of the payments to DeSilva and pay those sums to the Freedonia tax authority, then it would be held responsible for payment of the tax on the deal. That is, DeSilva was to receive part of his payments net of 30% tax. UDF knew that there was no way that DeSilva would accept this. However, if this was correct and UD London or UDF were made liable for the tax (estimated to be about £2.1 million before any penalty or fine), this would push the price of exiting the joint venture arrangements even higher than had been approved. UDF explained the situation to DeSilva and sought to include a clause in the agreement allowing it to make payment to DeSilva net of the tax. DeSilva contested UD London's interpretation of the tax law, claiming that his advisors said that UDF could pay the agreed amount and leave him—DeSilva—to worry about any taxes.

UDF put pressure on the GPLC corporate staff tax expert to agree with DeSilva's interpretation, but if it was erroneous, UDF or UD London or GPLC could be stuck with a tax liability running in the millions of pounds—and the company and its officers vulnerable to possible criminal prosecution. The tax expert also knew that the Freedonia tax authority had recently closed down a Mercedes operation over a contested tax payment of only a few hundred pounds. The tax expert was called down to Freedonia. Because of last-minute scheduling issues, he found himself face-to-face with DeSilva and Ferreira all alone.

At this meeting, DeSilva pulled out a letter on UDF stationery that was addressed to the Freedonia tax authority requesting a ruling on the interpretation of the tax law giving rise to the 30% tax. Next, he pulled out the official tax authority response that gave the go-ahead for the gross sale. "Your other people have agreed with me," DeSilva said through a translator, "and here's the evidence to prove it. Now, what's the problem?"

The tax expert quickly realized he was being cornered. He looked at the letter. The language in the purported UDF letter did not match his expectations for the wording his people would use or the ruling they would request. Furthermore, because he had been in close contact with the UDF negotiators, he was almost certain that they would have told him about the request long ago. He could only say that he was not authorized to move forward at this point. "How can you say this," DeSilva insisted. "Here's the proof. What kind of insolence is this!" DeSilva and Ferreira walked out of the meeting, leaving the tax expert sitting all alone.

The tax expert was shaken by the experience, but convinced that he had done the right thing given the magnitude of the risks involved. On his return to London, he ascertained that the letter had been drafted by DeSilva's tax advisor and that UDF had agreed to type the letter on its letterhead, sign it and give it to DeSilva who would have his tax advisor take it to the Freedonian tax authority for a ruling, all with the aim of moving the deal forward and saving time. The tax expert was not happy. He drafted an official UDF letter to the Freedonian tax authority requesting a ruling on the issue in terms acceptable to him. DeSilva was given the chance to review this "rewrite." After he approved it, the letter was sent off. To the surprise of the GPLC corporate staff and UD London's consultants, and to the relief of UDF, the tax authority ruled that the deal could proceed as a gross sale, relieving GPLC, UD London and UDF, and their officers, of any potential liability and potential criminal prosecution, and avoiding the potential closure of UDF.

Closing the Deal on All Fronts

The final major point to resolve was DeSilva's future relationship with UDF, an important issue for him. Mildwaters saw this as the key to completing the buyout, but given how hard the negotiations had been, UDF wanted as little to do with DeSilva as possible. His personality and style just made him too difficult and costly to manage. It had proposed a tightly constrained wholesale arrangement with DeSilva in which he would not have exclusive rights to the brands, and would have a limited territory within which to sell them. Mildwaters, however, argued that it would be cumbersome to try to confine DeSilva territorially; whatever contract terms were drafted, as a practical matter, they would be hard to enforce. Finally, GPLC, UD London and UDF internally agreed to offer DeSilva a broader wholesale arrangement. In turn, they asked him for his customer list so that UDF could pursue those contacts DeSilva would no longer supply. DeSilva ultimately agreed.

While the external negotiations proceeded, the negotiating team also continued to pursue support back home. Mildwaters kept the UD London Finance director and Yea, the GPLC Finance director, informed on a regular basis. People in London would understandably ask why UDF would want to pay up to £13.8 million to terminate a relationship they could leave for free in about two years. The UDF team needed to explain that this was not a typical deal. The money was not paid only to consolidate the UD brands in the Freedonia market and increase sales volumes and profits for UDF, but to protect the brands from the very real damage DeSilva could inflict on them into the future if not managed constructively. The UD London Finance director was brought to Freedonia to discuss the deal. The UDF team made sure he spoke to the sales team so that he would get a clear sense of the unique and powerful nature of DeSilva's personality and business dealings.

For the most part, the internal negotiations went reasonably well, but there were some tensions between GPLC's plan of attack and UDF's. GPLC did not want to let UDF's day-to-day focus get in the way of striking a good deal. The pressing needs of meeting projections next month, or next year, would drive in-market negotiators to settle too soon for too much. In turn, UDF felt that pieces of the deal were better suited to GPLC's needs than their own. After all, they not only knew the market, they also had to live with the consequences of the deal.

Mildwaters' other responsibilities in the Guinness Group meant that he was not always available to help the negotiating team make key decisions as and when they wanted to make them. For example, after the team reached general agreement with DeSilva on the numbers, it was still necessarily to translate them into specific formulas. Mildwaters was not available to assist in the process. These calculations could be massaged to UDF's benefit to greater or lesser degree, yet GPLC corporate staff was opposed to doing so. UDF could not get to Mildwaters, but Mildwaters could always be available to GPLC corporate staff to make these decisions. For DeSilva and Ferriera, by contrast, this deal clearly was the most important project on their plate. This meant that at in-market meeting when Mildwaters was not present DeSilva could sometimes play one member of the UDF team off another; he often professed annoyance at their claimed lack of authority to make decisions and their continual need to refer back to London and wait for Mildwaters to make them.

UDF itself continued to push GPLC's corporate staff, from finance to tax, to move the deal along. At one point, UDF arranged a press party for the signing of the deal. It was clear to GPLC corporate staff that the schedule could not be met, but UDF kept the date on the calendar up to the last minute and used this to put pressure on the staff to keep things moving. Finally, contract approval was given on June 15, 1995 and the deal was signed on July 11, 1995.

The price ranged from an expected minimum of £12.7 million to a maximum of £13.8 million. This broke down to £4.95 million for the purchase of DeSilva's shares in the joint venture company, a

maximum of £6.6 million in total for expected dividends from the joint venture company to the end of the supply agreement and profit from distribution to the end of the distribution agreement, and a maximum of £2.25 million for “goodwill”. The sum of £4.95 million equated to the actual “net worth” of DeSilva’s shares in the joint venture company as determined by UDF’s and DeSilva’s accountants at a date prior to the signing of the deal, including dividends declared but not paid and expected dividends from the joint venture company to the end of the supply agreement.

The original proposed sum of £4.4 million had been increased to a maximum of £6.6 million on the basis of the period over which the expected dividends and profit were to be calculated; this period, was, in fact, some seven months longer than had originally been calculated. UDF had originally overlooked the fact that at the end of the term of the distribution agreement, three months’ notice was required if it was to be terminated. Furthermore, that notice could not be given prior to the end of the term. The maximum sum of £6.6 million was dependent upon future growth in sales volumes and prices increases and made up of two elements: a fixed element based on past DeSilva sales volumes and a variable element based on actual UDF sales volumes and pricing in the two years following completion.

The original proposed non-compete payment of £1.75 million had been increased to maximum of £2.25 million on the basis that the period over which the final sum payable had been calculated was extended for six months beyond the period of the original proposed non-compete. This maximum sum of £2.25 million was based on actual UDF sales volumes and pricing in the two years following completion. Furthermore, the sum was not payable under a non-compete agreement but as an additional sum for DeSilva’s shares in the joint venture company in recognition of what it was anticipated would be the “net worth” of the shares if the distribution agreement had run its full.

The phasing of the payment was crucial to reaching the deal. Based on the expected price (£12.7 million), £4.8 million was payable on completion, £5.2 million would be payable on the first anniversary of completion, and the balance of £2.7 million would be payable on the second anniversary of completion. In addition, completion was conditional upon DeSilva settling his outstanding debt to the joint venture company, and the joint venture company to UD, prior to or at the same time as payment of the first installment of the price.

Notwithstanding the conflicts, UDF acknowledged that GPLC corporate staff played an important role in preparing for and conducting the negotiations. First, they helped it clarify its objectives and to remind it of its must-haves and walk-away. Second, and perhaps more important, having a seasoned negotiator at the table balanced the talks and enabled.

The new head of UDF believed that the deal was ultimately successful because his company and GPLC had the same overall objectives in mind; there was also a shared commitment from all in the Guinness Group to get the deal done right. While UDF was able to provide its extensive knowledge and expertise in the local market, GPLC was able to provide the overall strategic vision necessary to drive home a good deal. GPLC pushed UDF when necessary, but also built a partnership, not a command structure.

Some within UDF and UD London believed that what began as a failure was ultimately a success. While the Freedonian market overall has suffered, the deal has held. UD’s brands have been consolidated in-market under UDF and DeSilva has turned to interests in casinos. While he has not promoted UD brands through his wholesale arrangement, he has not “trashed” them nor carried out any significant damaging actions. In retrospect, the head of UDF ruminated, “If we had not been sandbagged in the first meeting, would we have marched ahead without help or much buy-in from the higher-ups? And if so, I wonder what the deal might have looked like.”

Appendix B: Project Big Fish¹³

In early 1990, United Distillers (UD) had purchased Scheldt, a Costonian spirits company. Soon after its acquisition, Scheldt lost one of the major third-party brands it had been distributing to another competitor. At least a third of the sales force was suddenly underemployed, but labor laws in Costonia made it difficult to remove people from the rolls. Moreover, given UD's recent purchase of the company, any layoffs would have been seen in a particularly negative light by the Costonian public.

In early 1993, UD enlisted HovenBank (HB) to investigate the potential purchase of companies that might put Scheldt's sales force back to work and fill the hole in the Scheldt portfolio. In its initial search, HB uncovered nothing. But shortly after the search was called off in October 1993, HB contacted up UD. As it turned out, the shareholders of a company codenamed Big Fish was interested in selling. Big Fish produced only one brand of spirit, a product slightly different and not necessarily competitive with Scheldt's brands. HB asked UD if they might represent the shareholders of Big Fish and be released from any obligation to UD. UD was a bit surprised by this sudden change in allegiance, but agreed to HB's switch figuring it might be able to call in a favor later on.

HB proceeded to open the sale to an auction for Big Fish. On November 1, 1993, HB provided general financial information as well as substantial information on the Costonian spirits market, most of which, ironically, had been developed by UD. HB did not allow, at this point, any contact with Big Fish or the shareholders.

Business Development at UD (UDBD) was based in London. The head of UDBD, Alistair Dench, who had already done the extensive research in the market, reviewed the numbers and other information. Big Fish's spirit was an exciting brand, one that had had extraordinary sales in the last few years but which still seemed to have further growth potential. UDBD determined a bid of some £104 million, roughly 10 times revenues, according to the then available sales figures. UDBD hoped that this would be competitive with others, such as Seagrams, who were also likely to bid on this attractive brand. In fact, the UDBD team had unexpectedly run into Seagrams representatives in a Costonian airport.

A project team was established on November 5, 1993, and concept endorsement obtained on November 19, 1993. The team received approval to give an indication of intent given on November 23, 1993, and decided to bid £104 million (subject to conditions and supply of information). At a meeting on November 19, 1993, in addition to authorizing "in principle" the bid, the board established a subcommittee of its members to help support the UDBD team. This subcommittee included Philip Yea, GPLC Finance Director, said by some to be "perhaps the most powerful position in the company." Within two days of the bid submittal, on November 26, 1993, HB responded in writing. "We are sorry to decline all offers received to date. If any bidder is willing to offer at last £128 million, then the owners of the company will consider further negotiations."

Internal Doubts

UDBD was not deterred. Working with newly obtained revenue figures, they were able to use their standard pricing formula, to justify a higher bid that would meet HB's threshold—or even go above it, given the exciting growth potential of the market. They sought approval to submit a second

¹³ The material in this appendix is distilled from a more extensive case prepared by Patrick Field, Senior Associate of the Consensus Building Institute, Cambridge, Massachusetts 01930. The names of most of the parties in this case have been disguised, as has the name of the country in which this negotiation took place.

bid of £128 million to acquire Big Fish. Guinness PLC (GPLC) corporate staff, however, were worried that Dench and his team seemed to be falling in love with the deal. It was even rumored internally that the financial analysis had been done backward; that is, a purchase price had been stipulated and then sales projections calculated that would justify it.

GPLC corporate staff felt that the sales projections were optimistic, at best. Thus, if UDBD were going to submit this £128 million second bid, they had better condition the bid on extensive due diligence as well as some guarantee of the growth projections. GPLC corporate staff wanted a large portion of the purchase price to be based on earnings in out-years, while UDBD felt that this would not be accepted. After numerous internal meetings and conversations, including another presentation by Dench's team to the GPLC board, the increased second offer was approved on December 3, 1993 and the second bid was submitted that day. Several dynamics in the Guinness Group influenced the internal negotiation. First, though Dench was formally accountable to Richard Clarke, UD Europe's General Manager, Clark was preoccupied with a large reorganization of the entire European business. Clark was a marketing expert, and often depended on Dench for his financial expertise. Thus, Dench, young and relatively inexperienced in dealmaking, was left to lead the negotiations. He wanted to do this deal. From his perspective, it was his opportunity, and the opportunity for the UDBD team, to demonstrate their dealmaking skills. Pulling of this deal would, in the words of one member of the GPLC corporate staff, "make them heroes and set their careers alight". Furthermore, it would demonstrate that such deals could be done by UDBD without GPLC corporate staff "being all over us."

Second, internal coordination was further complicated by the departure early in the process of the GPLC Corporate Finance director. His department had once been quite powerful in the early years after GPLC's buyout of UD; indeed, it often took the lead in carrying out major acquisitions. More recently, however, the office served just as an internal reviewer of financial models and taxes, with no veto power or even real influence over UD and Guinness Brewing World-wide deals. In some peoples' eyes, the Corporate Finance Department, had become, "just a bunch of bean counters." There were also changes in the GPLC Legal Department. It typically held little influence in the deal making process, but under its new director and General Counsel, Ken Mildwaters, things were changing. Yea and Mildwaters were old colleagues. Rumor had it that Yea had brought Mildwaters in to clean house, one way or the other, and to stop the hemorrhaging of profits to bad deals.

Third, although the Guinness Group was striving to provide more freedom to its business units, there was growing concern over several prominent acquisitions that had turned sour. For example, not long after the purchase of a brewery from a long-time local owner, its employees struck in protest against the new foreign owner. Recent acquisitions had also proven very problematic. As a result, there was little sentiment in London to take further risks.

In this skeptical climate, the negotiations nevertheless proceeded. HB and its clients, the Big Fish shareholders, accepted that the offer of £128 million was just enough, "the minimum" to enable the process to continue. (If there ever were other competitors, they dropped from sight.) At last, the UDBD team could meet directly with the two principal shareholders of Big Fish on December 10, 1993.

GPLC corporate staff heard no more about Big Fish until March 8, 1994 when UDBD advised that it wished to proceed with the acquisition. UDBD sent an approval paper (investment/acquisition/disposal request) to GPLC corporate staff and the board the next day. Yea responded by calling a meeting of UDBD and GPLC corporate staff for the following day, so that they could all agree on the terms of what would be proposed.

Those at the meeting agreed, based on the additional information provided to UDBD by the principal shareholders, that the second bid of £128 million would stand (subject to full due diligence and full representations and warranties) save that £8 million was to be held in escrow following completion and released depending upon the performance of Big Fish against its 1994 budget.

The “revised” second bid was sent to HB on March 16, 1994 and UDBD met with HB later that day to receive the feedback of the principal shareholders. It was not all that they wanted to hear. The price was the absolute minimum acceptable and there was to be no escrow. There was to be no exclusivity and strict confidentiality was to be maintained (that is, no access to the premises or people involved in the business other than the two principal shareholders and, in due course, the internal accountant). In addition, the contract would be in “Costonian” and not “English,” the shareholders would provide the first draft of the contract, and the contract had to be signed *before* due diligence could commence. This response was followed on March 25, 1994 by a letter from the shareholders’ attorney, confirming what had been said, and asking for a detailed proposal so that he could commence drafting.

Big Fish was a family business, with the current owners tracing their lineage back to the company’s founder. In all there were four shareholders: two principal shareholders (the gentlemen) and two minor shareholders (the wife of one of the principal shareholders, who was the sister of the other principal shareholders, and their daughter). The distribution of the shareholdings were: 50% to one principal shareholder, 20% to the husband principal shareholder, 25% to the wife, and 5% to the daughter. One of the two principal shareholders was very commercially driven, taking particular pride in the business, while the other was a technical wizard, extremely proud of the systems and machinery of the distillery. On one of the first visits, the two principal shareholders gave the UDBD team a tour of their 50 vintage Ferraris: clearly, the owners were very wealthy and, given the success of the business, did not have to sell. Their interest in getting out of the business, they claimed, stemmed from the fact that neither of the men had sons to whom they could pass the company. (In their aristocratic family, daughters did not have a place in business.) The UDBD team subsequently heard rumors that one of the principal shareholder, the one married to the sister of the other principal shareholder, was in the process of getting a divorce, and likely would *owe* a substantial settlement, but was unable to confirm this information.

Indeed, the Big Fish shareholders were very secretive. They were extremely worried that the labor force would find out about the deal before it was completed. They asked for complete confidentiality during the negotiations, for a long time refusing access to anyone at Big Fish, other than themselves, and to the sites. Even when site visits were scheduled they sometimes blocked site visits by the UDBD negotiators and their consultants conducting due diligence. This difficulty in obtaining information became increasingly problematic in the internal UD-GPLC negotiations.

Back in London GPLC corporate staff was worried that the £128 million offer had been too high, so they wanted to ensure that nothing was left uncovered in the due diligence. As one legal staff member later described it: “UD was rearing to go and we needed to put the brakes on.” The UDBD committed significant resources in this endeavor (in the end, due diligence costs alone totaled over £500,000).

After a meeting on April 18, 1994 between the two principal shareholders, their attorney, the UDBD negotiating team and Mildwaters, the parties agreed that limited documentary due diligence could take place before the signing of the contract, which they pencilled in for the end of June. Other due diligence would have to wait until after signing. The contract would be conditional upon this due diligence being satisfactory, and completion was pencilled in for the end of December. The due diligence investigation, which over time moved through documentary towards non-documentary, revealed several potential problems. It turned out, for example, that Big Fish did not directly hold

license to its spirit recipe. There were also important pension fund issues, stemming from complex Costonian legal requirements and the looming obligations of an aging workforce. Some potential environmental liabilities were identified as well.

There was also a potential internal problem. UDBD had recently completed a successful deal with an Freedomian spirits company in the Costonian market. One of the Freedomian company's products included a spirit somewhat similar to that made by Big Fish. The confidentiality agreement with the shareholders of Big Fish, however, prevented UDBD from notifying the Freedomian company of the possible deal; there was specific concern at UDBD that it might regard acquisition of Big Fish as violating a non-compete clause it insisted upon.

As the due diligence progressed, there was also a growing sense that it might prove harder than expected to integrate Big Fish into Scheldt's operation. True, the production facilities were located within an hour of one another, but workforce regulations and other factors meant that Big Fish would probably have to be run as a stand-alone company, at least initially. In short, the initial justification for doing the deal seemed to be less attractive than when the £128 million was offered. Nevertheless, the UDBD team argued that the financials still warranted moving forward.

The Negotiation Process

Contract negotiations thus proceeded, but by early June 1994 Mildwaters had begun to press for extensive warranties and guarantees in the contract in order to mitigate some of the potential problems that were turning up through due diligence. On the Costonian side, the Big Fish shareholders continued their hands-off approach by continuing with the appointment of their trusted family attorneys to oversee all the contract negotiations. In some ways, this agent served to insulate the negotiations from the strong emotions of the shareholders. On the other hand, he seemed to have little experience with the complex negotiations involved in corporate acquisitions. He struggled to understand many of the concepts advanced by Mildwaters and his team to address concerns that GPLC corporate staff had with the structure of the deal and the due diligence; often concepts which more than addressed his clients' concerns. The UDBD team feared that, given his inexperience, the attorney was both denying requests out of ignorance and perhaps not best serving his own client's interests.

As due diligence wrapped up, the UDBD team held a day-long due diligence findings meeting on August 4, 1994 with the GPLC board's subcommittee to discuss the results. Some GPLC corporate staff expected—perhaps even hoped—that some deal-breaking issue would surface, but in the end, UDBD's projections about brand health, volumes, distribution networks, and pensions all were largely confirmed.¹⁴ Almost all the problems raised early in due diligence appeared to be resolvable by appropriate representations and warranties in the contract and no major outstanding issues remained to stand in the way of the deal other than agreeing the terms of the contract.

The contract negotiations, however, were turning sour. Mildwaters wanted to hold all the shareholders personally accountable if future problems did arise. However, the Costonian attorney countered that the family's finances were arranged in such a way that this was not possible and that, in any event, the family's assets were largely unreachable. Only the principal shareholders would be accountable, and then only severally, not jointly or jointly and severally. As a consequence, Mildwaters requested that either the shareholders place a substantial sum, 10% of the price, in escrow or provide equivalent security to protect against potential liabilities. This request apparently

¹⁴ Some growth projections in Eastern Europe did seem high, but little could really be known about such a new and emerging market.

offended the Big Fish shareholders. As they saw things, their facilities were clean and well run. Mildwaters's requests implied distrust, as if they were being accused of covering up important information. The demand for security or an escrow amount apparently made the Big Fish shareholders worry that Mildwaters was just trying to find a way to get more money out of the sale at a later date.

The UDBD team, still eager to do the deal, was somewhat sympathetic to the shareholders. They were becoming increasingly frustrated with Mildwaters, accusing him of intransigence and outright hostility towards them and their efforts. In turn, Mildwaters came to see the UDBD team as young, inexperienced, hot-headed, overly emotionally attached to what seemed at best to be a marginal deal, and pursuing a self-promoting personal hidden agenda.

With all of the difficulties, internally and externally, it became obvious to the UDBD team that they would not be able to sign the deal by the expected date; a date they had nominated at the meeting on April 18, 1994. Furthermore they would not meet subsequently agreed signing dates of June 30, 1994 and August 31, 1994.

On August 24, 1994 Big Fish shareholders' attorney sent an angry letter to UDBD. "Let me express my disappointment and outrage that less than one week from the final signing date, I receive an English version of the contract that fails to take into account the due diligence conducted and does not reflect our agreement with regard to payment of the purchase price." The shareholders requested return of all documents and stated unequivocally that the sale was off.

Internal Differences

UDBD negotiators were surprised and shocked that the Big Fish shareholders had pulled out of negotiations. This was the second time it had happened. The first occasion, on June 13, 1994, had been triggered by the extent of due diligence requested. Clark had managed to placate the shareholders by agreeing to split the request into what was essential before signing and what was not. This time Clark was not only shocked but angry, as the attorney's letter blamed him, in particular, for not being present at key negotiations.

In a flurry of activity, UDBD urged its negotiating team to try to salvage the relationship with the Big Fish shareholders, if possible. Then sent faxes to both the Costonian attorney and to HB, asking for help. UDBD was particular puzzled by HB's lack of help because they had a substantial fee dependent on the final sale. Nonetheless, no replies were forthcoming. UDBD asked for a meeting with the full negotiating team: the UDBD team, GPLC corporate staff, Mildwaters and his team, and Yea.

At this session on August 31, 1994, the UDBD team expressed frustration that Mildwaters was not doing enough to educate the Big Fish shareholders about the complexities of the deal. They felt that Mildwaters had confused both the Costonian attorney and his clients and had never adequately explained to the Big Fish shareholders why they were being personally asked to pledge so much financial security. The UDBD team recommended that they return to the Big Fish shareholders in a conciliatory mood and continue their more friendly, engaging, "kid gloves" approach. UDBD argued that unless GPLC corporate staff, including Mildwaters, became more flexible, the deal would certainly break down.

GPLC corporate staff countered that UDBD had already been too soft and let the deal balloon out of proportion to its worth. They argued for not backing off the warranty and guarantee requests; and if that broke the deal, all the better if it protected the Guinness Group from future liabilities. Yea

listened carefully, but tipped his hat to GPLC corporate staff's strategy. It was to be a "take-it-or-leave-it" response. As one UDBD negotiator put it, "We didn't leave the meeting with an agreement, but we did leave with a decision." Another UDBD negotiator felt Yea simply "didn't want the deal, for reasons unknown, and this was his last chance to stop it".

At the highest levels of GPLC, it is rumored that Yea and Mildwaters worked very hard to get Clark, the general manager for Europe, to take responsibility for the deal his own business development team had been constructing. Even from the UDBD teams' perspective, UDBD felt Clark, their own project sponsor, was not putting his head on the block. He seemed very interested in the deal and unwilling to come right out and kill it, yet often he would not come out in full support in front of his GPLC counterparts. Perhaps it was because he did not want to displease them. Perhaps it was because he was very nervous about spending over £128 million in only the Costonian market.

One Last Effort

In any case, after the UD-GPLC meeting, Clark responded by seeking a conciliatory meeting with the Big Fish shareholders. Clark and the UDBD team met with them on October 11, 1994, expressed regret for any offenses committed, and asked to get the deal back on the table. He expressed hope that even if the deal could not be repaired, at the least, they perhaps might leave on friendly terms. The shareholders agreed to reconsider.

Within a few days, they responded with a final offer. The details included that no further due diligence be conducted, and no representations or warranties be required in relation to matters where due diligence had been conducted. Any liability under the warranties would fall on the two principal shareholders only, and then severally and not jointly or jointly and severally; the potential liability would be capped at £8 million, there would be no retention of purchase price or security arrangements, and there would be no representations and warranties covering the period between signing and completion (that is, UD would be on full risk). Mildwaters advised Clark that GPLC corporate staff felt that this was not justifiable, from their perspective. Nonetheless, he said, it was Clark's decision. If he wanted to take the risk, then GPLC corporate staff would go along with the decision. In the end, Clark agreed with Mildwaters, and the Big Fish shareholder's offer was not accepted.

Looking back, one senior GPLC corporate staff member stated: "In the end, I think the right result was obtained at the expense of lots of time and emotion. Morale suffered and relations remain somewhat strained between Guinness PLC Legal Department and UD."

From another perspective, a UDBD staff person said: "The brand is still doing well and had we purchased the company, it would have been a good deal for Guinness. As for the whether we would have secured the deal had we taken another tack, who knows? It's fair to say that the strategy we chose killed the deal. But it's harder to say that had we chosen the more "kid glove" approach we would have finalized the deal."