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ONLINE AUCTION SITES – DO YOU HAVE A CONTRACT?

A recent decision of the NSW Supreme Court (*Peter Smythe v. Vincent Thomas* [2007] NSWSC 844) has demonstrated that when there is offer and acceptance via a so called “auction” online, an enforceable contract has been entered into by the parties to it.

In this case, a dispute arose between the seller of a vintage Australian war-time aircraft and the buyer of that aircraft. The Buyer (Smythe) had made a “winning” bid on the online auction site, eBay.

The facts of the case were fairly simple. The Defendant, Vincent Thomas, listed a vintage Australian Wirraway “Warbird” Aircraft for sale on the website, eBay. The aircraft was listed for sale to the highest bidder during a period of 10 days in August 2006. Mr Thomas specified that the minimum bid required to sell the aircraft was \$150,000.00.

The Plaintiff, Mr Peter Smythe, made a bid of \$150,000.00 in accordance with the rules of eBay just before expiration of the 10 day bidding period. In accordance with eBay practice, eBay notified both Mr Thomas and Mr Smythe that Mr Smythe had won the bid with a notice stating in part:-

“Congratulations, the item is yours. Please pay now! Wirraway Australian Warbird Aircraft”.

Mr Thomas was disappointed that the highest bid received was \$150,000.00 and he disputed that a contract had been formed for the sale of the aircraft to Smythe.

Alternatively, Smythe claimed that as a result of his having been the highest bidder and his bid meeting the description of the minimum bid and complying in all other respects with



eBay bidding rules, a contract for the sale of the aircraft was entered into between himself and Mr Thomas.

Mr Thomas had received interest from another person interested in buying the aircraft for approximately \$220,000.00. The Court examined the eBay Rules. Relevantly, Clause 5.2 of the eBay Rules stated:-

“ 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 to the highest bidder upon the item’s completion”.

The Court was also advised that the eBay notice distributed to the parties following completion of the auction process included the line “Payment Details: Payment and Delivery arrangements to be negotiated”.

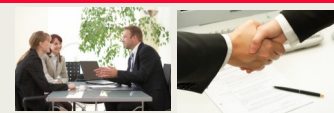
Mr Thomas argued that the proviso contained in the notification by eBay indicated that no contract existed and that an agreement between the parties



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had not been reached. Mr Thomas argued that:-

- The only contracts entered into were between eBay and Mr Smythe and eBay and Mr Thomas.
- The placement by Mr Thomas of an advertisement for sale on eBay was no different from the placement of an advertisement of an item for sale in the classified section of a newspaper such as the Sydney Morning Herald and as such, the eBay advertisement amounted to no more than an advertisement to sell. By responding via eBay Mr Smythe did no more than provide Mr Thomas with an invitation to treat or consider his offer.
- Further, even if the Court believed that there was an offer and acceptance taking place (which is necessary to form a contract) given that certain important elements of the agreement had not yet been concluded (regarding payment terms), there was no concluded agreement.

However, the Court concluded that a binding contract for sale had in fact been entered into between the parties. The Court concluded that Mr Thomas, in listing the aircraft for sale on eBay disclosed that he would offer to sell the aircraft provided that the following conditions were met:-

- He received a bid within the specified time period.
- The bid received was at least \$150,000.00.
- The buyer would be the highest bidder of those who made bids complying with the above two requirements.
- Mr Thomas did not qualify or seek to impose a qualification on his bid.



The case demonstrates the importance for people using online auctions such as eBay of being aware of the normal legal relationships that they will enter into by participating in sales and/or bids on those sites. The decision in this case can be interpreted as the law keeping pace with changing commercial arrangements and the fact that much commerce now, and into the future, will take place in cyberspace.

This was recognised at a Commonwealth level in 1999 with the passage of the Electronic Transactions Act 1999 (Cth). The object of this Act is to provide a regulatory framework that:-

- A. Recognises the importance of the information economy to the future economic and social prosperity of Australia.
- B. Facilitates the use of electronic transactions.
- C. Promotes business and community confidence in the use of electronic transactions.
- D. Enables business and community to use electronic communications in their dealings with government.

Please do not hesitate to contact us if you have any issues or concerns relating to contracts or legal dealings you have entered into via email or electronic commerce. Simon Cotterill can be contacted on 1300 727 813.



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