Spanish Real Estate Legal Update

Review

Nº 13 – October 2010

In this issue

- Hammonds awarded as “Real Estate Law Firm of the year 2010 – Spain”.
- Impact on urban planning in the reform of the Criminal Code.
- The right to terminate lease agreements given a delay in the payment of a month's rent.
- Mandatory nature of the professional association certificate (“visado colegial”) in the building industry.
- Resolutions of the Directorate-General of Registries and Notaries and recent Case Law.

Hammonds awarded as “Real Estate Law Firm of the year 2010 - Spain “.

Hammonds has been awarded as “Real Estate Law Firm of the Year 2010 – Spain” by the publication “InterContinental Finance Magazine” in its prizes “Global Awards 2010”, and also by the British Publication “Finance Monthly Magazine” in its prizes “Global Awards for Achievement 2010”.

The selection process for the winners in each publication is driven by an independent survey amongst sector experts and readers. Individuals vote for those law firms that they feel continually punch above their weight and who in their opinion, are the most capable within their field, and have performed to exceptional levels in one of the most difficult economic periods ever experienced.

We thank all our clients for their rely on our Law Firm, which have contributed to make Hammonds as one of the leading Law Firms in providing legal advise in the Spanish real estate sector.

Impact on urban planning in the reform of the Criminal Code.

The twenty-sixth reform of the Spanish Criminal Code was passed on 22 June, by virtue of the Act 5/2010 which amended the Criminal Code 10/1995, of 23 November, even though we will have to wait until the end of this year for it to come into force.

Among the different changes that will result from the reform, special mention should be made on those affecting urban planning, along with the introduction of the criminal liability of the body corporate. The aforementioned reform likewise seeks to bring Spanish legislation in line with European practices. It is modelled on other jurisdictions and introduces a corporate performance model or "Corporate Dense".

The scandals in Spain over recent years have probably helped the reform of the Criminal Code to focus on the area of land and urban planning crimes. Therefore, while the penalties are increased on the one hand, the sphere of the typical conducts has been increased on the other hand and now includes illegal urban development works and the instrument of planning in the crime of urban planning breach of trust.

Increasing the penalties is the initial corrective measures introduced to avoid the crimes benefiting the author. The crimes are thus prevented from being “profitable” for their author and likewise, the earnings from any crime can be confiscated irrespective of how said earnings could have been transformed. The prison sentence will be increased from between six months and three years to range between one and a half years and four years. The penalty consisting of being banned from exercising their professional or trade (developers, builders or project manager) will also increase to a period between one and four years. In any event, the judge may also order the demolition of the work and the replacement to the original state of the altered physical setting (with the latter being an additional new feature with respect current Criminal Code), without prejudice to any potential compensation to third parties who have acted in good faith.

It is also under analysis that for the first time, the authorities and civil servants can be punished when they are in breach of their obligations or when they do not exercise their duties most diligently when studying urban development projects, plot division, licence applications, etc. The Criminal Code even specifies that failing to carry out compulsory inspection, along with the concealment of illegal act may be punished by a prison sentence of up to four years. Therefore, the civil servants have lost their privilege as they will no longer be to opt between a prison sentence or fine as the result of the current Criminal Code.

Furthermore, the most important new aspect of this reform of the Criminal Code, consisting of the inclusion of the criminal liability of bodies corporate, is included in the area of crimes against land and urban planning.

This is the first time that companies that tolerate or condone the criminal behaviour of their directors and/or employees are punished. This shall be irrespective of whether or not the criminal liability of the individual responsible for the beach can be individualised. The list of penalties for the bodies corporate range from a fine, include being banned from obtained subsidies and public grants, to penalties for the most serious cases that include the company being stopped from trading or even being forced to wind up. Along with the above, the aim is to try and prevent companies from getting round their legal liability by means of the different corporate restructuring allowed by the law, that is transformation, mergers, demergers, etc., by transferring the criminal liability to the company or companies in which they transform, merge, absorb or demerge, provided that the new company continues with the same activity as the previous one and has the substantial identity in terms of clients, suppliers and employees.

Notwithstanding the above, to prevent this reform from creating a legal loophole, certain guidelines and exemptions should have been included regarding the controls that the companies should apply to their directors and employees to prevent the companies form being criminally charged as a result of the acts of said persons. We therefore hope that our legal system incorporates in the medium term models and codes of conduct similar to those applicable in other jurisdictions (for example in North America) where codes of conduct are already in place that limit or even exempt the companies from any criminal liability.

Eva Sánchez

The right to terminate lease agreements given a delay in the payment of a month's rent.

When the payment of the monthly rent for business premises is delayed, the lessors are often interested in seeking the termination of the agreement with the tenant instead of continuing the lease relationship with said tenant.

The Spanish Urban Tenancy Act 29/1994, of 24 November (Ley de Arrendamientos Urbanos, hereinafter the “LAU”) allows lease agreements to be terminated in the case of defaulting on the rent, without specifying whether the late payment of the rent can be considered as grounds for terminating the contract.

Likewise, the Spanish Civil Procedure Act 1/2000, of 7 January (Ley de Enjuiciamiento Civil, hereinafter the "CPA") establishes the possibility of ending the eviction process of a process due to the tenant defaulting on the rent, if prior to the court hearing, the tenant pays the lessor the amounts sought in the action. This power cannot be used by the tenant when eviction has been avoided by a late payment on a previous occasion.

This impossibility for second or subsequent avoidance of eviction by late payment allows the defaulting tenant, who fails to pay his rent and only meets his obligations when an action is filed with the courts, to be penalised.

The problem comes when a tenant after having avoided eviction by late payment delays the payment of the rent a second time.

Jurisprudence has been contradictory in this area, as on the one hand, the Provincial Courts have found on many occasions that defaulting on the payment of rent in the period stipulated in the lease agreement is a mere delay and cannot lead to such a serious penalty as the termination of the agreement, and at other times they have deemed that the delay in payment of the rent is sufficient grounds to terminate the agreement and therefore leads to eviction of the tenant.

The Supreme Court ended the disparity of criteria in the jurisprudence of the Provincial Courts when it issued its decision on 24 July 2008, where it declared as jurisprudence doctrine that “(…) *the payment of rent outside the agreed period does not exclude the applicability of the reason to terminate the lease envisaged in the Spanish Urban Tenancy Act (Ley de Arrendameintos Urbanos) and that is true even if that petition is based on the defaulting of a single month’s rent and it has been paid extemporaneously (…)”.*

The Supreme Court understands that the urban lease agreement is for value and commutative and the first obligation of the tenant is obviously to pay the rent. On the other hand, unless the parties had agreed that the payment for the income occurred as one-off payment, the agreement is a continuing obligation and defaulting on a single monthly payment of rent can be grounds for terminating the contract.

This jurisprudence has been recently followed in rulings such as the Decision of the Supreme Court of 26 March 2009 and the Ruling of the Provincial Court of the Balearic Islands on 20 July 2010.

In conclusion, the mere delay in the payment of the rent is sufficient grounds to order the eviction, and therefore, the current criterion of the most recent jurisprudence establishes that the delay in the payment of one month's rent is grounds for terminating the lease, which enables and entitles the lessors to terminate the leases whose tenants pay the rent outside the established period.

Sandra Paoletti

Mandatory nature of the professional association certificate ("visado colegial") in the building industry.

On October 1, 2010 Royal Decree 1000/2010 of August 5, on the obligatory professional association certificate, came into effect, seeking to identify the professional works that require the certificate of a professional association, as well as to specify the legal system that is applicable to the cases of obligatory professional association certificate.

Specifically in this note we shall briefly analyse the need to obtain the professional association certificate in the building industry, which must henceforward be taken into account by all agents in the building trade and specifically by the professionals involved therein (architects, engineers, etc).

The aforementioned Royal Decree develops what is set forth in section 13 of Law 2/1974 of February 13, on professional associations, in accordance with its current draft arising from the reform introduced by Law 25/2009 of December 22 on the modification of several laws for adaptation thereof to the Law on free access to the various service activities. Under said article 13, the professional association certificate became a voluntary instrument for use in those cases in which the client should expressly request this to be provided, including Public Administrations when acting as clients, although it granted the Government the power to determine which professional works would require obligatory professional association certificate on the basis of the existence of a direct causal relationship between the professional work and its impact on the safety and physical integrity of people.

Royal Decree 1000/2010 was adopted in the course of said legal qualification, seeking to regulate those professional works which by legal requirement must obtain professional association certificate, as an exception to the freedom of choice of the client established in the previous regulations, notwithstanding that other professional works may exist that are equally subject to professional association certificate at the express request of the client, including Public Administrations when acting as a client.

The obligatory nature of the obtaining of the professional association certificate has been set forth with an exclusive and excluding nature for all professional works listed in article 2 of the Royal Decree in question herein. Specifically, in the building sector, the works requiring professional association certificate shall be the following:

a) Building execution project. For the purposes herein, building shall be understood to mean that which is set forth in article 2.1. of Law 38/1999, of November 5, on building regulation and the obligatory nature of the professional association certificate shall extend to all works requiring a project in accordance with article 2.2 of the aforementioned Law.

b) Certification of final completion of building works. For the purposes herein, building shall be understood to means that which is set forth in article 2.1. of the Law on building regulation and the obligatory nature of the professional association certificate shall extend to all works requiring a project in accordance with article 2.2 of the aforementioned Law.

c) Building execution project and certification of final completion of building works which, if applicable, must be presented as part of the administrative proceedings to legalise the building works, in accordance with applicable urban development regulations.

d) Project of demolishment of building not requiring the use of explosives, in accordance with applicable urban development regulations

Notwithstanding the foregoing, exceptions to the obligation of obtaining professional association certificate shall be those works which, in application of the regulations of public contracting, should be

subject to a report from the office of project supervision or an equivalent body, pertaining to the appropriate Public Administration, in which case said report shall suffice in terms of compliance of the obligation of obtaining professional association certificate.

On the other hand, those professional works not requiring an obligatory professional association certificate and which form part of a contract with the General State Administration shall not be obliged to provide professional association certificate, although duly justified exceptions to this rule may be agreed by the Cabinet in accordance with the principles of necessity and proportionality.

Likewise, it must be pointed out that the obligation to obtain the professional association certificate must be complied with only once and by only one professional association, even if the works are carried out or completed within partial projects and other technical documents, without requiring the partial certification of the documents forming part therein. In any event, for works subject to obligatory professional association certificate, this must be obtained prior to presentation of said works to the pertaining Public Administration and, under no circumstance will professional association certificate be possible subsequent to presentation.

Lastly, we must simply point out that the obligatory professional association certificate shall be issued by the professional association pertaining to the principal matter of the professional works, which shall be that pertaining to the profession of the person responsible for the entire project. In the event of several professional associations pertaining to the principal matter, the professional may obtain the association certificate from any of them. With regard to the aforementioned certifications of completion of building works, the principal matter includes both the management of the works and the management of the execution of the works; the professional association certificate from a professional association empowered in either of these areas will therefore be sufficient.

Alfonso López

Resolutions of the Directorate-General of Registries and Notaries and recent Case Law.

Supreme Court, First Section (Civil). Decision 369/2010 of 8 June.

In the decision analysed below, regarding the term of the leases entered into prior to 9 May 1985, pursuant to the Spanish Urban Tenancy Act of 24 November 1998 (LAU – Ley de Arrendamientos Urbanos), and where the tenant is a body corporate that cannot accredit payment of the relevant business tax (IAE), the Supreme Court upheld the ruling of the Valladolid Provincial Court that found for the eviction due to the expiry of the term of the lease of the business premises.

The interest of this Supreme Court decision lies in the different interpretation that the Provincial Courts have given to Third Additional Provision, Section B, number 4, 2nd rule, of the Spanish Urban Tenancy Act, when establishing the duration of the business premises leases entered into prior to 9 May 1985, when the tenant is a body corporate and whose business activities are different to those envisaged in Rule 1 and where there is business tax liabilities, with the tenant being responsible for providing proof of the amount of business tax effectively paid.

The key legal issue consists of establishing if it is sufficient to only accredit the municipal minimum business tax liability for the business operations in 1994 (the year when the current Urban Tenancy Act came into force) or, on the contrary, the tenant needed to be registered and to pay the relevant tax, that is, to provide proof of the effective payment of the business tax liability.

The Supreme Court dismissed the appeal in cassation brought by the tenant and upheld the ruling of the Provincial Court, based on the following considerations:

It first referred to the Preamble of the LAU, which literally establishes that, "Fixed periods of notice, between five and twenty years, are established for the leases of bodies corporate, according to the nature and the volume of the operations at the leased premises. A short term is established for those leases involving business activities with such economic potential that they place the holders of these contracts in positions of equilibrium with respect to the lessors when negotiating new lease conditions".

With respect to the above, we can see how the Act tends towards a purely economic criterion, identified by business tax liability, pursuant to which it establishes a longer or shorter term of the contract, that is waived in the case that the business tax liability for the operations at the leased business premises limits its duration to the minimum term of five years. The problem arises when the Act does not establish the consequences that arise from the leases where the tenant is not registered for any business activity and therefore does not pay the IAE. Therefore, the High Court establishes the idea that the balance that the Act takes into account to set the length of these contracts is not merely nominal, but also real. The crucial point is to enjoy the rights that the legislation grants to the tenants that are, effectively, in good standing with their tax obligations, when establishing the number of years of the extension of the contract.

Therefore, following this decision, the Supreme Court has clarified a situation that was for a long time marred by the different legal rulings from the Provincial Courts, by finally establishing that the aforementioned minimum term, that is, a period of five years extension shall be applied, as the tenant has not met its tax obligations and therefore has not been able to justify the payment of its tax liability, even though the activity at the business premises would have allowed the tenant to enjoy a longer period pursuant to the business tax tariff.

Ignacio Domínguez

Provincial Court of the Balearic Islands (Section 3). Ruling number. 300/2010 of 20 July.

This article analyses the ruling of the Provincial Court that ordered the immediate eviction of business premises as by the tenant had failed to pay the waste collection rates in due time pursuant to what was envisaged in the lease agreement. The ruling also overturned the first instance ruling that threw out the eviction application due to failure to pay as the first instance court found that there was no repudiatiory conduct capable of justifying eviction, but rather a mere delay.

Given the first instance ruling, the lessor petitioned for the first instance ruling to be overturned and asked the court to find for the eviction application filed, as the failure to pay the waste collection rates in itself accredits the breach by the tenant of the obligations assumed and this was even more so as there had already been a previous eviction application that had been avoided by late payment of the outstanding amounts.

It should be recalled that there are several recent rulings that establish that the fundamental obligation of the tenant is to pay the agreed rent, as if it is accepted that the delay is not breach of contract, one would be entering into dangerous ground where it would be necessary to specify how many days' delay can be considered as a mere delay and the number of days when one would be dealing with real breach.

Notwithstanding what is established in the above paragraph, it is true that have also been numerous rulings from the Provincial Courts which has found that failure to pay the rent in the contractually stipulated period is a mere delay and not a contractual breach that can lead to the termination of the lease agreement.

The Supreme Court has finally ended the disparity between the rulings, by declaring that "the proven payment of rent outside the agreed period does not exclude the applicability of the reason to terminate the lease envisaged in the Spanish Urban Tenancy Act (Ley de Arrendamientos Urbanos)

and that is true even if the petition is based on the defaulting of a single month's rent and it has been paid extemporaneously…".

As the urban lease agreement is for value and commutative, the first obligation of the tenant is obviously to pay the rent. Unless the parties had agreed that the payment for the income occurred as one-off payment, the lease agreement is a continuing obligation and defaulting on a single monthly payment of rent can be grounds for terminating the contract. This criteria has to also be extended to defaulting on amounts that have been assumed or which are the obligations of the tenant pursuant to what has been agreed between the parties.

Therefore, defaulting or the subsequent payment can only be effective if the legislation itself so allows, as is the case of Article 22.4 of the Civil Procedure Act (Ley de Enjuiciamiento Civil), as it regulates the avoidance of eviction by late payment of the outstanding amounts. In fact, and as we have previously indicated, in the case in question, as an eviction petition had been filed prior to this procedure and a Court Order was issued that set aside the eviction action as the tenant had paid the outstanding rent, eviction could therefore not be avoided in these proceedings by paying the outstanding amounts.

Ignacio Domínguez

Ruling of the General Directorate of Registries and Notaries Public (Land), of 17 June 2010.

This Ruling deals with the refusal to enter a Rural Property Deed of Sale in the Land Registry where the property was formed by the segregation of another property, which in turn was the result of the division of another larger property, pending entry in the registry at the time of requesting the registration of the deed envisaged in the ruling.

We will begin by pointing out that along with the Deed of Sale dated 27 December 2000, the interested party filed a motion where he alleged that he had obtained the segregation licence by administrative silence procedure, all of which was accredited by means of, among others, the application sent to the Mayor of the local council, for a municipal licence to divide the land into plots, or for a certificate stating that it was not necessary, in order to carry out the segregation envisaged in the deed and proceed to register it with the Land Registry. The Registrar refused to enter the aforementioned deed as the portion of property sold was not registered in the name of any owner, and, as we have previously stated, the prior deed of segregation of the larger plot, from which, in turn, the sold property covered by this ruling came, had not been registered.

Subsequently, the deed of rectification was authorised of the aforementioned deed of 27 December 2000 and it rectified the later as it stated that the main property to be segregated was not actually the one described in the year 2000 deed, but rather the larger one of the plot, as was claimed was the outcome of various segregations.

The Registrar refused to enter the segregation carried out and referred to the case law of the High Court subsequently included in the current 2007 Land Act and its 1992 predecessor, where "licences against urban planning legislation cannot be deemed to have been acquired by the administrative silence procedure". The registrar considered that in this case and as could be seen from the registry records, there were signs of illegal divisions into plots involving the main property being segregated, according to the report issued by the local council.

Likewise, according to the General Directorate, the interested party cannot allege lack of unit and global rating, as the documentary source is different from those that were covered by the first annotation, as it included a new deed of rectification.

With regard to the above, it is repeated doctrine of the General Directorate of Registries and Notaries Public that, in the majority of cases, the Registrar will lack, according to the documentation submitted, sufficient judgement to decide whether the alleged right acquired by the silence procedure is or is not

against the planning requirements. Therefore, the Registrar shall make the relevant entry, unless it can be seen that the segregation in question clearly breaches the Urban Land Planning bylaws.

Well, as has been previously mentioned, based on the ruling of the Supreme Court on 28 January 2009, which has been included in the current state land legislation, “administrative licences against urban land planning requirements may not be deemed to have been acquired by administrative silence procedure”, which means that it must have been known by Notaries Public and/or Registrar, who must have been aware of it at the time of checking whether the deed submitted to be put on public record, and where applicable to register it, has a legal standing that cannot be contravened by the aforementioned jurisprudential argument.

Along with the above, we must refer to the autonomous urban planning legislation, that is, in the case in question, to the Urban Planning Act of Andalusia, which establishes that "any urban plot division shall require an urban planning licence or, where applicable, a certificate stating that it is not necessary", and also that "No public deed that contains plot division may be authorised or registered without the relevant licence, or the certificate stating that it is not necessary, being submitted and which the Notaries Public shall accredit in the relevant deed". Likewise, the same article of the regional legislation defines the concept of urban plot division for land not for building purposes as “the successive or simultaneous division of land, property or plots into two or more lots… that can lead to the formation of new entries”.

In addition to the above, both the Spanish land law and the additional legislation to the regulations to enforce the Mortgage Act regarding the entry of urban planning deed in the Land Registry, establishes that Notaries Public and Registrars shall request the relevant digital information or information accrediting the legality of the urban plot division from the Public Authorities.

Finally and to conclude, in the case in question, the Land Registrar refused to register the deed, and the General Directorate ratified the decision of the Registrar, as there are signs of illegal plot division regarding the main property for which the segregation is sought, along with the lack of response of the local council regarding the application to declare the licence not to be necessary, both of which are indicative that the plot division licence or the certificate stating it is not necessary cannot be deemed to have been acquired by administrative silence procedure pursuant to the aforementioned doctrine of the High Court.

Ignacio Domínguez

FOR MORE INFORMATION
Ramón Castilla
Partner
Hammonds LLP
T: +34 91 426 48 40
Email: ramon.castilla@hammonds.com

Berlin

Hammonds LLP
Unter den Linden 14
10117 Berlin Germany
Telephone +49 30 7261 68 000
Fax +49 30 7261 68 001

Leeds

Hammonds LLP
2 Park Lane
Leeds LS3 1ES
Telephone +44 (0)113 284 7000
Fax +44 (0)113 284 7001

Manchester

Hammonds LLP
Trinity Court
16 John Dalton Street
Manchester M60 8HS
Telephone +44 (0)161 830 5000
Fax +44 (0)161 830 5001

Birmingham

Hammonds LLP
Rutland House
148 Edmund Street
Birmingham B3 2JR
Telephone +44 (0)121 222 3000
Fax +44 (0)121 222 3001

London

Hammonds LLP
7 Devonshire Square
London EC2M 4YH
Telephone +44 (0)207 655 1000
Fax +44 (0)207 655 1001

Brussels

Hammonds LLP
Avenue Louise 250
Box 65
1050 Brussels Belgium
Telephone +32 2 627 7676
Fax +32 2 627 7686

Madrid

Hammonds LLP
Plaza Marques de Salamanca 3-4
28006 Madrid Spain
Telephone +34 91 426 4840
Fax +34 91 435 9815

Paris●

Hammonds Hausmann
4 Avenue Velasquez
75008 Paris France
Telephone +33 1 53 83 74 00
Fax +33 1 53 83 74 01

Hong Kong●

Hammonds
Suites 3201-05, 3217-20
32nd Floor Jardine House
1 Connaught Place
Central Hong Kong
Telephone +852 2523 1819
Fax +852 2868 0069

Beijing+

Hammonds Beijing
Representative Office Hong Kong
Suite 1419 - 20
South Tower Beijing Kerry Centre
1 Guang Hua Road
Chao Yang District
Beijing 100020 China
Telephone +86 108529 6330
Fax +86 10 85296116

● Affiliated undertakings of Hammonds LLP + Representative Office

WWW.HAMMONDS.COM

If you do not wish to receive further legal updates or information about our products and services, please write to: Sonia de Zunzunegui, Hammonds LLP, Plaza Marqués de Salamanca 3 y 4,28006 Madrid or email sonia.zunzunegui@hammonds.com.