COMMONWEALTH OF THE BAHAMAS
IN THE COURT OF APPEAL
SCCivApp. No. 9 of 2022

B E T W E E N

LINCOLN BAIN

BANI SHOE WAREHOUSE CO LTD

Appellants

AND

ZINNIA ROLLE

Respondent

BEFORE: **The Honourable Sir Michael Barnett, P**
The Honourable Mr. Justice Evans, JA
The Honourable Madam Justice Bethell, JA

APPEARANCES: **Ms. Tanya Wright, with Ms. Maria Daxon, Counsel for the Appellant**

Ms. Travette Pyfrom, Counsel for the Respondents

DATES: **27 July 2022; 15 September 2022**

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Civil Appeal – Contract – Breach of Contract – Forgery - What was agreed between the parties – whether it is an applicable case to set aside findings of fact made by the trial judge - A constitutional right to a fair trial within a reasonable time

The Respondent commenced an action by a Writ of Summons issued in April, 2015 alleging breach of contract. The Appellants entered a joint defence alleging that the signatures on the contractual documents were forged. During the two day trial, the dispute centered on what was agreed between the appellant and the Respondent and on what basis were the monies paid. The judge delivered her judgment in December 2021 and an "Addendum" to the judgment was given in January 2022. The Appellants has appealed both the judgment and the addendum on numerous grounds inter alia that, the "quality of the Addendum Judgment and Final Judgment and Her Ladyship's ability to deal properly with the issues were so adversely affected and compromised by reason of the inordinate and unusual delay in the delivery of her judgment, (5 years), that they cannot be allowed to stand" and that the judgments "were unjust improper wrong and in breach of the Constitutional right of the first and Second Appellants to a fair trial within a reasonable time". The Court heard the parties and reserved its decision.

Held: The appeal against the judgment of the 6 December 2021 is dismissed. The appeal against the Order made in the Addendum is allowed and it is set aside in its entirety. It is the usual practice for the costs of the appeal to go to the successful party and that is the order we propose to make subject to any representations that the parties may wish to make in writing within one week of the pronouncement of this judgment. Should none be made, the costs of the appeal are those of the respondent to be taxed if not agreed.

The judge did not believe Bain and Symonette and accepted the evidence of Rolle. She did not accept the evidence from Messrs Bain and Symonette that Bain's signature was forged. She accepted the evidence of Rolle that she made the agreements with Bain and that Bain signed the documents. She made those findings throughout the judgment. The trial judge's emphatic rejection of the evidence of Bain and Symonette was not unreasonable and cannot be said to have been "plainly wrong".

This court can only set aside the findings of fact if it is satisfied that those findings are "plainly wrong" or that are inconsistent in a material way with the evidence led at the trial.

The Court went on to consider the grounds relative to the delay in delivering the judgment. It noted that it was unfortunate that long delays in delivering judgments are not infrequent occurrences in this jurisdiction just as long delays occur in other jurisdictions. It further noted that a delay in delivering a judgment is not in and of itself a basis for setting aside a judgment and ordering a retrial. It does not in and of itself make a judgment unsafe.

The trial judge specifically said that evidence was fresh in her mind and that she had "benefited from my personal notes that have been recorded at all of the Court sittings in this matter and have used those notes to complete my final Judgment". There is no justification for this court not to accept the judge's determination that notwithstanding the delay, the evidence and her view of the witnesses were fresh in her mind.

However egregious and culpable the delay in this case was, that delay did not prevent the judge from properly evaluating the evidence and making the finding that was determinative of this case.

Cobham v Frett [2001] 1 W.L.R. 1775
Polymers International Limited v Philip Hepburn SCCiv App No 8 of 2021
Bahamasair Holdings Limited v Messier Dowty Inc [2018] UKPC 25
RAV Bahamas v Great Lakes Reinsurance (UK) plc SCCiv App No 26 of 2022

J U D G M E N T

Judgment delivered by The Honourable Sir Michael Barnett, P:

1. This is an appeal from a judgment by Grant Thompson J whereby she made the following order:

> **"For all of these reasons the forgery claim by the Defendant is dismissed. Summary Judgment is hereby granted to the Plaintiff and the Defendant ordered to pay the value of her filed claim in the amount of Sixty Four Thousand Dollars ($64,000.00). (On the recovery of Forty Thousand Dollars ($40.000.00) with Interest calculated at 10% up to the 23 April, 2010). Ms. Zinnia Rolle paid Mr. Lincoln Bain the 1st Defendant herein, the monies to be held on trust for three (3) years. The funds were never invested nor returned. I found the Plaintiff a credible witness. I did not believe the evidence of the 1st Defendant nor his witness. I also grant Three Thousand One Hundred Forty Three Dollars ($3,143.00) to be paid by the 2nd Defendant."**

2. The reference to summary judgment is unfortunate as it was not a 'summary' judgment but a judge delivered after a full trial.

3. The appellants are Lincoln Bain ("Bain") and Bani Shoe Warehouse Company Ltd. ("Bani") who were the defendants in an action brought by Zinnia Rolle ("Rolle"), the respondent to this appeal.

4. The subject matter of this action are transactions which occurred in 2010. The action was commenced by a Writ of Summons issued in April, 2015. The Statement of Claim is in the following terms:

> **"1.That the Plaintiff was at all material times a citizen of the Commonwealth of The Bahamas.**
>
> **2. That the First Defendant is a citizen and resident of the Commonwealth of The Bahamas.**
>
> **3. That the Second Defendant was at all material times a company operating in the sale of women's retail and wholesale shoes and apparels and other consumer items.**
>
> **4. That the Plaintiff entered into an Agreement with the First Defendant on the 23rd day of April, A.D., 2010 to hold in trust the sum of Forty Thousand ($40.000.00) Dollars for a period of 3 years, with a ten (10%) percent interest to be calculated annually. The said sum was given to the 1st Defendant for the purposes of investment should the Plaintiff wish to invest with an option to continue the agreement for another period of three years at an agreed interest rate.**

5. The said sum was paid by way of two installment payments the first of which was made on the 19th day of April 2010 by way of a check drawn on the Plaintiff account at the Teachers and Salaried Workers Cooperative Credit Union in the amount of Thirty-six Thousand Three Hundred and Sixty-Five dollars and Fifty-one cents ($36,365.51). The second payment was made by way of a banker's draft drawn on the Plaintiff account at First Caribbean International Bank in the sum of Three Thousand six hundred and Thirty four dollars and Forty nine cents ($3,634.49) made payable to the First Defendant.

6. The Plaintiff never exercised the option to invest the said sum and never instructed the 1st Defendant to invest the said sum. Copies of the checks will be produced at trial for their full terms and effect.

7. That the total to be collected by the Plaintiff from the First Defendant at maturity was the sum of Fifty-Three Thousand Two Hundred Forty Dollars ($53,240.00) inclusive of interest. To date the amount of outstanding including interest is the sum of Sixty-four Thousand dollars ($64,000.00).

8. The First Defendant did not invest any of the funds given pursuant to the agreement and has failed and or refused to return any of the money. Alternatively, the First Defendant wrongfully and in breach of the agreement invested the said $40,000.

9. The first defendant has failed and or refused to give an account of where the money was and or is invested.

10. As a result of the matter set out above the Plaintiff has suffered loss and damage.

11. That the Plaintiff entered into a contract with the Second Defendant which was owned and operated by the First Defendant on the 4th day of May 2010.

12. The following were express terms of the agreement:

> **(a) the Plaintiff will supply to the Second Defendant merchandise and will pay all costs associated with transporting the merchandise:**
>
> **(b) to pay the second defendant 30% of the retail price of the merchandise;**

(c) after withholding from the purchase price the son mentioned in item (b) above to remit the balance to the Plaintiff on a bi-weekly basis and to submit a bi-weekly statement of account.

13. That both Defendant breached the said contracts by failing to pay any or all of the sums due and owing on the said agreement despite repeated requests.

14. The amount owing to date under the agreement with the Second Defendant is the sum of One Thousand Seven Hundred and One dollars and Thirty five cents ($1,701.35) and One Thousand Four hundred and Forty one dollars and Sixty five cents ($1,441.65).

15. That the First and Second Defendants breached their said contracts and owe the sums of Sixty Four thousand ($64,000.00) and Three thousand, one hundred and Forty three dollars ($3,143.00) respectively.

16. That as a result of the Defendants breach of the contracts the Plaintiff has suffered loss and damage.

17. That the Plaintiff claims damages and interest thereon at such rate and for such a period as the Court may think fit pursuant to section 3 of the Civil Procedure Award of Interest) Act 1992.

AND the Plaintiff claims:

1. **Repayment of the amount paid pursuant to the agreements with interest;**
2. **A declaration that the First Defendant holds the entire sum paid under the contract in trust for the Plaintiff;**
3. **Such other accounts, directions and enquiries as may be necessary;**
4. **Damages**
5. **Interest;**
6. **Further or other relief, and**
7. **Cost"**

5. The appellants Bain and Bani served a joint defence. It was in the following terms:

"1. Paragraph 1 of the Indorsement of the Writ of Summons Amended Statement of Claim is not admitted or denied, as same is not within the 1st or 2nd Defendant's knowledge.

2. Paragraph 2 and 3 of the Amended Statement of Claim is admitted. The 1st and 2nd Defendants further aver that the 2nd Defendant was also in the business of the sale of children shoes.

3. As to paragraph 4 of the Amended Statement of Claim the First Defendant avers that the Plaintiff entered an agreement on or about July, 2010 to purchase the entire Kids Shoes Department of the Second Defendant's store in the sum of $40,000 after initially requested to buy out the Hand Bag Department of the Second Defendant's same store, which she assumed at the time was more profitable.

4. The 1st and 2nd Defendants further avers that the Plaintiff could not have entered into an agreement with them as alleged because between the 3rd and the 5th of May, 2010 the Plaintiff stated in several emails that she could not reach the 1st Defendant to start and formerly finalize the business arrangement that had previously been discussed between them to buy out a department of the subject business of the 2nd Defendant.

5. Except that it is admitted that a cheque was made payable to the 1st Defendant in the sum of Three Thousand Six Hundred Thirty Four Dollars and Forty-nine cent ($3,634.49), same being accepted and collected on behalf of the 2nd Defendant in accordance with the agreement between the parties as per paragraph 3 above, paragraph 5 of the Amended Statement of Claim is denied. The Plaintiff will be held to strict proof thereto.

6. Paragraph 6 of the Amended Statement of Claim is denied and the Plaintiff will be held to strict proof therein. The Defendants repeat paragraph 3 above and further avers that the Plaintiff received from the 2nd Defendant the remaining stock of its Children's Shoes Department and a turnkey business operation along with and all of its private business processes and strategies with respect it said Children Shoes Department. That this was the agreement entered between the parties and that the Plaintiff engaged in the said business until the business cease to operate on or about the 2nd of November, 2010 following a fire at the subject business location. Following the said fire, the 2nd Defendant allowed the Plaintiff to take possession of all the inventory in the said Kids Shoe Department, as the same had received very little fire damage. The 2nd Defendant has since not received any accounting for any profits or otherwise with respect to same.

7. The 1st Defendant denies paragraph 7, 8 and 9 of the Amended Statement of Claim and avers that he was never given any funds from the Plaintiff to invest as therein alleged and was never obligated to give an accounting or return any funds to the plaintiff as alleged. The 1st Defendant repeat paragraph 3 and 6 above.

8. The 1st and 2nd Defendants deny paragraphs 10 and 11 of the Amended Statement of Claim. The 1st Defendant further repeats paragraphs 3, 6 and 7 above.

9. Except that the terms are set out in paragraph 12 of the Amended Statement of Claim were the operating terms of business between the parties before the aforementioned fire, paragraph 12 of the Amended Statement of Claim is denied. The Plaintiff will be held to strict proof thereto.

10. That paragraphs 13, 14, 15, 16 and 17 of the Amended Statement of Claim are denied the Defendants will hold the Plaintiff to strict proof thereto.

11. That the alleged subject Agreement dated the 20th of April, 2010, 23rd April, 2010 and 4th of May 2010 are not the true representation of the terms of the agreement between the Plaintiff and the First and Second Defendants the First and Second Defendant put the Plaintiff to the strict proof thereto.

12. That the First Defendant denies that he ever signed the documents alleged or any such documents. The First Defendant puts the plaintiff to strict proof there too.

13. That the First Defendant avers that the signatures on the alleged Agreements or documents that purport to be his signatures are in fact not his and was forged by Keno Symonette.

14. Save as is hereinbefore admitted or not denied the First and Second Defendant and each of them deny every allegation of the Plaintiff's Amended Statement of Claim as if the same was herein set forth and traversed seriatim."

6. There was limited discovery and the trial took place in July and August 2017. There were three witnesses. They were Rolle, Bain and Keno Symonette, a former employee of Bani, who was called by the defendants.

7. All witnesses made a witness statement which served as their Evidence in Chief and were subjected to cross examination and re-examination. As I said the evidence was taken over two days and a stenographer was present to record the trial.

8. As can be seen from the pleadings the dispute centered on what was agreed between Rolle and Rolle. There was no dispute that Rolle paid monies to either Bain or Bani. The dispute turned on the basis upon which the monies were paid.

9. Rolle case is that the monies were paid pursuant to two agreements reduced to writing and signed by both her and Bain.

10. The first agreement dated the 20 April, 2010 was in the following terms:

> **"This is to certify that I Zinnia Rolle has turned over in trust to Lincoln Bain Forty Thousand Dollars ($40,000). This sum is to be held by him for three years. And returned to me with ten percent (10%) interest calculated yearly. The total to be collected at maturity is $52,240 inclusive of interest. The option is also available for the funds to be invested in shares of a business in which Mr. Bain has a controlling interest. This agreement matures on January 20, 2013. At maturity I have the option to continue this agreement for another three-year period. The actual amount paid at this time is $36,365.51. The balance of $3,634.49 is payable by June 15 to complete this agreement."**

11. That agreement purports to have the signature of both Rolle and Bain. The signatures are not witnessed by any person.

12. The other agreement was dated the 23 April, 2010. It was in the following terms:

> **"AGREEMENT**
>
> **This Agreement is made the 23rd day of April, A.D. 2010 BETWEEN LINCOLN BAIN of the Northern District of the Island of New Providence one of the Islands of the Commonwealth of the Bahamas AND ZINNIA ROLLE of the Western District of the Island of New Providence aforesaid. IT IS AGREED that ZINNIA ROLLE will give LINCOLN BAIN to hold in rust the sum of Forty Thousand ($40,000) dollars for the period of Three (3) years, with a Ten (10) percent interest to be calculated annually.**
>
> **WHEREAS: the option is available to ZINNIA ROLLE for the funds to be invested in shares of a business in which LINCOLN BAIN has a controlling interest.**
>
> **WHEREAS: This Agreement will be terminated on the 20th day of January, A.D. 2013 AND ZINNIA ROLLE has the option to continue the Agreement for another period of Three (3) years at an agreed interest rate.**

> **WHEREAS: The sum of Thirty six thousand Three hundred and Sixty-five dollars and Fifty-one ($36,365.51) cents has been given to LINCOLN BAIN by ZINNIA ROLLE leaving a balance of Three thousand Six hundred and Thirty-four dollars and Forty-nine ($3,634.49) cents which will be given to LINCOLN BAIN on or before the 15th day of June A.D. 2010.**
>
> **Dated this 23rd date of April A.D. 2010"**

13. That agreement was, according to Rolle, prepared by attorney Willie Moss and signed at his office by both Bain and her in the presence of one C. Butterfield an employee of Mr. Moss. Rolle said that she had been advised that the earlier agreement of the 29 April 2010 was inadequate and she went to attorney Moss to have him prepare a more satisfactory agreement.

14. Rolle also claims a breach of an agreement made on 4 May, 2010. The agreement was made with Bani whereby she was to supply Bani with shoes and Bani would sell those shoes for her. Bani would receive a commission on the sales and pay to Rolle the sale proceeds less the commission.

15. The defence of Bain was that he never signed those documents and that his signature was forged. He called Keno Symonette to give evidence. Symonette stated under oath that he forged the signature of Mr. Bain on the documents at the request of Rolle. He said that this was done in November, 2010 on the same date as a fire which occurred at Bani.

16. As I said, the trial took two days of evidence from only three witnesses. Surprisingly, Ms. Butterfield was not called as a witness to say that she signed as a witness to the signature of a person who signed in front of her or to confirm the date that the document was signed.

17. No banking evidence was led to show when the monies were in fact paid and to whom they were paid. No handwriting expert evidence was led to determine whether the signature of Mr.

18. Notwithstanding that evidence was completed in August, 2017 and submissions made sometime between November, 2019 and March 2020, the judgement in this simple trial was not delivered until 6 December, 2021. This is more than 4 years after the evidence was taken in August 2017 and at least more than 20 months after the closing submissions were made.

19. This delay is one of the basis for ground one of the appeal.

20. The judge delivered her judgment on 6 December, 2021. In that judgment she does not explain nor make any apology for the delay in delivering her judgment.

21. However, in an "Addendum" to the judgment given on 12 January, 2022 in circumstances that are puzzling, the trial judge offered an explanation for the delay in delivering her judgment. She said:

> **"The Court is still not in possession of all of the transcripts for this matter however all of the evidence submitted, whether through written submissions or given from the witness box, is**

> **still very fresh in my mind and I have carefully reviewed the relevant material. The failure to not have all of the transcripts in a timely manner has resulted in the Court delivering the Ruling of the 6th December 2021. I have however benefited from my personal notes that have been recorded at all of the Court sittings in this matter and have used those notes to complete my final Judgment."**

22. Litigants have a constitutional right to a fair trial within a reasonable time. That it should take more than 4 years to deliver a judgment in a case as simple is this is incredulous. It is a blight on the administration of justice.

23. The judgment is relatively simple. The judge did not believe Bain and Symonette and accepted the evidence of Rolle. She did not accept the evidence from Messrs Bain and Symonette that Bain's signature was forged. She accepted the evidence of Rolle that she made the agreements with Bain and that Bain signed the documents. She made those findings throughout the judgment.

24. At paragraph 3 she said:

> **"I found the Plaintiff a credible witness. I did not believe the evidence of the (1st) Defendant nor his witness. I also grant Three Thousand One Hundred Forty Three Dollars ($3,143.00) to be paid by the (2nd) Defendant.**

25. At paragraph 14 she said:

> **"Whist I did wonder why Mr. Keno Symonette would openly admit to a criminal offence in the face of the Court, I did not find Mr. Symonette to be a believable witness: the nature of his evidence and his demeanour lacked credibility."**

26. And later,

> **"I found by the completion of Mr. Symonette's evidence, both in content and demeanour that he was lacking credibility."**

27. At paragraph 15,

> **"I accepted the terms of the written contract between the parties of the 20 April, 23 April and the 4 May, 2010 respectively. Notwithstanding the amended defence (Paragraph 11 therein containing denials of the allegations). I now enter judgment against the 1st Defendant in the amount claimed in the Statement of Claim as amended I accepted the written agreements as true representations of the terms of agreement between these parties. I have on the evidence before me rejected**

the limited defence which alleges forgery and the bald assertion that the agreements do not truly represent what was agreed."

28. At paragraph 21 she said:

> **"21. The Plaintiff denied ever having a conversation with Mr. Keno Symonette. I found her a believable witness. She said that she only recalled seeing Symonette around Bani Shoe Warehouse when she went there for her businesses. She maintained clearily and empathically that all of her agreements were signed by the (1st) Defendant Mr. Lincoln Bain in the office of her then lawyer. Mr. Willie Moss and witnessed by Ms. Butterfield of his office. The third (3rd) agreement was signed and scaled at the Bani business establishment. Market Street. This agreement was separate from the other two with Mr. Lincoln Bain. However, Mr. Lincoln Bain signed and sealed for Bani Shoe Warehouse Company Limited. She did not just aver to these various agreements but she produced them on the record before me."**

29. Then at paragraph 25 she said:

> **"Having listened to the evidence as well as having observed the demeanour of the witnesses. I do not find the evidence given by the First Defendant or Mr. Keno Symonette to be credible. I am of the view that the allegation of forgery was a story that was made up in an attempt to discredit the documents produced by the Plaintiff."**

30. And finally at paragraph 27:

> **"The funds were never invested nor returned. I found the Plaintiff a credible witness. I did not believe the evidence of the 1st Defendant nor his witness."**

31. The appellants in this appeal asks this court to set aside the judgment granted in favour of Rolle. The grounds of appeal are as follows:

> **"1. The quality of the Addendum Judgment and Final Judgment and Her Ladyship's ability to deal properly with the issues were so adversely affected and compromised by reason of the inordinate and unusual delay in the delivery of her judgment, (5 years), that they cannot be allowed to stand**
>
> **2. The Learned Judge ignored relevant evidence and her findings are neither entirely consistent nor adequately**

supported by reasons such that the decision cannot reasonably be explained or justified.

3. The Judgment and Addendum Judgment were unjust improper wrong and in breach of the Constitutional right of the first and Second Appellants to a fair trial within a reasonable time

4. The Learned Judge erred in Law in delivering an Addendum Judgment dated 6th December 2021 to the Final Judgement of even date without giving serious or any consideration to the Bahamian Supreme Court Act and its attending rules.

4.The Learned Judge erred in Law in Ordering in the said Addendum Judgment that [2] "in default of payment the First Defendant is sentenced to Ninety (90) days imprisonment at The Bahamas Department of Correctional Services", an immediate Order of Committal in default of payment of a money judgment in breach of Sections 3 and or 4 of The Debtors Act, Orders 45 and 52 of the Rules of the Supreme Court (RSC) and the rules of Natural Justice:

5. The Learned Judge in the Court below erred in law and/or in fact when she ordered that the First Appellant pay the value of the Respondent's filed claim in the amounts of $64,000 (on the recovery of $40,000.00 with interest calculated at 10% up to 23rd April 2010). in the absence of any credible receipt voucher or proof that the sum of $36.365.51 was paid to the First Respondent.

6. The Learned Judge eared in law and in fact when she without any evidence and without giving a reason awarded the sum of $3.143.00 to the Respondent.

7. The Judgment and Addendum Judgment were unjust improper wrong and in breach of the Constitutional right of the first and Second Appellants to a fair trial within a reasonable time

8. The Learned Judge erred in law and in fact and misdirected herself when she made the findings that a Resulting Trust was created between the parties"

32. As the appellant readily acknowledges, the appeal invites the court to set aside findings of fact made by a trial judge. Specifically, the finding that the agreements were signed by Mr. Bain as asserted by Rolle in her evidence.

33. The ability of an appellate court to set aside findings of fact made by a trial judge has been considered by this court on a number of occasions. More recently in a judgment by Isaacs JA in **RAV Bahamas v Great Lakes Reinsurance (UK) plc** SCCiv App No 26 of 2022.

34. The decision of the Privy Council in **Bahamasair Holdings Limited v Messier Dowty Inc** [2018] UKPC 25 is perhaps the starting point. In that case Lord Kerr summed up the law as follows:

> **"The proper approach to the review by an appellate court to the findings of a trial judge**
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> **32. As was observed in DB v Chief Constable of the Police Service of Northern Ireland [2017] UKSC 7, para 78 the United Kingdom Supreme Court on a number of occasions recently has had to address the issue of the proper approach to be taken by an appellate court to its review of findings made by a judge at first instance. And, as was said in that case, perhaps the most useful distillation of the applicable principles is to be found in the judgment of Lord Reed in the case of McGraddie v McGraddie [2013] UKSC 58; [2013] 1 WLR 2477.**
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> **33. In para 1 of his judgment Lord Reed referred to what he described as "what may be the most frequently cited of all judicial dicta in the Scottish courts" - the speech of Lord Thankerton in Thomas v Thomas [1947] AC 484 which sets out the circumstances in which an appeal court should refrain from or consider itself enabled to depart from the trial judge's conclusions. Lord Reed's comprehensive and authoritative discussion ranged over the speech of Lord Shaw of Dunfermline in Clarke v Edinburgh & District Tramways Co Ltd (1919) SC (HL) 35, 36-37, where he said that an appellate court should intervene only if it is satisfied that the judge was "plainly wrong"; the judgment of Lord Greene MR in Yuill v Yuill [1945] P 15, 19, and the speech of Lord Hope of Craighead in Thomson v Kvaerner Govan Ltd [2003] UKHL 45; 2004 SC (HL) 1, para 17 where he stated that:**
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> **"It can, of course, only be on the rarest of occasions, and in circumstances where the appellate court is convinced by the plainest of considerations, that it would be justified in finding that the trial judge had formed a wrong opinion."**
>
> **34. Lord Reed then considered foreign jurisprudence on the subject in paras 3 and 4 of his judgment as follows:**

"3. The reasons justifying that approach are not limited to the fact, emphasised in Clarke's case and Thomas v Thomas, that the trial judge is in a privileged position to assess the credibility of witnesses' evidence. Other relevant considerations were explained by the United States Supreme Court in Anderson v City of Bessemer (1985) 470 US 564, 574-575:

'The rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of credibility. The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise. Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources. In addition, the parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one; requiring them to persuade three more judges at the appellate level is requiring too much. As the court has stated in a different context, the trial on the merits should be 'the 'main event' … rather than a 'tryout on the road.'' … For these reasons, review of factual findings under the clearly erroneous standard - with its deference to the trier of fact - is the rule, not the exception.'

Similar observations were made by Lord Wilson JSC in In re B (AChild) [2013] 1 WLR 1911, para 53.

4. Furthermore, as was stated in observations adopted by the majority of the Canadian Supreme Court in Housen v Nikolaisen [2002] 2 SCR 235, para 14:

'The trial judge has sat through the entire case and his ultimate judgment reflects this total familiarity with the evidence. The insight gained by the trial judge who has lived with the case for several days, weeks or even months may be far deeper than that of the Court of Appeal whose view of the case is much more limited and narrow, often being shaped and distorted by the various orders or rulings being challenged.'"

35. The Board adopts a similar approach. In their work, Privy Council Practice, Lord Mance and Jacob Turner at paras 5.46-5.53, state that the Judicial Committee of the Privy Council has the power to review factual findings. It will, however, review findings of fact based on oral evidence with great caution, and

will not normally depart from concurrent findings of fact reached by the courts below.

36. The basic principles on which the Board will act in this area can be summarized thus:

1. "… [A]ny appeal court must be extremely cautious about upsetting a conclusion of primary fact. Very careful consideration must be given to the weight to be attached to the judge's findings and position, and in particular the extent to which, he or she had, as the trial judge, an advantage over any appellate court. The greater that advantage, the more reluctant the appellate court should be to interfere …" - Central Bank of Ecuador v Conticorp SA [2015] UKPC 11; [2016] 1 BCLC 26, para 5.

2. Duplication of the efforts of the trial judge in the appellate court is likely to contribute only negligibly to the accuracy of fact determination - Anderson v City of Bessemer, cited by Lord Reed in para 3 of McGraddie.

3. The principles of restraint "do not mean that the appellate court is never justified, indeed required, to intervene." The principles rest on the assumption that "the judge has taken proper advantage of having heard and seen the witnesses, and has in that connection tested their evidence by reference to a correct understanding of the issues against the background of the material available and the inherent probabilities." Where one or more of these features is not present, then the argument in favour of restraint is reduced - para 8 of Central Bank of Ecuador.

37. The Board considers that the Court of Appeal in the present case should have operated on these principles in reviewing the Chief Justice's findings made at first instance."

35. In short this court can only set aside the findings of fact if it is satisfied that those findings are "plainly wrong" or that they are inconsistent in a material way with the evidence led at the trial.

36. I am not satisfied that the finding by the trial judge that Bain signed the two agreements is plainly wrong and inconsistent with the evidence. The judge has made it clear that she did not believe the evidence led by the defendants in the testimonies of Bain and Symonette. She heard their evidence and saw their demeanour. She believed the evidence of Rolle.

37. With respect, this is not surprising.

38. The relationship between Ms. Rolle and Mr. Bain started on 14 April, 2010 with an email from Rolle to Bain. The email was in the following terms:

> **"Subject: Financial Advice**
>
> **Date: Wed, 14 Apr 2010**
>
> **First let me take this opportunity to encourage you for the difference you have made in my life and that of the Bahamian people that have the courage to free themselves from the grips of this political circus by the information that you continue to supply keep it up and remember the lease you do to these my brothers you do unto me.**
>
> **I do not know if you charge a fee but I know I need some financial advice. You see I am a stay at home mom and a single parent, I know that you are wondering how can that be let me give you a basic update of my life to this point. I worked at Royal Bank for eight years at Bimini Branch and I decided in 2005 to leave Bimini and the Bank because I felt like I had outgrown both, but fate would have it a week later I lost my mother in that Chalk's crash. Learning two months later that I was pregnant with twins, going through mourning, the stress of carrying having and caring for twins physically and emotionally on my own when I myself was not that stable and if that is not enough to discover last year after just obtaining some health insurance that I have a medical condition so the insurance company rescinded their policy. So you can understand at this point in my life I cannot afford to make any more unwise decisions.**
>
> **I can also tell you that being a stay at home mother is a wonderful experience it is a great sacrifice for me thou, having to depend on someone financially is a big adjustment for me and the fact that nowhere in this Bahamas are you even acknowledged as soon as you say stay at home mom people quickly find ways to dismiss you and your quest because they do see this as a very important job that can help shape society but as a negative one. Anyhow I think I have regain my composure and myself confident and is ready to move forward, I tried a few avenues to get some things done but again the doors are closed as soon as the employment issue arises, I have contemplated looking for a job but I know in my heart of hears that, that is not something that I really want to do, been there done that and I believe that stress from that is a big factor in my medical**

> **condition. I have a few assets but I do not think that I am truly utilizing them to their fullest potential for my benefit, like you always say MAKING MONEY WHILE YOU SLEEP!**
>
> **Thanking you in advance for any assistance you can afford me."**

39. Mr. Bain responded to that email the same day in the following terms:

> **It would be a pleasure to assist you. I do not charge. Call me at 636 [redacted] so we can arrange a time to meet.**

40. It is clear that Rolle was seeking advice and assistance from Bain on how best to utilize her limited assets. She was trusting of Bain.

41. The agreements of 20 and 23 April, 2010 (made shortly after that email exchange) are consistent with that trust. She wanted Bain's expertise in investing that money on her behalf. The judge was entitled to accept Rolle's evidence in her witness statement where she said:

> **"The reason I entrusted the First Defendant with my money was because he held himself out as a capable and honest businessman who could invest my money in a profitable way.**
>
> **The monies I gave him represented my entire savings at that time and having met the First Defendant, who appeared to be an honest and upfront man, I decided to trust him to do the right thing"**

42. The withdrawal of her savings from the Teacher's Credit Union on 19 April, 2010 shortly after the email exchange is consistent with the making of the agreements on 20 and 23 April, 2010 and inconsistent with any agreement to purchase business in June 2010 as alleged by Bain.

43. Symonette's evidence that he forged Bain's signature on the three agreement at the urging of Rolle on the night of the fire of Bani in November, 2010 is understandably not credible. It is not likely that on the night of the fire Rolle or anyone else's attention would have been on creating a false documentation for insurance purposes.

44. Further, as the agreement of the 23 April, 2010 was intended to replace the agreement of 20 April, 2010 it is most unlikely that Rolle would have required Symonette to sign both the agreement of the 20 April, 2010 as well as the agreement of the 23 April, 2010. There would have been no need to sign the earlier agreement on 20 April, 2010.

45. In my judgment, the trial judge's emphatic rejection of the evidence of Bain and Symonette was not unreasonable and cannot be said to have been "plainly wrong".

46. The appellants also seeks to set aside the judgment as being unsafe because the over four years delay between the taking of the evidence in July and August 2017 and the delivery of the judgment on 6 December, 2012.

47. Unfortunately, long delays in delivering judgment are not infrequent occurrences in this jurisdiction just as long delays occur in other jurisdictions.

48. As I said earlier, the four years delay is inexcusable and a blight on the administration of justice. It is particularly egregious in this case as the trial in this relatively simple case took place over two days and only involved three witnesses whose evidence in chief was their witness statements. This case turned on the credibility of witnesses and the excuse given by the trial judge is lamentable. She must have formed a view as to the credibility of the witnesses during the trial. Given that she had her own notes, the absence of a stenographer's transcript for only a portion of the evidence could hardly justify four years delay. I am aware, as counsel said during the hearing of the appeal, that during the time the trial judge had a busy criminal calendar. But judges must balance their time and always be mindful of a litigant's right to a fair trial within a reasonable time and this includes the timely delivery of judgments.

49. But delay in delivering a judgment is not in and of itself a basis for setting aside a judgement and ordering a retrial. It does not in and of itself make a judgment unsafe.

50. This court in **Polymers International Limited v Philip Hepburn** SCCiv App No 8 of 2021 considered the effect of a long delay in delivering a judgment. The delay in that case was almost five years. In my judgment in that case I said:

> **"How should we treat this delay?**
>
> **46. In Yearwood v Commissioner of Police [2004] ICR 1660 the English Employment Appeal Tribunal after referring to Kaamin v Abbey National PLC [2004] ICR 841 said:**
>
> **"In all courts within England and Wales, the obligation is upon judicial officers to produce judgments within three months of the oral hearing, or of the last in a sequence of later submissions.**
>
> **Slightly greater flexibility is given to employment tribunals and the Employment Appeal Tribunal, since they are tripartite judicial bodies, dependent on part-time lay members and sometimes part-time tribunal chairmen and appeal tribunal judges. The long stop is three and a half months, beyond which there is delay and it is culpable: see [2004] ICR 841, 847, paras 8 and 9.**
>
> **63 The principle of law to be obtained was cited by Burton J as follows, at pp 849 and 851:**
>
> **"13. The state has its duty under article 6 in respect of both a fair trial and there being (and concluding by a judgment) a hearing within a reasonable time. But where an unsuccessful party brings an appeal based upon delay in the delivery of the judgment, the question is whether the party who lost has been**

deprived of a fair trial by virtue of that delay in judgment-i e such party must show that the result was unsafe as a consequence of the delay (and similarly the successful party will not be deprived of its success, not-withstanding a delay, unless the decision in its favour was unsafe as a result of the delay).”

“15.1. The appellant will need to invite the appellate court to examine the delayed judgment for any sign of error due to faulty recollection. The party impugning a judgment will need to show a material error or omission (if only one, then it would need to be the more significant) or a series of material errors or omissions. Material in this context does not mean material in the sense of an independent ground of appeal i e necessarily central to the decision and indicating an error of law or such error or errors of fact as to amount to perversity, but material in the sense that, taken separately or together, it or they show a real risk that there has been a failure of recollection, so as to establish that the decision is unsafe by virtue of the delay.

“15.2. Such causation is essential. The appeal must not be allowed, just because of the judgment being a delayed one, to degenerate into an impermissible appeal based upon an alleged error or errors of fact, as a result of what Lord Scott called ‘trawling’ through the judgment. It plainly should not open the door, of itself, to allowing a second bite at the cherry, or certainly to a remission to the employment tribunal for the purpose of allowing a better job to be done by the losing party, second time around. We are satisfied, notwithstanding Lord Scott's use of the words ‘probably or even possibly’, that, given the consequence for the parties of setting aside the judgment, the appeal tribunal must be satisfied on the balance of probabilities that the unsafeness is due to the delay. If the unsafeness of the decision due to the delay is established, then that is an independent ground of appeal, and the delay will have infected and rendered unsafe one or more of the bases in law for the tribunal's decision. The error or errors must be due to the delay, and cast doubt upon the decision or part of the decision.”

47. More recently, in Natwest Markets plc v Bilta (UK) Ltd (in liquidation) [2021] EWCA Civ 680 after referring to Sir Geoffrey Vos’ judgment in Bank St PetersburghvPJSC v Arkhangelsky (op cit) said:

“45.We respectfully agree. A delay of the magnitude in the present case, whatever the ex-planation may be, is plainly

> **inexcusable. It should not have happened and should not have been allowed to happen, particularly in a case where there were allegations of dishonesty, and the reputations and future employment prospects of the individuals concerned were at stake. Nevertheless, it is quite clear from the authorities that delay alone will be insufficient to afford a ground for setting a judgment aside. However, the delay will be an important factor to be taken into account when an appellate court is considering the trial judge's findings and treatment of the evidence, and the appellate court must exercise special care in reviewing the evidence, the judge's treatment of that evidence, his findings of fact and his reasoning".**

51. I am mindful of the observation of the Privy Council in **Cobham v Frett** [2001] 1 W.L.R. 1775 where the Board said:

> **"As to demeanour, two things can be said. First, in their Lordships' collective experience, a judge rereading his notes of evidence after the elapse of a considerable period of time can expect, if the notes are of the requisite quality, his impressions of the witnesses to be revived by the rereading. Second, every experienced judge, is likely to make notes as a trial progresses recording the impressions being made on him by the witnesses. Notes of this character would not, without the judge's permission or special request being made to him, form part of the record on an appeal. They might be couched in language quite unsuitable for public record."**

52. In this case, the trial judge specifically said that evidence was fresh in her mind and that she had "benefited from my personal notes that have been recorded at all of the Court sittings in this matter and have used those notes to complete my final Judgment". In my judgment, there is no justification for this court not to accept the judge's determination that notwithstanding the delay, the evidence and her view of the witnesses were fresh in her mind.

53. In this case, the primary finding of the judge was that the agreements were signed by Mr. Bain. I have already found that that finding was not unreasonable and could not be said to be plainly wrong. In my judgment, however egregious and culpable the delay in this case was, that delay did not prevent the judge from properly evaluating the evidence and making the finding that was determinative of this case.

54. In the circumstances the appeal against the judgment of the 6 December, 2021 is dismissed.

55. There was an Addendum to the judgment delivered on the 12 January, 2022. In that Addendum the judge said:

> **"1. My Order is that the First Defendant, Mr. Lincoln Bain shall pay the sum of Sixty-four Thousand dollars ($64,000) within a period of ninety (90) days from the date of Judgment, hat is on or before the 28th February, 2022.**
>
> **2. In default of such payment, the First Defendant is sentenced to ninety (90) days imprisonment at the Bahamas Department of Correctional Services."**

56. The respondent does not seek to support that part of the order. It was made after the judgment of the 6 December, 2021 was delivered and without hearing any of the parties or their counsel. It is plainly wrong for it to have been made. It is set aside in its entirety.

57. However, I am obliged to note that it is inconceivable that an order with such penal sanctions could have been made without hearing the party adversely affected by the order.

58. The appeal against the judgment of the 6 December, 2021 recited in paragraph 1 above is dismissed. The appeal against the Order made in the Addendum is allowed.

59. It is the usual practice for the costs of the appeal to go to the successful party and that is the order we propose to make subject to any representations that the parties may wish to make in writing within one week of the pronouncement of this judgment. Should none be made, the costs of the appeal are those of the respondent to be taxed if not agreed.

The Honourable Sir Michael Barnett, P

60. I agree.

The Honourable Mr. Justice Evans, JA

61. I also agree.

The Honourable Madam Justice Bethell, JA