

# Local Authority Land Disposals and State Aid

**Tim Buley**

# LA LAND DISPOSAL POWERS



**PRINCIPAL LOCA AUTHORITY LAND DISPOSAL POWERS:**

**(1) SECTION 123 LGA 1972**

**(2) SECTION 127 LGA 1972 – PARISH COUNCILS**

**(3) SECTION 233 TCPA 1990 – LAND HELD FOR PLANNING PURPOSES**

# SECTION 123 – CONSTRAINTS



**Provides power to dispose of land held by a local authority “in any manner they wish”, subject to the following constraints:**

**(a) Best value – subsection (2)**

**(b) Open space – subsection (2A) requires LA to advertise intention to dispose of open space land and consider objections (note special provisions for Wales)**

# SECTION 233 – CONSTRAINTS



**Provides power to dispose of land held “for planning purposes”:**

- (a) “to secure ... best use of that or any other land” or**
- (b) to secure building works needed “for the proper planning of the area”.**

**Consent of Secretary of State required:**

- (a) Disposal of commons land**
- (b) Disposal for less than best value.**

# BEST VALUE



All three statutory powers impose requirement to obtain best value.

Note that statutory obligation to obtain best value runs alongside other sources of such obligations:

- (a) Policy e.g. the Crichel Down Rules. Note also obligations imposed on central government bodies.
- (b) Common law fiduciary duty: *Roberts v Hopwood* [1925] AC 578
- (c) State Aid (see below)

# BEST VALUE



**Exceptions to statutory obligations to obtain best value:**

**(a) Short tenancies**

**(b) Consent:** NB Local Government Act 1972: General Disposal Consent 2003 (“the Consent”), annexed to Circular 06/03

# MONEY OR MONEY'S WORTH?



## Section 123 / 127:

“When deciding whether ... the best consideration reasonably obtainable has been obtained, the only consideration to which regard may be had is that which consists of those elements of the transaction of commercial or monetary value to the local authority”: *ex parte Coker ex p Coker* [1999] 4 All ER 1007.

See also *ex p Lemon Land* [2001] EWHC Admin 346 [2002] JPL 405, *R (London Jewish Girls High Ltd) v Barnet LBC* [2013] PTSR 1357

## Section 233 TCPA:

Different approach taken (in Scotland) in *Standard Commercial Prop v Glasgow CC* [2006] 2 AC 572, but State Aid points not argued

# Best value: Principles of challenge

## (1) GROUNDS OF CHALLENGE LIMITED TO PUBLIC LAW

The purported discharge by a local authority of its section 123 LGA 1972 duty can only be impugned by a court on the usual public law grounds: *R v Essex County Council ex p Clearbrook Contractors Ltd* (3 April 1981, unreported); *Salford Estates* at [95] (approved by Hickinbottom J in *Midlands Co-operative* at [122])

# Best value: Principles of challenge

## (2) Duty to achieve an outcome, not conduct a process

Section 123 LGA 1972 imposes a duty to achieve a particular outcome (namely the best price reasonably obtainable): it is not a duty to conduct a particular process (e.g. to have regard to particular factors: ***R (Salford Estates) v Salford CC*** [2011] EWHC 2135 (Admin) at [95] (HHJ Waksman QC, approved by ***R (Midlands Co-operative Society Ltd) v Birmingham CC*** [2012] EWHC 620 (Admin) - Hickinbottom J at [122])).

# Best value: Principles of challenge

**(3) *R v Darlington BC ex parte Indescon* [1990] 1 EGLR 278**  
(Kennedy J)

The "***Indescon*** principles":

"...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)

# Best value: Principles of challenge



## (4) Indecon (guidance):

(1) ... *the public authority may pray in aid "the common-sense rule underlying the old proverb: "A bird in the hand is worth two in the bush"": **Indecon** (see also **R (Lidl (UK) GmbH) v Swale Borough Council** [2001] EWHC Admin 405 (Morison J))*

Public authority was therefore entitled to conclude sale notwithstanding possibility arising at late stage of higher offer.

(2) ... *the public authority does not enjoy the benefit of hindsight, thus: "although there is a duty to probe and to explore any offer that may be made there may also be a danger that too much probing or indecisiveness may lead to the loss of a bargain ..."*

# THIRD PARTY PROTECTION: Section 128 LGA 1972



Section 128 LGA 1972 provides protection to third parties who are innocent of breach of best value requirement, by providing that disposal not “invalid” by reason of failure to acquire Secretary of State consent.

Lead case is *Structadene* (2001) 82 P & CR 25:

- (a) Section 128 bites at point of legal transfer, not agreement to sell (transfer of equitable interest).
- (b) Section 128 does not prevent challenge on other public law grounds, including those which overlap with best value obligation such as breach of fiduciary duty.
- (c) Query continuing role of section 128 given State Aid requirements which mirror / reinforce best value obligations.

# 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.

Sale of land at under-value may constitute a State Aid: see the Commission Guidance and C-239/09 *Seydaland Vereinigte Agrarbetriebe GmbH & Co KG v BVVG Bodenverwertungs-und-verwaltungs GmbH*

# State aid: the Commission Guidance



**European Commission Communication on State aid elements in sales of land and buildings by public authorities (97/C 209/03)**  
("the Commission Guidance")

- Purpose: issued to inform Member States as to how Commission will exercise its functions in relation to investigating possible State Aid in land sale cases
- Status: not hard law, but policy document which can be relied upon as “soft law” in domestic courts
- “[S]imple procedure that allows Member States to handle sales of land and buildings [by public authorities] **in a way that *automatically* precludes the existence of State aid**”
- Not exhaustive: *Seydaland*, para 39

# Commission Guidance: 2 procedures



## (1) OPEN MARKET SALE

*A sale of land and buildings following a sufficiently well-publicized, open and unconditional bidding procedure, comparable to an auction, accepting the best or only bid is by definition at market value and consequently does not contain State aid*

## (2) INDEPENDENT VALUATION

*If public authorities intend not to use the [unconditional bidding procedure], an independent evaluation should be carried out by one or more independent asset valuers prior to the sale negotiations in order to establish the market value on the basis of generally accepted market indicators and valuation standards. **The market price thus established is the minimum purchase price that can be agreed without granting State aid***

# STATE AID: JUSTIFICATION AND COMPATIBILITY



- Apparent State Aid (within 107(1)) may not be classed as State Aid *if* advantage justified by “*the nature or general scheme*”, “*nature or structure*” or the “*logic*” of the relevant system.
  - Court developed concept: Case 173/73 **Italy v Commission** [1974] ECR 709, para. 15; Case C-279/08 P **Commission v Netherlands** (Dutch Emission trading scheme)
- Articles 107(2) and (3) provide for State Aid which “shall”, or “may” be regarded as compatible with the internal market and hence permissible:
  - 107(2): aid with a “social character”, or relating to “natural disasters” or “exceptional occurrences.
  - 107(3): aid relating to economic development, heritage, and “other categories specified by Commission or Council

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