Dalam Mahkamah Tinggi Malaya Di Kuala Lumpur
Dalam Negeri Wilayah Persekutuan Kuala Lumpur, Malaysia
(Bahagian Dagang)
Guaman Sivil No. : WA - 22 NCC - 264 - 06 / 2022

Antara

Bank Pembangunan Malaysia Berhad … Plaintif

Dan

1) Sidqi Ahmad Said bin Ahmad
2) Shailen a/l Popatlal
3) Wan Alias bin Wan Ngah
4) Roslina binti Ibrahim
5) Abdul Wahid bin Abdul Ghani
6) Mohd Radzi bin Mohamed
7) Muhammad Shazhakim bin Shazarul Hisham
8) Shaza Arina binti Shazarul Hisham
9) Mustafa Ali Zaminali Sayed
10) Wong Chee Keong
11) Abd. Hadi bin Abd. Majid
12) Tunku Mazlina binti Tunku Abd Aziz
13) Ranjeet Singh Sidhu
14) Noorusa'adah binti Othman
15) Paneagle Holdings Berhad
16) Paneagle Sdn. Bhd.
17) VCB Investment Berhad
18) Open Fibre Sdn. Bhd.
19) Primawin Limited
20) China Finance Limited
21) Hadron Equities Limited (formerly known as Arab Emirates Capital Limited)
22) Orient Telecoms Sdn. Bhd.
23) Silver Ridge Holdings Bhd.
24) BVS Trinity Sdn. Bhd.
25) VCB Malaysia Bhd.

26) Zavarco PLC
27) Silver Ridge Sdn Bhd
28) Izlin binti Ismail (sebagai pentadbir bersama harta pusaka Mohd Zafer Mohd Hashim)
29) Muhammad Radzi Bin Mohd Zafer (sebagai pentadbir bersama harta pusaka Mohd Zafer Mohd Hashim)
30) Zakaria bin Saad … Defendan - Defendan

Grounds of Decision

Introduction

1. The Defendants filed the following striking out applications :

   (i) notice of application dated 24.11.2025 in Enclosure 1198 filed by the 2nd Defendant;

   (ii) notice of application dated 8.12.2025 in Enclosure 1273 filed by the 3rd, 5th, 12th, 15th, 18th and 26th Defendants;

   (iii) notice of application dated 8.12.2025 in Enclosure 1264 filed by the 4th, 11th, 17th, 24th and 25th Defendants;

   (iv) notice of application dated 8.12.2025 in Enclosure 1274 filed by the 7th, 8th, 9th and 22nd Defendants;

   (v) notice of application dated 1.12.2025 in Enclosure 1213 filed by the 6th Defendant;

(vi) notice of application dated 8.12.2025 in Enclosure 1275 filed by the 16th Defendant;

(vii) notice of application dated 8.12.2025 in Enclosure 1270 filed by the 10th Defendant;

(viii) notice of application dated 8.12.2025 in Enclosure 1272 filed by the 19th Defendant;

(ix) notice of application dated 8.12.2025 in Enclosure 1269 filed by the 23rd and 27th Defendants;

(x) notice of application dated 8.12.2025 in Enclosure 1271 filed by the 28th and 29th Defendants; and

(xi) notice of application dated 8.12.2025 in Enclosure 1268 filed by the 30th Defendant.

2. The striking out applications are made variously under paragraph 11 of the Schedule to the Courts of Judicature Act 1964 (read together with section 25 of the Courts of Judicature Act 1964), Order 18 rule 19 (1) (a), (b), (c) and (d) and Order 92 rule 4 of the Rules of Court 2012, and the inherent jurisdiction of the court.

3. On 23.2.2026, I allowed the striking out applications. It is my finding that the present suit is caught by the doctrine of res judicata and merger. Furthermore, the Plaintiff ("**P**") does not have the locus standi to initiate the present suit. Here are my reasons.

Background facts

4. On 26.7.2018, P filed Civil Suit No. : WA - 22 NCC - 313 - 07 / 2018 ("**suit 313**") against :- (i) Aries Telecoms (M) Bhd ("**Aries**"); (ii) Zavarco Bhd; and (iii) Zulizman bin Zainal Abidin (Zulizman). In suit 313, P secured a summary judgment for a loan sum of RM 400 million. P defended the summary judgment at the Court of Appeal and the Federal Court.

5. Throughout all the proceedings in suit 313 (at the High Court, the Court of Appeal and the Federal Court), P maintained that the "misuse of funds is of no concern to the Bank". P also maintained that "Aries is at liberty to commence action against RSS, TSSY and any other party who is involved".

6. The Federal Court proceedings concluded on 25.4.2022. P then mounted the present suit on 15.6.2022. In the present suit, P seeks to claim the same loan sum of RM 400 million against 30 Defendants. Notably, the recipient of the loan sum (Aries) is not named as a party in the present suit.

7. The loan sum of RM 386 million in suit 313 had increased to RM 451,266,763.13 due to the terms of the term loan facility, interest and cost of funds. In the present suit, the same sum of RM 386 million has increased to RM 564,991,617.25. As the loan sum was RM 400 million, for consistency and ease of reference, the figure of "RM 400 million" will be used herein.

Chronology of events

8. The key events are set out below.

<table>
<tr><th>Date</th><th></th></tr>
<tr><td colspan="2">High Court : suit 313</td></tr>
<tr><td>26.7.2018</td><td>Suit 313 filed.
P seeks RM 400 million against :- (i) Aries; (ii) Zavarco Bhd; and (iii) Zulizman.

24. As at 9.7.2018, the 1st Defendant is indebted to the Plaintiff in the sum of RM451,266,763.13 under the Term Loan Facility, the particulars of which are as follows:

<table>
<tr><th>Particulars</th><th>Amount (RM)</th></tr>
<tr><td>Principal</td><td>386,870,939.07</td></tr>
<tr><td>Interest</td><td>[illegible]</td></tr>
<tr><td>Late Payment Charges</td><td>13,901,904.56</td></tr>
<tr><td>Total</td><td>451,266,763.13</td></tr>
</table></td></tr>
<tr><td>23.8.2018</td><td>Defence and Counterclaim filed.</td></tr>
<tr><td>25.9.2018</td><td>Enclosure 11 (summary judgment) for RM 400 million filed by P.</td></tr>
<tr><td>4.10.2018</td><td>Enclosure 14 (striking out) filed by P.</td></tr>
<tr><td>19.10.2018</td><td>Enclosure 18 (striking out) filed by RSS and TSSY.</td></tr>
<tr><td>9.5.2019</td><td>Enclosures 11, 14 and 18 allowed. Summary judgment for RM 400 million entered.</td></tr>
<tr><td colspan="2">Court of Appeal : Appeals 931, 932 and 933 (suit 313)</td></tr>
<tr><td>13.5.2019</td><td>Notices of Appeal lodged against Enclosures 11, 14 and 18.</td></tr>
<tr><td>4.7.2019</td><td>Receiver and Manager appointed over Aries.</td></tr>
<tr><td>24.9.2020</td><td>P discovers “irregularities” in the loan (as pleaded at paragraph 81 of the statement of claim in the present suit).</td></tr>
<tr><td>29.9.2021</td><td>Aries files a notice of motion to adduce fresh evidence.</td></tr>
<tr><td>25.11.2021</td><td>In opposition to Aries’ notice of motion, P maintains that the “misuse of funds is of no concern to the Bank”.</td></tr>
<tr><td>25.11.2021</td><td>The Court of Appeal dismisses Appeal 931 and the notice of motion.
The summary judgment for RM 400 million is affirmed.
The Court of Appeal allows Appeals 932 and 933 and remits the counterclaim to the High Court.</td></tr>
<tr><td colspan="2">Federal Court : Motion 671 (suit 313)</td></tr>
<tr><td>17.12.2021</td><td>Motion 671 to the Federal Court filed.</td></tr>
<tr><td>Jan 2022</td><td>P “discovers” matters from RSS (as pleaded at paragraph 84 of the statement of claim in the present suit).</td></tr>
<tr><td>15.4.2022</td><td>P files its submissions in Motion 671. P maintains that “any allegation of wrongdoing [is] … of no concern to the Bank”.</td></tr>
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<table>
<tr><td>25.4.2022</td><td>Motion 671 dismissed by the Federal Court.</td></tr>
<tr><td colspan="2">High Court : The present suit</td></tr>
<tr><td>15.6.2022</td><td>P files the present suit.
P seeks the same sum of RM 400 million against 30 Defendants.

PART S. LOSS AND DAMAGE

216. As a result of the acts by the Defendants as pleaded above, BPMB had sustained loss and damage amounting to RM564,991,617.25 as at 14.6.2022, particulars of which are as follows:

<table><tr><th>Particulars</th><th>Total (RM)</th></tr><tr><td>Principal Sum</td><td>386,870,939.07</td></tr><tr><td>Interest</td><td>50,493,919.50</td></tr><tr><td>Late Payment Interest</td><td>124,007,418.86</td></tr><tr><td>Charges</td><td>1,003,037.56</td></tr><tr><td>Total</td><td>564,991,617.25</td></tr></table></td></tr>
<tr><td>9.12.2022</td><td>P files Winding - Up Petition No. : WA - 28 NCC - 966 - 12 / 2022 (Petition 966) to wind - up Zavarco Bhd.</td></tr>
<tr><td>28.8.2022</td><td>P files written submissions in support of Petition 966.</td></tr>
<tr><td>05.12.2023</td><td>Zavarco Bhd wound - up by P in Petition 966.</td></tr>
</table>

Suit 313 at the High Court

9. On 26.7.2018, P filed suit 313 against :- (i) Aries; (ii) Zavarco Bhd; and (iii) Zulizman. Suit 313 was filed to recover sums due under the term loan facility granted to Aries. Zavarco Bhd was the corporate guarantor, whilst Zulizman was the personal guarantor for the term loan facility.

10. Aries, Zavarco Bhd and Zulizman counterclaimed against :- (i) P; (ii) Ranjeet Singh Sidhu (RSS) (the 13th Defendant herein); (iii) Tan Sri Syed Yusof (TSSY); and (iv) Afidah binti Mohd Ghazali (Afidah). The counterclaim raised by Aries, Zavarco Bhd and Zulizman alleges that there was a conspiracy, fraud and collusion between P, RSS, TSSY and Afidah.

The application for summary judgment and the application to strike out the counterclaim

11. Three applications were filed in suit 313, namely :

(i) Enclosure 11 : Application by P for summary judgment for the sum of RM 451,266,763.13;

(ii) Enclosure 15 : Application by P and Afidah to strike out; and

(iii) Enclosure 18 : Application by RSS and TSSY to strike out.

12. On 9.5.2019, the High Court in suit 313 allowed the three applications. Consequently, summary judgment for the sum of RM 400 million was entered against Aries, Zavarco Bhd and Zulizman. Further, the counterclaim was struck out. P then caused a receiver and manager to be appointed over Aries on 4.7.2019.

Findings of the High Court in suit 313

13. In allowing Enclosure 11 (summary judgment by P), the High Court made the following findings :

> *"[165] At any rate, whilst Section 4.02 (a) of the Facility Agreement states that the purpose of the Term Loan Facility is to part finance the development and construction of and or related to the infrastructure project,* ***Section 4.02 (b) makes it clear that the "Bank shall not be obliged to monitor the utilization of the Facility by the Borrower*** *nor to ensure that the Facility is indeed used for the purpose stated in subsection (a)".*

*[166] As such, the **Bank was not contractually obliged to monitor how ATMB or its officers utilized (or misused) the monies** which were drawn down under the Term Loan Facility.*

*[167] In this context, it is relevant to mention that in paragraphs 61, 62, 63, 64, 65, 66 and 67 of Zulizman's affidavit affirmed on 16th November, 2018 (Enclosure 23), it is averred that **Ranjeet and Tan Sri may have misappropriated or at least channeled part of the loan monies** to their own companies, namely Rotschilds Sdn Bhd and G & P Solicitors Sdn Bhd.*

*[168] In my view, **any allegation of wrongdoing by directors, shareholders or officers of ATMB with respect to the usage or channeling of the loan monies** to their own companies etc., is in the present circumstances, **of no concern to the Bank**. Indeed, prior to the filing of this action, ATMB never complained about any failure on the Bank's part to supervise the usage of the loan monies. As such, even assuming (without concluding) that Ranjeet or Tan Sri were involved in any wrongdoing vis - à - vis the use or misuse of the loan monies, whether through their own companies, or otherwise is a separate matter and **ATMB is at liberty to take appropriate action against Ranjeet or Tan Sri and / or any other party, who is / are involved in any purported defalcation of monies** belonging to ATMB.*

*[169] Thus, the alleged misuse of the loan monies is an entirely separate matter and must not be conflated with the Bank's legitimate recovery action which is predicated purely on contractual documents. In this context, it is useful, necessary and imperative to emphasize that the **relationship between the Bank, ATMB, Zavarco and Zulizman, is purely contractual** (see: Shencourt (supra)).*

[170] As such, in the present circumstances, it is immaterial that the loan monies may have been diverted to Ranjeet's or Tan Sri's own companies. I also find it irrelevant that Ranjeet has feigned ignorance of the utilization of the proceeds of the loan. I will come back to Shencourt's case when I discuss the topic of alleged mala fides on the part of the Bank."

14. From the above, it can be seen that :

    (a) P was aware of the allegation of the misappropriation of the loan monies by RSS and TSSY (paragraphs 167 and 170 of the judgment);

(b) The High Court made a specific finding that any misuse of the loan monies by Aries was "of no concern to the Bank". Further, that "any wrongdoing vis - à - vis the use or misuse of the loan monies, whether through their own companies or otherwise is a separate matter and Aries is at liberty to take action against [RSS] or [TSSY] and / or any other party who is / are involved in the purported defalcation of monies belonging to [Aries]" (paragraph 168 of the judgment); and

(c) The relationship between P, Aries, Zavarco Bhd and Zulizman is purely contractual (paragraph 169 of the judgment).

15. What may be discerned is that :

(a) Any defalcation of monies would be Aries' concern. It would not be P's concern; and

(b) P's sole concern would be to recover the loan monies from Aries, Zavarco Bhd and Zulizman.

<u>Suit 313 moves to the Court of Appeal</u>

16. Three notices of appeal dated 13.5.2019 were lodged against the decision of the High Court. Namely :

(i) Civil Appeal No. : W - 02 (IM) (NCC) - 931 - 05 / 2019 (appeal against the summary judgment, being Enclosure 11) ("**Appeal 931**");

(ii) Civil Appeal No. : W - 02 (IM) (NCC) - 932 - 05 / 2019 (appeal against P and Afidah's application to strike out, being Enclosure 15) ("**Appeal 932**"); and

(iii) Civil Appeal No. : W - 02 (IM) (NCC) - 933 - 05 / 2019 (appeal against RSS and TSSY's application to strike out, being Enclosure 18) ("**Appeal 933**").

17. In Appeal 931 (summary judgment appeal), Aries, Zavarco Bhd and Zulizman filed a motion to adduce fresh evidence dated 29.9.2021 ("**Motion 39**"). P opposed Motion 39. P specifically argued as follows in its written submission dated 25.11.2021 :

> "32.3 in any event, the learned Judge rightly dismissed the Appellants' contention that the temporary waiver of the drawdown conditions evidence misappropriation of funds by RSS and TSSY on the ground that the **Bank was not contractually obliged to monitor how Aries and / or its officers utilized (or misused) the monies** drawn down. **Any allegation of wrongdoing by RSS and TSSY on the misuse of funds is of no concern to the Bank**. **Aries is at liberty to commence action** against RSS, TSSY and any other party who is involved."

18. It is imperative to note that P made a pointed submission that "Any allegation of wrongdoing by RSS and TSSY on the misuse of funds is of no concern to the Bank. Aries is at liberty to commence action against RSS, TSSY and any other party who is involved".

19. Appeals 931, 932 and 933 were all heard on 25.11.2021, together with Motion 39. The Court of Appeal decided as follows :

(a) Appeal 931 (summary judgment appeal) would be dismissed. The summary judgment for the sum of RM 400 million was maintained;

(b) Motion 39 in Appeal 931 was dismissed as leave to adduce fresh evidence was unnecessary on an interlocutory appeal; and

(c) Appeals 932 and 933 would be allowed. The counterclaim raised by Aries, Zavarco Bhd and Zulizman was remitted to the High Court for trial.

20. With Appeals 932 and 933 being allowed, the counterclaim was remitted to the High Court. That counterclaim is pending before me and the trial is fixed in June 2026.

<u>The summary judgment appeal from suit 313 moves to the Federal Court</u>

21. Aries, Zavarco Bhd and Zulizman filed a motion for leave to appeal to the Federal Court dated 17.12.2021 in Civil Motion No. : 08 (i) - 671 - 12 / 2021 (W) ("**Motion 671**").

22. In its written submission to the Federal Court, P accepted and emphasised the findings made by the High Court. Paragraph 32 of P's written submission dated 15.4.2022 stated :

> "32. It should be noted that in allowing the Bank's summary judgment application, the High Court has carefully evaluated the pleadings and affidavit evidence before it and found that the allegations of conspiracy and fraud raised by the Applicants are lacking in particulars, contradicted by documentary evidence and inherently incredulous. The **High Court also found that whatever allegations of wrongdoing by the director, shareholder or officer of Aries**

in respect of the usage of the monies disbursed under the Facility is a separate matter and does not affect the Bank's legitimate recovery action against the Applicants :

23. P steadfastly maintained in all submissions (written and oral) that there was no bribery and corruption, and that P has no responsibility as to how the loan monies are then used by Aries :

> "The important point at paragraph 165 "at any rate while Section 4.02 of the facility states that the purpose of the term loan is to part finance the development and construction of and related to the infrastructure project makes it very clear that the **bank shall not be obliged to monitor the utilisation of the facility** by the borrower nor ensure that the facility is indeed used for the proper stated fact". So therefore, **once the money has already been disbursed to Aries, the bank has got no responsibility as to how the monies are then used** by Aries. **This is a finding of the High Court Judge, concurrently the Court of Appeal accepted that position**. And that's why it's very clearly both the High Court and the Court of Appeal said judgment in favour of the bank for RM 400 million in the Court of Appeal is said the **borrowers is entitled to bring a counterclaim against the bank, against the officers of the bank for any wrongdoing**.
>
> …
>
> The second point, the second question, Yang Arif that's 1 (a), 1 (b), 1 (c) Yang Arif. The second question is that so - called Quincecare at (00:42:04). Yes, Question 2, with regard to this Yang Arif that is not in fact the pleaded case of the Applicant in the Court below. It is not a situation where the bank is controlling an account on behalf of the Applicant and therefore in those circumstances there is a duty of care on the bank to ensure that the account is operated in a proper manner or in the manner mandated by the Applicant. Those are not the facts **here money was borrowed, money was disbursed through the Applicant**. The **Applicant then used the money**. As to **how he has used it, that is an internal matter for the company to then bring whatever action against any party who may have wrongly used the money**. But it **has got nothing to do with any duty of care owed by the bank** and therefore this question also doesn't relate to the facts below. In the circumstances, Yang Amat Arif, Yang Arif, I believe my learned friend has not reached the threshold of what is required under Section 96."

24. P also maintained that there was no corruption :

> "Today, Yang Arif **other than the newspaper report, we don't have any evidence so - called of this alleged corruption**."

25. These submissions were ventilated in the Federal Court on 25.4.2022. It is pertinent to note that via its pleadings in the present suit, P has maintained that it had discovered "irregularities" in the loan from 24.9.2020. It was further given "information" by RSS (the 13th Defendant herein) in January 2022. Those dates preceded 25.4.2022. On 25.4.2022, the Federal Court dismissed Motion 671.

The Plaintiff enforces the summary judgment

26. P enforced the summary judgment by filing a winding - up petition against Zavarco Bhd in Companies Winding - Up Petition WA - 28 NCC - 966 - 12 / 2022. Zavarco Bhd was wound - up in December 2023 (See *Bank Pembangunan Malaysia Bhd v Zavarco Bhd* [2024] MLJU 3039).

27. In Petition 966 (i.e. the petition filed by P to wind - up Zavarco Bhd), P has admitted that the issue of bribery and corruption was raised and considered in suit 313, Appeals 931, 932 and 933 and Motion 671. This can be seen from the affidavit in reply filed by P on 31.7.2023 in Petition 966 :

> "8.5 The **issue on bribery and / or corruption were in fact raised by the Respondent during the course of proceedings in Suit 313** and was considered by the Court of Appeal and Federal Court. Nevertheless, they have failed to raise a single triable issue warranting the matter to proceed to trial. Therefore, to say that the Respondent was not afforded the chance to raise a defence and / or a triable issue is wrong."

28. In the upshort, the following transpired in suit 313.

(a) P had taken a consistent position before the High Court, the Court of Appeal and the Federal Court that any “misuse of the loan monies is of no concern to the Bank”.

(b) P had taken a consistent position before the High Court, the Court of Appeal and the Federal Court that any defalcation of the loan monies would be a matter for Aries to raise. To wit, “how [Aries] has used it, that is an internal matter for the company to then bring whatever action against any party who may have wrongly used the money”. In other words, P has no locus.

(c) P defended these positions before the High Court, the Court of Appeal and the Federal Court.

(d) The alleged bribery and corruption had been raised by the defendants in suit 313. P knew of the alleged bribery and corruption, but took a pointed position that there was no bribery and corruption. P cannot now be heard in the present suit alleging that there is purported bribery and corruption.

(e) P had secured an advantage from taking these positions. It obtained and maintained the summary judgment against :- (i) Aries; (ii) Zavarco Bhd; and (iii) Zulizman. It appointed a receiver and manager over Aries and wound - up Zavarco Bhd.

<u>The filing of the present suit and the change of position</u>

29. Having taken a specific position before the entire judicial hierarchy of Malaysia, P then abruptly changed tack. On 15.6.2022, P filed the present

suit against 30 Defendants. The same sum of RM 400 million that was the subject matter of the summary judgment in suit 313 is being sought in the present suit. The present suit is founded on tortious and equitable causes of action, including conspiracy to defraud and accessory liability, arising from the alleged wrongful disbursement, misutilisation and siphoning of the loan monies.

30. The Defendants in the present suit are :

(a) the former senior management and officers of P who were involved in the approval and disbursement of the loan;

(b) the independent checking engineer appointed for the project (the purpose of the loan was to partly finance the development of the coastal network which consists of installing a fiber optic network around Peninsular Malaysia);

(c) the current and former directors and shareholders of Aries and Aries' related companies; and

(d) corporate entities who have allegedly wrongfully benefitted and dishonestly assisted in the misappropriation of the loan sum disbursed by P to Aries.

31. By its pleaded case in the present suit, P claimed that it "discovered" a fraudulent scheme on 24.9.2020 :

"C.2 **Discovery of the Aries Fraud Scheme**

> 81. On 24.9.2020, upon its investigation over Aries based on documents available to the R&M and public information, the revealed to BPMB that there were certain irregularities in relation to the Loan. Among others, the R&M found that there were some discrepancies in information, missing documents, inconsistencies in Silver Ridge Sdn Shd's and / or Silver Ridge Holdings' report and payments to Paneagle Holdings which were not supported by the relevant information and documents."

32. P further alleged that it "discovered" the alleged bribery and corruption from RSS (the 13th Defendant herein) in January 2022 :

> "C.3 **Discovery of Bribery and Fraud**
>
> 84. In or around January 2022, BPMB discovered through Datuk Wira Ranjeet that :
>
> > 84.1 Sometime before 4.7.2012, Datuk Wira Ranjeet who was acting on behalf of Aries at the material time, had made payment to Dato' Zafer through Adah as the intermediary. the sum of about RM 8,000,000.00 for the successful disbursements of the Loan to Aries;"

33. These dates of <u>24.9.2020</u> and <u>January 2022</u> are significant. As at both these dates, P was submitting to both the Court of Appeal and the Federal Court that it was disinterested in any alleged misfeasance with regard to the loan. As at <u>25.11.2021</u> and <u>15.4.2022</u>, P was submitting to the Court of Appeal and the Federal Court respectively that "whatever allegations of wrongdoing [would be] … of no concern to the Bank".

34. On 15.4.2022 (three months after purportedly "discovering" the alleged bribery and corruption), P took a pointed written submission before the Federal Court to deny the alleged bribery and corruption :

> "**Even if the allegation of corruption or bribery raised by the Applicants is true** (**which is denied**), it merely impinges on the conduct of the individuals who engaged in bribery. It does not render illegal the Facility which was a perfectly

lawful transaction between the Bank and Aries, and from which Aries has benefited".

35. As submitted by P, bribery and corruption was raised to bring about a triable issue in suit 313, Appeals 931, 932 and 933 and Motion 671. P strenuously denied this. It succeeded at all levels of the court and the summary judgment was maintained. P cannot now be heard changing tack and alleging that there is purported bribery and corruption. It cannot deny the bribery and corruption, secure the summary judgment and then start fresh proceedings (the present suit) and now allege bribery and corruption.

36. In attempting to get around the fact that the issue of bribery and corruption is caught by res judicata, P attempted to argue that the issue of bribery and corruption was purportedly "not pleaded" in suit 313. However, it is trite that illegality need not be pleaded. The courts are bound to take note of the same and to act on it, should it be discovered at any stage of the proceedings. (See the Federal Court case of *Merong Mahawangsa Sdn Bhd & Anor v Dato' Shazryl Eskay Abdullah* [2015] 5 MLJ 619; the Court of Appeal case of *Pembinaan Jaya Zira Sdn Bhd v Sungai Lui Construction & Development Sdn Bhd and another appeal* [2025] MLJU 4705).

37. This is where res judicata and the doctrine of merger bites. P took a position in court proceedings and secured the summary judgment to its benefit. It cannot now take a different, inconsistent position and say that the allegations of wrongdoing with regard to the loan are now suddenly its concern. P had agreed that the only party that could bring these claims would be Aries. If P was serious about pursuing the alleged wrongdoing,

it ought to have brought its claims as early as September 2020. P did not do so. Instead, it pursued the summary judgment. In doing so, P stated that the misuse of the loan was of “no concern to the Bank”.

38. P did not appeal against the findings of the High Court in suit 313. Instead, it actively defended the same. P is taken to have admitted the correctness of the High Court’s findings. (See the Court of Appeal decision in *Frankey Leong Pit Fui (as the administrator of the estate of Louis Leong Kui Yung, deceased) v Foong Da Realty Sdn Bhd* [2021] 4 MLJ 418 at paragraphs 78 and 86). P cannot have two bites of the proverbial cherry. It is caught by the doctrine of res judicata and merger.

39. Based upon the words “in the present circumstances” appearing in the High Court judgment in suit 313, P argues that the High Court judgment in suit 313 has been taken out of context. I disagree. The chronology of events show that even when the “circumstances” changed (i.e. when P obtained knowledge of the receiver and manager’s report (on 24.9.2020), the PWC investigation report in relation to the loan (on 25.5.2021) and from RSS (the 13th Defendant herein) (in January 2022)), P still unequivocally maintained in court as follows :- “Any allegation of wrongdoing by RSS and TSSY on the misuse of funds is of no concern to the Bank. Aries is at liberty to commence action against RSS, TSSY and any other party who is involved.”

<u>Res judicata and issue estoppel</u>

40. P elected to mount its claim against Aries, Zavarco Bhd and Zulizman. It defended this position to the Federal Court. It cannot now do an about - turn and bring a claim for an alleged misuse of the loan. When

it had already maintained in the High Court, the Court of Appeal and the Federal Court that "any allegation of wrongdoing [is] …of no concern to the Bank". P is caught by res judicata and issue estoppel.

41. This is the position of law under the wider doctrine of res judicata. In *Serac Asia Sdn Bhd v Sepakat Insurance Brokers Sdn Bhd* [2013] 5 MLJ 1 at 18 - 19, the Federal Court held :

> *[44] We conclude by saying that once a regularly obtained order or judgment has been perfected, the court is functus officio. The matter as decided vide encl 6 is thus res judicata and cannot be re - litigated. It needs to be emphasised that the order made under encl 6 was appealed and affirmed right up to the Federal Court. It cannot now be revisited or reasserted under any guise in a subsequent proceeding. The issues raised by the respondent in encl 29 could have been brought up during the appeal process. The law does not allow the respondent to have a second bite of the cherry and in the manner as it did. This passage from Tenaga Berhad explains the rationale :*
>
>> *There was no merit in D2's argument that the second application to set aside the default judgment was justified because it was based upon a different ground from that relied upon in the first application. The* ***doctrine of res judicata in its wider sense*** *was applicable in the present case. It was certainly open to D2 to ground its first application on the basis that the default judgment was irregular. It was therefore an issue which properly belonged to the first application. But it chose not to rely upon that ground. Once the first application was dismissed, it was not open to D2 to make a second application to set aside the judgment on a different ground. It would amount to presenting one's case in installment which the law does not permit.*
>
> *In our judgment too, the re - litigation of a regularly and properly concluded matter as determined by the court is prohibited by the* ***wide doctrine of res judicata****. The* ***judicial process rests on the twin pillars of certainty and finality****. A final order or a judgment must therefore be vigorously protected by this doctrine, a position taken by the common law courts ever since Henderson (1843)."*

42. The Court of Appeal in *Dato' Sivananthan a/l Shanmugam v Artisan Fokus Sdn Bhd* [2015] 2 CLJ 1062; [2016] 3 MLJ 122 determined a similar point. The brief facts are as follows.

(a) LPPB had a parcel of land. Sivananthan (SS) and Khairuddin (KAH) claimed that they could get a JV agreement for Artisan Fokus (AF) on this land. AF would be the sole developer for the land under this JV.

(b) A shareholders' agreement was signed between SS, AF, KAH and one Hoe Tze Fook (HTF). In the said agreement, AF was to pay SS and KAH a commission of RM 3.6 million. Of this commission, RM 2.3 million was paid to a company called Cosmotine Sdn Bhd (Cosmotine). Cosmotine gave a "security" cheque for RM 2.3 million back to HTF.

(c) SS and KAH failed to get the JV with LPPB.

(d) When HTF presented Cosmotine's cheque for RM 2.3 million, the same was dishonoured. HTF then commenced an action for RM 2.3 million against Cosmotine. HTF secured a summary judgment. No appeal was filed by Cosmotine.

(e) AF then commenced a suit against SS and KAH, seeking the same sum of RM 2.3 million.

(f) SS made an application under Order 14A of the Rules of Court 2012. SS's application was this - "Whether in view of the cheque action taken by HTF against Cosmotine, is the suit filed by AF against him prohibited by the principle of estoppel, res judicata and doctrine of merger of cause of action?"

(g) AF argued that the claim filed by HTF against Cosmotine was a "cheque action" under the Bills of Exchange Act 1949. The suit by AF against SS and KAH was for a different cause of action.

(h) The High Court dismissed SS's application and entered judgment against him. SS appealed.

43. The Court of Appeal allowed SS's appeal. The Court of Appeal identified the core issue at hand :

"[14] … A question has therefore arisen in consequence of the commencement of the present action, which is ***whether the respondent is precluded from recovering judgment in this action by reason of the judgment previously obtained by HTF against Cosmotine in the HTF suit on the basis of the doctrines of estoppel, res judicata, merger and election****.*

…

[17] ***HTF had elected to commence the HTF suit against Cosmotine which ended with the summary judgment being recorded. The continuation of these proceedings against D2 has clearly violated the doctrine of election****, the concept which is ingrained in our legal system and common law that an individual can either opt for the choice of remedies or relinquish it. It is trite law and, indeed, a fundamental tenet of law that where a person has determined to follow one of his remedies and has communicated it to the other side in such a way as to lead the opposite party to believe that he has made that choice, he has completed his election and can go no further …*

[18] The options which were available to HTF and the respondent were either :

(a) an action by the respondent against D2 and KAH for the purported breach of the Agreement as in the present appeal; or

(b) an action in the HTF suit by HTF against Cosmotine following the dishonour of the cheque,

for the recovery of the sum of RM 2.3m. The ***respondent should go no further after the summary judgment was recorded as that was the choice for remedies it had made. It should not be allowed to make a further claim for the said sum based on the breach of contract, a remedy from which it is precluded by virtue of the election****.*

…

[21] A pertinent question which may inevitably be asked is whether there is any limit which should be put on the application of the doctrine of issue estoppel. We

raise this question because, contrary to the above requirement that the parties to the judicial decision are the same persons as to the parties to the proceedings in which the issue estoppel is raised, the ***parties in this appeal are completely different from the parties in the HTF suit****.*

[22] … The HTF suit according to the respondent, is a cheque action based on the Bills of Exchange Act 1949. The claim arose when the cheque dated 30 December 2011, issued for the sum of RM 2.3m to HTF by Cosmotine was dishonoured. The ***present claim by the respondent against D2, on the other hand, was also for the recovery of the said sum but premised on the breach of contract*** *when D2 and KAH were alleged to have breached the agreement. Clearly* ***the two actions were based on two different causes of action****. However, upon careful study of the statement of defence of Cosmotine in the HTF suit and the affidavits in relation to HTF's application to enter summary judgment in respect of the HTF's suit, we have no hesitation in holding that the* ***facts in that case and in the present appeal are identical****. Thus* ***in whatever forms the two claims are made*** *or described, be it the cheque action or for the breach of contract,* ***the claims are not fundamentally different*** *as it arose from the agreement where the sum of RM 2.3m was purportedly to have been paid by HTF to Cosmotine, pursuant to the agreement for the purpose which we have dealt at the beginning of our judgment and when the JV agreement failed to materialise, HTF presented the cheque to the bank for payment but was dishonoured. Since the demand for the refund was not met by Cosmotine, HTF commenced the action against Cosmotine while the respondent commenced the action against D2 and KAH.* ***Both suits claimed for the same amount of money to be paid by Cosmotine in the HTF suit and D2 and KAH in the present action****. It is manifestly clear therefore, that* ***both cases arose from the same set of facts, background, issues and circumstances while the reliefs claimed are consequent to the agreement****. On the contrary, we do not detect any real or glaring difference in both cases. There is indeed a mutual or privity of interest between D2 and Cosmotine in both civil suits. Furthermore, both cases involved same witnesses and same set of documents.*

…

[25] In the present appeal, since the present action would undoubtedly involve going over precisely the same facts as in the previous HTF suit, and ***accepting the broader approach and the wider sense of res judicata as the preferred and correct legal position, the fact that the parties to this suit are different from the HTF suit does not disentitle D2 to invoke the doctrine of issue estoppel*** *to bar the respondent from relitigating a specific issue that had been decided in the prior separate action. The* ***doctrine also applies to a non - party****. It is therefore* ***not necessary for parties to be the same in both actions****. What the* ***doctrine seeks to prevent is an abuse of the process of the court by attempting to make a double claim as well as allowing the plaintiff to relitigate its cause for the same relief and based on the same subject matter***

> ***for which judgment had successfully been obtained*** *in the HTF suit and to produce the same set of facts, the same witnesses and the same documents (see Seruan Gemilang Makmur Sdn Bhd v Badan Perhubungan UMNO Pahang Darul Makmur).*
>
> *[26] We would emphasise at this juncture that the* ***present action could have been included in the HTF suit by reason of the fact that the relief, evidence relied on and the witnesses are the same****. In truth,* ***the claims and relief sought in both suits share one common object which is the refund of RM 2.3 m*** *from Cosmotine, D2 and KAH which amount became liable to be refunded as a result of the alleged breach of the agreement. The* ***only difference lies in the cause of action****."*

44. *Dato' Sivananthan* (supra) was accepted by the Federal Court in *Ng Kong Ling & Anor v Low Peck Lim & Ors* [2017] 4 MLJ 21 at paragraph 40; and *Kerajaan Malaysia v Mat Shuhaimi bin Shafiei* [2018] 2 MLJ 133 at paragraph 22.

45. In the present case, P elected to proceed with the summary judgment in suit 313 and defended the same at the Court of Appeal and the Federal Court. Its cause of action has merged and it can no longer proceed with the present suit.

46. I recognise that the Defendants in the present suit were not parties to suit 313. Nevertheless, res judicata can bite even when a non - party has become involved. (See the Court of Appeal cases of *CIMB Bank Bhd (formerly known as Southern Bank Bhd) v Goh Ah Thiam* [2023] 3 MLJ 764 at paragraph 69; *Konsortium Lord - Saberkat Sdn Bhd v Petron Malaysia Refining & Marketing Bhd* [2020] MLJU 554 at paragraph 23; *Lee Ewe Liang & Anorv Yeoh Oon Theam & Ors* [2020] MLJU 1470 at paragraph 30).

47. In *Messrs KK Lim & Associates v OCBC Bank (M) Bhd* [2023] 6 MLJ 243, the Court of Appeal reaffirmed the twin pillars of certainty and finality in litigation. It establishes that a party is bound by its judicial admissions and the stance it adopts in court. Once a stance is asserted and reaped for benefit, the party is estopped from changing that stance in subsequent litigation involving the same factual matrix.

48. The brief facts are these.

(a) OCBC granted facilities to several borrowers. The borrowers charged their properties as security. The borrowers defaulted. OCBC initiated proceedings against them and secured judgment, based upon the facility agreements executed between the parties. OCBC further obtained orders for sale against charged properties.

(b) OCBC then mounted a fresh suit against several parties. This was a broad, wide - ranging suit. In gist, OCBC alleged that there was a fraudulent conspiracy afoot wherein the valuation of the charged properties was deliberately inflated. Bribery was also alleged. This resulted in OCBC giving out loans secured against inflated properties.

49. The 13th defendant in that case (Messrs KK Lim) were the solicitors acting for OCBC in preparing the facility agreements. They filed an application under Order 33 rule 2 of the Rules of Court 2012 to seek a determination of the following issues :

"a) sama ada plaintif, ada lah terhalang (estopped) daripada mendakwa bahawa defendan Ke - 13 telah melakukan apa - apa salah laku terhadap plaintif, oleh kerana plaintif :

> i) telah menyetujui dan menguatkuasakan terma - terma di dalam Perjanjian - Perjanjian Fasiliti dan Gadaian - Gadaian yang telah di sediakan oleh defendan Ke - 13;
>
> ii) dengan tindakan nya yang tanpa had dan tanpa syarat dalam meneruskan tindakan dan mendapatkan Penghakiman dan Perintah Jualan terhadap defendan Ke - 15 hingga Ke - 37, berdasarkan Perjanjian - Perjanjian Fasiliti dan Gadaian - Gadaian, walaupun telah mengetahui terlebih dahulu bahawa Laporan Penilaian Ke - 2 di bandingkan dengan penilaian yang telah dibuat oleh defendan Ke - 11 dan Ke - 12 menunjukkan percanggahan yang material dalam penilaian Hartanah - Hartanah milik defendan Ke - 15 hingga ke - 37;"

50. Messrs KK Lim applied to strike out OCBC's claim, primarily arguing that OCBC was taking a position diametrically opposed to its stance in the earlier recovery actions. The central question was whether a litigant who had successfully enforced a contract as valid in one proceeding could later impeach that same contract as fraudulent in another. Despite the matter being mid - stream trial, the Court of Appeal allowed the appeal and struck out the suit against Messrs KK Lim. The decision rested on several core findings regarding res judicata, election and estoppel.

(a) The Court of Appeal held that OCBC was caught by judicial estoppel. Having "approbated" the loan transactions to secure judgments against the borrowers, OCBC could not now "reprobate" those same transactions by alleging fraud. (See paragraphs 55 - 56 of the judgment).

(b) By pursuing and enforcing the debt recovery judgments (even after the purported discovery of irregularities), OCBC made a

definitive legal election to treat the loan agreements as valid and subsisting. It was therefore precluded from seeking inconsistent remedies based on the theory that the loans were a sham. (See paragraph 56 of the judgment).

(c) The Court of Appeal found that the second suit, based on fraudulent conspiracy, constituted an abuse of the judicial machinery. Allowing OCBC to 'have a second bite of the cherry' to salvage losses already adjudicated in a prior suit would undermine the integrity of the administration of justice. (See paragraph 62 of the judgment).

51. The Court of Appeal said (at page 272 - 273, 275) :

*"**Plaintif ada lah di halang (estopped) dengan pilihan dan res judicata (election dan res judicata)***

[54] Defendan ke - 13 menghujahkan bahawa plaintif ada lah di halang dari memfailkan tindakan ini terhadap defendan ke - 13 atas alasan berikut :

*(a) berdasarkan **doktrin pilihan apabila plaintif memilih untuk bergantung kepada dokumen pinjaman** yang telah di sediakan oleh defendan ke - 13 untuk menguatkuasakan hak nya di bawah undang - undang dalam **recovery action** dan juga prosiding halang tebus terhadap semua peminjam. **Setelah berbuat demikian plaintif tidak boleh kini di benarkan untuk mempersoalkan proses pinjaman di luluskan secara berlindung di bawah kausa tindakan frod selepas berjaya memperolehi penghakiman terhadap peminjam - peminjam**; dan*

*(b) **doktrin res judicata dan / atau gabungan** kerana plaintif telah sebelum nya menguatkuasakan perjanjian fasiliti dalam recovery actions dan prosiding halang tebus berdasarkan dokumen yang telah disediakan oleh defendan ke - 13.*

*[55] Kami **bersetuju dengan hujahan defendan ke - 13 bahawa plaintif ada lah di halang untuk memfailkan tindakan terhadap defendan ke - 13 apabila tiada isu mengenai kesahan dokumen perjanjian fasiliti yang terbukti telah***

di kuatkuasakan dan penghakiman pun telah di perolehi terhadap peminjam - peminjam. Plaintif telah mendapat manfaat dari dokumen yang telah di sediakan oleh defendan ke - 13, tidak boleh kini mendakwa bahawa dokumen yang di sediakan berdasarkan maklumat yang di perolehi secara tidak sah. Hak plaintif telah di lindungi dengan defendan ke - 13 menyediakan dokumen perjanjian fasiliti yang teratur dan boleh di kuatkuasakan serta dokumen sekuriti yang juga telah di kuatkuasakan dengan prosiding halang tebus. Defendan ke - 13 telah melaksanakan tanggungjawab professional nya sebagai peguam pinjaman.

*[56] Kami berpendapat **plaintif tidak boleh di benarkan untuk approbate and reprobate** dengan membenarkan tindakan atas kausa tindakan frod oleh defendan ke - 13 apabila plaintif telah menggunakan dokumen - dokumen tersebut secara sah di Mahkamah. **Plaintif telah mengambil recovery action setelah membuat siasatan dalaman** dan telah menyedari bahawa harga tanah telah di lambungkan dalam penilian oleh defendan ke - 11 seawal nya pada 14 April 2015 dan telah memfailkan recovery action pada 30 Julai 2015. Dengan **mengambil recovery action menunjukkan plaintif tidak berminat lagi untuk meneruskan tindakan frod dan memilih untuk menguatkuasakan hak nya berdasarkan perjanjian fasiliti** dan dengan memfailkan tindakan ini telah mengambil tindakan yang bertentangan terhadap defendan ke - 13 yang menyediakan dokumen perjanjian fasiliti tersebut.*

*[57] Kami menerima pakai pandangan mahkamah ini dalam Sykt Rodziah (sued as a firm) v Malayan Banking Bhd [2021] 5 MLJ 688; [2021] 5 CLJ 170 yang memutuskan bahawa suatu pihak **tidak boleh mengambil dua tindakan yang bercanggah di antara satu sama lain**.*

…

*[62] Berdasarkan di atas kami berpendapat adalah wajar kami campur tangan untuk membetulkan kesilapan yang dibuat oleh PK. Berdasarkan pliding dan keterangan yang telah di beri oleh saksi - saksi plaintif, PK telah gagal menghargai bahawa **halangan (estoppel) menyebabkan tindakan ini terhadap defendan ke - 13 tidak boleh di pertahankan**. **Sama ada jumlah penghakiman boleh di realisasikan oleh plaintif atau tidak ada lah khusus di antara plaintif dan defendan ke - 15 hingga ke - 37 (peminjam - peminjam)**. Setakat mana berkaitan dengan kewajipan defendan ke - 13 sebagai peguam pinjaman ia nya telah di laksanakan.”*

52. In *Sykt Rodziah (sued as a firm) v Malayan Banking Bhd* [2021] 5 CLJ 170; [2021] 5 MLJ 688, the Court of Appeal allowed an appeal and struck out a suit :

*"[55] The **plaintiff's claim is also an abuse of process**. We agreed with the contention of the second defendant that the **plaintiff's claim is an attempt by the plaintiff to salvage its position in relation to the monies due and owing under the banking facilities**. This is so since **in the recovery / debt action, the plaintiff had sought to recover RM 15,776,694.08 with interest against STT and the directors as monies due and owing under the banking facilities** (the 'judgment sum'). The **plaintiff failed to recover the judgment sum and had commenced execution proceedings** against STT and the directors for the same. The **plaintiff then sought to recover from the second defendant the amount outstanding from the judgment sum** due and owing by STT, which amounts to RM 5,784,473.12 despite the fact that by its own admission through Ms Saraswati, the plaintiff had acknowledged that the losses suffered by them was due to their own employee's negligence in approving the loan facilities to STT without reference to the SPA executed by STT as the purchaser and the vendor and not perusing the valuation report made by the first defendant. The plaintiff has knowledge that the properties were already paid for by STT and registered in the name of STT before the approval by them of the monies for the banking facilities. All these showed that the plaintiff's claim is an attempt to forum shop in the context of a 'tactical manoeuvre' by a party as seen in Ismail bin Ibrahim & Ors v Sum Poh Development Sdn Bhd & Anor [1988] 3 MLJ 348; [1988] 1 CLJ Rep 606. In such a scenario this **court has the discretion to strike out the action for abuse of court process**."*

53. Applying the above authorities, I find that P is caught by the doctrine of res judicata and merger of cause of action. P took judgment against Aries, Zavarco Bhd and Zulizman. It elected the course of action that it wanted to pursue.

54. P knew of the allegations pertaining to the loan facility, from as far back as 24.9.2020. Despite such knowledge, P elected to defend and maintain the summary judgment. It made representations to the High Court, the Court of Appeal and the Federal Court that the "misuse of funds is of no concern to the Bank". Having done so and reaped its reward, P is estopped from pursuing the present suit.

<u>Doctrine of election and merger</u>

55. P’s admission of knowledge of the bribe and irregularities at the appellate stages in suit 313 is the key turning point. Armed with the knowledge, P reached a crossroad where it could have either :- (i) disclose the fraud and seek to rescind the loan; or (ii) continue to enforce the loan as a valid contractual debt. P elected the latter. It had committed to a strategic course which was faster and guaranteed a judgment. Under the doctrine of election, P had made an unequivocal election to treat the loan as valid and subsisting. Hence, P is now legally barred from returning to that crossroad and try the above - mentioned path (i) again.

56. By pressing for the affirmation of the summary judgment in the Court of Appeal and Federal Court, P made a conscious election to treat the transaction as valid. Having elected to treat the loan as “clean” to secure a summary judgment, P is now legally barred from “reprobating” that same transaction in the present suit. It is a fatal error by P because :

(i) To obtain the summary judgment in suit 313, P had to insist that the loan be affirmed, thereby transforming the contractual obligation into a judicially recognized debt.

(ii) However, to now pursue a claim in tort, P must argue the opposite, that the contract was voidable by virtue of tortious liabilities. This is a legal contradiction.

57. One cannot treat a contract as valid and thereby gain the advantage of a debt judgment. And then turn around and treat it as void for the purpose of securing some other advantage. That would be equivalent to saying that the contract was valid but also void at the same time. One

cannot approbate and reprobate. (See the Federal Court case of *Nabors Drilling (Labuan) Corp v Lembaga Perkhidmatan Kewangan Labuan* [2020] 12 MLJ 54 at 64; the Court of Appeal cases of *Tenaga Nasional Bhd v Irham Niaga Sdn Bhd* [2011] 1 CLJ 491; [2011] 1 MLJ 752 at 777; *Amsiah Rahim v Borneo Samudera Sdn Bhd* [2024] 6 MLJ 68).

58. P's present suit is further exacerbated by the doctrine of merger. When a claimant wins a judgment, their original cause of action (whether in contract or the underlying torts of its formation) is merged into the judgment. The original right ceases to exist. It is replaced by the judgment debt.

59. The critical point here is that P in both suit 313 (contract) and the present suit (tort) sues for the same loan sum that had been released to Aries. This is fatal to P's present suit in the light of the summary judgment in suit 313. The combined effect of election and merger render the present suit unsustainable because :

(a) Even though the Defendants were not parties to suit 313, the subject matter (the loan proceeds) has already crystallized as a contractual debt by virtue of the suit 313 summary judgment.

(b) P cannot belatedly now ask this court to find that the Defendants hold "stolen / fraudulent money" based on the same subject matter, when the courts in suit 313 have already ruled that the same money is now a debt.

(c) P is entitled to pursue the debt by enforcing the summary judgment, which it did, through the garnishee proceeding and

winding - up proceeding filed against the guarantor, Zavarco Bhd. P has already enforced the summary judgment.

(d) The prayers for declaration, account and tracing in the present suit are attempts to recover the same loss already quantified in suit 313. In view that the original cause of action merged into the judgment, there is no surviving legal platform upon which to build a new tortious claim.

(e) Without a tortious platform to make a proprietary claim, this court cannot grant the prayers sought by P based on a contractual platform. The monies sought in the present suit no longer belong to P in equity. It is now a judgment debt in favour of P.

(f) By operation of law, any residue causes of action arising from the loan sum released to Aries merged and extinguished together with the summary judgment (now as a contractual debt), when the summary judgment was granted and subsequently affirmed by the appellate courts.

Locus standi

60. On the issue of locus standi, the High Court in suit 313 made a specific finding that any misuse of the loan would be a matter for Aries to raise and prosecute :

> *"[165] At any rate, whilst Section 4.02 (a) of the Facility Agreement states that the purpose of the Term Loan Facility is to part finance the development and construction of and or related to the infrastructure project,* ***Section 4.02 (b) makes it clear that the "Bank shall not be obliged to monitor the utilization***

__of the Facility by the Borrower__ nor to ensure that the Facility is indeed used for the purpose stated in subsection (a)".

…

[168] In my view, __any allegation of wrongdoing by directors, shareholders or officers of ATMB with respect to the usage or channeling of the loan monies__ to their own companies etc., is in the present circumstances, __of no concern to the Bank__. Indeed, prior to the filing of this action, ATMB never complained about any failure on the Bank's part to supervise the usage of the loan monies. As such, even assuming (without concluding) that Ranjeet or Tan Sri were involved in any wrongdoing vis - à - vis the use or misuse of the loan monies, whether through their own companies, or otherwise is a separate matter and __ATMB is at liberty to take appropriate action against Ranjeet or Tan Sri and / or any other party, who is / are involved in any purported defalcation of monies__ belonging to ATMB."

61. P also took and maintained this position in its written and oral submissions to the Court of Appeal and the Federal Court in suit 313. Having accepted this position as correct, P cannot now bring a claim in its own name. P has already satisfied itself by obtaining the summary judgment. If there is any misapplication of the loan, it is only Aries that can claim the same.

62. In submissions, P painted itself as an "aggrieved financier". However, none of the Defendants herein have ever taken any financing of RM 400 million from P - only Aries did. The "aggrieved financier" has been satisfied - it has obtained the summary judgment in suit 313 and enforced it.

63. P has casually bypassed the recipient of the loan (Aries) and now intends to go after monies that are not its own. P fails at the threshold requirement of locus standi. P confirmed that the monies, once given to Aries, belonged to Aries. P confirmed that it had no interest in the loan and how it was disbursed; Even assuming P's allegations are proven, the person aggrieved is Aries. P has no right, having satisfied itself by obtaining (and defending) the summary judgment.

64. P contends that locus standi is not pleaded. Whilst the exact words "locus standi" are not pleaded, it has been pleaded that the entire claim is an abuse of the process of the court.

65. Even if the words locus standi are not pleaded, it is a threshold issue that must be determined first before going into the merits of the case. This is because locus standi is a fundamental issue which goes to the jurisdiction of the court. If P is found to lack standing to sue, then the action fails in limine and there is no inquiry into the merits of the case. (See the Court of Appeal decision in *Shahidan Shafie v Atlan Holdings Bhd & Anor & other appeals* [2005] 3 CLJ 793 at 803; the Federal Court decision in *Ikatan Kelab - Kelab Melayu Negeri Pulau Pinang (499 - Penang) (suing through its President, Dato' Seri Hj Mohd Yussof Latiff) & Ors v Yayasan Bumiputra Pulau Pinang & Ors and another appeal* [2013] 6 AMR 613; [2013] 9 CLJ 941; [2014] 1 MLJ 27).

66. Also as observed by the Court of Appeal in *Bumiputra - Commerce Bank Bhd v Augusto Pompeo Romei & Anor* [2014] 3 MLJ 672 at 682 - 683, the lack of locus standi is a jurisdictional issue. The parties need not plead specific words, given that it is a fundamental issue that goes to the root of the plaintiff's standing.

<u>The alleged "Quistclose" trust</u>

67. P has further raised allegations that the RM 400 million loan facility was advanced on a "Quistclose" trust. Again, this point was considered by the High Court in suit 313. In assessing this point, the High Court observed that P was not contractually obligated to monitor how the loan monies

were used. With P not even being contractually - obliged to monitor the utilisation of the loan monies, P cannot allege in the present suit that a purported "Quistclose" trust exists. (See the Court of Appeal decision in *Pembinaan Lagenda v Geohan* [2018] MLJU 196).

68. On our facts, there can be no "Quistclose" trust as alleged. The High Court in suit 313 specifically found that P was "not contractually obliged to monitor how [Aries] or its officers utilised (or misused) the monies which were drawn down under the term loan facility". These findings were defended by P all the way to the Federal Court. Without there being any contractual evincement of trust obligations, P cannot now allege in the present suit that there are purportedly "trust" obligations.

<u>Delay in making the striking out applications</u>

69. P complains that the striking out applications are an afterthought and tactical manoeuvre to delay trial. The 2nd Defendant's striking out application was filed two weeks before trial and more than three years after this action was commenced. The other Defendants then followed suit and filed their respective striking out applications.

70. The 2nd Defendant admits there is a delay but explains the delay in the following manner.

(a) It took him a large amount of time to discover the various papers and documents on suit 313, and to further discover what had been filed and stated in the various cause papers.

(b) His solicitors needed time to peruse the various documents and go through the papers, which consists 10s of thousands of pages.

(c) There were numerous appeals and interlocutory applications filed within this matter that he had to deal with.

71. Notwithstanding the delay, it is not a ground to dismiss an application to strike out. After all, Order 18 rule 19 (1) of the Rules of Court 2012 explicitly states that striking out may be ordered "at any stage of the proceedings". No time limit is prescribed for the filing of a striking out application. While an application to strike out a pleading should be made as soon as possible, a late application is not necessarily doomed to failure. I refer to the following authorities.

72. In *Neoh Hong Sang (t/a Neoh Hong Sang Contractor) v Lye Weng Enterprise Sdn Bhd* [2008] 1 MLJ 623 at 667 - 669, the Court of Appeal affirmed the proposition that a striking out application can be made at any time, even after the case has been set down for trial. The Court of Appeal upheld the decision of the trial judge in allowing a striking out application filed 15 years after the filing of the writ. The argument of delay in filing the striking out application after trial dates had been fixed was rejected by the Court of Appeal. (See also the Court of Appeal decision in *Wong Yew Kwan v Wong Yu Ke & Anor* [2009] 2 MLJ 672 at paragraph 20).

73. In *Bujang Anak Liban v John Bungan Jangong Bayang* [2015] MLJU 2100, the Federal Court allowed an application to strike out after trial had proceeded. This was based upon the evidence of the plaintiff in that case.

Whether the striking out applications are barred by res judicata

74. Next, P turns around the same argument of res judicata against the Defendants. To wit, the contention that P has elected to pursue suit 313 and is therefore barred from pursuing the present suit is an issue which had already been determined by a previous judge.

75. P points out that various Defendants in the present suit have filed seven separate applications between August 2022 and April 2023 to strike out P's claim ("**previous striking out applications**"). The previous striking out applications were premised on identical grounds as the present striking out applications. The respective Defendants in the previous striking out applications raised similar arguments of res judicata, merger and locus standi, given that P had commenced and obtained judgment in suit 313. All the previous striking out applications were dismissed by the previous judge on 6.3.2024.

76. In the first place, the 2nd Defendant has never applied to strike out. Importantly, none of the Defendants have ever raised the papers and submissions (both oral and written) ventilated by P in :- (i) suit 313; (ii) Appeals 931, 932, 933 and Motion 39 at the Court of Appeal; and (iii) Motion 671 at the Federal Court. These papers have never been considered nor appreciated by the previous judge in the context of striking out or Order 33 rule 2 of the Rules of Court 2012.

77. It is noteworthy that P does not dispute these papers nor the chronology of events. In its affidavit in reply (Enclosure 1239), P avers :

> "9. At the outset, **Shailen's averments in paragraphs 13 to 60 are not disputed only in so far as they set out the chronology of events and are**

consistent with the contemporaneous records. However, Shailen's allegations in paragraphs 13 to 60, that BPMB adopted and maintained the position that any allegation of wrongdoing was of no concern to BPMB and that BPMB has now taken a diametrically converse position in Suit 264, are denied. I am advised by BPMB's solicitors and verily that Shailen has taken Suit 313 out of context".

78. I consider that there can be no res judicata from the interlocutory findings of the previous judge. At the time those findings were made, none of these papers were before the previous judge. None of the Defendants herein were parties to suit 313. None of the previous striking out applications contains the full and relevant papers from suit 313, Appeals 931, 932, 933, Motion 39 and Motion 671 and Petition 966. None of the previous striking out applications considered the position advanced by P.

79. On similar facts, the Court of Appeal in *Sykt Rodziah* (supra), *Zulpadli bin Mohammad & Ors v Bank Pertanian Malaysia Bhd* [2013] 2 MLJ 915 and *Leisure Farm Corp Sdn Bhd v Kabushiki Kaisha Ngu (formerly known as Dai - Ichi Shokai) & Ors* [2017] 5 MLJ 63 allowed applications to strike out.

80. The Court of Appeal in *Sykt Rodziah* (supra) observed :

"[46] Further, the recovery / debt action was filed on 11 January 2016, approximately one year and eight months before the filing of the claim to which this appeal pertains. The debt action was premised solely on STT's indebtedness. The ***plaintiff could have pleaded conspiracy or collusion by STT, STT's directors, guarantors, the valuers and the second defendant but the plaintiff had failed to do so****. Instead, the* ***plaintiff elected to treat the banking facilities as valid*** *and regular. The* ***plaintiff obtained a judgment*** *in default of appearance for the sum of RM 15,776,694.08 with interest and costs. The* ***plaintiff then commenced execution proceedings*** *and made STT's directors bankrupts.* ***Unable to recoup its losses, the plaintiff filed this action*** *under appeal against the first and second defendants,* ***changing its stance and taking a different position or direction from its previous action that of a***

pure debt recovery based solely on indebtedness to one based on negligence, fraud, conspiracy and collusion against the first and second defendants*. We are of the view and we agreed with the second defendant's counsel that* ***once it is established that a party has adopted a particular stance in an action before the court, it is estopped from changing that stance in another action****, and its admissions in pleadings would amount to judicial admissions admissible against it."*

81. Whilst the Court of Appeal in *Leisure Farm* (supra) observed :

"[17] Also cited by learned counsel in the course of his oral submission on this point is this court's decision in the case of Zulpadli bin Mohammad & Ors v Bank Pertanian Malaysia Bhd [2013] 2 MLJ 915 in which it was held that the respondent's own admission in the earlier suit as well as the amended statement of claim in the present suit showed that the appellants were innocent victims as much as the respondent was. The ***respondent was estopped from taking a position different from that pleaded in its defence in the earlier suit****. Clearly, the* ***essential function of judicial estoppel is to prevent intentional inconsistency while the object of the rule is to protect the court from the perversion of judicial machinery****.* ***Judicial estoppel seeks to address the incongruity of allowing a party to assert a position in one court and the opposite in another tribunal*** *(Peguam Negara Malaysia v Nurul Izzah bt Anwar & Ors [2017] MLJU 273)."*

82. In *Majlis Agama Islam Selangor v Dahlia Dhaima bt Abdullah and another appeal* [2023] MLJU 63, the Court of Appeal applied *Syarikat Rodziah* (supra) and outlined the rationale for the rule :

"[95] The pleadings in the MAIWP Summons are as such a form of judicial admission which thus operate to prevent or estop the respondent from adopting a different stance. In a recent decision of this Court in Syarikat Rodziah v Malayan Banking Bhd [2021] 5 CLJ 170 it was held that ***a party is estopped from taking a position different from what was pleaded in its earlier suit or changing its stance in another action****. The* ***party's admissions in pleadings in the earlier suit would amount to judicial admissions admissible against it****.*

[96] Related to this, in another decision of a Court of Appeal in Zulpadli bin Mohammad & Ors v Bank Pertanian Malaysia Bhd [2013] 2 MLJ 915 it was explained that ***the rationale of judicial estoppel is to prevent intentional***

***inconsistency and to protect the Court from the perversion of judicial machinery**.*"

The three remaining Defendants

83. The 1st Defendant did not file a similar striking out application. The 20th and 21st Defendants are unrepresented. Be that as it may, with the striking out applications of the Defendants being successful, the claim cannot stand against the three remaining Defendants. The present suit must likewise be struck out against the three remaining Defendants (even where no striking out application is raised by them).

84. This is due to the nature of P's claim, where allegations of conspiracy are raised. P's case is that the Defendants acted in concert to defraud P by causing the loan sum to be disbursed to Aries without fulfilling the necessary conditions precedents, misusing the loan sum, and siphoning the loan to other entities.

85. The High Court case of *Dato Abdullah bin Ahmad & Ors v Bank Bumiputra Malaysia Bhd* [2001] MLJU 638 is instructive.

(a) In that case, Dato Abdullah took a facility from BBMB. He pledged shares as security for the facility. He failed to repay the sums owing. BBMB sold the shares to Dato Azizuddin.

(b) Dato Abdullah then filed the first suit (D1 - 22 - 2101 - 90). In the said suit, he named BBMB and Dato Azizuddin as defendants. Dato Abdullah alleged that BBMB conspired and colluded with Dato Azizuddin to deprive him of the shares and to cheat him.

(c) Dato Azizuddin (the defendant in the first suit) then filed a second suit (D3 - 22 - 1178 - 92). In gist, Dato Azizuddin sought various reliefs to cause the share purchase to be effectuated and for dividends on the shares to be channelled to him. Dato Abdullah was named as a defendant.

(d) Dato Abdullah then settled the first suit with BBMB. As a result of this settlement, the first suit was withdrawn against BBMB. However, Dato Abdullah maintained his allegations of conspiracy and collusion against Dato Zainuddin.

86. The High Court held that Dato Abdullah's claims were unsustainable. By effecting the settlement against BBMB, the entire allegation of conspiracy and collusion would fall :

"The court's records show that the claim of the Abdullah group against BBMB vide the 1st suit and the counterclaim by BBMB in that suit has been withdrawn and settled respectively on 4 April 1997. Hence, what is clear is that BBMB is no longer a party to these proceedings.

…

I would think the same goes for their claim that BBMB colluded with the Ahmad Azizuddin group and acted with an intention to cheat so as to deprive the Abdullah group of the benefit of the said shares. ***I cannot see how a charge of collusion in a suit can stand when one of the two persons who are parties to the alleged understanding or conspiracy is no longer a party to the suit****.*

…

Since BBMB has now ceased to be party*, I would think that the* ***charge of collusion and acting with an intention to cheat against BBMB and the Ahmad Azizuddin group can no longer be pursued*** *by the Abdullah group. For the charge of collusion and acting with an intention to cheat, the Abdullah group would have to prove that there was an arrangement between BBMB and the Ahmad Azizuddin group to plan and prepare an unlawful or harmful act, namely -*

(i) that BBMB will secretly sell and the Ahmad Azizuddin group will secretly buy the said shares;

(ii) that BBMB and the Ahmad Azizuddin group are hostile towards the Abdullah group; and

(iii) that BBMB and the Ahmad Azizuddin group have conspired to injure the Abdullah group by depriving the same of the said shares and that they have done so with an intention to cheat.

***With BBMB now no longer a party, I cannot see how the charge of collusion can now remain an issue**. It is my view that the **substratum of the claim by the Abdullah group against BBMB and the Ahmad Azizuddin group evaporated the moment BBMB ceased to be a party to these proceedings**..”*

87. A similar position was observed by the Privy Council in *Village Cay Marina Ltd v Acland and others* (1996) 52 WIR 238. There, a claim for conspiracy was brought against several purported tortfeasors, including for alleged conspiracy. Prior to the claim being filed, the plaintiffs had executed a release agreement with VCM, the receiver.

88. The plaintiffs then sued the receiver and several other parties, alleging conspiracy. The Privy Council, agreeing with the trial judge, held that the release would extinguish the cause of action for conspiracy against the remaining alleged conspirators :

*“The next question is **whether the discharge, release and extinguishment benefit the receiver’s alleged co - conspirators and joint tortfeasors** (Barclays, Mr Acland, Landac and Rhyto). For guidance on the answer to that question, I invoke the decision of the English Court of Appeal in Duck v Mayeu [1892] 2 QB 511. There, A L Smith LJ said (at page 513) :*

> *‘It is, we think, clear law, that a **release granted to one joint tortfeasor, or to one joint debtor, operates as a discharge of the other joint tortfeasor, or the other joint debtor, the reason being that the cause of action, which is one and indivisible, having been released, all persons otherwise liable thereto are consequently released**. …*

*In the present case, we are not confronted with a covenant not to sue a joint tortfeasor or a joint debtor. The VCM - receiver release is a positive and unequivocal release and discharge of the receiver from all legal liability to VCM. The VCM - receiver **release therefore has the legal effect of releasing and***

> ***discharging the receiver's alleged co - conspirators and joint tortfeasors*** *(Barclays, Mr Acland, Landac and Rhyto) from all legal liabilities in respect of the alleged fraud and conspiracy and has the* ***legal effect of extinguishing all rights of action which VCM may have had against the alleged co - conspirators in respect of the alleged fraud and conspiracy****. The releases and discharges of the respondents thus render it unnecessary to determine whether the respondents in fact committed any tort against VCM before the execution of the VCM - receiver release."*

89. Here, the striking out of the Defendants will have a cascading effect on the three remaining Defendants. It has the effect of discharging and extinguishing the cause of action against the three remaining Defendants. With the claim against the Defendants being struck out and they no longer being parties to the present suit, the claim against the three remaining Defendants will also fall.

90. On top of that, arising from my finding that P does not have locus standi, the claim against the three remaining Defendants also cannot stand.

91. Incidentally, the 13th and 14th Defendants had entered into a consent judgment with P.

92. Pertaining to the 1st Defendant, P's pleaded case against him is worth highlighting. According to the re - amended statement of claim, P's case against the 1st Defendant is predicated on his alleged role as a dishonest intermediary in a bribery scheme involving the RM 400 million loan facility granted to Aries. P asserts that the 1st Defendant received bribes as a proxy for the late Dato' Zafer, who was the former managing director of P.

93. The specific assertions put forward by P against the 1st Defendant are :

(a) Identification as proxy : P asserts that the 1st Defendant received bribes as a proxy for the late Dato' Zafer;

(b) Dishonest assistance : The assertion that the 1st Defendant dishonestly helped Dato' Zafer breach his fiduciary and trust duties;

(c) Knowing receipt : The claim that the 1st Defendant received the bribe money with knowledge of its illicit origin in breach of trust; and

(d) Conspiracy to defraud : The 1st Defendant is alleged to have conspired with Dato' Zafer and others to deceive P and successfully disburse the loan through bribery.

94. As can be seen above, there are no allegations against the 1st Defendant that are independent of his alleged role as an intermediary for Dato' Zafer. The cause of action and factual assertion pleaded against the 1st Defendant are linked to the alleged breaches and bribery scheme centred on the late Dato' Zafer. Based on these assertions, P seeks to hold the 1st Defendant jointly and severally liable for the loan sum.

95. In the present suit, the 28th and 29th Defendants are sued as the administrators of the estate of the late Dato' Zafer. With the claim against the 28th and 29th Defendants being struck out and they no longer being

parties to the present suit, the claim against the 1st Defendant must also fall.

Conclusion

96. I conclude that the present suit is obviously unsustainable as P has no locus standi to file this claim. Even assuming it does, P's allegations are caught by res judicata. For the reasons above, I allowed the striking out applications.

97. After hearing the parties on costs, I awarded the following costs :

(i) costs of RM 75,000 in respect of Enclosure 1198 to the 2nd Defendant (taking into account that the composite submissions filed by the Defendants adopted the submissions raised by the 2nd Defendant as a core submission to advance their cause);

(ii) costs of RM 50,000 in respect of Enclosure 1273 to the 3rd, 5th, 12th, 15th, 18th and 26th Defendants;

(iii) costs of RM 50,000 in respect of Enclosure 1264 to the 4th, 11th, 17th, 24th and 25th Defendants;

(iv) costs of RM 50,000 in respect of Enclosure 1274 to the 7th, 8th, 9th and 22nd Defendants;

(v) costs of RM 20,000 in respect of Enclosure 1213 and Enclosure 1275 to the 6th and 16th Defendants;

(vi) costs of RM 20,000 in respect of Enclosure 1270 to the 10th Defendant;

(vii) costs of RM 20,000 in respect of Enclosure 1272 to the 19th Defendant;

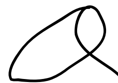
(viii) costs of RM 20,000 in respect of Enclosure 1269 to the 23rd and 27th Defendants;

(ix) costs of RM 20,000 in respect of Enclosure 1271 to the 28th and 29th Defendants;

(x) costs of RM 20,000 in respect of Enclosure 1268 to the 30th Defendant; and

(xi) no order as to costs in respect of the 1st Defendant, given that he did not file a striking out application herein.

Dated 23 February 2026



Quay Chew Soon
Judge
High Court of Kuala Lumpur
(Commercial Division NCC 2 & Admiralty 9)

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Zulaikha Aini Mohamed Khair Johari *(Messrs. Salehuddin Saidin & Associates)* for the 28th and 29th Defendants

Farhan Shafee and Lim Zun Kang *(Messrs. Shafee & Co.)* for the 30th Defendant

Case reference

1. *Bank Pembangunan Malaysia Bhd v Zavarco Bhd* [2024] MLJU 3039
2. *Merong Mahawangsa Sdn Bhd & Anor v Dato' Shazryl Eskay Abdullah* [2015] 5 MLJ 619
3. *Pembinaan Jaya Zira Sdn Bhd v Sungai Lui Construction & Development Sdn Bhd and another appeal* [2025] MLJU 4705
4. *Frankey Leong Pit Fui (as the administrator of the estate of Louis Leong Kui Yung, deceased) v Foong Da Realty Sdn Bhd* [2021] 4 MLJ 418
5. *Serac Asia Sdn Bhd v Sepakat Insurance Brokers Sdn Bhd* [2013] 5 MLJ 1
6. *Dato' Sivananthan a/l Shanmugam v Artisan Fokus Sdn Bhd* [2015] 2 CLJ 1062; [2016] 3 MLJ 122
7. *Ng Kong Ling & Anor v Low Peck Lim & Ors* [2017] 4 MLJ 21
8. *Kerajaan Malaysia v Mat Shuhaimi bin Shafiei* [2018] 2 MLJ 133
9. *CIMB Bank Bhd (formerly known as Southern Bank Bhd) v Goh Ah Thiam* [2023] 3 MLJ 764
10. *Konsortium Lord - Saberkat Sdn Bhd v Petron Malaysia Refining & Marketing Bhd* [2020] MLJU 554

11. *Lee Ewe Liang & Anorv Yeoh Oon Theam & Ors* [2020] MLJU 1470
12. *Messrs KK Lim & Associates v OCBC Bank (M) Bhd* [2023] 6 MLJ 243
13. *Sykt Rodziah (sued as a firm) v Malayan Banking Bhd* [2021] 5 CLJ 170; [2021] 5 MLJ 688
14. *Shahidan Shafie v Atlan Holdings Bhd & Anor & other appeals* [2005] 3 CLJ 793
15. *Ikatan Kelab - Kelab Melayu Negeri Pulau Pinang (499 - Penang) (suing through its President, Dato' Seri Hj Mohd Yussof Latiff) & Ors v Yayasan Bumiputra Pulau Pinang & Ors and another appeal* [2013] 6 AMR 613; [2013] 9 CLJ 941; [2014] 1 MLJ 27
16. *Bumiputra - Commerce Bank Bhd v Augusto Pompeo Romei & Anor* [2014] 3 MLJ 672
17. *Neoh Hong Sang (t/a Neoh Hong Sang Contractor) v Lye Weng Enterprise Sdn Bhd* [2008] 1 MLJ 623
18. *Wong Yew Kwan v Wong Yu Ke & Anor* [2009] 2 MLJ 672
19. *Bujang Anak Liban v John Bungan Jangong Bayang* [2015] MLJU 2100
20. *Sykt Rodziah (supra), Zulpadli bin Mohammad & Ors v Bank Pertanian Malaysia Bhd* [2013] 2 MLJ 915
21. *Tenaga Nasional Bhd v Irham Niaga Sdn Bhd* [2011] 1 CLJ 491
22. *Amsiah Rahim v Borneo Samudera Sdn Bhd* [2024] 6 MLJ 68
23. *Leisure Farm Corp Sdn Bhd v Kabushiki Kaisha Ngu (formerly known as Dai - Ichi Shokai) & Ors* [2017] 5 MLJ 63
24. *Majlis Agama Islam Selangor v Dahlia Dhaima bt Abdullah and another appeal* [2023] MLJU 63
25. *Dato Abdullah bin Ahmad & Ors v Bank Bumiputra Malaysia Bhd* [2001] MLJU 638
26. *Village Cay Marina Ltd v Acland and others* (1996) 52 WIR 238

<u>Legislation reference</u>

1. Section 25 of the Schedule to the Courts of Judicature Act 1964
2. Order 18 rule 19 (1) (a), (b), (c) and (d); Order 33 rule 2 and Order 92 rule 4 of the Rules of Court 2012
3. Bills of Exchange Act 1949