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New Technology and Contract Formation: The Continuing Evolution of the Common Law

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Case Commented On: *South West Terminal Ltd v Achter Land*, 2023 SKKB 116 (Can LII)

In *South West Terminal Ltd v Achter Land*, 2023 SKKB 116 (Can LII) (*Achter Land*), Justice T.J. Keene stated: "this court cannot (nor should it) attempt to stem the tide of technology and common usage – this appears to be the new reality in Canadian society and courts will have to be ready to meet the new challenges that may arise from the use of emojis and the like" (at para 40).

In *Achter Land*, the court determined that a thumbs up emoji (👍) indicated acceptance of a contract offer, and also constituted a signed endorsement of a written document, meaning it satisfied the requirements of the *Sale of Goods Act*, RSS 1978, c S-1 (*SGA*).

These types of cases raise concerns that allowing emojis to be used to accept offers to contract will lead to a decline in formality in contract formation. This post argues that it is not text messaging (and with it, emojis) that are leading to a decline in formality but rather, there is a broader decrease in formality in language and communication as a whole and legal decisions must necessarily reflect this shift.

Text messaging, where emojis are mostly used, is now an essential method of communication and their increasing entrenchment in our communication and language is inevitable. In fact, in 2015, the Oxford Dictionary chose "😂" as the word of the year.

We can expect more cases in which courts must consider the meaning of different emojis and their effect on contract formation and interpretation. It is also important for contracting parties to know that the meaning and context of the emojis they use may well end up being in issue if, in a text exchange, the parties discuss or agree to a contract that later becomes the subject of a legal dispute.

Case Summary

Facts

Achter Land was a summary judgment application brought by the plaintiff, South West Terminal Ltd ("SWT") against the defendant, Achter Land & Cattle Ltd ("Achter"). SWT claimed the parties had entered into a contract for the purchase and sale of flax. Achter did not deliver the flax and the plaintiff sued for breach of contract and damages. Achter denied entering into the contract and in the alternative, raised the statutory defence in s 6(1) of the *SGA*, arguing that the contract was

unenforceable because there was no note or memorandum of the contract made or signed by the parties.

SWT is a grain and inputs company. Achter is a farming corporation owned and operated by Chris Achter, a separate entity. For the purpose of this post, however, I will refer to both as "Achter".

SWT had previously purchased grain from Achter several times, through deferred grain contracts. Their dealings consisted of Kent Mickleborough, an agent of SWT, negotiating the terms with Achter, then upon reaching an agreement with him, drawing up a written sales contract for a particular grain, signing it, then sending it via text message to Achter to confirm the terms. Achter's confirmation text responses typically consisted of "ok", "looks good" and "yup". On each of these occasions, Achter delivered according to the terms he and Mickleborough had negotiated.

On March 26, 2021, Mickleborough sent a "text blast" to all his SWT clients, including Achter, offering to purchase flax seed at $17.00 per bushel, with delivery in the fall. Shortly following the text blast, Mickleborough called Achter to discuss Mickleborough's text. On that call, Achter agreed to sell SWT flax seed at $17.00 per bushel, with delivery in November 2021. The court noted that Mickleborough told Achter that he would "write up the contract and send it to him by text message and ask him to confirm the contract via text when it came through" (at para 23). Achter agreed.

Mickleborough drafted the contract, signed it, took a picture of it, and texted it to Achter with the message "Please confirm flax contract". Achter texted back "👍".

Achter did not deliver the flax. On November 30, 2021, the price for flax was $41.00 per bushel. SWT sued Achter for damages of $82,200.21 plus interest and cost.

Achter argued that the 👍 emoji meant that he was confirming receipt of the contract, not that he agreed with its terms. In other words, he argued there had been no meeting of the minds. He also argued that the contract failed for certainty of terms and that it did not meet the *SGA* requirements.

Decision

On the issue of contract formation, the court dealt with three sub issues: consensus ad idem, certainty of terms, and the requirements of the *SGA*.

a. Consensus ad idem

The court noted that a contract can only be formed when there is intention to create legal relations, an offer, acceptance, and consideration. The objective theory of contract formation determines whether these elements have been met, looking not at what the parties subjectively believed, but rather, at what the parties "indicated to the outside world, in the form of the objective reasonable bystander" (*Achter Land* at para 18). In other words, the courts must consider whether a reasonable person, having observed the parties' conduct, would conclude that they had reached a contract. In answering this question, the court can consider the surrounding circumstances, including the nature and relationship of the parties and the interests at stake (*Achter Land* at para 18).

In the parties' communications dating back to 2012, prior to the March 2021 exchange, the court found "an uncontested pattern" of entering into what the parties accepted to be binding delivery contracts on many occasions. It determined that the parties "clearly understood these curt words [in Achter's text responses] were meant to be confirmation of the contract and not a mere acknowledgement of the receipt of the contract", with proof of this being that Achter went on to deliver the grain as contracted (at para 22).

In the March 2021 exchange, the court noted that the exchange between Mickleborough and Achter was very similar to their previous exchanges but that instead of the "curt words", Achter had used the 👍 emoji. After canvassing the accepted meanings of the 👍 emoji, the court concluded that Achter had approved the contract, thereby entering into a binding deferred delivery contract with SWT (at paras 36, 42).

b. Certainty of terms

The court then dealt with the issue of certainty. An agreement can only be enforceable if the parties agree on the essential terms; a contract will not be formed if essential terms are uncertain.

Achter argued that the agreement was too uncertain to be binding because Mickleborough did not text a picture of the "General Terms and Conditions" found on the back of the contract and because the delivery date was stated to be "Nov".

Justice Keene did not accept these arguments, noting that contract interpretation requires consideration of both the words of the contract plus the factual matrix, as in, the surrounding circumstances at the time of contract formation (*Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53 (Can LII) (*Sattva*) at para 46). An application of the factual matrix showed that the same contract with the same terms had been entered into repeatedly by these two parties, who had a longstanding business relationship. Also, the essential terms of the contract were contained in the first page of the contract Achter received, and which he confirmed (at para 49).

c. SGA

Achter argued that the terms of the *SGA* rendered the contract unenforceable, as it was not in writing nor signed.

The court noted that the common law had developed to hold that emails are sufficient to meet the requirements of contracts being in writing and signed and that clicking on an "I agree" icon constituted an electronic signature (at para 59). It went on to find that the flax contract was "in writing" and "signed" by Mickleborough for the purposes of the *SGA*. It also found that a 👍 emoji, while a non-traditional means to "sign" a contract, nonetheless constituted a valid signature, as it identified the signator (Achter used his cell phone number) and it conveyed Achter's acceptance of the contract (at paras 59-63).

Commentary

This post will address the use of emojis in contract law as they raise two distinct issues: how courts determine the meaning of emojis, and the implications emojis raise for the formality required in contract formation.

Emojis and Their Meanings

One of the prevalent issues when dealing with emojis is how each emoji should be interpreted by courts. In *Achter Land*, the court had to interpret what the 👍 emoji meant. It referred to Dictionary.com, an online dictionary, which defined the 👍 emoji as being used "to express assent, approval or encouragement in digital communications, especially in western cultures".

In *Blom v Blom*, 2021 BCSC 18 (Can LII), the court had to assess the 😂 emoji. The claimant argued that the 😂 emoji had meant "hilarious" but the court found it to be "mocking" because it was in response to the respondent's serious allegation of duress and the claimant's reaction was "certainty dismissive of the respondent's account" (at para 59).

In *Achter Land*, counsel for the claimant argued that allowing the 👍 emoji to signify identity and acceptance "would open the flood gates to allow all sorts of cases coming forward asking for interpretations as to what various emojis mean… [leading courts to be] inundated with all kinds of cases…" (at para 40). The court did not dispute this point, only noting that this was a public policy argument, that these emoji cases are still "novel", but also that the court cannot "attempt to stem the tide of technology and common usage", that this is "the new reality in Canadian society" and that courts have to meet these challenges (at para 40). And indeed, given the number of emojis we have and their broad range of meanings, which indicate emotions, activities, food choices, locations, holidays, weather, and much more, the courts will likely be engaging in a lot more interpretation exercises.

Use of Emojis in Contract Interpretation → Decreasing Formality?

The remarkableness of the common law is that it adapts both by changing and staying the same. The legal test we use to determine whether a contract has been formed is unchanging: we rely on the reasonable person. The description of the identity of the reasonable person is also unchanging: this person is one who is appropriately informed of societal norms. But the actual identity of the reasonable person does change to reflect the evolution of language and methods of communication.

The reasonable person would know that there has been a widespread use of and reliance on text messaging, and with it, the use of emojis. They would also know that text messaging is less formal than other written methods of communication. In fact, they would know that we should not analogize text messaging to written communication, but to oral communication because it is informal, like talking. . And oral communication can lead to contract formation if the evidentiary difficulties are overcome. Individuals rarely use full sentences while texting. They use acronyms instead of entire words (for example, "lol" instead of "laughing out loud", "idk" to indicate "I don't know", "omg" to indicate "oh my god" or "oh my goodness"). Text messages do not usually contain proper grammar, capitalization, or punctuation. And text messages frequently include emojis.

That is not to say that the impact of decreasing levels of formality in our communications on contract formation is necessarily an entirely positive development. In his post on this same case, Michael Ilg likens contract formality to a "speed bump in the commercial marketplace"; he points out that the purpose of formality is to provide a sober second thought, allowing the contracting parties to understand the weight of what they are about to undertake.

I agree. These formalities serve an important purpose, and as Michael Ilg also notes, the reason they exist does indeed continue to persist. However, he also says that removing these requirements "may equate to modernization and liberalization of contracting… which… all sound commendable" but notes that there is "something concerning about the courts removing too many inherited and legislated formalities to contract formation". This statement implies that courts are eliminating these formalities in order to keep contracting requirements modern. It is here where we slightly diverge.

Courts are not paving the way to modernization of contracting, nor should they; courts are simply making sure that our reasonable person test is keeping up with modern communication. Is it better to have more formality in contract formation? Without a doubt. But the courts cannot impose more formality when language itself has become so informal. The increasing use of text messaging as a whole signals a decrease in the level of formality in our communications. The fact that courts are considering and accepting these communications is not only *not* concerning, it is necessary. Our reasonable person test must reflect our communication, however formal or informal it happens to be right now.

Of course, this may be a situation where the pendulum, having swung too far, must eventually swing back. In other words, once formality ceases to exist, individuals will find themselves in contractual relationships after a simple "yup" or "ok" or "👍". As we saw in *Achter Land*, it seems we are already here.

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