

Thumbs-up Emoji Can Create a Binding Contract

Over 10 billion emojis are sent each day.¹ The “thumbs up” emoji is commonly used as an indication of approval. It seems innocent enough: someone sends you a text that you want to acknowledge and you reply, “👍” without giving it a second thought. This case indicates that use of that harmless looking emoji could result in a binding agreement.

South West Terminal Ltd. v. Achter Land & Cattle Ltd., 2023

The Plaintiff in this case, South West Terminal Ltd. (South West), is a grain and crop inputs company. Kent Mickleborough is a representative of South West who acts mainly as a grain contract purchaser for the company. The Defendant, Achter Land & Cattle Ltd. is a farming corporation owned and operated by Chris Achter. South West has purchased grain from Achter since approximately 2012. The parties had previously confirmed these contracts by text.

Background

On March 26, 2021, Mickleborough sent a text to all South West’s suppliers advertising a price for flax for which South West was prepared to enter into contracts. Mickleborough’s text indicated that South West would pay \$17 per bushel for flax with a delivery period between September and November, 2021. Shortly after sending the text, Mickleborough received a phone call from Bob Achter, Chris Achter’s father, where Bob indicated that Achter wished to enter into an agreement with South West with the terms included in Mickleborough’s text. Mickleborough advised Bob that he would follow up with Chris to finalize the contract; which he did. The only difference with this interaction being that Achter sent the “thumbs up” emoji instead of communicating using words.

South West’s position was that a binding contract had been formed creating an obligation for Achter to sell the flax at the volume and price agreed upon in the text messages and phone conversation. Achter did not deliver the flax in November 2021 and by that time, the price of flax had

increased significantly. South West brought a motion for summary judgment. The damage amount claimed was the difference between the price South West agreed to pay to Achter and the price it had to pay to purchase the flax in November at the elevated cost.

Achter’s position was that by sending the “thumbs up” emoji, Chris was simply acknowledging receipt of the contract and not providing confirmation that he agreed to its terms. An affidavit sworn by Chris stated that he had not been provided with the full terms and conditions of the Flax Contract and he understood that the complete contract would follow by fax or email. Chris swore that he would not have approved the contract without reviewing the terms and conditions to ensure that they contained an “Act of God” clause.

What is the difference between a deferred delivery and a production contract?

A witness for the Plaintiff advised that an Act of God clause in a grain contract is rare because it transfers all the risk of the contract onto the buyer. Typically, the contracts entered into in the grain industry are deferred delivery contracts, not production contracts. In a deferred delivery contract, the buyer agrees to purchase a specific volume of grain at a specific price from the seller at a fixed time. In these types of contracts, the buyer is not buying a specific crop, they are only purchasing a specific quantity of grain at a fixed price from the seller at a specific time. In production contracts, the buyer is buying a particular crop to be grown. Production contracts generally include an Act of God clause which is why they are rare in the industry.

What are the contested issues?

The main issues to be decided were:

1. Should the court grant summary judgment?
2. Was a valid contract formed between South West Terminal and Achter to deliver 87 tonnes of flax in November 2021 for a price of \$669.21 per tonne?
3. Was there a *consensus ad idem* (meeting of the minds/mutual agreement)?
4. Was there certainty of terms?

¹ <https://www.brandwatch.com/blog/6-facts-about-emojis-found-using-new-analysis/>

5. Were the requirements of s. 6 of the Saskatchewan *Sale of Goods Act* (SGA) met?
6. What is the appropriate measure of damages?

What is a Summary Judgment Motion?

A summary judgment motion is a process by which the Court can dispose of a case without a trial. The Judge can either decide in favour of the Plaintiff and grant Judgment or in favour of the Defendant and dismiss the claim. The Court must be satisfied that there is no genuine issue requiring a trial to proceed with a summary judgment motion. If the Judge decides to proceed, evidence is given in writing without having to conduct a trial. The Judge in this case decided that there were no genuine issues requiring a trial so the motion could proceed.

Was a valid contract formed?

In order for a valid contract to be formed, the parties must have a common understanding of the terms of the agreement (*consensus ad idem*). In other words, the parties must intend to create obligations that may be enforced in Court and they both must understand what the duties and responsibilities of the parties are. In this case, the parties disagreed as to whether there was a meeting of minds that would form the basis of the contract. Whether this has happened is to be viewed in accordance with an objective theory of contract formation. The court is to look at “how each party’s conduct would appear to a reasonable person in the position of the other party”. The Judge stated that the test of agreement for legal purposes is whether parties have indicated to the outside world, in the form of the objective reasonable bystander, their intention to contract and the terms of such contract.² Consideration should not be given to what the parties subjectively had in mind but whether their conduct was such that a reasonable person would conclude that they intended to be bound. When determining if the parties intended to contract and the terms of the contract, Courts are permitted to consider the surrounding circumstances, the nature and relationship of the parties and the interests at stake. The Judge in this case decided that South West and Achter had previously established a business relationship that commenced at least as early as 2015 when Mickleborough was employed by South West as a grain buyer. In Mickleborough’s affidavit evidence, he stated:

“I would primarily deal with Chris when negotiating contracts with Achter Ltd. We would typically have a conversation,

either in person or over the telephone, agree on a price and volume of grain, then Chris would ask me to write up the contract and send it out to him. I have done approximately fifteen to twenty contracts with Achter Ltd. during my time with South West. Based on my longstanding relationship with Achter Ltd., Chris had provided me with his cell phone number. Based on my prior experience with Chris, I know that contacting this number will connect me with Chris.”

Mickleborough went on to describe several instances where South West had successfully purchased grain from Achter using the method above. Considering this evidence, the Judge decided that there had been an uncontested pattern of entering into what both parties knew and accepted to be valid and binding deferred delivery purchase contracts on a number of occasions. Accordingly, he found that Chris Achter had approved the contract in the same manner in which he had approved previous contracts, the only difference being that, this time he used an emoji. Considering all of the facts and circumstances he determined that the parties had intended for this contract to be binding as they had with past contracts.

The Judge also found that a 👍 is “an action in electronic form” that can be used to express acceptance as contemplated under *The Electronic Information and Documents Act, 2000*; similar to touching or clicking an icon or spot on a computer monitor to communicate electronically that is intended to express the offer or acceptance.

Achter advanced a defence claiming that the flax contract fails for certainty of terms because the Terms and Conditions had not been sent to him. Achter also contended that the delivery date of “Nov.” was too vague. The Judge decided that the essential terms of the flax contract were contained in the first page that was sent to Chris Achter by text message that included the parties, the property and the price and that the delivery date was not vague because November 2021 was the only logical interpretation based on the previous contracts between the parties. He concluded that the flax contract was not void for uncertainty.

Did Chris’ 👍 emoji constitute a “signature”?

The Judge considered whether a thumbs-up emoji was sufficient to meet the requirements of the SGA which mandates that agreements be confirmed by a note or memorandum of the contract made or signed by the parties for them to be enforceable.

² *The Law of Contract in Canada* (6th ed. 2011), at p. 15; see also S. M. Waddams, *The Law of Contracts* (7th ed. 2017), at p. 105.

The Judge found that the contract was “in writing” and was “signed” by both parties for the purposes of the SGA because there was no dispute that Mickleborough signed on behalf of South West. Further the signature requirement was met by the 🍞 emoji originating from Chris and his unique cell phone.

What is the appropriate measure of damages?

Section 50 of the SGA states that, in a case where damages are claimed for non-delivery, damages are to be assessed by calculating the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered.

Damages were assessed at \$82,200.21 which is the difference between the price offered and agreed upon and the price South West was required to pay for the undelivered flax at the increased price in November.

Takeaways

- Evidence of past performance and review of a previous business relationship may be considered by the Courts when determining if a contract has been formed.
- Emojis, touching a spot on a screen and checking a box are all valid “electronic signatures”.
- Although digital communication is convenient and is becoming increasingly common in business operations, the usual risk management techniques of contractual risk transfer should not be ignored or a valid contract could be deemed to be formed with unknown consequences.
- This case was in Saskatchewan, however, the other provinces have similar legislation concerning electronic transactions which means it has implications for the entire country.