Neutral Citation Number: [2013] EWHC 4075 (QB)

Case No: HQ07X01839

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/12/2013

Before :

MRS JUSTICE NICOLA DAVIES DBE

- -

Between :

Gary Flood	**Claimant**
- and -	
Times Newspapers Limited	**Defendant**

- -
- -

Mr James Price QC and Mr William Bennett (instructed by **Edwin Coe Solicitors**) for the **Claimant**
Mr Richard Rampton QC and Miss Kate Wilson (instructed by **Times Newspapers Legal**) for the **Defendant**

Hearing dates: 3 – 4 December 2013

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MRS JUSTICE NICOLA DAVIES DBE

Mrs Justice Nicola Davies DBE:

1. The claimant was at all material times a member of the Metropolitan Police Service ("MPS"). In June 2006 he was a member of its Extradition Unit. The defendant ("TNL") is the publisher of The Times and The Sunday Times.

2. The claimant brings this action for libel arising out of an article ("the article") published in The Times on 2 June 2006 under the headline "Detective accused of taking bribes from Russian exiles". The subheading reads "Police are investigating the alleged sale to a security company of intelligence on the Kremlin's attempts to extradite opponents of President Putin". The article first appeared in the print edition of The Times and thereafter on the *TimesOnline* website. The author of the article is Michael Gillard, an investigative journalist employed by the defendant.

3. On 31 May 2007 the claimant issued proceedings. The defendant advanced two substantive defences, a defence of public interest (*Reynolds*) privilege and justification. Following a trial in July 2009 before Tugendhat J the *Reynolds* defence in respect of the print version and in respect of the publication on the website up to 5 September 2007 was upheld [2009] EWHC 2375 (QB) [2008] EMLR 8. Appeals to the Court of Appeal and the Supreme Court ensued. The Court of Appeal allowed the claimant's appeal to the extent that it reversed the judgment of Tugendhat J where it had been held that the *Reynolds* defence succeeded [2010] EWCA Civ 804; [2011] 1WLR 153. The defendant appealed to the Supreme Court which restored Tugendhat J's judgment and held that publications up to 5 September 2007 were protected by *Reynolds* privilege [2012] UKSC 11 [2012] 2 AC 273. The defendant also appealed against that part of Tugendhat J's decision in which he held that the *Reynolds* defence failed in respect of website publications post 5 September 2007, the Court of Appeal having upheld that part of the earlier decision. The defendant subsequently withdrew its appeal to the Supreme Court on that issue.

The Article

4. Tugendhat J identified the material parts of the article thus (paragraph numbers are added):

> "1. Allegations that a British security company with wealthy Russian clients paid a police officer in the extradition unit for sensitive information are being investigated by Scotland Yard.
>
> 2. The officer, who has been moved temporarily from his post, is alleged to have provided Home Office and police intelligence concerning moves by Moscow to extradite a number of Russia's wealthiest and most wanted men living in Britain.
>
> 3. Anti-corruption detectives are examining documents detailing the client accounts of ISC Global (UK), a London based security firm at

the centre of the investigation. The financial dossier, seen by *The Times*, shows that ISC was paid more than £6m from off-shore companies linked to the most vocal opponents of President Putin of Russia.

4. Between 2001 and 2005, ISC provided a variety of specialist security services including 'monitoring' the Kremlin's attempts to extradite key clients to Moscow, where they face fraud and tax evasion charges.

5. A former ISC insider passed the dossier to the intelligence arm of the anti-corruption squad in February. The informant directed handlers to a series of ISC payments, totalling £20,000, made to a recipient codenamed Noah. Detectives from Scotland Yard professional standards directorate were told that Noah could be a reference to an officer in the extradition unit who was friendly with one of ISC's bosses.

6. The officer under investigation has been identified as Detective Sergeant Gary Flood. His home and office were raided last month.

7. A spokesman for the Metropolitan Police said yesterday:

> "We are conducting an investigation into allegations that a serving officer made unauthorised disclosures of information to another individual in exchange for money."

8. Anti-corruption detectives are examining the relationship between Sergeant Flood and a former Scotland Yard detective, one of the original partners in ISC. The men admit to being close friends for more than 25 years but deny any impropriety and are willing to cooperate with the inquiry.

9. Sergeant Flood has not been suspended. His lawyer said: "All allegations of impropriety in whatsoever form are categorically and unequivocally denied."

10. ISC Global was set up in October 2000 by Stephen Curtis, a lawyer. He was already acting for a group of billionaire Russians led by Mikhail Khodorkovsky and Leonid Nevzlin, who controlled Yukos Russia's privatised energy giant…

15. The dossier also reveals … Boris Berezovsky was a client of ISC.

16. … Two companies linked to Mr Berezovsky – Bowyer Consultants Ltd … and Tower Management Ltd … - appear to have made payments totalling £600,000 to ISC.

19. ISC stopped trading last year after Curtis, the chairman, died in a helicopter crash. Subsequently, two former Scotland Yard officers,

> Keith Hunter and Nigel Brown, whom Curtis recruited to set up ISC, fell out and Mr Hunter bought the company and renamed it RISC.
>
> 20. A spokesman for Mr Hunter said: "Neither my client nor his associated companies have ever made illegal payments to a Scotland Yard officer."
>
> 21. Mr Brown, who lives in Israel said: "Scotland Yard recently contacted me as a result of receiving certain information. I have been asked not to discuss this matter."

5. As a result of correspondence emanating from a journalist employed by TNL, an investigation by the Directorate of Professional Standards ("DPS") of the MPS into allegations of corrupt practice said to have been committed by the claimant was commenced. As a consequence of the investigation, the claimant was removed from the Extradition Unit from 28 April 2006 until December 2006. On 2 December 2006 the report of the investigation was completed, the Senior Investigating Officer being DCI Crump. The final paragraph stated:

> "In conclusion, I have been unable to find any evidence to show that Detective Sergeant Gary FLOOD is "NOAH" as alleged by Jonathon CALVERT in his letter, or that he has divulged any confidential information for monies or otherwise. Consequently there are no recommendations made as to criminal or discipline proceedings in relation to this matter."

The finding was accepted by the Independent Police Complaints Commission.

6. Michael Gillard was informed of the outcome in a letter dated 4 September 2007 from DCI Crump. Following this notification, deemed to have been received on 5 September 2007, the defendant did not update the website in order to report the outcome of the investigation until about 21 October 2009. Prior to that date the only alteration to the original article on the website was a legal warning which read "This article is subject to a legal complaint." No identification of the complainant was made.

7. The update made in October 2009 was as follows:

> "**Update**
> 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 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."

The Legal Proceedings

The defendant's plea of justification

8. The original plea of justification which was amended pursuant to the order of Eady J on 8 May 2008 stated:

> "Further or alternatively, if and in so far as the Article bore the natural and ordinary meaning that:
> (1) The claimant was the subject of an internal police investigation; and
> (2) There were grounds which ~~supported that~~ objectively justified a police investigation into whether the Claimant received payment in return for passing confidential information about Russia's possible plans to extradite Russian Oligarchs,
> Then it is true in substance and in fact."

9. By the May 2008 amendment, it was alleged that in 2002 the claimant was in particular need of extra money in addition to his normal salary. The claimant had "increased his borrowings by approximately £22,500 from November 2001 to December 2002. The Defendant will invite the inference that a principal reason for this was the Claimant's gambling habit". This allegation was linked to the original allegation that between December 2002 and April 2003, seven payments totalling £20,000 had been made to "Noah" from the suspense account of Keith Hunter of ISC. The May 2008 amendments averred that the claimant's personal financial situation improved materially at or around the same time as these payments

10. Further, amendments on 8 May 2008 or in June 2009 alleged that:

- Boris Berezovsky, a key ISC client, was arrested on extradition warrants in March 2003, the claimant played a significant role in the Metropolitan Police's handling of that extradition request, that he advised on and influenced Mr Berezovsky's bail conditions;

- Mr Hunter, the claimant's long-standing close friend, frequently bragged about having a contact within the Extradition Unit;

- just before the 'Noah' payments started - the claimant and Mr Hunter had meetings; at the first meeting it was alleged that the claimant passed to Mr Hunter police intelligence concerning Mr Berezovsky and one of his associates, Mr Dubov,

including the fact that Mr Dubov would be arrested immediately if found in the UK and possibly held in custody; the claimant offered to update Mr Hunter in the future on the outcome of meetings involving his superiors; at the second meeting, he briefed Mr Hunter on a recent meeting between police officers and representatives of the Foreign and Commonwealth Office and the Crown Prosecution Service;

- the claimant told Mr Hunter to advise a particular named suspect as to how to avoid being sent to the UK, advice clearly prejudicial to the chances of apprehending and extraditing him;

- the claimant's 'number' was to be included in an ISC invoice relating to extradition matters i.e. ISC was invoicing for the claimant's services.

It is the claimant's case that the effect of the plea of justification was to accuse the claimant of passing confidential police intelligence, derived from his work in the Extradition Unit, to ISC, to the potential grave prejudice of policing interests.

Meaning

11. In May 2008, Eady J refused to strike out the defendant's plea of justification holding that the meaning pleaded at paragraph 7 of the original Defence, namely that when the article was first published the claimant was the subject of an internal police inquiry and there were grounds which objectively justified such an inquiry, was a meaning which the article was capable of bearing.

12. In July 2013 at a hearing before Tugendhat J, the parties sought a ruling upon the meaning of the article. The ruling [2013] EWHC 2182 (QB) at [25] determined that the 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:
> 4.1 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;
> 4.2 had thereby committed an appalling breach of duty and betrayal of trust;
> 4.3 had thereby also committed a very serious criminal offence"

13. The ruling by Tugendhat J resulted in the defendant considering its position. In a letter to the claimant's solicitors dated 1 October 2013 from the defendant's legal manager it was stated:

> "TNL does not intend to amend its defence and will not be pursuing its defence of justification ….. "

No explanation for the abandonment of the defence was given in the letter, nothing was reported in The Times or on *TimesOnline*.

14. During this hearing Mr Rampton QC, on behalf of the defendant said that by reason of the ruling of Tugendhat J the defence of justification was no longer sustainable. The result of the defendant's late abandonment of their defence is that no remaining defence to the action exists, it is now for the Court to assess damages in respect of the publication of the article on the *TimesOnline* website from 5 September 2007 until about 21 October 2009.

Correspondence between the parties

15. On 20 December 2006 the claimant was informed that he was authorised to return to work in the Extradition Unit, that the investigation had concluded and that there was "no evidence" to support any of the allegations which had been made against him. The claimant was not given a copy of the report of the investigations, he was told of its conclusion. On 22 December 2006 the claimant's solicitor wrote to Alistair Brett, the then Legal Manager of TNL. The letter included the following:

> "As a result of your journalists, our client was off work for about 4 months with work related stress until last August when he was allowed to return to his command and building in the belief and expectation that our client had done nothing wrong, though this was to a specific project and not to his original duties. However as at 20 December our client has been authorised to return to his original duties as the investigation has concluded that there is no evidence to support any allegations of wrong doing on the part of our client, whether as alleged by yourselves or otherwise and he has been totally exonerated. …
> Your response to our letter dated 18 July suggests you have no intention of seeking to resolve this matter. However in view of what is stated above we are prepared to give you a final opportunity to reconsider your position and adhere to our client's demands. If however we do not receive a satisfactory response by 8 January 2007 we shall instruct counsel to settle the proceedings……"

16. By a reply dated 11 January 2007 Alistair Brett responded:

> "I refer to your letter of 22 December 2006 and would respond as follows. First, I am utterly amazed that you state that the police investigation into your client has now "concluded". I was certainly led to understand that the investigation was likely to go on well into this year – with detailed examination of seized computer material from RISC's officers' and unlikely to conclude until the early summer. We do know that your client is only recently returned to the Extradition Squad, but as we understand it, he is on restricted duties and therefore

> not doing his original job as the earlier restrictions have been varied but not lifted. If, contrary to our understanding, the investigation has concluded please may we see the conclusions and any recommendations made or at the very least those parts which are disclosable and relevant to your client's complaints against The Times' article in June last year. ….."

The letter then deals in detail with the refusal of Mr Brett to accept that the original complaint which led to the investigation had emanated from The Times. The letter concluded:

> "… you now try and maintain that the investigation into your client is concluded and that he has been "totally exonerated". Well if this is the case, please may we have a copy of the official form stating that there will be no further action against your client and that he is no longer the subject of an investigation that may lead to criminal or disciplinary charges.
>
> As I have always made clear in on-going investigations of this kind, The Times is always happy to carry a report on the outcome of an investigation but The Times will not prejudge a matter, which should be left to the Directorate Professional Standards. To do otherwise would be entirely wrong and for your client to issue proceedings now when an investigation is still ongoing would again be entirely premature and leave your client exposed to a serious costs order. And, finally, might I add that threats of conducting litigation on a CFA basis cut no ice with this department.
>
> I hope the above makes The Times position clear. … "

The first paragraph of Mr Brett's letter demonstrates that The Times had its own source which it still appeared to be using. In fact, the information relating to the client's restricted duties was wrong, he returned to work in the Extradition Unit on unrestricted duties.

17. The DPS report is dated 2 December 2006. However, it was not until September 2007 that the claimant received formal written notification of the result of the investigation on Form N163A which stated that the claimant had been informed by DCI Gary Crump that no formal disciplinary proceedings would be taken against him. On 4 September 2007 DCI Crump wrote to Mr Gillard, informing him "of the conclusion of the investigation into the matters raised in the letter from your colleague Mr Calvert dated 27 April 2006". The letter stated:

> "…. 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. … An investigative report has been submitted to the IPPC who have

> concluded that the investigation has been completed in a satisfactory manner and that the terms of reference have been met. I am therefore formally notifying you that this investigation is now complete and that the officer implicated in it will not be subject to any further criminal or disciplinary process. The officer will be notified of the result of this investigation immediately….."

18. On 31 May 2007, the claimant's solicitors sent by way of service to Mr Brett, the Claim Form issued on behalf of the claimant in order to preserve his position in respect of the limitation period. In his response Mr Brett asked for a copy of Form 163A and took issue with the suggestion that the original complainant emanated from The Times or The Sunday Times.

19. By early September 2007 both the claimant and TNL had received notification that the investigation into the claimant had been concluded by DPS. The claimant's solicitors wrote to Alistair Brett informing him of the outcome of the investigation. By a letter dated 14 September 2007, Mr Brett replied, the letter began:

> "Thank you for your letters of 5th and 10th September. Last week, we also were notified by the DPS that the investigation into your claimant had now been concluded and there was insufficient evidence to proceed with any criminal prosecution or internal police disciplinary process. There are a number of important witnesses who DCI Crump's team were unable to speak to or locate. Surprisingly, this includes the person referred to in The Times article as "the ISC insider". Once again the DPS has confirmed in recent conversations with Mr Gillard that this person was in their words "the informant", who had approached another part of the DPS earlier in 2006. We will obviously have to approach these and other witnesses if we are unable to resolve this matter in accordance with the proposals set out below. …
>
> Moving on to what I would now call The Times's *Reynolds* obligation to your client and carry a report of the findings of the DPS, I hope that what is now suggested will help resolve the current litigation with your client. As you know, I have always made it clear that "The Times is always happy to carry a report on the outcome of an investigation" (see my letter of 11 January this year). …
>
> We would therefore be very happy to carry a News in Brief item which would along the following lines:-
>
> **DS Gary Flood**
>
> In June last year we reported that anti-corruption detectives were investigating DS Flood of the extradition unit because of allegations that he had made "unauthorised disclosures of information" to ISC a London based security firm in exchange for money. ISC had a number

> of Russian clients who might have been the subject of extradition applications.
>
> The Metropolitan Police's Directorate of Professional Standards has now concluded its investigation of DS Flood and found that there is insufficient evidence to proceed with any criminal prosecution and DS Flood will not be subject to any disciplinary process. …
>
> In addition to this follow-up piece reporting the outcome of the investigation into your client we would on a totally ex gratia basis be prepared to pay your client's reasonable costs to date on a standard basis and without any CFA uplift. …
>
> I hope the above proposals will enable both parties to settle this litigation rapidly now and without further expenditure of time and effort. If we cannot now resolve the litigation, this letter will of course be relied on to buttress our defence of *Reynolds* qualify of privilege…..
>
> If we cannot resolve the litigation sensibly we will obviously have to go back to the confidential source and the complainant to see if they are prepared to release Mr Gillard and The Times from their duties of confidentiality……"

20. By a letter dated 24 September 2007 the claimant's solicitors replied:

> "We write further to your letter dated 14 September. The terms of a settlement set out in it are rejected.
>
> We note that in addition to our letter dated 5 September enclosing form 163A you were notified by the DPS that the investigation into our client had now finished. Police complaints procedure dictates that complainants have to be notified of the outcome of the investigations that occur because of their complaint. You were notified because you were the complainants, as is confirmed by forms 163 and 163A. The DPS does not update journalists on the outcome of internal complaints and would not have informed you of the outcome unless you had instigated the investigation. …..
>
> Whilst we note your offer to report the outcome of the MPS investigation, your proposed wording adds insult to injury. The investigation of our client came about as a result of your allegations, not those of any third party complainant. The investigation did not find "there was <u>insufficient</u> 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.
>
> It has particularly distressed our client that The Times has taken the very serious step of relying upon a defence of justification, a plea

> which it has not resiled from and which it is stridently pursuing; your letter of 14 September makes it clear that you will vigorously pursue third party disclosure relevant to it. Not only has this plea substantially aggravated the distress caused to our client, it has made it imperative that a formal acceptance by The Times that the allegations made by it were untrue be published. Accordingly, we do not consider the wording of your proposed apology to be acceptable; in fact we consider it to be positively unhelpful.
>
> Our client would be happy to settle these proceedings, but to do so he will require proper and full vindication and thus needs a proper apology published with reasonable prominence, the payment of all his costs and payment of suitable damages ….."

A draft of the apology was attached to the letter.

21. The reply from Mr Brett is dated 28 September 2007:

> "I am sorry that my letter of 14 September has elicited nothing more than an outright rejection of what was meant to be a positive move to try and resolve the differences between your client and Times Newspapers Limited. …."

Mr Brett reiterated the terms of the notice which were proposed and said that he would be "perfectly happy to consider any changes you would like to make to more acceptable to your client". He again took issue with a suggestion that The Times or one of its employees was the original complainant and continued:

> "… I therefore come back to my original offer of a follow-up report and a payment of your client's reasonable legal costs to date on an ex gratia basis and in an attempt to resolve this matter before further costs are incurred. If you really do not want a follow-up report to appear in the paper, you only have to say. But please be under no illusion that your client's counsel. Bennett cannot then in any way hold it against Times Newspapers 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 a *Reynolds* qualified privileged defence.
>
> Finally, if your client wants to take out £115,500 worth of ATE insurance that is his business. Given his knowledge of horses he will I am sure know more about gambling than me. In any event threats of ATE insurance do not frighten me in the slightest as it is exactly what happened in the Miller case with Associated and Associated won that case and the Police Federation lost a stack of money. …"

22. In their response the claimant's solicitors noted:

> "You state that you are happy to consider any changes to the proposed follow up report. We have made our suggested changes set out in our letter dated 24 September. We assume they have been rejected …"

23. In his reply dated 2 October 2007, Mr Brett once again took issue with the identity of the original complainant and then wrote:

> "…. As regards the report of the outcome of the investigation into your client, which might appear in The Times, what I suggested in my last two letters is light years away from what you wanted in your letter of 24 September which is headed "Apology" and goes on to assert there was no basis or truth in the article which appeared in The Times. Indeed what you wanted published and is attached to your letter of 24 September is nothing more than an admission of liability and states at the end that we have paid your client "legal costs and suitable compensation". With the greatest respect that is manifestly unacceptable when as you know we have mounted clear *Reynolds* qualified privilege defence and made it clear that insofar as the article meant that your client was the subject of "an internal police investigation" and "there were grounds which supported that police investigation", the article was true in substance and in fact. …
>
> Can I ask once again, "do you want us to carry a report on the outcome of the investigation into your client along the lines of what I have sent you or not? …."

Mr Brett then deals with allegations relating to Boris Berezovsky and states:

> "it should be remembered that the unexplained Home Office u-turn in granting Mr Berezovsky political asylum happened in the same period that the corrupt payments were made to "Noah"….."

24. By a letter dated 2 October 2007 the claimant's solicitors responded:

> "We have already answered your questions and see no point in continuing this correspondence. The matter will have to be determined by the court …"

25. The matter did come before the courts. In his ruling upon the *Reynolds* defence, Tugendhat J stated in respect of this correspondence:

> "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.

245 The upshot is that in relation to the website, TNL has not put forward anything to show that the continued website publication, without any updating or correction, met the requirements of responsible journalism as time went by. …

246 Some of the factors that applied in relation to the print publication on 2 June 2006 apply to the website publications since then. But there have been significant developments since then. After September 2007 TNL knew that there had been an investigation which had been completed, and the outcome of it. The status of the information had therefore changed for the worse (*Reynolds* Factor 5). On 5 November 2008 TNL obtained copies of documents from IPCC, as set out above. No evidence adverse to the Claimant's case has come to light from any of the further investigations to which Mr Brett was referring in his letter of 14 September 2007. TNL can no longer state that the website publication includes a fair representation of the Claimant's case (*Reynolds* Factor 8). His case now includes the favourable outcome to the investigation.

247 Nor can TNL rely on any of the public interest factors which they relied on in relation to the print publication (*Reynolds* Factor 2). And Mr Rampton has not advanced any other. As already mentioned, one of the principal points of public interest advanced for the print publication was that Michael Gillard's purpose was to call for an investigation, and, when he learnt that there was one, to ensure that it proceeded in a timely fashion. That purpose had been fulfilled to TNL's knowledge by 14 September 2007, and The Times has not continued to call for an investigation, or otherwise explain the continuing public interest in the website publications.

248 A further factor is that the plea of justification is limited, as set out above. It may or may not succeed. Even if it succeeds, that would be consistent with the Claimant being entirely innocent. The most recent circumstance to have changed since the original print publication is that the Claimant and Mr Hunter have given the evidence I have summarised above, and that they were asked no questions at all. This will be relevant to any relief to be granted, and any further complaint the Claimant may make as to future publication on the website. But it also goes to the care that a responsible publisher should take to verify the information published ... TNL do not challenge the Claimant's evidence, but neither do they act as a responsible publisher would act when faced with such evidence. TNL have been aware of the Claimant's case, and his evidence, prior to trial

> in the usual way, but have shown no response to it, such as would be appropriate to such unchallenged evidence.
>
> 249 I reach the same conclusion in this case as the Court of Appeal reached in *Loutchansky* at para 79. The failure to remove the article from the website, or to attach to the articles published on The Times website a suitable qualification, cannot possibly be described as responsible journalism. It is not in the public interest that there should continue to be recorded on the internet the questions as to the Claimant's honesty which were raised in 2006, and it is not fair to him. It is not in the public interest for the reasons given by Lord Nicholls in *Reynolds* at p201 cited in para 207 above."

26. Tugendhat J's comments at paragraph 249 were adopted by Lord Neuberger MR at [2010] EWCA Civ 804 [78]:

> "On the face of it, that conclusion appears to be not merely one which the judge was entitled to reach: it was plainly right, and indeed appears to be consistent with the decision of this court in *Loutchansky* … If the original publication of the allegations made against DS Flood in the article on the website had been, as the judge thought, responsible journalism, once the Reports conclusions were available, any responsible journalist would appreciate that those allegations required speedy withdrawal or modification. Despite this, nothing was done."

Lord Neuberger MR also adopted what the judge had said at paragraph 244 subject to a qualification which he identified thus [81]:

> "…. The only qualification I would make to that last analysis relates to the last sentence. The fact that the claimant's refusal is unreasonable will, save perhaps in the most unusual circumstances, not be enough to justify the defendant doing nothing if responsible journalism would otherwise require him to retract or modify a website publication if further relevant information comes to light. The essential point is that it is for a defendant to decide on the appropriate course to take. As well as being contrary to the principle, it seems to me to be literally adding insult to injury to enable a defendant to require a claimant, after new evidence has come to light, to agree a form of words to amend a publication which is defamatory of him but against which he cannot protect himself in law, so as to ensure he still cannot protect himself against it in law."

At [82] Lord Neuberger stated that it is "fanciful" to suggest that the claimant's solicitors were adopting an unreasonable attitude in the correspondence to the defendant's proposal. At [83] he identified the "consistent position" as being that what TNL were offering did not go far enough.

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.

29. At the trial in July 2009, the claimant and Mr Hunter gave evidence. Their evidence was unchallenged. In the middle of the trial The Times reported the matter thus:

> "**Times Defends "police cover-up" libel action**
> Scotland Yard try to cover up its failure properly to investigate allegations that a British security company with Russian clients paid a policeman, Sgt Gary Flood for sensitive information, a High Court libel hearing heard. Michael Gillard, a freelance reporter was giving evidence about an article he wrote for *The Times* on June 2, 2006 focusing on Mr Flood and ISC Global Limited, a London-based security firm. Mr Flood's action is against Times Newspaper Limited, which will argue that the article was in the public interest. The hearing continues.
> Full report, timesonline.co.uk

The direction to readers to the website was to the 2006 unqualified article.

30. On 29 September 2009 the judgment of Tugendhat J was sent to the parties and it would appear that it was following receipt of the draft that the Update appeared on the website.

Publication during the period 5 September 2007 to 21 October 2009

31. In his written evidence, Alistair Brett, stated that there were 763 visits to the web page during the relevant period and estimates that the number originating from this jurisdiction to be in the order of 549. The claimant accepts these figures. Mr Brett noted that there was a spike in hits (33) on 16 July 2009 in the middle of the Reynolds trial, which he infers were triggered by legal activity. This is disputed by the claimant who contends that the lawyers and others involved in the litigation had, for a considerable time, their own copies of the articles as well as copies in trial bundles. The claimant relies on the fact that the search was due to the report of the trial in *The Times* published on that day which it describes as unbalanced and unfair. Neither party suggests that for the purpose of this trial it is necessary to identify with exact precision the number of visits to the relevant website. Sufficient for these purposes is the fact that it is no less than 500 and no more than 550. The "vast bulk" of online hits apparently came from readers accessing the website through Google. It is the claimant's case that this indicates that the visits were by persons with a particular interest in the claimant and the subject which is one of the reasons why online publications are particularly damaging. Print publication is said to be ephemeral whereas website publications remain, and are a resource, for people who wish to make checks. Thus, as was noted by Tugendhat J, an old defamatory publication may permanently blight a person's prospects. It is the claimant's case that the tendency of defamatory material of this kind to "percolate" is significant.

The claimant's evidence

32. Witness statements from the claimant and one from his wife were before the court. The claimant also gave evidence.

33. The claimant joined the Police Force in January 1983, initially as a uniformed police constable. In 1988 he was selected to be a detective, in 1990 he passed his Sergeant's examination and in 1993 joined the Regional Crime Squad. He became a detective on the Murder Investigation Team (South) and was promoted to Detective Sergeant. In December 2001 he joined the Extradition Unit.

34. During the course of the claimant's career he received numerous commendations for investigative ability, case preparation and leadership. In the period following his appointment to the Extradition Unit the following commendations were received:

> January 2005 – Director of FBI, Robert Mueller, commendation for international co-operation in locating and arrest of Welsh and Trasher, wanted on FBI most wanted.
>
> January 2007 – Letter of thanks and appreciation from Richard Bradley, head of Home Office Judicial co-operation unit, for "the highly efficient and professional manner" in the planning of four co-ordinated arrests of suspected Rwandan war criminals.

> January 2007 – Thank you letter from Commander Sue Wilkinson in work undertaken involving 90 suspected Albanian murders in the UK. "Good example of how pleased we are to have you back".
>
> June 2007 – Letter of thanks and appreciation from Prosecutor in Italy for planning and arrests of two suspected terrorists.
>
> November 2007 – Letter of commendation from Chief Constable of West Yorkshire in organising and assistance given in the return of Jama to the UK wanted for the murder of a police officer.
>
> August 2008 – Letter of thanks and praise for professionalism in the arrest and subsequent evidence given at the trial of Entwistle, wanted in USA for Murder of his wife and infant child.

35. The claimant was acknowledged as the leading expert in extradition in the Police Service by peers and stakeholders (the Home Office, CPS, court and counsel). He was the author of, or contributed to, MPS responses to legislation, in this country and Europe. He was a member of numerous Home Office working parties into various aspects of the extradition process and was the reference point for the Anti Terrorist Unit for terrorist extradition requests. The claimant's annual appraisals for 2002 until 2009 identified the high regard within which he was held within the MPS. The claimant retired from the MPS on 1 March 2013.

36. The claimant confined his evidence to the damage caused since 5 September 2007. The matter consumed over seven years of his life, the period has been stressful not only for himself but for his wife and the consequent strains on their marriage. They have lived on tenterhooks with the threat of bankruptcy and with the constant aggression from The Times. Taking on such a huge organisation as The Times, which "gives no ground" has left both of them feeling battered and bruised. The Times has "attacked" him throughout with the "double-barrels" of *Reynolds* and justification. The Times has done everything possible to try to discover evidence to support their defences including specific disclosure applications against the MPS and the IPCC.

37. From 5 September 2007 until 21 October 2009 one of the "most respected and influential newspapers" in the country made incredibly serious allegations against the claimant to the effect there were strong grounds to believe that he was corrupt. The newspaper stood by the allegations that he most probably accepted bribes in exchange for selling confidential information which he learned from his job in the Extradition Unit and that by so doing he had committed a very serious criminal offence.

38. As to the Update, whilst The Times published a summary of the conclusions of DCI Crump, it did not accept them, it continued to assert that the article was true. The article on the website does not even record now that The Times has acknowledged (at least in private) that the justification defence will not be pursued at trial.

39. A police officer was what the claimant had wanted to be. It had always been an important part of his life, the position and respect which he built up in the Extradition Unit were particularly important to him, he felt that he had really achieved something in his life. Being a police officer and respected as such is a really important part of his identity.

40. Having spent years building a reputation as an expert in extradition, the claimant believed that his work and reputation were wiped out by the allegations in The Times. He was terrified that after years of building trust and relationships with stakeholders, they would believe the allegations and those relationships would be destroyed. He has since felt the need to defend himself in conversations with other detectives, to explain that he was completely exonerated and that he was suing The Times. When meeting people he is unsure whether they have read the article or not, even comments which may have been intended to be light hearted have upset him. By the date of the first trial in July 2009 the claimant's evidence was that he was paranoid and untrusting and tending to avoid people. The result of The Times's action has had a long term detrimental effect on his health and marred his enjoyment of much of his life. He has been distressed to see that his wife has been upset, he feels responsible for this.

41. The DPS investigation was extremely thorough, his home was searched, items including his computer were taken away and examined, he granted access to all of his financial records. The claimant believed that once the investigation was completed he would be exonerated. He had hoped that The Times would accept that the allegations which it had made were untrue. Even if it did not do so, the claimant believed The Times would publish the outcome of the DPS investigation. The apology offered by his solicitors was reasonably worded. The claimant was shocked by The Times' refusal to publish the result of the DPS investigation.

42. The claimant felt that The Times was trying to use his exoneration against him as a "bargaining chip". The manner in which The Times continued to litigate after September 2007 was "particularly nasty". The Times set about trying to find justification (evidence) from just about anywhere it could. Particularly distressing was the pursuit by The Times for information relating to the IVF treatment. The claimant found it extremely distressing to have to go over the facts concerning the IVF treatment including the fact of a miscarriage and it seemed to him there was no point other than to make his life as difficult as possible. In a letter dated 29 November 2007 Mr Brett demanded disclosure of all the claimant's financial records and also suggested that he was a drunk and a gambler. The claimant said he does gamble, it is not illegal and is not a problem for him, he has never had gambling debts. He rarely drinks alcohol.

43. The Times made applications against the MPS and the IPCC for documents relevant to the investigation. These documents were received by The Times on 5 November 2008, none supported its case on justification. The Times was given a copy of DCI Crump's Report. Even in possession of these documents, The Times did not update the article. It was awful to see such a powerful organisation behaving so

hypocritically, there was nothing the claimant could do but press on with his defamation claim. One particularly difficult matter arising from the conduct of The Times was that the claimant's exoneration by the DPS was seriously undermined by the continued publication of the article after 5 September 2007. Anyone who knew that the claimant was saying that he had been exonerated would have wondered why The Times was still publishing the article in its original form and why it did not report the fact of exoneration. Most people who read the article would not have known that he had been exonerated by the DPS investigation

44. The claimant identified a number of instances which have occurred as a result of the article being published. Some pre-date 5 September 2007 and were in a different jurisdiction, however, they demonstrate how people he has met have looked at the website article. After 5 September 2007 the claimant was anxious that people were continuing to do this both before and after meeting him. In January 2006 the claimant arrested Neil Entwistle for the murder of his wife and child on behalf of the USA. It was a case which received a great deal of media interest. In November 2007 the lead investigator informed the claimant that the Assistant District Attorney wanted confirmation from a senior officer that the claimant had been exonerated, that he was telling the truth about the allegations against him having been false. The investigator noted that the article was still online which is where he had read it. The senior officer wrote to the Assistant District Attorney clarifying that what the claimant said was correct and that he had been exonerated. The claimant gave evidence at the trial in America and prior to it learnt that the prosecution had disclosed to the defence the allegations that had been made against him.

45. In August 2008 the claimant learnt that one of the organisers of the FBI Charity Golf Tournament had read the article online and as a result he did not attend the tournament in 2009. He recently returned to it in 2013 having waited until his retirement before reattending. In November 2008, when the claimant and his wife were staying in Vermont for a short break, a conversation with the owner of the property at which they were staying led to the owner Googling the claimant as a result of which he remarked to the claimant that he could see why he needed a relaxing break.

46. In April 2009 the claimant was moved from the Extradition Unit to an attachment at Charing Cross Police Station, undertaking a project to look into wanted suspects and how to find them. It was the claimant's belief that he was seen to have been moved "under a cloud". Three police officers who had been asked to work for him subsequently told the claimant that they had searched the internet and read the article. The claimant described that as unpleasant and undermining. The claimant states that he has no doubt that a large number of police officers in the MPS and others who know him will have read the article since September 2007 and that it will remain a hindrance to his reputation and career. In April 2009 he had to inform his line manager and senior officers of the continuing defamation proceedings, these being the officers who would decide his suitability for promotion to inspector.

Oral evidence

47. The claimant was told in December 2006 that he had been exonerated by the police investigation and the IPCC. He thought this came from DCI Haynes when he returned to work in the Extradition Unit. He believed he was told by DCI Haynes that there was no evidence against him. He thought DCI Haynes genuinely welcomed him back. The claimant was pleased to be back at work and overjoyed to return to the Extradition Unit. In April 2009 he was moved away from the Unit, he was told that the Police Authority wanted to take him away from the high pressure of extradition work at a time when he was involved in this litigation. In the police, as in life, there is a culture of "no smoke without fire" which continues to exist.

48. The claimant described The Times as demonstrating "arrogance" in disputing the findings of the investigation. He had been worn down and felt "bullied", in particular by the conduct of Mr Brett as demonstrated in the correspondence. The "attacks" by Alistair Brett he described as "vicious". The claimant read the first paragraph of Mr Brett's letter of 14 September 2007 as indicating that Mr Brett was not happy with the police investigation and that The Times would delve and make enquiries to find further evidence. This affected the way in which the claimant regarded The Times' offer of a follow-up notice. The refusal by The Times to publish the update sought by his solicitors accompanied by what he described as threats if he did not settle were, in the mind of the claimant, clearly directed to an intent on the part of The Times to try and undermine the police investigation. His fear was that the investigation by The Times following his exoneration by the police might trigger another police investigation

49. The claimant found the investigation pursued by Alistair Brett to be worse than the police investigation because he knew there was no truth in the allegation but he did not come out of it as quickly as he could. The matter overtook his own and his wife's life. It is now over six years since he was exonerated and he is still waiting for an apology from The Times. The Update placed in October 2009 did not include an acceptance by The Times that there was no truth in the allegation. The Update did not say that The Times was agreeing with the result of the police investigation. The police had completely exonerated the claimant but he had nowhere to direct people to see that he had been exonerated.

50. In October 2007 the claimant and his wife applied for adoption which had been delayed until he had been formally exonerated. The process which took a further two years was successful. At no time during that process had he received any hint from anyone within the Social Services that their minds had been affected by The Times article.

Evidence of Jennifer Flood

51. Mrs Flood identified the change in her husband's personality since the article was first published, he has become paranoid, distrustful of people, easily stressed and has lost his outgoing nature. The claimant was extremely upset when The Times started prying into the IVF treatment as he felt it was a private matter. He was very upset by

the way in which he was treated by the lawyer who worked for The Times, the claimant became particularly angry when he received letters from the lawyer because they often made false accusations against him and he felt that the lawyer was trying to intimidate him. As to the adoption process, Mrs Flood states that both she and the claimant were in constant fear that the adoption personnel would discover details of the case and would not allow them to continue with the process. Mrs Flood describes her husband as being "absolutely desperate for public recognition of the fact that he is not guilty of the charge that The Times made against him". The claimant was devastated when The Times did not report what DCI Crump had found, namely, that the allegations against Gary were untrue.

Damages

52. The authority of *Cairns v Modi* [2013] 1 WLR 1015 CA identifies the following points of law and practice:

The three interlocking purposes of an award of damages in defamation cases are to: compensate for the damage to the claimant's reputation; vindicate his good name; take account of the distress, hurt and humiliation caused to him;

The conventional ceiling for general damages is now of the order of £275,000. This does not take account of the uplift consequential on the Jackson reforms, (which is inapplicable in this case);

Conduct or aggravation on the part of the defendant is reflected in compensatory damages where it causes additional hurt to the claimant's feelings, or, in the context of vindication, injury to his reputation, over and above that caused by the publication itself;

Vindication involves not merely compensation for past or future losses, but "in case the libel, driven underground, emerges from its lurking place at some future date, [the claimant] must be able to point to a sum awarded by [the Court] sufficient to convince a bystander of the baselessness of the charge";

There is no general principle that there is a reduced need for vindication once a reasoned judgment has been given at the conclusion of a trial. It is unlikely that readers of a web article will download the judgment and read it with close attention. The general public is concerned to discover the "headline" result;

The Judge will normally arrive at a global figure by way of award, rather than splitting the award into conventional figures for injury to feelings.

The claimant's case

53. Responsible public journalism can be conducted with consideration for the subject. The claimant was an experienced police officer of impeccable, indeed outstanding, record and service. He had the misfortune to be caught up in the scheming of an ISC insider who had an axe to grind who spoke anonymously both to the journalists and to

the police. The evidence at the *Reynolds* trial suggested that the person was Mr Hunter's former partner at ISC.

54. During the course of the police investigation the claimant was inevitably going to be under stress but throughout he had the hope and confidence that the police inquiry would clear him reasonably quickly. What he could not have expected was TNL's attitude when he was cleared. From that point it became a fight for his reputation and vindication. TNL refused to cease publishing the article complained of on the website and did not report the fact that the claimant was cleared by the police investigation. It did not even qualify the article with any hint that the investigation was over. The update that it offered was conditional on the claimant settling on TNL's terms backed up by what are described as threats undermining the conclusion of the police inquiry.

55. TNL persisted in a defence of justification which made allegations of the most serious kind against a police officer. For this reason the distress, hurt, stress and anxiety caused to the claimant by the publication and by TNL's conduct in the period after the cut off point can fairly be said to be, if anything, greater than that for the period before the cut off point notwithstanding the much larger numerical distribution of the article complained of in the earlier period. The injury to reputation was particularly serious because readers of *TimesOnline* were misled as to the status of the inquiry and led to suppose that there was still strong grounds to believe that the claimant was a corrupt officer and a criminal. The facts were deliberately withheld from readers. TNL was undermining the exoneration of the claimant in the inquiry and as the correspondence and the Re-Re-Amended Defence demonstrates, doing so with its eyes open. Hence the need for vindication is significantly greater in respect of the period after the cut off date.

56. Persistence in a plea of justification can increase damages, *Rantzen v Mirror Group Newspapers Ltd* [1994] QB 670 Neill LJ at 683:

> "… It is easy to see that a contest which involves justification or fair comment may increase the injury and add greatly to the anxiety caused by the proceedings which the plaintiff has had to bring to clear his name."

57. In this case the defence of justification went beyond merely supporting a meaning to the effect that there had been, during the course of the police investigation, objectively reasonable grounds for the police to investigate. TNL felt no scruple about holding over the claimant the threat of further investigations to undermine the conclusion of the police investigation in order to push the claimant into settling on TNL's term. There has been no attempt to express any regret for the anxiety and stress which the claimant has suffered as a result of this matter hanging over him for some years.

Vindication

58. The claimant is entitled to be vindicated to the extent that the defence of privilege fails. It is in the nature of a privileged publication that a claimant who may be wholly innocent is deprived of any means of vindicating his reputation. Described by Mr Price QC on behalf of the claimant as "the price a claimant pays in cases where the court judges that the public interest in publication must prevail" it is accepted that damages will be awarded only for the effects of the unprivileged publication. In *Underhill v Corser* [2010] EQHC 1195 (QB) Tugendhat J held that the bulk of the distribution of a society's magazine (443 copies) seriously defamatory of the claimant was privileged but the publication to about 13 readers was not. On the basis of the judge's findings as to the minimal extent of unprivileged publication, the defendant submitted that continuance of the action was an abuse of process but counsel for the claimant contended that as the aim of the proceedings was vindication that could be achieved in a claim based on publication to 13 publishees. The judge held that the allegation complained of was so serious that it was a proportionate step for the claimant to proceed with the claimant in respect of 13 or so readers

59. There is a particular need for vindication arising from TNL's persistence in the charge and its failure to inform its readers of the outcome of the investigation after the claimant had achieved what should have been vindication at the conclusion of the police inquiry. TNL has never acknowledged that the claimant is innocent. As such a "proper" sum by way of damages is required to vindicate the claimant. It is accepted that the damages must be proportionate to the publication which gives rise to the wrong and the claim.

60. Further, the claimant contends that it is necessary to have regard to the proper and necessary deterrent effect of a substantial award of compensatory damages on newspapers which "ride roughshod over the rights of other citizens". *Gleaner Co Ltd v Abrahams* [2004] 1AC 628 per Lord Hoffmann at [53]. TNL succeeded in defending publication of the article complained of up to 5 September 2007 by establishing that reporting the police investigation into the claimant and naming him was public interest journalism. If there was a public interest in reporting the investigation there must be a public interest in reporting its result and it is elementary fairness to the subject to do so. The meaning which TNL sought to justify related only to the existence of grounds objectively justifying the investigation. Continuing to publish the story without qualification is not responsible journalism, it is not in the public interest and it is unfair to the claimant.

The defendant's case

61. The failure by the defendant in allowing the original article to remain unamended on its website was the result of a misjudgement engendered, at least in part, by the attitude of the claimant to the defendant's proposal that the article should be amended. The correspondence in September/October 2007 demonstrates that the defendant was willing to publish an update. It did not do so because it reasonably understood that the claimant did not want one. The defendant initially saw the outcome of DCI Crump's investigation in September 2007 as a peg on which to attempt to settle the proceedings, the correspondence demonstrates that the discussion evolved, and, by 2

October 2007, the defendant was offering to publish an update outside the ambit of any settlement negotiations. The claimant's solicitors told the defendant in clear terms that he did not want an update. Moreover, at this stage of the proceedings the defendant had a good defence of *Reynolds* privilege. As to the Court of Appeal's criticism of the position the defendant took in this correspondence, that has to be understood in the context of its decision that the *Reynolds* defence failed for this period. The mitigation of damages is very different from the principles governing responsible journalism which was the issue before the Court of Appeal.

62. There was no obligation on the part of TNL to publish an apology. If a defendant advances the defence of *Reynolds* privilege, seeks and obtains the response of the claimant to the allegations then there is an obligation to publish that response. The claimant's full denial was published in the article, there are no grounds upon which it can be said the lack of apology aggravates damages.

63. The defendant's failure to publish an update has left it exposed to the claim by the claimant. That is a claim for such harm to the claimant's reputation and feelings as the court may think additional but limited publication is likely to have caused. The defendant's failure to publish an update is not, and cannot be, an aggravating feature justifying any additional or greater award of damages, unless there is a feature of this failure which aggravates the claimant's feelings.

64. Advancing and persisting in a plea of justification is not, of itself aggravating conduct, even if the defence fails or was found to be weak. *Oriental Daily Publisher Ltd v Ming Pao Holdings Ltd* [2012] HKCFA 59 [2013] EMLR 7 at [132]. Compensatory damages can take into account matters which could amount to aggravation, for example, the defendant's conduct of the action *John v MGN* ante at 607H. Whether categorised as aggravation or compensation for injury to feelings, the type of behaviour for which a claimant can recover damages is any "high-handed, oppressive or contumelious behaviour which increased the mental pain and suffering caused by the defamation"; *McCarey v Associated Newspapers Ltd* in (No.2) [1965] 2 QB 86 per Pearson LJ at 104G. It is denied that the defendant exhibited behaviour which could be described in these terms.

65. It is accepted that the correspondence emanating from Mr Brett was aggressive and unpleasant however, what Mr Brett was doing was not improper. He was trying, legitimately, to find information to support a defence. The information sought was the material which an investigating officer would want to see before reaching a conclusion. The pleading of justification was in the lowest of the three categories identified in *Chase v Newsgroup Newspapers Limited* [2003] ELMR 1 and accepted as such in 2008 by Eady J. It was restricted to an assertion that the claimant's conduct was being investigated by the police and that there were grounds which warranted that investigation. The defendant has never contended that the claimant was guilty of corruption or any wrongdoing. The limited plea of justification could not have permitted an "onslaught", in court or on paper, upon the claimant's credibility directed to the issue of his guilt. The amendments to the Defence were made without

objection and do no more than set out what the investigating officer would have looked at in order to see if the claimant had received payments.

66. The size of the award of damages must reflect the circumstances and have regard to the constraints of necessity and proportionality. *Rantzen v Mirror Group Newspapers Ltd* [1994] QB 670, *John v MGN Ltd* [1997] QB 586, *Cairns v Modi* ante. This means that the court must take account of the limited nature of the claim, namely damages for the harm to the claimant's reputation arising only from readers within this jurisdiction reading the article on the website between 5 September 2007 and about 21 October 2009 and for any hurt arising from those publications and any aggravation of that hurt brought about by the conduct by the defendant.

The claimant's hurt and distress

67. It is accepted that the claimant suffered anxiety and hurt feelings. These are a natural consequence of a defamatory publication and do not aggravate an award of damages. Described as noteworthy is the fact that in his evidence for the trial before Tugendhat J in July 2009 the claimant in his witness statement does not mention any additional distress caused by the lack of an update. He gave extensive evidence of the distress he suffered in April 2006 and in the immediate aftermath of the publication of the article. Further much of the distress and hurt suffered by the claimant was caused not by the publication of the June 2006 article but by the police investigation into him that was initiated before that date.

Damage to the claimant's reputation

68. Principal factors said to affect the reputational damage of any publication are the extent of its publication, the identity of the publishees and the gravity of the allegation. It is accepted that the meaning found by Tugendhat J is "clearly serious" however the extent of the publication is said to be very limited and no publishee of any importance has been identified by the claimant. There is no good evidence to suggest that those whose opinion of the claimant mattered in the period 2007 to 2009 was affected. That would be the opinion of friends, colleagues, in the police, the CPS and the Home Office. As to the number of users of the website, as a matter of general knowledge a hit does not equate to a unique user and the Court is invited to accept that both parties' lawyers would have been among the website traffic. By September 2007 the article was over a year old and is likely to have receded from the first results page of a search engine. This publication was at the opposite end of the scale from social media libels where the risk is that the allegation will go viral. The claimant's own evidence demonstrates that during the relevant period he enjoyed a good reputation in the eyes of his superiors in the MPS whose opinions of his professional standing must be the most important. He did not suffer any ongoing harm in respect of relations with other professionals outside the police.

Vindication

69. It is accepted that the claimant is entitled to vindication. Reliance is placed upon the judgments handed down in the course of litigating the *Reynolds* defence which state

in terms that the claimant has been exonerated. The meaning the defendant sought to defend as permitted by Eady J on 8 May 2008 was only that there were grounds to investigate him around the time of the original publication. In *Cairns v Modi* ante at [32] the Court of Appeal observed that:

> "There will be occasions when the judgment will provide sufficient vindication, but whether it does so is always a fact-specific question. The judge will be well placed to assess whether the terms of the judgment do indeed provide sufficient vindication in the overall context of the case."

Deterrence

70. There is nothing in this case which requires a deterrent award which could only be construed as punishment.

Conclusion

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.

Award of damages

83. The award of damages, for the period 5 September 2007 to 21 October 2009, to reflect the distress, anxiety and suffering of the claimant, the damage to his reputation and the need for proper vindication is £45,000. To that figure I have awarded a further £15,000 to represent the aggravation of those damages by reason of the conduct of the defendant and to serve as a deterrent to those who embark upon public interest journalism but thereafter refuse to publish material which in whole, or in part, exculpates the subject of the investigation. Accordingly, the claimant's award of damages is £60,000.