

CGF POINT OF LAW

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

ISSUE 1 OF VOLUME 1 - JANUARY 2013

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INTRODUCTION

By Mr. T. David Gittens, Q.C.,
Managing Partner



Welcome to the first issue of our e-Newsletter "CGF Point of Law". We are thrilled to be able to use this medium to communicate further with you, our clients, colleagues and friends and to keep you abreast of notable legal and other developments that may interest or affect you.

Our e-Newsletter will feature articles on topical legal issues and highlight the work that is conducted by our firm. The articles will feature points of law from our service areas, namely Corporate, Commercial, Property, Litigation and Intellectual Property. As time goes by, we will include additional features. "CGF Point of Law" will not only be sent to you electronically but will be made available on our website. (www.clarkes.com.bb)

This issue features topical articles from our Property and Litigation departments. You will read about the enforcement of restrictive covenants in housing developments, mortgage enforcement where the lender/mortgagee is seeking to realise its security over property which contains an occupied building and how to set off rent against income for tax purposes.

I would like to thank our editorial committee which is made up primarily of our Associates, for their hard work in producing "CGF Point of Law". I would also like to thank you for your ongoing commitment and support. Enjoy! 🌟

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 and business law areas, commercial litigation and advises clients on the purchase and sale of residential and commercial property in Barbados and maintains a significant trademark and patent registration practice. 🌟

🌟 Setting Off Rent Against Income For Tax Purposes? Not So Fast! 🌟

By Mr. Stephen W. Farmer, Partner and
Mrs. Kyesha Applewhaite, Associate

Section 10(1) of the Income Tax Act, Cap. 73 provides guidelines on what can be deducted when calculating assessable income.

Subsection (a) includes expenses incurred in that income year for the purpose of producing assessable income from that person's property or business. Subsection (p) then includes:

"in the case of a lease of residential or commercial property

- (i) *amounts expended by the lessor in respect of the lease; and*
- (ii) *payments incurred by the lessee under paragraph (a) where*
 - (A) *the lease is recorded or registered in accordance with the Land Registration Act;*
 - (B) *the property transfer tax payable under the Property Transfer Tax Act is paid; and*
 - (C) *the stamp duty payable under the Stamp Duty Act is paid."*

A tenant may therefore **only** set off rent against his assessable income if the assessable income is being produced from the premises and the lease is stamped, recorded and any property transfer tax due is paid.

Recording Leases

In order for a lease to be recorded in accordance with the Land Registration Act, Cap. 229, section 158(1) of that Act requires that an attorney-at-law sign a 'Drawn and Prepared' stamp on the lease.

In other words, the lease should be prepared by an attorney-at-law. Certain certificates and/or declarations required under other legislation should also be included in the lease to ensure that it is permitted to be recorded such as:

- (i) Certificate that the parties are resident in Barbados (if a party



Mr. Stephen W Farmer



Mrs. Kyesha Applewhaite

is a non-resident, the lease may need the permission of the Exchange Control Authority to be valid);

- (ii) Declaration by the landlord whether input tax has been previously allowed;
- (iii) Certificate stating whether the lease is for a term of 25 years or more.

Property Transfer Tax

Property Transfer Tax ("PTT") is only payable on leases for periods or terms of 25 years or more (although a series of leases adding up to 25 years or more will also attract this tax). PTT is calculated on the capitalized value of the lease. The capitalized value is calculated by multiplying the expected rate of return on the lease (as determined by the Valuation Department of the Land Tax Department) with the net rent. PTT is usually 2.5% of this capitalized value.

Stamp Duty

Stamp duty is 1% of the average annual rent under the lease.

The Property Transfer Tax Act, Cap. 84A also requires **ALL** leases over one year to be stamped and recorded or else they become void 3 months after their dates.

Far from being simple unregulated contracts, leases therefore require careful review and processing to ensure that they are, and remain, valid and enforceable. It is doubtful that

rent under invalid or void leases can be deducted from assessable income.

Having an Attorney-at-Law see to the lease ensures that **mandatory** legislative requirements are not inadvertently breached such as ensuring that:

- (i) The prescribed forms for the lease, where applicable, are used;
- (ii) The necessary notice is given to the Commissioner of Inland Revenue (without which a Court cannot assist a landlord in ejecting a tenant);
- (iii) The necessary extraordinary shareholder resolutions are obtained by companies seeking to lease all or substantially all of their property;
- (iv) A land tax certificate is obtained and notification of change of possession is served on the Commissioner of Land Taxes for certain leases;
- (v) Any banks with charges over the property give their consent (without which the landlord will likely be in default of the existing mortgage and the tenant's possession will be subject to the bank's right to take possession of the property); and
- (vi) The lease is, where necessary, prepared as a deed.

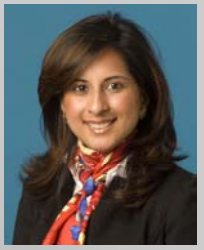
Finally, making or giving false or misleading returns or information in relation to the Income Tax Act, Cap. 73 can attract fines and even imprisonment and therefore persons should not seek to set off rent in contravention of the Income Tax Act. 🌟



Mr. Kevin Boyce

✿ An Outline of Mortgage Enforcement in Barbados ✿

By Mr. Kevin Boyce, Partner and Miss Lalita Vaswani, Associate



Miss Lalita Vaswani

Barbados has unique provisions with regard to the protection of borrowers/mortgagors. The following is a brief outline of the recommended steps to be taken by any lender/mortgagee seeking to realise its security over a property which contains an occupied building.

This procedure has been derived from the recently introduced Civil Procedure Rules, the Property Act, Cap. 236, the standard mortgage clauses used in this jurisdiction and our experience in the Courts.

Stage 1: Demands

The practice is that upon making default, the mortgagee or its legal counsel sends a letter to the mortgagor demanding that the arrears in respect of the default be paid immediately or paid within a defined period (usually 7 to 14 days after the mortgagor has received the demand). If the mortgagor does not respond to this demand, a second demand letter is sent, this time demanding the full sum owed.

Stage 2: Statutory Notice

If monies remain outstanding to the mortgagee, its legal counsel issues a statutory notice to the mortgagors requiring payment of the outstanding mortgage monies. Under the Property Act, the required notice period is 1 month in the case of unregistered land and under the Land Registration Act, Cap. 229 the required notice period is 3 months for registered land.

Stage 3: The Letter of Claim

The pre-action protocols of the Civil Procedure Rules require that a letter of claim or 'letter before action' be issued to the proposed defendant prior to the commencement of any legal action. In mortgage enforcement actions this has the practical effect of informing the mortgagor of the

intended legal action by the mortgagee due to the mortgagor's default. This letter is comprehensive as it generally sets out the particulars of the mortgagor's indebtedness and expressly sets out the relevant particulars of the mortgagee's right to commence enforcement proceedings. This letter is sent with the relevant documents that establish this right and more significantly a 'defendant's form' in which the mortgagor may admit the debt and submit a proposal for repayment to the mortgagee or its counsel.

The letter of claim provides a last chance for the mortgagor to satisfy its indebtedness to the mortgagee and it is a useful tool that facilitates negotiations between the two parties on modified repayment terms.

It is at this stage of issuing a letter of claim that the mortgagee should provide written notice of the impending legal action to any person who is in occupation of the mortgaged property and to any other mortgagee(s) holding a charge over the same property.

Stage 4: Initiating Legal Action

If the mortgagor's indebtedness continues and no suitable arrangement for settlement has been agreed between the parties, the mortgagee can now institute legal proceedings against the mortgagor.

The mortgagee is required to serve copies of the filed application on the mortgagor giving notice of the claim brought and the date of hearing. Where the property is subject to another mortgage, the other mortgagee(s) must also be served with notice of the application.

Stage 5: The Hearing

The application is heard before a Judge at the High Court and the mortgagee's

counsel puts forward arguments in support of an Order for Possession for the mortgaged property. The mortgagor or if represented, its counsel, may make arguments in response, and often seeks to adjourn the matter to allow further time to repay or negotiate with the mortgagee. Such adjournments are usually given. The Judge determines whether the application complies with the applicable laws and may accordingly grant an Order for Possession usually with a stay of execution of a few months to provide the mortgagor with a final opportunity to settle its obligations.

Stage 6: Enforcement

Once the Order for Possession is given and the stay of execution expires, the mortgagee's counsel prepares a Writ of Possession which is endorsed by the Chief Justice. This Writ is served on the Marshal and upon receiving instructions from the mortgagee, he shall proceed to 'levy execution' of the writ and take possession of the property.

Final Considerations

This is a brief guideline on the recommended mortgage enforcement process for an occupied property. Other factors may guide the actual possession procedure which will vary from case to case. Care should therefore be taken in these proceedings. Equally, mortgagees must be aware of the powers of the Court to facilitate settlement attempts by the mortgagor as well as the growing practice of debtors seeking injunctions to bar the mortgagees from exercising their rights. These steps are recommended to ensure that the mortgagee complies with its obligations on enforcement and restricts the grounds on which a mortgagor can find cause to resist the same. ✿

● Enforcement of Restrictive Covenants in Housing Developments ●

By Mrs. Rosalind Smith Millar, Partner

Miss Danielle Maycock, Associate, contributed to the article but
is no longer with the firm



Mrs. Rosalind Smith Millar

Restrictive covenants are an important means of managing the use and enjoyment of land in housing developments ('developments'). These types of covenants are contractual obligations made by deed and are enforceable between the original parties to the deed, and will usually be made binding on the land so as to be enforceable by and against future owners. Some examples of the most common restrictive covenants are those that prevent trade or business in the development, the further subdivision of the lots, or the number and kind of animals that may be kept at the property.

A development usually consists of land divided into lots (with or without dwellinghouses), townhouses or condominium units. In most cases, the lots, houses or units are sold to purchasers by one vendor who imposes the restrictions equally on each lot/unit by deed in the course of the sale. The deed will state the length of time for which the covenants are to apply to the lots; in many cases, a purchaser will see that the covenants are 'binding in perpetuity'. The term 'binding in perpetuity' does not mean that the covenants are permanent. The Property Act, Cap. 236 provides that the period of perpetuity cannot exceed 80 years. However, it is important to note that covenants can be modified or discharged.

Attorneys-at-law are frequently asked to advise aggrieved property owners in developments whether some neighbour's activity constitutes a breach of covenant and how to remedy the situation.

First, the attorney-at-law must determine whether the action by the offending party is restricted. This entails reading the deed creating the restriction to see if the activity complained of is a breach of covenant. That deed will usually be the first conveyance of the client's lot/ unit from the developer after the development has taken place. Subsequent conveyances of the same lot/ unit will incorporate the covenants and conditions by reference to that first conveyance.

The effect of a restrictive covenant is that each owner for the time being can sue or be sued by every other owner for breach of covenant. The purchaser's attorney-at-law should therefore thoroughly explain the covenants to the purchaser to ensure that he fully understands what is and is not permitted to be done with the property being purchased.

Each successive conveyance will also usually include a covenant by the purchaser to perform and observe the covenants and conditions and indemnify the vendor against future breaches by the purchaser or future owners but will state that the purchaser will not be liable for any breach occurring after he has parted with all interest in the property.

A client's first instinct may be to call the police or to 'sue' the offending party. However, the Attorney-at-Law should explain that unless a crime is being committed, it is not a matter for the police. Further, there are many steps to be taken before considering taking the matter to court.

First, is to have a friendly chat with the offending neighbour. If that fails, then (depending on how the chat went) a letter from the offended party or from his Attorney-at-Law should request compliance with the specific covenant(s) and inform that in the absence of compliance within a reasonable, specified time, an action will be initiated through the courts.

With the passage of time, covenants may become irrelevant, inconvenient or onerous. In such cases, one or more property owners in a development may apply to the Court to modify or discharge the covenants. All affected parties will have an opportunity to weigh in on the application.●

Mooting Competition

In February 2012 Clarke Gittens Farmer sponsored the 4th annual Clarke Gittens Farmer Mooting Competition which was held at the Faculty of Law, University of the West Indies ('UWI'), Cave Hill Campus, Barbados. The aim of the competition is to train and equip law students with advocacy and legal writing skills.

Several students within the Faculty competed in this competition which was held during the annual law week of the UWI Cave Hill Law Society. The competition comprised several preliminary and semi-final matches which culminated in a final round on 28 February 2012.

Below is a picture of the winning third year team of Ms. Tanya Prima, Mr. Rashad Brathwaite and Ms. Donia Fuller.



The photograph of Ms. Tanya Prima, Mr. Rashad Brathwaite and Ms. Donia Fuller was published with their consent

Nation Fun Walk

On Sunday, 18 November 2012, Clarke Gittens Farmer participated in the Nation Fun Walk and Run. Below are some members of the firm at the start of the event who completed the Fun Walk.

The participants pictured in the Fun Walk are named left to right:

Ms. Amanda Goddard, Mrs. Janelle Knight, Mrs. Nicole Boyce, Miss Melanie Garrett-Bailey, Mrs. Alicia Taylor, Mrs. Kyesha Applewhaite, Ms. Debbie Fraser, Miss Nicole McKetney, Mrs. Nicola Berry and Alexander Berry.



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

Team: **Supervising Partner:** Ms. Debbie Fraser **e-Newsletter Committee:** Mrs. Nicola Berry (Chair), Miss Annette Linton, Mr. Creig Kinch, Miss Nicole McKetney, Miss Sabrina Maynard, Mrs. Lisa Toppin-Corbin and Miss Lalita Vaswani.

Technical and Administrative Support: Miss Stephanie Blenman, Mr. John Newton and Ms. Erith Small.

Disclaimer: IMPORTANT NOTICE: This e-Newsletter does not constitute and should not be construed as legal advice. Should further analysis or explanation of the subjects contained in this e-Newsletter be required, please contact us. Always consult a suitably qualified lawyer on any legal problem or issue.