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Case Note

DECLARATORY RELIEF AND THE DOCTRINES OF MERGER AND IMPLIED OBLIGATION

Zavarco plc v Nasir [2021] EWCA Civ 1217; [2022] 2 WLR 261

This case note discusses the 2021 decision of the English Court of Appeal in *Zavarco plc v Nasir* [2021] EWCA Civ 1217; [2022] 2 WLR 261, concerning the nature of a judgment to which the seldom considered doctrine of merger applies. This was the culmination of litigation referred to below as "*Zavarco (No 2)*".[1] The issue in *Zavarco (No 2)* was whether purely declaratory relief engages the doctrine of merger, an issue which had not been considered in any earlier case. The scope of the discussion is widened to include another related doctrine, that of implied obligation, whereby a plaintiff who succeeds in obtaining an "executory" judgment (*eg*, a money judgment) can sue again on the judgment. The courts in *Zavarco (No 2)* were not invited to consider this doctrine. Had they done so, the defendant's position would have been exposed as incoherent. The matters addressed by the case note are of general interest in jurisdictions based on English common law.

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I. Introduction

1 In August 2021, the Court of Appeal of England and Wales issued its decision in *Zavarco plc v Nasir*,[2] a case concerning a rarely considered aspect of *res judicata*, namely the doctrine of merger. The issue was whether declarations made in earlier proceedings, *Zavarco plc v Nasir*,[3]

1 This collectively refers to the decisions of the Chief Master in [2019] EWHC 1837 (Ch), Birss J in [2020] EWHC 629 (Ch); [2020] Ch 651 and the Court of Appeal in [2021] EWCA Civ 1217; [2022] 2 WLR 261.

2 [2021] EWCA Civ 1217; [2022] 2 WLR 261.

3 [2017] EWHC 2877 (Ch). This is referred to below as "*Zavarco (No 1)*". The declarations are set out at n 15 below.

that Nasir, the defendant ("D"), was indebted to Zavarco plc ("Z") in the sum of €36m barred Z from suing D for a money judgment for that sum in a second action. D claimed that Z was barred by merger. The question whether the doctrine of merger applied to a purely declaratory judgment had not previously been the subject of decision in the English courts.[4]

2 The Court of Appeal's decision was on appeal from the judgment of Birss J, itself on appeal from the Chief Master of the Chancery Division, who had acceded to D's application and had struck out the proceedings in *Zavarco (No 2)*.[5] His decision was based on a misunderstanding of the doctrine of merger. Birss J rightly allowed Z's appeal,[6] but he too failed to grasp the doctrine fully. D then appealed to the Court of Appeal, which upheld Birss J's decision for entirely convincing reasons but did not fully explore all the failings of the lower courts. In particular, neither of the lower courts considered the possibility that the *res judicata* effect of a declaration is to be found in estoppel *per rem judicatam*, not merger. These failings are examined here with a view to highlighting the essential nature of merger. An additional concern of this case note is that none of the courts, including the Court of Appeal, addressed a separate doctrine of *res judicata*, namely that of "implied obligation", whereby a judgment creditor can sue the judgment debtor again, relying now on the earlier judgment as a new cause of action.[7] The two doctrines, although theoretically distinct, converge in the case of an executory judgment by a court of record.[8] In the *Zavarco (No 2)* litigation neither merger nor implied obligation applied because the relief granted in *Zavarco (No 1)* was only declaratory. However, had the doctrine of merger been engaged by the declarations made in *Zavarco (No 1)*, as D contended, the doctrine of implied obligation would have been simultaneously engaged, generating a new cause of action for Z and thereby exposing the incoherence of D's position.

4 See *Zavarco plc v Nasir* [2021] EWCA Civ 1217; [2022] 2 WLR 261 at [38].

5 [2019] EWHC 1837 (Ch).

6 *Zavarco plc v Nasir* [2020] EWHC 629 (Ch); [2020] Ch 651; K R Handley, "The *Res Judicata* effect of Declarations" (2021) 137 LQR 198.

7 The alternative label "implied contract" would also be justified by both ancient and modern authorities. This, however, would only have provoked a jejune argument about the juridical nature of the undoubted obligation to satisfy a judgment debt. "Implied obligation" sufficiently reflects what Sir David Richards said in the Court of Appeal in *Zavarco plc v Nasir* [2021] EWCA Civ 1217; [2022] 2 WLR 261 at [33], referring to "the obligation imposed by the judgment on the defendant".

8 As to "executory" or "coercive" judgments, see n 16, referring to *Zamir & Woolf: The Declaratory Judgment* (Sweet & Maxwell, 4th Ed, 2011) at para 1-02.

II. The doctrine of merger

3 The leading statement of the doctrine of merger is to be found in the following passage in Parke B's judgment in the Court of Exchequer in *King v Hoare*:[9]

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

As this makes clear, the doctrine of merger is part of the law of *res judicata*. Its engagement depends on the recovery of a judgment following a judicial determination that a claimed cause of action exists. One condition for the engagement of the doctrine is that the judgment be by a court of record. Thus, judgments of foreign courts, not being courts of record, are not subject to merger.[10] Another, as emphasised by Lord Penzance in *Kendall v Hamilton*,[11] is an identity between the cause of action sued on in the first action and that sued on in the second.

4 In *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd*,[12] Lord Sumption, in the Supreme Court of the United Kingdom, summarised the doctrine of merger thus:

> [M]erger … 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. … it is in reality a substantive rule about the legal effect of an English judgment, which is regarded as 'of a higher nature' and therefore as superseding the underlying cause of action: see *King v Hoare* …

9 (1844) 13 M & W 494 at 504.
10 See *Republic of India v India Steamship Co* [1993] AC 410 at 417H.
11 (1879) 4 App Cas 504 at 526.
12 [2013] UKSC 46; [2014] AC 160 at [17].

Lord Sumption was not the only judge to say that merger causes a cause of action to be "extinguished".[13] Parke B had in fact used the word "changed". In the High Court of Australia,[14] Dixon J, with greater accuracy, said this:

> [T]he very right or cause of action claimed or put in suit has in the former proceedings passed into judgment, so that it is merged and has no longer an independent existence.

III. *Zavarco plc v Nasir*

5 The facts of the case were, in brief, as follows: Z's articles of association ("Articles") entitled it, as a matter of contract, to issue a call notice requiring a shareholder to pay any amounts unpaid on his shares. The Articles also entitled Z to issue a notice of intended forfeiture to a shareholder who had not complied with a call notice. Non-compliance with a notice of intended forfeiture entitled Z to forfeit the shares which were the subject matter of the notice. Where shares had been forfeited, the former shareholder nevertheless remained liable for all sums payable by him under the Articles at the date of forfeiture. Z had issued D with 360 million shares, each with a nominal unpaid amount of €0.10. It served him with a call notice to pay €36m, the amount unpaid, which D failed to do. Z then served him with a notice of intended forfeiture. In *Zavarco (No 1)*, Z sought declaratory relief but did not seek a money judgment. It obtained declarations that D's shares were unpaid, that the call notice and the notice of intended forfeiture were valid, and that it was entitled to forfeit D's shares. The declarations involved an express affirmation of the existence of an unpaid debt of €36m owed to Z by D.[15] Z then forfeited D's shares out of court. When the forfeited shares yielded nothing, Z issued fresh proceedings against D in which it sought a money judgment for €36m. In its particulars of claim it recited the declarations made in *Zavarco (No 1)* and claimed €36m as a contractual debt pursuant

13 Eighty years before *King v Hoare* (1844) 13 M & W 494, Lord Mansfield, delivering the opinion of all the judges, said that the cause of action is "drowned in the judgment": see *Biddleson v Whitel* (1764) 1 Wm Bl 506 at 507. See also *Kendall v Hamilton* (1879) 4 App Cas 504 at 539, *per* Lord Selborne: "merged and extinguished"; *Republic of India v India Steamship Co* [1993] AC 410 at 417F, *per* Lord Goff of Chieveley: "ceases to exist".

14 *Blair v Curran* (1939) 62 CLR 464 at 532. See also *Chamberlain v Deputy Commissioner of Taxation* (1988) 164 CLR 502. *Cf Kendall v Hamilton* (1879) 4 App Cas 504 at 526, *per* Lord Penzance: "advanced into a judgment".

15 The declarations were as follows (see *Zavarco plc v Nasir* [2019] EWHC 1837 (Ch) at [25]):

> 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.

to the Articles. Thus, it sought to enforce the very same contractual cause of action as it had asserted in *Zavarco (No 1)*.

6 D applied to strike out the claim on the ground that the cause of action recognised in the declarations made in *Zavarco (No 1)* had merged therein and so had ceased to exist. The Chief Master allowed D's application. He held that the fact that the declarations in *Zavarco (No 1)* were not "executory" or "coercive", as in a money judgment,[16] did not prevent merger:[17]

> 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.

He concluded that, given that the causes of action were the same, the doctrine applied,[18] and struck the proceedings out.

7 The conclusion only has to be stated to be seen to be absurd: it meant that the declarations made in *Zavarco (No 1)* had caused Z to cease to have the very right which they proclaimed it had, thereby disabling it from recovering the debt owed by D. On appeal, Birss J had no difficulty in arriving at the correct answer. He recognised that the declarations made in *Zavarco (No 1)* were formal statements that Z had, and continued to have, the right to be paid €36m:[19]

> … 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. …
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> …
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> … The question [is] whether the earlier right in particular has merged into and been extinguished by the actual declaration given in the judgment, having regard to the terms in which that declaration is couched.

16 See *Zavarco plc v Nasir* [2019] EWHC 1837 (Ch) at [41], citing Jeremy Woolf, *Zamir and Woolf: The Declaratory Judgment* (Sweet & Maxwell, 4th Ed, 2011) at para 1-02. This distinguishes between "executory" or "coercive" judgements, where the court orders the defendant to act in a certain way, *eg*, to pay damages or to refrain from interfering with the claimant's rights, and declaratory judgments, which merely proclaim the existence of a legal relationship, and contain no order capable of enforcement against the defendant.

17 *Zavarco plc v Nasir* [2019] EWHC 1837 (Ch) at [46].

18 See *Zavarco plc v Nasir* [2019] EWHC 1837 (Ch) at [58]–[62].

19 *Zavarco plc v Nasir* [2020] EWHC 629 (Ch); [2020] Ch 651 at [26] and [28]–[29].

> One only has to ask that question in this case to see that the answer is that these declarations do not purport to do that. They are, if anything, a formal statement explaining why [Z] did have and still does have a right to €36m cash from [D].

8 The Court of Appeal agreed.[20] Indeed, Sir David Richards, with unanimous concurrence, said:[21]

> [I]t is hard, indeed I would say impossible, to think of a sound reason why a declaration of legal right or obligation should automatically bar a subsequent claim for enforceable relief.

9 While Birss J had reached the correct result, some of the reasoning which led him to it is open to serious criticism. He misunderstood the essential nature of the doctrine of merger and omitted to carry out a survey of the legal landscape, which includes the doctrine of implied obligation. It is a striking feature of the judgments of both the Chief Master and Birss J that they focused entirely on the extinctive effect of merger. Neither considered the relevance of estoppel *per rem judicatam* or the role played by it in the doctrines of *res judicata*.[22] They accordingly failed to consider the possibility that a declaration operates by way of estoppel, not merger.

10 At the very outset, in considering the justification for the doctrine of merger, Birss J went off in the wrong direction, saying:[23]

> If you think about it, the claimant cannot still have their old legal right to the sum of money for breach of contract, otherwise they would now have two rights and might end up with a right to double recovery. So the idea is that the old right, or cause of action, has merged into the new right, the judgment.

This is to treat merger as a doctrine aimed at preventing double recovery. The true position, however, is quite different. Merger is not at all concerned with preventing double recovery but with the effect of an executory or

20 *Zavarco plc v Nasir* [2021] EWCA Civ 1217; [2022] 2 WLR 261 at [37]: "a purely declaratory judgment … itself imposes no obligation but only confirms the obligation which already exists".

21 *Zavarco plc v Nasir* [2021] EWCA Civ 1217; [2022] 2 WLR 261 at [38].

22 The only brief references to estoppel are to be found in *Zavarco plc v Nasir* [2020] EWHC 629 (Ch); [2020] Ch 651 at [13], [14], [17] and [18], *per* Birss J, and then only in or in relation to quotations from *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2013] UKSC 46; [2014] AC 160 and *Clark v In Focus Asset Management & Tax Solutions Ltd* [2014] EWCA Civ 118; [2014] 1 WLR 2502.

23 *Zavarco plc v Nasir* [2020] EWHC 629 (Ch); [2020] Ch 651 at [12].

coercive judgment on a cause of action.[24] What prevents double recovery is not the common law doctrine of merger, but equity.[25]

11 Birss J went on to agree with the Chief Master that the declarations made in *Zavarco (No 1)* had "remedial" consequences, supporting Z's self-help remedy of forfeiting D's shares out of court.[26] With respect, this was irrelevant, since Z's right to forfeit extra-curially existed both before and after the declarations, which recognised but did not change the right. Of course, Z acquired an advantage by the declarations: D could no longer successfully challenge the lawfulness of a forfeiture. However, this advantage was not a "remedy" conferred by the declarations: it was an advantage that accrued by reason of estoppel *per rem judicatam*, not merger.

12 Still on the wrong track, Birss J then gave two examples of declarations which, he said, engage the merger doctrine. The first is a declaration that quantifies damages but without any executory or coercive order to pay them. The effect, he said, is that any right to a higher sum based on the same cause of action is lost, having merged in the declaration:[27]

> The critical thing … [is] that the first judgment … placed a value on the damages due for that cause of action. Once that was done, any right to a higher sum based on the same cause of action had merged into and been extinguished by that judgment.

This is wrong at several levels:

> (1) The doctrine of merger operates on a cause of action, "extinguishing" it. If merger were to be engaged by this example, it could only be because a declaration as to the quantum of damages implicitly affirms the existence of the underlying cause of action that gives the right to damages. But Birss J accepted that the declarations in *Zavarco (No 1)* did *not* engage the

24 *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2013] UKSC 46; [2014] AC 160 at [17]: "merger … is in reality a substantive rule about the legal effect of an English judgment".

25 See *Townsend v Stone Toms & Partners (No 2)* (CA, England & Wales) (1 January 1984) (unreported), citing *Morris v Robinson* (1824) 3 B & C 196 at 205-6, *per* Bayley J: "If indeed the plaintiffs were to recover the full value of the goods in each action, a Court of Equity would interfere to prevent them from having a double satisfaction." See also *Imperial Bank of Canada v Begley* [1936] 2 All ER 367; *BO Morris Ltd v Perrott* [1945] 1 All ER 567 at 570 and *Kohnker v Karger* [1951] 2 KB 670 at 675.

26 *Zavarco plc v Nasir* [2020] EWHC 629 (Ch); [2020] Ch 651 at [23] and [24].

27 *Zavarco plc v Nasir* [2020] EWHC 629 (Ch); [2020] Ch 651 at [25].

merger doctrine, even though they affirmed the existence of Z's contractual cause of action.

(2) The right to damages is not separate from the underlying cause of action and is not in itself a cause of action capable of undergoing merger.

(3) A claimant's right to damages exists before as well as after the process of quantifying them: quantification recognises the extent of the right but does not change it.

(4) Without an executory or coercive order, a declaration as to quantum creates no new or higher right or remedy. What it does is to create an issue estoppel precluding the parties from contradiction. This, however, has nothing to do with merger. Birss J's error was to focus on merger as if it were the only relevant form of *res judicata*, thereby overlooking the separate doctrines of estoppel *per rem judicatam*.

13 The fundamental point about merger is that it operates by analogy with the merging of an inferior in a higher security, such as the merging of a simple contract in a specialty.[28] Merger changes an "inferior" right (a cause of action) into a "higher" right (a judgment), with a "higher" remedy.[29] Sir David Richards made statements to the same effect in the Court of Appeal when he said:[30]

> [M]erger applies where an obligation under the cause of action is *embodied in*, and *replaced by*, a final order of the court … [emphasis added]

and when he identified Parke B's reference to "the inferior remedy [being] merged in the higher" as "the critical part" of the judgment in *King v Hoare*.[31]

14 Without a higher right there is nothing into which the cause of action can merge. Merger thus describes the change that an executory or coercive judgment makes to a cause of action by conferring on the

28 See *Kendall v Hamilton* (1879) 4 App Cas 504 at 526, *per* Lord Penzance, referring to a case where "a security of one kind or nature has been superseded by a security of a higher kind or nature".

29 See *Smith v Nicholl* (1839) 5 Bing (NC) 207 at 220, *per* Tindall CJ: "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." See also *King v Hoare* (1844) 13 M & W 494 at 506, *per* Parke B: "[W]here judgment has been obtained for a debt, as well as a tort, the right given by the record merges the inferior remedy by action for the same debt or tort against another party."

30 *Zavarco plc v Nasir* [2021] EWCA Civ 121; [2022] 2 WLR 261 at [31].

31 *Zavarco plc v Nasir* [2021] EWCA Civ 121; [2022] 2 WLR 261 at [33].

successful party a "higher" right. By contrast, a declaratory judgment only recognises the existence or extent of a cause of action, leaving the cause of action itself unchanged: no "higher" right or remedy is created and so no question of merger can arise. The preclusive effects of a declaration are the consequence of estoppel *per rem judicatam*, not merger.

15 This was recognised in *New Media Distribution Company SEZC Ltd v Kagalovsky*,[32] where Kagalovsky sought to defend a claim in England on the ground that the cause of action had merged in a judgment of the New York State Court. Smith J succinctly rejected the defence of merger for two reasons: (a) on appeal, the New York Supreme Court had overturned the judgment against Kagalovsky; and (b) the doctrine of merger is not engaged by a foreign judgment:[33]

> … the Amended Defence pleads that '[New Media's] cause of action is merged in the [New Media Judgment] entered on 20 September 2012 by the New York State Court'. …
>
> …
>
> In this case, … the claims made by New Media [in New York] against Mr Kagalovsky *failed*. This cannot, therefore, be a case of *merger* … If anything, it is a case of estoppel *per rem judicatam*.
>
> … There is no merger of judgment because (i) Mr Kagalovsky succeeded, on appeal, in having the claims against him in the New Media Action dismissed and (ii) because the doctrine of merger does not apply where the anterior judgment was that of a non-English court.
>
> [emphasis in original]

16 The second example Birss J gave of a declaration engaging the doctrine of merger is where the existence of only part of a claimed cause of action is recognised. He assumed that, in the case of the court making a declaration recognising a cause of action for a debt of €36m against a claim for €40m, the cause of action would merge in the declaration. He then asserted that merger would apply to the unsuccessful as well as the successful part: it is merger, he said,[34] that would prevent the claimant from suing again for the disallowed €4m.

17 Birss J apparently saw merger as applying separately to the successful claim for €36m and the claim for the disallowed €4m. What he failed to grasp is that merger applies to neither, for essentially the same reason, namely that while a declaration recognises the existence and/or

32 [2018] EWHC 2876 (Ch).

33 *New Media Distribution Company SEZC Ltd v Kagalovsky* [2018] EWHC 2876 (Ch) at [28] and [33]–[34].

34 *Zavarco plc v Nasir* [2020] EWHC 629 (Ch); [2020] Ch 651 at [31].

extent of a cause of action, it has no effect on the parties' rights and duties. If Z had originally sought €40m but succeeded only in a declaration that it was entitled to €36m, it would have been precluded from suing again for the disallowed €4m by estoppel *per rem judicatam*, not merger, since a declaration upholding only part of a claim recognises the existence and extent of the claimant's cause of action but does not change it. Moreover, a failed claim is not an "inferior" right capable of being changed into a "higher" right. Of course, a failed claim cannot be relitigated, but this is the effect of estoppel, not merger. Birss J's second example, like his first, had nothing to do with merger.

18 In the Court of Appeal,[35] Sir David Richards rejected both of Birss J's examples in this perfunctory, penultimate paragraph of his judgment:

> On one matter, I respectfully disagree with Birss J. While he considered that the application of merger to declarations would depend on the terms of the declaration, it is my view that the basis and development of the doctrine shows that it has *no application at all to declarations*. [emphasis added]

19 The Court of Appeal thereby re-affirmed the orthodox view of the doctrine of merger set out in *Spencer Bower and Handley: Res Judicata*,[36] *viz*, that merger does not apply in the case of a purely declaratory judgment. Moreover, by rejecting Birss J's two examples it leaves as an unsupported outlier the possibility canvassed earlier, albeit inconclusively, by a differently constituted Court of Appeal in *Terry v BCS Corporate Acceptances Ltd*[37] ("*Terry*"), to the effect that merger may operate *in favour of a successful defendant*.[38]

20 This was based on the following passage in *Halsbury's Laws of England*:[39]

35 *Zavarco plc v Nasir* [2021] EWCA Civ 121; [2022] 2 WLR 261 at [41].

36 LexisNexis Butterworths, 5th Ed, 2019. See *Zavarco plc v Nasir* [2021] EWCA Civ 1217; [2022] 2 WLR 261 at [1].

37 [2018] EWCA Civ 2422 at [56]–[61]. The case is not referred to in the current edition of K R Handley, *Spencer Bower and Handley: Res Judicata* (LexisNexis, 5th Ed, 2019).

38 Although Birss J did not refer to *Terry v BCS Corporate Acceptances Ltd* [2018] EWCA Civ 2422, he adopted the same heterodox position in his second example of a declaration operating by way of merger, when asserting that a declaration that a cause of action is held to exist only partially operates by merger in favour of the *partially successful* defendant.

39 Vol 12A (LexisNexis, 2015) at para 1594. Currently the same text is to be found in *Halsbury's Laws of England* vol 12A (LexisNexis, 2020) at para 1559, which does not refer to *Terry v BCS Corporate Acceptances Ltd* [2018] EWCA Civ 2422.

> When judgment has been given in a claim, the cause of action of which it was given is merged in the judgment and its place is taken by the rights created by the judgment.

It was suggested that these words are capable of extending to the dismissal of a cause of action, *ie*, where the judgment is in the defendant's favour. The orthodox view, that merger operates only against a successful claimant, not in favour of a successful defendant, was attributed solely to "academic commentary".[40] In fact, however, the academic commentary referred to simply reflected all existing judicial authority.[41]

21 No attempt was made by the Court of Appeal in *Terry* to explain what it is that merges when a judgment dismisses a claim. The true position, as discussed above,[42] is that the essential effect of merger, when it is engaged, is to change an "inferior" right (the cause of action) into a "higher" right (the judgment) with a "higher" remedy. A judgment dismissing a claim cannot cause the rejected cause of action to merge into a "higher" right with a "higher" remedy.

IV. Implied obligation

22 A further striking feature common to all three judgments in the *Zavarco (No 2)* litigation is the absence of any reference to the separate doctrine of implied obligation. This is an important feature of the legal landscape which, had it been noticed, would have demonstrated the incoherence of D's position.

23 The leading case on the implied obligation doctrine is *Williams v Jones*,[43] decided by the Court of Exchequer in 1845, only two months after *King v Hoare*. The issue was whether an action of debt lay upon a judgment of a county court. The Court of Exchequer held that it did. Parke B laid down the following general principle:[44]

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40 *Terry v BCS Corporate Acceptances Ltd* [2018] EWCA Civ 2422 at [59]. The commentators mentioned are K R Handley, *Spencer Bower and Handley: Res Judicata* (LexisNexis Butterworths, 4th Ed, 2009) at para 19.02, and Peter R Barnett, *Res Judicata, Estoppel and Foreign Judgments* (Oxford University Press, 2001) at para 1.41.

41 To the authorities mentioned in *Spencer Bower and Handley* and by Barnett, may be added *Matadeen v Caribbean Insurance Co Ltd* [2002] UKPC 69; [2003] 1 WLR 607, not cited in *Terry v BCS Corporate Acceptances Ltd* [2018] EWCA Civ 2422, where the Privy Council (at [46]) set out the doctrine of "former recovery" (*ie*, merger) in entirely orthodox terms.

42 See paras 16–21 above.

43 (1845) 13 M & W 627.

44 *Williams v Jones* (1845) 13 M & W 627 at 633.

> The principle on which this action is founded is, that, where a court of competent jurisdiction has adjudicated a certain sum to be due from one person to another, a legal obligation arises to pay that sum, on which an action of debt to enforce the judgment may be maintained. It is in this way that the judgments of foreign and colonial courts are supported and enforced, and the same rule applies to inferior courts in this country, and applies equally whether they be courts of record or not.

Despite the notion of an implied obligation having been expressly rejected by Lord Mansfield in *Biddleson v Whitel*,[45] Parke B's statement of the law has been accepted: the judgment of a court of competent jurisdiction creates "a new debt" by reason of an implied obligation to pay on the part of the judgment debtor.[46] A judgment creditor can thus sue again on the first judgment, for the same relief. There are then two judgment debts for the same sum.

24 The doctrine is part of the law of *res judicata*: it depends on a court having "adjudicated a certain sum to be due".[47] It is, however, theoretically distinct from merger, since it applies to judgments by courts of competent jurisdiction,[48] whether or not they are courts of record. As Parke B observed, it applies to foreign judgments.[49] Indeed, it is the only means of giving effect to foreign judgments at common law.[50] In this respect it is unlike the doctrine of merger, which applies only to courts of record and so does not apply to foreign judgments.

25 Suing on a judgment debt has long been a permissible means of enforcing it. At common law, there was a presumption that a judgment had been satisfied after a year and a day had elapsed without execution

45 (1764) 1 Wm Bl 506 at 507: "[N]o implied contract arises between the parties from the judgment." The case seems to have been lost sight of.

46 See *In re European Central Ry Co* (1876) 4 Ch D 33 at 38, *per* Bramwell LJ, giving the judgment of the Court of Appeal ("a fresh debt is created with different consequences"); *Bennett v Bank of Scotland* [2004] EWCA Civ 988 at [18], *per* Mummery LJ, with unanimous concurrence ("a new debt").

47 See *Williams v Jones* (1845) 13 M & W 627 at 633.

48 At the time of *Williams v Jones* (1845) 13 M & W 627, county courts in England and Wales could be courts of competent jurisdiction but were not courts of record, though they have been made so since. The issue in *Williams v Jones*, therefore, was whether the plaintiff could sue on the judgment of a court not of record.

49 See also *Grant v Easton* (1883) 13 QBD 302 at 303 and *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591 at 633B.

50 In the United Kingdom, resort to the implied obligation doctrine as a means of enforcing foreign judgments was abrogated by the Civil Jurisdiction and Judgments Act 1982 (c 27) s 34, save in a case where the foreign judgment is not entitled to recognition.

being issued, leaving an action on the earlier judgment as the only or most practical means of enforcement.[51]

26 The right to sue on a judgment was recognised in the Common Law Procedure Act 1852.[52] In *Bullen and Leake's Precedents of Pleadings*,[53] there were precedents for counts on judgments, citing *Williams v Jones*. The right is currently recognised in s 24(1) of the Limitation Act 1980:[54]

> An action shall not be brought upon any judgment after the expiration of six years from the date on which the judgment became enforceable.[55] [reference added]

27 In England and Wales, the enforcement of a domestic judgment by a fresh action, although unusual, is still permissible today. In *E D & F Man (Sugar) v Haryanto*,[56] Leggatt LJ, with the agreement of the other members of the Court of Appeal, rejected an argument that an action on a judgment was obsolete, saying:

> [A]n action in debt can be founded on an existing judgment. The juridical basis of the claim seems to be that of an implied contract to pay on the part of the party against whom judgment has been obtained. That that is the attitude of the Court has been clear for more than 150 years: see *Williams v Jones*.

28 Where the first judgment is by a court not of record, such as a foreign court, the judgment creditor, when suing in a second action, may assert the following alternative causes of action: (a) the original cause of action, since this was not extinguished by the first judgment; or (b) the new debt generated by the doctrine of implied obligation. Double recovery is prevented, not by the common law doctrine of implied obligation but equity.[57]

29 By contrast, where the first judgment is by a court of record, the original cause of action is extinguished, but in fresh proceedings the judgment creditor may assert a new cause of action on the matter

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51 *W T Lamb & Sons v Rider* [1948] 2 KB 331 at 336.

52 c 76 (UK).

53 Edward Bullen & Stephen Leake, *Bullen and Leake's Precedents of Pleadings* (Stevens and Sons, 3rd Ed, 1868) at p 193 *ff*.

54 c 58 (UK).

55 The Singapore Limitation Act 1959 s 6(3) is in the same terms, save for a 12-year limitation period. In *Lowsley v Forbes* [1999] 1 AC 329, the House of Lords held that "[a]n action … upon any judgment" refers to a fresh action to enforce a judgment, not proceedings to execute it.

56 English Court of Appeal Transcripts (17 July 1996) (unreported). See also *Bennett v Bank of Scotland* [2004] EWCA Civ 988.

57 See para 10 above.

of record,[58] contract of higher degree,[59] contract of record,[60] or implied contract,[61] generated by the first judgment. This new cause of action can be considered to be a product of either or both of the doctrines of merger and implied obligation, since in the case of a judgment of a court of record the two doctrines converge, as noted by Mummery LJ, in *Fraser v HLMAD Ltd*,[62] approving the following submission of counsel:[63]

> [The claimant's] cause of action for wrongful dismissal was transmuted into the judgment and thereafter ceased to exist independently of the judgment. *The cause of action is replaced by the rights created by the judgment, including, in certain circumstances, the right to bring a claim on the judgment.* [emphasis added]

There, the first sentence, echoing Dixon J in *Blair v Curran*,[64] clearly refers to the doctrine of merger; the second also refers to merger but "the right to bring a claim on the judgment" refers indifferently to the doctrines of merger and implied obligation.

V. Implied obligation and *Zavarco (No 2)*

30 The significance of the implied obligation doctrine for the *Zavarco (No 2)* litigation is that if, as D contended, Z's original contractual cause of action had merged in the declarations made in *Zavarco (No 1)*, it would have been changed into a higher right. This, after all, is how merger works.

31 On D's argument, merger prevented Z from suing again on the contractual cause of action, but if this argument had succeeded, D would necessarily have subjected himself to an implied obligation to give effect to this higher right into which the contractual cause of action had merged. Z thus had two alternative claims against D: (a) on the contractual cause of action, if, as Z contended, merger did not apply; or (b) on the implied

58 *King v Hoare* (1844) 13 M & W 494 at 504.
59 *Freshwater v Bulmer Rayon Co Ltd* [1933] 1 Ch 162 at 189.
60 *Freshwater v Bulmer Rayon Co Ltd* [1933] 1 Ch 162 at 189.
61 *E D & F Man (Sugar) v Haryanto* English Court of Appeal Transcripts, 17 July 1996 (unreported).
62 [2006] EWCA Civ 738; [2006] ICR 1395. Lord Sumption may have been making the same point in the passage quoted above from *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2013] UKSC 46; [2014] AC 160, when saying: "merger … 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". On the other hand, it may be that by "a right on the judgment" he was not referring to an action on the judgment but only to execution of it.
63 *Fraser v HLMAD Ltd* [2006] EWCA Civ 738; [2006] ICR 1395 at [17].
64 See text to n 14.

obligation, if, as D contended, merger applied. Self-defeatingly, if D's argument that merger extinguished Z's contractual cause of action had succeeded, it would only have served to expose him to an alternative claim on his implied obligation.

32 Z only claimed the first of these alternatives. It thus passed up the opportunity of exposing D to the horns of this dilemma from which he could only have escaped by showing that, in the case of a declaratory judgment, merger applies but implied obligation does not, *ie*, to deny the convergence between the two doctrines alluded to above. He would have needed to argue that in place of its contractual cause of action Z had a higher right (in consequence of the application of the merger doctrine) but had no right to enforce this by action (in consequence of the non-application of the implied obligation doctrine). The argument would have sought to extend the scope of the merger doctrine to purely declaratory relief, while at the same time narrowing the scope of the implied obligation doctrine to non-merging executory judgments, *ie*, to judgments of courts not of record, such as foreign judgments. Had the argument been made, however, it ought never to have succeeded, since the conclusion desired by D is justified by neither principle nor authority.

33 In *Zavarco (No 2)*, Z only asserted its contractual cause of action, so that the ramifications of the implied obligation doctrine were never pursued. Had they been, D's case would have been demonstrated to be not only wrong but incoherent.