Changing rooms

So you want to buy a dental practice? John Grant sheds some light on what's involved in this complex and time-consuming process

T

will not have escaped your attention that over the last couple of years the country has suffered something of an economic downturn.

While some dental practices have been affected – some significantly, others less so – by and large the dental profession has escaped unscathed by the economic issues that have affected a lot of business in the UK.

This has certainly been reflected in the market for dental practices, which has seen – and continues to see significant activity, particularly with regard to NHS practices – but also with regard to private practices as well.

Positive thinking

An idea I like at the moment is that I am not the managing partner of a solicitors' practice – I am the managing partner of a business selling legal services. The same can be said of dental practices - they are in my view not practices, but businesses selling dental services. Consequently, anyone looking to purchase a practice should ask, first and foremost, whether this is good business? More significantly, will it continue to be a good business after the principal's departure or are there opportunities you have identified that will enable you to develop a practice into a good business? This is the key question a potential buyer should ask himself when looking at practices to buy.

Having identified a practice and having determined if it fits your bill, the buyer and the seller will embark upon the legal process where the assets of the practice will be transferred. This article is intended to give an overview of that process. Bear in mind however that this is very much a general guide and is not intended as a detailed consideration of all that is involved in what is an extremely detailed, complex and in many cases lengthy legal process.

While the title may refer to the purchase of a practice, it is hoped that this article will provide useful information for sellers as well.

Negotiating the deal

In English law, a verbal contract is just as binding, and just as enforceable, as a written contract. There may be difficulties in establishing the precise terms of the contract - particularly if there is a dispute, and proving certain terms in the absence of anything in writing may be troublesome to put it mildly, but in principle, if an offer or by one party is accepted by another then there may well be a binding contract.

The only time this does not apply is where property is involved. In this situation, the contract must be in writing and certain other formalities need to be present for a binding contract to be entered into.

Given that most practices involve a property element, the chances of inadvertently entering into a binding contract are slim. However, in order to avoid this scenario, it is recommended that all correspondence – and in particular any that may contain an offer, be headed, “Subject to contract”.

You will have seen this phrase numerous times on estate agents' boards. From a legal perspective, this means that an offer may have been accepted, but at law, there is still no legally binding agreement.

It is important to be as precise as possible when concluding a deal. For example, is stock included or excluded from the price being negotiated? Are there any items of equipment or other fixtures at the practice, which may not be included in the price? Is the deal dependent upon the Seller remaining at the practice post completion and if so on what terms? Is there any equipment on lease or hire purchase and if so will that be paid off, on or before completion?

The legal bit

Once the deal is done (or "hears of terms agreed"), it will be necessary to instruct solicitors to affect the transfer of assets.

These days more than ever, it is necessary to instruct a solicitor who is dually aware - a solicitor who does not know his PDS from his GDS or what is meant by a Capital Scheme does not have the requisite knowledge to guide you through the process without a significant risk that something may go wrong either during, or perhaps more importantly from your point of view, after the completion of the purchase.

Once solicitors have been instructed the legal process can commence. There is no difference between the process followed for the acquisition of a dental practice and the purchase of a residential property: the legal principles are precisely the same. The process can be broken down into these stages:

- Pre-exchange of contracts
- Exchange of contracts
- Post-exchange/pre-completion
- Completion
- Post-completion
- Pre-exchange of contracts

As stated at this stage, a deal has been agreed, but there is still no binding legal agreement. There are essentially three key matters, which need to be attended to.

First, the sale agreement or contract has to be negotiated. Issues such as how the purchase price is to be split between goodwill, equipment and property will need to be agreed (always seek your accountant's advice on this due to the tax consequences). How will partially completed treatments be dealt with? Is there to be a retention for failed treatment and if so, how much and for how long will it be held after completion?

The issues are numerous and as a consequence, contracts can be lengthy and technical documents. It can take some time for the form of these documents to be agreed.

Secondly, your lawyer should carry out what is known as the due-diligence process. In essence, this means obtaining information and documentation about the practice and the property to ensure there are no problems that could affect the practice going forward.

Part of this process includes sending detailed questionnaires to a seller’s solicitor. A solicitor should be asking for up-to-date copies of equipment-inspection certificates, contracts of employment, and contracts with associates and other self employed persons. If the practice is an NHS practice, then a copy of the NHS contract should be provided to the buyer so that the pay statements so that UDA performance can be checked. The list goes on and on, suffice it to say that when acting for a buyer it is not unusual to end up with one if not two files of
documents – as well as ensuring full and proper replies to all of the questions asked.

Pay attention
One matter you should pay close attention to does relate to the employees of the practice. In accordance with the TUPE regulations, all employee contracts of employment will be transferred to you on completion, and those employees will have the benefit of their existing terms and conditions. While not impossible, it will be extremely difficult to alter terms and conditions of employment after completion.

Thirdly, you will (unless you are extremely fortunate) need finance in place so you know that you will have the finance available to complete the deal, prior to being legally committed to it.

While it is fair to say that funding is no longer quite as freely available as it was a couple of years ago, finance is certainly very much available and the banks that were buying and that your role as an entrepreneurial business man can begin.

Do not be rushed! For most dentists, the purchase of their own practice will be the biggest business transaction they ever take part in – it is of vital importance that everything is in place before being legally committed, that you end up with the practice that you thought you were buying and that your role as an entrepreneurial business man can begin.

Exchange of contracts

The legal significance of exchange of contracts is that it is from that moment that you are legally bound to buy – and the seller, legally bound to sell.

Your solicitor will have one part of the sale contract signed by you and the seller’s solicitor, an identical copy, signed by the seller. These days, exchange of contracts usually takes place on the telephone, with each solicitor placing their part of the contract in the post that night.

Apart from being legally bound, there are two other issues to consider. First, on exchange, in most cases a 10 per cent deposit is paid to the seller (or more specifically to the seller’s lawyer). Do you have these funds available? If not, will this make up part of the funding from your lender? Most banks will agree to advance part of the loan to a buyer’s solicitor for use as a deposit.

Secondly, at exchange of contracts, a completion date is agreed, this being the date when the balance of the purchase monies are paid over and the practice becomes yours.

The time between exchange of contracts and completion can vary enormously. In some cases, exchange and completion take place simultaneously, while at the other extreme, if you are working as an associate, you may not wish to give notice to your principal until there is a legally binding contract. If this is the case, there can be three months between exchange of contracts and completion.

The completion date does need to be agreed beforehand in order for exchange of contracts to take place.

Post-exchange/pre-completion
At this point, the lawyers are busy preparing any other documents which need to be in place and signed for completion: mortgage deeds, transfers of property and the like. It may also be necessary – if this is an NHS practice – for certain notices to be sent to the PCT, or if a Capitation Scheme Practice is being purchased, notice given to the Capitation Scheme provider so that arrangements are in hand for the Capitation Scheme patients to be transferred to you.

Time to complete
In most cases this is the easy bit. The money should arrive from your funders. We generally request funds the day prior to completion to ensure there are no delays on the day of completion. From a legal perspective, from the moment these funds arrive in the seller’s solicitors’ account, the practice is yours.

Post-completion
By this stage, you will have had more than enough of your lawyers and will be happy to be able to concentrate on treating patients.

In many cases, these days there are post-completion issues to deal with, particularly with NHS practices where more notice may have to be sent to PCTs. If there was a retention from the purchase monies, it is possible that issues may arise if clinical neglect or failed treatment arises. In such circumstances, it is imperative you notify your lawyers as soon as these issues arise. There are in many cases time limits in which claims must be made and if missed, may result in you being unable to pursue what otherwise would have been a perfectly valid claim.

To summarise
Each transaction is different and each raises its own issues to deal with. The vast majority involve complex legal issues. On average, transactions take about four to five months to get to the stage where exchange of contracts can take place. Some take substantially longer, very few happen quicker.