

# CGF POINT OF LAW

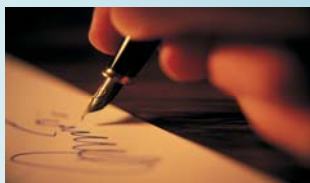
E-NEWSLETTER OF CLARKE GITTENS FARMER, ATTORNEYS-AT-LAW

ISSUE 2 OF VOLUME 1 - APRIL 2013

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## INTRODUCTION



Welcome to the second issue of our e-Newsletter.

We take this opportunity to thank our clients, colleagues and friends for their well-wishes and support after the publication of our first issue. We look forward to producing future issues that will continue to shed light on challenging and topical legal issues.

In our first article we address a real estate issue that has plagued many land owners: lost title deeds. In the past the procedure to replace lost title deeds was complex, expensive and long. However, legislation was passed in 2011 that simplified the procedure. In our article we give an overview of the new legislation and the procedure now available to land owners who have lost or misplaced their title deeds.

We then turn our focus to commercial entities. First, we look at the ways in which service providers can legally contract with their customers. Second, we focus on the impact of the Financial Services Commission, a regulatory board, on how commercial entities conduct their businesses.

We hope you enjoy. 🌟

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 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. 🌟

## ● Help! I've Lost My Deeds! ●

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



Mr. Stephen W. Farmer, Q.C.

Traditionally, losing one's title deeds was one of the worst misfortunes a land owner could experience. It is important to have original title deeds, and not just copies, as original title deeds are usually required for a person to prove to a potential purchaser or lender that his title is good.

The process of replacing title deeds was expensive (fees and expenses in the range of \$10,000.00) and time consuming (sometimes taking over 3 years). This process called for lawyers to put a mortgage in place as security for a pretend loan. The "lender" would seek to foreclose on the property and would go to Court to obtain an order for the "sale" of the property. The land owner would "buy" the property and the Registrar of the Supreme Court would give the land owner a new conveyance of the property. This conveyance was called a "Registrar's Conveyance" and by law, was an adequate replacement for the lost deeds.

Today, the experience of an owner losing his title deeds will differ. The Land (Title Proceedings) Act was proclaimed on March 10, 2011 and amended the Land (Title Deeds Restoration) Act ("the Restoration Act"). The Restoration Act originally dealt with replacing title deeds that were destroyed by a disaster, such as fire or flooding but now also covers lost deeds.

Under the amended Restoration Act, where title deeds are lost, either by the owner himself or misplaced by a person holding those title deeds (such as a bank), an application can be made by the land owner to the Registrar of Titles to have "restored deeds" issued to the owner. Restored deeds, by law, have the same effect as original title deeds.

The process basically involves five steps:

1. An application is made by the owner of the land. The application will include an affidavit from the owner explaining the circumstances of the loss (as well as affidavits from any other persons who may have relevant information about the loss) and certified copies of the lost deeds are attached.
2. An indemnity protecting the Registrar of Titles from suits by persons prejudiced by the issue of the "restored deeds" will be given.
3. The application is reviewed by the Registrar of Titles and, if approved, is recorded at the Land Registry.
4. The land owner advertises the loss in the newspapers and the Official Gazette.
5. The Registrar of Titles may, if he thinks necessary, conduct a hearing, in which he may examine the land owner and anyone else he feels should be examined.

Once the Registrar of Titles is satisfied that the title deeds really were lost and cannot be found, restored title deeds are issued.



Mrs. Kyesha Applewhaite

Some land owners no longer have title deeds, but instead have Certificates that were issued by the Government to persons who live in "registration districts". Some examples of areas that are registration districts are Ruby Park, Cave Hill and some parts of Husbands. Such owners have the same rights and responsibilities as an owner with title deeds but their title documents simply take a different form. Where Certificates are lost, the process is also very straightforward. The Land Registration Act, which governs land in registration districts, sets out a very similar process to the Restoration Act.

It is expected that the new restoration process will cost significantly less than the previous process and should take between three months and one year depending on the circumstances involved. The process should make it easier to replace lost title deeds than before. ✚



Mrs. Savitri St. John

# What Service Providers Need To Know About The Consumer Protection Act & Unfair Contract Terms

By Mrs. Savitri St. John, Partner and Miss Nicole McKetney, Associate



Miss Nicole McKetney

## Introduction

The Consumer Protection Act, Cap. 326D ('the Act') aims at protecting consumer rights by, among other things, prohibiting and penalizing the use of unfair contract terms by suppliers of services. The Act is administered and enforced by the Fair Trading Commission ('the FTC'). This article summarises the effect of the Act on how service providers can legally contract with their consumers. This article focuses only on service providers. It does not focus on suppliers of goods.

## What Types Of Transactions Are Affected?

For the purposes of the Act, a consumer is an individual who obtains services and goods for personal use. Terms prepared in advance where the consumer had no say in the substance of the term (like terms in standard form contracts) are affected by those parts of the Act concerning unfair contract terms.

If someone claims that he is a consumer or that a term is unfair, it is for the supplier to disprove this.

## Can I Contract Out Of The Act?

A contract term that is inconsistent with the Act's unfair contract provisions, or that expressly excludes, restricts or modifies the application of those provisions to the contract, is of no effect.

If a supplier tries to contract out of the Act, it may be guilty of misleading conduct and falsely representing that the consumer is not entitled to rights and remedies under the Act. The following penalties may also apply.

Capacity	Punishment		
	Fine		Imprisonment
Supplier			
Individual	\$10,000	And/ or	2 years
Not an Individual	\$100,000	And / or	-
Director of Corporate Supplier	\$25,000	And / or	2 years

## How Do I Spot An Unfair Contract Term?

Generally, a contract term is unfair if to the detriment of the consumer it causes a significant imbalance in the rights of the supplier and the consumer. The schedule to the Act provides a list (which is not exhaustive) of terms that are deemed unfair.

Some common terms found in service contracts that are generally considered unfair are terms:

- (a) excluding or limiting the supplier's liability for its or its agent's acts or omissions where the supplier is at fault;
- (b) excluding the consumer's right to set off his debt to the supplier against the supplier's debt to the consumer;
- (c) allowing the supplier to terminate a contract of indeterminate duration without reasonable notice where there are no serious grounds for so doing;
- (d) allowing the supplier to change contract terms unilaterally and without specifying a valid reason in the contract;
- (e) allowing the supplier to unilaterally change a characteristic of a service without a valid reason.

## Exceptions

However, the Act allows the use of the terms at c) and d) above in:

- (i) transactions in transferable securities, financial instruments and other products or services where the price is linked to fluctuations in a stock exchange quotation or index or a financial market rate that the supplier does not control; or
- (ii) contracts for the purchase or sale of foreign currency, traveller's cheques or international money orders denominated in a foreign currency.

The Act allows a supplier of financial services to unilaterally change interest rates or the amount of its charges for financial services without notice provided there is a valid reason for the change. The supplier is also required to inform the consumer of the change at the earliest opportunity and the consumer must be allowed to terminate the contract immediately.

The Act allows a supplier to change the conditions of a contract of indeterminate duration once the supplier gives the consumer reasonable notice and the consumer is allowed to terminate the contract.

It allows a supplier to unilaterally terminate a contract of indeterminate duration without notice provided there is a valid reason for so doing and the supplier must inform the consumer of that reason immediately.

## What Happens If I Use An Unfair Contract Term?

If a term is unfair, it cannot be enforced against the consumer. The FTC also has the power to apply to the High Court for injunctions restraining the supplier from acting in breach of the Act or for a variety of orders, including orders rendering the entire contract void or varying the contract.

## Simple Plain Language

The Act requires a written term in a contract to be in plain and intelligible language. If the meaning of the term used is unclear, the interpretation that is most favourable to the consumer will be used.

If a supplier is uncertain about whether a contract term is unfair or unclear, it can submit the contract to the FTC for its comments.



# ■ The Long Arms Of The Financial Services Commission - Its Powers Reaching Beyond The Regulated Entity ■

By Mrs. Nicola Berry, Associate

The Financial Services Commission ('the FSC') which was established on April 1, 2011 under the Financial Services Commission Act, 2010-21 ('the Act') has been mandated to, amongst other things, supervise and regulate the operations of the financial services sector other than the banking services. This sector includes: (a) exempt insurance companies; (b) insurance companies; (c) pension plans; (d) securities and capital markets; (e) mutual funds; and (f) credit unions (each of these regulated entities is referred to as 'an entity'). This article seeks to briefly examine the general powers of the FSC under the Act and in particular, its powers in relation to the appointment of auditors and the conduct of examinations and investigations into the affairs of an entity.

The FSC has been given wide powers under the Act. It may:

- (a) give directives to ensure compliance with the Act, the regulations or guidelines made under the Act and with any of the legislation under which an entity operates and to ensure that an entity is being properly managed and remains financially sound;
- (b) investigate the affairs of an entity;
- (c) suspend or cancel the registration or revoke the licence of an entity;
- (d) seize the management and control of an entity, appoint a manager or take any other necessary action for the purpose of protecting the interest of the customers of an entity as well as creditors and the public and ensuring that the entity remains



Mrs. Nicola Berry

financially sound; and  
(e) reorganise or wind up an entity.

The CEO of the FSC may request certain information relating to an entity's business operations such as information relating to its financial statements or its financial returns or information which the FSC considers necessary in respect of any holding company, subsidiary, or affiliate of the entity. The extensive powers provided to the FSC as noted above, coupled with the power of the CEO to request information allow for the FSC to closely supervise and review the financial records, management and control of an entity. An entity must therefore ensure that it is managed in a financially sound manner and that its filings with the FSC are timely. It must also be mindful of the cost implications that arise from the frequency of the filings and from any frequent request for information by the CEO of the FSC.

## Auditors

An entity is required to appoint an auditor to conduct its annual audit however the auditor must be approved by the FSC as having the capacity and resources to satisfactorily audit that particular entity. If an entity fails to appoint an auditor or terminates the appointment of its

auditor, the FSC may appoint an auditor and fix the remuneration to be paid to the auditor by the entity. In addition, if the FSC is not satisfied with the annual financial statement or report of the auditor, it may appoint another auditor to conduct an independent audit and fix the remuneration to be paid to the auditor by the entity.

An entity should therefore ensure that its auditor is carefully selected, it is satisfied that the auditor has the capacity and resources to satisfactorily conduct the audit and that the auditor is approved by the FSC prior to undertaking any annual audit. This would avoid the additional expense and the delay which would result if the entity is compelled to remunerate an auditor appointed by the FSC, if either the chosen auditor is rejected by the FSC or the FSC is dissatisfied with the audit as carried out by the chosen auditor and directs that an independent audit be conducted.

## Examinations

The FSC may cause an examination to be made into the affairs of an entity to determine, amongst other things, whether the provisions of the Act are being complied with. The FSC also has the power in respect of any holding company, parent company or any other company that holds shares in an entity to inspect the books of the company or request any information from the appropriate authorities in any country where the company is located.

With respect to foreign offices, where the FSC is of the opinion that the operation of a foreign office of an entity presents a threat to the financial soundness of an entity, the FSC may require the entity to make such changes in the operations of the foreign office as are considered necessary or require an entity to

# • The Long Arms Of The Financial Services Commission - Its Powers Reaching Beyond The Regulated Entity cont'd...•

By Mrs. Nicola Berry, Associate

## Examinations cont'd...

close that office. The power of the FSC to require an entity to close a foreign office illustrates a strong regulatory environment.

## Investigations

The FSC may, where it considers it necessary, authorise a suitably qualified person to conduct an investigation into the affairs of an entity. The investigator under the Act has wide powers as it relates to the collection of information.

An investigator is not merely limited to collecting information from an entity and its present auditors, officers or employees, but may also summon persons such as former auditors, former officers or former employees, who no longer have a fiduciary relationship with an entity and request information from them. This may ostensibly include retirees and persons who have terminated their contract of employment or contract for service with an entity.

It would also appear from the Act that an investigator may even make enquiries from a person who is not an employee or agent of the entity but merely someone with whom the entity conducts business.

The FSC, as seen above, has considerable powers under the Act and a wide regulatory reach to ensure that entities maintain high standards of financial probity and sound business practices. Entities should therefore ensure that they are compliant with the Act at all times. •

## • CGF NEWS •

### Appointment of Queen's Counsel



We extend congratulations to our Mr. Stephen Farmer, Q.C. who was elevated to the Inner Bar at a Special Sitting of the Supreme Court of Judicature on Friday April 26, 2013 as one of Her Majesty's Counsel for Barbados (Queen's Counsel).

Mr. Farmer was articled to the law firm of Cottle Catford & Co. and 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.

He went on to join the law firm of Bayley & Gittens in 1979 and this firm merged with Peter Evelyn & Co. in 1986 to form the firm of Evelyn Gittens & Farmer. In 2002 Mr. Farmer together with Mr. T. David Gittens, Q.C. merged their practice with that of Clarke & Co. to form the law firm of Clarke Gittens Farmer.

Mr. Farmer is currently the partner in charge of Clarke Gittens Farmer's Property Department. He practices mainly in the property area working on mortgages and in the area of property development in the residential, resort and commercial sectors.

Below is a picture of Mr. Stephen Farmer, Q.C. taken at the ceremony held at the Supreme Court of Judicature on Friday April 26, 2013 when he and eight other attorneys-at-law were admitted to the Inner Bar. •



## CGF NEWS

### Mooting Competition

CGF recently sponsored the annual Clarke Gittens Farmer Mooting Competition at the Faculty of Law, University of the West Indies, Cave Hill Campus, Barbados. The finals of the Mooting Competition were held on Tuesday, February 26, 2013 and the winning teams were as follows:

First year team: Suzanna Clarke and Andre Sheckleford

Second year team: Amanda Montague and Jakita Connell

Third year team: Malike Kellier, Novia Cotterell and Stephanie Williams

### Conferences, Courses and Seminars

Members of the firm participated in the following conferences, courses and seminars during the last quarter:

1. The 8<sup>th</sup> AML/CFT Compliance Conference organized by the Caribbean Financial Action Task Force held at the Frank Collymore Hall, Central Bank of Barbados January 31, 2013 to February 1, 2013.

2. Euromoney Loan Documentation and Advanced Loan Documentation Courses in Bridgetown Barbados February 18- 21, 2013.

### Conferences, Courses and Seminars cont'd...

3. International Tax And Trust Congress, March 12 - 13, 2013 Hilton, Barbados. Miss Gillian Clarke delivered a paper on "Island spotlight: Barbados as a jurisdiction of choice for Latin America".

4. Ms. Debbie Fraser and Mrs. Nicola Berry delivered a presentation to the Bar Association on April 20, 2013 at the Hilton, Barbados, entitled "The Sale of Securities - Defining the Issuer and the Securities and An Examination of Take-Over Bids".

Below is a picture of Ms. Debbie Fraser (standing) and Mrs. Nicola Berry (seated) taken at the presentation. ✚



● **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, Q.C. **Partners:** Mr. Stephen W. Farmer, Q.C., 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 A. P. Fraser **e-Newsletter Committee:** Mrs. Nicola Berry (Chair), Miss Annette Linton, 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.

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