Quadrant CHAMBERS

Does the doctrine of merger apply to declarations?

Paul Downes KC, Robert-Jan Temmink KC, Tom Nixon & Tom Hall

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In a judgment handed down on Wednesday 19 February 2025 (Nasir v Zavarco Plc [2025] UKSC 5), the Supreme Court has held that the esoteric but longstanding doctrine of merger, which prevents a party from seeking any further relief on a cause of action once a judgment has been given upon it, does not apply to declaratory judgments.

Paul Downes KC, **Robert-Jan Temmink KC**, **Tom Nixon** and **Tom Hall** acted for the appellant, instructed by Lee Donoghue and Jessica Verrall at Teacher Stern LLP.

Background

The background to the dispute was that the appellant, Tan Sri Nasir, had subscribed to 360 million shares in the respondent company, Zavarco, upon its incorporation in 2011. Tan Sri Nasir subsequently transferred to Zavarco all of his shares in Zavarco's Malaysian subsidiary, Zavarco Berhad.

Years later, in 2015, Zavarco served a call notice on Tan Sri Nasir requiring him to pay €36 million (the par value of the shares) in cash for his shares. Tan Sri Nasir refused to pay, contending that he had already provided good consideration in the form of the shares which he had transferred to Zavarco from its subsidiary.

Zavarco then served Tan Sri Nasir with a notice of intended forfeiture of the shares.

In the litigation which followed, Martin Griffiths QC, sitting as a Deputy Judge of the High Court, granted declarations in Zavarco's favour stating that the shares which Tan Sri Nasir held in Zavarco were unpaid, and that Zavarco was entitled to forfeit the shares.

Zavarco duly forfeited the shares, and commenced the proceedings which were the subject of this appeal, claiming payment of €36 million as a debt.

Tan Sri Nasir applied to set aside the service of the claim form or to strike out the proceedings. He argued that the cause of action on which Zavarco's debt claim was based – the fact that the shares were unpaid – had merged into Mr Griffiths' declaratory judgment and thus been extinguished as a matter of law.

That argument was accepted at first instance by Chief Master Marsh, who held that the cause of action determined by Mr Griffiths' judgment (i) was identical to that relied upon by Zavarco in its debt claim, (ii) had merged with that judgment, and (iii) had thus been extinguished by operation of law.

On appeal, Birss J reversed Chief Master Marsh's decision, concluding that while there was no reason in principle the doctrine of merger could not apply to declarations, on the facts of this case, the doctrine did not operate to extinguish Zavarco's right to payment for the shares. Birss J said that he could 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".

Tan Sri Nasir's appeal from that decision was dismissed by the Court of Appeal, which held that the doctrine of merger did not apply to declarations.

Tan Sri Nasir appealed again to the Supreme Court.

The Supreme Court's Decision

The Supreme Court dismissed the appeal. Lord Hodge, who gave the only judgment, began by reviewing the early history of the doctrine, observing that it had been 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 ([17]).

Lord Hodge concluded that, in the context of merger at least, 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. His Lordship held that it is the right to claim a further remedy from those factual circumstances, rather than the factual circumstances themselves, which the first judgment extinguishes by creating an obligation of a "higher nature" ([37]).

The central question to be decided was thus: "Does a declaration create an obligation of a higher nature which engages the doctrine of merger?"

Lord Hodge considered that declarations do not create obligations of a higher nature, but merely confirm obligations which already exist ([50]). His Lordship thus concluded that the doctrine of merger is confined to coercive judgments ([49]).

His Lordship identified several further reasons why the doctrine of merger should not be extended so as to apply to declaratory judgments. These included the fact that there can be justifiable reasons for a litigant to seek a declaration before pursuing their claim for a coercive remedy. Indeed, his Lordship considered that it made good sense in this case for Zavarco to resolve the dispute as to whether it was entitled to forfeit the shares before exercising its right to forfeiture and before pursuing its claim for payment of those shares ([51]).

Lord Hodge also observed that, given the range of rules and remedies by which the court can achieve finality of litigation and prevent duplicative, vexatious claims, as well as the modern case management powers available to the court, it is not as though there is any need to extend the doctrine of merger to remove a lacuna ([54]).

Comment

It is now clear that obtaining a declaration as to the existence of a cause of action, such as the existence of a debt, will not of itself bar the litigant from bringing further proceedings on that cause of action, for instance by later bringing a claim for payment of the debt. However, litigants still need to exercise caution before bifurcating their claims in this manner given that scope remains for a finding of abuse of process under the principle in ***Henderson v Henderson.***

Paul Downes KC

"Superb advocacy and commands the attention of the judge. Really polished and excellent at arguing the most difficult of cases." (Legal 500, 2025)

Paul specialises in commercial law, and has specific expertise in banking and finance-related matters. Paul is an Associate of the Chartered Institute of Bankers. He is recommended as a leading silk for Banking and Commercial Dispute Resolution in Chambers & Partners UK Bar and for Banking & Finance, Commercial Litigation, Financial Services and Fraud Civil in Legal 500.

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"Robert is an absolute Rolls-Royce of a silk for the modern era." (Chambers UK, 2025)

Robert has a wide-ranging and international practice in commercial and chancery law. He is known for being a talented and intellectually-agile advocate equally at home in fraud and financial services cases as in aviation and shipping matters. He has a strong practice in construction, energy and infrastructure disputes and is often asked to advise and act in complex insolvency and cross-border actions.

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"Tom is an excellent lawyer, he picks up on detail and his drafting is near flawless." (Chambers UK, 2024)

Tom has developed a practice that matches the breadth of Chambers' practice areas, including international commercial arbitration and litigation, shipping, fraud, conflicts of laws, commodities, aviation, commercial chancery and company work.He has experience litigating claims of all sizes, undertaking complex trials both as sole counsel and as part of a larger team, and at every level of appeal.

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Tom joined Quadrant Chambers in October 2023, upon successful completion of his pupillage. He accepts instructions across Chambers' core areas, including commercial litigation, shipping, insurance, banking, and commodities.

Before pupillage, Tom completed the BCL at Oxford, obtaining a Distinction overall and the Peter Birks Prize for coming top of the year in Restitution of Unjust Enrichment. Tom achieved a Distinction in both the GDL and the Bar Course, and was awarded the William Rose Prize for obtaining the highest mark in his year for Drafting. Before coming to law, Tom graduated with a first-class degree in History.

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