

Case No 488/94

IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the appeal between:

FRANK R THOROLD (PTY) LIMITED Appellant

and

ESTATE LATE SIR ALFRED BEIT Respondent

CORAM: Corbett CJ, Smalberger, F H Grosskopf, Nienaber JJA,
et Plewman AJA.

DATE OF HEARING: 14 May 1996

DATE OF JUDGMENT: 22 August 1996

J U D G M E N T

/CORBETT CJ: . . .

CORBETT CJ:

In 1796 there was published in Paris a large paper, folio edition of Le Vaillant's *Voyage dans l'Interieur de l' Afrique, par le Cap de Bonne-Espérance* (one volume) and his second *Voyage dans l' Interieur de l'Afrique* (two volumes). This edition was unique in size and in that each plate was reproduced in duplicate, one in black and white and one in colour. For modern-day collectors this work is extremely rare and much-prized.

On Monday 27 May 1991 and in the Claremont (Cape Town) civic centre Mr Stephan Welz ("Welz") of the firm Stephan Welz and Co (Pty) Ltd ("Stephan Welz & Co") conducted an auction sale of important Africana books, paintings, furniture and silver from the collection of Sir Alfred Beit. One of the items on sale (lot 537) was a copy of the above-mentioned edition of Le Vaillant's *Voyages*. It was bound in contemporary French, crimson morocco leather and in very fine condition. In his sale catalogue Welz had placed an

estimated price of R25 000 - R40 000 against this lot. In circumstances which I shall describe in more detail later the lot was knocked down to a Mr R C Fryde ("Fryde") representing (as managing director) Frank R Thorold (Pty) Limited ("Thorold"), of Johannesburg, booksellers specialising in Africana, for an amount of R80 000. For reasons which will emerge from my more detailed account of the sale Welz decided thereafter to re-open the bidding. Eventually after a lengthy tussle with a rival bidder, Mr R E Levitt ("Levitt"), the lot was again knocked down to Fryde, this time for R300 000. Fryde had a long-standing arrangement with Stephan Welz & Co for 30 days credit. On the day after the sale Fryde took delivery of lot 537 and in due course tendered payment of R80 000 for it. This tender was rejected, but Thorold maintained that there was a valid sale of the lot to it at a price of R80 000. Eventually Sir Alfred Beit instituted action against Thorold in the Witwatersrand Local Division claiming payment of the sum of R300 000, interest and costs.

The case came before Blieden J who, on 9 May 1994, held in favour of Sir Alfred Beit and granted the relief claimed. He subsequently granted leave to appeal to this Court. This appeal is now before us. On 12 May 1994 Sir Alfred Beit died and his estate has been substituted as plaintiff (and respondent) in these proceedings.

It is not necessary to refer to the pleadings since during the course of the trial the parties agreed (I quote from the judgment of the Court *a quo*) -

"... that if Welz was not entitled to reopen the bidding after the book was knocked down to the defendant [Thorold] at R80 000 there was no sale at R300 000 and the plaintiff [Sir Alfred Beit] is only entitled to receive R80 000, which was duly tendered by the defendant. On the other hand, if Welz was entitled to continue with the bidding after the R80 000 knockdown, then the book was sold at R300 000 and the plaintiff must succeed in his claim for this amount."

The essential issue, therefore, is whether or not Welz was entitled to

re-open and continue with the bidding.

I come now to the facts and circumstances of the sale, which commenced at 20h00. It was obviously a prestigious auction, with many very fine items on offer. There were well over 300 people in attendance. The auction hall was filled to capacity. At one end of the hall, which measured about 30 metres by 20 metres, there was a raised platform upon which the auctioneer's rostrum was positioned. The seating in the hall was arranged in about 17 rows, with an aisle down the middle which created two blocks. The main *dramatis personae* were Welz, the auctioneer; Fryde, representing, as I have indicated, Thorold; and Levitt. Levitt, an attorney by profession, is a collector of Africana and at the time lived in Durban. All of them gave evidence at the trial. The only other witness in the case was a Miss Vanessa Phillips, who was in the employ of Stephan Welz & Co and on the evening of the sale acted, *inter alia*, as a "bid-spotter". Welz, Levitt and Miss Phillips were called by the plaintiff; Fryde by

the defendant.

The auctioneers kept an audio tape of the entire auction.

In addition, the South African Broadcasting Corporation ("SABC") caused the auction to be filmed for television purposes. Unfortunately the SABC did not keep the original video tape and the only version available at the trial was one which had been spliced and edited in such a way that certain portions of the film appeared in the incorrect sequence. Not much reliance, could, therefore, be placed on the video film as evidence of what occurred. However, using the audio component of the SABC film and the audio tape kept by the auctioneers, the parties were able to produce an agreed transcript of what occurred, aurally, when lot 537 was auctioned. This transcript was put in as an exhibit (exhibit A196). For a portion of the transcript there are noted, alongside the statements recorded, what are termed "timing marks" in seconds and fractions of a second. These were measured from the audio tape and each relates to the beginning of the

word or sentence against which it appears. These timing marks enable one to determine the time factor involved in the part of the auction to which they relate.

Lot 537 came under the hammer about 20 minutes after the commencement of the sale. At that stage Fryde was seated in about the middle of the last row of seats in the right-hand block, as seen from the auctioneer's viewpoint. According to Welz, Fryde was about 35 metres away from him and in "virtually the extreme right-hand corner". Another participant in the bidding, a Mr Paul Mills ("Mills"), of Clarke's book shop, was seated in about the middle of the second-last row of the left-hand block, viewed from the position of the auctioneer, and about 30 metres away. And Levitt was seated on the aisle in the fourth row from the front of the left-hand block, about 8 to 10 metres from the auctioneer. Miss Phillips was seated on the stage, slightly forward of the auctioneer, about two metres away from him and to his left.

Welz, who had a commission from a foreign buyer to bid up to R37 000, opened the bidding on lot 537 at R25 000. Mills immediately entered the bidding, raising Welz's bid by R3 000. The bidding continued, with raises of R2 000 or R3 000, until Mills bid R38 000. As this exceeded Welz's commission, he did not respond. At this point Fryde started to bid and he and Mills bid against one another until Fryde bid R80 000. There was no counter-bid from Mills. Exhibit A196 records what ensued thereafter as follows (save where otherwise indicated, the statements recorded emanate from the auctioneer):

"(seconds)	
0.00	80 000 still
1.63	Still to my right at R80 000
4.73	Bids to my extreme right at 80 000
7.17	Far back at R80 000 [All done?] - no
9.49	At R80 000
10.72	No more? At R80 000
12.88	Selling At 80 000
14.61	No?

15.14		(Knocking sound is heard)
15.85	Auctioneer:	Thorolds
18.1-	Faint voice:	[Sir, I bid]
22.45	Auctioneer:	I am sorry, I missed a bid in the front here.
25.92		I very clearly asked if it was no more and I am sorry you did not bid
31.55		I have 85 000 in the front now
	Faint voice:	[.]
39.46	Auctioneer:	85 in the front
	Faint voice:	[. . . it was knocked down to me]
41.72	Auctioneer:	I am sorry, I was on the bidder on the back - and not in the front.
46.98		At 85 000. Bids in the front at 85 000.
51.05		Bidding? "

(The figures in the left-hand column represent the timing marks in seconds and fractions thereof taken to two decimal points.)

As this extract from exhibit A196 indicates, there was for a period of approximately 15 seconds no advance on Fryde's bid of R80 000 and at the end of this period Welz knocked lot 537 down to Thorolds ("[k]nocking sound is heard") at that price. During this period, as the record shows, Welz solicited further bids in the usual manner.

The transcript further indicates that a couple of seconds

after the lot was knocked down a "faint voice" was heard to say "Sir, I bid". It is common cause that this was Levitt's voice: and this is where Levitt comes into the picture. Levitt stated in evidence that he had come from Durban to Cape Town specifically in order to buy lot 537. He had heard about it from Mills, who told him that the book was "a very fine copy". A private viewing of the book shortly before the start of the sale confirmed this assessment and made him even more determined to acquire it. It was his practice at auction sales to enter the bidding only after other bidders had "run their course" and when he was satisfied that there was nobody else interested apart from the current highest bidder. He stated that he always tries to sit in a place where the auctioneer can see him clearly and, when entering the bidding, he normally raises his pen and waggles it. Once he has caught the auctioneer's attention he makes affirmative bids "with a slight affirmative twitch of the head", indicating a nod. His was described in evidence as a "very understated bidding style".

On this occasion, according to Levitt, he entered the bidding after Fryde had bid R80 000 and there had been no response from Mills. He did so in his usual manner by raising his pen aloft in his left hand and wagging it. Levitt estimated in evidence that this occurred between timing marks 7.17 and 9.49. It is common cause that his bid did not come to the attention of Welz prior to the lot being knocked down to Thorold.

Although Levitt's protest, "Sir, I bid", is described in exhibit A196 as a "faint voice", this was because he was some distance from the recording machines. In fact he spoke very loudly and half-raised himself in his seat. There were also calls by people sitting near him to the effect that he had bid. Welz understood Levitt's protest to mean that prior to the lot being knocked down to Fryde he (Levitt) had made a higher bid, which had been overlooked. Welz accordingly announced: "I am sorry, I missed a bid in the front here". (See exhibit A196, timing mark 22.45.) This provoked a

protest from "Fryde's corner", which Welz described thus:

"The essence of the protest was that: you have sold it to me and that is it. There was also, at the same time, a tremendous hubbub in the auction room, as it was a very euphoric sale, if I might describe it as such. There was much excitement and obviously an incident such as this caused quite a considerable stir among the audience . . ."

According to Welz, on perceiving this protest from Fryde, he started to try to say to Levitt that he (Welz) was sorry that he (Levitt) did not make a greater effort to attract the auctioneer's attention (see timing mark 25.92), but broke off. (In parenthesis I should mention that there was a suggestion that the word "bid" at the end of this entry should read "but"; however nothing much turns on this.) Welz then decided to try to seek confirmation of Levitt's bid. He looked towards one of his bid-spotters, but received a neutral response; towards the staff at the telephone table, with a similar response; and towards Miss Phillips, who gestured "very much in the

affirmative". Having received this confirmation of the bid from Miss Phillips, Welz decided to re-open the bidding and, addressing Fryde, announced "I have R85 000 in the front now". This announcement had reference to Levitt's bid, R5 000 being what Welz then considered to be an appropriate increment on the previous bid. There was further protest against this decision from "Fryde's corner" (indicated by the interjection described as a "faint voice" recorded at timing mark 39.46). Welz then essayed an explanation for his having missed Levitt's bid (timing mark 41.72). Eventually "things quietened down". Welz repeated the announcement that he had a bid of R85 000 "in the front" (timing mark 46.98) and thereafter enquired of Fryde whether he was bidding (timing mark 51.05). Fryde thereupon responded in the affirmative and the bidding was raised to R90 000. The bidding then proceeded steadily, with Fryde and Levitt being the only participants, until lot 537 was knocked down to Thorold at the price of R300 000.

In her evidence Miss Phillips stated that from where she was sitting on the stage her vision of Levitt was partially obscured by a "large gentleman" sitting in front of him (Levitt also mentioned this "burly man" to his front) with the result that she could see only Levitt's head and his right shoulder, but not his left shoulder or the lower part of his body. In the period between the bid of R80 000 and the fall of the hammer on that bid she saw Levitt bidding. According to her, he was looking fixedly at the auctioneer and nodding his head. This was before the fall of the hammer. She thought that Levitt's bid had been picked up by Welz and was surprised when the lot was knocked down to Thorold. When thereafter Welz turned to her, she nodded and said "Yes, he is bidding", thus confirming Levitt's bid.

Fryde's evidence was broadly in conformity with that of the other witnesses. Immediately after lot 537 was knocked down to him for R80 000 he was congratulated by friends sitting with him and he entered the purchase in his catalogue. Prior to this he had not

observed Levitt make a bid, but he conceded that he was not in a position to dispute that Levitt had done so. Nor did he observe Levitt's protest ("Sir, I bid") after the fall of the hammer. His first intimation of anything untoward having happened was Welz's statement: "I am sorry, I missed a bid in the front here". Under cross-examination Fryde conceded that these words meant and conveyed to him that the auctioneer acknowledged that he had missed a bid in respect of lot 537 and that the auctioneer was going to decide what the implications of this were: whether to re-open the auction or to decline the bid. Fryde further agreed that he would consequently have been awaiting the outcome of the auctioneer's adjudication, which had "an important ramification" for him as the successful bidder. He denied having made any protest at that stage; nor, according to him, was there any "hubbub" in the room at any stage. He acknowledged, however, that when making his decision whether to continue with the sale or not, Welz would have been entitled to infer that he (Fryde)

would stand firm and contend that he was the purchaser of the lot at R80 000.

Fryde could recall having thereafter heard Welz say something like "I very clearly asked if it was no more . . ." (cf timing mark 25.92), which conveyed to him that Welz was about to adjudicate against the overlooked bidder. He then heard Welz say "I have R85 000 in the front row". (Cf timing mark 31.55.) From this he inferred that Welz had "overturned his previous attitude" and had accepted that a new bid had been made. His reaction was one of shock and he called out loudly: "No, no." Welz then repeated the call of R85 000 (cf timing mark 39.46). Fryde thereupon stood up and, addressing Welz, said: "I protest Mr Welz, this item has been knocked down to me" or words to that effect. After Welz's statement "I am sorry, I was on the bidder on the back - and not in the front" (see timing mark 41.72), which he took to be directed at himself, and after Welz having twice called the bid of R85 000 (see timing marks

46.98 and 51.05) he re-entered the bidding. It is common cause that he did so under protest and that he did not thereby compromise his position. Finally, I would add that Fryde did not see Welz seek confirmation from his bid-spotter, but he conceded that he was not in a position to dispute Welz having done so.

The main differences between the evidence of Fryde and that of the witnesses called on behalf of the plaintiff are whether he (Fryde) protested after Welz's announcement that he had missed a bid in the front; and whether there was at any stage a "hubbub" in the auction room. Neither of these differences appears to me to be of major importance.

At this point what may well be asked is whether Levitt did bid in the manner deposed to by him and, if so, how it came about that Welz missed seeing the bid. The Court *a quo* clearly accepted that Levitt did bid in the manner deposed to by him. The Court found that all the witnesses were honest people who were trying to

describe the events of the evening to the best of their ability, bearing in mind the lapse of time (about 3 years) since the auction sale. Of Levitt the Court said:

"Levitt was an impressive witness, and after having heard him give evidence one can understand why Welz had not thought it possible that he had not made a bid when he claimed that he had."

There was no evidence to contradict Levitt's evidence that he did bid before the fall of the hammer; and the evidence of Miss Phillips confirmed that he did so. It is true that Miss Phillips stated that she saw Levitt bid by nodding his head, whereas initially Levitt himself spoke only of waggling his pen for this opening bid. But Miss Phillips could not see the left-hand side of Levitt's body and this would account for her not having seen the motion with the pen. When asked whether he did anything other than raising his pen to attract initially the attention of the auctioneer, Levitt stated that he

"might have been bobbing around a bit" in his chair, but that he did not remember what else he was doing. Taking into account all the circumstances, I do not find any real inconsistency between the testimony of Levitt and Miss Phillips in this regard. Bearing in mind that, according to Levitt (and there is no reason to disbelieve this), he came all the way from Durban to acquire lot 537, that he had considerable experience of auction sales and that in fact after the bidding was re-opened he bid up to R280 000 for the lot, the probabilities point to his having entered the bidding and having done so in the manner described by him, prior to the lot being knocked down for the first time. The only other possibility is that he mistimed his entry into the bidding and then attempted to retrieve the position by falsely pretending to have made an earlier bid. But this possibility was never put to Levitt and is contrary to the evidence of Miss Phillips. It can be disregarded.

It was argued by Thorold's counsel on appeal that prior to

the fall of the hammer at R80 000 Levitt did not bid "in any meaningful sense". I did not understand counsel to contend that if Levitt did what he says he did, this did not constitute a meaningful bid. The point made was rather that, if he attempted to bid at all, the bid must have been so unobtrusive that it failed to qualify as a meaningful bid. This argument was founded mainly on the fact that Welz failed to pick up the bid.

Welz's explanation of his failure to observe this bid may be summed up as follows. At the beginning of the auction he looked around to see where the important buyers were and noted that the majority, if not all of them, were seated at the back of the auction room. This was a common practice. From a conversation which he had had with Levitt prior to the sale he understood that Levitt had previously acquired a similar copy of *Le Vaillant's Voyages*. He accordingly did not regard Levitt as a prospective buyer of lot 537. Also, for various reasons Levitt appeared for some years to have lost

interest in buying at sales. Throughout the initial stage of the auctioning of lot 537 (i.e. until knocked down for R80 000) all the bidding had come from the very back of the auction room and his attention was concentrated there, and more particularly on Fryde and Mills. The price of R80 000 was far in excess of the estimated price for the work and when the bidding reached that level, he (Welz) was convinced the book had reached "its absolute top price". For these reasons he did not think to look at or to Levitt.

On Levitt's estimation he entered the bidding some 5 to 8 seconds prior to lot 537 being knocked down. It does seem somewhat strange that during that period Welz did not observe his bid. On the other hand, given the circumstances - the crowded sale room, his concentration on the back of the room and the tension of the moment - his failure is understandable. And it certainly does not establish that Levitt failed to bid in any "meaningful" way.

It is also curious that during this vital period in which

Welz gave no indication of having picked up Levitt's bid, Levitt did not take more obtrusive steps to bring his bid to the attention of the auctioneer and that Miss Phillips did not herself do something to this end. On the other hand, the period was relatively short and they no doubt expected the bid to be observed any moment.

Both Fryde and Levitt were well known to Welz and were friends of his of long standing. A few days after the sale Welz visited Fryde at the premises of Thorold. A conversation took place between them, of which Fryde made a note after Welz had left. Thorold's counsel sought to use the contents of this note to discredit Welz's evidence. The trial Judge came to the conclusion that these notes were ". . . at best for the defendant [Thorold] equivocal, and at worst do not take the matter any further". I am inclined to agree.

For these reasons I accept that Levitt did bid at the time and in the manner deposed to by him and that the case must be adjudged upon that basis. I turn now to the question whether in law

Welz was entitled, in the circumstances, to re-open or continue with the bidding after the initial knock down to Fryde.

Central to this question are Stephan Welz & Co's "Conditions of Business". It is common cause that in conducting the sale Stephan Welz & Co, represented by Welz, acted as the duly authorized agent of Sir Alfred Beit and that the purchase and sale of lots at the auction were subject to the aforementioned Conditions of Business. The role of such conditions was aptly described by Broome J in Estate Francis v Land Sales (Pty) Ltd and Others 1940 NPD 441 as follows (at 457):

"An auction is a form of competitive bargaining with the object of a contract of sale resulting carried out in accordance with certain rules. These rules are the conditions of sale. They are framed by the seller to represent the terms upon which he is prepared to submit his property to competition. They are, so to speak, the rules of the game and they bind all the players."

Commenting on this dictum in the subsequent case of Shandel v Jacobs and Another 1949 (1) SA 320 (N), Carlisle J stated (at 325):

"The question then arises, who are the players who are so bound? The conditions of sale are agreed upon in the first instance between the seller and the auctioneer and between these two they rest upon a contractual basis. When goods are offered for sale pursuant to them, they form the basis of the bargaining carried on between the auctioneer and the bidders. That the bidders are, as BROOME, J., put it, players, I have no doubt . . ."

In the present case the following conditions in Stephan Welz & Co's Conditions of Business are pertinent:

"1 The buyer

The highest bidder will be the buyer at the 'hammer price' and any dispute will be settled at the auctioneer's absolute discretion. Every bidder will be deemed to act as principal unless there is in force a written acknowledgement by Welz & Co that he acts as agent on behalf of a named principal.

.....

31 Welz & Co has absolute discretion without giving

any reason to refuse any bid, to divide any lot, to combine any two or more lots, to withdraw any lot from the auction and in case of dispute, to put up any lot for auction again.

.....

35 In these conditions:

(a)

(b) 'hammer price' means the price at which a lot is knocked down by the auctioneer to the buyer;

.....

37 The headings in these conditions do not form part of the Conditions of Business but are for convenience only."

It is clear from these conditions and the general nature of an auction sale that in this case each bid constituted an offer, open for acceptance by the auctioneer, such acceptance normally being signified by the fall of the hammer. (See generally Demerara Turf Club Limited (In Liquidation) v Wight [1918] AC 605 (PC); S.W.A. Amalgameerde Afslaers (Eiendoms) Bpk v Louw 1956 (1) SA 346 (A), at 354 E - F; AGC (Advances) Ltd v McWhirter 1977 NSW 9454, a decision of the Supreme Court of New South Wales.)

Welz stated in evidence that when he decided to accept that Levitt had made a *bona fide* bid higher than Fryde's and to re-open the bidding, he purported to exercise the "auctioneer's absolute discretion" to settle "any dispute", conferred upon him by condition 1 of Stephan Welz & Co's Conditions of Business. It is Thorold's general contention that in the circumstances no such "dispute" arose and that, therefore, Welz had no such discretion.

The ordinary, grammatical meaning of the word "dispute" (as a noun) is easily ascertained by reference to the dictionaries. The second meaning given by the Shorter Oxford English Dictionary is:

"An argumentative contention, a controversy; also, in weakened sense, a difference of opinion: freq., a heated contention, a quarrel 1611; a logical argument."

Here, however, we are concerned with the meaning and ambit of "dispute" in the context of condition 1. As to this, there does not appear to be any South African authority; but there are certain

decisions of other jurisdictions. Foremost of these is the English case of Richards v Phillips and Others [1969] 1 Ch. D. 39 (CA), which is in many respects similar to the present case. It related to the sale by public auction of the Lyric Theatre in Hammersmith. Condition 2 of the conditions of sale provided, *inter alia*, that -

"(3) . . . if any dispute arises respecting a bid, the auctioneer may determine the dispute, or the property may, at the vendor's option, either be put up again at the last undisputed bid or be withdrawn.

(4) Subject to the provisions of this condition, the highest bidder shall be the purchaser . . ."

The property was put up for sale subject to a reserve of £25 800. The bidding opened at £10 000 and advanced to £20 000 on bids from the plaintiff, Richards, and the auctioneer, bidding on behalf of the vendors. At about this time one D lifted his copy of the sale particulars with the intention of indicating a bid. He thought that he had caught the auctioneer's eye. His action was observed by certain members of the auctioneering firm present (including a partner, S) but not by the auctioneer himself. The bidding continued, with bids by

the plaintiff and the auctioneer (on behalf of the vendors). Finally the plaintiff bid £26 000. D, not having heard the plaintiff's bid of £26 000, himself indicated a bid of £26 000 in the same way as before. Again he thought that he had caught the auctioneer's eye, but was mistaken. Again his bid was observed by the same members of the auctioneering firm. The auctioneer knocked the property down to the plaintiff for £26 000. Shortly thereafter D realised that the final bid which the auctioneer had accepted was not his but the plaintiff's. D then protested to the auctioneer. After a short interval, during which the auctioneer consulted S (who confirmed D's bid), the auctioneer announced that there had been a misunderstanding over the bidding and that he proposed to put up the property again. The plaintiff and others protested at this. The bidding was re-started and the plaintiff and D bid against one another. Eventually the property was knocked down to the plaintiff for £37 500. The claim which

ultimately came before the court was one against the auctioneers for damages in the sum of £11 500, being the difference between £37 500 and £26 000. It was contended by the plaintiff, *inter alia* (i) that he alone communicated his bids to the auctioneer and as the highest bidder became the purchaser under condition 2(4), with the consequence that there was a binding contract between the vendors and the plaintiff; and (ii) that there was in the circumstances no "dispute . . . respecting a bid" which would justify the auctioneer in putting up the lot again under condition 2(3). The trial Judge, Pennycuik J, chose to deal first with the second of these contentions.

In this connection he said (at 51):

"This contention raises the question: What is meant by the expression 'a dispute . . . respecting a bid' in condition No. 2 (3) of the National Conditions of Sale? It is common ground that the dispute must be a genuine one. On the other hand, I do not think the scope of the expression should be further restricted. An auctioneer

has to make up his mind quickly, sometimes in circumstances of confusion. It would throw an intolerable burden upon him if in that short time he had to do more than recognise the existence of a genuine dispute. I do not propose to attempt an exhaustive definition of the expression 'a dispute . . . respecting a bid'. It seems to me that an auctioneer can properly act on the footing that there is a dispute respecting a bid, at any rate where the rival contentions are such that a competent auctioneer acting in his expert, professional capacity could reasonably take the view that if the matter were fully investigated either of the rival contentions might prevail. No counsel took serious objection to a formulation on these lines or advanced any alternative.

Having formed the view that there is a dispute, the auctioneer may either determine the dispute himself then and there or put up the property again. The option is expressed to be that of the vendor, but it is not in dispute that the auctioneer exercises it on his behalf. It is worth while to bear in mind that the result of putting up the property again is in the nature of things calculated to achieve the purpose of an auction, namely, that the property is sold at the highest price which anyone present is willing to give."

Turning to the facts of the case, the learned Judge held that the

auctioneer, having been informed that D had made the latest bid and that both D and S thought that the property had been knocked down to D, was entitled to take the view that there was a "dispute" within the meaning of condition 2(3). He accordingly concluded that the auctioneer was entitled to re-open the bidding and that this disposed of the action. He went on to express the view that he would "accept" contention (i), but he observed that its consequence was "defeated by virtue of condition 2(3)". The action was dismissed. An appeal to the Court of Appeal was also dismissed. The members of the Court (Harman, Russell and Widgery LLJ) agreed that a dispute concerning a bid within the meaning of condition 2(3) did arise and that the auctioneer rightly determined it by putting the property up for sale again. They reached this conclusion despite an argument on behalf of the plaintiff that D's motions, being unobserved by the auctioneer, were ineffective as bids; that, therefore, there never was another bid; and that accordingly, the property having been knocked down to

plaintiff for £26 000, the matter was closed and the auctioneer was not entitled to take the property back into the market.

Four Australian cases were also referred to in argument.

Green v Rose (1900) 21 NSW 226; Ulbrick v Laidlaw [1924] VLR 247; AGC (Advances) Ltd v McWhirter, *supra*; and Hordern House Pty Ltd v Arnold [1989] VR 402. None of them is as in point as Richards v Phillips *supra*. Three were concerned with rival bids for the same lot, one of which was overlooked or ignored by the auctioneer, and with conditions of sale which, though differently worded, made provision for the lot to be put up again in the event of a "dispute" arising. In each case the lot in question had not been re-offered for sale, and the resulting litigation took various forms. In Green's case it took the form of an action for specific performance by the successful bidder, the vendor (defendant) raising the defence that because of a rival bid the auctioneer ought to have put up the lot

again. In Ulbrick's case it took the form of the plaintiff (the unsuccessful bidder) suing the auctioneers for damages for breach of contract for not having re-offered the property for sale. And in Hordern's case it took the form of a procedure for the identification of the undisclosed principal of the successful bidder. In the fourth case, the AGC (Advances) case, the issue was whether the auctioneer had been justified in refusing to accept the highest bid offered at the sale.

In Ulbrick's case, where the Court (the Full Court of the Supreme Court of Victoria) held that the auctioneer had erred in failing to re-offer the property, the following was said about the word "dispute" in the condition there under consideration (at 252):

"We see no ground for interpreting the word 'dispute' in any narrow sense. We think it means a dispute *de facto*, and that it is immaterial whether, upon investigation, it turns out that the claim of one of the contestants is based upon a misunderstanding of what has been done or upon a disputed fact, or is as to the legal effect of a particular act. The condition is designed to avoid investigation as

well as decision."

Various judgments make the point that the "dispute" must be a *bona fide* one.

In the present case it was contended on behalf of Thorold that what occurred did not give rise to a "dispute" within the meaning of condition 1 of the Conditions of Business. It was argued (i) that a dispute postulates two or more parties who are in controversy with each other: a mere claim by one party that something is or ought to have been the position does not amount to a dispute; (ii) that the dispute envisaged in condition 1 must be material or legally relevant, and in the context of the condition "any dispute" means any dispute as to who is the buyer at the hammer price; and (iii) that on the facts no such dispute arose when Levitt claimed that he had bid.

I cannot accept this line of argument. To begin with, I do not think that the word "dispute" in condition 1 should be given a

restricted meaning. It is preceded by the word "any". The word "any" has an expansive influence. In its natural and ordinary sense, unless restricted by the context, it is an indefinite term which includes all of the things to which it relates (see Hayne & Co v Kaffrarian Steam Mill Co Ltd 1914 AD 363, at 371). Moreover, in the settlement of disputes, the auctioneer is given very wide powers, viz "an absolute discretion". In my view, underlying condition 1 is the recognition that often in auction sales situations arise where there are conflicting interests, *inter alia*, as between bidders and that it is desirable that these be settled on the spot as quickly as possible by the auctioneer. Another cogent argument in favour of an expansive, rather than a restricted, interpretation of the condition is that mentioned by Pennycuik J, viz the burden that would be placed upon the auctioneer, who has to make up his mind quickly, often in circumstances of confusion, if he were required to do more than recognise the existence of a genuine dispute.

It is perfectly true that condition 1 provides that the highest bidder will be the buyer at the hammer price, but in essence what happened in this case is that after lot 537 had been knocked down to Fryde, Levitt objected, claiming that he had made a bid while the bidding was still open. Implicit in this were the contentions that Fryde was not the highest bidder and that, accordingly, the lot should not have been knocked down to him. Fryde first became aware of this only when Welz announced that he had missed a bid in the front. He had not observed Levitt's protest. It is true that at that stage Fryde did not say anything, but his attitude then and as later articulated was clearly and unequivocally to the effect that, with the fall of the hammer, he had purchased lot 537 for R80 000. Moreover, Fryde conceded that Welz would have been entitled to infer this. Welz was accordingly, as Fryde admitted, called upon to decide whether to reject Levitt's bid or to re-open the bidding. This decision would have had the effect of either confirming the sale to Fryde or

nullifying it. In my opinion, in the circumstances a dispute arose within the meaning of condition 1.

I understood counsel for Thorold to accept the correctness of the decision in Richards v Phillips, *supra*. They sought, however, to distinguish it on the ground that there the auctioneer had to decide between two equal bids. I fail to see the cogency of this point of distinction. In Richards v Phillips, as in this case, the auctioneer failed to pick up the one bid and was only alerted to this bid after having knocked the lot down to the other bidder. The fact that in the present case the unobserved bid was an advance on the (initially) successful bid, whereas in Richards v Phillips it was an equal bid, does not seem to me to make any difference in principle. If in Richards v Phillips there was a "dispute", then there was a "dispute" in the present case. And here I might just point out that the wording of the condition in Richards v Phillips - "a dispute . . . respecting a bid" - is slightly narrower in its implications than that of the

condition here under consideration.

The evidence and the cases show that the missing of a vital bid by an auctioneer is a not infrequent occurrence. It seems to me to be improbable that condition 1 - and similarly worded conditions - were not intended to cater for that situation.

It was argued on behalf of Thorold that when the lot was knocked down to Thorold for R80 000 there was a valid sale at that price which could not be undone by the auctioneer in the exercise of his powers under condition 1. It seems to me that this argument begs the question. Condition 1 identifies the buyer as the "highest bidder". The question raised by Levitt's protest was whether Fryde was the highest bidder; and this was the dispute which Welz was called upon to settle. Until that dispute was decided there could be no question of a valid sale to Thorold.

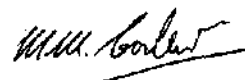
For these reasons I am of the view that in the circumstances of this case a "dispute" within the meaning of that word

in condition 1 did arise; and that, accordingly, the auctioneer had the power to settle that dispute. Once it is accepted that in such circumstances a dispute arises, then it seems to me to follow that one of the courses open to the auctioneer is to rule that the bidding be re-opened. Only in this way could any recognition be given to the bid that was overlooked and at the same time equitable treatment meted out to the bidder to whom the property had been knocked down. The powers accorded to the auctioneer under condition 1 are of the widest possible nature ("absolute discretion") and I have no doubt that re-opening the bidding was intended to be one of them. In condition 31 there is express mention of putting up the lot for auction again. Assuming in favour of Thorold that condition 31 had no application in the circumstances of this case, I do not think that condition 31 can lead to an interpretation of condition 1 which excludes the power to re-open. After all, as was pointed out in Richards v Phillips, *supra*, and in the judgment of the Court *a quo*, the result of re-opening in

circumstances such as these is calculated to achieve the purpose of the auction, viz the sale of the property at the highest price which anyone present is willing to give.

To sum up, I hold that in this case the auctioneer, Welz, was entitled to re-open and continue with the bidding after the initial knocking down of lot 537 to Thorold for R80 000. It follows that the Court *a quo* came to the correct conclusion and that the appeal must fail.

It is ordered that the appeal be dismissed with costs, such costs to include the costs of two counsel.



M M CORBETT

SMALBERGER	JA)	
F H GROSSKOPF	JA)	
NIENABER	JA)	CONCUR
PLEWMAN	AJA)	