UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

RESTRICTIVE COVENANT – Modification - dilapidated university boathouse – planning permission for larger new community rowing facility – prohibition on trade or business – use restricted to gardens or pleasure grounds – height restriction – whether covenants obsolete – whether covenants secure practical benefits of substantial value or advantage – whether restriction contrary to the public interest – application dismissed - Law of Property Act 1925 s.84(1)(a),(aa)

IN THE MATTER OF AN APPLICATION UNDER SECTION 84 OF THE LAW OF PROPERTY ACT 1925

BY

THE UNIVERSITY OF CHESTER

Applicant

Re: Land at Sandy Lane
Dee Banks
Chester

Before: Martin Rodger QC, Deputy President and Peter D McCrea FRICS

Sitting at: Manchester Crown Court

on

26-27 September 2016

Alex Troup, instructed by Lyons Davidson on behalf of the Appellant
Tom Weekes QC, instructed by Jolliffe & Co for Dr Ronald Witter, an objector
Mrs Sonia Barry appeared for herself and Mr Joseph Barry, objectors

The following cases are referred to in this decision:

C&G Homes Ltd v Secretary of State for Health [1991] Ch 365

Rolls v Miller (1884) 27 Ch D 71

Wickenden v Webster (1856) 119 ER 909

Central Electricity Generating Board v Dunning [1970] 1 Ch 643

In re Ellenborough Park [1956] Ch. 131

Re Truman, Hanbury, Buxton & Co Ltd's Application [1956] 1 QB 261

Hepworth v Pickles [1900] 1 Ch 108

Chatsworth Estates Company v Fewell [1931] 1 Ch 224

Shaw v Applegate [1977] 1 WLR 970

Richards v Revitt (1877) 7 Ch 224

Shephard v Turner [2006] 2 P&CR 27

Re Collins' Application (1975) 30 P&CR 527

Gilbert v Spoor [1983] (Ch) 27

Dobbin v Redpath [2007] EWCA Civ 570

Introduction

1. The River Dee rises in Snowdonia, traverses North Wales and meanders into England before completing its 70 mile journey by discharging into the Irish Sea to the south of the Wirral peninsula. At Chester the river loops back on itself in a wide and picturesque arc, with the town sitting above the eastern bank and meadow grazing on the west. At this spot the river has long been popular with rowers: in 1541 the scholars of King's School Chester rowed Henry VIII on the Dee and Chester Regatta, established in 1733, is the oldest in the country.

2. The University of Chester now wishes to provide better facilities for its students, and those of the local academies with which it is associated, to participate in competitive rowing. However, the land on which the University proposes to construct a modern boathouse is the subject of restrictive covenants which block that use. The University has therefore applied to the Tribunal under grounds (a) and (aa) of s.84(1) of the Law of Property Act 1925 to modify those covenants.

3. The application land is at Sandy Lane in the suburb of Chester known appropriately as Dee Banks, which was designated a conservation area in 1987. The land is held by the Chester Diocesan Board of Finance as custodian trustee for the University, but for convenience we shall refer to it as the "University's land".

4. The University's land forms part of a 2.5 acre stretch of riverside land which runs along the eastern bank of the Dee. In 1891 the whole of this land was acquired for £300 by three local residents on behalf of themselves and a group of their neighbours. By a Deed of Partition of 22 August 1896 it was partitioned into 12 separate lots of unequal sizes, each of which was allocated to the owner of a house on Dee Banks who had contributed to the purchase price. By the same deed the purchasers entered into a scheme of mutual covenants, the relevant effects of which were to prohibit any trade or business, to restrict the use of each lot to private occupation only as gardens or pleasure grounds, and to limit the height of any building to a horizontal line at a level 4'6" above the level of the adjoining pavement on Sandy Lane.

5. Some of the riverside lots are no longer in the ownership of residents of Dee Banks. One of these is the University's land, which was acquired in 1965 by the Chester Diocesan Training College, which later became part of the University. The College built a modest single storey boathouse at the water's edge which was used to provide regular sailing instruction to students of physical education until about 1980, and then less frequently by student clubs as a base for canoeing and to store canoes until it became too dilapidated and fell out of use in around 2002.

6. On 14 November 2014 planning permission was granted to the University for the demolition of the old boathouse and for the erection of a larger two-storey building, to be used as a "community rowing and fitness facility", providing boat storage, changing rooms, and a new pontoon (the "fitness facility" element of this description referred to a gym which was part of the original proposal but which was subsequently omitted from the final scheme). Before it can implement the planning permission the University must first obtain a modification of the 1896 restrictions.

7. The University was represented at the hearing of the application by Mr Alex Troup of counsel who called Mr Eric Shapiro FRICS FCIArb to give valuation evidence. Unchallenged evidence of the University's plans and of its previous use of the land was given by Mr Gordon Reay, the University's Director of Sport and Recreation, by Ms Joan Royle, a full-time lecturer in the Physical Education (subsequently Sports Science) Department of the University from 1964 to 1991, and by Dr Sarah Griffiths, a student of the University from 1992 to 1995 and now a member of its staff.

8. Eleven objectors to the University's application are listed in the schedule attached to this decision. The objectors include Dr Ronald Witter who owns the riverside land which adjoins the University's land to the north. Dr Witter was represented at the hearing by Mr Tom Weekes QC, who called Mr Stephen Cheshire MRICS to give valuation evidence, and Mr Robert May MRTPI to give evidence on planning and amenity. Evidence was also given by Mr Roger Atkinson OBE, a resident of Dee Banks since 1964 and Secretary of the Dee View Estate from 1966 until 1992. Mrs Sonia Barry, another objector, also appeared before the Tribunal to explain her objection.

9. None of the remaining objectors appeared at the hearing, but we have taken into account the content of their notices of objection in reaching our decision.

Statutory provisions

10. Section 84 of the 1925 Act gives the Tribunal power to discharge or modify restrictive covenants affecting land where certain grounds in section 84(1) are made out. The first ground relied on by the University is ground (a) which applies where the Tribunal is satisfied that by reason of changes in the character of the property or the neighbourhood or other circumstances of the case which the Tribunal may deem material, the restriction ought to be deemed obsolete.

11. The University's alternative ground is (aa). So far as is material this requires that, in a case falling within subsection (1A), the continued existence of the restriction would impede some reasonable user of the land for public or private purposes. Satisfaction of subsection (1A) is therefore essential to a successful claim under ground (aa); it provides as follows:

> (1A) Subsection (1)(aa) above authorises the discharge or modification of a restriction by reference to its impeding some reasonable user of land in any case in which the Upper Tribunal is satisfied that the restriction, in impeding that user, either —
>
> > (a) does not secure to persons entitled to the benefit of it any practical benefits of substantial value or advantage to them; or
> >
> > (b) is contrary to the public interest;
>
> and that money will be an adequate compensation for the loss or disadvantage (if any) which any such person will suffer from the discharge or modification.

12. The principal issues for determination are, therefore, whether grounds (a) or (aa) are satisfied. At the hearing the main focus was on Dr Witter's objection as he was the only objector who had served formal evidence. Additionally, as his riverside plot directly adjoins the University's land, it was apparent that if Dr Witter's objection was unsuccessful, then the objections of others less immediately affected must also fail.

Dee Banks

13. The Dee Banks conservation area is approximately a mile south east of Chester city centre on the eastern bank of the river. The area slopes steeply down towards the river from east to west, and is divided into three areas by two roads, each of which runs in a north-south direction. The higher of these roads is called Dee Banks and is fronted on its eastern side by a row of large and attractive Victorian villas of different sizes and designs standing in their own grounds. On the opposite side of the road each of the villas has a further garden sloping steeply down towards the river to the west. At the foot of these sloping "middle gardens" runs a second road, Sandy Lane, a relatively busy route to the city centre. Sandy Lane and Dee Banks converge immediately to the south of these sloping middle gardens, which gradually taper in size; to the north the middle gardens are large, terraced areas, well maintained and stocked with a variety of plants, while at the southern end they are no more than narrow, steep, triangular parcels of grass.

14. At the bottom of the slope, between Sandy Lane and the river, is the 2.5 acre stretch of riverside land partitioned in 1896 into twelve separate lots which remain the subject of the original scheme of covenants. The lots were not of equal size; the most southerly, lots 11 and 12, together comprise about half the total area, while the most northerly, lot 1, was simply a narrow strip providing access to the river. A number of the lots were or have subsequently been amalgamated to provide larger gardens. These riverside gardens are generally flat, but at a lower level than Sandy Lane. In the case of Dr Witter's land the difference in levels between the road and the garden is about 3.5 metres so that access is by means of a flight of fifteen steps. Each of the riverside gardens provides access to the waterfront.

15. Topographically, therefore, if viewed in cross section from west to east, the conservation area rises from the flat riverside gardens, stepping up to Sandy Lane, then rising again through the steep middle gardens, before finally reaching Dee Banks with its row of Victorian villas. From the houses on Dee Banks the middle and riverside gardens are visible, and the whole aspect looks out across the River Dee to the meadows on the opposite side and, beyond that, to the city and its cathedral in the distance. It is a most attractive view.

The University's land and its neighbours

16. The University's land is reached by a flight of steps down from Sandy Lane and is 9.35 metres wide and about 40 metres long. The only structure on the land is the dilapidated boathouse, while the remainder of the ground is rough grass. A single large mature tree stands close to the southern boundary. The northern and southern boundaries of the land are marked by a chain link fence, through which the neighbouring plots are clearly visible.

17. Immediately to the north of the University's land is the riverside garden belonging to Dr Witter, the principal objector and the owner of No. 41 Dee Banks. No 41 is a substantial detached house created by Dr Witter's father in the 1950s by the amalgamation of Nos. 39 and 41 which had formerly been occupied as separate semi-detached residences. Dr Witter's middle garden, between Sandy Lane and Dee Banks, is terraced and features a seating area and summer house looking out over the river. His riverside garden comprises three of the original twelve plots partitioned in 1896, lots 1, 2 and 3, and is positioned at the foot of the slope below Nos. 39, 41 and 43 Dee Banks. It is 27 metres wide and about 40 metres long and has been very well maintained, with a large immaculate lawn, a mature planting bed along the southern boundary, a swimming pool, seating areas, and a number of outbuildings providing changing rooms and other amenities. Three docks or inlets allow mooring and access by boat.

18. Bounding Dr Witter's garden on its north side is Chester Sailing and Canoeing Club, whose grounds lie outside the area comprised in the scheme of covenants. Beyond that is a public park, including a slipway.

19. To the south of the University's land is the Chester Motor Boat Club, whose grounds are similar in size to Dr Witter's garden, and on which there stands a brick-built clubhouse. Beyond the Motorboat Club's boundary the remaining riverside gardens feature a variety of wooden structures, summerhouses and boat houses.

20. No vehicle access is available to any of the riverside gardens, because of the difference in levels between the carriageway and the gardens. There is, of course, very easy access to the riverside gardens from the river.

21. At the southern end of the land originally comprised in the 1896 Deed is an apartment development known as Riverside Court which was built in about 1980 on the former site of the White House public house. The car park and two of the apartments in this development lie within the land affected by the 1896 covenants, but no objection seems to have been taken to them, despite their presence being a breach of at least one of the covenants.

The 1896 Deed of Partition

22. The 1896 Deed contains a schedule of 11 covenants, of which three are relevant to this application, as follows:

> (1) That no letting of boats or any trade or business of any kind shall be carried on upon the said Lots respectively but that the same shall be used for private occupation only as gardens or pleasure grounds.
>
> (3) That the hedge or fence bounding the said several Lots towards [Sandy Lane] shall not be or grow to more than 4ft 6inches in height measuring from the path of the said road.
>
> (9) No dwelling house shall be erected on any Lot. If any summer house or boathouse shall be erected on any Lot the highest point of such summer

> house or boathouse shall not be higher in a horizontal line than the highest part of the boundary fence against [Sandy Lane] of the Lot upon which such summer house or boathouse is erected.

23. Given the difference in levels between the riverside plots and Sandy Lane, the combined effect of covenants 3 and 9 is to restrict the height of any boathouse which could be built on the University's land to less than 5 metres.

24. It is common ground that the 1896 Deed created a scheme of development and that, subject to any question of acquiescence, the covenants are in principle enforceable by Dr Witter and the other objectors who own riverside plots against the University.

The proposed use of the University's land

25. The existing boathouse is a timber and corrugated cement asbestos structure, now in poor condition, situated adjacent to the river at the western end of the University's land. It is a single-storey structure about 3.7m wide x 11m long and is fully compliant with the height restriction imposed by covenant 9.

26. The proposed new boathouse would be much larger and would be situated towards the eastern end of the University's land, largely filling the site at the end closest to Sandy Lane. It would be predominantly two storeys high with boat storage at ground floor level and shower and changing facilities on the first floor. The whole of the ground floor storey would 5.85m wide x 23.4m long with a first floor structure 4.5m wide x 17.1m long. Access to the first floor would be from Sandy Lane, where the building would project a maximum of 2.7m above street level. The maximum height of the building when measured from ground level on the site would be at least 6.2m, although Mr Weekes suggested that it would be greater than that.

27. The northern elevation of the new boathouse, facing Dr Witter's garden and almost tight to the boundary, would have a green "living" wall up to the floor level of the first floor, but above that level the remainder of the elevation would be finished in a zinc type cladding. The single storey ground floor element projecting at the front of the building would have cedar/larch boarding to elevations.

28. The officer's report on the University's planning application contained the following assessment of the impact of the proposal:

> "It is acknowledged that the proposed building would have an impact on the users of [Dr Witter's garden] due to its proximity to the site boundary. However, it is not considered these plots should be afforded the same protection as the formal domestic curtilage of a dwelling (as they are open to the river and separated from the host dwelling by two public highways). The design of the boathouse ensures that there would be no additional overlooking or loss of privacy as a result of the development, as the only windows in the side elevation would be obscurely glazed (and this could be secured by condition). It is also recommended a condition is imposed restricting the

use of the roof area (on the western end of the building) to ensure it is not used as a balcony. Given the height and proximity of the boathouse, it is considered that there would be an over bearing impact when viewed from the part of the river garden nearest the site. Given the use of the green wall, set back at first floor level and the width of the adjoining river garden (over 27m wide) it is not considered this impact would be unacceptable".

29. The planning officer went on to conclude that the intrusion on Dr Witter's private space and the conservation area generally was justified by a greater public interest:

> "It is acknowledged that the scale and massing of the proposed development would result in limited harm to the Dee Banks Conservation Area. However, it is considered that this harm would be outweighed and justified by the clear public benefits the scheme would bring with regards to promoting healthy communities and the provision of an enhanced sporting facility."

30. Planning permission was granted by Cheshire West and Chester Council on 10 November 2014 (14/00513/FUL) for the demolition of the existing boathouse and the erection of the proposed new community rowing and fitness facility. Consistently with the planning officer's recommendations, the permission was subject to a series of conditions including restricting the use of the rowing facility to 06:30 – 21:00 during the week and 08:00 – 18:00 on Saturdays, Sundays and public holidays. Sandy Lane is not to be used for the loading or unloading of boats of any type. The windows in the north and south elevations are to be glazed with obscure glass and no other windows or openings are to be introduced. The roof area of the single storey element is not to be used as a balcony or roof garden. The tree which will be lost is to be replaced on the meadows opposite the site.

The modification sought

31. On 9th March 2015 Dr Witter issued proceedings in the High Court seeking injunctions to restrain the proposed breaches of covenants 1 and 9. The University applied for and obtained a stay of the proceedings under section 84(9) of the 1925 Act in order to allow the present application to be made.

32. The University now seeks modification of covenants 1 (if necessary) and 9 in order to implement its planning permission. Mr Reay explained that it was the wish of the University to improve the rowing facilities available to its members in order to encourage greater participation, to develop the talents of its students, to establish a competitive rowing team and eventually to host a North West University boat race to promote elite rowing. The new facilities would be available not only to students of the University but also to those aged 14 to 18 who attended the local academies managed by the University of Chester Academies Trust and, it was hoped, to the students of a local school for children with disabilities.

33. The parties did not agree on the extent of the modification required to enable the University's proposals to proceed. Mr Troup submitted that, on a proper construction of covenant 1, neither the

use made of the site by the University since 1965 nor its proposed use, was a breach. The question whether the historic use of the University's land was a breach was also said to be relevant to the application under ground (a), as it was the University's alternative case that, if the use was a breach, Dr Witter and other objectors had acquiesced in that breach to such an extent that the restriction in covenant 1 should be deemed obsolete. It is convenient to consider the meaning of covenant 1 at this stage.

Has there previously been a breach of covenant 1, and will there be in future?

34. Three issues arise concerning the scope of the restriction on use. The first is whether the past or future activities of the University amount to the carrying on of "a business of any kind" upon the land. The second is whether the University's land has been and will remain "used for private occupation only". The final question is whether the land has been or will in future be used "only as gardens or pleasure grounds". Mr Troup argued that the first of these questions should be answered in the negative and the remainder in the affirmative; Mr Weekes QC said that each should be answered in the opposite sense. Mr Weekes also submitted (referring to *C&G Homes Ltd v Secretary of State for Health* [1991] Ch 365, 380) that the covenant should not be interpreted as imposing a single obligation, and that due effect ought to be given to all of the words in which the parties had expressed themselves. That is no doubt correct, although it is necessary to have regard to the language of the instrument as a whole, and to the light which one limb of the restriction may throw on others, in order to understand each part of it.

No … business of any kind

35. Dealing with the prohibition on business use Mr Troup focussed on the covenant as a whole and submitted that, as the word "business" in covenant 1 is prefaced by references to "the letting of boats" and "any trade", the draftsman clearly had a prohibition on commercial activities in mind. He referred to a dictum of Lindley LJ in *Rolls v. Miller* (1884) 27 Ch D 71, 88, in support of the proposition that a covenant not to carry on a business extends to "almost anything which is an occupation, as distinguished from a pleasure – anything which is an occupation or duty which requires attention is a business". Canoeing and rowing were activities for pleasure rather than an occupation or duty.

36. For the objectors Mr Weekes QC drew attention to the wide scope of the covenant, with its reference to "any trade or business of any kind" and submitted that the use of the land for the purposes of an educational establishment was a business use. He cited *Wickenden v Webster* (1856) 119 ER 909 in which a covenant requiring premises to be used as a private dwelling house only and prohibiting the carrying on of "any public trade or business whatsoever" was held to have been broken by the use of the premises as a day school.

37. The prohibition on business use in covenant 1 strikes us as being the corollary of the requirement that the University's land be used for private occupation only. The context of the obligation was a scheme of mutual covenants entered into by a group of adjoining owners, many of whom (although perhaps not all) were resident in the neighbouring houses, and the requirement of private occupation is clearly intended to be restrictive and personal although not necessarily

domestic. The objection to business use is not to commerce as such, but is to the consequences for the comfort and enjoyment of neighbouring owners if an activity which was not private was allowed to take place on the land. We do not think the distinction made by Mr Troup between activities which are an occupation and those which are for pleasure is a valid one in this context (nor was the distinction relevant in *Rolls v. Miller* which concerned a boarding house to which young women were admitted without charge). From the perspective of members of a student canoeing or rowing club, their use of the land might be entirely for pleasure, but the University's purpose in making the land available for that activity was in fulfilment of its broader educational objectives which are aptly described as its business. The fact that the University's business is not a commercial enterprise carried on with a view to profit does not make the term an inappropriate one to use in describing its activities.

38. We are therefore satisfied that the activity of the University in using the land for educational purposes, whether originally as part of courses of instruction or less formally as part of the facilities it proposes to make available to its student body (and in the future to its affiliated academies) is the carrying on of a business on the land. The use was a breach in the past and would be a breach when resumed in future.

Private occupation only

39. We are also satisfied that the proposed use cannot be described as "private occupation". The University's facilities will not be made available to the general public without distinction, but will be used only by its members and those with whom it has a close connection through its Academies Trust or by special invitation. The University will therefore control access to the new boathouse but, nevertheless, the size and fluctuating composition of the group to whom access will potentially be available is inconsistent with the concept of private occupation. This is a question of degree and there may not always have been a breach; the argument for regarding as private the original occupation of the land as a site from which the University's staff would deliver courses of instruction to its own students as part of its programme of physical education seems to us to be stronger. For the future, however, we regard the proposed use as too intensive and as involving too many individuals with more remote connections to the University to amount to private occupation of the land. We should add that we were referred by counsel to a number of authorities on the meaning of the expression "private dwelling house", but we did not find these of assistance.

Gardens or pleasure grounds

40. The final aspect of this issue concerns the use of the land as "gardens or pleasure grounds". Once again Mr Troup argued that the past and proposed use of the land would be compliant with this restriction. The reference to a pleasure ground has a distinctly Victorian flavour but Mr Troup offered a dictionary definition of the term as meaning a piece of ground used for amusement, recreation or enjoyment, which he said was an apt description of how the University's land will be used once the new boathouse is built.

41. Mr Weekes QC acknowledged that there had been no breach of the obligation to use the University's land only "as gardens or pleasure grounds", given that, throughout the period of its

ownership, the land had retained the characteristics of a garden. We think that concession was appropriate; although the University has not used the land for many years, the greater part of the area is without buildings and has the appearance of a neglected garden, while the derelict boathouse is of a size appropriate to a riverside garden.

42. Mr Weekes nevertheless submitted that the proposed use of the land could not be described as being for a garden or pleasure ground. Having regard, in particular, to the very much greater extent to which the footprint of the new boathouse would cover the University's land, no part of that land would aptly be described as a garden. The only open area, lying between the boathouse doors and the river, would be a concrete slip way leading to a pontoon. We agree that once the new boathouse is constructed the land will cease to be a garden of any description.

43. The most celebrated case concerning the use of a pleasure ground is *In re Ellenborough Park* [1956] Ch. 131 which concerned a conveyance in 1864 of plots of land on a building estate each of which included an express grant of easements for "the full enjoyment of the pleasure ground set out and made" in front of the plot conveyed. In the Court of Appeal Lord Evershed M.R. considered the nature of the permitted use, at p.168:

> "The enjoyment contemplated was the enjoyment of the vendors' ornamental garden in its physical state as such — the right, that is to say, of walking on or over those parts provided for such purpose, that is, pathways and (subject to restrictions in the ordinary course in the interest of the grass) the lawns; to rest in or upon the seats or other places provided; and, if certain parts were set apart for particular recreations such as tennis or bowls, to use those parts for those purposes, subject again, in the ordinary course, to the provisions made for their regulation; but not to trample at will all over the park, to cut or pluck the flowers or shrubs, or to interfere in the laying out or upkeep of the park. Such use or enjoyment is, we think, a common and clearly understood conception, analogous to the use and enjoyment conferred upon members of the public, when they are open to the public, of parks or gardens such as St. James's Park, Kew Gardens or the Gardens of Lincoln's Inn Fields."

44. The expression "pleasure grounds" has also been used in a number of statutes, including the Public Health Acts 1875 to 1925 and legislation concerned with compulsory acquisition. By section 22(1) of the Electricity (Supply) Act 1919 (a re-enactment of section 21 of the Telegraph Act 1863) the power of an authorised electricity undertaker to place electric lines above ground was not exercisable over land used as a garden or pleasure ground. In *Central Electricity Generating Board v Dunning* [1970] 1 Ch 643, Foster J was required to consider whether an area of pasture and moorland extending to 118 acres and used for gliding by members of a gliding club was a pleasure ground within the meaning of section 22(1). The surface of the ground had been improved by the club by the removal of walls and other obstructions. In that rather specific context it was held (at 652G) that the essence of a pleasure ground was that it is the ground which gives pleasure to people; the expression did not mean any ground on which a person carries on an activity which they find pleasurable.

45. Although the expression is antique, the concept of a pleasure ground is readily understood. Ordinarily it is a public park or public garden where people can go to derive pleasure from their surroundings, or from facilities provided there for recreation. A restriction on the use of land to a pleasure ground in purely private occupation might seem outside that more usual concept which carries an implication of public access, but the basic idea is the same and the use of the expression in this particular context may be due to the particular characteristics of this case. The most significant feature of the land partitioned into lots by the 1896 Deed is that it is adjacent to the river, and it was clearly contemplated that the individual lots might be used in connection with boating. It may have been thought that to restrict the permitted use of the land to gardens alone would be too narrow to encompass all of the leisure activities which the covenantors might wish to engage in. Against that background we consider that (despite the distinction made in *Central Electricity Generating Board v Dunning*) the use of the University's land and other riverside lots for launching boats is not prohibited by the covenant against their use otherwise than as a garden or pleasure ground.

46. Despite that conclusion we are satisfied that the University's proposed use will be a breach of covenant. It is not necessary or helpful to provide a definition of pleasure grounds, or to catalogue all of the activities which may be carried on in compliance with covenant 1. The sole question is whether the University's proposed use will be compliant. The dominant characteristics of the intended use is storage and preparations to make use of the things which are stored. We do not consider that land occupied almost entirely by a single building used for the storage of boats and the provision of changing facilities, the remainder of which is a concrete slip way with no other use than as a route to the river, can properly be described as a garden or pleasure ground. The proposed use is of a different type entirely. In future the students of the University may well derive pleasure from the activities in connection with which the land is used, but in doing so they will not be making use of the land as a garden or pleasure ground.

47. We therefore conclude that covenant 1 has been breached in the past by the business of the University carried on from the land between about 1965 and 2002, and will be breached for the same reason by the proposed use of the land, and additionally because if the proposed use is implemented the land will not be used for private occupation only as gardens or pleasure grounds.

Ground (a)

48. In *Re Truman, Hanbury, Buxton & Co Ltd's Application* [1956] 1 QB 261, Romer LJ explained that if the character of an estate as a whole or of a particular part of it gradually changes, a time may come when the purpose for which a covenant restricting the use of the estate was entered into can no longer be achieved. When that time does come, it may be said that the covenant "ought to be deemed to be obsolete" in the sense in which that expression is used in section 84(1)(a).

49. On behalf of the University Mr Troup submitted that covenants 1 and 9 ought both to be deemed obsolete by reason of material changes in the character of the University's land and of the neighbourhood since the covenants were imposed in 1896 and other material circumstances. He relied on a number of events or features as amounting to material changes.

Material changes

50. First, Mr Troup said that since at least 1965 the University's land had ceased to be associated or in common ownership with any house at Dee Banks to which it had originally been allocated. He made the same point in relation to a number of the other riverside plots, at least seven of which are now in separate ownership from any house at Dee Banks.

51. As to the University's land itself, we do not accept that this change has been made out. Assuming it to have been lot 4, the University's land was allotted in 1896 to Edward and Mary Pierpoint, whose address was given in the Deed of Partition as at Cressington Park, Liverpool. There is therefore no evidence that the land was originally owned together with a house on Dee Banks. The same cannot be said of all but one of the remaining lots, which were allotted to contributors identified as being "of Dee Banks". However, and in any event, no restriction on who may own the riverside land is contained in the 1896 Deed and the benefit of the covenants themselves does not run with any other property belonging to the original covenantors. We therefore do not regard these changes in ownership as material.

52. Secondly, Mr Troup pointed to the presence of the now derelict boathouse on the University's land since 1965, and its use for sporting, educational and recreational purposes. He also relied on the structures built on the plots owned by the Chester Sailing and Canoeing Club and the Chester Motor Boat Club, including club houses and other buildings, and on the intensive use of those plots by club members for sporting and recreational purposes.

53. Neither the presence of boathouses or other structures on the covenant land, nor its use for recreational purposes, amount to changes from uses contemplated in 1896; the erection of a summerhouse or a boathouse on each lot is specifically mentioned in covenant 9. None of the buildings exceeds the height restriction imposed on such structures. A change in the land which was intended, anticipated and for which express provision was made in the instrument establishing the scheme of covenants cannot provide a valid basis for alleging obsolescence for the purpose of ground (a).

54. Thirdly it is pointed out correctly that the height of the fence and hedge separating the University's land from Sandy Lane now somewhat exceeds the limit of 4 feet 6 inches imposed by Covenant 3, as does the height of the single tree and other smaller bushes growing on the University's land. Elsewhere the height restriction on roadside fences and hedges seems generally now to be ignored (although, uniquely, Dr Witter's are compliant).

55. We do not think the change in the height of the hedges is material to this application, as the hedges themselves do not significantly restrict the view from above Sandy Lane and, in any event, the only view relied on by the principal objector is the view from his riverside garden of the University's land, which is unaffected by the University's roadside fence and hedge.

56. Finally, reliance is placed by Mr Troup on the construction of Riverside Court, the substantial block of flats at the southern end of the area affected by the covenants. There was formerly a public

house on this land, although we were not told whether the building was present in 1896. Nevertheless, the construction of the block of flats in 1980 was clearly a breach of covenant 9 (no dwelling house). Mr Atkinson explained that he had been unaware that the covenant bound a relatively small part of the land on which Riverside Court now stands and that, as far as he knew, there had been no reliance on the covenants by the objectors or by anyone else when the building was constructed.

57. Once again, at least from the perspective of Dr Witter's land, we do not consider that this change is material. From Dr Witter's riverside garden the block of flats is concealed from view by mature trees and, even if it was visible, the building would be distant and entirely unobtrusive.

58. We have already found that the use of the land for the business of the University was a breach of covenant 1 from 1965 to 2002, and we think it likely that the use by the Motor Boat Club was also a breach. To that extent a material change has occurred in the character of the University's land and that of its immediate neighbour. We are satisfied that the land occupied by the Sailing Club is not affected by the covenants (although Mr Troup sought unsuccessfully to persuade several witnesses in cross examination that it incorporated lot 1, the narrowest of the 1896 lots). Of course that does not rule out any changes which have occurred on the Sailing Club's land as potentially being material for the purpose of ground (a) but, as we do not know the condition or use of the Club's land in 1896, no such changes have been proven to have occurred. The same can be said of the other land to the north of the Sailing Club, now the site of a public recreation ground and car park.

Acquiescence

59. Apart from these changes or alleged changes in the neighbourhood, Mr Troup also relied on the fact that (as we find) the historic use of the University's land after 1965 constituted a breach of Covenant 1, and moreover that Dr Witter and the other beneficiaries of the covenants had acquiesced in that breach. They had also acquiesced in the Motor Boat Club's use of its plot (which is arguably a business use), and in the construction of Riverside Court. Mr Troup argued that acquiescence in the use of the University's land had continued for a period of 51 years but we think that an exaggeration as, on the evidence, there has been no active use of the University's land for the last 14 years. On the other hand, Riverside Court has been present for 36 years and we assume that the Motor Boat Club is a long established use of at least the same duration.

60. The University's case is that because those with the benefit of the covenants have acquiesced for so long in their breach, the covenants themselves have become incapable of enforcement, and hence should be deemed to be obsolete. Obsolescence, in that sense, may not arise from a wholesale change in the character of the property or of the neighbourhood such as was considered in *Re Truman, Hanbury, Buxton & Co Ltd's Application,* but if circumstances were such that a covenant has become unenforceable, we agree that could justify treating the covenant as obsolete.

61. A person entitled to the benefit of a covenant will not be entitled to an injunction to enforce the restriction if it would be inequitable to the covenantor for the court to grant it. Whether enforcement

would be inequitable will depend on the facts of each case and the required elements are capable of being expressed in different ways.

62. In *Hepworth v Pickles* [1900] 1 Ch 108 a covenant prohibiting the use of land as a tavern had been breached for 24 years. Farwell J held that the covenant had become unenforceable on the grounds that it had been waived or released by the persons entitled to enforce it as a result of their prolonged inactivity in the face of a clear breach. In *Chatsworth Estates Company v Fewell* [1931] 1 Ch 224 the same judge suggested that a fair test of acquiescence or waiver would be to ask whether "the plaintiffs by their acts and omissions represented to the defendant that the covenants are no longer enforceable". In that case a covenant against the use of houses on a residential estate other than as private dwellings had been breached by the establishment, with the covenantee's permission, of a number of schools, a hotel and three boarding houses as well as other breaches of which it was unaware. The Judge described the plaintiffs (at p.230) as "not unduly insistent on the observance of these covenants" although he found that they were "doing what they think sufficient to preserve the character of the neighbourhood" and were "not intending, by their acts or omissions, to permit this area to be turned into anything other than a mainly residential area". He went on to find that the acts and omissions of the plaintiff in licensing breaches did not disentitle it to enforce the covenant to prevent the defendant from using his house as a guest house.

63. In *Shaw v Applegate* [1977] 1 WLR 970, which concerned the breach of a covenant against the use of land as an amusement arcade, which had continued for more than two years before objection was taken, Buckley LJ expressed the requirements of acquiescence slightly differently and said (at 978D): "that to deprive the possessor of a legal right of that right on the ground of his acquiescence the situation must have become such that it would be dishonest or unconscionable for him to continue to seek to enforce it".

64. Would it be unconscionable or dishonest for Dr Witter, or others entitled to the benefit of the Dee Banks covenants, now to seek to enforce them by injunction? Have they represented to the University that the covenants are no longer enforceable? We think not. In the case of covenant 9, there is no evidence of any breach of the prohibition on buildings above the permitted level of the roadside boundary fences, except at the extreme southern end of the riverside land where Riverside Court encroaches to a modest extent on the covenant land. As to covenant 1, the case for acquiescence is perhaps a little stronger, but we remain satisfied that it does not deprive the objectors of the right to enforce the covenant or render it obsolete. While it is true that both the University and the Motor Boat Club have used their land for their businesses, and while we are sure that no injunction would now be available against the current use of the Motor Boat Club, there has been a lapse of 14 years in any active use of the University's land so that no current impression can be said to have been created concerning the enforceability of the covenants. More significantly there is no objection in principle by any objector to the continuation of the same sort of low level, non-commercial use as has existed for many years. The evidence does not establish that any of the non-compliant uses has caused nuisance, annoyance or inconvenience to those with the benefit of the covenants and we can see no reason why their tolerance and neighbourliness in the past should have given rise to any genuine expectation in the University that a significantly more intensive or intrusive use would be treated with equal indulgence.

65. Finally, we were referred in argument to the following observation of Fry J in *Richards v Revitt* (1877) 7 Ch 224, 226 which seems to us to be equally apt in this case:

> The fact that the Plaintiff did not interfere to prevent a small and limited breach does not conclude him for all time in respect of a wider and more important breach.

It is clearly important that those with the benefit of covenants should not feel compelled to object to every inconsequential infringement for fear of losing the right to object to something which may threaten their enjoyment of their own land to a much more significant degree.

Conclusion on ground (a)

66. The purpose of covenant 1 was to preserve the peace and tranquillity of the riverside gardens and to retain the predominantly domestic character of the area. It has very substantially succeeded in that purpose, although the close proximity of the busy modern highway that is now Sandy Lane makes some inroads into that tranquillity. The historic infringements of the covenant in the case of the University's land and the continuing use of the Motor Boat Club land, to our minds, have not detracted significantly from the achievement of the original objective.

67. The purpose of covenant 9 was to the same effect, and is likely also to be related to the preservation of views both of the river itself and across the riverside area as a whole. We do not consider that the presence of the modern block of flats at the end of this stretch of riverbank undermines those objectives, at least as far as concerns the land towards the north of the covenant area, and no other breach or material change can be pointed to.

68. We are satisfied therefore that, far from being obsolete, the 1896 covenants continue to play an important role in preserving the particular character of the land at the foot of Dee Banks. We are sure that the land would look very different today had the scheme of covenants never been imposed, and (but for the protection afforded by its conservation area status) that it would be at risk of losing its character in future.

Ground (aa)

69. Although the University's alternative case on ground (aa) took up the greater part of the evidence and argument, we can deal with it relatively shortly as a result of the very firm views we formed during our inspection of the site. In reaching our conclusion we have regard to the policy underlying ground (aa) which (as the Court of Appeal explained in *Shephard v Turner* [2006] 2 P&CR 27, at [58]) is "to facilitate the development and use of land in the public interest, having regard to the development plan and the pattern of permissions in the area".

70. There is no doubt that the proposed use of the University's land is reasonable, and Dr Witter acknowledged that at an early stage of the application. Nor is there any doubt that the covenants impede the proposed reasonable use of the University's land. Covenant 1 remains enforceable and prohibits business use which, as we have explained, we consider an apt description of the University's intentions, while the design of the new boathouse exceeds the height restriction in covenant 9.

Practical benefit of substantial value or advantage

71. Having visited the land and considered the plans and drawings of the proposed new building, we have no doubt that the ability to prevent the construction of such a relatively tall building in such close proximity to the boundary of Dr Witter's garden is a practical benefit of substantial value or advantage secured by the covenants.

72. It is apparent from the condition of the riverside garden and from their evidence that Dr and Mrs Witter derive great pleasure and personal satisfaction from it, and hope that they and their family will be able to continue to do so in future. The proposed new boathouse was described by the planning officer as overbearing and by Mr May as being visually intrusive and of a different scale to the other buildings and structures along this part of the river. We agree with both assessments and with Mr May's further observation that the zinc clad upper section of the facade would be alien to the locality and would provide a particularly unattractive backdrop to the Witters' carefully tended garden. Although the removal of the original dilapidated boathouse from closer to the water's edge will enhance the view of the river itself, it will do so at the expense of walling in the rear area of the garden for a distance of 10 metres along the southern boundary. We consider it likely that the new structure would dominate and transform the garden. It will additionally cast a significant part of the garden in shadow to a depth of between 2m and 9m at different times of the year. Although the garden as a whole is 27m wide, the area which will be shaded will include the principal herbaceous border and a large area of lawn, which we regard as a significant interference.

73. We are less concerned by other disadvantages which Dr and Mrs Witter feared they might be exposed to if the new boathouse is constructed. We think it improbable that the lights required to illuminate the slip way or the interior of the boathouse would be intrusive, as they would be in use at times when there is unlikely to be anyone seeking to enjoy the garden. The number of students using the boathouse at any one time would be low, and the periods during which they would be likely to congregate on the slipway would be short. We therefore think it unlikely that the enjoyment of the garden would be intruded upon to any significant degree by additional noise, having regard to the fact that this stretch of the river is already busy with commercial pleasure boats passing and private motor and sailing boats casting off and mooring quite frequently. There would be some additional loss of privacy but this is likely to be modest.

74. Although the university's expert witness, Mr Shapiro's, said in his report to the Tribunal that he did not believe that the new building would create shadowing on Dr Witter's garden he withdrew this observation in his oral evidence and expressly disavowed any expertise in questions of amenity. Mr Shapiro expertise was solely in valuation and in his report he said that he did not believe that Dr Witter's land would be reduced in value to any substantial degree. When giving evidence in chief he qualified this assessment by suggesting that Dr Witter's land might experience a diminution in value of up to 10% as a result of the construction of the new boathouse. It was not explained why, if that was his view, Mr Shapiro had not included it in his original report.

75. Mr Shapiro emphasised that his assessment was of the impact which the boathouse would have on the value of the land "as a garden", by which he meant as land confined to its existing use and without hope of development. He suggested that the land must have some hope of development.

Despite the scheme of covenants and the restrictions imposed by conservation area status, the evidence of Mr Cheshire was of surprisingly large sums being paid for the riverside plots for which Mr Shapiro could think of no explanation other than that a premium was being paid for the prospect of development at some time in the future. We discount this view entirely and prefer the evidence of Mr Cheshire and the view of Mr Atkinson that the large sums for which the riverside gardens change hands are explicable by the location and in particular by proximity to the river and the convenience and amenity which the riverside gardens afford to those interested in boating.

76. We also reject the principal submission of Mr Troup on the first limb of section 84(1A) which was to the effect that, as the University could build an almost identical boathouse but with a slightly reduced height without infringing covenant 9. It was said to follow that the only benefit secured by the covenants was to limit the height of any boathouse so that instead of being 2.7m above the level of the pavement on Sandy Lane it would be only 1.3m above that level. Such a boathouse of slightly reduced height would, it was suggested, be only slightly less intrusive than the structure currently proposed so that the benefit secured by the covenant should be assessed as comprising no more than the difference between two marginally different degrees of interference. That proposition is based on the fallacy the University might wish to build a single storey boathouse as tall as would be permitted by covenant 9, so as either to provide additional storage space for which there appears to be no requirement or to provide an upper storey too low to be of any practical use. There was, understandably, no evidence from the University to that effect. In any event, we are satisfied that quite apart from the height restriction imposed by covenant 9, the University's proposed use of the land is contrary to covenant 1 which would impede the use of even a much lower building on a similar footprint because the land would cease to be used for private occupation only as a garden or pleasure ground.

77. In general, we do not consider that the practical benefits secured by a covenant should be assessed by a comparison with fanciful schemes which, though not prohibited by the covenant, have no realistic prospect ever of being implemented.

78. It is not necessary for us to seek to quantify in monetary terms the value of the benefit secured by the covenants in impeding the construction of the proposed boathouse. It is sufficient that we are satisfied that the benefits secured by the covenant confer a practical benefit of substantial advantage on the owners of Dr Witter's riverside garden. That conclusion is sufficient to dispose of University's reliance on the first limb of section 84(1A).

Contrary to the public interest

79. The alternative limb of section 84(1A), on which the University also relies, requires us to consider whether in impeding the use of the University's land for the proposed new boathouse the covenants are contrary to the public interest.

80. There is clearly a need for improved facilities for the University's own students and the potential benefits to the wider academic community described by Mr Reay in his witness statement were not challenged. The University Rowing Club finds its existing accommodation at the Grosvenor

Rowing Club inadequate and restrictive and no alternative site is available. The opportunity to introduce rowing to more students of the University and also, for the first time, to the older pupils of the six academies and to foster competitive crews would be valuable to the individuals concerned and to the schools and University.

81. Those wider public benefits were regarded by the planning officer as sufficient to outweigh the harm which the proposed development would cause to the conservation area in general and to Dr Witter's enjoyment of his land in particular. We give them weight, and having regard to these benefits we consider that it can fairly be said that the proposed use of the University's land for the new boathouse would be in the public interest.

82. However, that a proposed use of land would be in the public interest is not enough in itself to satisfy the second limb of section 84(1A); what is required is that in impeding that use the covenants are contrary to the public interest. We take the view that before it can be determined that the restrictive effect of a covenant is contrary to the public interest it is necessary to make a broad assessment not only of the beneficial use which is prevented by the covenant but also of the advantages which it secures to those entitled to the benefit of the covenant.

83. In *Re Collins' Application* (1975) 30 P&CR 527, at 531, the Lands Tribunal (Mr Douglas Frank QC) implied that in weighing this balance between public interest and private rights, considerable weight should be given to private rights:

> "In my view for an application to succeed on the ground of public interest it must be shown that that interest is so important and immediate as to justify the serious interference with private rights and the sanctity of contract."

84. In weighing the significance of the proposed use against its impact on those with the benefit of the covenants we are influenced in particular by two factors. The first is the degree of damage (which we consider to be extreme) which will be caused to the amenity and enjoyment of Dr Witter's riverside garden by the scale, location and design of the new boathouse. There is a counterbalancing public interest in not imposing that sacrifice on him and his successors (contrary to the scheme of covenants agreed amongst their predecessors) except for the most pressing reasons. The second is the damage which the modification of the covenants would do to the enforceability of the scheme of mutual covenants which has preserved the very unusual character of this small corner of Chester since 1896. All of those with an interest in the land bound by the scheme have an interest in the continuation of their "local law" which we may legitimately take into account (as the Court of Appeal has confirmed in *Gilbert v Spoor* [1983] (Ch) 27 and *Dobbin v Redpath* [2007] EWCA Civ 570). We consider there also to be a counterbalancing public interest in avoiding the disruption of the scheme unless the public benefit to be secured is very significant.

85. Having regard to those matters as well as to the benefits which would be secured by the implementation of the University's proposals, we are not satisfied that, by impeding those proposals, the covenants are contrary to the public interest.

Adequacy of money as compensation

86. We reach the same conclusion, that the requirement of section 84(1A) is not satisfied in this case, by an alternative route. For the reasons already given in paragraph 84 above we do not consider that money would adequately compensate Dr Witter for the disadvantage which he would suffer if the covenants were to be modified sufficiently to permit the University to build and use its new boathouse. We do not base that assessment on the personal circumstances or preferences of Dr Witter, who informed us in his witness statement that he is not interested in being compensated financially for a modification, but on an objective appraisal. While the property market could no doubt yield an answer expressed in monetary terms, and a valuer or the Tribunal could predict what that answer might be, we nevertheless consider that an award of money would be an inadequate substitute for the unimpeded enjoyment of a beautiful space and for the preservation of a scheme of mutual restraint which has so far succeeded in its object for 120 years. Those benefits, in our view, are invaluable, using that word in both its everyday and its literal sense.

Conclusions

87. The applicant has failed to satisfy us that ground (a) or ground (aa) have been made out. The application is therefore refused.

88. This decision is final on all matters other than the costs of the application. The parties may now make submissions on costs and a letter giving directions for the exchange of submissions accompanies this decision.

Martin Rodger QC
Deputy Chamber President

Peter D McCrea FRICS
Member

18 October 2016

Costs

89. We have now received submissions on costs. Dr Witter seeks an order that the University reimburse the costs he has incurred in the proceedings, which are said to total £125,063.21. We are also invited to undertake a summary assessment of these costs, or to order a payment on account of £80,000 and a detailed assessment.

90. Mr Troup accepted that, as a matter of general principle, Dr Witter, as the sole objector who incurred costs in the proceedings, should be awarded his costs, unless he has acted unreasonably.

91. However, he submitted that Dr Witter had acted unreasonably in several respects. First, he called an excessive number of experts: Mr Cheshire, Mr May and Mr Deakin. The evidence of Mr May did not take matters any further - the Tribunal questioned the utility of evidence on "amenity" prior to the hearing, and Mr May's evidence was only referred to in one paragraph of the decision. The fees charged by Mr May should also be disallowed. Mr Deakin's visualisation report was disproportionate, and the same information could have been provided just as effectively by reference to the planning drawings. The fees charged by Mr Deakin should therefore be reduced by 50%. Dr Witter's evidence was also late, despite the deadline for service having been extended on a number of occasions. The Tribunal had considered the explanation offered for the delay unconvincing and misguided.

92. Secondly, Dr Witter repeatedly indicated that he wished to erect "mock ups" of the new boathouse, initially on the University's land. Despite the Tribunal indicating in advance that it did not consider that "mock ups" of the proposed building would assist, Dr Witter did erect indicative height poles in his garden. His solicitor's costs in corresponding about this issue should be disallowed.

93. Thirdly, there was no attempt by Dr Witter's solicitors to agree a trial bundle. It was the duty of the applicant to prepare the trial bundle, which was being done when Dr Witter's solicitors indicated that they were preparing an alternative trial bundle – which was not used in the hearing, - the costs of which should be disallowed.

94. Mr Troup also submitted that costs exceeding £125,000 were not suitable for summary assessment, as the sum was extraordinarily high and warranted careful scrutiny.

95. As for Dr Witter's request for a payment on account of £80,000 in the event that detailed assessment was ordered, Mr Troup pointed out that, by his own pleading, Dr Witter was a comparatively wealthy man, and would suffer no hardship by being kept out of his money until a detailed assessment had taken place. There was no real danger that the University would be unable to pay any assessed costs. If the Tribunal was minded to order a payment on account, an appropriate sum would be £40,000.

96. In response, Mr Weekes QC suggested a summary assessment would avoid further delay and expense. The Tribunal was best placed, having heard the evidence and conducted the claim, to assess the costs. It was readily apparent how the costs had been incurred. Viewed globally, they were proportionate to what was at stake. The proceedings were of considerable importance and the issues were not straightforward. Dr Witter conducted the litigation efficiently, making concessions where appropriate, which Mr Weekes suggested contrasted with the applicant's approach.

97. Mr Weekes disputed the applicant's suggestion that Dr Witter had acted unreasonably. His stance was vindicated by the Tribunal's decision that the application should be dismissed.

98. Mr Weekes challenged the specific criticisms made by the applicants. It was reasonable for Dr Witter to call Mr Cheshire, whose evidence demonstrated Mr Shapiro's errors and lack of local knowledge. It was reasonable for him to call Mr May, whose analysis must have assisted the Tribunal in forming its own views. Similarly, Mr Deakin's evidence was important, and it was obviously wrong to criticise use of the underlying computer visualisations rather than scaling from plans.

99. As regards the late evidence, the reasons for this had to be explained to the Tribunal by Dr Witter's solicitor with some care. The letter of explanation itself would have taken about three hours, and so cost about £750.

100. As for the "mock up" proposal, the costs of corresponding about this should be allowed. It was reasonable, before the Tribunal expressed its subsequent view, to think that a mock up might be of some assistance, not least because it is difficult to envisage a proposed structure. In the alternative, the relevant correspondence represented about half an hour of time, or £125.

101. Finally, as regards the bundle, the version prepared by the applicants was extremely poor, and Dr Witter should not be criticised for trying to make sure that the Tribunal had a proper bundle. In the alternative, the time incurred on this was about 1 hour, at a cost of £250.

102. Mr Weekes reaffirmed a request for an on account payment in the event that the Tribunal was minded to order a detailed assessment, and that an amount of £80,000 was reasonable bearing in mind that incurred disbursements, including VAT, alone accounted for just over £60,000.

Conclusion

103. As the parties have identified, the starting point is that successful objectors should be awarded their costs unless they have acted unreasonably or, we would add, unless there is some other good reason for the Tribunal to make a different order.

104. There can be no doubt that Dr Witter is a successful objector, entitled in principle to recover his costs. We do not understand Mr Troup's submission to be that he has acted in such a way in the proceedings as to justify the Tribunal refusing to make any order in his favour at all. The issues raised are instead concerned with the quantum of the costs incurred by Dr Witter which the University shall be required to pay on a standard basis assessment. Two questions are raised by Mr Troup's submissions. The first is whether those costs have been reasonably incurred. The second is whether the costs are in themselves reasonable.

105. We do not think it appropriate to undertake a summary assessment of a six figure bill of costs incurred in a relatively complex hearing spread over two days. We intend therefore to direct a detailed assessment. Nevertheless, there is substance in the criticisms of the manner in which the objector's case was prepared. In order to assist the parties in seeking agreement, and the Registrar if necessary in undertaking that assessment, we make some observations and exclusions based on our knowledge of the issues and the conduct of the proceedings.

106. Dr Witter obtained the consent of the Tribunal to rely on the evidence of two experts, Mr Cheshire and Mr May, and to produce the visualisations prepared by Mr Deakin. That does not mean that the costs of doing so were, in the event, reasonably incurred or that they should necessarily be met by the University.

107. We agree with Mr Troup that very little was gained from Mr May's evidence which was not equally apparent from our inspection. The same obvious points could have been made by Mr Cheshire (whose evidence was generally helpful) or a lay witness. We therefore disallow the costs incurred in connection with the evidence of Mr May. We did however find the visualisations prepared by Mr Deakin to be useful.

108. The evidence of Dr Witter and Mrs Witter was, in effect, identical, and included a very large number of colour copies of photographs reproduced as exhibits to both statements. This was obviously excessive and unreasonable, and the cost of the second statement are to be disallowed.

109. In respect of the late submissions of the objector's expert evidence, it is obviously unacceptable for parties to disregard the Tribunal's directions and the manner in which the evidence was held back in this case smacked of gamesmanship. There was no reason why the expert evidence needed to be vetted by Dr Witter personally and reliance on his illness as an excuse for late service was opportunistic. We therefore disallow the costs associated with correspondence between the parties and with the Tribunal concerning expert evidence after the date on which expert evidence ought first to have been served.

110. As regards the "mock ups" and height poles, we made our position on these clear prior to our site inspection, and again consider that the University should not meet the cost of their production, erection, and associated correspondence.

111. We do not consider that the objectors should be penalised for attempting to agree a trial bundle, and do not disallow such costs as they may have incurred in doing so. However, the Tribunal directed that the bundle be prepared by the University's solicitors and we did not find the resulting bundle to be defective. It will be for the Registrar to consider to what extent other costs concerning the bundle were reasonably incurred on behalf of Dr Witter.

112. There are a number of entries in the schedule of costs which appear to relate to the cost of liaison between Dr Witter's solicitors and other objectors who were not represented. These shall not be recoverable. Dr Witter's solicitors were representing him and there is no good reason why the University should pay for other interested parties to be kept informed.

113. There was nothing inappropriate in the use of leading counsel, but that expense having been incurred, it will be necessary for the Registrar to scrutinise the bill of the objector's solicitors with particular care. This was a legally complex case, but the costs claimed do seem to us to be disproportionate. It will be for the Registrar to determine whether this impression persists once the adjustments we have indicated have been made.

114. However, we are satisfied that Dr Witter will recover a substantial sum, and there is no good reason for any delay longer than is necessary in his receiving payment. We therefore direct that the applicant shall pay the sum suggested by Mr Troup, £40,000, on account within 28 days of the date of this costs decision.

Martin Rodger QC
Deputy Chamber President

Peter D McCrea FRICS
31 January 2017

SCHEDULE OF OBJECTORS

1	Mr C E Davies and Mrs S J Davies	55 Dee Banks
2	Chester Motor Boat Club	Dee Banks
3	Dr Robin Witter	41 Dee Banks
4	Riverside Court Management (Chester) Ltd	2 Riverside Court, Dee Banks
5	Robert and Patricia Wright	934 Chester Road, Great Sutton
6	Emma Dixon Bate	57 Dee Banks
7	Patricia Broadwood	63 Dee Banks
8	Joseph and Sonia Barry	The Grange, 1 Hoole Road, Chester
9	Mrs Jeanette Campbell	Woodland House, Townfield Lane, Mollington, Chester
10	White House Scientific Ltd	The White House, Whitchurch Road, Waverton, Chester