

ESSEX COURT CHAMBERS: PUPILLAGE INTERVIEW PROBLEM 2023

1. Instructing Solicitors act for Lonsdale Architects Ltd (“**Lonsdale**”), a firm of architects operating out of Lowerland. It is owned and managed by Aaron Arora (“**AA**”). Advice is sought in relation to an agreement between Lonsdale and Gibson Enterprises Ltd (“**Gibson**”), a company which provides serviced office and warehouse spaces across Upperland.
2. In late 2018, Lonsdale entered into negotiations with Gibson over the use of three office spaces in Gibson’s renovated building in Upperland. The following terms were agreed:

“1) Lonsdale shall be provided with the use of three Class 2 office spaces within Gibson’s building in Upperland, the choice of which remain at Gibson’s discretion, for the duration of this Contract in consideration of a monthly fee of 9,000 Upperland Pounds due at the end of each month.

2) This Contract shall last for a period of 12 months from 1 January 2019 and then will be extended automatically for successive periods of 12 months until brought to an end by Lonsdale or Gibson.

3) Either Lonsdale or Gibson can terminate this Contract at the end date stated in it, or at the end of any extension period, by giving at least 4 months’ notice to the other.

4) Gibson may put an end to this Contract immediately by giving Lonsdale notice, and without the need to follow any additional procedure, if:

4.1) Lonsdale becomes insolvent, goes into liquidation or becomes unable to pay its debts as they fall due; or

4.2) Lonsdale is in breach of one of its obligations which cannot be put right or Gibson has given notice to put right and which Lonsdale has failed to put right within 14 days of that notice.

5) If Gibson puts an end to the Contract pursuant to Clause 4 above, it does not put an end to any outstanding obligations, including the monthly fee for the remainder of the period for which the Contract would have lasted if Gibson had not ended it.

6) This Contract shall be governed by the law of Upperland and any dispute arising out of this Contract shall be subject to the exclusive jurisdiction of the Courts of Upperland.

7) Gibson’s standard terms and conditions available on its website shall form part of this Contract. The standard terms and conditions are available in hard copy on request.

3. Gibson’s website lists two sets of terms and conditions, one titled ‘Terms and Conditions (Warehouses)’ and one titled ‘Terms and Conditions (Offices)’. The ‘Terms and Conditions (Offices)’ provide, amongst other things, that:

*“**Force Majeure:** no party shall have any liability to the other under this Contract if prevented from, or delayed in, performing its obligations under this Contract by events beyond its reasonable control (a “**Force Majeure Event**”). Upon the occurrence of a Force Majeure Event: (i) the affected party shall notify the other party of the Force Majeure Event and its anticipated effect on the performance of its obligations under this Contract as soon as reasonably possible; and (ii) the affected party’s obligation to perform its obligations shall be suspended during the period required to remove such Force Majeure Event.”*

4. No similar term exists in the ‘Terms and Conditions (Warehouses)’.
5. Shortly after signing the agreement, Gibson allocated Offices D, E and F in the building to Lonsdale, who moved in on 1 January 2019. Office D was set up as Lonsdale’s ‘front of house’, while Offices E and F were used as offices for Lonsdale’s employees. From January 2019 to June 2022, Gibson issued monthly invoices, which were duly paid by Lonsdale. In early 2022, Gibson reallocated Offices J and K to Lonsdale in place of Offices E and F.
6. In early July 2022, a financial crisis occurred in Lowerland. As a result of the crisis, the Central Bank of Lowerland restricted all payments in foreign currencies, including Upperland Pounds. Lonsdale’s own bank, Lower Credit, prohibited all transfers of foreign currency to banks in other countries. Lonsdale accordingly did not pay the amounts invoiced by Gibson for July and August 2022.
7. On 15 August 2022, Beatrice Bellini (“**BB**”) of Gibson wrote to Lonsdale requesting payment of the outstanding invoices. AA explained that Lonsdale had been advised by Lower Credit that payments could not be made in Upperland Pounds until around early October 2022 and that, on account of cash flow problems resulting from the crisis, Lonsdale could not make payment in any other currency. At the same time, AA requested that Gibson move Lonsdale to a smaller office space, since “*warehouses J and K have been lying empty since the reallocation*” and there was “*now pressure to cut costs*”.

8. BB responded later the same day stating that the delay in payment was “*unacceptable*” and that if the funds were not received within 14 days Gibson would be “*forced to resort to our legal remedies.*” In the same email, BB wrote:

“We are willing to accommodate your request. If you are willing to give up Offices J and K by 19 September, we can either take 50% off the monthly price moving forward from September, or, given your payment difficulties, provide you a rebate so that no instalments fall due for September and October, and then see about a reduction of price next year. We can’t, of course, do anything about the amounts already invoiced. I’ve set up a variation request on the online portal – please sign in to your account and indicate which option is preferred.”

9. AA responded immediately stating:

“Thank you for the kind offer, but we did request to be moved to a single smaller space. We are happy to give up J and K, but we are not clear how the suspension of the next two months will help matters – really it is the last two months which require suspending. We will need a longer-term solution involving a smaller all-purpose office space.”

10. No response was received to AA’s message. On 25 August, Gibson issued an invoice for the sum due for August, which Lonsdale did not pay. On 12 September, employees of Lonsdale arrived at the building to find that padlocks had been placed on the doors of Offices D, J and K.
11. AA rang BB the same day, exasperated, offering to pay the invoices up to July and requesting that Office D be unlocked. BB requested that Lonsdale first “*pay up the full amount up to and including September in order to reinstate the account, and we can then discuss a potential downsize scenario.*” AA, furious that BB had insisted on full payment of the sum for September, said: “*there isn’t a chance we’re paying that sum!*” BB responded saying: “*fine, I am terminating your account with immediate effect.*”
12. Shortly afterward, Gibson invoiced Lonsdale the full amounts for the remainder of 2022 and the entire of 2023. Gibson subsequently issued proceedings in the Upperland Commercial Court for the outstanding invoiced amounts.

Advise Lonsdale of its legal position. Upperland contract law has recently been codified. Extracts of the code have been provided.

ESSEX COURT CHAMBERS: UPPERLAND CONTRACT CODE (EXTRACTS)

Article 7 – Formation and Variation

- 7.1 A contract is concluded by the acceptance of an offer or by the parties signing an agreement containing the agreed terms.
- 7.2 An offer is an expression, by words or conduct, of a willingness to be bound by specified terms as soon as there is acceptance by the person to whom the offer is made ('the offeree').
- 7.3 An offer is different from an invitation to treat which is an expression, by words or conduct, of a willingness to negotiate.
- 7.4 An acceptance is the expression, by words or conduct, of assent to the terms offered.
- 7.5 An acceptance must usually be communicated to (that is, received by) the person by whom the offer is made ('the offeror') although the offeror can waive the need for communication.
- 7.6 The offeror may prescribe the mode of acceptance but, unless the offeror makes use of that mode of acceptance compulsory, any other mode of acceptance will suffice provided that it is no less advantageous to the offeror.
- 7.7 Where an offeror makes a promise in return for performance by the offeree but the offeree does not promise to perform so that only the offeror is bound under the contract (a 'unilateral contract'), in general there is acceptance by the offeree (so that withdrawal by the offeror would constitute a breach) once the offeree starts to perform even if the offeror is not bound to perform until performance by the offeree is complete.
- 7.8 An offer is terminated, so that it is no longer open for acceptance, by–
- (a) the offeror's revocation;
 - (b) the offeree's rejection (which may take the form of a counter-offer); or
 - (c) lapse of time (which may be either the expiry of the period specified in the offer or, where there is no period specified in the offer, the expiry of a reasonable time).

Article 9 – Certainty and Completeness

- 9.1 For an agreement to be legally binding, it must be certain and complete.

Article 12 – Consensual Variation

12.1 A contract may be varied or rescinded by an agreement between the parties that is legally binding as satisfying the requirements in Articles 7 to 11.

Article 13 – Express Terms.

13.1 The express terms of a contract may be oral or in writing.

13.2 Even where a contract has largely been concluded orally, a party ('A')'s written terms may be incorporated into a contract with the counterparty ('B') by one of the following methods:

- (a) signature by B;
- (b) reasonable notice given to B of those terms prior to the formation of the contract; or
- (c) a consistent course of dealing on those terms between A and B.

13.3 Whether notice is reasonable for the purpose of Article 13.2(b) depends on all of the circumstances, including the nature and effect of the term.

Article 14 – Interpretation

14.1 A term of a contract is to be interpreted by asking what the term, viewed in light of the contract as a whole, would mean to a reasonable person having all the relevant background knowledge that was reasonably available to the parties at the time the contract was made.

14.2 In applying Article 14(1), account must be taken of –

- (a) the natural and ordinary meaning of the words used;
- (b) the overall purpose of the term and the contract;
- (c) the facts and circumstances that were known or assumed by the parties at the time the contract was made; and
- (d) commercial common sense,

and, of those factors, (a) carries the most weight.

14.3 When interpreting a term of a contract, the subsequent conduct of the parties must not be taken into account.

Article 18 – Breach of Contract

- 18.1 A breach of contract occurs when a party fails to perform the contract in accordance with its terms.

Article 19 – Termination

- 19.1 The innocent party has the right to terminate the contract for breach by the other party where the other party:
- (a) breaches a term that is a condition, i.e., such an important term of the contract that any breach of it would deprive the innocent party of substantially the whole benefit of the contract or if it is clear that the intention of the parties is that any breach of it should give the innocent party the right to terminate the contract;
 - (b) breaches a term which is not a condition, and the consequences of the breach are such as to deprive the innocent party of substantially the whole benefit of the contract; or
 - (c) anticipatorily repudiates the contract – i.e. makes clear, by words and conduct, that: (i) it is not going to perform the contract at all; (ii) it is going to commit a breach falling within Articles 19.1(a) or (b), whether or not the due date for performance has occurred.
- 19.2 Termination of a contract for breach depends on the election of the innocent party and does not occur automatically as a matter of law.
- 19.3 Termination occurs when the innocent party makes clear to the other party, by words or conduct, that it is treating the contract as at an end.
- 19.4 Termination of the contract means that, subject to contrary agreement, the parties are discharged from their obligations under the contract which would arise after termination but not those which have arisen before.

Article 20 – Compensatory Damages

- 20.1 Where there has been a breach of contract by the defendant, the claimant has a right to an award of compensatory damages which:
- (a) provide a monetary equivalent to the claimant's loss caused by the breach; or
 - (b) put the Claimant into as good a position as if the contract had been performed.

Article 32 - Frustration

- 32.1 A contract is frustrated where, after making the contract, there is such a change of circumstances that performance of the contract would be physically or legally impossible or would otherwise be rendered radically different from that promised.
- 32.2 Article 32.1 shall not apply where the parties to a written contract have, by an express term or an implied term, dealt with the legal effects of a change of circumstances outside their contract, including what might otherwise be a frustrating event, by an express term (commonly referred to as a 'force majeure' clause).