INTRODUCTION

No ordinary business - no ordinary law firm

Good health is the first priority for everyone, and dentist play a key role in providing it. Similarly we aim to ensure our client’s practices are healthy by understanding their issues and the regulatory environment in which they work. Buyers and sellers alike can benefit from the added value of using solicitors familiar with dental practices and aware of the potential pitfalls. Charles Russell is one of the UK's leading law firms specialising in providing legal services to the healthcare sector.

This edition proceeds on the basis of current tax law as at the start of the current tax year on 6 April 2012.

I hope this guide will illustrate some of what Charles Russell LLP has to offer, and help buyers and sellers alike.

David Reissner, Partner
Head of Healthcare
September 2012

This information has been prepared by Charles Russell LLP as a general guide only and does not constitute advice on any specific matter. We recommend that you seek professional advice before taking action. No liability can be accepted by us for any action taken or not taken as a result of this information. Charles Russell LLP is not authorised under the Financial Services and Markets Act 2000 but we are able in certain circumstances to offer a limited range of investment services to clients because we are members of the Law Society. We can provide these investment services if they are an incidental part of the professional services we have been engaged to provide.
**Associations**

Charles Russell is a member of the NASDAL panel. NASDAL is a national organisation, with members spread throughout the UK, aimed to provide the dental profession with a reliable source of up-to-date, technically sound, specialist advice. We are also on the BDA panel of specialist dental solicitors.

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**OVERVIEW**

The ownership structure of a dental business which is intended to be sold will normally dictate the nature of the sale and purchase transaction. Generally there are two types of transaction namely the transfer of key assets of a dental business from seller to buyer; or the transfer of ownership of the corporate vehicle which operates the dental business from seller to buyer (e.g. the transfer of the shares in a company).

Asset disposals involve a seller transferring the NHS Dental Contract, goodwill, key assets (including premises) and material trading contracts (e.g. with staff) to the buyer. In other words a change of ownership of the assets employed in the business takes place.

Share sale transactions do not normally involve such a change - instead the dental business continues to be owned and operated by the relevant corporate vehicle (e.g. a company) and ownership of the company itself is transferred from seller to buyer.

There are advantages and disadvantages (not just from a legal perspective but also from an accounting, tax and logistical perspective) associated with each of these options (for both buyers and sellers).

With transfers of shares in companies, continuity of business ownership is usually preserved and normally third party approvals are not required. That said, a buyer will inherit any pre-acquisition liabilities of the company which must still be paid out of the profits of the business post acquisition. For that reason buyers will typically undertake a more detailed process of investigating the historic operation of the business (including its tax history) with this type of transaction and seek a greater degree of protection in the legal documents governing the transaction.

The advantages and disadvantages to buyers and sellers associated with each of type of transaction are explored in greater detail in the following sections.

If needed, we can provide contact details of dental agents and/or accountants and valuers who specialise in advising dental businesses.

Our Transactions Team led by partner Tim Jenkins is experienced in dealing with these types of transaction for buyers and sellers of all types and sizes. We are able to offer a competitively priced, added-value service and we apply our experience and specialist knowledge to achieve speedy and cost effective completion of transactions in a commercially-driven, sympathetic and approachable way.
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1 **TERMINOLOGY**

We hope you will find this Guide is written in plain English. We have tried to avoid technical terms. Where we have used some technical expressions, we hope the meaning will be obvious. For example, a reference to a PCT is to a Primary Care Trust. People commonly speak about dentists having an “NHS contract”. These came in two distinct forms and variations thereto either a PDS or GDS contract. However, for convenience, we refer in places to NHS contracts. References to a buyer include a prospective buyer as well as someone who completes a purchase. References to buying include buying freehold or leasehold premises.

2 **WHO MAY OWN A DENTAL PRACTICE?**

2.1 In most of the United Kingdom, only a dentist, a partnership comprised of a majority of dentists, or a company (or limited liability partnership (LLP)) with 51% of directors who are dentally qualified (ie dentist, hygienist or dental nurses) may own and run a dental practice.

2.2 A sole trader has the sole right and responsibility for the management and conduct of his or her business. He or she may engage staff to assist but, ultimately, the responsibilities vest in him or her alone. Similarly, in the case of a partnership, it is a fundamental right of each partner, in the absence of any agreement to the contrary between the partners, to be involved in the management of the partnership business. A sole trader or partnership does not have a legal existence which is independent of the individuals themselves. Accordingly the individual sole trader or partners are liable to the fullest extent of their personal assets for all business liabilities incurred.

2.3 This contrasts with a limited company or LLP which is a separate legal entity with an existence independent of its owners (the shareholders) or directors. As a result, the limited company or LLP may own property, enter into its own contracts and incur its own debts. The shareholders or directors of the limited company, or the owners of an LLP, are not generally liable for the debts or other commitments of the company or LLP. If the shares are issued “fully paid” and the company or LLP incurs liabilities which exceed available assets, resulting in the liquidation or receivership of the company or LLP, then the directors, shareholders or members cannot generally be called on to contribute further to meet any shortfall to creditors. The value of their investment is lost, but their personal assets are not at risk – in other words, their liability is limited.

3 **STRUCTURING THE SALE AND PURCHASE**

3.1 If the seller of a dental practice is an individual or partnership, the bricks and mortar of the building can be sold. If the seller is a company, the seller can sell either the physical premises or shares in the company. The goodwill in the business can also be sold. The goodwill in a business will usually be reflected in the price, but goodwill – which may include the NHS dental contract – can be sold separately.

3.2 At the outset, a company needs to consider whether a share sale or an asset sale is more appropriate. Each structure has its own advantages and disadvantages. A share sale involves the buyer acquiring some or all of the shares in the company that is running the dental practice (the target). An asset sale involves a buyer acquiring from the company selected assets which make up the dental practice, for example, the premises, the NHS Contract, goodwill, staff and stock in trade.

3.3 When a buyer acquires the shares in a company, he also inherits all the company’s assets and liabilities (including the shop or other property) unless they have been transferred out of the company prior to the sale. For this reason, a contract for the sale of shares often has a more extensive set of warranties and a tax deed to protect the buyer in respect of unexpected liabilities that may exist in the company.

3.4 If the assets are being bought from the company, the buyer chooses those assets and liabilities he wants to acquire, and leaves with the company the assets and liabilities the buyer does not want to purchase. It is important to identify what the buyer wants to buy, because
the ownership of assets (especially the property) does not automatically transfer to the buyer unless specific arrangements are made.

4 SHARE SALE

<table>
<thead>
<tr>
<th>Advantages to a Buyer</th>
<th>Disadvantages to a Buyer</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Continuity of business - the business is carried on by the same company before and after acquisition, thereby giving an impression of continuity to the outside world.</td>
<td>• No cherry-picking - the buyer cannot cherry-pick assets and liabilities, and will automatically acquire all the assets and the liabilities of the target company.</td>
</tr>
<tr>
<td>• No NHS delays – dependent on the NHS contract a change of ownership application may not be necessary. However consent from the PCT may be required in respect of the change of shareholders and directors.</td>
<td>• Liabilities will be inherited - since liabilities will be inherited, a full due diligence exercise needs to be carried out to establish what the liabilities are.</td>
</tr>
<tr>
<td>• Premises - title to any premises held by the target company will normally automatically pass to the buyer with the target company.</td>
<td>• Increased costs - carrying out due diligence can involve a higher level of professional fees.</td>
</tr>
<tr>
<td>• Contract rights - contracts will normally automatically transfer with the target company (subject to any change of control provisions).</td>
<td>• No tax deduction for cost of assets - as the assets acquired are the shares in the target company rather than the assets of the business, the tax benefits available on a purchase of assets (see further below) will not be able to be utilised.</td>
</tr>
<tr>
<td>• Stamp duty - stamp duty at the rate of 0.5% is payable on the transfer of shares. This compares favourably to the maximum 4% rate of stamp duty land tax payable if the transfer is of assets and includes UK land and buildings in commercial or mixed commercial and residential use. However, other assets typically transferred as part of a business are no longer within the charge to stamp duty.</td>
<td></td>
</tr>
<tr>
<td>• Preservation of tax losses - trading losses will generally be available to be carried forward for use after the sale against the target company’s profits provided there is not a major change in the nature or conduct of the trade. Tax losses would not be preserved with an asset sale although a pre-sale hive down of the assets to a company could be considered.</td>
<td></td>
</tr>
<tr>
<td>• Fewer transfers - no need to transfer assets or contracts as these will be vested in the target company.</td>
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</tr>
<tr>
<td>• Employees - employees of the target company will remain employed by the target company and the new owner of the company will become their employer, usually without the need for prior consultation.</td>
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</tr>
<tr>
<td>• Care Quality Commission (“CQC”) - as registration of the target company is already in place only a notice of variation of the registered manager will be required to be submitted.</td>
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</table>
Share Sale (Continued)

<table>
<thead>
<tr>
<th>Advantages to a Seller</th>
<th>Disadvantages to a Seller</th>
</tr>
</thead>
<tbody>
<tr>
<td>• <strong>Liabilities to creditors</strong> - unless the seller has given personal guarantees or indemnities, debts and other liabilities of a company will become the responsibility of the new owner.</td>
<td>• <strong>Increased costs</strong> - since the liabilities of the target company will be inherited by the buyer and the buyer will be carrying out a full due diligence exercise so as to establish the liabilities, the seller may be involved in higher level of professional costs in disclosing the documentation, identifying the liabilities and addressing the buyer’s enquiries.</td>
</tr>
<tr>
<td>• <strong>Premises</strong> - including any leasehold property, will remain with the target company. This will include any contingent liabilities attaching to any premises such as dilapidations. A share sale, therefore, enables the seller to avoid such liabilities. However, any personal guarantees will remain in force until released by the third party holder.</td>
<td>• <strong>Liability of the seller</strong> - the buyer will probably require the seller to accept personal liability for any inaccuracy in the disclosure of information, and the seller may also be required to indemnify the buyer against any unforeseen liability for tax or other expenses which arise after the sale has been completed and which are referable to periods preceding the sale.</td>
</tr>
<tr>
<td>• <strong>Single tax charge</strong> - on a share sale, the proceeds of sale will be received directly by the shareholders of the target company, thus avoiding a potential double tax charge on the sale of assets (i.e. a tax charge in the target company on the disposal of its assets, followed by a tax charge on the shareholders on the extraction of the sale proceeds).</td>
<td></td>
</tr>
<tr>
<td>• <strong>Entrepreneurs' Relief</strong> - individual shareholders may be able to benefit from the new entrepreneurs' relief on a share sale. More information about this relief is included in section [ ] below.</td>
<td></td>
</tr>
</tbody>
</table>

PAGE 3
Assets in a dental practice may include the tangible assets (the bricks and mortar, fixed assets and material business contracts (including staff)) together with the goodwill, or just the tangible assets, or just the goodwill. The goodwill includes the value of an NHS contract.

### Advantages to a Buyer

<table>
<thead>
<tr>
<th>Liabilities</th>
<th>the buyer will not generally assume pre-existing liabilities of the business. These remain with the seller unless specifically transferred to the buyer.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cherry-picking</td>
<td>the buyer will be able to select those assets and liabilities he wishes to acquire. But beware – this does not apply to employees.</td>
</tr>
<tr>
<td>Tax deduction for cost of assets</td>
<td>a tax deduction will normally be available in respect of the cost of goodwill and stock. Capital (depreciation) allowances should also be available in respect of the cost of plant and machinery. These deductions can be extremely valuable.</td>
</tr>
</tbody>
</table>

### Disadvantages to a Buyer

<table>
<thead>
<tr>
<th>Premises</th>
<th>consent will usually be required from any landlord of leasehold property before it can be transferred to the buyer. This can prove costly and time consuming. Stamp duty land tax is also payable on transfers of property.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Business contracts</td>
<td>will need to be specifically assigned to the buyer (apart from employment contracts), which will often require the consent of a third party. The NHS contract will have to be subject to a change of ownership application while the seller is still providing services.</td>
</tr>
<tr>
<td>Tax losses</td>
<td>tax losses in the selling company will not be available for use after the sale.</td>
</tr>
<tr>
<td>Care Quality Commission</td>
<td>a new application will need to be made for the registration of the new entity and can take up to 120 days to process</td>
</tr>
</tbody>
</table>

### Advantages to a seller

<table>
<thead>
<tr>
<th>Apportionment of purchase price</th>
<th>although not strictly a benefit, the seller may be able to apportion the consideration payable between the assets being acquired. This may be important from a tax point of view in order to minimise tax charges arising on the sale and should be considered at an early stage on a business transfer.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Tax losses</td>
<td>if assets are sold at a loss, for tax purposes, these losses may be able to be used to reduce tax payable by the seller</td>
</tr>
</tbody>
</table>

### Disadvantages to a seller

<table>
<thead>
<tr>
<th>Ensuring correct tax treatment</th>
<th>the fewer assets that are acquired by the buyer the more difficult it will be for a seller to argue that there has been a transfer of a going concern from a VAT perspective – in other words, the seller may have to charge VAT on the price for the assets.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Continuing liabilities</td>
<td>even if leasehold property is assigned to the buyer, the seller may remain liable in the event of breach of the lease by the buyer, for example if the buyer does not pay the rent.</td>
</tr>
<tr>
<td>Consent</td>
<td>consent may need to be obtained from the landlord for the transfer of leasehold property and for any charge to be taken as security by a bank financing the acquisition. Consent would normally also be required from the landlord before carrying out any work to the premises.</td>
</tr>
<tr>
<td>Double tax charge</td>
<td>there is likely to be a tax charge in the target company on the</td>
</tr>
</tbody>
</table>
### 6 BEFORE BUYING

#### 6.1 Negotiations

At the outset a prospective seller and prospective buyer will agree in outline a price and general terms for the sale and purchase of the dental practice. It is extremely helpful to the solicitors if these can be written down in as much detail as possible, with apportionments of the sale price and with specific items which have been agreed between the parties. The discussions should be “subject to contract” and these words should be added to anything in writing. This is so that neither party is legally bound before solicitors have drawn up the full documentation after making the necessary checks and giving advice. If the buyer is relying on prescription figures or other financial information about a business, it is important to let his solicitor know. The information should be referred to in the contract. Above all, the buyer should avoid entering into a contract saying he does not rely on information given during negotiations, or that the contract represents the entire agreement between the buyer and the seller, if the buyer needs to rely on the accuracy of the information given. All such information should be disclosed by the seller’s solicitor.

#### 6.2 Preliminary Deposit

Quite often a buyer is asked to place a preliminary deposit, or non-refundable deposit, with the Agents. Care should be taken to ascertain the basis on which the Agents holds the deposit. By way of example, it should be returnable to the buyer if he or she finds significant faults in the accounts of the seller, or if the seller withdraws from the transaction or if there is a defect in the title or CQC registration or if the NHS contract cannot be transferred.

#### 6.3 Finance

A buyer needs to consider how he will finance the purchase of the business. A bank will usually want a first legal charge over the premises and in the case of a corporate buyer, a debenture over its assets. If the premises to be purchased are leasehold then the landlord’s consent must usually be obtained before the first legal charge can be granted. Some leases allow the landlord to refuse consent. Beware using the target company’s assets as security for a Bank (on a share purchase) which can in certain circumstances still be unlawful.

#### 6.4 Warranties and Due Diligence

Warranties and indemnities in the sale contract (under an asset or share sale) give a buyer a right to bring claims against the seller after completion. If the buyer has little confidence in the seller’s ability to pay compensation for any breach of warranty, the buyer will need to rely heavily on a due diligence exercise, checking in advance the truth of representations made by the seller and the state of the business. The buyer should also consider holding back a proportion of the price to meet any such claims (a joint solicitors’ account is the normal mechanism).
6.5 **The Contract**

When everything has been agreed in detail, the buyer and seller will both sign a contract. The contract becomes binding when both have sent a signed contract to each other or some other arrangement has been agreed. Different rules apply in Scotland. If premises hold an NHS contract, the contract of sale may need to be conditional on the transfer of such contract to the Buyer.

6.6 **Outstanding Applications for NHS Contracts**

6.6.1 If the premises already hold a NHS contract – not shares in a company – that are being bought, the buyer will need together with the seller to apply to the PCT for a change of ownership. The application to the PCT for change of ownership must be made while services are still being provided by the seller from the premises.

6.6.2 It is important to note that the NHS contact will not be transferred by an agreement between the buyer and seller. Notices have to be completed and lodged with the local Primary Care Trust before an existing dental practice changes hands. Care should be taken to ensure that the seller cannot require completion of the purchase until the buyer has the benefit of the NHS contract.

6.6.3 If the premises or practice holds a General Dental Services Contract (“GDS”) then the transfer of the NHS Contract can be dealt by way of the seller entering into a Partnership Deed with the buyer on exchange with a view that completion will take place as soon as the PCT acknowledge confirmation of the partnership. The seller then ‘retires’ 58 days after completion, the PCT contract then automatically transfers to the buyer. It is important to ensure that the sale contract incorporates both the provisions of the partnership and retirement as well as incorporate provisions for both parties to comply with their obligations to submit Notices to the PCT to ensure that the change of ownership of the PCT contract.

6.6.4 If the premises or practice holds a Personal Dental Services Contract (“PDS”) then the process to transfer the NHS Contract will be slightly more complicated. Dependant on the PCT, and only if the PCT agree, it may be quicker for the PCT to enter into a new PDS Contract directly with the buyer. However, if this is not an option that the seller wishes the buyer to pursue, then the only way forward is for the seller to contact the PCT to convert the PDS contract to a GDS one and then the partnership route as outlined in the paragraph above can be followed. The option of the conversion of a PDS Contract to a GDS Contract is only applicable for a dental services contract and is not applicable for an orthodontic PDS Contract.

6.6.5 Both the seller and the buyer should be made aware that in either case, whether conversion of the NHS contract or a direct new NHS contract to the buyer, each option runs the risk of the PCT taking an opportunity to either reduce the number of UDAs or reduce the value of the UDA, or even inserting more restrictive clauses. Getting legal advice is essential to avoid entering into contracts that are unduly restrictive.

6.7 All practices must now be registered with the Care Quality Commission (“CQC”) therefore care must be taken to ensure that the requisite indemnities are in place in the sale contract to protect the seller from any breaches of CQC by the buyer post completion, and also adequate indemnities to ensure the buyer is indemnified against any liabilities for CQC breaches by the seller pre-completion. Where there is an asset sale completion will be conditional upon confirmation of CQC registration of the buyer, this will be unnecessary for a share sale although an application to vary the ‘manger’ will need to be made.

6.8 Where the transaction involves the acquisition of an existing practice through an asset sale neither the seller nor the buyer will have any control over how long the CQC will take to update its registration list. It will therefore be necessary for the buyer and seller to submit the application to register the buyer simultaneously with the seller’s de-registration application, otherwise the CQC will not process the buyer’s application. CQC will then issue confirmation stating whether or not they will have any objections to the registration of the new buyer and (if
there are no objections) will request confirmation of the completion date. Once CQC receive
confirmation that completion has taken place from both parties CQC will issue the Notice of
Decision to the buyer. The Certificate for registration follows 28 days after the Notice has been
issued.

6.9 New ownership and new premises must be registered with the CQC. If existing premises
change hands new registration is necessary. Registration with the CQC is not instant, so
adequate time should be allowed for this process (the time scales for processing do not
including the application process time for an enhance Criminal Records Check), especially if
the buyer is in a hurry to open.

6.10 Dental Practices are not registerable for VAT. The sale contract must ensure that adequate
provisions are in place to ensure that neither the seller or the buyer elects to register for VAT
prior to completion. The seller will also wish to ensure that adequate indemnities are in place
from the buyer in event that H M Revenue and Customs conclude that the transfer is a
transaction which attracts VAT in order the buyer reimburses the seller for the VAT element of
the transaction.

6.11 Buyers should check whether the business is required to be registered with the Information
Commissioner for data processing by the business.

7 KEY ASSETS AND TERMS

7.1 Premises

7.1.1 The buyer’s solicitor will carry out a full investigation of the title of the seller to the
premises so as to ensure that the property is free from any mortgages or
restrictions and can be used as a dental practice. The process includes identifying
whether the premises are freehold or leasehold. Enquiries of various local
authorities and utility companies will be carried out to ensure that:

- the premises are directly accessible from the public highway;
- they are served by all necessary utilities;
- there are no nearby traffic schemes that might adversely affect the
  business; and
- the premises have the necessary planning consent.

7.1.2 Checks will also be made to ensure that the benefit of any important rights of way
(for example, to use a loading bay or service yard) have been properly protected at
the Land Registry.

7.1.3 The buyer’s solicitor will raise preliminary enquiries of the seller’s solicitors so as to
obtain general information about the premises and the practice.

7.1.4 The buyer’s solicitor will raise preliminary enquiries of the seller’s solicitors so as to
obtain general information about the seller.

7.1.5 The buyer needs to be clear before agreeing to buy premises, what condition they
will be in, particularly for new developments. For example, some contracts specify
the premises will be completed to a “shell and core” finish. This is a very basic
standard of finish, leaving the buyer with only a floor and four walls. One
advantage to the buyer is that the buyer may obtain early access to the premises
and be able to fit them out to his or her own specification. A disadvantage is that
the buyer will have the expense, for example, of installing a ceiling and connecting
up to utilities. This is something the buyer should be clear about before
exchanging contracts.

7.1.6 We will advise buyers on steps to be take to check whether the premises comply
with Fire Regulations, the Equality Act 2010 and the Control of Asbestos
Regulations 2012 and on whether any work will need to be carried out to meet the requirements of the Act and the Regulations.

7.1.7 The buyer shall consider whether CQC requirements and HTM 01-05 provisions for essential or best practice are met and if not whether any works will need to be carried out to meet the requirements of the regulation standards.

(A) Freehold

If a seller owns the freehold interest in the property, there may be two approaches to dealing with the property:-

(a) The freehold interest in the property could be bought by the buyer. If the buyer does this, he should consider the possibility of buying in his own name and, simultaneously with completion, granting a lease of the premises to a trading company. This is a form of pension planning. If, in the future, the buyer wishes to sell the dental practice and the lease, he can do so and retain the freehold interest in the premises, thereby generating an income through the rent that continues to be payable.

(b) If the practice holds a NHS Contract the buyer should be cautious to ensure that the NHS Contract is not just held against the practice premises as this would limit any application to relocate from the practice premises should the practice expand at a future date.

(c) The seller may wish to retain the freehold interest in the property and may therefore only be prepared to grant a lease to the buyer. A well advised dentist may in that situation wish to have an option to acquire the freehold interest or right of first refusal to buy the freehold interest if it later becomes available. This can often be negotiated at the time a dental lease is taken.

Quite often an interest in dental premises is subject to a tenancy of the upper residential parts. If this is the case and the buyer wishes to occupy the flat, the buyer’s solicitor will need to ascertain the basis of occupation of the residential tenant, and if the tenant can be required to vacate.

Care must be taken where the upstairs of the dental practice property comprises two or more flats because sellers sometimes have to offer existing tenants first refusal over the dental premises, and this can hold up a sale.

(B) Leasehold

If a seller occupies the premises under a lease then the landlord’s consent to assign (sell) the lease (only on an asset rather than share sale) to the buyer will normally be required. The sale agreement would include a provision that completion of the sale is conditional upon obtaining the landlord’s licence to assign the lease.

The seller’s solicitor would apply to the landlord for consent to the assignment. The landlord will want to consider the trading history and track record of the buyer. He would do so by looking at accounts and references. If the buyer is a first time buyer or his accounts do not show a satisfactory financial position, the landlord may request additional security before granting consent (for example a rent deposit or a guarantee), and may otherwise refuse consent. A buyer should note that leases usually contain restrictions preventing a tenant from sharing occupation or parting with possession of the property until the landlord’s licence to assign is completed. If, therefore, a seller allows the buyer to take occupation before granting consent to the assignment, this will be a breach of the lease, and render it liable to termination by forfeiture.

A lease is often a long and complicated document placing numerous obligations on a tenant. The main items to look out for are:
• **Repair** – Usually it will be the tenant’s responsibility to maintain the premises in “good and substantial repair and condition”. If, therefore, the premises are not in good repair when a new lease is granted or a lease is assigned to the buyer, then it will be the buyer’s responsibility to bring the premises into the proper standard of repair. On the grant of a new lease a tenant can sometimes agree with the landlord that a description of the current condition, ideally with a detailed written schedule and photographs, is attached to the lease and that the tenant is not required to put the premises in a better condition.

• **A structural survey** – It is always advisable to obtain a survey prior to entering into a new lease. This will identify any disrepair which the landlord can require the tenant to carry out or the cost of which can be passed on to the tenant as part of a service charge.

• **Rent Review** – A lease will provide for the rent payable to be reviewed, often every three or five years. Commonly, the lease says the rent can only be reviewed upwards only. We will advise on the various ways the rent can be assessed.

• **Assignment/Underletting** – Usually a lease will prevent a tenant from assigning or underletting part of the premises, but assignment or underletting the whole of the premises may be allowed with the landlord’s prior consent. If the lease started before 1st January 1996 then an outgoing tenant will continue to be responsible under the lease despite the assignment. If any assignee subsequently becomes insolvent/bankrupt or breaches the lease then a landlord can pursue the original tenant for any arrears of rent or for breaches of tenants’ covenants. If the lease started after 31st December 1995 the landlord can, on an assignment, often require a tenant to enter into an authorised guarantee agreement. In this agreement the outgoing tenant guarantees the performance of the tenant’s covenants in the lease but only until the outgoing tenant’s assignee assigns the lease with landlord’s consent.

• **Use** – The lease will usually specify what business may or may not be carried on at the premises, or what goods may or may not be sold. D1 use should be sought although care also needs to be taken if the use is restricted to dentistry, without any provisions for changes, especially if there are any future plans to relocate or expand the business to another area.

• **Alterations** – Usually the landlord’s consent is required before any alterations may be carried out to the premises. Quite often a landlord will not allow any structural and external alterations and may impose controls on the type of signage which is permitted.

• **Renewal** – Most business leases can be renewed on similar terms when they run out, but there are strict time limits that apply to the right to renew. It is important to check that the right to renew has not been excluded under the Landlord and Tenant Act 1954. However, there are certain grounds on which the landlord can oppose a renewal. The most common ones are when the landlord wants to occupy the premises for his own use, or if the landlord wishes to redevelop the premises.

• **Service Charge** – Where the premises form part of a larger building, the landlord may retain responsibility for the repair and maintenance of the roof and main structure and for the provision of other services. Where this is the case, the landlord will seek to recover its costs through a service charge. Unlike residential tenants, business occupiers do not have statutory rights to be consulted on proposed expenditure to be recovered through the service charge. Consequently, as well as checking the
wording of the clause, it is useful for tenants to obtain an assurance that the landlord will comply with the voluntary code of practice for service charges.

- **Unattractive Lease Terms** - If the terms of an existing lease are unattractive to a buyer, particularly if the landlord wants personal guarantees, and if the landlord is receptive, it may be possible to negotiate a completely new lease.

7.1.8 Sellers are required to provide an Energy Performance Certificate ("EPC") (relating to the dental premises). An EPC is valid for 10 years from the date of issue and contains information relating to the energy efficiency of a property and recommendations for improvements to the property’s energy performance. A poor rating may affect the value of the property and any future sale. EPCs for qualifying premises will be required on any asset sale involving the grant of a lease, the transfer of a lease or the transfer of a freehold interest in premises. EPCs are not generally required if the sale proceeds as a sale of the company where the dental practice is already vested in the company (ie where no separate property transfer is required). The statutory requirement is to provide an EPC to a buyer irrespective of whether the buyer requests one.

7.2 **Equipment and Stock**

7.2.1 In the case of an asset sale, an inventory is usually appended to the sale contract listing all the items and equipment which are to be transferred to the buyer on completion.

7.2.2 The sale agreement will also contain provisions for valuing the stock in trade which is to be bought. It helps if both parties can agree on a stock valuer to be appointed to carry out the valuation on the day of completion.

7.3 **Goodwill and Protection of Goodwill**

7.3.1 Goodwill is an intangible asset, but it is the asset which can have the highest value. Goodwill is a combination of a business’s reputation in the marketplace, the location of its business and operations, and its market share in the range of goods and services in which it is involved. It will include a value for operating the NHS contract.

7.3.2 The transfer of the goodwill of the business normally confers on the buyer the right to carry on the business together with the exclusive right to use its trading name. However, in the absence of an express covenant against competition, the seller will be free to set up a competing business or solicit former patients and customers.

7.3.3 A buyer may have spent a large sum of money on goodwill and should ask for the contract to be worded in a way that stops this value from being eroded by the seller being able to open a competing business in his own name in the locality. The same consideration applies on a company share sale since the price paid for the shares will normally include an amount for goodwill.

7.3.4 It is common for a seller to agree that, for a specified period and/or within a certain radius of the premises, he/she will not compete with the business he/she has sold. Often, a buyer will agree that a restrictive covenant of this kind will not be infringed if the seller acts as a locum.

7.4 **Special Dental Clauses**

A contract for the sale/purchase of a dental practice may need some or all of the following:

- A clause making it clear whether business information are relied on.
• A clause making completion of any agreement conditional on an NHS contract being transferred.

• A clause providing for some of the price to be held back in case the circumstances prevailing at the time of the agreement change within a specified period, for example as a result of NHS contract partly transferred or clawback.

• An indemnity from the seller to protect the buyer from inheriting liability for a clawback.

• Arrangements to enable the business to be carried on after completion in the name of the seller on behalf of the buyer – until the CQC has put the buyer’s name in its registration list.

Some of these are dealt with in more detail elsewhere in this booklet.

7.5 Completion

Completion of the contract for the sale of the assets of the dental practice may be expressed to be conditional. If the seller’s interest in the premises is leasehold then the consent of the landlord may be needed before an assignment can be completed. Following exchange of contracts (if an NHS contract involved), an application will need to be made to the PCT for the transfer of the NHS contract to the buyer and also application to confirm the transfer of the CQC registration to the buyer.

7.6 Employees

As a general rule on the sale of a business, the contracts of employment of the employees of the business immediately before the sale of the business are transferred automatically to the buyer on completion of the sale. As a result, the buyer becomes responsible for all the rights, obligations and liabilities of the seller under the employment contracts of all the employees. The buyer also generally inherits each employee’s accumulated statutory rights. The employees’ contracts of employment continue to have effect after the transfer as if they were originally made between the buyer and the employee.

7.7 Associates

As all dentists are aware Associate Contracts do not transfer on completion. In order to protect any goodwill that is linked to the Associate’s income the buyer may be wise to ensure that adequate provisions are in place in the sale contract to transfer the associate contract to the buyer on completion, either by ensuring that the Associate enters into a new Associate Contract to be signed on exchange, which will complete simultaneously with the practice purchase, or a letter of confirmation by the Associate to confirm the acceptance of the transfer their existing contract to the buyer on completion. A buyer should think carefully and in good time to see whether Associates are to be retained or not following completion.

7.8 Locums

Particular care needs to be taken with locums, particularly in the case of long term locums. A buyer will need to ask careful questions about any associates or hygienist or any other worker who the seller has treated as a locum and obtain a copy of any locum contract. The buyer should establish whether the locum is likely to have employment rights or if there is a risk of a tax liability coming to light after the purchase has been completed.

7.9 From 1 October 2011, the Agency Workers Regulations 2010 came into force, introducing new rights for workers used by a business and supplied via an agency (which may include agency locums). If there are any such workers used in the Practice then some further due diligence may need to be undertaken to establish historic compliance and cost impact for the buyer.

7.10 Material Contracts
As part of the seller’s Practice he may have entered into a number of contracts with suppliers, laboratories, software suppliers etc. If they are important to the future running of the business the buyer may wish to take transfers of these contracts on completion. The contract provisions will need to be carefully considered to ascertain whether they can actually be taken over by the buyer. It is also important for a buyer to consider whether he can avoid taking over some contracts and/or secure better trading terms with other suppliers. If so he may require the seller to terminate any contracts. The terms of these contracts are likely to mean that the third parties involved can withhold consent to any proposed transfer. These terms should be checked prior to completion of a sale.

8 Fitness to Practise

8.1 Disclosure

All applicants for an NHS dental contract or for change of ownership must disclose in their applications:

- Any convictions or ongoing criminal charges.
- Any adverse findings or ongoing investigations by the GDC.
- Any adverse findings or ongoing investigations by the NHS Counter Fraud and Security Management Service.
- Any ongoing investigations by another PCT.
- Details of any circumstances where the applicant has been removed or contingently removed from, refused admission to or conditionally included in another PCT’s list.

8.2 References

When an application is made for a new NHS contract, the applicant (in the case of a company, any dental director) must provide the names and addresses of two referees. The referees should ordinarily be two people with whom the applicant has worked in the last two years for a period of more than 3 months.

Referees must be willing to provide a reference in respect of two recent posts (including the applicant’s current post) as a dentist, and the posts must have lasted at least three months. If it is not possible to provide two referees willing to give references relating to two recent posts of at least three months, applicants should explain this fully and are then entitled to offer alternative referees.

8.3 Refusal on Fitness to Practise Grounds

The PCT can refuse an application where it considers that the applicant is unsuitable to be included in the list. It can also defer a decision until the outcome of any current investigation.

The applicant may appeal against the PCT’s action within 28 days. Fitness to practise is a complex area and legal advice should be sought promptly if difficulties arise.

9 CARE QUALITY COMMISSION (“CQC“)

9.1 From 1st April 2011 all dental practices must be registered with the Care Quality Commission on the regulated activities which is carried out at the dental premises, the three regulated activities for the dental practices are:

9.1.1 Treatment of disease, disorder or injury
9.1.2 Surgical procedures
9.1.3 Diagnostic and screening procedure
9.2 If the practice is not registered with CQC then the practice will be operating illegally. During the transitional period the CQC have stated that no enforcement action will be taken for non-registration provided that the dental practice has made the application for registration in good time.

9.3 Breaches of CQC will be investigated jointly with the PCT (where a NHS contract is involved) if the breaches are of a clinical nature and where breaches are of a criminal or disciplinary nature they will be investigated jointly with the General Dental Council (“GDC”).

9.4 If CQC takes enforcement action and closes a practice, dentists may challenge CQC decisions (right or wrong) through applications to the High Court for Judicial Review. If an application is successful and a CQC decision overturned, legal costs may be recoverable, but it is usually not possible to obtain compensation for loss of business during a period of closure even if the decision of the CQC is found to be unlawful. However legal advice should be sought promptly, because strict time limits apply.

10 TAX ISSUES

10.1 In addition to the general factors outlined above, there may be specific tax issues which have an important bearing on which type of transaction is used. Whilst these issues can be wide-ranging and complex, a synopsis of some of the more notable points are as follows:

10.1.1 Tax deduction for goodwill and other intangible assets: When purchasing assets from an unconnected party, a buyer which is within the charge to UK corporation tax can generally claim tax relief in relation to goodwill, intellectual property and other intangible fixed assets – this is not possible on a share sale. However, the sale of goodwill is likely to give rise to a tax charge in the hands of the seller.

10.1.2 Capital (depreciation) allowances: The buyer will often be entitled to claim capital allowances (and therefore reduce the corporation tax bill for the acquired business) on the cost of plant and machinery, generally at the rate of 18% a year on a reducing balance basis (or 8% for certain assets which are classified as “integral features”). Higher first-year rates may be available to small or medium-sized companies. For sellers, if the sale price exceeds the tax written down value of the relevant asset, this could give rise to a tax charge in respect of the difference.

10.1.3 Higher acquisition cost: The buyer will obtain a market value acquisition cost in the assets being purchased, and the profit on a future sale would be calculated by reference to the increase in value following acquisition. On a share purchase, the assets remain owned by the target company and therefore continue to retain their historic acquisition cost, which is likely to be low.

10.1.4 Tax losses: Trading losses will generally be available to be carried forward for use after a share sale and can be set-off against the target company’s profits, provided there is not a major change in the nature or conduct of the trade. Tax losses would not be preserved with an asset sale, although a pre-sale hive down of the assets to a company could be considered.

10.1.5 Roll-over relief: On the acquisition of certain types of assets, chargeable gains on the sale of certain other assets may be deferred by the buyer by way of roll-over relief until the sale of the replacement assets.

10.1.6 Stock: An immediate tax deduction will normally be available to a buyer for the amount paid for any stock.

10.1.7 Tax liabilities: With an asset purchase, the buyer does not take on the tax liabilities of the seller. However, on a share purchase, the liabilities are transferred to the buyer together with the target company.
10.1.8 **Stamp duty and stamp duty land tax:** The transfer of shares is subject to 0.5% stamp duty. Other assets commonly transferred as part of a business purchase (for example, goodwill, book debts and contracts) are no longer within the charge to stamp duty, which may result in no stamp duty cost to the buyer of assets. However, transfers of property with commercial or mixed commercial and residential use will be subject to stamp duty land tax at a maximum rate of up to 4%.

10.1.9 **Individual seller – entrepreneurs' relief:** Individuals and trustees who dispose of shares in a trading company in which they have a qualifying interest may be able to benefit from the entrepreneurs' relief. Broadly, the relief applies in relation to tax arising on capital gains made by individuals in respect of certain types of business sale.

Subject to meeting certain qualifying requirements, the relief is available for the disposal of trading businesses on asset transfer, as well as disposals of shares in trading companies (or the holding company of a trading group). The relief is also capable of applying on business disposals by pharmacy partnerships.

Broadly, the first £10 million of gains that qualify for relief will be charged to Capital Gains Tax (“CGT”) at an effective rate of 10%. Gains in excess of £10 million will be charged to CGT at two separate rates of 18% and 28% for basic and higher rate/additional rate tax payers respectively.

Claims may be made on more than one occasion up to the 'lifetime' limit of £10 million, and this limit will only begin to diminish when the relief is claimed.

Trustees will be able to claim relief on certain disposals where a “qualifying beneficiary” has a qualifying interest in the business in question.

10.1.10 **Corporate seller - substantial shareholdings exemption:** A gain on a sale of shares by a company is exempt from corporation tax where, throughout a continuous 12-month period beginning not more than two years before the sale, the selling company held a substantial shareholding (being generally at least a 10% interest) in the target company.

10.1.11 **Value added tax - share sales are generally exempt supplies for VAT purposes.** Transfers of assets that comprise a business or part of a business being transferred as a going concern (“TOGC”) are not VATable. However, care should be exercised where the buyer is “cherry picking” assets, as this may result in the acquisition of only a few assets of the business and the transfer may not qualify as a TOGC (and may therefore be subject to VAT).

11 **PURCHASE VEHICLE**

11.1 A buyer of a dental business (whether acquiring shares or assets) should consider whether he or she wishes to purchase the business in his or her personal name or, in the case of the buyer being a number of dental practices, through a partnership or, for any buyer, as a limited company or LLP.

11.2 There are likely to be tax advantages and disadvantages with each approach and this is something on which advice should be sought at an early stage. If the business is not in the name of a limited company, buyers should seek advice on the advantages and disadvantages of incorporation because it is important to look ahead. Some of the advantages and disadvantages are mentioned in paragraph 2.3 and in sections 4 and 5 of this Guide.

11.3 The use of a company or LLP by a buyer may also simplify borrowing arrangements. Typically, lenders require security for the provision of finance, and the security arrangements can be simplified if the borrower is a company or LLP.
12 AFTER COMPLETION

12.1 Unless the buyer has acquired the shares in the company which runs the dental practice, the buyer will need to make sure that the PCT has processed swiftly an application for change of ownership. The contract should have included arrangements for running the dental practice after completion if the change of ownership has not been fully processed by then. Unless the buyer has acquired the shares in a company that runs an existing dental practice, the buyer must give the PCT at least 28 days notice of the intention to commence the provision of services. The PCT will be able to supply a standard form for this.

12.2 Any change of name of the dental practice which include the words “dental” or “dentist” must gain consent from the General Dental Council and this can take several weeks. Until consent is given the dentist can not use the name for the practice. Care should therefore be taken to make the application for the use of the name in good time.

13 CONTACT US

For any further information about our services or charges, please contact a member of the Charles Russell Dental Team whose details are on the following pages. You can also visit our website at www.charlesrussell.co.uk/dental.
BELOW ARE OUR KEY CONTACTS:

Key contacts
Dental

REGULATORY - David Reissner, Partner, Head of Healthcare
David is an expert in healthcare law, administrative and public law (including Judicial Review). He advises on a range of NHS and other legal and ethical issues. Clients include representative bodies, dentists, pharmacists, pharmacy owners and other healthcare professionals.

David appears regularly as a solicitor advocate at NHS hearings and in healthcare disciplinary proceedings. He heads up the firm’s Healthcare group and is listed in the main legal directories as a leading practitioner in his field.

David contributes regularly to a range of publications in the Healthcare field.

David is a member of the Pharmacy Law and Ethics Association (PLEA) and the Medico Legal Society. David has been appointed by the National Assembly for Wales as a Chairman of NHS pharmacy appeal panels and as an Adjudicator in dental disputes. David was appointed a Deputy District Judge in 2000.

PROPERTY – Jenin Khanam, Senior Associate, Key Contact for Dental law
Jenin specialises in commercial matters including the buying and selling of businesses with a particular emphasis on the acquisition and sale of dental practices. She has considerable years of experience in acting for dentist ranging from individual practitioners to corporate organisations and is on the recommended legal advisor list of the British Dental Association.

She offers an effective and efficient service advising upon all legal aspects of setting up and running a dentist practice and dealing with both expected and unexpected problems whilst offering practical solutions. Jenin has advised dental clients on all aspects of their NHS contracts and has been involved in negotiating terms of new contracts with the PCT.

Jenin has run a number of seminars on buying and selling dental practices, the legal and ethical requirements of a dental practitioner as well as the provisions of Care Quality Commission (CQC). She also regularly advises a national high street lender on the specific requirements of dental transactions. She is also noted in Legal 500, 2012.

REGULATORY - Noel Wardle, Partner
Noel specialises in healthcare and regulatory law. He advises clients on a range of healthcare matters, including disciplinary proceedings, judicial reviews, prosecutions and inquests. According to Chambers UK, Noel is an "Associate to watch" who "really knows his stuff...".

Noel is a member of the Association of Regulatory and Disciplinary Lawyers.
REGULATORY - Susan Hunneyball, Senior Associate

Susan has considerable experience in advising clients on healthcare matters. She recently acted for dentists in a key case which resulted in rectification of their GDS contracts. Other work in this area includes acting for clients in disciplinary hearings before professional and health bodies as well as advising pharmacists on the framework governing control of entry to PCT pharmaceutical lists and appeals to the NHSLA (FHSAU), often acting as solicitor advocate.

Susan advises in relation to public and administrative law (including judicial review) and in relation to prosecutions, mainly high value fraud, brought by the CPS and other prosecuting agencies.

REGULATORY - Rachel Warren, Senior Associate

Rachel advises clients on healthcare, pharmacy and other regulatory matters. These include disciplinary proceedings, judicial reviews and advising clients in relation to applications for inclusion in Primary Care Trust healthcare lists, including appeals to the NHS Litigation Authority. Rachel regularly advises clients on the regulatory regime governing care homes, and also acts for people being investigated or prosecuted by regulatory agencies such as the CPS (and other prosecuting agencies) in relation to NHS fraud, the Commission for Social Care Inspection (now the Care Quality Commission) and the Environment Agency.

CORPORATE FINANCE - Tim Jenkins, Partner

Tim specialises in the sale and purchase of retail healthcare businesses (both asset and share based). Tim’s clients include retail healthcare operators of all shapes and sizes including a number of regional multiples and he is used to handling transactions of varying size, value, volume and complexity. “Tim…receives particular praise for his work in the healthcare and pharmacy sector” (Chambers UK, 2009)

PROPERTY - Debra Kent, Partner

Debra deals with the full range of healthcare related property matters both as part of share and business sales and acquisitions as well as standalone businesses, health centres and those trading in shopping centres and retail parks. According to Chambers UK, Debra “takes her clients’ interests extremely seriously” and “her exceptional understanding of complex real estate deals’ plays in completing deals successfully.”

PROPERTY - Simon Davies, Partner

Simon handles commercial property transactions acting for buyers and sellers of dental practices.
PROPERTY - Claire Timmings, Senior Associate
Claire’s experience includes property related corporate disposals, the grant of leases of healthcare properties, lease renewals, acquisitions and disposals of healthcare premises including new developments and LIFT schemes.

PROPERTY – Jenny Hotston, Senior Associate
Jenny has experience in a wide range of property work including commercial landlord and tenant work, lease renewals, acting on behalf of charities, acquisitions and disposals, title investigations and corporate support work. Jenny is a member of the Healthcare Team. Jenny assists on the property aspects of corporate support healthcare sales and purchases for individuals and multiples, as well as acting for individual on healthcare property transactions. Jenny has had experience acting for landlords and tenants on the construction of new properties, including pharmacies adjacent to Health Centres, both in the private sector and in conjunction with Local Improvement Finance Trusts.

CORPORATE TAX - Amanda Solomon, Partner
Amanda specialises in all aspects of corporate tax law and business-related tax matters. Her areas of expertise include mergers and acquisitions (both domestic and international), business transfers (including healthcare), structuring venture capital investments, joint ventures, management buyouts, entrepreneurial tax reliefs, e.g. enterprise investment scheme, the tax efficient structuring of employee remuneration and benefits, film tax reliefs and the tax treatment of intellectual property.

EMPLOYMENT - Ben Smith, Senior Associate
Ben advises on a wide range of employment matters, both contentious and non-contentious. Ben has particular expertise in providing practical commercial advice to corporate clients on the whole range of HR issues, including disciplinary and grievance processes, redundancy and re-structuring programmes, TUPE, discrimination and dismissals. Ben has substantial experience in dealing with Employment Tribunal litigation, assessing risks and engaging in commercial settlement negotiations on behalf of clients. He also drafts employment policies, consultancy and service agreements and advises on compromise agreements (on behalf of the individual or the employer). Ben regularly speaks at seminars and conducts internal client training sessions.

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