WHAT IS VEXATIOUS – THE LEGAL PERSPECTIVES

Introduction

Litigation is rarely welcomed by those who become involved in it, whether as a pursuer/petitioner or defender/respondent. It can be lengthy, stressful, expensive and inconvenient. Yet some litigants may pursue a range of cases or pursue several different matters at once. In the majority of cases the proceedings will have been instituted with a proper basis in law. However, what happens in a situation where either:-

(i) A person commences proceedings many times against the same person for substantially the same reasons, and/or has sued a wide range of individuals or institutions for matters which are identical or have no legal validity; or

(ii) Litigation is brought solely to harass or subdue an adversary?

In the first category such a pursuer/petitioner may be declared vexatious by order of the court in terms of section 1 of the Vexatious Actions (Scotland) Act 1898[1] ("the 1898 Act") and prevented from raising future proceedings except with the leave of the court, if the court is satisfied that "*he has habitually and persistently instituted vexatious legal proceedings without reasonable ground*". In the second category the proceedings pending before the court and the taking of steps in those proceedings may amount to an abuse of process and may be characterised as vexatious as that term is understood in terms of the 1898 Act.

In the first category it is the person that is declared vexatious whereas in the second category it is the proceedings that are declared vexatious. However, in both situations the court requires to be satisfied that the litigation is or has been vexatious. How then have the courts interpreted the term "vexatious"? Guidance can be elicited from the authorities relating to the interpretation and application of section 1 of the 1898 Act

[1] See: 61 & 62 Vict cap 35

and, also, from some of those authorities establishing and illustrating the court's[2] inherent power to protect itself from an abuse of its process.

Vexatious Actions (Scotland) Act 1898

Section 1 of the 1898 Act provides:-

> 'It shall be lawful for the Lord Advocate to apply to either Division of the Inner House of the Court of Session for an order under this Act, and if he satisfies the Court that any person has habitually and persistently instituted vexatious legal proceedings without any reasonable ground for instituting such proceedings, whether in the Court of Session or in any inferior court, and whether against the same person or against different persons, the Court may order that no legal proceedings shall be instituted by that person in the Court of Session or any other court unless he obtains the leave of the Lord Ordinary on the Bills in the Court of Session, having satisfied the Lord Ordinary that such legal proceeding is not vexatious, and that there is prima facie ground for such proceeding. A copy of such order shall be published in the Edinburgh Gazette.'

In terms of Section 1 the court requires to be satisfied on a number of matters before it 'may' make an order declaring a litigant vexatious. The matters on which it must be satisfied include *inter alia* that the person against whom the order is sought has "…*instituted vexatious legal proceedings without any reasonable ground*…"

There are few reported decisions[3] under the 1898 Act and in only two, *Lord Advocate v McNamara* and *HM Advocate v Frost* was the legislation considered in any detail.

[2] All references are to the Court of Session.
[3] *Lord Advocate v Arnold* 1951 SC 256; *Lord Advocate v Rizza* 1962 SLT (Notes) 8; *Lord Advocate v Henderson* 1983 SLT 518; *Lord Advocate v Cooney* 1984 SLT 434; *HM Advocate v Bell* 2002 SLT 527; *HM Advocate v Frost* 2007 SC 215 and *Lord Advocate v McNamara* 2009 SC 598

The word 'vexatious' is not defined in the 1898 Act or in the equivalent English statute, the Vexatious Actions Act 1896 ("the 1896 Act").[4] As the court observed in *Lord Advocate v McNamara*,[5] it is (and remains) a familiar term in practice relating to abuses of process, and that the term "vexatious" in the 1896 and 1898 Acts bears the same meaning as that developed in practice.

The meaning of the term was considered by the Master of the Rolls, Lord Phillips of Worth Matravers who delivering the judgment of the Court of Appeal, in *Bhamjee v Forsdick*[6] where he observed that:-

> 'The courts have traditionally described the bringing of hopeless actions and applications as "vexatious" … In *Attorney-General v Barker* Lord Bingham of Cornhill CJ, with whom Klevan J agreed, said, at p 764, para 19 that "vexatious" was a familiar term in legal parlance. He added:
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> > "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 the 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."'

This view found favour with both the court in *McNamara* and *Frost*. However, in the context of an application in terms of section 1 of the 1898 Act the court in *McNamara* agreed with the view expressed in *HM Advocate v Frost* [7] that 'legal proceedings may

[4] 59 & 60 Vict cap 51. Note: the 1898 Act was modelled on the 1896 Act and was *mutatis mutandis* in almost identical terms
[5] 2009 SC 598 at paragraph [31]
[6] [2004] 1 WLR 88 at paragraph [7]
[7] 2007 SC 215 at paragraph [30]

be properly seen as "vexatious" if they are devoid of reasonable grounds for their institution.' In that regard the court in *Frost* considered that the words used by the Master of the Rolls were apt to cover the situation where the proceedings might be vexatious even if there were reasonable grounds for instituting such proceedings.

The characteristic features of vexatious proceedings were identified by the High Court of New Zealand in *Attorney-General v Collier*[8] :-

> 'Vexatious litigation is frequently accompanied by complex pleadings, a widening circle of defendants as litigation proceeds, frequency of striking out of part or all of the statements of claim, inability to accept unfavourable decisions, escalating extravagant or scandalous claims (frequently involving allegations of conspiracy or fraud) and failure to pursue proceedings once instituted. The authorities cited to us from other jurisdictions demonstrate the consistency with which characteristics such as these are present in vexatious litigation.'

This approach is also consistent with the Scottish authorities. In *Lord Advocate v Cooney*[9] the court also identified similar characteristics:-

> '[T]he nature of the actions the respondent has raised, the persons he has convened as defenders, his purpose in using or rather abusing the legal processes to carry on a war of attrition, the hopelessness of his actions yet his persistence in pursuing them to the limits which the law allows, and the damaging effects of this conduct on his victims.'

In approaching the question of "vexatious" in the context of an application in terms of section 1 it is not the manner in which proceedings are conducted which is in issue but whether the nature and substance of the proceedings themselves can be characterised as vexatious. The court in *McNamara*[10] was content to adopt the distinction between an action which is vexatious and an action which is conducted vexatiously a

[8] [2001] NZAR 137 at paragraph [36]
[9] 1984 SLT 434
[10] Supra at paragraph [34]

distinction that was drawn by Lord Parker LCJ in *Re Langton*[11] which concerned an application under the English legislation. The facts of that case where that in July, 1957, Mr Langton instituted proceedings against the executors and two beneficiaries under the will, dated 27 February 1949, of his aunt, who died in September 1952, seeking to have that will revoked in favour of a will made in 1906 in which he benefitted. On 17 July 1962 the court upheld the validity of the 1949 will and dismissed the action; the Court of Appeal dismissed an appeal by Mr Langton. Between 1 June 1961 and 24 June 1965, Mr Langton instituted ten further actions seeking to re-litigate the issue of the validity of the 1949 will on various grounds, including, *inter alia*, the ground of fraud. Some of those actions had been dismissed and proceedings in the others were still pending.

Lord Parker LCJ ignored the original action relating the validity of the 1949 will for the purposes of the application to have Mr Langton declared vexatious on the basis that the action itself was not vexatious albeit that it was conducted vexatiously. He stated:-

> 'Despite the fact that it may be said that the manner in which that action was conducted was vexatious, it must be remembered that the respondent acted in person, and, not only that, but that the action itself could not be said to be a vexatious action; it was one which the respondent was fully entitled to litigate and did litigate and accordingly, so far as these proceedings are concerned, I ignore that action except as a matter of history.'

It is worth remembering that in so far as proceedings are conducted in a vexatious manner the court has the power to regulate matters and do justice between the parties by way of an award of expenses.

[11] [1966] 1 WLR 1575 at 1758; see also: *Attorney General v Wentworth* (1988) 14 NSWLR 481; *Attorney General v Collier* supra at paragraph 31

Abuse of Process

In Scotland, the court possesses an inherent power to prevent abuses of process.[12] In *Clarke v Fennoscandia Ltd (No 3)*[13] the Lord Justice Clerk observed that the court possessed an inherent power similar to that of the High Court in England to strike out an action that amounts to an abuse of process and that the concept need not be confined to fraud. The essential question is whether the action compromises the integrity of the court's procedures. In *Moore v Scottish Daily Record and Sunday Mail Limited* a bench of five judges had to address the issue of the inherent power of the court in which the Lord Justice Clerk stated that:-

> "The court has an undoubted inherent jurisdiction to take action where there has been a contempt of court or an abuse of process; or where for some other reason a fair trial of a case has become impossible."[14]

Lord Reed[15] in *Hepburn v Royal Alexandra Hospital NHS Trust* explained the nature of the power. He observed that it was described as "inherent" because it was essential to the court's performance of its constitutional function. It was also distinct from the court's power to make rules of court having the force of law and that its juridical basis was the authority of the court to uphold, protect and fulfil the judicial function of administering justice according to law. He noted that this power was exemplified by punishment for contempt of court, and by the prevention of abuses of process, but that it was not restricted to those examples given the Court's recognition of the power to dismiss a pending action for inordinate delay where the court cannot be satisfied that a just determination of the dispute remains possible.

In *Clarke v Fennoscandia Ltd (No 3)*[16] the Lord Justice Clerk noted that the action before them was based on the allegations of conspiracy and fraud that the pursuer had failed to substantiate in any of the litigations pursued and that after a long and

[12] See: *Shetland Sea Farms Limited v Assuranceforeningen Skuld* 2004 SLT 30; *Clarke v Fennoscandia Limited* 2005 SLT 511 and 2008 SC (HL) 122; *Moore v Scottish Daily Record and Sunday Mail Limited* 2009 SC 178; *Hepburn v Royal Alexandra Hospital NHS Trust* 2010 SLT 1071. A similar power exists in England – see: *Metropolitan Bank Limited v Pooley* (1885) 10 App Case 210 at 220-1

[13] Ibid at paragraph [17]

[14] Supra at paragraph [13]

[15] Supra at paragraph [47]

[16] Ibid at paragraph [17]

complex procedural history in which the pursuer had no material success the Lord Ordinary had dismissed the action in the interlocutor under review. His Lordship expressed the view *obiter* that this case might have raised the question whether the court's power should be exercised. He observed that an action might be an abuse of process '*if it wastefully occupied the time and resources of the court in a claim that was obviously without merit*'. In the same case Lord Clarke,[17] with whose opinion both the Lord Justice Clerk and Lord Menzies concurred, observed that the court might '*prevent proliferation of litigation in relation to essentially the same dispute and the same issues*'. In a similar vein, Lord Rodger of Earlsferry in the House of Lords noted that an action might be dismissed as incompetent if it was not brought for a legitimate purpose.[18]

The court in *McNamara*[19]expressed the view that these were all descriptions of proceedings which might be characterised, in the language of the 1896 and 1898 Acts, as vexatious.

Conclusion

A vexatious litigation is, therefore, one 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 defender/respondent to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the pursuer/petitioner; and that it involves an abuse of the process of the court on the grounds that it is 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.

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[17] Ibid at paragraph [40]
[18] *Clarke v Fennoscandia Limited* 2008 SC (HL) 122 at paragraph 35
[19] Supra at paragraph [7]