Top 10 commercial decisions of 2023: What Canadian businesses need to know

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We've examined some of the most significant commercial decisions of the last year. From a disagreement between a landlord and a commercial tenant to contract wordings and agreements by emoji, these cases serve as important guidelines and examples for businesses to take note of. Our commercial litigators stay on top of commercial cases and decisions to help you understand the impact these outcomes could have on your business.

Williams v. Amazon Inc., 2023 BCCA 314

(Jake Cabott, Amy Laverdure and Jessica Hennings)

Introduction

The Supreme Court of Canada's decision in *Uber v. Heller*, 2020 SCC 16, created questions over whether mandatory arbitration clauses between parties with uneven bargaining relationships are ever enforceable. In a notable development in post-*Uber* jurisprudence, the British Columbia Court of Appeal in *Williams v. Amazon.com Inc*., 2023 BCCA 314 decided that mandatory arbitration clauses will be presumptively enforceable even where there is a standard form consumer contract.

What you need to know

- The *Arbitration Act* shows clear legislative intent in favour of the presumptive enforcement of arbitration agreements.
- Unconscionability requires there to be an unequal bargaining relationship and a resultingly uneven bargain. Where an arbitration clause is drafted in a way that supports the weaker party in having their complaints heard, it will not be unconscionable.
- Arbitration clauses barring class action claims are enforceable, as nothing in the *Arbitration Act* specifically preserves the right to initiate a class action.

Background

The appellant's action began in the British Columbia Supreme Court after he filed a claim against Amazon alleging violations of the *Business Practices and Consumer Protection Act*, seeking relief under the *Competition Act* and other common law remedies. The appellant was a bookseller who alleged that Amazon's bookselling platform favoured books distributed by Amazon itself at the expense of third-party booksellers. The appellant intended to certify his action as a class, bringing in other third-party sellers on Amazon.

In 2015, the appellant created an account with Amazon.ca which allowed him to purchase goods on the website. To do this, he was required to accept certain terms and conditions imposed by Amazon. The conditions included a mandatory arbitration clause selecting United States law for all disputes other than small claims actions or actions involving an alleged infringement intellectual property rights. Additionally, the clause included an agreement to conduct claims on an individual basis, essentially waiving the right to initiate a class action proceeding.

Before the application on the certification of the class could be heard, Amazon brought an application for a stay of proceedings under s. 15, now s. 7, of the *Arbitration Act*. The lower court allowed the stay application, allowing the claims under the *Consumer Protection Act* to continue, following the decision in *Seidel v. Telus Communications Inc.*, 2011 SCC 15, that found the *Consumer Protection Act* effectively legislated claims out of arbitration.

On appeal, the appellant argued that the arbitration clause ought not be enforced because it was 1) incapable of being performed because of the *Competition Act* claim; and (2) void because of unconscionability and public policy concerns.

Applying the band-new *Uber* framework

At the time of the trial judge's decision, *Uber* had only reached the Ontario Court of Appeal. While the trial judge had applied the Ontario court's analysis of *Uber*, the Court in this decision had the benefit of expanded guidance from the Supreme Court.

While the Court found that the trial judge's analysis on unconscionability and public policy was not as robust as required by *Uber*, the decision contained no palpable and overriding errors and should not be displaced. The Court found that the trial judge had appropriately addressed the considerations of power imbalance in bargaining, the disproportionality between the costs of arbitration and the value of the appellant's claim, and the potential for unfairness arising from the use of a standard form contract.

Unconscionability requires both an unequal bargaining relationship *and* a problematic bargain

The Court accepted the appellant's position that there was an unequal bargaining relationship between Amazon, an industry-leading company with significant financial resources, and third-party booksellers. However, the Court found that despite the unequal bargaining relationship, the arbitration clause was not unconscionable.

The Court highlighted the differences between the appellant and the plaintiff in *Uber*, who was reliant on Uber for his livelihood. It found that the appellant was not similarly reliant on Amazon and therefore had a greater amount of choice when entering into the arbitration agreement.

Additionally, the Court found that despite the bargaining imbalance, the arbitration agreement itself was not disproportionately in favour of Amazon. The Court emphasized that Amazon had tailored its arbitration clause, allowing consumers to pursue an action in Small Claims rather than proceed to arbitration, would reimburse up-front administrative costs associated with arbitration, and did not require arbitration over intellectual property claims. The Court found that this tailoring allowed Amazon's users greater flexibility in having their complaints heard, compared to the rigid and costly process in *Uber*.

Unequal bargaining relationships do not automatically make a contract contrary to public policy

The Court found that to determine whether the clause was contrary to public policy, it must look not only at the existence of an unequal bargaining relationship, but to the context of the relationship, the appellant's degree of vulnerability, and the nature of the transactions at issue.

The Court rejected the appellant's argument that mandatory arbitration was contrary to public policy because it deprived him of relief under the *Competition Act*, finding that there was nothing in the *Competition Act* that prevented an arbitrator from adjudicating a claim under it.

Furthermore, the Court found that the provisions in the arbitration clause that barred class actions proceedings were not contrary to public policy. The Court considered the legislative framework set out by the *Arbitration Act* and found that it was overwhelmingly in favour of the enforcement of arbitration agreements, establishing a "presumption of arbitral jurisdiction", that displaced any right to a class proceeding that might exist.

Key takeaways

In the wake of *Uber*, the Court of Appeal's decision in *Williams* shows that despite unequal bargaining relationships, standard form contracts with arbitration clauses are presumptively enforceable. Notably, where the stronger party takes steps to accommodate the weaker in the arbitration process and the weaker party has a meaningful choice when entering the contract, a mandatory arbitration clause is not unconscionable. Parties drafting arbitration clauses should be mindful of any dominant position they may hold and consider creative drafting to lessen the imbalance of power.

Williams also demonstrates that British Columbia continues to be an arbitration-friendly jurisdiction, with courts treating arbitration agreements as presumptively enforceable absent legislative intent. Given the strong preference for arbitration in the *Arbitration Act*, this presumption is unlikely to be easily displaced.

Niagara Falls Shopping Centre Inc. v. LAF Canada Company, 2023 ONCA 159

(Roberto Ghignone and Abubaker Ahmed)

Introduction

Amidst the continuing tumultuous fallout of the COVID-19 pandemic, a legal skirmish between a landlord and their commercial tenant, shed light on the application of force majeure clauses and the intricacy of contractual interpretation.

In *Niagara Falls Shopping Centre Inc. v. LAF Canada Company*, 2023 ONCA 159, the Ontario Court of Appeal addressed the application of a force majeure clause in a commercial lease agreement within the context of the COVID-19 pandemic and the government mandated closure of all non-essential businesses.

This case, emblematic of the challenges faced by countless businesses during the pandemic, provides a reminder that the precise wording used in a force majeure clause will determine the obligations of each party.

What you need to know

- When the Ontario government declared a state of emergency and mandated closures of non-essential businesses due to the COVID-19 pandemic it triggered the application of the *force majeure* clause.
- The Niagara Falls Shopping Centre Inc. ("the Landlord") and the fitness facility leased by LAF Canada Company (the Tenant) were forced to close. At issue was the interpretation of the *force majeure* clause. The Ontario Superior Court initially ruled in favor of the Landlord. The Tenant appealed.
- The Court of Appeal focused on several aspects of the Force Majeure clause in its review of the lower court judge's interpretation of the clause. It was acknowledged by both parties that the Covid-19 pandemic prevented both parties from performing their obligations under the Lease. At issue, however, were the excusing provisions and the curative provisions
- The excusing provision stated that performance would be excused and "such act will be extended for an equivalent period". The Court of Appeal highlighted that the effect of this clause was that performance of the act would be "excused" for the duration of the delay caused by the force majeure event. This provision emphasized the temporary nature of the excuse from performance obligations.
- The Court determined that the force majeure clause excused the landlord from providing the premises to the tenant during the government-mandated closure periods. However, it also held that the lease term should be extended by the closure period, ensuring that the tenant would ultimately receive the full benefit of the lease term.
- The second was that delays or failures "which can be cured by the payment of money" will not be considered force majeure events. As a result, despite the financial challenges faced by the tenant due to the closures, the clause explicitly

excluded "financial inability" as a force majeure event. This provision reinforced the tenant's obligation to pay rent during the closure periods.

Background

Niagara Falls Shopping Centre Inc. “the Landlord”, owns a shopping plaza in Niagara Falls, Ontario, which includes a fitness facility leased by LAF Canada Company “the Tenant”.

In March 2020, the Ontario government declared a provincial state of emergency due to the COVID-19 pandemic and mandated the closure of all non-essential workplaces, including fitness facilities. This government order significantly disrupted the tenant's business operations, leading to financial challenges.

In May 2020, the landlord and the Tenant entered into a rent deferral agreement that provided limited rent relief from April to June 2020. Pursuant to that agreement, 50 per cent of the base rent was forgiven and 25 per cent was deferred. After the rent deferral agreement expired, the Tenant paid rent until the end of 2020, even though the fitness club was permitted to re-open only with limited capacity. When the Ontario government reimposed the lockdown, effective Dec. 26, 2020, the Tenant refused to continue paying rent. The Landlord responded by bringing an action for all unpaid rent and various associated charges.

The tenant sought relief from paying rent during the periods of government-mandated closures, arguing that the force majeure clause in the lease agreement should excuse them from their rent obligations. The landlord, on the other hand, maintained that the force majeure clause only exempted them from providing the premises during closure periods but did not relieve the tenant from paying rent.

Key takeaways

This decision underscores the importance of careful legal drafting in commercial contracts and agreements. It emphasises the significance of the specific wording utilized in the various components of the *force majeure* clauses. Courts will and give meaning to all aspects of the clause including any excusing and curative provisions. As such, parties should ensure that their force majeure clauses accurately reflect the allocation of risk intended by the parties.

Markowich v Lundin Mining Corporation, 2023 ONCA 359 and *Peters v SNC-Lavalin Group Inc*, 2023 ONCA 360

(Natalia Vandervoort)

Introduction

On May 24, 2023, two separate decisions were released by the Court of Appeal for Ontario that provide guidance on the requirement to disclose a “material change” under securities law.

Both cases were appeals from decisions that dismissed the motion for leave under section 138.8 of the *Securities Act*, and the motion for leave to proceed under the *Securities Act*. In both cases, the motion judge was not satisfied that there was a reasonable possibility that the plaintiff could succeed at trial by establishing that there was a material change.

Background

In *Lundin Mining,* there was a rockslide and resulting pit wall instability at a mine operated by Lundin. The rockslide was not disclosed for approximately one month. Once disclosed, Lundin’s share price on the TSX declined by 16 per cent.

In *SNC Lavalin*, SNC did not disclose a phone call with the Department of Public Prosecutions Services of Canada, in which SNC was advised that it would not be invited to negotiate a remediation agreement. Once SNC issued a press release disclosing the phone call, its securities dropped by 13 per cent.

What you need to know

In *Lundin Mining,* in a unanimous decision, the Court of Appeal for Ontario adopted a generous interpretation of “change in the business, operations or capital”, and granted leave for the action to proceed. The issue of class action certification was remitted to the Superior Court.

The Court confirmed the following two-step test to establish a “material change”: (1) whether there has been a “change” in the risk of the issuer’s “business, operations or capital”, and (2) whether the change was “material” in the sense that it would be expected to have a significant impact on the value of the issuer’s shares.

In the first step of the test, the Court noted that there is no assessment of the magnitude of the change. It is only at the second step that the court should consider the materiality or magnitude of the change. The Court also made it clear that a material “change” cannot be external to the company.

In *SNC Lavalin*, the Court of Appeal for Ontario dismissed the appeal and held that the phone call was not a “change in business, operations or capital”. The phone call between SNC and the Department of Public Prosecutions Services of Canada did not change the risk of prosecution faced by SNC. This was demonstrated by the fact that SNC continued to negotiate a remediation agreement for over one month after the phone call. The Court emphasized that the meaning of “change” depends on the specific facts of each case and there is no clear-cut rule as to what will qualify as a “change”.

Key takeaways

- A determination of whether there has been a change in the “risk” faced by a company is highly contextual and fact specific.
- It is important for issuers to engage counsel early, as even a short delay in reporting can lead to potentially significant consequences.
- The Court of Appeal’s decisions confirm the two-part test for determining whether there has been a “material change” under the *Securities Act*. The test consists of two distinct inquiries.
- A broad interpretation of material change infuses a heightened sense of unpredictability into what could be considered a material change.

Boal v International Capital Management Inc, 2023 ONCA 840

(Natalia Vandervoort)

Introduction

This December 2023 ruling from the Court of Appeal for Ontario was an appeal from one of the first decisions to consider whether Client-Focused-Reforms made it easier for a plaintiff to establish a fiduciary duty between a client and financial advisors.

Background

International Capital Management (ICM) was the Appellant’s investment advisor. ICM presented the Appellant with the opportunity to invest in a promissory note- which she did for approximately $100,000. ICM did not disclose that they owned 75 per cent of the promissory note shares and that it was a high-risk investment.

The Appellant initiated a class action proceeding, representing 170 ICM clients who invested in the promissory notes. One of the claims was for breach of fiduciary duty to the proposed class.

Prior to being heard at the Court of Appeal, the certification motion was dismissed by the certification judge, and that ruling was upheld by the Divisional Court. The Divisional Court stated that the claim for breach of fiduciary duty was entirely based on the Mutual Fund Dealers Association of Canada’s rules and bylaw, and therefore did not meet the requirements for establishing an ad hoc fiduciary relationship.

What you need to know

The Court of Appeal found that the claim disclosed a cause of action for breach of fiduciary duty, based on the five factors outlined by the Ontario Court of Appeal in *Hunt v TD Securities Inc*: vulnerability, trust, reliance, discretion, and professional rules/codes of conduct.

First, it was pled that the defendants violated their professional duties as members of the Mutual Fund Dealers Association of Canada. Second, they exercised unilateral

discretion by reviewing the class members' financial plans and choosing who to recommend the investment in the promissory notes to. Third, the defendants controlled all information about the investments and chose what to reveal about it, rendering the class vulnerable to the defendants' discretion. Fourth, the proposed class had long standing relationships with the defendants, and the right to trust their financial advisors and should not have to protect themselves from the advice and recommendations of their financial advisors. Fifth, the class relied on the accuracy of the information from ICM, including the level of risk in the investment.

This case was remitted back to the Superior Court for a fresh determination on the common issues and preferable procedure certification criteria.

Key takeaways

- This may open the door to increased litigation in relation to fiduciary duties between advisors and non-managed account clients, including class actions.
- This case was decided on a pleadings motion and the final determination of the issue has not yet been made.

CNOOC Petroleum North America ULC v ITP SA, 2023 ABKB 689

(Rodney A. Smith, Andrew Pozzobon and Taylor Kemp)

In *CNOOC Petroleum North America ULC v ITP SA*, 2023 ABKB 689, the Court of King's Bench of Alberta considered an application to produce various documents that were created during the plaintiff's investigation of a pipeline failure, including an investigation report.

Read the full insight to learn more.

Impact Assessment Act, 2023 SCC 23

(Andrew Pozzobon)

On Oct. 13, 2023, the Supreme Court of Canada issued its highly anticipated opinion in Reference re *Impact Assessment Act*, 2023 SCC 23 (the IAA Reference). At issue in the IAA Reference was the constitutionality of the *Impact Assessment Act* (the IAA), which is a significant piece of federal environmental legislation that purports to govern when, and on what basis, certain projects are subject to federal oversight and regulation.

Read the full insight to learn more.

Unjust enrichment: Physicians' Dialysis Center Inc. v Credit Valley Hospital, 2023 ONCA 402

(Roberto Ghignone and Carl Farah)

Unbeknownst to some doctors at the CVNA clinic, a group of their partners used an organization called PDC to secretly flow funds themselves while they provided nephrology services under an agreement with a local hospital. In the wake of this discovery, the two doctors who had been left out sued to recover funds. The plaintiffs were successful at trial, and this was upheld on appeal.

The Court of Appeal for Ontario found that the doctors behind PDC had unjustly enriched themselves at the expense of the remaining doctors and that the head of the nephrology department had breached his fiduciary duties in setting up this scheme. This decision serves as a reminder that contract interpretation is to be performed to give rise to the objective intentions of the parties and that persons in a position of trust have a legal obligation to act in the best interests of their clients.

What you need to know

- Drs. Wu, Wong and Wadgymar founded a partnership nephrology clinic called CVNA where they provided nephrology services to patients. These doctors also treated patients at a local hospital. Over time, Drs. Kim, Perkins, and Boll joined the CVNA partnership. All the partners contributed, based on their interest in the partnership, to CVNA's overhead expenses. Drs. Wu, Wong and Wadgymar also founded a separate organization called PDC which had as one of its goals performing research.
- After provincial funding was offered to the hospital to provide a nephropathy clinic to hospital patients, the hospital and Dr. Wu, who headed the nephrology department at the hospital, reached an agreement. The terms were that the hospital would house their new nephrology clinic at CVNA and compensate the physicians for overhead expenses.
- The terms were that the hospital would house their new nephrology clinic at CVNA and compensate the physicians for overhead expenses. The internal memo to the hospital did not specify to who payment should be made but Dr. Wu advised them to make payments to PDC. Later, the parties reduced their understanding to a Memorandum of Understanding (MOU) that only identified the payees as the "Nephrologists". The MOU set out that the hospital would reimburse the Nephrologists based on their clinical workload.
- The Court of Appeal upheld the trial judge's findings that the use of the word "Nephrologists" was a reference to the CVNA nephrologists who also provided services at the hospital. Further, the Court noted that only reason that PDC received the payments from the hospital was because of Dr. Wu's request and not because this was included in the MOU.

Background

Drs. Wu, Wong and Wadgymar, Kim, Perkins, and Boll were partners in a nephrology practice (CVNA). All the CVNA partners contributed, based on their interest in the partnership, to CVNA's overhead expenses. The premises that housed CVNA was owned by various corporations that were ultimately linked back to Drs. Wu and Wong. Drs. Wu, Wong and Wadgymar also founded a separate organization called PDC which had as one of its goals performing research.

Drs. Perkins and Boll learned, by chance, that one of their partners were receiving funds from Dr. Wu. Later, Drs. Perkins and Boll started two separate but almost identical claims alleging unjust enrichment as against the remaining doctors, the hospital and PDC for their share of the funds paid by the hospital.

To establish unjust enrichment, Drs. Perkin and Boll were required to establish that (1) the defendants were enriched; (2) they were correspondingly deprived; and (3) that there was no legal reason for the benefit and corresponding deprivation.

At trial, the Court sided with Drs. Perkins and Boll and found that the funds should have been paid to each of physician partners of CVNA. The Court also found that the only reason the hospital paid the funds to PDC was because Wu, as the head of nephrology, had requested them to do so.

The defendants appealed, but their appeal was dismissed.

Key takeaways

This case is a reminder that the words of a contract will be interpreted in light of the surrounding circumstances to identify the objective intentions of the parties. In this case the use of the word "nephrologists" rather than a specific partnership meant that the reimbursements for overhead were intended to be paid to all nephrologists rather than a subset. Additionally, this decision serves as a reminder that persons in positions of trust have an obligation to act in the best interest of those whose interests they are representing.

Ponce v. Société d'investissements Rhéaume ltée, 2023 SCC 25

(Antoine Gamache)

Introduction

This case gave the Supreme Court of Canada (the SCC) the opportunity to clarify, under Québec civil law, the intensity of the contractual obligation to abide by the requirement of good faith. More importantly, in this case, the Court was allowed to clarify the extent of the information that must be disclosed during the pre-contractual phase in compliance with the requirement of good faith. Also, the SCC provided guidance regarding the disgorgement of profits under Québec civil law.

What you need to know

- In a contractual relation, a duty of good faith, from which arises a duty of information and transparency, exists under article 1375 of the *Civil Code of Québec* (the CCQ).
- The parties to a contract have an obligation to reasonably consider the other party's interests in good faith. This can result in positive obligations such as a duty to inform.
- Knowing a decisive information that the other party to a contract does not know might create a positive obligation of information as detailed by the SCC in *Bail*[1].
- Even if disgorgement of profits without regard to injury may not be an appropriate remedy, because it is not in keeping with the compensatory function of civil liability, when the breach of the good faith obligation prevents the plaintiff to prove its damages, there is « a rebuttable presumption that the […] lost advantage is equivalent to the profits unjustly realized ».

Background

This case involves the sale by a group of shareholders of their shares to the two presidents of the company. At the time of the sale, the said two presidents did not disclose to the shareholders that Industrial Alliance was interested in buying the whole company at a higher price. Upon learning that the two presidents had ultimately sold their shares to Industrial Alliance, while making a substantial profit, the shareholders filed a motion to institute proceedings for damages in the Superior Court, claiming approximately $24 million as damages.

These damages allegedly represented the profits they would have obtained by selling their shares at the price paid by Industrial Alliance. They claimed with success that the presidents violated the obligation they had to abide by the requirements of good faith by concealing Industrial Alliance's interest in the company.

Good faith, loyalty and transparency

The obligations of good faith, loyalty and transparency were contractually implied through the application of articles 1434 and 1375 *Civil Code of Québec*, which provides, *inter alia*, that the parties to a contract must conduct themselves in good faith both at the time the obligation arises and at the time it is performed or extinguished.

Under article 1434 CCQ, the SCC determined that the nature of the presidents' incentive pay agreement entered into by the shareholders and the presidents (the Presidents' Agreement) entailed an implied obligation to inform, which required the presidents to provide the shareholders with all information relevant to making an informed decision about the sale of their shares.

Under article 1375 CCQ, the Court explained that through the combined effect of arts. 1375 and 1434 CCQ, good faith performance is an implied obligation that by law must be included in a contract. This implied obligation may result in a duty to inform.

Applying the test previously laid out by the SCC in *Bail*, the SCC ruled that (1) the presidents knew about Industrial Alliance's interest and the value of this information; (2) the information had a decisive impact on whether the shareholders would sell their shares and at what price; and (3) the shareholders could not inform themselves about the Industrial Alliance's interest, and a relation of trust existed between the presidents and the shareholders. Since the three criteria of the test developed in *Bail* were met, the SCC ruled that the presidents had to disclose the interest expressed by Industrial Alliance in acquiring the company.

Therefore, when the presidents chose not to disclose the interest of Industrial Alliance they failed to comply with their obligations to the shareholders.

Damages – Disgorgement of profits

The SCC also had to determine to appropriate remedy in the circumstances and reiterated the cardinal rule governing the award of damages under Québec civil law, which is that the damages granted to the shareholders should compensate them for the gain lost as a result of the fault in order to place them as if the presidents had not failed their obligations.

According to the SCC, such mechanism only applies « where a person is charged with exercising powers in the interest of another ». Hence, the disgorgement of profits would not be possible in the case of a simple breach of the duty of good faith. The principle set out in article 1611 CCQ then applies: the shareholders can be compensated for the gain lost.

However, nothing prevents the courts from using the profits made by the wrongdoer to establish the plaintiff's lost gains, when the violation of the good faith obligation prevents the plaintiff to prove its damages. In fact, applying the Court of Appeal of Québec's decision in *Baxter*[2], the SCC found that such a situation « gives rise to a rebuttable presumption that the shareholders' lost advantage is equivalent to the profits unjustly realized by the presidents »[3]. Since the presidents do not rebut the presumption, the damages awarded are equal to the profits unjustly realized.

Key takeaways

This case has been the occasion for the SCC to clarify the obligation of good faith in a contractual context. In fact, it confirmed a test that determines which information falls under the duty to inform. Moreover, this court rejected the disgorgement of profit's applicability for compensation purposes, while allowing a presumption when the breach of good faith prevents the plaintiff from proving its damages.

[1] *Bank of Montreal* v. *Bail Ltée*, [1992] 2 SCR 554 (*Bail*).

[2] *Biotech Electronics Ltd*. v. *Baxter*, [1998] R.J.Q. 430 (C.A.) (*Baxter*).

[3] *Ponce* v. *Société d'investissements Rhéaume ltée*, 2023 SCC 25, at para. 11.

South West Terminal Ltd. v. Achter Land & Cattle Ltd., 2023 SKKB 116

(Jake Cabott, Amy Laverdure and Jessica Hennings)

Introduction

Technology and its usage have increased drastically over the last several years and this is a reality that cannot be ignored. In this case, the use of emojis is at the crux of this breach of contract case. In this novel decision, the Court recognized the emergence of technology and looked towards a number of factors to determine the meaning of a thumbs up emoji sent in response to photo of a contract. This decision will have a significant impact on the Canadian Courts' future consideration of non-text communications, which is certain to become more common and create more issues.

What you need to know

- Non-text communications, such as emojis, may signify a party's acceptance with the terms of a contract and constitute a signature to a contract.
- When interpreting whether party's entered into a contract through non-text communications, the Court will engage in the normal objective reasonable bystander test to determine the parties intention to contract and its terms.
- The Courts may also consider surrounding circumstances and patterns of behaviour between the parties to determine whether the parties have entered into a contract.
- The Courts are aware of the evolution of technology and the challenges that it brings, but are prepared to address these challenges that may arise.

Background

South West and Achter Land & Cattle Ltd. (ALC) had a longstanding business relationship in which South West would purchase grain through ALC several deferred grain contracts since 2012. The details of these contracts were typically discussed informally over the phone or in person and, once the parties came to a consensus on the terms, South West would send a written copy of the agreement to a certain ALC representative, typically via email or text message, at which point ALC would communicate its acceptance and then deliver grain in accordance with those contracts.

For example, in the past, South West's representative would send a photo of the front side of a one-page contract to the ALC representative with a text message asking ALC to confirm the contract. The contract page in the photo would contain terms outlining pertinent details of the contract, such as the price and delivery period, while the reverse page would contain the standard boiler plate terms that remained the same. In response to South West's message requesting confirmation of the contract, ALC would send a message communicating its acceptance, which previously included messages like "looks good", "ok" and "yup". For years, the parties had no issues with this manner of contract formation until 2021.

In March 2021, South West's representative texted ALC's representative a message containing details of flax prices and certain months for delivery. This text message initiated a call between South West and ALC in which the terms of a contract were discussed. Similar to the past, after the parties agreed to the terms, South West drafted the agreement with a deliver period of "Nov" and sent a photo of the front page of the contract asking ALC to confirm. In response to South West's text message, ALC's representative texted a thumbs up emoji " ".

At no point between sending the thumbs up emoji and the November delivery date, did ALC contact South West to discuss the contract except in September 2021 to discuss a possible crop failure. Despite all of these circumstances, ALC did not deliver the grain in accordance with the contract and South West sued it for breach of contract.

ALC denied it entered into the contract with South West, or in the alternative, that such a contract was unenforceable under the *Sale of Goods Act* as there was no note or memorandum of the made and signed by ALC. Rather than communicating acceptance of the contract, ALC suggested that the thumbs up emoji was merely an acknowledgement of receipt of the contract.

Patterns of behaviour will be considered in the interpretation of non-text communications

The key issue in this case relates to the "meeting of the minds" component necessary for the formation of a contract. Specifically, the parties dispute the meaning of a thumbs up emoji in the context of this case. As such, the Court had to determine whether an objective reasonable bystander would believe the thumbs up signified the parties' intention to contract in accordance with the terms set out. The surrounding circumstances, including the relationship between the parties may also be considered.

In this instance, the ALC exhibited a pattern of behaviour when negotiating its contracts with South West that clearly indicated it was aware the contract at issue was valid and binding. ALC had performed on past contracts where a brief one-to-two-word response was provided to South West's request to confirm the contract. Much like this case, there was also no evidence that suggested ALC was left wondering about any of those previous contracts in which they performed and were paid. ALC had clearly intended such informal communications to signify acceptance.

The Court also considered the Dictionary.com meaning of the thumbs up emoji, which indicated "it is used to express assent, approval or encouragement in digital communications, especially in western cultures." Although the authority of this definition was unclear, it "seem[ed] to comport with [the Judge's] understanding from [his] everyday use – even as a late comer to the world of technology." As the test requires the understanding of an objective reasonable bystander, ALC's understanding of the thumbs up emoji was not considered.

ALC also argued the interpretation of the thumbs up emoji would open the flood gates and ask the Court to interpret several other emojis, including and . This argument was not accepted as the Court must recognize the emergence of technology and the new challenges, they may bring rather than ignore it.

In light of this, the Court held the use of the thumbs up emoji in this case meant ALC accepted the contract with South West and the parties' had a meeting of the minds.

A signature was not necessary to express acceptance of the contract

Under the circumstances of this case, much like clicking an icon on a webpage or another electronic communication, the thumbs up emoji was an action in an electronic form that may be used to express acceptance. In particular, the thumbs up emoji is an action in electronic form as defined by the *Electronic Information and Documents Act*.

ALC's argument that an actual signature was an essential component for the identity of a party accepting the terms of a contract was not persuasive and not accepted. The thumbs up emoji was also sufficient to constitute a signature as required under the *Sale of Goods Act*, which states the contract must be in writing an signed. As electronic actions denoting acceptance under the *Electronic Information and Documents Act* have been accepted as valid signatures under the *Sale of Goods Act*, the thumbs up emoji was sufficient.

The terms of the contract are certain

ALC argued that the terms of the contract were uncertain and, as the photo only contained the one side of the contract, essential terms were not included. It was also argued that the delivery period stated as "Nov" was vague. These arguments were rejected given the surrounding circumstances.

Given the longstanding relationship between South West and ALC and the many contracts agreed to through photos sent by text message, ALC cannot now deny it agreed to this particular contract. The use of "Nov" was also not vague as the parties would have known the delivery date was in 2021 based on previous dealings.

Key takeaways

The Courts have recognized the evolution of technology and will not ignore its existence and is prepared to face he challenges that may arise from the use of non-text communications, such as emojis. Although such communications are non-traditional, the traditional test used to determine whether a contract was properly formed will be used and what an objective reasonable bystander would understand will be considered. However, this may not be the only factor the Courts will consider as they may look to the surrounding circumstances, including the relationship between the parties and their pattern of contractual dealings.

Individuals and organizations should be cautious about the use of informal non-text communications when negotiating contracts. Subjective intentions are not a factor to be considered in the interpretation of such communications that may have somewhat ambiguous or wide-ranging meanings. Parties should be clear in their communications when negotiating contract and make inquiries if there is any ambiguity in a someone's communication respecting a contract's terms or the acceptance of those terms.

By

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