

Why does it take so long?

Russell Abrahams explains the process of buying and selling a practice.



As I'm quite fond of telling people, following my recent birthday, I am 58 years old and, in the vernacular of the 1970s, I'm high mileage! This, in turn, leads to certain advantages and disadvantages. I remember, back in the day, circa 1990, when Martyn Whiteman, of RHW, now long retired, was the leading dental lawyer and I was a young upstart.



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Ed Bonner was selling a practice in Clapham to Ora Dental, then run by another young upstart, Julian Perry. Julian has just re-emerged, post-Oasis and Bupa, as a consultant to mydentist and in a sort of poetic way, has come back to us to help out with one or two little doozies.

They wanted to do the deal in a hurry, Ed had hired Martyn and Martyn put me in the frame to act for Ora. The money was lined up, Ed and Martyn had prepared a full file of due diligence (DD) papers and the CQC was but a twinkle in her mother's eye.

I received a bundle of papers at 9am on a Thursday and, once I was up to speed, I tootled down to Martyn's office in Guildford for an afternoon meeting. We closed the deal that night and the money was moved at 9am on the Friday. Job done.

I must be getting old, because I can't do it that quickly anymore! Jokes aside, my age is an insignificant factor in the cauldron of inactivity that passes itself off as the sale and purchase process.

So, why does it take so long? Why does it take anything up to a year to effect what is essentially an incredibly simple transaction? The typical deal is for circa £1m and it comprises the transfer of a commercial lease and the sale of goodwill, equipment and stock, with a transfer of employees and self-employed staff thrown in. It should still be a 24-hour process, but it isn't. Why?

Delaying factors

There are essentially four delaying factors. First up, finance. Back in the day, and I'm talking about pre-2008, lenders were queueing up to undercut each other and to put the finance

On the table within 24 hours. As you know, they all took a deep, cold bath in 2008. I was involved in one particular transaction, where money had been lent left, right and centre and coupled with the mortgages on the personal homes of the two partners involved, who ended up bankrupt; the bank in question took a hit on a single practice of just over £4m.

Needless to say, the banks are being somewhat more cautious now about lending. But cautious doesn't need to mean virtually motionless! A very long-standing client of mine, admittedly used to the old days, got a bit frustrated with barrages of additional questions coming from the bank week after week. They were quite simply prevaricating and refusing to make a meaningful decision. He sent them an email to which he attached various items under the legendary line, "In an effort to speed up this process and in anticipation of your next round of questions, I attach an expired bus timetable, my school reports and my mother's shoe size is 6!"

The supplemental finance problem is that, with bigger numbers involved and therefore the need for greater caution, lenders are introducing independent lawyers to act for them, rather than allowing the buyer's solicitor to act for the lender and the buyer.

This is a totally irrational and ludicrous proposition, based loosely on the notion that the lender ends up with more protection than it would do if it were represented by a solicitor who was more invested in the buyer than the lender. Of course, the fear is totally unfounded. The solicitor acting for both buyer and lender will act faster, with less duplication than if there are two solicitors involved.

The lender should remember that the solicitor takes on a PI backed duty of care to the lender, which is no less valuable than that assumed by the independent solicitor.

But I can let you into a secret. Although many of the dental lenders require their security to be supervised by a panel solicitor, some of the panel solicitors are also leading dental solicitors. Generally speaking, those lenders will permit their panel solicitor to act for the lender and for the buyer. It's also worth noting that where the

same solicitor acts for lender and buyer, there can be a substantial saving in overall legal fees.

Secondly, CQC. I hope that you are all aware that the only way to sell an NHS practice is via the so-called partnership route, which means that the buyer and the seller have to become partners and registered at CQC as a provider, followed by a deregistration and reregistration of buyer alone. The process is ridiculously time-consuming and can add months to the overall sale process.

What is interesting is that this slightly pointless two-step process is being looked at more closely and we may be able shortly to report on a solution, at least to taking the preliminary step, by allowing the buyer alone to register. That said, although it simplifies the overall process, the buyer still has to register and the sale can't go through until he has registered, so the delaying factor is there.

Thirdly, due diligence. I have to say this: it's got out of hand! In the old days, we took a list of employees and of the terms of their employment, with similar information on the self-employed staff. We took a schedule of equipment and a list of commercial contracts. We raised standard enquiries on the property and, if today's NHS contract had applied then, we would have raised a few enquiries into that key document.

Now, it is not unusual for enquiry forms to run to 30 or 40 pages. The documents cover items as remote as sex discrimination policies, inoculation procedures and credit control listings.

In fairness, prices are much higher than they were 30 years ago, the clients are much more sophisticated and therefore demanding (in terms of data processing) than they were back in the day and of course the independent solicitors acting for the lenders have to earn their crust!

The due diligence process gets subbed out to the lowest common denominator, possibly a paralegal with three weeks' experience in the dental industry and the rounds of questioning begin!

The bottom line is that there should be an industry standard enquiry form, subject of course to variations for unusual features, limited to five pages

and not in pitch six! And of course, today's data hungry buyers should feel free to make whatever enquiries they want of their sellers, but they really don't need to clog up the legal process with that information. There is a genuine legal problem around this proposition, but this is not the forum for that debate.

So to summarise, I absolutely respect the desire of the young, modern buyer fully to investigate not just clinical matters but commercial and legal issues, this should be done directly by buyer and seller and their package of questions and answers should be handed over to the solicitors to be included in the pack prior to exchange of contracts. This keeps fees down, speeds up the timeline and maximises the flow of information.

And then, on the subject of due diligence, you also have to think about your seller. Imagine the scene, he/she is 55, knackered; been drilling and filling for 30 years; likes clinical work but is sick and tired of the admin, the HR issues, CQC, and so on. So, they decide to sell the practice. They approach one of the great gods of our time, the practice broker, who values the practice at three gazillion pounds and promises a buyer within six weeks. That's it then, job done. The seller is sick and tired of the admin and just gets on with clinical work, lets the admin slip a little further and ignores screaming emails from his solicitor seeking replies to due diligence questionnaires.

He/she prods the lawyer every few weeks and says, "When are you sending me my 3 gazillion pounds?" Honestly, this happens to me virtually every day! It's tough getting due diligence information out of the seller and that job could be made a lot easier if the enquiry form were manageable, rather than ludicrous.

Fourthly, how long is the lease? Typically, a lender will not lend in respect of a practice where the lease has less than 10 years unexpired. So, if this is an issue, the seller needs to kick off the process of extending the lease before they even put the practice on the market. They don't have to, but if it isn't done, it can easily add three months to the length of the process. ☹



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Other reasons

There are of course other potential reasons why delays happen. In my 30 years of experience I have also had to contend with deal fatigue and solicitors.

Where the underlying legal process of a deal takes in excess of six months, the risk of that deal becoming abortive increases exponentially – this is deal fatigue. That gorgeous practice you spotted last night in the bar just doesn't seem so gorgeous six months on! Buyers and sellers look for reasons to pull out. This of course is the reason why brokers push so hard for holding deposits. I guess holding deposits help, but the reality is that you can't keep people married by putting a bullet to their heads if they want to get divorced. Once deal fatigue sets in, the deal is dead in the water.

In fact, I had one such deal some years ago. We were pretty much there, but the buyers' solicitor told the buyers that the lender could withdraw the offer of finance any time prior to completion, which meant, at least in theory, that the buyers were at risk of being unable to complete if the lender withdrew the offer between exchange and completion. It was the final straw and the buyers pulled out.

And finally solicitors – please don't quote me on this one! Solicitors can get bogged down in trivial issues, largely down to fear and inexperience. Here is a genuine example from the past, just for a laugh.

I was selling a practice on the Harley Street patch and the buyer was represented by an inexperienced solicitor. He got bogged down on the restrictive covenants. I drafted the sale agreement, I put it all the standard stuff, straight down the middle-of-the-road, as ever, including a restrictive covenant saying that the seller would not poach any of the patients and would not work within a mile of the Harley Street area for two years after completion of the sale.

The buyer's solicitor was outraged and accused me of all kinds of nefarious activities. How could the seller expect to work in say Hammersmith after selling a practice in Harley Street? He was not prepared to accept anything less than a universe wide restriction for the rest of the seller's life. I rang the guy up and I asked if it would be okay if the seller worked on Mars after the sale. The solicitor thought about it for a bit and conceded that that would be fine!

I've done two deals very recently, where I've acted for the seller and the buyer has acted for himself. They've both been fairly small cash deals. I put the paperwork together, straight down the middle-of-the-road and in both cases the buyer reviewed the papers, picked up a couple of points which were agreed fairly easily and that was that.

A few weeks ago I went to the gym. And while I was there, I had a Eureka moment. We are all talking about dental deals taking longer and longer to go through. We can make these delays go away.

All we need to do is open the file, identify the issues that need to be resolved: due diligence, length of lease, finance and CQC and then put the file in the freezer until the buyer and the seller have addressed those issues. We can then slam through the rest of it in two weeks, without getting deal fatigue.

The only catch is that we need the same solicitor acting for the buyer and the lender, which we need to start insisting on, because it is a waste of money and 'jobs for the boys' to allow anything else to happen.