



Simply the Best; Public Authority Land Disposal

Constanze Bell, Barrister

**This seminar paper is made available for educational purposes only. The views expressed in it are those of the author. The contents of this paper do not constitute legal advice and should not be relied on as such advice. The author and Kings Chambers accept no responsibility for the continuing accuracy of the contents.*

Section 123 of the Local Government Act 1972

Section 123 of the Local Government Act 1972 provides as follows:

(1) Subject to the following provisions of this section, a principal council may dispose of land held by them in any manner they wish.

*(2) Except with the consent of the Secretary of State, a council shall not dispose of land under this section, otherwise than by way of a short tenancy, **for a consideration less than the best that can reasonably be obtained.***

“Land” is defined in section 270 as including “*any interest in land and any easement or right in, to or over land..*”

NB- Section 233: section 123 LGA 1972 does not apply to land which has been acquired or appropriated for planning purposes and is for the time being held for those purposes

233.— Disposal by local authorities of land held for planning purposes.

(1) Where any land has been acquired or appropriated by a local authority for planning purposes and is for the time being held by them for the purposes for which it was so acquired or appropriated, the authority may dispose of the land to such person, in such manner and subject to such conditions as appear to them to be expedient...

...

(3) The consent of the Secretary of State is also required where the disposal is to be for a consideration less than the best that can reasonably be obtained and is not—

(a) the grant of a term of seven years or less; or

(b) the assignment of a term of years of which seven years or less are unexpired at the date of the assignment...”

1. What is the duty to obtain best value?

The duty to obtain the best price does not require the highest offer to be invariably accepted, regardless of who makes it and when it is made.

R (Midlands Co-operative Society Ltd) v Birmingham CC [2012] EWHC 620 (Admin) (Hickinbottom J)

[124] In considering whether a particular price is the best price reasonably obtainable, the best price achievable in the open market is likely to be relevant. In many cases, they will be the same. It is intrinsic to the concept of open market value that it takes into account all potential bidders, including any special bidders, to avoid a speculator buying property and selling it on to someone with a special interest at a higher price (Commissioners of Inland Revenue v Clay [1914] 3 KB 466)

Annex A to the Crichel Down Rules: Guidance for departments: “Market value and the date of valuation (Rule 26)

[18] For the purposes of the Rules, ‘market value’ means ‘the best price reasonably obtainable for the property’. This is equivalent to the definition of ‘market value’ in the RICS Appraisal and Valuation Manual (the ‘Red Book’), but including any ‘Special Value’ (i.e. any additional amount which is or might reasonably be expected to be available from a purchaser with a special interest like a former owner).

The only consideration to which regard may be had is that which consists of those elements of the transaction of commercial or monetary value, capable of being assessed by valuers: R v Pembrokeshire CC ex p Coker [1999] 4 All ER 1007; R v Hackney LBC ex p Lemon Land [2001] EWHC Admin 346 [2002] JPL 405.

There is no prescribed route to achieve the best price reasonably obtainable but there may be circumstances in which an actual sale on the open market is the only way to achieve it (as opposed to one particular sale at a price according to independent valuation).

Best consideration is not limited to the purchase price but may include a term or condition attached to the disposal which identifies a specific commercial benefit to the vendor. These conditions are referred to as voluntary conditions.

Conditions attached to the disposal which may have a quantifiable commercial or monetary worth could include:-

- Covenants requiring the land to be used for a particular purpose;
- A pre-emption clause giving the vendor the option to buy the land back on specified terms if the purchaser wishes to sell it; or,
- A provision in the contract enabling the authority to recover land on the terms reflecting the consideration for which it was disposed of, if the land is no longer being used for the purposes for which it was disposed of at less than best consideration.

Conditions or benefits arising which cannot be considered when calculating best consideration, include those which do not have a direct commercial or monetary value to the Council such as:-

- Job creation;
- Social value – ie improved visitor numbers to a particular area;
- Using the land for a particular desirable purpose

But, these conditions can be taken into account if a disposal at less than best consideration is proposed as they are “social, economic or environmental benefits” which may arise from the disposal.

What are the exceptions to the obligation to obtain best value?

- Short tenancies (terms/ assignments of 7 years or less);
- with the consent of the SoS;
- The LGA 1972: General Disposal Consent*

(purpose for which the land is to be disposed is likely to contribute to the achievement of any one or more of: promotion/ improvement of economic well-

being; promotion/ improvement of social well-being; promotion/ improvement of environmental well-being; and the 'undervalue' is 2mill or less.)

Undervalue? The difference between the unrestricted value of the interest to be disposed of and the consideration accepted.

*It is recognised that there may be circumstances where a Council considers it appropriate to dispose of assets at an undervalue (i.e. less than the best consideration that can reasonably obtained). Councils should not divest themselves of valuable public assets unless they are satisfied that the circumstances warrant such action.

A general disposal consent has therefore been issued to give local authorities autonomy to carry out their statutory duties and functions, and to fulfil such other objectives as they consider to be necessary or desirable. However, when disposing of land at an undervalue, Council's must remain aware of the need to fulfil their fiduciary duty in a way which is accountable to local people.

A Circular issued in 2003 gives authorities consent to a disposal of land at an undervalue provided that:-

- a) a local authority considers that the disposal is likely to contribute to the achievement of:
 - i) the promotion or improvement of economic well-being;
 - ii) the promotion or improvement of social well-being;
 - iii) the promotion or improvement of environmental well-being; and
- b) the best price reasonably obtainable for the property does not exceed £2,000,000 (two million pounds).

2. Public Law Grounds of Challenge to disposal of land

A purported discharge of s123 duty can only be impugned on the usual public law grounds.

Q: What are the usual grounds?

Q: What is Wednesbury unreasonableness?

Discussion: Fairness, the Claimant's best friend

Discussion: Remedies, is relief discretionary?

3. Test your knowledge: Questions for Discussion

- I. Is an authority entitled to prefer a firm bid at a lower price to a last minute spoiling bid? If an authority is minded to do so, what steps should they take to substantiate their position?
- II. Is the S123 duty a duty to follow a particular process or to have regard to particular factors?
- III. What are the Indecon principles? Do they assist the LA?

4. Answers

- I. "A bird in the hand is worth two in the bush". R (Lidl (UK) GmbH v Swale Borough Council [2001] EWHC Admin 405 (Morison J) & affirmed in Indescon.
- II. No. R (Midlands Co-operative Society Ltd) v Birmingham CC [2012] EWHC 620 (Admin) - Hickinbottom J at [122]) S123 imposes a duty to achieve a particular outcome.
- III. Yes! R v Darlington BC ex parte Indescon [1990] 1 EGLR 278 (Kennedy J).

*"...a court is only likely to find a breach or an intended breach by a council of the provisions of section 123(2) of the [LGA] 1972 if the council has (a) failed to take proper advice or (b) failed to follow proper advice for reasons which cannot be justified or (c), although following proper advice, followed advice which was so plainly erroneous that in accepting it the council must have known, or at least ought to have known, that it was acting unreasonably" (282H)** (see later)*

Also:

A bird in the hand is worth two in the bush; and

There is a duty to probe and explore potential offers there may also be a danger that too much probing or indecisiveness will lead to the loss of a bargain

5. Disposal of Land & State Aid

Disposals by public authorities also need to comply with the European Commission's state aid rules, because if land is disposed of at less than best consideration, the authority is providing a subsidy to the purchaser. Disposals must be notified to the Commission where the undervalue is not de minimis.

The Commission has issued guidance on methods of sale which will ensure that no state aid is given.

Even where the Secretary of State consents to a disposal at less than the best consideration that can reasonably be obtained, the disposal must still comply with EU State aid rules.

Failure to comply with the State aid rules will mean that the subsidy is unlawful, and may result in the benefit being recovered (with interest) from the recipient.

What is state aid?

Article 107(1) of the Treaty on the Functioning of the European Union ("TFEU"):

"Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market."

The classification as 'aid' within the meaning of Article [107(1) TFEU] requires that all the conditions set out in that provision are fulfilled:

- (1) the measure must be an intervention by the State or through State resources;
- (2) the measure must confer an advantage on the recipient;
- (3) the measure must favour certain undertakings or the production of certain goods (selectivity);
- (4) the measure must be liable to affect trade between Member States; and
- (5) the measure must distort or threaten to distort competition.

R. (on the application of Faraday Development Ltd) v West Berkshire Council [2016] EWHC 2166 (Admin)

Abstract: The claimant applied for judicial review of a decision of the defendant local planning authority to enter into an agreement with a developer to facilitate the regeneration of a site owned by the local authority.

The Claimant was the second-place bidder who claimed that the Council did not have due regard to its duty under s123 LGA 72 in awarding the contract to the winner; and in any event the contract is a Public Works Contract under the PCRs and should have been tendered on that basis.

The site in question comprised plots held on long leases. There had been little new investment in the estate over the previous 40 years. The local authority wished to retain ownership of the site to generate income in the form of ground rents and to secure redevelopment of the site in order to enhance that income. The claimant, which held leases on several of the plots, was a special purpose vehicle incorporated in order to assemble land for redevelopment within the estate. The local authority accepted a bid by the developer in preference to that of the claimant on the basis that the former was more experienced in delivering such schemes. Under the development agreement, the developer was obliged to prepare project plans for the development but was not obliged to take on the obligations of acquiring a plot and carrying out the redevelopment; instead, it had a commercial incentive to draw down land because of its substantial commitment to the planning of the whole site and its preparation of development strategies for each plot, giving it an opportunity to carry out a profitable development.

The claimant contended that (1) the local authority was in breach of its obligation under the Local Government Act 1972 s.123 not to dispose of land for a consideration less than the best that could reasonably be obtained; (2) the development agreement was a public contract to which the public procurement legislation applied; (3) the local authority's reason for entering into an agreement outside the public procurement regime was irrational, given that one of the objectives of that legislation was to promote competition.

Question for discussion: Are the Council in trouble?

Holgate J summarised the following principles for the application of s.123(2):

- The Court cannot substitute its own view on the facts and merits for that of the local authority. It may interfere only if there was no material on which the decision could have been reached, if relevant matters were disregarded, if irrelevant matters were taken into consideration or the decision was irrational (at [131(i)]).
- A breach of s.123(2) is likely only if the council did not take proper advice, failed to follow proper advice for reasons that cannot be justified or it followed advice that was plainly erroneous and that it was thus unreasonable to follow (at [131(ii)]).
- “Consideration” is confined to elements of the transaction that are of commercial or monetary value (at [131(vi)]). Creation of jobs is an irrelevant consideration (ibid.)
- The deliverability or credibility of a bid is a commercial factor that is relevant to an assessment of whether the consideration offered is the best reasonably obtainable. Thus, a higher but less certain bid may not represent the best consideration (at [131(vii)]).
- There is no absolute duty on a council to market the land or to obtain independent advice (at [131(viii)]).

Holgate J dismissed the claim

****Taking Proper Advice**

Whitstable Society v Canterbury City Council [2017] EWHC 254 (Admin)

Mr Justice Dove held the City Council had entered into a contract for the disposal of land at less than the best consideration, even after following their valuer's report.

Mr Justice Dove gave judgement on 15 February 2017 finding for the claimant on the issue of best consideration but refusing relief on the grounds of delay, prejudice to the developer and good administration being the need for certainty in the decision-making of local authorities, especially where a commercial transaction is in issue.

The Council had taken the advice of a professionally qualified valuer applying the RICS Valuation professional standards ("the Red Book") for determining market value and taking into account any special purchaser.

Mr Justice Dove restated the principles set out in the case of *Faraday Development Limited v West Berkshire [2016] EWHC 2166*.

What was the problem?

The valuer had assumed that affordable housing would be required as part of the grant of planning permission on the basis that the new local plan policy which required it on all small sites would be in place and adopted by March 2015. However, by the time of the decision to dispose and the contract was entered into that assumption was wrong.

Mr Justice Dove concluded:

"A planning permission unencumbered by an affordable housing requirement would have had a substantially higher value than the defendant achieved, as would a valuation of the land which included the prospect of achieving such a planning permission bearing in mind the factual position as it existed as at the 11th of December 2014. In my view there is substance therefore in the Claimant's contention that there has been a breach of s123(2) of the 1972 Act and a legal error by the defendant, in that the defendant failed to obtain best consideration for the land since the sum it accepted was based on a valuation predicated on it being inevitable that affordable housing would be required."

Discussion: How might this situation have been avoided? What are the lessons to learn from this scenario?

The Commission Notice on the notion of State aid as referred to in article 107(1) TFEU

The Notion explains in detail the criteria to apply in order to decide whether a transaction involves State aid. It applies to all types of transaction, not just disposals of land.

The Notion provides guidance on how to arrive at a market value and addresses areas such as how to run a competitive bidding process and the options for establishing market value using benchmarking and other standard valuation methodologies.

6. How is the Council able to demonstrate it has obtained best consideration?

As long as the DM has had regard to the relevant evidence, applied the right legal test and been rational/ reasonable in their determination, their decision should be defensible.

Can the Council justify its position on the evidence?

Keep good records!

NB- sometimes there are specific procedural requirements, e.g- public open space s123(2A) LGA 1972.