The background of the slide is an abstract, fluid painting in shades of teal, cyan, and deep red. The colors swirl and blend together, creating a sense of movement and depth. A solid white horizontal bar is positioned at the top left of the slide, partially overlapping the abstract background.

How do you control - and overcome - the difficulties of (1) forged/fake evidence and (2) illegally obtained evidence, e.g. hacked emails or secret video footage?

Tim Akkouch KC

Essex Court Chambers

Forged and fake evidence: 2024

- Goodbye graphologists
- Hello technology expert witnesses.
- Keep control of your enquiry agents.



Crypto Open Patent Alliance v Wright

[2024] EWHC 1198 (Ch),
Mellor J

- ChatGPT used to produce witness evidence
- ChatGPT used to produce fake documents

“... ornate passages ...” [515]

“... florid prose ...” [516]

“Consequently, attempting to reverse this process ... is akin to an art analyst trying to deduce the precise movement and techniques used by an artists solely from the finished painting. While certain broad strokes may be inferable, the exact method and sequence of creation are lost once the artwork is complete.”

Wright gets caught out

...

[315]: The content of [a specific document] was written by ChatGPT. In particular ... a deleted file containing part of the [document] was recovered. [It] begins with the words:

“Certainly, here’s the LaTeX code for Section 7, which covers Recommendations.”

So what can you do?

- Run appropriate searches of disclosed documents.
- Get a computer expert.
- Ask about ChatGPT and other accounts (or get them listed in the DRD).

[515]: “The Developers strongly suspected that these ornate passages ... were made up by ChatGPT. They pressed for Dr Wright’s ChatGPT records to be preserved and produced. He appears to have held two accounts, one of which he supposedly does not have access to and the other of which holds 22 million lines of text”



**Bourlakova v
Bourlakov
[2024]
EWHC 765
(Ch)**

A freezing injunction application goes wrong

...

“At the February hearing, there was an extraordinary turn of events arising from the evidence then relied upon by the Claimants in support of the Injunction Application. That evidence included the first affidavit of [a solicitor] ... [and] exhibited a report of the same date from a private investigation firm called CT Group.”

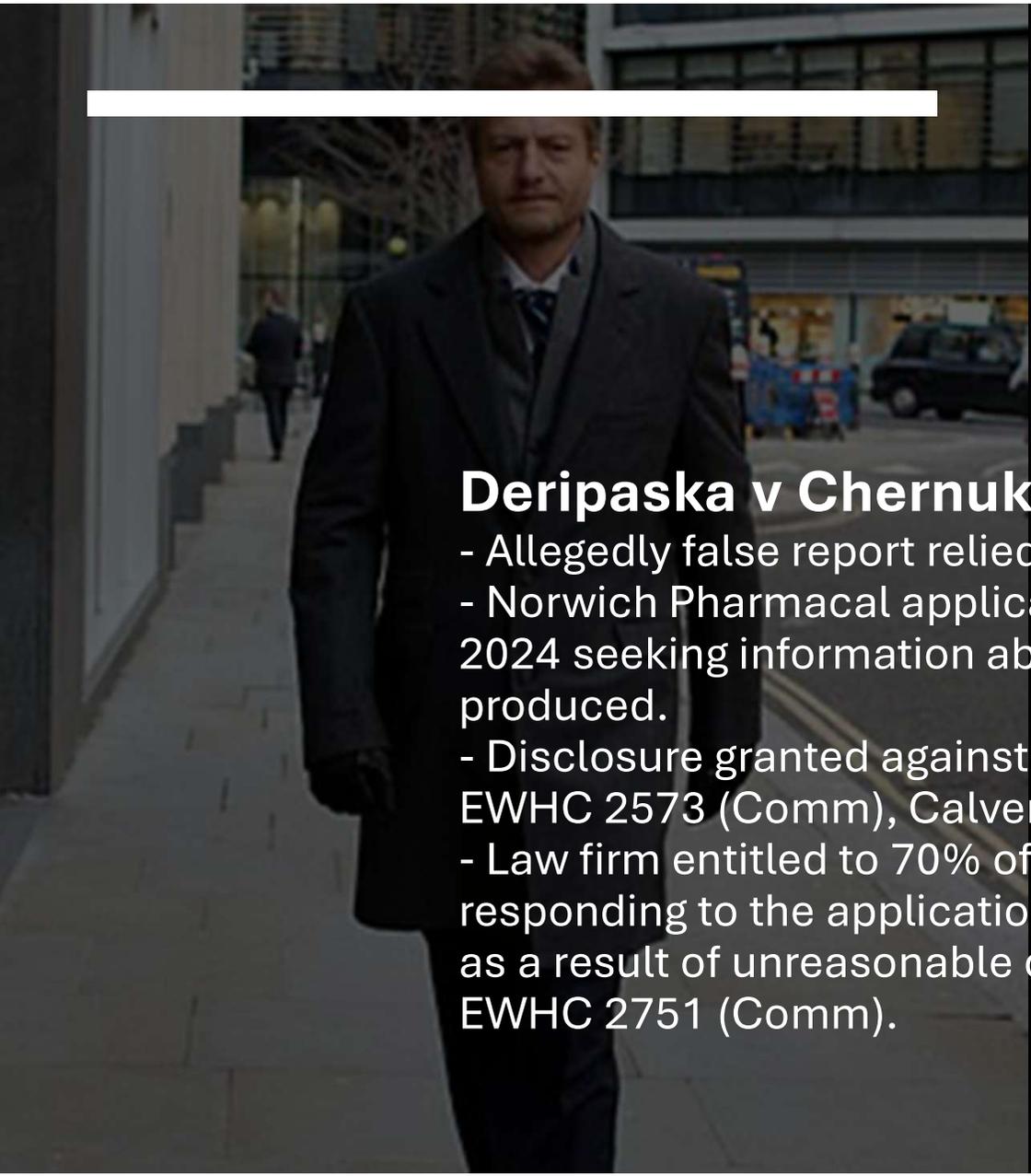
“... analysis of the material provided in the CT Report had confirmed that a considerable volume was fake or forged. Further, correspondence with [the solicitor] revealed that it had been aware since August 2023 that CT held potentially privileged documents belonging to the Defendants but no efforts were made to notify them about this. ...”





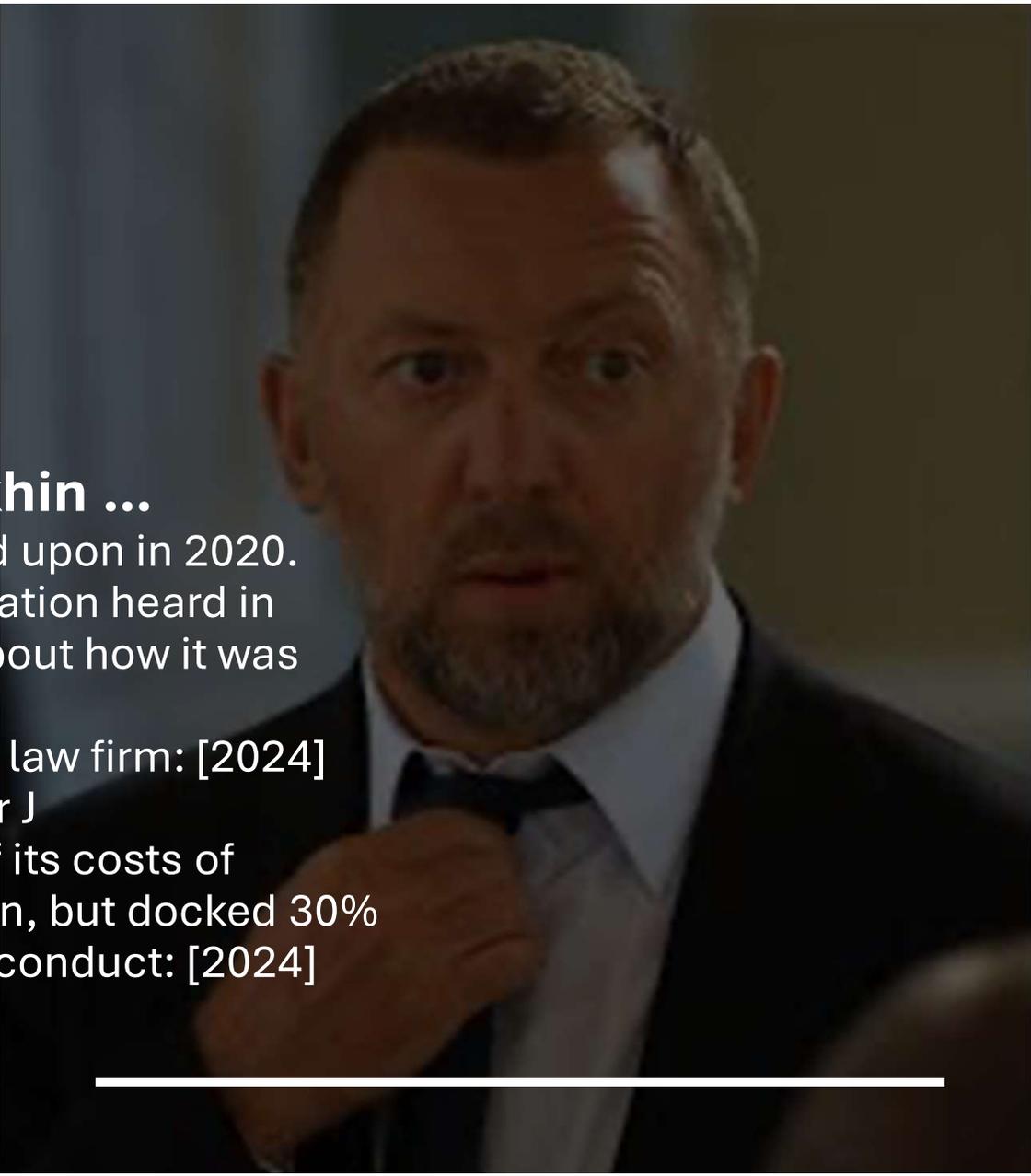
Problems ...

1. Repeated adjournment of freezing order application: [21].
 2. Evidence explaining what had been done: [27]-[41].
 3. Separate breach of confidence proceedings: [28].
 4. Adverse costs orders?
-



Deripaska v Chernukhin ...

- Allegedly false report relied upon in 2020.
 - Norwich Pharmacal application heard in 2024 seeking information about how it was produced.
 - Disclosure granted against law firm: [2024] EWHC 2573 (Comm), Calver J
 - Law firm entitled to 70% of its costs of responding to the application, but docked 30% as a result of unreasonable conduct: [2024] EWHC 2751 (Comm).
-

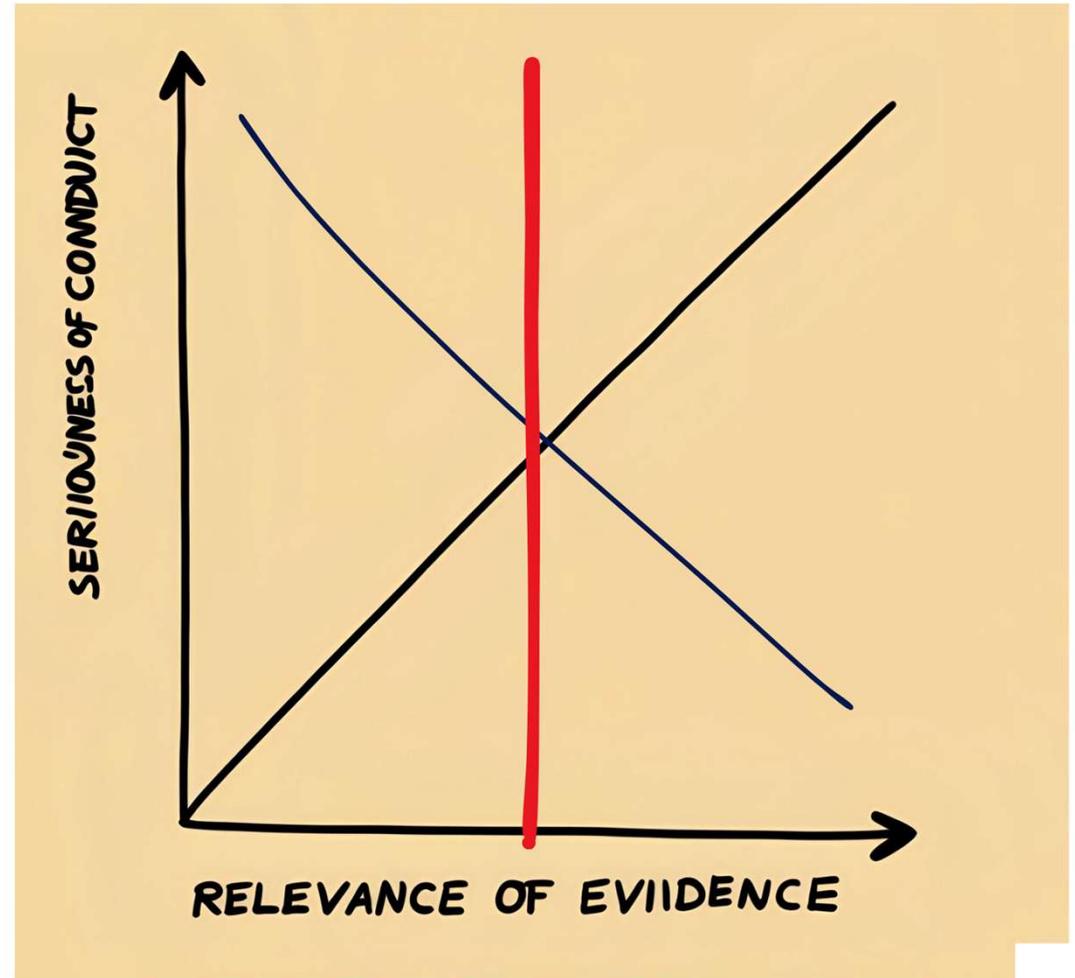


Some lessons?

- Do not assume that documents are genuine. And don't get caught out by CPR r. 32.19.
 - Interrogate your own client's documents before relying on them.
 - If an enquiry agent has been used, get straight answers.
 - If forgery is suspected, get appropriate expert help.
-



Test for admission of illegally obtained evidence



How does this arise in practice?

- Personal injury or civil fraud claim surveillance footage.
- The bin run.
- Pretext calls or phone hacking.
- (Spear) phishing / other email hacking.
- By other ingenious methods.
- By own enquiry agents; by third parties offering to sell you data; by persons unknown who make information available (directly or by publishing online).

Seriousness

- No tort, breach of privacy or criminal offence.

(It is possible to get surveillance evidence lawfully: [2020] EWHC 3241 (QB), [113] (Richard Spearman KC).)

- Tort and/or breach of privacy

Jones v University of Warwick [2003] 1 WLR 954 (Lord Woolf LCJ)
Immermann v Tchenguiz [2011] 2 WLR 592 (Lord Neuberger MR)

- Criminal offence:

Dubai Aluminium v Al-Alawi [1999] 1 WLR 1964 (Rix J)

Relevance

- Obviously, the more relevant the evidence the less likely the court to exclude it.
- You are weighing up competing public interests: (i) getting to the truth vs (ii) courts should not acquiesce/encourage the use of unlawful means to obtain evidence: Jones, [2].
- But there comes a time when the wrongdoing is so serious that the Court is likely to exclude or even strike out the wrongdoing party's case (Jones, [28]).

More problems and ideas

- Privilege? In both received material and also instructions to enquiry agents. Dubai, pp 1968-9,
- Can you run an 'ends justify the means' argument? Jones, [12], [29].
- Can you reverse engineer?
- Bringing claims against the enquiry agents or others for breach of confidence or in harassment?

Judge Harris:

“In order to uncover his deception steps may have been taken which involved him in being misled or his privacy being infringed. Misleading him may be the only practical means of showing that he himself is misleading other people”

Lord Woolf:

“While not excluding the evidence it is appropriate to make clear that the conduct of the insurers was improper and not justified. We disagree with the indication of Judge Harris to the contrary.”

Rix J:

“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. ... 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.”