

GUIDE TO PROTECTED CELL COMPANIES IN THE ISLE OF MAN

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PREFACE

This Guide is a summary of the law and procedures relating to Protected Cell Companies in the Isle of Man.

It is recognised that this Guide will not completely answer detailed questions which clients and their advisers may have; it is not intended to be comprehensive. If any such questions arise in relation to the contents, they should be addressed to any member of the team, using the [contact information](#) provided at the end of this Guide.

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1. THE LEGISLATION

There are two regimes governing the formation and operation of protected cell companies (**PCCs**) in the Isle of Man. The regime which is applicable will depend upon whether the company in question is incorporated under the Isle of Man Companies Acts 1931-2004 (the **1931 Acts**) or the Isle of Man Companies Act 2006 (the **2006 Act**).

Companies incorporated under the 1931 Acts (**1931 Act Companies**) can only be incorporated or registered as PCCs under the Protected Cell Companies Act 2004 (the **2004 Act**). Companies incorporated under the 2006 Act (**2006 Act Companies**) can only be incorporated or registered as PCCs in accordance with the terms set out in the 2006 Act.

2. USES OF PCCS

A PCC incorporated or registered under the 1931 Acts¹ or the 2006 Act can be used for any business purpose.

3. HOW IS A COMPANY FORMED AS A PCC?

Only companies limited by shares can be established as PCCs. There are two ways in which a company limited by shares can become a PCC:

- it can be incorporated as a PCC, in which case its memorandum of association must expressly state that it is a PCC; or
- it can apply to the Registrar of Companies (the **Registrar**) to be converted into a PCC. For 2006 Act Companies, this procedure requires the company to submit an application to the Registrar together with its amended memorandum of association and its new articles of association. Upon receipt of a completed application form, the Registrar will register the documents and issue a certificate of conversion. For 1931 Act Companies, the conversion must be authorised by the company's articles of association and a statement of conversion in the prescribed form stating that the company's memorandum of association has been amended to state that the company is a PCC must be submitted to the Registrar.

The name of a PCC must include one of the following phrases:

- "Protected Cell Company" or "protected cell company";
- "PCC" or "pcc".

4. CHARACTERISTICS OF A PCC

The main characteristics of a PCC are that:

- it is a single legal person;
- it may have one or more cells for the purpose of segregating and protecting cellular assets;
- the creation of a cell does not create, in respect of that cell, a legal person separate from the PCC; and
- each cell of the PCC must have its own distinct name or designation.

A PCC must inform any person with whom it enters into any transaction in respect of a particular cell that the company is a PCC and identify or specify the cell in respect of which that person is transacting.

Subject to any specific modifications set out in the 1931 Acts or the 2006 Act (as applicable), the whole of the 1931 Acts or the 2006 Act (as applicable) will apply to PCCs in the same way as they apply to

¹ Protected Cell Companies (Eligibility) Regulations 2010

any other company incorporated under such act. Accordingly, provisions in the 1931 Acts or the 2006 Act relating to the reduction of share capital, the purchase by a company of its own shares and the issue of shares with or without a par value will apply equally to PCCs.

5. CELLULAR ASSETS AND NON-CELLULAR ASSETS

The assets of a PCC are characterised as either “cellular assets” (being those assets of the PCC attributable to the cells of the PCC) or “non-cellular assets” (being those assets which are not cellular assets).

A PCC must:

- keep its cellular assets separate and separately identifiable from its non-cellular assets; and
- keep its cellular assets attributable to each cell separate and separately identifiable from its cellular assets attributable to other cells.

A PCC can create and issue shares in respect of any cell (cell shares). The proceeds of the issue of cell shares are cellular assets attributable to the cell in respect of which the cell shares were issued. The proceeds of the issue of shares other than cell shares are non-cellular assets.

6. ASSETS AND LIABILITIES

Income, receipts and other property or rights of a PCC which are not attributable to a cell will constitute the PCC’s non-cellular assets. Similarly, the liabilities of a PCC which are not attributable to any of its cells are to be discharged from the PCC’s non-cellular assets.

Generally speaking, if any liability arises which is attributable to a particular cell of a PCC:

- the cellular assets attributable to that cell will be primarily liable;
- the PCC’s non-cellular assets will be secondarily liable, provided that the cellular assets attributable to the relevant cell have been exhausted; and
- the liability will not be a liability of any cellular assets not attributable to the relevant cell.

The PCC can by agreement with the person in respect of whom the liability arises agree that a liability is the liability solely of the company’s non-cellular assets or the cellular assets attributable to a particular cell of the PCC.

Without prejudice to the above provisions, cellular assets attributable to a cell of a PCC are:

- available only to the creditors of the company who are creditors in respect of that cell and who are thereby entitled, to have recourse to the cellular assets attributable to that cell; and
- absolutely protected from the creditors of the PCC who are not creditors in respect of that cell and who accordingly will not be entitled to have recourse to the cellular assets attributable to that cell.

7. IMPLIED TERMS

Unless expressly excluded in writing, the following terms are implied into every transaction entered into by a PCC:

- that no party will seek to make or attempt to make liable any cellular assets attributable to any cell of the company in respect of a liability not attributable to that cell;
- that if any party succeeds by any means in making liable any cellular assets attributable to any cell of the PCC in respect of a liability not attributable to that cell, that party is liable to the PCC to pay a sum equal to the value of that benefit; and

- that if any party succeeds in arresting, seizing or attaching by any means, or otherwise levying execution against, any cellular assets attributable to any cell of the company in respect of a liability not attributable to that cell, that party holds those assets or their proceeds on trust for the PCC and must keep those assets or proceeds separate and identifiable as such trust property.

8. DISPUTES AS TO LIABILITY

If any dispute arises as to:

- whether any right is or is not in respect of a particular cell;
- whether any creditor is or is not a creditor in respect of a particular cell;
- whether any liability is or is not attributable to a particular cell;
- the amount to which any liability is limited,

the PCC may apply to the Isle of Man court for a declaration in respect of the matter in dispute.

9. DISTRIBUTIONS UNDER THE 2006 ACT

The term Distribution is expressly defined in the 2006 Act and includes the transfer of any assets by a company to or for the benefit of a member or the incurring of a debt by a company to or for the benefit of a member (e.g. by virtue of the purchase or redemption of shares or the making of a dividend).

The directors of a PCC may authorise a distribution in respect of a cell (a cellular distribution) at any time if they are satisfied on reasonable grounds that the PCC will immediately after the distribution, satisfy the solvency test. Ordinarily, a company satisfies the solvency test if:

- the company is able to pay its debts as they become due in the normal course of the company's business; and
- the value of the company's assets exceed the value of its liabilities.

In applying the solvency test to a PCC for the purpose of making a cellular distribution in respect of a cell the directors do not need to take account of:

- the assets and liabilities attributable to any other cell of the PCC; or
- the non-cellular assets and liabilities of the PCC.

Similarly, the directors of a PCC may authorise a distribution in respect of the PCC's non-cellular assets and liabilities (a non-cellular distribution) at any time if they are satisfied on reasonable grounds that the PCC will immediately after the distribution satisfy the solvency test. In applying the solvency test for the purpose of making a non-cellular distribution the directors do not need to take account of the assets and liabilities of any cell of the PCC (save in limited circumstances).

10. DISTRIBUTIONS UNDER THE 1931 ACTS

Generally, a company has implied power to apply its profits to the distribution of dividend amongst its members but it is not bound to do so. The 1931 Acts are silent as to how you ascertain what profits of a company are available for distribution. Accordingly, the rules for ascertaining the profits available for distribution have been formulated by case law and is the same as the position that existed in England prior to the introduction of the English Companies Act 1980.

It is generally for the company to determine by its articles or by resolution what sort of profits may be distributed by way of dividend and the Courts will not normally interfere with that determination. However, dividends must not be paid out of capital or out of borrowed money. It is not necessary to

make good the loss of fixed capital (in the current or previous accounting periods), before a company can make a distribution of its profits by way of dividend.

In ascertaining the profits available for distribution in a particular accounting period, loss or depreciation of circulating capital must be deducted before profits, if any, are arrived at. In addition, there seems to be no legal requirement to the effect that a company must not distribute as a dividend the clear net profit of its trading unless its paid up capital is intact or until it has made good all losses incurred in previous years.

Subject to contrary provision in a company's articles of association, an accretion to fixed assets, when realised, may be brought into the profit and loss account and constitute profits available for distribution by way of dividend. An example of an article to the contrary would be an article providing that dividends must only be paid out of trading profits.

It is less certain whether an unrealised appreciation of fixed assets can constitute profits available for distribution by way of dividend. The increase in value must be a real one and there must be set off against any such increase any loss which the company has suffered in respect of its other fixed assets. The dangers of distributing unrealised increases in the value of fixed assets as dividends are obvious: the realisation may turn out to have been too optimistic, and even if it was not excessive at the time it was made, a subsequent fall in the value of the asset or in market prices generally may make the revaluation surplus unrealisable.

A company is not bound to distribute the whole of its distributable profits among its members, unless its articles so provide. It is usual for a substantial part of the current year's profits to be carried forward to the next and subsequent financial periods, when they may be dealt with as if they were profits earned during those periods.

These rules only provide a general overview of the principles applicable when ascertaining what profits a company has available for distribution. Each case would have to be decided on its own facts and appropriate accountancy advice should be sought.

11. RECEIVERSHIP ORDERS

The PCC itself, the directors of the PCC, any creditor of the PCC in respect of a cell, any holder of cell shares in respect of a cell and such other persons as may be prescribed, may apply to the Isle of Man court for a receivership order in respect of a cell. For 1931 Act Companies, the Official Receiver may also apply.

A receivership order is an order directing that the business and cellular assets of, or attributable to, a cell will be managed by a receiver for the purposes of the orderly winding up of the business of or attributable to the cell and the distribution of the cellular assets attributable to the cell to those persons who are entitled to have recourse to such assets.

The court may make a receivership order in respect of a cell if it is satisfied that:

- the cellular assets attributable to a particular cell of the PCC (when account is taken of the PCC's non-cellular assets, if relevant) are or are likely to be insufficient to discharge the claims of creditors in respect of that cell; and
- the making of the order will enable the orderly winding up of the business of or attributable to the cell and the distribution of that cell's cellular assets.

The receiver must file a copy of the receivership order with the Registrar within one month from the date of the receivership order.

A receivership order cannot be made if a liquidator has already been appointed in respect of the PCC or if the PCC has passed a resolution for voluntary winding up. In addition, a receivership order will cease to have effect if a liquidator is appointed in respect of the PCC.

When an application has been made for a receivership order and during the period of operation of the receivership order:

- no proceedings may be instituted or continued by or against the PCC in relation to the cell in respect of which the order was made; and
- no steps may be taken to enforce any security or in execution of legal process in respect of the business or cellular assets of or attributable to the cell in respect of which the order was made,

except by leave of the court, which may be conditional or unconditional.

In addition, during the period of operation of the receivership order:

- the functions of the directors will cease in respect of the business and cellular assets of or attributable to the cell in respect of which the order was made; and
- the receiver will be deemed to be a director of the PCC in respect of the non-cellular assets of the PCC (unless no creditors of the cell in question are entitled to have recourse to the PCC's non-cellular assets).

The court can only discharge a receivership order if the court is satisfied that the purpose for which the order was made:

- has been achieved or substantially achieved; or
- is incapable of achievement.

In the event that the order is discharged on the ground that the purpose for which the order was made has been achieved or substantially achieved, the court can direct that any payment made by the receiver to any creditor of the PCC in respect of that cell will be deemed full satisfaction of the liabilities of the PCC to that creditor in respect of that cell and the creditors' claims against the PCC in respect of that cell will be deemed extinguished. However, any such direction will not affect or extinguish any right or remedy of a creditor against any other person, including any surety of the PCC.

Upon discharging the receivership order the court may direct that the cell be dissolved.

12. LIQUIDATION

In the liquidation of a PCC, a liquidator must:

- keep the PCC's cellular assets separate and separately identifiable from its non-cellular assets and keep cellular assets attributable to each cell separate and separately identifiable from cellular assets attributable to other cells; and
- in discharging the claims of creditors of the PCC, apply the PCC's assets to those entitled to have recourse to them in conformity with the provisions of the 2004 Act or the 2006 Act dealing with PCCs (as applicable).

13. CREATION OF SECURITY

The PCC may create any security interest in respect of assets attributable to a particular cell in relation to any liability attributable to that cell or any liability that is not attributable to that cell. For 1931 Act Companies, the written consent of all the members of the relevant cell must be obtained. The provisions of the 1931 Acts and the 2006 Act (as applicable) dealing with registration of charges and receivers and managers will apply to each cell of the PCC as if each cell were a separate company.

14. **DIRECTORS' DUTIES**

The provisions of the 1931 Acts and the 2006 Act relating to PCCs do not affect the functions of the directors of a PCC in respect of the affairs of the PCC including the due administration of the affairs of each cell of the PCC (save as expressly provided by the 2006 Act).

For more specific advice on PCCs in the Isle of Man, we invite you to contact:

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For the convenience of clients in other time zones, a list of contacts available in each of our jurisdictions may be found [here](#).