KING'S BENCH FOR SASKATCHEWAN

Citation: **2023 SKKB 116**

Date: **2023 06 08**
Docket: QBG-SC-00046-2022
Judicial Centre: Swift Current

BETWEEN:

SOUTH WEST TERMINAL LTD.

PLAINTIFF

- and -

ACHTER LAND & CATTLE LTD.

DEFENDANT

Counsel:

Michael Marschal	for the plaintiff
Jean-Pierre Jordaan	for the defendant

JUDGMENT KEENE J.
June 8, 202

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I INTRODUCTION

[1] This is a summary judgment application brought by the plaintiff, South West Terminal Ltd. [SWT], under Rule 7-2 of *The Queen's Bench Rules* for judgment against the defendant, Achter Land & Cattle Ltd. [Achter]. SWT claims the parties entered into a deferred delivery purchase contract [flax contract] on March 26, 2021 in which SWT agreed to buy and Achter agreed to deliver 87 metric tonnes of flax for a contracted price of $669.26 per tonne, with delivery between November 1, 2021 and

November 30, 2021. Achter did not deliver any flax. The plaintiff sues for breach of contract and damages of $82,200.21 plus interest and costs. The defendant denies entering into the contract and in the alternative or in addition relies on the statutory defence found in s. 6(1) of *The Sale of Goods Act*, RSS 1978, c S-1 [*SGA*] contending any contract is unenforceable because there was no note or memorandum of the contract made or signed by the parties.

[2] For the most part this application involves the law of contract and the application of the *SGA* and the core facts are not necessarily in dispute. What sets this case apart is the use of a thumbs up emoji "👍" and what that meant in the context of the specific facts of this law suit.

II NOTICE OF OBJECTION

[3] The plaintiff filed an affidavit sworn by Justin Isherwood on December 20, 2022 in support of SWT's application for summary judgment. The defendant has brought an application to strike the entirety of para. 4 of Mr. Isherwood's affidavit. I reproduce para. 4 as follows:

> 4. Act of god [*sic*] clauses in grain contracts are rare across the industry, as they effectively shift all of 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 contracts to purchase a specific volume of grain at a specific price from the seller at a fixed time in the future. In such 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 contrast, production contracts are where the buyer is buying a particular crop to be grown. These production contract [*sic*] also entitle the buyer rights to additional tonnage grown in a particular year on the specified acres. Production contracts do typically contain an act of god [*sic*] clause; and as such are rare in the industry.

[4] The defendant's grounds are set out in the striking application which are reproduced as follows:

> 4. Rule 13-30 states that an affidavit filed in support of a motion for final relief must be confined to facts that are within the personal knowledge of the person swearing or affirming the affidavit.

5. Rule 13-30(3) required that an affiant swearing an affidavit on information and belief disclose the source of the information and/or belief in the affidavit. The Affidavit contains statements, opinions, or conclusions based solely on information and belief without adequately disclosing the source of the information and/or belief.

6. The Affidavit contains multiple statements opining as to legal opinion and/or expert opinion.

7. Statements made in an affidavit based solely on irrelevant or unreliable evidence are inadmissible. The Affidavit contains several inadmissible statements that are irrelevant or unreliable relating to Act of God clauses.

8. Statements made in an affidavit that are based solely on speculation, hearsay, argument or opinion evidence are inadmissible. The Affidavit contains several inadmissible statements of argument, opinion, hearsay, or speculation relating to Act of God clauses and grain contracts.

9. Rule 13-30(4) states that the costs of every affidavit that unnecessarily sets forth matters of hearsay or argument, or copies of or extracts from documents, must be paid by the party filing the affidavit.

10. Rule 7-9 states that this Honourable Court may strike out all or a portion of a pleading or other document where that document is:

(a) scandalous, frivolous or vexatious;

(b) immaterial, redundant or unnecessarily lengthy;

(c) may prejudice or delay the fair trial or hearing of a proceeding; or

(d) is otherwise an abuse of process of the Court.

11. The Affidavit contains statements that are opinion, speculation, argument, and/or unsubstantiated belief, in the guise of factual evidence.

[5] In addition, during oral argument, Achter's lawyer contended that the first sentence: "acts of god clauses in contracts are rare across the industry, as they effectively shift all of the risk of the contract onto the buyer" is factually incorrect because the often used SWT deferred delivery purchase contract has as part of its

"General Terms and Conditions" a sort of act of God clause in clause 8 reproduced as follows:

> **8. SWT Delay.** If SWT is unable to receive the grain in SWTs elevator within the delivery period for circumstances beyond its control, SWT may, upon notice to the Producer, extend the final day of the delivery period or terminate this Contract. Such circumstances include, without limitation, fires, strikes, floods, acts of God, lawful acts of public authorities, or delays or defaults caused by common carriers.
>
> (Isherwood affidavit sworn October 28, 2022 Exhibit B – page 0049 – Joint Book of Documents)

[6] The defendant argues that Mr. Isherwood should not be allowed to give what amounts to broad ranging expert opinion on grain contracts in the industry without being qualified as an expert or providing a proper factual or academic basis for his opinion.

[7] The plaintiff responds to this concern as follows:

> 24. This evidence cannot be considered in isolation. This evidence was adduced in response to the affidavit of Chris. In Chris's affidavit, he claims that he believed that the flax contract discussed on the phone was going to be a "production contract with an Act of God clause". Chris used the term "production contract", and SWT was replying to that evidence providing proper context in response.
>
> [Footnote omitted]
>
> (Plaintiff's brief dated April 3, 2023)

[8] I agree with SWT. The plaintiff is entitled to respond to evidence raised by the defendant.

[9] In addition, the plaintiff set out in its response to the striking application the following:

> 31. In contrast with an independent expert witness, the Courts also recognize witnesses who have expertise and who are actually involved in the events underlying the litigation" (*Kon Construction Ltd. v Terranova Developments Ltd.*, 2015 ABCA 249 at par [*sic*] 35; sited with approval in *Yashcheshen v Teva Canada Ltd.*, 2022 SKCA 49 at para 80). These are "[l]itigants (including the officers

and employees of corporate litigants) who have expertise, and who were actually involved in the events underlying the litigation" (*Kon Construction* at para 35). These types of witnesses were involved in the underlying events but are unable to adequately explain why they did what they did without engaging with their expertise (*Kon Construction* at para 35-43).

32. In this case, the contract actually discussed on the phone was a deferred delivery contract. Chris confirmed on cross-examination that his expectation that the contract would be a production contract was just something he expected in his mind and he never mention it to Kent on the phone. SWT employees have to be able to explain the general context in which they are operating in, in order to explain why their employees sent Chris a contract that said "Deferred Deliver" in bold letters at the top, and why there would obviously not be an act of God clause benefiting the farmer in the contract. They cannot do that without engaging with their personal knowledge and experience in the industry. Mr. Isherwood obviously could not interpret the flax contract itself under the guise of evidence (see e.g. *Ps International Canada Corp. v Palimar Farms Inc.*, 2016 SKQB 232 at paras 39-40), but he can provide evidence as to the general market and context that SWT is operating in; that is all paragraph 4 of the3 Reply Isherwood Affidavit is doing.

33. As stated by the Alberta Court of Appeal in *Kon Construction* at para 40:

> [I]t is generally not necessary to quality [litigant experts] as "experts" under the *Mohan* procedure. As parties to the litigation they are entitled to testify, and generally they will have the most direct and relevant evidence about the issues. The truth finding function of a trial requires that their evidence be received. Since they were often only involved in the underlying events because of their expertise, it makes no sense to hold that they cannot explain why they acted as they did, if they stray into their expertise. Their opinions explain why they acted as they did.

34. Paragraph 4 of the Reply Isherwood Affidavit is explaining the general context in which SWT was operating in when the flax contract was entered into. His evidence is explaining, based on his personal knowledge and experience in the industry, that there are thee two types of contracts (terms used by witnesses for both Achter and SWT), this is what those contracts typically provide for, and one is way more common in the industry than the other. This is not an opinion, this is just the reality. Mr. Isherwood then provides context for the statement in the following paragraph, stating: "For context, SWT entered into 1187 deferred delivery contracts between Sept 16, 2021 and Dec 14, 2022, whereas it only entered into 10 production contracts over that same time."

> 35. The application to strike is misconceived. It does not make sense for the Courts to emphasize the importance of the factual matrix, particularly the market in which the parties are operating, but then not allow evidence on that factual matrix and circumstances the parties are operating in. Further, this type of evidence is commonly accepted by the Courts.
>
> 36. For a case on virtually identical circumstances, in *JGL Commodities Ltd. v Puddell Farms Ltd*, 2018 SKQB 345 at para 6 [*Puddell Farms*], there was evidence from William Shaw Jameson, the CEO of one of the parties (a grain trading company, similar to SWT), who provided evidence on deferred delivery contracts, what they were and their commonality. There was also evidence from the farmer on production contracts, what they are and what they generally contain (*Puddell Farms* at para 10). The Court also accepted evidence from the grain trader's employee about how the contract in issue was typical of the type of contracts used in the industry (*Puddell Farms* at para 12). Justice Tholl [as he then was] not only accepted this evidence, but he relied on this evidence in rendering his decision on frustration (*Puddell Farms* at para 58).
>
> [Footnotes omitted]
>
> (Plaintiff's brief dated April 3, 2023)

[10] I agree with the above. Mr. Isherwood is entitled as a "litigation expert" to provide the type of evidence he deposed to in the impugned para. 4 of his affidavit and such evidence as stated in the above plaintiff's brief has been allowed by the courts.

[11] Additionally, it is important to read paras. 5, 6 and 7 of Mr. Isherwood's December 20, 2022 affidavit. For brevity I will not reproduce those paragraphs but when these paragraphs are read in conjunction with para. 4 – a factual basis is provided for the more generalized statement found in para. 4.

[12] Counsel for the defendant may be correct in saying Mr. Isherwood did not mention the often used deferred delivery purchase contracts which do contain a buyer friendly act of God clause in the two first sentences. However when looked at in context it appears Mr. Isherwood was directing his attention more to Chris Achter's [Chris] evidence about production contracts.

[13] I also note that this whole business of the difference between deferred delivery purchase contracts and production contracts and the relative rarity of

production contracts and whether or not Mr. Isherwood overstepped his evidentiary competence in para. 4 – is basically moot because it is evident (as I will discuss below) Chris seemed to be aware of the difference of the two types of grain contracts in any event. It appears that the point that Mr. Isherwood wished to convey is that a production contract is relatively uncommon and contains significantly differently information than a deferred delivery production contract.

[14] Therefore, I have decided to dismiss the defendant's application to strike para. 4 of Mr. Isherwood's December 20, 2022 affidavit. I note the defendant withdrew part of its striking application (para. 9 of the Kent Mickleborough affidavit sworn September 14, 2022) but did so only after the plaintiff was put to the effort of including that issue in a written brief. The plaintiff should receive costs from the defendant for the striking application. I order that Achter shall pay to SWT costs for the dismissed application to strike fixed at $400.00.

III FACTS

[15] The parties have filed an agreed statement of facts which I reproduce:

AGREED STATEMENT OF FACTS

The following facts are agreed to for the purposed [*sic*] of addressing South West Terminal Ltd.'s application for summary judgment:

1. South West Terminal Ltd. ("**SWT**") is a grain and crop inputs company incorporated under The Business Corporations Act, RSS 1978, C B10 (the "**BCA**") with their registered office in Gull Lake, Saskatchewan.

2. Achter Land & Cattle Ltd. ("**Achter**") is a corporation incorporated under the BCA with their registered office in Swift Current Saskatchewan. Achter is a farming corporation owned and operated by Chris Achter. Chris Achter is a proper representative of Achter. Chris Achter's father is Bob Achter. Chris Achter's cell phone number is 306-264-7664.

3. Kent Mickleborough is a Farm Marketing Representative with SWT, primarily acting as a grain buyer for SWT.

4. SWT has purchased grain from Achter through various deferred grain contracts since approximately 2012.

5. On March 26, 2021 at 1:01PM, Mr. Mickleborough texted the following text message to producers including Bob Achter and Chris Achter:

   All Divisions - - Kent Mickleborough – Flax Prices : Flax 1Can(max 6% dockage) $22.50/bu Apr. $17.00 Oct/Nov/Dec del

6. Following Mr. Mickleborough sending this text message, he received a call from Bob Achter. After speaking with Bob Achter, Mr. Mickleborough called Chris Achter. Following the phone call with Chris Achter, Mr. Mickleborough had a contract drafted for Achter to sell SWT 86 metric tonnes of flax to SWT at a price of $17.00 per bushel (which amounts to $669.26 per tonne) with a delivery period listed as "Nov". Mr. Mickleborough applied his ink signature to the contract, then took a photo of the contract using his cell phone. Mr. Mickleborough then texted the photo of the contract to Chris Achter at 306-264-7664, along with the text message: "Please confirm flax contract". Chris Achter texted back from 306-264-7664 a "thumbs-up" emoji.

7. Achter did not deliver 87 metric tonnes of flax to SWT in November 2021.

8. The spot price that flax was trading at on November 30, 2021 was $41.00 per bushel (which amounts to $1,614.09 per tonne).

IV ISSUES

[16] The plaintiff has conveniently set out the issues which I will use to a degree:

(a) Should this court grant summary judgment?

   (i) Can disputes in the evidence be justly and proportionately resolved through the summary judgment process?

   (ii) Are there any genuine issues for trial?

(b) Was a valid contract formed between SWT and Achter to deliver 87 tonnes of flax in November 2021 for a price of $669.21 per tonne?

   (i) Was there a *consensus ad idem*?

(ii) Was there certainty of terms?

(c) Were the requirements of s. 6 of the *SGA* met?

(d) What is the appropriate measure of damages?

V DECISION

(a) Should this Court grant summary judgment?

[17] The parties are in agreement that this case is tailor-made for the summary judgment procedure set out under Rules 7-2 and 7-5. I agree. This application will permit the court to make a fair and just determination by making efficient use of the court resources while at the same time save the parties significant time and expense. I am of the view I can resolve disputes in the evidence through the summary judgment process. As I will develop below – I find there are no genuine issues in this case requiring a trial. I will now move on to the contested issues.

(b) Contract Formation

(i) *Consensus Ad Idem*

[18] The parties disagree as to whether there was a meeting of minds which is the basis of a contractual obligation. A contract is only formed where there is an offer by one party that is accepted by the other with the intention of creating a legal relationship and supported by consideration (*Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral v Aga*, 2021 SCC 22 at para 35, 459 DLR (4th) 425 [*Aga*]). 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" (*Aga* at para 35). The test for agreement to a contract for legal purposes is whether the 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 (*Aga* at para 36). The question is not what the parties subjectively had in mind, but rather whether their conduct was such that a reasonable person would conclude that they had intended to be bound (*Aga* at para 37). The courts when considering this question are not restricted to the four

corners of the purported agreement, but can consider the surrounding circumstances (*Aga* at para 37). The nature and relationship of the parties and the interests at stake help inform the question of an intention to create a legal contractual relationship (*Aga* at para 38).

[19] Chris who is the acting mind of the defendant Achter had a long standing business relationship with SWT going back to at least 2015 when Kent Mickleborough [Kent] started with SWT as a grain buyer (Kent Mickleborough affidavit sworn September 14, 2022 at para. 2). Since the business relationship between Kent as a grain buyer for SWT and Chris as principal for Achter is important I will sacrifice brevity and reproduce from Kent's September 14, 2022 affidavit the following:

> 3. 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 SWT. Based on my longstanding relationship with Achter Ltd., Chris had provided me with his cell phone number, which is 306-264-7664. Based on my prior experience with Chris, I know that contacting this number with connect me with Chris.
>
> 4. After the commencement of the Covid-19 pandemic in approximately March of 2020, the sales team with SWT stopped going out and meeting with producers in person, including Achter Ltd. Instead, we would typically do contracts through email or text message. However, even prior to the pandemic, I had done contracts with producers by email and text message. Prior to the contract in issue in the within proceeding, I had completed four contracts with Achter Ltd. by having Chris execute the contract by text message from 306-264-7664.
>
> 5. For instance, on July 14, 2020, after discussing and agreeing on a contract with Chris Achter, I prepared a contract for the sale of 185 metric tons [*sic*] of durum wheat from Achter Ltd. to SWT for a price of $312.31 per ton [*sic*]. I signed the contract and then took a photo of it using my cell phone and sent it to Chris at 306-264-7664. I messaged: "Please confirm terms of durum contract." Chris texted me back: "Looks good". At the time, I understood this to be that Chris was agreeing to the contract and this was his way of signally [*sic*] that agreement. Achter Ltd. delivered on this contract without issue. A copy of the contract and text message is attached as **Exhibit "B"**.

> 6. On September 11, 2020, after discussing and agreeing on a contract with Chris Acter [*sic*], I prepared a contract for the sale of 131 metric tons [*sic*] of durum wheat from Achter Ltd. to SWT for a price of $284.77 per ton [*sic*]. I signed the contract and then took a photo of it using my cell phone and sent it to Chris at 306-264-7664. I messaged: "Please confirm terms of durum contract". Chris texted me back: "Ok". At that time, I understood this to be that Chris was agreeing to the contract and this was his way of signally [*sic*] that agreement. Achter Ltd. delivered on this contract without issue. A copy of the contract and the text messages is attached as **Exhibit "C"**.
>
> 7. On October 21, 2020, after discussing and agreeing on a contract with Chris Acter [*sic*], I prepared a contract for the sale of 395 metric tons [*sic*] of durum wheat from Achter Ltd. to SWT for a price of $308.65 per ton [*sic*]. I signed the contract and then took a photo of it using my cell phone and sent it to Chris at 306-264-7664. I messaged: "Please confirm terms of durum contract". Chris texted me back: "Yup". At that time, I understood this to be that Chris was agreeing to the contract and this was his way of signally [*sic*] that agreement. Achter Ltd. delivered on this contract without issue. A copy of the contract and the text messages is attached as **Exhibit "D"**.
>
> [Emphasis in original]

[20] I find the above is not in contest.

[21] So in short, what we have is 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. It is important to note that each time Kent added to the offered contract "Please confirm terms of durum contract" and Chris did so by succinctly texting "looks good", "ok" or "yup". The parties clearly understood these curt words were meant to be confirmation of the contract and not a mere acknowledgement of the receipt of the contract by Chris. There can be no other logical or creditable explanation because the proof is in the pudding. Chris delivered the grain as contracted and got paid. There was no evidence he was merely confirming the receipt of a contract and was left just wondering about a contract.

[22] I will leap frog over the controversial March 26, 2021 flax contract evidence found in the Mickleborough affidavit for the purposes of revealing further uncontradicted proof of the manner in which the parties conducted their business by adding from Kent's affidavit:

> 12. On June 10, 2021 after discussing and agreeing on a contract with Chris Acter [*sic*], I prepared a contract for the sale of 336 metric tons [*sic*] of durum wheat from Achter Ltd. to SWT for a price of 349.07 per ton [*sic*]. The delivery period was July 1, 2021 to August 15, 2021, so Achter Ltd. was required to deliver the wheat by August 15, 2021. I signed the contract and then took a photo of it using my cell phone and sent it to Chris at 306-264-7664. I messaged: "Please confirm terms of durum contract". Chris texted me back: "Ok". At that time, I understood this to be that Chris was agreeing to the contract and this was his way of signally [*sic*] that agreement. Achter Ltd. delivered on this contract in July 2021 and August 2021 without issue. A copy of the contract and the text messages is attached as **Exhibit "F"**. Of note, the market price of wheat had slightly risen at the end of June 2021 and early July 2021 from when the contract was entered into on June 10, 2021. As a result, Achter Ltd. could have made slightly more money by delivering the wheat to another purchaser.
>
> [Emphasis in original]

[23] I now, with that as background, return to the controversial March 26, 2021 flax contract and the discussions and actions arising between Kent and Chris. I reproduce from Kent's September 14, 2022 affidavit the following:

> 8. On March 26, 2021 at 13:01, I sent out a text blast to all of my clients with SWT advertising a price for flax that SWT was prepared to enter into contracts for. I advertised that SWT would pay $17 per bushel for flax with a minimum of 6% dockage and with a delivery period between September and November 2021. Dockage refers to any material intermixed with a parcel of grain, a high dockage percentage would be a lower quality of grain. This text message was sent to both Chris at 306-264-7664, and Bob.
>
> 9. Shortly following my text blast, I received a call from Bob. Bob told me that he had seen my text regarding the current price of flax and wanted to enter a contract for Achter Ltd.'s new crop of flax at $17 per bushel. I asked if Bob had talked with Chris about the potential contract and Bob said he had. I chatted with Bob some more and at the end of the conversation told Bob that I would give Chris a call on his cell and get the contract in place with Chris.
>
> 10. I then called Chris about the potential flax contract. I said "I assume you talked to Bob about this" and Chris confirmed that he had spoken to Bob and wanted to enter into a flax contract for 87 metric tons [*sic*] of flax at $17.00 a bushel, which works our to $669.26 per ton [*sic*]. The delivery period was going to be November 2021. I told Chris that I would write up the contract and send it to him by text message and ask him to confirm he contract via text when it came through, which Chris agreed to do.

> 11. I then wrote up the contract for a purchase of 87 metric tons [*sic*] of flax for $669.26 per ton [*sic*], with a delivery period in November 2021 (the "**Flax Contract**"). I then signed the contract, took a photo of it and texted it to Chris at 306-264-7664. I messaged: "Please confirm flax contract". Chris tested back a thumbs up emoji. At the time, I understood this to be that Chris was agreeing to the contract and this was his way of signally [*sic*] that agreement. A copy of the contract and the text message is attached as **Exhibit "E"**.
>
> [Emphasis in original]

[24] I find this to be very similar to the durum contracts referred to above including Kent's use of the phrase "Please confirm flax contract" (the only difference being the use of the word flax instead of the word durum) and this time instead of words like "ok", "yup" or "looks good" being texted by Chris – a commonly used 👍 emoji was texted by Chris.

[25] Chris's version of the March 26, 2021 flax contract episode is set out in his affidavit as follows:

> 4. I have been selling grain to the Plaintiff for several years. Most of the contracts I entered into with the Plaintiff were to sell grain that I had already harvested and would be ready for delivery shortly. In other words, we would agree to the sale of grain, and delivery would be completed within the next few weeks.
>
> 5. With contracts where grain is on hand, I do not insist on an Act of God clause because the grain is already grown, and I am reasonably certain I would be able to deliver. I also do not insist on written agreements, as all I need to know is the volume and the price that the Plaintiff is offering. Once the volume and price are confirmed, I will make arrangements for delivery within the next few weeks. Of all the contracts attached to the affidavit, only Exhibit D (the Flax Contract) was not for grain on hand.
>
> 6. Whenever I enter a contract where the grain still needs to be produced, I insist on an Act of God clause. The reason is that I do not want to be bound to deliver grain that I cannot produce due to circumstances outside my control.
>
> 7. In response to paragraphs 10 and 11 of the affidavit, we did not discuss the particulars of the Flax Contract during that call. That time of year is a very busy time for me as I am calving about 400 cows during March and the beginning of April. I expected that the contract would be a production contract with an Act of God clause, which protects me if the crop gets hailed out or gets damaged by drought.

(Affidavit of Chris Achter sworn November 16, 2022)

[26] It is important to note that Chris acknowledges that he did not tell Kent anything about production contracts – see para. 7 from his above affidavit (see also transcript of cross-examination of Chris T-52).

[27] In terms of the 👍 emoji - and what this electronic picture meant – Chris deposes:

> 8. I confirm that the thumbs-up emoji simply confirmed that I received the Flax contract. It was not a confirmation that I agreed with the terms of the Flax Contract. The full terms and conditions of the Flax Contract were not sent to me, and I understood that the complete contract would follow by fax or email for me to review and sign. Mr. Mikleborough [*sic*] regularly texted me, and many of the messages were informal. Attached as Exhibit "A" is one example of many jokes that Mr. Mikleborough [*sic*] would send me. I deny that he accepted the thumbs-up emoji as a digital signature of the incomplete contract. I did not have time to review the Flax Contract and merely wanted to indicate that I did receive his text message.
>
> 9. I did not and would not have entered into the Flax Contract without first reviewing the terms and conditions with specific reference to the Act of God clause.

[28] Chris was cross-examined on the use of the 👍 emoji. I reproduce from the cross-examination transcript the following:

> Q. Okay. So let's talk about the thumbs up emoji because you responded with a thumbs up emoji, right?
>
> A. Yes.
>
> Q. Yeah. What kind of phone do you have?
>
> A. An iPhone.
>
> Q. Good. Good. That's the best kind of phone. So when you're on your - - I have an iPhone as well. So when you're on your phone texting, you - - you, basically, open the text messaging application, and then there's a keyboard, and then there's a button that opens another keyboard with a bunch of emojis on them, right?
>
> A. Yes.
>
> Q. Yeah. And, like, there's a smiley face emoji, which would generally indicate, like, I'm happy, correct?

A. Yes. There's lots of different emojis, yeah.

Q. Yeah. And the emojis indicate specific things, right? Like, the happy - - the smiley face emoji would - - would generally, indicate I am happy, correct?

A. Yes. It usually pops up - - the - - the ones you use the most, the emojis are the first ones that pop up. There's usually two or three that you use regularly that will pop up.

Q. Yeah. And the emojis are used to express things in digital communications, right? Like, they're - - they're used to express specific sort of meaning, correct?

A. Yes.

Q. Yeah. Have you ever Googled the meaning of the thumbs up emoji, Mr. Achter?

A. No, I haven't.

Q. Okay, fair. I'm going to share my screen with you. Here, just wait. Here. I'm going to share my screen with you, okay? So I have Google open here, and then I'm going to type in thumbs up emoji meaning into the search bar, and what pops up is it says, "I approve." Would you agree with that - - that interpretation of the thumbs up emoji? Would you agree that that's what the thumbs up emoji means?

MR. JORDAAN: Objection. My client is not an expert in emojis.

MR. MARSCHAL: Okay.

Q. MR. MARSCHAL: But he does send emojis, correct?

A. Yes.

Q. Yeah, okay. Okay. And at paragraph 8 of your Affidavit, you say you deny that Kent accepted the thumbs up emoji as a digital signature of the incomplete contract. But you would agree with me, Mr. Achter, that you don't know what Kent thought, right? Like, you don't know what's in his mind, right?

(Transcript pages 55-57)

[29] It would have been preferrable if the questioner had been more direct in his questioning and asked what Chris understood a 👍 emoji meant as opposed to the more general question that was objected to by Chris's counsel. However, it is not

what Chris may or may not think a 👍 emoji means. It is what the informed objective bystander would understand.

[30] It appears that Chris does not accept SWT's contention that a 👍 emoji means something to the effect "I agree" or "I accept" or some sort of positive affirmation. Instead it appears he takes the position that he is generally unaware of what a 👍 emoji means and in particular what he meant to convey to Kent on March 26, 2021. This has led the parties to a far flung search for the equivalent of the Rosetta Stone in cases from Israel, New York State and some tribunals in Canada, etc. to unearth what a 👍 emoji means. These cases to the small degree they are helpful are all distinguishable on their facts and context. I prefer a simpler approach.

[31] A starting point is that the 👍 emoji has arrived in the world of dictionary meaning: "it is used to express assent, approval or encouragement in digital communications, especially in western cultures (👍; *Dictionary.com* online**:** <https://www.dictionary.com/e/emoji/thumbs-up-emoji/> (17 May 2023)). I am not sure how authoritative that is but this seems to comport with my understanding from my everyday use – even as a late comer to the world of technology. However rather than simply relying on judicial notice – I will also look at what Chris deposed in his affidavit. For convenience I repeat his para. 8 here:

> 8. I confirm that the thumbs-up emoji simply confirmed that I received the Flax contract. It was not a confirmation that I agreed with the terms of the Flax Contract. The full terms and conditions of the Flax Contract were not sent to me, and I understood that the complete contract would follow by fax or email for me to review and sign. Mr. Mikleborough [*sic*] regularly texted me, and many of the messages were informal. Attached as Exhibit "A" is one example of many jokes that Mr. Mikleborough [*sic*] would send me. I deny that he accepted the thumbs-up emoji as a digital signature of the incomplete contract. I did not have time to review the Flax Contract and merely wanted to indicate that I did receive his text message.

[32] In my opinion this paragraph appears to be carefully crafted to state that there was a confirmation of the receipt of the contract (seemingly denoting a form of acknowledgement) which I took to mean that Chris understood a 👍 emoji means "ok" or something affirmative. This ends up being a bit of a cake and eat it too

situation – Chris wants the court to accept the 👍 emoji meant only he got the contract but not that he approved the contract. This is of course somewhat self-serving.

[33] It is interesting to note that Chris from that point on never contacted Kent or anyone at SWT to discuss the flax contract further except for a brief discussion about a possible crop failure in September 2021. Chris would have the court believe that during the crop growing season he believed there was no flax contract with SWT.

[34] The facts seem to be somewhat different. Chris responded to the offer to contract – Kent called him because through Bob Achter (Chris's father) Chris had expressed interest in a flax contract. There would be no other purpose for Kent's telephone call on March 26, 2021 to Chris. During that call Kent and Chris talked about the flax contract and just like in previous occasions with the durum contracts a deal appears to have been at least verbally struck. This was followed up by Kent sending a screenshot of the clearly titled Deferred Delivery Production contract indicating the product (flax), price and the parties just as they had done on numerous occasions before without any issues. Kent added "Please confirm flax contract" – just as he had done in the past with the exception of the word flax instead of durum was used. Chris responded from his cell phone with a 👍 emoji.

[35] I prefer Kent's evidence that the above had been discussed. The court does not accept Chris's version (para. 8 of Chris's affidavit) because the circumstances leading up to the conversation (multiple previous contract negotiations resulting in contracts) support Kent's recollection – indeed Kent ultimately sent the texted contract offer shortly after the gentlemen ended their telephone call. Even though this is a summary judgment application, I am satisfied that I can resolve this evidentiary dispute on the affidavit evidence without the necessity of a trial.

[36] I am satisfied on the balance of probabilities that Chris okayed or approved the contract just like he had done before except this time he used a 👍 emoji. In my opinion, when considering all of the circumstances that meant approval of the flax contract and not simply that he had received the contract and was going to think about it. In my view a reasonable bystander knowing all of the background would

come to the objective understanding that the parties had reached *consensus ad item* – a meeting of the minds – just like they had done on numerous other occasions.

[37] Additionally, I find under these circumstances a 👍 emoji is "an action in electronic form" that can be used to allow to express acceptance as contemplated under *The Electronic Information and Documents Act, 2000*, SS 2000, c E-7.22 [*EIDA*] as per s. 18:

> 18(1) Unless the parties agree otherwise, an offer or the acceptance of an offer, or any other matter that is material to the formation or operation of a contract, may be expressed:
>
> (a) by means of information or a document in an electronic form; or
>
> (b) by an action in an electronic form, including touching or clicking on an appropriately designated icon or place on a computer screen or otherwise communicating electronically in a manner that is intended to express the offer, acceptance or other matter.
>
> (2) A contract shall not be denied legal effect or enforceability solely by reason that information or a document in an electronic form was used in its formation

[38] I note Justice Scherman in *Quilichini v Wilson's Greenhouse*, 2017 SKQB 10, [2017] 8 WWR 375 [*Quilichini*] interpreted this provision of the *EIDA* as follows:

> [10] The legislation is clear. Agreement to contractual terms can be expressed by touching or clicking on an appropriately designated icon or place on a computer screen. The fact that the contract could have alternatively been executed by printing a hard copy and having a participant sign a hard copy form does not detract from the foregoing. The fact that there are optional ways to execute the contract does not lead to the conclusion that using only one of those options does not constitute agreement.

[39] The defendant argues that contrary to all of the above – an actual signature is essential because it confirms the person's identity and a signature conveys a message – in this case acceptance. However, I do not find that argument persuasive. I agree a signature in the classic presentation does denote identity and confirmation

of an agreement (See para. 56 following in this judgment). However, that in itself does not prevent the use of a modern day emoji such as a 👍.

[40] Counsel for Achter remonstrates that allowing a simple 👍 emoji to signify identity and acceptance would open up the flood gates to allow all sorts of cases coming forward asking for interpretations as to what various different emojis mean – for example what does a 👊 emoji mean or a 🤝 emoji mean, etc. Counsel argues the courts will be inundated with all kinds of cases if this court finds that the 👍 emoji can take the place of a signature. This appears to be a sort of public policy argument. I agree that this case is novel (at least in Saskatchewan) but nevertheless 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.

[41] I acknowledge the defendant relies on *Can-Am Farms Ltd. v Parkland Pulse Grain Co. Ltd.*, 2004 SKQB 58. However that case is distinguishable on the facts. In that case the grain buyer was waiting to hear back from a seller – nothing had been agreed upon and there was no *consensus as idem*. There was no contract signed. Justice Krueger held it was incumbent on the grain buyer to inquire with the seller subsequent to the parties' telephone call to see what was going on. Here the 👍 emoji was Chris's response to an offered flax contract. This is substantially different in my opinion.

[42] For the above reasons I find that the parties entered into a binding legal contract under the unique circumstances of this case. Therefore this issue does not require a trial.

(ii) Certainty of Terms

[43] Achter's statement of defence claims that the flax contract fails for certainty of terms. In his authoritative text, John D. McCamus, *The Law of Contracts*, 3d ed (Toronto: Irwin Law Inc., 2020) at 97-98 sets out the law on certainty of terms and contracts as follows:

> In order for an agreement to be enforceable, the parties must have reached agreement on all the essential terms of their agreement. As is often said, the parties must make the agreement, the courts will not make it for them. Further the parties "must so express themselves that their meaning can be determined with a reasonable degree of certainty." [*Scammell and Nephew Ltd v Ouston*, [1941] AC 251] Where the parties either fail to reach agreement on the essential terms of the agreement or express themselves in such fashion that their intentions cannot be divined by the court, the agreement will fail for lack of certainty of terms. In such circumstances, the parties have not reached a sufficient *consensus ad idem* to enable the courts to enforce their agreement. At the same time, the requirement of certainty of terms and its underlying rationale must be balanced against the practicalities of transactional negotiations. Parties may be unable to anticipate and articulate agreements with respect to future events and may intentionally leave gaps in their agreements to provide for future and mutually satisfactory accommodations. Parties, especially those not advised by lawyers, may be unaware of the nature of all the essential terms to be stipulated in the particular context. Parties may assume that reasonable or "the usual" arrangements will apply to an undetermined matter. In all such cases, the parties may intend to enter into binding contractual arrangements and believe that they have successfully done so. Rigid application of the doctrine of certainty, therefore, could produce much mischief, especially in cases where the parties detrimentally rely on the assumption that a valid and enforceable agreement has been created. Accordingly, courts will attempt to fill gaps and find meaning in agreements in circumstances where it appears that a binding agreement was intended by the parties.

[44] Justice Jackson set out three general categories for considering the doctrine of uncertainty of contract in *Harle v 101090442 Saskatchewan Ltd.*, 2014 SKCA 6 at para 41, [2014] 4 WWR 783. A contract can be incomplete, in the sense that there is no agreement on an essential term. A contract can be an agreement to agree, in the sense that the parties have stipulated in an agreement that they intend to reach an agreement in the future. A contract can be impermissibly vague on an important term in the sense of an incurable uncertainty.

[45] Achter relies on two facts to support its contention the flax contract is void for uncertainty. The first is Achter notes that Kent did not text a photograph of the "General Terms and Conditions" found on the back of the flax contract to Chris; and secondly the photograph of the flax contract texted to Chris stated the delivery period as "Nov". Achter argues without the accompanying "General Terms and Conditions" the agreement lacks essential terms. In regard to the "Nov" delivery date,

the argument appears to be that the texting of the delivery period as "Nov" is impermissibly vague. I do not accept these arguments for the following reasons.

[46] The modern judicial approach to contractual interpretation directs the courts to consider the surrounding circumstances of the contract – often referred to as the factual matrix (*Sattva Capital Corp. v Creston Moly Corp.*, 2014 SCC 53 at para 46, [2014] 2 SCR 633 [*Sattva*]).

[47] Justice Mitchell in *101034761 Saskatchewan Ltd. v Mossing*, 2022 SKQB 193 [*Mossing*] applied Justice Rothstein's understanding of the present state of contract law set out in *Sattva* by noting courts must read contracts in the context of the surrounding circumstances known to the parties at the time of the formation of the contract (*Mossing* at para 107). The surrounding circumstances or factual matrix include facts that were known or reasonably capable of being known by the parties when they entered into the written agreement (*Mossing* at para 107). However, the factual matrix cannot include evidence about subjective intentions held by the parties (*Mossing* at para 107). The question about whether the parties intended to enter into a contract and whether the essential terms of the contract can be ascertained with a reasonable degree of certainty is to be determined from the perspective of a reasonable objective bystander aware of all the material facts (*Mossing* at para 109). The subjective intention and beliefs of the parties are irrelevant and have no place in the interpretive process (*Mossing* at para 110).

[48] I will now apply the law to the factual matrix in this application. The parties had a long standing business relationship leading up to March 2021. Achter had entered into many deferred delivery purchase contracts with SWT leading up to March 26, 2021. The terms and conditions were set out repeatedly in these contracts. Chris may have been thinking about a form of production contract but he never told Kent. A reasonable, objective bystander aware of all of the previous contractual history would believe the same contract was being entered into – a deferred delivery production contract. The terms and conditions had never changed on the standard boiler plate reverse of the document. Chris received the front of the deferred delivery contract. The fact that he did not receive the reverse does not in my opinion invalidate the contract for uncertainty. The reality of the situation informs the court that Chris

would have known from the many previous contracts what the terms and conditions on the flax contract would be since the front page was clearly titled "Deferred Delivery Production Contract". Chris argues that he wanted a production contract with "an act of God clause" that favoured the producer. However, that was never conveyed to Kent and it does not matter under these circumstances what Chris may have thought. Accordingly, the defendant's argument that the absence of the "Terms and Conditions" boiler plate creates an uncertainty is not persuasive.

[49] I agree with the plaintiff's approach that even if the general terms and conditions are not part of the flax contract – the essential terms of the flax contract are contained in the first page of the contract that was texted to Chris and to which he confirmed. The question is whether the contract as presented disclosed the substance of the parties' agreement. The agreement did convey with sufficient clarity the essential terms in agreement being the parties (SWT and Achter), the property (flax) and the price (*Mossing* at paras 112-113). It is understood that courts will not enforce an agreement where an essential term is too uncertain – but nevertheless every effort should be made to ascertain the substance of the agreement (*Mossing* at para 115). In my view there are no missing or unascertainable essential terms in the flax contract – the parties, property and price were crystal clear.

[50] I will briefly discuss the defendant's contention that the listing in the flax contract of a "Nov" delivery date is too vague. This in my view is a red herring. The parties would have known based on their previous dealings and the context in which the flax contract was discussed that this meant November 2021 delivery date. (Kent's September 14, 2022 affidavit paras. 8, 10 and 11 set out above). This is the only logical interpretation. There is no uncertainty as to the delivery date in my opinion.

[51] Therefore I do not find that the flax contract was void for uncertainty and there is no genuine issue requiring a trial on this point.

(c) Were the requirements of the *SGA* met?

[52] Achter also defends the claim on the basis that the requirements of s. 6 of the *SGA* were not met in the circumstances. Section 6 of the *SGA* is reproduced as follows:

> **When contract enforceable by action**
>
> 6(1) A contract for the sale of goods of the value of $50 or upwards shall not be enforceable by action unless the buyer shall accept part of the goods so sold and actually receive the same or give something in earnest to bind the contract or in part payment or unless some note or memorandum in writing of the contract is made and signed by the party to be charged or his agent in that behalf.
>
> (2) This section applies to every such contract notwithstanding that the goods may be intended to be delivered at some future time or may not at the time of the contract be actually made, procured or provided or fit or ready for delivery or that some act may be requisite for the making or completing thereof or rendering the same fit for delivery.
>
> (3) There is an acceptance of goods within the meaning of this section when the buyer does any act in relation to the goods which recognizes a pre-existing contract of sale whether there be an acceptance in performance of the contract or not.
>
> [Emphasis added]

[53] The only issue in this case is the "note or memorandum in writing and signed by the party" element.

(i) Electronic Signatures – Requirements of s. 6 of the *SGA*

[54] The plaintiff's brief ably sets out some background that in my view is not at issue:

> 68. The requirement of a "note or memorandum" in s. 6 of the SGA originated as s. 17 of the *Statute of Frauds* of 1677. The *Statute of Frauds* does not require the entire agreement to be in writing, compliance may found if the essential terms of the agreement are set out in an acceptable note or memorandum (*Faer v Krug*, 2020 SKQB 298 at para 55; see also S.M. Waddams, The Law of Contracts, 6th ed (Aurora, Ont: Canada Law Book, 20210) at 231 [*Waddams*]). Courts have interpreted s. 6 as requiring a document expressly or implicitly identifying the parties, the goods sold, and the price (the consideration) if a price was agreed upon (Gerald Fridman, *Sale of Goods in Canada*, 6th ed (Toronto: Carswell, 2013) at 42-43 [*Fridman*]). However, the note or memorandum does not

> need to be a singular document – it may be multiple documents, so long as there is reference between the documents (*Fridman* at 42-43; see also *Waddams* at 231-234).
>
> 69. To fulfill [*sic*] the signature requirement, the signature does not need to be a signature in the strict sense of the word – so long as it shows that it is the defendant who is agreeing to the terms (*Fridman* at 42-45; see also *Waddams* at 231-234). The word "writing" or similar terms includes anything represented or reproduced by any mode of representing or reproducing words in visible form (*The Interpretation Act, 1995*, SS 1995, c I-11.2, s 27(1)). Section 8 of *EIDA*, also confirms that a requirement of any law that any information or document be in writing is satisfied if the information or document is in electronic form.

[55] The *EIDA* states:

> **Signatures**
>
> 14(1) A requirement pursuant to any law for the signature of a person is satisfied by an electronic signature.

[56] The term "electronic signature" is defined in the *EIDA* as follows:

> 3 In this Part:
>
> ...
>
> (b) "**electronic signature**" means information in electronic form that a person has created or adopted in order to sign a document and that is in, attached to or associated with the document;

[57] Justice Layh in *I.D.H. Diamonds NU v Embee Diamond Technology Inc.*, 2017 SKQB 79, [2017] 9 WWR 172 [*Embee*] in considering signatures and what signatures are meant to convey stated:

> [43] I find this discussion significant because it shows that even absent specific legislation allowing for acceptance of electronic signatures, courts have considered an electronic signature as a valid signature simply under longstanding principles of common law. I agree. The common law has always applied a wide range of analysis to determine the sufficiency of a signature. For example, an ordinary signature at the foot of a document probably provides more comfort as to the authenticity of its contents than a signature at the head of a document even though both are "signed." Common law courts have considered several deviations from "wet ink" signatures, including simple modifications such as crosses, initials, pseudonyms, printed names and rubber stamps.

[58] It is important to note that Justice Layh meant this reasoning to apply to a cross section of statutes (*i.e.* he was deciding a *Limitations Act*, SS 2004, c L-16.1 claim but looked to jurisprudence under *The Saskatchewan Insurance Act*, RSS 1978, c S-26). I find his sound reasoning to equally apply to the *SGA*.

[59] The common law has developed in these modern times to hold that emails are sufficient to constitute in writing and signed requirements (*Embee* at paras 48-55; *Buckmeyer Estate Re*, 2008 SKQB 141, [2008] 9 WWR 682; *Love v Love*, 2011 SKQB 176, [2011]11 WWR 614 and *Love v Love*, 2013 SKCA 31, 359 DLR (4th) 504). I have already referred to Justice Scherman's findings in *Quilichini* where he found clicking on the "I agree icon" constituted an electronic signature in a go kart waiver document (*Quilichini* at para 6). The court in that case decided that the clicking on the "I agree icon" meant the customer was agreeing to contractual terms that "can be expressed by touching and clicking on an appropriately designed icon or place on a computer screen" (*Quilichini* at para 10). I find therefore there is case authority for the use of email and the use of electronic non-wet ink signatures to identify the person signing and to establish the person's approval of the document's contents.

[60] The issue that remains is: is a 👍 emoji good enough to meet the requirements of the *SGA* in the unique circumstances of this case?

[61] I find that the flax contract was "in writing" and was "signed" by both parties for the purposes of the *SGA*. There is no dispute that Kent electronically signed on behalf of SWT. The new twist is: did Chris's 👍 emoji constitute a "signature"?

[62] In my opinion the signature requirement was met by the 👍 emoji originating from Chris and his unique cell phone (agreed upon statement of facts para. 2; cross-examination of Chris T6.7-T6.10; T28.6-T28.20) which was used to receive the flax contract sent by Kent. There is no issue with the authenticity of the text message which is the underlying purpose of the written and signed requirement of s. 6 of the *SGA*. Again, based on the facts in this case – the texting of a contract and then the seeking and receipt of approval was consistent with the previous process between SWT and Achter to enter into grain contracts.

[63] This court readily acknowledges that a 👍 emoji is a non-traditional means to "sign" a document but nevertheless under these circumstances this was a valid way to convey the two purposes of a "signature" – to identify the signator (Chris using his unique cell phone number) and as I have found above – to convey Achter's acceptance of the flax contract.

[64] I therefore find that under these circumstances that the provisions of s. 6 of the *SGA* have been met and the flax contract is therefore enforceable. There is no issue in this regard that requires a trial.

(d) Assessment of Damages

[65] The plaintiff sets out in its brief (which does not appear in contest) the following:

> 92. The assessment of damages in the within proceeding is straight forward and formulaic. Section 50 of the *SGA* sets out proper measure of damages as follows:
>
> > **Damages for non-delivery**
> >
> > **50**(1) Where the seller wrongfully neglects or refuses to deliver the goods to the buyer the buyer may maintain an action against the seller for damages for non-delivery.
> >
> > (2) The measure of damages is the estimated loss directly and naturally resulting in the ordinary course of events from the seller's breach of contract.
> >
> > (3) Where there is an available market for the goods in question the measure of damages is *prima facie* to be ascertained by 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 or if no time was fixed then at the time of the refusal to deliver.
>
> 93. Subsection 50(3) clearly provides that the *prima facie* measure of damages for a buyer against a seller for non-delivery is the difference between the contract price and the market price at the time that delivery ought to have been made (see also *Puddell Farms* [*JGL Commodities Ltd. v Puddell Farms Ltd*, 2018 SKQB 345] at para 69-73). Here, the contract price is set out in the Flax Contract, and the market price at delivery is the market price on November 30, 2021, as this is the final day in the delivery period that Achter was entitled to deliver the flax.

> 94. The contract price is $17.00 a bushel (which works out to $669.26 a tonne). The market price on November 30, 2021 is $41.00 a bushel (which works out to $1,614.09 a tonne). The difference is $24.00 a bushel (which works out to $944.83 a tonne). The Flax Contract was a for a [*sic*] total of 87 tonnes of flax. Multiplying the tonnes by the difference in price amounts to *prima facie* damages of $82,200.21. there is no evidence to rebut this *prima facie* calculation.

[66] I accept the above. I therefore find that the plaintiff's damages for the breach of the flax contract by Achter shall be set at $82,200.21 and there is no issue in this regard requiring a trial.

VI JUDGMENT

[67] I am satisfied that I should grant the plaintiff's application for summary judgment. There are no genuine issues that require a trial. This is an expeditious and proportional way to resolve these matters.

[68] The court holds for the above reasons that there was a valid contract between the parties that the defendant breached by failing to deliver the flax. The plaintiff has established that the damages should be set at $82,200.21 plus interest and costs. *The Pre-judgment Interest Act*, SS 1984-85-86, c P-22.2 is more appropriate under these circumstances than the interest rate advanced by the plaintiff. I note the plaintiff requested costs under column 2. This case did raise novel issues but on the balance was not overly complicated. I order costs payable to the plaintiff in the usual manner under column 1.

[69] The court therefore orders:

(a) The plaintiff, SWT's application for summary judgment is granted;

(b) There shall be a judgment against Achter for damages in the amount of $82,200.21 payable to SWT plus interest on the said $82,200.21 as per *The Pre-judgment Interest Act* from and after November 30, 2021 to the date of the order; and

(c) SWT shall receive fixed costs of $500 for the notice of objection application and in addition SWT shall receive from Achter costs assessed under column 1 of the Tariff.