Neutral Citation Number: [2014] EWCA Civ 1574

Case No: A2/2014/0120

**IN THE COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**NICOLA DAVIES J**
**[2013] EWHC 4075 (QB)**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/12/2014

**Before :**

**LADY JUSTICE MACUR**
**LADY JUSTICE SHARP**
and
**SIR TIMOTHY LLOYD**

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**Between :**

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| **TIMES NEWSPAPERS LIMITED** | **Appellant** |
| **- and -** | |
| **GARY FLOOD** | **Respondent** |

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**Richard Rampton QC** and **Kate Wilson** (instructed by **Times Newspapers Limited, Legal Department**) for the **Appellant**
**James Price QC** and **William Bennett** (instructed by **Edwin Coe**) for the **Respondent**

Hearing date: 14 July 2014

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# Judgment

## Lady Justice Sharp:

*Introduction*

1. The claimant in this case, Mr Gary Flood, brought proceedings for libel against Times Newspapers Limited (TNL) in May 2007. Six years later, the claim came before Nicola Davies J in a trial for the assessment of damages. She awarded Mr Flood £60,000 in damages. There is no appeal against that determination. The issue that arises on this appeal relates to the costs order she then made. She ordered TNL to pay Mr Flood's costs of the action, including the costs of the trial of damages and the reserved costs of the trial of a preliminary issue before Tugendhat J in July and October 2009, which dealt with TNL's defence of *Reynolds* privilege.

2. There were no CPR part 36 offers made by either side and the judge therefore had a discretion as to costs, which fell to be exercised in accordance with CPR 44. 2. This provides in part that:

> (1) The court has discretion as to –
>
> (a) whether costs are payable by one party to another;
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> (b) the amount of those costs; and
>
> (c) when they are to be paid.
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> (2) If the court decides to make an order about costs –
>
> (a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but
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> (b) the court may make a different order.
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> …
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> (4) In deciding what order (if any) to make about costs, the court will have regard to all the circumstances, including –
>
> (a) the conduct of all the parties;
>
> (b) whether a party has succeeded on part of its case, even if that party has not been wholly successful; and
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> (c) any admissible offer to settle made by a party which is drawn to the court's attention, and which is not an offer to which costs consequences under Part 36 apply.
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> (5) The conduct of the parties includes –
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> (a) conduct before, as well as during, the proceedings and in particular the extent to which the parties followed the Practice Direction – Pre-Action Conduct or any relevant pre-action protocol;

(b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;

(c) the manner in which a party has pursued or defended its case or a particular allegation or issue; and

(d) whether a claimant who has succeeded in the claim, in whole or in part, exaggerated its claim.

(6) The orders which the court may make under this rule include an order that a party must pay –

(a) a proportion of another party's costs;

(b) a stated amount in respect of another party's costs;

(c) costs from or until a certain date only;

(d) costs incurred before proceedings have begun;

(e) costs relating to particular steps taken in the proceedings;

(f) costs relating only to a distinct part of the proceedings; and

(g) interest on costs from or until a certain date, including a date before judgment.

(7) Before the court considers making an order under paragraph (6)(f), it will consider whether it is practicable to make an order under paragraph (6)(a) or (c) instead.

…

3. The real contest between the parties on costs, both before the judge and before us, concerned the reserved costs on the issue of privilege and who should pay them.

4. TNL argued before the judge that Mr Flood had sued over the publication of the article in its print edition and online. Each separate publication gives rise to a separate cause of action. TNL's defence of *Reynolds* privilege succeeded in respect of most of the publications sued on; it should therefore have its costs of that issue which it had won.

5. The judge rejected that argument. She considered Mr Flood should be treated as the successful party in the litigation and that there was no reason to depart from the general rule, that he was entitled to the costs of the action. Her judgment is a careful and nuanced one. It was reached following an equally careful judgment on the assessment of damages, against which there is no appeal, and which considered in detail the history of the litigation, and TNL's conduct of it, a matter which was significant both in relation to damages and to the costs order the judge then made.

6. The issue for this court is whether the judge exceeded the wide ambit of discretion given to her on the issue of costs. In my judgment, she did not. She made no error of

principle, and was entitled to exercise her discretion in the way that she did. I would therefore dismiss this appeal.

*Overview*

7. The case concerned an article written by Michael Gillard and published in The Times newspaper by TNL on 2 June 2006 entitled "Detective accused of taking bribes from Russian exiles." Its subtitle was "Police are investigating the alleged sale to a security company of intelligence on the Kremlin's attempts to extradite opponents of President Putin". At the time the article was published and until his retirement Mr Flood was a detective sergeant with the Metropolitan Police Extradition Unit. The article appeared in the print edition and on the Timesonline website. The article identified the officer under investigation as Mr Flood. The article is set out in a number of the reported judgments of this case, to which I shall refer, and it is not necessary to set it out again.

8. The Directorate of Professional Standards (the DPS) of the Metropolitan Police conducted an investigation into the allegations of corrupt practice said to have been committed by Mr Flood. The Senior Investigating Officer (from 28 April 2006) was DCI Crump. In the course of the investigation, search warrants were executed at Mr Flood's home, and from that date he was removed from the Extradition Unit until January 2007 when he returned to it.

9. The DPS made its report into these allegations (the Report) on 2 December 2006 though the Report was not made available to the parties until early September 2007. Its findings, the date they were provided to TNL, and what TNL did (or perhaps more accurately did not do) as a result, proved to be critical to the eventual outcome of the litigation. In short, the Report exonerated Mr Flood. Its conclusions were that the DPS had been: "unable to find any evidence to show [Mr Flood]… has divulged any confidential information for monies or otherwise. Consequently, there are no recommendations made as to criminal or discipline proceedings in relation to that matter." However, TNL did not report on the outcome of the investigation its article had called for, or update its online article for a further two years.

10. Proceedings for libel were begun on 31 May 2007 in relation to both the print and the online publications. Mr Flood claimed the words complained of meant there were strong grounds to believe, or alternatively that there were reasonable grounds to suspect that he had abused his position as a police officer with the MPS extradition unit by corruptly accepting £20,000 in bribes from some of Russia's most wanted suspected criminals in return for selling to them highly confidential Home Office and police intelligence about attempts to extradite them to Russia to face criminal charges, that he had thereby committed an appalling breach of duty and betrayal of trust and had thereby committed a very serious criminal offence.

11. TNL relied on two substantive defences in relation to both the print and online publications: public interest (*Reynolds*) privilege and justification. The meaning which TNL sought to justify was a lower meaning than that complained of by Mr Flood. It was that: "the claimant was the subject of an internal police investigation and that there were grounds which objectively justified a police investigation into whether the claimant received payments in return for passing confidential information about Russia's possible plans to extradite Russian oligarchs."

12. In its privilege defence, TNL drew no distinction between the print and online publications. Its defence was that publication was in the public interest, and its journalists acted responsibly in composing and publishing the article. In his Amended Reply, Mr Flood did not distinguish between the print and the online publications either. But he alleged in relation to the website publications that the circumstances had changed as time passed, further information came to TNL and there was no continuing public interest in the website publications.

13. On 2 June 2009, Eady J ordered, on TNL's application, that the privilege defence should to be tried as a preliminary issue, and the trial of that issue took place before Tugendhat J between 15 and 20 July 2009. In a judgment handed down on 16 October 2009, Tugendhat J held the privilege defence was successful for the print edition and the online publications up to 5 September 2007; but the defence was unsuccessful for the online publications made after that: see [2009] EWHC 2375 (QB).

14. The judge's headline findings on privilege were that the publication on the 2 June 2006 was a proportionate interference with Mr Flood's right to reputation given the legitimate aim in pursuit of which publication was made. The story was about a police investigation into an allegation that an officer in the extradition unit had been corrupted by a former police officer now working on behalf of very wealthy and controversial Russians living in England. The story was of high public interest, and its purpose was to ensure that that investigation was carried out promptly. That too was a matter of public interest. The judgment of TNL in publishing the story and in naming Mr Flood was within the range of permissible editorial judgments which the court was required to respect (see para 215). The fact that the investigation may have been precipitated by TNL's journalists was not a reason why TNL should not have had the benefit of *Reynolds* public interest if they then reported on the investigations in the article: (see para 258).

15. In relation to what appeared on the website however, different issues arose.

16. The website version of the article had remained online in its original form from 2 June 2006 to the date of the judgment, save for the addition of the words "[this article is subject to a legal complaint]" after the first paragraph of text at some unspecified time after the libel action was begun. In summary, the judge decided the continued publication of the article without a suitable *Loutchansky* notice[1] attached alerting any reader of the article as to the outcome of the investigation could not constitute responsible journalism for the purposes of the defence of privilege after 4 September 2007. This was when TNL learnt of the official conclusions of the police investigation

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[1] See *Loutchansky v Times Newspapers Ltd (nos 2-5)* [2002] QB 783 at para 73, and [77]-[79] (a decision upheld in Strasbourg: see *Times Newspapers Ltd (Nos 1 & 2) v UK* (Applications 3002/03 and 23676/03). In *Loutchansky* the court said that (i) the issue of privilege had to be considered by reference to the circumstances as they existed at the time of each publication (which by virtue of the single publication rule, was on each occasion that they were accessed and read on the web); and that (ii) changing circumstances in relation to archive material (website publications of articles which had originally appeared in hardcopy, but which continued to be made available by the publisher on the internet) could be dealt with by the attachment of an appropriate [*Loutchansky*] notice warning against treating it as the truth, which would normally remove any sting from the material.

into the allegations against Mr Flood that there was no evidence to suggest any wrongdoing by him.

17. The judge also found that Mr Flood's rejection of offers made by TNL shortly after it had learned of the outcome of the MPS investigation, to publish words to the effect that 'there was insufficient evidence to proceed with any criminal prosecution' was reasonable. Since that correspondence has featured in the arguments before us, it is convenient to set out what Tugendhat J said about it. He said:

> 237. Further Mr Rampton submits that TNL can rely on the fact that it offered to publish the outcome of the Report, but this was rejected outright. He relies on the exchange of correspondence that took place in September, as follows.
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> 238. On 14 September 2007 Mr Brett, Legal Manager of TNL, wrote that TNL had been notified the previous week by DPS that the investigation into the Claimant had been concluded and "there was insufficient evidence to proceed with any criminal prosecution or internal police disciplinary process". The letter includes an offer to publish what is called "a News in Brief item which would run along the following lines". There then followed a draft consisting of three sentences. The first two sentences summarised the gist of the allegations made in the article complained of. The third read:
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> "The Metropolitan Police's Directorate of Professional Standards has now concluded its investigation into [the Claimant] and found there is insufficient evidence to proceed with any criminal prosecution and [the Claimant] will not be subject to any disciplinary process".
>
> 239. On 24 September 2007 solicitors for the Claimant responded that this added insult to injury, explaining:
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> "The investigation did not find 'there was insufficient evidence to proceed with any criminal prosecution'. There was no evidence, and, as a result, 'no formal disciplinary proceedings will be taken against' our client".
>
> 240. Solicitors for the Claimant drafted their own form of Apology. That did not follow the words of the Report either, and was not acceptable to TNL.
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> 241. On 28 September 2007 Mr Brett wrote that there were a number of important witnesses who DCI Crump's team were unable to speak to, including the ISC Insider, and that TNL would have to approach those witnesses if the parties could not resolve the matter in accordance with proposals that he then set out. The letter stated that if the Claimant really did want what he called "a follow up report" to appear in the paper (in the

> same terms as he had previously offered), the Claimant only had to say so. Mr Brett added:
>
> "But please be under no illusions that your client's counsel … cannot then in any way hold it against [TNL] for not publishing a follow up report when this matter goes to trial and we rely, not only on a plea of justification but also on a *Reynolds* qualified privilege defence".
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> 242. The wording put forward by TNL is different from that in the Report itself ("unable to find *any* evidence" – see para 4 above). The communication to TNL referred to by Mr Brett, which is the source for his wording ("*insufficient* evidence"), is a letter dated 4 September 2007 from DPS to TNL in which DCI Crump wrote:
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> "Having considered all of the available information, I am of the opinion now that there is insufficient evidence to proceed with any criminal prosecution. I am also of the view that insufficient evidence exists to mount any internal police disciplinary process".
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> 243. At this stage nothing turns on the difference between the parties on what was to be published, because in the event TNL did not publish any form of words along those lines. It may become relevant in relation to the form of any relief to be granted in due course.
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> 244. Each party was entitled to reject the form of words tendered by the other in correspondence. The parties to a dispute are not obliged to settle it, and may choose to litigate. But the risk in relation to the *Reynolds* public interest defence lay on TNL, and not on the Claimant. It is for a defendant to make good his defence. It may well be good practice to seek to agree a form of follow-up publication in a case such as this. But if there is no agreement, then the publisher must take his own course, and then defend it if he can at trial. He cannot offer the claimant a form of words which the claimant refuses to accept, and then rely on that refusal to relieve him of the obligation of acting responsibly and fairly, at least when the claimant's refusal is reasonable, as it was here.

18. On 21 October 2009, a few weeks after the judgment on privilege was handed down, TNL added an update to the article online, reporting for the first time, the outcome of the MPS investigation into Mr Flood. Mr Flood did not complain of the updated article, so his claim from then on was concerned with the publications (or 'hits') on TNL's website for the two year period between 5 September 2007 and 21 October 2009[2]. These numbered about 550. This was a small fraction of the relevant print

[2] The update read: "In May 2007, DS Gary Flood issued libel proceedings against Times Newspapers in respect of the article below. Those proceedings are still ongoing. DS Flood disputes that there is any truth in the

edition of about 633,850 copies and of the 3,777 hits on TNL's website up to 4 September 2007. (It is said on behalf of TNL that applying "the conventional multiplier for a daily newspaper per copy, of 2.5 readers per copy, this represents just under 1.6 million readers." Nothing turns on the point in this appeal, but I am bound to say I am doubtful whether such a multiplier is justified as a matter of convention in 2014 given the many different ways in which people now obtain information about current affairs, not least through the internet, as in this case).

19. There were then appeals and cross appeals to the Court of Appeal and then to the Supreme Court on the issue of privilege: see [2010] EWCA Civ 804; [2011] 1 WLR 153; and [2012] UKSC 11; [2012] 2 AC 273. The Court of Appeal decided that the judge was wrong to hold that privilege attached to the pre-September 2007 publications, and upheld his ruling that it did not attach to those after that date. On 21 March 2013 however, the Supreme Court allowed TNL's appeal in part, restoring the judge's decision that the publications up to 5 September 2007 attracted privilege. It adjourned the issue of whether the website publications had ceased to be privileged after 5 September 2007, but TNL subsequently withdrew that part of its appeal. Costs orders were made following these events which form no part of this appeal.

20. After the judgment of the Supreme Court, two more events of significance occurred. First, on 25 July 2013 Tugendhat J. decided the issue of meaning as a preliminary issue. He held the publications for which liability was still in issue, bore the more serious meaning contended for by Mr Flood, rather than that justified by TNL: see [2013] EWHC 2182 (QB). This meaning was "that there were, and at the date of publication of the article online complained of there continued to be, strong grounds to believe that the claimant had abused his position as a police officer with the Metropolitan Police's Extradition Unit by corruptly accepting £20,000 in bribes from some of Russia's most wanted suspected criminals in return for selling to them highly confidential Home Office and police intelligence about attempts to extradite them to Russia to face criminal charges; had thereby committed an appalling breach of duty and betrayal of trust; had thereby also committed a very serious criminal offence".

21. Secondly, and as a result of the decision on meaning, on 1 October 2013 TNL withdrew its defence of justification and admitted liability.

*The damages judgment*

22. This then was the background to the damages hearing tried by Nicola Davies J, on 3-4 December 2013. She handed her judgment down on damages on 19 December 2013: see [2013] EWHC 4075 (QB). She heard the argument on costs that afternoon and gave her decision on costs which is the subject of this appeal the following day.

23. Her damages judgment contains a meticulous analysis of the evidence relevant to the assessment of damages. This included (importantly for present purposes) an analysis of the stance TNL adopted to the litigation with particular reference to what was said

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allegations which, as the article reported, were being investigated by the police at the time it was published. On 20 December 2006, DS Flood returned to his duties at the Extradition Squad. In the middle of 2007, the Independent Police Complaints Commission accepted DCI Gary Crump's final report which concluded, "I have been unable to find any evidence to show that Detective Sergeant Gary Flood is "NOAH"? or that he has divulged any confidential information for money or otherwise. Consequently there are no recommendations made as to any criminal or disciplinary proceedings in relation to the matter."

in correspondence by its then in-house solicitor, Mr Brett in the period between 5 September 2007 to 21 October 2009. This was relevant to the issue of damages because "…if there has been any kind of high-handed, oppressive, insulting or contumelious behaviour by the defendant which increases the mental pain and suffering caused by the defamation and may constitute injury to the plaintiff's pride and self-confidence, those are proper elements to be taken into account in a case where damages are at large." See *McCarey v Associated Newspapers Ltd* (No 2) [1965] 2QB 86 at 104.

24. The judge set out at paragraphs 15 to 24 of the damages judgment, substantial extracts from the open correspondence between the parties from early September 2007 to early October 2007 which Tugendhat J had earlier considered in the context of the argument on responsible journalism: see paragraph 17 above. As to the correspondence which took place after that, and what Mr Rampton QC for TNL was constrained to say about it, the judge said this:

> 27. The trial of the *Reynolds* defence took place in July 2009, judgment being given in October 2009. Correspondence between the claimant's solicitors and Mr Brett on behalf of TNL continued from October 2007 up to trial and thereafter. In addition to the Reynolds defence, TNL were vigorously pursuing a defence of justification, the nature and extent of which is set out in paragraphs 8 – 10 above. The correspondence which emanated from Mr Brett during this period has properly been conceded to be "aggressive" and "unpleasant" by Mr Rampton QC. On occasion, it was also unnecessary. The pleaded defence of justification alleged that the claimant needed money by reason of his gambling. Notwithstanding the limit of the pleading, in correspondence, Mr Brett pursued the sensitive issue of the IVF treatment undertaken by the claimant and his wife. The intrusive and aggressive approach of Mr Brett upon an unpleaded issue of particular sensitivity is encapsulated in an extract from a letter written by him dated 29 November 2007:
>
> > "… I must therefore insist on full disclosure of all documents relating to the IVF treatment, invoices, cheques, bank statements around this time in 2001 and 2002 etc as the treatment is on any basis extremely expensive …"
>
> 28. By reason of the concession made by Mr Rampton QC it is unnecessary to set out any further correspondence in this judgment. The claimant, quite properly, was being sent all this correspondence by his solicitors in order for him to comment upon the same.

25. The judge rejected in uncompromising terms TNL's argument that the open offers made to Mr Flood in September/October 2007 were reasonable ones which it could rely on in mitigation of damages; and made findings which were very critical indeed of TNL and its conduct of the litigation after it was told of the outcome of the MPS

investigation. It is necessary to read paragraphs 71 to 82 of her damages judgment as part of this judgment and to avoid the need for cross-referral, they are set out at Appendix 1.

26. Though in raw numbers the extent of the actionable publications which were relevant for the purposes of damages was relatively small, and certainly far smaller than the number of publications before 5 September 2007, as can be seen from paragraph 81 of the damages judgment, the judge concluded their publication mattered. This reflects the reality of the position in relation to libel, where the fact that a libel or slander has been communicated to only a few publishees does not of itself give an indication of what is at stake or the need of a claimant to obtain vindication. This significant point was made by Tugendhat J in his judgment on *Reynolds* privilege where he said:

> 233. Whether or not the scale of a website publication, and any resulting damage, is likely to be modest compared with that of the original publication, will depend on the facts of each case. But the judgment in *Loutchansky* was delivered eight years ago, in 2001. Since then the use of the internet, and in particular of internet search engines has increased. What has also increased is the amount of material on the internet. In 2001 there were relatively few years of back numbers of newspapers available on the internet. Since then each year's publications have been added. In most cases, as time passes, the original print publication will become increasingly difficult to access, and would be forgotten. But the website publication will remain, and in some cases (where the fame of a person has increased) it may even be viewed with increasing frequency. So a person's reputation may be "damaged forever" in the words of Lord Nicholls in *Reynolds* at p201 cited in para 207 above. As I remarked in another case, quoting from an article by a well known media lawyer, what is to be found on the internet may become like a tattoo (*Clarke (t/a Elumina Iberica UK) v Bain & Anor* [2008] EWHC 2636 (QB) para 55). Some actual and prospective employers, and teachers, make checks on people by carrying out internet searches. An old defamatory publication may permanently blight a person's prospects. This may be so, even in those cases where the allegation has been authoritatively refuted, but the refutation is either not on the internet, or, where it is on the internet, its authority is not apparent, or is not credited, on the footing that there is no smoke without fire.

*The costs judgment*

27. The outcome of the litigation could properly be described as a victory for Mr Flood. He had received a substantial award of damages for a serious libel which had caused him great harm. In this respect, the judge's findings speak for themselves.

28. When it came to the decision on costs however, as the judge clearly recognised, she had to consider the matter through the prism of CPR Rule 44.2. She had already looked in detail at the open correspondence between the parties, but in this context

she had to consider the offers to settle made in 'without prejudice save as to costs' correspondence between Mr Flood's solicitors and TNL which the parties drew to her attention.

29. TNL argued for an issue based order. It said that the appropriate costs order, reflecting the relative success of the parties on the issue of privilege, and acknowledging the important public interest matters arising in these proceedings, was that Mr Flood should pay TNL's costs of the *Reynolds* issue, save for any costs incurred wholly in relation to the website publications after 5 September 2007; and TNL should pay Mr Flood's costs of all the other issues in the action. (I should add that TNL said in terms that a percentage costs order was inappropriate). Mr Flood on the other hand asked the court to order TNL to pay his costs of the action on a standard basis up to the end of October 2009 and on the indemnity basis thereafter.

30. The correspondence the parties referred to on the issue of costs was 'without prejudice save as to costs', with the exception of TNL's letter of 16 August 2013. It is not necessary for present purposes to set out all the terms of each offer. In summary:

i) On 12 November 2007, Mr Flood offered to settle the action on the following terms: that TNL pay him £25,000 damages and his costs; that it undertook not to repeat the words complained of, and deleted the article from its website and that it published an apology acknowledging it had made an honest mistake in publishing the allegation that Mr Flood had been accused of selling confidential information obtained during the course of his duties to Russian exiles, he had not acted in that way and had never been accused of doing so, and he had been exonerated by the MPS investigation.

ii) On 15 November 2007, TNL (Mr Brett) responded:

> "there is no chance of our settling this litigation by payment of any damages or any costs and we will, and are prepared to, take the action to trial. You should be under no illusions that any insurance cover you may take out is unlikely to give your client anything like the cover or protection he may need as Times Newspapers is very likely to spend a considerable amount of money in defending what we see as a wholly unmeritorious claim. The only way we will settle is if we carry a follow-up article saying that your client has been exonerated by the DPS – no correction, no apology (there was after all an investigation into him, although we do not know how thorough it was and we are now looking into that), no damages and, as you are on a CFA, no costs being paid by this company to your firm."

iii) On 30 October 2008, following an application by TNL for third-party disclosure from the IPCC (to obtain material to support its defence on justification) Mr Brett wrote a long letter which said, amongst other things:

> "I have now got copies of all the IPCC documents plus your Further Disclosure …I think it worth rehearsing some of the documents and evidence we both saw on Friday at the IPCC. First, everything that was contained in The Times article of 2nd

> June 2006 seems to be fully supported by the IPCC documents… what the IPCC, or rather the Met DPS department, did by way of investigating the allegations …was less than useless…At the end of the day it becomes horribly clear from the IPCC documents that the DPS simply wanted to get the investigation out of the way …As you will have gathered all these highly damaging documents will shortly be going down to Counsel for them to view them and amend our pleadings …Before restoring my applications for further disclosure and to amend our defence, I must obviously give you and your client the opportunity to discontinue the proceedings before they become even more expensive and even more hopeless given what is now coming out through third party disclosure. Third party disclosure with the MPS will almost certainly be far worse for your client…Before embarking on this next phase of the action, I must ask you and your client if he wishes to discontinue the action and trigger the insurance policy you have taken out on his behalf in this CFA driven action. As you will have gathered, there is no conceivable chance of Times Newspapers capitulating in this case and if necessary we will fight it all the way to trial and seek to recover what may be hundreds of thousands of pounds in legal costs from your client or his insurance company…I cannot believe that anyone can or will want to carry on funding this action in the light of the documents disclosed last Friday…"

iv) On 23 April 2010, a month before the hearing of the *Reynolds* appeal in the Court of Appeal, TNL offered to forego its own solicitors' costs if the action was discontinued. In the course of that letter Mr Brett said:

> "I am of course acutely aware that your client only has insurance cover up to £200,000 but that he has equity in his house and other assets…Again, I am conscious of his attempts with his wife to start a family and their need for a family home…If your client was expecting £25,000 in damages for 100 per cent of publications, he cannot realistically expect much more than 0.1 per cent of £25,000, i.e. roughly £25 for 549 hits on our website, when most of these would have been seen by lawyers anyway, as can be seen by the spikes on our graphs. I cannot believe it is sensible to risk the roof over one's head for even £5,000 but that is a matter for your client."

v) On 2 April 2012, shortly after the Supreme Court gave judgment on the privilege issue, TNL's offer was that Mr Flood should pay TNL's costs up to the maximum of the sum insured under his after-the-event insurance. It said:

> "It is…highly likely that the costs which will fall to be recovered by TNL will be in excess of the sum insured under your client's after-the-event insurance…I have made clear that TNL will…continue to defend what is left of the claim against it…I have been advised that TNL's position in relation to the

> defence of justification has strong prospects of success. In that event, your client stands to be exposed further in costs... Although vindication of your client's reputation may be regarded as a legitimate reason for commencing proceedings, that has long since been achieved…In short, these proceedings can serve no further purpose and stand to be struck out being 'not worth a candle'.

vi) On 16 August 2013, after Tugendhat J's decision on meaning, TNL made an open offer to pay Mr Flood £17,500 in damages, but on the basis, amongst other things, that Mr Flood should pay TNL's costs of the part of the *Reynolds* trial on which it had succeeded.

vii) On 17 September 2013, Mr Flood offered to accept £17,500 in damages on the basis that TNL paid the costs incurred in the High Court, that is, costs apart from those in the Court of Appeal and Supreme Court, subject to a deduction of 30 per cent of Mr Flood's base costs to reflect a contribution towards TNL's *Reynolds* defence costs.

viii) On 21 November 2013, TNL offered to pay £17,500 in damages with each side bearing its own costs of the entire action.

31. After setting out the arguments on costs made by each side, the judge gave her conclusions which were as follows:

> 17. The starting point for the award of costs has to be CPR 44.2(2)(a), namely that the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party. The court can depart from such a ruling and, in so doing, must have regard to all the circumstances, including the conduct of the parties, whether a party has succeeded on a part of his case and whether any admissible offer to settle has been made.
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> 18. In considering CPR 44.2, I do so in the context of the facts of this case, namely that the defendant has succeeded upon a substantive part of one of its two defences. I bear in mind the words of Jackson LJ in Fox v Foundation Piling Limited ante, that the unwelcome trend to depart form the starting point identified in 44.2(2)(a) can cause huge additional costs to the parties and huge costs to other litigants because of the uncertainty which such an approach generates. It is of note that these words come from the judge tasked with the revision of the costs rules.
>
> 19. In my view, the litigation as a while has to be considered. I begin with the reason for the bringing of the claim, which is said to be the claimant's need for proper vindication. I accept that that was indeed the claimant's purpose for two reasons: (a) the relatively modest sums sought by way of damages in WPSAC correspondence; and (b) the fact that the claimant continued his fight to the bitter end in order to obtain the

vindication he sought. I accept that numerically the defendant has succeeded as to the greater number of publications following the findings by Tugendhat J and upheld by the Supreme Court upon Reynolds privilege.

20. As to the progress of the matter prior to the final hearing, from November 2007 I note the claimant indicated a willingness to settle the action. Any offer has to be viewed in the circumstances prevailing at the time it was made. In November 2007 the defendant had a valid Reynolds defence. That said, its written response to the claimant's original offer was bruising. It was not until August 2013 that the defendant demonstrated any real willingness to negotiate a settlement. There is force in Mr Price QC's description of the die-hard attitude of the defendant to settlement. The unsubtle threats to the personal financial situation of the claimant directed at the home in which he lived illustrate just how hard a line was being taken by the defendant.

21. In my view, the defences of Reynolds privilege and of justification could not easily be separated. The facts underlining the defence of justification had as much in common with the facts which had to be pleaded and investigated upon the Reynolds issue. I accept the claimant's contention that it is not possible to make a clean distinction between the costs incurred in the Reynolds issue and those in respect of justification. The abandonment of the justification defence occurred shortly before the damages trial. I accept the trigger for the abandonment was the ruling on "meaning" by Tugendhat J but that has to be viewed in the context of the case as a whole and the hard line hitherto taken by the defendant in respect of any possible settlement.

22. On the issue of Reynolds privilege, there was no clear-cut win for the defendant. The defendant won on part, the claimant won on part, and it was on that part upon which ultimately the claimant obtained the vindication for which he had sued. An issue-based costs order in respect of this hearing would have its problems.

23. Returning to the starting point; I find that the aim of the claimant in these proceedings was to obtain vindication and in that he has succeeded. I take account of the fact that the defendant succeeded on a substantive issue in respect of publications protected by the Reynolds defence. Against that, I balance the conduct of the defendant in robustly refusing to countenance any settlement of this action, save on its own terms. It was not until August 2013 that there was any softening of the defendant's line in terms of settlement. All of this is relevant but of considerable significance is the fact that any

> offer made by the defendant to settle has been beaten by the award of damages.
>
> 24. Having identified what I regard as the relevant considerations for the award of costs and mindful of the view of the Court of Appeal in Fox ante, I am not persuaded that there exist good grounds to depart from the general rule identified in CPR 44.2(2)(a). Accordingly, I order that the defendant should pay the claimant's costs of the action, such costs to include the damages hearing in December 2013 and the hearing in July 2009 before Tugendhat J in respect of the Reynolds defence.
>
> 25. It being conceded that no Part 36 offer has been made in this case, the claimant has a high hurdle to overcome in order to persuade the court that costs should be on an indemnity basis from the end of October 2009. My views as to the conduct of the defendant are clear from my judgment on damages and provided the basis for an aggravation of the original award. I have taken account of the conduct of the defendant, both in the award of damages and in reaching the decision that the defendant should pay the costs of this action. I do not regard it as appropriate to further rely upon this conduct in order to even attempt to meet the description identified by Mr Rampton QC and accepted by Mr Price QC, namely the unreasonable conduct has to be exceptional in order to provide a proper basis for indemnity costs. The order of the court is that the defendant should pay the claimant's costs of this action on a standard basis.

32. It is not suggested by Mr Rampton that the judge left out of account or took into account some feature she should or should not have considered, but his central argument is that she reached a decision that was plainly wrong because she did not balance the various factors which she considered fairly in the scale. TNL had won a substantial victory at the *Reynolds* privilege hearing which had occupied some 4 days. It succeeded in its important defence of public interest journalism, in respect of the overwhelming number of publications on which Mr Flood had sued, a success eventually upheld by the Supreme Court. In those circumstances Mr Rampton submits the judge's decision that it should pay the entire costs of the litigation was unjust and plainly wrong.

33. I am unable to accept those submissions.

34. There were a number of important factors relevant to costs in this case as the judge clearly recognised and which she carefully balanced in reaching her decision; these were the overall outcome of the case, in terms of the award of damages to Mr Flood and the vindication he achieved by pursuing it; TNL's success on the issue of privilege and the parties' approach to settlement.

35. Although the judge concluded that Mr Flood was to be regarded as the successful party, in oral argument, neither side attached a great deal of significance to this matter standing on its own. Mr Rampton described the point as somewhat sterile. Mr Price submitted that it may make no practical difference whether the matters the judge considered were regarded as factors in the decision as to whether there was an overall winner, or in the wider balancing exercise of who should pay the costs. He submits the judge could (and would) have reached the same decision as to costs by balancing those factors, even if she had preferred to say there was no overall winner. I am inclined to agree that the matter can be looked at in this way, notwithstanding the structured approach to the exercise of discretion on costs contained in CPR 44.2.

36. Nonetheless, the judge regarded Mr Flood as the successful party in the litigation, and in my view she was entitled to do so.

37. Starting with the eventual outcome of the case, this was on any fair view, a success for Mr Flood as I have said. The award of £60,000 was a substantial one in libel terms, particularly where the allegation was not of guilt, but of strong grounds to suspect guilt of the conduct alleged[3], and it exceeded by a considerable margin any offer of damages that had been made by TNL. Although as Tugendhat J correctly observed in *Clarke v Bain and ors* [2008] EWHC 2636 (QB) at 54, defamation actions, unlike personal injury actions for example, are not primarily about recovering money damages, but about vindication of a claimant's reputation so the amount of damages is not necessarily a measure of a claimant's success, an award of damages nonetheless operates in part to vindicate a claimant's good name, as well as to compensate him for the injury to his reputation and for the distress, hurt and humiliation which the defamatory publication and the aggravating conduct of the litigation had caused him: see *John v MGN Ltd* [1997] QB 586 at 607 CA. All these were important features of this case as the judge recorded in her damages judgment.

38. The allegation against Mr Flood was a clearly a serious one – in short that there were strong grounds to suspect he was guilty of corruption. Further, TNL had continued to publish it for a period of more than 2 years after it knew he had been exonerated of any such charge. In my opinion, the judge was quite entitled to conclude that he had brought the action to obtain vindication in respect of that allegation – and that he succeeded in achieving that objective. It is true that as a result of the ruling on *Reynolds* privilege the number of actionable publications was relatively small. Nonetheless, it is artificial to suggest, as Mr Rampton does, that the issue of vindication is somehow divisible. Mr Flood had brought the proceedings to clear his name in respect of a particular allegation and by the end of the trial he had succeeded in doing so. As the judge said, TNL won on part, and Mr Flood won on part, and it was on that part upon which he won, that ultimately Mr Flood obtained the vindication for which he had sued. Although the issue of justification has not featured much in the argument before us, it should not be forgotten that until very shortly before the trial on damages, TNL was defending the action on the grounds that what it had published about Mr Flood was true. Nor should it be forgotten that the judge found that the manner in which TNL had conducted the litigation, left him with no choice but to pursue the proceedings to clear his name – which in the event he did: see paragraph 79 of her damages judgment, set out at Appendix 1.

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[3] A 'Chase level 2' meaning: see *Chase v* News *Group Newspaper Ltd* [2002] EWCA Civ 1772; [2003] EMLR 11.

39. The fact that TNL had won on a part of the case and in relation to most of the publications complained of, did not preclude a judgment that Mr Flood was the overall winner of the action. Success in this litigation was not to be measured by raw numbers as I have already said: such an approach would have been overly simplistic and wrong. It is true of course that, technically, each separate communication of defamatory material gives rise to a separate cause of action; so, theoretically, the publication of an article in a newspaper gives rise to many thousands of actionable publications. But it would be an abuse of the process of the court to bring a separate action for each of those publications; and generally speaking, there is one action, and only one award of damages, albeit the extent of publication may be relevant to size of the overall award.

40. Mr Rampton submits on the issue of overall success, it is relevant to ask whether Mr Flood had won anything of value which he could not have won without fighting the action through to the finish, or TNL had substantially denied Mr Flood the prize which he fought the action to obtain: see *Roache v News Group Newspapers Limited and others* [1998] E.M.L.R. 161, per Sir Thomas Bingham MR at p168-9. I agree it is relevant to ask such a question, and particularly where, as here an action is not concerned, or certainly not primarily concerned, with money. But as will be clear from what I have already said, on the facts of this case, the answer to the question is, or the judge was entitled to conclude that the answer to it was, one which was favourable to Mr Flood.

41. Whether Mr Flood was the successful party overall or not, it was undoubtedly the case that TNL had won on a significant part of the case, comprising numerically the greater proportion of the publications. And where a party has succeeded on part of its case, even if that party has not been wholly successful this is one of the factors to which the court will have regard when deciding what order (if any) to make about costs: see CPR 44.2(4)(b). There is also no doubt that Nicola Davies J was fully aware of the importance of this point to the issue of costs, and it is clear from her judgment that she gave the matter the most anxious consideration. Mr Price submits, rightly in my view, that the whole judgment really amounted to a careful examination of the weight to be attached to this point, and whether and to what extent it was counterbalanced by other relevant factors. Mr Flood's success in obtaining substantial damages and vindication were factors which pulled in his direction on the issue of costs; and TNL success on the privilege issue pulled in the other. In the event, the judge thought that TNL's success, which might otherwise have entitled it to an issue based costs order, was to be counterbalanced by its approach to settlement, and this was a view I think she was entitled to take.

42. As with the question of who was the successful party overall, the question of who should pay the costs of the privilege issue at the end of the litigation could not be answered simply by looking at the numbers in respect of which each side had won or lost. This much can be seen from the way that Tugendhat J looked at the matter, when considering what order for costs to make after the trial of the privilege issue; and indeed what Mr Rampton said to him at the time. The argument for TNL at that stage, was that that the judge should make an award of the costs of the preliminary issue in TNL's favour because it had won on numerically the greater number of publications; and he should not be inhibited from doing so by the 'without prejudice save as to costs' offer of £25,000 which Mr Flood had made on 12 November 2007 (which TNL

had persuaded the judge to look at in order to support its argument that the judge could say now that it should be paid those costs before the matter went any further).

43. Mr Rampton said the question for the judge was whether "there is a realistic prospect that a reasonable jury properly directed could in all the circumstances award the claimant more than £25,000 if he wins on the defence of justification. If the jury did award him more than that, then he would have an argument that he was entitled, not just to the costs of that part of the trial…but to the whole costs of the action from the date this offer was made, 12 November 2007."

44. Tugendhat J however said:

> It would not be right, I think, for me at this stage to try and put a figure on – whether it is a percentage or in some sort of monetary terms – on the degree of success which is represented by the claimant's success for the period after 5th September 2007. What I can say is that, having regard to the way the matter has been contested, I see no reason to doubt that the defendant would have conducted the trial of the preliminary issue very substantially, if not identically, to the way in which they did, even if the claimant had conceded that qualified privilege was a defence in respect of the print publication, and even if they had conceded it was a defence in respect of some of the website publications. This is the way the matter has been contested. So it is very hard for me to say that the outcome is so clear a victory for one or the other that I can make a fair award of costs now. So, that is why I am reserving the costs.

45. In those circumstances, Nicola Davies J's view that on the issue of *Reynolds* privilege, there was no clear-cut win for TNL, notwithstanding the numbers on which it had won, cannot realistically be criticised. Indeed the argument before her proceeded on both sides on the basis that TNL had won on part, and Mr Flood had won on part.

46. In considering the settlement point, the judge did not deal with TNL's open offers to settle the litigation in early September/October 2007 and Mr Rampton criticises her for not doing so: he says these were reasonable offers, and it was therefore a travesty of the true position to describe TNL's attitude to settlement as "die hard". There is no substance in this criticism in my view. Mr Rampton had mounted the same argument on that part of the correspondence at the damages hearing and the judge had rejected it: see paragraphs 71, 73 and 79 of the damages judgment set out at Appendix 1. Not surprisingly perhaps, Mr Rampton did not then repeat this argument to the judge on the issue of costs.

47. Nor is there any substance in the suggestion that the judge somehow misapprehended the significance in the scheme of things of Mr Flood's offer of the 12 November 2007 and gave it too much weight. It was not suggested on Mr Flood's behalf to the judge, nor did the judge find that TNL's refusal to accept the offer made on the 12 November 2007 was unreasonable or that TNL should have settled for £25,000 at that stage. As the judge said, the reasonableness of any offer had to be viewed in the

circumstances prevailing at the time, and at the time the offer of 12 November 2007 was made, TNL had a valid *Reynolds* defence.

48. The position had changed however by the time of TNL's letter of 30 October 2008. This was sent 14 months after TNL's continued publication of the article ceased to be protected by *Reynolds* privilege; and 9 months before the trial of that issue. It showed very clearly that TNL was unwilling to accept the outcome of the MPS investigation, or to settle the action by giving Mr Flood any form of vindication or even modest damages under any circumstances. The judge was entitled to view this as demonstrating an intransigent (or "die hard") approach to the litigation and settlement, and this was something she was entitled to take into account when considering the question of costs. In the end of course, Mr Flood was awarded damages substantially in excess of the amount TNL offered as late as August 2013, and substantially more than the amount he had earlier offered to accept.

49. It is suggested that TNL could not have settled the action without conceding the issue the Supreme Court decided in its favour, and this consideration effectively tied its hands with regard to negotiation. Thus it is said, an order for costs which effectively penalised it for not making any such offer undermined or would serve to undermine the importance of the *Reynolds* privilege defence, and the important Article 10 ECHR considerations which underpin it: in particular the vital role the media has in ensuring that the public obtains the public interest information that it needs and in maintaining the free flow of information upon which our democracy depends.

50. No one would or could gainsay for a moment the importance of the principle. But looking at the facts of this case, TNL obviously could have settled the action before the *Reynolds* trial, or at least offered to do so, in respect of the publications on which it lost, without conceding the point on which it won, and on terms which respected its right to publish information of public interest in the period up to the 5 September 2007. The fact that it made no such offer however had nothing to do with the difficulty in framing such an offer, but stemmed from its unwillingness to accept the outcome of the MPS investigation, a matter which is clear from the letter of 30 October 2008. TNL knew before the *Reynolds* trial, that Mr Flood had indicated a willingness to settle but it adopted an attitude which precluded any negotiation at all. It is to be observed that Tugendhat J concluded that TNL would have fought the trial in much the same way, even if Mr Flood had conceded that the publications before the 5 September 2007 were covered by privilege. As Mr Price submits, if TNL had not continued to publish the libel after the point when it no longer had a defence, it would not have had to pay damages or costs. Equally, if it had been willing to compromise in respect of the publications for which it had no defence, then the costs of the *Reynolds* trial might well have been avoided.

51. Tugendhat J's views on the costs of the privilege issue did not bind those of Nicola Davies J, nor fetter her discretion when it came to the issue of costs. But Tugendhat J has very great experience in this field, and had of course the particular advantage of trying the *Reynolds* privilege issue. His view was that it could not be said after the trial of the preliminary issue, that the outcome was clear cut enough to merit making an order for the costs of the privilege issue in TNL's favour. And it appeared to be TNL's view that an award of damages of more than £25,000 might entitle Mr Flood to all the costs of the action. It is pertinent to ask how the position had improved for TNL by the end of the trial. By then it had lost on the issue of meaning, it had

withdrawn its defence of justification, it had conceded liability and it been ordered to pay Mr Flood £60,000 in damages, substantially more than he had offered to accept at an earlier stage of the proceedings.

52. Nicola Davies J could have made a different order on costs than she did, but her discretion on costs was a wide one. I do not accept she erred in exercising it, and I would dismiss this appeal.

**Sir Timothy Lloyd:**

53. I agree.

**Lady Justice Macur:**

54. I also agree.

# Appendix 1

## The conduct of the defendant

71. It is possible to pursue journalism said to be in the public interest and demonstrate consideration for the subject whose reputation may suffer in the event of publication. The need for such consideration is particularly acute given the subject's lack of redress. Once it is known that there is material which exonerates, in whole or in part the subject of the journalistic investigation, consideration should be shown for the position of the subject by publishing exculpatory material. On the facts of this case no such consideration was demonstrated by TNL, in particular, The Times and its then Legal Manager Alistair Brett towards the claimant during the period 5 September 2007 to 21 October 2009.

72. The absence of consideration is compounded by the fact that the article published in June 2006 contained allegations which attacked the core of the claimant's character, personally and professionally. Of this experienced and responsible police officer, a recognised expert in his specialised field, it was being alleged that there were strong grounds to believe that he was dishonest, corrupt and acting in a manner which represented not only serious criminal conduct but a grave breach of the trust which had been placed in him.

73. In my view, following the conclusion of the police investigation the claimant was entitled to expect the defendant to amend the article and to publish, at the very least, the outcome of the investigation. The fact that for two further years the claimant had to live with the article, publicly detailing allegations of dishonesty and corruption, of itself, represents a need for proper vindication. I do not accept the defence submission that the judgments handed down in the course of litigating the *Reynolds* defence which stated that the claimant had been exonerated provided sufficient vindication. The individual who wished to research the claimant and therefore access The Times website is unlikely to have found his or her way to one of these judgments and within it the fact of the exoneration.

74. From 14 September 2007, TNL demonstrated an unwillingness to accept the findings of the police investigation and persisted in its own pursuit of evidence. Evidence which could serve to undermine the findings of the investigation. The defendant's stance is encapsulated in the first paragraph of Alistair Brett's letter of 14 September 2007 which states that witnesses, not seen during the police investigation, would have to be approached if the matter could not be settled on TNL's

terms. From the outset Mr Brett linked the offer of an update to the article to settlement of the action.

75. The defendants were pursuing a *Reynolds* defence. It was submitted by Mr Rampton QC that at trial, by reason of the limited nature of that defence, the defendant would not be permitted to cross-examine the claimant as to his credibility or any "guilt" in respect of the allegation. Whether such a course would have been permitted at trial it is a fact that the defendant's pursuit of evidence went beyond the limited nature of the pleading as evidenced by the insensitive and intrusive demand by Mr Brett for financial details and documentation relating to the IVF treatment of the claimant and his wife. It was not just the pursuit of evidence, it was the manner in which the same was conducted. When the concession is made by highly experienced Queen's Counsel that the correspondence of the then Legal Manager of TNL was aggressive and unpleasant, that is a matter of which account should be taken by the court. In his evidence to the court the claimant said that he felt bullied by Mr Brett's correspondence. I accept his evidence.

76. I accept that the cross-examination of the claimant in these proceedings by Mr Rampton QC, properly taking the necessary points, demonstrated both restraint and sensitivity. The claimant was not cross-examined in the 2009 proceedings before Tugendhat J. Unhappily, the restraint demonstrated by Mr Rampton QC in court, is not reflected in the correspondence nor in the detailed amendments made to the original Defence, all of which would have served to increase the anxiety of the claimant as to what he could face at trial and to his particular fear that the defendant's conduct would lead to the reopening of the police investigation. I accept that the aggressive conduct of the defendant's case increased the distress and anxiety of the claimant. I also accept that his fear that the same could lead to a reopening of the police investigation was reasonable in the circumstances.

77. TNL were entitled to properly pursue a defence of justification. However, the manner in which the defence was conducted went beyond merely supporting the pleaded case namely that there had been, during the course of the police investigation, objectively reasonable grounds for the police to investigation. I accept the claimant's contention that TNL felt no scruple in holding over the claimant the threat of further investigations to undermine the conclusion of the police investigation and thus pressure the claimant into settling on TNL's terms.

78. Mr Rampton QC describes the failure to provide an update as a "misjudgement". In my view, the course taken by the defendant goes beyond misjudgement, it represents a dogged

refusal to take a course which was professional, responsible and fair. It was devoid of any consideration for the position of the claimant. The Times' report of the proceedings at the *Reynolds* trial on 16 July 2009, set out in paragraph 29 above, exemplifies the attitude of The Times, namely, its refusal to accept the findings of the police investigation and its continued reliance on the unamended article. These facts underline the need in this case for proper vindication of the claimant. The refusal, coupled with the manner in which The Times pursued its own investigation and sought details and documentation from the claimant, can properly be described as oppressive and high handed. It is conduct which serves to aggravate the award of damages.

**The claimant's hurt and distress**

79. The result of TNL's conduct meant that the claimant had no choice but to pursue these proceedings in order to clear his name. I find that this exacerbated the distress and anxiety caused by the original publication. I accept that the article, when first published, would have caused distress and anxiety as did the police investigation but I also accept the claimant's evidence that throughout he had the hope and confidence that he would be cleared reasonably quickly by the investigation. When the result was known, the claimant was entitled to expect qualification of the original article by publication of the fact that he had been exonerated. What he did not expect was from that point he had to fight for even the publication of the outcome of the inquiry. The conduct of TNL during this period added considerably to the suffering of the claimant."

80. In December 2006 the claimant was allowed to return to his work in the Extradition Unit. In April 2009 he was moved from the Unit, the reason given being the pressure in his personal life and The Times litigation. Extradition was the work the claimant enjoyed and upon which he had built his reputation. Had the claimant received the published exoneration by TNL to which he was entitled, it is reasonable to conclude that he would have been permitted to remain in his specialist field. The refusal of TNL to act responsibly can be said to have directly impacted upon the professional life of the claimant during this period, a factor of which account can also be taken in assessing any award of damages.

**Reputation**

81. I accept that the claimant did not submit actual evidence of damage to his reputation amongst colleagues and his peers however common sense suggests that the continuance of such serious allegations in a medium which can be accessed by those who wish to learn more about the claimant can have done his

reputation no good. I accept the defence contention that it was the original article which received the highest readership. However, the continuance of the article on the website meant that it was there to be read by anyone with a particular interest in the claimant. I do not accept that this is likely to have been lawyers, as those lawyers involved in the case would have had their own copies of the article. Far more likely is the example of the three police officers who were to work with the claimant, and in advance of so doing carried out their own research. That is what people do, professionally and personally. Further, as the claimant demonstrated by the evidence relating to the Entwhistle case in America, the existence of the article undermined his own statement that he had been exonerated. All of this would be difficult on a purely personal level but the attack included allegations of a grave nature upon the integrity, professionalism and reputation of an experienced police officer working in a specialised field.

**Deterrence**

82. The Times was aware of its obligation to publish the result of the police inquiry. This was identified in correspondence as early as September 2007 as was noted in the judgments of Tugendhat J and the Court of Appeal. The Times was also on notice of its need so to do be reason of the decision in *Loutchansky*. For reasons, which have never properly been identified, The Times refused to act responsibly. It is such conduct which invokes the concept of deterrence as a marker and a warning that such conduct cannot represent responsible journalism.