Too small and not insulated

Cop on to COP CPOs

In dealing with the climate crisis, property may have to be requisitioned. Article 43 gives the State a call option.

by Edmund Honohan

The 26th United Nations Climate Change Conference in Glasgow (COP 26) (just finished) is likely to be a game-changer for environmental law in Ireland, but in a way that has not yet been debated, namely, the extensive use of Compulsory Purchase Orders. If there's agreement, Glasgow will be the first time that State Parties will have committed to enhanced ambition since COP21 – as required under the five-yearly 'ratchet mechanism'.

A 2020 unanimous decision of the Irish Supreme Court found that a 2017 Government plan for addressing climate change up until 2050 failed to include "the sort of specifics which the statute requires" (Clarke. C.J.) to facilitate informed public consultation as required under the relevant legislation. Friends of the Irish Environment (FIE), an NGO, had challenged the "National Mitigation Plan" for emissions reductions on a number of grounds. The judgment suggests that we'll see demanding climate imperatives in play in future cases. Too late now for "vague proposals and aspirations" (Clarke C.J.)

For example, in dealing with the climate crisis, property may have to be requisitioned. If we can, in "just transition", begin to cull dairy herds, we can also demolish and redevelop inner city "brown fields" to optimise the energy efficiency of all the new housing that is going to be built, and at the same time cut the fuel-guzzling commute and insist on public-transport use. What if the Government, having signed up to COP26, finds it "necessary in a democratic society" to re-design large parts of our existing built environment. Can the brown fields be CPO'd?

To my mind, the issue is to identify the countervailing *public* property rights which the Constitution asserts in Article 43, inferentially, when it refers to "reconciling" private rights with the "exigencies of the common good". In contemporary terms, society has a call option on private property for which there is a pressing need in the public interest.

The European Court of Human Rights accepts interference with rights when there is a "pressing social need" and it is justified as being "necessary in a democratic society" The implications of Article 43's "common good" and "principles of social justice" in these times of existential crisis may yet surprise us.

In Ireland an early illustration of the Supreme Court ruling on the balance between public and private rights was the 1952 case of Foley where a farmer signed up for the Land Purchase scheme, the transformative project of "transferring the ownership of agricultural lands to the occupying tenants to create a peasant proprietorship".

But the Land Commission required him to reside in the farmhouse on the lands and moved to evict him when he failed to do so. No, the Supreme Court ruled, this was not an infringement of his Constitutional rights. Mr Foley was required to stay in residence in the farmhouse as *quid pro quo* for the State-subsidised land deal he had made with the Land Commission. The requirement that the house be occupied was held not to be an infringement of his property rights.

The "exigencies of the Common Good" justified the residence requirement in social legislation with such a transformative objective. The judicial yardstick for CPOs in the context of the grand climate-change agenda will probably follow the view in *Foley*'s case.

By the same measure, what about the international investment fund which benefits from planning, access to utilities, and tax breaks, but leaves the apartments it builds empty? This is surely an infringement of the public's "common good" property rights? Is it time for the Attorney General to enforce the Constitution? Perhaps even time for a Public Nuisance action to force these apartments on to a dysfunctional market?

So what happens if we sign up to targets in Glasgow in November? They'll only be worth the paper they're written on if they're legally binding in some real and tangible way. Such as, for example, enforceability at the suit of the citizen.

The danger is that regulatory structures will be erected to shield against citizen litigation. Citizens could be deprived of the right to pursue a claim to the benefits of the new law. Glasgow's targets should also be the touchstone for "horizontal" public nuisance litigation, with the consent of the Attorney General, and not merely at the instance of an individual who can demonstrate damage special to himself.

The patrimony of the State, which in other circumstances might safely be left in private hands, must now be on stand-by to underpin our collective efforts to reach the public goals that will be recognised in Glasgow. In a time of crisis, that patrimony must be returnable to public hands.

> "Any changed Glasgow climate targets will only be worth the paper they're written on if they're legally binding in some real and tangible way - such as enforceability at the suit of the citizen

Edmund Honohan, Master of the Irish High Court, writes in a personal capacity