



Buying and Selling a Dental Practice – the legal process

Part 6: Due Diligence – an overview



Alexander Hall
Solicitor

Due diligence is the process of fact-finding that a buyer, his solicitor and his other advisors carries out. It serves a number of purposes:

1. To identify whether or not the practice is really worth the asking price or your offer;
2. to identify any liabilities or financial risks, whether actual or potential;
3. to feed into and be used in the formal warranty and disclosure process.

In the planning stages, an organised seller will do well to arrange documents and information ready for the time when he is asked by the buyer for such information. Such preparation can save a lot of time as it can take weeks to put together the responses and documents needed.

The seller should take care though when responding. In law, the principle of ‘caveat emptor’ or ‘let the buyer beware’ applies. Consequently, the onus is on the buyer to make enquiry – as long as the seller is not misleading, he does not need to volunteer any information. Consequently, accurate and true answers to the questions asked and not more than that are all that is expected and required of the seller.

There are two types of due diligence – financial and legal.

Financial due diligence involves looking closely at the practice accounts, tax records, ledgers and records – to ensure that the practice is in the expected healthy financial state. Many buyers will seek the assistance of an accountant to look behind the accounts.

A buyer should require the cooperation of the seller in making such records available for inspection.

Legal due diligence tends to cover a number of issues. Here are some examples:

Property

- Title to the property
- Other occupiers
- Third party rights
- Liabilities – for example, under asbestos legislation

Employees

- Employment contracts
- Minimum wage
- Disciplinary and grievance circumstances
- Outstanding tribunal claims
- Foreign workers
- Vaccinations
- PAYE and NI
- GDC registration

Associates and Hygienists

- Agreements, terms
- GDC registration
- Performers lists

Equipment

- Regularly tested and maintained?
- Age and condition?
- Subject to hire purchase agreements?
- Compliance – for example, X-rays

Goodwill

- How is it made up?
- Patient data
- Private / practice plan / NHS

NHS

- GDS/PDS contract?
- Remedial/breach notices?
- Clawback?
- PCT inspection report?
- Investigations?

Contracts

- With whom?
- Value for money?

Solicitors use standard questionnaires, often adjusted to the circumstances of the proposed transaction.

It is on the basis of the responses (or lack of them) that many of the terms of the sale and purchase agreement can be negotiated. For example, the buyer may require an indemnity from the seller in relation to disclosed circumstances that may or may not result in a financial liability for the buyer following completion.

NHS clawback as a result of underperformance by the seller is a prime example. The buyer may even wish to propose retaining a proportion of the purchase price so that funds are available in the event that the liability arises. In the most serious circumstances, the buyer may find out that the practice is worth far less than the proposed purchase price and either a lower price may be agreed or the buyer may pull out of the transaction. This may also often be influenced by the bank’s valuation.

For more information speak to Alexander Hall on:

0845 55 55 321