



THE LAWRENCES[®] LETTER

News and information for clients and friends of Lawrence, Lawrence, Stevenson LLP

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For Lack of Evidence

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In the course of business, disputes arise. If those disputes should end up in court, the case will be decided on the strength of the evidence presented. Sadly, many businesses do not record the early stages of a dispute, so there is little to prove who did what, when, and to whom.

Take the case of ABC Manufacturing ("ABC"), which bought a machine from XYZ Machines ("XYZ"). Shortly after installation, the machine began to malfunction, disrupting production. Over time, the machine broke down more frequently, shutting down ABC's production line completely for prolonged periods. Despite frequent discussions between representatives of ABC and XYZ and numerous attempts to resolve the technical problems, little or only temporary improvement resulted. Eventually XYZ said they could do nothing further. ABC felt that it had no alternative but to commence legal proceedings.

By the time the matter came to trial, ABC's chief engineer (the person primarily handling the technical problems with the assistance of XYZ's representatives) had moved to another jurisdiction and was unavailable to testify. ABC's president knew about the problems in general terms, but was not part of the meetings or discussions with XYZ's representatives. When the matter came to court, he did the best he could but was unable to provide a precise chronology or a complete list of specific problems, the corresponding dates, and the failed attempts at rectification. When cross-examined at trial, his testimony was inconsistent and sometimes contradictory.

The court concluded that the problems with the machine appeared relatively minor and not significant enough to merit the damages claimed.

How could ABC Manufacturing have achieved a better result? By keeping proper records. The company should have kept a production log showing the output generated by the machine. Entries should have been made in that log showing when the machine was inoperative due to mechanical failure. All telephone complaints made to the manufacturer should have been documented with at least a memorandum to file, or a letter or email to the manufacturer confirming the problems.

All emails and responses should have been detailed, complete and specific. They should also have been



secured and kept for trial purposes to confirm the actual chain of events that transpired. Any meetings or attempts by the manufacturer to repair the machine should have been documented with minutes, including the nature of the problem, the reason for the malfunction and the corrective steps the manufacturer was taking to remedy the problem. Any service calls and documentation confirming parts replacement or repair should have been kept. With such a paper trail, the trial could have proceeded even without the availability of ABC's president and could have been used as a basis for cross-examining XYZ's witnesses at trial.

Litigation can be won or lost well before commencement of legal proceedings. It is often not the strength or weakness of the case, but rather the existence or lack of corroborative evidence that will help the court to find in your favour. The time to assemble the evidentiary trail starts with the realization of the problem, not months or even years later, when litigation appears to be the only remedy left.

Lawrences' Litigation Group has extensive experience in helping businesses prepare for litigation, both as plaintiff and defendant. We can also help you anticipate the problems that can lead to litigation and prevent them wherever possible.



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In this issue:

For Lack of Evidence	1
Selling Land: Verbal Agreements can be Enforced	2
The Difference Between a Will and an Estate Plan	3
Life at Lawrences [®]	4