

# BARNES THOMAS COUNTY AUCTIONEERS

## VENDOR'S TERMS AND CONDITIONS

### 1. Interpretation

1. In these terms, the following words and phrases shall have the following meanings:
- 1.1.1. **Agreement:** means these terms and conditions and the relevant Consignment Form.
- 1.1.2. **Conditions of Sale:** means the conditions of sale set out at Schedule 1.
- 1.1.3. **Consignment Form:** means the relevant consignment form.
- 1.1.4. **Purchaser:** means either the bidder who submits the highest bid at the auction that is accepted by the Auctioneer or the person who the Auctioneer declares as purchaser of the Lots in accordance with clause 4.3.
- 1.1.5. **Purchaser's Premium:** means the premium payable to the Auctioneer which shall be calculated at the rate of 20% of the Purchase Price, exclusive of ARR if applicable
- 1.1.6. **Purchase Price:** means the amount payable by the Purchaser;
- 1.1.7. **Auctioneer, Auction Date, Auction Venue, Commission, Delivery Date, Illustration Charge, Insurance Charge, Insurance Policies, Lots, Reserve, Vendor:** shall have the meaning set out on the Consignment Form.
- 1.2. The headings do not affect the interpretation of the Agreement. Any reference to a party's employees includes its agents and sub-contractors. Where the context so requires the singular includes the plural and vice versa.

### 2. Basis of Contract

- 2.1. The Vendor's request for the Auctioneer to auction the Lots constitutes an offer by the Vendor to appoint the Auctioneer as its agent for the sale of the Lots in accordance with these terms.
- 2.2. A binding contract shall not come into existence between the Auctioneer and Vendor unless and until the Auctioneer has issued a Confirmation Form, or, if earlier, when the auction begins.
- 2.3. The Auctioneer will act as the Vendor's agent to sell the Lots at the Auction Venue on the Auction Date subject to these terms.
- 2.4. The Agreement will relate only to the Lots identified in the Confirmation Form. The Auctioneer will not be obliged to auction any other lot which may have been part of the Vendors request until the auction of such lot has been confirmed in a Confirmation Form.
- 2.5. These terms apply to the Agreement to the exclusion of any other terms that the Vendor seeks to impose or incorporate, or which are implied by trade, custom, practice or course of dealing.
- 2.6. No addition to, variation of, exclusion or attempted exclusion of any term of the Agreement shall be binding unless agreed in writing and signed by the Auctioneer.

### 3. Auctioneer's Obligations

- 3.1. The Auctioneer agrees to:
- 3.1.1. perform the auction using reasonable care and skill;
- 3.1.2. use reasonable endeavours to promote the sale of the Lots before the Auction Date;
- 3.1.3. use reasonable endeavours to sell the Lots at the Auction Venue on the Auction Date, but any such date shall be estimates only and time shall not be of the essence for performance of the Agreement;
- 3.1.4. publish the Vendor's description of the Lots (as set out in the Consignment Form) in an auction catalogue;
- 3.1.5. subject to clause 5.1, take delivery (on the Delivery Date) and store the Lots at the Auction Venue or any other venue notified in writing to the Vendor;
- 3.1.6. display the Lots at a pre-auction viewing;
- 3.1.7. accept payment of the Purchase Price from the Purchaser;
- 3.1.8. enter into a contract for sale of the Lots with the Purchaser on behalf of the Vendor in accordance with the Conditions of Sale;
- 3.1.9. return any unsold Lots to the Vendor, at the Vendor's cost.

### 4. Vendor's Obligations

- 4.1. The Vendor shall:
- 4.1.1. ensure that the descriptions of the Lots are complete and accurate in all material respects;
- 4.1.2. provide the Auctioneer with such information, materials and assistance as the Vendor may reasonably require in order to perform the auction;
- 4.1.3. sell the Lots with full title guarantee free from all liens, charges, encumbrances and third party claims;
- 4.1.4. obtain and maintain all necessary licences, permissions and consents which may be required for the sale of the Lots at the auction; and
- 4.1.5. provide the Auctioneer with all information known to the Vendor relating to the present and past ownership of the Lots.
- 4.2. The Vendor warrants that:
- 4.2.1. it is the owner of the Lots and has the right to enter into this Agreement and appoint the Auctioneer as its agent; and
- 4.2.2. it is the owner or licensee of the intellectual property rights in the photographs and descriptions of the Lots.
- 4.3. The Vendor agrees that the Auctioneer will have the authority to sell the Lots to any Bidder who places a bid at the Reserve or higher immediately after the auction has taken place.

### 5. Payment

- 5.1. The Vendor shall pay the Auctioneer the Insurance Charge and the Illustration Charge within 7 days of the date of signing the Consignment Form or within 14 days prior to the Auction Date whichever is earlier.
- 5.2. The Vendor agrees to pay the Commission to the Auctioneer. The Auctioneer will be entitled to deduct the Commission and any other reasonable expenses from the Purchase Price before transferring the balance to the Vendor.
- 5.3. Subject to clause 9.3, the Auctioneer agrees to transfer the balance of the Purchase Price to the Vendor by cheque, or any other method notified to the Vendor, within 30 days of receipt of the Purchase Price from the Purchaser.
- 5.4. Time for payment shall be of the essence. If the Vendor fails to make any payment on the relevant due date, the Auctioneer may charge interest on the amount outstanding from the due date to the date of receipt (whether or not after judgment), at the annual rate of 3% above the then current base lending rate of Barclays Bank Plc, accruing daily and compounded quarterly.
- 5.5. Unless otherwise stated, all charges are exclusive of VAT.

### 6. Intellectual Property Rights

- 6.1. All Intellectual Property Rights in any photographs and descriptions of the Lots provided by the Vendor are and will remain the property of the Vendor. The Vendor grants the Auctioneer a non-exclusive, transferable, royalty free license to use such photographs and descriptions for the purposes of promoting the sale of the Lots.
- 6.2. The Vendor agrees that the Auctioneer may take photographs, sketches and copies (of whole or part) of the Lots for the purposes of promoting the Lots, the Auctioneer's services and recording keeping.
- 6.3. All materials, including photographs and auction catalogues, produced by the Auctioneer to promote the sale of the Lots are the exclusive property of the Auctioneer.

### 7. Description

- 7.1. The Auctioneer will be entitled to rely entirely on the descriptions of the Lots provided by the Vendor in the Consignment Form.
- 7.2. Any statement made by the Auctioneer in respect of the Lots is a statement of opinion only.
- 7.3. The Vendor agrees to indemnify and hold harmless the Auctioneer from and against any losses, damages, costs (including all legal fees) and expenses incurred by or awarded against the Auctioneer as a result of, or in connection with, any claim that the Lots do not comply with the descriptions.

### 8. Reserves

- 8.1. The Lots will be sold without a reserve unless a Reserve is set out on the Consignment Form.
- 8.2. The Vendor agrees that the Auctioneer shall have the absolute discretion to sell the Lots at 10% below the Reserve.
- 8.3. Subject to clause 8.2, the Vendor agrees that, if the Lots are offered for sale at the Reserve and no bids are made at 10% below or above the Reserve, the Lots will not be sold by the Auction and the Vendor will be responsible for the payments set out at clause 5 and any other charges incurred.
- 8.4. If a Reserve has been placed on the Lots, the Auctioneer may (at his sole discretion), place bids (up to and equalling the Reserve) on the Vendor's behalf.
- 8.5. The Vendor agrees that the Auctioneer can refuse to accept bids (whether or not a Reserve has been placed on the Lots) where such refusal is reasonable in the circumstances.

### 9. Forgeries and Infringement

- 9.1. If the Purchaser (acting in good faith) considers the Lots to be forgeries or an infringement of third party intellectual property rights, the Auctioneer may accept the return of the Lots from the Buyer and refund the sums paid by the Buyer to the Auctioneer.
- 9.2. The Vendor agrees to be bound by the Auctioneer's decision when deciding whether or not the Lot is a forgery. The Auctioneer shall be entitled to take into account the views of any expert consulted by them.

- 9.3. The Vendor agrees that its right to receive payments in accordance with clause Subject to clause 9.3, the Auctioneer agrees to transfer the balance of the Purchase Price to the Vendor by cheque, or any other method notified to the Vendor, within 30 days of receipt of the Purchase Price from the Purchaser. shall be temporarily suspended for any period required by the Auctioneer to investigate any allegation that the Lots are forgeries or an infringement of third party intellectual property rights. In the event that the Auctioneer considers the Lots to be forgeries or an infringement of third party intellectual property rights, the Vendor's right to receive payment in accordance with clause Subject to clause 9.3, the Auctioneer agrees to transfer the balance of the Purchase Price to the Vendor by cheque, or any other method notified to the Vendor, within 30 days of receipt of the Purchase Price from the Purchaser. shall end.

- 9.4. The Vendor agrees that:

- 9.4.1. the Auctioneer may retain any sums paid by the Purchaser and refund the same to the Purchaser; and
- 9.4.2. on receipt of a written request from the Auctioneer, it will pay the Auctioneer any sum that would otherwise have been due to the Auctioneer (including a sum equivalent to the Purchaser's Premium) and any other sum refunded to the Purchaser and, on receipt of such sums, the Auctioneer will return the Lots to the Vendor.

- 9.5. The Vendor agrees to indemnify and hold harmless the Auctioneer from and against any losses, damages, costs (including all legal fees) and expenses incurred by or awarded against the Auctioneer as a result of, or in connection with:

- 9.5.1. any photographs, sketches and copies taken in accordance with clause 6.2; or
- 9.5.2. any claim that the Lots are forgeries or infringe any third party intellectual property rights.

### 10. Termination

- 10.1. Either party may terminate this Agreement forthwith on giving notice in writing to the other if:
- 10.1.1. one party ceases to carry on business, are adjudicated bankrupt or dies; or
- 10.1.2. either party commits any material breach of any term or obligation of this Agreement and (in the case of a breach capable of being remedied) shall have failed, within 14 days after the receipt of the request in writing from the other to do so, to remedy the breach.
- 10.2. The Auctioneer may terminate this Agreement forthwith on giving notice to the Vendor if:
- 10.2.1. the Vendor fails to pay any sum due under this Agreement and such sum remains unpaid for 14 days after written notice has been served by the Auctioneer on the Vendor confirming that such sum has not been paid;
- 10.2.2. the Vendor does anything that adversely affects the Auctioneer's goodwill and reputation;
- 10.2.3. the Auctioneer reasonably considers the Lots to be forgeries or infringements of the intellectual property rights of any third party.
- 10.3. The Auctioneer may terminate this Agreement at any time on serving the Vendor with 1 months' prior written notice.
- 10.4. On termination, all sums accruing up until the date of terminate shall be due and payable by the Vendor.

### 11. Limitation of liability

- 11.1. The following provisions set out the Auctioneer's entire liability (including any liability for the acts or omissions of its employees or sub-contractors) to the Vendor in respect of any breach of the Agreement and any representation, statement or tortious act or omission (including negligence) arising out of or in connection with the Agreement.
- 11.2. All warranties, conditions and other terms implied by statute or common law are excluded from the Agreement to the fullest extent permitted by law.
- 11.3. Nothing in these terms excludes or limits the Auctioneer's liability for death or personal injury caused by the Auctioneer's negligence, fraud or fraudulent misrepresentation.
- 11.4. Subject to condition 11.3:
- 11.4.1. The Auctioneer shall not be liable for any loss of profits, loss of business, depletion of goodwill or similar losses or for any special, indirect or consequential loss, costs, damages, charges or expenses howsoever arising; and
- 11.4.2. The Auctioneer's total liability in contract, tort (including negligence or breach of statutory duty), misrepresentation, restitution or otherwise, arising in connection with the performance or contemplated performance of the Agreement shall be limited to the Purchase Price or £1,000 in the event that there is no Purchaser,
- 11.4.3. The Auctioneer's total liability in contract, tort (including negligence or breach of statutory duty), misrepresentation, restitution or otherwise, arising in connection with the performance or contemplated performance of the Agreement shall be limited to the lower of Purchase Price (if any) or £1,000 in the event that there is no Purchaser,
- 11.5. Nothing in this clause 11 shall limit the Vendor's right to claim in respect of the loss of the Lots or the Vendor's entitlement to the proceeds of such insurance claim provided the Vendor has paid the Insurance Charge in accordance with clause 12.1.
- 11.6. The Vendor agrees to indemnify and hold harmless the Auctioneer from and against any losses, damages, costs (including all legal fees) and expenses incurred by or awarded against the Auctioneer as a result of, or in connection with, any claim arising in respect of the Lots.

### 12. Insurance

- 12.1. Provided that the Vendor pays the Insurance Charge, the Auctioneer shall maintain the Insurance Policies for the benefit of the Lots.
- 12.2. If the Vendor does not pay the Insurance Charge, the Insurance Policies will not apply to the Lots and the Auctioneer recommends that the Vendor obtains separate insurance for the Lots.

### 13. Disputes

- 13.1. If any dispute arises in connection with this Agreement, the Vendor and the Auctioneer will, within 14 days of a written request from one party to the other, meet in a good faith effort to resolve the dispute.
- 13.2. If the dispute is not resolved at that meeting, the parties will attempt to settle it by mediation in accordance with the Truro County Court Mediation Service. Unless otherwise agreed between the parties, the mediator will be nominated by the Truro County Court. To initiate the mediation a party must give notice in writing (ADR notice) to the other party to the dispute requesting a mediation.

### 14. Force Majeure

- 14.1. The Auctioneer shall not be liable to the Vendor for any breach of its obligations under this Agreement if such breach is due to an act, event, omission or accident beyond the Auctioneer's reasonable control (**Force Majeure Event**).
- 14.2. If a Force Majeure Event occurs, the Auctioneer shall inform the Vendor as soon as possible and take all reasonable steps to mitigate the effects of the Force Majeure Event.

### 15. Waiver

- 15.1. A waiver of any right under the Agreement is only effective if it is in writing and signed by or on behalf of the waiving party, and it applies only to the party to whom the waiver is addressed and the circumstances for which it is given.

### 16. Entire Agreement

- 16.1. This Agreement constitutes the whole agreement between the parties and supersedes all previous agreements between the parties relating to its subject matter.
- 16.2. Each party acknowledges that, in entering into this Agreement, it has not relied on, and shall have no right or remedy (other than for breach of contract) in respect of, any statement, representation, assurance or warranty (whether made negligently or innocently) other than as expressly set out in this Agreement.

### 17. Assignment

- 17.1. The Vendor shall not, without the prior written consent of the Auctioneer, assign, transfer, charge, sub-contract or deal in any other manner with all or any of the Vendor's rights or obligations under the Agreement.

### 18. Third party rights

- 18.1. This Agreement is made for the benefit of the parties to it and (where applicable) their successors and permitted assigns, and is not intended to benefit, or be enforceable by, anyone else.

### 19. Notices

- 19.1. Any notice required to be given pursuant to this Agreement shall be in writing and shall be delivered by hand or sent by pre-paid first-class post or recorded delivery post to the address of the party or by email to the address set out on the Consignment Form or, in each case, such other address as may be notified by one party to the other.
- 19.2. A notice delivered by hand is deemed to have been received when delivered (or, if delivery is not in business hours, 9.00 am on the first business day following delivery). A correctly addressed notice sent by pre-paid first-class post or recorded delivery post shall be deemed to have been received at the time at which it would have been delivered in the normal course of post. An e-mail shall be deemed to have been delivered within 24 hours from the time of being sent, provided that no failure notice is received by the sender.

### 20. Governing law and jurisdiction

- 20.1. The Agreement and any disputes or claims arising out of or in connection with its subject matter are governed by and construed in accordance with the law of England and Wales and the courts of England and Wales shall have exclusive jurisdiction.