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Two recent rulings on the lifting of the corporate veil

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Pursuant to the *lifting of the corporate veil* legal doctrine, liability for the acts of a company may be extended to third parties (mainly shareholders and group companies) disregarding its separate legal personality under certain circumstances such us "*undercapitalisation, commingling* (confusión) *of legal personalities, external management and fraud or abuse*"[1].

The Spanish Supreme Court has stated that lifting the veil is an exceptional remedy to be applied restrictively and provided that no other action is available to the creditor. We refer below to two interesting rulings recently handed down by the Barcelona Court of Appeal (BCA)[2].

The first one is about two companies, Fertisubur and Zoberbac, that had the same headquarters, corporate purpose, website, logo, sole director, suppliers and clients and used to act in the market as a single business.

A supplier, Altemus, with certain outstanding claims against Fertisubur sought payment by the latter and, jointly and severally, by Zoberbac pursuant to the lifting of the veil doctrine. Altemus also sued Fertisubur's sole director, since the company's net equity was below fifty per cent of its share capital before the debts were incurred[3].

A commercial court upheld the claims against Fertisbur and its sole director. As for Zoberbac, the court noted that there were sufficient reasons to lift the corporate veil and declare its liability too, namely the intermingling of businesses in customer relationships and a fraud in the distribution of revenue and debts (Fertisubur assumed the debts necessary to carry out the business activity, while all the revenue was earned by Zoberbac). However, the court dismissed the claim against Zoberbac on the grounds that lifting the veil, as a last resort remedy, was not appropriate considering that the action against the sole director had been upheld and there was no evidence that he was unable to pay Altemus.

The BCA reversed the first instance judgment as regards Zoberbac and declared it jointly and severally liable for the debts. The BCA pointed out that directors' liability and veil lifting are not incompatible actions and thus can be brought cumulatively. The last resort nature of the veil lifting simply means that this remedy is limited to debts that cannot be collected from the main debtor, as was the case with Fertisubur.

[1] See, for instance, judgment of the Supreme Court 673/2021 dated 5 October 2021.

[2] Judgments of the Barcelona Court of Appeal 1534/2022 and 1724/2022 respectively dated 26 October and 17 December 2022.

[3] According to the Spanish Companies Act, directors are jointly and severally liable for the company's debts incurred after the occurrence of an event of compulsory dissolution (*e.g.*, the reduction of the company's net equity below fifty per cent of its share capital as a result of losses) 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.

The second judgment is about a company, BCN Aduanas, that incurred in debts *vis-à-vis* two suppliers for several services provided between February and November 2019. Mr. Anselmo was the sole shareholder (indirectly, through its wholly owned company Alter Capital) and the sole director of BCN Aduanas.

A new company, BCN Euroexpress, was incorporated in February 2019 with the same sole shareholder and director. BCN Aduanas sold most of its assets, employment contracts and client portfolio to BCN Euroexpress for a price of € 3 million in April 2019. An Italian company acquired 51% of BCN Euroexpress two weeks later and became its sole shareholder in August 2020.

In January 2020 BCN Aduanas expressly acknowledged the debts owed to the suppliers and proposed a payment plan, but in June 2020 Mr. Anselmo informed them that BCN Aduanas had no capacity to meet the plan, there being no record of the destination of the € 3 million allegedly received from BCN Euroexpress.

The suppliers then filed a lawsuit claiming payment by BCN Aduanas and, jointly and severally, by Alter Capital and BCN Euroexpress invoking the lifting of the veil doctrine.

A commercial court upheld the claim and its judgment was confirmed by the BCA following an appeal by BCN Euroexpress, at the time wholly owned by the Italian company.

The BCA found that more than 90% of BCN Aduanas' business had been transferred to BCN Euroexpress (a new company with the same sole shareholder, sole director, corporate purpose and registered office) in order to avoid fulfilling BCN Aduanas' present and future obligations.

Very importantly, the BCA found that the change of shareholder that had subsequently happened in BCN Euroexpress was not a reason to exclude its liability, even if the new shareholder (the Italian company) had not participated in the fraud committed by the former (Mr. Anselmo).

These judgments show that lifting the corporate veil, despite its nature of last resort remedy, is not so uncommon in Spanish case law and that an *innocent* purchaser of a company (like, apparently, the Italian company mentioned above) may suffer the consequences.