Litigation Privilege Does Not Automatically Protect Communications with Funders: The Commercial Court Clarifies the Limits of Privilege in the Context of Litigation Funding

by Joseph Lewin and Yelim Jun

In *Uber London Ltd & Ors v Garry White & Ors; Mishcon de Reya LLP* [2026] EWHC 1610 (Comm), the Commercial Court held that documents created to help a funder decide whether to invest in a claim will not ordinarily attract litigation privilege.

This means that information a firm gathers while acting for a funder can later fall within the control of the claimants it goes on to represent in the same matter.

Background

The Claimants (a claim group of over 10,000 individual London black cab drivers and the assignee of two former minicab operators) alleged that the Defendants (three companies in the Uber group) obtained and retained their private hire operator's licence through an unlawful means conspiracy alleged to involve fraud.

Because the claims were issued outside the ordinary six-year limitation period, the Claimants relied on section 32 of the Limitation Act 1980, contending they could not, with reasonable diligence, have discovered the fraud before June 2018. A preliminary issue trial was listed to determine the question of whether the Claimants discovered, or could have discovered with reasonable diligence, the alleged fraud and/or deliberate concealment only after June 2018.

The Claimants were represented by Mishcon de Reya ("**MdR**"). However, before MdR's engagement with the individual drivers had begun, in late 2017 it was engaged by the litigation funder Harbour to investigate the merits and value of the potential claim. During that stage, MdR corresponded extensively with Harbour and with the Licensed Taxi Drivers' Association ("**LTDA**"), a black cab drivers' trade association. MdR was not formally engaged by the Claimants until October 2018 onwards.

Once the proceedings had started, the Defendants sought disclosure of communications exchanged between MdR and Harbour before the engagement of MdR by the Claimants (the "**Harbour Communications**"). This included correspondence between MdR and

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Harbour, communications with the LTDA, and documents held on MdR's file opened in Harbour's name in connection with the potential claim.

The Claimants resisted disclosure on four grounds: (i) that the documents were not relevant; (ii) on the grounds of litigation privilege; (iii) that the documents were outside their control; and (iv) that disclosure occurring so close to trial would be disproportionate.

Judgment

(i) Were the Harbour Communications relevant to the preliminary issue?

The Court held that the Harbour Communications were likely to contain relevant material, on two bases.

First, where the Claimants or the LTDA had communicated directly with MdR, that material could shed light on individual Claimants' actual knowledge of the alleged facts.

Secondly, what MdR and Harbour had discovered during their investigation could inform the question of what a Claimant could reasonably have discovered at the time (even though the Defendants accepted that MdR's knowledge could not simply be imputed to the Claimants).

(ii) Were the Harbour Communications protected by litigation privilege?

As set out in the classic cases of *Three Rivers (No. 6)* [2005] 1 AC 610 and *WH Holding Ltd v E20 Stadium LLP* [2018] EWCA Civ 2652, communications between parties or their solicitors and third parties for the purpose of obtaining information or advice in connection with existing or contemplated litigation are privileged when the following conditions are satisfied:

1. Litigation must be in progress or in reasonable contemplation.
2. The communications must have been made for the sole or dominant purpose of conducting litigation.
3. The litigation must be adversarial, not investigative or inquisitorial.

The Court rejected the Claimant's claim to be able to withhold the Harbour Communications on the basis of litigation privilege. The Court confirmed that litigation privilege protects only communications created for the dominant purpose of conducting litigation.

The Court found that Harbour had instructed MdR so that Harbour could decide whether to fund the proceedings. As such, the dominant purpose of the communications was in relation to funding, not the conduct of litigation.

This was distinguished from the situation where an individual litigant who takes its own funding decision. In that situation, the decision whether to fund and the decision whether to litigate are one and the same, made by the person who will actually be the claimant, and so it forms a part of that person's conduct of their own litigation. In contrast, a third-party funder's commercial decision whether to fund someone else's claim is not necessarily part of conducting that litigation.

The fact that litigation privilege can, in principle, be claimed by a non-party funder (as recognised in the case of *Al Sadeq v Dechert* [2024] EWCA 28) did not assist Harbour, since there was no evidence it intended to play any role in the litigation itself beyond funding it.

Communications between Harbour and MdR did remain capable of attracting another kind of privilege: legal advice privilege, because of the solicitor-client relationship between Harbour and MdR. But communications with third parties such as the LTDA were not automatically protected in the same way.

(iii) Were the Harbour Communications within the Claimants' control?

The Court also rejected the argument that the Harbour Communications sat outside the Claimants' control because they belonged to Harbour and not the Claimants.

The Court’s reasoning was that once the individual Claimant drivers became MdR's clients, MdR also owed them a duty to disclose material information. That included information that MdR had originally acquired while acting for Harbour.

As held in the case of *Hilton v Barker Booth & Eastwood (a firm)* [2005] 1 WLR 567, a solicitor owing duties to two clients cannot simply prefer one over the other, and it was unrealistic to suppose MdR would investigate the same claims for Harbour, then represent the Claimants, while disregarding everything it had already learned. The obvious commercial expectation was that this earlier work would be used to advance the Claimants' case.

MdR sought to rely on a confidentiality clause in a 2024 retainer agreement between it and RGL Management Ltd (a claims management company acting on behalf of the Claimants) to argue that it was relieved of any duty to disclose information obtained while acting for other clients. The provision stated that MdR may "*have acted for persons in the same or similar sector as yours and by agreeing to the terms of this letter you agree that will have no duty to disclose to you any confidential information that we have obtained, or might in the future obtain, from acting for such persons or which is derived from any other source*".

The Court rejected this on several grounds. Claimants who had already become MdR's clients had an existing right to information in the Harbour Communications where it was relevant to their claims before the 2024 retainer agreement. If they were to surrender that right, it would have required their informed consent (also required under the SRA Code of Conduct). The Court found no evidence that such informed consent had been given. The terms had simply been made available to the Claimants through a portal, with no indication that Claimants understood they were giving up existing rights to relevant information. The Court found that even if the terms had been contractually binding, that would not have amounted to informed consent. In addition, the wording of the clause was not sufficiently clear to show that the Claimants had agreed to waive access to this information.

(iv) Was disclosure reasonable, proportionate, and necessary at this stage?

The Claimants argued that it was neither reasonable nor proportionate for disclosure to be given at such a late stage (approximately two weeks before the start of the preliminary issue trial) and that it was not necessary for the just disposal of the proceedings.

The Court rejected this, but it drew a distinction between two categories of documents within the Harbour Communications:

1. Documents bearing on the actual knowledge of the individual drivers, including communications with the LTDA, were not privileged, likely straightforward to review, and directly relevant to the preliminary issue. Their disclosure was ordered as reasonable, proportionate, and necessary.
2. Documents reflecting only MdR's or Harbour's own assessment of the merits were of more marginal, indirect relevance and largely likely to fall under legal advice privilege. A review to isolate the smaller pool of non-privileged material in this category would be time-consuming for limited benefit, so this was excluded from the order.

Key Points to Note

The judgment is an important reminder of several practical points:

1. However closely a funder is involved in evaluating a claim's merits, litigation privilege will only apply to communications where the sole or dominant purpose of the communication is the conduct of litigation, not the funder's own decision on whether to finance it. Unless that communication separately attracts legal advice privilege, it may need to be disclosed.
2. The same considerations apply to other communications. For example, in *RBS Rights Litigation [2017] 1 WLR 3539* the argument that an After the Event (ATE) policy was subject to litigation privilege was rejected on a similar basis.
3. Whilst in this case, there was no dispute as to whether litigation was in contemplation, it is important to note that litigation privilege will not automatically apply to the investigative stages of a claim, i.e. before litigation is in contemplation. Even where litigation is reasonably contemplated, the dominant purpose test must still be satisfied. Material created primarily for fact-finding, risk assessment, or other investigative purposes will not attract litigation privilege unless those activities are actually undertaken for the dominant purpose of conducting the litigation. (See *The Director of the Serious Fraud Office v Eurasian Natural Resources Corporation Ltd* [2017] EWHC 1017 (QB)).
4. When engaging a law firm, clients should ensure that they understand whether the firm has previously obtained information about their claim while acting for another party (for example, a funder or another interested party) and how that information will be handled. Any restrictions on the firm’s ability to share relevant information with the client should be explained clearly at the outset, including what information may be withheld and why.

If this decision raises questions about your own funding arrangements, disclosure strategy, or privilege position, please get in touch with our Commercial Litigation team.