IN THE GRAND COURT OF THE CAYMAN ISLANDS
CIVIL DIVISION

CAUSE NO. G 338 OF 2013

BETWEEN:

ROGER MYERS **First Plaintiff**

BRAYDEN MYERS **Second Plaintiff**

AND

KENRICK MCFIELD **Defendant**

Appearances:	Mr. Clyde Allen of Chambers for the Plaintiff Mr. Paul Keeble & Ms. Sulekha Tummala of Hampson & Company for the Defendant
Before:	Hon. Justice Richard Williams
Heard:	16 February 2017 & 1 May 2017
Draft Judgment circulated:	14 June 2017 & 15 June 2017
Date of Judgment:	**16 June 2017**

JUDGMENT

Introduction

1. This case concerns the Defendant's ("D") application dated 24 October 2016 for an order that the Second Plaintiff's ("P") claim be dismissed and for judgment to be entered for D. In the alternative to dismissal, an order in relation to outstanding disclosure is sought setting a date for compliance by P with the order of 29 September 2016 pursuant to GCR O.45, r.6(2). In the alternative to an order for

dismissal, an unless order is sought by D stating that if compliance with paragraphs 1-6 of the Order of 29 September 2017 is not forthcoming by a date specified by the Court, the Clerk of Court shall enter judgment for D dismissing P's action. If the action is to proceed, directions to trial are sought[1] by D. The Summons is supported by an affidavit of Erwin Freeland, Claims Manager at Saxon Motor & General Insurance Company Ltd sworn on 21 September 2016 as well as affidavits sworn in earlier applications by D to strike out or dismiss the action.

2. The application in the Summons is made pursuant to GCR O.24, r.20(1) for purported failure to comply with orders for discovery made by the Chief Justice on 6 May 2014[2] and 4 February 2016[3] and by myself on 29 September 2016.

3. The application in the Summons is also made pursuant to GCR O.18, r.19(1)(d) as an abuse of process by reason of inordinate and inexcusable delay. The application is further made pursuant to the inherent jurisdiction of the Grand Court for (i) want of prosecution; and/or (ii) inordinate and inexcusable delay; and/or (iii) intentional and contumelious disregard of the above-mentioned three orders.

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[1] In the same terms as set out in paragraph 4 of D's Summons to Strike dated 20 January 2014.
[2] Paragraph 1 of that order.
[3] Paragraphs 1-5 in that order.

Procedural Background

4. On 30 September 2013 the Plaintiffs filed their Specially Endorsed Writ of Summons and Statement of Claim in which they sought damages as a consequence of injuries suffered in a motor vehicle accident on 9 June 2012 when it is alleged that the motor vehicle being negligently driven by D collided with their motorcycle. On 24 October 2013 D filed a defence denying liability. In the Defence it is claimed that the Plaintiffs failed (i) to comply with pleading requirements under GCR O.6, r.2(f) and O.18, r.8(4); and (ii) to produce in a timely fashion or at all medical reports and damage documentation which would enable D to assess the claims.

5. On 10 October 2013 the Plaintiffs filed an application for summary judgment and for an interim payment. On 22 January 2014 D filed a Summons to strike the Plaintiffs' claim, alleging a failure by them to make discovery by list in accordance with the automatic directions under O.25, r.8. In the alternative an unless order was sought requiring the Plaintiffs to make discovery by list within 14 days and, if they failed to do so, then their claim should stand dismissed and judgment be entered for D. If the matter was to proceed, directions to trial were also sought.

6. When the two Summonses came before Chief Justice Smellie on 6 May 2014, he adjourned them for one month for negotiations to take place towards settlement.

He directed that if the matter did not settle within that timeframe, then the matter should be restored before him for a hearing of the summary judgment application and the interim payment application. The Chief Justice directed the Plaintiffs to:

> *"....make immediate disclosure to (D) of their medical records and reports to date including those held by CIHSA/George Town Hospital and the Cayman orthopaedic group, supported by list of documents, and to make disclosure on an ongoing basis until maximum medical recovery in each case."*[4]

Regrettably, although served on him on the 6 May 2014, counsel for the Plaintiffs failed to respond to D's attorneys request for him to approve the draft order and, as a consequence, the order was submitted without his comments to the Chief Justice on 13 May 2014 for the order to be settled.

7. The case did not settle and, for reasons which are not clear on the papers, the parties failed to have the matter restored at the end of the month as directed by the Chief Justice. On 28 May 2014 and 18 July 2014 the Plaintiffs' attorney served a supplemental list of documents on D.

8. On 30 January 2015 D filed a Summons in which he sought an unless order to enforce ongoing discovery ordered on 6 May 2014 and additional specific discovery. D contended that, despite voluntary payments being made to the First Plaintiff and on account for P, there had been a failure to make ongoing discovery

[4] Paragraph 1 of the Order dated 6 May 2014.

which had been ordered on 6 May 2014. In addition, it was claimed by D that despite requests by letter dated 27 June 2014, 11, 18 and 21 July 2014 and 22 September 2014 and an email of 4 August 2014, the Plaintiffs had failed to make the specific discovery that had been requested. It was also alleged that the Plaintiffs' attorney had persistently ignored correspondence from D's attorney.

9. When the Summons came on before the Chief Justice on 4 February 2016 he was informed by D that the claim in relation to the First Plaintiff had been settled.[5] The Chief Justice then went on to give the following directions:

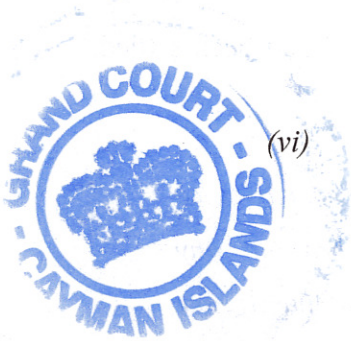
> *"(i) (P) is to request and produce his medical records since birth and his academic records, and records of any standardized testing, psychological testing and intelligence testing and evaluations, including those held at Grace Christian Academy and Wesleyan Christian Academy and PSATS administered at those schools, if they are available or were taken;*
>
> *(ii) P's attorney is to write to the schools requesting the records referred to in the foregoing paragraph, with copies of the said correspondence copied to the attorneys for the Defendant. In the event the schools fail to respond promptly, the Plaintiff's attorney is to issue a subpoena duces tecum directed to the responsible party at the schools seeking production of the records as aforesaid compelling them to respond in writing;*

[5] A Consent Order signed by the parties on 25 September 2015 containing the settlement was signed by Clerk of the Grand Court on 5 February 2016, on the basis that the dismissal of that action upon payment of the settlement amount was without prejudice to the continuation of the action by P.

(iii) *(P) is to provide full particulars of his employment history and income, including at Hurley's and Fosters Food Fair at The Strand;*

(iv) *(P) is to request and produce the reports and records of his treating doctors including the reports of Dr Blanca Bolea, Dr Marc Lockhart, Dr Philip Scurria, and Dr Glynn, including any documents referenced in those reports;*

(v) *(P) is to produce a copy of the social enquiry report in any further report by Dr. Clement von Kirchenheim, if it exists, and documents referenced in Dr. von Kirchenheim's report;*



(vi) *(P's) attorney is to obtain an appointment from Dr Lockhart for an assessment by him, and such other specialists as Dr Lockhart considers reasonably necessary, funded by the Defendant. The Plaintiff's attorney is to enquire of Dr Lockhart when his report can be produced, notified the Defendant's attorneys in writing by letter other specialists instructed;*

(vii) *in the event the report of Dr Lockhart and those to whom he has referred the 2nd Plaintiff when produce, are insufficient to permit an assessment of the quantum of the 2nd Plaintiff's claim, such that further evaluations are considered necessary, and no agreement with the Plaintiff can be agreed, then the 2nd Plaintiff may apply to the Court for further directions: and*

(viii) *Mr Keeble having confirmed that liability is not in issue that judgement be entered for the Second Plaintiff."*

10. On 1 August 2016 D filed a Summons to dismiss, seeking orders in very similar terms to those sought in the Summons which is now before me. The Summons was supported by the First Affidavit of Kim McLaughlin, as well as by the First and Second Affidavits of Kenneth Osborne. It is contended that the requests made in writing, which are set out in paragraph 8 above, and the disclosure ordered in paragraph 1 of the Chief Justice's Order of 6 May 2014 and paragraphs 1 to 5 of the Chief Justice's Order of 4 February 2016 had not been complied with. It was contended that D was suffering prejudice from the delay on the basis that pre-judgment interest is claimed by P and that the passage of time made it increasingly unlikely that P's pre-accident health and academic records would be available.

11. P's Summons came on before me on 29 September 2016. When one is considering the protracted dispute about disclosure, it is extremely important to recall that the Order I made on 29 September 2016 bears great similarity to the Orders made by the Chief Justice on 6 May 2014 and on 4 February 2016. When I made my Order on 29 September, I did so after having carefully reviewed the terms of the earlier orders, in which a number of provisions had clearly not been fully complied with. When making the Order on 29 September 2016, I aimed to clarify where there had been non-compliance and to update the discovery that was required. Before I gave the directions in that order, I gave both attorneys ample

opportunity to go through the paragraphs of the previous orders and to set out where they believed there had been compliance or non-compliance.

12. At the hearing on 29 September 2016 I did not accede to D's application for me to dismiss P's claim or to make an unless order, but instead, as requested at paragraph 4 of the Summons, I gave further directions for discovery and for actions to be taken by P's attorney by certain dates. I made the following orders:

> *"1. The 2nd Plaintiff is to request and produce his academic records, records of any standardised testing, intelligence testing and evaluations and PSATS administered at Grace Academy School, Cayman Academy, GED and UCCI if they are available or taken. Written requests are to be made for this by the 2nd Plaintiff's attorney by or on 7 October 2016. The 2nd Plaintiff's attorney is to supply the Court and the Defendant's attorney with copies of all correspondence with these schools since 4 October 2016 and ongoing.*
>
> *2. If the schools failed to respond by 4 November 2016 then the 2nd Plaintiff's attorney is to issue a subpoena duces tecum directed to the responsible party at the schools seeking production of the records as aforesaid compelling them to respond in writing.*
>
> *3. The 2nd Plaintiff is to request and produce records of all psychological testing and intelligence testing and evaluations – written request to the appropriate persons are to be made for these by the 2nd Plaintiff's attorney by on 7 October 2016 – 2nd Plaintiff's attorney is to supply the Defendant's attorney with*

copies of written requests made since 4 February 2016 and ongoing, along with written replies to the requests.

4. *The 2nd Plaintiff's attorney is to confirm in writing by or on 7 October 2016 to the Defendant's attorney whether all of the 2nd Plaintiff's medical records since birth have been produced. If they have not been produced yet, then the 2nd Plaintiff's attorney is to write to request the same, by on 14 October 2016, to each of the relevant medical practices/institutions and copies of those written requests and the written replies to requests are to be provided by him to the Defendant's attorney.*

5. *The 2nd Plaintiff is to provide full particulars of his employment history and income including at Hurley's and Fosters Food Fair at the Strand. The 2nd Plaintiff's attorney is to write to the employers by or on 7 October 2016 and to provide copies of the correspondence and replies on this issue since 4 February 2016 to the Defendant's attorney.*

6. *The 2nd Plaintiff is to request and produce reports and records of his treating doctors including the reports of Dr. Bolea and Dr. Glynn. The 2nd Plaintiff's attorney is to write to the doctors by or on 7 October 2016 to obtain the aforesaid. The requests and the replies are to be provided by the 2nd Plaintiff's attorney to the Defendant's attorney.*

7. *The 2nd Plaintiff is to provide the Defendant's attorney with a copy of the reports and records of Dr. Phillip Scurria by or on 7 October 2016.*

8. *As directed at paragraph 4 of the Order dated 4 February 2016, the 2nd Plaintiff is to request and produce reports and records of Dr. Marc Lockhart by or on 7 October 2016.*

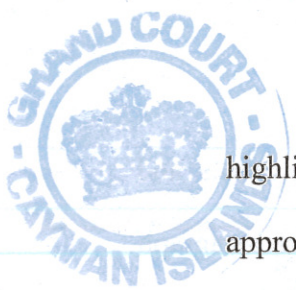
9. *The 2nd Plaintiff is to produce a copy of the Social Enquiry Report and any further report by Dr. Clement Von Kirchenheim, if it exists, and the documents referred to in Dr. Von Kirchenheim's report by or on 7 October 2016.*

10. *The 2nd Plaintiff's attorney should provide the Defendant's attorney with details as to when Dr. Lockhart indicates that his report will be ready.*

11. *....."*

13. On 24 October 2016 D filed the Summons to Dismiss which is currently before me. That Summons reiterates a great part of the content of the Summons dated 27 July 2016 which came on before me on 29 September 2016 and which resulted in an order that was approved by me on 25 October 2016.

14. In the Summons D reiterated his contention that the written request outlined in the previous summonses had still not been complied with, nor had the disclosure required in paragraph 1 of the Order of 6 May 2014, or in paragraphs 1 to 5 in the Order of 4 February 2016 and the Order of 29 September 2016. He stated that in relation to the Order of 29 September 2016, P's attorney had failed to do a number of things which he had been ordered to do by or on 7 October 2016. D



highlighted that yet again P's attorney had failed to return a draft order[6] with his approval or comments as required by GCR O.42, r.5(5).[7]

15. On 10 October 2016, less than two weeks after the 29 September hearing and 15 days before the order from that hearing was perfected, P filed a Summons requesting an application for an extension of time from 7 October 2016 to 21 October 2016. He also sought a variation of parts of the order which he contended directed the disclosure of "*privileged correspondence between the plaintiff's attorney and third parties.*" That Summons was never served on D. However, an amended version of that Summons containing the same hearing date as the D's Summons to dismiss, namely 16 February 2017, was belatedly served at 2:53 PM on 15 February 2017.

16. At the outset of day one of this hearing, namely on 16 February 2017, I had to deal with the issue caused by the very late service of P's Summons. I informed the parties that, having regard to the extended date sought by P for disclosure given in paragraph 1 of that Summons, it appeared that P was clearly indicating that the disclosure could and should already have been given by 21 October 2016. P's attorney made clear that paragraph 2 in his Summons, which was dealing with the issue in relation to privilege, related to paragraphs 3, 4, 5, and 6 of my Order

[6] This time it being the Order of 29 September 2016.
[7] A copy of that order was sent by D's attorney to the Court on 12 October 2016 inviting the Court to settle the order so that enforcement be taken in relation to parts of the order which P had allegedly not complied with. I directed that the order be slightly amended. On 21 October 2016 D's attorney sent a further email to the Court indicating that P's attorney had still failed to approve the terms of the draft order.

dated 29 September 2006 which required disclosure by him of requests and replies to third parties. P's attorney indicated that the application under paragraph 2 had been made because he, in my view wrongly, felt that he had not been given a sufficient opportunity to make submissions in relation to that disclosure at the half-day September hearing. The privilege issues raised by P's attorney had been considered and dealt with at the September hearing. I am satisfied that P's attorney had been afforded, and had taken up, the opportunity to make his arguments about privilege at the September 2016 hearing and that, after careful consideration of his submissions, I went on to make the order. I noted that the type of disclosure ordered by me in September was similar to that ordered by the Chief Justice at paragraph 2 of his Order of 4 February 2016 and no challenge or reference had been made to the inappropriateness of that Order on the ground of privilege. As in the case of ***Joy Hope Ann Vernon v Eileen Jennifer Green*** G19 of 2105, a matter involving the same attorneys and similar issues in relation to non-disclosure by P's attorney, one of the reasons for requiring the disclosure of such correspondence was to enable P's attorney to meet any allegation that he was not doing all that he reasonably could have been expected to have done to obtain the disclosure.

17. I refused P's application to adjourn, this application having been made by P as he wanted his belatedly served Summons to be heard at the same time as D's summons. Having regard to the fact that we were dealing with non-disclosure

from orders made by the Chief Justice on 6 May 2014 and 5 February 2016 as well as my Order made on 29 September 2016, in which I carefully reviewed the status of the previously ordered disclosure, with one eye on the Overriding Objective, I was not satisfied that it would be appropriate to delay this case any further. I directed that P's belatedly-served Summons could not be heard at this time, as D could not be expected to be in a position to address the issues raised therein.

18. At this hearing I have again afforded the parties an opportunity to go through the paragraphs of the relevant order setting out where they believed there has been compliance or non-compliance. One of the substantial issues at this hearing has been whether P's attorney has used his best endeavours to obtain the required disclosure. On the first day of the hearing, where the discovery appeared to be lacking, P's attorney sought to adduce email evidence of communications which he contended contained requests for the disclosure from medical practitioners, contending that it was not his or his client's fault if those requests had not been complied with. As those documents had not been produced prior to the hearing in an organised form resulting in an unnecessarily protracted hearing due to P's attorney's resultant unstructured submissions, I directed that, to better utilise the time on day two of this hearing, within 14 days he provide a bundle to the Court and to D's attorney containing all of the email communications which have been produced in Court. Regrettably P's attorney failed to comply with that direction,

as he only filed an affidavit sworn on the same day by P exhibiting a number of documents including some emails on the Friday afternoon before the Monday hearing, and that was done only after receiving a reminder from the Court by email on the previous day.

19. During the final day of this hearing it became evident that P was becoming concerned about the manner in which his attorney was handling his case and the possibility that this might lead to a dismissal of the claim. The indication was given to the Court that P wanted to change his attorney at that stage and P and his attorney left the room for a conference. Upon their return into Court, P's attorney remained and conducted the case until the end of the hearing. On 11 May 2017, ten days after the hearing, a Notice of Change of Attorney for P was filed. Any reference I make in this Judgment to "P's attorney" relates to the former attorney. I am conscious that any direction that I give to P will now have to be complied with by new attorneys. It is hoped that their involvement, bringing with it hopefully a fresh and proactive and not reactive approach to the proceedings and directions, will result in a drastic reduction in valuable Court time being overly occupied with a series of discovery hearings and that informed and sensible negotiations to settlement will now be able to be genuinely embarked upon. This road traffic accident occurred five years ago and settlement was reached concerning injuries received by the First Plaintiff in September 2015. There is a

real need to ensure that the remaining proceedings are resolved in a manner consistent with the Overriding Objective, whether that be by settlement or by trial.

20. At the end of the hearing I adjourned and I indicated that I would later provide a reserved judgment. This is that written Judgment.

Guidance on Compliance with Court Orders

21. Before I go on to analyse the disclosure and whether there has been compliance with the 29 September 2016 Order, I see merit in reiterating in full for these parties what I said under the heading "Comments Concerning the Requirement to Comply with Court Orders" in the case of ***Helfrecht v Chapman and ors*** Cause No 59 of 2013. I stated as follows:

> "*23. Before I go on to deal with the law in relation to unless orders, I would like to make some general observations. In that Although the recently gazetted* ***Practice Circular No. 1/2014*** *has been issued by the Chief Justice in relation to compliance with court orders in a different division, namely the Family Division, the sentiment expressed therein may often be equally applicable to the Civil Division. A copy of the Circular was provided to the parties by the Court this morning before their submissions. In any event, Counsel for the Plaintiff at the time informed the Court that they had intended to bring it to the Court's attention during the hearing this morning.*
>
> *24. In my view, the sentiments expressed in paragraph 1 of the Practice Circular may equally apply to this Division. If one*

replaces the words 'Family Division' with 'Civil Division' it could then read "orders made by the Civil Division of the Grand Court are not preferences, requests or mere indications; they are orders. Practitioners and those who appear before the Grand Court are reminded that orders, including interlocutory orders must be complied with to the letter and on time."

25. At paragraph 2 of the Practice Circular, reference is made to the following statement of St James Munby, the President of the Family Division in England and Wales in ***Re W (A Child), Re H (Children) [2013] EWCA Civ 1177 at paras. 52 & 53:***

> *"The court is entitled to expect – and from now on family courts will demand – strict compliance with all such orders. Non-compliance with an order should be expected to have and will usually have a consequence."*

Here I break from the President's statement and introduce the word 'Civil Courts' instead of 'Family Courts'. The President continued:

> *"Let me spell it out. An order that something is to be done by 4 PM on Friday, is an order to do that thing by 4 PM on Friday, not by 4:21 PM on Friday let alone by 3:01 PM the following Monday for some time later the following week. A person who finds himself unable to comply timeously with his obligations under an order should apply for an extension of time before the time for compliance has expired. It is simply not acceptable to put forward as an explanation for non-compliance with an order the burden of other work. If the time allowed for compliance with an order turns out to be inadequate the remedy is either to apply to the court for an extension of time or to pass the task to someone else who has the available the time in which to do it."*

26. *Paragraph 3 of the Practice Circular reiterates Sir James Munby's following views expressed at page 6 of his* ***7th View from the Presidents Chambers, January 2014****:*

> *"What....is for me a real concern is something symptomatic of a deeply rooted culture in the family courts which, however long established, will no longer be tolerated. I refer to the slapdash, lackadaisical and on occasions almost contumelious attitude which still far too frequently characterises the response to orders made by family courts. There is simply no excuse for this. Orders, including interlocutory orders, must be obeyed and complied with to the letter and on time. Too often they are not. They are not preferences, requests or mere indications; they are orders. This principle applies as much to orders by way of interlocutory case management directions as to any other species of order. The court is entitled to expect – and from now on family courts will demand – strict compliance with all such orders. Both parties and none parties to whom orders are addressed must take heed..... Non-compliance with order should be expected to have and will usually have a consequence."*

27. *Paragraph 6 of the Practice Circular informs that:*

> *"....persons who appear before the Grand Court are expected to comply with their plain and unqualified obligation to comply with the terms of a court order made against or in respect of them, unless or until it is discharged. This obligation applies to all forms of orders including interlocutory case management directions."*

28. *Paragraph 7 of the Practice Circular provides:*

> *"if parties are unable to comply with the terms of an order, they are <u>not</u> entitled to agree a variation of the order without obtaining the court's approval, and therefore must make the appropriate application to the grand court for the time for compliance has expired."*

29. As I have already clearly acknowledged, this Practice Circular relates to procedures in a different Division of the Grand Court. I am acutely conscious that differences exist in procedure between the two Divisions. However, I am of the view that the sentiments expressed in the Circular are ones which attorneys who appear before the Civil Division should also take heed of. In a number of cases, this being one of them, the concerns expressed about the state of affairs in the Family Division in England and Wales and in the Cayman Islands are equally applicable to proceedings in the Civil Division of the Grand Court."

Has there been Compliance with the Order of 29 September 2017?

22. **Paragraph 1 Order 29 September 2016 - (*The 2nd Plaintiff is to request and produce his academic records, records of any standardised testing, intelligence testing and evaluations and PSATS administered at Grace Academy School, Cayman Academy, GED and UCCI if they are available or taken. Written requests are to be made for this by the 2nd Plaintiff's attorney by or on 7 October 2016. The 2nd Plaintiff's attorney is to supply the Court and the Defendant's attorney with copies of all correspondence with these schools since 4 October 2016 and ongoing.)* – In relation to GED** - It is evident that GED is not a school and is actually a type of course, so that ordered disclosure is no longer required. P's attorney had written to Errol Levy, at Levy's Educational Tutoring & Consulting Services, concerning the GED tests, and was informed by him that P had "*dropped out of the program.*"

23. **In relation to Grace Academy ("GA")** - On 26 September 2016, only three days prior to the 29 September 2016 hearing, P's attorney sent an email to GA and attached a copy of the Chief Justice's Order dated 4 February 2016. He referred to the email as being a follow up request for information as no reply had been received to previous contact with GA. In the email he requested confirmation as to whether GA possessed any of the documents referred to in the Order. On 27 September 2016 the Office Manager at GA replied saying that there were no records to show that P had enrolled at GA. On 17 October 2016 and 18 October 2016 follow-up emails were sent to the school by P's attorney. On 17 October 2016 GA stated in emails that all records prior to 2014 had been destroyed in Hurricane Ivan. On 18 November 2016 the School clarified that no documents could be located concerning P. I am satisfied that P has used his best endeavours to comply with the disclosure required in the 29 September 2016 order in relation to GA. Regrettably, this email correspondence was not provided in an organised manner to the Court or D until it was belatedly filed on the afternoon of the last working day prior to the restored part-heard hearing, namely on 28 April 2017, as a part of a number of attachments to P's affidavit sworn on the same day[8].

24. **In relation to Cayman Academy ("CA")** – There has not been compliance with this part of the Order. No written records have been provided from CA, P's

[8] The Court having ordered on day 1 of the part-heard hearing on 16 February 2017 that the bundle with the correspondence which had been produced for the first time and in a piecemeal fashion to the Court on that day be provided to the Court and to D's attorney within 14 days, namely by or on 2 March 2017.

attorney informing the Court that he had not received any documentation from CA. No copies of correspondence between P's attorney and CA, which could verify that requests for this information had been made, have been provided. Unfortunately P's attorney, despite the terms of my Order and the Order of the Chief Justice requiring the correspondence, apparently was not compelled to strictly comply with the terms of the Orders, feeling that all that was required of him was to attend CA and to make an oral request. On the evidence before me, on the balance of probabilities, P's attorney has not satisfied me that he has used his best endeavours to obtain these reports and I make a finding he has failed to provide the correspondence as directed. Accordingly I now direct:

(i) P is to write to CA to request P's academic records, records of any standardised testing, intelligence testing and evaluations and PSATS administered at CA. The written request to be made for this by P's current attorney by or on 23 June 2017.

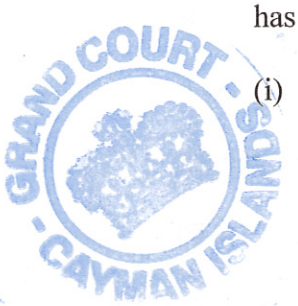
(ii) P's current attorney is to supply D's attorney with copies of the correspondence between CA and himself (and ongoing) concerning the reports, as well as all (if any exists) correspondence with CA by P's former attorneys since 4 October 2016 by 4:00 p.m. on 30 June 2017.

(iii) that copies of the required documentation are to be served on D's attorneys within 48 hours of their receipt by P or his attorney (whoever receives them first).

25. **In relation to UCCI** - Again, it appears that P's attorney did not perceive the need, prior to 7 October 2016, to comply with the Chief Justice's Order and my Order requiring him to write to UCCI. His explanation is that prior to that date he felt all that he was required to do was to contact them orally to make the request. On 7 October 2016 P's attorney wrote to a general email address at UCCI[9] requesting P's documents pertaining to education, courses attended and test results. Rather unsurprisingly, having regard to the nature of the email address that was utilised, he received no response. It appears that P's attorney met with Mr. Greg Fielder in October 2016 and wrote to him on 20 November 2016 and on 1 December 2006 seeking a statement as to how he knew P and/or his family. A written letter from Mr. Fielder is attached to P's affidavit of 28 April 2017. From that letter it is clear that Mr Fielder is involved in youth mentoring. This letter does not discharge P's responsibility under my and the Chief Justice's Orders to obtain records from UCCI. At the February hearing P produced a document headed official transcript from UCCI dated 21 February 2017. At the February hearing P through his mother informed the Court that the transcript was incomplete, as it did not mention any intelligence testing or ACT testing carried out at UCCI. Regrettably, P's attorney failed in between the February and May 2016 hearings to contact UCCI, armed with instructions from his client about why the transcript was incomplete, to seek clarification about the transcript. Although

[9] (info@ucci.edu.ky).

there has been belated part compliance with the orders in relation to UCCI, there has not been full compliance. Accordingly I now direct:



(i) P is to write to UCCI to request clarification about P's Official Transcript dated 21 February 2017 and to provide any reasons why it is incomplete. The written request to be made for this by P's current attorney by or on 23 June 2017

(ii) P's current attorney is to supply D's attorney with copies of the correspondence (and ongoing) between UCCI and himself concerning the reports as well as all (if any exists) correspondence with UCCI by P's former attorneys since 4 October 2016 by 4pm on 30 June 2017.

26. **Paragraph 3 of the Order of 29 September 2016** – ***(P is to request and produce records of all psychological testing and intelligence testing and evaluations – written request to the appropriate persons are to be made for these by P's attorney by on 7 October 2016 – P's attorney is to supply D's attorney with copies of written requests made since 4 February 2016 and ongoing, along with written replies to the requests).*** – A copy of Dr. Clement von Kirchenheim's Report was provided to D's attorneys on 10 June 2014. In that report the doctor refers to testing and scores obtained. D requested that information and P"s attorneys indicated that it had not been asked for from Dr. von Kirchenheim a she believed that Dr. Lockhart's office would have it. In the Chief Justice's Order of 4 February 2016 D was directed to provide "…. *any*

further report by Dr Clement von Kirchenheim, if it exists, and documents referenced in Dr von Kirchenheim's report." P is still to provide the testing documents referred to in Dr. von Kirchenheim's report of 6 March 2014 as directed. It appears that there was no further psychological testing, intelligence testing or other valuations done by Dr. von Kirchenheim and the only other report is the BHAC Report dated 9 February 2017. That report was prepared by Suzanne Neita, Consultant Psychiatrist, and has been served. In that report Dr. Neita refers to the results of the psychological testing, but the testing results and the scores have not been provided. Although there had been disclosure of the reports thee orders have not been fully complied with. Accordingly, I now direct;

(i) P is to write to Dr. von Kircheneim and Dr. Neita to request the test results and scores for the tests conducted by them and referred to in their reports. The written request to be made for this by P's current attorney by or on 23 June 2017.

(ii) P's current attorney is to supply D's attorney with copies of the written request sent to and replies received from D. von Kirchenheim and Dr. Neita concerning the testing results by 4pm on 23 June 2017.

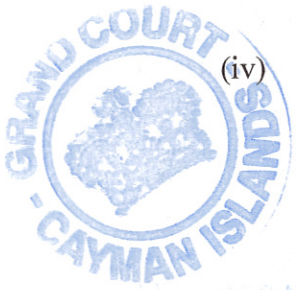
(iii) that copies of the required documentation are to be served on D's attorneys within 48 hours of their receipt by P or his attorney (whoever receives them first).

27. **Paragraph 4 of the Order of 29 September 2016** – ***(P's attorney is to confirm in writing by or on 7 October 2016 to D's attorney whether all of the P's medical records since birth have been produced. If they have not been produced yet, then P's attorney is to write to request the same, by on 14 October 2016, to each of the relevant medical practices/institutions and copies of those written requests and the written replies to requests are to be provided by him to D's attorney).*** - I am satisfied that the medical records from the George Town Hospital/Health Services Authority ("GT/HSA") have been produced. On 7 October 2016 P's attorney wrote to Ms. Neil at GT/HSA seeking confirmation that the documents provided by GT/HSA were in fact all the documents they had since for P since his birth. On 10 October 2007 Ms. Neil confirmed that the provided documents were the entire files since P was aged six, but added that he was at Chrissie Tomlinson Memorial Hospital ("CTMH") before then. P's attorneys then contacted CTMH sending a letter on 10 October 2016 along with a copy of the 29 September 2016 Order. CTMH replied on the same day and provided two pages of documents. P's attorney wrote back to CTMH seeking confirmation that these were all the documents that they held in relation to P. P's attorney stated that he received a reply from Mr. Andrew Tomlinson confirming that that these were all the documents they had. There was reference in the documentation to Dr. Cridland, who had been P's Paediatrician. P's attorney wrote to Dr. Cridland on 12 October 2016 and was told on 30 October 2016 by Dr. Thomas, who now manages that practice, that there were no

records for P and that any documentation would have been destroyed in Hurricane Ivan.

28. **Paragraph 5 of the Order of 29 September 2016 – *(P is to provide full particulars of his employment history and income including at Hurley's and Foster's Food Fair at the Strand ("Foster's"). P's attorney is to write to the employers by or on 7 October 2016 and to provide copies of the correspondence and replies on this issue since 4 February 2016 to D's attorney.)* -** P's attorney wrote to Hurleys on 10 October 2016, but failed as required by the September 2016 order, to copy D's attorney into the correspondence at that time. An appropriate reply was received by P from Hurleys on 16 February 2017. P attorneys wrote to Foster's on 29 September 2016 and again he failed to copy D's attorney in as required. P received a reply on 8 December 2016. Unfortunately Foster's failed to provide details about P's salary level and payments received. Regrettably, it was not until two weeks prior to the second day of this hearing that P wrote to Foster's pressing them for the additional information. That detail has not been provided yet by Foster's or P. According I direct:

(i) P's current attorney is to write to Foster's to request details of P's salary and income received whilst he was employed there. The written request to be made for this by P's current attorney by or on 23 June 2017.



(iv) that a copy of the reply containing the required information is to be served on D's attorneys within 48 hours of its receipt by P or his attorney (whoever receives them first).

29. **Paragraph 6 of the Order of 29 September 2016 – (*P is to request and produce reports and records of his treating doctors including the reports of Dr. Bolea and Dr. Glynn. P's attorney is to write to the doctors by or on 7 October 2016 to obtain the aforesaid. The requests and the replies are to be provided by P's attorney to D's attorney.)*** -The main complaint now made by D's attorney in relation to this disclosure is not that requests for the relevant information have not been made by P; it is that they have not been copied into all of the correspondence by P's attorney as required and that the documentation has only been sought at the last-minute, just before hearings. D's attorney is also critical that the documentation is sent to him in a disorganised fashion. It is right that some of the disclosure has not been sought in an efficient manner, for example P's attorney without good explanation was confused about where Dr, Bolea was located and therefore the request was sent the wrong surgery. This has caused unnecessary delay in collating all of the relevant medical evidence and the information and Dr. Bolea's disclosure is still outstanding. According I direct that:

(i) P's current attorney is to write to Dr. Bolea to request the production of P's reports and records. The written request to be made for this by P's current attorney by or on 23 June 2017.

(ii) P's current attorney is to supply D's attorney with copies of the correspondence (and ongoing) between Dr. Bolea and himself concerning the request:

(iii) that copies of the required documentation are to be served on D's attorneys within 48 hours of their receipt by P or his attorney (whoever receives them first).

30. **Paragraph 8 & 10 of the Order of 29 September 2016 – (*As directed at paragraph 4 of the Order dated 4 February 2016, P is to request and produce reports and records of Dr. Marc Lockhart by or on 7 October 2016. - The 2nd Plaintiff's attorney should provide the Defendant's attorney with details as to when Dr. Lockhart indicates that his report will be read)* -** P's attorney was informed that all of Dr. Lockhart's records in relation to P were held at CTMH. On 10 October 2016 he wrote to CTMH to obtain those documents. CTMH replied on the same date with some medical notes for P, but as mentioned in paragraph 26 above, they only amounted to 2 pages. D's attorney accepts that, but is critical of the fact that they only received the same on the evening before the first day of this hearing. It turns out that Dr. Lockhart was not the one preparing the report, in fact the report was actually prepared by Dr. Neita. In her report,

under the heading sources of information, Dr. Neita mentions CTMH medical record of P's visit with Dr. Lockhart. It appears that the full disclosure has now been given in relation to this part of the Order and, for completeness sake, also in relation to paragraph 7 of the Order concerning the disclosure from Dr. Scurria.

31. **Paragraph 8 & 10 of the Order of 29 September 2016 -** ***(P is to produce a copy of the Social Enquiry Report and any further report by Dr. Clement Von Kirchenheim, if it exists, and the documents referred to in Dr Von Kirchenheim's report by or on 7 October 2016)*** - As already mentioned herein, Dr. von Kirchenheim's report has been disclosed. In relation to the social enquiry report, P's attorney agrees that this should be disclosed and states that this has already been produced to D. D's attorney is adamant that it has not been disclosed. Accordingly, I direct that a copy of the social inquiry report be provided by P's current attorney to D's attorney by 30 June 2017.

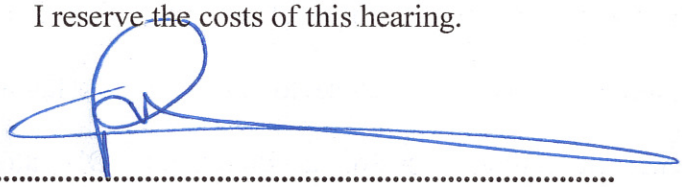
Conclusions

32. When analysing the degree of compliance with the Court orders, I have done so with the forceful submissions made by D's attorney firmly in my mind. Having had the opportunity to review the discovery issues, I am satisfied that on the whole there has been compliance with the Order of 29 September 2016. I understand Mr. Keeble's frustration at the unstructured way that some of the discovery has been given, and this includes the manner in which the documents

have been transmitted, the fact that a great deal of disclosure including copies of the directed communication was made very close to hearings. P's failure to provide the correspondence in a timely fashion as directed to D's attorney illustrates a rather unattractive approach to strict compliance with Court orders. I am acutely conscious that it has taken at least four disclosure orders (three made by the Chief Justice) and many arduous months to arrive at the level of disclosure now given, particularly by P. However, P's approach and the highlighted non-compliance is not to the degree that the Court should make a finding of intentional and contumelious disobedience of its orders, or there to be an abuse of process due to inordinate delay. Having reached this conclusion, although I have in mind the principles relating to the applications made by D's attorney, I do not intend to conduct an analysis of the case law relating to dismissal.

33. The orders that I have made in this Judgment are designed to move this case forward in a manner consistent with the Overriding Objective. P's current attorneys would be well advised to ensure full compliance. What is extraordinary in this case is that one would expect, in a case where liability is not the issue, P to be the one who is most anxious to get this matter disposed of either by settlement or a trial. P must realise that for either of those to happen there must be sufficient disclosure to either facilitate informed negotiations or conduct an effective hearing.

34. I reserve the costs of this hearing.



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The Honourable Mr. Justice Richard Williams
JUDGE OF THE GRAND COURT