

IN THE PRIVY COUNCIL

ON APPEAL

FROM THE COURT OF APPEAL OF HONG KONG

BETWEEN :

AIK SAN REALTY  
TUNG HING SHING REALTY LIMITED  
YAU SUN DEVELOPMENT COMPANY LIMITED Appellants  
(Plaintiffs)

10 - and -

ATTORNEY GENERAL Respondent  
(Defendant)

CASE FOR THE APPELLANTS

Record

1. The Appellants are the leasehold owners of a plot of land in the area of Causeway Bay on Hong Kong Island, known as Nos. 16-26, Yun Ping Road, or Inland Lot No. 457, Section F, and The Remaining Portions of Sections C, D, E and G. At the back of this site is a street by the name of Jardine's Crescent. The Appellants by their Architects submitted plans for redevelopment of their site which plans were rejected on 25th January, 1980 on the ground that the street shadow area had exceeded that provided for under Building (Planning) Regulation 16 made under the Buildings Ordinance, (Chapter 123), Laws of Hong Kong. This appeal arises from proceedings brought by the Appellants as Plaintiffs in the High Court and later in the Court of Appeal of Hong Kong

page 36-37

2. By an Originating Summons dated 17th July, 1980, the Appellants as Plaintiffs claimed against the Respondent as Defendant for the following declarations:

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(1) A declaration that upon the true construction of Regulation 16 of the Building (Planning) Regulations, the Plaintiffs' proposed building on the aforesaid site (other than Section F thereof) will not abut, front or

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project over Jardine's Crescent.

(2) A declaration that the Building Authority's decision dated 25th January, 1980 rejecting the Plaintiffs' building plans on the ground that street shadow area had been exceeded under Building (Planning) Regulation 16 was accordingly invalid.

(3) A declaration that the Plaintiffs' said building plans are deemed under Section 15(1) of the Buildings Ordinance to have been approved by the Building Authority.

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3. On 23rd December, 1980, the Originating Summons having come on for hearing before the High Court of Hong Kong (Liu, J) was dismissed. The Appellants appealed to the Court of Appeal, which on 30th June, 1981, dismissed the appeal. By an Order dated 17th July, 1981, the Court of Appeal granted leave to the Appellants to appeal to the Privy Council from the decision of the Court of Appeal.

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Page 36 lines 15-20

4. Between May, 1978 and November, 1979, the Appellants acquired the leasehold in Sections F, C, D, E and G of Inland Lot No. 457 (Nos. 16-26 Yun Ping Road, Hong Kong). This site was situated in an area of high density development and had no restrictions in the Crown Lease. Therefore, the Appellants were entitled to build to the full site coverage and plot ratio stipulated in the First Schedule of the Building (Planning) Regulations.

Page 36 lines 21-30

5. The Plaintiffs' site, when first acquired, was of a rectangular shape with the top and the bottom sides each abutting onto a street, namely, Yun Ping Road and Jardine's Crescent. The remaining two sides abutted onto other property, namely, No. 14, Yun Ping Road on the side and No. 28, Yun Ping Road on the other. By a series of Deed Polls executed between July to November, 1979, Sections C, D, E and G were partitioned and parts of the partitioned Sections sold to Mentor Limited (whose site shall hereinafter be referred to as the "Mentor Site"), with the following resultant holdings:

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Plaintiffs' Site

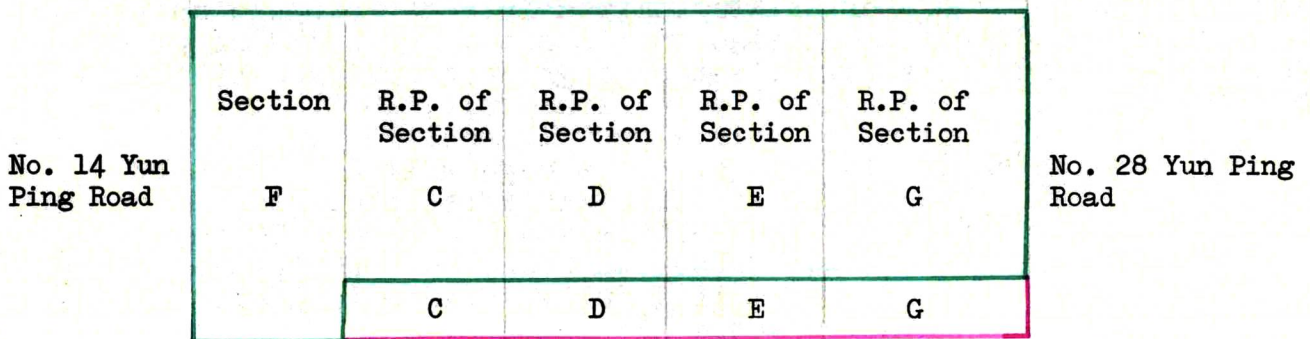
Mentor Limited's Site

I.L. 457 Section F  
R.P. of Sec. G,  
E, D & C

Section G subsec. 1  
Section E subsec. 1 and 2;  
Section D subsec. 1;  
Section C subsec. 1.

6. As result of the partition and the sale to Mentor Limited, the Plaintiffs' site became a six-sided figure, with the side of the original rectangular shape facing Jardine's Crescent being transformed into three sides, with the first side at Section F of I.L. 457 touching Jardines Crescent, and the remaining two sides (which complete this six-sided figure) touching two of the sides of the Mentor Site. The following diagram represents the Plaintiffs' site (in green) and the Mentor site (in red) in relation to Yun Ping Road, Jardine's Crescent, and Nos. 14 and 28, Yun Ping Road:

Yun Ping Road



Jardine's Crescent

7. The Plaintiff companies and Mentor Estate Limited are entirely different entities and evidence was put before the High Court to the effect that there was no intention of re-assigning the Mentor Site to the Plaintiffs then or at any time in the future.

Page 95  
Page 112-115

8. The Plaintiffs intend to redevelop their site into a building of 27-storeys with a lower ground floor.

Page 37 lines 14-16  
Page 81-88 (plans)

The lower ground floor and the first four floors would be used for a shopping plaza while the remaining upper floors would be used for office accommodation. The proposed building is designed with its main entrances opening onto Yun Ping Road and a minor entrance which serves as ingress and egress for a Power Sub-Station and a Means of Escape for the rest of the building at Section F of I.L. 457, opening onto Jardine's Crescent. All

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of the windows of the building will be on the side of Yun Ping Road. There are no windows facing Jardine's Crescent. The building is also designed on the basis of a plot ratio of 14.997 which complies with the First Schedule to the Building (Planning) Regulations. The "street shadow area" (which by Regulation 16 determines the height of a building) is calculated on the basis of Nos. 16-26, Yun Ping Road, (namely, Section F of I.L.457) on the side of Yun Ping Road, and No. 16, Yun Ping Road, on the side of Jardine's Crescent, such being the only two sides of the Plaintiffs' six-sided site, fronting or abutting upon a street exceeding 4.5 metres in width. Both Yun Ping Road and Jardine's Crescent exceed 4.5 metres in width.

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Page 38 line 11 to Page 39 line 4  
Page 94-96

9. Mentor Estate Limited intends to build an advertisement sign on its site, and building plans for this advertisement sign were approved by the Building Authority on 11th April, 1980. The dimensions of this sign will be 1'1" deep, 18' high and 140' long. This sign will not actually touch the wall of the Plaintiffs' proposed building. There will be a gap of about 50 mm (2 ins.) between the two proposed structures. Mentor Estate Limited fully intends to proceed with this project.

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Page 37 line 14  
Page 89

10. On 25th January, 1980, the Building Authority disapproved the plans put forward by the Plaintiffs' Architect on 28th November, 1979 giving, inter alia, the following reasons:

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"The street shadow area over Jardines Crescent has been exceeded, Building (Planning) Regulation 16. Your calculations should be based upon the overall frontage of the building. The alienated portion is not considered to affect the application of this Regulation".

Page 14 line 5 to Page 15 line 8

11. The above reasons given by the Building Authority formed the basic issue that the High Court had to decide when the Originating Summons came before Mr. Justice Liu for hearing on 1st December, 1980. The hearing took 2 days. After reading the evidence and hearing arguments by Counsel, the Learned Judge found against the Plaintiffs and dismissed the Originating Summons. He said that it was common ground that "abuts" means "touching" but that whether or not a building "fronts" a street, is a matter of degree to be determined by a number of factors which include the importance of an exit discharging into that street, the dimensions of the side overbearing upon it, the proximity of the building to

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the street and the nature and size of any intervening structure. He thought the proposed advertisement sign of Mentors' too insignificant as compared with the Plaintiffs' proposed building to be able to prevent the entire building from fronting onto Jardine's Crescent. By giving the word "frontage", what he termed, "a large and liberal construction", he ruled that the whole length of the rear of the Plaintiffs' proposed building will front Jardine's Crescent for determining the permitted street shadow area under Regulation 16(2).

12. The Plaintiffs appealed to the Court of Appeal (Huggins, V.P., Leonard and Li J.J.A.) which heard the case on 15th and 16th June, 1981. Leonard, J.A., said that "the essential question for decision here is whether a developer in planning the development of a site can increase the permitted potential height of the building to be erected on it by alienating a narrow strip of land along part of one side of the site so as to separate part of the new site thus created from the road over which the building is to tower." The Defendant served no Respondents' Notice and argued to uphold the decision of the Judge in the first instance upon the reasons given in his judgment.

13. In the Court of Appeal, Counsel for the Appellants submitted three arguments as to why the appeal should be allowed and the declarations sought in the Originating Summons, granted:

(1) Although Regulation 16(1) starts off by saying that "where a building abuts, fronts or projects over a street, the height of a building shall be determined by reference to the street shadow area thereof", the determination of street shadow area under Regulation 16(2) and (4) requires the Court to consider whether or not the site has a boundary which fronts or abuts a street. "Fronts or abuts" should in the context have the same meaning, i.e. "touch" because, if a site does not abut (which must mean, "touch") a street, Regulation 19 will take over from Regulation 16 as to determination of a building's height. So that Regulations 16 and 19 may exist without conflict, "frontage" of a site must be taken to be that boundary of the site which touches the street. Accordingly, the only "frontage" (in the meaning assigned to it by Regulation 16(4)) of Plaintiffs' site in relation to Jardine's Crescent, is Section F of I.L.457, which constitute factor F in determining "street shadow area" under Regulation 16(2).

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- (2) IF "fronting" were to be a question of degree as suggested by the Judge in first instance, there would be endless uncertainty and arguments, which does not seem to accord with the spirit of Regulation 16 which on its face, was clearly intended to achieve exactitude.
- (3) The scheme of the Regulations does not envisage an intervening structure, i.e. that shadow area calculations should be made twice, namely, once for a building on a site which actually touches a street and again, for the building immediately behind. Shadow area calculations having been made for the Mentor structure, similar calculations should not then be made in respect of the part of the Plaintiffs' building which is immediately behind. 10

14. Huggins V.P. and Leonard J.A. appear to have accepted the first part of the first contention of counsel for the Appellants, namely that Regulations 16 and 19 must be given a consistent application; and Li, J.A. did not express disagreement with that proposition. All three judges accepted the second contention, namely that questions of degree do not enter into any consideration of the word "fronting". The Court of Appeal therefore unanimously disapproved the ground upon which the High Court had dismissed the action. However, all three judges held that the appeal failed because in applying the definition of "street shadow area" in Reg. 16, the boundary of the site in Reg. 16(4) was not confined to the part (1/6) which actually abutted Jardine's Crescent but included the length of boundary which abutted the strip. All three judges did not deal with the third contention of Counsel for the Appellants. 20 30

Page 22 line 34 to Page 23 line 22

15. Huggins, V.P., found against the Appellants for the following basic reasons:

- (1) Regulation 16(4)(a) requires the projection to be drawn from every side of the proposed building, and "it was not suggested that this proposed building had more than four "sides" and that one should regard that portion which abutted Jardine's Crescent as one side and that portion which abutted the alienated strip as another side." 40

Page 24 line 8 to line 42

- (2) While accepting that "it is a very real difficulty", in the light of Regulation 19, to apply Regulation 16 such that the 5/6 of the Plaintiffs' proposed building (which is behind the advertising board) is deemed to be 50

fronting the street, the definition of "frontage" refers to "the boundary" as opposed to "such part of the boundary", and "it is immaterial that only part of the boundary abuts or fronts the street" - hence, the "frontage" of the Plaintiffs' site should be taken to include the part which abuts the alienated land.

10 16. Leonard, J.A., found against the Appellants for essentially the same reasons as Huggins, V.P. He said:

(1) "Mr. Widdicombe makes out a very strong case for his contention that that portion of the proposed building which is to lie behind the severed strip will not abut or front Jardine's Crescent and I am prepared to accept for the purposes of this judgment that it will not (however absurd such acceptance may be when one contemplates the vastness of the blank wall intended to tower over that street)".

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Page 28 lines 23-28

(2) "The site will have four boundaries forming a rectangle as shown on the block plan at P.87 of the agreed bundle. One of these four boundaries will abut and front Jardine's Crescent. It will also abut and front the severed strip. Where it does it may not abut and front Jardine's Crescent. But that does not make it two boundaries in relation to the site it contains. It is a single boundary - the boundary to the North East of the site. It abuts and fronts on Jardine's Crescent".

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Page 28 lines 33-39

17. Li, J.A., in finding against the Appellants, said:

(1) "It is also abundantly clear that at least 1/6th of the proposed building abuts and fronts Jardine's Crescent. That is so because 1/6th of the building constitutes an integral part of the building. If it abuts, then the whole building (in one unit) can be said to be a building which abuts the street. For example, if a person puts one of his feet on to the street it is futile to argue that he has not entered the street simply because his whole body has not gone on the street. For this reason I am of the opinion that the building is one which abuts on Jardine's Crescent."

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Page 31 lines 15-22

(2) "Having regard to the definition of the word frontage, I am of the opinion that a line

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Page 31 lines 34-39

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can be drawn from the abutting part of the site or the two extremities of that abutting boundary at right angles to the centre line of Jardine's Crescent for the purposes of sub. paragraph (b) and (c) in the definition of "street shadow area" in paragraph 4 of Regulation 16. After all a line is only an imaginary concept. It has neither width or height."

18. The Court of Appeal on the basis of the reasons summarised above dismissed the Appeal with costs. 10

Contentions of the Appellants

19. The Appellants say that the Court of Appeal was right in ruling out questions of degree in determining the meaning of the words "frontage" and "fronting", and in thereby disapproving the ground upon which the High Court dismissed the action.

20. The Appellants say that Huggins V.P. and Leonard V.P. were right in interpreting Regulations 16 and 19 such that once a site abuts a street, the site immediately behind cannot be said to be fronting that street, but they were wrong in holding that the proposed building only had 4 sides built on a site with 4 boundaries. In fact, the proposed building will have 6 sides to be built on a six-sided site (see diagram in paragraph 6 above), and the only boundary of the site which can be said to "front or abut" Jardine's Crescent lies on Section F of I.L.457. It is this boundary alone which should constitute Factor F in Regulation 16(2). 20 30

21. The Appellants say that Li, J.A. is wrong in saying that once a part of a building abuts or fronts a street, then the entire building so abuts or fronts. If that be right, there would have been no need to use "frontage" as a limiting factor in Regulation 16(2) and (4). The dimensions of the building would suffice.

22. The Appellants also say that the Court of Appeal in omitting to deal with the third contention of Counsel for the Appellants (paragraph 17(3) hereof), (namely, that the Scheme of the Building (Planning) Regulations do not envisage the existence of an intervening structure) failed to consider an important aspect of the Appellants' case, and the Appellants annex hereto 3 diagrams to show the application of Regulation 16 and illustrate their contention. 40



23. The Appellants further say that the Court should consider the generality of sites and buildings in interpreting Regulation 16 and not be influenced by the size of the alienated strip. The situation is no different in principle to a row of houses in front of 5/6th of the length of the Plaintiffs' site, and examples were quoted in evidence by Mr. Simon Kwan who was not cross-examined.

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Page 39 line  
19 to Page  
40 line 3  
Pages 99-102

10 AND THE APPELLANTS HUMBLY SUBMIT THAT THE  
APPEAL SHOULD BE ALLOWED FOR THE FOLLOWING AMONG  
OTHER

R E A S O N S

- (1) That upon a true construction of Regulations 16 and 19 "frontage" as factor F in shadow area calculations should mean that boundary of a site which is actually contiguous with a street of 4.5 m wide or more.
- 20 (2) That the High Court and the Court of Appeal were wrong in holding that "frontage" for the purposes of calculating "street shadow area" should constitute the entire length of the Plaintiffs' site.
- (3) That the Plaintiffs' site only fronts or abuts Jardine's Crescent to the extent of the boundary of Section F of I.L.457 which is actually contiguous to Jardine's Crescent, and it is the length of this boundary which should be taken into account in calculating the  
30 "street shadow area" under Regulation 16(2).

D. WIDDICOMBE

A. NEOH

DIAGRAM A

STREET SHADOW AREA WHERE BOUNDARY OF SITE TOUCHES THE STREET

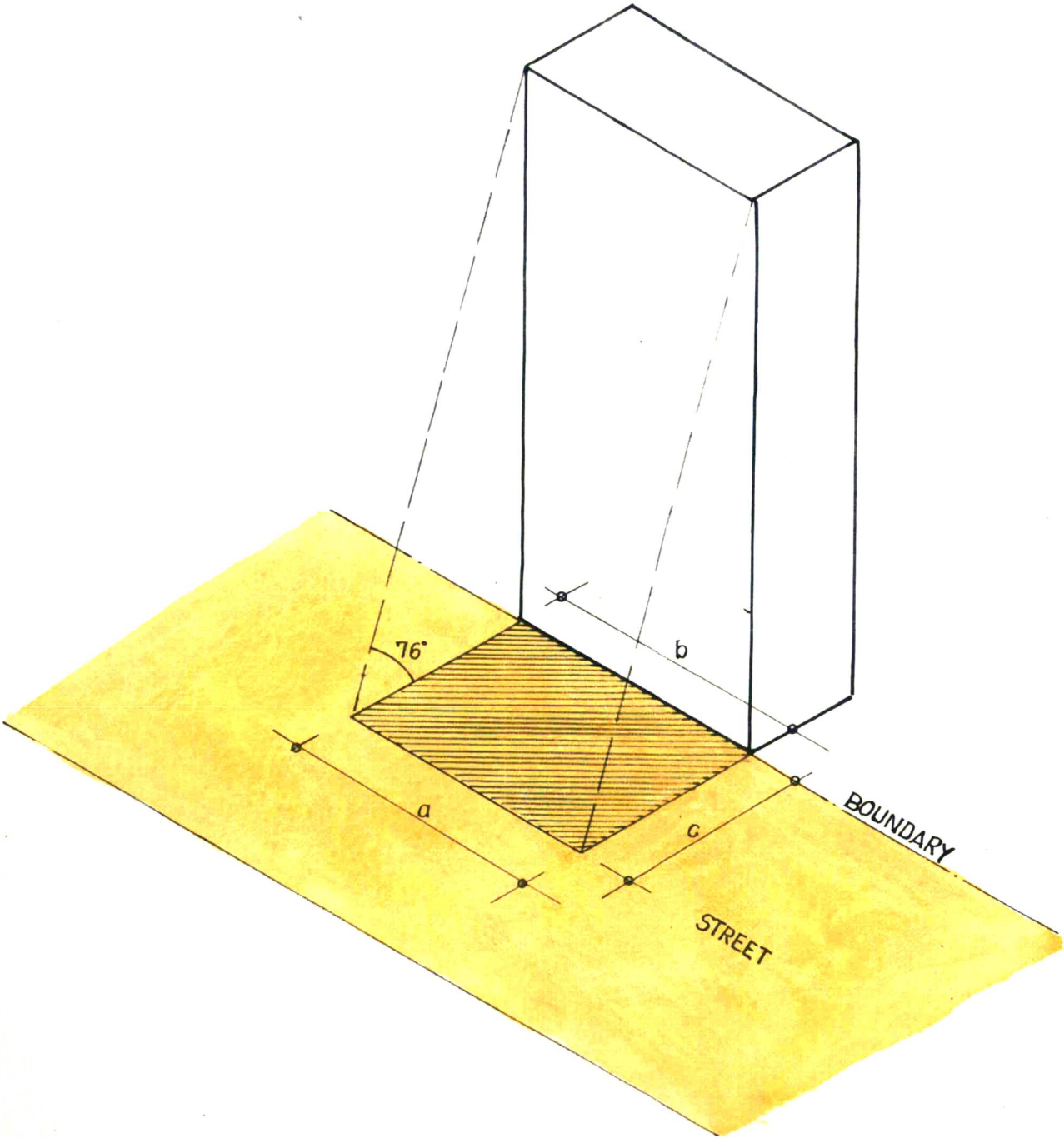


DIAGRAM 'B' STREET SHADOW AREA WHERE  
ONE OF THE BOUNDARIES OF THE SITE  
IS SEPARATED FROM THE STREET BY  
ANOTHER SITE.

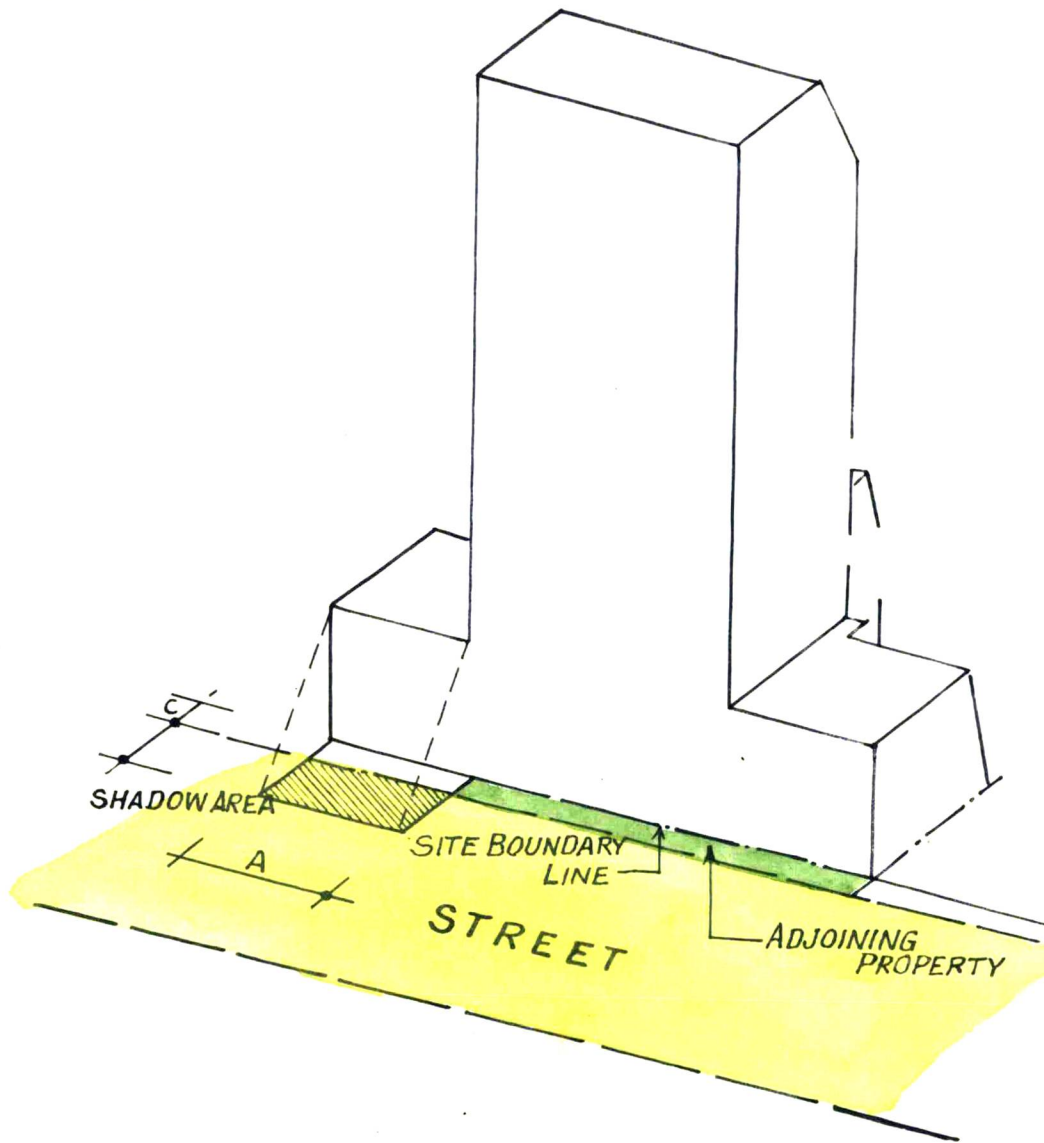
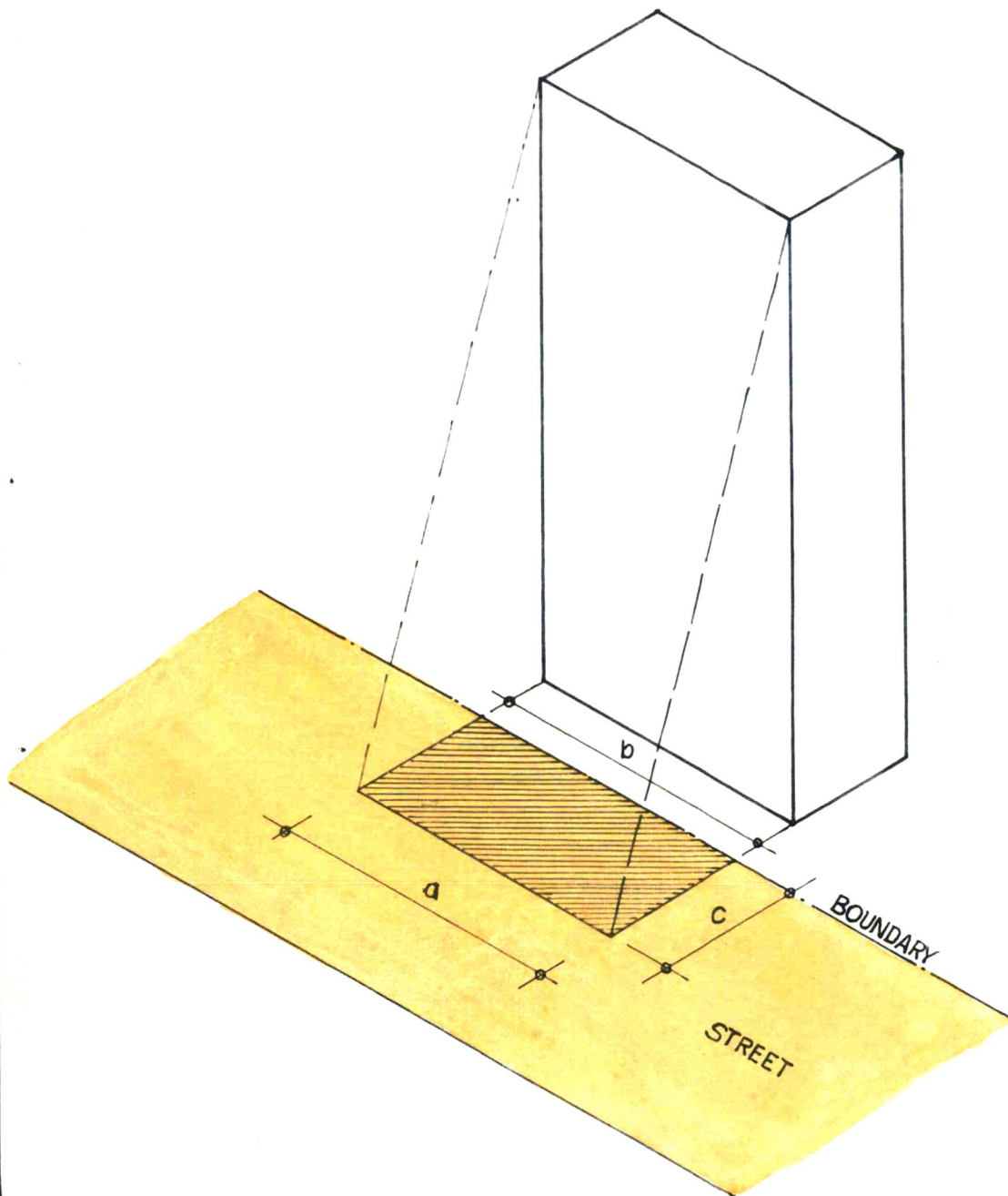


DIAGRAM 'C'

STREET SHADOW AREA WHERE BOUNDARY OF SITE TOUCHES THE STREET BUT THE BUILDING IS SET BACK FROM THE BOUNDARY OF THE SITE.



Appeal No. 48 of 1981

IN THE PRIVY COUNCIL

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O N A P P E A L  
FROM THE COURT OF APPEAL OF HONG KONG

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B E T W E E N :

AIK SAN REALTY  
TUNG HING SHING REALTY LIMITED  
YAU SAUN DEVELOPMENT COMPANY LIMITED

Appellants  
(Plaintiffs)

- and -

ATTORNEY GENERAL

Respondent  
(Defendant)

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CASE FOR THE APPELLANTS

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Coward Chance,  
Royex House,  
Aldermanbury Square,  
London WC2V 7LD.

Solicitors for the Appellants