

REPUTATION UPDATE: PRIVACY RIGHTS DURING CRIMINAL INVESTIGATIONS REVISITED

The Court of Appeal has upheld a successful claim by an individual anonymously known as 'ZXC' for misuse of private information in respect of details of a criminal investigation into ZXC which were published by Bloomberg. In its [judgment](#), the Court of Appeal held that ZXC had a reasonable expectation of privacy in respect of a UK law enforcement body's suspicion that ZXC had committed a criminal offence. While there is no unqualified right to privacy during an investigation, it is the legitimate starting point when considering whether an individual's Article 8 rights are engaged.

Background

The Claimant is a US citizen residing in the UK who was the Chief Executive of one of the regional divisions of a company anonymously known as X Ltd.

Following the public questioning of certain transactions involving X Ltd, an investigation was commenced by a UK legal enforcement body (**the UKLEB**), which thus far has not led to any employees of X Ltd being charged with any offence. The UKLEB's policy is not to make public comment on ongoing investigations, and accordingly any media coverage of the investigation purporting to reflect the UKLEB's position were either speculation or unauthorised (and unconfirmed) disclosures.

In the Autumn of 2016, Bloomberg published an online article which set out that the Claimant had been interviewed by the UKLEB as part of its investigation into X Ltd, the likely source being someone within the UKLEB. At that time, the Claimant provided the Bloomberg journalist with a comment for publication, which was described by the Judge at first instance as an "*understandable media strategy in the circumstances*".

Later in 2016, Bloomberg published a further article (**Second Article**) containing certain information (**Information**) drawn almost exclusively from a so-called 'Letter of Request' (**LoR**) sent by the UKLEB to the competent authority in a foreign state, requesting mutual legal assistance to aid the UKLEB's investigation into X Ltd. The LoR was of a highly confidential nature, and was headed (in bold) "*Confidential Letter of Request*". The LoR named the Claimant as one of the individuals in relation to whom the UKLEB were seeking banking and business records from the foreign state. It stated the possible charges concerned and summarised the UKLEB's investigations up to that point.

The LoR also contained a detailed assessment of the evidence that the UKLEB had obtained to that point, which included assertions that (a) X Ltd had provided false documents to the UKLEB, (b) various suspects had committed fraud by false representation, and (c) the UKLEB was investigating whether the Claimant was part of a conspiracy to defraud X Ltd.

Prior to publication of the Second Article, an employee at the UKLEB and the Claimant's solicitor both contacted Bloomberg to inform them that the LoR was confidential, the former indicating that publishing it would prejudice an ongoing investigation. Although Bloomberg had granted the Claimant a 'right-to-reply', no consideration was given by Bloomberg to the sensitivity of the LoR and whether the publication of such confidential information would be justified in the public interest (per Nicklin J at first instance).

Initial proceedings

The Claimant brought a claim for misuse of private information, breach of confidence and breach of the Data Protection Act 1998. Ultimately, the latter two causes of action were not pursued before the Judge, as the Claimant accepted that if he were to succeed in his claim

for misuse of private information, he would not succeed in his breach of confidence claim, and that similar considerations applied to the misuse of private information and data protection claims.

At first instance, the Claimant was successful in his claim for misuse of private information and was granted both an injunction and £25,000 in damages by Mr Justice Nicklin. Bloomberg appealed the decision to the Court of Appeal, who considered specifically whether the trial Judge was right to find that (i) the Claimant had a reasonable expectation of privacy in respect of the Information, such that the Claimant's Article 8 rights were engaged, and (ii) these privacy rights outweighed Bloomberg's Article 10 right to freedom of expression.

Decision on appeal

The Court of Appeal dismissed Bloomberg's appeal, citing the judgment of Mr Justice Mann in *Sir Cliff Richard v BBC* [2019], to the effect that, while there is no "*invariable or unqualified right to privacy during an investigation*", it is nevertheless "*the legitimate starting point*" that an individual has a reasonable expectation of privacy in respect of an investigation.

In his leading judgment, Lord Justice Simon took the opportunity to clarify this point in specific terms, setting out that "*those who have simply come under suspicion by an organ of the state have, in general, a reasonable and objectively founded expectation of privacy in relation to that fact and an expressed basis for that suspicion*". This suspicion may or may not be well founded, but until this is proven either way, the law must acknowledge the "*human characteristic to assume the worst (that there is no smoke without fire)*".

In this case, the Claimant had not even been arrested. Simon LJ made it clear that a reasonable expectation of privacy is not dependent on the type of crime being investigated, as it is damaging to be suspected of a crime, whatever the nature of the crime. In the present case, the crime in question related to business dealings, and was subject to the usual approach by the UKLEB, namely that it would be investigated before any charge might be brought. While Simon LJ acknowledged there will be some cases where an individual's reasonable expectation of privacy may be significantly reduced (perhaps even extinguished) due to the public nature of the suspected crime (for instance, rioting), he saw little justification for a "*hierarchy of offences*".

Simon LJ rejected Bloomberg's contention that the Nicklin J had wrongly conflated private information with confidential information, on the basis that the sensitivity of the Information and the circumstances in which Bloomberg obtained it were indicative of the provisional nature of the UKLEB's suspicion, which in turn suggested a reasonable expectation of privacy in the information.

The Court of Appeal also held that Nicklin J was correct to distinguish within the Information between, on the one hand, information about the alleged criminal conduct (which in itself was not something the Claimant could expect to keep private), and on the other hand the UKLEB's suspicions about that conduct (which constituted the Claimant's private information, as they were necessarily one sided and it was never intended that they would be disclosed publicly). Indeed, the Claimant had not complained previously about the media's interest in allegations about X Ltd's involvement in corruption in the foreign state.

With respect to the balancing act between Article 8 and Article 10, the Court of Appeal rejected Bloomberg's contention that Nicklin J was wrong to distinguish between the public interest in alleged corruption in the foreign state and any potential public interest in publishing the LoR. In Lord Justice Underhill's view, "*information that an individual is the subject of a formal*

criminal investigation is genuinely of a different character from allegations about the conduct being investigated”.

Although Nicklin J had acknowledged there was a “*high*” public interest in the alleged corruption, that public interest did not confer a wide authority on Bloomberg to report on the contents of the LoR, in which there was not sufficient public interest to justify publication. On the facts, Bloomberg had not used its editorial discretion to contribute to public debate by highlighting specific points such as, for instance, drawing attention to “*perceived inadequacies in the investigation*”. In fact, Bloomberg had done little (if anything) beyond simply publishing the Information in the highly confidential LoR.

Finally, the Judge had not erred by taking the confidentiality of the LoR as his starting point, thereby, in Bloomberg’s view, applying the wrong test. He had applied the right test by striking the balance between article 8 and article 10 rights, weighing “*the nature and consequences of the breach of privacy against the public interest, if any, in the disclosure of private information*” (per *Prince of Wales v Associated Newspapers [2006]*).

In fact, Mr Justice Nicklin said that the starting point on these facts was that there was a “*very clear public interest that the contents of the LOR should not be published and the confidentiality of the UKLEB’s investigations should be maintained*” (emphasis added). He had considered the fact that the UKLEB had not issued a claim in respect of the LOR, and equally considered its attitude to Bloomberg’s decision to publish its contents.

Comment

This case expands upon Mr Justice Mann’s judgment in *Richard v BBC*, restating that individuals in general (in the absence of any exceptional circumstances, such as a threat to the public) have a reasonable expectation of privacy in the fact of an investigation, and adding that this principle applies regardless of the type of crime being investigated or the public characteristics of the subject, for instance their involvement in politics or business.

Lord Justice Simon’s judgment provides an important summation of why damage to reputation can, as in this case, be the centre of a claim for misuse of private information: “*the law should recognise the human characteristic to assume the worst (that there is no smoke without fire); and to overlook the fundamental legal principle that those who are accused of an offence are deemed to be innocent until they are proven guilty*”.

Although the right of privacy in the details of a criminal investigation is not unqualified, it remains the “*legitimate starting point*” that such information is private until the point when an individual is charged with an offence. Publications must give this due consideration prior to publication of any information relating to an investigation and take into account not only the public interest in the subject matter being investigated, but also in the publication of the specific information or documentation in question.

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