

Presumption of innocence: privacy until proven guilty?

Reasonable expectations of privacy and the presumption of innocence are two of the legal principles raised in a recent Supreme Court landmark decision (*Bloomberg LP v ZXC* [2022] UKSC 5). Two news articles published by Bloomberg LP were at the heart of the five-year legal battle.

The court ruled against Bloomberg, reaffirming the principle that a person under criminal investigation should have a reasonable expectation of privacy in respect of information relating to that investigation, up until the point that they are formally charged.

Relevant publications

In 2016, Bloomberg published two articles on its website relating to an individual, ZXC. The first article disclosed that ZXC had been interviewed by the UK Law Enforcement Body (UKLEB) as part of an investigation into overseas corruption.

The second article went further and published the specific details of the criminal investigation. These details included that the UKLEB suspected that ZXC had provided false information on the value of an asset to the board of the company where he worked. Significantly, the specific information set out in the second article was drawn almost exclusively from a highly confidential letter of request from UKLEB to the competent authorities of a foreign state seeking further information on ZXC in order to assist with the investigation. On publication of the second article on Bloomberg's website, ZXC requested that Bloomberg remove it, given the sensitive nature of its contents, but Bloomberg refused.

Following an unsuccessful application for an interim injunction, ZXC brought a claim under the tort of misuse of private information, seeking damages and injunctive relief. The High Court upheld the claims and awarded ZXC damages of £25,000 ([2019] EWHC 970 (QB)). Bloomberg appealed, unsuccessfully, to the Court of Appeal and the Supreme Court ([2020] EWCA Civ 611).

Supreme Court decision

The Supreme Court confirmed that misuse of private information is a distinct tort where liability is determined by applying

Application of the principles

On 2 March 2022, the Court of Appeal handed down its judgment in *Brake v Guy*, in which it applied the principles set out in *Bloomberg LP v ZXC* ([2022] EWCA Civ 235; [2022] UKSC 5). In *Brake*, two former employees issued proceedings for misuse of private information and breach of confidence in relation to the alleged accessing, retention and use of their personal emails, which were held within their employer's business email account.

Applying *Bloomberg*, the court noted that although certain types of personal information are, as a general rule, treated as private, this does not give rise to any legal presumption of privacy. It held that the employees had failed to discharge the burden of demonstrating that they had a reasonable expectation of privacy in relation to the emails.

the two-stage test from *Murray v Express Newspapers plc* ([2008] EWCA Civ 446; see *News brief "Privacy: greater expectations of protection"*, www.practicallaw.com/9-382-0129). The first stage concerns the question of whether the claimant objectively has a reasonable expectation of privacy in the relevant information, considering all the circumstances of the case. If so, the second stage asks whether the expectation is protected by the right to privacy under Article 8 of the European Convention of Human Rights (ECHR) (Article 8) or is outweighed by the right of freedom of expression under Article 10 of the ECHR (Article 10).

In relation to the first stage of the *Murray* test, Bloomberg sought to challenge the general rule that a person under criminal investigation has, before being charged, a reasonable expectation of privacy in respect of information relating to that investigation. Bloomberg argued that, here, the reasonable expectation of privacy had been determined without considering all the circumstances of the case. The court considered a number of factors, including the nature of the information disclosed, the absence of consent to publication, the effect of publication on ZXC and the circumstances in which and the purposes for which the information came into the hands of Bloomberg. The court held that, on balance, given the highly sensitive nature of the information and the clear indication that the investigation was at an early stage, the additional factors considered did not outweigh ZXC's reasonable expectation of privacy.

Bloomberg's second argument relied on the public's ability to observe the presumption of innocence. The court dismissed this argument, stating that the context is how others, including a person's inner circle, their business or professional associates, and the general public, will react to the publication of information that a person is under criminal investigation.

In relation to the second stage of the *Murray* test, Bloomberg argued that the information should not be protected under Article 8 because it related to ZXC's business activities and not his personal life. Bloomberg argued that the fact that it was reputationally damaging would not be relevant in the context of his business activities. The court viewed this as an unduly restrictive view of the protection afforded by Article 8, which can include professional or business activities. Any criminal lawyer would advise that it is now common practice for the police not to identify those under investigation before charge. The reputational damage to ZXC and the subsequent potential for consequential economic loss to ZXC's business was obvious.

Finally, Bloomberg argued that certain elements of the High Court's judgment ran contrary to the principles of defamation law. However, the court quickly dismissed this argument, stating that ZXC had not brought a claim in defamation.

Ongoing implications

The Supreme Court's decision reinforces the general principle that suspects have a reasonable expectation of privacy up until

the point of charge and further demonstrates the courts' reluctance to go against an individual's right to privacy in an increasingly public world. However, the court was careful to note that this expectation is merely a starting point, not a legal presumption or rule, and this has already been reiterated in subsequent case law (see box "*Application of the principles*").

Some will see this decision as a concerning outcome for freedom of expression while others will celebrate the affirmation of the right to privacy. It highlights a sensitive

issue and may threaten to give additional ammunition to the government's current proposals to reform the Human Rights Act 1998 (see *Opinion "Human rights reform: a controversial Bill of Rights"*, www.practicallaw.com/w-034-1990). The government has reportedly expressed concern about judgments creeping into the realm of suppressing press freedom, and the Ministry of Justice is thought to be looking into this area.

Bloomberg undoubtedly serves as an important reminder for journalists and

media organisations to carefully consider the information that they decide to publish about individuals who are the subject of criminal investigations. While these types of claims will always be determined on a case-by-case basis, this decision makes it clear that the key issues are the confidential nature of the information and the stage of the investigations.

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