



The Interview

Richard Kemp started Kemp Little LLP ten years ago. Kemp Little became the first LLP law firm in 2001. In the last ten years Richard has built a legal firm which focuses on business and technology. Richard himself is ranked in the top 10 IT and telecoms lawyers in the world

Q. Well the first and most obvious question to ask you is - what do you think of the comment that an entrepreneurial lawyer must surely be a non-sequitur?

A. People's perceptions about lawyers - the standard caricatures - haven't changed that much, but the reality is that over the last generation or so law firms have become accomplished not only in how they look after their clients' interests but also as managed, entrepreneurial businesses in their own right. So you are seeing increasingly today entrepreneurial law firms and entrepreneurial lawyers who are good lawyers as well.

Q. You founded Kemp Little - what made you do it and why?

A. I had set up departments and offices for other law firms but hadn't found the right environment. When I turned 40 and had the money to start up I thought I'd have a crack at setting up a law firm

Q. Who is your hero and why?

A. Steve Winwood - the perfect musician who's come through 40+ years in the music business.

Q. Assuming you are both a lawyer and an entrepreneur, does this mean you work twice as hard as anyone else?

A. When setting up - yes; as the firm becomes more established, you can share the load more.

Q. Having a global top 10 ranking in IT and telecoms law is an amazing achievement, what practical advantages does it have?

A. Thanks. In a crowded market place maybe it gives you a bit of visibility. The main things though are experience and wanting to stay engaged in what I believe is the most fascinating area of the law.

Q. **Who were your first clients and why did they take you on?**

A. A number of the clients I'd worked with at previous firms followed when we opened. In particular, a nice Microsoft story - within 30 minutes of opening our doors on 26 November 1997, Microsoft had given 3 new instructions. They were hugely supportive - entrepreneurial and keen to give a new business a break. Secondly, the British Police - in a funny kind of way, for the same reasons - being supportive and positive.

Q. **How did you achieve your growth levels in such a short time?**

A. We lucked out with the timing, the clients and the people. Starting at the end of '97, we got 4 years worth of cyclical upswing and the internet boom to get the business right. We got instructions from the likes of Microsoft and the Police. And many of the excellent people and lawyers in the practice, including all our equity partners - Lucy Vernall and Siobhan McElhinney in our corporate group and Calum Murray and Paul O'Hare in commercial - joined the practice during this period.

Q. **Tell us a bit how you funded your firm in the early days? Were there any big issues you had to face?**

A. I borrowed £150,000 to start the firm up, and repaid it within a couple of years. Key thing was not to forget that cash is king. There was one big tax bill that came as a surprise which would have been a bit of a problem without the windfall of being able to sell some internet boom shares to cover the payment (which actually turned out to be quite good timing anyway!)

Q. **What do you look for in your new partners and employees?**

A. Aside from the usual things, a real desire to build a business.

Q. **What makes "tech" deals different from other types of deals?**

A. Tech people are normally pretty open and rational and just want to get the deal done, which makes most tech deals pretty positive. You could probably say that about many areas of business though. The other thing is that, especially with 'business 2.0' really starting to take off, technology, markets and the law move increasingly quickly which makes deals and the process stimulating and where you really feel you can add value.

Q. **Why should an investor come to a firm like yours when they want to do a tech deal?**

- A. We bring two things that set us apart. First, tech is the thing we focus on at our practice so we bring an environment where lawyering technology is right at the heart of everything we do in the firm.

Secondly, building a business ourselves from scratch in the tech space has given us a lot of experience and confidence about what capital providers are looking for. Both these things mean we have insight and expertise that is pretty unique in the UK legal market place.

- Q. **Do law firms always grow organically? If not, have you been tempted to adopt a build and buy strategy?**

- A. Interesting question. In the early days, as we were getting the platform right, we grew organically. Now, as we're more established, the platform is a lot stronger and our clients are starting to ask us to do more things for them, we're thinking more about lateral hires, etc. In fact, we're launching our litigation practice and our first technology litigation partner is joining us next month. We see this as the first of a number of targeted senior hires we'll be doing in the coming months, so we won't be totally organic from now on and see this - and this is a change in our thinking - as the natural way to develop our business now.

- Q. **When should you start talking to your lawyer about a deal?**

- A. I think it depends on the relationship with your lawyer, but we want to be the sort of law firm that develops relationships with our clients where they're bringing us into their thinking really early on because they feel we can start adding value from the outset.

- Q. **Do you think it is important for both sides to have their own lawyers in an investment round?**

- A. Yes - investment deals don't need to be adversarial, but lawyers can help focus discussions on the key issues up front which might not otherwise be addressed (for example, the mechanics of dealing with circumstances where the investor and investee wish to part company) and ensure that the investment documentation contains all necessary protections. They can also play an important role as a business advisor. This is especially true for investee companies who are unfamiliar with the investment process, but could also apply to seasoned investors. No matter how many investment deals you've worked on, an experienced lawyer will probably have worked on more of them.

- Q. **Are the needs of your big clients different from the needs of your little clients?**

- A. Yes. In our world, big clients tend to have their own in house legal teams, where the in house experience level of what's needed in a deal and the bandwidth to do it is greater. Little clients, where you're usually dealing at CEO or CFO level, may or may not have less experience of deals, but they almost certainly have less bandwidth. In each case, you use your experience to gauge the best way that you can add value and help the client get the best

deal - that assessment and getting it right is a key part of the expertise our lawyers bring in this situation.

Q. How do you write a shareholder agreement in the first round of a deal that won't get torn up in the next round?

A. A third party institutional investor which is being asked to invest in a later round may look to impose its own set of documentation or terms whatever you do for the first round. The rationale is that investments made at different times may have differing valuations and risk factors and so require differing rights and protection for the new investor. For the investee, one good way to prevent this is to convince your existing investors to put their hands in their pockets and follow-on in the next round!

Otherwise, it boils down to common sense - each of the initial parties needs to understand the driving factors for each of the others; primarily, the management team of an investee company needs to understand the aims of their investors and what drives their business. That way both parties are likely to reach a reasonable position which is mutually acceptable (and may not need much adjustment on later rounds) and maintain a good working relationship. Existing shareholders need to be kept fully involved in any new financing, even if they are not investing, as they will need to consider the dilutive effect of the new investment and will probably need to give their consent to the new terms.

Q. I hear that there can be a real issue around whether you own your software if it has been written using Open Source Software ('OSS'). Could you explain a bit more about this?

A. We're seeing a lot of clients wanting our help in the OSS space right now. OSS is a community type approach to writing software that has brought with it new types of software licensing. It helps businesses take out cost from the software development process - by licensing in free of charge 'pre-baked' software components, typically in more routine areas like operating systems (where Linux has a lot of traction), database systems like SQLite and other well known OSS products like Apache. Using OSS like this also frees up your own software engineers to do more value added stuff.

But the licences that cover some OSS software - particularly Linux and the licence called the GPL that it's licensed under - also follow this community approach. This is that where you develop software based on, say Linux licensed under the GPL, then that software you've developed also has to be licensed onwards under the same terms. Now if those terms, as with the GPL in some cases, say you have to give up the copyright in the software you've developed and offer the source code on a free basis - so called 'copyleft' - you're well away from the traditional approach to proprietary software where what you develop and the rights in it are yours.

The position gets more complex as there isn't just one licence for OSS - the body that looks after certifying OSS has given its approval to over 50 OSS products and licences - and many of the licences are unclear, so you have to know what OSS components are being used then see what the licence terms say.

Competitive pressure and the need to innovate and keep down IT costs are driving use of OSS into the business mainstream. The thing is that many businesses - even larger companies - don't know they're using OSS in their products or operations, and so are unaware of the copyleft and other non-standard licensing terms they're bound by.

This is why software due diligence, where you're funding a business that uses software as much as one that develops it, is getting much more important in day to day fundings and deals.

Q. What do you think are the most important contracts a small business should make sure they have in writing?

A. Where a small business is looking for funding, what the capital providers are looking for is no surprises. This means that any previous funding, shareholding and directors/service arrangements should be written up properly; and that any major assets - for example technology - and commitments - property leases, key people, longer term supply contracts - should be documented. In the real world, although ideally all the business's commitments should be properly recorded, there's never enough time to sweep them all up and it's good practice to make sure contracts are no longer than they need to be, especially in the early day - so short contracts are generally good.

Q. Do you think small companies or big companies are more scared about litigation?

A. Fortunately in the UK we have less of a litigation culture than in the USA, and don't have on a big scale the class action litigation they have there. Also, if you look at it, the number of High Court proceedings has declined noticeably since the Woolf court reforms were put through a few years ago. That said, litigation for a small company can be a 'bet the shop' type thing - especially over a patent or exploitation of key technology, whereas a large company, by simply having more weight of resources, may be better placed, whether as claimant or defendant.

Q. What are the typical mistakes companies make when they approach lawyers?

A. We had the experience (and it was a really good experience) of using management consultants for the first time recently, and it made me think that when you use any adviser for the first time the 'relationship' things you take for granted - the intuitive compass you develop - as a lawyer you just don't have as a first time client of business law firm. So, as a 'new' client, it's as easy to abdicate responsibility for your decisions to the lawyer as it is to not give your lawyer enough information to do the job properly.

So, we see our job as to guide the client through the funding process - it's a good lawyer's job to weigh up how experienced the client is in using legal advice and then to support the client in that part of the relationship also - by

saying what information is needed, why and by when, etc - but also communicating that it's our job to advise and the client's job to decide.

Q. What are the issues for lawyers about how advisory fees should be?

A. In this market the pattern is to move away from hourly rates towards fixed fees. Our job is to be innovative about how we can configure our business to meet market demand. So we look to see how we can take the costs out of the deal so we can do the right deal for the client that is also cost effective for us. For example, this may be through using standard forms to reduce the paperwork so we can spend more time on advice.

What we try to do is communicate with the client in advance about the expectations of the work involved and where we really should be there and where perhaps we can be in the background, having given what we call pre-advice. Sometimes, even, it can more effective the client does some things without us e.g. scope key areas of due diligence.

Q. Some law firms make a big issue out of the fact that you should always use fresh documents for each deal, but we know there are standard documents around. What's your view?

A. The BVCA has free documents on their website and if you can understand how they work then you can understand how to do the deal. But the difficulty comes if you believe that legal documents are "one size fits all". You must think how you need to tailor a document for your own needs - and where to stick your neck out in negotiations. These are the bits where we love to help as they are the really interesting bits. We understand this!

Perhaps even more interesting is the theme behind standard documentation - it shows that commoditisation is a force in our business as well as everyone else's. Technology has even affected law firms! We had to decide where we want to be. So we use (and help write!) standard legal documentation and use our "know-how" to do what we do best: give good service to tech clients.

Q. What tips would you offer an investor wanting to invest in IT and telecoms?

A. The window of opportunity for an innovative business is generally a lot shorter than the principals in the business think it is - people often think they have a year or two to get the product developed and to market; in reality, it's very often 3 to 6 months. This means if they don't get the funding deal done quickly, they may have missed the boat.

Q. How close should you be to your lawyer?

A. It may sound trite, but durable client/lawyer relationships are built on trust, respect, openness and communication. A good lawyer will always want to be of service and add value, but equally provide independent and objective advice. It's then the client's right to accept that advice or not so good communication on the frequently complex issues that arise is as important as anything else.

But I wouldn't want to have to advise, if you're the Attorney General, whether or not you should also attend cabinet meetings.

Q. What should you do as an investor if your investee company tells you they have got involved in litigation?

A. Again, the golden rule is communicate - early, fully and openly. Hopefully, your company will have seen this coming so it's something you'll have been monitoring on the radar for some time. That will likely be the case if the company is the claimant in litigation - as a rule of thumb, and it's something I always say in trepidation of my litigation colleagues, it's still all too often the case that the only people that win in litigation are the lawyers. People forget the pressures that having a third party decider brings, how it causes the eye to get taken off the ball of running the business in the here and now, and just how long, costly and wearing the whole process is. If you're on the receiving end of a writ, then hopefully, you'll have had some warning from the company and have been able to speak to management and take legal advice so as to be able to make the right call.

Q. What do you think lead investors can do to protect themselves against litigation by other investors?

A. If one investor is acting as "representative" of the others, it may be worthwhile agreeing up front a set of terms of reference which detail the ambit of the lead investor's role (and suitable limitations of liability).

Q. What do you think passive investors can do to protect themselves against potential malpractice by management teams and lead investors?

A. At the time of the investment, it should ensure that it is happy with the protection afforded by the investment documentation, taking independent legal advice if necessary. Depending upon the size of its investment, it may look to insist on veto rights over certain specified actions of the company or an enhanced voting or control right in the event that the management or the other investors breach the terms of the investment documentation. Even a very passive investor should ensure it is maintaining communication with the company and other investors at all times and reviewing all information provided to it by the company.

Q. Do you have a top tip for angel investors?

A. Yes, unless you can finance the deal yourself, gang up and syndicate quickly. That will put us in a position where we can do the legals quickly and cost effectively.

Q. Are there any hot legal changes about to happen in the tech world that our readers should know about?

A. Use of copyright on the internet is a big area - think of the Viacom/YouTube case. Data protection is also more important. Web 2.0 is creating the issue of new clothes needed for existing law. This all may be dealt with through the

establishing of licensing rights deals at a high level, but not at a consumer level.

The Gowers Report on IP was a bit of a damp squib but software patents in the UK are getting more difficult and overall the IP space gets more and more interesting.

The other big issue is the criminalisation of price fixing, now that competition law has real teeth for the first time. Someone will go down for this one day - it will be a slow burn, but someone will go down for it.

The other big theme is that the EU is aggregating all the EU consumer laws, which will have a big impact.

Perhaps both entrepreneurs and angels should also remember that whilst today we have greater informality for business, there is now far greater formality for employment law, so get your paperwork in order in this area especially.

Q. What do you do to relax and unwind?

A. Given a choice, sleeping in and reading the papers of a week-end, holidays with the family and walking in Cornwall.

Q. Lastly, tell us about your own best law story.

A. For me personally, it's the nice Microsoft story of getting 3 new jobs in from their legal team within half an hour of opening for business - I knew from then we'd make a go of it.