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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.
Steven 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

1 of Richard Harris and Richard Fear (“the intended witnesses”).

2
3 The application is brought by First American Corporation and First American Bank
4
5 Shares Inc. (hereinafter together “First American”).

6
7 The background is required to set the context for the decision at which I have arrived not
8
9 to grant the Letter of Request, as it is presently framed.

10
11 Background

12
13 First American were bank holding companies organised under the laws of Virginia in the
14
15 United States of America but now in liquidation under the control of a trustee appointed
16
17 by the District Court.

18
19 That appointment was made when it was revealed that the ill-reputed, ill-fated Bank of
20
21 Credit and Commerce Holdings S.A. and its affiliates (“BCCI”) had managed, in breach
22
23 of United States law, to acquire First American by means of BCCI’s acquisition of First
24
25 American’s parent company, Credit and Corporation Holdings N.V. (“CAH”).

26
27 First American has filed action (“ the Zayed action”) now pending before the District
28
29 Court seeking damages it claims to have suffered as the result of the public loss of
30
31 confidence following from the publication of the fact of BCCI’s involvement in its
32
33 ownership and the consequential run of its depositors on First American and the severe
34
35 diminution of value in its shares which followed.

36
37 The testimony of the intended witnesses is sought in furtherance of that claim in the
38
39 Zayed action.

40
41 A second and related action before the District Court (also intituled herein) does not
42
43 figure for present purposes. In it Clarke Clifford and Robert Altman are plaintiffs
44
45 seeking indemnification from First American, for the legal fees and costs incurred in their

1
2 defence of Federal and State criminal and civil prosecutions in the United States
3
4 relating to their alleged involvement in the affairs of BCCI and First American.

5
6 In the Zayed action First American's claim is brought against Sheikh Zayed bin Sultan
7
8 AL-Nahyan, Clarke Clifford, Robert Altman and 26 others whose names figure
9
10 prominently in the list of dramatis personae of the BCCI debacle.

11
12 In the Zayed action, the very large quantum of damages First American seeks against
13
14 them is said to arise from the defendants' role in assisting BCCI's illegal acquisition of
15
16 First American through the clandestine acquisition of the shares in CCAH.

17
18 BCCI itself has been the subject of criminal proceedings in the United States. In those
19
20 proceedings it has made admissions, and has been convicted pursuant to a plea
21
22 agreement, in respect of its illegal acquisition of CCAH and First American.

23
24 The particular modus operandi alleged in the Zayed action is similar. It involves the
25
26 acquisition of control of CCAH by the use of various individual defendants as nominees
27
28 for the purchase of the shares in CCAH which were publicly traded and by which those
29
30 nominees agreed not to disclose BCCI's true ownership of the shares.

31
32 This is a process that is alleged to have begun in 1982 and continued through to 1986.

33
34 It is averred in the Zayed action that the scheme was necessary and was hatched because,
35
36 in its quest to expand its empire, BCCI had already made attempts to acquire controlling
37
38 interests in another United States bank, but was rejected as unsuitable by the Federal
39
40 regulators. The regulators' approval of the acquisition of shares in CCAH was also
41
42 required and therefore anticipated not likely to have been given.

43
44 It is also averred that BCCI provided the funds for the purchases of the shares and booked
45

1 those funds as loans to the nominees in its accounts.

2
3 A further twist in the scheme alleged is that funds were also provided by International
4
5 Credit and Investment Company ("ICIC") - the BCCI affiliate investment bank
6
7 established in the Cayman Islands - which sent deposits to BCCI to be used to fund the
8
9 acquisition of shares in the names of the nominees. To the extent that ICIC sometimes
10
11 sent money direct to the nominees it is averred that ICCI held the shares so acquired in
12
13 CCAH through the nominees, for BCCI.

14
15 With the illegal acquisition of the shares in yet another United States Bank - the National
16
17 Bank of Georgia ("NBG")- the plot thickened. For this a similar nominee scheme is
18
19 alleged to have been hatched, involving another of the oft-recurring names of the BCCI
20
21 saga - Gaith Pharaon.

22
23 It is claimed that Pharaon acquired sufficient funds to purchase all the shares in NBG in
24
25 1978 and although it is not yet clear just what portion he held as nominee for BCCI, First
26
27 American intend to show that a substantial number were so held.

28
29 Pharaon remains a fugitive subject of criminal proceedings filed in the United States
30
31 since 1992.

32
33 First American's claim for damages against Pharaon in respect of his acquisition of NBG
34
35 is said to have arisen in the following manner. NBG was a successful bank until 1985
36
37 when it became plain that Pharaon was being pressured by his various creditors, in
38
39 respect of very large indebtedness. It is said that BCCI became aware of this and
40
41 concerned that the shares in NBG which Pharaon held on its behalf would be vulnerable
42
43 to action by Pharaon's creditors, as the shares were ostensibly his, being registered in his
44
45 name.

1
2 It is alleged that the defendants Clifford and Altman - already among those listed as
3
4 shareholders of record of CCAH as cyphers for BCCI - (and who were also at once
5
6 officers of First American and its attorneys) - became further involved in the conspiracy
7
8 by arranging for First American to acquire Pharaon's registered shares in NBG for 220
9
10 million dollars. This was some 60 million dollars more than they were then worth.

11 With the proceeds, it is alleged that Pharaon arranged to pay off loans in his name on the
12
13 books of BCCI and ICIC. Thus the solvency of First American was sacrificed in the
14
15 scheme to keep BCCI afloat, BCCI's clandestine ownership perpetrated and the
16
17 inevitable disclosure of the massive frauds perpetrated within BCCI, postponed.
18

19 As First American was secretly owned by BCCI, it was in that manner also placed in
20
21 breach of American law by the failure to disclose to the authorities that BCCI had
22
23 acquired the shares in NBG.
24

25 It is said that as this conspiracy was unveiled in its fullness, First American, an hitherto
26
27 profitable and well-established bank, was driven inexorably to its ruin.
28

29 And so the Zayed action - though brought in the name of the trustee of First American -
30
31 is for the foregoing reasons ultimately brought for the benefit of the many creditors and
32
33 depositors of First American and of BCCI who were the ultimate victims. The latter
34
35 stand to benefit also from any recoveries pursuant to the plea agreement entered into with
36
37 the United States authorities.
38

39 From these essentials of the claim in the Zayed action, it is plain that the action is
40
41 complex and its outcome very significant to very many people.
42

43 The case is one which will doubtless require the continued close management of the
44
45

1 District Court which has made orders requiring the parties to co-operate in defining and
2
3 honing the issues to be tried.

4
5 Many defendants have settled with First American and others will have judgment entered
6
7 against them in default.

8
9 In fact, it is expected that the matter will eventually go to trial only against the remaining
10
11 four active defendants - they being Clifford, Altman, A.R. Khalil and Ali Mohammad
12
13 Shorafa.

14
15 So notwithstanding its scope and the complexities of the massive international fraud
16
17 which was perpetrated, there is some indication that before the time of the trial, the
18
19 pleaded issues may be significantly narrowed from the existing pleadings of some 300
20
21 pages and 700 paragraphs.

22
23 This may also result in the evidence - relevant and necessary to prove the issues - being
24
25 better defined and more amenable to particularisation.

26
27 As a premise from which to proceed to consider this request for evidence from the
28
29 intended witnesses themselves, the narrowing of issues also points to the likelihood that
30
31 the evidence required of them can become more precisely identified.

32
33
34 The intended witnesses

35
36 The intended witnesses Harris and Fear were respectively the audit partner of Price
37
38 Waterhouse for the audit of BCCI Overseas (on which more below) and a senior Price
39
40 Waterhouse audit manager during the years leading up to the world-wide closure of BCCI
41
42 in 1991.

43
44 More specifically, Harris was the Price Waterhouse Cayman ("PW Cayman") partner
45

1 responsible for the BCCI Overseas and ICIC Overseas audit engagements from 1978 to
2
3 1986 when the scope of his responsibilities were significantly reduced. Fear was
4
5 employed by PW Cayman from 1982 until 1985 and was from June 1985 to August 1986
6
7 principal audit manager for BCCI Overseas' financial statements.

8
9 As will be seen when we come to examine the scope of the requested testimony, the
10
11 range of issues proposed would cover the entire fourteen year audit period of Harris' and
12
13 Fear's involvement; ie: 1978 to 1986.

14
15 Questions would also go to the state of their knowledge in the light of information which
16
17 came to Price Waterhouse's attention in November 1990 from what are referred to as the
18
19 "secret Naqvi files" - some 6000 files compiled by that former high - ranking employee
20
21 of BCCI, the contents of which were kept undisclosed to Price Waterhouse until that
22
23 time. These files related to the BCCI Treasury and showed the real scope of the fraud
24
25 and of the falsification of the BCCI financial statements which had been perpetrated and
26
27 upon which past audits had been based and certificates issued. In sum, they revealed the
28
29 real extent of the BCCI Treasury fraud and losses.

30
31 The significance of the Naqvi files was brought home by the Statutory Report which PW
32
33 UK was required to file with the Bank of England in 1991 (the "Section 41 Report").

34
35 Notwithstanding that that report showed that PW were themselves misled in the
36
37 preparation of the audits, in the present context the intended witnesses (as are other PW
38
39 personnel) are concerned that they could become the targets of claims by First American.
40
41 Their concerns are heightened by the fact that First American has alleged the fraudulent
42
43 complicity of Price Waterhouse in the illegal acquisition by BCCI of the CCAH shares.

44
45 These are allegations made within proceedings taken in New York with the objective of

1
2 compelling “the world-wide firm of Price Waterhouse,” including PW New York, PW
3
4 Cayman and PW UK to divulge information in their custody, power or control - thus
5
6 expressed in the widest terms - which might assist First American in the Zayed action.
7
8 First American has obtained an order in that New York action against PW New York and
9
10 PW U.K. (on the basis that the latter has a business presence in New York) which is on
11
12 appeal. No order was however, obtained against PW Cayman.

13
14 Although these allegations made against Price Waterhouse in the New York action
15
16 emerge nowhere in the very extensive pleadings in the District Court - (where it is
17
18 instead averred that Price Waterhouse as well as the U.S. Federal authorities were
19
20 deceived by those responsible for the fraud within BCCI) - counsel for First American
21
22 refused repeated invitations from the other side in these proceedings to disavow any
23
24 intention to sue upon such allegations. All that was offered in that regard was the rather
25
26 opaque assurance that, in the course of examination, no question would be asked of the
27
28 intended witnesses which tends to show that they or Price Waterhouse, knew of or was
29
30 part of the fraudulent scheme to conceal BCCI’s beneficial ownership of CCAH or in
31
32 NBG .

33
34 Thus the intended witnesses would still be faced with the prospect of being compelled to
35
36 testify about matters in respect of which allegations of fraud may yet be raised and
37
38 pursued against them.

39
40 That, to my mind, was a very significant factor in the treatment of this very widely
41
42 framed Letter of Request.

43
44 The issue of what the intended witnesses may or may not have known is indeed a live one
45

1 before the District Court. There Clifford and Altman, in their defence, have asserted that
2
3 they could not have known the true nature of the CCAH shareholdings if, as they assert,
4
5 Price Waterhouse as the auditors, did not know.

6
7 It is therefore a reasonable concern of the intended witnesses that - as a matter of
8
9 inference - what First American will seek to achieve upon their examination is their
10
11 impeachment by the impermissible expedient (as they would be First American's own
12
13 witnesses) of putting to them that they had knowledge of the deception.

14
15 Against all that background, I think the intended witnesses must be forgiven their -
16
17 concerns that, unless restricted, the range of questioning could be so wide as to
18
19 accommodate that objective of impeaching them by seeking to show, contrary to their
20
21 audit reports, that they must have been negligent or worst - aware - of the scheme. And
22
23 more specifically in this context - of the impropriety of the "loans" to the Zayed
24
25 defendants and of the fictitious nature of the interest charges which were allowed to
26
27 accrue upon those loans.

28
29 That was certainly the line of questioning sought to be pursued in a similar Letter of
30
31 Request from the District Court to the English High Court for testimony from PW UK
32
33 and its personnel. That Request failed for reasons similar to those raised by the intended
34
35 witnesses here. See written judgment of Popper^{le}well J. delivered (in unapproved version)
36
37 on 16th December 1997 in First American Corp. et al and Sheikh Zayed Bin Sultan Al-
38
39 Nahayan et al Cause JC/97/1708. That decision - to the extent that it found the Letter of
40
41 Request to be oppressive - has been upheld on Appeal to the English Court of Appeal -
42
43 (written judgment given on 12.5.98). I will consider this judgment further below.

44
45 I conclude in this matter that similar factors, particularly those which I find also in this

1
2 case tend to point to oppression, should determine the exercise of the discretion which I
3
4 undoubtedly have.

5
6 These are issues to be more closely considered when I come to look at the law on the
7
8 subject.

9
10 It must here be recognised, however, that the intended witnesses are, indeed, likely to be
11
12 able - after a suitable opportunity to prepare so to do - to give evidence of matters which
13
14 will be relevant to the trial in the Zayed action.

15
16 In fact the intended witnesses do not dispute this, and Mr. Jones has laid considerable
17
18 emphasis on his clients' willingness to testify once the issues are sufficiently specified so
19
20 as to allow them sensibly and practicably to prepare to do so.

21
22
23 BCCI Overseas and the Central Treasury

24
25 First American's proposition - that the intended witnesses have relevant evidence to give
26
27 - derives in general terms from the known connection between BCCI Overseas, ICIC
28
29 Overseas and First American.

30
31 BCCI Overseas and BCCI S.A.(the Luxemborg holding Company) were the BCCI
32
33 group's principal operating companies and had subsidiaries, branches and representative
34
35 offices in many countries around the world. Of significance to the present matter was the
36
37 creation and operation - already mentioned - of the BCCI Central Treasury within BCCI
38
39 Overseas in March 1982. Central Treasury was, however, at all material times managed
40
41 from London, England and later moved to Abu Dhabi to avoid scrutiny in England.

42
43 The scale of the Central Treasury operations is described in First American's pleadings
44
45 as "enormous, involving management of BCCI group and other funds of approximately

1
2 \$5 billion, generated almost entirely from local depositors' dollar - denominated funds.”

3
4 The pivotal averment in respect of BCCI Central Treasury for present purposes is at
5
6 paragraph 331 of the pleadings where it is stated : “Money used to fund share purchases
7
8 of CCAH by Fraudulent Shareholders was repeatedly taken from BCCI Central Treasury
9
10 Funds.”

11
12
13 The Letter of Request

14
15 Against all that factual background the terms and scope of the Letter of Request reveal
16
17 the magnitude of the enquiry and of the task in preparation to be undertaken by the
18
19 intended witnesses.

20
21 Much emphasis was laid by Mr. Rubin on the fact that the Letter of Request does recite
22
23 the obligatory statement that the evidence sought is intended “to be used at the trial of
24
25 this action.” This statement, is of course, one which must be taken by this Court as
26
27 intended in good faith by the foreign Court to meet the requirements of Article 2 of the
28
29 Hague Convention on the Taking of Evidence Abroad (“the Convention”) which states
30
31 that: “A letter of Request shall not be used to obtain evidence which is not intended for
32
33 use in judicial proceedings, commenced or contemplated”.

34
35 What is nonetheless to be noted here is that, although full faith and credit is to be afforded
36
37 the request of a foreign court, the objective determination of whether a request satisfies
38
39 the legal requirements of the Convention and of domestic law are for the requested court
40
41 to be resolved by reference to all the relevant circumstances.

42
43 As a matter of domestic law, effect will not be given to a letter of request whose
44
45 function is shown after objective assessment by the requested court to be

1
2 merely exploratory or investigatory, rather than intended to seek evidence for use at the
3
4 trial in the foreign court. This is the oft-cited prohibition against “fishing”.

5
6 In The Westinghouse case [1978] A.C. 547 Lord Wilberforce (at p 610 C-D) recognised
7
8 this principle in the following terms: “ the distinction (is) drawn----- between “a process
9
10 by way of discovery and testimony for that purpose” and “testimony for the trial itself”.
11
12 But which it is in fact is not to be determined by the drafting of - lawyers (of the
13
14 requesting party) but objectively by the nature of testimony sought. The fact that any
15
16 evidence obtained is intended to be put in at the trial, is quite consistent with the inquiry
17
18 extending (impermissibly) to trains of inquiry which might produce such evidence”.

19
20
21 The Schedule of Testimony

22
23 There is a schedule to the Request in which is described the testimony sought from the
24
25 intended witnesses, Harris and Fear. As originally presented, the schedule came as a part
26
27 of the Request from the District Court.

28
29 But that schedule has been proposed by First American to be reduced by this court to
30
31 meet the concerns of the intended witnesses and an amended schedule showing these
32
33 proposed reductions was filed along with the affidavit evidence in these proceedings.

34
35 A copy is attached as Appendix A to this judgment for ease of reference. Further
36
37 amendments and delimitations were proposed on behalf of First American during the
38
39 course of the arguments.

40
41 The effect of all this would have been to shape the request into something else altogether.
42
43 That, I readily concluded, was an impermissible manner of dealing with the request of a
44
45 foreign Court. See Voluntary Purchasing Group v. Insurco 1994 - 95 CILR 84.

1
2 Notwithstanding the duty and wish of this court to assist the District Court in its trial of
3
4 this very complex and important case - and one which involves international fraud of the
5
6 most destructive scale - this court has no power to re-write the Request.

7
8 And even if it could properly so delimit the Request, the remaining scope and breadth of
9
10 the Request notwithstanding the proposed amended schedule of testimony, would be
11
12 impermissible. That can best be illustrated by the amended schedule itself.

13
14 Considerable efforts were made in the affidavits of Mr. Barrie and in the submissions of
15
16 Mr. Rubin to explain, on behalf of First American, the true objective of the proposed
17
18 amended schedule of testimony.

19
20 This was done in an effort to refute the complaints of the intended witnesses that the
21
22 schedule is oppressively wide. It was also sought to demonstrate that the evidence which
23
24 they can give can readily be identified by reference to the audit records which should be
25
26 held by PW Cayman and readily available for the purposes of testimony.

27
28 In the end I accepted Mr. Jones' submission that that would be an inappropriate manner
29
30 of proceeding for the further reason that, if the request is to be executed, the schedule of
31
32 testimony would be the only available guide to the examiner who would be appointed by
33
34 this court. Counsel's affidavits, or the glosses or qualifications placed upon the Request
35
36 by counsel in submissions, could not guide the examiner and certainly could place no
37
38 restraint upon Counsel cross-examining for the defendants in the Zayed action. They
39
40 have a right to be represented and would be free to ask any question which objectively
41
42 arises from the matters covered by the schedule of testimony and without any regard to
43
44 restraints agreed by First American's counsel.
45

1
2 Two questions of law
3

4 In the end the decision in this matter had to turn upon two main questions of law.

5
6 The first, reflecting the primary thrust of the objection, was whether oppression was
7
8 fairly to be the anticipated outcome of the examination of Harris and Fear being allowed
9
10 to proceed on the basis of the schedule of testimony.

11 The second was whether the schedule of testimony (even as amended) was so wide as to
12
13 accommodate the potential for a roving inquiry, not just for evidence for the specific
14
15 purposes of the trial, but also for information which may lead to the obtaining of such
16
17 evidence ie: “a fishing expedition.”
18

19 These are questions to which I will turn below by reference to the law. For now I will
20
21 examine some aspects of the schedule of testimony which, to my mind - as a matter of the
22
23 exercise of discretion - demonstrates the impermissible breadth of the request and its
24
25 potential abuse as a means of oppression. I need only examine a few aspects of those
26
27 which would remain notwithstanding the proposed amendment.
28

29
30
31 The scope of the Request
32

33 Item 3 - BCCI's Central Treasury Division Losses:
34

35 This makes reference to losses incurred from the early 1980s through
36
37 1986 (the last year that Harris certified an audit) and goes on to refer to the
38
39 circumstances surrounding the “subvention” of funds from ICIC Staff Benefit fund used
40
41 to cover certain of such losses in 1986.

42
43 Mr. Barrie and Mr. Dugan (in their affidavits) and Mr. Rubin in submissions, sought to
44
45 explain that this range of testimony is necessary to support the central hypothesis of

1
2 First American's case - that ICIC funded BCCI's acquisition of shares in First American
3
4 through the alleged nominee defendants. There is said to be evidence of this relationship
5
6 also to be gleaned from the fact that ICIC misappropriated its Staff Benefit Fund to the
7
8 order of some 150 million dollars, which it provided to BCCI as the afore-mentioned
9
10 "subvention".

11
12 The point here, as Mr. Rubin said, is that First American seeks to prove that ICIC and
13
14 BCCI were in reality one organisation; presumably to show that shares bought with ICIC
15
16 funds were held for BCCI. Even if so, one cannot overlook the fact that this particular
17
18 item of the schedule is so widely drawn, that it would permit of just about any question
19
20 relating to BCCI Central Treasury losses over the years mentioned. That risk would arise
21
22 although First American's stated objective in this regard might well be achieved by a few
23
24 carefully worded questions going to the witnesses' ability to say whether ICIC provided
25
26 the funds and subventions in questions.

27
28 There appears to be a further element of First American's claim that would require
29
30 reference to BCCI Central Treasury losses. This is identified at paragraphs 335 - 340 of
31
32 the Claim and involves the profits alleged to have been fictionally booked in BCCI's
33
34 accounts as being interest due or paid on the "loans" made to the nominee shareholders.
35
36 As Treasury losses increased, so were the fictitious interest dues increased in the books to
37
38 show greater income or receivables. This is also said to be a part of the scheme to
39
40 defraud creditors of BCCI and to hide the true magnitude of losses from the auditors.

41
42 From all this it will, I think, be readily apparent, that unless the inquiry is properly
43
44 focussed by questions designed to elicit evidence for the specific purposes of the trial, the
45

1 scope and range of questions about the subject of Treasury losses - even taken by itself -
2
3 could be uncontrollably broad. And - as in the case of any other subject-matter - would
4
5 require the intended witnesses to undertake countless hours of preparation to be in a
6
7 position to respond to the range of possible questions. This would entail, I am told,
8
9 reference to hundreds of files on the subject-matter of the Treasury losses alone.

10
11 By way of further illustration of the scope of that exercise, there is an issue whether
12
13 reference is to the Treasury losses as misleadingly reported in the accounts - and hence
14
15 certified by PW Cayman - or to Treasury losses as they actually occurred. This is not
16
17 made clear in the schedule of testimony. If only the former, then it is not disputed that
18
19 the extent of the losses is a matter which can be readily given in evidence by expert
20
21 witnesses in the District Court by reference to the certified audits given by Price
22
23 Waterhouse and which are already a matter of record in the Zayed action. In this regard I
24
25 feel compelled to agree with Mr. Jones, that it is unrealistic to expect that Harris and Fear
26
27 will now repute their findings already certified in their audits in respect of the magnitude
28
29 of the Treasury losses for the years in question.

30
31 If the latter - and the enquiry seeks to show the true extent of Treasury losses ultimately
32
33 revealed by the Naqvi files - then the inquiry would suggest an expectation of evidence
34
35 from Harris and Fear about matters with which they were not privy. It is not disputed
36
37 that those files and the Section 41 report compiled by reference to them, were dealt with
38
39 by P.W. UK; not by Harris and Fear. For those reasons, the true extent of the Treasury
40
41 losses did not come to light until after November 1990, some three years after Harris and
42
43 some five years after Fear were last responsible for the audits. Against that background,
44
45 where no real probative value is apparent, it is the reasonable concern of Harris and Fear -

1
2 raised also in light of the allegations of fraud in the New York action - that the real
3
4 objective is somehow to impeach them. Such an objective or even the reasonable
5
6 apprehension of it, must, by any measure, be regarded as oppressive.

7
8 It is also to be noted that the request does not differentiate in any way between the role of
9
10 Harris and the more limited role of Fear during the respective periods; and the latter must
11
12 be, for that reason, even more concerned about the scope of the questions which could
13
14 arise and how to prepare to answer them.

15
16 When faced with these realities, Mr. Rubin's submission - that the witnesses would be
17
18 under no legal obligation to prepare themselves to testify and so need not be concerned to
19
20 refer to the vast number of records - rang empty indeed. Their failure to do so would
21
22 render the entire exercise futile as it is only reasonable to anticipate that they could recall
23
24 very little detail without so doing.

25
26 Whatever Counsel's views may be or concessions made, this Court must be astute to
27
28 anticipate the likely impact of its orders. An order requiring the intended witnesses to
29
30 testify carries the expectation that they will take all reasonable and necessary steps to
31
32 ensure that they are able to do so, and in a responsible and helpful manner. The
33
34 expectation therefore would be that they would be obliged to review the very many files
35
36 and to select from them documents for purposes of references when testifying.

37
38 They would have to do so at their own expense in terms of time and money, clearly an
39
40 oppressive prospect given the vastness of the records and the breadth and scope of the
41
42 schedule of the testimony.

1 Documentary Discovery

2
3 There is yet a further fundamental objection in principle to preceding in that way: It
4
5 would inevitably lead to impermissible documentary discovery as the witnesses in cross-
6
7 examination - irrespective of any disavowal of such intentions by Mr. Rubin - would be
8
9 asked to produce the documents on which they rely to refresh memory or in any other
10
11 way for giving testimony.

12
13 Mr. Rubin's rejoinder (somewhat contradictory in light of his disavowal of any claim to
14
15 documents) - that such an outcome would be unobjectionable if a natural consequence of
16
17 the witnesses giving evidence - I thought was yet another attempted denial of the ~~Cyprus~~
18 Islands public policy contained in the local equivalent of the United Kingdom domestic
19
20 law.

21
22
23 The result would be that First American would achieve the impermissible (and
24
25 unrequested) result of pre-trial discovery of documents, by the objectionable expedients
26
27 of failing to identify the documents it seeks to rely on when examining the intended
28
29 witnesses and by failing to provide them in advance with a suitably focussed schedule of
30
31 questions or framework of issues.

32
33 I have first singled out the Central Treasury losses because I consider that to be the most
34
35 egregious example of the impermissible breadth of the topics in the schedule of
36
37 testimony.

38
39 The potential for abuse here is plainly revealed when it is also borne in mind that I was
40
41 told, more than once in the arguments, that what First American really seeks to prove in
42
43 this request is simply the true size of the Treasury losses to support a further hypothesis
44
45 of its case; viz: that it became necessary for BCCI to reflect the fictitious loans to

1
2 defendants and interest as accumulating on them so as to hide in its books the large
3
4 Treasury losses under discussion.

5
6 Yet this is all secondary - as Mr. Rubin conceded - to the real thrust of First American's
7
8 claim, which is that the Zayed defendants held their shares for BCCI thus enabling its
9
10 ownership of First American, and that this ultimately caused its ruin.

11
12 This concession of Mr. Rubin's is particularly startling when it is placed in full context -:
13
14 the true size of the Treasury losses became a matter of record as long ago as June 1991, in
15
16 the Section 41 report of P.W. U.K. to the Bank of England. This is a fact pleaded by First
17
18 American itself. See paragraph 540 of the claim in the Zayed action.

19
20 Viewed in that light, there appears no justification for that aspect of the request which
21
22 would involve the intended witnesses in the massive preparatory work and expose them
23
24 to such wide-ranging exploratory examination and cross-examination to prove an issue
25
26 readily provable by other available means.

27
28 Items 8, 9 and 6 of the Schedule

29
30 Equally forceful objections apply to all the other topics of the amended schedule
31
32 when viewed in the context of the known circumstances of this case.

33
34 Considering the real thrust of First American's case, I think I need examine only some
35
36 other topics to further illustrate the vagueness and scope of the schedule. One such topic
37
38 is covered in items 8 and 9. It relates to the nature of the relationship between BCCI and
39
40 the defendants who are alleged to have been its nominee shareholders in CCAH. Clearly,
41
42 if there is evidence to be given by the intended witnesses which can shed light on this
43
44 relationship - in particular to reveal that the defendants were knowingly "fronting" for
45

1 BCCI - First American's case would be greatly helped.

2
3 Evidence such as, for example, that the "loans" to those defendants were never repaid or
4
5 no attempts made to recover them, would be highly probative.

6
7 However, instead of presenting questions focussed on those issues, and which would
8
9 enable the intended witnesses to, in turn, focus their own review and preparations, we
10
11 see in items 8 and 9 issues which could hardly be less focussed.

12
13 Item 8 reads: "The adequacy of documentation covering the loans made by BCCI to
14
15 record shareholders of CCAH." Framed in that way, this is a subject which is not
16
17 confined even to the "loans" made to those persons for the purposes of acquiring shares
18
19 in CCAH, but could relate to any loan to any such person - of which I am informed there
20
21 were many. Examples, cited by Mr. Jones, were loans apparently made to or guaranteed
22
23 by defendants Altman and Pharaon in respect of what has been referred to as the "Jeddah
24
25 Hotel Project". (Page 1364 of the exhibits to the second affidavit of Steven Barrie
26
27 Exhibit "SJB9").

28
29 Item 9 seeks to explore the relationship between BCCI and the shareholders of CCAH in
30
31 the widest terms and condescends to particulars by reference only to sub items a. to f;
32
33 which in themselves are very widely cast.

34
35 The key issue which First American needs to prove in this context - as indeed in respect
36
37 of item 6- is whether Clifford or Altman disclosed to P.W. Cayman that their loans were
38
39 subject to the purported form of "hold harmless" or non - recourse agreement which they
40
41 allege. They say that the only securitisation or the recourse given to BCCI for the loans
42
43 were the shares themselves. Yet the only aspect of item 9 which directly addresses that
44
45 issue is sub-item d. In the rest of item 9 and item 6 lies the potential for a roving inquiry

1
2 of the widest kind.

3
4 In this context, it is also to be borne in mind that First American has obtained the
5
6 issuance of a further letter of Request from the District Court to this Court. By that
7
8 Request (which has since the arguments in this matter been granted by this Court) the
9
10 custodian of records of P.W. Cayman is required to provide any available documentary
11
12 evidence about the audit confirmation process in respect of the loans and to testify about
13
14 the provenance of such documents where they exist and where they do not, in
15
16 confirmation of the fact that they do not exist.

17
18 When it is borne in mind that a most pivotal issue in the trial will be whether Clifford and
19
20 Altman qualified audit confirmations in respect of their “loans” by reference to the
21
22 alleged non - recourse agreements or by reference to the alleged agreed interest rates, the
23
24 evidence to be produced pursuant to this second Letter of Request will, in large part,
25
26 address that issue.

27
28 Viewed in that light, the very wide terms of items 6 and 9 become even more troubling. I
29
30 think they fairly attract the criticism of Mr. Jones that they would enable - even if not so
31
32 designed or intended - a general “trawl through” the voluminous records in the nature of
33
34 a fishing expedition.

35
36 With those illustrations and the many others showing the potential in the schedule for its
37
38 oppressive and wide use, I can I can now turn to the applicable legal principles.

39
40
41 General principles

42
43 The power to order the taking of evidence pursuant to a letter of request is statutory. In
44
45 the Cayman Islands it is contained within the Evidence (Proceedings in other

1
2 Jurisdictions) (Cayman Islands) Order 1978. (“the Evidence Order”).
3

4 The Evidence Order adopts with modifications the United Kingdom legislation which
5
6 gives effect to the Convention. The Convention was acceded to by the United Kingdom
7
8 and colonies (including The Cayman Islands) with certain reservations which reflect,
9
10 among other things, settled common law principles. These principles require that
11
12 requests in aid of the process of pre-trial discovery (very familiar to the United States
13
14 courts) may not be accommodated.

15
16 The Cayman Islands public policy against granting such foreign requests is embodied
17
18 in section 2 (3) of the Evidence Order. That provision precludes the courts from making
19
20 an order in aid of foreign proceedings which it could not make in aid of its own
21
22 proceedings. The policy is also reflected in the further limitations imposed by section 2
23
24 (4) which stipulates the need for specificity in requests for documentary evidence.

25
26 These general principles and limitations are already recognised within the local case law -
27
28 see Voluntary Purchasing Group (Supra) at page 88 line 10 to page 90 line 39).
29

30 As our enabling legislation is based on the English Evidence Act of 1975; these
31
32 provisions are in common with those applied in England and Wales. See The
33
34 Westinghouse case (Supra).

35
36 The moot point of principle which arises here is whether this prohibition against pre-trial
37
38 discovery or “fishing” is applicable to requests for evidence by way of the oral
39
40 examination of witnesses. As “fishing” is not a term of art, I here describe it adopting the
41
42 description most often cited in the cases: the seeking of evidence not itself for direct and
43
44 immediate use at a trial, but instead in the hope that it might lead to a line of inquiry
45

1 which might lead to such evidence.

2
3 To the extent that, as I have found, the present request for oral testimony lends itself
4
5 potentially to such a fishing exercise, the Evidence Order would preclude it and the
6
7 request could not be allowed on jurisdictional grounds. This view of the law follows one
8
9 line of authority. As will be seen, other pronouncements in the cases are to the contrary.

10
11 Before looking at the case law, it should be recognised that there are general practical
12
13 consequences of importance involved in the first, or restrictive, construction of the
14
15 Evidence Order - a request for oral evidence would need to specify with some degree of
16
17 particularity the very questions to be asked before it would likely be free of the vice of
18
19 potential abuse. And so the “subject - matter approach” or format, of the sort adopted in
20
21 the schedule to the present request, would not ordinarily do.

22
23 This is a consequence which Mr. Rubin said would derogate from the right of a
24
25 requesting court to elect between that format and the format of the listing of specific
26
27 questions. It is a right of election which the Convention itself in Article 3 (f) recognises
28
29 in these terms:

30
31
32 “A letter of Request shall specify -

33
34 “ (a) - (e) - -

35
36 (f) the questions to be put to the persons to be examined

37
38 *or* a statement of the subject - matter about which they are

39
40 to be examined” (emphasis applied).

41
42 I was invited by Mr. Rubin to treat this right of election in Article 3 (f) as reflecting the
43
44 difference of procedure employed as between civil law and common law countries. In the
45

1 former, a list of questions is required as it is the judge, and not counsel for the parties,
2
3 who examines witnesses; whereas in the latter, the converse applies and there the
4
5 requested court usually therefore only needs the subject-matter format to guide its
6
7 conduct of the inquiry.

8
9
10 As a purely practical matter, I have no difficulty in accepting that even if the right to elect
11
12 were to be deemed unaffected by domestic public policy and law; the right of election
13
14 must nonetheless be subject to the reasonable expectation that the format elected by the
15
16 requesting Court will be one which would not result in unfairness to the witnesses who
17
18 will be required to respond. What that means, in practical terms, is that the greater the
19
20 complexity and breadth of the subject - matter, the greater will be the need to enable
21
22 witnesses to identify the specific issues to which they must respond and to prepare
23
24 themselves for so doing.

25
26 In the end, Mr. Rubin acknowledged that this general standard of fairness was left intact
27
28 notwithstanding the right of the requesting Court to elect between the subject -matter and
29
30 listing formats. The several concessions made during the arguments - culminating in
31
32 that to “provide a full list of questions without admitting that the civil mode applies” -
33
34 were therefore, to my mind, implicit admissions that the standard of fairness mentioned
35
36 above would be violated by the excessive breadth of the request in this case.

37
38 Whatever the provenance of Article 3(f) of the Convention, I am satisfied that the format
39
40 elected by the requesting Court must reasonably ensure that its request can
41
42 sensibly be enforced and without oppression or unfairness to the witnesses who must
43
44 respond.
45

1
2 Oppression
3

4 This leads me naturally to the wider consideration of the issue of oppression, with which
5
6 the issue of fairness is inextricably linked.

7
8 In this case, for reasons appearing from the factual context described above, oppression is
9
10 a discrete objection from that of “fishing”.

11
12 It arises in this case by reference to the sheer magnitude and expense of the task to which
13
14 the intended witnesses would be subjected by way of preparing to give their testimony in
15
16 response to the request as framed.

17
18 It also arises by reference to the allegations in the New York proceedings of Price
19
20 Waterhouse’s knowing complicity in the fraudulent scheme involving the use of the
21
22 nominee shareholders. These are allegations which First American refused to disavow
23
24 even throughout these proceedings before me, and in spite of being invited so to do.

25
26 Price Waterhouse staunchly deny these allegations and First American gives no
27
28 undertaking that it will not yet seek to sue Price Waterhouse in respect of them either in
29
30 the existing Zayed action or otherwise.

31
32 Allegations of complicity in fraud can only properly be made upon substantial grounds;
33
34 otherwise the allegations would be reckless and abusive.

35
36 To require the intended witnesses to submit to a roving inquiry upon the very issues
37
38 surrounding those allegations with the threat of suit hanging over them, would, by any
39
40 measure, be unfair and oppressive.

41
42 On this very same issue, the English Court of Appeal has taken the same view in
43
44 upholding Justice Popplewell’s decision to refuse the request to the English courts: “It
45

1 seems to me, inherently oppressive to hold over the head of the two witnesses serious
2
3 allegations of complicity in fraud and the real possibility of being joined as defendants in
4
5 a civil action based on that alleged complicity, while at the same time requesting an
6
7 opportunity for a wide examination of the two witnesses on the very topics that would be
8
9 relevant in an action against them” - per Vice Chancellor Sir Richard Scott at pages 22-23
10
11 of the transcript of judgment of the Court of Appeal.

12 Oppression as a specific ground for refusal has been recognised before in the cases.

13 In addressing the general rule of fairness and the duty of the requested court to maintain
14
15 the balance between assisting the foreign Court and preventing abuse of intended
16
17 witnesses Lord Woolf MR in Re The State of Minnesota’s Request said this (at page 11
18
19 of the unreported judgement of the English Court of Appeal delivered 30.7.97):

20
21
22 “ - because of the need to hold the balance between the requesting
23
24 court and the witnesses who are to be examined if the Request
25
26 is given effect, the court will not allow uncertain, vague or other
27
28 objectionable Requests to be implemented.
29

30 A witness is entitled to know within reasonable limits the matters
31
32 about which he or she is to be examined. Although there is the
33
34 possibility, to which I have already referred, of matters coming
35
36 back to the Courts for further rulings, in general the court has to
37
38 take into account that once it makes an order it ceases to have
39
40 control over the examinations.”
41
42

43
44 And per Gibson LJ at pages 24g - 25a:
45

1 “Comity dictates that effect should be given to a Letter of Request
2
3 if this is possible.

4
5 But the English Court’s natural inclination to give effect to the
6
7 Request must be tempered both by the requirements of the Act,
8
9 which limit jurisdiction of the English Courts to applications for
10
11 an order for evidence (ie: factual material required to prove or
12
13 disprove allegations at trial), and by the proper concern of the
14
15 English Court that those within its jurisdiction who are called upon
16
17 to give evidence will be fairly dealt with in the evidence -
18
19 gathering process, which the court may allow to be conducted here
20
21 for the purposes of the foreign proceedings.”
22

23 For the reasons already demonstrated, these are observations which I think are a fortiori
24
25 applicable in this case and I conclude that it would be oppressive to allow the Request as
26
27 presently framed.

28
29 “Fishing”

30
31 That being my decision, I need not proceed to a determination of the other primary legal
32
33 issue, viz: whether a request for oral evidence can be refused on the basis that it
34
35 constitutes a fishing expedition.

36
37 Nonetheless, as the issue is one of general importance over which considerable time and
38
39 effort was taken, it is right that I should at least offer my views.

40
41 Until the Court of Appeal decision in England upon the appeal involving First
42
43 American’s Request to that Court, I was inclined to accept Mr. Jones’ submissions that
44
45 the answer has already been reached in England in decided cases in a manner suitably to

1
2 be adopted in similar circumstances in Cayman.

3
4 In Re The State of Norway's Application (No.1) [1981] 1 Q.B. 433 Lord Justice Kerr at
5
6 pages 482 -3 said this, addressing the impermissible potential for fishing as he saw it in
7
8 Norway's request for evidence:

9
10 "In the present context fishing

11
12 may occur in two ways.

13
14 First, the "evidence" may be sought for a preliminary purpose,
15
16 such as the process of pre-trial discovery in the United States. The
17
18 fact that this is clearly impermissible for the purposes of the
19
20 (English) Act of 1975 is established in the Westinghouse case
21
22 [1978] 1 A.C. 547, and was equally so held by this court in relation
23
24 to the Foreign Tribunals Evidence Act 1856 in Radio Corporation
25
26 of America v Rauland Corporation [1956]. Q.B. 618. This is
27
28 relevant in the present context, as McNeil J rightly indicated. It is
29
30 perhaps best described as a roving inquiry by means of the
31
32 examination of witnesses, which is not designed to establish by
33
34 means of their evidence allegations of fact which have been raised
35
36 bona fide with adequate particulars, but to obtain information
37
38 which may lead to obtaining evidence in support of a party's case.
39
40 In the Radio Corporation case [1956] 1 Q.B. 618 the court was
41
42 concerned with the word "testimony" in the Act of 1856 whose
43
44 equivalent is now "evidence" in the Act of 1975. In a passage
45

1 from the leading judgment given by Devlin J which is quoted by
2
3 Lord Fraser of Tullybelton in the Westinghouse case [1978] A.C.
4
5 547, 642 he said at p.646- :

6
7
8 “Testimony if at can be called “testimony” which consists of mere
9
10 answers to questions -- designed to lead to a train of inquiry is not
11
12 permissible.”
13

14
15 As will be seen, the dictum (per Vice Chancellor Sir Richard Scott) in the Appeal upon
16
17 First American's request in England now squarely refutes these passages and leaves to be
18
19 finally decided, by the House of Lords the issue at hand.

20
21 If one were to apply the earlier pronouncements of Kerr LJ in the context of the
22
23 present case, they would clearly advise against approving the present request as based
24
25 upon the wide subject - matters in the schedule, as that would admit of “a very wide
26
27 roving inquiry by means of the examination and cross-examination” of the intended
28
29 witnesses. And would by the same measure go far beyond that which may be strictly
30
31 described as designed to elicit evidence for the proof of particular allegations of fact in
32
33 the trial of the Zayed action.

34
35 Moreover, whether or not that is the intended effect of the Letter of Request would seem
36
37 to be irrelevant. This is because, if Kerr LJ is correct, no jurisdiction is vested in
38
39 the Court by the Evidence Order to allow a request which could or would likely be
40
41 abused in that manner. The test is not whether a fishing expedition is intended, it is
42
43 whether one would be allowed or whether the request is so designed that it would be
44
45 allowed.

1 And I should make it plain that I make no finding that it is the objective or intent of this
2
3 Request to enable fishing. On the contrary, comity dictates that I accept that, as the
4
5 Request states on its face, it seeks “evidence for use of at the trial.” I am, however,
6
7 obliged to observe that the differences between the American and our systems as to what
8
9 may be permissible by way of pre-trial discovery for such purposes, are not always
10
11 readily apparent and, in response to a question posed in these proceedings, I was
12
13 informed that no effort had been made to explain to the District Court the narrower
14
15 premises upon which assistance is afforded by our Courts. The District Court would
16
17 therefore not have addressed the need to frame the schedule of requested testimony in
18
19 such manner as to reflect the fact that this Court does not allow pre-trial discovery.
20
21 That such issues of the conflict of laws should be considered in the interest of comity
22
23 by a requesting Court, to ensure that the ambit of its request can be accepted and acted
24
25 upon, I do not think involves any infringement of the principles of the Convention.
26
27 The need so to do clearly arises and more so in a case of this complexity and size. It is
28
29 also significant that the necessary advice on these issues was available to the District
30
31 Court in the form of the large international law firm representing First American on
32
33 whose behalf the Request is made.
34
35 It is also to my mind in this context not without significance that the earlier request - in
36
37 very similar terms to the English High Court (which exercises the identical powers in
38
39 these matters) - had been refused before this Request was argued before this Court, and
40
41 for very similar reasons.
42
43 Considerable debate occurred about what persuasive value should be given in this
44
45

1 jurisdiction to the statements of Lord Justice Kerr quoted above from the case of Re
2
3 Norway No.1. Mr. Rubin submitted that they do not comprise the ratio decidendi of that
4
5 case and should not be adopted here. This he submitted for the practical reason, in
6
7 particular - and earlier touched upon - that nothing in the Convention excludes or
8
9 precludes a procedure by which a witness could be examined or cross-examined upon
10
11 matters which follow naturally on answers given and by which the witness may be
12
13 required to disclose documents relied upon (by way of preparation or refreshing memory
14
15 or otherwise) for the purpose of giving his testimony. If such an outcome were to be
16
17 described as “fishing” or as a “roving inquiry” for the purposes of English law, it is
18
19 nonetheless, he submitted, to be regarded as permitted by the Convention which, in
20
21 Article 3, imposes conditions of specificity only upon requests for documentary evidence.
22
23 These arguments, to my mind, overlook the concerns about general unfairness and the
24
25 practical obligations and powers of the court to prevent it -matters already addressed.
26
27 They also overlook the issues of oppression in the specific contexts which I have already
28
29 addressed and which must be considered, irrespective of the working of the Convention.
30
31 Apart from all that, these particular arguments of Mr. Rubin overlook, to my mind, the
32
33 very reason for the reservations recorded by the British Government upon accession to
34
35 the Convention and expressed in the Evidence Order by way of the limitation of the
36
37 Courts’ jurisdiction not to make orders which it could not make for the purpose of
38
39 obtaining evidence for domestic litigation; i.e. Section 2(3) of the Evidence Order. This
40
41 is because in domestic litigation a witness is never compelled until the court is satisfied
42
43 that he has relevant evidence to give and that he has or has been afforded an
44
45 understanding of the testimony required of him.

1
2 Exercises by which roving inquiries are allowed by way of pre-trial discovery based upon
3
4 broad subject-matters do not fit within those confines.

5
6 Mr. Rubin's arguments, it must be acknowledge^d, have found some robust support in
7
8 the English Court of Appeal which has held that the prohibition against "fishing" cannot
9
10 apply to a request for viva voce testimony which is otherwise permissible and in response
11
12 to which the witness has relevant testimony to give. See the decision in the recent
13
14 pronouncements of the Court of Appeal in the First American case. (Supra).

15
16 In giving the judgement of the Court the Vice Chancellor disagreed with the words of
17
18 Kerr LJ in Re Norway (No.1) which he described as obiter dictum (and overruling
19
20 Popplewell J in the court below to the extent that he had relied upon them). The Vice
21
22 Chancellor quoted and expressed his agreement in this regard instead with
23
24 pronouncements - (also disagreeing with those of Kerr LJ in Norway (No.1)) - made by
25
26 Woolf LJ in Re Norway No. 2 [1990] 1 A.C. 181/182 and continued:

27
28 "I am in respectful and complete agreement with the opinion
29
30 expressed by Woolf L.J. in the passage I have cited. If oral
31
32 evidence is being sought for the purpose of use at trial and if there
33
34 is good reason to believe that the intended witness has knowledge
35
36 of matters in issue at the trial so as to be likely to be able to give
37
38 evidence relevant to those issues, I do not understand how an
39
40 application to have the intended witness orally examined can be
41
42 described as fishing. It cannot be necessary that it be known in
43
44 advance what answers to the questions the witness can give".
45

1
2 However, later at page 18 of the transcript the Vice Chancellor stated, somewhat in
3
4 qualification it seems to me of his earlier pronouncement:

5
6
7 “In relation to oral testimony I do not think an objection of
8
9 “fishing” has substance except in a case in which the conclusion
10
11 can be reached, whether from the terms of the request or from other
12
13 sources, *that the intention* underlying the request is not one of
14
15 obtaining evidence for use at trial. The width of a request may
16
17 indicate the absence of that intention. But equally the width of a
18
19 request may be the inevitable consequence of the complexities of
20
21 the issues and of the witness’s involvement in them” (emphasis
22
23 supplied).

24
25 So here we see a variance of approach as between “relevance” being the determinative
26
27 factor to one that invites an examination of the issue of whether there exists some
28
29 “intention” to use the request for fishing.

30
31 Difficulties with either approach immediately appear.

32
33 If the witness’s ability to give the relevant information sought is to be the determinative
34
35 factor then however exploratory the request in its terms, it ought never to be
36
37 disallowed on the ground of fishing unless there is that intention shown. Yet that is the
38
39 nature of the complaint of fishing in this case, as in the English case - which the Court of
40
41 Appeal refused but on the other ground of oppression only.

42
43 When viewed in that sense, no question of proportionality can arise as a measure of
44
45 whether or not the request is to be disallowed as being substantially one which is

1
2 exploratory in nature.

3
4 In this case that presents an obvious problem. Given the entire nature and particularly the
5
6 breadth of the schedule of requested testimony, it is hard to avoid the conclusion -
7
8 especially when the request is viewed in the context of the real issues which need to be
9
10 proved through the intended witnesses - that the request is one which is substantially
11
12 exploratory in nature.

13
14 And so, unable as I have been to find lack of relevance, the latest pronouncements of
15
16 the Court of Appeal would, notwithstanding the substantial exploratory nature, advise
17
18 that I allow the request.

19
20 Put in rhetorical form the point is more forceful: If relevance is to be the determinant
21
22 factor, is the requested court obliged to overlook the obvious exploratory nature?

23
24 The other test postulated is "intention".

25
26 One is obliged, for the reasons I have already touched upon, to recognise and heed the
27
28 stated intention to the foreign Court; ie: in this case that the evidence is intended for use
29
30 at the trial.

31
32 But this is to be matched against the other realities - such as that the District Court may
33
34 well not have considered the differences between its pre-trial discovery procedure
35
36 and the stricter approach of our Courts. These are realities which can render the
37
38 intention ambiguous. Why, in those circumstances, should the patent potential for abuse
39
40 of the Request be ignored in deference simply to the stated intention?

41
42 And what of a case, as I believe the present to be, in which is absent any proven intention
43
44 on the part of any party - (including the party at whose instance the request is made) - but
45

1 nonetheless the request itself patently contains the potential for abuse as a fishing
2
3 exercise? Is the requested court to be then obliged to conclude that - as the request is one
4
5 for oral testimony and as the witnesses do have some relevant testimony to give - the
6
7 obvious potential for abuse is no ground for refusing?

8
9 These are questions which I respectfully believe fairly arise from a reading of the Vice
10
11 Chancellor's opinion in the First American case.

12
13 I therefore feel compelled to conclude that they are no more persuasive than the reasoning
14
15 of Kerr LJ in Re Norway (No.1) pp482 -3 (quoted supra). And as we have seen, Kerr LJ
16
17 had found previous support in the sage words of Lord Fraser and of Lord Wilberforce
18
19 from the Westinghouse case (at page 610 C-D) (both already cited supra).

20
21 For the sake of argument further analogous reference was also made to the court's
22
23 exercise of its subpoena powers to compel witnesses to testify in domestic cases - as a
24
25 reference point for the construction of Section 2 (2) of the English Act of 1975 (Section 2
26
27 (3) of the Evidence Order).

28
29 These are the provisions which limit the Court's power to compel testimony in all of
30
31 letters of requests only as it could for similar purposes in domestic cases.

32
33 By reference to that analogy for present purposes, I simply conclude - by repeating the
34
35 views earlier expressed - that it is difficult to imagine that our Courts in domestic
36
37 proceedings could seek to compel a witness, even one having some relevant testimony to
38
39 give, to submit to the patently exploratory exercise which the schedule of testimony in
40
41 this case would permit.

42
43 For all those reasons I would refuse this request also on the basis - whether as a matter of
44
45 discretion or jurisdiction I make no finding - that it would allow, intentionally or

1
2 otherwise, an impermissible fishing exercise.

3
4 A redrafted Letter of Request

5
6 The arguments in this matter forced the elicitation of issues which clearly point, in my
7
8 view, to the sorts of questions which could readily be listed in a carefully redrafted
9
10 schedule of requested testimony and so as to overcome the objections in this case.

11
12 The intended witnesses have recorded their willingness to assist if provided such a
13
14 schedule by which they would be guided in preparing themselves to testify.

15
16 I have no doubt that with the assistance of counsel for First American, such a schedule
17
18 can now readily be prepared.

19
20 I close by reaffirming the willingness of this Court to assist, whenever possible, in the
21
22 interest of comity.

23
24
25
26
27
28 Anthony Smellie
29 JUDGE OF THE GRAND COURT
30

31 Dated this 21st day of May 1998



APPENDIX "A"

Exhibit A -- Schedule of Requested Testimony

- ~~1. The audits conducted by Price Waterhouse for BCCI or International Credit and Investment Company (Overseas) Limited ("ICIC"), and any related entities for each of the following years: 1982-91.~~
- ~~2. Investigations, reviews or inquiries (other than the audits referred to in topic number 1) conducted by Price Waterhouse during the years 1982 through 1991 into BCCI's deteriorating financial condition, its relationship to Credit and Commerce American Holdings, N.Y. ("CCAH"), and its relationship to ICIC.~~
3. The losses BCCI's Central Treasury Division incurred from the early 1980s through 1986, and the circumstances surrounding the "subvention" used to cover certain of such losses in 1986.
4. Loans by BCCI to defendant Ghaith R. Pharaon to purchase shares in National Bank of Georgia, ~~Independence Bank, and/or Finance and Investment International Limited.~~
5. Studies or analyses conducted by Price Waterhouse on the valuation of CCAH shares, and communications with BCCI on that subject.
6. CCAH share transactions funded and/or orchestrated by BCCI or ICIC, including the following:
 - a. the acquisition of CCAH shares by defendants Clifford and Altman in 1986, including the non-recourse loans from BCCI to Clifford and Altman to purchase the shares and the agreements to pledge those shares to BCCI;
 - b. the acquisition of CCAH shares by defendants Clifford and Altman in connection with the CCAH share rights offering in August 1987, including the non-recourse loans from BCCI to Clifford and Altman to purchase the shares and the agreements to pledge those shares to BCCI;
 - c. the transfer of CCAH shares held by Clifford and Altman to defendant Mohammed Mahmoud Hammoud on or about March 31, 1988 and the source of funds provided to Clifford and Altman in connection with that transfer;
 - d. the CCAH share transactions funded or orchestrated by BCCI or ICIC in connection with the tender offer for shares of Financial General Bankshares in March 1982, and the share rights offerings occurring in August 1982, December 1983, July 1986, August 1987 and July 1989; and

- e. BCCI's role in transfers of CCAH stock among CCAH record shareholders.
7. BCCI's plans for a merger or other business combination of BCCI and First American.
8. The adequacy of documentation covering the loans made by BCCI to Record Shareholders of CCAH.
9. The relationship between BCCI and the Record Shareholders of CCAH, including the following:
 - a. loans made by BCCI or ICIC to the Record Shareholders of CCAH;
 - b. the pledge of CCAH shares by Record Shareholders of CCAH to BCCI or ICIC;
 - c. side agreements between BCCI or ICIC and the Record Shareholders of CCAH;
 - d. agreements between BCCI and the Record Shareholders of CCAH that loans were non-recourse;
 - e. guarantees by BCCI or ICIC to cover principal and/or interest payments on loans to the Record Shareholders of CCAH to purchase CCAH shares; and
 - f. powers of attorney by Record Shareholders of CCAH authorizing ICIC, BCCI, defendant Abedi, defendant Naqvi, and/or other ICIC or BCCI representatives, to vote, sell or otherwise dispose of interests in CCAH shares.
10. Loan confirmation requests directed to the Record Shareholders or CCAH during the period 1982 to 1991 and the responses of the Record Shareholders of CCAH.
- ~~11. Meetings attended by, and other communications between, members or employees of Price Waterhouse, on the one hand, and United States counsel for BCCI, on the other, which occurred during the period from January 1986 to April 1991, concerning any of the subjects listed in paragraphs 1 to 10 and 13.~~
- ~~12. Meetings attended by, and other communications between, members or employees of Price Waterhouse, on the one hand, and BCCI or ICIC officers and directors, on the other, concerning any of the subjects listed in paragraphs 1 to 13.~~