

Note on the Law regarding s.123 Local Government Act 1972: Duty to Dispose Land for the Best Consideration Reasonably Obtainable

1. Local authorities are given powers under the Local Government Act 1972 to dispose of land in any manner they wish, including sale of their freehold interest, granting a lease or assigning any unexpired term on a lease, and the granting of easements. The only constraint is that a disposal must be for the best consideration reasonably obtainable (except in the case of short tenancies), unless the Secretary of State consents to the disposal (section 123, LGA 1972).
  
2. The purpose of s.123 is to ensure, so far as reasonably possible, that public assets are not sold by public authorities at an undervalue, save, if at all, with the consent, general or specific, of the Secretary of State. Section 123 (in so far as is relevant) is in the following terms:

***123 Disposal of land by principal councils.***

*(1) Subject to the following provisions of this section, and to those of the Playing Fields (Community Involvement in Disposal Decisions) (Wales) Measure 2010, 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.*

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3. In *R (Faraday Developments Ltd) v West Berkshire Council [2016] EWHC 2166 (Admin)*<sup>1</sup> Holgate J distilled (at [131]) the following principles from the case law regarding when a Court, on an application for judicial review alleging a breach of the duty under s.123, may or may not intervene: -
  - I. The Court is not entitled to substitute its own view on the facts and merits for that of the local authority, the Court may interfere only if there was no

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<sup>1</sup> Overturned on appeal to the CA, but on the issue of whether the agreement was a 'public works contract'. There was no ground of appeal reopening the issue of whether best consideration had been obtained.

material upon which the authority's decision could have been reached, or if in reaching that decision, the authority disregarded matters it ought to have taken into consideration, or if it took into account matters which were irrelevant, or if its decision was irrational;

- II. The Court is likely to find a breach of Section 123(2) only if the local authority (a) has failed to take proper advice, or (b) failed to follow proper advice for reasons which cannot be justified, or (c) although following advice, it followed advice which was so plainly erroneous that in accepting it the authority must have known, or at least ought to have known, that it was acting unreasonably;
- III. Section 123(2) does not mandate the authority to have regard to any particular factors;
- IV. There is no need for the authority's decision-making process to refer to Section 123(2) explicitly, provided that the Court is able to see that the duty has in substance been performed;
- V. The obligation under Section 123 is not to conduct a particular process, but to achieve a particular outcome, (albeit process may have an important, or even determinative, evidential role in deciding whether the authority has complied with Section 123(2));
- VI. "Consideration" in Section 123(2) is confined to those elements of a transaction which are of commercial or monetary value<sup>2</sup>, and therefore the Court will quash a decision to sell property where the authority has taken into account an irrelevant factor, (e.g. job creation), when assessing whether it is obtaining the best "consideration" reasonably obtainable;
- VII. The deliverability or credibility of a bid, or the care with which it has been prepared, are commercial factors which are relevant to an assessment of whether the "consideration" offered is the best reasonably obtainable: the highest offer on the table need not represent the best "consideration", because an authority may conclude that "a bird in the hand is worth two in the bush";

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<sup>2</sup> See also: *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

- VIII. In order to discharge the duty under Section 123(2) there is no absolute requirement to market the land being disposed of, or to obtain an independent valuation.
4. 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. As Hickinbottom J observed in *R (Midlands Co-operative Society Ltd) v Birmingham CC* [2012] EWHC 620 (Admin) (at [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)”*.
5. In *R v Middlesbrough BC ex p Frostree* 16 December 1988 (unreported) Roch J stated: *“In my judgment, the word ‘consideration’ in section 123(2) of the Local Government Act 1972 refers to the price payable for the land. That price may consist simply of the sum of money offered for the land or may consist in part of such a sum and in part of other elements such as rights in the nature of easements or a right to repurchase reserved to the selling authority, provided such elements have a commercial or monetary value which is capable of being assessed by those expert in the valuation of land. The word ‘consideration’ does not, in my judgment, include elements which are not capable of having a commercial or monetary value to the vending council.”*
6. In *R v. Pembrokeshire CC Ex parte Coker* [1999] 4 All ER 1007 Lightman J noted (at 1012): *“It is clear that an authority may lawfully and properly take into account, when deciding whether to make a disposition and the identity of the disponent, the social value of the effect of the disposition on job creation. But the social value of a disposition cannot be taken into account when questions arise of compliance with the*

*obligation under s 123 to obtain the best consideration obtainable. Section 123 requires the consent of the Secretary of State before this obligation can be relaxed. When deciding whether (for the purposes of s 123) 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; and undertakings to create a number of jobs or use land for a particular desirable purpose do not (as least normally) count as such consideration: see R v Middlesborough BC ex p Frostree Ltd (16 December 1988, unreported). Accordingly the council could not in this case, without obtaining the consent of the Secretary of State, allow the perceived social value of job creation to be reflected as entitling CSSL to some discount on, or as part satisfaction of, the commercial monetary value was required to obtain.”*