Sustainability

Whether or not an association representing public interests may sue a company in a civil case in order to have it reduce its CO_2 emissions

Below follows a commentary on the already much celebrated judgment of The Hague District Court, which upheld a class action against Shell, ordering it to reduce its CO_2 emissions by a certain percentage and within a certain period of time.

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The Hague District Court, Commerce Team, Case C/09/571932 of 26 May 2021, Milieudefensie et alii v. Royal Dutch Shell PLC[1].

The Dutch association Milieudefensie sues the Shell Group (RDS) for the court to order the company to reduce its Co_2 emissions by 45% by 2030. The lawsuit is allowed to proceed.

1. Decision of the Court (partial excerpt)

Access to Dutch courts is governed by Dutch law. The class actions of Milieudefensie et al. are governed by Book 3, Section 305a of the Dutch Civil Code, pursuant to which a foundation or association with full legal capacity may initiate legal proceedings for the protection of similar interests of other persons.

The class actions of Milieudefensie et al. are public interest actions. Such actions seek to protect public interests, which cannot be individualised because they accrue to a much larger group of persons, which is undefined and unspecified. The common interest of preventing dangerous climate change by reducing Co_2 emissions can be protected in a class action. The dispute over the admissibility of

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class actions revolves around the question of whether or not they meet the "similar interest" requirement within the meaning of Book 3, Section 305a of the Dutch Civil Code. This requirement entails that the interests in question must be suitable for bundling so as to safeguard an efficient and effective legal protection of the stakeholders.

The court is of the opinion that the interests of current and future generations of the world's population, as principally served by class actions, are not suitable for grouping. Although the entire world's population is served by curbing dangerous climate change, there are huge differences in the time and manner in which the world's population in various places will be affected by global warming caused by Co_2 emissions. Therefore, this principal interest does not meet the "similar interest" requirement under Book 3, Section 305a of the Dutch Civil Code.

A claimant must have an independent and direct interest in the legal proceedings initiated. This is complemented by the option in Book 3, Section 305a of the Dutch Civil Code discussed above to initiate proceedings for the protection of similar interests of others. The legislative history of Book 3, Section 305a of the Dutch Civil Code states that if a public interest action is initiated, "citizens, individually, are generally not entitled to initiate proceedings due to a lack of interest". In other words, in addition to a class action, there is only room for claims by individual claimants if they have a sufficiently concrete individual interest. That is not the case here: the interest of individual claimants' claims is the same as the common interest that the class actions seek to protect. Their interests are already served by the class actions and they have no interest in a separate claim in addition to the class actions. The individual claimants' claims should therefore be held not allowable.

RDS' obligation to reduce Co_2 emissions derives from the unwritten standard of care under Book 6, Section 162 of the Dutch Civil Code, which means that acting in conflict with what is generally accepted according to unwritten law is unlawful. It follows from this standard of care that in determining the Shell group's corporate policy, RDS must observe the due care exercised in society. The interpretation of the unwritten standard of care calls for an assessment of all the circumstances of the case in question.

From the *Urgenda* judgment of the Dutch Supreme Court it can be deduced that Articles 2 and 8 of the European Convention on Human Rights (ECHR) offer protection against the consequences of dangerous climate change due to Co_2 emissions-induced global warming. The UN Human Rights Committee, which decides on violations of the International Covenant on Civil and Political Rights (ICCPR), determined the same as regards Articles 6 and 17 ICCPR. In a case on the right to life as enshrined in Article 6 ICCPR, the UN Human Rights Committee found as follows:

> "Furthermore, the Committee recalls that environmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life."

In 2019, the UN Special Rapporteur on Human Rights concluded the following:

> "There is now global agreement that human rights norms apply to the full spectrum of environmental issues, including climate change."

RDS's argument that the human rights invoked by Milieudefensie et al. offer no protection

against dangerous climate change therefore does not hold.

The serious and irreversible consequences of dangerous climate change in the Netherlands and the Wadden region, as discussed under (4.4. (3)), pose a threat to the human rights of Dutch residents and the inhabitants of the Wadden region.

It can be inferred from the UN Guiding Principles on Business and Human Rights and other soft law instruments that it is universally endorsed that companies must respect human rights. This includes the human rights enshrined in the ICCPR, as well as other "internationally recognised human rights", including the ECHR. For example, the OECD Guidelines for Multinational Enterprises state the following:

> "Enterprises should, within the framework of laws, regulations and administrative practices in the countries in which they operate, and in consideration of relevant international agreements, principles, objectives, and standards, take due account of the need to protect the environment, public health and safety, and generally to conduct their activities in a manner contributing to the wider goal of sustainable development. In particular, enterprises should:
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> (...)
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> Consistent with the scientific and technical understanding of the risks, where there are threats of serious damage to the environment, taking also into account human health and safety, not use the lack of full scientific certainty as a reason for postponing cost-effective measures to prevent or minimise such damage;".

In its interpretation of the unwritten standard of care, the court has also included the internationally propagated and endorsed need for companies to genuinely take responsibility for Scope 3 emissions. This need is more keenly felt where these emissions form the majority of a company's Co_2 emissions, as is the case for companies that produce and sell fossil fuels. In the case of the Shell group, approximately 85% of its emissions are Scope 3 emissions.

The court concludes that RDS is obliged to reduce Co_2 emissions from Shell group activities by a net 45% by the end of 2030, relative to 2019, through Shell group corporate policy. It is up to RDS to design the reduction obligation, taking into account its current obligations. The reduction obligation is an obligation of result for the activities of the Shell group. It is a significant best efforts obligation with respect to the Shell group's business relations, including end-users, in the context of which RDS may be expected to take the necessary steps to remove or prevent the serious risks ensuing from Co_2 emissions generated by the business relations, and to use its influence to limit any lasting consequences as much as possible.

2. Commentary on Spanish law

According to Art. 24(1) of the Consumer Protection Act, *[c]onsumer and user associations formed in accordance with the provisions of this title and the regional legislation applicable to them, are the only ones with standing to act for and on behalf of consumers' and users' public interests.*

However, according to Art. 11(2) and (3) of the Civil Procedure Act, only consumer and user associations have standing to defend consumers and users. Other associations representing collective interests other than the defence of

consumers do not have such standing under Spanish law.

This will also be the case when transposing Directive 2020/1282, which obliges States to give associations representing consumer interests collective standing to bring actions for injunctions and damages.

In principle, there is no major difficulty in arguing that diffuse interests that may have been environmentally harmed may find a route through Art. 11(3) of the Civil Procedure Act, by means of a generous reclassification of environmental interests as interests of consumers as a whole. However, it is curious that the aforementioned Directive does not list the defence of the environment among the 66 "consumerised" matters for which collective protection is possible.

According to Art. 53 of the Consumer Protection Act, "the action for injunction to retrain is aimed at obtaining a judgment ordering the defendant to cease a conduct and to prohibit its future repetition. Likewise, the action may be brought to prohibit the performance of a conduct when the conduct has ended at the time the action is brought, if there is sufficient evidence to fear its immediate repetition".

There is no abstract action for injunction in Spanish law (nor in the aforementioned directive) other than the action for injunction to restrain, and the sub-genre of actions to void unconscionable clauses. The rest of the abstract actions are declaratory.

In Spanish law, it is not possible to bring an abstract civil action (collective or individual) that has as the object of the claim regulatory compliance by a company, or a specific type of regulatory compliance. There are no civil actions for injunction that have as a claim mere compliance with legal rules.

An action for injunction to restrain cannot contain a reduction of Co_2 emissions over a certain timeframe and in a certain proportion, *even if there were a binding legislative instrument* (the "2030 Agenda" is not). This claim is not an action for injunction to restrain prohibited conduct.

There is no fundamental right contained in an international instrument that can support the existence of a singular or collective personal right to claim from a company an emissions reduction.

The judgment of the Hague Court would not be enforceable under Spanish procedural law, even if it were possible in the abstract. It is probably not enforceable under Dutch law either.