RECENT DEVELOPMENTS

HUMAN RIGHTS

Balancing expectations of privacy in police investigations with press freedom: the Supreme Court's decision in *Bloomberg v ZXC*

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Introduction

The Supreme Court has recently confirmed that as a general rule a person under criminal investigation has, prior to being charged, a reasonable expectation of privacy in respect of information relating to that investigation.[1] Consequently, as a starting point at least, the revelation of those details will amount to a breach of an individual's expectation of privacy, unless justified by any public interest defence or other circumstances which refute or outweigh that expectation. The Supreme Court stressed that this was only a general rule, or legitimate starting point, rather than a legal presumption, the finding of expectation being fact dependent. However, many fear that it will have a chilling effect on press freedom, and that it will skew the balance between privacy and free speech in this area.[2] The decision comes at a time when there is much debate about the judicial development of the law of privacy at the expense of free speech,[3] but equally, post-Leveson, when there is still much distrust of the press with respect to its investigative and reporting tactics.[4] This note argues that the decision in *Bloomberg*, although perhaps unexceptional on its facts, sets a dangerous (and potentially Convention-incompatible) precedent that will have a chilling effect on free speech in general, and distorts the balance between free speech and privacy in misuse of private information cases.

The facts and decision of the Supreme Court

In 2013, the appellants, Bloomberg LP, an international news and media organisation, had reported that a UK law enforcement body (UKLEB) was investigating allegations of fraud, bribery and corruption in relation to a company. In 2016, the appellants published an article about ZXC, the chief executive of the company, in connection with that investigation, and

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[1] *Bloomberg LP v ZXC* [2022] UKSC 5.

[2] Jim Waterson, 'Bloomberg loses landmark UK supreme court case on privacy: Media will find it harder to publish information about people in criminal investigations' *The Guardian*, 16 February 2022. See also, Joshua Rozenberg, 'Suspects and the Right to Privacy' (2022) 119 (7) *Law Society Gazette* 11.

[3] See Jake Kanter 'Media Groups Raise Concerns in response to Human Rights Act Consultation', *The Times*, 22 March 2022. More specifically, the government has expressed concern over the use by wealthy business people of SLAPS (Strategic Lawsuits Against Public Participation): Ministry of Justice, Strategic Lawsuits Against Public Participation – a Call for Evidence, 17 March 2022, available at https://consult.justice.gov.uk/. See now the Strategic Litigation Against Public Participation (Freedom of Expression) Bill 2021-22 (HL Bill 134) received its first reading on 18 March 2022 (HL Vol 820 col 571.

[4] *Leveson Inquiry - Report into the culture, practices and ethics of the press*, 29 November 2012. Gemma Horton, 'Celebrity Privacy and Celebrity Journalism: has anything changed since the Leveson Inquiry?' (2020) 25(1) Communications Law 10.

in late 2016 published a second article in which it referred to a formal letter of request from UKLEB to a foreign government, seeking banking and business records in relation to the company and nine named executives, including ZXC. Pointing out that letters of request in general and this letter of request, are labelled confidential,[5] the Supreme Court noted that the judge had 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. The Court 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.[6] Despite UKLEB's investigation into the company being in the public domain, no charges were brought against ZXC.

ZXC claimed damages for misuse of private information by Bloomberg LP and applied for an interim injunction to remove an article about the investigations from its website. That application failed as in the court's view the Article 8 rights were likely to be outweighed by the defendant's Article 10 rights.[7] The High Court then found that ZXC's Article 8 rights outweighed the defendant organisation's Article 10 rights.[8] In the court's view, there was a clear public interest in maintaining the confidentiality of the investigations, and the justifications for the breach of ZXC's privacy did not outweigh his Article 8 rights.[9] The Court of Appeal upheld that decision,[10] finding that the judge had been right to conclude that those who simply came under suspicion by an organ of the state had, in general, a reasonable and objectively founded expectation of privacy in relation to that fact.[11] Further, the judge had not wrongly confused private information with confidential information when considering whether there was a reasonable expectation, and had rightly made clear that the letter's confidentiality was not determinative of whether ZXC had a reasonable expectation, while placing reliance on its highly confidential nature in determining that the information was private.[12] Further, the judge had rightly accepted that the investigation was a matter of public interest, and had brought that into the balance, but had noted the letter's confidential nature had been apparent from its terms.[13]

The appellants appealed to the Supreme Court on the issue of whether the fact that information published by them about a criminal investigation originated from a confidential law enforcement document rendered that information private and/or undermined Bloomberg's ability to rely on the public interest in its disclosure. The Supreme Court also considered whether the Court of Appeal was wrong to uphold the findings of Nicklin J in the High Court that the claimant had a reasonable expectation of privacy and that the balancing exercise came down in favour of the claimant.[14]

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[5] *Bloomberg LP v ZXC* [2022] UKSC 5, at [17]. In *National Crime Agency v Abacha* [2016] EWCA Civ 760, the Court of Appeal noted the confidential nature of such letters, accepting that it was right to start from the position that letters of request are confidential (Goss LJ, at [48].
[6] *Bloomberg LP v ZXC* [2022] UKSC 5, at [17], citing Nicklin J in *Bloomberg LP v ZXC* [2019] EWCH 970 (Ch), at [125].
[7] Decision of Garnham J, 2 February 2017. In the High Court, Nicklin J was very critical of the defendant's candour in those earlier proceedings: *Bloomberg LP v ZXC* [2019] EWCH 970 (Ch), at [73-75].
[8] *Bloomberg LP v ZXC* [2019] EWCH 970 (Ch).
[9] *Bloomberg LP v ZXC* [2019] EWCH 970 (Ch), at [125], at [126] and [132-133].
[10] *ZXC v Bloomberg LP* [2020] EWCA Civ 611. See Nicole Moreham 'Privacy and police investigations: ZXC v Bloomberg [2021] 80(1) CLJ 5.
[11] *ZXC v Bloomberg LP* [2020] EWCA Civ 611, at [81-88].
[12] *ZXC v Bloomberg LP* [2020] EWCA Civ 611, at [90-92].
[13] *ZXC v Bloomberg LP* [2020] EWCA Civ 611, at [115-116].
[14] *Bloomberg LP v ZXC* [2022] UKSC 5, at [63].

In dismissing the appeal, the Supreme Court found that the general rule or legitimate starting point described by the lower courts was not a legal presumption, and whether there was a reasonable expectation of privacy was a fact-specific enquiry.[15] The Court also pointed out that this will not invariably lead to a finding that there was a reasonable expectation of privacy in the information.[16] The Court then explained that the rationale for the starting point was that publication of such information ordinarily caused damage to the person's reputation and to multiple aspects of the person's physical and social identity protected by article 8.[17]

Despite its insistence that this did not obviate the need of the claimant to prove an expectation of privacy, the Court accepted that in applying the presumption in these cases, it was likely that the expectation of privacy would be proved. Thus, it recognised that it was being asked whether the general rule in relation to this category of information was similar to the general rule in relation to certain other categories of information, most strikingly information concerning the state of an individual's health, which was widely considered to give rise to a reasonable expectation of privacy.[18] It then conceded that a consideration of all the circumstances of the case, including, but not limited, to the so-called *Murray* factors,[19] will, in relation to certain categories of information, generally lead to the conclusion that the claimant objectively has a reasonable expectation of privacy in information within that category.[20]

In justifying the starting point, the Supreme Court noted that for some time, judges have voiced concerns as to the negative effect on an innocent person's reputation of the publication of the fact that they were being investigated by the police or an organ of the state.[21] It then referred to a number of cases that had, in its view, led to a general rule or legitimate starting point that such information is generally characterised as private at stage one.[22] These cases included judgments with respect to contempt of court,[23] but also a number

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[15] *Bloomberg LP v ZXC* [2022] UKSC 5, at [67]. It was accepted, at [77], that if someone is charged with a criminal offence there can be no reasonable expectation of privacy, that being the rational boundary, as the open justice principle in a free country is fundamental to securing public confidence in the administration of justice, citing *Scott v Scott* [1913] AC 417.

[16] *Bloomberg LP v ZXC* [2022] UKSC 5, at [68].

[17] *Bloomberg LP v ZXC* [2022] UKSC 5, at [71], citing *Niemietz v Germany* (1992) 16 EHRR 97, at [29]. Again, in the Court's view, the public's understanding of the effect on a person of publication of information that they were suspected of having committed a criminal offence was a question of fact rather than of law. The question was how others would react to the publication of information that the person was under investigation: *Bloomberg LP v ZXC* [2022] UKSC 5, at [107-108].

[18] *Bloomberg LP v ZXC* [2022] UKSC 5, at [72], referring to see Eady J in *McKennitt v Ash* [2005] EWHC 3003 (QB), at [142].

[19] *Murray v Express Newspapers Ltd* [2008] EWCA 446, where the following factors were regarded as relevant: the attributes of the claimant; the nature of the activity in which the claimant was engaged; the place at which it was happening; the nature and purpose of the intrusion; the absence of consent and whether it was known or could be inferred; the effect on the claimant; and the circumstances in which and the purposes for which the information came into the hands of the publisher.

[20] *Bloomberg LP v ZXC* [2022] UKSC 5, at [72], citing Buxton LJ in *McKennitt v Ash* [2007] EWCA Civ 1714, at [23]

[21] *Bloomberg LP v ZXC* [2022] UKSC 5, at [80].

[22] *Bloomberg LP v ZXC* [2022] UKSC 5, at [81].

[23] *Attorney General v MGN Ltd* [2011] EWHC 2074 (Admin), which led the Leveson Inquiry to recommend that save in exceptional and clearly identified circumstances, 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 (at Part G, Chapter 3, para 2.39). Recently, the Appeal Court of the High Court of Judiciary decided that a person had committed an offence under s.11 of the Contempt of Court Act 1981 by disclosing the identity of complainers in a

of cases where the courts had found an expectation of privacy with respect to police investigations and arrest.[24] In particular, the Supreme Court referred to the judgment of Mann J in *Richard v BBC*,[25] where the judge had stated that as a matter of general principle, a suspect has a reasonable expectation of privacy in relation to a police investigation. [26]

Moving to the issue of the presumption of innocence, the appellants submitted that the impact of the presumption eliminates, or significantly reduces, the negative effects of publication of such information, arguing that the lower courts had significantly overstated the likelihood of publication damaging the claimant's reputation, and underestimated the public's ability to observe the legal presumption of innocence. They relied in particular on the dicta of Lord Roger in *Re Guardian News and Media Ltd*,[27] where he noted that the law proceeds on the basis that most members of the public understand that, even when charged with an offence, one is innocent unless and until proved guilty in a court of law. Further, that understanding applied if you are someone whom the prosecuting authorities are not even in a position to charge with an offence and bring to court.[28]

However, the Supreme Court then referred to its later decision in *Khuja v Times Newspapers Ltd*,[29] where the majority of the Supreme Court held that whether the public would have equated suspicion with guilt was a question of fact. Thus, although, as a general rule, the public understand that there is a difference between allegation and proof, whether they did so would differ from case to case.[30] Thus, in the Supreme Court's view, it was apparent 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.[31] The Supreme Court in *Bloomberg* then justified the establishment of the starting point of privacy in misuse of information cases, by first stating that the presumption of innocence is a legal presumption applicable to criminal trials. It then stated that all the evidence from case law and practice in this area now admits to only one answer, namely that the person's reputation will ordinarily be adversely affected causing prejudice to personal enjoyment of the right to respect for private life.[32]

The Supreme Court then considered the interaction between the law and defamation and misuse of private information cases. First, it stated that it was inappropriate to read the defamation law concept of a hypothetical reader into the tort of misuse of private

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sexual offence case, despite that person claiming he had a good reason for doing so: *Murray v Lord Advocate* [2022] HCJAC 14.

[24] *Bloomberg LP v ZXC* [2022] UKSC 5, at [90-4]. The cases included *Hannon v News Group Newspapers Ltd* [2014] EWHC 1580 (Ch)*; Crook v Chief Constable of Essex Police* [2015] EWHC 988 (QB)*; ERY v Associated Newspapers Ltd* [2016] EWHC 2760 (QB); and *Mosley v Associated Newspapers Ltd* [2020] EWHC 3545 (QB).

[25] [2018] EWHC 1837 (Ch).

[26] *Richard v British Broadcasting Corporation* [2018] EWHC 1837 (Ch), at [248]. The judge held that if the 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 then the position might be different.

[27] [2010] UKSC 1.

[28] *Re Guardian News and Media Ltd* [2010] UKSC 1, Lord Rodger, at [66].

[29] [2017] UKSC 49, a case where the public's understanding of the presumption of innocence was considered in the context of press reporting and open justice. See Robert Craig, 'The end of innocence: open justice, free speech and privacy in the modern constitution – Khuja v Times Newspapers Ltd' (2019) 82(1) MLR 129

[30] *Khuja v Times Newspapers Ltd* [2017] UKSC 49, Lord Sumption at [9].

[31] *Bloomberg LP v ZXC* [2022] UKSC 5, at [107].

[32] *Bloomberg LP v ZXC* [2022] UKSC 5, at [108].

information, thus allowing a defendant to claim a less serious or harmful meaning to the publication.[33] This was because in misuse of private information cases, part of the factual enquiry was as to the effect on the claimant of publication, which did not require an objective assessment. Rather, 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.[34] Despite that distinction, with respect to reputational damage, the Supreme Court held a person's reputation clearly fell within the scope of private life within Article 8, if the attack on reputation attained a certain level of seriousness and caused prejudice to that right.[35]

The appellants were dealt a further blow when the Supreme Court stressed that this case turned not on identifying the nature of the activity (potential corruption), but on the private nature of the information about the investigation. Thus, the private nature of that investigation was not affected by the specifics of the activities being investigated.[36] Further, the courts below had not failed to consider the claimant's attributes. Accordingly, ZXC's status as a businessperson involved in a large public company meant that the limits of acceptable criticism of him were wider than in respect of a private individual, but that had to be balanced against the effect of publication on the claimant's reputation.[37]

Finally, the Supreme Court dismissed the defendant's argument that it had been wrong to hold that even where a claim for breach of confidence had not been pursued, the fact that the published information originated from a confidential law enforcement document rendered the information private and undermined its ability to rely on the public interest defence. The Supreme Court noted that the judge treated the confidentiality of the information as being a relevant and important factor at both stage one and stage two, but did not treat it as being determinative.[38] It had not been necessary to show that information was confidential in order to prove that it was private and those courts had been aware of that distinction and had not fallen into error on that point.[39] Nevertheless, the judge was right to place reliance on the public interest in the observance of duties of confidence when carrying out the balancing exercise,[40] and that 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.[41]

[33] *Bloomberg LP v ZXC* [2022] UKSC 5, at [110].
[34] *Bloomberg LP v ZXC* [2022] UKSC 5, at [112].
[35] *Bloomberg LP v ZXC* [2022] UKSC 5, at [121]. Relying on *Denisov v Ukraine* (Application No 76639/11), (unreported) 25 September 2018, *Pfeifer v Austria* (2007) 48 EHRR 8, and *Axel Springer AG v Germany* (2012) 55 EHRR 6 (Grand Chamber). As argued below, this allows the claimants a double benefit when bringing the action in misuse of private information, and deprives the defendant of some advantages inherent in defamation proceedings.
[36] *Bloomberg LP v ZXC* [2022] UKSC 5, at [129].
[37] *Bloomberg LP v ZXC* [2022] UKSC 5, at [140-141]. Therefore, the Supreme Court found that the balance had been applied correctly in ZXC's favour.
[38] *Bloomberg LP v ZXC* [2022] UKSC 5, at [148].
[39] *Bloomberg LP v ZXC* [2022] UKSC 5, at [150-151].
[40] *Bloomberg LP v ZXC* [2022] UKSC 5, at [152].
[41] *Bloomberg LP v ZXC* [2022] UKSC 5, at [153].

The impact of *Bloomberg* on investigative journalism, free speech and privacy protection

Following the public, and personal furore after the case of *Sir Cliff Richard v BBC*,[42] it was feared that non-disclosure of details with respect to early police investigations was to become the norm, the press having to wait at least until the individual is charged. This could have a chilling effect on press reporting where it raises matters of public debate, which are beyond question in this case, and were evident in *Richard*.[43] That such publication and debate is discouraged, even as a starting point could deter the media from investigating and reporting on such matters, and might well be in conflict with the European Court's jurisprudence on free speech and public debate. Although the decision might provide greater latitude to the press than before when reporting *after* charge, at present the decision has simply caused fear and distrust from the media. For example, Dawn Alford, Executive Director of the Society of Editors noted that the ruling that will have far-reaching implications for the British media and that legitimate public interest journalism will go unreported.[44] This observation is part of a wider concern that in the post-Human Rights Act era the courts have developed the law of privacy to such an extent that free speech and media freedom has been compromised a concern shared by the present government and one reason why it feels the Act is in need of reform.[45]

At present, the test of legitimacy is whether the courts are following the jurisprudence of the European Court of Human Rights, and thus maintaining the essential principles of privacy, press freedom and proportionality. In that regard, the decision gives rise to several areas of concern. First, it is established that when in conflict neither of these rights should be given a 'trump' status, the question of which right prevails being determined by proportionality.[46] Although the Supreme Court is clear that its ruling has not disturbed this, the starting point is bound to have an effect on the court's balancing exercise, added weight being given to the claimant's expectation of privacy because of its impact on the presumption of innocence and enhanced damage to the private life and reputation of the claimant. The Supreme Court has in effect created a presumption that the defendant has acted illegitimately in transgressing this rule, placing the defendant further on the back foot, and making it more difficult at the second stage to justify this interference via the defence of public interest.

Second, by the Supreme Court's rejection, then use, of the rules of defamation and free speech, the defendant in these cases suffers a double blow to press freedom and its opportunity to counter the claimant's *prima facie* expectation of privacy claim. The Supreme Court first rejects a comparison with defamation principles when considering the

[42] [2018] EWHC 1837 (Ch). For a critical commentary on the case, see Thomas DC Bennett and Paul Wragg 'Was Richard v BBC correctly decided?' [2018] 23(3) *Communications Law* 151

[43] See Steve Foster, 'Media responsibility, public interest broadcasting and the judgment in Richard v BBC' [2018] 5 EHRLR 490, at [501].

[44] Society of Editors, 'Far-reaching implications of Bloomberg privacy ruling, says SoE' 16 February 2022. See also, Jim Waterson, 'Privacy Laws could be rolled back following SC ruling', *The Guardian*, 19 February 2022 (online version).

[45] Daniel Martin, 'Vow to stop un-British 'drift' to privacy law as Dominic Raab eyes overhaul of Human Rights Act to 'correct' freedom of speech imbalance in wake of Duchess of Sussex court case'. *The Daily Mail*, 6 December 2021.

[46] *Re S (Publicity)* [2005] 1 AC 593, where Lord Steyn identified the following considerations as being of particular importance in carrying out the balancing exercise: an intense focus on the comparative importance of the specific rights being claimed in the individual case; the justifications for interfering with or restricting each right"; and the proportionality of the respective interference or restriction.

likely meaning that the article would have had on the readership.[47] The appellants are thus reminded that the claimants have not brought an action in defamation, but in misuse of private information, where different tests apply.[48] Yet the Court proceeds to employ defamation principles when considering the likely injury caused to the claimant by the revelation of the details of the investigation.[49] Thus, the Court rejects the appellant's claim that that the information was protected because it belonged to a part of the individual's life which was of no one else's concern. That, in the Court's view, was an unduly restrictive view of the ambit of Article 8, as a person's reputation clearly fell within the scope of private life within that Article, if the attack on reputation attained a certain level of seriousness and caused prejudice to the claimant's article 8 right.[50]

This leaves the defendant in an invidious situation. Because the claimant has chosen not to pursue a defamation claim, they benefit from the more liberal approach adopted in misuse of private information cases. Had the case been brought in defamation, the defendants would have been likely to successfully plead that the natural meaning of the revelation was that the claimant was being investigated, not that they were guilty, but as the case is for misuse of private information and dependent on an expectation of privacy, the claimant has been injured by the revelation.[51] This, of course, is a natural consequence of the claimant's choice, and no one doubts that the actions are indeed different. However, the inequity in this case has been created by the Supreme Court's over-zealousness in protecting the claimant from pre-charge revelations. Having found that this starting point is justified because of the potential damage to the claimant's reputation, the Court is then unable to back track and provide the appellant's with the defences and leeway they would have received had they been defending a defamation claim. If the claimant benefits when bringing what is essentially a privacy claim, then surely the defendants are entitled to rely on reciprocal principles of press freedom that would be available in defamation proceedings. To provide the claimant with both benefits skews the balancing act that the courts are bound in law to carry out in conformity with the jurisprudence of the European Court of Human Rights, considered below. Naturally, *any* defendant is on the back foot when the court finds an expectation of privacy, which the defendant then has to override in the second stage. However, if the court has classed that type of information as so important as to give rise to a starting point of expectation, then that is bound to affect the balancing exercise at the second stage.

Third, the Supreme Court insists that the nature of the claimant's activities should be restricted to the private nature of the commercial data, not including the possible criminal

[47] *Bloomberg LP v ZXC* [2022] UKSC 5, at [110-112].
[48] Note, in *Clarke v Rose* [2022] 3 WLUK 121, Judge Lewis refused to grant interim injunction against a campaigner under the 1997 Act to prevent her making allegations of abuse against them, where the focus of the complaint was defamation rather than harassment. The judge noted that a libel injunction was not normally granted where a defendant had stated their intention of defending any libel action at trial, and they had evidence to prove the allegations (*Bonnard v Perryman* [1891] 2 Ch. 269). See also *LNS v Persons Unknown* (the John Terry case) [2010] EWHC 119, where the interim and 'super' injunctions were refused because in essence the claimant was attempting to defend his reputation, and was thus bound by the rule in *Bonnard*.
[49] This may also impact on the assessment of damages. See Jeevan Hariharan, 'Damages for reputational harm: can privacy actions tread on defamation's turf?' (2021) 13(2) Journal of Media Law 186.
[50] *Bloomberg LP v ZXC* [2022] UKSC 5, at [121]. Under s.1 of the Defamation Act 2013, a statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant, and harm to the reputation of a body that trades for profit is not "serious harm" unless it has caused or is likely to cause the body serious financial loss.
[51] See Nicola Moreham 'Privacy and police investigations: ZXC v Bloomberg' (2021) 80(1) CLJ 5, at 7.

nature of those investigations. Again, this provides very generous protection to the Article 8 rights of the claimant, and insufficient recognition to the argument that any reasonable expectation of privacy in respect of police investigations needs to be reconciled with the principle that individuals should not be allowed to suppress evidence of their own wrongdoing.[52] The appellants argued that the High Court and Court of Appeal had failed to apply the multi-factorial analysis laid down in *Murray*,[53] in particular that they had incorrectly confined the factor of the nature of the activity in which the claimant was engaged to ZXC being the subject of the investigation, rather than it being identified as alleged corruption.[54] In response, the Supreme Court noted that the present case turned not on identifying the nature of the activity, but on the private nature of the information about the investigation; thus the private nature of that investigation was not affected by the specifics of the activities being investigated.[55] Accordingly, the public interest reason for the potential breach of the claimant's expectation of privacy is of no relevance; the fact that the information was being investigated was enough to found the expectation. Of course, the defendant will be allowed to raise this factor at the second stage, but as we shall see by that stage the legitimate expectation is already strongly established and weighted, and the public interest arguments may rarely win out, as they might in other cases not dealing with this type of information.[56] The approach may also be at odds with the European Court's decision in *Axel Springer v Germany*,[57] discussed later, unless we accept that the starting point is fully justified in cases of pre-arrest disclosures, and thus that different rules apply.

In any case, the Supreme Court found that the courts below *had* considered the claimant's attributes, and that ZXC's status as a businessperson involved in a large public company meant that the limits of acceptable criticism of him were wider than in respect of a private individual.[58] However, consideration of the claimant's attributes had to be balanced against the effect of publication on him, and the courts below had committed no error in that respect.[59] As argued above, once the starting point has been established, the status of the claimant, and the public interest element at the second stage, is in danger of being lost or forgotten.[60] Although this appeal primarily concerned the question of legitimate expectation of privacy rather than whether the revelation was justified in the public interest, the Supreme Court had several opportunities to temper the effect of its starting point by reiterating the importance of investigative journalism, and by reducing the privacy expectations of

[52] Nicola Moreham 'Privacy, reputation and alleged wrongdoing: why police investigations should not be regarded as private' (2019) 11(2) *Journal of Media Law* 142. Of course, in the present case, this refers to the investigation of *suspected* wrongdoing.
[53] *Murray v Express Newspapers Plc* [2008] EWCA Civ 446.
[54] *Bloomberg LP v ZXC* [2022] UKSC 5, at [128].
[55] *Bloomberg LP v ZXC* [2022] UKSC 5, at [129-131].
[56] Nonetheless, it is conceded that the decision reconcilable with its previous decision in *JR38's Application for Judicial Review, Re* [2015] UKSC 42. In that case, the publication by the police of images of a 14-year-old boy apparently committing public order offences did not violate his Article 8 rights, as the boy could not have had a reasonable expectation that photographs of him committing the offences, taken for the limited purpose of identifying him, would not be published. This decision relegates the other *Murray* factors, including the boy's age, because of the nature of the claimant's activities, yet in *Bloomberg*, the Supreme Court quite rightly contrast the claimant's wholly suspected activities with the events in JR38 in finding that there has been a breach of the Court's starting point with respect to pre-charge revelations.
[57] (2012) 55 EHRR 6 (Grand Chamber).
[58] *Bloomberg LP v ZXC* [2022] UKSC 5, at [140].
[59] *Bloomberg LP v ZXC* [2022] UKSC 5, at [140-141].
[60] Thus, once the Supreme Court had laid down the essential principles of its starting point, it dispensed with the question of whether the facts disclosed a breach in one sentence. – 'This case clearly falls into the category of information in which the legitimate starting point applies': *Bloomberg LP v ZXC* [2022] UKSC 5, at [145].

powerful claimants. This gives rise to real concerns over the weighting of the rights, and, more generally, the precarious position of press freedom and the public interest in these cases.

Fourth, the Court's approach to the presumption of innocence gives scant recognition to the claim that the public can recognise the clear distinction between a person's guilt on the one hand, and the suspicion of guilt on the other, the latter carrying with it a presumption of innocence. Instead, the Supreme Court was strongly influenced by the potential harm caused to the individual's reputation by the public being informed of the investigations. The Court's dismissal of Lord Rodger's dicta in *Re Guardian Newspapers*,[61] is, it is argued, overly dismissive of the public's ability to see the difference, and thus damaging to public debate on such issues; the courts' presumption of harm in these cases frustrating any public discussion and decision on the investigation and its inferences. Further, in the Supreme Court's view, publication of this information would assist the clarification of the public's perception and understanding of the issues, and failure to mention the suspects would lead to a disembodied story and the matter being given a lower priority in the media.[62] In the present case, the Supreme Court stressed that in *Re Guardian*, the Supreme Court had certainly not laid down a rule of presumption in favour of publication. True, there might be evidence that the public understanding of a particular publication is likely to be that the person was in fact guilty. Yet, to turn that possibility into a general starting point, so that we are assuming that disclosure before arrest will be damaging to the individual's reputation and expectation of privacy is, it is submitted, a considerable judicial leap, and one that could damage press freedom.

Fifth, it has been suggested that the action in this case should have been taken under the law of confidentiality rather than misuse of private information, thus providing a more targeted, and less potentially disruptive, basis for liability.[63] In this case, the defendants certainly acquired a duty of confidentiality, which made it easier to accept the right of confidentiality/legitimate expectation of privacy, and, potentially, reject any public interest defence.[64] To apply the rules of confidentiality to misuse of private information cases in general provides an unnecessary weighting to the Article 8 claim, with a potentially disadvantage to the defendants at both stages.

Finally, the decision of the Supreme Court follows a number of recent decisions that are unfavourable to press and media freedom, and which have thus tilted the balance in favour of individual privacy. In *PSJ v News Group Newspapers*,[65] the Supreme Court held that the press could be prohibited from disclosing private information despite that information reaching the public domain and being available on social media.[66] Whist it might be

[61] [2010] UKSC 1. See Michael Bohlander, 'Open Justice or Open Season?' [2010] *Journal of Criminal Law* 321.
[62] *Re Guardian Newspapers* [2010] UKSC 1, Lord Rodger at [60].
[63] See Nicola Moreham, 'Police investigations, privacy and the Marcel principle in breach of confidence' (2020) 12(1) Journal of Media Law 1, and Nicola Moreham 'Privacy and police investigations: ZXC v Bloomberg'(2021) 80(1) CLJ 5, at 8. Contrast Robert Craig and Gavin Phillipson 'Privacy, Reputation and anonymity: ZXC goes to the Supreme Court (2021) 13(2) *Journal of Media Law* 153, at 170-171.
[64] See, for example, *McKennit v Ash* [2007] 3 WLR 194 (breach of personal confidentiality), and *HRH Prince of Wales v Associated Newspapers* [2007] 2 All ER 139 (breach of confidentiality and copyright).
[65] [2016] UKSC 6.
[66] See Jacob Rowbotham 'Holding back the tide: privacy injunctions and the digital media' [2017] 133 LQR 177; Keina Yoshida 'Privacy injunctions in the internet age: PJS v News Group Newspapers Ltd' [2016] EHRLR 434.

legitimate to distinguish private information cases from traditional confidentiality claims in this respect,[67] maintaining injunctions in such cases can have an unnecessarily damaging effect on press freedom and free speech.[68] Second, decisions such as *Richard* have been instrumental in restricting the scope of the public interest defence where the courts find that the media have been guilty of irresponsible journalism or broadcasting, or of making a good story or good television at the expense of furthering the public interest.[69] Whilst this fact should be taken into consideration when conducting the balancing exercise, or, in *Bloomberg*, in assessing the level of the expectation of privacy, cases such as *Richard*, and now *Bloomberg,* have created presumptions that apply more generally in this area, and damage the public interest defence beyond those cases where irresponsible journalism is clearly present on the facts.[70]

The decision of the Supreme Court and ECHR jurisprudence

It will be interesting to see whether the appellants in *Bloomberg* choose to pursue a case before the European Court of Human Rights. On the one hand, the Strasbourg Court appears satisfied with the general balancing exercise carried out by the domestic courts in these cases. It may therefore show due respect to the Supreme Court's ruling, in its balancing of Article 8 and 10 rights, as it did in the *Campbell* case when it was referred to the Strasbourg Court.[71] On the other hand, the decision might be regarded as unduly restrictive of press freedom and investigative journalism, clashing with many of the principles that the Court has established in the area of public interest free speech.[72] Specifically, the Court might feel that the starting point could have a chilling effect on press freedom and the defendant's right to raise any public interest defence. In this respect, the European Court's rejection of Max Mosely's claim, that the press should have a legal duty to inform an individual that they intend to publish private information, is illustrative.[73] In that case, the European Court had regard, in particular, to its implications for freedom of expression, not limited to the sensationalist reporting at issue in this case, but to political reporting and serious investigative journalism, and that the introduction of restrictions on the latter type of journalism required careful scrutiny.[74] Specifically, the Court felt that that in order to prevent a serious chilling effect on freedom of expression, a reasonable belief that there was a public interest at stake would have to be sufficient to justify non-notification, that a narrowly defined public-interest exception would increase the chilling effect of any pre-

[67] *Attorney General v Guardian Newspapers* [1988] 1 AC 109.
[68] Ursula Smartt, 'Are privacy injunctions futile in the digital age? Why Scottish papers choose to name the super injunction A-listers - and why they cannot do so online' (2017) *European Intellectual Property Review* 413.
[69] See also the case of *Channel 5 v Ali* [2019] EWCA 677, noted by Steve Foster, 'Interfering with editorial judgment, making ''good television'' and the loss of the public interest defence' (2019) 24(3) *Communications Law* 102.
[70] Steve Foster, 'Media responsibility, public interest broadcasting and the judgment in Richard v BBC' [2018] 5 EHRLR 490, at 503.
[71] *Campbell v MGN Ltd* [2004] 2 AC 457. In *MGN Ltd v United Kingdom* (2011) 53 EHRR 5, the European Court found that the majority of the House of Lords recorded the core Convention principles and case law relevant to the case, and had underlined in some detail the particular role of the press in a democratic society and, more especially, the importance of publishing matters of public interest: *MGN Ltd v United Kingdom* (2011) 53 EHRR 5, at [145
[72] In particular, the principles laid down in *Sunday Times v United Kingdom* (1979) 2 EHRR 245*, Lingens v Austria* (1986) 8 EHRR 407, *Oberschlick v Austria* (1995) 19 EHRR 389, *Observer and Guardian v United Kingdom* (1991)14 EHRR 153, and *Axel Springer v Austria* (2012) 55 EHRR 6.
[73] *Mosley v United Kingdom* (2011) 53 EHRR 30.
[74] *Mosley v United Kingdom* (2011) 53 EHRR 30, at [121].

notification duty.[75] It is argued, therefore, that the inclusion of the starting point of privacy might have a similar chilling effect on press freedom and the availability of the public interest defence in misuse of private information cases.

The European Court's balancing exercise is similar to the one adopted by the domestic courts in *Murray*,[76] but as domestic law is informed by the case law of the Strasbourg Court, the traditional jurisprudence of the European Court in this area is a natural starting point. In that respect, the Supreme Court's ruling could be criticised at three levels.

First, it fails to take into account the fact that the claimant in this case was a large, public company, where different rules of investigation and privacy expectation apply, and that the lower courts failed to give due weight to the commercial attributes of the claimant, in accordance with the principle laid down in *Oberschlick v Austria (No 2*).[77] In that case, the Court stressed that the protection of reputation of politicians was less than would be accorded to a private individual, and that the limits of acceptable criticism, are wider with regard to a *politician* acting in his public capacity than in relation to a private individual.[78] Thus, the appellants argued that businesspersons 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 knowingly lay themselves open to close scrutiny of their acts by the media, and the courts below had failed to give adequate consideration to the attributes of the claimant.[79] The Supreme Court accepted that it was a relevant consideration at stage one in determining whether the information can be characterised as private. However, it stressed that it was only one factor, to be balanced against the effect of publication of the information on him.[80] The Supreme Court then re-enforced the importance of the starting point by stating that 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, the Court stated it might be that the damage to a businessperson actively involved in the affairs of a large public company would be *greater* than to a private individual.[81] In any case, the Court considered that the judge was entitled to identify the most significant *Murray* factor as being the 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.[82]

The Supreme Court's ruling on this point is, it is argued, a distortion of the European Court's case law. In *Steel and Morris v United Kingdom*,[83] the Court conceded that in principle Article 10 did not deprive multi-national and public companies of the right to bring

[75] *Mosley v United Kingdom* (2011) 53 EHRR 30, at [126].
[76] In *Axel Springer v Germany* (2012) 55 EHRR 6, the Grand Chamber established the relevant criteria as: whether the article contributed to a debate of general interest; the subject of the article and how well-known the relevant person was; the prior conduct of the person; the method of obtaining the information and its veracity; the content, form and consequences of the publication; and the severity of the sanction imposed, at [62].
[77] (1997) 25 EHRR 357
[78] *Oberschlick v Austria (No 2)* (1997) 25 EHRR 357, at [29].
[79] *Bloomberg LP v ZXC* [2022] UKSC 5, at [136]. The Court cited *Fayed v United Kingdom* (1994) 18 EHRR 393, that in respect of the 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, at [75].
[80] *Bloomberg LP v ZXC* [2022] UKSC 5, at [140].
[81] *Bloomberg LP v ZXC* [2022] UKSC 5, at [140].
[82] *Bloomberg LP v ZXC* [2022] UKSC 5, at [141].
[83] (2005) 41 EHRR 22.

proceedings in defamation, or to obviate the requirement for the defendants to prove the truth of any statement.[84] Nevertheless, the Court stressed that such companies inevitably laid themselves open to increased public scrutiny.[85] The question in our case, therefore, is whether it is sufficient for the courts simply to take the commercial attributes of the claimant into account as one, unexceptional factor, when they have already established reputational harm as, if not the leading factor, the starting point of the balance. In such cases, the European Court might feel that the balancing exercise is being skewed in favour of the claimant, and that its traditional jurisprudence on public interest speech is being undermined.

Secondly, The Court rejects the claim that Article 8 should not be relied on in order to complain of a loss of reputation that resulted from the claimant's actions. Having accepted that the notion of private life covered the right to reputation,[86] the Supreme Court cited the case law of the European Court that Article 8 cannot be relied on in order to complain of a loss of reputation that is the foreseeable consequence of one's own actions, such as, for example, the *commission* of a criminal offence.[87] It then noted that in *Denisov v Ukraine,*[88] the Grand Chamber had stated that any such suffering could not *in itself* amount to an interference with the right to respect for private life, extending that principle to cover not only criminal offences but also other misconduct entailing a measure of legal responsibility with foreseeable negative effects on private life.[89] The Supreme Court acknowledged that this factor could be taken into account at stage one in determining whether the claimant has established a reasonable expectation of privacy in the relevant information in a case, for instance, where a person is actually convicted of a criminal offence or investigated and found to have committed the alleged misconduct.[90] However, although conceding that the reference in *Denisov v Ukraine* to 'other misconduct entailing a measure of legal responsibility' was one that can be taken into account at stage one, it noted that the examples provided by the Court related to misconduct established after authoritative findings following an official investigation.[91] Of course, the jurisprudence should draw a distinction between proven conduct and investigations into suspected acts, but to classify the latter as prima facie private, almost irrespective of the public interest in such investigations is, it is argued overly protective of individual privacy.

Thirdly, and more generally, have domestic courts failed to give due weight to the role of the media in investigating matters of public interest, and is the starting point in conflict with that role? The Supreme Court accepted that in considering the public interest in publication, the contribution that publication will make to a debate of general interest is a factor of

[84] *Steel and Morris v United Kingdom* (2005) 41 EHRR 22, at [94].
[85] *Steel and Morris v United Kingdom* (2005) 41 EHRR 22, at [94].
[86] *Bloomberg LP v ZXC* [2022] UKSC 5, at [145], citing *Pfeifer v Austria* (2007) 48 EHRR 8, at [35].
[87] *Pfeifer v Austria* (2007) 48 EHRR 8, at [98], *Denisov v Ukraine* (Application No 76639/11) (unreported) 25 September 2018, and *Axel Springer v Germany* (2012) 55 EHRR 6.
[88] Application No 76639/11) (unreported) 25 September 2018.
[89] *Denisov v Ukraine*, Application No 76639/11) (unreported) 25 September 2018, at [95], citing *Gillberg v* Sweden (2012) 34 BHRC 247.
[90] *Bloomberg LP v ZXC* [2022] UKSC 5, at [123], citing *Sidabras and Džiautas v Lithuania* (2004) 42 EHRR 6, where a person was proved to be a former KGB officer, and thus lost his expectation of privacy and reputation under Article 8.
[91] *Bloomberg PL v ZXC* [2022] UKSC 5*,* at [123]. The Supreme Court did not consider that misconduct is confined to a finding at the end of a criminal or other authoritative process. For instance, an armed bank-robber who held hostage a number of customers and employees in a televised three-day siege could hardly claim a reasonable expectation of privacy when s/he surrendered and was arrested. This would appear to justify the Supreme Court's decision in *JR38's Application for Judicial Review, Re* [2015] UKSC 42.

particular importance.[92] Thus, in *Von Hannover v Germany,*[93] the Court stated that it should be the decisive factor in balancing the protection of private life against freedom of expression,[94] and in *Axel Springer* it was said to be an initial essential criterion.[95] Yet in this case, the Supreme Court are adamant that any public interest in publication was offset by the public interest in upholding the confidentiality of the letter of request, and the appellant's clear breach of such confidentiality. Thus, the Letter of Request clearly stated disclosure of its contents will pose a material risk of prejudice to a criminal investigation, and that the claimant had a particular interest in avoiding prejudice to, and maintaining the fairness and integrity of, that investigation.[96] It is argued that the Supreme Court has taken these factors, together with the predominant weight it attaches to the starting point, to exclude any meaningful consideration of the public interest in modifying the individual's expectation of privacy. Such confidentiality exists for very sound reasons, although primarily to safeguard the integrity and fairness of the investigation, rather than specifically to protect the individual's privacy interests. In any case, the factor of confidentiality should not dominate the court's inquiry at either stage, and may conflict with the European Court's jurisprudence. For example, in *Sunday Times v United Kingdom*,[97] the European Court found that the domestic courts' interpretation of contempt laws centred entirely on the need to secure the administration of justice, to the exclusion of the very great public interest in the matter to which the offending articles related to.[98] Similarly, the Supreme Court's judgment could be said to have the same effect on curtailing investigative journalism on matters of public debate, at least until the parameters of the starting point's exceptions are articulated.

The Court has certainly provided the domestic courts with a good deal of discretion in this area,[99] although Korpisaari notes that the Court is often prepared to adopt a *de novo* approach in assessing whether the domestic authorities achieved the appropriate balance.[100] However, one recent decision of the European Court suggests that it would favour the Supreme Court's (and the recent domestic courts') approach to defending privacy rights over free speech, particularly where the reporting is regarded as unnecessary or unprofessional. In *M.L. v Slovakia*,[101] the Court upheld a claim under Article 8 of the mother of a deceased priest where, after his death, the press had published stories of his previous convictions for sexual abuse and a possible link between it and his supposed suicide. In giving judgment in favour of the applicant, the Court accepted that, generally, Article 8 could not be relied on in order to complain of a loss of reputation that is the foreseeable consequence of, *inter alia*, the *commission* of a criminal offence.[102] However, it then stressed that a criminal conviction does not deprive the convicted person of his or her right to be forgotten; all the more so if that conviction has become spent, and that, after a certain period of time, persons who have been convicted have an interest in no longer being

[92] *Bloomberg PL v ZXC* [2022] UKSC, 5, at [62].
[93] *Von Hannover v Germany* (2005) 40 EHRR 1.
[94] *Von Hannover v Germany* [2005] 40 EHRR 1, at [109].
[95] *Axel Springer v Germany* [2005] 41 EHRR 22 at [90].
[96] *Bloomberg PL v ZXC* [2022] UKSC 5, at [152].
[97] (1979) 2 EHRR 245.
[98] *Sunday Times v United Kingdom* (1979) 2 EHRR 245, at [65].
[99] *MGN Ltd v United Kingdom* (2011) 53 EHRR 5, and *Mosley v United Kingdom* (2013) 53 EHRR 30 on the balancing exercise carried out by the UK domestic courts.
[100] Päivi Korpisaari, 'Balancing freedom of expression and the right to private life in the European Court of Human Rights - application and interpretation of the key criteria' (2017) 22(2) *Communications Law* 39.
[101] Application No 34159/17, decision of the European Court of Human Rights 2021.
[102] *M.L. v Slovakia*, Application No 34159/17, decision of the European Court of Human Rights 2021, at [38].

confronted with their acts.[103] Again, it is noted that this dicta was concerned with the commission of criminal offences, but if the rule were not to preclude investigations of criminal conduct before charge, could, in spirit apply to such investigations, albeit in a naturally more circumscribed way.

The Court noted that the material was presented in a sensational and gossip-like manner, with flashy headlines placed on the front pages, along with photographs of the applicant's late son, and were presented as statements of fact rather than value judgments.[104] Although accepting that the articles raised matters of public interest and debate,[105] it was convinced that it was possible to inform the public adequately about the matter by simply reporting only the facts accessible from the publicly available criminal files. Further, although the pre-eminent role of the press in a democracy and its duty to act as a "public watchdog", different considerations apply to press reports concentrating on sensational and, at times, lurid news, intended to titillate and entertain, aimed at satisfying the curiosity of a particular readership regarding aspects of a person's strictly private life.[106]

The government has highlighted this case in its recent plans to reform the Human Rights Act,[107] pointing to a growing trend for the European and domestic judges to protect privacy above press freedom, particularly after the *Von Hannover* ruling.[108] Nevertheless, there are several aspects of the Supreme Court's ruling that might attract the European Court's interest. First, there is little doubt that the rule, or starting point, has a disadvantageous effect on the balancing exercise in general and the availability of any public interest defence, both generally and in *Bloomberg*. The starting point does, in reality create a presumption in favour of the claimant's privacy and a presumption of non-publication, which can only be *especially* damaging to any subsequent inquiry into any public interest publication. Equally, although the Supreme Court stresses that the starting point admits of exceptions, in practice it bears some of the characteristic of a blanket rule, irrespective of other factors that would normally be taken into consideration. Consequently, there will be insufficient opportunity for the presumption to be reversed in cases of a strong public interest.

Conclusions

The starting point is clearly favoured and adopted by all relevant state agencies, who regard it as an unbreakable rule. However for the courts to adopt this as the starting point in their judicial balancing act, risks them attaching undue weight to the fact that the defendants had broken the law, or practice, of confidentiality, and to them applying that rule disproportionately in the law of misuse of private information. Whilst that starting point

[103] *M.L. v Slovakia*, Application No 34159/17, decision of the European Court of Human Rights 2021, at [38]. The Court thus took into account that not only were the articles in question published several years after the applicant's son's criminal convictions, but also after those convictions had become spent (at [39])
[104] *M.L. v Slovakia*, Application No 34159/17, decision of the European Court of Human Rights 2021, at [42-43].
[105] *M.L. v Slovakia*, Application No 34159/17, decision of the European Court of Human Rights 2021, at [50].
[106] *M.L. v Slovakia*, Application No 34159/17, decision of the European Court of Human Rights 2021, at [53], citing *Mosley v United Kingdom*, Application No. 48009/08, decision of the European Court 10 May 2011
[107] Ministry of Justice, Human Rights Act Reform: a Modern Bill of Rights, A consultation to reform the Human Rights Act 1998, December 2021, at para 9 and 204-217.
[108] *See M.A. Sanderson 'Is Von Hannover v Germany a step backward for the substantive analysis of speech and privacy interests? (2004) EHRLR 631.*

might be acceptable in the statutory law of contempt,[109] in cases where the courts' essential role is to balance the respective Convention rights, it is both unnecessary and unjust to apply it as rigorously in cases involving the privacy, or reputation of the claimant.

As with the decision of the High Court in *Richard,* the decision of the Supreme Court in *Bloomberg* was made in the context of very loose and perhaps negligent journalistic practice. In *Richard*, that led to the High Court - perhaps inadvertently - restricting the availability of the public interest defence when the media indulge in what is perceived as unprofessional journalism, and seeking to make 'good' television.[110] This can create a chilling effect on future investigations, and promote further judicial distrust of the media, which can, perhaps inadvertently, be reflected in the court's balancing exercise. Similarly, in *Bloomberg*, the Supreme Court was clearly unimpressed by the tactics employed by the defendants, including their blatant disregard of the confidentiality of the letter and the need to preserve the integrity in those proceedings. Such confidentiality exists to maintain the continuation of those investigations, rather than the privacy of those under investigation. It should not justify a starting point in establishing an expectation of privacy in all cases, albeit with exceptions. It is argued that the creation of this starting point risks distorting the courts' subsequent enquiries at both stages, exacerbated by the Court's refusal to consider the public interest reason for the appellant's investigation and subsequent publication. Consequently, at the second stage, the public interest defence is given little if no weight. Thus, in subsequent cases, defendants might find that they have damned themselves by their breach of confidentiality and of this newfound presumption, or starting point, of privacy. Further, the claimant's expectation of privacy in this case has survived despite being an officer a large corporation who are being investigated for fraud and corruption; these factors being considered as single factors and now outweighed by the dominant element of harm to reputation and the presumption against pre-charge disclosure.

An application to the European Court of Human Rights cannot fully remedy the potential inequalities created by this decision: the European Court is not a court of appeal on domestic law, and must decide the case based on the facts presented to it by the applicant. Only if it feels that the Supreme Court's application of the starting point test disadvantaged Bloomberg could if find a violation; otherwise, we would have to wait for a further application to the Court, on more promising and worthy facts.

This of course presumes that the European Court would regard the starting point, or presumption, as an unnecessary or disproportionate impediment to free speech and the media's opportunity to defend itself from actions in misuse of private information. In *MGN* v *United Kingdom*, the Court provided the national courts with a good deal of discretion in balancing the two conflicting rights and upheld the House of Lord's decision despite pleas that it had failed to adequately uphold principles of free speech and public debate. Yet in other cases, the Court has been more sympathetic to the media, and in *Mosely,* it defended the press from a pre-disclosure rule that would have struck at the heart of press freedom. The European Court's traditional jurisprudence on press freedom has certainly been modified post- *Von Hannover*,[111] and there is evidence of a greater pro-privacy approach in

[109] For example, under s.11 of the Contempt of Court Act, creating an offence of disclosing individual identity against a judge's order.
[110] Steve Foster, 'Media responsibility, public interest broadcasting and the judgment in Richard v BBC' [2018] 5 EHRLR 490, at 503.
[111] *M.A. Sanderson 'Is Von Hannover v Germany a step backward for the substantive analysis of speech and privacy interests?* (2004) EHRLR 631.

the last two decades,[112] illustrated most starkly by the recent decision in *ML v Slovenia*. Despite that, it is argued that the Supreme Court's ruling constitutes an unnecessary and insufficiently inflexible extension of Article 8, disturbing the delicate balance between privacy and free speech rights.

[112] See Michael Tugendhat, 'Privacy, Judicial Activism and Free Speech (2018) 28(2) *Communications Law* 63.