3rd June 1998

FIRST AMERICAN CORPORATION et al
CAUSE NO: 847 of 1997

Justice Smellie's has amended and underlined changes to the above judgment.

Lorraine Hennie
Secretary to the
Hon. Justice Smellie Q.C.

IN CHAMBERS

IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO: 847 OF 1997

In the matter of the Evidence (Proceedings in Other Jurisdictions) (Cayman Islands) Order 1978

and

In the Matter of Civil Proceedings now pending before the United States District Court for the District of Columbia

BETWEEN: FIRST AMERICAN CORPORATION et al

Plaintiffs

- and -

SHEIKH ZAYED BIN SULTAN AL-NAHYAN et al

Defendants

AND BETWEEN: CLARK M. CLIFFORD et al

Plaintiffs and Counterclaim Defendants

- and -

FIRST AMERICAN CORPORATION et al

Defendants and Counterclaim-Plaintiffs

Appearances: Andrew Jones and Neil Timms of Maples and Calder for Price Waterhouse (Cayman) and the intended witnesses.
Stephen Rubin instructed by Stephen Barrie of C.S. Gill & Co. for First American Bank Corporation.

Judgment

This application seeks orders granting and enforcing a Letter of Request from the United States District Court for the District of Columbia ("the District Court") for the testimony

scope and range of questions about the subject of Treasury losses - even taken by itself - could be uncontrollably broad. And - as in the case of any other subject-matter - would require the intended witnesses to undertake countless hours of preparation to be in a position to respond to the range of possible questions. This would entail, I am told, reference to hundreds of files on the subject-matter of the Treasury losses alone.

By way of further illustration of the scope of that exercise, there is an issue whether reference is to the Treasury losses as misleadingly reported in the accounts - and hence certified by PW Cayman - or to Treasury losses as they actually occurred. This is not made clear in the schedule of testimony. If only the former, then it is not disputed that the extent of the losses is a matter which can be readily given in evidence by expert witnesses in the District Court by reference to the certified audits given by Price Waterhouse and which are already a matter of record in the Zayed action. In this regard I feel compelled to agree with Mr. Jones, that it is unrealistic to expect that Harris and Fear will now refute their findings already certified in their audits in respect of the magnitude of the Treasury losses for the years in question.

If the latter - and the enquiry seeks to show the true extent of Treasury losses ultimately revealed by the Naqvi files - then the inquiry would suggest an expectation of evidence from Harris and Fear about matters with which they were not privy. It is not disputed that those files and the Section 41 report compiled by reference to them, were dealt with by P.W. UK; not by Harris and Fear. For those reasons, the true extent of the Treasury losses did not come to light until after November 1990, some three years after Harris and some five years after Fear were last responsible for the audits. Against that background, where no real probative value is apparent, it is the reasonable concern of Harris and Fear -

be adopted in similar circumstances in Cayman.

In Re The State of Norway's Application (No.1) [1987] Q.B. 433 Lord Justice Kerr at pages 482 -3 said this, addressing the impermissible potential for fishing as he saw it in Norway's request for evidence:

> "In the present context fishing
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> may occur in two ways.
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> First, the "evidence" may be sought for a preliminary purpose, such as the process of pre-trial discovery in the United States. The fact that this is clearly impermissible for the purposes of the (English) Act of 1975 is established in the Westinghouse case [1978] 1 A.C. 547, and was equally so held by this court in relation to the Foreign Tribunals Evidence Act 1856 in Radio Corporation of America v Rauland Corporation [1956]. Q.B. 618. This is relevant in the present context, as McNeil J rightly indicated. It is perhaps best described as a roving inquiry by means of the examination of witnesses, which is not designed to establish by means of their evidence allegations of fact which have been raised bona fide with adequate particulars, but to obtain information which may lead to obtaining evidence in support of a party's case. In the Radio Corporation case [1956] 1 Q.B. 618 the court was concern with the word "testimony" in the Act of 1856 whose equivalent is now "evidence" in the Act of 1975. In a passage

jurisdiction to the statements of Lord Justice Kerr quoted above from the case of Re Norway No.1. Mr. Rubin submitted that even if they do comprise the ratio decidendi of that case they should not be adopted here. This he submitted for the practical reason, in particular - and earlier touched upon - that nothing in the Convention excludes or precludes a procedure by which a witness could be examined or cross-examined upon matters which follow naturally on answers given and by which the witness may be required to disclose documents relied upon (by way of preparation or refreshing memory or otherwise) for the purpose of giving his testimony. If such an outcome were to be described as "fishing" or as a "roving inquiry" for the purposes of English law, it is nonetheless, he submitted, to be regarded as permitted by the Convention which, in Article 3, imposes conditions of specificity only upon requests for documentary evidence. These arguments, to my mind, overlook the concerns about general unfairness and the practical obligations and powers of the court to prevent it -matters already addressed. They also overlook the issues of oppression in the specific contexts which I have already addressed and which must be considered, irrespective of the working of the Convention. Apart from all that, these particular arguments of Mr. Rubin overlook, to my mind, the very reason for the reservations recorded by the British Government upon accession to the Convention and expressed in the Evidence Order by way of the limitation of the Courts' jurisdiction not to make orders which it could not make for the purposes of obtaining evidence for domestic litigation; i.e. Section 2(3) of the Evidence Order. This is because in domestic litigation a witness is never compelled until the court is satisfied that he has relevant evidence to give and that he has or has been afforded an understanding of the testimony required of him.

Exercises by which roving inquiries are allowed by way of pre-trial discovery based upon broad subject-matters do not fit within those confines.

Mr. Rubin's arguments, it must be acknowledged, have found some robust support in the English Court of Appeal which has held that the prohibition against "fishing" cannot apply to a request for viva voce testimony which is otherwise permissible and in response to which the witness has relevant testimony to give. See the decision in the recent pronouncements of the Court of Appeal in the First American case. (Supra).

In giving the judgement of the Court the Vice Chancellor disagreed with the words of Kerr LJ in Re Norway (No.1) which he described as obiter dictum (and overruling Popplewell J in the court below to the extent that he had relied upon them). The Vice Chancellor quoted and expressed his agreement in this regard instead with pronouncements - (also disagreeing with those of Kerr LJ in Norway ( No.1) ) - made by Woolf LJ in Re Norway No. 2 [1990] A.C. 781/782 and continued:

> "I am in respectful and complete agreement with the opinion expressed by Woolf L.J. in the passage I have cited. If oral evidence is being sought for the purpose of use at trial and if there is good reason to believe that the intended witness has knowledge of matters in issue at the trial so as to be likely to be able to give evidence relevant to those issues, I do not understand how an application to have the intended witness orally examined can be described as fishing. It cannot be necessary that it be known in advance what answers to the questions the witness can give".