# THE QUBE, 90 WHITFIELD STREET W1T 4EZ

## STATEMENT IN SUPPORT OF APPLICATION FOR CERTIFICATE OF PROPOSED LAWFUL DEVELOPMENT

1. **Introduction**
2. The Qube is a predominantly B1 office building abutting Whitfield Street, Maple Street and Tottenham Court Road. There are retail units fronting Tottenham Court Road.
3. This application relates solely to the roof space as edged in red on the location plan.
4. **The proposals**
5. Plan P40, is an existing roof plan and plan P41 shows the area in which it is proposed to install some PV panels. It will be seen that this is an "L" shaped area set in from the edge of the building. Drawing P42 shows existing elevations and drawing P43 shows proposed elevations. There is no discernible difference between the two. P43 also shows the PV solar panel mounted on a console mounting system. It is intended that these will be ballast filled to avoid any penetration of existing roof structure. In effect they will be "sitting" on the roof. The chosen location means that they will sit behind the building parapet and will not be visible from any vantage point except perhaps from the upper floor of a minimal other buildings.
6. **The purpose**
7. The purpose behind the installation proposed is to save electricity usage at the building. All the tenants within the building are supportive of the proposal.
8. **The reason why planning permission is not required**
9. Planning permission would be required if the proposal amounts to "development" within section 55 of the T and C P Act 1990. Development specifically excludes operations which "do not materially affect the external appearance of the building". Works to the roof which did not materially affect the external appearance were considered in Burroughs Day v Bristol City Council 1996 1 EGLR 167 which is attached to this statement. In particular, the Judge noted that what had to be affected was the "external appearance", not "the exterior". He also noted that visibility form the air or a few buildings or even a single building would not suffice to make the change one affecting the external appearance.
10. It is therefore asserted that the installation of the proposed PV panels on the roof of Qube in such a position that they are not visible from the street and not apparent on the elevations does not amount to development which requires planning permission as it will not affect the external appearance of the building.
11. It is requested that this be confirmed in a certificate.

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[1996] 1 EGLR 167

# Burroughs Day v Bristol City Council

**QUEEN'S BENCH DIVISION**

**January 18 1996**

**Mr Richard Southwell QC, sitting as a deputy judge of the division**

Estates Gazette May 11 1996[1996] 19 EG 126

*Planning permission -- Listed building -- Refusal of listed building consent for alterations -- Compensation -- Whether consent refused for works not materially affecting external appearance -- Whether works constituted development -- Role of expert witness*

In December 1989 the defendant council refused to grant listed building consent to the plaintiffs in respect of proposed alterations to a listed building. The amended application, not involving an earlier proposal of partial demolition, was in respect of alterations to accommodate a lift shaft within a roof valley. On June 24 1991 the Secretary of State for the Environment dismissed the plaintiffs' appeal against the refusal, noting that the special interest of the building would be reduced by the loss of the original characteristic valley gutter shape of the roof. The plaintiffs, being concerned to establish a claim for compensation for a refusal of listed building consent under section 27 of the Planning (Listed Buildings and Conservation Areas) Act 1990, sought a declaration in the present proceedings that works for which consent had been sought did not constitute development within the meaning of section 55 of the Town and Country Planning Act 1990.

***Held***: The declaration was granted. The works did not amount to development within the meaning of section 55(2)(a)(ii) of the 1990 Act. In considering the meaning of works which "do not materially affect the external appearance of the building", the following must be taken into account: (1) What must be affected is "the external appearance", and not the exterior of the building. The alteration must be one which affects the way in which the exterior of the building is or can be seen by an observer outside the building. (2) The degree to which the alteration must be capable of being seen by observers is all roof alterations which can be seen from any vantage point on the ground or in or on any neighbouring building. (3) The external appearance must be "materially" affected, and this depends in part on the degree of visibility. (4) Materiality must in every case take into account the nature of the particular building which it is proposed to alter, such as whether it is listed. (5) The effect on the external appearance must be judged for its materiality in relation to the building as a whole, and not by reference to a part of the building taken in isolation. (6) Evidence of facts will almost always be relevant when applying section 55(2)(a). The evidence should include the proposed alterations to the building with plans, photographs and written, and if necessary, oral evidence and evidence as to the extent to which the altered external appearance of the building would be visible. (7) It is not the role of an expert to express opinions as to the interpretation of statutory provisions. In applying these factors, the proposed roof alterations, and other works to the windows involving the restoration of georgian window-glazing bars, and not the subject of the Secretary of State's decision, would not have materially affected the external appearance of the building.

Some of the expert witnesses were not independent, being employees, or ex-employees of the defendant council. Some of these experts wrongly thought it was an essential part of their function as experts to act as

supplementary advocates for their client, the council. The experts' conclusions as to the interpretation of the statutory provisions were neither admissible nor helpful.

**The following cases are referred to in this report.**

*Kensington and Chelsea Royal London Borough Council v CG Hotels* (1980) 41 P&CR 40, CA

*National Justice Compania Naviera SA v Prudential Assurance Co Ltd "Ikarian Reefer"* [1993] 2 Lloyd's Rep 68; [1993] 2 EGLR 183; [1993] 37 EG 158

> This was an action by the plaintiffs, Burroughs Day, seeking a declaration against the defendants, Bristol City Council, that certain proposed works to be carried out by the plaintiffs did not constitute development within the meaning of section 55 of the Town and Country Planning Act 1990.

John Hobson (instructed by Burroughs Day, of Bristol) appeared for the plaintiffs; Robert Thomas (instructed by the solicitor to Bristol City Council) represented the defendants.

Giving judgment, **MR RICHARD SOUTHWELL QC** said: This case involves the determination of a point of some importance in the operation of the planning statutes, which apparently has not as yet been the subject of any direct decision of the courts.**MR RICHARD SOUTHWELL QC**

The plaintiffs are a well known firm of solicitors with offices in Bristol at 14, 15 and 16 Charlotte Street. I will refer to them as "the solicitors". Nos 14, 15 and 16 are georgian houses of architectural distinction, which are listed as Grade II* and are within a conservation area of importance to the City of Bristol. They form part of one of a number of terraces of substantial and distinguished houses designed and built by members of the Paty family in the latter part of the 18th century.

14 and 15 Charlotte Street have been occupied by the solicitors for some considerable time. Extensive alterations to their interiors had regrettably been made, before the legislation on listed buildings and conservation areas had established the present regime of protection for buildings of architectural distinction. No 16 has been occupied by the solicitors for a shorter time.

The defendants are Bristol City Council, to which I will refer as "the council".

In 1988 and 1989 the solicitors had decided that they wished to make changes to no 16 (with consequential changes to no 15) so as to enable them to use the three buildings as an integrated whole, and to install a lift in no 16 which would serve each of the floors of no 16, and through interconnecting openings also serve each of the floors of nos 14 and 15.



Accordingly, on January 20 1989 Mr James Ackland, an architect who was then practising under the firm name of Eustace H Button & Partners, chartered architects, in Bristol, made an application to the council on behalf of the solicitors for listed building consent for works to be carried out on and in 14, 15 and 16 Charlotte Street. The brief description of the proposed works reads as follows:

> EXTERNALLY NO 16 Removal of First Floor of rear extension and provision of new tile roof. Alterations to windows of rear extension. Renewal of windows of front elevation with sash bars. Repairs to stonework. Alteration and repairs to roof.

> INTERNALLY NO 16 Removal of staircase. Construction of lift shaft. Upgrading structure for fire resistance and fire precautions. Forming openings between No 16 and No 15.
>
> NOS 14 AND 15 Upgrading doors and screens for fire resistance and fire precautions. Removal of stair from Ground Floor to Basement in No 15.

For the purposes of this action I am concerned only with the proposed alterations to no 16. It is material to note that the application for listed building consent ("LBC") included works involving:

(1) major changes to a small rear extension of no 16;

(2) the renewal of the windows of the front elevation (which had previously been replaced with windows containing single glass panes of a victorian style) so as to restore the georgian style with smaller glass panes and georgian glazing bars;

(3) alterations to the roof to accommodate the lift.

The drawings annexed to the application showing the proposed works included drawings L18B, L19B, L20C, L21A and L22A. Later in this judgment I will have to consider these drawings in some detail. At this stage it suffices to say that drawings L21A and L22A showed the changes proposed to the front and rear elevations including the replacement of the windows on the front elevation as referred to in (2) above.

On the same day Mr Ackland, on behalf of the solicitors, made an application for planning permission in respect of the same works and relying on the same drawings.

There followed discussions and correspondence between Mr Ackland and employees of the council, especially Mr Spearman (then a member of the central area development control team) and Mr Christopher Curtis (an architect who was then a principal officer in the council's planning office dealing with design and conservation in conservation areas and the city centre). Mr Spearman and Mr Curtis immediately made clear their concerns about the nature of the proposed works, and the effect the works would in their view have, particularly on the interior of no 16: see the council's letter to Mr Ackland of March 8 1989. Mr Ackland replied by a long letter of March 14 1989 explaining the background to the two applications and confirming the solicitors' intention to replace the front-elevation windows.

In the course of these discussions the possibility of an alternative scheme, not involving the insertion of a lift shaft in no 16, was considered. By letter dated September 8 1989 to the council Mr Ackland confirmed that this alternative was not acceptable to the solicitors, who wished:

> to pursue what is basically their present application. They wish their application for Listed Building Consent No 012OL/89C in an amended form (as mentioned below) determined and their application for planning permission No 0211F/89C withdrawn.

Mr Ackland went on to state:

> We have amended the drawings relating to the existing application so that any external demolition or alteration works have been omitted. We consider that the proposed alterations do not now require planning permission and therefore that application No 0211F/89C can be withdrawn.
>
> Please substitute the enclosed three copies of each of revised drawings Nos 650/L12C, L13H, L14H, L15E, L16F, L17E, L18C, L19D, L20D, L21B and L22B for those submitted with our application for listed building consent and obtain a decision from the Planning Committee on that application. (Drawings Nos 650/L1B, L2A, L3A, L4A, L5A, L6A, L7, L8, L9, L10 and L11 have not been revised as they show the building as existing.)

Mr Ackland accepted in his oral evidence that in the second line of this extract the word "material" should have been inserted, ie "any external demolition or material alteration works", because external works were still included in the application for LBC, namely the works on the roof and the works set out on drawings L21B and L22B (after revision).

On December 6 1989 the council decided to refuse the amended application for LBC. The notice of the council's decision contained (clearly in error) the same description of the external works proposed for no 16 as had appeared in the original LBC application before its amendment. The reasons for the council's refusal related to the changes proposed for the interior of no 16, save only that reference was made to the "large area of inner flat roof to no 16".

On April 24 1990 the solicitors appealed against the refusal of LBC. In the appeal document the works were described as "form openings between numbers 16 and 15 and various internal works in number 16 Charlotte Street, Bristol". But the address of the site was stated as "14, 15 and 16 Charlotte Street [etc]". In referring to the relevant plans the solicitors included drawings L21B and L22B, which contained reference to the replacement of the windows on the front elevation.

There are two matters which I should mention at this point.

The first is that the roof of no 16 is composed of two tiled ridges to front and rear, of mansard form on the outside surfaces with dormer windows inserted, and ordinary slopes on the inner surfaces down to a lead valley gutter. At the other sides of the roof, ie the side at the end of the terrace and at the party wall with no 15, there are high gable walls with numerous chimney pots. If the lift were to be installed, the lift shaft would have protruded through the valley gutter and the tiled surface to the inner side of the rear ridge, going up to nearly the same height as the ridge (I consider below the contentions as to the height of the proposed lift shaft roof), and there would have been a substantial area of flat roof, at a level between the levels of the lift shaft roof and the valley. These alterations would all have been between the two ridges, affecting the two internal slopes, and would not have been visible from any of the surrounding streets.

The second matter is that by September 1989 the solicitors, fearing that LBC might be refused, were putting themselves in a position in which, if LBC were refused, they might be able to claim compensation pursuant to the Town and Country Planning Act 1971, sections 171 (1) to (4) and 173 (1) and (2). These statutory provisions were consolidated in the Planning (Listed Buildings and Conservation Areas) Act 1990 ("the PLBCA"), section 27 (since repealed). Counsel throughout referred to section 27 of the PLBCA for convenience. Section 27 (so far as material) reads as follows:

> (1) This section shall have effect where --
>
> (a) an application is made for listed building consent for the alteration or extension of a listed building;
>
> (b) the works do not constitute development or they do so but the development is such that planning permission for it is granted by a development order; and
>
> (c) the Secretary of State, either on appeal or on the reference of the application to him, refuses such consent or grants it subject to conditions.
>
> (2) If, on a claim made to the local planning authority within the prescribed time and in the prescribed manner, it is shown that the value of the interest of any person in the land is less than it would have been if listed building consent had been granted or, as the case may be, had been granted unconditionally, the local planning authority shall pay that person compensation of an amount equal to the difference.

The most material part is subsection (l)(b). To succeed in a claim under section 27 the solicitors have to establish that the works for which LBC has been refused "do not constitute development", ie planning permission is not required (the reference to a development order is not material in this case). Mr Ackland had taken the view that the works covered by the LBC application, as amended, were not "development" and did not require planning permission. Whether the works considered on the appeal to the Secretary of State constituted



"development" is the central question in this action, to which I will return later.

The appeal was fixed for hearing in an inquiry before an inspector on December 4 1990. In their rule 6 statement dated July 30 1990, the council referred in the heading to the works as originally described in the LBC application. This was a mistake as the council were aware that the application had been amended. In para 2.1 the council referred to the original applications. In para 2.2 the council, after referring to the alternative proposal, stated that the solicitors:

> opted to delete most of the external refurbishment work, withdraw the planning application and revert to the major internal works to No 16 which were the basis of the proposal as originally submitted.

In para 5.2 the council stated that:

> It is considered that the lift housing and proposed flatted (*sic*) roof at no 16, some 0.9 metres higher than the existing central valley, will erase the traditional form and integrity of this roof.

In para 5.10 the council stated that:

> It was a matter of regret that the applicant decided to withdraw the originally-submitted parallel planning application which included various external renovations to stonework and alteration of some windows. Negotiations were in hand to achieve the removal of metal casement windows at dormer level in no 16 with timber sash windows of the correct historical pattern.

The inquiry took place on December 4 1990. At its commencement the inspector sought clarification of the works he had to consider and therefore of the drawings of the works. In my judgment, it is clear on the evidence that the inspector was told that drawings L21B and L22B were no longer relevant to his inquiry because these related to external works which the solicitors were no longer pursuing. The main evidence in this regard was:

(1) The statement in para 4 of the inspector's first report to which I will refer later.

(2) The written and oral evidence of Mr Allingham, a solicitor who represented the council at the inquiry. In his witness statement he stated that, as far as he could recall, no part of the LBC application, including any drawing, was withdrawn by the solicitors during the inquiry. In his oral evidence he made it clear that he had little memory of what had happened five years before, on December 4 1990.

His contemporaneous documents seemed to me to indicate to the contrary to his written statement. When first instructed by the council his note, in relation to para 2.2 of the rule 6 statement, was: "All external works abandoned". Para 2.2, quoted above, showed that the council were aware that "most of the external refurbishment work" had been deleted. The only remaining external item was the works in the roof valley.

His brief note of the opening of the inquiry contained the following:

> Application plans: L12C etc. Does not include external works.

This note is not consistent with the inspector having been told that the works on L21B and L22B were being pursued.

In his letter of December 6 1990, two days after the inquiry, to the assistant city clerk Mr Allingham dealt with the likelihood of a claim for compensation under section 27 of the PLBCA in the event that refusal of LBC was upheld. In doing so he used these words:

> The works in question were substantially internal works, involving the installation of a lift shaft, and although requiring some external works in the form of alterations to the roof, it may be argued that these do not materially affect the external appearance of the building.

If the window and other alterations set out on drawings L21B and L22B still formed part of the works for which LBC was being sought, I have no doubt that Mr Allingham would have mentioned these additional external works.

Having seen and heard Mr Allingham give evidence I am satisfied that in this regard his memory was at fault and that his written statement is not correct.

(3) Mr Spearman also gave written and oral evidence. His written statement, para 7, reads as follows:

> I recall that when the inquiry opened on 4th December 1990 after the introductions of the parties present, the drawings under consideration were run through. My own notes indicate that I had insufficient time to record the correct suffixes except for the last two, which might have been repeated. I submit my notes, together with a typewritten transcript, as evidence (appendix 2 to my Statement). The point is, however, that I am clear that drawings 650/L21B and L22B were presented and considered at this appeal.

The notes to which he referred of the start of the inquiry contained a list running across the page of all the drawings previously mentioned in the solicitors' application and appeal. Below that appear the words "Clarify applica[tion] 21B and 22B".

In his written and his oral evidence Mr Spearman suggested that these notes confirmed that drawings L21B and L22B were identified by the solicitors' representative, Mr G Hesketh, a partner in that firm, as being part of the scheme for consideration by the inspector and that these drawings were actually considered by the inspector during the inquiry.

Having seen and heard Mr Spearman give evidence, I am satisfied that his evidence in this respect was untrue. The true reason why drawings L21B and L22B were separately identified in his contemporaneous note was that it was made clear to the inspector, by Mr Hesketh, that the inspector was not to consider these drawings because the works they showed were no longer part of the solicitors' LBC application or appeal.

However, the principal reason why I am satisfied that these drawings were withdrawn from the application and appeal is what the inspector stated in his first report to which I now turn.

The inspector's first report was dated January 4 1991. In para 1 he stated that the appeal was against a refusal of LBC:

> for works of alteration, namely, the forming of openings between 15 and 16 Charlotte Street, Bristol and for various internal works in 16 Charlotte Street.

In para 4 he referred to what he had established at the inquiry as being the scope of the current application and appeal, and stated as follows:

> *Certain works of external alteration which are shown on the application plans (drg nos: 21b and 22b) are not now to be regarded as part of the proposals.* The concurrent planning application in respect of the external works has been withdrawn (LPA 3).

Emphasis supplied.

After summarising the contentions for the solicitors and the council, the inspector set out his conclusions. It is material to note that nowhere in these three sections of his report did the inspector make any further reference to the window replacement and other works set out on drawings L21B and L22B, a reference which he would undoubtedly have made if those works and those drawings remained within the ambit of the LBC application and appeal.

His conclusion as to the proposed changes in the roof valley was (para 26.3) that:

> The loss of the characteristic valley gutter shape of roof would reduce the special interest of the building since it is clearly an original feature.

His other conclusions related to solely internal changes and I need not refer to these. He finally recommended that the appeal be dismissed and that LBC be not granted.

Following receipt of the inspector's report, the Department of the Environment wrote to the solicitors (and to the council) on March 25 1991 seeking further clarification of the scope of the works forming the basis of their appeal. After referring to the deletion of all works listed under "externally no 16", and to the works listed under "internally no 16" as being within the appeal, the department stated that there was no mention of the works quoted for buildings "Nos 14 and 15". Accordingly the department asked for written clarification of "exactly what works you wish to be considered in the appeal". This request did not result from any doubt about drawings L21B or L22B.

*[1996] 1 EGLR 167 at 170*

The council's reply dated April 17 1991 did not include any reference to those drawings or the works shown on them. The solicitors' reply dated April 9 1991, after stating that "the works forming the basis of our Appeal are those covered by the amending letter of 4th September 1989", went on to clarify that the internal works affected no 15 but not no 14.

Following this correspondence the inspector wrote a second report dated May 31 1991 in which he amended some paragraphs in his first report. His amendments were directed to dealing with 14 and 15 Charlotte Street and made no relevant change in relation to no 16. So far as related to no 16, para 4 of this report, including the sentence referring to drawings L21B and L22B, remained unchanged.

The decision of the Secretary of State on the appeal was conveyed by letter dated June 24 1991. It was noted that:

> certain works of external alteration which are shown on the application/appeal plans (APP2 drg nos: 21b and 22b) are not now regarded as forming part of the appeal proposals and that a concurrent planning application, also in respect of external works, has consequently been withdrawn.

The Secretary of State agreed with the inspector's conclusions and accepted his recommendation. It was noted that:

> the appeal proposals relate only to internal works. He is therefore satisfied that the visual impact upon the Conservation Area will be minimal and that the character and appearance of the Conservation Area will be preserved.

In making this statement the Secretary of State was aware that alterations to the roof valley were involved, because later in the letter it was stated:

> Moreover, the special interest of the building would also be reduced by the loss of the original, characteristic valley gutter shape of the roof.

His conclusion was:

> However, the key element of the scheme as a whole (ie the provision of the lift and associated internal alterations) remains unacceptable for the reasons outlined above and accordingly the Secretary of State hereby dismisses your appeal.

Thereafter, following discussions between the parties, the solicitors issued a writ indorsed with a statement of claim on July 22 1993, seeking:

> A Declaration that, upon their true construction, the works comprised in the Plaintiff's application for listed building consent in respect of 16 Charlotte Street, Bristol, as more particularly described in Paragraphs 4 to 8 hereof, did not constitute development within the meaning of Section 55 of the Town and Country Planning Act 1990 or a Declaration to like effect in such other terms as this Honourable Court may order.

Section 55 of the Town and Country Planning Act 1990 ("the TCPA") replaces provisions previously in section 22 of the Town and Country Planning Act 1971, as amended. Section 55 provides (so far as material):

> Meaning of "development" and "new development"
>
> **55.**-- (1) Subject to the following provisions of this section, in this Act, except where the context otherwise requires, "development" means the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land.
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> (2) The following operations or uses of land shall not be taken for the purposes of this Act to involve development of the land --
>
> (a) the carrying out for the maintenance, improvement or other alteration of any building of works which --
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> (i) affect only the interior of the building, or
>
> (ii) do not materially affect the external appearance of the building,
>
> and are not works for making good war damage or works begun after December 5 1968 for the alteration of a building by providing additional space in it underground;

In considering the application of section 55 of the TCPA to the facts of this case, I take first the proposed alterations to the roof of 16 Charlotte Street together with the internal alterations, and leave for later considera-

tion the proposed external alterations shown on drawings L21B and L22B. All the internal alterations would have affected only the interior of the building and therefore by virtue of section 55(2)(a)(i) would not be "development" requiring planning permission. I can concentrate, therefore, in the first place on the changes to the roof of no 16.

As I have said, all the proposed changes to the roof were between the inner surfaces of the two roof ridges and below the levels of the ridges. Mr John Hobson for the solicitors, in his careful and lucid submissions, first submitted that such changes fell within the words in section 55(2)(a)(i) -- "affect only the interior of the building" -- because they were within the "envelope" of no 16, and he referred to a number of occasions on which in relation to these roof changes words such as "inner" and "internal" were used. In my judgment, the roof changes would have altered the exterior surface of the roof and cannot be treated as affecting only the interior of no 16.

This case turns on the meaning of section 55(2)(a)(ii) -- "do not materially affect the external appearance of the building". The following points have to be taken into account in interpreting these words and applying them to the facts:

> (1) What must be affected is "the external appearance", not "the exterior". The use of the word "appearance" means that it is not sufficient for the external surface of a building to be affected by the proposed alteration. The alteration must be one which affects the way in which the exterior of the building is or can be seen by an observer outside the building.
>
> (2) There was much argument as to the extent to which the alteration must be capable of being seen by observers at different points outside the building. Here it was common ground that the alterations would not have been visible to observers in Charlotte Street or any neighbouring streets -- what Mr Hobson for the solicitors called "normal vantage points". Mr Robert Thomas for the council submitted that it would suffice if the change to the exterior was one visible only from isolated points on higher buildings or from balloons or aircraft overhead. Mr Hobson submitted that the change to the external appearance must be visible from a number of normal vantage points, whether in the neighbouring streets or houses, and that visibility from the air or a few buildings or even a single building would not suffice to make the change one affecting the external appearance.

The words of section 55 have to be interpreted generally, since they may apply to an infinite range of different buildings, including a second world war prefabricated home about 8 ft high, houses of two, three or more storeys, factories, towerblocks of flats and office buildings of one to perhaps a 100 storeys. In my judgment, all roof alterations which can be seen from any vantage point on the ground or in or on any neighbouring building or buildings would be capable of affecting the "external appearance" of the building in question. It is not necessary to consider the position if a roof alteration were visible only from the air, which is not the position in the present case.

The decision in *Kensington and Chelsea Royal London Borough Council v CG Hotels* (1980) 41 P&CR 40 CA was cited by Mr Hobson as the only authority of any relevance. In that case the installation of floodlights below ground-floor level and on the first-floor balconies was held not to affect materially the external appearance of the building. Reference was made to the floodlights not being visible from the street. But the court in that case was primarily considering whether the erection or placing of small lights could or did "materially affect", and the case does not assist in resolving the issues in this case.

> (3) The external appearance must be "materially" affected. This involves a judgment as to the degree to which the particular alteration affects the external appearance. The effect must be more than *de minimis* (the addition of spotlights in the *Kensington and Chelsea* case was either *de minimis* or nearly so). I do not derive any real assistance from the substitution of possible synonyms such as "substantial" which Mr Hobson favoured.

Whether the effect of an alteration is "material" or not must, in my judgment, depend in part on the degree of visibility. A change to the



front wall of a building or the front of the roof which is visible from the street is much more likely to be "material", than a similar change which can be seen only from the top of much taller buildings.

> (4) One point much argued before me was whether a different test of "materiality" should be applied to listed buildings or buildings in a conservation area than to buildings which are not listed and not in a conservation area. Mr Hobson submitted that in section 55 of the TCPA "development" is being defined in respect of all kinds of buildings and therefore the same test must be applied irrespective of whether the building in question is listed or in a conservation area.

In my judgment, whether the external appearance of a building is "materially affected" is likely to depend on both the nature of the building and the nature of the alteration. In argument I contrasted (1) the fixing of a Coca-Cola sign to the front of a newsagent's shop in a busy high street, and (2) the fixing of a similar sign to the front of an 18th century house such as 16 Charlotte Street. (1) might not be material, whereas (2) would be likely to be material. "Materiality" must in every case take into account the nature of the particular building which it is proposed to alter. It is obvious that what is not a material alteration to the external appearance of a factory, eg a Coca-Cola factory, may be a material alteration to the external appearance of an 18th-century house whether or not it is listed or in a conservation area.

> (5) Mr Hobson submitted correctly that the effect on the external appearance must be judged for its materiality in relation to the building as a whole, and not by reference to a part of the building taken in isolation.
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> (6) Some evidence of facts will almost always be relevant when applying section 55(2)(a). The court has to have evidence as to the building to be altered, and the alterations proposed, with plans, photographs and written and (if necessary) oral evidence explaining the plans and photographs, and also evidence as to the extent to which the altered external appearance of the building would be visible.
>
> (7) Expert evidence may also assist in drawing to the attention of the court factors which the experts using their expertise can explain to the court. But it is not the role of an expert in a case such as this to express opinions as to the interpretation of statutory provisions. The expert evidence adduced before me went this far: indeed one town planning witness called by the council went further and decided that an estoppel pleaded by the solicitors (and abandoned before me) did not arise. This represented a misuse of expert evidence and showed a misunderstanding of the role of an expert witness in a case such as this. I will have more to say about that later.

**Proposed roof alterations**

As I have already described, these involved a flat roof for the lift shaft and a lower area of flat roof at a level between the lift shaft roof and the valley gutter.

The council adduced the evidence of two witnesses described as "expert witnesses", Mr Curtis and Mr Richard Matthews. Both were long-serving employees of the council (though Mr Curtis was now retired), and were not in any sense independent experts. Both appeared to regard advocacy for their employer as an integral part of their role as an expert. Both expressed opinions on statutory interpretation. Mr Matthews even reached a conclusion on the question of estoppel. I can give only limited weight to any of their evidence, except in so far as it is non-controversial.

Mr Matthews (a chartered town planner employed in the central area development control team in the council's planning department) gave evidence, *inter alia*, as to the height of the proposed lift shaft roof, based on his analysis of Mr Ackland's drawings L18C, L19D and L20D. His conclusion was that part of the lift shaft roof would have been marginally above the rear roof ridge, and he arrived at this conclusion by reference to drawing L19D which, he said, showed an intention on the part of Mr Ackland (on the solicitors' behalf) to lower the rear ridge by a material degree. In my judgment, this part of Mr Matthews' evidence was misconceived. It was inconsistent with Mr Matthews' own analysis of drawing L20D, showing the whole of the lift shaft roof below the ridge. It was also contrary to Mr Ackland's evidence, which I accept, that the drawings showed the height of the highest point of the lift shaft roof 2 in below the ridge, and that in any event it was always his intention to ensure that the lift shaft roof would be below the ridge, and he could readily have changed the detailed design if necessary to achieve this.

Mr Curtis' evidence as to the architectural distinction, history and importance of 16 Charlotte Street and the terraces of which it forms part is for the most part non-controversial, though Mr Curtis' enthusiasm sometimes carried him rather too far. He drew attention to the terms of Circular 8/87 -- *Historic Buildings and Conservation Areas Policy and Procedures*, the council's statement on conservation policies of 1989, the council's deposit Bristol local plan and the council's conservation area enhancement statements of November 1993. He pointed to the importance of the "roof-scape" in Bristol with so large an inheritance of 18th and early 19th century buildings, including terraced houses. His conclusions were in stark terms: I quote from the following paragraphs of his report:

> Para 3.11 Here, the effect on the roofing is drastic and eliminates its interior form.
>
> In this case we are talking about a relatively unregarded valley gutter section and adjacent roofs, but nonetheless valuable for that.
>
> Para 3.12 The protrusion of the lift housing would have a gross effect on the scale of the traditional valley gutter arrangement and the existing internal roof pitches would be demolished. Properties in this historic quarter would overlook the new roof profile and vast spread of flat roof from above, and the effect on the terrace would be a dire one. Original shape, pitch and cladding and scale of elements would all be drastically altered.

Since Mr Curtis had indicated that inside surfaces of the roof of no 16 were visible only from the Berkeley Square offices or from balloons, the second sentence I have quoted from para 3.12 is, with all respect to Mr Curtis, much exaggerated.

> Para 4.2 Here almost all the original form and cladding would be lost in the valley roof section and an overscaled sea of flat roof and lift motor housing would replace the original roof construction and the form of the roof as a whole would of course be damaged if this restructuring were to be allowed.
>
> Para 4.7 In this case I am stressing the need to keep the internal roof form even though it may not be seen from the street, in order that the integrity of this otherwise virtually unaltered historic building be maintained.

Mr Curtis' evidence amounted to an eloquent plea that this historic building should not be altered by reason of its architectural distinction and of the national and local policies applying to listed buildings and conservation areas.

Mr Matthews' evidence (apart from what I have already referred to) followed somewhat the same lines as Mr Curtis'. It can be summarised in part of a sentence from his para (13):

> ... I am satisfied for planning purposes that it is sufficient for there to be a material alteration to the outside of the building and that planning permission would be required for such works where there is no orthodox or everyday view of the works.

Mr Matthews apparently did not appreciate that in applying section 55 of the TCPA the basic question is a question of law, or that the words used in section 55 are "external appearance" with which the phrase "the outside of the building" is not synonymous. Mr Matthews also produced photographs taken from the Berkeley Square offices to which I refer below.

Turning to the solicitors' witnesses, Mr Ackland's first statement was confined to factual evidence as to the planning and LBC history. His third statement was directed to the contention that the alterations shown on drawings L21B and L22B were included in the works the subject of the appeal. His second statement was described as an expert report, but was primarily concerned with answering Mr Matthews' analysis of Mr Ackland's drawings, an analysis which I have already rejected.

The solicitors also called as an expert Mr Ian Mellor, a qualified town planner and a partner in Barton Willmore Group. Mr Mellor was



the only independent witness. He expressed the view that neither the roof works nor the works on drawings L21B and L22B would have materially affected the external appearance of no 16. Like the other expert witnesses he did not fully appreciate the distinction between the matters on which he could speak from his own expertise, and questions of law as to the interpretation and application of section 55.

Mr Mellor independently analysed the drawings to assess the height of the proposed lift shaft roof. He concluded, in para 5.12 and 5.13, that this roof would have been 0.05 m (2 in) below the rear ridge and that:

> the proposed construction would be below the two ridge lines and both parapets ie totally enclosed by existing structures which are higher than the proposed lift head.

He also concluded that the roof changes would be only an "internal" alteration within section 55(2)(a)(i), a conclusion which I have rejected as inconsistent with the interpretation of that section.

Overall I derived little assistance from any of the expert evidence. The history produced by Mr Curtis and the documents to which he referred could readily have been agreed.

My conclusions as to the roof works, based on the interpretation of section 55 already set out, are as follows:

(1) These works would have affected the external appearance of 16 Charlotte Street. I leave on one side the possibility of appearance to persons in balloon baskets (or aircraft) who regularly traverse Bristol and about whom I was entertained with much evidence and submissions. As Mr Matthews' photographs taken from the upper floor of the Berkeley Square office building -- and in reverse direction from the roof of no 16 -- show, part of the flat roof of the lift shaft and part of the larger area of flat roof would have been visible to those who work in the top two floors of that office building. In my judgment, these works would have affected the external appearance of no 16 at least to the extent that they would have been thus visible.

(2) Whether the external appearance would have been *materially* affected is a matter of degree on which I have to form a judgment, taking into account all the evidence placed before me. I have reached the firm conclusion, on which I have really no doubt, that the external appearance of no 16 would not have been materially affected. In reaching this conclusion I have had particular regard to the following:

(a) This is a listed building, in a conservation area, and of considerable distinction, and in determining "materiality" I must have regard to the fact that alterations to the exterior of no 16 which would be immaterial on other buildings may be material on such a listed building.

(b) The roof works would affect only the valley between the ridges. They would superimpose two fairly substantial areas of flat roof in place of the slopes running down to the valley gutter.

(c) The roof works would not be visible from any street or from any window of any building nearby, except from the top two floors of the Berkeley Square office building and from the air.

(d) Apart from these high and (in the case of the view from the air) unusual vantage points, the roof works would be entirely invisible to anyone looking at no 16.

(e) Even from the Berkeley Square office building, the degree to which the external appearance of no 16 would be affected would be very small, though perhaps not minimal.

**External works on drawings L21B and L22B**

I have already held that: these proposed works did not go forward on the appeal to the Secretary of State; were not considered by the inspector; were not considered by the Secretary of State; and for the purposes of section 27 of the PLBCA were not works in relation to which the Secretary of State refused LBC.

For present purposes, however, I assume that these proposed works did form part of the works considered by the Secretary of State. Most of the works on drawings L21B and L22B were minor renovations which clearly were not development and did not require planning permission. The arguments before me have revolved round the replacement of the present sash windows with victorian-style large glass panes by sash windows with georgian-style smaller panes and georgian glazing bars, and a similar replacement of the metal dormer windows. This, it is contended by the council, amounted to development within section 55 of the TCPA. This contention appears not to have been raised by the council until shortly before this action came on for trial before Waller J on April 27 1995 resulting in an adjournment of the trial, and further pleading, discovery and statements of witnesses. It is, in hindsight, unfortunate that the existing issue as to the roof works was not then determined.

Mr Curtis did not deal with the window replacement in his report. Mr Matthews dealt with this work in his third report. Having reached the erroneous conclusion that this work was considered by the inspector and the Secretary of State, Mr Matthews referred to the window replacement on the front elevation as "significant external alterations" and concluded that:

> On any view these alterations represent a material alteration to the external appearance of the building and thus require planning permission.

He then referred to an allegation that this had been conceded at the hearing on April 27 1995 by counsel then appearing for the solicitors (not Mr Hobson), an allegation which was not pursued by Mr Thomas for the council, there having been adduced before me no evidence of any such concession, whether a transcript of the hearing or any other relevant evidence.

For the solicitors Mr Ackland produced relevant evidence about the window replacement in his third report. His evidence was that:

(a) the addition of such glazing bars is an improvement which does not materially affect the external appearance in the context of a georgian street, where most of the adjoining buildings either have their original windows or have been so improved;

(b) the council would not have required an application for planning permission to be made for the purpose of carrying out an improvement which the council regarded as necessary and desirable (Mr Ackland gave recent instances in which the council had not required such an application for a similar improvement).

(b) is in my view irrelevant. The question before the court is not whether this particular council would have required an application, but whether such a window replacement would have amounted in law to development within section 55 of the TCPA. (a) is also irrelevant because Mr Ackland did not appreciate that the conclusion he was reaching was a conclusion of law.

Mr Mellor dealt with the window replacement work in his first and second reports and reached a similar conclusion that this was not development within section 55.

Mr Ackland and Mr Mellor, in their oral evidence, indicated that it was possible that replacement going the other way, ie the insertion of large victorian panes, instead of georgian glazing bars and small panes in keeping with the design of no 16, might have materially affected the exterior appearance. They were further cross-examined on the basis that if replacement going one way amounted to development, then surely replacement going the other way must also be development, a proposition which neither accepted.

In my judgment, this is an issue which is even clearer than the issue as to the roof works:

(1) No 16 is a georgian building of architectural distinction and with the other attributes already set out.

(2) At some earlier stage victorian-style large panes have been inserted in the sash windows on the front elevation. The works would have restored the original georgian appearance.

(3) If this was not a listed building and in a conservation area, it would be plain that the replacement of the windows, either way, would not be development within section 55.

(4) Given that no 16 is a listed building and in a conservation area, a window replacement which merely involves restoration of the georgian glazing bars and small panes is similarly not development because it would not materially affect the external appearance.

(5) Whether in such a building the removal of georgian windows

*[1996] 1 EGLR 167 at 173*

and their replacement by victorian sash windows or indeed modern windows would materially affect the external appearance is not a question which I have to decide. It would be a matter of degree in each case. Logically, such a change could be regarded as material for the purposes of section 55, because of the damage it might do to the appearance of the building, even though a change the other way, restoring the original design, would not be material because of not involving any such damage.

I have tried in this judgment to deal with all the main points raised by Mr Hobson and Mr Thomas in their submissions, but I have not lengthened it by dealing with every point they raised, including references to other sections of the PLBCA, and to the general development order, which, in my view, did not carry the submissions any further.

**Declaration**

It follows that I will make the declaration claimed by the solicitors, unless either party wishes to make any submissions about the form of the declaration.

**Expert evidence**

It is a matter of concern that in 1995 reports were still being produced by expert witnesses which fly in the face of the long-established requirements as to the duties of expert witnesses. These were conveniently summarised by Cresswell J in *National Justice Compania Naviera SA v Prudential Assurance Co Ltd ("The Ikarian Reefer")* [1993] 2 Lloyd's Rep 68* at pp81-82. Though there was a successful appeal against his judgment to the Court of Appeal, [1995] 1 Lloyd's Rep 455, the Court of Appeal expressed no dissent from his summary of the duties of expert witnesses, which is as follows:

* Editor's note: Also reported at [1993] 2 EGLR 183.

THE DUTIES AND RESPONSIBILITIES OF EXPERT WITNESSES in civil cases include the following:

1. Expert evidence presented to the Court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation (*Whitehouse v Jordan*, [1981] 1 WLR 246 at p256, per Lord Wilberforce).

2. An expert witness should provide independent assistance to the Court by way of objective unbiased opinion in relation to matters within his expertise (see *Polivitte Ltd v Commercial Union Assurance Co Plc*, [1987] 1 Lloyd's Rep 379 at p386 per Mr Justice Garland and *Re J*, [1990] FCR 193 per Mr Justice Cazalet). An expert witness in the High Court should never assume the role of an advocate.

3. An expert witness should state the facts or assumption upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion (*Re J* sup).

4. An expert witness should make it clear when a particular question or issue falls outside his expertise.

5. If an expert's opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one (*Re J* sup). In cases where an expert witness who has prepared a report could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report (*Derby & Co Ltd and Others v Weldon and Others, The Times*, Nov 9, 1990 per Lord Justice Staughton).

6. If, after exchange of reports, an expert witness changes his view on a material matter having read the other side's expert's report or for any other reason, such change of view should be communicated (through legal representatives) to the other side without delay and when appropriate to the Court.

7. Where expert evidence refers to photographs, plans, calculations, analyses, measurements, survey reports or other similar documents, these must be provided to the opposite party at the same time as the exchange of reports (see 15.5 of the Guide to Commercial Court Practice).

Though this summary was given in a commercial court action, it applies to all legal proceedings.

It is unfortunate that in the current 1995 edition of the Supreme Court Practice (the White Book) there is no reference to *The Ikarian Reefer*, for example, in the notes to the relevant part of Ord 38, r35 to 44 and no reference to any of the principles or guidance relating to the preparation of experts' reports. *The Ikarian*

*Reefer* is mentioned only in note 104/13/1 on p1569 in relation to Ord 104, r13 concerning experts in patent and other intellectual property proceedings.

My judicial experience in the High Court is that of a deputy judge, and therefore less frequent than the experience of a full-time High Court judge. I have found, when sitting as a deputy judge, little appreciation on the part of litigators, advocates and expert witnesses of these elementary requirements governing the production of expert evidence.

In the present case, as I have indicated,

> (1) Some of the expert witnesses were not independent, being employees or exemployees of the council.
>
> (2) Some of the expert witnesses apparently thought that it was an essential part of their function as experts to act as supplementary advocates for their clients, the council.
>
> (3) Each of the expert witnesses, who were architects or town planners, took it upon himself to reach conclusions as to the interpretation of the statutory provisions, a matter on which expert opinion from a non-lawyer is neither admissible nor helpful.

I hope that in the next Supplement to the White Book, or by some other means, it will be possible to bring to the attention of the legal professions the simple requirements to be met by expert witnesses as summarised in *The Ikarian Reefer*.