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ANALYSIS

Banking & Finance

Resolved bank's liability as pledgee of third-party owned shares in the bank

(Supreme Court judgment no. 1207/2026 of 20 July)

The fiduciary nature of the managed investment relationship supports the view that the bank should be liable for the loss of the pledged item because there would not have been such loss had the client's order been executed prior to the bank's resolution — but not for the reason given in the judgment.

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1. The case

Pursuant to Article 1867 CC ("CC"), a pledgee must exercise, as such, the care of a reasonably prudent person, is entitled to reimbursement for expenses incurred in the upkeep of the pledged item and is liable for any loss or damage thereof in accordance with the provisions of said code.

On 22 December 2016, Delta submitted an out-of-court claim to Banco Popular for failing to execute the order to sell the bank's shares that were in its custody. Ultimately, the shares were written off as a result of the intervention by the European supervisory body (the Single Resolution Board, SRB) and their subsequent sale to Banco Santander for one euro. Based on these facts, Delta sought, in the main, a declaration of breach of contract by Banco Popular in its portfolio management, order execution and banking advice by failing to execute the order to sell the bank's shares. In the alternative, Delta sought a declaration that Banco Popular was liable, in accordance with Article 1867 CC, for the loss of the shares pledged as loan collateral.

2. The Supreme Court judgment (no. 1207/2026 of 20 July, ECLI:ES:TS:2026:3188)

The Court of Justice's judgment of 5 May 2022 (Case C-410/20), in reference for a preliminary ruling concerning the effects of the decision to place Banco Popular under resolution with respect to shares previously acquired in a public offering, held that Directive 2014/59 precludes, following a total write-down of shares in the capital stock of a credit institution or investment firm subject to a resolution procedure, persons having acquired shares, in the context of a public offer to subscribe issued by that institution or firm, before the opening of such a resolution procedure, from bringing an action for damages on the basis of the information provided in the prospectus or an action for a declaration of invalidity of the share subscription agreement, which, given its retroactive effect, results in the restitution of the value of said shares.

Shareholders bear the "first loss".

However, the previous case law of the Court of Justice of the European Union does not apply to a case such as this one — specifically, to the action brought under Article 1867 CC for the loss of the pledged shares — because this action would not be affected by the previous ruling, insofar as it is neither an action for a declaration of invalidity of the acquisition of the preferred stock (later converted into bonds and subsequently into shares) nor an action for damages arising from that acquisition, when the shares in the capital stock of a credit institution subject to a resolution procedure are subsequently fully written down. In this case, the action brought under Article 1867 CC, which governs a pledgee's liability, is based on the fact that the bank failed to comply with an order to sell the shares pledged as collateral for a loan at a time (May 2015) when the share price would have allowed the loan to be repaid and would even have left a surplus for the client. However, the decline in the share price and the subsequent write-down resulted in the loss of the pledged item, which the claimant attributes to the bank's conduct.

The claimant has standing to bring the action provided for in Article 1867 CC for the loss of value of the pledged shares because the bank failed to carry out the sell order; this action cannot be based on the facts or conduct that led to the bank's resolution, in accordance with the case law already cited. On this basis, Delta has standing to bring the action. Specifically, the claim attributed the loss of the pledged shares to the bank's failure to comply with the order to sell the shares — which were subsequently lost — as the bank pursued its own interests due to its "urgent need for capitalization". There is no violation of Articles 37(2)(b) or 39(2) of the Credit Institutions and Investment Firms (Recovery and Resolution) Act 11/2015 of 18 June — the violation of which is the first ground of appeal — because these provisions are not applicable to the action brought, which is not subject to the general rule that no obligation shall subsist with respect to the amount of the instrument that has been written-down. This is a different type of action from those cases in which the Supreme Court, in accordance with the case law of the Court of Justice of the European Union, has found that no action exists.

The second ground of appeal alleges a violation of Article 1867 CC due to conflicting case law among the provincial courts, insofar as they have divergent views on the liability of the pledgee in the event of the loss of a pledge consisting of securities[1]. The bank contends that Article 1867 CC does not extend to the bank's liability "for the loss of the shares as a result of the resolution of the bank that issued the pledged shares, decided by the Single Resolution Board on 7 June 2017". This ground is rejected for the following reasons:

- In the present case, where the pledged asset consists of shares in a financial institution, in addition to the provisions of Articles 1863 through 1872 CC, the specific provisions of the Financial System (Reform Measures) Act 44/2002 of 22 November and of Royal Decree-law 5/2005, of 11 March, on urgent reforms to boost productivity and improve public procurement, will apply.

- The pledge established on the bank's own shares constituted financial collateral in accordance with Articles 6 and 7 of Royal Decree-law 5/2005. Article 1866 CC provides that "a pledge agreement entitles the pledgee to retain the property in his possession or in the possession of a third party to whom it has been delivered". And Article 1871 of the same code denies the pledgor the right to "demand the return of the pledged property against the pledgee's will until the debt and interest are paid, along with any applicable expenses".

- Article 1867 CC, upon which the action under review is based and which the

[1] This case law is set out, on the one hand, in Seville Provincial Court judgment no. 208/2021 of 27 May; in Jaen Provincial Court judgment no. 716/2021of 17 June; in Gipuzkoa Provincial Court judgments nos. 148/2018 of 28 March and no. 272/20211 of 26 July; in Cordoba Provincial Court judgment no. 65/2005 of 15 February; in Valencia Provincial Court judgment no. 428/2004 of 21 September; in Santa Cruz de Tenerife Provincial Court judgment no. 603/2004 of 10 December; in the Madrid Provincial Court judgment of 3 November 1993 and in the decision now under appeal, judgment no. 96/2022, handed down by the Alicante Provincial Court on 1 March 2022.

appellant claims has been violated, imposes on the pledgee the duty to "exercise, as such, the care of a reasonably prudent person, is entitled to reimbursement for expenses incurred in the upkeep of the pledged item and is liable for any loss or damage thereof in accordance with the provisions of said code", in accordance with the provisions of the Civil Code.

- In a case such as this one, in which the pledged property consists of shares in a financial institution — subject to special regulations — in order to determine the bank's liability for the loss of the pledged shares pursuant to Article 1867 CC, it is necessary to analyse, first, whether the bank's failure to comply with a sell order given by the shareholder constitutes a breach of the duty of due care and preservation when the shares subsequently lose their value and are written off.

- The Supreme Court had already ruled on a similar case involving a pledge of a securities deposit in Judgment no. 444/2014 of 3 September. In that ruling, it was held that the pledge constituted financial collateral governed by Royal Decree-law 5/2005, which required the express authorisation of the pledgee (the bank) in order *to be substituted*. The conduct examined in this judgment consisted of partially disregarding the order to sell one of the acquired financial products and the order to purchase others in accordance with the financial institution's own interests. That is, whether it was justified for the financial institution to refuse to comply with the sell and buy orders because that financial product was pledged.

- The Supreme Court held that, in reality, the issue was whether the failure to comply with the sell and buy orders — taking into account in that case that the deposit was pledged to secure two credit transactions — constituted a breach of the duties imposed on the defendant by Article 79 of the Securities Market Act 24/1988 of 28 July — applicable *ratione temporis*, in the version prior to the amendment by Act 47/2007 of 19 December —. This provision set out the principles and requirements to be observed by investment firms, credit institutions, and individuals or entities operating in the securities market, both when receiving and executing orders and when providing investment advice on securities, including the obligation to minimise conflicts of interest and, in the event of a conflict, to give priority to the interests of their clients. In the present case, Articles 79 and 79 *bis* of Act 24/1988, as amended by Act 47/2007, were applicable; this law transposed Directive 2004/39/EC (the European financial markets regulation, known as MiFID) into Spanish law. These provisions governed disclosure obligations and conflicts of interest.

- Although Judgment no. 444/2014 alleged a violation of Articles 1866 and 1871 CC — which apply generally to all pledge rights, without prejudice to the specificities of special regimes and contractual agreements — its reasoning, set out below, is also applicable when a violation of Article 1867 CC is alleged, although there is a significant difference between this case and that one, which will lead to a different outcome:

— Article 9 of Royal Decree-law 5/2005, of 11 March, concerning the rights to substitute and dispose of the subject matter of pledges, provides in paragraph 1 that, "[w]hen the financial collateral agreement so provides and under the terms it establishes, the guarantor may exercise, no later than the date of fulfilment of the principal financial obligations covered by the collateral agreement, a right to substitute the collateral, consisting of the ability to make use of the subject matter of said financial collateral, in exchange for the simultaneous provision of an item that has substantially the same value to replace the original one".

— Pursuant to paragraph 2, when the pledge agreement so provides, the pledgee may exercise a right of disposition over the subject matter of the pledge, consisting of the ability to use and dispose of the subject matter as its owner.

— In Judgment no. 44/2014, the Supreme Court held, in accordance with the terms of the agreement, that it fell within the defendant's discretion to either approve the order to sell and purchase the pledged shares in order to replace the collateral with the proceeds obtained, or to deny authorisation to sell, since the secured obligation remained outstanding. Similarly, it could refuse to substitute the collateral. That is to say, the refusal to comply with that order to sell and purchase constituted the exercise of its own right as pledgee, and such exercise could not be deemed — as the appellate court did — to be contrary to the requirements imposed on it, in its capacity as a fund manager, by Article 79 of the Securities Market Act then in force. It further noted that, in this context, the right of retention over the collateral was supplemented by the provisions of the aforementioned Article 9 of Royal Decree-law 5/2005 and by the terms agreed upon in the pledge agreement.

— In this case, the tenth provision of the addendum to the securities pledge agreement stipulated that the bank's consent was required to release the securities from the pledge. Therefore, in this case as well, the pledgee, in accordance with the agreement and the provisions of Article 9 of Royal Decree-law 5/2005, had the authority to decide whether to sell the shares or replace the collateral.

— However — the Court continues — the present case differs from that in Judgment no. 444/2014 *because the sale order entailed the repayment of the loan and the termination of the pledge due to the extinguishment of the* *secured claim, since the value of the shares exceeded the secured capital*. Whereas, in the case decided in that judgment, the sale entailed only a partial repayment of the secured loan, and the intention was to replace the subject matter of the pledge with other securities, which justified the financial institution's refusal, in a case such as this, where the market price of the shares made it possible to repay the loan through their sale, *the bank's exercise of its right to retain the pledge and refuse consent to cancel the pledge — by not proceeding with the sale — and thereby the loan, entails a redistribution of the risk of insufficient collateral coverage, which is transferred to the pledgee*. Thus, it is the bank that assumes the risk of a loss in the value of the pledged shares due to a subsequent devaluation and their subsequent write-down, as occurred in this case.

> *The right to early repayment does not imply the right to realize the value of a pledge to obtain liquid funds to pay off the loan*

3. Commentary

According to Article 9(2)(4) of Royal Decree-law 5/2005 (financial collateral), "when the pledge agreement so provides, the pledgee, *instead of providing an equivalent asset, may offset its value or may apply its amount toward the fulfilment of the principal financial obligations*". The provision refers to the pledgee who is the beneficiary of a right to dispose of the pledged item, which gives rise to a "duty to provide equivalent value". However, it does not grant the pledgor exercising their right of substitution (Art. 9(1)) a similar power. In other words, the pledgor cannot contribute cash in lieu of the replaced financial instruments (unless otherwise agreed, of course) and cannot trigger the sale of the collateral to apply the proceeds toward fulfilling the principal obligation. And, although by contract (there is no statutory provision for a non-consumer bank loan) the debtor may make early repayment, the right to early repayment does not imply the right to realize the value of a pledge to obtain liquid funds to pay off the loan.

Note Article 1871 CC, which the ruling cites without delving into the provision. "The pledgor may not demand the return of the pledged item against the pledgee's will until the debt and interest have been paid, along with any applicable expenses". The pledgor has the right to pay (repay) using his own liquid funds, but cannot demand restitution (the sale of Banco Popular securities) in order to obtain the funds with which to pay.

It must be acknowledged that the resolution of Banco Popular and its transfer to Banco Santander for one euro meant that the holders of common stock and securities equivalent to it (subordinated bonds) suffered the "first loss" and were not compensated in any way. If the pledged shares had remained in Banco Popular's custody when the Single Resolution Board intervened, the *pledge would have been lost by the owner (the pledgor), who would have been left without shares.* Paradoxically, however, no loss occurs with respect to Banco Popular's *contractual* rights (though it does lose its possessory security interest), because (as guaranteed by contract) it continued to have the right to the restoration of the collateral or, failing that, to acceleration. As for the right in rem and the possessory security interest, the right and interest are lost in both cases: there is no object of ownership, and there is no subject matter of pledge.

> *The pledgor is not permitted to order the enforcement of the pledge on his own*

The rationale behind the ruling we are discussing is that Banco Popular is at fault and suffers the *fortuitous* loss of the collateral because it had failed to comply with the order to sell these shares when they still had sufficient value to cover the debt. It had done so to avoid signalling a sell-off panic to the market. That is why the risk is attributed to it, and for no other reason: *because the alternative lawful conduct as an investment firm would have prevented the client's subsequent loss and its own loss, since the claim could have been fully settled with the value of the collateral.*

The Court refers — though it is unclear for what purpose — to the rights of substitution and disposition of the collateral set out in Article 9 of Royal Decree-law 5/2005 on financial collateral, which we have already mentioned above. Not only did it appear that no right of substitution had been agreed upon in favour of the pledgor, but this right was also insufficient to allow the pledgor to simply request the sale of the pledged item, unless there were a contractual mechanism permitting the actual subrogation of the money as collateral in place of the shares. In any case, this seems like an inconsequential digression at the end of the case.

And there remains one final consideration that the judgment seems to overlook: the pledgee may sell the pledged item (enforcement) to collect the unpaid debt. Default must have occurred, and notice must be given that self-enforcement is being carried out. However, the pledgor is not permitted to order the enforcement of the pledge on his own. As the ruling states, in general, the pledgee cannot be compelled to relinquish the pledge, unless — where such a provision has been agreed upon — the pledgor has exercised the right of substitution under Article 9 of Royal Decree-law 5/2005. The pledgee cannot be compelled to do so, even if the pledged item is sufficient for payment, because the performance period is not established by law solely for the benefit of the pledgor. But it is also unclear whether Article 9 of the Royal Decree-law would have allowed the pledgor to do so, even if substitution had been agreed upon!:

> … the following are deemed subject matter of equivalent value: […] When the subject matter consists of negotiable securities or other financial instruments: the contribution of other negotiable securities or other financial instruments from the same issuer or debtor, which form part of the same issue or class and have the same face value, currency, and description; or the contribution of other assets when an event has occurred that affects the negotiable securities or other financial instruments initially contributed, if such a possibility is provided for in the pledge agreement [Art. 9.3 RDL 5/2005].

The pledgee cannot be compelled to relinquish the pledge, unless — where such a provision has been agreed upon — the pledgor has exercised the right of substitution

Therefore, the issue boils down to one question: Was the bank obligated to execute the order to sell its own shares that were the subject of the pledge? Because, if it was obligated, it was in default at the time of the bank's resolution, and if it was in default, according to the Roman legal maxim, the compensable value was the higher price the shares would have reached from the date of default until the time of their loss.

In my opinion, the ruling is correct. The bank had placed itself in a conflict of interest with its client that was not due to the loan or the existence of the pledge (Art. 198 of the Securities Market Act); the bank had a self-interest opposed to a sale that would further drive down the share value and send an unhelpful message to the market. If the conflict cannot be resolved in any other way, and the conflicting relationship cannot be dissolved, the bank finds itself in a fiduciary position in which it is obligated to maximise the client's benefit over its own. It bore no credit risk: it would not release the proceeds from the enforcement to hand them over to the client, but rather would apply them to the payment of the loan; that was the extent of its *contractual interest,* at least if there were no other outstanding obligations arising from other causes (see Art. 1866(2) of the Civil Code) for the payment of which it could have retained the pledged item, and if the early repayment of the loan did not worsen the bank's position in a hedging arrangement with a third party. Not even that, because the bank could have sold the pledged item and retained the proceeds from the sale as a pledge without extinguishing any of the customer's liabilities until the agreed-upon maturity date, *thereby preserving the value of the pledged item.*

The situation would be different if the bank had lent the money so that the borrower could purchase the bank's shares in its initial public offering (which was, in fact, the purpose of the loan) and a minimum holding period for the shares had been agreed upon by the borrower. The judgment says nothing on this point. However, even if such an arrangement had been agreed upon, the bank would have had to pay a special fee for this obligation, since it goes beyond the scope of the sales contract — for example, if the loan had been granted for that very reason at a below-market interest rate.