THE 10 GREATEST LEGAL MISTAKES IN BUSINESS

...and how to avoid them

PAUL BRENNAN

author of *The Law is an Ass*
- make sure it doesn't bite yours!

"Good common sense advice on how to avoid costly mistakes."
– Bob Ansett

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The Ten Greatest Legal Mistakes in Business – and how to avoid them

"If you laid all of our laws end to end, there would be no end."
- **Mark Twain**

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INTRODUCTION

Mistakes?
There have been a few

"If I had but one life to give for my country it would be a lawyer's."
- Anon

The message of this e-book is if you are in a legal hole stop digging. It lists the 10 top business mistakes in the first chapter and then there are nine other chapters giving tip after tip on how to negotiate tricky legal areas.

Much of the advice has been learnt by seasoned business people through grim experience. It does not have to be like this if you read this e-book.

Each chapter is witty, easy to read and packed with useful legal information.

Paul Brennan is a practising lawyer and the legal columnist with MyBusiness magazine, the leading magazine for SMEs in Australia.

CHAPTER 1

The 10 most expensive legal mistakes

"If you are in a legal hole stop digging."
- Paul Brennan

The worst thing about committing a legal mistake is that everyone seems to find it obvious after the event especially your wife/partner.

If business owners started to create new, exciting, unique legal mistakes then it would be a real challenge for us lawyers-fortunately for us they do not. This means that your lawyer has probably seen the legal mistake before and has a good idea what to do. Although it may not seem that way to you.

Many small business legal services can be divided into "deals" where lawyers prepare documents to anticipate and avoid future problems or "disputes" where things did not get documented at the start and the parties come out swinging. Usually deals are cheaper than disputes.

Experienced business owners are adept at working out when to document and when to wing it.

Mistake no. 1 You unexpectedly die and your business stops dead too. This can be very inconvenient.

Avoid this by having a will including a business clause allowing the trustee to run your business. Add a big life insurance payout and your place on the mantelpiece will be guaranteed. This is called Succession Planning.

For extra points have an enduring power of attorney so that another can sign documents if you are in a coma. The sickeningly organised business will have an extra person appointed to sign documents e.g. the company has granted a power of attorney or at least a minute conferring that right.

Mistake no. 2. Your business is sued and you lose your home.

A tricky one this and is best combined with Mistake no. 1. A lawsuit can result in bankruptcy for the loser. Is your home in another's name (e.g. your wife's) or is your business a "limited" company? If not, then your entire family life is at risk. This is called "Asset Protection".

Mistake no. 3. You take court action against your lawyer's advice.

Lawyers spend a lot of time talking their clients out of taking legal proceedings. From a sales point of view I am not quite sure why we do this.

If the credits rolled when you issued the writ all would be well. However litigation is for tough people with money. Litigation is not a deal. However against some unscrupulous people it is unavoidable.

Mistake no. 4. You do not have a shareholder/partnership agreement.

Often these are difficult to negotiate and seem an unnecessary expense. But become a good idea usually in hindsight as they can make any split quick, cheap and less acrimonious.

Mistake no. 5. You do not have terms and conditions.

In the land of the blind the one eyed man is King. If you make the rules of any relationship you should be in a better position if there is a dispute. If you do not impose your terms and conditions on any business relationship then at best there will be uncertainty and at worst you will be subject to someone else's unfavourable terms.

Mistake no. 6. You keep changing lawyers.

Either you have been very unlucky or you need to re-evaluate your lawyer management skills. Constant change is disruptive and you miss out on the benefits of a trusted relationship. This does not apply to anyone who may want to change to my firm.

Mistake no. 7. You fail to identify and protect your intellectual property.

What are your trade secrets? Don't answer that! If it is a really good idea and not nailed down someone will steal it. Do you have trade marks, use copyright notices, get assignments of valuable designs, logos and important materials? Use licences when you allow other people to use your name, services, products or ideas as part of their business. You can lose rights by allowing easy use. Or others can say that they thought they could use it too ("implied" consent).

Mistake no. 8. You do not have written contracts with your employees.

Employees can not only take your paper clips but your trade secrets, client lists, best ideas and deliver them to your competitor. The general law protects your trade secrets to an extent. However a contract can supplement this protection with conditions relating to confidentiality, limits on new employment to be outside a certain radius from your office and not to solicit your customers.

Mistake no. 9. You do not read the small print of important contracts.

If it is an important contract read the small print. Don't just leave it to your lawyer. If you sign a contract you are stuck with it.

Mistake no. 10. You fail to protect your business/product names.

You may have a domain name and a registered business name but only a trade mark confers ownership of a name. Don't allow a competitor the opportunity of applying for a trade mark of your business name or products. Protect yourself by registering trade marks.

I doubt if any business owner has been able to dodge all 10 legal mistakes. If you are a small business owner and can avoid doing more than 5 on any one day then you are a winner (unless of course you are looking for a Guinness Book of Records entry then go for it).

CHAPTER 2

Taking the pain out of partnership disputes

"When does a gift become a loan? When the relationship ends."
- Judge Judy

Your business partner is not pulling his or her weight. Unless you can lower your expectations there will come a time when you decide to go it alone. You go to the lawyer who has been acting for the partnership to whinge about the other partner. However, he tells you that he has a conflict of interest and he cannot act for you.

You choose another lawyer. He will be tempted to lecture you on the imprudence of entering into business without a partnership agreement. If this takes any more than half an hour then you may not have made the right choice. Of course you don't have a partnership agreement! Who does the lawyer think you are, BHP?

If you do not have a partnership agreement then the law generally lays down about ten ground rules:

• Partners must make financial contributions equally;

• Partners are equally responsible for the debts of the partnership;

• Partners may need to pay up the whole debt, not just half, and then seek reimbursement from the other partner;

• There is no salary for acting in the partnership business, regardless of how much more you have worked than your partner;

• All property bought by the partnership is partnership property;

• Partners must be truthful and tell each other everything about the partnership business (tough, I know);

• Partners must account for any benefit received using partnership property or concerning the partnership;

• Persons dealing with the partnership can assume it still exits until given notice that it has been terminated;

• Partners can do everything necessary to wind up the partnership. If they do not complete existing contracts they could be sued; and

• Partners are entitled to have partnership property applied in payment of the debts and then applied to what is due to each of them.

The lawyer will advise you that it is in your business interests to have an amicable split. You know this too but you feel bitter and find it hard to put the relationship down to experience and walk away. You have only been together for a year or two and, although the potential is great, in reality the partnership is not worth anything.

Here is a seven-point checklist of the predictable disputes between partners who do not have a partnership agreement:

• The business name and domain name registrations belonging to the partnership could go to the highest bidder of the two of you. Note that these registrations do not mean that you own the name as only a trade mark confers ownership. Therefore, they have limited value. You could agree not to use the registrations, but this is a waste, isn't it?

• Preparing final accounts. Should this not be done by an independent accountant so it is all above board? Well yes, if you both don't mind paying more for an accountant who is unfamiliar with the business, charging more and taking longer.

• Competition. You could agree to split the client list and look after your own clients. But what fun is that? Outright war may be inevitable, especially if you are the stronger partner.

• It may be satisfying to threaten to sue your ex-partner. You may see this as one of the benefits of not having a partnership agreement. Often partnership agreements provide that no court action can be commenced without an attempt at mediation. Alternatively it can provide for arbitration which lacks the drama of threatening to slap a writ on your ex-partner.

• Who paid for what? If accounts have been kept it is usually too easy to work out who paid for what and especially if there is not much money in the kitty this argument usually runs out of steam.

• Another fruitful point of argument if you have not got any real money is IP rights. These can be in documents, logos and ways the partnership did things.

• The debts owing to the partnership need to be collected. This can be an exercise in one partner chasing debts from friends of the other partner.

Many of the predictable disputes can be anticipated by a partnership agreement at the outset as it will provide for a mechanism in the event of a breakup. To fight over the carcass of the business

normally involves legal costs. Therefore only fight if it benefits you (not just to wind-up your partner). Ask yourself 'What's in it for me?'. If the answer is 'nothing much', opt to shake hands and move on.

Chapter 3

Avoiding disaster when buying a business

"Failure is more interesting than success,
however, there is not much money in it."
- Paul Brennan

Long ago judges got sick of people saying that they did not know what they were signing and generally if you sign a contract then you are stuck with it. Consumers get some leeway but generally not business people.

Nowadays lawyers put essential information like price in easy-to-read schedules. Many put red stickers on contracts so that clients know exactly where to sign. This makes it easier for people buying businesses to have a quick look at the schedules, sign up and rely on the contract being fairly reasonable.

As a buyer of a business what do you need to look for?

Well, first of all expect the Seller to be in poor heath (like ageing South American dictators facing a show trial, many desperate sellers seem to develop these and then cheerfully live on to 90).

The Seller will not want you to have a due diligence condition? This acts like a cooling off period for say 14 days. It allows time for your accountant to get a better and closer look at the business. It also gives time for you to reflect on the deal.

Here are 6 other conditions that need to be considered carefully by a Buyer:

1. **Hand over**

On completion the Seller will want to receive the money, hand over the keys and walk away. A handover condition would list the various other documents and evidence of ownership that you may need if he is to finance, operate and eventually sell the business. Hopefully you will be able to piece these items together later on, however at that stage it will not be your client's problem as he will be long gone.

2. **Warranties**

These are promises made by the Seller to say that the business is alright. There can be quite a few for instance the business has no issues with the authorities. The Seller promises that he does not know of certain other issues that affect the business. By giving these promises the seller risks being sued by you if the business does not live up to his promises.

3. **Restrictions on the Seller's Right to Trade**

This limits the Seller's right to carry on a similar business in a certain area, for a certain period of time after the sale. This is a difficult condition as the limitation should not be too wide or a court may throw it out. However if you get it right the Seller will not be able to carry on a competing business for some time. If this is not specified in the contract the Seller can set up next door. Of course the Seller would not dream of coming back. But in the event of a miraculous recovery it gives the Seller this option.

4. **Finance**

This allows you to get out of the contract after say 14 days if no finance can be found but it can be used by some as a way of getting out of the contract generally. The Seller will want you to find finance however without this clause and a contractual deadline looming you will be even more motivated to ensure that you come up with the money.

5. **Deposit**

The standard deposit is often 10%. It is usually kept by a stakeholder. However it is increasingly common for sellers to accept less than 10%. This can cause problems if the deal falls through. If there is a low deposit it gives the Seller very low leverage if a problem should occur.

Having the deposit kept by a stakeholder on trust can be inconvenient for the Seller. If the deal falls through the stakeholder will usually insist on a court order or the consent of both parties before releasing the deposit. It would be far easier for the seller if the deposit was released to him straight away.

6. **Plant and equipment**

Unless it is listed in the contract you can never be sure that what you think is being sold is actually being sold to you. Anything not nailed down may disappear on settlement unless it is listed in the contract. Equally you may be left with some large items of machinery that the Seller does not want. Some items which appear to be business assets may not in fact belong to the Seller such as rights in intellectual property.

Buyers usually require and Sellers normally accept these conditions. If they are not included in the contract it does not mean that you cannot ask for such concessions later on. However it would allow the Seller the advantage of being able to refuse.

Buyers should not expect a contract to be "fairly reasonable". In my experience if you do not check the contract before you sign, then it is the condition that you desperately needed which is missing. We lawyers call this 'sod's law'.

Chapter 4

Restraint of trade watchouts

"I never met a litigator who did not think that he was winning the case right up to the moment when the guillotine came down."
- William Baxter

Anyone who has watched Fatal Attraction especially the final scene will know how hard it is to get rid of some people. Many people who buy businesses find the sellers to be helpful people. They transfer the business and then fade away. Other purchasers find that the vendor is a ratbag who will not go away and keeps popping up again and again in their lives.

At first you will be pleased that the vendor has not died of the life threatening illness and/or has overcome the family crisis which was his declared reason for selling. You will appreciate his advice and continued support with your customers and referrers but there comes a time when he must go.

"But he sold the shop, he can't come back, the contract says so" I hear you say. Well yes, there is usually a "restraint of trade" clause. But these clauses need to be approached with caution and where they are unreasonable they will not be allowed.

"But people wouldn't buy businesses if owners did not get lost". Well yes, however judges don't exactly see it this way. They say, as a starting point, that restraint of trade is contrary to public policy and basically get all funny about it.

Judges want the restriction to stop the vendor from trading in circumstances which would unreasonably detract from the goodwill sold but not further. If you ask for too much they can throw the clause out.

Here is the type of test that a Judge may apply:

1. What activity needs to be protected?
2. Does the restraint protect it?
3. Did the restraint go further than needed?

Academically this works a treat but in practice it is difficult to apply with any certainty.

So here is an example. You bought a Brazilian Wax Business and one year later the owner sets up down the road. You tell him he cannot do that and he replies that restraint of trade clauses are against public policy.

You sue. You find yourself in court within a few days asking for an injunction to close him down. This hearing is an important but preliminary skirmish and a full trial of the issues will take place a year or so down the track. Injunction proceedings are quick but expensive.

The Judge will examine the restraint of trade clause in the contract. It is likely to have three elements:

1. Distance - say a radius of 50 kilometres.
   Once you have explained to the Judge what a Brazilian Wax business does he would probably accept that there should be some geographical distance between shops due to the crying and shouting. However 50 kilometres? You would need to emphasise the intimate nature of the business. It is not just a "drop 'em, rip and tear" operation but requires a degree of intimacy. The judge might liken it to his hairdresser or his tailor. Examples of other clients who are prepared to travel that distance to be tortured would be useful. But maybe 50 km is too far, especially if the shop is in a built up area.

2. Duration - say five years. If the Vendor was to return to the area and start up a competing business within 5 years would this damage the business that he sold to you? I would say yes unless he had developed cold hands.

3. Type of business. Brazilian wax is a very small area of business to restrain. Say the contract restrained "waxing" rather than just "Brazilian Waxing". It is difficult to know if the judge would allow you to expand the restriction to legs, backs and chests or top lips. He would want to protect the goodwill sold to you. Finger nails may be out of the question.

In practical terms the judge would take into account that you had paid good money and would hopefully stop the vendor carrying on a Brazilian Wax business and maybe a waxing business.

Here are five tips:

1. Think carefully about the terms of the restraint clause. There can be all sorts of restraints: business activities, assisting competition, acting for clients, soliciting past or existing clients and disclosing confidential information.
2. For those "back of a cigarette packet" business purchasers. Make sure you have a restraint of trade clause and get a lawyer to draft it. Mistakes such as not putting in a duration or geographical area can be fatal.
3. Don't ask for the world; try to limit your request for restraint of trade to what you need.
4. If the business is in a highly populated area insist on a much narrower geographical restriction.
5. Take a careful look at the vendor and ask: Is this person likely to break their word? Are they young? Is their story plausible? Do they seem lazy or simply worn out?

So are judges just out of touch? No, they usually work hard to get the right answer. In one case a judge adjourned a trial while he took a ride on a bus - his first. If the judge in your case decides to have a "Brazilian", my advice is - sell tickets.

CHAPTER 5

A tactical approach to negotiating leases

"Lawyers are like nuclear weapons. I have them because everyone else has."
- Lawrence Garfield

One of the first bail applications that I made was for a murderer. In retrospect it was not difficult as however good my argument may have been the magistrate was not going to grant bail.

HAPPY BIRTHDAY AT THE MAGISTRATES COURT

Your property lease negotiations do require tactics. They are a minefield for the unwary and can make your stay in a property miserable. They contain delayed action mines that can go off six months, one year or three years later, usually when your business is facing its darkest hour.

The lease document only ever becomes important if there is a dispute between the Lessor (the landlord) and the Lessee (you). Unfortunately there is plenty to argue about and to send you rushing to find a copy of your lease.

Lease Rule One – there is no such thing as a standard lease.

There is, however, a fairly standard procedure:

Stage 1: You negotiate and agree a lease with an estate agent.

Stage 2: The Lessor's lawyer will provide a lengthy document –

sometimes 30 pages or more – which invariably contains clauses that were not discussed.

The Lessor's lawyer will insist that no amendments be made to the lease document. You will feel pretty committed by this stage and therefore in a weak negotiating position.

If you have not taken care in negotiating the lease, you will find that the Lessor has you 'over a barrel'. The secret is to know what to ask for when negotiating a lease with the estate agent in Stage 1. So that in Stage 2 the discretion of the Lessor's lawyer to put nasty clauses in the lease is limited.

Here are seven tips:

1. Rental term

If your business doesn't succeed and you want to get out of the lease or if it does succeed and you need more or better space, you are still committed to the full term of the lease. Make sure that you can transfer the lease to someone else.

2. Subletting

You may want to cover part of the rent by taking in tenants. If you don't specify this, the lease may exclude your right to do so.

3. Rent

Most people concentrate on getting a good deal with their rent. However the rent will increase each year, sometimes staggeringly so.
Apart from a fixed percentage increase, there are two types of rent review – the Consumer Price Index (CPI), which keeps up with inflation; and the market review, which brings the rent into line with other rental values. This can be a killer, because it means that even if your rent is particularly reasonable in the first year, a subsequent market review would destroy the benefit. A CPI review may take place every year but try to limit market reviews to, say, every three years.

4. Guarantees

If you are taking the lease in the name of your company, they will want personal guarantees, usually by the directors of the company. This is a good reason for not having your spouse involved in the company, especially if he or she is not playing an active role.

5. Deposit

This is usually three month's rent and is kept by the Lessor without interest. Offer a bank guarantee instead. This simply involves the bank guaranteeing the amount without you actually having to pay out the cash.

6. Repairs

You would probably expect the Lessor to be responsible for repairs but that is not always the case. Check it out.

7. Put the lease offer in writing

The estate agent should do this for you. If not, set out the agreement you think you have made using the above headings. Mark any correspondence, 'Subject to lease".

Got those tips? Well, here are 6 further points to note (I didn't say this was going to be easy):

- Instruct a lawyer. I know that you think they are a miserable, costly bunch but they love reviewing leases – sad, I know. Your lawyer can coach you to achieve a successful negotiation.

- Read it. You may sign credit card applications and bank approval letters without reading a word but a lease you must read.

- Insurance. A lease usually requires you to take out insurance. Don't try to understand the insurance clauses - they may be in three different places in the lease. Just photocopy the relevant pages and send them to your insurance broker.

- Outgoings. Some leases have complicated outgoings provisions. Make sure that the real estate agent has given you details of the outgoings in writing.

- Demolition/renovation clauses. To my mind, this usually spells trouble. If the Lessor is renovating the premises or plans to knock them down, forget it and find something else. You may find yourself surrounded with dust and building works and with a Lessor who still expects you to pay rent.

- Use of premises. The lease will limit your use of the premises to certain activities. Make sure it covers your needs.

Getting a lease is one thing, living with it is another. It's a bit like playing leapfrog with a unicorn. You've got to keep on your toes as mistakes can be costly. Beware.

Chapter 6

What's in a name? Trade marks and the law

"I decided that the law was the direct opposite of sex
- even when it was good it was still lousy."
- Mortimer Zuckerman

Just as in horror movies when the hero decides to enter the spooky room at end of the hall there are plenty of people advising against "Do it Yourself" ("DIY") trade marks. In fact there is a whole industry of lawyers and trade mark agents advising against it.

The fun of trade marks is that they stop your competitors copying the unique way you do something. In the case of Coca Cola this is quite understandable. In the case of the New Zealand ice cream seller who by registering a musical trade mark stopped their competitors playing Green Sleeves, it is a service to humanity. Who could not support Harley Davidson wishing to trade mark the Harley Davidson engine rumble? This could keep so many of those ageing imitators off our streets?

When someone is considering whether or not to instruct a lawyer to register a trade mark on their behalf they will probably take note of the government website which is so invitingly user friendly (always a dangerous sign). It offers a procedure which is a simple three step program:

Step 1. Complete a simple application form to the trade marks office and pay a fee.

Step 2. An examiner:

a) searches to find out if there is another mark which is deceptively similar being used for similar products and services.
b) decides if your mark is capable of distinguishing your goods or services.

Step 3. The mark is advertised and if there is no opposition then it is registered three months later. Generally it's yours forever provided that you pay the registration fee every few years and continue to use it.

It is hardly surprising that this approach has attracted (a little like accountancy) a lot of strange people. There are all sorts of applications, for instance:

- the bark of a dog - clearly for the dog who has everything, or
- the smell of beer on dart feathers - proving so very popular with nuns.

In this climate, what "red blooded" business owner would not wish to apply for a trade a mark to protect their point of difference. Even smells can be the subject of a trade mark. So there is something for everybody.

So why not apply for a trade mark on a DIY basis?

Well, here are three points about the application process:

1. Expect your examiner to be a person who would like to give you the trade mark ("the Mark") but for reasons which are a little difficult to follow cannot do so. It is often more than their job is worth to allow you a monopoly over a word. For instance, if they gave you the mark "Money Grabbing" for use in the banking industry, what would all the other bankers do?

2. Examiners may reject your application outright or turn the knife by raising an arcane, impossibly difficult requisition (question). You will find yourself warming to their talk of "not distinctive enough", "capable of distinguishing" and "no direct reference to the character and quality" only to realise later that you don't know what they are on about. It might be more helpful to look upon the trade mark fraternity as a secret society with the examiners as Worshipful Masters.

3. The last 100 meter lap of the process is the 3-month advertising period. This can cause people using similar names to come out of the woodwork, encouraged by lawyers who scan the advertisements to locate potential opponents. You may end up with a fight on your hands.

Here are just three of the potential issues you may face once you have registered the Mark:

1. You have registered the mark in the wrong class or missed a class that covers a particular (usually profitable) activity. There are 45 classes being lists of words describing goods and services. It is a little bit like reading a huge packing list.
2. Trade marks usually apply to one country so if you have not registered it in other countries it may be too late as someone else has registered the mark.
3. You don't use the Mark properly for say 3 years and it is taken off you. A competitor will often helpfully start this procedure.

The way to avoid these problems is to get legal advice before you apply. You will be advised to have a pre-application search - do it. This will save you from applying for a mark which has no chance of success as it is so similar to a mark being used by another. Once you explain your business plans you will be told in which classes to register. You can discuss in which countries to register and how.

There are business people who manage to register DIY trade marks, run their businesses unsuccessfully and no one ever tries to steal their mark. However if a name is central to your business and it draws customers, then DIY trade marks are not ideal.

Unless you have time to dedicate to the craft, it may be better to instruct your lawyer to make the application. But don't let me put you off.

Chapter 7

Protecting your business secrets

"If you first don't succeed quit there is no point in being a damn fool about it."
- W.C. Fields

If you are a paranoid uncommunicative boss who can't delegate, you may not have much of a business and your employees probably don't like you - but you get full marks in the confidentiality stakes.

Despite the proliferation of electronic listening devices which could make spying on your competitors so much more fun, it is likely that your confidential business information will be taken by your employees.

....AND THE ACCOUNTANT PRINCE WAS LOVED BY THE PEOPLE FOR HIS KIND AND GENEROUS DEEDS

To protect themselves, employers can put a confidentiality clause in employment agreements. Those employers who have not quite got round to confidentiality clauses will be relieved to know that the Law of Confidentiality imposes on employees an unwritten implied duty to keep things secret. Not only whilst employed but after leaving employment. One of the most cost effective methods of protection is to ensure that your employees know of this implied duty.

So what is confidential information? There are generally three things a court will consider:

- Was there a quality of confidentiality about the information?

For instance, was it an essential part of the goodwill of the business - a client list or the Coca Cola formula?

- Was it given in circumstances which suggest that it was confidential?

The practice of stamping documents "confidential", is good evidence. But it can often be taken up with relish by the whole staff stamping everything "confidential" which somewhat devalues this protection. So too, a strong procedure for secure storage and handling of confidential information can be undermined by a culture of non-compliance.

- Was it used to the detriment of the giver?

For instance, are your former employees selling the same goods? Or has the information been passed to a competitor?

Not everything labelled confidential will be treated as such by the courts. So too the courts need to see some real loss not just hurt pride.

Does confidentiality apply to your consultants? Maybe a little, but you should have a consultancy agreement and confidentiality is an important part of it.

The first thing a lawyer will do when representing a person who has taken your confidential information is to say that it was not "confidential". To which your lawyer will respond "Yes it is". You can save a few $'s on this "yes it is - no it isn't" argument by having a confidentiality agreement. This will help prevent the "goal posts moving" by defining the confidential information and having an acknowledgement that it is confidential.

If the information which has been taken by a former employee is of prime importance to you, e.g. your client list or your secret formula for making fried chicken, then the Court can give you an order to enter and search the employee's home or their new employer's business premises.

How easy is it to get a search order? Well, not that easy as the judge will probably look for:

- A strong case. Often your witness is an employee or disgruntled ex-employee of the competing business which they have joined. So the evidence can be quite good except where they turn out to be a drunkard or in some other way unreliable, which happens often.
- There is serious damage to you. For instance, they are contacting your clients one by one who surprisingly seem only too pleased to leave you. But you know that if they had not been approached they could have put up with your service for years.
- There is some essential evidence on the premises which your ex employee is likely to destroy. For instance account books or computer records.

For those of you who thought law was dull, hang on to your hats because within hours or a couple of days after your first call to your lawyer you could be knocking at the door of your employee or his new employer, court order in hand, demanding your confidential information back..

By that time your entourage will have grown. There will be your lawyer. There is often another more junior lawyer (to help your lawyer), a lawyer from another firm whose task is to watch your lawyer and the junior lawyer (no, I am not joking), sometimes an accountant to look at the accounts (lawyers don't do figures - except maybe bills) and possibly an IT person to deal with the computers.

Is this caste of people a bit excessive? Well yes, especially as you are paying for it (if you lose). But if you win, you flick the bill to your ex-employee, or most of it.

You are probably thinking that you cannot wait to try this on your ex-employees, if you get the chance. Well, it can be very satisfying but there is a downside:

- The raid is just the start. You still need to go through the whole trial process unless you settle.
- You must undertake to pay for their loss of business if you have got it wrong.

A traitor leaving your employ and stealing your secrets will send you into orbit. The law offers you a fast solution but it comes at a price. Sometimes to protect your business you must pay it, sometimes not.

Chapter 8

Surviving a computer contract

"For certain people after 50 litigation takes the place of sex."
- Gore Vidal

Let's assume that you are at the stage of upgrading or renewing your business' computer system which probably means that you are also purchasing software, hardware and services. Software contracts usually include provision for consultants to continue the pecializes n of the software and fine-tune the system in the months following the purchase.

You want to go ahead and the supplier gives you a draft contract for you to review and sign. What do you do with that draft contract? You read it and give it to a lawyer who pecializes in reviewing software contracts. Only kidding — you hate lawyers. You sign it and put your copy in a draw.

Without or preferably with a solicitor there are seven points that you should be looking for in a computer contract:

The exclusion clause

Somewhere in the contract you will find the exclusion clause. This limits the liability of the supplier. Software suppliers tend to exclude liability for as much as they can. A common limitation is to cap the amount of any claim that you may make in court to be no more that the price that you paid for the software. This can leave you very much out of pocket.

1. Damages

What is the amount of damages (compensation) you will get if the contract goes wrong i.e. the supplier makes a mess of it?

• 'Direct' losses. These are losses which directly flow from the breach of contract; the price paid, cost of putting it right, any reasonably incurred emergency short-term fixes and directly lost profits.

• 'Consequential' losses. These are indirect losses which do not directly flow from the breach of contract. But there is a limit on what you can claim, damages cannot be too remote.

This is a complicated area of law and what you need to know is — don't allow the supplier to exclude direct losses but expect the supplier to exclude consequential loss.

2. Can you transfer it?

Can you let another company use the software? Can you sell your rights in it to another company? The supplier should give a licence that allows you to act as freely as your business requires in using the software.

3. Who is going to use the software?

Make sure the contract contains the correct company/employee name/s and that the licence is appropriate for the requirements of your business. A licence to use the software at one office will cost you a further payment if you open a branch office. If you put it in the name of one company but in fact another company also owned by you uses it, you can be charged extra. However it does not need to be like this if you insist upon the right type of licence for your business — there are about 12 different types.

4. Escrow agreement

What happens if the software vendor becomes insolvent, or is unable or unwilling to keep up with commitments? Then the buyer will need to get access to the software to remedy errors and keep the system up to date. This is usually achieved by an escrow agreement. Here the source code is held by a third party and released to the buyer on specified events such as insolvency or failure to support. The terms are fairly standard. Companies in the computer industry go bust, or the people behind them lose interest, with great frequency.

5. Termination

If things are going wrong then you will be reluctant to continue paying the supplier until they put things right. The contract may provide that if you do not hand over the money when due, the supplier will tell you not to use the system until the installment is paid. If you cannot use the software your business could suffer. It is best not to leave a consideration of these issues until the problem arises. The contract will deal with what happens on termination or if the matter is going badly wrong.

6. Selling your business

When a company buys your business they want to know what they are getting. This check of the business assets is called due diligence. Part of the assets to be checked is the ownership of software.

The buyer relies on warranties. These are personal promises usually by the directors that they own the software. A problem for the seller company is that directors are personally liable.

The problem for the buyer company is that suing on the warranty costs money — it is better to get it right in the first place.

So am I exaggerating about the extent of trouble you can get into when dealing with computer contracts? Well, no. The computer industry has a word for users being ripped off. It is called 'stiffing'. An example is a company which purchased an existing business including expensive essential software. After the purchase they were contacted by the

software publisher (a US multinational) as their use of the software was inconsistent with the licence. The bill was substantial — equal to a new software system. They learnt about stiffing the hard way. So be warned.

Chapter 9

Mediation to settle disputes

"Discourage litigation. Persuade your neighbors to compromise whenever you can. There will still be enough business."
- Abraham Lincoln

The CIA is alleged to have launched 638 assassination attempts against Fidel Castro including one using an exploding Cuban cigar. Unfortunately assassination is not available to litigants and they are condemned to fight their enemy in the courts.

Many people find that issuing a writ feels better than sex (depending, of course, on who their current partner is). However in some entrenched cases after a year or so of mind numbing correspondence, evidence gathering and legal conferences which prove expensive, tedious and time consuming, all parties can feel like they have been through the mill.

At this stage neither party is prepared to give up and both parties are ready to fight on, but they may be ready for Mediation. Mediation is where you meet the other party with their lawyers with the object of putting an end to the whole expensive process and getting back to business.

What happens:

1. The lawyers agree on a suitable mediator, usually (yes, you guessed it) another practising lawyer. It is difficult to describe what makes a good mediator. If they share any characteristic it is that they are a little strange. There are non-lawyer mediators but often they cannot meet this standard except, of course, accountants.
2. The parties attend the Mediator's office for the Mediation, which often takes all day. It is not a process steeped in tradition but giving the Mediator a cheque before you start seems to be an important requirement. As is:
   - Whatever you say cannot be used against you in court.
   - Only one person speaks at a time.
3. As there are 10 or more people in the Mediation Room (multiple lawyers, litigants and various hangers on), the Mediation starts with people introducing themselves. If you have seen the opening of "The Magnificent Seven" you will know the type of stance that is to be assumed.
4. The Mediator then lectures all on what is best described as the 'bleeding obvious':
   - It finishes today whereas litigation is difficult to finish as the loser may appeal.
   - There are no winners or losers in Mediation.
   - It is you who decides to finish it. If not, you can always go back to your bunker and start firing again.
   - It would be a big surprise if a judge finds your case to be 100% right and then gives you the type of pay-out that you think that you deserve.
   - There is uncertainty right up to the trial.
5. A lawyer on each side makes a brief case overview presentation (five minutes). This can either be like the Assegai waving and chanting at the start of "Zulu", or a "Budget Speech", depending on your lawyer.
6. At this stage it is traditional to have a crazed interjection from one of the litigants. Try to give some thought to it so it is something appropriate and memorable such as insultingly "you slippery two faced toad", or more humourously "you couldn't lie

straight in bed". It probably costs you a few thousand more to settle but most litigants find it is worth it.

7. The parties are split up into different rooms.
8. Once alone, the Mediator will tell the Plaintiff that their case is rubbish and it will cost them double the legal costs that they thought they might need to pay. If the wall between the rooms is thin the Plaintiff will then hear the Mediator making the same speech to the Defendants.
9. The Mediator will then flit between the rooms conveying offers back and forth.
10. Some mediators prefer to have their own little room where the parties can come one at a time to confess their offers. Very popular with Catholic litigants.
11. The first offer is normally met with rage and the suggestion "You can't be serious".
12. Finally the parties are nagged into offering far more than that ever expected when the Mediation began, and agreement is reached.
13. It then takes the lawyers a couple of hours to commit the agreement to writing and the whole thing is over including a clause which "optimistically" swears the parties to secrecy.

The ideal finish to Mediation (from the Mediator's twisted point of view) is that both parties walk away feeling that they have been done. If a payment from one party to another is made, then this can be a contribution to their legal costs rather than an admission of any guilt.

At first, you will wonder why you ever started litigation? The answer is that sometimes unscrupulous people push until you have no choice but to fight. However over the ensuing months and years you will come to the realisation that the Mediation saved you a lot of time and money.

In a perfect world your enemy would leave the Mediation and be promptly run over by a bus. This seldom happens. However if he is as slimy as you say then hopefully he or she will come to a bad end.

If you can't let it go and Mediation is not for you, then there is always the exploding cigar.

Chapter 10

Litigation – the last resort!

"It is not whether you will win or lose - it is the expense and stress of being in the litigation game that is the killer."
- Paul Brennan

It would be great if "litigation" (a legal dispute involving a court case) was like boxing and after a few three minute rounds one person was declared the winner.

Anyone who has been in litigation will tell you that there is a lot of pleasure in slapping a writ on your enemy. If the credits rolled at that point then it would be a very satisfying experience. But they do not. Litigation is stressful, time consuming and expensive.

THE FIRST PUBLIC FLOAT OF A LAW FIRM GOES DOWN WITH ALL HANDS. NO LAWYERS SURVIVE. INVESTORS QUEUE UP TO DO IT AGAIN.

Your lawyer will advise you to look for every opportunity to avoid litigation. Both contracts and courts often refer matters to mediation where the parties can reach some common ground to settle their difficulties without a court hearing.

So why do it? Unfortunately in business there are people who will treat you as a mug, try to rip you off or just dither. After trying every other avenue even the most prudent business owner is sometimes faced with the prospect of litigation.

Many business owners don't speak to a lawyer about potential litigation until it is too late. Apart from the two obvious reasons a) it costs money and b) we are a miserable bunch, there are three reasons why you delay in seeing your lawyer:

1. You decide to work on the legal problem yourself - 3am is always a good time for this sort of reflection.

2. You want to organise every last page of detail - letters, emails, diagrams, photos to give your lawyer the clearest picture.
3. You have another go at getting your adversary to see sense.

Some businesses don't do all this. They go to their lawyers early, get the advice and are often able to avoid the legal dispute and move on. Dull, I know.

Your lawyer will probably approach your first interview in roughly these 3 stages:

Stage 1
- What damage have you really suffered? He doesn't care about the ins and outs of how you have been shafted, only the consequences.
- Is there a cheaper or alternative method of getting what you want as opposed to legal action?

Stage 2 If legal action is the only solution:
- Can you prove it? Start from a position of strength or you are likely to lose.
- Can you gather more evidence? Hopefully you have left the door open to interacting with your adversary.

Stage 3 A reality check:
- Do you want to spend the cash? You may decide to spend the money on a holiday instead.
- Do you have the grit that litigation requires? More than aggression, it requires time and hard work.

Often I find this can be done in a 30 minute initial interview. If it is a non-starter I don't need the detail, save it for your mates at the pub - it is cheaper.

Once your lawyer advises you that legal action is "on", I suggest that you take careful note of the ROI ("return on investment") in damages and costs.

Damages

Anyone who has watched US TV soap operas will know that a win in a law suit is a time for great rejoicing for clients and lawyers alike. Generally, this is not the case in the rest of the world. In the UK/Australia, courts generally try to put the claimant back in the position they were in before they suffered the loss, which for a lot of businesses is not so great.

Clients want to know if their case is good enough to sue the pants off their opponent. Normally the answer is a resounding "yes". However the real issue is how much the claim is worth i.e. what "damages" (money) they will receive if/when they win.

For example, where someone has run off with cash it is easy to determine the damages. You get back the cash. The court does not normally give you a bit extra on top because the defendant has been a real nuisance. The object of an award by a civil court is generally not to punish the defendant but to compensate you for your loss.

The loser paying your "costs" is not what it seems

When you win a claim, the loser usually pays your legal costs. The court rate charged to a defendant's opponents is about 70% at best. So the winner usually suffers a 30% shortfall on their costs.

The satisfaction of knowing that the claimant will not make a killing out of suing you does not lessen the strain on the business being sued. They must pay their own legal costs and if they lose they pay the winner's legal costs (mercifully or unfairly, depending on which side you are on, only about 70%).

Most business owners worry that their lawyer will not issue court proceedings fast enough. Please be assured that your lawyer stands ready to fight it to your last penny.

If you are ready to do what it takes and prepare carefully then litigation can be an effective tool to deal with difficult people. It calls their bluff.

Litigation is not about throwing yourself "up against the wire". As Sun Szu said in The Art of War, "The object of war is peace."

CONCLUSION

"Lawyers are the only persons in whom ignorance of the law is not punished."
- Jeremy Bentham

A judge once said to barrister F.E. Smith, "You have been questioning this witness for two hours, and yet we are none the wiser."

F. E. Smith replied, "No, my lord, but you are much better informed."

The legal mistakes which are the subject of this book have been made by business people since time immemorial (which we lawyers decided should be 1154). So maybe you will not be able to avoid all of the mistakes. However I hope that you are all far better informed.

I wish you all the best with your businesses. Many of you will fail, few will achieve success, but all of you have the chance to keep your sense of humour.

Paul Brennan
2007

APPENDIX

Five tips to resolve your legal dispute

- Don't just throw yourself up against the wire hoping for the best - be tactical.
- Sometimes be prepared to shake hands and walk away so that you can get on with your life.
- Have a good relationship with your lawyer (I didn't say this was going to be easy).
- Wish for your opponent to fall under a bus but do not say it. The more satisfying the insult the more it costs you to resolve the dispute. However if you have Mafia connections, use them.
- Sun Tzu said in the "Art of War", "The object of war is peace". Loosely translated this means "Only give them hell when it is necessary and you know that you can get away with it."

ABOUT PAUL BRENNAN

Paul Brennan has gained his experience from a diverse legal career. Having been trained in a Canadian law firm he went on to be a partner in law firms both in London and Sydney. He has been a tenant barrister in the Middle Temple, a solicitor at New Scotland Yard and a consultant at a Hong Kong criminal law firm. A Legal Counsel and Investigative Manager at Intel Corporation based in Hong Kong. He now practices at a Queensland law firm, Brennan solicitors.

His book "The Law is an Ass - Make sure it doesn't bite yours!" has been described as "irreverent and funny". A legal columnist with MyBusiness (the leading Australian magazine for SMEs) and a regular commentator on Business Essentials. He is a conference speaker. He draws legal cartoons for the Australian Financial Review, the Proctor and Asialaw.

His "Law & Disorder" blog is at:
http://www.brennanlaw.com.au/PaulBrennansblog.htm

The Law is an Ass

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Is the law something of a mystery to you? Do you sometimes feel you should know a little more about the way the law works? If you answered yes, this book is for you.

Paul Brennan has written a terrific little book that combines the qualities of a useful reference book on the law with wry humour and the odd belly laugh.

Illustrated with cartoons drawn by the author, this book is an easy to read way to become more knowledgeable about the law.

As Paul says, 'Either you understand the law or you become its victim. Your choice.'

You will learn about -

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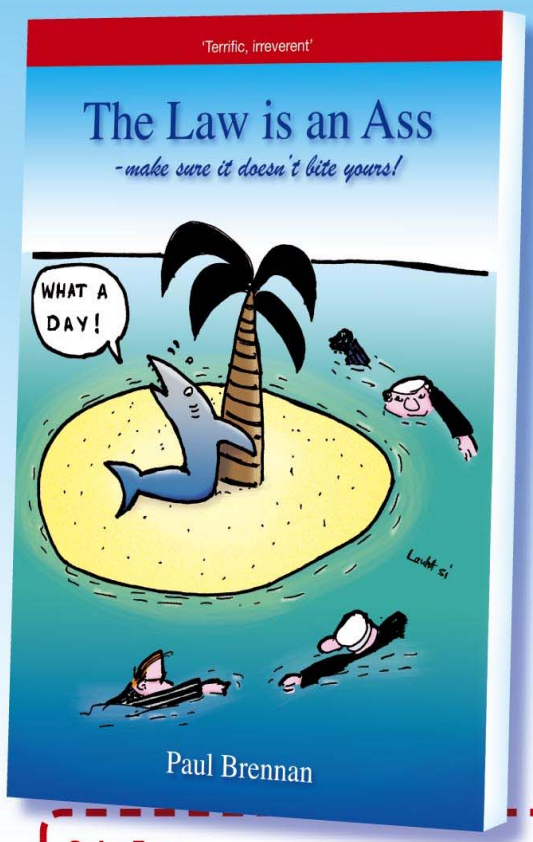
Business Law:
including buying a business, shareholder agreement, loans and contracts

Suing and being sued:
including defamation, injunctions, mediation and being a good witness

Intellectual property:
including copyright, trademarks and confidentiality

e-law:
including internet law, emails and spam.

Paul Brennan is uniquely qualified to write this book. He has practised law in Europe, North America, Asia and Australia. His experience with a US multinational, as a partner in law firms in London and Sydney, and ten years in Asia have combined to give him the broad background and experience he brings to this book. Paul now runs his own law firm working with small to medium sized businesses, especially those dealing internationally.



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