



INSIDE:		
COMPANY STATUS FOR UNIVERSITIES?	page 3	BREAKING CHINA
UNIVERSITY STUDENT ACCOMMODATION REPORTS	page 8	DELAY TO COMPANIES ACT IMPLEMENTATION
CHANGES TO PUBLIC PROCUREMENT THRESHOLD	page 10	DISCRIMINATION BY ASSOCIATION
EDUCATION NEWS	page 12	page 6
		page 9
		page 11

ENERGY PERFORMANCE CERTIFICATES FOR COMMERCIAL BUILDINGS - AS EASY AS A B C....D E F G

With the introduction of Home Information Packs in 2007 it is understandable that most of the media attention surrounding the Energy Performance Building Directive (EPBD) and the requirements for Energy Performance Certificates (EPCs) has been focused on the implications for residential property sales. However, from April 2008 the government's implementation of the directive will also extend to non-domestic buildings. Along with the implementation in 2010 of the Carbon Reduction Commitment (the government's proposed carbon trading scheme), EPCs will bring energy efficiency to the forefront for institutions involved in property development and occupiers alike.

The result of The Energy Performance of Buildings (Certificates and Inspections) Regulations 2007 (the Regulations) will be to label all non-domestic buildings in the same way that new white goods and electrical appliances are rated. So a building's rating will be ranked on an A - G scale (A being the most

efficient) which will be determined following a formal assessment by a qualified independent assessor.

Success or failure in this area will be an important factor for the government's own targets, as non-domestic buildings contribute approximately 15% of the UK's total CO2 emissions. In addition to this, education institutions may find that other third parties (for example students and research partners) have an increasing expectation that steps will be taken by institutions to minimise carbon emissions and display environmental credentials.

The Regulations

A revised timetable for implementation has recently been published staggering the requirement for EPCs into three phases according to floor area. From 6 April 2008 EPCs will be required on the construction, sale or letting of non-domestic buildings with a floor area over 10,000 sq m. That requirement will then be extended on 1 July 2008 to buildings with a floor area over 2,500 sq m, and all other

remaining commercial buildings on 1 October 2008.

In the private sector EPCs will not be required until a new sale or letting of the building is arranged and will be valid for a period of 10 years (although this limit is soon to be reviewed and may be shortened). For buildings already on the market as at 6 April, an EPC must be in place no later than 1 October 2008. A small number of exemptions will apply to:

- small non-residential buildings with a floor area of less than 50 sq m
- buildings used primarily or solely as places of worship
- temporary buildings with a planned time of use of two years or less, industrial sites, workshops and non-residential agricultural buildings with low energy demand.

Where a new building is constructed, no completion certificate will be issued without a valid EPC.



EDUCATION BRIEF

The definition of 'Building' in the Regulations includes reference to part of a building that has been designed or altered to be used separately. In practice this is likely to mean that if one tenant in a multi-let building decides to assign or sublet its demise the entire building will require assessment. This may be relevant in the context of technology, research or enterprise parks. The cost of an assessment will vary significantly depending on the size and nature of the building. However, from the drafting of the Regulations it is likely that in a tenanted building the landlord will be required to pay. Whether the cost might be recoverable through the service charge will depend on the terms of the lease and may become a hot topic as the Regulations come into force.

Failure to comply with the Regulations when dealing with non-domestic property could incur a penalty equivalent to 12.5% of the rateable value of the building or a default penalty of £750 where the formula cannot be applied. The owner of the building will carry the liability for such penalty which will initially be capped at a minimum of £500 and a maximum of £5,000.

The public sector

The public sector will also be

subject to a separate regulation whereby a Display Energy Certificate (DEC) must be produced and displayed prominently in buildings with large numbers of public visitors and a floor area exceeding 1000 sq m. The DEC will have to display the building's operational rating based on its energy consumption per useful square metre. This is likely to affect local councils, universities, colleges, schools, hospitals and buildings occupied by government departments (and potentially PFI projects).

Practical Implications

Given that the Regulations will rate the asset and that compliance will become the responsibility of the owner or landlord of the building, it is the property sector (including education institutions) and its investors who need to be prepared for the implementation of EPCs.

Another driving factor for larger businesses in the pursuit of energy efficient buildings will be the potential for minimising the cost of buying emissions allowances pursuant to the Carbon Reduction Commitment. Where a business or organisation to which the commitment applies already occupies energy efficient buildings it will be able to save further costs by reducing the number of allowances

it needs to purchase. That commitment is proposed to apply to businesses and public sector organisations with an annual electricity bill in excess of £500,000.

The upside is that the assessment of existing buildings will allow the owner to identify what upgrades are needed to improve the efficiency of the building and therefore its rating. Doing that may be as simple as attaining the correct balance between an existing or improved heating system and the correct insulation within the building.

Well-prepared institutions would be wise to act now and plan for the assessment of buildings prior to the Regulations coming into effect. Early assessment should help protect asset values and identify in advance any actual or perceived disadvantages of a particular property, prior to it being marketed. If it doesn't seem cost-effective to improve the energy efficiency of buildings which are likely to receive poor ratings, bear in mind that a poor rating may itself have a detrimental effect on the rental and capital values of such buildings at the point of remarketing (or rent review).

Tim Reid, Solicitor, Property Disputes
T: 0870 763 1673
E: tim.reid@martjohn.com



COMPANY STATUS FOR UNIVERSITIES?

Twenty years ago, the structures created for the then polytechnics gaining independence from local authority control owed something to the organisation of existing universities. The powers of the new statutory corporations and other principal provisions of the 1988 Act covered some of the same ground as both the charter and statutes of the older HEIs, but as this is primary legislation, they are even harder to change.

The instrument and articles of government of statutory HEIs deal in more detail with constitutional arrangements. They also have something in common with the statutes of a chartered university. Whilst no institution would seek to amend its statutes more often than absolutely necessary, the procedure involved is at least easier than the steps required to alter the charter itself.

That procedural difference was partly preserved for statutory HEIs. The articles of government are made or changed by the corporation with the Secretary of State's approval: a fairly flexible regime. The instrument of government for new HEIs was originally prescribed by the Privy Council, which also has to approve

modifications. The instrument must include provisions set out in a schedule to the 1988 Act, although other material may also be included if 'necessary or desirable'. The schedule contains some detailed arrangements for the composition of the corporation, which may be amended by the Secretary of State.

The 1992 legislation for FE corporations established them on similar lines to what then became the new universities. The FE instrument and articles of government are made by the Secretary of State, who may also modify them for individual institutions.



The Minister's letter to Vice Chancellors in February 2006 set out how government intended to implement the HE White Paper's suggested relaxation of Privy Council control of how HEIs go about their business. For chartered universities, it identified content traditionally found in the statutes which is or is not regarded as a matter of public interest. Non-core subjects may therefore, with the Privy Council's approval, be removed to ordinances or other regulations not subject to external consent. For political reasons at the time, the model statute was still classified as core. It has since become clear that institutions wishing to remove staff matters from their statutes will not face any regulatory barrier, although internal obstacles are of course involved. The revised model statute has as a result become as redundant as the old one.

In the same spirit, the new FE instrument and articles, effective from the beginning of this year, dispense with most categories of governors, requiring only that they have the necessary skills, and require no more than rule-making by the corporation, after consultation, on the conduct, suspension and disciplining of staff.



EDUCATION BRIEF

DIUS's FE Governance Team are seeking to identify other instances of regulatory requirements which impede practical operations, and to encourage take-up of the power to innovate which, remarkably, allows ministers temporarily to disapply statutory provisions in order to facilitate approved projects which would otherwise be unlawful.

If you are prepared to believe in joined-up government, you might see in these developments the influence of the principles of better regulation, which include proportionality and focus. Another of those principles is consistency. Pre- and post-1992 universities have always started from different points, because of the basic distinction between the powers of a chartered body (which can broadly do anything a private individual may do) and a statutory corporation (strictly confined to its powers as defined). Chartered status also has a cachet which most would be reluctant to surrender. So, in recent months, some new universities have been attracted to the suggestion that reconstituting themselves as limited companies might assist them to face the realities of competing in the modern HE market.

The 1988 legislation permits a statutory HEI to transfer its undertaking to a company, by order of the Secretary of State. The company would be designated for HEFCE funding and incorporated by guarantee with charitable objects, again in a form approved by the Secretary of State, and requiring Privy Council approval to

A few HEIs, such as the former London polytechnics, are already constituted as companies, and others have recently converted from trust to company status as designated institutions. It does not seem to be suggested that these institutions have found company status of itself any proof against constrained powers, government



amendments. There is a model form of memorandum and articles of association for such a company, closely based on the statutory powers and standard instrument and articles of government. There is no requirement to follow this form, which has not been revised for many years and will be even more out of date as a result of the Companies Act 2006.

interference or lack of flexibility. The key is said to be in defining objects, powers and administrative provisions in the new company's constitution, so as to avoid prohibitions or uncertainties arising from the legislation, for example in financing arrangements or partnership projects.



This and the migration of a university's undertaking to a new company sound like great work for lawyers. But any HEI wishing to consider this option would need to be satisfied that the benefits of more room to manoeuvre as a company justified the cost and disruption of such a major project, given the continuing application of charity law to both the old and new bodies, and the preservation of the rights of staff transferring to the new entity under TUPE. It also seems odd that, at a time when government is looking for regulatory burdens to reduce, statutory HEIs should be encouraged to rectify perceived defects in their powers by individually redefining their own, at the expense of transferring their activities to a new body. Bill Rammell's February 2006 letter recognised that parts of the HE instrument and articles were in need of review and invited proposals for amendment from the sector. If the main statutory powers are also a real problem, would it not be more sensible for the sector to mobilise its considerable lobbying powers to get the primary legislation changed?

It has also been suggested that a modern, business-facing university may be better placed to deal with business on an equal footing if legally constituted in the same way as its customers. This echoes the view of some FE colleges that companies prefer to buy training services from another company to dealing with a college. Both these arguments may be more about perception than reality. If the product is right, those who use it are unlikely to worry about the provider's constitution. Indeed they may prefer dealing with an established entity to a newly formed company.

As the Charities Act 2006 comes into force, this debate about structures has widened to question the net benefit of charitable status, when competition from private universities and colleges looks certain to increase. That is a subject for a future article.

Paul Pharaoh - Partner, Head of Education

T: 0870 763 1455

E: paul.pharaoh@martjohn.com





BREAKING CHINA

The rapid growth of further and higher education in developing countries offers the potential of a new era for UK institutions. Many institutions are financially dependent upon high numbers of overseas student enrolments, and have been keen to cement and increase the international reputation of the institution by establishing stronger links abroad in countries such as China, whether through partnerships with Chinese institutions or by opening campuses in China.

There is no doubt that the emergence of China in the FE/HE market marks a great opportunity, however there are risks. This article looks at two of those risks in particular: protecting your brand, and minimising the likelihood of disputes.

Brand and reputation

One step that should be taken if you intend to promote your brand in China is to register a trade mark. In the UK, you can rely on your unregistered rights if someone was to use your marks. The present law in China does not afford much protection to those with unregistered rights. When this is combined with the general difficulties experienced

in enforcing your rights abroad, even more so in China, it is preferable to avoid these problems by applying for a trade mark.

The Chinese Trade Mark Office operates a "first to file" system, rather than a "first to use" system, i.e. the first person to file an application for a mark has the right to use it, rather than the first person to use the mark in the territory. This means that applications need to be made early to stop others from registering your mark. If this does happen, it can be a long and difficult process to recover your mark.

At present, applying for a trade mark in China is a long process and requires the instruction of local agents to deal with the Chinese Trade Mark Office. It can take between three and four years for a mark to reach registration. Another complication is that China is a single class system. This means that, unlike in the UK, you need to file a separate application for each class of goods or services for which you require protection. If you require protection in a large number of classes, the cost can be high.

While it can take a long time for the Chinese Trade Mark Office to examine your application, if it determines that there is a problem with the application, the deadlines set for dealing with this can be very short. This means that any required information (such as use of the mark in China) has to be made available quickly.

Changes have been proposed to try and reduce the amount of time that applications take to reach registration. Until these are implemented the process of registering a mark in China is likely to remain lengthy, particularly as the rush of applications shows no sign of slowing.

The administrative problems aside, if expansion into China is a possibility it is definitely worth filing an application to register your mark sooner rather than later. If someone else files to register your mark first, or something similar, this could block your application.



Dispute resolution

The core problem faced by a UK institution is negotiating an agreement with a Chinese partner that sufficiently protects your own interests. Your partner is likely to be a relatively unknown institution, operating within a legal and cultural system very different to those in UK.

The Chinese Government are permitting foreign partnerships, but only with the Chinese institution very much in control. Joint ventures must allow a minimum of 50% control to the Chinese partner and the president must also be Chinese.

Legally, the Chinese commonly enter loosely worded agreements, allowing flexibility in interpretation. This uncertainty can be compounded by the fact that it is common to have very broadly worded legislation, coupled with a large discretion in the application of Chinese law generally.

Having the agreement governed by English law and courts can ease some of the potential uncertainty. However, it may be appropriate to have non-exclusive jurisdiction for the English courts as property and intellectual property right disputes may need to be decided by the court in the country of registration.

From a practical perspective, you should develop a good understanding of your partner's ethos and culture before agreements are entered into. You should be prepared to identify and deal with difficult issues at the outset. Differences in interpretation of common terms can often create confusion - ensure that central terms are mutually understood. Do not allow government relations to be wholly handled by your overseas partner. Whilst this may seem the simplest option at the outset, it may mean that you do not receive information first hand and would not have any direct contacts with officials should a dispute arise between you and your partner institution.



If problems do arise, you may wish to assert your rights in the local courts, although this may not necessarily be the best approach. Negotiation and discussion of the issues or the use of mediation may have a far less disruptive effect on the relationship.

Zoë Robertson - Associate, IP & Technology Team
T: 0870 763 1640
E: zoe.robertson@martjohn.com

Andrew Holden - Associate, Commercial Disputes Management
T: 0870 763 1661
E: andrew.holden@martjohn.com



UNIVERSITY STUDENT ACCOMMODATION REPORTS 2008

The importance of universities to the UK economy has been highlighted, yet again, by a recent report from King Sturge into the student accommodation market. The report into the UK market, and a sister publication which addresses student accommodation issues in western Europe, can be obtained at www.kingsturge.com.

The reports make fascinating reading as to King Sturge's assessment of the student accommodation market. Some highlights include:

- There are now 1.4 million students in full time higher education.
- Since King Sturge's last report in 2005, private sector operators have increased the number of purpose-built bed spaces by 36% to 123,500. Despite this impressive increase the universities themselves still remain the dominant players in the market, with over 320,000 beds.
- One of the effects of private sector involvement has been to expand students' choices and to

help universities offer different types of accommodation from traditional halls to shared houses and en-suite accommodation. As the value of student accommodation assets has grown in the past five years, the range of procurement options available to universities has increased immeasurably and there are now more designing, building, financing and operating opportunities.

- It is clear that the student accommodation sector as a whole (worth in excess of £20 billion) is now an asset class in its own right. With more than £700 million worth of transactions being undertaken in 2006/7, this makes for exciting times and interesting deals to be done by universities with financiers/investors eager to look at university real estate projects. While conventional procurement, construction and the financing of student accommodation still has a place, there are now wider and much more imaginative products available for universities and other operators such as partnership agreements,

REITs and bonds.

- That confidence is exemplified across the student accommodation market - the University of Worcester is currently embarking on a major expansion of its accommodation as part of the creation of its brand new inner city campus site in the heart of Worcester (see www.worcester.ac.uk). The government's drive to raise student numbers to 50% coupled with the demand for UK education from overseas students and the latest drive to establish university towns means that student accommodation will continue to play a significant part in the UK property market.

For further information on the reports or the student accommodation market generally, contact either:

Conal Newland at King Sturge
T: 07971 104 052
E: conal.newland@kingsturge.com

Clive Read - Partner, Property Group
T: 0870 763 1439
E: clive.read@martjohn.com



DELAY IN COMPANIES ACT IMPLEMENTATION

The government announced before Christmas that implementation of most of the provisions of the new Companies Act 2006, which were previously due to come into force on 1 October 2008, would be delayed until 1 October 2009.

The government has shifted back the timetable because the Registrar of Companies at Companies House could not guarantee that new systems would be in place by October 2008 to deal with the changes, in particular the mechanics of incorporating new

- Accounts, Reports and Audit
- Distributions (particularly distributions in kind).

The delay in the timetable for implementation is disappointing, as it means there is a more lengthy transitional period in which elements of both the old Companies Act and the new Act are in force.

This may make it more difficult for institutions to consider the changes as a whole and ensure any companies they are involved with, which might include wholly-owned subsidiaries or joint venture companies with third parties, have their affairs in good order and comply with the new legislation.



The headline issues arising from the new legislation and our analysis of their significance to education institutions were considered in the last edition of Education Brief (Issue 44, Winter 2007) and our Education Bulletin (September 2007).

companies under the 2006 Act, and the changes relating to share capital which will affect all limited companies.

The changes envisaged for introduction on 6 April 2008 will not be affected. These principally relate to:

- Company Secretaries (which private companies will no longer be required to have)

John Nicholson - Solicitor,
Corporate Group
T: 0870 763 1434
E: john.nicholson:martjohn.com



RECENT CHANGES TO PUBLIC PROCUREMENT THRESHOLDS

When awarding contracts for supplies, works or services, public authorities are required to consider compliance with the EC public procurement rules. The relevant EU Directive dealing with these rules is implemented in the UK by the Public Contracts Regulations 2006. The UK Regulations apply to the public sector, including further and higher education institutions in their capacity as bodies governed by public law, but only in circumstances where more than half of the institution's finance is derived from the state or where the institution is subject to state management supervision.

The EC public procurement rules apply where the estimated value of a contract is above defined thresholds that are periodically reviewed by the EU Commission. The thresholds are set in euros, but fixed conversion rates for member states outside the euro-zone (which are adjusted every two years) are also provided. It is therefore very important to always be aware of the relevant threshold and the conversion rate applicable at any one time.



Most recently, the EU Commission adjusted the thresholds to the following sterling equivalents applicable from January 2008 onwards: £3,497,313 for public works contracts; £139,893 for public supplies contracts; and £139,893 for most public services contracts. It should be noted that even if the contract value is below the thresholds, the general principles in the EC Treaty, including

the requirement of transparency, equality of treatment of bidders and non-discrimination on the grounds of a contractors' nationality, may still apply to a public contract. This means that it may still be necessary to award the contract on a non-discriminatory basis to undertakings in other EU member states.

Kristina Barbov - Solicitor,
Competition & Procurement Team
T: 0870 763 1206
E: kristina.barbov@martjohn.com

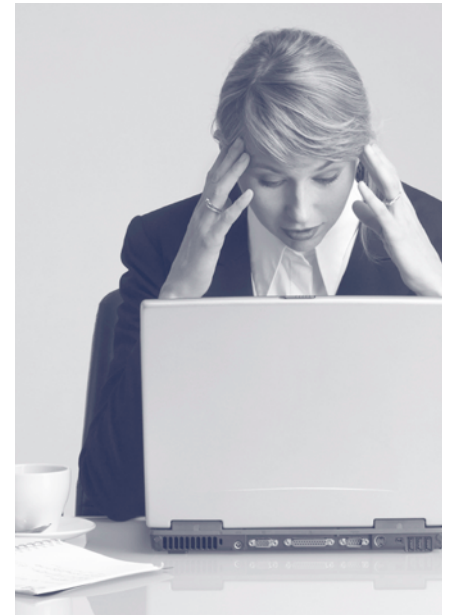


DISCRIMINATION BY ASSOCIATION

Since coming into force in 2002, the Disability Discrimination Act has presented significant challenges to institutions' means of delivering education. Following the recent publication of the Advocate General's opinion on a case referred to the European Court of Justice (ECJ) from a London Employment Tribunal, it appears that the ambit of the legislation may be significantly wider than hitherto understood.

The case concerned an employee who was the principal carer for her disabled son. The issue for consideration was whether the prohibition of discrimination contained in the Directive (that established the general framework for equal treatment in employment and occupation including vocational education) covers cases where an employee is treated less favourably than her colleagues because, although not herself disabled, she is associated with a disabled person. The Advocate General concluded that that it did.

The reasoning is that prejudice deprives disabled individuals of valuable options and as a result erodes human dignity and personal autonomy, values which underpin equality. However, targeting a person who is himself disabled is not the only way of discriminating against him; there are other subtler, less obvious ways of doing so i.e. by targeting not the disabled individual but persons closely associated with him. The Advocate General's view was that a robust conception of equality entails that these subtler forms of discrimination should also be caught by anti-discrimination legislation, as the dignity of a disabled person is affected as much by being directly discriminated against as it is by seeing someone else suffer discrimination merely by virtue of being associated with him. Therefore, if someone is the object of discrimination on the grounds of disability, he can avail of the protection of the Directive, even if he himself is not disabled.



The Advocate General's opinion is not binding on the judges of the ECJ, but it is frequently followed. If it is followed in this case, the implication will be that institutions will not only have to take into account the rights of their disabled students, but also the rights of disabled persons who are not students but whose carers are signed up for courses.

Geraldine Swanton - Senior Associate, Education Team
T: 0870 763 1455
E: geraldine.swanton@martjohn.com



MARTINEAU JOHNSON
 T: 44(0)870 763 2000
 F: 44(0)870 763 2001
 www.martineau-johnson.co.uk
 E: lawyers@martjohn.com

EDUCATION BRIEF

EDUCATION NEWS

New Head of Education



With effect from 1 May this year, Smita Jamdar will succeed Paul Pharaoh as Martineau Johnson's Head of Education. Smita trained with the firm, becoming a partner in 2004, and has been a key member of the Education Team for some time.

Paul will continue as a member of the team, and will take on the role of chair of the Education Sector Group, which brings together lawyers from specialist teams throughout the firm who work with education clients.

New IP partner

We are delighted to welcome Des Burley to the firm as a partner in our Intellectual Property and Technology team. He has extensive experience advising education clients on the commercialisation of

their intellectual property and on data protection/freedom of information, as well as on IT and e-commerce issues.

Des has a particular insight into technology transfer, having completed secondments at two research intensive universities. He has also seen life on the other side during a recent visiting lecturer stint on the Birmingham City University Business School MBA course. He is a regular speaker on the exploitation of intellectual property and has a keen interest in the challenges faced by users and developers of open source software.



Des has advised HEIs on a wide range of technologies and all areas of IP commercialisation, for example: space engineering, clinical trials - for eye surgery and for blood "markers" (and the implications of the Human Tissue Act), furniture design; spin-out companies; NHS Trusts

collaborating with universities; and on the exploitation of software.

Competition winner

The winner of our education solutions prize draw was Mark Cowling, of the Department of Legal Affairs at De Montfort University. Mark wins a free in-house training session for him and his team.

You can still register for our enhanced online portal for HE and FE institutions at: www.educationsolutionsonline.co.uk



EDUCATION SOLUTIONS
online

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 T: 0870 763 1314 or E: paul.pharaoh@martjohn.com

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