

CGF POINT OF LAW

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

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INTRODUCTION



Welcome to the third issue of our e-Newsletter.

We wish to thank you, our clients, colleagues and friends for your continued support and positive feedback on our previous publications.

In this issue, we examine in the first of a two-part series some of the challenges lenders face when taking security from a company. We examine the risk of a debtor making a fraudulent preference under the Bankruptcy and Insolvency Act and the importance of conducting due diligence checks into the financial standing of the company prior to taking security from a company. Our next article provides an overview of the pensions regime in Barbados. The third article addresses the controversial area of adverse possession which is a topical legal issue that has recently received national attention in our newspapers.

We hope you enjoy these offerings!

Please feel free to contact us if you have any comments or questions in relation to the articles contained in this e-newsletter.

The e-Newsletter Committee

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.



Mrs. Savitri C. B. C. St. John

✦ Challenges With Taking Security From A Company - Part 1 ✦

By Mrs. Savitri C. B. C. St. John, Partner
and Mr. Creig R. D. Kinch, Associate



Mr. Creig R. D. Kinch

Introduction

There are many challenges a lender may face when taking security from a company. In this two article series we will deal with two of these challenges: (1) fraudulent preference; and (2) financial assistance.

In this issue we will focus on fraudulent preference while in the next issue we will examine financial assistance.

Fraudulent Preference

What is Fraudulent Preference?

The Bankruptcy and Insolvency Act ('the Act') establishes a priority list for payment to creditors where a debtor enters bankruptcy. Under this priority, secured creditors or creditors who have obtained a judgment against the debtor receive preference to other creditors called ordinary creditors.

The Act seeks to ensure that all ordinary creditors rank equally and share equally on distribution of the debtor's assets on insolvency. However, a fraudulent preference seeks to circumvent this by preferring an ordinary creditor ahead of other ordinary creditors.

According to sections 70 and 71 of the Act any:

- (1) conveyance or transfer of property;
- (2) charge made on property;
- (3) payment made;
- (4) obligation incurred; and

(5) judicial proceeding taken or suffered by any insolvent person (i.e. the use of the court process to justify, validate or pave the way to a fraudulent conveyance or payment),

within 3 months of bankruptcy (or in the case of a person related to the insolvent person - within 1 year), with the intent to prefer a creditor ahead of other creditors, may be deemed to be fraudulent and void against a trustee in bankruptcy.

The mere fact that a creditor obtains a preference over other creditors is not automatic proof of a fraudulent intention on the part of the debtor. To constitute a fraudulent preference there must be both a preference in fact and an intention on the part of the debtor to prefer. The intent to prefer is to be presumed, in the absence of evidence to the contrary, if the effect is to give the creditor a preference over other creditors.

However, under section 74 of the Act, all transactions between a bankrupt and any person dealing with the bankrupt in good faith and for value in respect of the property are valid against the trustee.

Importance of Fraudulent Preference to Lenders

A Lender who:

- (1) secures a previously unsecured loan to a debtor; or
- (2) initiates legal proceedings against a debtor in respect of an unsecured loan

3 months prior to the bankruptcy of the debtor, may find that such action

might be void where there was an intention on the part of the debtor to create a preference in favour of the lender over other ordinary creditors.

A lender should bear in mind that if it decides to:

- (1) secure an unsecured loan; or
- (2) initiate legal proceedings to obtain a judgment for monies owed,

where it is apparent that the bankruptcy of the debtor is imminent, such security or judgment might be deemed a fraudulent preference and therefore void. Such a lender should therefore conduct its business with the debtor accordingly and not rely too heavily on security taken in these circumstances.

Lenders should also be cautious about taking security from a borrower or guarantor that was purchased from an individual with whom the borrower or guarantor is connected within 1 year prior to that individual's bankruptcy. If a Court deems that the sale of the property was to perpetrate a fraudulent preference (or fraud generally) then the transfer or conveyance of that property may be deemed to be void and a lender who has notice of the fraudulent preference may not be able to successfully rely on that property as security for its loan. ✦



Mrs. Rosalind K. Smith Millar

✦ The Pensions Regime in Barbados - An Overview of Retirement Benefits ✦

By Mrs. Rosalind K. Smith Millar, Partner and Miss Lisa N. Kadirullah, Associate



Miss Lisa N. Kadirullah

The pension regime in Barbados has undergone significant reform in the last decade, affecting both public and private sector employees.

There are different laws for public and private sector employees, but all employees and self employed persons are required to contribute to the National Insurance Scheme ('the NIS') under the National Insurance and Social Security Act ('the NIS Act').

Public sector pension regime

Payment of public sector pension is generally governed by the Pensions Act. Public sector pensions are 'non-contributory' and are paid from the Consolidated Fund. The amount payable varies according to the date of appointment to a public office and the date of retirement. There is other legislation which deals with specific categories of public workers e.g. teachers, statutory board employees, casual employees, the Barbados Defence Force (contributory scheme) and the Prime Minister.

With the exception of the Prime Minister, no public officer has an absolute right to compensation for past services or to a pension, gratuity or other allowance.

Private sector pension regime

The establishment, management and regulation of employers' pension plans for the benefit of private sector employees are governed by the Occupational Pension Benefits Act ('the OPBA') and regulations, which came into force in 2011.

There are two kinds of employer-funded plans: the defined benefit plan and the defined contribution plan. The benefits payable under a defined contribution plan are determined by the amount of accumulated contributions and yields credited to each individual pensioner's account. The benefits payable under a defined benefit plan are determined in advance by reference to various factors including level of earnings and length of service.

In addition to employers' plans anyone, whether employed or not, may establish a personal registered retirement savings plan. If registered under the Income Tax Act, contributions up to a fixed maximum may be allowed for income tax purposes.

Retirement age

Retirement benefits vary depending on the employee's age at retirement. Public sector retirement may be as early as 50 years in special cases, but cannot extend beyond age 65. Under the OPBA, the normal retirement age for private sector employees cannot be later than the pensionable age under the NIS Act.

The pensionable age under the NIS Act is currently 66 years. It will increase to 66 ½ years from 1 January 2014 and to 67 years from 1 January 2018. There is a voluntary minimum retirement age of 60 years, and a deferred retirement age up to 70 years.

Integration with NIS pension

The NIS provides pensions to all persons attaining pensionable age who have satisfied its contribution requirements.

Although only the Statutory Boards (Pensions) Act explicitly states that a public officer's pension payable under that Act is to be reduced by the amount of his NIS pension, in practice all public pensions are reduced by the amount of NIS pension. This is called integration or abatement of pension.

A private pension plan may also (but is not obliged to) provide for integration to occur upon the pensioner attaining the pensionable or voluntary pensionable retirement age under the NIS Act. In such cases, the OPBA regulations limit the amount of the reduction that may be required.

All employees therefore need to understand their pension entitlements. Public service employees should be aware that they have no absolute right to receive a pension, and the effect of integration.

Private sector employees should equally be aware of their obligations and benefits under their employer's pension plan if offered. ✦

• Adverse Possession •

By Mr. Stephen W. Farmer, Q.C., Partner

(Miss Sharon Smith an intern with the firm also contributed to this article)



Mr. Stephen W. Farmer, Q.C.

The adage that possession is nine-tenths of the law is a simple, but useful way of viewing how a title to land may be lost. A person who is in possession of land as a trespasser or squatter ("the Adverse Possessor") may apply for and obtain good title where the true owner fails to assert his rights of ownership to the land. This is known as adverse possession.

Adverse possession is possession by an Adverse Possessor which is inconsistent with the title of the true owner. A successful claim by the Adverse Possessor requires two essential elements – factual possession and animus possidendi (the intention to possess).

Factual possession is the actual physical possession of the land; it must be exclusive, open and unequivocal. An action against the Adverse Possessor by the true owner for the recovery of the land must be brought within 10 years of the

Adverse Possessor taking possession. Failure to do so may result in the true owner losing his right to the land. The adverse possession must be continuous; any break within the ten year period will have the effect of restoring full rights to the owner and restarting the limitation period.

The 10 year limitation period under section 25 of the Limitation of Actions Act, Cap. 231, is a matter of public policy aimed to prevent claims being brought by the true owner against the Adverse Possessor after 10 years of continuous possession.

Animus possidendi or intention to possess the land must be shown by the Adverse Possessor excluding all others, especially the true owner. This intention to possess may be evident through the acts of the Adverse Possessor such as fencing the disputed land or other acts in keeping with an owner of the land. Any act recognizing the true owner's title such

as queries with a view to purchase the land may serve to defeat any such intention.

An Adverse Possessor establishing a claim to adverse possession of unregistered land may apply for and obtain a formal certificate of title under the Land (Title Proceedings) Act, 2011-7. In the case of registered land, a certificate of title may be issued by the Registrar of Titles under the Land Registration Act, Cap 229.

Land owners are advised to regularly inspect their property to prevent claims to adverse possession being made. Fencing where practicable, is a way of securing the property and reducing the likelihood of an Adverse Possessor coming into possession of the land. •

• CGF NEWS •

CGF Presentations

Mrs. Savitri St. John, partner in the Property Department, and Mr. Creig Kinch, associate in the Property Department were part of a panel of presenters at RBC Royal Bank (Barbados) Limited's mortgage seminar, which was held on May 23, 2013 at the Hilton Barbados Hotel. Mrs. St. John and Mr. Kinch spoke on "Demystifying the Legal Process" and "Town Planning Law" respectively.

Mrs. Savitri St. John and Mr. Creig Kinch together with Miss Annette Linton and Miss Melanie Garrett-Bailey, associates of the Property Department, prepared and taught two modules of the recently held Barbados Estate Agents and Valuers Association (BEAVA) course for real estate agents at the Barbados Community College, on June 24 and 27, 2013.

We look forward to Ms. Debbie Fraser, Mrs. Nicola Berry and Ms. Sabrina Maynard of our Commercial Department being featured as speakers in the upcoming Caribbean Commercial Law Workshop to be held in Miami from August 18-20, 2013. •



Mr. Creig Kinch presenting at the BEAVA course for real estate agents.

● CGF NEWS cont'd ●

In-house Seminar

On July 17-18, 2013, Mrs. Rosalind Smith Millar, partner in the Property Department together with Mr. Creig Kinch and Mrs. Lisa Toppin-Corbin, associates in the Property and Corporate Departments respectively and Ms. R. Janis Roberts, Business Manager of the firm, presented an in-house seminar on "The Practice of Law" to students attached to the firm during their holidays. The topics presented to the interns included: Professional Ethics; Professional Courtesies; Traditions of the Legal Profession; Attire; Personal and

Gender Issues in the Profession; Use of Technology and Social Media; Law as a Business; Getting a Job as a Lawyer; Managing a Law Practice; Work Ethic; Human Resource Issues and Civic Responsibility. The seminar, which was well received, has been part of the firm's curriculum for interns on attachment in the summer for the past two years. The law students who participated in this seminar are: Mr. Rashad Brathwaite, Ms. Erica Griffith, Ms. Ruth Henry, Ms. Christina Maycock, Ms. Destinie Simmons and Ms. Sharon Smith. 🌟



Seated (from left): Ms. Christina Maycock, Ms. Ruth Henry, Ms. Sharon Smith, Ms. Erica Griffith, Mrs. Rosalind Smith Millar, Mrs. Lisa Toppin-Corbin, Ms. R. Janis Roberts and Ms. Destinie Simmons.

Standing (from left): Mr. Rashad Brathwaite and Mr. Creig Kinch

● **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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