

Directors, conflicts of interests and good faith

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Diligence and loyalty are directors' most important duties pursuant to the Spanish Companies Act (SCA). Loyalty requires directors not only to act in the best interest of the company in every given transaction, but also to adopt the necessary measures to avoid the very situation of direct or indirect conflict of interests.

In accordance with the SCA¹, only the general shareholders' meeting (GSM) or the board (as applicable) may authorise a director to carry out a transaction that entails a direct or indirect conflict between the interest of the director and that of the company.

A recent judgment by the Barcelona Court of Appeal (BCA)² has reminded that, absent an express authorisation, good faith may lead to conclude that the authorisation was granted tacitly or presumedly.

In the case at hand, a limited liability company (MCI) had two shareholders (G-MCI and ASPROMA). G-MCI was the majority shareholder and MCI's only subcontractor.

ASPROMA brought an action against one of the two directors of MCI, who was also a relevant shareholder of G-MCI, on the grounds that he had violated his duty of loyalty by authorising payments from MCI to G-MCI for the works carried out by the latter to the former.

The claim was dismissed in the first instance and ASPROMA appealed the decision.

The BCA noted that the conflict had existed since the moment in which ASPROMA had acquired its stake in MCI and that in fact both shareholders had signed a memorandum in which they had agreed that G-MCI (the company controlled by the director sued by ASPROMA) would be MCI's subcontractor. Therefore, the parties were fully aware of the conflict and tacitly accepted that the director in question acted on behalf of MCI in its dealings with G-MCI.

The BCA found that, even if the formalities to authorise the conflict of interests had not been complied with, the principle of good faith led to conclude that a tacit or presumed authorisation had been granted. The BCA referred to several Supreme Court decisions about conflicts of interests known by the parties beforehand.

The ruling is remarkable in that it reminds that the principle of good faith may override the legal formalities required by corporate law.

¹ Article 230.

² Judgment of the Court of Appeal of Barcelona 1126/2022 dated 6 July 2022.