Neutral Citation Number: [2020] EWCA Civ 611

Case No: A2/2019/1158

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE QUEEN'S BENCH DIVISION
MEDIA AND COMMUNICATIONS LIST
Mr Justice Nicklin
HQ17M00166

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/05/2020

Before:

LORD JUSTICE UNDERHILL
(Vice President of the Court of Appeal, Civil Division)
LORD JUSTICE BEAN
and
LORD JUSTICE SIMON

- -

Between:

ZXC	**Respondent (Claimant)**
- and -	
Bloomberg L.P.	**Appellant (Defendant)**

- -
- -

Antony White QC and **Clara Hamer** (**instructed by Reynolds Porter Chamberlain LLP**) for the **Appellant**

Tim Owen QC and **Sara Mansoori** (instructed by **Byrne and Partners LLP**) for the **Respondent**

Hearing dates: 3 and 4 March 2020

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OPEN AND PUBLIC VERSION OF JUDGMENT

Lord Justice Simon:

Introduction

1. This is an appeal from the judgment of Mr Justice Nicklin ('the Judge') dated 17 April 2019, in which he found that the Defendant ('Bloomberg') had breached the Claimant's privacy rights. He made an award of damages for the infraction of those rights and granted an injunction restraining Bloomberg from publishing information which further identified the Claimant as the subject of a criminal investigation.

2. The primary question that arises on Bloomberg's appeal against the Judge's finding and the grant of the injunction is whether, and to what extent, a person can have a reasonable expectation of privacy in relation to information that relates to a criminal investigation into his activities. It is common ground that, if someone is charged with an offence, there can be no such expectation.

3. The Claimant originally included claims for breach of confidence and breaches of the Data Protection Act 1998. These claims were not pursued before the Judge; the Claimant accepted that, if he could not succeed with his claim in relation to the misuse of private information, he would not succeed in his breach of confidence claim and that similar considerations applied to the Data Protection Act claim.

4. This judgment is an open judgment. It is an edited version of the private judgment that was also handed down today. Following the Judge's approach below, sections of the private judgment have been removed or edited to protect the Claimant's identity. The approach to anonymisation taken here reflects that taken by the Judge.

5. Moreover, as was the case below, the Court has imposed a reporting restriction that prohibits both the reporting of the Claimant's name and any particulars or details likely to identify the Claimant, in connection with these proceedings. The contents of this open judgment can however be reported freely.

6. References to the judgment below are to the Judge's open judgment.

The background

7. Bloomberg is an international financial software, data and media organisation, with headquarters in New York. Bloomberg News is well-known in particular for its financial journalism and reporting.

8. The Claimant is a US citizen. He worked for a company, X Ltd, which operated overseas. The Claimant was the Chief Executive of one of X Ltd's regional divisions but was not a director of X Ltd.

9. The integrity of various transactions involving X Ltd has been publicly questioned for a number of years. Among these were transactions in a particular country ('the Foreign State').

10. These concerns led a United Kingdom Legal Enforcement Body ('the UKLEB') to begin an investigation into X Ltd. The current position is that none of the personnel employed by X Ltd has been charged with any offence as a result of the UKLEB investigation. Media reports as to the progress of the UKLEB investigation have

appeared, from time to time, and there has been speculation as to the status of the investigation and the focus of UKLEB's inquiry. UKLEB's policy is not to make any public comment upon ongoing investigations. As the Judge noted, at [8], the details of the reports consequently appeared to either conjecture or to be unauthorised (and therefore unconfirmed) disclosures.

This remains the position.

The Autumn article

11. In the Autumn of 2016, Bloomberg published an article on its website concerning the Claimant's involvement in the UKLEB investigation ('the Autumn Article').

12. The Autumn Article was written by one of Bloomberg's journalists, HYX. It explained that the Claimant had been interviewed by the UKLEB as part of its investigation. The Judge concluded at [13] below that HYX's likely source for this information was someone employed at the UKLEB.

13. It is important to note that, although highly displeased at its publication, the Claimant did not take any action over the Autumn Article. Instead, acting through his solicitor Mr Byrne, the Claimant provided HYX with a comment for publication. The Judge described this as being an understandable media strategy in the circumstances.

14. The current action arises from the publication of a further article ('the Article'), written by a different journalist to the author of the Autumn Article ('the Journalist'). The Article which forms the subject of this appeal is detailed further at [26]- [28] below.

Mutual Legal Assistance

15. The United Nations Convention against Corruption (the 'Convention') was adopted in October 2003. It includes provisions for mutual legal assistance ('MLA'), by which states can cooperate in investigating or prosecuting criminal offences.

16. A Letter of Request ('LoR') is the usual way of seeking MLA. LoRs are formal and highly confidential documents, as is recognised and explained in the 2015 Home Office guidance, 'Requests for Mutual Legal Assistance in Criminal Matters: Guidelines for Authorities Outside of the United Kingdom', as well as by decisions of the courts in this jurisdiction. The introduction to these guidelines makes clear that it is a procedure used for obtaining material that cannot be obtained on a law enforcement (police force to police force) basis, and particularly in pursuit of enquiries that require coercive means (e.g. court orders to obtain material). In *National Crime Agency v. Abacha* [2016] 1 WLR 4375, the Court of Appeal explained the purpose and reach of LoRs. It emphasised their confidential nature at [37]-[38] and [48].

The Letter of Request

17. In 2016 the UKLEB sent a 15-page LoR, accompanied by several enclosures, addressed to the Competent Authority of the Foreign State. Its confidential nature could not have been made clearer since it was headed in bold: 'Confidential Letter of

Request'. It was expressed as a request for assistance pursuant to the Convention and the UN Convention against Transnational Organized Crime (Palermo, 2000); and gave a general description of the nature of the UKLEB's investigation into X Ltd:

> The investigation is at an evidence gathering stage. There have been interviews with some witnesses and suspects. There have been no searches of properties linked to the suspects at this time. Nobody has been charged with any offence.

18. The LoR sought banking and business records in relation to X Ltd and a number of named individuals, one of whom was the Claimant. It also stated that the investigation concerned a number of possible offences: including, corruption, bribery, offences under the Proceeds of Crime Act 2002 and Fraud Act 2006, and conspiracy. Details were given of the various possible charges that were the subject of the investigation and of the maximum penalties upon conviction. It summarised the investigations up to that point; and identified three transactions that were the specific targets of the request for assistance. Two further pages explained why the assistance was required, and the early stage of the investigation was apparent from the description of the UKLEB's investigation and the areas in respect of which it sought assistance.

19. The LoR also contained a detailed assessment of the evidence that the UKLEB had so far obtained in relation to various transactions, together with initial conclusions that had been reached on the basis of the evidence it had obtained. In relation to the Claimant, the LoR contained the following assessment:

> … We have obtained a number of documents from [X Ltd] which state [redacted]. However, the documents have used [incorrect information] and are thus false. The [UKLEB] believes that various suspects have committed fraud by false representation by dishonestly representing that [the property] was a valuable asset based on data for an entirely different asset. The [UKLEB] are investigating whether [the Claimant] was part of a conspiracy to defraud [X Ltd].

20. The LoR described six entities that the UKLEB believed would have documents which would assist its investigation and identified those documents. It concluded with details of how the evidence could be transmitted to the UK Central Authority and contained the following express statement under the heading, 'Confidentiality':

> Although the fact of our investigation into [X Ltd] is public, neither its extent nor the detail of the information we hold is public. In order not to prejudice the investigation, I request that no person (including any of the above-named subjects) is notified by the competent authorities in your country of the existence and contents of this Letter of Request and any action taken in response to it. I further request that action is taken to ensure that any person from whom evidence is sought does not so notify any other person.
>
> The reason for requesting confidentiality is that it is feared that, if the above suspect (sic) or an associated party became aware of the existence of this request or of action taken in response to it, actions

> may be taken to frustrate our investigation by interference with documents or witnesses.
>
> If it is not possible to preserve the confidentiality in the above manner, please notify me prior to executing this Letter of Request.

Events leading up to publication of the Article

21. At [25]-[61] below the Judge made detailed findings as to how a copy of the LoR came into the hands of Bloomberg's employees, Bloomberg's intention to publish its contents in an article, and some of the contacts that its employees made prior to publication.

22. The first was with an employee at the UKLEB, who emailed Bloomberg:

> Coming back to you again on this – if your colleague has a letter of request (that would be confidential) and the printing of such could prejudice an ongoing criminal investigation. Can your colleague please let me know urgently what is intended to go out in this article please and when?

23. The second was with Mr Byrne, the Claimant's solicitor. He informed Bloomberg that he was surprised that Bloomberg was contemplating publishing information from such a confidential source.

24. The Judge's conclusions on this aspect of the case were set out at [51] of the judgment:

> It is a striking feature of this case … that in none of the pre-publication email communications is there any recognition of the highly confidential nature of the LoR or any record of whether (as claimed by [Bloomberg's] witnesses called to give evidence at the trial) there was a careful (or indeed any) assessment of the potential consequences of breaching that confidentiality or any weighing-up of this against the perceived public interest in publication.

The Judge added:

> 59. On the evidence, I conclude that no-one at [Bloomberg] involved in publication of the Article was aware of just how sensitive the LoR was. There is no hint of this even being a consideration in any of the email traffic, and [the UKLEB's employee's] concerns about its publication failed to alert them to this important issue. It might be thought surprising that an international publisher of the standing of [Bloomberg] had failed to appreciate (or inform itself) of the status of a letter of request. [The Journalist] is the only person, who gave evidence, who had actually read the confidentiality section in the LoR … although the LoR had been sent to the in-house lawyer ... In his evidence, [the Journalist] accepted that this was 'a warning to the world, in effect, to anyone who gets hold of it… that they must not,

> effectively, leak this information because it will harm the [UKLEB] investigation.'
>
> 60. Equally, the evidence strongly suggests that the editorial process of [Bloomberg] simply failed to appreciate that the Article potentially engaged the privacy interests of the Claimant …

25. The Judge recorded Bloomberg's concern that the Claimant be offered a 'right-to-reply' while noting that a right to advance matters bearing on the truth of an allegation did not operate 'to such an extent or at all' where the subject's objection was not to the falsity of allegations, but rather, as private information, that they should not be published at all, see [61].

The Article

26. As noted at [14] above, this appeal arises out of the Article, written by [the Journalist], and published by Bloomberg on its website in 2016 ('the Article').

27. The Judge found that the Article contained information drawn almost exclusively from the LoR sent by the UKLEB to the Competent Authority in the Foreign State.

28. The Claimant claims that he had a reasonable expectation of privacy in relation to the following matters contained in the Article (the 'Information'): (1) the fact that in its investigations into the Claimant the UKLEB had asked the authorities in the Foreign State to provide banking and business records relating to four companies within a specified period; and (2) the details of the matters that the UKLEB was investigating in relation to the Claimant, including that, (a) the UKLEB considered that the Claimant had provided false information to the X Ltd board on the value of an asset in a potential conspiracy, (b) the UKLEB believed that the Claimant had committed fraud by false representation by dishonestly representing that [name] was a valuable asset based on data for a different asset; and (c) the UKLEB was seeking to trace the onward distribution of [a substantial sum of money] paid into [a bank account], as it believed that these monies were the proceeds of crime carried out by the Claimant.

Reaction to publication of the Article

29. The UKLEB was quick to express its displeasure at the publication of the Article. It asked Bloomberg by email whether it had considered the implications of publishing the contents of the article before giving the UKLEB a reasonable opportunity to express its views about publication. The Judge held that the UKLEB's decision not to take any formal steps against Bloomberg did not detract from its clearly expressed view that the breach of confidentiality was 'serious'.

30. The Claimant's solicitors sent a letter to Bloomberg nine days after the Article was published, complaining that publication was a misuse of their client's private information and/or a breach of confidence. The focus of the complaint was that the LoR was a 'highly confidential document', and that the Article contained 'previously undisclosed confidential information in the context of a continuing criminal investigation,' in respect of which no charges had been brought. The letter threatened an application for injunctive relief if the Article were not taken down from

Bloomberg's website, with an undertaking not to publish or disclose any information relating to the UKLEB's investigation into the Claimant while it continued.

31. Bloomberg declined to do so; and the Claimant applied on notice for injunctive relief. The application came before Garnham J at a hearing in February 2017. The Claimant's application was for an order requiring Bloomberg to remove the information relating to him in the Article. However, he accepted that, in the light of the Autumn Article, Bloomberg could continue to publish the fact that he was being investigated by the UKLEB.

32. Garnham J refused to grant an injunction. He acknowledged that the Claimant had a legitimate expectation of privacy under article 8 of the European Convention on Human Rights ('ECHR') in relation to information that he was being investigated for a criminal offence; but concluded on the evidence before him that such privacy rights would be found to be outweighed by Bloomberg's right to freedom of expression under article 10 of the ECHR.

33. Over the 4-day trial of the action before Nicklin J, which took place in November 2018, the Judge heard evidence which caused him considerable disquiet as to Bloomberg's conduct at the earlier interlocutory hearing before Garnham J.

34. First, Bloomberg's then solicitors, CMS Cameron McKenna Nabarro Olswang LLP, had failed to provide the Court (and the Claimant) with a copy of the LoR, or even disclose that Bloomberg had a copy of it. A sight of the LoR would have immediately revealed the references to the confidentiality of its contents, and the UKLEB's assessment that a failure to observe the restrictions might 'frustrate [its] investigation by interference with documents or witnesses', see [20] above. Second, Bloomberg had failed to reveal in its evidence that the UKLEB had clearly protested about the publication of the contents of the LoR both before and after they had been published.

35. After an analysis of how these failures occurred and who was responsible for them, the Judge said this, at [101] of his judgment:

> Without the LoR, the Claimant's solicitors were deprived of the ability to demonstrate, from the express terms of the LoR, the harm that the UKLEB itself judged risked being caused by a failure to observe the strict requirements of confidentiality that were imposed.

At [105(iii)], he added this:

> I am satisfied that, had Garnham J been provided (as he should have been) with a copy of the LoR and, more significantly, the evidence of the UKLEB's position in relation to publication of the Article, it is likely that the Claimant's application for an injunction would have been successful. The Judge said expressly that, had the application been supported by the UKLEB, 'the outcome may have been very different' (see [79] above).

36. The reference to [79] was to a passage at [59] in the interlocutory judgment of Garnham J in which he had said:

> … the article here prompted no adverse reaction from the investigators concerned. It appears that the UKLEB had no fears that the reporting was damaging the investigation. Had this application been made, or supported, by the UKLEB, the outcome may have been very different.

37. In the course of his finding in favour of the Claimant, the Judge held that Bloomberg had published private information about the Claimant that was in principle protected by the provisions of article 8 of the ECHR; and that in balancing the Claimant's rights against those of Bloomberg under article 10, the balance came down in favour of the former.

The legal principles that apply to claims founded on the misuse of private information

38. Articles 8 and 10 of the European Convention on Human Rights Convention provide:

> Article 8
>
> Right to respect for private and family life
>
> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.
>
> Article 10
>
> Freedom of expression
>
> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent states from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

39. Many of the principles were largely agreed at the hearing of this appeal, as they had been before the Judge.

40. Liability for misuse of information is determined by applying a two-stage test summarised by Buxton LJ in *McKennitt v. Ash* [2008] QB 73 (CA) at [11]:

> … in a case such as the present, where the complaint is of the wrongful publication of private information, the court has to decide two things. First, is the information private in the sense that it is in principle protected by article 8? If no, that is the end of the case. If yes, the second question arises: in all the circumstances, must the interest of the owner of the private information yield to the right of freedom of expression conferred on the publisher by article 10? The latter enquiry is commonly referred to as the balancing exercise, and I will use that convenient expression. I take the two questions in turn. Some aspects of the jurisprudence overlap between the two questions, but it remains necessary to keep the underlying issues separate. I have well in mind, in addressing article 8, the warning given by Lord Nicholls of Birkenhead in his speech in *Campbell's* case … at para 21:
>
> > in deciding what was the ambit of an individual's 'private life' in particular circumstances courts need to be on guard against using as a touchstone a test which brings into account considerations which should more properly be considered at the later stage of proportionality. Essentially the touchstone of private life is whether in respect of the disclosed acts the person in question had a reasonable expectation of privacy.'

41. The reference to *Campbell's* case was to the decision of the House of Lords in *Campbell v. Mirror Group Newspapers Ltd* [2004] 2 AC 457.

42. In summary, stage one of the enquiry is whether a claimant has a reasonable expectation of privacy in the relevant information? If the answer is yes, stage two involves an enquiry and evaluation as to whether that expectation is outweighed by a countervailing interest, in the present case Bloomberg's right to freedom of expression under article 10.

Stage one

43. At this stage, there must be an objective assessment of what a reasonable person of ordinary sensibilities would feel if he or she were placed in the same position as the claimant and faced with the same publicity.

44. As Lord Hope of Craighead expressed it in *Campbell v. MGN Ltd* (above) at [99]:

> The mind that has to be examined is that, not of the reader in general, but of the person who is affected by the publicity. The question is what a reasonable person of ordinary sensibilities would feel if she was placed in the same position as the claimant and faced with the same publicity.

45. Before what has been described as the 'threat to the personal autonomy' of an individual is protected, it must attain a certain level of seriousness, see *R (Wood) v. Commissioner of Police of the Metropolis* [2010] 1 WLR 123 at [22], in a passage approved of by Lord Toulson (with whom Lord Hodge agreed) in *In re JR38* [2016] AC 1131 at [87]. Once this threshold of seriousness is passed, the enquiry is broad and may involve a number of circumstances, see the judgment of the Court (Sir Anthony Clarke MR, Laws and Thomas LJJ) in *Murray v. Express Newspapers plc and another* [2009] Ch 481 at [36]. I have enumerated these circumstances for convenience:

> As we see it, the question whether there is a reasonable expectation of privacy is a broad one, which takes account of all the circumstances of the case. They include (1) the attributes of the claimant, (2) the nature of the activity in which the claimant was engaged, (3) the place at which it was happening, (4) the nature and purpose of the intrusion, (5) the absence of consent and whether it was known or could be inferred, (6) the effect on the claimant and (7) the circumstances in which and the purposes for which the information came into the hands of the publisher.

46. If there is no 'reasonable expectation of privacy' or 'legitimate expectation of protection' (the tests being synonymous) in relation to the matter of complaint, there is no relevant interference with the personal autonomy of the individual and article 8.1 is not engaged, see *In re JR38* (above) Lord Toulson at [88] and Lord Clarke of Stone-cum-Ebony at [105]. If there is such an expectation, it is for a defendant to justify the interference with the claimant's privacy at stage 2 of the enquiry, see *In re JR38* (above) Lord Toulson at [85].

47. If the information, or similar information, about the individual is in the public domain, it is a matter of fact and degree as to whether that individual can have a reasonable expectation of privacy which the courts should protect.

48. However, the protection may be lost if the information is in the public domain, see *Lord Browne of Madingley v. Associated Newspapers Ltd* [2008] QB 103 (CA) at [61] where Sir Anthony Clarke MR, giving the judgment of the court, said:

> It appears to us that there is potentially an important distinction between information which is made available to a person's circle of friends or work colleagues and information which is widely published in a newspaper.

See also *ETK v. News Group Newspapers Ltd* [2011] 1 WLR 1827 (CA) at [10(3)].

49. What may start as information which is private may become information known to the public at large. Whether this is so is a matter of fact and degree for determination in each case depending on the specific circumstances.

50. The principal issue between the parties on the appeal in relation to stage l, as it was before the Judge, is whether a person can have a reasonable expectation of privacy in the fact and the details of a police investigation, or an equivalent enquiry by an authorised prosecuting authority into what was essentially a business transaction.

51. In summary, Mr White QC submitted that not all criminal activity formed part of a person's private life. It was not the fact of an investigation which gave rise to the protection of a private life, but the nature of the activity that was being investigated. It was in this context that he drew attention to a distinction drawn in cases on article 8 between 'domestic' or 'truly personal' activity on the one hand, and activities which constituted 'public' aspects of a person's life, for example, politics or business. In the present case, information about the conduct of a senior employee of a public company in relation to that company's business dealings fell outside the protections afforded by article 8. Furthermore, the fact that a person is alleged to have committed an offence, and the details of the alleged offence is not, of itself, private, even at the stage before arrest or charge. The fact that the LoR was sent in confidence to the competent authority of another state and contained information about a criminal investigation did not mean that it constituted information over which the subject had any reasonable expectation of privacy.

52. The response of Mr Owen QC was that there was an expectation of privacy in what was necessarily a matter of suspicion by a state organisation, whatever the subject of suspicion; and that such an expectation was entirely reasonable.

Whether a person has a reasonable expectation of privacy in relation to a police or similar enquiry

53. As has been made clear in a number of cases, 'private life' in article 8 is a broad term and not susceptible to exhaustive definition, see *Pretty v. United Kingdom* (2002) 35 EHRR 1 at [61], and *PG v. United Kingdom* (2008) 46 EHRR 51 at [56]. However, it is plainly a broad concept which covers the physical and psychological integrity of a person and may embrace an individual's physical and social identity, see *Pretty* (above). Lord Sumption described it as 'the most elastic of rights' in *R (Catt) v. Association of Chief Police Officers of England, Wales and Northern Ireland and another* [2015] AC 1065 at [3]. At [4], he continued:

> Given the expanded concept of private life in the jurisprudence of the Convention, the test cannot be limited to cases where a person can be said to have a reasonable expectation about the privacy of his home or personal communications. It must extend to every occasion on which a person has a reasonable expectation that there will be no interference with the broader right of personal autonomy recognised in the case law of the Strasbourg court.

54. The reason why it has proved 'the most elastic of rights' is that the circumstances in which there may be interference with a right to personal autonomy are variable; and the articulation of rights may change in response to changes in societal attitudes and developments in technology.

55. Having reviewed a number of first instance cases, the Judge concluded at [119]:

> From these cases, it is possible now to say that, *in general*, a person does have a reasonable expectation of privacy in a police investigation up to the point of charge (emphasis original).

Ground 1

56. This conclusion gives rise to the first ground of appeal. Bloomberg submits that it was wrong in law.

57. The Judge's conclusion contained two important qualifications. First, it is implicit that there may be exceptions to a general expectation of privacy. Second, the expectation of privacy does not continue after the suspect is charged.

58. The Judge relied on the statement of Mann J in *Richard v. BBC* [2019] Ch 169 at [248]:

> It seems to me that on the authorities, and as a matter of general principle, a suspect has a reasonable expectation of privacy in relation to a police investigation, and I so rule. As a general rule it is understandable and justifiable (and reasonable) that a suspect would not wish others to know of the investigation because of the stigma attached. It is, as a general rule, not necessary for anyone outside the investigating force to know, and the consequences of wider knowledge have been made apparent in many cases: see above. If the presumption of innocence were perfectly understood and given effect to, and if the general public were universally capable of adopting a completely open and broad-minded view of the fact of an investigation so that there was no risk of taint either during the investigation or afterwards (assuming no charge) then the position might be different. But neither of those things is true. The fact of an investigation, as a general rule, will of itself carry some stigma, no matter how often one says it should not. This was acknowledged in *Khuja v. Times Newspapers Ltd* [2019] AC 161 (the *PNM* case renamed in the Supreme Court). The trial judge had acknowledged that some members of the public would equate suspicion with guilt, but he considered that members of the public generally would know the difference between those two things: see [32]. Lord Sumption JSC was not so hopeful. He observed, at [34]: 'Left to myself, I might have been less sanguine than he was about the reaction of the public to the way PNM featured in the trial.'

59. The *Khuja* case, referred to in this passage, concerned the identity of someone referred to in court proceedings. In the Court of Appeal, Sharp LJ (in the case that was then named *PNM v. Times Newspapers Ltd* [2014] EWCA Civ 1132) referred at [41] to material which provided 'some support for the proposition that there should be more careful consideration of [an arrested] person's rights than there might have been in the past.'

60. Lord Kerr of Tonaghmore and Lord Wilson JJSC in *Khuja*, in their dissenting judgment, set out good reasons why a person under arrest but not charged would have a reasonable expectation of privacy in relation to that fact:

> 49. Plainly there is increasing concern, judicial and extra-judicial, about the effect upon an innocent person's reputation of publication of the fact of his arrest. In the second volume of the report of his 'Inquiry into the Culture, Practices and Ethics of the Press' dated 29 November

2012, HC 780-11, Leveson LJ referred at para 3.25 to the case of Mr Christopher Jefferies, addressed in *Attorney General v MGN Ltd* [2011] EWHC 2074 (Admin); [2012] 1 WLR 2408. Mr Jefferies was exposed as having been arrested on suspicion of murder. He was later demonstrated to have been innocent of it but meanwhile he had been subjected to a protracted campaign of vilification in the press, which had led him to leave his home and to change his appearance. Although in that case the press had committed contempt of court and had published actionable libels about Mr Jefferies, the significance of the case for present purposes lies in the ease with which arrest may generally be associated with guilt. In the event Leveson LJ recommended at para 2.39 that, save in exceptional and clearly defined circumstances, the police should not release the names or identifying details of those who are arrested or suspected of a crime.

50. On 4 March 2013 Treacy LJ and Tugendhat J issued a paper entitled 'Contempt of Court. A Judicial Response to Law Commission Consultation Paper No 209'. They made clear that it reflected the views of the President of the Queen's Bench Division, the Senior Presiding Judge, Leveson and Goldring LJJ and other senior judges. They observed at para 5:

> The police arrest many people who are never charged. If there were a policy that the police should consistently publish the fact that a person has been arrested, in many cases that information would attract substantial publicity, causing *irremediable* damage to the person's reputation.' (Emphasis supplied)

They proceeded to indorse the recommendation made by Leveson LJ in para 2.39 of his report.

51. On 31 October 2016 Sir Richard Henriques, a former High Court judge, made a report entitled 'An Independent Review of the Metropolitan Police Service's handling of non-recent sexual offence investigations alleged against persons of public prominence'. Sir Richard said at para 1.67:

> I consider it most unlikely that a Government will protect the anonymity of suspects pre-charge. To do so would enrage the popular press whose circulation would suffer. Present arrangements, however, have caused the most dreadful unhappiness and distress to numerous suspects, their families, friends and supporters. Those consequences were avoidable by protecting anonymity. Nobody is safe from false accusation and damaging exposure under present arrangements. A reputation built on a lifetime of public service or popular entertainment can be extinguished in an instant. I sincerely believe that statutory protection of anonymity pre-charge is essential in a fair system.'

61. The references to 'irremediable damage' to reputation in the extract set out in paragraph 50 and the 'most dreadful unhappiness and distress' in the extract set out in paragraph 51 give support for a general expectation of privacy in relation to those who have been arrested.

62. Bloomberg criticised the Judge's approach in the present case as failing properly to focus on the subject matter of the UKLEB investigation. If the information being investigated did not form part of a person's private life, it did not become private because it was the subject of an investigation. Someone who was fulfilling a professional role in a large public company was not operating within the sphere of their private life, particularly when the conduct complained of was unlawful. Among the relevant material background was: (1) the widespread public concern about corrupt payments made to acquire valuable assets in the Foreign State; (2) the Claimant's position within X Ltd as Chief Executive of a division which conducted business in the Foreign State; and (3) the lack of complaint by the Claimant about the contents of the Autumn Article, with the implicit acceptance that the fact that he was being investigated by the UKLEB was in the public domain.

63. Mr White reminded the Court that the notion of private life under article 8 was broad but not unlimited; and it was necessary to look at the activity in issue. As both domestic and Strasburg decisions have made clear, it does not extend to activities which are of an essentially public nature. Businessmen who are actively involved in the affairs of large public companies are not operating in that sector of their lives as private individuals, and they inevitably and knowingly lay themselves open to close scrutiny of their acts.

64. The domestic authority that founded this part of Bloomberg's submission was the decision of the Supreme Court in *Kinloch v. HM Advocate* [2013] 2 AC 93. The appellant had been observed carrying a bag which, when searched, was found to contain large sums of money. When indicted for an offence under the Proceeds of Crime Act 2002, he took the point that the surveillance was unauthorised and constituted a breach of his right to respect for his private life under article 8.1. This unpromising point was dealt with shortly in the judgment of Lord Hope DPSC at [21]:

> There is nothing in the present case to suggest that the appellant could reasonably have had any [reasonable] expectation of privacy. He engaged in these activities in places where he was open to public view by neighbours, by persons in the street or by anyone else who happened to be watching what was going on … The criminal nature of what he was doing, if that is what it was found to be, was not an aspect of his private life that he was entitled to keep private …

65. The judgment of Lord Toulson in *In re JR38* (above) cited this passage from *Kinloch*, when reaching the view expressed at [100] that, among other things, it was important to understand the nature of the activity in which a person was involved in considering whether article 8 was engaged. In that case, the majority of the Supreme Court considered that rioting by a child was not an activity that constituted an aspect of private life that engaged the protection of article 8.

66. These cases, as well as the other cases relied on by Bloomberg, *Browne v. Associated Newspapers Ltd* [2008] QB 103 (CA) at [52]-[53] and *Yeo v. Times Newspapers Ltd*

[2017] EMLR 1 at [147], support the proposition that there is a line to be drawn between public aspects of a private life (business in the former case, politics in the latter case) and the personal aspects of a private life, when it comes to a consideration of whether there is a reasonable expectation of privacy.

67. In *Axon v. Ministry of Defence* [2016] EMLR 20, Nicol J had to consider this question in the context of a claim under article 8 and/or for breach of confidentiality in relation to investigations by the defendant into complaints about Commander Axon's conduct as a naval officer. It was accepted that his was a public role, and that his removal from command of a vessel was a 'public matter'. However, it was argued on his behalf that the reasons for his removal were matters in which he had a reasonable expectation of privacy. There were a number of features which were particular to the case; but some of the observations of Nicol J in the course of concluding that the claimant did not have a reasonable expectation of privacy are relevant to the present case. First, see [64a], the case concerned:

> … the claimant's role in a very public position. That does not mean that there is nothing about his performance in that role which would attract a reasonable expectation of privacy, but it sets an important context.

68. Second, the misconduct in question was both serious and material to the stage 1 question, see [64e]. Third, the serious and unusual event was bound to become a public fact, see [64f]. Fourth, the security markings on the relevant personnel documents did not preclude the argument that the claimant did not in fact have a reasonable expectation of privacy in the information that it contained.

69. These and the Strasbourg cases (for example, *Al-Fayed v. United Kingdom* (1990) 12 EHRR 1 and *Steel and Morris v. United Kingdom* (2005) 41 EHRR 22) indicate that one of the factors bearing on whether a reasonable person of ordinary sensibilities would consider that he had a reasonable expectation of privacy is the extent to which the information relates to what might be characterised as a public aspect of a personal life in contradistinction to the private aspect of a personal life, including sexual aspects of that life; but whether they do in the particular circumstances will depend upon the multi-factorial analysis set out in *Murray v. Express Newspapers Ltd* (above), see [45] above. The Judge approached this issue under the enumerated headings in that case.

(1) The Claimant's attributes

70. Although he held a senior position in X Ltd, which at the time was a publicly listed company, he was not a director and (on evidence which the Judge accepted) achieved no particular prominence in his role within the company.

(2) Nature of the activity in which he was engaged

71. The activity that the UKLEB was investigating was whether the Claimant had been involved in corruption in relation to X Ltd's activities in the Foreign State. However, the Claimant was not seeking to assert a privacy right over this alleged conduct. He accepted that Bloomberg could report on the matters that the UKLEB was investigating. His claim related to a reasonable expectation of privacy over

confidential details of the UKLEB investigation and, in particular, its suspicions as to his conduct in the light of the evidence it had obtained.

(3) The place at which it was happening

72. As the Judge found, none of the facts relating to the scope of the UKLEB's investigation into the Claimant, or the particular matters in respect of which it suspected the Claimant had been involved in criminal activity, had been made publicly available by the UKLEB. Prior to publication of the Article, they had remained confidential to the UKLEB's investigation.

(4) The nature and purpose of the intrusion

73. The Judge found that this factor did not have much resonance in the present case, and that it was more relevant to the stage two analysis.

(5) The absence of consent

74. The Judge held that it must have been clear to Bloomberg that the Claimant had not consented to the publication.

(6) The effect of the publication on the Claimant

75. The Judge accepted that the publication of the Information had a significant adverse impact on the Claimant both in terms of loss of autonomy and damage to reputation; but found that it was not a case in which the consequences of publication had been devastating or life changing.

(7) The circumstances in which and the purposes for which the information came into the hands of the publisher

76. The Judge held that this was the most significant factor for a number of reasons.

77. The first was that the UKLEB was a law enforcement body carrying out a criminal investigation into X Ltd in which the Claimant was a suspect. Although the fact of the investigation into X Ltd was known, the particular targets of the investigation and the identities of those suspected was not.

78. The second and most important circumstance was the preliminary and contingent nature of the investigation. The College of Policing Guidance made clear that suspects in criminal investigations should not be identified prior to charge. This 'Guidance in Relationships with the Media' (2013) was referred to by Mann J in *Richard v. BBC* (above) at [243]. Paragraph 3.5.2 of the Guidance provides:

> … save in clearly identified circumstances, or where legal restrictions apply, the names or identifying details of those who are arrested or suspected of crime should not be released by police forces to the press or public. Such circumstances include a threat to life, the prevention or detection of crime or a matter of public interest and confidence…

79. A revised Guidance on 'Media Relations' was issued by the College of Policing in 2017. It is clear from both the 2013 Guidance and the 2017 revised Guidance that a

suspect should not be identified to the media prior to the point of charge, save where justified by clear and exceptional circumstances.

80. These statements from the College of Policing are not statements of the law. However, they reflect both an operational response to criticisms about the unfairness of previous incidents in which suspects were named, as well as some of the judicial observations to which I have referred above. In *Richard v. BBC* (above), Mann J, having referred to these statements, noted:

> [250] These judicial remarks demonstrate at least some of the reasons why an accused should at least prima facie have a reasonable expectation of privacy in respect of an investigation. They are particularly appropriate to the type of case referred to there (of which, of course, the present case is an instance) but they are generally applicable, to varying extents, to other types of cases.
>
> [251] That is not to say, and I do not find, that there is an invariable right to privacy. There may be all sorts of reasons why, in a given case, there is no reasonable expectation of privacy, or why an original reasonable expectation is displaced … But in my view the legitimate expectation is the starting point. I consider that the reasonable person would objectively consider that to be the case.

81. *Richard v. BBC* was a case in which the investigation related to allegations of historical sexual abuse; but Mann J's observations were rightly directed more widely: not as an invariable or unqualified right to privacy during an investigation, but as the legitimate starting point. In my view this was the correct approach and an accurate statement of the law. At [234] Mann J had noted that the question, whether the existence of a police investigation gave rise to a reasonable expectation of privacy, had not been clearly and authoritatively answered; and Mr White pointed out that the cases cited by the Judge in the present case were either interim decisions based upon specific facts or were not such as to provide support for the general proposition.

82. Since the matter arises for decision in the present case, I would take the opportunity to make clear 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. The suspicion may ultimately be shown to be well-founded or ill-founded, but until that point 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.

83. In the present case, the Claimant has not even been arrested.

84. I would add that the reasonable expectation of privacy is not in general dependant on the type of crime being investigated or the public characteristics of the suspect (for example, engagement in politics or business). The crime need not be sexual: the much maligned Christopher Jefferies (see *Khuja* above at [59]) was not suspected of a crime relating to private aspects of his life; and I see no good reason why suspicion relating to a crime concerning business dealings should be an exception to a salutary general approach which is founded on the preliminary stage of a state enforcement agency

enquiry into what may or may not lead to a charge. To be suspected of a crime is damaging whatever the nature of the crime: it is sensitive personal information and there can be little justification for a hierarchy of offences giving rise to suspicion; although I would accept that there may be some cases where the reasonable expectation of privacy may be significantly reduced, perhaps even to extinction, due to the public nature of the activity under consideration (rioting, for example or, Mr White's example, electoral fraud). If the expectation of privacy is reduced it will bear on the weight to be attached to the article 8 rights at stage two.

85. I would accept the Judge's observation in his judgment at [124]:

> Nevertheless, an expectation of privacy in arrest/police investigation is not invariable. Whether it arises in any particular case will always depend upon the individual facts of that case. For example, if the suspect's name were to be released by the police – for legitimate policing reasons – then s/he may well find it difficult to establish that s/he had a reasonable expectation of privacy in that information. Equally, an armed bank-robber who held hostage a number of customers and employees in a televised 3-day siege, could hardly claim a reasonable expectation of privacy when s/he surrendered and was arrested.

86. The Judge also found that there was a third reason, linked to the second: namely the very clear indications in the LoR that the investigations were at an early stage, neither the extent nor the detail of its contents were in the public domain. This and the highly confidential nature of its contents should have been recognised by Bloomberg. The reasons for the strict confidentiality were clearly expressed: to avoid prejudice to the UKLEB's investigation that might be caused if the subjects of the investigation became aware of the focus of the investigation and took steps to frustrate it by interference with documents and/or witnesses. In the event, Bloomberg decided to publish its contents in the Article even before the date by which the authorities in the Foreign State had been asked to respond to the LoR. Furthermore, and contrary to what Garnham J had been led to believe at the hearing of the application for an interim injunction, the UKLEB had objected to publication of the Article. All these were matters which were relevant to the question of whether the Claimant, objectively speaking, had a reasonable expectation of privacy in the information contained in the LoR. The degree of confidentiality was, at least to this extent, qualitatively different to most police investigations.

87. This part of the judgment gives rise to a separate matter of complaint which I address below. However, in my view, the Judge was right, at the very least, to treat the fact that the Information was contained in a LoR and the circumstances in which the Information came into the hands of Bloomberg as showing the provisional nature of the UKLEB's suspicion and consequently the reasonable expectation of privacy in relation to the Information.

88. For the reasons set out above, I would reject ground 1.

89. The other grounds can be dealt with more shortly:

Ground 2

90. This is a complaint that the Judge wrongly conflated private information with confidential information. Not all confidential information is private information, and not all confidential documents contain private information, see for example, *Axon v. MOD* (above) at [64.k], where it was found that the confidential marking on a relevant document did not mean that it contained private information.

91. In *Abbey v. Gilligan and Associated Newspapers Ltd* [2012] EWHC 3217 (QB) at [39], Tugendhat J accepted that in an appropriate case the court could hold that the manner in which a person expressed themselves could give rise to a reasonable expectation of privacy.

92. It is right that the Judge found that it was a 'striking feature' that there was no recognition by Bloomberg as to the confidential nature of the LoR, nor of the potential consequences of breaching that confidentiality nor any weighing up of this against any perceived public interest in publication (see, [51] and [113]). However, he made clear that the confidentiality of the LoR was not determinative of the issue of whether the Claimant had a reasonable expectation of privacy in the Information, although he placed reliance on the highly confidential nature of the LoR in determining that the Information was private. In my view he was right to do so for the reason set above: it was part of 'the circumstances in which and the purposes for which the information came into the hands of the publisher,' see (7) in *Murray* at [45] (above).

93. In *Browne v. Associated Newspapers* (above) at [31], the Court of Appeal observed that:

> … the relationship between the relevant parties is of considerable importance in answering Lord Nicholls's question, namely whether there was a reasonable expectation of privacy. In answering that question there are a number of potentially relevant questions, depending on the circumstances. They include whether the person concerned … received information which he knew or ought reasonably to have known was fairly and reasonably to be regarded as confidential or private.

Ground 3

94. Mr White argued that the Judge erred by drawing what was an artificial distinction between factual allegations about the Claimant's alleged criminal conduct on the one hand, and the UKLEB's suspicions about that conduct on the other. In the judgment at [113], after referring to the *Axon* case (above), the Judge said this:

> Here the article was not making factual allegations about the Claimant's conduct (as to which the fact that they had been set out in a confidential document would not make them confidential/private); it was reporting the UKLEB's assessment of the evidence they had obtained and their suspicions, based on that evidence, that the Claimant may have committed a criminal offence.

95. Bloomberg submitted that this was a distinction without a difference. The Information consisted of allegations that the Claimant had provided false information to the X Ltd

board on the value of an asset in a potential conspiracy to which another named official of X Ltd may have been complicit; that he had committed fraud by false representation by dishonestly representing that [name] was a valuable asset based on data for an entirely different asset; and that a substantial sum of money paid into a bank account was the proceeds of a crime carried out by him. The additional information that the UKLEB 'considered' or 'believed' these allegations, and its associated request for records, did not alter this fundamental position. In short, the facts were the same, and did not lead to a different result depending on the UKLEB's assessment of them.

96. In my view there is plainly a difference between a report about the alleged criminal conduct of an individual; and a report about a police investigation into that individual and preliminary conclusions drawn from those investigations. The latter may include the former; but it also conveys that the investigating authority regards the allegations as serious enough to warrant investigation and had drawn preliminary conclusions to the disfavour of the Claimant. For the reasons set out above there is a significant distinction, and that is why the approach of the police in this country has changed. In the present case the Judge was right to identify the distinction. Nor did he focus exclusively on the UKLEB investigation without reference to the underlying allegations being investigated. It is clear that he was well aware that the Claimant did not complain about the media's interest in and reporting of allegations about X Ltd's involvement in corruption in the Foreign State.

Ground 4

97. Bloomberg argued that the Judge erred in holding that the Claimant had a reasonable expectation of privacy in relation to the fact that he was being investigated by the UKLEB and the nature of the offence for which he was being investigated. Mr White relied on (1) the public debate and discussion of controversial transactions involving X Ltd in the Foreign State which gave rise to these allegations; (2) the Claimant's publicly-known role and responsibilities within X Ltd in that country; and (3) his concession that, in the light of the Autumn Article, Bloomberg could continue to publish the fact that he was being investigated by the UKLEB.

98. It is not, and could not be, contended that the Judge failed to consider these matters. The complaint is essentially that having considered them he reached the conclusion that he did. It is essentially an invitation to this Court to substitute a different conclusion on the various factors considered by the Judge. I would decline that invitation. It is a contention founded on the weight attached by the Judge to particular factors, but without identifying any error of law. I would also observe that, although Garnham J dismissed the application for injunctive relief, he too found, at [45] of his judgment, that the Claimant had a reasonable expectation of privacy in relation to the Information.

Ground 5

99. This ground is based on what is said to be the Judge's failure to have regard to *Murray* factor (4) above: the nature and purpose of the intrusion. It is said that, in addressing this factor, the Judge should have recognised that Bloomberg published a single article containing accurate information, which did not go significantly further

than what was already publicly available, and whose purpose had been to contribute to a debate of general interest and importance.

100. I would reject this criticism. The Judge considered the nature and purpose of the intrusion, but rightly recognised that it was more relevant at the proportionality stage of the analysis, stage two, see Lord Nicholls in *Campbell v. MGN* (above) cited in *McKennitt* at [11] above. At [22] in *Campbell v. MGN*, Lord Nicholls made clear that, when considering whether an individual had a reasonable expectation of privacy in relation to the facts in question, wording such as 'highly offensive in order to be actionable' and 'highly offensive' could too easily bring into account considerations which go more properly to issues of proportionality: for instance, the degree of intrusion into private life, and the extent to which publication was a matter of proper public concern. Such an approach 'could be a recipe for confusion.' This was a recognition that the degree of intrusion into private life is not relevant at stage one when 'deciding whether the disclosed information was private.' They were considerations that went 'more properly to issues of proportionality', at stage two.

101. It follows that the Judge was correct to conclude, as he did at [125(i)(d)], that the public interest in reporting matters relating to allegations of corruption against X Ltd were considerably more relevant to the justification for any interference (stage two) with such privacy rights as the Court found at stage one.

Conclusion at stage one

102. For these reasons, I would conclude, in agreement with the Judge, that the threshold of seriousness was passed and that a reasonable person of ordinary sensibilities, placed in the position of Claimant, would have had a reasonable expectation of privacy in relation to the Information.

Stage two

The law

103. At this point the second question arises: whether in all the circumstances the interests of the owner of the private information must yield to the right of freedom of expression conferred on the publisher by article 10? The fact that this enquiry is commonly referred to as 'the balancing exercise' illustrates that this is primarily a matter for assessment by the trial judge.

104. In striking the balance, the following principles apply.

105. First, although article 8 and article 10 contain important rights, both are qualified and neither has precedence. Where their values are in conflict, it is necessary to bring a close focus on the comparative importance of the rights being claimed in the particular case; to take into account the justifications relied on for interfering with or restricting each right; and to apply a proportionality test, in what is sometimes referred to as 'the ultimate balance', see *In re S (a Child) (Identification Restrictions on Publication)* [2005] 1 AC 593 at [17], Lord Steyn (with whom all other members of the House of Lords agreed); and *PJS v. News Group Newspapers Ltd* [2016] AC 1081 at [20], Lord Mance (with whom three other members of the Supreme Court agreed). Lord Mance added at the end of that paragraph:

> The exercise of balancing article 8 and article 10 rights has been described as 'analogous to the exercise of a discretion': *AAA v Associated Newspapers Ltd* [2013] EWCA Civ 554, para 8). While that is at best only an analogy, the exercise is certainly one which, if undertaken on a correct basis, will not readily attract appellate intervention.

106. Second, the decisive factor at stage two is an assessment of the contribution which the publication of the relevant information would make to a debate of general interest: *Von Hannover v. Germany* [2004] EMLR 21 at [76]; and *ETK v. News Group* (above) at [10(5)].

107. Third, the court must have in mind the observations of the ECtHR in *Axel Springer v. Germany* [2012] EMLR 15 at [79]:

> The Court has also repeatedly emphasised the essential role played by the press in a democratic society. Although the press must not overstep certain bounds, regarding in particular protection of the reputation and rights of others, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest. Not only does the press have the task of imparting such information and ideas; the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of 'public watchdog' (see *Bladet Tromsø and Stensaas v. Norway* [GC] (1999), no. 21980/93, §§59 and 62, ECHR 1999 III, and *Pedersen and Baadsgaard*, cited above, §71).

108. The Court must not allow itself to be drawn into confining the important rights of the press under article 10, so that it ceases to be the public watchdog of freedoms in a democratic society and becomes the muzzled lapdog of private interests.

109. Fourth, it will be necessary to weigh in the balance the factors identified by the ECtHR, in the *Axel Springer* case, at [89] and following:

(1) contribution to a debate of general interest, see also [106] above;

(2) how well-known is the person concerned and what is the subject of the report;

(3) the prior conduct of the person concerned;

(4) the method of obtaining the information and its veracity; and

(5) the severity of the sanction imposed: the proportionality of the interference with the exercise of the freedom of expression.

110. These principles were not in substantial issue on this appeal, the debate was as to how they had been applied by the Judge.

The Judge's approach and findings

111. In approaching the 'ultimate balance', see *In re S (a Child)* (above), the Judge recognised, at [133] of the judgment, the test that he had to apply, namely:

> … an intense focus to the comparative importance of the Claimant's Article 8 rights that I have found are engaged and the Article 10 rights of the Defendant (and the public generally), consider the respective justifications for interfering with or restricting each right, and make an assessment of the proportionality of the respective interference.

112. While recognising that the issue of corruption in the Foreign State, and X Ltd's possible involvement in that corruption, was of high public interest, the Judge found that this consideration had only an indirect bearing on the case, since the Article was not presenting the fruits of Bloomberg's investigation into the alleged corruption. The news value of the Article was the disclosure that a LoR had been issued, the revelation of what and who were the targets of the UKLEB investigation, and the exposure of the nature of the UKLEB's suspicions. What Bloomberg had to show was that there was a sufficient public interest in revealing the information about the UKLEB's investigation drawn from the LoR such as to outweigh the reasonable expectation of privacy in relation to that information, see judgment at [127]. He accepted that the UKLEB investigation into X Ltd was a matter of public interest; and that there was a public interest in the media reporting of developments in the UKLEB investigation. In discharging its role, the media could legitimately be expected to highlight any perceived deficiencies or unwarrantable delays in the investigation. However, the Article made no such criticisms of the investigation and the Information in the LoR was not published in the article for this reason, see judgment at [128].

113. In assessing whether there was a sufficient public interest to justify disclosure of the Information, the Judge took as a starting point that, applying the clear principles from authorities that he had previously referred to, including *National Crime Agency v. Abacha* (above), there was a clear public interest in the contents of a LoR not being published and the confidentiality of the UKLEB's investigations being maintained. Both the implicit confidential nature of the LoR and the circumstances in which it came into its possession meant that Bloomberg was bound generally to observe the confidentiality of its contents. The facts that none of its employees seemed to have appreciated its confidential nature, and that the Claimant had not pursued (and on Bloomberg's case, could not pursue) a claim for breach of confidence did not alter this fundamental position, see judgment at [129].

114. The Judge recognised that such confidentiality could not be absolute. Interviews of witnesses and possible suspects might provide an insight into the matters which were being investigated. Equally, there might be occasions when the public interest in maintaining confidentiality in an investigation could be outweighed by other considerations: for example, if documents suggested that the investigators had been subjected to improper political pressure not to pursue certain people or lines of inquiry. Necessarily, the assessment was highly fact-specific and involves a careful assessment of the justification for, and proportionality of, the interference with the confidentiality balanced against interference with the right of freedom of expression. Ultimately, the question is whether any fetter on freedom of expression was 'necessary in a democratic society', see *HRH Prince of Wales v. Associated Newspapers Limited* [2008] Ch 57 (CA), 125 at [67].

115. The Judge directed himself that the question was not whether there was a sufficient public interest to outweigh the confidentiality of the LoR, but whether there was a sufficient public interest to outweigh the Claimant's privacy interests, see judgment at

[131]. Having identified the various points relied on by Bloomberg as justifications for the breach of the Claimant's privacy, at [132], he concluded that they did not, individually or collectively, 'provide such a sufficient countervailing justification to outweigh the Claimant's article 8 rights.'

116. Finally, in considering the respective justifications for interference with the Claimant's article 8 rights and Bloomberg's article 10 rights, the Judge concluded that interference with the latter was necessary and proportionate to secure the legitimate aim of protecting the Claimant's reasonable expectation of privacy in the highly confidential information concerning the UKLEB's on-going investigation, see judgment at [133].

117. I have set out the Judge's reasoning on this aspect of the case because it demonstrates that his assessment of the factors weighing in favour of the Claimant's article 8 rights and Bloomberg's countervailing article 10 rights was thorough and nuanced.

Bloomberg's criticism of the Judge's reasoning

118. Mr White submitted that, if the Claimant had established any rights under article 8, they were necessarily 'weak' rights and were substantially outweighed by the public interest in the exposure of crime. The Judge had accepted that the issue of corruption in the Foreign State and particularly the possible involvement in that corruption by X Ltd, its officers and senior employees was a matter of high public interest. The news value of the Article was the identity of those suspected by the UKLEB based on evidence that it had gathered.

119. Like the Judge, I would accept that the UKLEB investigation into X Ltd was a matter of public interest: not least because the UKLEB is publicly funded and charged with the investigation and prosecution of serious criminal offences; and that there was a clear public interest in the media following and reporting on developments in the investigation. In discharging its role as 'public watchdog', see the *Axel Springer* case (above) at [79], the media could legitimately be expected to highlight, for example, perceived inadequacies in the investigation. However, the Judge brought these matters into the balance; and, as he noted, the Article did not make any such criticism, and the private information contained in the LoR was not published in the Article for this purpose.

120. The confidential nature of the LoR was apparent from its terms; and the circumstances in which it came into Bloomberg's possession were such that it was bound to observe the confidentiality of the document. The fact that none of Bloomberg's employees appeared to have appreciated its highly confidential nature on the one hand, and the fact that the UKLEB had not pursued, and (on Bloomberg's case) the Claimant could not pursue, a claim for breach of confidence, on the other hand, did not alter this position.

121. It is clear that there was a considerable amount of information available publicly about the UKLEB's investigation, including the Claimant's involvement in that investigation, not least from the Autumn Article, and that such information was no longer confidential. On the other hand, the Claimant was not trying to stop what was already in the public domain. His claim was closely focussed on what had been published in the Article. I see no reason to disagree with the Judge's view that there

was no sufficient public interest to justify disclosure of the LoR's contents and that the confidentiality of the UKLEB's investigations should be maintained.

Ground 6

122. Mr White argued that the Judge failed to attach sufficient weight to the public interest in information about 'the issue of corruption in the Foreign State and possible involvement in that corruption by X Ltd and its employees/officers'.

123. A criticism that a trial judge failed to give sufficient weight to a material factor that he plainly took into account is not a promising argument on appeal.

124. Bloomberg's argument is that the Judge proceeded on the basis of two distinctions, neither of which were justified. First, he asked whether there was 'sufficient public interest in revealing information about the UKLEB's investigation drawn from the LoR', rather than whether there was sufficient public interest in revealing information about the Claimant's alleged criminal conduct in his senior role in X Ltd, which was the subject of that investigation and formed a core part of the Information. The fact that it derived from a state investigating authority gave weight to Bloomberg's article 10 rights, see the *Axel Springer* case (above) at [102]-[105]. Second, in distinguishing between publishing 'the fruits of an investigation' by Bloomberg into the alleged corruption, which might have been justified in the public interest on the one hand, and 'the revelation of what and who were the targets of the UKLEB investigation and its suspicions based on the evidence it had gathered', which was not in the public interest, on the other hand. Mr White submitted that journalists frequently rely on what they have been shown, see for example the *Axon* case (above). The distinction drawn by the Judge risked undermining investigative journalism, and he was wrong to take into account the provenance of the Information when assessing the public interest in publication, and to conclude that the public interest was weakened because the information was not secured by Bloomberg's own investigation. Neither distinction was justified by the case law on article 10.

125. Bloomberg also argued that the Judge failed to apply the 'crucial principle' which applies when considering whether the public interest justifies the publication of private information that, where there is a rational view by which publication can be justified in the public interest, a court must give full weight to editorial knowledge and discretion, and be slow to interfere, see *Ali & Aslam v. Channel 5 Broadcasting* [2019] EWCA Civ 677, Irwin LJ (delivering the judgment of the Court) at [83] and [92].

126. These arguments depend on what is said to be the artificiality of the distinction advanced as ground 3. In my view, the Judge was entitled to distinguish between the public interest in revealing information about the Claimant's alleged criminal conduct in his role at X Ltd and the UKLEB's investigation drawn from the LoR. He attached significant weight to the high public interest in information about 'the issue of corruption in the [Foreign State], and possible involvement by X Ltd and its employees/officers', see judgment at [126]; and, as he noted at [132(ii)], there was nothing to prevent Bloomberg from publishing articles raising public awareness of the problems of corruption in the Foreign State, and nor preventing it from investigating the issue itself and publishing what it discovered. However, he rightly identified that the public interest in publication about the problems of corruption in the Foreign State

was not directly relevant to the specific question he had to address, namely: whether there was a public interest in publishing information about the contents and provisional results of the UKLEB investigation.

Ground 7

127. If contrary to the argument advanced under ground 6, the Judge was correct to distinguish between the public interest in information about the investigation and about the subject-matter of the investigation, Bloomberg submitted that the Judge's decision had the effect of wrongly limiting the scope of permissible reporting. He had erred in two material respects.

128. First, he was wrong to conclude that the only developments in which there was sufficient public interest were those deserving of criticism. This finding was contrary to the 'crucial principle' in relation to press reporting, see [125] above. Secondly, he wrongly classified the media's function as a 'public watchdog' as limited to publishing criticism of the way that a public body was performing its duties: its duty was wider, as made clear by the ECtHR in *Von Hannover v. Germany* (application 59320/00*)* (2004) 40 EHRR 1, at paragraph 63:

> The Court considers that a fundamental distinction needs to be made between reporting facts - even controversial ones - capable of contributing to a debate in a democratic society relating to politicians in the exercise of their functions, for example, and reporting details of the private life of an individual who, moreover, as in this case, does not exercise official functions. While in the former case the press exercises its vital role of 'watchdog' in a democracy by contributing to 'impart[ing] information and ideas on matters of public interest' (*Observer and Guardian*, cited above, ibid.) it does not do so in the latter case.

129. Mr White argued that there was a sufficient public interest in what had been already a prolonged investigation.

130. The arguments are variants of the criticism that forms the basis of ground 3. While there is, of course, a well-recognised principle that the court should not substitute its own view for those of editors or publishers when considering editorial techniques, it is implicit in Bloomberg's argument that editorial discretion should allow the publication of information in respect of which there is insufficient public interest. A recognised public interest in alleged corruption in the Foreign State did not confer a wide authority to report on the contents of the LoR, in which there was not a sufficient public interest to justify publication. The Judge gave an instance of what the media might legitimately be expected to highlight: 'for example, any perceived inadequacies in the investigation.' This was plainly not intended to be exhaustive of legitimate media concerns.

131. The difficulty with this argument remains the fact that Bloomberg had done little, if anything, more than publish the Information in the highly confidential LoR.

Ground 8

132. This is a complaint that, when assessing the public interest, the Judge erred in taking the confidentiality of the LoR as his starting point and therefore applied the wrong test. This was a privacy (and not a breach of confidence) case, in which there was no relevant confidential relationship between the parties. It followed that the right approach was simply to strike 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', see *Prince of Wales v. Associated Newspapers* (above) at [65], and also [68].

133. In my judgement this ground fails to recognise that 'by far the weightiest factor' supporting the Judge's conclusion that the Claimant had a privacy interest in the information was 'the circumstances in which and the purposes for which the information came into the hands of' Bloomberg, see judgment at [125(ii)]. The Judge did not find that 'the starting point' was 'the confidential nature and content of the LoR'. The Judge said that 'the starting point' 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', see [129].

134. Although there was no claim for breach of confidence, there was a substantial and clearly identified public interest in maintaining the confidentiality of the LoR and its Information. The fact that the UKLEB had not advanced a claim in respect of the LoR was material, but so was its attitude to Bloomberg's publication of its contents, as it belatedly emerged. This was a factor to be weighed when balancing the respective article 8 and article 10 interests, and I can see nothing to justify 'appellate intervention', to adopt Lord Mance's phrase in *PJS v. News Group* (above).

135. **Ground 9** was a matter of complaint in respect of which Bloomberg was refused permission to appeal, and nothing further need be said about it.

Ground 10

136. This is a contention that the Judge erred in his understanding of the *Axel Springer v. Germany* case. It is said that he was wrong to conclude that the criteria identified by the ECtHR in respect of the balancing of the rights under articles 8 and 10 was accommodated within the domestic authorities, particularly *Murray* (above). The *Murray* criteria are relevant at stage one, whereas the *Axel Springer* criteria are relevant at stage two. If the Judge had correctly applied the *Axel Springer* criteria at stage two, he would have concluded that Bloomberg's article 10 rights outweighed the Claimant's article 8 rights, insofar as his article 8 rights were engaged at all.

137. I would dismiss this ground of appeal. The Judge did not discount the *Axel Springer* criteria. He considered them; but concluded that he did 'not derive much assistance' from them, see judgment at [134]. Although it might have been better if he had addressed the criteria separately, there is a significant degree of overlap between the *Murray* and *Axel Springer* factors. Two of the *Axel Springer* criteria, (2) the degree to which the person concerned is well-known and what is the subject of the report, and (3) the prior conduct of the person concerned, are accommodated within three of the *Murray* criteria, (1) the attributes of the claimant, (2) the nature of the activity in which the claimant was engaged, and (3) the place at which it was happening.

138. The extent of the overlap between the two sets of criteria is also clear from the *Murray* factor (4) 'the nature and purpose of the intrusion'. When considering stage one of the analysis, the Judge had expressly acknowledged that 'the facts relating to the public interest in reporting on matters connected with the allegations of corruption made against X Ltd are relevant, not to this factor, but to the justification for any interference with any privacy right the Court finds that the Claimant has', see judgment at [125(i)(d)].

139. In any event, if, and to the extent that, the Judge did not specifically address each of the *Axel Springer* criteria, I would reject the argument that this had a material impact on his conclusion. Viewed overall, it was, at the very least, a conclusion that was reasonably open to him.

Conclusion on stage two

140. I would reject Bloomberg's complaints about the Judge's conclusion in relation to the weighing of the article 8 and article 10 interests at stage two.

Overall conclusion

141. For the reasons set out above, I would dismiss the appeal.

142. I would add two further points. First, we were referred to an article by Professor Nicole Moreham, 'Privacy, Reputation and Alleged Wrongdoing: why police investigations should not be regarded as private', in (2019) Journal of Media Law, 11:2, 142-162. It will be apparent from the title that I disagree with her conclusions; but I would wish to acknowledge the illuminating contribution of the article to the debate on the issues that arise.

143. Second, the Judge awarded the Claimant £25,000 for breach of his right to privacy. No point was taken by Bloomberg about that level of damages; and we heard no submissions about an appropriate award for such a breach. In these circumstances it is neither necessary nor desirable to say anything about the damages, other than to say that nothing in this judgment should be regarded as endorsing this level of recovery.

Lord Justice Bean:

144. I agree with both judgments.

Lord Justice Underhill:

145. I agree that this appeal should be dismissed, essentially for the reasons given so clearly and comprehensively by Simon LJ. But I add this short judgment because of the importance of the issues which it raises and because I have not found it entirely straightforward. I address in turn the two stages of the necessary analysis identified by Buxton LJ in *McKennitt v Ash*: see para. 40 above.

146. The question at stage 1 is whether Bloomberg's disclosure that the Claimant was the subject of a UKLEB investigation, and the details given in the Article, engaged his article 8 rights. Simon LJ refers at paras. 53 and 54 above to some of the ways in which Courts have sought to identify a unifying principle underlying the disparate circumstances which have been held to fall within the scope of article 8. However, I

do not think that it is necessary in a case of the present kind to grapple with the (to put it no higher) elusive concepts of "psychological [or social] integrity" and "personal autonomy". It is in my view sufficient to ask, as he does (and as Nicklin J did), whether the Claimant had a reasonable expectation of privacy in relation to the information in question.

147. As to that, I agree with Simon LJ's conclusion, at para. 81 of his judgment, that the passage from the judgment of Mann J in *Richard v BBC* which he quotes at para. 58 represents the correct approach to a case of this kind, and with his further observations at paras. 82 and 84-85. It is important to emphasise that, as he says, the proposition that a person has a reasonable expectation of privacy in relation to a police (or similar) investigation is not a universal rule and that the circumstances of a particular case may justify a different conclusion. But the Judge fully recognised that.

148. Nicklin J undertook his assessment of the case by reference to the seven categories identified in the judgment of this Court in *Murray* (see para. 45 above). That was a perfectly appropriate way of proceeding, though I do not think that the Court in that case intended to provide anything in the nature of a rigid checklist; not all the factors enumerated may be relevant in every case, and in some cases other circumstances may be relevant. I can see no error of law in his conclusion, and I agree with Simon LJ's rejection of grounds 2-5. In particular, I agree that the Judge did not fall into the error of conflating privacy and confidentiality. Although he did place considerable emphasis on the confidentiality of the LoR it is clear that he did so on the basis that that was relevant to 'factor (7)' and thus to the question whether the Claimant could reasonably expect the material in it to be private. I regard that as legitimate.

149. Overall, I can accept that some of the features relied on by Mr White enumerated at para. 62 above take the present case outside the basic paradigm where the subject of a criminal investigation has a reasonable expectation of privacy, but I agree with the Judge and Simon LJ that they are not sufficient to justify the conclusion that the Claimant's article 8 rights were not engaged.

150. Turning to stage 2 of the analysis, this involves a balancing exercise. I accept that the balance in this case may have been quite a fine one, but this Court cannot interfere with how it was struck by the Judge unless he misdirected himself or his decision can positively be said to be wrong. I agree with Simon LJ that he did not do so and that none of the criticisms pleaded by Bloomberg under grounds 6-8 or 10 is well-founded. The only point on which I would wish to say something further is Mr White's contention – which underlies both grounds 6 and 7 – that the distinction made by the Judge between reporting what Bloomberg had learnt about the alleged corrupt transactions and reporting that the Claimant was under investigation for his alleged role in them is artificial, or a distinction without a difference: as Simon LJ points out, that echoes a challenge also made at stage 1 (ground 3). I accept that in the circumstances of a particular case the undoubted legitimacy of publishing allegations of misconduct may mean either that a person under criminal investigation for involvement in the misconduct has no reasonable expectation of privacy in that fact or that that expectation is outweighed by the article 10 rights of the publisher. But it does not follow that the distinction itself is unreal or that it can simply be disregarded in every case. For the reasons given by Simon LJ at para. 96, 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. The question for the

Judge was whether the distinction should operate on the facts of this case. I see no error in his conclusion that it should.

151. Finally, I agree with Simon LJ that nothing in our decision should be taken as expressing any view, either way, about the quantum of the damages awarded by the Judge.