[GB] The Supreme Court find Bloomberg's reporting of a criminal investigation before any charge breached an individual's reasonable expectation of privacy

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The Supreme Court has determined that Bloomberg LP (Bloomberg) misused private information when it published an article regarding ZXC, the CEO of a public international company. The article relied upon a confidential Letter of Request (LOR), concerning ZXC and his company, issued by a UK law enforcement body to another jurisdiction.

ZXC argued the use of the LOR by Bloomberg before any investigation and charge had been made constituted a breach of his reasonable expectation of privacy. The High Court agreed, considering Bloomberg had published information that should have remained private. Bloomberg unsuccessfully appealed to the Court of Appeal.

Misuse of private information is a separate tort from breach of confidentiality and defamation with its own two-stage test. The first stage is one of whether ZXC objectively had a reasonable expectation of privacy in the relevant information considering the circumstances of the case. Such circumstances include consideration of the 'Murray factors' identified in Murray v Express Newspapers plc [2008] EWCA Civ 446.

Stage-two was balancing the right for private and family life under Article 8 of the European Convention on Human Rights (ECHR) against the publisher's freedom of expression under ECHR Article 10. It is widely accepted that there is a negative effect on an innocent person's reputation in publishing that they are subject to criminal investigations before any charge has been made. Various court 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.

Bloomberg argued that the public would on the whole regard someone innocent until proven guilty and would not discern guilt purely from being aware of a criminal investigation. The Supreme Court found that the presumption of innocent until proven guilty was applicable when someone had been charged and their innocence or otherwise would be determined at court. Whereas, the public being aware of an investigation before charge ran the risk of effecting someone's

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reputation regardless, impacting on their right to private life such as the right to establish and develop relationships with other people.

Further, Bloomberg argued that under defamation law the public could distinguish suspicion from guilt and people were not unduly suspicious or avid for scandal. However, the Supreme Court held that in ZXC's case there had been a misuse of private information with different constituent elements and a distinct purpose to protect an individual's private life in accordance with Article 8, regardless of the truth or falsity of published information.

Bloomberg argued that the investigation concerned ZXC's business activities, and not his private life. The Supreme Court determined that the exercise of Article 8 included professional and business activities thus prejudicing a person's right to a private life.

Bloomberg's appeal included the argument that the lower courts had failed to apply the stage-one test properly by not considering all the circumstances including the alleged corruption of ZXC's company's activities abroad. The Supreme Court held that the courts had considered that while ZXC, as CEO of a large public company, was subject to scrutiny that may be greater than for a private individual, there were, nevertheless, limits. According to the court, this factor was "not in itself determinative and should only form part of the stage one analysis".

The legitimate starting point was that a person subject to a criminal investigation prior to being charged had a reasonable expectation of privacy in respect of information relating to that investigation, and that in all the circumstances that expectation applied to ZXC.

Bloomberg's appeal to the Supreme Court included the argument that the Court of Appeal had not taken into account the fact that Bloomberg had published information originating from confidentiality law thus enabling the publisher to rely upon public interest for its disclosure. The Supreme Court felt the judge had been right to consider the LOR's confidential nature for both stage-one and stage-two. However, the lower courts had not determined the private status due the letter being classified confidential nor had the courts prevented Bloomberg relying on a public interest argument. Whilst there was a difference between private and confidential information, if information is confidential that is likely to support the reasonableness of an expectation of privacy.

Public interest arguments were justified when finding fault or inadequacy with a criminal investigation, rather than just reporting the occurrence of an investigation. Bloomberg tried to argue that the Court of Appeal had been wrong to uphold the findings of the first instance judge. However, the Supreme Court concluded that Bloomberg had failed to establish that the Court of Appeal had erred in its determination of stage one and two; as such, there were no grounds

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to intervene with the first judge’s decision in relation to the balancing of Articles 8 and 10.

Bloomberg LP (Appellant) v ZXC (Respondent) [2022] UKSC 5 on appeal from [2020] EWCA 611 – 16 February 2022, Supreme Court of the UK

https://www.supremecourt.uk/cases/docs/uksc-2020-0122-judgment.pdf

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