When it’s time to buy, or sell, a practice

Ray Goodman looks at some things to consider

There is much to be considered when buying or selling a practice and professional legal advice will always be beneficial when it comes to negotiating terms or drawing up a contract. With the right know-how a transaction can be made simpler and all the more likely to succeed.

There are a number of ways to own a dental practice, each with legal, financial and clinical responsibilities. Sole ownership means more responsibility, in the event of a liability default the principal’s personal assets will be at risk. A partnership is also quite common; this can be agreed between any number of partners who jointly own and operate the practice and liability is shared. A partnership agreement is drawn to agree the obligations and entitlements of the partners between themselves. Liability of partners to third parties is however joint and several, which means in the event of a claim against the partners a claimant can recover from any or all the parties.

A dentist buying shares in a limited company becomes a part owner of the company but not necessarily a director with the means to influence its policies or operations. Limited Liability Partnerships (LLP) differ from traditional partnerships as they limit the personal liabilities of the partners. An LLP is a legal entity in its own right in the same way that a limited company is and the business operates along similar lines to that of a limited company. To an extent an LLP has some of the benefits of a limited company and of a partnership. If a practice is already owned by a limited company it may be that the only option is to buy the shares. This is a more risky and expensive transaction as the buyer will take the company with all of its liabilities including historical tax issues, so it is crucial that the buyer has expert advisors who can carry out due diligence both against the practice and the limited company and safeguard the buyer from any future claims.

Many dentists share premises and common practice expenses, such as reception staff etc. With each practitioner responsible for an agreed proportion of the expenses, the individual practitioners will each own their practice but share other income and expenses on a pre agreed basis. This should be documented in an expense sharing agreement to avoid dispute and to provide a procedure to deal with the situation should one of the expense sharers die or wish to retire from the practice.

Any problems further down the line can derail a proposed sale, so it is important to clarify what is being sold. A sales memorandum called a Heads of Agreement or Heads of Terms is often drawn up to define the basic terms and to ensure that the parties are agreed as to the fundamental terms before expense is incurred in the sale process. Generally speaking Heads of Agreement will not be legally binding though; it can be expressed that some provisions are and if not properly worded they can create binding obligations, so it is important to have an experienced dental lawyer review such terms before they are agreed upon and signed.

The sale and purchase contract is the definitive agreement between buyer and seller, once signed and exchanged by both parties it is a legally binding document. All practices and deals are different so the structure of sale and purchase agreements will vary. At the outset the contract will name the parties to the sale. The full details of ownership and addresses of every participant in the transaction will be recorded, the core of the agreement is the description of the assets and how they will be paid for.

Warranties given by the seller (such as the condition of its assets) regarding the state of the practice should be included in the...
agreement and an experienced dental lawyer will also be retained to cover any issues arising from due diligence. The terms under which the buyer assumes responsibility for any incurred liabilities will also be detailed, along with provisions relating to the transfer of contracts including PCT contracts, appointments of private and NHS work in progress and a myriad of other matters. All of which are designed to provide certainty to the parties and thus avoid any problems post-completion.

A potential buyer must have access to the necessary funding before entering into a binding agreement. Fortunately dentistry is still seen as a relatively low risk investment area for lenders and even in today’s climate many banks are still happy to provide loans to dentists. Though, the lender will not usually sanction the release of purchasing funds prior to the transfer of ownership being completed. The buyer must therefore be aware that he or she may have to cover any transaction costs that may occur early on such as a deposit.

Due Diligence should be conducted on behalf of the buyer; this is when the lawyers request information about and consider all aspects of the practice. This is done to check that there are no issues that are likely to affect the value or operation of the practice in the future; this will cover matters like property title and rights of any occupiers of the premises, compliance with GDC guidelines and Doll regulations will be taken in to consideration. As will conformity with all regulatory regimes such as CQC, environmental law and ionising radiation regulations etc.

An important detail of Due Diligence is the inspection of the accounts; buyers will need to be aware of any previous errors by the seller. Though under no obligation to give information not requested by the buyer, the seller should answer questions truthfully and fully. Failure to do so could give rise to a claim for damages on the grounds of misrepresentation or breach of warranty if loss is sustained by a borrower as a result of any error or omission. The responsibility is therefore firmly on the practice purchaser to perform due diligence with the utmost attention to detail to safeguard his own interests.

Rarely will buying a practice not involve the acquisition of its premises, either on a freehold or leasehold basis. Typically, freehold is the less complicated of the two, it can however occur that the property is subject to an outstanding mortgage, or is the security for a loan. In this case the buyer’s solicitor needs to make sure such liabilities will be discharged prior to or on completion of the transaction.

With leasehold premises, there are two further fundamental factors to consider; how long is left on the lease and whether the current holder has the consent of the property owner to transfer. Finance providers will in many cases need to take a mortgage over the lease and may require a minimum of fifteen years and evidence of continuing security of tenure. If a new lease is to be arranged, the incoming tenant will often be responsible for maintenance and repairs, so the buyer’s solicitor will need to negotiate the best form of repairing covenant to safeguard his client against future claims. Planning issues will also need to be checked.

Once securing your practice, the worst-case scenario is to discover that the seller has set up shop just down the street and has taken 90 per cent of his patients with him. To avoid this, a buyer can seek the insertion of a restraining clause in the sales agreement which will prevent the outgoing dentist from establishing another business locally, within a designated time frame. Flexibility will be expected to reach a geographic solution that suits both parties. If the restraints imposed upon the seller are deemed by a court to be unreasonable having regard to the circumstances of the case they will not be enforceable.

Transferring ownership of a practice can be a complex process, a specialised dental lawyer will help make it easier and reduce risks involved. #

About the author
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Ray Goodman is a Member of the Association of Specialist Providers for Dentists (ASPD), legal member of NASDA (National Association of Dental Accountants), and included on the BDA list of recommended dental solicitors. He has a comprehensive understanding of the commercial and professional objectives of Dental Practices, along with all the relevant legal requirements.
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