

Land disposal by public bodies: State Aid and Best Value

Tim Buley

Overview



1. Best Value
 - A. Sources of the obligation to obtain best value
 - B. Exceptions to the obligation to obtain best value
 - C. The nature of the obligation to obtain best value

2. State aid and the obligation to obtain best value
 - A. Definition of State aid
 - B. European Commission Communication 97/C 209/03
 - C. State Aid: key lessons

1. Best value

A. Sources of the obligation to obtain best value

Best value



Section 123 of the Local Government Act 1972

Provides that local authorities may (with a minor exception relating to playing fields in Wales) dispose of land as they see fit, but:

*(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.***

- NB Section 127 makes identical provision for parish or community councils, or the parish trustees of a parish

Best value



Section 233 Town and Country Planning Act 1990

- Section 233(8): 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
- Instead, section 233 permits disposal but subject to:
 - (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...*

Best value: Central government



HM Treasury guidelines: “Managing Public Money”

(July 2013)

Annex 4.15: Asset management

Box A4.15D: protocol for disposal of land, property and other assets

“Value assets at **market prices** using Royal Institute of Chartered Surveyors’ Red Book”

- An example of how that approach has been adopted in practice:

Best value



Ministry of Defence / Defence Infrastructure Organisation:
“Defence Infrastructure Interim Land and Property Disposal
Strategy” (October 2011)

3. Development and land disposal principles

...

Over-riding Principle

*[24] ...DIO sells its surplus land and property in accordance with Treasury Guidelines (Managing Public Money) which requires us to get **the best price reasonably obtainable**...*

*[25] ...We will seek **market value** for land according to the planning situation.*

Best value



Crichton Down Rules (Circular 06/2004):

Apply to surplus Government land which was acquired by, or under a threat of, compulsion

*26. Disposals to former owners under these arrangements will be at current **market value**...*

27. As a general rule, departments should obtain planning consent before disposing of properties which have potential for development. Where it would not be practicable or appropriate for departments to take action to establish the planning position at the time of disposal, or where it seems that the likelihood of obtaining planning permission (including a more valuable permission)...

...is not adequately reflected in the current market value, the terms of sale should include clawback provisions in order to fulfil **the Government's or public body's obligation to the taxpayer to obtain the best price...."**

Best value: Other public bodies



Most public bodies are subject to overriding obligations to obtain best value when selling off real property, whether imposed by statute, published policy or because required to comply with Managing Public Money guidance.

e.g. TfL is subject to both statutory requirements to obtain best value and has made public statements that it will seek to obtain best value for land sales.

B. Exceptions to the obligation to obtain best value

Best value



Short tenancies: the obligation to obtain best value contained in sections 123 and 127 LGA 1972 does not apply to disposals of land by way of a “short tenancy” i.e. by (a) the grant of a term not exceeding seven years or (b) the assignment of a term which has not more than seven years to run

With the consent of the Secretary of State:

- Both section 123 LGA 1972 and section 127 LGA 1972 provide for an exception to the obligation to secure the best consideration that can reasonably be obtained, where the Secretary of State consents

Best value



- **The Local Government Act 1972: General Disposal Consent 2003** (“the Consent”)
 - Annexed to Circular 06/03
 - Removes the requirement for authorities to seek specific consent from the Secretary of State for any disposal of land where:
 - 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:
 - 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

Best value



- the “**undervalue**” (i.e. the difference between the unrestricted value of the interest to be disposed of and the consideration accepted) is **£2,000,000 or less**
- Where the case does not fall within the terms of the Consent: an application to the Secretary of State for a specific consent is required
- Following amendment by the Growth and Infrastructure Act 2013, section 233 TCPA 1990 now empowers the Secretary of State to give “general” consent in relation to land held for planning purposes: see section 233(3A) TCPA 1990. Specific consents were previously required.

Best value



- However: 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
 - When a public authority disposes of land at less than best consideration, it provides a subsidy to the purchaser. The public authority must therefore ensure that the nature and amount of subsidy complies with the rules in relation to State aid, particularly if there is no element of competition in the sale process
 - 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
 - (Discussion of the State aid rules follows below)

Best value



- POLICY CASES / CENTRAL GOVERNMENT
 - Where the obligation to obtain best value comes from published policy , rather than statute, the principle that a public body is entitled to depart from published policy for good reason ought to mean that the public body may be entitled to sell for other than best value. In Central Government, HM Treasury approval is likely to be required.
 - NB where vendor is Secretary of State, this is roughly analogous to a local authority seeking Sec State approval.
 - BUT this again must be subject to compliance with State Aid rules

C. The nature of the obligation to obtain best value

Best value



What does “the best consideration that can reasonably be obtained” mean?

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)*

Best value



NB see also Annex A to the Crichton Down Rules:

Annex: 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).”

Best value



For the purposes of section 123, 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

Best value



RELEVANCE OF OPEN MARKET SALE

Although there is no particular prescribed route to achieve the best price reasonably obtainable, there may be circumstances in which an actual sale to the market is the only way to achieve it as opposed to one particular sale at a price according to an independent valuation: ***Salford Estates*** at [98] with reference to ***Tomkins v Commissioner for New Towns*** [1989] 1 EGLR 24 (CA)

Best value



GROUNDINGS 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



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



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



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 ..."*

2. State aid and the obligation to obtain best value

A. Definition of State aid

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."

State aid



Assessing the value of the aid: **Case T-366/00 *Scott v Commission*** [2007] ECR II 797:

“[105] ...when assessing the value of an aid in the form of a sale of property at an allegedly preferential price, the principle of the private investor operating in a market economy applies. Therefore, the value of the aid is equal to the difference between what the recipient in fact paid and what it would have had to pay in an arm’s length transaction on the open market to buy an equivalent property from a vendor in the private sector at the time of the relevant transaction”

B. European Commission Guidance

State aid



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

NEW GUIDANCE (19 May 2016): *Commission Notice on the notion of State aid as referred to in article 107(1) TFEU ("Notice")*

- NB not specific to land disposal, deals with all aspects of State Aid.
- Particularly relevant sections: paras 88-96 and 97-105
- Reaffirms that sale at under-value will be State Aid
- Broad effect similar to earlier guidance, some changes of detail

State aid: Status / effect of Notion $\frac{L}{C}$

STATUS:

3. Given that the notion of State aid is an objective and legal concept ... this Notice clarifies the Commission's understanding of Article 107(1) ... The views set out in this Notice are without prejudice to the interpretation of the notion of State aid by the Union Courts ...

4. It should be stressed that the Commission is bound by this objective notion and enjoys only a limited margin of discretion in applying it ...

Guidance binds the Commission but not others, relevant aid to interpretation at least for domestic court.

EFFECT:

89. If ... sale of assets ... carried out following a competitive, transparent ... tender procedure ... it can be presumed that those transactions are in line with market procedures ...

101. Whether a transaction is in line with market conditions can also be established on the basis of a generally accepted, standard assessment methodology.

State aid



*C-239/09 Seydaland Vereinnigte Agrarbetriebe GmbH & Co KG
v BVVG Bodenverwertungs-und-verwaltungs GmbH*

39. ... while it is clear that the best bid or an expert report are likely to provide prices corresponding to actual market values, as the Commission states in Title II, points 1 and 2(a), it cannot be ruled out that other methods may also achieve the same result.

State aid



- “a competitive, transparent, non-discriminatory and unconditional tender procedure” (para 89)
 - i. Notion not prescriptive as to methods of publication, but in cases where intentional bids are likely the publication should reflect that
 - ii. No “special obligations” permitted except under the general law or via planning constraints.
 - iii. Guidance on procedure at paras 90-100

OR

- “a generally accepted, standard assessment methodology ... based on the available objective, verifiable and reliable data ...” (para 101).
 - i. Quite prescriptive guidance at paras 102-107 on valuation methodologies.
 - ii. Guidance on “margin of error” less prescriptive than old guidance

State aid



KEY IMPLICATIONS:

- (a) State Aid principles run in tandem with domestic law principles about obtaining best value for public authority land disposal
- (b) Reduce room for exceptions and departure from best value obligations e.g. Sec State consent cannot be an answer to State Aid.
- (c) Commission Guidance provides new source for arguments about the detail of what a public body is required to do.

Land disposal by public bodies: State Aid and Best Value

Tim Buley