

Sale of Business Agreement

Explanatory notes

The advice in these notes is intended to be by way of general guidance only. It is no substitute for detailed advice specific to your practice from a solicitor or chartered accountant, as appropriate.

Questions of the sale price (particularly: Is it reasonable?) and profitability should be addressed to your practice's accountant. Questions relating to the other terms of the agreement should be raised with your solicitor. It should also be borne in mind that the standard form of agreement was designed for the sale of businesses generally. Aspects of the form (such as the stock in trade provisions) may carry less significance in the sale of a medical practice than they would in the sale of a supermarket.

Commentary will now be provided on most of the aspects of the form which have been left blank.

Price

For reasons related to tax depreciation it will usually be in the vendor's interest to make sure that the plant is not sold for more than book value. Conversely, it will be in the purchaser's interest for the plant to be written up to its maximum value.

The purchaser should ask for goodwill and tenancy figures to be broken down. No stamp duty is payable on goodwill, but will be payable on the conveyance of the lease. If the figure is not broken down into the two elements, the IRD may claim conveyance duty on the goodwill.

Value of Stock

Stock in trade is expressed on the form to be "subject to adjustment". Under clause 5.2 the purchaser is to elect whether or not to accept all or part of the excess above the expressed percentage or the maximum stock value adjustment.

In a medical practice the main item of stock in trade will be medical supplies. These are likely to change to some extent between the date the contract is signed and possession date. The adjustment provisions allow the price to be adjusted to take account of fluctuations.

Possession Date

The period of about a fortnight from the signing of the contract is likely to be needed if the purchaser has to obtain finance. If the property is subject to a lease, some further time may need to be allowed for the vendor or his or her solicitor to obtain the landlord's consent to the assignment of the lease. The landlord will probably ask the vendor (or his/her solicitor) for details of the purchaser's financial position.

GST

Clause 16 provides that unless otherwise stated the supply made by the agreement is zero rated. Where supply is not zero rated, GST is payable by the purchaser.

In the normal course, the sale of a medical practice as a going concern to a GST registered medical practitioner will be zero rated. If, however, there is any doubt about that in the particular circumstances, the purchaser should obtain legal advice.

Restraint of Trade

The restraint of trade provision must be reasonably necessary to protect the goodwill being purchased by the purchasing medical practitioner, otherwise it will not be enforceable in the Courts. Reasonableness is generally judged according to the scope and duration of the restraint, and its geographic area. Much will depend on the particular circumstances. For example, in a rural practice which services a large area, a much wider restraint (perhaps 3 years and 50 kilometres) may be allowed than in a city or suburban practice which attracts patients from a much smaller area (perhaps 1 year and 5 kilometres).

Warranties

Any warranties given by the vendor medical practitioner should be recorded in the document. It is in the interests of the purchaser to check warranties or other representations about turnover by asking to inspect the vendor's accounts. Rule 11(2)(e) of the Health Information Privacy Code 1994 should also be noted in this connection. It allows the vendor to disclose health information (as defined in the Code) where disclosure is essential to facilitate the sale of the business as a going concern and it would be impracticable to obtain the patient's authorisation. These criteria for disclosure, will normally be met where a medical practice, perhaps with many hundreds of patients on its books, is being sold.

Special Conditions

(a) Approvals

Very occasionally the purchaser medical practitioner will need to make the agreement conditional on receiving an approval. An example would be an overseas medical practitioner coming to practice in New Zealand, who may need to make the purchase conditional on obtaining registration in New Zealand and possibly also on obtaining a suitable contract or section 51 arrangement with the Health Funding Authority.

(b) Staff

A much more common condition relates to the vendor's staff. The sale of the vendor's business usually means that his or her staff become technically redundant. The need to consider redundancy compensation will often be avoided by providing that the purchaser must offer existing staff continued employment on the same conditions. Even so, there may in some situations still be a liability for redundancy compensation and the agreement should spell out whose liability that will be (generally, the vendor, as it will be his or staff whose positions are being made redundant). The vendor will have other obligations under industrial law, but it is outside the scope of this pamphlet to discuss them here. The NZMA's pamphlet on redundancy should be consulted.

(c) The Name of the Practice

Sometimes the name of the practice will be part of the goodwill that the purchaser is buying. The agreement should specify whether the purchaser is to be free to use the name of the practice after the sale.

(d) Resolution of Disputes

The parties should also consider whether they would like a provision which enables disputes to be dealt with by arbitration. The advantages of arbitration over Court proceedings are generally seen to be privacy, speed, and having an expert of the parties' own choice determine the dispute. An arbitration clause needs to record that the parties agree to have any dispute determined by arbitration, and must also identify how the arbitrator is to be selected. It is best to get such a clause drawn up by a solicitor.

Other Matters

Depending on the particular circumstances, there could be other subjects that need to be covered by special conditions. Where any doubt arises over whether something should be expressly dealt with, it is best to take the advice of the practice's solicitor.

Need more help?

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