ZXC v BLOOMBERG LP (CA)

Facts and background

1 It is doubtful whether any privacy judgment has had such implications for a liberal democracy as this one, holding, as it does, that the suspicion of corruption held by the authorities is a private fact and enforceable as such by the suspected party. This case note deals only with the Judges' treatment of the first stage of any privacy enquiry – does the claimant have a reasonable expectation in the privacy of the information published?

2 There were two Bloomberg publications relevant in this case. An earlier article, not sued upon, disclosed that the claimant had been interviewed by a United Kingdom Law Enforcement Body ("UKLEB") as part of an investigation into corrupt transactions in a foreign state. It had probably been leaked to Bloomberg from within UKLEB.

3 But it was the second article that disclosed the following facts in respect of which the claimant now claimed a reasonable expectation of privacy : that UKLEB considered that he had provided false information, on the value of an asset, to the board of the company he worked for; that they believed he had committed fraud by dishonestly inflating the value of an asset; that they were seeking to trace the onward distribution of money they believed were the proceeds of crime carried out by the claimant; and also that the

UKLEB had asked authorities in the foreign state to provide certain corporate banking and business records. This information was all contained in a Letter of Request ("LOR") from UKLEB to the competent authorities of the foreign state. The UKLEB claimed confidentiality in the LOR and its contents, but had taken no action against Bloomberg.

4 The Court of Appeal ("CA") upheld the trial court's finding that Bloomberg had infringed the claimant's privacy in publishing these details. Their judgment is meticulously faithful to the UK Law of Privacy, as it now is, conscientious and accurate in its distillation of the (far from crystal clear) principles sought to be articulated in the body of case law built up this century, insightful in its own right, and, in this context, logical reading.

5 Yet, stand back from all of that for a moment, and think about the result : The suspicion of a public law enforcement body (such as the police) is now a private fact, and enforceable as such by the suspected miscreant! This means that police investigations are now inoculated from scrutiny at the behest of the suspect (the judgment's protestations to the contrary mark how divorced from reality it is). This is a finding with implications well beyond the right of free expression : it constitutes a restraint on investigating and holding to account a public authority where scrutiny is often the most important restraint on abuse, and it therefore undermines democracy itself; and it constitutes a restraint on all investigative journalists in logic (if not in the intentions of the judges in the CA) because, if the suspicions of the police, for example, are a private matter, then so, by parity of reason, are the suspicions of everyone else including investigative journalists. I am not aware of any comparable democracy that has adopted such a rule, not even those with a far older and more developed recognition of privacy rights (such as the USA). What went wrong?

6 What went wrong is almost 20 years of failure on the part of judges schooled in the common law to understand and properly conceptualise : (1) the nature and concept of privacy; (2) the distinction between privacy and reputation; (3) the distinction between privacy and confidential

information; and (4) that what is in the public interest to investigate and disclose is not, ever, private. All blended with some fickle and unstable legal reasoning.

7 The Court of Appeal started with the 2-stage test it had laid down a little over a decade ago in McKennit v Ash. The first stage (which is the only concern of this note) is whether or not the information is private and this is revealed by the answer to the question as to whether or not the claimant had a "reasonable expectation of privacy". Only if that answer is affirmative, does one move to the second stage (must this expectation yield to the publisher's right of free expression?).

The first ground of appeal

8 The Court of Appeal agreed with the Judge in the lower court who had found that "in general, a person does have a reasonable expectation of privacy in a police investigation up to the point of charge". This proposition is not so bizarre as it seems, at least not in English law : it finds support in the High Court and from a minority in a Supreme Court case. In both cases, however, the Judges involved seem to lose their bearings and jaywalk from the privacy side of the street to the reputation side of the street. So Mann J in Richard was concerned with the "stigma" attached to being the subject of an investigation; and Lords Kerr and Wilson JJSC, in Khuja, were concerned with damage to the reputation of an innocent man. The CA continued in this vein in agreeing with the trial Judge in the answers he gave to the Murray checklist questions, most notably the following :

8.1 First, that the claimant had achieved no particular prominence – relevant, perhaps, to a case of a public figure photographed in a park, but pointless in a corruption case.

8.2 Second, was the nature of the activity the claimant had engaged in. This was, of course, business activities whether or not corrupt. But, held the CA, the claimant did not assert privacy in this, but rather over the UKLEB's suspicions. Except that the UKLEB's

suspicions were not the claimant's activities, so it is not easy to see how this requirement was held satisfied.

8.3 Third, the circumstances in which, and the purpose for which, the information came into the hands of the publisher. These included (again) the confidentiality of the information, the UKLEB's objection to publication and the provisional nature of its suspicions. This is entirely misconceived. A private fact is not more or less private for these reasons. It is private because it is one of those facts in deeply personal life that a person would reasonably regard as private – whether a sexual liaison or preference or details of early morning ablutions. The privacy of none of these depends on "circumstances" or the "purpose" for which leaked.

The second ground of appeal

9 Bloomberg then argued that the Judge had erred in law by conflating the discrete concepts of private information and confidential information. And he very obviously did so, as the reasoning of the CA in his support so palpably shows: the Judge had held that confidentiality of the information leaked to Bloomberg was not "determinative" of privacy, and had merely "placed reliance on the highly confidential nature of the (information received) in determining that the information was private". Is such "reliance" on confidentiality not quite obviously proof of the conflation Bloomberg complained of?

10 It gets worse : the claimant's reasonable expectation of privacy was held to have derived from the UKLEB's classification of the information as confidential. So X now acquires a reasonable expectation of privacy in respect of information because Y regards such information as confidential!

11 And worse : if the fact of the UKLEB's suspicion is truly a private fact then the UKLEB, itself, was precluded from publishing that fact – even to the prosecuting authorities. This absurdity, alone, ought to have signified to the CA that they had misconceived the case.

The third ground of appeal

12 Here, Bloomberg argued that the Judge erred in drawing an artificial distinction between the factual allegations of the claimant's alleged criminal conduct on the one hand (the earlier article) and the UKLEB's suspicions on the other hand. The CA agreed with the trial Judge because, they held, the second article "conveys that the investigating authority regards the allegations as serious enough to warrant investigation and had drawn preliminary conclusions to the disfavour of a claimant" (my emphasis). This is, again, reputation. So much so, that the Judges in the CA have unwittingly stumbled on the second level of meaning in defamation law (Chase – reasonable grounds to suspect guilt).

Remaining grounds of appeal

13 The CA added nothing to the trial judgment on the further grounds of appeal, holding that the Judge had properly considered all relevant matters.

Conclusion

14 Thus the three grounds of appeal that drew the CA into substantive reasoning are all illustrative of the first, second and third conceptual failures articulated in paragraph 6 above (the fourth is relevant only at the second stage of enquiry which this case note does not canvass).

15 There is so much wrong with this judgment that it is not possible to deal, in a short note, with much more than the tip of the iceberg. But, in conclusion, three big mistakes pretty much dictated the result –

15.1 The lack of a definition of privacy. A "reasonable expectation of privacy" is not a definition, but rather a test. It is also a test impossible to apply in the absence of a definition of privacy.

15.2 There is no recognition or understanding of the roles played by the law-enforcement and regulatory arms of the state. No-one wants

to become entangled in the investigations and procedures of such institutions but when a person is, that is not a private matter, but a public matter. It is very far from the inner life and from hearth and home. If entanglement with the coercive agencies of the state were to be private, how is society (including the press) ever to hold them accountable?

15.3 Neither the Court of First Instance nor the CA appeared conscious of the fact that libel law has already evolved techniques and rules to deal with publication of official (and other) suspicions and investigations. That is because the courts have long recognised that such publications do impact on the subject's reputation and, because they do, well-honed (by now) rules of meaning and a defence of truth strike the balance between the rights of the suspected person and the society's interest in being properly informed of law enforcement matters. In other words the courts in the UK have, for many years now, recognised that the investigations and suspicions of agencies charged with upholding the law and prosecuting crime may impact on the reputation (often only temporarily) of the suspect; but not on her privacy.

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