



Illuminato

Helping your business grow
in an uncertain world

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WINTER 2010

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Welcome to **Illuminato**, our new quarterly communication! In **Illuminato** we will focus on important commercial matters that can directly affect your commercial activities.

In every issue, we will highlight topical aspects of the law that you need to be aware of, to avoid the common pitfalls and challenges of doing business today.

Illuminato will make you aware of future events, training courses and competitions. Be sure to check out our new series of seminars and gain invaluable education about brands, intellectual property and innovation.

If there are specific topics or questions that you would like us to address in future issues, do please drop me a line at the email address below.

We wish you all a successful 2010 and beyond!

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**Ellis Jones Corporate Team:
01202 414000**

DON'T STEAL MY NAME!

Companies should be aware that they can now more easily object to the registration by someone else of a company name that may be confused with their own.

Previously, companies could only oppose to similar names of other companies on the grounds of trade mark infringement or passing off actions. This first was often costly and time consuming. Further, if the company with a similar name was not trading in a sufficiently similar line of business, there was nothing one could do.

However, since 1 October 2008, a company has been able to object to the registration of a company name that is similar to their existing one. The objecting company must be able to demonstrate that they have established goodwill in the name or that the new name is likely to cause confusion.

In particular, these rules seek to prevent the registration of a company name for the sole purpose of obtaining

consideration from an objector who may wish to prevent such registration. Such registrations are known as opportunistic registrations and have become increasingly common.



Similar rules have already existed for some time in respect of opportunistic domain name registrations under the dispute resolution services provided by Nominet and ICANN.

To take advantage of any of the above procedures, please contact us for further information.

“The objecting company must be able to demonstrate that they have established goodwill in the name”

Did you know that you could still be regarded as a director even if you have not been formally appointed as such?

If you act as if you are a director regardless of not being appointed as such, or are a person in accordance with whose directions or instructions the directors of the company are accustomed to act, then you are likely to be regarded as “a de facto director” or “a shadow director”.

For example, a director of a corporate director could be at risk of being considered a shadow director, or many non-executive directors upon whose advice the directors rely too heavily could also be regarded as shadow directors. Equally, majority shareholders upon whose instructions the directors make their decisions are likely to be considered shadow directors.

The consequences of this are severe.

Firstly, shadow directors have been held to owe the statutory duties, liabilities and obligations imposed by legislation in the same manner as ‘appointed directors’. They may not owe the full range of fiduciary duties owed by director, because the indirect influence a shadow director

has on the decision making, is not usually considered enough to impose such duties on him. That is not to say that in certain circumstances the courts would not impose such duties.



De facto directors on the other hand will owe all the duties of a validly appointed director, including the full range of fiduciary duties. In particular, the Insolvency Act 1986 allows a liquidator or any creditor to bring proceedings for

misfeasance or breach of duty against an officer of the company, which includes a de facto director.

Secondly, consideration should also be given to the fact that certain transactions between a company and a shadow director (e.g. in the case of a conflict of interest), must be approved by the shareholders in general meeting and can be voidable if the proper formalities of the Companies Acts have not been observed.

Thirdly, it is clear that in cases where the corporate structure is such that particular individuals have not been appointed as directors on purpose in order to avoid liability for decision making, it is important for those individuals to remember not to in fact exercise any substantial control over the company in any ‘shadow’ capacity.

You do not have to be a formally appointed director to be a director in the eyes of the law!

For further information, contact **Ellis Jones Corporate Team** on **01202 414000**.



During the recent cold snap it has been difficult, if not impossible, for some employees to get to work. So, before employees disappear back under the duvet for a mid morning snooze, the question is: where do they stand with their employer?

IS AN EMPLOYEE ENTITLED TO BE PAID WHILST UNABLE TO ATTEND WORK? The onus is on the employee to be ready and willing to work. Even if the reason for absence is that the employee physically could not make it to work because of the snow, he or she is not entitled to be paid. However, there can be exceptions. Employers should make sure that they consult their employees’ contracts and employment

policy documents before deciding not to pay their employees. If these documents state that employees will be paid in these circumstances, then they should be.

TO PAY OR NOT TO PAY? If an employer has established that they are not obliged to pay, then they have the option of whether they choose to do so nonetheless. There is no

right or wrong answer here for every business. A balance should be struck between giving employees the incentive to come to work by not paying them unless they do, and the possible upset to morale that refusing to pay may cause.

It is somewhat different if the employer closes the business because of bad weather. Usually the employees should be paid in these circumstances.

CAN HOLIDAY BE USED? An employer can *agree* with their employee that in these circumstances paid holiday entitlement can be used. Normally, however, an employee cannot be forced to take the time as holiday.

WHAT ABOUT SCHOOL CLOSURES? A parent is entitled to unpaid time off to arrange care for their child. If an employer fails to allow this, a tribunal claim for discrimination may follow, so employers should agree to such requests. However, the employee is only entitled to ‘reasonable’ time off.

WHAT IF AN EMPLOYEE COULD MAKE IT IN BUT DECIDES NOT TO? This could be a disciplinary matter, however, an employer should be certain that they have got their facts straight before embarking down this route. Employers should be wary of ‘forcing’ an employee to come to work where the employee has indicated that they do not think the journey is safe. An employer has health and safety responsibilities and should not put their employees at risk.

For further information, contact **Ellis Jones Employment Team** on **01202 636210** or email **employment@ellisjones.co.uk**

1. BUILD VALUE EVERY DAY

People do business with people they trust and people who make them feel special. Create a ritual that ensures you reach out regularly to new or current customers, not to push for a sale, but to add value. The more people you help, the more profits you attract. Connect them with a business opportunity or potential partner and do something to help them achieve their dreams. They will soon help you achieve yours.

2. WRITE A GOAL LIST

You cannot reach your goals, if you can't remember what they are! Write them down to help you focus and you can share this with your wider team.

What's your plan to make this your best year ever? Here are **10 suggestions to get your business on the right track this year.**

10 TIPS TO KICK START YOUR BUSINESS THIS YEAR

3. BRAND YOUR NAME AND BUSINESS

Stand out and be distinguishable, be cool - or hot even!

4. FIND A MENTOR

Even experienced chief executives will benefit from a fresh point of view.

5. SAY ‘YES’ WHEN YOU WANT TO SAY ‘NO’!

Increase your possibilities, options and opportunities. If you say “no” to a business, social or community project, invitation or event, you are also saying “no” to the benefits that may arise. Meeting new people means gathering new ideas and learning more about your industry. Just connect and share!

6. INCREASE PRODUCTIVITY

Focus on the 20% of your work that generates 80% of the revenue.

7. MAKE USE OF TECHNOLOGY

More people are connecting through social networking Web sites. Is your business connecting with them? Also, check your business is at the top of the search results. What would your clients be searching for? Work with Search Engine Optimization experts to ensure your web content is being found by search engines, and guiding that business to you.

8. TAKE STOCK AND CHARGE FORWARD

Ask yourself challenging questions like: “What battles did I fight and not win last year?”, “Are any of those battles worth continuing?”, “Why didn't I win them last year?”, “What can I do to win them this year?” or “How can I make those things I liked most about last year happen more frequently?”

9. WRITE DOWN A PLAN

If you have been sitting on a business idea for a while and have not yet acted on it, now is the time to do something about it! Write down your ideas and start working on a plan.

10. WRITE A NOT-TO-DO LIST

What are you wasting time on? Try this useful exercise. Keep track half-hourly of your activities during the workday for a week. Then annualise the total amount of time for each activity that was unproductive. How much more efficient could you be, if you did not do those activities? Put those things on your **not-to-do-list** and ask people to point out if you

In difficult times of recession it is easy for both directors and shareholders to overlook part 23 of the Companies Act 2006 which provides that dividends must be paid from distributable profits only.

Payments which are made out of capital where there are no profits available for distribution are unlawful and the impact on directors and shareholders can be profound.

“directors may be personally liable for the repayment of unlawful dividends.”

Directors who authorise unlawful dividends will also have cause to worry; they may also be liable to repay any unlawfully declared dividends, even where they are not a shareholder. They are also

responsible for ensuring that the company has proper accounts on a basis of which they will be able to determine whether the company has distributable reserves at any one time. Ignorance is no defence!

In a recent case the High Court held that directors may be personally liable for the repayment of unlawful dividends where they were aware of an outstanding tax liability to which a provision out of profit should have been made.

These provisions are likely to be particularly relevant, in

the event the company experiences any financial difficulties, because any administrator or a liquidator will undoubtedly seek repayment of any unlawful distributions.

To avoid any such unpleasant surprises at already difficult times, directors' in particular should be vigilant in taking steps to ensure that they have complied with their statutory and common law duties as directors and to ensure that dividends are paid out of profits of the company only.

For further information, contact **Ellis Jones Corporate Team** on **01202 414000**.



It has been held by the Court of Appeal that shareholders who accept dividends where they knew or had reasonable grounds to believe that there were insufficient profits for a distribution are liable to **repay** such dividends.

**World Intellectual Property Day
COMPETITION**

**WIN £250 &
work experience
at ELLIS JONES Solicitors**

As part of World Intellectual Property Day (26 April 2010), Ellis Jones, in association with IBM, invites undergraduates of Business School to answer this question in 2000 words or less:

“The next Big Thing - to protect or share?”

What is the role of Intellectual Property Rights in innovation?”

The winner will receive £250 in prize money and two weeks working with professionals at Ellis Jones Solicitors in Bournemouth.

Submit your entry by 19 March 2010. For full details and registration visit www.ellisjones.co.uk

EVENTS CALENDAR

24 Feb

Be the Best

- 2 hr session on brand protection
- 9.00am for 9.30am start
- £10 per delegate
- Coffee on arrival

26 Apr

Innovation Linking the World

- Coffee morning in support of World Intellectual Property Day
- Guest speaker Dr David Richards of Bournemouth University
- 9.00am for 9.30am start
- £10 per delegate
- Coffee on arrival

Venue (all events)

Bournemouth University
Business Executive Centre.
BH8 8GB

2010

24 Mar

What IP?

- half day seminar to assist in identification of Intellectual Property
- 8.30am for 9.00am start
- £15 per delegate
- Lunch included

PRE-BOOK AND SAVE £5

Pre-book all three events for £30
For further details, call Annina on 01202 414003 or go to www.ellisjones.co.uk