IN THE COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

Claim No. 2023/CLE/gen/00226

BETWEEN:

PALM CAY DEVELOPMENT COMPANY

Claimant

AND

ALLWORTH MERLIN PICKSTOCK

Defendant

Before:	The Honourable Mr. Justice Leif Farquharson
Appearances:	Mr. Dion Smith for the Claimant Mrs. Al-Leecia Pickstock for the Defendant
Hearing dates:	15 January 2026, 26 January 2026

RULING

The Application Before the Court

1. I have before me an application by the Claimant seeking an order permitting it to call Mr. Cyril Morley, a marine surveyor, as a witness in the trial of this action and seeking relief from sanctions to facilitate this. The trial itself commenced on 21 October 2025 and is part-heard, being set to resume on 18 March 2026. Counsel for the Claimant initially sought to move the application orally while on his feet during the trial. The Court then advised him that if the matter was to be pursued, he would need to file a formal application. He subsequently did so, filing a Notice of Application on 22 October 2025. This is supported by an affidavit sworn to by Shandika Morley, a legal assistant employed by the firm of attorneys representing the Claimant, filed on 29 October 2025.

2. Suffice it to say, the Claimant's application is vigorously opposed by the Defendant. The Court heard arguments on the matter on 15 January 2026 and reserved its decision.

3. This is my ruling on the application.

Procedural History

4. Before giving my decision, it is useful to provide some background on the procedural history of this matter, which serves to place the current application in its proper context. The factual background to the underlying dispute itself is addressed in my earlier Ruling on the parties' respective applications to amend dated 11 July 2025 (at paras.2-6).

5. In short, this matter was originally before Fraser, Sr. J. (as she then was). By a Case Management Conference Order dated 5 March 2024 (the "***1st CMC Order***"), she issued various directions to progress the matter towards trial, including as it related to the preparation of a bundle of evidentiary documents and service of witness statements from both factual and expert witnesses, with both sides being permitted to call two experts. The 1st CMC Order provided for all interlocutory applications to be made before 8 August 2024 and scheduled 19 September 2024 for a pre-trial review (PTR). The 1st CMC Order also included a sanction for non-compliance with any of its terms in the form of the striking out of the offending party's pleadings.

6. Both parties subsequently filed applications to amend. By Order dated 9 October 2024 and made at a further procedural hearing (the "***2nd CMC Order***"), Fraser, Sr. J directed that these applications be heard on the papers. She also granted both sides relief from the sanctions included in the 1st CMC Order and extended the time for both sides to comply with all outstanding pre-trial directions. Specifically, she directed that the Claimant file the bundle of evidentiary documents referred to in the 1st CMC Order by 7 April 2025 and that both sides file and exchange all witness statements by 23 May 2025. As the original trial dates had to be vacated, she also fixed new trial dates of 21 and 22 October 2025. As before, the 2nd CMC Order embodying her further directions included a sanction for non-compliance in the form of the striking out of the offending party's pleadings.

7. The file was subsequently transferred to me, coming on for hearing for the first time on 20 March 2025. At this time, I was informed that the Court's ruling on the outstanding applications to amend (which, as indicated, were to be determined on the papers) was still pending.

8. This is where the events transpiring take on heightened importance. The Court issued its Ruling on the amendment applications on 11 July 2025. At the PTR held on 16 September 2025, it was evident that whilst considerable progress had been made, a number of the case management directions had not been fully complied with. With the parties' agreement, the Court accordingly extended the timelines for the remaining directions in the 2nd CMC Order to be fulfilled. This was embodied in a "*Further Directions Order*" of the same date. This included a direction that the bundle of evidentiary documents be filed by 22 September 2025 and that all witness statements be filed and served by both sides by 30 September 2025. The trial dates of 21 and 22 October 2025 remained.

9. In compliance with the Further Directions Order, the Claimant filed the bundle of evidentiary documents on 22 September 2025, which was countersigned by both counsel.

Both sides each also filed a total of eight (8) witness statements by the stipulated deadline of 30 September 2025. As mentioned, the trial commenced on 21 October 2025 and continued the following day as scheduled, with the Claimant calling a number of its witnesses.

10. During the course of trial, the Claimant sought to call Mr. Cyril Morley as a witness. Notably, Mr. Morley signed a witness statement in the action; however, this was only filed on 14 October 2025 – two weeks after the deadline set in the Further Directions Order and one week before the start of trial. His witness statement included as an attachment a marine survey report seemingly prepared by him in October 2024 and purporting to speak to (among other things) the condition of the vessel "*Chardenae*," its market value at the time and its replacement value. The report had been disclosed by the Claimant at an earlier stage in the litigation almost one year prior in an affidavit opposing the Claimant's application to amend (see 2nd Affidavit of Shandika Morley filed on 17 October 2024). It was also included in the bundle of evidentiary documents, in the section comprised of documents whose truth was disputed (i.e. "*Part B*").

11. As indicated, Mrs. Pickstock strenuously resisted Mr. Morley being called as a witness. She quite properly foreshadowed her objection to him being called in an email addressed to the Court and counsel for the Claimant shortly before the commencement of trial.

Grounds for the Application

12. In making the present application, the Claimant invokes CPR 29.11, CPR 26.8 and the inherent jurisdiction of the Court. The stated ground for the application, according to the Claimant's Notice of Application, is that the Claimant was unable to comply with the Court's Further Directions Order of 16 September 2025 as the intended witness (Mr. Morley) "*was not on the Island on the date his witness statement was prepared.*"

Affidavit Evidence of the Parties

13. Shandika Morley, in her affidavit in support of the application, deposes *inter alia*: the marine survey report of Mr. Morley is essential to the Claimant's case; the report is more probative than prejudicial; allowing Mr. Morley to testify would assist the Court in dealing with the case justly and efficiently; the Defendant had notice of the report previously as it was exhibited in an affidavit sworn by her in opposition to the Defendant's earlier application to amend; the report was also included in the bundle of evidentiary documents; "*The witness statement [of Mr. Morley] was prepared on or before the 29th of September 2025 however the witness was not on the Island and was not available to sign the witness statement on the date it was prepared*"; "*The witness statement was filed on the 14th of October, 2025 as soon as it was signed*"; the witness statement of Mr. Morley is in the bundle of pleadings and witness statements filed on 14 October 2025 (that is, the Trial Bundle); the Defendant did not object to Mr. Morley giving evidence until the day before trial; the witness statement of Mr. Morley only exhibits a report that the Defendant previously had notice of; after the Defendant took objection to the witness statement of another of the Claimant's expert witnesses by reason of his report not being compliant with the requirements of CPR Part 32, the Claimant re-filed the witness statement of Mr. Morley on 27 October 2025 in a form which is compliant with the CPR, without adding any new evidence.

14. The Defendant himself swore an affidavit in opposition to the application. This was filed on 8 December 2025. He also relies on his earlier affidavit filed on 8 August 2024 in relation the amendment applications. He deposes *inter alia*: he accepts that the report of Mr. Morley was disclosed earlier; he does not accept its probative worth as suggested in the Claimant's affidavit evidence or the necessity of the report for the just and efficient disposition of the action; he notes that the stated purpose of Mr. Morley's survey, on its face, was for "*Insurance Evaluation/Condition Report*"; he suggests that the report is lacking in meaningful detail and an explanation of the processes followed in determining the market value and replacement value of the material vessel, and is significantly inferior to the report prepared by Albert Armbrister relied on by the Claimant (which is included in the bundle of evidentiary documents in the section comprising documents agreed as to authenticity and truth); he asserts that the Claimant by its counsel expressly agreed that the report of Mr. Morley be included in the bundle of evidentiary documents in the section in which it is located (namely, Part B), and cannot therefore assert ignorance that its veracity was disputed; he assumed that the Claimant had no intention of calling Mr. Morley as a witness, given its agreement to Mr. Armbrister's report and its failure to file any witness statement on his behalf by 30 September 2025; the witness statement of Mr. Morley filed on 14 October 2025 was not served on his attorneys, but was instead merely slipped in the Trial Bundle without notice to him or his attorneys; his attorneys only noticed the witness statement of Mr. Morley filed on 14 October 2025 when preparing for trial on 20 October 2025 and reviewing the Trial Bundle, and immediately raised objection; the witness statement of Mr. Morley filed on 27 October 2025 was filed without leave, after the Court had already directed that a formal application for relief would need to be made by the Claimant if it wished to rely on Mr. Morley's statement and call him as a witness; up to and including the first day of trial, and despite filing Mr. Morley's statement out of time, the Claimant made no application for relief from sanctions; although it is asserted that Mr. Morley was unavailable to sign a witness statement prior to the deadline stipulated in the Further Directions Order, the witness statement filed on his behalf on 14 October 2025 bears the date 29 September 2025, which was before the deadline. Mr. Pickstock's last-mentioned observation is correct. Mr. Morley's witness statement (which purports to bear his signature) was filed on 14 October 2025; however, it bears the date of 29 September 2025, which was obviously within the period stipulated in the Further Directions Order. This discrepancy was never fully explained.

Discussion and Analysis

15. CPR 29.11, which addresses the consequences of failure to serve a witness statement or witness summary, provides as follows:

> "*(1) If a witness statement or witness summary is not served in respect of an intended witness within the time specified by the Court, the witness may not be called unless the Court permits.*
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> *(2) The Court may not give permission at the trial unless the party asking for permission has a good reason for not previously seeking relief under rule 26.8.*" [Emphasis supplied]

16. This provision is not unique to The Bahamas. The UK counterpart is found in Rule 32.10 of the English CPR, albeit there is no reference to the requirement to show a good reason for not previously seeking relief from sanctions where permission is sought to call the witness at trial. Despite this, it is generally acknowledged that the exercise of the judicial

discretion to grant permission for a witness to be called in such circumstances is not at large (see ***2024 White Book*, para.32.10.2**).

17. The Eastern Caribbean counterpart is, for all intents, identical to Rule 29.11 of the Bahamian CPR, and is even located in Rule 29.11 of both the original and the revised editions of the EC CPR. While not binding on this Court, the decisions of the EC courts on the interpretation of the rule are nonetheless of persuasive value. Regional academic writings on the construction of the rule also offer instructional guidance. In this regard, the commentary in ***'The Caribbean Civil Court Practice' (3rd ed.) 2024*, at p.400**, states:

> *"If a witness statement (or witness summary in respect of an intended witness) is not served within the time specified by the court, the witness may not be called unless the court permits. The court will not give permission at the trial unless the party asking for permission has a good reason for not previously seeking relief from sanctions under the court's case management powers. It is to be emphasised that the party applying must not only show a good reason for not having complied with the order originally but a good reason (and in practice a compelling reason) for not having - prior to trial - applied for relief from the sanctions for late service provided in the rules."* [Emphasis supplied]

18. The requirements of the rule, and the exercise of the court's discretionary powers in such circumstances, were comprehensively examined by Acting Justice Denys Barrow of the High Court of Grenada (now, Justice of the CCJ) in the case of ***Kenton Collinson St. Bernard v. Attorney General and Others* Civil Case No.0084 of 1999**. He also addressed the fundamental difference in approach to non-compliance under the RSC and the CPR regimes. In a passage which bears setting out at some length, Justice Barrow stated as follows (at paras.4-11):

> *"[4] When the trial was about to begin counsel for the police pointed to rule 29.11 of the Civil Procedure Rules 2000. That rule says that if a witness statement is not served in the time specified the witness may not be called unless the court permits. The court may not give permission at the trial, the rule states, unless the party seeking permission has a good reason for not previously seeking relief under rule 26.8.*
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> *[5] This provision is of arching importance as it distills the essence of the new Rules. Before CPR 2000 it was a matter for the broad discretion of the court how to treat non compliance, which had become commonplace. There was nothing in the old rules standing in the way of the court deciding, as the claimant's counsel has invited the court to decide in this instance, that since there was no prejudice to the defendants it would waive the non-compliance. This was the accepted way of proceeding. In Hytec Information Systems Ltd v Coventry City Council [1997] 1 WLR 1666 at 1671 the English Court of Appeal described the reluctance that had become established in the courts to apply sanctions even where there had been violations of peremptory orders. The courts hesitated to act because they did not want to be draconian.*
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> ....
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> *[7] In our small societies personal as opposed to purely professional relationships are unavoidable and those relationships may cause or may be perceived as causing reluctance to enforce the rules. The approach of the new rules to non-compliance eliminates the operation of the personal factor. CPR 2000 took away the wide discretion formerly reposed in the*

courts to determine what should be the consequence of non compliance. A basic part of that discretion had been to determine whether, in fact, there was to be any consequence. How a given judge or how different judges responded to non-compliance depended on the individual exercise of discretion. That exercise was unavoidably affected by the dynamics of the relationships between different lawyers, between different chambers and between different lawyers or chambers and different judges. Results were understandably seen as arbitrary.

[8] CPR 2000 set a fixed sanction for non-compliance. Rule 29.11 states that the person whose witness statement has not been delivered in time may not be called as a witness at the trial. ….

[9] The setting of a fixed sanction for non-compliance results in the elimination of the wide discretion of old and this last is completed by limiting the court's ability to grant relief from sanction. The court can only consider granting relief, at the trial, if the defaulting party gives good reason for not having previously applied for relief. A tight structure is therefore established to deal with non-compliance. However convincing may be the explanation for non-compliance the court cannot even start to consider it, far less allow itself to be affected by any explanation, unless the defaulter has a good reason for not having made a formal application for relief from sanctions. The effect of rule 29.11 is that a defaulter may have a good explanation for non-compliance but no good reason for having failed to previously apply for relief from sanction and in that event the defaulter must suffer the sanction.

[10] Rules 26.7 and 26.8 express the central idea that the fixed sanction for non-compliance will take effect unless there is a prompt application for relief supported by evidence on affidavit. The requirement underscores the imperative that the defaulter must act. The defaulter cannot sit by until the day of the trial, as was the old practice, because not even an excuse of superior merit can save the defaulter if he does not act promptly to seek relief from sanction. It is mandatory that such an application must be made promptly because if an application for relief could be made any old time there would be no certainty to trial dates since these would need to be vacated to accommodate late compliance that had been permitted upon late applications. The companion requirement to promptitude, that there must be evidence on affidavit, emphasises the weightiness of satisfying the stated conditions and eliminates the old practice of counsel merely trotting out an excuse from the bar table.

[11] In this case there was no application for relief from sanction. The rule says I may not permit the witnesses to be called unless the claimant has a good reason for not previously seeking relief. …. After I had adjourned the trial to deliver this Ruling, which would determine how the trial was to continue, the claimant filed an application pursuant to rule 26.8 to seek relief from sanction. That is an extreme example of a late application and demonstrates why the rules preclude late applications. To entertain it I would need to delay the ruling and the trial to hold a hearing of that late application. That would make a mockery of the requirement of promptitude. I refuse to do so." [Emphasis supplied]

19. Coming back to the matter at hand, the affidavit of Shandika Morley states at paragraph 8: "*The witness statement was prepared on or before the 29th of September 2025 however*

the witness was not on the Island and was not available to sign the witness statement on the date it was prepared." While this may possibly serve to explain why the witness statement of Mr. Morley was not filed and served by the deadline of 29 September 2025, self-evidently this does not explain, much less provide a *"good reason"*, why relief from sanctions was not sought previously. The explanation is also somewhat vague and imprecise in its terms.

20. The remainder of Ms. Morley's affidavit does not significantly advance the position. In paragraph 4, she states that the survey report of Mr. Morley *"is essential to the presentation of the Claimant's case and…is more probative than prejudicial."* This is to some extent a legal submission as opposed to a statement of fact. In any event, it says absolutely nothing in terms of providing a good reason for the Claimant not having previously sought relief under Rule 26.8. The same could be said of the statement in paragraph 5 of her affidavit to the effect that to allow Mr. Morley to give evidence "*would assist the court in the dealing with the matter justly and efficiently.*"

21. The previous disclosure of Mr. Morley's survey report and its inclusion in Part B of the evidentiary bundle, whilst perhaps relevant to the issue of prejudice to the Defendant, again says nothing in terms of providing a good reason for the Claimant not having previously sought relief under Rule 26.8 – which is the governing consideration in an application of this nature. The suggestion that the Defendant would suffer no prejudice by Mr. Morley being called, in any event, appears to be overstated. The Defendant would have prepared its case on the footing that Mr. Morley was not being called, that his report fell within the category of documents included in Part B of the evidentiary bundle and that its own marine surveyor's report was accepted by both sides as to authenticity and truth. If Mr. Morley were called at this stage, this would likely have to be revisited. The current application has also served to delay the proceedings.

22. The reference to the witness statement of Mr. Morley having been included in the Trial Bundle served on 14 October 2025 and to the Defendant not raising objection to the witness giving evidence until the day before the trial similarly goes nowhere in providing a good reason for the Claimant not having previously sought relief under Rule 26.8. It surely cannot be suggested from this that the Defendant somehow misled the Claimant into believing that Mr. Morley was accepted as a witness or waived his right to object to him being called. It is also worth noting that, according to the Defendant, Mr. Morley's witness statement filed on 14 October 2025 was merely tucked away in Vol.2 of the compendious (unfiled) Trial Bundle containing the pleadings and witness statements filed in the matter and served shortly before the start of trial.

23. The Claimant's reliance on the Court's inherent jurisdiction, with all due respect, does not assist. Rule 29.11 is an express provision specifically addressing the requirements to be satisfied where a party seeks permission to call a witness at trial whose witness statement or witness summary has not been served in time. It would therefore be inappropriate, in my view, to allow the requirements of the rule to be circumvented by recourse to the Court's inherent jurisdiction. The Court of Appeal explained the matter thus in ***Belgravia International Bank & Trust Co. Ltd. v. Sigma and Anor.*** **[2022] 2 BHS J. No. 114** (at para.62):

> *"62. In my judgment, the decision of the Privy Council in The Attorney General v Universal Projects Limited [2011] UKPC 37 encapsulates the law regarding inherent jurisdiction versus rules of court. Lord Dyson said at paragraphs 26-27:*

> *"26. ...Mr. Knox submits that, even if the application under rule 26.7 is rejected, the court retains an inherent jurisdiction to set aside the judgment in order to prevent its own process from being abused where the claim is shown to be misconceived and to be bound to fail.*
> *27. Rule 26.2(1) provides that the court may strike out a statement of case or part of a statement of case if it appears "(b) that the statement of case or part to be struck out is an abuse of the process of the court; or (c) that the statement of case or the part to be struck out discloses no grounds for bringing or defending a claim". The rules contemplate that an application under rule 26.2(1) will be made while the proceedings are on foot, i.e. before judgment is entered. If a default judgment is entered, the rules provide that the defendant can apply to have it set aside, but only if the conditions set out in rule 13.3(1) or rule 26.7 (whichever is applicable) are satisfied. There is no scope for recourse to the inherent jurisdiction of the court. The territory is occupied by the rules. The court's inherent jurisdiction cannot be invoked to circumvent the express provisions of the rules. As the Board said in Texan Management v Pacific Electric Wire and Cable Co Ltd [2009] UKPC 46 at para 57:*
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> > *"The modern tendency is to treat the inherent jurisdiction as inapplicable where it is inconsistent with the CPR, on the basis that it would be wrong to exercise the inherent jurisdiction to adopt a different approach and arrive at a different outcome from that which would result from an application of the rules.""* [Emphasis supplied]

24. The Claimant in its submissions also sought to invoke the Court's general power to rectify matters embodied in CPR 26.9. In my view, this reliance was similarly misplaced. The opening words of that rule confirm that it only applies where the "*consequence of failure to comply with a rule, practice direction or court order has not been specified by any rule, practice direction, court order or direction.*" In the instant case, the consequence of failure to serve witness statements within the time specified by the Court is addressed in Rule 29.11(1) itself; namely, the witness may not be called unless the Court permits. The seeking of permission in such circumstances at trial is, of course, addressed in Rule 29.11(2). This expressly and specifically requires the party seeking permission to establish "*a good reason for not previously seeking relief under Rule 26.8.*" Accordingly, I do not regard Rule 26.9 as affording the Claimant the reprieve suggested or as somehow ousting the requirements of Rule 29.11(2).

25. The Claimant's submissions based on Rule 26.8 were not extensively developed. For completeness, I would nonetheless confirm that I do not regard this as a suitable case in which to grant relief from sanctions. First, the current application engages the specific requirements of Rule 29.11. As indicated, I am not satisfied that these have been met. Second, the failure to file the witness statement of Mr. Roker within the time stated in the Further Directions Order has served to disrupt the conduct of this particular litigation. Third, given the vagueness of Ms. Morley's affidavit evidence, I am unable to accept that the Claimant has shown a good reason for its default. Fourth, the application for relief, being moved at trial, is exceedingly late by any standards. To grant relief in such circumstances, in my view, would directly undermine the need for litigation to be conducted efficiently and the need to enforce compliance with the Rules and the Court's orders (see generally ***Andrew Smith v. First Caribbean International Bank*** **[2023] 1 BHS J. No. 76, at paras.57 and 67-72**).

Conclusion and Disposition

26. In conclusion, and having considered the parties' affidavit evidence, submissions and authorities in their entirety, I am not satisfied that the Claimant has shown a good reason for not previously seeking relief under Rule 26.8. The present application is accordingly dismissed and the witness statements of Cyril Morley filed on 14 and 27 October 2025 are excluded. As a result, Mr. Morley may not be called at the continuation of the trial.

27. As the successful party, the Defendant is to receive his reasonable costs of the application, which I will summarily assess unless otherwise agreed.

L. Farquharson

Farquharson, J.