

Buying and Selling Pharmacies – An Overview

Introduction

This note has been designed and structured to provide prospective clients with a brief overview of the start to finish process of a *typical* pharmaceutical transaction. Of course, we can never predict how the transaction will 'pan-out' and the nature of the transaction is very much dependant on the other party's aims and / or legal representation. We will always try to enable the transaction to go as smoothly (and as quickly) as possible, whilst keeping your best interests at the forefront.

It's a great deal, what next?

The process of buying and selling a pharmacy and what areas are of key importance depends upon the structure of the deal and the perspective of the buyer or seller. Most transactions have a generic form which can be split into 5 key stages: -

- Stage 1 Deal structure
- Stage 2 Due Diligence
- Stage 3 Documentation
- Stage 4 Completion
- Stage 5 Post-completion

Stage 1 Deal structure

To finalise the deal structure there are some key steps to be taken: -

Non-Disclosure / Confidentiality Agreement

The seller and the buyer should enter into a non-disclosure or confidentiality agreement. This will protect against a buyer/seller disclosing the other party's confidential information. This is normally dealt with by the business transfer agent in addition to an exclusivity agreement for the benefit of the buyer.

The General Pharmaceutical Council (GPhC)

As you are no doubt aware, the GPhC is the organisation which regulates pharmacists and pharmacy technicians. They are the 'quality assurance' body of the pharmaceutical industry in the United Kingdom and they need to be notified if there is a share purchase of a pharmacy.

Please keep this in mind when deciding whether or not to enter into a transaction of this nature as these 'notifications' do add on some extra time to the overall length and cost of buying/selling a pharmacy.

The GPhC provide extremely helpful guidance on the process and details of the required changes dependant on whether it is an asset purchase or a share purchase.

Funding

The buyer should consider the funding options available and secure the required level of funding. In recent years, funding options have become more limited due to stricter lending criteria. With this in mind, the seller should ask for proof of funding in order to avoid wasting time. Asking for proof of funding may seem a little crude however; a serious buyer will expect to be asked.

Team

All parties should appoint a lawyer for legal advice and an accountant for tax advice. Both should be experienced in dealing with buying and / or selling pharmacies due to the added requirements to notify governing bodies (for example, the GPhC) when there is a change of directorship (in a share sale) or change of ownership (if an asset sale). With this in mind, the legal advisors should also have expertise in other relevant areas. This can include, for example employment issues.

Does the seller want to sell the company's shares or the assets?

Depending on the structure of a business (i.e. sole trader, partnership, limited liability partnership or limited company in its various guises), the seller and the buyer will need to consider the best way to structure the deal. If the seller is a limited company, there are a variety of reasons why the decision to sell the assets or the shares in the company are important. Tax advice aside, these can be boiled down into two concepts: -

- (i) if a buyer buys the assets, then they will not be acquiring the liabilities of the company (note that this does not apply to employees as they will under English law transfer across to the buyer); and
- (ii) if a buyer acquires the shares they will be taking the company and all liabilities contained in that company (note that the purchase agreement and the tax indemnity will try and apportion those liabilities between the buyer and the seller).

To avoid any problems at a later date, the buyer and the seller should consult their accountants' early and obtain tax advice in order to assess the most tax efficient method of structuring the deal.

For the purposes of this note, we will assume that the pharmacy is owned by an English registered limited company and the seller is selling their shares in that company.

We have a deal structure

Once the terms and structure of a deal are agreed, the parties should prepare heads of terms containing the deal terms and timescales for completion. The heads of terms will usually contain binding terms (for example, a costs penalty for withdrawal and an exclusivity period for the buyer) and non-binding terms regarding the deal. Again, these aspects are normally dealt with the by transfer agent.

Stage 2 Due Diligence

Is 'due diligence' painful?

Due diligence is the term used to refer to the buyer's investigation of the business and pharmacy. The buyer will ask questions and make various searches to establish details about the pharmacy and its owner. For example: -

- A Companies House search to check the shareholding of the company that owns the pharmacy; and
- A number of property searches to check the building in which the pharmacy is situated.

The questions will usually be extensive and will deal with the various elements of the pharmacy and its business (e.g. business structure, commercial agreements, employees and litigation).

Due diligence can be a painful process; however, it is imperative for a buyer to understand the business/pharmacy in depth. For a seller the positive benefits are: -

- any problems are identified at an early stage; and
- the production of the disclosure letter will be much easier (see Stage 3 (ii) below).

Stage 3 Documentation

What documentation is involved?

A transaction to buy and sell a pharmacy normally involves a variety of documentation. Some of these are standard in any transaction and I have listed some of the key documentation below.

(i) Purchase Agreement

This will either be an asset or share purchase agreement ("Purchase Agreement"). The Purchase Agreement will usually be drafted by the buyer however, there is no hard and fast rule on this. The Purchase Agreement will be the subject of negotiation and will detail the price, parties and time for payment.

The majority of the negotiating time will be spent on the following: -

a. Limitations on liability

The seller will want to be able to retain as much money as possible. The basic way to ensure this happens is for the seller to limit their liability under the Purchase Agreement. This can be done in a variety of ways, for example: -

- ensuring there is full disclosure against all warranties (see Stage 3 (i) b below);
- specifying that no claims can be brought after a certain period of time after completion; and
- capping liability to amounts of consideration actually received (less if possible).

From a buyer's perspective, it is reasonable to expect that the seller will want to limit their liability however; the extent of this limitation should be carefully examined (e.g. if the buyer agrees to limit the time period in which they can bring a claim, the buyer should ensure that the time period only applies to instigating the claim and not obtaining judgement).

b. Warranties

The buyer will expect the seller to give warranties. Warranties are statements about the pharmacy being purchased. The idea behind warranties is that if the statements do not equate to the position in the pharmacy being sold then the seller should disclose this to the buyer. If the

seller does not disclose something and the warranty proves to be inaccurate then the buyer may have a right of action against the seller.

In order to avoid this happening:-

- the seller must ensure that the warranties are limited to the extent necessary (i.e. they relate to matters the seller could know and not matters in the future or outside their control); and
- the seller, their solicitor and their accountant must take the time to go through each warranty and make a disclosure, as necessary, against each warranty that is inaccurate.

It is not in the buyer's interest to have to take legal action against the seller for a breach of warranty and the buyer must give the seller time to review and disclose against the warranties. In addition, the buyer should ensure that they read and understand all of the disclosures and seek further clarification as necessary.

The warranties will be extensive but it is imperative that they are reviewed in detail and all relative disclosures are made. This is the area where all parties will get a good insight into how the business is run and any skeletons in the closet.

c. Tax indemnity (share purchases)

Although in the majority of transactions the seller will be asked to give tax warranties, the buyer should also require a tax indemnity. The idea behind a tax indemnity is to spilt the tax liabilities of a company at completion into those properly payable by the seller prior to completion and those properly payable by the buyer after completion. Therefore, if a liability has to be discharged by the buyer (or indeed a tax relief has to be used to meet a liability) that should have been discharged by the seller, then the buyer has a claim against the seller under the tax indemnity to be refunded.

The buyer may meet some resistance from a seller who is asked to give a tax indemnity and tax warranties, however, the buyer should always insist on both. From a seller's perspective, it is imperative to ensure that the buyer cannot claim twice for the same breach under a tax indemnity and any tax warranties.

(ii) Disclosure Letter

The disclosure letter is a letter from the seller to the buyer (or their respective legal advisers) and contains all of the disclosures against the warranties.

For example, the buyer should ask for a warranty from the seller that there are no ongoing claims against the pharmacy, then the seller should disclose this against the warranty to avoid a claim in the future. Once disclosed, the buyer will look to cover off any liability arising by seeking an indemnity from the seller or making a retention from the purchase price until the matter is resolved.

If the matter is disclosed, there is normally a workable solution to resolve the problem.

Stage 4 Completion

If the parties have decided to move straight to completion, then completion will take the form of a completion meeting (held remotely or in person). On completion the documentation will be signed and the purchase price due on the completion date will be paid.

Completion will be the effective date where the seller will relinquish control of the pharmacy and pass it to the buyer.

If the transaction is an asset purchase, this will normally proceed as an exchange of contracts and subsequent completion. In between the exchange and completion, the buyer and the seller will work with GPhC in order that their change of ownership is registered and will take effect on the same date as completion.

In the instance of a share purchase, the notifications to GPhC can (unless there are additional changes being made) be notified on completion.

Stage 5 Post-completion

After completion, there will still be a variety of matters that need to be attended to. Mostly these will relate to releasing any charges of the seller over the business, or the buyer making filings, for example: -

- Filing documentation at Companies House regarding a change of directors (in a share purchase), issuing shares or, if the purchase was supported by finance, filing the relevant charge details at Companies House and, if appropriate, the Land Registry.

Gary McGonagle
Howman Solicitors
Tel: 0207 629 1801
Email: gmg@howmansolicitors.co.uk
Website: www.howmansolicitors.co.uk