In The Supreme Court of Bermuda

CIVIL JURISDICTION

2025 No: 89

BETWEEN:

TRELANE LTD

Plaintiff

And

EDWARD KARL FURTAK

Defendant

RULING

Dates of Hearing:	Monday 13 January 2027
Date of Judgment:	Tuesday 27 January 2027
Plaintiff:	Mr. Kyle Masters and Ms. Siobhan Boys (Carey Olsen Bermuda Limited)
Defendant:	In Person

Strike Out Application under RSC Order 18/9(1) and in exercise of the Court's Inherent Jurisdiction - Application for Summary Judgment under RSC Order 14 – Whether there is a fair probability of a bona fide defence of Promissory Estoppel / Waiver by Estoppel / Equitable Forbearance

RULING of Shade Subair Williams J

Introduction

1. This Court is concerned with the Plaintiff's application, brought by way of a summons filed on 15 July 2025 and dated 29 July 2025, to strike out the Defendant's Defence dated 3 July 2025 and later filed on 7 July 2025. Conjunctively or alternatively, the Plaintiff seeks summary judgment. On both applications, judgment is sought in substantially the same terms as prayed in the Specially Endorsed Writ of Summons (the "Writ"):

   (i) The principal sum of US$382,751.19 (Outstanding Principal Sum);

   (ii) Interest in the amount of US$91,860.32, being interest calculated at the agreed rate of 1.5% per calendar month on the Outstanding Principal Sum (Agreed Rate) from 1 March 2024 to 30 June 2025.

   (iii) Further interest at the Agreed Rate from 1 July 2025 to the date of payment;

   (iv) Liquidated damages in the amount of $50,000;

   (v) Costs

2. The Plaintiff's summons is supported by the Third Affidavit of Mr. David Kessaram, of law firm Cox Hallet Wilkinson Limited ("CHW"). That affidavit was sworn and filed on 15 July 2025. Mr. Kessaram's Second Affidavit, sworn on 18 June 2025 and filed on 21 June 2025, was made in support of the Plaintiff's earlier application to set aside the Defendant's Memorandum of Appearance. The first affidavit filed by Mr. Kessaram in these proceedings was sworn and filed on 6 May 2025. That affidavit was filed in support of the Plaintiff's application for an Order for substituted service.

3. Having received the oral and written submissions of both Mr. Masters for the Plaintiff and Mr. Furtak who appeared as a litigant in person, I reserved my Ruling which I now provide together with the reasons set out below.

The Pleaded Facts:

4. A Specially Endorsed Writ of Summons (the "Writ") was filed on 11 April 2025. On the facts pleaded in the Statement of Claim, the Plaintiff is a corporate entity organized under the laws of the British Virgin Islands. It carries on business as an investment holding company. The Defendant is said to be a business man.

5. The Plaintiff loaned monies to the Defendant. By a promissory note (the "promissory note") dated 15 January 2024, the Defendant agreed to repay the Plaintiff a principal sum of $497,487.86 in instalments as follows:

   A. US$114,428.94 on 31 January 2024;
   B. US$283,263.33 on 29 February 2024;
   C. US$99,487.86 on 31 March 2024

6. The promissory note further provides that in the event of default on any of the amounts specified above, the entire principal sum or the outstanding balance thereof, together with liquidated damages in the sum of US$50,000.00, shall become immediately payable. The promissory note also expressly states that it shall be governed by Bermuda law and that any outstanding sums shall be recoverable by proceedings issued under the exclusive jurisdiction of a Bermuda Court.

7. It is stated in the Statement of Claim that on 20 March 2024 the sum of US$382,751.19 was still owing under the agreement and promissory note and that on that same date the parties entered into a written forbearance agreement (the "first forbearance agreement"). A copy of the first forbearance agreement was exhibited to Mr Kessaram's 6 May 2025 affidavit.

8. In the first forbearance agreement the Defendant agreed to pay the Plaintiff the outstanding principal sum of US $382,751.19 in two installments with interest at the rate of 1.5% per calendar month calculated from 29 February 2024 and the further sum of US$5,000 in liquidated damages on the new dates specified in the first forbearance agreement. In exchange, the Defendant would be released from his obligation to pay the sum of US$50,000 in liquidated damages. At paragraph [1] of the first forbearance agreement, it provides, in its relevant parts:

   "*Trelane will forbear enforcing the payment obligations of EKF … PROVIDED THAT each of the payments below are made in whole and on time:*
   a. ..
   b. …
   c. *The principal amount due under the promissory note dated 15 January 2024 (US$382,751.19) in to equal instalments of US$191,375.60 each on 31 May 2024 and 30 June 2024 with interest on each instalment at the rate of 1.5% per calendar month calculated from 29 February 2024 to the date of payment, namely, the sum of US$8,611.89 on 31 May 2024 and the sum of US$11,482.52 on 30 June 2024; plus the amount of US$5,000 in liquidated damages on 30 June 2024*."

9. The Plaintiff's case is that on 3 May 2024 it entered into a second written forbearance agreement (the "second forbearance agreement") with the Defendant. A copy of the second

forbearance agreement was also exhibited to Mr. Kessaram's 6 May 2025 affidavit. By the second forbearance agreement, the Defendant agreed to pay the principal sum outstanding (US$382,751.19) with accrued interest at the agreed rate of 1.5% (per calendar month) on the dates set out in the first forbearance agreement "*without prejudice to the Plaintiff's rights under the 15th January 2024 promissory note and the 20th March 2024 forbearance agreement*" (para [6] of the Writ).

10. The Plaintiff's case is that the Defendant failed to meet his obligations under the 3 May 2024 agreement. Instead, the Defendant sought the further indulgence of the Plaintiff for the repayment of the outstanding sums. The Plaintiff obliged the Defendant to the extent set out in email correspondence between the parties between 16 July 2024 and 16 April 2025.

11. The Defendant admits his indebtedness but relies on the doctrines of estoppel, waiver and variation to support his defence. At paras [1.2]-[3.4] of his Defence, Mr. Furtak states:

"…
1.2 The Defendants [Defendant] *aver*[s] *that the Plaintiff is not entitled to the relief claimed, whether by way of default judgment or otherwise, due to the subsequent conduct of the parties and the representations made by the Plaintiff following the execution of the Forbearance Agreement dated March 2024 (the "FBA").*
…
2.1. The Defendants [Defendant] *admit*[s] *the execution of the FBA and the indebtedness described therein as of that date.*

2.2. The FBA provided that the Plaintiff would forbear from enforcing repayment obligations provided certain scheduled payments were made, and set out the consequences of default in clause 2.
…
3.1 Since execution of the FBS, the Plaintiff and the Defendants [Defendant] *engaged in frequent telephone and email communications, during which the Plaintiff represented that it would not take enforcement action pending the refinancing efforts of the Defendants* [Defendant].

3.2. In reliance on these ongoing assurances, the Defendants [Defendant] *continued their* [his] *efforts to refinance and restructure their repayment proposals to accommodate the Plaintiff's demand for additional default interest as consideration for delayed enforcement.*

3.3 The Plaintiff repeatedly indicated that immediate enforcement would not be pursued, and that repayment extensions were acceptable, conditional only on the continued accrual of interest.

3.4. *The Defendants* [Defendant] *reasonably relied on these representations and refrained from seeking alternative debt restructuring options or emergency legal protection*."

12. Based on these pleaded facts, the Defendant asserts an entitlement under the equitable doctrines of estoppel and waiver. Alternatively, he asserts a variation of contract. His pleaded case is that the Plaintiff waived the right to strict compliance with repayment dates set out in the first forbearance agreement, and that it varied the terms of the said agreement. Without any reference to the second forbearance agreement, the Defendant's case is that the Plaintiff is accordingly estopped from asserting a right to immediate enforcement.

13. At paragraph [4.3] of the Defence, Mr. Furtak states that the Plaintiff's commencement of legal proceedings is sudden and that it contradicts the Plaintiff's prior representations, thereby constituting an abuse of process. (Notwithstanding, the Defendant did not seek to strike out the Plaintiff's claim. It is apparent that the Defence was pleaded in response not only to the Writ but also to the Plaintiff's earlier application for the setting aside of the Memorandum of Appearance for judgment in default.)

The Law on Strike-Out

14. The Plaintiff says the Defence should be struck out pursuant to the Court's inherent jurisdiction or pursuant to the Court's statutory powers under RSC Order 18/9 (1)(d) which provides:

18/19 Striking out pleading and indorsements
19 (1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that—

(a) it discloses no reasonable cause of action or defence, as the case may be; or
(b) it is scandalous, frivolous or vexatious; or
(c) it may prejudice, embarrass or delay the fair trial of the action; or
(d) it is otherwise an abuse of the process of the court;
and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

(2) No evidence shall be admissible on an application under paragraph (1)(a).

15. The Plaintiff argues that the Defence does not disclose a reasonable defence as indebtedness is admitted without material qualification. Mr. Masters submitted at paragraph [13] of his written submissions; "*The Court should exercise its case management powers to save the time and*

costs of what is bound to be a hopeless endeavour on the part of the Defendant to avoid payment in the circumstances."

16. Citing my earlier ruling in *David Lee Tucker v Hamilton Properties Ltd* [2017] Bda LR 136 Mr. Masters submitted that the Court's determination of a strike out application is a component of active case management. Mr. Masters correctly submitted that the Court is required to act in accordance with the Overriding Objective and in doing so it is required to identify the issues to be tried at an early stage and summarily dispose of others to avoid unnecessary expense and to ensure that matters are dealt with expeditiously and fairly.

17. RSC Order 18/19(2) does not permit the Court to look beyond the pleadings where the strike out application is grounded under RSC Order 18/19(1)(a). The test is that "*it discloses no reasonable cause of action or defence, as the case may be*". That means that the party bringing the application for the strike out of pleadings may not rely on affidavit evidence or any other extraneous factors to strike out the claim or the defence. The exercise for the Court entails nothing more or less than an examination of the pleading itself on its face. So, the Court will review the pleaded document, without regard to the merits of the claim or the defence or its prospects of success, so long as the relevant pleading discloses a reasonable claim or defence. The strength of the evidence which would later be adduced at trial is a matter for the trial judge.

18. The remaining grounds for striking out the Defence on a statutory footing are under RSC Order 18/19(1)(b)-(d). The Court's powers in exercise of its inherent jurisdiction allow for the Defence to be struck out as an abuse of process. In a broad sense, the only real ground for striking out a case is on the grounds of abuse of process. If the pleading discloses no reasonable cause of action or defence, if it is scandalous, frivolous or vexatious; or if it may prejudice, embarrass or delay the fair trial of the action, then, in the end, what is really being said, is that the pleading gives way to an abuse of process.

19. In the more recent decision handed down in *David Lee Tucker v Hamilton Properties Ltd* [2025] SC (Bda) 133 civ. (22 December 2025) I stated:

"*The Court's inherent jurisdiction not only empowers it but also obliges it to safeguard against conduct which would otherwise malign the overall fairness and integrity of its proceedings. The Court acts as its own gatekeeper and is expected to expel from its arena any abuse which, if left undisturbed, would plunge its repute deep into the scrutiny of the reasonable-minded observer*.

20. I also referred to Lord Diplock's explanation of the Court's inherent jurisdiction as it relates to the duty to eliminate abuses of the Court processes:

"In *Hunter v Chief Constable* [1982] AC 529 at para [536 C] Lord Diplock put it this way:

"*It concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people. The circumstances in which abuse of process can arise are very varied…*""

Decision on the Strike-Out Application

21. In these proceedings, the Plaintiff fails under RSC Order 18/19(1)(a) as the Defence, on the face of the pleading, discloses a reasonable defence. While Mr. Furtak's indebtedness is admitted, the Defence statement also asserts an equitable entitlement recognized under the law and which would, if successful, subvert the claim against him.

22. The Plaintiff, however, does succeed under RSC Order 18/19(1)(b)-(d) as there is a proper basis for finding that the Defence is scandalous, frivolous and vexatious having regard to all of the evidence before this Court. I also find that allowing the Defence to stand would prejudice, embarrass and delay the fair trial of the action. It is, otherwise, an abuse of process.

23. My reasons for finding that the Defence statement pleaded is an abuse of process are the principally the same as the reasons I rely on in granting summary judgment further below.

The Law on Summary Judgment

24. The Plaintiff seeks an Order for summary judgment pursuant to RSC Order 14. RSC Order 14/1(1) entitled a plaintiff to obtain summary judgment in circumstances where the defendant has entered an appearance but where that defendant has no defence to the writ or a particular part of the claim, albeit that the Defendant may have a valid defence as to the amount of damages claimed.

25. RSC Order 14/1(1) provides:

"***14/1 Application by plaintiff for summary judgment***
Where in an action to which this rule applies a statement of claim has been served on a defendant and that defendant has entered an appearance in the action, the plaintiff may, on the ground that the defendant has no defence to a claim included in the writ, or to a particular part of such a claim, or has no defence to such a claim or part except as to the amount of any damages claimed, apply to the Court for judgment against that defendant."

26. Subsection (2) outlines the application of Rule 1. It states that the Rules applies to every action begun by writ other than a claim for libel, slander, malicious prosecution or false imprisonment, and other than a claim based on an allegation of fraud or an Admiralty action *in rem*. Equally, the Court will not grant an order for summary judgment pursuant to Order 14 where the action is for specific performance. The summary judgment powers of the Court for an action of that kind are contained in RSC Order 86.

27. Rule 2 requires an application for summary judgment to be made by summons and supported by an affidavit verifying the relevant facts on which the claim is based. The deponent must also state his or her belief that there is no defence to that claim or that part of the claim, except as to the amount of any damages claimed. Subsection (3) requires the application to be served on the defendant no less than ten (10) clear days before the return date on the summons.

28. Rule 3 empowers the Court to enter judgment for a plaintiff and to stay judgment until after the trial of any counterclaim. Rule 3 provides:

> "***14/3 Judgment for plaintiff***
> *3 (1) Unless on the hearing of an application under rule 1 either the Court dismisses the application or the defendant satisfies the Court with respect to the claim, or the part of a claim, to which the application relates that there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial of that claim or part, the Court may give such judgment for the plaintiff against that defendant on that claim or part as may be just having regard to the nature of the remedy or relief claimed.*
>
> *(2) The Court may by order and subject to such conditions, if any, as may be just, stay execution of any judgment given against a defendant under this rule until after the trial of any counterclaim made or raised by the defendant in the action.*"

29. In the commentary section of the 1999 White Book at para [14/4/9] it is said that the power to give summary judgment under Order 14 is intended only to apply to cases where there is no reasonable doubt that a plaintiff is entitled to judgment. In such cases, as pointed out by the esteemed authors citing *Jones v Stone* [1894] A.C. 122, it follows that it would be inexpedient to allow a defendant to defend for mere purposes of delay. Conversely, a defendant who has shown a fair probability of a *bona fide* defence is a defendant who has established an entitlement to leave to defend.

30. Order 14, similar to other interlocutory disposal powers, is to be read as an illustrative extension of the Overriding Objective. Order 1A Rule 2(a) expressly provides that the Court must seek to give effect to the Overriding Objective when it exercises any other powers conferred on the Court by the Rules of the Supreme Court. So, the Court's powers to grant

summary judgment are not solely derived from Order 14, they are as much governed by the Overriding Objective.

31. Sparing the parties from the expense of a trial where the claim cannot be defended is a top-ranking example of what is meant by dealing with the case justly, because that is both expeditious and fair as contemplated by Rule 1(2)(d).

32. Rule 4 imposes a duty on the Court to actively manage cases. The relevance of that Rule to the Court's power to grant summary judgment under RSC Order 14 was identified by Kawaley AJ (now President of the Court of Appeal for Bermuda) in *Wong, Wen-Young et al v Grand View Private Trust Company Ltd* BM 2019 SC 88. While this decision was not cited, I am mindful that the Defendant is unrepresented. So, the reference to this caselaw is intended to be informative on uncontroversial and well-known legal principles. In *Wong* Kawaley AJ's attention was specifically drawn to the Court's duty to actively manage cases under Rule 4. Active case management is defined under Rule 4(2) and paragraphs (b) and (c) are of particular importance to RSC Order 14. Those provisions speak to active case management including the duty to identify the issues at an early stage and to promptly decide which issues require full investigation and trial and which issues ought to be disposed of summarily.

33. For completion, RSC Order 1A provides:

> *1A/1 The Overriding Objective*
> *(1) These Rules shall have the overriding objective of enabling the court to deal with cases justly.*
> *(2) Dealing with a case justly includes, so far as is practicable-*
> *(a) ensuring that the parties are on equal footing;*
> *(b) saving expense;*
> *(c) dealing with the case in ways which are proportionate-*
>
> *(i) to the amount of money involved;*
> *(ii) to the importance of the case;*
> *(iii)to the complexity of the issues; and*
> *(iv)to the financial position of each party;*
>
> *(d) ensuring that it is dealt with expeditiously and fairly; and*
> *(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases*
>
> *1A/2 Application by the Court of the Overriding Objective*
> *2 The court must seek to give effect to the overriding objective when it-*

(a) exercises any power given to it by the Rules; or
(b) interprets any rule.

1A/3 Duties of the Parties
3 The parties are required to help the court further the overriding objective.

1A/4 Court's Duty to Manage Cases
4 (1) the court must further the overriding objective by actively managing cases.
(2) Active case management includes-

a) encouraging the parties to co-operate with each other in the conduct of the proceedings;
b) identifying the issues at an early stage;
c) deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others;
d) deciding the order in which issues are to be resolved;
e) encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure;
f) helping the parties to settle the whole or part of the case;
g) fixing timetables or otherwise controlling the progress of the case;
h) considering whether the likely benefits of taking a particular step justify the cost of taking it;
i) dealing with as many aspects of the case as it can on the same occasion;
j) dealing with the case without the parties needing to attend at court;
k) making use of technology; and
l) giving directions to ensure that the trial of a case proceeds quickly and efficiently

34. Mr. Masters cited *Mehta v Viking River Cruises Ltd* [2024] Bda L.R. 99 where Hellman J stated at para [18]:

"*18. It has been said that leave to defend should be given where a difficult question of law is raised. See Campbell v. Vickers [2002] Bda L.R. 3, SC, per Meerabux, J. at page 3, citing Electric Corporation v. Thompson-Houston 10 T.L.R. 103. On the other hand, there will be cases where the Court has heard full argument on the question and where the facts necessary to resolve it are not in dispute. In such cases, if there is no reasonable doubt that the question should be resolved in favour of the plaintiff, who would in that event be entitled to judgment, then, absent a compelling reason to the contrary, the Court should in my judgment grasp the nettle and decide the question at the summary judgment stage*."

35. In *Wong* Kawaley AJ also quoted from Moore-Bick L.J.'s decision in *ICI Chemicals & Polymers Ltd. v. TTE Training Ltd.* [2007] E.W.C.A. Civ 725 as follows:

"*12. In my view the judge should have followed his original instinct. It is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better.*

13. In cases where the issue is one of construction the respondent often seeks to persuade the court that the case should go to trial by arguing that in due course evidence may be called that will shed a different light on the document in question. In my view, however, any such submission should be approached with a degree of caution. It is the responsibility of the respondent to an application of this kind to place before the court, in the form of a witness statement, whatever evidence he thinks necessary to support his case. Where it is said that the circumstances in which a document came to be written are relevant to its construction, particularly if they are said to point to a construction which is not that which the document would naturally bear, the respondent must provide sufficient evidence of those circumstances to enable the court to see that if the relevant facts are established at trial they may have a bearing on the outcome.

14. ... it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction."

36. The summary judgment scheme is not only parented by the Overriding Objective; it is ultimately governed by constitutional principles of trial fairness. Section 6(8) of the Bermuda Constitution guarantees the right to be given a fair trial within a reasonable time where a Court is tasked to determine the existence or extent of any civil right or obligation. In the constitutional context, the question for the judge becomes whether the trial of the issues by summary judgment protects against the constitutional unfairness of allowing the proceedings to be protracted through to trial in circumstances where to do so, the plaintiff would be deprived of a right to have the claim decided within a reasonable timeframe.

37. Where, at the interlocutory stage of the proceedings, it is painstakingly clear, meaning beyond reasonable doubt, that the Plaintiff will necessarily succeed at trial in respect of a claim for a liquidated sum, the right to a fair trial within a reasonable time is marked by the stage at which the Court is called upon to grant summary judgment. On the other hand, the Court will also have to grapple with whether the Defendant's constitutional right to a fair trial is endangered. The answer is in the affirmative where there is any established probability of a *bona fide*

defence with some prospect of success, otherwise put: where there is any reasonable uncertainty as to the Plaintiff's entitlement to judgment.

The Law on Promissory Estoppel / Waiver by Estoppel / Equitable Forbearance

38. Whether it is referred to as promissory estoppel or waiver by estoppel or even equitable forbearance, the principle refers to an equitable doctrine within contract law which bars one party (the "promisor") from reneging on a promise of forbearance made to the other contracting party (the "promisee") in respect of a term of the contractual agreement which the promisee was originally obliged to perform.

39. A summary statement of the law on promissory estoppel is provided by the authors of Chitty on Contracts (33rd Edition) at Chapter 22 at [22-040], [22-042] and [22-044] as follows:

"*22–040 Where one party voluntarily accedes to a request by the other that he should forbear to insist on the mode of performance fixed by the contract, the court may hold that he has waived his right to require that the contract be performed in this respect according to its original tenor. Waiver (in the sense of "waiver by estoppel" rather than "waiver by election") may also be held to have occurred if, without any request, one party represents to the other that he will forbear to enforce or rely on a term of the contract to be performed or observed by the other party, and the other party acts in reliance on that representation*.

…

22–042 The party who forbears will be bound by the waiver and cannot set up the original terms of the agreement. If, by words or conduct, he has agreed or led the other party to believe that he will accept performance at a later date than or in a different manner from that provided in the contract, he will not be able to refuse that performance when tendered. However, in cases of postponement of performance, if the period of postponement is specified in the waiver, then, if time was originally of the essence, it will remain so in respect of the new date. If the period of postponement is not specified in the waiver, the party forbearing is entitled, upon reasonable notice, to impose a new time-limit, which may then become of the essence of the contract. Similarly, in other cases of forbearance, he may be entitled, upon reasonable notice, to require the other party to comply with the original mode of performance, unless in the meantime circumstances have so changed as to render it impossible or inequitable so to do.

…

…

22–044 A waiver is also distinguishable from a variation of a contract in that there is no consideration for the forbearance moving from the party to whom it is given. It may therefore be more satisfactory to regard this form of waiver, that is "waiver by estoppel", as analogous to, or even identical with, equitable forbearance or "promissory" estoppel. Although consideration need not be proved, certain other requirements must be satisfied for such an estoppel to be effective: first, it must be clear and unequivocal; secondly, the other party must have altered his position in reliance on it, or at least acted on it."

40. While each case will invariably turn on its particular facts, in lieu the usual requirement for the passing of consideration, the party who asserts the entitlement to equitable forbearance must establish that:

(i) The promisor made a clear and unequivocal representation that the promisor's contractual rights will not be enforced or will be suspended;
(ii) The promisor intended for the promisee to rely on that clear and unequivocal representation and
(iii) He/she/it, as the promisee, altered his/her/its position in reliance on the clear and unequivocal representation made and did so to his/her/its detriment

41. Mr. Masters assisted this Court in citing the decision of Akenhead J sitting in the English High Court in *ADS Aerospace Limited v EMS Global Tracking Limited* [2012] EWHC 2310 (TCC). At paras [145] and [146] of the judgment, it provides:

"*Finally, the essential elements of promissory estoppel (sometimes known as equitable forbearance) are summarised by Wilken and Ghaly at Paragraphs 8.03 and 8.04:*

"There are four [elements]. They are well established. First, one party to a contract or other legal relationship ('the promisor') makes a clear and unequivocal representation to the other ('the promisee'); that representation being intended to affect the legal relations between them. Second, the representation is that the promisor's legal rights under the contract or relationship will not be enforced or will be suspended. Third, the promisee, to the knowledge of the promisor, in reliance on the representation alters its position to its detriment. Fourth, the promisor now seeks to withdraw from that representation.

Once these elements are made out, the doctrine will operate to ensure that the promisee is not left, as a result of its change of position, in a worse position than before the representation was made. There is, therefore, considerable remedial flexibility dependent on the way in which the promisee has changed its position in reliance on the representation. Thus, if it is possible to restore the promisee to its original position and reverse the detriment on reasonable notice, the doctrine is suspensory of the promisor's rights and the promisor will be permitted to resile from the representation on reasonable notice. If, however, that is not possible or it would be highly detrimental or inequitable so to do, even after notice, the doctrine may operate as a permanent bar on the withdrawal of the representation."

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Equitable forbearance is a defensive doctrine that cannot be used to create new obligations: its ambit is restricted to promises to forgo existing rights and does not extend to promises to create new ones, so that it can be used "as a shield but not a sword". This principle was first articulated in Combe v Combe [1951] 2 KB 215, where the court emphasised that to allow equitable forbearance to create rights would undermine established contract law principles by enabling promises unsupported by consideration to be enforced. It was in this case that Lord Denning explained and perhaps qualified his decision in Central London Property Trust Ltd v High Trees House Ltd, 1947 KB 130, saying that "the principle never stands alone as giving a cause of action in itself" and that "it can never do away with the necessity of consideration when there is an essential part of the cause of action." While it has been said that "swords with a little ingenuity can be beaten into shields" (see Brikom Investments v Seaford [1981] 1 WLR 863) the principle has frequently and more recently been approved (see for instance BP v Aon [2006] EWHC 424 at 268ff).

The Relevant Evidence on the Application for Summary Judgment

42. On the facts, Mr. Furtak stated in his Defence at para [3.1]: *Since execution of the FBS, the Plaintiff and the Defendants* [Defendant] *engaged in frequent telephone and email communications, during which the Plaintiff represented that it would not take enforcement action pending the refinancing efforts of the Defendants* [Defendant].

43. Referring to this passage, Mr. Kessaram stated at paras [6]-[7] of his Third Affidavit:

"*The Defendant pleads that the representations were made in "frequent telephone and email communications" but does not particularize the allegation by giving dates and times when the representations were allegedly made. He does not state what was written in the emails he relies upon or what was said in the telephone conversations which is* [sic] *alleged to constitute the relevant representations.*

It is the Plaintiff's case that no such representations were made whether in emails or in telephone conversations."

44. Under the narrative appearing at paras [9]-[10] of Mr. Kessaram's Third Affidavit he produced copies of email communications between him and Mr. Furtak. Mr. Kessaram states:

"*The Defendant also refers to emails and telephone calls and relies upon representations allegedly made by the Plaintiff in these communications as the basis of his defence. I produce and exhibit hereto marked DRK-3 copies of emails passing between myself (acting on behalf of the Plaintiff) and the Defendant in the period from 13th January 2025 to 16 April 2025 (the*

latter date is shortly after the Specially Endorsed Writ of Summons was issued). In these e-mails references are made to telephone conversations.

These e-mails show that there was no representation made to the Defendant either in the e-mails themselves or (by inference therefrom) in any phone calls made between me and the Defendant as alleged by the Plaintiff."

45. Mr. Masters highlighted some of the 43 email messages which were produced under Mr. Kessaram's Third Affidavit. Bearing in mind that it is never disputed that there was a second forbearance agreement which was entered on 3 May 2024, Mr. Kessaram wrote to Mr. Furtak on 13 January 2025 as follows:

"*Edward*
Trelane's real interest is in knowing when its debt is going to be repaid. Can you please advise on this very pressing issue. An email is all that is needed.
I am available to speak at 2:30pm Bermuda time. But repayment in the immediate future is all it will be interested in hearing about.
Regards
David"

46. After a few email exchanges between the parties about scheduling, Mr. Kessaram further wrote to Mr. Furtak on 29 January 2025 as follows:

"Dear *Edward*
Please confirm that (as promised) you will be making a payment of the amount of interest due on the outstanding debt as at 31st December 2024 ($57,412.70).
Kind Regards
David"

47. On 3 February 2025 Mr. Furtak replied with an apologetic explanation for his delay in reply and by way of assurance, he stated; "*I will be attending to this payment as a matter of priority*."
48. On 7 February 2025 Mr. Kessaram wrote:

"Dear *Edward*
Please see attached which will be filed soon if something is not done about this debt. It has been long enough.
Regards
David"

49. The following Monday on 10 February 2025 Mr. Furtak wrote:

"*Good morning David*
My closing on the property here in Florida is set for this week. These are the proceeds from which I will be sending the first payment to Trelane.
My apologies for the unavoidable delay but things are indeed on track now.
David, please do not hesitate to call me on my Florida mobile…before taking any precipitous action.
Kind Regards Edward"

50. On 17 February 2025, Mr. Kessaram emailed Mr. Furtak asking about payment, stating that the Plaintiff was expecting payment the previous week. It is evident that Mr. Kessaram and Mr. Furtak subsequently spoke by telephone as a further email was sent to Mr. Furtak by Mr. Kessaram on 20 February 2025 stating:

"*Please confirm payment will be made tomorrow of the interest on the principal amount of the debt as promised on our recent telephone call. I calculate the payment (up to 31st January 2025) to be ($63,153.95).*"

51. On 21 February 2025 Mr. Furtak sent Mr. Kessaram an email reply stating:

"*Thank you David*
I mentioned I am taking matters into my own hands regarding the liquidity required. That said, I am still reliant on other parties to some extent, though more traditional and dependable parties.
In order to close the first liquidity as agreed, I needed approval of a mortgage on our property. I had expected that on Monday/Tuesday but only received it late in the day (4:52pm) yesterday…
With that now completed, I am working today with the US lender who will provide the required bride funding. Sorry for the long explanation but I want to be 100% transparent with you on the progress.
I will have a further update this afternoon and am available any time today to discuss on a call should you have any questions."

52. On 27 February 2025 Mr. Kessaram requested an update on the payment of the debt. On 3 March 2025 Mr. Furtak replied stating that he was heading to Toronto that morning "*to support the appraisal of the property finance closing*." He also stated that he would have "*an update on the closing date*" by the following day.

53. By Mr. Kessaram's 17 March 2025 email, it is beyond plain that he was frustrated by Mr. Furtak's ongoing assurances in the absence of any repayments. Mr. Kessaram wrote:

"*Edward*
I'm not falling for these excuses again. I asked for a good faith payment in an amount that a successful businessman would have no trouble paying and got nothing. I've been a fool thinking you were sincere. Not this time.
David"

54. In response Mr. Furtak wrote:

"*Dear David*
Respectfully, you knew that I was making this payment from closing. The closing is happening and the payment will be made.
I hope that you will reconsider.
Edward"

55. On 24 March 2025 Mr. Furtak informed Mr. Kessaram that the "*transaction finally closed*" and stated that he would provide a further update. In a same day reply, Mr. Kessaram wrote, in relevant part; "*Please keep me updated with developments. Please confirm also that you will be retiring the entire debt, interest and damages*."

56. Between 28 March and 3 April 2025 Mr. Kessaram requested further updates from Mr. Furtak and stated that he had instructions to file legal proceedings the following day. On 3 April Mr. Furtak asked for Mr. Kessaram to permit him to "*make the interest payment as agreed and then follow up with the balance from the closings of our offering as we agreed on our call*." Mr Furtak stated in the email:

"*…We agreed a minimum of $50,000 per month. However, I believe it will be retired in full from the first 2-3 monthly closings. I am only a week late on the initial payment and that has been largely due to…*
Can we please have a call first thing Friday before you take any action? I assure you I am dealing with this on an urgent basis.
…"

57. On 4 April 2025 Mr. Kessaram replied:

"*US$74,636.51 today. That is the interest due up to 31st March 2025. We can talk about the rest once that is paid*."

58. On 7 April 2025 Mr. Furtak replied "*Thank you David*" to which Mr. Kessaram responded:

"*Ed*
I am not sure what you are thanking me for. No money was received on Friday. So the writ is being filed today. If the total amount owed plus $1000 (in accordance with the Rules of the Supreme Court 1985…) is paid within 14 days of service of the writ, the action will be stayed. If not, I will expect to receive your defence. The writ will be served at Wakefield Quin in accordance with the Forbearance Agreement dated 20th March 2024, Para. 5.
David"

59. On the same day, Mr. Furtak wrote:

"*Good morning, David*
I was thanking you for agreeing to accept the interest payment and to working with me to match the repayment of the principal from our monthly closings.
Could I ask that you postpone any filing with the court until Thursday at 5pm?
Kind regards
Edward"

60. Again, on the same day, Mr. Kessaram replied:

"*Edward*
Trelane never agreed to payment of just interest. It sought an expression of good faith by the interest payment as a precursor to negotiating a payment plan. The good faith payment was never made. In light of the history of broken promises, Trelane is going ahead with the filing today.
David"

61. One might reasonably anticipate that the Writ was filed that day on 7 April. However, in a further 7 April 2025 email, Mr. Kessaram wrote to Mr Furtak providing real insight on the effect of their earlier telephone conversation that morning. On 7 April Mr. Kessaram wrote:

"*Ed*
Further to our telecon this morning, Trelane will delay filing its writ until 5:00pm Thursday, 10 April 2025 on the strength of your promise that the interest calculated up to 31st March 2025 i.e., US$74,636.51 will be paid before then as a goodwill gesture in anticipation of agreement being reached on a repayment schedule of the remainder of the debt, further interest and damages.
David"

62. On Thursday 10 April 2025 Mr. Furtak sent an email to Mr. Kessaram stating that he tried to reach Mr. Kessaram by telephone and that he was calling with an interest payment update. In a further 10 April email, Mr. Furtak stated:

"*Hello David.*
I tried to reach you on several occasions today but understand you were traveling. I hope everything is OK.
David, I am securing a mortgage on a property here in Ontario in order to make the interest payment as we agreed. Would Trelane accept a guarantee from the Ontario Holdco for the property while the mortgage is funded?
Please advise so that I may put that in place ASAP.
Kind regards,
Edward"

63. The following day on 11 April 2025 Mr. Kessaram replied: "*Your time is up. You've had long enough*." To that, Mr. Furtak replied: "*I will have the financing done shortly and will still make the interest payment* [blank space] *Hopefully we can bring this back on track…*"

64. The final two emails which passed between the parties relate to Mr. Furtak's express concern about the publicity of these proceedings.

65. The Writ was filed on 11 April 2025.

66. In reply to Mr. Kessaram's Third Affidavit exhibiting these numerous email exchanges consisting of 43 separate messages (16 of which, on Mr. Master's count, comprise Mr. Kessaram's request for repayment updates), the Defendant filed affidavit evidence in his own name sworn on 9 December 2025. At paras [3]-[6] of Mr. Furtak's evidence he states:

"*Communications and Implied Forbearance*
Since the original written forbearance expired, the Plaintiff and I have communicated on multiple occasions regarding payment. Most communications with the Plaintiff were telephonic. As I speaking as a business associate and friend, I did not take contemporaneous notes.

During these communications, the Plaintiff indicated an understanding that I would be pursuing refinancing, and no objection or immediate demand for payment was made.

Based on these discussions and the Plaintiff's conduct, it was reasonable to understand that repayment would not be enforced immediately, and that the original written forbearance was effectively supplemented by this conduct.

There has been no formal notice from the Plaintiff indicating an intent to enforce repayment, and the Plaintiff has not taken enforcement action against the principal Borrower, which remains the primary obligor under the promissory note."

Analysis and Decision on the Application for Summary Judgment

67. Mr. Furtak submitted that there is a genuine triable issue as to whether repayment is presently due. He argued that the Plaintiff's claim for judgment is premature as its conduct created a reasonable expectation that a further repayment period would be permitted for as long as refinancing was being pursued. Mr. Furtak says that this forbearance applies to the entire indebtedness.

68. In his written arguments at para [10], Mr. Furtak stated that the following factual matters are in dispute:

"…

a. *The Plaintiff and the Defendant continued negotiations and communications after the original written forbearance expired. These communications created a reasonable expectation of forbearance pending refinancing.*
b. *The Plaintiff did not demand immediate repayment and has not issued a formal notice of intent to enforce repayment.*

c. *The Plaintiff has not enforced the debt against the principal Borrower, which remains the primary obligor.*

d. *The Defendant has a good faith refinancing plan in progress, which has experienced delays and is reasonably expected to complete on or before 31 March 2026*."

69. It was never suggested by Mr. Furtak that the email correspondence produced by Mr. Kessaram was either an incomplete or inaccurate representation of the parties' communications. In fact, Mr. Furtak's evidence and supporting submissions blatantly ignore the factual position explicitly told by those emails. What is clearly reported by the emails is that for months Mr. Kessaram tirelessly pursued payment by the Defendant for the Plaintiff.

70. The only post-second forbearance agreement allowance offered by Mr. Kessaram was the conditional offer contained in Mr. Kessaram's 7 April email. On that occasion Mr. Kesaram referred to the parties' 7 April 2025 telephone conversation and stated that the Plaintiff would delay the filing of the Writ until 5:00pm Thursday, 10 April 2025 on the strength of the

Defendant's promise to have paid before then the sum of US$74,636.51 (representing the interest calculated up to 31st March 2025). The offer specified that payment of that sum would have been accepted by the Plaintiff as a "*goodwill gesture in anticipation of agreement being reached on a repayment schedule of the remainder of the debt, further interest and damages*". However, Mr. Furtak made no goodwill payment of the kind. So, he is not entitled to argue that he relied on the offer to his detriment. In my judgment, the equitable doctrine of waiver estoppel or equitable forbearance does not arise on these undisputed facts.

71. As for the Defendant's complaint that he has been made to suffer the unfairness of pursuit while the principal borrower was left undisturbed, Mr. Masters clarified the position for the Court as follows:

"*…the Defendant was the only borrower under the Promissory Note…The corporate entity the Defendant refers to may be a reference to another promissory note dated 15 January 2024, which has been repaid in full. The Defendant is the sole debtor under the Promissory Note*."

72. I am in no reasonable doubt that the Plaintiff is entitled to judgment and that to refuse summary judgment would be inexpedient and a dereliction of the Court's duty to actively manage this case as required of the Court by the Overriding Objective. In this case, allowing the matter to advance to a full-blown trial would only serve as an opportunity for the Defendant to further delay repayment of the debt he clearly owes to the Plaintiff. That would, in all certainty, result in a real injustice to the Plaintiff because the Defendant has established no fair probability of a *bona fide* defence with any prospect of success.

73. Further, in my judgment, the grant of summary judgment is (i) consistent with the Plaintiff's constitutional right to a fair trial within a reasonable time and (ii) does not deprive the Defendant of his constitutional right to a fair trial within a reasonable time. To use the phraseology of Moore-Bick L.J in *ICI Chemicals & Polymers Ltd. v. TTE Training Ltd.* as adopted by Hellman J in *Mehta v Viking River Cruises*, this is an appropriate case to '*grasp the nettle and decide the question at the summary judgment stage*.'

74. For all of the reasons above, I grant summary judgment to the Plaintiff.

Conclusion

75. The strike out application is granted.

76. The application for summary judgment is granted in respect of the following:

    (i) The outstanding principal sum of US$382,751.19 and

(ii) Interest at the rate of 1.5% per calendar month on the outstanding principal sum commencing from 1 March 2024 to the date of payment.

77. Subject to either party filing a Form 31 TC within 14 days to be heard on the issue of damages, I grant judgment for liquidated damages in the amount of $50,000.00.

78. Subject to either party filing a Form 31 TC within 14 days to be heard on the issue of costs, I award costs in the cause on a standard basis in favour of the Plaintiff, to be taxed by the Registrar if not agreed.

Dated 27th day of January 2026

THE HON. MRS JUSTICE SHADE SUBAIR WILLIAMS
PUISNE JUDGE OF THE SUPREME COURT