Neutral Citation Number: [2023] EWHC 2022 (Ch)

Case Nos: CH-2022-LDS-000010;
CH-2022-LDS-000011

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN LEEDS
CHANCERY APPEALS LIST (ChD)

On appeal from Order dated 7 September 2022 Deputy District Judge Jonathan Rodger

The Court House
1 Oxford Row
Leeds
LS1 3BG

3 August 2023

Before :

MR JUSTICE FANCOURT
Vice-Chancellor of the County Palatine of Lancaster

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Between :

BURRAS OTLEY LIMITED	**Claimant**
- and -	
(1) HELEN JOHNSON	
(2) PETER FRANCIS SWANN	
(3) ANNIE SWANN	
(4) GRAHAM NEWALL	
(5) ANNE NEWALL	**Defendants**

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Mr Nicholas Trompeter KC (instructed by **Walker Morris LLP**) for the **Claimant**
Ms Joanne Wicks KC (instructed by **Gordons LLP**) for the **Defendants**

Hearing date: 18 July 2023

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APPROVED JUDGMENT

This judgment was handed down via hearing at 10.00 am on 03 August 2023 by circulation to the parties or their representatives and by release to the National Archives.

The Vice-Chancellor :

Introduction

1. This is an appeal by the Claimant and a cross-appeal by the First, Second and Third Defendants against an order of Deputy District Judge Jonathan Rodger made on 7 September 2022 ("the Judge" and "the Order") on the hearing of a summary judgment application. The appeals raise difficult questions of interpretation of conveyances made in the 1930s relating to development land in Otley, West Yorkshire. I am grateful to both Counsel for their detailed analysis and excellent submissions.

2. By the Order, the Judge made declarations about the extent to which parts of land owned by the Claimant ("C's land") have the benefit of a right of way over parts of the Defendants' different parcels of land. The titles to all the affected parcels of land are now registered at HM Land Registry, but the relevant conveyances were made well before compulsory registration of title in Otley and were not registered at the time.

3. The matter is a little complex because there are three different parts of C's land, shown coloured mauve, yellow and blue on the plan used in the lower court and which is annexed to this judgment as "Plan 1". There are also three different properties owned by the Defendants (part of the land edged green on Plan 1). As the Judge held, different parts of C's land have different appurtenant rights over the Defendants' land.

4. There is no challenge to the Judge's conclusion that the blue land can enjoy no rights under the reservation in the 1937 Conveyance, but the Defendants challenge his conclusion that the yellow land does enjoy such rights.

5. The Defendants are respectively the owners of three houses built in the 1930s on land that was once in the same ownership as C's land. These are: The Croft (Ms Johnson), Ghyllbrook (Mr and Mrs Swann) and Wingfield (Mr and Mrs Newall). These are the three houses on the land edged green nearest C's land. Each of these three properties fronts what is now a surfaced lane (identifiable within the land edged green, to the south of the houses). I will call this "the Lane", without prejudice to its true character and status from time to time. It runs from The Croft at its west end to a highway called Ash Grove at its east end. On the far (west) side of C's land is another highway called West Chevin Road, connected to C's land along a driveway.

6. The matters in dispute depend on the effect of rights that were reserved in favour of the vendors' retained land out of two conveyances of parcels of the former estate. By those conveyances, the predecessors in title of the Claimant, who were executors and trustees, conveyed separate parcels of land to a builder, Mr Moon: the first was made on 11 February 1936 ("the 1936 Conveyance"), by which the parcel of land furthest east and nearest to Ash Grove was conveyed to Mr Moon; and the second was made on 29 September 1937 ("the 1937 Conveyance"), by which the parcel of land immediately to the west of the first parcel was also conveyed to Mr Moon. The plans in these Conveyances are respectively "Plan 2" and "Plan 3" annexed.

7. On the land conveyed by the 1936 Conveyance ("the 1936 land") were built two semi-detached houses. One, Invermay, nearest to Ash Grove, plays no part in this litigation. The second house is Wingfield. On the land conveyed by the 1937 Conveyance ("the 1937 land"), two more semi-detached houses were built: Ghyllbrook, next to Wingfield,

and The Croft at the end. In fact, a small sliver of the 1936 land also became part of the title of Ghyllbrook, though that house comprises mainly part of the 1937 land.

8. The Judge held that no effective rights of way over the Lane were reserved in favour of any part of the retained land out of the 1936 Conveyance, but rights to pass and repass on foot and with horses, carriages and motor vehicles at all times and for all purposes were reserved out of the 1937 Conveyance and benefit the mauve and the yellow land.

9. The net effect is that the Claimant, which is a property development company, cannot access C's land from Ash Grove for the purposes of developing it, because it has no rights over Wingfield's section of the Lane. Whether its land enjoys any access from the west was not canvassed before me.

10. The effect of the Judge's decision was therefore that, after the 1936 Conveyance, the original vendors and estate owners and their successors in title, including Mr Moon as purchaser under the 1937 Conveyance and the owners of Ghyllbrook, had no right to pass and repass over the Lane to reach Ash Grove either.

11. In time, that deficiency of title has very likely been cured by the successive owners of Ghyllbrook and The Croft using the Lane as of right to access and egress their properties, but the Claimant and its predecessors have not used the Lane because it ends at The Croft and has never connected with the retained land. The Claimant's rights therefore depend on whether there was an effective reservation out of both the Conveyances.

12. The Judge's Order seemed to satisfy no one, as both the Claimant and the Defendants have appealed. I granted them all permission to appeal by order dated 6 December 2022.

13. The Claimant contends that the Judge was wrong to construe the 1936 Conveyance as reserving no immediately effective right of way over the 1936 land. The first three named Defendants contend that the Judge was wrong to construe the 1937 Conveyance as reserving an effective right of way over the 1937 land in favour of the mauve and yellow land, and further contend that any right of way reserved by either Conveyance was later severed from the yellow land by the terms of a conveyance of that land dated 31 December 1946 ("the 1946 Conveyance").

14. Before dealing with the appeals against the interpretation of the 1936 and 1937 Conveyances, it is necessary to set out a little more of the undisputed background and then the terms of the two central Conveyances. The parties to the two Conveyances were in substance the same (and only differ at all because one of the two vendor executors of the former estate owner died after the 1936 Conveyance, leaving only one executor to execute the 1937 Conveyance).

Factual background

15. All the land in issue in this litigation and other land, then known as the Burras House estate, was owned by Mr Alfred Marshall before his death in 1932. The main house was serviced by a private driveway leading perpendicularly from West Chevin Road. It is common ground that at the end of Mr Marshall's life there was no track or roadway passing through the estate, from one side to the other. An Ordnance Survey plan of 1938

shows no sign of any connection from the driveway or from West Chevin Road in the west to Ash Grove in the east.

16. In 1922, however, the local council, Otley Town Council, had promulgated the Otley Town Planning Scheme. This included proposed construction of new roads in the town, including a new 40 feet wide road, metalled and with pavements on either side, passing through the estate, to the north of Burras House and its driveway, and through some allotment gardens, on a roughly east-west axis, joining Ash Grove just before that road joins Burras Lane further to the east ("the New Road"). In fact, the New Road has never been built, for whatever reason. One conveyance of other estate land in 1934 does refer to part of Ash Grove on the line of the New Road having been improved, but that was apparently not done pursuant to the Scheme.

17. In time, the Otley By-pass was built and perhaps the New Road was considered to be unnecessary, or unaffordable. The mid-line of the intended New Road nevertheless defines the southern boundaries of the Defendants' properties and it is over the northern half of the New Road within the Defendants' titles that the Claimant asserts a right of way, over what is now the Lane.

18. After Mr Marshall's death, his executors sold off plots of land for building purposes. The plans within various conveyances show that the development had been planned and plotted, with consistent building lines running along both sides of (but set back from) the New Road. There were to be at least three further plots of land (each suitable for a pair of semi-detached houses) along the north side of the New Road, to the west of The Croft, and other plots of land to the south west, towards Burras House.

19. The first two parcels of land to be sold were on the south side of the New Road, by conveyances made on 19 December 1933 and 31 July 1934. These parcels were sold to an existing owner of a house fronting Burras Lane, to the south, who had access to that highway. The midline of the New Road defined the northern boundaries of those parcels. As with the 1936 Conveyance and the 1937 Conveyance, these two early conveyances purported to convey with the land rights of way over streets and roads on the retained land and to reserve to the vendors the equivalent rights of way over streets and roads on the land conveyed.

The terms of the Conveyances in issue

20. By the 1936 Conveyance, which appears to have been the third parcel of the estate sold by the executors, they conveyed to Mr Moon in fee simple:

> "ALL THAT plot of land situate on the West side of Ash Grove Otley in the County of York bounded on the North by property of Mr Charles Herbert Crowcroft Batty on the South by the middle line of a proposed New Town Planning Road forty feet wide on the East by the middle line of Ash Grove and on the West by other property belonging to the Vendors and containing in the whole eight hundred and ninety square yards and delineated on the plan here annexed and thereon surrounded by a red boundary line TOGETHER WITH rights of foot horse and carriage and motor road at all times and for all purposes (in common with the Vendors and their successors in title) over

> and along all streets and roads formed made and opened through in or upon any part of the remaining estate of the Vendors when and so often as the same streets and roads are or shall be respectively formed made and opened for use but not further or otherwise AND ALSO the free use in common as aforesaid of the drains and sewers made or intended to be made under the said streets and roads respectively and under any other of the Vendors' adjoining land with power to open into and make communications with the same respectively making good all damage done thereby and restoring the surface of the said streets and roads and adjoining land as soon as may be RESERVING NEVERTHELESS to the Vendors and their successors in title and their tenants the like free and unrestricted rights of way and passage at all times and for all purposes in common as aforesaid over and along such part of the said streets and roads aforesaid as are included in the plot of land hereby conveyed AND ALSO the like use in common as aforesaid of the drains and sewers with liberty to enter upon the said streets or roads for the purpose of opening into and making connections with the said drains and sewers making good all damage done thereby and restoring the surface as soon as may be..".."

21. Mr Moon then covenanted in clause 2, for himself and his successors in title, to respect building lines, fence the land conveyed, not build more than two dwellings, and:

> "(g) If and whenever the proposed New Town Planning Road shown upon the plan is required to be made either by the Vendors or the Purchaser the Purchaser shall according and in proportion to the extent of his frontage towards the proposed New Town Planning Road delineated on the plan contribute with the Vendors and the owners for the time being of the other plots of land having such frontage to the expense of making and forming the said proposed New Town Planning Road into a road properly metalled and fit for carts waggons motor cars and carriages with a footway on each side thereof and such main sewers and surface water drains as shall be made or required to be made by the competent Local Authority and shall at all times thereafter until the same shall be taken over by the Local Authority contribute the proportion aforesaid towards the expenses of repairing and maintaining the proposed New Town Planning Road and Ash Grove rights of way over which are included in this sale and the said sewers and drains. Notice by either party requiring the making of the proposed New Town Planning Road and the sewers and drains shall be sufficient if made in writing and posted to the other party..."

22. This covenant is notable because, despite its form, it appears to acknowledge the right of either the vendors or the purchaser to give an effective notice requiring the New Road to be built, which would then give rise to a proportionate liability of all purchasers and the vendor for the cost of construction and maintenance, until adoption. The covenant also recognises that rights of way over the proposed New Road were intended to be included in the sale of the development land.

23. By clause 2(h), it was provided that

> "The purchaser shall not be entitled to any easement or right of light or air or otherwise which would restrict or interfere with the free user of any adjoining or neighbouring land of the vendors for building or other purpose."

24. At first blush, it appears that the rights of way reserved to the vendors are intended to mirror the rights of way granted to the purchaser, though it is not clear why clause 2(g) refers to a right of way granted over Ash Grove, half of the width of which was conveyed to Mr Moon. It is not known whether the vendor's estate extended beyond the middle line of Ash Grove.

25. The critical question, as a matter of interpretation of the 1936 Conveyance, is whether the rights so granted and reserved were immediately effective, in either case, or whether the rights only came into existence when the New Road or another road was built. If they were immediately effective in favour of the vendors and their successors in title, the Claimant has the benefit of those rights. If they were only to take effect when the New Road was built, it is agreed that the intended reservation (and indeed the intended grant to Mr Moon) was void for perpetuity at common law, because the rights might have vested outside the perpetuity period of lives in being plus 21 years (the construction of the New Road being a contingency that might only occur after the end of that period).

26. On 31 July 1936, Invermay was sold by Mr Moon. The terms of that conveyance are not fully known, save that the purchasers made covenants with Mr Moon that replicated the covenants of Mr Moon in the 1936 Conveyance. The registered title does not now note any rights of way to which that property is subject.

27. On 19 August 1936, Mr Moon conveyed the property known as Wingfield, with the semi-detached house that he had built upon it, to Mr and Mrs Gray. There was no express grant of a right of way over Invermay, but none was needed if a right of way had been validly reserved in the conveyance of that property. The registered title states only that the property has the benefit of but is subject to the rights reserved by the 1936 Conveyance.

28. The 1937 Conveyance came about a year later, shortly after a conveyance of the blue land and other estate land by the remaining executor to a Mr Slack. It takes a broadly similar approach to that taken by the draftsman of the 1936 Conveyance (who may or may not have been the same person). The property conveyed was not of course adjacent to Ash Grove, so was land locked unless a right of way had been reserved out of the 1936 Conveyance over the part of the Lane within the 1936 land.

29. The relevant terms of the grant and reservation of rights of way in the 1937 Conveyance (the parcels clause otherwise following the same structure as the parcels clause of the 1936 Conveyance) are:

> "TOGETHER WITH rights of foot horse and carriage and motor road at all times and for all purposes (in common with the Vendor and his successors in title) over and along all streets and roads formed made and opened through in or upon any part of the remaining estate of the Vendor when and so often as the same streets and roads are or shall be respectively formed made and opened for use but not further or otherwise... RESERVING NEVERTHELESS to the Vendor and his successors in title and his and their tenants the like free and unrestricted rights of way and passage at all times and for all purposes in common as aforesaid over and along such part of the

> said *proposed New Town Planning Road* as is included in the plot of land hereby conveyed..."

I have indicated by the use of italics and underlining the only substantive respect in which the wording of the 1937 grant and reservation differs from the wording of the 1936 grant and reservation (the different wording in the 1936 Conveyance being "streets and roads aforesaid").

Later history

30. To complete the picture, on the day following the 1937 Conveyance Ghyllbrook (which by then had been built) was conveyed by Mr Moon to Mr and Mrs Spencer together with and subject to the rights and reservations in the 1936 and 1937 Conveyances.

31. There is therefore a reasonable inference that Mr Moon had used proceeds of sale of Invermay or Wingfield in July and August 1936 to carry out the construction of Ghyllbrook and The Croft. It must be the case that, after the 1936 sales and before the 1937 Conveyance, Mr Moon had enjoyed access to the 1937 land along the Lane, since the 1937 land was otherwise landlocked after the 1936 sales. It is unknown whether he did so with the permission of the purchasers of Invermay and Wingfield or as licensee of the vendors (if effective rights of way had been reserved out of the 1936 Conveyance).

32. Ghyllbrook was sold by Mr Moon the day after the 1937 Conveyance, so it is obvious that he had been building on that land with the permission of the vendors or, more probably, pursuant to a building contract. Mr Moon himself occupied The Croft as his home after completion and it was not sold until many years later.

33. By the 1950s, the track that had emerged and become the Lane was shown on the Ordnance Survey map. It has never been adopted as a public highway.

The Judge's conclusions

34. The Judge delivered a reserved judgment following the hearing of the summary judgment application. It had been common ground at the hearing that there would be no more relevant facts to emerge at a trial and so the Judge should proceed to construe the two Conveyances against the background facts that were known, and decide on a balance of probabilities the effect of their terms. The judgment is a careful and considered analysis of the issues.

35. The Judge indicated that there was only one contentious issue of fact, namely whether by the date of each Conveyance a rough track existed in front of Invermay, Wingfield and Ghyllbrook, leading to The Croft, in roughly the position where the New Road was intended to be built. The Claimant contended that it did, both in February 1936 and in September 1937. The Defendants were unable to advance a positive case, but argued that the Claimant had failed to prove its case in this regard.

36. The Judge's conclusion on that issue was that a track was probably present by the date of the 1936 Conveyance. He so held on the basis that, as a matter of inference, Mr Moon

would have been building Wingfield and Invermay for some time before the date of the 1936 Conveyance (since both properties were completed and sold only 6 months later), and that the 1938 Ordnance Survey map – which did not show a track – did not accurately record what was on the ground in 1936 (because it does not show Wingfield and Invermay, which were both completed by August 1936).

37. The Judge considered that the obvious route to access both building plots was along the south of the plots, where the site of the New Road is marked on Plans 2 and 3.

38. He considered that, since Ghyllbrook was sold by Mr Moon the day after the 1937 Conveyance, the building work on that property and on The Croft must also have been proceeding for many months before the date of that Conveyance. He found that it was more likely than not that work on all four houses on the two plots had started by February 1936 and that accordingly a rough track leading to the front of those properties would have been in use, and therefore in existence, ending at the boundary between Ghyllbrook and The Croft.

39. On the issue of interpretation of the Conveyances, the Judge addressed the cases of the Claimant and the Defendants and dealt with a number of discrete linguistic arguments advanced by each. He also briefly summarised the law on interpretation of contracts and on the presumption of validity, neither of which was in dispute before him, and he identified the aspect of the rule against perpetuities that arose.

40. It is evident that the Judge was concerned, in interpreting the Conveyances, to decide whether the reservations in the Conveyances had any degree of contingency about them, such as would invalidate the purported reservation. His answer, in relation to both Conveyances, was that there was none, because in the case of the 1936 Conveyance the reservation was not over the New Town Planning Road, yet to be built, but over all streets and roads that had been formed or made and opened, and in the case of the 1937 Conveyance because the reservation was over the site of that part of the proposed New Town Planning Road that was included in the 1937 land.

41. Having disposed of the argument on perpetuity, the Judge then addressed whether the wording of the 1936 Conveyance meant that a right was reserved over the rough track, as being a "street" or "road", and whether the slightly different wording of the 1937 Conveyance meant that a right was reserved over that part of the 1937 land on which the New Road was intended to be built. He held (at para 77) that the reservation in the 1936 Conveyance did reserve an immediate right over "the said streets and roads aforesaid", namely "all streets and roads formed or made and opened through in or upon" any part of the remaining estate". He held (at para 81) that the 1937 Conveyance reserved an immediate right of way over that part of the land conveyed upon which it was then proposed to construct the New Road.

42. The Judge would therefore have reached the same conclusion on the effect of the reservations in both Conveyances but for the fact that he held that the rough track could not be called a "street" or "road" within the meaning of the 1936 Conveyance. The claim based on the 1936 Conveyance therefore failed, whereas the claim based on the 1937 Conveyance succeeded, in relation to the mauve and yellow retained land, because the right was reserved over the site of the intended New Road. The Judge rejected the argument that a sufficient contrary intention in the 1946 Conveyance excluded the effect of s.62(1) Law of Property Act 1925 in relation to the yellow land.

The appeals

43. The Claimant having failed in relation to the 1936 Conveyance, it appeals against the declaration in para 1 of the Order, which denied any right of way over Wingfield and the sliver of 1936 land forming part of Ghyllbrook's title. The grounds of appeal are (in summary): (1) that the Judge misconstrued the reservation and should have held that it related not to a street or road but to the land shaded on Plan 2 as being the site of the proposed New Road, or alternatively (2) that the Judge was wrong to hold that the track was not a road or street.

44. The First to Third Defendants are the appellants in relation to the declaration in para 2, which states that the mauve and yellow land have the benefit of a right of way over the site of the New Road in front of Ghyllbrook and The Croft. Their grounds of appeal are (in summary) that (1) the reservation was over a future road not then in existence, not the site of the New Road, and so void, or alternatively (2) the 1946 Conveyance had the effect of severing any such reserved rights from the yellow land.

45. Neither side served a Respondent's Notice.

46. Strictly, a Respondent's Notice should have been served by the Defendants, if they wished to uphold the decision in relation to the 1936 Conveyance on the basis that the factual conclusion about the existence of a rough track was wrong, or that the streets or roads contemplated by the reservation were only estate roads, such as the New Road, not a road created only on the land sold (which is a question of interpretation).

47. Although the Defendants addressed the factual question in their skeleton argument, and contended that the Judge reached the wrong conclusion, it was not addressed in the Claimant's skeleton argument, which asserted that there was no appeal against the decision on the factual issue. I raised with Ms Wicks KC on behalf of the Defendants whether a Respondent's Notice should not have been filed to take that point, to which she responded that sufficient notice of the arguments had been given, as the skeleton argument was filed in February 2023. Mr Trompeter KC on behalf of the Claimant did not suggest in his reply that he was unable to deal with the issue, but he did not in fact address it. It seemed to me that he was assuming that Ms Wicks could not rely on that matter without permission to do so.

48. I do not consider that in fairness the Defendants can (in effect) seek to appeal the factual finding without a Respondent's Notice contending that the Judge's decision should additionally be upheld for that reason, or without agreement. It raises a distinct issue and it is not sufficient to say that the parties are effectively re-arguing the case on appeal. That is true enough in relation to the issue of interpretation, but the Defendants would have to persuade me that the Judge was wrong (on the admittedly limited evidence before him) to reach the factual conclusion that he did.

49. As far as the additional argument on interpretation of the 1936 Conveyance is concerned, I take a different view, on the basis that the argument is part and parcel of a single exercise of identifying the meaning of the reservation in the Conveyance.

The parties' cases

50. The Defendants' case is that there is no realistic interpretation of the rights reserved in either the 1936 or 1937 Conveyance that provides an immediately effective right for the vendor and its successors in title to pass and repass along the intended route of the New Road.

51. They argue that the rights granted and reserved in both Conveyances are intended to mirror each other. That is to say, the rights reserved to the vendors for the benefit of the retained land over the land conveyed are intended to be the equivalent of the rights granted to the purchaser over the retained land. The parts of a road or street or of the New Road over which rights are reserved are of course different from the parts of land over which equivalent rights are granted to the purchasers, but nevertheless the effect was intended to be the same, namely that the rights would be exercisable when the roads, streets or New Road in question were built and not before.

52. Ms Wicks said that as well as being the natural reading of the grant and reservation it made good commercial sense, even if it made bad legal sense on account of the rule against perpetuities. Until the rest of the estate had been allotted and sold for development, it cannot have been the intention of the owners that purchasers of individual plots should be entitled to ride and drive over any part of the estate, but only do so over the roadways when built. Equally, the vendors had never enjoyed and did not need a road or street over the land sold, but would want to use it when the New Road had been constructed.

53. Ms Wicks referred to the terms of other conveyances, one shortly pre-dating and others post-dating the 1937 Conveyance, as demonstrating that immediate rights were only granted over existing roads, and otherwise the rights were contingent on new roads being built. But the terms of these conveyances cannot be assumed to have been reasonably available to or known by Mr Moon, so their provisions cannot affect the interpretation of the two Conveyances with which I am concerned.

54. In any event, it is agreed that the rights *granted* by the Conveyances were dependent on the construction of roads or streets: the matter in issue is whether that position was mirrored in the terms of the reservations.

55. On the other side of the argument, Mr Trompeter submits that both Conveyances in issue should be interpreted as reserving immediate rights over the intended route of the New Road (and in the case of the 1936 Conveyance over Ash Grove – though it is not clear whether this road was adopted by that time). He contends that that conclusion is a realistic interpretation of the 1936 Conveyance whether or not the Judge was right to find that a rough track already existed at that time, and that it is clearly what the words in the 1937 reservation are used to mean.

56. Mr Trompeter's best point, apart from linguistic arguments, seemed to me to be that it would be uncommercial for there to be no reservation to the vendors of immediate rights of way over the land sold, along the route of the New Road. That is because once the 1936 land and the parcel opposite it had been sold (the latter was sold in 1933), unless immediate rights of way were reserved across those parcels the vendors had no further ability to access Ash Grove themselves or, more significantly perhaps, to sell further development plots along the line of the New Road with rights of access to Ash Grove

and the highways to the east. That could significantly impact the value of those plots, unless and until the New Road was built, because there was no available access at that time to the highway at West Chevin Road.

57. That is at first blush a serious argument, if it is assumed that the vendors were seeking to maximise receipts from the development land without undue delay. It appears, from the pattern of conveyances from 1933 to 1938, that the vendors were proceeding to sell off all the land in the estate, though not in a hurry. Burras House with a parcel of surrounding land was sold in August 1937, shortly before the date of the 1937 Conveyance. The mauve land was sold in 1938. The last parcel, the yellow land, was not sold until 1946, doubtless as a consequence of the Second World War.

58. It does therefore appear reasonable to assume that the vendors, as trustees, were seeking to sell the estate so far as possible for residential use or development, to maximise the value of the estate. They were not delaying doing so until the New Road and new Burras Drive were built, probably because that would involve them in having to contribute to the cost of it, proportionately to the extent of their retained frontage land (see the terms of clause 2(g) of the 1936 and 1937 Conveyances).

59. If the Defendants are right in their interpretation of the reservations in the 1936 and 1937 Conveyances, the effect was that the intended reservation over the New Road when built was void, but even allowing for the fact that the draftsman did not foresee that outcome, the vendors would be unable to sell the remaining parcels of development land on the estate with access to Ash Grove until the New Road had been built. Mr Moon and his successors in title as purchasers of Wingfield and Invermay could have prevented any purchaser of the 1937 land or the blue, mauve and yellow land from crossing their property until the New Road was built.

60. In fact, it appears that it was intended well before the date of the 1937 Conveyance that Mr Moon would purchase the land thereby conveyed, because Ghyllbrook was sold the day after the 1937 Conveyance, so construction had obviously been continuing for some months at least before the land was conveyed to Mr Moon. It may not be surprising that the owners of Invermay and Wingfield acquiesced in their builder crossing their land for construction purposes, but Mr Moon appears to have been able to sell Ghyllbrook on 30 September 1937 without the purchasers' solicitors detecting that there was a question about its rights of access to Ash Grove.

61. Mr Trompeter ultimately contended that the court should prefer an interpretation that gives effect to rather than defeats the evident intentions of the parties, so far as the reservations are concerned.

Legal principles

62. The Judge had in mind the effect of the rule against perpetuities, and the validity principle, when seeking to extract the meaning of the words used. If the reservation properly construed was one over a part of the New Road when built then it was void. It was indeed common ground (at least before me) that the grants in both Conveyances of rights of way over the vendor's retained land were void for this reason, as being unambiguously over all streets and roads opened "when and so often as the same streets

and roads are or shall be respectively formed made and opened for use but not further or otherwise", with no such street or road in existence at the date of the grant. It is clear, therefore, as Ms Wicks submitted, that the draftsman did not have a full understanding of the effect of the rule against perpetuities on the grant or reservation of easements, because it is obvious that an effective grant of a right of way over new roads was intended.

63. This is a matter of some importance in interpreting the reservations in the two Conveyances. The validity principle is not a means of correcting a void grant or reservation and does not enable the court to "read down" the relevant words so that they have different effect as a valid grant. The extent to which the court may properly go in preferring an interpretation that validates a contract was discussed in Egon Zehnder Ltd v Tillman [2020] AC 154, which was concerned with the meaning of the words "interested in" in an employee's restrictive covenant. Lord Wilson JSC said:

> "Better considered without reference to its original formulation in Latin, which nowadays few people understand, the validity principle proceeds on the premise that the parties to a contract or other instrument will have intended it to be valid. It therefore provides that, in circumstances in which a clause in their contract is (at this stage to use a word intended only in a general sense) capable of having two meanings, one which would result in its being void and the other which would result in its being valid, the latter should be preferred. In the present appeal, however, the parties are at odds about the specific circumstances in which the principle is engaged. Is it engaged only when the two meanings are equally plausible or is it also engaged even when the meaning which would result in validity is to some extent less plausible? [38]

64. Lord Wilson then reviewed recent decisions and texts and, contrary to previous expressions of the principle requiring rival interpretations to be "equally plausible", or the court at least "to be in a state of real and persistent uncertainty of mind", he held that the true requirement was that a rival interpretation had to be a "realistic" interpretation before the validity principle could be applied:

> "In my view Megarry J, Toulson LJ and Patten LJ were identifying the point at which the principle is engaged in much the same place. Let us work with Patten LJ's adjective: let us require the alternative construction to be realistic." [42]

The other members of the court agreed with Lord Wilson.

65. Accordingly, if there is no realistic alternative construction – which is accepted to be the case in relation to the words of grant in the 1936 and 1937 Conveyances – the fact that the interpretation leads to the grant being void cannot justify preferring a different meaning, even if that would result in a valid grant. The same applies in principle to the reservations.

66. There was no real dispute between the parties about the right approach in law to construing the two Conveyances. The relevant law on the interpretation of commercial contracts is that explained in three well-known recent decisions of the Supreme Court. For these and most other purposes, it can be taken as succinctly summarised in the

judgment of Carr LJ in EMFC Loan Syndications LLP v The Resort Group plc [2021] EWCA Civ 844; [2022] 1 WLR 717:

> "56. The relevant well-known legal principles of contractual construction are non-contentious and to be found in a series of recent cases, including Rainy Sky SA v Kookmin Bank [2011] 1 WLR 2900; Arnold v Britton [2015] AC 1619 and Wood v Capita Insurance Services Ltd [2017] AC 1173.
>
> 57. In summary only then, the court is concerned to identify the intention of the parties by reference to what a reasonable person having all the background knowledge which would have been available to the parties would have understood the language in the contract to mean. It does so by focusing on the meaning of the relevant words in their documentary, factual and commercial context. That meaning has to be assessed in the light of the natural and ordinary meaning of the clause, any other relevant provisions of the contract, the overall purpose of the clause and the contract, the facts and circumstances known or assumed by the parties at the time that the document was executed and commercial common sense, but disregarding evidence of the parties' subjective intention. While commercial common sense is a very important factor to be taken into account, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed. The meaning of a clause is usually most obviously to be gleaned from the language of the provision. Where the parties have used unambiguous language, the court must apply it; if there are two possible constructions, the court is entitled to prefer the construction consistent with common sense and to reject the other (see Rainy Sky SA v Kookmin Bank (*supra*), at paras 21 and 23).
>
> 58. In Wood v Capita Insurance Services Ltd (*supra*), at paras 9–11 Lord Hodge JSC described the court's task as being to ascertain the objective meaning of the language which the parties have chosen to express their agreement. This is not a literalist exercise focused solely on a "parsing of the wording of the particular clause"; the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning. The interpretative exercise is a unitary one involving an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences investigated."

67. It is therefore necessary mentally to go through a process of linguistic analysis, checking and re-checking, comparing the different possible ways of interpreting the Conveyances in the light of their surrounding factual circumstances, and with a view to giving sensible commercial effect to them unless required by sufficiently clear language to reach what appears to be an uncommercial result. The principle of validity is a further canon of construction that applies in this case.

68. There was one minor difference between the parties as to the legal approach to interpreting the Conveyances. That was whether there was a limit to the weight that could be given to factual context in interpreting the words used. Mr Trompeter relied on the

principle established by the majority in the decision of Cherry Tree Investments Ltd v Landmain Ltd [2013] Ch 305, to the effect that where a record of a transaction is intended to appear on a public register, the admissible background material should be limited to what the reasonable reader of the register would be likely to know or expect to take into account:

> "The reasonable reader's background knowledge would, of course, include the knowledge that the charge would be registered in a publicly accessible register upon which third parties might be expected to rely. In other words a publicly registered document is addressed to anyone who wishes to inspect it. His knowledge would include the knowledge that insofar as documents or copy documents were retained by the registrar they were to be taken as containing all material terms, and that a person inspecting the register could not call for originals. The reasonable reader would also understand that the parties had a choice about what they put into the public domain and what they kept private. He would conclude that matters which the parties chose to keep private should not influence the parts of the bargain that they chose to make public. There is, in my judgement, a real difference between allowing the physical features of the land in question to influence the interpretation of a transfer or conveyance (which we do) and allowing the terms of collateral documents to do the same (which we should not)... physical features are, after all, capable of being seen by anyone contemplating dealing with the land and who takes the trouble to inspect. But a third party contemplating dealing with the land has no access to collateral documents." (per Lewison LJ at [130])

69. In that case, a facility agreement varied terms relating to exercise of a power of sale contained in the registered charge. The majority of the court held that the question of whether the power of sale had become exercisable under the charge should be determined at a trial and could not simply be decided as a matter of interpretation of the charge in the light of the terms of the facility agreement. An issue of rectification of the charge was likely to arise.

70. The judgment of Lewison LJ itself indicates a distinction between cases where extraneous material can be expected to affect the interpretation of a contract and those where it should not, even if the document in issue is to be registered. The position is not as simple as saying that weight should not be given to extraneous material where a document is to be registered or is a public document. The Supreme Court has more recently emphasised that differences in interpreting public documents are more nuanced and ones of degree rather than kind: Barnardo's v Buckinghamshire [2018] UKSC 55; [2019] 2 All ER175 at [13], per Lord Hodge JSC; Lambeth LBC v Secretary of State for Housing Communities and Local Government [2019] 1 WLR 4317 at [18]-[19], per Lord Carnwath JSC.

71. In my judgment, this is not a case where the limited background facts relied upon (the Otley Town Planning Scheme, the nature of the Burras House estate, the physical features of the land in issue) fall within the *Cherry Hill* principle. The main reason is that the Conveyances were not registrable in 1936 and 1937. Details of the Conveyances were only registered much later (upon registration of title following a first transfer of title after first registration for Otley was introduced by The Registration of Title Order 1973) in so far as relevant to current rights in the newly registered properties. The transaction was completed and the grants and reservations took effect according to the principles of

unregistered conveyancing. The provisions of the Land Registration Act 1925 were irrelevant to the meaning and effect of these conveyances, and the introduction of compulsory registration in 1973 cannot have changed the meaning of the Conveyances. The secondary reason is that the contextual material relied on is in any event quite different from the sort of case with which Lewison LJ was concerned, or from a document that only 'speaks' as a public document, such as a planning permission. As Ms Wicks submitted, this conventional exercise of interpreting a conveyance is a world away from a case where an unpublished collateral contract varies or detracts from the terms of a document that only takes effect upon registration.

72. A further consideration, when construing the Conveyances, is that although these were professionally prepared documents, it cannot be assumed that the draftsman gave precise legal effect and perfect expression to the intentions of the parties. Not only are the rights of way granted to the purchasers agreed to be void for perpetuity, but the scheme by which the New Road was to be built and funded by the purchasers of parcels was liable to be defeated because it might depend on enforcing positive covenants against successors in title to the original purchasers. Thus, Mr Moon would be liable to the vendors to contribute proportionately to the cost, but absent a direct deed of covenant with the vendors made by his purchasers (which the Conveyances do not require), those purchasers of Invermay, Wingfield and Ghyllbrook would not be liable. It is also evident that the drafting of the reservations is not on any view precisely correct, where they refer to use "in common as aforesaid" and to "the said streets and roads aforesaid" – I refer to these points further below. It would therefore be wrong to take an overly literal approach to interpreting the Conveyances.

The issues of interpretation of the 1936 Conveyance

73. The 1936 Conveyance must be interpreted first. Its meaning cannot be affected by the terms of a later conveyance, nor indeed by a prior conveyance that was not known or reasonably available to the vendors and Mr Moon at the time. One can however discern from the surrounding circumstances that the vendors were selling off the estate of which they were trustees for building purposes, to realise maximum value for the beneficiaries, that the land conveyed was one of the plots to be sold for that purpose, and that the purchaser was interested in building houses on the land for profit.

74. The real question for the Judge was whether the words used in the reservation mean that the vendors reserved an immediately exercisable right to pass and repass over part of the 1936 land, in its existing condition, to get to and from the retained land from Ash Grove. The Claimant says that they do. The Defendants say that the reserved right to pass and repass depended on the prior construction of a street or road, which might be the New Planning Road, as with the purchaser's intended rights to pass and repass over retained estate roads.

75. Mr Trompeter submitted that the words "the like" in "the like free and unrestricted rights of way and passage at all times and for all purposes in common as aforesaid …" refer back to the mode of use described in the grant, namely rights of "foot horse and carriage and motor road". That is because the other words of the grant, describing the extent of the rights and when and for what purposes they are exercisable, are repeated in the reservation, and the description of the land over which they are exercisable is stated

expressly in the reservation as being "over and along such part of the said streets and roads aforesaid as are included in the plot of land hereby conveyed". Ms Wicks contended that the words "the like" describe the rights of way more generally, as being future rights, like the rights granted to the purchaser. I consider that Mr Trompeter is right on this narrow point, as did the Judge, but that does not answer the real question, which depends on the meaning of the words "over and along such part of the said streets and roads aforesaid as are included in the plot of land hereby conveyed".

76. The "said streets and roads aforesaid" are, in my judgment, an emphatic reference back to the streets and roads previously referred to in the grant, namely "all streets and roads formed made and opened through in or upon any part of the remaining estate of the Vendors" and as further referred to in the rights of drainage granted. The phrase cannot be read as being limited to the New Road, or the intended site of the New Road, because it expressly refers back to "all streets and roads", not "the New Town Planning Road".

77. Mr Trompeter argued that the word "aforesaid" referred back to the parcels clause, not the grant of rights of way, where the middle line of the proposed New Road was identified as the southern boundary of the land conveyed. I am unable to accept the argument that that is what the word "aforesaid" refers to. It is clearly referring to the "streets and roads" referred to in the grant of rights of way. The "said streets and roads aforesaid" is not an apt reference to what is described as a boundary line in the parcels clause, or even to one half of the proposed New Road shown on the plan. The New Road was referred to in the parcels clause as "the proposed New Town Planning Road" and if a right was to be reserved over the line of that road, with immediate effect, the draftsman would surely have said so.

78. It can be said, however, that on the Defendants' interpretation the reservation does not make literal sense, because a right would not be reserved by the vendors over streets and roads to be built on their own land: the purchaser could re-grant no such right. The reservation must refer to something on the land conveyed, since it is only over that land that the purchaser can make an effective re-grant. It is true that the use of language is not perfect, but for reasons that follow I consider that it is nevertheless reasonably clear what is meant.

79. For the Claimant to succeed, the words have to be interpreted as meaning either the land over which the New Road is intended to be built, or any road or street in existence on the conveyed land on the date of the Conveyance. The Judge considered that it was the second of these possibilities, but held that no such road or street existed.

80. Mr Trompeter argued that the reservation had to be construed in one of those ways otherwise it did not make sense, if it referred instead to the said streets and roads to be constructed on the retained land (which is what the words of grant were concerned with). He pointed out that there was only ever contemplated to be one road to be formed on the land sold and purchased, not "streets and roads".

81. However, I consider that the suggested mismatch with "the said streets and roads aforesaid" is too literal an approach to identifying the meaning of the words, given that both parties contend, in different respects, that the draftsman was not precise in his use of language. The same literal error in the draftsman's language exists where he refers to the reserved rights being used "in common as aforesaid". What was "aforesaid" was use by the purchaser in common with the vendors and their successors in title as owners of

the retained land, but that is clearly inexact as applied to use by the vendors of the 1936 land. What is nevertheless evident in context is that those words mean use in common with the purchasers and their successors in title, i.e. they impose a limitation on the right reserved (non-exclusive use) that is intended to mirror the same qualification of the right of way granted to the purchaser.

82. It is therefore credible that what the draftsman meant by "such part of the said streets and roads aforesaid as are included in the plot of land hereby conveyed" is not literally the streets and roads on the retained land, but such part of the new streets and roads as will be built on the 1936 land. That interpretation makes perfect sense, in context, because the principal new road, the New Road as I have defined it, was intended to be built across the 1936 land and the retained land. That is clear from the covenant at clause 2(g) and the plan within the 1936 Conveyance (Plan 2) and from admissible extraneous material. That therefore explains why the parties are contemplating the "said streets and roads" being built on the 1936 land as well as on the retained land, though the rights reserved are not limited to the New Road any more than the rights granted are.

83. Mr Trompeter argued against that conclusion because, he said, it does not give effect to the use of the present tense in the words "as are included in", which signify that the subject-matter of the right reserved exists at the time of the Conveyance and is able to be re-granted by the purchaser to the vendors. There are, he explained, no words of conditionality used in the reservation. For that reason, he argued that the subject-matter of the right was necessarily the land in existence at that time over which the line of the New Road was intended to pass, as marked on the plan.

84. In my view there is no difficulty in context in reading those words as meaning "as will be included" – their purpose is to differentiate the part of the New Road to be built on the land conveyed rather than on the land retained, not to limit the rights reserved to any street or road already in existence (which the parties knew had not yet been built).

85. It seems to me that what the draftsman is doing, albeit using imperfect language, is providing for a right that mirrors the purchaser's rights, for the vendors to make use of that part of the new roads that are created and are to be built (in part) on the purchaser's land.

86. I then need to consider the commercial argument that I identified for reaching a contrary conclusion. Is a presumed need for the vendors to access Ash Grove sufficient to lead to the words of the reservation being understood in a different sense, as reserving an immediate right of passage over part of the 1936 land? The effect of that reading would be to break the mirror between the rights granted and the rights reserved.

87. It would, usually, be surprising to conclude that vendors had cut off their access to the highway by failing to reserve rights, especially if the access was in use or the retained land needed that access. In this case, the access had not been used by the retained land, and there was no clear route established. The retained land as a whole had access to West Chevin Road, over the driveway, but that would not have been convenient for parts of the retained land adjoining the 1936 land. Anyone wishing to develop that adjoining land might well have wanted access from Ash Grove.

88. Of course, that development could proceed (ignoring the effect of the rule against perpetuities) once the New Road was built. It is possible that the parties contemplated

that the New Road would soon be built, which would – on adoption – solve all problems with access. The 1936 Conveyance gives the vendors and the purchaser alike the right to trigger the obligation to build the New Road, so it would not have been regarded as a serious landlock issue, as the parties apparently had no idea of the perpetuity problem. Whether any thought was given to the building of the New Road is of course unknown. Given the sales that did take place after the 1936 Conveyance, it does not seem to have created an impediment in practice to the vendors selling the development land. The argument may therefore not be quite as strong as it first appeared.

89. A counterweight appears to me the be this. If the parties intended to create an imbalance between the vendors' reserved rights and the rights granted to the purchaser, so that the vendors obtained and could transfer immediate rights of access but the purchaser's rights were contingent, one would have expected that difference to be clearly expressed in the deed. The language of the grant of future rights of way is over "all streets and roads formed made and opened … when and so often as the same streets and roads are or shall be respectively formed made and opened for use". If one were seeking, in contradistinction to the grant of future rights, to reserve to the vendors an immediately effective right of way over specific land or over the rough track, one would not in common sense use language such as "over and along such part of the said streets and roads aforesaid as are included in" the land conveyed. Using that language is making a deliberate link back to the terms of the grant. Even though the present tense is used in the words "as are included in the plot of land hereby conveyed", it is the part of the said streets and roads that is stated to be included, not the site of the intended New Road (to which the draftsman could easily have referred instead, if he was reserving a right over that land).

90. I therefore ask myself whether there really are here two "realistic" interpretations (per Lord Wilson JSC), one of which is the reservation of an immediate right over the track or the site of the New Road, and the other of which is a contingent right over the new road or roads when built. If there are two realistic interpretations then I should favour that which validates rather than avoids, which is the first interpretation.

91. I have, not without some difficulty and only after considerable weighing of the arguments and reconsideration of them all, ultimately come to the conclusion that there is only one realistic interpretation, and that is that the draftsman did intend to mirror the rights granted to Mr Moon by reserving rights over part of the "said streets and roads aforesaid", being the roads to be built across the retained land and the land conveyed. In all probability, that was to be the New Road, but neither the grant nor the reservation was limited to the New Road. It might have been a different road (eg one 30 feet wide, or one taking a slightly different route over the retained land but the same route over the conveyed land), but the critical point is that it was a road to be built in future on the retained land and on the 1936 land, connecting with Ash Grove.

92. The reason why I have rejected the Claimant's argument is, ultimately, that the reservation is not expressed to be over the land identified as being the site of the proposed New Road: it is "over the said streets and roads aforesaid". The "said streets and roads aforesaid" are clearly a reference back to the same streets and roads to be built at a time in the future on the retained land (for the most part) but also on the land conveyed. Both parties clearly expected these roads to be built, and that process could be instigated at any time. When built, they would serve the vendors' and the purchaser's successors in title equally. Apart from the perpetuity problem, there was no serious issue about

development land being landlocked, such as might drive one to a different interpretation: there would either be give and take between the developers, or there would be a delay in building until the roads had been built. The commercial argument on which the Claimant relies therefore is insufficient to displace what I consider to be the clear meaning of the words used, in their factual context.

93. The validity principle cannot save the reservation (any more than the grant) unless there is a realistic rival interpretation. For the reasons that I have given, I do not consider the interpretation preferred by the Claimant or that favoured by the Judge to be a realistic interpretation. The parties – albeit mistaken as to the law – intended to grant and reserve rights over future roads. The Judge's preferred interpretation involves ignoring the words "such part of the said streets and roads aforesaid" (which refer back to the terms of the grant and indicate a part of the streets and roads there identified) and reading the reservation as if it said simply "streets or roads".

94. Had it been necessary to decide it, I would have held that the Judge was right to conclude in any event that the grass track – which on any view by February 1936 could not have been much of a track, and possibly only a line over the grass – was not a "street or road" within the meaning of the 1936 Conveyance. The words "street" and "road" are capable in law of having a wide meaning, and in a statutory context have a specific and sometimes wide meaning given to them, but in the context of the 1936 Conveyance they are used as ordinary words of the English language. What is contemplated is clearly something that is constructed, as the parties contemplated that new streets and roads would be "formed made and opened" across the estate, and the contingent obligations on the parties were to build the New Road to modern specification.

95. Accordingly, the Claimant's appeal against the declaration in para 1 of the Order must be dismissed.

The issues of interpretation of the 1937 Conveyance

96. I turn to the declaration in para 2 of the Order, which relates to the effect of the 1937 Conveyance.

97. The language of the two Conveyances is different, and the Judge was entitled to ask himself whether that difference required a different conclusion. The context was also different, in that the same parties had entered into the 1936 Conveyance previously, believing that they had created future rights of way over roads to be built on the retained land and the land conveyed.

98. Essentially the same question arises in relation to the right of way reserved to the vendor: was it a right immediately exercisable over part of the land conveyed, or was it only exercisable once the New Road had been built on the retained land?

99. Having (as he must have assumed) reserved a future but not immediate right to pass over the land conveyed in 1936, did the vendor have a reason and intend to extract a better right from Mr Moon by way of reservation in the 1937 Conveyance?

100. The terms of the right of way granted to the purchaser are identical to those of the 1936 Conveyance and so the purported grant is void.

101. The terms of the reservation do not, however, mirror the terms of the grant in the same way that the reservation in the 1936 Conveyance did: the right reserved is "over and along such part of the said proposed New Town Planning Road as is included in the plot of land hereby conveyed." The link with the "streets and roads aforesaid" to be built on the retained land as referred to in the terms of the grant is absent.

102. Mr Trompeter submitted that it is here clear that the right was over such part of the proposed New Road as was part of the plot conveyed, i.e. a reservation over the site of the proposed New Road, not over the road when built. The Judge accepted this argument.

103. In his written submissions, Mr Trompeter argued that the fact that the Judge had come to different conclusions as regards each of the Conveyances in issue indicated that something had gone wrong, as it could not have been the parties' intentions to reserve immediate rights to the vendor that could not be used if no equivalent rights were reserved over the 1936 parcel of land: the way to Ash Grove remained unavailable until the New Road was built. Ms Wicks argued that it would be illogical to reserve an immediate right that served no practical purpose, and that the reservation should therefore be interpreted in the same way as the reservation in the 1936 Conveyance.

104. I do not agree that something is necessarily shown to have gone wrong by the different conclusions that the Judge reached. In my judgment, the different wording of the 1937 reservation presents a different question of interpretation, which is what is meant, in context, by referring to a part of an identified proposed road as is included in the plot? The actual words need to be interpreted. What would have been logical to provide is not a substitute for that exercise.

105. Mr Trompeter naturally emphasises the words "proposed" and the present tense of the words "as is included" as justifying the Judge's conclusion that it was the site of the New Road, in so far as it formed part of the 1937 land, over which rights were reserved. What is different here is the absence of a link back to the "said streets and roads" over which rights are granted, to be built in future.

106. I am not however persuaded that the answer is driven by the use of the present tense to describe what is included in the plot. The usage is the same as in the 1936 Conveyance, save that instead of "said streets and roads" to be built in future there is a reference here to the proposed New Road, which is similarly to be built in future.

107. The argument based on commercial sense for the vendor to reserve immediate rights of access is necessarily less strong in the 1937 Conveyance than it was in the 1936 Conveyance, as there could be no immediate right to access Ash Drive over the 1936 land until the New Road was built. On the other hand, the mirroring of the rights granted is less marked in the 1937 Conveyance, so it cannot be inferred that a reservation equivalent to the grant is what was meant. The proposed New Road is identified on the plan annexed to the 1937 Conveyance (Plan 3), which supports the argument that a right of way was reserved over that part of it within the 1937 land.

108. The Judge concluded that the right was reserved, without any words denoting contingency, over the part of the land conveyed over which it was proposed to build the

New Road. It can of course be said that there is contingency implicit in the word "proposed", in that the New Road is acknowledged to be going to be built in future. The real question is whether the right is reserved over the land or over the road to be built.

109. In my judgment, there are genuinely two realistic interpretations of these words, given the difference and lack of reciprocity between the words of grant and the words of reservation. Reserving an immediate right of way over the 1937 land may have been of limited benefit, given that the vendor had only tried to reserve a future easement over the 1936 land, but it is impossible to know what further thoughts the draftsman or the parties might have had in the 18 months following the 1936 Conveyance, during which time Burras House and a substantial portion of the estate had been sold. In any event, it is evident that, in one respect at least, the parties did not achieve by the 1936 Conveyance what they intended to. As a result, the "pointless" argument is in my view of no great weight. The proper focus is on what the words mean.

110. The Judge obviously considered that an immediate reservation was not just a realistic interpretation but the correct one. I consider that it is a realistic interpretation though there is another interpretation that is equally persuasive. As there are two realistic interpretations, I should favour that which makes the reservation valid rather than void. Accordingly, I hold, in agreement with the Judge, that a right of way was reserved with immediate effect over the part of the 1937 land over which the New Road was to be built. I therefore dismiss the First, Second and Third Defendants' appeal against the interpretation of the 1937 Conveyance.

The effect of the 1946 Conveyance

111. By an assent dated 24 May 1939, the remaining executor assented to the remaining land of the estate vesting in himself and two others as trustees for sale ("the trustees"). This was or included the yellow land.

112. By a conveyance made on 31 December 1946 ("the 1946 Conveyance"), the trustees sold the yellow land to Marjorie Slack, the wife of the owner of Burras House. Mrs Slack had previously purchased the mauve land.

113. Being retained in the estate until 1939, the yellow land had obtained the benefit (such as it was) of any valid rights reserved by the vendors out of conveyances of earlier building plots, including the rights reserved by the 1937 Conveyance.

114. By the 1946 Conveyance, the yellow land, expressed to be bounded on the north by the middle line of the proposed New Town Planning Road, was conveyed to Mrs Slack:

> "TOGETHER with rights of way at all times and for all purposes over and along the whole width of Burras Drive leading into West Chevin Road when the same shall be made and until the whole of it is made along such portion of the same as is made and over and along the proposed new Town Planning Road if and when the same shall be made …"

The plan in the 1946 Conveyance shows that the land conveyed includes a significant stretch of the southern half of the New Road and two building plots, one on either side

of the intended enlarged Burras Drive that was to connect with the New Road. The plot to the east of Burras Drive is approximately opposite The Croft.

115. The land on which the enlarged Burras Drive was to be built was in part the blue land, conveyed to Mr Slack in August 1937, and in part the mauve land, conveyed to Mrs Slack in December 1938. Rights of way over the existing driveway were reserved out of the blue land.

116. The effect of s.62(1) of the 1925 Act is that, subject to the operation of subsection (4), all rights appurtenant to the yellow land, including rights over the New Road that were reserved to the vendors and then assented to the trustees, are deemed to be conveyed expressly with the yellow land, without being specifically recited in the parcels clause.

117. Section 62(4) provides:

> "This section applies only if and as far as a contrary intention is not expressed in the conveyance, and has effect subject to the terms of the conveyance and to the provisions therein contained."

118. The argument of the Defendants is that, on the true construction of the 1946 Conveyance, a contrary intention is apparent that s.62(1) shall not operate to vest the rights of way reserved out of the 1937 land in Mrs Slack. That is said to be because the 1946 Conveyance expressly grants a more limited right, namely one that only comes into effect once the New Road is built.

119. The express grant of a right of way over and along the New Road was either unnecessary – because reserved rights of way were already appurtenant to the yellow land – or it was to make a new grant over a different part of the New Road on land then retained by the trustees, where no right of way existed, or (as the Defendants contend) it was an express grant designed to limit the rights that the owners of the yellow land would otherwise enjoy.

120. When the mauve land was conveyed to Mrs Slack in 1938, rights of way were only granted over Burras Drive. No part of the New Road land was conveyed to Mrs Slack then.

121. It is not possible to say whether other land forming the site of the New Road, to the west, was retained by the trustees at the time of the 1946 Conveyance. Its plan records that land to the south west of the yellow land was then owned by Mr F A Marshall and others, but that is not conclusive as to whether the trustees retained other such land on the estate.

122. The question that arises under s.62(4) in these circumstances is whether, as a matter of interpretation of the 1946 Conveyance, the parties intended to exclude the operation of s.62(1) as regards rights over the New Road. The mere fact that a limited express grant is included in a conveyance does not without more mean that the effect of s.62(1) in relation to a wider right is excluded: Gregg v Richards [1926] 1 Ch 521; Snell & Prideaux Ltd v Dutton Mirrors Ltd [1995] 1 EGLR 259. The question is rather whether, on the true interpretation of the conveyance, the limited right was expressed for the purpose of excluding s.62(1). In the latter case, the Court of Appeal was able to conclude that the limited grant was included for a different purpose and was not meant impliedly to exclude the wider right, if it existed. In the former case, the Court of Appeal concluded only that,

in view of the express terms of the habendum, they could not conclude that the full effect of the statutory predecessor of s.62(1) was intended to be excluded.

123. A relevant question is whether there is, objectively, any reason why a vendor would wish to pass on with the land fewer rights than they themselves owned. This may be more likely where the vendor retains other land than when all that the vendor owns is being sold.

124. In my judgment, there is nevertheless insufficient material to conclude that the parties intended to exclude whatever rights the trustees had over the New Road land and could pass with the yellow land. It is clear that they intended Mrs Slack to have the right to use the whole of the New Road once it was built. That purported grant involved rights over far more than the 1937 land. Mrs Slack had not previously been granted rights over the New Road appurtenant to the mauve land, nor had Burras House when it was sold to her husband.

125. There is no obvious reason why any immediate rights that the trustees owned over parts of the New Road land would be excluded from the conveyance of land that itself included part of the land on which the New Road was to be built. The trustees could not themselves make use of the New Road until it was built, and there is no indication that the trustees were intending to build it. Mrs Slack had the right to use the adjoining stretch of the land for the New Road because she was the owner of it. The Defendants argued that the rights under the 1937 Conveyance were not being used – which can be assumed to be correct, as they are still not being used – and that there was therefore no access to Ash Grove. That is true, but it is not a reason positively to detach rights from land being sold.

126. The Defendants further argued that there were good estate management reasons for preventing Mrs Slack from passing over The Croft and Ghyllbrook. However, what these reasons were, and why the trustees remained interested in estate management at that stage, was not explained. The considerable majority of the former estate had been sold by that time.

127. I am therefore not persuaded that the express grant of a future right over all the New Road was meant to take away any existing right to use a part of that land. I conclude that the grant of a future right of way over the New Road was intended to grant expressly to the yellow land full rights over all the New Road, so as to include any parts of the intended route (nearest West Chevin Road) that were still retained by the trustees. Given that the Slacks had received no previous grant of a right to use the New Road, it seems credible that Mrs Slack, having acquired the yellow land that included part of the route, would have stipulated for an express grant of rights (for what it was worth).

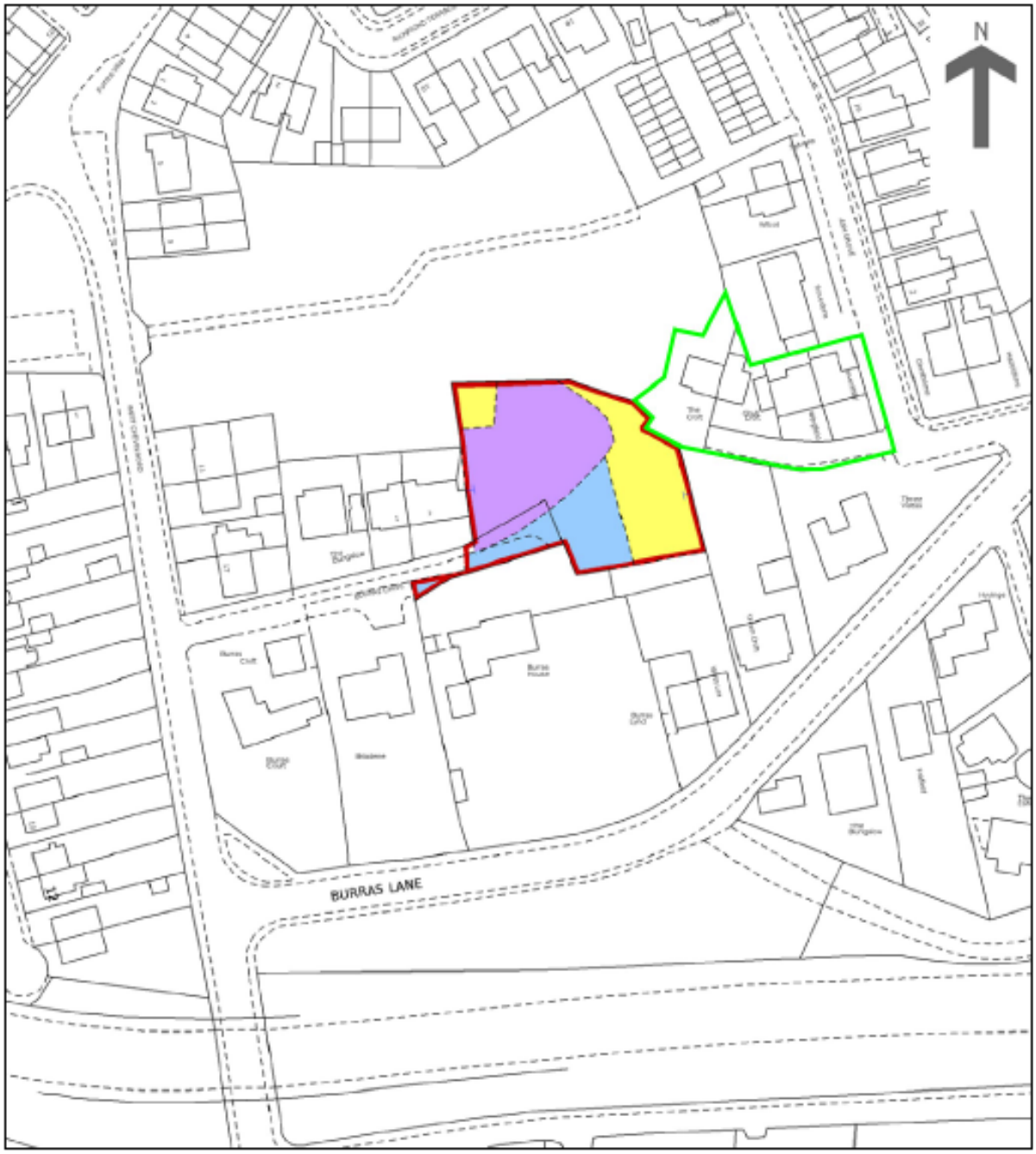
128. In any event, given that the future grant was void for perpetuity and of no effect, it is not appropriate to construe the 1946 Conveyance as the replacement of existing rights with a different, invalid future right.

129. I therefore reject the appeal against the Judge's conclusion on this ground too.

130. The appeal of the Defendants against para (2) of the Order is dismissed.

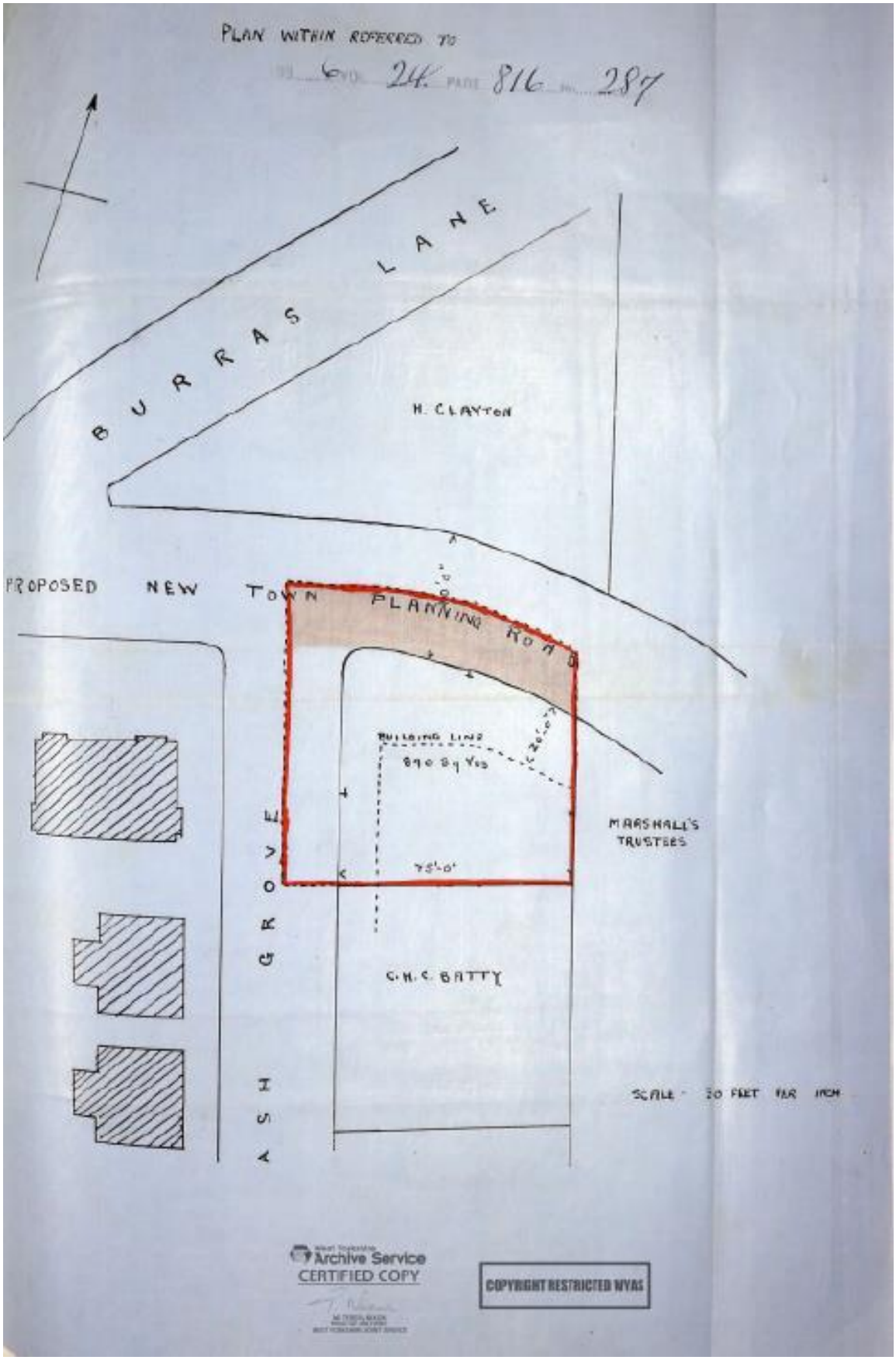
Plan 1

…



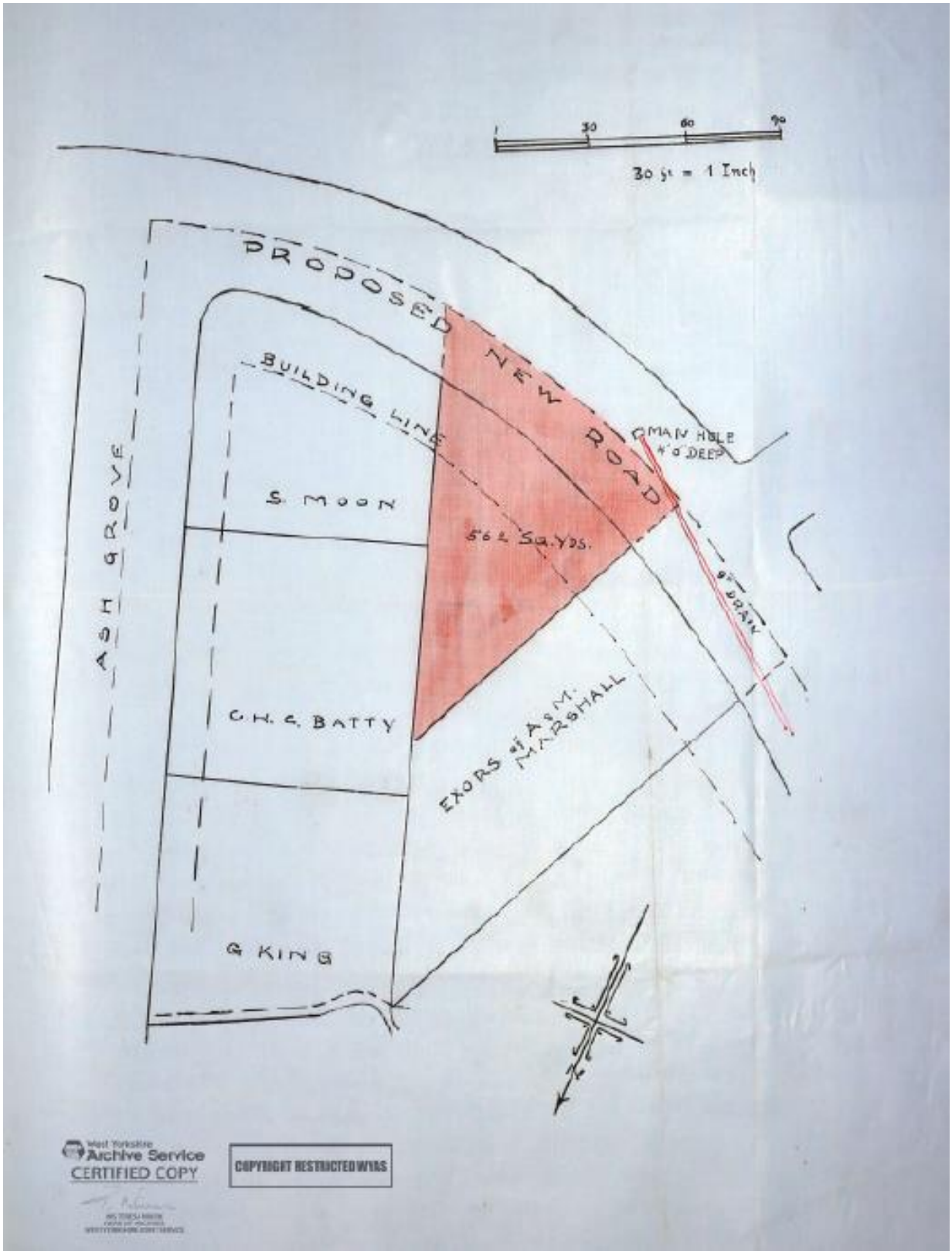
Plan 2

(note: North mark on this plan is incorrect – Plan 3 shows correct direction)



Plan 3

…


30 60 90
30 ft = 1 Inch
PROPOSED NEW ROAD
BUILDING LINE
MAN HOLE 4'0 DEEP
ASH GROVE
S. MOON
5'6 L. SQ. YDS.
9" DRAIN
C.H.C. BATTY
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