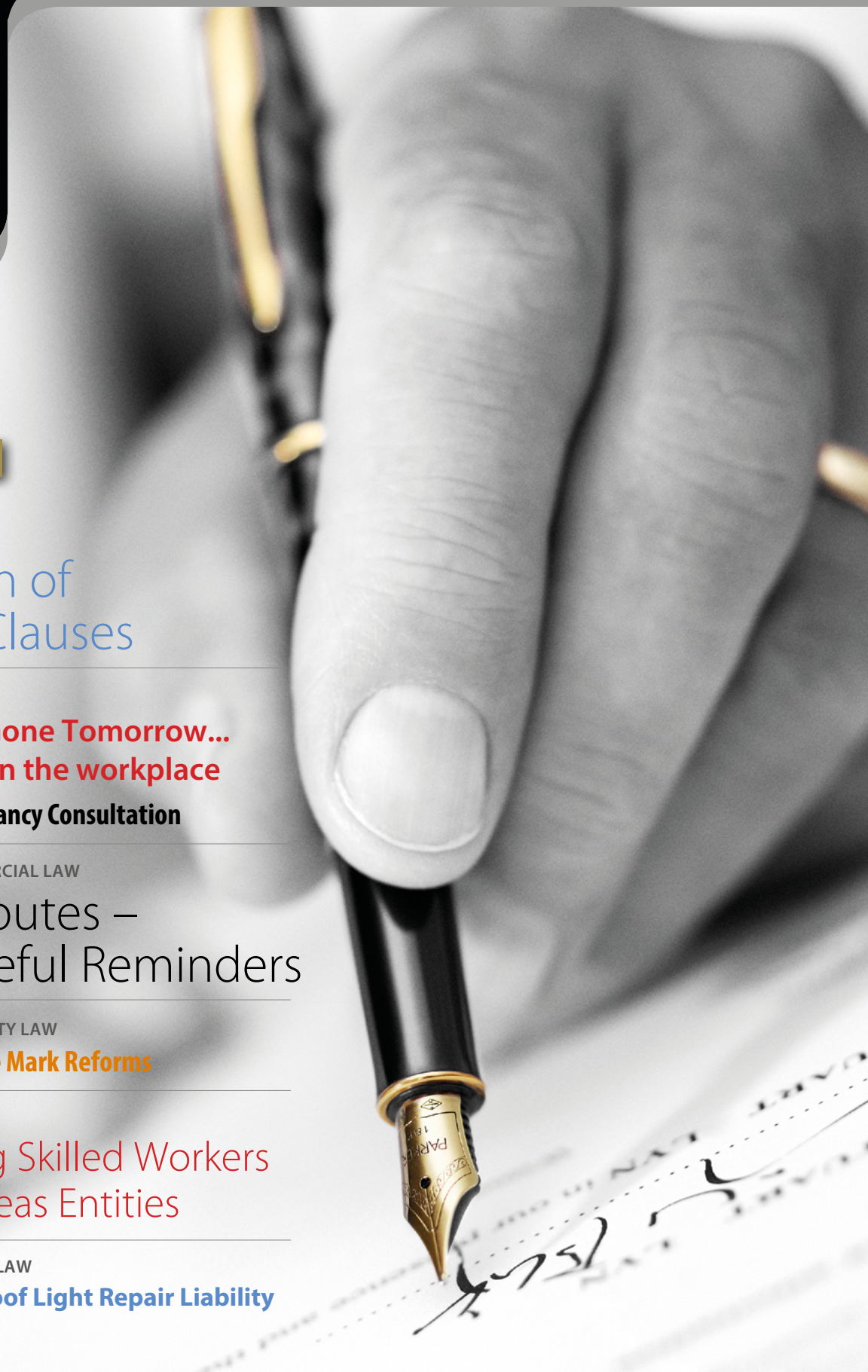
Corporate
NEWSLETTER

Summer 2015



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CONSTRUCTION LAW

Limitation of Liability Clauses – a Refresher

Stuart Nash, Partner

A limitation of liability clause should limit the supplier's liability to the customer for:

- breaches of the contract
- any representation, statement or tortious act or omission arising under or made in connection with the contract, and
- any use or resale by the customer of the goods, or of any products incorporating the goods.

This is generally achieved by stating that the limitations of liability apply to all losses arising under or in connection with the contract, and specifying that the limitation apply to all heads of loss, that is, contract, tort, misrepresentation, breach of statutory duty or otherwise. It is usual to specify that the exclusion of liability in tort includes liability for negligence, in order to satisfy the need for express wording when excluding liability for negligence.

A limitation of liability clause should not exclude or restrict liability for matters where the law prohibits

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Editor's Note

Welcome to the Summer 2015 edition of our Corporate Newsletter. This issue contains a variety of useful articles covering real estate, construction, M&A, employment, immigration, corporate and intellectual property law.

We strive to include content which we think is relevant to, and a useful update for businesses. However, if there are any particular areas of interest you would like us to consider in future issues, please do get in touch. We welcome your feedback.

Russel Shear
Head of Corporate & Commercial
t: +44 (0)20 7691 4082
e: russel.shear@edwincoe.com

this, and it is advisable to state expressly that such liability is not excluded or restricted as a failure to make this clear may cause the entire clause to fail.

It would be reasonable to expect a supplier to undertake some liability in negligence for damage to tangible property, as insurance should be easily obtainable for this type of loss, except where it makes more sense for the customer to insure (for example, if it is their building or their landlord already insures it). The use of a short preamble or recital at the beginning of a clause explaining the reasons for, or background to, its insertion is likely to be helpful in convincing a court of its reasonableness.

Structure

Exclusion clauses should, as far as possible, be drafted in the form of a series of clauses, sub-clauses and sub-paragraphs. This means, if one sub-clause is held unreasonable, it can be severed from the other provisions, which will remain enforceable.

Insurance

The supplier should contact its insurers to discuss the types of loss in respect of which it might obtain insurance and the appropriate upper limits. The supplier must also make sure that the limitation of liability clause does not invalidate its insurance cover. The availability of insurance is also a relevant factor when assessing the reasonableness of particular exclusion or limitation, the courts taking into account which party could most sensibly be expected to insure against the relevant risk.

Consequential loss

Due to a misconception that financial losses are consequential or indirect losses, the term "consequential loss" is sometimes used as a catch-all intended to cover any type of financial loss. However, it cannot be relied on for this purpose, as consequential loss has been judicially defined as losses other than direct losses (see *Ferryways NV v Associated British Ports* [2008] EWHC 225), and financial losses can be direct or indirect, depending on the circumstances in which the loss arises. If seeking to exclude a particular type of financial loss (for instance, loss of profits or loss of savings), exclude it separately by name.

Exclusion of financial losses

Draftsmen commonly try to exclude a wide range of financial losses. However, this can be a high risk approach, as a company's fortunes are, for the most part, measured in financial terms, and the courts are hostile to exclusion clauses that leave the non-defaulting party without a substantive remedy. Businesses should take a mindful approach to excluding liability for financial losses, and in particular to the issue whether an exclusion clause that excludes all heads of financial loss will still provide a meaningful remedy for the non-defaulting party in the event of a breach. A lower risk approach is to draft an exclusion clause that places an upper limit on liability for financial losses. This will have a good chance of being held reasonable, depending on the amount of such limit.

For further information with regard to this article, please contact:

Stuart Nash
Partner
t: +44 (0)20 7691 4131
e: stuart.nash@edwincoe.com

Or any member of the Edwin Coe Construction team

EMPLOYMENT LAW

Here Today, Gone Tomorrow...

Social media in the workplace – managing your workforce to protect your reputation

Linky Trott, Partner

There is no doubt that most businesses use social media to help with brand building, fostering collaboration and communication, as way of recruiting new talent, improving employee engagement and driving innovation.

But there are also risks. This article looks at how a business should manage its workforce in the context of social media to avoid damage to the reputation of the business.

'Whilst the management of the business reputation is a concern for employers, the legal risks in addressing matters with staff can be complex.'

Whilst the management of the business reputation is a concern for employers, the legal risks in addressing matters with staff can be complex.

Where staff make derogatory comments on websites, which directly relate to work and/or colleagues, it is easy to see why a dismissal of the employee would be fair. For example, a high street store dismissed one of its employees for posting onto a social networking site, *"I work at [name of store] and can't wait to leave because it's s&*t"*. The result was dismissal for gross misconduct.

Nonetheless, damage to reputation by the employer cannot simply be assumed. In the case of *Taylor v Somerfield* which is an unreported case from July 2007, the Claimant had been dismissed for bringing the company into disrepute when he posted video footage on YouTube which had been filmed on a mobile phone, showing two colleagues hitting each other with plastic bags and generally horsing around one of the Somerfield depots.

The employer did not dismiss for horsing around in the warehouse (presumably because it was during a legitimate break and was of an innocent nature) but rather because the employee posted a video of it on YouTube. Somerfield asserted that this brought the Company into disrepute. The Employee who was dismissed, issued proceedings for unfair dismissal and the Tribunal found in his favour.

The Tribunal noted that the only way in which Somerfield could have been identified from the video was from the colour of the uniforms and the plastic bags. Furthermore, the video was only on YouTube for three days and on closer analysis, it seemed the video had only been viewed eight times, three of which were by Somerfield managers investigating the disciplinary offence!

This case makes it clear that the extent of the 'publication' will be relevant and consideration of the actual, rather than the speculative, reputational damage needs to be considered.

Where a business is concerned that an employee's conduct on social media outside of work has brought the Company into disrepute, the position is rather more problematic. If the conduct impacts on the employee's ability to undertake their job or where the conduct is inconsistent with their professional role, then a dismissal is likely to be fair. But where the conduct is just 'unpalatable' rather than impacting on the employee's ability to do their role, care must be taken before dismissing or disciplining for reputation reasons.

One case which gives an insight into the line that the Tribunals will take in these matters is the case of *Smith v Trafford Housing Trust* [2012]. Mr Smith was demoted because he had posted his views on his Facebook page about gay marriage, which he didn't support. When he was demoted, he resigned and brought a breach of contract claim. He won. In finding in his favour, the Court specifically referred to the following: the fact that no reasonable reader of Mr Smith's Facebook page could think that his comments were made on behalf of the Trust (although the Trust was mentioned on his Facebook page as his employer); that his views were expressed moderately and were his personal views expressed on his personal Facebook page over a weekend; and fundamentally, the fact that Mr Smith's Facebook page was clearly for non work related purposes and it had not acquired a work related context.

Contrast that case with the case of *Gosden v Lifeline Project Limited* [2009]. The facts of the case were a little convoluted but in broad terms, Mr Gosden had sent an email to a friend of his who worked at a client of his employer. The email was sent from Mr Gosden's personal email account to the friend's personal email account but it was marked in the subject heading, *"It is your duty to pass this on!"* It was an email that contained sexist and racist comments.

The friend did pass it on which is how it came to be in the client's email system and eventually a complaint as to its contents was made and the email and its author came to be reported to Mr Gosden's employer. Mr Gosden was dismissed by his employer for having brought the Company into disrepute with their biggest client and for breach of their equal opportunities policy. He brought a claim for unfair dismissal and lost.

This case is a warning for individuals who circulate such emails in private with little thought for where they may be sent on, but it is interesting to note that the Tribunal was more concerned with the fact that Mr Gosden had no control over where it may be sent on, rather than the fact that the subject heading urged people to send it on. Whether or not it may have influenced the final decision or not is hard to assess but Mr Gosden didn't help himself by firstly denying that he sent the email and then denying that it was in any way offensive.

What should be done?

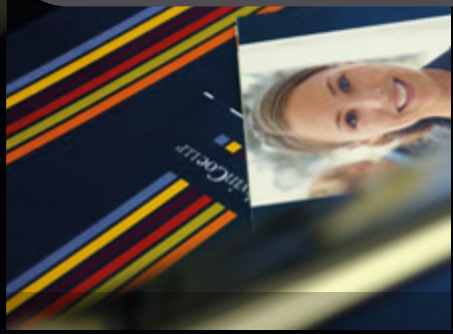
The case law that is now developing on the question of misconduct over social media both at work and privately, time and time again, demonstrates that those employers with well considered and comprehensive social media policies are best placed to protect the interests of the business when issues arise. As a minimum, suitable and proportionate policies should be put in place.

'...those employers with well considered and comprehensive social media policies are best placed to protect the interests of the business when issues arise.'

For further information with regard to this article, please contact:

Linky Trott
Partner
t: +44 (0)20 7691 4022
e: linky.trott@edwincoe.com

Or any member of the Edwin Coe **Employment team**



CORPORATE AND COMMERCIAL LAW

M&A Disputes – Some Useful Reminders

Matthew Overton, Senior Associate

In light of the recent trend towards an increase in litigation arising out of merger and acquisition activity, it is a good time to bear-in-mind a few of the practical steps, highlighted in some recent cases, that can be taken by deal teams – both on the selling and buying side – in order to reduce the likelihood of an unfavourable outcome.

Earn-outs: When acting for a seller, it is important to ensure that the earn-out mechanism includes so-called "anti-avoidance" provisions which seek to limit the ability of the buyer to reduce payments under an earn-out in the event that the buyer sells the target on to another party.

Notice requirements: The importance of ensuring that the formalities for giving notices are properly understood, and complied with, by the relevant internal stakeholders cannot be overstated. This can be the case as regards the bringing (or defending) of breach of warranty claims, or in connection with the settlement of an earn-out mechanism (e.g. where a seller has only a limited period within which to challenge the buyer's draft set of completion accounts). In either scenario, failing to serve a notice in time, or failure to provide an appropriate level of detail or supporting material, can lead to substantial financial losses.

Indemnity claims: The courts have recently re-stated the rule that where a party is seeking to rely on an indemnity, any ambiguity in the drafting of that indemnity is likely to be construed against that party. It is therefore very important to ensure that appropriate care and advice is taken when drafting indemnity provisions in order to ensure that clear wording is settled.

However, while usually this strict interpretation by the courts benefits a seller (being the recipient of an indemnity claim), it is equally important to remember that the courts will not bend over backwards to assist a seller facing an indemnity claim from a disgruntled buyer – it is therefore just as important to the seller to ensure that wording is clear and unambiguous.

Standard of disclosure: A seller should seek to limit the scope of its "knowledge" when preparing a disclosure letter such that it is deemed to hold only the knowledge of certain key (named, if possible), members to the target company's senior management team – failing to impose this qualification can be significantly risky, especially for a large and diverse seller/target.

For the buyer, it is important to ensure that agreed disclosure items are clear and unambiguous: permitting a seller to make a woolly, vague disclosure, that is not specifically limited to an identified warranty, can risk prejudicing the ability for the buyer to bring a warranty claim (or make an appropriate recovery) in respect of what the buyer considers to be an unrelated warranty.

For further information with regard to this article, please contact:

Matthew Overton
Senior Associate
t: +44 (0)20 7691 4033
e: matthew.overton@edwincoe.com

Or any member of the Edwin Coe Corporate & Commercial team

EMPLOYMENT LAW

A store is a store and not an "establishment"

Collective Redundancy Consultation

Rachel Harrap, Head of Employment

Collective redundancy consultation obligations in England apply where there are 20 or more affected employees at one "establishment". Failure to collectively consult entitles employees to claim a protective award. A protective award is a maximum of 90 days' gross pay for each employee, so where there are numerous employees, the exposure can be very significant.

Woolworths

The iconic English company, Woolworths, went into liquidation and its large number of employees were made redundant. The employees were based in individual stores and at head office. No collective redundancy consultation was carried out by Woolworths or its Liquidators. The employees brought claims for a protective award for failure to collectively consult.

Claims and the Tribunals

When the claims were heard by the Employment Tribunal, some claims were upheld for protective awards, but claims for some 4,400 employees were excluded where they worked in stores which employed fewer than 20 employees.

The case was appealed to the Employment Appeals Tribunal. The Employment Tribunal found that an "establishment" had to be construed so as to pursue the core objective of the Collective Redundancies Directive (98/59), to afford greater protection to workers in the event of collective redundancies. On that basis the meaning of one establishment was by reference to the retail business of each employer and so all the Woolworths stores within the business constituted one establishment. Accordingly, all the employees were entitled to a protective award. Given the size of the award which would ultimately fall on the taxpayer, that Judgment was appealed.

Court of Appeal

The Court of Appeal decided to refer the matter to the European Court of Justice, asking it to determine:

- whether the phrase "at least 20" was a reference to the number of employee dismissals across all of the employer's establishments in which dismissals were proposed within a 90 day period; or
- the number of dismissals proposed in each individual establishment, to which the affected employees were assigned.

European Court of Justice

The European Court handed down its Judgment in the Woolworths' case on 30 April 2015. The European Court had already interpreted the term "establishment" as meaning:

- a unit in which the workers made redundant are assigned to carry out their duties; and
- a distinct entity having a certain degree of permanence and stability, which performs one or more tasks and which has a workforce, technical means and a certain organisational structure allowing for the accomplishment of those tasks, but which need not have legal economic financial, administrative or even technological autonomy in order to be regarded as "an establishment".

In order to be "an establishment" the unit or store in question therefore did not have to have independent management functionality to effect collective redundancies.

In summary, the European Court has confirmed that under the Collective Redundancies Directive an employee's obligations are triggered in respect of the single employing unit to which the affected employees are assigned. It remains for National Courts to determine what is a relevant "establishment" in accordance with this decision on any given facts and whether the affected employee is assigned to the local employment unit, but in essence an individual store is likely to be an establishment for the purposes of counting whether there are more or less than 20 employees and whether or not the collective redundancy obligations are triggered.

For further information with regard to this article, please contact:

Rachel Harrap
Head of Employment
t: +44 (0)20 7691 4084
e: rachel.harrap@edwincoe.com

Or any member of the Edwin Coe **Employment team**

INTELLECTUAL PROPERTY LAW

Proposed EU Trade Mark Reforms

Simon Miles, Head of Intellectual Property
Karen Lee, Associate

Following two years of inter-institutional discussions, the European Commission recently reached a political consensus with the European Parliament and the Council of the EU on the proposed EU trade mark reforms which will result in amendments to the existing Trade Marks Directive, the Community Trade Mark (CTM) Regulation and the CTM Fees Regulation. The latest development is that the European Council has formally endorsed the reforms and on 16 June 2015, the Parliament's Committee on Legal Affairs voted on the reforms before they head to the full parliament.

'It is hoped that faster and less burdensome procedures will be of help to growing businesses which roll out their businesses to more than one Member State.'

Changes in the official fee

Changing the fee structure for CTM applications so that the application fee will cover a single class of goods/services (rather than covering three classes by default as is currently the case). The proposed application fee for one class of goods/services filed electronically is €775, but the overall cost to apply in three classes will remain at €900. A staggered approach to registration fees will also apply per class of goods/services. The reduced cost is obviously welcome for smaller enterprises as they often require only a single class application.

In terms of renewing CTMs, costs are again falling from €1,350 to renew in three classes to €1,050. It will cost €850 to renew CTMs in a single class. A concern of national registries will be that the cost reduction will encourage a greater number of CTMs to be filed at the expense of national applications. This could well force national registries to increase their costs and this would affect businesses that do not operate on a pan-EU basis.

Harmonisation of registration procedures

The proposals to streamline procedures at national registries and to harmonise them include:

- Enabling trade mark applicants to raise a defence of non-use against an opponent's mark which has been relied upon and which has been registered for more than five years.
- Requiring all Member States to have procedures in place to enable applicants to invalidate or revoke a third party mark without the requirement to go to court first.

It is hoped that faster and less burdensome procedures will be of help to growing businesses which roll out their businesses to more than one Member State.

"Modern business environment"

There are a raft of other changes which are intended to modernise things and to increase legal certainty by adapting trade mark rules to the modern business environment. To do this the changes seek to clarify the extent of trade mark rights and their limitations.

These include:

- Deletion of the words "capable of being represented graphically" from the definition of "Trade Mark". Advances in technology mean that trade marks are capable of taking other forms such as sounds or, potentially, smells. It remains to be seen how such marks may be depicted with the necessary precision to permit registration.
- Confirmation that the use of a sign as a trade name, company name or part of such name is potentially infringing use.
- Revision of the concept of "honest practices" to exclude practices which insinuate that there is a commercial connection with the owner of a trade mark. There are also proposals to exclude acts which take unfair advantage of, or are detrimental to, the repute or distinctive character of a trade mark.
- Clarification that the CTM owner can prevent a third party from using the mark in comparative advertising provided that such advertising fails to meet the requirements in the Misleading and Comparative Advertising Directive.

The modernisation of the law is welcome and seeks to plug the gap between the legal rules and the case law that has developed from it.

Counterfeit goods

The intentions of the reforms are to strengthen the means to fight against counterfeits, including goods in transit through the EU. Such means include enabling a CTM owner to prevent the entry of counterfeit goods, in particular sales over the internet delivered in small consignments, being imported into the EU where the consignor is acting in the course of trade. The aim is to help prevent the EU being used as a distribution hub for counterfeit goods. Such measures seeking to prevent the movement of counterfeit goods will be welcome news to trade mark owners.

New name

The Office for Harmonisation in the Internal Market will be renamed the "European Union Trade Marks and Designs Agency" and a CTM will become a "European trade mark", news which is sure to thrill the Swiss – a CTM does not include a number of countries in Europe including Switzerland.

If you wish to discuss any of the issues raised in this article, please contact:

Simon Miles
Head of Intellectual Property
t: +44 (0)20 7691 4054
e: simon.miles@edwincoe.com

Karen Lee
Associate
t: +44 (0)20 7691 4039
e: karen.lee@edwincoe.com

Or any member of the Edwin Coe **Intellectual Property team**

IMMIGRATION LAW

Transferring Skilled Workers from Overseas Entities

Dhruti Thakrar, Head of Immigration

Given that many Governments have policies to restrict migration into their countries, facilitating the transfer of skilled employees from overseas can be time consuming and complex if you are not familiar with the rules, but doing so is not impossible.

In the UK, if a company wishes to recruit a non-EU foreign national, it must hold a Sponsor Licence. A Sponsor Licence is an authorisation by the Home Office giving a company access to a software system which enables them to issue Certificates of Sponsorships (CoS) to non-UK/non-EU foreign nationals which the overseas National can use to apply for a Tier 2 visa. A company can obtain a Sponsor Licence by applying online and submitting the prescribed documents which demonstrate that the company is a legitimately trading organisation.

Ordinary commercial companies can apply for either a Tier 2 General or Tier 2 Intra-company Transfer (ICT) Sponsor License or both. Different types of licences are also available, for example, for organisations in the sporting and creative industry.

Intra-company Transfer (ICT)

Where a company in the UK has an overseas branch or subsidiary they can apply for a Tier 2 Intra-company Transfer licence. This will then enable the company to transfer an employee from an overseas branch or subsidiary to fill a position in the UK company on a Tier 2 ICT visa provided certain requirements are met, as described below.

Companies need to meet the minimum salary requirements for the Tier 2 ICT, as the Transferee would need to be paid the appropriate salary in accordance with the Tier 2 Codes of Practice which vary for different types of jobs. In addition, the position has to be at least a NQF Level 6 job, i.e. a graduate level position.

According to the government website, four types of Tier 2 Intra-company Transfer visas, are available for employers to consider:

- **Long-term Staff**
  This visa is for transfers of more than 12 months into a role that cannot be filled by a UK employee. The applicant would need to have worked for the overseas employer for at least 12 months.
- **Short-term Staff**
  This visa is for transfers up to and including 12 months into a role that cannot be filled by a new UK recruit. The applicant would need to have worked for the overseas employer for at least 12 months.
- **Graduate Trainee**
  This visa is for transfers into the graduate trainee programmes for specialist roles. The applicant would need to be a recent graduate with at least three months' experience with the employer overseas.

'A company can obtain a Sponsor Licence by applying online and submitting the prescribed documents which demonstrate that the company is a legitimately trading organisation.'

USA L-1 visa – Intra-company Transfer
The USA also has an L-1 visa which is similar to the Intra-company Transfer category which enables employees of overseas companies to be transferred to a USA branch or subsidiary. The maximum period permitted in this category is for up to seven years. One of the requirements is that the employee being transferred must have worked for a subsidiary, parent, affiliate or branch office of the US company outside of the US for at least one year out of the last three years of submission of the petition.

The overseas company or the US company would first need to file a petition to the relevant USCIS service centre. Once the petition is approved, the Transferee can than apply for the relevant L1 visa.

The L1 visa has two subcategories, namely the L1-A and L1-B visas:

- **L1-A – for Managers/Executives**
  This subcategory is designed for personnel at managerial or executive level. The executive or manager should have supervisory responsibility for professional staff and/or for a key function, department or subdivision of the employer.
- **L1-B - Specialized Knowledge Staff**
  This subcategory covers those with knowledge of the company's products/services, research, systems, proprietary techniques, management, or procedures.

Where a company has a real need to recruit overseas skilled workers, this can be achieved provided all the requirements are met. Though the process may, at first glance seem complex, immigration specialists like ourselves can assist with the process and secure the visas for you with reasonable ease.

For further information with regard to this article, please contact:

Dhruti Thakrar
Head of Immigration
t: +44 (0)20 7691 4137
e: dhruti.thakrar@edwincoe.com

Or any member of the Edwin Coe **Immigration team**

PROPERTY LITIGATION LAW

Dilapidations/Roof Light Repair Liability

Joanna Osborne, Partner

The Technology Construction Court has provided useful guidance on a tenant's liability for repair to roof lights at the end of their lease. Given that disrepair to roof lights and the exterior are often the most expensive dilapidations items for many commercial and industrial buildings, the Court's ruling is worth consideration for landlords and tenants alike.

The majority of leases contain a covenant which requires the tenant to keep the premises in good and substantial repair and condition throughout the term of the lease and to leave the premises in that condition at the expiry of the lease. This involves taking whatever steps are reasonably necessary to achieve that standard.

'The majority of leases contain a covenant which requires the tenant to keep the premises in good and substantial repair and condition throughout the term of the lease and to leave premises in that condition at the expiry of the lease.'

The Court has ruled that a roof light ceases to be in condition once there has been a visible and significant reduction in its transparency; such that the light coming through has to be assisted artificially. The Court rejected the argument that the roof light had to be leaking in order to constitute disrepair. If the roof lights have fallen into such disrepair at the end of the lease term, a tenant will be liable for the costs incurred by the landlord of putting the roof lights back into a good condition. When calculating its liability, the parties must consider the condition that could be expected of the building of its age and type, and the length of the lease. In addition, the condition of the premises is considered by reference to what would make the premises reasonably fit for occupation by that class of tenant that would take a property of this type at lease commencement.

Given this potential liability, tenants should take all reasonable steps to maintain any roof light each year to avoid a large dilapidations bill at the end of the lease. Failing to carry out routine maintenance in this way can substantially increase the expected costs of occupancy over a building's life span and the longer the lease the bigger the claim the landlord can bring. For example if the life expectancy of a roof light is 20 years and the lease has a 15 year term, it is highly likely that the entire cost of replacing the roof lights may be included in a claim for dilapidations against that tenant. Conversely for a tenant of a shorter lease, the tenant may be able to raise good arguments that they should not have to pay for damage (due to the poor maintenance) caused by others.

Roof lights have taken many forms and have been manufactured in various material types over the years, such as reinforced glass, PVC and GRP. Many of these are very fragile and failing.

Tenants entering into new leases, particularly shorter leases, may therefore wish to consider specifically excluding their repairing liability in respect of roof lights where possible. Otherwise they may want to provide for the additional costs of occupation by negotiating a reduction in the rent. Any tenant taking an assignment of a full repairing lease in a property with roof lights should look at this issue very carefully, as they will not have the opportunity to renegotiate lease terms with the landlord. Even if taking on a longer lease, a tenant should try to restrict its liability by reference to a full Schedule of Condition if possible. It may also be arguable that the existence of roof lights should be taken into account at rent review thereby potentially reducing the tenants' rental liability.

This is clearly an area where tenants and landlords will need to consider their leases and ensure they are adequately protected. Many tenants may find themselves surprised by high dilapidations claims in the future, but as tenants begin to wake up to their potential and take steps to avoid this liability, landlords will also need to ensure their reversions are properly protected.

' Many tenants may find themselves surprised by high dilapidations claims in the future, but as tenants begin to wake up to their potential and take steps to avoid this liability, landlords will also need to ensure their reversions are properly protected.'

For further information with regard to this article, please contact:

Joanna Osborne
Partner
t: +44 (0)20 7691 4034
e: joanna.osborne@edwincoe.com

Or any member of the Edwin Coe Property Litigation team

We hope you find this newsletter useful and interesting, and we would welcome your feedback. For further information and additional copies please contact the editor: Russel Shear on t: +44 (0)20 7691 4082 e: russel.shear@edwincoe.com

Edwin Coe LLP
2 Stone Buildings
Lincoln's Inn
London WC2A 3TH
t: +44 (0)20 7691 4000
e: law@edwincoe.com