VEXATIOUS LITIGANTS

CIVIL WATCH – PRACTICE NOTE

As part of Goldsmith Chambers' Civil Watch series, David Giles, Head of the Civil Team at Goldsmith Chambers, revisits vexatious litigants.

SUMMARY

1. In *AG v Millinder* [2021] EWHC 1865 (Admin), the Divisional Court imposed an all proceedings order under s42 Senior Courts Act 1981. The effect of the all proceedings order is that for an indefinite period of time (the Court could have fixed the period of time, but considered an indefinite order was appropriate in Mr Millinder's case), Mr Millinder cannot begin civil or criminal proceedings without first obtaining permission of the High Court. Mr Millinder is the latest addition to the list of vexatious litigants who persistently take legal action against others in cases without any merit and who are subject to s42 orders. The list, accessible on Gov.UK, applies to England and Wales.

2. Mr Millinder became embroiled in litigation with Middlesbrough Football Club. He made applications and claims which had no legal basis. He was unable to take no for an answer. Out of frustration, he sent threatening and intemperate correspondence to counsel, solicitors, and officials and directors of Middlesbrough, court officials and judges. An extended civil restraint order was made for a period of two years expiring June 2020. In July 2020, Mr Millinder resumed his vexatious litigation making further totally unmeritorious applications in his obsessive pursuit of "justice". On 11 November 2020 Fancourt J made a General Civil Restraint Order. The judge summarised Mr Millinder's contentions as:

   "all the orders were made as part of a corrupt conspiracy involving the Judges in question in an attempt to defraud Mr Millinder and/or his companies and favour [MFC]."

3. The Attorney General applied for an all proceedings order. In addition to the events which had led to the making of the ECRO and the GCRO, the AG relied on Mr Millinder's repeated wholly unmeritorious attempts, which were malicious and vexatious, to prosecute individuals (lawyers and judges included) connected with his misguided claims against Middlesbrough FC. The AG also relied on Mr Millinder's wild, abusive and threatening emails to the court.

4. One example of such conduct which the AG relied on was an email sent on 10 February 2021 to Snowdon J, who was to hear Mr Millinder's application to set aside the GCRO. Mr Millinder wrote:

   "I want to add that you, Snowden J and the rest of your cohorts, the white-collar criminals pretending to be "honourable" judges are nothing other than a total disgrace, the lowest of the low, morally bankrupt traitors and enemies of the people who go to work only defraud innocent parties who seek justice in "courts", assisting fellow criminals in using the court to defraud whilst providing impunity to the fraudsters."

5. Mr Millinder even targeted the judge who was to hear the AG's application. He emailed Swift J and said:

   "I am not going to mince my words any more, all responsible can go to hell the lot of you vile, immoral oath breaking, unconstitutional dishonest cowards of common purpose. How dare you defraud me in the name of justice and then seek to conceal your wrongdoings in this way. We have the GLD lying in evidence, replicating the same void order made by Fanning x 6 when it ceases to exist from the outset. You parasites do like founding something on nothing and committing fraud upon fraud in the name of law and "justice". You are a disgrace to humanity and an insult to the name of law and justice."

6. When Mr Millinder was asked by the Divisional Court if, in the light of his trenchantly expressed views, he objected to Swift J sitting in judgment on the AG's application on the ground of actual or apparent bias, Mr Millinder said he had no objection and happy to proceed. Swift J astutely observed:

   "To my mind this sequence of events only serves to demonstrate the conclusion already reached by other judges: that Mr Millinder's email barrages are not simply in the category of misguided communications of a litigant in person, but rather that they are a specific tactic which he deploys either to harass or in the hope that he may browbeat the recipients."

7. So much for Mr Millinder.

8. In this note, I shall discuss how and in what circumstances a civil proceedings order under s42 may be made and its consequences.

HISTORICAL BACKGROUND

9. A brief historical introduction to the vexatious litigant jurisdiction follows:

10. Grepe v Loam

11. Vexatious litigation first emerged as a serious problem in the mid - 19th century.[1] Initially, the court acted to protect itself from vexatious litigants by relying on its inherent jurisdiction to restrain abuse of its procedure. In 1887, in *Grepe v Loam*, the court ordered that Mr Grepe could not make further applications in those proceedings without the court's prior permission.[2] Thereafter, such orders were known as *Grepe v Loam* orders. A *Grepe v Loam* order was limited to applications in existing proceedings and it only applied to High Court proceedings.

12. Alexander Chaffers

13. In the 1890s', Parliament took action, largely in response to the litigation mania of Alexander Chaffers, an attorney and solicitor, who began claims against many of the leading figures of the day (the Prince of Wales, the Archbishop of Canterbury and the Lord Chancellor all numbered among his victims).[3] Mr Chaffers' vexatious litigation led to the passing of the Vexatious Actions Act 1896. That Act created what are now known as civil proceedings, criminal proceedings or all proceedings orders made under s42 of the 1981 Act.

14. Between the late 19th century and the early years of the 21st century, the courts and parties to litigation strove to curb the activities of vexatious litigants through the use of *Grepe v Loam* orders or, in more extreme cases, the AG would apply for an order under s42 of the 1981 Act.[4] However, the courts were experiencing increasing numbers of obsessed litigants who simply would not take no for an answer, and who bombarded the courts, and of course the unfortunate defendants and respondents, with claims and applications which were devoid of merit or simply incoherent and incomprehensible.

15. Between 2000 and 2004, the Court of Appeal extended the range of the *Grepe v Loam* order to deal with the increasing problem of vexatious litigation.

16. Evolution of CRO's

17. First, in the case of *Ebert v Venvil*[5] the Court of Appeal decided that the High Court had inherent jurisdiction to make a *Grepe v Loam* order which extended to the county courts and prohibited the litigant from commencing new proceedings arising out of the initial proceedings, such as against the lawyers appearing for either party or the judges hearing the proceedings. These so called extended *Grepe v Loam* orders would be limited to an initial 2-year period.

[1] See "Vexatious litigants & access to justice: Past present future" 30 June 2006, Rt Hon Sir Anthony Clarke MR
[2] Grepe v Loam (1887) 37 Ch D 168
[3] See "Alexander Chaffers and the Genesis of the Vexatious Actions Act 1896" (2004) 63(3) CLJ, 656 -684, Michael Taggart
[4] And under its predecessor S51 Supreme Court of Judicature (Consolidation) Act 1925
[5] Ebert v Venvil [2000] Ch 484

18. The second case was *Bhamjee v Forsdick and Others (No 2)*[6] in which the Court of Appeal held that, where the court was satisfied than an extended *Grepe v Loam* order had not controlled the vexatious litigation, the High Court had inherent jurisdiction to make a general civil restraint order which prevented the litigant from commencing any proceedings or making any applications in the High Court for a period not exceeding 2 years without first obtaining the permission of a judge designated to consider such an application.

19. Thirdly, in *Mahajan v Department of Constitutional Affairs*,[7] the Court of Appeal decided that the court's inherent jurisdiction to protect abuse of its procedures extended beyond the type of order made in *Bhamjee*, to enable the High Court or the Court of Appeal to make general civil restraint orders which restricted litigants from making any applications or issuing any proceedings in the High Court or any county court without first obtaining the court's permission.

20. In *Bhamjee v Forsdick and Others (No 2)*[8] Lord Phillips of Matravers MR, explained that the court had an inherent jurisdiction to prevent abuses of its procedures, that the categories of abuse were never closed, there was no right to trouble the court with claims which were an abuse of its process, the court could proportionately regulate access to it so long as the essential right of access was not entirely extinguished, and one way of regulating its processes would be to insist on conducting proceedings in writing.

21. Lord Phillips presaged the introduction in 2004 of civil restraint orders under the CPR, which empower the court in appropriate circumstances to make civil restraint orders, by referring to Grepe v Loam orders as 'civil restraint orders' [limited CRO], Ebert v Venvil orders as 'extended civil restraint orders' [ECRO], and the even wider form of order, should the extended civil restraint order be insufficient protection, as a 'general civil restraint order' [GCRO].

22. In 2004, the CPR were amended to introduce the power to make a civil restraint order. In so doing, the Rules Committee adopted Lord Phillip's terminology.

SECTION 42 SENIOR COURTS ACT

23. <u>The Attorney General's role</u>

24. The starting point for obtaining a s42 civil proceedings order is notification of the AG's Office that consideration should be given to applying for a civil proceedings order (or restriction of proceedings order[9]) against an individual. The AG advises that if you believe that an individual has been involved in

[6] Bhamjee v Forsdick and Others (No 2) [2003] EWCA Civ 1113, [2004] 1 WLR 88
[7] Mahajan v Department of Constitutional Affairs [2004] EWCA Civ 946
[8] Bhamjee v Forsdick and Others (No 2) [2003] EWCA Civ 1113, [2004] 1 WLR 88
[9] A similar provision to section 42 of the Senior Courts Act 1981 is contained in section 33 of the Employment Tribunals Act 1996, under which the Attorney General can apply to the Employment Appeal Tribunal for a restriction of proceedings order in relation to proceedings before the Employment Tribunal, the Employment Appeal Tribunal

vexatious litigation, full particulars of the subject's alleged vexatious activity, including court reference, parties' names and outcome should be provided to the GLD, on a spreadsheet, together with the supporting material. The GLD will then investigate on behalf of the AG.

25. Normally, the AG will only consider making the application unless there have been at least six separate claims commenced which have been either struck out or unsuccessful, but each application is considered on its individual merit. This figure, however, is not cast in stone and each case will be looked at on its own merits.

26. However, the AG's guidance recommends that those thinking of asking the AG to investigate an individual's litigation activity with a view to proceedings under s42 should in the first instance seek alternative remedies such as the CRO. Presumably, if the alternative remedy of obtaining a CRO, ECRO and GCRO have not succeeded in curbing the vexatious litigant, the AG will seriously consider taking action under s42.

27. Before making the application under s42, the law officer must be satisfied that it is in the public interest to make the application. Indeed, the involvement of the AG is intended to safeguard the potential respondent to such an application and he acts in his constitutional role as guardian of the public interest. The AG will only sanction the application if there is solid ground for making the application.

28. Once the investigation is complete, and normally after counsel's opinion on the merits of an application has been obtained, the Treasury Solicitor will advise the AG of the merits of the application. Where the advice is that the application has at least a good prospect of success, the law officer (the AG or SG) will consider the case and whether the application should be made. The overriding question is whether it would be fair to attempt to restrict the individual's right to issue proceedings when balanced against the public interest in restricting the right of access to litigants who abuse the court system.

29. <u>Procedure</u>

30. If a decision is reached in favour of making the application, the application for a civil proceedings order must be made by the AG using a Part 8 claim form filed in the Administrative Court Office accompanied by a witness statement in support and served on the person against whom the order is made.

31. If, having issued a Part 8 claim form for an order under s42, the AG finds that there is no prospect of an early hearing date, it is possible to apply for an interim injunction under s37(1) to restrain the respondent from commencing claims or issuing an application pending the final hearing of the substantive Part 8 proceedings.[10] Such interim orders are unusual, but the conditions for making

[10] In re Blackstone [1995] COD 105, and Attorney General v Campbell [1997] COD 249

such an interim order are that there must be a strong case for granting a final order, there is a danger of substantial delay before the matter will be finally heard and there are real reasons to suppose that the allegedly vexatious litigant will indulge in further allegedly vexatious proceedings unless restrained. If an interim order is made, the respondent is able, pending the final hearing of the claim, to apply under s42(3) to institute, continue or make applications in proceedings otherwise subject to the interim order.

32. It is not necessary for evidence to be led to prove authorisation of the application by the AG.[11]

33. The application for a civil proceedings order is heard by a Divisional Court of the High Court.

34. The defendant to the claim has 14 days from service of the claim form to acknowledge service and indicate whether he or she wishes to defend the claim and, if he or she wishes to rely on written evidence that must be filed with the acknowledgement of service.

35. It may, in some circumstances, be appropriate for the application to include an application for an order restraining a vexatious litigant from also acting as a litigation friend, a McKenzie friend or otherwise assisting any third party in the conduct of civil proceedings, except with the permission of the court.

36. Statutory pre-conditions

37. The statutory preconditions under s42 which the court must be satisfied are met before it can consider whether to make a civil proceedings order are that the defendant has:

    (a) instituted civil proceedings; or

    (b) made applications in civil proceedings;

    (c) in the High Court family court or any inferior court ; which

    (d) are vexatious; and

    (e) has done so habitually and without reasonable grounds.

38. Instituting civil proceedings

39. Civil proceedings are started in the High Court or the County Court by a variety of means. Most commonly, a claim is begun, and civil proceedings are instituted, in the High Court and the County Court by the court issuing the claim form. However, under CPR Part 20, civil proceedings may also be instituted by

[11] Attorney General v Foley and Another [2000] EWCA Civ 62, [2000] 2 All ER 609

a defendant making a counterclaim against the claimant or against a person other than the claimant or against an existing party or by the defendant making an additional claim for contribution or indemnity against an existing party or against a person not already an existing party. Therefore, a party can be said to have instituted vexatious proceedings by counterclaim.[12]

40. An application for permission to proceed with judicial review, is in itself a proceeding and requires permission under section 42(1A)(a).[13]

41. Applications in civil proceedings in the High Court or County Court are generally made by an "application notice" under CPR Part 23 being filed. Forms N244 or PF244 or PF3 or forms N16A, N361, or PF43, of PF44 may be used for that purpose. However, an application may be made in the High Court or County Court informally and orally, without an application notice. Litigants, particularly those acting in person, may simply write to email the court or even the judge directly, with a request for an order or decision to be made. Those informal methods of applying may constitute the making of an application for the purposes of s42.

42. *Attorney General v Jones*[14] decided that the words 'civil proceedings in the High Court or any inferior court' in s42(1)(b), included appeals to the Court of Appeal from the High Court or any inferior court, such as a county court, but not proceedings originating in the Court of Appeal, such as renewed applications for leave to apply for judicial review, nor appeals from bodies that were not inferior courts.

43. In *Re Vernazza*,[15] Court of Appeal was doubtful as to whether petitioning for permission to appeal to the House of Lords (as was) was instituting civil proceedings but leant in favour of the view that an appeal to the Court of Appeal was instituting civil proceedings. Whether petitioning the Supreme Court for permission to appeal would constitute the institution of civil proceedings, or the making of an application in civil proceedings, remains to be seen.

44. <u>Inferior court?</u>

45. In *Attorney General v BBC*[16] the House of Lords had to decide whether it was possible for the Divisional Court to punish a contempt of an inferior court where the alleged inferior court was the local valuation court. In deciding by a majority that the local valuation court was not an inferior court, the crucial point appears to have been that the valuation court discharged an administrative function and was not a court of law, and inferior courts were limited to courts of law.

[12] Attorney General v Jones [1990] 1 WLR 859
[13] Re Ewing (No 1) [1991] 1 WLR 388
[14] Attorney General v Jones [1990] 1 WLR 859
[15] Re Vernazza [1960] 1 QB 197
[16] Attorney General v BBC [1981] AC 303

46. The *BBC case* was applied by the Divisional Court to another contempt of court case in *Peach Grey & Co v Sommers*[17] when it decided that an employment tribunal was an inferior court because it exercised the judicial power of the state.

47. In the context of s42 of the Senior Courts Act 1981, the BBC case and Peach Grey were applied in *In re Ewing*,[18] *Ewing v Security Service*,[19] *Vidler v UNISON*[20] and *Attorney General v Singer and Singer*[21] which, respectively, held that the Information Tribunal, the Investigatory Powers Tribunal, the Employment Tribunal and the Leasehold Valuation Tribunal were inferior courts.

48. Vexatious

49. The authority most frequently cited as to the meaning of 'vexatious' and 'habitual and persistent' in s42, is *Attorney General v Barker*.[22] 'Vexatious civil litigation' and litigation 'without reasonable grounds', is litigation with little or no basis in law (or no discernible basis), and it involves an abuse of the process of the court, meaning 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. The hallmark of habitual and persistent litigation without reasonable grounds is:[23]

    "that the plaintiff sues the same party repeatedly in reliance on essentially the same cause of action, perhaps with minor variations, after it has been ruled upon, thereby imposing on defendants the burden of resisting claim after claim; that the claimant relies on essentially the same cause of action, perhaps with minor variations, after it has been ruled upon, in actions against successive parties who if they were to be sued at all should have been joined in the same action; that the claimant automatically challenges every adverse decision on appeal; and that the claimant refuses to take any notice of or give any effect to orders of the court. The essential vice of habitual and persistent litigation is keeping on and on litigating when earlier litigation has been unsuccessful and when on any rational and objective assessment the time has come to stop."

50. For the vexatious litigation to be habitual and persistent, there must be an element of repetition, although it is not necessary for the repetition to have been over a long period of time.

51. In *Attorney General v Covey; Attorney General v Matthews*,[24] Dr Matthews argued that, while he did not dispute that he had generally brought and

[17] Peach Grey & Co v Sommers [1995] ICR 549
[18] In Re Ewing [2002] EWHC 3169 (QB)
[19] Ewing v Security Service [2003] EWHC 2051 (QB)
[20] Vidler v UNISON [1999] ICR 746
[21] Attorney General v Singer and Singer [2012] EWHC 326 (Admin)
[22] Attorney General v Barker [2000] EWHC 453 (Admin), [2000] FLR 759
[23] Attorney General v Barker [2000] EWHC 453 (Admin), [2000] FLR 759 at [22] per Lord Bingham of Cornhill CJ
[24] Attorney General v Covey; Attorney General v Matthews [2001] EWCA Civ 254

conducted litigation which was vexatious and unreasonable, his actions fell outside s42 because he had not brought more than one claim or application against the same person and his litigation was directed towards different individuals. Dr Matthews referred to the judgment of Lord Bingham in *Attorney General v Barker*, in which he said the hallmark of vexatious litigation was that the claimant sued the same party repeatedly, and therefore in making the civil proceedings order against him the Divisional Court had gone beyond the principles set out in s42 as explained by Lord Bingham. The Court of Appeal rejected that submission and held that the cumulative effect of a litigant's claims against a number of different defendants satisfied the requirement of repetition, notwithstanding that the litigant had not repeatedly sued the same party on the same issue. Lord Woolf CJ emphasised that when considering whether the conditions for making an order were met it was necessary "*to look at the whole picture*" and consider the cumulative effect of the activities relied on "*both against the individuals drawn into the proceedings and on the administration of justice generally*".

52. Discretion

53. Assuming that the court is satisfied that the statutory precondition is satisfied, the court will then move on to consider whether it should in the exercise of its discretion make the order. In Mr Millinder's case, Swift J said:[25]

"Any form of order is a serious step; a balance must be struck between the respondent's prima facie right to invoke the jurisdiction of the court and the need to protect the rights of others not to be faced with abusive and ill-founded claims. In Attorney General v Jones [1990] 1 WLR 859 Staughton LJ put the matter in the following way (at page 865 C-D).

"The power to restrain someone from commencing or continuing legal proceedings is no doubt a drastic restriction of his civil rights, and is still a restriction if it is subject to the grant of leave by a High Court Judge. But there must come a time when it is right to exercise that power, for a least two reasons. First, the opponents who are harassed by the worry and expense of vexatious litigation are entitled to protection; secondly the resources of the judicial system are barely sufficient to afford justice without unreasonable delay to those who do have genuine grievances, and should not be squandered on those who do not."

54. The circumstances which may be relevant to the exercise of the discretion will vary from case to case. Lord Bingham CJ in *Attorney General v Barker* said that the exercise of the discretion:[26]

"… will depend on [the court's] assessment of where the balance of justice lies, taking account on the one hand of a citizen's prima facie right to invoke the

[25] At [4]
[26] Attorney General v Barker [2000] EWHC 453 (Admin), [2000] FLR 759 at [2]

jurisdiction of the civil courts and on the other the need to provide members of the public with a measure of protection against abusive and ill-founded claims."

55. In *Attorney General v Barker*, the approach taken by the court seems to have been whether, in the circumstances, it was considered necessary to make the order to prevent future abuses of the court's procedures. In that case, Mr Barker persuaded the court that his habitual and persistent vexatious litigation was a thing of the past and a product of the particular situation in which he had found himself, and that he had the insight to appreciate that a repetition of his previous resort to litigation would damage himself and disrupt his contact with his children. Therefore, even if the court had not found the necessary element of repetition to be missing, the court would not have made the order in the exercise of its discretion.

56. In contrast, in the case of *Attorney General v Badibanga*[27] the court was satisfied that, unless the civil proceedings order was made, Mr Badibanga would continue to abuse the court's process by instituting vexatious proceedings, so the order was made. Mr Badibanga's vexatious litigation showed no sign of abatement and during the course of the hearing he courteously explained to the court that he fully intended to continue launching appeal after appeal against those individuals and agencies he blamed for his misfortune.

57. While s42 and orders made there under are not in itself incompatible with Article 6, the Article 6 rights should be considered by the court when considering whether to make a civil proceedings order.[28]

58. <u>Duration</u>

59. If a s42 civil proceedings order is made, the court can specify a period of time for which it will apply, otherwise, the order will remain in place without time limit.[29] Indeed, according to the White Book's commentary, the practice is to make the order for an indefinite period unless there is some rational or logical basis for imposing the order for a limited period of time.[30] Very few such orders are made for a limited period of time. The court has discretion to vary the duration of the order in the light of changed circumstances.

60. <u>Permission application</u>

61. After the civil proceedings order is made, the vexatious litigant may only institute, continue or make applications in civil proceedings with the leave or permission of a High Court judge. If the vexatious litigant wishes to apply for permission to appeal to the Court of Appeal from a decision permission under

[27] Attorney General v Badibanga [2003] EWHC 394 (Admin)
[28] Attorney General v Covey; Attorney General v Matthews [2001] EWCA Civ 254
[29] Senior Courts Act 1981, s 42(2)
[30] Civil Procedure 2013 (the White Book) (Sweet & Maxwell, 2021) at p 2534, para 9A-152.6

s42(3) is required, even where the vexatious litigant was the defendant to the proceedings, because substantive appeals to the Court of Appeal amount to an application in civil proceedings and, therefore, if prior permission is not obtained, the Court of Appeal has no jurisdiction to hear the application for permission to appeal.[31] Permission to institute, continue or make applications in civil proceedings is granted if the court is satisfied that the step sought to be taken will not be an abuse of the process of the court and there are reasonable grounds for taking it.[32] If the application for permission to commence or continue the claim or make the application is refused, it is not possible to appeal that refusal of permission.[33]

62. If a vexatious litigant is a defendant to civil proceedings, he requires permission to make a counterclaim because the making of a counterclaim is the bringing of proceedings within s42(1A)(a).

63. The procedure for the making an application for permission under s42(3) is laid down by paragraph 7 of PD 3A.

64. Masters and District Judges do not have jurisdiction to make orders or grant interim remedies in applications under s42 by a person subject to an order under that section for permission to begin or continue with proceedings.

65. There are two limbs to s42(3). For permission to institute or continue the claim or make the application, the applicant must satisfy the court that the proposed proceedings or application are not an abuse of the process of the court in question and, additionally, that there are reasonable grounds for the proceedings or application.

66. In *Ewing v News International Ltd and Others*,[34] in giving the court's reasons for refusing Mr Ewing's application for permission to commence defamation proceedings, Coulson J summarised the approach the courts should take to an application for permission under s42(3), as follows:[35]

    (a) The test under s.42(3) should be exercised with 'due care and caution' or 'carefully and sparingly';

    (b) In considering whether or not the claimant has reasonable grounds for bringing his claim, the court would normally have to consider whether or not that claim had a real prospect of success;

    (c) Any consideration by the court as to whether or not a libel claim was an abuse of the process would involve a careful consideration of all of the

[31] Garratt & Co v Ewing [1991] 1 WLR 1356, Henry J applying Attorney General v Jones [1990] 1 WLR 859
[32] Senior Courts Act 1981, s 42(3)
[33] Senior Courts Act 1981, s 42(4)
[34] Ewing v News International Ltd and Others [2008] EWHC 1390 (QB)
[35] Ewing v News International Ltd and Others [2008] EWHC 1390 (QB) at [57]

likely issues, as well as issues of proportionality and the overriding objective;

(d) The claimant's previous conduct, including the findings that led to the making of the restraint order in the first place, was relevant to the exercise under s.42(3);

(e) All of these principles are in accordance with article 6 of the Human Rights legislation.

67. Coulson J agreed with the defendant's submission that the test of 'real prospect of success', applied to applications made under rule 24.1 of the CPR, and the expression 'reasonable grounds for the proceedings or application', in s42(3) bore no more than a semantic difference, and therefore it was for the court to consider whether the claimant's claim had a real prospect of success when considering whether there were reasonable grounds for allowing the claimant to continue with the claim.

68. The court emphasised the two-stage approach required by s42(3). In relation to libel claims, the court was 'obliged to take a robust view' and to strike out such claims at an early stage if the claim was an abuse of process or contrary to the CPR' overriding objective on the ground that the damages that would be ordered would be small and out of all proportion to the costs of the proceedings. Therefore, even if the proposed proceedings raised reasonable grounds to suppose that they would be successful, the court could still refuse to grant the application under s42(3) if the defendants could show that the claimant's claim was an abuse of process. In order to decide whether the proposed proceedings were an abuse of process, it was necessary to analyse the likely issues in and possible outcomes of the litigation.

69. The fact that a civil proceedings order is not a complete bar on future litigation, but acts as a filter, means that vexatious litigants can, if their voracious appetite for litigation remains unsatisfied, continue to indulge in vexatious litigation through making numerous applications for permission under s42(3).

70. In Mr Ewing's application, the court pointed out that he had been a vexatious litigant since 1989 when he was made subject to a civil proceedings order, and he was applying for permission to bring claims against the defendant newspapers. In refusing Mr Ewing's application, the court observed that he was undeterred by the civil proceedings order and had made at least 22 applications for permission under s42(3), in 17 separate sets of proceedings, of which the vast majority were unsuccessful.

71. <u>Permission in judicial review</u>

72. When a person subject to a s42 order applies for permission to bring judicial review proceedings, the guidance issued by the Court of Appeal in *Ewing v*

Office of the Deputy Prime Minister and Another will apply.[36] In his judgment, Carnworth LJ said:[37]

"Judicial review poses particular problems in this context for a number of reasons: in particular—

i) Judicial review has its own separate permission requirement, the issues on which are likely to overlap with the issues under section 42;
ii) The standing requirements are more generous, and the other parties who may be entitled to take part in the proceedings are often less clearly defined, than in ordinary civil proceedings;
iii) There are strict time-limits for bringing proceedings.
There can be no single solution to these problems, because the cases vary so much. The judge dealing with the section 42 application needs to have them clearly in mind, and to fashion the order accordingly."

73. The guidance given by the Court of Appeal is set out below:[38]

i) *A vexatious litigant should not allow his name to be included in a claim form (even as a 'proposed' claimant) unless and until he has obtained the necessary leave;*

ii) Where unusually the court office is faced with a section 42 application by a vexatious litigant, relating to his wish to be joined as a claimant to judicial review proceedings for which there is a concurrent application by a competent claimant, a clear distinction should be drawn between the two applications. The court office should assign separate file reference numbers to the section 42 application by the vexatious litigant and to the application for judicial review by the competent claimant. The latter application should be issued only in that person's name.

iii) The section 42 application will be dealt with under para 7.6 of the Practice Direction supplementing CPR 3.4, the papers (including the proposed claim) being sent to a single judge. The next step will depend upon the decision under 7.6:

a) If an oral hearing is directed, the hearing will not be on notice unless the judge formally so directs. The judge should in any event give brief reasons explaining the intended purpose of the oral hearing.
b) If section 42 permission is granted, then the order will direct that the vexatious litigant be added as an additional claimant to the application for permission to apply for judicial review and notice of the addition be given to the defendants (and the interested

[36] [2005] EWCA Civ 1583, [2006] 1 WLR 1260
[37] Ewing v Office of the Deputy Prime Minister and Another [2005] EWCA Civ 1583, [2006] 1 WLR 1260 at [35]
[38] Ewing v Office of the Deputy Prime Minister and Another [2005] EWCA Civ 1583, [2006] 1 WLR 1260 at [36]

parties, if any) to the application for judicial review. Both claimants will then be potentially at risk for any costs subsequently ordered.

c) *If permission is refused, that is the end of the matter so far as the vexatious litigant is concerned. The application by the other person will continue under the usual judicial review procedure, and that person will bear the responsibility for any costs."*

74. Contempt

75. Lists are prepared of persons against whom section 42 orders have been made and these are circulated to court offices, so the system is largely self-policing. The list is also available on the Ministry of Justice website.[39] Occasionally, individuals subject to an order succeed in issuing cases without leave of the court. In these cases, the AG must decide whether to bring contempt of court proceedings.

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30th August 2021

[39] gov.uk.

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