Neutral Citation Number: [2020] EWHC 629 (Ch)

Case No: CH-2019-000221

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
APPEALS (ChD)
On appeal from the Order of Chief Master Marsh made on 23rd July 2019
In action BL-2018-002129

Royal Courts of Justice
The Rolls Building
7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Date: 20/03/2020

Before :

MR JUSTICE BIRSS

- -

Between :

Zavarco Plc

Claimant/Appellant

and

Tan Sri Syed Mohd Yusof Bin Tun Syed Nasir

Defendant/Respondent

- -
- -

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

Hearing dates: 11th March 2020

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE BIRSS

Mr Justice Birss :

1. This is an appeal from the order of Chief Master Marsh made on 23rd July 2019 in which he dismissed the claim on the ground that the court has no jurisdiction to hear it. His judgment is [2019] EWHC 1837 (Ch). The Chief Master gave permission to appeal because he recognised that the conclusion on the point of law was contrary to a clear statement in the leading textbook in this area.

2. I will refer to the appellant as Zavarco and the respondent as Mr Nasir, without any disrespect to him (bearing in mind his title).

3. The action which the Chief Master dismissed was a claim issued on 11th October 2018 by Zavarco in which it claims €36 million owed by Mr Nasir. This debt arises because Mr Nasir was allotted 360 million shares in Zavarco of €0.10 each on its incorporation and they remain unpaid. Mr Nasir's case (amongst other things) was that he was not obliged to pay for those shares with cash but rather that it was agreed that the par value would be satisfied by transfer to Zavarco of shares in another company ("ZB"). ZB stands for Zavarco Berhad, a Malaysian company. However in a judgment in this division dated 14th November 2017 following proceedings brought in 2016 the judge (Mr Martin Griffiths QC) rejected Mr Nasir's case about that. The judge held there was no agreement that Mr Nasir's shares would be paid for otherwise than in cash (paragraphs 72 and 89) and that Mr Nasir took the shares on the terms of the Memorandum and Articles of Association and no other terms (paragraph 73). The judge found that Mr Nasir was obliged to pay for the shares in cash (paragraph 79). This meant that under the Articles, Zavarco would be entitled to forfeit the shares as long as they complied with certain steps in relation to Mr Nasir. These were to serve on him a valid call notice requiring the unpaid sum to be paid, and, assuming the sum was not paid after 14 days, to serve a notice of forfeiture. The judge held that the call notice and notice of forfeiture sent by Zavarco were valid (paragraph 95).

4. On giving judgment Mr Griffiths QC granted two declarations as follows:

> "1. The shares held by Mr Nasir in Zavarco Plc, namely 360 million ordinary shares of €0.10 each ("the Shares") are unpaid.
>
> 2. 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."

5. In addition to other irrelevant orders, the judge also gave a direction pending any appeal at paragraph 9:

> "9. Pursuant to CPR 52.16, the effect of paragraphs 1 and 2 of this Order be stayed, with the consequence that Zavarco Plc may not take steps to enforce payment for or forfeit the shares presently registered in the name of Mr Nasir pending the outcome of any application made by Mr Nasir to the Court of Appeal for permission to appeal …".
>
> [Chief Master's emphasis]

6. Permission to appeal from that order was refused.

7. After the judge's judgment Zavarco forfeited the shares. By Article 75.3 of the Articles, even if a person's shares have been forfeited, that person remains liable for all sums payable under the Articles, subject only to a point that they would be entitled to credit for any sum the company obtained in return for allotting the shares to someone else. In fact Zavarco has not allotted them to anyone else. This may or may not be explained by the background to this dispute. Mr Griffiths QC found that the business was being ramped, offering unrealistic hope of future profit based on very little and that it had no value unless it could secure substantial capital investment (paragraph 114). In any event the shares were suspended.

8. Thus Zavarco now seeks payment of the €36 million debt from Mr Nasir. It issued the claim which came before the Chief Master. Mr Nasir applied to have the claim dismissed on two grounds, first that the doctrine of merger applied and so the cause of action had been extinguished by the judgment of Mr Griffiths QC, and second because the action was an abuse of process on ***Henderson v Henderson*** grounds, i.e. that the claim could and should have been brought in the first action and to bring it now was an abuse. The Chief Master decided that the merger doctrine applied and so he dismissed the claim. It is common ground that if merger does apply then no discretion is involved. The consequence is automatic. The Chief Master did not need to examine ***Henderson v Henderson***.

9. The decision on merger turns on a short question of law – does merger apply to declaratory judgments? There is no authority directly on the point. The leading textbook in this area is Spencer Bower and Handley (5th Ed, November 2019). The textbook expresses the clear view that it does not (paragraphs 20.01 and 20.08) but cites no authority on the matter. The reason given is that what is required is a judgment granting relief, and a declaration of right does not qualify as relief. I will come back to the judgment in more detail below but briefly put, the Chief Master was not persuaded that a declaration, at least of the kind in this case, was not a form of relief. He recognised that certain kinds of declarations will not support merger, but this case was not one of them.

10. The first question on this appeal is therefore concerned with merger. If the appeal is allowed on that ground then the ***Henderson v Henderson*** point has to be considered. Although the Chief Master did not (and did not have to) address it, neither party suggested that ***Henderson v Henderson*** should be remitted instead.

11. Before turning to the point of law, it is worth looking briefly at how this dispute got here. There is no evidence explaining why the first proceedings only claimed declarations and did not include a claim for the money. Counsel for Mr Nasir submitted that Zavarco or its legal team had just made a mistake and that did not justify Zavarco not being visited with the legal consequences of that error. The Chief Master clearly suspected that the true reason for the absence of a claim for damages or a debt in the first action was an attempt to avoid the £10,000 court fee it would have attracted, whereas a claim for declarations alone attracted a much lower fee. As he pointed out, there could have been an application to amend to include a money claim (and pay the higher fee) but that did not happen. Counsel for Zavarco before me submitted that I should not assume it was a mistake. He suggested, without saying this is what did happen, that his clients' approach may have been to obtain clarity

about their ability to exercise the self-help remedy of forfeiting the shares before they did so, which the declaration gave them. He also referred to paragraph 9 of the judge's order, which clearly contemplated that there could well be attempts to enforce payment after the judgment, but which stayed any such attempt pending appeal.

Merger – the law

12. Before getting into the legal theory, it is worth setting out the easy example which illustrates merger. If a claimant has a cause of action which gives them a legal right to a sum of money from a defendant (e.g. a claim for breach of contract), then before judgment is given, the claimant's legal right is that which the law provides for as arising from the cause of action. The parties may disagree about the merits of the claimant's right and go to trial. Assuming the claimant wins the trial, they will obtain a judgment ordering the defendant to pay them that sum of money. The claimant now has a legal right to the money from the defendant, based on the judgment itself. This new legal right is different from the old one. For example the way the limitation rules apply differs and the accrual of interest may well be different too. If you think about it, the claimant cannot still have their old legal right to the sum of money for breach of contract, otherwise they would now have two rights and might end up with a right to double recovery. So the idea is that the old right, or cause of action, has merged into the new right, the judgment. Whether "merger" is the best metaphorical description of this idea does not matter. It makes sense.

13. Merger is similar to but not the same as other doctrines which come into play when a party or a dispute comes back to a court a second time after a previous decision. They include res judicata, issue estoppel and the rule in ***Henderson v Henderson***. In ***Virgin Atlantic Airways v Zodiac Seats*** [2013] UKSC 46, [2014] AC 160 Lord Sumption deals with this at paragraph 17. He said as follows:

> "17. 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.
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> 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."
>
> [*sentences separated out for clarity*]

14. In the final sentence, in relation to the policy justification, Lord Sumption singles out the doctrine of merger as a possible exception. The others, like res judicata, issue estoppel and ***Henderson v Henderson*** all have a similar policy justification which is procedural in nature and is concerned with abusive proceedings. Whereas merger is distinct, it is a substantive rule of law, not a procedural discretion.

15. The textbook heavily relied on by the appellant (Spencer Bower and Handley) refers to a "plea of former recovery" (paragraph 19.01) in a chapter entitled "Merger in judgment". As I read the textbook the authors regard merger as an explanation for a doctrine of former recovery. However that distinction does not matter for present purposes. What matters is that the textbook explains the rationale for the concept itself on three grounds (paragraph 19.02). The first is a public interest in the termination of disputes between litigants, the second is a private interest in an individual litigant not to be sued twice for the same thing, and the third is the idea that the cause of action must cease to exist once judgment had been given on it.

16. While these are indeed justifications which were used in the past, I believe Lord Sumption's approach may help to understand the doctrine as it applies in the modern context. The second justification for merger given in the textbook (a litigant not being sued twice) is the procedural abuse point which Lord Sumption doubted was a basis for merger. The first justification (the public interest in finality) is similar. Those two policies support a broad procedural doctrine which may involve an exercise of discretion. They are consistent with merger but they are not focussed on supporting the automatic and technical nature of the doctrine as it is today.

17. In ***Clark v In Focus Asset Management*** [2014] EWCA Civ 118, [2014] 1 WLR 2502 the Court of Appeal considered merger and res judicata (particularly cause of action estoppel). Although the judgment in ***Virgin*** had come out by the hearing in ***Clark***, it does not appear to have been cited, as the Chief Master noted. The Chief Master cited the whole passage (paragraphs 3-12) from the judgment of Arden LJ in ***Clark***. I will set out one passage from that longer section. At paragraph 5 Arden LJ set out the nature of merger:

> "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 India Steamship Co Ltd (No 2)* [1998] AC 878). As Mummery LJ held in *Fraser v HLMAD Ltd* [2006] ICR 1395, at para 28, a single cause of action cannot be split into two causes of action."

18. Later, at paragraphs 11 and 12, Arden LJ addressed policy justifications. In that section Arden LJ was dealing with both res judicata/ cause of action estoppel, and merger together. The two policy justifications identified are the same two private and public interests in Spencer Bower and Handley (above).

19. Although ***Clark*** shows that merger can be used to explain what happens in certain situations, it is also clear that its explanatory power can have real effects. The ***Republic of India*** case (also known as ***The Indian Grace***) which was cited in ***Clark*** (above) is an example. An important aspect of that case was that s34 of the Civil Jurisdiction and Judgments Act 1982 had reversed the previous rule that merger could not apply in the case of a foreign judgment. The result was that a judgment in India for £6,000 for short delivery of the cargo as a result of a fire on a vessel carrying ammunition precluded a later claim for £2.6 million for the total loss of the cargo.

20. Turning to declaratory judgments in particular, the only authority even apparently directly on the point which was cited by the appellant is a decision of the Court of Appeals of the State of Oregon, USA on 24th May 1995 in ***O'Connor v Zeldin*** 895 P.2d 809 (Or.App 1995). The court there held that a previous declaration that a marital property settlement agreement was valid and enforceable, arrived at in circumstances in which the husband had been refusing to abide by its terms, did not preclude the wife from later seeking further relief by way of damages for breach of

contract and conversion. However even as a persuasive authority the case is of limited assistance because it arose in a specific statutory context which does not apply before me.

21. The appellant submitted that a declaratory judgment cannot support merger because a declaration is a remedy of a different kind from the other sorts of remedies the courts can give such as orders to pay money or injunctions to refrain from doing something. The difference said to matter is that the latter are executory or coercive in nature whereas the former (declarations) are not. This distinction between coercive remedies and declarations is drawn by the authors of the textbook on declaratory judgments Zamir & Woolf (4th ed). The Chief Master set this passage out at paragraph 41.

22. As the Chief Master noted at paragraph 42, Zamir & Woolf's description of declaratory relief is not controversial. He went on "Clearly there is a real difference between a judgment that may lead to enforcement and a judgment that merely declares what the parties' legal position is." I agree. Nevertheless the Chief Master was not persuaded this distinction amounted to a relevant difference, at least on the facts of this case. He noted at paragraph 44 that Spencer Bower and Handley's justification for the rule is that a declaration does not qualify as a judgment granting relief. He found that difficult to follow and so do I. I agree with the Chief Master that the fact it is discretionary cannot matter (paragraph 44) and the appellant did not suggest otherwise. Also, as the Chief Master identified, the fact that one can think of various declarations which are not obviously based on a cause of action in the ***Letang v Cooper*** sense, does not mean there are not others which can be regarded as a remedy for a cause of action. He regarded the declaration obtained by Zavarco in this case as an example, as explained in paragraph 57 of the judgment:

> "57. *[…]* He [*Mr Temmink*] points to the importance and economic value that attached to the declaration the claimant obtained. It enabled the claimant to forfeit shares with a par value of €36 million. Although no money changed hands as a consequence of the determination, it enabled the claimant to pursue its remedy through the operation of the Articles. Mr Temmink submits that it is not right to analyse the outcome of the 2016 proceedings, as Mr Lawrence proposed, as not providing the claimant with a remedy in the sense of something it could enforce against the defendant. However, this is to approach the matter without regard to what the claimant was able to achieve with the benefit of the declaration. Armed with the declaration the claimant could safely operate the provisions of the Articles and forfeit the shares. Forfeiture was not a remedy the court was able to offer. The declaration supported the self-help remedy agreed in the contract between the parties"

23. I agree with this, and I agree with the Chief Master that it shows that declarations can qualify as judgments granting relief and therefore shows that the justification given in Spencer Bower and Handley for why declarations cannot support merger is at least too widely stated in that it treats all declarations as if they are not relief or not capable of being a remedy.

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.

25. Turning to the situation in ***The Indian Grace***, as a matter of logic, if the first court had made the order for the sum of £6,000 to be paid and had also granted a declaration that £6,000 had to be paid, the result would have been the same. It seems to me that it follows that the result would also have been the same if the first court had only granted the declaration and for some reason not included a coercive order requiring a sum to be paid, perhaps because it was not thought to be needed. The critical thing which had happened in ***The Indian Grace*** 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.

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.

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.

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.

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.

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.

31. Things would be very different if, for example, another issue before Mr Griffiths QC had been as to the amount to be paid, perhaps because of a dispute about the number of shares allotted. Say Zavarco had been claiming that 400 million shares were allotted (meaning €40 million was due) and the judge had decided the number was 360 million shares, contrary to Zavarco's case. On that hypothesis Zavarco could not now claim a sum as large as €40 million from Mr Nasir. I would hold that the reason why not is because any right to the extra €4 million in cash has merged into and been extinguished by the declaratory judgment that 360 million shares had been allotted. However that is not this case.

32. I will allow the appeal on the first ground.

The second ground – effect of forfeiture

33. The second ground of appeal was another occasion in which the Chief Master differed from statement in a textbook which had been made without citing authority. The question is whether, on the standard provisions on forfeiture of shares in the Articles of Association, the effect of forfeiture of a member's shares creates a new obligation owed by that person, as a debtor, to the company as compared to the old pre-forfeiture obligation as a contributor. This mattered for the merger point because if the obligation Mr Nasir owes Zavarco today is a new one compared to the one he owed before the forfeiture took place, then since forfeiture only happened after the first judgment, the new right can hardly have merged into or been extinguished by that judgment. The Chief Master noted in paragraph 15 that the commentary on these standard provisions in Palmer's Company Law expresses the view that the forfeiture prevents the company suing the shareholder for past calls, but that the provisions, by which the shareholder remains liable for all sums payable for the shares at the date of forfeiture with interest, creates a new obligation as a debtor. His decision on this was within paragraph 59:

> "It seems to me that, with respect to the editors of Palmer, by virtue of section 33(2) of the Companies Act 2006, the payment that was due to be made for the shares was always a contractual debt. It is not right to see a liability of a contributor as being converted to a different liability."

34. Since it is not necessary for me to decide this issue, all I will say is that I see the force in the Chief Master's decision.

Third ground

35. There was a third ground of appeal concerning cumulative remedies. It was closely related to the first ground and does not need to be addressed.

Abuse of process

36. I turn to consider the second basis for Mr Nasir's original application to stay or dismiss the action, namely the argument that the money claim could and should have

been brought in the first action and so, to bring it now is an abuse of process following ***Henderson v Henderson*** and ***Johnson v Gore Wood*** [2002] 2 AC 1. This was raised on appeal by the Respondent's Notice. The Chief Master did not address it because he did not have to. I must decide the matter afresh.

37. The starting point is Lord Bingham's summary of the principles in ***Johnson v Gore Wood***. The core passage relevant to this case is:

> "… The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole.
>
> The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all.
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> …
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> It is, however, wrong to hold that because a matter could have been raised in early proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before.
>
> …
>
> While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice."

38. Two points are advanced on Mr Nasir's behalf:

i) Zavarco has put forward no cogent explanation why no debt claim was made in the 2016 proceedings;

ii) All the facts and matters entitling Zavarco to claim in debt were pleaded and determined in the 2016 proceedings. The company simply omitted part of its

case and seeks to vex Mr Nasir twice with multiple sets of proceedings where one would have sufficed.

39. Plainly Zavarco could have included the debt claim in the first action and no convincing reason why not has been provided. However I would have more sympathy with Mr Nasir if it had not been obvious that the company and the judge seemed to think that enforcement of the obligation to pay cash for the shares would follow the decision. Otherwise the passage in paragraph 9 underlined above makes no sense. No reasonable person in Mr Nasir's position when that order was made could have thought that the order was the end of the matter as far as an obligation to pay was concerned.

40. Counsel for Mr Nasir submitted that it was perfectly ordinary for a party to come to court for declaratory relief, get it, and then start a second claim like this. However although there was some trading of anecdotes during the hearing, no clear example of that taking place has been cited. The various cases provided can all be explained in other ways.

41. Zavarco or its advisers took a grave risk in proceeding this way. The point clearly could have been raised and I believe it ought to have been mentioned more clearly, at least to make crystal clear how it was that Zavarco envisaged the matter would proceed (see e.g. ***Aldi Stores*** [2007] EWCA Civ 1260). However there is nothing to which my attention has been drawn to suggest that Mr Nasir could have had a reason to think Zavarco was giving up its right to require him to pay cash for the shares by bringing their claim to establish that they were entitled to forfeit them. It was made clear in the order (para 9) that enforcement of the payment obligation was likely to follow afterwards once any appeal was over, and Mr Nasir cannot have thought otherwise. In my judgment looking at the case as a whole and in all the circumstances, Zavarco's conduct is not an abuse of the court's process.

Conclusion

42. The appeal is allowed. The claim ought to proceed.