

Crime brief

This month, David Walbank QC focuses on a successful attempt to avoid a media scrum & an ongoing campaign to avoid extradition

IN BRIEF

► Under investigation: human rights & expectations of privacy.

► Extradition extensions.

The Supreme Court has recently given judgment on an issue of perennial concern to those who find themselves under criminal investigation but wish to avoid a media circus in the full glare of publicity. In *Bloomberg LP v ZXC* [2022] UKSC 5, [2022] All ER (D) 74 (Feb) the court considered whether a criminal suspect, not yet charged with any offence, has a reasonable expectation of privacy regarding the details of the ongoing inquiry.

ZXC was chief executive of one of the regional divisions of a PLC, which carried on business across a number of jurisdictions. He was a US citizen but had indefinite leave to remain in the UK. He brought a civil claim for misuse of private information, arising from the publication of a news story by Bloomberg, the financial data and media conglomerate which has its headquarters in New York and is known worldwide for its financial journalism and economic reporting. The article in question described allegedly corrupt practices by the company in one of the countries within the geographical territory covered by ZXC's division. It was based almost entirely on the leaked contents of a confidential Letter of Request, which had been sent by UK law enforcement to the authorities of the state that was the focus of the investigation.

In his civil action, ZXC argued that he had a reasonable expectation of privacy in relation to the facts and matters canvassed in the Bloomberg story, including the details of the criminal investigation by the UK authorities, their assessment of the evidence, their conclusion that he had been complicit in corruption and their analysis of how the information sought in the Letter of Request might assist their inquiries.

ZXC contended that by publishing the article Bloomberg had misused the confidential information contained in the Letter of Request and he sought an

injunction and damages. Following a trial in the High Court in London, Mr Justice Nicklin handed down both a private judgment and an edited open judgment, finding against Bloomberg and awarding ZXC damages of £25,000. The Court of Appeal (Civil Division) dismissed the media giant's appeal and there was then a further appeal to the Supreme Court.

In handing down the judgment of the Supreme Court, Lord Hamblen and Lord Stephens JJSC referred to a long line of authorities in which celebrities and other high-profile figures (including Mohamed Al-Fayed, Max Mosley and Sir Cliff Richard) had all sought to fend off unwarranted media intrusion into their private lives under the guise of reporting on ongoing criminal inquiries in the public interest.

Their Lordships observed that there will ordinarily be what they described as a 'legitimate starting point' that the individual under investigation has a reasonable expectation of privacy. This stems from a combination of factors including: the common practice of state investigation agencies to hold off identifying individuals under investigation prior to charge; the risk of unfair reputational damage to such individuals regardless of their public status or personal characteristics; and what has historically been a uniformity of judicial approach based on the judges' recognition that the presumption of innocence cannot always afford sufficient protection.

There was no basis for reading across from the law of defamation the notion of a hypothetical 'not unduly suspicious' reader. Nor, for the purposes of Art 8 ECHR, could a person's business affairs be divorced from their private life by simply ignoring the inevitable impact on their reputation and standing. In the end, the inherent confidentiality of a Letter of Request was highly relevant to whether a suspect's privacy rights were engaged and, if they were, whether they were outweighed by the media's right to freedom of expression.

The Supreme Court dismissed Bloomberg's appeal and upheld the first instance decision in favour of ZXC.

Extradition encore

The Home Secretary, Priti Patel MP, is being kept busy with extradition requests from the US Government. Last month we looked at the case of Julian Assange, the founder of Wikileaks (see *NLJ*, 15 & 22 April 2022, p31). This month we examine *R (Lynch) v Westminster Magistrates' Court* [2022] EWHC 142 (Admin), [2022] All ER (D) 90 (Jan) which is just the latest instalment in the long-running litigation arising from the controversial \$11bn takeover of Autonomy Corporation plc by Hewlett Packard.

In 2019, eight years after the deal was sealed, the US requested the extradition of Autonomy's founder and CEO, Dr Michael Lynch, on charges of wire fraud, securities fraud and conspiracy. Dr Lynch is alleged to have been the architect of a corporate scam to inflate the reported revenue, earnings and value of Autonomy to make it more attractive to potential purchasers. He is also charged with having later conspired to conceal fraudulent accounting within the company's books and to obstruct the investigation by lying to investigators, destroying documents and paying hush money to former employees.

After the court sent the case to the Home Secretary for her to decide whether the extradition should go ahead, she twice obtained extensions of time from the court to consider representations from Dr Lynch's solicitors, Clifford Chance, and then to await the judgment in the related Chancery proceedings. But when she asked for another three months, Swift J in the Administrative Court agreed with the district judge that enough was enough and went out of his way to stress that the timetable is driven by the judges not the politicians.

This saga shows no sign of coming to an end just yet. The Home Secretary has since approved the extradition. But her decision is itself now subject to appeal.

NLJ

David Walbank QC is a member of Red Lion Chambers and the founder of the updating website www.crimecast.law on which he presents video case reviews of recent judgments. The site currently hosts more than 200 free-to-view videos.