

Achieving full sale value

Alexander Hall outlines the legal process.

You have decided to sell your practice, a substantial part of the income of which may be attributed to your PDS or GDS contract with the PCT. It has taken years of effort to build up your practice to its current UDA level. You expect to achieve a substantial sum for this goodwill at time of sale.

However, the PCT tells you that you are prohibited from assigning or transferring the contract to the prospective purchasers. If you sell the practice, it will put the contract out to tender. This threatens to slash the value of your practice or even make it unsaleable.

Further, on a termination of the contract, if your practice is behind in the performance of UDAs, you may be faced with a bill from the PCT for a clawback of UDA payments.

What can you do? A way of transferring the contract has come to be known as the 'partnership method'. However, a number of complicated steps must be followed. Further, banks' reticence to lend to potential purchasers during the current recession has made this process more difficult and it is littered with pitfalls which can trap the unwary.

Simply put, the process involves the seller and the purchasers entering a temporary partnership, into whose names the PCT will put the GDS contract. Following completion of the sale, the seller retires from the partnership leaving the purchasers as the sole contractors.

Stage 1 – PCT co-operation

The PCT must be consulted on the proposed arrangement and be satisfied with the incoming partners, the prospective



● Before you hand over your practice make sure there are no pitfalls.



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purchasers of the practice. The PCT must agree to novate the GDS contract from the original contractor (the seller) to the new partnership (the seller and the purchasers). It may be appropriate for the seller to seek a change from a PDS to a GDS contract without any loss in UDA value before Stage 2 takes place.

Stage 2 – Agreement and exchange

The parties must agree to the completion of the forthcoming practice sale in the Asset Purchase Agreement (APA). The parties' solicitors will often handle this. The APA will make completion conditional on a number of factors. Banks have traditionally been satisfied to advance the purchase monies for completion once the agreements had been exchanged with the NHS contract also being transferred on completion. However, banks are now requiring the prospective purchasers to be in control of the NHS contract before completion, so that they can be sure of the value of the security (the practice). This leaves the seller with a conundrum. The last thing a seller would want to do is part with sole right to the NHS contract before selling the practice. What if completion did not occur? The valuable contract would have been given away.

Consequently, to satisfy the banks and adequately protect the seller, completion must only take place if the parties first enter a partnership agreement (PA) and the PCT contract is novated to the new partnership. The APA and the PA must be drafted to ensure that if for any reason Stages 3-5 do not occur, the position may revert back to stage 1 without the loss of the contract and the search for new purchasers may begin.

The agreement is also an opportunity for the purchasers to protect themselves from any clawback of UDAs by the PCT for arrears that were inherited at completion. The purchasers will want the seller to indemnify them for any clawback. The seller will have a chance to agree a cap to the amount

of the indemnity and a time frame after which the indemnity will expire. No seller wants a surprise letter from the purchasers asking for a large sum of money two or three years after the sale!

The PCT contract also reserves to the PCT the right to terminate the contract if, as a result of the retirement of a partner (in this case the seller), the PCT is not satisfied with the ongoing performance of the remaining partners (the purchasers). Obviously, the purchasers and their bankers would be aggrieved if, following their large outlay on purchasing the business, they lose the contract shortly thereafter. The seller must ensure that it is agreed in the APA that he will not be liable should that event occur. Conversely,

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the purchasers may seek a limited indemnity from the seller to repay a proportion of the purchase price in such circumstances.

Stage 3 – Partnership agreement

The PA is simply a mechanism of transferring the PCT contract rather than the governing document of a 'true' partnership. Whilst a PA will normally detail the agreement of the partners in relation to the ownership of capital, distribution of income and liabilities, this PA must reflect the reality of the situation. The purchasers are really partners in name only before completion and vice versa for the seller following completion. Consequently, the capital, income and liability must all belong to and rest with the seller until completion, and thereafter solely with the purchasers. The parties must use the PA to protect themselves from liability for actions taken by the other that are out of their control. It is also imperative that the parties agree that, if for any reason the completion does not occur, the purchasers will retire from the

partnership bringing it to an end, or as soon as possible after the completion the seller does likewise.

Stage 4 – GDS partnership contract

Only once the protection afforded to both parties by the APA and the PA is in place, may the parties enter the novated PCT contract. The seller must ensure that protection is in place first. Otherwise, if the completion does not occur, he may be stuck with two fellow contractors he does not want. This stage requires the cooperation of the PCT and significant delays to completion may occur as a result.

Stage 5 – Completion and post-completion

Once the parties have agreed and exchanged the APA, executed the PA and entered the new NHS partnership contract with the PCT, completion may take place. The seller has sold the practice with the NHS contract. However, he is still a member of the partnership. Consequently, he must retire from the partnership either on completion day or as soon as possible afterwards. The NHS contract may stipulate a minimum time limit before a partner may be removed from the new NHS contract. Notice must be given to the purchasers and the PCT.

With the consent of the third party, a seller may assign, novate or transfer most contracts to a purchaser. The dental contract with the NHS is different. Whilst it is possible to realise the true value of the practice's goodwill, the process is complicated, long-winded and exacerbated by the credit-crunch nervousness of funders. Perhaps not surprisingly, significant delays may be experienced and legal costs may be dramatically increased, particularly if the seller, purchasers and their advisors are not aware of the ways forward. ■

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