

COMMONWEALTH OF THE BAHAMAS

2015

IN THE SUPREME COURT

CLE/gen/00701

Common Law & Equity Division

BETWEEN

ZINNIA ROLLE

Plaintiff

AND

LINCOLN BAIN

First Defendant

AND

BANI SHOE WAREHOUSE CO. LIMITED

Second Defendant

Before: The Honourable Madam Justice Mrs. Cheryl Grant-Thompson

Appearances: Ms. Travette Pyfrom, Counsel for Plaintiff;
Mr. Donald Saunders, Counsel for the 1st & 2nd Defendants

Hearing Dates: 20 February, 2017, March 2017, 30 August, 2017, 29 November, 2018, 3 May, 2019, 9 May, 2019, 11 June, 2019, 20 March, 2020, & 30 November, 2021.

FINAL JUDGMENT

GRANT-THOMPSON J.

BACKGROUND

1. The Plaintiff claimed a breach of two agreements. The first is an alleged written agreement dated 20 April, 2010, and a second more detailed written Agreement, (executed on 23 April, 2010) with the First (1st) Defendant. The Third Agreement is dated the 4th May, 2010 and made with the Second (2nd) Defendant. The Plaintiff rented from the First (1st) Defendant, who was at all material times the President and partial owner of a company located on Mackey Street, an emporium which operated in the sale of women's retail, wholesale shoes, apparels and other consumer items.
2. The Plaintiffs case is that she paid a sum of monies, specifically Forty Thousand Dollars (\$40,000.00) to the First (1st) Defendant for investments purposes to be held on trust for a period of three (3) years at a 10% interest rate per annum. The First (1st) Defendant accepted that he executed a Forty Thousand Dollars (\$40,000.00) agreement relative to the Second Defendant, Bani Shoe Warehouse Company Limited. However, he could not produce anything in writing to support this assertion. This is relative to the Third Agreement. He does not accept that he received Forty Thousand Dollars (\$40,000.00) to be held on trust for investment purposes. The evidence was: *"Yes we had an oral agreement. Q. And that the oral agreement was to purchase the shoe department at \$40,000.00? A. Yes...so, the Kid's Shoes Department"* (Page 4 cross-examination of the 1st Defendant line 14-19).

ISSUES

- i. Was there any or any properly executed agreements between the Defendant and the Plaintiff;
 - ii. If there was, what were the terms of these agreements and did they create a resulting trust; and
 - iii. Did the Defendant breach the trust and was the Plaintiff liable to compensation in the result.

3. 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.

THE LAW

4. In civil proceedings it is trite law that the standard of proof is on a balance of probabilities (as per Lord Denning J, **MILLER v MINISTER OF PENSION [1947] 2 AER page 372**).

5. The House of Lords decision of **Re B (Children) (Care Proceedings: Standard of Proof) [2008] 3 WLR 1** is also instructive relative to the standard of proof. Lord Hoffman at paragraphs 31 and 32 stated as follows:

“31 My Lords, if the judiciary in this country regularly found themselves in this state of mind, our civil and family justice systems would rapidly grind to a halt. In this country we do not require documentary proof. We rely heavily on oral evidence, especially from those who were present when the alleged events took place. Day after day, up and down the country, on issues large and small, judges are making up their minds whom to believe. They are guided by many things, including the inherent probabilities, any contemporaneous documentation or records, any circumstantial evidence tending to support one account rather than the other, and their overall impression of the characters and motivations of the witnesses. The task is a difficult one. It must be performed without prejudice and preconceived ideas. But it is the task which we are paid to perform to the best of our ability.

32 In our legal system, if a judge finds it more likely than not that something did take place, then it is treated as having taken place. If he finds it more likely than not that it did not take place, then it is treated as not.”

6. Further resulting trusts were adequately addressed by Lord Justice Briggs in **BELLIS V CHALLINOR [2015] EWCA**, paragraph 53, 54:

“Quistclose- type trusts are a species of resulting trust which arise where property (usually money) is transferred on terms which do not leave it at the free disposal of the transferee. That restriction upon its use is usually created by an arrangement that the money should be used exclusively for a stated purpose or purposes; and

There must be an intention to create a trust on the part of the transferor. This is an objective question. It means that the transferor must have intended to enter into arrangements which, viewed objectively, have the effect in law of creating a trust (paragraph 56).”

7. On the issue of the alleged forgery relied upon by the Defendant, Lord Denning in ASSOCIATED LEISURE LIMITED V ASSOCIATED NEWSPAPER LIMITED [1970] 2QBD at page 450 stated that:

“ a charge of fraud, he must not put a plea... unless he has clear and sufficient evidence to support it.” Order 18, Rule 12 also provides that, “the necessary particulars of fraudulent intentions must be contained in the pleadings. The pleadings should set out the facts, matters and circumstances relied upon to show that the party charged had or was actuated by fraudulent intention. General allegations however, strong may be the words in which they are stated, insufficient to amount to an averment of fraud of which the Court ought to take notice...”

8. I also found **Order 18 Rule 8 Rules of the Supreme Court** to be highly instructive relative to specifically pleading fraud. Order 18 Rule 8 states as follows:

“(1) A party must in any pleading subsequent to a statement of claim plead specifically any matter, for example, performance, release, any relevant statute of limitation, fraud or any fact showing illegality —

(a) which he alleges makes any claim or defence of the opposite party not maintainable; or

(b) which, if not specifically pleaded, might take the opposite party by surprise; or

(c) which raises issues of fact not arising out of the preceding pleading.

(2) Without prejudice to paragraph (1), a defendant to an action for the recovery of land must plead specifically every ground of defence on which he relies, and a plea that he is in possession of the land by himself or his tenant is not sufficient.”

ALLEGED AGREEMENTS BETWEEN THE PARTIES

9. Whether or not there was an agreement between the parties as alleged by the Plaintiff is essentially one of the primary issues before the Court. According to the evidence of the Plaintiff, the first agreement relative to the Forty Thousand (\$40,000) paid to the First Defendant to be held on trust for a period of three (3) years was constructed in two parts. Firstly, on the 20th April 2010 the Plaintiff and the First Defendant signed a document labelled “Agreement” in which the First Defendant allegedly signed and acknowledged receipt of the sum of Forty Thousand Dollars (\$40,000) to be held in trust by the First Defendant for a period of three (3) years.

10. The second part of the alleged agreement between the parties according to the Plaintiff was formulated on the 23rd April, 2010. The Plaintiff avers that the both documents were signed by herself and the first Defendant and the

agreement dated April 23rd 2010 was witnessed by C. Butterfield and signed at the office of Willie Moss’.

11. The 1st Defendant Mr. Lincoln Bain claimed that he did not sign a trust agreement and that his clear signatures on the agreements before me were forged. He called his former manager, Mr. Keno Symonette to confirm his assertion of forgery. Although, the First Defendant herein alleged that he had an alternative agreement, he failed to produce the document before the Court which embodied that agreement. Notwithstanding, no alternative agreement was produced nor pleaded.

12. The documents forming the purported first “Agreement” between the Plaintiff and the First Defendant which had a total value of Forty Thousand Dollars (\$40,000) are hereby reproduced below.

Image a) Signature from Agreement dated 20th April, 2010

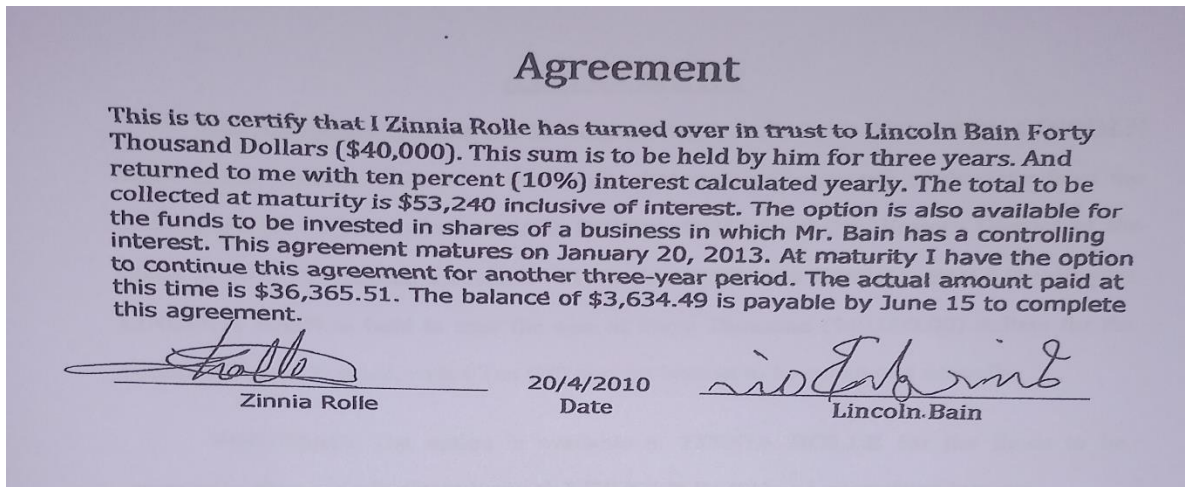
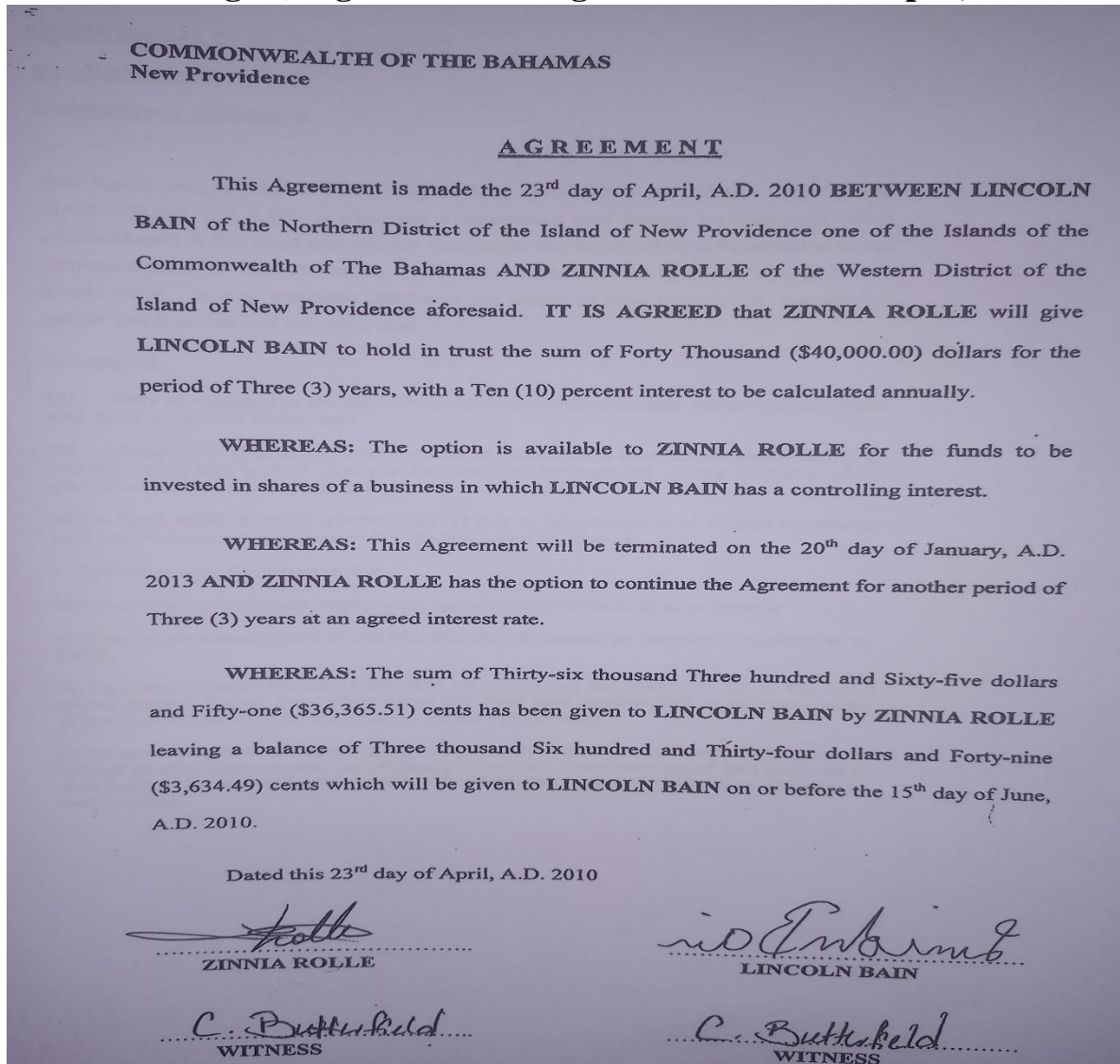


Image b) Signature from Agreement dated 23rd April, 2021



13. Mr. Lincoln Bain accepted before my Court that he was paid the Forty Thousand Dollars by the Plaintiff. However, he distinguished this evidence and stated that the monies were paid in order to purchase the Kid's Shoe Department Store from Bani Shoes Warehouse Company Limited. He indicated he would have produced this agreement. However, same was destroyed in a fire. So both parties agreed the Forty Thousand Dollars was paid. The discrepancy is for which purpose were the monies paid. Was the

payment made in order to establish a resulting trust on behalf of the First Defendant; or was the payment to secure additional shop space with the Second Defendant. The decision turned on which witness I found to be more credible based on the evidence before me.

- i.** (As per cross-examination of the 1st Defendant recorded at page 2 at line 14-32 of the Court’s transcripts) In giving evidence the Defendant opined that, *“I knew that I did not sign this document. And I was trying to find other employees that would have known information. The ones that I could tracked down, because when the company close, everyone scattered...I was trying to find any employee that would have had any information. So, I was calling around different people. But Kino was the one, who had the same number, same e-mail, so I got him easier. And so, when I got him I told him what was going on. And he told me he said, he had something to tell me. And that is when he confided in me. I then in turn told him, that this is serious. And I told him that I may be pressing charges. And he said, he understand. And I brought him to see the lawyer, my lawyer who told him, that it could be fraud charges involved.”*
- ii.** Mr. Keno Symonette, a witness called on behalf of the defence testified that he forged Mr. Lincoln Bain’s signature on the three agreements during a fire at the Bani Shoe Loft. He claimed that the Plaintiff invited him to sign Bain’s signature as close as possible to the actual signature. Mr. Symonette alleged that the Plaintiff was distraught as a result of the fire and claimed she needed the signature for insurance purposes so in the result he signed Mr. Lincoln Bain’s signature. He submitted to me that:

“21. It should be noted that in support of the (1st) Defendant’s defence, Mr. Symonette stated that he had never signed the documents alleged to have been signed by himself. Mr. Symonette confirmed in evidence that on the date of the subject fire, he was approached by the Plaintiff (at the front door of the store) and was presented with the three Agreements in question in this matter and was advised by the Plaintiff at the time that she could not locate or contact the First (1st) Defendant, but quickly needed the same Agreements to be **processed quickly.**” Mr. Symonette says in evidence that, **“Yes i forged the signatures that of the First (1st) Defendant.”**

22. Mr. Symonette evidence is that based on the Plaintiff’s advice to him that she needed the Agreements to be “processed quickly” and the fact that she appeared to be very irate, troubled and depressed, he thought she needed the documents signed for insurance purposes.

23. He stated that the Plaintiff asked him if he could sign the First (1st) Defendant’s signature as close as possible and that he could read the documents in details, but **“only glanced over it”** and was **“rushing.”**

24. In his Witness Statement, Mr. Symonette said that, **“I felt sorry for the Plaintiff and signed the three (3) Agreements in the area of above type name of the First (1st) Defendant that only the Plaintiff witnessed me signed the said aforesaid Agreements.”**

25. He further stated in his Witness Statement and in support of the First (1st) Defendant's evidence at trial that he was looking for persons familiar with the circumstances of the parties' agreement and whom could verify that the allegations of the Plaintiff failed as it related to the agreement between the parties and the execution of the Agreements that, ***“I only became aware of the fact that the Plaintiff was using the said documents against the First Defendant in a lawsuit on the 20th March, 2017, after I received a call from the First Defendant requesting that I serve as a witness concerning this subject suit. I thought, and verily believe, that the purpose of my evidence was to confirm that the Plaintiff operated the Children's Shoe Department, but when the First Defendant mentioned the three written agreements, I felt bad, guilty and confessed to signing the said Agreements unbeknown to him and without his consent.”***

- iii.** The Second Defendant claimed that the agreement was in a form and style of a general consignment agreement with an intention to provide a 70/30 split of profits on the sale of shoes in the Kids Shoe Department in the Second Defendants Store. The First Defendant denied his alleged involvement in the execution of this agreement. He denied he owed funds to the Plaintiff in respect of either Agreement;
- iv.** The Plaintiff made the Forty Thousand Dollars (\$40,000.00) payment in two cheques. The first in the amount of Thirty Six Thousand Three Hundred Sixty Five Dollars and fifty one cents (\$36,365.51) and the second and third instalment by bankers draft made payable to Mr.

Lincoln Bain as well in the amount of Thirteen Thousand Six Hundred Thirty Four Dollars and forty-nine cents (\$13,634.49); and

- v. Whilst the 1st Defendant acknowledged the payment check of Thirteen Thousand Six Hundred Thirty Four Dollars and forty nine cents (\$13,634.49) (24 June, 2010). He denied ever having received the first payment by cheque for Thirty Six Thousand Three Hundred Sixty Five Dollars and fifty one cents (\$36,365.51), directly or at all. He claimed the entire sum was being paid to the Second Defendant to purchase the Kids Shoes Department. That notwithstanding the clear words of the Agreements they did not express the true intention of the parties.

IS THE FORGERY ALLEGED BY THE 1ST DEFENDANT LINCOLN BAIN MADE OUT?

14. Notwithstanding that forgery was alleged it was not substantiated. The Defendant's pleadings claim that, *“the first defendant did not make the signature on the alleged agreements that purports to be his signature they are in fact not his and were forged by Mr. Keno Symonette.”* Whilst, 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. I note there was no claim the Plaintiff was involved in this alleged forgery. It is crucial in law that she should have been involved in some way:

- i. Mr. Symonette attempted before me to sign Mr. Lincoln Bain's name. It was a poor and not convincing attempt which did not even

came close to Mr. Bain's signature. I followed the procedure laid out for this type of circumstances outlined in Section 55 and 56 of the Evidence Act, Chapter 65 which provides as follows:

“55. If a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to being his handwriting.

56. (1) In order to ascertain whether any signature or writing is that of the person by whom it purports to have been written any signature or writing, admitted or proved to the satisfaction of the court to have been written by that person, may be compared by a witness, or by the court, or the jury, with the one which is to be proved, although that signature or writing has not been produced or proved for any other purpose.

(2) The court may direct any person present in court to write any words or figures for the purpose of enabling the court to compare the words or figures so written with any words or figures alleged to have been written by that person.”

- ii. Mr. Symonette was invited to sign Mr. Lincoln Bain's signature three times. He was allowed to refresh his memory from Mr. Bain's signature and he patently failed to do so on all three (3) occasions. By contrast, when I compared Mr. Bain's the signature on the agreements to Mr. Symonette's attempt to sign for Mr. Bain in the presence of the Court, I found the signatures to be totally different to the extent that they could be compared to day and night.

iii. Whereas Mr. Bain's signature on those documents were almost a replica of each other. I do not accept that Mr. Symonette was the penman on any of these material occasions. His purported signature of Mr. Lincoln Bain's did not match the signatures on the agreements nor the witness statements, and they appeared to be nothing more than vain attempts made by the witness in the witness stand. I found by the completion of Mr. Symonette's evidence, both in content and demeanour that he was lacking in credibility.

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.

16.An original agreement was provided relative to "The Bani Agreement" (4 May, 2010). I referenced Section 41, 43 40 & 62 of the Evidence Act, Chapter 65 in this regard which provides that:

"40. Whenever any statement admissible under section 39 is proved, all matters may be proved, either in order to contradict or to corroborate it, or in order to impeach or confirm the credit of the person by whom it was made, which might have been proved

if that person had been called as a witness and had denied upon cross-examination the truth of the matter suggested.”

“41. The contents of documents may be proved either by primary or by secondary evidence.”

“43. Secondary evidence includes —

(a) certified copies given under the provisions hereinafter contained;

(b) copies made from the original by mechanical processes which ensure accuracy of the copy, and copies compared with such copies;

(c) copies made from or compared with the original;

(d) counterparts of documents as against the parties who did not execute them; and

(e) oral accounts of the contents of a document given by some person who has himself seen it.

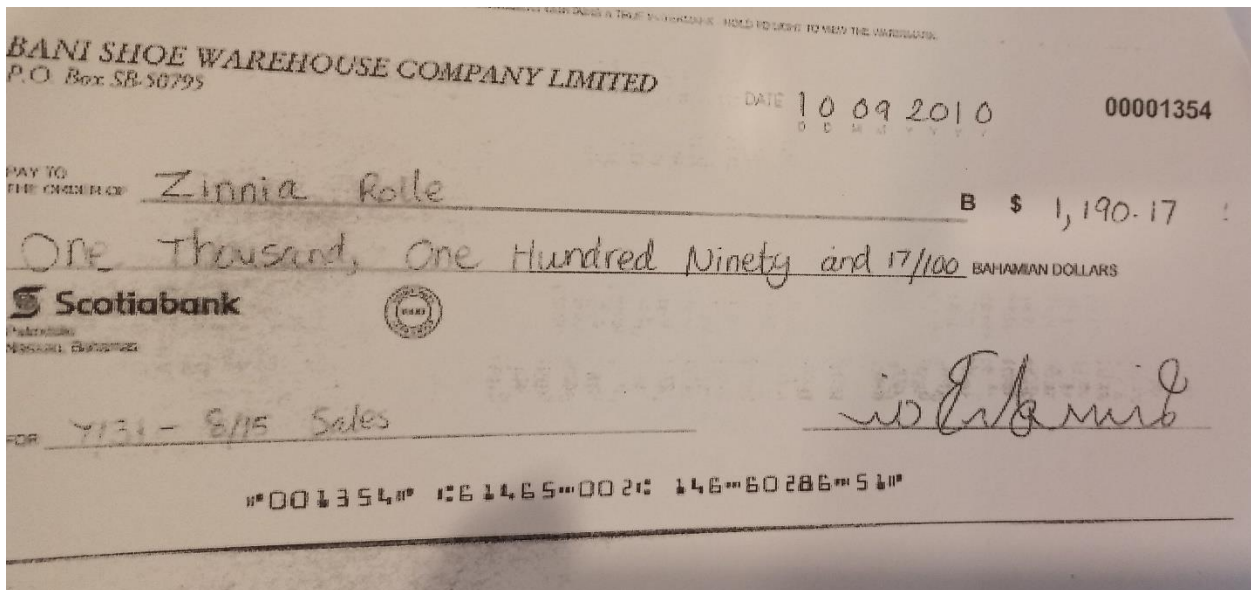
“62. (1) Where in any civil proceedings a statement contained in a document is proposed to be given in evidence by virtue of section 58, 60 or 61 it may, subject to any rules of court, be proved by the production of that document or (whether or not that document is still in existence) by the production of a copy of that document, or of the material part thereof, authenticated in such manner as the court may approve.”

17.I noted that notwithstanding Mr. Symonette’s allegation to be the penman on the three agreements which the Plaintiff produced in evidence, he is not

alleged to have ever signed cheques on behalf of the (2nd) Defendant. The (1st) Defendant Mr. Bain was the President and partial owner of the (2nd) Defendant's company and did have the authority to sign on behalf of Bani Shoe Warehouse.

18. Another document exhibited in evidence by the Plaintiff was a cheque in the amount of One Thousand One Hundred and Ninety Dollars and seventeen cents (\$1,190.17) allegedly paid to the Plaintiff by the First Defendant. I also took note of the signature on this document and found it to be identical to the signature on the three agreements before the Court, two of which have been displayed above.

Image c) Photo of cheque issued by 2nd Defendant to Plaintiff allegedly signed by the 1st Defendant dated September 10th, 2010



19. Having observed the signature of the three agreements before the Court alleged to have been penned by Mr. Symonette and having examined other documents alleged to have been signed by the 1st Defendant. Further having

Mr. Symonette attempt to replicate the signatures in the face of the Court, I have concluded that the signatures of the three agreements before the Court and the signature on the cheque issued to the Plaintiff by the 2nd Defendant were all signed by the 1st Defendant. The similarities between the signatures in my view are so exact the Latin maxim *res ipsa loquitur* (Latin: “the thing speaks for itself”) can be applied.

Final Analysis and Conclusion

20. As this is a civil trial the standard of proof is based on a balance of probabilities as opposed to the criminal standard of beyond a reasonable doubt. As it relates to the standard of proof in civil cases, in *Re B [2008] [2008] 3 WLR 1*, the House of Lords stated as follows,

[13] My Lords, I would invite your Lordships fully to approve these observations. I think that the time has come to say, once and for all, that there is only one civil standard of proof and that is proof that the fact in issue more probably occurred than not. I do not intend to disapprove any of the cases in what I have called the first category, but I agree with the observation of Lord Steyn in McCann's case that clarity would be greatly enhanced if the courts said simply that although the proceedings were civil, the nature of the particular issue involved made it appropriate to apply the criminal standard.

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 clearly 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 sealed 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.

22.It must further be noted that notwithstanding the allegations that the signature of the First Defendant was forged in relation to both the document labelled “Agreement” dated April 20th, 2010 and the document labelled “Agreement” dated April 23rd, 2010, the First Defendant did not produce any evidence of a police report being filed as it related to this alleged forgery. Section 348 of the Penal Code, Chapter 84 states as follows:

“348. Whoever defrauds any person by any false pretence shall be liable to imprisonment for five years.”

23.The action of forging the signature of the First Defendant allegedly done by Mr. Keno Symonette is a crime punishable by imprisonment for up to five (5) years. In my view the response by any reasonable right minded individual who was entered into an agreement without their knowledge for an amount in excess of Forty Thousand (\$40,000) Dollars would be to immediately report this action to the police. Due to the severity of this offence there is no limitation period and the First Defendant could have reported this matter to

the police the instant it was brought to his attention. The First Defendant did not do so and as far as I am aware has still not done so to date.

24.According to the evidence of Mr. Symonette, all three agreements were allegedly signed on the date Bani's Shoe Warehouse was destroyed by fire. According to media reports, the subject fire occurred on the morning of November 3rd, 2010 at approximately 4:40am. Mr. Symonette was given an opportunity to reproduce the signature of Mr. Bain that he alleged to have signed on three (3) separate documents during the middle of a fire. Notwithstanding being given an opportunity to refresh his memory as it relates to the signature of the First Defendant, Mr. Symonette in my view failed miserably at his attempt to reproduce the signature.

25.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. I am further of the view that I am unable to consider this allegation of fraud because it was not specifically pleaded as mandated by Order 18 Rule 8 Rules of the Supreme Court. I rejected the Defendants claim that the Plaintiff was nothing more than an overly ambitious elderly woman who was desperate for an investment and is now lying on him.

26.Clearly the Plaintiff was rather naive and trusting although she is a mature and sensible lady. She on the evidence initially accepted a "bare bones" (20 April, 2010) contractual agreement from Mr. Bain, which was later, fleshed out with the benefit of their lawyers (2nd agreement of the 24 April, 2010). As indicated earlier Mr. Lincoln Bain denied all of the above. I am satisfied that the facts

in issue more probably occurred than not and that the Plaintiff has satisfied the standard of proof required by law.

27.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.

28.Cost is awarded to the Plaintiff to be taxed if not agreed.

DATED this 6th day of December A.D., 2021.

The Honourable Madam Justice Mrs. Cheryl Grant-Thompson