Neutral Citation Number: [2019] EWHC 970 (QB)

Case No: HQ17M00166

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MEDIA AND COMMUNICATIONS LIST

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17 April 2019

Before :

THE HONOURABLE MR JUSTICE NICKLIN

- -

Between :

ZXC **Claimant**

- and -

Bloomberg L.P. **Defendant**

- -
- -

Tim Owen QC and Sara Mansoori (instructed by **Byrne and Partners LLP**) for the **Claimant**
Gavin Millar QC and Clara Hamer (instructed by **CMS Cameron McKenna Nabarro Olswang LLP**) for the **Defendant**

Hearing dates: 27-30 November 2018

- -

Approved Public Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HONOURABLE MR JUSTICE NICKLIN

The Honourable Mr Justice Nicklin :

1. This is a claim for misuse of private information. The central issue is whether the Claimant can have a reasonable expectation of privacy in information that relates to a criminal investigation into his activities. No charges have been brought against the Claimant.

2. The Claimant originally included also claims for breach of confidence and breaches of the Data Protection Act 1998, but these claims have fallen away. Mr Owen QC, for the Claimant, accepts that, on the facts of this case, (1) if the Claimant does not succeed with his misuse of private information claim, then he will not succeed with a breach of confidence claim; and (2) similar consideration means that the Claimant need not pursue his claim under the Data Protection Act. Those concessions have helpfully narrowed the issues that I have to decide.

3. This judgment is a version of a private judgment that I have handed down today. Parts of the private judgment have been removed or altered in order to produce this public judgment. The purpose of doing so is to avoid identifying the Claimant who has been anonymised by the Court due to the nature of the claim. The Court has made a reporting restriction order prohibiting the reporting in connection with these proceedings of the name of the Claimant or any particulars or details likely to lead to the identification of the Claimant as the Claimant in these proceedings. The contents of this public judgment can be reported freely.

The Parties

4. The Claimant is a citizen of the United States, but he has had indefinite leave to remain in the UK since 2014. He worked for a company, X Ltd, and became the Chief Executive of one of its divisions. He was not a director of the company.

5. The Defendant is an international financial software, data and media organisation which has its headquarters in New York. The Defendant publishes content on several platforms, including on Bloomberg.com. Bloomberg News is well-known, and recognised, particularly for financial journalism and reporting.

X Ltd's Operations

6. X Ltd carried on business in several foreign countries.

Public concerns about possible corruption

7. The integrity of some transactions involving X Ltd had been publicly questioned for a number of years.

The law-enforcement investigation

8. A UK law-enforcement body, "UKLEB", began an investigation into X Ltd. The position, today, is that no-one has been charged as a result of the UKLEB investigation. Media reports as to the progress of the UKLEB investigation have appeared, from time to time, and there has been speculation as to the status of the investigation and the focus of UKLEB's inquiry. UKLEB's policy is not to make any public comment upon ongoing investigations and details in those reports would

therefore appear to be either conjecture or to be based upon unauthorised – and therefore unconfirmed – disclosures.

The Article

9. In the Autumn of 2016, Bloomberg published an article on its website concerning the Claimant and the UKLEB investigation written by HYX ("the Autumn Article").

10. Although the Autumn 2016 Article is not sued upon by the Claimant, the circumstances in which it came to be published have been the subject of evidence during the trial.

11. David Byrne is an experienced criminal solicitor. He was representing the Claimant in relation to the UKLEB investigation. In 2016, UKLEB had informed the Claimant that he would be required to attend for an interview under caution. Arrangements were made, and the Claimant (accompanied by Mr Byrne) duly attended for interview in the Autumn of 2016.

12. HYX emailed Mr Byrne. She told Mr Byrne that she had been trying to contact him, but his mobile phone had been switched off. In fact, at that moment, Mr Byrne had been sitting with the Claimant during his UKLEB interview. HYX stated that she wished to speak to Mr Byrne about the Claimant and asked him to telephone her as soon as he got the email. In gaps in the interview, Mr Byrne was able to send short emails to HYX asking her what she wanted. HYX replied by email:

> "I understand [ZXC] has been called in by the [UKLEB] for an interview under caution as part of the [X Ltd] investigation and I'm writing a story noting this.
>
> On background (i.e. not for attribution) I wondered if there was anything you wanted to say that I may not be aware of to put this into context/ and or anything that may be important for me to include to fully reflect your client's position?
>
> And, of course, I also wanted to check if there was any comment you wanted me to include on-the-record.
>
> Let me know if you would prefer to respond by phone. I can make myself available this evening."

13. Mr Byrne was shocked that HYX had obtained this information. He considered that it could only have come from an unauthorised disclosure from UKLEB; no-one else knew the arrangements for the interview. The Claimant made the point in his evidence that he had been told by UKLEB that he had to keep the fact that he was being interviewed confidential. On the evidence, it would appear likely the information received by HYX had come from someone at UKLEB. This has not been confirmed by the Defendant on the grounds that this would disclose a confidential journalistic source.

14. Mr Byrne considered that, as the information that the Claimant had been interviewed by UKLEB was going to be published, the Claimant had little choice but to offer some comment for publication. That was an understandable media strategy. So, the

following morning, again finding time between the Claimant's interviews with UKLEB, Mr Byrne spoke to HYX on the telephone and gave her a comment for publication.

15. HYX confirmed the terms of the statement with Mr Byrne by email and shortly thereafter the Autumn Article was published online. Comments from him appeared in paragraphs 2, 4 and 6. A spokeswoman at UKLEB was quoted as declining to comment, no doubt acting in accordance with UKLEB's policy not to comment on ongoing investigations.

16. Although not pleased about the leak of information that led to it, the Claimant did not take any action over the Autumn Article.

The Main Article

17. The claim in this action arises from the publication of a further article by the Defendant. The article, in the following terms, was written by [the Journalist] ("the Article").

18. The information in the Article was almost exclusively drawn from a letter sent by UKLEB to a foreign government. The Article stated that this letter had been "*shown*" to the Defendant. There is no dispute that this was a formal Letter of Request from UKLEB to the foreign government ("the LoR"). It is also common ground – now – that the Journalist, had not only been "*shown*" the LoR, he had been provided with a copy of it prior to publication of the Article and which he had retained.

Mutual Legal Assistance and the Letter of Request

19. The United Nations Convention against Corruption was adopted on 31 October 2003 ("the Convention"). It included provisions for mutual legal assistance ("MLA"): a method of cooperation between States for obtaining assistance in the investigation or prosecution of criminal offences.

20. Under paragraph 15 of Article 46 of the Convention, a request for MLA 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.

21. MLA is usually sought by way of Letter of Request. Letters of Request are formal, and highly confidential, documents. This is recognised, and explained, in the 2015 Home Office guidance *Requests for Mutual Legal Assistance in Criminal Matters:*

Guidelines for Authorities Outside of the United Kingdom ("the MLA Guidelines") and in decisions of the Courts in this jurisdiction. The introduction to the MLA Guidelines states that the procedure is used for obtaining material that cannot be obtained on a law enforcement (police to police) basis, particularly enquiries that require coercive means (e.g. court orders to obtain material).

> "Requests are made by a formal international Letter of Request… In civil law jurisdictions these are also referred to as *Commissions Rogatoires*. The assistance is usually requested by courts or prosecutors and is therefore referred to as 'judicial cooperation'."

22. In ***National Crime Agency -v- Abacha*** **[2016] 1 WLR 4375**, the Court of Appeal reviewed the status of requests for MLA in an appeal against a refusal to order inspection of a particular MLA request under CPR Part 31.14. Gross LJ (with whom Hamblen LJ and Sir Colin Rimer agreed) explained the special status of Letters of Request and other requests for MLA:

> [36] The importance of MLA is well explained in the introduction to the [MLA Guidelines]:
>
> > "MLA … is the formal way in which countries request and provide assistance in obtaining evidence located in one country to assist in criminal investigations or proceedings in another country. Due to the increasingly global nature of crime MLA is critical to criminal proceedings and ensuring justice for victims of crime. The UK is committed to assisting investigative, prosecuting and judicial authorities in combating international crime and is able to provide a wide range of MLA."
>
> [37] The Guidelines treat confidentiality as forming part of MLA:
>
> > "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. Requests are not disclosed further than is necessary to obtain the co-operation of the witness or other person involved."
> >
> > "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."…
>
> [39] The courts have upheld claims to confidentiality in this area…
>
> [40] In ***R (Evans) -v- Director of the Serious Fraud Office*** **[2003] 1 WLR 299**, the US authorities sent a letter of request to the Secretary of State for

> mutual assistance in the investigation of a serious fraud. That assistance involved obtaining evidence and information from members of an English firm of accountants, who were not themselves under suspicion. The matter was referred to the Director of the Serious Fraud Office and the solicitors for the accountants sought access to the letter of request. Access was refused, on the basis that it was by Treaty a confidential document but the Director provided detailed information as to the US investigation, based on the letter of request…

After reviewing a number of the other authorities in which the status and confidential nature of Letters of Request (usually in the context of an application for disclosure of the relevant request and requiring the Court to balance the interests of justice in the particular case with the confidentiality that attached to Letters of Request), Gross LJ summarised the confidentiality interests:

> [48] 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 MLA, 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.

23. In each of the cases where the confidentiality of Letters of Request or other requests for MLA was considered, the issue was approached from the standpoint of the requesting State and the identified confidentiality interests were those of the requesting State. The potential harm from disclosure of the request for MLA was to the relevant criminal investigation and to the wider public interest in supporting and maintaining effective investigations into international crime. The cases do not consider whether disclosure of the request for MLA engages and potentially harms the separate privacy interests of the identified subject(s) of the criminal investigation.

The Letter of Request

24. The LoR was a 15-page letter with several enclosures. It was addressed to the Competent Authority of the foreign state ("CA"). I do not need to set out the whole letter, but I note the following:

    i) The letter was headed: "**CONFIDENTIAL LETTER OF REQUEST**" and the request for assistance was expressed to be made pursuant to the Convention and the UN Convention against Transnational Organized Crime (Palermo, 2000).

    ii) It gave a general description of the nature of 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.*"

iii) The LoR sought banking and business records in relation to X Ltd and a number of named individuals, one of whom was the Claimant.

iv) The LoR stated that 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. Full details were given of the various possible offences the subject of the investigation together with the maximum penalties upon conviction.

v) Over four pages, UKLEB gave a summary of its investigations up to that point, and identified the three transactions that were the specific targets of the request for assistance from CA. Two further pages of detail explained why the assistance was required. The fact that the investigation was at any early stage was apparent from UKLEB's description of its investigation and the areas in respect of which it sought assistance. One example will suffice:

> "We have requested documentation relating to [a transaction]. This is because [X Ltd] purchased [the asset] in a deal which [UKLEB] knows involved the use of false documents. The material requested is important as [UKLEB] wish to confirm who sold the permit to [a company] and understand the history of this [transaction]. Regarding the identity of the seller, we believe this might be revealed from the details of previous [owners], and from identifying those previously involved in transactions. This information is important as it is suspected that the identities of the real beneficiaries have been disguised. It is suspected that this was in order to facilitate corrupt payments."

vi) The LoR contained a detailed assessment of the evidence UKLEB had so far obtained in relation to various transactions, together with initial conclusions UKLEB had reached on what it believed was demonstrated by the evidence it had obtained. In relation to the Claimant, the LoR contained the following assessment by UKLEB:

> "… We have obtained a number of documents from [X Ltd] which state [redacted]. However, the documents have used [incorrect information] and are thus false. [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]."

vii) The LoR then identified six entities that UKLEB believed would have documents that would be of assistance in its investigation, and identified the documents it sought.

viii) The LoR concluded with details of how the evidence could be transmitted to the UK Central Authority and contained the following express 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 in the above matter, please notify me prior to executing this Letter of Request."

ix) UKLEB asked the CA to execute the LoR by a particular date.

Events leading to the publication of the Article

25. The Journalist's evidence at trial was that he had been given a copy of the LoR. The delay between when he first received it and the publication of the Article appears to be a result of a request from his source not to publish the information from the LoR immediately. In [Month] 2016, the Journalist emailed a draft of the Article to his immediate superior, [the Editor]. The actual text of the draft article has been redacted by the Defendant (on the asserted grounds of relevance), but by way of background, the Journalist told the Editor:

> "Reading the [LoR] again I realized that it actually states explicitly that the nine individuals are under investigation. While the investigation has been reported before, I don't think anyone has been able to report the names of specific [X Ltd] execs under investigation or that [name] is being investigated..."

26. On Wednesday [Month] 2016, the Journalist emailed the Editor to advise him that he had not "*started right of reply yet*" as he was waiting to see which individuals in his draft of the Article it was ultimately decided should be included. The "*right of reply*" was a reference to the journalistic practice of contacting the subject of an article for a comment or reaction before publication.

27. On Thursday [Month] 2016, the Editor emailed a draft of the Article up the editorial chain of the Defendant to Antony Sguazzin, Managing Editor. The Editor was concerned that, at 1,000 words, the draft was "*trying to cram in lots because all of the info in the [LoR] is new*". He advised Mr Sguazzin that he had not yet shown the article to the Defendant's Standards and Legal department.

28. The same day, at 11.54, the Journalist emailed HYX for assistance with the article. He was aware that HYX had sought comment from the Claimant in relation to the Autumn Article. The Journalist told HYX that he had "*a leaked letter from [UKLEB] to the [foreign] government, requesting bank and corporate records to assist the investigation*". He asked her whether she could approach him again for a response to the proposed article. The Journalist also asked HYX to contact UKLEB. HYX was the reporter at the Defendant who was responsible for covering matters relating to UKLEB. She was therefore used to being regularly in contact with UKLEB, and had

established a good working relationship with the Senior Communications Officer of UKLEB ("the Press Officer").

29. HYX duly emailed the Press Officer at 14.07 on that Thursday:

> "A colleague of mine is writing a story about [X Ltd] focused on a letter of request you made to the [foreign state's] authorities. It notes that you are investigating [name] as well as a list of [X Ltd] execs… and what you are looking at in the probe – including [various transactions] between [date] and [date]. If you can let me know if you have any comment asap that would be great."

30. In her evidence, HYX said that it was her experience that UKLEB would not comment on ongoing investigations. She was not surprised, therefore, when the Press Officer responded, at 15.59 that afternoon, confirming that UKLEB declined to comment on the story. HYX emailed the Journalist to confirm that this was UKLEB's position.

31. However, it appears that, very quickly thereafter, the Press Officer had reappraised the situation and had a change of heart. At 16.14, the Press Officer emailed HYX:

> "Coming back to you again on this – if your colleague has a letter of request (that would be confidential) and the printing of such could prejudice an ongoing criminal investigation. Can your colleague please let me know urgently what is intended to go out in this article please and when?"

32. The Press Officer has not given evidence, but it appears likely that she had not initially focused on the nature of the document upon which the Defendant was proposing to base its article. It is clear, however, that as soon as the Press Officer realised that the Defendant was proposing to publish material from a letter of request, UKLEB became immediately very concerned about the publication of information from the LoR.

33. HYX forwarded the Press Officer's email to the Journalist at 16.42, confirmed to the Press Officer that she had done so, and said that the Journalist would contact her directly. At 16.46, the Journalist forwarded the email from the Press Officer to the Editor and alerted him to UKLEB's change of stance towards the threatened publication of the article.

34. Consistent with UKLEB's concern over the threatened publication, having not heard from the Journalist, the Press Officer emailed HYX again at 17.29:

> "Unfortunately, no one came back to me. Who is your colleague writing this and when can he/she come back to me?
>
> As said earlier we believe the publication of material pertaining to an LoR will pose a material risk of prejudice to a criminal investigation…"

35. HYX replied at 17.48, advising the Press Officer that the journalist who was writing the Article was the Journalist, reassuring her that nothing would be published that evening and stating that the Journalist would telephone her in the morning. the Press Officer responded at 17.51, thanking HYX for the information and advising that, if

the Journalist called the following day, Friday [Month] 2016 he would have to speak to one of her colleagues (whose telephone number was provided) as the Press Officer would be on leave.

36. Separately, and following the Journalist's request to contact the Claimant, HYX emailed Mr Byrne at 14.18 on the same Thursday [Month] 2016:

> "A colleague of mine is writing a story re the [X Ltd] investigation based on a request for assistance sought by [UKLEB] from the [authorities of the foreign state].
>
> The letter alleges that [ZXC] gave the X Ltd board false information to get them to sign off on a purchase of [an asset for a substantial sum]. The allegation is that [X Ltd] paid [the money] for a [potentially worthless asset] and that this money – which was transferred to a whole series of shell companies – was a bribe.
>
> Please let me know asap if you'd like me to include any comment on behalf of [ZXC] in the story…"

37. Mr Byrne, who as I have already noted was an experienced criminal lawyer, said in his evidence that he was very surprised to learn that the Defendant had seen the LoR because it was a highly confidential State-to-State law enforcement document. He considered that it could only have been obtained by the Defendant as a result of someone committing a serious breach of confidence.

38. As HYX had not heard back from Mr Byrne, she sent him a further email at 10.09 saying that if she did not hear back from him, the Defendant would assume that he did not want to comment. The two eventually spoke on the telephone late in the afternoon on Friday [Month] 2016. HYX told Mr Byrne that the draft Article was with the Defendant's lawyers and that it might well be published that evening. Mr Byrne said that he expressed his surprise that the Defendant was contemplating publishing information "*from such a confidential document*". HYX, in her evidence, said that she did not recall Mr Byrne expressing this view. When cross-examined she said she did not think that Mr Byrne was particular about the LoR and she did not recall him expressing his feelings in the forceful way he had done before the Autumn Article. On this point, I accept the evidence of Mr Byrne. I consider that, as an experienced criminal solicitor, he was genuinely shocked that the Defendant was considering publishing material from an LoR. He may not have expressed himself as forcefully as in the Autumn call, but I am satisfied that he conveyed his surprise that the contents of an LoR might be published.

39. HYX and Mr Byrne did not communicate again before publication of the Article. No one at the Defendant contacted UKLEB on that same Friday [Month] 2016 to follow up on the concern expressed by the Press Officer.

40. It appears that during Friday [Month] 2016, the Article was sent for review by the Defendant's in-house lawyers. The advice has not been disclosed. At 16.39, the Journalist emailed a copy of the LoR to Katherine Graham, an in-house lawyer of the Defendant based in the US. The Journalist said that Ms Graham had specifically asked to see the LoR. There is no subsequent reference to what was Ms Graham's view regarding the status of the LoR and whether it could be published.

41. When the Article did not appear over the weekend, Mr Byrne concluded that the Defendant was likely to have received advice and concluded that the LoR was a leaked law enforcement document relating to an ongoing investigation that was highly private and confidential and that information from it could not be published. Mr Byrne was wrong.

42. On the following Monday [Month] 2016, at 09.43, the Editor emailed Mr Sguazzin the current draft of the Article and advised him:

> "…this needs a final backread for grammar etc. just spoke to [the Journalist] and he says UKLEB's only comment was: 'I look forward to reading your story.' so we're good to go"

The Journalist said that he had telephoned UKLEB before this email was sent. He was unable to speak to the Press Officer (or her superior) but did speak to someone called "P" (he did not know his surname). P repeated UKLEB's 'on-the-record' position – that it did not comment on ongoing investigation – but expressed a personal view that he looked forward to reading the story. Shortly after that, however, a little before 10.00, the Press Officer telephoned the Journalist. In his evidence, the Journalist said that the Press Officer had asked for an outline of what information from the LoR the Defendant intended to include in the Article. He told her that he had discussed this request with his senior editors but that the decision had been taken to refuse the request on the basis that it was the Defendant's standard practice not to share a draft of an article.

43. The journalistic resistance to providing a draft of an article to someone prior to publication is not uncommon (and may well be justifiable), but this was not what the Press Officer was asking for. She was trying to establish whether what the Defendant was intending to publish would potentially harm the investigation. That was not an unreasonable request. It did not require provision of the whole Article, just a summary of the key points from the LoR that the Defendant intended to include. When cross-examined, the Journalist suggested that the Defendant would have considered any points UKLEB wanted to raise about possible prejudice to the investigation. However, without knowing what from the LoR the Defendant intended to publish, the Press Officer could not begin to engage in that dialogue. The Press Officer would also have been justifiably concerned that nothing she said should be seen as confirming details from the LoR.

44. Nevertheless, during her call, the Press Officer had clearly repeated to the Journalist UKLEB's concerns regarding publication. The Editor emailed Mr Sguazzin again at 10.07:

> "hi – need to consult when you've got a minute. [The Journalist] spoke to [UKLEB] and they've said they have concerns. asked for outline of story, but I've said we can't do that. they now saying their case team will come back to us in next coupla hours outlining their concerns about us publishing…"

45. At 10.36, Mr Sguazzin emailed a copy of the article to Heather Harris, an executive editor:

> "… We called [UKLEB] today to give them final chance – they said they would go back to their case team and get back to us in a few hours – they've had [time period] already to comment..."

46. Ms Harris responded at 10.51 that she thought the article "*seems fine… unless they're in any way questioning the veracity of this letter*". That response tends to show that Ms Harris either had not focused upon the nature of UKLEB's objections to publication (if they were communicated to her) or she had misunderstood them. The issue was not the authenticity of the LoR; it was UKLEB's concerns about publishing the confidential information contained in it and the harm that might be caused to the ongoing investigation.

47. Mr Sguazzin responded immediately: "*No they just don't like the fact we have it…*" Mr Sguazzin was not called to give evidence, but this remark shows that he also had not understood the nature of UKLEB's objections. UKLEB's complaints were not simply the understandable irritation and concern of a body that had discovered that a highly confidential document had been leaked to a media organisation. The Press Officer had specifically articulated (at least twice) the risk to the ongoing investigation that was posed by publication. The same risks to the investigation, if the confidentiality of the LoR was not respected, were also spelled out in the LoR itself. To dismiss UKLEB's objections to publication as "*they just don't like the fact that we have it*" suggests either that Mr Sguazzin was not aware of the nature of UKLEB's objections or that he did not understand them.

48. At 11.07, the Journalist emailed the Press Officer:

> "Our executive editor [Ms Harris] has decided to publish and I can't hold them off any longer. I've done what I can. The story is going out now."

49. The Article was then published on the Defendant's website.

50. The Journalist was asked by Mr Owen QC why the Defendant had not waited the few hours that UKLEB had requested before publishing the Article. The Journalist replied that he thought that UKLEB had not been consistent in its position and had given "*mixed messages*". I do not accept that. Apart from the off-the-record (and clearly 'off-the-cuff') remark of "P", UKLEB had, through the Press Officer – its senior communications officer and the Defendant's key contact – been consistent throughout as soon as she appreciated that the Defendant had a copy of the LoR. Insofar as the Defendant contends that UKLEB did not articulate its concerns regarding publication fully or clearly, that was largely as a result of two factors: first, the Defendant had practically disabled UKLEB's ability to do so by its refusal to provide sufficient information identifying – even in outline (or "*bullet-points*" as the Press Officer had requested in her call with the Journalist) – what from the LoR it was intending to publish; and second, the Defendant was not prepared to delay publication. The Journalist gave this answer in his evidence as to the timing of publication:

> "… once we have taken a decision to publish and we have informed all of the intended… subjects of the story, particularly when it is a sensitive story and there is the potential for push back from subjects in that story, we normally try to move quite quickly".

He was not asked to clarify what he meant by "*push back*" but one form of "*push back*" is obviously an application for an injunction.

51. It is a striking feature of this case – and one upon which Mr Owen QC has relied – 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 the Defendant'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.

52. In his First Witness Statement, the Journalist explained how he and his colleagues had approached the decision to publish information from the LoR:

> "I discussed [the LoR] with editorial colleagues on or around [Date]. After careful consideration of all material facts, including in particular a weighing of the public interest in the disclosure of [the Claimant's] involvement in the matter against any countervailing considerations, we took the decision to name [the Claimant] within [the Article] along with two other individuals under investigation. In particular we considered the following facts to justify doing so:
>
> (a) the [LoR] contained specific allegations regarding [the Claimant] in connection with X Ltd's purchase of [an asset]; and
>
> (b) [the Claimant] was responsible – and was publicly known to be responsible – for X Ltd's activities in [this area] throughout the period under investigation by UKLEB...

53. As to his assessment of the "*strong*" public interest in reporting matters relating to UKLEB investigation, including details relating to the Claimant, the Journalist identified the following:

> "(a) There are plainly very strong grounds for considering that there is widespread and substantial corruption in [the country] which is having catastrophic consequences on the bulk of the population there. That is a major matter of international public concern.
>
> (b) [X Ltd] was a major… international business. Its successor company is also a major international business represented by [number of] people worldwide. Any suggestion of significant impropriety at such a business is also a major matter of public concern internationally.
>
> (c) … [T]he suggestion arises from [the LoR] that in at least one instance any wrongdoing was the act of individuals and the [X Ltd] board was itself misled. If that is correct, it is only right and only fair to [X Ltd] that this is reported fully.
>
> (d) … [T]here is a perception of an on-going prevalence of corruption in [certain transactions in the country] and it is constructive for material like this to be in the public domain so that there is wider consciousness about the corruption problems that exist in [the country] and so that the consequences for individuals may act as a deterrent for others.

> (e) Full reporting of [the UKLEB] investigation may encourage witnesses to come forward and assist [UKLEB].
>
> (f) These matters have been considered in considerable detail by and are a matter of concern to UK Parliamentarians.
>
> (g) [redacted].
>
> (h) [The Claimant] is an international businessman likely to have continuing business activities.
>
> (i) … Bloomberg and Bloomberg News have a particular focus on financial matters in [the area] where it aims to promote transparency, accountability and good governance…
>
> Finally, if I as a journalist were to come across credible allegations suggesting impropriety on the part of individuals such as that suggested by [the LoR] but where there was no police or equivalent investigation, I would undoubtedly wish to investigate allegations and, if they remained credible and after putting the allegations to the individuals concerned and considering the public interest, would wish to publish them. I do not understand why the fact of the UKLEB Investigation should restrict my ability so to publish. Indeed, common sense would dictate just the opposite result."

54. In relation to that last paragraph, I note the following:

i) There is no evidence that the Journalist did independently investigate the matters that were included in the LoR. As such, he had no basis upon which to conclude, even if he had put to the Claimant allegations drawn from the LoR, that they "*remained credible*". Throughout, they remained allegations made by UKLEB in a highly confidential document.

ii) The UKLEB investigation did not impede in any way the Journalist's (or the Defendant's) ability to investigate X Ltd and to publish whatever it wished. The legal impediment asserted in this case is to publication of the Information derived from the LoR.

55. The Journalist explained his understanding of the width of his right to report upon the UKLEB investigation as follows:

> "… I believe that I and my colleagues at Bloomberg News should have the widest possible ambit to be able to report on all matters relating to the [UKLEB] Investigation, where we consider reasonably in our professional editorial judgment that it is in the public interest to do so."

In re-examination, Mr Millar QC asked the Journalist whether "*widest possible ambit to report*" was his phrase. He replied: "*No, I don't believe it was actually, initially written by me*". That was probably not the answer that Mr Millar QC was expecting. The cogency (indeed, credibility) of a witness's evidence is undermined if it appears that words have been put into his/her mouth when the witness statement is drafted. I note that the same phrase, about having the "*widest possible ambit to be able to report…*", also appeared, word for word, in the Editor's witness statement.

Ultimately, it does not matter as this was an expression of opinion by both witnesses, even if it was not necessarily their own.

56. By the time the Article was published, the Journalist had been a journalist with the Defendant for around 16 months. In contrast to his inexperience, the Editor was a seasoned journalist. He had been an editor for the Defendant for 12 years, and had been a journalist for 30 years. Nevertheless, he accepted that he was not familiar with the status of Letters of Request or the MLA regime generally. Although he had not seen a copy of it, the Editor said that the confidential nature of the LoR was well understood prior to publication. He accepted that he was unaware that the LoR had a specific section dealing with the confidentiality of the request and the potential risk to the investigation if its contents were disclosed. He said that, with hindsight, he should have known about this. Notwithstanding this, in answer to a question by Mr Millar QC, the Editor maintained that, even if he had seen it, it would not have altered his decision regarding publication.

57. The Defendant's evidence as to the alleged assessment of the public interest and the decision to publish comes from the Journalist and the Editor. But it is clear on the evidence that they did not actually make the decision. It was taken at a much higher editorial level within the Defendant - by individuals who have not given evidence – and then communicated to the Editor (and the Journalist).

    i) When giving evidence, the Journalist said of the ultimate decision to publish the Article: "*… that is a decision that is then made… by the senior editors in our organisation and by legal and standards…*" the Journalist was simply not party to any of these discussions or decisions.

    ii) The Editor was the Journalist's immediate superior editor, but he decided that the decision whether to publish the Article "*should be escalated to Mr Sguazzin, because we had received contradictory messages from [UKLEB]*". For reasons I have already explained, in my judgment, the messages that the Defendant received from UKLEB (ignoring the Press Officer's very first email in response to HYX) were not contradictory; they were consistent. From his evidence, I do not know whether the Editor was party to discussions with Mr Sguazzin as to the weight to be attached to the confidentiality of the LoR and the concerns expressed by UKLEB, but my impression is that he was not. The Editor stated that Mr Sguazzin consulted a more senior member of the editorial team, Ms Harris (a fact that is borne out by the email traffic), and that it was Mr Sguazzin who confirmed to the Editor that Ms Harris had approved publication of the Article. Beyond the email exchange I have recorded above (see [45]-[47]), I have no evidence at all as to the decision-making process adopted by Mr Sguazzin and Ms Harris; whether they were aware of and had considered the highly confidential nature of the LoR, the concerns expressed by UKLEB that publication posed a material risk to its criminal investigation and why, notwithstanding these matters, they decided that publication of information from the LoR was nevertheless justified in the public interest.

58. Put shortly, therefore, I do not know whether the matters advanced by the Journalist and the Editor in their evidence as bearing upon the public interest in, and justifying publication of, the Article were actually the matters that were considered by

Mr Sguazzin and Ms Harris. It is surprising that neither of these more senior editors provided witness statements for the Defendant.

59. On the evidence, I conclude that no-one at the Defendant 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 Press Officer'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 the Defendant 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 (see [24(viii)]), although the LoR had been sent to the in-house lawyer Ms Graham (see [40]). 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 the Defendant simply failed to appreciate that the Article potentially engaged the privacy interests of the Claimant. The Journalist and the Editor were concerned that the allegations made against the Claimant in the LoR should be put to him for comment before publication. In his evidence, the Editor considered that the purpose of contacting the Claimant (or his representatives) prior to publication was to give him a right of reply and/or to obtain a comment.

61. In the context of defamation, the purpose of offering a 'right-to-reply' is obvious; it enables the respondent to deny the allegations (if he wishes to) and to advance any matters that s/he considers have a bearing on the truth of the allegation(s). But those considerations do not operate (to such an extent or at all) where the subject's objection to publication is not the truth or falsity of the allegations, but rather that, as private information, they should not be published at all. The conventional 'right-to-reply' approach made to a subject will usually alert him/her to the fact that the media organisation is intending to publish material to which the subject may object on grounds of privacy and/or confidentiality, but that is a by-product, not its purpose. Here, the approach by HYX did enable Mr Byrne, on behalf the Claimant, to register his objection to publication on the basis of confidentiality/privacy interests arising from the nature of the LoR. But thereafter Mr Byrne's response was treated by the Defendant as the Claimant not responding to a request for comment. The obligation to "put" the allegations to the Claimant was regarded as having been discharged. This obscured the fact that the Claimant's real objection to publication was on grounds of confidentiality/privacy. There is no record of Mr Byrne's objection having been acknowledged or discussed further by any of the Defendant's staff.

The reaction of UKLEB to publication of the Article

62. UKLEB's response to publication of the Article was swift. Again, consistent with the matter causing some alarm to UKLEB, the Press Officer (or her senior) telephoned HYX within minutes of it being published online. In her evidence, HYX confirmed that UKLEB was expressing unhappiness about the publication of the Article, but she did not have a long discussion about it in the call. She reported the call to the Journalist in an email at 11.23:

> "… I had a concerned call from [UKLEB]. I said they needed to liaise with you…"

63. The Editor sent an email to himself as an *aide memoire* at 13.41. It contained (in bullet points) his justification for publishing the Article in response to the UKLEB complaint:

> "* public has a right to know
>
> * publishing these type of article (sic) lead to public discussion which can have an impact on the fight against issues like corruption, which as you know is a very serious problem in [the country]
>
> * My experience has been that if you publish it can lead others to supply information that might be material to the story or to the investigation
>
> * We got mixed messages – first told you're looking forward to reading it/then told to wait. Then told a statement coming soon
>
> * Had four days to respond. Were aware of this story on Thursday. Why wasn't [UKLEB] concern articulated more clearly before we published?"

64. The day after the Article was published, the Press Officer emailed the Editor, the Journalist and Randy Shapiro, the Defendant's Global Legal Counsel, based in New York:

> "I am writing to express our consternation with the way in which [the Article] was published yesterday.
>
> Despite us registering our concerns about this intended story late last week and expecting a phone call from the author on Friday, a call did not materialise and we discovered, last minute on Monday morning that this story was being published and was a fait accompli.
>
> Editorial decisions are of course a matter for you and your team. However, in our experience it is not unusual for media organisations and the journalists that work for them to consider the implications of what they propose to publish before pressing send, not wishing, for example, to be responsible for risking the personal safety of individuals, not compromising criminal investigations or the ability to bring alleged criminals to justice. Indeed, many journalists have approached us in similar circumstances, and we have found them open to discussing the possible consequences of publishing particular information and whether any potential damage could be mitigated. We would have expected to have been given a reasonable opportunity to put across our concerns before any publication.
>
> We are therefore surprised at the disregard which Bloomberg – an international media organisation we have always considered responsible and professional – showed on this occasion. This episode may be isolated but it is serious and has placed a question mark over our future relationship."

65. Ms Shapiro contacted the Press Officer to try and arrange for them to speak about her concerns. Perhaps optimistically, she sought to characterise what had happened as a

"*breakdown in communications*" between the Defendant and UKLEB. The two did speak three days after the email exchange. Ms Shapiro sent an email summarising their call later that same day. Ms Shapiro expressed "*regret*" that UKLEB felt that it had been afforded an inadequate opportunity to articulate its concerns prior to publication of the Article. She acknowledged that UKLEB had requested information about what the Defendant intended to publish and an opportunity to provide the Defendant with details of its concerns regarding publication. "*The response never came, so we published the story*". Ms Shapiro concluded her email: "*I am hopeful we can both chalk this up to experience and move on productively…*"

66. It appears that the Press Officer did not respond to that email and UKLEB took no further steps in relation to the Article.

The reaction of the Claimant to the Article

67. The Claimant's immediate response was to object to the publication of information from the LoR in the Article by letter to UKLEB the day after the publication of the Article. He had previously complained to UKLEB about what he regarded as the leak of information by UKLEB about his interview to the Defendant, that led to the Autumn Article, and demanded that UKLEB carry out an inquiry into this apparent further leak. The UKLEB's response was brief. In a letter the following day, UKLEB denied that it had been the source of the information relating to the Claimant's interview with UKLEB or that it had provided the Defendant with a copy of the LoR. It sought to reassure the Claimant that UKLEB would take all reasonable steps to protect the confidentiality of its investigation, but beyond that it refused to provide any details of any inquiry into the alleged leak of information. In subsequent correspondence, the Claimant asked whether UKLEB was considering making an application for an injunction against the Defendant in relation to the publication of information from the LoR and, if not, whether UKLEB would support such an application by the Claimant. UKLEB declined this invitation in a single sentence in a letter sent four days after the publication of the Article: "*It is a matter for your client as to the remedies he may seek against the Press.*"

68. I do not regard the fact that UKLEB decided not to take any formal steps against the Defendant as detracting from UKLEB's concern that the breach of confidentiality was "*serious*". Even if UKLEB had the appetite for litigation against the Defendant (and a willingness to spend its limited resources on legal proceedings), the reality was that the Article had already been published. In practical terms, the damage to the confidentiality of the LoR had been done; in legal terms, given the publication, UKLEB may well have been pessimistic at the prospects of a Court granting an injunction based on breach of confidence.

69. A letter of complaint was sent to the Defendant by the Claimant's solicitors nine days after the Article was published. It complained that publication of the Article was a misuse of the Claimant's private information and/or a breach of confidence. In addition, it was alleged that publication breached the Claimant's rights under the Data Protection Act 1998. The nub of the complaint was that the LoR was a "*highly confidential document*" and that the Article had contained information that was "*previously undisclosed, confidential information in the context of a continuing criminal investigation*". No charges had been brought against the Claimant and reliance was placed on the authority of ***ERY -v- Associated Newspapers Ltd*** **[2016]**

EWHC 2760 (QB) [65] in support of the contention that the Claimant had a reasonable expectation of privacy in relation both to the fact that he was under investigation by UKLEB and, more particularly, the details of the investigation. The letter concluded by requesting that the Defendant should take down the Article from its website and provide an undertaking not to publish or otherwise disclose any information relating to UKLEB's investigation into the Claimant whilst it was continuing. If such steps were not taken within 5 days, the letter indicated the Claimant's intention to seek an injunction to restrain further publication of the Article.

70. In its letter of response, the refused to remove the Article from its website or to provide any undertaking regarding further publication. In respect of the claim for breach of confidence, it denied that the Claimant had standing to pursue such a claim as the allegedly confidential information was not owned by the Claimant; in respect of the claim for misuse of private information (and breach of confidence), that the Claimant's rights were outweighed by the Article 10 rights of the Defendant, in particular the contention that it was in the public interest to reveal that the Claimant was under investigation by UKLEB; and finally, in respect of the data protection claim, it contended that publication was protected by the journalistic exemption under s.32 Data Protection Act 1998.

The Interim Injunction Application

71. In light of the refusal to take down the Article or to provide undertakings regarding further publication, the Claimant applied, unsuccessfully, for an interim injunction. In most cases, it would not be necessary to go into the background or detail of such an application at trial; a paragraph summarising the decision would usually be sufficient. In this case, however, I am going to have to deal in some detail with the application for the injunction because of what I am satisfied was a serious failure of candour in the evidence the Defendant put before the Court at the injunction application and, thereafter, a prolonged failure to inform the Court (or the Claimant) subsequently that material statements of fact, upon which the Court had relied at the interim injunction stage, were not correct.

72. The injunction application was issued by the Claimant two days after receipt of the Defendant's letter of response, before the Claim Form had been issued. It was supported by a witness statement from Mr Byrne. The Defendant filed a witness statement from the Journalist ("the Journalist's First Statement"). The application came before Andrew Baker J on 9 January 2017. The Judge adjourned the application to be heard on 2 February 2017. He made a number of ancillary orders, including granting the Claimant permission to issue the Claim Form identifying him as "ZXC".

73. The application duly came before Garnham J on 2 February 2017. In the interim, the Claimant had issued the Claim Form and served Particulars of Claim. In summary, the Claimant was seeking an order requiring the Defendant to remove the information relating to him from the Article on its website (save for certain identified information). The evidence remained as it was at the hearing on 9 January 2017. I have been provided with a transcript of the hearing. I have read the full transcript and been referred to particular parts of it.

74. There are two matters of concern: first, the impression the Court received from the evidence as to the position of UKLEB as to publication of the Article and, closely

related to that, the failure to provide the Court (and the Claimant) with a copy of the LoR (or even to disclose that the Defendant had a copy of it) which would have allowed a greater focus on the confidentiality restrictions contained in the LoR itself and UKLEB's own assessment that a failure to observe the restrictions might "*frustrate [its] investigation by interference with documents or witnesses*".

75. The attitude of UKLEB to the publication of the Article was a matter that assumed importance at the hearing. The Judge knew that UKLEB had refused to support the Claimant's application – and Mr Millar QC on behalf of the Defendant placed express reliance on this fact – but beyond that, the evidence of the Defendant was silent to the position adopted by UKLEB in relation to the publication of the Article.

76. The Judge handed down two judgments on 23 February 2017 – one public and one private – explaining his reasons for refusing the Claimant's application for an injunction. Necessarily, parts of the private judgment had to be redacted, and parts of it amended, to produce a judgment that could be published without disclosing the information that the Claimant was seeking to protect or identifying him. My references to Garnham J's judgment are to the private judgment (with necessary redaction or changes).

77. The Judge rejected the submission of the Defendant that a person cannot have a reasonable expectation of privacy in the information that he is being investigated by the police or other state law enforcement agency carrying out its public function. Whether there was a reasonable expectation of privacy in any particular case was a fact-sensitive exercise [40]. The Judge held that he was satisfied that the Claimant was likely to establish at trial that he had a legitimate expectation of privacy in the contents of the LoR [41]-[45], and identified factors that tended to reduce the weight to be attached to this side of the balancing process [50]-[56].

78. However, the Judge concluded that, on the evidence before him, it was likely that the Claimant's privacy rights would be found to be outweighed by the Article 10 rights of the Defendant, which the Judge was satisfied were "*substantial*" ([57]). The Judge identified three reasons why he had reached this conclusion. First, the Article was "*a serious piece of journalism about a serious topic; [a UKLEB] investigation into offences of bribery, fraud and corruption involving huge sums of money*" and that the publicity produced by the Article might encourage other witnesses to come forward [58].

79. The second reason was [59]:

> "… the article here prompted no adverse reaction from the investigators concerned. It appears that [UKLEB] had no fears that the reporting was damaging the investigation. Had this application been made, or supported, by [UKLEB], the outcome may have been very different".

80. The third reason was that the decision whether to include the Claimant's name was a legitimate journalistic decision with which the Court should be slow to interfere [60].

81. The Judge considered that the weight to be attached to these factors was to be reduced "*somewhat*" by two matters [61]: first, the Defendant had made "*highly confidential information contained in a State to State communication*" publicly available and that

"*the public interest in preserving the confidentiality of Letters of Request is very real*"; and second, the Article was not whistleblowing journalism; it related solely to the progress of the UKLEB investigation.

82. The Judge's conclusion in [59] was made in ignorance of the clear protests of UKLEB both before and after publication of the Article (see particularly [31] and [34] and [64] above). I am quite satisfied that Mr Millar QC was not aware of this evidence at the hearing on 2 February 2017. He would not have made the submissions he did, if he had been. The position of staff of the Defendant is different. The Journalist did not apparently attend the injunction application on 2 February 2017, and his evidence, at trial, was that he did not recall seeing the judgment either in draft or after it was handed down. When asked by Mr Owen QC to consider paragraph [59] of Garnham J's judgment, the Journalist accepted that the first sentence was not accurate. To his knowledge, the Article *had* prompted adverse reaction from UKLEB both before and after publication. He considered that the second sentence only referred to UKLEB's reaction after publication of the Article, but accepted that, in that respect, it was also inaccurate.

83. In his First Witness Statement, the Journalist had not mentioned the protestations the Defendant had received from UKLEB. This is very surprising. Indeed, in paragraph 19, the Journalist said this:

> "Prior to publishing [the Article], Bloomberg sought comment from [the Claimant]… [UKLEB] and the [foreign] government. In the event, none of them provided any comment, save for [name]'s representatives, who chose not to comment on the on-going investigation."

The statement that UKLEB had not provided any comment was false. In his evidence, the Journalist was questioned why the Article stated (paragraph 4) that UKLEB had "*declined to comment*". The Journalist drew a distinction between comments made 'on-the-record' and information provided to journalists on an 'off-the-record' basis. UKLEB, he said, had refused to comment 'on-the-record' and that this position was reflected in the Article. The communications from UKLEB protesting about publication were, he claimed, all 'off-the-record'. There is no indication of that in any of the emails themselves, but the Journalist (and the Editor) said that they believed that all communications with UKLEB were 'off-the-record' unless UKLEB specifically indicated that a comment was 'on-the-record'.

84. The distinction between 'on-' and 'off-the-record' communications with journalists is familiar (if occasionally misunderstood by those who are party to them), but what the Journalist said in paragraph 19 was said in a witness statement for the Court. If it was meant to convey the meaning that UKLEB had provided no comment *for publication*, it should have said so clearly. But even if this was the intended meaning, the statement was misleading by omission. I cannot (and do not need to) reach any conclusion whether this was done deliberately, but this is likely to be one of the parts of the evidence that misled Garnham J to believe that UKLEB had no concerns about the publication of the Article.

85. I do not know who (if anyone) at the Defendant considered Garnham J's judgment (whether in draft or following hand-down), but almost everyone who was involved in the publication of the Article on behalf of the Defendant *knew* that UKLEB was

unhappy (to say the least) about the publication of the Article and had clearly said so. Simply from the email traffic, it is clear that this was known (in ascending order of seniority) at least by HYX, the Journalist, the Editor, Mr Sguazzin and Ms Shapiro. I do not know whether any of them read the judgment, but if it is really the position that no-one who was familiar with the case read it, then that shows a worrying disconnect between those at the Defendant capable of giving meaningful instructions and those conducting the litigation on its behalf.

86. But matters do not rest there. When the solicitors instructed by the Defendant were finally provided with the emails that showed the true position about UKLEB's concerns, it apparently occurred to none of them that it was important that both the Court and the Claimant were informed that an important factual finding in the judgment on the interim injunction application had been incorrect.

87. A further point of concern arises from the Journalist's reference to the LoR in his First Witness Statement. In paragraph 10, the Journalist stated:

> "The [Article] was based on the contents of [the LoR] that requested support from the [foreign] government relating to [UKLEB's] investigation of the acquisition of [assets] by X Ltd… I was shown the [LoR] on [date]".

No copy of the LoR was exhibited to the Witness Statement and no indication was given that the Journalist had actually been provided with a copy of the LoR not just "*shown*" it. The Claimant, and his lawyers, remained in ignorance of this important fact until July 2018, when the LoR was finally disclosed to them by the Defendant. The chronology is as follows:

i) Directions made at the Case Management Conference had required the parties to provide standard disclosure by 2 February 2018. The LoR was not disclosed by the Defendant in its standard disclosure.

ii) The LoR was not disclosed to the Claimant until a redacted copy of it was provided to the Claimant under cover of a letter dated 18 July 2018. The letter stated:

> "… Pursuant to CPR 31.14, we enclose a redacted copy of the [LoR]. The redactions have been carefully considered and applied on the grounds of source protection.
>
> The [LoR] was not previously contained in our client's standard disclosure list on the basis that it did not fall to be disclosed to your client pursuant to its standard disclosure obligations under CPR 31.6…"

iii) CPR Part 31.14 is the rule that requires parties to permit inspection of a document that is referred to in a statement of case or in that party's evidence. It is not necessary for me to determine the point, but I am far from satisfied that the LoR did not fall comfortably within the Defendant's standard disclosure obligations.

88. The Journalist was cross-examined about the belated disclosure of the LoR by the Defendant in July 2018 whereas the Journalist had been given (and retained) a copy of the LoR prior to publication of the Article (see [18] above). Cross-examined about his

use of the word "*shown*" in paragraph 10 of his First Witness Statement, he was asked whether the suggestion that someone had been shown a document indicated that s/he had retained a copy. The Journalist answered:

> "As a journalist, if I was reading that statement in an article, I would not think that 'shown' precluded the fact they might also have it."

He accepted that, in every-day language – not in the context of an article – "*shown*" would not suggest that the person had retained a copy. The Journalist explained that the reason that he had used "*shown*" in the First Witness Statement was because the word "*shown*" had been used in the Article. Candidly, the Journalist accepted that his use of the word "*shown*" would be misleading, but stated that it was never his intention to mislead.

89. The Journalist's evidence on this point was unconvincing and is difficult to understand. Initially, when I read the Journalist's witness statement before the trial, I had thought that the reason that he had used the word "*shown*" in the First Witness Statement was an effort to protect his source. If that had been the explanation, it would still not have been acceptable, but at least it would have been understandable. But that was not the explanation that the Journalist gave in his evidence at trial. I reject the suggestion that "*shown*" was used in the First Witness Statement simply because it was the word used in the Article. That is not credible. The decision on what words to use in a witness statement is wholly different from the choice of words for publication in articles.

90. But matters do not rest there. The Journalist gave evidence on the second day of the trial. He was in the middle of his evidence when the court adjourned for lunch that day. When the court reconvened at 2pm, and before the Journalist recommenced his evidence, with the agreement of Mr Owen QC, Mr Millar QC read a statement on the basis of instructions he had received from the Defendant. Expressly on the basis that the Defendant did not waive privilege, it included the following:

> "The legal work on the [First] Witness Statement… was mainly undertaken by … [an Associate Solicitor] of Olswang LLP... under the supervision of Dan Tench, the partner. Mr Tench has no clear recollection of what the state of knowledge was in respect of whether [the Journalist] did or did not retain a copy of the LoR, and a quick review of the contemporaneous emails undertaken this morning does not assist. However, he considers it extremely unlikely that he or [the Associate] were aware of this…
>
> Mr Tench believes that if he had known that [the Journalist] retained a copy of the LoR, that the witness statement was going to state simply that he was shown it, that is something that he would, at the very least have raised with… leading counsel. [Mr Tench] can recall a detailed discussion about the form of the witness statement, but there was no reference to this sentence or to this issue. Mr Tench believes that when he was informed in and around [Month] 2017 … that [the Journalist] did have a copy of the LoR, this was the first he knew of it…
>
> [The Journalist], accordingly and as far as we can discern, the position appears to be simply that the wording of the article in respect of the LoR, i.e. the use of the word 'shown' was adopted in the witness statement without any further interrogation…"

91. Nothing more was said on the topic and the Journalist completed his evidence.

92. Overnight on 29 November 2018, Mr Tench sent me a letter (copied to the Claimant's solicitors) concerning the issue of the Journalist's First Witness Statement.

> "As you will recall yesterday at court my client's counsel… read out a statement concerning the Letter of Request…
>
> In order to assist the Court, I prepared that statement very quickly over the luncheon adjournment stating as best I could my recollection of the events in question with the assistance of the limited review of material we had undertaken on our computers in court during the morning session. I have now had a further opportunity to reflect on that statement and to review some more of the contemporaneous material. Now that I have more time, I would like to make the corrections below.
>
> Firstly, I stated in the statement that I considered 'it extremely unlikely that [I] or [the Associate] were aware of this [the Journalist retaining a copy of the letter]'. Having had a chance to review some further material, I have not come across anything which definitively demonstrates that either I or [the Associate] knew. However, there is some material which could support the view that [the Associate] may have known, and I believe in hindsight it was in fact unwise for me to have speculated as to her state of knowledge. As regards myself, I can now say only that I think it is unlikely (rather than 'extremely unlikely') that I knew…"

Mr Tench apologised to the Court for the inaccuracy of the statement that had been read to the Court on 28 November 2018.

93. It seemed to me to be unsatisfactory, particularly in light of the need to correct the statement that had been read to the Court, for the matter to be left on the basis of the statement read to the Court and the letter of correction. I therefore directed that a witness statement should be filed by Mr Tench confirming what the Court had been told on instructions and in the letter, but also setting out clearly (1) when the Defendant's solicitors first became aware or suspected that the Journalist had a copy of the LoR; (2) the basis (without waiving privilege) for the statement that there was "*some material which could support the view that [the Associate] may have known*" that the Journalist had a copy of the LoR; and (3) the date on which the material suggested that the Associate may have known this. I also directed that it should identify when the Defendant's solicitors first became aware of the emails from UKLEB expressing concern about publication of the LoR, as this was also material to the issue of what the Court was told at the interim injunction application.

94. In the witness statement he filed pursuant to that direction, Mr Tench provided an overall summary:

> "On [date], [the Associate] met with [the Journalist] and took notes. The notes stated that he 'received' the LoR. [The Associate] prepared an initial draft of the statement, which made no reference to [the Journalist] receiving or being shown the LoR, merely that the Article was based on the LoR. I reviewed that briefly on the same or the following day. A version was then provided to [the Journalist] in similar form.

> [The Journalist] did not provide any comments on that draft. I returned to the office a few days later, and I believe that I undertook a more detailed review of the draft witness statement [two days after my return]… A hearing was scheduled for Monday, 9 January 2017. That meant that the finalisation of the witness statement was urgent.
>
> I believe that one of the things which arose out of my review is that I sought more information about the LoR. A version of the statement was provided to [the Journalist] on the evening of [my review] asking for information about when he received it.
>
> [The following morning], at 10.51, we received a draft of this statement with his amendments. This included deleting the question about receipt and replacing it with the wording "I was shown the [UKLEB] letter on [date]."

95. Mr Tench's statement also contained the following specific details:

    i) in preparing for the interim injunction application, "*there was no focus on either the contents of the LoR, save to the extent that it was reproduced in the Article… or whether the Defendant had approached [UKLEB] and whether [UKLEB] had raised any objections to the publication of the Article*";

    ii) Mr Tench had specifically asked the Journalist, in a comment on the draft witness statement, when he had first received a copy of the LoR;

    iii) The Journalist returned the statement having deleted Mr Tench's question and added the words, "*I was shown the [UKLEB] Letter on [date]*". He had also added, after these words: "*The source asked that I not publish the contents of the letter immediately*"; and

    iv) the solicitors suggested that the sentence about the source's request should be deleted as it added nothing of "*any probative value*". The Journalist accepted the deletion.

96. Mr Tench concluded this section of his statement by stating:

> "… I had and have no suspicion that [the Journalist] was seeking to mislead us or the Court. He was repeating the wording he had used in the Article as published and there was no reason for him to understand that there may be any relevance of him retaining a copy of the LoR."

97. As to the balance of the matters that Mr Tench was required to cover in his statement:

    i) The Defendant's solicitors were told by the Journalist that he had a copy of the LoR on [date], and they were provided with it on 18 December 2017.

    ii) The Defendant's solicitors received copies of the emails sent by [UKLEB] to the Defendant both before and after publication in late December 2017 as part of general e-disclosure provided to the solicitors by the Defendant. The emails were reviewed in January 2018.

98. Neither party sought to reopen the evidence or to recall the Journalist and Mr Owen QC did not seek to cross-examine Mr Tench on his statement. Both parties have, however, provided written submissions on this further evidence and the conclusions each party has invited the Court to draw from it.

99. In my judgment, the evidence shows a lack of rigour by the Defendant's solicitors. The Journalist's changes to his statement should have been recognised as potentially having been made by him to protect his source, but the wording he had suggested for his witness statement was misleading. The Journalist had told the Associate, in the meeting, that he had a copy of the LoR. Mr Tench had specifically asked the Journalist to confirm when he had received it. The capacity of the word "*shown*" (inserted by the Journalist) to mislead should have been detected by Mr Tench (or the Associate) and corrected so as not to mislead.

100. Of more consequence is the effect this has on the Journalist's evidence. In light of the fact that Mr Tench had asked him, specifically, when he had received the LoR, the answer he gave in his evidence that the choice of the word "*shown*" was merely because that was the word that had been used in the Article, cannot be accepted. The Journalist declined to state in the witness statement that he had a copy of the LoR and used the word "*shown*" quite deliberately. It was chosen to obscure the fact that he did have a copy of the LoR. My conclusion is that the Journalist did so because he judged it appropriate or necessary to protect his source. That was a serious misjudgment by the Journalist. This was a witness statement for use in Court proceedings. Whatever the justification for using the word "*shown*" in the Article (and having seen earlier drafts, the word "*given*" was changed to "*shown*" prior to publication), the Court must be given a candid and clear account. The Court regularly deals with issues of source protection and will ensure that journalistic sources are protected appropriately. It is not for a journalist to deploy misleading evidence as a form of 'self-help', however noble the intention behind it.

101. The direct consequence of the misleading nature of the Journalist's First Witness Statement was that the LoR was not available – as it should and would have been – to the Claimant's solicitors and the Court at the interim injunction application. It was not provided to the Defendant's solicitors until December 2017 and the Claimant's solicitors did not get it until July 2018. Without the LoR, the Claimant's solicitors were deprived of the ability to demonstrate, from the express terms of the LoR, the harm that UKLEB itself judged risked being caused by a failure to observe the strict requirements of confidentiality that were imposed.

102. That leads to the second failure of candour at the interim injunction application: the failure to disclose the approach of UKLEB to publication of information from the LoR. Whatever the extent of the duty of a defendant in terms of its responsibility at an *inter partes* hearing to ensure that the Court is provided with evidence that has a potential bearing on the issues, one thing is quite clear; a party must not permit the Court to be misled.

103. From the moment that any member of the Defendant's staff who was familiar with the stance taken by UKLEB became aware that Garnham J had relied upon the fact that UKLEB had not complained about the publication of the Article (see [79] above), then s/he knew that this factual premise was incorrect, and the Court had been

(perhaps unintentionally) misled. At that stage, an obligation arose to correct the misapprehension.

104. In terms of specific duties, the Defendant's solicitors, at least, had a duty to act as soon as they became aware that Garnham J had been misled as to material facts at the interim injunction application.

i) The Solicitors Regulation Authority Code of Conduct 2011 (version 18), which was in force at the relevant time, provides ten mandatory "*Principles*", including:

> "1. uphold the rule of law and the proper administration of justice;
>
> 2. act with integrity;
>
> 3. not allow your independence to be compromised;
>
> 4. act in the best interests of each client;
>
> 5. provide a proper standard of service to your clients; and
>
> 6. behave in a way that maintains the trust the public places in you and in the provision of legal services."

ii) Where two or more principles come into conflict, the Code provides:

> "… the one which takes precedence is the one which best serves the public interest in the particular circumstances, especially the public interest in the proper administration of justice…"

iii) Chapter 5 deals with the duties of solicitors to the Court. Framed in terms of outcomes, solicitors are required to "*achieve*" the following:

> "**O(5.1)** you do not attempt to deceive or knowingly or recklessly mislead the court; [and]
>
> **O(5.2)** you are not complicit in another person deceiving or misleading the court."

iv) The "*indicative behaviours*" by which solicitors might demonstrate that the outcomes had been achieved, included:

> "**IB(5.4)** immediately informing the court, with your client's consent, if during the course of proceedings you become aware that you have inadvertently misled the court, or ceasing to act if the client does not consent to you informing the court."

v) The Code of Conduct is outcomes-focused. As made clear in the Introduction:

> "The outcomes are supplemented by indicative behaviours. The indicative behaviours specify, but do not constitute an exhaustive list of, the kind of behaviour which may establish compliance with, or contravention of the

> Principles. These are not mandatory but they may help us to decide whether an outcome has been achieved in compliance with the Principles.
>
> We recognise that there may be other ways of achieving the outcomes. Where you have chosen a different method from those we have described as indicative behaviours, we might require you to demonstrate how you have nevertheless achieved the outcome."

vi) The attitude of UKLEB to the publication of the Article by the Defendant was a material fact upon which Garnham J had relied when determining the interim injunction application (see [79] above).

vii) It was apparent, from communications between the Defendant's staff and UKLEB, that the Judge's conclusion as to the attitude of UKLEB was erroneous (see [82] above).

105. My conclusions as to the interim injunction application are as follows:

i) The statement in the Journalist's First Witness Statement, relied upon to resist the injunction application, that he had been "*shown*" a copy of the LoR was misleading by omission. He had, in fact, been given a copy of it (see [88] above). The LoR should have been disclosed both to the Court and to the Claimant as part of the Defendant's evidence at the interim injunction application. It is difficult now to assess what impact that would have had on the fate of the application. Garnham J did conclude that the LoR was a State-to-State communication that contained "*highly confidential information*" (see [81] above), but it does seem to me that disclosure of the LoR would have allowed the Claimant to rely upon UKLEB's own assessment of the likely harm to its investigations by disclosure of its contents.

ii) Garnham J's findings that the Article "*prompted no adverse reaction from the investigators*" and that UKLEB had "*no fears*" that the Article would damage its investigation were factually incorrect (as was rightly acknowledged by the Journalist in his evidence). Anyone at the Defendant who was aware of communications with UKLEB regarding the Article would have recognised this and it should have been corrected as soon as the Defendant's solicitors were aware of the true position.

iii) I am satisfied that, had Garnham J been provided (as he should have been) with a copy of the LoR and, more significantly, the evidence of UKLEB's position in relation to publication of the Article, it is likely that the Claimant's application for an injunction would have been successful. The Judge said expressly that, had the application been supported by UKLEB, "*the outcome may have been very different*" (see [79] above).

Misuse of Private Information: the parties' cases

106. The Claimant's claim is that he had a reasonable expectation of privacy in the following information which he contends was published in the Article ("the Information"):

i) the fact that 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 by [date]; and

ii) the details of the deal that UKLEB was investigating in relation to the Claimant, including that:

a) 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) 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) 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.

107. In response, the Defendant (a) denies that the Claimant had a reasonable expectation of privacy in the Information or, in the alternative, (b) any privacy interests that the Claimant can demonstrate are outweighed by the Defendant's Article 10 rights.

108. In relation to expectation of privacy, the Defendant contends:

i) generally, the fact that a person is alleged to have committed an offence, and the details of the alleged offence, are not private information in respect of which the person has any reasonable expectation of privacy and does not become so merely because the allegation is made to or by a law enforcement agency such as UKLEB and/or that the agency believes that the allegation is or may be true;

ii) generally, the fact that a person is the subject of an investigation by a law enforcement agency such as UKLEB, and the details of the agency's investigation (including the investigatory steps being taken, the details of the allegation made against the person, or the agency's view on whether the person has committed an offence), is not, of itself, private, even at the stage before the person is arrested or charged. The investigation is one which is conducted by a state law enforcement agency carrying out public functions;

iii) the fact that a Letter of Request is sent in confidence to the competent authority of another state and contains information about a criminal investigation into a person does not mean that it is information over which the subject has any reasonable expectation of privacy;

iv) the following specific factors militate against the Claimant having any privacy rights in the Information:

a) the UKLEB investigation had been preceded by public debate about the conduct of X Ltd;

b) the UKLEB investigation had, at the date of publication of the Article, been underway for [a period] and involved substantial evidence gathering and the interviewing of witnesses; and

c) there was a substantial and legitimate public interest in the thoroughness, progress and direction of UKLEB's investigation, in particular whether particular transactions involving X Ltd were the subject of the criminal investigation.

These three factors, it is argued, gave rise to a duty on the media to obtain and disseminate information about the UKLEB investigation and the public had a right to receive it.

Further:

d) the Information concerned alleged misconduct by the Claimant while in a senior role in a company which was being investigated by a state law enforcement agency;

e) even before the Autumn Article, the Claimant's involvement in the matters that became the subject of the UKLEB investigation had been discussed in the public domain; and

f) the Autumn Article had already disclosed several pieces of information relating to the Claimant and the UKLEB investigation; and

v) the Claimant had sufficient time to apply for an injunction to prevent publication of the Information (and/or the Article). He did not do so, and he did not complain about the Article until some time after publication.

109. As to public interest/Article 10, the Defendant contends:

i) there is a strong public interest in the media reporting on UKLEB investigations, generally, but specifically those into companies like X Ltd;

ii) that public interest is strengthened where (a) the investigation is into allegations of fraud, bribery and corruption over a lengthy period, involving substantial sums of money; (b) the alleged offences may have been committed by and benefited the company; (c) senior officers of the company were alleged to have been involved; (d) the company's board may have been involved and/or misled by its senior officers; and (e) there is a perception of an on-going prevalence of corruption and secrecy in transactions in the relevant country. The Defendant contends that, "*it is constructive for information about this subject-matter to be reported so that there is a wider consciousness and concern about corruption in [the country] and so that the consequences for individuals may act as a deterrent for others*";

iii) there had already been publicity and public discussion about the activities of X Ltd that were now the subject of investigation by UKLEB, including detailed reporting and discussion of possible serious. The Article informed the

public that these were now under criminal investigation by UKLEB, along with details of who and what was being investigated;

iv) the UKLEB investigation had been long-running, but no individual had yet been charged. There is a strong public interest in reporting the scope, direction, investigative steps taken and progress of the UKLEB investigation; such reporting ensures accountability and may encourage other witnesses to come forward to assist the investigation;

v) the Claimant had been publicly identified as connected with the relevant transactions of X Ltd during the period of alleged wrongdoing;

vi) the Claimant is an international businessman who is likely to have continuing business activities; and

vii) the Defendant has a particular focus on financial matters in [the area] where it aims to promote transparency, accountability and good governance.

Misuse of Private Information: the law

110. There is a large degree of agreement as to the legal principles to be applied:

i) liability for misuse of information is determined applying a two-stage test: (1) does the claimant have a reasonable expectation of privacy in the relevant information; and (2) if yes, is that outweighed by countervailing interests, typically freedom of expression under Article 10: ***McKennit -v- Ash*** **[2008] QB 73** [11];

ii) stage one – expectation of privacy – is an objective assessment; what a reasonable person of ordinary sensibilities would feel if s/he were placed in the same position as the claimant and faced with the same publicity: ***Murray*** [35]; ***In re JR 38*** **[2016] AC 1131** [88];

iii) the Court will consider all the circumstances, but particular matters may include (***Murray*** [36]; ***In re JR 38*** [60]):

a) the attributes of the claimant;

b) the nature of the activity in which the claimant was engaged;

c) the place at which it was happening;

d) the nature and purpose of the intrusion;

e) the absence of consent and whether it was known or could be inferred;

f) the effect on the claimant; and

g) the circumstances in which and the purposes for which the information came into the hands of the publisher.

iv) whether the availability in the public domain of the same or similar information leads to the conclusion that the claimant cannot have a reasonable expectation of privacy is a matter of fact and degree, to be assessed in the individual case: the question is not whether the information was generally accessible, but rather whether the remedy of injunction would serve a useful purpose: ***PJS -v- News Group Newspapers Ltd*** **[2016] AC 1081** [26], [32];

v) at stage two – the balancing exercise – neither Article 8 nor Article 10 has precedence over the other; where their values are in conflict, what is necessary is an intense focus on the comparative importance of the rights being claimed in the individual case; the justifications for interfering with or restricting each right must be taken into account; and the proportionality test must be applied, the so-called ultimate balance: see ***PJS*** [20]; ***In re S*** **[2005] 1 AC 593** [17];

vi) courts need to be on guard against bringing into account at stage one considerations which should more properly be considered at stage two: ***Campbell -v- MGN Ltd*** **[2004] 2 AC 457** [21];

vii) the "decisive factor" at stage two is an assessment of the contribution which the publication of the relevant information would make to a debate of general interest: ***Von Hannover -v- Germany*** **[2004] EMLR 21** [76]; ***Ntuli -v- Donald*** **[2011] 1 WLR 294** [20]; ***K -v- News Group Newspapers Ltd*** **[2011] 1 WLR 1827** [10(5)]

viii) the ECtHR has given some broad guidance on factors relevant to the balancing exercise in ***Axel Springer -v- Germany*** **[2012] EMLR 15** [79]:

a) whether the publication contributes to a debate of general interest;

b) how well-known is the person concerned and what is the subject of the publication;

c) the prior conduct of the person concerned;

d) the method of obtaining the information and its veracity; and

e) severity of the sanction imposed: the proportionality of the interference with the exercise of the freedom of expression.

111. Mr Owen QC submits that the Claimant's privacy rights are reinforced by the highly confidential nature of the LoR (see the discussion in ***Abacha***, [22] above). He relies upon several statements from decisions of the Court of Appeal as to the public interest in the observance and enforcement of duties of confidentiality:

i) in ***Prince of Wales -v- Associated Newspapers Limited*** **[2008] Ch 57**:

> [67] There is an important public interest in the observance of duties of confidence. Those who engage employees, or who enter into other relationships that carry with them a duty of confidence, ought to be able to be confident that they can disclose, without risk of wider publication, information that it is legitimate for them to wish to keep confidential. Before the Human Rights Act 1998 came into force the

> circumstances in which the public interest in publication overrode a duty of confidence were very limited. The issue was whether exceptional circumstances justified disregarding the confidentiality that would otherwise prevail. Today the test is different. It is whether a fetter of the right of freedom of expression is, in the particular circumstances, 'necessary in a democratic society'. It is a test of proportionality. But a significant element to be weighed in the balance is the importance in a democratic society of upholding duties of confidence that are created between individuals. It is not enough to justify publication that the information in question is a matter of public interest. To take an extreme example, the content of a budget speech is a matter of great public interest. But if a disloyal typist were to seek to sell a copy to a newspaper in advance of the delivery of the speech in Parliament, there can surely be no doubt that the newspaper would be in breach of duty if it purchased and published the speech.
>
> [68] For these reasons, the test to be applied when considering whether it is necessary to restrict freedom of expression in order to prevent disclosure of information received in confidence is not simply whether the information is a matter of public interest but whether, in all the circumstances, it is in the public interest that the duty of confidence should be breached. The court will need to consider whether, having regard to the nature of the information and all the relevant circumstances, it is legitimate for the owner of the information to seek to keep it confidential or whether it is in the public interest that the information should be made public.
>
> [69] In applying the test of proportionality, the nature of the relationship that gives rise to the duty of confidentiality may be important. Different views have been expressed as to whether the fact that there is an express contractual obligation of confidence affects the weight to be attached to the duty of confidentiality.

ii) and, referring to these paragraphs from ***Prince of Wales***, Sir Terrence Etherton MR held, in ***ABC -v- Telegraph Media Group*** **[2019] EMLR 5** [22]:

> "The passage which we have quoted emphasises the importance of the public interest in the observance of duties of confidence, and identifies the relevant principle as being 'whether, in all the circumstances, it is in the public interest that the duty of confidence should be breached.' That question must be answered by a consideration of 'all the relevant circumstances', while 'having regard to the nature of the information'. The test is ultimately one of proportionality. Where (as in the Settlement Agreements in the present case) there is an express contractual obligation of confidence which may have been broken, it is 'arguable' that the express duty carries more weight 'than a duty of confidentiality that is not buttressed by express agreement', but the extent to which is does so 'will depend upon the facts of the individual case.'"

112. In addition, I would note also what was said by Sharp LJ in ***Mionis -v- Democratic Press SA*** **[2018] QB 662** [71]:

> "… [T]he underlying point in relation to confidence, as the passage referred to in the judgment of Bingham LJ in ***Attorney General -v- Guardian Newspapers Ltd (No.2)*** **[1990] 1 AC 109, 215** ["***Spycatcher***"] makes clear, is that:
>
> > 'the duty of confidence does not depend on any contract, express or implied, between the parties. If it did, it would follow on ordinary principles that strangers to the contract would not be bound. But the duty 'depends on the broad principle of equity that he who has received information in confidence shall not take unfair advantage of it': ***Seager -v- Copydex Ltd*** **[1967] 1 WLR 923, 931** *per* Lord Denning MR. 'The jurisdiction is based, not so much on property or contract, but rather on the duty to be of good faith': ***Fraser -v- Evans*** **[1969] 1 QB 349, 361** *per* Lord Denning MR'".

Lord Goff's speech in ***Spycatcher*** also remains an authoritative statement of the principles relating to breach of confidence (at pp.281A-282G).

113. Mr Millar QC contends that any confidentiality that attached to the LoR is not determinative of the issue of whether the Claimant has a reasonable expectation of privacy in the Information: ***Axon -v- Ministry of Defence*** **[2016] EMLR 20** [64(k)]. I accept that it is not determinative, but that was not the point that was being addressed in ***Axon***. Nicol J found that "*the security markings [on the documents] do not… estop the Ministry of Defence from arguing that the Claimant did not in fact have a reasonable expectation of privacy in the information in which he relies*". Here the Article was not making factual allegations about the Claimant's conduct (as to which, the fact that they had been set out in a confidential document would not make them confidential/private); it was reporting UKLEB's assessment of the evidence they had obtained and their suspicions, based on that evidence, that the Claimant may have committed a criminal offence.

114. Mr Millar QC argues that if the reporting complained of relates wholly and exclusively to the Claimant's conduct in public roles, then Article 8 is not engaged: ***Yeo -v- Times Newspapers Limited*** **[2017] EMLR 1** [147]. He contends that the ECtHR has clearly recognised that businessmen actively involved in the affairs of large public companies are not private individuals and that they "*inevitably and knowingly lay themselves open to close scrutiny of their acts*": ***Steel -v- UK*** **[2005] EMLR 15** [94].

115. In response, Mr Owen QC submits that the sphere of private life under Article 8 extends to activities relating to one's professional and business life. These activities can, and often do, also relate to the sense of a person's personal fulfilment. It also covers activities involving the interaction between the State and the individual which, he submits, are analogous to the current situation: ***Peck -v- UK*** **[2003] EMLR 15**; ***R (C) -v- Commissioner of Police of the Metropolis*** **[2012] 1 WLR 3007**; ***R (Wood) -v- Commissioner of Police of the Metropolis*** **[2010] 1 WLR 123** and particularly ***PG -v- UK*** **(2008) 46 EHRR 51** [56]–[57].

116. Mr Millar QC also submits that the following legal principles also have a bearing on the case:

i) a person asserting that his/her Article 8 rights are engaged by the publication of material that may damage his/her reputation must demonstrate that the

attack is on his/her personal integrity and that it must attain a level of seriousness in a manner causing prejudice to personal enjoyment of the right to respect for private life: ***In re Guardian News & Media*** **[2010] 2 AC 697** [42]; and ***Axel Springer*** [83];

ii) once the public interest in a topic has been established, Article 10 protects the form of the reporting, including the decision to name the subject of the story: ***Khuja -v- Times Newspapers Limited*** **[2019] AC 161** [34]; and ***In re Guardian News & Media and others*** **[2010] 2 AC 697** [63]; and

iii) where the subject of the publication relates to a suspect in a police investigation, the public interest in reporting his/her identity is enhanced by the potential for such reporting to bring forward witnesses with information/evidence relevant to the investigation, including those who might rebut the allegations made against the suspect: ***Khuja*** [32].

117. The principal issue of contention between the parties is whether a person can have a reasonable expectation of privacy in the fact (and details) of a police investigation concerning him/her.

118. Mr Owen QC argues, principally on the basis of ***Richard -v- BBC*** **[2018] 3 WLR 1715**; **[2018] EMLR 26**, that the law has now recognised that, as a matter of general principle, a suspect does have a reasonable expectation of privacy in relation to a police investigation. Mr Millar QC submits that the present case is a long way removed from the facts of ***Richard*** and that the Judge's central finding was that the claimant had a reasonable expectation of privacy in information about the historic child sex abuse complained against him which was the subject of the South Yorkshire Police investigation. The Judge specifically concluded that the nature of the offence that was being investigated reinforced the reasonable expectation of privacy because of the damage that could be done if it were revealed (at [262]).

Does a person have a reasonable expectation of privacy in a police investigation into him/her?

119. There exists now a body of case-law in which this question has been addressed: ***Hannon -v- News Group Newspapers Ltd*** **[2015] EMLR 1**; ***PNM -v- Times Newspapers Limited*** **[2014] EMLR 30** (CA); ***ERY -v- Associated Newspapers Limited*** **[2017] EMLR 9**; ***ZXC -v- Bloomberg LP*** **[2017] EMLR 21**; ***Richard -v- BBC***; and ***Khan -v- Bar Standards Board*** **[2018] EWHC 2184 (Admin)** [47]. From these cases, it is possible now to say that, *in general*, a person does have a reasonable expectation of privacy in a police investigation up to the point of charge.

120. In ***Richard -v- BBC***, Mann J concluded:

> [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. It is, as a general rule, not necessary for anyone outside the investigating force to know, and the consequences of wider knowledge have been made apparent in many

> cases: see above. 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. This was acknowledged in ***Khuja -v- Times Newspapers Ltd***... The trial judge had acknowledged that some members of the public would equate suspicion with guilt, but he considered that members of the public generally would know the difference between those two things: see [32]. Lord Sumption JSC was not so hopeful. He observed, at [34]: '*Left to myself, I might have been less sanguine than he was about the reaction of the public to the way PNM featured in the trial.*' …
>
> [250] These judicial remarks demonstrate at least some of the reasons why an accused should at least prima facie have a reasonable expectation of privacy in respect of an investigation. They are particularly appropriate to the type of case referred to there (of which, of course, the present case is an instance) but they are generally applicable, to varying extents, to other types of cases.
>
> [251] That is not to say, and I do not find, that there is an invariable right to privacy. There may be all sorts of reasons why, in a given case, there is no reasonable expectation of privacy, or why an original reasonable expectation is displaced… But in my view the legitimate expectation is the starting point. I consider that the reasonable person would objectively consider that to be the case."

121. Several of the authorities have been substantially influenced by the practice and policy of police forces in the UK regarding the release of information regarding criminal investigations, and in particular the naming of suspects prior to charge. The College of Policing has adopted a policy that suspects should not usually be named prior to charge. In its *Guidance on Relationships with the Media* (2013), paragraph 3.5.2 provided:

> "… save in clearly identified circumstances, or where legal restrictions apply, the names or identifying details of those who are arrested or suspected of crime should not be released by police forces to the press or public. Such circumstances include a threat to life, the prevention or detection of crime or a matter of public interest and confidence…"

122. The revised guidance on *Media Relations*, issued by the College of Policing in May 2017, now contains the following:

i) under *Key Themes*:

> "The police service has a duty to safeguard the confidentiality and integrity of the information it holds and the rights of individuals to privacy. This duty must be balanced against the duty to be open and transparent…"

ii) under *Police and the media*:

"**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 e.g. a threat to life, the prevention or detection of crime or a matter of public interest and confidence."

iii) under *Arrests, charges and judicial outcomes*

"**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)[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.... In certain circumstances, this may include people who have failed to answer bail.

When someone is arrested, police can proactively release the person's gender, age, where they live (i.e., the town or city), the nature, date and general location of the alleged offence, the date of the arrest, whether they are in custody or have been bailed, and the subsequent bail date, or if they were released without bail or with no further action being taken. This should not apply in cases where, although not directly naming an arrested person, this information would nevertheless have the effect of confirming their identity.

The rationale for naming an arrested person before they are charged should be authorised by a chief officer and logged either by them or by the [Corporate Communications Department]. The authorising officer should also ensure the CPS is consulted about the release of the name.

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. It cannot and does not seek to prevent the media relying on information from sources outside the police in order to confirm identities.

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[1] Paragraph 239 of Sir Brian Leveson's report (*Inquiry into the Culture, Practices and Ethics of the Press,* November 2012 (HC 780-II)) contained the following recommendation:

> "… Police forces must weigh very carefully the public interest considerations of taking the media on police operations against article 8 and article 6 rights of the individuals who are the subject of such an operation. Forces must also have directly in mind any potential consequential impact on the victims in such cases. More generally, I think that the current guidance in this area needs to be strengthened. For example, I think that it should be made abundantly clear 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."

Responding to enquiries about arrests

If a name or names are put to the police with a request for confirmation of an arrest the response should be 'we neither confirm nor deny'. No guidance should be given. Police should not respond by supplying other information that, although not directly naming an arrested person, would nevertheless have the effect of confirming the person's identity…

To receive any information in response to an enquiry about an arrest, the media need to provide details sufficient to allow that arrest or incident to be traced, including location, date and type of offence. If confirming that an arrest has been made, police should always be clear that in doing so they are not confirming the identity of the arrested person.

Information about a police investigation or ongoing operation

Information can be proactively released to aid an investigation, with appeal points asking for the public's assistance, to maintain public confidence in policing activity, or where it is a matter of public interest. Forces should always consider the victim's wishes when releasing information relevant to them.

Responses to media enquiries about investigations or police activity should be open, honest and transparent. Clear reasoning should be recorded if a decision is made to withhold information because its release would have a detrimental impact on the investigation or operation. Individuals who are, or may be, involved in an investigation should not be identified and responses must be carefully worded so as not to identify such individuals. In some cases, this could mean that details of age or geography are not released…

Naming on charge

This includes those who receive a summons to court.

Those charged with an offence should be named unless there is an exceptional and legitimate policing purpose for not doing so or reporting restrictions apply. This information can be given at the point of charge. A decision not to name an individual who has been charged should be taken in consultation with the CPS…

If charges are withdrawn before someone first appears in court, forces should proactively release this information as soon as possible in order to be fair to the person involved, especially if a case has been previously publicised. Ultimately, the responsibility for accurate reporting lies with the media.

Identities of people dealt with by cautions, speeding fines and other fixed penalties – out-of-court disposals – should not be released or confirmed. Forces should say that 'a man' or 'a woman' has been dealt with and only release general details of the offence."

123. One of the reasons why the reasonable person would objectively consider that the suspect had a reasonable expectation of privacy is the existence of the policy of police forces not to name a suspect prior to charge. In ***PNM***, in the Court of Appeal, Sharp LJ stated that there was "*a growing recognition that as a matter of public policy the identity of those arrested or suspected of crime should not be released to the public save in exceptional and clearly defined circumstances*". The justification for this policy, as identified in the College of Policing guidance, was that naming suspects carried "*a risk of unfair damage to the reputations of those persons, particularly if they are never charged*". But there is also a wider public interest in maintaining the confidentiality of police investigations so as to ensure their integrity and effectiveness.

124. Nevertheless, an expectation of privacy in arrest/police investigation is not invariable. Whether it arises in any particular case will always depend upon the individual facts of that case. For example, if the suspect's name were to be released by the police – for legitimate policing reasons – then s/he may well find it difficult to establish that s/he had a reasonable expectation of privacy in that information. Equally, an armed bank-robber who held hostage a number of customers and employees in a televised 3-day siege, could hardly claim a reasonable expectation of privacy when s/he surrendered and was arrested.

Decision

Stage 1: reasonable expectation of privacy

125. In my judgment, the Claimant does have a reasonable expectation in the Information (defined in [106] above). I am satisfied that a reasonable person of ordinary sensibilities, placed in the same position of the Claimant, would consider that he had a reasonable expectation of privacy in the Information. My reasons for this conclusion are as follows.

i) Not all of the factors identified in ***Murray*** (see [110(iii)] above) are applicable in this case.

a) *Attributes of the Claimant*

It is correct that the Claimant held a senior position in X Ltd. But, against that, he was not a director of the company and he did not discharge any public (as opposed to private) function; he was not a politician, for example. I accept the Claimant's evidence that he achieved no particular public prominence in his role.

b) *Nature of the activity in which the Claimant was engaged*

The activity that UKLEB was investigating was whether the Claimant had been involved in corruption in relation to X Ltd's activities in the foreign country. Framed like that, there might be a strong argument that this was not something that would give rise to a legitimate expectation of privacy. But this is not the correct approach. The Claimant is not, by these proceedings, seeking to assert a privacy right over this alleged conduct. During the trial, Mr Owen QC repeatedly disavowed such a

claim. The Claimant, he submitted, was not arguing that the Defendant could not report, itself, on the matters that UKLEB were investigating. The Claimant's reasonable expectation of privacy was over confidential details of the UKLEB investigation, and in particular UKLEB's conclusions as to the Claimant's conduct as demonstrated by the evidence it had obtained.

c) *The place at which it was happening*

This is a factor that is likely to have more relevance to claims that relate to conduct or activities of a claimant that take place in a public or semi-public place. Insofar as it has a bearing on this case, the relevance is that none of the facts relating to the scope of UKLEB's investigation into the Claimant or the particular matters in respect of which UKLEB suspected the Claimant had been involved in criminal activity had been made publicly available by UKLEB. Prior to publication of the Article, they had remained confidential to UKLEB's investigation.

d) *The nature and purpose of the intrusion*

This factor does not have much if any resonance in this case. The facts relating to the public interest in reporting on matters connected with the allegations of corruption made against X Ltd are relevant, not to this factor, but to the justification for any interference with any privacy right the Court finds that the Claimant has.

e) *The absence of consent; whether it was known or could be inferred*

Mr Byrne, on behalf of the Claimant, had not stated, expressly, when he spoke to HYX prior to publication of the Article, that the Claimant objected to publication (see [38] above), but it must have been clear that the Claimant had not consented to publication.

f) *The effect on the Claimant*

The Claimant is an experienced businessman and, as such, appears to me to have developed some robustness and resilience. In his evidence, he described his reaction to the Article as one of outrage and anger. He said:

> "Suddenly, the fact that I was a suspect in the criminal investigation and [UKLEB's] beliefs about my actions were shoved into the public domain where anyone, including my family, friends and business contacts, could read them. I do not consider that Bloomberg had any right to publish this information about me, and to have done so online where it was accessible to anyone has been particularly damaging to me as an international businessman".

That is a complaint about loss of autonomy and damage to reputation. Both are dimensions of the Article 8 right. The Claimant gives further details of the impact of publication on him (which I consider in more detail in [145] below). Whilst I accept the publication of the Article has

had a negative impact on the Claimant, this is not a case in which the consequences of publication have been devastating or life-changing.

ii) In my judgment, by far the weightiest factor leading to my conclusion that the Claimant does have a reasonable expectation of privacy in the Information is the final factor identified in ***Murray***: the circumstances in which and the purposes for which the information came into the hands of the publisher. Insofar as the following matters do not neatly fit into this category, they are nevertheless important factors when the Court is considering all the circumstances of publication.

a) UKLEB is a law enforcement body. It was conducting a criminal investigation into X Ltd in which the Claimant was a suspect.

b) Although the fact of the UKLEB investigation into X Ltd was publicly known, the particular targets of that investigation and the identity of any individual suspects were not.

c) The clear public policy – reflected in the College of Policing Guidance – is that suspects in criminal investigations should not be identified prior to charge.

d) The LoR was (and should have been recognised by the Defendant to be) a highly confidential document, sent on a State-to-State basis as a request for MLA. As stipulated in the LoR itself, strict confidentiality was imposed to avoid prejudice to UKLEB's investigation that might be caused if the subjects of the investigation became aware, from the contents of the LoR, of the target(s) and focus of the investigation and took steps to frustrate it by interference with documents and/or witnesses. The Article was published *before* the date by which UKLEB had asked CA to respond to the LoR. This was not a historic request. As far as the Defendant was aware, it was an outstanding letter of request from UKLEB made in an ongoing criminal investigation.

e) Some of the confidential information in the LoR was particularly sensitive. As required by the Convention, UKLEB had to set out details of its investigation into X Ltd and, as part of this, the LoR gave a summary of UKLEB's suspicions and early conclusions based upon the investigations and evidence it had obtained up to that point. This information, which ordinarily would have circulated only internally within the UKLEB investigation and not disclosed more widely (even in any subsequent criminal proceedings), was necessarily at that stage provisional. As the investigation continued, any initial or preliminary conclusions of the UKLEB investigators might be revised or abandoned in light of later acquired evidence or information.

f) Public disclosure of this sort of information from an ongoing police investigation harms the public interest for two main reasons:

- it risks jeopardising the investigation by alerting potential suspects to the avenues of inquiry being pursued potentially enabling them to destroy documents or otherwise obstruct the investigation; and

- it potentially causes reputational harm to the suspects identified in the LoR. The contents of the LoR – and details of UKLEB's suspicions or conclusions based on the evidence they had obtained – would never be disclosed publicly. If one of the suspects was subsequently charged, details of UKLEB's case against him/her would enter the public domain as a result of the criminal proceedings. This would be evidence presented in open court, not the (provisional) conclusions or opinions of UKLEB. Importantly, in the context of a criminal trial, the relevant defendant would have a full opportunity to present his case in answer to the prosecution's evidence. It is not generally in the public interest for only one side of a case to receive publicity: ***Qadir -v- Associated Newspapers Limited*** **[2013] EMLR 15** [99]-[101].

g) Although the Claimant himself has not pursued his direct claim for breach of confidence in relation to the publication of the Information in the Article, the high-level of confidentiality that I find attaches to the Information is a very significant factor when considering whether he has a reasonable expectation of privacy in that Information. That factor is further strengthened by the fact that the LoR 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. When cross-examined, the Journalist did not accept Mr Owen QC's suggestion that he must have realised that the person who supplied the LoR was committing a criminal offence, but he did accept that it would be generally expected that details of an ongoing police investigation would be kept confidential.

h) Contrary to the findings made in the judgment on the interim injunction application (see [76]-[81] above), the publication of the Article (both threatened and actual) had provoked a serious adverse reaction from UKLEB. Although UKLEB's concern was the threat to the integrity and effectiveness of the investigation – rather than concern for the privacy interests of the Claimant – it is nevertheless a factor that reinforces the public interest in maintaining the confidentiality of police investigations.

Stage 2: public interest/Article 10 justification

126. I accept, without hesitation, that the issue of corruption in the [foreign country] and possible involvement in that corruption by X Ltd and its employees/officers is a matter of high public interest (not least for many of the reasons given by the Defendant – see [109] above). But this significant public interest has only an indirect bearing in this case. As Garnham J found at the interim injunction application, the Article was not presenting the fruits of an investigation by the Defendant into this alleged corruption. 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 UKLEB's suspicions based on evidence it had gathered.

127. When considering the public interest/Article 10, the assessment is of the strength of the justification for publishing the Information, derived from the LoR. What the Defendant must demonstrate is that there was a sufficient public interest in revealing information about UKLEB's investigation drawn from the LoR to outweigh the reasonable expectation of privacy that I have found that the Claimant had in relation to this information.

128. I accept that UKLEB's investigation into X Ltd was, itself, a matter of public interest. UKLEB is publicly-funded and charged with the investigation and prosecution of serious criminal offences. There is a clear public interest in the media following and reporting on developments in the UKLEB investigation. Discharging its role as 'watchdog', the media could legitimately be expected to highlight, for example, any perceived inadequacies in the investigation, undue delay or concern over the direction the investigation was taking. But the Article was making no such criticism of the UKLEB investigation. Information from the LoR was not published in the Article for this purpose.

129. In my judgment, when assessing whether there was a sufficient public interest to justify disclosure of the Information, the starting point is that, applying the clear principles from the authorities I have identified ([22], [111]-[113] above), 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. The confidential nature of the LoR (as apparent from its terms), and the circumstances in which it came into the possession of the Defendant, mean that the Defendant was bound generally to observe the confidentiality of the LoR. The fact that (a) none of the Defendant's staff apparently appreciated the highly confidential nature of the LoR; and (b) the Claimant has not pursued (and on the Defendant's case, cannot pursue) a claim for breach of confidence does not alter this fundamental position.

130. I recognise, of course, such confidentiality cannot be absolute. Interviews may have to be carried out of witnesses and possible suspects and, from those, the interviewees may gain an insight into the matters which are being investigated. Equally, there may be occasions when the public interest in maintaining confidentiality in the investigation might be outweighed by other considerations. If, for example, internal investigation documents were leaked to a journalist that suggested that the investigators had been subjected to improper political pressure not to pursue certain people or lines of inquiry, there could well be a strong public interest justifying publication notwithstanding the confidentiality. Necessarily, this is a highly fact-specific assessment and would involve a careful assessment of the justification for, and proportionality of, the interference with the confidentiality balanced against interference the right of freedom of expression. Ultimately, the question is whether any fetter on freedom of expression is 'necessary in a democratic society': ***Prince of Wales -v- Associated Newspapers Limited*** [67].

131. Of course, I am not considering whether there was a sufficient public interest to outweigh the confidentiality of the LoR generally; only whether there was a sufficient

public interest to outweigh the privacy interests that I have found the Claimant had in the Information.

132. The matters relied upon by the Defendant as providing a countervailing justification for the breach of the Claimant's privacy were identified in the Journalist's evidence (see [53] above). In my judgment, they do not (individually or collectively) provide such a sufficient countervailing justification to outweigh the Claimant's Article 8 rights.

i) Items (a), (b), (f), (g) and (i) go to support the general public interest in corruption in the foreign country and X LTD's standing. They have little or no bearing on whether there was a public interest justifying the publication of the Information.

ii) The concern identified in item (d) was not assisted by publication of the contents of the LoR. There was nothing to prevent the Defendant from publishing articles raising public awareness of the problems of corruption in the foreign country. The fact of the UKLEB investigation into X Ltd was already public knowledge, and could have been repeated in any such Article. Equally, there was nothing preventing the Defendant from investigating the issue and publishing what it discovered.

iii) Item (e) has no real weight. UKLEB is perfectly able, and is immeasurably better placed, to decide whether, and if so what, confidential information from the investigation should be released to encourage witnesses to come forward. Put shortly, it was not for the Defendant to make that decision. In particular, it was in no position to make an assessment whether the information from the LoR it published in the Article might do the UKLEB investigation more harm than good. In his evidence, the Journalist accepted that he was not able to assess whether publication of the Article would harm the UKLEB investigation. The principle from ***Khuja*** relied upon by Mr Millar QC ([116(iii)]), that there is a public interest in identifying those charged with criminal offences or named in criminal proceedings, does not have the same force in the circumstances on this case. In respect of the latter category, it is the principle of open justice that permits reporting of allegations of criminal conduct made against others in criminal proceedings. In respect of the former, there is no issue that a person cannot ordinarily have an expectation of privacy once s/he has been charged with a criminal offence. But that is not the position here. No charges had been brought against the Claimant.

133. Finally, applying the ***Re S*** ultimate balance, I must apply an intense focus to the comparative importance of the Claimant's Article 8 rights that I have found are engaged and the Article 10 rights of the Defendant (and the public generally), consider the respective justifications for interfering with or restricting each right, and make an assessment of the proportionality of the respective interference.

i) The justification for interfering with the Article 10 rights of the Defendant is the legitimate interest of protecting the Claimant's reasonable expectation of privacy in highly confidential information relating to an ongoing UKLEB investigation into him. Specifically, publication of UKLEB's assessment of the evidence it had so far obtained and what the investigators believed that the

evidence proved regarding the Claimant's alleged conduct represented a serious interference with the Article 8 right. Specifically, it was information that would ordinarily not have been made publicly available and more generally, the policy of the police is that, prior to charge, suspects in criminal investigations should not be identified. That policy expressly recognises that identification of suspects prior to charge risks causing "unfair damage" to reputation, particularly if they are not subsequently charged.

ii) In the assessment of the importance of the Article 8 right, I take into account that public concern had already been expressed about possible corruption in transactions involving X Ltd and that, given his role, this would inevitably raise questions in the minds of some as to the possible involvement of the Claimant. Nevertheless, there is in my judgment a significant qualitative difference between speculation about an individual's possible involvement in criminal activities and publication of ostensibly credible and genuine information from the criminal investigation as to the investigators' suspicions of a person's conduct based on the evidence they had obtained.

iii) The extent of the inference with the Article 10 right is limited. A restriction on the publication of the Information does not impinge upon the Defendant's ability to report generally on the issues of significant public interest concerning alleged corruption in the foreign country or specifically into the activities of X Ltd and the Claimant.

iv) That interference is necessary to secure the legitimate aim and, I am satisfied, is proportionate to that legitimate aim. The restriction of the Article 10 right is limited to the Information.

v) 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.

134. I do not derive much assistance from the factors identified in ***Axel Springer***. I am satisfied that the matters identified by the ECtHR are already accommodated in the domestic authorities, particularly ***Murray***, which guide the Court as to the proper approach in misuse of private information cases. I have considered these above and in particular the factors identified in ***Murray*** ([125]).

135. For these reasons, I find that the Claimant's claim for misuse of private information succeeds.

Remedies

Injunction

136. The Claimant has been consistent throughout this claim that the primary remedy he seeks is an injunction.

137. This is an unusual case. The interim injunction was refused on 22 February 2017. The Article has therefore been continuously available on the Defendant's website

since it was first published. Although it is not unprecedented, it is unusual for a claimant who has failed to obtain an interim injunction to pursue a claim to trial. This is a reflection of the practical reality in privacy cases; frequently, the fate of the interim injunction application determines the whole claim. One of the reasons for that is that if a claimant is unsuccessful, and the private information s/he was seeking to protect is published, the damage is done. Although the ECtHR has held that damages are capable of being an *effective* remedy in Article 8 claims (***Mosley -v- UK*** **[2012] EMLR 1** [120]), this does not displace the recognition in domestic law that damages in misuse of private information claims are unlikely to be an *adequate* remedy: ***PJS*** [41], [43]; ***Douglas -v- Hello! Ltd (No.3)*** **[2006] QB 125** [257], [259]; ***A -v- B*** **[2003] QB 195** [11(ii)]. Under English law, if a successful claimant is not granted an injunction, an award of damages is the *only* remedy available in misuse of private information claims.

138. Mr Millar QC for the Defendant submits that the Court should refuse an injunction for the following reasons:

i) The information complained of has been in worldwide circulation for nearly two years. Further, there is now much more information publicly available about alleged wrongdoing by the Claimant at X Ltd, by reason of [further matters].

ii) Even if an injunction were granted in this jurisdiction it would not prevent continued publication by the Defendant of the information in issue in the rest of the world.

iii) There is a heavy onus on the Claimant to show that the injunction he seeks would be of any meaningful value by way of protection of his Article 8 rights. Only then could it be justified as an interference with the Defendant's Article 10 rights to publish. This not a case like ***PJS*** where private information had been published by the media in the rest of the world impacting on a family living and working in this jurisdiction but not yet by the media in this jurisdiction.

139. I disagree. There is no evidence that there has been any publication of these further matters. It is impossible to know what will happen in the future. Should there be subsequent publicity of those matters the Claimant will have to accept those consequences. But that does not lead to the conclusion that an injunction should not be granted. The issues are quite different.

140. It is also correct that any injunction the Court does grant would not prevent publication by the Defendant outside England & Wales. It is for the Defendant to decide, editorially and as an exercise of its undoubted rights of freedom of expression, whether to continue to publish the Information in other jurisdictions following this judgment. But even assuming that the Defendant decided to do so, this would be one factor to be balanced against other considerations.

141. ***PJS*** is clear authority that this Court should not simply refuse an injunction to a successful claimant on the grounds that, because the Court cannot stop publication everywhere in the world, it should not prevent it anywhere. The consequences to the

rule of law from that proposition would be profound. Lord Mance (with whom Lord Neuberger, Baroness Hale and Lord Reed agreed) said [3]:

> "The court is well aware of the lesson which King Canute gave his courtiers. Unlike Canute, the courts can take steps to enforce its injunction pending trial. As to the Mail Online's portrayal of the law as an ass, if that is the price of applying the law, it is one which must be paid. Nor is the law one-sided; on setting aside John Wilkes's outlawry for publishing *The North Briton*, Lord Mansfield said that the law must be applied even if the heavens fell: ***R -v- Wilkes* (1770) 4 Burr 2527**. It is unlikely that the heavens will fall at our decision. It will simply give the claimant, his partner and their young children a measure of temporary protection against further and repeated invasions of privacy pending a full trial which will not have been rendered substantially irrelevant by disclosure of relatively ancient sexual history."

142. That was said in the context of an interim injunction pending trial. The position is *a fortiori* when the Court has found, *after* a trial, that the relevant publication should not be allowed.

143. After noting the important differences between actions for breach of confidence and misuse of private information in terms of what is sought to be protected by the grant of an injunction ([25]-[31]), Lord Mance approved Tugendhat J's statement in ***Green Corns Ltd -v- Claverley Group Ltd* [2005] EMLR 31** [78]-[79] that "*the question [is] not whether information was generally accessible, but rather whether an injunction would serve a useful purpose*" [26].

144. In my judgment, an injunction in this case does serve a useful purpose.

i) First, it represents the remedy that naturally follows from the Court's decision that the Information should not have been published by the Defendant. It is the most effective remedy and the Court should be slow to reach the conclusion that it can serve no purpose.

ii) Second, the evidence shows that the extent of publication of the Article has been limited. The Article has had just over 11,100 'hits', which in the context of mass media publications is a modest figure. The Article was republished (in whole or in part) by a number of online publications (some in languages other than English). I do not have any evidence on the number of people who have read these further publications. A three-paragraph article did appear on another website. It named the Claimant and stated that he was one of a number of individuals being investigated by UKLEB. Importantly, however, this article did not set out the detail of UKLEB's suspicions of illegal activity on the part of the Claimant. Apart from that, none of the secondary publishers could be described as 'mainstream' media and few appear to have any connection with the UK. In short, the evidence as to the extent of publication does not suggest that the Information has obtained such widespread coverage that no purpose would be served by granting an injunction.

iii) Third, the Claimant's evidence as to the impact of the publication of the Information on him was not challenged at the trial.

145. A further significant factor in favour of granting the Claimant an injunction in this case is my finding that, had Garnham J not been misled as to material facts and had he been provided with a copy of the LoR, it is likely that the Claimant would have been granted an interim injunction on 22 February 2017 (see [105] above). Had an interim injunction been granted, the force of Mr Millar QC's submissions to the effect that an injunction after trial can serve no purpose would be largely, if not entirely, removed. It cannot be right that a Defendant, who avoided an interim injunction on further publication, after the Court was deprived of highly material facts, can then rely on that further publication to resist the grant of a final injunction.

146. For these reasons, I am satisfied that, in principle, the Claimant is entitled to an injunction. I will invite the parties' submissions as to the appropriate terms of the injunction order.

Damages

147. In ***Richard -v- BBC***, Mann J identified five factors that should be taken into account in assessing general damages for misuse of private information: [350].

(a) Damages can and should be awarded for distress, any damage to health, invasion of the claimant's privacy (or depriving him of the right to control the use of his private information), and damage to his dignity, status and reputation: ***Richard -v- BBC*** [334]-[345]; ***Gulati -v- MGN Ltd*** **[2016] FSR 12** (ChD); **[2017] QB 149** [45] (CA).

(b) The general adverse effect on his lifestyle (which will be a function of the matters in (a)).

(c) The nature and content of the private information revealed. The more private and significant the information, the greater the effect on the subject will be (or will be likely to be). In ***Richard*** the Judge found that it was extremely serious. It was not merely the fact that an allegation had been made. The fact that the police were investigating and even conducting a search gave significant emphasis to the underlying fact that an allegation had been made.

(d) The scope of the publication. The wider the publication, the greater the likely invasion and the greater the effect on the individual.

(e) The presentation of the publication. Sensationalist treatment might have a greater effect, and amount to a more serious invasion, than a more measured publication.

148. Mr Millar QC takes issue with the submission that the Court can award the Claimant damages for damage to reputation as an element of the award in a misuse of private information case. He advances the following argument:

i) The Court of Appeal has held that reputational damages are only available in defamation and limited other torts which are premised on the falsity of information: ***Lonrho -v- Fayed (No. 5)*** **[1993] 1 WLR 1489**. The common law does not protect reputations built on a false basis. Any cause of action

entitling a claimant to damages for injury to reputation must therefore either allow the defendant a defence of truth (e.g. libel and slander) or must be founded on the act of a defendant that casts an imputation on the reputation of the claimant which, by definition, is not justified (e.g. malicious prosecution or false imprisonment): ***Lonrho,*** 1496 *per* Dillon LJ; 1502 & 1504, *per* Stuart-Smith LJ; and 1509 *per* Evans LJ.

ii) Reputation is protected at common law because it gives individuals who lack direct knowledge of the person concerned a basis on which they may regulate their conduct towards them ***Reynolds -v- Times Newspapers Ltd*** **[2001] 2 AC 127, 201** *per* Lord Nicholls. A reputation, in truth not deserved, does not provide a sound basis for doing this. Any cause of action in which damage to reputation can be claimed must permit (as a minimum) the Defendant to advance a defence of truth. There is no such defence in misuse of private information.

iii) It makes no difference that reputation is within the scope of ECHR Article 8. Contracting parties can choose how their domestic law should give effect to Convention rights, provided the rights are effective. The Convention does not prescribe causes of action. At common law, if reputation is alleged to have been damaged in circumstances in which the Article 8 right is engaged, a claim can be brought in defamation. The law of defamation will strike an appropriate balance between free speech and reputation/Article 8 through its familiar presumptions and defences.

149. In my judgment there is some force in Mr Millar QC's submissions, and care must be taken when assessing damages in misuse of private information cases.

i) There is no dispute that reputation is an aspect of the Article 8 right. The difficulty arises because English law accommodates the Article 8 right in different ways; the torts of defamation and misuse of private information (together with data protection laws) being the principal private law remedies. These causes of action cannot be neatly divided into their own compartments; they overlap. A particular publication may give rise to a claim for defamation, or misuse of private information, or both.

ii) Damages awarded in defamation claims serve three purposes: (a) compensation for the damage to reputation; (b) vindication of the falsity of the defamatory allegation; and (c) compensation for the distress, hurt and humiliation which the defamatory publication has caused (the so called 'solatium'): ***John -v- MGN Ltd*** **[1997] QB 586**, **607-608** *per* Sir Thomas Bingham MR.

iii) The truth or falsity of the information that forms the basis of a complaint of misuse of private information is generally irrelevant: ***McKennitt -v- Ash*** **[2008] QB 73** [86]. It *may* become an issue if it is raised by a defendant on the issue of public interest defence/Article 10.

iv) It is a fundamental principle in the law of defamation that damages and vindication of reputation should not be awarded on a false basis: i.e. where the defamatory allegation can be proved to be substantially or partially true: e.g.

Mackenzie -v- Business Magazine (UK) Ltd (unreported CA, 18 January 1996); ***McPhilemy -v- Times Newspapers Ltd*** **[1999] 3 All ER 775, 789c-d**; ***Burstein -v- Times Newspapers Ltd*** **[2001] WLR 579** [47], [60]. This principle is important in balancing the Article 8 and Article 10 rights. Looked at through this prism, the imposition of an award of damages for damage to reputation is an interference with the Article 10 right which cannot be said to be necessary to protect the Article 8 rights of another if the defamatory allegation is true.

150. It seems to me to follow from these principles that:

i) damages awards in misuse of private information claims cannot ordinarily include elements for compensation for damage to reputation and/or vindication of reputation (elements (a) and (b) from ***John***);

ii) to award damages for these elements whilst at the same time holding that the truth or falsity of the information is irrelevant is wrong in principle; insofar as any damages award were to be increased to reflect these aspects, the additional element is an unjustifiable interference with the Article 10 right of the defendant;

iii) if a claimant wishes to seek an award of damages that reflect elements (a) and (b), then a defendant would have to be permitted to defend as true any underlying defamatory allegations that fall within the claim for misuse of private information (or advance any other defence that would have been available had the claim been brought in defamation: cf. ***Rudd -v- Bridle & Another*** **[2019] EWHC 893 (QB)** [60(5)] *per* Warby J); and

iv) the element of *solatium* is an element common to damages awards in both defamation and misuse of private information. In support of his/her claim for damages in a misuse of private information claim, it is at least arguable a claimant is entitled to rely upon the element of distress and upset caused by his/her belief that the allegations are false and have damaged his/her reputation. The basis for this is that, *true or false*, it was a misuse of private information for the relevant information to have been published.

151. The tort of misuse of private information "*focuses upon the protection of human autonomy and dignity — the right to control the dissemination of information about one's private life and the right to the esteem and respect of other people*": ***Campbell -v- MGN Ltd*** **[2004] 2 AC 457** [51]. Of course, "*esteem*" is often bound up with aspects of reputation. It might be better to use the phrase "*damage to the standing of the claimant*" rather than "*reputation*" when referring to this element of privacy damages. But whatever it is called, in a misuse of private information claim a person cannot be awarded any element of compensation for harm to/vindication of reputation caused by the publication of defamatory statements if the defendant is not given the opportunity to defend the statements as true. That would be to award at least some element of damages on a false basis and be contrary to the principles that I have set out above.

152. In this case, the Claimant made an express concession that the truth or falsity of the underlying information in the LoR is not a relevant issue. In my judgment, the

consequence of that is, whilst he can legitimately rely upon the distress and embarrassment that he has felt as a result of the publication of the Information, he cannot be awarded any element of purely reputational damages.

153. The evidence on damages was not challenged by the Defendant.

i) The fact that the Claimant was outraged when the Article was published. It informed the world about the details of the confidential Letter of Request and that he was a suspect in the criminal investigation. He has had to confront the fact that the Article has been picked up and is liable to be reported in "Due Diligence" reports and he is concerned as to the impact that may have on him. He feels that the fact that the Article has remained online has had a negative impact on his family life. The fact that his wife has been upset by it has also angered the Claimant.

ii) In her statement, the Claimant's wife stated that the Claimant had been extremely distressed since the publication of the Article and that it has greatly affected his mood and his sleeping. He has become irritable and angry.

154. I exclude from my assessment of damages evidence the fact that some of the Claimant's bank accounts were closed after the Article was published. Arguably, this falls into the category of purely reputational damage, but I am not satisfied on the evidence that the action of the bank was caused by publication of the Article.

155. An assessment of damages for misuse of private information cannot be a scientific process. My assessment of the factors identified in [147] in this case is as follows:

i) I accept that the Claimant has been caused significant distress and anger by the publication of the Information and that it has negatively impacted his dignity and standing. The continued publication of the Information has aggravated that position. There is no evidence that it has affected his health. I have already noted his robustness and resilience (see [125(i)(f)] above).

ii) Apart from the impact on his family life, there is no evidence of wider impact on his lifestyle.

iii) As to the nature of the information, this was highly confidential information that disclosed the views of UKLEB on his alleged criminality. The Information was not limited to the fact that the Claimant was being investigated for possible involvement in serious criminal offences, it contained specific details as to the views of UKLEB on the evidence they had collected so far in their investigation and the degree to which it implicated the Claimant. Because the information was never intended to be published by UKLEB, it was by its nature entirely one-sided.

iv) The extent of the publication of the Information was limited but included some republication by secondary publishers. However, there has been only one example of another mainstream media organisation republishing any of the Information.

v) The presentation of the Information in the Article was not sensationalist; it was serious and measured. On the one hand, that has reduced the distress that the Claimant might have been caused had the presentation been different, but on the other the source of the Information – UKLEB – meant that the Information would be regarded as credible and therefore adds to the concern of the Claimant as to the lasting impact the disclosure of the Information may have on him.

156. Reflecting as best I can all of those factors, I consider the appropriate figure for damages is £25,000.