

# CGF POINT OF LAW

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

ISSUE 1 OF VOLUME 3 - JANUARY 2015



## In This Issue

Introduction .....	Page 1
About Clarke Gittens Farmer .....	Page 1
A General Guide to Merger Regulation in Barbados .....	Page 2
Negotiating Renewable Energy Power Purchase Agreements Keys to Drafting and Allocating Risks .....	Page 4
Matters to Consider When Appointing a Receiver .....	Page 7
Attorney Profile .....	Page 9
CGF News .....	Page 9

## 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 exclusively from our Commercial Department.

Our first article is a continuation of our discussion on merger transactions in Barbados. The article is the second in a two-part series on the merger control regime in Barbados and focuses specifically on the application process for proposed mergers, which is currently a hot topic in the region.

In the second article, we turn our attention to the developing area of law relating to renewable energy projects and power purchase agreements ("PPAs"). The article examines the core issues that project participants should contemplate during the course of their negotiations of PPAs and the practical steps that may be taken to mitigate inherent risks in such transactions.

In our final article, we dissect the recent Barbadian case of *Gypsy International Ltd. and Royston Beepat v. Canadian Imperial Bank of Commerce Civil Appeal No.27 of 2012* which offers us guidance on issues which must be frequently addressed when considering the appointment of a receiver.

We do hope you enjoy this issue's offerings!

The e-Newsletter Committee



# ✦ A General Guide to Merger Regulation in Barbados ✦

By Miss Olivia N. D. Cadogan, Associate

Miss Olivia N. D. Cadogan

## Introduction

This article is the second in a two-part series on the merger control regime in Barbados and focuses specifically on the regulatory framework for mergers in Barbados.

As was noted in our October 2014 issue, where the market share of merging parties is not less than forty percent (40%) (the "**Threshold**") the Fair Trading Commission (the "**Commission**") will be interested in the matter and an enterprise which desires to effect that merger is required to notify and apply to the Commission for permission to do so. Although there is no deadline for filing a notifiable transaction, the notification should be made once an intention to merge has been established.

## The Application Process

Rule 2 (1) of the Fair Competition (Merger) Rules 2009 (the "**Rules**") provides that where an enterprise is desirous of effecting a merger, it shall:

- (a) submit to the Commission:
  - i) the Merger Application Form<sup>1</sup>;
  - ii) a merger proposal<sup>2</sup>;
  - iii) copies of any agreements or any other contracts on which the merger is based;
  - iv) copies of resolutions of the board of directors of any enterprise involved in the merger with respect to the acceptance of a merger proposal;
  - v) for each of the merging enterprises, three (3) copies of the most recent annual financial reports, if any, and of the annual accounts;
  - vi) a list of all other regulatory bodies which will be affected by the proposed merger;
  - vii) copies of applications made to other regulatory bodies under part (vi) above;
  - viii) a list of the notified mergers involving any of the merger enterprises in any other country during the last five (5) years; and

- (b) pay to the Commission the merger application fee (noted below) specified in the Fair Trading Commission (Fair Competition Merger Fees) Regulations, 2009 (the "**Fee Regulations**").

After receipt of the Merger Application Form and the accompanying documents mentioned above the Commission will then conduct an investigation into the proposed merger in order to satisfy itself that the proposed merger would not affect competition adversely or be detrimental to consumers or the economy<sup>3</sup>. Rule 4 of the Rules provides that where the Commission conducts such an investigation, the Commission may charge investigation fees (noted below) in accordance with the Fee Regulations.

## Fees

Regulation 2 (1) (b) of the Fee Regulations provide that the merger application fee shall be BDS \$500.00 and is payable for each merger application.<sup>4</sup> One of the parties to the merger shall pay the merger application fee or all the parties to the merger shall jointly pay the merger application fee.<sup>5</sup>

<sup>1</sup>Rule 2 (2) of the Rules provides that the Merger Application Form shall contain the following particulars in relation to each of the merger enterprises:

- (a) names and official addresses;
- (b) names and positions of senior officers;
- (c) ownership and control;
- (d) the nature of all relevant business conducted;
- (e) the reasons for the merger;
- (f) details of all relevant group relationships associated enterprises, degrees of dependency and percentages of holdings;
- (g) where shares in another enterprise are to be acquired, the amount of the shares to be acquired and the total owned in it by the purchaser or any related enterprise;
- (h) the total turnover for the last financial year of (i) each enterprise in the merger in Barbados; and (ii) each relevant group of enterprises worldwide; and
- (i) the gross worldwide assets of each of the enterprises engaged in the merger as at the last financial year.

<sup>2</sup>Rule 2 (3) of the Rules provides all the information that must be contained in the merger proposal.

<sup>3</sup>Section 20 (6) of the Fair Competition Act.

<sup>4</sup>Regulation 2 (2) of the Fee Regulations.

<sup>5</sup>Regulation 2 (3) of the Fee Regulations.

## ❖ A General Guide to Merger Regulation in Barbados Cont'd...❖

By Miss Olivia N. D. Cadogan, Associate

Regulation 3 (1) of the Fee Regulations also provides that where the Commission conducts an investigation into a proposed merger under Section 20 (6) of the Fair Competition Act, Cap. 326C of the Laws of Barbados (the "Act"), it may charge merger investigation fees which may fall within one of the following categories:

- (a) Category 1 - Where a merger is not likely to harm competition, that is, a merger with a marginal competition effect or a positive competition effect; or
- (b) Category 2 - Where a merger is likely to harm competition, that is, a merger with a significant negative competition effect.

With respect to Category 1, where the total combined assets of the merger:

- (a) do not exceed BDS \$5,000,000.00, the investigation fee to be charged per investigation is BDS \$5,000.00;
- (b) exceeds BDS \$5,000,000.00 but does not exceed BDS \$20,000,000.00, the investigation fee to be charged per investigation is BDS \$7,500.00; or

- (c) exceeds BDS \$20,000,000.00, the investigation fee to be charged is BDS \$10,000.00.<sup>6</sup>

With respect to Category 2, where the total combined assets of the merger:

- (a) do not exceed BDS \$5,000,000.00, the investigation fee to be charged per investigation is BDS \$20,000.00;
- (b) exceeds BDS \$5,000,000.00 but does not exceed BDS \$20,000,000.00, the investigation fee to be charged per investigation is BDS \$30,000.00; or
- (c) exceeds BDS \$20,000,000.00, the investigation fee to be charged is BDS \$40,000.00.<sup>7</sup>

In conclusion, there are a number of documents that a party must submit to the Commission along with a Merger Application Form in a notifiable merger transaction. It is prudent for parties to be aware of these documents and the prescribed fees so that they may order their affairs accordingly. ❖



<sup>6</sup>Second Schedule to the Fee Regulations.

<sup>7</sup>Second Schedule to the Fee Regulations.



Mrs. Nicola A. Berry

# ✦ Negotiating Renewable Energy Power Purchase Agreements - Keys to Drafting and Allocating Risks ✦

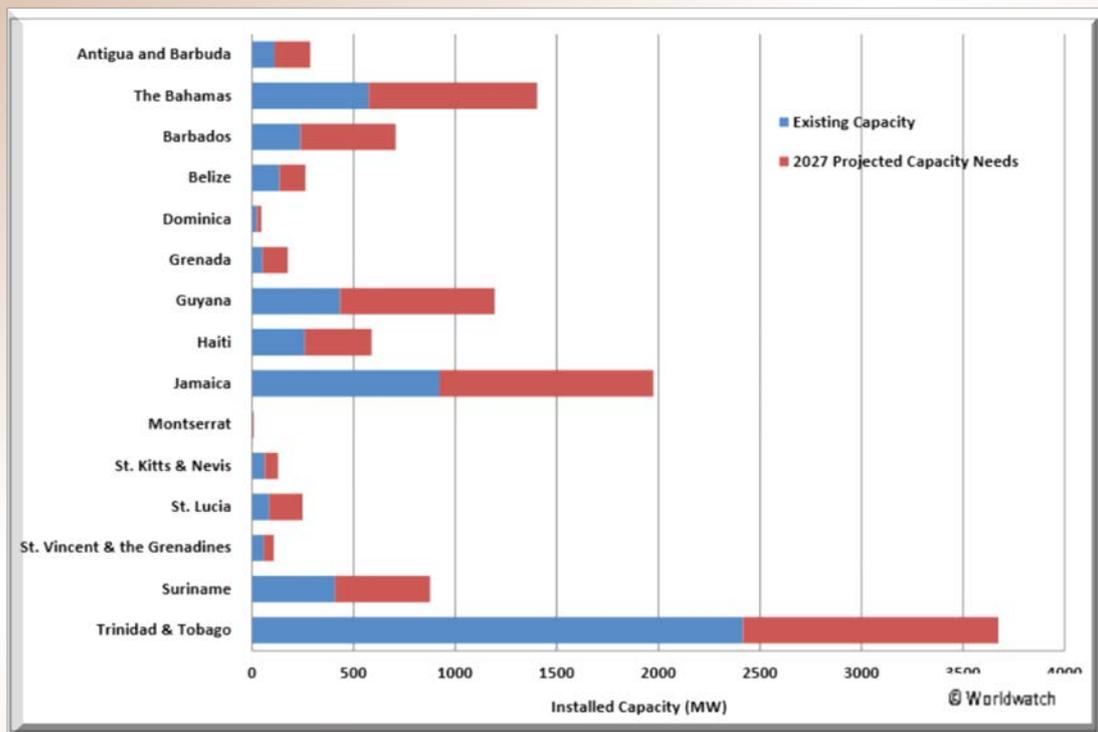
By Mrs. Nicola A. Berry, Partner

A power purchase agreement ("PPA") is a long-term contract for the purchase and sale of the electricity generated by a power plant (generally fifteen (15) to twenty (20) years). The Caribbean Sustainable Energy Roadmap has indicated that electricity demand is expected to grow in the region in the coming years (see Table 1). As the opportunities for renewable energy development are explored and pursued, the PPA will therefore increasingly be at the

The PPA's importance to both parties cannot be overstated. From the utility's perspective, the PPA represents a component of its ability to plan for the long term to serve its customers efficiently, reliably and safely. From the IPP's perspective, a project's value is based on its ability to generate stable income and a good PPA provides an up-front guarantee of a long-term stream of revenue.

Table 1<sup>1</sup>

Existing capacity and projected capacity needs in 2027



front and centre of every potential renewable project.

It is essential that developers and other project participants consider certain key issues during the course of their negotiations of the PPA and take practical steps to mitigate the risks. The rest of this article will examine this further in the context of a utility purchaser and an independent power producer ("IPP") seller and specifically on the sale of power under grid tied solar and wind generation renewable energy facilities.

### Conditions Precedent

The purchaser will want to ensure that the seller's conditions precedent cover a variety of matters including the construction of the project in accordance

<sup>1</sup>Caribbean Sustainable Energy Roadmap (C-SERMS), Phase 1, Summary and Recommendations for Policymakers, Working Draft as of June 2013, Katie Auth et al. (CARICOM, Worldwatch Institute, Inter-American Development Bank), at p. 10.

# ✿ Negotiating Renewable Energy Power Purchase Agreements - Keys to Drafting and Allocating Risks Cont'd... ✿

By Mrs. Nicola A. Berry, Partner

with required standards, completion of plant commercial operation tests for each wind turbine generator / solar panels, certification by independent engineers, execution of an interconnection agreement, the receipt of all permits, consents, licenses, approvals and authorizations in a non-appealable form and the receipt of financing.

The seller on the other hand will want to ensure that the purchaser is compliant with any contract procurement rules, and that all regulatory approvals are in place.

## **Commercial Operation Date ("COD")**

All new-build renewable projects carry a risk that the facility will not be physically constructed on time or in accordance with specifications and performance criteria. In PPAs, this risk is allocated to the seller, who will guarantee a specified date by which COD will occur.

## **Price, Interconnection, Transmission, Delivery**

The price paid to the seller should be sufficient to service the seller's debt for the facility, cover operations and maintenance and other costs, and provide a return on the seller's investment.

Separately from the PPA, the seller will apply for the right to interconnect its generating facility to the grid in order to be able to deliver energy to the purchaser. Purchasers under PPAs typically include a provision in the PPA stating that the seller is obligated to obtain such interconnection rights as are necessary to facilitate the delivery of energy, and that the purchaser has no role in that process.

With respect to transmission and delivery, the purchaser and the seller should negotiate at what specific point (the "**Point of Delivery**") the title to and risk of loss of the energy passes from the seller to purchaser. The Point of Delivery may or may not be at the point of interconnection. If not, the PPA will typically require the seller to enter into and bear the cost of transmission of the energy from the point of

interconnection to the Point of Delivery, although at times the seller will negotiate to pass some of these costs on to the purchaser.

## **Curtailment**

Curtailment occurs when the purchaser or a transmission provider needs to or wishes to curtail supply coming from the facility. Since payments to the seller under a PPA first require the delivery of energy to the Point of Delivery, curtailments have the potential to reduce the revenue stream of the project, or at least make it less certain.

In most PPAs there are two (2) types of curtailments. Firstly, voluntary curtailment where the purchaser wishes to curtail for the convenience of managing its available energy supply sources or for other economic reasons. Most PPAs require full compensation by the purchaser for the seller's lost revenue resulting from voluntary curtailment. Secondly, non-voluntary curtailment whereby the interconnection provider, or transmission owner/authority is required to curtail the production of energy at the facility because of an emergency, force majeure event, an event that would have damaged the system, caused harm to people or property, or due to constraints on the system.

The allocation of curtailment risk can be contentious but the risks may be balanced in different ways. The seller may absorb the curtailment for an agreed upon number of megawatt hours after which the purchaser pays as if the energy were actually generated. The loss from an involuntary curtailment is generally borne both by the seller and the purchaser (though somewhat asymmetrically).

Curtailment is treated differently depending on the cause of curtailment and quality of transmission. Regardless of how the risk is shared, the PPA needs to calculate the amount of energy that would have been generated without curtailment.

# ✦ Negotiating Renewable Energy Power Purchase Agreements - Keys to Drafting and Allocating Risks Cont'd... ✦

By Mrs. Nicola A. Berry, Partner

## Performance Guarantees

The seller prefers to deliver an "as available" product with no liquidated damages for shortfalls in performance however the purchaser often insists on performance guarantees. The seller will generally commit to a minimum "Guaranteed Output". If there is a shortfall in output the seller may be liable for purchasers' damages. The shortfall may even amount to an event of default. The seller will want to count curtailed energy and energy lost through force majeure towards the achievement of an output guarantee.

## Defaults and Damages

There are a number of ways that the action or inaction of one of the parties could jeopardize the project. Many of these will be specified in the contract as events of default which may require the payment of damages.

A well drafted PPA is essential. The risks associated with such projects are expensive and must therefore be allocated appropriately. ✦





Ms. Debbie A. P. Fraser

## ❖ Matters to Consider When Appointing a Receiver ❖

By Ms. Debbie A. P. Fraser, Partner and  
Head of the Commercial Department

### Introduction

In November 2014 the Barbados Court of Appeal ("CA") examined the law relating to the appointment of a receiver in *Gypsy International Ltd. and Royston Beepat v. Canadian Imperial Bank of Commerce Civil Appeal No. 27 of 2012* (the "Case"). The decision was delivered by The Honourable Andrew Burgess J.A. on behalf of the panel of the CA and who is also the author of the leading text "The Law of Corporate Receivers and Receiver-managers"<sup>1</sup>. I will first review the facts of the Case and then give a summary of the findings of the CA.

### Facts

Gypsy International Ltd. ("Gypsy") was in the business of manufacturing and selling high quality jeans in the 1980s. Mr. Beepat, one of the directors of Gypsy, was also an investor. Gypsy obtained loan facilities from various lenders including the Canadian Imperial Bank of Commerce ("CIBC"). The CIBC loan was secured by a demand debenture over Gypsy's assets. Evidence was provided that Gypsy had a significant and advanced manufacturing business. In 1984 a fire occurred at Gypsy's premises. Shortly thereafter, CIBC appointed a receiver of Gypsy without serving a prior demand for payment on Gypsy. The receivership lasted

for four (4) years. Gypsy never recommenced operations and eventually its assets were realised by the receiver. The sale proceeds were, however, not sufficient to pay off Gypsy's debts to CIBC. Following the termination of the receivership, CIBC demanded payment of the sums allegedly due from Gypsy from Mr. Beepat who had personally guaranteed Gypsy's debts. CIBC then filed suit against Gypsy and Mr. Beepat (the "appellants"). The CA was asked to consider:

1. Whether the appointment of the receiver was valid;
2. Whether parties can agree in a debenture to exclude any requirement for making demand before the appointment of a receiver;
3. Was Gypsy estopped from challenging the appointment of the receiver?; and
4. What damages would be applicable (if any).

### Findings of the CA

The following are the main findings:

1. The CA found that service of demand was an essential prerequisite to the valid appointment of a receiver under a demand debenture. In addition, the Bankruptcy and Insolvency Act,



<sup>1</sup>The Caribbean Law Publishing Company Ltd., (2002)

## ✿ Matters to Consider When Appointing a Receiver Cont'd...✿

By Ms. Debbie A. P. Fraser, Partner and  
Head of the Commercial Department

Cap. 303 of the laws of Barbados introduced a requirement for a secured creditor to send to a debtor company a notice of intention to enforce security; reflecting a wider principle which mandates service of demand before the appointment of a receiver. CIBC's appointment of the receiver was therefore not valid.

2. Canadian cases clearly provide that demand must be made before the appointment of a receiver and this requirement overrides any terms of a security document that conflicts with the principle. The Companies Act, Cap. 308 of the laws of Barbados is based on Canadian legislation and in the circumstances the CA decided to follow the Canadian authorities. The CA decided that as a matter of law, the requirement for demand cannot be contractually excluded. CIBC was therefore required to serve notice of demand to Gypsy despite the provisions of the demand debenture.
3. CIBC argued that the appellants treated the appointment of the receiver as valid and could not subsequently seek to challenge it. The CA, however, held that CIBC could not use the fact that Gypsy did not initially challenge the receivership as a defence to Gypsy's claim that the receivership was invalid.
4. The CA supported the principle that a company is entitled to substantial damages for trespass to land and goods and other invasion of rights by an unauthorised receiver even though it was making a loss in trading and there was little or no evidence on which an accurate estimate of pecuniary loss from the trespasses could be

made.<sup>2</sup> Even though it was not making a profit at the commencement of the receivership, Gypsy was awarded damages for loss of profits based on evidence which indicated that given Gypsy's trajectory, it would have made a profit if its business was not liquidated by the receiver.

The Case provides clear guidance on matters frequently arising for consideration when contemplating the appointment of a receiver. ✿



<sup>2</sup>Tuscany Imports (Investments) Pty Ltd. v Dall'Oste Belvedere and Lightfit & Co. Pty Ltd. v Tuscany Imports Pty Ltd, Nos.1781 of 1978 & 4534 of 1979

## ✦ ATTORNEY PROFILE ✦

In this issue we continue our series of profiles on the firm's attorneys-at-law. This issue profiles Mr. Ramon O. Alleyne.



Mr. Ramon O. Alleyne

Ramon Alleyne is an accomplished commercial litigator and advisor on banking, corporate, commercial and general business matters. His corporate and commercial services include advising international lawyers and local clients in connection with banking and financial transactions, labour and insolvency issues.

As the partner in charge of the firm's Litigation Department, Ramon was involved in successfully

litigating what has been to date the largest commercial claim in Barbados to proceed through to full trial. He represents and advises members of the "Big Four" accounting firms in Barbados and in that capacity has litigated many of the major insolvency matters that have gone to trial.

Called to the Bar in multiple Caribbean jurisdictions, Ramon has litigated for a number of commercial clients who have region-wide interests in jurisdictions such as Dominica, St. Vincent and Antigua.

Ramon is an active participant in both the private and public sector business community in Barbados, being a past chairman of the Sanitation Service Authority and a director of the Transport Authority which operates the public transport system. Ramon also chairs the Board of Trustees operating the Government sponsored Industrial and Employment Fund. This fund was created to finance and stimulate the manufacturing industry in Barbados.✦

## ✦ CGF NEWS ✦

1. The Property Department of the firm has been very active in its presentations and seminars in recent months. The firm was represented by Ms. Melanie Garrett-Bailey and Mr. Creig Kinch<sup>1</sup> at the Barbados Association of Retired Persons' seminars on "The Legal Side of Retirement" at Coverley, Christ Church, Barbados in September and October 2014. Similarly, in September 2014 Ms. Garrett-Bailey and Mr. Kinch also provided practical training to members of the Barbados Estate Agents and Valuers Association on "Registration of Rentals" (the "**BEAVA Training Session**").
2. Additionally, from October to December 2014 Ms. Garrett-Bailey tutored students of the Barbados Community College as part of its Property Management Course. We understand that the above-mentioned seminars, training sessions and tutorials were well-received and beneficial to attendees. In fact, the substance of the BEAVA

Training Session was later featured as an article in the Barbados Property News. ✦



3. On November 6, 2014, Mrs. Nicola A. Berry, a Partner in the Commercial Department was invited to guest lecture in the University of the West Indies, Cave Hill Campus, Faculty of Law's Caribbean Energy & Gas Law course. Mrs. Berry delivered a lecture on power purchase agreements. ✦



<sup>1</sup>Mr. Creig Kinch has since left the firm.

## ✿ CGF NEWS Cont'd... ✿

### Charitable Donations

Clarke Gittens Farmer recognises the importance of serving its community and is pleased to support charities and non-profit organisations in the community.

At the end of 2014, the partners and staff of Clarke Gittens Farmer made monetary donations to several charitable organisations, including the Because of Jenna Trust and the Salvation Army.

Because of Jenna Trust is a charitable organisation dedicated to easing the suffering of severely brain-injured children in Barbados and improving their quality of life.

The Salvation Army is characterised for the assistance it provides to unfortunate persons.



It provides help to the elderly, young, drug addicts, disabled people and individuals who are victims of natural disasters. The Salvation Army also distributes meals and clothing and provides shelter to those in need. ✿

### Congratulations

Mr. Dario Welch, Miss Janet Taylor and Miss Ruth Henry who recently joined the Property and Corporate Departments of the firm were admitted to the Barbados Bar on October 17, 2014 at the Supreme Court in Barbados. We extend our heartiest congratulations to them! ✿



### Thank You Readers

The Newsletter Committee wishes to extend thanks to its readers for their comments and well-wishes following the issue of our 2014 e-Newsletters.

In 2015, the Newsletter committee is committed to continuing to provide our readers with articles on a range of topical issues. ✿

✿ **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](http://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.

**Team: Supervising Partner:** Mrs. Nicola A. Berry. **E-Newsletter Committee:** Miss Annette Y. Linton (Chair), Miss Sabrina L. Maynard, Mr. Michael J. Koeiman and Miss Olivia N. D. Cadogan. **Technical and Administrative Support:** Miss Stephanie V. Blenman, Mr. John B. Newton and Ms. Erith S. 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.

Copyright© 2015 Clarke Gittens Farmer. All rights reserved. ✿

Member

**LexMundi**  
World Ready

Lex Mundi is the world's leading network of independent law firms with in-depth experience in 100+ countries worldwide.