

Background

- [2] In the year 2000 and for some time before and after that the appellant brought second hand goods in from the United States and sold them in Tonga. It seems that the respondent purchased goods from him from time to time. It is not disputed that on the 25th November 2000 the respondent purchased goods to give to his daughter for her wedding. The appellant says that the arrangement was that these goods would be paid for within three months and that the value of them was \$3,955. The respondent says that he gave the appellant somewhere between \$2,000. and \$3,000. in cash and arranged that his daughter would select goods to the value of the money provided. He also said that some goods were returned and exchanged for others. The Appellant did not deny that this may have happened.
- [3] The appellant called two women who were aged about 15 & 16 respectively in 2000 and were living with the appellant. Both witnesses initially said that they heard the respondent say he would pay for the goods within 3 months. One of them later altered her evidence and said that the statement was that he would finalise payment within 3 months. She also said that he made some payment towards the goods as he was leaving the house.
- [4] The appellant acknowledged that he took no action to recover the money until April 2002 when he wrote a letter of demand to the respondent. The respondent denies ever receiving such a letter. The respondent says that he heard nothing from the appellant until December 2001 when he visited the appellant to purchase some office equipment and was told he owed the appellant \$3,955. He says he immediately wrote a letter denying this and threw it in the appellant's face. The appellant denied both incidents.
- [5] The Appellant's lawyer Mr Kengike gave evidence and said he met the respondent on 14th November 2002 and was told by the respondent that he did not respond to Mr Kengike's letter

about the claim because the appellant was his relative and "he will contact with him and do not worry about your fee I will pay them".

- [6] The respondent denied such a meeting and making this statement. The appellant produced no records of the transaction. During his evidence he read from a diary which he said listed the goods and the money owing but did not produce that document. He now complains that the Judge did not ask for it but of course it was his obligation to produce it, not the Judge's to ask for it. The statement of claim was issued in November 2002 but the trial was not held until November 2007.

The judgment

- [7] In his judgment the Judge recorded the facts set out above and noted the absence of records and the time that had elapsed since the transaction took place. He said that he accepted that the appellant genuinely believed he was owed the money but held that given the lapse of time, the confusion between goods being returned and exchanged, and the absence of records he could not be satisfied on the balance of probabilities that the respondent owed the appellant \$3,955.

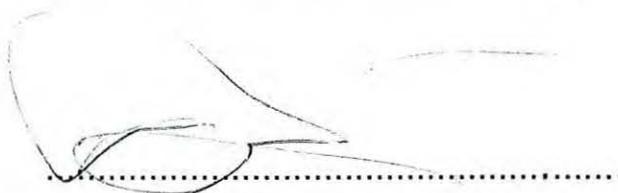
The arguments in this Court

- [8] Mr Kengike for the appellant filed a lengthy submission which, in summary, claims that the Judge was wrong not to accept the appellant's evidence. He submits that the Judge was wrong to say as he did at page 3 of his judgment that "The Plaintiff argues that money was paid by the defendant on the 24th November and goods were taken". The Judge later found as a fact that "it is not said how much money was handed over and it is not clear what it was for". The appellant agreed that money was handed over on the 25th November but he says it was for goods earlier purchased by the respondent. The Judge's comments seem to be correct.

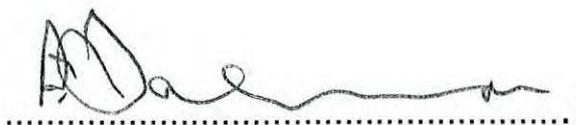
[9] In summary the submissions on behalf of the appellant are asking this Court to retry the case on matters of fact. It is not appropriate that we do so. The trial judge saw and heard the witnesses and was in a much better position than we are to decide whether or not the appellant had proved his case on the balance of probabilities. The judgment of the New Zealand Court of Appeal in *Rae v International Insurance Brokers* [1998] 3 NZ LR 190 at p.197 describes the correct approach:

"Appellants often wish to treat appeals as retrials on matters of fact. Counsel must, of course, be faithful to their instructions, but they have a duty to make it plain to their clients that the ambit of an appeal on fact is very narrow. Any tendency or wish to engage in a general factual retrial must be firmly resisted. This Court will not reverse a factual finding unless compelling grounds are shown for doing so."

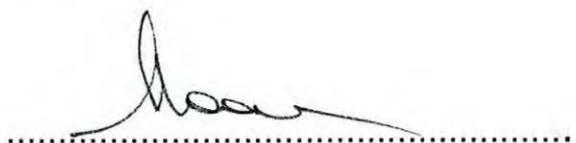
[10] No compelling grounds have been put forward in this case and the appeal must be dismissed. The Respondent is entitled to costs.



Burchett J



Salmon J



Moore J