



Disputes and Investigations Predictions: 2023

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2022 was an unprecedented year of change. The continuation of the global economic downturn is expected to lead to a further increase in the number of disputes across many sectors.

The 2022 trends highlighted and the predictions for 2023 have been drawn from across our dispute resolution team, covering a broad range of sectors and specialist practice areas including: reputation management, fraud and asset recovery, art, data protection, IP and technology, banking and financial services, commercial, and property.

Our predictions for the year ahead include a possible increase in inauthenticity claims in the art sector, a rise in claims pursued for data theft and fraud, and a greater volume of FCA investigations and enforcement action being taken against regulated firms.

The impact of the much discussed Online Safety Bill is likely to be a point of interest, and, as the pressures of the cost of living crisis are felt, we also expect to see supply chain disruption and corporate insolvencies, both leading to increased litigation, and a greater scrutiny of past financial transactions.

This publication summarises a selection of the major developments in dispute resolution from 2022 and highlights a number of significant developments on the horizon in 2023.

If you would like to discuss any of the areas listed in this review, please do get in touch with the authors or your usual contact at Farrer & Co, who would be happy to discuss the issues raised further.

“
Very adaptable,
covering a huge range
of litigation with a
superb cohort of
litigators.”

- Chambers & Partners, 2023



At a glance

A possible increase in inauthenticity claims.

What we saw in 2022

At the end of 2022 the English courts delivered two judgments concerning negligence in the art market, one on authenticity and one on attribution. These two cases will be of significant interest to both dealers and collectors.

In November Mr Justice Jacobs found in favour of Qatari sheikh Hamad Bin Abdullah Al Thani in a claim brought against the London-based dealer John Eskenazi. The case concerned seven antiquities purchased from Eskenazi for a total of c. \$5m. Al Thani sought to return the items and claim the purchase price following doubts about the items' authenticity. The judge found in Al Thani's favour concluding that the antiquities were forgeries. Whilst he rejected Al Thani's allegations of fraud, he ruled that Al Thani was entitled to the full purchase price, as well as damages for negligence.

In December another judgment on negligence in the art world was handed down. The case concerned authenticity and this time the court found in favour of the defendant dealer, Simon Dickinson. Dickinsons had sold a painting by Chardin on behalf of the Wemyss family for £1.15m. Only a few months later the same work was sold for the equivalent of \$10.5m. In the interim between the two sales the painting had been the subject of a deep clean which led to the discovery of a Chardin signature. This led to the new seller being able to market the painting as a work "by Chardin" as opposed to simply a "copie retouchée", hence the increase in value.

The judge rejected allegations by the Wemyss family that Dickinsons should prior to their sale have contacted the leading expert on Chardin who published the artist's catalogue raisonné. He also rejected the notion that Dickinsons should not have taken the decision to sell on their own initiative but should have put the proposed sale to the Wemyss, finding that it was "entirely reasonable for Dickinson to accept and discharge a mandate of this kind on a discretionary basis without detailed and regular recourse to their principals."

Predictions for 2023

The Eskenazi case illustrates that the buying and selling of antiquities is fraught with potential difficulties. Furthermore, given the increasing pressure on institutions and collectors to return antiquities of dubious provenance to their countries of origin, owning large collections of antiquities is becoming a less attractive proposition. Buyer's remorse in this shifting political landscape which favours repatriation of cultural artefacts may be a factor in collectors looking to unwind their acquisitions of antiquities. Buoyed by the success of Al Thani against Eskenazi, we may see an increase in claims against dealers of antiquities alleging inauthenticity or shaky provenance as collectors seek to divest themselves of such works.

Meanwhile the Wemyss case against Dickinsons appears to support the notion that claims for negligence for failing to spot a "sleeper" which goes on to fetch a much higher price in a subsequent sale are difficult cases to win. Cases brought by buyers against dealers and auctioneers for negligence in attribution do not come to trial very often and this case will give buyers further pause for thought. It may therefore be a while before we see another reported case in which a disgruntled buyer goes up against a dealer or an auctioneer on the issue of attribution.

In conclusion, in 2023 we may see more cases on inauthenticity and fewer on attribution.



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2022

2023



At a glance

An increased number of digital asset related claims, and more corporate insolvency applications.

What we saw in 2022

- An increase in successful High Court jurisdiction challenges, which we anticipate is partly Brexit related but may also signal a shift in the general stance of English Court judges to seizing jurisdiction.
- An increase in complex, multi-jurisdictional fraud claims being issued before the English Courts.

Predictions for 2023

- Claims arising out of sovereign debt defaults, in the wake of upwards pressure on global inflation and energy costs. Such defaults will be linked to currency devaluation in local emerging markets currencies, which pay for energy in USD or other major currencies which will diverge in value to local currencies.
- Continued increase in cryptocurrency related claims. A combination of (i) the willingness of the English Courts to re-apply existing law to novel digital asset classes and (ii) the wider market difficulties and exchange collapses is likely to see even more cryptocurrency related claims – especially fraud claims – being litigated in England in 2023.
- A likely increase in corporate insolvencies in 2023 (amid the wider economic turbulence) may result in significant litigation fall-out. These could include claims by investors to recover their losses, as well as claims by insolvency practitioners against former managers and possible claims to investigate and recover misappropriated company assets.



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2022

2023



At a glance

2023 will be the year the Online Safety Bill will come into force with its critics arguing that it could amount to a form of self-censorship.

What we saw in 2022

- The trial of the year was unquestionably Wagatha Christie, with Coleen Rooney successfully defending the defamation claim brought by Rebekah Vardy. While not heavy on legal developments, the case underlined the potentially disastrous consequences of pursuing libel litigation (and seeing a phone disappear in the North Sea).
- The decision of the Supreme Court in ZXC v Bloomberg firmly established the starting point that a person under criminal investigation has a reasonable expectation of privacy before charge. We have seen a number of cases in which the principle in ZXC has been live, both in the context of traditional media coverage but also publications on social media.
- Russia's invasion of Ukraine, which coincided with the dismissal of ENRC's claim against the journalist Tom Burgis (relating to his book Kleptopia) brought the term SLAPP (Strategic Lawsuit Against Public Participation) firmly into the public consciousness. There was considerable scrutiny of the role of media laws, so the narrative goes, in enabling oligarchs to use limitless wealth to silence legitimate public debate. While there undoubtedly are examples of unmeritorious claims being pursued, our experience is that these are not widespread, nor does the law facilitate the success of such claims.

Predictions for 2023

- 2023 may finally be the year when the much-discussed Online Safety Bill comes into force. All indications are that the Bill will be enacted in the next parliamentary session. Whether it will be met with approval is another matter, with both sides of the debate voicing criticisms. Proponents of freedom of expression may feel that the Bill creates a danger of self-censorship by platforms afraid to fall foul of its provisions. On the other hand, there is widespread feeling the Bill does not go far enough in protecting social media users from harmful content.
- The Aaron Banks and Carole Cadwalladr defamation litigation will make for a fascinating hearing in the Court of Appeal. This is a case where Cadwalladr's public interest defence fell away at a certain point after publication. The Court will, in particular, be considering whether Banks has to show that serious harm was caused to his reputation after the public interest defence fell away, or whether it is enough that it was caused at any point following publication. A real 50/50 decision, but one of significance.
- The debate on where the line should be drawn between restrictions on freedom of speech will rage on. The Higher Education (Freedom of Speech) Bill remains in progress, while we can also expect to see more noise around SLAPPs (a private members' bill was started in the House of Lords in September 2022), and possibly legislative action in the year ahead. With that is likely to come a more bullish media, and a more challenging environment for those seeking to challenge adverse coverage.



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2022

2023



At a glance

It seems inevitable that the number of insolvencies will increase in the coming years.

What we saw in 2022

- We were expecting to spend a lot of time in 2022 dealing with the ongoing fall out from the Covid-19 lockdowns and the numerous rent arrears disputes which flowed from these. In particular, we were expecting a high volume of our landlord clients instructing us in relation to formal arbitrations concerning rent arrears under the government scheme. In reality, this has not troubled our desks too much, largely because, in our experience, the parties have preferred to take a pragmatic approach and reach a deal than rely on the uncertain outcome of an arbitration. This has meant there have not been as many litigated (or arbitrated) cases as we might have expected (although there have been some) and with most deals reached remaining confidential there has not been as much media coverage around the (often significant) concessions as we might have expected.
- Instead, a primary focus (certainly in the last half of the year) has been the Building Safety Act and the various regulations which underpin it. This will have very far reaching consequences for developers and freeholders of residential blocks as well as for the residential tenants who live in such blocks.

Predictions for 2023

- We think litigation flowing from the Building Safety Act, and further detail around a number of the anticipated regulations and compensation funds, will be a key feature of 2023, with a number of listed cases due to be heard before the First Tier Tribunal next year. These decisions are likely to have far-reaching implications for those with responsibility (or historic responsibility) for high rise residential blocks. This will also most probably affect land owners who have let the buildings under long leases.
- While the cost of living crisis looms large in our collective consciousness, at the time of writing, the property market remains active with a high number of international investors continuing to view the UK as a sensible place to invest. However, if the various political pressures are not resolved in the early part of the year it is foreseeable that lending will be more difficult to secure (and fund) and the number of "mid-level" transactions may slow. Against this context it seems inevitable that the number of insolvencies will increase over the coming year as the pressure from the last few years reaches a tipping point for a significant number of companies. Litigation around corporate insolvency is therefore likely to be something else we see increase over the coming year.
- Linked with this we anticipate there may be a number of people looking to extricate themselves from contracts which seemed a good idea when the contracts were completed, but increasingly became onerous given the change in climate (in particular the increased costs associated with funding). Similarly non-completion claims in purchases of both residential and commercial property seem likely.



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2022

2023



At a glance

A difficult economic environment will impact the data landscape, leaving clients more likely to be exposed to ICO fines. The challenge for clients will be dealing with the ICO and managing reputational risks.

What we saw in 2022

- Insurance cover for data security breaches continued to tighten, meaning that clients either didn't take out insurance at all or picked up the bill themselves after an attack as a result of increases in cyber-insurance excesses.
- The Information Commissioner's Office changed policy on data protection non-compliance by public organisations by relaxing the level of fines it would impose. In the case of the Cabinet Office New Year's Honours List breach, the ICO settled the legal challenge to the fine imposed in 2021 by reducing it ten-fold to only £50,000.
- The courts continued to pushback against claimants in a series of data privacy litigation claims, with claims thrown out altogether or transferred to the Small Claims Track of the County Court so making them largely unviable. Even when compensation was awarded it was nominal, in one case as low as £250 when the CPS unlawfully released data about an individual under police investigation.

Predictions for 2023

- With a recession already upon us, we expect cuts in data security budgets leaving clients more exposed to ransomware attacks and other data security failings. With no sign that insurance cover will be more readily available and affordable and greater pressure on clients' budgets, we think clients will be even more exposed to the consequences of those incidents.
- In a difficult economic environment, we wait to see if the ICO will be more lenient in terms of fines with non-public sector clients who suffer data breaches as it has been in 2022 with public sector organisations. We think not. In fact, we predict increasing levels of fines and challenges to them in the courts, a trend which has already begun.
- The one silver lining for clients is that we see no change in the court's attitude towards speculative litigation brought by individuals impacted by data privacy breaches. The challenge for clients is therefore likely to be in dealing with the ICO and other regulators as well as managing reputational impacts, rather than litigation post-breach.
- We no longer expect any major reforms to UK data protection laws, as had been touted by the Johnson and then the Truss governments. We believe the UK Government's focus will be elsewhere both here and abroad in the difficult economic and political environment in the run up to the next General Election in 2024. Clients will largely be relieved about not having to reform data protection compliance yet again, having gone through the pain and cost associated with the 2018 GDPR reforms.



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2022

2023



At a glance

An increased focus on past financial transactions, particularly in the context of insolvency and private equity, and greater clarity from the courts on the scope of the Quincecare duty.

What we saw in 2022

We have seen a year of increased litigious activity in the financial services sector which mirrors the increased activity and scrutiny of the regulators.

There has also been a number of influential decisions which have sought to define the scope of the Quincecare duty this year. The High Court dismissed the Federal Republic of Nigeria's \$1.7bn claim against JP Morgan, drawing a distinction between the concerns a bank may have about money laundering in relation to its customer and specific concerns about a payment instruction, and whether that instruction is an attempt to misappropriate the customer's funds – only the latter would trigger the Quincecare duty. In RBS v JP SPC, the Court of Appeal has refused to extend the scope of the duty to cover third parties (such as beneficial owners), as the duty arises from an implied contractual term and does not exist outside of a contractual relationship. Both cases sought to limit the scope of the duty, which illustrates that the courts are seeking to strike a balance with cases such as Philipp v Barclays (in the Court of Appeal) which suggested that the duty may be expanded to include victims of APP fraud i.e. where the instruction came from the customer and not the customer's agent.

The High Court confirmed in the case of Autonomy and others v Michael Lynch that claims brought under s90A and schedule 10A of FSMA 2000, which allow holders of listed securities to bring claims against issuers for misstatements and omissions in their published information, must prove that the statements were known to be untrue or misleading. Proving that the person discharging managerial responsibility knew about the particular misstatement is a high hurdle for potential claimants to overcome.

Predictions for 2023

In circumstances where post pandemic recovery is sought in the midst of a possible recession and a challenged economic environment, we anticipate that there will be a greater focus on the investigation of past financial transactions, particularly in the context of insolvency where creditors are actively looking to litigate to maximise recovery. Two key areas of review may be for any potentially fraudulent activity where a transaction hasn't been as successful as anticipated or for a breach of a Material Adverse Effect clause (there has been a recent increase in such claims following a lag after the Travelport case was decided in 2020).

The increased scrutiny is also likely to lead to an increase in private equity disputes, and the review of former directors' actions, particularly where that company was in financial distress.

The evolution of the Quincecare duty will continue in to 2023, with two key cases being heard before the Supreme Court: the Stanford International Bank Ltd v HSBC case in January to consider whether the duty extends to creditors in the context of a liquidation; and the Philipp v Barclays case in February to determine the applicability of the duty to customers of APP fraud. After a turbulent few years where we have seen both the expansion and restriction of the duty, it is hoped that 2023 will bring some clarity. Depending on the outcome of these test cases, we may see a series of follow up claims issued or a change in how such claims are treated by the banks.

In the wake of the FTX collapse at the end of 2022 and cases such as Jones v Persons Unknown, we predict that the regulators taking a greater interest in crypto worldwide will result in enforcement action being taken and claims arising out of volatile markets.



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2022

2023



At a glance

Areas in which we may see increased enforcement activity could be in the handling of mortgage arrears and the sale of financial products such as pensions.

What we saw in 2022

The FCA's approach over the past year can be summarised by its declaration that it is looking to focus on "results rather than being driven by processes". There has been a real shift in its willingness to intervene across the board:

- By March 2022, the FCA had opened 194 new enforcement cases (109 into individuals and 85 into firms) - an increase of 55 per cent compared to the previous financial year.
- There were a number of high-profile fines for banks under the AML regulations, for example the c. £265 million fine against NatWest in late December 2021, c. £63.9 million fine against HSBC in January 2022 and c. £784k against Barclays in February 2022 (in addition to a voluntary payment of c. £10 million to the customers of Premier FX).
- The FCA took a firm stance against online fraud and between January and October 2022 they had removed or amended nearly 5,000 online financial promotions from authorised firms which were misleading or harmful, a dramatic increase from the 564 cases in 2021.
- The FCA was granted new powers to support its existing "use it or lose it" initiative which shortened the removal process so the FCA could crack down on regulated firms being used as a vehicle for fraud. The scheme resulted in 264 firms applying to voluntarily cancel, and a further 47 to modify, their permission to carry out regulated activities.
- The FCA's Strategy for 2022 to 2025 was published in December 2022, with a focus on the following three commitments: (i) "reducing and preventing serious harm" by acting sooner and ensuring there is greater scrutiny on regulated firms; (ii) "setting and testing higher standards" with a focus on ensuring that firms consider the actual impact of their products and services on consumers; and (iii) "promoting competition and positive change" with a number of regulatory reforms to ensure a greener and sustainable economy, to strengthen the UK's capital markets and to ensure greater transparency and accountability. This serves as a clear signal to firms that the FCA intends to build upon its action of this year.

Predictions for 2023

The momentum built by the FCA 2022 is only set to increase throughout 2023 and we can expect a continued increase in enforcement action, investigations, and intervention on behalf of consumers. In particular, we predict that the following areas will be of particular interest:

- In July 2023, the FCA's new "Consumer Duty" will start to apply to open products and services, with the rules starting for closed products and services in July 2024. The new rules focus on ensuring that firms act to deliver good outcomes for retail customers, requiring them to act in good faith, avoid causing foreseeable harm and to enable and support customers to pursue their financial objectives. This will likely be an area of interest as we start to see the FCA taking enforcement action for non-compliance and providing an insight into how the FCA will define these duties.
- We anticipate that the impact of the current economic crisis will start to be felt by firms, as there is increased pressure to handle customers in the right way from the FCA, government and wider society. Areas in which we may see increased enforcement activity could be in the handling of mortgage arrears and the sale of financial products such as pensions.
- Whilst ESG has been a key area of focus for many over the last few years, 2023 is set to see the beginning of the implementation of the FCA's package of new measures to tackle greenwashing, including investment product sustainability labels and restrictions on how terms like "ESG", "green" or "sustainable" can be used. The "general anti-greenwashing rule" is set to take effect from June 2023, whilst the rules for labelling, consumer-facing disclosures, pre-contractual disclosures, naming and marketing will apply from June 2024. Despite the implementation being gradual, we predict that this will result in a great deal of activity in this area as we move towards a unified standard and individuals have a basis on which to ground greenwashing claims.



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2023



At a glance

Businesses will likely come under increased pressure as higher borrowing costs, energy prices and ongoing supply chain disruptions place commercial relationships under even more strain.



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What we saw in 2022

- In disputes over the terms of commercial contracts the courts have continued to favour outcomes which make commercial common sense rather than interpreting contracts literally, even if doing so leads to a commercially nonsensical result. The 2015 Supreme Court judgment in *Arnold v Britton* does now seem to be the high water mark of the literal approach to contractual interpretation.
- The long-awaited Supreme Court judgment in *BTI v Sequana* clarified that a “real risk of insolvency” was not sufficient to trigger the duty of a company’s directors to consider the interests of creditors alongside the interests of shareholders. Instead, the trigger point is when the directors know or ought to know that the company is insolvent or bordering on insolvency, or that insolvent liquidation is probable. It will still be difficult for directors to be certain exactly when this trigger point has been reached. The Supreme Court also confirmed that prudent directors of companies in difficult financial circumstances should take and act on advice from insolvency and restructuring lawyers.

Predictions for 2023

- Many businesses are facing a perfect storm of higher borrowing costs, higher energy prices, supply chain disruption and demand-side pressures. This will put commercial relationships under strain and will lead to disputes when businesses try to renegotiate or exit existing contracts.
- English court judgments will become easier to enforce in the EU if the UK signs and ratifies the Hague Convention 2019. The government is carrying out a public consultation on whether the UK should become a contracting state to the Convention. If ratified, the Convention would come into force 12 months after the date of ratification. It would require other contracting states (currently members of the EU, and Ukraine) to recognise and enforce judgments of the English court provided that proceedings giving rise to the judgment were issued after ratification.
- A number of business interruption insurance coverage disputes arising from the Covid-19 pandemic remain to be resolved. There were several judgments in 2022 following the Supreme Court Judgment in the FCA’s business interruption test case. Further claims are expected to come to trial in 2023 which will help to clarify whether businesses have valid business interruption claims.

2022

2023

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