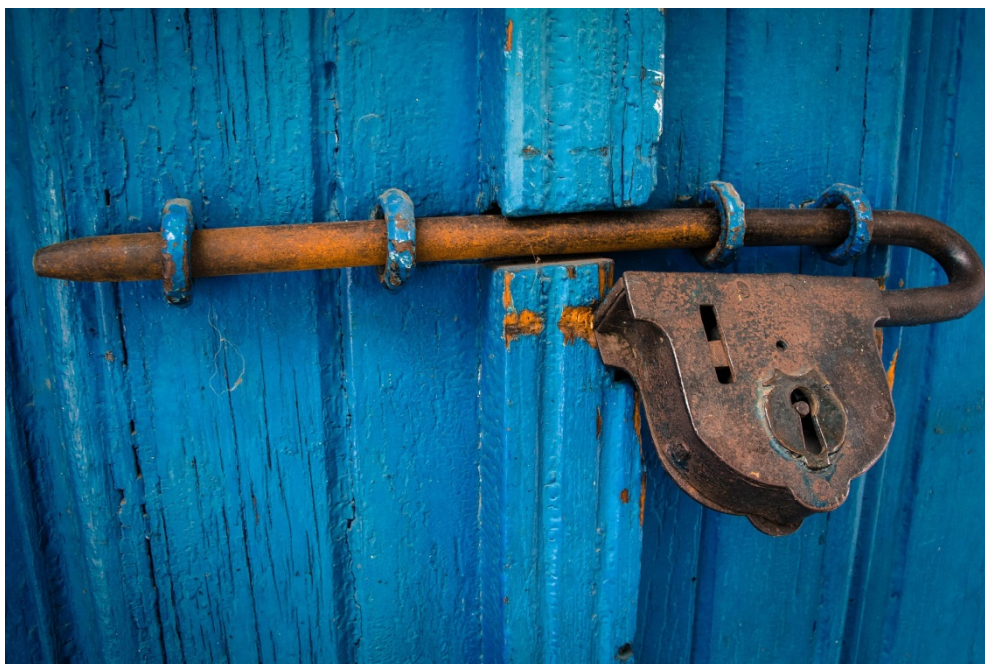


# CGF POINT OF LAW

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



## 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 our Property Department and Intellectual Property Department.

We continue our discussion on penalty clauses in contracts in our first article and focus on the enforceability of the 10% deposit clause in simple contracts for the sale of land. In particular we focus on the special treatment of the 10% deposit by the courts, the situations where a deposit would be deemed unenforceable and the concept of a deposit versus part payment.

Our second article on the law of easements is also the second of a two part series. In this issue we highlight the extent of easements or rights over land with a focus on when such an easement or right is created by express grant and by presumed grant. We also examine how such an easement or right can be extinguished or terminated.

With an ever increasing emphasis on influence marketing in the online social sphere, there are several considerations that arise from the perspective of intellectual property and consumer protection. Our third and final article focuses on some of those considerations.

We hope you enjoy!

~ The e-Newsletter Committee~

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Mrs. Anya J. Harrison

# The Penalty Rule is Now a Centenarian. Has it Become Wiser? (Part 2)

By Mrs. Anya J. Harrison, Associate

## Genuine Pre-estimate or Penalty

In our last issue on penalty clauses, we saw how the courts' focus has changed in complex commercial matters where the innocent party's interest in performance means more than financial compensation.

In this issue we continue with penalty clauses, this time in simple contracts for the sale of land, particularly where a vendor can forfeit a 10% deposit on the purchaser's failure to complete the purchase.

## Penalty Clauses

Let's briefly refresh our minds: a penalty clause is a clause in a contract which requires the breaching party to pay or forfeit a sum of money to the innocent party. Generally, the penalty clause has been held to be unenforceable unless the payment or forfeiture can be justified as a genuine pre-estimate of the loss the innocent party will suffer as a result of the breach.

## Special Treatment of the 10% Deposit

In a standard agreement or contract for the sale of land or property in Barbados, the purchaser is required to pay a portion of the purchase price to the vendor's lawyer as 'stakeholder' on the execution of the agreement. For the most part, this portion of the purchase price is referred to in the contract as the deposit and is generally 10 per cent of the purchase price. It is usually an express term of the contract that

the vendor can keep the deposit if the purchaser fails to complete the purchase.

It has been found that though 10 per cent of the purchase price may not be considered a genuine pre-estimate of the loss the vendor will bear, it is not considered a penalty.

The special treatment of the 10 per cent deposit derives from the ancient custom of providing an earnest for the performance of a contract in the form of giving either some physical token of earnest (such as a ring) or earnest money.<sup>1</sup> The history of the law of deposits can be traced to the Roman law of *arra* or *arrha*, and possibly further back still<sup>2</sup>. "Arrha" was not only given as proof of the contract of buying and selling; if the arrha was given as evidence of a contract absolutely made, it was evidence of the unalterable obligation of the contract, which neither party alone could rescind. If the giver receded from his bargain, he would forfeit the arrha.<sup>3</sup>

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<sup>1</sup> See Lord Browne-Wilkinson in the Jamaican case of *Workers Trust and Merchant Bank Ltd v Dojap Investments Ltd* at (1993) 42 WIR 253 page 256 where he also makes reference to *Howe v Smith* (1884) 27 Ch D 89, per Fry LJ at pages 101, 102.

<sup>2</sup> Ibid

<sup>3</sup> See article by George Long, M.A., Fellow of Trinity College on p137 of William Smith, D.C.L.,

# The Penalty Rule is Now a Centenarian. Has it Become Wiser? (Part 2) Cont'd...

By Mrs. Anya J. Harrison, Associate

Ever since the decision in *Howe v Smith*<sup>4</sup>, the nature of such a deposit has been settled in English law and passed on to Commonwealth Caribbean jurisdictions. It is an earnest for the performance of the contract: in the event of completion of the contract the deposit is applicable towards payment of the purchase price; in the event of the purchaser's failure to complete in accordance with the terms of the contract, the deposit is forfeited, equity having no power to relieve against such forfeiture.<sup>5</sup>

## An Unenforceable Deposit

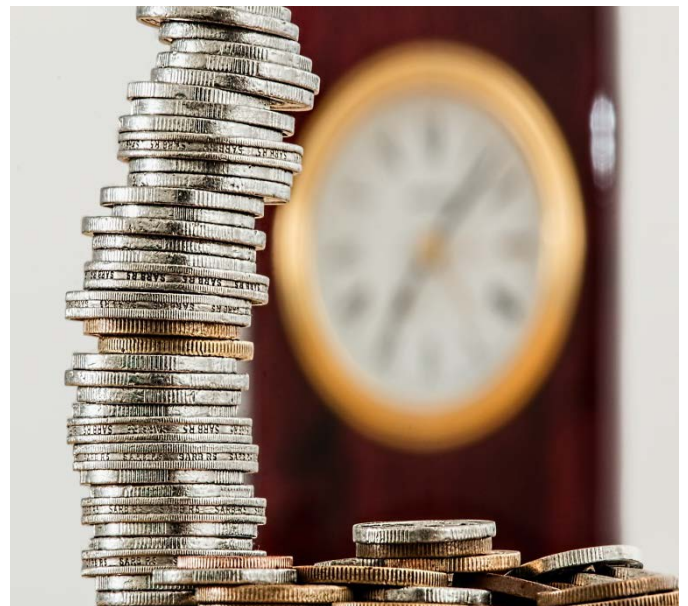
The court will not, however, give such divinity to any deposit. In an instance where a deposit of 25 per cent is required by the vendor the court may conclude such a provision is a penalty and unenforceable.<sup>6</sup>

## Deposit or Part Payment

An initial portion of the purchase price can be referred to as a deposit or part payment. The anomaly of the deposit can be seen in the two principles operating here, where:

- i. on one hand, where the payment is said to be a *deposit* that amount is earnest for the performance of the contract and at common law can be forfeited by the vendor where the purchaser fails to complete the contract; and

- ii. on the other hand, if the amount is stated to be paid as *part payment of the purchase price* only it can be recovered by the purchaser where the contract is rescinded, whether it is the vendor or purchaser at fault.<sup>7</sup>



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<sup>4</sup> (1884) 27 Ch D 89

<sup>5</sup> *Workers Trust and Merchant Bank Ltd v Dojap Investments Ltd* (1993) 42 WIR 253 at page 256

<sup>6</sup> See *Workers Trust and Merchant Bank Ltd v Dojap Investments Ltd* (1993) 42 WIR 253

<sup>7</sup> See *Pompey v Mahadeo* (2002) 61 WIR 293 at page 298





Miss Jaina O. Colucci

## Just Passing Through: The Creation of Easements (Part 2)

By Miss Jaina O. Colucci, Associate

In our last issue we outlined the ways by which an easement or right may be created over the land of another, namely by express grant, implied grant and prescription. In this article we will discuss the extent of easements or rights over land and, more importantly, how an easement or right over land can be extinguished.

Knowing the extent of the right affecting land may be crucial to property owners as the right may hamper or even thwart the planned use of the property. The parameters of an easement are defined primarily by:

- (1) the physical extent of the easement, for example, the width of a right of way;
- (2) the purpose for the easement, for example, a right to use a right of way but only for pedestrians on foot; and
- (3) any limitations on the use of the easement, for example, a right of way that may only be used at a specific time during the day.

### Easements created by Express Grant

The extent of an easement acquired by an express grant depends on the construction of the document creating the right. The language will be interpreted in light of the surrounding circumstances and the intention of the parties at the time the right was created. It is therefore important to contemplate how the easement is to be exercised and make sure that any desired limitations are clearly specified in the document itself. Failure to properly define the limitations imposed on the easement can lead to disputes. This problem arose in a Barbadian case, *Naime v Rockley Country Club*<sup>1</sup>, where a residential property was conveyed subject to an express easement which allowed the

owner of adjacent land (which at the time of the conveyance was a disused golf course) 'to go, return, pass and repass by day and night over and along a portion of the residential property with or without carts, trucks, carriages or motor cars or other motor vehicles of all kinds laden or unladen'. Eventually, the disused golf course was converted into a large resort and it was alleged that the right of way previously granted was confined to pedestrians and one or two private cars. The owner of the residential land sought an injunction to restrain what was described as an unjustifiable enlargement of the right of way, due to a constant flow of traffic to and from the resort.



The Barbados High Court held that there could be no objection to the increased use of the right of way, because the wording in the conveyance gave the owners of the resort an unrestricted right of way, which was not limited to the amount or type of traffic that would have used the said right of way when the easement was originally created. Any limitations to the right of way should have been included in the original conveyance.

<sup>1</sup> *Naime v Rockley Country Club* (1981) 16 Barb LR 44.

# Just Passing Through: The Creation of Easements (Part 2), Cont'd...

By Miss Jaina O. Colucci, Associate

## Easements Created by Implied Grant and Prescription (Presumed Grant)

When considering the establishment and extent of a presumed grant, the following are to be examined:

- the actual manner in which the easement has been used;
- the actual scope of the use of the right; and
- character of the land benefiting from the easement before the right was implied, or during the period of prescription.

Thus, an easement of necessity will be limited to the circumstances existing at the time the easement was implied. For example, if at the time of a conveyance a landlocked lot of land was solely used for agricultural purposes, the implied easement of necessity in relation to access could not later be used to facilitate the transport of building materials to and from the landlocked lot.<sup>2</sup>

Similarly an easement which is acquired through prescription is limited to the purposes for which the land was used during the period of prescription and it cannot be extended to include purposes that are significantly different from the right enjoyed during the period.

## Termination of Easements

An easement may be terminated and will cease to exist if:

- it is expressly released in a deed;
- the land subject to the easement and the land benefiting from the easement are owned by the same person; or
- if the easement is impliedly released through abandonment.



In order to be effective at law, an express release of an easement must be by deed.<sup>3</sup> Therefore, when the person benefiting from the easement and the person bound by it agree to a release, they should enter into an agreement by deed. Additionally, if the land benefiting from the easement was subdivided into smaller lots, for the easement to be completely extinguished, all of the owners of the subdivided land must enter into the deed of release.

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<sup>2</sup> *Corporation of London v Riggs* (1880) 13 Ch D 798

<sup>3</sup> Equity allows an informal release of an easement to be effective if it would not be equitable for the persons to claim that the easement still exists.

# Just Passing Through: The Creation of Easements (Part 2), Cont'd...

By Miss Jaina O. Colucci, Associate

## Unity of Ownership and Possession

An easement will also be extinguished if the ownership and possession of the freehold estate of both the land subject to and the land benefitting from the easement is vested in the same person, for example if A, the owner of the lot subject to a right of way, purchases the lot having the benefit of the said right of way and occupies both lots.<sup>4</sup>

## Implied Release

If the owner of the land benefitting from the easement shows that he no longer means to assert the right to the easement (that is, he shows an intention to abandon the easement) then it will be terminated by an implied release. This usually occurs where the right has not been used or enjoyed for a significant length of time.

Whether there was actually an intention to abandon is a question of fact in each instance and a claim for abandonment will only be successful if the owner of the land benefitting from the easement does some act which undoubtedly shows that the owner intends that neither he nor his successors in title will make use of the right in the future.



Therefore, non-user for a very long period of time is not sufficient to show that the easement has been abandoned unless it is coupled with the necessary intention. If the owner of the land benefitting from a right of way has a more convenient route over his land<sup>5</sup> abandonment will not be inferred, since this is a satisfactory explanation for the non-user. Generally, the courts will be reluctant to conclude that an easement has been abandoned due to the fact that owners of land do not normally intentionally seek to strip themselves of property rights unless it proves to be advantageous, even if there is no present need for the use of the easement. Thus it can be difficult to establish abandonment unless the circumstances are clear. Abandonment may, however, be inferred where over a long period the successive owners benefitting from the easement acquiesced to the changes made to the adjoining land.<sup>6</sup>

Property owners and prospective purchasers of property should carefully examine the rights affecting the property in question, the extent of said rights and how long those rights have been enjoyed.

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<sup>4</sup> Mere unity of possession without unity of ownership will not be sufficient to extinguish the easement and the easement will only be suspended until the unity of possession ends. In the same way, if the owner only has unity of ownership the easement will continue until there is also unity of possession.

<sup>5</sup> *Benn v Hardinge* (1992) 66 P&CR 246, where the non-use of a right of way lasted for 175 years, but it did not amount to a presumption of abandonment because an alternative means of access explained that there had been no occasion to use the right of way.

<sup>6</sup> *Dear v Wilkinson* (1960) 2 WIR 309, Supreme Court, Barbados



Mrs. Rosalind K. Smith Millar

# Influence Marketing, Intellectual Property and Consumer Protection

By Mrs. Rosalind K. Smith Millar, Partner  
and Miss Britney Mayers, Intern



Miss Britney Mayers

We have all seen them: Youtube channels with hosts raving about new products luring viewers, enticing them as subscribers with must-have secrets or hacks.

Or perhaps it's Facebook or Snapchat, or the Instagram "#picoftheday", "#nofilter". These popular tags are usually accompanied by photos posted by "instamodels", celebrities or even everyday people using new electronic devices: "#iphoneonly", reading new books "#fiftyshadesofgrey", or using a new diet supplement "#herbalife".

In an "instafamous" world all it takes is the alignment of a product with the right person and likes and followers begin to tumble in. This is a marketer's dream, as increased interest often equals increased sales.

This is influence marketing in a nutshell: the engaging of a powerful, popular or relevant enough individual to influence others within their online social sphere, usually through the social media platforms. But is there any protection out there for the #bombardedconsumer? And who owns any resulting intellectual property?

Forbes Magazine<sup>1</sup> compiled a list of the top 10 influencers of 2017 and their total reach using Twitter, Instagram, Facebook and Youtube. The top three categories with highest reach were:

- Entertainment – 246,920,000
- Gaming – 228,000,000
- Fitness – 106,000,000

It is therefore not surprising that many companies are allocating substantial marketing dollars to advertising through social media endorsements. This is largely in an attempt to reach the much coveted millennial market. As a result, advertisers are willing to pay influencers with large followings substantial sums per mention or per post. Just take Cristiano Ronaldo, the Real Madrid soccer star with his 100 million plus Instagram followers; he reportedly generates \$176 million in value for his sponsored posts<sup>2</sup>.

A discussion about influence marketing and intellectual property can be addressed from several angles. Questions emerge about the influencer's and the company's intellectual property and its protection. Similarly, where a person is not employed as an authorized influencer by the company but produces creative content which is subsequently used elsewhere, is that person's creative content protected? Hashtags are also an area of concern; these words or phrases when used by enough people have the ability to "trend" and once trending, generate phenomenal reach; but who owns a hashtag?

There is also the matter of consumer protection to be considered:

- Do we naturally assume that a "Youtube vlogger" or an "instagrammer" who records on his personal channel or posts on his personal page, is uploading content to draw interest to himself, or to someone else?
- Or consider the up-and-coming makeup artist who uses several brushes but finds that one particular brand is her favourite, mentions this several times, and holds it up for the camera to

<sup>1</sup> [www.forbes.com/top-influencers](http://www.forbes.com/top-influencers)

<sup>2</sup> [www.forbes.com](http://www.forbes.com)



# Influence Marketing, Intellectual Property and Consumer Protection, Cont'd...

By Mrs. Rosalind K. Smith Millar, Partner  
and Miss Britney Mayers, Intern

focus on the name and number while flippantly telling her viewing audience where to purchase it; she may even provide a "personal" code for a discount on purchase.

Are these posts organic and motivated by a genuine desire to share knowledge about a product, or are they born out of contractual obligation?

The incorporation of brand messages and products into personal accounts of individuals with social clout can result in seemingly authentic and commercially effective content. However, the risk of misleading the consumer through lack of sufficiently clear disclosure of the relationship between the influencer and the brand must be guarded against.

The Federal Trade Commission in the United States of America ("**FTC**")<sup>3</sup>, a government agency charged with consumer protection against unfair and deceptive business practices, has imposed on influencers an obligation to clearly and conspicuously disclose their relationships with brands when promoting or endorsing products through social media. Disclosure is a shared responsibility and the FTC emphasizes the use of clear and unambiguous language to identify material connections. The FTC has defined a material connection as any relationship that might affect the credibility that consumers give to endorsements<sup>4</sup>.

Similarly, the Australian Competition and Consumer Commission ("**ACCC**")<sup>5</sup> recognises that "Consumers rely on online reviews to make purchasing decisions. Businesses and review platforms need to manage online reviews to prevent consumers from being misled." In 2011 the ACCC took action against removalist business

Citymove for misleading online reviews. Citymove admitted to having made representations on its website that purported to be testimonials by genuine consumers when they were not. Citymove paid a \$6,600.00 infringement notice.

The consumer should always be able to discern the nature of the representation: it is becoming more and more difficult to determine the nature of a representation based solely on context.

Legislation within our Caribbean region does not appear to contemplate the development of influence marketing with as much specificity as the legislation within Australia or the United States of America. Many of the regional provisions, such as section 37 of the Fair Competition Act of Jamaica and section 9 of the Consumer Protection Act of St. Lucia, cover actions which seek to make false or misleading representations but particularly in relation to the nature or manufacturing process of goods; they do not cover disclosure responsibilities of brands and marketers.



<sup>3</sup> [www.ftc.gov](http://www.ftc.gov)

<sup>4</sup> For more information, go to <https://www.ftc.gov/tips-advice/business-center/guidance/ftcs-endorsement-guides-what-people-are-asking>.

<sup>5</sup> [www.accc.gov.au](http://www.accc.gov.au)

# Influence Marketing, Intellectual Property and Consumer Protection, Cont'd...

By Mrs. Rosalind K. Smith Millar, Partner  
and Miss Britney Mayers, Intern

Notable however, is section 12 of the Consumer Protection Act, Cap 326D of the Laws of Barbados which provides:

- "1) A person shall not in trade or commerce as a supplier engage in conduct that is likely to be misleading or deceptive.
- 2) Nothing should be construed as limiting the generality of section 1"

The wording of this provision may be sufficiently broad to capture under its purview the growing trend of influence marketing, but the question remains whether it goes far enough.

This question comes against the backdrop of another question: is influence marketing really a concern for the region; one significant enough to necessitate legislative intervention?

Regionally, we are no strangers to brand ambassadors. Our athletes and entertainers have always been aligned with local and international products or

services. One of the more recent and popular brand ambassador agreements perhaps is Machel Montano with Uber in Trinidad and Tobago<sup>6</sup>.

However, there is a growing industry of Caribbean social media personalities including "QuitePerry", "Trabass", and "MajahHype". On the realization of the worth of their social media currency these persons have amassed significant followings. With their reach, they have the capacity to undertake lucrative influence marketing endorsements. Steps must be taken to ensure that any influence marketing endeavours are subject to rules for clear and ambiguous disclosure, so as not to mislead or deceive consumers.

With a trend that shows no sign of slowing down, perhaps a careful legislative examination is required to equip the region with the ability to respond to this development appropriately for the protection of all consumers.



<sup>6</sup> [www.uber.com/en-TT](http://www.uber.com/en-TT)

## ATTORNEY PROFILE

### **Mrs. Sharmila Williams-Nascimento, Associate**

In this issue we continue our series of profiles of the firm's associates. We profile Mrs. Sharmila Williams-Nascimento, one of our associates in the Corporate Department.



Sharmila Williams-Nascimento was born in Trinidad and attended the University of the West Indies where she pursued her studies in Literatures in English before embarking on her Legal Education. She completed her LLB at the University of the West Indies, Barbados and followed with her Legal Education Certificate at the Hugh Wooding Law School, Trinidad. She was called to the Bar in Trinidad and Tobago in 2008 and in Barbados in 2016.

Sharmila has worked as a Legal Officer at the Legislative Drafting Department in the Ministry of the Attorney General in Trinidad and served as Crown Counsel in the Department of Public Prosecution and further at the Legislative Drafting Department in Belize. Sharmila completed her LLM in Corporate and Commercial Law at the Cave Hill campus, Barbados and joined Clarke Gittens Farmer in 2016 as an Associate in the Corporate Department.

# CGF NEWS

## Seminars and Conferences

From July 23<sup>rd</sup> to 25<sup>th</sup> 2017, legal practitioners, academics and other professionals from across the region came together at the Hilton Miami Downtown for this year's Caribbean Commercial Law Workshop (the "**Workshop**"). The Workshop was held under the auspices of the Faculty of Law of the University of the West Indies, Cave Hill Campus. The theme for this year's Workshop was "Hemispheric Change & Caribbean Commercial Law".

Clarke Gittens Farmer was represented at the conference by Ms. Debbie Fraser, Partner and Head of the Commercial Department, Mrs. Nicola Berry, fellow Partner in the Commercial Department and Mrs. Olivia Burnett, an Associate also in that department.

Mrs. Burnett presented a paper entitled "You Can't Judge a Merger by its Cover – Regulating Real Changes in Barbados" while Ms. Fraser moderated a panel discussion of business leaders in the region.



Pictured far left: Mrs. Olivia N. D. Burnett  
and centre: Ms. Debbie A. P. Fraser

## Seminars and Conferences, Cont'd

On 14<sup>th</sup> June 2017 our Ms. Gillian Clarke, Ms. Joanna Austin, Mrs. Sharmila Williams-Nascimento and Mr. Corey Greenidge attended a presentation hosted by the Barbados Chamber of Commerce and Industry in collaboration with the Barbados International Business Association entitled: "De-Risking in the Commercial Banking Sector: What does it really mean?"

On June 27<sup>th</sup> 2017, our Ms. Gillian Clarke, Partner and Head of the Corporate Department presented to the Barbados Estate Agents and Valuers Association Inc. on the Code of Ethics.

Our Ms. Gillian Clarke and Ms. Sabrina Maynard attended a conference entitled "Current Issues in International Tax Planning" hosted by the Institute of Chartered Accountants of Barbados from May 4<sup>th</sup> to 5<sup>th</sup> 2017.

From May 20<sup>th</sup> to 24<sup>th</sup> 2017, our Mrs. Rosalind Smith Millar, Partner in the Intellectual Property Department and Property Department attended the International Trademark Association Annual Meeting in Barcelona, Spain, which was attended by more than 10,000 participants.

The Barbados Bar Association's Inaugural Law Conference was held from June 2<sup>nd</sup> to 4<sup>th</sup> 2017 in Barbados where our Mrs. Nicola Berry moderated a segment on Corporate Governance. Also in attendance was our Ms. Gillian Clarke, Ms. Debbie Fraser, Mrs. Rosalind Smith Milar, Mrs. Laverne Ochoa-Clarke, Mrs. Sharmila Williams-Nascimento, Ms. Joanna Austin, Miss Jaina Colucci, Mrs. Olivia Burnett, Mr. Dario Welch, Miss Ruth Henry and Miss Lanasia Nicholas.



# CGF NEWS Cont'd...

## Events

On June 10<sup>th</sup> 2017 the firm joined with Verdun and Marina House in helping make Barbados safer and healthier for all by contributing to the Substance Abuse Foundation Inc.'s fundraising dinner at the Tides Restaurant. In attendance was our Mrs. Nicola Berry, Ms. Gillian Clarke, Ms. Debbie Fraser, Ms. Joanna Austin, Mr. Dario Welch and Miss Ruth Henry.

## External Appointments

We are pleased to announce that our Ms. Rosalind Smith Millar, Partner in the Property Department and Intellectual Property Department was appointed Vice President of the Barbados Bar Association for 2017-18 with effect from July 8, 2017. Congratulations Rosalind!

## Interns

In June and July 2017 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 the increasingly important area of Anti-Money Laundering as well as on Conveyancing. This year the students were also given a presentation on aspects relating to Intellectual Property on video games.



Pictured left to right: Miss Britney Mayers, Miss Kyla Bryan, Miss Denisha Goodridge, Mr. Kemar White, Miss Simone Scott and Miss Khadisha Wickham. Not pictured is Miss Rishelle-Ann Watson.

# CGF POINT OF LAW

**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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