

Open for business

Jonathan Silverman offers a foolproof guide to fixing up a franchise

When it comes to advising a business with the potential to grow by becoming a franchisor, there are a number of issues which lawyers must remember. Acting to help maximise the returns and minimise the pitfalls should cushion the client and – if things go well – may earn you a more lucrative repeat customer.

Assess the benefits

A good lawyer with appropriate commercial skills should actively engage with the client to identify the business' unique elements which could make it stand out. Evaluation of which of these aspects are appropriately protectable to a greater or lesser extent and how that will impact on any franchising programme should also be offered.

Analyse the existing business to try to define what has been successful to date, stressing to the client that it is hopeless to simply contemplate a franchise model in an attempt to support a failing business or as a way of raising money. There has to be an ability for the client to demonstrate to any prospective franchisee that it is truly worth their while to commit long term. Showing it will be governed by a well-drafted franchise agreement with all the related costs and commitments included will make it more attractive.

In the case of the newly emerging franchise chain, if the franchisor has started to build on strong business foundations he should be able to demonstrate that there is a brand and defined business methods and systems – all of which will be of real benefit to someone who may not yet have developed a full set of business skills themselves.

Pitch the product

Branding is a particular area where the lawyer has a key part to play in ensuring that the client obtains appropriate trademark protection both in the UK and perhaps overseas jurisdictions at a very early stage in the business development. This can be a critical factor as to whether or not the business will be successfully franchiseable.

Certainly clients in the e-commerce sector place great emphasis upon obtaining key domain names, yet without trademark



protection their position is far less secure.

Whereas it may simply be foolhardy to start a business using a name which has not been properly protected, it is potentially fatal to try and exploit a brand without ensuring appropriate protection because without this in place the brand will never be secure and protectable and the commercial value will be seriously compromised.

The essence of the franchise is that there are several protectable elements within the business which, when put together, produce a suite of rights of commercial value capable of being licensed in return for a capital payment and regular stream of royalties based on turnover.

Make it watertight

The lawyer's role is to ensure that from the outset the client builds a sound business model capable of being franchised and that he advises on the necessary ways to obtain protection which are likely to include trademark registration, well-drafted contracts of employment, non-disclosure agreements and properly worded marketing documents offering the franchise opportunity.

There is a need when acting for any over-enthusiastic, sales-orientated business person to ensure that they do not offer a franchisee anything which they cannot properly

deliver or make any promises as to the profitability of the performance of the franchise which could lead to a claim for misrepresentation or, worse, fraud.

Consequently, the lawyer needs to ensure that his client does not make overambitious sales forecasts or promise quick returns to any prospective franchisee; no amount of disclaimers within the franchise agreement will be of help if an aggrieved franchisee can point to over zealous sales literature produced to them ahead of the deal being completed.

It is worth considering with the client the prospect of first setting up a captive franchise as a means of beginning to understand how the model will work and what the requirements will be from a franchisee.

Whether that is done by using one's own staff operating from an existing outlet, or by first trying out the venture as a soft launch, will depend upon the circumstances. Much can be learned which will save the client considerable anguish later on.

Paperwork

While lawyers are used to reducing everything onto paper, clients running businesses are less keen so to do. But, if a business is to be successfully franchised and if proper controls are to be kept, it is important to assist the client with documenting the complete business process which they are offering to their franchisees, setting out their business methodology, sales scripts, management documentation and also the design for stationery and web presence.

Protect your clients IPR whether by trademark, copyright or patent service to give a strong platform from which to grant a licence – not forgetting that business methods can sometimes also be protectable.

If the lawyer engages with the client from the offset there is every likelihood that he will be retained throughout the process of rolling out the franchise programme and assisting in the enforcement of the franchisor's rights over a long period of time – helping to transform what at one stage was a small business into a very nice repeat client!

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