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IS YOUR NAME IN SOMEONE ELSE'S DOMAIN?

Newspapers recently reported the difficulties encountered by the Vice-Chancellor of the University of Kingston, Sir Peter Scott. A former lecturer at the University had registered the domain name www.sirpeterscott.com and was using it to publicise his grievances with the University and Sir Peter.

Sir Peter made a complaint under the dispute resolution procedure for 'dot com' domain names and the complaint was decided by arbitration before the World Intellectual Property Organisation Arbitration and Mediation Centre in Geneva.

For Sir Peter to succeed in his complaint under the policy he had to show that:

- www.sirpeterscott.com was identical or confusingly similar to a trade mark in which he had rights;
- the lecturer had no rights or legitimate interests in respect of the domain name; and
- www.sirpeterscott.com had been registered and was being used in bad faith.

The complaint failed because Sir Peter was unable to show that he had the necessary trade mark rights to succeed. The name was not registered as a trade mark and Sir

Peter was unable to show that he had acquired sufficient goodwill to establish unregistered rights.

The case highlights the problems that universities and colleges can encounter with troublesome third parties who use similar or associated domain names to air their grievances.

Each case will need to be considered on its own facts and there may be other ways to resolve the matter aside from a complaint of this sort. However, a useful practical tip is to consider whether there are domain names that an institution can register before someone else gets the chance. Universities and colleges will also want to ensure that appropriate names and marks which appear in domain names are registered as trade marks to avoid the problem that Sir Peter had.

Another issue worthy of some thought is which domain names are likely to rank high in a google search. This is likely to be the case for domain names that comprise the names of individuals where people search on their name. Indeed, Sir Peter was quoted as being concerned by the fact that the website was one of the first that came up if you googled him.

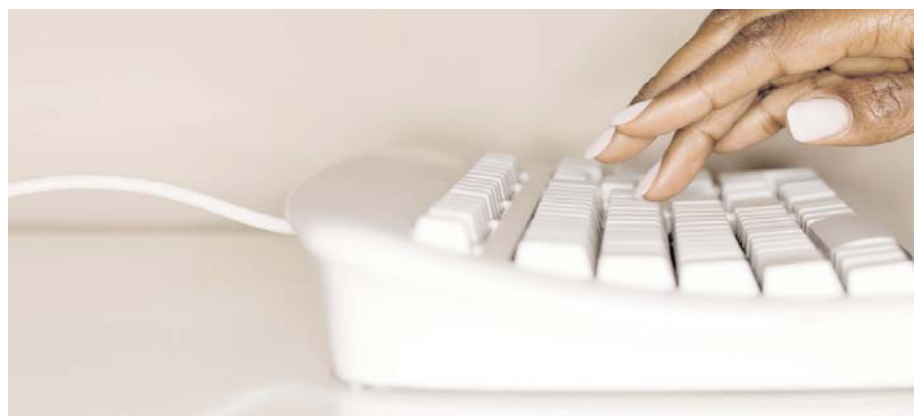
For more information on domain name disputes please go to http://www.martineau-uk.com/expertise/ip/IP_DomainNameDisputes.htm

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HOLIDAY **PAY** DURING LONG **PERIODS** OF **SICK** LEAVE

The House of Lords has recently decided in favour of the workers in the long-running dispute of *Her Majesty's Revenue and Customs v Stringer and Others*¹. In its judgment, the House of Lords ruled that workers who have a claim for unpaid annual leave under regulations 13 and 16 of the Working Time Regulations 1998 (the Regulations) are not only entitled to bring claims before an Employment Tribunal under the Regulations, but also under section 13 of the Employment Rights Act 1996 (ERA), which gives workers the right not to have unlawful deductions made from their wages.



“Employment Tribunal found that Mr Ainsworth was entitled to a payment in lieu of annual leave even though he was off sick”

Background

Mr Ainsworth was an employee of HM Revenue & Customs, and complained that the Revenue had made an unlawful deduction from his wages in that it had failed to make a payment in lieu of the unused annual leave to which he was entitled, under Regulation 14(2), upon the termination of his employment. Regulation 30 provides that such a claim must be brought within three months of the initial breach of the Regulations. However, Mr Ainsworth pursued the claim under the unlawful deductions provisions of the ERA, which allows such claims to be brought within

three months of the last in a series of deductions.

The decisions

The Employment Tribunal found that Mr Ainsworth was entitled to a payment in lieu of annual leave even though he was off sick at the time that his employment terminated. This decision was approved on appeal by the Employment Appeal Tribunal but was then overturned by the Court of Appeal, which held that the Regulations were intended to provide a single and exclusive regime for the enforcement of the right to annual leave

which the ERA should not be allowed to circumvent. A further appeal was lodged with the House of Lords which referred the case to the European Court of Justice.

In January 2009, the ECJ held that the right to paid statutory annual leave continues to accrue during sick leave and, on termination of the employment relationship, a worker who has been on sick leave and unable to take paid annual leave is entitled to a payment in lieu of that leave.

When the case was referred back to the House of Lords it confirmed the ECJ's decision and restored the decision of the EAT, holding unanimously that such a claim could be brought under the ERA. It held that the sum claimed by Mr Ainsworth fell within the definition of “wages” under section 27(1) of the ERA.

Implications for institutions

III Institutions are likely to be nervous by this judgment and the financial implications of employees returning to work after long periods of sick leave only to be entitled to a substantial periods of paid annual leave. However, it is worth noting that the decision here concerned statutory holiday only, so

III Institutions should look at whether their sickness policies are currently too generous and discourage absent employees from returning to work. They should also consider whether sickness absence should be managed more robustly.

III A full review of sickness, holiday and maternity policies may be required to prevent, or at least reduce, the financial ramifications resulting from the judgements of the ECJ and the House of Lords.

This issue is still not finally resolved, as the House of Lords left some questions unanswered. For example, whether annual leave accrued by a worker on sick leave can be carried over to the next holiday year remains unclear, and will need to be resolved by further case law.

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“The House of Lords restored the decision of the EAT, holding unanimously that such a claim could be brought under the ERA”

institutions can still provide in employment contracts that contractual leave in excess of the statutory minimum does not accrue during a period of sick leave.

III Institutions are at risk of potentially costly back-dated pay claims from former employees as workers will now be able to take advantage of the more generous time limits that apply to claims for unlawful deductions from wages under the ERA. A claim for an unlawful deduction from wages can be brought within three months of the last in a series of deductions, therefore allowing a claim to go back more than three months if the underpayments form part of a series.



FREEDOM OF INFORMATION UPDATE

The provision of education by publicly-funded institutions is not a commercially competitive activity (at least as far as the Information Commissioner is concerned).

A member of the public, apparently committed to exposing what he regards as pseudoscience, particularly alternative medicine, made a request under the Freedom of Information Act (FOIA) to the University of Central Lancashire for copies of various course materials in connection with the BSc in Homeopathic Science. Reading lists and validation agreements were disclosed, but the University sought to rely on a number of exemptions in the Act to withhold the remainder of the requested information:

- breach of confidence (in relation to anonymised case studies only) (s.41);
- the information was reasonably accessible to the applicant by other means (s.21);
- disclosure would or would be likely to prejudice the effective conduct of public affairs (s.36(2)); and
- disclosure would or would be likely to prejudice the commercial interests of any person (s.43(2)).

Confidential information

The Commissioner found that the University correctly relied upon the exemption for confidential information in relation to the

anonymised case studies as, in effect, these amounted to part of someone's personal medical records. The Commissioner found this to be the case despite the fact that the patients would not be identifiable.

Information reasonably accessible by other means

To support reliance on the exemption for information that is reasonably accessible to the applicant by other means, the University argued that it was open to the applicant to enrol on the course, which would provide him with access to the information he sought. The Commissioner concluded that, in view of the fact that the applicant would have to pay £9,000 in tuition fees for a three-year degree course, the information was not reasonably accessible.

Prejudice to the conduct of public affairs

In seeking to justify the Vice Chancellor's opinion that disclosure of the course materials would be likely to prejudice to the effective conduct of public affairs, the University argued that it would prompt requests for all or any of the University's course materials, which would cause continuous or disproportionate interruption and disruption, which the Commissioner rejected as unlikely. The University was also concerned for the copyright and moral rights in the course materials, but this was rejected by the Commissioner for lack of evidence, as well as being an issue that was irrelevant to this exemption. In any event copyright is not

compromised by disclosure under the FOIA and recipients can be reminded of the constraints imposed on them under copyright law with regard to subsequent use of the course materials. The Commissioner was not convinced that the Vice Chancellor's opinion was objectively reasonable.

The Commissioner also stated that the exemption for disclosures which would otherwise prejudice the effective conduct of public affairs is only available where there is prejudice to a public authority's ability to offer an effective public service or to meet its wider objectives or purpose (rather than merely function) due to the disruption caused by disclosure and diversion of resources in managing the impact of disclosure. The implication of this conclusion is that the ability of institutions successfully to rely on this limb of the exemption is severely limited, and should be invoked only where there is clear evidence of likely disruption to an institution's mission or primary purpose, rather than individual activities. The consequences of this conclusion are that this exemption will in practice only be of use where disclosures will inhibit free and frank provision of advice or the free and frank exchange of views for the purpose of deliberation (e.g. where access is sought to minutes of senior management meetings discussing strategy, reorganisation or tactics in the face of industrial action).



Prejudice to commercial interests

The most controversial aspect of the Commissioner's decision is, in our view, the treatment of the exemption relating to prejudice to commercial interests. The University understandably was concerned about disclosing its intellectual property to the public without charge, which, it argued, would lead to widespread unauthorised copying, prejudicing its commercial interests. The Commissioner distinguished financial and commercial interests. Commercial interests relate to an organisation's ability to participate competitively in a commercial activity (i.e. the sale and purchase of goods

effect on finances, he did not perceive it as a commercial interest. He regards universities as non-profit-making bodies and the provision of higher education as a public service, notwithstanding the imposition of tuition fees. We understand that the university intends to appeal against that decision.

Many have construed this decision as a moratorium on applying the exemption for commercial interests to information relating to the provision of HE (or FE). In our view, institutions should not be deterred from invoking this exemption in appropriate cases, but should seek to challenge the

Commissioner's perception by persuading him of the commercially competitive challenges faced by educational institutions generally and specifically in the recruitment of students.

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“The Commissioner conceded that the ability to recruit students has an undoubted effect on finances”

and services), because universities are funded by HEFCE and because there is no requirement to pay tuition fees up-front as they can be deferred until a graduate reaches the relevant income threshold, he did not accept that the interest being protected was a commercial one. Furthermore, the Commissioner maintained that while the University may have a commercial interest in the provision of higher education, a different commercial interest was envisaged in this exemption.

What most institutions will find difficult to accept is the Commissioner's view that universities' need to be commercially competitive is not paramount, because their survival is not dependent on self-funding. While the Commissioner conceded that the ability to recruit students has an undoubted



CIVIL LITIGATION COSTS REVIEW

On 8 May Lord Justice Sir Rupert Jackson published his preliminary report on civil litigation costs.

Sir Rupert was asked to review the rules and principles governing the costs of civil litigation and to make recommendations in order to promote access to justice at proportionate cost. A period of consultation with practitioners and court users will follow the publication of the preliminary report before the final report is published.

meritorious claims. Sir Rupert identifies a number of options for change which include limiting disclosure to those documents on which parties wish to rely on at trial, promoting the use of electronic disclosure, and the use of keyword searches in identifying discloseable documents contained in databases and other forms of electronic storage.

Sir Rupert has placed much emphasis on costs management both in his preliminary report and at seminars and public consultations. He has expressed a view that the lack of certainty surrounding litigation costs is a disincentive to litigants who may have meritorious claims from pursuing those claims, and as such may prevent access to justice. The preliminary report invites consultation on enhanced costs management which may include the filing of detailed costs budgets and introducing new forms of costs management orders.

“On 8 May Lord Justice Sir Rupert Jackson published his preliminary report on civil litigation costs”

Summary of the preliminary report

The preliminary report raises issues on which practitioners and court users are invited to comment or provide opinions.

Two of the key points discussed in the preliminary report are disclosure and costs management.

Disclosure (the process by which parties search for, and exchange lists of, documents which they may seek to rely on at trial or which may affect the veracity of the parties' respective cases) has often been regarded as a costly process which of itself may discourage litigants from pursuing otherwise



Birmingham Technology and Construction Court and Mercantile Court pilot scheme

The preliminary report has been followed by a series of public seminars taking place in major commercial centres in England and Wales.

On 26 May Sir Rupert attended a meeting of court users of the Birmingham Technology and Construction Court and the Birmingham Mercantile Court. The meeting was also attended by leading practitioners from throughout the West Midlands and beyond. As part of the process of enhanced costs management a pilot scheme for use in these specialist courts, which deal principally with technology and construction disputes and business disputes respectively, was discussed.

The pilot scheme will operate from 1 June to 30 September and will introduce some of



If the pilot scheme is a success it is likely to be referred to in the final report as a suggested model for other courts.

The consultation process in particular, and to a lesser extent, the pilot scheme in Birmingham provides universities and colleges with an opportunity to put forward their views on the cost of litigation generally, the extent to which their unwillingness to litigate is affected by the unpredictability of costs and their views as to how such costs may best be managed by their lawyers and/or the court. Should you wish to pass on your own views and experiences of litigation please contact us and we will be delighted to put these forward to Sir Rupert.

“This will involve the judge in actively managing the costs of the litigation as well as the case itself”

the proposals discussed in the preliminary report, in particular the filing at court of detailed budgets of the parties’ estimates of costs for the litigation. The judge will therefore be in a position to approve or disapprove of each side’s budget for each step in the action and may, if appropriate, order the attendance of the parties’ solicitors at regular hearings in order to monitor expenditure. This will involve the judge in actively managing the costs of the litigation as well as the case itself.

Education institutions and the consultation process

As large organisations, property owners and businesses, universities and colleges are inevitably involved in litigation from time to time whether it be through disputes arising out of the construction of new build student accommodation or technology parks, or through disputes between suppliers of the institution or suppliers of spin-off companies in which the institution has some form of investment.

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MARKET TRENDS - FE COLLEGES ACQUIRING PRIVATE PROVIDERS

Notwithstanding the wave of FE college mergers we have witnessed in recent years, colleges have traditionally preferred to expand organically, adapting to increased student numbers by developing new course offerings and adding additional resources through their funding streams.

However, in recent months we have seen evidence of a growing trend for colleges to consider inorganic expansion by way of acquisition, not of other colleges, but of existing training and education providers, many of which are privately owned and managed businesses.

There are many reasons why acquiring private providers might be attractive for colleges, including:

- the ability to quickly establish course offerings in new disciplines in response to changing markets;
- 'buying turnover', with the prospect of tapping in to new funding streams with some certainty;
- allowing the college to compliment existing courses by 'bolting-on' resources;
- the comfort of taking on a team of staff with a track record of delivery;



- more swiftly providing a 'critical mass' in areas where the college lacks a geographic presence.

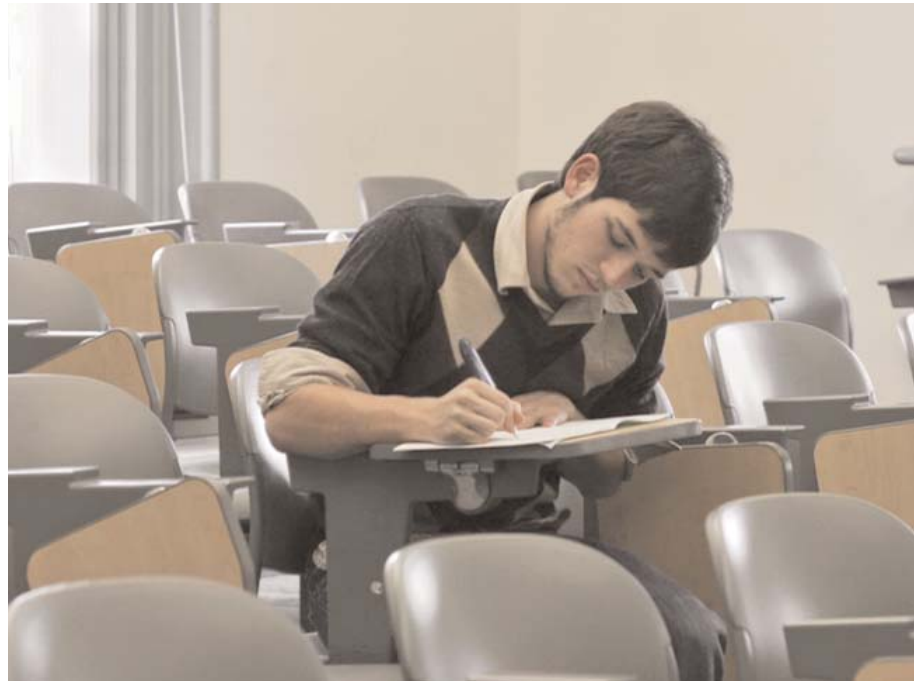
A number of our clients and contacts in the FE sector are currently discussing potential acquisitions of private providers with us. This trend may in part be driven by the prospect of more money being made available to public sector FE providers rather than their private sector counterparts.

On the other side of the fence, there are a large number of owner-managers of private training providers who are looking to dispose of their business. With debt markets still in a

certain amount of turmoil, exit opportunities are far more limited than in recent years, and this creates a 'buyer's market' which colleges can take advantage of. Sellers are also increasingly looking at different ways to realise their business's value or structure their exit, and this is resulting in an increasing number of joint ventures between the public and private sector, 'vendor roll-overs' (in which the former owners maintain an interest on a long or short term basis), and other more sophisticated structures with college partners.

Colleges thinking about a potential acquisition should consider amongst other things:

- how the acquisition might be best structured - should the target provider's entire undertaking be acquired, or are there assets that might be 'cherry-picked' whilst leaving certain liabilities behind?
- the price to be paid for the business and the basis on which this should be paid, in respect of which there are numerous options;
- the importance of the target's existing management team and the extent to which they need to be retained and/or incentivised;



“It may be appropriate for them to seek specialist corporate finance advice ”

- if owner-managers are not being retained, preventing them from setting up a new provider in competition with the college;
- whether existing contractual arrangements and relationships such as funding agreements might be easily acquired or whether there is the risk of termination on acquisition;
- whether the acquisition structure has any implications for the employees of the target provider and the college;
- the tax consequences of the acquisition structure.

Transactions of this nature need to be handled delicately and with expertise, not just in the legal issues that arise, but in the sector in which the parties operate, the constraints they face and the drivers behind their ventures.

We always recommend that colleges considering acquisitions speak to their advisors at an early stage, as it may be appropriate for them to seek specialist corporate finance advice in addition to relying on the expertise of their own internal and external financial and legal teams.

Colleges looking to make acquisitions in certain sectors, but without specific targets in mind, may also wish to consider instructing professional advisors to identify suitable targets, and there are a number of organisations which specialise in this.

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PAY IT AGAIN SAM

If you have music playing in public anywhere on your campus (other than in a classroom environment), from live bands and student radio to dance classes, juke boxes and discos, and you don't have an appropriate licence for that use, you will be breaking the law.

Why do you need a licence to play music on campus?

A licence is needed because recorded and live music is protected by copyright and playing it in public (outside of the teaching curriculum) needs the permission of the copyright owner.

Getting a licence - The Royalty Collection Societies

So that you don't have to get permission from each copyright owner (and pay a royalty) every time a piece of music is played anywhere on campus, you can apply for a blanket licence covering your use from the two main music royalty collection societies in the UK - the PRS/MCPS (who represent music composers and publishers) and the PPL (who represent record companies and performers).

Failure to get the correct licence from both the PRS/MCPS and PPL will mean you are breaching copyright and can have serious consequences. If you continue to play music in public without a licence you may find your institution facing legal action, which could ultimately result in a court order stopping

you from playing any music on campus altogether until all outstanding (and retrospective) fees, costs and damages are paid.

What licences do you need?

The PRS/MCPS offer a single blanket licence renewable annually which will cover you for all use of live and recorded non-curricular music on campus. Unfortunately there is no blanket licence available from PPL and each different or new use you make of licensable music, from background music in a canteen to a DJ playing at a end of year ball, attracts a separate licence fee. The costs of each of these licences will vary depending on the

type and size of the premises and the nature and extent to which the music is used.

Exemption for music played as part of the curriculum

Education institutions benefit from certain exemptions from paying a licence fee to play music.

The basic rule is that all instances where recorded or live music is being played (background or otherwise) should be licensed:

- where the use of that music is not directly part of the curriculum; or
- where members of the public are present.



For example, a licence would not be required to listen to a music radio station or watch a music video as part of a media studies course, but it would be required if the same radio station was played on a radio to staff listening in a refectory kitchen or in offices, or if students were watching the music videos on a TV in a student gym.

Similarly, you wouldn't need a licence to play music in dance lessons to students enrolled on a performing arts course, but a licence would be required if that music was played as an aid to tuition in a class open to members of the public or students not enrolled on a course.

and discos. Less obviously perhaps, background music in canteens, theatres, shops, common rooms, keep-fit and aerobics classes and leisure centres must also be licensed. Some curricular activities where members of the public are present and recorded music is played, for example an end of year fashion show for design students, or music played during a theatre performance, will also require a licence.

PPL and PRS/MCPS licences are payable regardless of whether performances are live or recorded and whether an admission charge is paid, membership is required, or entry is restricted to staff or students and

How much will I need to pay?

The fee you will need to pay will depend on, for example: the audible playing area (for background music in canteens or a jukebox), the amount of time music is played, how often, and the anticipated attendance (for a regular student disco) or the number of classes per week (for dance tuition).

Some licensable activities may already have been paid for: some dance tutors will hold their own PPL/PRS licences, your jukebox rental agreement will normally cover licence fees and it is not unusual for individual staff members to have sought their own PRS/PPL licences for activities they know require one.

The only way to ensure that you are properly licensed for all uses you make of music, live or recorded, across your campus is to carry out a detailed audit. A recent review we carried out on behalf of a client found that they were paying too much to both the PRS and PPL due to duplication of licenses across their campus premises. Bringing all their licenses under one single manageable agreement with PPL saved them a considerable amount of time and money and gave them the confidence that they were no longer breaking the law.

Most usefully, the audit allowed our client to review all their uses of music on campus and to better manage, restrict or even prohibit certain more expensive and non-essential licensable activities.

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“A licence would be required if that music was played as an aid to tuition in a class open to members of the public”

What other campus premises might need a licence?

Certain types of musical performances where music is played as part of any event or is the main attraction, such as concerts

their guests. Even premises where members of the general public don't have access, including playing music in a work area (such as a staff radio in a canteen kitchen) need a licence.





EDUCATION NEWS



We are delighted to have been appointed as AHUA's national sponsors with effect from 1 May 2009. The appointment reflects our position as one of the leading firms advising the sector, and we are very pleased to have the opportunity to further demonstrate our commitment to the sector through this important relationship.

Student rag and other public charitable collections

The Charities Act 2006 has extended regulation of public charitable collections to apply not only to professional fund-raisers, but also to employees and paid officers or trustees of charities. Depending on their employment status, officers of students' unions are likely to be affected if they take part in collections in a public place or door to door.

The new requirement applies to people acting as collectors who are paid more than £1000 per year either in the capacity of officer, employee or trustee of a charity, or for being a collector. Solicitation of money or property for a particular charity or charitable purpose is required to be accompanied by a statement containing specified information.

This presumably means that tin-rattlers must carry the statement, which must state :

- the name of the charity or charities
- if more than one, the proportion in which they will benefit
- that the collector is an officer, employee or trustee
- that the collector is paid in that capacity, or for acting as a collector.

Failure to do this is a criminal offence. The Office of the Third Sector has issued model 'solicitation statements' - http://www.cabinetoffice.gov.uk/media/cabinetoffice/third_sector/assets/fundraising/employees_or_trustees_of_a_charity_guidance.pdf.

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