

## South West Terminal Ltd v. Achter Land & Cattle Ltd<sup>1</sup>

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*A Canadian case, so not binding on the English courts; it is of interest though.*

### Coffee Time Summary

- The judge decided, on the facts, that a 👍 'thumbs up' emoji amounted to an acceptance of an offer with the intention of creating a legal relationship supported by consideration. Achter's failure to perform the contract entitled SWT to claim damages (financial compensation) for breach of contract.
- On the particular facts of each case, an emoji may be sufficient to evidence acceptance of an offer, but one should stick to words when negotiating business contracts. It is also probably wise to avoid using popular abbreviations when negotiating contracts unless they have an accepted meaning within your industry.
- A 💩 'poo emoji' is unlikely to evidence acceptance but 😎 'smiley face with glasses emoji' could. It depends on the facts.

### The Background Facts

- South West Terminal (SWT) was a grain and crop inputs company and Achter was a farming corporation owned and operated by a Mr Chris Achter. His father Bob was also involved in running the business.
- SWT acted through a Mr. Kent Mickleborough, its representative.

### History or course of dealing

- Prior to the disputed March 2021 flax contract, the parties had entered a series of supply contracts. These contracts had been agreed in person or over the phone albeit following the COVID-19 pandemic it was more common to do this through an email or text message. In summary, the process was as follows:
  - First, there was a discussion following which Mr Mickleborough (SWT) prepared a contract, signed it and sent a photo of it from his cell phone to Chris Achter, asking, "Please confirm terms of durum contract".
  - Second, Mr Achter would respond with "Looks good", "OK", or "Yup"; and
  - Third, Achter delivered the goods, i.e., the durum wheat.

<sup>1</sup> 2023 SKKB 116 (CanLII)

- So, there was a history or course of dealing between the parties where one can readily see an offer by SWT and acceptance by Achter. If there was any doubt about this, Achter's conduct in delivering the goods evidenced the existence of the contract by its conduct.

### Disputed March 2021 flax contract

- The same process took place in March when Mr. Mickleborough sent a 'text blast' advertising a price for flax that SWT would enter into a contract for. Bob and Chris Achter responded saying they would sell at the SWT price of \$17 per bushel. Mr Mickleborough prepared the contract, signed it and sent a photo of it to Chris Achter asking, "Please confirm flax contract". Mr. Achter response was a 👍 "thumbs-up" emoji.
- Achter did not deliver the flax and by November 2021 flax was trading at \$41 per bushel.

### The claim for damages for breach of contract

- SWT claimed damages of \$82,200.21 for breach of contract, i.e., the non-delivery of the flax, and applied for summary judgment.

### Achter's denial – there was no acceptance by a 👍 'thumbs-up' emoji

- Achter claimed there was no contract because:
  - The terms of the flax contract were not discussed and, in this case, Chris Achter would (in contrast to the durum wheat contracts) have asked for an 'Act of God' clause to protect Achter against being unable to deliver the agreed quantity of flax. In other words, as there was no agreement on the terms of the contract, there could be no concluded contract and the thumbs-up emoji did not change this. This argument was, on the facts, rejected by the judge who also noted that despite what he now claimed, Mr Achter never contacted SWT to discuss the flax contract after March 2021;
  - The full SWT terms were not sent with the photo of the signed flax contract and without these and without being able to review and agree the full terms there was no concluded contract. The thumbs-up emoji did nothing more than confirm receipt of the contract; it did not confirm Achter's agreement to the full terms. Again, on the facts, this argument was rejected by the judge, not least because of the parties' long standing business relationship, i.e., Achter knew what SWT's standard T&Cs were and, in any event, the photo of signed flax contract contained all the essential terms; and
  - The reference to "Nov" delivery date in the photo of the signed flax contract was too vague and, therefore, the contract was void for uncertainty. The judge concluded "Nov" delivery in a March 2021 contract meant November 2021 delivery. So, this argument failed too.

### The judge's decision – what did a 👍 'thumbs-up' emoji mean?

- The judge considered the meaning of a thumbs-up emoji by reference to, "what the informed objective bystander would understand". In doing so he had regard to:
  - a dictionary meaning which was, "it is used to express assent, approval or encouragement in digital communications".<sup>2</sup>; and
  - the cross-examination evidence of what appears in the Google search bar for the thumbs-up emoji, namely, "I approve".

<sup>2</sup> Dictionary.com online: [www.dictionary.com/e/emoji/thumbs-up-emoji](https://www.dictionary.com/e/emoji/thumbs-up-emoji)

- Of course, there was the undisputed evidence of a history or course of dealing where the response to, "Please confirm terms of durum contract" had been met with the response "Looks good", "OK", and "Yup" followed by the delivery of the wheat. Indeed, the same had happened in a June 2021 contract for durum wheat, i.e., 3 months after the now disputed flax contract, when Mr. Achter's response had been "OK". As for the disputed March 2021 contract, the response to, "Please confirm flax contract" had received the thumbs-up emoji.
- Accordingly, knowing all the background facts, the informed objective bystander would conclude the parties had intended to enter into a contractual relationship, i.e., there had been a 'meeting of the minds'. If one stands back it is not difficult to see that all the necessary ingredients of a contract existed, i.e., the parties, the subject matter (87 tonnes of flax by November), consideration (the price per bushel), an offer (photo of signed contract) and an acceptance (thumbs-up emoji). The only problem for Achter was that by November 2021 the price for flax had risen from \$17 to \$41 per bushel, i.e., Achter stood to lose a significant sum.

### Financial outcome

- SWT was granted summary judgment for \$82,200.21 plus interest based on the difference in price, i.e.  $\$41 - £17 = \$24$  per bushel or £944.83 per tonne x 87 tonnes = \$82,200.21.

### Conclusion

- On the facts SWT's success is unsurprising, i.e., there was a long-standing business relationship between the parties where contracts were entered into through a standard process of a discussion, a photo of a signed contract and a text response.
- As for the use of the thumbs-up emoji to signify acceptance of an offer thereby giving rise to contractual rights and obligations, the SWT v. Achter case is another in a long list in which the judiciary have, despite changes in modern business life, upheld commercial contracts. There have been cases on acceptance by facsimile (remember those) and by email.
- Of course, had Mr Achter's response to the photo of the flax contract been 🍌 'poo emoji' one assumes the decision would have been different, but had it been 😎 'smiley face with glasses emoji' it would have been the same. The key point is, how will a court interpret an emoji on the facts of each case? In the SWT v. Achter it was relatively easy, but it might not always be so. Therefore, the advice must be that when negotiating contracts stick to words rather than emojis. 👍 One should also avoid popular abbreviations such as 'LOL' because one former Prime Minister (aka David Cameron) didn't know what that meant which proved a little embarrassing.

If you have any questions or would like any further information, please contact:

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