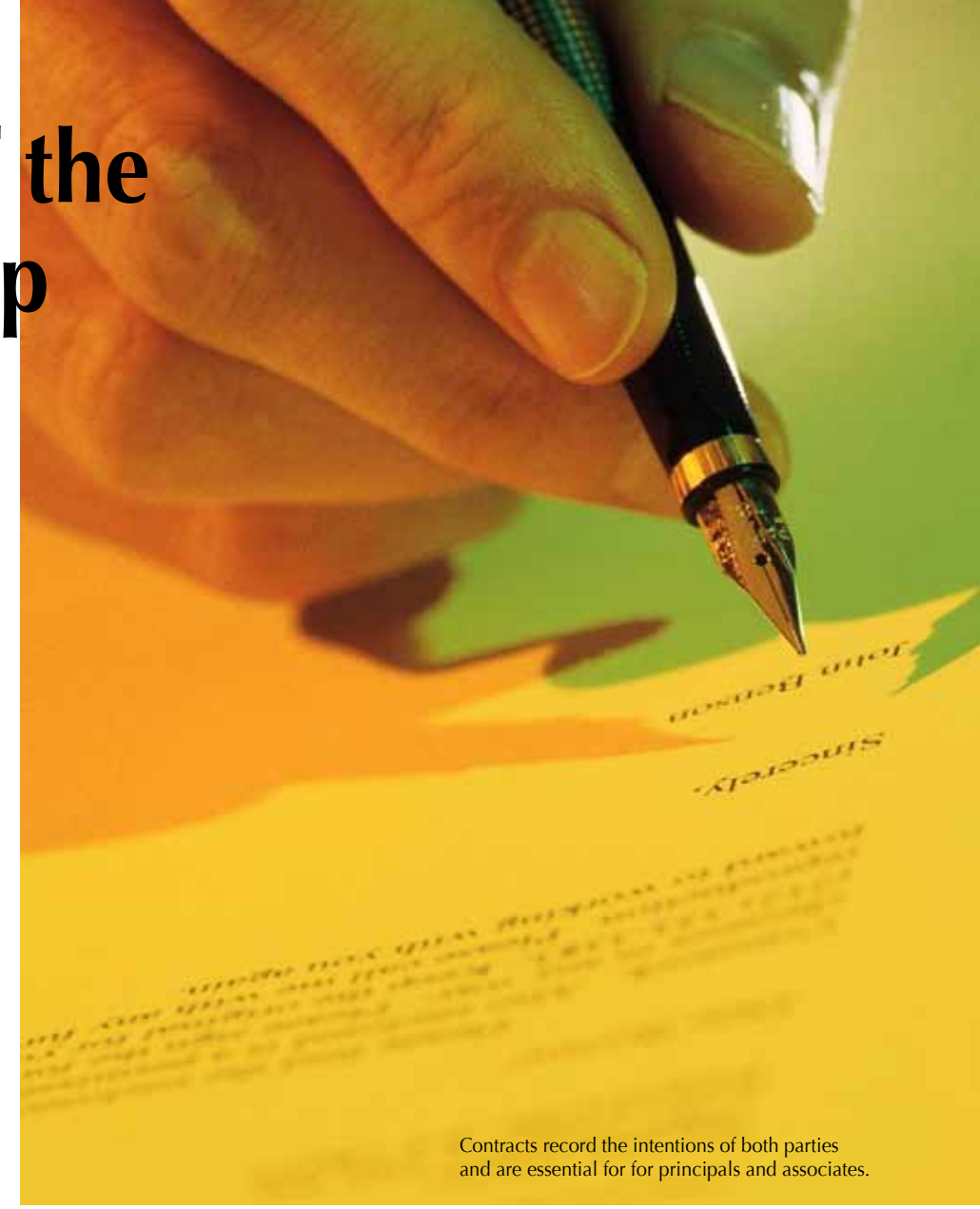
The end of the relationship

What should happen if a contract is terminated, asks **Peter Holland**?



Contracts record the intentions of both parties and are essential for for principals and associates.

In the world of general dental practice, the role of associate dentist has many advantages, both to the practice and to the associate. Arrangements between practice-owners and associate dentists are common and most are generally successful. But if either the practice or the associate decides to terminate an arrangement, it can disintegrate into legal proceedings and end up in a Court or Employment Tribunal.

Difficulty can well ensue if a contract is ended by the practice. If termination is not consensual then an associate will understandably, consider their legal position.

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It is perhaps surprising but not uncommon for there to be no contractual document. (This is unwise from a tax perspective as both the BDA and the DPA agreements are recognised by HM Revenue and Customs, although worth bearing in mind that the decisions of HMRC are not binding on the Courts or the Tribunals.)

In the event that there exists a written agreement, the contents of the contract may not actually reflect working practice.

The intention behind a contract of this kind is to sidestep the constraints➲

imposed by a myriad of Acts of Parliament, both UK and European, and common law. In fact, there is no statutory definition and each situation must be determined on its own facts. The law applies a multiple test. Factors that will be considered include:

- whether the work is carried out personally in return for a wage or remuneration (a mutuality of obligation)
- the extent of control of the person performing the service.

The Employment Tribunal will take a practical approach and will consider issues such as use of own equipment, investment, the payment of a fixed wage or salary and payment for absences.

The intention of the parties at the outset of their arrangement is important and this should be recorded. I also think that it is important to take stock of the situation on a regular basis. If a dispute arises, it is likely to be determined as a preliminary issue before any unfair dismissal or other employee claim is heard.

The second scenario that I will address is the use of restrictive covenants.

As an associate, an ambitious young dentist could use their time working for a practice-owner to springboard themselves into a strong position. They will have had time to understand the needs and opportunities in the given geographical location, have had the opportunity to view other practices which may be seeking to sell, built up a relationship of trust with patients and of course earned some money to fund a new business.

The question of restrictive covenants or covenants in restraint of trade is not an obscure area of the law. The covenants entered into between parties should be in writing and genuinely exist to protect the practice's legitimate business interest, that is, the value of the practice owner's goodwill.

If the main purpose of a covenant is to simply seek to restrain competition it will be unenforceable. The burden of proof will fall to the practice seeking to enforce such a clause. Such claims as may be brought are usually through the courts rather than the Employment Tribunals. If an injunction is sought to enforce a covenant, an application should be brought before a Court quickly. Failure to do so will inevitably lead a Judge to conclude that the discretionary remedy of a compulsory order to restrain was not necessary and that a claim could proceed to seek damages alone.

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Restrictive covenants are likely to seek to prevent a dentist from practising within a geographical area of the place of work for a period of time. Covenants may also seek to restrain the employment of staff of the practice, again for a period of time, or to solicit clients.

The Courts are generally less inclined to be sympathetic in their approach to a practice in the employment contract than in commercial transactions, for example, on the sale of a business. Covenants may be unreasonable in respect of the nature of the restraint, the ambit of the restraint and the duration of the restraint. The Courts will not modify a covenant, it will be enforceable as drafted or it will fail.

In drafting a covenant, the practice should consider the reasons why it is needed. The ambit of the clause should be reasonable, for example, a clause restricting practice in a five mile area of a surgery in central London is more likely to fail than that in a rural more sparsely populated area. The duration of the covenant should be considered having regard to the time that the practice will need to deal with the departure of the practitioner. It is often the case that the parties to employment or consultancy contracts do not take legal advice before they are signed but clearly this may assist in establishing that the parties were aware of the nature and effect of the agreement that they were about to enter into.

Entering into a contract and keeping a record of the intentions of both parties at the time is strongly advised.