ANALYSIS

Corporate & Commercial

Sale of essential assets without shareholder approval and the enforceability of such violation against third parties

(Supreme Court judgment no. 881/2026 of 9 June)

The Supreme Court (Judgment no. 881/2026 of 9 June) has held that Article 234(2) of the Companies Act is applicable by analogy in a case where a company director disposed of essential company assets without the required authorisation from the shareholders in general meeting (Art. 160(f) of the Companies Act).

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1. Background

§ 1. In May 2019, a public limited company sold thirty-eight properties to a private limited company. The seller stated in the preamble to the sales contract that none of the properties sold qualified as essential assets of the company for the purposes of Article 160(f) of the Companies Act (LSC) and that the value of none of the transferred properties exceeded 25% of the value of the assets listed in its most recent approved balance sheet. In light of the existing encumbrances on the properties, a price of 500 euros was set for each one. The purchase price was withheld by the buyer to settle certain debts of the seller.

§ 2. A shareholder company of the seller sued both the seller and the buyer, seeking a declaration that the sale concluded in May 2019 was void. The claim was based on a failure to comply with the legal requirements for the sale of essential assets (Art. 160(f) LSC), since the seller's shareholders had not authorised in general meeting the transfer. Furthermore, the claimant argued that the buyer did not act in good faith because, given that its director had been a shareholder of the seller until 2014, it knew that the properties sold were essential assets.

§ 3. The lawsuit was dismissed in both instances. In particular, the Provincial Court held — unlike the lower court — that the transferred properties should be considered essential assets because they constituted the seller's only available source of income (income that ceased upon the alienation). In fact, the transferring company's operations came to a complete standstill following the transaction. In short, the sale had amounted to a *de facto* liquidation of the alienating company; therefore, for the transaction to be lawful, authorisation from the shareholders in general meeting would have been required. However, the appellate court ultimately rejected the appeal, finding that Article 234(2) LSC was applicable and finding no bad faith or gross negligence in the buyer's conduct. It also ruled out the possibility that the sale was a sham (Santa Cruz de Tenerife Provincial Court (First Chamber) judgment no. 193/2023 of 20 April [ECLI:ES:APTF:2023:315]).

§ 4. The Supreme Court (Judgment no. 881/2026 of 9 June [ECLI:ES:TS:2026:2556]) allowed the 'cassation' appeal lodged by the claimant and declared the sale of the properties void, with the consequent settlement of the possessory status (the selling company's right to receive the proceeds — in this case, the rental income from the properties — was recognised, as was the buying company's right to reimbursement of the necessary expenses incurred for the preservation of the property, both from a physical and a legal standpoint).

§ 5. It is worth noting that the Supreme Court considered Article 234(2) LSC to be applicable to the case *(by analogy)*, but nevertheless ultimately found the sale to be void on the grounds that the buying company had not acted in good faith and without gross negligence. Two distinct (though clearly related) issues were therefore examined, which we will address immediately, also separately.

2. The legal principles established in judgment no. 881/2026 of 9 June

2.1. *The issue*

§ 6. The Supreme Court explained that the dispute, as it had been presented, involved two distinct issues that had to be addressed sequentially. First, it was necessary to analyse, in abstract terms, the effect against third parties of a disposition of "essential assets" decided and executed by the board of directors without the authorisation of the shareholders in general meeting. The question, therefore, was whether, under those circumstances, the transferring company would remain bound with respect to hypothetical third parties acting in good faith (see below, section 2.2). If the answer to this question were affirmative, it would then be necessary to examine, moving on to the specific case in dispute, whether the buyer of the "essential asset" had in fact acted in good faith and without gross negligence (see below, section 2.3).

2.2. *The effectiveness against third parties of the disposition of essential assets carried out by a company director without a general meeting resolution*

§ 7. The Supreme Court began by noting that, with regard to acts of disposition (acquisition, alienation, or contribution to another company) of the company's "essential assets", the question has arisen as to the significance that should be attributed to the fact that a director has carried out one of these acts of disposition without passage of the required general meeting resolution authorising the same (either prior to the director's action or by ratifying it subsequently). Viewed from the perspective of the buyer, the question is whether a violation of Article 160(f) LSC is enforceable against third parties (whose conduct meets certain conditions: having acted in good faith and without gross negligence) or whether, on the contrary, such a violation results in the invalidity of the transfer transaction and its absolute ineffectiveness against third parties, regardless of how their conduct is characterised. In other words: it must be determined whether, once an action for declaration of invalidity has been brought against a contract concerning essential assets that was entered into by a company director without the backing of the appropriate general meeting resolution, third parties are protected when they act in good faith and without gross negligence (or, in other words, whether or not the company will remain bound by the contract — assuming its legality in all other respects — with respect to them). Ultimately, all of this leads to the question of whether Article 234(2) LSC should be applied in the event of a violation of Article 160(f) of that Act.

§ 8. The judgment under discussion addressed this issue through the line of reasoning summarised below (*see* §§ 9—15).

§ 9. In the judgment under discussion, the Supreme Court identified a significant similarity between the conduct of a director who disposes of essential assets without the approval of the company's shareholders in general meeting and that of a director who, likewise without the shareholders' authorisation, performs acts not included within the corporate purpose defined in the articles of association. In both cases, these are acts that should be approved by the general meeting. And, in both cases, the requirement for approval by the shareholders in general meeting constitutes a legal limit external to the directors' powers of representation.

§ 10. As we have noted, the Supreme Court held that the corporate purpose constitutes a *legal* and *external* limit on the directors' power of representation (it is imposed by law and cannot be set aside by a provision in the articles of association, and a director lacks the authority to perform acts outside the corporate purpose without the approval of the shareholders in general meeting). However, despite this, Article 234(2) LSC provides that the company "shall be obligated to third parties who have acted in good faith and without gross negligence, even if it appears from the articles of association filed with the Registry of Companies that the act is not included within the corporate purpose".

§ 11. Something similar would apply to transactions involving essential assets. The general meeting's authority in this area constitutes a *legal* and *external* limit on the directors' power of representation, which cannot be overridden by the articles of association: the directors lack the authority to carry out such transactions without the approval of the shareholders in general meeting.

§ 12. In summary: the Supreme Court found that there was *a common rationale* underlying both scenarios and that a *legal gap* existed (because the Companies Act does not contain an express provision regarding the effects vis-à-vis third parties of acts of disposition of essential assets carried out by a director without the approval of the shareholders in general meeting). Consequently, it held that the aforementioned Article 234(2) could be applied *by analogy*: the company will be obligated to third parties who have acted in good faith and without gross negligence for acts of disposition of essential assets, even if such acts were carried out without the authorisation of the shareholders in general meeting (that is, in violation of Article 160(f) LSC).

§ 13. In Judgment no. 881/2026, which is the subject of this discussion, this line of reasoning was reinforced — and made somewhat more complex — based on two considerations. On the one hand, it was stated that "[a]cts of disposition involving essential assets generally entail a *de facto* substitution or modification of the company's corporate purpose, either in its substance or in the manner in which it is carried out, since, following the alienation, the company no longer possesses the asset that would allow it to pursue its corporate purpose as it had been doing" (the extreme case would be — just as had occurred in this case — a transaction involving the alienation of essential assets that amounts to the *de facto* liquidation of the company; see Supreme Court Judgment no. 285/2008 of 17 April [ECLI:ES:TS:2008:1382]). On the other hand, the Supreme Court emphasized that the execution of contracts and legal transactions involving assets falls, in principle, within the scope of the corporate director's management authority. In this regard, it noted that Article 160(f) LSC refers to transactions (acquisition, alienation, or contribution of assets) that are, in principle, management acts that would typically and initially fall within the scope of the directors' authority, whereas the remaining subsections of the aforementioned Article 160 refer to actions of a corporate nature (which clearly exceed that scope of authority).

§ 14. In other words: with respect to a third party contracting with the corporation, a business transaction involving an essential asset is, in most cases, regarded as a mere act of ordinary management falling within the director's authority. Therefore — the Supreme Court concluded — "the acts provided for in Article 160(f) LSC are formally included within the category of acts considered by Article 234(2) LSC to protect third parties acting in good faith and without gross negligence". With this interpretation, the objective of Article 160(f) LSC, that is, "to protect shareholders from actions by the governing body that entail a *de facto* modification or substitution of the corporate purpose", becomes compatible with the necessary protection of commercial transactions that underlies the aforementioned Article 234(2) (all the more so since, in the specific case of the disposal of assets, registration disclosure is unable to provide third parties with sufficient information regarding the essential nature of the acquired asset). One might wonder, however, whether this line of reasoning could not, in extreme cases, lead to the conclusion that Article 234(2) LSC is directly applicable (and not by analogy — *see* § 12) when Article 160(f) of that Act is violated: if acts of disposal of essential assets are characterised by involving a *de facto* modification or substitution of the corporate purpose, it would seem reasonable to conclude that the situation described in Article 234(2) would always and directly apply when such a disposal occurs (by definition, these would be acts not covered by the corporate purpose). The question, then, is to determine to what extent acts of disposition involving essential assets that do not entail a modification or substitution of the corporate purpose (neither in its content nor in the manner of its exercise), but rather merely involve a different way (in qualitative or quantitative terms) of carrying out the same business activity, can be considered acts of disposition.

§ 15. The Supreme Court concluded its reasoning by ruling out the possibility that European Union legislation or the silence of Article 160(f) LSC regarding the consequences of noncompliance could constitute an obstacle to this interpretation:

a) Regarding the first point, the issue was to determine the scope of Article 10(1) of Directive 2009/101/EC, which provides as follows:

> Acts done by the organs of the company shall be binding upon it even if those acts are not within the objects of the company, unless such acts exceed the powers that the law confers or allows to be conferred on those organs.

The question is whether the phrase "unless such acts exceed the powers that the law confers or allows to be conferred on those organs" prevents Member States from providing for cases in which acts by directors that exceed the powers conferred on them by law (in our case, the alienation of assets considered essential) are binding on the company.

In the Supreme Court's view, the purpose of this provision is for Member States to legally and without exception define the scope of directors' power of representation, with the understanding that only statutory limits are enforceable against third parties, and not those set out in the articles of association or agreed upon voluntarily. However, the fact that only statutory limits are enforceable against third parties does not preclude — as the court of last resort notes — the possibility that national legislation may provide that certain statutory limits will not be enforceable against third parties acting in good faith and without gross negligence.

The ruling we are discussing added that this will be the case especially when, as occurs in the case of the disposal of essential assets, the acts in question are by the directors that do not fall within the corporate purpose (a situation in which the provision of Directive 2009/101/EC expressly provides for the company's obligation) or that, at least de facto, modify or replace it (note that this clarification is linked to the idea — above, §§ 13—14 — that acts of disposition of essential assets governed by Article 160(f) LSC are those that effectively result in a modification or replacement of the corporate purpose — or directly in its negation, such as those with liquidation implications —).

b) As for the fact that Article 160(f) LSC does not expressly state the consequences of its violation — unlike Article 161 of that Act, which refers to Article 234 — the Supreme Court noted that this lack of express provision cannot be interpreted as precluding its application. It also noted that the aforementioned Article 161 refers to internal limits on the actions of directors (which derive from the decision of the shareholders in general meeting). It thus rejected the appellant's argument based on the idea that, if the legislature had intended to preserve the application of Article 234, it would have done so expressly.

§ 16. A final observation concluded the reasoning set out in the judgment. It cannot be argued that, under the interpretation upheld by the Supreme Court, shareholders would be left unprotected against actions by directors who exceed their authority and encroach upon that of the shareholders in general meeting. In fact, the interests of the shareholders would be sufficiently protected under the liability regime governing company directors. It must also be borne in mind that a director who has caused harm to the company by acting in violation of Article 160(f) LSC could not invoke the business judgment rule (Art. 226 LSC) in his or her favour because, precisely, such acts would be directly contrary to the law.

2.3. *Good faith and the absence of gross negligence. The resolution of the case*

§ 17. As we have seen, the Supreme Court held that Article 234(2) LSC is applicable by analogy to cases involving the disposal of essential assets. Naturally, this does not mean that, in every case and without further consideration, a potential violation of Article 160(f) of that law is necessarily irrelevant to third parties. For the invalidity that, in principle, should apply to a disposition carried out without the authorisation of the shareholders in general meeting not to affect them, they must have acted in good faith and without gross negligence (Supreme Court judgment no. 285/2008 of 17 April [ECLI:ES:TS:2008:1382]), taking into account, of course, the relevant circumstances.

§ 18. However, as indicated in the judgment in question, in this case it could be determined that the third party buyer of the properties had not acted in good faith and without gross negligence. On the one hand, because the buyer's corporate director had been a shareholder of the seller until five years prior to the alienation. Holding this position had afforded it the opportunity to obtain information that allowed it to adequately assess the significance of a transaction involving the transfer, in a single act and without receiving consideration, of the seller's entire productive assets (the Provincial Court, however, had considered that, since the buyer's corporate director had severed ties with the transferring company in 2014, sufficient time had elapsed to preclude "the inference that [the buyer] was aware of the seller's situation").

§ 19. Added to this, moreover, were the characteristics of the transaction itself, which in and of themselves demonstrated the purchaser's lack of good faith. Indeed, the Provincial Court — like the lower court — held that the buyer had assumed the encumbrances ("numerous" and "of significant financial value") on the properties, thereby releasing the seller from the corresponding obligations. However, the Supreme Court aptly noted that the assumption of another's debt by a third party will have delegatory effects and release the original debtor only when consented to by the creditor (Art. 1205 of the Civil Code). In the absence of such consent, the assumption of a debt by a party unrelated to the original contractual relationship constitutes a *cumulative* assumption, which — as such — does not release the original debtor but rather involves the addition of a new obligor who, by becoming a joint and several debtor with the original debtor, reinforces the guarantee of payment of the assumed obligation. In our case, the properties were encumbered by mortgages and liens, and the alienating company remained liable for the corresponding obligations (regardless of whether the seller and buyer had agreed that the buyer would assume the debt, since such an agreement would have had effect only *between the parties*). In particular, it should be noted that the mortgagor is not released from the secured obligation (in the absence of the mortgagee's consent) merely by transferring the mortgaged property and deducting the amount of the secured obligations from the sale price. In short: with the alienation of the thirty-eight properties, the seller was left without any assets or income, but was not released from her obligations since the creditors did not consent to a delegation.

§ 20. In the Supreme Court's view, the circumstances noted (above, §§ 18—19) precluded the conclusion that the third party acquiring the assets had acted in good faith and without gross negligence. Consequently, the third-party acquirer could not be protected under Article 234(2) LSC. This, in turn, meant that the violation of Article 160(f) of that law and the resulting invalidity of the sale transaction had to affect the third-party. The result was a declaration of invalidity of the sale and the order that the buyer return the transferred properties (without the seller having to return any amount, since it did not receive the purchase price). And all of this is without prejudice to the necessary settlement of the state of possession (Arts. 453 and 455 of the Civil Code).