

**IN THE HIGH COURT OF FIJI**  
**AT SUVA**  
**CIVIL JURISDICTION**

**Civil Action No:** HBA 10 of 2012

**BETWEEN** : Peter Melgaard

**Appellant**

**AND** : Rex Hollows

**Respondent**

**COUNSEL** : Appellant in person.  
Mr P Howard for Respondent.

**Date of Judgment** : 1 August 2013.

**JUDGMENT**

1. Peter Melgaard, the Appellant in this appeal, had filed action in the Magistrate Court claiming damages in a sum of \$48,496.00 from Rex Hollows, the Respondent, for breach of Agreement.
2. The Defendant by his notice of motion to strike out the plaintiff's claim stated that the plaintiff's action is a simple contract which shall not be brought after the expiration of six years from the date on which the alleged breach has occurred in terms of *Section 4(1)(a) of Limitation Act* and the Plaintiff's action was against a wrong person as per the Agreement and in fact this agreement was between Plaintiff and Roller Pacific Ltd.

3. The learned Magistrate upon hearing both the Appellant and Counsel for the Respondent and upon affidavits filed by both parties, dismissed the claim of the Appellant without costs.
4. The appeal lies from the Ruling of the learned Magistrate dated 29 December 2011 referring the dismissal of the appellant's claim.

### **Grounds of Appeal**

5. This appeal has been filed on the following elaborated grounds which provide the learned magistrate erred by;
  - ij Failing to give consideration and appropriate weight to evidence from the appellant and corroborated in the letter from Peter Malycha dated 25 October 2005 of ratification or adoption by the respondent of the original debt plus interest;*
  - ii] Failing to determine that a second or supplementary cause of action by the appellant/plaintiff against the respondent/defendant accrued within the meaning of s.(1)(a) of the Limitation Act [Cap 35] when the respondent promised to pay the appellant on 25 October 2005;*
  - iii] Determining that the limitation period runs from the initial agreement in 1999;*
  - iv] Failing to determine that the limitation period runs from 25 October 2005 when the respondent promised to honor the debt owing to the appellant;*
  - v] Determining that the Section 4(1)(a) of the Limitation Act [Cap 35] is a bar to the appellant/plaintiff's claim.*

*vi) The first to fifth grounds of appeal are interconnected to each other and take the issue with the ruling of the learned magistrate deciding the limitation as a bar to the Appellant's claim and failure to consider the letter of Peter Malycha dated 25 October 2005 as an acknowledgement of his debt plus interest which allegedly has the effect of extending the simple contract between the parties to 25 October 2005 and/or provides a second or supplementary cause of action on 25 October 2005.*

### **The Determination**

6. Section 4(1)(a) of the Limitation Act specifies that actions founded on simple contract or tort shall not be brought before a court after expiration of six years from the date of which the cause of action accrued.
7. It is clear from the affidavits filed by both parties and documents annexed thereto, that the agreement was entered into between parties in way back in 1999. This position was further corroborated by the Bank Statement submitted to court along with the affidavit in reply by the Appellant. The Appellant submitted Bank Statement to establish that he made a payment to Respondent after the agreement was executed between parties. Further, the Appellant in his Writ of Summons quantified the amount due to him from the date of breach of the agreement and it was in the year 2000. Even if the date the breach was to be considered as year 2000, the action of the Appellant is time barred in year 2006.
8. It is noted that the Statement of Claim was dated 18 April 2011 and the Plaintiff's action is time barred in terms of *Section 4(1)(a) of Limitation Act*.
9. The Appellant in his reply to the notice of motion of the Defendant to strike out, has taken up the position that six years should be counted or run from 25 October 2005 as there was an acknowledge of debt in 2005 by the Respondent in the presence of Mr. Peter J Malycha, confirmed by his undated letter issued to whom it may concern.
10. *Section 12(3) of the Limitation Act* though not specifically referred to, by the Appellant in the grounds of Appeal, states as follows:

***“Where any right of action has accrued to recover any debt or other liquidated pecuniary claim, or any claim to the personal estate of a deceased person or to any share or interest therein, and the person liable or accountable therefore acknowledges the claim or makes any payment in respect thereof, the right shall be deemed to have accrued on and not before the date of the acknowledgement or the last payment.”***

Section 13(1) of the Limitation Act states as follows:

***“Every acknowledgment referred to in section 12 shall be in writing and signed by the person making the acknowledgment.”***

11. In careful consideration of both Sections referred above, it is clear that debt has to be acknowledged by the Respondent/Defendant Mr. Hollows and needs to be in writing. Accordingly the letter issued by Mr. Peter P Malycha cannot be considered as an acknowledgement of the Respondent to count the six year period from the year 2005.
12. In the case of ***Bush v Sterens*** [1963] 1QB, at 6; [1962] 1All ER 413 at 415, considered provisions of the limitation Act and stated as follows:-

*“It seems to me as a matter of syntax that the right which shall be deemed to have accrued is a right of action to recover any debt or any liquidated pecuniary claim. The subsection does not change the nature of the right; it provides that, in the specific circumstances of an acknowledgment or payment, the right shall be given a notional birthday and on that day, like the phoenix of fable, it rises again in renewed youth – and also like the phoenix, it is still itself.”*
13. It is abundantly clear from the above authority that the commencement of the time period from year 2005 can only be considered only if the acknowledgment of debt by Defendant creditor.
14. The grounds of appeal have no merits and dismiss the same with costs to the Respondent, which I intend to summarily assess.

**Final Orders**

15. The appeal is dismissed and the respondent is entitled to costs in the sum of \$750.00.
16. Orders accordingly.

**Susantha N Balapatabendi**  
**JUDGE**