Neutral Citation Number: [2021] EWCA Civ 1217

Case No: A3/2020/0670

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)
Mr Justice Birss
[2020] EWHC 629 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/08/2021

Before:

LORD JUSTICE HENDERSON
LORD JUSTICE WARBY
and
SIR DAVID RICHARDS

- -

Between:

ZAVARCO PLC	**Claimant/ Respondent**
- and -	
TAN SRI SYED MOHD YUSOF BIN TUN SYED NASIR	**Appellant /Defendant**

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Robert-Jan Temmink QC and Tom Nixon (instructed by **Teacher Stern LLP**) for the **Appellant**
Patrick Lawrence QC (instructed by **Needle Partners LLP**) for the **Respondent**

Hearing dates: 29 April 2021

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Approved Judgment

In accordance with the Covid-19 protocol for handing down judgments, this judgment has been handed down by Lord Justice David Richards remotely by circulation to the parties' representatives by way of e-mail, by publishing on www.judiciary.uk and by release to Bailii. The date and time for hand down will be deemed to be Thursday, 5 August 2021 at 10:30.

Sir David Richards:

Introduction

1. The issue raised by this second appeal is whether the doctrine of merger, whereby a judgment on a cause of action precludes a new action for further relief on the same cause of action, applies where the judgment is for declaratory relief only. It appears that this is an issue on which there is no decided case either in this country or in any other Commonwealth country. The current edition of a leading textbook, *Spencer Bower & Handley: Res Judicata* (5th ed. 2019), expresses the view that merger does not apply in the case of a purely declaratory judgment, as have all previous editions since the first edition published in 1924.

2. The present proceedings were dismissed by an order of Chief Master Marsh dated 23 July 2019, which declared that the court had no jurisdiction to hear the claim. The order was made on the basis that the doctrine of merger applied in the case of a prior declaratory judgment, so as to preclude a subsequent claim on the same cause of action for payment of a debt. By an order dated 30 March 2020, Birss J (as he then was) allowed an appeal against the Chief Master's order. Permission for a second appeal was given by Newey LJ.

Facts

3. So far as relevant to the issue raised by this appeal, the facts may be summarised as follows.

4. The claimant company, Zavarco plc (Zavarco), was incorporated in England on 29 June 2011 as a public company. On incorporation, 360 million ordinary shares of €0.10 each, representing 30% of its issued share capital, were allotted to the appellant (Mr Nasir) and the balance were allotted to a Mr Ranjeet Singh Sidhu. On 25 July 2011, the entire issued share capital of Zavarco Berhad (ZB), a company incorporated in Malaysia, was transferred to Zavarco. A subsidiary of ZB held licences to develop a fibre optic telecommunications network in Malaysia. The transfer of ZB to Zavarco, and the flotation in August 2011 of Zavarco on the Frankfurt Stock Exchange, were carried out in order to raise capital for development of the telecommunications network. The background to Mr Nasir's involvement in Zavarco is complex but it is not germane to the issue on this appeal.

5. On 5 June 2015, Zavarco served on Mr Nasir a call notice, requiring him to pay up in cash at par the 360 million shares issued to him on incorporation (the shares), making a total of €36 million. Mr Nasir contested any liability to pay up the shares, asserting that they had been issued in consideration for the transfer of shares in ZB. On 15 June 2016, Zavarco served on him a notice of intended forfeiture of the shares pursuant to provisions in its articles of association. Both parties issued proceedings in respect of this dispute. The first in time was a Part 8 claim issued by Mr Nasir. Subsequently, Zavarco issued a Part 7 claim, seeking declarations that the shares were unpaid, that the call notice and notice of intended forfeiture were valid and that Zavarco was entitled to forfeit the shares, and alternatively, if the call notice or the notice of intended forfeiture were held to be invalid, a declaration that Zavarco was entitled to serve new notices. No claim for payment of the par value of the shares or other relief was made by Zavarco.

6. Both claims came on for trial before Mr Martin Griffiths QC (sitting as a Deputy Judge of the High Court) over four days in October 2017. He gave judgment for Zavarco, finding that there was no agreement that the shares were to be paid up otherwise than in cash. By an order dated 14 November 2017, he made declarations that the shares were unpaid and that "Zavarco Plc, having taken steps required under the Articles of Association and Mr Nasir having failed to pay for the same, is entitled to forfeit the Shares" (the 2017 order).

7. Mr Nasir's application for permission to appeal was refused on 24 May 2018, following which Zavarco forfeited the shares on 11 June 2018. By then, there was no market for the shares and they were not sold.

8. On 11 October 2018, the present proceedings (the second action) were issued, claiming €36 million and interest. Permission was given to serve the claim form out of the jurisdiction on Mr Nasir in Malaysia. On 22 November 2018, Mr Nasir issued an application under CPR 11.1, disputing the jurisdiction of the court and seeking an order to set aside service of the claim form.

9. The application was heard on 30 May 2019 by Chief Master Marsh, who gave judgment in favour of Mr Nasir on 17 July 2019, declaring that the court had no jurisdiction to hear the claim and dismissing the claim.

10. The application was made on two bases. First, it was said that the claim for payment of the amount due on the shares was barred by virtue of the doctrine of merger, applicable as a result of the declarations made in the 2017 order. Alternatively, it was argued that the claim for payment made in the second action should have been included in the first action and the failure to do so rendered the second action an abuse under the principles established in *Henderson v Henderson* (1843) 3 Hare 100.

The judgment of Chief Master Marsh

11. In a clear and careful judgment, the Chief Master reviewed the more recent authorities which discuss the doctrine of merger, particularly the observations of Lord Sumption in *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2013] UKSC 46, [2014] AC 160 (*Virgin Atlantic*) and of Arden LJ in *Clarke v In Focus Asset Management and Tax Solutions Ltd* [2014] EWCA Civ 118, [2014] 1 WLR 2502 (*Clarke*). From these he deduced that merger was the automatic consequence of a final judgment on a cause of action when all aspects of the cause of action have been dealt with; see [31] and [39].

12. As regards the view expressed in *Spencer Bower & Handley* (at that time in its 4th edition, published in 2009), the Chief Master agreed that there was a real difference between a judgment that may lead to enforcement and one that merely declares what the parties' legal position is. However, he did not agree that a declaration could not qualify as a judgment granting relief. It depended on the nature of the claim and the declaration made. Where the declaration was that a liquidated sum was due under a contract, the claim was not only based on a recognisable cause of action, unlike for example a declaration as to status, but the court must have considered and determined all the facts that form the cause of action, just as it would if it were asked to give judgment for the liquidated sum. These considerations led the Chief Master to say at [46]:

> "The essence of the doctrine of merger is that the cause of action merges in the judgment. The cause of action is thereby extinguished by a combination of the judicial determination of the facts forming the cause of action and manifestation of that determination in the order, or judgment, of the court that follows. Even accepting that a declaration does not have any executory or coercive effect, a declaration that is based upon findings of fact that relate to a recognisable cause of action, still determines the issue and it is hard to see why it should not have the effect of extinguishing the cause of action. It is after all a matter for the claimant to decide whether additional relief may be needed. A determination and grant of declaratory relief followed by a second stage when the court is asked to consider additional claims for relief is clearly unobjectionable if it is made within the same claim based on prayers for relief sought in the claim form."

The judgment of Birss J

13. On appeal, Birss J agreed with some of the points made by the Chief Master. For example, he agreed that a declaration was, in a case such as the present, a judgment granting a remedy for a cause of action and that it made no difference that it was a discretionary remedy. He also agreed that the justification given in *Spencer Bower & Handley* for saying that declarations cannot support merger, viz that declarations do not constitute relief or a remedy, is too widely expressed. He said at [24]:

> "In my judgment this case illustrates that a declaration can be a remedy for a cause of action and since it can be, there is no reason why the doctrine of merger could not apply when it is the sole remedy granted. A declaration is a remedy which the claimant can "recover" (to use the word stressed by the appellant) based on a cause of action. In that sense I agree with the Chief Master."

14. Taking the example of a claim for a liquidated sum of £x, merger would result from a declaration that £x was due and payable, even if no judgment for payment of such sum was sought or given. By analogy with *Republic of India v India Steamship Co Ltd (The Indian Grace)* [1993] AC 410, albeit that the relief there was judgment for damages of £6,000, "the critical thing…was that the first judgment had placed a value on the damages due for that cause of action. Once that was done, any right to a higher sum based on the same cause of action had merged into and been extinguished by that judgment".

15. That example was, however, to be distinguished from the present case. Birss J said:

> "26. However what this shows is that one needs to examine both the judgment and the legal right said to have merged into it before the answer in a particular case can be given. I do not see how a declaration which declares to exist the right which the claimant already had before judgment was given, could be said to extinguish that pre-existing right. It does the opposite.

> This may well be what the authors of the Spencer Bower and Handley textbook had in mind. Now it may be that on procedural grounds a second court might refuse to entertain a second action of some kind which is based on that right, but that would not be as a result of merger, that would be based on the fulfilment of the policy in favour of finality and against abusive proceedings.
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> 27. The appellant's counsel emphasised that merger is a technical and automatic doctrine. I agree that that is relevant to understanding its scope. Merger is a way of explaining how one legal right can have disappeared after a judgment has been given and therefore it has a narrower focus than the wider concepts based on the prevention of abuse and on finality.
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> 28. What happened in the proceedings below is the Chief Master rejected the argument that declarations as such could not support merger because in fact they could be relief for a cause of action. As I have said I believe he was correct to do that. Before the Chief Master the way the arguments had been advanced meant that that was enough to dispose of the issue. However in my judgment it is not. Characterising a declaration as relief or as a remedy is not enough to answer the question in a given case. The question will be whether the earlier right in particular has merged into and been extinguished by the actual declaration given in the judgment, having regard to the terms in which that declaration is couched.
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> 29. One only has to ask that question in this case to see that the answer is that these declarations do not purport to do that. They are, if anything, a formal statement explaining why Zavarco did have and still does have a right to €36 million cash from Mr Nasir.
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> 30. In my judgment the doctrine of merger applied to the declarations made in the previous action in 2017 does not operate to extinguish the claimant's right against Mr Nasir under the Articles to be paid €36 million. It is that right, recognised by the judgment, which this present action is based on."

16. Birss J therefore reversed the Chief Master's decision on the application of merger in this case. He went on to consider the alternative ground based on *Henderson v Henderson* and held that, in all the circumstances, there was no abuse of the court's process in bringing the first action for declaratory relief and, subsequently, bringing the second action for an order for payment of the amount due on the shares. In reaching this conclusion, it was relevant that it was obvious from the terms of the 2017 order that enforcement of the obligation to pay the calls would or might follow. Birss J held that no reasonable person in Mr Nasir's position could have thought that the order was the end of the matter as far as an obligation to pay was concerned. There is no appeal from this aspect of Birss J's decision.

Submissions on this appeal

17. Appearing for Mr Nasir, Mr Temmink QC submitted that Birss J had overturned over a century of case law in holding that judgment on a cause of action does not extinguish that cause of action. He had erroneously held that a prior judgment merely prevents the re-assertion of the same "right" on which the first judgment was given. His decision that the 2017 order had determined Zavarco's right to forfeit the shares but not its right or claim for payment of €36 million unpaid on the shares involved an impermissible distinction between a cause of action and a right arising under a cause of action. Such a distinction was not only unsupported by any authority but was contrary to existing authority. The first, and principal, ground of appeal was therefore that Birss J erred in law in finding that the 2017 order merged only Zavarco's "right" to forfeit the unpaid shares but did not extinguish the cause of action on which it was based. The relevant cause of action was that Mr Nasir was liable to pay €36 million on the shares, but had failed to do so, giving rise to both a right of to forfeit the shares and a right to payment.

18. Mr Nasir's second ground of appeal was that Birss J had adopted an approach which had not been argued before him by either party and which Mr Nasir had not had an opportunity of answering. Even if the factual premise were correct, this should have been raised with Birss J when he circulated his draft judgment and before he handed down judgment. In any event, the point of principle has been fully argued before us as a matter of substance.

19. Developing his submissions on the principal ground of appeal, Mr Temmink argued that Birss J failed to take account of the wide exclusionary effect of the doctrine of merger, which prevents not merely the repeated assertion of the same "right" but prevents the assertion of new "rights", and the claiming of new remedies, on the basis of the same cause of action. It bars the whole cause of action, which Mr Temmink submitted was demonstrated by the decision of the House of Lords in *The Indian Grace*. Birss J should have asked whether the cause of action asserted in the second action was the same as that asserted in the first. As it clearly was the same cause of action, it followed that it had merged into the 2017 order so as to preclude any claim for further relief based on it, such as an order for payment of the sum due.

20. Zavarco supported Birss J's reasoning but also filed a respondent's notice, seeking to uphold his order on the further ground that, as a general proposition of law, a cause of action does not merge with, and is not extinguished by, a declaratory judgment.

Discussion

21. I consider it helpful to start with a passage from the judgment of Lord Sumption in *Virgin Atlantic* which was cited by both the Chief Master and Birss J. Merger was not an issue in that case, which was concerned with the different doctrine of cause of action estoppel (the principle that once it has been held in proceedings that a cause of action does or does not exist, that result cannot subsequently be challenged by any party to the proceedings).

22. At [17], Lord Sumption summarised the various legal principles, including cause of action estoppel and merger, which together constitute res judicata:

> "Res judicata is a portmanteau term which is used to describe a number of different legal principles with different juridical origins. As with other such expressions, the label tends to distract attention from the contents of the bottle. The **first** principle is that once a cause of action has been held to exist or not to exist, that outcome may not be challenged by either party in subsequent proceedings. This is "cause of action estoppel". It is properly described as a form of estoppel precluding a party from challenging the same cause of action in subsequent proceedings. **Secondly**, there is the principle, which is not easily described as a species of estoppel, that where the claimant succeeded in the first action and does not challenge the outcome, he may not bring a second action on the same cause of action, for example to recover further damages: see *Conquer v Boot* [1928] 2 KB 336. **Third**, there is the doctrine of merger, which treats a cause of action as extinguished once judgment has been given upon it, and the claimant's sole right as being a right upon the judgment. Although this produces the same effect as the second principle, it is in reality a substantive rule about the legal effect of an English judgment, which is regarded as "of a higher nature" and therefore as superseding the underlying cause of action: see *King v Hoare* (1844) 13 M & W 494, 504 (Parke B). At common law, it did not apply to foreign judgments, although every other principle of res judicata does. However, a corresponding rule has applied by statute to foreign judgments since 1982: see Civil Jurisdiction and Judgments Act 1982, section 34. **Fourth**, there is the principle that even where the cause of action is not the same in the later action as it was in the earlier one, some issue which is necessarily common to both was decided on the earlier occasion and is binding on the parties: *Duchess of Kingston's Case* (1776) 20 St Tr 355. "Issue estoppel" was the expression devised to describe this principle by Higgins J in *Hoysted v Federal Commissioner of Taxation* (1921) 29 CLR 537, 561 and adopted by Diplock LJ in *Thoday v Thoday* [1964] P 181, 197-198. **Fifth**, there is the principle first formulated by Wigram V-C in *Henderson v Henderson* (1843) 3 Hare 100, 115, which precludes a party from raising in subsequent proceedings matters which were not, but could and should have been raised in the earlier ones. **Finally**, there is the more general procedural rule against abusive proceedings, which may be regarded as the policy underlying all of the above principles with the possible exception of the doctrine of merger." (emphasis added, for convenience)

23. Another summary of cause of action estoppel and merger was given shortly afterwards by Arden LJ in *Clarke*, although it does not appear that the court was referred to *Virgin Atlantic*. The case concerned a claim by retail investors for negligent advice, causing an alleged loss of £300,000, in circumstances where they had successfully taken a complaint to the Financial Ombudsman Service and had been

awarded and paid £100,000 in compensation, the maximum available under the ombudsman scheme. This court held that the second claim was barred by cause of action estoppel.

24. Arden LJ said by way of explanation of cause of action estoppel and merger:

> "3. Common law doctrines preclude a person who has obtained a decision from one court or tribunal from bringing a claim before another court or tribunal for the same complaint. These rules are referred to as *res judicata* and merger. The parties have argued this case on the basis of both principles. The judge dealt solely with merger.
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> 4. To understand merger, it is necessary to understand the meaning of "a cause of action". It is not a legal construct. The term "cause of action" is used to "describe the various categories of factual situations which entitle[d] one person to obtain from the court a remedy against another" (per Diplock LJ in *Letang v Cooper* [1965] 1 QB 232 at 242. A complaint to the ombudsman need not be a cause of action but (as further discussed below) it may involve consideration of an underlying cause of action and the facts on which a complaint is based may be or include facts constituting a cause of action.
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> 5. Merger explains what happens to a cause of action when a court or tribunal gives judgment. If a court or tribunal gives judgment on a cause of action, it is extinguished. The claimant, if successful, is then able to enforce the judgment, but only the judgment. The effect of merger is that a claimant cannot bring a second set of proceedings to enforce his cause of action even if the first tribunal awarded him less than he was entitled to (see, for example, *Wright v London General Omnibus Co* [1877] 2 QBD 271 and *Republic of India v Indian Steamship Company Ltd (The Indian Grace)* [1998] AC 878). As Mummery LJ held in *Fraser v HMLAD* [2006] EWCA Civ 738 at [29], a single cause of action cannot be split into two causes of action.
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> 6. *Res judicata* principally means that a court or tribunal has already adjudicated on the matter and precludes a party from bringing another set of proceedings (see generally *Lemas v Williams* [2013] EWCA Civ 1433). The doctrine also covers abuse by a litigant of the court's process by bringing a second set of proceedings to pursue new claims which the claimant ought to have brought in the first set of proceedings (this is known as the rule in *Henderson v Henderson* (1843) 3 Hare 180; 67 ER 313).
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> 7. The requirements of *res judicata* are different from those of merger. All that is necessary to bring merger into operation is that there should be a judgment on a cause of action. *Res*

> *judicata* may apply either because *an issue* has already been decided or because a *cause of action* has already been decided. We are concerned on this appeal with *res judicata* of the latter kind, known as cause of action estoppel."

25. Mr Temmink points to statements such as merger "treats a cause of action as extinguished once judgment has been given on it" (per Lord Sumption in *Virgin Atlantic*) and "[i]f a court or tribunal gives judgment on a cause of action, it is extinguished" (per Arden LJ in *Clarke*) as demonstrating that once Zavarco obtained declaratory relief in the 2017 order, it was not open to it subsequently to claim payment of the unpaid amount on the shares.

26. I accept that the underlying cause of action in both proceedings is the same, namely that Mr Nasir as allottee and registered holder of the shares was liable to pay in cash the amount called up on the shares, amounting to €36 million. For the reasons that follow, I do not accept that the 2017 order, containing declarations that the shares were unpaid and that Zavarco was entitled to forfeit the shares, excluded Zavarco's right subsequently to bring proceedings for judgment for €36 million.

27. The doctrine of merger is a rule of substantive law that is strictly applied. It does not involve the exercise of any discretion by the court. At a time when the means available to the courts to control abusive litigation were significantly less than they have since become, merger played an important role. As the passage from Lord Sumption's judgment quoted above shows, there is now an extensive range of tools available to control the abuse of the court's process. I cannot think of any circumstances in which those tools would not be sufficient to prevent abuse, even if merger ceased to exist. There is, of course, no question of abolishing merger, but there is no good reason for widening its scope beyond its established bounds. It was described by Lord Goff of Chieveley in *The Indian Grace* at p.424 as a "highly technical doctrine". In the present case, it is instructive that Birss J rejected the argument based on *Henderson v Henderson*, finding that bringing the second action involved no abuse of the court's process.

28. A doctrine that prevents a party bringing a second claim to recover a remedy that has already been the subject of a judgment between the same parties makes obvious sense. A doctrine that would prevent a party from bringing a claim for an enforceable remedy, such as a judgment for debt or damages, because it had earlier obtained a declaration as to its rights and the defendant's obligations serves no obvious purpose, if the circumstances are such that the second action is not an abuse of the court's process.

29. It is not easy to discern from the authorities the precise scope or limits of the doctrine of merger. *The Indian Grace* is one of the few cases in recent years which was directly concerned with merger, albeit as modified in its application to foreign judgments by section 34 of the Civil Jurisdiction and Judgments Act 1982 (see the report at pp.423-424). Lord Goff, giving the only reasoned speech, approved at p.417 a passage from *Spencer Bower* (2nd ed. 1969) which stated that the effect of merger was that a person "in whose favour an English judicial tribunal of competent jurisdiction has pronounced a final judgment…is precluded from afterwards

recovering before any English tribunal a second judgment *for the same civil relief* in the same cause of action" (emphasis added). In that case, the plaintiffs had recovered damages for breach of contract in proceedings in India and, subject to any waiver or estoppel, were thereby precluded, by virtue of section 34, from bringing a second action in England for further damages for the same breach of contract.

30. There are further statements in the current edition of *Spencer Bower*, and have been in all previous editions, which refer to the attempt in later proceedings to recover the same relief as was recovered in earlier proceedings as being a defining feature of merger. So, in the current edition at para 19.01, repeating what has appeared in all previous editions, it is stated that:

> "A plea of former recovery is distinguishable from one of *res judicata* estoppel. The latter prohibits contradiction, the former reassertion. In cases of estoppel what must not be controverted is a proposition of law or finding of fact. In cases of former recovery what is not allowed is a second proceeding *for the same relief*." (emphasis added)

31. It is not necessary on the present appeal to decide whether the doctrine of merger applies only to claims for the same relief. What does, however, clearly emerge from the authorities is that merger applies where an obligation under the cause of action is embodied in, and replaced by, a final order of the court.

32. *King v Hoare* (1844) 13 M&W 494 is the authority frequently cited in the context of merger and to which counsel for both parties took us. As with many of the cases concerned with merger, it was a claim against a defendant jointly liable in contract or tort with another. The claim was for the price of goods sold and delivered. The defendant pleaded that the goods were sold to him and one Smith jointly and that the plaintiff had already obtained judgment against Smith for the price of the goods. The issue, as stated by Parke B at p.503 was whether a judgment recovered against one of two joint contractors is a bar in an action against the other. He continued:

> "If there be a breach of contract, or wrong done, or any other cause of action by one against another, and judgment be recovered in a court of record, the judgment is a bar to the original cause of action, because it is thereby reduced to a certainty, and the object of the suit attained, so far as it can be at that stage; and it would be useless and vexatious to subject the defendant to another suit for the purpose of obtaining the same result. Hence the legal maxim, "transit in rem judicatam", - the cause of action is changed into matter of record, which is of higher nature, and the inferior remedy is merged in the higher."

33. This critical part of Parke B's judgment, and in particular his reference to "the inferior remedy [being] merged in the higher", shows that the focus is on the obligation imposed by the judgment on the defendant, as does his reference to the judgment in the first action being "a bar to the original cause of action, because it is thereby reduced to a certainty, and the object of the suit attained". Demonstrating the antiquity of the doctrine, Parke B referred to the judgment of Popham CJ in *Brown v Wootton*

(1604) SC Cro Jac 73 where he said: "If one hath judgment to recover in trespass against one, and damages are certain, although he be not satisfied, yet he shall not hath a new action for this trespass".

34. In *Kendall v Hamilton* (1879) 4 App Cas 504. Lord Hatherley said at p.519 that after judgment for debt had been obtained against two joint debtors "their co-contractor could not, according to *King v Hoare*, be sued, because the debt, which was a simple contract debt in the first instance, contracted by the firm, had passed into *rem judicatam* under the operation of the judgment which had been obtained against the two". Lord Penzance (dissenting in the result but not on this point) said at p.526:

> "The doctrine of law regarding merger is perfectly intelligible. Where a security of one kind or nature has been superseded by a security of a higher kind or nature, it is reasonable to insist that the party seeking redress should rest upon the latter, and not fall back on the former. In like manner, when that which was originally only a right of action has been advanced into a judgment of a Court of Record, the judgment is a bar to an action brought on the original cause of action. The reasons for this result are given by Baron Parke in *King v. Hoare*."

35. In *Director-General of Fair Trading v First National Bank plc* [2001] UKHL 52, [2002] 1 AC 481, Lord Bingham at [3] cited with approval from Peter Gibson LJ's judgment in the same case, where he said: "It is trite law in England that once a judgment is obtained under a loan agreement for a principal sum and judgment is entered, the contract merges in the judgment and the principal becomes owed under the judgment and not under the contract".

36. *Spencer Bower* refers to merger as "former recovery" and has done so since the first edition. Mr Temmink criticised this term, suggesting that it was not used elsewhere. This is not, however, the case. In *Conquer v Boot* [1928] 2 KB 336, Talbot J referred at p.346 to "the plea of res judicata or judgment recovered". In *Halsbury's Laws of England* (4th ed) Vol 12, para 1190 states:

> "The defence of 'judgment recovered', arising as it does out of res judicata, has much in common with estoppel by record, although it is not founded upon it. A claimant who has once sued a defendant to judgment cannot, while the judgment stands, though unsatisfied, sue him again for the same cause, not because he is estopped from doing so (although he, as well as the defendant, is estopped from averring anything contrary to the record), but because the cause of action is merged in the judgment, which creates an obligation of a higher nature."

37. A declaration is a quite different remedy from judgment for a debt or damages. It makes sense to speak of a merger of a claim for a debt or damages into a judgment for the payment of a specified sum as debt or damages, so creating "an obligation of a higher nature". The lesser right is merged into the higher. The same simply cannot be said of a purely declaratory judgment, which itself imposes no obligation but only confirms the obligation which already exists. As Birss J aptly put it, "I do not see how a declaration which declares to exist the right which the claimant already had before

judgment was given, could be said to extinguish that pre-existing right. It does the opposite."

38. It has been stated in all editions of *Spencer Bower* that the doctrine of merger does not apply to a declaration: see the current edition at para 20.01 and the 1st edition at para 304. No authority is cited for that proposition, but none can be when, so far as known, it has never previously been contended that it does apply to a declaration. It is, however, consistent with the underlying rationale of the doctrine. Moreover, it is hard, indeed I would say impossible, to think of a sound reason why a declaration of legal right or obligation should automatically bar a subsequent claim for enforceable relief.

39. There is a further consideration as regards declarations. As the authorities demonstrate, merger (or former recovery) is a very longstanding doctrine of the common law. Declaratory relief was an equitable remedy, and declarations as a sole remedy were virtually unknown until the mid-nineteenth century: see *Zamir & Woolf: The Declaratory Judgment* (4th ed. 2011) para 2-01 et seq. It is clear from judgments given in the early years of the nineteenth century that the doctrine of merger was by then fully formed and well understood. In view of the growth in other means to prevent abuse of the court's process, there is no case for expanding the scope of the rigid doctrine of merger or for applying it to a remedy that was never in the contemplation of the judges who developed it.

40. On any footing, in my view, Birss J was right to hold that the declaration made in this case did not prevent Zavarco from bringing its second action to recover judgment for the unpaid calls. He considered and rejected the argument that any abuse of process, or unfairness to Mr Nasir, was involved in bringing the second action seeking judgment for payment of €36 million, having previously obtained declaratory relief. In circumstances where Zavarco was intending to operate the forfeiture mechanism in its articles of association and Mr Nasir was contending that his shares were fully paid up, it made good sense to resolve that issue by proceedings for a declaration without necessarily at the same time seeking judgment for the unpaid calls. If Zavarco had been able to sell the shares after forfeiture, it would not have been entitled to judgment for the full amount but only for the amount, if any, remaining after giving credit for the net sale proceeds.

41. On one matter, I respectfully disagree with Birss J. While he considered that the application of merger to declarations would depend on the terms of the declaration, it is my view that the basis and development of the doctrine shows that it has no application at all to declarations. Of course, depending on the circumstances of the case, a claimant who first seeks only declaratory relief may be precluded, by the other principles designed to prevent abuse, from bringing further proceedings.

42. For these reasons, I would dismiss the appeal.

Lord Justice Warby:

43. I agree.

Lord Justice Henderson:

44. I also agree.