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NASIR v Zavarco plc [2025] UKSC 5, [2025] A.C. 738 originated from a dispute as to whether Nasir had effectually discharged his €36 million debt to Zavarco. This debt was owed under Zavarco's articles of association, as the price for Nasir's subscription for certain shares in the company. Initially, each party sought their own declaration to clarify the legal position. After trial, a judge declared that (1) Nasir had not discharged the debt which had fallen in arrears; and (2) on that account, his shares became forfeitable to Zavarco. No appeal ensued. Nasir was unmoved by the declaration, however, which prompted Zavarco, upon forfeiting the shares, to bring a second action, this time claiming in terms an order that Nasir do pay the debt so declared. (Under the articles, Nasir "remains liable" for the price of the shares despite their forfeiture: at [7].) Nasir replied that this second action was barred by the doctrine of merger: that Zavarco's cause of action for recovering the debt had merged in, and become extinguished by, the judgment in the first action, even though that was a purely declaratory judgment. This argument found favour with the Chief Master but failed before the judge and the Court of Appeal. A unanimous Supreme Court led by Lord Hodge has now dismissed Nasir's final appeal. Zavarco's payment claim may thus proceed.

To this outcome there can be little complaint. The declaration, unappealed as it was, was a mere intermediate step towards securing a judicial enforcement of Nasir's debt obligation. No doubt it constitutes res judicata, so that the parties were estopped *per rem judicatam* – by that judgment – from challenging the determination that Nasir owed the debt (at [53]). Far from seeking to do so, in bringing the second action Zavarco sought to put the declaration into executable effect: without an order directing payment there was no judgment debt in answer to which Nasir's assets could be attached. It is unimaginable that Zavarco could not obtain such order. Even without words to that effect, every declaration unaccompanied by consequential relief carries with it an implicit liberty to apply (*Fischer v Secretary of State for India in Council* (1898) L.R. 26 Ind. App. 16, 29). In other words, Zavarco could have summarily applied for a consequential debt-payment order even within the first action. It chose to start a new, follow-on action, but the form of its claim could hardly matter. Either way, the "further proceedings entail", in Lord Hodge's words, "what ought to be a straightforward claim for the debt" (at [53]). That is to say, Zavarco was entitled to obtain, if it wished, a debt-payment order consequent on the declaration. Its ability to do so had not passed *in rem judicatam* – merged in a judgment; only if it had got such order would that have happened.

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This sufficiently boils down the Supreme Court's negative answer to Nasir's appeal: the doctrine of merger cannot possibly operate to bar a claim for monetary relief consequent on a purely declaratory judgment (at [39]–[57]). But the doctrine itself, and its association with contractual debts (such as the one in the present case), remain to be defined. This is, with respect, the more significant aspect of the decision, inviting close attention.

"What is the cause of action that merger extinguishes?" (at [33]). "Imprecision in the meaning of cause of action", observed Brennan J., "tends to uncertainty in defining the ambit" of the doctrine (*Port of Melbourne Authority v Anshun Pty. Ltd.* [1981] HCA 45, (1981) 147 C.L.R. 589, 610–11). In some contexts, a "cause of action" signifies an amalgamation of facts the existence of which gives cause for a judicial response; in other words, the factual basis of a claim. But as Lord Hodge put it, "[t]he facts are the facts and cannot be extinguished by a judgment" (at [37]). If anything, a judgment in favour of a claimant serves to confirm rather than to "destroy" the existence of the supporting facts. "Cause of action" therefore cannot here mean the facts. Rather, it is, in Lord Hodge's view, the "entitlement to obtain a remedy from the court" arising from those facts (at [35]), in other words a "right to claim a … remedy" (at [37]), or simply a "right of action" (at [22]–[23], citing *Kendall v Hamilton* (1879) 4 App. Cas. 504, 515, 526), that a judgment may extinguish.

But what is a right of action in a contractual debt claim? That would appear, on Lord Hodge's reasoning (at [33]–[37]), to be the creditor's *right to assert*, as a ground for monetary relief for non-payment, her *extra-curial right to be paid* the debt. It therefore becomes critical that we differentiate between these two rights, often assumed, mistakenly it is submitted, to coinhere in one another. A right to be paid a debt, although described by some as a "claim right", has in truth nothing to do with a court claim: a debtor must pay her debt when it becomes payable, whether or not the court is involved. But a creditor may have no means to enforce her debtor's obligation save by suing her. This the creditor can do by exercising her right of action, a distinct right that accrues when the debtor fails to pay at the time required (which is not necessarily the moment when the debt arises), at which point the court becomes duty-bound to hear the creditor's claim, when presented, and to give the appropriate relief. The court's duty alongside the creditor's right of action is subject, among other things (e.g. procedural rules and limitation law), to the law's countervailing concern for finality in litigation (at [17], [31]). Once a creditor has obtained relief in the sole form of a debt-payment order, for instance, she has exhausted her right of action, and will be precluded from returning to the court to claim her concurrent remedy of damages for loss; nor will she be able to claim any deficit

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between what she might now assert to be the actual value of the debt and the amount awarded. Extinguishment of her right of action means that the debt, though untouched, has become unenforceable and cannot be asserted as a ground for monetary relief a second time.

Many cases even from the highest authorities speak of merger as operating on the debt itself. Lord Hodge has identified some of them (at [19], [29], [48]). That notion can also be detected in the reasoning of the courts below ([2020] EWHC 629 (Ch), [2020] Ch. 651, at [12], [29]–[31]; [2021] EWCA Civ 1217, [2022] Ch. 105, at [31], [34]–[35]). These statements were not endorsed by the Supreme Court, and must be read with caution. For one thing, judgments in Scotland are not understood to have such effect (*Bank of Scotland v Davis* 1982 S.L.T. 20 (I.H.)). Even here we are told that judgments do not in fact extinguish debts for all purposes (bankruptcy petition: *Re King & Beesley* [1895] 1 Q.B. 189 (D.C.); identification of taxable income: *Riches v Westminster Bank Ltd.* [1947] A.C. 390); and that some debts are apparently immune from such treatment (secured debt: *Economic Life Assurance Society v Usborne* [1902] A.C. 147 (H.L., Ire.); statutory debt: *Ealing L.B.C. v El Isaac* [1980] 1 W.L.R. 932 (C.A.)). The law becomes intelligible when we understand merger as operating on the right to claim monetary relief arising from the non-payment of a debt, rather than on the debt itself; in old language it is the "remedy" that goes. That a debt is unenforceable a second time following judgment may generate the impression that the debtor's obligation "becomes owed under the judgment and not under the contract" (*Director General of Fair Trading v First National Bank plc* [2001] UKHL 52, [2002] 1 A.C. 481, at [3]); and, correspondingly, that "the [creditor]'s sole right [is now] a right on the judgment" (*Virgin Atlantic Airways Ltd. v Zodiac Seats UK Ltd.* [2013] UKSC 46, [2014] A.C. 160, at [17]). But where the debt can be enforced otherwise than by an action for monetary relief, or if a person is relying on the debt without enforcing it, then the true position emerges. Having two rights to be paid the same sum does not of course entail double recovery. This is because a creditor obtains judgment, though not in satisfaction of her pre-existing right, yet still as security for such satisfaction. Payment pursuant to judgment would therefore *pro tanto* satisfy both rights at once.

Recognising merger as being concerned to extinguish the right to claim monetary relief helps us see Nasir's appeal in potentially new light. While the Supreme Court did not speak in these terms, one might think that a claim for declaratory relief involves the exercise of a fundamentally different right. It is true that, in this case, the factual circumstances underlying both actions happened to be the same (at [38]); and in both actions Zavarco asserted the same contractual right. But (1) Zavarco did so initially to claim declaratory relief alone; and, importantly, (2) the court has jurisdiction to make declarations, regardless of (a) the existence of facts supporting an

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immediate right to claim monetary relief; or even (b) the existence of any underlying right (consider negative declarations). The right to apply for declarations would therefore appear to be distinct from the right to claim monetary relief, even though the legal and factual bases supporting the latter may already have emerged. So the fact that an action for monetary relief has become time-barred should not absolutely preclude a declaratory action, although it may militate against discretion being exercised (*National Bank of Commerce v National Westminster Bank* [1990] 2 Lloyd's Rep. 514 (Com. Ct.); contrast *Woodeson v Credit Suisse (UK) Ltd.* [2018] EWCA Civ 1103). Conversely, it would be strange if the mere commencement of a declaratory action without an initial claim for monetary relief (as in the present case) were thought sufficient to stop the limitation clock running. In short, Zavarco had not exercised the right of action it now sought to exercise; it is only right that it was allowed to do so.

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