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# Let The Auctioneer/Manager Beware

*Not a case of “caveat emptor” but more a case “caveat magister auctionis”  
i.e. Let The Auctioneer Beware.*

by Stephen Potter and Chris Lovatt

## Abstract

This analysis of the law covers the role of the management of auction sales and the implications that arise therefrom. The article will explore the legal obligations of the parties to an auction sale with specific reference to the newly defined liability of the managers of auction sales where articles or property are sold “without reserve”. The conclusions are that it is now clear that if an auctioneer refuses to sell to the highest bidder then he will incur liability to the bidder. This could have dire financial consequences. The existing case law and new precedent materials will be examined and approached objectively and appropriate conclusions will be drawn. The consequences for the manager of auctions for mismanagement are weighty.

## Introduction

This article is concerned with the form of trading of goods and services by means of auction sales. This form of trading has been an established method of selling from time immemorial and it is used in many fields of commercial activity. According to Cassell’s Classical Dictionary auctions and the appropriate words for holding them were being used by Cicero in Roman times (Cassell, 1964). The dictionary defines an auctioneer as the “magister auctionis”, the master of the auction. In fact the word “auctio” derives from the Latin noun meaning an increase which is derived from the bidding process where the price offered will augment during the process.. Auctions appear in English case law and one of the most noteworthy precedents that will be referred to later is *Payne v Cave*. This precedent is still applicable in interpreting the rules relating to auction sales today, despite its antiquity being over two hundred years old. Auction sales have continued, as a matter of commercial practice, to be used for general goods and chattels, fine art and antiques, the auction of future expectations, livestock, land and houses etc. Their function has been extensive. The impact of sales by auction has received a new impetus over the last few years as a result of the Internet and the use of e-commerce. Chaston comments “The new website, Auctions on-line, rapidly recruited 150 art auction houses, permitting the company to offer access to almost 4000 catalogues. These catalogues contain information on over \$400 million worth of approved art antiques and collectibles (2001; p.199). This indicates one example of the enormity of the market. This view is supported by Haig who notes “on line auctions now constitute the fastest growing area of the whole e-commerce market” (2001; p.128). This article will be of professional interest and relevance to those involved

in the conduct and management in the traditional form of auction as well as the e-commerce variety that is the topical area at the moment.

The research will investigate from the study of some legal literature, statutes and cases when the contractual obligations begin within the context of an auction. It will explore the issues of whose law is to apply as this can be crucial in determining legal rights and obligations. Greater analysis will be undertaken where the legal scenario has become particularly contentious from the manager's and auctioneer's standpoint in light of a recent decision of the Court of Appeal in *Barry v Davies*. Judicial decisions of the Court of Appeal rank high in the hierarchy of the courts and can only be overturned, under normal circumstances, by the House of Lords if the case concerns a domestic matter. The decision of this court will be binding on the Court of Appeal itself and upon lower courts and it will have a persuasive effect upon other judicial bodies (Keenan and Riches, 2002). This precedent has imposed the need for greater caution upon the auctioneer. Whether the auctioneer is part of a traditional firm conducting a live auction or whether the business is being conducted by means of e-commerce the case may have a profound impact and the auctioneer should beware if excessive financial penalties are to be avoided through the operation of the civil law. The establishing of the point at which a contract is made is not a bureaucratic point of excessive detail but it is a point of crucial significance. At this point under the operation of the rules of common law the clock begins to run and the legal status of the contract provides the parties with their rights and their corresponding liabilities. A study of the rules that relate to the formation of a contract by auction under English law and a detailed analysis of the recent change that should set alarm bells ringing for auctioneers and saleroom managers will be carried out with appropriate conclusions and guidelines for safer practice by the professionals operating in this area. The article will conclude with some practical guidance that may be applicable to practitioners and people involved in the managing of auction sales.

### **When Does The Law of England and Wales Apply?**

Keenan defines a contract which, *inter alia*, would include a contract of sale by auction as "an agreement enforceable by the law between two or more persons to do or abstain from doing some act or acts, their intention being to create legal relations and not merely to exchange mutual promises" (2000; p.2). This is a definition that applies to contracts concerned with English law.

The use of the term "English Law" would appear to be, on the face of it, very parochial but in reality English law can have far reaching effects. If a contract is made in England and Wales then, unless the contrary can be established the contract will be governed by the English law and it will come under the jurisdiction of the English courts. The common law rules that have

been defined by precedent over the years will apply and their implications upon the parties particularly in auction sales will be discussed in this article.

However, English law can extend beyond the geographical boundaries of England and Wales. McKendrick notes that “International trade is not a new phenomenon. Indeed many of the cases.....were litigated between parties who had no connection with England other than the fact that their contract was governed by English law..... The explanation for the choice of English law as the governing law is undoubtedly to be found in England’s great trading history” (2000; p.13). Therefore, the choice of English law is popular given that it is tried and tested over the years by means of commercial practice and judicial precedent. The advantages of the common law and codified statutory law having certainty and clarity of interpretation assist the popularity of the choice of English law to regulate the contractual relationship. A contract can have a “jurisdiction clause” stipulated in it that specifies that English law is to be used in the event of interpretation of the contract or disputes. The influence of English law extends well beyond the national boundaries of the jurisdiction as a result of this positive choice made consciously by the parties. An example of a jurisdiction clause quoted is “The parties irrevocably submit to the exclusive jurisdiction of the courts of England and Wales to determine all disputes in connection with this agreement” (Croner, 2000).

The introduction of the Contracts (Applicable Law) Act 1990 affirms that the parties’ choice of law will be paramount (Chuah, 1999). It is further contended that the law of the place where the contract is to be performed will be presumed to be the applicable law. This could well be the law of England and Wales. This, according to Chuah, is different from the former common law provision but he observes that in practice “the changes are purely architectural” (1999; p.221). He contends that the results would invariably be the same. With international contracts made by e-commerce the position is yet to be finally regularised as the technology has moved ahead of the regulatory framework.

The conclusion of these findings is that for a variety of reasons English law has historically and currently been of importance in the interpretation and application of contract rules. The law extends far beyond the national boundaries and given the impact of English common law on what are now foreign jurisdictions, for historical reasons, the influence of it is considerable in its effect.

### **When is the Contract at Auction Made?**

Auction sales are similar in their legal structure to ordinary contracts and the common law requirements regarding their formation are the same. The contract of sale will require a buyer and a seller and the auctioneer will act in an agency capacity. The legal analysis of this agency relationship falls mainly outside the scope of this article. The existence of a contract will depend upon

there being a valid offer made by the bidder that is then accepted by the offeree or an agent on his behalf. Other common law requirements such as the need for some form of consideration, the intention to create a legally binding relationship and full contractual capacity will be needed to enforce the contract. In all contracts the subject matter of the contract must be legal or the contract will be void.

An analysis of the traditional auction situation produces the following results. Of these requirements offer and acceptance have particular relevance due to the different way in which the contract is made at auction. Firstly, when the auctioneer asks for bids this is not regarded as an offer but an invitation to treat. Invitations to treat are not offers that are capable of acceptance but they are invitations to parties to make an offer *Fisher v Bell*. McKendrick observes that the bidder makes an offer and this is then accepted by the fall of the hammer by the auctioneer (2000, p. 37). Therefore, until the auctioneer accepts the highest bid there is no contract at common law or under statute. The rule in *Payne v Cave ante.* is that the bidder can withdraw his offer before the hammer falls. The auctioneer can withdraw the item from sale if it is said to be sold subject to a reserve price that has not been reached. This matter is dealt with in the following section. If the item is sold without reserve then it is sold to the highest bidder and the auctioneer cannot withdraw the lot without serious consequences that are detailed in the final section.

Similar principles would apply to bids made by telephone and other means of electronic communication. There would have to be some form of positive acceptance by the auctioneer to secure a legally binding contract. The rules relating to acceptance by post and other forms of communication are well established under the common law and would be applicable under auction sales. A postal acceptance e.g. will take place when the letter is posted *Household Fire Insurance Co. v Grant* and an electronic communication will take place when the acceptance is received by the offeror at the place where the offeror happens to be *Entores v Miles Far East Corporation*. The logical outcome from these binding precedents is that, if an acceptance of an offer were made by e-mail and the message for some reason failed, then that would not be valid acceptance and there would not be a legally binding contract. It is also a clearly established principle of English Common Law that the declaration of an intention to hold an auction at some time in the future is also an invitation to treat. This does not in itself constitute an offer capable of acceptance. Therefore failure to hold the auction will not amount to a breach of contract. This was the judicial decision in the case of *Harris v Nickerson*.

### **Auction Sales with and without a Reserve**

Each item that is sold at auction may be regarded as a separate contract of sale according to s.57(1) of the Sale of Goods Act 1979. The conclusion

from this is that each item may be sold with or without a reserve price. If the sale is said to be subject to a reserve then Keenan observes that “the auctioneer has no power to sell below the reserve price. In addition the auctioneer cannot be made liable for breach of warranty if he will not sell below the reserve” (2000; p.335). In practical terms this means that the bidder cannot sue the auctioneer if he refuses to sell an item where a reserve has been specified. Many owners of property protect their interests by placing a reserve price below which they are unwilling to sell. If the auctioneer ignored the reserve he would be acting outside his authority and therefore he would incur liability. As a matter of further note for managers and auctioneers, the seller or his agent cannot bid unless the power to do so has been reserved in the conditions for the auction sale. Many sellers appoint the auctioneer to act as their agent with a view to bidding to attain the reserve price. Any bids made by the seller or the auctioneer once the reserve price has been reached could be regarded as fraudulent.

Sales that are advertised to be without reserve state that there is no reserve price and the implication of this will be considered in the next section as the position has been redefined by recent case law to the detriment of the auctioneer.

### **The Dramatic Current Legal Change**

As referred to previously, the common law rules have been developed recently within the specific context of auction sales by codification of the common law and the decision of the Court of Appeal in the case of *Barry v Davies q.v.*

A detailed analysis of the current legal situation relating to auction sales that are said to be sales without reserve is provided here.

Section 57 of the Sale of Goods Act 1979 provides:

(2) A sale by auction is complete when the auctioneer announces its completion by the fall of the hammer, or in other customary manner; and until the announcement is made any bidder may retract his bid.

(3) A sale by auction may be notified to be subject to a reserve or upset price, and a right to bid may also be reserved expressly by or on behalf of the seller.

(4) Where a sale by auction is not notified to be subject to a right to bid by or on behalf of the seller, it is not lawful for the seller to bid himself or to employ any person to bid at the sale, or for the auctioneer knowingly to take any bid from the seller or any such person.

(5) A sale contravening subsection (4) above may be treated as fraudulent by the buyer.

(6) Where, in respect of a sale by auction, a right to bid is expressly reserved (but not otherwise) the seller or any one person on his behalf may bid at the auction.

The sale of goods by auction was the issue in the recent case of *Barry v Davies ante.*, in the Court of Appeal (Civil Division). The case concerned the sale of two engine analysers entered in an auction sale, to be sold without reserve, on the instructions of the Customs and Excise authorities in consequence of VAT liability incurred by the manufacturers. The machines, which had not been used, would have cost £14,521 each had they been bought from the manufacturers. The plaintiff ran a car tuning business and was interested in them for his business. He went to view the machines at the auction room on 20 June 1997 and was told by the auctioneer that they were to be sold on the 25th without reserve. The plaintiff attended the auction, where the auctioneer announced that the machines were to be sold that day on behalf of the VAT Office and that they were each worth £14,000. No bid was made for the machines, other than that of the plaintiff at £200 each. There had been a previous bid of £400 each from the auctioneer's son-in-law, but this was not mentioned. The auctioneer decided that, even in the absence of a reserve, he was not justified in selling the machines for as little as £400. he explained,

*"I think I am justified in not selling at an auction without reserve if I think I could get more in some other way later."*

The auctioneer withdrew the machines from sale. They were sold some days later for £750 each after appearing in a magazine advertisement.

The plaintiff claimed damages, as the highest bidder, for the difference between the value of the machines (£28,000) and the bid of £400.

Judgement was entered for the plaintiff at Northampton County Court for £27,600 plus costs against the auctioneers for breach of a collateral contract between the auctioneer and the highest bidder. This collateral contract involved an offer by the auctioneer to sell to the highest bidder which was accepted when the bid was made. The case went on appeal to the Court of Appeal on the grounds that the judge was wrong in law in finding that the auctioneers were bound to sell in an auction without reserve to the highest bidder and that either there was no such collateral contract or, if there was, there was no consideration to support it.

The leading judgement was delivered in the Court of Appeal by Sir Murray Stuart-Smith. It was argued on behalf of the auctioneers that an auction without reserve did not amount to a promise by the auctioneer to sell to the highest bidder, but it was merely a statement that the vendor had not placed a reserve on the lot. This proposition was in line with the principle that there is no completed contract until the fall of the hammer, until which time the bidder is at liberty to withdraw the bid. Such a promise should not be implied



because there could be other reasons why the auctioneer would be entitled to withdraw the lot, such as the suspicion of an illegal ring or that the vendor did not have title to sell.

It was also argued on behalf of the auctioneers that there was no consideration for the promise to sell to the highest bidder. The bid itself could not amount to consideration as it could be withdrawn prior to the fall of the hammer. The bid was a discretionary promise, an illusory consideration, merely promising to do something 'if I feel like it'.

Sir Murray Stuart-Smith referred to the previous legal authorities, such as they were, as not speaking with one voice. He continued,

*"Although the [Sale of Goods] Act does not expressly deal with sales by auction without reserve, the auctioneer is the agent of the vendor and, unless [section 57] subsection (4) has been complied with, it is not lawful for him to make a bid. Yet withdrawing the lot from the sale because it has not reached the level which the auctioneer considers appropriate is tantamount to bidding on behalf of the seller. The highest bid cannot be rejected simply because it is not high enough."*

The case provides an interesting review of cases dating from the eighteenth century. The case of *Warlow v Harrison* concerned the sale of a horse at an auction advertised as without reserve. The plaintiff bid 60 guineas for a mare, whereupon the owner bid 61 guineas. On being informed that the last bidder was the owner, the plaintiff refused to bid further. The defendant auctioneer knocked the mare down to the owner, knowing him to be such, and entered his name in the sale book as purchaser. Immediately afterwards the plaintiff claimed the mare from the auctioneer as the highest *bona fide* bidder. Subsequently the plaintiff sued the auctioneer. The decision went against the plaintiff on the case as pleaded but the Court of Exchequer Chamber was of the view that were the pleadings to be amended, the plaintiff would be entitled to succeed on a retrial. Martin B. referred to the announcement that the sale was to be without reserve and that,

*"This, according to all cases both at law and equity, means that neither the vendor nor any person in his behalf shall bid at the auction, and that the property shall be sold to the highest bidder, whether the sum be equivalent to the real value or not"*

The situation was likened to that of a loser of property offering a reward. An auctioneer putting property up for sale upon the condition that the sale shall be without reserve, contracts that it will be so. Martin B. stated the position thus,

*"We think the auctioneer who puts the property up for sale upon such a condition pledges himself that the sale shall be without reserve; or, in other words, contracts that it shall be so; and that this contract is made with the highest bona fide bidder: and, in case of breach of it, that he has a right of action against the auctioneer...We entertain no*



*doubt that the owner may, at any time before the contract is legally complete, interfere and revoke the auctioneer's authority: but he does so at his peril; and, if the auctioneer has contracted any liability in consequence of his employment and the subsequent revocation or conduct of the owner, he is entitled to be indemnified."*

Sir Murray Stuart-Smith referred, in *Barry v Davies*, to consideration, identifying detriment to the bidder since his bid could be accepted unless and until withdrawn and benefit to the auctioneer as the bidding is driven up, with sale attendance likely to be increased in the knowledge of the absence of a reserve. Even though the contract on conclusion of the sale is between the purchaser and vendor and not the auctioneer, that does not prevent the existence of a collateral agreement between the auctioneer and the bidder. This agreement could also arise where there was no contract between the vendor and purchaser.

The consequences of the judgement were severe for the auctioneer, whose liability was for the difference between the contract price and the market price in accordance with section 51(3) of the Sale of Goods Act 1979. In this case the market price was the manufacturer's list price, a finding not to be taken in support of a principle that the manufacturer's list price is normally the market price of second-hand goods, according to Pill L.J. His Lordship considered that in this respect the plaintiff was perhaps fortunate as, in most cases, there will be evidence of second-hand prices but in this case the auctioneer's counsel objected to such evidence in an attempt to confine the assessment of damages to £750 for each of the machines, being the actual amounts for which they were subsequently sold.

It is interesting to compare the outcome of this case with that of *Payne v Cave ante*, where the highest bidder at an auction sale was held to be entitled to withdraw his bid before the hammer fell. The court recognised that the auctioneer was the agent of the vendor and that the assent of both parties was necessary to make the contract binding, signified on the part of the seller by knocking down the hammer. It was stated that every bid was nothing more than an offer on one side, not binding on either side until it was assented to, otherwise one party would be bound by the offer and the other not, which could never be allowed.

In the present case it would seem that the auctioneer's actions were influenced by the assumption that as a bidder could withdraw an offer prior to the fall of the hammer, the auctioneer on behalf of a seller was similarly entitled to refuse to accept the offer. As agent for the seller, an auctioneer is under a duty to his principal to exercise reasonable care and skill.

As the auctioneer had been instructed by Customs and Excise that the machines were to be sold without reserve, that was how it was to be. The plaintiff could have been even more astute. Upon realising that he had the field to

himself, he could have withdrawn his bid of £200 for each machine and then bid a nominal amount of, say £1, for each machine.

Such are the serious consequences of *Barry v Davies*. Let the auctioneer indeed beware.

### **Conclusions**

The role of the English law in the conduct of sales by auction is highly significant. It can apply to many forms of contract whether made inside or outside the jurisdiction. As with all common law and statute law principles, these are capable of development and change as the law and society evolves. The advent of e-commerce will be embraced by these rules and the new form of business transactions will still render the common law and codified statutory rules highly relevant where English law applies. The specific rules that relate to the formation of contracts at an auction sale are well established and they will be transferable to the e-commerce environment.

As the common law has a degree of certainty it is not rigid to the point of unreserved immutability. It can adapt and common law rules will develop when appropriate cases come before the courts. This has been the situation in the case of *Barry v Davies ante*. This judgement has clearly stated the principle that an auction sale without reserve can result in the auctioneer becoming personally liable if he does not sell to the highest bidder. The liability lies as a result of a breach of the collateral contract made between the auctioneer and the bidder. Furthermore, the extent of the liability can be considerable as was evidenced in that case. Auctioneers and the managers of auction sales should be aware of the dangers. These findings will also be of relevance to professional indemnity insurers as factors influencing the assessment of risk.

### **Recommendations**

1. If a seller wishes to bid then he must expressly reserve the right to bid before the auction process commences.
2. An auctioneer can refuse to sell an item if there is a reserve price that is not reached during the bidding process. Failure to do so would be acting outside his authority.
3. A bidder will incur legal liability until the sale is completed by the fall of the hammer or some other prescribed means indicating that the highest offer has been accepted. Auctioneers should clearly indicate the point at which the sale is executed.
4. If the sale is said to be without a reserve price then the auctioneer is obliged to sell to the highest bidder irrespective of the price otherwise individual liability will accrue to him. Auctioneers should approach any sale

without reserve with extreme caution.

5. A failure by the auctioneer to advise of the consequences of selling without a reserve could amount to a breach of duty of care. The auctioneer could be liable in negligence to the seller client whose property has been sold for less than was anticipated. The auctioneer would be well advised to inform the seller of the consequences that would occur if the goods were to be sold without reserve.

6. Insurers should be aware of the consequences of the recent judicial decision in their risk assessment of auction businesses, as the financial implications can be severe.

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