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Significant Changes to Media, Communications, and Data Claims in the English Courts

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Speedread

A new regime for media, communications, and data claims will shortly come into force, with the introduction of revised procedural rules and detailed practice directions.

The changes will be introduced from 1 October 2019 and include:

- a new CPR Part 53, which designates the Media and Communications List (the "MC List") as a specialist list of the High Court where High Court claims for defamation, misuse of private information, breaches of data protection law, and harassment must be issued;
- two new practice directions (53A and 53B), which include rules concerning the transfer of proceedings to or from the MC List and the contents of statements of case; and
- a new pre-action protocol, which includes requirements regarding the contents of letters of claim in defamation, slander and malicious falsehood, privacy and confidence, data protection and harassment cases, and contains provisions dealing with responses to letters of claim and settlement/alternative dispute resolution.

The new regime ushers in welcome changes at a time when claims relating to issues such as defamation, privacy and data protection are increasingly prevalent. While defamation and privacy cases are certainly on the rise in recent years, data protection has become a particularly fertile ground for disputes, especially since the introduction of the GDPR. This trend is likely to continue. Large-scale data breaches are becoming increasingly common and give rise to potential multi-claimant actions brought by individuals whose data has been compromised as a result. These actions are being led by specialist law firms who have recognised the substantial growth of claims in this area and market themselves as data breach compensation experts, acting for claimants on a no win no fee basis.

The procedural changes demonstrate not only a shift in the nature of the work being undertaken by the Courts, but also an understanding by the Courts that claims involving areas such as data protection encompass complex matters of law, for which specialist judges and a streamlined litigation process are required.

Designation as a Specialist List

The MC List is not new. It was originally established in 2017 as a new list within the Queen's Bench Division ("QBD"). It was placed under the charge of Mr. Justice Warby, who was given primary responsibility for cases involving one or more of the main media torts (defamation, misuse of private information and breach of data protection law) and related or similar claims, including malicious falsehood and harassment.

Importantly, the MC List was not established as a designated specialist list and no specific rule required claims concerning defamation, privacy and data protection to be issued there. This was noted by Chief Master Marsh in *Mezvinsky & Ors v Associated Newspapers Limited* [2018] EWHC 1261 (Ch), a case involving claims for breach of confidence/privacy and misuse of private information brought by the grandchildren of former U.S. President Bill Clinton. The proceedings were issued in the Business List (ChD). However, given their nature, the Defendant made an application was made to transfer them to the MC List. The application was dismissed by the Chief Master, who observed that "*unless the CPR expressly provides that an area of business is a specialist list…the notion has no application*". He held that the MC List is not a specialist list: "*It was not created by a provision in the CPR, or in statute*" and that "*The creation of the M&CL has no direct extra-divisional effect*".

From 1 October 2019, this changes. Under the new CPR 53.2(1), the MC List will be made a designated specialist list of the High Court. However, more significantly, under new CPR 53.1(3), a High Court claim must be issued in the MC List if it is or includes a claim for defamation, misuse of private information, breach of data protection law or harassment by publication. In addition, a claim may be issued in the MC List if it arises from the publication, or threatened publication, of information via the media, online or in speech or other activities of the media.

Under new CPR 53.2(2) – (4):

- the judge in charge of the MC List will be a judge of the QBD. The position is currently held by Mr. Justice Warby;
- a formal category of judges in the MC List will be created ("MC List Judges"). The MC List Judges must be authorised by the President of the QBD, in consultation with the Chancellor of the High Court; and
- all proceedings in the MC List will be heard by MC List Judges or a Master of the QBD, although another judge of the QBD or the Chancery Division may hear an urgent application if an MC List Judge is unavailable.

The New Practice Directions

Two new practice directions will be introduced to supplement CPR 53.

PD 53A makes provision for the transfer of proceedings to and from the MC List. Any application for a transfer to or from the MC List must be made promptly and normally no later than the first case management conference. Where an application is made to transfer a claim to the MC List, an order for transfer will not be given until the judge in the MC List is satisfied that notice of the application has been given to the court in which the claim was proceeding and any applicable consent has been given. When considering whether to transfer a claim to or from the MC List, the judge in the MC List will consider whether the claim, or any part of it, falls outside of the scope of that list or falls within the scope of that list but would more conveniently be dealt with in another court or list.

PD 53B revises the current PD 53 to extend its application beyond defamation claims. So far as defamation claims are concerned, the new PD 53B reflects the current provisions of PD 53 concerning statements of case in such claims, the court's powers in relation to an offer of amends, applications for determination of meaning, summary disposal and statements in open court. However, the new PD 53B is extended to include broad provisions covering general matters regarding statements of case, as well as specific requirements for the contents of statements of case in claims for misuse of private or confidential information, breaches of data protection law and harassment.

It should also be noted that PD 53B states that CPR 65.28, which requires claims of harassment to be issued under the Part 8 procedure, shall not apply to claims for harassment arising from publication or threatened publication via the media, online or in speech. Accordingly, such claims will need to be issued under the Part 7 procedure.

The New Pre-action Protocol

A new pre-action protocol will be introduced to replace the current pre-action protocol for defamation claims. The new protocol will apply to all claims in defamation, misuse of private information, data protection law or harassment by publication, and claims in breach of confidence and malicious falsehood, which arise from publication or threatened publication by the print or broadcast media, online, on social media or in speech.

The new protocol includes provisions concerning litigants in person and specific requirements for letters of claim in cases involving defamation, privacy and breach of confidence, breaches of data protection law and harassment where the course of conduct includes publication. It also includes new provisions concerning settlement, and, specifically, the use of Part 36 offers to settle, as well as revisions to previous provisions concerning alternative dispute resolution.

Comment

The new regime recognises an expanding landscape in media and communications disputes.

While there are already specific rules and a pre-action protocol for defamation claims, the changes that will be brought in from 1 October 2019 are significant as they revise and expand these rules and protocol to apply to a broader range of media-related claims, including those concerning data protection and privacy and confidence.

While claims in these areas are not new, they have increased markedly in recent years. This is not surprising in an age where the use of online content, social media and blogs has increased the channels through which, for example, potentially defamatory material and actions constituting harassment might arise.

Increasing issues concerning the mistreatment of personal data have meant that disputes relating to breaches of data protection legislation, and associated claims concerning privacy and misuse of private information, are now more prevalent than ever. This is primarily due to the imposition of the GDPR and Data Protection Act 2018, but also reflects the increased publicity and general awareness of how personal data should be handled. The upward trend of disputes in this area is unlikely to ease off, particularly given the frequency of significant data breaches and the establishment of specialist law firms focused on bringing large-scale compensation actions on behalf of claimants whose data has been compromised.

The requirement that data protection claims be issued in one list presided over by specialist judges means that cases in this complex, and still relatively uncertain, area of law will be determined by judges with appropriate expertise and experience in often self-contained issues. Further, the

introduction of prescribed rules for dealing with such claims should ensure that they benefit from more consistent and efficient case management.

It is worth noting, in particular, that even though the MC List was originally established for the purpose of taking primary responsibility for media-related claims, claims based on areas such as data protection (and privacy) have continued to be issued in the Chancery Division, as well as QBD, with transfers to the MC List often refused. This has created uncertainty and arguably negated the purpose for which the MC List was originally created. The designation of the MC List as a specialist list and the requirement that claims concerning breaches of data protection law, misuse of private information, defamation and harassment be issued there, resolves this issue.

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If you have any questions concerning these developing issues, please do not hesitate to contact either of the following Paul Hastings London lawyers:

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