

# DONEDEALS

ISSUE 06

AUTUMN 2010

KEEPING YOU INFORMED



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**EDUCATION**

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# INTRODUCTION

Welcome to our first edition of Education Done Deals, our new half yearly publication that keeps you informed of some of the issues that affect the education sector, along with a little bit of news on what our team have been working on recently. I hope you find it interesting reading.

It is almost impossible not to begin any review of the last twelve months in education without at least a passing reference to the extraordinarily difficult economic climate. Whilst the private sector began the year in misery but at least ended it with a modicum of optimism and encouragement from government, the education sector started the year full of caution and ends it with confirmation that very difficult times lie ahead.


There are however reasons to be optimistic. The sector has spent the last year bracing itself for cuts and planning for the austere funding regime in ways which encourage the view that it will not only survive but even thrive. As always, the sector is showing itself to be robust and confident, ready to take the necessary action, and creative and innovative in the ways it addresses future funding reductions. The capacity to adapt is the key to resilience, and our work with our university and college clients, for whom change has often been the only constant in a perpetually shifting policy landscape, confirms that the sector's impressive and undiminished ability to respond to new challenges.

**“Recent wins have reaffirmed our position in the top tier of legal advisers to the education sector.”**

For our education practice, the year has seen a continuation of the pattern of expansion and success established over the last five years.

The team has racked up significant wins throughout the year, including most recently Glyndwr University, Nottingham University, Nottingham Trent University, Derby College and Amersham & Wycombe College – all competitive tenders that prove Martineau's strategy, business model and propositions are finding favour with clients and potential clients alike.

A newer development in the last twelve months or so has been the use of sector purchasing consortia, or joint procurement exercises, to establish legal service framework agreements. The North West Universities Purchasing Consortium and the



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North East Universities Purchasing Consortium have both recognised the quality of service we offer and we are approved to deliver legal services to any of the consortia members.

We have been appointed to the Crescent Purchasing Consortium Framework to provide legal services to its national membership of FE colleges, based largely on our commitment and support for the sector. Our excellent service record and the demonstrable value for money we offer were contributory factors in our inclusion on the list.

We anticipate that the use of these framework agreements will undoubtedly increase as institutions recognise the opportunity they offer to procure high quality legal advice without the often high costs of an independent procurement exercise; we hope that the sector will make good use of these established arrangements in the future.

Turnover from work done for our university and college clients continues to grow. The work is shared between more than 90 lawyers across the firm and they all continue to play their part in our success. Every team in our firm has acted for one or more of our education clients in the last year, highlighting the vast breadth of our specialist knowledge, and the depth of engagement our lawyers have with the sector.

Innovation is a founding principle of this firm and it is important we live up to it in everything we do,

from the solutions we provide to the way in which we communicate with our clients. This approach has been typified with our creation of the Midlands University Estates Breakfast Club, which offers a stage for estate directors to debate planning, finance and real estate issues with lawyers who bring a national perspective to what at first might appear to be just local issues. Similar principles underpin the IP Breakfast Round Tables, and FE HR Directors’ Forum, which we have begun to run on a termly basis. We enjoy the opportunities these bring for focused and constructive dialogue with the sector to find shared solutions to common problems.

The education sector is part of our DNA – it defines this firm. So we were immensely proud to take over in May 2009 the role of national sponsors to the Association of Heads of University Administrations (AHUA) – the influential organisation for senior university managers responsible for professional services.

This edition of ‘Done Deals’ is as much an endorsement of our optimistic view of the future of the education sector as it is a celebration of the work we have done. Print is a traditional medium for communication, but for many reasons its popularity is waning and it must be viewed merely as a snapshot in time and not a running commentary – that’s what our new look website at [www.martineau-uk.com](http://www.martineau-uk.com) is for.

**Smita Jamdar**  
**Partner & Head of Education**

# HUMAN RESOURCES



The education sector, although insulated from the initial effects of the economic downturn, is now showing signs of distress, and we are witnessing an increase in the number of education institutions undertaking restructuring and redundancies, as well as considering optimal configurations for the future, through shared services, collaborations and in some cases mergers. Many of our university and college clients are seizing the opportunity to become leaner and more fleet of foot.

Institutions continue to face a disproportionate number of discrimination claims in comparison to the rest of society. A contributory factor in the decision to sue an institution remains that unionised staff have the backing they need to take on their employers, without the stigma so normally attached to suing the hand that feeds. The education sector sees many of these individuals remaining in their positions, even after the case is won or lost, an outcome that is comparatively rare in the private sector.



These complex new considerations are having to be tackled alongside pre-existing areas of difficulty for universities and colleges. A delay on the part of some institutions to implement the National Framework Agreement has led to an increase in our work defending institutions against discrimination claims. This important harmonisation of pay and conditions for all staff should ideally have been sorted out by now, and prolonging the process has only increased the likelihood of claims.

The last twelve months have seen a far greater focus on performance issues in the sector, for a whole host of reasons ranging from student complaints about lecturers' performance, through to the need to have all remaining staff in a leaner organisation operating at the highest levels of performance.



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### Information and consultation

We highlighted our expertise in working for education sector clients when defending a complaint on behalf of Bournemouth University, which led to a ground-breaking decision on the interpretation of the Information and Consultation of Employees Regulations 2004. For the first time in its history, the Central Arbitration Committee considered the steps an employer is required to take and when, once a valid employee request is received. Our submission was preferred to guidance provided by ACAS and DBERR and this led to the case being reported, as *Darnton v Bournemouth University* (2009).

### Whistleblowing or mischief-making?

As you read the details of this recent case, you will appreciate why the institution cannot be named. We successfully defended a major education institution from multiple claims brought by a former employee for breach of contract, unlawful deduction of wages, detriment on the grounds of trade union activities and detriment due to making protected disclosures.

The case involved numerous applications under the Freedom of Information Act and the Data Protection Act, and potentially serious allegations of impropriety and fraud made against a number of the institution's staff, including members of the executive team. We worked closely with the institution's HR team and successfully defended a total of six employment tribunal claims, with the tribunal being highly critical of the claimant's conduct whilst in the employ of the institution.



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# REAL ESTATE



The past year has seen business driven by the sustainability agenda, with almost everyone looking to design, construct and implement buildings in a more environmentally friendly way – there is at last a realisation the climate really is changing and not for the better.



The Carbon Reduction Commitment (CRC), an innovative climate change and energy saving scheme for the UK, is now in force and requires education institutions to examine their current operations and re-assess their long term plans as they look to expand and improve their offering. New campuses, extensions to existing campuses or the construction of student accommodation will all require designs that encompass the very latest technology to achieve a reduction in carbon footprint.

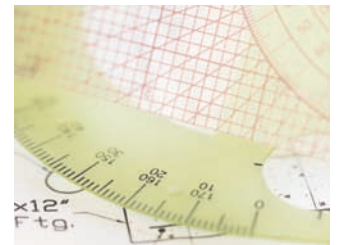
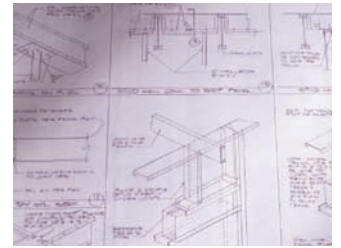


As one might expect, UK education institutions are leading the technological revolution and helping develop alternatives to our reliance on carbon heavy energy. We are currently helping many institutions developing their own energy solutions as they seek to increase the level of renewable energy they consume. Many are investigating the viability of producing their own energy on campus, from wind and bio-energy, with the potential to sell surplus energy back to the grid – some institutions are also determining the potential of developing micro power generation solutions based on combined heat and power.

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The emphasis on the student experience and the learner voice has also impacted on the built estate: an attractive campus and state-of-the-art facilities are an important aid to recruitment, retention and positive student feedback. It is the funding to develop these large projects that education institutions have struggled to secure over the last 12 months. With the much publicised Learning and Skills Council (LSC) shortfall throwing many FE projects into doubt, and reduced capital funding casting a shadow over the HE sector, we find ourselves helping institutions secure alternative funding that will not impact on their status or create further problems later in the project's life.

Throughout the bank lending crisis, we have built an enviable reputation for facilitating alternative funding for many corporate transactions. It is this ability that puts us in pole position to help education institutions and local councils when they appreciate the seriousness of allowing developments to stall and understand that the work must go on. Finding a way and creating unusual funding vehicles to allow developments to progress will pose no problem to our lawyers – it's what we're especially good at.

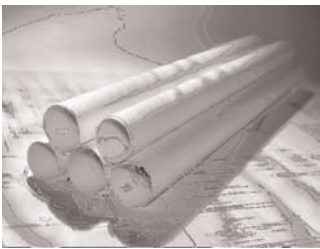


“We find ourselves helping institutions secure alternative funding that will not impact on their status or create further problems later in the project's life.”



### **Estates master-planning**

We have continued to advise the University of Cumbria in the delivery of its Estates Strategy over four principal and geographically diverse campuses, involving advice on disposals, acquisitions and planning issues. We helped them with the acquisition of new sites through a grant development agreement with leases attached and advised on the grant funding agreement from the regional development agency, designed to underpin funding for the 20 year development project.



We have also continued to act for the University of Warwick in their 10 year Masterplan. This ambitious plan sees the University looking to expand and improve its campus, its offering and its impact on the local community. We have prepared a strategic Section 106 agreement, which requires us to work with two separate local planning authorities as the campus falls across two planning jurisdictions, dealing with issues such as the use of green travel plans, car sharing, bike lanes etc., to help overcome objections. The plan is for this agreement to be flexible enough to serve the University well over the next 10 years of its development.

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## Major Projects

Another client challenging many teams within our firm to deliver results as we continue to advise on projects totalling more than £140 million is the University of Worcester. We have helped with the University's acquisition and regeneration of a city centre site as a new mixed use campus with student accommodation, trading accommodation and conference facilities.

We have also acted for the University in a joint library project with Worcestershire County Council, involving a PFI funding agreement, long-term operational requirements, balancing the risks and rewards of the parties' respective legal interests. This is the first deal of its kind in the UK.

We are involved in the £66m development of Bournville College's new landmark campus on the former MG Rover works and the disposal of the College's existing site. Our work has included the development and agreement for a long lease in the context of a wider mixed use town centre development to be built over the next 15 years.

We continue to advise on all planning issues relating to the Area Action Plan and associated Section 106 planning obligation. We are advising on the marketing and estates strategy for the disposal of the existing site including the grant of outline permission with associated Section 106 planning obligation for residential use.

We are acting for North Warwickshire and Hinckley College in their £10m plans to build a brand new Hinckley campus. The new facility will have a distinct focus on Creative Art and Media but will offer opportunities for a wide range of vocational studies, Higher Education and Adult education activities too. The expectation remains that the overall project will be open for business in September 2011.



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# COMMERCIAL, TECHNOLOGY & IP



It is often the case that in harsh economic conditions the more inventive businesses are the ones that not only survive the recession, but flourish throughout and emerge stronger once the economy recovers. Many of our university and college clients are seeking to do precisely this by flexing their commercial muscle to get better deals, open up new funding sources, and exploit their assets more effectively, giving us a far more varied range of work than we have previously seen.



With the need to be more commercially focussed, many institutions are recognising the need for far stricter terms and conditions to cover the services they provide, and those that they procure. The days of simply accepting the other side's terms are coming to an end. In the digital age institutions are also looking closely at the information they make available over the internet – particularly with more people willing to take advantage of any errors.



It is easy to view the process of contract reviews and re-writing terms and conditions as an area where immediate cutbacks can be made, particularly when business is down and they are required less. But it is important to remember that in turbulent times there is a temptation to take greater risks on both sides of the contract, and in these cases, the contract is the insurance.

There has never been a more important time to review everything and perhaps give the small print more attention than it would normally attract. Now is the time to build these foundations expertly and make sure they are robust enough to withstand the pressures of increased business once the economic recovery begins. Once business picks up, activity becomes more frenetic and the simple process of reviewing, then finalizing contracts and checking terms can be easily overlooked and forgotten – opening up unnecessary risks.

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Our commercial lawyers are dedicated to this exacting process and they have been busy helping institutions sort out these problems before they become big headaches.

The Wellings Report highlighted a number of barriers to the successful collaboration between education institutions and businesses. It is no surprise that this report has created a lot of work for our IP lawyers and we are advising many institutions on how to come to terms with its findings and in particular how they can best implement the report's recommendations.

One of the recommendations of the report is for institutions to formalise their IP policies, whilst ensuring the policy does not act as a disincentive for enterprise and that students are properly

informed before assigning ownership. Another of the report's recommendations encouraged institutions to incentivise staff in relation to IP matters, in the hope it would increase participation in research programmes.

In light of the report's wide-ranging recommendations, most of our education sector clients are currently reviewing their IP policies, with particular focus on their dealings with consultancies and the way staff report on such private consultancies. It is essential there is careful management of the risks associated with the loss or diffusion of IP within any given project – which is lucky for us; it's what we do and do well.



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### Local energy for local people

Our reputation as a leading firm in the education and energy sectors allows us to exercise our expertise in both disciplines undertaking work with Aston University and its plans to develop a centre of excellence for bio-energy research. The newly formed European Bio-Research Institute (EBRI) will trial innovative technologies and scale them to industrial levels to ascertain their suitability for commercial energy production.



It is intended that EBRI, whilst headquartered at Aston, will have satellite centres throughout Europe and beyond, all working to the same aim of reducing our reliance on fossil fuels and the carbon produced by their consumption. It is expected EBRI will lead directly to as many as 14 capital projects by 2020.



We are advising on the legal structure of this body and helping with the funding arrangements, in particular the negotiating of joint funding ventures with interested parties – so while not necessarily a done deal, in the context of the planet’s future, possibly one of the most important deals we have been involved with.

The ultimate goal for EBRI is to facilitate the commercial production of energy from small-scale power plants, using renewable energy and bio mass sources. In simple terms, we are helping them create small, local power stations, with short transmission lines, which are far more sustainable than huge power stations, miles from the consumers who use the energy produced.

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## Drug abuse

We were asked to advise a university on the contractual arrangements around exploitation of a patent for a cancer drug. The income from the patent had been substantial, and the university wanted to liquidate the revenue stream (in part) to a capital lump sum against future revenue.

We advised on all aspects of the agreements with the funder and the warranties given by the university. The contracts had to be sufficient to give the funder the security required, but without the university over committing in terms of its obligations. Importantly, the immediate capital sum was to be covered by royalties up to a certain level - and beyond that level, the royalties were shared.

In addition, a US licensee sued a “generic” pharmaceutical manufacturer and the validity of the patent was challenged. Through the US action, a non-party disclosure order was served on the university requiring them to provide specific thesis information and lab notebooks and related information within a day or so. We advised the university on the order itself and implications for the revenue capitalisation agreement and the original licensing agreement, which were potentially financially significant for the university. We obtained agreement to a reasonable time to comply with the order and negotiated payment of all of the university’s costs by the other party.



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### Collaborating yet competing

We are currently advising a consortium of FE colleges, under a framework agreement, acting in unison and sharing resources to secure private sector contracts. The aim of the consortium is to form a company offering service provision in the training sector, with the combined resources having enough capacity to deliver training to major employers. Any of the consortium members acting alone would be swamped by interest from a major employer. This team approach is the sort of innovative solution to winning new business and ultimately new funding that many of our clients are turning to us to structure and document.



### Challenging procurement

We were asked to advise a university on their procurement of an online digital archive on national culture, on behalf of the Welsh National Assembly Government. The procurement was a high profile and significant project for the university, notably since they were procuring the services on behalf of the Assembly Government. There was also fierce competition amongst bidders across Europe since this would be one of the first projects of this type.

“This team approach is the sort of innovative solution to winning new business and ultimately new funding that many of our clients are turning to us to structure and document.”

Notably, bidders were also encouraged to integrate open source tools into their proposed solution. We assisted the university in the selection of an appropriate baseline standard contract and drafted appropriate amendments applicable to the services to be supplied; the timelines for completion of the project; risk transfer; and to account for the fact that a public body was the contracting party. In particular, the contract had to cover: a payment profile to incentivise the contractor to meet deadlines and key performance requirements; the

integration of open source materials; hosting of the archive; and realistic levels of risk transfer. Since we are regularly drafting and negotiating contracts of this nature we are aware of what will be tolerable to bidders in a competitive situation whilst protecting the university appropriately. This enabled us to draft a commercially realistic contract for the university to present to potential bidders. This led to minimal clarification of the terms and no additional time spent on negotiation.



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# STUDENTS, STRATEGY & GOVERNANCE



Institutions continue to face challenges from students under disability discrimination legislation, particularly where issues of fitness to practise are involved. There is a very difficult balance to be struck between protecting the public and ensuring that students with disabilities are not excluded from certain professions, and our experience of advising on these issues over many years means that we are able to advise on these sensitive matters with confidence and expertise.



A new development this year has been the return of student sit-ins and protests, where students have taken direct action about planned campus closures, the situation in the Middle East, and the wages paid to cleaners, to name but a few. Whilst students do of course have certain rights to carry out a peaceful protest, we have considerable experience in taking swift and decisive legal action to bring protests to an end where they are disrupting the institution's business or causing a risk to health and safety.



One of the key stories of the year has been the implementation of the Charities Act 2006, and in particular the appointment of HEFCE as the new principal charity regulator for universities, soon to be followed by the Skills Funding Agency in FE. The removal of the presumption that education is for the public benefit has significant consequences for institutions, requiring them to reassess whether all of their activities are being carried out in the public benefit. Many institutions are reviewing their research and other externally-funded activities and are considering whether to channel these through subsidiary companies, or to formalise such arrangements where they already exist. We have developed a checklist for use in considering whether research contracts meet the public benefit requirements, and continue to advise a number of institutions on the implications of the Charities Act.

“We have developed a checklist for use in considering whether research contracts meet the public benefit requirements.”

We have also seen an increase in tensions between governors of some HE and FE institutions and their senior managers, perhaps heightened by the funding squeeze and the increasing scrutiny of the regulators over issues of governance and funding.

#### **Portfolio rationalisation**

The year has seen many institutions forced to review their entire portfolio of provision, to review whether what they are offering should be rationalised. This has ranged from trimming marginal provision, such as a nursery or lifelong learning centre, “non-core” provision such as divestment of FE for HEIs and vice-versa, failing subject areas, or indeed entire sites.

At the same time, we have had clients who have opened new centres in the UK and abroad. Our firm has advised on all aspects of these schemes, including ensuring a clear chain of decision

making, relevant equality impact assessments and processes for dealing with objections from staff, students and other stakeholders.

#### **Information overload?**

We have seen a huge increase in requests for access to information under the Freedom of Information Act (FOIA), in particular, and under the Data Protection Act (DPA). These regimes are a very valuable tool for staff and students to gain access to information to enable them to commence proceedings. In the context of litigation, information is usually only disclosed when proceedings have been commenced and the information must be relevant to those proceedings, constraints which do not apply to requests for access under the DPA and FOIA. The HE sector in particular has been bedevilled by voluminous and frequent FOIA requests from one source, who often submits those requests on behalf of others who wish to remain anonymous and, in addition,



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submits each request to every university in the country. Our clients needed clear and practical advice on the extent of their disclosure duties, given the large volumes of information held by them, the increasing use of the DPA and FOIA regimes by individuals and the very significant resources that could be expended in servicing such requests.

more than others, delivering tangible results. As more schools look to benefit from their re-invention as academies, there is a move to tie them more closely to their local university or college, in what could be described as a 'buddy' system, designed to offer the help and support the academy needs to progress.



#### **Academy Schemes**

We are proud of our status as one of the country's leading education legal practices - it is a hard won ranking and not one earned with a few high profile deals. It is our involvement in every aspect of the education sector that earns respect from our peers, and our work in the academy scheme is a prime example.

We are helping universities and colleges get involved with their local academy schemes, driven partly by our understanding of the special nature of these schemes. Our expertise in this specialist area comes from having advised on the creation of the Grace Academies in Solihull and Coventry. We are currently advising Walsall Council on their plans for expanding the academy scheme in their region.



Successive governments are determined to be remembered for their improvements in the education sector, but some changes stand out

“We are helping universities and colleges get involved with their local academy schemes, driven partly by our understanding of the special nature of these schemes.”

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Based in Birmingham and London, Martineau has international capabilities through Multilaw - an independent network of law firms in 150 commercial centres globally with access to over 6,000 lawyers, and State Law Resources - a network of independent law firms based in North America and the UK with specialisms in regulated sectors such as energy.

Combining highly regarded industry expertise with an ability to adapt to the ever-changing business environment, Martineau is committed to delivering innovative, practical advice to its clients and intends to remain a high quality blue-chip firm, delivering exceptional partner-led services.