

Group Briefing  
April 2018

# Illegally Obtained Evidence: Poison or Antidote?

## KEY CONTACT



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A package lands on your desk. It is the smoking gun that will hand you the case that has plagued your company for years. It comes from an anonymous source, but you know there is only one way it could have come into your possession: it has been stolen. Can you use it? Should you use it?

Although it may sound like a hackneyed set-piece from a low-budget detective movie, situations like this can and do arise.

The issue of illegally obtained evidence has been the subject of much judicial scrutiny over the years. Courts are faced with balancing two competing, but equally legitimate, policy objectives. On the one hand, society has an interest in seeing crimes punished and civil wrongs remedied. On the other, illegal or unethical conduct should not be sanctioned or incentivised.

### UNCONSTITUTIONALITY

In Ireland, when it comes to the admissibility of evidence, a clear distinction is drawn between unconstitutionality and mere illegality.

Historically, evidence that had been tainted with unconstitutionality was strictly excluded. However, this approach resulted in some absurd outcomes; with valuable evidence at times being excluded for minor transgressions

(such as a clerical error on a search warrant). The landmark decision of *AG v O'Brien* heralded a move towards a more permissive approach. This trend culminated in the more recent case of *DPP v JC*, where, in the context of a criminal prosecution, it was held that evidence obtained unconstitutionally would be admissible if the breach was unintended.

*P v Q* is a rare example of civil proceedings in which the issue was considered. The case involved a dispute over the custody of a child. The child's father broke into a safe in order to obtain evidence that the mother had been engaging in dangerous sexual activity with strangers. This was deemed to be a breach of the mother's constitutional right to privacy. However, the Court held that the mother's conduct had the potential to compromise the welfare and constitutional rights of the child. The evidence was therefore admitted. The balance struck here was between comparable constitutional rights of individuals: the mother's right to privacy as against the child's right to be brought up in a safe environment. It is quite possible that the evidence would have been excluded if the mother's constitutional right had conflicted with a less fundamental private right, such as a contractual right or a claim in tort.

This document contains a general summary of developments and is not a complete or definitive statement of the law. Specific legal advice should be obtained where appropriate.

**ILLEGALITY**

In circumstances where evidence is obtained illegally, but not unconstitutionally, the courts enjoy a much broader discretion.

In *AG v O'Brien*, the Supreme Court held that the trial judge has discretion to decide whether or not to exclude illegally obtained evidence.

The Court in *P v Q* also adopted a discretionary approach to the issue. It found that, while courts should be reluctant to admit evidence obtained illegally, there is no rule to say that it must always be excluded.

There is a paucity of Irish precedent on the admissibility of illegally obtained evidence in civil proceedings. However, in circumstances where evidence has been obtained illegally but not unconstitutionally, the reasoning of the English courts will likely be persuasive.

The English approach was neatly summed up in *Jones v University of Warwick*. In that case, an investigator (posing as a market researcher) gained entry to the plaintiff's home and filmed

her using a hidden camera. It was alleged that the evidence had been obtained by means of a trespass and in breach of her right to privacy as protected by Article 8 of the European Convention on Human Rights. The Court held that it had a discretion to determine the issue of admissibility, having regard to the significance of the evidence and the gravity of the unlawful act in question.

Interestingly, *Jones* also illustrates the different approach that the English courts take to breaches of fundamental rights. In that case, a breach of the plaintiff's right to privacy (which is a constitutional right in Ireland), was considered as a general unlawful act, albeit a severe one. It did not compel the English courts to apply a *prima facie* exclusionary rule.

**BUT SHOULD YOU USE IT?**

There is no absolute exclusionary rule in respect of unlawfully obtained evidence in Ireland. This is true even in the case of civil proceedings where constitutional rights have been infringed. However, this does not grant litigants a "free pass" to use any evidence, regardless of

how it is obtained. Litigants and legal professionals should note that:

- » A decision by a court to admit illegally obtained evidence extends only that far: criminal or civil prosecution may still result from the illegal methods employed.
- » A decision to exclude evidence is not the only means by which a court can express its disapproval. In *Jones*, for example, the Court took account of the defendant's unlawful conduct in its order for costs.
- » The act or appearance of condoning, encouraging, or participating in illegal activity can have extremely serious reputational and professional consequences.

In sum, when deciding whether to use evidence, one should carefully consider the: (i) probative value of the evidence in question; and (ii) legal and reputational risks involved.

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