Enviromental justice astray

Planning bill curtails rights to environmental litigation when there has never been greater recognition of the imperative of environmental enforcement

by Tony Lowes

Derrybrien
In October the European Court of Justice fined Ireland for failure to "take the minimum steps required to comply with the judgment of 3 July 2008" – confirming the need for environmental assessments of the likely consequences of building a windfarm in County Galway. Its construction led to a 2.5-kilometre bog-slide, the death of 50,000 fish, and the contamination of public-water supplies 20 kilometres away. Ireland's conduct since showed that it has "not acted in accordance with its duty of sincere co-operation to put an end to the failure to fulfil obligations" under the EU Directive on Environmental Impact Assessment. To emphasise the `'indisputable seriousness`', the clearly unhappy European Court of Justice imposed penalties on Ireland even greater than those sought by the European Commission; a lump-sum fine of €5m and a daily penalty of €15,000 for each further day of non-compliance.

Apple
A decision by technology giant Apple to cancel a plan to build an €850 million data centre in Athenry, Co Galway, because of a protracted legal challenge which culminated in April in Supreme Court dismissal, was stated by Business Minister Heather Humphreys to show the need for the State's planning processes to be more efficient. This was effusively echoed by many political and media commentators. Athenry is probably more responsible than any scheme for the State's precipitate Planning Bill. However, it has recently emerged that upgrading the grid to allow data centres will cost Ireland an entirely unheralded €9bn, and dramatically exacerbate greenhouse gas excesses, with extraordinarily little economic or employment gain. This is just the sort of thing that should have been subjected to impact assessment. And just the sort of scheme that could be insulated from judicial review from members of the public such as the individuals vilified over the Apple appeal and litigation.

THE GOVERNMENT recently published its Housing and Planning and Development Bill 2019 designed to restrict access to justice for individuals, community groups, and Non-Governmental Organisations [NGOs]. "The proposed measures are clearly pro-developer and anti-environmentalist, draconian, oppressive, and should be resisted", concluded Michelle Hayes in the current Irish Legal News.

It is likely the measures will fall foul of the Aarhus It Convention which is incorporated into Irish Law. The Convention gives the public and NGOs "the right to review procedures to challenge public decisions that have been made without respecting the [right to participate in environmental decision-making] or environmental law in general". To that extent the measure is pro-tem grandstanding designed to appeal to developers and the anti-environmental. If it is implemented it is likely to be largely overturned under EU law, if a Green-tinged government does not do it first.

Among the draconian proposals, 'standing' – i.e. the appropriateness of a particular person taking a case before the Court - is to be made more difficult to obtain. It will no longer be enough for applicants to show a "sufficient interest" but rather "substantial interest" and that they must be "directly affected by a proposed development", and have had prior participation in the planning process.

It only just stopped short of requiring an objector to be a local. Further restrictions, along with a reduction of the current eight-week period to review planning decisions have also been mooted publicly and may yet be added to the legislation.

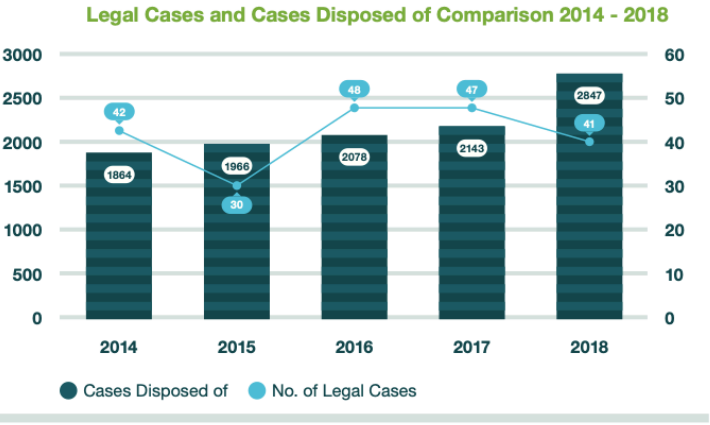
To make it harder to obtain legal representation on the current 'no foal no fee' model, planning will be one of the few types of legal action where successful litigants will no longer recover full costs if they win. This introduces a significant inequality of arms since in these cases the counter party is always a public body whose budget and resources are guaranteed by the state and whose lawyers are paid at market rates whether they win or lose. It is rash for Ireland to treat litigation on EU law matters less favourably than other forms of litigation that has no connection with EU law.

Community environmental groups taking action will have to show they have been established for three years, ruling out the traditional means of communities responding to an unwanted, damaging development by reactively forming a group to oppose it.

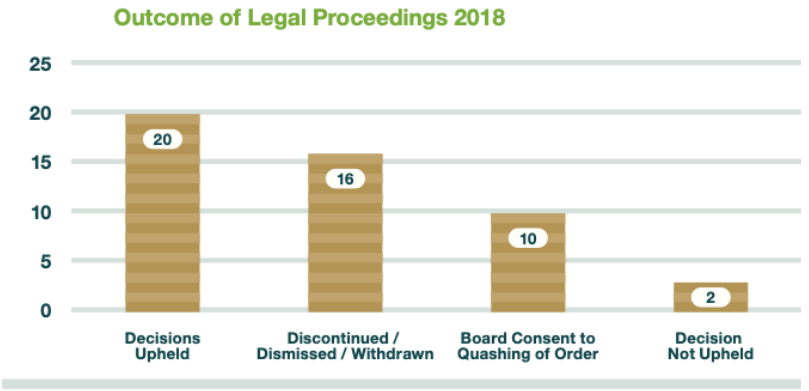
These groups must also have a minimum of 100 "associated members". Membership administration already over-burdens mostly voluntary NGOs. The bald figure is in fact drawn from an European Court of Justice Swedish case - with a key phrase shamelessly redacted by the Bill. Sweden attempted to restrict legal challenges to groups with 2000 members, but reduced it to 100 to avoid a European Court of Justice ruling – but it also included the key phrase "or otherwise shows that the business has public support", as a saver in its legislation.

Citing Magna Carta of 1215, a recent English UK Supreme Court judgment on access to justice offered a powerful restatement of the importance of the fundamental right to access to justice 'inherent in the rule of law':

"Without such access, laws are liable to become a dead letter, the work done by Parliament may be rendered



There were 22 substantive judgements in cases taken with 20 decisions of the Board upheld. Proceedings against An Bord Pleanála were discontinued, dismissed or withdrawn in 16 cases.



During the year, the Board consented to the quashing of 10 of its orders where a procedural defect was identified.

nugatory, and the democratic election of Members of Parliament may become a meaningless charade".

Lord Reed's judgment quoted Sir Edward Coke's seventeenth-century 'Institutes of the Laws of England':

"Justice must be free, because nothing is more iniquitous than saleable justice; full, because justice ought not to limp; and speedy, because delay is in effect a denial. Then it is both Justice and Right".

Perhaps Ireland's most signal use of the Courts to prevent damaging planning was the Burren Action Group championed by the late Professor Emer Colleran. Defeating a 1993 Office of Public Works proposal to build an Interpretative Centre at Mullaghmore, County Galway, promoted by Minister Sile de Valera, took ten years, but their legal actions established the principle that the State is not exempt from requiring planning permission.

By 2006 the Celtic Tiger streamlined planning for developments of strategic importance to the State, by-passing Local Authority decision-makers with applications going directly to An Bord Pleanála.

These large projects include often highly contentious private proposal like large housing projects, wind farms, and natural gas storage facilities such as LNG facilities. The only appeal for these projects is from An Bord Pleanála to the High Court.

Ironically, the constitutional right to '"an environment that is consistent with human dignity and the wellbeing of citizens at large" was recently recognised in a judgment on a legal challenge by Friends of the Irish Environment to the proposed new Dublin Airport Runway. And the idea that planning appeals and legal challenges are the cause of long delays – an often-cited reason for the ratcheting of restrictions - infuriates those who work in this sector. For the rare cases that make it to court, which are a fraction of a percent of all planning decisions, delays caused by public bodies are the most frequent. Litigants regularly wait months for the State or An Bord Pleanála to respond to their cases - almost a year in one current case, while some judges take the same time to publish their judgments. In any event rather than scheming to foil objectors, the State would be better making sound and transparent legal decisions. While cases like the Galway Bypass and the Athenry Data Centre provoked 'Deep State's' ire, the particular wrath of Minister Murphy is probably fuelled by the bleatings of developers who have the ear of his department and, in particular, the humiliation he and Minister Bruton must have suffered being told off like school boys by Justice Garrett Simons last month.

The State had pleaded for five years with the High Court not to rule on An Bord Pleanála's 2013 determination that large-scale industrial peat-extraction required planning permission because they were going to change the law. The Court's time would be wasted on a 'moot' case! The prevarication had exhausted the High Court's patience by December 2018 when it supported the Board's ruling and rejected any further appeal. Richard Bruton and Eoghan Murphy did indeed then change the law, but their January 2019 Statutory Instruments were struck down in Justice Simons' scathing judgment this October after a Friends of the Irish Environment challenge.

To continue any peat production, the developers (including Bord na Móna, whose licences predate EIA legislation) must now put together an environmental impact assessment – (this was also the case with the windfarm at Derrybrien) - and obtain planning permission from the relevant Local Authority, which means retrospective permission. Unless, of course, populist Ministers scurry back to rush legislation through the Dáil. Peculiarly and personally targeted by the new restrictions is Peter Sweetman, Ireland's leading 'serial litigant', with 14 successful Judicial Reviews and three successful references to Europe: the enfant terrible for government and developers. He helped develop Friends of the Irish Environment. His cases are regularly cited across Europe. An embarrassing number of grounding judgments on environmental matters in Irish and EU courts are titled 'Sweetman'.

Sweetman recently brought the Irish afforestation programme to a halt by issuing hundreds of identical objections to licence applications, pointing out that EU law required they be subject to appropriate assessment when they may have an impact on designated EU nature conservation areas.

"Planning is a democratic art", says Judy Osborne, a former chairperson of An Taisce, planner, and Friends of the Environment Director. She cites the Department of the Environment's 2012 'Action Programme for Effective Local Government': 'At the centre of democracy is the participation of citizens in public life and their right to influence the decisions that affect U their lives and communities. Open and inclusive policy-making increases public participation, enhances transparency and accountability, and builds civic capacity.'

She echoes EU Trade Commissioner Phil Hogan who, as a not particularly 'environmental' Minister for the Environment told a 2014 meeting of the parties to the Aarhus Convention, which provides for access to environmental justice, that "The participation of members of local communities, whether as individuals or as members of local sectoral, community or other groups in public life and their right to influence the decisions that affect their lives and communities are at the centre of democracy".

In the era of climate change, species extinction and social fracture we must move to a system centred on sustainability; and ensure that such a system must be monitored and enforceable. It is a breathtaking step backward to curtail rights to environmental justice, in 2019.

Tony Lowes is a Director of Friends of the Irish