

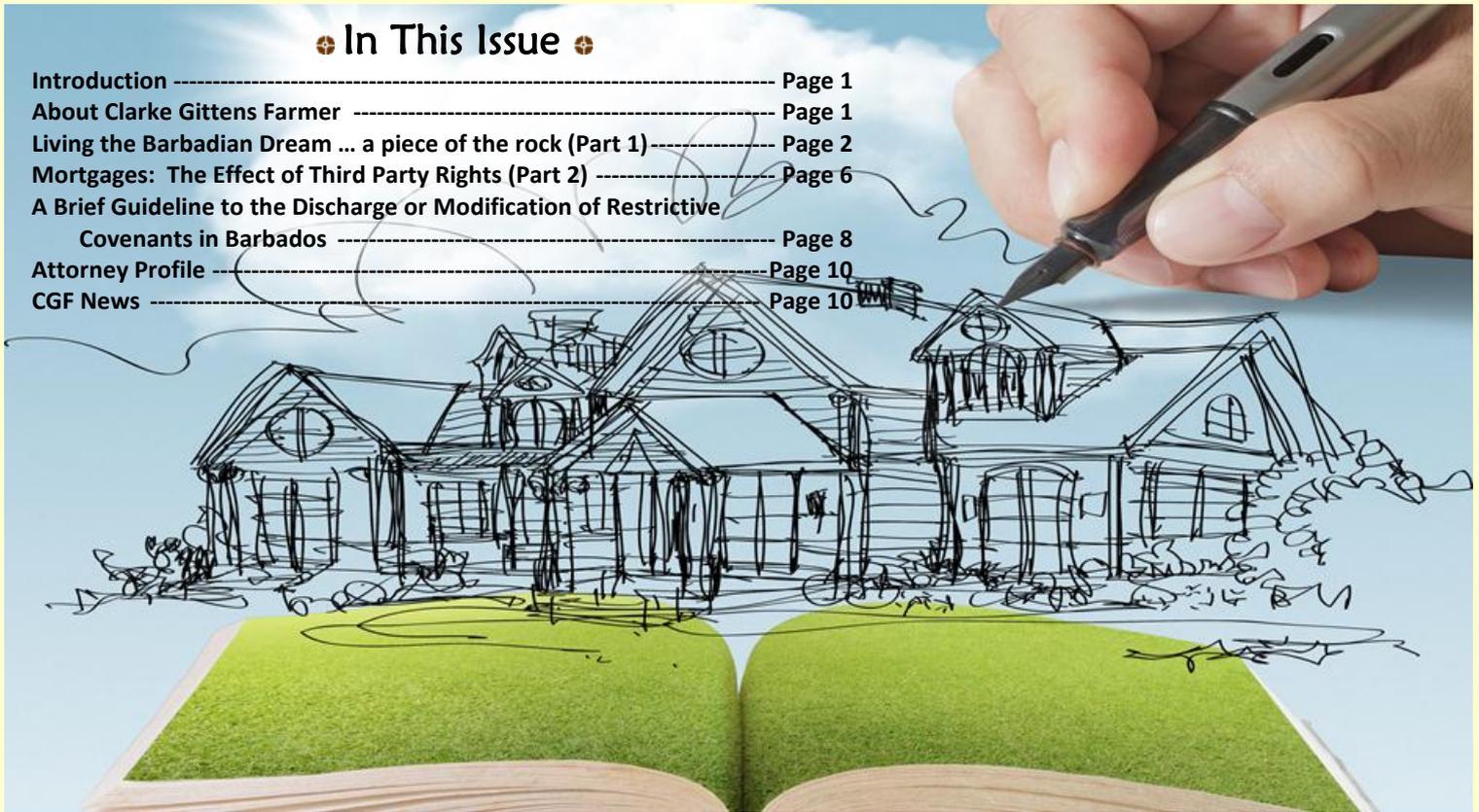
CGF POINT OF LAW

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

In this issue of our newsletter, we feature articles from the Property and Litigation departments.

Our first article is the first of a two part series examining some of the matters to be considered when buying, selling or mortgaging residential property in Barbados. This article looks at residential transactions mainly from the perspective of a residential purchaser who may or may not be borrowing money to finance the purchase.

In our second article, we conclude the two part series on the effect of third party rights on a lender's interest in mortgages and the property charged, by looking at the ways in which a lender can attempt to safeguard its security interest. This includes the requirement for a third party's consent to the mortgage, which operates to prevent such a person from asserting an interest in priority to the lender's interest. The article also explores the issue of duress and undue influence.

Our third and final article outlines in five steps the procedure and considerations of local courts in deciding whether to discharge or modify restrictive covenants in Barbados.

We hope you enjoy this issue's offerings!

The e-Newsletter Committee



Mrs. Rosalind K. Smith Millar

✿ Living the Barbadian Dream ... a piece of the rock (Part 1) ✿

By Mrs. Rosalind K. Smith Millar, Partner

This is Part 1 of a two part series on some of the matters to be considered when selling, buying or mortgaging residential property in Barbados.

Land is, arguably, the most valuable asset in Barbados. Virtually everything that happens in Barbados is somehow tied to land.

Land endures (unless there is an unsuspected sink hole below); it appreciates in value over time; it cannot be moved around or hidden away; and property-based investments are protected by a very well-understood legal system.

For the average Barbadian, owning a piece of the rock is the ultimate dream: the purchase of a home is likely to be the major financial undertaking of an entire lifetime.

Some have the opportunity to buy under legislated assistance programs such as the Tenancies Freehold Purchase Act, Cap 239B, the Agricultural Holdings (Option to Purchase) Act, Cap 221, and through the National Housing Corporation's lease-to-own programmes.

There is also the large and growing group of locals and non-Barbadians who purchase for investment, for holiday homes, retirement properties etc. These individuals are the residential buyers.

Then there are the commercial transactions – sales and purchases of commercial properties (malls, buildings in Bridgetown and elsewhere). A surprisingly large number of commercial transactions (business loans) in Barbados are secured by debentures or simple mortgages over land.

Most lenders, regardless of the purpose of the loan, will ask for security, usually in the form of a charge over land and other assets.

This article looks at the residential transactions mainly from the perspective of a residential purchaser who may or may not be borrowing money to finance the purchase.

Selling, Buying and Mortgaging Land

It sounds so simple - transferring ownership of land from one person to another, and/or creating a mortgage charging a piece of land - but buying, selling and mortgaging real property involves a multiplicity of legal processes.

There are about 65 different pieces of principal legislation (not including various regulations) that have to be considered when dealing with land matters. There is a lot of "stuff" that goes into getting it right, and a lot of government departments to interact with to achieve a smooth land transaction.

Before You Begin

Before you begin a land transaction, you have to think about a few things:

- What are you trying to achieve?
- What is the nature of the property - Land, House, Townhouse, Condominium?
- How are you going to finance it?
- Is it for investment – what is the return on investment, over what period?
- How long is the particular transaction going to take?
- Are other people or transactions affected by what you propose to do?
- What are the lenders prepared to do for you?
- What documents will you need to produce?
- If you are planning to build, who are the reputable contractors?
- Which lawyers are good at what you want to do?

You must also understand that there is a requirement for your lender and your Attorney-at-Law to "know the customer". Do not get upset when they ask for certain information such as proof of identity, proof of address and source of funds.

Living the Barbadian Dream ... a piece of the rock (Part 1) Cont'd...

By Mrs. Rosalind K. Smith Millar, Partner

First Steps

- If you are a first-timer, you should sit down with your Attorney-at-Law as soon as you decide to undertake a land transaction.
- Always go and inspect the property yourself, and take along a civil engineer if the building is old, has been unoccupied for a long time, or you think there may be structural problems.
- Scout for a good deal with the lenders.

Other professionals (lenders, land surveyors, architects, engineers and contractors, to name a few) will provide guidance and information about some of the things they are concerned with.

Instructing Your Attorney-At-Law

After the preliminaries such as the inspection, valuation, loan application and planning approval have been attended to, you should retain your Attorney-at-Law to move the transaction forward.

Whether you are a vendor or a purchaser, your instructions to your Attorney-at-Law should aim to provide as much information as possible, up front, so that any potential problems can be dealt with in a timely fashion.

The vendor should consider:

- Are all of the title deeds in hand to show a good title?
- Will a new plan or surveyor's report be needed?
- Are there any encroachments or other problems with the property?
- Are all land taxes paid up?
- Are the electricity, water and gas services connected and paid up?

- Are all of the required planning approvals and certificates in order?
- Are all of the estate matters in order e.g. certificate of clearance from Barbados Revenue Authority?

The purchaser should consider:

- Personal or corporate due diligence on the vendor.
- Will there be any co-owners involved? Will you be joint tenants, tenants-in-common?
- What are the Exchange Control requirements for non-nationals or non-residents?
- What are your plans for the near future – will you need advice on town planning, change of use, listed buildings, preservation of trees?

Both parties must think about related transactions and how to schedule the timing of the transaction, for example, is the money from one sale needed to pay for another property, or timely clearing a loan to reduce payment of interest.

The typical residential purchase and mortgage transaction takes about three months, so early attention to these issues will prevent delay in the closing stages of the transaction. Remember that delays have consequences, such as incurring additional interest on a mortgage, or even having a sale fall through altogether.

Legal Process and Cost Estimate

Your Attorney-at-Law should explain to you what to expect in terms of the process and the timing, which vary according to what the transaction requires. He/she should also give you a preliminary estimate of the costs you will incur. This may only be an estimate, pending receipt of additional information.

Living the Barbadian Dream ... a piece of the rock (Part 1) Cont'd...

By Mrs. Rosalind K. Smith Millar, Partner

Also note that:

- The vendor pays the transfer tax and stamp duty on transfer of ownership; the costs of releasing any prior charges; providing a new plan if needed; his own legal fees and VAT.
- If the vendor is a developer, there are many other infrastructural costs that have to be met before the Chief Town Planner will allow the sale of the lots, houses or condominium units.
- The purchaser pays to record his conveyance/transfer, all costs of providing security for his financing, his own legal fees and VAT as well as those of his lender and a proportionate part of the land tax for the current year.
- The borrower pays all costs associated with the loan and security, including his own and the lender's legal fees, valuations, negotiation fees and insurances.

Basic Overview of the Sale / Purchase Process

1. Real estate agent connects the parties; once the offer is accepted, he sends a letter to both sets of Attorneys-at-Law. This should be "subject to contract"; OR
2. Parties alert their Attorneys-at-Law that agreement has been reached "subject to contract".
3. Purchaser may need to apply for or confirm availability of financing.
4. Vendor's Attorney-at-Law sends agreement and copies of the title documents to purchaser's Attorney-at-Law.
5. Purchaser signs and pays deposit, then vendor signs. Each side gets an original signed agreement.

6. Purchaser's Attorney-at-Law investigates the vendor and the property and provides information to the lender's Attorney-at-Law.
7. Exchange Control issues are dealt with.
8. Conveyance, mortgage and other necessary documents are prepared, reviewed and agreed upon, then signed by the purchaser then the vendor.
9. Any required releases of prior charges are signed and held pending loan repayment.
10. Purchaser's Attorney-at-Law asks lender's Attorney-at-Law to request the loan funds.
11. All Attorneys-at-Law meet and exchange documents for money.
12. Lender/Purchaser's Attorney-at-Law stamps and records the documents at the Land Registry.
13. Recorded deeds are held by lender for the duration of the mortgage or, if none, by the purchaser.

Getting the Loan Approved –Facility Letter or Loan Agreement

A loan offer or facility letter should contain:

- Borrower's full and correct name and address,
- Loan amount,
- Terms and conditions of the loan – interest rate, repayment, pre-payment, conditions precedent, ongoing requirements,
- Main security required by the lender, and
- Collateral security.

The facility letter must be accepted and signed by all parties to be bound by its terms, such as guarantors and other third parties affected.

✦ Living the Barbadian Dream ... a piece of the rock (Part 1) Cont'd...✦

By Mrs. Rosalind K. Smith Millar, Partner

Basic Overview of Mortgage Process

1. Borrower applies for loan and loan is granted.
2. Lender instructs its Attorney-at-Law.
3. Attorney-at-Law writes to borrower's Attorney-at-Law for security items and information.
4. Borrower's Attorney-at-Law provides title documents and other information or documents requested.
5. Lender's Attorney-at-Law investigates title and prepares security documents.
6. Borrower's Attorney-at-Law coordinates transaction with vendor's Attorney-at-Law.
7. Releases of prior charges are executed in anticipation of completion.
8. Lender's Attorney-at-Law advises lender when all required security is available for completion and requests disbursement of loan funds.
9. All Attorneys-at-Law complete transaction; prior mortgages are paid off and released.
10. Lender's Attorney-at-Law stamps and records security documents.
11. Lender's Attorney-at-Law sends all security documents and title deeds to lender to hold for duration of the mortgage.

In Part 2 of this article, aspects of the above processes will be discussed in greater detail. ✦





Miss Jaina O. Colucci

❖ Mortgages: The Effect of Third Party Rights (Part 2) ❖

By Miss Jaina O. Colucci, Associate

Introduction

In this article we continue to examine the impact of third party rights on the rights of a lender, by looking at the precautionary steps lenders may take to prevent their interests from being overridden.

Protection for the Lender

To preserve priority for their security, many lenders have adopted the practice of requiring a third party's consent to the mortgage. This consent operates to prevent the signatory from asserting an interest in priority to the lender's interest and usually takes the form of an occupier's release or postponement of claim which contains the following:

- consent by the third party to a legal charge being created in favour of the lender over the property;
- an undertaking by the third party that the charge over the property takes priority over any right, interest or claim they may have in the property or the proceeds of sale;
- an undertaking by the third party not to assert his right or interest in a manner adverse to that of the lender;
- an undertaking by the third party not to obstruct, delay or hinder the realisation by the lender of its security; and
- an undertaking by the third party to give up possession of the property to the lender upon the exercise of its rights under the mortgage.

Although consent may be obtained by either: (a) the third party being made a party to the mortgage itself so that his interest can be charged in the lender's favour or; (b) through the execution of a separate deed of postponement in order to give the lender priority, the third party may, in the absence of independent legal advice, yet be able to overcome the lender's assumed priority of interests.

Duress and Undue Influence

The lender should satisfy itself that the third party has entered freely into the transaction. If the lender or its Attorney-at-Law knows or suspects that the third party is acting other than of his own free will, whether it be under duress or undue influence, or knows or suspects that the third party has been misled, the lender should not proceed with the loan.

In the significant case of *Royal Bank of Scotland v Etridge (No. 2)*, (2002) 4 All E. R. 449, the House of Lords stated that proof that the wife placed trust and confidence in her husband, in the context of a transaction which requires explanation, will normally be sufficient to require the lending institution to presume that there has been some form of undue influence. The presumption of undue influence is rebuttable and in order to do so the lender must make certain that the transaction has been explained to the third party adequately. It must be confirmed that the third party signed the relevant documentation after full, free and informed thought about it.

It is therefore recommended that the third party obtains independent legal advice before signing the mortgage document, a guarantee or a postponement of claim.

The mere fact that independent legal advice has been provided, however, does not automatically mean that the lender is entitled to rely on it. The mortgage may still be deemed unenforceable if it is viewed as being manifestly disadvantageous to a third party. A precise and accurate account of any meeting with the third party and what was explained should be recorded by the Attorney-at-Law giving the advice.

Independent legal advice must have the effect of establishing that the third party who is signing any document affecting their rights understood:

❖ Mortgages: The Effect of Third Party Rights (Part 1) Cont'd...❖

By Miss Jaina O. Colucci, Associate

- that he is free to obtain independent legal advice from an Attorney-at-Law of his choice;
- the rights he has or may acquire in respect of the property;
- the full effect and extent of the contents of the mortgage, which has been explained to him (i.e. the potential risks involved and liability where applicable);
- the nature and practical effect of signing the postponement of claim (i.e. that it only postpones his rights or interests in the property but does not remove them);
- that he is not obligated to sign the documentation and that if he does sign, he must be doing so of his own free will; and
- why it has been recommended by the lender that he obtain legal advice (i.e. that the purpose of this requirement is to prevent him from disputing that he is legally bound by the mortgage, guarantee or postponement of claim once signed).

Conclusion

In recent times local courts have been keen to ensure that there is fairness between parties to a relationship where one party takes out a mortgage without the knowledge or informed consent of the other party. This was clearly illustrated in *RBTT Bank Barbados Limited v Davis and Davis No. 757 of 2010* where the borrower's wife claimed that she was bound by the postponement of claim only to the extent of the amount she had knowledge of i.e. the amount secured by the mortgage before it was up-stamped. She successfully claimed that the postponement of claim signed for the mortgage did not extend to the further charges which were made without her knowledge. The court took the view that the wife's interest in the property took priority over that of the lender as it related to the further charges.

Lenders should see to it as part of their normal practice, that if it appears that a third party would have an interest in the property:

- proper enquiries are made as to the existence or potential existence of third party rights;
- all affected third parties are duly identified and informed of the transaction;
- the third party is strongly recommended to obtain independent legal advice as to the nature and extent of such rights and the effect of the transaction on such rights;
- if the third party refuses to seek truly independent legal advice, that an Attorney-at-Law certifies that such advice has been given; and
- the third party acknowledges that he has received legal advice on the transaction, understands the transaction and is participating in the transaction of his own free will, free from duress or undue influence. ❖





Mr. Kevin J. Boyce

✦ A Brief Guideline to the Discharge or Modification of Restrictive Covenants in Barbados ✦

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



Mr. S. Matthew Goodin

Introduction

Restrictive covenants are private agreements between land owners which limit the way in which land may be used. This article discusses the procedure and the considerations taken into account by local Courts when deciding whether to discharge or modify a restrictive covenant.

Step 1: Application Notice and Affidavit

An application can be made by any person with a legal interest in the land affected by the covenant. The applicant must swear an affidavit setting out their basis for the proposed discharge or modification of the covenant which must be based on any of the following grounds¹:

1. changes in the character of the property itself, or in the neighbourhood, or where other material circumstances exist which lead the Judge to conclude that the restriction has become obsolete;
2. that the continued existence of such restriction would impede the reasonable user of the land for public or private purposes without securing to any person practical benefits sufficient in nature or extent to justify the continued existence of the restriction;
3. that the owner of the land that has the benefit of the covenant agrees to the discharge or modification, such agreement being either express or by implication, by their acts or omissions; or
4. that the proposed discharge or modification will not injure the persons entitled to the benefit of the restriction.

You should consult with your Attorney-at-Law to determine if your situation falls within one of these grounds.

Step 2: Ex parte Directions Hearing

Once you have determined that the grounds to discharge or modify the covenant exist, an application will have to be filed in the Court. Once the application has been filed, there will be a hearing before a Judge who will give directions as to how notice of the application is to be given to any party who could potentially be affected by the discharge or modification of the covenant. The Judge has the ultimate discretion to decide how notice of the application should be given. In recent applications, Judges have required advertisements to be placed in local newspapers or personal service on parties with a benefit of the covenant.

Step 3: Advertising and Service on Parties

The usual practice however, is to have the notice advertised twice (or more if so directed) in a daily local newspaper, one of which must be a Sunday edition. This advertisement should set out:

- The description of the land affected by the restrictive covenant; and
- The remedies asked for (i.e. whether the application is for the removal or modification of the covenant).

The notice will invite all persons affected by the application to enter an appearance before the Court.

Notice of the application and a copy of the directions order must also be served on the Chief Town Planner.

¹ See Property Act, Cap 236 Section 196

✦ A Brief Guideline to the Discharge or Modification of Restrictive Covenants in Barbados Cont'd... ✦

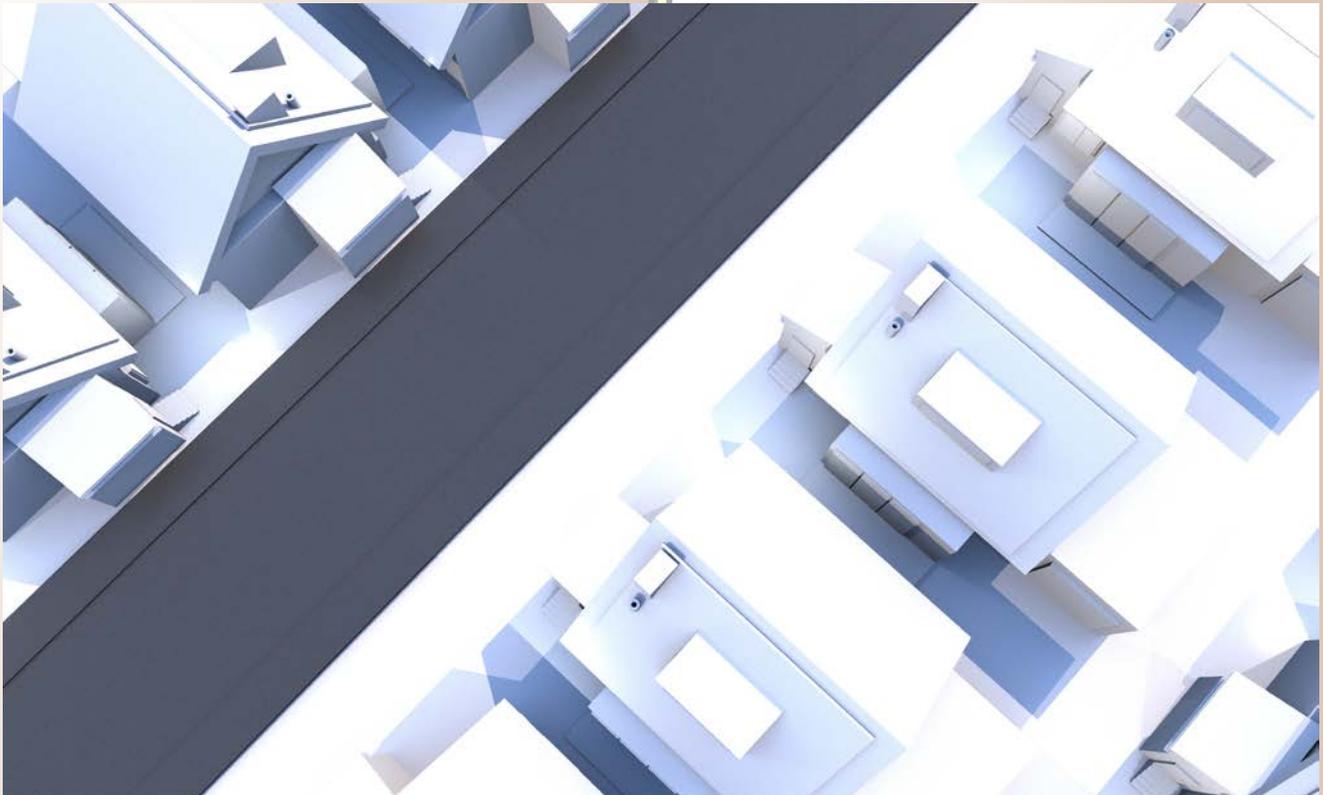
By Mr. Kevin J. Boyce, Partner and
Mr. S. Matthew Goodin, Associate

Step 4: Receipt of Objections and Submissions in Response

The applicant's Attorney-at-Law should cause a search to be done at the Registry to ascertain whether there are any parties who have filed objections to the application. These results should then be recorded in an affidavit of search. The Chief Town Planner, as well as any potentially affected parties opposed to the application, should then enter an appearance before the Court. If there are no objections, the Court will usually grant the discharge or modification requested. However, if there are objections to the application, the Court would then give further directions as to the conduct of the application (eg. filing of further affidavits and/or legal submissions).

Step 5: Court Hearing

Once the Court's directions have been completed, the Court will have a hearing with the respective parties present to determine if the covenant should be discharged or modified. There are a variety of factors which go into such a determination and whether the application will succeed depends entirely on the type and strength of the evidence before the Court. Each case is fact specific and the work done to prepare before seeking the assistance of the Court is critical. ✦



✦ ATTORNEY PROFILE ✦

In this issue we continue our series of profiles on the firm's Attorneys-at-Law. This issue profiles Ms. Debbie A. P. Fraser.



Ms. Debbie A. P. Fraser

Debbie heads the Commercial Department at Clarke Gittens Farmer. Debbie has been in practice since 1992 and is qualified to practice in Barbados and Jamaica. She is a graduate of the University of the West Indies and the Norman Manley Law School in Jamaica where she received the Legal Education Certificate of Merit. Debbie joined Clarke Gittens Farmer in November 2003 as an associate and became a partner in the firm in May 2005. Her recent practice has concentrated on mergers and acquisitions, takeovers,

energy law, securities law, project finance and both international and domestic capital markets for debt financings. Prior to joining Clarke Gittens Farmer, Debbie was a partner in one of the most reputable law firms in Jamaica where her practice covered various areas of law including securities law, copyright law, banking and corporate finance, telecommunications and commercial litigation.

Debbie was also a part time lecturer at the University of the West Indies (Mona Campus, Jamaica) and the Mona Institute of Business (an affiliate of the University of the West Indies) in securities law, contract law and business law. She is a former Chairman of the Copyright Tribunal of Barbados and is the Deputy Chairman of the Financial Services Commission of Barbados which is responsible for regulating the financial sector other than banking services. She has delivered a number of papers on securities law, directors' duties and responsibilities under the companies legislation and a review of development and changes in certain financial legislation. ✦

✦ CGF NEWS ✦

Staff Committee

March 2015 marked the revival of the Clarke Gittens Farmer Staff Committee ("**the Committee**") which has a mandate to organise fellowship-building activities and to provide an additional avenue for staff to submit feedback and suggestions on the improvement of their work environment.

On 27th March 2015 the Committee held its first event, a Health Fair for staff. The mobile unit of the Breast Screening Programme allowed for staff to be screened individually to allow for early detection of breast cancer. This was very well received by staff, both men and women.

The nurses from the Edgar Cochrane Polyclinic were also present offering a range of services from blood sugar testing to flu and tetanus shots, blood pressure checks and also invaluable nutritional facts and counselling. HIV testing was also conducted in conjunction with the Ministry of Health through the HIV Commission.

Skin Analysis was performed by the staff of Collins Ltd. who also provided advice as to the steps needed to regularise any abnormalities produced from the evaluation.



Ms. Renee Gay having her blood pressure checked

The Health Fair was followed by our Sweet Treats Monday on 1st June 2015 and "A Good Ole Bajan Breakfast" on 6th July 2015.

The Committee also launched its Recycling Programme as the firm's way of playing its part in protecting the environment. Collection stations have been set up in two of the lunch rooms for recyclable material which will be collected by B's Recycling.

✿ CGF NEWS Cont'd... ✿

Charitable Donations

Clarke Gittens Farmer, along with other members of the Barbados International Business Association made a combined charitable donation to the Winston Scott Polyclinic which saw the purchase of a walk-in vaccination storage cooler, a generator and other valuable equipment geared towards strengthening public health care services in Barbados.

On 29th June 2015, this equipment was revealed at a ceremony at the Winston Scott Polyclinic. ✿



Miss Gillian M. H. Clarke receives a certificate of appreciation on behalf of Clarke Gittens Farmer

Property Department

On 2nd May 2015 our Mrs. Savitri St. John was one of the presenters at the Barbados Bar Association seminar on Conveyancing and Registration of Title. The seminar was held for members of the Barbados Bar Association and covered a range of topics including the Agreement for Sale, Transactional and Procedural Matters, the Conveyance and Registered Land. ✿

Interns

In July 2015 our Mrs. Rosalind Smith Millar presented a series of in-house seminars 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 a profession 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 including Intellectual Property, Mortgages and Conveyancing. ✿



Mrs. Rosalind Smith Millar (centre) sits with the law students (from left): Amanda Montague, Michelle Moncrieffe, Andrew Rodgers, Alana Nichols, Jessica Theobalds, Christopher Harper, Lanasia Nicholas, Romel Watkins and Ian King.

✿ **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.

Contact: Website: www.clarkes.com.bb; Address: [Clarke Gittens Farmer](#), 'Parker House', Wildey Business Park, Wildey Road, St. Michael, Barbados. Telephone: (246) 436-6287; Telefax: (246) 436-9812.

Partners: **Managing Partner:** Mr. T. David Gittens, Q.C. **Partners:** Mr. Stephen W. Farmer, Q.C., Miss Gillian M. H. Clarke, Mr. Ramon O. Alleyne, Mrs. Savitri C. B. C. St. John, Ms. Debbie A. P. Fraser, Mrs. Rosalind K. Smith Millar, Mr. Kevin J. Boyce and Mrs. Nicola A. Berry.

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