

## THE TREASURY SOLICITOR AND VEXATIOUS LITIGANTS

### Introduction

Litigation is rarely welcome by those who become involved in it, whether as a Claimant or Defendant. It can be lengthy, stressful, expensive and inconvenient. Some litigants may pursue a range of cases or pursue several different matters at once. This is not uncommon.

What is the position however, if one party to proceedings constantly and in most cases unsuccessfully, issues claims and applications within existing claims or appeals against every decision made against them? What if that person has commenced proceedings many times against the same person for substantially the same reasons, or has sued a wide range of individuals or institutions for matters which are identical or have no legal validity?

The Court has its own powers to deal with unmeritorious claims and applications. It may strike out the action as an abuse of process of the Court; or it may of its own motion, or on request by a party to the proceedings, issue various orders restricting the litigant's ability to continue with further applications or claims. The Civil Restraint Order (CRO) is a useful remedy for an individual to consider if they have been subjected to 2 or more unmeritorious claims or applications made against them by the same person and they relate to the same or similar matters. It is relatively quick to achieve, is granted for a period up to 2 years, preventing the subject of it from taking certain steps as specified in the Order, without first obtaining leave of a designated Judge. CRO's do not require the intervention of the Attorney General (**see Civil Procedure Rules (CPR) Part 3.11, practice direction 3c**). It should be noted that the Employment Tribunal (ET) and Employment Appeal Tribunal (EAT) has its own rules and are not bound by CPR. CRO's cannot therefore be obtained in the ET or EAT, although ET Judges do have powers to make some restrictive Orders under ET/EAT Rules.

If the activity of the subject has been in the Civil or Criminal courts, the Attorney General, who has a public interest function in preserving the administration of justice, can make an application to the Divisional Court pursuant to **Section 42 of the Senior Courts Act 1981**, seeking a **Civil Proceedings Order** or a **Criminal Proceedings Order**, for the subject to be declared a vexatious litigant (VL). If the vexatious activity has been in both Civil and Criminal courts, the Attorney General may seek an **All Proceedings Order** under Section 42 which covers both jurisdictions. Similarly, if the activity of the subject has been in the ET's, the Attorney may make an application to the EAT pursuant to **Section 33 of the Employment Tribunal's Act 1996**, seeking a **Restriction of Proceedings Order**. The effect of such orders is to restrict the individual's ability to bring further claims or applications within existing claims without leave of a High Court Judge/EAT as appropriate.

VL proceedings brought under these acts can only be brought by HM Attorney General and the decision to bring such actions are taken only after a full investigation by the Treasury Solicitor's Department into the individual's activity and where one of the Law Officers (the Attorney General or Solicitor General) determines that it would be in the public interest to make the application.

When the Attorney General's Office (AGO) receives a complaint about an individual's litigious activity and is asked to undertake a VL Investigation, it will ordinarily instruct Treasury Solicitor to investigate the matter. It should be noted however, that not all complaints will result in an investigation. The complainant must in the first instance, provide sufficient information to persuade AGO that there is merit to deploying investigative resources in the particular instance.

Those thinking of asking HM Attorney General to investigate an individual's litigation activity with a view to proceedings under Section 42 or Section 33 should in the first instance seek alternative remedies such as the CRO (see above).

### **The Role of the Treasury Solicitor**

Information on the litigant complained of will be gathered from the complainant(s) and or their legal representatives but will primarily be sought from the Courts and/or Tribunals where the individual is known or thought to have been active. The types of documentation sought during an investigation are copies of claim forms, pleadings, applications, interim and final orders and transcripts of proceedings. The Treasury Solicitor will seek copy documents whether the outcome assists the subject of inquiry or not. This is to ensure that when any decision is made as to whether or not it is in the public interest to bring VL proceedings against the subject, it is done so on an objective basis.

When a reasonable body of information has been obtained, sometimes following advice sought from Counsel, the Treasury Solicitor will advise AGO of the merits of an application to the Court/EAT. Where it is considered that a VL application would have good prospects of success, one of the Law Officers will then personally consider the case and decide whether an application should be made.

It should be made clear that just because a complaint has been made, this does not of itself mean that an application for a VL Order will automatically follow. It can be disappointing to complainants to discover that despite their own findings and following an investigation, the matter is not pursued by the Attorney General. However, it is important for those subject to vexatious type litigation that they consider all remedies open to them and not assume that the Attorney will find the overall conduct of the individual whether in the Courts or Tribunals to be vexatious. The overriding principle of fairness is applied by the Attorney when balancing an individual's right to bring proceedings, against the public interest when seeking an order that limits the individual's access to the Courts and/or Tribunals.

In determining whether a litigant is likely to fall within this category and, therefore, be considered an appropriate candidate for an application, one of the Law Officers will look at the number and type of proceedings, the individual's conduct and character displayed during those proceedings, the degree of hardship suffered by complainants and the likelihood of unmeritorious litigation continuing if not restricted from doing so.

In practice, the Attorney is unlikely to intervene unless at least 6 separate claims have been commenced by the subject which have been unsuccessful or struck out. This figure, however, is not cast in stone and each case will be looked at on its own merits.

If the Attorney decides that the application is warranted, the Treasury Solicitor will make an application to the Divisional Court or the Employment Appeal Tribunal (as appropriate).

### **Vexatious Litigant Hearings**

The individual subject to a Vexatious Litigant application will be served with a copy of it, together with the signed authority of the Law Officer approving the application, the evidence obtained in support of the application, and the witness statement/affidavit of the Treasury Solicitor caseholder making the application on the Attorney's behalf. The claim and evidence will ordinarily be personally served on the subject although this is not strictly necessary.

The individual subject to the application will be entitled to make representations on the application once served on him/her and has the option of being heard at the oral hearing (either in person or by way of legal representation).

The VL proceedings brought in the Divisional Court are heard before 2 High Court Judges, one of whom will be a Lord Justice of Appeal. VL proceedings brought in the EAT are heard before an Appeal Tribunal of three comprising the Chairman (a Lord Justice of Appeal) and two members. The Court or Appeal Tribunal will consider whether the litigant has habitually and persistently and without reasonable ground instituted proceedings/ applications and will look at the entire history (as available) of the subject's conduct within the court/tribunal proceedings (***see AG v Vernazza [1959] 1 W.L.R. 622***).

In AG v Barker [2000] 1 FLR 759 Lord Bingham of Cornhill CJ described the hallmark of a vexatious litigation as follows:

***“Vexatious is a familiar term in legal parlance. The hallmark of a vexatious proceeding is in my judgment that it has little or no basis in law (or at least no discernible basis); that whatever the intention of the proceeding may be, its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant; and that it involves an abuse of process of the court, meaning by that a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process”.***

### **Consequences of an Order pursuant to Section 42 of the Senior Courts Act 1981/Section 33 of the Employment Tribunals Act 1996**

If the Divisional Court or EAT grants the VL Order it has the effect of halting all existing claims by the “vexatious litigant”. This means that they cannot commence any new legal proceedings, nor may they continue with any current claims or pending applications whatsoever, without first obtaining leave of a High Court Judge/EAT as appropriate.

Unlike the Civil Restraint Order (CRO), the S42 or S33 VL Order is usually granted for an indefinite period, although the Court has power to limit the Orders to a specified period of time, for example 10 or 15 years. The S.42 Order is then sent to all Courts in England and Wales and the litigant's name is entered onto the Court records, to prevent him or her from issuing further claims without permission. The order may (but not necessarily) contain a penal notice. The names of those subject of a Section 42 Order

are listed on HM Court Service Website with the date the order was obtained (see HM Court Service website: "information about vexatious litigants"). There is currently no similar website publication of Section 33 Orders in the EAT.

It is a requirement of the Section 42 Order that it be published in the London Gazette. The Section 33 Order is also published in the Edinburgh Gazette.

### **Human Rights**

The right of an individual to commence proceedings to enforce or defend his rights is one of the fundamental rights in a free society. The right to a fair trial is enshrined in Article 6 of the European Convention of Human Rights. To limit this right, therefore, represents a major restriction on the liberty of the individual for which there must be proper authority and justification and which must be done only when no other options remain.

Those individuals who become known as 'vexatious litigants' have, in the opinion of the High Court, so abused this right by the commencement of unmeritorious claims or by the manner in which they have used the Courts that their right to continue to use the Court has to be subject to a right of supervision by the Court itself.

The Section 42 procedure and similarly the Section 33 procedure is, however, safeguarded by the fact that personal consideration is given in each case by one of the Law Officers, to the issues involved when deciding whether to make an application. This ensures that the provision is not being used arbitrarily to remove a citizen's rights.

Furthermore, the effect of a Section 42 or Section 33 Order does not remove the right to issue proceedings entirely. Those who have been proclaimed vexatious still do have access to the Courts. They are simply required to take an additional step in the process which acts as a filter, by obtaining the permission of the Court/EAT prior to any claims being issued. It has, therefore, been held that the Section 42 and consequently, the Section 33 procedure, does not violate either the European Convention on Human Rights or the Human Rights Act 1998.

**The Treasury Solicitor  
July 2010**

### **Some useful authorities relating to vexatious litigation (this list is not exhaustive)**

***AG v Vernazza [1959] 1 WLR 622***  
***AG v Barker [2000] 1 FLR 759***  
***AG v Matthews [2001] EWCA Civ 254***  
***AG v Jones [1990] 1 WLR 859,863***  
***Ebert v Official Receiver [2002] 1 WLR 320***  
***Bhamjee & Forsdick (no.2) [2004] 1WLR 88***