

Selling and buying a dental practice

Whether you are buying or selling, you need to prepare for the transaction and enter into it with your eyes wide open. The best preparation is to have the support of knowledgeable advisors. A specialist lawyer is particularly recommended. NASDAL lawyers understand what is required and will guide you on what you need to have in place before you embark on either a sale or purchase.

Selling

Before you select a specialist dental practice sales agent, you should start collecting together the information that the purchaser will request. This will be part of their due diligence exercise. In most cases, you will need to put together a ring binder full of information about the practice, the staff and its equipment and any insurance or other certificates. For instance: practice leases, staffing expenses, PAYE records, rateable value, energy performance certificates, asbestos audits, X-ray test certificates, building regulations, staff inoculations. The list is long.

A second key point that requires early preparation is to ensure that if your property is leasehold, you are offering a sufficient term to the purchaser. Banks will almost certainly not assist the purchaser if the remaining leasehold term is less than ten years and ideally it should be considerably more. If only a few years remain, at the earliest stage, possibly well before going to a sales agent, you need to be talking to your landlord about agreeing an extension to the lease.

Buying

If you are thinking of buying, apart from arranging funding, there are probably two particular points which require attention and the first is a point needs to be looked at from the earliest possible moment.

Since the 1 April 2011 a service provider of a regulated activity has to register before carrying out the activity with the Care Quality Commission. Undertaking a regulated activity without registration is a criminal offence that can attract a fine of up to £50,000. The most relevant regulated activities for dentists are:

1. The treatment of disease, disorder or injury;
2. Diagnostic and screening procedures;
3. Surgical procedures.

Registration has to be effected in respect of each activity. The difficulty is that registration can take a period of up to 120 days and when a purchaser has found a practice, albeit that there may still be some time before an exchange of contracts, the purchaser should put in a registration application. Once this has happened, it is also crucial that the purchaser keeps in touch with the CQC assessor and seller so that the progress of the application can be followed. Tying in the end of the registration process with the completion of the purchase is a complicated area and one where your specialist dental lawyer will be advising you and your funders.

A second key area where your specialist lawyer will be looking to advise is ensuring that, if the practice is NHS, that the seller's GDS contract or PDS agreement is passed over to you, in its advertised form, at the time of completion. Different arrangements apply to the two types of contract but particularly with PDS agreements, the Commissioner will often, on a proposed transfer, take the opportunity of trying to re-negotiate more advantageous terms.

One final point that requires some thought at an early stage is the extent to which you would wish the vendor to be precluded from practising in the area where you are purchasing. It may be that in some cases vendors will remain on with the practice as a salaried associate for a short period of time but,

generally speaking, purchasers will want to have them well off the scene and not trying to attract the goodwill of patients, thereby diminishing the expensive goodwill that you have paid for. Some lenders also require this as a term of their loan offer.

"Failed/flawed incorporations"

Dentists have had the legal right to incorporate since 2006. However, when looking to incorporate an NHS contract difficulties can often arise. The consent of NHS England is required to transfer the NHS Contract to a new limited company. If NHS England do consent, then they may do so on the condition the contract is varied with a revised UDA value or with new terms (more favourable to the Commissioner). Where the contract is not incorporated properly and/or the legal steps of transferring the contract to the limited company are not followed, this is known as a failed or flawed incorporation; effectively the practice goodwill is purportedly transferred to the corporate body but the contract is left behind with the individual practitioner. Whilst practices with such structures can operate happily for years, issues often arise at the point of sale, usually when the purchaser carries out an investigation into the target practice and uncovers these issues.

A proportion of dental practice purchases and sales currently involve flawed incorporations. Once issues are identified they will need to be unpicked. Many lenders may be unhappy to lend against the purchase of such practices. In the worst case scenario, a practice may be unsaleable unless corrective action is taken. More often than not, delays are likely.

The most valuable asset of a dental practice will often be the NHS Contract it holds, and the associated goodwill. If a contract is transferred without the consent of NHS England, this provides the Commissioner with the automatic right to terminate the contract, as a result of the breach. It is important to identify, from an early point, who the legal contractor is and whether the correct consents have been obtained. We have seen instances where a limited company was advertised for sale (as a share sale) in the belief it held an NHS contract only to them find out that the contract was never legally transferred from the former principal or partnership. This leads to delays and increased costs from both sides of the matter as the matter needs to be re-structured.

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If in doubt, you should speak to a specialist solicitor and accountant prior to taking steps to sell your practice. It is essential that the appointed sales agent has a full understanding of the property and contract arrangements and does not just "put the business on the market". This will ensure your practice can be marketed accurately and will allow the eventual purchaser to enter into the transaction with full knowledge of the structure of your business.

Prepared on behalf of NASDAL by Andrew Lockhart-Mirams, Specialist Consultant at Veale Wasbrough Vizards LLP. To contact Andrew, email: ALockhart-Mirams@VWV.co.uk or to find a NASDAL member in your area, go to www.nasdal.org.uk.