

THE DUTY TO GET THE BEST PRICE ON THE SALE OF LAND

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1. Private and commercial landowners are free to buy and sell land at whatever price they choose, but many owners owe a duty to sell land at the best price reasonably obtainable: trustees, companies, mortgagees, receivers, and most public bodies. Whether you represent such an owner, or buy land from such an owner, you need to be aware of the following issues:
 - a. What are the terms of the power of sale?
 - b. What has to be done to ensure that the sale is at the best price reasonably obtainable?
 - c. What can be taken into account as consideration?
 - d. What protection is afforded to a purchaser?
 - e. What remedies are available for sale at an undervalue?
2. Sales by public bodies raise issues peculiar to them, such as whether non monetary consideration can be taken into account. They are, however, generally aspects of the wider issues, and best considered in the wider context. The purpose of this talk is to examine these issues with particular reference to councils.

Terms of the power of sale

3. Each body's powers of sale must be checked. Some bodies can only sell land with the consent of a minister or another body (eg a water company selling "protected land") . One of the most commonly encountered powers is that given to principal councils under section 123 of the Local Government Act 1972, and numerous other bodies by the statute that governs them. It 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..*”

What has to be done to secure the best price?

4. Guidance on the general requirements to ensure that the best price is secured can be gained from cases regarding sales by mortgagees. They indicate that the vendor should normally ensure that the property is exposed to the market for an adequate length of time (*Predeth v Castle Phillips Finance Co Ltd* [1986] 2 EGLR 144, CA in which a period of 3 months was held to be appropriate), in appropriate publications (*American Express International Banking Corp v Hurley* [1985] 3 All ER 5644) and should obtain an open market valuation. It is not necessarily sufficient to advertise the property and sell it at auction. (*Tse Kwong Lam v Wong Chit Sen* [1983] 3 All ER 54, [1983] 1 WLR 1349, PC).
5. 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. The Court recognises the adage that a bird in the hand is worth two in the bush. See for example *R v Commission For New Towns ex p Tomkins* (1988) 87 L&GR 207, CA.; *R v Pembrokeshire CC ex parte Coker* [1999] 4 All ER 1007. Thus an authority may well be entitled to prefer a firm bid at a lower price to a last minute spoiling bid. Eg *R (on the application of Lidl) v Swale BC and Aldi* [2001] EWHC Admin 405.
6. Some statutes impose specific procedural requirements, such as for disposal of public open space (s123(2A) local Government Act 1972).
7. The terms of the disposal are material to the assessment of the consideration.

In determining whether the disposal is at the best consideration obtainable, it should be assumed that the purchaser assumes no onerous obligations other than any which the authority is not obliged to impose. Thus if the purchaser gives a restrictive covenant which reduces the value of the consideration, the sale is likely to be at an undervalue.

8. 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 (more than Euro 100,000). The Commission has issued guidance (97/C209/03) on methods of sale which will ensure that no state aid is given. A copy is annexed, but the main requirements are
 - a. Sufficient publicity, *“when it is repeatedly advertised over a reasonably long period (two months or more) in the national press, estate gazettes or other appropriate publications and through real-estate agents addressing a broad range of potential buyers, so that it can come to the notice of all potential buyers. The intended sale of land and buildings, which in view of their high value or other features may attract investors operating on a Europe-wide or international scale, should be announced in publications which have a regular international circulation. Such offers should also be made known through agents addressing clients on a Europe-wide or international scale.”*
 - b. *open and unconditional bidding procedure, comparable to an auction, accepting the best or only bid; or*
 - c. *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.*

What consideration can be taken into account?

9. In the case of a normal sale, the consideration is easy to quantify. In the case of local authorities, numerous attempts have been made to justify sales on the ground that non-monetary consideration was being provided. These attempts have all failed. The courts have held that for the purposes of s123, consideration cannot be taken into account unless it has a commercial or monetary value which is capable of being assessed by valuers. Thus, the following cannot be taken into account
- a. The desirability of the proposed use of the property as a health and fitness club - *R v Middlesborough BC ex p Frostree Ltd* 16.12.1988 unreported ;
 - b. A covenant by the tenant to use its best endeavours to employ specified numbers of people.- *R v Pembrokeshire County Council ex p Coker* [1999] 4 All ER 1007;
 - c. The desire to retain a particular use which would create jobs – *R v Hackney LBC ex p Lemon Land* [2001] LGR 555.

What protection is afforded to a purchaser?

10. Section 128(2) provides:

"Where under the foregoing provisions of this Part of this Act or under any other enactment, whether passed before, at the same time as, or after, this Act, a local authority purport to acquire, appropriate or dispose of land, then

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(a) in favour of any person claiming under the authority, the acquisition, appropriation or disposal so purporting to be made shall not be invalid by reason that any consent of a Minister which is required thereto has not been given or that any requirement as to advertisement or consideration of

objections has not been complied with, and

(b) (b) a person dealing with the authority or a person claiming under the authority shall not be concerned to see or enquire whether any such consent has been given or whether any such requirement has been complied with".

11. This is a commonly found provision designed to protect purchasers (see for example s104 of the Law of Property Act 1925). It has been held that it prevents the sale from being impeached by any means, including judicial review, and regardless of whether the challenge is made by the vendor or a third party. See *London Borough of Barnet v Barnet Football Club Holdings Ltd* [2004] EWHC 519.

What is a disposal

12. Both section 123 and section 128 refer to a “disposal”. The first question which has come before the courts on the meaning of this term is whether an option is a disposal. To a property lawyer the answer is obviously “yes”. An option creates an interest in land, (*Pritchard v Briggs* [1980] Ch. 338) so the grant of an option must be a disposal. Although the question has not been directly decided, the courts have assumed that the grant of an option is a disposal in *Trustees of Chippenham Golf Club v North Wiltshire DC* (1992) 64 P&CR 527, *West Middlesex Golf Club v Ealing LBC* (1994) 68 P&CR 461, and *R v Pembrokeshire CC ex parte Coker* [1999] 4 All ER 1007.
13. The second and more difficult question is whether a contract for the sale of land is a disposal. Again, to a property lawyer, a contract is within the definition of “land” because it creates an equitable interest. Some contracts are performed but not completed, for tax reasons. Surely a contract for sale must be subject to the obligation to obtain the best price. The difficulty is that if the contract is a disposal, what is completion? Is it another disposal? Does the adequacy of the price have to be considered at both stages? The question had

to be considered in the first instance case of *R v London Borough of Hackney ex p Structadene Ltd* [2001] 1 E.G.L.R. 15. The Council decided to sell a property which it had valued at £400,000. It agreed to sell at that price to its tenants. At the last minute an offer of £450,000, but the council turned it down and entered a contract to sell to the tenants at £400,000. If the contract was a disposal, the sale could not be impeached for non-compliance with s123, because of the safe harbour provisions of s128. It was held that there could only be one “disposal” for the purposes of sections 123 and 128(2), and that it was not the contract for the disposal of an interest in land, but only completion by transfer or grant of the legal estate. The Judge (Elias J) acknowledged that the issue was difficult, and that there was force in the arguments to the contrary. If his decision is correct:

- a. It is inconsistent with the assumption that an option is a disposal;
- b. the purchaser does not benefit from the “safe harbour” provision in section 128 until completion has taken place. This, however, is no different from the position of a purchaser from a mortgagee (section 104(2) Law of Property Act 1925)) or from a charity (see *Bayoumi v Women’s Total Abstinence Educational Union Ltd* [2003] 1 All ER 864).
- c. the consent of the Secretary of State to the “disposal” can still be obtained at any time prior to completion;
- d. a contract cannot be void from the outset if the consent of the Secretary of State can still be obtained, and the contract itself remains in existence so long as the Secretary of State’s consent could be obtained. It could, however, be challenged by judicial review;
- e. It raises the question about when the adequacy of the consideration is to be judged. If it is to be judged at completion, any contract is vulnerable to increases in value or spoiling bids from competitors. It could only be protected by providing for payment of additional

consideration on completion to reflect any increase in market value. The better view is that the adequacy of the consideration should be judged at the time the contract is entered into.

14. It seems likely that the meaning of disposal will have to be considered by the Court of Appeal.

General consent

15. s123(2) permits a disposal at less than the best price reasonably obtainable with the consent of the Secretary of State.

16. The Secretary of State has issued general consents from time to time to disposals falling within certain criteria. Until recently, they were limited, as one might expect, to disposals for certain specified purposes where the undervalue was less than 20%. The General Disposals Consent 2003 marks a dramatic change, going so far as to allow authorities to ignore the requirement to get best value in most cases. It is short and striking, and merits being set out in full

“General Disposal Consent (England) 2003

1. The First Secretary of State ("the Secretary of State"), in exercise of the powers conferred by sections 123(2), 127(2) and 128(1) of the Local Government Act 1972, hereby gives consent to a disposal of land otherwise than by way of a short tenancy by a local authority in England in the circumstances specified in paragraph 2 below.

2. The specified circumstances are:

a) the local authority considers that the purpose for which the land is to be disposed is likely to contribute to the achievement of any one or more of the following objects in respect of the whole or any part of its area, or of all or any persons resident or present in its area;

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 difference between the unrestricted value of the land to be disposed of and the consideration for the disposal does not exceed £2,000,000 (two million pounds).

Interpretation and savings

3. (1) In this instrument -

"local authority" means:

i) London borough council;

ii) a county council;

iii) a district council;

iv) a parish council and parish trustees acting with the consent of a parish meeting;

v) a National Park authority;

vi) a Metropolitan Borough Council

vii) a joint authority established under Part IV of the Local Government Act 1985;

viii) a police authority established under section 3 of the Police Act 1996;

ix) the Metropolitan Policy Authority;

x) the London Fire and Emergency Planning Authority;

xi) the Broads Authority;

xii) the Council of the Isles of Scilly;

and any other person to whom, by virtue of statute, section 123(2) or section 127(2) of the Local Government Act 1972 applies;

"unrestricted value" means the best price reasonably obtainable for the property on terms that are intended to

maximise the consideration, assessed in accordance with the procedures set out in the Technical Appendix.

(2) Nothing in this instrument shall be construed as giving consent to a disposal for any purpose for which the consent of the Secretary of State is required by virtue of section 25(1) of the Local Government Act 1988, section 133(1) of the Housing Act 1988, section 32(2) or section 43(1) of the Housing Act 1985, or otherwise as having effect as a consent for any purposes other than those of Part 7 of the Local Government Act 1972.

17. The 2003 Consent forms part of Circular 06/2003, which also contains guidance on valuation, and applications for specific consent where required.

18. The criteria for this consent are based on section 2 of the Local Government Act 2002, and cases on that will be of assistance. Subject to meeting those criteria, it must be a rare case where a disposal is proposed which is at an undervalue greater than £2million.

19. It is important to note what the 2003 Consent does not do:

- a. It does not apply to all public bodies;
- b. It does not apply to land acquired or appropriated for planning purposes under s233 Town and Country Planning Act 1990;
- c. It does not preclude judicial review of the decision to make a disposal at an undervalue;
- d. It does not remove the need to comply with the Commission state aid rules (see para 8 above), which require notification of any sale where the undervalue is not de minimis (more than Euro 100,000)

Commission Communication on State aid elements in sales of land and buildings by public authorities

(97/C 209/03)

(Text with EEA relevance)

(Only the version published in the OJ is authentic. Published in the Official Journal OJ C 209, 10.07.1997)

(Text with EEA relevance)

I. INTRODUCTION

On a number of occasions in recent years the Commission has investigated sales of publicly owned land and buildings in order to establish whether there was an element of State aid in favour of the buyers. The Commission has drawn up general guidance to Member States in order to make its general approach with regard to the problem of State aid through sales of land and buildings by public authorities transparent and to reduce the number of cases it has to examine.

The following guidance to Member States:

- describes a simple procedure that allows Member States to handle sales of land and buildings in a way that automatically precludes the existence of State aid,
- specifies clearly cases of sales of land and buildings that should be notified to the Commission to allow for assessment of whether or not a certain transaction contains aid and, if so, whether or not the aid is compatible with the common market,
- enables the Commission to deal expeditiously with any complaints or submissions from third parties drawing its attention to cases of alleged aid connected to sales of land and buildings.

This guidance takes account of the fact that in most Member States budgetary provisions exist to ensure that public property is in principle not sold below its value. Therefore, the procedural precautions recommended to avoid State aid rules coming into play are formulated in a way that should normally allow Member States to comply with the guidance without changing their domestic procedures.

The guidance concerns only sales of publicly owned land and buildings. It does not concern the public acquisition of land and buildings or the letting or leasing of land and buildings by public authorities. Such transactions may also include State aid elements.

The guidance does not affect specific provisions or practices of Member States intended to promote the quality of and access to private housing.

II. PRINCIPLES

1. Sale through an unconditional bidding procedure

A sale of land and buildings following a sufficiently well-publicised, 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. The fact that a different valuation of the land and buildings existed prior to the bidding procedure, e.g. for accounting purposes or to provide a proposed initial minimum bid, is irrelevant.

(a) An offer is 'sufficiently well-publicised' when it is repeatedly advertised over a reasonably long period (two months or more) in the national press, estate gazettes or other appropriate publications and through real-estate agents addressing a broad range of potential buyers, so that it can come to the notice of all potential buyers.

The intended sale of land and buildings, which in view of their high value or other features may attract investors operating on a Europe-wide or international scale, should be announced in publications which have a regular international circulation. Such offers should also be made known through agents addressing clients on a Europe-wide or international scale.

(b) An offer is 'unconditional' when any buyer, irrespective of whether or not he runs a business or of the nature of his business, is generally free to acquire the land and buildings and to use it for his own purposes. Restrictions may be imposed for the prevention of public nuisance, for reasons of environmental protection or to avoid purely speculative bids. Urban and regional planning restrictions imposed on the owner pursuant to domestic law on the use of the land and buildings do not affect the unconditional nature of an offer.

(c) If it is a condition of the sale that the future owner is to assume special obligations - other than those arising from general domestic law or decision of the planning authorities or those relating to the general protection and conservation of the environment and to public health for the benefit of the public authorities or in the general public interest, the offer is to be regarded as 'unconditional' within the meaning of the above definition only if all potential buyers would have to, and be able to, meet that obligation, irrespective of whether or not they run a business or of the nature of their business.

2. Sale without an unconditional bidding procedure

(a) independent expert evaluation

If public authorities intend not to use the procedure described under 1, 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.

An 'asset valuer' is a person of good repute who:

- has obtained an appropriate degree at a recognised centre of learning or an equivalent academy qualification

- has suitable experience and is competent in valuing land and buildings in the location and of the category of the asset.

If in any Member State there are not appropriate established academic qualifications, the asset valuer should be a member of a recognised professional body concerned with the valuation of land and buildings and either:

- be appointed by the courts or an authority of equivalent nature,

- have as a minimum a recognised certificate of second: re-education and sufficient level of training with at least three years post-qualification practical experience in, and with knowledge of, valuing land and buildings in that particular locality.

The valuer should be independent in the carrying out of his tasks, i.e. public authorities should not be entitled to issue orders as regards the result of the valuation. State valuation offices and public officers or employees are to be regarded as independent provided that undue influence on their findings is effectively excluded.

'Market value' means the price at which land and buildings could be sold under private contract between a willing seller and an arm's length buyer on the date of valuation, it being assumed that the property is publicly exposed to the market, that market conditions permit orderly disposal and that a normal period, having regard to the nature of the property, is available for the negotiation of the sale [\(1\)](#).

(b) Margin

If, after a reasonable effort to sell the land and buildings at the market value, it is clear that the value set by the valuer cannot be obtained, a divergence of up to 5 % from that value can be deemed to be in line with market conditions. If, after a further reasonable time, it is clear that the land and buildings cannot be sold at the value set by the valuer less this 5 % Margin, a new valuation may be carried out which is to take account of the experience gained and of the offers received.

(c) Special obligations

Special obligations that relate to the land and buildings and not to the purchaser or his economic activities may be attached to the sale in the public interest provided that every potential buyer is required, and in principle is able, to fulfil them, irrespective of whether or not he runs a business or of the nature of his business.

The economic disadvantage of such obligations should be evaluated separately by independent valuers and may be set off against the purchase price. Obligations whose fulfilment would at least partly be in the buyer's own interest should be evaluated with that fact in mind: there may, for example, be an advantage in terms of advertising, sport or arts sponsorship, image, improvement of the buyer's own environment, or recreational facilities for the buyer's own staff.

The economic burden related to obligations incumbent on all landowners under the ordinary law are not to be discounted from the purchase price (these would include, for example, care and maintenance of the land and buildings as part of the ordinary social obligations of property ownership or the payment of taxes and similar charges).

(d) Cost to the authorities

The primary cost to the public authorities of acquiring land and buildings is an indicator for the market value unless a significant period of time elapsed between the purchase and the sale of the land and buildings. In principle, therefore, the market value should not be set below primary costs during a period of at least three years after acquisition unless the independent valuer specifically identified a general decline in market prices for land and buildings in the relevant market.

3. Notification

Member States should consequently notify to the Commission, without prejudice to the de minimis rule [\(2\)](#), the following transactions to allow it to establish whether State aid exists and, if so, to assess its compatibility with the common market.

(a) any sale that was not concluded on the basis of an open and unconditional bidding procedure, accepting the best or only bid; and

(b) any sale that was, in the absence of such procedure, conducted at less than market value as established by independent valuers.

4. Complaints

When the Commission receives a complaint or other submission from third parties alleging that there was a State aid element in an agreement for the sale of land and buildings by public authorities, it will assume that no State aid is involved if the information supplied by the Member State concerned shows that the above principles were observed.

(1) Article 49 (2) of Council Directive 91/674/EEC (OJ No L 374, 31 . 1 2. 1991 , p. 7

(2) OJ No C 68, 6. 3. 1996, p. 9.