Notes on Dental Practice Sale and Purchase Agreements

1. Background

1.1. Once signed, dated and exchanged between the seller(s) (S.) and buyer(s) (B.), the business sale/purchase agreement/contract (BTA) is legally binding, S. to sell and B. to purchase, upon the terms of the BTA.

It is therefore essential that all outstanding issues on the BTA are dealt with **BEFORE** exchange. After exchange is too late!

1.2. In dental practice sales, the BTA is sometimes conditional on certain things happening before completion. Some examples of conditionality (depending on the particular transaction) include:

- CQC registration being approved
- In NHS contract cases, written confirmation of the PCF to the GDS contract partnership,
- In the case where there is to be a new third party lease, the new lease coming into effect,
- In cases where the consent of a landlord is needed to the assignment of the lease, that consent being given.

1.3. There is usually a deposit to be paid by B. upon exchange, usually 10% but this may be negotiated between the parties. If B. fails to complete the purchase the deposit may be forfeit, (there may be other compensation payable as well).

1.4. In dental practice sales, it is usual to provide for the risk in the assets to pass on completion, so S. will need to keep full insurance in place until completion.

B. will need to ensure full insurance is in force as from completion.

1.5. The gap between BTA exchange and completion is often in the region of 4 weeks, but this may vary. In transactions involving NHS contracts, PCTs often look to completion at the end of a calendar month for BSA purposes. Sometimes exchange and completion is simultaneous.
2. The BTA -Asset apportionments and Seller’s existing contracts.

2.1 S. is selling the assets -Goodwill, Equipment, sometimes a freehold, or an assignment of a lease etc.

S. and B. may each want to get accountancy advice as to the fair apportionment between the various assets, since there may be tax implications, and to reach an agreement accordingly.

2.1 Only the assets will transfer, not S’s liability for tax, loans etc.

However, assets may be subject to hire purchase or other financial liabilities, or may not even belong to S. perhaps on hire only. The Due Diligence (see below) process will reveal this.

S. will often want B. to take on any third party finance, and will ask B. to agree to continue to pay such finance and to "indemnify" S. against the on-going liabilities. There may be scope for S. and B. to negotiate about this.

2.2 S. will usually expect B. to take on existing supplier contracts for the same reason, and there will be a list of contractual obligations referred to, or listed, in the BTA which B. is expected to take on -again, scope for negotiation.

2.3 S. will generally expect B. to take on existing stock, and (unless it's agreed otherwise) to pay a separate stock price for such stock.

3. Employees

3.1 Under the Transfer of Undertakings Regulations (TUPE), B. will take over all S’s employees' contracts of employment, and all the obligations thereunder, as if B. were the original employer.

3.2 If B. tries to change an employee's terms, adversely, any such change will likely be void. Any dismissal of an employee, due to the transfer, is likely to be automatically unfair. Affected employees may apply to an employment tribunal, claims may be substantial.

If S. does anything similar before the transfer, there may be the same consequence, but B. will inherit the claims. There is usually a provision in the BTA to have S. indemnify B. in such circumstances.

3.3 S. is under a duty to carry out a consultation with all affected employees a reasonable time before the transfer becomes effective, to advise them about the proposed transfer, when it is likely to happen, and how employees may be affected. Failure to consult, may, in itself, lead to a claim. B. has to tell S. whether any changes are contemplated to enable S. to pass this information on to employees. We can supply a suitable pack for sellers to comply with their TUPE responsibilities -just ask.

3.4 There may be exceptions to some of the above, if changes/redundancies etc. are for an Economic Technological or Organisational reasons. This is a tricky and high risk area of law, and specific legal advice is need at the outset. -don't DIY it!
4. Incomplete work, defective work etc.

4.1 There are provisions in the BTA to allow for the fair apportionment of incomplete work.

4.2 If there is a risk of defective work "in the pipeline", B. may want to negotiate a retention to be held for, perhaps, 12 months, to cover some reimbursement against the costs of such defective work.

Please discuss this with us if you think appropriate.

5. Associates

5.1 Associates, therapists and hygienists (Associates) are often not employees (though will be "workers" for the purpose of the Equality Act) and, if so, their self-employed contracts will not fall under the TUPE regulations.

S. will usually require B. to renew Associates agreements, on completion, on terms no less favourable than those with S. in order to avoid B. terminating Associates agreements on completion, and the Associate then suing S. perhaps for their contract being terminated on less than contractual notice.

5.2 With self-employed workers, performing long terms contracts, there is always a risk of Her Majesty's Revenue and Customs querying the self-employed status and claiming the real relationship is one of employment, that PAYE and NICs should have been deducted, and claiming some back payments from the employer. There is always a risk that B may inherit such claims from S under TUPE, and the BTA will usually include a warranty aimed at ameliorating this risk. To date, HMRC has held back on dental associates, but there is always the risk of things changing. There have been a number of such cases, however, involving hygienists and therapists. B. should always consider whether therapist/hygienists should become employed, though this may not be popular with them!

6. Warranties

6.1 As part of the BTA process S. will have been required to provide full due diligence (DD) information, through pre-contract and practice enquiries, together with a comprehensive bundle of documentation.

6.2 Warranties are promises made by S. to B. that the practice is in the state promised by the warranties, and with reference to the DD bundle, the preliminary practice and property enquiries, and the correspondence between S. and B's solicitors.

Warranties need to be read and considered by B. carefully, to make sure B. is satisfied that the promises made by S. are comprehensive and clear enough for B. to rely on.

6.3 Warranties are sometimes qualified or excluded by something called a "Disclosure Letter". A Disclosure Letter is a statement by S. that S. is stating that some of the warranties either have specific exceptions to them, or are modified to some extent. There will then be no breach of warranty if the Disclosure Letter applies.
If there is anything you do not understand, or wish to change or query, about the warranties/Disclosure Letter (if there is one), please let us know.

6.3 If S. breaks a warranty, then B. may be able to seek compensation if B. can prove a breach. The BTA will contain certain restrictions on warranty claims. For example, small claims are usually excluded (so called "de minis" provisions) and there will be a "protocol" for bringing claims (including time limits). If the protocol is not complied with, it may nullify any claim. If there is any possibility of a claim, promptness in following the protocol is important.

7. Restrictive Covenants - "binding out" provisions

7.1 These are usually wider, in scope, on a sale, than would be the case in, say, an associate's agreement. Consider the scope, length of time, and any geographical areas, carefully.

8. Stamp Duty Land Tax etc.

8.1 Depending on the nature of the transaction and the value of the transaction in relation to the surgery property, SDLT may be payable, together with Land Registry fees, if registration is necessary. Our Property Department will advise -please ask.

8.2 Buyers should consider obtaining valuation advice to make sure none of the apportionment of the price attributable for Goodwill should have been attributed to the property (for SDLT purposes), to ensure they are not underpaying SDLT, which could be later picked up upon by HMRC.

9. General

9.1 Whether B. or S., please make sure you read through the entire DD bundle and associated documentation carefully. We will also have checked it, and will raise any points and supplementaries we think relevant, but this is NOT a substitute for you making sure the documentation fully represents the practice that you are selling or buying. Please raise any queries.

9.2 Please also read through the BTA and all associated documentation. Again, we will make amendments and will make comments where we think appropriate.

We are under an obligation to ensure we explain the effects of important documentation, hence this advice note. However, this does not remove your obligation to ensure you read through and understand all the paperwork. We are here to explain anything you do not understand - just ask!

HCB Solicitors
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