Neutral Citation Number: [2005] EWHC 1691 (Ch)

Case No: HC05C00938

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27 July 2005

Before :

THE VICE CHANCELLOR

- -

Between :

THE MAYOR AND COMMONALTY AND CITIZENS OF THE CITY OF LONDON (1)

THE WARDENS AND COMMONALTY OF THE MYSTERY OF MERCERS IN THE CITY OF LONDON — **Claimants**

- and -

INTERCEDE 1765 LIMITED (1)
INTERCEDE 1766 LIMITED (2) — **Defendants**

- -
- -

Hazel Williamson QC (instructed by **Herbert Smith**) for the **Claimants**
Paul Morgan QC (instructed by **Mayer Brown Rowe & Maw**) for the **Defendants**

Hearing dates: 20th, 21st and 22nd July 2005

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE VICE CHANCELLOR

The Vice Chancellor :

Introduction

1. The Royal Exchange is a well known grade I listed building on the north side of Cornhill in the City of London. The claimants, the Corporation of London and the Mercers Company, are the trustees of the Gresham Trust and, in that capacity, the registered proprietors of the Royal Exchange under Title No: NGL 621884. Opposite the Royal Exchange on the south side of Cornhill there was built in the period 1927 to 1930 the head office of Lloyds Bank, of which the address was Nos 15 to 22 Cornhill ("the Lloyds Building"). On 24th October 1928 the claimants and Lloyds Bank Ltd executed a Deed ("the Deed") relating to the height of their respective buildings. In essence it restricted the permissible height of buildings then or thereafter built on the parties' respective sites by reference to the drawing attached to the Deed and reproduced in the appendix to this judgment.

2. In May 2002 IVG Asticus Real Estate Ltd ("IVG") acquired the Lloyds Building, then a grade II listed building, from Lloyds Bank plc, and procured the freehold title to the same to be registered in the names of the defendants, two of its subsidiary companies under Title No: NGL 809337. IVG intended to develop the same together with certain adjacent sites it had acquired from others, namely 70-77 Lombard Street, 13-14 Cornhill and 78 Lombard Street. Its original development plans were superseded by others in consequence of the relisting of the Lloyds Building in August 2003 as Grade II*. Thus it was not until March 2004 that the plans for which IVG obtained planning permission and Listed Building Consent in August 2004 were submitted to the relevant authorities. The buildings for which such permission was granted would, at various points, be higher than what was then thought by all concerned to be permitted by the Deed.

3. In February 2004 contact between the representatives of the claimants and of IVG was established. In due course this led to negotiations between them to ascertain how much the claimants would accept as the price for a modification of the Deed so as to enable the development plans of IVG to proceed unaltered. In June 2004 IVG started certain preliminary works. In October 2004 demolition work began. Negotiations as to the price for the claimants' consent effectively broke down in November 2004 but the building work proceeded unabated. In December 2004 IVG obtained the advice of counsel as to the proper interpretation of the Deed. In January 2005, in consequence of that advice, IVG claimed for the first time that its plans would not, if implemented, infringe the height restriction imposed by the Deed. The claimants then sought further advice too but, in the light of that advice, persisted in their contention as to the true interpretation of the Deed.

4. After a good deal of inter-solicitor correspondence and at least one meeting the Part 8 Claim now before me was commenced by the claimants on 15th April 2005. They seek declarations that (1) on the true interpretation of the Deed IVG is not entitled to erect any building to a height of more than 108'3" and (2) completion of the scheme of works in accordance with the plans for which IVG obtained planning permission would entail the construction of a building in excess of that limit. It is not disputed that if the Deed is to be interpreted as the claimants contend then the development for which IVG obtained planning permission will infringe the height limit thereby imposed. IVG contends that such limit impedes the reasonable use of Nos 15 to 22

Cornhill for public or private purposes and that its discharge or modification would not injure any person entitled to the restriction. Accordingly, on 27th May 2005 IVG issued an application in the Lands Tribunal under s.84(1)(aa) and (c) Law of Property Act 1925 (as amended) seeking an order modifying the provisions of the Deed so as to enable it to complete its intended development. On 13th July IVG applied in this action for a stay of all further proceedings pending the determination of its application by the Lands Tribunal.

5. IVG also claims that even if it is wrong on the true interpretation of the Deed and even if the Lands Tribunal refuses to modify the Deed the claimants should not be granted any injunctive relief. In essence the contention is that damages in the measure now recognised by the decision of the House of Lords in **A-G v Blake** [2001] AC 268 is an adequate remedy to the claimants because, as the conduct of their representative throughout the negotiations made clear, the claimants seek money not an alteration to IVG's proposed buildings.

6. Accordingly the issues for my determination are:

   (1) what, on the true construction of the Deed, is the height limit it imposes?
   (2) if that limit is 108'3" as the claimants contend what (if any) injunction should I grant in the light of (i) IVG's application to the Lands Tribunal and (ii) the conduct of the parties?

Though the first issue lies in a narrow compass I need to set out the facts in more detail and make certain findings of fact lest, if I reject the claimants' case on interpretation, a higher court subsequently takes a different view.

The Facts

7. The evidence included witness statements from four witnesses, one for the claimants and three for IVG. Each of them was cross-examined. The witness for the claimants was Mr Michael Soames, a chartered surveyor of considerable experience. He is, and since June 2003 has been, the surveyor to the Joint Grand Gresham Committee, made up of appointees of the Corporation and the Mercers Company to administer the property subject to the trusts of the will of the late Sir Thomas Gresham. As such Mr Soames is responsible for the management of the Royal Exchange. As he explained, the Royal Exchange is let on a variety of leases some for office use and others for retail purposes until at the earliest 2115. The claimants nevertheless enjoy a present interest and concern in the Royal Exchange as they are entitled to a percentage of the rents received by the head lessee. Mr Soames conducted all the negotiations with IVG on behalf of the claimants and his evidence was directed to explaining and amplifying what the correspondence shows.

8. The witnesses for IVG were Mr David Gibson, the managing director of the relevant IVG subsidiary, Mr Matthew Mason, the project director employed by IVG, and Mr Peter Inskip, the projects director employed by Buro Four Project Services the Project Managers retained by IVG. The evidence of Mr Inskip was directed to the course of the construction of the Lloyds Building in the 1920s, as shown by the product of his researches, in order to ascertain the stage it had reached when the Deed was executed on 24th October 1928. Counsel for the claimants objected to paragraphs 23 to 29 of

his witness statement on the grounds that it contained expressions of opinion rather than statements of fact and no permission to adduce expert evidence had been obtained by IVG. I upheld this objection and, in the event, Mr Inskip did not verify these paragraphs. I have incorporated the material parts of the rest of his evidence in my account of the facts which follows. There was little (if any) conflict of fact between the evidence of Mr Soames on the one hand and of Mr Gibson and Mr Mason on the other. It is necessary for me to draw certain inferences from the facts and the evidence of those individuals and I will do so in the course of my account of the facts. Whilst I may not accept without qualification all that I was told I do not believe that any of the witnesses set out to mislead me; but where there is a conflict between the oral evidence and a contemporary document, save where I have stated the contrary, I prefer the evidence of the contemporary document.

9. In 1927 the buildings then standing on Nos 15 to 22 Cornhill, which had been erected in 1887, were demolished. They included substantial chimney structures to a height well in excess of 108'3". Similarly the tower on the Royal Exchange erected in 1844 was higher than 108'3". The Lloyds Building was constructed by Trollope & Colls Ltd in accordance with the design of joint architects Sir John Burnet and Partners and Campbell Jones Sons and Smithers. At that time s.47 London Building Act 1894 imposed a height restriction on new buildings of 80 feet (exclusive of two storeys in the roof) but LCC might allow higher buildings to be erected. The building contract was concluded in June 1926. Demolition of the existing buildings then started. Unfortunately an adjoining building was undermined in the process, causing a partial collapse. The construction works were interrupted and not resumed until 1927.

10. It is apparent from a minute of a committee of Lloyds Bank dated 4th March 1927 that there had been disputes with both Commercial Union as to the height of the proposed building and with the owners of the Royal Exchange in relation to an alleged infringement of rights to light. It is not possible to determine the exact point in the construction of the Lloyds Bank Head Office building reached by October 1928. It is unnecessary to do so as it is common ground that the extent of the plans and the proposed height of the building would be well known to both parties at the time the Deed was executed. It must be assumed that if and to the extent that the consent of LCC under s.47 London Building Act 1894 was required it had been obtained. The Lloyds Building was handed over to Lloyds Bank Ltd on completion of the works in July 1930. As constructed it included two towers, at the east and west ends of the building. The height of the building including those towers exceeded 108'3" by a little over 6'.

11. I shall refer to the Deed in more detail later when considering the issue of its construction. At this stage it is sufficient to note four features. First, clause 1 authorised the claimants

> "at any time hereafter to raise their building The Royal Exchange aforesaid or to erect any new building or buildings at any time hereafter on the site of their said building or on any part thereof to a height not exceeding the height indicated by the green color [sic] on the said drawing and in accordance therewith..."

Second, clause 2 authorised Lloyds Bank Ltd

> "at any time to erect their proposed new building and any other new building or buildings at any time hereafter on the site of Nos 15 to 22 inclusive Cornhill aforesaid or on any part thereof to a height not exceeding the height indicated by the red color [sic] on the said drawing and in accordance therewith..."

Third, clause 4 contained a mutual covenant that the respective parties

> "will not at any time hereafter build heighten alter reconstruct or rebuild their respective buildings so as in any way to contravene the provisions hereof as regards heights shown on the said drawing."

Fourth, the drawing attached to the Deed and reproduced in the appendix to this judgment is headed 'Diagram of heights between Lloyds Bank Ltd & Royal Exchange'. It shows only the facades of the two buildings. It specifies two heights, namely 80' to the pediment and 108'3" to the top of the façade and one angle, namely 75° from the outside edge of the pediment to the top of the façade. The drawing also includes a line, described in relation to the Lloyds Bank Head Office building as 'building line' proceeding vertically from the ground to the base of the pediment and then at the specified angle to the top of the façade. The colours green and red are applied to what I take to be all the stone or brick work of the respective buildings, but in the case of the Royal Exchange in relation to a notional building.

12. Until IVG obtained the advice of counsel in December 2004 Mr Soames, Mr Gibson and Mr Mason all considered that the restriction imposed by the Deed was an absolute restriction on building above 108'3" on any part of Nos 15 to 22 Cornhill. I have little doubt but that it was on that understanding that IVG acquired the site in May 2002. By then Mr Soames and Mr Gibson were well known to each other from other development projects with which they had been concerned since 1999. In late 2003 Mr Soames approached Mr Gibson to ascertain from him the plans of IVG for the Lloyds Building. The principal concern of Mr Soames was to ascertain whether the Lloyds Building contained space which could be used as a livery hall by the Mercers Company.

13. Mr Soames and Mr Gibson met for lunch on 9th February 2004. They looked round the Lloyds Building first. Mr Gibson outlined the plans IVG had in mind both then and during lunch including the construction of two extra floors. He pointed out that there were some rights of light and other related issues he would have to discuss with the claimants in due course but did not mention the Deed specifically. On 31st March 2004 IVG submitted its application for planning permission and listed building consent for its revised plans. On 27th April 2004 the rights to light consultants retained by IVG wrote to Mr Mason suggesting that she needed to open discussions

with the claimants sooner rather than later as such matters could lead to protracted discussion. He also informed him that in respect of the earlier plans the surveyor then employed by the claimants, Mr Kennard, had been prepared to advise them to accept a payment of £50,000, not on the basis of any residual valuation but as the price of their consent.

14. On 16th June 2004 Mr Mason wrote to Mr Soames suggesting a meeting between Mr Gibson and himself and Mr Soames. He enclosed with his letter a pre-Planning Design Report, pointed out the existence of the Deed and set out a brief history of the earlier negotiations between the Mercers Company and IVG. On 18th June 2004 Mr Soames acknowledged receipt of the pre-Planning Design Report. He did not read it but filed it. At about that time IVG commenced certain preliminary works.

15. The meeting between Mr Gibson, Mr Mason and Mr Soames took place on 9th August 2004. By then the respective rights to light consultants had examined the Deed and plotted the profile of IVG's proposed new building so as to ascertain that it would exceed 108'3" in height. Also it was clear that planning permission and listed building consent would be forthcoming. The meeting took place over lunch. Mr Gibson told Mr Soames of the impending grant of planning permission in accordance with the plans sent by Mr Mason with his letter of 16th June 2004 and of IVG's intention to commence the redevelopment works in October 2004. They discussed the area of the site affected by the Deed, about 40% of the whole, and the development value attributable to the two extra floors. The focus of the discussion was the amount to be paid to the claimants to secure their consent to a modification of the Deed so as to permit the development in accordance with the plans. Mr Soames suggested that a development value calculation be made.

16. On 11th August 2004 Mr Mason wrote to Mr Soames confirming the grant of planning and listed building consent and the intention to start the redevelopment in October 2004. After referring to certain other matters Mr Mason wrote:

> "As you will be aware the deed is relevant to circa 40% of the additional floors, their 100% net area being 12,000 and 10,000 sq ft respectively. You indicated at our meeting that a compensation figure based on the development value of these floors would be your intended route to resolve the deed/new floors clash.
>
> I have been through the figures in terms of development value, which are affected by both the comparatively high costs of construction and development overage payment to Lloyd's TSB, the net effect of which is a total cost of £16.5m, just for these two floors.
>
> Taking these figures into account, the effect of current market rents and yields gives a negative development value.
>
> Clearly we would not undertake this work if that was the case, and we have taken a view on where we may expect to be as of 2007. However, this still only gives a value of circa £750k in total for all of both floors, and of course is based on an

> improving market, which therefore has a large element of risk attached to it.
>
> The sum of £50k previously agreed with the JGGC some years ago, does not therefore look out of place as a percentage split figure of the above. However, on the basis of agreeing a quick and relatively 'consultant cost free' settlement, I confirm that we are willing, subject to heads of terms and contract to offer £120,000 to buy-out the 1928 deed."

17. On 16th August 2004 Mr Soames replied:

> "Thank you for your statement in relation to the figures. You have the advantage of me in that you have looked at the figures in terms of development value, but you have not provided me with any of the detailed breakdown. I will clearly need this.
>
> If my understanding of your letter is correct, the amount of floor area that you are able to take advantage of by renegotiating the deed is 8,800 square feet.
>
> I would be grateful if you could please supply me with plans and sections showing the effect of the development both with and without the deed and also provide me with calculations of the net and gross areas.
>
> Once I have this information, I would be better able to consider your proposal."

18. On 26th August 2004 Mr Mason replied, so far as relevant in the following terms:

> "I enclose a set of our planning drawings and area schedules to which our development appraisal is based.
>
> For the purposes of agreeing a figure with yourselves we have tried to keep the development value calculation of these floors as simple as possible, and therefore have taken the view, for the time being, that the area not affected by the deed would be used for plant in any "with the deed scheme". As a result the £750k is based on the total NIA of 22,690 sq ft. You will however see from the attached deed drawing the actual area affected by the deed is relatively small.
>
> Similarly our costs of £16.5m are also based on the total cost of the additional floors and are broadly broken down as follows:
>
> £'m

- Lloyds Development Payment 3.1
- Construction Cost 8.7
- Consultancy Fees 1.8
- Marketing, Letting and Contingency 0.5
- Finance of selling costs 2.4

Total 16.5m

> Again these are simplified costs and for example, do not take into consideration the additional planning/holding costs caused by our prolonged planning period created by these additional floors.
>
> I trust the above give you the information you require."

19. In his oral evidence Mr Soames described these details as useless. He considered that Mr Mason's letter was 'a bland fob-off'. He explained, and I accept, that a residual valuation to ascertain the development gain to be derived from an extra two floors can vary widely according to the assumptions made. He wanted to know what assumptions Mr Mason had made and to see his calculations. Notwithstanding the request in Mr Soames' letter of 16th August 2004 Mr Mason had not provided them.

20. Mr Soames did not reply, notwithstanding telephone messages left for him by Mr Mason. Mr Mason wrote again on 8th October 2004 enquiring if Mr Soames had yet considered IVG's offer. Mr Soames replied on 11th October 2004:

> "Given the information that was contained in your letter, I suppose I was rendered speechless by the fact that the decision on whether to build the extra floors was only worth what you offered.
>
> Perhaps you might like to have another look at your figures!"

21. The response of Mr Mason on 22nd October 2004 was to confirm that he had checked his figures and that they were correct. He added:

> "Notwithstanding the above, our offer was made on the basis of a quick agreement, so perhaps you would like to review it anyway and suggest an alternative figure?"

22. The position at that time was that demolition work had just started. As Mr Mason described it, this was the point of no return because the commencement of the demolition gave rise to an obligation as a result of the conditions attached to the grant of planning permission to construct the new building in accordance with the plans.

Mr Mason and Mr Gibson were confident that agreement would be reached because Mr Soames had indicated that his clients did not object to the plans for two extra floors as such but sought a share of the consequential development gain as the price for their consent. For his part Mr Soames assumed that if no agreement as to price was reached then as responsible developers IVG would amend their plans to reduce the height of the new buildings so as to conform with the requirements of the Deed.

23. There was no further communication between Mr Mason and Mr Gibson on the one hand and Mr Soames on the other until 14th January 2005. On that date Mr Mason wrote to Mr Soames to indicate that IVG had taken further advice. He continued:

> "The advice we have received confirms that the deed refers only to the facades of the buildings on Cornhill, a point reinforced by the Royal Exchange Tower which exceeds the height of the 'permitted' facades. As you will note from our scheme drawings our new element is stepped in well beyond these elevations and within the 75° line shown.
>
> In any event, we have also been advised that the provisions of the Deed should be modified, and in this context we are proceeding with our development. I hope to forward details of the appropriate modifications, during the course of next week."

Mr Mason agreed in cross-examination that the letter was not accurate in that it suggested that the advice received was a good deal more certain than it was in fact.

24. On 4th February 2005 Mr Mason sent to Mr Soames the modifications to the Deed suggested by IVG. Broadly they give effect to the construction of the Deed preferred by counsel instructed by IVG. On 7th February 2005 Mr Soames noted that IVG had begun to scaffold the Lloyds Bank building. This indicated to him that the development had started. It was suggested to Mr Soames that he must have been aware that the development had started in about October 2004 because of the erection of hoardings. He denied it and I accept his denial. It was not until he saw the scaffolding going up that he had reason to believe that the development had started. His attitude was that no responsible developer would have started the development without either agreeing so important a matter as the height of the new building or amending the plans so as to reduce the height.

25. Unknown to Mr Soames, Mr Gibson and Mr Mason did not share that view. To them all that was required was to ascertain, as they had done, that Mr Soames, on behalf of the claimants was looking to agree the price not to secure a reduction in height. As Mr Mason put it "Eventually people do agree – they have to". Mr Gibson and Mr Mason did not change their plans or slow down the development. It was suggested to them that they were seeking to minimise the risk of an injunction against IVG by completing as much of the development as they could before objection was taken. I do not accept that they speeded up the development or deliberately concealed their progress from Mr Soames but I am surprised that in encouraging him to reach agreement Mr Mason did not in his letters dated 8th and 22nd October 2004 or otherwise point out that the redevelopment had started and expenditure was being

incurred which might be wasted if the height of the building had to be reduced later. Mr Gibson and Mr Mason believed that the further the development had progressed when objection was eventually taken the less the risk of an injunction being granted to inhibit its continuation.

26. In my view Mr Soames, Mr Gibson and Mr Mason are all experienced property professionals. Each believed that the other would move first and propose a figure to be paid to the claimants as the price of their consent if the plans to build above 108'3" proceeded. But they were too far apart. Mr Soames thought, in the absence of the details he sought from Mr Mason, that the figure should be £2m to £3m. Mr Gibson and Mr Mason considered that the maximum development gain was £550,000. So it was that this dispute ended up in court.

27. On 15th February 2005 solicitors were instructed on behalf of the claimants. They asked for a copy of counsel's opinion, for details of the proposed works and confirmation that they would not impinge on the rights of the claimants under the Deed. The solicitors for IVG refused to give such confirmation and failed to comply with the request to supply a copy of counsel's opinion until 8th March 2005. The solicitors for the claimants repeated their requests for details of the works on 22nd February and 2nd March. On 8th March 2005 the solicitors for IVG merely referred those for the claimants to the earlier correspondence and the planning permission. The solicitors for the claimants repeated their request for details of the proposed works on 16th and 18th March. They considered that there was uncertainty as to what the proposals were. The response of the solicitors for IVG sent on 23rd March 2005 was to deny that there was any uncertainty. A meeting between the parties and their solicitors took place on 7th April 2005 but there was no resolution of the dispute.

28. At one stage it was suggested by IVG that the claimants had delayed unduly before commencing these proceedings on 15th April 2005. I reject that suggestion. For the reasons already given I do not accept that Mr Soames knew before February 2005 that the development had commenced and was proceeding. After that date the delay was, in my judgment, caused by the failure of IVG through its solicitors promptly to provide the information reasonably requested by the claimants' solicitors.

29. In his second witness statement Mr Mason set out details of what he contends would be wasted expenditure if an injunction, as sought by the claimants, is granted now. It was suggested to him in cross-examination that the figures are overstated. It was also suggested that the wasted expenditure, if any, was caused by the failure of IVG to reach agreement with Mr Soames before embarking on the development.

30. I accept both suggestions. It is clear that the alleged wasted expenditure is but an apportioned part of the whole. IVG did not enter into a single building contract but are carrying out the development through a construction management contract with separate contracts for separate parts of the development. Accordingly the justification for apportionment of total expenditure to date is not demonstrated. The only commitment to date which might have to be altered if an injunction is granted is the steelwork and stonework ordered in October 2004. To the extent that it is for use for building above 108'3" cancellation charges might be payable.

31. Mr Gibson and Mr Mason accepted that to proceed with the demolition in October 2004 without having secured the agreement of Mr Soames as the price to be paid for the consent of the claimants to the height restriction being exceeded involved a risk.

In their evidence they sought to minimise it. The fact remains that they took it with their eyes open. In my judgment they must now accept the consequences. Such expenditure as may be wasted is the consequence of their conduct. Such hardship as may result is self-induced.

Construction of the Deed

32. The Deed contains a number of recitals as to the title and interest of the parties. They refer to the drawing "hereto annexed" and the fact that such drawing shows part of the Royal Exchange and part of the proposed new building to be erected by Lloyds. The last recital records that the parties

> "have agreed to enter into this Deed relating to the height of their said respective buildings and to any future buildings to be erected on the site of the [Royal Exchange]"

33. I have already set out in paragraph 11 above the relevant parts of the body of the Deed. The drawing is set out in the appendix to this judgment and is of crucial importance to the question of construction. The legend indicates that it was prepared by Campbell Jones Sons and Smithers and is to a scale of 1/8th of an inch to 1 foot. The left hand third is a plan showing Cornhill with the façade of the Royal Exchange to the north and 15 to 22 Cornhill and the proposed Lloyds Bank building to the south. It indicates the position of sections A-A and B-B as depicted in the middle and right hand thirds of the drawing respectively. In each part the Royal Exchange is shown coloured black. Coloured green in the two sections is the profile of the permitted new building on the Royal Exchange site. Coloured red in the two sections is the profile of the proposed new Lloyds Building.

34. Counsel for the claimants points out that the limit on height is that "indicated by the red color". She points to the top of the proposed new Lloyds Building where it is coloured red. That she submits is the height limit which, for convenience, is shown to be 108'3" by the vertical line showing that measurement. She suggests that the drawing was not specially drawn for the purpose of the Deed but was taken from one of the many architect's drawings which must have been available at the time. She referred me to other such drawings which also showed the angle 75° and submitted that it had nothing to do with the height restriction because the angled line is not coloured. She pointed out that the restriction applied to any building on the site of 15 to 22 Cornhill, not just its façade.

35. Counsel for IVG disputed this construction on a number of bases. First, he points out, the drawing gives no indication as to the area of the sites of the Royal Exchange or Nos 15 to 22 Cornhill. If the height limit is to be imposed on the whole of those sites where on the drawing can they be found? Second, clauses 1 and 2 of the Deed require that the new buildings should be built

> "...to a height not exceeding the height indicated by the [green][red] color on the said drawing **and** in accordance therewith..."[emphasis added]

Counsel for IVG submits that the building must be comply with all the information relating to height to be deduced from the drawing. Third he relies on the fact that the angled line is described, in the case of the Lloyds Bank building, as the building line with an exception permitted for section X-X at fifth floor level. Fourth, he points out that if the permitted height for the site of the Lloyds Building was, in effect, a horizontal line it is surprising that it is not shown, whether coloured on not. Finally, counsel for IVG points out that the construction of the towers on the Lloyds Building were permitted by the height restriction he contends for but would have infringed that for which the claimants argue.

36. I prefer the arguments of counsel for IVG. I start with drawing. First, the legend suggests that it was produced by the architect for the purpose of the Deed. No doubt parts of it were derived from pre-existing drawings. It is not to be supposed that it included a lot of irrelevant detail, such as the angle 75° and the building line, or omitted matters of importance, such as the areas of the affected sites, in the ascertainment of the height restriction. Accordingly I consider that the inclusion of "the building line" and the 75° angle must have been intended to have some bearing on the problem. Similarly the omission of any indication of the extent of the sites is inconsistent with a uniform horizontal restriction on height.

37. Second, if it had been intended to impose a uniform horizontal restriction on height of 108'3" across the whole of the site why use a drawing at all? It could have been simply imposed in words such as those to be found in s.47 London Building Act 1894. But if it had been thought to be desirable to use a drawing why not depict on it the horizontal line intended at 108'3"? And if the height restriction was intended to be shown by the colours red and green only why use such colours to depict parts of the respective buildings which have no relevance to height at all?

38. Third, clauses 1 and 2 of the Deed clearly impose an obligation to erect new buildings "in accordance with the drawing" as well as "to a height not exceeding..". The former words, as well as the latter, are part of "the provisions hereof as regards height shown on the said drawing" for the purposes of clause 4. Thus it was envisaged that all the parameters indicated on the drawing and relevant to height would be observed.

39. Fourth, the towers incorporated into the Lloyds Bank building exceeded 108'3". If the construction advanced by the claimants is correct then the building then under construction would have infringed the newly imposed restriction. It would be surprising if the parties had intended to impose a height restriction inconsistent with the erection of the building then in progress. The court should avoid such a conclusion if it reasonably can.

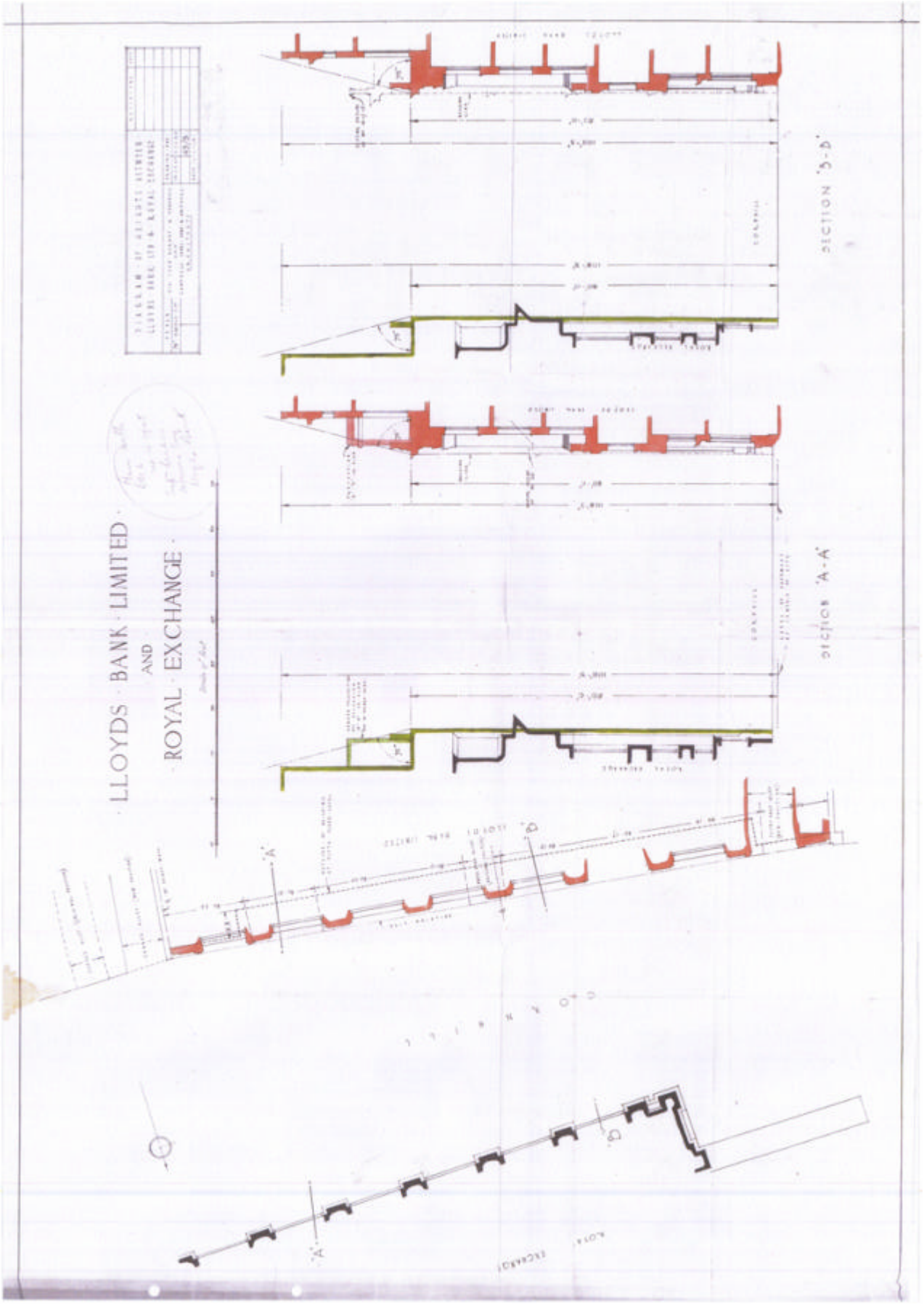
40. Fifth, the Deed and the drawing have to be construed as a whole giving appropriate weight to each part of each of them. In my judgment the construction advanced by IVG does so. That contended for by the claimants does not in that it ignores significant parts of the information conveyed in the drawing by the building line and angle of 75°. Similarly it ignores the additional requirement imposed by clauses 1, 2 and 4 for the erection of the buildings in accordance with the drawings as a whole and not just in accordance with the colouring.

41. Sixthly, it is not uncommon to impose a height restriction otherwise than over a uniform horizontal plane. Thus greater heights are often acceptable if they are stepped back from the frontage. In such a case what is needed is the specification of the angle and the point at which it is to be applied. That is exactly what the angle from the vertical drawn at the level of the pediment does. It permits higher buildings the further away from the frontage the relevant part is. Given the steepness of the angle it is not necessary to depict the depth of the site. Hence there is no indication of the depth of 15 to 22 Cornhill for it was not necessary to do so.

42. For all these reasons I accept the construction advanced by IVG and reject that for which the claimants contend. It is common ground that in that event the development proposed by IVG is not in breach of any height restriction imposed by the Deed. Accordingly I dismiss this action.

43. In the event the questions of what if any injunction to grant and whether to stay this action pending a determination of the Lands Tribunal do not arise.

APPENDIX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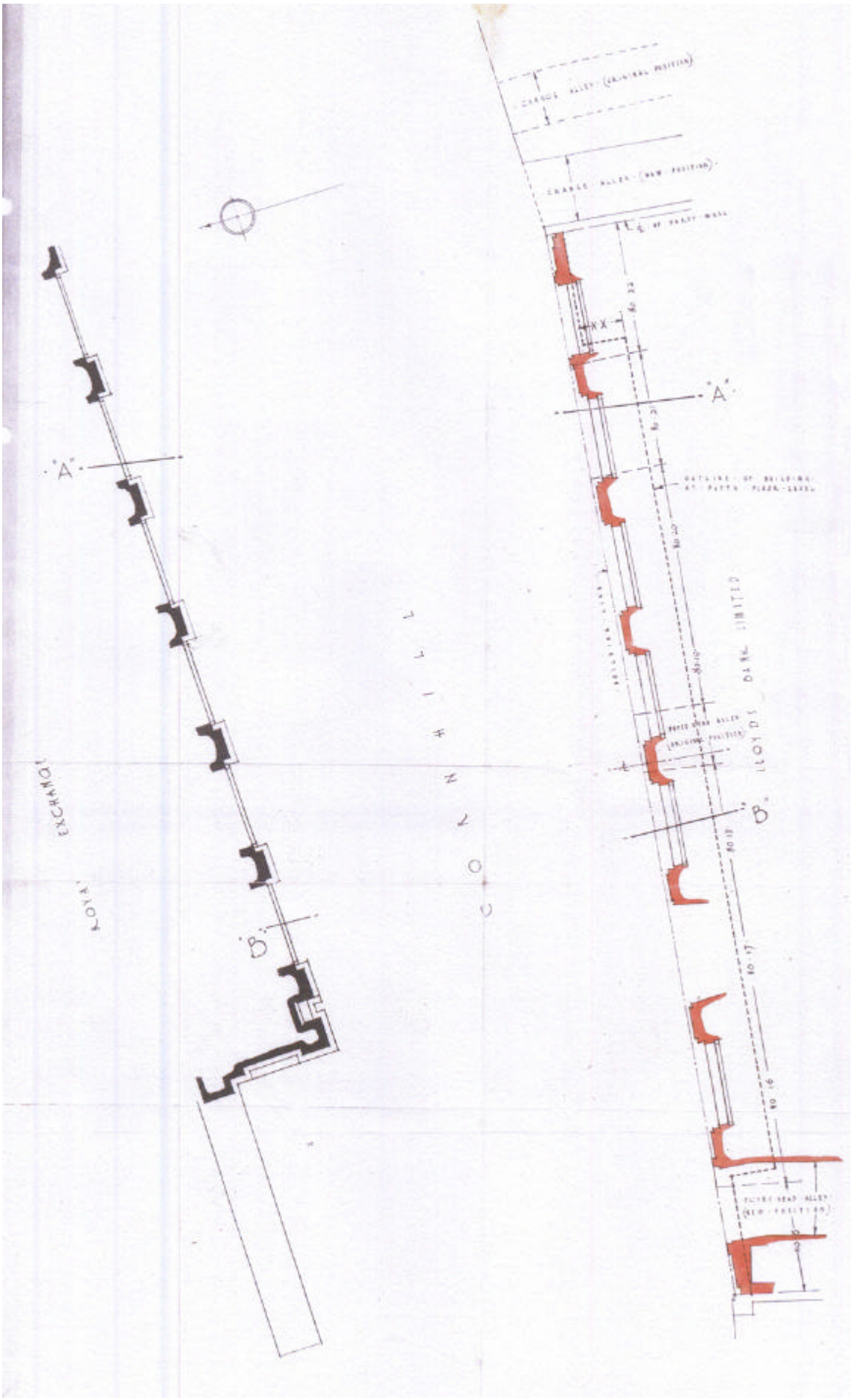
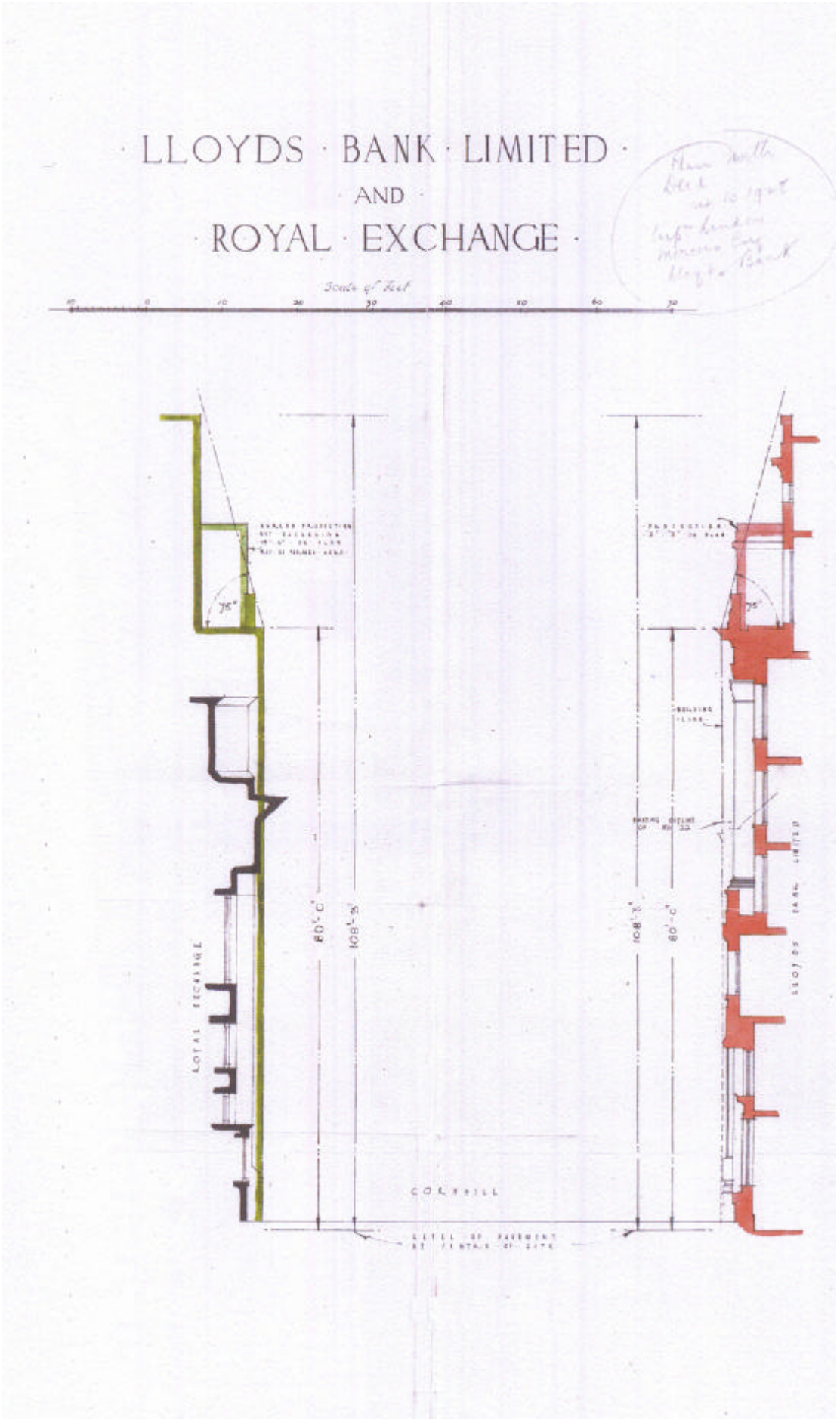
AND
ROYAL EXCHANGE
SECTION 'B-B'
SECTION 'A-A'


"A"
"B"
"A"
"B"
LLOYD'S


LLOYDS · BANK · LIMITED ·
AND
· ROYAL · EXCHANGE ·
Scale of Feet
80'-0"
108'-3"
75°
CORNHILL

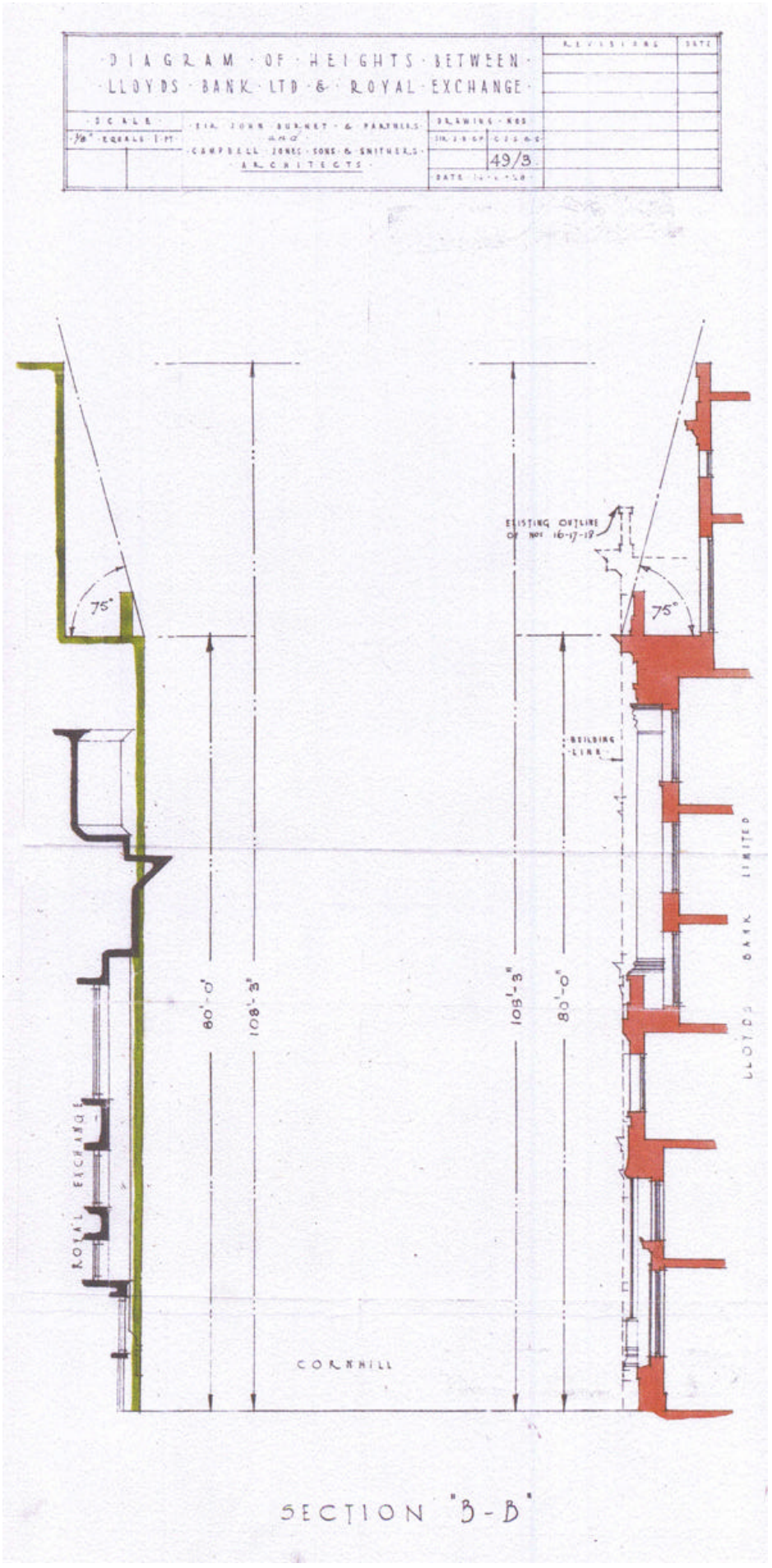


DIAGRAM OF HEIGHTS BETWEEN
LLOYDS BANK LTD & ROYAL EXCHANGE
SCALE
1/8" EQUALS 1'-0"
SIR JOHN BURNET & PARTNERS
AND
CAMPBELL JONES SONS & SMITHERS
ARCHITECTS
DRAWING NOS
49/3
REVISIONS
DATE
EXISTING OUTLINE OF NOS 16-17-18
75°
75°
BUILDING LINE
80'-0"
108'-3"
108'-3"
80'-0"
ROYAL EXCHANGE
CORNHILL
LLOYDS BANK LIMITED
SECTION "B-B"