



## Commercial Litigation Predictions for 2021

January 2021

Our Commercial Litigation Department have been closely monitoring important litigation trends and risks for the coming year. The events of 2020, including COVID-19 and Brexit, have changed how everyone does business and with that, trends have emerged in litigation practice that look set to continue. We have set out below an overview of what you need to know heading in to 2021.

Our depth of knowledge and experience enables us to provide highly strategic and specialist commercial and legal advice to our clients. Please contact us to discuss how we can support your business needs.

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### **THIRD PARTY LITIGATION FUNDING IN IRELAND**

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Third Party Litigation Funding (**TPLF**) is often viewed as an essential mechanism to access justice. This is currently prohibited in Ireland through the torts of maintenance and champerty. Given the potential impact of Brexit and the unavoidable long-term societal and financial impact of COVID-19, it is likely that Ireland's approach to TPLF will come under increasing focus. We have previously written on this topic [here](#) and [here](#) and in further articles available [here](#) and [here](#).

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## INCREASED CYBERSECURITY THREATS

The COVID-19 pandemic has resulted in fraud, cyber-crime and cyber-attacks becoming more prevalent. While many businesses have strong IT infrastructures in place, they are nevertheless exposed to additional cyberthreats as a result of, mainly, (1) businesses moving online and (2) employees moving to remote working. Cybercriminals exploit the increased reliance on technology to steal not only money, but also sensitive information and customer data. We expect to see a continuing increase in cyber-fraud incidences.

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## LITIGATION POST BREXIT

Brexit has created various legal uncertainties for the United Kingdom in respect of the interaction between it and the European Union. One glaring example is the refusal of the United Kingdom to accept the jurisdiction of the European Court of Justice in dispute resolution and governance. Ireland is now the only English-speaking common-law system in the EU. We therefore anticipate increased selection of Ireland as a forum for dispute resolution.

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## CENTRAL BANK/ REGULATORY PREDICTIONS

The Central Bank of Ireland (**CBI**) traditionally outlines its “enforcement priorities” in January of each year.

In its 2020 address, the CBI indicated its intention to concentrate on its longstanding fitness and probity (**F&P**) regime. William Fry has prepared a briefing on this issue - [see here](#). We also expect that the CBI will continue to focus on launching its Senior Executive Accountability Regime, [see here](#).

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## INSURANCE LITIGATION/BUSINESS INTERRUPTION

Proceedings relating to business interruption insurance cover were to the fore in Ireland in 2020 and various court proceedings were progressed, including against FBD Insurance plc (**FBD**). As with the FCA test case in the UK, the FBD judgment in Ireland will have a lasting effect in 2021. We have previously discussed this topic [here](#) and [here](#).

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## **FORCE MAJEURE/ FRUSTRATED CONTRACTS/ CLAIMS ARISING OUT OF COMMERCIAL RELATIONSHIPS/ DISRUPTION TO SUPPLY CHAINS (ARISING FROM COVID-19)**

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Following the outbreak of COVID-19 in the first quarter of 2020, the principles of force majeure and frustration came to the fore in respect of commercial contracts which could no longer be completed or were more difficult to complete. While the majority of disputes were resolved commercially in the early stages, we anticipate that litigation will arise in 2021 regarding force majeure events notified during the course of 2020.

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## **DISCOVERY**

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Applications for security for costs of discovery will become more frequent in 2021, following the decision of Quinn J in *Betty Martin Financial Services Ltd v EBS DAC* [2020] IHEC 543, in which the plaintiff was ordered to provide security for the defendant's costs of making discovery.

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## **DATA PROTECTION/ CONTENTIOUS TECHNOLOGY LITIGATION**

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Since the coming into force of the General Data Protection Regulation (**GDPR**) in 2018 we have seen an increase in contentious data protection disputes and litigation. We have seen a surge in the use of Data Subject Access Requests (**DSARs**) by data subjects as set out in Article 15 of the GDPR. The GDPR and the Data Protection Act 2018 have introduced greater rights and remedies for data subjects.

See our collection of articles on this topic [here](#), [here](#), and [here](#).

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## **COMMERCIAL TENANCIES ISSUES ARISING FROM COVID-19**

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Following the government restrictions announced during 2020 as a result of COVID-19, there has been a significant increase in commercial tenancy disputes, particularly in the retail sector. 2021 will bring more challenges to commercial tenancies as the long-term effects of the pandemic fully crystallise. We have previously discussed this topic [here](#) and [here](#) and in further articles available [here](#) and [here](#).

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## CLIMATE CHANGE LITIGATION

There has been an increased focus on climate change issues in planning and environmental litigation in Ireland. In July 2020, the Supreme Court quashed the Irish Government's statutory plan for tackling climate change. The Supreme Court found that the measures identified in this climate plan were not specific or transparent enough and it was therefore not compliant with the relevant legislation. We have also seen climate change issues being raised in planning challenges, particularly in relation to data centre developments.

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## HIGH COURT PLANNING LIST

In October, a new division of the High Court was created to deal specifically with cases relating to commercial planning and Strategic Infrastructure Development (**SID**). This division now deals with planning cases with a commercial element, and challenges relating to SID and Strategic Housing Development. This new specific division of the High Court is to be welcomed, given the increase in litigation in this area.

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## CORPORATE ENFORCEMENT AUTHORITY

In 2018, the Irish legislature published the General Scheme of the Companies (Corporate Enforcement Authority) Bill 2018 (**General Scheme**), which proposes to make a number of amendments and additions to the Irish Companies Act 2014, most notably as regards the establishment of a standalone agency, called the Corporate Enforcement Authority, to tackle white-collar crime in Ireland. For further reading, see our earlier commentary on the General Scheme [here](#) and our more recent article on the findings of the Hamilton Review regarding white-collar crime in Ireland [here](#).

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## REMOTE TRIALS

The Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020 (**Act**) has introduced some novel changes to be aware of when litigating in Ireland. In particular, Part 2 of the Act recognises the recent innovations from the Irish Judiciary and the Irish Courts Service regarding remote hearings in civil proceedings and, for the first time, places such hearings on the same statutory footing as proceedings held in a physical courtroom. We previously released [this video](#) on the subject and our related articles are available [here](#) and [here](#).

## CONTACT US

For more information, please contact any of our team below.



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