Incorporating incorporation into your practice

You too could become the next Gordon Gecko, says James Shedlow, if you consider converting your dental practice into a limited company

In recent years, the concept of ‘incorporation’ has enjoyed a meteoric rise in its profile within dental circles to the point that it is now a de rigueur consideration for any modern-day practitioner.

Its innovative application and accompanying advantages against the traditional sole practitioner/partnership backdrop have gained the concept considerable support in some corners as a modern alternative, and solicitors are receiving increasing numbers of instructions from dental practitioners in this regard.

In such a climate, this article is aimed at the dental practitioner flirting with the idea of trading his whites for the kind of braces favoured by Gordon Gecko, Wall Street’s infamous anti-hero, and sets out some of the issues that such a practitioner might expect to encounter both during and following incorporation.

The Pros:

Sale of the practice

Besides the fact that there may be significant tax advantages associated with incorporating a dental practice, incorporation can also be extremely helpful when the practice is sold. Unfortunately, these types of contract tend to be populated with endless tax warranties, necessitating far greater input from your accountant than would be the case if the individual assets of the practice were being sold.

Furthermore, it should be noted that the NHS rules in England and Wales do not include a right to assign or transfer either an NHS General Dental Services (GDS) contract or a Personal Dental Services (PDS) agreement. It is possible to transfer an NHS contract held in the name of a limited company because when the shares of the company are sold the contract held should simply transfer to the new owners as part of the assets of the company. In such a scenario no change of contract from the perspective of the primary care trust (PCT), and the company remains the legal holder of the contract.

In the event of death

Incorporation may serve to protect a dental practitioner’s NHS contract and the value of the goodwill in their business, in the event of the death of the particular dental practitioner concerned.

An NHS contract held in the name of such an individual will terminate seven days from the date of that individual’s death, unless the PCT receives written confirmation from the deceased’s personal representatives that they are looking to sell the practice and that there are adequate arrangements in place to ensure the performance of dental services under the contract in the meantime. In such circumstances, the regulations provide for the contract to continue for three months with provision for extension by a further six months.

While this might potentially allow nine months to arrange the sale of the practice, ultimately there is no obligation on the PCT to transfer the NHS contract to a prospective buyer. Furthermore, there is no guarantee that the sale of the practice will be concluded within this nine-month window.

Incorporation can help in this scenario on the basis that the NHS contract would continue to be held by the company despite the death of an individual director of the company.

However, please be aware that the PCT can terminate an NHS contract held by a company where the majority of the directors cease to be dentists or dental care professionals (DCPs) registered with the General Dental Council (GDC). To ensure that the contract would continue in the event of such a death, it would be necessary to make sure that there were sufficient dentists or registered DCPs on the board of the company to maintain such a majority.

Facilitating investment

There is no requirement for the shareholders of the limited company to be dentists or DCPs, or for the shareholders and directors of such a company to be the same people.

Accordingly, this facilitates financial investment in the practice by non-dentist family members or third party investors who, in return, would acquire a...
shareholding within the relevant limited company.

However, such a transfer of any substantial shareholding in the limited company, and potentially result in disputes arising in the long term in connection with the direction and management of the limited company.

The Cons:

Issues of NHS contracting
If you hold an NHS contract as a sole practitioner or partnership and want to incorporate, please be aware that there is no right obliging the NHS to contract with the incorporated practice. Accordingly, it would be necessary to have the PCT’s agreement in advance that they would be willing to issue a new contract in the name of the limited company.

It is fundamentally important that a new contract is issued to the limited company and signed by both parties before trading commences, as failure to do so could result in tax and accounting confusion as well as issues relating to the validity of NHS claims.

Issues arising upon a change of control
In the event that an NHS contract is issued to the limited company set up, whilst the standard GDS and PDS terms permit the sale of a company and therefore the effective transfer of an NHS contract held by the company, many PCTs now require 'change of control' clauses to be inserted into GDS contracts or PDS agreements granted to limited companies. Such clauses can potentially prevent the transfer of the NHS contract.

The drafting of such clauses varies depending on the PCT involved. Some clauses provide for the contract to automatically terminate if there is a change in the ownership of the company, whilst others require the PCT to give prior consent to a change of control. This is clearly problematic and such clauses would need to be negotiated with great care with the PCT.

An informed choice
In conclusion, it is clear that the concept of incorporation offers a number of advantages and will be of particular interest to practitioners in certain circumstances, but that at the same time there are clearly a number of pitfalls that need to be carefully considered before the decision is made.

Any practitioner considering incorporation should seek legal and accountancy advice before taking any steps forward and, in the context of the acquisition/disposal of a practice, advise its legal representatives at the first opportunity of any intention to incorporate as this could have important ramifications in terms of concluding the transaction in a manner that fulfils the intentions of the respective parties.

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