

FARRER&Co

Disputes Predictions

January 2022



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Welcome to our annual disputes and investigations predictions publication. We asked specialists from across our disputes team to provide their insights on the key developments and trends that they saw and experienced in 2021 and their predictions for the year ahead.

2021 was another extraordinary year of change, challenge and adaptation and the disputes and investigations landscape was no different. As we all move into a new phase of managing the impact of Covid-19 in society and in our working and professional lives, this publication is an attempt to provide a degree of foresight, against the backdrop of increasingly unpredictable hurdles, as well as opportunities, as to what we see coming down the track.

The 2021 trends highlighted and the predictions for 2022 have been drawn from across our disputes and investigations group, covering a broad range of sectors and specialist practice areas. The predictions cover topics as diverse as NFTs, the proposed Online Safety Bill, FCA investigations, ransomware attacks, fraud, ESG, rent arrears, privacy laws, insolvency and class actions and we hope that as a result there is something here for everybody.

If you would like to discuss any of the areas highlighted in our review, please do get in touch with the authors or your usual contact at Farrer & Co.

“
A really excellent litigation team that knows its stuff, and has a great understanding of what clients want and how to get it for them (if it can be done). No weak links at all.”

-Legal 500, 2022



At a glance

The scope of privacy laws will be greatly determined by the Supreme Court's judgment in ZXC v Bloomberg.

New rules in the family courts will potentially create significant, but legitimate, public scrutiny of previously private matters.

What we saw in 2021

Covid-19 has continued to occupy news organisations, but we saw the beginnings of a return to greater levels of traditional and investigative journalism on other matters, such as the Everyone's Invited movement and the Pandora Papers.

While there were some high profile defamation judgments, like the successful claim against Tommy Robinson by a young Syrian refugee and the ongoing WAGatha Christie saga (Rebekah Vardy vs Coleen Rooney for those who have not been following), the increase in the use of data protection laws in media and reputation law cases continued. The proportion of data protection claims being commenced in the media and communications list of the High Court has increased. This is particularly relevant to cases involving online material, where the 'right to be forgotten' has played an important role in enabling individuals to remove inaccurate or outdated content on Google and social media websites.

More generally, the extent of freedom of expression rights has occupied the limelight in a number of different ways, ranging from the debate around so-called 'cancel culture' to the challenges posed by user-generated content on social media.

Predictions for 2022

We expect to see Covid-19 occupying increasingly less column space, continuing the return to more investigative journalism and a corresponding rise in reputation risk for clients based on other themes.

The scope of privacy laws in police and other law enforcement investigations will be greatly determined by the Supreme Court's judgment in ZXC v Bloomberg. The Supreme Court heard the case in November 2021, and we expect judgment to be given in the early part of this year. A key question which the Court will address is the extent to which an individual has a reasonable expectation of privacy in relation to information concerning a criminal investigation into their activities. ZXC is the latest in a line of cases, the most famous of which is Sir Cliff Richard's successful litigation against the BBC. However, this is likely to be the most important judgment to date, having reached the Supreme Court.

After the Joint Committee's extensive recommendations on the proposed Online Safety Bill, a groundbreaking piece of proposed legislation designed to regulate social media platforms and search engines, there is considerable uncertainty whether the Bill will come into law this year. However, it is to be hoped that changes made to the draft Bill will address some of its uncertainties, particularly the grey areas around how it intends to address the balance between freedom of expression and the undoubted harm caused by much online content.

It's expected new rules in the Family Courts will open them up to more detailed reporting, particularly where well-known divorcing couples are fighting over the spoils. This will potentially create significant, but legitimate, intrusive public scrutiny of previously private matters. However, this is likely to be partially ameliorated by the introduction of 'no fault' divorce and greater use of private resolution schemes, reducing the number of cases getting to court. MailOnline will not be able to rub its hands quite so gleefully!



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At a glance

Proposed new legislation promoting arbitration for rent arrears disputes will be fraught with difficulty and may lead to satellite litigation around arbitration decisions.



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What we saw in 2021

Commercial landlord and tenant relationships have been tested to breaking point by Covid-19. Government guidance to stay at home led to a downturn in business across all sectors and large parts of the hospitality industry were actually mandated to cease trading. This resulted in thousands of businesses which leased their premises losing the income on which they depended to pay rent. Whilst the government reacted quickly at the outset of the pandemic to put restrictions in place to prevent landlords from forfeiting leases as a result of arrears and encouraging parties to reach sensible arrangements, some landlords took the aggressive step of issuing debt claims in the Courts. Those tenants with pockets deep enough to defend these claims ran arguments based on the frustration of their leases as a result of the legal restrictions preventing them from trading. While the High Court held that there was no defence to the non-payment of rent and the landlords received judgement in respect of the arrears, it has recently been announced that a key decision is being appealed so there may yet be further developments here, and potentially less reassuring news for Landlords.

These disputes were comparatively rare though and it seems that the majority of landlords and tenants were able to reach some form of agreement on rent, whether it was a straight concession or slightly amended payment terms.

2021

Predictions for 2022

Looking ahead, in addition to the anticipated judicial clarity on the question of whether tenants are required to pay rent during the Covid-19 lockdowns or whether there was a total failure of consideration or an implied term in their leases which operates to suspend that obligation, more property related Covid-19 legislation is on the horizon. The government has proposed legislation aim at “mopping up” any outstanding Covid-19 rent arrears by allowing parties to unilaterally apply for disputes to be subject to binding arbitration if agreement cannot be reached focussing on an objective review of a tenant’s viability and affordability. We will have to wait for the legislation to be enacted to gauge the level of demand for the new scheme and its effectiveness but our initial view is that this is a proactive and necessary measure implemented by the government. We predict that navigating the new system will be fraught, particularly for Landlords who will be encouraged to accept (likely hefty) rent concessions – we can see plenty of scope for challenging the decisions and suspect satellite litigation may spring up around the arbitrations.

2022



At a glance

We expect growth in the number of ransomware attacks and attempts to reach an international consensus on the payment of ransoms.

The decision of the Supreme Court in Lloyd-v-Google will not mean the end of the pursuit of collective actions as a result of data privacy breaches.



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What we saw in 2021

- There was an increase in ransomware attacks and a tightening of insurance cover, meaning impacted organisations were increasingly left to pay for the consequences of attacks from their own pockets because of increases in cyber-insurance excesses.
- The Information Commissioner's Office continued to focus on online marketing breaches and the Privacy & Electronic Communications Regulations, with a series of hefty fines but with an increasing focus on big brand names.
- Issues were caused by employees and others moving jobs, partly prompted by the dislocation caused by Covid, and taking contact data and intellectual property with them which led to claims against them and their new employers.
- There was pushback from the courts in a series of data privacy litigation claims, where the courts began to rein in the extent to which defendants were required to compensate individuals, culminating in the pivotal decision of the Supreme Court in Lloyd -v- Google where the ability for claimants, funders and their lawyers to use the collective Representative Claim model was curtailed.

Predictions for 2022

- The New Information Commissioner, John Edwards, took over from Elizabeth Denham in January this year. We don't expect any radical changes in regulatory policies and priorities immediately, but we do expect a robust conversation between the ICO and the Government over the proposed reforms to U.K. data protection laws which are currently under consultation. We also expect tension with the EU in the context of those reforms in relation to the Adequacy Decision granted to the U.K. for EU/U.K. personal data transfers in 2021. However, we do not expect that Adequacy Decision to be revoked. In our view, because of the uncertainties caused by these changes, we suggest that organisations double down on compliance with existing requirements until we are clear about any changes.
- We will see further growth in ransomware attacks and more questions posed about whether ransoms should be paid, including attempts to reach international consensus on this issue.
- In spite of the decision of the Supreme Court in Lloyd -v- Google, we still expect to see collective actions pursued by claimants, funders and their lawyers arising out of data privacy breaches with a switch to the Group Litigation Order (GLO) model or the testing of the bifurcated Representative Claim model suggested by the Supreme Court.
- We will begin to see disputes about the sale of NFTs hitting the public domain, focusing on copyright, passing off and fraud.

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At a glance

We predict an uptick in FCA enforcement activity as we emerge from the pandemic.

Enforcement action against senior managers with feature with greater frequency.



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What we saw in 2021

- FCA enforcement activity was slow for the year, following the trend established in the second half of 2020 with the global pandemic continuing, understandably, to focus the FCA's attentions on other priorities. Enforcement data published by the FCA in July (including data to the end of the financial year to March 2021) showed the FCA achieved 147 outcomes using its powers of enforcement against 217 outcomes in the previous financial year, and the outcomes achieved in the remainder of 2021 to date to not show a marked uptick in activity.
- The FCA's focus on non-financial misconduct continued, but not without some bumps along the way. In one of the most closely followed enforcement outcomes of the year, a Final Notice was issued by the FCA in the Frensham case following Mr Frensham's unsuccessful appeal to the Upper Tribunal. Despite the FCA's success, the real interest came in comments made by the Tribunal to the effect that the fact of a serious criminal conviction (not involving dishonesty) is not necessarily enough on its own to justify prohibition and that while the FCA prevailed for other reasons, it had not done enough in linking the criminal conviction of Mr Frensham to the FCA's statutory objectives and his ability to carry out his professional role.
- The Frensham case also saw the FCA come in for some strong criticism from the Upper Tribunal for its handling of the case, which followed on from criticism it received earlier in the year in the Forsyth case where the Upper Tribunal concluded that the FCA's conduct had fallen well below the standards the regulated community and public at large are entitled to expect. The FCA will be keen to avoid any repeats in 2022.

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Predictions for 2022

- Despite the slowdown in enforcement activity, in its business plan published earlier this year the FCA has sought to position itself as a more assertive regulator that will "test its powers to the limit". We predict that the enforcement data for the past couple of years will reflect a period of unusually low activity and that, for once, 2022 will see a return to the "old normal".
- We predict that one area that will see a new normal emerge is in enforcement action taken against senior managers under the SMCR. Over 5 years since SMCR was first introduced, and 2 years on from the regime being extended to solo-regulated firms, the expected enforcement activity has not emerged. We expect that to change in 2022. While it can be argued that the lack of enforcement activity is a demonstration of successful changes in behaviour as a result of SMCR, the FCA will want enforcement outcomes to bolster the deterrent.
- We also expect to see an uptick in enforcement action related to the FCA's consumer protection agenda, with a focus on systems and controls, as well as in relation to market abuse.

2022



At a glance

Litigation relating to ESG investments and allegations of ‘greenwashing’ will feature prominently on the financial disputes landscape this year.

What we saw in 2021

There was certainly an increase (on my desk, at least) in fraud claims during 2021. In particular, disputes involving cryptocurrencies – both fraud claims and commercial disputes – was a specific area which rose in prevalence among my cases in 2021. That was perhaps reflective of the rapidly evolving status of digital assets under English law. I anticipate that this will continue to be a growth area in 2022: as cryptocurrencies become increasingly interesting to investors, so too do those investors/investments become increasingly interesting to fraudsters, as well as providing a stage for commercial disputes amongst investors, businesses, trading partners and exchange platforms.

Predictions for 2022

In terms of predicted ‘new’ ground for claims in 2022, litigation risks concerning ESG investments and allegations of ‘greenwashing’ are likely to come to the fore this year. While ESG issues have already been the subject of greater regulatory scrutiny and pressure of late, significant FCA enforcement action before 2023 seems relatively unlikely: compliance statements by firms remains in many cases at a relatively developmental stage so premature enforcement action risks suppressing good intentions.

Instead, the more immediate litigation risks are posed by the threat of Court claims around ESG issues – particularly around the sales and promotion processes. I expect to see claims beginning to emerge around issues such as: over-stated environmental credentials of ‘green’ investments; clients claiming that investments do not match their stated investment objectives (given that ESG preferences are increasingly being included in initial client profiling); and claims regarding the accuracy and realism of ESG investment claims. The latter appears to me to be a particularly fertile area for prospective claims and may become the new battleground for financial mis-selling claims, which often revolve around assertions in marketing materials in any event. There may be other avenues of attack too, including shareholder activism and action against Boards of Directors who fail to deliver on green objectives. Other jurisdictions have already seen an increase in this type of ESG litigation; 2022 could be the year when it finally lands in England.

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At a glance

We will see an increase in consumer-focussed claims being framed and pursued as competition law claims.

What we saw in 2021

January 2021 saw the most significant insurance judgment of recent years. The test case was brought by the FCA on behalf of thousands of businesses whose insurance claims for business interruption losses caused by the coronavirus pandemic had been rejected.

In its wide-ranging judgment the Supreme Court overturned the controversial Orient-Express decision which had long been helpful for insurers in limiting their liabilities for business interruption losses. In so doing the Supreme Court recognised that a strict application of the “but for” test of causation may not always be appropriate where a loss is caused by two concurrent causes arising from the same underlying event (a hurricane in Orient Express).

[Full briefing here.](#)

Predictions for 2022

Many column inches have been devoted to the death of the “class action” in England and Wales following the Supreme Court’s judgment in Lloyd v Google in November 2021. The Supreme Court rejected the claim in part on the basis that it had been brought on behalf of millions of iPhone users on an “opt out” basis – meaning that the time-consuming and expensive business of identifying and signing up claimants individually could be avoided. However, collective actions on an “opt out” basis are already permitted in England and Wales in competition law cases. Last year saw progress in several potentially huge collective actions against Mastercard, BT and South Eastern and South Western rail franchises. The coming year will likely see more consumer-focussed cases being framed and pursued as competition law claims.

Following Brexit, the UK is outside the EU’s system to ensure that only one court in the EU has jurisdiction over a single claim and which provides for the judgment of that court to be enforceable throughout the EU. Accession to the Lugano Convention would provide the UK essentially the same benefits but in June 2021 the EU refused to accept the UK’s application. The only other route to joining is to obtain the unanimous consent of all EU members states. In the current political climate that seems very unlikely.

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At a glance

There will be a significant increase in insolvency litigation as legislative fetters on creditor action are phased out and clarity emerges on the viability of debtors.

We predict that post-M&A pricing and earn-out disputes will be seen more frequently as deals brokered in a healthier financial climate fail to deliver on expectations.



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What we saw in 2021

- Despite the severe financial impact inflicted upon them by the pandemic, many businesses have stayed afloat due to significant government stimulus and temporary insolvency protections coupled with an unusual tolerance on the part of contracting parties for delayed or partial performance. This tolerance has in part been driven by factors such as the possible longer term impact of action on the supply chain, a sense of collective responsibility and the PR implications of appearing too aggressive in the 2021 climate.
- In *Okpabi v Royal Dutch Shell* [2021] the Supreme Court held that Royal Dutch Shell Plc may have owed a duty of care to those allegedly harmed by the acts of its foreign subsidiary. This demonstrated potential movement on the part of the English Courts towards a claimant friendly view that transnational claims may be “arguable” against a wider set of UK based entities such as joint venture partners, minority investors and entities involved in supply chain supervision, if those entities have been involved played a role in the management of a particular subsidiary function. [Full briefing here.](#)
- The rapid growth of investment in young tech companies and other start-ups has produced some uneasy alliances between founders and investors, often accompanied by poor internal governance. We have advised on associated breaches of shareholder, JV and investment agreements and allegations of unfair prejudice against minority shareholders.

2021

Predictions for 2022

- We predict a major uptick in insolvencies and insolvency litigation, as legislative fetters on creditor action are phased out and there is increasing clarity around debtors’ viability. Having operated within a comparatively tolerant environment for the last 18 months, directors are likely to find that their use of company assets and decision making comes under close scrutiny as defaults and debts are called in.
- 2022 should see the Supreme Court’s decision in *Sequana*, which will further scrutinise the question of precisely when directors are expected to know that their company is insolvent or is likely to become insolvent, triggering their obligation to act in the best interests of creditors rather than the interest of shareholders. This is of very significant practical consequence for the conduct of business, particularly for those companies impacted by the pandemic.
- We predict an uptick in post-M&A pricing and earn-out disputes, as the outcomes from deals brokered in a healthier financial climate tend increasingly to depart from expectations.
- An uncertain financial climate, coupled with the growing trend towards investment in start-ups, may increase the chances of internal disputes among shareholders of private companies if their priorities and appetite for risk are not aligned.
- Class action culture will be further embraced and facilitated in the UK, as class action specialists develop models to enable access to justice for claimants for whom it would not be economically viable to bring an individual claim. This is supported by the growth in the third party litigation funding market and the evolution of litigation technology which makes it easier and more efficient to manage cases on this scale. We expect to see group litigation in respect of data handling and privacy issues; shareholder rights; competition law breaches; ESG issues and mass institutional mis-selling. We also expect to see novel causes of action, as lawyers use the heft of their claimant group and litigation funders to push the boundaries and open the door to further claims.
- In the wake of the Supreme Court’s decision in *Okpabi*, we predict further attempts to attach liability to UK parent companies of foreign subsidiaries, for example in relation to overseas environmental and human rights issues. Directors will need to be alive to the potential risks associated with the issue of groupwide policies and direct involvement or management of the activity of subsidiaries.

2022

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