IN THE SUPREME COURT CASE NO UKSC 2020/0122

ON APPEAL FROM THE COURT OF APPEAL

(CIVIL DIVISION)

BETWEEN:

BLOOMBERG LP

Appellant/Defendant

-and-

'ZXC'

Respondent/Claimant

-and-

THE MEDIA LAWYERS ASSOCIATION

Intervener

SUBMISSIONS OF THE MEDIA LAWYERS ASSOCIATION

References in square brackets are to paragraphs of the open judgments of the Court of Appeal ('CA [x]') and Nicklin J ('J [x]').

INTRODUCTION

1. The Media Lawyers Association (the '**MLA'**) is an association of in-house media lawyers with broad membership from many of the UK's leading newspapers, broadcasters, book publishers, magazines and representative bodies. Its members include national, regional and local news media organisations across the UK.

2. The MLA sought permission to intervene in this appeal by Application Notice filed on 21 September 2021 on the ground that the present case raises important points of principle, whose resolution will have significant practical repercussions for freedom of expression and the media's Article 10 rights. At the time of drafting that application remains to be determined.

OVERVIEW

3. This appeal concerns a claim brought in the tort of misuse of private information ('**MOPI'**). The general approach the law takes to this cause of action is now well-settled and is, no doubt, the subject of little if any dispute. It is accurately summarised by Simon LJ in CA Open [42] in the following terms:

> *In summary, stage one of the enquiry is whether a claimant has a reasonable expectation of privacy in the relevant information? If the answer is yes, stage two involves an enquiry and evaluation as to whether that expectation is outweighed by a countervailing interest, in the present case Bloomberg's right to freedom of expression under article 10.*

4. In these submissions the MLA will refer to the two parts of this test as "Stage 1" and "Stage 2".

5. In this appeal the Supreme Court will consider, for the first time, the correct treatment of the rights protected by Articles 8 and 10 ECHR in the reporting of information that a person is the subject of pre-charge arrest or investigation by the state and, in particular, the approach by the Court below to the Stage 1 test and the potential impact of that approach on the Stage 2 exercise.

6. The MLA does not seek to duplicate the submissions of the Appellant, but to address the broader issues raised by the appeal and the impact of the law as it stands on both news and investigative reporting. In short summary, the MLA is concerned that:

   6.1. Cases involving state suspicion pre-charge have become an exception to the general law of misuse of private information, as articulated by the House of Lords in *Campbell v MGN* [2002] 2 AC 457 and subsequently by the Court of Appeal in Murray [2009] Ch 481, where the Stage 1 test is a multi-factorial exercise to be applied to the circumstances of each individual case. Instead, this category of information is now placed in an exceptional category benefitting from a *de facto* generic protection with very limited exceptions: CA Open [82]-[85] (the "generic protection rule").

6.2. This gives rise to problematic questions as to the scope of the privacy right in such cases, and its impact on the Stage 2 test, with a clear potential for chilling legitimate public interest reporting.

6.3. Properly understood the tort of defamation should, at least ordinarily, be the vehicle by which the law may provide a remedy for the harm to reputation which substantially underpins the generic protection rule.

6.4. Even if that is wrong, the Court of Appeal was incorrect to adopt the generic protection rule. This was an unjustified and over-expansive approach to what constitutes a reasonable expectation of privacy which has unduly weighted the balance against freedom of expression at both Stage 1 and 2 of the assessment.

6.5. Finally, the Court of Appeal was incorrect in its approach to the role of editorial discretion as an essential element of the test at Stage 2.

7. The submissions which follow are divided into two parts. The first addresses the MLA's primary contention that misuse of private information is not ordinarily the appropriate cause of action in cases where an individual is identified as the subject of state suspicion.

8. The MLA invites the Court to hold that the Courts below have erred in asserting that there is any "starting point" that a person the subject of arrest or investigation has a reasonable expectation of privacy in that fact, and that, generally, any such person must look to the law of defamation for a remedy.

9. The second part deals with the proper approach to the two-stage test for MOPI in state suspicion cases if, contrary to that primary contention, cases involving the identification of those who come under suspicion by the state are properly to be addressed by the MOPI tort.

SUBMISSIONS

A. The wider context

10. The issue engaged by this appeal is the correct treatment of the rights protected by Article 8 and Article 10 ECHR in the following immediate context:

[1] Investigation (pre-charge in the case of criminal investigations)

[2] Arrest

[3] Whenever an individual is identified in the context of [1] or [2].

11. Coverage of pre-charge investigative activity (including arrest) by organs of the state is a significant and legitimate feature in both news and investigative reporting.[1] Media interest in this context is most commonly directed at persons and institutions with substantial public-facing roles or responsibilities.

12. Legal precedent has recognised the following principles by way of background:

    12.1. News is a perishable commodity, produced by journalists and editors who make decisions about the publication of information under considerable time pressure (see *Reynolds v Times Newspapers Limited* [2001] 2 AC 127 (HOL), per Lord Nicholls [205] and Lord Steyn [215]).

    12.2. Names are an essential component of engaging journalism as recognised by Lord Roger in *In Re GNM* [2010] 2 AC 697, [63] and the statements of principle from the ECtHR there cited. They give credibility and context to a story, and without them the impact is much reduced: (*Jameel v Wall Street Journal Europe* [2007] 1 AC 359, per Lord Scott [142] and Baroness Hale [148]).

    12.3. Further, individuals are often significant in the terms of the positions they hold and the associated responsibilities. The risks of false identification, if names are not given, is further addressed below.

    12.4. News and investigative reporting is not merely an exercise of the right of freedom of expression but reflects a positive duty to impart information on matters of public interest with a corresponding right of readers and viewers to receive it: see the ECtHR authorities discussed below and in *In re GNM* at [49] and *Jameel,* in particular per Baroness Hale at [146] and Lord Scott at [128]-[138].The law takes an expansive view as to the public interests served

[1] Axel Springer (2012) 55 EHRR 6 at [96]

by freedom of expression. In *Reynolds v Times Newspapers Ltd* ([2001] 2 AC 127 (CA) 176-6, Lord Bingham explained

> *We do not for an instant doubt that the common convenience and welfare of a modern plural democracy such as ours are best served by an ample flow of information to the public concerning, and by vigorous public discussion of, matters of public interest to the community. By that we mean matters relating to the public life of the community and those who take part in it, including within the expression "public life" activities such as the conduct of government and political life, elections (subject to section 10 of the Act of 1952, so long as it remains in force) and public administration, but we use the expression more widely than that, to embrace matters such as (for instance) the governance of public bodies, institutions and companies which give rise to a public interest in disclosure, but excluding matters which are personal and private, such that there is no public interest in their disclosure. Recognition that the common convenience and welfare of society are best served in this way is a modern democratic imperative which the law must accept.*

B. Preliminary questions as to the scope of the Court of Appeal's approach to the Stage 1 test

13. The Court of Appeal's general rule that a reasonable expectation of privacy attaches is on its express terms confined to criminal investigation by any "organ of the state". However, if reputational harm is a justified rationale for this rule, there is concern that it may be deployed to support a yet further unjustified extension to early investigation by professional or financial regulators with a statutory basis (such as the Solicitors Regulatory Authority, Bar Standards Board or Financial Conduct Authority) or indeed to other non-statutory bodies with obvious public facing responsibilities (e.g. sporting disciplinary bodies). The media regularly report on the investigation of named individuals in many contexts such as these in advance of formal complaint. These bodies often consider allegations of serious misconduct.

14. The MLA submit that persons with public facing roles or responsibilities should ordinarily accept that in a modern democracy they have no general reasonable expectation of privacy in the fact of investigation by the state (which may take

many months and not infrequently years) or in arrest or in investigation by professional bodies in relation to carrying out of those roles or duties.

15. There are also no clear identifying factors for the exceptions to the generic presumption at Stage 1, bearing in mind Simon LJ's statement that "*the reasonable expectation of privacy is not in general dependant on the type of crime being investigated or the public characteristics of the suspect (for example, engagement in politics or business)*". Electoral fraud engages a particular public interest, but so do many other forms of actual or suspected wrongdoing as in the political, industrial, environmental or business contexts, which the ordinary citizen would not regard as private. If there is a public interest in pointing out that an individual is not being investigated by the state, when he or she should be, there is a parallel public interest in being accurately informed about who is being investigated by the state for what in such a context. Rioting is another stated exception in Simon LJ's judgment presumably because it takes place in public and there are many witnesses, but why, as an example, should manipulation of the LIBOR rate be treated differently for these purposes.

16. The problem of jigsaw identification is a very real one for editors who must have regard for what information already exists in the public domain and what is likely to be known to those close to the suspect. If jigsaw identification applies,[2] even reporting the fact of an arrest without a named individual may be actionable. Similarly, where an individual's misconduct has been widely reported (perhaps as a result of prior media investigation), it may then become impossible to report the fact that an investigation has commenced, or an arrest has been made, for fear that they will be identifiable by reference to previous coverage.

[2] Perhaps surprisingly, the question of what constitutes sufficient identification of the Claimant in a misuse of private information claim does not appear to have been the subject of detailed judicial determination, although in *OPO v MLA* [2015] EMLR 4 the Court of Appeal considered the related issue of whether information "related to" the claimant at [39] and [45] . Recent first instance decisions in the related field of data protection have seen a trend of applying principles for determining meaning taken from the law of defamation (*Aven v Orbis Business Intelligence* [2020] EWHC 1812 (QB)). There is a helpful overview of how the law of defamation approaches the issue of identification (including "reference innuendo") in *Monir v Wood* [2018] EWHC 3525 (QB), Nicklin J [95]-[110]

17. At a recent hearing the Court of Appeal's judgment was (albeit unsuccessfully) deployed to argue that individuals named on indictments in criminal proceedings (who have not been charged) should not be named unless and until they are charged, and that their names should be withheld from a sentencing hearing (*SFO v Lufkin and Petrofac Ltd* (HHJ Taylor), unreported, Southwark Crown Court, 29 September 2021).

18. For these various reasons, the MLA questions whether the exceptions cited by way of example by the Court of Appeal sufficiently satisfy the requirements of legal certainty (see *Sunday Times v UK* (1979-80) 2 EHRR 245, [46]-[53]).

C. Whether the correct remedy for reputational harm in this context is provided by the law of defamation

19. No such uncertainty arises if the appropriate remedy is to be found in the law of defamation for coverage of the kind discussed above. This was a substantial element in the Appellant's application for permission to appeal, whose submissions are adopted by the MLA and not repeated at length here.

20. This tort has been the subject of extensive statutory adjustment in the Defamation Act 2013, after the fullest consultation with all sides of the debate.[3] There was no suggestion that allegations of arrest or investigation warranted particular protection.

21. Parliament has addressed the need (or its absence) for exceptional protection for reputation in related contexts, e.g. (i) imposing reporting restrictions in respect of pre-charge allegations against teachers in s.11 of the Education Act 1997 (ii) the repeal of anonymity for those accused of rape[4] by the Criminal Justice Act 1998; and, (iii) the 2010 decision, by the Coalition Government, not to reinstate

[3] The Report of the Joint Committee on the Draft Defamation Bill is available at https://publications.parliament.uk/pa/jt201012/jtselect/jtdefam/203/203.pdf and the Governments' response is at https://www.parliament.uk/globalassets/documents/joint-committees/draft-defamation-bill/government-response-cm-8295.pdf.

[4] As had been provided by s.4 of the Sexual Offences (Amendment) Act 1976

anonymity for defendants in rape cases following a review of the evidence.[5] What Parliament has not done is to provide a general pre-charge anonymity for those suspected of crime.

22. There have been major changes in operational guidance produced by the police in response to criticism of their decisions to release information about suspects, but the role of the media is quite distinct from that of the police.

23. In these cases, reputational harm has been central to the reasoning at the first stage[6] yet the claims have proceeded in MOPI. There are two principal concerns to which the MLA would draw particular attention.

24. First, MOPI has no regard for differences of language and meaning which is an essential part of a tort concerned with reputational harm:

    24.1. In defamation, editors make decisions on the basis of what the reasonable reader would understand the words to mean – and that is the criterion applied by the Courts in relation to that tort as the very first substantive step.[7]

    24.2. How the reasonable reader generally approaches a report of suspicion or investigation is reasonably settled see *Lewis v Daily Telegraph* [1964] AC 234, per Lord Devlin at 286: "*If the ordinary sensible man was capable of thinking that wherever there was a police inquiry there was guilt it would be almost impossible to give accurate information about anything: but in my opinion he is not*".

    24.3. It is incoherent to apply a different criterion to the import of media coverage by framing the claim in privacy on the basis that reputational harm will result from the reaction of an unreasonable reader insensitive to the

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[5] See https://www.parliament.uk/business/publications/research/key-issues-parliament-2015/justice/anonymity-for-defendants/; and https://www.justice.gov.uk/downloads/publications/research-and-analysis/moj-research/anonymity-rape-research-report.pdf.

[6] This is seen most clearly in *ZXC* (CA Open at [61], [82] and [84]) but also in the authorities cited in support of that position from [58]ff (Mann J in *Richard v BBC* [2019] CH 169, at [248] and the extrajudicial statements by Treacy LJ and Tugendhat J and Sir Richard Henriques). It can similarly be seen in the rationale for the generic protection approach as explained by Warby J in *Khan v BSB* [2018] EWHC 2184 (Admin) [47].

[7] The principles are well known: *Stocker v Stocker* [2020] AC 593. For a discussion of the practical application of this principle in case management terms see *Bokova v Associated Newspapers Ltd* [2018] EWHC 2032, per Nicklin J at [8]-[10].

presumption of innocence. *If*, of course, an article overstates the position (by on its own terms suggesting guilt or strong suspicion)[8] then that is what the newspaper would have to prove for the purposes of a truth defence. Mr Jefferies' successful defamation actions are a case in point.[9] Libellous allegations of actual or suspected criminal conduct can attract very substantial awards of damages.

25. Second, Article 8 cannot be relied upon to complain of a loss of reputation which is the result of one's own actions (e.g. the commission of a criminal offence): *Axel Springer v Germany* (2012) 55 EHRR 6 at [83].[10] It is difficult to reconcile this with a tort where truth or falsity is generally irrelevant (*McKennitt v Ash* [2008] QB 73 (QB)).

26. A publication which reports an arrest or investigation may, in context, suggest grounds for investigation, suspicion or guilt in ascending order of seriousness. In the libel context, a defence of truth to an allegation of suspicion cannot be made out by proving the existence of that suspicion: it is necessary to prove the existence of an objective foundation for that suspicion, focused on the claimant's conduct (the so-called conduct rule, see *Shah v Standard Chartered Bank* [1999] QB 241). If the media can prove the substantial truth of the relevant sting, *Axel Springer* would be circumvented if the claimant can obtain a remedy in reliance on a privacy right.

27. This second concern is reflected in two recent first instance decisions rejecting reputational harm as head of loss in privacy claims: *ZXC* at first instance (J Open [147]-[152] and *Sicri.* In both cases, the Court rejected a claim for general damages for harm to reputation. Such damages had been awarded to the successful claimant in *Richard v BBC*, although it could be said that the coverage in that case was in some respects intrusive in the conventional sense.

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[8] See *Chase v News Group Newspapers Ltd* [2003] EMLR 11

[9] https://www.theguardian.com/media/greenslade/2011/jul/29/joanna-yeates-national-newspapers and see *Khuja v Times Newspapers Ltd* at [49].

[10] This principle was recently reiterated by the Court in *ML and WW v Germany,* 60798/10 and 65599/10, 28 June 2018 at [88]. The Court there emphasised the well-established principle that "*in order for Article 8 to come into play, however, an attack on a person's reputation must attain a certain level of seriousness and in a manner causing prejudice to personal enjoyment of the right to respect for private life*".

28. If the law bases the reasonable expectation of privacy at Stage 1 on reputational harm, it is very difficult to see why it should be impermissible to recover damages for such harm, if liability is established. The MLA submits that Warby J was right to reject the availability of reputational damages in this tort for the reasons he gave at [152]-[163]. The same reasons explain why the correct remedy in a claim premised on the Article 8 right to reputation is to be located in the domestic law of defamation.

29. Third, there is the important issue of the correct approach to prior restraint. Applications for interim injunctions in privacy claims are governed by s.12(3) of the Human Rights Act 1998 (as considered in *Cream Holdings v Banerjee* [2005] 1 AC 53) which provides that:

> *No such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed.*

30. By contrast, in defamation, applications for interim injunctions are subject to the rule in *Bonnard v Perryman* [1891] 2 Ch 269 which holds that an interim injunction will not generally be granted where the defendant intends to prove the truth of the allegation (or advance another substantive defence) unless it can clearly be shown that that such defence is bound to fail.

31. This rule was considered by the Court of Appeal in *Greene v Associated Newspapers Limited* [2005] QB 972, where the claimant argued that s.12 HRA 1998 required the Court to reject the strictures of the rule and adopt a more flexible approach. That argument was dismissed by the Court, notwithstanding the accepted position that reputation is a value which may benefit from protection under Article 8.

32. It is also well established that the Court should not grant an interim injunction applying a lower threshold test where the "nub" of the claim is the protection of reputation: see the cases reviewed in *Hannon v NGN* [2015] EMLR 1 at [32]-[64]. In such a case, the Court may dismiss the application as an abuse of process (where the alternate cause of action has been chosen to avoid the strictures of the rule in *Bonnard v Perryman*) or should apply the stricter rule.

33. If reputational harm cannot sound in damages in MOPI, it is submitted that it is again incoherent for prior restraint to be determined by reference to the test which applies to privacy rather than defamation claims.

D. Other established restrictions

34. In circumstances where genuinely confidential documents are leaked to the media there *may* be a traditional claim for breach of confidence subject to any argument based on the public domain or a countervailing public interest.[11] The extension of MOPI in response to concerns about the confidentiality of underlying documents is therefore unnecessary.

35. Another obvious restriction on any coverage from the time of arrest is the strict liability rule under section 2 of the Contempt of Court Act 1981 (see further 56.2 below).

E. The approach at Stage 1

36. These submissions assume, contrary to the MLA's primary submission, that the defamation argument does not prevail and that the tort of misuse of private information is generally available on the basis of the potential reputational harm which disclosure may cause.

37. Stage 1 of the conventional approach requires a court to consider whether an individual has a reasonable expectation of privacy in the information complained of. That requires a close focus on the position of the Claimant. As Lord Hope explained in Campbell v MGN Ltd:

> *The mind that has to be examined is that, not of the reader in general, but of the person who is affected by the publicity. The question is what a reasonable person of ordinary sensibilities would feel if she was placed in the same position as the claimant and faced the same publicity.*

[11] See for example *Hellewell v Chief Constable* [1995] 1 WLR 804 (QB) where the claim for breach of confidence arose not from disclosure of the fact of an investigation but of a photograph taken of the suspect in custody.

38. The approach to the exercise was summarised by the Court of Appeal in *Murray v Express Newspapers* [2009] Ch 481 at [36] by reference to a non-exhaustive list of factors including:

> *The attributes of the claimant, the nature of the activity in which the claimant was engaged, the place at which it was happening, the nature and purpose of the intrusion, the absence of consent and whether it was known or could be inferred, the effect on the claimant and the circumstances in which hand the purposes for which the information came into the hands of the publisher.*

39. Those factors illustrate the central point identified by the Court: that "*the question of whether there is a reasonable expectation of privacy is a broad one, which takes account of all the circumstances of the case*" (see also *Re JR 38)*.[12]

The appropriateness of radical change

40. Both the Court of Appeal and the Judge below expressly acknowledged the *Murray* factors in their judgments, but the "generic protection rule" represents a significant departure from this multi-factorial approach as is apparent from the express exclusion in CA Open [82] of factors which the MLA submits are plainly relevant "circumstances of the case" namely, the type of offence being investigated, the context in which it is said to have arisen (e.g. business, politics etc), and the public-facing characteristics of the suspect and the matter under investigation.

41. The underpinning for the general rule rests heavily on the extrajudicial pronouncements of (a) Sir Brian Leveson in the Report of his Inquiry into the Culture, Practices and Ethics of the Press, (b) Treacy LJ and Tugendhat J in their response to the Law Commission consultation on Contempt of Court, (c) Sir Richard Henriques and (d) the College of Policing Guidance which is cited in CA Open [78]-[79].

42. As to these:

[12] There is a danger that the so-called "Murray factors" become a straightjacket: they are not a checklist, and they do not delimit the scope of the court's assessment at Stage 1. See by way of parallel this Court's discussion of the dangers of "checklists" in the context of the defence under s.4 of the Defamation Act 2013 in *Serafin v Malkievitz* 2020 UKSC 23.

42.1. (a), (b) and (d) of those documents have the same common thread (the Leveson Inquiry itself).

42.2. They were, understandably, prompted by extreme cases: notably that of Christopher Jefferies[13] (where the publications were both contempts of Court and indefensible libels) and, in the case of the Henriques report, the Metropolitan Police's handling of the false allegations made by Carl Beech ('Nick') in Operation Midland.

42.3. All concerned the circumstances in which the police can be permitted to disclose information about a suspect. The position in respect of the media is plainly different, not least because the police have no Article 10 rights and the media have their own duties as the 'public watchdog'. None of these statements consider the essential question of whether (and if so how) the concerns which prompted them should be addressed in the context of private law rights against journalistic entities.

42.4. In any event, reliance on these places the cart before the horse for the reasons given by the Appellant in its grounds at paragraph 68.

43. There are deeper semi-constitutional concerns as to the desirability of the generic rule, in circumstances where blanket privacy protection places a veil over exercise of the coercive power of the state at the pre-charge stage, including arrest and search and seizure.

44. Further, it was unnecessary for the Court of Appeal to adopt the generic protection approach to reach its decision.

F. The effect on Stage 2

45. There remains Stage 2. However, the exclusion, or diminution, at Stage 1 of key Murray factors such as the nature of the actual or suspected offence, the position and responsibilities of the claimant, and the wider context, to the point of creating a reasonable expectation of privacy in almost all cases, will inevitably make Stage

[13] See footnote 9 above

2 extremely difficult to satisfy for the media with a consequent chilling effect. It is those very factors which would (and should) ordinarily carry weight at Stage 2. This is the inevitable consequence of Simon LJ's observation in CA Open [82] that "*To be suspected of a crime is damaging whatever the nature of the crime; it is sensitive personal information and there can be little justification for a hierarchy of offences giving rise to suspicion*".

46. However sensitive the information may be, another factor which will vary with the circumstances is the risk of false identification and uninformed speculation posed by an anonymised report. That may be highly material by the same token (see *Flood v Times Newspapers Limited* [2012] 2 AC 273, Lord Phillips PSC at [72]-[74]).[14]

47. There are obvious cases where such an approach to Stage 2 cannot reflect the public's legitimate expectation, and right, to know: those involving elected officials or environmental crime are cases in point, as are those involving financial crime, particularly where the alleged criminal activity has wider economic consequences, including job losses, or interacts with public finances or the political sphere.[15]

48. The Court of Appeal's exclusion or weakening of these factors from the assessment is contrary to authority, as identified by the Appellant in its Grounds of Appeal at [58]-[59]. In addition, in *Axel Springer* at [91] (itself, in part, an arrest case) the ECtHR made the following observation about the essential relevance of the role of the applicant:

> *The role or function of the person concerned and the nature of the activities that are the subject of the report and/or photo constitute another important criterion, related to the preceding one. In that connection a distinction has to be made between private*

[14] See also, in the separate context of open justice and court reporting, paragraph 5.4 of the Judicial College Guidance on Reporting Restrictions in the Criminal Courts.

[15] See as an illustrative example the SFO's 14 May 2021press release confirming its investigation into the Gupta Family Group Alliance including its financing arrangements with Greensill Capital UK Ltd. Both the GFGA and Greensill are companies intrinsically linked, as a matter of common knowledge, with specific natural persons who following the Court of Appeal's decision can presumably assert Article 8 rights in respect of the reporting of this investigation (https://www.sfo.gov.uk/2021/05/14/sfo-confirms-investigation-into-gupta-family-group-alliance/). The SFO's announcement does not appear to reflect a "policing purpose" other than the (essential) purpose of informing the public that the investigation is ongoing.

individuals and persons acting in a public context, as political figures or public figures. Accordingly, whilst a private individual unknown to the public may claim particular protection of his or her right to private life, the same is not true of public figures. A fundamental distinction needs to be made between reporting facts capable of contributing to a debate in a democratic society, relating to politicians in the exercise of their official functions for example, and reporting details of the private life of an individual who does not exercise such functions.

49. It is to be noted, in this context, the ECtHR's expansive approach to the concept of a "public figure" in that case, holding (at [99]) that the applicant was sufficiently well known as an actor to qualify as a public figure, and that this "*consideration thus reinforces the public's interest in being informed of [his] arrest*". In many cases the public-facing role of the claimant will be of much stronger legitimate interest to the public than in the *Axel Springer* case.[16]

50. In the defamation context, the presence of public facing responsibilities and/or the public facing nature of an alleged crime would be a significant factor in any assessment of a defence of publication in the public interest under s.4 of the Defamation Act 2013, where the reasonable belief of the publisher that publication is in the public interest is the central consideration. That is apparent from the pre-2013 Act authorities, in particular *Flood* (per Lord Phillips at [68] and Lord Mance at [155] and [179]).[17]

Impact on reporting of the media's own investigations

51. The current approach directly stifles the media's ability to report its own investigations in any case where those investigations lead to investigation or other pre-charge activity by the authorities. It is not disputed in this case that the Claimant had no reasonable expectation of privacy in respect of Bloomberg's own reporting of allegations against them (see J Open [125(i)(b)]).

52. Where the media have investigated actual or suspected misconduct and are prepared to name names the public has a positive right to know whether the police

[16] See for example *Yeo v Times Newspapers* [2015] EWHC 3375 (QB) and *Axon v MoD* [2016] EMLR 20
[17] Serious reputational harm being presumed in any case where the section 4 defence would be considered.

(or indeed any relevant regulator) has taken action in response. In this way the law should reflect what was said by the ECtHR in *Axel Springer* that the public "*do, in principle, have an interest in being informed – and being about to inform themselves – about criminal proceedings, whilst strictly observing the presumption of innocence*" (at [96]).

53. The observation (at [62]) that *in general* those who are arrested would suffer "*'irremediable damage' to reputation*" and "*the 'most dreadful unhappiness and distress'*", language which is taken from Sir Richard Henriques' Report, is a one-sided view of the problem and a generality. It also ignores the real possibility that the distress may be self-inflicted. If, for example, a tycoon is under investigation for misuse of his company's pension fund, and his or her conduct reasonably gives rise to that suspicion, it is wholly unclear why distress should be a decisive factor at stages 1 or 2.

Other factors militating against the justification for protection

54. The current approach gives a role to the police in deciding which suspects should be named ("*legitimate policing reasons*" being an accepted exception to the generic protection).[18] This law enforcement exception is premised on a genuine public interest consideration but fails to recognise both the related and the different public interests which may underpin media publication. Investigation often takes many months or years, especially in complex cases where public-facing misconduct is at stake, and some witnesses will prefer to approach the media rather than the police. Even where law enforcement concludes that on the evidence there are insufficient grounds for a criminal investigation to be pursued, and so do not appeal for witnesses, a report of the investigation may still serve this public interest in encouraging witnesses to report to the media information about similar conduct which while it may not be criminal is nevertheless seriously improper or unethical. The fact of the investigation (if closed) remains a vital part of that story. It reassures those who might have evidence that previous witnesses were treated

[18] J Open [124], CA Open [85] and see also the discussion of "shaking the tree" in *Richard* at [252].

seriously, or because the closing of an investigation may provoke witnesses to come forward who would otherwise perceive a risk of injustice.[19]

55. This recognition that the media play a role distinct in society from the police underlines a further public interest overlooked in the Court of Appeal's judgment: that of deterrence. Reporting of investigations by an independent media operates as a deterrent: it demonstrates that matters are looked into by the authorities. Names are an essential facet of such reports for the reasons given, and – in the case of public facing individuals – in reinforcing public confidence that nobody is above the law.

56. Finally, the MLA submits that the Supreme Court should have regard to:

    56.1. The fact that the relevant privacy codes (the Editors' Code of Practice as applied by IPSO and the OFCOM Broadcasting Code) do not contain any general right of anonymity pre-charge (whether as a starting point or otherwise): s.12(4)(b) HRA 1998.

    56.2. The fact that in the majority of cases (and in particular those which follow arrest) the strict liability rule for contempt will operate as a check against sensationalist or prejudicial reporting of an arrest or pre-charge investigation, and that the law recognises that "*Journalists and their editors will strive to avoid any publication which risks putting them in breach of the strict liability rule*" (*In re BBC* [2018 1 WLR 6023 (CA) per Lord Burnett CJ at [32]). To this extent, the law of contempt operates as a check against publicity of a kind which might be thought most likely to cause the sort of reputational harm which has concerned the Courts below. Further, the law of defamation provides remedies including substantial damages, injunctive relief and declarations of falsity if individuals are wrongly placed under suspicion.

[19] If A reads that the police have closed an investigation into B because of insufficient evidence this may prompt A to come forward with her evidence of B's treatment of her. Note that this is the case irrespective of (a) whether the report of the investigation criticises its handling by the police or even (b) whether there are grounds for such criticism.

56.3. The role of the law of confidentiality is also material for the reasons outlined at paragraph 34 above.

57. The MLA endorses the criticisms made of the Court of Appeal's reasoning at Stage 2 in Grounds 2 and 3 of the Grounds of Appeal. Again, to avoid repetition, these submissions focus on two interrelated concepts of considerable importance for the media generally: "journalistic duty" and the need to make allowance for editorial discretion.

58. The Strasbourg Court has repeatedly emphasised that the press disclose information not just as an exercise of a right but pursuant to a duty, see *Jersild v Denmark* (1995) 19 EHRR 1 at [31] (emphasis added):

> *…freedom of expression constitutes one of the essential foundations of a democratic society and that the safeguards to be afforded to the press are of particular importance (ibid.). Whilst the press must not overstep the bounds set, inter alia, in the interest of "the protection of the reputation or rights of others", **it is nevertheless incumbent on it to impart information and ideas of public interest**. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of "public watchdog".*

59. As the Court has emphasised that this duty is a duty to impart information consistent with the press' "obligations and responsibilities": *Fressoz and Roire v France* (2001) 31 EHRR 2. This imparts into the Article 10 analysis principles of journalistic ethics or responsible journalism.

60. In *Fressoz,* the applicants had been convicted after publishing the documents. Although the information in these documents was lawful and its disclosure permitted, the documents themselves were confidential. The Court held the conviction was an unjustified interference with Article 10: although the protection of confidentiality was a legitimate aim, the operation of the principle of journalistic duty (and the public's right to know) protected the applicants' "*rights to divulge information on issues of general interest provided that they are acting in good faith and on an accurate factual basis and provide 'reliable and precise' information in accordance with the ethics of journalism*" (at [54]). As the Court held, the underlying subject matter

(information as to M. Calvet's income) did contribute to a debate of general public importance and its publication was justified in order to corroborate the terms of the article and was relevant to the "*credibility of the information supplied*" [55].

61. The MLA's members therefore have a duty to impart information on matters which contribute to a debate of general interest. The media cannot discharge its obligation as a watchdog if it cannot adequately report on the activities of organs of the state exercising pre-charge powers of investigation and arrest and fulfilment of this duty serves separate public interests (outlined above) in encouraging the free flow of information about misconduct and acting as a deterrent.

62. As the discussions in *Flood* and *Jameel* illustrate, this understanding of a journalistic duty to impart information in the public interest in accordance with principles of responsible journalism underpinned the development of *Reynolds* privilege. In that context, the importance of the concept of editorial discretion was key and underpinned the House of Lord's conclusion that publication of both Mr Jameel and Mr Flood's names (in both cases in the context of reports of state suspicion) was in the public interest and privileged.[20]

63. *Reynolds* privilege was abolished by the Defamation Act 2013. The twin concepts of journalistic duty and editorial discretion are, however, retained by s.4 of that Act, both in the requirement to show "reasonable belief" in the public interest in order to establish the defence and, expressly, in s.4(4) which provides that:

> *In determining whether it was reasonable for the defendant to believe that publishing the statement complained of was in the public interest, the court must make such allowance for editorial judgement as it considers appropriate*

64. The requirement to show "reasonable belief" is echoed in the exemptions for freedom of expression which are found in Schedule 1 Paragraph 13 and Schedule 2 Paragraph 26 of the Data Protection Act 2018. Both provisions are designed to safeguard Article 10 rights. The latter provision provides a wide-ranging protection for journalism, whereas the former provides additional and specific

[20] See *Jameel* per Lord Bingham at [33], Lord Hoffman at [51] and Lord Hope at [108]; *Flood* per Lord Mance at [132]-[137] and Lord Dyson at [194] and [199].

protection in circumstances where the journalism is concerned with alleged or established unlawful acts, dishonesty, malpractice or other allegations of impropriety or unfitness (doubtless reflecting Parliament's recognition of the specific public interest role of the media in reporting this type of information). In both cases, the provision is engaged as a result of the "reasonable belief" of the data controller that processing is in the public interest. These provisions are important because they form part of a specific statutory code set out by parliament for balancing the rights of data subject (which can encompass, at least in some contexts both privacy and reputational rights[21]) with the Article 10 rights of the media.

65. Defamation and data protection are two of the three key torts affecting freedom of expression[22] which have undergone recent statutory intervention and the coherence of approach is therefore noteworthy. Were these principles to be eschewed in MOPI, the tort would be a significant outlier and inconsistent with Parliament's approach.[23] This is undesirable and incoherent.

66. The importance of coherence illustrates the significance of editorial discretion as an essential factor for the Court to consider when it comes to Stage 2 of the MOPI assessment. That this is relevant is clear as a matter of high authority: see *Campbell v MGN*[24] and the MLA submits that the law does and should afford to its editors' decisions as to public interest, based on their experience, insight and approach, an effective and meaningful margin of appreciation.

CONCLUSIONS

67. The MLA is grateful to the Supreme Court for its consideration of these written submissions. Although every effort has been made to avoid duplication, they have been prepared without sight of the parties' Cases for reasons of timing. The MLA

[21] See *Aven v Orbis* [2020] EWHC 1812 (QB), per Warby J at [196]ff and compare the discussion of that decision in *Sicri* at [152] and [163].
[22] I.e. those which, in the experience of the MLA, are generally relied on by claimants in publication cases and which (as well as harassment by publication) are "media and communications claims" for the purposes of CPR Part 53.
[23] For recognition of the importance of coherence in this area see *Khuja* at [34] and *Sicri* at [144], [152] and [160].
[24] Per Lord Hope [112]-[113] and [120]-[121], Lord Carswell [169]-[170], and Lords Nicholls and Hoffman (in the minority) at [28] and [61]-[77].

would welcome the opportunity to make oral submissions if the Court considers they would be of assistance.

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18 October 2021

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