

THE USE OF ILLEGALLY OBTAINED EVIDENCE IN CIVIL CASES

Zoe O'Sullivan KC



serle court



No privilege in unlawfully obtained information

Dubai Aluminium v Al -Alawi [1999] 1 WLR 1964 at 1969:

"It seems to me that if investigative agents employed by solicitors for the purpose of litigation were permitted to breach the provisions of such statutes or to indulge in fraud or impersonation without any consequence at all for the conduct of the litigation, then the courts would be going far to sanction such conduct...

“it seems to me that criminal or fraudulent conduct for the purposes of acquiring evidence in or for litigation cannot properly escape the consequence that any documents generated by or reporting on such conduct and which are relevant to the issues in the case are discoverable and fall outside the legitimate area of legal professional privilege. “



Breach of confidence/misuse of private information

Tchenguiz v Imerman [2010] EWC Civ 908 at [141]

“In the present case, there is no real doubt but that the defendants have substantially breached Mr Imerman's rights of confidence in relation to much, and probably the great majority, of the information obtained through accessing it through the server on some nine occasions in early 2009. Furthermore, there seems to be a substantial possibility that the information was all obtained as a result of some of the defendants committing a breach of statutory duty or even a crime.”

A defence of public interest?

It may be a defence to a claim for breach of confidence if the unlawfully obtained evidence reveals serious wrongdoing.

See **Istil Group v Zahoor** [2003] 165 (Ch) Lawrence Collins J at [112]:

“In my judgment the combination of forgery and misleading evidence make this a case where the equitable jurisdiction to restrain breach of confidence gives way to the public interest in the proper administration of justice.”

GDPR/Data Protection Act 2018

GDPR Article 1(1)(a): **Personal data shall be processed fairly and lawfully and in a transparent manner.**

The grounds for lawful data processing are set out in GDPR Article 6. These include:

- (a) Consent of the data subject
- (c) Where processing is necessary for compliance with a legal obligation to which the controller is subject; and
- (e) Legitimate interests



Offences under the Data Protection Act 2018

Section 170(1) makes it an offence knowingly or recklessly

- (a) to obtain or disclose personal data without the consent of the controller;
- (b) To procure the disclosure of personal data to another person without the consent of the controller; or
- (c) After obtaining personal data, to retain it without the consent of the person who was the controller at the time when it was obtained.

It is a defence (inter alia) to prove that the processing was necessary for the purposes of preventing or detecting crime or was, in the particular circumstances, justified as being in the public interest.



Hacking offences

Computer Misuse Act 1990

Unauthorised access to computer material

Section 1:

A person is guilty of an offence if—

- (a) he causes a computer to perform any function with intent to secure access to any program or data held in any computer, or to enable any such access to be secured;
- (b) the access he intends to secure, or to enable to be secured, is unauthorised; and
- (c) he knows at the time when he causes the computer to perform the function that that is the case.

Admissibility

All evidence is *admissible* even if unlawfully obtained. But the court has a *discretion* not to admit unlawfully obtained evidence in civil proceedings. **Kuruma v R [1955] AC 197; Imerman v Tchenguiz [2011] at [170]- [177]**

CPR 32.1: “The court may use its power under this rule to exclude evidence that would otherwise be admissible.”

The decision whether to exclude evidence is essentially a case management decision for the judge to make, taking all relevant factors into account: **Consolidated Contractors International SAL v Masri [2011] EWCA Civ 21 at [45]**.

The balancing exercise

“the court should consider the means employed to obtain the evidence together with its relevance and probative value and the effect that admitting or not admitting it would have on the fairness of the litigation process and the trial....To put it slightly differently, the issue was whether the public policy interest in excluding evidence improperly obtained was trumped by the important (but narrower) objective of achieving justice in the particular case.”

Mustard v Flower [2019] EWHC 2623 (QB)



Leading cases

Obtaining unauthorised access to obtain confidential information for use in divorce proceedings: **Tchenguiz v Imerman** [2010] EWCA Civ 908.

Secret video surveillance and recordings in personal injury cases: **Jones v University of Warwick** [2003] 1 WLR 954 Court of Appeal; **Mustard v Flower** [2019] EWHC.

Private banking details obtained by an inquiry agent: **Fiona Trust Holding Corp v Privalov** [2007] EWHC 39 (Comm); **Hughes v Carruatu** [2006] EWHC 1791 (QB)

“Phishing” for evidence: **RAKIA v Azima** [2021] EWCA Civ 349

Sources of guidance for lawyers

Bar Council's Guidance on "Evidence obtained illegally in civil and family proceedings" (2020):

- a. You must never advise that evidence be obtained illegally
- b. If evidence has already been so obtained, you must advise the client of both (a) the client's disclosure obligations and (b) where applicable, counsel's own disclosure obligations, including the ramifications of the decision in **Dubai Aluminium**, and
- c. If the client is in breach of the consequent disclosure obligations, you will almost invariably have to return the case.