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CLIMATE LITIGATION
What does it mean for Ireland?

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CLIMATE LITIGATION

Climate litigation has increased in many jurisdictions over the past 30 years, and especially in the last five or so years. It is seen as a way of both advancing climate objectives and raising greater awareness of environmental concerns. This dramatic rise is due to the greater social focus on environmental issues and climate change, not to mention the increasingly worrying science. The Grantham Research Institute on Climate Change and the Environment has noted a doubling of climate change-related cases globally since 2015, bringing the total number of cases to over 2,000, with around one quarter of these filed between 2020 and 2022. There has also been a noted increase in 'framework' cases: cases where Government policy frameworks (for fighting climate change and working towards carbon neutrality) have been challenged by environmental objectors for being too vague. In the case of Ireland, this was done successfully in *Climate Case Ireland*, discussed below. It resulted in much stronger climate framework legislation, and some interesting observations by the Supreme Court on how these cases can be taken. A good example of the relevance of such legislation is the recent concession by An Bord Pleanála of a judicial review case challenging the decision to permit a new ring road around Galway City, on the basis of a failure to consider Climate Action legislation.

In this article, we review the climate litigation trends, consider some recent cases of interest, and reflect on how climate litigation can impact developers and investors, with a view to guiding their response.

The impact of climate litigation

Climate litigation can impact companies in a variety of ways including:

- pressuring governments to increase their ambition in carbon reduction, leading to tighter regulation and, in some cases, a restriction on certain operations
- ensuring stricter enforcement of existing legislation
- challenging environmental assessment and permitting decisions
- enforcement of securities laws and consumer protection legislation

There has been a significant escalation in the use of the legal system by activists, advocacy groups and certain public authorities in different countries, in an effort to block carbon-intensive activities over the last ten years in particular. The claims advanced vary depending on the particular circumstances of the litigation involved, however definite trends are emerging as outlined below:

- human rights arguments are being used
- states are being held to account by their own judiciaries to take proper steps towards their stated climate action objectives
- nuisance claims and disclosure-related litigation are increasingly being pursued against carbon majors
- claims of deceptive 'greenwashing' marketing campaigns are being brought before courts and non-judicial bodies

Although only a small sample, three decisions of the Irish and EU member states' courts are worth considering in more detail.

1. Urgenda Foundation v Netherlands

This Dutch case is celebrated as the first to establish a legal duty on a government to prevent dangerous climate change. The Supreme Court of the Netherlands confirmed in 2019 that the Dutch government is under an obligation to significantly reduce its greenhouse gas emissions in the short-term to prevent dangerous climate change. The Court rejected all of the Dutch government's arguments, including the claim that emissions from the Netherlands are small – roughly around 0.4% of global emissions – and therefore the impact of tightening its emissions reduction policies would just be a “drop in the ocean”. Further, and most significantly, the Court decided that the risks of climate change fell within the scope of the European Convention on Human Rights, particularly within Article 2 (right to life) and Article 8 (private and family life). In so doing, the Court created the basis for the argument that climate change is a human rights issue.

2. Climate Case Ireland

In *Friends of the Irish Environment v Ireland* (**Climate Case Ireland**) in 2020, the Irish Supreme Court held that under the Climate Action and Low Carbon Development Act 2015 (the **2015 Act**), the Irish government was under a binding legal obligation to set out serious and credible measures to achieve Ireland’s ‘national transition objective’. Section 4 of the 2015 Act required adoption of a National Mitigation Plan which would "specify the manner in which it is proposed to achieve the national transition objective", i.e. transition to a "low carbon, climate resilient and environmentally sustainable economy" by 2050. Friends of the Irish Environment (**FIE**), an active national environmental

NGO, challenged the legal validity of the 2017 National Mitigation Plan (the **Plan**) on the basis that it failed to (a) meet the requirements of the 2015 Act and (b) vindicate constitutional and human rights.

The Supreme Court overturned the Plan, because it did not contain the specificity required by the 2015 Act. According to the Supreme Court, the 2015 Act required that the Plan explain how the government planned to achieve the National Transition Objective (**NTO**) over the entire period to 2050, not just the five years until the first scheduled review.

The level of specificity required was enough: "*to allow a reasonable and interested member of the public to know how the government of the day intends to meet the NTO so as, in turn, to allow such members of the public as may be interested to act in whatever way, political or otherwise, that they consider appropriate in the light of that policy.*"

However, the Supreme Court was more cautious in relation to the constitutional and human rights claimed by FIE. It denied FIE standing, as a corporate entity, to invoke such personal constitutional or human rights, but left this issue open to be decided in a future case.

Climate Case Ireland led to the introduction of stronger legislation in Ireland – the Climate Action and Low Carbon Development (Amendment) Act 2021. It is noteworthy that a failure by An Bord Pleanála (Ireland's national planning authority) to take account of that legislation was successfully used by FIE in a legal challenge in October 2022 to a decision to grant permission for a new ring road around Galway City. An Bord Pleanála announced that it would not be contesting the legal challenge and admitted that it was "not aware" at the time the planning permission was granted that the government had adopted a new climate plan (Climate Action Plan 2021) just days previously and therefore, had failed to consider it, as required by law. A key consideration now for any projects applying for planning permission, is to ensure that the climate impact is fully considered.

3. Royal Dutch Shell case

The District Court in The Hague in June 2021 held that Royal Dutch Shell (**Shell**) must reduce its emissions by net 45% by 2030. This marked the first time a court had ordered a private company to align itself with the Paris Agreement. In its decision, the Court used the 'soft law' of the United Nations Guiding Principles to establish that Shell had a duty of care towards Dutch citizens and is therefore obliged to reduce its emissions to help prevent climate change.

One key point from the Court's decision is that Shell was ordered to account for emissions from the fuels and other energy products it sells, known as scope 3 emissions, which make up more than 90% of the total amount. The Court reached a different conclusion on this question than the Norwegian Supreme Court in December 2020 did when faced with a challenge to the granting of controversial oil exploration licences in the Arctic.

This question of emissions is a key legal battleground, which has seen courts in different jurisdictions, including Ireland and the UK, reach different conclusions in challenges to development consents in industry sectors as diverse as oil refinery and food production facilities.

Shell has said it will appeal the decision, which it expects to take between two and three years. However the District Court's ruling applies in the meantime.

Sectors at risk

Although the majority of cases to date have been taken against governments or fossil fuel companies, sectors such as food and agriculture, transport and finance are also being increasingly targeted.

Climate change arguments are also being used in environmental assessment cases relating to planning permission and environmental licensing. In a recent Irish case, An Taisce (an environmental NGO) sought to challenge a planning decision to allow the expansion of a cheese factory in Kilkenny on the basis that upstream emissions had not been properly taken into account by An Bord Pleanála. In particular, it was argued that there was no adequate environmental impact assessment of the 450 million litres of milk needed to supply the factory. It was further argued that such supply would have significant consequences for Ireland's greenhouse gas reduction obligations as the supply of milk at these quantities would negatively impact methane and nitrate emissions.

The High Court rejected this argument, and upheld the decision to grant permission. An Taisce appealed to the Supreme Court, which gave judgment in February 2022. In refusing An Tasice's appeal, the Supreme Court considered the interpretation of Article 3(1)(a) of the Environmental Impact Assessment (**EIA**) Directive (Directive 2011/92/EU, as amended), and Art 6(3) of the Habitats Directive (Council Directive 92/43/EEC, as amended). Ultimately, the Court concluded that the effects which the applicant argued should have been considered were so remote that they could not realistically have been regarded as falling within the scope of these directives. Despite this finding, the Supreme Court did note that An Taisce had nevertheless raised important and practical issues regarding the development consent process.

Costs protection

Legal cost risk is an essential consideration for applicants bringing climate proceedings. Under Irish and EU Law, there are a number of protections in place which afford leniency to applicants in circumstances where they raise points of environmental law in the courts, so they are not exposed to costs orders against them. Domestically, section 50B of the Planning and Development Act 2000 provides that, where an applicant raises issues relating to provisions of the EIA Directive and Habitats Directive in Judicial Review proceedings, then the court may determine that each side should bear their own costs. Furthermore, the Environment (Miscellaneous Provisions) Act 2011 provides that, in proceedings where Section 3 of this Act applies (where civil proceedings are brought for the purpose of compliance/enforcement of a condition or requirement of an environmental licence), then each party shall bear their own costs. This domestic legislation is bolstered at EU level by the Aarhus Convention, which requires, at Article 9(4), that proceedings brought for the purposes of enforcing environmental laws should be appropriate, and be fair, equitable, timely and not prohibitively expensive.

The scope of protection afforded to applicants under these provisions has been considered by the courts on a number of occasions, and most recently by the Court of Appeal in 2021 in *Heather Hill Management Company CLG & Anor v An Bord Pleanála*. Here the Court overturned the earlier decision of Simons J in the High Court, and determined that the application of the special costs rules apply only to those grounds of challenge which allege a breach of the requirements of the directives specified in section 50B(1), but not to any other grounds for judicial review in the proceedings which are not based on these directives. This case has been appealed to the Supreme Court and a decision is awaited.

The special costs rules, even where applicable, do not automatically entitle the applicant to their costs in circumstances where they lose their case. This issue was considered in the above-mentioned An Tasice case in a separate costs hearing, in which the Court held that, despite European and national environmental law considerations being raised, and the fact that An Taisce had no personal or financial interest in the outcome and instituted the litigation in the public interest, they were not entitled to an order for costs. Each party was ordered to pay their own costs.

SLAPP litigation

Strategic Lawsuits Against Public Participation (**SLAPP litigation**) have received increased focus in the Irish courts through the lens of the Aarhus Convention in recent years. These are lawsuits which are generally lodged against NGOs and public interest groups to prevent them from informing the public and reporting on matters of public interest. The protection afforded by the Aarhus Convention against such litigation is a vital aspect of access to justice in climate litigation. In a recent High Court Decision, *Enniskerry Alliance and Enniskerry Demesne Management Company CLG v An Bord Pleanála*, Humphreys J noted that the ability of concerned individuals to litigate on environmental matters was dependent on a range of preconditions, one being, the "rejection of penalisation prohibited by the Aarhus Convention, or incitement to such penalisation and other related inchoate wrongs".

Climate washing

There has also been a marked increase in climate washing cases (also known as 'green washing'), which are challenges or complaints made on the basis of misleading or unsubstantiated communications in relation to environmental performance in order to gain a commercial or political advantage. These cases and rulings are typically taken by advertising standards regulators (as a result of complaints) in respect of companies that highlight their climate-friendly activities without acknowledging their involvement in less climate-friendly activities, or their own carbon impact.

A recent decision by the Advertising Standards Authority of Ireland (**ASAI**) provides an example of this. An advertisement for the Land Rover Defender, featuring an Irish TV celebrity with the headline “planting the seeds of a more sustainable life”, was held to be in breach of the ASAI Code. Green washing was the dominant factor in this decision, and the ASAI found that other statements made in the advertisement with regard to the environmental credentials of the product were "likely to mislead consumers".

What does this all mean?

It is important to acknowledge that use of the courts to address climate change issues faces many well-known hurdles, including technical legal issues such as the entitlement to bring the case, barriers to accessing justice including access to lawyers, difficulties in dealing with scientific evidence, and the conservatism of many courts when confronted with contentious policy issues. Nevertheless, climate-related litigation is likely to increase.

Apart from the risks of climate litigation, and of not securing regulatory consents due to a failure to take adequate account of climate impacts, there is also reputational risk to consider: the risk of companies being perceived by customers, employees, investors or shareholders as failing to address climate and sustainability issues. This can be even more significant. All the indications are that companies that are taking a 'business as usual' approach to climate and sustainability issues will quickly be perceived by each of these stakeholder groups as not responding to these issues with sufficient focus or urgency. It is almost inevitable that companies will be judged in ten years' time with a degree of hindsight that will lead to a harsh judgment of any perceived failure to respond fully to the specific challenges which climate change and carbon reduction present.

At the time of writing, the United Nations Climate Change Conference 2022 (COP 27) has just begun. The UN has reported that EU Member States are still not doing enough to limit global warming to 1.5°C. One year on from the commitments made by governments in Glasgow at COP26, this serves to highlight the need for tangible action on climate change and will likely lead to further climate action litigation from those who want to see better results in the fight on climate change.

In summary, the best advice is to put every decision being made through the 'climate action' lens to determine: will it negatively impact on national and international targets and how could it be changed to positively impact on the attainment of them?

The law as stated is at 3 November 2022. Check out our Climate Action Hub for the most up-to-date content.