“Pliego” us not into temptation

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PRACTICES Litigation, International Arbitration

“He who fights with monsters should see to it that he does not become a monster himself”

Friedrich Nietzche *Beyond Good and Evil*

In August 2024 claimants who say they are the victims of a $300 million fraud started proceedings in England against Vladimir Sklarov, a notorious fraudster, and various companies said to be associated with him. Mr Sklarov and an associate, using false names, had pretended to be managers of a fund owned by the wealthy Astor family (of whom Mr Sklarov’s associate pretended to be a descendant). In 2021 they persuaded the claimants to enter into a stock loan agreement, under which they transferred shares worth $415 million to two custodians to hold as collateral for a loan of $113 million supposedly from the Astor family fund. It is alleged the custodians secretly sold the shares, used part of the proceeds to fund the loan and misappropriated the remainder, taking elaborate steps to conceal the sale from the claimants for the better part of three years. In *Pliego & Anor* v *Astor Asset Management 3 Ltd & Ors* [2024] EWHC 2522 (Comm) the claimants obtained worldwide freezing orders (WFOs) against Mr Sklarov and his companies, since upheld on appeal [2025] EWCA Civ 1060). Under these WFOs, Mr Sklarov was ordered to give disclosure concerning his assets. The disclosure given is said by the claimants to have been inadequate and they are presently seeking to have Mr Sklarov committed to prison for contempt.

Very shortly after they commenced the proceedings and obtained the WFOs, however, the claimants also (without the knowledge of their solicitors) hired private investigators who were (or claimed to be) “*veterans of elite units in the Israeli intelligence community*” with “*unique expertise in social engineering, psychological and behavioural pattern-identification*” to support the claimant’s “*legal efforts to obtain compensation for ... the alleged frau*d” “*select optimal subjects ... to approach in order to extract the intelligence*” “*create elaborate, personalized cover stories ... for reach subject approved by the client*” and build “*personal and/or professional relationships ... to extract relevant information and evidence*”. One of their operatives “**BCO**” approached “**X**” a partner at the solicitors’ firm representing Mr Sklarov. BCO pretended to be representing a client with a substantial dispute who wanted to interview X with a view to engaging his services.

BCO met repeatedly with X, initially in a video call, then at an in-person lunch meeting and eventually in the course of a dinner with drinks. BCO covertly recorded these meetings at which “*X was skilfully and tenaciously steered by BCO into discussing various aspects of the litigation and settlement strategy of his clients*” and “*deceived and played for a fool by a skilful and well-prepared interrogator armed with insider knowledge*”. X divulged information about the perceived strengths and weaknesses of Mr Sklarov’s defence and his *de facto* control of the various entities which had been used to perpetrate the alleged fraud and which had held and distributed the proceeds.

On being presented with these recordings and learning of what the claimants had done, the claimants’ solicitors refused to view or listen to the recordings. The claimants’ response was to instruct new solicitors *“who appear to have no such inhibition*”. The judgment does not say exactly what it was that X told BCO, but presumably it was something damning. The new solicitors evidently thought it showed the claim to be unanswerable and applied for summary judgment

relying on the recordings. The defendants countered by applying for the claim to be struck out on the grounds that, by obtaining the information for their solicitor in that way, the claimants had abused the court's process. Alternatively, the defendant sought an order that the information so obtained was inadmissible and the claimants could not rely on it.

These applications were the subject of a 2.5 day hearing. The claimants and defendants sought, respectively, almost £1.8 million and over £2.4 million for their costs of that hearing [2025] EWHC 3124 (Comm). Apparently: "*Three skeleton arguments were filed, totalling over 160 pages and featuring almost 600 footnotes. A total of 122 legal authorities were cited. The hearing bundles contain over 7,500 pages and occupy 25 lever arch files. This includes 14 witness statements (two served during the hearing) and five expert reports, plus numerous references to parts of 16 further affidavits or statements served earlier in these proceedings*".

"*A difficult choice*"

In a judgment dated 13 November 2025 [2025] EWHC 2968 (Comm) Stephen Houseman KC (sitting as a deputy judge of the high court) observed:

> "*The litigating parties have presented me with a difficult choice. What should the Court do when someone with an apparently strong and substantial, perhaps unanswerable, claim in fraud seeks summary judgment in light of illicit knowledge obtained by unethical means?*"
>
> "*I have not found it easy to decide what to do in these circumstances. ... it feels appropriate to grant permission to appeal and cross-appeal irrespective of the outcome. The impact of the claimants' litigation behaviour, which I regard as abnormal and abusive, deserves evaluation by reference to the competing public and private interests at stake*".

The judge:

- held that "*The claimants have abused the process of the Court by engaging private investigators to obtain sensitive information from their opponent's litigation solicitor through the use of unethical methods and practices. This is so irrespective of the precise evidential status of any part of the illicit information, including engagement of the iniquity principle*"; but
- declined to strike out the claim for that abusive conduct;
- struck out the claimants' application for summary judgment saying "[a]*lternatively, if not struck out, I would decline to enter summary judgment or grant a conditional order as a matter of discretion even if the conditions for doing so were otherwise met*";
- reserved to another hearing the evidential status of the information obtained by the private investigators and the defendant's applications for that evidence to be excluded;
- ordered the claimants to pay the costs of the hearing to be assessed on the indemnity basis, with the costs of the applications to exclude evidence (said to represent 25% of the costs claimed) reserved to that further hearing; and
- granted permission to appeal and cross appeal.

The judgment is notable for the obvious difficulty which the judge experienced in deciding *not* to strike out the claim and in recognising the possibility that this might be reversed on appeal, or that the claim still might be struck out for abuse in respect of the 'forward looking position'.

> "*There have been moments when I have felt that I ought to accede to this primary position* [that the claim should be struck out for the accrued abuse]. *This reflects the gravity and culpability of the claimants' behaviour, which I have characterised as an affront to justice and inimical to the fundamental norms and values of civil litigation in this jurisdiction.*"
>
> *The Court's response must fit the abuse which has so far been established. As explained in Issue (1) above, that abuse is found in the unethical behaviour involved rather than the nature or quality of the illicit information*"
>
> "*striking out (or staying) the entire claim would be disproportionate at this juncture where there is a decent prospect of the claimants succeeding on their deceit claim at trial. There is a distinct policy in favour of exposing and remedying serious wrongdoing such as fraud*"
>
> "*I am satisfied that there is a more proportionate response to the claimants' abuse of process, namely forfeiture of their summary judgment application and payment of costs*"
>
> "*I do not consider it appropriate and proportionate to strike out (or stay) the claim in its entirety at this stage. The fate of these proceedings awaits the outcome of the Information Review Hearing* [on the status of the evidence and the 'forward looking position']"
>
> "*Despite the fact that my determination involves the contextual exercise of discretion, I will grant permission to appeal and cross-appeal. ... My concern, if anything, is that I may have been too lenient on the claimants in choice of response*".

One reason the case is interesting is because some readers might have some instinctive sympathy for the claimants and their solicitors. Faced with a fraudster who they say has stolen $300 million from them by deception, one can understand the temptation on the part of the claimants to practice some deceit on him and the lawyers who serve him in an effort to find out where the claimants' stolen money has gone. Presented with damning evidence which, for all that it was obtained improperly, does now exist and might well lead to the recovery of hundreds of millions of pounds of one's clients' money, it is not obvious why they should not seek to make use of it, if those are the clients' instructions.

Consider, by way of analogy, the (not-uncommon) experience of having some item such as a bike stolen, finding it advertised on Gumtree or similar and, faced with indifference on the part of the police, posing as a prospective buyer in order to locate it and recover it from the wrongdoer oneself by way of self-help. Imanuel Kant aside, few people would say it was wrong to have lied to the thief in that scenario, any more than to the murderer at the door.

One might have expected that the distinction, and the reason for the particular opprobrium which the claimants' efforts attracts in *Pliego*, might have derived from the deceit having been practiced in the context of legal proceedings, and against the other parties' legal representatives, so that the information obtained was privileged, tending to reveal the content of legal advice, and thus sacrosanct.

That, though, is not (at least on the face of it) the reason for the decision. It is important to appreciate that the questions of whether the information obtained from X is protected by legal privilege and, even if it is not, whether it is admissible in evidence, have not been determined and have been deferred to a future hearing. The judgment draws a distinction between what was referred to as the 'accrued abuse of process' and the 'forward looking position'.

The accrued abuse of process is that – irrespective of whether the information is privileged / admissible - the claimants acted unethically to obtain it, and that was an abuse of process "*It can be an abuse of process to take unethical steps to obtain information from an adversary's litigation solicitor even if that information is not privileged or any privilege that would otherwise attach to it is precluded by the iniquity principle or destroyed by loss of its confidential character. ... By way of analogy, the receipt and use of an opposing party's internal legal documentation, whether or not it was all covered by privilege, has been found to comprise "the most severe abuses of the arbitral process" which themselves justified setting aside a substantial award on the grounds of public policy: see The Federal Republic of Nigeria v. Process & Industrial Developments Ltd. [2023] EWHC 2638 (Comm) at* [516].

The 'forward looking position', by contrast, concerns two issues:

- What is the evidential status of the information obtained from X – is it privileged or otherwise inadmissible at trial?
- "*Is the claimants' possession of illicit knowledge likely to obstruct the just disposal of these proceedings or otherwise create a substantial risk to a fair trial?*" in that regard "*Whilst the claimants can be restrained from making use of such information, and have given an interim undertaking to this effect pending resolution of the cross-applications, they cannot have their illicit knowledge erased or reversed. There is no way of policing its invidious or invisible influence upon their litigation or settlement strategy day in day out*". That will raise:
    - Whether the proceedings should still be struck out as an abuse of process for that reason.
    - If the proceedings continue, whether the claimants' solicitors, who have seen and are aware of the information, admissible or not, can continue to represent the claimants in the proceedings. See *Avonwick Holdings Ltd & Anor* v *Shlosberg* [2016] EWCA Civ 1138 where a claimant's solicitors read the defendant's privileged documents and were injuncted from acting for the claimant against the defendant.
    - Potentially, if the information obtained from X is privileged (because it tends to reveal the content of legal advice) the case raises the question of whether the judge, having been privy to it, is unable to sit as the trial judge.

All these issues depend on the unresolved question of whether and to what extent the information is privileged.

Evidence obtained improperly

One can conceive of a spectrum of improper means by which evidence might be obtained.

- At one extreme are cases where a **crime** has been committed to obtain the evidence, the most serious being where evidence is obtained through violence or the threat of violence. Then there would be evidence obtained through other indictable offences - bribery, blackmail, burglary, theft – down to offences like procuring disclosure of personal data without consent contrary to section 170 of the Data Protection Act 2018, punishable only by a fine.
- A second category might be cases where evidence has been obtained in a way which, though not a crime punishable by the state, is still deprecated by the law and is civilly actionable as a **tort**. Fraud, trespass, conversion and (inducing) breach of contract, breach of trust or breach of confidence are the obvious examples.

- In theory, there might then be some potentially more nebulous and contentious third category where evidence has been obtained in some way which is neither criminal nor tortious, but which is still, in some relevant sense, ‘unethical’, ‘unfair’ or ‘sharp practice’ which the court should deprecate, even though it does not give rise to a criminal sanction or civil liability.

This third category (if it exists) is probably quite limited because it is not easy to think of conduct by which one might obtain evidence ‘unethically’ which would not also, technically, fall within the definition of some tort or crime. If there is such a third category of ‘unethical’ behaviour which the ‘law’ proper does not deprecate, but the court does *de facto* punish, then this presents a problem at the boundary where the lack of clarity might lead to injustice. Litigants, and lawyers advising them, who take every care to act within the strict letter of the published law, and obtain evidence in a lawful way, might justifiably feel aggrieved if the evidence which they thereby obtained were to be excluded, or if their claims were to be struck out, or they were to be punished through the imposition of costs or some other sanction, based on an individual judge’s more subjective conception of what is ‘ethical’.

When seeking to analyse the improper obtaining of evidence, two further variables – aside from the question of how serious the wrongdoing is – are the identity of the wrongdoer and the identity of the person against whom it is directed. It seems natural (at least to the modern, Western, jurist steeped in Magna Carta, the US Constitution and so on) to expect that the law might treat evidence obtained through wrongdoing by the state in deploying its vast powers and resources to obtain evidence against its subjects differently to wrongdoing by private litigants directed against one another. A further category might be where evidence was revealed through wrongdoing by someone completely unconnected with the litigation (e.g. Wikileaks). As for the target of the wrongdoing, there is the potential for the law to approach differently evidence obtained through wrongdoing directed against the other party, through wrongdoing directed against their lawyers and wrongdoing against non-parties.

How does the conduct of the claimants in *Pliego*, or of their agent BCO, fall to be characterised? To procure the meetings with X, BCO lied that he represented a prospective client (and failed to mention the important fact of who he did represent). Had it not been for that lie, the meetings would never have taken place and so the information would never have been divulged. As for the meetings themselves:

> “*(iii) ... X was skilfully and tenaciously steered by BCO into discussing various aspects of the litigation and settlement strategy of his clients, including by reference to the WFOs. This involved persistent questioning designed to elicit insights into Mr Sklarov’s business model or practices, his de facto control of corporate entities involved in this alleged fraud, the perceived legitimacy or otherwise of such practices, and the merits of the claim and his defence to such claim.*
>
> *(iv) On numerous occasions, BCO interrupts X so as to sharpen the focus of an answer or bring the subject back on track. Sometimes this is done by offering a selective or salacious recap of what he pretends to understand X has just told him (e.g. references to “Ponzi” and “Madoff”); other times by insisting on greater clarity where X has said something potentially ambiguous. On other occasions, X is left to speak freely because he is divulging what is being targeted and harvested by BCO. ... it has all the hallmarks of persistent leading, channelling and swarming of questions designed to pressure the interviewee into privileged and confidential territory.*

> *(v) At no point did BCO express any reservation or inhibition about X delving into confidential or potentially privileged territory. On the contrary, the line of questioning was designed to encourage X to do so whilst thinking he was in a safe environment. It is hard to imagine (a genuine intermediary of) a genuine prospective client behaving in this way or feeling comfortable with someone else's solicitor speaking so freely and candidly about such sensitive matters in pending litigation - at any rate without saying something to sign-post their discomfort or break the momentum of candour.*
>
> *(vi) It is clear that BCO was very well briefed about the issues in these proceedings and nuances about the case. This is what enabled such close and careful interrogation of X. ... This degree of insight on the part of an interviewer is far removed from a situation in which (a genuine intermediary of) a genuine prospective client meets with a solicitor in good faith in order to evaluate their expertise and suitability for a specific dispute. The two scenarios are incomparable.*
>
> *(ix) X was lulled into a false sense of confidence and security, as evidenced by how he started to share personal information about his non-professional life and family members. He was the victim of a contrived rapport and false sense of confidence that encouraged an excess of candour. He was deceived and played for a fool by a skilful and well-prepared interrogator armed with insider knowledge.*"

Thus:

> "*I proceed on the basis that there was nothing unlawful or illegal about the way the illicit information was obtained from X or transmitted to the claimants or their new solicitors. As already noted, the claimants' leading counsel accepts that it involved unethical behaviour. The stated basis of such concession was the deceptive basis of the meetings I would go further than this: the process of extracting the illicit information from X was itself unethical* ..."

The two in-person meetings between BCO and X took place outside England (the judgment does not say where) so the applicable law is unclear. As a matter of English law, it certainly appears arguable that X's conduct in lying to obtain the meeting, and in not disclosing his true identity and mission, might have amounted to some tort (procuring breach of confidence, deceit) or crime (fraud). While there is an obvious judicial aversion to prejudging such matters, it might have been better to have made some provisional finding – that this was *prima facie* a crime / tort – rather than to proceed on the basis that – lawful or not – it was 'unethical'. As for the conduct or process of the meetings – skilful and persistent questioning in a public place (a restaurant) by a knowledgeable person who covertly recorded the conversation – that was not, in itself, a tort or a crime.

How to treat improperly obtained evidence?

The court did not have time to decide, and adjourned to a later hearing, the question of what is the evidential status of the "*illicit*" information obtained from X "*through the use of unethical methods*". The judgment, as a result, does not discuss the rich case law around the admissibility of improperly obtained evidence. This is, in a sense, unfortunate, because that case law offers an extremely useful starting point from which to approach the issue raised by *Pliego*, including the question of whether the claimants' conduct amounted to an abuse of process.

Why exclude any evidence at all?

Only in litigation do we seek to arrive at factual conclusions without regard to evidence. The rest of the time everyone – judges and jurors included - continuously forms a view of what it 'real' or 'true' untroubled by any rules. No one feels the need to (nor can they) 'exclude' any evidence from their consideration. We take all the information available to us at a given time and form, largely unconsciously, a bundle of shifting, provisional conclusions from our imperfect recollections of that evidence, and that is our mental model of reality.

In most fields, the notion of 'excluding' or 'including' evidence is anathema. Under torture, Mark Smeaton confessed to an affair with Anne Boleyn, and Guy Fawkes to the Gunpowder Plot. Medical experiments and drug trials have been conducted in unethical ways. Yet no one is concerned to ensure that historians tasked with understanding the fall of Anne Boleyn or the Gunpowder Plot be kept in ignorance of the improperly obtained confessions or that clinicians and scientists tasked with understanding how best to treat a given disease must be kept in ignorance of data obtained through trials which don't meet modern ethical standards. Rather, they consider the available evidence and weigh it in the balance, conscious of their limitations. Per Jeremy Bentham: there is: "*one mode of searching out the truth: ... see everything that is to be seen; hear every body who is likely to know any thing about the matter*". Bentham was radically dismissive of exclusionary rules of evidence, calling them "*a frequent source of impunity and encouragement of crime*".

People are prone to biases and errors of reasoning, and intuitively accord evidence greater or lesser probative weight than it warrants on careful examination. This has been a rich field of study in psychology (particularly flowing from the work of Tversky and Kahneman) and so knowledge and awareness of them is widespread. As an individual, one can try consciously to be alert for and take account of such biases in assessing all the evidence available, but one still remains conscious of it.

Litigation (at least, jury trials) present a unique environment whereby a filter can be applied so that the subject fact finders are presented only with pre-selected evidence and deprived of other evidence which is deemed too prejudicial for them to hear. The common law recognises a judicial discretion to exclude evidence which is more prejudicial than probative. Many exclusionary rules of evidence essentially flow from this, and are reflective of an unwillingness to trust mere lay jurors with evidence which it is felt might accord too much weight, and treat as more reliable that is really the case.

Sometimes the exclusion of improperly obtained evidence (e.g. confessions and allegations against others compelled by torture – see below) can be rationalised in these terms – that such evidence is unreliable. Often, though, the exclusion of improperly obtained evidence is nothing to do with its reliability or probativeness. Indeed, the very fact of the evidence having been obtained through some impropriety will frequently render it more probative and more reliable than it otherwise would have been. X was undoubtedly more candid and unguarded with BCO than if it had not been for BCO's deception. See too the covertly obtained evidence in *Khan* and *Jones* v *University of Warwick*, discussed further below.

Often, the rationale for the exclusion of improperly obtained evidence is not that the evidence is not probative in the instant case. Indeed, excluding it might well lead to a less just – or, at least, a less accurate outcome in the instant case. Rather, the argument for excluding the evidence is that, if one admits such evidence, one is rewarding and encouraging similar wrongdoing by others. This is the conflict on which almost all cases about improperly obtained evidence ultimately turn. The court is called upon to balance the desire to do justice in the instant case – punish or compensate for the wrongdoing which is the subject of that case and is proven by that evidence – against the desire not to be seen as encouraging or endorsing some other, distinct, wrongdoing which was perpetrated to obtain the evidence, the legal consequences of which wrongdoing the court is not

presently concerned to decide. This presents a binary dilemma, in which either choice – admit the evidence or exclude it – has a negative consequence and one is concerned to weigh up what is the least bad option. The result of these competing policy considerations is that the law in this area is characterised by discretion, and not absolute rules.

What does exclusion of evidence mean in the civil context?

The end of civil jury trials has rendered the whole concept of "*excluding*" evidence something very different in the civil context to what that meant in the criminal context, because any evidence will almost invariably be available to the judicial decision maker, and they will have knowledge and awareness of it. Exclusion of evidence in the civil context means not that the fact finder is deprived of the information, but that they are trusted consciously to discount it, and to assign it no weight, in a way that the law does not trust jurors to do.

The exception to this – of particular interest in the context of *Pliego* – is with respect to privileged material. Occasionally, during interlocutory proceedings, judges will, through accident or design, see privileged material. For example, an offer to settle or without prejudice privileged correspondence might accidentally be referred to, or a decision might be required to be made regarding whether it is privileged or not. Another (rare) example is where a party claims documents are privileged and withholds them from disclosure, but there is reason to think the claim to privilege might be false and the court decides that it is necessary to check. In these cases a judge might look at the documents to decide if they are privileged, but (if the material, or some it, does turn out to be privileged) that judge will not sit as the trial judge. See *WH Holding Ltd & Anor* v *E20 Stadium LLP* [2018] EWHC 2578 (Ch).

As stated, the judgment in *Pliego* did not decide whether the information obtained from X was privileged, and denies that the question of whether the material is privileged is relevant to the decision of whether the way in which it was obtained was a breach of process:

> "*The ... Defendants contend that such illicit knowledge comprises or includes matters protected by legal professional privilege belonging to them.*"
>
> "*The claimants now accept, correctly and candidly, that the methods employed to obtain this illicit knowledge from their adversary's solicitor were unethical. However, ... they deny receiving or obtaining insight into any privileged communications, invoking (so far as necessary) the iniquity principle.*"
>
> "*... the claimants ... engaged in unethical behaviour with a view to obtaining an unfair litigation advantage. This finding is both important and serious. Such behaviour is anathema to the fundamental basis or premise of civil proceedings. This conclusion does not require what took place to be labelled as 'privilege hunting' or given any other emotive or forensic label. Nor does it depend o*n the precise evidential status of any of the information obtained by such unethical methods."

Confessions obtained by improper means

We intuitively treat confessions - statements which people make contrary to their own interests - as highly probative, even conclusive. Confessions by people accused of wrongdoing are thus much sought after by those charged with investigating and prosecuting it. One surefire way to obtain a confession is through torture. But this presents something of a moral hazard, because it works equally well on the innocent as on the guilty, and just as well for imaginary crimes as for real ones.

One might have hoped that an uncorroborated confession obtained by torture would thus be given little weight by decision makers, but history supplies plentiful examples of people eagerly sent to the scaffold by judges and jurors on the strength of confessions or allegations elicited through torture and for witchcraft and similar.

Fact finders often greatly underestimate how readily some people will confess to things they have not done, and how easy it is to obtain such false confessions. The caution which the common law (now) exhibits around confessions is born partly out of an aversion to torture, and a concern that admitting confessions might both encourage it and lead to inaccurate results.

In *A* v *Secretary of State for the Home Department (No 2)* [2005] UKHL 71. At common law, there is an absolute rule that evidence obtained by torture (not just confessions) is inadmissible in judicial proceedings.

Confessions obtained by improper means are inadmissible

At common law evidence of a confession made by a defendant, if challenged, may not be given unless the prosecution proves beyond reasonable doubt that the confession was not obtained by oppression or in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by him in consequence thereof. The rule is now enshrined in section 76 of the Police and Criminal Evidence Act 1984, but that enacted a rule which was established at common law and expressed in such decisions as *Ibrahim* v *The King* [1914] AC 599. Lying to a suspect that the interview is "*off the record*", or that they will get bail if they confess, or that you have evidence which does not exist are examples of oppression or conduct likely to render any confession elicited unreliable.

Sometimes a confession is obtained by oppression, or in a way which was liable to render it unreliable, but the confession leads to evidence (e.g. the location of a body, or of stolen goods) which confirms it to have been true. Per Lord Scarman in *Sang* (see below)

> "*The problem was resolved in R. v. Warickshall [1783] 1 Leach 263 by the court declaring, p.264:—*
>
> > *"Facts thus obtained, however, must be fully and satisfactorily proved, without calling in the aid of any part of the confession from which they may have been derived."*
>
> *The discovery of the stolen goods in that case, or ... the finding of the remains of the corpse, is the best possible evidence of the truth of the confession ... but in English law the confession is inadmissible, not because it is unreliable (its reliability is established by what has been found), but because to admit it would be unfair.*"

Evidence obtained by other improper means is admissible if relevant

Confessions and evidence obtained by torture aside, however, there is no rule which automatically renders evidence obtained in other improper ways inadmissible. On the contrary, per Crompton J in *R* v *Leatham* (1861) 8 Cox CC 498 at 501: "*It matters not how you get it if you steal it even, it would be admissible in evidence*".

In *Kuruma* v. *The Queen* [1955] AC 197 a certain regulation made unlawful possession of ammunition an offence in Kenya and provided a power whereby "*any Police Officer of or above the rank of Assistant Inspector with or without assistance ... may stop and search ... any individual ... if he suspects that any evidence of the commission of an offence against this regulation is likely to be*

found on such ... individual". Kuruma was stopped and searched, unlawfully, by police officers of a lower rank, who found, as a result of that unlawful search, two rounds of ammunition in his pocket. He was convicted and sentenced to death but appealed, arguing the evidence obtained by the unlawful search was inadmissible. The Privy Council dismissed the appeal. Per Lord Goddard:

> "*... the test to be applied in considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible, and the court is not concerned with how the evidence was obtained*".

A common law discretion to refuse to admit evidence which the accused was unfairly induced to produce voluntarily after the event

Lord Goddard continued, *obiter*, however:

> "*No doubt in a criminal case the judge always has a discretion to disallow evidence if the strict rules of admissibility would operate unfairly against an accused. ... If for instance some admission of some piece of evidence, e.g. a document had been obtained by a trick, no doubt the judge might properly rule it out*".

In *R* v. *Payne* [1963] 1 W.L.R. 637, Payne was persuaded to allow himself to be examined by a doctor on being told that it was no part of the doctor's duty to examine him in order to give an opinion as to his fitness to drive. The doctor gave evidence that the accused was unfit to drive, and Payne was thereby convicted of an offence. The conviction was quashed on appeal. Lord Parker C.J. held the judge should have exercised the discretion identified by Lord Goddard in *Payne* to disallow the evidence "*on the basis that if the* [defendant] *realised that the doctor was likely to give evidence on that matter he might refuse to subject himself to examination*".

It is not obvious how *Kuruma* and *Payne* are to be reconciled. For the police to search Kuruma when they had no power lawfully to do so was civil, and probably criminal, battery. For the doctor to examine Payne, when Payne's consent to such examination was not genuine but had been obtained through trickery, was the same. Yet the bullets found by the police as a result of the unlawful search must be admitted, while the opinion formed by the doctor as a result of the unlawful examination may be excluded.

In *Sang* (see below) their Lordships sought to explain the exclusion of the evidence in *Payne* as analogous to excluding a confession obtained by oppression. Per Lord Diplock:

> "*the document obtained from a defendant by a trick* [referred to in Lord Goddard's *obiter* in *Kuruma*] *is clearly analogous to a confession which the defendant has been unfairly induced to make*"
>
> "[the doctor's evidence in *Payne*] *is analogous to unfairly inducing a defendant to confess to an offence, and the short judgment of the Court of Criminal Appeal* [in *Payne*] *is clearly based upon the maxim nemo debet prodere se ipsum*"
>
> "*The underlying rationale of this branch of the criminal law* [concerning confessions] *though it may originally have been based upon ensuring the reliability of confessions is, in my view, now to be found in the maxim nemo debet prodere se ipsum, no one can be required to be his own betrayer or in its popular English mistranslation "the right to silence". That is why there is no discretion to exclude evidence discovered as the result of an illegal search but*

there is discretion to exclude evidence which the accused has been induced to produce voluntarily if the method of inducement was unfair."

Inducement to commit the offence itself

In *R* v *Sang* [1979] UKHL 3 Sang was charged with conspiracy to counterfeit bank notes. Sang claimed he had only been induced to commit the offence by an *agent provocateur* acting on the instructions of the police. English common law does not recognise a defence of 'entrapment'. If one is induced to commit an offence – whether by agents of the state or others - then one has, nonetheless, committed it. All the elements of the offence, factual and mental, are present so no finding other than 'guilty' is logically possible. The inducement might go to reduce the degree of guilt, and be taken into account on sentencing. As Lord Fraser famously observed, "*when Eve, taxed with having eaten forbidden fruit, replied 'the serpent beguiled me', her excuse was at most a plea in mitigation and not a complete defence*".

Sang sought to argue, however, that the court had a discretion to exclude all the evidence of his having committed the offence. If one is unfairly induced to confess, one's confession should not be admissible. So if one is unfairly induced to commit an offence the evidence of one's having done so should not be admissible. The judge held that, even if Sang had been induced to commit the offence by the police the court had no discretion to exclude the evidence of his having done so.

Their Lordships agreed. Per Lord Diplock: "*1. A trial judge in a criminal trial has always a discretion to refuse to admit evidence if in his opinion its prejudicial effect outweighs its probative value. 2. Save with regard to admissions and confessions and generally with regard to evidence obtained from the accused after commission of the offence, he has no discretion to refuse to admit relevant admissible evidence on the ground that it was obtained by improper or unfair means. The court is not concerned with how it was obtained. It is no ground for the exercise of discretion to exclude that the evidence was obtained as the result of the activities of an agent provocateur*."

The statutory discretion in PACE 1984

In 1984 section 78 of the Police and Criminal Evidence Act 1984 ("**PACE 1984**") introduced a potentially wider discretion whereby, in criminal proceedings "*the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it*".

In *R* v *Khan (Sultan)* [1997] UKHL 14 Khan and his cousin arrived on a flight from Pakistan. Customs officials found his cousin to be in possession of £100,000 worth of heroin and arrested him. Khan later went to the home of a man named Bashforth where, without Khan or Bashforth's knowledge, the police had installed a listening device, committing a civil trespass and occasioning some damage to Bashforth's property. The police thereby recorded a conversation in which Khan made statements amounting to an admission that he was a party to the importation of drugs by Mr Nawab. Mr Khan was charged with an offence. Without the recording, there was no case against Mr Khan. He argued the evidence was inadmissible or that the court should exclude it in its discretion because it had been obtained contrary to the right to privacy in Article 8 of the European Convention on Human Rights. When the court ruled the evidence admissible, Mr Khan pleaded guilty, but appealed the ruling on admissibility.

The House of Lords reiterated that evidence obtained improperly or even unlawfully remains admissible, subject only to the power of the trial judge to exclude it in the exercise of his common law discretion or under the provisions of section 78 of PACE.

Regarding the common law discretion, the evidence was highly probative and not prejudicial, so the first limb of the discretion described in *Sang* was not relevant. As to the second limb, the evidence was a "*... confession ... obtained from the accused after commission of the offence*" so one might have thought that the court would have discretion to exclude it at common law, if it was obtained improperly. Lord Nolan appeared to suggest however, that the common law discretion was relevant only where the confession had been improperly "*induced*" rather than merely being improperly observed:

> "*I would regard it as a misuse of language to describe the appellant as having been "induced" to make the admissions which were recorded on the tape. He was under no inducement to do so. But if this be too narrow a view, the only result would be to bring into play the judge's discretion as to whether or not the evidence should in fairness be admitted ...*"

Lord Nolan considered that, in exercising the discretion, whether at common law or under section 78:

> "*if the behaviour of the police in the particular case amounts to an apparent or probable breach of some relevant law or convention, common sense dictates that this is a consideration which may be taken into account for what it is worth. Its significance, however, will normally be determined not so much by its apparent unlawfulness or irregularity as upon its effect, taken as a whole, upon the fairness or unfairness of the proceedings. ... Upon the facts of the present case, in agreement with the Court of Appeal, I consider that the judge was fully entitled to hold that the circumstances in which the relevant evidence was obtained, even if they constituted a breach of article 8, were not such as to require the exclusion of the evidence. I confess that I have reached this conclusion not only quite firmly as a matter of law, but also with relief. It would be a strange reflection on our law if a man who has admitted his participation in the illegal importation of a large quantity of heroin should have his conviction set aside on the grounds that his privacy has been invaded.*"

The discretion to stay

In *R* v *Horseferry Magistrates Court ex parte Bennett* [1994] 1 AC 42 the English police caused the defendant to be abducted from South Africa to England for trial, in disregard of extradition laws. The court stayed the proceedings as an abuse of the court's process, and that was upheld on appeal. Their Lordships recognised that proceedings may be stayed in the exercise of the judge's discretion as an abuse of process not only where a fair trial is impossible but also where it would be contrary to the public interest in the integrity of the criminal justice system that a trial should take place.

In *R* v *Latif* [1996] 1 WLR 104 Shahzad had been looking to export heroin from Pakistan to the UK. Honi, an informant, lied to Shahzad that he knew an airline pilot who could courier heroin to the UK. It was agreed Honi would take delivery of heroin in Pakistan, arrange for it be flown to England by the pilot, take delivery of it in England himself and then deliver it to Shahzad in London. Shahzad delivered £3.5 million worth of heroin to Honi. It was carried to England by a customs officer (who thereby himself committed a crime). Shahzad flew to London where he was covertly recorded meeting Honi, discussing delivery of and payment for the heroin and taking delivery of what purported to be the heroin (actually Horlicks), following which Shazad was arrested and charged

with being knowingly concerned in the fraudulent evasion of the prohibition on importation of a controlled drug. Complaining he had been incited to commit the offence and lured to the jurisdiction by subterfuge, Shazad sought for the proceedings to be stayed as an abuse of process, alternatively for the evidence to be excluded under section 78. The judge refused.

The appeal was dismissed. Per Lord Steyn:

> "*The starting point is that entrapment is not a defence under English law. That is, however, not the end of the matter. Given that Shahzad would probably not have committed the particular offence of which he was convicted, but for the conduct of Honi and customs officers, which included criminal conduct, how should the matter be approached? This poses the perennial dilemma ... If the court always refuses to stay such proceedings, the perception will be that the court condones criminal conduct and malpractice by law enforcement agencies. That would undermine public confidence in the criminal justice system and bring it into disrepute. On the other hand, if the court were always to stay proceedings in such cases, it would incur the reproach that it is failing to protect the public from serious crime. The weaknesses of both extreme positions leaves only one principled solution. The court has a discretion: it has to perform a balancing exercise. ... The speeches in Bennett conclusively establish that* ***proceedings may be stayed in the exercise of the judge's discretion not only where a fair trial is impossible but also where it would be contrary to the public interest in the integrity of the criminal justice system that a trial should take place****. An infinite variety of cases could arise. General guidance as to how the discretion should be exercised in particular circumstances will not be useful. But it is possible to say that* ***in a case such as the present the judge must weigh in the balance the public interest in ensuring that those that are charged with grave crimes should be tried and the competing public interest in not conveying the impression that the court will adopt the approach that the end justifies any means****.*
>
> *In my view the judge took into consideration the relevant considerations placed before him. He performed the balancing exercise. He was entitled to take the view that Shahzad was an organizer in the heroin trade, who took the initiative in proposing the importation. ... The conduct of the customs officer was not so unworthy or shameful that it was an affront to the public conscience to allow the prosecution to proceed. Realistically, any criminal behaviour of the customs officer was venial compared to that of Shahzad.*"

As for the argument that the evidence ought to be excluded under the section 78 discretion as having "*such an adverse effect on the fairness of the proceedings that the court ought not to admit it*" the judge at first instance said: "*there is nothing of substance here which is unfair to the defendant in admitting this evidence. The incriminating remarks are on tape, so that proof of them does not depend on recollection of witnesses. He was not deprived of any rights that he had or sought to avail himself of. It is not evident to me that any legislation or rules of practice designed to protect people from authority, has been infringed. Nor is it evident to me that the defendant is in any way handicapped from conducting his defence ....*". Lord Steyn agreed: "*The judge found as a fact that Shahzad was not in any way prejudiced in the presentation of his defence. Counsel found it impossible to challenge that finding*".

In *R* v *Looseley* [2001] UKHL 53 their Lordships revisited entrapment in light of the Human Rights Act 1998, holding the English law approach to be compatible with the Convention. Their Lordships confirmed that entrapment is not a defence. Per Lord Hofmann "*The section 78 discretion enables the judge to safeguard the fairness of the trial. But the entrapped defendant is not ordinarily complaining that the admission of certain evidence would prejudice the fairness of his trial. He is*

saying that whatever the evidence, he should not be tried at all. The appropriate remedy, if any, is therefore not the exclusion of evidence but a stay of the proceedings". Regarding the balancing act, and how the discretion to stay should be exercised in cases of entrapment, the case offers various guidance and identifies various factors. Per Lord Nicholls:

> "*... a useful guide is to consider whether the police did no more than present the defendant with* ***an unexceptional opportunity to commit a crime****. ... McHugh J had this approach in mind in Ridgeway v The Queen (1995) [1995] HCA 66, 184 CLR 1992, 92 when he said:*
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> > *'The State can justify the use of entrapment techniques to induce the commission of an offence only when the inducement is consistent with the ordinary temptations and stratagems that are likely to be encountered in the course of criminal activity. That may mean that some degree of deception, importunity and even threats on the part of the authorities may be acceptable. But once the State goes beyond the ordinary, it is likely to increase the incidence of crime by artificial means.'*
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> *This is by no means the only factor to be taken into account when assessing the propriety of police conduct. ...*
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> *Ultimately the overall consideration is always whether the conduct of the police or other law enforcement agency was so seriously improper as to bring the administration of justice into disrepute. ... the court has regard to all the circumstances of the case ...*
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> *The nature of the offence. The use of pro-active techniques is more needed and, hence, more appropriate, in some circumstances than others. The secrecy and difficulty of detection, and the manner in which the particular criminal activity is carried on, are relevant considerations.*
>
> *The reason for the particular police operation. It goes without saying that the police must act in good faith and not, for example, as part of a malicious vendetta against an individual or group of individuals. Having reasonable grounds for suspicion is one way good faith may be established, but having grounds for suspicion of a particular individual is not always essential. Sometimes suspicion may be centred on a particular place, such as a particular public house. Sometimes random testing may be the only practicable way of policing a particular trading activity.*
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> *The nature and extent of police participation in the crime. The greater the inducement held out by the police, and the more forceful or persistent the police overtures, the more readily may a court conclude that the police overstepped the boundary: their conduct might well have brought about commission of a crime by a person who would normally avoid crime of that kind. In assessing the weight to be attached to the police inducement, regard is to be had to the defendant's circumstances, including his vulnerability. This is not because the standards of acceptable behaviour are variable. Rather, this is a recognition that what may be a significant inducement to one person may not be so to another. For the police to behave as would an ordinary customer of a trade, whether lawful or unlawful, being carried on by the defendant will not normally be regarded as objectionable.*"

There is an echo of this reasoning in *Pliego*, where the judge observed that: "*it is wholly unrealistic to suppose that X would have revealed what he did to (a genuine intermediary of) a genuine potential client in meetings convened to explore his professional experience and capabilities. BCO's*

conduct of those meetings in bad faith bears no resemblance to the genuine scenario sought to be replicated or imitated through this covert operation".

The civil law framework

In *Pliego* the claimants were seeking summary judgment, relying on the information BCO obtained from X and the defendants were seeking to have the claim struck out as an abuse of process or for the evidence to be excluded.

CPR 24.3 says "*The court **may** give summary judgment against a claimant or defendant on the whole of a claim or on an issue if— (a) it considers that the party has no real prospect of succeeding on the claim, defence or issue; and (b) there is no other compelling reason why the case or issue should be disposed of at a trial*". If the defence has no real prospect of success and there is no compelling reason why it should be disposed of at a trial, then the court has a discretion to strike it out, but can still exercise that discretion against the claimant, and refuse. Like all discretions in the CPR, this is to be exercised in accordance with the overwhelming objective of dealing with cases justly and at proportionate cost set out in CPR 1.1.

CPR 3.4(2)(b) says "*The court may strike out a statement of case if it appears to the court - ... (b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings*".

There is no reference in *Pliego* to (c) "*that there has been a failure to comply with a rule, practice direction or court order*", but that may be a consideration at the next step in the proceedings if the information obtained from X is held to be privileged, because it might then be argued that the claimant had breached, for example, PD 57AD 19.2 "*Where a party is told, or has reason to suspect, that a document has been produced to it inadvertently, that party shall not read the document and shall promptly notify the party who produced it to him*" though query whether the covert recording is really a "*document ... produced ... inadvertently*" in the relevant sense.

The civil courts have a discretion to exclude evidence which is otherwise admissible. This is set out in CPR 32.1 "*(2) The court may use its power under this rule to exclude evidence that would otherwise be admissible*".

The effect of CPR 1.2 is to require that the court, when exercising that discretion, must seek to give effect to the overriding objective in CPR 1.1 of dealing with the case "*justly*" and at proportionate expense, which includes "*so far as is practicable ... ensuring that it is dealt with ... fairly*". The effect of section 6 of the Human Rights Act 1998 is also to require the court, when exercising that power, to refrain from acting "*in a way which is incompatible with a Convention right*". These "*Convention rights*" include the right to a fair trial (Article 6) the right to respect for private and family life (Article 8) and protection of property (Article 1 of the First Protocol).

This can be usefully compared with section 78 of PACE, conferring a discretion to exclude evidence where it "*would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it*".

The result is that, where evidence has been obtained in some improper way, the court can weigh up the public interest in discouraging similar conduct in the future against the strong, present, public (and private) interest in having the court establish what the truth is and decide the case in accordance with that true position.

The leading example of this is the civil context is *Jones* v *University of Warwick* [2003] EWCA Civ 151. A claimant sought damages for continuing disability in her hand alleged to have been caused by an accident at work. The employer's insurers retained an investigator who obtained access to the claimant's property by deception, claiming to be a market researcher, and covertly filmed the claimant, without her knowledge or consent, using her hand without difficulty. The claimant, relying on her Article 8 privacy rights, sought for the evidence to be excluded. The district judge at first instance excluded the evidence. On first appeal Deputy High Court Judge Harris said:

> "*The primary question for the court is not whether or not to give approval to the method whereby evidence was obtained. It is whether justice and fairness require that this highly material evidence, which contradicts the evidence which she has given to others, should be put to her before the trial judge to enable him to reach a sound conclusion about the true extent of any disability. True, the claimant was herself deceived but there is strong prima facie evidence that she herself is deceiving or misleading the defendants to enrich herself thereby. It is not easy for the defendants to protect themselves against exaggerated claims. Anyone with much experience of personal injury litigation will know that the defendants and their insurers are frequently faced by claimants who suggest that their disabilities are far greater than they are, and large sums of money may be unjustifiably sought. Though such people are rarely, if ever prosecuted, in many cases what they do or seek to do must amount to the crime of obtaining property or pecuniary advantage by deception. In these circumstances I do not believe that the courts should be too astute to prevent effective investigation by the defendants of claimants against them. Clearly, there is a public interest that unfair, tortious and illegal methods should not be used in general and where they are unnecessary, but the conflicting considerations are on the one side the claimant's privacy and on the other the legitimate need and public interest that defendants or their insurers should be able to prevent and uncover unjustified, dishonest and fraudulent claims. In the instant case I have no doubt that the latter considerations do and should outweigh the former.*"

On second appeal, the Court of Appeal said:

> "*It is not possible to reconcile in a totally satisfactory manner, the conflicting public policies. ... prior to the coming into force of the CPR and the Human Rights Act ... [t]he achieving of justice in the particular case which was before the court was then the paramount consideration for the judge trying the case. If evidence was available, the court did not concern itself with how it was obtained. While this approach will help to achieve justice in a particular case, it will do nothing to promote the observance of the law by those engaged or about to be engaged in legal proceedings. This is also a matter of real public concern. If the conduct of the insurers in this case goes uncensured there would be a significant risk that practices of this type would be encouraged. This would be highly undesirable, particularly as there will be cases in which a claimant's privacy will be infringed and the evidence obtained will confirm that the claimant has not exaggerated the claim in any way.*
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> *Fortunately, in both criminal and civil proceedings, courts can now adopt a less rigid approach to that adopted hitherto which gives recognition to the fact that there are conflicting public interests which have to be reconciled as far as this is possible. The approach adopted in R v Karuna ... and R v Sang ... and R v Khan (Sultan) ... has to be modified as a result of the changes that have taken place in the law ...*"
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> "*The court must try to give effect to what are here the two conflicting public interests. The weight to be attached to each will vary according to the circumstances. The significance of*

> *the evidence will differ as will the gravity of the breach of Article 8, according to the facts of the particular case. The decision will depend on all the circumstances. Here, the court cannot ignore the reality of the situation. This is not a case where the conduct of the defendant's insurers is so outrageous that the defence should be struck out. The case, therefore, has to be tried. It would be artificial and undesirable for the actual evidence, which is relevant and admissible, not to be placed before the judge who has the task of trying the case. We accept Mr Owen's submission that to exclude the use of the evidence would create a wholly undesirable situation. Fresh medical experts would have to be instructed on both sides. Evidence which is relevant would have to be concealed from them, perhaps resulting in a misdiagnosis; and it would not be possible to cross-examine the claimant appropriately. For these reasons we do not consider it would be right to interfere with the Judge's decision not to exclude the evidence.*"
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> "*Excluding the evidence is not, moreover, the only weapon in the court's armoury. The court has other steps it can take to discourage conduct of the type of which complaint is made. In particular it can reflect its disapproval in the orders for costs which it makes. In this appeal, we therefore propose, because the conduct of the insurers gave rise to the litigation over admissibility of the evidence which has followed upon their conduct, to order the defendants to pay the costs of these proceedings to resolve this issue before the district judge, Judge Harris and this court even though we otherwise dismiss the appeal.*"

When evidence has been wrongfully obtained, the options available to the civil court are, essentially, to strike out proceedings as an abuse of process, exclude the evidence, or admit the evidence but order the wrongdoer to pay the costs of the proceedings to determine if it is admissible.

To date, the exclusion of improperly obtained evidence seems, however, more of a theoretical possibility than a practical reality in the civil context. The evidence was admitted in *Jones*. In *O'Leary* v *Tunnelcraft Ltd* [2009] EWHC 3438 (QB) covert recordings were excluded but on case management grounds (they were disclosed to close to the trial) rather than for impropriety. In *Agents Mutual* v *Gascoigne Halman* [2017] CAT 5 covert and potentially illegal recordings for "*corporate espionage*" were admitted. In *Imerman* v *Imerman* [2010] EWHC 64 (Fam) Mrs Imerman, concerned her husband might conceal contested assets in a divorce, had her brother (who shared her husband's office) make illegal copies of documents from his computer. These were admissible, but (as in *Jones*) Mrs Imerman was subject to costs sanctions.

Routinely imposing costs sanctions as a middle ground between the rock of excluding relevant evidence and deciding the case on a factually incorrect basis and the hard place of encouraging wrongdoing is hardly a perfect solution, and certainly does not 'square the circle'. When enough money is in issue, the value of the evidence which can be obtained by wrongdoing may be such that the mere prospect of having to pay the costs of a hearing to decide if it is admissible is not much of a disincentive so, in high stakes litigation, litigants may well take a calculated risk and roll the dice. It will be interesting to see what will be the status of the evidence in *Pliego*. If the information, or some of it, is privileged then it will be inadmissible. If the information, or some of it, is not privileged (say under the iniquity exception) the question will arise as to whether the court should admit it.