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A good ruling on financial assistance: collateral given to secure third-party borrowings is not invalid

(Supreme Court Judgment no. 190/2025 of 6 February)

A return to sound common sense after the blunder of the previous Supreme Court ruling, *Ezentis*, of 2023.

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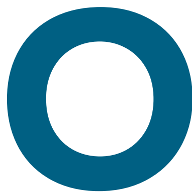

n 21 October 2005, the shareholders of *Hotel El Hórreo, S.A.* and *Eurohouse Gestión de Viviendas, S.L.* signed an agreement for the sale of all the shares of the former in which it was provided that the latter, the purchaser, could assign its contractual position to its own shareholders, who would ultimately execute the deeds of sale. On 26 January 2006, several deeds were executed by way of which the shareholders of *Eurohouse* bought all the shares of *Hotel El Hórreo*. Subsequently, *Eurohouse* took out two equity loans with the savings bank *Caja de Ahorros de Galicia*, currently owned by the 'bad bank' *Sareb*. *Hotel El Hórreo* was involved in the granting of the aforementioned loans, represented by the same person who represented *Eurohouse*, as a non-debtor borrower who provided the equity in the properties owned by *Hotel El Hórreo* as collateral for the loans. The stated purpose of the loans was to finance the purchase of the properties used as collateral. The amount of the loans was not

used to purchase the collateral properties, but to pay the price of the shares sold by the shareholders of *Hotel El Hórreo* to the shareholders of *Eurohouse*.

Hotel El Hórreo brings an action for declaration of invalidity of collateral on the grounds that it falls under the prohibition of financial assistance in (what is now) Article 150(1) of the Companies Act (LSC), the act of assistance being the collateral given to secure third-party borrowings (those of *Eurohouse*, of its shareholders). The action is based on alleged case law that holds that the infringement of financial assistance automatically triggers absolute nullity under Article 6(3) of the Civil Code (CC), which would not be affected by the rule that prohibits obtaining advantages by acting against one's own conduct. After failing in the first and second instance, *Hotel El Hórreo* appealed to the Supreme Court, an appeal that was also rejected.

1. Supreme Court Judgment no. 190/2025 of 6 February

The judgment clearly states that in its initial configuration this transaction would not be financial assistance, since the equity loan is not received nominally to purchase the shares, but supposedly to purchase collateralised properties:

> But the borrower, Eurohouse, did not use the money obtained with the loan for the purpose for which it was granted, but rather gave its shareholders the money obtained with said loan so that they could pay the shareholders of Hotel El Hórreo the price of all the shares of Hotel El Hórreo, which was the company that owned the collateral properties, which constituted financial assistance prohibited by Article [150(1)] of the [Companies Act].

According to the Supreme Court, the penalty of invalidity of the transaction consisting of the financial assistance is not expressly provided for in the article (Art. 150(1) LSC), but is inferred from Article 6(3) CC as it is an infringement of a prohibitive rule. But such a penalty is not appropriate in the case of an equity loan where the lending institution was unaware of the illegal purpose thereof, since the loan secured by the collateral was granted for the purchase of the collateral properties.

Furthermore, the party seeking a declaration of invalidity is not among the persons protected by the statutory provision (which would be the company's creditors or the shareholders outside the company's governing body) and cannot exploit this prohibition to benefit those who acted in the knowledge of the illegal action (the current shareholders of *Hotel El Hórreo*, who used the money from the loan granted to *Eurohouse* - and secured by the collateral given by *Hotel El Hórreo* - to purchase 100% of the shares in this company and who intend to have the collateral released without having repaid the money used to purchase the shares, harming a person unconnected to the unlawful intent of the transaction, since, according to what was established in first instance, the lending institution was unaware that the financing secured by the collateral given by *Hotel El Hórreo* was ultimately going to be used to purchase not the properties of the guarantor company, but 100% of the shares of the guarantor company. Taking these circumstances into account, the claim is abusive because the legal person seeking the declaration of invalidity is made up entirely of those who received the money from the borrower who obtained the loan secured by the collateral constituting financial assistance, or their successors in title.

If the claim for declaration of invalidity of the collateral given by *Hotel El Hórreo* were upheld, its shareholders would have obtained the money with which they paid the price of all the shares, without any obligation to repay the loan arising from the financing agreement, as they are not the borrowers, and they would now get the properties that form part of the assets of the company whose shares they have acquired to be released from the collateral securing the loan.

2. Opinion

This latest Supreme Court ruling on the prohibition of financial assistance in the purchase of shares in the assisting company (*assisting* as 'borrower for third party debt') is to be praised, erasing the bad taste left by the reading of the immediate precedent (Supreme Court Judgment of 20 April 2023, *Ezentis*) which held an agreement to underwrite the value of the shares sold by the company invalid and intentionally caused a quasi-breach of warranty of title of the 'assisted' purchaser; this penultimate iniquitous ruling, constructed with the worst systematic interpretation, injurious to the rule of estoppel, promoting fraud and undermining the principle of bilaterality, is an illustration of how one can profit from one's own contractual turpitude, providing 'today's bread' to the fraudulent seller at the expense of 'tomorrow's bread' to honest and productive transactions, which will not be able to be carried out, to the detriment of future sellers or issuers (shareholders thereof) of their own shares.

The financing bank cannot suffer the consequences of the financial assistance provided by the company to the purchasing shareholders

This is the decisive factor. The corporate rules in this respect (the principles of 'intangibility of share capital', of 'prohibition of atypical corporate distributions' or of 'prohibition of using company resources to decide on the ownership of capital') lack the *aequitas* necessary to establish the nullity under Article 6(3) CC, are not rules of implicit justice and cannot prevail against the rules, written or otherwise, of Spanish civil law that proscribe any harmful conduct under Article 7 CC and any investment that seeks to profit from fraud itself. In other words, Article 150(1) LSC would only lead to invalidity *ceteris paribus* when all the actors in the transaction participated in the turpitude; but not even then, because, when this happens, and precisely because it happens, the law deprives all those involved of their right to take legal action (Art. 1306 CC). That is to say, except in some marginal cases that it is always possible to speculate about, Spanish civil law would generally prevent the violation of Article 150(1) LSC (and similar provisions) from causing civil-law invalidity. In other words, Article 150(1) LSC contains a provision that typically (almost always) proceeds against *tenorem rationis*.

Note too that the collateral transaction is entirely linked to the loan. It would not be possible to make a selective cut in order to leave the loan active (and undoubtedly unpaid) and liquidate the security. Given

> *Normally, the beneficiary of the prohibition of financial assistance will have acted in bad faith*

the nature of the link, the interested parties would not have standing to seek a declaration of invalidity in respect of the collateral without doing the same with the loan, and it does not matter that the original borrower was *Eurohouse* and not *Hotel El Hórreo* and that those assisted were the shareholders of *Eurohouse* - here we must *lift all veils*. Then, given the tenor of Article 1308 CC, they could not demand the release ('restitution' derived from the invalidity) of the collateral without putting in the hands of the bank all the money received plus statutory interest. And this solution, not entirely bad, incurs more transaction (and equity) costs than leaving things as they are thanks to the wise rule of *unproductiveness of all fraud*, among other reasons, because the loan is also linked to the purchase of shares, which, if there were someone interested in asking for it, would also blow up with the invalidity of the loan and the collateral: the shareholders of *Eurohouse*, who, having to 'repay' the loan to the bank, finally seek a declaration of invalidity of the purchase, because without the borrowed money they would not have done any purchasing.

Note a fact that is normally overlooked, namely: the fraud of the (board) representative is attached to the represented party, all the more clearly when such party is not a natural person with his or her own free will. Therefore, the claimant company has committed fraud because its managing director committed fraud. (And this will almost always be the case in the famous financial assistance transactions!)

But our laudable judgement here falls short in one respect. There is a break in the argument that makes it somewhat inconsistent. On the one hand, the bank is immune to the scheming of the shareholders for the simple reason that it is a third party that has granted a loan to the shareholders or to intermediaries thereof. But, on the other hand, it is emphasised that the bank was unaware of the simulation of the loan to shareholders and that it had been formally presented for a purpose other than assistance, so that the simulation - and this would now be the rule - would not be enforceable against bona fide third parties. These are two different explanations, and the second is more limited in scope, so that the bank's safeguard would not apply if the bank was aware of the final use of the money.

In my opinion, the bank's unassailability does not require simulation caused by insiders. A third party suffices. In fact, it is enough that all the interested parties on the active side have committed fraud.

All of the above does not prevent good shareholders and innocent creditors of the company from being able to claim civil, corporate or non-corporate liability from the company's directors, the company or the company's shareholders.

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