

HOW MANY CONTRACTS IN AN AUCTION SALE?

JAMES BROWN* AND MARK PAWLOWSKI**

*LL.B (Hons), Ph.D, FHEA, Barrister, Senior Lecturer, Business School, Aston University.

**LL.B (Hons.), BCL (Oxon), ACI Arb, SFHEA, Barrister, Professor of Property Law, School of Law, University of Greenwich. The writers wish to express their gratitude to Franklin Meisel for his initial suggestions for this article.

INTRODUCTION

Making sense of auction sales, in terms of English contract law, is no easy task. Despite the common perception of hammers hitting blocks, signifying the creation of the basic sale contract,¹ a typical auction sale necessarily involves the making of several forms of contract other than the obvious primary sale agreement. The purpose of this article, therefore, is threefold, namely, to (1) examine these various forms of contractual relationship² which may come into existence as a result of a traditional (face to face) auction sale; (2) consider specifically the selling of land at public auction with a view to advocating a change in the law requiring the formality of writing for sales contracts of land for both private and public auctions, and (3) compare briefly the contractual elements of an online ascending model of auction sale typified by the eBay phenomenon.

NATURE OF AUCTION SALES

Despite the lack of any formal statutory definition of an auction sale, *Halsbury's Laws of England* states that “[an] auction is a manner of selling or letting property by bids, usually to the highest bidder by public competition”.³ This is the so-called “ascending bid” form of auction, and this article is concerned predominantly with this type of auction where the same is attended by a group of potential bidders/purchasers.

¹ See, *Payne v Cave* (1789) 3 Term Rep 148 and s.57(2) of the Sale of Goods Act 1979, which states that: “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”.

² It is not proposed to examine the relationship between seller and auctioneer as this will depend on principles of agency and whether the auctioneer has express or apparent authority to act on behalf of his principal.

³ *Halsbury's Laws of England*, (4th ed., Reissue), Butterworths, at para 201. It is noteworthy that, in addition to the “ascending bid” auction, alternative forms of auction also exist, for example, the “Dutch auction” and variants of the same, (based on the competition of descending bids) and sealed bid arrangements. For a full discussion of the various types of auction: see, B.W. Harvey and F. Meisel, *Auctions Law and Practice*, (3rd ed., 2006), Oxford University Press, at paras.1.02-1.04. Further, for a useful discussion of the history of auctions in the UK: see, Harvey and Meisel, above, at paras. 1.05-1.11.

Auction sales have been around for a long time.⁴ Perhaps the most direct historical comparison to current practice of the ascending auction can be traced back to the Roman auction, indeed the word “auction” is derived from the latin *augere* and *auctum*, meaning “to increase”.⁵ In England, according to Harvey and Meisel, chattel auctioning can be traced back to just after the Restoration period.⁶ Land auctions in the UK, on the other hand, seem to have become established by the mid-18th century, with the first reported case involving a purported land auction appearing at this time.⁷ It is to this period that the first major British auction houses can trace their origins. For example, the first recorded auction at Sotheby’s took place in 1744 and Christies was founded not long after in 1766.⁸ Today, the auction sale is routinely employed in the sale of commodities, plant and industrial equipment, land, artwork, antiques and other personal property. Undoubtedly, this form of sale has become an important aspect of English mercantile practice.

ECONOMIC BENEFITS OF AUCTION SALES

Selling land or chattels by way of auction sale is arguably a more economically efficient way of selling property than by the normal route of private treaty where goods are offered for sale at a fixed price and presented for sale on a “take it or leave it” basis. An auction sale positively encourages a healthy system of barter. Further, because auction sales occur only at a specific time and place, buyers in attendance will be focused on achieving a fair price for the property in question. The atmosphere of competitive bidding can generate potentially a better price than an ordinary open market sale. The auction environment, therefore, creates a window of opportunity for the micro-economic factors of supply and demand to play themselves out in a more intensive way. The presence of two (or more) eager potential buyers can force up the price of the property in question to a figure way above its normal market value.

THE ROLE OF THE AUCTIONEER

An auctioneer acts as an agent of the vendor of the goods or land to be sold at the auction. His role, however, extends beyond simply conducting the auction. In the case of a sale of land, he will act on behalf of the vendor in a similar way to an estate agent involving himself in each step of selling the property from pre-inspection to final contract signing. He may also be a valuer or surveyor. In particular, the auctioneer will normally evaluate the property for sale by auction, gathering and compiling the necessary information for the auction catalogue featuring

⁴ Harvey and Meisel, above, at para. 1.05, cite Herodotus, who by his writings refers to auctions existing around 500 BC in ancient Babylon, the transactions being concerned with the yearly sale of women of marriageable age.

⁵ See, Harvey and Meisel, above, at para. 1.06 and, more generally, J.A.C. Thomas, “The Auction Sale in Roman Law” (1957) 1 Jur R (April) 43.

⁶ Harvey and Meisel, above, at para 1.08.

⁷ See, *Daniel v Adams* (1764) Amb 495 and Harvey and Meisel, above, at para 1.10.

⁸ Harvey and Meisel, above, at para.1.13 and 1.14. Interestingly, a third major UK auction firm/auction house, namely, Phillips, Son and Neale, can also trace its origins back to the mid-18th century.

relevant photographs, descriptions and guide prices. He will also be responsible for advertising and promoting the auction and making potential buyers aware of the properties on offer.

THE “FOUR BASIC CONTRACTS” MODEL

In terms of a typical auction sale, four basic contracts underpin the auction process. First, there is a contract between bidders *inter se*, what can be termed as the “taking part contract”. Secondly, there is a contract between the auction house and each individual bidder. Thirdly, there is the sale contract itself which exists between the bidder whose bid is accepted and the seller. Fourthly, there is the potential for a separate (or collateral) contract to exist between auctioneer and highest bidder where the auction involves the sale of a lot without reserve.

(a) the taking part contract

This form of contract exists between the bidders *inter se*, and is analagous to the contract position which arose in *The Santiana*.⁹ Here, both claimant and defendant entered their respective yachts in a regatta race. In doing so, they agreed to be bound by the sailing rules of the Yacht Racing Association. One of these rules provided that the owner of any yacht “disobeying or infringing any of these rules . . . shall be liable for all damages arising therefrom”. In breach of one of the rules, the defendant’s yacht ran into and sank the claimant’s yacht. The collision occurred without fault on the part of the defendant. It was held that the parties had accepted a contractual obligation not to disobey the sailing rules with the result that the defendant was liable to the claimant for the loss suffered as a result of the breach and further, that the effect of the agreement between the parties was to displace the limitation on liability which would otherwise have been applicable as a result of the application of a statutory provision.

It is noteworthy that the dispute here was not one between one of the competitors and the organisers of the competition. Rather, it was between two of the competitors. Moreover, the issue related to the terms of the contract concluded between the competitors. Although the court gave no clear answer as to when precisely the contract was formed between the competitors,¹⁰ there was no doubt that a contractual relationship existed between the parties. Significantly, Lord Herschell stated:¹¹

“I cannot entertain any doubt that there was a contractual relation between the parties to this litigation. The effect of their entering for the race and undertaking to be bound by these rules to the knowledge of each other, is sufficient, I think, where those rules

⁹ [1895] P 248, (CA), affirmed sub nom *Clarke v Dunraven* [1897] AC 59, (HL).

¹⁰ Lord Esher MR stated that the competitors “were bound when they began to sail and not before then”. Lopes LJ concluded that “the contract arose directly any owner entered his yacht to sail” and Rigby LJ stated that “the contract was created when the parties actually came forward and became competitors”.

¹¹ [1897] AC 59, at.63.

indicate a liability on the part of the one to the other, to create a contractual obligation to discharge that liability.”

It is submitted that the position of each bidder at an auction sale is not dissimilar. Arguably, when a bidder attends an auction and acquires an auction catalogue containing the auction’s standard conditions, each bidder individually contracts with all the other bidders to abide by the conditions. Each individual bidder provides consideration by agreeing to be bound by the common auction rules. In short, a multiplicity of individual contracts arise between each bidder at the auction and all bidders are deemed to play the “bidding game” by the auction rules.

As in *The Santiana*, it might be difficult to pinpoint the precise time of offer and acceptance in this contract between bidders, but arguably a contract *inter se* exists in much the same way as a contract between the competitors in a yacht race. Bidders enter the “bidding race” by attending the auction and impliedly contract to be bound by the auctioneer’s common conditions so as to be given the opportunity to enter bids for the property to be sold. Thus, for example, if one bidder deliberately excludes another bidder from the auction room causing the excluded bidder to miss his chance to bid for a particular lot, the bidder who has been so denied could arguably sue the offending bidder in contract and recover damages. These damages would represent the “lost chance” of securing the property to be sold at auction.¹² To take another example, if one bidder conspires with others to drive up the price artificially so as to deprive another bidder of his opportunity to secure the purchase of a lot, damages for the loss of a chance could be claimed against the conspiring bidders with those damages being apportioned equally between those responsible.¹³ It will be seen that this “taking part contract” is necessary in the context of an auction sale so as to protect the economic interests of each bidder against any breach of the auction conditions (or other wrongdoing) committed by fellow bidders. Essentially, the contract represents the legal mechanism which ensures that all bidders at the auction play by a common set of mutually enforceable rules.

Apart from contractual redress, the practice of so-called “bid rigging” may be the subject of criminal prosecution under English law. The Auction (Bidding Agreements) Acts of 1927 and 1969 make it a criminal offence for dealers to give an inducement or reward to any person for abstaining from bidding at a sale by auction and for any person to accept the inducement or reward. The seller may also avoid the contract of sale and the members of the ring will be jointly and severally liable to compensate the seller for his loss. The Enterprise Act 2002, on

¹² See, *Chaplin v Hicks* [1911] 2 KB 532. Arguably, the fractional lost profit (if any) on any such purchase would be ascertained by calculating the basis for such a profit and dividing the same between the number of bidders taking part. If damages for any loss of a chance proved to be incapable of quantification or inapplicable, the bidder could, in the alternative, claim his damages on a “reliance basis” (i.e., damages representing the cost of any outgoings, catalogue/registration fee, travel costs, etc., as money laid out in advance of the taking part contract). See generally, *Anglia Television v Reed* [1972] 1 QB 60, CA.

¹³ Presumably, in such a situation the deprived bidder could sue one of the conspiring bidders (the one most able to pay) for breach of the “taking part contract” and claim damages for his lost chance (or, alternatively, for his reliance losses). The sued bidder could then presumably claim a contribution against the other conspiring bidders so as to apportion this loss between them all: see, *Deering v Earl of Winchelsea* (1787) 2 Bos & P 270, Court of Exchequer. The tort of civil conspiracy may also have been committed in this scenario. Again, the damages would represent the injured bidder’s lost chance of any *pro rata* profits which could have been gained from the bidding.

the other hand, makes it a criminal offence to participate in a “bid-rigging arrangement”. Although the offence is directed primarily at contractors, who in the course of a tender process agree to fix prices, the provisions of the Act apply equally to an auction where there is an agreement amongst the potential bidders that one (or some) of them will abstain from bidding (or that they will bid in a certain way) and the effect of such an agreement is to distort competition. Whilst the Act required the prosecution to show that the members of the arrangement had acted dishonestly, this element of the offence has since been removed by the Enterprise and Regulatory Reform Act 2013. Finally, an arrangement between bidders designed to restrict competition at auction may fall within the ambit of the Competition Act 1998.

Despite this considerable body of legislation, the criminal and regulatory law has been largely ineffective in dealing with bid rigging. Only a handful of reported prosecutions have been successful, which may be partly attributable to the fact that both the Auction Acts and the Enterprise Act afford a defence to participants in bidding arrangements if they provide certain information in writing to the auctioneer before the bid is made. Contractual sanctions, therefore, are likely to continue to play a significant role in protecting the interests of innocent participants at auction until such time as a new regulatory framework is put in place to deal specifically with objectionable bidding practices.

(b) contract between the auction house and each bidder

As well as entering into a multiplicity of individual contracts with each of his fellow bidders, a bidder also enters into a separate auction contract with the auction house itself. In terms of consideration, the auction house allows the bidder to take part in the auction according to its sales conditions in return for which the bidder (by taking part in the bidding) helps force up the price and provides the auction house with the opportunity to earn its commission. It goes without saying that, without a competitive group of bidders, there would be no auction, and without an auction, the auction house would not be able to earn its commission by bringing about the relevant sale.

If, therefore, the auction house fails to entertain a genuine bid put forward by a bidder and awards the sale of the lot in question to another rival bidder for less than that which was offered, the former may bring an action against the auction house for damages for breach of contract. These damages would represent the loss of profit (if any) on any purchase which should have been obtained by the bidder in question or, alternatively, the disappointed bidder could claim his reliance losses (i.e., any expenditure he has laid out in advance of the commencement of the auction). If a bidder is ignored and the property is sold for the same price to another, then again the ignored bidder’s damages would represent the same lost profit (if any) which could have been earned if his bid had been properly accepted. Alternatively, the disappointed bidder may again be entitled to reliance loss damages.

If, having ignored the genuine bid, the auction house in breach of contract sells the lot for more than what was offered, the ignored bidder may claim damages for his lost chance of being able

to purchase the property as a result of being barred from the bidding. If it is not possible to quantify this lost chance, arguably the ignored bidder has suffered no loss and would have no claim for any expectation damages despite the breach of contract. Presumably, however, he could seek to protect his reliance interest and, accordingly, claim his pre-contract expenditure.

The contract which exists between the auction house and each bidder (on an individual rather than co-contracting party basis) is clearly necessary to protect the economic interests of each bidder. Essentially, each and every bidder should be permitted an equal opportunity to take part in the auction on the condition that he abides by the auctioneer's auction conditions.¹⁴

(c) seller/bidder sale contract

Contract lawyers will be more than aware of the main sale contract which comes into existence between the seller and successful bidder when the auctioneer accepts the highest bid for a lot in the customary manner of hitting the hammer on the block.¹⁵ This orthodoxy suggests that, by striking the block, the auctioneer accepts the bidder's offer to purchase the lot in question.

A distinction, however, needs to be made between those auctions where there is a "sale *with* reserve" and those where there is a "sale *without* reserve". The position is relatively straightforward in the case of auctions held *with* a reserve price.¹⁶ Here, the auctioneer, in inviting bids for a particular lot, makes an invitation to treat to the various bidders. The offer is then made by the relevant bidder. That bid is not usually accepted immediately. The auctioneer invites further bids to be made for the lot. If no other bids are forthcoming, the auctioneer will accept the bid on the fall of his hammer.¹⁷ It is at this point that acceptance of the offer by the auction house (on behalf of the seller) takes place and the contract of sale is struck. Moreover, where a lot is subject to a reserve price, arguably the auctioneer cannot withdraw the lot once the reserve price has been reached.¹⁸ Thereafter, it would seem that, once the best bid has been achieved, the auctioneer accepts the same by the fall of the hammer.

It has also been held that an advertisement by an auction house to hold an auction sale with reserve on a certain day will not constitute an offer to potential bidders that the auction sale will actually take place. In *Harris v Nickerson*,¹⁹ the claimant failed to recover damages for loss suffered in travelling to the advertised place of an auction sale which was ultimately cancelled. His claim was condemned as "an attempt to make a mere declaration of intention a binding contract".

¹⁴ If a bidder fails to abide by the auctioneer's terms and conditions and his bid is not entertained by the auctioneer, this would presumably permit the auction house to "accept" the breach as bringing the contract with the bidder in question to an end, with the result that the auction house would be released from considering his particular bid: See, *Hong Kong Fir Shipping Co v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26.

¹⁵ *Payne v Cave* (1789) 3 Term Rep 148 and s.57(2) of the Sale of Goods Act 1979.

¹⁶ This is where a price for a particular lot is reserved as the minimum acceptable price by the seller (i.e., a bottom line price).

¹⁷ *British Car Auctions v Wright* [1972] 1 WLR 1519.

¹⁸ See, Scott [2001] LMCLQ 334, at pp. 336-337.

¹⁹ (1873) LR 8 QB 286.

(d) collateral contract between auctioneer and highest bidder

Where the auction sale is held *without* a reserve price, the contract law position is more complicated.²⁰ The dicta of three judges of the Exchequer Chamber in the 19th century case of *Warlow v Harrison*²¹ suggests that, in the case of an auction held without a reserve price, the auctioneer makes an offer to sell the lot and that offer is accepted by the bidder who makes the highest bid at the auction. Similarly, on this reasoning, an advertisement to hold an auction without reserve will amount to a unilateral offer to sell to the highest bidder which is capable of acceptance by any bidder complying with the terms of the offer.²² The situation is analogous to a contractor who makes a tender in response to an invitation for tenders. The tender is an acceptance of the offer to consider compliant tenders. It is important, however, to observe, that there is no *contract of sale* between the highest bidder and the seller of the property if the auctioneer refuses to accept the highest bid. The auctioneer, in these circumstances, is liable on a *separate* (or collateral) contract between him and the highest bidder that the sale will be without reserve. One surprising consequence of this analysis, however, is that, whereas there is no breach of contract if the auctioneer simply withdraws the lot from the sale before bidding commences, if instead he allows bidding to commence and then places a reserve price on the lot, he is in breach.

A contrary argument is that there is no separate or collateral contract because the auctioneer who holds an auction without reserve is merely making a request for bids from those participating at the auction. The offer, therefore, is made by the bidders and no contract is formed, in the same way as an auction for a lot with a reserve price, until the fall of the hammer. The cases of *Harris v Nickerson*²³ and *Payne v Cave*²⁴ support this approach, although they can be distinguished on the grounds that they both involved auction sales which were not without reserve. There is also the Scottish case of *Fenwick v. MacDonald Fraser*,²⁵ which is persuasive on this point. Here, the claimant attended an auction sale and made a bid for lot 50, a bull. His offer of 42 guineas was the highest bid made at the sale of the lot and, accordingly, he was the purchaser in terms of the conditions of sale. The auctioneer then withdrew the lot intimating that there was a reserve price on it for 150 guineas. The Court of Session held that s.58(2) of the Sale of Goods Act 1893 (forerunner to s.57(2) of the Sale of Goods Act 1979, which stipulates that a sale by auction is complete when the auctioneer announces its completion upon the fall of the hammer) implied that the seller had the right to withdraw the lot at any time before the hammer falls. This was a corollary of the right of the buyer to withdraw his bid. Significantly, the statutory provisions make no exception for auction sales without reserve. Moreover, the auctioneer may have good reasons for withdrawing the lot. For

²⁰ This is where the “highest bid” constitutes the winning bid, whether its actual value is low or high.

²¹ (1859) 1 E & B 309. See also, *Harris v Nickerson* (1873) LR 8 QB 286, per Blackburn and Quain LJ.

²² *Williams v Carwardine* (1833) LKB 101, (a reward case) and *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256.

²³ (1873) LR 8 QB 286.

²⁴ (1789) 3 Term Rep 148.

²⁵ (1904) 6 F (Ct. of Session) 850. Strictly speaking, the sale was not “without reserve” in this case because the auction conditions provided expressly for the right of the sellers to bid (albeit just once) for the lot. See also, *Mainprice v Westley* (1865) 6 B & S 420.

example, let us assume that a bidder flies all the way from Australia to bid at the auction and is the highest bidder at the point at which the lot is withdrawn (because the seller decides to keep the lot after all). There has been no completed sale (in the orthodox sense) and yet the auctioneer is liable for the bidder's travelling expenses or, alternatively, the difference between what he bid and the actual value of the lot.

So far as English law is concerned, the point has since been clarified by the Court of Appeal in *Barry v Davies (trading as Heathcote Ball (Commercial Auctions) & Co)*,²⁶ where it was accepted that, where a lot was auctioned without reserve, the auctioneer would be in breach of contract to the highest bidder if he withdrew the lot from sale. Indeed, in this case, the Court went so far as to say that the withdrawal of the lot would constitute an unlawful bid by the auctioneer on behalf of the seller under s.57(4) of the Sale of Goods Act 1979. The facts are noteworthy. Customs and Excise put up two engine analysers for sale by auction without a reserve price. The price of new machines was £14,521 each. The claimant bid the highest price of £200 for each machine after the auctioneer had tried and failed to obtain bids of £5,000 and £3,000 for each machine. The auctioneer refused to sell the machines to the claimant for such a low price and they were later sold to a third party for £1,500 each. Interestingly, the claimant brought an action against the auctioneer for breach of contract, rather than the seller, Customs and Excise. The claim succeeded on the ground that there was a separate "collateral contract" between the auctioneer and the highest bidder²⁷ constituted by an offer by the auctioneer to sell to the highest bidder which was accepted when the bid was made.

The claimant was held to be entitled to recover £27,600 by way of damages, being the difference between the amount that the claimant had bid to purchase the machines (£400) and the amount he would have been required to pay to obtain the machines in the ordinary way (£28,000).²⁸ Given, however, that there was no *contract of sale* between the seller and the bidder, but merely a collateral contract to effect a contract of sale, the damages awarded appear misconceived. Arguably, all that the disappointed bidder has lost is the chance of obtaining the lot at the price which he actually bid. This chance may be said to have a value and the court should not reject a claim for damages simply because it may be difficult to assess.²⁹ In *Thomas Eggar Verrall Bowles (a firm) v Anthony Burnett Rice*,³⁰ for example, a prospective purchaser was wrongfully denied a chance to bid at auction. Rimer J awarded him damages based on the

²⁶[2000] 1 WLR 1962, CA.

²⁷ See, E. McKendrick, *Contract Law Text Cases and Materials*, (4th ed.), Oxford University Press, at p. 80: "it was not a contract of sale between the buyer and seller. The effect of the auctioneer's action was to prevent a contract coming into being between the seller and the buyer." Arguably, however, there was such a contract between the bidder and the seller. Being the agent of Customs and Excise, the auctioneer had the authority of the seller to make the offer to sell to the highest bidder. That offer was accepted when the highest bid was made, resulting in a contract of sale of the machines at the price as between seller and the bidder. If the highest bid is acceptance in itself, this obviates the significance of the "fall of the hammer".

²⁸ This represents the measure of damages awarded under s.51(3) of the Sale of Goods Act 1979, where there is a failure by the seller to deliver the goods to the buyer. The two machines were, in fact, sold elsewhere for a total of £1,500. That sum, however, was held not to be the measure of the claimant's loss since it would not put him into possession (or in a position to obtain possession) of two brand new £14,000 machines. Significantly, the claimant was not a trader but wanted to use the machines in his own business.

²⁹ See, C.J. Slade, "Auction Sales of Goods Without Reserve", (1953) 69 LQR 21.

³⁰ Unreported, Ch D, 21 December 1999.

assessment that he had lost a 70 per cent chance of successfully bidding for a lot. He was, therefore, entitled to recover 70 per cent of the aggregate of the cost price of the stock plus the likely profit less the cost of acquisition. In *Barry*, however, this approach was unnecessary given that the claimant was the sole person willing to bid throughout.

What then was the consideration for the auctioneer's promise to sell the lot to the highest bidder? On this point, the Court of Appeal held that the highest bidder supplies the necessary consideration by performing the act of making the highest bid.³¹ This is a benefit to the auctioneer (as the price is driven up) and a corresponding detriment to the bidder in that he runs the risk of his bid being accepted. Another way of looking at this is to say that the auctioneer's offer to sell the lot without reserve is a unilateral offer to those bidding at the auction.³² The highest bidder provides consideration by simply performing the act of making the highest bid.³³ In *Barry*, Stuart-Smith LJ stated:

“As to consideration, in my judgment there is consideration both in the form of detriment to the bidder, since his bid can be accepted unless and until it is withdrawn and benefit to the auctioneer as the bidding is driven up. Moreover, attendance at the sale is likely to be increased if it is known that there is no reserve.”

On commentator, however, has expressed difficulty with this view in that “the bid made is a revocable one and this provides an insecure foundation for the finding of consideration for the promise”.³⁴ In other words, if the bidder can withdraw his bid at any time before the fall of the hammer, how can this be a benefit to the auctioneer or a detriment to the bidder? Another unresolved question which arises from the *Barry* ruling is the precise moment at which the auctioneer makes the offer to sell the goods. Is it when the auction is advertised without a reserve price, or is it later when the auctioneer puts the lot up for sale at the auction? In *Barry*, the Court of Appeal did not address this question and academic opinion, it seems, is divided.³⁵

Finally, a more fundamental question arises as to whether the auctioneer in contracting to sell to the highest bidder is, in fact, acting as agent for the seller so as to make the latter liable under the collateral contract. Harvey and Meisel, in their book on *Auctions Law and Practice*,³⁶ make the point that:³⁷

“. . . if an advertisement of a sale without reserve is made on the instructions of the vendor, there seems nothing in principle to prevent the court from holding that this constitutes an offer by the vendor, as principal, to sell to the highest bidder made through the auctioneer merely as agent.”

³¹ See also, F. Meisel, “What Price Auctions Without Reserve”, (2001) 64 MLR 468, at p. 470, citing *Blackpool and Fylde Aero Club v Blackpool Borough Council* [1990] 1 WLR 25, (invitation for tenders).

³² See, L.C.B. Gower, (1952) 68 LQR 457.

³³ See, *Williams v Carwardine* (1833) LKKB 101 and *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256.

³⁴ McKendrick, *Contract Law Text Cases and Materials*, (4th ed.), OUP, at p. 81.

³⁵ See, L.C.B. Gower, [1952] 68 LQR 238, at p. 241 and Scott [2001] LMCLQ 335.

³⁶ B.W. Harvey and F. Meisel, *Auctions Law and Practice*, (3rd ed., 2006), Oxford University Press.

³⁷ *Ibid*, at para. 3.46.

To this extent, therefore, there may be no real difference between the notion that the auctioneer is personally liable on the collateral contract but can look to the seller for an indemnity, and one that renders the seller primarily responsible on the contract as principal.³⁸

SELLING LAND AT AUCTION

Land may be sold at public auction³⁹ for a variety of reasons. For example, the sale may take the form of the sale of investment “ground rents” (i.e., reversions on long leases), or of commercial property, the value of which has to be realised because of liquidation or some other economic imperative. In many instances, the sale will involve a mortgagee seeking to sell residential property following repossession. Auction sales of land can also occur in other situations, for example, where the property to be sold is owned by an employer who needs to realise the same, having previously used it to house a previous employee or a current employee who has been relocated. Whatever the context, as a precursor to most public auction sales, the vendor will typically have received advice from his agents that sale by public auction represents the most efficient and effective way of realising the value of the land concerned.

(a) the auction process⁴⁰

A sale of land by public auction, as compared to an ordinary sale of land by private treaty, throws up different and unique problems of law and practice.⁴¹ As far as the auctioneer is concerned, however, the preparation for the auction will not be dissimilar to the preparation of land sold by private treaty in so far as the auctioneer will act as agent for the vendor and will typically communicate with the seller’s solicitor who will be charged with the drawing up of a sale contract incorporating the standard (and any special) conditions of sale.

So far as the potential bidder is concerned, unlike a purchaser proceeding by private treaty, he will not know whether he has been successful until the auction has been held. Despite this uncertainty, a potential bidder must, in advance of the auction, be prepared for the consequences which flow from a successful bid. In this connection, he must make all the necessary standard searches preceding the signing of a binding contract and ensure that he has the appropriate finance in place so as to fund the purchase. For many, it will often be impracticable to proceed with a land purchase at auction where reliance is being placed on the

³⁸ If, on the other hand, the identity of the seller as principal is not disclosed, it is likely that the auctioneer would remain personally liable for withdrawing the lot.

³⁹ This article focuses on the sale of land at *public* auction. This is a common form of auction employed in this country. Whilst no formal definition exists, in broad terms a public auction can be defined as any auction which is open to the general public. By way of contrast, a private auction is one which is not open to the general public, but where the group of potential bidders is united by a common personal nexus to a person or organisation, such as members of a certain family or company.

⁴⁰ See generally, B. W. Harvey and F. Meisel, *Auctions Law and Practice*, (3rd ed., 2006), Oxford University Press, at paras. 9.01-9.11.

⁴¹ Here again, however, the auction sale may take the form of a sale of lots with a reserve price or without reserve.

sale of an existing property unless appropriate bridging loan facilities are in place. Additionally, many purchasers of domestic property will be dependent upon the availability of a mortgage which will often prove difficult to secure before the auction sale. That said, several steps can be taken to facilitate the conveyancing process. Thus, it is relatively common for the vendor's solicitors to effect local (and other) searches⁴² of the property before the auction and to make the results available to potential bidders. Also, standard enquiries before contract can be answered on a pro-forma basis.⁴³

Once a bid for the land has been accepted by the auctioneer, by the fall of the hammer, the successful bidder will be treated as having entered into a binding contract with the vendor. It is submitted, however, that this contract represents, in effect, a collateral contract with the vendor (or a "contract to contract") to buy the land in question.⁴⁴ It is only after a bid has been accepted that the final stage of the auction process results normally in the parties entering into a written agreement, signed by both parties. This written agreement represents the formal contract of sale between buyer and seller of the land in question incorporating the general (and any special) conditions of sale.⁴⁵ Presumably, the practical need for evidential certainty with land sold at auction is the same as it is with land purchased by way of private treaty which necessitates a formal written contract of sale signed by both parties.

If the purchaser refuses to complete the purchase, he will be in breach of his collateral contract, for which the vendor may claim damages representing any difference between the price bid at the auction and any subsequent fall in the market price for the property. In this connection, the auctioneer may be instructed to place the property back into auction at the next available opportunity so as to mitigate the seller's loss. If there is a shortfall in price at a subsequent auction, the difference between this shortfall and the accepted bid of the bidder in breach will necessarily represent the seller's damages for breach of contract. If, on the other hand, a higher price is obtained at the subsequent auction, the seller would suffer no loss and merely nominal damages may be awarded to mark the breach.

⁴² It is not unknown for vendors to use the less purchaser-friendly conditions of sale than those used in private treaty sales, presumably on the basis that, at supposedly "knock-down" auction prices, potential bidders will be less fussy about making the normal property enquiries and more content to undergo some risk in effecting their purchase: see, B. Thornell and G. Murphy, "The Hammer Goes Down" (1994, 4 May) 91 (17) Law Society Gazette, 19. It is noteworthy, however, that legal and estate agents' professions have produced a Code of Practice, (RICS, Real Estate Auction Group), which has made some inroads into removing the potential for abuse by the vendor of the purchaser's position at auction. This Code specifically seeks to "strike a balance between the contractual needs of the seller and the buyer whilst recognising that the seller will wish to determine the principal terms under which he/she wishes to sell".

⁴³ Occasionally, the standard form of contract for land auctions incorporates a provision allowing the purchaser to make his local searches *after* the auction and rescind if the certificate of search discloses adverse entries which have not been revealed as special conditions in the contract. It seems that there is no reason why a survey of the property commissioned by the vendor should not be open for inspection, nor office copy entries of the Land Register.

⁴⁴ By analogy, the following collateral contract cases may be of relevance here: *Couchman v Hill* [1947] KB 554 and *City and Westminster Properties (1934) Ltd v Mudd* [1959] Ch.129.

⁴⁵ These conditions govern the relationship between the seller and the buyer and are drawn up by the RICS in conjunction with the legal professions as part of their Common Auction Conditions. Again, these may be supplemented by any special conditions agreed between the parties.

Conversely, if the seller refuses to go ahead with the transaction, the purchaser would be well-placed to seek a decree of specific performance of the contract or, if a decree is refused, to claim damages in lieu under the Chancery Amendment Act 1858.⁴⁶

(b) the requirement of writing

The requirement for a signed written memorandum, as a necessary prerequisite to an enforceable contract for the sale of land, has its origins in s.4 of the Statute of Frauds 1677, which was replaced and replicated in s.40(1) of the Law of Property Act 1925.⁴⁷ Following the recommendations of the Law Commission in 1987,⁴⁸ s.40 was (in turn) repealed and replaced by s.2 of the Law of Property (Miscellaneous Provisions) Act 1989, which now governs contracts for the sale of land made after 27 September 1989.

For land sold at private auction, the requirement of a written agreement, signed by both parties in compliance with s.2(1), applies in the same way as it does for other standard land sales by private treaty.⁴⁹ Significantly, however, s.2(5)(b) of the 1989 Act expressly exempts contracts for the sale of land made in the course of a *public* auction from the formality of writing. In this connection, the Law Commission, in reference to the desirability of providing a statutory exception for public auction sales, stated:⁵⁰

“We appreciate that the effect of our recommendation is that it will no longer be necessary for any written agreement to come into being. However, at present the [auctioneer’s] memorandum can come into existence and may be signed without actually involving the parties themselves. It is thus not a formality which necessarily serves the function of warning people what they are doing or making sure they understand the importance of the contract. There is little doubt that in the vast majority of cases the terms of the contract will continue to be put into writing, and if they were not, the courts would readily decide any dispute as to terms as they do now with other oral contracts. However, we propose confining this exception to public auctions since other forms of auction would still seem to call for the protective functions of formalities.”

⁴⁶ Although the 1858 Act has been repealed, the repealing Act has preserved the jurisdiction: see, ss.3 and 5 of the Statute Law Revision Act 1883.

⁴⁷ Section 40(1) of the Law of Property Act 1925 provides that: “no action may be brought upon any contract for the sale of other disposition of land or any interest in land, unless the agreement upon which such action is brought, or some memorandum or note thereof is in writing, and signed by the party to be charged or by some person thereunto by him lawfully authorised”.

⁴⁸ See, *Transfers of Land: Formalities for Contracts for Sale, etc. of Land*, (Law Com No. 164, 1987).

⁴⁹ In this scenario, the auctioneer can argue that he has *implied* authority to sign the written agreement on behalf of both vendor and purchaser. It is noteworthy, however, that under s.2 of the 1989 Act, solicitors and estate agents require an *express* authority from their clients before they can sign a written contract for the sale of land: see, *Smith v Webster* (1876) 3 Ch D 49; *H Clark (Doncaster) Ltd v Wilkinson* [1965] Ch 694; *Wragg v Lovett* [1948] 2 All ER 968 and *Kean v Mear* [1920] 2 Ch 574.

⁵⁰ *Ibid*, at para. 4.11.

It will be observed that, in one breath, the Commission abolishes the requirement of written formality where the sale is made in the course of a public auction, yet at the same time retains the requirement of a signed written contract for sales of land at private auction. In the writers' view, it is hard to justify this distinction. Indeed, in one sense, it might be said that the demand for greater protection lies in the context of land sales at public auction on the grounds that such auction sales are undoubtedly more common.

Prior to the enactment of s.40 of the 1925 Act, a contract made in the course of a public auction was made on the fall of the hammer with the auctioneer having authority to sign a memorandum on behalf of both the vendor and purchaser.⁵¹ Under the provisions of s.40, therefore, a contract for the sale of land at auction was in reality always enforceable. Under the 1989 Act, however, public auction sales are excluded from the application of s.2 so that there is a binding contract on the fall of the hammer despite the absence of any writing at all.⁵²

The logic of distinguishing between a private and public sale at auction is hard to understand. The need for evidential certainty in terms of the price paid, the identity of the property and names of the parties must surely apply to both types of transaction. Moreover, the suggestion that the courts would "readily decide any dispute as to terms "as they do now with other oral contracts" is open to serious doubt. As Harvey and Meisel observe in their book, *Auctions Law and Practice*,⁵³ the suggestion "underestimates the difficulties which would arise were the terms of a contract for the sale of land by public auction *not* put into writing". As the authors also point out, the effect of abolishing any requirement of writing in the case of land sales by public auction is to render such sales complete simply by the fall of the hammer as with chattels. However, the need for some form of written statement of terms in such cases is beyond doubt, not only to safeguard the interests of the buyer but also to protect the seller. Given that the Law Commission clearly envisaged that there would always be such a document in practice, it is all the more surprising that the requirement of writing was not put on a statutory footing. As mentioned earlier, once a bid for the land has been accepted by the auctioneer, the successful bidder is treated normally as having entered into a collateral contract with the vendor to effect a formal contract in writing to buy the property. The mechanism of a collateral contract is an important and necessary mechanism so as bind the parties prior to a formal contract of sale which, it is submitted, has just as much relevance to public as well as private auction sales.

In the writers' view, therefore, no distinction should be made between the two types of sale so that the written requirements of s.2 should apply to both types of transaction.

ONLINE AUCTIONS

⁵¹ See, *Beer v London Paris Hotel Co* (1875) LR 20 Eq 412 and *Sims v Landray* [1894] 2 Ch 318.

⁵² See, Megarry and Wade, *The Law of Real Property*, (7th ed.), Thomson Sweet and Maxwell, at para 15-022.

⁵³ B. W. Harvey and F. Meisel, *Auctions law and Practice*, (3rd ed., 2006), Oxford University Press, at para. 9.12.

An online auction is an auction which is held over the internet.⁵⁴ Online auctions come in many different formats, but the most popular are the so-called “ascending English” and “Dutch” auctions. In an English auction, the initial price starts low and rises up due to competition amongst the bidders, whereas in a Dutch auction the price begins high and is systematically lowered until a buyer accepts the price.

Transactions conducted on eBay, for example, represent the traditional ascending English model of auction sale. Both sellers and buyers must register themselves on eBay so as to be bound by the eBay terms and conditions. This acknowledgment is a mandatory requirement for participation in the auction and, in doing so, both seller and buyer declare their intention to contract subject to these terms not merely in relation to eBay, but also amongst themselves *inter se*.⁵⁵ To this extent, therefore, the parties’ respective contractual relationships do not differ fundamentally from the “taking part” contract and contract between auction house and bidder to be found in a traditional auction sale.

As with a traditional auction, an item is listed for sale⁵⁶ with a reserve price and prospective purchasers make their respective bids. The item listed for sale is then sold to the highest bidder provided the reserve price is met. Unlike a traditional auction, however, eBay as an “auctioneer” does not physically deal with the bids, nor does it receive the purchase money or take physical possession of the relevant item – instead, it merely provides the electronic forum for the transaction, charging a fee to list the items, and oversees bidding on behalf of the sellers. There is also the crucial difference of timing. Most online auctions are conducted over a certain period of time which helps the bidder who does not have to be constantly online to participate in the auction. There is also the obvious distinction that online auctions use the internet to conduct a virtual scenario where the parties never meet and the purchaser has no opportunity to examine the items personally.

Despite these fundamental differences, the eBay sale itself, in terms of offer and acceptance, does not differ significantly from the traditional auction sale transaction. In this connection, the New South Wales Supreme Court in *Peter Smythe v Vincent Thomas*⁵⁷ has ruled that the fundamental principles of offer and acceptance in contract law apply equally to contracts formed online. In this case, a 1946 World War II plane was put up for sale on eBay with an auction period of 10 days and a reserve price of \$150,000. At the end of the auction period, eBay

⁵⁴ We are not concerned here with a traditional auctioneer using the internet as an additional sales channel in a physical (or virtual) auction room.

⁵⁵ Users agree to the eBay terms and conditions by clicking on an “I accept” button located at the end of the User Agreement.

⁵⁶ The eBay’s User Agreement makes clear that eBay itself does not offer to sell anything and that the offer for sale is made by the registered user who places the items for sale. The Agreement also states that: “eBay is not an auctioneer. Although commonly referred to as an online auction web site, it is important to realise that we are not a traditional auctioneer. Instead the site acts as a venue, which allows registered users to offer, sell, and buy just about anything which is legal, at any time, from anywhere, in a variety of price formats including fixed price and auction-style. We do not review listing provided by users, we never possess the items offered through the site and we are not involved in transactions between buyer and sellers.” On this basis, it is difficult to see how eBay can be said to be acting as agent for either the seller or buyer or that it has authority to execute a contract on behalf of the parties.

⁵⁷ [2007] NSWSC 844.

informed both the buyer and seller that the seller had “won” the aircraft. There were no other bidders. The Court held that an online auction was capable of creating a binding contract between buyer and seller in the same way as a traditional auction – “the auctioneer is the agent of the seller and the agent can accept a bid on behalf of the seller which is what occurs in an eBay auction”.⁵⁸ Significantly, Clause 5.2 of the eBay Rules stated that:

“If you receive at least one bid at or above your stated minimum price (or in the case of reserve auctions, at or above the reserve price), you are to be obligated to complete the transaction to the highest bidder upon the item’s completion.”

This demonstrated that an online auction was completed when a nominated deadline had passed. In the words of Rein AJ:⁵⁹

“In circumstances where both the buyer and seller agree to accept the terms and conditions of eBay, I see no difficulty in treating the parties as having accepted that the online auction will have features that are both similar and different to auctions conducted in other forums . . . The parties have agreed to allow eBay, or its computer, to automatically close the bidding at a fixed time and have accepted that eBay will have no personal liability to either buyer or seller. The automatic close of bidding at a fixed time and the generation of an eBay advice headed ‘won’ appear to have been accepted by the parties to an eBay auction as the equivalent of the fall of the hammer.”⁶⁰

This resembles, in many ways, the old method of holding an auction “by inch of candle” where, after the conditions of sale had been read out, a piece of candle was lighted and participants commenced bidding against one another. The last bid before the candle burnt out won the day. In this form of auction, the going out of the candle corresponded to the fall of the hammer in a modern auction. Similarly, in the context of an eBay style of auction, once the reserve price has been reached at the fixed deadline, the highest bidder will “win” the item and will be deemed to be the successful purchaser. In the *Smythe* case, in particular, even though certain important elements of the transaction (i.e., regarding payment terms) had not been concluded, the Court held that the parties had entered into a binding contract of sale according to the eBay terms and conditions⁶¹ once the designated time for bidding for the item had elapsed. The case is, therefore, significant in so far as it confirms, so far as the applicable law in Australia is concerned, that an eBay sale constitutes a species of auction⁶² and, therefore, a sale of goods.

⁵⁸ Ibid, at [77] per Rein J.

⁵⁹ Ibid, at [35].

⁶⁰ Rein AJ noted that s.60(2) of the Sale of Goods Act 1923 (equivalent to s.57(1) of the Sale of Goods Act 1979 in the UK), contemplated modes of completion other than the fall of the hammer. The relevant sub-section makes provision for the sale to be complete by the fall of the hammer or “any customary manner”, which in the context of an online auction must surely include a set time elapsing without the intervention of a live auctioneer.

⁶¹ It is to be noted that the claimant did not seek to enforce the agreement between eBay and the seller.

⁶² In *Chelmsford Auctions Ltd v Poole* [1973] QB 542, Lord Denning MR identified three contracts on a sale by auction: (1) the sale contract between the owner and the highest bidder; (2) the contract between the owner and the auctioneer; and (3) the contract between the auctioneer and highest bidder. It is submitted that this tripartite contractual relationship also exists in online eBay auctions. The seller contracts with eBay for the provision of the online site for hosting the auction. The buyer also has a contract with eBay for the provision of the site to access and take part in the live auctions. There is also sale contract itself between the seller and

If accepted by the English courts, this will inevitably have important consequences in terms of consumer protection⁶³ for both buyer and seller.

Apart from the online auction typified by the eBay model, it is possible for traditional auctioneers to use the internet as an additional sales channel and sell via a virtual auction room rather than a physical one, or use both in order to receive bids from potential purchasers. Technologies such as video links, broadband and Skype make this possible. As with telephone bids, however, it is submitted that virtual bids placed during a physical and/or virtual auction do not alter the essential legal framework of the auction sale. Regardless of the technology used to receive bids, the live auctioneer retains his role as agent for the parties and, therefore, remains a traditional auctioneer. For example, Gilden's Arts in London, specialising in international art, conducts live auctions where bidders can also participate online. Another example is the-saleroom.com, which is Europe's leading portal for fine art and antiques auctions. Visitors to the site can search and browse catalogues and place bids over the internet in real time, with live audio and video feeds communicating the auction room atmosphere. The site is wholly owned and operated by ATG Media – a global pioneer of auction portals and live and timed online auctions.

In both examples, the live auction takes place in a real physical auction room and registered⁶⁴ bidders can listen and see the items being put up for sale. Online bids are placed in real time just as bids placed in the physical room. All bids are treated in the same way by the live auctioneer. The contractual model in these types of auctions is, therefore, no different from the one discussed earlier in relation to traditional auction sales.

CONCLUSION

The complexity of auction sales throws up a variety of different contractual scenarios, all of which have a valuable role to play in protecting the interests of both buyer and seller. The so-called "taking part contract" between bidders *inter se* ensures that all the participants at the auction play the bidding game by the auction rules. A breach of these rules lays an individual bidder open to a claim in damages against a fellow bidder for the lost chance of bidding for a particular lot or, alternatively, damages representing his pre-contract expenditure. The contract which exists between the auction house and each bidder also safeguards the economic interests of each bidder. Thus, if the auction house fails to entertain a genuine bid and awards the lot in

highest bidder. The lack of any agency, however, between the seller and eBay is the main distinguishing feature notwithstanding that eBay charges a fee from the seller as well as a commission on a successful sale.

⁶³ The Consumer Contracts (Information, Cancellation and Additional Payments) Regulations 2013 already apply to eBay online auction sales in so far as they fall within the definition of "distance contracts" which are made under an organised scheme for selling or supplying without both the trader and the consumer being physically present simultaneously and made using only means of distance communication. Arguably, the Sale of Goods Act 1979 also applies to internet auctions. The position is less clear regarding the application of s.12(2) of the Unfair Contract Terms Act 1977 and s.2(5) of the Consumer Rights Act 2015. The word "auction" is not defined in these Acts.

⁶⁴ Telephone and online bidders will be required to register in much the same way as physical bidders at the auction.

question to a rival bidder for a smaller bid, or simply ignores a bidder and sells the lot for the same price to another, the disappointed bidder will have a claim in damages for the lost profit (if any) which could have been earned if his bid had been properly accepted. Alternatively, the disappointed bidder may claim reliance loss damages.

In terms of the actual sale contract between bidder and seller, a distinction is drawn, as we have seen, between those auctions where there is a “sale *with* reserve” and those where there is a “sale *without* reserve”. In the case of auctions held *with* a reserve price, the auctioneer, in inviting bids for a particular lot, makes an invitation to treat to the various bidders. The offer is then made by the relevant bidder. Where, on the other hand, the auction sale is held *without* a reserve price, the auctioneer makes an offer to sell the lot and that offer is accepted by the bidder who makes the highest bid at the auction. If the auctioneer withdraws the lot without justification, he is liable on a *separate* (or collateral) contract between him and the highest bidder that the sale will be without reserve. As a matter of policy, it seems right to hold the auctioneer liable under this separate contract. If he were not liable, the fact that the sale was without reserve (which may induce persons to bid) would have no meaning and not benefit bidders at all. In other words, absent a collateral contract, there would be no legal effect in advertising a sale as being without reserve since the sale is not complete until the fall of the hammer.

Selling land at public auction raises different issues. Once a bid for the land has been accepted by the auctioneer, by the fall of the hammer, the successful bidder will be treated as having entered into a binding contract with the vendor. This contract, however, represents, in effect, a collateral contract with the vendor to buy the land in question - an important and necessary mechanism, it is submitted, which is employed in order to define the parties’ legal relationship prior to the execution of a formal written contract of sale. So far as the sale contract itself is concerned, a distinction is drawn, as we have seen, between private and public auction sales in so far as s.2(5)(a) of the 1989 Act exempts public auction sales of land from the formality of writing. Although the Law Commission, in its 1987 Report, suggested that this caused no practical difficulties, it also acknowledged that, in the vast majority of cases, the terms of the parties’ sale agreement will be put into writing. In the writers’ view, therefore, the “protective functions of formalities”⁶⁵ should apply to both private and public auction sales of land, not least in order to avoid the possibility of an evidential vacuum in such sales, but also to better reflect auction practice.

So far as online auction sales are concerned, the contractual model deployed in traditional (face to face) auctions does not, in the writers’ view, differ significantly from the typical eBay type of ascending auction available on the internet. Although there is no “live auctioneer”, such online auctions provide a virtual platform whereby sellers and buyers may be brought together directly in order to contract. Apart, therefore, from the lack of any agency between seller and

⁶⁵ See, *Transfers of Land: Formalities for Contracts for Sale, etc. of Land*, (Law Com No. 164, 1987), at para. 4.11.

“auctioneer”, the eBay model has all the key hallmarks of a traditional (face to face) auction in so far as the necessary elements of public competition and sale to the highest bidder are present.