CGF POINT OF LAW

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

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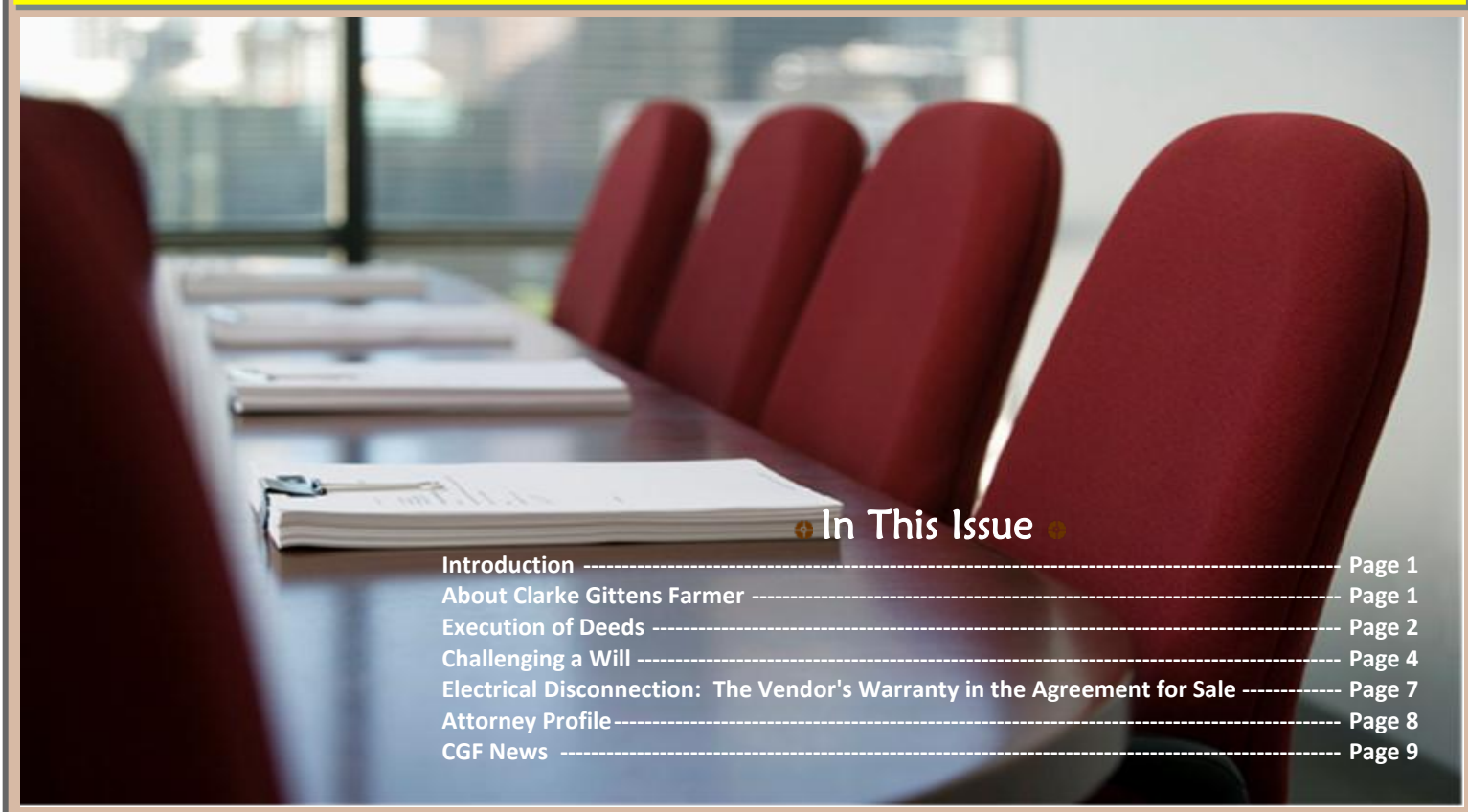


In This Issue

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

In this issue of our e-Newsletter we feature articles from our Corporate and Property departments.

In our first article we look at the law relating to the execution of deeds. Parties to a transaction devote a significant amount of time to negotiating the terms of their agreement and settling any documents necessary to complete the transaction. Once the documents are settled the parties are usually eager to sign on the dotted line. However, there are certain statutory requirements relating to the execution of deeds that must be satisfied. In our first article we discuss these statutory requirements.

We then continue our exploration on the law relating to wills. In our second article, we examine the grounds on which a will may be challenged and the steps that attorneys take to mitigate the risk of challenge.

In our final article we discuss an issue relating to the sale of real estate, namely, electrical disconnections and how they can impact the sale of property.

We hope you enjoy this issue's offerings.

The e-Newsletter Committee

Miss Gillian M. H. Clarke

Execution of Deeds

By Miss Gillian M. H. Clarke, Partner
and Miss Joanna M. Austin, Associate

Miss Joanna M. Austin

Introduction

While parties concentrate on the terms of their contracts and basic execution thereof there have been frequent instances where the statutory requirements on execution of deeds have not been met. The recent case of *Briggs and others v Gleeds (Head Office) and others [2014]*[1] ("**Briggs v Gleeds**") however reinforces the need for adherence to the statutory requirements of execution of deeds. In Briggs v Gleeds the court held that certain trust deeds which were not properly witnessed were of no effect as they were not executed in accordance with the relevant statutory rules. In this article we will discuss the execution of deeds.

Execution of Deeds

Section 71 of the Property Act Cap. 237 (the "**Property Act**") provides that subject to subsection (5) every document satisfying the requirements of sub-section (2) is, if executed after 1st January, 1980, a deed notwithstanding that it has not been sealed. The requirements of subsection 71(2) are that the document be signed by the party to be bound by it; attested by at least one witness in accordance with subsection (3); and expressed to be a deed, conveyance, assurance, mortgage, charge, settlement, covenant, bond or specialty. The common practice in Barbados is for individuals to affix a red circular seal to deeds.

No particular form of words is required for the attestation referred to in section 71(2) but a witness to a deed executed in Barbados must add his address and occupation. While the Property Act does not prescribe the individuals who must witness the execution of deeds, section 71 (4) provides that the attestation of a document by an attorney-at-law has the same effect as acknowledgement of the parties or probate of the witnesses before the Judges or the Commissioners of Probate under section 16 of the Evidence Act. It is common practice for parties to execute deeds in the presence of their attorney-at-law as witness to be in the strongest position with respect to the admissibility of the deed as evidence in a Barbados court.

Execution of Deeds By Corporations

Section 71(5) provides that nothing in this section affects the need for a deed to be sealed if the party to the bound by the deed is a corporation. Unlike companies in some jurisdictions, a Barbados company is required to have a common seal. A company may for the purpose of sealing any document, use its common seal or any other form of seal. A company's by-laws may also authorise the use of an official seal for use in any country, district or place outside Barbados. The official seal must be a facsimile of the common seal and include the name of the country, district or place where it is to be used. Deeds to which an official seal of the company is duly affixed binds the company as if it had been sealed with the common seal of the company.

Section 74 (1) provides that a deed in favour of a purchaser is deemed to have been duly executed by a corporation aggregate if its seal is affixed thereto in the presence of and attested by its clerk, secretary or other permanent officer or his deputy, and a member of the board of directors, council or other governing body of the corporation, and where a seal purporting to be the seal of a corporation has been affixed to a deed, attested by persons purporting to be persons holding such offices then the deed is deemed to have been executed in accordance with the requirements of this section, and to have taken effect accordingly.

[1] EWHC 1178 CH

Execution of Deeds Cont'd.

By Miss Gillian M. H. Clarke, Partner
and Miss Joanna M. Austin, Associate

Corporations do have discretion as to the mode of execution above, notwithstanding section 74(1), by way of section 74(5) which provides that any mode of execution or attestation authorised by the corporation by practice or statute, charter, memorandum or articles, deed of settlement or other instrument constituting the corporation or regulating the affairs thereof, is (in addition to the other authorised by section 74) as effectual as if section 74 had not been passed.

However, section 74 (5) does not extinguish the requirements of section 71 (5) and while the corporation may deviate from the mode of execution set out in section 74(1) its common seal or any other form of seal must still be affixed to a deed.

Execution of Deeds by Attorney in Fact

A corporation's seal need not be affixed however, where the deed is being executed on behalf of a corporation pursuant to a deed of power of attorney. A deed signed by a person empowered by a deed of power of attorney binds the company and has the same effect as if it were under the company's seal.

Section 74(3)(a) provides that where a person is authorised under a power of attorney or any statutory or other power to convey any interest in any property in the name or on a corporation's behalf, section 138 applies. Section 138(2) provides that where an attorney is authorised to convey such an interest in property on the corporation's behalf the attorney may sign the name of the corporation in the presence of at least one witness; and where such conveyance is a deed, the attorney's seal must be affixed.

Execution of Deeds by Foreign Corporations

Where foreign corporations are parties to a deed to which a Barbados corporation is also a party, it is submitted that the proper mode of execution as it relates to the sealing of the deed by that foreign corporation should be determined by the laws of the jurisdiction of its incorporation. Where the foreign corporation intends to execute the document as a deed, the attestation clause "*EXECUTED as a Deed by …*" is commonly used.

Having regard to the provisions of the Evidence Act Cap. 121 our advice to clients, is that the signature of the foreign corporation must be witnessed by a notary public.

We will explore the issues relating to execution of documents and admissibility into evidence in a future article.

Mrs. Rosalind K. Smith Millar

Challenging A Will

By Mrs. Rosalind K. Smith Millar, Partner
and Miss Jaina O. Colucci, Attorney-at-Law

Miss Jaina O. Colucci

Introduction

In our previous article entitled 'Making a Will'[1], we emphasised that opting to make a will is the best way to control what happens to your property after you die. The person making the will (the testator) safeguards his property by naming who will be in charge of his estate (the executor), and by identifying the persons who are to benefit under his will, that is, the persons to whom his property and other assets are going to pass upon his death. This reduces the likelihood of uncertainty, hardships or disputes over who gets what.

A testator's will serves as his final say and he has complete freedom to leave his possessions to anyone he chooses, subject to certain provisions protecting spouses, minors or disabled children. Making a will should therefore ensure that nothing is left to question. However, there are times where there is something wrong with the will itself, or there are suspicious circumstances connected to the making of the will, or there may simply be someone who is unhappy with his share under the will. When this happens an aggrieved person often resorts to challenging the validity of the will as a whole or specific provisions of the will.

Challenging the Validity of a Will

Generally speaking, the common grounds upon which the validity of a will may be challenged include these circumstances:

- The will has not been properly executed or properly witnessed.
- At the time of making the will the testator did not possess the requisite mental capacity, or he did not know or approve of the contents of the will.
- The testator was unduly influenced to make the will or was the victim of fraud by a third party.
- The testator made a mistake.

Improper Execution or Witnessing of a Will

A will must be made in writing by a testator who is at least 18 years old (or married, if younger) and of sound mind. There are two ways to make a valid will:

a. A "holograph" will is made when the testator writes the entire will in his own handwriting. This type of will does not need to be signed by the testator but if he signs it, his signature need not be witnessed by anyone else.

b. The more usual format is a handwritten or typewritten will which must be signed at its foot or end by the testator or by some other person at his direction and in his presence. The testator's signature must be made or acknowledged by him in the presence of two witnesses present at the same time. The witnesses must then also sign in the presence of the testator and of each other.

These requirements are straightforward, and any shortcomings can often be identified on examination of the will without further investigation or an in depth analysis.

An applicant for a grant of probate must prove to the Court that the will was properly executed. This is done by an affidavit of one of the attesting witnesses confirming that he was present with the other witness when the testator signed the will and that the signatures affixed to the will are in fact those of the testator and the attesting witnesses.

If no attesting witness is available, evidence of the due execution of the will must still be presented to the Court, normally in the form of an affidavit deposed to by a third party who was also present when the testator signed his will, such as the attorney who prepared the will or his secretary. If there is no such person, an affidavit deposed to by someone who is familiar with the testator's signature and handwriting must be submitted.

[1] (Issue 1 Volume 2 – January 2014, 'Making a Will' by Mrs. Rosalind K. Smith Millar, Partner and Miss Annette Y. Linton, Associate.)

Challenging A Will Cont'd

By Mrs. Rosalind K. Smith Millar, Partner
and Miss Jaina O. Colucci, Attorney-at-Law

The validity of the will can be challenged for not meeting the requisite formalities for execution in the following circumstances:

- The witnesses did not actually see the testator affixing his signature, nor did the testator acknowledge his signature in their presence
- There was only one attesting witness
- The witnesses attesting to the due execution of the will were not present at the same time

Note that if the testator's signature is not placed at the foot or end of the will, this does not invalidate the entire will, but any dispositions or directions appearing after the signature will not be given effect.

Lack of Mental Capacity

Challenging a will on the ground of mental incapacity requires proof that the testator's mental condition or state of mind at the time he was making the will would have prevented him from being aware of the effect of what he was doing.

The mental capacity of the testator is assessed broadly and it must be determined whether or not he understood the nature and effect of the will he made (in other words the testator must understand the effect of his wishes being carried out at his death), the extent of the property he is disposing of, the nature of any claims on him (e.g. the rights of a spouse or minor or disabled child), the persons he is leaving any of his assets to and the manner in which property is to be distributed. It must also be clear that the testator knows and approves of the contents of the will.

Normally the person alleging that the testator did not have the requisite mental capacity is the person who bears the burden of proof. If the will appears to be rational on its face, it is presumed that the testator possessed the requisite testamentary capacity: the challenger must rebut this presumption by producing evidence that the testator either lacked the mental capacity at the time the will was made or when he gave instructions for it to be prepared. However, if the testator had a history of mental illness, the burden shifts to the person seeking to have the will admitted to probate.

Testators whose wills are most likely to be challenged are those who are elderly, suffering from a serious medical condition or those who die shortly after making the will. Medical evidence of the testator's state of mind when the will was being made is the best evidence when dealing with cases such as these and it can therefore be crucial. An Attorney-at-Law preparing a will for an ill or elderly person will often take the precautionary step of acquiring a medical certificate from the testator's present doctor stating that he has examined the testator and deemed that he is of sound mind. Additional evidence can also come from family members, close acquaintances or persons who conducted business with the testator, and who can offer insight as to his general mental state.

Undue Influence and Fraud

The testator must not only be mentally competent and know and approve of the contents of the will but he must be exercising his free will. Undue influence may take many forms. The influence may be in the form of either physical coercion, or emotional or mental pressure. Whatever form it takes, the undue influence must have the effect of coercing the testator to make a will or part of a will which does not reflect his own wishes.

Where Undue Influence Coerces, Fraud Misleads

It is necessary to distinguish the case of an individual who tries to benefit by appealing to the testator's affections, family ties or to a sentiment of gratitude for past favours. No matter how much this kind of behaviour is frowned upon it is not illegal. What is unacceptable is an action designed to force the testator into making a will he would not have made otherwise (undue influence), or to disinherit someone who would otherwise have become a beneficiary (fraud).

It is not usually easy to prove undue influence, since the challenge usually arises after the death of the

Challenging A Will Cont'd

By Mrs. Rosalind K. Smith Millar, Partner
and Miss Jaina O. Colucci, Attorney-at-Law

one person capable of stating with certainty whether his actions were unduly influenced. Where the will appears to be otherwise valid, the person claiming undue influence must prove it specifically, going beyond a mere suspicion, and giving the Court clear evidence that influence was in fact exercised and that the testator was not acting as a free agent.

When taking instructions for the will, a prudent Attorney-at-Law should meet with the testator on his own and take his instructions for the will, especially if under the circumstances it appears that something is amiss.

Mistake

A testator who makes a will without understanding that it is a will he is making, has acted without proper testamentary capacity. In such a case, the mistake relates to the whole will. On the other hand, if only some of the words used in the will are not what he intended to write, the mistake will relate to only that part of the will, and only that part will be held invalid.

Challenging the Provisions Under a Will

A will may be perfectly valid, properly signed and witnessed, made without any undue influence by someone in complete possession of his mental faculties who understood all the implications of what he was doing, but there may still be someone who wishes to challenge the provisions made in the will rather than the validity of the will itself.

Under the Succession Act, Cap. 249 of the laws of Barbados a will is subject to the following provisions for the protection of spouses and children:

- The testator's surviving spouse has a legal right to one half of the testator's estate. If the testator is survived by a spouse and a minor or disabled child the spouse will only be entitled to one quarter of the testator's estate. The spouse's legal right to claim a share takes priority over any other testamentary dispositions or shares on intestacy.
- If the will contains a gift to the testator's surviving spouse, the spouse must choose whether to accept the gift or the legal share, unless the will expressly states that the spouse shall take both. This election must be made within 6 months after the latter of the date of probate or the date of receipt of a notice of election from the executor.
- Children are not automatically entitled to a share of the testator's estate but where the testator dies leaving a child who is a minor or who cannot maintain himself due to a mental or physical disability and the Court is of the opinion that the testator has not made adequate provision for that child in accordance with his means, the Court can make provision for the maintenance of that child, by way of a lump sum payment or periodic payments or both. Such an application must be made within 12 months from the grant of probate.

The Succession Act therefore allows a testator's spouse or minor child or child with a disability to be provided for out of the estate, regardless of the terms of the will. When preparing a will an Attorney-at-Law should enquire whether the testator has a spouse and/or children, and provide the testator with relevant information so that he can address his mind to the nature of all claims on him. The wishes of the testator must be considered in the light of those potential claims so as to mitigate against the possibility of the will being challenged or deemed invalid.

Conclusion

A challenge to the validity of a will delays the administration of the testator's estate. This may lead to disgruntlement among the beneficiaries and may even result in the testator’s wishes being overlooked.

When preparing your will, the possibility of potential claims and disputes must be borne in mind and steps should be taken to preserve the validity of the will. It is therefore always advisable to obtain proper legal advice from an Attorney-at-Law to ensure that you are making informed decisions and that your wishes are likely to be upheld.

Electrical Disconnection: The Vendor's Warranty in the Agreement for Sale

By Mrs. Laverne O. Ochoa-Clarke, Associate

Mrs. Laverne O. Ochoa-Clarke

The standard agreement for sale of a property which includes a building will contain a warranty by the vendor that the electricity supply has not been disconnected for more than thirty days and, if it has, that the vendor will have the supply reconnected at his expense prior to completion of the sale and purchase.

This clause exists for a very good reason and has both practical and financial implications for the vendor and purchaser. The consequences of disconnection can be particularly dire if the supply has been disconnected for more than six months.

Where the electricity supply to a building has been disconnected for more than six months, it cannot be reconnected unless a new Installation Certificate of Approval is issued by the Government Electrical Engineering Department ("**GEED**").

To obtain an Installation Certificate of Approval the property must be inspected by GEED. Inspection occurs after application by the vendor's licensed electrician and payment of the requisite fee (which depends on the number of electrical meters, lights and plugs etc. to be inspected) to GEED.

This process of re-inspection may be a lengthy and costly one for several reasons:

1. The age of the building - this may influence GEED's decision whether to require the removal of the existing electrical wiring and installation of new wiring or whether adjustments need to be made to the existing electrical wiring before the property is inspected.

2. The type of electrical fixtures installed - GEED may have to inspect the property several times before they are satisfied that the property's electrical installation conforms to the accepted international electrical standards.

Once the GEED is satisfied that the electricity supply can be reconnected, the Chief Electrical Officer will issue the vendor with an Installation Certificate of Approval. The vendor takes this certificate together with the details of the meter number and the requisite reconnection fee to the Barbados Light & Power Company Ltd. and asks for the electricity supply to be reconnected to the property.

The cost of inspection and re-connection of the supply of electricity may therefore be significant, and this additional and unexpected cost may mean that the vendor's net proceeds of sale will be significantly less than anticipated. For this reason, it is critical that the vendor's Attorney-at-Law enquire, when taking instructions for the sale of the property, about the state of the electricity supply.

The reconnection process may also affect the scheduled completion date. If the Attorneys- at-Law for the vendor and purchaser are aware that the supply of electricity has been disconnected for more than six months the parties may be able to negotiate a more realistic completion date than the customary three months from the date of signing the Agreement for Sale. The parties may also be able to negotiate whether who pays the costs of reconnection or even whether the supply of electricity should be re-connected to the property at all.

The purchaser's Attorney-at-Law should also make early enquiries from the vendor's Attorney-at-Law about the state of the electricity supply and from the purchaser as to the purpose he intends to put the building to. This is important because the purchaser may wish, for example, to demolish the entire property or may decide to renovate the property and therefore not require the vendor to re-connect the supply of electricity.

In a case where the vendor is depending on the proceeds of sale of one property to finance the purchase of another property or some other project, the additional delay and cost can have far-reaching consequences for the vendor. Where sale proceeds are going to pay off an existing loan, delays in completion will have serious financial consequences, especially where interest is accruing at a high daily rate.

Electrical Disconnection: The Vendor's Warranty in the Agreement for Sale Cont'd

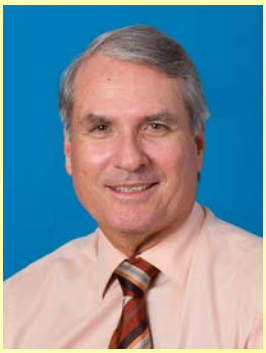
By Mrs. Laverne O. Ochoa-Clarke, Associate

On the other hand, the purchaser may also be affected by the delay where there are time limits for drawing down on a loan.

The issue is therefore one that should be addressed by the Attorneys-at-Law for both vendor and purchaser at the point of taking instructions, and not be left as an afterthought.

ATTORNEY PROFILE

In this issue we present our second instalment of a series of profiles of the firm's attorneys.



Mr. Stephen W. Farmer, Q.C.

Stephen Wilfred Farmer, Q.C. is the partner in charge of the Property Department.

His legal training began when he was articled to the law firm of Cottle Catford & Co. He studied in England for both Parts I and II of the British Law Society Solicitors Examination and was admitted to practice law in Barbados in 1976. In 2013 he was elevated to the Inner Bar as one of Her Majesty's Counsel for Barbados (Queen's Counsel).

Stephen practices mainly in the property area, working on mortgages and in the area of property development in the residential, resort and commercial sectors. He advises both domestic and international clients in transactions ranging from the sale and purchase of commercial and residential land and property, the development of building estates to leases of commercial premises.

Stephen is a keen sportsman who was captain of the Barbados National Youth Cricket Team and subsequently represented the Barbados National Senior Cricket Team between 1970 and 1977. Stephen was also a member of the board of the Barbados Cricket Association and was a national selector.

CGF NEWS

In-house Seminar

In June Mrs. Rosalind Smith Millar, partner in the Property Department together with Mr. Creig Kinch and Mrs. Kyesha Applewhaite, associates in the Property Department and Ms. R. Janis Roberts, Business Manager of the firm, presented a series of in-house seminars on "The Practice of Law" to law students attached to the firm for the summer. The in-house seminars focused on giving the students an overview of the practice of law as a business and the topics presented included professional ethics, personal and gender issues in the profession, use of technology and social media, managing a law practice, human resource issues and civic responsibility. Presentations were also made on certain practice areas within the profession, namely, property law and intellectual property law.

Some of the law students who participated in the in-house seminar are: Standing (from left) – Jason Wilkinson, Baseer Makda, Zahir Jackson, Anika Collymore-Taylor, Shanna Goddard, Chloe Noel and Janelle Skeete. Seated (from Left) – Ava-Marissa Lee and Yvette Collymore

Seminars and Conferences

Mr. Creig Kinch presented at a lunch time seminar held at the Barbados Bar Association's headquarters on June 12, 2014 on the topic "How to make a successful application under the Land (Title Deeds Restoration) Act". The Seminar was held for members of the Bar Association and the areas addressed included a brief history of the procedures used in Barbados to replace missing title deeds, the pros and cons of starting a new application to restore the missing title deeds versus continuing an existing foreclosure suit and the step by step process for making an application to restore missing title deeds.

Ms. Debbie Fraser and Mrs. Nicola Berry, partners in the Commercial Department, are scheduled to take part in the up-coming 13th Annual Caribbean Commercial Law Workshop to be held August 10-12th, 2014 in Trinidad. Debbie will be moderating a panel discussion on the topic "Corporate Financing and Corporate Reorganisation as Mechanisms for Growth" and Nicola will be making a presentation on the topic "Negotiating Renewable Energy Power Purchase Agreements - Keys to Drafting and Allocating Risks".

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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