

Case Note: Smythe v Thomas [2007] NSWSC 844

Fiona Stuart

Fiona Stuart is a second year graduate solicitor at Mallesons Stephen Jaques in Sydney specialising in commercial IT and IP matters.

The advent of online resources such as eBay to facilitate so-called "online auctions" has given rise to a number of consumer legal issues. In the recent Supreme Court of NSW matter of *Smythe v Thomas*¹, one of the considerations before Acting Justice Rein was whether a successful bid on an eBay "online auction" creates a binding and enforceable agreement between the buyer and seller as in the case of a traditional auction.

The defendant in this matter was a registered eBay user who listed his Wirraway Australian Warbird Aircraft on eBay with a notation of a minimum bid of \$150,000 for 10 days in August 2006. The plaintiff was also a registered eBay user who placed a bid in accordance with eBay rules for \$150,000. Both the plaintiff and the defendant were notified by eBay that the plaintiff had "won" the Wirraway.

What was at issue in this matter was whether the defendant had a legal obligation to accept the plaintiff's bid. The plaintiff argued that a contract for the sale of goods had been entered into between himself and the defendant by virtue of the successful bid. The defendant denied this claim, arguing that the acceptance of eBay's terms and conditions created an agreement between eBay and the users respectively, not an agreement between the users themselves. The only available consequence of breaching eBay's terms, the defendant argued, was for eBay to remove the defendant as a registered user.

The defendant claimed that eBay has a function more akin to the classifieds section of a newspaper than a public auction administered by an auctioneer. As such, the defendant contended that the plaintiff's bid should be characterised as an invitation to treat. It should be noted that clause 3 of the

eBay User Agreement specifically states that eBay is not a traditional "auctioneer" despite being commonly referred to as an online auction web site.

On the question of whether an online auction constitutes an auction, Rain AJ noted that there is no legislative definition of "auction" pertaining to the sale of goods to provide an answer. The *Property Stock and Business Agents Act 2002* (NSW) defines "auction", but it was agreed that that Act was not relevant in this case as it deals only with auctions of real estate and livestock, not goods. His Honour turned to the closest relevant definition, being "auction sales", under the *Sale of Goods Act 1923* (NSW) to provide insight into the key elements of an auction. Auction sales are there defined as follows:

(1) where goods are put up for sale by auction in lots, each lot is prima facie deemed to be the subject of a separate contract of sale,

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

(3) where a sale by auction is not notified in the conditions of sale to be subject to a right to bid on behalf of the seller, it shall not be lawful for the seller to bid 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: any sale contravening this rule may be treated as fraudulent by the buyer,

(4) a sale by auction may be notified in the conditions of sale to be subject to a reserved price, and a right to bid may also be reserved expressly by or on behalf of the seller,

*(5) where a right to bid is expressly reserved, but not otherwise, the seller, or any one person on the seller's behalf, may bid at the auction.*²

In attempting to ascertain the pivotal features of an auction, Rein AJ also considered several cases and journal articles submitted by counsel for the plaintiff describing various systems of auctions.

One such article cited by his Honour, "Sale by Auction in Holland"³ describes a system of bidding in Holland whereby a candle is lit after the conditions of the sale are read out. Bidders then proceed to bid against one another, and the last bid before the candle is burnt out is deemed to be the winner.

Reine AJ also cited a judgment of the Tribunal de Grande Instance in which Gomez P, Marcus VP and Dallery J observed:

*In reality, an online auction presents all the characteristics of a public auction because it is open to all interested Internet users as long as they register beforehand and agree to the contractual clause governing online sales.*⁴

While it was agreed in this case that the *Property Stock and Business Agents Act 2002* (NSW) was not relevant, it is noteworthy that it defines "auction" as follows:

"auction" means the sale of property by any means (including the Internet) whereby:

(a) the highest, the lowest, or any bidder is the purchaser, or the first person who claims the property submitted for sale at a certain price named by the person acting as auctioneer is the purchaser, or

(b) there is a competition for the purchase of the property in any way commonly known and understood to be by auction.⁵

In reaching his decision in favour of the plaintiff, Rein AJ dismissed the notion that the presence of an auctioneer is the critical feature of an auction. Rather, Rein AJ argued, online auctions are a species of auction, and in accepting eBay's terms and conditions, registered users agree to allow eBay or its computer to automatically close the bidding at a fixed time.

Clause 5.2 of the eBay User Agreement certainly indicates that the intention of the bidding process is to create a binding agreement between the buyer and seller and not an invitation to treat:

Except for items to which the Non-Binding Bid Policy (located at:

http://pages.ebay.com.au/help/policies/non-binding-bid.html) applies, 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 obligated to complete the transaction with the highest bidder upon the item's completion, unless there is an exceptional circumstance, such as:

- 1. the buyer fails to meet the terms of your listing (such as payment method); or*
- 2. you cannot authenticate the buyer's identity.*

A similar obligation is imposed on eBay buyers at clause 4:

You are obligated to complete the transaction with the seller if you purchase an item through one of our fixed price formats or are the highest bidder ...unless the transaction is prohibited by law or this User Agreement. If you are the highest bidder at the end of an auction (meeting the applicable minimum bid or reserve requirements) and your bid is accepted by the seller, you

are obligated to complete the transaction with the seller, unless the item is listed in a category under the Non-Binding Bid Policy ... or the transaction is prohibited by law or by this Agreement.

Rein AJ's decision will undoubtedly be welcomed by online entrepreneurs seeking to encourage consumer confidence in online purchases. From a legal perspective, his Honour's decision honours a well established principle of contract law that in commercial agreements there is a presumption that the parties did intend their agreement to be attended by legal consequences.

¹ *Smythe v Thomas* [2007] NSWSC 844.

² *Sale of Goods Act 1923* (NSW): s 60.

³ G T Morice, "Sale by Auction in Holland" (1915) 32 *South African Law Journal* 140 at 141.

⁴ *Chambre National des Commissaires Priseurs v NART SAS* [2001] ECC 24 at [22]-[24].

⁵ *Property, Stock and Business Agents Act 2002* (NSW):s 3.