

15/83

ON APPEAL
FROM THE COURT OF APPEAL OF HONG KONG

BETWEEN :

ATTORNEY GENERAL

Appellant
(Defendant)

- and -

MIGHTYSTEAM LIMITED

Respondent
(Plaintiff)

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CASE FOR THE APPELLANT

RECORD

1. This is an appeal by leave of the Court of Appeal of Hong Kong, leave having been granted by order dated the 23rd day of February 1982, to appeal against a decision of the Court of Appeal of Hong Kong (Leonard V-P, Cons & Zimmern JJ.A) whereby the order of the Honourable Mr. Justice Fuad dated the 8th day of October 1981 was set aside and declarations were granted in terms of paragraphs (1) and (4) of the originating summons dated the 5th day of May 1981, namely :-

pp.12-32

pp. 4-5

pp. 1-3

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(i) A declaration that Inland Lot No.2232, 12 Bowen Road, Hong Kong (hereinafter called "the said site") is a class A site within the meaning of the Building (Planning) Regulations; and

(ii) A declaration that the purported refusal by the Building Authority's letter dated the 20th day of June 1980, to approve plans for the redevelopment of the said site is incorrect, null and void in so far as it is grounded on the basis that the said site does not abut on a street and that, accordingly, the height of and the site coverage and plot ratio for any building thereon falls to be determined under regulation 19 of the said Regulations.

pp. 74-78

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RECORD

pp.53-55
pp.37-51

2. The said site (more particularly shown in Appendix A of this Case) consists of the original Inland Lot No.2232 and an extension thereto granted in 1973 for garden purposes. The Respondent acquired leasehold in the said site by virtue of an assignment dated the 9th day of July 1980 of a Crown Lease granted in 1918 from one Irene Zigal.

p.87

3. The said site is linked to Borrett Road by a Reinforced Cement Concrete bridge (hereinafter called "the said bridge") constructed on or over Crown Land. On the 1st day of April 1962 permission to use the said bridge was granted to the said Irene Zigal as the then registered owner of the original Inland Lot No. 2232 by Crown Land Permit No.3163 as a means of access to the said site which permit was expressed to be non-transferable. It is common ground that although no such permit or right of way has ever been granted to the Respondent, the Crown has allowed the Respondent to use the said bridge as a means of access to the said site.

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pp. 56-72

4. On or about the 28th day of April 1980, the Respondent by their Architects submitted building plans to the Building Authority for approval for redevelopment of the said site on the assumption that the site was a class A site. If approved, the proposed building would comprise 24 storeys of domestic accommodation over four storeys of car park.

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pp. 74-78

5. The Building Authority refused his consent to the building plans pursuant to the Buildings Ordinance Chapter 123 of the Laws of Hong Kong by a letter dated the 20th day of June 1980 in which the Building Authority stated, inter alia,

"As the site does not abut a street, the Building Authority has determined under Building (Planning) Regulation 19, that the maximum permissible height, site coverage and plot ratio of any building to be erected on this site should be 40 m, 39% and 2.9022 respectively. Accordingly your proposal is unacceptable in these terms....."

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6. Regulation 19 provides as follows :-

"Where a site abuts on a street less than 4.5 m wide or does not abut on a street, the height of a building on that site or of that building, the site coverage for

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the building and any part thereof and the plot ratio for the building shall be determined by the Building Authority".

RECORD

10 7. The issue between the parties is whether the said site is a class A site in which case the permissible development limits are prescribed in the First Schedule to the Building (Planning) Regulations or whether it is one to which Regulation 19 applies in which case the Building Authority is entitled to determine the height site coverage and the plot ratio of the proposed building.

8. Class A site is defined in Regulation 2(1) of the Building (Planning) Regulations as follows :-

"Class A site" means a site, not being a Class B site or Class C site, that abuts on one street not less than 4.5 m wide or on more than one such street.

20 9. The word "street" is defined in the following places :-

(a) Section 3 of the Interpretation and General Clauses Ordinance Cap.1.

"street" and "road" mean -

(a) any highway, street, road, bridge, thoroughfare, parade, square, court, alley, lane, bridle-way, footway, passage, tunnel; and

30 (b) any open place, whether situate on land leased from the Crown or not, used or frequented by the public or to which the public have or are permitted to have access;

The application of this definition is governed by Section 2(1) of the same Ordinance which reads as follows :-

40 "Save where the contrary intention appears either from the Ordinance or from the context of any other Ordinance of instrument, the provisions of the Ordinance shall apply to this Ordinance and to any other Ordinance in force, whether such other Ordinance came or comes into operation before or after

RECORD

the commencement of this Ordinance, and to any instrument made or issued under or by virtue of any such Ordinance".

(b) Section 2(1) of the Buildings Ordinance Cap.123, in so far as is relevant, provides as follows :-

"In this Ordinance, unless the context otherwise requires -

"street" includes the whole or any part of any square, court, alley, highway, lane, road, road-bridge, footpath, or passage whether a thoroughfare or not". 10

(c) Regulation 2(1) of the Building (Planning) Regulations contains the following definition of street :-

"2(1) In these regulations, unless the context otherwise requires, words and expressions have the meaning attributed to them by the Buildings Ordinance, and - "street" includes any footpath and private and public street. " ". 20

10. The Interpretation and General Clauses Ordinance Cap. 1 contains the following provisions which are relevant to the construction of the above provisions -

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Section 19

"An Ordinance shall be deemed to be remedial and shall receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Ordinance according to its true intent, meaning and spirit".

Section 31

"Where any Ordinance confers power to make any subsidiary legislation, expressions used in the subsidiary legislation shall have the meaning as in the Ordinance conferring the power, and any reference in such subsidiary legislation to the "Ordinance" shall be construed as a reference to the Ordinance conferring the power to make such subsidiary legislation". 40

11. The Originating Summons came before the Honourable Mr. Justice Fuad on the 28th day of September 1981. The Respondent contended :
- RECORD
pp. 1-3
- (a) That the said site abuts on Borrett Road.
 - (b) That the said bridge is a road-bridge and is therefore a street within the meaning of Section 2 of the Building Ordinance Cap.123. p. 8 11.9-11
 - 10 (c) That as regards the width of the said bridge the proper approach is to measure the overall width of the bridge. p. 8 11.15-18
 - (d) That the said site also abuts on the said bridge.
 - (e) That therefore the said site is a class A site. p. 8 11.19-20
12. The Appellant contended :
- 20 (a) that the said site does not abut on Borrett Road.
 - (b) That the governing definition of street is the one provided in the Building (Planning) Regulation. p. 8 11.31-32
 - (c) That the said bridge does not fall within the meaning of the said definition.
 - (d) That the said bridge is not a street for the purposes of the Building (Planning) Regulations as it has none of the characteristics of a street. 30
 - (e) That the said bridge is in any event less than 4.5 m wide. The Appellant submitted that in measuring the width of the bridge, the width of the kerbstones at each side thereof should be ignored. In this case, the useable space between the kerbs of the bridge has been measured and found to have an average width of 4.403 m. The measurements were shown in a diagram exhibited to an affidavit filed on behalf of the Appellant in the courts below and is now reproduced in Appendix B of this Case. 40 p. 94

RECORD

(f) That the said bridge is an access road within the meaning of Section 2(1) of the Buildings Ordinance where access road is defined as follows :

"Access road" means a road on land held under lease, licence or otherwise from the Crown or on land over which the Crown has granted a right of way, providing access only to buildings used or intended to be used wholly or mainly for purposes of habitation, and which is not a street.

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13. In dismissing the said Summons, the Honourable Mr. Justice Fuad held :

p.9 11.28-29

(a) That the definition of "street" in Regulation 2(1) of the Building (Planning) Regulations is relevant to the determination of the said Summons.

p.11 11.9-11

(b) That the said bridge is not a street within the meaning of the Building (Planning) Regulations.

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p.11 11.9-11

(c) That the said site does not abut on a street.

14. The Respondent appealed to the Court of Appeal of Hong Kong on the grounds that Fuad J. has erred in law as follows:

pp. 12-13

(i) in holding that the relevant definition of "street" was solely the one contained in the Building (Planning) Regulations rather than a combination of that one and the one given in the Buildings Ordinance, Cap.123, and

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p. 12

(ii) in holding that by reason of the nullah which ran along it the said site does not abut Borrett Road or the cul de sac which may or may not be Borrett Road.

p.16 11.26-29
p.23 11.3-8
p.27 11.40-44

15. The Court of Appeal, whilst upholding the learned Judge's finding that the said site does not abut on Borrett Road, allowed the appeal and granted the declarations set forth in paragraph 1 above. The reasons given by the learned Justice of Appeal were as follows :-

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p.17 11.11-15
p.24 11.15-17
p.28 11.14-17

(a) That the definitions of street contained in the Buildings Ordinance and the Building (Planning) Regulations

should be read together.

RECORD

(b) That the bridge, being a road-bridge, is a street within the meaning attributed to it in the principal Ordinance although in common parlance it is not regarded as such. p.27 11. 1-3 p.31 11.41-42

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(c) That in holding that the said bridge must be taken as not less than 4.5 m wide, the width of the kerbs at each side must be added to the width of the carriageway as street is defined in the Buildings Ordinance to include "the whole of" any square, court or alley, highway, roadbridge..... p.23 11.34-35 p.20 11.42-46 p.23 11.31-35 p.28 11.12-14

(d) Leonard V.P. in his judgement said :

"It was not argued that the bridge was an access road nor was it suggested that the site did not abut upon it". p.20 11.35-36

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In fact Counsel for the Appellant referred both the Trial Judge and the Court of Appeal to the definition of access road in section 2 of the Buildings Ordinance. Cons.J.A. referred specifically to this definition in his judgment. When Counsel for the Appellant attended before the Court of Appeal to seek leave to appeal to the Privy Council, Counsel for the Appellant pointed out to Leonard V.P. that this point had in fact been made in the Court below and in the Court of Appeal. The Learned Judge invited Counsel for the Respondent to agree that this was so and Counsel for the Respondent did not dispute that this point was raised and the Learned Judge expressed the hope that this point would be specifically agreed between the parties. p.25 11.30-38

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16. The Appellant submits that the Appeal should be allowed with costs for the following, among other,

R E A S O N S

(a) that there is a contrary intention or the context otherwise requires that the meaning of street in the instant case is to be governed by the definition in the

RECORD

Building (Planning) Regulations to the exclusion of those in the Buildings Ordinance and the Interpretation and General Clauses Ordinance Cap.1. The contrary intention is demonstrated by the following arguments :-

- (i) That the Building (Planning) Regulations themselves provide a different definition of street;
 - (ii) That "street" is the only word defined in both the principal Ordinance and the Regulations; 10
 - (iii) That the word "footpath" appears in both the definitions in the principal Ordinance and the Regulations;
 - (iv) That if street means what the Ordinance says then the definition of road in the Regulations is partly circuitous. Road is defined in the Regulations as follows :- 20
- "Road" means a street not including any footpath.

p.9 11.28-29

p.17 11.11-15

p.24 11.15-17

In this respect, the Appellant submits that the court at the first instance has correctly held that the definition of street in the Regulations is relevant to the determination of the said Summons. The Court of Appeal has erred in holding that the definitions of street in both the principal Ordinance and Regulations should be read together and in placing too much weight on the conjunctive "and" in the opening words of Regulation 2. 30

In this connexion, the Appellant will refer at the hearing to the following passages at page 335 of G.C.Thornton's Legislative Drafting 2nd Edition :-

"Expressions in subordinate legislation bear the same meanings as in the relevant principal legislation unless the contrary intention appears. It is not therefore legally necessary, nor in general desirable, to repeat in subordinate legislation definitions appearing in the principal Legislation. Nevertheless, instances may occur in which it is helpful to do so, for 40

example where the subordinate legislation is of such a substantial nature that it is likely in practice to stand alone and be used without recourse to the enabling legislation by the affected members of the public. A code of building by-laws or regulations might be such an instance.

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Although it is highly desirable that the use of language in subordinate legislation should accord with that in the enabling legislation, exceptional circumstances may render it necessary and appropriate to attach a different meaning to a word or an expression in subordinate legislation. It is desirable in such cases, in order to avoid uncertainty, to insert in the subordinate legislation a definition stipulating the new meaning for the purposes of the subordinate legislation, or perhaps for purposes limited to a specified part of the subordinate legislation".

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(b) That the said bridge is not a street within the meaning of the definition in the Building (Planning) Regulations.

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(c) That the bridge is less than 4.5 metres wide. The Appellant submits that a practical approach should be adopted with regard to ascertaining the width of the bridge. It is submitted that the width of the kerbs should be ignored bearing in mind that the purposes of the Building (Planning) Regulations are, inter alia, to provide for adequate means of access and escape in the event of fire and other emergencies. The appellant submits that the relevant width for this purpose is the actual useable roadway. As Lord Selbourne L.C. said when dealing with section 157 of the Public Health Act 1875 in the case of George Robinson v. the Local Board for the District of Barton-Eccles, Winton and Monton 1893 A.C. 798 at page 807.

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"If the street is already of a certain width you may want to widen it; but it is not of a certain width for any purpose useful to the public unless the public can pass over it".

RECORD

The Appellant further submits that the words "the whole of" in the definition of street in the principal Ordinance refer to the surface area of the street to the exclusion of whatever forms the boundary. Just as it would be absurd to suggest that the width of a square, court or alley included the width of the structures which formed it, so it would be absurd to suggest that the width of a road-bridge included the parapets or verges or kerbstones which limited the surface area of the road-bridge.

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(d) That the statutory definitions of street in both the principal Ordinance and the Regulations do not take away its ordinary meaning.

(e) That even if the definition of street in the Buildings Ordinance applicable, nevertheless the bridge is still not a street because it has none of the characteristics of a street. In this respect, the relevant definitions do no more than provide that what is naturally a street shall not cease to be so merely because it also acquires the characteristics of any of the other features mentioned therein. The inclusion of "private and public street" in the definition of street in the Building (Planning) Regulations is a good illustration.

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(f) That the bridge in question is an access road within the meaning of Section 2 of the Buildings Ordinance Cap.123 in that it has none of the characteristics of a street and is a road on land held under licence or otherwise from the Crown providing access only to the said site which is used wholly or mainly for purposes of habitation. In this respect, the Buildings Ordinance draws a clear distinction between a street and an access road. If in the definition of "access road" street has the meaning set out in the definition of a street the words "access road" are deprived of any meaning at all, because every access road would be a street. This absurdity can and should be avoided by construing "street" in the definition of access road in accordance with its normal meaning and applying the definition of street to anything coming within the words used which is not also

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an access road.

RECORD

10 (g) Further, that there is something in the context of the legislation under discussion to the contrary requiring the word "street" to be given its natural and popular meaning, namely, a roadway with a row of houses on each side. An example of such contrary intention can be found in the definition of "access road". Unless the word street is given its natural and popular meaning, the phrase "and which is not a street" in the latter part of the definition of access road would be rendered meaningless if a road on land automatically became a street only by reason of the definition of street in the Buildings Ordinance.

20 (h) (i) The Appellant seeks leave to raise a point of construction on the Building (Planning) Regulations that was not raised by the Appellant in either court below but which was adverted to by Zimmern J.A. when he said :

p.31 11.41-46
p.32 11. 1-4

30 "In my view the road-bridge in instant case comes within the definition of street under the Ordinance and the sole question left is whether the site abuts on to it. It is a matter on which I have my doubts in respect of a road which runs into the site. However Mr. Ogden had throughout argued that the site for the purposes of the Regulations does so abut and we have no argument to the contrary on behalf of the Attorney General".

40 (ii) The Respondents have been granted declarations to the effect that their site is a class A site. The height of buildings to be erected on Class A sites is governed by Regulation 16 of the Building (Planning) Regulations which, in so far as is material, provides :-

"16(1) where any building abuts, fronts or projects over a street, the height of such building shall be determined by reference to the street shadow area thereof.

(2) subject to para.(3), the street shadow area of a building shall not exceed the area obtained by applying the formula -

$$\frac{F \times W}{2}$$

RECORD

in which -

F is the length of the frontage of the building; and W is the width of the street upon or over which the building abuts, fronts or projects.

(3).....

(4) for the purposes of this Regulation -

"corner" means an intersection of 2 streets where the angle of intersection of lines drawn along the centre of such street is less than 140° measured on the side nearer to the building; 10

"frontage" in relation to a building, means that boundary of a site upon which the building is erected which abuts or fronts a street and includes any service lane or other opening within such boundary; 20

"street" means a street or service lane at least 4.5 m wide;

"street shadow area" in relation to a building, means an area on the surface of a street contained by -

(a) a line formed by the projection from every part of the side of the building abutting, fronting or projecting over such street of planes at an angle of 76° from the horizontal from the highest point on such building or on any projection therefrom of a permanent nature, from which such planes could be drawn uninterrupted by any other part of that building; 30

(b) a line formed by the frontage of the building; and

(c) lines drawn from each extremity of the frontage of the building at right angles to the centre line of the street. 40

The Appellant contends that where a street leads to a site

(as opposed to a street running along the side of a site) it is impossible to draw Line (C) in Regulation 16(4) because lines drawn at right angles from the frontage of the building to be erected on the site will run parallel to and never meet the centre line of the street. The Appellant contends that this provides a strong indication that the said site does not abut the road-bridge when construing "abut" in the context of these Regulations.

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The diagrams at Appendices C-E of this Case illustrate this argument.

NEIL KAPLAN Q.C.

S.Y. CHAN

Plan showing the site I.L. No. 2292 and its extension

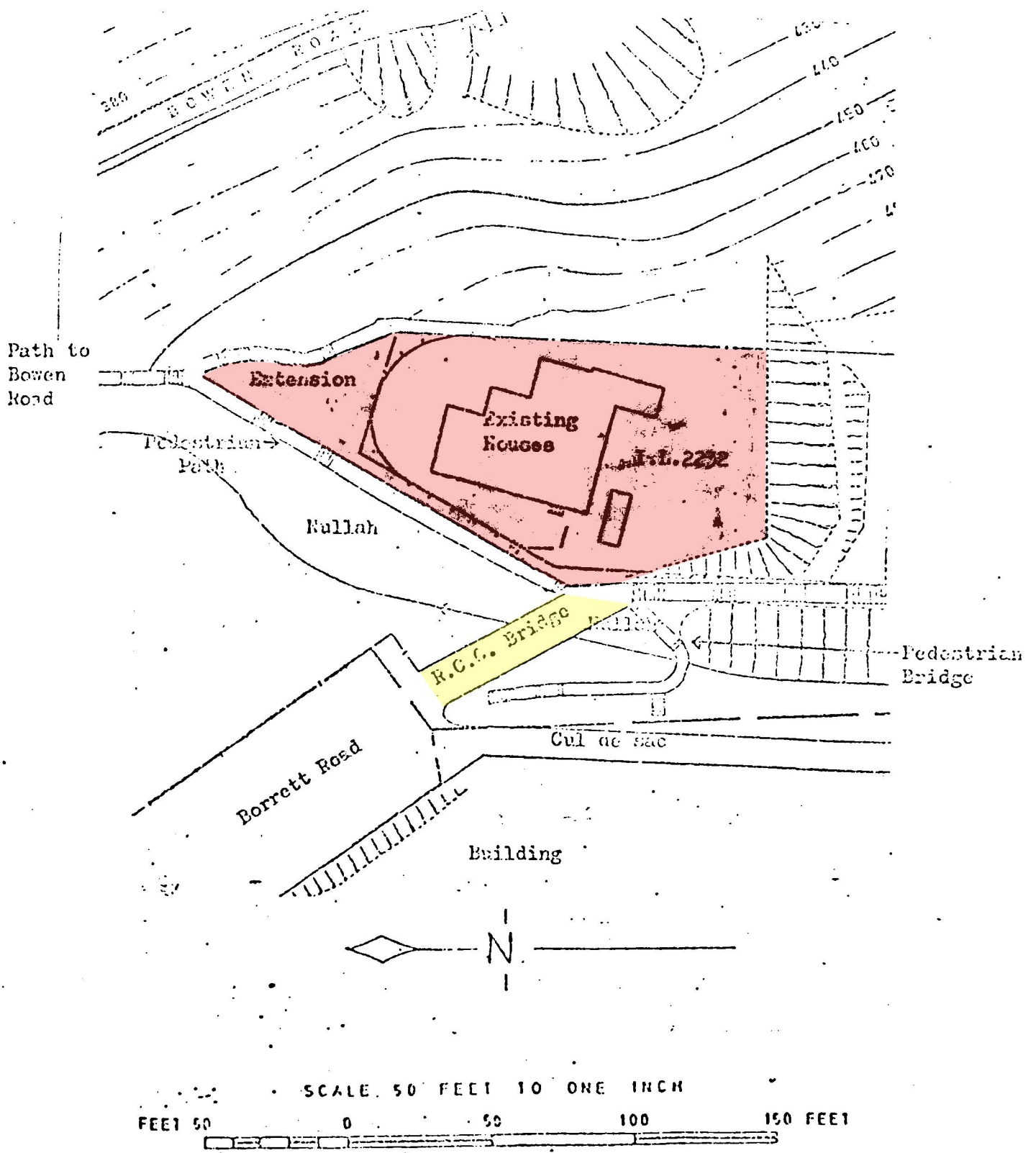
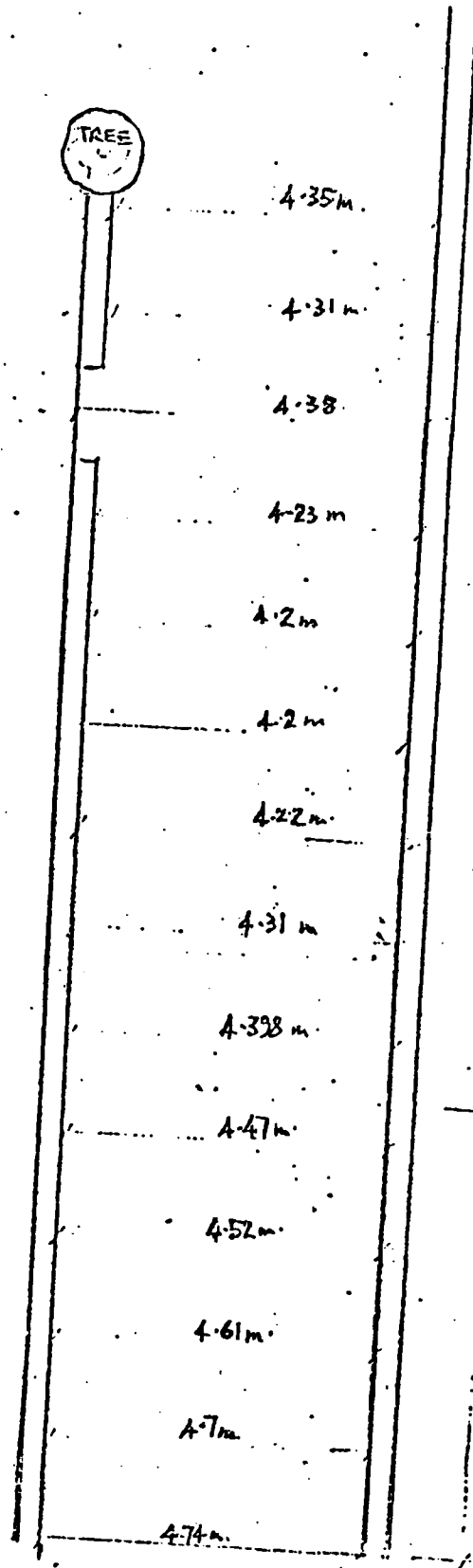
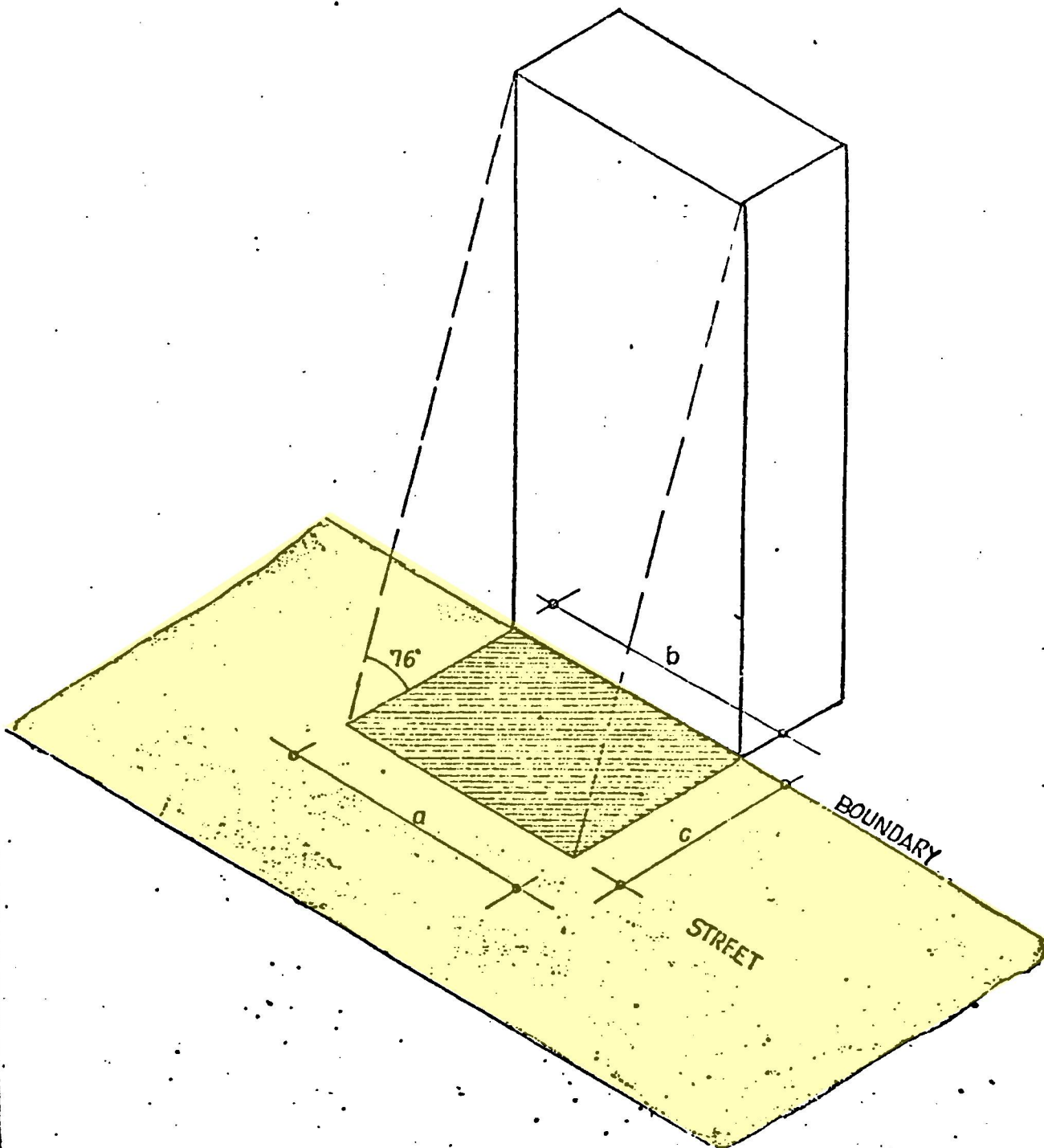


Diagram showing width of R.C.C. Bridge



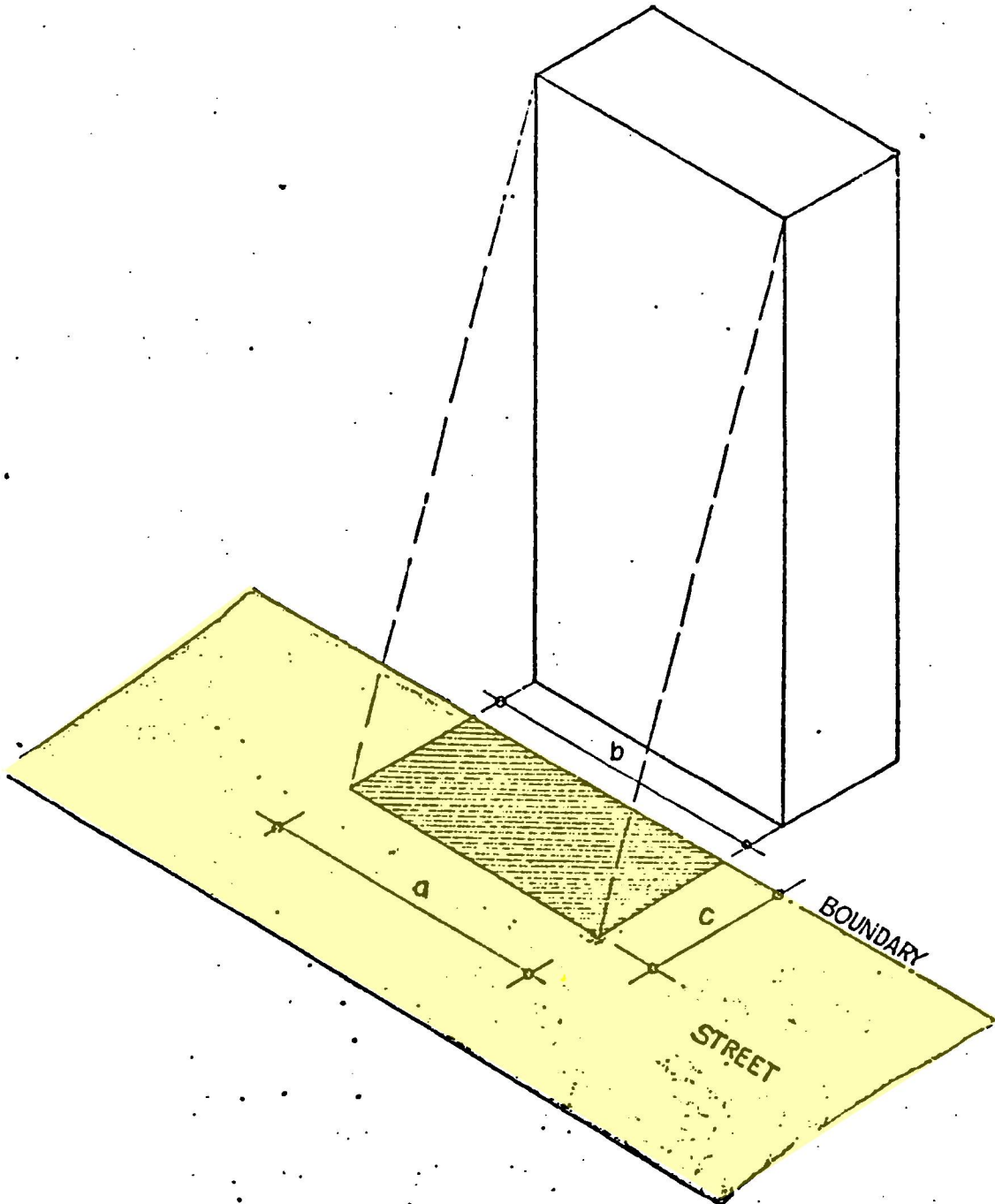
Appendix C

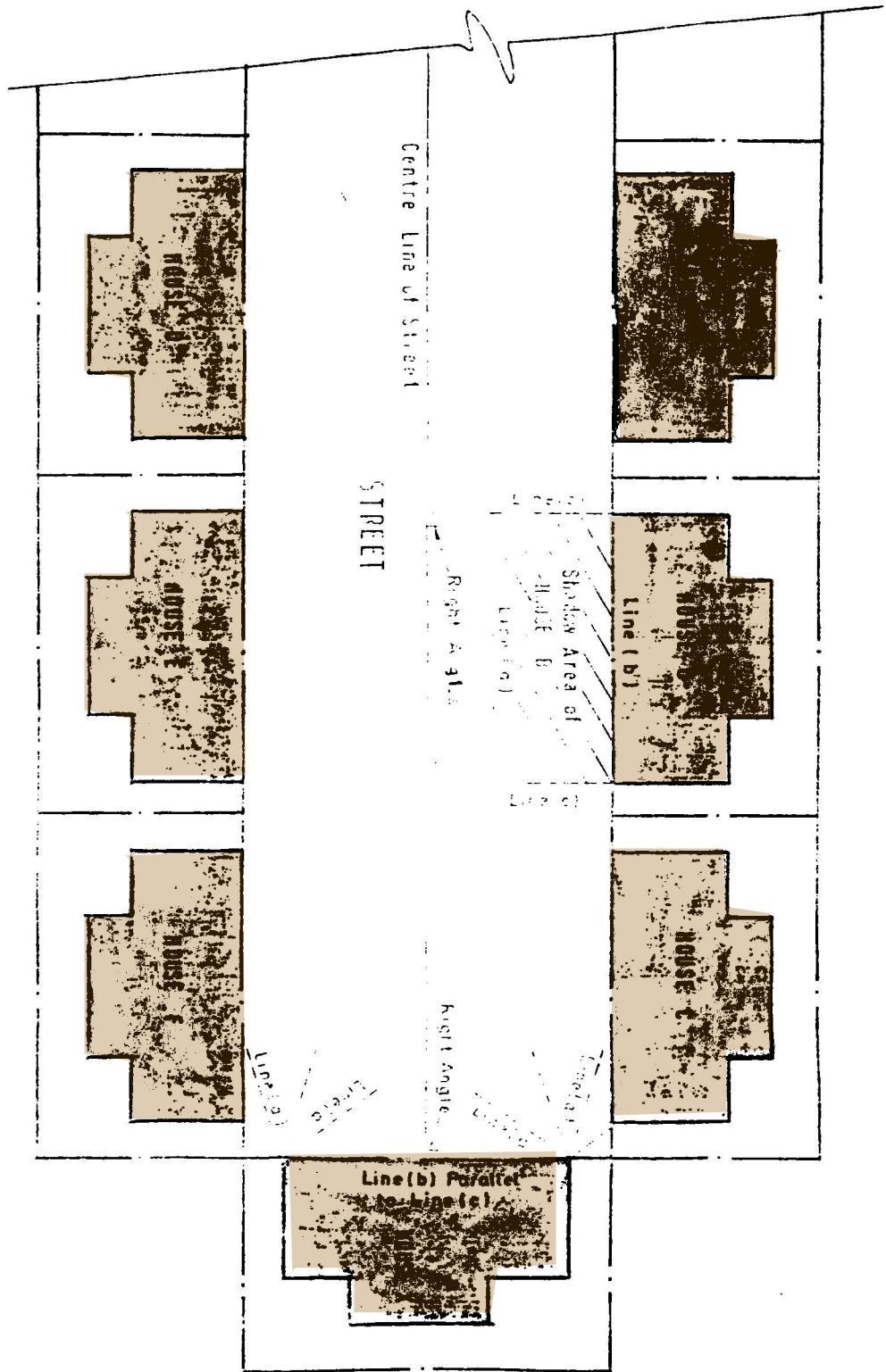
STREET SHADOW AREA WHERE BOUNDARY OF SITE
TOUCHES THE STREET



Appendix D

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





No. 31 of 1982

IN THE PRIVY COUNCIL

O N A P P E A L

FROM THE COURT OF APPEAL OF HONG KONG

B E T W E E N:

ATTORNEY GENERAL

Appellant
(Defendant)

- and -

MIGHTYSTREAM LIMITED

Respondent
(Plaintiff)

CASE FOR THE APPELLANT

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