

# Contract

## An Offer You Can't Refuse

Roland Fletcher\*

### Introduction

The general requirements of a valid contract must contain an offer, acceptance, consideration, intention, capacity and if necessary the correct formation, *eg*, does the contract have to be in writing. The focus of this article will be on offer, acceptance, consideration and an invitation to treat when dealing with contracts concluded during an auction.

### Invitation to Treat

In order to prove a contract exists it must be shown there was a definite offer made to either a particular person or to the public at large, which has been accepted. However, what may appear to be an offer may constitute an invitation to treat. An invitation to treat, in law, is not an offer but is inviting offers from the public, *eg*, an advertisement<sup>1</sup>, usually, goods on display in a shop window and a self-service<sup>2</sup>. Bowen LJ attempted to distinguish the difference between an offer and invitation to treat as:

"It is not like cases in which you offer to negotiate, or you issue advertisements that you have got a stock of books to sell, or houses to let, in which case there is no offer to be bound by any contract. Such advertisements are offers to negotiate – offers to receive offers – offers to chaffer."<sup>3</sup>

Arguably, this definition does not assist the courts when dealing with auctions, *eg*, when the auctioneer requests a bid for an item, which will be sold to the highest bidder – does this constitute an offer or merely an invitation to treat? The application of this distinction was tested in the case of *Payne v Cave*<sup>4</sup> and was found to be an invitation to treat and not an offer. The bids constituted the offer and acceptance would take place on the fall of the auctioneer's hammer. This has been given statutory authority under the Sale of Goods Act 1979, which states:

"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."<sup>5</sup>

Therefore, common law and statute have set the legal rules, the auctioneer's request for bids constitutes an invitation to treat and the bids an offer, which is accepted upon the fall of the hammer. However, there are exceptions to the general rule if goods are sold at auction using the wording: with reserve or without reserve.

### Auctions With or Without Reserve

If an auction is said to be "with reserve", a minimum price must be reached before acceptance is deemed to

be valid. If the auctioneer accepts a bid which is lower than the reserve price there will be no contract between the seller and buyer.<sup>6</sup> However, if an item is advertised stating "without reserve" case law has not only suggested this is a definite offer<sup>7</sup> but also a collateral contract between the auctioneer and bidder (purchaser).<sup>8</sup> Thus, in such circumstances if the auction is held and a prospective purchaser makes a bid, this is deemed to be an acceptance to an offer the auctioneer cannot refuse.

### A Definite Sale to the Highest Bidder

The case of *Barry v Davies*<sup>9</sup> is an interesting case that deals specifically with the issues and effect of a sale by auction, which is expressed to be "without reserve". The auction advertised two Alan Smart Engine Analyser. Both machines were new and were being sold by customs and excise due to the manufacturer's liability for unpaid VAT. The machines were worth £14,521 each and customs and excise had informed the auctioneer, a Mr Cross, to sell the machines "without reserve", and this was the basis of the sale. During the auction Mr Cross informed the audience the machines were worth £14,000 and suggested bids begin at £5,000; there was no bid; he then requested £3,000 but still no response. He then invited bids from the audience and the plaintiff bid £200 for each machine and no other bids were made. Mr Cross responded by withdrawing the machines and defended his actions by stating:

"I could not see how I could sell for as little as this, even though it was without reserve. 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. I did not take up [the offer of] £400. I thought they were worth more."<sup>10</sup>

The machines were eventually sold a few days later for £750 each after advertising them in a magazine.

The plaintiff brought a claim on the basis that the machines were advertised "without reserve" and he was the highest bidder. He claimed the value of the machines, £28,000, less the value of his bid of "£400, resulting in damages of £27,600. Based upon common law the Judge held:

### \*Lecturer in Law at the University of Glamorgan

<sup>1</sup>*Partridge v Crittenden* [1968] 2 All ER 421.

<sup>2</sup>*Fisher v Bell* [1961] 1 QB 394 and *Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern) Ltd* [1953] 1 QB 401.

<sup>3</sup>*Carlill v Carbolic Smoke Ball Co Ltd* [1893] 1 QB 256, CA.

<sup>4</sup>(1789) 3 Term Rep 148.

<sup>5</sup>S 57(2).

<sup>6</sup>*McManus v Fortescue* [1907] 2 KB 1.

<sup>7</sup>*Warlow v Harrison* (1859) 1 E & E 309, *obiter dictum*, that in such cases the auctioneer is making a pledge to sell to the highest bidder.

<sup>8</sup>*Barry v Davies (trading as Heathcote Ball & Co) and Others* [2000] 1 WLR 1962.

<sup>9</sup>*Ibid.*

<sup>10</sup>*Ibid.*, p 1964, at para C.

# Contract

"... it would be the general and reasonable expectation of persons attending at an auction sale without reserve that the highest bidder would and should be entitled to the lot for which he bids. Such an outcome was in his view fair and logical. As a matter of law ... there was a collateral contract between the auctioneer and the highest bidder constituted by an offer by the auctioneer to sell to the highest bidder which was accepted when the bid was made."<sup>11</sup>

This view was supported on appeal by Sir Murray Stuart-Smith who was also of the opinion that a collateral contract may exist, in such circumstances, between the auctioneer and bidder.<sup>12</sup> For these reasons the original Judge's decision<sup>13</sup> on liability was upheld

## Consideration: *Quid Pro Quo*

Mr Moran, counsel for the defendant, criticised the court's decision on a number of grounds, *eg*, there was no offer – this was an invitation to treat, there is no contract until the auctioneer's hammer falls and any bids may be withdrawn before such time. He supported the latter point with section 57(2) of the Sale of Goods Act 1979, and most importantly, he argued there was no consideration for the auctioneer's promise. For a contract to be valid it must be supported by consideration, *ie*, an exchange of value: *quid pro quo*.<sup>14</sup> The law will enforce a bargain, *ie*, a contract supported by reciprocal consideration, where both parties are able to demonstrate a benefit and detriment on both sides.

Mr Moran argued that there was no consideration for the auctioneer's promise to sell to the highest bidder. He was of the opinion that the bid in itself would constitute consideration as the person bidding is not giving anything in return and that bids are merely a discretionary promise to pay. Furthermore, he attempted to negate the auctioneer's liability under the rules of agency:

"... where an agent is acting for a disclosed principal he is not liable on the contract ... If therefore there is any collateral contract it is with the principal [customs and excise] and not the agent [Mr Cross]."<sup>15</sup>

The court rejected Mr Moran's argument, based on the principles of agency, with reference to the case of *Warlow v Harrison*<sup>16</sup> and reinforced their decision by quoting from the judgment:

"In a sale by auction there are three parties, *viz*: the owner of the property to be sold, the auctioneer, and the portion of the public who attend to bid, which of course includes the highest bidder ... We think the auctioneer who puts the property up for sale upon such a condition [without reserve] 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 [the bidder] has a right of action against the auctioneer."<sup>17</sup>

Regarding the issue of consideration the court found it to be present, in this instance, based on the following:

"... in my judgement 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 the 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."<sup>18</sup>

## The Market Rule: Damages

Mr Moran attempted to reduce the plaintiff's damages and argued the original Judge was in error when he awarded the plaintiff £27,600. Mr Moran was of the opinion that no more than £1,600 should have been awarded. The original Judge's assessment was based on the market rule, *ie*, to compensate the plaintiff for loss of bargain and put him in the position he would have been in had the contract been fulfilled.

Sir Murray Stuart-Smith examined the original Judge's assessment on damages which was based on the following:

"The plaintiff is entitled to be put in the position in which he would have been in if the contract had not been broken, that is, he would have had two newly manufactured engine tuning machines. ... The defendant's contention is that the value of these machines, *ie*, the measure of the plaintiff's loss, was only £1,500, [representing the price they were eventually sold for] but that sum would not put the plaintiff into possession or into a position to obtain possession of two brand new £14,000 tuning machines. ... I find that the measure of the plaintiff's loss is indeed £28,000, less the £400 of his bid, namely £27,600."<sup>19</sup>

Therefore, the market rule prevailed and the plaintiff was awarded damages accordingly.

## Conclusion

Applying the above legal rules a contract is not concluded until the auctioneer's hammer falls, which signifies acceptance of the bidder's offer. However, there are exceptions to the general rule and lessons to be learnt from the case of *Barry v Davies*. This case demonstrates the courts are prepared to reverse the process when goods are offered using the wording "without reserve", which may result in an offer you can't refuse and a collateral contract between the auctioneer and person making the highest bid.

<sup>11</sup> *Ibid*, p 1964, at para F.

<sup>12</sup> *Ibid*, p 1968, at para A.

<sup>13</sup> Judge Charles Harris QC sitting at Northampton County Court.

<sup>14</sup> A compensation, or the giving of one thing of value for another thing of like value.

<sup>15</sup> *Barry v Davies*, *supra*, n 8 at p 1965, para D.

<sup>16</sup> 1 E & E 309.

<sup>17</sup> Cited in *Barry v Davies*, *supra* at p 1966, at paras B, C and E.

<sup>18</sup> *Ibid*, at p 1967, para H.

<sup>19</sup> *Ibid*, at p 1968, paras E, G and H.