



## STUDENTS & THE LECTURERS' PAY DISPUTE: MANAGING THE CONTINUING IMPLICATIONS

**A**s a result of the proposals agreed between HE employers and the University and College Union in early June, the majority of staff taking part in industrial action have ended their boycott on setting and marking student assessments.

The extent to which the boycott has affected individual institutions varies across the sector. Some have been able to set and mark assessments before the usual deadlines, whilst others will be required to implement contingency plans to deal with late or cancelled assessments, and/or delayed results.

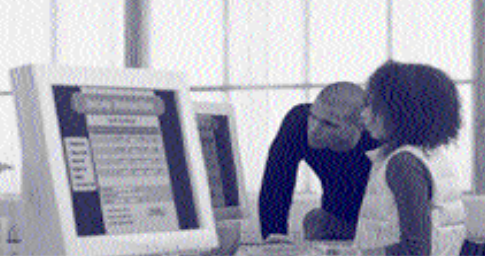
The impact on final year students is likely to be the most significant.

In an email bulletin published in May (available at [www.educationsolutionsonline.co.uk/bulletins.asp](http://www.educationsolutionsonline.co.uk/bulletins.asp)), we provided information

in response to questions raised by a number of institutions during the period of industrial action. This included information on courses of action affected students may seek to follow, and suggested steps institutions could take to minimise the prospects of successful complaints, or minimise potential financial exposure. Key points included:

- The student-institution relationship is a contractual one. The terms of the contract include assessment regulations and procedures. If assessments are delayed, or are carried out in a way not permitted by the institution's internal procedures, a student may have grounds to claim compensation for breach of contract. Institutions may need to consider suspending or amending existing rules and regulations to ensure that contingency measures are not in breach of the student-institution contract;
- The majority of HE institutions are public bodies. As a result, contingency plans must be applied in a fair and rational manner, in accordance with procedures. If an assessment board or other body makes a decision that is outside the scope of the institution's procedures, or is irrational, a student may have grounds to ask a court to judicially review the decision reached, or the procedure followed;
- A student who complains to the OIA or takes action in the courts may seek compensation for disappointment or distress caused by an alleged breach by the institution (eg delay in awarding degrees). The OIA in particular may be willing to consider making such awards, although experience to date suggests they are likely to be relatively low. A key aspect of managing students' expectations is to continue to provide as much information as possible about contingency plans and their implications.





Although the majority of staff have now resumed normal duties, many of these considerations will continue to be relevant over the coming months. Some of the key issues likely to be facing institutions include:

- A potential increase in academic appeals and/or student complaints - institutions should ensure that procedures are robust and that cases are dealt with promptly. It may be necessary to amend procedures, review the composition of academic appeal and other panels, consider widening the pool of potential panel members and/or provide members with appropriate training and guidance;
- Procedures for re-scheduling outstanding examinations, and/or for re-classifying awards granted on a provisional basis, should be fair and transparent, and applied to each student in a rational manner. Decisions reached by assessment and other boards, and the reasons for them, should be recorded in sufficient detail, so that they are capable of standing up to external scrutiny;

- If the degree ceremony is scheduled for a date that precedes the final determination of degree classifications, the institution should consider carefully how to cater for affected students. If the ceremony cannot be delayed, the desire to avoid alienating those affected must be balanced against the need to ensure that students are not given unrealistic expectations. Some institutions are inviting students to a 'celebration of academic achievement' or similar, which recognises that awards cannot yet be conferred, but gives students an opportunity to attend an end of year event.

Institutions should also take time to review internal processes, procedures and regulations and consider if they proved to be robust in dealing with the impact of the industrial action, or if changes are required.

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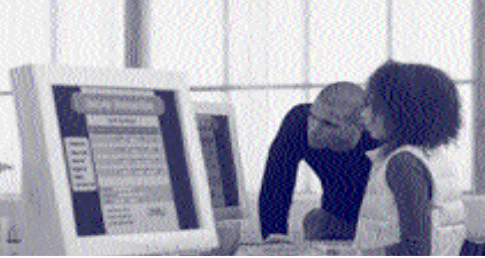
## THE REIT & THE BALANCE SHEET - WHAT REAL ESTATE INVESTMENT TRUSTS COULD MEAN FOR YOU

**T**he long awaited arrival of UK Real Estate Investment Trusts (REITs) on 1 January 2007 will be one of the most significant developments which the UK property market has seen for many years. Major players are already gearing up to exploit their potential and the first REIT fundraising can be expected in the autumn.

REITs are a new type of company specifically designed for investment in property. They will be listed PLCs whose shares will be available both to institutions and the public. Provided certain criteria are met - e.g. 75% of its income and assets must relate to "property rental business" - the REIT will not pay tax on rents received or on capital growth. This is in contrast to "non-REIT" property companies which suffer a double tax hit - the company itself pays tax on income and gains, and its shareholders pay tax on dividends.

The REITs legislation may be of interest to institutions with substantial property portfolios. Initial feedback from the property investment industry suggests that student accommodation in particular is likely to prove an attractive asset for a REIT. It offers good occupancy rates, a predictable income stream collected at the beginning of each term and an established mechanism for property management, including a bespoke set of sanctions for defaulting tenants.





**So the investment community is interested in the education sector. But what might be in it for universities and colleges?**

It ought to be possible for a university or college landowner, in conjunction with a suitable fund promoter or sponsor, to set up a REIT to which it would transfer its stock of student accommodation. This would release equity tied up in land and reduce exposure to bank debt. It would also provide access to a new source of capital from private investors. Crucially, it would be another way of moving property and associated bank funding off-balance sheet, a preoccupation of many finance and estates directors. The attractiveness of REITs as a solution for HE and FE landlords will depend in large part on the extent to which their appeal to the investment community feeds through to land valuations, and it is really too early to speculate on this. The new REIT legislation is still very much a work in progress. It is also difficult to predict at this stage what the market for UK REITs will be, although comparisons with other jurisdictions such as the US and Australia suggest that there will be significant investor appetite, which means that the demand for "REIT-able" properties is likely to be high.

Whatever the future holds for UK REITs overall, as a potential new source of off balance sheet funding for property they are likely to be of considerable interest to sector landlords. We will continue to update you on this subject through our bulletin service.

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**Forthcoming conference:**

Martineau Johnson, in conjunction with Knight Frank, PWC and Ogier Asset Management are hosting a conference to look specifically at how REITs might impact on the education sector at the London Stock Exchange building, Paternoster Square, London on 12th July 2006.

For further information please contact Anna Wanless on **Direct Dial:** 0870 763 1426 or **Email:** [anna.wanless@martjohn.com](mailto:anna.wanless@martjohn.com)

## CLIMATE CHANGE AND ENERGY COSTS - BIOMASS OPPORTUNITIES FOR THE EDUCATION SECTOR

**T**he UK government has set various targets for reducing greenhouse gas (GHG) emissions to tackle global warming and to reduce the UK's dependency on fossil fuels. The 2006 Renewables Obligation target for the production of electricity from renewables is 15.4% by 2015. Given recent concerns over Europe's dependency on gas from Russia, the government is also now conducting a further energy review to address security of supply.

The UK also has commitments under the Kyoto protocol to reduce GHG emissions by 12.5% below 1990 levels by 2008-2012 and it has a national goal of reducing carbon dioxide emissions by 60% by 2050. The use of biomass to generate electricity and heat and to provide an alternative source of transport fuel are two of the available technologies for reducing GHG emissions.

### What is biomass?

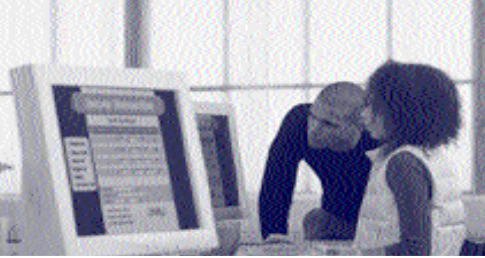
Biomass falls into two main groups - "virgin biomass" which covers forestry and energy crops, and "waste biomass" which incorporates recycled clean biomass and waste from municipal and commercial sources, sewage, and food and animal wastes.

Biomass can be converted into heat and electricity in a number of ways including burning, fermentation and anaerobic digestion. Certain high energy crops can also be processed to produce biofuels. In the UK, the main sources of virgin biomass for energy are short rotation coppice, high yielding varieties of either willow or poplar and miscanthus; and for converting to biofuels are sugar beet and oil seed rape.

### Relevance to the education sector

Not surprisingly, universities are at the forefront of biomass research and development in the UK. From propagating disease resistant and high yield energy crop strains to developing more energy efficient combustion techniques, universities are making a valuable contribution to the growth of the biomass industry. However, the contribution of the education sector to the fight against climate change need not end there - universities, colleges and schools can increase their involvement and gain valuable PR by applying academic research on campus and educating by example as highlighted by the following case studies:

- **Harper Adams University College** was short-listed for the Green Gown Award, which recognises high quality performance in sustainable higher education, after installing the UK's first micro-turbine biomass generator. The generator was installed with funding from the DTI and is able to generate energy to provide a quarter of Harper Adams' average electrical demand. It will also provide through a district heating scheme 50 per cent of the heat needed for several campus buildings including two student halls of residence. Although Harper Adams' commercial farm business will grow energy crops for the generator, additional fuel is also sourced from local farm businesses.
- **Newcastle University** has undertaken the R&D and prototype development of a biomass gasification system which generates both heat and power. The results are positive enough for the University to be considering planting some short rotation coppice to power the system.



- **Kingsmead Primary** is the first school in Cheshire to be built with a biomass heating system. It will use less than one quarter of the energy consumed by a typical primary school and the biomass heating system will provide 60% of the school's heating needs.

### The practicalities

Biomass will not be the solution to the energy needs of all education institutions. For biomass to be a viable option, the institution will need to either have its own estate from which to source wood or energy crops, or be located close to forestry or agricultural land on which suitable crops can be grown. Planning regulations for biomass generating facilities place great emphasis on the need to source biomass locally (usually within a 20-30 mile radius) to reduce the carbon footprint of the biomass transport infrastructure.

The next consideration is to ensure the biomass project will be cost-effective. Although biomass boilers are still more expensive than conventional fossil fuel boilers, the DTI has recently announced that it will introduce a five year grant scheme to support biomass boilers. The scheme will offer £10-15 million in its first two years of operation and the DTI expects to open the scheme for applications around the end of 2006, subject to receiving the necessary EU State Aid clearances. Grants under this

scheme will provide up to 40% of the additional costs of the biomass boiler infrastructure, over and above the cost of a comparable fossil fuel boiler. Other grants will also be made available to help establish energy crops and to develop the supply chain required to harvest, store, process and supply energy crops and wood fuel to energy end users.

As well as investigating the availability of grants, it is important to compare the cost of the biomass fuel with the cost of conventional gas and electricity supplies. With fossil fuel costs spiralling upwards, biomass as a fuel is becoming an increasingly attractive proposition. Additional revenue can also be generated through the sale of surplus electricity to the national grid and from Renewables Obligation Certificates.

### The way forward?

The government has recognised the potential that on-site renewable energy systems in schools offer for increasing awareness and understanding of climate change in all sectors of the community. The Department for Education and Skills will soon be developing a requirement for the feasibility of the use of biomass to be evaluated for all projects within its capital programmes, including in future PFI contracts. Whilst HE and FE institutions are not legally required to have environmental sustainability policies, there is still a

good argument for exploring the possibility of installing biomass generation, not least on the basis of cost and, in some circumstances, the ongoing development of home grown research projects. We are able to provide links to businesses who are increasingly interested in working in partnership with education providers to obtain valuable tax breaks on purchase of required new equipment.

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### Forthcoming seminar

Martineau Johnson will shortly be holding a seminar covering the key practical aspects of biomass, biofuels and bioenergy. Please contact Emma Rawlinson on **Direct Dial:** 0870 763 1464 or **Email:** [emma.rawlinson@martjohn.com](mailto:emma.rawlinson@martjohn.com) if you are interested in attending.

## THE WIDENING ARM OF ELECTRONIC COURT PROCEEDINGS - THE POSSESSION CLAIMS ONLINE PROJECT

It's no secret that the aim of the courts is to move towards a civil court service which draws far more heavily on the benefits of electronic systems and services. This stems largely from the Woolf reforms of 1999 but the development of electronic systems for the management of court proceedings has been slow. Sir David Neuberger, the "Judge in Charge of Modernisation", attributes this in part at least to funding issues. Despite this, things are gradually changing in favour of increased reliance on IT in the management and progress of claims, and this is a trend which is set to continue, offering (it is hoped) more efficient courts and a better service for court users.

The Possession Claims Online Project is to be operated as a pilot scheme in the South Wales county courts this summer and is expected to be rolled out nationally shortly afterwards. The system allows possession claims based on rent (or mortgage) arrears to be issued online via a Court Service website. Court fees can be paid online by debit or credit card and the proceedings are issued (and a hearing date allocated) immediately.

The system even chooses the correct court for the case based on the postcode of the property concerned. In fact, possession claims issued online in this way will be the first proceedings which can in theory be pursued to final order and enforcement in a totally paperless way. The parties will be able to retrieve information about the case online at any time. It will be possible to issue general applications and warrants for possession online, and the parties will be able to choose whether they wish to be contacted by the court electronically or by post.

The system will of course be of limited application, at the outset at least, because it only applies to possession claims based on rent or mortgage arrears. It won't for example be suitable for possession claims against students who remain in accommodation after their licence has expired (although this may change as the system is widened in the future). But where universities or colleges let accommodation and the tenant (be it a student, resident tutor or some other tenant) defaults on rent payments, the new system may help to speed up the process of regaining possession and shorten the time during which there is no income from the

property. It may also help to reduce the time and cost involved in court proceedings.

Even if you think the new system is unlikely to be of benefit to your institution when it's launched, it is without doubt a sign of things to come. The move away from paper-based court proceedings may be slow but it's certainly starting to happen.

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# EXEMPT CHARITIES & THE CHARITIES BILL

**T**he Charities Bill, first published before the last election, has gone very quiet of late, constantly deferred in the face of more pressing parliamentary business. But the government is said still to be determined to get it through, and the next reading in the House of Commons is scheduled to take place at the end of June. If this goes ahead, the Bill may make it onto the statute book by 2007, although is unlikely to come into full force until some time after that. How will the Bill affect exempt charities, which include all HEIs and FECs except some of those which are neither chartered bodies nor statutory corporations? At present, the Charity Commission's role relation to exempt charities is limited. It can make orders enabling trustees of exempt charities to take steps which might otherwise be outside their powers, and give formal advice in relation to specific questions. Trustees acting in accordance with such advice are protected even if it turns out to be incorrect.

The Commission cannot currently institute an inquiry into the affairs of an exempt charity, or demand documents, or use any of its fairly draconian powers of intervention into management. This is because most exempt charities already have a sector regulator, such as HEFCE or the LSC, whose powers have until now been regarded as sufficient. But if the Bill becomes law all of that changes. Concern that sector regulators are not providing sufficient monitoring of compliance with charity law has led to proposals for regulation of exempt charities by the Charity Commission, subject to safeguards. Frontline regulation will continue to be by sector regulators, now given statutory responsibilities as 'principal regulators'. The Bill imposes a duty on principal regulators to do all they reasonably can to ensure that charities are properly managed. As we reported in Issue 36 of Education Brief (winter 2004) after these proposals were first made, HEFCE and LSC are promising a light touch in their new role as charity law monitors.

The Bill also enables the Secretary of State to add or remove organisations from the list of exempt charities, by amending the schedule to the Charities Act 1993, if he/she is satisfied this is desirable in the interests of ensuring appropriate regulation and ensuring compliance by charity trustees with their legal obligations. This power could be used to bring HE or FE institutions which are currently registered charities (those constituted as trusts or companies, unless individually designated as exempt) into line with the rest of the sector. In Wales, HEFCW is reluctant to become a principal regulator, so it seems that HEIs in Wales will in future be registered charities. So will students' unions with a turnover above £100,000, which are specifically excluded from exempt status by the Bill - see Education Brief Issue 37 (Summer 2005). The Oxford colleges prefer to be regulated by the Charity Commission.

The Commission will in future be able to exercise the following powers in relation to exempt as well as registered charities, although before stepping in it must consult the principal regulator:

- Require a change of name
- Institute inquiries into management
- Call for documents
- Exercise intervention powers for the protection of a charity
- Give direction about dormant bank accounts
- Promote a local act of parliament (which is of course part of the mechanism of merging chartered universities)
- Exercise control over litigation within the definition of 'charity proceedings'
- Order a disqualified person to repay sums received from a charity.

Equal regulation of registered and exempt charities seems reasonable enough, but there has been concern about the expanded role of the Commission.

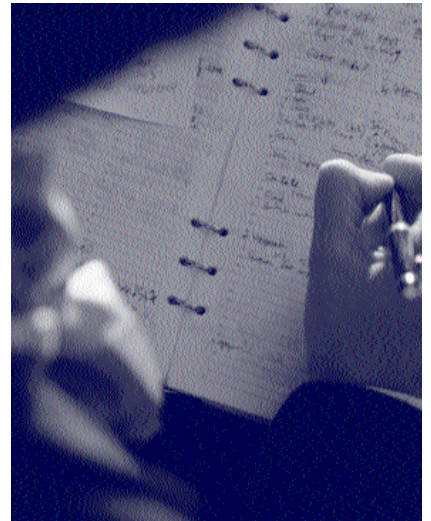
To put this in perspective, intervention by the Commission in the management of registered charities is currently targeted at fraud or other deliberate wrongdoing and rarely occurs where errors have occurred due to mistake or misunderstanding, when support and encouragement are more likely to be offered. It is difficult to see the education sector regulators asking or agreeing that the Commission should exercise their powers in any but the most extreme circumstances.

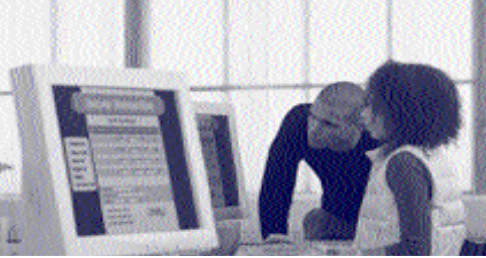
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# E-DISCLOSURE

**E**lectronic means of document creation and storage are now the norm in the education sector, and the vast majority of electronic documents are not printed as much is created through e-mail.

E-mail users often see this form of communication as less formal than, for instance, letters or faxes. However, under the new rules on electronic disclosure this attitude could prove costly for an institution involved in a dispute.

Where litigation in our courts is concerned it has been the longstanding practice for parties to have to exchange and disclose documentary evidence as part of the preparation for trial.

Essentially a party must disclose the documents relied on in support of its case, and documents which are relevant - for better or for worse - to another party's case.

Until recent times documents have been confined to writing on paper, whether typed or handwritten, and whether sent to another person or kept as a private note or record. So, the term covers letters, copy letters, minutes of meetings, file notes and diary entries, and working drafts and copies of all these.

However, the new disclosure rules also oblige a party to litigation to disclose any electronic record which would have to be disclosed if a conventional document, and they are very wide in their effect. They cover electronic records held on a server, or on a PC, or on a backup tape or separate memory device. Perhaps more surprisingly they also cover hand-held devices, phones and cameras.

This means that casual comments contained in an e-mail can prove costly, as they may be obtained by the other side. Furthermore, what was sometimes a time-consuming and expensive stage or preparation for trial has now acquired a whole new dimension, as information technology has added substantially to the volume of material which can be stored for later retrieval.

However, there are limits on the extent to which a party has to trawl their own system, and can ask an opposing party to do the same. The rules provide that the search for relevant documents only needs to be carried out to the extent which is reasonable and proportionate. Quite what will be reasonable and proportionate in any particular case will be open to debate between the parties and submission to

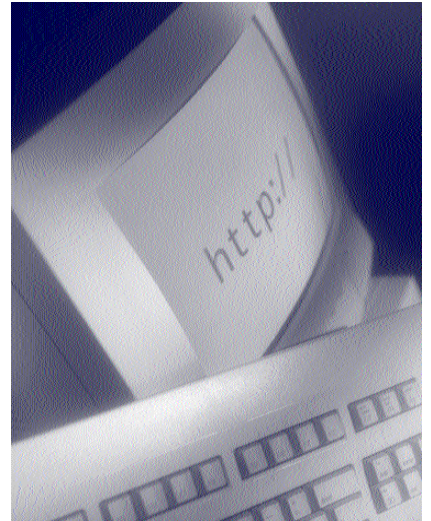
the court, but no doubt the following factors will be important in the determination:

- The extent and availability of the documents and data to be searched
- The disruption caused by the search
- Lapse of time since the creation of the documents
- The whereabouts of the information
- The cost
- The probative worth of the information being looked for
- The likelihood that information will be found
- Factors relating to ease of retrieval and disclosure of the information

There are sophisticated software tools available to help with the disclosure process. It is possible to sort documents and data by using carefully selected parameters - especially key words - so as to reduce the volume of information which is provided or reviewed after being received. Viewing systems are also available to facilitate the scrutiny of documents, and their marking and indexing where necessary. The technology is also available to enable the form of the documents and data disclosed to be selected, particularly bearing in mind that a pdf version is frozen and stripped of information about its provenance.

Those who wish to try to predict and manage the risk involved can use technical means of doing so, including effective document management systems based on comprehensive document management and retrieval policies. In addition, effective preventative action can be taken by:

- Making people aware of the value of making contemporaneous records to back up their actions and beliefs at any given time, in case those are challenged at a later date
- Warning them of the potentially damaging effect of irresponsible or unguarded comments recorded either on paper or electronically
- Discouraging the use of unnecessarily wide e-mailing and copying.



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# EDUCATION NEWS

## Team news

Smita Jamdar gave birth to a son, her second, at the start of June. Mother and baby are doing well. Smita returns to work in January 2007.

## Training for company secretaries and directors

We have recently developed a training package for company directors and secretaries of subsidiary companies of universities and colleges. For further information please contact David Allison on **Direct Dial:** 0870 763 1588 or **Email:** david.allison@martjohn.com

## Clarification

A reader has contacted us to express concern that the lead article in last term's Education Brief could be interpreted to mean that the author had read and/or reviewed the specific student contracts issued by the Oxford Colleges and/or the University of Oxford.

We are very happy to make clear that the article was intended to be a general review of the legal issues surrounding the student-institution contract and some of the pitfalls in producing such a document. It was not intended to be a legal analysis of the contents of the Oxford contract(s), the press reports of which were only referred to in order to show why the subject was, at the time of going to print, particularly topical.

If you would like any further information about this edition of Education Brief, or about our work for education clients, please contact **Paul Pharaoh**, Partner and Head of Education, on **Direct Dial:** 0870 763 1314 or **Email:** paul.pharaoh@martjohn.com

**Education Brief aims to introduce you to legal issues of concern to managers in education. It is not a substitute for taking appropriate specialist advice in individual cases.**

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