



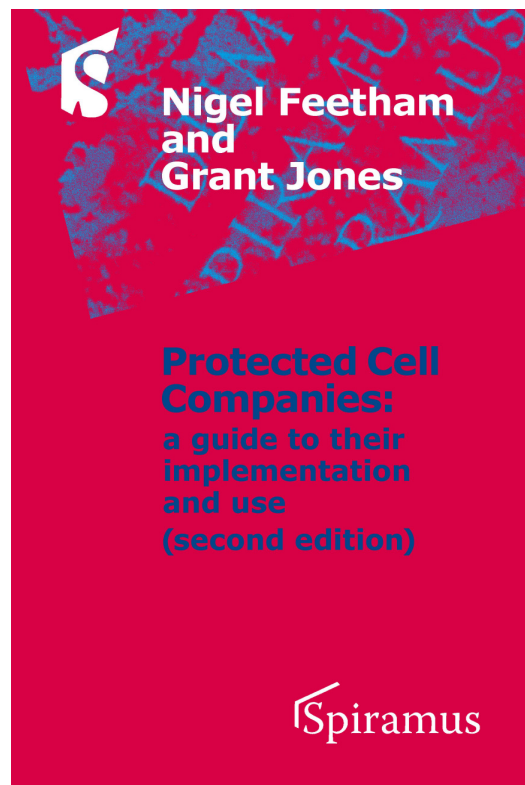
Article by Nigel Feetham

I have spent the last few months working on the forthcoming second edition of my book "Protected Cell Companies: a guide to their implementation and use" (co-authored with Grant Jones, a Special Professor of Law at Nottingham University).

Surprisingly, no one had ever written a book on "protected cell companies" despite the fact that such companies were widely used in international business transactions. It spurred us to write the first edition of the book. Although this helped to break down some misconceptions associated with the PCC, there was still a view that this extension of the limited liability of members is too innovative, wholly untested in any court and therefore best avoided. In writing this new book we set out to describe important legal developments since the publication of the first edition, and to demonstrate, through further study, that the concept of statutory segregation of assets and liabilities was not new.

In fact, the principle of limitation of liability whereby the liability of a trader or investor was limited to specific amounts was recognised in commerce long before limited liability under general incorporation law was introduced. The deployment of capital at a large scale (and therefore the very advent of capitalism) had its origins on this one fundamental principle: namely, that a trader or investor would not lose more than the capital and assets he had chosen to put at risk in respect of a particular business or investment. The PCC and other forms of segregated business is an application of this old legal principle. There are now many examples of structures around the world that perform a similar function and a highlight of the new edition of the book is to show that statutory segregation in the corporate form also existed in other jurisdictions before Guernsey enacted its PCC Ordinance and called its new creation the 'PCC'. One must also not lose sight of the fact that the evolution of new business forms is the result of the work of lawyers in the laboratory and that these laboratory tests invariably build on established legal principles. The PCC is no different.

There are thousands of these segregated companies around the world (if we include the US Series LLC, Series Trust and others) and transactions take place across many jurisdictions including Europe and the US. This is not a case of legislation that only exists in some 'offshore islands'.



Among the many materials and cases I have read when compiling this new edition, two are worth highlighting.

First is an article written in 2003 by a leading US academic and prolific writer Professor Larry Ribstein, and his words echo as true today as when they were written:

"The recent past shows that our 'laboratory' of state laws can develop and refine business forms when the business need arises, notwithstanding seeming tax or theoretical impediments. We can promote this laboratory by keeping the road to the future as free as possible of regulatory and tax potholes. There are also ways to encourage evolution. In particular, the future, like the past, owes to the work of lawyers in the trenches, both on behalf of clients in individual cases and at the bar and law-reform level. Preserving this dynamic system is a key to this country's continued prosperity" (LLCs: Is the future here? Business Law Today, Vol 13, Number 2, November 2003).

The second is the insightful judgment of Judge Ware in 1831 in *The Rebecca*, Case No 11,619, District Court, D. Maine. This was a maritime law case where the judge held, after giving an extensive account of the history of the legal principle under maritime law, that a shipowner's liability was limited to the value of the ship and its freight:

"The maritime law... has, on principles of general policy, restricted him [a creditor] to a particular fund, it not only permits him to proceed directly against it in specie, but gives him a privilege against it over the general creditors of his debtor [shipowner]. This privilege, so far from being dangerous and embarrassing to commerce, as it was represented at the argument, appears to me to be perfectly natural and just, and entirely in harmony with the general spirit of maritime law... This form of contract was probably suggested by the extreme perils attending on all commercial operations, in those ages of barbarism and disorder, and more particularly on those of maritime commerce.

The profits of trade in those times were great and tempting, in proportion to the greatness of the risk, and by this contract men of capital were enabled to participate in these profits, without putting at hazard their whole property. It therefore had a direct and powerful influence in drawing out dormant capital, and putting it into a state of activity, and by thus giving a new impulse and greater extension to commerce, to render capital at once more productive to the owner and more beneficial to the community. It was, in fact, in the primitive ages of trade, one of the most powerful springs by which maritime commerce was carried on." In essence, the 1831 claimant run the familiar argument (and failed!) that to limit liability to a particular fund was contrary to public policy.

The above are just some of the themes which are developed in the new book. The first edition of this book was based on the law as at 24 January 2008. We pointed out back then that there was a dearth of legal authority and detailed commentary on the subject of the protected cell company. Since then there have been developments on different aspects of this subject.

On the judicial front, the proposed amalgamation of a PCC with a conventional company was the subject of judicial decision in Guernsey (the original home domicile of the PCC), whilst a decision of the tax appellant tribunal in India found in favour of a foreign taxpayer incorporated as a PCC.

There has also been a helpful tax ruling issued by the Australian Tax Office recognising the PCC structure. The first redomiciliation (migration) of a PCC between EU Member States took place in 2008 and many new cell companies have been set up over the last two years. Also, the PCC has been involved in several cross border litigation cases. Finally, in the context of a non-EU insolvency, the House of Lords decision in *McGrath v Riddell* [2008] UKHL 21 has come to the aid of the PCC. In this second edition, chapters have been updated to take account of these and other developments whilst retaining the practical emphasis of the first edition.

A positive trend is that more and more lawyers, accountants and institutions are now making these entities available to their clients. In many ways, the subject discussed in the book is no longer just about 'the PCC'. It is about 'segregated business structures' and in future years the PCC will likely become part of this wider subject-matter as what was once seen as a relatively new business form receives international acceptance from professionals, lawmakers, and of course, the judiciary.

I hope the book, in its new edition, will be useful to practitioners, future authors and researchers alike. Readers should continue to send comments and/or materials on any of the subjects covered by this new edition.

http://www.spiramus.com/protected_cell_companies.htm



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