A director's retroactive duty of loyalty to post-debt restructuring shareholder-turned creditors

An interpretation to defend creditors against pre-restructuring conduct of directors.

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A corporate conflict model (company, shareholders, creditors) follows that responds to an actual precedent, minus specifics that are irrelevant for our purposes. Persons 'A' and 'B' are the direct shareholders of 'Prima' and indirect shareholders of 'Secunda', the latter being wholly owned by the former. Both are, at the *relevant time*, in difficulties that are sufficient to characterise their insolvency as imminent or likely. Before the relevant time, Secunda gave out a loan to Prima whose maturity is extended at the relevant time as neither of the parties gave notice otherwise. As of yet, no loan payment has been made. A is the sole director of Prima and Secunda. Neither company is subject to insolvency proceedings and they each avoided bankruptcy by way of a restructuring plan.

'T5' is the moment when Secunda's creditors take ownership of Secunda through a debt-for-equity restructuring agreement. Prima and its shareholders disappear from Secunda. From the moment T0 to T5 (the moment of exit from Secunda), Secunda's director A did not give a due-and-payable notice in respect of the loan made to Prima. *In T6, Secunda will claim civil liability from A as director by reason of not discharging his duty of loyalty to the company*

from T0 to T5 (Arts. 227 and 232 of the Companies Act). This hypothetical case is vaguely reminiscent of that settled by Judgment no. 693/2017 of the Supreme Court of 20 December *(Vulcano)* where the company's interests *as such* finally triumphed over the sole shareholder's interests.

We are not interested in weighing in on the debate as to whether company directors *owe fiduciary conduct* to a company's creditors *in the proximity* of insolvency, a debate which in Spain arises from time to time under the influence of U.S. legal literature (Pedro Vizcaíno, 2017; Jesús Alfaro, 2019; Juana Pulgar and Eva Recamán, 2020). In my opinion, the existence of these fiduciary duties, which, moreover, I do not believe exist, is immaterial.

What is argued here is that in the hypothetical case under consideration (Secunda's creditors become shareholders in T5 through a debt/equity swap), Secunda's best interest matches the best interest of these creditors who would later become shareholders, and precisely because they became shareholders. Therefore, in T6 Secunda can file a corporate liability claim for breach by the director of his duty of loyalty throughout the relevant time. It is true that we are operating with a powerful fiction by projecting the present backwards in a manner that seems to disregard the facts as they were in the past. But this is not an obstacle. The law continually operates with fictions, if justified.

And I believe that the deeper intention of Article 19 of Directive (EU) 2019/1023 (restructuring) is to justify this fiction. It is of no practical importance that this piece of legislation was not transposed into national law by Act 16/2022, it being sufficient here to appeal to the legal doctrine established by the CJEU in *Francovich* and *Marleasing*.

As my hypothetical case is circumscribed by its circumstances, I can avoid commenting on whether on the border *(am Rande)* of insolvency the company's interest becomes the same as the creditors' interest as such creditors. Nor do I deal with how this postulate would be enunciated, which is difficult to specify in its correct terms, as can be seen, for example, from the revealing judgment of the English Supreme Court of 5 October 2022 *(Sequana)* and the commentaries it has generated (cf. Cristoph Thole, ZEuP 2013, pp 710 ff).

If in the hypothetical case now under consideration it is deemed appropriate to provide some remedy to Secunda *under its current shareholder composition* - i.e. to Secunda's creditors, in their new status - the company and insolvency law remedies will not serve us when defending creditors in the proximity of insolvency. These remedies presuppose a state of insolvency (thus, Arts. 226, 281, 443, 456 of the Insolvency (Recast) Act), or have already been exhausted in the scheme of arrangement ('homologation') procedure (Arts. 631 and 650 of the Insolvency (Recast) Act) or, at least textually, require that the creditors' standing as such persists (Arts. 240 and 367 of the Companies Act), or in fact do not protect the creditors who were already creditors at the relevant time (thus Art. 367 of the Companies Act), or end up being blind paths, such as Articles 240 and 241 of the Companies Act, if the creditors have to face Secunda's best interest in T0, an amalgamation of the shareholders' and company's interest, which will not leave a loophole of corporate otherness that would allow the toxic tandem of self-referential interests to be disaggregated.

Now the only issue of concern is the duty of loyalty in the hypothetical case under consideration. Questions relating to the causality

between conduct and harm and to the limitation period of Article 241 bis of the Companies Act are postponed for a future occasion. For the time being, we assume that these two variables are exogenous and noncausal in our case.

In concrete terms, the following is proposed:

1. Between T0 and T5, director A was not subject to a special duty of loyalty to Prima because between A, B, Prima and Secunda there was no heterogeneity of interests, so that, whatever he did or did not do, A was never in a position to harm Secunda's interests.

2. Moreover, he could always counterargue that, by not demanding payment of the loan or declaring it due, director A was serving Secunda's interests, which could not be other than those of his absolute shareholders.

3. Secunda, by means of its director A, would never have filed a corporate liability claim against director A, and should never have filed such a claim, because a claim of this nature would not be covered by the duty of loyalty of director A to Secunda.

4. If such a rule exists and it can be reasonably construed that in such cases the creditors' best interest is that of the company, then it must be declared that, limitation-period problems aside, between T0 and T5 company director A was in breach of his duty of loyalty to the company.

5. The *mobile* nature of the duty of loyalty would not be at odds with Supreme Court Judgment no. 14/2018 of 12 January. This ruling merely held, correctly, that the commencement of the limitation period of the corporate liability claim is not the day on which the claimant entered the share capital and the historical shareholders exited. According to the Supreme Court, and rightly so, the view that "the directors against whom the claim was directed, who had been the sole shareholders, ceased to hold the majority of the share capital and a new majority shareholder entered the shareholding, and only at that point was it possible to file the corporate liability claim", is incorrect.

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