



Land and Environment Court New South Wales

Case Name: Strebora Pty Ltd v Randwick City Council

Medium Neutral Citation: **[2017] NSWLEC 1204**

Hearing Date(s): 5 – 6 April 2017

Date of Orders: 26 April 2017

Date of Decision: 26 April 2017

Jurisdiction: Class 1

Before: Dickson, C

Decision: The orders of the Court are:
(1) The Interim Heritage Order on "Hillsea" at 48 Dudley Street, Coogee (Cnr Lot 3 DP545077), dated 8 September 2016 is revoked.
(2) The appeal is dismissed;
(3) The exhibits are returned with the exception of exhibit A, and the Class 1 Application.

Catchwords: INTERIM HERITAGE ORDER: validity - whether the heritage significance of the house is sufficient to warrant local heritage listing - whether on further investigation the item is likely to be found of heritage significance - resident submissions

Legislation Cited: Environmental Planning and Assessment Act 1979
Land and Environment Court Act 1979
Heritage Act 1977

Cases Cited: Byron Ventilink Pty Ltd v Byron Shire Council [2005] NSWLEC 395

Texts Cited:

Category: Principal judgment

Parties: Strebora Pty Ltd (Applicant)
Randwick City Council (Respondent)

Representation: Counsel:
Mr C McEwan (Applicant)
Ms S Duggan (Respondent)

Solicitors:
Hartley Solicitors (Applicant)
Norton Rose Fulbright (Respondent)
File Number(s): 2016/274622
Publication Restriction: No

JUDGMENT

- 1 **COMMISSIONER:** This is an appeal pursuant to 30(1) of the *Heritage Act 1977 (NSW)* (Heritage Act) against the making of an Interim Heritage Order (IHO) by Randwick City Council over the property at 48 Dudley Street, Coogee.
- 2 Relevantly an IHO is made pursuant to s25(2) of the Heritage Act which states:

(2) A council authorised under this section may make an interim heritage order for a place, building, work, relic, moveable object or precinct in the council's area that the council considers may, on further inquiry or investigation, be found to be of local heritage significance, and that the council considers is being or is likely to be harmed.
- 3 Randwick Council is authorised to make IHOs for items in the Randwick local government area. This authorisation arises from an order made by the Minister administering the Heritage Act on 12 July 2013 (Exhibit B) (the Ministerial Order).
- 4 Whether the Council followed the mandatory steps in making the IHO is a matter of contention between the parties.
- 5 In making its decision in respect of the appeal, the Court may order a stay to the IHO (sub cl. 30(3) of the Heritage Act) or may revoke or confirm the order. The powers of the Court on appeal at cl 39 of the *Land and Environment Court Act 1979* also apply, and the respondent argues relevantly cl 39(4), which requires the Court to have regard to the relevant acts, the circumstances of the case and the public interest. Relevantly the Court, on appeal, is re-exercising the powers of the Council, under cl 25(2) of the Heritage Act to make the IHO.
- 6 The issues for the Court to determine are:
 - (1) Whether the Interim Heritage Order was validly made;

- (2) Whether the heritage significance of the property is sufficient to warrant local heritage listing; and
 - (3) And subsequent to (1) and (2); whether the Interim Heritage Order should be revoked or retained.
- 7 It is agreed between the parties that during the process of assessment since the making of the IHO sufficient research and study of the property has occurred, and that the IHO does not need to be maintained for this purpose.

The site and its context

- 8 The site comprises a single lot described as Lot 3 DP 454077, with a street address of 48 Dudley Street, Coogee. The subject site is located at the south east corner of the intersection of Dudley Street and Mount Street, Coogee.
- 9 The joint report of the heritage experts describe the context of the subject site as follows:

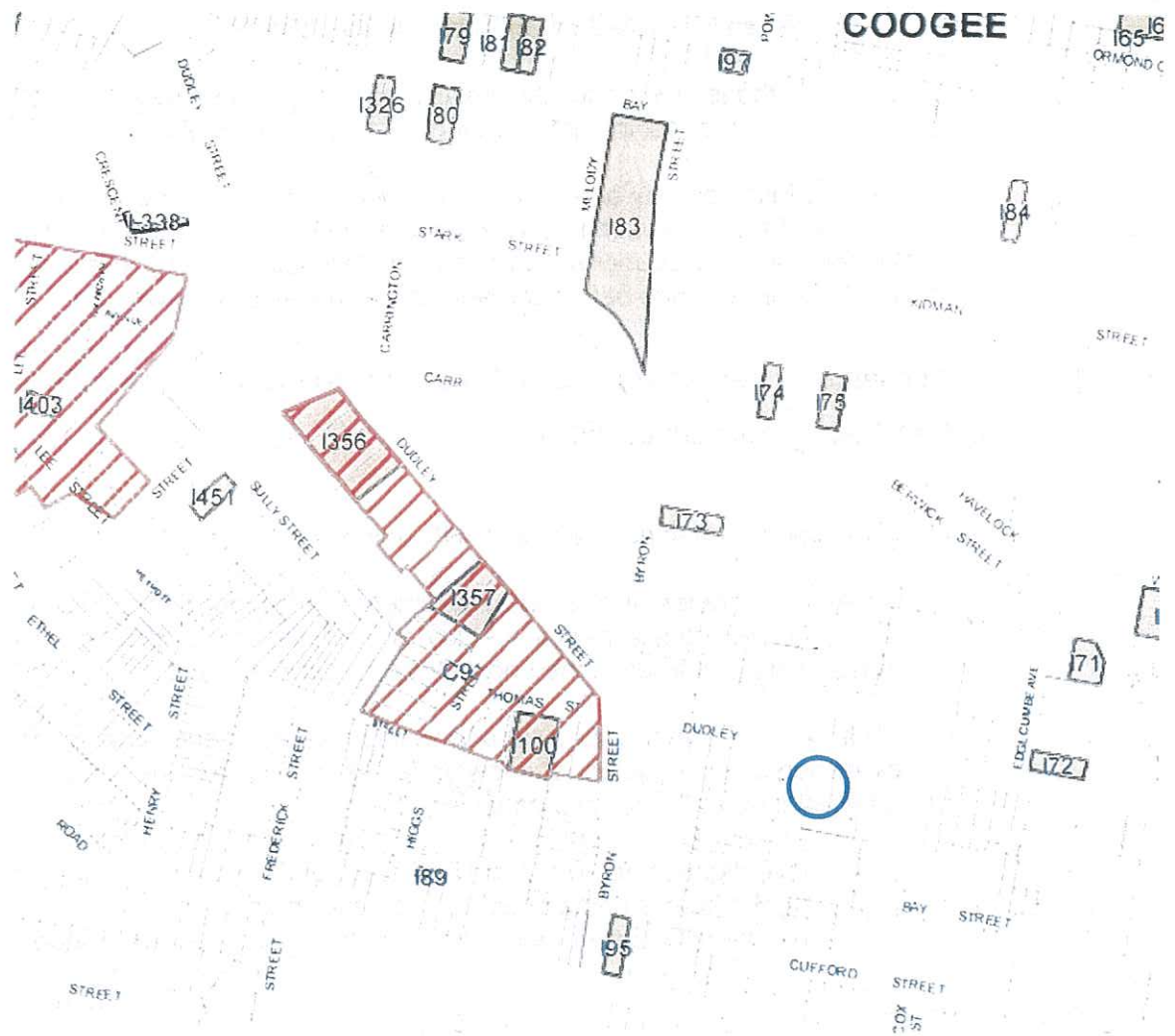
The site contains a two-storey residence with a detached garage to the rear of the site and a swimming pool located in the front yard. The site is adjoined by residential flat buildings to the east and the south and is located opposite residential flat buildings to the north and northwest.

Freestanding residences and attached residential buildings of similar age and style to the subject residence extend west from the subject site along Dudley Street.


The current site is a residue of an earlier larger site occupied by the house that was subdivided and originally included a further lot to the east containing a tennis court and gardens.

The building on the site is a two/ three storey, sandstone, face brick and slate residence erected in 1919-1920 for Samuel Sibley to a design by Arthur Pritchard Architect.

The subject site is not in a designated heritage conservation area, but it is in proximity to the Dudley Street Precinct as indicated in the red hatch in the following extract of the Heritage maps:



Extract from Randwick LEP map - Sheet HER_007

 Subject site

Planning Controls:

- 10 In the 1998 amendment to the Heritage Act Randwick Council, amongst other Councils, was authorised to make IHOs for items of local heritage significance. Section 25 of the Heritage Act provides:

(1) The Minister may, by order published in the Gazette, authorise a council to make interim heritage orders for items in the council's area.

(2) A council authorised under this section may make an interim heritage order for a place, building, work, relic, moveable object or precinct in the council's area that the council considers may, on further inquiry or investigation, be found to be of local heritage significance, and that the council considers is being or is likely to be harmed.

(3) An interim heritage order made by a council is of no effect in so far as it applies to any of the following items:

(a) an item to which an interim heritage order made by the Minister applies,

(b) an item listed on the State Heritage Register.

(4) An authorisation under this section can be given subject to conditions and a council cannot act in contravention of the conditions of its authorisation.

(5) The Minister may at any time by notice published in the Gazette withdraw a council's authorisation or change the conditions of its authorisation. The withdrawal of a council's authorisation does not of itself affect any interim heritage order made before the authorisation was withdrawn.

- 11 Authorisation under the Ministerial Order, for the making of an IHO, is subject to the following relevant conditions:

(1) A Council must not make an IHO unless:

(a) An environmental planning instrument containing a schedule of heritage items derived from a heritage study and provisions for the management of those items is in force in the Local Government Area; and

(b) It has considered a preliminary heritage assessment of the item prepared by a person with heritage knowledge, skills and experience employed or retained by the Council and considers that:

(i) the item is or is likely to be found, on further inquiry and investigation, to be of local heritage significance;

(ii) the item is being or is likely to be harmed;

(iii) the IHO is confined to the item determined as being under threat;

...

(5) An IHO made by a Council must contain the following condition:

"this interim heritage order will lapse after six months from the date it is made unless the local council has passed a resolution before that date;

(b) in the case of an item which, in the council's opinion, is of local significance, to place the provisions for protecting and managing the item; and

...

Council's compliance with 1(b) of the proceeding conditions is contested by the applicant.

- 12 Section 29 of the Heritage Act provides that the IHO takes effect from the date of publication in the Gazette. Relevantly in these proceedings that date is 8 September 2016.

- 13 The effect of an IHO on a property is contained in Part 4 of the Heritage Act. Section 57(1) of the Heritage Act which provides:

When an interim heritage order or listing on the State Heritage Register applies to a place, building, work, relic, moveable object, precinct, or land, a person must not do any of the following things except in pursuance of an approval granted by the approval body under Subdivision 1 of Division 3:

- (a) demolish the building or work,
- (b) damage or despoil the place, precinct or land, or any part of the place, precinct or land,
- (c) move, damage or destroy the relic or moveable object,
- (d) excavate any land for the purpose of exposing or moving the relic,
- (e) carry out any development in relation to the land on which the building, work or relic is situated, the land that comprises the place, or land within the precinct,
- (f) alter the building, work, relic or moveable object,
- (g) display any notice or advertisement on the place, building, work, relic, moveable object or land, or in the precinct,
- (h) damage or destroy any tree or other vegetation on or remove any tree or other vegetation from the place, precinct or land.

- 14 It is accepted by the parties and the experts that the NSW Heritage Office Guidelines – Assessing Heritage Significance 2001 are the appropriate standard for the assessment of the items significance and whether it meets the threshold to warrant local listing.

Public submissions

- 15 At the commencement of the hearing members of the public addressed the Court during the onsite view. The concerns raised by the residents can be summarised as follows:
- (1) The community has strong concerns about the potential demolition of the building. These concerns have generated an online petition with a significant number of signatures.
 - (2) The residents seek the inclusion of the building in the existing Dudley Street Heritage Area as an extension of it;
 - (3) The residents seek the upholding of the IHO;
 - (4) That the loss of the building removes the potential for future generations to learn about the past and the way of life of previous generations;

- (5) That as the land on which the building stands began as a part of a land grant from 1856. As such part of the subject land existed prior to the commencement of the Randwick Municipality, and has stood for its entire history;
 - (6) The building is historically significant due to the architect – Alfred Frederick Pritchard who designed it;
 - (7) The residents support the recognition of the heritage significance, in part, for its association with both the owner Samuel Edward Sibley, the properties architect, as well as its subsequent owner Emily Joseph.
 - (8) The building should be retained as it represents a unique architectural expression of the Federation Arts and Crafts: shingle style; and
 - (9) The retention of the building will contribute to maintaining a diversity of housing types with the increasing density of the Coogee suburb.
- 16 In addition to these concerns the Council has received nine submissions and a petition in relation to the proposed redevelopment of the site. A number of these submissions raise concern with the proposed demolition of the buildings on the property at 48 Dudley Street.

Relevant Background

- 17 The Council has undertaken a number of heritage studies of the Randwick Local Government area to identify heritage items and conservation areas to be included in the Local Environmental Plan (LEP) as items of local significance. These studies include:
- (1) Randwick Heritage Study 1986 by Lester Firth and Associates. This study aimed to identify and record items of heritage significance work of conservation. As a result of this study 195 items were listed.

- (2) Randwick Heritage Study Specialist Report – Architecture and Townscape 1989 by Perumal Murphy Pty Ltd. The objective of this report was to give an overview of the evolution of the municipalities built environment.
- (3) Subsequent to the above studies it is agreed between the parties that these studies were reviewed, and properties added to the schedule 5 of the LEP (and thus were listed as having local heritage significance), in 1994, 1998 and 2012.
- 18 Prior to the IHO being made, the subject site has not previously been identified in any heritage study for inclusion in Schedule 5 of the LEP, or been recommended for inclusion in a Heritage Conservation Area (HCA).
- 19 The parties have different positions in relation to these studies and the fact that the subject property was not identified, or listed, as a result of them. The applicant argues that these studies reviewed the subject property and formed a view that the building was representative of the federation period, but did not meet the threshold of significance to warrant listing. The Council holds the view that: firstly the completion of heritage studies are iterative and it is expected that additional items will be identified during their periodic review; and secondly that none of the reviews referenced above have looked specifically at the subject site and its significance. Therefore the Council maintains that the IHO has allowed such investigation and confirmed that local listing is warranted.

Heritage Assessments of the Subject Property

- 20 The heritage experts agree that the following is a summary of the recent considerations of the property by various parties as part of the making of the IHO and subsequent to it:

In July 2016 a local resident made an appeal at a Council meeting against the proposed redevelopment of the site and the demolition of the existing house. He made a presentation entitled “Preserving Randwick’s Cultural Legacy”.

In August 2016, NBR Architecture gave an opinion to the owners as part of a submission to Council in regard to the delay of consideration of the Development Application for redevelopment of the site. This preliminary assessment drew on available information that was available regarding the property, its owners and architect and also consideration of the physical condition of the property which was informed by the ABC Structural Engineers Assessment.

On 8th September, Council's Heritage Planner, Lorraine Simpson recommended to Council the making of an Interim Heritage Order, stating GML Heritage has been engaged to provide a heritage assessment of the property, but this investigation has not been finalised. The IHO was *"to allow for the completion of the GML heritage assessment for the building. Depending in the recommendations of this heritage assessment consideration could be given to heritage listing for the property"*.

The Preliminary Heritage Assessment of the property from Godden MacKay Logan, Heritage Consultants (GML) was received by Council dated 9th September 2006 (sic) which concluded that:

"On the basis of the documentary research and preliminary physical analysis, it is likely that the property does not meet the required threshold for listing at the local level.

However, this preliminary assessment illustrates that the subject site is only just below the required threshold for listing at the local level. It is possible that on further research and an internal inspection of the property may lead to the subject site demonstrating significance at the local level under a number of criteria."

NBR Architecture made a further comment following review of the additional material identified by GML in their preliminary assessment submitted to Council in December 2016 including the following:

"The preliminary assessment indicated it was unlikely that the place would be associated with any particular community group for any of the identified reasons for consideration of significance. I am in general agreement with the remaining assessments by GML in their advice to Council that the site and its building is not rare and that its design and construction do not exhibit a high level of technical achievement and that the building would not be listed for its representative values alone."

An internal inspection of the property was undertaken by Peter Romey, Jyoti Somerville and Angela So of GML on October 2016 and a full Heritage Assessment Report authored by these experts was submitted to Randwick Council on January 2017 that concluded:

"On the basis of the available evidence and as documented in Section 4.3, an objective assessment of the abovementioned aspects of significance of 'Hillsea' (48 Dudley Street) against the SHR criteria demonstrates that the property does not meet any of these criteria at the Local level. On this basis therefore, the property does not warrant listing as an item on Schedule 5".

Council subsequently engaged Colin Brady to make further assessment and peer review of the GML assessment. No inspection of the interiors was made in undertaking the assessment. The assessment found that the place reached the threshold for local listing for all of the standard listing criteria with the exception of Social Significance. The assessment suggests that it is a 'notable example' and a 'superior example of the building type and style'. The conclusion reached by this report states:

"It is the considered recommendation of this assessment that based upon criteria of assessment established by the Heritage Division Environment and Heritage NSW the residence, Hillsea at 48 Dudley street qualifies for inclusion in Randwick Local Environmental Plan as an item of local heritage significance."

Expert Evidence

- 21 The Court heard expert planning evidence from Mr Robert Staas, for the applicant, and Mr Colin Brady for the Council. The experts participated in a joint conferencing process prior to the hearing which sought to address the issues in contention. As a result of the conferencing process they prepared a joint expert report which was tendered as Exhibit 4.

Was the Interim Heritage Order validly made?

- 22 It is agreed between the parties that Council's Senior Environmental Planning Officer – Heritage has the relevant qualifications and experience required by the conditions in the Ministerial Order, and that the remaining conditions precedent for the making of the IHO are met.
- 23 However, the applicant argues that the IHO is defective as the Council's authority, through the Ministerial Order, is subject to a condition that prior to making the IHO, that Council "*considered a preliminary heritage assessment of the item prepared by a person with appropriate heritage knowledge, skills and experience employed or retained by the Council*". (Exhibit B)
- 24 The applicant argues that the verbal report of the Heritage Officer, on which the Council relied to make the IHO, was insufficient to meet this condition.

25 In the alternative Council argues that the condition at (1)(b)(ii) of the Ministerial Order, referred to above, was satisfied by a verbal report, later captured in a file note (Exhibit C) and the subsequent Preliminary Heritage Assessment of the property by Godden MacKay Logan (GML).

26 Relevantly the evidence of Mr Kyriacou, whose delegation was utilised to make the IHO, is as follows:

3. On 8 September [2016] I was acting Director City Planning. On that day I caused an Interim Heritage Order (IHO) to be placed on the subject property, 48 Dudley Street, Coogee.

4. Prior to preparing the IHO I had discussion with Council's Senior Environmental Planning Officer – Heritage regarding the subject property and the placement of an IHO on that property. The file note at Tab 6 of Councils bundle reflects the content of the discussions I had with Ms Simpson.

5. At the time of deciding to make the IHO on the subject property I was concerned the item was likely to be harmed as Council had received a notice that a Complying Development Certificate was to be issued for demolition of the building.

(extract of Affidavit, Exhibit 8)

27 The applicant argues that the inclusion of the words "prepared by" in the conditions of the Ministerial Order requires the preparation of a document, and that the decision maker refers to this document at the time of making the IHO.

28 It is Mr McEwan's submission that an oral briefing, or a discussion, is not sufficient to meet the condition outlined at (1)(b)(ii) of the Ministerial Order. Further Mr McEwan submits that it is clear from Mr Kyriacou's affidavit that he relied solely on this oral briefing, and not the file note which he agreed was prepared after the making of the IHO.

29 Mr McEwan argues that the process of making the IHO was also defective in that the file note prepared by Ms Simpson (Council's Senior Environmental Planning Officer – Heritage) documenting her briefing to Mr Kyriacou does not constitute a preliminary heritage assessment. Rather Mr McEwan states that Ms Simpson's memo covers a description of the building, its qualities and to a

limited extent the persons associated with the building. He notes that the memorandum refers to the fact that "*GML Heritage has been engaged to provide a heritage assessment of the property, but this assessment has not been finalised*" (Exhibit C).

30 Mr McEwan also submits that the failure of the assessment that resulted in the making of the IHO being in written form lacks procedural fairness for the applicant, and does not accord with the weight of the restrictions that arise for the landowner whose property is the subject of the IHO.

31 In summary the applicant argues that on the basis of the evidence the process utilised to make the IHO is defective as:

- (1) Mr Kyriacou did not consider a preliminary heritage assessment prior to making the IHO;
- (2) The file note subsequently prepared by Ms Simpson summarising the briefing she provided Mr Kyriacou does not constitute a preliminary heritage assessment.

32 Ms Duggan for the Council argues in the alternative that firstly the "preliminary assessment" is not required to be in writing, and that in her submission there is nothing contained in any Act or the Ministerial Order that requires it to be so. Ms Duggan submits that an IHO, by its nature, is intended to be implemented in circumstances where a quick response is required, such as is in the case of imminent harm or in this case impending demolition. Ms Duggan submits that it would be an incongruous outcome to require a written assessment in such circumstances.

33 Equally under the legislation an IHO is only able to be implemented where an item is not listed, therefore giving less weight to the properties absence from the previous heritage studies completed for the Randwick Municipality.

- 34 In reply to Mr McEwan, Ms Duggan argues that the reference in the Memorandum (Exhibit C) to a preliminary assessment to be completed by GML Heritage was not a delegation of this task to GML, and is irrelevant as you could have multiple preliminary assessments of an item.

Findings

- 35 The question of the adequacy of a heritage assessment which was relied on in making an IHO was considered, in part, by the Court in *Byron Ventilink Pty Ltd v Byron Shire Council* [2005] NSWLEC 395 at [57]:

Is a "new" heritage assessment report necessary under Sch 1(1)(b)(i) of the Minister's order and cl 5.5.2(1)(b)(i) of the Guidelines to inform a Council on whether to exercise its discretion to issue an IHO? The applicant argued the 1983 and 1992 reports were insufficient and did not satisfy the Guidelines, that a preliminary heritage assessment must consider certain matters, and the relevant heritage criteria where not specifically addressed in these reports. The guidelines do not specifically state that a new report is needed. Given that an IHO is intended to be imposed quickly I do not consider the Guidelines should be interpreted as requiring a new report be prepared provided that the 'old' reports relied on do satisfy the Guidelines overall. The Wheeler report was prepared by Council's Senior Planner, who also has qualifications and experience in heritage conservation, Her Statement of Evidence dated 24 May 2005 makes clear in par 4 the matters about which she satisfied herself in reaching the conclusion that the IHO was necessary, for example that the buildings were under threat and were likely to have heritage significance. As part of her report she has attached the 1983 and 1992 reports, both of which identified the 1929 building as having heritage significance and recommended its conservation. I consider the Wheeler report and other material relied on meets the requirements of Sch1(1)(b)(i) of the Minister's order and cl5.5.2(1)(b)(i) of the Guidelines.

- 36 Pain J, at [61] of the same matter, confirms that it is her finding that "*the Guidelines are mandatory and must be complied with given Sch 1(6) of the Minister's order.*" At [14] it is confirmed that the reference to 'guidelines' are those that "*have been issued for the assessment of heritage values generally under the Heritage Act in accordance with several criteria. Clause 7 of the Guidelines provides guidance on how these criteria might be applied*". Relevantly Clause 7 of the guidelines details how to assess heritage significance.

- 37 In the proceeding judgement the Court found that a new, or specific report, is not required to be prepared to support the finding that an IHO was necessary in the circumstances of the case. However the decision in *Byron Ventilink Pty Ltd v Byron Shire Council* does conclude it is important that such an assessment meets the requirements of the 'guidelines', and that it makes a conclusion or identifies why the officer is satisfied the IHO is necessary, and that the building or site may have heritage significance. In reaching this conclusion reference is made to the section of the Guidelines that detail the process of assessment of heritage significance. In this matter, the relevant guidelines remain "Assessing Heritage Significance" prepared by the NSW Heritage Office, 2001.
- 38 Following a review of the file note relied on by Mr Kyriacou I accept the submission of Mr McEwan that it does not satisfy the requirements of the ministerial order for a preliminary heritage assessment. I have reached this conclusion for the following reasons:
- (1) Unlike the facts in *Byron Ventilink Pty Ltd v Byron Shire Council* no previous heritage studies of the precinct or the LGA had identified the property as having heritage significance or warranting listing at a local level. Thus these studies could not be relied on to inform the making of the IHO, or identifying the relevant criterion in the Guidelines that elucidate the potential significance of the item;
 - (2) At the time of determining to make the IHO the Council relied exclusively on a verbal briefing by Council's Senior Environmental Planning Officer - Heritage, which was later captured in the File note at Tab 6 of Exhibit 2. That file note does not identify (utilising the relevant guidelines) on what basis or criterion the property is likely to be found, on further inquiry and investigation, to be of local heritage significance;
 - (3) As a result I am satisfied that, the Council had no preliminary assessment of significance on which to rely in determining to make the IHO.

Based on these reasons I find that the Interim Heritage Order was not validly made.

- 39 I accept the submission of Ms Duggan that requiring a written assessment in circumstances of pending demolition may be unwieldy. However, the burden placed on a landowner by the making of an IHO gives weight to the conclusion that the reasoning that supported such a determination, and the criterion on which the Council concluded the property is likely to be found, on further inquiry and investigation, to be of local heritage significance should be clear to the applicant. In most cases, such reasoning should be captured in writing at the time of the making of the IHO.
- 40 Notwithstanding that the preceding conclusion that the IHO was not validly made I will briefly address the remaining issues in contention between the parties to ensure the substantive issues in the proceedings are determined.

Is the building at 48 Dudley Street, Coogee of local heritage significance?

- 41 In his evidence Mr Staas concurs with the conclusions of the both the Preliminary Heritage Assessment by GML [refer par 20], and their subsequent comprehensive heritage assessment (Exhibit 5). He agrees with their conclusion that the property does not reach the threshold for listing under any of the standard assessment criteria.
- 42 The assessment undertaken by GML in their comprehensive heritage assessment report can be summarised as follows:

Comparative Assessment
Summary of Conclusions

In summary, 48 Dudley Street, Coogee, has a range of heritage values relating to the following:

- As a component of the formative period of suburban development of the Randwick Municipality in the early twentieth century, and particularly this area of Coogee with its access to both city and coast;
- The extent to which the residence has retained evidence of its original architectural layout and character, both internally and externally, though

this has been compromised by the extensive removal of/damage to original internal features and fabric;

- The building's association with the architect Arthur F Pritchard;
- Its role as a representative example of early twentieth century Arts and Crafts – Bungalow style residences within the local area – characterised by many houses of the same style and period; and,
- Its association with the area's popularity over the late nineteenth and early twentieth centuries for substantial sized ('grand') architect-designed houses on large land allotments for people of means.

...

- The residence provides a substantial and (externally at least) relatively intact component of the early twentieth century Arts and Crafts – Bungalow style residential development typical of the area's historically significant items and areas. In views both out from and towards the site it forms and end (or starting) point for a streetscape of this character along the southern boundary of Dudley Street, including the Dudley Street HCA.
- The visual and physical proximity of the site to a group of late twentieth century three storey brick home unit developments detracts from the building's setting and its aesthetic contribution to the streetscape in views east from the junction of Dudley and Mount streets.
- Recent modern developments in the vicinity of the subject site are also changing the character of its setting, though these are not integral to views towards the building or its streetscape presentation to Dudley Street.

...

43 The GML report also completes an assessment of the properties significance against the significance criteria in the Guidelines (Section 4.3, Exhibit 5), and concludes that the property does not meet any of the relevant criteria and does not warrant listing at the local level. Mr Staas supports this conclusion and states that: (the property) *remains incidental to historically important processes and activities, is not associated with historically significant persons or events, has only a loose association with creative achievement, is only sought to be retained in preference to a proposed alternative, is not rare and whilst representative is not a fine example of its type and has lost a range of the characteristics that define the type.*

44 In the alternative, Mr Brady's Heritage Assessment Report (Exhibit 6) concludes that the property at 48 Dudley Street qualifies for local heritage listing under the criterion in the Guidelines for historic, aesthetic and social significance. He summarises the reasoning behind his differing conclusion to that of GML as follows:

Recent assessment of the site by GML Heritage has focussed on the professional reputation of Arthur F Pritchard and the comparative aesthetic qualities of the subject residence in comparison with other listed residences in the locality. Limited discussion of the location, former surrounds and historical perspective of comparable residences has been included in the assessment. Within the GML Heritage report streetscape assessment has been substantially focused on later development to the east rather than the cohesive forms and styles of residences extending from *Hillsea*, 48 Dudley Street west to the Dudley Street Conservation Area.

Further consideration of the aesthetic qualities of the residence *Hillsea*, the time of its construction, the background to the original owner and the relationship of the residence to the setting extending east of the site have provided the basis of findings that differ from those of GML Heritage.
(Exhibit 6)

At the time of completing his assessment, Mr Brady relied on an external view of the building fabric and the site, as well as the information and photography contained in the GML report and the sales brochure utilised during the 2016 sale of the property.

- 45 Mr Brady argues that the property warrants listing under Criterion A: *An item is important in the course or pattern of a local areas cultural or natural history* for the following reasons:

Hillsea erected at 48 Dudley Street in 1919-20 demonstrates the pattern of large private residences erected on high ground about Coogee Bay in the transition from Federation to Inter War styles, the house demonstrating the, by then rare ability to gain prominence by inclusion of extensive private grounds in contrast to reliance on elevation above surrounding streets.
(Exhibit 6)

- 46 Mr Staas and GML disagree with the conclusion of Mr Brady principally on the basis that poor quality 1970s three-storey flat buildings east of Mount Street compromise the original setting (Exhibit 5). Mr Brady who gives greater weight to the sites relationship with the streetscape setting when viewed from the west contests this conclusion. It is his view from this location the property provides an endpoint to a grouping of Late Federation and Interwar housing.
- 47 Mr Brady also argues that the contention that the property has fallen below the threshold of significance due to the later construction of residential flat buildings adjacent the site is countered by the decision to list other federation

houses (such as Archina at 49 Avoca Street) which are surrounded by late 20th Century development (Exhibit 4).

- 48 Mr Brady argues that the property warrants listing under Criterion B: *An item has strong or special association with the life or works of a person, or group of persons, of importance in the cultural or natural history of the local area* for the following reasons:

Hillsea, 48 Dudley Street Coogee has a long term association with Herbert Edward Sibley successful chemist and his family, owners and residents of *Hillsea* from its construction in 1919-20 to sale in 1947 and with the Joseph family, owners and occupants from 1947 to 2016. (Exhibit 6)

Hillsea demonstrates the works of established architect Arthur F Pritchard, three times president of the NSW Institute of Architects, previous partner in his father William Pritchard's architectural practice and an exponent of commercial and residential architecture and residential planning of the late 19th and early 20th centuries. This association is considered significant under this criteria. (Exhibit 6)

- 49 It is the evidence of Mr Staas that Mr Brady over states the social standing of the owner (Mr Edward Sibley) and the architect (Arthur F Pritchard). It is his view that whilst Sibley was affluent, he was not prominent in a manner that would warrant listing under this criterion. Equally, his conclusion is that the information provided by Mr Brady in relation to the architect is not sufficient to demonstrate that the property is associated with a significant person and therefore it warrants listing.

- 50 Mr Brady argues that the property warrants listing under Criterion C: *An item is important in demonstrating aesthetic characteristics and/or a high degree of creative or technical achievement in the local area* on the following basis:

... the confidence displayed in the planning and detailing of the residence, responding to varied outlook from each elevation and the interface of exterior and interior detailing, demonstrates the work of a mature designer skilled in the language and principles of Federation housing..

In his oral evidence Mr Brady argued that the planning of the residence, the use of borrowed light, the use of the third level of the dwelling and the use of

an indoor/outdoor relationship between each room make the dwelling unique, and demonstrate the creative achievement of the architect.

51 Mr Staas, and the GML Heritage assessment, conclude that *Hillsea* is representative, but not notable example, of a substantial early twentieth Century Arts and Crafts residence and utilises a standard repertoire of forms, materials and stylistic detailing. It is their conclusion that the property does not meet Criterion C at a local level (Exhibit 5). In his oral evidence Mr Staas argued that the asymmetrical planning, and the orientation of the property to the both the view and the street, are not a unique or uncommon approach to the design of a home on such a site. It is his conclusion that based on the evidence the architectural design is competent but not outstanding (as required by the Guidelines). It is Mr Staas opinion that the building is not *representative of any significant innovation in architectural design following the First World War. It is relatively standard expression of upper middle class housing, that would have been somewhat old fashioned at the time. There is no obvious evidence of transitional design influences in what is a standard design type* (Exhibit 4).

52 It is agreed between the parties that the property does not meet the threshold for listing under Criterion D of the Guidelines.

53 Mr Brady argues that the property warrants listing under Criterion E: *An item has potential to yield information that will contribute to an understanding of the areas cultural or natural history* on the following basis:

Hillsea, 48 Dudley Street Coogee depicts the lifestyle, setting and living conditions of substantial 'gentleman's' residences of the later Federation Era and Inter War years located in preferred locations of the period. The proximity of the residence to other large scale residences from the period including those in the Dudley Street Conservation Area to the northwest forms a consistent grouping demonstrating streetscape settings associated with such construction. Despite later construction of residential flat buildings to the east and to the opposing side of Dudley Street, *Hillsea* remains prominent as the eastern end point of a notable streetscape extending the Dudley Street Conservation Area.

The residence is considered of local significance under this criteria.

- 54 In relation to Criterion F (an item possesses uncommon, rare or endangered aspects of the areas cultural or natural history), and G (an item is important in demonstrating the principal characteristics of a class of the area's cultural or natural places' the Preliminary Heritage Assessment report prepared by GML (Exhibit 2, Tab 5) concluded that the threshold for listing under these criteria was not met. Importantly the further report identifies (at page 7) a list of examples of Prichard's residential work between 1904 to 1919, although their status is unconfirmed. In terms of the rarity of the item the report concludes that the residence provides a substantial and (externally at least) relatively intact component of the early twentieth century Arts and Crafts/Bungalow style residential development typical of the area's historically significant items and areas (page 50, Exhibit 5). The report concludes that *Hillsea* has a role as a representative example of early twentieth century Arts and Crafts – Bungalow style residences within the local area – characterised by many houses of the same style and period (page 49, Exhibit 5).
- 55 It is the evidence of Mr Staas that the subject property is an example of what was a fairly common architectural style within the area and features many of the principal characteristics of the style, however in his assessment the compromised setting detracts from its potential representative value as a fine example of its type.
- 56 In the alternative it is Mr Brady's evidence, and the submission of the Council, is that being a representative example of the style is sufficient to warrant listing at a local level and that in fact this has previously been the basis of the listing of a number of properties in the Randwick local government area.
- 57 The GML Heritage Assessment concludes that *it is unlikely that the property would have historical archaeological potential for evidence of previous European occupation* and that the property is unlikely to meet this criterion for listing at a local level (Exhibit 5).
- 58 Ms Duggan submits that where a building is assessed to be close to the line between inclusion and exclusion, as was the case in the preliminary

assessment completed by GML heritage, it is likely that two experts may have different opinions or conclusions on whether the property meets the threshold for local listing.

- 59 Mr McEwan's submission is that the weight of heritage assessment and opinion does not support the listing of the property. It is his position that numerous studies have been completed, and the Council has listed several buildings and precincts within the visual catchment of the site. It is his view that in each case there was potential for the subject site to be reviewed and listed by these studies, but this did not occur.
- 60 Further Mr McEwan submits that following the making of the IHO the Preliminary Assessment undertaken by GML concluded that *it is likely that the property does not meet the required threshold for listing at the local level* and sought *further research and an internal inspection of the property* to determine the final significance of the property. This internal inspection was undertaken, and the conclusion of the GML Heritage Assessment report was that the property does not warrant listing at a local level. Mr McEwan emphasises that Mr Brady's assessment did not include such an inspection of the interiors prior to his completion of the report.

Findings

- 61 I am persuaded that the purpose of the making of the IHO has been satisfied by the completion of additional research and assessment of the property and building at 48 Dudley Street, Coogee.
- 62 I am satisfied that the January 2017 Heritage Assessment Report by GML Heritage (Exhibit 5) is a balanced and comprehensive assessment of the heritage values of the property.
- 63 In considering the competing positions of the heritage experts on the heritage significance of the property, I prefer and accept the evidence of Mr Staas and the conclusions of the GML report tabled in the proceedings as Exhibit 5. The summary of my reasoning is as follows

- (1) In relation to Criterion A of the guidelines I accept Mr Brady's view that: *Hillsea demonstrates the pattern of large private residences erected on high ground about, the house demonstrating the, by then rare ability to gain prominence by inclusion of extensive private grounds in contrast to reliance on elevation above surrounding streets;* but conclude these same characteristics are eroded in the current setting of the property. I accept the conclusion of GML that the re-subdivision of the original allotment and the subsequent construction of adjoining residential flat buildings have eroded the contribution of the building to the local area (Exhibit 2, tab 5). I find that the property does not warrant local listing under this criterion.
- (2) I am not satisfied on the evidence before the court that the association of the property with either the owner (Mr Edward Sibley) or the architect (Arthur F Pritchard) meet the threshold detailed in the guidelines under Criterion B.
- (3) I am not persuaded by the argument that the design, planning or detailing of the dwelling within the property demonstrates technical innovation or is aesthetically distinctive (Criterion C & F). In reaching this conclusion I have given weight to the guidelines which state (at page 16): *An item may be considered significant under this criterion if it is a major landmark in a town, or is the first major work in a particular architectural style. It will not be significant if its landmark qualities have been diminished by surrounding development, or it is only one of many examples of the architectural style.* I find that the property does not meet the threshold detailed in the guidelines under Criterion C or F.
- (4) In relation to the remaining criterion I find that the evidence before the Court does not support a finding that the property has potential to yield information that will contribute to an understanding of the local areas history (Criterion E), or that the property is a fine example of its type (Criterion G). In relation to the argument between the experts as to whether being a representative example is sufficient to warrant listing I

have considered the impact of the recent removal of internal fabric and the agreement of the experts in their joint report that:

- The current internal condition of the building does not enhance any potential heritage values suggested by the Council; and
- The original site and setting has been compromised by later subdivision and development.

I find that the property does not meet the threshold detailed in the guidelines under the remaining Criterion.

- 64 Having considered all the evidence before the Court, and the submission from the members of the public, I am not satisfied that the property is worthy of local heritage listing on the grounds put forward by Mr Brady and the Council.

Should the Interim Heritage Order be revoked?

- 65 In submissions Ms Duggan put to the court that the conclusion of both the GML Heritage assessment and the Heritage Assessment completed by Mr Brady support the extension of the Dudley Street Heritage Conservation Area to include the subject property.
- 66 Section 1.0 of the Joint Heritage Experts report states that *"the experts did not investigate further any listing of the property within an enlarged Conservation Area extending along Dudley Street as this is not relevant to the matter before the Court in these proceedings"*.(Exhibit 4)
- 67 Ms Duggan submits that Council's position is that the heritage significance of *Hillsea* extends to its inclusion in a HCA and that only this building was included in the IHO as it is the only item in imminent harm, therefore meeting the precondition.
- 68 In oral evidence Mr Staas stated that in his view any extension of the HCA would require greater consideration and more evidence before a conclusion could be drawn.

69 In the alternative Mr Brady's report states:

"... that the consistent grouping of residences of similar aesthetic forms in Dudley Street extending from *Hillsea* north and north east warrants the extension of the Dudley Street Heritage Conservation Area to include all residences to the southern side of Dudley Street as far east as the eastern boundary of *Hillsea*." (Exhibit 6)

70 Randwick Municipal Council considered the consideration of both the heritage listing of the property, and the extension of the HCA on 28 February 2017. The Council resolved to progress the listing of the property, and the extension of the HCA through the preparation of a planning proposal to amend the LEP (Exhibit 2)

71 Mr McEwan strongly put that the consideration of the extension of the HCA is not before the Court and that such a listing, if it was to be considered, would need to follow a heritage assessment which has not been completed.

Findings

72 These proceedings are an appeal against the making of an IHO, pursuant to s25 of the Heritage Act, on the property at 48 Dudley Street. I am not satisfied that in making the IHO the Council sought to extend it beyond the listing of the property as an *item* to that of a component of an extension to a heritage precinct.

73 Notwithstanding these reservations, I concur with the evidence of Mr Staas that irrespective the evidence before the Court is insufficient to meet the conditions of the Ministerial Guidelines and support the continuation of the IHO for this purpose.

74 Given my findings at [61] that the research and reports that have been undertaken and provided to the Court as part of these proceedings are comprehensive, I am satisfied that further investigation of the property is not warranted.

75 On the basis of the proceeding, I find that it is appropriate to revoke the IHO.

Orders:

76 The orders of the Court are:

- (1) The Interim Heritage Order on "*Hillsea*" at 48 Dudley Street, Coogee (Cnr Lot 3 DP545077), dated 8 September 2016 is revoked.
- (2) The appeal is dismissed;
- (3) The exhibits are returned with the exception of exhibit A, and the Class 1 Application.

A handwritten signature in blue ink, consisting of a series of loops and a long horizontal stroke extending to the right.

.....
D M Dickson

Commissioner of the Court