

Buying and Selling a Dental Practice – the legal process

Part 3: Heads of Terms



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Following initial negotiation, often assisted by an agent, the seller and proposed purchaser reach agreement on the main terms of the proposed transaction.

Those main terms will often include:

- The Price
- The assets being bought and sold – i.e. the freehold property? Or will a lease be granted to the buyer?

However, at this stage the ‘handshake’ is not legally binding and nobody has made a legally enforceable commitment to buy or sell.

In order to discourage time-wasters, obtain a level of commitment from the buyer and as part of the service they provide to sellers, agents will often obtain the buyer’s agreement and signature to a Heads of Terms or Heads of Agreement document.

This is different to a Heads of Terms document which the party’s solicitors may negotiate on behalf of the parties early on in the legal process.

Heads of Agreement – Agents document

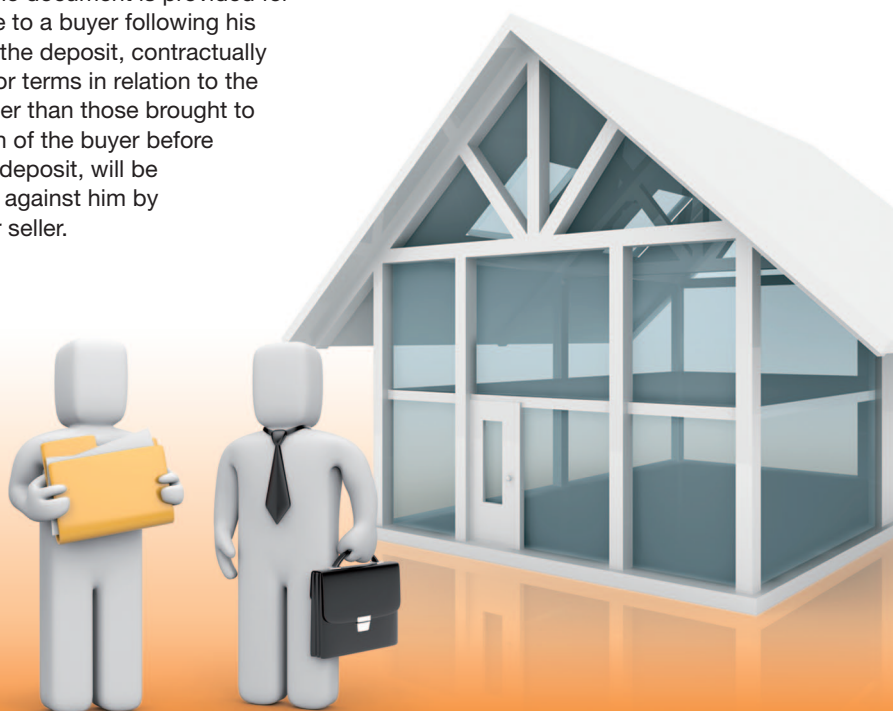
This document will often outline key information. It is sometimes used interchangeably with or as a Memorandum of Sale. It often includes the following:

- The Price offered and accepted
- The proposed apportionment of that price between goodwill, fixtures, fittings and equipment and the freehold premises
- It may state that the purchase price of stock is not included
- The identity and full details of the parties and their respective solicitors

The agent may have required a deposit be paid by the buyer and the document may explain the terms on which that deposit will be held, forfeited or repaid.

It is worth remembering that in the event that the document is provided for the first time to a buyer following his payment of the deposit, contractually no clauses or terms in relation to the deposit, other than those brought to the attention of the buyer before he paid the deposit, will be enforceable against him by the agent or seller.

It may be that the buyer is asked to agree that he will forfeit the return of his deposit if he withdraws from the transaction for various reasons other than certain specified reasons. A seller will do well to obtain agreement for forfeiture of the deposit for any reason, including a reduction in the purchase price. A buyer must resist agreeing to such a term. The due diligence process has hardly begun - matters may be discovered that could appropriately lead to a price reduction. Such a reduction might also occur as a result of an agreed retention of the purchase monies for any reason. These matters may not be negotiated or known for some weeks.



In order to keep the transaction moving and assist momentum, the document may require the buyer's agreement to forfeiting the deposit if the transaction does not complete within a specified time period – for example, 3 months. Care must be taken in relation to this period, certain matters will be beyond the control of the parties (eg. the landlord's consent to assign a lease, bank funding and the PCT's consent to vary a GDS contract) and the transaction will only go as fast as the slowest person involved (who may be a disinterested third party).

The potential loss of a deposit acts as a real discouragement against time-wasting potential buyers. However, it also has other uses – for example, as protection from costs incurred in the event that the transaction is aborted. This is the prime motivation for a deposit or an indemnity as a result of the Heads of Terms negotiated between the party's solicitors.

Heads of Agreement – Solicitors document

There are a number of issues that may appropriately be dealt with in a legal Heads of Terms agreement proposed and negotiated by your solicitor. Commonly only certain provisions of the Heads of Terms will be specified as legally binding, whilst all other provisions serve a useful purpose in setting the broad parameters of the deal to be done and help to focus minds so that time and energy is not lost becoming involved in relatively unimportant detail too early in the negotiations.

As well as the price, the assets to be bought and sold and the structure and timing of the transaction, the main issues may include:

- Costs, costs protection and indemnities

As mentioned above, the loss of a deposit helps to sort the wheat from the chaff. However as a buyer, it is worth ensuring that the deposit is of sufficient amount to cover your costs in the event that the buyer withdraws.

Alternatively, it is sensible to propose an indemnity so that, in the event that the

buyer withdraws from the purchase, the reasonable costs of the seller may be recovered from the buyer.

A buyer would wish to resist such an indemnity or at least ensure that the indemnity is only enforceable in certain circumstances or capped at a reasonably low maximum amount.

- Exclusivity

A buyer wants to know that he is the only person in the running to purchase the practice. This provides reassurance that he is not going to be gazumped by another buyer. Consequently, in consideration of the costs that the buyer is due to incur in carrying out a due diligence process, it is reasonable for the buyer to demand exclusivity for at least an initial specified period (often known as the 'lock-out' or 'exclusivity' period).

Such a period also focuses the mind of the buyer and his advisors, providing an incentive for them to carry out due diligence without delay.

- Confidentiality

During the due diligence process the buyer will require, and the seller will have to provide all sorts of information and documents about the practice to be purchased. This will include financial information and such information will provide an insight into the weaknesses, strengths and prospects of the practice and the seller's business.

A seller will not want to disclose such information without obtaining the potential buyer's undertaking to keep the information confidential. Such confidentiality should also extend to the buyer's employees, associates and advisors. The seller should also obtain the buyers agreement to use the information for the purpose only of investigating the practice with a view to purchasing it. The last thing a seller would want to do is reveal such information to his competitors. In the event that the transaction is abortive, the buyer can be obliged to hand back or destroy copies of all disclosed documents.

What can a seller do if the confidentiality clause is breached? Pursuing court

proceedings for compensation may be expensive and difficult as it may be awkward to quantify the loss the seller has incurred as a result of the unlawful disclosure of information. Linking forfeiture of a deposit to a purported breach of confidentiality can be an incentive for the buyer to handle disclosed information carefully.

- Price amendment mechanisms

The price may be agreed, but it is not yet set in stone.

Consequently, a buyer may wish to state that the price and completion of the transaction shall be subject to the results of his due diligence and satisfactory searches. The seller cannot then argue that the buyer is prohibited from negotiating a reduction in price, suggesting a retention of the purchase monies to be used dependent on the outcome or occurrence of certain events (eg. to cover the costs of returning patients due to failed or negligent dental work, a breach of warranty or the work required due to the results of a property survey) or proposing an earn-out, deferred consideration or instalment payments (eg. due to the prospect that goodwill may be lost as private patients are loyal to and follow the seller).

However, a seller may wish to take the opportunity to attempt to restrict the buyer's options and maintain the price initially accepted.

In conclusion

Heads of Terms are not always entered or even considered. An agent is not always involved and, especially if the transaction is to take place very soon, there may be little time or need for such a document.

However, there are often good reasons to consider this – as protection against costs, to obtain commitment and promote confidentiality.

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