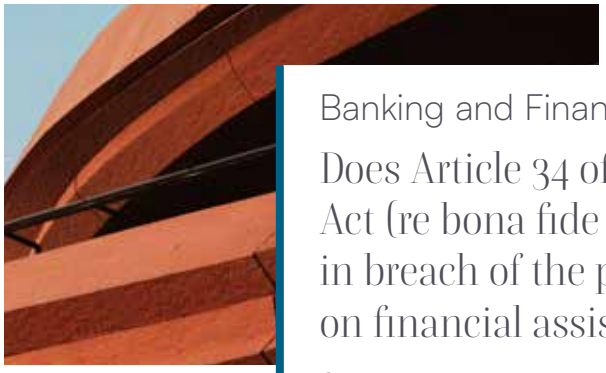
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# *ANALYSIS*



Banking and Finance

## Does Article 34 of the Spanish Land Registration Act (re bona fide purchasers) cure a mortgage loan in breach of the prohibition on financial assistance?

(Supreme Court Judgment no. 1469/2026 of 22 September)

The Supreme Court states unequivocally that this is the case, but the correct answer is quite the opposite.

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It is not the subject of the decision on appeal (or it is not made clear) whether the mortgage claim assigned to Newgate was originally in breach of the prohibition on financial assistance under Articles 143 (para. 2) and 150 of the Companies Act (LSC) in which the assignor, Mitre, might have been in breach. The Supreme Court, in Judgment no. 1469/2026, takes this as a given (albeit only for the purposes of argument) solely to hold that, despite this, the claim acquired by assignment — which is the subject of the appeal — was protected by lack of constructive notice under Article 34 of the Land Registration Act (LH).

For our purposes, we accept, for the sake of argument, that a breach of the aforementioned provisions may result in the civil nullity of the transaction or some other equivalent form of invalidity, without disputing this point. The appellant (a bankrupt company in liquidation) puts forward two compelling arguments to counter this position, namely that the assignee of a claim is not a third party who gave value without notice (bona fide purchaser) but a first party, and is therefore excluded from the scope of Article 34 LH, and that the assignment agreement was void under Article 33 of the same Act, and that lack of constructive notice does not validate void contracts.

The Supreme Court rightly rejects both arguments. Firstly, the purchaser of a claim is a specific successor in title to the first party, but is not a party to the underlying transaction because they are not bound by the original transaction, but rather by the subsequent assignment agreement. Secondly, even if the original mortgage claim were void on the grounds that it constituted financial assistance, the assignment transaction does not constitute such assistance; and it is this agreement that is relevant for the purposes of Article 33 LH. Title to the original mortgage claim may be void, but Newgate does not acquire it through a financial assistance transaction, but rather by assignment, which is not void *ceteris paribus* (it could be void on grounds of simulation, fraud against creditors, etc., but no such circumstances have been proven). The Supreme Court rejects (though it does not explain how it differs from the present case) the view that the case considered in Supreme Court Judgment no. 1127/2008 of 20 November, in which the assignment by the lender of a mortgage loan to a third party does not render the loan — previously held void on the grounds of usury — valid, under the protection afforded by the Land Registration Act to a bona fide purchaser, since case law holds that the nullity of agreements on the grounds of usury does not permit remedial validation as they are radically void.

However, I consider that the Supreme Court's judgement is mistaken, and that it is inappropriate to rely on Article 1258 of the Civil Code (CC) and Article 149 LH, which do not strengthen Newgate's position but rather undermine it. I shall now set out my arguments on this point:

1) The Land Registration Act provides that nominate and innominate rights in rem are entered in the Land Registry, including the mortgage loan (Article 2(2)). It is a proprietary interest in another's property which is transferable like other rights in rem and the essence of which is to "directly and immediately encumber the [mortgaged] property" (Art. 104 LH), but not the secured claims, which do not constitute the subject matter of the mortgage. This is what Article 34 of this Act refers to as *a registered right in rem*, or, more accurately, in accordance with Articles 32 and 38, a registered right in rem. An "inaccuracy" in the Registry is a discrepancy which, "with regard to registrable rights", exists

between the Registry and the legal reality outside the Registry (Art. 39 LH).

2) However, under Spanish law, a 'mortgage claim' is also considered a 'right' (Art. 1878 CC, Art. 149 LH). In the case of a 'mortgage claim', the loan is an 'accessory' to the claim. Consequently, the assignment of the mortgage claim entails the assignment of the loan as an accessory (Art. 1258 CC). However, the claim as such is not a 'registrable right', but an 'agreement'. The agreement is not transferable in accordance with the Land Registry, but rather in accordance with the ordinary rules governing the assignment of claims; only the accessory right in rem arising from the agreement ('option to purchase' [Art. 14], that is to say, the right in rem to a purchase option established by contract) is transferred in accordance with the Land Registry. Claims and debts are transferred without being subject to rules on priority in the Registry. If a mortgage is assigned, the assigned debtor may raise against the assignee the same defences that they could raise against the assignor, regardless of whether the assignee might be a "bona fide purchaser protected by Article 34 of the Land Registration Act". Claims cannot be acquired '*a non domino*', nor can mortgage claims that do not exist outside the Registry. Hence, Article 149 LH is quite correct in stating that "the [assigned] debtor shall not be bound by that agreement to any extent greater extent he or she would be bound by his or her own".

*The assignment of the mortgage claim entails the assignment of the loan as an accessory*

3) A mortgage claim that is void, without effect or unenforceable does not cease to be so merely because the assignee has acquired a mortgage loan which, *on the face of it,* might be subject to the enhanced protection provided for in Article 34 LH. Furthermore, as the loan is an accessory to the claim and cannot subsist without a valid debt, Article 34 cannot validate a mortgage acquired '*a non domino*' as security for a claim without effect. This is self-evident. If the original mortgage claim was void due to a breach of the prohibition on financial assistance, it will remain so when a third party acquires it by way of assignment. If the mortgage claim has been extinguished by a payment not recorded in the Registry, the bona fide assignee shall acquire neither the claim nor the loan against the original debtor, who, moreover, has not been a party to the transfer of the claim.

4) It is irrelevant that the ground for nullity is a circumstance not recorded in the Registry. This is a case of intrinsic invalidity that is not subject to the rules governing public records. Similarly, a *usurious* mortgage is void, even if it is transferred in accordance with the Registry and the assignee is bona fide. Once again, these are intrinsic issues, not matters of public record or lack thereof.

5) This does not mean that a mortgage right *'ad non domino'* can never be acquired in accordance with the Registry. Let us consider some straightforward cases:

The claim exists, but the mortgage loan was not created by an authorised person (the owner), and a third party acquires the loan without notice of that contingency being given in the Registry. The claim is valid, the loan is not, but it may be protected under Article 34 LH. Let us imagine that the mortgage loan is created to secure a pre-existing claim, which will allow for a clawback in insolvency proceedings (avoidance) if the other requirements are met; and, if this is the case, the claim is extinguished and the assignee of this claim cannot uphold the loan under the aforementioned Article 34. There was a mortgage payable in priority that was wrongfully discharged: the assignee of the registered loan acquires, by virtue of the aforementioned Article 34, the loan on a first-ranking basis. The mortgage claim had not been apportioned in the manner required by Article 119 LH; the assignee of that mortgage claim does not acquire a valid mortgage under Article 34, as the claim itself is vitiated. The entry recording the creation of the mortgage loan stipulated that the right in rem was extended to improvements made by a third party and provided for a waiver of the priority granted by Article 113 of the same Act to a third-party possessor; a bona fide third-party assignee does not improve their position (ineffectiveness vis-à-vis a third-party possessor), even if they hold a right protected by Article 34.

*If the loan is void on the grounds of financial assistance, it is also void in the hands of a bona fide third-party assignee*

6) Let us modify the factual scenario slightly:

The third mortgage guarantor, who is not a debtor, merely created a loan on their property as security for a third party's debt, which is in breach of the prohibition on financial assistance, and the beneficiary of the loan assigns it to a third party without this entailing the assignment of the underlying claim. This is a very common scenario in the practice of financial assistance provided by the company whose shares are being acquired. Now, the title establishing the mortgage loan is independent of the underlying claim or debt, which the mortgagor and the assignee do not acquire. Consequently, Article 149 LH does not apply, because in this case it is not the mortgage claim that is transferred, but the isolated right in rem, which is assigned to a bona fide purchaser. In such a case, the mortgage loan is transferred as an isolated right in rem, and the nullity of Article 143 (para. 2) LSC does not affect the claim that is secured. We now ask whether, in this case, the mortgage loan can be transferred under the terms of Article 34 LH and whether the 'assignee' of the loan can acquire the status of a protected third-party mortgagee.

7) It cannot. The transaction establishing a mortgage loan for a third party's debt is vitiated by the contravention of Articles 143 (para. 2) and 150 LSC. This is now an intrinsic defect in the loan (not in the claim), and this defect is not cured by the rules on indefeasibility of title. It is a defect intrinsic to the loan, not a defect relating

to the mortgagor's lack of beneficial ownership, which is what Article 34 LH would cure. An intrinsic defect cannot be cured by means of registration; it always attaches to the right, irrespective of public recording; it is a substantive defect, as if, for example, a mortgage loan were created over a land-sea area and it were subsequently transferred in accordance with Article 34 LH. If the loan is void on the grounds of financial assistance, it is also void in the hands of a bona fide third-party assignee, even though, admittedly, their acquisition transaction is not subject to financial assistance or any other ground for nullity. The title of derivative acquisition is 'valid' within the meaning of Article 33 LH, but the mortgage loan is not actually acquired by way of lack of constructive notice. The situation is the same as if the loan had been granted in respect of a third party's debt that is void due to money laundering or usury.

8) It should be noted, however, that there is a difference between a mortgage loan (securing a third party's debt) contravening the prohibition on financial assistance and a mortgage loan (securing a third party's debt) relating to a claim tied to usury. In the second case, the loan is not *usurious*; it is the claim that is, and, even where a third party has provided the mortgage, the nullity of the claim entails that of the mortgage by virtue of its accessory nature, a principle that takes precedence over that of lack of constructive notice. In the first case, the underlying claim is free from the taint of invalidity, but the mortgage loan is not. The nullity of its constitutive instrument taints the mortgage loan going forward, even if the agreement by which the void loan is assigned were not itself void: the loan cannot cease to be in breach of the prohibition on financial assistance, even if it is transferred in accordance with the terms of Article 34 LH.

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