

Buying and Selling a Dental Practice

- the legal process

Part 9: The Sale and Purchase Agreement - An Overview



Alexander Hall

The sale and purchase agreement is the formal written contract which governs the sale, sets out the terms of the contract and once it has been signed and dated (“exchange”) legally binds both the seller and purchaser.

As the sale and purchase agreement will include provisions, indemnities, terms and references to additional or ancillary documents which will be specific to, and required by, the individual circumstances of each transaction, it is not possible to finalise and agree the content of the sale and purchase agreement until the full due diligence process has been completed.

Something discovered by the purchaser during the due diligence process may require him to insist on a particular clause or indemnity in order that he may protect himself from financial liability. Furthermore, it may be that the structure of the transaction should change due to facts discovered during the due diligence process.

The sale and purchase agreement is divided into a number of different parts.

Parties, definitions and interpretation

During the first few pages of the agreement the main parties to the contract and the transaction are set out. These obviously include the seller and the purchaser and may also include other parties that are either relevant to the transaction or actually contractual parties themselves. For example, the sellers may be all of the partners in a partnership and if so all of their names and addresses should be included. However, it may be that only one of the partners owns the premises and is selling the premises or granting a lease of the premises to the purchaser. Consequently, it is often helpful to make a distinction between that person as one of the partners along with the partners generally as the sellers and that person as a specific seller of one of the assets (in this example, the premises).

If any of the parties is a company or a limited liability partnership then the full name of the company, the address of its registered office and its company number should be included. This is to ensure that there are no ambiguities or misunderstanding (or loopholes!) in the future when perhaps there is a dispute regarding the terms of the contract.

To ensure that the contract is clear, unambiguous and accurate it is usual to include a list of definitions during the first few pages of the agreement. These definitions will be terms that are used at least more than once throughout the agreement and are often used so that a full explanation of what is meant by

the term is not required on every occasion it is used. Otherwise long sale and purchase agreements would be even longer!

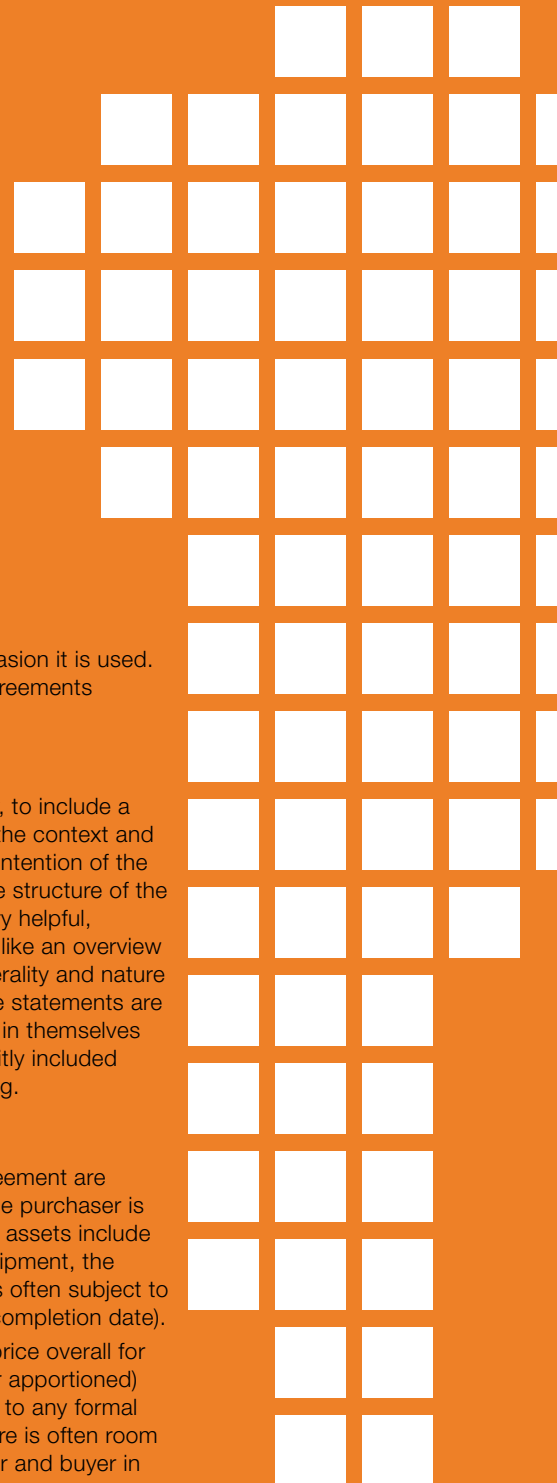
Recitals

It is common, although not obligatory, to include a number of statements which set out the context and give an overview of the purpose and intention of the sale and purchase agreement and the structure of the transaction. These recitals can be very helpful, especially to a lay person who would like an overview of the transaction. However, the generality and nature of the statements often mean that the statements are not and should not be legally binding in themselves and indeed a provision is often explicitly included stating that they are not legally binding.

Assets to be sold

Central to the sale and purchase agreement are terms explicitly stating what assets the purchaser is buying and the seller is selling. These assets include the goodwill, fixtures, fittings and equipment, the practice premises and stock (which is often subject to separate valuation on or around the completion date).

These terms also record the agreed price overall for the practice assets and as divided (or apportioned) between the different assets. Subject to any formal valuation that has been obtained, there is often room for negotiation between the purchaser and buyer in



relation to the way in which the overall purchase price is divided between the assets. That is because, dependent on the circumstances of the parties and the way in which the assets are being sold or purchased (e.g. by individuals or by a company), there can be tax advantages and disadvantages to increasing or decreasing the amounts allotted to various assets.

These terms will also describe how and when the purchase price is to be paid. For example, it is usual for a 10% deposit to be paid by the purchaser to the seller's solicitors on exchange of contracts. The remaining 90% is often then paid at completion.

However, depending on the results of the due diligence exercise it is possible and sometimes prudent for a buyer to negotiate alternative terms. For example, it may be that a proportion of a purchase price is paid on completion and a second instalment is paid finally at a later date. The amount of that instalment can be adjusted due to a number of factors including potential loss of goodwill during the first year or in the event that an issue discovered during due diligence causes financial loss. It is common also for a proportion of the purchase price to be paid into a joint retention account held by the parties' solicitors for a specified period on and from completion to be used by the purchaser in the event that such an issue discovered in due diligence does cause the purchaser financial expense or if the purchaser has grounds to make a claim for breach of a warranty (see below).

Pre-completion matters

It is usual for the sale and purchase agreement to explicitly state that completion is conditional on a number of events taking place. If those events do not take place, then there may be specified opportunities for the parties to withdraw from the transaction. These events often include, for example, a variation of the contract with the PCT into the joint names of the parties in partnership together or consent by the PCT for the transfer of the contract to the buyer. Obtaining consent from the landlord of the practice premises to the assignment or grant of a lease of the premises to the buyer may also be a condition precedent. It is also usual for the seller to use the period between exchange and completion to consult with his employees and inform them of the forthcoming change in ownership and employer, thereby complying with his obligations under employment legislation.

Completion day

The sale and purchase agreement will also contain specific provisions as to what must happen on completion day. These may include payment of the outstanding amount of the purchase price to a specified account of the seller's solicitor and the handover of key documents, property title deeds, keys, records and physical possession of certain assets.

Warranties

These are very important both to the seller and the purchaser. They are statements of fact about the practice, the seller and the assets which the purchaser may and will rely on. If any of the statements prove to be incorrect and the purchaser incurs financial loss as a result, then it may be possible for the purchaser to make a claim against the seller. Therefore, from the purchaser's point of view, the warranties should be as many and as wide as possible. However, the seller will want to give as few and as narrow warranties as possible.

Whether or not a purchaser will be able to claim for breach of warranty will also depend on the agreed limitations to warranty claims. For example, it is usual for such claims to be restricted only to matters which were not disclosed by the seller to the purchaser. If those matters were disclosed to the purchaser, then the purchaser was in a position to negotiate the

agreement with his eyes wide open to the issue and should not be able to claim against the seller in relation to the issue. It is also usual to limit warranty claims to only those that exceed a certain financial value (for example: £500). This prevents the purchaser from making numerous and frivolous small value claims in relation to trivial breaches of warranties. However, the purchaser will want to negotiate a limit that is as low as possible and the seller will want to negotiate as high a limit as possible.

Liability and Indemnities

The parties will want to agree that certain liabilities will belong to and will remain with one or the other.

For example, whilst all employees and liabilities connected with employees automatically transfer to the new employer (the purchaser), in the event that the purchaser discovers during the due diligence process that an employee is likely to make a claim against the employer for whatever reason it would be prudent for the purchaser to obtain agreement from the seller to remain liable for any financial expense arising out of that situation and to indemnify the purchaser for any such financial expense. Similar provisions are often agreed in relation to contractual liabilities. For example, specific provisions will often be agreed in relation to any liabilities for payment of patient charge revenue or repayment of clawback under the GDS/PDS contract by the seller arising before completion date or by the purchaser arising out of circumstances that exist following completion.

Schedules

Much of the detailed factual information is often listed in schedules annexed to the main body of the sale and purchase agreement. For example, often an inventory of fixtures, fittings and equipment or a list of the employees and associates and their terms are included in schedules.

The schedules may also include the agreed form of ancillary documents. For example, if the purchaser is to go into partnership with the seller for a specified period in order to obtain a variation of the GDS contract into their joint names with a view to dissolving the partnership at a later date leaving the GDS contract in the sole name of the purchaser, the agreed form of partnership agreement, deed of retirement/dissolution and GDS contract notices to be served on the PCT are often included in the schedules. If a lease is to be granted to the purchaser on completion, then often the agreed form of lease will also be annexed to the sale and purchase agreement as one of the schedules.

This is a whistle-stop tour of the main parts and purpose of the sale and purchase agreement. Some of the specific issues will be explored in later articles.

**Alexander Hall
Solicitor
mfg solicitors LLP
www.mfgsolicitors.com/dentists
01562 516010**

**This article was produced for and first published on
www.dentaltubules.com in November 2010**



Call mfg now on:
01562 820181
www.mfgsolicitors.co.uk

