

THE HIGH COURT

[2005] 402 CA

**IN THE MATTER OF SECTION 160 OF THE PLANNING AND DEVELOPMENT ACT 2000 AND IN THE MATTER OF AN APPLICATION
BY FINGAL COUNTY COUNCIL**

BETWEEN

FINGAL COUNTY COUNCIL

PLAINTIFF

AND

KEVIN MARTIN DOWLING, BRIAN PETERS AND WILLIAM PETERS

DEFENDANTS

Judgment of Mr. Justice de Valera delivered 26th July, 2007.

1. This is an appeal by way of re-hearing from the decision of Her Honour Judge Linnane in the Circuit Court on the 9th November, 2005. By notice of motion dated the 6th July, 2005, the plaintiffs sought:

1. An order restraining the defendants and each of them, their servants or agents, licensees and all persons having knowledge of the making of the order from carrying out any development on lands situate at Baldongan, Skerries in the County of the City of Dublin.
2. An order restraining the defendants and each of them, their servants or agents, licensees and all persons having knowledge of the making of the order from using the original steel framed corrugated apex roofed agricultural structure on the lands at Baldongan, Skerries, Co. Dublin, as a PVC window and door factory.
3. An order restraining the defendants and each of them, their servants or agents, licensees and all other persons having knowledge of the making of the order from using a large single storey extension to the rear of the said agricultural structure on the western boundary of lands at Baldongan, Skerries, Co. Dublin, as part of the manufacturing process relating to the PVC window and door factory.
4. An order restraining the defendants and each of them, their servants or agents, licensees and all other persons having knowledge of the making of the order from completing and using as the large apex steel framed structure of solid block construction on the southern side of the existing agricultural structure incorporating a mezzanine floor over ground floor for storage purposes at Baldongan, Skerries, Co. Dublin, as part of the manufacturing process relating to the PVC window and door factory.
5. An order directing the defendants and each of them to cease the use of the large steel framed corrugated apex roof agricultural structure and remove the single storey extension erected to the rear of that agricultural structure on the western boundary and the large apex steel framed structure with solid block walls from the lands and premises at Baldongan, Skerries in the County and the City of Dublin.
6. Such further or other order as to this Honourable Court may seek just.
7. An order providing for the plaintiffs costs.

2. This application was heard on the 9th November, 2005 and an order reflecting the decision of Her Honour Judge Linnane was perfected on the 18th November, 2005 in the following terms:

1. That the defendants and each of them, their servants or agents, licensees and all other persons having knowledge of the making of the order be restrained from using the original steel framed corrugated apex roof agricultural structure on lands at Baldongan Skerries, Co. Dublin, as PVC window and door factory on or before the 1st February, 2006.
2. That the defendants and each of them, their servants or agents, licensees and all other persons having knowledge of the making of the order be restrained from using a large single storey extension at the rear of the said agricultural structure on the western boundary of lands at Baldongan, Skerries, Co. Dublin, as part of the manufacturing process relating to the PVC window and door factory on or before the 1st day of February, 2006.
3. That the defendants and each of them to remove the single storey extension erected to the rear of that agricultural structure on the western boundary, and the large apex steel framed structure with solid block walls from the lands and premises at Baldongan, Skerries in the County of the City of Dublin, on or before the 1st February, 2006.
4. That the plaintiff do recover from the second and third named defendants the costs of this application to be taxed in default of agreement.
5. That the second and third named defendant's application for a stay on the issue of costs herein be refused.

3. As a result of the order of Her Honour Judge Linnane certain structures on the site were removed and this matter now concerns only the original steel framed corrugated apex roofed agricultural structure which remains on the lands at Baldongan, Skerries, Co. Dublin.

4. It is the defendants contention supported by affidavits from

William Peters on the 26th October, 2005

Jason Peters on the 28th October, 2005.

Morris Harnett on the 28th October, 2005.

Michael Cameron on the 28th October, 2005.

Thomas Walsh on the 20th October, 2005.

Kevin Martin Dowling on the 21st October, 2005.

William Peters (second affidavit) on the 20th March, 2006.

John Hennessy on the 20th March, 2006.

Garrett Peters on the 20th March, 2006.

5. (The affidavits from William Peters (second affidavit) John Hennessy and Gareth Peters are sworn after the Circuit Court hearing of the 9th of November, 2005 and were therefore not considered by Judge Linnane when reaching her judgment). That works commenced on the said site in or about July 1997.

6. There are two affidavits sworn on behalf of the plaintiff. They are

Joseph Gorman on 4th of July, 2005.

Conor Cooney on 6th of July, 2005.

7. And in neither of these affidavits is there any averment concerning the commencement of PVC door/window manufacturing at the site. Both these affidavits pre-date (and were relied on in) the application of the 9th November, 2005 and no further affidavits have been filed on behalf of the plaintiff in reply to the defendants affidavits.

8. I accept the defendants submission relying on the decision in *Dublin Corporation v. Gerard Sullivan* (Unreported, High Court, 21st December, 1984) that the onus is on the plaintiff to prove its contention in this matter and that the use of the structure already referred to at Baldongan for the manufacture of PVC doors and windows commenced since the 7th July, 1998. This the plaintiff has not done.

9. The defendants assertions in this regard are not entirely satisfactory particularly those sworn before the hearing of the 9th November, 2005 but the subsequent affidavits especially that of Mr. Hennessy, particularly where no attempt has been made to contradict or correct any of the contents and where no replying affidavits have been produced persuades me that I should accept that the PVC window/door operation did, on the balance of probabilities, commence in or about July, 1997.

10. This satisfies me that, as submitted by the defendants pursuant to s. 160(6)(a)(i) of the Planning and Development Act of 2000 that the plaintiff's application is statute barred and must therefore be dismissed.