

CGF POINT OF LAW

E-NEWSLETTER OF CLARKE GITTENS FARMER, ATTORNEYS-AT-LAW

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ABOUT



Clarke Gittens Farmer is one of the principal law firms in Barbados. The firm is a commercial law firm, providing legal services for both domestic and international corporate and private clients. The firm strives to provide high quality work in banking, corporate, commercial, business law and commercial litigation. The firm also advises clients on the purchase and sale of residential and commercial property in Barbados and maintains a significant trademark and patent registration practice.

INTRODUCTION

We are pleased to share with you the first issue of our e-Newsletter for 2016 and would like to take this opportunity to wish you all the very best for 2016. We hope that you continue to enjoy our offerings and we welcome your feedback.

In our first article we continue our discussion on the "new" Registration of Title system introduced by the Land Registration Act, Cap. 229 of the laws of Barbados. In this issue we highlight some of the new procedures established under this legislation along with some of the advantages and disadvantages of the system.

Our second article examines the practical considerations of shareholders' agreements, the types of shareholders' agreements under the Companies Act, Cap. 308 of the laws of Barbados, the reasons for implementing a shareholders' agreement and some common provisions which should be included in such agreements.

In our final article we re-visit the case of *Gypsy International Ltd. and Royston Beepat v. Canadian Imperial Bank of Commerce* which was appealed to the Caribbean Court of Justice ("the CCJ") and the impact of the CCJ's decision as it relates to the appointment of a receiver.

We hope you enjoy this issue's offerings!

• The e-Newsletter Committee



Mrs. Rosalind K. Smith Millar

✦ Old Wine in a New Skin: The System of Registration of Title in Barbados (Part 2) ✦

By Mrs. Rosalind K. Smith Millar, Partner
and Miss Ruth J. Henry, Associate



Miss Ruth J. Henry

Introduction

Continuing from Part I of this article, we now review some of the new or different procedures that were introduced by the Land Registration Act, Cap 229 ("the LRA") and highlight the advantages and disadvantages of switching from the old unregistered system to the new registration system.

Procedural differences

Lost or Destroyed Deeds or Certificates of Title

Unregistered system - All original title documents are required to establish title for not less than twenty years. Replacing a lost or damaged deed can be costly and time-consuming.

Registration system - The original title documents are surrendered to the Registrar of Titles ("the Registrar") and replaced with a Certificate of Title or a Certificate of Charge, in which all relevant matters of title are summarised.

The procedure to replace a lost or destroyed certificate of title/charge, is less onerous: the owner or chargee may apply to the Registrar for a replacement and supply evidence to satisfy the Registrar that the Certificate was in fact lost or destroyed. Notices of the application are published in the newspapers and *Official Gazette*, giving the public an opportunity to object to the application. Upon the expiration of the notice period, the Registrar cancels the lost or destroyed Certificate and issues a replacement.

Transmission

"Transmission" is the process by which the property of a deceased owner is transferred from the deceased's estate to either the personal representative of the deceased's estate or the person entitled to inherit (the beneficiary). The term "transfer" is used when the property is being transferred to a third party e.g. by way of a sale.

Unregistered system - On the death of a **joint tenant**, no further action is required to vest the whole of the property in the surviving owners. The death certificate may be recorded in the Land Registry as part of the chain of title. With a **tenancy in common**, a formal document is required to transfer the deceased's share of the property to the beneficiary or new owner. The property of a sole owner is dealt with according to his Will or the laws of intestacy and formal documents are required to transfer the property to the person entitled to it.

Registration system - Where a **joint proprietor** dies, the other joint proprietor(s) may have the deceased's name deleted from the Register. The death certificate becomes a part of the record; the old Certificate of Title may be cancelled and replaced with a new Certificate.

The personal representative of a deceased **sole proprietor or proprietor in common** may have himself registered as owner in a representative capacity. This would not normally be done in the unregistered system unless a trust is established.

The personal representative may transfer the property directly to the beneficiary or a purchaser without first registering himself as representative owner.

Mutations: Adding, Subtracting and Altering Boundaries

Unregistered system - The Registrar's role in joining or subdividing parcels of land comes only at the end of the process when the town planning documents are being recorded.

Registration system - The owner of two adjoining registered parcels of land may apply to the Registrar to cancel the existing separate records (called "**folios**"), create a new single folio and issue a new single Certificate of Title. Similarly, a proprietor who wishes to subdivide his property may apply to have the folio cancelled and new folios established for each new parcel.

In either case, substantial changes require the permission of the Chief Town Planner.

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The owners of contiguous parcels of land may, with the consent of any other person having a right or interest, request the Registrar to subdivide or alter the boundaries of the parcels. If the boundary adjustment is substantial, the Registrar may refuse, and the parties may need to get planning approval for the change.

Title searches

Title searches are a necessary step in any dealings with land. A vendor or chargor / mortgagor must prove a "good and marketable title" so that a purchaser or lender can easily sell the property in the future.

Unregistered system - Title searches are conducted by searching the records of the Land Registry (and sometimes the Archives Department) to verify the continuity of the chain of title and see whether there are any prior or overriding interests. There is a certain skill to this process, particularly when property is owned by companies that amalgamate, change their names and so on, or where previous owners have died.

Registration system – Title searches are done by obtaining an official search report from the Land Registry. The report is essentially a replication of the Certificate of Title or Certificate of Charge. A request may be made for a 14 day stay of registration; during this period no activity can be registered except by the person to whom the stay is granted.

Minor interests

There are many ways in which one may have a valid and enforceable legal or equitable interest in land. The obvious legal interests (ownership, mortgages, long leases etc.) are typically recorded or registered to give public notice of the existence of the rights or interests.

Although one may record virtually any document under the unregistered system, many minor interests tend not to be recorded. Examples of minor interests include life interests given under a Will, short-term periodic tenancies, equitable charges, easements, profits, covenants and enforcement orders.

Some minor interests cannot be registered, but the LRA provides new devices to deal with them, called inhibitions, cautions and restrictions. Here are some comparative examples:

A. Inhibitions

Unregistered system - A charging order made by the Court to enforce a judgment has no effect on the land until it is recorded at the Land Registry.

Registration system - A charging order for a registered title will prohibit the registration of dealings with the land for a specified time or until a further order of the Court. This must be registered as an Inhibition.

B. Cautions

Unregistered system - A memorandum of deposit of deeds evidencing the creation of an equitable mortgage may be recorded.

Registration system – An equitable charge over a registered title cannot be created by "depositing the title deeds with the lender", but a person claiming an unregistrable interest may lodge a caution forbidding the registration of dispositions of, or the making of entries affecting his interest. Notice of the caution must be given to the proprietor affected by the caution. The Registrar cannot enter a disposition that is inconsistent with the caution, but may refuse to enter a caution he considers unnecessary.

C. Restrictions

Unregistered system - This system is user-driven, and depends on parties taking action and presenting documents for recording.

Registration system - The Registrar may, of his own motion, enter a restriction where it appears to him that the power of a proprietor to deal with his land, lease or charge is restricted. For example, if on the death of a joint trustee the surviving trustee is not entitled to exercise the trust powers alone, the Registrar must

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enter a restriction in the Register. The entry may subsist for a particular period, until a specified event occurs or until further order. Notice of the restriction is given to the proprietor, who may apply to the

Registrar or to the Court to have it removed or varied. The Registrar cannot enter a disposition that is inconsistent with the restriction except by order of the Court.

COMPARISON OF FEATURES

✓	Advantage	✗	Disadvantage
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Unregistered System		Registered System	
X	Must safeguard original deeds	✓	Registry takes custody of original documents
✓	Broken title chain indicates problems with title	X	Registry's failure to collect all original documents may cause doubt as to registration status
X	Title defects remain active until rectified by act of parties	✓	Registration cures past defects except acts of illegality or fraud
X	No title guarantee	✓	Title guaranteed by government with compensation
X	Registrar only records documents; does not generally act of his own motion	✓	Registrar must enter restrictions of his own motion – plays active role in managing title matters
X	Need to prove at least 20 years' title	✓	All relevant information contained in Certificate of Title
X	Higher probability of boundary and title disputes	✓	Fewer boundary disputes following registration process
✓	Registrar cannot compel parties to act	✓	Registrar has wide powers to compel registration and certain dealings with land
✓	More flexibility in drafting purpose-built documents	X	Rigid use of standard forms; Registrar's approval required to vary prescribed forms
✓	Lower recording costs	X	Significantly higher registration costs; penalties for late registration
X	Rectification of documentary errors may be made more difficult if a party has died	✓	Registrar may rectify errors in the Register not materially affecting the interest of a proprietor
X	More expensive to restore lost or destroyed original title documents	✓	Cheaper and faster to replace a lost or destroyed certificate of title
✓	Personal representative not usually recorded as owner unless acting as trustee	✓	Personal representative may register himself as proprietor in a representative capacity or as trustee
X	Search results depend on searcher's ability	✓	Searches reflect content of Register
✓	Searches may be done quickly according to skill of person searching	X	No control over how long it takes to get official search
✓	Ability to record minor interests at will	X	Limitations on ability to register minor interests

Conclusion

This article has given a very high level overview of some of the changes brought in by the "new" Land Registration Act.

Looking at the table above, the new system apparently displays more advantages than the old; however, in practice the new system is far less flexible to use than the old system.



Miss Gillian M. H. Clarke

✦ Shareholders' Agreements: Practical Considerations ✦

By Miss Gillian M. H. Clarke, Partner
and Miss Janet E. Taylor, Associate



Miss Janet E. Taylor

Introduction

When setting up a company with unrelated third parties or even family and friends, it is easy to assume that nothing can go wrong in the future. However, business relationships can become strained or destroyed and, if the worst should happen, a difference of opinion can result in a costly or acrimonious legal dispute. If you are considering whether to incorporate a company with other persons and are looking for a framework within which to structure your future relationship with them, you should carefully consider putting a shareholders' agreement in place to protect both the business enterprise and your own investment in the company.

When should you put a Shareholders' Agreement in place?

The requirement for a shareholders' agreement may arise in multiple ways, for example:

- in a corporate joint venture, which may be described as an arrangement between two or more parties who pool their resources and collaborate in carrying on a business activity with a view to mutual profit;
- where two or more individuals decide to go into business together and do so through the medium of a limited liability company in which they are all shareholders;
- where a business angel or venture capitalist or provider of private equity is providing capital for the establishment or development of a company in return for shares in it and desires a shareholders' agreement to protect its investment; or
- in any situation where a private company has more than one shareholder with a significant stake in the company.

The Companies Act, Cap.308 of the laws of Barbados (the "**Companies Act**") contains provisions

governing the rights of shareholders. However, the default provisions in the Companies Act with respect to the rights of shareholders may not be the appropriate ones for every situation. Shareholders may wish to vary the default position, by including specific provisions in the articles of incorporation of the company (the "**Articles**") or by entering into a shareholders' agreement and, most often, by a combination of the two. Shareholders' agreements are made among all of the shareholders of a company, and in many cases, include the company itself, as a party.

What is a Shareholders' Agreement?

The Companies Act provides that an otherwise lawful written agreement among all of the shareholders of a company, or among all of the shareholders and a person who is not a shareholder, that restricts, in whole or in part, the powers of the directors of the company to manage the business and affairs of the company¹, is a valid agreement. This type of agreement is referred to as a unanimous shareholder agreement ("**USA**").

A shareholder who is a party to a USA has all the rights, powers and duties, and incurs all the liabilities of a director of the company to which the agreement relates, to the extent that the agreement restricts the discretion or powers of the directors to manage the business and affairs of the company; and the directors are thereby relieved of their duties and liabilities to the same extent².

The Companies Act also enables a person who is the sole beneficial owner of all the issued shares of a company to make a written declaration that restricts in whole or in part the powers of the directors to manage the business and affairs of the company. This declaration also constitutes a USA³.

¹ Section 133(1) Companies Act

² Section 133(2) Companies Act

³ Section 133(3) Companies Act

✿ Shareholders' Agreements: Practical Considerations Cont'd... ✿

By Miss Gillian M. H. Clarke, Partner
and Miss Janet E. Taylor, Associate

A shareholders' agreement does not have to include provisions which restrict the powers of the directors of the company to manage the business and affairs of the company, i.e. every shareholders' agreement does not have to be a USA. However, where it is a USA, the Companies Act requires that once a USA is executed or terminated, written notice of that fact, together with the date of execution or termination, must be filed with the Registrar of Companies within 15 days after the execution and termination, respectively⁴.

What provisions are commonly included in Shareholders' Agreements?

A shareholders' agreement governs the parties' relationship with respect to the operation and management of the company, and addresses issues that might otherwise become divisive in the future, if not agreed to in advance.

Typically, a shareholders' agreement will address the following issues:

- Initial contributions to capital and the rules governing additional capital requirements;
- Management structure, including appointment and powers of a managing director;
- The number of directors each shareholder may appoint, the appointment and removal of directors and the rights of shareholders to replace their nominated directors;
- Dividend policy;
- Specific provisions dealing with conflicts of interest;
- Detailed provisions regarding meetings and voting rights (often different from the standard provisions in the by-laws);
- Specific management and decision topics requiring the prior approval of shareholders by way of unanimous or special resolutions;

- Restrictions on transfers of shares, including pre-emptive rights;
- Compulsory share transfer events including 'drag along' and 'tag along' rights;
- Detailed share valuation provisions;
- Restrictions on contracts between the company and shareholders or directors;
- Obligations of shareholders, including non-compete provisions;
- Dispute resolution provisions and provisions dealing with consequences of deadlocks; and
- Termination of the shareholders' agreement, whether by transfer of shares to third parties, by the buy-out of one shareholder by another or by liquidation of the company.

The Articles and Shareholders' Agreements

The Articles are a constitutional document of every company, prescribing the capital structure of the company i.e. the class or classes of shares in the company, and the rights, privileges, restrictions and conditions attaching to each class of shares, providing for restrictions on the transfer of shares, and containing other provisions such as pre-emptive rights, and restrictions on the issue of shares to the public.

Where there are multiple parties involved in a project, it is best to think about the provisions of the shareholders' agreement even before incorporation. At that point, the shareholders should, as far as is possible, be of a similar mind about what they expect to offer to and get from the company. If the differences of opinion between the shareholders at this stage are too strong to agree on the terms of a shareholders' agreement, this should raise an alarm about the nature of the future relationship.

⁴ Section 133 (4) Companies Act

✦ Shareholders' Agreements: Practical Considerations Cont'd... ✦

By Miss Gillian M. H. Clarke, Partner
and Miss Janet E. Taylor, Associate

It is important to ensure that the Articles and the shareholders' agreement do not contain conflicting provisions. A shareholders' agreement will often require the articles to be amended to conform to the provisions in the shareholders' agreement, and will stipulate that in the event of a conflict, the provisions of the shareholders' agreement will prevail and that the shareholders will procure that the Articles are amended accordingly.

In Closing

A shareholders' agreement, as a binding contract, is enforceable in the same way as any private contract between the contracting parties. Both statute and common law will affect the interpretation and enforceability of any particular agreement.

Taking the time to negotiate a shareholders' agreement can be a worthwhile investment, when forming a company or entering into a business arrangement. The agreement should be prepared after each party has taken the appropriate legal advice. Whilst many of the provisions in a shareholders' agreement may seem straightforward, the importance of drafting an agreement specifically tailored to the unique circumstances of a company and its shareholders' needs, cannot be overstated. ✦





Mr. Kevin J. Boyce

✿ Matters to Consider When Appointing a Receiver: A New Look at the Gypsy Case ✿

By Mr. Kevin J. Boyce, Partner
and Mr. S. Matthew Goodin, Associate



Mr. S. Matthew Goodin

Introduction

In our January 2015 edition of the Newsletter our partner and head of the Commercial Department, Ms. Debbie Fraser, authored an article entitled "Matters to Consider When Appointing a Receiver". That article explained the state of the law, as it then was, relative to the appointment of a receiver and was based on the Barbados Court of Appeal ('**Barbados CA**') decision in *Gypsy International Ltd and Royston Beepat v Canadian Imperial Bank of Commerce* Civil Appeal No. 27 of 2012 ('**Gypsy**'). Since then, *Gypsy* was appealed to the Caribbean Court of Justice ('**the Court**' or '**CCJ**') which subsequently overturned the decision of the Barbados CA. This article now gives a synopsis of the CCJ's decision.

Background

In November 2015, the CCJ was asked to make a ruling in *Gypsy* on the requirement of making a formal demand before a receiver can be appointed. In the Court below, the Barbados CA held that service of a demand was an essential prerequisite to the valid appointment of a receiver under a demand debenture/security document. Unsatisfied with this decision, Canadian Imperial Bank of Commerce ('CIBC') appealed to the CCJ.

Findings of the CCJ

1. The CCJ disagreed with the decision taken by the Barbados CA to follow the Canadian approach and case law which stipulate that demand must be made before the appointment of a receiver, *regardless of any conflicting terms in a security document*¹.

Instead, the Court opted to follow the Australian common law approach² which was followed regionally in the Eastern Caribbean

Supreme Court³. This approach dictates that, in determining whether a demand needed to be made, one must examine the actual language of the security document. In applying the test the CCJ found that, based on the natural and ordinary meaning of the words used in that security document, there was no need for a demand for payment to be made prior to the receiver's appointment. CIBC's appointment of the receiver was therefore held to be valid.

2. Further, the CCJ held that, even if the appointment of the receiver had been found to be invalid, the company would have been estopped from raising any challenge to the said appointment. This was because, during the period of the receivership, the company treated the appointment as valid, fully co-operated with the receiver and raised no prior objection to the grounds of his appointment. In coming to its conclusion, the Court noted that it would be unconscionable to allow the company to benefit from a "mistaken assumption shared by all the parties that the appointment was valid".
3. Finally, the CCJ found that, even if the receiver had not been validly appointed, CIBC could not be held liable for damages arising out of the receivership. This was due to the fact that the security document purported to make the receiver an agent of the company and there was no evidence that CIBC prevented the receiver from exercising independent judgment, thereby exerting some form of control over the receiver.

¹ *R E Lister Ltd v Dunlop Canada Ltd* 1982 CanLII 19 (SCC), [1982] 1 SCR 726

² *Pan Foods Company Importers and Distributors Pty Ltd v Australia and New Zealand Banking Group Ltd* [2000] HCA, (2000) 170 ALR 579

³ *Chase Manhattan NA v Circle Corporation Ltd* (1986) 37 WIR 160

✦ Matters to Consider When Appointing a Receiver: A New Look at the Gypsy Case Cont'd... ✦

By Mr. Kevin J. Boyce, Partner
and Mr. S. Matthew Goodin, Associate

Points to Note

1. It should be borne in mind that the CCJ's decision in *Gypsy* was based on an interpretation of the security document itself. Since the creation of that document, the law in Barbados has advanced with the enactment of the Bankruptcy and Insolvency Act, Cap 303. In this regard, clear legal advice should be obtained with regard to the process to be followed when a determination is made to appoint a receiver.
2. The estoppel principle utilised in *Gypsy* is a useful argument in the arsenal of any Bank wishing to use the other party's willing or co-operative conduct as a defence to a subsequent objection to the validity of a receiver's appointment.
3. Financial institutions should take care to preserve the independence of the appointed receiver.
4. Both financial institutions and the appointed receivers should seek the appropriate legal advice during the course of the receivership process.

Should you have any queries or need further information regarding the appointment of receivers, please give us a call. ✦



✦ ATTORNEY PROFILE ✦

In this issue we continue our series of profiles on the firm's Attorneys-at-Law. This issue profiles Mr. Kevin J. Boyce.



Mr. Kevin J. Boyce

Kevin J. Boyce is a partner in the litigation department of Clarke Gittens Farmer. He completed his LLB at the University of the West Indies Cave Hill Campus and his Legal Education Certificate at the Hugh Wooding Law School. At Cave Hill Kevin sat as the National Affairs Chairperson of the Guild of Students and President of the Law Society.

In 2000 he was admitted to practice in both Barbados and Trinidad and Tobago. Kevin joined Clarke Gittens Farmer in 2002 as an Associate in the Litigation Department and became a partner in 2008. He is an alumnus of the Lex Mundi Institute (2008 Monterrey and 2015 Cambridge) and the United States International Visitor Leadership Program (2014).

Kevin's practice is mainly in the field of commercial and civil litigation with an active cross border practice. His clients include the major regional commercial banks and conglomerates. He also advises on employment, enforcement and insolvency issues and manages the firm's loan recovery practice. Some of the matters Kevin has worked on include:

- (i) successfully defending a major local manufacturer against price gouging claims;
- (ii) advising on international and local multimillion dollar insolvencies;
- (iii) performing loan recovery services for the major regional commercial entities;
- (iv) advising and defending a number of commercial employers in employment disputes; and
- (v) successfully prosecuting and defending a number of civil claims on behalf of our clients.

Kevin also provides legal training to regional private sector and government financial institutions on issues relating to loan recovery management. He is a former director of the Barbados Investment and Development Corporation and is a member of the Rotary Club of Barbados West. ✦

✦ CGF NEWS ✦

Workshops and Presentations

In December our Mr. Kevin Boyce, partner in the Litigation Department, was one of the featured presenters at the Caribbean Development Bank's 2015 training programme for development finance institutions held in St. Kitts & Nevis. Mr. Boyce presented the fourth and final training module in the programme entitled "Loan Recovery Management with Focus on Legal Issues". The training programme was attended by participants from 13 different institutions drawn from 10 of the Caribbean Development Bank's borrowing member countries. The purpose of the module was to introduce the participants to the legal side of loan recovery and enforcement and better equip the bankers working within the finance institutions to better manage the loan recovery process and engage with their lawyers.

Our Mrs. Rosalind Smith Millar, a partner in our Property Department and the partner in charge of our Intellectual Property Department, recently attended the Lex Mundi Institute Business Management Programme at the University of Cambridge, Judge Business School, an exciting and intense 5-day course designed to increase lawyers' understanding of their clients' business challenges and the concepts that underlie their business operations. ✦

✦ CGF NEWS Cont'd... ✦

Community Outreach Initiative

At the end of 2015, the partners and staff of Clarke Gittens Farmer continued their support for the Because of Jenna Trust and the Salvation Army by making monetary donations to both of these organisations.

In addition, in the spirit of giving and fostering relationships within our immediate community the Staff Activities Committee reached out to the St. Michael South East Constituency Council ("the Council") to indicate our firm's interest in donating Christmas hampers to families in need in

the community. The Council identified six families that would benefit from assistance during the Christmas period and provided us with the names and the number of persons (children & adults) in each of the six households. The staff responded enthusiastically to this initiative and on December 17, 2015 our Mrs. Lisa Sealy-Lewis and Miss Latoya Kinch presented the hampers at the Parkinson Resource Centre to St. Michael South East Constituency Council member Mr. Tennyson Drakes and Ms. Shirley Small of the Department of Constituency Empowerment. The Council was very pleased with the donation and are looking forward to a continued relationship with the firm. ✦



Our Mrs. Lisa Lewis-Sealy, Business Manager, presenting the firm's Christmas hampers to Ms. Shirley Small of the Department of Constituency Empowerment.

✦ **CGF POINT OF LAW** published by Clarke Gittens Farmer is an e-Newsletter for clients, colleagues and friends of the firm. This e-Newsletter provides an overview of notable news and legal developments.

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