Evidence obtained illegally in civil and family proceedings

Purpose:	To advise barristers in relation to illegally obtained evidence
Overview:	General approach - Claims to privilege in illegally obtained evidence - *Imerman*, breach of confidentiality and computers - Conclusion
Scope of application:	All practising civil and family barristers
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Status and effect:	**Please see the notice at the end of this document. This is not "guidance" for the purposes of the BSB Handbook I6.4.**

General approach

1. It is increasingly common for counsel to have to advise in cases where evidence has, or may have been, obtained illegally.

2. Whilst it will be for you to decide, in each particular case, whether or not the evidence falls into the category of illegally obtained evidence, this ethical assistance is designed to assist in any situation in which it appears that the evidence has, indeed, been so obtained.

3. It should go without saying that it would be serious professional misconduct for counsel, knowing or reasonably suspecting that such evidence was illegal:

   a. To advise that such evidence should be obtained; or

   b. Otherwise participate in the obtaining of information illegally.

In this respect your attention is drawn to the BSB Handbook CD1, CD3 and CD5:

"CD1 - You must observe your duty to the court in the administration of justice."

"CD3 - You must act with honesty, and with integrity."

"CD5 - You must not behave in a way which is likely to diminish the trust and confidence which the public places in you or in the profession."

4. Clearly, advising the commission of, or participating in, any criminal act would be in breach of these provisions. Depending on the precise factual circumstances, it may be that advising the commission of, or otherwise participating in, some non-criminal but otherwise unlawful action - such as breach of confidence - could also be in breach of these provisions.

5. Furthermore, you may find yourself in professional difficulties simply by having sight of improperly obtained documents. In this respect your attention is drawn to rC3 and rC5, as well as to the guidance contained in gC8, gC11 and gC13.

6. As regards the rules:

"rC3 - You owe a duty to the court to act with independence in the interests of justice. This duty overrides any inconsistent obligations which you may have (other than obligations under the criminal law). It includes the following specific obligations which apply whether you are acting as an advocate or are otherwise involved in the conduct of litigation in whatever role (with the exception of Rule C3.1 below, which applies when acting as an advocate):

.1 you must not knowingly or recklessly mislead or attempt to mislead the court; […]"

"rC5 - Your duty to the court does not require you to act in breach of your duty to keep the affairs of each client confidential."

7. As regards the relevant guidance:

"gC8 - As set out in Rule rC5, your duty to the court does not permit or require you to disclose confidential information which you have obtained in the course of your instructions and which your client has not authorised you to disclose to the court. However, Rule rC6 requires you not knowingly to mislead the court. There may be situations where you have obligations under both these rules."

"gC11 - If there is a risk that the court will be misled unless you disclose confidential information which you have learned in the course of your instructions, you should ask the client for permission to disclose it to the court. If your client refuses to allow you to make the disclosure you must cease to act, and return your instructions: see Rules rC25 to rC27 below. In these circumstances you must not reveal the information to the court."

"gC13 - Similarly, if you become aware that your client has a document which should be disclosed but has not been disclosed, you cannot continue to act unless your client agrees to the disclosure of the document. In these circumstances you must not reveal the existence or contents of the document to the court."

And rC25 and rC26:

"rC25 - Where you have accepted instructions to act but one or more of the circumstances set out in Rules rC21.1 to rC21.10 above then arises, you must cease to act and return your instructions promptly. In addition, you must cease to act and return your instructions if: […]

.2 - the client refuses to authorise you to make some disclosure to the court which your duty to the court requires you to make, or

.3 – you become aware during the course of a case of the existence of a document which should have been but has not been disclosed, and the client fails to disclose it or fails to permit you to disclose it, contrary to your advice."

"rC26 - You may cease to act on a matter on which you are instructed and return any instructions if: […]

.6 you become aware of confidential or privileged information or documents of another person which relate to the matter on which you are instructed…"

8. If the improperly obtained confidential material about which you have become aware relates to a child and there are family court proceedings in progress, you may be under a duty to disclose the material to the court regardless of your instructions and regardless of whether you cease to act for your client. This important topic is covered in the Disclosure of unhelpful material in family proceedings (children) document on the Bar Council website.

Claims to privilege in illegally obtained evidence

9. Legal professional privilege does not apply in relation to documents that have been criminally or fraudulently obtained for the person who unlawfully obtained the documents: see, eg *Dubai Aluminium v. Al Alawi* [1999] 1 WLR 1964 at 1969F (***'Al Alawi'***) per Rix J. This is pursuant to the 'fraud exception' (also known as the 'iniquity exception') to legal professional privilege. This exception applies in both civil and criminal cases: see, eg, *Kuwait Airways Corporation v. Iraqi Airways Co (No. 6)* [2005] EWCA Civ 286, [2005] 1 WLR 2734 (***'Kuwait'***) at [25] per Longmore LJ. Moreover, this exception applies to both legal advice privilege and litigation privilege: *Ibid* at [31],[42].

10. Where the exception applies, *all* documents generated by or reporting on such criminal or fraudulent conduct that are relevant to the issues in the case will be

disclosable: see, eg *Al Alawi* at p1969F. It follows that all such documents obtained, together with the documents seeking them (such as any letters of instruction to the person who obtained them) and communications concerning the exercise of gathering those documents, will have to be disclosed to the other side. Plus, this will be the case whether or not so doing will assist the client or prejudice them and their sources, by revealing criminal or fraudulent activity.

11. These principles also apply in family proceedings. Subject to one potential qualification (addressed in §12.c below), it is and remains the obligation of a spouse who has obtained access to their spouse's documents unlawfully or clandestinely to disclose that fact promptly, either if asked by the other spouse's solicitors or at the latest and in any event when they serve their questionnaire: see, eg, *Imerman v. Tchenguiz* [2010] EWCA Civ 908, [2011] Fam 116 ('***Imerman***') at [42] per Lord Neuberger MR (judgment of the Court)

12. However, at least the following important caveats apply:

a. First, the fraud or iniquity exception does not apply to evidence which has been obtained by *any* unlawful means. Thus, the exception does not appear to apply, for example, to documents obtained through trespass or conversion (see eg, *Al Alawi* at p1968F) nor to breach of privacy rights nor unlawful surveillance evidence (see eg, *Holyoake v. Candy* [2017] EWHC 52 (QB) at [88]-[95] per Warby J (obiter)). Accordingly, in each case, counsel will need carefully to consider whether the means of obtaining the documents does fall within the iniquity exception.

b. Second, where the issue of fraud is one of the issues in the underlying action, the exception will only apply where either there is a *strong or very strong prima facie case* of fraud: see *Kuwait* at [42]. Where the issue of fraud is not one of the issues in the underlying action, a *prima facie case* of fraud may be sufficient: *ibid*.

c. Third, counsel will need to consider whether (i) the privilege against self-incrimination is available to their client in the circumstances of their case; and (ii) if the privilege is available and the client invokes it, what information or disclosure the client may then lawfully withhold. In this regard, the privilege has been held *not* to apply in ancillary relief proceedings (as they were then known as) at all: see *R. v. K* [2009] EWCA Crim 1640, [2010] QB 369 at [32], [74] per Moore-Bick LJ (judgment of the Court). In *Imerman* (a subsequent case, where *R. v. K* was cited in argument but not in the judgment), the Court of Appeal heard no argument on the point and ultimately left open the questions as to (i) whether the privilege would be available; and (ii) if it were available, its extent: see [42].

d. Fourth, there may be privilege held by a third party in the documents. Theft or fraud does not defeat their privilege, and they may object to the disclosure and inspection of the documents, although possibly not to simply disclosing their existence.

Without notice applications

13. When making a without notice application, it *may* be the duty of the applicant's counsel to draw fairly and squarely to the attention of the court any grounds to believe that evidence relied upon has been illegally obtained: see eg, *Franses v. Al Assad* [2007] EWHC 2442 at [83],[84] per Henderson J but cp: *Memory Corporation v. Sidhu* [2000] 1 WLR 1443 at 1458 per Robert Walker LJ.

14. It will always be necessary for counsel to consider whether it is *material* to the application that the evidence was obtained illegally. It may be material because it goes to the reliability or weight of the evidence, or the probity of the applicant or their sources: see, eg, *PJSC National Bank Trust v. Mints* [2020] EWHC 204 (Comm) at [150] per Cockerill J.

Criminal offences that may be committed in obtaining evidence

15. Applying the above principles, counsel will need to consider (amongst other things) whether a criminal offence (or fraud) has been committed in the course of obtaining the evidence in question.

16. The surreptitious obtaining of documents could involve the commission of various offences. It may involve theft, burglary or blackmail. Obtaining documents by deception could also involve the offence of fraud, contrary to section 1(1) of the Fraud Act 2006. In particular, counsel should also be aware of the following offences which were highlighted in *Imerman* (at [92] and [102]):

17. First, section 1 of the Computer Misuse Act 1990 makes it an offence for a person to cause *"a computer to perform any function with intent to secure access to any program or data held in any computer"*, where "*the access … is unauthorized*" and "*he knows at the time … that that is the case*". This offence includes conduct that might ordinarily be said to be computer hacking. Securing access includes taking copies of any data or moving any data to "*any storage medium*" or using such data. An act is "*unauthorised, if the person doing* [it] … *is not* [and does not have the authority of] *a person who has responsibility for the computer and is entitled to determine whether the act may be done*".

18. Since the offence is concerned with (i) causing the computer to "*perform any function*"; and (ii) doing so "*with intent to secure access to any program or data"*; it follows that there is no requirement that the defendant should actually *succeed* in obtaining access to the program or data. The offence thus includes conduct which might usually

be thought to fall within the scope of the law of attempt: see, eg, *Blackstone's Criminal Practice 2025*, §B17.3.

19. There is no public interest defence to an unauthorised access offence: see, eg, *R. v. Coltman* [2018] EWCA Crim 2059, [2019] 1 WLR 6208 at [18] per Rafferty LJ (judgment of the Court).

20. Second, section 170(1) of the Data Protection Act 2018 concerns the unlawfully obtaining of personal data.[1] It is an offence knowingly or recklessly to obtain or disclose (or procure the disclosure of) personal data without the consent of the controller, or to retain it without consent. This offence may be established even if the data in question was originally lawfully obtained. For example, employees who are granted access to the lawfully obtained data of their employer's clients may commit the s. 170 offence by recklessly or knowingly disclosing that data without the consent of the data controllers: see, eg, *Blackstone's Criminal Practice 2025*, §B17.23.

21. Section 170(2) provides a defence where (a) the obtaining, disclosing, procuring or retaining was "*necessary for the purpose of preventing or detecting crime*"; (b) was "*required or authorized … by a rule of law*", enactment or court order; or (c) was "*justified as being in the public interest*". Certain other defences are also provided by s.170(3).

22. Clients often seek to argue that their case was "*justified as being in the public interest*". However, in *Imerman* (at [103]), the Court of Appeal observed obiter and on the facts of that case, that the argument that unlawfully accessing the document could be said to have been to protect the wife's rights in the divorce proceedings can scarcely be said to render it in the public interest, even if it was done with a view to exposing, or preventing the husband's anticipated wrongful concealment of assets.

Breach of confidence

23. Subject to any defences that may be available in law or equity, a person who intentionally and without authorisation obtains another person's confidential information, knowing that the other person reasonably expects it to be private, commits a breach of confidence: see, eg, *Imerman* at [68].

24. More particularly, and again subject to any such defences, it would generally be such a breach for a person **(A)**, without the authority of the other person **(B)**, to examine, or to make, retain, or supply copies to a third party of, a document whose contents are, and were (or ought to have been) appreciated by A to be, confidential to B: *Ibid* at [69]. The fact that A has a means of access to get into B's room or even into their desk does not by any means necessarily lead to the conclusion that A has the right to look at, let alone to copy, or even disseminate, the contents of B's private or

[1] The successor to s.55 of the Data Protection Act 1998 considered in *Imerman.*

confidential documents contained therein: *Ibid* at [79].

25. There is a duty of confidence between husband and wife and as between civil partners, see if authority were necessary: *Ibid* at [80]. However, the fact that two parties live together, especially if they are married, civil partners, or lovers, will often affect the question of whether information contained in certain documents is confidential: *Ibid* at [87].

26. As regards remedy, if A has taken the documents, there can almost always be no question but that they must return them: they are B's property. If A makes paper or electronic copies, the copies should be ordered to be returned or destroyed (again subject to any available defences): *Ibid* at [73]-[75], [141].

27. If the documents must be returned, then it appears almost inevitable that they would fall within the issues covered by the BSB Handbook set out above.

28. It may or may not be professionally embarrassing to continue to act in such a situation. Whether this is so will depend on the circumstances.

Conclusion

29. The following principles therefore apply:

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 *Al Alawi*; and

c. If the client is in breach of the applicable disclosure obligations, you will almost invariably have to return the case.

30. Moreover, a solicitor who receives, reads, and passes on documents that are confidential to another party, particularly knowing that they have been taken from that party unlawfully, may well be an appropriate defendant to a claim in breach of confidence proceedings: see eg, *Inerman* at [159].

31. The same approach must apply to counsel too. More generally, counsel should be aware that being involved in the obtaining or retention of evidence that has been obtained unlawfully may expose them to personal liability in tort, equity and/or breach of the Data Protection Act 2018.

Important Notice

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