

Independent Community Pharmacist Magazine

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Pharmacy and the Law

Purchasing a pharmacy: key points

Richard Hough, a practitioner in pharmacy law, highlights some of the considerations which a purchaser should address when making the decision to buy a pharmacy



Buying a pharmacy is one of the most significant business decisions a pharmacist will undertake. At the outset, it is important that all pre-contract negotiations between the purchaser and the seller are undertaken "subject to contract", which should be added to all written documents to ensure that the purchaser is not unintentionally bound prior to the agreement of final documentation.

It is sensible for the parties (or preferably, for the reasons stated below, their solicitors) to draw up the Heads of Terms, a document which sets out the main agreed terms of the purchase but which is generally not intended to be legally binding. Please note, however, that, if the essential elements of a contract are present, the parties may end up being unintentionally bound by its terms.

The purchaser is often required to pay a preliminary deposit to the seller's solicitor. The basis upon which it will be held should be established by the purchaser. The purchaser should, for example, ensure that it is refundable if the "due diligence" it undertakes reveals any significant misrepresentations or if the seller withdraws from the sale.

Finance

Finance is usually obtained through either pharmaceutical wholesalers or high street banks. In choosing the former, the purchaser's discretion to purchase stock from a variety of suppliers will be fettered as the wholesaler will insist on certain levels of stock purchases being made from it. A bank usually requires either a debenture over the purchasing company's assets (if appropriate) or a first legal charge over the business premises (subject to landlord's consent) supported by a personal guarantee and possibly a second charge over the purchaser's home.

Due diligence is a vital pre-acquisition exercise in which the purchaser checks the "health" of the business, its operation and the accuracy of any representations made by the seller. Additionally, inquiries should be made of the local primary care trust, doctors' surgeries,

residential and nursing homes and whether any third party minor relocations or new NHS contract applications are pending, all of which may adversely affect the profitability of the business. The purchaser should obtain the last three years' FP34s (Prescription Pricing Division statements) to quantify accurately historic prescription sales as well as current management accounts, which will reveal any recent business deterioration.

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When a pharmacy owning company ("target") is for sale, the purchaser can either acquire the target's shares or all or some of its assets, which will include the premises (freehold or leasehold), NHS contract, goodwill, staff and stock in trade.

The advantages and disadvantages of both methods, including tax implications, should be discussed in advance with a solicitor and accountant. A share purchase usually maintains continuity of business ownership and third party approvals are not normally required. However, the purchaser inherits the seller's pre-acquisition liabilities.

An asset purchase allows the purchaser to "cherry pick" required assets and avoid acquiring unwanted liabilities, but third party consents are often required prior to (and sometimes after) transfer. Tax issues facing the

seller will often dictate whether a share or asset purchase is preferred.

The purchaser's solicitor should investigate the seller's title to the property to ensure that it is free from mortgages or restrictions and can be used as a pharmacy. Inquiries should also be made of various local authorities and utility companies to ensure that the premises are directly accessible from the public highway, are served by all the necessary utilities and have necessary planning consent.

The purchaser's solicitor will raise preliminary enquiries of the seller's solicitor to obtain general information about the premises, which should comply with the Disability Discrimination Act 1995 and the Control of Asbestos Regulations.

If a lease is granted to the purchaser, the incoming tenant should consider the following:

- that the provisions of the Landlord & Tenant Act 1954 for the tenant's right to renew the lease on similar terms have not been excluded; potential for large dilapidations/reinstatement costs should also be considered
- that the rent payable is often reviewed every 3-5 years and is usually upwards only in line with the Retail Prices Index; it is difficult to predict a realistic commercial rent value so far in advance, so careful thought must be given to rent review provisions and whether break clauses are required
- that the lease does not allow the landlord to establish any competing pharmacies within neighbouring property under its control, although in some cases such clauses may be deemed anti-competitive
- whether the lease contains an option for the tenant to purchase the freehold
- that consulting rooms can provide an additional source of income if sub-let to other healthcare professionals; if the lease is silent on this issue, it will be at the landlord's discretion if such shared occupation is to be allowed
- that length of remaining lease term is important, as a funder may not support a purchase where security of tenure is limited.

If the business does not have an existing NHS contract, an application for preliminary or full consent should be made to the PCT and completion must be made conditional upon the PCT granting the application.

Application

If the premises are already included in the PCT's pharmaceutical list, and it is an asset purchase, the purchaser will need to file an application with the PCT for a change of ownership, which needs to be done well in advance of completion. Completion should be made conditional upon the PCT registering the change of ownership.

The Transfer of Undertakings (Protection of

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LIVERPOOL

Horton House, Exchange Flags, Liverpool L2 3YL
0151 600 3000

MANCHESTER

55 King Street, Manchester M2 4LQ
0161 836 8800

PRESTON

7-8 Chapel Street, Preston PR1 8AN
01772 823921

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Employment) Regulations 2006 ("TUPE") provides that, on an asset purchase, the contracts of employment of all employees of the business will transfer to the purchaser under their pre-acquisition terms and conditions. TUPE applies to all those employed in the business, including part-time workers, employed family members and (potentially) long-term locums.

If an employee can show they have been dismissed for reasons connected with the transfer of the pharmacy, the dismissal is deemed automatically unfair, and the liability will pass to the purchaser. Warranty/indemnity cover should be sought in such circumstances.

Goodwill is a combination of a business's profitability, reputation, location, market share and a value for operating the NHS contract. The transfer of the goodwill normally confers on the purchaser the right to carry on the seller's business together with the exclusive right to use its trading name.

However, in the absence of an express covenant against competition, the seller is free to set up a competing business and solicit former customers. Therefore, it is vital that the sale agreement contains restrictive covenants preventing the seller from competing with the business within a certain radius of the purchased pharmacy and for a specified period.

Rights

The principle of caveat emptor (purchaser beware) applies in English law and warranties and indemnities give a purchaser contractual rights to bring claims against the seller for misrepresentations of the business. However, warranties and indemnities are not a substitute for undertaking thorough due diligence. Where appropriate, the purchaser may wish to insist that a proportion of the purchase price is withheld to meet any such claims within a defined period.

And finally:

- Ensure that VAT registration is established prior to completion
- New ownership and new premises must be registered pre-completion with General Pharmaceutical Council.
- New owners should register with the Data Protection Information Commissioner.

This article is provided to give an overview of common problems encountered during a pharmacy acquisition and is not a substitute for obtaining detailed legal advice.

Richard Hough is a solicitor and pharmacist in the commercial and intellectual property team at Brabners Chaffe Street LLP, Solicitors, and is based in their Liverpool office (richard.hough@brabnerscs.com; tel 01 51 600 3302)

LIVERPOOL

Horton House, Exchange Flags, Liverpool L2 3YL
0151 600 3000

MANCHESTER

55 King Street, Manchester M2 4LQ
0161 836 8800

PRESTON

7-8 Chapel Street, Preston PR1 8AN
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