Hilary Term
[2025] UKSC 5
On appeal from: [2021] EWCA Civ 1217

JUDGMENT

Nasir (Appellant) *v* Zavarco plc (Respondent)

before

Lord Hodge, Deputy President
Lord Hamblen
Lord Leggatt
Lord Stephens
Lady Rose

JUDGMENT GIVEN ON
19 February 2025

Heard on 9 July 2024

Appellant
Paul Downes KC
Robert-Jan Temmink KC
Tom Nixon
Tom Hall
(Instructed by Teacher Stern LLP)

Respondent
Patrick Lawrence KC
Charles Phipps
(Instructed by Needle Partners Ltd (Leeds))

LORD HODGE (with whom Lord Hamblen, Lord Leggatt, Lord Stephens and Lady Rose agree):

1. The appeal concerns the scope of the longstanding English law doctrine of merger. In short, the question is whether the doctrine, by which a cause of action merges with a judgment in the action, applies to a declaratory judgment.

1. Factual background

2. This appeal is the latest stage of a long-running dispute between Tan Sri Nasir, a Malaysian citizen ("the appellant") and the respondent, Zavarco plc ("Zavarco"), as to whether the appellant was obliged to pay €36 million for shares which he acquired in Zavarco.

3. Zavarco is a public limited company incorporated in England and Wales. On its incorporation on 29 June 2011, the appellant subscribed to the memorandum of association and became the holder of 360 million €0.10 shares in Zavarco. The subscription amounted to a commitment to invest €36 million out of a total subscription of €120 million. The appellant then transferred to Zavarco the shares in a Malaysian company, Zavarco Berhad ("ZB"), which became Zavarco's subsidiary. The appellant did not pay in cash for his 360 million shares in Zavarco. The appellant's position was that he had provided consideration in the form of the ZB shares. Zavarco considered that he was obliged to pay for the shares notwithstanding the transfer of the shares in ZB.

4. On 5 June 2015 Zavarco served a call notice on the appellant for payment of €36 million in cash for the shares. After the appellant did not pay the sum demanded, Zavarco served a Notice of Intended Forfeiture on 15 June 2016. Litigation followed.

5. First, on 9 September 2016, the appellant commenced proceedings in the High Court seeking a declaration that he was entitled to vote as the registered holder of the shares. In his witness statement he asserted that the shares were fully paid as the transfer of the shares in ZB amounted to good consideration. Three days later, on 12 September 2016, Zavarco commenced proceedings in the High Court seeking declarations (i) that the shares were unpaid, (ii) that the Notice of Intended Forfeiture complied with Zavarco's articles of association, and (iii) that it was entitled to forfeit the shares. Zavarco's particulars of claim also asked for "further or other relief as appropriate" in the usual way but no request was made for any such relief and the matter proceeded as a claim for declarations.

6. The two claims were tried together in a four-day trial before Martin Griffiths QC, acting as a Deputy High Court Judge. The central issue in the trial was whether the shares were unpaid. The appellant argued that the transfer of the ZB shares was a valid arrangement for alternative consideration under section 594 of the Companies Act 2006 ("the 2006 Act"), and that, if it was not, he was entitled to relief under section 606 of the 2006 Act. In a judgment dated 14 November 2017 ([2017] EWHC 2877 (Ch)) Mr Griffiths found in favour of Zavarco, and he granted the relief sought by it, making the declarations by order dated 28 November 2017 that:

> "(1) The shares held by Mr Nasir in [Zavarco], namely 360 million ordinary shares … are unpaid.
>
> (2) [Zavarco], having taken the steps required under the Articles of Association and Mr Nasir having failed to pay for the same is entitled to forfeit the shares."

Mr Griffiths stayed the effect of the order pending any application to appeal to the Court of Appeal. The appellant did not receive permission to appeal, and on 11 June 2018 Zavarco forfeited the appellant's shares.

7. Under articles 75.3 and 77 of Zavarco's articles of association a person whose shares have been forfeited remains liable to pay for the unpaid shares and has a right to credit for the proceeds of any sale by Zavarco of the forfeited shares.

8. On 11 October 2018 Zavarco commenced the proceedings which are the subject of this appeal. Zavarco's claim is for payment of €36 million as a debt following Mr Griffiths' judgment and interest thereon.

9. The appellant applied to set aside the service of the claim form or to strike out the proceedings on the grounds (i) that the claim for payment had merged into Mr Griffiths' declaratory judgment and had been extinguished as a matter of law, and (ii) alternatively, that the proceedings should be struck out as an abuse of process, applying the principles in *Henderson v Henderson* (1843) 3 Hare 100 and subsequent case law. The *Henderson v Henderson* abuse of process argument is no longer live and the remaining issue is the scope of the doctrine of merger.

10. In a judgment dated 17 July 2019 ([2019] EWHC 1837 (Ch)) the Chief Master (Marsh) held that the cause of action determined by Mr Griffiths' judgment was identical to that relied upon by Zavarco in the present claim, had merged with that judgment and had been extinguished by operation of law.

11. Zavarco appealed, and in a judgment dated 20 March 2020 ([2020] EWHC 629 (Ch); [2020] Ch 651) Birss J allowed Zavarco's appeal. Birss J saw the case as turning on a short question of law: whether merger applies to declaratory judgments. He recognised that merger is a substantive rule of law rather than a procedural rule. He observed that there was no case law authority on the question of law but only a statement in the leading textbook on this area of law, *Spencer Bower and Handley: Res Judicata* ("*Spencer Bower*"), 5th ed (November 2019), para 20.01, which stated that merger did not apply to declarations. Birss J did not accept the assertion in the textbook that a declaration does not qualify as a judgment granting relief. He held that a declaration can be a remedy for a cause of action and that there was no reason why the doctrine of merger could not apply when a declaration was the sole remedy. Nonetheless, he held that it was important when addressing the doctrine of merger to focus on the terms in which a declaration was couched. In this case the declaration did not extinguish the cause of action. He explained (para 26):

> "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."

12. There was a dispute about the basis on which Birss J had determined the question of the scope of the doctrine of merger, and the appellant was given permission for a second appeal to the Court of Appeal.

13. In a judgment dated 5 August 2021 ([2021] EWCA Civ 1217; [2022] Ch 105) the Court of Appeal (Henderson, Warby LJJ and Sir David Richards) dismissed the appeal. The judgment, to which I return in more detail below, was written by Sir David Richards, with whom Henderson and Warby LJJ agreed. In short, the Court of Appeal held that the doctrine of merger has no application to declarations.

14. This court gave the appellant permission to appeal on 12 May 2022. The appeal was due to come to a hearing in late 2023 but was adjourned at the appellant's request and was not heard until 9 July 2024.

15. On this appeal, Paul Downes KC for the appellant argues that the doctrine of merger, which provides that a judgment that determines a cause of action extinguishes that cause of action, extends to a declaratory judgment. The result is that the cause of action which gave rise to the declaration cannot be re-asserted in a new claim. In an examination of the long history of the doctrine of merger, to which I will return below, Mr Downes submits that the doctrine looks to the substance of the relevant claims and prohibits duplicative litigation which reasserts the same cause of action, whether or not the remedy sought in the second action is the same as that sought in the first. The result,

he submits, is that Zavarco's cause of action was extinguished by the declaratory judgment of Mr Griffiths in 2017.

16. For the reasons which I set out below, I am not persuaded that the doctrine of merger extends to declarations, and I would dismiss the appeal. In this judgment I look first at the early history of the doctrine before turning to consider more modern cases, including Commonwealth cases, the commentary in *Spencer Bower* and the policy underlying the doctrine in the modern context.

2. The early historical development of the doctrine of merger

17. The doctrine of merger was developed as a means to promote finality in litigation and to prevent duplicative and vexatious litigation. Unlike the standard defence of res judicata in the form of cause of action estoppel, which prevents the contradiction of an earlier judgment as to the existence or non-existence of a cause of action, merger was designed to make a litigant seek his or her remedies in one action by extinguishing a cause of action when judgment has been given on it. I examine a few of the cases to illustrate the point and to identify the conceptual basis of the doctrine.

18. In 1604-1605 in *Broome v Wooton* (1605) Cro Jac 73; 80 ER 47 (see also *Brown v Wootton* (1604) 2 Jac 1; 79 ER 62) in an action of trover (ie for the wrongful taking of personal property) of plate the claimant, who had obtained decree for damages against one defendant, was barred from raising an action for damages against another person for the same trover and conversion. The court held that the judgment against the first wrongdoer was a bar against the other wrongdoer, holding that

> "the thing incertain is now by the judgment made certain, and so altered and changed into another nature than it was at first; and therefore he cannot resort to demand the incertainty again, for the first judgment shall be a bar to it."

As explained below, statute later removed the obvious injustice of barring recovery of damages from a joint wrongdoer when the claimant had failed to recover damages under the judgment against the defendant in the prior action.

19. Similar reasoning was adopted by the Court of Common Pleas in *Higgens's Case* (1605) 6 Co Rep 44b; 77 ER 320, which concerned the enforcement of a debt on a bond. The claimants had obtained a judgment for the debt on the bond and were barred from raising a fresh action on the bond so long as the judgment of a court of record remained in force (ie it was not reversed on appeal). The court explained:

> "So when a man has a debt on a bond, and by ordinary course of law has judgment thereon, the contract by specialty which is of an inferior nature, is by judgment of law changed into a matter of record, which is of a higher nature. … the debt due by the bond is transformed and metamorphosed into a matter of record."

20. In *King v Hoare* (1844) 13 M & W 494; 153 ER 206, the claimants sued an individual on a debt arising from the purchase of goods and obtained judgment which was not satisfied. The claimants then sought to recover from another individual arguing that the debt was a joint debt owed by both the defendant against whom judgment had been obtained and the new defendant. The Court of Exchequer held that the earlier judgment barred the action against the joint debtor. Baron Parke stated (p 504):

> "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 a matter of record, which is of a higher nature, and the inferior remedy is merged in the higher. This appears to be equally true where there is but one cause of action, whether it be against a single person or many. The judgment of a court of record changes the nature of that cause of action, and prevents its being the subject of another suit, and the cause of action, being single, cannot afterwards be divided into two."

21. This summary is consistent with prior case law such as *Drake v Mitchell* (1803) 3 East 251; 102 ER 594, in which Lord Ellenborough CJ (p 258) said that the doctrine related to the particular cause of action in which the judgment operated as a change of remedy and was of a higher nature. Such judgments had to be from a court of record; the doctrine did not apply to the judgments of foreign courts: *Smith v Nicolls* (1839) 5 Bing (NC) 208; 132 ER 1084. Where the cause of action is not the same in the second action, the doctrine does not apply: *Seddon v Tutop* (1796) 6 Term Rep 607; 101 ER 729.

22. The House of Lords in *Kendall v Hamilton* (1879) 4 App Cas 504 upheld and adopted the judgment in *King v Hoare* in a case in which the claimants had lent money to merchants who speculated in the shipment of iron to the United States of America. The claimants obtained judgment for payment of the debt against two individuals who

carried on business in partnership. The judgment was not satisfied because of their insolvency. The claimants later discovered that a third individual had been a partner in the business and sued him to recover the debt. The House of Lords (Lord Penzance dissenting) held that the claimants were barred from suing the third partner. Earl Cairns LC explained (p 515) that by suing and obtaining judgment against the first two partners the claimants had "exhausted their right of action" and that "the right of action which they pursued could not, after judgment [was] obtained, co-exist with a right of action on the same facts against another person".

23. Lord Penzance, who dissented in the result, described the doctrine of merger 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*."

24. Nonetheless, several of their Lordships observed that the rule could operate harshly to defeat meritorious claims: Lord O'Hagan at p 534, Lord Blackburn at p 544, and Lord Penzance, who at p 530 described the rule as "unbending and indiscriminate".

3. Statutory intervention and modern case law

25. Parliament addressed the indiscriminate nature of the rule initially in section 6(1) of the Law Reform (Married Women and Tortfeasors) Act 1935 by disapplying the rule in relation to joint tortfeasors. Currently, section 3 of the Civil Liability (Contribution) Act 1978 provides:

> "Judgment recovered against any person liable in respect of any debt or damage shall not be a bar to an action, or to the continuance of an action, against any other person who is (apart from any such bar) jointly liable with him in respect of the same debt or damage."

That disapplied the rule in relation to persons jointly liable. But merger survives to bar multiple actions against the same person on the same cause of action.

26. Parliament has further intervened in section 34 of the Civil Jurisdiction and Judgments Act 1982 ("the 1982 Act") to impose, alongside the common law plea of merger which applies to domestic judgments of courts of record, a statutory bar on such actions in England and Wales or Northern Ireland if the claimant has been given a judgment in his favour in a court in another part of the United Kingdom or in the court of an overseas country, unless that judgment is not enforceable or entitled to recognition. That provision circumvents the anomaly in the common law that the judgment of a court other than a court in England and Wales could support a plea of res judicata in the form of a cause of action estoppel or an issue estoppel, where the judgment was in favour of the defendant, but not a plea of merger, where the judgment was in favour of the claimant. The statutory bar on further proceedings now operates whether the judgment is in favour of the defendant or the claimant.

27. The House of Lords addressed section 34 of the 1982 Act in *Republic of India v India Steamship Co Ltd* [1993] AC 410 ("*The Indian Grace*"). In that case, a fire occurred on board the Indian Grace with the result that part of the cargo was jettisoned, and the remainder was damaged. The cargo owners obtained damages of about £6,000 in proceedings in India for short delivery of the cargo under the bills of lading resulting from the jettisoning. Before judgment was given in the Indian proceedings the cargo owners raised in rem proceedings in England for about £2.6 million against the same defendants for the total loss of the cargo. The House of Lords held that, subject to any estoppel, waiver or contrary agreement, section 34 of the 1982 Act would bar the English proceedings as the loss and damage to the cargo resulted from a single incident, ie the fire during transit, and there was identity between the causes of action in the two proceedings, notwithstanding that there may have been a breach of more than one term of the contract. In that case the courts below and, in the House of Lords, Lord Goff of Chieveley who gave the leading judgment noted the startling disparity between the sum recovered in India and the outstanding claim in London. But Lord Goff observed (p 415) that "consequences of this kind may result from the application of the principle, which is founded upon the public interest in finality of litigation rather than the achievement of justice as between the individual litigants".

28. Under the doctrine of merger, a claim under a loan agreement merges with the judgment and, subject to any contrary stipulation with regard to interest on the debt, the debt becomes owed under the judgment and not under the contract: *Director General of Fair Trading v First National Bank plc* [2001] UKHL 52; [2002] 1 AC 481, Lord Bingham of Cornhill at para 3. In *Clark v In Focus Asset Management and Tax Solutions Ltd* [2014] EWCA Civ 118; [2014] 1 WLR 2502 ("*Clark*") the Court of Appeal similarly explained that the effect of merger was that a claimant, if successful, can enforce the judgment but only the judgment. As a result, the claimant cannot bring a second set of proceedings to enforce a cause of action even if the tribunal has awarded

less than the claimant would have been entitled to. See the leading judgment of Arden LJ at para 5.

29. In delivering the leading judgment in *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2013] UKSC 46; [2014] AC 160, ("*Virgin Atlantic*") Lord Sumption stated (para 17) that "res judicata" is a portmanteau term used to describe different legal principles with different juridical origins. He described the doctrine of merger as a substantive rule about the effect of an English judgment and said that it "treats a cause of action as extinguished once judgment has been given on it, and the claimant's sole right as being a right on the judgment". Also within the portmanteau are (i) cause of action estoppel, (ii) the principle that where a claimant has 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 (*Conquer v Boot* [1928] 2 KB 336), (iii) issue estoppel, (iv) *Henderson v Henderson* abuse of process, which precludes a party from raising in subsequent proceedings matters which were not, but could and should have been raised in earlier ones: see *Henderson v Henderson* (above); *Arnold v National Westminster Bank plc* [1991] 2 AC 93; and *Johnson v Gore Wood & Co* [2002] 2 AC 1; and (v) a more general procedural rule against abusive proceedings. Lord Sumption's summary has been frequently cited but, while this is not germane to the outcome of this appeal, I consider that the principle in *Conquer v Boot*, which prohibits more than one action to recover damages on the same cause of action, is properly characterised as an example of the doctrine of merger rather than as a separate rule.

30. Lord Sumption (para 25) described res judicata (ie cause of action estoppel or issue estoppel) as a rule of substantive law and abuse of process as a concept which informs the exercise of the court's procedural powers. He added, "they are distinct although overlapping legal principles with the common underlying purpose of limiting abusive and duplicative litigation".

31. More recently this court has affirmed the importance of finality in litigation in *Test Claimants in the FII Group Litigation v Revenue and Customs Comrs* [2020] UKSC 47; [2022] AC 1, paras 57-76, in which it considered cause of action estoppel, issue estoppel and *Henderson v Henderson* abuse of process. In relation to the obligation on a party to advance its whole case at trial and avoid successive litigation see also the judgment of the Judicial Committee of the Privy Council in *Primeo Fund v Bank of Bermuda (Cayman) Ltd* [2023] UKPC 40; [2024] AC 727, paras 146-156. The purpose of the doctrine of merger and the various rules and concepts of res judicata is to support the good administration of justice by promoting finality of litigation and preventing the duplication of actions both in the public interest and in the interests of the parties.

32. As Sir David Richards has stated in his judgment (para 27) merger played an important role in controlling abusive litigation when the means of control available to the courts were significantly less than they have since become. The common law now

has a panoply of rules and doctrines by which the courts can promote finality of litigation and prevent duplicative and vexatious actions. Those aims can be further supported by judicial case management under among others Part 3 of the Civil Procedure Rules and practice directions.

4. What is the cause of action that merger extinguishes?

33. In his written case for the respondent Patrick Lawrence KC correctly describes the concept of a cause of action as protean and in the context of the doctrine of merger as being imprecise and ambiguous.

34. Going back in time to an age in which causes of action were divided into categories according to the form of action by which the remedy was obtained, in *Putt v Royston* (1692) 2 Show KB 211; 89 ER 896 it was held that a judgment in favour of a defendant in an action of trespass barred an action by the claimant in trover in relation to the same property and one sees an emphasis being placed on the identity of the factual basis of each action. The Lord Chief Justice (Sir Francis Pemberton) stated (p 213):

> "Where the same evidence will maintain one or the other, there without question a bar in the one will be so in the other, as in *Ferrer's case* [(1597) 6 Co Rep 7] but where the evidence will not, it is otherwise."

This judgment was not a case of merger but the application of the doctrine of res judicata to defeat a duplicative claim which sought to contradict a prior judgment. Although this was concerned with a different legal issue, the approach is consistent with Brennan J's discussion (see para 36 below) of the circumstance where a claimant has a right to remedies on different legal bases and where the obtaining of a judgment on one legal basis bars recovery of a further judgment on the same facts on another legal basis.

35. More recently, in *Letang v Cooper* [1965] 1 QB 232, 242-243 ("*Letang*") in an often-cited passage Diplock LJ defined a "cause of action" as:

> "simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person."

This definition covers both the factual situation and the entitlement to obtain a remedy from the court. In *Clark* (above) Arden LJ, in explaining the doctrine of merger at para 4, adopted Diplock LJ's approach in *Letang* to the meaning of a "cause of action".

36. In an Australian case on *Henderson v Henderson* abuse of process and, alternatively, merger, *Port of Melbourne Authority v Anshun Proprietary Ltd* (1981) 147 CLR 589, Brennan J, who analysed the case as involving merger, stated at p 610:

> "There is an imprecision in the meaning of the term cause of action, which is sometimes used to mean the facts which support a right to judgment … sometimes to mean a right which has been infringed … and sometimes to mean the substance of an action as distinct from its form … . Imprecision in the meaning of cause of action tends to uncertainty in defining the ambit of the rule that a judgment bars subsequent proceedings between the same parties on the same cause of action."

He addressed case law which treated cause of action to mean a right and case law which treated the concept to mean the facts which support a right to judgment. He then considered a circumstance where the same facts support rights to different remedies against the same defendant. He continued (p 612):

> "Accordingly, inconsistency between judgments against the same defendant is avoided by the merger in the judgment first recovered of the right to the remedy thereby given and of all other rights which arise on the same facts. Thus, a plaintiff who recovers a judgment for damages in assumpsit is precluded from recovering a judgment for damages in tort arising out of the same facts … a principal who recovers a judgment for damages in fraud against his bribed agent is precluded from recovering a judgment in the amount of the bribe as moneys had and received to his use … and a party whose goods have been wrongfully seized and who recovers in replevin, is precluded from recovering a judgment for damages in trespass to goods … ."

37. In the context of the doctrine of merger, in my view, the concept of a cause of action which is extinguished by the obtaining of a judgment involves the right to a remedy in the given factual circumstances: see *Serrao v Noel* (1885) 15 QBD 549, Bowen LJ at pp 559-560; and *Conquer v Boot* [1928] 2 KB 336, Sankey LJ at pp 339, 342-343, Talbot J at p 343. The two cases from the Court of Appeal of Victoria, Australia, to which reference was made in the appellant's written case – *King v Lintrose Nominees Pty Ltd* [2001] VSCA 140; 4 VR 619 and *Sahin v National Australia Bank Ltd* [2012] VSCA 317 – are consistent with this analysis. So also is the judgment of the Court of Appeal of British Columbia in *Dhillon v Jaffer* 2016 BCCA 119, which is an application of the doctrine of merger to prevent an action for damages for breach of fiduciary duty where a claimant has already recovered damages for negligence arising

out of the same facts. The facts are the facts and cannot be extinguished by a judgment. It is the right to claim a further remedy arising from those factual circumstances and not the factual circumstances themselves, that the first judgment extinguishes by creating *an obligation* of a higher nature.

38. It is not disputed that the factual circumstances underpinning the earlier application for declaratory relief and those relied on in the current action are the same. The question relates to the remedy obtained in the first action. Does a declaration create an obligation of a higher nature which engages the doctrine of merger? That is the central question on this appeal.

6. Declarations as to legal rights

39. There is no English case law authority on the application of the doctrine of merger to declaratory relief. The cases on merger to which I have referred all concerned attempts by claimants to pursue fresh proceedings after having obtained a judgment for the payment of a sum of money or to enforce a right of property by ordering the return of property. In this judgment I use the expression "coercive judgment" to describe such judgments for the payment of money or the return of property.

40. *Spencer Bower* since its first edition in 1924 has asserted that a judicial declaration of rights and liabilities does not fall within the ambit of the doctrine. In this, the leading textbook, the term "the doctrine of former recovery" is used and has the same meaning as merger.

41. In para 303 of the first edition of *Spencer Bower* it is stated that a judgment which can operate as a merger is "a judgment granting relief and remedy to one of the parties". Such a judgment may be a final judicial decision such as a final order or an arbitral award. But in para 304 it is stated:

> "The following do not satisfy the requirements mentioned, and, therefore, are not deemed 'judgments' for the purposes of the plea of former recovery: a naked judicial declaration of rights and liabilities… ."

No authority is cited for this proposition, but *Spencer Bower* had already explained at para 295 that, in contrast to the plea of res judicata which prohibits the contradiction of a proposition of law or a finding of fact necessarily involved in the judgment, merger does not allow a person to be sued for a second time for the remedy contained in the "jussive or prohibitive" part of a judgment. By this the author confined the application

of merger to judgments that commanded a person to do something or prohibited a person from doing something.

42. In the 5th edition of *Spencer Bower,* of which the Hon Kenneth R Handley KC is the author, the doctrine of merger is described (para 19.01) in these terms:

> "Any person in whose favour an English judicial tribunal of competent jurisdiction has pronounced a final judgment, is precluded from recovering before any English tribunal a second judgment on the same cause of action."

At the start of the following chapter (para 20.01) *Spencer Bower* discusses the nature of the judgments granting relief which merge with and thereby extinguish the cause of action. They may be a judgment for debt, or damages, or coercive, including a decree of specific performance. The text continues: "The following do not qualify as a judgment granting relief for present purposes: a declaration of right… ." Thus, from the first to the fifth edition *Spencer Bower* has asserted that declaratory relief is outside the scope of the doctrine of merger. The sixth edition (February 2024), edited by Patrick Keane, has the same text in para 19.01 but qualifies its discussion in para 20.01 by reference to Birss J's judgment in this case.

43. Mr Downes submits that the proposition that the doctrine of merger does not apply to a declaration of right is fundamentally wrong. The nub of his submission is that the doctrine of merger is designed to make sure that there is no more than one claim between the parties arising from the same set of facts. He submits that the doctrine of merger requires that a cause of action be litigated and determined once and once only. Therefore, a claimant who brings a claim that requires the determination of a cause of action must elect the remedies that it wishes to obtain. Once judgment is given, the cause of action is extinguished. Critically, he submits that this reasoning applies regardless of the remedy being sought, whether it be damages or the payment of a debt or a declaration.

44. I am not persuaded that that submission is correct. There is no authority which supports the extension of the doctrine of merger to cover the declaration of the existence of a right and there are good reasons why the doctrine should not be so extended.

45. First, the doctrine of merger was developed and fully formed before the courts adopted the practice of giving purely declaratory relief and it is striking that in more than a century since the grant of purely declaratory relief became more widespread there is no example in case law of the doctrine of merger being applied to such relief.

46. While the court has long had the jurisdiction to grant declaratory relief, it is only in the later nineteenth century and twentieth century, long after the development of the doctrine of merger, that the courts have developed the practice of making declarations. For a long time, the courts refused to grant purely declaratory relief rather than making declarations that were ancillary to other remedies. It required parliamentary intervention to promote the use of declaratory relief. Thus, for example, section 50 of the Court of Chancery Procedure Act 1852 stated that:

> "No suit in the said Court [the High Court of Chancery] shall be open to objection on the ground that a merely declaratory decree or order is sought thereby, and it shall be lawful for the Court to make binding declarations of right without granting consequential relief."

Nonetheless, judges remained reluctant to grant such relief; and it was only after the rules of court, which were made under the Judicature Acts of 1873 and 1875, stated the court's powers to do so that judges adopted a more liberal approach to the grant of such relief. The history of the development of the declaratory judgment is set out in more detail in chapter 2 of *Zamir and Woolf, The Declaratory Judgment*, 4th ed (2011) and Mr Downes does not challenge that account.

47. In my view, the idea that one sees in cases such as *Broome v Wooton* and *King v Hoare* of the claimant obtaining by judgment a higher remedy than that which the cause of action gave is consistent with there being a coercive element in the judgment. Tindal CJ in *Smith v Nicolls* (para 21 above) captured the essence of the doctrine of merger when he stated (p 220):

> "The ground on which a plea of judgment recovered [ie merger] bars the Plaintiff from any further action is, that the original nature of the debt, or damage, where it may be sought to be recovered, is changed: *that he has a higher remedy; he has a judgment in a court of record on which he can issue an immediate execution*: and inasmuch as an immediate execution could be issued on his judgment, it would be a very superfluous matter, and give great encouragement to litigation, if he were allowed to commence de novo, and bring another action on that which was the original ground of complaint." (Emphasis added.)

48. In *Clayton v Bant* (2020) 272 CLR 1, a decision of the High Court of Australia, Edelman J in his judgment (para 66) also emphasised the coercive nature of the first judgment in describing the doctrine of merger in these terms:

> "… where a cause of action, or 'the very right … claimed', has previously been established by a local court then at common law the 'merger of the right or obligation in the judgment' can be relied *upon to preclude re-assertion of the extinguished right*. The doctrine of merger is not merely based upon principles of finality. It exists because *when a court order 'replicates' the prior right, with added consequences such as enforcement mechanisms*, the prior right 'has no longer an independent existence'. No action can be brought upon that extinguished right. The successful plaintiff's only right is a right on the local judgment, which is 'of a higher nature'." (Emphasis added.)

49. In my view *Spencer Bower* was and is correct to confine the established application of the doctrine of merger to coercive judgments and thereby exclude declaratory relief from its ambit. I would however reserve judgment on whether the doctrine extends to final injunctions so that the grant of a final injunction enforcing a right would preclude a later claim to damages arising from the same facts. That is a matter on which the court has not been addressed and there may be arguments against applying the doctrine to such orders.

50. In his judgment in the Court of Appeal in this case, Sir David Richards stated (para 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."

I agree.

51. Secondly, there may be justifiable reasons for a litigant to seek a declaration before pursuing a claim for a coercive remedy. As Sir David Richards stated in para 40 of his judgment, it made good sense for Zavarco to resolve the dispute whether it was entitled to forfeit the shares which the appellant asserted were fully paid before exercising its right of forfeiture which gave rise to the claim for payment for those shares. It is of note that the appellant has not appealed Birss J's rejection of his defence that there was *Henderson v Henderson* abuse of process and unfairness in the raising of the second action. As Mr Lawrence states in his written case, everyone concerned knew that Zavarco might seek to enforce its right to payment after it had established its right to forfeit the shares.

52. Thirdly, the doctrine of merger has often been criticised for its rigidity and its capacity to cause injustice. In *Kendall v Hamilton* Lord Penzance described the doctrine as "unbending and indiscriminate". Similarly, in *Brunsden v Humphrey* (1884) 14 QBD 141, in which the Court of Appeal held that a claim for damages for personal injury was a different cause of action from a claim for damage to property caused by the same traffic accident, both Brett MR and Bowen LJ expressed concern about the harsh results which the doctrine can produce. Similarly, the judges in *The Indian Grace,* including Lord Goff in the House of Lords (para 27 above), stated that the analogous statutory provision in section 34 of the 1982 Act did not achieve justice as between the litigants. That possibility of injustice is a relevant consideration against extending the doctrine of merger to circumstances in which it has not been applied and in which it would be incongruous.

53. Fourthly, to allow a claimant to obtain a purely declaratory judgment without excluding its right thereafter to seek a remedy such as damages does not give rise to the mischief of duplicative or vexatious litigation, or at least not to the extent of a repetition of a trial on the merits. In this case the declaratory judgment establishes the legality of the forfeiture and will not be open to contradiction because of the plea of res judicata in the form of an issue estoppel. The further proceedings entail what ought to be a straightforward claim for the debt which is the unpaid price of the shares.

54. Fifthly, as discussed in paras 29-32 above, there are currently a range of rules and remedies by which a court can achieve finality of litigation and prevent duplicative and vexatious suits, and the modern powers of case management enable the court to control the conduct of a litigation to promote efficiency and the proportionate use of resources. There is no need to extend the scope of the doctrine of merger to remove a lacuna.

55. Sixthly, I am not persuaded that upholding the Court of Appeal's judgment creates a mismatch or divergence between the common law doctrine and section 34 of the 1982 Act, to which I referred in para 26 above. The relevant words in the section are:

> "No proceedings may be brought by a person in England and Wales or Northern Ireland on a cause of action in respect of which a judgment has been given in his favour… ."

On a superficial reading this is a complete bar on all proceedings in England and Wales. But a closer examination of the statutory words ("proceedings … on a cause of action in respect of which") reveals that the Scottish or foreign judgment would be a judgment on a cause of action, or, in other words, a coercive remedy. What is prohibited is a second action in England and Wales or Northern Ireland on a cause of action which has given rise to a relevant coercive judgment elsewhere. This is consistent with the policy background, which involved the extension of the doctrine of merger to relevant Scottish and foreign judgments. A first judgment which was the equivalent of declaratory relief in the law of England and Wales would not be a judgment on a cause of action to which the section applies.

56. For completeness, I record that Mr Lawrence drew the attention of this court to three recent Commonwealth cases which refer to the Court of Appeal's judgment in this case. In *Mensink v Registrar of the Federal Court of Australia* [2022] FCAFC 102, the Full Court of the Federal Court of Australia expressed doubt that the doctrine of merger applied to the obtaining of declaratory relief: para 52. The Court of Appeal of South Australia expressed a similar view in a dispute about costs in *H v K* [2023] SASCA 26, at least in relation to the declaration of a fact or a state of affairs, but expressed caution about using English authority in this area as the Australian courts had developed differing jurisprudence in the operation of preclusionary doctrines: paras 74-75. The High Court of New Zealand in *Te Rūnanga o Ngāi Tahu v Attorney-General* [2022] NZHC 1643 quoted with apparent approval Sir David Richards' statement in para 37 of his judgment which I have quoted in para 50 above: see the judgment of Associate Judge Paulsen at paras 76 and 77. In summary, there is within the wider common law at least tentative support for the exclusion of declaratory judgments from the ambit of the doctrine of merger and, significantly, no authority to the contrary has been cited to the court.

57. Finally, Mr Downes drew the court's attention to a case note on the judgment of Birss J by Kenneth R Handley KC, the author of the 5th edition of *Spencer Bower*, in the Law Quarterly Review: (2021) 137 LQR 198. In that case note Kenneth Handley suggests that the doctrine of merger would apply where the court grants a declaration against the Crown under section 21 of the Crown Proceedings Act 1947 because such declaratory relief is a final judgment. I would not wish to endorse that suggestion both because I reserve judgment on the application of the doctrine of merger to injunctive relief and because it is significant, in my view, that such a declaration has no coercive effect. It is, nonetheless, not necessary for the court to express a concluded view on this matter as again the court has not heard argument on it.

6. Conclusion

58. For these reasons, which are substantially the same as those of Sir David Richards in the Court of Appeal, I would dismiss the appeal.