The reporting restrictions made by the High Court and the Court of Appeal remain in force.

Hilary Term

[2022] UKSC 5

On appeal from: [2020] EWCA Civ 611

JUDGMENT

Bloomberg LP (Appellant) v ZXC (Respondent)

before

Lord Reed, President

Lord Lloyd-Jones

Lord Sales

Lord Hamblen

Lord Stephens

JUDGMENT GIVEN ON

16 February 2022

Heard on 30 November and 1 December 2021

Appellant

Antony White QC

Clara Hamer

(Instructed by Reynolds Porter Chamberlain LLP (London))

Respondent

Tim Owen QC

Sara Mansoori

Edward Craven

(Instructed by David Byrne)

LORD HAMBLEN AND LORD STEPHENS: (with whom Lord Reed, Lord Lloyd-Jones and Lord Sales agree)

1. **Introduction**

1.

The central issue on this appeal is whether, in general, a person under criminal investigation has, prior to being charged, a reasonable expectation of privacy in respect of information relating to that investigation.

2.
The appellant, Bloomberg LP ("Bloomberg"), is an international financial software, data and media organisation headquartered in New York. Bloomberg News is well-known for its financial journalism and reporting.

3.
The respondent, ZXC ("the claimant"), is a citizen of the United States but has had indefinite leave to remain in the UK since 2014. He worked for a publicly listed company which operated overseas in several foreign countries ("X Ltd") and became the chief executive of one of its regional divisions but was not a director.

4.
The claimant brought a claim for misuse of private information arising out of an article ("the Article") published by Bloomberg in 2016 relating to the activities of X Ltd in a particular country for which the claimant's division was responsible (the "foreign state"). These activities had been the subject of a criminal investigation by a UK law enforcement body (the "UKLEB") since 2013. The information in the Article was almost exclusively drawn from a confidential Letter of Request sent by the UKLEB to the foreign state.

5.
The claimant claims that he had a reasonable expectation of privacy in information published in the Article and in particular the details of the UKLEB investigation into the claimant, its assessment of the evidence, the fact that it believed that the claimant had committed specified criminal offences and its explanation of how the evidence it sought would assist its investigation into that suspected offending.

6.
The claimant claimed that Bloomberg misused his private information by publishing the Article and sought damages and injunctive relief. Following a four-day trial before Nicklin J, the claims were upheld and damages of £25,000 awarded, as set out in his open judgment of 17 April 2019 - [2019] EWHC 970 (QB); [2019] EMLR 20. Bloomberg's appeal was dismissed by the Court of Appeal (Underhill LJ, Vice President of the Court of Appeal, Civil Division, and Bean and Simon LJJ) in its open judgment of 15 May 2020 - [2020] EWCA Civ 611; [2021] QB 28. Permission to appeal was granted by a panel of the Supreme Court on 17 December 2020.

7.
The judgments below were given in an open form which was an edited version of the private judgment also handed down. In the open judgment sections of the private judgment were removed or edited to protect the claimant's identity. We propose to give an open judgment only. For the parties all further factual details are sufficiently set out in the private judgments given by the courts below. Those details are not necessary for the purpose of the decision on this appeal. References in this judgment are to the judge's and to the Court of Appeal's open judgments.

2. **The factual background**

8.
The integrity of various transactions involving X Ltd has been publicly questioned, including by UK Parliamentarians, for a number of years, including its transactions in the foreign state.

9.

Following the announcement of the UKLEB investigation in 2013, Bloomberg and other media outlets have reported on the investigation, noting that the UKLEB was focusing on allegations of fraud, bribery and corruption relating to the activities of the company or its subsidiaries. The investigation remains ongoing, but the current position is that none of the personnel employed by X Ltd has been charged with any offence.

10.
In the autumn of 2016, Bloomberg published an article (the “autumn article”). The autumn article explained that the claimant had been interviewed by the UKLEB as part of its investigation. A Bloomberg journalist had contacted the claimant’s solicitor prior to publication. The judge found that the solicitor was shocked that the journalist had obtained this information and that the likely source for this information was someone employed by the UKLEB. The solicitor considered that, as the information that the claimant had been interviewed by the UKLEB was going to be published, the claimant had little choice but to offer some comment for publication. The judge described this as an understandable media strategy. The claimant, although highly displeased at its publication, did not take any action over the autumn article and has accepted that Bloomberg could continue to publish the information it contained.

(i) The Letter of Request (referred to in the judgments below as “LoR”)

11.
Also in the autumn of 2016, the UKLEB sent a 15-page Letter of Request, accompanied by several enclosures, to the foreign state. A Letter of Request is the usual means by which legal assistance is sought by one state from another in relation to the investigation or prosecution of criminal offences in accordance with The United Nations Convention against Corruption (“the Convention”), which was adopted in October 2003.

12.
Under paragraph 15 of article 46 of the Convention, a request for mutual legal assistance is required to include: (i) the subject matter and nature of the investigation to which the request relates and the name and functions of the authority conducting the investigation; (ii) a summary of the relevant facts; (iii) a description of the assistance sought and details of any particular procedure that the requesting state party wishes to be followed; (iv) where possible, the identity, location and nationality of any person concerned; and (v) the purpose for which the evidence, information or action is sought.

13.
Letters of Request are confidential documents as recognised and explained in the 2015 Home Office guidance entitled Requests for Mutual Legal Assistance in Criminal Matters: Guidelines for Authorities Outside of the United Kingdom, 12th ed (“the Guidelines”). As stated in the Guidelines:

“Confidentiality.

It is usual policy for central or executing authorities to neither confirm nor deny the existence of an MLA request, nor disclose any of its content outside government departments, agencies, the courts or enforcement agencies in the UK without the consent of the requesting authority, except where disclosure is necessary to obtain the co-operation of the witness or other person concerned.

Where public statements are made by an overseas authority about the assistance it is requesting from the UK, the central authority should be notified so that they may respond appropriately to any media or public enquiries.

In general, requests are not shown or copied to any witness or other person, nor is any witness informed of the identity of any other witness. In the event that confidentiality requirements make execution of a request difficult or impossible, the central authority will consult the requesting authorities. In cases where disclosure of a request or part thereof is required by UK domestic law in order to execute the request, it will normally be the case that the requesting authority will be given the opportunity to withdraw the request before disclosure to third parties is made."

14.
The confidentiality of Letters of Request was addressed in the Court of Appeal decision in National Crime Agency v Abacha [2016] EWCA Civ 760; [2016] 1 WLR 4375, which concerned a request for inspection of a Letter of Request under CPR Part 31.14. After a review of the authorities, Gross LJ stated at para 48 as follows:

"I accept that it is right to start from the position that letters of request such as the request are confidential. Both the Treaty and the Guidelines are clear in this regard. This court is of course anxious to assist the requests of friendly foreign countries for [mutual legal assistance], both as a matter of comity and on the very practical basis that it is only by furnishing such assistance that international crime and large-scale corruption can be combated. In many cases, there will be very good reasons for maintaining the confidentiality of such requests; examples are readily to hand - such as national security (when it arises), investigations at an early stage, a proper reluctance to disclose what lines of inquiry are being followed and which individuals are under suspicion."

15.
The Letter of Request was headed "CONFIDENTIAL LETTER OF REQUEST" and sought banking and business records in relation to X Ltd and a number of individuals, one of whom was the claimant. It gave a general description of the nature of the UKLEB's investigation into X Ltd and stated: "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."

16.
It stated that the UKLEB's investigation concerned possible offences of corruption, bribery, offences under the Proceeds of Crime Act 2002, and various offences under the Fraud Act 2006 together with conspiracy to commit certain offences. It gave a summary of investigations up to that point and identified the three transactions that were the specific targets of the request for assistance and explained why that assistance was required. It contained a detailed assessment of the evidence the UKLEB had so far obtained together with initial conclusions the UKLEB had reached on what it believed was demonstrated by the evidence. In relation to the claimant this included the following:

"... 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]."

17.
It contained the following statement under the heading "Confidentiality":

"... 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."

(ii) The Article

18.
The judge found that the Article contained information drawn almost exclusively from the Letter of Request, a copy of which had been obtained by the Bloomberg journalist. He further found that it had been given to the journalist "in what must have been (and should have been recognised as) a serious breach of confidence by the person who originally supplied it" (para 125).

19.
The private information which the claimant claims was misused as a result of the publication of the Article (the "information") is as follows: (i) the fact that the UKLEB had asked the authorities of the foreign state to provide banking and business records relating to four companies in its investigations into the claimant (and others) and wanted the information about the claimant from the foreign government; and (ii) the details of the deal that the UKLEB was investigating in relation to the claimant, including that: (a) the UKLEB considered 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 officer of X Ltd may have been complicit; (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 an entirely 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 a crime carried out by the claimant.

20.
The judge made detailed findings about the events leading up to the publication of the Article. Bloomberg contacted the UKLEB prior to publication and there was correspondence between them. The UKLEB repeatedly expressed concerns about the threatened publication and told Bloomberg it believed that "the publication of material pertaining to a LoR will pose a material risk of prejudice to a criminal investigation". Bloomberg also contacted the claimant's solicitor who expressed his shock and surprise that Bloomberg was considering publishing information from a confidential Letter of Request.

21.
The judge found that:

"51. 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.

…

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 …"

22.
The day after the article was published, the UKLEB sent an email expressing its consternation with the way in which the article was published as it said it would have expected to have been given a reasonable opportunity to put across its concerns before any publication.

23.
The claimant's immediate response was to complain to the UKLEB and demand that it carry out an inquiry into this apparent further leak.

3. **The proceedings below**

(i) The application for an interim injunction

24.
The claimant sought an interim injunction restraining further publication of the Article. The application was heard by Garnham J on 2 February 2017 and was refused in a reserved judgment given on 23 February 2017 ([2017] EWHC 328 (QB); [2017] EMLR 21). Garnham J held that he was satisfied that the claimant was likely to establish at trial that he had a reasonable expectation of privacy in the information but concluded, on the evidence before him, that it was likely that any infringement of the claimant's privacy rights under article 8 of the European Convention on Human Rights ("ECHR") would be held to be outweighed by Bloomberg's right to freedom of expression under article 10 of the ECHR.

25.
In the light of the evidence subsequently given at trial, Nicklin J found that there had been two failures of candour by Bloomberg and that Garnham J had been (perhaps unintentionally) misled as to material facts. He found that, first, the journalist's evidence contained a false statement that the UKLEB had not provided any comment when contacted about the Article and this was not brought to the attention of the court when Bloomberg's then solicitors subsequently received the emails between the UKLEB and Bloomberg (although the emails were later disclosed to the claimant). Secondly, the journalist had withheld the fact that he had retained a copy of the Letter of Request and it was not made available at the interim injunction hearing as it should have been. It was found that if Garnham J had been provided with a copy of the Letter of Request and the evidence of the UKLEB's position, he would likely have granted the injunction sought.

(ii) The judgment of Nicklin J

26.

It has at all times been common ground that liability for misuse of private information is determined by applying a two-stage test. Stage one is whether the claimant objectively has a reasonable expectation of privacy in the relevant information. If so, stage two is whether that expectation is outweighed by the publisher's right to freedom of expression. This involves a balancing exercise between the claimant's article 8 right to privacy and the publisher's article 10 right to freedom of expression.

27.

In relation to stage one, the judge held, having regard to the authorities and various public policy statements, that "it is now possible to say that, in general, a person does have a reasonable expectation of privacy in a police investigation up to the point of charge" (para 119). Having considered the various potentially relevant circumstances identified in Murray v Express Newspapers plc [2008] EWCA Civ 446; [2009] Ch 481, para 36, he concluded that the claimant had a reasonable expectation of privacy in respect of the information (para 125).

28.

In relation to stage two, the judge found that the issue of corruption in the foreign state and possible involvement in that corruption by X Ltd and its employees/officers was a matter of "high public interest". He also found, however, that this public interest had only an "indirect" bearing in this case because "the Article was not presenting the fruits of an investigation by [Bloomberg] into this alleged corruption"; instead, "the Article reported some of the contents of the LoR, presented with other background material to place the contents of the LoR in context for general readers. The news value in the Article was the revelation of what and who were the targets of the UKLEB investigation and the UKLEB's suspicions based on evidence it had gathered" (para 126).

29.

In these circumstances, the question the judge asked himself was whether there was "sufficient public interest in revealing information about the UKLEB's investigation drawn from the LoR" to outweigh the reasonable expectation of privacy that he had found the claimant had in the information (para 127). In answering this question, the judge took as his "starting point … applying the clear principles" from the authorities he identified that "there was a very clear public interest that the contents of the LoR should **not** be published and that the confidentiality of UKLEB's investigations should be maintained" (emphasis in original) and found that the confidential nature of the Letter of Request and the circumstances in which it came into Bloomberg's possession meant that Bloomberg was bound generally to observe the confidentiality of the Letter of Request (para 129). The fact that this was not appreciated by Bloomberg, and that the claimant had not pursued (and on Bloomberg's case could not pursue) a claim for breach of confidence, "does not alter this fundamental position" (para 129).

30.

The judge also found that the UKLEB's investigation into X Ltd was itself a matter of public interest, and that there was a clear public interest in the media following and reporting on "developments" in the investigation. He noted, however, that the Article had not made any "criticism" of the investigation (such as "inadequacies in the investigation, undue delay or concern over the direction the investigation was taking" or if "investigators had been subjected to improper political pressure not to pursue certain people or lines of inquiry") which the media could legitimately be expected to highlight in its role as a "watchdog" (paras 128-130).

31.

The judge considered the various matters relied upon by Bloomberg but concluded that they did not (either individually or collectively) provide sufficient countervailing justification to outweigh the claimant's reasonable expectation of privacy. The judge also noted that there had been no evidence as to the alleged assessment of the public interest by Bloomberg from those who actually made the decision to publish (which he described as "surprising").

32.
Having carried out the balancing exercise the judge concluded that the claimant's article 8 right prevailed. He noted that the restriction of the article 10 right was limited to the information and observed that "there is no pressing need for the contents of the LoR (as it related to the claimant) to be published. There is no public interest justification for publishing the Information. On the contrary, the public interest clearly favours upholding and maintaining the confidentiality of the information in the LoR" (para 133).

33.
The judge upheld the claimant's claim for misuse of private information, awarded him £25,000 in damages, and granted an injunction preventing Bloomberg from further publishing the Article or the information within England and Wales. In relation to damages, he noted the claimant's express concession that the truth or falsity of the underlying information in the Letter of Request was not a relevant issue and held that whilst he could rely upon the distress and embarrassment he had felt as a result of the publication of the information, he could not be awarded any element of purely reputational damages (paras 149-152).

(iii) The judgment of the Court of Appeal

34.
The leading judgment in the Court of Appeal was given by Simon LJ. Underhill LJ gave a short concurring judgment and Bean LJ agreed with both judgments.

35.
In relation to stage one, Simon LJ rejected Bloomberg's primary ground of appeal that the judge was wrong to conclude that, in general, a person has a reasonable expectation of privacy in a police investigation up to the point of charge and stated as follows at para 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."

He described this in para 81 as "the legitimate starting point" whilst expressly accepting at para 85 that "an expectation of privacy in arrest/police investigation is not invariable."

36.
Simon LJ also rejected Bloomberg's ground of appeal that the judge had wrongly conflated private information with confidential information and held that the judge had been entitled to place reliance on the highly confidential nature of the Letter of Request in finding that the information was private:

this was part of “the circumstances in which and the purposes for which the information came into the hands of the publisher” (para 92).

37.
Bloomberg’s other grounds of appeal in relation to stage one were also rejected and Simon LJ concluded, in agreement with the judge, that a reasonable person of ordinary sensibilities placed in the position of the claimant would have had a reasonable expectation of privacy in relation to the information (para 102).

38.
In relation to stage two, Simon LJ found that there was no reason to disagree with the judge’s view that there was no sufficient public interest to justify disclosure of the Letter of Request’s contents and that the confidentiality of the UKLEB’s investigation should be maintained (para 121).

39.
Simon LJ held that the judge had not taken an overly narrow view of those matters which it would have been in the public interest to publish, observing that:

“130. … 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.”

40.
Simon LJ also rejected Bloomberg’s ground of appeal that the judge had erred, when assessing the public interest, in taking the confidentiality of the Letter of Request as his starting point and therefore applied the wrong test as this was a privacy and not a breach of confidence case, stating as follows:

“ 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 para 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’ …”

41.
Simon LJ concluded that he would reject all of Bloomberg’s complaints “in relation to the weighing of the article 8 and article 10 interests at stage two” (para 140).

42.
The Court of Appeal accordingly dismissed the appeal on all grounds.

4. **The legal framework**

(i) The tort of misuse of private information

43.
Articles 8 and 10 of the ECHR provide as follows:

“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.”

44.
Section 12 of the Human Rights Act 1998 (“HRA”) contains specific provisions which apply where, as in this case, “a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression”. In particular, section 12(4) provides that:

“(4) The court must have particular regard to the importance of the Convention right to freedom of expression and, where the proceedings relate to material which the respondent claims, or which appears to the court, to be journalistic, literary or artistic material (or to conduct connected with such material), to -

(a) the extent to which - (i) the material has, or is about to, become available to the public; or (ii) it is, or would be, in the public interest for the material to be published;

(b) any relevant privacy code.”

45.

In the seminal decision of the House of Lords in Campbell v MGN Ltd [2004] UKHL 22; [2004] 2 AC 457 it was recognised that the values enshrined in articles 8 and 10 had become part of the cause of action for breach of confidence and that in relation to private information "the essence of the tort is better encapsulated now as misuse of private information" - see the judgment of Lord Nicholls of Birkenhead at para 14. This is a distinct cause of action from breach of confidence. It rests on different legal foundations and protects different interests - see the judgment of Lord Nicholls in Douglas v Hello! Ltd (No 3) [2007] UKHL 21; [2008] AC 1, para 255 and the judgment of the Court of Appeal in Vidal-Hall v Google Inc [2015] EWCA Civ 311; [2016] QB 1003 in which it was held that misuse of private information should be recognised as a tort.

46.
In giving the judgment of the Court of Appeal in Murray v Express Newspapers plc Sir Anthony Clarke MR helpfully summarised the principles stated by Lord Nicholls in Campbell as follows at para 24:

"… (i) The right to freedom of expression enshrined in article 10 of the Convention and the right to respect for a person's privacy enshrined in article 8 are vitally important rights. Both lie at the heart of liberty in a modern state and neither has precedence over the other: see [2004] 2 AC 457, para 12. (ii) Although the origin of the cause of action relied upon is breach of confidence, since information about an individual's private life would not, in ordinary usage, be called 'confidential', the more natural description of the position today is that such information is private and the essence of the tort is better encapsulated now as misuse of private information: see para 14. (iii) The values enshrined in articles 8 and 10 are now part of the cause of action and should be treated as of general application and as being as much applicable to disputes between individuals as to disputes between individuals and a public authority: see para 17. (iv) Essentially the touchstone of private life is whether in respect of the disclosed facts the person in question had a reasonable expectation of privacy: see para 21. (v) In deciding whether there is in principle an invasion of privacy, it is important to distinguish between that question, which seems to us to be the question which is often described as whether article 8 is engaged, and the subsequent question whether, if it is, the individual's rights are nevertheless not infringed because of the combined effect of article 8(2) and article 10: see para 22."

47.
In Murray the Court of Appeal endorsed the two stage test for whether there has been misuse of private information, as explained in the Court of Appeal decision in McKennitt v Ash [2006] EWCA Civ 1714; [2008] QB 73. As stated by Simon LJ at para 42 of his judgment in the present case, at stage one, the question is whether the claimant has a reasonable expectation of privacy in the relevant information; if so, at stage two, the question is whether that expectation is outweighed by the countervailing interest of the publisher's right to freedom of expression. This two stage test is now well established.

(ii) Stage one

48.
In relation to both stage one and stage two, general guidance can be found in the growing body of domestic legal precedent and also the jurisprudence of the European Court of Human Rights ("ECtHR") on articles 8 and 10 which the court must take into account. Under section 12(4) of the HRA, where the proceedings relate to material "which the respondent claims, or which appears to the court, to be journalistic, literary or artistic material (or to conduct connected with such material)" then the court "must have particular regard" to "any relevant privacy code." In relation to newspapers and magazines the relevant privacy code is the Editors' Code of Practice, established by the Editors'

Code of Practice Committee and overseen by the Independent Press Standards Organisation - see Sicri v Associated Newspapers Ltd [2020] EWHC 3541 (QB); [2021] 4 WLR 9.

49.
Whether there is a reasonable expectation of privacy is an objective question. The expectation is that of a reasonable person of ordinary sensibilities placed in the same position as the claimant and faced with the same publicity - see Campbell at para 99 per Lord Hope of Craighead; Murray at para 35.

50.
As stated in Murray at para 36, “the question whether there is a reasonable expectation of privacy is a broad one, which takes account of all the circumstances of the case”. Such circumstances are likely to include, but are not limited to, the circumstances identified at para 36 in Murray - the so-called “Murray factors”. These are:

(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.

51.
Although the Murray factors are not exhaustive, and the significance of individual factors will vary from case to case, they have been regularly considered and applied by the courts by way of guidance and the appropriateness of so doing was affirmed by the majority of the Supreme Court in In re JR38 [2015] UKSC 42; [2016] AC 1131 - see the judgment of Lord Toulson (with which Lord Hodge agreed) at paras 88 and 98 and the judgment of Lord Clarke of Stone-cum-Ebony (with which Lord Hodge also agreed) at paras 113-114.

52.
Whilst all the circumstances of each case must be considered, Gatley on Libel and Slander, (12th ed) at para 22.5 suggests that there are certain types of information which will normally, but not invariably, be regarded as giving rise to a reasonable expectation of privacy so as to be characterised as being private in character. These are the state of a person’s physical or mental health or condition; a person’s physical characteristics (nudity); a person’s racial or ethnic characteristics; a person’s emotional state (in particular in the context of distress, injury or bereavement); the generality of personal and family relationships; a person’s sexual orientation; the intimate details of personal

relationships; information conveyed in the course of personal relationships; a person's political opinions and affiliations; a person's religious commitment; personal financial and tax related information; personal communications and correspondence; matters pertaining to the home; past involvement in criminal behaviour; involvement in civil litigation concerning private affairs; and involvement in crime as a victim or a witness. Support for this non-exhaustive listing is set out in footnotes 30 to 45. A similar list is to be found in Carter-Ruck on Libel and Privacy, 6th ed (2010) at para 19.7 which is then discussed and explained at paras 19.9 to 19.54.

53.
Gatley also suggests that there are some types of information which will normally not be regarded as giving rise to a reasonable expectation of privacy so as not to be characterised as being private in character, namely: corporate information, a person's physical location, involvement in current criminal activity, a person's misperformance of a public role, information deriving from a hearing of a criminal case conducted in public, and the identity of an author (see further, footnotes 48 to 53). A similar list is set out and discussed in Carter-Ruck at paras 19.60-19.64.

54.
A relevant circumstance will be the extent to which the information is in the public domain. Information that was private may become so well known that it is no longer private. Whether this is so is a matter of fact and degree - see K v News Group Newspapers Ltd [2011] EWCA Civ 439; [2011] 1 WLR 1827, para 10(3). In relation to journalistic, literary or artistic material, section 12(4) of the HRA requires the court to have particular regard to "the extent to which the material has, or is about to, become available to the public".

55.
The effect on the claimant must attain a sufficient level of seriousness for article 8 to be engaged - see R (Wood) v Comr of Police of the Metropolis [2009] EWCA Civ 414; [2010] 1 WLR 123 per Laws LJ at para 22; In re JR38 at para 87. In general, there will be no reasonable expectation of privacy in trivial or anodyne information.

(iii) Stage 2

56.
Stage 2 involves a balancing of the claimant's article 8 right to privacy and the publisher's article 10 right to freedom of expression in order to determine which should prevail in the particular circumstances of the case - the so-called "balancing exercise".

57.
As Lord Hoffmann explained in Campbell at para 55:

"Both [rights] reflect important civilised values, but, as often happens, neither can be given effect in full measure without restricting the other. How are they to be reconciled in a particular case? There is in my view no question of automatic priority. Nor is there a presumption in favour of one rather than the other. The question is rather the extent to which it is necessary to qualify the one right in order to protect the underlying value which is protected by the other. And the extent of the qualification must be proportionate to the need …"

58.

In In re S (A Child) (Identification: Restrictions on Publication) [2004] UKHL 47; [2005] 1 AC 593, at para 17 Lord Steyn confirmed that neither right has precedence over the other and identified the following considerations as being of particular importance in carrying out the balancing exercise:

(1)
"an intense focus on the comparative importance of the specific rights being claimed in the individual case";

(2)
"the justifications for interfering with or restricting each right"; and

(3)
"the proportionality" of the respective interference or restriction.

59.
Under section 12(4) of the HRA the court must have particular regard "to the importance of the Convention right to freedom of expression". As stated by Lord Nicholls in Reynolds v Times Newspapers Ltd [2001] 2 AC 127, 205:

"… the court should have particular regard to the importance of freedom of expression. The press discharges vital functions as a bloodhound as well as a watchdog. The court should be slow to conclude that a publication was not in the public interest and, therefore, the public had no right to know, especially when the information is in the field of political discussion."

60.
The ECtHR jurisprudence is to similar effect. As stated in Axel Springer AG v Germany (Application No 39954/08) [2012] EMLR 15, para 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 (1999) 29 EHRR 125, paras 59 and 62, and Pedersen v Denmark (2004) 42 EHRR 24, para 71)."

61.
The extent to which publication is in the public interest is of central importance. This is reflected in section 12(4) of the HRA under which, in relation to journalistic, literary or artistic material, the court is required to have particular regard to the extent to which "it is, or would be, in the public interest for the material to be published".

62.
In considering the public interest in publication, the contribution that publication will make to a debate of general interest is a factor of particular importance. In Von Hannover v Germany (Application No 59329/00) [2004] EMLR 21, para 76 it was said by the ECtHR that it should be "the decisive factor in balancing the protection of private life against freedom of expression". In Axel Springer it was said to be an "initial essential criterion". Other factors of likely relevance identified in that case are:

(1)
how well-known is the person concerned and what is the subject of the report;

(2)
the prior conduct of the person concerned;

(3)
the method of obtaining the information and its veracity;

(4)
the content, form and consequences of publication; and

(5)
the severity of the restriction or interference and its proportionality with the exercise of the freedom of expression.

5. **The issues**

63.
The issues, as defined by the parties, which arise on this appeal are:

(1)
Whether the Court of Appeal was wrong to hold that there is a general rule, applicable in the present case, that a person under criminal investigation has, prior to being charged, a reasonable expectation of privacy in respect of information relating to that investigation.

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

(3)
Whether the Court of Appeal was wrong to uphold the findings of Nicklin J that the claimant had a reasonable expectation of privacy in relation to the published information complained of, and that the article 8/10 balancing exercise came down in favour of the claimant.

6. **Issue 1 - Whether the Court of Appeal was wrong to hold that there is a general rule, applicable in the present case, that a person under criminal investigation has, prior to being charged, a reasonable expectation of privacy in respect of information relating to that investigation.**

(i) An outline of the broad issues under this ground of appeal

64.
As noted above at para 47, in order to establish misuse of private information, a claimant must first show that the information in question is private. The test at stage one is whether there is objectively a reasonable expectation of privacy taking into account all the circumstances of the case, including but not limited to, the so-called Murray factors, enumerated at para 50 above.

65.
Issue 1 relates to the application of this stage one test and whether the judge, at para 119, and the Court of Appeal, at paras 81, 82, 144, and 147, were correct to hold that there was a general rule

applicable in this case, that a person under criminal investigation has, prior to being charged, a reasonable expectation of privacy in respect of information relating to that investigation. Simon LJ in the Court of Appeal characterised this general rule, at para 81, as “the legitimate starting point.”

66.
Before considering this ground of appeal it is appropriate to define the general rule or legitimate starting point, which was adumbrated by both the judge and by the Court of Appeal.

67.
First, the general rule or legitimate starting point is not a legal rule or legal presumption, let alone an irrebuttable presumption. The determination as to whether there is a reasonable expectation of privacy in the relevant information is a fact-specific enquiry.

68.
Second, the general rule or legitimate starting point does not invariably lead to a finding that there was objectively a reasonable expectation of privacy in the information. The judge stated, at para 124, that “an expectation of privacy in arrest/police investigation is not invariable” and whether it arises in a particular case “will always depend upon the individual facts of that case.” In the Court of Appeal Simon LJ stated, at paras 57, 81 and 85, that there is not “an invariable or unqualified right to privacy during an investigation”; instead, it is “the legitimate starting point.” Underhill LJ stated, at para 147, that “[i]t is important to emphasise that … 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.” So, for instance, public rioting is not the kind of activity which article 8 exists to protect: see In re JR38 at para 100.

69.
Third, the general rule or legitimate starting point does not obviate the need for the claimant to set out and to prove the circumstances establishing that there was objectively a reasonable expectation of privacy.

70.
Fourth, we understand that the reference to a general rule or a legitimate starting point means that once it is established that the relevant information was that a person, prior to being charged, was under criminal investigation then the correct approach is for a court to start with the proposition that there will be a reasonable expectation of privacy in respect of such information and thereafter consider by reference to all the circumstances of the case whether the reasonable expectation either does not arise at all or was significantly reduced. If the expectation does not arise then the information can be published. If the expectation is reduced it will bear on the weight to be attached to the article 8 rights at stage two; see Simon LJ at para 84.

71.
Fifth, the rationale for such a starting point is that publication of such information ordinarily causes damage to the person’s reputation together with harm to multiple aspects of the person's physical and social identity such as the right to personal development, and the right to establish and develop relationships with other human beings and the outside world all of which are protected by article 8 of the ECHR: see Niemietz v Germany (Application No 13710/88) (1992) 16 EHRR 97, para 29. The harm and damage can on occasions be irremediable and profound.

72.

We consider that the general rule or the legitimate starting point adumbrated in the courts below in relation to this category of information is similar to what can be termed a general rule in relation to certain other categories of information. It has already been recognised that a consideration of all the circumstances of the case, including but not limited to the so-called Murray factors, will, generally, in relation to certain categories of information lead to the conclusion that the claimant objectively has a reasonable expectation of privacy in information within that category. The most striking example of such a category is information concerning the state of an individual's health which is widely considered to give rise to a reasonable expectation of privacy: see McKennitt v Ash [2005] EWHC 3003 (QB) at para 142 per Eady J, and in the Court of Appeal at para 23 per Buxton LJ. There can of course be exceptions even in relation to information concerning the state of an individual's health, but generally, details as to an individual's health are so obviously intimate and personal that a consideration of all the circumstances will result in that information being appropriately characterised as private under the stage one test unless there are strong countervailing circumstances.

73.
Accordingly, the first question posed under Issue 1 is whether the courts should proceed from a similar starting point of there being a reasonable expectation of privacy in respect of information that a person is under criminal investigation and in respect of information relating to that investigation, prior to the person being charged. The second question posed under this ground of appeal is whether the starting point applies in the present case.

(ii) A summary of the grounds on which Bloomberg challenges the general rule or legitimate starting point

74.
In summary Bloomberg challenges the general rule or legitimate starting point in relation to this category of information on the following bases.

(a) Presumption of innocence. Bloomberg submits that, given the public's ability to observe the presumption of innocence so as not to assume guilt, the courts below incorrectly assessed the general negative effect on the individual's reputation of publication of information that he is under criminal investigation. In this way Bloomberg argues that the application by the courts below of a general rule or legitimate starting point is unsound because it significantly overstates the capacity of publication of the information to cause damage to the claimant's reputation given the public's ability to observe the presumption of innocence.

(b) Defamation authorities. Bloomberg submits that the reasoning of the courts below for upholding a general rule of privacy (namely, the "human characteristic" to equate suspicion or investigation with guilt on the assumption that there is "no smoke without fire") runs contrary to well-established principles in defamation law that the ordinary reasonable reader is not unduly suspicious or avid for scandal, can be taken to know about things that are common knowledge, and is capable of distinguishing suspicion or investigation from guilt. Again, relying on these authorities Bloomberg argues that the application by the courts below of a general rule or legitimate starting point is unsound because it significantly overstates the capacity of publication of the information to cause damage to the claimant's reputation given the ordinary reasonable reader's ability to observe the presumption of innocence.

(c) Reputational damage. Bloomberg submits that the courts below incorrectly held that information about an individual being subject to criminal investigation is private because it is potentially reputationally damaging. Bloomberg submits that information is not protected because the

consequential harmful impact relates to private life. Rather, information is protected because - irrespective of the effect on the claimant's reputation - information of that nature belongs to a part of the claimant's life which is of no-one else's concern. Typical examples of such information are information as to health, the intimacies of relationships and family life, sexual expression and the inner workings of the mind. In this case Bloomberg argues that information in relation to the claimant's business activities does not fall within an area of his life that is no-one else's concern.

(d) Submission that the courts below applied an incorrect legal test. Bloomberg submits that the courts below failed to apply the correct legal test at stage one which involves consideration of "all the circumstances of the case". Rather, Bloomberg says that the courts below, by the application of a general rule or starting point, gave pre-ordained weight to one circumstance, namely the effect on the claimant, and obscured consideration of all the other circumstances such as:

(1)
whether the activity about which information is disclosed (or to be disclosed) is of such a nature as to fall within the scope of "private life" so that article 8 is engaged. In this respect Bloomberg argues that the Murray factor of "the nature of the activity in which the claimant was engaged" was incorrectly confined by the courts below to the claimant being the subject of the UKLEB's investigation whereas the activity should have been identified as "alleged corruption in relation to X Ltd's activities in the foreign country";

(2)
the status of the claimant so that consideration of the Murray factor of "the attributes of the claimant" ought to have led the courts below to the recognition that businessmen actively involved in the affairs of large public companies, such as the claimant, are not in that sector of their lives private individuals but rather that they knowingly lay themselves open to close scrutiny of their acts by the media; and

(3)
whether publication of the information undermines personal integrity as distinct from merely harming reputation.

(iii) Issues that do not arise on this ground of appeal

75.
Before proceeding further it is appropriate to identify various issues that do not arise for determination on this ground of appeal.

76.
First, this ground of appeal is confined to the stage one test. Even if information is characterised as private it would still be capable of being published if outweighed at stage two by the countervailing interest of the publisher's right to freedom of expression in accordance with article 10 of the ECHR: see In re JR38 at para 85.

77.
Second, it was common ground that if someone is charged with a criminal offence there can be no reasonable expectation of privacy. We consider, generally, that to be a rational boundary, as the open justice principle in a free country is fundamental to securing public confidence in the administration of justice: Scott v Scott [1913] AC 417. Consequently, whenever a person is charged with a criminal offence the open justice principle generally means that the information is of an essentially public nature so that there can be no reasonable expectation of privacy in relation to it.

78.

Third, the information the subject of this appeal is set out at para 19 above. The information relates to the investigation of the claimant by the UKLEB, an organ of the state, and includes information as to the UKLEB’s suspicions, assessments, and preliminary conclusions to the disfavour of the claimant. This appeal does not concern the publication of information about an individual’s wrongdoing resulting from Bloomberg’s own investigations. Accordingly, the appeal is confined to the impact of information derived from an investigation of a person by an organ of the state rather than the distinct and separate situation that might arise if Bloomberg wished to publish information as to the results of its own investigations.

79.

Fourth, Nicklin J awarded £25,000 damages for Bloomberg’s misuse of private information. There has been no appeal against that award, or the principles applied by the judge in assessing the amount of damages. The applicable principles as to damages formulated in this case and in Sicri v Associated Newspapers Ltd may merit consideration in a case in which the issues arise for determination. We have reservations about the extent to which quantification of damages for the tort of misuse of private information should be affected by the approach adopted in cases of defamation, but it is not appropriate to address this in this judgment.

(iv) The negative effects of publishing information that a person is under criminal investigation and a resulting uniform general practice

80.

For some time, judges have voiced concerns as to the negative effect on an innocent person’s reputation of the publication that he or she is being investigated by the police or an organ of the state. These concerns are echoed in the Leveson Inquiry Report, and have the support of the senior judiciary, the College of Policing, the Metropolitan Police Service, the Independent Office of Police Conduct, the Director of Public Prosecutions, the Home Affairs Select Committee and the Government.

81.

Several themes emerge from the material articulating those concerns. First, the growing recognition that as a matter of public policy the identity of those arrested or suspected of a crime should not be revealed to the public has now resulted in a uniform general practice by state investigatory bodies not to identify those under investigation prior to charge. Second, the rationale for this uniform general practice is the risk of unfair damage to reputation, together with other damage. Third, the practice applies regardless of the nature of the suspected offence or the public characteristics of the suspect. To be suspected by the police or other state body of a crime is damaging whatever the nature of the crime. The damage occurs whatever the characteristic or status of the individual. Fourth, there is uniformity of judicial approach, at first instance in a series of cases and in the Court of Appeal in this case, based on judicial knowledge that publication of information that a person is under criminal investigation will cause damage to reputation together with other damage, irrespective of the presumption of innocence. This has led to a general rule or legitimate starting point that such information is generally characterised as private at stage one.

82.

Attorney General v MGN Ltd [2011] EWHC 2074 (Admin); [2012] 1 WLR 2408, which was referred to at Part F, Chapter 1, para 3.25 and Part F, Chapter 5, paras 4.1-4.21 by Leveson LJ 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-II, addressed the case of Mr Christopher Jefferies. 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, leading 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 Part G, Chapter 3, para 2.39 that:

"save in exceptional and clearly identified circumstances (for example, where there may be an immediate risk to the public), the names or identifying details of those who are arrested or suspected of a crime should not be released to the press nor the public."

83.
That recommendation was taken up by the College of Policing which is the professional body whose purpose is to provide those working in policing with the skills and knowledge necessary for effective policing. The College is a company limited by guarantee wholly owned by the Secretary of State for the Home Department. It has various statutory functions in relation to the issuing of guidance and the giving of advice deriving predominantly from the Police Act 1996: see R (Miller) v College of Policing [2020] EWHC 255 (Admin); [2020] HRLR 10, para 102 and R (Officer W80) v Director General of the Independent Office for Police Conduct [2020] EWCA Civ 1301; [2021] 1 WLR 418, para 30. In 2013 the College of Policing published Guidance on Relationships with the Media which, at para 3.5.2, stated:

"Police forces must balance an individual's right to respect for a private and family life, the rights of publishers to freedom of expression and the rights of defendants to a fair trial. Decisions must be made on a case-by-case basis but, save in clearly identified circumstances, or where legal restrictions apply, the names or identifying details of those who are arrested or suspected of a crime should not be released by police forces to the press or the public . Such circumstances include a threat to life, the prevention or detection of crime or a matter of public interest and confidence." (Emphasis added)

84.
In 2017 the College of Policing published further guidance on Media Relations (which was subsequently updated again in 2019) which expressly recognises that reputational risks are the reason for not disclosing the names prior to the point of charge. The further guidance states at 3.2:

"Respecting suspects' rights to privacy

Suspects should not be identified to the media (by disclosing names or other identifying information) prior to the point of charge except where justified by clear circumstances eg a threat to life, the prevention or detection of crime or a matter of public interest and confidence." (Emphasis added)

The further guidance continues at 4.2:

"Naming on arrest

Police will not name those arrested, or suspected of a crime, save in exceptional circumstances where there is a legitimate policing purpose to do so. This position is in accordance with recommendations and findings of the Leveson Inquiry (part 1), the Information Commissioner and the Home Affairs Select Committee.

A legitimate policing purpose may include circumstances such as a threat to life, the prevention or detection of crime, or where police have made a public warning about a wanted individual.

…

This approach recognises that, in cases where the police name those who are arrested, there is a risk of unfair damage to the reputations of those persons, particularly if they are never charged …" (Emphasis added)

We agree with the observation of Simon LJ, at para 80, that the College of Policing guidance "reflect[s] both an operational response to criticisms about the unfairness of previous incidents in which suspects were named" and various "judicial observations" regarding this.

85.
The same approach has been adopted by the Independent Office for Police Conduct ("IOPC") which oversees the police complaints system in England and Wales. The IOPC carried out an investigation, known as Operation Kentia, into the conduct of Metropolitan Police officers who applied for search warrants for properties connected to the late Lord Bramall, the late Lord Brittan and Harvey Procter as part of the force's Operation Midland investigation into allegations made by Carl Beech. Following that investigation and in its report dated October 2019, the IOPC recommended, at p 31, para 50, that:

"Naming a suspect before charge is a major step and should only be undertaken in exceptional circumstances and for a clear policing purpose."

86.
It is apparent from the Report entitled Police Bail dated 20 March 2015 of the House of Commons Home Affairs Committee (Seventeenth Report of Session 2014-15, HC 962, para 7) that the same approach has also been adopted by both the Commissioner of the Metropolitan Police and by the Crown Prosecution Service. The Report went on to recommend this approach stating, at p 13, para 3, that:

"The police should not release information on a suspect to the media in an informal, unattributed way. If the police do release the name of a suspect it has to be limited to exceptional cases, such as for reasons of public safety."

87.
The same approach has been adopted by the Government. In a written ministerial answer dated 24 December 2015, the Minister of State for Home Affairs, Lord Bates, cited the College of Policing's guidance and stated that: "It is the Government's position that, in general, there should be a right to anonymity before the point of charge." On 16 March 2021, the current Parliamentary Under-Secretary of State for Justice, Lord Wolfson of Tredegar QC, reiterated that position, explaining that "there is indeed a difference between pre and post charge. The Government believe that, in principle and in general, there should be a right to anonymity pre charge in respect of all offences."

88.
Exactly the same approach was contained in the paper dated 4 March 2013 issued by Treacy LJ and Tugendhat J 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 added)

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

89.
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.” (Emphasis added)

90.
The private nature of information that a person, prior to charge, is subject to investigation by the police has been considered in several first instance judgments. In each case, the characterisation of such information as private was based on the potential that its publication would ordinarily cause substantial damage to the person’s reputation, and other damage.

91.
In Hannon v News Group Newspapers Ltd [2014] EWHC 1580 (Ch); [2015] EMLR 1 the claimant brought a claim for misuse of private information arising from the defendant’s publication of the fact of his arrest. Mann J observed, at para 92, that: “The general practice of the police is, by and large, not to identify those who have been formally arrested …”. He cited at paras 93-95 the observations of Sir Brian Leveson in the Leveson Inquiry Report and the formal consultation response published by Tugendhat J and Treacy LJ, see para 88 above, which supported the proposition that media reports of arrests engage the privacy rights of the arrested individual. On that basis, Mann J refused to strike out the misuse of private information claim.

92.
In PNM v Times Newspapers Ltd [2014] EWCA Civ 1132; [2015] 1 Cr App R 1 Sharp LJ referred, at para 37, to “a growing recognition that as a matter of public policy the identity of those arrested or suspected of a crime should not be released to the public save in exceptional and clearly defined circumstances”.

93.
In Crook v Chief Constable of Essex Police [2015] EWHC 988 (QB) a police force issued a press release which stated that the claimant was wanted on suspicion of rape. The claimant had not been arrested or charged with any offence. The claimant issued proceedings against the police for damages for breach of confidence, breach of his data protection rights and a violation of article 8. As the judgment records at para 45: “[t]here is no dispute in relation to the claim under article 8 that the information is such that there was a reasonable expectation of privacy.” The court went on to hold, at

para 65, that the disclosure of the information was not necessary and proportionate to any legitimate aim and had therefore violated article 8.

94.
In ERY v Associated Newspapers Ltd [2016] EWHC 2760 (QB); [2017] EMLR 9 the claimant was a businessman who had been interviewed by police under caution in respect of his suspected involvement in a financial crime. The defendant publisher conceded that the fact that the businessman had been interviewed under caution would engage his article 8 right and that, on the facts, the defendant's article 10 right was not capable of prevailing over that right; see paras 11 and 52. On the basis of that concession, Nicol J held, at para 65, that the businessman had a reasonable expectation of privacy in the information that he was being investigated by the police.

95.
In Richard v British Broadcasting Corpn [2018] EWHC 1837 (Ch); [2019] Ch 169 Mann J held at para 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. … 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."

96.
In Khan v Bar Standards Board [2018] EWHC 2184 (Admin) a barrister had been found to have committed professional misconduct by "speaking publicly of criminal allegations, his knowledge of which derived from his professional involvement, at the pre-charge stage, in a matter where no charges had in the event been brought". He sought to challenge the disciplinary findings on the basis (amongst other things) that they violated his right to free expression under article 10. In rejecting that argument, Warby J cited Richard and explained, at para 47, that: "The open justice principle does not extend this far; the starting point in such a case is that the person under criminal investigation has a reasonable expectation of privacy".

97.
In Sicri v Associated Newspapers Ltd Warby J held that an individual who had been arrested as a suspect in connection with the Manchester Arena terrorist attack in 2017, but who was subsequently released without charge, had a reasonable expectation of privacy in relation to information about his arrest. The judge went on to hold that a newspaper's publication of that information constituted a misuse of private information. In reaching this conclusion, Warby J referred to some of the authorities and the Court of Appeal's judgment in the present case and observed, at para 85, that they reflected "a general rule in favour of pre-charge anonymity for suspects". Warby J explained, at para 76, that "[t]he notion that information about official suspicion engages an individual's article 8 rights, because of its reputational impact, appears to me to have been firmly established at the highest level over a decade ago".

98.

In Mosley v Associated Newspapers Ltd [2020] EWHC 3545 (QB); [2021] 4 WLR 29 Nicklin J explained, at para 57, that: "In the ordinary course, neither the police nor a prosecuting authority will identify suspects in criminal investigations prior to charge, save where justified by clear and exceptional circumstances …". He went on to observe, at para 58, that the law has "achieved a measure of coherence. In general, the fact that someone has been under criminal investigation or suspicion by the police or prosecuting authority will only become public at the point of charge; ie the point at which the process of the court has been engaged".

99.
In R (Rai) v Crown Court at Winchester [2021] EWHC 339 (Admin); [2021] ACD 70 the Divisional Court (Stuart-Smith LJ and Nicklin J) observed, at para 49, that the judgments in Richard, Sicri and the present case "are authority for the proposition that, in general, a suspect in a criminal investigation has an expectation of privacy up to the point of charge; not thereafter. At the point of charge, or shortly thereafter, the suspect (now defendant) will appear in a criminal court and the open justice principle will lead to the public identification of the defendant as having been charged with a criminal offence".

(v) The presumption of innocence (see para 74(a) above)

100.
Bloomberg submits that the general rule or legitimate starting point adumbrated by the courts below is unsound because it significantly overstates the likelihood of publication of the information causing damage to the claimant's reputation and underestimates the public's ability to observe the legal presumption of innocence.

101.
One of the so-called Murray factors which is to be taken into account in determining whether there is a reasonable expectation of privacy, is the effect of publication of the information on the claimant. In relation to that factor if the presumption of innocence was perfectly understood and given effect to, so that the general public in their everyday lives, in their social interactions, and in their business and professional relationships applied the legal presumption of innocence, then there would be no stigma and no adverse effect on the claimant. In this way, Bloomberg submits, the impact of the presumption of innocence eliminates, or significantly reduces, the negative effects of publication of information that a person is under criminal investigation. On the other hand, the claimant submits that there are ample grounds for concluding that despite the presumption of innocence, which applies as a matter of law in criminal proceedings, experience suggests that generally the public's reaction to publication of information as to police suspicions is that reputational and other damage ordinarily will be caused to the person even if he or she is entirely innocent.

102.
Bloomberg relies on the observations of Lord Rodger of Earlsferry in In re Guardian News and Media Ltd [2010] UKSC 1; [2010] 2 AC 697 to support their contention that the presumption of innocence ameliorates the adverse effect of publication of the information. In that case Lord Rodger, speaking of the publication of the names of defendants in advance of criminal trials, observed at para 66:

"In allowing this, the law proceeds on the basis that most members of the public understand that, even when charged with an offence, you are innocent unless and until proved guilty in a court of law. That understanding can be expected to apply, a fortiori, if you are someone whom the prosecuting authorities are not even in a position to charge with an offence and bring to court." (Emphasis added)

103.

These observations by Lord Rodger were considered by this court in Khuja v Times Newspapers Ltd [2017] UKSC 49; [2019] AC 161. In that case Mr Tariq Khuja had been arrested by the police as someone suspected of being involved in sexual offences against children. He had been released without being charged but at a subsequent criminal trial, in which other individuals were accused of sexual offences against children, a significant part of a complainant's evidence related to her abuse by a man with the same first name as Mr Khuja. The Times and the Oxford Mail wished to publish information about Mr Khuja derived from those proceedings at trial and Mr Khuja, despite the public nature of the trial, applied for an interim injunction relying on the tort of misuse of private information to prevent publication.

104.

The issue in Khuja concerned the limit on the permissible reporting of evidence given in public during a criminal trial. That is a different issue than in the present appeal which involves the limit imposed by the law on the ability to report, not criminal trials, but rather police suspicion prior to charge. However, one of the issues that arose in Khuja was the adverse effect of publication on the claimant of the information in that case given the public's understanding of the presumption of innocence. The impact of the presumption of innocence on the negative effects of publication of the information in this case also arises in this appeal.

105.

The minority in Khuja, Lord Kerr of Tonaghmore and Lord Wilson, considered at paras 44 and 45 that given that he held that "the law proceeds on the basis" that the public understand the presumption of innocence, as emphasised at para 102 above, Lord Rodger had articulated a legal presumption and they held, at para 56, that there was no basis for such a presumption. They considered that Tugendhat J and the Court of Appeal had fallen into error by proceeding on the basis of an asserted presumption which had no proper legal foundation. Accordingly, they conducted the balancing exercise again recognising "the risk to [Mr Khuja] that his identification would generate a widespread belief not only that he was guilty of crimes which understandably attract an extreme degree of public outrage but also that he had so far evaded punishment for them." Accordingly, notwithstanding that he was presumed by the law to be innocent there was "the risk of profound harm to the reputational, social, emotional and even physical aspects of his private and family life …". They considered, at para 59, that the scales "descended heavily in favour of [Mr Khuja's] rights under article 8". The minority would have found in favour of Mr Khuja so as to grant an interim injunction prohibiting publication of the information.

106.

Lord Sumption, delivering the majority judgment in Khuja, held at para 8, that Lord Rodger's observation could not be treated as a legal presumption. Rather, Lord Sumption stated that "experience suggests that as a general rule the public understand that there is a difference between allegation and proof." He continued that whether they did so would "differ from case to case, depending on, among other things, the gravity of the allegations, the character of the evidence and the extent of the publicity surrounding the trial." Lord Sumption, reading the relevant part of Tugendhat J's judgment as a whole, said, at para 33, that the judge "was doing no more than saying that while some members of the public would equate suspicion with guilt, most would not." Lord Sumption considered, at para 34, that this "conclusion was one that [the judge] was entitled to reach" though he entered the qualification casting doubt on whether this was a realistic reflection of the position, by stating that "Left to myself, I might have been less sanguine than he was about the

reaction of the public to the way in which [Mr Khuja] featured in the trial." The majority found that the lower courts had not fallen into error, so there was no need to conduct the balancing exercise again. Accordingly, the appeal was dismissed.

107.
It is apparent from both the majority and minority judgments in Khuja that the public's understanding of the effect on a person of publication of information that they are under police suspicion of having committed a criminal offence is a question of fact rather than of law. Lord Sumption specifically rejected the proposition that any legal presumption had been applied. He considered that the adverse effect had to be determined on a case-by-case basis.

108.
The presumption of innocence is a legal presumption applicable to criminal trials. In that context the presumption weighs heavily in the directions that a jury is given or in the self-directions that a judge sitting alone applies. However, the context here is different. In this context the question 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 that person is under criminal investigation. All the material which we have set out between paras 80-99 above now admits to only one answer, consistent with judicial experience, namely that the person's reputation will ordinarily be adversely affected causing prejudice to personal enjoyment of the right to respect for private life such as the right to establish and develop relationships with other human beings. Accordingly, we reject the submission that a general rule or starting point is unsound because it significantly overstates the capacity of publication of the information to cause reputational and other damage to the claimant given the public's ability and propensity to observe the presumption of innocence.

109.
We would add that in the course of submissions reference was made to expressions such as "there being no smoke without fire" and that "mud sticks". These expressions were then followed by debates as to whether "smoke" represented rumour and "fire" was the equivalent of guilt, or whether fire could be reasonable suspicion of guilt. We consider that such expressions obscure rather than elucidate the essential point, which in the event was accepted by Bloomberg, namely that reputational and other harm will ordinarily be caused to the individual by the publication of such information. The degree of that harm depends on the factual circumstances, but experience shows that it can be profound and irremediable.

(vi) The relevance of defamation authorities (see para 74(b) above)

110.
Bloomberg submits that the reasoning of the courts below for upholding a general rule of a reasonable expectation of privacy (namely, the "human characteristic" to equate suspicion or investigation with guilt on the assumption that there is "no smoke without fire") runs contrary to well-established principles in defamation law: see para 74(b) above. Bloomberg argues in accordance with those principles that the ordinary reasonable reader is not unduly suspicious, can be taken to know things that are common knowledge and is capable of distinguishing suspicion from guilt. By contrast, it is argued that the courts below incorrectly applied an unduly suspicious hypothetical reader, who always adopts a bad meaning (who "assumes the worst") where a less serious or non-defamatory meaning is available, and who "overlooks" the "fundamental" and well-known principle of the presumption of innocence. In that respect we were referred to well-known authorities in relation to the tort of defamation.

111.
However, the claimant did not bring a claim in defamation. The sole claim was in the tort of misuse of private information which is a separate, distinct and stand-alone tort. It has different constituent elements and serves a distinct purpose. In the tort of defamation, the falsity of the information at issue is of central importance. However, the purpose of the tort of misuse of private information is not confined to protection of an individual from publication of information which is untrue, rather its purpose is to protect an individual's private life in accordance with article 8 of the ECHR, whether the information is true or false.

112.
We consider that it is inappropriate to read across the concept of a hypothetical reader from the tort of defamation into the tort of misuse of private information. As Lord Sumption stated in Lachaux v Independent Print Ltd [2019] UKSC 27; [2020] AC 612, para 1:

"The tort of defamation is an ancient construct of the common law. It has accumulated, over the centuries, a number of formal rules with no analogue in other branches of the law of tort. Most of them originated well before freedom of expression acquired the prominent place in our jurisprudence that it enjoys today."

In the tort of defamation, the meaning of a statement is not that which other people may actually have attached to it, but that which is derived from an objective assessment of the defamatory meaning that the notional ordinary reasonable reader would attach to it. In the tort of misuse of private information, part of the factual enquiry is as to the effect of publication of the information on the claimant. The question becomes how would others perceive the claimant if the information was published? That enquiry does not require the application of an objective assessment of the defamatory meaning that the notional ordinary reasonable reader would attach to the information. The outcome of that enquiry in this case is straightforward as it is accepted by Bloomberg that damage to reputation and other damage will occur because the claimant is suspected by the UKLEB of being a criminal. Bloomberg suggests that the factual enquiry as to how others perceive the claimant should exclude any consideration as to whether others might perceive him as actually guilty of the offence. The tort of misuse of private information is not confined in that way, so the factual enquiry as to how others perceive the claimant can include a range of reactions including that some may perceive the claimant as guilty whilst others may perceive his or her conduct as having given cause for the criminal investigation.

113.
We reject Bloomberg's argument at para 74(b) above.

(vii) Reputational damage (see para 74(c) above)

114.
Bloomberg submits that the courts below incorrectly held that information about an individual being subject to criminal investigation is private because it is potentially reputationally damaging. Rather, Bloomberg submits that information is protected because - irrespective of the effect on the claimant's reputation - information of that nature belongs to a part of the claimant's life which is of no-one else's concern.

115.
We consider that this is an unduly restrictive view of the protection afforded by article 8 of the ECHR. The ECtHR (Grand Chamber) in Denisov v Ukraine (Application No 76639/11) (unreported) 25

September 2018, para 95, relying on S and Marper v United Kingdom (Application Nos 30562/04 and 30566/04) (2008) 48 EHRR 50, para 66; Gillberg v Sweden (Application No 41723/06) (2012) 34 BHRC 247, para 66; and Bărbulescu v Romania (Application No 61496/08) (2017) 44 BHRC 17, para 70, stated that:

"The concept of 'private life' is a broad term not susceptible to exhaustive definition. It covers the physical and psychological integrity of a person. It can therefore embrace multiple aspects of the person's physical and social identity. Article 8 protects in addition a right to personal development, and the right to establish and develop relationships with other human beings and the outside world."

116.
The broad term can also include activities of a professional or business nature. We consider that publication of information about an official criminal investigation into a person's business activities can fall within the concept of "private life". At para 100 in Denisov the Grand Chamber stated that:

"… the notion of 'private life', as a broad term, does not exclude in principle activities of a professional or business nature. It is, after all, in the course of their working lives that the majority of people have a significant opportunity to develop relationships with the outside world (see Niemietz v Germany (1992) 16 EHRR 97, para 29; [Volkov v Ukraine (Application No 21722/11) (2013) 57 EHRR 1, para 165]; and [Bărbulescu v Romania (Application No 61496/08), para 71]). Professional life is therefore part of the zone of interaction between a person and others which, even in a public context, may, under certain circumstances, fall within the scope of 'private life' (see [Martínez v Spain [GC] (Application No 56030/07) (2014) 60 EHRR 3, para 110])."

117.
Bloomberg, whilst accepting that the notion of private life can include activities of a professional or business nature, argues, in reliance on Fayed v United Kingdom (Application No 17101/90) (1994) 18 EHRR 393, that the private character of those activities does not extend to businessmen who are actively involved in the affairs of large public companies. We will consider this argument in paras 136 to 141 below.

118.
The Grand Chamber, in Denisov, also considered, at para 97, whether the notion of "private life" should cover a right to respect for reputation, which is not expressly mentioned in article 8. The court cited its decision in Pfeifer v Austria (Application No 12556/03) (2007) 48 EHRR 8, para 35, for the principle that:

"a person's reputation, even if that person was criticised in the context of a public debate, formed part of his or her personal identity and psychological integrity and therefore also fell within the scope of his or her 'private life'."

119.
The Grand Chamber continued, at para 98, by stating that:

"However, it is important to stress that article 8 cannot be relied on in order to complain of a loss of reputation which is the foreseeable consequence of one's own actions, such as, for example, the commission of a criminal offence (see [Sidabras and Džiautas v Lithuania (Application Nos 55480/00 and 59330/00) (2004) 42 EHRR 6, para 49], and [Axel Springer AG v Germany [GC] (Application No 39954/08) (2012) 55 EHRR 6, at para 83], 7 February 2012). In [Gillberg v Sweden [GC] (Application No 41723/06) (2012) 34 BHRC 247] the Grand Chamber did not limit this rule to reputational damage

and expanded it to a wider principle that any personal, social, psychological and economic suffering could be foreseeable consequences of the commission of a criminal offence and could not therefore be relied on in order to complain that a criminal conviction in itself amounted to an interference with the right to respect for 'private life' ... This extended principle should cover not only criminal offences but also other misconduct entailing a measure of legal responsibility with foreseeable negative effects on 'private life'."

120.

In Axel Springer AG v Germany the ECtHR, at para 83, stated "that the right to protection of reputation is a right which is protected by article 8 of the Convention as part of the right to respect for private life" but continued by stating that "[i]n order for article 8 to come into play, however, an attack on a person's reputation must attain a certain level of seriousness and in a manner causing prejudice to personal enjoyment of the right to respect for private life."

121.

We consider that the importance of the decisions in Pfeifer, Denisov and Axel Springer in relation to the first ground of appeal is the principle that a person's reputation falls within the scope of his or her "private life" so that article 8 applies provided the attack on reputation attains a certain level of seriousness and causes prejudice to personal enjoyment of the right to respect for private life.

122.

We also consider that the qualification, in para 98 of Denisov, articulates other circumstances which can be taken into account at stage one in determining whether the claimant has established a reasonable expectation of privacy in the relevant information. So that, for instance, a person actually convicted of a criminal offence as in Gillberg (see paras 33 and 64-68), or investigated and found to be a former KGB officer as in Sidabras and Džiautas v Lithuania (Application Nos 55480/00 and 59330/00) (2004) 42 EHRR 6 (Sidabras (see para 13) and Džiautas (see para 19)), cannot complain of the foreseeable consequence of a loss of reputation or of any personal, social, psychological and economic suffering as a result. We have emphasised the requirement that the consequence is foreseeable, as for instance, in Sidabras and Džiautas the ECtHR found, at para 49, that the applicants "could not have envisaged the consequences that their former KGB employment would entail for them."

123.

We consider that the reference in Denisov to "other misconduct entailing a measure of legal responsibility" is again another circumstance which can be taken into account at stage one in determining whether objectively there is a reasonable expectation of privacy in the information. However, ordinarily by analogy to the other examples in para 98 of Denisov, it is misconduct established after authoritative findings following an official investigation, for instance, such as a finding of medical malpractice following an official investigation by the General Medical Council or a finding in civil proceedings that a person has committed fraud. However, we do not consider that misconduct is confined to a finding at the end of a criminal or other authoritative process. For instance, other circumstances can extend to the example given by the judge, at para 124, of "an armed bank-robber who held hostage a number of customers and employees in a televised three-day siege" whom he considered "could hardly claim a reasonable expectation of privacy when s/he surrendered and was arrested."

124.

The principle that a person's reputation falls within the scope of his or her "private life" so that article 8 applies was recognised by Lord Sumption in Khuja at para 21 when he stated that:

"The protection of reputation is the primary function of the law of defamation. But although the ambit of the right of privacy is wider, it provides an alternative means of protecting reputation which is available even when the matters published are true."

125.
We consider that article 8 does encompass a "reputational" dimension which in the United Kingdom is primarily protected by the tort of defamation. However, reputational damage attaining a certain level of seriousness and causing prejudice to personal enjoyment of the right to respect for private life, can also be taken into account in determining whether information is objectively subject to a reasonable expectation of privacy in the tort of misuse of private information. It is included in all the circumstances of the case which should be considered and "the effect on the claimant" is expressly one of the Murray factors. On this basis, we reject Bloomberg's argument at para 74(c) above, and we consider that information may be characterised as private because it is reputationally damaging provided it attains a certain level of seriousness and consequentially impacts on the personal enjoyment of the right to respect for private life.

(viii) Submission that the courts below applied an incorrect legal test (see para 74(d) above)

126.
Bloomberg submits that the courts below failed to apply the correct legal test at stage one which involves consideration of "all the circumstances of the case".

127.
The application by the courts below of a general rule or legitimate starting point did not mean that they did not apply the multi-factorial analysis set out in Murray. The judge, at para 125, approached the issue under the enumerated headings in that case and Simon LJ considered his approach at paras 70-87. In relation to the Murray factor of "[t]he effect of the publication on the claimant" the judge accepted that the publication of the information had a significant adverse impact on the claimant both in terms of loss of autonomy as well as damage to reputation, but found that it was not a case in which the consequences of publication had been devastating or life-changing. The judge considered that the most significant Murray factor was "[t]he circumstances in which and the purposes for which the information came into the hands of the publisher." He gave a number of reasons for that conclusion including the preliminary and contingent nature of the investigation.

128.
Bloomberg asserts that in applying the multi-factorial analysis the courts below incorrectly confined the Murray factor of "the nature of the activity in which the claimant was engaged" to the claimant being the subject of the UKLEB's investigation. Rather, Bloomberg suggests that the activity should have been identified as "alleged corruption in relation to X Ltd's activities in the foreign country." Bloomberg contends that once the activity has been correctly identified, the court should then analyse whether the claimant was engaged in that activity.

129.
In a case such as the present, we do not consider that the nature of the activity in which the claimant was engaged is a factor of particular significance. It was of significance on the facts of Murray, but, as already stated, the Murray factors are not exhaustive and their individual significance, if any, will vary

from case to case. This case concerns information relating to a criminal investigation (see paras 19 and 78 above) rather than, as in Murray, media intrusion into a person's activities.

130.
In Murray the claimant, the 19-month-old son of a well-known author, had been photographed without the knowledge or consent of his parents, whilst being pushed by his father in a pushchair in a public street, with his mother walking alongside, on their way to a café. The claimant, through his parents as his litigation friends, claimed damages against a newspaper publisher and a photography agency alleging a breach of his right to respect for his privacy under article 8 of the ECHR in that without his parents' knowledge or consent the agency had taken, retained and supplied, and the newspaper publisher had published, private and confidential information contained in the photograph in respect of which he had a reasonable and legitimate expectation of privacy. The photography agency applied to strike out the claim on the basis that there could be no reasonable expectation of privacy in respect of the simple activity of walking down a street. So, a central question on the strike out application was whether a distinction could be drawn between different types of activities. Patten J held that a distinction could be drawn between a child, or an adult, engaged in family and sporting activities and something as simple as a walk down a street or a visit to the grocers to buy the milk. Patten J considered that the first type of activity was clearly part of a person's private recreation time intended to be enjoyed in the company of family and friends and that, on the test deployed in Von Hannover v Germany, publicity of such activities is intrusive and can adversely affect the exercise of such social activities. However, Patten J struck out the claim and gave summary judgment, holding that innocuous conduct in a public place or routine activities such as a simple walk down the street or a visit to the shops did not attract any reasonable expectation of privacy. The Court of Appeal allowed the appeal, holding that Patten J was wrong to strike out the claim on the ground that the claimant had no arguable case that he had a reasonable expectation of privacy. Sir Anthony Clarke MR, delivering the judgment of the Court of Appeal stated at para 55, that the members of the court did not agree "that it is possible to draw a clear distinction in principle between the two kinds of activity." He continued by stating that "… an expedition to a café of the kind which occurred here seems to us to be at least arguably part of each member of the family's recreation time intended to be enjoyed by them and such that publicity of it is intrusive and such as adversely to affect such activities in the future."

131.
In Murray, the nature of the activity plainly affected the question as to whether there was a reasonable expectation of privacy in the relevant information. However, this case does not turn on identifying the nature of the claimant's activity, but on the private nature of the information about the UKLEB's criminal investigation into his activities. The private nature of that information is not affected by the specifics of the activities being investigated.

132.
We are confirmed in that view by the analysis that Bloomberg invites.

133.
The judge at para 125(i)(b) considered that the activity in question was being subject to the UKLEB's investigation so that the claimant's reasonable expectation of privacy was over confidential details of the UKLEB investigation, and in particular the UKLEB's conclusions as to the claimant's conduct as demonstrated by the evidence it had obtained. In this way the reasonable expectation of privacy attached to the fruits, not of Bloomberg's own investigation (see para 28 above), but of the UKLEB's ongoing confidential investigation into the claimant and the views the UKLEB had formed in that context as to the claimant's potential culpability.

134.
We accept that a criminal investigation is into an underlying suspected criminal activity. However, in so far as it is relevant to consider the second enumerated Murray factor, then in the context of information relating to a criminal investigation, we consider that the courts below were correct to identify the activity as the criminal investigation in circumstances where the information which the claimant seeks to characterise as private are the fruits of that investigation, see paras 19 and 78 above.

135.
For all these reasons we reject Bloomberg's case that the courts below materially erred in law in their consideration of the Murray factor of "the nature of the activity in which the claimant was engaged".

136.
Bloomberg further asserts that in applying the multi-factorial analysis the courts below failed to give adequate consideration to the Murray factor of "the attributes of the claimant." Bloomberg argues that this factor ought to have led to a recognition that businessmen actively involved in the affairs of large public companies, such as the claimant, are not in that sector of their lives private individuals but rather that they knowingly lay themselves open to close scrutiny of their acts by the media.

137.
In Oberschlick v Austria (No 2) (Application No 20834/92) (1997) 25 EHRR 357, the ECtHR considered the limitation in article 10(2) of the protection of the reputation of others upon the right to freedom of expression under article 10(1). The ECtHR considered that the limitation of the protection of reputation of politicians was less than would be accorded to a private individual. The court observed, at para 29, that:

"… the limits of acceptable criticism, they are wider with regard to a politician acting in his public capacity than in relation to a private individual. A politician inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must display a greater degree of tolerance, especially when he himself makes public statements that are susceptible to criticism. He is certainly entitled to have his reputation protected, even when he is not acting in his private capacity, but the requirements of that protection have to be weighed against the interests of open discussion of political issues, since exceptions to freedom of expression must be interpreted narrowly …"

138.
Bloomberg asserts that a similar principle applies to businessmen and in this respect, reliance is placed on the decision of the ECtHR in Fayed v United Kingdom which concerned an alleged violation of article 6(1) of the ECHR in that the applicants asserted that they had been denied effective access to a court to determine their civil rights to honour and reputation. They had been subject to an inspectors' report which had arrived at provisional conclusions that they had dishonestly misrepresented their origins, their wealth, their business interests and their resources at the time of their takeover of House of Fraser, and that they had lied about these and other topics to the inspectors and produced a set of documents as evidence that they knew to be false. Bloomberg relies on para 75 of the judgment of the ECtHR which "recognise[d] that limitations on access to court may be more extensive when regulation of activities in the public sphere is at stake than in relation to litigation over the conduct of persons acting in their private capacity."

139.
Bloomberg asserts that significantly, the ECtHR continued by stating that:

“As to enforcement of the right to a good reputation under domestic law, the limits of acceptable criticism are wider with regard to businessmen actively involved in the affairs of large public companies than with regard to private individuals , to paraphrase a principle enunciated by the Court in the context of the State’s power to restrict freedom of expression in accordance with article 10(2) of the Convention. Persons, such as the applicants, who fall into the former category of businessmen inevitably and knowingly lay themselves open to close scrutiny of their acts, not only by the press but also and above all by bodies representing the public interest.” (Emphasis added)

140.
We accept that the status of the claimant as a businessman actively involved in the affairs of a large public company means that the limits of acceptable criticism of him are wider than in respect of a private individual. However, that does not mean that there is no limit, nor does it mean that this circumstance is determinative. We consider that it is a relevant consideration at stage one in determining whether the information which has been published or which is to be published can be characterised as private. However, it is only one factor, and consideration of “the attributes of the claimant” must be balanced against the effect of publication of the information on him. The ordinary conclusion in relation to the effect of publication of information that an individual is under criminal investigation is that damage occurs whatever his characteristic or status. Indeed, ordinarily we would anticipate greater damage to a businessperson actively involved in the affairs of a large public company than to a private individual.

141.
We consider that the status of the claimant was taken into account by both the judge and by Simon LJ. They noted that the claimant “held a senior position in X Ltd”, but “was not a director” and “achieved no particular prominence in his role.” The judge was entitled to identify the most significant Murray factor as being “[t]he circumstances in which and the purposes for which the information came into the hands of the publisher” and to place less emphasis on the status of the claimant. We reject Bloomberg’s argument that the courts below failed to give adequate consideration to the Murray factor of “the attributes of the claimant”.

142.
It is clear that the information contained an attack on the claimant’s reputation which attained a level of seriousness sufficient for article 8 of the ECHR to come into play. However, Bloomberg also argued that inadequate consideration was given by the courts below as to whether publication of the information undermined personal integrity as distinct from merely harming reputation. As we have indicated, at para 121 above, for article 8 to come into play the manner of attack on a person’s reputation, in addition to attaining a certain level of seriousness, must cause prejudice to personal enjoyment of the right to respect for private life. The judge held at para 155(i) that publication of the information had “negatively impacted [the claimant’s] dignity and standing” and “caused [him] significant distress and anger”. He held at para 153, that publication of the information had a “negative impact on [the claimant’s] family life” (including causing distress to his wife), had “greatly affected his mood and his sleeping”, caused him “distress and embarrassment” and made him “irritable and angry.” The judge observed, at para 125(i) that the claimant’s case involved a complaint about “loss of autonomy” as well as being particularly damaging to the claimant as an international businessman, and that “[b]oth are dimensions of the article 8 right”. In light of the judge’s unchallenged acceptance of the claimant’s evidence about the effect of the publication of the information on his dignity, autonomy and family life, and Bloomberg’s acceptance of the award of

£25,000 damages we reject the argument that there was no prejudice to personal enjoyment of the right to respect for private life caused by the manner of attack on the claimant's reputation.

143.
We reject Bloomberg's argument at para 74(d) above.

(ix) Does a general rule or a legitimate starting point apply in relation to this category of information?

144.
A determination as to whether there is a reasonable expectation of privacy in the relevant information is a fact-specific enquiry which requires the evaluation of all circumstances in the individual case. Generally, in setting out various factors applicable to that evaluation, including but not limited to the Murray factors, it is important to recognise that not all of them will be relevant to every conceivable situation and that the examination of the factors must be open textured without being given any pre-ordained weight. However, in respect of certain categories of information, such as the information in this case, a consideration of all the circumstances and the weight which must be attached to a particular circumstance will generally result in a determination that there is a reasonable expectation of privacy in relation to information within that category. In respect of those categories of information it is appropriate to state that there is a legitimate starting point that there is an expectation of privacy in relation to that information. We prefer the terminology of "a legitimate starting point" to emphasise the fact specific nature of the enquiry and to avoid any suggestion of a legal presumption, as noted above in para 67. We consider that the courts below were correct in articulating such a legitimate starting point to the information in this case. This means that once the claimant has set out and established the circumstances, the court should commence its analysis by applying the starting point.

(x) Does the legitimate starting point apply in the present case?

145.
This case clearly falls into the category of information in which the legitimate starting point applies.

(xi) Conclusion in relation to this ground of appeal

146.
The courts below were correct to hold that, as a legitimate starting point, a person under criminal investigation has, prior to being charged, a reasonable expectation of privacy in respect of information relating to that investigation and that in all the circumstances this is a case in which that applies and there is such an expectation. We would dismiss this ground of appeal.

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

147.
The short answer to this ground of appeal is that neither the judge nor the Court of Appeal held that the fact that the information originated from a confidential document rendered the information private or meant that Bloomberg could not rely on the public interest in its disclosure.

148.

It is correct that the judge treated the confidentiality of the information as being a relevant and important factor at both stage one and stage two but he did not treat it as being determinative. The Court of Appeal rightly held that such an approach was justified and involved no error of law.

149.
At stage one, it was common ground that the judge should consider the Murray factors, so far as applicable, and he did so at para 125. Factor (7) is "the circumstances in which and the purposes for which the information came into the hands of the publisher". As the Court of Appeal held, the confidentiality of the Letter of Request was clearly a relevant circumstance in relation to factor (7) - see the judgment of Simon LJ at para 92 and that of Underhill LJ at para 148.

150.
The recognition that the causes of action for misuse of private information and for breach of confidence are distinct means that there is no necessary overlap between them. Information may be private but not confidential, or confidential but not private. To prove that information is private it is not necessary to show that it is confidential. Often, however, confidentiality and privacy will overlap and confidentiality may well be relevant to whether there is a reasonable expectation of privacy. In particular, if information is confidential that is likely to support the reasonableness of an expectation of privacy.

151.
The judge was clearly well aware of the distinction between confidential information and private information and in the paragraph in which he found the "high-level of confidentiality" that attached to the Letter of Request to be a "very significant factor" when considering whether there was a reasonable expectation of privacy, he specifically made reference to the fact that there was no claim for breach of confidence (para 125(g)).

152.
At stage two, the judge was right to place reliance on the public interest in the observance of duties of confidence when carrying out the balancing exercise. As Steyn J stated in Greystoke v Financial Conduct Authority [2020] EWHC 1011 (QB), in the context of weighing the competing rights under articles 8 and 10, at para 28:

"In a case where the information is the subject of a duty of confidence, a significant element to be weighed in the balance is the important public interest in the observance of duties of confidence: see Brevan Howard Asset Management LLP v Reuters Ltd [2017] EWCA Civ 950 at paras 62-69."

153.
That public interest both weakens the justification for interfering with or restricting the right of privacy and strengthens the justification for interfering with or restricting the right to freedom of expression. It is also relevant to the proportionality of such interference or restriction. The method of obtaining the information is also one of the relevant factors identified in Axel Springer.

154.
In the present case, there was a general public interest in the observance of the duties of confidence and a specific public interest in maintaining the confidence of the Letter of Request so as not to prejudice the criminal investigation. As was stated in the Letter of Request, disclosure of its contents "will pose a material risk of prejudice to a criminal investigation". As a suspect in the investigation, the claimant also had a particular interest in avoiding prejudice to, and maintaining the fairness and integrity of, that investigation.

155.

In such circumstances the Court of Appeal was clearly correct in concluding that there was no error of law in the judge’s approach. As Simon LJ stated at para 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 …”

156.

Simon LJ was here referring to the judgment of Lord Mance in PJS v News Group Newspapers Ltd [2016] UKSC 26; [2016] AC 1081, para 20 in which he stated as follows:

“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 at [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.”

8. Issue 3 - Whether the Court of Appeal was wrong to uphold the findings of Nicklin J that the claimant had a reasonable expectation of privacy in relation to the published information complained of, and that the article 8/10 balancing exercise came down in favour of the claimant.

157.

This ground of appeal is dependent upon Bloomberg establishing that the Court of Appeal erred in law on Issue 1 and/or Issue 2, which it has not done. If no error of approach is shown then there are no grounds in this case for interfering with the judge’s decision in relation to the balancing exercise.

9. Conclusion

158.

For the reasons given, we would dismiss the appeal.