

Incorporation prospects

Alexander Hall outlines legal developments and potential opportunities for DBCs.



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The rules for Dental Bodies Corporate have been relaxed in recent years. The General Dental Council no longer keeps a register of them and the

2005 Regulations relating to GDS contracts envisage the award of GDS contracts to DBCs. However, incorporation remains unattainable for many mixed and National Health Service dental practices. That may change following a recent European Court of Justice decision.

Practising as a DBC has the same attraction to dentists as it does to any other business person in every other sector. The possibility of limited personal liability – limited to that paid or to be paid on issued

shares with the DBC carrying the weight of potential liability - would encourage entrepreneurial spirit and calculated financial risks.

The potential issue of non-voting shares to outside investors looking for a dividend would open the door of equity finance investment for many practices otherwise reliant on debt finance. The possibility of using the DBC vehicle for succession planning, as a means of passing the practice on by the sale of shares or gradually to key



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personnel by the grant of share options, might even be possible.

Tax efficiencies may be available with the options of extracting funds by way of a director's salary or dividends as a shareholder. The value of the practice transferred to the DBC may be treated as a loan and repaid by the DBC to the dentist by instalments.

However, the option of incorporation is not practically available for many mixed and NHS practices. Why not?

Opposition

The Regulations allow a GDS contract to be varied in recognition of a change from practising as a sole practitioner to a partnership and *vice versa*. However, the wording of the Regulations does not specifically envisage a variation of a contract in recognition of a transfer from a sole practitioner or partnership to a DBC. Even the limited alternative of incorporation as a Limited Liability Partnership (LLP) (the prospect of limited liability is a benefit that an LLP shares in common with a DBC) is unavailable as the Regulations class incorporation as an LLP as incorporation as a DBC.

The only way to incorporate as a DBC is to transfer the GDS contract to it. Such a transfer requires the mutual consent of

both parties to the contract, the contract holder and the PCT. However, Clause 12 of the standard health department GDS contract prohibits assignment and transfer of the contract, even though the clause is not listed as a mandatory GDS clause in the Schedules to the Regulations.

The supervisory and guidance body, NHS Primary Care Commissioning, supports the use of clause 12 and confirms its fatal effect on incorporation in a number of guidance documents.

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For example, in the *Briefing paper: Termination of dental contracts and sale of goodwill* the PCC states: 'If a practice becomes a Dental Body Corporate – either as a private company limited by shares or a limited liability partnership – then a new GDS contract or a PDS agreement is required ... it follows that the previous contract or agreement held by the practice will terminate by virtue of incorporation.'

The PCC further states in the guide *PCT powers in relation to contractual changes*: 'Incorporation is not considered a minor change and requires a new contract/ agreement that specifically includes

the provisions relating to dental bodies corporate.'

As a result of the PCC guidance and the inclusion of clause 12, PCTs refuse to agree to a variation of a contract in recognition of incorporation. Why does the PCC guide the PCTs in this way? Why is clause 12 included?

There are two purported reasons:

1. The variation would not be limited to a change of the name of the contract-holder. The regulations state that, in the case of a contract awarded to a DBC, certain provisions relating only to DBCs must be included in the contract; and

2. Any change that is material or more than 'minor' may amount to a fresh 'award' of a contract under the Public Contracts Regulations 2006 (PCR). EU Directives relating to the award of contracts by public and quasi-public bodies were implemented in the UK by the PCR. In certain circumstances if the contract value exceeds a certain threshold, then the whole of the PCR applies. That means that one of a number of tendering processes (and always the general EU principles of transparency, an appropriate degree of advertising and a fair procedure) must be applied by the PCT, a simple contract variation by mutual agreement is prohibited.

However, are the additional

☛ mandatory provisions required for DBCs by the regulations more than 'minor'? Is the variation of a GDS contract in recognition of a transfer to a DBC a 'material' change in the contract?

Presstext case

As the PCR stems from EU Directives, European court decisions on the subject have a direct impact on the interpretation of the PCR.

In the summer of 2008, the European Court of Justice (ECJ) published its decision in the case of *Presstext Nachrichtenagentur GmbH v Austria (2006)(C-454/06)*. The case involved an Austrian local authority and two companies, one a subsidiary of the other. Following a tendering process pursuant to the EU Directives, a company was awarded a contract by the local authority. Later the company, with the mutual agreement of the local authority, transferred the contract to another company which was a subsidiary that was wholly owned and controlled by the original contractor. The contract was varied in recognition of this transfer, no tendering process was followed.

The issue to be decided was whether the change to the

contract was 'material' or more than 'minor' thus triggering the need for compliance with the tendering processes required by the EU Directives.

The ECJ decided that such a change is only 'material' if 'it demonstrates the intention of the parties to renegotiate the essential terms of the contract' and stated that 'the fact remains that an internal reorganisation of the contractual partner does not modify in any fundamental manner the terms of the initial contract.'

It was the opinion of the ECJ

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that: 'The terms 'awarding' and 'awarded' ... relating to the coordination of procedures for the award of public services contracts must be interpreted as not covering a situation where services supplied to the contracting authority by the initial service provider are transferred to another service provider established as a limited liability company, the sole shareholder of which is the initial service provider, controlling the new service provider and giving it instructions.'

'Material' or 'minor' changes

GDS and PDS contracts are public service contracts subject to the European regime and the PCR. When a contract is transferred to a DBC, no 'material' changes need be made. The inclusion of the provisions required by the Regulations cannot be said to be 'material'. They are simply administrative provisions.

The original contractor - the dentist - continues to be the shareholder and director, owning and controlling the DBC. No material terms of the contract change. The services, practice premises, UDA levels, performers requirements and so on all stay the same.

mfg Solicitors have written to the PCC urging it to revise its guidance to PCTs in the light of the Presstext case. The PCC have confirmed that they and the Department of Health are considering the 'issues'.

It is hoped that a basic commercial option for many other sectors – incorporation – may soon become available to dentists and dental partnerships. ■

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