Neutral Citation Number: **[2026] EWHC 1610 (Comm)**

Case Nos: CL-2024-000252 & CL-2024-000366

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)

The Rolls Building
7 Rolls Buildings
Fetter Lane, London
EC4A 1NL

Date: Friday 12 June 2026

Before:

MR JUSTICE BIRT

- -

Between:

(1) UBER LONDON LIMITED **(2) UBER B.V.** **(3) UBER TECHNOLOGIES, INC.**	**Applicant / Defendants**
- and -	
(1) GARRY WHITE AND OTHERS	**First Respondent / Claimant**
(2) MISHCON DE REYA LLP	**Second Respondent**

And Between:

(1) UBER LONDON LIMITED **(2) UBER B.V.** **(3) UBER TECHNOLOGIES, INC.**	**Applicants / Defendants**
- and –	
(1) JUSTIN PETERS (AS ASSIGNEE FOR (1) KABBEE EXCHANGE LIMITED (DISSOLVED) AND (2) IRIDE LONDON LIMITED (IN LIQUIDATION)	**First Respondent / Claimant**
(2) MISHCON DE REYA LLP	**Second Respondent**

- -

- -

MR ALAIN CHOO CHOY KC and MS REANNE MacKENZIE (instructed by Mishcon de Reya LLP) for the **Claimants/Respondents**

MS SONIA TOLANEY KC and MR MICHAEL WATKINS (instructed by Herbert Smith Freehills Kramer LLP) for the **Defendants/Applicants**

- -

APPROVED JUDGMENT

(Main Judgment on Disclosure)

If this Transcript is to be reported or published, there is a requirement to ensure that no reporting restriction will be breached. This is particularly important in relation to any case involving a sexual offence, where the victim is guaranteed lifetime anonymity (Sexual Offences (Amendment) Act 1992), or where an order has been made in relation to a young person.

Digital Transcription by Marten Walsh Cherer Ltd.,
2nd Floor, Quality House, 6-9 Quality Court, Chancery Lane, London WC2A 1HP.
Telephone No: 020 7067 2900. DX 410 LDE
Email: info@martenwalshcherer.com
Web: www.martenwalshcherer.com

MR JUSTICE BIRT:

1. This is my ruling on the Defendants' application for disclosure. I am giving it orally now in the interests of expedition, due to the imminent trial date.

2. The Respondents to the application are the Claimants, as well as their solicitors, Mishcon de Reya, who are the Second Respondents to the application. An application for disclosure is made against them in the alternative under CPR 31.17.

3. The Respondents oppose the application on a number of grounds:

   i) First, the documents are said not to be relevant in relation to the upcoming preliminary issue trial.

   ii) Second, the documents are said to be privileged.

   iii) Third, the documents are said not to be in the Claimants' control. This is what has led to the alternative application against Mishcon de Reya under CPR 31.17.

   iv) Fourth, the production is opposed on the basis that it is neither reasonable nor proportionate for disclosure to be given at this late stage, around two weeks before the trial starts, and that it is not necessary for the just disposal of the proceedings.

4. The Defendants join issue with the Respondents on each of those points.

5. The Claimants in these two actions are: first, individual black cab drivers; and second, the assignee of the rights of two companies previously involved in the provision of private hire car services in London. They bring a claim against the Defendants, alleging unlawful means conspiracy.

6. The Defendants to both claims are three companies in the Uber group of companies, including Uber London Limited, which is the licensed private hire operator in London. When I refer to "Uber" in this ruling, I will do so by reference to the Defendants collectively, for the sake of simplicity.

7. The gist of the claim, in very broad outline, is that the Claimants allege that the Defendants conspired to cause them loss, by the use of unlawful means over the period mid-2012 to 14 March 2018. The alleged unlawful means include allegations of deliberate wrongdoing, including fraudulent misrepresentation relating to Uber's operating system. It is alleged that, but for the alleged conspiracy, Uber would not have obtained a private hire operator licence and would not then have competed with the Claimants for the provision of private hire journeys in London. These allegations are denied by the Defendants in their entirety.

8. The claims were issued on 2 May 2024 and 24 June 2024. It is accepted that the primary six-year limitation period expired before issue of the Claim Forms. The Claimants rely on section 32 of the Limitation Act to displace the primary limitation period.

9. The trial of a preliminary issue is due to commence on 25 June 2026, to determine the question: "Did the Claimants discover, or could the Claimants with reasonable diligence have discovered, the alleged fraud and/or deliberate concealment only after 25 or 26 June 2018?"

10. The dates of 25 and 26 June 2018 are relevant because the first of those dates is the date on which evidence in Uber's licensing appeal in the Westminster Magistrates' Court was made public; and the second was the date when the licensing appeal judgment was published. The Claimants say that they did not discover, and could not have discovered, the fraud that they allege against the Defendants prior to the hand down of that licensing appeal judgment.

11. The Defendants' position is that before the publication of the licensing appeal judgment, the Claimants either did discover the alleged fraud or could, exercising reasonable diligence, have discovered the alleged fraud. In support of this, the Defence plead seven specific documents that were publicly available before the licensing appeal judgment.

12. Relevant to the applications before the Court today are the involvement of the litigation funder, Harbour, and the Claimants' solicitor, Mishcon de Reya. Harbour provided litigation funding for the early stages of this claim, including at the time of the first letter before action but appear to have stopped providing funding in November 2019. As I say, Mishcon de Reya are the Claimants' solicitors and they have been the Claimants' solicitors since October 2018. That is when, on the Claimants' evidence, the first letter of engagement was entered into with a potential Claimant.

13. However, importantly, before Mishcon de Reya were engaged by individual Claimants, and before Harbour had decided to fund any claim against the Defendants, Mishcon de Reya and Harbour had been in communication. The Claimants' evidence is that Harbour engaged Mishcon de Reya to investigate a potential claim in December 2017. During their investigation of the potential claims, Mishcon de Reya spoke to the LTDA – that is the Licensed Taxi Drivers' Association – which is a trade association of black cab drivers, whose members include many of the individual Claimants in this action. It is documents generated during this period of time, whilst Mishcon de Reya were engaged by Harbour and before the engagement of Mishcon de Reya by the Claimants, that are the subject of this disclosure application.

14. In this application, the Defendants seek disclosure of documents they refer to as "the Harbour Communications", described in the draft order attached to the Application Notice in three paragraphs as follows:

> "i. All correspondence between [Mishcon de Reya] and Harbour up to October 2018 in connection with a potential claim against any one or more of the Defendants (or the Defendants' corporate group more generally);
>
> ii. All correspondence between [Mishcon de Reya], the LTDA and/or any members of the LTDA up to October 2018 in connection with a potential claim against any one or more of the Defendants (or the Defendants' corporate group more generally); and
>
> iii. All documents saved to the Harbour File (and any connected or related files) up to October 2018 including but not limited to internal correspondence, external correspondence, attendance notes, memos, presentations, advice, letters."

The "Harbour File" that is mentioned there refers to a file that was opened by Mishcon de Reya on 14 March 2018 in Harbour's name in connection with the potential claim against Uber.

15. The parties each advanced arguments as matters of principle under the topics of relevance, privilege and control. I will deal with those first, before turning to the question of whether, in light of my conclusions on those points, any disclosure should be ordered.

16. First I will deal with relevance.

17. The Defendants say that the Harbour Communications are relevant, such as to fall within the test for Model D disclosure under Practice Direction 57AD, as well as the test for relevance under CPR 31.17.

18. As an introductory point, the Defendants point out that the Harbour Communications are between parties that are (or have been) directly involved in this case because they involve: Mishcon de Reya, who are now the Claimants' solicitors; Harbour, the Claimants' former litigation funder; the LTDA, a trade association, of which many of the Claimants are members; and, it is said, a number of the Claimants themselves.

19. In relation to that final point, it is said that a number – over a hundred individuals – responded to a request by the LTDA to provide initial assessments of lost earnings for the purposes of supporting the initial formulation of the claim, and that the LTDA liaised with its members about the engagement with Mishcon de Reya. It is relevant in relation to that point to note that the Defendants in their evidence, at Ms Lidgate's second statement, paragraph 73, confirmed that in relation to the relevance issue they are not seeking to impute to the Claimants knowledge from the Harbour Communications in the period before they were clients of Mishcon de Reya. In other words, they are not seeking to say that the Harbour Communications are relevant to the section 32 issues because Mishcon de Reya's knowledge of their contents can be imputed to the individual Claimants. They accept it cannot be.

20. The two ways in which the Harbour Communications might be said to be relevant would be: (1) because they go to the actual knowledge of individual Claimants; and / or (2) they go to what individual Claimants could reasonably have discovered.

21. As to (1), as I have mentioned, at least some individual Claimants were involved in communications between the LTDA and Mishcon de Reya in the relevant period and, it appears, prior to 25 / 26 June 2018. Some provided information in relation to the assessment of damages. It also appears that the LTDA updated its members, which included a large number of the Claimants in these proceedings, about its discussions with Mishcon de Reya. It is difficult to see how those communications would not be relevant to the state of knowledge and understanding of potential claims on the part of individual Claimants. That is not by way of imputing knowledge to the Claimants, but by way of potentially shedding light on the actual knowledge of some or more of the individual Claimants. This relates at least to communications with individual Claimants and possibly to those with the LTDA, insofar as they might shed light on what was passed on to or was discussed with individual Claimants.

22. Mr Leedham explains, in his statement at paragraphs 32 and following, that there was no direct contact between Mishcon de Reya and individual drivers in this period, but rather the contact Mishcon de Reya had was with the LTDA and through the LTDA any individual drivers. He also explains that the LTDA gave the Claimants access to its documents for the purposes of these proceedings and that a disclosure review has been undertaken in respect of them, ending up with 1,205 documents being disclosed. There has, therefore, been some disclosure through the LTDA documents of some material in this category in the relevant period. Indeed, the fact that such documents have been reviewed for disclosure and disclosed is relied upon by the Defendants as illustrating the relevance of these sorts of documents during this period.

23. However, as is recognised by both parties, the documents provided by the LTDA are not understood to be a complete record of communications that the LTDA had about these matters in this period. I was not shown the details of what had been said about this, but I was told that not all the documents and other communications had necessarily been kept by the LTDA. The result is that there may well be gaps in the documentary records supplied by the LTDA of, for example, its communications with drivers in this period. It might be that some of the gaps in that documentary record can be filled by the material held within the Harbour Communications. For example, if the LTDA passed on to Mishcon de Reya a communication that it had had with a driver.

24. As a result of this, during the course of the hearing, Mr Choo Choy KC, representing the Respondents, conceded that there may be documents within the Harbour File comprising communications between a driver and the LTDA which in principle may indicate what a black cab driver might have known or be doing (as opposed to what a funder knew or may be doing) and accepted such documents would prima facie be relevant to the preliminary issue.

25. That was a pragmatic recognition of the position. If there is material within the Harbour Communications that sheds light upon the knowledge or understanding in relation to potential claims against Uber on the part of individual drivers, that will be relevant. Insofar as it relates to the knowledge or understanding of one of the Claimants, that is obviously the case. Even if, however, it relates to the knowledge or understanding of a driver who is not a Claimant, it may still be relevant as either evidence of what it might have been reasonable for a Claimant to discover or, though depending on the facts, potentially the basis for an inference of knowledge or understanding on the part of another driver who is a Claimant.

26. As to the second potential area of relevance – what Claimants could reasonably have discovered – it may be relevant to that to understand what others had, in fact, discovered. In this respect, the Defendants relied upon the case of *Banca Intesa Sanpaolo SpA v Comune di Venezia* [2022] EWHC 2586 (Comm); [2024] Bus LR 228. In that case, the Court of Appeal at paragraphs 186 to 188 referred to the position of others in a similar situation to the Claimants there in support of its conclusions on section 32. That was a case where the other entity, whose knowledge and understanding was being referred to, was similar to the party against whom the time bar was being asserted – there, an Italian local authority.

27. Here, it is pointed out by the Claimants that what Harbour and Mishcon de Reya managed to discover is not necessarily an automatic proxy for what an individual cab driver could have discovered. There may ultimately be some force in such an argument,

however that seems to me to be a point for the trial, rather than one that rules such documents out at this stage as not relevant at all. There may, for example, be points about it having been reasonable for individual drivers to approach lawyers. It may be said that individual drivers would have approached lawyers but for the fact that it was understood that claims were being investigated by Mishcon de Reya and a funder with a view to a future group action. There may be other points about how much weight can be put on what Mishcon de Reya and Harbour discovered in assessing what it was reasonable for a Claimant to have discovered. These would all be points for the trial. However, what Harbour and Mishcon de Reya had discovered seems to me in principle likely to be relevant, at least to some extent. It is worth recalling that Mishcon de Reya and Harbour were not investigating related claims against other potential Defendants or for other potential Claimants. They were investigating claims to be brought against Uber by a group of black cab drivers, which is the claim in the first action in these proceedings.

28. I was referred to a number of authorities, setting out the test that would be applied at the trial of the Preliminary Issue in relation to the reasonable discoverability test, including (among others) the *FII Test Claimants case* [2021] UKSC 31; [2021] 1 WLR 4354, *Paragon Finance plc v D B Thakerar & Co* [1999] 1 All ER 400, and *Super Fast Trading Ltd v Bank of Ireland* [2025] EWHC 871 (Comm). I do not intend to seek to pre-empt the arguments that the parties might have at the preliminary issue trial about that test, or how it is to be applied here. Suffice to say for present purposes that the way the Claimants put it in their skeleton argument for this hearing was that the question to be asked is: "When did the Claimants discover (or with reasonable diligence could have discovered) enough to plead their case of the fraud against the Defendants?" In so formulating the question, they put emphasis on the enquiry being focused on the Claimants. They say that even if Mishcon de Reya or Harbour had, prior to 26 June 2018, identified a potential claim to bring against the Defendants, that would not mean that any reasonable Claimant could also have identified that such a claim was possible prior to the licensing appeal judgment.

29. It may be correct to say that it is not inevitably an automatic conclusion to draw. However, that does not mean either that it might not be the right conclusion to draw on the facts of this case, once they have been explored at the preliminary issue trial, or that what Mishcon de Reya had identified is otherwise not relevant at all to the enquiry. It is right to say that the test of what a Claimant could have discovered is an objective test of reasonable diligence, but that it applies to the actual claimant rather than some hypothetical claimant. And that may mean that what another, different type of, entity or individual might have actually discovered does not necessarily provide a ready proxy. However, it may well shed light on, for example, what steps are available to be taken, what documentation was reasonably available, and what conclusions reasonably could have been drawn. So it does not seem right to me to say that it is entirely irrelevant.

30. It is likely, therefore, to be relevant to know what claim Mishcon de Reya and Harbour were investigating when considering what claims were at that point in time reasonably discoverable by the Claimants. That is not to say that that will necessarily be determinative of the point. It might or it might not be, and that will be a point for the trial. But it is difficult to see why the state of Mishcon de Reya and Harbour's investigations would not be relevant at all.

31. As a result, there is likely to be material within the Harbour Communications that falls within the relevance tests. I have not been given a detailed account of what the material is. And without it, I cannot of course say that all the material within the Harbour Communications falls within the test for relevance. But for the reasons I have explained, it appears likely to contain relevant material.

32. The second issue of principle is that of privilege.

33. The Defendants accept that some of the documents held by Mishcon de Reya may be protected by legal advice privilege and for which inspection can be withheld. However, they say that is not a reason for refusing to *disclose* those documents where they are relevant. Moreover, it is said that the claim to privilege must be made on an informed basis, by reference to the documents, rather than on a blanket basis. Importantly, in relation to the Harbour Communications, the Defendants say that the relevant documents came into existence for the dominant purpose of arranging litigation funding, to which communications litigation privilege does not attach at all.

34. The first issue that arises, therefore, is what is the scope of any applicable privilege here? That has given rise at this hearing to argument in relation to litigation privilege.

35. Before considering that issue, I should note that there was no real dispute at the hearing about legal advice privilege. Although, in their skeleton argument, the Defendants said that the nature of Mishcon de Reya's engagement with Harbour remained unclear, that has not been picked up in their oral submissions. The evidence in Mr Leedham's statement is that there was a solicitor and client relationship at the relevant time between Mishcon de Reya and Harbour, and that is the basis upon which argument at this hearing has proceeded. It was, therefore, accepted that legal advice privilege would attach to communications, insofar as they met the test for legal advice privilege, between Mishcon de Reya and Harbour. It appears likely that a substantial number of documents in the Harbour Communications are, therefore, subject to legal advice privilege.

36. The parties both recognised that parts of communications with third parties might potentially also be subject to legal advice privilege if they contained or evidenced the legal advice that was protected by privilege, and that may depend on the terms on which that was so communicated to third parties, although there has been no argument about that at this hearing and I do not decide anything about it. However, beyond such a category, it was accepted that legal advice privilege does not cover communications between a solicitor and a third party. The result is that communications between Mishcon de Reya and the LTDA or (if there were any) between Mishcon de Reya and individual cab drivers, which did not constitute the dissemination of legal advice covered by privilege, would not be covered by legal advice privilege and could only be covered by litigation privilege if it was available. That was one of the key reasons why the Defendants have sought to pursue their contention that litigation privilege is not available here. And it is to the argument on litigation privilege that I now turn.

37. Lord Carswell, in *Three Rivers (No. 6)* [2005] 1 AC 610, defined litigation privilege in terms he set out at paragraph 102:

> "102. The conclusion to be drawn from the trilogy of 19th century cases to which I have referred and the qualifications expressed in the modern case-law is that 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, but only when the following conditions are satisfied:
>
> (a) litigation must be in progress or in contemplation;
>
> (b) the communications must have been made for the sole or dominant purpose of conducting that litigation;
>
> (c) the litigation must be adversarial, not investigative or inquisitorial."

38. Of the conditions he there set out, the one on which the Defendants here place emphasis is the second, that, "the communications must have been made for the sole or dominant purpose of conducting that litigation", with particular emphasis on the phrase "conducting that litigation". Those words are important. Litigation privilege does not extend to any document brought into existence for the purposes of litigation. Popplewell J (as he then was), in *Excalibur Ventures LLC v Texas Keystone Inc* [2012] EWHC 2176 (QB), at paragraph 15, rejected the suggestion that it did. It is, as Popplewell J went on to note at paragraph 17, the "use of the document or its contents in the conduct of the litigation which is what attracts the privilege." That was a proposition approved by the Court of Appeal in *WH Holding Ltd v E20 Stadium LLP* [2018] EWCA Civ 2652, at paragraph 17.

39. As a summary of the principles applicable when considering litigation privilege, both parties relied upon what was said at paragraph 27 of the Court of Appeal's judgment in *WH Holding*:

> "27. In summary, our conclusions are as follows:
>
> i) Litigation privilege is engaged when litigation is in reasonable contemplation.
>
> ii) Once litigation privilege is engaged it covers communications between parties or their solicitors and third parties for the purpose of obtaining information or advice in connection with the conduct of the litigation, provided it is for the sole or dominant purpose of the conduct of the litigation.
>
> iii) Conducting the litigation includes deciding whether to litigate and also includes whether to settle the dispute giving rise to the litigation.
>
> iv) Documents in which such information or advice cannot be disentangled or which would otherwise reveal such information or advice are covered by the privilege.
>
> v) There is no separate head of privilege which covers internal communications falling outside the ambit of litigation privilege as described above."

40. In *Excalibur*, Popplewell J was considering whether the terms on which a litigant secures funding for his litigation were covered by litigation privilege. He noted that the rationale for litigation privilege was explained by Aikens J in his judgment in

Winterthur Swiss Insurance Company v AG (Manchester) Ltd (In Liquidation) [2006] EWHC 839 (Comm), at paragraph 68, in a passage cited and relied upon (omitting the footnote references) in *Excalibur* by Popplewell J, at paragraph 21:

> "68. The rationale for the first sub-type (ie. "litigation privilege") rests, in modern terms, on the principles of access to justice, the proper administration of justice, a fair trial and equality of arms. Those who engage in litigation or are contemplating doing so may well require professional legal advice to advance their case in litigation effectively. To obtain the legal advice and to pursue adversarial litigation efficiently, the communications between a lawyer and his client and a lawyer and a third party and any communication brought into existence for the dominant purpose of being used in litigation must be kept confidential, without fear that what is said or written might be disclosed. Therefore those classes of communication are covered by "litigation privilege"."

41. Popplewell J in *Excalibur* went on to hold that the terms on which a litigant secures funding for his litigation does not, therefore, engage litigation privilege. Other cases have rejected the argument that an ATE policy is subject to litigation privilege on a similar basis. See, for example, *In Re RBS Rights Litigation* [2017] 1 WLR 3539, at paragraphs 111 to 112.

42. The position in relation to funders is summarised in Hollander, *Documentary Evidence* (15th ed.), at paragraph 26-08:

> "In one sense, one can say that discussions with funders are created for the dominant purpose of actual or contemplated litigation. Indeed, this will be the only purpose of discussions with funders. But the argument that such documents are subject to litigation privilege misunderstands the nature of litigation privilege, which protects communications made for the dominant purpose of conducting litigation. Obtaining funding cannot sensibly be regarded as within this principle."

43. It should also be noted that, as is made clear in the decision of the Court of Appeal in *Al Sadeq v Dechert LLP* [2024] EWCA 28; [2024] KB 1038, that litigation privilege can, in principle, be claimed by a non-party to litigation: see the judgment of Popplewell LJ in that case, at paragraph 195, where he said:

> "Provided the dominant purpose ingredient is fulfilled, there seems no principled basis for limiting the scope of litigation to that to which the person is a party."

He identified a number of examples where unjust anomalies would be produced if the position were otherwise. Of these, he noted at (4) the examples of liability insurers and litigation funders, noting that the latter "may play a significant part in the conduct of proceedings". However, the claiming of litigation privilege in such circumstances is, of course, subject to the dominant purpose test being met.

44. In support of their position that Harbour's purpose cannot have been to conduct litigation, the Defendants rely on what they refer to as a widely accepted principle that litigation funders should not conduct litigation on behalf of those whose claims they fund. They referred, for example, to paragraph 9.3 of the Association of Litigation Funders Code of Conduct and a recent recommendation from the Civil Justice Council

that litigation funders should not control proceedings. However, there was little development of that point, and in any event it does not appear to me to advance matters, at least not in the circumstances of this case (where the period in question was before Harbour had decided to fund any case).

45. The Defendants also note that it is unusual for a single firm of solicitors to act for both a litigation funder and for the clients whose claims are funded because of the risk of conflict of interest. They relied on what is said in Hollander *Documentary Evidence*, at paragraph 26-10:

> *"*The starting point is that the client's lawyer cannot claim legal advice privilege for communications with a funder or potential funder because the funder is not his client, and cannot be his client (there would be a huge conflict of interest)."

46. That is not quite the situation here, where it is necessary to keep in mind the timing. On the evidence for this application, Harbour engaged Mishcon de Reya as their lawyers, seeking legal advice in relation to potential claims by cab drivers. That is the retainer pursuant to which the documents in question were produced. It is right, of course, that later on Mishcon de Reya were engaged directly by the taxi drivers who have brought claims, but they were not so engaged at the time of the communications in issue on this application. So far as the period of time goes relevant to this application, this does not fit the fact pattern where a claimant engages a lawyer and the lawyer then liaises with the funder or potential funder. Here at the material time, the lawyer-client relationship was between the lawyer and the funder.

47. Before coming to the central issue between the parties, I should also note two further points:

    i) The first is that no claim to litigation privilege was made on the basis that individual Claimants who created documents in this period did so with a dominant purpose related to the conduct of litigation. The claim to litigation privilege was put squarely on the basis that it was Harbour's privilege, and that it was Harbour's purpose that counted when assessing when litigation privilege had arisen.

    ii) The second is that the Defendants accept that when the communications in issue were created, litigation was in reasonable contemplation. So there is no dispute that that part of the test is fulfilled.

48. The issue that does arise is whether the documents were created with the dominant purpose of conducting litigation. The Defendants contended that the documents were created with the dominant purpose of enabling Harbour to decide whether to fund the claim, not of conducting litigation, such that litigation privilege does not attach.

49. In his submissions, Mr Choo Choy accepted that it was necessary – in order to claim litigation privilege over the Harbour communications – that they had been created with the dominant purpose of the conduct of litigation. He also accepted that they were created for the purpose identified by Mr Leedham, in his witness statement at paragraphs 21 to 25. It was clear from those paragraphs that the evidence was that the dominant purpose was to enable Harbour to decide whether to fund the claim. Indeed, the Respondents' skeleton argument accepted (at paragraph 30) that Harbour sought

advice from Mishcon de Reya, "in order to decide whether to fund a claim on behalf of licensed black cab drivers against Uber."

50. Mr Choo Choy, therefore, sought to argue that this was part of the conduct of litigation. He said that the dominant purpose of the Harbour retainer was the conduct of litigation because the conduct of litigation includes deciding whether or not to litigate and that includes, as an integral part, whether or not to spend money on the claim.

51. He emphasised that at paragraph 27(iii) of *WH Holding*, the Court made it clear that the conduct of the litigation includes deciding whether or not to litigate. He said that if a prospective claimant were to seek legal advice as to whether he had a viable cause of action and how much his claim might be worth, in order to decide whether it was legally and financially viable to fund that claim, he would be treated as having sought that advice for the purpose of conducting litigation. He said it should make no difference that it is a litigation funder in its own right that seeks such advice for the purpose of its decision whether or not to fund someone else's claim. The purpose in both cases, he emphasised, was to seek advice on merits and quantum, to determine the viability of the claim, so as to inform the decision whether or not to litigate. That was conduct of the litigation, whether such advice was sought by a claimant or by a third-party funder.

52. Mr Choo Choy recognised that in *Excalibur*, the Court concluded that discussions with funders were not for the purpose of conducting litigation, such that no claim for litigation privilege could arise, but he said that was beside the point. He noted that in *Excalibur* the question was whether the Claimant should disclose documents showing its attempts to obtain litigation funding and the terms it obtained for funding. He accepted such documents would not be concerned with the conduct of the litigation, as they did not deal with the merits of the claim and would not be used in the litigation.

53. Attractively though these points were put on behalf of the Respondents to the application, I do not agree that they amount to showing that the dominant purpose of the creation of the Harbour Communications was the conduct of litigation. Mr Leedham's statement, which was the only evidence of purpose, was clear. It was to enable Harbour to take a decision whether to fund the claim. It was not evidence that the documents were created to enable Harbour (or anyone else thereafter) to conduct the claim.

54. The basis on which it has been put by Mr Choo Choy was that Harbour's consideration of whether to fund the claim was part of the conduct of the litigation. However, it was not. Harbour was not conducting this or any other litigation, and there was no evidence relied by on Harbour as to what role it might play in any litigation that was commenced beyond being the funder, or any evidence that documents or material it gathered for its funding decision might thereafter be used to conduct the litigation. Indeed, when it came to his submissions on the control point, Mr Choo Choy said that Mishcon de Reya and the Claimants would not have needed to use any of the material in the Harbour Communications for the purposes of litigation.

55. There may, as Popplewell LJ recognised in *Al Sadeq*, be circumstances where litigation funders play a significant part in the conduct of proceedings, but there was no evidence of any such part here or any suggestion in the evidence that the purpose of the creation of the relevant documents was other than for the purposes of a funding decision. The fact that litigation funders may be able to claim litigation privilege, even though a non-

party to the litigation, does not mean that they always will be able to do so. As made clear, at the start of paragraph 195 in *Al Sadeq*, it depends on whether the dominant purpose ingredient is fulfilled.

56. It is right that the decision whether or not to litigate is part of the conduct of litigation. However, Mr Choo Choy's equivalence of the position of a third-party funder with a claimant does not seem to me to represent the right analysis here. Harbour were seeking legal advice not for the purpose of conducting litigation, but for the purpose of deciding whether to fund litigation that it was not going to conduct; or at least, as I have said, there is no suggestion in the evidence here that the funder intended to conduct the litigation. It is different with an individual litigant who takes their own funding decision – they are deciding whether to start litigation, which includes deciding whether to put money into it, and that is then going to be their own litigation. The claimant's decision is part of its conduct of its litigation, including the decision to start it. The funder's decision, however, is only a decision to fund someone else's litigation. It is not the funder's decision to start the litigation, and it will be up to the individual claimant whether they want to do that once a funding decision has been taken.

57. Nor does it seem to be right to draw the privilege line around communications that go to the merits, as opposed to communications that deal with matters such as the terms of a funding arrangement. The test for litigation privilege in the authorities does not refer to whether the content of the communications in question deals with the merits or quantum, as distinct from other matters that might relate to litigation such as terms of funding, but to the purpose for which the communication was created. I can see that the content of documents may inform the analysis of purpose. But it is not determinative of it.

58. The view that I have come to in relation to litigation privilege is consistent with the conclusion of Aikens J in the *Winterthur* case, in relation to what was referred to in his judgment as the "pre-ATE policy documents". These were documents created such that potential personal injury claims could be assessed for viability under a "no win, no fee" scheme, which involved the issuing of an ATE policy. These documents included application forms, which set out preliminary details of a claimant's potential claim, and questionnaires, which set out further details of the accident circumstances and the losses claimed. The claimant there contended that the documents came into being for the purpose and benefit of the insurer, in order to decide whether the insurer would issue an ATE policy in respect of any particular claim. The defendants said that the dominant purpose for which these documents were created was, objectively speaking, that of conducting litigation, which was reasonably in the prospect at the time they were created. It was argued (as set out at paragraph 86 of the judgment) that "there was a "unified" purpose in completing these pre-ATE Policy documents, because the process of obtaining the ATE Policy was an intrinsic part of the litigation process" and that the "whole process, considered objectively, is in aid of litigation".

59. Aikens J accepted that, at the time the communications were created, litigation was in contemplation. However, he rejected the submission that the dominant purpose test was met, and he explained that at paragraph 91 (omitting footnote references):

> "91. That leads on to the next question: whether the pre-ATE Policy documents identified in the Panel Solicitors' schedule were created for the dominant purpose of obtaining legal advice in respect of that contemplated litigation.

> For this I have to ask: why did enquiries have to be made as to the circumstances giving rise to the potential claims? Was the dominant purpose one which would lead to a decision on whether or not to litigate the claim? This is a more difficult issue. In the end I have concluded that, at the time that these documents were created, the dominant purpose was to make a decision on whether the ATE Policy would be issued and the potential claim funded. If the policy was not issued, then there would be no litigation. I appreciate that there are indications in the documents (to which Miss Carr drew my attention) which suggest that there will be litigation. But that was not guaranteed until the ATE Policy had been issued. I accept that a subsidiary reason for producing the documents was the potential litigation, but it was not what was uppermost in the minds of NIG and TAG at the point they were created."

60. Whilst the question of what the dominant purpose was is a question specific to the facts of each case in which it arises, the points with which Aikens J dealt are not dissimilar to the arguments here. These were documents that dealt with the content of the claims – they were not, for example, documents simply recording the terms of funding or the terms of ATE cover – and Aikens J accepted that the potential litigation was a subsidiary reason for producing the documents, but that was not sufficient. Moreover, he did not accept the defendants' argument that there was a "unified" purpose that encompassed obtaining the ATE as an intrinsic part of the litigation process. This is consistent with, and supports, the view that the funder's decision whether or not to fund the litigation is not, itself, conduct of the litigation.

61. Accordingly, I find that on the evidence put before the Court as to the purpose for which the Harbour Communications were created, that they do not attract litigation privilege.

62. The next issue is that of control.

63. The Claimants also contend that the Harbour communications are not, and never have been, within their control. Before considering this issue, I note that when the issue of disclosure of these documents was first raised in correspondence, the response from Mishcon de Reya, on 12 January 2026, was not to say that such documents were outside the control of the Claimants and, therefore, could not be considered for disclosure, but rather was to take the point on relevance and say that, the communications would "be considered in the course of our document review". I will come back to that later in the context of timing.

64. In support of the contention now made, that the documents are not within the Claimants' control, the Respondents say that, in the period before 25 June 2018, no individual driver was a client of Mishcon de Reya. Rather they say that, in that period, Mishcon de Reya had been retained by Harbour and that the Harbour Communications, which were generated pursuant to the retainer with Harbour, are within Harbour's control and not that of the Claimants.

65. The Defendants point out that the Harbour Communications are in the physical possession of Mishcon de Reya, who are currently the Claimants' solicitors. They say Mishcon de Reya owed the Claimants a fiduciary duty to disclose to them everything that is material, or which may be material, to their judgment, contending that this duty is engaged in respect of any information that is known to Mishcon de Reya, even if

came to be known to them confidentially by reason of them having been instructed on another matter by another client.

66. In support of this, the Defendants relied on *Hilton v Barker Booth & Eastwood (a firm)* [2005] 1 WLR 567 and its application of the case of *Moody v Cox* [1917] 2 Ch 71. In *Hilton*, the Defendants' solicitors had acted for B in criminal proceedings and was aware that B had been imprisoned for various offences relating to trading whilst an undischarged bankrupt. The defendants then came to act for the claimant, as well as for B, in a transaction he was entering into with B. They did not inform the claimant of what they knew about B. The issue, insofar as relevant for present purposes, was whether they were under a duty to do so, even though they continued to have professional duties to B which would have included not revealing that information to the Claimant.

67. The House of Lords held that the existence of the ongoing duty to B did not absolve the solicitors of the duty to disclose the facts to the claimant. Lord Walker noted, at paragraph 44, that a solicitor who has conflicting duties to two clients may not prefer one to another, and that "[s]ince he may not prefer one duty to another, he must perform both as best he can." The "fact that he has chosen to put himself in an impossible position does not exonerate him from liability." Lord Scott, having referred to *Moody v Cox*, said that the reasoning in that case:

> "…depended on the failure by the solicitors to disclose to their client information that it was their contractual duty to him to disclose. The fact that the disclosure of the information would, or might, have placed the solicitors in breach of duties they owed to others did not relieve them of the contractual duties they had undertaken or of the legal consequences of their breach of those contractual duties."

68. Thus here, it is argued that the fact that Mishcon de Reya had an ongoing duty of confidentiality to Harbour does not mean that they did not have a duty to communicate everything they knew was material to the Claimants' claims to the Claimants, once they became their clients. That analysis appears to me to be a correct application of the decision in *Hilton v Barker*. The further question that then arises is whether the fact that there exists that duty has the result that the communications in question are within the Claimants' control, notwithstanding the existence of the inconsistent obligation upon Mishcon de Reya in favour of Harbour. *Hilton v Barker* confirms the duty exists but does not dictate which of the conflicting duties takes precedence in any given circumstance. The furthest it goes is Lord Walker's stating that the solicitor must perform both duties as best he can.

69. It is important to recall the context in which this arises in this case. Harbour had engaged Mishcon de Reya to investigate the potential merits and quantum of claims of drivers against Uber. In other words, to investigate the merits and quantum of claims of those who include the Claimants, against the parties who are now the Defendants. Mishcon de Reya then sought to sign-up the Claimants to bring the claims that had been so investigated, to be funded by Harbour. That is, at least, how things stood when the first of the Claimants started to be signed up in October 2018 and at the time of the first letter before action, indeed up to the point at which it appears that Harbour ceased its involvement. During that period, it seems inconceivable that Mishcon de Reya would have thought themselves under an obligation to Harbour not to reveal to the Claimants or to use for the Claimants' benefit information material to potential claims against

Uber (i.e. information in relation to these very claims for these very Claimants) that they had learned and understanding they had reached, in particular in circumstances where Harbour was funding the claims.

70. There was no suggestion in the evidence that Claimants had been signed up on the basis that such information would not be used to advance their claims. And when Claimants were signed up, no doubt it having been circulated that Mishcon de Reya had been investigating the claims with a litigation funder, they would, it seems likely, have assumed that information Mishcon de Reya had learnt and understandings it had reached about those claims would be used to further the formulation and pursuit of the Claimants' claims. It would have been bizarre for Mishcon de Reya, having explained to prospective claimants that they had been investigating potential claims that black cab drivers might have against Uber, and had been doing so with a litigation funder who was going to fund the claims, and were content to take claims forward as a result and that Harbour were content to fund them, to have said to prospective claimants that they would however not be using any information they had learned or understanding they had reached up to that point in time and would be starting entirely afresh with research into the claims and analysis of potential claims once the first claimant was signed up with them as a client. There was no evidence that anything like that had been said, and it would be most surprising if it had been. The Claimants would have assumed that they were joining a train that was already moving, not that their solicitors would work from a standing start once they had signed up.

71. That is not to say that the material in question was created for this purpose. I have already dealt with that in the context of the question as to litigation privilege. It was not. It was created with a dominant purpose of allowing Harbour to decide to fund the claims. Nonetheless, once Harbour had decided to fund the claims, and once Claimants had been signed up, it was in the circumstances I have described information that Mishcon de Reya had a duty to make available to the Claimants in pursuit of their claims, absent an express agreement to the contrary from the Claimants.

72. At the time when Claimants began to be signed up, therefore, they had a right to the information held by Mishcon de Reya relating to their claims, and it seems to me that in the absence of any evidence to the contrary, it is a reasonable inference that the information was used by Mishcon de Reya to pursue the Claimants' claims. The Claimants thus had a right to the information and to the documents in which it was contained, which were, therefore, in their control for the purposes of disclosure.

73. However, the Respondents rely on the terms of a retainer they say was entered into with the Claimants, which they say constitutes the individual Claimants' informed consent to Mishcon de Reya not disclosing to the Claimants information learnt in the course of the Mishcon de Reya retainer with Harbour. As far as the individual Claimants in claim CL-2024-000252 go, this is said to be a retainer negotiated between Mishcon de Reya and an entity referred to in the evidence as "RGL". This means, say the Respondents, that the Claimants do not have control of the Harbour communications.

74. The evidence relating to this was as follows:

    i) As I have already noted, Mishcon de Reya started signing up clients in October 2018 and continued to do so throughout 2019. A letter of claim was sent to Uber on 12 July 2019. This was all in the period when Harbour was providing

funding. Harbour then confirmed, in November 2019, that they would no longer provide funding.

ii) Mr Leedham explains that in around March 2024, he began discussions with RGL, which he describes in his evidence as a claims management company. He said that RGL "took over the book build" and is "authorised by the Claimants to act as their agent." No documentation showing this was exhibited.

iii) Mr Leedham said that his firm negotiated a retainer with RGL on behalf of the Claimants in claim CL-2024-000252, the terms of which were finalised on 1 April 2024 – some two weeks before issue of the Claim Form – and, he said, which superseded any previous retainers. He said the terms were uploaded on to RGL's online portal, which he said each individual Claimant can log in to, in order to receive updates and access key documentation relating to the claim.

iv) He also says his firm entered into retainers with Mr Peters, the Claimant in claim CL-2024-000366, later in 2024.

v) He said the retainers with the Claimants contained the following wording:

> "Solicitors have a duty to keep the affairs of their clients confidential. They also have a duty to disclose all relevant information. I, and other colleagues working on your matter may, from time to time, 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 (see also paragraph 7 of our terms of business)."

vi) Mr Leedham contended that, by this clause, the Claimants gave their informed consent (for the purposes of paragraph 6.4(b) of the SRA Code of Conduct) to information from the Harbour File not being disclosed to them.

75. This evidence was, in some respects, thin, in particular, in respect of the individual Claimants in claim CL-2024-000252. There was no disclosure of the terms of the authority said to have been given by the individual Claimants to RGL, or what its scope was said to be. The only evidence is Mr Leedham's assertion that RGL was authorised by the Claimants to act as their agent. There was no disclosure of the retainer said to have been negotiated between Mishcon de Reya and RGL. The paragraph I have referred to was quoted in Mr Leedham's statement, but no other information about the contents of the retainer was provided, such that there was no opportunity to see the clause in its context. In fact, Mr Leeham's statement does not even say that the terms were signed by RGL under any authority. He simply says that they were negotiated with RGL and then, once finalised, uploaded to the online portal to which Claimants are said to have access. Moreover, the end of the extract that I have quoted refers to paragraph 7 of Mishcon de Reya's terms of business, which was not produced in evidence. I also note that it was not said that there was any similar clause in any earlier retainer with any of the individual Claimants.

76. The question is whether the presence of this clause was sufficient to show that the Claimants had foregone their rights to information held by Mishcon de Reya that was

relevant to their claims, where that information was derived from the Harbour retainer. It seems to me that it was not, for the following reasons:

i) The starting point is that before finalisation of these terms, the individual Claimants who before that point in time had become Mishcon de Reya's clients had a right to the Harbour information, insofar as it was material to their claims. That is as a result of the analysis I have already explained. Moreover, as I have said, there is no evidence that there was any consent to similar effect having been given in any earlier retainer by which any Claimant engaged Mishcon de Reya. That being the case, the Respondents' submission must be that by finalisation of the terms containing the clause now relied on, those individual Claimants were forsaking their existing rights to the information in question – information which, as I have noted, related to their claims and which they had no doubt assumed had been and would be used to pursue their claims.

ii) Whether or not the clause was sufficient was approached by both parties on the basis that the client's informed consent would be required in order to abrogate the solicitor's duty to disclose all material information to its current clients. This also reflects paragraph 6.42 of the SRA Code of Conduct.

iii) However, there is no evidence that any individual Claimant gave their consent to this clause, let alone their informed consent to what the Respondents now say was its effect. As I have already noted, there is no clear evidence as to how it is said that the terms of this retainer were agreed on behalf of the Claimants. It is simply said that the terms were finalised and placed on a portal, to which the Claimants have access. There was no evidence as to whether the individual claimants had, as part of their arrangements with RGL, agreed to be bound by documents finalised in such a way. There was no evidence that RGL had signed the retainer on behalf of the Claimants or agreed to it within the scope of RGL's authority in any other way. The evidence does not, therefore, go so far as to demonstrate individual Claimants being bound to this clause.

iv) But in any event, even if they were contractually bound by a mechanism, such as posting terms on a portal to which they had access – which, as I say, the evidence does not demonstrate – that would not amount to informed consent. That would require some evidence that the Claimants were aware that, by this clause, they were agreeing to give up their rights to information material to their claim, to which they currently had access but would not, shortly before issue of the Claim Form, any longer have access. There is no suggestion that any Claimant was made aware of that or gave their consent in any informed manner to it.

v) The terms of the clause, itself, certainly do not make it sufficiently clear that this is what the Claimants were giving their consent to. The clause refers to the firm having acted for persons "in the same or similar sector as yours", and goes on to say that there was no duty to disclose confidential information obtained from acting for such persons "or which is derived from any other source." Harbour were not persons acting in the same or similar sector as the individual black cab drivers, such that the only words on which reliance could be placed were "confidential information … which is derived from any other source." In circumstances where the Claimants had (before the date of these terms) access

> to the Harbour Communications, insofar as they were relevant to their claims, it does not appear to me that that information is capable of being described as "confidential information" within the meaning of this clause. At any rate, it is sufficiently ambiguous that any agreement that there was to it cannot properly be described as the giving of informed consent to what the Respondents say was the effect of the clause.

77. Accordingly, the clause relied on by the Respondents does not alter the position, at least in respect of the individual Claimants in claim CL-2024-000252, and in particular those who were already Mishcon de Reya's clients before that retainer was finalised. The Claimants in that action continued to have a right to this information.

78. The position in respect of Mr Peters in the second action may be more nuanced, though there was precious little evidence about how the retainer that he had agreed had been negotiated or what he understood about the position relating to Harbour's previous involvement and the documents Mishcon de Reya held as a result of that retainer. There was no real focus on this in the argument. But in any event, I do not need to determine the position in relation to Mr Peters. It is sufficient, for the purposes of the issues in this application, if the documents are in the control of the Claimants in the first action, given the order already made in this case that the proceedings are to be managed and tried together, that the documents disclosed in one action shall stand as disclosure in the other, and that there was one joint list of issues for disclosure.

79. The fact that Harbour may also have had continuing rights to the documents and to their confidentiality is not an answer to the Claimants having control. It is not infrequently the case in litigation that a party holds disclosable documents in its control over which a third party asserts confidentiality. That is not an automatic bar to disclosure, though it may be something the Court takes into account in the exercise of any discretion in ordering production, or in imposing conditions on the use of the documents beyond the normal rules. Many different factors may bear on that, including the position taken by the third party, the nature of the material, and the strength of the claim to confidentiality.

80. Here, notably, Harbour has made no claim to confidentiality in these documents that goes beyond privilege, despite having been put on notice of the application. In that respect, I note that shortly before issuing their application, the Defendants' solicitors wrote to Mishcon de Reya, on 29 April 2026, noting that they did not know, and Mishcon de Reya had refused to reveal, the name of the specific Harbour entity which was said to have engaged Mishcon de Reya, such that they did not presently intend to name any Harbour entity as a Respondent to the application, but that they would not object to the joinder of the relevant Harbour entity to the application. It is clear that once the application had been issued, Mishcon de Reya communicated with Harbour about the application, because Mr Leedham, in his statement responding to the application, referred to Harbour Fund IV LP having written to Mishcon de Reya on 14 May 2026 about it and saying Harbour did not waive privilege. That letter, which was exhibited to Mr Leedham's statement, referred to the Defendants' applications dated 6 May 2026, in terms that suggested that Harbour had seen them, confirmed the Harbour documents had been created in the course of Harbour's engagement of Mishcon de Reya, and stated that to the extent any are legally privileged, Harbour did not consent to that privilege being waived. Harbour did not seek to be joined to the applications.

81. The Harbour letter only refers to privilege. It does not go beyond that. It does not contend, for example, that non-privileged material remains confidential to Harbour or that any of the material in question is only in its control and not in the control of individual Claimants. It does not seek to assert any right to confidentiality in non-privileged material, or to explain what its interest in maintaining any such confidentiality might be, nor does it suggest that it resists disclosure of non-privileged material.

82. In those circumstances, it seems to me that not only are the documents in the control of the Claimants, but also that any right that Harbour might have to confidentiality in the documents should not stand in the way of disclosure of non-privileged material, in particular given the fact that Harbour does not seem to assert such a right or object to the disclosure of material on that basis.

83. As a result, the Respondents' attempt to resist the application on this ground also fails.

84. I now deal with the points made as to reasonableness, proportionality and necessity.

85. The application was brought both under paragraph 17 and, in the alternative, paragraph 18 of Practice Direction 57AD.

86. The Claimants' first point under this heading is that there is no existing order for extended disclosure that covers the Harbour Communications, such that paragraph 17 does not apply. As to that, issue one in the list of issues for disclosure is sufficiently wide, such that these documents, given what I have said about relevance, fall within it. However, the point made by the Respondents is based on part two of the DRD, where the scope of the search is identified, and the Respondents point out that this did not identify any custodians from Harbour or Mishcon de Reya. In other words, it is said that although the documents in question might fall within the scope of the list of issues for disclosure, the Claimants did not agree in the DRD to search for them. These aspects of the DRD, it was pointed out, were agreed on 12 March 2026, postdating the exchanges about the Harbour involvement, including the Mishcon de Reya 12 January letter, which took issue with the relevance of the documents, but which said "they would be considered in the course of our document review".

87. That letter seems to me to sit uncomfortably with the scope of search, as set out in the DRD. Mishcon de Reya had said, on 12 January, that they would consider these documents in the course of their document review, but did not include as custodians anyone from Mishcon de Reya or Harbour, who would hold them. It was suggested that, for this purpose, I should look only at the DRD and not have regard to the 12 January letter. That seems to me to be unrealistic. There is no suggestion that before the DRD was finalised the parties engaged in further correspondence, in which Mishcon de Reya explained that they would not, after all, review these documents, or consider them in their review, or explain why. Ms Lidgate's evidence, on behalf of the Defendants, was that her firm had understood from the 12 January letter that Mishcon de Reya had agreed to review the documents, for the purpose of disclosure. And it may well, therefore, have been thought on the Defendants' side that given that Mishcon de Reya had said they would consider them in the course of their document review, they did not need to identify custodians because the documents had already been identified and were ready to be reviewed.

88. In the circumstances, it seems to me it would be appropriate to consider the application under paragraph 17 of the Practice Direction. However, I will also consider it under paragraph 18, in any event, under which the key additional point that was relied upon by the Respondents was the requirement that the Court has to be satisfied that varying the original order for extended disclosure is necessary for the just disposal of the proceedings. Under both paragraphs 17 and 18, the Court must be satisfied that the further order in relation to disclosure is reasonable and proportionate.

89. As a general point, I note that this litigation is of very high value. I was told that the total loss across the two actions is estimated at over £340 million. The Claimants are represented by an experienced City law firm, which has the resources available to conduct the required review. The fact that Mishcon de Reya was party to the documents at the time they were created ought also assist. Indeed, Mr Leedham was the partner with the responsibility for the retainer with Harbour, and so he has personal knowledge of what the Harbour communications contain, at least to some extent, which would no doubt assist with the review. I note that the Respondents have not said in their evidence that they could not carry out a review of the documents in relatively short order, and no suggestion was made that an order for such a review would, in any sense, imperil the trial date.

90. The key objection by the Respondents is that more than 9,500 documents would fall to be reviewed, they say, if this application were granted, in circumstances where the trial is imminent, with skeletons due on 22 and 23 June. However, as I have noted, it is not said that the exercise cannot be done in time, only that there is limited time for it. Mr Leedham's evidence is, in fact, notably thin on any difficulties, simply saying that the exercise would not be reasonable and proportionate and would cause a significant amount of costs.

91. However, as I have said, given Mishcon de Reya's involvement with the material, I would have expected them to have given some thought to it and the likely impact it might have on their preparation for trial if I ordered that it should be disclosed. This is not, as I understand the submissions, a point based on the need to conduct a search for the material. It is the need to review it. Whilst I accept that that may be a substantial task, given the team involved and its knowledge of the material, it appears to be a task that can be accomplished. And, as I say, it has not been said in the evidence that it could not be done.

92. Also, relevant at this stage is the Defendants' point that the reason this point has been raised in court so late before the hearing of the preliminary issues is down to the Claimants and their attitude when these documents were first raised by the Defendants. I have already mentioned some of the matters relating to this but will give a short recap.

    i) The CMC, at which the list of issues for disclosure were settled, took place on 22 October 2025.

    ii) The Defendants had been asking the Claimants, both before and after the CMC, about when the LTDA first approached Mishcon de Reya in relation to a potential claim. By a letter, dated 5 December 2025, Mishcon de Reya stated, for the first time, that they had been approached by a funder in around December 2017 about exploring a claim against Uber and that in January 2018, they (Mishcon de Reya) had approached the LTDA.

iii) In response, the Defendants asked (in a letter of 23 December 2025) for confirmation that communications between Mishcon de Reya and the funder would be produced in disclosure.

iv) By response of 12 January 2026, the Claimants stated that it was, premature to debate issues of privilege before disclosure had been completed, but confirmed that communications between Mishcon de Reya and a funder would be "considered in the course of our document review" but that "it would be entirely inappropriate to "confirm" at this stage that such communications would be produced to your clients."

v) The first tranche of disclosure was provided on 12 March, the Claimants having sought extensions to the original deadline, which had been 26 February.

vi) The Defendants then wrote, on 23 March, seeking clarification in relation to the Harbour Communications, in response to which, on 8 April, Mishcon de Reya stated that no such documents formed part of the agreed document review exercise. They also said that any such documents would be privileged.

vii) Correspondence was then joined on these matters. And when it became clear that no resolution would be possible, the Defendants issued their application on 6 May.

93. In the circumstances, it seems to me that the Claimants are somewhat the authors of this situation, insofar as it has resulted in a squeezed timetable. Their 12 January 2026 letter was, at best, equivocal about the Claimants' position in respect of the Harbour communications. In fact, that letter was reasonably understood by the Defendants as saying that the Claimants would consider the documents in the course of the review, in the sense of reviewing them for relevance and privilege, albeit not confirming at that stage that all the documents would be produced in disclosure. If the Claimants were going to assert the position that they have now taken, including a blanket claim for privilege over the whole collection of documents without review and a submission that the documents were not, in fact, in their control, those are points that could (and should) have been made clear at that stage. It is easy to see why, given what was said in correspondence, the Defendants took the view that they had to wait to see what was included in the disclosure, before they did anything further.

94. I have addressed relevance as a separate topic, as the parties did in their submissions. However, when it comes to considering what is reasonable and proportionate, and indeed what is necessary for the just disposal of the proceedings, there is a need to step back, in order to consider the potential fruits of a review.

95. The Harbour Communications may include documents relating to the state of knowledge or understanding of an individual driver regarding claims that might be brought against Uber. They may also include documents relating to the state of knowledge or understanding of Mishcon de Reya or Harbour regarding the same claims. Both of those categories of documents would be relevant to the preliminary issues, as I have explained already, although in relation to the second of those categories it is fair to say that is of more marginal relevance, being material potentially capable of informing as to the question of what reasonably might have been discovered, rather

than direct evidence of what was discovered by individual Claimants in the relevant period.

96. However, as I have also already noted, many of the documents seem likely to be subject to legal advice privilege and, in particular, it seems to me that many (if not all) of those documents which demonstrate Mishcon de Reya and Harbour's view of the potential case in terms of its merits, are likely to be covered by legal advice privilege.

97. The Respondents, during the course of the hearing, confirmed that documents within the Harbour File comprising communications between a driver and the LTDA which in principle may indicate what a black cab driver might have known or be doing would be relevant to the preliminary issue. That, as I have already indicated, seems to me to have been sensible concession. Given that such documents would not be privileged, they should be disclosed, save in the unlikely event that any part of them is covered by Harbour's legal advice privilege. In addition, it seems to me that this should extend to any documents which relate to the state of knowledge or understanding of an individual driver regarding claims that might be brought against Uber. By that, I mean actual knowledge of an individual driver, whether a Claimant or not.

98. However, I do not think the search and review should also be for documents going to the state of knowledge or understanding of Mishcon de Reya or Harbour themselves. Although relevant, as I have already said, they are only of indirect relevance. Many of the documents satisfying that criteria of relevance are, in any event, likely to be subject to legal advice privilege and a review to seek to identify any such documents which are relevant in that way but which are not privileged is likely to be difficult and more time-consuming as a result. In other words, it seems to me that a review in order to identify such documents for disclosure is likely to bear little fruit, what it does find would be only of marginal relevance, and it is likely to involve a difficult and time-consuming exercise. At this stage of proceedings, it does not seem to me to be reasonable or proportionate to order that to be undertaken.

99. On the other hand, the review I think ought to be undertaken, to encompass any documents bearing on actual knowledge of an individual driver, ought to be more straightforward to carry out, less likely to bring difficult calls in terms of privilege, and any documents identified and disclosed are likely to have a more direct relevance to the issues to be determined. I have been given little by way of evidence about how the documents are held or how they might be reviewed, so it is difficult, at this stage, to say more about the practicalities. However, it seems to me that an order for disclosure of such documents is not only reasonable and proportionate but also necessary for the just disposal of the proceedings. Any documents in this category would be clearly and directly relevant to the preliminary issue and, given that they are not privileged, already to have been identified and disclosed.

100. I will hear the parties on any further orders or directions that might need to be made relating to the review, including as to timing.

101. That deals with the first part of the application. I should record that the Claimants sought, in the alternative to their contention that the Harbour communications were in the control of the Claimants, to bring the application against Mishcon de Reya under CPR 31.17. The Respondents did not suggest that any other or different particular points would arise if that was the route that had to be followed, save for noting that

disclosure from a third party has to be necessary, in order to dispose of the claim fairly or to save costs, which is a similar question to that which arises under paragraph 18 of the Practice Direction, which I have already referred to. However, given what I have determined in relation to control, I do not need to deal with that alternative application in detail and, given the shortage of time, I do not do so now.

102. I now turn to the part of the application dealing with metadata and the explanations given in relation to privilege.

103. The Defendants complain that the Claimants have given insufficient detail in relation to their claim to privilege and have been overenthusiastic in their stripping of metadata from privileged documents. The complaints are these:

i) The claim to privilege has been inadequately explained. The claim to privilege in the disclosure certificate records simply the following:

> "Privileged. Where documents have been identified as part privileged, the privileged section of the document has been redacted to retain privilege."

The description of the class of document so protected is simply given as:

> "Information which is privileged"

ii) The Claimants have stripped all metadata from all fully privileged and some part-privileged documents, even where, say the Defendants, it is implausible that the metadata itself would be privileged.

iii) The Defendants have also expressed concern about many of the redactions that have been made for privilege.

104. The Defendants, therefore, seek orders requiring disclosure of non-privileged metadata and an explanation of the basis on which privilege has been asserted over documents, including metadata.

105. The Claimants contended in their skeleton argument that they had properly and correctly redacted by class, and they relied on paragraph 14.1 of Practice Direction 57AD:

> "14.1 A person who wishes to claim a right or duty (other than on the basis of public interest immunity) to withhold disclosure or production of a document, or part of a document, or a class of documents which would otherwise fall within its obligations of Initial Disclosure or Extended Disclosure may exercise that right or duty without making an application to the court subject to—
>
> (1) describing the document, part of a document or class of document; and
>
> (2) explaining, in the Disclosure Certificate, the grounds upon which the right or duty is being exercised.
>
> A claim to privilege may (unless the court otherwise orders) be made in a form that treats privileged documents as a class, provided always that paragraph 3.2(5) is complied with."

106. Paragraph 3.2(5) of the Practice Directions provides:

> "3.2 Legal representatives who have the conduct of litigation on behalf of a party to proceedings that have been commenced, or who are instructed with a view to the conduct of litigation where their client knows it may become a party to proceedings that have been or may be commenced, are under the following duties to the court—
>
> (5) to undertake a review to satisfy themselves that any claim by the party to privilege from disclosing a document is properly made and the reason for the claim to privilege is sufficiently explained."

107. The explanation in the disclosure certificate is, as I see it, inadequate. It does not identify what type of privilege is claimed, over which documents. It just says privileged documents or parts of documents have been withheld. There has been no attempt to describe the class of documents being withheld, other than by saying that they are privileged. There have, during the course of the subsequent exchanges in correspondence and in the evidence for this application, been further explanations in relation to the Harbour Communications. But of course, that has been in relation to documents which the Claimants have been saying are not within their control, such that it appears that they would not have been covered by the claim for privilege in the disclosure certificate anyway.

108. The Defendants and the Court is entitled to an explanation. The Practice Direction requires a description of the document, part of a document, or class of document. It seems to me that must go beyond simply saying "privileged documents".

109. No doubt, seeking to pre-empt what looked likely, during the course of the hearing, Mr Choo Choy has made it clear that his clients would indeed provide a more detailed statement of the basis of the claim to privilege in relation to all of the documents, or classes of documents, or part of documents, that had been treated as privileged. That was a sensible suggestion, and it ought to be included in the Court's order on these applications.

110. As to metadata for privileged documents, during the course of the hearing, the Claimants confirmed that they were willing, for communications which had been treated by the Claimants as privileged, to provide metadata showing the dates and identities of parties to those communications in the period ending 26 June 2018, where one or more of the Claimants are parties to those communications. They did not accept, however, they should provide the metadata for all authors and recipients of all privileged documents without any time limit.

111. I can see that, in some cases, having the non-privileged metadata for privileged documents may be important. However, one needs to ground this in the material that has been disclosed and in the issues. The metadata may or may not be relevant. Disclosing it without the content of the documents may or may not be straightforward. Here, one has to ask why the metadata for the privileged documents is relevant, in particular given the late stage at which this has arisen.

112. The Defendants said in their skeleton argument that the information is "plainly relevant because it will show the date and frequency of communications between the Claimants

and their legal advisers." As I say, the Claimants have agreed to identify the metadata of documents in the period up to 26 June 2018, where one or more of the Claimants are party to the communications. But one asks, beyond those documents, why is such metadata relevant to the preliminary issue? Insofar as this is a complaint about privileged documents once Mishcon de Reya had been engaged by the Claimants, it is difficult to see what relevance such points have, given that occurred after the dates in June 2018 relevant to the preliminary issue. Insofar as this is a complaint about documents for which privilege is claimed before that time – in other words, when Mishcon de Reya were engaged by Harbour – then Mishcon de Reya were not the Claimants' legal advisers at that time, such that the point of relevance identified by the Defendants does not arise. If what is meant by the Defendants is the frequency and date of communications between the (then) future Claimants and Mishcon de Reya, who are now (but were not then) the Claimants' legal advisers, then those are the communications for which the Claimants have now said they will disclose the metadata they have identified.

113. The upshot is that the rationale for the relevance of the metadata beyond that which the Claimants have said they will provide is not made out. It would, in the circumstances, be wholly disproportionate to require the Claimants to go through and disclose further metadata at this late stage and so shortly before the trial.

114. That concludes my ruling on the matters on which I heard argument. But I will now deal with any points the parties want to make about timing or other directions.

(The hearing continued – see separate transcript)

(This Judgment has been approved by the Judge.)

Digital Transcription by Marten Walsh Cherer Ltd
2nd Floor, Quality House, 6-9 Quality Court, Chancery Lane, London WC2A 1HP
Telephone No: 020 7067 2900 DX: 410 LDE
Email: info@martenwalshcherer.com
Web: www.martenwalshcherer.com