

**DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR
DI DALAM WILAYAH PERSEKUTUAN, MALAYSIA
(BAHAGIAN DAGANG)
GUAMAN SIVIL NO.: WA-22NCC-395-08/2022**

ANTARA

- 1. ZAVARCO BERHAD**
(sebelum ini dikenali sebagai Vasseti Berhad)
[No. Syarikat: 887017-M]
- 2. ZULIZMAN BIN ZAINAL ABIDIN**
(No. K/P: 720801-14-5249) **... PLAINTIF -
PLAINTIF**

DAN

- BANK PEMBANGUNAN MALAYSIA BERHAD**
[No. Syarikat: 16562-K] **... DEFENDAN**

JUDGMENT
(Enclosure 15)

- [1]** This was an application by the Defendant (“**BBMP**”) to strike out the Plaintiffs’ (**Zavarco** and **Zulizman**) Writ and Statement of Claim both dated 15.8.2022 pursuant to Order 18 Rule 19(1)(b) and (d) of the Rules of Court 2012 and/or the inherent jurisdiction of this Court (“**this Application**”).

A] SALIENT BACKGROUND FACTS

- [2]** The essential chronology of events is as follows:

The Original Facility and Suit 313

- [3] On 28.6.2012, BPMB granted a Term Loan Facility of RM400 million ("**the Facility**") to Aries Telecoms (M) Berhad ("**Aries**") for developing a fibre optic network around Peninsular Malaysia. Zavarco provided a corporate guarantee whilst Zulizman provided a personal guarantee dated 17.4.2017 for the Facility.
- [4] When Aries was conducting its listing exercise in the UK, it **requested** more time from BPMB. BPMB agreed and granted an extension pending the listing exercise, but in return required a corporate guarantee from Zavarco and a personal guarantee from Zulizman.
- [5] On 26.7.2018, BPMB commenced Suit No. WA-22NCC-313-07/2018 ("**Suit 313**") against Aries, Zavarco and Zulizman for recovery of monies due under the Facility. On 23.8.2018, Aries, Zavarco and Zulizman filed their Defence and Counterclaim alleging **conspiracy** by BPMB and its CEO to destroy Aries as an ongoing concern.
- [6] On 25.9.2018, BPMB applied for summary judgment and also applied to strike out the Counterclaim. On 9.5.2019, the High Court (Nantha Balan J, as His Lordship then was) allowed both applications and entered judgment for RM451,266,763.13 together with interests and costs ("**the Judgment**"). The High Court also struck out Aries, Zavarco and Zulizman's Counterclaim.

The Appeal to the Court of Appeal, Motion to Adduce Fresh Evidence and Leave to Appeal to the Federal Court

- [7] On 13.5.2019, Zavarco, Zulizman and Aries appealed to the Court of Appeal. During the appeal, on 31.3.2021, news articles were published by "theedgemarkets.com" and "freemalaysiatoday.com" reporting the arrest of four individuals including BPMB's former president and managing director for receiving kickbacks related to the Term Loan Facility.
- [8] On 29.9.2021, Zavarco, Zulizman and Aries filed a motion to adduce fresh evidence comprising these news articles. Specifically, they sought to adduce articles from "theedgemarkets.com" titled "*MACC detains four including former*

bank president cum MD for suspected graft” and from “freemalaysiatoday.com” titled “*Former bank president among 4 nabbed by MACC*”, both dated 31.3.2021. The articles reported that four individuals including BPMB’s former president and managing director were arrested for receiving approximately RM8 million in “kickbacks” for approving the RM400 million loan. Zavarco and Zulizman argued that this evidence would satisfy the “smoking gun” that the High Court judge was looking for to support their claims of conspiracy and economic sabotage, and that it directly confirmed their defence and causes of action.

- [9] On 12.11.2021, BPMB filed written submissions in the Court of Appeal opposing the motion, arguing that the news articles were not connected to or did not make any reference to the Term Loan Facility and that “at best, the sum of the loan mentioned in the News Articles matches the Facility.”
- [10] The Court of Appeal dismissed this motion but held that pursuant to Rule 7(2) of the Rules of the Court of Appeal 1994, leave was not required for the Court of Appeal to consider the news articles as the appeals arose from interlocutory applications. The Court of Appeal then **referred to the reports** but nevertheless **dismissed** the appeal against the Judgment on 25.11.2021, though it allowed the appeal against the striking out of the Counterclaim.
- [11] On 17.12.2021, Zavarco and Zulizman applied for leave to appeal to the Federal Court, posing questions of law concerning illegality, fraud and conspiracy. The issue of **bribery** was raised before the Federal Court. On 25.4.2022, the Federal Court **dismissed** the leave application.

Suit 264 and the Present Action

- [12] On 16.6.2022, shortly after the Federal Court’s decision, BPMB filed Suit No. WA-22NCC-264-06/2022 (“**Suit 264**”) against its former managing director Dato’ Zafer and 26 other defendants arising from various wrongdoings in connection with the Facility. In Suit 264, BPMB pleaded bribery, fraud, conspiracy to defraud, breach of directors’ duties, and other causes of action.
- [13] The present action was commenced on 15.8.2022, with Zavarco and Zulizman seeking to **impeach** the Judgment on grounds of

alleged fraud, misrepresentation and/or concealment of material facts.

B] BPMB'S ARGUMENTS

[14] BPMB submitted that Zavarco and Zulizman's claim should be struck out on the grounds stated below:

[15] BPMB argued that it had pleaded and disclosed all material facts in support of its summary judgment application in Suit 313. The material facts relating to the Facility, Personal Guarantee and Corporate Guarantee were fully pleaded. BPMB submitted that Suit 264 concerns distinct claims against its former directors and third parties, which do not affect its right to recover sums due under the Facility.

[16] BPMB cited **Seruan Gemilang Makmur Sdn Bhd v. Kerajaan Negeri Pahang Darul Makmur & Anor [2016] 3 MLJ 116**, where the Federal Court held that fraud must be actual positive fraud and that the earlier judgment cannot be impeached on mere general allegation of fraud, it must be shown with sufficient details how, when, where and in what way the alleged fraud was committed.

[17] BPMB heavily relied on **Indian Bank v. Green Mint Pte Ltd and 2 Ors [2021] SGHC 265**, submitting that there is a crucial distinction between:

- i) contracts to pay bribes; and
- ii) contracts procured by bribery.

In the former, the contract would be unenforceable on grounds of illegality, whereas in the latter, the contract remains enforceable. BPMB argued that the bank is distinct from its agent and has the option to rescind or continue with the contract.

[18] BPMB also cited **Honeywell International Middle East Ltd v. Meydan Group LLC [2014] EWHC 1344**, where the English High Court held that while bribery is clearly against English public policy and agreements to offer bribes are unenforceable, contracts

obtained through bribery are not, as a matter of English public policy, considered unenforceable.

- [19] BPMB argued that Zavarco and Zulizman are not innocent guarantors. Upon investigation, the Receiver and Manager discovered that Aries paid a significant amount concealed as “director’s fees” to Zulizman, and that the directors and shareholders of Zavarco were dishonest in relation to inducing and/or assisting in breaches of fiduciary duties.
- [20] BPMB submitted that guarantees are separate and independent contracts. Pursuant to the terms of the Corporate Guarantee and Personal Guarantee, Zavarco and Zulizman are liable to repay the outstanding amount irrespective of the validity or enforceability of the Facility.
- [21] BPMB contended that in Suit 313, Zavarco and Zulizman have raised the issues of bribery and corruption before the Court of Appeal, and the Federal Court had also considered these issues. The present action constitutes a collateral attack on the properly obtained Judgment.

C] ZAVARCO AND ZULIZMAN’S ARGUMENTS

- [22] Zavarco and Zulizman opposed the striking out application on several grounds as stated below:
- [23] Zavarco and Zulizman alleged that BPMB had deliberately concealed material facts from the courts in Suit 313, specifically that on 24.9.2020, BPMB’s Receiver and Manager discovered irregularities in the Facility, but BPMB failed to disclose these findings despite Suit 313 being a live matter before the appellate courts. They further argued that when they sought to introduce the news articles as fresh evidence at the Court of Appeal, BPMB actively opposed this by denying any connection between the reported arrests and the Term Loan Facility, despite BPMB’s subsequent admissions in Suit 264.
- [24] Zavarco and Zulizman relied on **Takhar v. Gracefield Developments Limited [2019] UKSC 13**, arguing that an action

to set aside a judgment for fraud is independent of the original proceedings and therefore *res judicata* does not apply.

- [25] Zavarco and Zulizman argued that allegations of fraud require determination at trial with viva voce evidence, citing **Serac Asia** (supra) and **Seruan Gemilang** (supra).
- [26] Zavarco and Zulizman attempted to distinguish **Indian Bank** (supra), arguing that it was a Singapore case with no consistent Malaysian authority, and that it was distinguishable because the person alleging bribery was the bank itself, not the borrower.

D] THE BRIBERY ISSUE

i) The Law on Contracts Procured by Bribery and Public Policy Consideration

- [27] The Singapore High Court's decision in **Indian Bank** (supra) is directly on point and provides sound legal principles that ought to be applied. The case establishes the crucial distinction between contracts to pay bribes (which are unenforceable) and contracts procured by bribery (which remain enforceable). The Singapore High Court held as follows:

*"19 As I have noted, contracts procured by bribery are ordinarily addressed **in the context of the law of agency**. Nonetheless, in recent years, that a contract has been procured by bribery has sometimes been raised as a possible new category of contracts against public policy. The bank cited two English cases concerning enforcement of arbitration awards arising from contracts said to have been procured by bribery. In both cases, **the court held that there was no English public policy requiring a court to refuse to enforce a contract procured by bribery**: see *Honeywell International Middle East Ltd v Meydan Group LLC (formerly known as Meydan LLC)* [2014] EWHC 1344 (TCC) at [184]; *National Iranian Oil Company v Crescent Petroleum Company International Ltd and another* [2016] EWHC 510 (Comm) at [49(2)]."*

(own emphasis added)

- [28] As stated in **Indian Bank** (supra), where a contract is procured by bribery, the innocent party has the option to rescind or affirm the

contract. The bank, being **distinct from its agent**, retains its right to recover monies disbursed. To hold otherwise would reward the wrongdoer and punish the victim. In this regard the Singapore High Court held as follows:

*"... It is that other party which is the victim of the briber's conduct. **It has potential remedies against the bribe-taker within its ranks.** It also, as **the innocent party, has the option to avoid the contract procured by a bribe,** either by rescission from inception of the contract, if counter-restitution is possible, or for the future: see *Panama and South Pacific Telegraph Co v India Rubber, Gutta Percha, and Telegraph Works Co* (1875) LR 10 Ch App 515. However, **it also has the option to continue with the contract.** Further, it may lose the right to avoid the contract through waiver or inaction after discovery of the bribe. **If the contract is not avoided by the innocent party, then both parties are held to its terms.**"*

(own emphasis added)

- [29] The position is further supported by **Honeywell International** (supra), where the English High Court held:

*"[185] It follows that whilst bribery is clearly contrary to English public policy and contracts to bribe are unenforceable, as a matter of English public policy, **contracts which have been procured by bribes are not unenforceable.**"*

(own emphasis added)

- [30] As cautioned by the Federal Court during the leave application proceedings, if banks could not recover loans simply because their officers were corrupted, "*the whole banking system will collapse.*" This **public policy** consideration strongly supports BPMB's position.

ii) Multiplicity of Proceedings and Interconnected Suits

- [31] A fundamental issue in this case is that both Suit 313 and Suit 264 involve the same or very similar subject matter, similar parties and essentially the same relief claimed. Both suits are interconnected, creating a multiplicity of proceedings that this Court must address.
- [32] Zavarco and Zulizman themselves acknowledged that both suits are "*deeply interconnected*" and involve the "*same subject matter*"

arising from the same Term Loan Facility. This interconnectedness militates against allowing the present action to proceed, as it would lead to inconsistent findings and abuse of the judicial process (**Joseph Paulus Lantip & Ors v. Unilever Plc [2012] 7 CLJ 693**).

E] THE FRAUD ALLEGATIONS

- [33] The well-known and frequently cited case of **Seruan Gemilang** (supra) also involved an application to **strike out** as well as an action to **impeach** or set aside an earlier judgment on the grounds of fraud, similar to the present case. The Federal Court held as follows:

*"[40] **The fraud must be actual positive fraud**, a meditated and intentional contrivance to keep the parties and the court in ignorance of the decree by the contrivance (see Patch v Word).*

*[41] **The earlier judgment cannot be impeached or set aside on a mere general allegation of fraud. It must be shown with sufficient details how, when, where and in what way the alleged fraud was committed.**"*

(own emphasis added)

- [34] Zavarco and Zulizman have failed to demonstrate with sufficient specificity how the alleged concealment constituted "actual positive fraud" or a "meditated and intentional contrivance" as required by **Seruan Gemilang** (supra). The allegations are primarily based on speculation and inference rather than concrete evidence of deliberate fraud.
- [35] Crucially, the allegations of bribery and corruption **have been pleaded in the Counterclaim in Suit 313** and were considered by the appellate courts. More specifically, at the Court of Appeal stage, Zavarco and Zulizman **formally raised fraud allegations** through their Notice of Motion to adduce fresh evidence, specifically seeking to introduce news articles reporting the arrest of BPMB's former president and managing director for receiving kickbacks related to the RM400 million facility. Notwithstanding BPMB's objection that the articles were unrelated to the Term Loan Facility, the Court of Appeal **took them into account** and nevertheless dismissed the appeal against the Judgment.

- [36] The Federal Court had **also considered** these issues when determining the leave application.
- [37] Zavarco and Zulizman, when defending Suit 313, had enlarged their pleaded case (through their defence and counterclaim) to cover matters similar to those now raised in the present suit. Zavarco and Zulizman are therefore attempting to **relitigate matters** that have been conclusively determined.

F] ZAVARCO AND ZULIZMAN'S POSITION AS GUARANTORS

- [38] The evidence reveals that Zavarco and Zulizman are not innocent guarantors. The Receiver and Manager's investigation discovered that:
- i) Aries paid a significant amount concealed as "director's fees" to Zulizman;
 - ii) The directors and shareholders of Zavarco were dishonest in relation to inducing and/or assisting in breaches of fiduciary duties.
- [39] All parties, including Zavarco and Zulizman, are tainted by the wrongdoing. Zavarco and Zulizman cannot now seek to benefit from their own participation in the scheme by avoiding their guarantee obligations.
- [40] The guarantee contracts are separate and independent from the underlying facility. As established in cases such as **Bank Pembangunan Malaysia Bhd v. Ketheeswaran a/l M Kanagaratnam [2022] 5 MLJ 393**, guarantees stand alone and BPMB can sue the guarantors without first establishing liability against the borrower.
- [41] The terms of the guarantee are wide enough to cover situations of illegality and do not frustrate the agreement. Zavarco and Zulizman are bound by their guarantee obligations irrespective of any alleged wrongdoing in relation to the facility.

G] **RES JUDICATA AND ISSUE ESTOPPEL**

- [42] The Courts have on various occasions struck out claims seeking to impeach judgments allegedly obtained fraudulently on grounds of *res judicata*. In **Datuk Hj Ishak bin Ismail v. Kenanga Investment Bank Bhd & Ors [2012] 7 MLJ 840**, the High Court struck out the plaintiff's claim on the grounds of *res judicata*, holding as follows:

*"[62] Therefore the present action which is brought before me is wholly premised on the contention of the 'Suppressed Evidence' to question the validity of the **summary judgment** which was ordered by the Court of Appeal, which had been **addressed and adjudicated**. These same arguments are untenable on account of *res judicata* and issue estoppels. These two principles were explained in **Asia Commercial Finance (M) Berhad v Kawal Teliti Sdn Bhd** and **Hartecon JV Sdn Bhd & Anor v Hartela Contractors Ltd [1996] 2 MLJ 57**."*

(own emphasis added)

- [43] Further, in **Dato' Ahmad Johari bin Tun Abdul Razak v. A. Santamil Selvi a/p Alau Malay @ Anna Malay & Ors and another appeal [2020] MLJU 562**, the Court of Appeal addressed a situation where the plaintiffs' earlier suit had been struck out, prompting them to file a second suit. The Court of Appeal held as follows:

*"[50] On the factual matrix of this case, we are of the view, that the 2nd present Suit is in fact no more than a repetition, in **thinly veiled new guise** of the cause of action of the 1st or earlier suit and the 2nd/present Suit was filed **with the intention to re-litigate and re-open the earlier suit** which was struck out and dismissed by the 1st Court. This is so since the parties, the facts of the case, the **causes of action and the reliefs sought by the Plaintiffs are identical, if not one and the same**. Even if the "continuing tort" as averred to in the 2nd/present Suit could be said to be a different cause of action, which we are of the view it is not; **that cause of action was already present or in existence when the 1st Suit was filed on 9.6.2014** and no reasons or explanations were proffered by the Plaintiffs as to why it was not pleaded and brought or filed together with the 1st Suit. In light of the principle expounded by *Henderson v Henderson (supra)*, that a party should bring forward once and for all every points which properly belonged to the subject of litigation and not to litigate by way of instalments, the 2nd/present Suit ought to be dismissed on the ground that it is *res judicata* in its **extended or broader***

sense and an abuse of the process of court. The Learned HCJ's finding to the contrary is thus unsustainable."

(own emphasis added)

- [44] Zavarco and Zulizman were parties to Suit 313 and defended the claim at every stage of the proceedings. They raised defences and counterclaims including conspiracy and fraud. Crucially, they raised **similar issues** in the **appellate courts** through their Notice of Motion to adduce fresh evidence specifically alleging fraud by BPMB's officials. Having exhausted all appellate remedies up to the Federal Court, they are clearly barred by *res judicata* and estopped from denying their liability.
- [45] Accepting Zavarco's and Zulizman's contention that the principles of *res judicata* are inapplicable would risk opening the floodgates to previously adjudicated claims. A plaintiff could simply file a new suit to challenge a judgment already rendered against them, thereby requiring the matter to proceed to trial regardless of its prior final determination (**Dato' Ahmad Johari** (supra)).
- [46] While Zavarco and Zulizman cite **Takhar v. Gracefield** (supra) regarding independent cause of action, this principle does not apply where, as here, the alleged fraud issues **have already** been **ventilated and adjudicated** in the original proceedings. The cases they relied on such as **Hong Leong Finance Bhd v. Dayasar Industries Sdn Bhd [2002] 5 CLJ 149** are distinguishable as they concern interlocutory applications that were dismissed with parties required to go to trial, which is not the case here.

H] COLLATERAL ATTACK

- [47] The present action constitutes a clear collateral attack on the Judgment. Zavarco and Zulizman are attempting to impeach a decision that has been **affirmed** by the Court of Appeal and where **leave to appeal** to the Federal Court has been **refused**. This is precisely the type of case where the courts must prevent abuse of process and ensure finality of litigation (**Development & Commercial Bank Bhd v. Aspatra Corp Sdn Bhd [1995] 3 MLJ 472; Dato' Ahmad Johari** (supra)).

[48] In the case of the case of **CIMB Investment Bank Bhd v. Metroplex Holdings Sdn Bhd [2014] CLJ 1012** the Federal Court had struck out an action on the ground that it was a collateral attack of an order for sale that was regularly obtained.

I] “OBVIOUSLY UNSUSTAINABLE”

[49] Taking an objective view of the pleadings and applying the test in **Bandar Builder** (supra):

- i) The Plaintiffs’ claim constitutes an impermissible collateral attack on a final judgment.
- ii) Zavarco and Zulizman are attempting to relitigate matters already determined.
- iii) The legal principles in **Indian Bank** (supra) and **Honeywell** (supra) demonstrate that even if bribery occurred, it does not affect BPMB’s right to recover under the facility.
- iv) Zavarco and Zulizman are not innocent guarantors and cannot avoid their independent guarantee obligations.

J] CONCLUSION

[50] After comprehensive consideration of all submissions, authorities and evidence, I find that:

- i) The Plaintiff’s claim and the reliefs sought constitute a **collateral attack** on the Judgment. In Suit 313, Zavarco and Zulizman raised allegations of bribery and corruption, both in their original Counterclaim and later before the Court of Appeal, relying on news reports that were adduced as evidence. These allegations were formally presented and considered by the Court of Appeal, yet the appeal against the Judgment was ultimately **dismissed**.
- ii) The Federal Court had also **considered** these issues when dismissing the leave application.

- iii) Therefore, the principle of ***res judicata*** applies in the present case to matters that were **actually decided** in earlier proceedings. In any event, the instant case can fall within the scope of the **broader doctrine** of *res judicata*, on the basis that the doctrine extends to matters that could have been, or should have been, raised in the earlier proceedings (**Joseph Paulus Lantip** (supra); **Henderson v. Henderson [1843] 3 Hare 100, 67 ER 313**).
 - iv) Both Suit 313 and Suit 264 involve the same or very similar subject matter, similar parties and essentially the same relief claimed. Zavarco and Zulizman, when defending Suit 313, had enlarged their pleaded case to cover matters similar to those now raised in the present suit. Both suits (Suits 313 and 264) are interconnected, creating a multiplicity of proceedings.
 - v) There is no fraud, misrepresentation and/or concealment of material facts that would justify impeaching the Judgment.
 - vi) The contention by Zavarco and Zulizman that the Facility is rendered illegal due to alleged corruption or bribery, and that they are consequently absolved of any obligation to repay the outstanding amount thereunder, is without merit (**Indian Bank** (supra)).
- [51] The present action is plainly and obviously unsustainable and constitutes an abuse of the process of Court (**Seruan Gemilang** (supra)).
- [52] For the reasons set out above, I allowed this Application with costs in favour of the Defendant.

Dated this 10th day of June, 2025

-SGD-

(**WAN MUHAMMAD AMIN BIN WAN YAHYA**)
Judge
High Court of Malaya,
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LEGISLATION / RULES CITED

Rules of Court 2012

- Order 18 Rule 19(1)(b) and (d)

Rules of the Court of Appeal 1994

- Rule 7(2)

CASES CITED

1. Bank Pembangunan Malaysia Bhd v. Ketheeswaran a/l M Kanagaratnam [2022] 5 MLJ 393
2. CIMB Investment Bank Bhd v. Metroplex Holdings Sdn Bhd [2014] CLJ 1012
3. Datuk HJ Ishak bin Ismail v. Kenanga Investment Bank Bhd & Ors [2012] 7 MLJ 840
4. Dato' Ahmad Johari bin Tun Abdul Razak v. A. Santamil Selvi a/p Alau Malay @ Anna Malay & Ors and another appeal [2020] MLJU 562
5. Development & Commercial Bank Bhd v. Aspatra Corp Sdn Bhd [1995] 3 MLJ 472
6. Henderson v. Henderson [1843] 3 Hare 100, 67 ER 313
7. Honeywell International Middle East Ltd v. Meydan Group LLC [2014] EWHC 1344
8. Hong Leong Finance Bhd v. Dayasar Industries Sdn Bhd [2002] 5 CLJ 149
9. Indian Bank v. Green Mint Pte Ltd and 2 Ors [2021] SGHC 265
10. Joseph Paulus Lantip & Ors v. Unilever Plc [2012] 7 CLJ 693
11. Seruan Gemilang Makmur Sdn Bhd v. Kerajaan Negeri Pahang Darul Makmur & Anor [2016] 3 MLJ 116
12. Takhar v. Gracefield Developments Limited [2019] UKSC 13