Understanding the Legal aspects of Franchising

David Kaye QFP, Harper Macleod LLP
Our firm in numbers

- 27 years old
- 404 people
- 25 jurisdictions of deals in 2014
- Ranked in Scotland:
  - 2nd law firm
  - 2nd professional services firm
  - 6th top dealmakers
- £25m projected turnover in 2015/16
- 7 times law firm of the year
- 6 offices
Tailored services for clients

Client Sectors

- Banking & Finance
- Energy & Natural Resources
- Food, Leisure & Hospitality
- Healthcare & Life Sciences
- Insurance
- Real Estate & Construction
- Public & Third Sector
- Retail
- Sport
- Technology
- Transport
- Private Individuals
A selection of our clients
Facts and Figures

- Number of franchise systems in the UK: 901
- Number of franchisee outlets: 44,200
- Number of people employed in franchising: 621,000
- Franchise Industry annual turnover in the UK: £15.1 billion
- 97% of franchisees reporting profitability (including new-start businesses)
- Franchisees’ satisfaction with their franchisor has never been higher (91% saying they are ‘mainly’ or ‘definitely’ satisfied).

Source: BFA Natwest Franchise Survey 2015
Is there such a thing as “Franchising Law”? 

Unlike many other countries worldwide, Franchising is not regulated in the UK. Instead it is governed by the following:

- General Commercial Law (e.g. Contract, Corporate, Property and IP)
- Specific Acts of Parliament (e.g. Trading Schemes Act 1996)
- European and UK Competition Law (e.g. on price fixing and vertical agreements)
- Court Judgements
- The European Code of Ethics for Franchising
- British Franchise Association Guidance
- Best Practice!!
Legal Requirements

• Franchise Documents:
  – Confidentiality/Non Disclosure Agreements
  – Deposit Agreements
  – Franchise Agreements
  – Side Letter?

• Trade Mark Registration
  – Trademark License agreement

• Operations Manual
  – Closely linked to the Franchise Agreement
Key Terms of the Relationship

- Rights Granted
  - What is the Franchisee allowed to do?

- Fees:
  - Initial Fee
  - Management Services Fee
  - Product/Service Fees
  - National Marketing Contribution

- Term
  - How long will the relationship last?
  - Franchisee's Right of Renewal

- Territory
  - Where can the Franchisee operate from? Exclusive Territory?

- Targets
  - Will the Franchisee be required to meet any minimum performance targets?
**Franchisor’s Obligations**

- **Initial Obligations**
  - Provide Initial Training
  - Provide Start-up Package/Equipment
  - Supply an Operations Manual (on loan)
  - Assist with Set-up

- **Ongoing Obligations**
  - Ongoing Training and development
  - Updates to Operations Manual/Procedures
  - Supply products/services to the Franchisee
  - Provide a Helpline/Support for enquiries
  - Provide Annual Conference/Regional Meetings (at Franchisor discretion)
Franchisee’s Obligations

- Supply Products & Services to Customers
- Recruit, Train and Supervise Employees
- Locate Premises (and take the lease of the premises, if appropriate)
- Vehicles (buy/lease suitable vehicle)
- Intellectual Property, Internet and Social Media (comply with brand guidelines)
- Accounting & reporting Requirements
- COMPLY WITH THE OPERATIONS MANUAL!
Franchisee’s Right to Sell

– Franchisor’s prior consent is required
– Payment of Costs (legal/training)
– Commission on introduction of a Purchaser
– Right of First Refusal – Franchisor can buy the business back (at market rate)
Death/Incapacity of the Franchisee

- Right of a family member (acceptable to Franchisor) to step-in
- Right of the family to find a purchaser (acceptable to Franchisor)
- Buy back/Termination
Termination

- One-sided – normally allowing only Franchisors to terminate. Some suggested grounds for termination might be:
  - Failing to pay sums due
  - Material or repeated breach of the Franchise Agreement
  - Providing false or misleading information to the Franchisor
  - Damaging the Brand
  - Failing to obtain Franchisor consent (buying from non-approved suppliers)
  - Bankruptcy
  - Suspending (or threatening to suspend) business

- Franchisee’s common law right to terminate if the Franchisor is in breach of the agreement
Consequences of Termination

- Franchisor’s right to recover loss (including loss of anticipated earnings)
- Franchisee ceases to trade and ceases use of all Intellectual Property
- Abide by Restrictive Covenants (including “Connected Persons”):
  - Non-compete provisions (in the Territory)
  - Non-solicitation of employees/suppliers
  - Non-solicitation of customers
General Clauses

- Individual’s Guarantee and Covenants
- Indemnity by Franchisee
- Acknowledgements
  - No rights to the System
  - No guarantee or warranty provided by Franchisor
  - Exercising own personal judgement following legal advice
- Entire agreement
- Alternative Dispute Resolution
  - Informal meeting
  - Mediation
  - Arbitration (BFA Arbitration Scheme)
- Governing Law
Role of the BFA

- Trade Body for Franchising in the UK
- Only source of governance for franchising
- Courts have deemed their guidance useful in determining cases
- Why use BFA accredited advisors?
  - Many companies claim to be able to help you franchise (particularly online!)
  - BFA accreditation helps you to find genuine expertise
What we do?

Act in the UK and overseas for Franchisors, Master Franchisees and Franchisees in relation to:

– Drafting UK and International Franchise Agreements;
– Advising on Brand Protection and Trade Mark Registration;
– Assisting with the Purchase and Re-sale of Franchise Businesses;
– Reviewing and Reporting on Franchise Documentation;
– Advising on structuring a Franchise in the UK;
– Advising on International Expansion through Franchising;
– Advising on Exit and Buy-out Strategies;
– Assisting with Dispute Avoidance and Resolution; and
– Drafting Ancillary Commercial Documentation.
Clients / Franchising Experience
Questions?
David Kaye QFP
Partner
Harper Macleod LLP

0141 227 9576
david.kaye@harpermacleod.co.uk