Neutral Citation Number: [2021] EWCA Civ 49

Case No: A2/2019/2059

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISON
MRS JUSTICE CHEEMA-GRUBB
CO/5120/2018

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/01/2021

Before :

LORD JUSTICE DAVIS
LORD JUSTICE FLAUX
and
LADY JUSTICE ELISABETH LAING

- -

Between :

JONATHAN REES	**Appellant**
- and -	
COMMISSIONER OF POLICE OF THE METROPOLIS	**Respondent /Cross-Appellant**

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- -

Mr David Lemer (instructed by **Freedman Alexander LLP**) for the **Appellant**
Mr Jason Beer QC and **Ms Charlotte Ventham** (instructed by **The Directorate of Legal Services**) for the **Respondent**

Hearing date : 10th December 2020

- -

Approved Judgment

LORD JUSTICE DAVIS :

Introduction

1. This is an appeal by the claimant, Jonathan Rees, against an assessment of damages (including aggravated and exemplary damages) in a total sum of £155,000. The claim for damages was based on the claimant's incarceration in prison in circumstances of (as was subsequently established) malicious prosecution and misfeasance in public office.

2. There are two grounds of appeal, for which leave was given by Males LJ on 16 December 2019. The first is that the award was too low, in particular with regard to the element reflecting loss of liberty. The second is that the judge erred in failing to award interest on the basic and aggravated damages. The respondent cross-appeals, by leave given by this court at the hearing, asserting that an award of exemplary damages was not justified or, if it was, that the award made in that respect by the judge was too high.

3. The appellant was represented before us by Mr David Lemer. The respondent was represented before us by Mr Jason Beer QC and Ms Charlotte Ventham. The arguments, both written and oral, were excellent.

Background facts

4. The background facts are very striking. They are conveniently summarised by the judge, Cheema-Grubb J, at the outset of her judgment handed down on 31 July 2019, [2019] EWHC 2339 (QB), and are as follows. At that stage, I might add, there were three claimants: the appellant, Glenn Vian and Garry Vian.

5. In summary, in April 2008 the claimants had been charged with murder following the investigation of an alleged contract killing, of considerable notoriety, in a pub car park in South London on 10 March 1987. The high-profile case against them reached the Central Criminal Court. However, in February 2010 Maddison J held that the evidence of a key prosecution witness, Gary Eaton, should be excluded. The reason was that a high-ranking police officer, Detective Chief Superintendent David Cook, had compromised the integrity of the evidence which Eaton proposed to give by initiating or allowing extensive contact with the witness in contravention of express agreements and accepted procedures. During this period Eaton's evidence, initially innocuous, expanded appreciably to include presence at the scene of the killing shortly after its commission, together with knowledge of the claimants in the vicinity. Despite that ruling, at first the Crown indicated that the trial was to proceed on other evidence; but in March 2011 the judge was told that the prosecution was to be discontinued. No evidence was offered and each of the claimants obtained not guilty verdicts.

6. They subsequently issued claims in the High Court for damages. After a preliminary trial on the issue of liability Mitting J dismissed the action: *Rees and Others v Commissioner of Police for the Metropolis* [2017] EWHC 273 (QB). His detailed factual conclusions, themselves to a degree predicated on the findings and decision of Maddison J, were on appeal in that case adopted by the Court of Appeal. The central points on the appeal were whether the limited but decisive conclusions in favour of the defendant could be sustained. First, had Mitting J been right to reject the claim on the basis that, although it had been established that DCS Cook's actions regarding Eaton had led to the claimants being prosecuted, the defendant was not liable, vicariously, to

compensate them for the tort of malicious prosecution because DCS Cook was not a prosecutor, had not been malicious and there was reasonable and probable cause to prosecute. Secondly, in respect of misfeasance in public office, although DCS Cook was a public officer exercising a public power and he had deliberately perverted the course of justice realising that it would probably cause injury to the claimants, had Mitting J been right to hold that the defendant was not liable to compensate the claimants because they would have been prosecuted by the Crown Prosecution Service on other evidence.

7. The claimants' appeal succeeded: [2018] EWCA Civ 1587. DCS Cook was the most senior police officer in the case and he presented the evidence to the Crown Prosecution Service for a decision on sufficiency of evidence for charge. He did so knowing that he had suborned the evidence of Eaton and falsely presented him as an eye-witness to the murder scene. On analysis, the remaining evidence was weak and circumstantial and it had been rejected previously as insufficient to provide a realistic prospect of conviction; so it was inconceivable that charges would have been brought without DCS Cook's deliberate manipulation. The independent prosecutor's decision was overborne or perverted by the police officer's actions: DCS Cook was a de facto prosecutor. The Court of Appeal held that he had been malicious, within the meaning of the relevant authorities, because he could not have believed that the case tainted with the evidence of Eaton was fit to go to a jury; and such dishonest pursuit of the case, whether or not DCS Cook himself believed the claimants to be guilty, amounted to deliberately perverting the course of justice: and that was sufficient malice.

8. As to misfeasance in public office, Mitting J had relied on the initial continuation of the case against the claimants after Maddison J had excluded Eaton's evidence as the basis for concluding that DCS Cook's actions did not cause loss. There was no sufficient evidence before the judge to show whether, in fact, charges would have been brought without Eaton's contribution to the case. The Court of Appeal held, on the balance of probabilities, that a prosecution would not have been brought had it been known in April 2008 that Eaton's evidence would not have been admissible at trial because of the actions of the Senior Investigating Officer in the case, who had perverted the interests of justice in order to obtain it. Accordingly, there had been loss to each claimant.

9. I note that the murder itself had been committed as long ago as 10 March 1987 and that the appellant was initially arrested shortly thereafter, and subsequently re-arrested, but was released without charge. He was, however, again arrested on suspicion of murder on 21 April 2008 and was detained until charged on 23 April 2008. He was remanded in custody until 3 March 2010, when he was released from custody on restrictive bail conditions. On 11 March 2011, in the circumstances outlined above, the prosecution offered no evidence against the appellant and the other two claimants, who had also been charged with the murder.

10. The proceedings for malicious prosecution and misfeasance in public office were commenced on 10 March 2014. It was those proceedings, as I have said, which resulted in the decision on liability of Mitting J, which was reversed by the Court of Appeal on 18 July 2018. This then led to the hearing on the quantum of damages to be awarded to the claimants.

11. It was accepted before Cheema-Grubb J that the arrest on 21 April 2008 and detention prior to charge were lawful. Thereafter the period of detention was agreed to be 682

days (between 23 April 2008 and 3 March 2010). For part of that time – 5 months – the appellant had been detained as a Category A prisoner. It may here also be noted that the appellant, as had the other two claimants, had been in custody before. He himself had previously received a sentence of seven years imprisonment for conspiring to pervert the course of justice.

12. The three claimants had sought damages, by way of basic award, for distress, humiliation and anxiety and also for loss of liberty. The claimants further sought aggravated and exemplary damages. On behalf of the appellant and the second claimant, the figure proposed to the judge for distress etc. was in the range of £50,000 - £60,000 and for loss of liberty of £100,000 to £150,000. Aggravated damages in the range of £80,000 - £100,000 and exemplary damages in the range of £70,000 - £100,000 were also sought. Differing figures were in some respects propounded for the third claimant.

Legal principles

13. The relevant legal principles for these purposes are reasonably well established. The task for the judge was to apply those principles to the circumstances of this particular case.

14. The leading authority on damages in the case of false imprisonment and malicious prosecution remains that of *Thompson and Hsu v Commissioner of Police of the Metropolis* [1998] QB 498.

15. The Court of Appeal there gave detailed guidance as to how juries are to be instructed in such cases. Among the many important points there made, the following in particular can, for present purposes, be noted:

    (1) An analogy with awards in personal injury claims may properly be made: p512 A-D.

    (2) An award of exemplary damages may be more difficult to justify where the person responsible for meeting an award of damages (the defendant) is not the wrongdoer but a vicariously liable "employer": p512 H.

    (3) A risk of double-counting, particularly in cases of awards of both aggravated and exemplary damages, should be guarded against: p. 513 A.

    (4) In cases of wrongful deprivation of liberty, damages are to be awarded on a progressively reducing scale, because, among other things, a claimant is entitled to have a higher rate of compensation for the initial shock of being arrested and detained. A guideline of £3,000 for initial wrongful detention lasting 24 hours is proposed: with a progressively reducing scale for subsequent days: p.515 E-F.

    (5) There can be no precise arithmetical relationship between basic damages and aggravated damages, as the circumstances will vary from case to case; and the total figure should not exceed what is considered fair compensation for the injury suffered: p.516 E-G

(6) Where, exceptionally, substantial exemplary damages are to be awarded in malicious prosecution cases then the conduct must be "particularly deserving of condemnation"; and "the figure of £50,000 should be regarded as the absolute maximum, involving directly officers of at least the rank of superintendent": p.517 C-D.

(7) An adjustment for inflation in future cases would, however, be appropriate for the recommended figures: p.517 E.

16. Further, it is well-established that there is no tariff, as such, in such cases. The award for false imprisonment should be assessed globally. As was said by Lord Woolf MR in *R v Governor of Brockhill Prison, ex parte Evans (No. 2)* [1999] QB 1043 at p. 1060G (and reflecting what was said in this respect in *Thompson*):

> "No two cases are the same. The shorter the period the larger can be the pro rata rate. The longer the period the lower the pro rata rate…."

17. I do not consider that any further elaboration on the authorities setting out the applicable principles on the assessment of damages in such cases is needed for present purposes.

The judge's assessment

18. The judge appraised the contentions advanced conspicuously thoroughly and carefully.

19. Among other things, she included in her award an element for distress and reputational loss. In this respect, she noted that the appellant (as had the other two claimants) had previously been in custody on other matters. But in the present case they had, over a lengthy period, been facing a charge of murder, in a case which had attracted a degree of notoriety. On loss of liberty, she also took account of the fact that the appellant had been kept in Category A conditions for five months and, when released, had then been subjected to restrictive bail conditions.

20. The judge had been presented with a significant number of cases advanced as comparator cases. These, among others, included awards in personal injury cases and in unlawful immigration detention cases. Most prominently advanced, perhaps, on behalf of the claimants was the decision in *AXD v The Home Office* [2016] EWHC 1617 (QB). In that case, the claimant, as it was found, had been wrongfully detained in immigration detention between 1 April 2013 and 14 May 2014. Jay J reviewed numerous authorities advanced to him as suggested comparators (and some of which were also referred to in argument before the judge and before us). In the circumstances of that particular case, Jay J indicated that a global basic award of £80,000 was appropriate.

21. Weighing the factors, the judge in the present case concluded that, so far as the appellant was concerned, the basic award should be £87,000, comprising £27,000 for distress etc. arising from the charge and £60,000 for loss of liberty. As to aggravated damages, given all the circumstances the judge held, after reviewing matters, that an award under this head was "plainly merited". She awarded them in the sum of £18,000.

22. After further reviewing aspects of the case, the judge also held that adequate punishment and public censure required a separate award of exemplary damages (which, of course, are not designed to be compensatory, as such) to "mark the court's denunciation of DCS Cook's unconstitutional behaviour as an agent of the state". She said that a "particularly gross breach of trust had been involved". She went on to refer to the "egregious and shameful behaviour" of a senior police officer, DCS Cook, and to denounce reliance on what in effect had been his "ends justify the means" approach in the police investigation. Applying thereafter the approach set out in *Riches v News Group Newspapers Ltd* [1986] QB 256, she reached a global figure by way of exemplary damages of £150,000, to be divided equally between the three claimants.

23. Thus it was that the judge made an overall award in favour of the appellant of £155,000. In doing so, she had described the quantum of the basic awards which had been proposed on behalf of the claimants as "ambitious". The judge also ordered interest on each award from the date of her judgment. This award was therefore made up as to £27,000 for distress etc; £60,000 for loss of liberty; £18,000 for aggravated damages; and £50,000 for exemplary damages. The second claimant received the same award. The third claimant, who in any event for much of the time had been in prison for another offence, received £9,000 for loss of liberty and a total award of £107,000. Those two claimants have not sought to appeal.

24. In reaching her conclusion on the individual elements and the total award the judge had, I note, among other things said this:

> "In setting individual components I bear in mind the total award I make in favour of each claimant and strive to avoid double-counting. My attention has been directed to many cases which are said by one party or another, to provide some assistance to me in my task in an unusual case. I refer to some of them but even those which provide guidance cannot be applied mechanistically given that the task I am engaged in is an assessment which, although broadly expressed, must be bespoke for this unusual case."

Arguments and disposal

25. It is ordinarily very difficult in this sort of case to displace an evaluative conclusion of a judge as to the proper quantum of damages, following a thorough review of the evidence. Ordinarily it is necessary to show, on appeal, that a material factor has been wrongly left out of account, or that an immaterial factor has been wrongly taken into account, or that there has been some error of law or principle, or that the overall award is beyond the range reasonably open to the judge. But here, it is said, the judge had indeed erred.

Ground 1

26. In support of his first ground – that the award for loss of liberty was significantly too low – Mr Lemer briefly submitted that the judge, having factored in the approach indicated by *Thompson* which included the proposition that suggested figures should be cross-checked against personal injury awards, erred in then repeating that approach in her final overall appraisal. I can see no objection to that at all, however. If there is a

useful cross-check to be made then it can do no harm to double-check. In any event, it was not suggested to us that the judge's award was unreasonably out of line with personal injury awards. Mr Lemer also briefly submitted that the judge had attached too much weight to the fact that the claimant had been lawfully detained for two days before being charged and (ex hypothesi) unlawfully detained thereafter. But that was a factor properly taken into account by the judge; and there is nothing to show that the judge gave excessive weight to this point so as unreasonably to distort the award.

27. Mr Lemer's real point, however, was to criticise the judge's approach to the comparator cases involving unlawful immigration detention. He complained that the judge failed to give them any, or at all events any due, weight.

28. I do not agree. The judge never rejected such cases as irrelevant. What she did, however, was to indicate that she accepted the submission of leading counsel then appearing for the respondent that such cases were to be treated with "some caution". The judge considered those cases not to be "ideal comparators". But it is clear that she nevertheless had some regard to them: referring in particular to the facts and award in the *AXD* case.

29. As the judge noted, in such cases the awards tend not to be broken down into constituent parts of distress etc. on the one hand and loss of liberty on the other hand. Further, the context can be very different. Such cases also may involve, amongst other things, the detainee being detained on an open-ended basis, in circumstances of having the particular stress of potentially facing forced return to a country where he fears persecution. These, as it seems to me, are valid considerations in approaching, in a context such as the present, cases of that kind advanced as proposed comparators. I would be inclined to accept Mr Lemer's submission that there are no "separate silos" (in his phrase) between awards of damages in unlawful immigration detention cases and the present kind of case. But it does not follow at all from that that such cases are to be treated without any differentiation; and the judge's note of caution in this respect was, in my opinion, justified.

30. Mr Lemer nevertheless, taking the *AXD* case as his chosen bench-mark comparator case, submitted that the award here was far lower than that awarded to the claimant in the *AXD* case, when one took into account the much longer period of incarceration in prison which the appellant here had undergone.

31. There are, as I see it, quite a few answers to that objection. First, as the authorities make clear, there is a progressively reducing scale as the period of detention goes on. Second, the award in *AXD* was a global award. But in the present case, the basic award was split between distress etc. and loss of liberty (and aggravated damages were then also awarded). Third, the facts in *AXD* were specific to that case: for example, the claimant there was facing the prospect of being returned to a country where he believed he faced torture and persecution; he had been abused and harassed while detained; and so on.

32. I in any event agree with Mr Beer QC for the respondent that taking one single case as the appropriate comparator can be unwise. Besides, and allowing for the many factual differences between the two cases, the total basic award in the present case is not materially out of line with that made in *AXD*; and, when one also has regard to various other cases proffered as comparators to the judge (as to us), I cannot see that the conclusion of the judge on the basic award was outside the range of awards reasonably open to her.

33. That being so, and given that there was no error of law or principle in the way the judge approached the assessment of the basic award, I would conclude that this ground fails.

Ground 2

34. By this ground, the appellant challenges the judge's decision not to award interest on the damages pursuant to s.35A of the Senior Courts Act 1981.

35. The claim form had expressly included a claim for interest pursuant to s.35A of the Senior Courts Act 1981, as amended. We were told that counsel for the third claimant – he being separately represented at the hearing – developed that claim, as already set out in written submissions, fully in oral argument. It is to be taken that leading counsel then appearing for the appellant had adopted that argument. The judge rejected the point. She did not spell out her reasoning. She simply said in the last paragraph of her judgment: "Interest from the date of this judgment".

36. Mr Lemer complains that the judge gave no reasons for her conclusion on this issue. He said that that amounted to an error of law. He necessarily had to accept that s.35A on its face confers a discretion on the court as to whether to award interest in a case such as this (the position is expressly different, under the section, in personal injury claims). But he submitted that the appellant had been kept out of what was due to him as compensation for his wrongful imprisonment. Interest should, he said, have been awarded from the date when no evidence was offered in the Crown Court (11 March 2011); or, if that was too ambitious, at any rate from the date on which the claim form was issued (10 March 2014) up to judgment. If that was not to be done, the judge should, he said, at least have explained why.

37. The problem with that submission is that there is an authoritative (and principled) basis for withholding an award of interest in such a context.

38. Thus in *Saunders v Edwards* [1987] 1 WLR 1116 the plaintiffs, purchasers of a flat, had succeeded in a claim based on dishonest misrepresentation. The judge awarded damages reflecting the difference between the price paid and the true value of the property had the misrepresentation not been made. He also awarded a further sum, by way of damages, for disappointment and inconvenience. The writ had included a claim for interest under s.35A of the Supreme Court Act 1981 from the date of the issue of the writ. The trial judge made an award of interest on the principal award. But he also awarded interest on the award of damages for disappointment and inconvenience.

39. It was held by the Court of Appeal that, in the latter respect, that award of interest was erroneous in principle. The judge having taken into account all matters up to the date of judgment, there could be no justification then to award interest on damages for disappointment and inconvenience from the date of the writ: see at p. 1129 D, per Kerr LJ. Having so stated, Kerr LJ went on to say, at p.1129 G:

> "As it seems to me, certainly in the present case though without purporting to lay down any rigid rules, it is generally better to award a global sum under this head of damages, without the addition of any interest."

Nicholls LJ expressly agreed with Kerr LJ on this issue: p.1133 H. Bingham LJ expressed himself in similar, and indeed in more uncompromising, terms. He said this at p.1135 D-G:

> "The intervention of statute has made general damages for pain and suffering and loss of amenity in personal injuries actions a special case. The damages awarded here for inconvenience and disappointment have no special features. The judge's award was clearly intended to compensate the plaintiffs for the inconvenience they had suffered throughout their occupation of the flat up to the date of trial and for disappointment during the same period. It was a single global award, modest in amount but intended to cover the past and the future. It is somewhat analogous to an award of general damages to a defamation plaintiff for mental distress and suffering, which have never, as I think, been augmented by interest up to the date of the trial. I consider this approach to be correct in principle, because in neither case can the damages be realistically seen as having accrued due to the plaintiff at a certain time in the past and as having thereafter been wrongly withheld from him.
>
> It is accepted that the judge erred in exercising his discretion so as to award interest at the rate of 12.5 per cent, on these damages. That entitles this court to consider the matter afresh. Doing so, I am of the clear opinion that in this case any award of interest on these damages is inappropriate. The same rule would ordinarily apply in similar or analogous cases."

40. A similar issue arose in the case in *Holtham v The Commissioner of Police for the Metropolis* (The Times, 28 November 1987). That case had involved an award of damages for wrongful arrest and false imprisonment. The Court of Appeal applied the decision in *Saunders v Edwards* as to whether interest should be awarded. Lord Donaldson MR (with whom the other two members of the court, who included Nicholls LJ, agreed) expressly held that the principle underlying that decision "must apply to general damages for wrongful arrest and false imprisonment." He went on (page 13 of the transcript):

> "This will cause no injustice since juries, when awarding damages, will no doubt take account of how long it has taken plaintiffs to establish that the arrest and unlawful imprisonment was unlawful and of any increase in their suffering due to this delay."

41. We were referred in argument to McGregor on Damages 20th ed. at paragraphs 19-051 to 19-056. The view there vigorously advanced, in line with a dictum relating to interest on damages for pain, suffering and loss of amenities of Lord Denning MR, giving the judgment of the court, in *Cookson v Knowles* [1977] QB 913 at p.921D, is that in all cases of non-pecuniary loss interest should never be awarded. However, that dictum of Lord Denning MR was not approved in the subsequent House of Lords decision in *Pickett v British Rail Engineering Ltd* [1980] AC 136. It was there observed that an increase of damages to take account of inflation was designed to preserve the real value

of money; whereas interest was designed to compensate for being kept out of that real value. The two matters are thus distinct: see the speech of Lord Wilberforce at p. 151 C-F; and the speech of Lord Scarman at p.173 D-F.

42. The position nevertheless remains that, by its terms, s.35A of the 1981 Act confers a discretion. Further, awards of damages at trial in a case of the present kind are not necessarily designed simply to include an allowance for intervening inflation: they may also reflect that the claimant has suffered, for example, distress and disappointment and other damage as assessed up to the date of the judgment. That, indeed, was precisely the basis for not awarding interest in *Saunders v Edwards* and *Holtham* (decisions which post-dated *Pickett*); and it is a principled basis.

43. In the present case, of course, the basic award extended not only to distress etc. but also to loss of liberty itself. But it seems to me at least consistent with the approach taken in *Holtham* for a judge to be entitled to decline to award interest on any element of the award for non-pecuniary loss in cases of this kind. Whilst *Holtham* was not a malicious prosecution case as such, the underpinning elements – loss of liberty and distress etc – were effectively, in substance, the same.

44. I do acknowledge that compensation for wrongful deprivation of liberty on the one hand and compensation for distress etc, (which may lie in the past, present and future) on the other hand are not co-extensive. I acknowledge that it can be said that loss of liberty has an end-point (the date of release or removal of all restrictions on liberty) and is not "forward-looking" in the way that distress and reputational damage can be. It can also be said that, as here, the wrongfulness of the detention in question may have been established prior to the hearing before the judge assessing the damages. But the reality is that, in cases of this kind, there is still some overlap in the elements of the award. That is reflected, for example, in the practice of making global, undifferentiated awards in most wrongful immigration detention cases (and sometimes also in wrongful arrest cases). It is also reflected by the fact that, on a pro-rated basis, an award for a short or initial wrongful detention usually is relatively high: precisely in order to factor in, as stated in *Thompson*, the initial shock and humiliation and so on. It is therefore pragmatic practice ("generally better", to adopt the words of Kerr LJ), in my opinion, that the approach to not awarding interest on damages in cases such as this should apply across the board and without differentiation: as was indicated as appropriate in *Holtham* itself.

45. In the present case, it is evident that the judge had adjusted her award to take into account inflation, having regard to the criteria indicated in *Thompson* and having regard to the enjoinder in that case that, in the future, the indicated parameters should be adjusted to allow for inflation. The judge having done that, there is, in my view, no reason to think that the judge had not further calibrated her award by taking account of the fact that it was only at the date of her judgment that the claimants' rights were being finally vindicated and that their damages were being assessed as at that date. In fact, in his written submissions before the judge counsel for the third claimant had expressly invited the judge to award interest or, if that was not done, to adjust the award upwards. There is every reason to think, given the arguments presented to her, that she had done just that.

46. Mr Lemer noted that in *AXD* Jay J had in fact awarded interest under s.35A of the 1981 Act from the date of the issue of the claim form to the date of judgment: see paragraph 53 of the judgment. It is not clear, however, if the issue was debated before him.

Likewise, in *R (Diop) v Secretary of State for the Home Department* [2018] EWHC 3420 (Admin) interest under s.35A on an award of damages for wrongful immigration detention was made. But there the point also was not argued: see paragraph 6 of the judgment of the deputy High Court Judge.

47. In my view, therefore, having regard in particular to the approach taken as to interest as applied in *Saunders v Edwards* and then extended in *Holtham* to cases of wrongful arrest and false imprisonment, the better course for judges in cases of this kind will usually be to fix an award of damages both to reflect intervening inflation (having regard to the *Thompson* criteria) and then also to reflect the fact that the award of damages is being calculated by assessing the situation up to and as at the date of judgment. If that is done there will then be no call for an award of interest under s.35A of the 1981 Act. On the footing that a judge does proceed on that basis then I consider, all the same, that it would be good practice for him or her expressly to state, albeit briefly, that that is indeed the position being adopted.

48. Since, in the light of the arguments addressed to her, the judge is, in my opinion, to be taken as having adopted that course here, even if she did not in terms spell it out, there is no proper basis for interfering with the exercise of her discretion not to award interest under s.35A of the 1981 Act.

Cross-Appeal

49. I turn to the cross-appeal.

50. It was not entirely clear to me if Mr Beer was, at the hearing before us, positively pursuing a challenge to the judge's decision to make an award of exemplary damages at all. To the extent that he was, I would reject that challenge. (I should here mention that the court had queried whether this cross-appeal was even viable, given that the global award for exemplary damages was £150,000 before allocation between the three claimants and given that the other two claimants were not party to this appeal. But Mr Beer gave an assurance to us that there would be no challenge to the awards of exemplary damages in their cases.)

51. The fact remains that not only was this a notorious murder but also the prosecution case had collapsed in circumstances of notoriety. The officer authorising the prosecution on so tainted a basis had been of very senior rank – Detective Chief Superintendent (a rank which is certainly capable, in an appropriate case, of attracting a maximum award of damages, as *Thompson* itself states at p.517 C-D). The judge's remarks in this regard, which I have referred to above, were justified. Further, she had considered whether an award of aggravated damages, on top of the basic award, would suffice; and had decided that it would not. She also rejected, as she was entitled to, the suggestion that there had been sufficient public exposure and scrutiny of the police misconduct (for example, in the ruling of the trial judge in the Crown Court and in the more recent decisions of Mitting J and of the Court of Appeal). It is true, as Mr Beer emphasised, that the respondent was only exposed to such an award on the basis of vicarious liability, not of personal responsibility. That is a relevant consideration (see *Thompson* at p.512 H). But it cannot of itself be decisive: indeed, almost invariably in these kinds of cases the defendant is potentially liable on a vicarious basis. Overall, in my opinion, there is no proper justification for interfering with the judge's decision, in the circumstances of this particular case, to award exemplary damages.

52. The main attack of Mr Beer, however, was as to the size of the award for exemplary damages. He in particular stressed that the "absolute maximum" for such an award, as stated in *Thompson* at p.517C-D (and repeated at p.520 A), was £50,000. Adjusted for inflation, that corresponds, as it was said, to a figure of around £91,500. But here, it was complained, the judge had made a global award of £150,000, before then allocating the award equally between the three claimants.

53. In my opinion, however, the statements made in *Thompson* as to the "absolute maximum" available by way of award of exemplary damages are not to be read in so limited a way. Indeed, the Court of Appeal in *Thompson* had itself stated at p.516 A-B:

> "We appreciate, however, that circumstances can vary dramatically from case to case and that these and the subsequent figures which we provide are not intended to be applied in a mechanistic manner".

Precisely so.

54. In particular, the guidance given in *Thompson* was, as I see it, directed at the paradigm of a single plaintiff (claimant). It was not directed at cases where there were several claimants: and plainly the greater number of persons wrongly detained by reason of malicious prosecution or misfeasance in public office in a particular case must at least be capable of bearing on the quantum of any award of exemplary damages. (In saying that, I bear in mind that where there is a large class of claimants, some of whom may not even be before the court, then an award of exemplary damages may not be appropriate at all: see *R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12, [2012] 1AC 245, at paragraph 167 of the judgment of Lord Dyson. But the present is not such a case.) Overall, I see no reason for a court being required in a case such as this to confine its total award of exemplary damages to a total figure of £50,000 (adjusted for inflation); and every reason for it not being so confined.

55. In the (exceptional) circumstances of the present case, the judge was, I conclude, entitled to reach a global figure of £150,000 for exemplary damages, before then allocating it equally between the three claimants. It may also be noted that the resulting individual awards are well within the maximum figure, adjusted for inflation, proposed in *Thompson*.

56. Mr Beer did also briefly submit that by such an award the judge failed sufficiently to have regard to the sizeable awards of basic and aggravated damages and failed sufficiently to consider whether those awards of themselves afforded adequate punishment to the respondent. The short answer to that submission, however, is that the judge had considered such matters. She had further directed herself as to the need to avoid double counting. She had directed herself correctly as to the underlying principles relating to awards of exemplary damages. She had also directed herself as to the need to stand back and look at matters in the round. Here too, as I see it, there is, overall, no proper basis for the appellate court interfering.

Conclusion

57. I would, for my part, affirm the award of damages made by the judge. I would dismiss the appeal and I would also dismiss the cross-appeal.

LORD JUSTICE FLAUX:

58. I agree.

LADY JUSTICE ELISABETH LAING:

59. I also agree.