

# Bloomberg LP (Appellant) v ZXC (Respondent) [2022] UKSC 5

Published 24 March 2022

The Supreme Court (“SC”) has provided further guidance on Misuse of Private Information and Breach of Confidence causes of action, as well as how the Court will balance the privacy and confidentiality rights of individuals against the right to freedom of expression of others.

## Background

The claimant, a US citizen with UK residency, worked for a publicly listed company (X Limited). He and his employer have been subject to criminal investigation by a UK Legal Enforcement Body (the “UKLEB”). Since 2013, the UKLEB was looking into the integrity of various transactions in a foreign state for which the claimant’s division of the company was responsible. Media group Bloomberg LP (“**Bloomberg**”) reported on these investigations since they began, as did other media outlets. To date, none of X Limited’s employees have been charged.

In 2016, the UKLEB sent a confidential Letter of Request to the foreign state, seeking its assistance in the investigations. It sought information on, *inter alia*, banking and business records in relation to X Limited and individuals, which included the claimant. In autumn of the same year, Bloomberg published an article (the “**Article**”) which the Court found contained information drawn “almost exclusively” from the Letter of Request which had to have 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”.

The claimant sought an interim injunction restraining further publication of the Article and also brought a claim for misuse of private information. The Claimant claimed he had a reasonable expectation of privacy in the information published, the details of the UKLEB investigation and the UKLEB’s belief the Claimant had committed specified criminal offences. The information which the Claimant submitted was private and had been misused in the Article included:

1. the fact that the UKLEB had asked the government of the foreign state for banking and business records in relation to its investigations into the claimant (and others); and
2. the details of the deal the UKLEB was investigating. This included that: (a) the UKLEB considered the claimant had provided false information as to the value of an asset; (b) the UKLEB believed that the claimant had committed fraud by false representation; and (c) the UKLEB was seeking to trace a substantial sum of money it believed were the proceeds of a crime committed by the claimant.

## Judgment

The judge recognised that liability for misuse of private information is determined by applying a two-stage test. Stage one considers whether the claimant has an objectively reasonable expectation of privacy in the relevant information; and stage two considers whether this is outweighed by the right to freedom of expression.

The judge held that a person has a reasonable expectation of privacy in a police investigation up to the point of charge, and thus stage one was satisfied. As to stage two, the judge engaged in a more involved balancing exercise. The judge determined that the nature of the criminal charge, corruption in the foreign state, was a matter of high public interest, but this interest only had an “indirect” bearing on the matter. The Article was not reporting on the *fruits* of the investigation, only disclosing the contents of the Letter of Request and providing background information. The judge then held that there was a public interest in not publishing the contents of the Letter of Request and in maintaining the confidentiality of the UKLEB’s investigations. Finally, the judge noted that there was no evidence of an assessment of the public interest by Bloomberg. Following this balancing exercise, the judge determined that the claimant’s Article 8 rights prevailed.

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.

## Court of Appeal judgment

The Court of Appeal (“CoA”) conducted a similar balancing exercise as the judge and came to the same view.

## Supreme Court judgment

Rejecting Bloomberg’s appeal, the SC held that the right to privacy during the investigation was a legitimate starting point for the balancing exercise, given publication of such information could cause damage to a person’s reputation. The CoA was correct in asserting that whilst there is not an invariable or unqualified right to privacy during the investigation, in this case, public interest in open justice must be balanced against the risk of unfair damage to the reputation of the claimant.

The SC also held that the concept of ‘private life’ can encompass a person’s reputation, 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. As such, the term can also include activities of a professional or business nature.

Furthermore, consideration of “the attributes of the claimant” must be balanced against the effect of publication of the information on him. Whilst publication of information that an individual is under criminal investigation could be damaging to an individual, regardless of his characteristic or status, the SC would ordinarily expect greater damage on a businessperson actively involved in the affairs of a large public company than to a private individual.

Finally, the SC confirmed that the causes of action for misuse of private information and breach of confidence are distinct, so there is no necessary overlap between them. Information may be private but not confidential, or confidential but not private. Often, however, confidentiality and privacy will overlap and if information is confidential, that is likely to support the reasonableness of an expectation of privacy.

## Analysis

The Court has provided useful guidance on the balancing exercise of competing interests and rights, and how it conducts its fact specific analysis. Insofar as it relates to reporting on criminal allegations, it is evident that the SC, and the lower courts, considered how the balance between the rights of: (i) public interest in open justice; (ii) freedom of expression, particularly of the free press; and (iii) rights to respect for private life had already been struck by the general rule that an individual’s identity should not be published before charge.

The fact that the confidential nature of information can also be taken into account in determining whether information is objectively subject to a reasonable expectation of privacy is welcome clarification - particularly given the Court’s view that disclosure of confidential information affecting an individual’s professional life could impact their Article 8 rights and give rise to a claim under the tort of misuse of private information.

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