



Land and Environment Court
New South Wales

Case Name: Casey v Woollahra Municipal Council

Medium Neutral Citation: [2021] NSWLEC 1719

Hearing Date(s): 26 October 2021

Date of Orders: 24 November 2021

Decision Date: 24 November 2021

Jurisdiction: Class 1

Before: Horton C

Decision: The Court orders that:
(1) The appeal is upheld.
(2) Development Consent No. DA410/2019 is modified in the terms in Annexure A.
(3) Development Consent No. DA410/2019 as modified by the Court is Annexure B.
(4) Development Consent No. DA107/2020 as modified by the Court pursuant to s 4.17(1)(b) of the Environmental Planning & Assessment Act 1979 is Annexure C.
(5) All exhibits are returned, except Exhibits B, L and 2.

Catchwords: MODIFICATION APPLICATION – heritage significance – effect of proposed development on heritage conservation area – conditions of consent

Legislation Cited: Environmental Planning and Assessment Act 1979, ss 4.55, 8.9,
Land Environment Court Act 1979, s 34
Woollahra Local Environmental Plan 2014, cl 5.10, Sch 5

Texts Cited: National Construction Code
The Burra Charter, the Australia ICOMOS Charter for Places of Cultural Significance

Woollahra Development Control Plan 2015

Category:	Principal judgment
Parties:	Timothy Casey (Applicant) Woollahra Municipal Council (Respondent)
Representation:	Counsel: J McKelvey (Applicant) S Puckeridge (Solicitor) (Respondent) Solicitors: Gadens Lawyers (Applicant) Lindsay Taylor Lawyers (Respondent)
File Number(s):	2021/186521
Publication Restriction:	No

JUDGMENT

- 1 **COMMISSIONER:** A dwelling house, designed by noted Australian architect Ken Woolley, is the subject of development consent granted to Development Application No. DA410/2019/1 for alterations and additions at No 8A Cooper Street, Paddington (the original consent).
- 2 The terrace house is listed as an item of local heritage significance and the appeal now brought by the owner, Mr Casey (the Applicant) under s 8.9 of the *Environmental Planning and Assessment Act 1979* (EPA Act), follows the refusal by the Woollahra Local Planning Panel on behalf of the Woollahra Municipal Council (the Respondent) of Modification Application DA410/2019/3 (the Modification Application).
- 3 The Modification Application seeks to modify the terms of the original consent, pursuant to s 4.55(2) of the EPA Act by the deletion of certain conditions imposed with the original consent.
- 4 On 18 March 2021, the Respondent granted consent to Modification Application DA410/2019/2 (the First Modification Application), but did not consent to the deletion of Conditions C.11(c), C.11(d), C.11(e), C.11(f) and C.11(g).
- 5 Accordingly, Condition C.11 now relevantly provides:

“C.11 Modification of Details of the Development (section 4.17(1)(g) of the Act)

The approved plans are to incorporate the following amendments which are to be submitted [within 28 days of the date of this determination] for approval by Council’s Development Control Manager and prior to the issue of any Construction Certificate.

...

c) The bathroom wall that has been removed at Level 2 is to be interpreted through the use of a bulkhead and inlay in the floor marking the width and alignment of the original curved bathroom wall.

d) The new gutter to the kitchen terrace is to be removed and the original design is to be reinstated.

e) The proposed new sliding door mechanisms to the kitchen terrace are to be removed, and the original location of the doors is to be reinstated with a sympathetic sliding door similar to the original.

f) The replacement of the kitchen terrace with pavements to match the kitchen floor is to be removed and the original gravel court is to be reinstated.

g) The front entrance garden is to be reinstated as original, including gravel, planting and the down chain.”

- 6 The Court arranged a mandatory conciliation conference under s 34AA of the *Land and Environment Court Act 1979* (LEC Act) on 25 October 2021, which commenced with an onsite view.
- 7 In the company of the legal representatives, heritage experts and the Applicant, the Court viewed the site from Cooper Street, and entered the dwelling to view the first floor Kitchen terrace, sliding doors, gutter and existing rainwater heads evident on the eastern façade of the building.
- 8 Following the onsite view, the conciliation conference commenced on Microsoft Teams, and an oral submission was heard from Mr Milenko Mijuskovic who supports the conditions imposed in the Original Consent and invokes the articles of the Burra Charter as the basis for restoring the original condition of the dwelling. In doing so, he cites the small area of roof over the sliding doors being in the tradition of ‘gutter-less’ roofs found in Australian vernacular sheds and buildings evident in the works of architects Philip Cox, Glenn Murcutt, and Daryl Jackson being contemporaries of Ken Woolley.
- 9 As the parties were unable to fully resolve the issues at the conciliation conference, I terminated the conference and proceeded forthwith to hearing in accordance with s 34AA(2)(b)(i) of the LEC Act.

- 10 The contentions substantially reflect those set out by the Respondent in the Statement of Facts and Contentions marked Exhibit 1, but for some particulars no longer pressed.
- 11 In opening submissions, the parties agreed that the dispute is in respect of two principally contested matters, being:
 - (1) The size and prominence of the gutter over the sliding doors, and
 - (2) The removal of the original pebble bed to the kitchen terrace.
- 12 As the application is a modification application, s 4.55(2) of the EPA Act provides power for the Court, on appeal, to grant consent to modify a development consent if satisfied, as I am, that the development to which the consent as modified relates is substantially the same development as the development for which consent was originally granted, and if it has notified the application and considered submissions.
- 13 For the reasons that follow, I find the modification application warrants the grant of consent.

The site

- 14 The site is legally described as Lot 2 in DP 573941 with a front boundary width of 6.63m and a total site area of 355.7m².
- 15 The site is occupied by a detached dwelling house that presents a two-storey façade to Cooper Street, with a large circular opening at the first floor referred to by parties as ‘the oriel’.
- 16 The house is identified in Sch 5 of the Woollahra Local Environmental Plan 2014 (WLEP) as an item of local heritage significance, and the Statement of Significance describes the site in the following terms:

“With its response to the site and local streetscapes, intelligent planning, honesty in the use of vernacular building materials, numerous references to local historical architectural elements, and sophisticated sequential progression of spaces, the building is an exemplary work of the Late Twentieth Century Modern style, recognised at the time of its construction by a RAIA (NSW Chapter) Merit Award and the 1983 Wilkinson Award. As a house designed and constructed by the architect for his own use, and occupied by the architect between 1981 and 1987, the place is closely associated with architect Ken Woolley, who is one of the most prominent and important Australian architects of the mid and late 20th century. The house is significant

in marking a milestone in the design approach of an architect of outstanding significance to 20th century architecture in Australia.”

17 The site is also located within the Paddington Heritage Conservation Area (Paddington HCA).

18 By virtue of its heritage listing and location within the Paddington HCA, the provisions of cl 5.10 of the WLEP apply, and are relevantly:

(1) **Objectives** The objectives of this clause are as follows—

- (a) to conserve the environmental heritage of Woollahra,
- (b) to conserve the heritage significance of heritage items and heritage conservation areas, including associated fabric, settings and views,

...

(2) **Requirement for consent** Development consent is required for any of the following—

- (a) demolishing or moving any of the following or altering the exterior of any of the following (including, in the case of a building, making changes to its detail, fabric, finish or appearance)—

- (i) a heritage item,

...

- (iii) a building, work, relic or tree within a heritage conservation area,

...

(4) **Effect of proposed development on heritage significance** The consent authority must, before granting consent under this clause in respect of a heritage item or heritage conservation area, consider the effect of the proposed development on the heritage significance of the item or area concerned. This subclause applies regardless of whether a heritage management document is prepared under subclause (5) or a heritage conservation management plan is submitted under subclause (6).

...

19 It is relevant to record here that works associated with the original consent have commenced onsite, and so the Respondent considers it necessary for certain works that are inconsistent with the relevant conditions of consent to be altered.

20 The dispute is primarily focused in the location of the kitchen terrace which is located on the first floor, behind the primary street façade which is partly visible through the oriel.

- 21 Access from the kitchen to the terrace was originally via three sliding aluminium framed doors. The Applicant has now installed four sliding aluminium framed doors that project south of the original location.
- 22 Next, while Woolley originally detailed no gutter to capture rainwater above the sliding doors, the Applicant proposes, and has constructed, a custom steel gutter over the sliding doors, contrary to Condition C.11(d).
- 23 Finally, the Applicant has paved the terrace in brick pavers to match the inside floor finish, in contrast to the original pebble finish, contrary to Condition C.11(f).

The Applicant proposes conditions

- 24 At the commencement of the hearing, the Applicant proposed the application before the Court be further modified by addition of conditions of consent that give effect to the following:
- (1) Firstly, to cut back the gutter currently installed over the sliding doors by 500mm to minimise or remove the gutter from view from a south east location on Cooper Street.
 - (2) Secondly, to require the installation of a balustrade compliant with the National Construction Code in a gap identified during the onsite view, in a manner consistent with the approved mesh barrier applied to the internal staircase.

Expert evidence

- 25 As the contentions relate to heritage, the Court was assisted by a joint expert report prepared by Ms Shona Lindsay, on behalf of the Respondent, Mr Stephen Davies, on behalf of the Applicant, and Mr Robert Brown, also on behalf of the Applicant.
- 26 The Respondent objected to Mr Brown's expert evidence to the extent it departed from the leave granted by the Court on 15 September 2021 for Mr Brown to provide opinion in respect of the design and location of the sliding doors on the kitchen terrace.
- 27 Following submissions by the parties, I admitted Mr Brown's evidence on the basis that the design of the sliding doors is intimately related to the gutter being located directly over, and is arguably part of the sliding door assembly, and on

the basis that the location of the sliding doors, being on the terrace, invites comment on the terrace on which the doors are located.

The height of the gutter over the sliding doors

- 28 According to the Applicant, the gutter in question is in the order of 200mm high, being determined firstly by the volume and velocity of water sheeting off the section of vertical roof above, and secondly, to match the height of existing rainwater heads performing a similar function at the level of the roof gutter and level 1 terrace to the rear of the site.
- 29 The curved design of the eastern end of the gutter is said to reflect, and so be responsive to the bespoke, curved design of the building.
- 30 While the eastern extent of the gutter can be seen from a standing position on Cooper Street to the south east of the site, the parties agree that the gutter would not be seen from this location if cut back by 500mm as now proposed by the Applicant.
- 31 The parties agree that a gutter is warranted, despite this not being an original element of Woolley's design.
- 32 That said, according to the Respondent the gutter, whether as installed, or as proposed to be cut back, is oversized and so is not carefully designed sympathetically within the significant historic fabric as sought in the objectives and controls at Part C1.4.1 of the Woollahra Development Control Plan 2015 (WDCP).
- 33 In particular, Ms Lindsay considers the scale of the gutter, when viewed through the circular oriel from Cooper Street, or from the kitchen terrace itself, to be unsympathetic to the heritage item.
- 34 Such a sightline is only possible when standing directly in front of the site, according to photographs taken by the Applicant and reproduced, relevantly, below:



Removal of the original pebble bed to the kitchen terrace

- 35 The experts agree that the kitchen terrace was originally designed as a light well to reflect northern light into the interior off the white-painted brickwork wall fronting Cooper Street, at the base of which was a pebble drainage bed to capture water and drain to a drainage chain to the east of the terrace, to the ground below.
- 36 Evidently, the Applicant has removed the pebble bed. In place of the pebbles, the Applicant has replicated brick paving used internally to pave the terrace. As drainage now occurs on the surface of the brick paving, a linear grated drain has also been added alongside the bottom sliding door track.
- 37 Ms Lindsay considers the removal of the original fabric to be unnecessary, particularly with the addition of a gutter to collect roof runoff, and given the number of terraces in the dwelling that can be used as outdoor spaces.
- 38 The change in finish also alters the perception of the kitchen terrace that was intended, and perhaps used, as a planting court, or garden setting as suggested in the Heritage Impact Statement prepared by Mr John Oultram that accompanies the Class 1 Application (Exhibit F).

- 39 The paving detracts from the architectural merit of the building, contrary to Objective O2, Part C1.3.12 of the WDCP that is directed to existing contemporary infill buildings, and with Control C2 due to an inconsistency with the character of the existing building.
- 40 According to Mr Brown and Mr Davies, the pebble drainage resulted, over time, in damp and mould on the south facing façade of the building (Exhibit 3, Fig 2) that is rectified by the addition of the paving, which extends in to the kitchen terrace the original finish selected by Woolley for the interior spaces.
- 41 The Applicant relies on the citation supporting the 1983 Wilkinson Award cited by the Statement of Significance at par 14 to question the degree of the contribution made by the kitchen terrace in the context of the heritage significance of the site. The citation states, relevantly:

“

...

The Jury, however, found the sectional skillion resolved by the curve at the dining end anti-climactic, as it rises to maximum volume over minimum space. This sectional device has been used by architects like Aalto to greater effect. Nonetheless, the living/dining areas a relaxed space opening to the sun and view and yet trapping reflected light and direct skylight skilfully whilst providing privacy from the street...The Jury expressed some concern at the facile approach to the streetscape and found some references to the surrounding environment (eg the chimney and undulations in the screen wall) neither convincing or necessary.

...”

- 42 The kitchen terrace will continue to function as a light well and garden setting for the interior as originally intended.

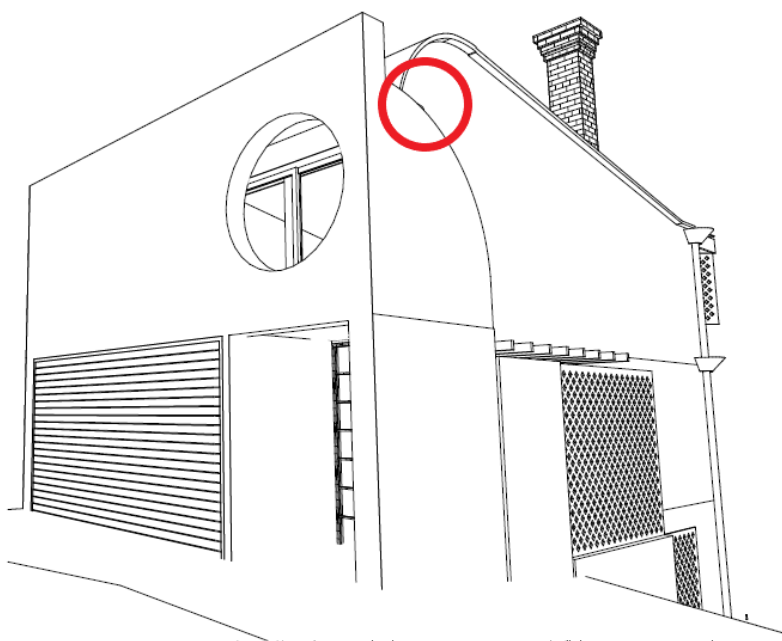
Conclusion

- 43 While this work by Ken Woolley is described as an outstanding example of Late Twentieth Century Modern style architecture, showing Post Modern style influences, the building is considered of low significance for its architectural detailing (Exhibit 4, Folio 221).
- 44 In my view, this is relevant for two reasons:
- (1) Firstly, the building, put simply, stands out as distinctly ‘modern’ in an otherwise predominantly Victorian-era streetscape to which controls are

directed, largely, for the retention of Victorian-era materials, finishes and details.

- (2) Secondly, the design of the gutter and finish of the kitchen terrace that are the subject of the modification application before the Court may be characterised as architectural details, which is not a feature of the identified heritage significance of the item.

- 45 The parties agree that a gutter is warranted. As a recognised work of modern architecture that is only 40 years old, a contemporary approach is appropriate if it is to conform, as it does, with Objective O2 and Control C4 of Part C1.5.8 of the WDCP that directs applicants to consider materials, finishes and details that are “appropriate to the architectural style” of the building.
- 46 The visual bulk of the gutter is determined by both its height, and its width. As stated at [27], the gutter is coupled to the overhead sliding door track, which accommodates 4 sliding panels.
- 47 The eastern extent of the gutter as shown in the image at [34] is determined by the current limit of the door track which extends past the eastern edge of brickwork. It is proposed by the Applicant to cut back the door track so that the sliding doors stop at the edge of the brickwork.
- 48 The Applicant also proposes that the gutter be cut back. An image showing the result of this proposal, consistent with the Applicant’s proposed condition of consent, is reproduced below (Exhibit L):



- 49 During the proceedings, a large gap in the order of 500mm was identified on the north side of the kitchen terrace that appears to be an original feature of the house. The parties agree the gap represents a fall risk and a condition of consent is proposed for a barrier to be installed in this location.
- 50 The Applicant submits that the proposed works are properly characterised as ‘alterations’ to the building, and not additions as understood by the relevant objectives and controls in the WDCP.
- 51 Whether or not this is the case, the works as described at [47]-[48] cannot be said to dominate the main front section of the house (Objective O2, Part C1.3.5), serve to retain the principal building form (Objective O1, Part C1.4.1) and for the reasons at [45], are consistent with the existing building (Control C2, Part C1.3.12).
- 52 According to the Burra Charter, adaptation should seek minimal change to significant fabric, only after considering alternatives (Article 21.2), and any new work should not distort or obscure the cultural significance of the place, or detract from its interpretation and appreciation (Article 22.1).
- 53 Heritage significance is intrinsic to a place, and is not determined only by what is seen from the public domain. However, in the circumstances of this case, I consider the extension of the original floor material out on to the kitchen terrace to be a sympathetic and acceptable alteration that will not detract from its interpretation or appreciation – either when viewed from Cooper Street or when standing on the terrace itself.
- 54 The colour, format and lay pattern of the paving matches the original internal floor material in every respect. As I understand the works already completed, there has not been, and is not proposed to be, any alteration to the structural elements such as the concrete slab supporting the terrace, or to the brickwork enclosing the terrace.
- 55 This means the kitchen terrace will remain a light well for the interiors, and works are also likely reversible and so reinstatement of the pebble drainage bed is not precluded in the future.

- 56 Accordingly, I consider the modification application, as amended by the Applicant's proposed conditions of consent, sympathetic to the heritage significance of the item, and to the Paddington HCA in accordance with cl 5.10 of the WLEP.
- 57 The Respondent also seeks to ensure the conditions of consent, if modified, are completed in a prompt manner, and the parties agree that it is reasonable for the development consent DA107/2020, granted by the Court in proceedings 2020/313933 be modified to require that the occupation certificate not be issued for the works the subject of that consent until Condition C11.A of Annexure B to this judgment be satisfied.

Orders

- 58 The Court orders that:
- (1) The appeal is upheld.
 - (2) Development Consent No. DA410/2019 is modified in the terms in Annexure A.
 - (3) Development Consent No. DA410/2019 as modified by the Court is Annexure B.
 - (4) Development Consent No. DA107/2020 as modified by the Court pursuant to s 4.17(1)(b) of the Environmental Planning & Assessment Act 1979 is Annexure C.
 - (5) All exhibits are returned, except Exhibits B, L and 2.

.....

T Horton

Commissioner of the Court

[Annexure A \(141073, pdf\)](#)

[Annexure B \(550264, pdf\)](#)

[Annexure C \(572415, pdf\)](#)

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