COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

2015/CLE/gen/00341

IN THE MATTER of the trusts of the Deed of Settlement dated 30 June, 1992 and designated as the Glenfinnan Settlement **AND** in the trusts of the Deed of Settlement dated 23 March 2009 and designated the Moray Settlement **AND** the trust of the Deeds of Settlement dated 20 December 2006 and designated the Emo Settlement, the Hewish Settlement and the Came Settlement

BETWEEN

ASHLEY DAWSON-DAMER

Plaintiff

AND

(1) GRAMPIAN TRUST COMPANY LIMITED
(2) LYNDHURST LIMITED

Defendants

Before Hon. Ian R. Winder

Appearances: Richard Wilson QC with John Minns for the Plaintiff
Eason Rajah, QC with Sean Moree, Vanessa Smith and Erin Hill for the First Defendant

13 February 2020

RULING

WINDER J

This is my decision with respect to two related applications concerning whether Simon Taube QC (Taube QC), lead counsel on record for the first defendant (“Grampian”), will be required to be examined in the course of the trial of this action.

Background

1. The background to this dispute is well rehearsed, but nonetheless necessary for the purposes of this ruling. I will adopt portions of the summary of the background as detailed in the submissions of both the plaintiff ("Ashley”) and Grampian.

2. The proceedings relate to a discretionary trust known as the “Glenfinnan Settlement” established on 30 June 1992 by a corporate settlor known as Spey Ltd (“Spey”). Spey received the assets from an earlier settlement dated 29 May 1973 (the “1973 Settlement”). The assets were originally derived from the estate of G. S. Yuill, a wealthy industrialist, who died on 10 October 1917.

3. G. S. Yuill’s great-grandsons were George Seventh Earl of Portarlington (“Lord Portarlington”) (born 1938) and John Dawson-Damer (1940-2000). In 1961 Lord Portarlington married Davina. They had four children (Charles, Edward, Marina and Henry). In 1982 John Dawson-Damer married Ashley. Together they had two adopted children (Piers and Adelicia).

4. Between 1988 and 1992 the trustee of the 1973 Settlement (Arndilly Trust Company Ltd) effected a complete reconstruction of the family trusts by which the assets of the 1973 Settlement were appointed absolutely and beneficially to Spey Ltd, which subsequently resettled them onto new settlements (of which Grampian was trustee). The effect of that reconstruction was that the settled assets were thereafter held on new trusts in the following approximate shares:

a. 25% on new trusts for George and his family including adopted issue (the Islay and Annan Settlements);
b. 25% on new trusts (including the Willards Settlement) for John and his family including adopted issue; and
c. 50% on the trusts of the Glenfinnan Settlement for the living and unborn descendants of Lord Carlow (but the definition of "*children*" and "*issue*" in the deed of settlement excludes "*legitimated adopted or illegitimate*" persons).

5. One of the main purposes of this reconstruction was to enable substantial provision to be made for John and Ashley's adopted children, who, by reason of their adopted status, were not beneficiaries of the 1973 Settlement.

6. On 24 June 2000 John died in a racing car accident in England. In 2002 Grampian retired as trustee of the Willards Settlement and this settlement was extracted from the trust structure. On 29 March 2007 George and Davina were excluded from the class of beneficiaries of the Glenfinnan Settlement.

7. In consequence of the foregoing there are currently 19 living discretionary objects of the Glenfinnan Settlement. They are:
    a. Charles, Viscount Carlow, his wife Clare and their four minor children;
    b. Edward Dawson-Damer, his wife Joanne, and their three minor children;
    c. Marina Dawson-Damer;
    d. Henry Dawson-Damer, his wife Alexandra, and their four minor children; and
    e. Ashley.

8. Grampian administers the Glenfinnan Settlement and the other family settlements with the assistance of professional men known as "Family Advisers". Grampian says that the role of the Family Advisers, broadly stated, has been to manage and report on the business interests and investments of the underlying companies of which Grampian is a shareholder, to liaise on Grampian's behalf with lawyers, accountants, investment

managers and other advisers and to inform Grampian about the circumstances, wishes and aspirations of the beneficiaries.

9. On 21 December 2006, Grampian appointed approximately 60% of the Glenfinnan Settlement fund in equal shares to three new Bermudian discretionary settlements (known as "Came", "Emo" and "Hewish") for the respective benefit of George's three sons (Charles, Edward and Henry) and their families (the "2006 Appointment"). Came, Emo and Hewish are administered by Lyndhurst Ltd in Bermuda ("Lyndhurst").

10. On 31 March 2009, Grampian appointed a further (approximately) 38% of the Glenfinnan Settlement fund onto the trusts of a new discretionary settlement (the "Moray Settlement") for the benefit of George's children and remoter issue (the "2009 Appointment"). The Moray Settlement is administered by Grampian.

11. The 2006/2009 Appointments were concealed from Ashley at the time, and were only revealed as a result of enquiries by her lawyers a number of years later.

12. Ashley's case is that the 2006 and 2009 Appointments were improper and constituted a breach of trust by Grampian, principally on the basis that when exercising its fiduciary discretion, Grampian failed to give any proper consideration to her as one of the beneficial class who might be the recipient of benefit under the Settlement, effectively ignoring her as a possible recipient of benefit under the Settlement. There are various specific bases on which Ashley says that the 2006/2009 Appointments were made in breach of trust. They include that Grampian:
    a) Wrongly adopted a 'policy' which effectively prevented Ashley from being genuinely considered for benefit from the Settlement;
    b) Failed to make any enquiry of Ashley as to her financial needs and wishes before making their decision to make the 2006/2009 Appointments;
    c) Failed to take into account Ashley's financial circumstances and to weigh them against the needs of the beneficiaries in whose favour the 2006/2009 Appointments were being made;

d) Failed to take into account Ashley's legitimate and reasonable expectation that Grampian would not appoint almost the entirety of the trust fund of the Settlement to her exclusion without giving her the opportunity to make representations to the trustee concerning her current and future needs; and

e) Took into account and allowed itself to be influenced by the personal views of the so-called 'Trust Advisers' or 'Family Advisers', who were hostile towards Ashley.

13. Ashley says that an important issue in determining her claim is whether Grampian was justified in not making any contact with her, whether to consult with her or to seek her views or to obtain financial or other information from her, prior to making the 2006/2009 Appointments.

14. Grampian's case in these proceedings is that it executed the 2006 and 2009 Appointments with the intention of benefitting Lord Portarlington's children and remoter issue. Grampian says that its reasons for executing the appointments at the time and in the manner they were made are clearly documented in contemporaneous memoranda and correspondence which has now been disclosed to Ashley for the limited purposes of these proceedings.

15. Pleadings have been closed, general discovery concluded and witness statements have been settled. The trial of the action was fixed to commence on 24 February 2020 but has now been fixed to commence on November 30, 2020.

The Applications

16. The respective applications are the following:

(1) Grampian's application by Summons dated 10 December 2019 for directions that no order be made nor any writ of subpoena or letter of request be issued or letter of request be issued nor other step be taken to compel the examination of Taube QC.

(2) Ashley's cross application by Summons dated 24 December 2019 for leave to cross-examine Taube QC on the contents of his affidavit dated 9 December 2019 and generally or for a letter of request to the English High Court to examine Taube QC.

17. The applications are supported by the Affidavits of Taube QC dated 29 November 2019 and 18 December 2019, the Third Affirmation of Andrew C. D. Smith dated 11 December 2019 and the Tenth Affirmation of Ziva Robertson (Robertson 10) dated 28 January 2020.

18. In or about June 2019, upon the appointment of Sir Brian Moree QC as Chief Justice, Taube QC took over as Grampian's lead counsel. Taube QC has been specially admitted to The Bahamas Bar for this purpose. The evidence however is that he has advised Grampian in this litigation since 2014.

19. In 2006, Taube QC had earlier been instructed by the law firm Taylor Wessing LLP, to advise Grampian. Ashley says that she first became aware this involvement of Taube QC on 21 June 2019, in the course of proceedings in the UK where Taylor Wessing were ordered to itemize documents (the LPP Schedule) which it had withheld production from Ashley on the grounds of legal professional privilege. The LPP Schedule, says Ashley, revealed for the first time that "Taube QC had advised Grampian in respect of "the Glenfinnan Reorganisation" between April and September 2006."

20. Ashley says that the documents containing that advice were initially withheld on the basis of an assertion of privilege by Grampian. On 10 October 2019, Grampian voluntarily waived legal professional privilege in relation to documents and disclosed to Ashley some 17 lever-arch files of documents. Amongst those files were the instructions to and notes of advice provided by Taube QC in 2006.

21. Ashley says that a review of Taube QC's advice which was provided to Ashley in October 2019 revealed that:
    a. Taube QC advised Grampian on the 2006 Appointment.
    b. In the course of that advice, Taube QC was asked to advise Grampian whether it had any obligation to notify Ashley that it intended to make the 2006 Appointment, or to inform her after the event that it had done so. The notes of the consultation with Taube QC on 2 August 2006 record as follows:

        "*Trustees generally are not bound to disclose details of the distributions (or in this case the new settlements) to other beneficiaries although no formal decision (i.e. a leading case) has been made or exists in the UK as yet. Having explained Ashley's position to counsel, he advised that there was no legal obligation to discuss the proposed new settlements with Ashley or even inform her after the event. Even if the law changes on this point, Counsel queried what Ashley's remedy would be since she would not have suffered any loss at all as a result of the non-disclosure. However any resolution of the trustees relating to the new settlements should refer to the trustees having taking (sic) into account the circumstances of <u>all</u> the beneficiaries prior to the new settlements being established*."

        "*This* [a reference to Mr Taube QC's instructions] *was an important point and Counsel referred the meeting to Underhills "Law of Trusts and Trustees" on page 673 onwards. Counsel felt that the law might change in the future but at the moment there was no obligation or duty on the trustees to discuss the proposals with discretionary beneficiaries as opposed to those with IIP's and particularly with ADD. In practice, from a practice point of view the trustees would want to discuss the proposals with the beneficiaries affected, meaning George's four children. However any trustees' resolution implementing the proposals should indicate that the claims of <u>all</u> beneficiaries have been taken into account before adopting the proposals. Finally the trustees should be aware that 40% of the main long-term fund (worth approximately £80m) would remain available to meet the*

needs of the original class of beneficiaries. There was no proposal to remove ADD as a beneficiary of the long-term settlement at this stage."

[In a handwritten note] "*Underhills Law "Trusts & Trustees" page 673 onwards… No need to discuss?... not obliged to discuss with her. No duty to disclose at the moment… Resolution to indicate that the claims of all beneficiaries have been taken into account… Ashley problem / In practice they should be discussing the proposals with the beneficiaries.*"

c. These notes of the conference on 2 August 2006 indicate that Taube QC advised that Grampian had no duty to notify Ashley of the appointments it was contemplating making, or to "*even inform her after the event*." However, the notes give rise to a number of obvious questions regarding the advice in fact given by Taube QC to Grampian:

   i. The handwritten note indicates that "*in practice*" Grampian should be discussing its proposals with "*the beneficiaries.*" One of the typed notes of the meeting adds the gloss that the proposals should be discussed with "*the beneficiaries affected, meaning George's four children.*" It is unclear whether Taube QC was advising that Grampian should in practice discuss its proposals with the beneficiaries as a whole, which would include Ashley, or simply with George's children. On its face the latter advice would be (to say the least) surprising, since Ashley's interests were clearly affected by the proposals because she would not have any possibility of benefiting under the new settlements.

   ii. The second typed note indicates that Taube QC's advice that there was no duty to discuss the proposals with Ashley was based on the fact that "*40% of the main long-term fund (worth approximately £80m) would remain available to meet the needs of the original class of beneficiaries. There was no proposal to remove ADD as a beneficiary of the long-term settlement at this stage*." That indicates that Taube QC's advice was that the existence of an obligation (whether a legal duty or something which "*in practice*" ought to be done by Grampian) to notify Ashley of the

trustee's proposals or to consult with her on them depended on whether assets would remain in the fund from which she could benefit. If that is correct as a matter of fact, it bears directly on whether Grampian acted properly in making the later 2009 Appointment – an appointment which virtually eradicated Ashley's interests in the trust fund, but which Grampian did not reveal to Ashley or discuss with her.

iii. The instructions to Taube QC dated 11 July 2006 refer to Ashley's position as being a "*complication*" in the proposed restructuring, and state that "[a]*lthough it is considered that John's family was fully and properly provided for under the 1992 reorganisation it would be considered provocative to remove Ashley as a beneficiary of Glenfinnan…*". The handwritten note of the consultation with Taube QC on 2 August 2006 then refers to Ashley as a "*problem.*" What is not apparent from the typed notes is the extent to which Mr Stanford Tuck, Mr Morrison and Mr Burns (who all attended the conference) explained to Taube QC why it would be considered "*provocative*" to exclude Ashley as a beneficiary of Glenfinnan; why she was described as a "*problem*" at that conference; and the extent to which the views of (in particular) the Family Advisers regarding Ashley's status under the trust was material to the advice given by Taube QC that there was no need for Grampian to consult with her or notify her of the appointments. Of course, the characterisation of Ashley's status and intentions to Leading Counsel advising on the 2006 Appointment is also material to Ashley's case that the Family Advisers were by that time actively hostile to her interests, viewing her and her family as a '*contamination'* of the structure.

22. Additionally, Taube QC, in a sworn affidavit, has produced the contemporaneous instructions, attendance notes and opinions relative to the advice given in 2006. He also states in his affidavit that he has no independent memory of the advice he gave in 2006.

23. Grampian states that the scope of Taube QC's instructions and advice to Grampian can be seen from the following documents:
    a. Taylor Wessing's first written instructions to Mr Taube QC dated 7 July 2006;
    b. One handwritten and two typed attendance notes of a consultation with Mr Taube QC on 2 August 2006;
    c. Taylor Wessing's further written instructions to Taube QC dated 26 August 2006;
    d. Taube QC's written note of advice dated 13 September 2006;
    e. Typed attendance note of a further consultation with Taube QC on 14 September 2006;
    f. Taube QC's further written note of advice dated 8 November 2006;
    g. Taube QC's own handwritten notes provided voluntarily in support of this application and transcribed for the benefit of Ashley and the Court.

    Ashley suggests, in paragraph 11 of the Richardson Affirmation that there are additional material which Taube QC has not disclosed relative to his advice.

Analysis and Discussion

24. Rajah QC, for Grampian, says that I am permitted to make the order he seeks in the course of exercising my case management powers. Reliance is placed on Order 31A rule 18(2)(s) which empowers the court to "take any other step, give any other direction or make any other order for the purpose of managing the case and ensuring the just resolution of the case". He says that the rules seek to prevent abuses of process which would include only allowing witness to be called only if the purpose is to obtain relevant evidence for use at trial and not for any collateral purposes such as what Ashley pursues, namely to knock out the opponent's lead counsel.

25. Grampian argues that the just resolution of the dispute does not require the compulsory examination of Taube QC unless Ashley can prove that:

a. the application is not an abuse of process but is made *bona fide* on reasonable grounds for the purpose of obtaining relevant evidence: *R v. Baines* [1909] 1 KB 258; and
b. Taube QC has material and relevant evidence to give: *Ehrmann v. Ehrmann* [1896] 2 Ch 611.

26. In relation to the issue of abuse of process, Grampian says that the real purpose of Ashley's application is not to obtain Taube QC's evidence. Grampian says that Ashley's desire to call Taube QC is an abuse of process as this is a cynical strategy to prevent Grampian from continuing to instruct Taube QC as its lead advocate. If Taube QC is called as a witness he must relinquish his brief as lead advocate as a result of the rule of practice that one cannot be both a witness and advocate in a cause or matter. It is therefore argued that Ashley's real motive is to disrupt Grampian's trial preparation and readiness.

27. Further they say that the loss of Taube QC as lead advocate is disproportionate to any benefit Ashley could derive in calling him as a witness. They say in their submission, that:

> *Mr Taube QC has advised on this complicated and hard-fought case over an extended period of years, and his in-depth knowledge and understanding of the issues cannot be replaced. Grampian would have to instruct new counsel at this late stage of the proceedings who would have to start from scratch. This would be unjust. The Court should exercise its case management powers to prevent such an injustice.*

28. On the question of the relevance of the evidence of Taube QC, Grampian says that the areas of desired examination have to be tested for relevance against Ashley's case. That case, they say is that Grampian misunderstood the purpose of the Glenfinnan Settlement and Ashley's status as a beneficiary and, furthermore, that Grampian allowed the Family Advisor's alleged hostility to Ashley to influence its decision to make the 2006 and 2009 Appointment." They argue that as Taube QC was

instructed to give technical legal advice on tax and other issues it would be surprising if (even with a clear memory of events in 2006) he had any relevant evidence on the issues with which Ashley's claim is concerned. It is quite clear, they say, that Mr Taube QC does not have material and relevant evidence to give.

29. Grampian says that since the advice given in 2006 Taube QC did not at any other stage advise Grampian until the pre-action stage of these proceedings in 2014. Further, they say that it is clear that every single proposed line of questioning would depend on Taube QC having an independent recollection of things said and done in routine conferences and advice over a decade ago. Finally they say that Taube QC's affidavit demonstrates that this will be a futile exercise, since he says:

    "*I have no memory or independent recollection of what was said at those consultations in 2006, over 13 years ago. I could give no material oral evidence on the topics on which, Ashley's lawyers claim, they wish to question me*".

30. Ashley suggests that Taube QC is a significant witness. Ashley says that she wishes to examine him on the areas set out in sub-paragraphs 6(a) to (i) of the Robertson Affirmation as follows:

    a. The nature and substance of Mr Taube QC's interactions with the directors of Grampian and with the Family Advisers, including, in particular, in 2006 (and in 2009 if applicable);
    b. Mr Taube QC's recollection of the oral advice he provided to (and/any oral instructions received from) Grampian and/or the Family Advisers. In particular, the instructions (both written and oral) that Mr Taube QC was given in respect of Ashley, and the explanation of her position and status under Glenfinnan. This is particularly important given that Mr Taube QC's instructions and advice indicate that he and the Family Advisers treated Ashley as a "problem". For example, Mr Taube QC was instructed that "a complication" arises out of the position of our client and her adopted children; and advised that " ...there was no obligation or duty on the trustees to discuss the proposals with discretionary beneficiaries ...and particularly with ADD";
    c. The instructions Mr Taube QC was given by the Family Advisers regarding the objectives of the restructuring in both 1989-1992 and 2006;

d. The accuracy of the contemporary notes of the Family Advisers' consultations with Mr Taube QC in August 2006 and September 2006, including any discrepancies between the notes;
e. The nature and content of the advice Mr Taube QC gave prior to the 2006 Appointment and in particular whether any of the notes of the consultations with him (which differ from each other in both content and emphasis in a number of important respects) were settled by him and/or fully and accurately reflect his advice;
f. Mr Taube QC's understanding of the decision-making process in respect of the 2006 Appointments and the stage it had reached by the time he was asked (by the Family Advisers) to advise particularly given the contradictions in Grampian's case on the timing of the relevant decision(s);
g. Mr Taube QC's knowledge of the potential for further restructuring and his involvement, if any, in the 2009 Appointment;
h. The reasons why, at the conference on 14 September 2006, Mr Taube QC was "relieved that no irrevocable actions were being taken or intended to be taken whilst the Family Advisers were in Nassau next week and the actions he was referring to; and
i. Mr Taube QC's evidence as to the full content of his advice that Grampian need not discuss the creation of the proposed new settlements with Ashley, and in particular whether that advice was explicitly premised on the fact that following the creation of the proposed new settlements, 40% of the value of the fund would remain in Glenfinnan."

Ashley says, in the Richardson Affirmation, that she believes that Taube QC does have relevant evidence to give beyond the documents which he has already produced under cover of his affidavit. She says that whilst he may not currently have a clear recollection of these matters, as is often the case with witnesses of fact, his recollection may be refreshed in the course of giving evidence.

31. Ashley says that from a review of paragraph 21 above, it will be apparent that Taube QC’s contemporaneous advice and the circumstances of his instruction in 2006 have a direct and material impact on Ashley’s case that both the 2006 and the 2009 Appointments were flawed.

32. Having considered the issues which arise, I regret that notwithstanding the disruption which my decision will undoubtedly cause to Grampian, Ashley should be permitted to examine Taube QC.

33. Notwithstanding its vintage, I accept the applicability of the proposition as expressed by Willes J in *Ex parte Fernandez* (1861) 10 CBNS 3, at 39 where he stated:

> "*Every person in the kingdom except the sovereign may be called upon and is bound to give evidence to the best of his knowledge upon any question of fact material and relevant to an issue tried in any of the Queen's courts, unless he can show some exception in his favour*"

In *Hoskyn v Metropolitan Police Commissioner* [1979] AC 474, at 484, Lord Wilberforce described this principle as "*a constitutional principle underlying our whole system of justice.*"

34. In my view there was relevance in the material disclosed by Grampian in the disclosure made in October 2019 relative to Taube QC. The facts and matters raised by Ashley in her submissions, and detailed at paragraph 21 above, demonstrate that the contemporaneous advice and the circumstances of Taube QC's instruction in 2006 may have a direct and material impact on Ashley's challenge to the 2006 and the 2009 Appointments. In giving the disclosure, Grampian made the conscious decision to waive privilege indicating that it *will assist it to vindicate its decisions as trustee.* The obvious proposition is that the material relative to Taube QC's instructions would not have been disclosed by Grampian, much less privilege waived, if Grampian felt that it was not relevant to the issues in this dispute. Indeed the material ought not to have been a part of the disclosure it they were irrelevant.

35. Contrary to the submission of Grampian, I accept that Taube QC's advice which he gave to Grampian in 2006 will likely arise at trial as part of the contested issue of whether the 2006 and 2009 Appointments were flawed and should be set aside. The evidence demonstrate that Taube QC was involved in and advised on the 2006 Appointment, which is now the subject-matter of this litigation. In particular, Taube QC gave advice relative to Ashley's position and whether she should be notified of or consulted regarding the intended appointment.

36. Ashley says that *"Taube QC seems to have advised that she need not be notified or consulted, but that advice appears to have been based on the premise that funds would be retained in Glenfinnan from which Ashley could benefit – something that was not true of the 2009 Appointment, which eradicated virtually the whole of Ashley's remaining interest in the fund. These matters are directly pertinent to Ashley's claim, including that it was a breach of trust that Grampian failed to consult her over the 2006/2009 Appointments. It must be right that Ashley is able to explore these issues with Mr Taube QC at trial."* There is some merit in the submission relative to Ashley's right to explore these issues. Whilst I have come to have much regard for Taube QC, the fact of his statement that he has no recollection of the consultations with him in 2006 cannot negate or diminish the right of Ashley to examine him. It would be a dangerous precedent if witnesses were able to opt out of being called to give evidence by swearing an affidavit saying 'I don't remember'. I therefore also could not accept Grampian's further argument that, at trial, the Court will have the evidence of Messrs Stanford-Tuck, Morrison and Burns who attended the consultations with Mr Taube QC and that Ashley's advocate will be able to examine them on their recollection of what they said to Mr Taube QC in 2006. The purpose of the examination it to test evidence and in such examination it is not improbable that new evidence may be uncovered. Ashley should have the opportunity to test or seek to refresh Taube QC's memory. I also bear in mind that it would be unfair to have to cause Ashley to have to reveal full specifics of what her cross examination would be in relation an examination of Taube QC. Were it not for Taube QC's position as lead advocate I have little real doubt that resistance to his giving evidence would be so robust, if at all.

37. On my assessment of the evidence, I did not accept Grampian's complaint that Ashley true purpose in the application was the postponing of the trial and disrupting the trial readiness of Grampian.

38. Grampian argues that Ashley's true purpose was revealed in her behaviour when she received the LPP Schedule in July 2019. Grampian remarks that her first response was a letter in August 2019, inquiring whether Taube QC would be conflicted and

nothing about what relevance his evidence might yield. Respectfully, this was an unfair inference as the documents, at that time, remained privileged and she had no way of knowing what the true role of Taube QC may or may not have been. So whilst an issue was raised as soon as the LLP Schedule was provided, it was only in mid October 2019 that the disclosure of Taube's advice was made. Thereafter, correspondence in November 2019, do not reflect any significant delay prior to Grampian moving its Summons on 10 December 2019. Admittedly, whilst Ashley it certainly not troubled by Taube QC's predicament, I could not find that the desire to call Taube QC as a witness was for a collateral purpose and could be considered an abuse of process. I was satisfied that he had relevant evidence to give.

39. Respectfully, Grampian and Taube QC must, at some point, have contemplated whether Taube QC earlier involvement in the factual matrix of the dispute may have been a cause for some concern.

40. As indicated, I regret the disruption which will be caused to Grampian. In weighing the matter, it is noted that whilst Taube QC may have been Grampian's lead counsel he was only in the top job for a few months, following upon the elevation of Sir Brian Moree QC. He came into the role in June 2019, some eight months in advance of trial, which had been fixed for February 2020. Coincidently, this is the approximate time remaining before the trial is set to begin in early December 2020. I am comforted that the remainder of Grampian's UK and Bahamas team remains in place for continuity. I am satisfied that able Queen's Counsel, such as Mr Rajah QC, if he is to get the brief, is well able to come up to speed, notwithstanding the complex issues to be canvassed at the trial. The Court is open to a slight adjustment of the trial date having regard to this new challenge for Grampian. Additionally what is also unknown is the impact of the Covid-19 contagion.

41. In the circumstances therefore I am not prepared to give the direction sought by Grampian in its Summons seeking primarily to restrain the taking of evidence of Taube QC. The Summons is therefore dismissed.

42. I accept Grampian's proposition that the proper test for the issuance of letters of request, was set out by Sir Richard Scott V-C in the English Court of Appeal in ***First American Corporation v. Zayed*** **[1998] 4 All ER 439** where it was stated at page 448:

> *"In summary, in considering the letters of request in this case the court should in my opinion ask first whether the intended witnesses can reasonably be expected to have relevant evidence to give on the topics mentioned in the amended schedule of requested testimony, and second whether the intention underlying the formulation of those topics is an intention to obtain evidence for use at the trial or is some other investigatory and therefore impermissible intention"*
>
> (emphasis added).

43. I accept that the evidence sought from Taube QC is relevant and not required for some ulterior purpose. If Grampian and Taube QC are not minded to agree for an acceptable means for his examination I am prepared to order that a Letter of Request for his examination be issued to the English High Court. I will adjourn at this point to permit the parties to consider, and if possible agree, what directions would be appropriate in the circumstances.

44. I will also reserve on the question of costs to permit the parties to make representation as to why costs ought not to follow the event in the usual course.

Dated the 3rd day of April 2020

Ian R. Winder

Justice