

## RICS Regulation and Rural Professional Group

### Interim guidance for firms who practice livestock auctioneering

#### Introduction

This guidance will help firms which undertake livestock auctioneering to understand whether money received by an auctioneer from a purchaser paying for property sold at auction is received as an **agent** for the vendor or as a **principal**. This will be determined by the terms of the contracts governing the auction. The application of the \*RICS Rules of Conduct will be governed by the nature of a firm's relationship with its vendors as determined by those contract terms.

#### Sale by auction

During an auction, the auctioneer will seek open competitive bids from prospective purchasers for the property entered by the vendors. Once the auctioneer is satisfied that the highest available bid has been made, he marks this with the fall of his hammer, setting the price for the sale. At that point, the highest bidder becomes the purchaser who is contractually bound to pay for the goods. The auctioneer has a duty to account to the vendor for the price achieved, having taken his own commission and costs due under his terms of business.

It is the terms of the relationships between, first, the vendor and the auctioneer and, then, the purchaser and the auctioneer with regard to payment for the goods that will dictate whether the money is received as an agent or as a principal.

An auction conducted by an auctioneer for a vendor or vendors involves three contracts:

- a contract between the vendor and the auctioneer instructing the auctioneer to act as the vendor's agent in arranging and managing the auction process – this can be called the **'instruction contract'**;
- a contract between the vendor and the highest bidder (who becomes the purchaser on the fall of the hammer) for the sale of the goods – this can be called the **'supply contract'** transferring ownership;
- a contract between the purchaser and the auctioneer which will govern, among other matters, the payment arrangements under which the auctioneer may be either a principal or an agent according to the terms – this can be called the **'transaction contract'** governing payment.

For further analysis, see the Court of Appeal decision in *Chelmsford Auctions v Poole* [1973] 1 All ER 810, CA.

*\*Rules of Conduct for Firms are made by the Regulatory Board of the Royal Institution of Chartered Surveyors (RICS) under Article 18 of the Supplemental Charter 1973 and bye-law 5 of RICS' bye-laws. Version 4 of these Rules shall apply from 01 August 2010.*

*Rule 8 which appears under Part II Conduct of business deals with clients' money, whereby it states that:*

*"A Firm shall preserve the security of clients' money entrusted to its care in the course of its practice or business."*

While the terms of the contract between the vendor and the auctioneer may well be set out in a separate document (the terms of business), the auction will be governed by the auctioneer's Conditions of Sale (which will include terms for the contract between the auctioneer and the successful bidder, the purchaser). Separately, common law provides a security for payment for the goods, linked to the possession of the goods, known as a 'lien'.

Consequently, once the purchaser has taken possession of the goods, the auctioneer's lien becomes a security over the purchase price.

The auctioneer can therefore sue the purchaser for that price in his own name. This may be waived or enhanced by the terms of Conditions of Sale. Those Conditions may also provide expressly for retention of the auctioneer's title as a further basis on which the auctioneer could sue the purchaser where he has taken the goods and has not paid for them.

### Where the auctioneer receives the payment as an agent

Where the contracts provide that the auctioneer will pay the vendor only once the auctioneer has been paid, the auctioneer is acting as agent. Generally, the contracts will allow intervening time for funds to clear. In this instance, the vendor is fully exposed to the risk of the purchaser defaulting and cannot ordinarily look to the auctioneer if the auctioneer has not been paid.

Once the payment has been received from the purchaser, the auctioneer holds it in a fiduciary capacity with a duty to protect the money. The auctioneer is then specifically liable to the vendor for that sale price, net of commission and any other costs due under his terms of business.

RICS Rules of Conduct (in the agency scenario)

These require:

- the auctioneer to maintain a segregated **client money account** which is titled as a client or auction sales account to hold that money,
- the auctioneer to make it **clear to the vendor in the terms of business** that this is how that money will be safeguarded from the auctioneer's creditors, should the auctioneer become insolvent.

### Where the auctioneer receives the payment as principal

Where under the contracts, the auctioneer receives the purchase price as principal, his duty to pay the vendor is not linked to his obtaining the purchase price from the purchaser. In this situation, the contracts require the auctioneer to pay the vendor, usually on a specified timetable, irrespective of whether the purchaser has yet paid the auctioneer, or pays at all. In this situation, the vendor is insulated from any default by the purchaser.

In these situations where the auctioneer is principal in the receipt of the purchase price, he assumes two risks which he would not carry as agent:

- the risk that the purchaser fails to pay for the goods – the credit risk; and
- the cost of financing the time between paying the net proceeds of the sale to the vendor and being paid by the purchaser.

The auctioneer's lien under common law and any powers reserved under the Conditions of Sale are important safeguards for these risks.

As the auctioneer is now not holding the money received from the purchaser in a fiduciary capacity for the vendor, it follows that the auctioneer need not hold it in a client money account.

RICS Rules of Conduct (in the principal to principal scenario)

In this situation, the auctioneer **must make it clear in his terms of business with the vendor that:**

- a) the nature of the contract is not that of agent, but of **principal in the financial transaction**; and
- b) sale proceeds will not be paid into a client bank account, and
- c) consequently, **RICS Client Money Protection Scheme (CMPS) will not apply to protect the vendor** against the auctioneer in the event of insolvency.

## Conclusion

Whether a firm who practices livestock auctioneering acts as agent or as principal in receiving the purchase price for an item of goods sold at auction is a matter of fact depending on its terms of business and the Conditions of Sale.

These must be transparent and fair. They must also make the **auctioneer's status** in this matter abundantly **clear to vendors** and whether that means:

- a) monies will be held in a recognised **client account**, or
- b) monies are payable to vendors irrespective of how or if the auctioneer recovers the purchase price from the purchaser, so that the money will not be held in a client money account and therefore **no cover would be available for it from the RICS CMPS**, in the event of the auctioneer becoming insolvent or as a result of any other loss.

RICS Regulation will undertake monitoring of regulated firms to establish compliance with this guidance. Where non-compliance is identified, this will be investigated and has the potential for disciplinary proceedings to be instigated.

A help sheet is available to download from [www.rics.org/regulation](http://www.rics.org/regulation) should firms require additional guidance on the holding of clients' money.

***Disclaimer:*** This note is intended to raise awareness among livestock auctioneers in the United Kingdom of the difference between the auctioneer acting as an agent and as a principal in receiving the purchase price from the purchaser of goods sold at auction.

It does not purport to offer legal advice. Firms are strongly encouraged to take professional advice to determine the terms upon which they contract with vendors and their Conditions of Sale.

This guidance is only applicable to livestock auctioneers.