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Press Summary

16 February 2022

Bloomberg LP (Appellant) v ZXC (Respondent)

[2022] UKSC 5

On appeal from [2020] EWCA Civ 611

Justices: Lord Reed (President), Lord Lloyd-Jones, Lord Sales, Lord Hamblen, Lord Stephens

Background to the Appeal

The Respondent (“**ZXC**”) is a US citizen who worked for a company which operated overseas. He and his employer were the subject of a criminal investigation by a UK Legal Enforcement Body (the “**UKLEB**”). During that investigation, the UKLEB sent a confidential Letter of Request (the “**Letter**”) to the authorities of a foreign state seeking, among other things, information and documents relating to ZXC. The Letter expressly requested that its existence and contents remain confidential.

The Appellant (“**Bloomberg**”), a well-known media company, obtained a copy of the Letter, on the basis of which it published an article reporting that information had been requested in respect of ZXC and detailing the matters in respect of which he was being investigated. After Bloomberg refused to remove the article from its website, and following an unsuccessful application for an interim injunction, ZXC brought a successful claim against Bloomberg for misuse of private information.

ZXC claimed that he had a reasonable expectation of privacy in relation to: (1) the fact that the UKLEB had requested information relating to him in the context of its investigations, and (2) the details of the matters that the UKLEB was investigating in relation to him. The first instance judge held that Bloomberg had published private information that was in principle protected by article 8 of the European Convention on Human Rights (the “**ECHR**”); and that in balancing ZXC’s rights against those of Bloomberg under article 10 ECHR, the balance favoured ZXC. Bloomberg’s appeal against that judgment was dismissed by the Court of Appeal. Bloomberg now appeals to the Supreme Court.

Judgment

The Supreme Court unanimously dismisses the appeal. It holds that, in general, a person under criminal investigation has, prior to being charged, a reasonable expectation of privacy in respect of information relating to that investigation. Lord Hamblen and Lord Stephens give the sole joint judgment, with which the other Justices agree.

Reasons for the Judgment

As is now well established, and was common ground, misuse of private information is a distinct tort where liability is determined by applying a two-stage test. Stage one is whether the claimant objectively has a reasonable expectation of privacy in the relevant information considering all the circumstances of the case. Such circumstances are likely to include, but are not limited to, those identified in the Court of Appeal's decision in *Murray v Express Newspapers plc* [2008] EWCA Civ 446 at para 36 (the so-called "**Murray factors**") [48-55]. If so, stage two is whether that expectation is outweighed by the publisher's right to freedom of expression. This involves a balancing exercise between the claimant's article 8 ECHR right to privacy and the publisher's article 10 ECHR right to freedom of expression, having due regard to section 12 of the Human Rights Act 1998 [56-62].

Issue 1: The stage one test and whether the Court of Appeal was correct to hold that there is a general rule, applicable in the present case, that a person under criminal investigation has, prior to being charged, a reasonable expectation of privacy in respect of information relating to that investigation.

It is widely accepted as a matter of public policy that there is a negative effect on an innocent person's reputation in publishing that he or she is being investigated by the police or another state organisation. There is a uniform general practice by state investigatory bodies not to identify those under investigation prior to charge [80-89]. Additionally, several first instance judgments have accepted the private nature of such information based on the potential that its publication would ordinarily cause substantial damage to the person's reputation, and other damage [90-99].

Bloomberg advanced four arguments challenging the general rule or legitimate starting point in relation to this category of information, all of which the court rejects [74].

First, Bloomberg submitted that given the public's ability to observe the presumption of innocence, the application of a general rule or legitimate starting point is unsound because it overstates the extent to which publishing the information will cause damage to the claimant's reputation. The presumption of innocence is a legal presumption applicable to criminal trials. But in this different context, the question is how others, including a person's inner circle, will react to the publication of information that that person is under criminal investigation. It is undeniable that a person's reputation will ordinarily be adversely affected, impacting their right to respect for private life such as the right to establish and develop relationships with other people [100-109].

Second, Bloomberg argued that the courts' reliance below on the "human characteristic" to equate suspicion or investigation with guilt on the assumption that there is "no smoke without fire" runs contrary to well-established principles in defamation law such that the ordinary reasonable reader can distinguish suspicion from guilt and is not unduly suspicious

or avid for scandal. But ZXC did not bring a claim in defamation. The tort of misuse of private information is a separate tort with different constituent elements and a distinct purpose. Unlike in defamation, the purpose of the tort of misuse of private information is not only to protect an individual from the publication of untrue information. Rather, its purpose is to protect an individual's private life in accordance with article 8 ECHR, regardless of the truth or falsity of the information, and it is therefore inappropriate to read across concepts from the tort of defamation [110-113].

Third, Bloomberg submitted that information should not be protected because it's reputationally damaging but rather because it belongs to a part of the claimant's life which is of no-one else's concern and that does not include ZXC's business activities. This is an unduly restrictive view of the protection afforded by article 8 ECHR, which can include professional or business activities. A person's reputation is within the scope of their article 8 ECHR "private life" provided the attack on reputation attains a certain level of seriousness and prejudices a person's right to respect for private life [114-125].

Fourth, Bloomberg argued the courts below failed to apply the correct legal test at stage one, involving a consideration of "all the circumstances of the case", which should have included the activity in which ZXC was engaged, namely "alleged corruption in relation to ZXC's company's activities in a foreign country". The nature of the activity in which ZXC was engaged is not a factor of particular significance here. The courts below gave due consideration to the applicable Murray factors in their multi-factorial analysis, including ZXC's status as a businessman involved in the affairs of a large public company. Whilst ZXC's status might mean that the limits of acceptable criticism are wider than for a private individual, there is a limit. The factor is not in itself determinative and should only form part of the stage one analysis [126-143].

Therefore, the courts below were correct to hold that, as a legitimate starting point, a person under criminal investigation has, prior to being charged, a reasonable expectation of privacy in respect of information relating to that investigation and that in all the circumstances this is a case in which that applies and there is such an expectation [144-145].

Issue 2: Whether the Court of Appeal was wrong to hold that, in a case in which a claim for breach of confidence was not pursued, the fact that Bloomberg published information originating from a confidential law enforcement document rendered the information private and/or undermined Bloomberg's ability to rely on the public interest in its disclosure.

The judge was right to treat the Letter's confidentiality as a relevant and important factor at both stage one and stage two but neither the judge nor the Court of Appeal held that the Letter's confidentiality itself rendered the information private or prevented Bloomberg from relying on the public interest on its disclosure. Whilst there is no necessary overlap between the distinct actions for misuse of private information and for breach of confidence, confidentiality and privacy will often overlap, and if information is confidential that is likely to support the reasonableness of an expectation of privacy [147-156].

Issue 3: Whether the Court of Appeal was wrong to uphold the findings of the first instance judge.

This ground of appeal was dependent upon Bloomberg establishing that the Court of Appeal erred in law on Issue 1 and/or Issue 2, which it has not done. Therefore, there are no grounds for intervening with the judge's decision in relation to the balancing exercise [157].

References in square brackets are to paragraphs in the judgment

NOTE:

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at: [Decided cases - The Supreme Court](#)