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Actions by creditors of a company against its directors

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According to the Spanish Companies Act (SCA), company's directors are liable *vis-à-vis* creditors (i) for the debts incurred after an event of compulsory dissolution (for instance, a net equity drop below fifty per cent of the share capital) if they fail to call a general shareholders' meeting to address the situation within two months from the date when they knew or should have known about the event (art. 367) and (ii) for the damages *directly* caused to creditors as a consequence of a breach of their duties (art. 241).

Actions by creditors of a company against the directors are always fearsome, but although they are not unusual in Spain those based on art. 241 SCA tend to be dismissed. A recent judgment by the Barcelona Court of Appeal (BCA)[1] reminds the case-law on this second kind of actions.

Obviously, directors are not liable for any breach of contract or non-payment by the company. There must be (i) an act or omission by them in breach of the law, the company's by-laws or their duties of diligence or loyalty, (ii) a *direct* damage caused to the creditor rather than a detriment to the company's assets that *indirectly* impacts on the creditor and (iii) a causal link between the directors' behaviour and the damage.

The reason why these actions are usually dismissed is that courts often find that the requirement that the damage to the creditor be direct is not met.

It is quite common for creditors, as the claimant did in the case resolved by the BCA, to base their actions on the fact that the directors *de facto* closed down the debtor company without following the liquidation and dissolution process provided for by the SCA. Courts expect in these cases that the creditor brings evidence that the company owned sufficient realisable assets to pay the debt and would therefore have paid it if wound up in accordance with the SCA.

If the company was already insolvent and, therefore, unable to pay its creditors when it was irregularly closed down, then directors will not be liable as a rule, although they might be under "very exceptional" circumstances that should be proven, such as (i) incurring debts when it was clear that the company was doomed to closure and not able to repay them or (ii) fraudulent deviation of the company's assets to the directors or any person or entity related to them.

The BCA dismissed the action in the case at hand as it found that the creditor had not proven that the company would have paid its claim had it been wound up properly. The BCA noted that a mere reference to the company's financial statements reflecting the debt and certain assets, "without further analysis", is not enough, as any financial statements include, by definition, assets and liabilities. It is also irrelevant that the director had not disclosed the destination of the company's assets, as this occurs in all *de facto* closures of companies.

[1] Judgment 613/2024 of 19 January.