



# SIT IN PRETTY?

How well placed are institutions to deal practically with unacceptable student protests?

Budget cuts, course closures, the Israeli invasion of Gaza, the cancellation of a May ball. A small selection of reasons behind recent student protests which have been in the news for one reason or another. Some people think student protest action these days tends to be a bit half-hearted. Certainly, no one really thinks we're heading back to the student protest ethos of the sixties and seventies (although some of these recent examples do look like cases of rebels in search of a cause), but this kind of activity is definitely on the rise. How is it best dealt with, and how well does the current law support universities and colleges in dealing with it?

Of course students do have certain rights to protest. Human rights legislation is designed to safeguard freedom of demonstration and freedom of expression. But that should not be at the expense of an institution's entitlement to use its own property for its own purposes and deal effectively with any trespass by students, either in areas in which they have no permission to be, or in any area for purposes other than those for which they are authorised to be there.

## The risks to institutions

It's not just because of the risk of a technical trespass by students that institutions need to be vigilant. The kind of protests we have seen in recent times can easily:

- disrupt the operation of the institution (for example by taking teaching space out of use);
- affect income stream;
- cause additional concerns regarding the health and safety of staff and other students; and
- hinder or prevent the legitimate use of the institution's facilities by others.

Institutions often have little or no notice that the protest is going to happen. This makes things particularly difficult, especially where the protest takes the form of a sit in on part of the institution's property. A decision then has to be made quickly: negotiate with the protesters or take swift legal action to bring the protest to an end.

Any lawyer well versed in the approach of the courts these days is likely to flinch at the prospect of taking what could be seen as aggressive legal action against students (or indeed anyone else) without first exploring whether the problem can be resolved without recourse to litigation. That holds true to some extent in student protest situations too, where sometimes a resolution can be achieved through discussion. The difficulty here though, particularly where the protest is resulting in the kind of difficulties mentioned above, is that the institution is to a greater or lesser extent hostage to the protesters' demands. This can mean that a protest drags on longer than it needs to, during which time teaching or administrative accommodation may be put out of use, security and other staff may be diverted from their normal duties and the institution's income may be affected.

“Of course students do have certain rights to protest.”



In these circumstances, swift action in the courts may be the only realistic option. But how can the courts help, and what kind of orders are likely to be made to assist the institution in resolving the matter?

### **What can the courts do?**

Essentially, two orders are possible. First, the court may make a possession order requiring the protesters to leave the area concerned. Secondly, as an alternative or in addition to a possession order (depending on the circumstances), the court may make an injunction order prohibiting the protesters from entering a certain area.

In protest scenarios things are not always that clear cut - for example the students may just be walking through the institution's campus from time to time, rather than staging a sit in. In such circumstances an

injunction order is an alternative which enables the court to restrain entry onto land even where the protesters are not in occupation. However, an injunction order can be far more difficult to enforce than a possession order if it is not obeyed, and for that reason a possession order is generally preferable.

The question often arises how far the court can go in making a possession order, and whether such an order can extend to property not actually occupied by the protesters. For example, the protesters may be occupying a lecture theatre but the institution may want a possession order in relation to the whole of its property to make sure they don't simply move to a different lecture theatre or another of its buildings. In

1980, the court decided in the case of *University of Essex v Djemal* ([1980] 1 WLR 1301) that a possession order could be made to extend to the whole of the owner's property, although the scope of the order should depend on the circumstances of the case. In that case, the protesters had already been evicted from another part of the campus and the court was prepared to make a possession order in respect of the whole campus, even though the protesters at the time were occupying only one floor of one building.





The principle in the Djemal case was later extended so that a possession order could be made in respect of different property owned by the claimant in some circumstances - all very helpful for institutions faced with problems caused by protesters. But earlier this year, in the case of Secretary of State for Environment, Food and Rural Affairs v Meier ([2009] UKSC 11), the Supreme Court pulled back from the previous broad interpretation of when a possession order might be made.

The case revolved around a group of travellers moving from wood to wood. The claimant sought (1) a possession order in respect of the site the travellers were on at the time the proceedings were issued and also in respect of 13 other woods; and (2) an injunction order prohibiting them from entering or re-entering any of the 14 sites.

The Supreme Court considered that a possession order would require the defendants to give back possession of the land to which the order related. As the travellers were not on 13 of the 14 sites, they would not be able to comply with any possession order made in relation to those sites. Further, it held that an order for possession in respect of the 13 other woods would deprive any actual occupiers of those sites of the opportunity to be heard.

As for the application for an injunction order, the Supreme Court reversed the first instance decision to refuse this. That refusal had been based on the difficulties associated with enforcing such an injunction. The Supreme Court however considered that an injunction could act as a deterrent, and did not consider it appropriate to assume that an injunction would not be complied with.

### Where does all of this leave us?

Certainly, as things stand the injunction order remains a useful remedy for institutions in circumstances where a possession order cannot be obtained. No doubt it is open to discussion whether a group of student protesters are more likely to obey an injunction order than a group of travellers. But the injunction is not a perfect remedy in these cases because of the difficulties which can arise with enforcement if it is not obeyed. In Meier the court noted the need for reform, and it seems likely that in time a new, more effective, remedy will be devised.

In the meantime, the point to bear in mind is that if student protests cannot be diffused swiftly by discussion, decisive action in the courts does tend to be very quick and very effective.

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# NEW COALITION GOVERNMENT: FURTHER CHANGES TO THE PLANNING SYSTEM!

Now that the Tory/Lib Dem coalition is in place it will be interesting to see how far their election manifestos are brought into effect in relation to the planning system, and whether their respective agendas will be followed. The Queen's speech on 25 May has already indicated substantial moves to implement a number of proposals, many of which will be of interest to universities and colleges.

The British Property Federation (BPF) generally indicated support for these proposed reforms.

The Tory manifesto promised to overhaul the planning system and to give local people more power. It was interesting to note that in April 2010 the BPF indicated that the proposals were attractive in principle 'but would be difficult to follow through in detail'.

A number of ideas have been put forward including:

- abolishing the right of planning inspectors and the Planning Inspectorate to rewrite Local Plans;
- encouraging local authorities to compile "infrastructure plans";
- abolishing Regional Development Agencies (RDAs) and replacing them by Local Enterprise Partnerships (now to be contained in the Public Bodies Bill);
- scrapping regional housing targets with the intention of allowing communities to decide new build levels at local level;
- abolishing Regional Spatial Strategies;
- giving local planning authorities a duty to co-operate across boundaries;
- giving planning policing powers to councils to respond to neighbours and local people objecting to "back-garden" development;
- incentives for councils to grant planning permission and changes of use classes to make it simpler for buildings to be re-used;
- the introduction of third party rights of appeal, targeted at those applications which are not in accordance with the Local Development Plan;
- abolishing the Infrastructure Planning Commission (IPC) or alternatively making it part of the Planning Inspectorate, so that it would report to or make recommendations to the Secretary of State who would make the ultimate decision. The Queen's speech clearly indicates that the coalition will proceed to scrap the IPC completely and that they will seek to replace the non-elected body with "an efficient and democratically accountable system that provides a fast track process for major infrastructure projects".

The abolition of the IPC will unfortunately defeat one of the main planks of the recent new system put in place for major infrastructure schemes. The idea had been to speed up the process for getting consent for such major infrastructure schemes.

Many commentators raised repeated concerns regarding the old system which had in-built delays whilst schemes went through the public inquiry process and then awaited a decision from the Secretary of State. The introduction of the IPC had been designed to streamline and speed up bringing forward major infrastructure schemes that were seen as vital for the economy in the UK. The new nuclear industry especially has been dependent on the introduction of the IPC in order to bring forward new nuclear power stations before difficulties are encountered in 2016/17 with the supply of power in the UK.

The Lib Dems as part of their election manifesto pledged support for the Tories' proposed overhaul of the planning system and also supported the axing of the IPC. This support would appear to have fed its way through in the coalition package.

It is also interesting to note that the Lib Dems' manifesto also sought to introduce a local competition test for all planning applications for new retail developments. A "competition test" would prevent any retailer opening a new store in an area where it is already significantly represented. There is no sign of this proposal feeding its way through in the Queen's speech at this stage.

The Tory green paper on planning before the election indicated a presumption in favour of sustainable development.

It also advocated that it would introduce measures that would make it unlawful for a planning authority to refuse planning permission if an application conformed with a Local Plan and was accompanied by a “local infrastructure tariff” for the development, with larger projects having produced an appropriate public consultation exercise.

Caroline Spelman, the then Shadow Community Secretary, indicated during the election “we will put communities in the driving seat, creating an ‘open space’ planning system which provides new homes and jobs to the benefit of the economy, local democracy and the environment”. This is now reflected in the Queen’s speech which refers to radically reforming the planning system in the longer term to give neighbourhoods a say in the shape of their local area based on the “Open Source Planning” document. The Queen’s speech also made reference to a Devolution & Localism Bill which will set out a new planning framework, indicating that the coalition government will publish and present to Parliament a simple and consolidated national planning framework covering all forms of development and setting out national economic environmental and social priorities.

Further items stressed in the Queen’s speech confirm the abolition of Regional Special Strategies and the replacement of some RDAs with “local enterprise partnerships”. It is thought that those RDAs which are perceived as doing a good job will be retained: more information will follow in



the Public Bodies Bill. Emphasis was also placed on the creation of a presumption in favour of sustainable development in the planning system.

Other government proposals in the Queen’s speech indicate a commitment to maintaining the Green Belt, stressing the importance of Sites of Special Scientific Interest and creating a new designation to protect “green areas” of particular importance to local communities.

Another interesting move indicates the abolition of the Government Office for London and a clear indication that the government will consider abolishing the remaining Government Offices.

We will all have to wait and see how these measures will be implemented in the coming months. However, developers, planning officers and lawyers have all been seeking to cope with the current planning system in the UK which has gone through a number of radical changes in recent years. For example, the LDF system is still in the process of implementation. Further substantial changes which look like they are

imminent will only exacerbate the delays and frustrations that are encountered in the planning system by anyone seeking to provide new development.

The UK desperately needs a stable and consistent planning system which allows new housing and new employment opportunities to come through in a realistic and economic time frame. Further structure changes to the planning system will, it is feared, inevitably lead to further delays in the planning process and will only increase the frustrations of landowners, developers and entrepreneurs around the UK seeking to progress development projects. The radical changes made as a result of the Planning and Compulsory Purchase Act 2004 promised a planning system which would be “simpler, faster and more efficient”. It has patently failed! Let us hope that the planned changes to be made by the coalition will go some way to achieving this aim - we live in hope!

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# CONSEQUENTIAL LOSS...OR IS IT?

So, you think you know what consequential loss is?

The tendency is to assume that the term “consequential loss” has a meaning which is clearly and completely understood by the courts, so that if a contract simply excludes it then there can never be liability for loss of profit, business, goodwill and reputation (more correctly referred to as “economic loss”).

The reality is much less clear. The courts themselves say that without further elaboration in the contract, the term “consequential loss” is not sufficiently clear. That is a warning to all of us as regards our approach to drafting contracts.

The terms “economic loss” and “consequential loss” are often treated as synonymous, but they are not. Consequential loss in fact refers to the causal link between a breach of contract or duty and a resulting loss, whilst economic loss is one of the types of loss that can be caused by such a breach. In this article we explore these two concepts, their relationship and their implications for drafting a contract which limits liability effectively.

**“The courts themselves say that without further elaboration in the contract, the term “consequential loss” is not sufficiently clear.”**



## Causation and consequential loss – direct and indirect losses

Direct losses are those directly resulting from a breach, such as the cost of rectifying physical damage or the cost of engaging another party to complete contracted works.

Indirect losses are those losses which do not directly result from the breach. Liability incurred to sub-purchasers for non-performance of a contract, the loss of repeat orders, or loss of business opportunity are all good examples.

However, losses can be too remote for damages to be claimed. Unless the parties express a different intention, the defaulting party is liable for all direct losses and those

indirect losses that are within the parties’ reasonable contemplation. The innocent party accepts the risks of any other more remote consequences of the breach because they are not reasonably foreseeable by the defaulting party.

## Types of loss – economic loss, physical loss

Because physical loss is usually direct loss and economic loss is often indirect loss, many contracting parties erroneously assume that this is always the case and that “consequential loss” and “economic loss” are the same thing.

However, economic losses, such as loss of profit, are often direct losses. An example would be the failure of a piece of software whose job is to record sales and the related profit. The direct consequence of the

software supplier's breach would be loss of profit for his client. The supplier's liability would not be reduced by a clause simply excluding liability for consequential losses.

#### Implications for drafting limitation clauses

A well drafted exclusion clause will deal with both direct and indirect losses and limit liability appropriately to each of them. The provision will address the extent to which it is intended there should be liability for economic loss in each of those categories.

The devil is in the detail – the wording should be tailored to reflect what is being supplied under the contract and take into account the way in which the parties have decided to apportion risk and liability between them.

“Many will be aware that there can be no limitation of liability for death or personal injury through negligence or for any act of dishonesty.”

Certain well known overriding rules apply – a supplier dealing on standard terms can only exclude liability to the extent that it is reasonable for it to do so, and industry norms and trade practices will be relevant to this. There are further rules relating to contracts with consumers. Many will be aware that there can be no limitation of liability for death or personal injury through negligence or for any act of dishonesty.

A blanket exclusion of liability for “consequential losses” may be not very effective, or even completely ineffective, so the parties may unwittingly leave themselves exposed to potentially extensive liabilities.

#### Conclusion

Separation of the concepts of causation and the nature of the resulting losses, together with careful drafting, will greatly increase the prospects of ensuring that limitation clauses are upheld by the courts if challenged so that parties can have greater confidence that the various risks inherent in forming a contract can be positioned as they intend.

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# FLIGHT IN VICTORY FOR UNITE

The dispute between British Airways Plc and the trade union Unite has caught the attention of both the media and the legal world in recent weeks, with a “first” in terms of the Court of Appeal examining the lengths to which a union must go to notify its members of the result of a strike ballot.

## Background

Given challenging economic conditions, BA consulted about and subsequently proposed to make changes to the terms and conditions of cabin crew in an effort to improve efficiency. Unite balloted its members on strike action in November 2009 and the members voted by an overwhelming majority to support a strike. However, the strike was prevented in December 2009 when it was declared unlawful by the High Court because ballot papers had been sent out incorrectly.

The union re-balloted in February 2010, again receiving widespread support for strike action. The first strike took place in March 2010, after which negotiations took place and the parties were nearing agreement over the main issues. However, there were sticking points over BA’s proposed removal of travel perks from employees who had taken part in the strike, as well as allegations that British Airways had taken unjustified disciplinary action against a number of the union’s members. Accordingly, the union called for a further series of strikes totalling 20 days, the first of which was to be held on 18 May 2010. The day before, on 17 May



2010, BA successfully obtained an interim injunction from the High Court preventing the strike action from going ahead (pending a full merits hearing).

## Injunction

Industrial action injunctions can be sought by employers to prevent a trade union calling a strike that has not been lawfully balloted in accordance with the Trade Union and Labour

Relations (Consolidation) Act 1992 (TULCRA). The court does not look into the lawfulness of the action itself, but essentially assesses whether, on the “balance of convenience”, the facts support the granting of an injunction. In order to do so, the court also has a duty to take into account the likelihood of the union succeeding in ultimately establishing statutory immunity at the full trial of the action.

  
**BRITISH  
AIRWAYS**

Statutory immunity is awarded to the participants and organisers of trade disputes, including strikes, provided that the union complies with the statutory requirements relating to balloting and notification as set out in TULCRA. British Airways argued during the hearing on 17 May that immunity had been lost, on the ground that the union had failed to take such steps as were reasonably necessary to ensure that all those entitled to vote were informed of the outcome, specifically:

1. The number of votes cast in the ballot;
2. The number of individuals answering Yes to the question(s);
3. The number of individuals answering No to the question(s); and
4. Spoilt voting papers.

BA argued that the union was not able to point to any direct communication to its members containing the full statutory information or even informing them of where that information could be found.

### The union's dissemination of the results

Unite acknowledged that it was not able to point to any direct communication to its members, but argued that communication by post was ineffective in the case of a mobile workforce. It argued in the High Court that it had satisfied the test of reasonableness in terms of communicating those results to its members on the grounds that it had:

- Posted copies of the Independent Scrutineer's Report containing the statutory information on notice boards in all crew report centres and made copies of the report available in union offices;
- Passed news sheets amongst members by hand;
- Posted statutory information on the union's websites;

- Posted a text message announcing the result (but not all of the statutory information) to BASSA members;
- Issued a press release giving the result (but not all the statutory information) on the union's websites and emailed this to relevant members; and
- Posted a video of the Assistant General Secretary announcing the result (but not all of the statutory information) on its website.

### High Court decision

Having regard to the likelihood of success at trial, the judge was inclined to think that the union had probably failed to adequately put in place a system to ensure that all reasonable steps were taken to communicate the statutory information to the relevant members. Accordingly, on the balance of convenience, the High Court came down in favour of the airline and granted the injunction. Unite appealed.

**“Unite acknowledged that it was not able to point to any direct communication to its members, but argued that communication by post was ineffective in the case of a mobile workforce.”**



### Court of Appeal decision

Three days later the Court of Appeal overturned the decision and lifted the injunction. The decision was made by a two-to-one majority. The majority of the Court of Appeal held that, whilst more could have been done to communicate the statutory information to the union's members, the efforts were sufficient to amount to compliance with the statute. Lady Justice Smith added that "it was a fair and open ballot and not to uphold the appeal would mean that the rights of workers to withdraw their labour would be undermined".

### Comment

This decision will be unwelcome to universities and colleges, and offers unions confidence that the court system will support genuine efforts made to hold a fair and open ballot of workers in order to exercise their right to withdraw labour should it be deemed necessary to take such steps. The Court of Appeal's interpretation suggests a wide reading of the test of "reasonableness" and many institutions may side with Lord Neuberger who disagreed with the majority decision feeling that this was a "dry and technical" point and that, in his view, the union had not complied with statute as it could easily have done more.

With the likelihood of more industrial disputes on the horizon in the education sector over the coming months, universities, colleges and unions alike will no doubt need to see how the courts continue to interpret the statutory requirements.

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### The new Bribery Act

We are holding seminars on the new Bribery Act on 13 and 30 September 2010.

The Act is due to come into force this autumn. It creates criminal offences of bribery which are committed by anyone who gives or receives a financial or other advantage if there is an intention to cause the 'improper' performance of a function or activity. As with any organisation engaged in business, universities and colleges are at risk of acting in breach of these provisions.

There are various ways the offences could be committed within an educational setting - in relation to preferential treatment given to a prospective student, for example. Institutions also engage in procurement exercises, often involving multi-million pound contracts, and are therefore particularly vulnerable to bribery in the marketplace.

A criminal offence is also committed by a commercial organisation where an 'associated person' of that organisation commits an offence of bribery, unless the organisation can demonstrate that it had in place adequate procedures to prevent bribery. This is known as the 'corporate offence'.

Even in non-commercial organisations and charities, it will be regarded as good HR practice to have in place procedures and codes to deal with the tackling, discovering and reporting of offences such as bribery, and these seminars will cover the sorts of procedures that ought to be in place.

A copy of the invitation to this seminar can be found at <http://www.martineau-uk.com/Seminars.aspx>

We hope that our seminar will be of interest, and we look forward to hearing from you. Of course, if you would like to talk before September about the issues arising, please let your usual contact at Martineau know.



# GOOGLE EARTH AT WORK

Online tools such as Google Earth have become a fundamental part of our internet experience and are used formally and informally across numerous sectors and in a wide variety of professions. One interesting use of Google Earth occurred in 2008 when a group of scientists visited a site in northern Mozambique which they had identified using Google Earth. The area had previously been inaccessible due to rough terrain and decades of civil war, but upon visiting the site the scientists discovered hundreds of different plant species, birds, butterflies, monkeys and even a new species of giant snake.

Other significant and illustrative uses of Google Earth include the discovery in 2009 by an archaeologist of an ancient burial site in Ireland; the mapping of earthquake survivors by aid workers in Haiti earlier this year; the use by police to track criminals and locate illegal drugs; and the use by public benefit organisations to increase climate change awareness.

These stories demonstrate how Google Earth can be used in a legitimate way to benefit professional and business activities. However users should be aware of Google's strict terms and conditions which, amongst other things, generally expressly forbid users from copying, translating, modifying or making derivative works of the content of any of its sites. This would mean, for example,

that copies of maps taken from Google sites should not be used in other documents without obtaining the appropriate licence from Google or any other applicable provider.

Further, in its terms and conditions Google states that it does not warrant that any information provided by it will be accurate or reliable, and limits its liability for any indirect or consequential loss. This means that it would be difficult to make a claim against Google. Therefore any information used should be substantiated by information from other sources or site visits.

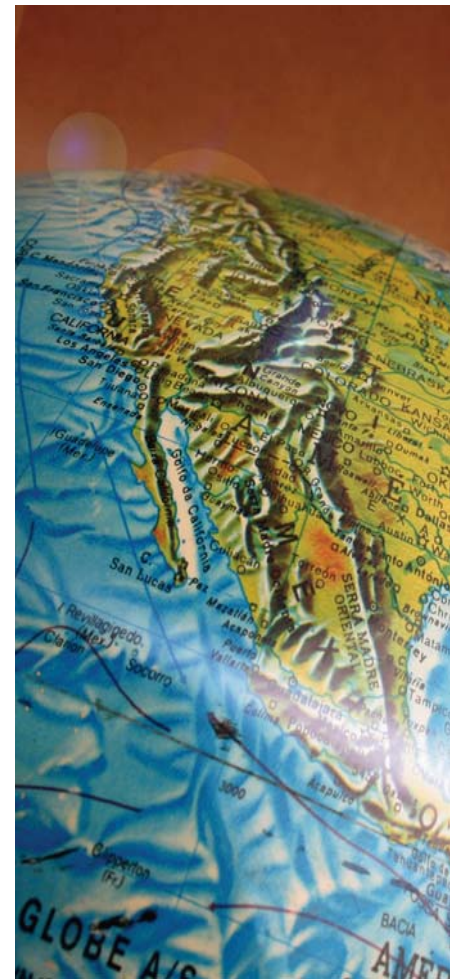
Just because information is accessible through the internet does not mean you can do what you want with it or even rely upon it. The terms and conditions of use and/or any licence should always be read and understood. This is even more important in a commercial context and where any information you are looking to provide relies on information other than your own.

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# EDUCATION NEWS

## Monthly education bulletins

The Education Team at Martineau is now producing two regular monthly education bulletins, one aimed at universities and the other at colleges, in addition to Education Brief. The bulletins are sent out by e-mail and contain articles on a wide range of topics including students, governance, IP, commercial, estates and human resources.

Anyone wishing to receive either of these bulletins can email [sarah.jordan@martineau-uk.com](mailto:sarah.jordan@martineau-uk.com) or sign up on our website at: <http://www.martineau-uk.com/Subscribe.aspx>

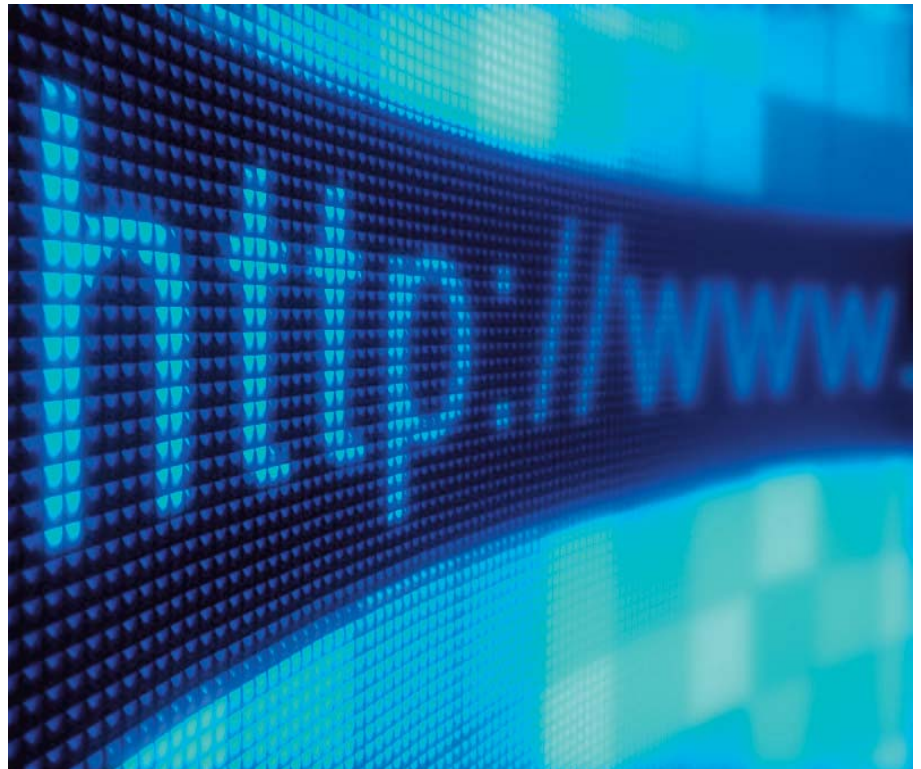
Past editions of the bulletins can also be found on the website.

## First Woman Awards

Smita Jamdar was recently shortlisted in the business services category at the prestigious First Women Awards.

The event, hosted by the CBI and sponsored by Lloyds Banking Group, was attended by many talented and high profile business women and leaders.

Regrettably it wasn't to be Smita's night, but it was a terrific achievement for her to be amongst the shortlist.



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. Education Brief may be photocopied for the use of colleagues within your institution. An electronic version is available on our dedicated education portal: [www.educationsolutionsonline.co.uk](http://www.educationsolutionsonline.co.uk)

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