Part 18 Questions in RTA Cases Where Fraud is Alleged

By Deborah Tompkinson – Clerksroom – August 2012

Telephone 0845 083 3000 or go to www.clerksroom.com

1 Introduction

If you have got this far, then you have already begun working on the case (probably on a CFA if you are for the Claimant) and your interest is engaged.

2 Points applicable to both parties

a) Part 18 is a knife with two edges. Where fraud has raised its head, care is needed on both sides. Defendants who suspect fraud often try to play their cards close to their chest. But this is not necessarily allowed, although Claimant[1] solicitors often do not challenge it. Defendants are, however, entitled to seek clarification and may wish to do so. Why?:

(i) If Claimant is not a fraud:

- He deserves to know the allegations so he can answer/dismiss them
- His solicitors need to know them so that they can properly investigate and advise their client.

(ii) If Claimant is a fraud:

- He should be warned early of the probable consequences of proceeding.
- His solicitors need to know so that they can properly advise their client of his jeopardy – and try to persuade him to withdraw.
- If the evidence is sufficiently persuasive, a claim may be headed off before issue or withdrawn.

b) Before issue of proceedings, both parties may seek information under the Protocol. Claimants are strangely reluctant to do this where fraud is in the air. But it is worth bearing in mind:

(i) **Personal Injury Pre-action Protocol Para 1.2** *The aims of pre-action protocols are:*

· better and earlier exchange of ***information (sic)***

[1] For convenience I have assumed that the suspected fraud is a Claimant but this is not always the case and this section should be read both ways.

· better pre-action investigation by both sides
· to put the parties in a position where they may be able to settle cases fairly and early without litigation; and

(ii) **PIPP Para 3.10** directs that, if the Defendant denies liability, he should enclose with the letter of reply, **documents** in his possession which are material to the issues between the parties, and which would be likely to be ordered to be disclosed by the court, either on an application for pre-action disclosure, **or on disclosure during proceedings**. There is no reason for the force of these obligations to be watered down where fraud is suspected, for the reasons given above; and

(iii) The duty on parties imposed by CPR r.1.3 requires that they should co-operate in making a real attempt to explore the significant narrowing of, or compromise of, that dispute **Lexi Holdings v Pannone and Partners** [2010] EWHC 1416 (Ch), June 18, 2010.

c) There are sanctions for non-compliance. if you can think of any documents or information, that clearly ought to have been disclosed and have not – ask.

d) Both sides should have, preferably prior to Part 18 arising, and providing the basis for further questions:

(i) An accident report form, possibly more than one;

(ii) Notes of telephone calls to their insurer, broker, or Accident Management company giving accounts of the accident.

(iii) Any independent witness questionnaires. There is no property in a witness.

(iv) MOT certificate - if there is doubt as to the roadworthiness of a vehicle.

(v) Engineer's reports or repair estimates or repair invoices, so as to compare accounts of the accident with the damage sustained.

e) Irrespective of who it was reported to, or how, none of the reports at (i) to (iii) above is necessarily privileged – not even the one to the insurer. It will be rare for privilege to attach, see **Axa v Allianz** [2011] Lloyd's Rep IR 544. It is amazing how rarely parties press for each other's accident report – even when fraud is <u>not</u> in the air.

f) The earliest account can be illuminating.

g) Contriving the purpose of a document (e.g., by putting in a statement to the effect that the recipient's primary purpose in asking is to gather information for legal proceedings) is unlikely to deceive the court - **Price Waterhouse v BCCI Holdings** [1992] BCLC 583 at 591D.

h) Insisting on early disclosure of the first reported accounts of the accident can dramatically alter perspective. In one case, a party, Mr A, sought to withdraw a pre-issue admission, where he had driven into an open van door. Examination of his insurer's correspondence revealed that his account had progressed, over some time, thus:

(i) Mr A was uncertain of how the van door came to swing open.

(ii) Mr A saw Mr B walking to the rear of his van when the door swung open.

(iii) Mr A noticed Mr B getting into rear of van.

(iv) Mr A saw Mr B get into the rear of the van, which swung down on its hinges, causing door to swing open. Mr B's account of being in the driver's seat was now aggressively disputed.

This progression was pointed out to his solicitors, who had taken over from his insurers, on the eve of their application to withdraw the admission, along with a demand for full disclosure of each account and a reason for the changes. Mr A immediately settled.

i) If a party objects to disclosing documents or answering Part 18 requests, there are always sanctions. A suitable sanction might be that the offender be barred from seeking to rely later on any argument, or documents now within their knowledge or power to disclose, unless disclosed in compliance with the order.

3 Drafting Part 18 Questions – general points

a) Questions should be fact and allegation specific. Prolix and pro forma questions are likely to attract challenges. Before drafting check the current state of play of Part 18 and the Protocols.

b) Questions should not be cross-examination in writing. It is not good strategy to give a hostile witness (let alone a potentially fraudulent one) time to spot and devise a tight answer to your best points. So keep it factual and aimed at flushing out the case.

c) Do not ask multiple questions. The following is an example:

7 Did you ever speak with a representative of [Accident Management Company] ? If so, when was this? Was the communication face-to-face or by telephone? What were you told about their services and how payment for those services would be arranged? Were you at all ever advised at any stage from the date [Accident Management Company] first made contact with you to the date you ended contact with [Accident Management Company] that you had entered into an agreement for them to provide you with a

replacement vehicle on a credit hire basis for which you would be accepting personal liability for such charges with a basic rate of £[a lot of money] per day (net) together with additional charges?

Needless to say, the (blameless) victim of this interrogation answered simply "*Yes, phone, can't remember when*". The questioner was lucky to get that much.

d) Consider carefully whether counsel can draft the Part 18 questions. If you decide to use counsel, pick one who does not ask unnecessary questions. Even if the questions are concise (see below), the responding party will get bored and recalcitrant if presented with too many pages of questions (the above example is taken from one that ran to almost 20 pages).

e) If you do not want to use counsel:
   (I) Keep the questions short.
   (ii) Keep the questions focused.
   (iii) Check them carefully for ambiguity before sending them. Read them out aloud to a colleague who will play devil's advocate before pressing the print button.

4 Receiving Part 18 Questions – General points

a) When receiving Part 18 Questions, check the current state of play of Part 18 and the Protocols.

b) Part 18 requests can only be made after issue. This is implicit in **18 PD 1.6 (1)** which provides that a a request must headed with the name of the court and the title and number of the claim. Prior to issue, a similar effect can be achieved, however, under the **Personal Injury Pre-action Protocol**: **1.2** (see section 2 above).

c) It may be better, therefore, to consider accommodating at least part of the request, if it is not too onerous, and is the sort of thing that might reasonably be helpful to both parties eg, in reducing bloated or scattergun pleadings or even in encouraging the Defendant to agree the claim or the Claimant to withdraw it.

d) If the questions indicate a real problem may exist in your case, you may wish to take them up with the questioner in any event.

e) After issue, the questioner is entitled to a response. But not necessarily to every question they ask. CPR 18.1 makes it clear that requests must be directed to clarify or give information about any matter in dispute. This applies to the Request generally and to each question on it. So consider carefully whether a request goes to a matter in dispute e.g., if the request is for a colour copy of the passport, has identity been put in issue? If the V5 is requested, is it in issue who owns the car? Beware of knee jerk reactions. Even the most egregious request is likely to have a few justifiable questions tucked away in it. Locate them and answer them.

f) Note: **18 PD 1.2** *a request should be concise and strictly confined to matters which are reasonably necessary and proportionate to enable the*

first party to prepare his own case or to understand the case he has to meet.

g) So applying that guidance, what might be objectionable?

(i) Fishing
(ii) Cross-examination in writing
(iii) Cross-examination going solely to credit
(iv) Questions that will not reasonably assist the questioner to prepare his case.
(v) Questions that are disproportionately expensive to answer.
(vi) Questions about privileged material.
(vii) Prolixity (because it is likely to be disproportionate).
(viii) Ambiguous questions (unlikely to clarify)
(ix) Double questions (unlikely to clarify)

h) In our view, the following questions are essential in almost every case:

Did you report the accident to:

(i) The police,
(ii) Your insurer,
(iii) Your insurance broker or
(iv) An accident management company?

Was the report:
(i) In writing,
(ii) By telephone or
(iii) Both?

And the documents should be sought, especially if they have not been disclosed pre-issue, under the Protocol. Remember that most insurers, brokers and AMCs should have some written record system for telephone calls.

i) Costs. Where an application is necessitated by non-compliance with a protocol or practice direction , the party asking may be able to recover costs even where a CFA does not expressly address them, **Connaughton v Imperial College Healthcare NHS Trust** [2010] EWHC 90173 (Costs). Party asking may have to pay the costs of disclosure but party responding may have to pay costs of unreasonably resisting the request and application, **Bermuda International Securities v KPMG** [2001] EWCA Civ 269,

4 Your opponent asks if they can interview your client

a) We usually ask clients what they would do if they were acting in a criminal case and were asked by the other side (whichever) for permission to interview their client, with or without their presence. If you would not do it

in a criminal case, is there any more compelling reason to do so in a civil one (irrespective of whether fraud is alleged or not)?

b) It is very hard to envisage circumstances in which a solicitor could accede to such a request without exposing himself to disciplinary proceedings for professional misconduct. Besides, very few civil practitioners have the necessary experience to represent a client in a hostile interview.

c) So how does a competent solicitor answer such a cheeky or ignorant demand? A simple No, may raise the temperature. How about:

"*We are willing, in principle, to consider any reasonable requests. In this case, however, perhaps you could direct us to the passage of the Code of Conduct which would justify so unusual a departure from orthodox professional practice.*"

d) If in doubt, pass it up to the Professional Indemnity Partner. That is their job.

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