

**Judgment 21/2008 In the proposed amalgamation of AB International
Fund PCC Limited with AB Asia Pacific Growth
Fund Limited – Royal Court (Civil Action File 1182)
– 3 July 2008**

Protected Cell Companies Ordinance, 1997 – Amalgamation of Companies Ordinance, 1997 – proposed amalgamation of a Protected Cell Company (to be the amalgamated company) and a non-cellular company – held that such an amalgamation is permissible – the assets and liabilities of each of the pre-amalgamation cells and of the non –cellular company will remain separate and apart

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

Civil 1182

The 3rd day of July 2008, Before Richard John Collas Esquire, Deputy Bailiff, alone.

**In the matter of the proposed amalgamation of
AB INTERNATIONAL FUND PCC LIMITED**

With

AB ASIA PACIFIC GROWTH FUND LIMITED

Whereas on 27th June 2008 the Deputy Bailiff considered an application for the amalgamation of the said companies and heard thereon Advocates J. M. Wessels and M Pullum counsel for the applicant and *amicus curiae* respectively and granted the said application the Deputy Bailiff this day handed down written reasons for the said decision in the terms attached hereto.

S M D ROSS
H.M. Deputy Greffier

**IN THE ROYAL COURT OF GUERNSEY
ORDINARY DIVISION**

In the matter of the proposed amalgamation of

AB INTERNATIONAL FUND PCC LIMITED

With

AB ASIA PACIFIC GROWTH FUND LIMITED

Date of hearing: 27th June 2008

Judgment handed down: 3rd July 2008

Before: Richard John COLLAS Esq., Deputy-Bailiff

**Counsel for the Applicant: Advocate J M Wessels
Crown Advocate M Pullum appearing as *Amicus Curiae***

Legislation referred to:

1. The Protected Cell Companies Ordinance 1997 – 1998 as amended.
2. The Amalgamation of Companies Ordinance, 1997.
3. The Companies (Guernsey) Law 2008, section 61.

1. This application raises, for the first time in the Royal Court, issues concerning a proposed amalgamation between a Protected Cell Company or PCC and a non-cellular company. AB International Fund PCC Limited (“AB PCC”), a Guernsey registered Protected Cell Company, is proposing to amalgamate (“the Amalgamation”) with AB Asia Pacific Growth Fund Limited (“AB Ltd”), a non-cellular company registered in the British Virgin Islands. It is proposed that the amalgamated company will be AB PCC but with a new cell to be known as the Asia Dynamic Cell (“the AD Cell”) to which the pre-amalgamation assets and liabilities of AB Ltd will be attributed.
2. The relevant legislative provisions are in the Protected Cell Companies Ordinance 1997 – 1998 as amended (“the PCC Ordinance”) and the Amalgamation of Companies Ordinance, 1997 (“the Amalgamation Ordinance”). Neither Ordinance makes express provision for the amalgamation of a PCC with any other entity whether cellular or non-cellular.
3. The directors of a PCC have a duty (under Section 32 of the PCC Ordinance) to keep cellular assets separate and separately identifiable from non-cellular assets and to keep cellular assets attributed to each cell separate and separately

identifiable from cellular assets attributable to other cells. In pursuance of that duty, the directors of AB PCC propose that the assets of AB Ltd will be attributed to the AD Cell following the Amalgamation. Can they attach the liabilities of AB Ltd to the same cell?

4. The application has been prompted by the Guernsey Financial Services Commission which requires clarification before giving its consent under section 2 of the Amalgamation Ordinance. GFSC consent is needed because AB PCC is a “supervised company” as defined in section 14 of the Amalgamation Ordinance. The GFSC has requested confirmation that the amalgamation proposal will operate fairly in accordance with its terms both in respect of the members of the amalgamating companies and also in relation to any known or unknown creditors thereof. (See paragraph 3 of a letter from the GFSC to Ozannes dated 30th January 2008).
5. In order to satisfy the GFSC, AB PCC has applied to the Court for the following declaration:

“That the Company may enter into the amalgamation and that Asia Dynamic Cell may be created for the purpose of section 11(1)(b) of the PCC Ordinance to ensure that the pre-amalgamation liabilities of AB that will attach to the Company following the said amalgamation as a result of section 8(d) of the Amalgamation Ordinance will do so only in respect of Asia Dynamic Cell.”

6. I allowed the application on 27 June and I am now giving the reasons for my decision.
7. As I have said, neither the Amalgamation Ordinance nor the PCC Ordinance deals specifically with a merger between a PCC and another entity. The Amalgamation Ordinance provides in Section 1(1) that “two or more companies may amalgamate and continue as one company” and Section 12 defines “company” as “a body of persons incorporated under the laws of any district, territory, or place”. Both AB PCC and AB Limited come within that definition and so, in the absence of any express provision declaring that a PCC may not participate in an amalgamation, the natural interpretation of Section 1 of the Amalgamation Ordinance is to the effect that the two companies may amalgamate.
8. The GFSC was not represented at the hearing but Crown Advocate Pullum appeared as *amicus curiae*. She referred me to the policy letter in Billet d’Etat XIV of 1995, to see if it assisted with the interpretation of the Ordinances. The Policy Letter, at page 681, proposed amendments to Guernsey company law to permit amalgamations of companies, cross border mergers, cross border migration, the creation of Protected Cell Companies and a number of other matters.
9. The proposals were approved by the States and led to the enactment of enabling provisions by Order in Council pursuant to which the PCC Ordinance and the Amalgamation Ordinance were later enacted. As Crown Advocate

Pullum pointed out, the motivation behind the proposals was “*to maintain Guernsey’s competitive position among offshore finance centres and to grasp opportunities which have been identified*” (page 682) and, in respect of Protected Cell Companies, to provide a corporate structure that “*will be very attractive to promoters and therefore a significant marketing tool*” (page 685). There is nothing in the policy letter to indicate that the States intended to impose restrictions which would prevent the amalgamation of a PCC with another company. Instead, the opposite is to be inferred as the intention of the States was to provide the finance industry with structures and marketing tools to further the interests of the industry.

10. Section 61 of the Companies (Guernsey) Law 2008 (“CGL 2008”), which was not in force at the date of the hearing but was about to come into force, expressly confirms that a PCC may amalgamate although it may only do so with another PCC or body corporate of the same type. If CGL 2008 was in force, AB Ltd would have to convert to a PCC before merging with AB PCC. The company seeks to avoid the need to convert by commencing the amalgamation process under the present legislation. In my view, it may do so because I consider that it is permissible under the Amalgamation Ordinance for a PCC to amalgamate with a non-cellular company.
11. The directors of AB PCC propose that in the amalgamated company the assets of AB Ltd are to be attributed to the AD Cell.
12. Section 8(d) of the Amalgamation Ordinance provides that the amalgamated company shall be liable for all the liabilities of the amalgamating companies but where the amalgamated company is a PCC, the Ordinance does not specify whether the liabilities are to attach to cellular or non-cellular assets.
13. Common sense suggests that the pre-amalgamation liabilities of an amalgamating company should attach to the cell to which the assets of that company are attributed. Any other conclusion would be manifestly unfair. For example, if the liabilities of AB Ltd were to attach to the non-cellular assets of AB PCC, the creditors would be prejudiced because it is more than likely that the non-cellular assets would be insufficient to meet the liabilities. Also, if they were to attach to any other cell or cells within AB PCC, the creditors of those other cell or cells would be prejudiced. Whereas, if the liabilities of AB Ltd attach to the AD Cell, the creditors will be able to follow the assets of AB Ltd into the AD Cell and recover their liabilities from the same assets as are available to them before the Amalgamation.
14. Similarly, in my view, any cells of AB PCC that are in existence immediately before the Amalgamation should be unaffected by the Amalgamation. The Amalgamation should not cause there to be any change in the assets and liabilities attributed to any of the pre-amalgamation cells.
15. The only fair and practical way to give effect to the merger is to create a new cell in AB PCC and to attach the assets and liabilities of AB Ltd to that cell. I believe that is entirely consistent with the true purpose of the two Ordinances and, in particular, with the principles that govern the operation of a PCC.

16. Advocate Wessels advanced a further argument which persuaded me that is the correct interpretation of the Amalgamation Ordinance. He drew an analogy with contracts or other transactions that a PCC might enter into on behalf of a cell. Section 11 of the PCC Ordinance requires a PCC to inform other parties of the identity of the cell with which they are transacting unless they are not transacting with a cell. He quoted by way of an example that if a cell enters into a lease agreement, the benefit of the lease will be attributed to a specified cell and the liabilities arising under the lease would attach to the same cell.
17. The word “*transaction*” and cognate expressions are defined in section 27 of the PCC Ordinance. The definition is extremely wide: “*anything (including, without limitation, any agreement, arrangement, dealing, disposition, circumstance, event or relationship) whereby any liability arises or is imposed; and cognate expressions shall be construed accordingly*”. Advocate Wessels submitted, and I agree, that the definition is sufficiently wide to include an amalgamation proposal.
18. I am therefore satisfied that, as with any other transaction, the PCC may inform all parties concerned with the amalgamation, including the members and creditors of the amalgamating companies, of the identity of the cell or cells involved in the merger so as to ensure that the liabilities of an amalgamating company are attributed to the specified cell in the amalgamated entity to which the assets of that company are also attributed.
19. Advocate Wessels advised me that the amalgamation proposal which has been drafted in respect of the proposed Amalgamation between AB Ltd and AB PCC specifies that the assets and liabilities of AB Ltd are all to attach to the AD Cell.
20. It is to be noted that although the CGL 2008 will permit two or more PCCs to amalgamate, it does not specify how the amalgamation is to be effected. The only fair and sensible construction is that each of the cells of the pre-amalgamation companies will retain their identity and their separate assets and liabilities in the amalgamated company so that the integrity of each cell is unaffected by the merger.
21. I was concerned as to whether any party could be prejudiced by this ruling. The assets and liabilities of each of the pre-amalgamation cells of AB PCC and of the non-cellular AB Ltd will remain separate from the assets and liabilities of any other cell so I do not believe that any party will be prejudiced. If I am wrong, I have been satisfied on affidavit evidence that all the investors in AB Ltd will be given the opportunity to vote on the proposals. All members of AB PCC will also have the opportunity to vote. Section 4 of the Amalgamation Ordinance requires every creditor to be notified and it also requires publication to be made in La Gazette Officielle. All concerned parties will therefore have notice of the amalgamation proposal and they will have the opportunity to object to it.

22. If, despite any objections, the Amalgamation proceeds, any party who considers they may be prejudiced by this ruling may apply to the Court under Section 9 of the Amalgamation Ordinance to request the Court to modify the amalgamation proposal and as they will not be bound by this decision, the Court could make any order required to eliminate the prejudice or any risk of prejudice.
23. The application was brought under Section 10A of the PCC Ordinance which is concerned with disputes as to the liabilities attributable to the cells of a PCC. Advocate Wessels suggested that the concerns raised by the GFSC could be treated as a dispute for the purposes of that section. I consider that would be stretching the definition of “dispute” and I feel it is not necessary to do so. I am satisfied that the Court has the inherent power to interpret the two Ordinances in order to ensure that their intentions can be put into effect.
24. I therefore granted the application and declared that AB PCC and AB Ltd may amalgamate and that the pre-amalgamation liabilities of AB Ltd will attach to the AD Cell, being the cell to which the directors of AB PCC will attribute the pre-amalgamation assets of AB Ltd.