



[2017] UKFTT 0639 (PC)

REF NO 2016/0324

**PROPERTY CHAMBER
FIRST-TIER TRIBUNAL
LAND REGISTRATION DIVISION**

**IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY
LAND REGISTRATION ACT 2002**

B E T W E E N:

**(1) IAN TAYLOR
(2) JANETTE DIANE TAYLOR**

Applicants

And

IRENE TERRIBLE

Respondent

**Property address: Stonehurst, Selby Road, Monk Fryston, Leeds LS25 5JE, and
The Garden House, York Road, Monk Fryston, Leeds LS25 5JF**

Title numbers: NYK120508 and NYK40618

**Before: Judge David Taylor
Leeds Employment Tribunal
27 and 28 June 2017**

**Representation: Applicants in person. The Respondent was represented by Mr Kester
Lees, instructed by Squire Patton Boggs**

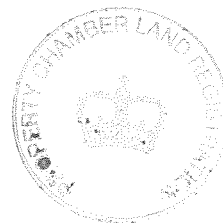
ORDER

THE TRIBUNAL ORDERS as follows:-

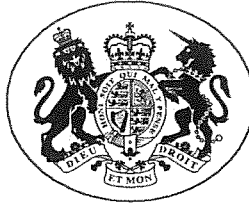
1. The Chief Land Registrar shall cancel the Applicants application in Form AP1 dated 5th December 2015.

BY ORDER OF THE TRIBUNAL

David Taylor



DATED 28th July 2017



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by Mr Kester Lees instructed by Squire Patton Boggs**

DECISION

1. Mr and Mrs Taylor own and live at Stonehurst, Selby Road, Monk Fryston, Leeds LS25 5JE ('Stonehurst'). Stonehurst is registered at HM Land Registry under title number

NYK120508. A copy of the title plan relating to Stonehurst is annexed to this decision at **Appendix 1**.

2. Mrs Torrible owns and lives at the neighbouring property to the north, which is known as The Garden House, York Road, Monk Fryston ('The Garden House'). The Garden House is registered at HM Land Registry under title number NYK40618. A copy of the title plan relating to The Garden House is annexed to this decision at **Appendix 2**. The Garden House formerly included the parcel of land which is shown coloured pink on the plan at Appendix 2. That land is now the site of a dwelling called Cargan Lodge, which was constructed in about 2004, and which is in third party ownership.
3. By an application dated 5th December 2015, Mr and Mrs Taylor applied against both registered titles to register the benefit and burden of a right of way arising from a conveyance dated 2nd September 1938 between (1) Laura Battersby and (2) William Henry Lorriman ('the 1938 Conveyance'). Mr and Mrs Taylor say that that right of way follows the route which they have shown hatched in blue upon the plan which is annexed to this decision at **Appendix 3**.
4. Mrs Torrible objected to that application, and the resulting dispute has been referred to this Tribunal for determination.
5. The issues that I am required to determine include the following:
 - a. whether the 1938 conveyance conferred an immediate, or future, right of way;
 - b. depending upon the answer to (a), whether the purported grant of the right of way was void and, if not, whether it binds Mrs Torrible;
 - c. the route of the right of way;
 - d. if there was a valid grant of a right of way which bound Mrs Torrible, whether the right of way has since been abandoned and / or whether Mr and Mrs Taylor are prevented, by operation of a proprietary estoppel, from asserting that the right of way exists.

Background Facts

6. In 1923 a builder named Robert Battersby purchased a parcel of about 4 acres of land at Monk Fryston, which was roughly square in shape, and which was bounded on the

south by the Selby Road, and on the east by the Tadcaster Road. To the north and west of those 4 acres was a substantial tract of land which was owned by a Mr S. Clowes. Mr Clowes' land comprised quarries to the west, and farmland to the north and west.

7. After developing and selling off some parts of the 4 acres, Mr Battersby was left with an irregularly shaped parcel comprising about 11,120 square yards, which he conveyed into the joint names of himself and his wife, Laura in 1927.
8. Mr Battersby died 9 years later, on the 1st July 1936. Before his death, he had constructed a property called 'Stonehurst' upon the 11,120 square yards.
9. By the 1938 Conveyance, Laura Battersby conveyed Stonehurst, together with garden land comprising 8,570 square yards, to William Lorriman. Those 8,570 square yards comprised the southern portion of the 11,120 square yards which she then owned, and Mrs Battersby retained the northern portion of that land.
10. The parcel conveyed by the 1938 Conveyance - known as Stonehurst - was described by reference to a plan upon which it was delineated with a red line. The 1938 Conveyance provided that Stonehurst was conveyed:

'TOGETHER with a right of way for the Purchaser and his successors in title (in common with all other persons entitled to use the same) at all times and for all purposes over the proposed road coloured brown on the [1938 Conveyance] plan running from the North Westerly corner of the plot of land hereby conveyed into the main Tadcaster Road to and from the said plot of land the Purchaser paying a just and proper proportion of the cost of keeping the said proposed road in proper repair and condition such cost to be based on the extent to which the Purchaser uses the said proposed road by comparison with the other users of the said road PROVIDED nevertheless that so long as the said proposed road shall remain unmade any persons entitled to any rights thereover shall have no right to call on the Vendor to make such road.'

11. Annexed to this decision at **Appendix 4** is a copy of the 1938 Conveyance plan, upon which the route of the 'Proposed Road' is marked. It is not in dispute that the proposed road is shown running over land which was retained by Mrs Battersby out of the 1938 conveyance.
12. It can be seen from the 1938 Conveyance plan that the proposed road contained two sections. The longer section ran in an east / west direction, meeting the Tadcaster Road at its eastern end. The shorter section ran north / south, connecting the north western

corner of the garden of Stonehurst to the longer section of the proposed road which I have already described. The point at which this short section of the proposed road met the northern boundary of Stonehurst was at a point due north of a water supply tower. That water supply tower was situated within Stonehurst's garden, on Stonehurst's western boundary.

13. Neither party was able to adduce any evidence of the physical appearance of the site in 1938, and in particular there was no evidence that any sort of track existed over the route of the proposed road at that time. The best information that I have is that which can be gleaned from (a) a 1927 plan which shows the 11,120 square yards (this plan forms part of the abstract of title of Mrs Battersby), and (b) the 1938 Conveyance plan itself. Neither plan appears to show any existing track running over any part of the proposed road. Accordingly, from these documents, and from the description of the route of the right of way within the 1938 Conveyance as being over a '*proposed road*', which is '*unmade*', I conclude that there was no established track or way which existed along the route of the proposed road at the time of the 1938 conveyance, and that the proposed road was to intended to be constructed over an area of land which, in 1938, was undeveloped farmland.
14. Nothing material happened after the 1938 Conveyance until the early 1970s. By that time it seems that Ann Lorriman had succeeded to William Lorriman's title to Stonehurst, and a bungalow (known as 'Cherry Garth') had been built within the eastern half of Stonehurst's garden.
15. By a conveyance dated 15th January 1974, Ann Lorriman sold the dwelling known as Stonehurst, and an area of garden land which surrounded it, to Mr and Mrs McKendrick. Mrs Lorriman retained Cherry Garth, and an irregularly shaped area of garden land around that property. A copy of the 1974 conveyance plan is attached to this decision at **Appendix 5**.
16. The following potentially significant points emerge out of the 1974 conveyance:
 - a. although the 1974 conveyance made reference to the 1938 Conveyance, it did not include any purported conveyance of any right of way over the route of the proposed road;

- b. because of the irregular shape of the garden of the retained site of Cherry Garth, the effect of the 1974 conveyance was to separate the northern boundary of Stonehurst from the southern boundary of The Garden House;
- c. the 1974 conveyance plan showed a hedge running along the northern boundary of Cherry Garth. I find that this was probably the same privet hedge as Mr Derry told me had existed when he later acquired Cherry Garth. There was no indication upon that plan of any gate or opening within that hedge which would have formed a means of access from the site onto the land to the north (and therefore onto the proposed road);
- d. the 1974 conveyance plan showed a gate within the middle of the northern boundary fence of Stonehurst. This gate provided a means of access from the garden of Stonehurst into the garden of Cherry Garth. However, as I have already noted, there does not appear to have been a means of access from the garden of Cherry Garth onto the proposed road. The 1974 conveyance does not contain any express explanation of the reason for the existence of the gate in the northern boundary of Stonehurst. It is possible that its existence simply reflected the fact that Stonehurst and Cherry Garth had been in the common ownership of Mrs Lorriman, and that she had wanted to be able to pass between their gardens. Or it is possible that the gate existed so as to enable the purchasers of Stonehurst to exercise their right to inspect and maintain drains and pipes which served Stonehurst, but which lay within the garden of Cherry Garth (this right was included in the 1974 conveyance). However, in the absence of any evidence that shows that the route of the proposed road was accessible via the northern boundary of Cherry Garth, and because of the location of the gate in the common boundary between Stonehurst and Cherry Garth (which was located well to the east of the north/south section of the proposed road), I do not consider that the existence of the gate which is shown on the 1974 plan had anything to do with providing a means of access to the proposed road which had been referred to in the 1938 conveyance.

17. I therefore conclude that, up until 1974, there was no means of passing from the site of Stonehurst / Cherry Garth onto the land to the north. The two parcels were separated by a continuous privet hedge, and there were no gates within that hedge.

18. By a conveyance dated the 20th August 1975 the Respondent's late husband, Peter Torrible, purchased a parcel of land from the Clowes family. That parcel shared its eastern boundary with the 4 acres of land to which I referred in paragraph 6 above, and its southern boundary lay along the Selby Road. In the early 1970s, Mr Torrible developed that parcel of land by constructing a house upon it. He called that house Willowfields House. The location of Willowfields House is apparent from the plan at Appendix 1.
19. According to the Respondent and her witnesses, at the time when Mr Torrible purchased the site of Willowfields House, the only means of access to it was along a rough track which, by 1974, existed along the east / west section of the proposed road. There were iron gates at the entrance to Willowfields House at the western end of that track. Those witnesses who could speak to the appearance of the track at the time were clear that it was unmade. According to Mrs Torrible's evidence, within about 12 to 18 months of completing the construction of Willowfields House, her husband caused the east / west track to be gravelled. Thereafter, that gravel was renewed at intervals. Thus, at least on one view, by about the mid-1970s, a 'road' had been constructed along the east / west section of the proposed road which had been described in the 1938 Conveyance. The short north / south section of the proposed road had not, however, been made up. This area of land was heavily overgrown with brambles and the like.
20. In 1987, Mr Torrible purchased the land upon which he would eventually build The Garden House and Cargan Lodge. That land was first registered, under title number NYK40618 on the 16th February 1987, and Mr Torrible was its first registered proprietor. Mr Torrible applied for and obtained planning permission to develop that land, by construction of The Garden House, in the early 1990s.
21. On the 27th April 1992, Mr and Mrs Derry bought Cherry Garth from Mrs Lorriman. Included within the documents supplied to me is a letter dated 27th April 1992 which was written by Mrs Lorriman's conveyancing solicitors to the conveyancing solicitors who were acting for Mr and Mrs Derry in connection with that purchase. Within that letter Mrs Lorriman's solicitors wrote:

'Our clients have mentioned that there is a right of way enjoyed by our clients over the parcel of land immediately to the rear of the back garden and this right of way is included on the plan attached to the 1938 Conveyance and is shown on the plan as the proposed road. Our clients have stated that unfortunately the right of way was omitted

form the subsequent plan attached to the 1974 conveyance on the sale of Stonehurst. The right of way was not part of the Stonehurst property sold in 1974. Our clients have particularly requested that we mention this to your clients.'

22. I have heard no evidence of the circumstances in which this letter came to be written, nor any explanation for Mrs Lorriman wish to flag up the existence of the right of way. But, from the evidence that I heard from Mr Derry, it certainly seems that the right of way was a significant feature in the mind of Mrs Lorriman at about the time of her sale of Cherry Garth. Mr Derry recalled that, on the first occasion when he and his wife had viewed Cherry Garth prior to its purchase, Mrs Lorriman had '*made a big thing about the right of way ... she said we would be wise to walk it regularly - if we didn't use it we might lose it.*'
23. Having regard to the chronology of events which I have described - and although I did not hear from Mrs Lorriman or, of course, from the late Mr Torrible - I find that it is likely that the claimed existence of the right of way was an issue that had been raised by Mrs Lorriman as a result of Mr Torrible's application for planning permission to develop the site of The Garden House. I find that it is likely that her concerns that the right of way might be 'lost' if it was not exercised reflected a concern that Mr Torrible's proposed construction of The Garden House might impact upon the existence or future availability of the right of way.
24. Mr Derry gave evidence that, at the time when he purchased Cherry Garth, a gate had existed in the privet hedge which formed the northern boundary of Cherry Garth. This gate had been in the position marked 'gate' on the plan at Appendix 3.¹ As I have already said, there is no evidence that this gate had existed in 1974, and in light of the material before me I conclude that it had most likely been constructed at some time between 1974 and 1992. I also find that it is likely that it was constructed by or on behalf of Mrs Lorriman; I can think of no reason why the owner of land to the north of Cherry Garth would have wanted to construct a gate which opened into Cherry Garth.
25. The reasons for construction of this gate are unclear. There is simply no evidence about it. It is possible that it was constructed in order that a perceived right of way over the

¹ The reader should note that the irregular shaped garden of Cherry Garth (shown in Appendix 5) meant that this gate was in the common boundary between Cherry Garth and The Garden House and not, as appears from Appendix 3, in a common boundary between Stonehurst and The Garden House; those properties did not share a common boundary in 1992.

proposed road could be exercised by Mrs Lorriman. But it is also possible that it was constructed simply for the purpose of asserting a right, in the face of Mr Torrible's threatened development of the land which adjoined Cherry Tress' northern boundary. I do not think that it is without significance that I have heard no evidence that Mrs Lorriman ever actually exercised the claimed right of way. Indeed, although Mrs Lorriman's son (Malcolm) prepared a brief witness statement for the Applicants in these proceedings, even he only asserted that he had been aware of the existence of a right of way. He did not give any evidence that he had ever used it, or that he had seen others using it.

26. Looking at the totality of the evidence concerning the construction of the gate within the privet hedge, I conclude that it had been constructed by or on behalf of Mrs Lorriman, and that it was constructed primarily for the purpose of asserting her right of way in the context of an anticipated development of the site of The Garden House.
27. Little changed after Mr Derry purchased Cherry Garth. Mr Derry gave evidence that, in the early years after he purchased Cherry Garth, he would from time to time go through the gate in the privet hedge, in order to exercise his dog on the unkempt land beyond. Sometimes, he told me, he would pass over the unkempt land and walk onto the east / west track which ran between Willowfields and the Tadcaster Road. On occasions, he would use that track to access Willowfields. On other occasions he would pass along the track to join the Tadcaster Road. I accept his evidence about his occasional use of the track during the period immediately after his acquisition of Cherry Garth.
28. Construction of The Garden House began very shortly after Mr Derry had purchased Cherry Garth. Mr Derry recalled that, during the course of the construction of The Garden House, he was approached by Mr Torrible, out of the blue, who asked Mr Derry how much we would want in return for 'giving up his right of way'. Mr Derry was a little taken aback by the question, but - off the top of his head - suggested £2,000. He said that Mr Torrible's response was to walk off '*in a huff*' saying that the price demanded by Mr Derry was far too much.
29. Although Mr Derry was challenged about his recollection of these events, I accept his evidence about it. Having regard to my conclusions (above) it seems to me that even if Mr Torrible had not previously been aware of it, he was certainly aware by about 1992 that a claimed right of way existed over the route of the proposed road. What is more, it was clearly in Mr Torrible's interests to investigate the possibility of negotiating a

release of that right of way, so as to clear his title for the purpose of developing The Garden House.

30. After Mr Torrible's attempts to negotiate a release of the right of way had failed, and during the course of the development of The Garden House, Mr Torrible constructed a brick wall along the common boundary between Cherry Garth and the Garden House. He placed a gate within that wall, in the same location as the gate in the privet hedge to which I referred above. The key to that new gate was handed to Mrs Derry, and kept by her.
31. Mr Derry accepted that he had not used the route of the proposed road at all during the course of the construction of The Garden House, because it was not safe for him to do so. In relation to the period after construction, he claimed occasional use. That claim was disputed by Mrs Torrible who pointed out that, if Mr Derry had come through the gate in the boundary wall, he would have entered straight into a landscaped area of her rear garden. She said that he could not possibly have escaped the attention of her gardener (who was regularly present) nor, for that matter, her dogs, which were allowed to roam freely within the garden of The Garden House. She suggested that it was inconceivable that Mr Derry could have used the route without her being aware of it. Mrs Torrible also pointed out that, following the construction of The Garden House, the iron gates which had formerly existed at the entrance to Willowfields House were relocated to the east. She gave evidence that these gates were routinely kept locked, and would have been an impediment to any use of the proposed road.
32. Initially, it appeared difficult to reconcile Mr Derry's claims of user after the mid-1990s with Mrs Torrible's insistence that the route had not been used. But the answer to the difficulty was provided by Mr Derry himself. During his evidence he said that he considered that use of the route, because it would involve passing across the landscaped rear garden to The Garden House, would have been inconsiderate to Mr and Mrs Torrible. It was because of his concern to avoid causing his neighbours upset that he would make a point of avoiding even attempting to use the gate, and the route over the proposed road, if he could see that Mr and Mrs Torrible, or their dogs or their gardener were present in the garden of The Garden House. On the totality of the evidence I find that, if there was any use of the proposed road after the construction of The Garden House in the mid-1990s, it was extremely infrequent indeed. Not only that, but Mr Derry was at pains to avoid using it when Mr and Mrs Torrible (or their

gardener or dogs) were present, so that Mr and Mrs Torrible were, for their part, entirely ignorant of any continuing use of the gate or the proposed road after The Garden House was constructed.

33. After completing the construction of The Garden House, by a transfer dated 25th August 1995, Mr Torrible transferred Willowfields House to Michael and Janet Garrity. By this time a new entrance had been constructed into Willowfields House from the Selby Road. Accordingly, the transfer contained a transferor's covenant to extend the eastern boundary wall of Willowfields so as to close off the means of access onto the gravelled track which, since the mid-1970s, had served Willowfields House. As I have already said, the iron gates which had existed at the entrance to Willowfields House were relocated to the east.
34. To complete the conveyancing history, Mr and Mrs Taylor acquired Stonehurst and were registered as its proprietors on the 6th September 1999. Subsequently, by a transfer dated the 29th October 2002, Mr Derry transferred to Mr and Mrs Taylor the small part of his garden which, until the transfer, had separated the northern boundary of Stonehurst from the southern boundary of The Garden House. In 2004, Cargan Lodge was developed and sold off (and as part of the development some automated gates were constructed at the eastern end of the proposed road). Finally, in 2011, Mr and Mrs Taylor acquired Cherry Garth from Mr Derry, and they were registered as its proprietors on the 18th May 2011.

My Conclusions Upon the Issues

i) Interpretation of the 1938 Conveyance

Immediate or Future Right?

35. The first point which I am required to decide is whether, properly construed, the 1938 Conveyance created an immediate right of way, or a conditional future right of way over a road which had yet to be constructed.
36. So far as this issue is concerned, I have no hesitation in concluding that the parties to the 1938 Conveyance did not intend to create an immediate right of way. Instead, the 1938 Conveyance created a future right, which was conditional upon a road first being

constructed over the route of the 'proposed road'. I reach this conclusion for the reasons which I describe below.

37. First, a right of way is, by its nature, a right to pass over the surface of land owned by another. It is common for the intended route of a right of way to be identified within a grant, either by reference to a plan upon which the line of the route is indicated, or by reference to a description of the physical appearance of the ground over which the right is to exist, or by using both methods. Thus, a right of way might be granted over '*the route coloured brown on the attached plan*', or it might be granted over the '*concrete path which exists between [defined points]*.'
38. In the present case, the draftsman has used both methods. He has identified the intended route of the way by reference to a plan upon which it is coloured brown, but by his reference to a '*proposed road*' he has made clear that the right intended to be granted is a right to pass over a surface which has not yet been constructed.
39. Second, as I have found, there was no established track which existed in the location of the 'proposed road' in 1938. The route of the proposed road was, therefore, over unadulterated farm land. It follows that the right of way was not, therefore, a right which was capable of immediate vehicular use at the time of the 1938 conveyance. Nor do I have any evidence from which I can conclude that it would have been a straightforward matter to use it as a pedestrian.
40. Third, it is also clear from the 1938 Conveyance plan that the means of access to Stonehurst in 1938 was over a driveway which opened onto the Selby Road. The plan did not reveal any driveways within the curtilage of Stonehurst which connected with the southern end of the north / south section of the proposed road. So, not only was the intended right of way itself incapable of vehicular use, but there was no obvious vehicular route within Stonehurst that connected to the proposed road.
41. Fourth, although it might be said that the answer to the point which I have described in paragraph 39 above is that the purchaser under the 1938 conveyance acquired an implied ancillary right to enter upon the servient land for the purpose of constructing a road upon it, it is clear from the proviso within the 1938 Conveyance ('*PROVIDED nevertheless that so long as the said proposed road shall remain unmade any persons entitled to any rights thereover shall have no right to call on the Vendor to make such road*') that the parties envisaged that the road would be constructed by the vendor.

42. Fifth, the law does not impose any general obligation upon a servient owner to construct or make up a road over which a right of way may be exercised. Nor did the vendor under the 1938 Conveyance enter into any express covenant to make up the road. It follows that, if the right of way was intended be immediate, there was no obvious need for the 1938 Conveyance to contain a proviso that the vendor could not be compelled to construct the road. On the other hand, if the right of way was a future (conditional) right which would only come into being once the road had been constructed, then the purchaser might have been able to contend that there was an implied obligation upon the vendor to construct the proposed road within a reasonable period of time, in order that the right of way would arise. The proviso made clear that that argument was not available to the purchaser, and that the decision when (and indeed whether) to construct the road was one which rested entirely with the vendor.
43. Sixth, at a late stage in these proceedings Mrs Torrible produced from her own title deeds a version of the 1938 Conveyance plan which had been marked up showing an intended development of the parcel of land which Mrs Battersby had retained out of the 1938 Conveyance. There is no evidence about the identity of the person who marked up the plan, nor about when the plan was marked up. However, I note that the plan shows (a) the location of dwellings which had, by 1938, been constructed by Mr Battersby and which opened onto the Selby and Tadcaster Roads and (b) the intended sites of 10 more semi-detached dwellings, which were to be constructed along the southern edge of the proposed road, and which appear to have been of a similar size and shape to those which had already been constructed by Mr Battersby. I find, on the balance of probabilities, that this plan had been created by or on behalf of Mr Battersby prior to his death, and that it showed the intended scheme of development of the entire 4 acres at that time. On that basis I conclude - consistently with my finding in paragraphs 41 and 42 (above) - that the parties to the 1938 Conveyance envisaged that the proposed road would be constructed as part of the intended development of the 10 semi-detached dwellings which are shown on the plan. However, Mr Battersby's recent death meant that it was uncertain when or whether this development would proceed, and this was why the proviso was required - to make clear that, because of this uncertainty about whether the development would proceed, Mrs Battersby could not be called upon to construct the proposed road.

44. Seventh, the 1938 Conveyance contains a provision which makes clear that the purchaser is to contribute a '*just and proper proportion of the cost of keeping the said proposed road in proper repair and condition*'. The obligation to contribute to maintenance was, therefore, an obligation to contribute towards the maintenance of *a road*. There was no obligation to contribute towards the cost of maintenance of the route *before* construction of the road, even though the costs of maintaining an unmade track in a serviceable condition might well have exceeded the costs of maintaining a formal road. The fact that the obligation to contribute to maintenance did not arise until the road had been constructed is, in my view, consistent with the existence of the right of way being conditional upon the construction of the road in the first place.
45. Eighth, the extent of the purchaser's contribution to maintenance was to be calculated by reference to '*the extent to which the Purchaser uses the said proposed road by comparison with the other users of the said road.*' There is nothing on the face of the 1938 Conveyance, nor on the 1938 Conveyance plan, which shows that any 'others' had any right to use the proposed road. But the plan to which I have referred in paragraph 43 (above) shows that an intended development of the land to the south of the proposed road would have resulted in others using the proposed road in common with the owner of Stonehurst. Once again, therefore, this evidence points to the conclusion that the right of way was to be over a road which was to be constructed as part of wider development to be undertaken by Mrs Battersby or her successors in title.

The Route of the Proposed Road

46. The Applicants seek to register a right of way over the route which is shown hatched blue on the plan at **Appendix 3**. They say that the western boundary of the north/south section of the right of way is demarcated by a line of mature trees which can be seen in various photographs within the trial bundle.
47. The Respondent's case is that the line of mature trees marked the eastern boundary of the proposed road. She says that the pedestrian gate in fact enters upon an area of garden land over which no right of way, present or future, was ever intended to be created.

48. In considering this question, I have been assisted to some degree by an overlay plan which has been prepared by First Point Surveys on behalf of the Respondent, and to a greater degree by my site visit.
49. The plan prepared by First Point Surveys shows the 1938 Conveyance plan superimposed onto a modern survey of the site. It is immediately apparent that the 'fit' of the older plan onto the newer survey is not perfect. Nevertheless, the exercise that has been undertaken by the surveyor appears to me to give a reasonable indication the north/south section of the right of way was intended to follow the route which the Respondent describes, rather than that for which the Applicants contend.
50. That impression was very clearly confirmed by my site view. As I have indicated (above), it appears from the 1938 Conveyance plan that a straight line continuation of the north-south section of the proposed road would have met the water supply tower which is shown marked on the plan. On site, it was apparent that a straight line continuation of the line for which the Applicants contend would miss that water supply tower by a considerable margin. I conclude, therefore that the intended route of the proposed road was one which would have had as its eastern boundary the line of trees which now exists within the garden of The Garden House.

ii) The Consequence of My Conclusions About the Proper Interpretation of the 1938 Conveyance

51. The conclusions which I have reached about the proper interpretation of the 1938 Conveyance, are significant for a number of reasons.
52. Firstly, as the Respondent contends, the effect of the rule against perpetuities (in the form in which that rule existed before the passing of the Perpetuities and Accumulations Act 1964) is that the purported grant was void from inception. As the authors of Megarry & Wade explain in *The Law of Real Property* at para 9-018:

'The rule in its classical form, as it existed before the Perpetuities and Accumulations Act 1964, can be summarised in two propositions:

- (i) Any future interest in any property, real or personal, is void from the outset if it may possibly vest after the perpetuity period has expired.*

(ii) The perpetuity period consists of any life or lives in being together with a further period of 21 years and any period of gestation.'

53. The result of this rule is that, because the creation of the right of way was conditional upon the construction of the proposed road, and because there was always a possibility that the road might be constructed (and therefore that the right of way might vest) outside the perpetuity period, therefore the purported grant was void. This effect is illustrated by the decision of the Court of Appeal in **Shrewsbury v. Adam [2006] 1 P&CR 474** (see in particular at pages 483-484).
54. Second, even if not void from inception, the fact remains that the north/south section of the proposed road has never been constructed. Therefore, if the 1938 Conveyance is analysed as having conferred a conditional right of way, the relevant condition has not been satisfied, and so the right of way has not arisen. There is, therefore, no easement which is capable of being registered. Mr and Mrs Taylor are not assisted by the fact that the east / west section of the proposed road has been constructed, because any right of way must accommodate a dominant tenement, and unless the right has arisen over the entirety of the route of the proposed road (ie. over the north / south section as well as the east / west section), it does not do so.
55. Third, because the condition precedent to the existence of the right of way has not been satisfied, and because the right of way has therefore not arisen, it follows that there was no right in existence over the north / south section of the proposed road which was capable of binding Mr Torrible as an overriding interest (by operation of ss.5 and 70(1) of the Land Registration Act 1925) at the time when he acquired and was registered as proprietor of the intended sites of The Garden House and Cargan Lodge in 1987. It follows that Mr Torrible acquired title free of the 'right' created by the 1938 Conveyance.
56. For the reasons that I have described, I conclude that the purported grant of the right of way by the 1938 Conveyance was void from inception because it offended against the rule against perpetuities. If I am wrong about that, then it seems to me that, in any event, the conditional nature of the right means that it has not yet come into existence and accordingly that Mr Torrible acquired title to The Garden House free of the right.

Abandonment or Proprietary Estoppel?

57. It will be apparent that my conclusions so far all depend upon my decision that, properly construed, the 1938 Conveyance created a future (conditional) right, rather than an immediate right of way over the route of the proposed road. If I am wrong about that, and if the effect of the conveyance was to create an immediate right, then there can be no question of the rule against perpetuities having been offended, the conditionality point would fall away, and the legal right of way would have bound Mr Torrible (and his successors in title) as an overriding interest.
58. For this reason, the Respondent urges me to consider her alternative lines of defence to the applicants' claim. She argues that, if she would otherwise have been bound by the right of way, that right of way has nevertheless been abandoned. Alternatively she says that the Applicants should be prevented by a proprietary estoppel from asserting the right. I will consider these arguments briefly.

Abandonment

59. There is no dispute as to the relevant legal principles, which have been succinctly set out in the skeleton argument filed on behalf of the Respondent. Of particular significance in the present case are these:
- a. abandonment depends upon the intention of the person alleged to be abandoning the right of way as perceived by the reasonable owner of the servient tenement;
 - b. accordingly, to establish abandonment of an easement the conduct of the dominant owner must have been such as to make it clear that he had a firm intention that neither he nor any successor in title of his should thereafter make use of the easement.
60. The factors which are relied upon by the Respondent in support of her assertion that the right of way has been abandoned are these:
- a. that no road was ever constructed along any part of the proposed road prior to 1975;
 - b. that even since 1975, no part of the north/south section of the proposed road has been constructed;

- c. no claim to the right was made in 1992 when planning permission was sought to develop The Garden House;
 - d. since the mid-1990s a wall has been erected on part of the route of the way;
 - e. for over 20 years there have been locked gates along the east / west section of the driveway which would have prevented use of the alleged right of way;
 - f. since around 2004 electric gates have been installed at the eastern end of the proposed road (near to its opening onto the Tadcaster Road).
61. The only matter which the Respondent can point to *prior* to the early 1990s, as evidencing abandonment, is the dominant owner's failure to construct a road along the route of the proposed road. I reject the submission that a mere failure to construct a road over the route of a right of way is sufficient to demonstrate an intention that neither the dominant owner for the time being, nor any successor in title of his, should ever make any use of the right of way.
62. In relation to the period since the 1990s, I accept the evidence that various structures (walls, a greenhouse and two sets of gates, one of which is kept locked) have been erected on the route of the proposed road. But these structures were erected *by Mr Terrible and / or the owners of Cargan Lodge*. They are not, therefore, examples of conduct *by the dominant owner* from which a reasonable servient owner might infer an intention to abandon. What is more, in light of my findings, it is quite clear that Mrs Lorriman and Mr Derry were actively asserting their rights during the early 1990s (and were known to be doing so), at least until construction of The Garden House was complete.
63. It follows that, had I found that the right of way had been validly created in 1938, I would not have found that there had been any subsequent abandonment of it.

Proprietary Estoppel

64. The Respondent is, however, on stronger ground arguing that Applicants should be prevented, by operation of a proprietary estoppel, from asserting the right of way. Since the mid-1990s, the garden of The Garden House has been heavily landscaped. The route of the north/south section of the proposed road has been built over, firstly by the construction of a wall and secondly by construction of a greenhouse. The owners of the

dominant land (formerly Mr Derry and latterly the Applicants) have made no complaint about the construction of these features.

65. The explanation for the absence of protest may be that Mr Derry and the Applicants were all mistaken about the precise route of the north/south section of the right of way, and did not realise that these structures were being erected upon the true route of the right of way. But the Respondent's argument goes further than this, because even the area of garden which is immediately to the north of the pedestrian gate has been heavily landscaped, with a flower border immediately in front of the gate, and lawned area beyond that, and no trace of a path or way leading between the gate and the east / west section of the proposed road. What is more, gates have been erected along the east / west section of the proposed road, and one of those sets of gates has routinely been kept locked by Mrs Torrible. No complaint has been made about any of this. In fact, on Mr Derry's evidence, it seems that after The Garden House had been constructed in the mid-1990s he went out of his way to avoid being seen using the proposed road. The Applicants, for their part, accept that they have not used the gate at all, for similar reasons - they have not wished to cause upset to the Respondent.
66. Looking at the evidence in the round, so far as the Respondent has been aware, this right of way has gone unused by the dominant owner for in excess of 20 years, and the route across which it passed (and / or over which it was believed to pass) has been cultivated, to a very high standard, as part of her garden. All of this has been with the apparent acquiescence of Mr Derry and, latterly, Mr and Mrs Taylor. In these circumstances it would, in my view, be unconscionable for the Applicants now to be permitted to assert the right of way. In circumstances in which the right of way is not a necessary means of access to Stonehurst, and appears rarely to have been used in the past, I am satisfied that the minimum relief required to satisfy the equity would involve the extinguishment of the right.

Conclusions

67. For the reasons that I have given, I will direct the Chief Land Registrar to cancel the Applicants' application to register the right of way purportedly created by the 1938 Conveyance.

68. The normal consequence of the outcome which I have directed is that the Applicants, as the unsuccessful parties, would be ordered to pay the costs of the Respondent. I will, however, consider any submissions that the parties may wish to make, either in connection with the principle of who should pay costs, or in connection with the assessment of those costs. I would invite the parties to file and serve upon each other their written submissions upon these issues, together with any other material upon which they wish to rely in connection with an assessment of costs, by 1st September 2017.

BY ORDER OF THE TRIBUNAL

David Taylor

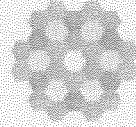
Dated this 28th day of July 2017



APPENDIX 1 - TITLE PLAN RELATING TO STONEHURST

Land Registry
Official copy of
title plan

Title number NYK120508
Ordnance Survey map reference SE4929NW
Scale 1:1250 enlarged from 1:2500
Administrative area North Yorkshire : Selby



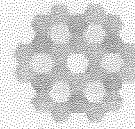
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APPENDIX 2 - TITLE PLAN RELATING TO THE GARDEN HOUSE

Land Registry
Official copy of
title plan

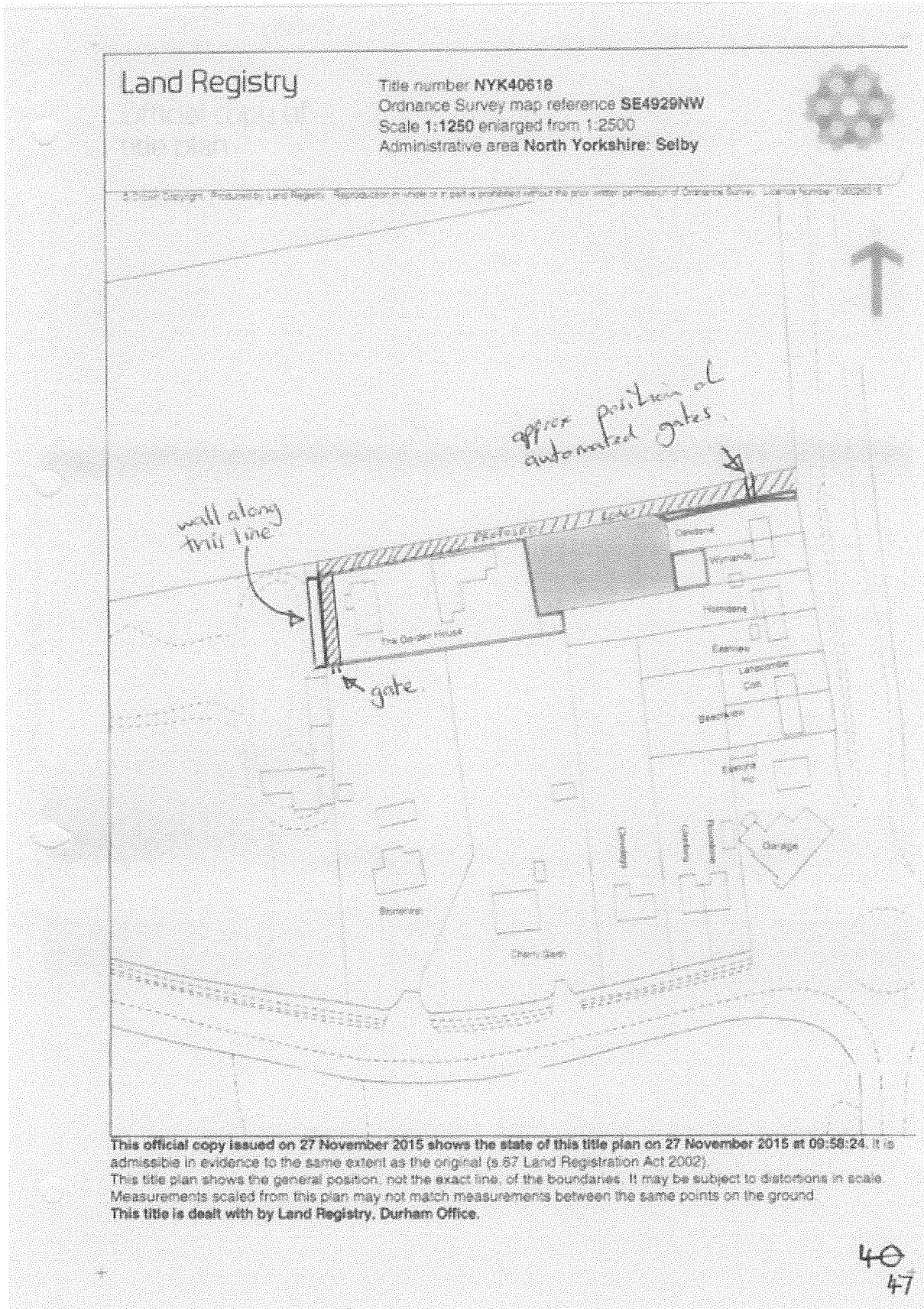
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Administrative area North Yorkshire : Selby



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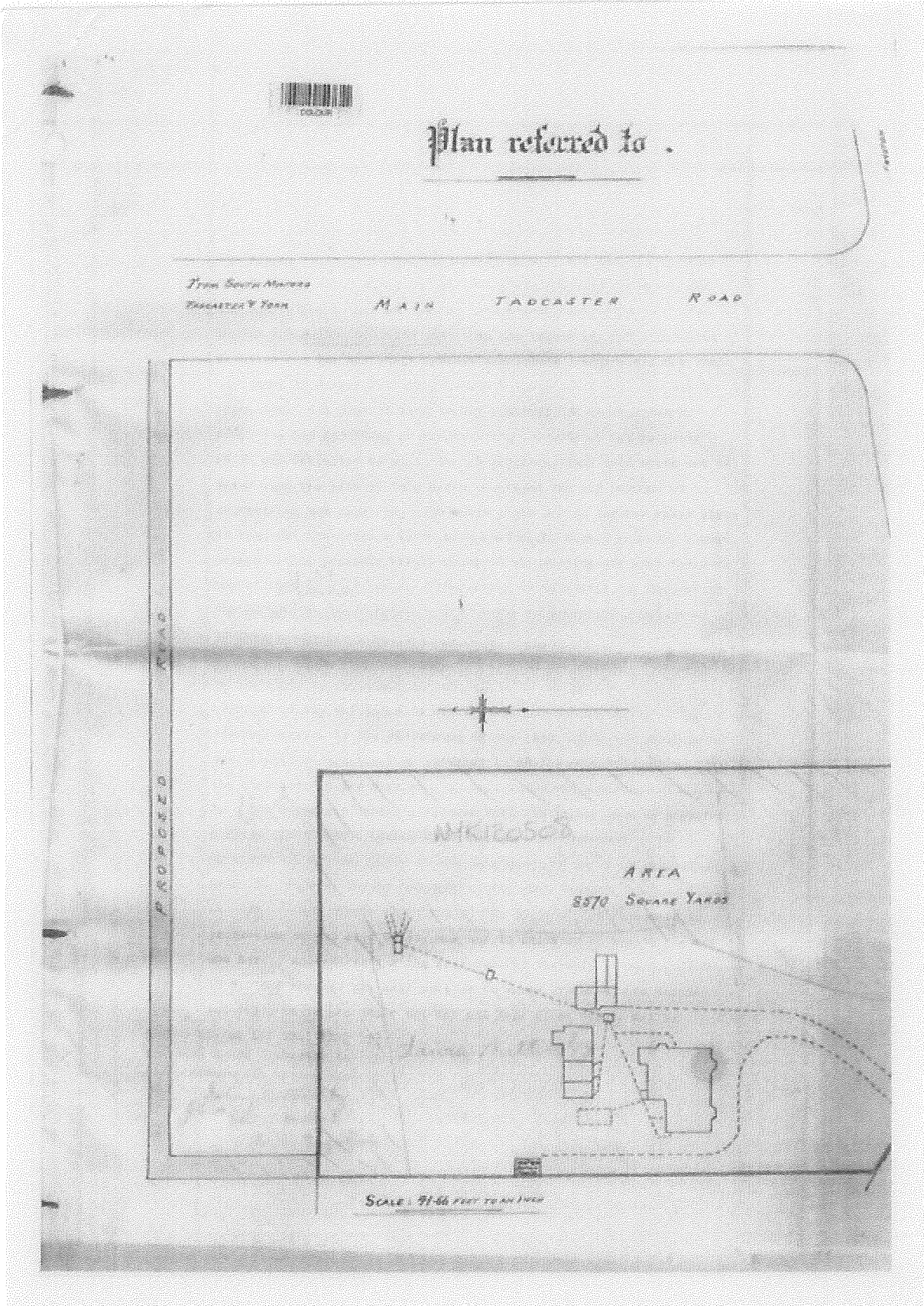


APPENDIX 3 - RIGHT OF WAY CLAIMED BY APPLICANTS



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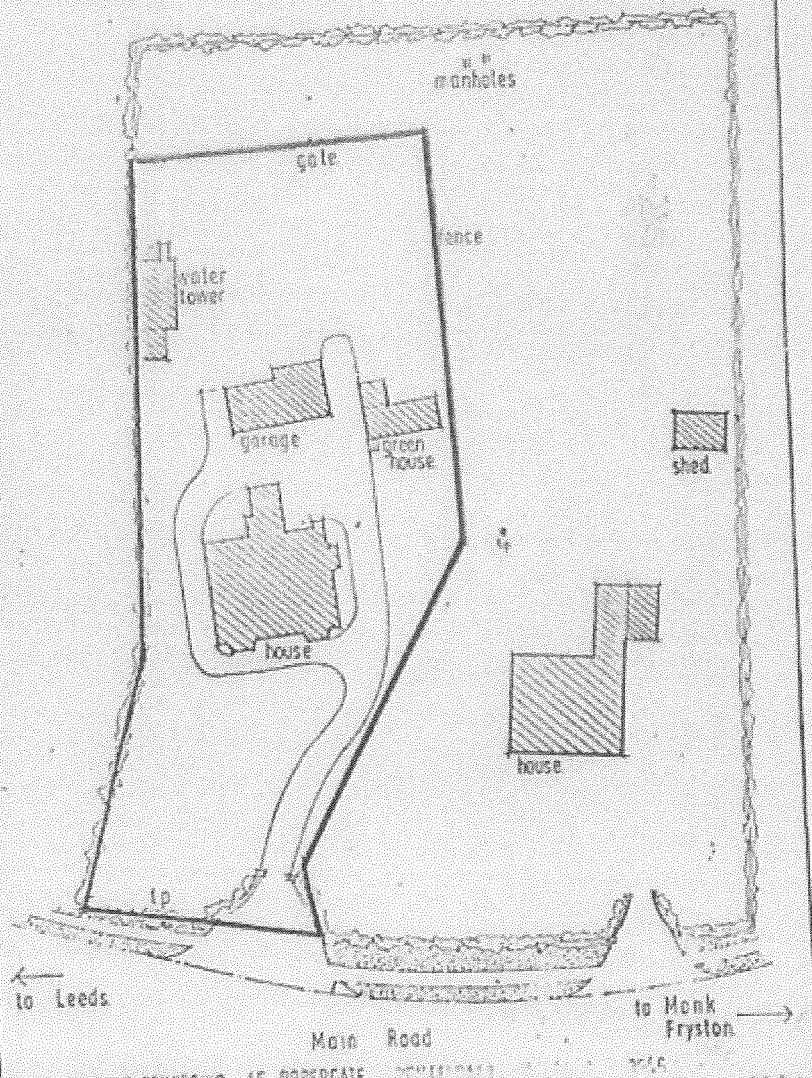
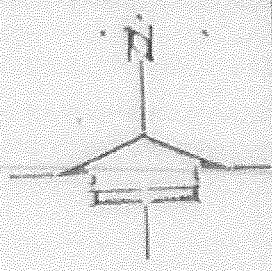
APPENDIX 4 - 1938 CONVEYANCE PLAN



APPENDIX 5 - 1974 CONVEYANCE PLAN

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100-
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SCALE 1:500
DATE 25-6-73



15 ROPERGATE

