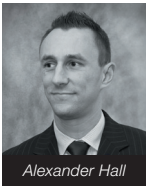


■ Buying and Selling a Dental Practice

■ - *the legal process*

Part 11: Protection of Goodwill



Alexander Hall

One of the greatest fears of any purchaser is that the selling dentist, following completion, sets up just round the corner and steals all the patients (which he just sold to the purchaser) back for himself. Patients loyal to and comfortable with a dentist can decide to hunt down a dentist who has moved in order to carry on being treated by him.

Consequently, the goodwill that the purchaser bought may be worthless or at least worth less than the amount paid in such circumstances.

How may a purchaser protect himself? In the sale and purchase agreement, it is common and sensible if you are a purchaser, to ensure that provisions restraining the seller are included.

These provisions, if breached, may be enforced by the purchaser against the seller in court proceedings for breach of contract. In such proceedings a court can order the seller to cease trading from 'round the corner' in competition with the purchaser. Such an order is called an 'injunction'.

An injunction may cost a purchaser between £5,000 and £20,000, but faced with the waste of £100,000, £200,00, £500,000 or more spent on purchasing goodwill, all of which could disappear due to the actions of the seller, such expenditure may look like money well-spent (especially if a high proportion of those costs are recoverable from the seller).

However, restraint of trade clauses, or 'binding-out' provisions, have been subject to judicial intervention, and as such, courts often hold unreasonably wide clauses unenforceable. If not careful, clauses that are drafted too widely can be struck out in court entirely, leaving a purchaser with no protection at all. Consequently, 'less can be more' - as if it comes to the crunch, the clause can be enforced.

Such clauses must be justifiable, based on the facts and circumstances of each case. So what can a purchaser get away with? There are three main areas which should be considered – subject matter, geography and time.

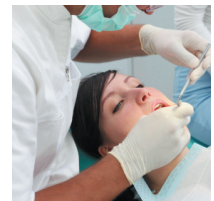
Subject matter

The clause can prohibit the seller from working as a dentist, in private practice, in the NHS, in a hospital, as a dental nurse, or as a director of a dental body corporate or as a shareholder in such a company (subject to a reasonable geographical area – see below) after completion. However, restrictions on working in a hospital, as a cleaner in a dental practice or as a business consultant to other dental practices will often be unenforceable – as none of these positions necessarily mean that the seller will be in a position to 'steal' the patients back or otherwise diminish the value of the goodwill bought by the purchaser. Consequently care must be taken as exactly what the clauses will prevent the seller from doing after completion.

Geography

It will only be possible for a seller to 'steal' patients back if he sets up nearby – perhaps near enough for patients to travel to.

Consequently, a purchaser is wise to insist on a clause restraining the seller from carrying on the above activities within a reasonable distance of the practice bought and sold.



It is common for banks to insist on a three or five mile radius. However, this should also be justified. In a famous, private, cosmetic 'practice to the stars' (if such a practice exists!) it may be that a very wide radius of "all of England" could possibly be justified and enforceable.

However, for an NHS practice in built-up central London, with a similar practice on every third street corner, a prohibition on the seller working within two miles may not be enforceable. It may be too wide. However, in rural Wales, where the next practice is in the next town ten miles away, and all patients use their own cars to travel to the dentist, a radius of 15 miles may be reasonable.

Time

It is sensible for a purchaser to require a clause that restrains the seller from carrying on the above activities for a specified period of time following completion. Indeed, one of the requirements of many banks funding purchasers is that the seller is restrained contractually in this way for at least two years.

However, once again such periods must be justifiable. Consequently, it is important for a purchaser, whilst not ignoring the disincentive power of a wide restraint clause, to think about what may be justified. For example, in a family practice where most families attend every six months, could much more than 12 months be justified? By 13 months, most patients would have had to have attended once, if not twice, and built a new relationship with the purchaser. In practices with a longer recall period, a longer restraint period may be justified.

Other considerations

Clauses can also reasonably include prohibitions on poaching key staff from the practice or suppliers to the practice.

These tend to be less important generally with dental practices. However, imagine you bought a practice which carried out substantial orthodontic or MOS work by the use of one or more associates who were qualified and experienced in such work. A good proportion of the goodwill value would no doubt be based on the income derived from such work. You wouldn't be happy if the seller set up 10 miles away in a new practice and recruited those associates away from you! Restraint clauses prohibiting such action by the seller can also be considered.

Without thinking carefully about these clauses, the money spent on goodwill may be wasted. If a seller breaches these clauses, they may be enforced and a court may award the purchaser damages to compensate the purchaser for his losses. However, going overboard with clauses that are too wide can leave a purchaser with nothing if and when the clauses ever need to be enforced.

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