Neutral Citation Number: [2019] EWHC 1837 (Ch)

Case No: BL-2018-002192

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
BUSINESS LIST (ChD)

Rolls Building, Fetter Lane,
London EC4A 1NL

Date: 17/07/2019

Before:

CHIEF MASTER MARSH

- -

Between:

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

- -
- -

Patrick Lawrence QC (instructed by **Needle Partners Limited**) for the **Claimant**
Robert-Jan Temmink QC (instructed by **Teacher Stern LLP**) for the **Defendant**

Hearing dates: 30 May 2019

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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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CHIEF MASTER MARSH

Chief Master Marsh:

1. The claimant seeks to recover from the defendant €36 million as a debt together with interest. The claimant's case in outline is that (i) the defendant formerly held shares in the claimant, (ii) he was required to pay for the shares in cash, (iii) he has failed to pay for them and (iv) he is, despite the shares having been forfeited, liable to the claimant as a debtor for the nominal value of the shares which is €36 million.

2. This claim was issued on 11 October 2018 and permission to serve the claim on the defendant in Singapore was given by an order made by Master Price on 15 October 2018. The defendant disputes that the court has jurisdiction to try the claim against him, or alternatively, that if the court has jurisdiction the court should not exercise it. He issued an application dated 22 November 2018 under CPR 11.1 which was heard on 30 May 2019. The defendant's principal contention is that the determination of an earlier claim ("the 2016 proceedings") by a judgment of Mr Martin Griffiths QC, sitting as a Deputy High Court Judge, dated 14 November 2017 and the order made on that date, has the effect that the doctrine of merger, which is a species of res judicata, applies.

3. The defendant's case is summarised succinctly in paragraphs 14 and 15 of the witness statement of Lee Donoghue, a solicitor with Teacher Stern LLP, made in support of the application:

> "14. I believe that the facts pleaded in both proceedings are identical; the parties are identical and the causes of action are identical. Although the present proceedings are said to be a claim for a debt, the cause of action remains precisely the same as the [2016 proceedings]. This statement does not attempt to address the law on res judicata by merger, but I understand that, as a matter of law, the Claimant's cause of action in the present claim has merged with the judgment in the [2016 proceedings] and was thereby extinguished. Accordingly, the Court has no jurisdiction to try the present claim.
>
> 15. If the Court were to find that despite the merger the Court does have jurisdiction, then the Defendant will say that the Court should decline to exercise such jurisdiction as it may have:
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> a. because of res judicata by merger; alternatively
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> b. because of the operation of the doctrine of the principles in *Henderson v Henderson*."

4. The claimant was incorporated in England and Wales on 29 June 2011. On incorporation the defendant was allotted 30% of the claimant's shares and Mr Ranjeet Singh Sidhu was allotted the remaining 70% of the shares.

5. Zavarco Berhad ("ZB") is a Malaysian company. ZB's principal business was in a subsidiary called V Telecoms Berhad ("VTel") which has, or had, licences to develop a fibre optic telecommunications network in Malaysia that could not be established without major capital investment. The claimant was incorporated in England with a view to flotation on the Frankfurt Stock Exchange so as to attract shareholder investment for the VTel business. The whole of the ordinary share capital in ZB was

transferred to the claimant on 25 July 2011 and it was listed on the Frankfurt Stock Exchange on 23 August 2011.

6. The Deputy Judge summarised the nature of the 2016 proceedings in the first three paragraphs of his judgment:

> "1. The central dispute in this case is whether [Mr Nasir] is or was obliged to pay up the 360 million shares he received on the incorporation of Zavarco Plc ("Z")[1] in cash, or whether it was agreed or arranged that the par value would be satisfied by the transfer to Z of shares in another company "ZB" and, if it was, what the legal consequences of that might be. The par value was 10 Euro-cents per Z share, and so the total amount in dispute is 36 million euros in respect of Mr Nasir's 360 million shares in Z.
>
> 2. It is common ground that Mr Nasir's shares were never paid up in cash. Z served a call notice on Mr Nasir on 5 June 2015 for payment. Mr Nasir has not paid, disputing his liability to do so, and Z served a Notice of Intended Forfeiture on 15 June 2016. No action has been taken on that, pending the outcome of these proceedings.
>
> 3. Both parties have brought claims and submitted their dispute to this Court. The first in time is a Part 8 claim by Mr Nasir against Z but, since the matter was clearly unsuited to summary proceedings, another action was brought under Part 7 by Z (as Claimant) against Mr Nasir (as Defendant). Both actions are listed before me, but the trial has proceeded on the second action, which encompasses the issues in the first action. This judgment will decide both." [my emphasis]

7. Later in the judgment, the Deputy Judge observed in relation to the claimant's business:

> "114. This business was being ramped, offering unrealistic hope of future profit based on very little, in order to get a short term listing which would not truly reflect the value that a detailed audit or careful valuation would produce.
>
> …
>
> This was a business that had no value unless it could secure substantial capital investment. I have been shown no evidence that this was in place on 29 June 2011."

8. It is necessary to consider the way claim is put forward in the particulars of claim in both proceedings and to review the authorities on the subject of merger. A convenient starting point, however, is the provisions of the claimant's articles of association dealing with call notices and forfeiture of shares.

Articles of association

9. Article 69.1 permits the directors to send a "call notice" to a member requiring the member to pay a specified sum ("the call"), subject to the restriction in Article 69.2

[1] The Deputy Judge referred to the claimant as Z.

limiting the amount of the call to the sum unpaid on the member's shares. Article 69.3 specifies that a member must comply with the requirements of a call notice save there is no liability to pay any sum claimed before 14 days after service of the call notice have passed.

10. Article 72 describes the "automatic consequences" if there is a failure to comply with a call notice. The failure to pay the call sum triggers an entitlement to issue a "notice of intended forfeiture" of the shares. The formal requirements for a notice of intended forfeiture, which are not of concern, are set out in Article 73.

11. Article 74 gives the directors power to forfeit shares if the notice of intended forfeiture is not complied with before the date for payment of the call that is specified in the notice.

12. Under the Articles there are distinct steps that must be followed. The service of a call notice equates to a demand for payment and is a pre-requisite for a claim by the company to seek payment of the call. Shares cannot be forfeited without two prior steps; first the service of a call notice and secondly the service of a notice of intended forfeiture. How these steps, that are specified by the Articles, are part of a cause of action giving rise to a claim is a matter that requires further analysis because at common law, if shares are forfeited, the company's right to receive payment for the shares is extinguished. By virtue of the forfeiture, the company holds the shares and is free to allot them to other persons. Absent saving provisions in the Articles, the directors must elect between forfeiting the shares, or pursuing payment. However, it is common for the Articles to contain provisions that abrogate the common law position and that is the case with the claimant.

13. Article 75 provides that forfeiture extinguishes all interests in the share and all other rights relating to them. It goes on:

> "75.3 If a person's shares have been forfeited:
>
> …
>
> 75.3.4 that person remains liable to the Company for all sums payable by that person under the Articles at the date of forfeiture in respect of those shares, including any interest (whether accrued before or after the date of forfeiture) in the same manner in all respects as if those shares had not been forfeited, and to satisfy all (if any) claims, demands and liabilities which the Company might have enforced in respect of the shares at the time of forfeiture:
>
> …"

14. The rationale for this provision is clear. The directors will wish to prevent a shareholder who has not paid for shares from participating in the company and exercising rights that accrue by virtue of being a shareholder by forfeiting the shareholding. However, it is useful for the company to retain flexibility about what further steps it may wish to take. If the company is able, due to market conditions, to allot the shares to a person willing to pay the par value, or more, it need not rely on its right to require payment by the original shareholder. Indeed, it is common ground that the claimant's right to recover from the defendant the sum claimed in the call notice is

subject to the principle of double recovery. Where disposal of the forfeited shares at par value is not an option, the right to recover under Article 75.3 may be exercised.

15. Palmer's Company Law provides a commentary on the standard provisions for forfeiture of shares. There are two passages that are of significance:

    (1) "6.225 The forfeiture of a share ends the membership of the shareholder. It becomes the property of the company and all interests in that share and all claims and demands against the company in respect of it are extinguished.

    Although in theory this means that the shareholder is also absolved of liabilities on the share, i.e. for the call or instalment, in practice the articles usually retain that liability. That would, however, then be as a debtor rather than as a contributor."

    (2) "6.233 In strict legal theory, forfeiture prevents the company suing the shareholder for past calls or instalments. But the articles commonly provide that the shareholder remains liable for all sums payable by that person in respect of the shares at the date of forfeiture with interest.

    This creates a new obligation as a debtor, which can be enforced by an action. Where the obligation was to pay calls "owing" at the date of forfeiture it was held to include those which had not then become payable. The modern wording is "payable" which must be construed as such.

    The company can never recover more than the difference between the amount payable on the shares and the amount received from subsequent holders of the shares …". [My emphasis]

16. The editors of Palmer do not cite authority for the proposition that a claim under a provision such as Article 75.3 after forfeiture has taken place is a new obligation. The logic is, presumably, that prior to forfeiture, the shareholder's relationship with the company is that of contributor whereas after forfeiture, the shareholder is no longer a contributor and has no further relationship with the company qua shareholder. Nevertheless, the former shareholder remains bound by the provisions of the Articles and the right to recover is a contractual right arising from the provisions of the Articles.

17. It is not in doubt that the service of a valid call notice gives the company the right to recover payment of the amount of the call. The cause of action is complete once the notice is served and the minimum period of 14 days has elapsed. There is no obligation to take steps to forfeit the shares. Forfeiture is a distinct step which the directors may, or may not, consider to be appropriate in the circumstances. If the shares are forfeited, following service of notice of intention to forfeit, article 75.3 applies. It is notable that it is drafted in terms that the person whose shares are forfeited "remains" liable to the Company. This suggests that the Articles preserve the cause of action arising from the call notice, which would otherwise be extinguished, rather than create a new cause of action. However, the editors of Palmer suggest otherwise. I will return to this subject later in this judgment.

The 2016 proceedings

18. The defendant commenced proceedings by way of a Part 8 claim. It was followed shortly by the claimant's Part 7 claim. For all practical purposes, as the Deputy Judge indicates, the Part 8 claim ceased to be of relevance. The claimant's particulars of claim, having set out the background alleged:

    (1) The defendant was a shareholder (paragraph 4);

    (2) The defendant's shares were unpaid and the full nominal amount was outstanding (paragraph 5). Further particulars alleged, inter alia, that the claimant had not received any non-monetary consideration in respect of the defendant's shares;

    (3) A call notice was sent on 5 June 2015 requiring him to pay the amount unpaid on his shares of €36 million (paragraph 6);

    (4) The Defendant failed to pay the sum due under the call notice or any part of it (paragraph 8);

    (5) A notice of intended forfeiture was sent dated 15 June 2016 (paragraph 9). The notice gave rise to an issue of construction concerning whether the notice gave the requisite 14 days notice;

    (6) The claimant was entitled to forfeit the shares (paragraph 14).

19. The claimant sought the following relief:

    "(a) A declaration that the Defendant's shares in the Claimant are unpaid;

    (b) A declaration that the Claimant's notice of intended forfeiture is to be construed as set out in paragraph 10 above;

    (c) A declaration that the Claimant's call notice and/or notice of intended forfeiture are valid, and that the Claimant or its directors are entitled to forfeit the Defendant's shares;

    (d) Alternatively, if the call notice and/or notice of intended forfeiture are found to be invalid, a declaration that the Claimant or its directors are entitled to send a new call notice and/or notice of intended forfeiture;

    (e) Further or other relief as appropriate."

20. There was no claim for payment of the sum claimed to be due pursuant to the call notice; and no step had been taken to forfeit the shares. I do not consider the prayer for "further or other relief as appropriate" is material. There are three connected reasons for this conclusion:

    (1) The claimant is required to state the remedy that is sought in the claim form – CPR 16.2(1)(b). There is no requirement to include it in the particulars of claim although it is conventional to do so. In the 2016 proceedings the

claimant under the heading "brief details of claim" described the claim in these terms:

"The Claimant asks the Court declaratory relief as set out in the Particulars of Claim attached". [sic]

It is clear from this description of the claim that the relief sought was confined to the declarations. The claimant was not entitled to extend the scope of the relief described in the claim form by adding the common rubric 'further or other relief' to the list of declarations in the particulars of claim.

(2) As a matter of construction, it would not have been open to the claimant to contend that the prayer for 'further or other relief' entitled the claimant to seek relief of a type that was entirely different to the declarations that are specified such as a money claim.

(3) The claimant chose not to make a money claim and paid the court fee that was appropriate to a non-money claim. In order to have pursued a money claim the claimant would have needed to amend the claim form to include such a claim and paid the (substantial) additional court fee. The wisdom of saving the court fee of £10,000 but facing the risk of losing a right to recover €36 million must be questionable.

21. There are other elements of the particulars of claim which explain why the claim was brought as a claim seeking only declarations. Paragraphs 12 and 13 refer to letters from solicitors acting for the defendant dated 2 June and 29 June 2016 setting out the basis upon which they denied that the claimant was entitled to forfeit his shares. Amongst other grounds, it was asserted on behalf of the defendant that the claimant would be acting fraudulently "by taking steps to forfeit the Defendant's shares". It was not expressly part of the claimant's case that it was entitled to be paid pursuant to the call notice. However, a right to forfeit could only arise if a valid call notice had been served; or, put more accurately, unless the defendant was liable to pay for the shares in cash, the claimant had no entitlement to serve a call notice.

22. Paragraph 14 asserts the claimant's right to forfeit the defendant's shares and this is followed by a concluding paragraph:

"15. As a result of the Defendant's letters above, the Claimant is at risk that if it exercises its rights without first obtaining declaratory relief from the court, the Defendant will wrongly issue proceedings to restrain the Claimant or to challenge the validity of its actions, and that the Defendant will wrongly allege fraud against the Claimant or its directors."

Judgment in the 2016 proceedings

23. It is unnecessary to refer to the judgment handed down by the Deputy Judge on 14 November 2017 in detail. It is however instructive to set out the issues dealt with by the Deputy Judge as he formulated them although bearing in mind that many of the issues arose on the defendant's counterclaim:

"9. The issues I have to decide are:-

(1) On what terms did Mr Nasir take his shares in Z?

(2) Is Mr Nasir obliged by section 584 of the Companies Act 2006 ("the Act") to pay for the shares in cash in any event?

(3) Does section 593(3) of the Act apply to Mr Nasir's shareholding or was there on or before 29 June 2011 an arrangement to which section 594(1) applies?

(4) Is Z entitled to forfeit any of Mr Nasir's subscriber shares in reliance upon section 584 and/or section 593 of the Act and articles 69 and 74 of its Articles of Association?

(5) Is Z estopped from asserting that Mr Nasir's shares are unpaid (or from denying that they are paid or from otherwise denying that Z is entitled to vote his shares). Two estoppels are alleged: an estoppel by convention and an estoppel by representation.

(6) Is Mr Nasir entitled to relief under section 606 of the Act?

(7) If Z is entitled to forfeit Mr Nasir's shares, should Z now make restitution to Mr Nasir?"

24. Taking the issues in turn:

(1) The greater part of the judgment concerns the first issue which the Deputy Judge described as fact intensive. The defendant sought to establish that at the date of incorporation of the claimant there was an agreement (the SPA) to the effect that his shares would be paid for otherwise than in cash. The Deputy Judge held that the defendant took his shares "… on the terms of the Memorandum and Articles of Association which were genuinely dated 29 June 2011 (and not backdated), and on no other terms. He did not take them on the terms of the SPA, which was drawn up later and did not refer to those shares. He did not take them on the basis of any agreement or arrangement with Mr Sidhu that the par value of those shares would not have to be paid in cash, or that the par value would be attributed to the consideration for the SPA or the transfer of the ZB shares to Z. …". [73]

(2) The Deputy Judge held that "… section 584 of the Act required that all the shares be paid up in cash.". [79]

(3) The Deputy Judge held that there was no agreement on 29 June 2011 pursuant to which Mr Nasir's holding of shares was allotted to him in consideration of the subsequent transfer to the claimant of shares in ZB. [89].

(4) Having referred to Articles 69, 73 and 74, the Deputy Judge held that "… the call notice and notice of forfeiture were properly sent, and Z is entitled to forfeit Mr Nasir's shares accordingly." [95]

(5) The defendant's case on estoppel was rejected. [104]

(6) The Deputy Judge decided that he should not exercise power under section 606 of the Act to grant relief in respect of the defendant's liability to pay for

the shares: "It does not seem to me to be just and equitable that, Mr Nasir's obligation being (as I have found) to pay them up in cash, he should not pay the whole amount." [115]

(7) The Deputy Judge rejected the claim in restitution. [121]

25. The Deputy Judge's conclusions are reflected in the order dated 28 November 2017. The claimant was wholly successful. Mr Nasir's Part 8 claim and his counterclaim were dismissed and two declarations were made on the claimant's claim:

> "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."

26. Mr Temmink who appeared for the defendant placed reliance in particular on the second declaration which confirmed that Mr Nasir had failed to pay for the shares and the claimant was entitled to forfeit the shares. The right to forfeiture could only arise if the claimant had served a valid call notice; and a valid call notice could only be served if the claimant was entitled to be paid the amount that remained unpaid on the defendant's shares. In addition, the defendant relies on the terms upon which a stay was ordered:

> "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 …". [my emphasis]

27. It is clear from the sentence in paragraph 2 of the judgment to which I drew attention earlier in this judgment that the parties and the court were well aware of the limited relief the claimant sought in the 2016 proceedings. The proceedings cleared the way for the claimant to forfeit the defendant's shares. Two points bear emphasis:

(1) It is not suggested by the claimant that it was unable to include a claim for payment in the 2016 proceedings either in addition to, or in the alternative to, the claims for declarations.

(2) It was not asserted by the claimant that the trial before the Deputy Judge dealt with preliminary issues, leaving over an entitlement to pursue further relief, or that it is open to the claimant to pursue further relief in 2016 proceedings.

This claim

28. This claim is drafted in a very similar form to the 2016 proceedings. Apart from minor differences of layout, the differences of substance are:

(1) The particulars of claim refer to the 2016 proceedings and the effect of the judgment is summarised. The order made by the Deputy Judge on 28 November 2017 is set out in full. The claimant expressly relies on findings that the claimant has not received any money payment or non-monetary

consideration for the shares and that the Defendant is required to pay for them in cash.

(2) The claimant avers that the call, the sum due pursuant to the call notice dated 5 June 2015, remains unpaid.

(3) The claimant refers to forfeiture of the defendant's shares. (Forfeiture did not take place until 11 June 2018, more than 6 months after the judgment of the Deputy Judge and after the defendant's application for permission to appeal had been refused on 24 May 2018).

(4) The core of the claim is set out in paragraphs 21 to 23 of the particulars of claim. The claimant refers to Articles 72.1.3, 72.2.2.3 and 75.3.4 and claims the call together with interest on the Call Amount. In paragraph 23 the claimant says it "… seeks enforcement of the payment of the Call Amount by way of a claim in debt, together with interest pursuant to the Articles ...".

(5) The relief that is sought reflects the money claim together with interest.

The Law

29. The doctrine of merger was considered by the Court of Appeal in *Clark v In Focus Asset Management* [2014] 1 WLR 2502. The claim concerned an award by the Financial Ombudsman Service, which had been accepted by the complainant. The principal issue before the Court of Appeal was whether the award was a judicial decision capable of giving rise to res judicata. At [3 – 12] Arden LJ discusses the meaning of res judicata and merger, and the differences between them. It is helpful to set out the passage in full.

> "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 argued this case on the basis of both principles. The judge dealt solely with merger.
>
> 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, 243). A complaint to the ombudsman need not be a cause of action but … 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.
>
> 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.

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 litigant ought to have brought in the first set of proceedings (this is known as the rule in *Henderson v Henderson* (1843) 3 Hare 100).

7. The necessary 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.

8. I take as the requirements of cause of action estoppel the summary from Spencer Bower & Handley, Res Judicata, 4th ed (2009) cited with approval by Lord Clarke of Stone-cum-Ebony JSC … in the recent case of *R (Coke-Wallis) v Institute of Chartered Accountants in England and Wales* [2011] 2 AC 146, para 34:

"In para 1.02 Spencer Bower & Handley, Res Judicata, 4th ed makes it clear that there are a number of constituent elements in a case based on cause of action estoppel. They are: '(i) the decision, whether domestic or foreign, was judicial in the relevant sense; (ii) it was in fact pronounced; (iii) the tribunal had jurisdiction over the parties and the subject matter; (iv) the decision was – (a) final; (b) on the merits; (v) it determined a question raised in the later litigation; and (vi) the parties are the same or their privies, or the earlier decision was in rem.'"

9. If the requirements of res judicata are fulfilled, they constitute an absolute bar and the court has no discretion to hold that res judicata should not apply in any particular case.

10. If the requirements of merger are satisfied, it is unnecessary to see if the requirements of res judicata were fulfilled, and vice versa.

11. There is a powerful twofold rationale for the doctrines of merger and res judicata. The first rationale is "the public interest in finality of litigation rather than the achievement of justice as between the individual litigants" (see per Lord Goff of Chieveley in *Republic of India v India Steamship Co Ltd (No 2)* [1998] AC 878, 903). Mr Clive Wolman, for the claimants, suggests that the public interest in finality arises out of a concern that the public courts and tribunals should not be clogged by repetitious re-hearings and redeterminations of the same disputes. This is clearly a powerful consideration.

> 12. Second, there is the private interest. As Sir Nicholas Browne-Wilkinson V-C put it in *Arnold v National Westminster Bank plc* [1989] Ch 63, 69, "it is unjust for a man to be vexed twice with litigation on the same subject matter"."

30. Merger was also considered by the House of Lords in *Virgin Atlantic Airways Ltd v Premium Aircraft Interiors UK Ltd* [2014] AC 160 which was heard a few months before *Clark v In Focus Asset Management* although oddly Lord Sumption's observations on the subject of res judicata do not appear to have been cited to the Court of Appeal. At [17] Lord Sumption provided a summary of the general principles of res judicata. He described res judicata as a "portmanteau term which is used to describe a number of different legal principles with different juridical origins." After dealing with cause of action estoppel, he continued:

> "... Second, 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 on it, and the claimant's sole right as being a right on 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 superseding the underlying cause of action see *King v Hoare* (1844) 13 M & W 494, 504 (Parke B).
> …"

31. Both Lord Sumption and Arden LJ treat merger as the automatic consequence of a judgment on a cause of action. Although this is undoubtedly right, when considering whether merger has taken place, it is necessary to examine the context in which the judgment is given. A judgment given after a trial of all the issues in a claim will lead to merger but, by contrast, a judgment of a preliminary issue will not.

32. Neither party referred me to Spencer Bower & Handley, Res Judicata, 4th ed which contains an extended discussion of "Merger in Judgment" which is also described in the text as "Former Recovery". (The authors appear to have treated the two concepts as broadly interchangeable.) The 4th edition pre-dates the two cases to which I have referred. However, Arden LJ relied on the analysis in Spencer Bower & Handley in relation to res judicata and it is reasonable to suppose that the author's analysis of the constituent elements of merger is equally worthy of consideration. I provided a first draft of this judgment to Mr Lawrence and Mr Temmink and invited them to provide any further submissions they felt to be helpful. Both took the opportunity to provide further submissions and I have had regard to them when finalising this judgment.

33. Merger is described in Spencer Bower & Handley at 19-01 in the following way:

> "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. … 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." [my emphasis]

34. At paragraph 19-03 the constituents of a good plea of former recovery are summarised:

> "A party setting up a former recovery must establish that:
>
> (i) the former judgment can in law support the plea;
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> (ii) it was in the terms alleged;
>
> (iii) the tribunal had jurisdiction;
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> (iv) the former judgment was final and remains in force;
>
> (v) the claimant is suing on the same cause of action; and
>
> (vi) the parties are the same or their privies."

35. Subsequently, at para 20.01, in considering what amounts to a judgment for the purposes of merger, the following passage appears:

> "For present purposes a *res judicata* means a judicial decision or award granting relief but acceptance of a payment into court in full satisfaction has the same effect. The cause of action may be at common law, equitable, or statutory, the decision may be *in rem* or *in personam* and it may have been obtained after a hearing, by default or by consent. The relief may be judgment for debt or damages, or coercive. None of these differences matter.
>
> …
>
> The following do not qualify as a judgment granting relief for present purposes: a declaration of right; a verdict not followed by judgment; a right to sign judgment on default; a compromise without judgment; and a balance order in the winding up of a company." [my emphasis]

36. Finally, at para. 21.13 it is suggested that a later claim will not be barred if the causes of action are cumulative unless the claimant has obtained full satisfaction.

37. This extract from Spencer Bower & Handley suggests that not all judgments are capable of supporting a plea of merger. Three examples are given. First, a judgment granting a declaration on the basis that it is the nature of the relief that is granted, it is not a judgment capable of supporting a plea of merger. Secondly, where the former judgment is not final. Thirdly, a judgment where the causes of action are cumulative.

38. It is notable that the definition of merger given by Spencer Bower & Handley is not entirely on all fours with the descriptions of the doctrine given by Lord Sumption and Arden LJ. The passage at paragraph 19-01 cited above places some reliance on the second proceedings being pursued for the same relief. If this is right, the automatic application of merger solely because the facts that support a cause of action are repeated in a second claim may be doubtful.

39. Plainly it is right that a judgment that is not final will not support a plea of merger. However, it seems to me that the notion of finality does not suffice to explain some obvious examples of judgments that, although final, do not lead to merger. It is a commonplace that the court may try a claim on the basis that preliminary issues are determined first. Merger can only occur when all aspects of the cause of action have been dealt with. If a party commences a claim seeking declaratory relief to establish whether it has a cause of action, does it necessarily follow that the claimant must pursue within that claim the relief that may flow from obtaining a declaration that is favourable?

40. It is also right that there are examples of causes of action, in the sense of sets of facts that constitute a cause of action, being cumulative. The same set of facts may entitle the claimant to bring different claims for different causes of action. Spencer Bower & Handley instances a beneficiary with a claim in personam against a defaulting trustee being entitled to bring a later claim for a proprietary tracing remedy. Another example is a beneficiary applying to remove a trustee of a trust on the basis there has been a breach of trust and later bringing a separate claim for relief arising from the breach of trust. These examples suggest that the doctrine of merger is not quite as absolute as might appear from the judgments I have cited.

41. It is notable that at para. 20-01 of Spencer Bower & Handley a judgment for a declaration is identified as a judgment which is not to be treated as "a judgment granting relief" for the purposes of merger. No authority for this proposition is cited. It is therefore useful to consider why declaratory relief might have been singled out in that way. In Zamir & Woolf The Declaratory Judgment 4th ed the authors at para. 1-02 say this about the nature of declaratory relief:

> "A declaratory judgment is a formal statement by a court pronouncing upon the existence or non-existence of a legal state of affairs. It is to be contrasted with an executory, in other words coercive[2], judgment which can be enforced by the courts. In the case of an executory judgment, the courts determine the respective rights of the parties and then order the defendant to act in a particular way, for example, by an order to pay damages or to refrain from interfering with the *claimant's* rights; if the order is disregarded, it can be enforced by official action … A declaratory judgment, on the other hand, pronounces upon a legal relationship but does not contain any order which can be enforced against the defendant."

42. This description of declaratory relief is not controversial. 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. However, there is nothing to stop a claimant seeking both declaratory and coercive relief in the same claim. Indeed, section 49(2) of the Senior Courts Act 1981 encourage the court to " …so exercise its jurisdiction in every cause or matter before it as to secure that, as far as possible, all matters in dispute between the parties are completely and finally determined, and all multiplicity of legal proceedings with respect to those matters is avoided." CPR 40.20 makes it clear that the court has power to make "…binding declarations whether or not any other remedy is claimed."

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[2] Here "coercive" is being used in a narrower way than para. 20-01 of Spencer Bower & Handley: Res Judicata.

43. It seems to me that section 49(2) amounts to no more than an exhortation directed to the court and it has no direct effect upon the parties to a claim if the parties choose to litigate in a cumulative manner. CPR 40.20 clarifies that other remedies may be claimed with a prayer seeking a declaration. Neither provision takes matters any further.

44. The emphasis in Spencer Bower & Handley is that for merger to take effect there must be a judgment granting relief. This can be seen from the passages cited from paragraph 19-01 and from the later passage at paragraph 20-10. The author goes on to opine that a declaration does not qualify as a judgment granting relief. I am bound to say I find this view to be difficult to follow. It may be that the author's opinion has been expressed too widely. The fact that declaratory relief is discretionary cannot of itself be sufficient to take it into a category of relief on its own because other forms of relief, such as injunctions, are discretionary. The grant of a final injunction following a trial, without other relief, would not be a bar to merger taking place because the court has made a determination on the cause of action.

45. However, declaratory relief arises in many different circumstances and in some cases it is not obviously based on a readily recognisable cause of action (in the *Letang v Cooper* sense). For example, a declaration as to status, the lawfulness of a decision or a future course of conduct are rather different to a declaration that a debt is due under a contract. By contrast, for the court to grant a declaration that a liquidated sum is due under a contract, it must have considered and determined all the facts that form the cause of action. The exercise the court has undertaken to reach the judgment is the same as if the claim had sought judgment for the liquidated sum. The position might be different if a declaration were to be sought in terms that the defendant was in breach of the provisions of a contract, without seeking further relief, even if damages are not an essential part of the cause of action. The point does not arise here because the claim is for a liquidated sum, the essential elements of the cause of action being the obligation to pay and non-payment.

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.

47. It seems to me, with respect to the author of Spencer Bower & Handley, that whether the grant of declaration will lead to merger depends upon the nature of the claim and the declaration that is granted.

48. The other essential element for the doctrine of merger to apply in this case is for the cause of action in both claims to be matched. The cause of action relied on by the claimant in both claims derives from its Articles. It is common ground that they are to

be treated as a contract between the claimant and the defendant. Section 33 of Companies Act 2006 provides:

> "Effect of company's constitution
>
> (1) The provisions of a company's constitution bind the company and its members to the same extent as if there were covenants on the part of the company and of each member to observe those provisions.
>
> (2) Money payable by a member to the company under its constitution is a debt due from him to the company. In England and Wales and Northern Ireland it is of the nature of an ordinary contract debt."

49. The leading authority on the subject of merger arising in connection with a contract is *Republic of India & another v India Steamship Co Ltd ("The Indian Grace")* [1993] AC 410 at 415. The claim concerned a fire on board The Indian Grace. Part of the cargo was jettisoned as a result of the fire and part was damaged by it. A claim in personam was brought in India for the undelivered cargo and judgment was obtained for about £6,000. A claim in rem was then brought in London claiming damages of £2.6 million. An application was made to strike out the claim relying on section 34 of the Civil Jurisdiction and Judgments Act 1982. Lord Goff gave the leading speech. He rejected the submission that there was a lack of identity between the cause of action in India (damage to cargo) and the cause of action in the claim brought in London (short delivery). Lord Goff concluded that it was "… wholly unrealistic to regard the cause of action as being other than a cause of action arising under the contract, which provides for the relevant duties of the shipowners, regarding the seaworthiness of the ship and the care of the goods." [420 C – D]

50. Lord Goff then considered *Brunsden v Humphrey* (1884) 14 Q.B.D. 141 and *Conqueror v Boot* [1928] 2 KB 336. He accepted when considering *Brunsden v Humphrey* that, in the case of a claim in negligence, it is theoretically possible to segregate different causes of action by reference to the different heads of damage. However, as *Conquer v Boot* shows a claim under a contractual promise to complete the building of a bungalow involved one contractual promise, that is to complete the bungalow. Further claims for different damage did not prevent merger applying. Lord Goff went on [421 C- F]:

> "If I turn to the present case, I find that the situation is not precisely the same. The present case is not concerned with the failure to construct a building in accordance with a certain specification, which can result in a whole series of defects which may nevertheless lead to a single breach of contract, i.e., the failure to hand over the building constructed in accordance with the terms of the contract. It is rather concerned with a single incident, i.e., the fire during transit which broke out in the cargo over which the plaintiff's consignment of munitions was stowed, which resulted in the damage to that consignment and to loss (by jettison) of a small part of it. Furthermore, as appears from the pleadings, that loss or damage might have resulted from breach of more than one term of the contract … However, for present purposes, there is no need to distinguish between the two breaches; because the factual basis relied upon by the plaintiffs as giving rise to the two breaches is the same, and indeed referred compendiously by the plaintiffs in the Cochin action as "negligence". In these circumstances. I

> am satisfied that there is identity between the causes of action in the two sets of proceedings."

Discussion

51. The defendant says that the facts alleged in the claim amounted to a cause of action entitling the claimant to recover the unpaid amount due for the shares and cause of action merges with the judgment and the order and is thereby extinguished. Mr Temmink invites the court to have closely in mind the exhortation of Lord Atkin in *Workington Harbour and Dock Board v Trade Indemnity Co Ltd* (1938) 60 Lloyd's Rep 209 at 219:

> "The result is that the plaintiffs who appear to have had a good cause of action for a considerable sum of money fail to obtain it, and on what may appear to be technical grounds. Reluctant, however, as a Judge may be to fail to give effect to substantial merits, he has to keep in mind principles established for the protection of litigants from oppressive proceedings. There are solid merits behind the maxim nemo debt bis vexari pro una et eadem causa."

52. The focus of the 2016 claim was upon establishing that the claimant was entitled to forfeit the defendant's shares. However, in order to be entitled to do so, the claimant had to establish that the shares were unpaid and a valid call notice had been served which was a prerequisite for serving a notice of intended forfeiture, itself a prerequisite for forfeiture. There is no doubt that the cause of action pursued by the claimant is based upon successfully establishing that the defendant was a contributory, the shares were unpaid and a valid call notice had been served. These are the same facts that are relied on in this claim as forming a basis for the claim in debt. As can be seen from section 33 of the 2006 Act, money due from a member is a debt due from him to the company.

53. It is uncontroversial that when the claimant issued the 2016 claim, it was entitled to pursue a claim in debt for €36 million on the basis of the facts that were pleaded as a basis for obtaining declaratory relief. The claimant would have been entitled to include a prayer for relief seeking judgment for that sum. The claimant did not to do so. Whether that was an oversight, or a deliberate choice, is not known. It is, in any event, not to the point.

54. Mr Lawrence submits that on the facts of this case merger has not taken place. He says the claimant adopted an entirely conventional approach when faced with a shareholder who had intimated grounds upon which he would contend that the shares should be treated as paid up, or relief should be granted. He says the claimant entirely properly and reasonably chose to seek only declarations with a view to establishing the legal position before taking steps to forfeit the shares registered in the defendant's name.

55. It can also fairly be said that the claimant's approach was transparent. This is shown by the remark in paragraph 2 of the judgment to the effect that nothing had been done in relation to forfeiture pending the outcome of the proceedings. The shares were forfeited not long after the defendant's application for permission to appeal was dismissed and subsequently this claim was issued. The possibility of a claim being made for €36 million will have been obvious to the defendant after the judgment and

forfeiture of the shares. The public policy reason for res judicata is on one view not engaged. However, merger is a principle of law that does involve the court undertaking an evaluation of the merits and exercising a discretion. The doctrine of merger applies as a function if the doctrine's relevant criteria are met.

56. Mr Lawrence, in his further submissions, accepts that there is no authority in this jurisdiction which either supports or contradicts the view expressed in Spencer Bower & Handley. He submits that the court should, however, give considerable weight to their view and that to take a different view would make radically new law and be wrong.

57. Mr Temmink submits that the authors of Spencer Bower & Handley do no more than express an opinion of the law. He 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

58. Although proper consideration should of course be given to the view expressed by the authors of Spencer Bower & Handley it is unsupported by authority and I consider it is expressed too widely. The grant of a declaration may not lead to merger in every case. That will depend upon the nature of the claim and the terms of the declaration. For the reasons I have given earlier in this judgment, I consider that in this case the mere fact of the claimant seeking declarations, taken in isolation, does not prevent the doctrine of merger applying because of the effect of the declaratory relief I have described. The doctrine of merger will only apply, however, if the cause of action in both claims is the same.

59. I consider that it is not appropriate to strive to find differences between the facts that form the cause of action in two claims. It is right, as in *The Indian Grace*, to look at the substance of the claims and to consider whether they arise from the same breach. It is not an oversimplification to say that the claim arises from the defendant's failure to pay for his shares. €36 million was due when the 2016 proceedings were issued. At that time the defendant was a contributor. After forfeiture of his shares, his relationship with the claimant changed although the sum that was due to be paid remained the same. 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.

60. The defendant was liable to pay for his shares and a valid call notice was served pursuant to Article 69. Article 75.3.4 provides that following forfeiture of the shares the defendant remained liable to pay that sum. In other words, the basis of liability was preserved by virtue of the consensual arrangement that is reflected in the rticles;

but it is the same liability as before. Preservation of liability following forfeiture does not create a new liability. It follows, in my judgment, that although some additional facts are pleaded in this claim, they are merely part of the narrative explaining how the claim came into being and not new facts signifying a new cause of action.

Conclusion

61. I am satisfied that all the essential elements for merger are made out. The claimant's cause of action merged in the judgment of the court and the order made in the 2016 proceedings, and it has been extinguished.

62. It follows that the court has no jurisdiction to deal with this claim and I will make a declaration accordingly. It is unnecessary to deal with the alternative limb of the application.