



Land and Environment Court
New South Wales

Case Name: Shaw v Woollahra Municipal Council

Medium Neutral Citation: [2023] NSWLEC 1358

Hearing Date(s): 7 & 8 June 2023

Date of Orders: 07 July 2023

Decision Date: 7 July 2023

Jurisdiction: Class 1

Before: Walsh C

Decision: In Proceedings 2023/0074046:
The Court orders:
(1) The appeal is upheld.
(2) Pursuant to s 8.25(3)(a) of the Environmental Planning and Assessment Act 1979, Woollahra Municipal Council is directed to issue a Building Information Certificate in respect of Building Information Certificate Application No. BIC 2/2023, concerning the property at 62 Queen Street Woollahra, within 14 days.
(3) The exhibits are returned with the exception of Ex 1, 5, A, B, H, M and P, which are retained.

In Proceedings 2023/0074021:
The Court orders:
(1) The appeal is upheld.
(2) Development Consent No. DA216/2020 is modified in the terms in Annexure A.
(3) Development Consent No. DA216/2020 as modified by the Court is Annexure B.
(4) The exhibits are returned with the exception of Ex 1, 5, A, B, H, M and P, which are retained.

Catchwords: MODIFICATION APPLICATION – building works undertaken without consent – application for building

information certificate – modification of consent

Legislation Cited: Conveyancing Act 1919, s 88E
Environmental Planning and Assessment Act 1979, ss 4.16, 4.56, 8.7, 8.9, 8.25
Land and Environment Court Act 1979, s 34
Woollahra Local Environmental Plan 2014, Sch 5

Cases Cited: Scarf v Shoalhaven City Council [2021] NSWLEC 128

Texts Cited: Woollahra Development Control Plan 2015

Category: Principal judgment

Parties: Graeme Shaw (Applicant)
Woollahra Municipal Council (Respondent)

Representation: Counsel:
Dr S Berveling (Applicant)
P Rigg (Respondent)

Solicitors:
Boskovitz Lawyers (Applicant)
Peter R Rigg (Respondent)

File Number(s): 2023/74021
2023/74046

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JUDGMENT

- 1 **COMMISSIONER:** On 8 April 2021, in the matter *Shaw v Woollahra Municipal Council* [2021] NSWLEC 1169 (*Shaw No 1*), the Court granted consent to Development Application DA216/2020, which was for alterations and additions to the existing dwelling at 62 Queen Street Woollahra (site). Consent was granted consistent with an agreement between the parties following a conciliation conference held under s 34 of the *Land and Environment Court Act 1979* (LEC Act) and was subject to conditions.
- 2 The two proceedings before me here relate to the approved DA216/2020 in one way or another, and are described, respectively, as follows:
 - Proceedings 2023/0074046 is an appeal against the refusal by Woollahra Municipal Council (Council) to issue a Building Information Certificate (BIC)

over part of the building occupying the site. Henceforth I will describe this as the BIC appeal. The Council reference number for the BIC appeal is BIC 2/2023 (advice from Mr Rigg dated 29 June 2023).

- Proceedings 2023/0074021 is an appeal against Council's deemed refusal of a modification application lodged by the applicant under s 4.56 of the *Environmental Planning and Assessment Act 1979* (EPA Act), which would modify the consent for DA216/2020. Henceforth I will describe this as the MA appeal. The Class 1 Application (Ex H) indicates the Council reference number for the MA appeal is DA/216/2020/4.
- 3 Each proceedings are appeals under Class 1 of the Court's jurisdiction. The BIC appeal is brought under s 8.25 of the EPA Act. The MA appeal is brought under s 8.9 of the EPA Act. The two appeals were heard concurrently, and an order was made on 8 June 2023 that evidence in each proceeding also relate to the other proceedings.

Setting

- 4 I rely on the Applicant's Statement of Facts and Contentions (Ex A) for much of the descriptive material that follows, noting Council's agreement with the relevant content (Respondents Statement of Facts and Contentions in Reply Ex 1 p 1). The site lies on the northern side of Queen Street, between Halls Lane and Oxford Street, and is legally described as Lot 76, Section B in Deposited Plan 12. The site is quite rectangular and has dual street frontages, although Queen Street provides the actual frontage to the dwelling (Smith Street to the north presents as something of a rear laneway). Street frontage boundaries are 6.095 metres (m) and side boundaries are 32.95m.
- 5 The site is fairly level, with a minor west to east cross fall of approximately 0.1m along the Queen Street frontage and a south to north cross fall of approximately 0.7m. The Site is presently occupied by a two-storey Victorian terrace house building, used as a single dwelling-house. The site has minimal vegetation apart from a single tree located in the rear yard and one in the front yard. The rear of the site fronting Smith Street comprises a single hardstand parking space and small shed.
- 6 The site is listed as a heritage item of local significance under Sch 5 of Woollahra Local Environmental Plan 2014 (WLEP). Under "item name" is the text: "Terrace house and interiors, front fencing". The Site is zoned R2 Low Density Residential under the WLEP.

- 7 The Site falls within Woollahra Heritage Conservation Area under WLEP and forms part of the Queen Street Precinct as described in the Woollahra Development Control Plan 2015 (WDCP).
- 8 The surrounding streetscape consists of a variety of one, two and three-storey buildings of various historical periods, many of which comprise retail and/or commercial premises on the ground floor level with a mix of commercial and residential uses to the upper levels. The terraces to the immediate east and west also enjoy listings as local heritage items, typically with one or two-storey rear wings and single storey boundary-to-boundary garages built to the rear boundary on Smith Street.

Lay Submission

- 9 Objecting submissions in relation to the MA appeal were summarised in Council's statement of facts and contentions in relation to that matter (Ex 5). I will note here that the Court heard submissions on behalf of an objector during the site inspection, prior to attending Court for the hearing proper. These lay objections raised concerns about the implications of both of the applications for the adjoining property to the west, and across Smith Street to the rear. The objector provided a number of sheets of A3 drawings with detailed notes on concerns about the existing building. The objector was also represented by L Sims of counsel who also provided a list of objecting notes. Together these objecting submissions were tendered as Ex 6.

BIC appeal

- 10 This appeal is seeking a BIC in regard to certain unauthorised works particularised in the applicant's Class 1 Application (Ex B behind Tab 3).

Items

- 11 The particulars were summarised in Ex A (p 1) and itemised as Item "a" to "l" as follows:

- "a. Garage roof lowered by 256mm to RL 76.67;
- b. New western boundary wall constructed to 1810mm high;
- c. First floor western roof height raised by 80mm to RL 80.39;
- d. Solar panels, aerial & satellite installed;
- e. 1 x new step added to steps from terrace to garage;

- f. Ground floor laundry wall and level 1 boundary walls clad in fireproof Axon cladding;
- g. Attic floor level lowered by 380mm to RL80.225.
- h. Ensuite added to attic bedroom with dimensions 3.5m x 1.2m;
- i. Ground floor bi-fold doors increased to 2.7m high and 4,400mm wide;
- j. Level 1 sliding doors increased to 2.7m high;
- k. First floor roof colour built in Monument colour; and
- l. Dormer location shifted from main roof centerline by 250mm, and Dormer width increased by 90mm.”

12 At Ex 1 and in oral submissions, Council indicated that its concern in relation to the issue of the BIC was limited to item “f” above. That is, in regard to “Ground floor laundry wall and level 1 boundary walls clad in fireproof Axon cladding”. Council particularises its concern in relation to item “f” at Ex 1 p 4-5, but in brief it concerned certain fire safety related points. I note here that the wall in question (both in regard to the ground and first floor) abutted the boundary with the property to the west.

Evidence

13 The fire engineering experts engaged in the proceedings were as follows:

- L Tunhavasana (engaged by applicant)
- J Mattern (engaged by Council).

14 The key evidence in regard to the fire-related concerns with the western wall included the following:

- Joint expert report by fire engineering experts filed 26 May 2023 (Ex 2)
- Fire engineering report by J Squared Engineering (where Mr Tunhavasana is employed) dated 28 May 2023 (Ex C)
- Expert joint letter prepared after the site inspection on 6 June and tendered as Ex K on 7 June.

15 I can note here it was agreed that the fire-related concern and BIC application was limited to aspects of the first floor walls.

16 The train of events relating to the fire engineering expert evidence can be summarised as follows.

- (1) There remained points of disagreement among the experts at the time of preparation of Ex 2. The applicant was seeking a performance based

solution after Council found that “(elements) of the building design do not satisfy the Building Code of Australia (BCA) deemed to satisfy (DTS) provisions” (Ex C p 4). The key point of dispute related to a proposed ongoing maintenance requirement to be imposed on the site as proposed by the applicant’s expert (involving a wetting sprinkler system). Council’s expert was concerned about the “robustness” of such an approach (including in relation to compliance and enforcement) but was open to a revised fire engineering analysis seeking to justify a solution to the wall arrangement.

(2) Ex C was then prepared, analysing the application of what was termed the “James Hardie Smart Boundary Wall System” (Ex C p 4), henceforth the Hardie system. The Hardie system employs a configuration which was agreed by the experts as providing a satisfactory performance based solution. The concern from Council and its expert was whether the as-built western wall was configured in accordance with the Hardie system. That is to say, there are certain special requirements in regard to thickness and packing of the insulation to comply with the Hardie system. There was some photographic evidence that this had occurred, but Council believed it was inconclusive. At the time of the site inspection the interior and exterior wall cladding was in place and as such, there was no easy opportunity to visualise the actual internal configuration.

(3) At the conclusion of the site inspection, the experts participated in what they described as a “destructive inspection”. That is, a sample cut-out was made into the western wall’s internal cladding from the inside of the dwelling. As a result a sample visual inspection was available. In Ex K the experts advised, and provided photographic evidence, that the construction appeared to incorporate timber studding and densely packed insulation between timber elements, as required of the Hardie system, including insulation thickness of 85mm, tightly packed.

17 The conclusion of the experts, jointly, was that the performance-based solution in evidence along the western wall was acceptable. In turn, it was apparent there was no evidence to support Council’s (earlier) position in relation to BIC issue “f”.

Modification Application Appeal

18 There were two essential aspects to the modifications sought. Each relate to imposing additional conditions of consent on DA216/2020. New conditions would be imposed providing for the undertaking by an expert of a fire safety maintenance check, annually. The consent (Condition 3) would now include reference to the fire engineering report which provides the benchmark for this annual fire safety maintenance check. This requirement would be supported by a positive covenant under s 88E of the *Conveyancing Act 1919* (in order to

make future owners aware of the requirements). The s 88E instrument would also include a provision to also indemnify Council of claims or actions relating to compliance.

- 19 The second area of modification of the consent for DA216/2020 was in response to the objecting submissions. The “Axon cladding” referred to above at [12], faces directly on the courtyard area of the (objecting) neighbour to the west. The proposal is to augment the s 88E instrument to include the provision that “the owner is required to rectify any defect affecting the fire safety performance of the Axon cladding on the western wall”.

Contentions

- 20 Mr Rigg indicated in his closing submissions that the contentions relating to the MA appeal (as documented in Ex 5) were not pressed. Of note to me here was that Council was satisfied in regard to fire safety matters. This was for the most part based on the conclusions of the fire safety experts (see [17]). I note, more broadly, that the fire safety experts themselves saw no requirement for the additional fire safety review requirements as embodied in the new conditions proposed in the MA appeal.

Council submissions

- 21 In his closing submissions, Mr Rigg argued that the Court should not direct Council to issue a BIC in relation to the existing wall cladding along the western wall boundary (ie BIC issue “f”). Reference was made to s 8.25(3) of the EPA Act, which indicates the Court may do any one or more of the following:
- (a) direct the council to issue a building information certificate in such terms and on such conditions as the Court thinks fit,
 - (b) revoke, alter or confirm a notice to supply information,
 - (c) make any other order that it considers appropriate.
- 22 Mr Rigg argued that s 8.25(3)(a) and (c) of the EPA Act provided relatively open ended power to the Court in regard to BICs. I understood Mr Rigg’s focus on the existing wall cladding along the western wall boundary related to the appearance of the western wall cladding in the local context and the maintenance burden that might be placed on the adjacent property owner.

- 23 According to Mr Rigg, not issuing the BIC in relation to the western wall cladding would allow time for reinstatement of a form of walling that was to be expected when consent was issued. I will return to this point when giving consideration to objecting submissions.

Consideration

Modification application appeal

- 24 I am here giving consideration to the MA appeal, but it will be seen that some issues relating to the BIC come up for attention as well, in particular in relation to objecting submissions.
- 25 I would firstly reference jurisdictional requirements. These relate principally to the MA. It is clear to me that these modifications to consent conditions, relating to future fire protection-related activities over time, readily meet the requirements of s 4.56(1)(a) of the EPA Act. That is, the development to which the consent as modified relates is substantially the same development as the development for which the consent was originally granted. These changes relate to matters of detail only and the development would qualitatively and quantitatively remain the same as that already approved as alterations and additions to the existing dwelling at the site.
- 26 In relation to s 4.56(1)(b) and (c) of the EPA Act, I accept that the modification application has been properly notified, as inferred in Ex 5 (p 4-5). In terms of s 4.56(1)(d) and the consideration of these submissions, I note that Ex 5 provides a summary listing of written objecting submissions and Ex 6 provides documentation on the objections of the neighbour to the immediate west (including summary notes from Ms Sims' submission). I have considered these objecting submissions and can synthesise them into six topics. I note that some topics relate to the BIC, but for convenience I consider the objecting topics together. Below the topics are nominated and my consideration is outlined.

Western building wall is inappropriate due to materiality and fire safety concerns (in particular in regard to the upper level)

- 27 This point aligns with the concerns raised in submissions by Mr Rigg (see [22]). The objections from, and on behalf of, the neighbour to the immediate west

raised the issue of the external appearance of the western building wall (comprising Axon cladding) and fire safety concerns. The appearance concern was linked to heritage implications, given both the site and its immediate neighbour to the west are listed as heritage items, and located within the Woollahra HCA (see [6]-[8]). There was also a concern about the visual intrusiveness of the cladding more generally.

- 28 Item “f” in the BIC application seeks the assurances provided by the BIC process for the “level 1 boundary walls clad in fireproof Axon”. A point of interest for me here was what the consent conditions to DA216/2020, as agreed by the parties under their conciliated agreement, and as explained in *Shaw No 1*, might have had to say about the western building wall details. It turns out that the answer is very little. The applicant tendered the approved plans, along with the conditions to that consent (Ex O). Council tendered the s 34 agreement in relation to DA216/2020, along with a document titled “agreed statement – jurisdictional prerequisites” (Ex 7). While a new western wall is shown in the various floor plans relating to DA216/2020, there is no western elevation drawing and no indication of the materials that it might be composed of. There is an indication in the statement of jurisdictional prerequisites (par (r)) that what ended up as the approved plans “resolve any outstanding heritage related matters”. I further note that Mr Rigg indicated that Council did not, itself, press any heritage concerns in regard to these appeals before me here.
- 29 I take Mr Rigg’s arguments (and that of the owners of the property to the west) to be that, on merits, any BIC issued should not include item “f”. I understood the merits arguments to include (1) heritage conservation impacts, and (2) general appearance and maintenance obligations associated with a cladding wall occupying a shared boundary line (ie inaccessible for the owners of the site and exposed to the owners of the adjoining property to the west).
- 30 While, according to the drawings, consent was given to the western wall, its materiality was not prescribed. There was a consciousness of heritage issues explicit in the agreed statement of jurisdictional prerequisites and the judgement in *Shaw No 1*. There was an implied consciousness of objecting submissions in each as well. On the basis of the evidence before me, I

generally agree with Mr Berveling that what is being effectively sought in Mr Rigg's arguments (and that of the owners of the property to the west) is to use the BIC process (and s 8.25 of the EPA Act) to add something to the consent to DA216/2020 which was not imposed at the time. Given the agreement among the fire engineering experts that the western wall was satisfactory in regard to that topic, and noting the applicant's proposal to include via the s 88E instrument an obligation on the owners of the site to "rectify any defect affecting the fire safety performance of the Axon cladding on the western wall", I am satisfied that the BIC can include item "F". In coming to this conclusion, I also accept Dr Berveling's submissions that questions in regard to the management of abutting walls on neighbouring properties is not uncommon in inner city areas such as this, and given that consent for the abutting wall has already been given, it would be inappropriate for the BIC process to be used to seek to manage ongoing maintenance arrangements.

- 31 While I note that both parties took me to the decision of Pain J in *Scarf v Shoalhaven City Council* [2021] NSWLEC 128, I thought the decision gave little support to Mr Rigg's arguments with respect to the use of s 8.25 of the EPA Act for the purposes he sought.

Existing wall along the western boundary in the rear yard area is inappropriate due to height in particular, and materiality

- 32 A wall along the western boundary of the site exceeds the DCP control of 1.8m to a marginal extent. The extent of the breach is insignificant in my view and the materials are not unsatisfactory.

First and ground floor northern doors (to the rear) are within 900mm of the side boundary and therefore breach the National Construction Code.

- 33 I requested advice from the fire engineers on this topic, otherwise providing expert evidence in the proceedings. In Ex K these experts advised that at the ground floor, the glazed opening was some 620mm from the western boundary and at the first floor the glazed opening was some 900mm from the western boundary. The experts advised that (par 5.3):

"Both windows are perpendicular to the western boundary in which NCC Clause 3.7.2.3 does not specify the need for these opening to require any additional fire protection."

- 34 In oral evidence the experts confirmed that there was no breach of the relevant National Construction Code (or, as put, “NCC”) provision.

Amenity impacts of the (enlarged) northern windows

- 35 Items “i” and “j” in the BIC application refer to increased heights to ground floor and first floor glazing at the rear which looked out of the site to the north. The concern raised was potential impacts to the north, in particular to residences across Smith Street who enjoyed private open space and living areas on their southern sides. There was an opportunity for a site inspection from one of the terraces.
- 36 It seemed to me that the additional height of the glazing brought little additional potential for overlooking to the north. That is, the sight lines from within the site through the area of additional height were mostly to the sky, aimed one might assume at capturing additional sun.

Works nominated in the BIC are not the totality of the unauthorised works that have been undertaken.

- 37 The question for the Court in regard to the BIC application are limited to the matters listed in that application.

Inability to grant consent to modification application for works that have already been undertaken.

- 38 The proposed modifications relate to future active management on the site concerned with the augmentation of already compliant fire safety engineering. It does not seem reasonable for the Court in this instance to step in the way of a modification which seeks to further de-risk any potential fire-related concerns for the site and therefore its environs.
- 39 In regard to s 4.56(1A) of the EPA Act, I have given consideration to s 4.15(1) of the EPA Act, and find that no further matters of relevance arise with respect to the modification application before me. I note I have considered the reasons given for the grant of the consent that is sought to be modified, to the extent that these reasons were covered in the agreed statement – jurisdictional prerequisites in relation to DA216/2020 provided to the Court and the content of the relevant judgement (*Shaw No 1*).

BIC Appeal

- 40 The BIC appeal has also been successful in relation to each of the items “a” to “i”. Council only contested the issue of a BIC with respect to item “f”, and with the agreement between the experts in regard to the fire engineering aspects of the wall, I find no legitimate reason to not support the appeal.

Note

- 41 After reserving my decision, the Court (via its Commissioner Support Officers) approached the parties with what is a quite regular request to provide draft conditions of consent (without prejudice), in accordance with the Court’s template for modification applications (ie commonly referenced as “Template for Determination of Application to Modify Development Consent (Annexure A)” and “Template for Development Consent as Modified (Annexure B)”; or to advise if the template was not to be followed in the circumstances. One of the parties seemed to make further submissions in relation to the substantive matters at hand in case in this further contact with the Court. I would note that no consideration has been given to these submissions.

Orders

Proceedings 2023/0074046

- 42 The Court orders:
- (1) The appeal is upheld.
 - (2) Pursuant to s 8.25(3)(a) of the *Environmental Planning and Assessment Act 1979*, Woollahra Municipal Council is directed to issue a Building Information Certificate in respect of Building Information Certificate Application No. BIC 2/2023, concerning the property at 62 Queen Street Woollahra, within 14 days.
 - (3) The exhibits are returned with the exception of Ex 1, 5, A, B, H, M and P, which are retained.

In respect of proceedings 2023/0074021

- 43 The Court orders:
- (1) The appeal is upheld.
 - (2) Development Consent No. DA216/2020 is modified in the terms in Annexure A.
 - (3) Development Consent No. DA216/2020 as modified by the Court is Annexure B.

- (4) The exhibits are returned with the exception of Ex 1, 5, A, B, H, M and P, which are retained.

P Walsh

Commissioner of the Court

Annexure A

Annexure B

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