FEDERAL COURT OF AUSTRALIA

Schiff v Nine Network Australia Pty Ltd (No 4) [2023] FCA 688

File number(s):	NSD 1086 of 2021
Judgment of:	**JACKMAN J**
Date of judgment:	23 June 2023
Catchwords:	**DEFAMATION** – application for leave to further amend defence – whether particulars of directly relevant background context in mitigation of damages defective – whether the principle in *Burstein v Times Newspapers Ltd* [2001] 1 WLR 579 is confined to evidence of "misconduct" as opposed to "facts" – whether evidence of opinions held by regulators or agencies as to the existence of facts is admissible – extent to which evidence of beliefs or opinions held by the applicant is admissible – discretionary case management principles guide the application of the *Burstein* principle to applications for leave to amend particulars – leave refused in respect of some particulars, granted in respect of others
Legislation:	*Evidence Act 1995* (Cth) ss 55, 56, 135 *Federal Court of Australia Act 1976* (Cth) s 37M
Cases cited:	*Australian Broadcasting Corporation v Chau Chak Wing* [2019] FCAFC 125; (2019) 271 FCR 632 *Barilaro v Google LLC* [2022] FCA 650 *Burstein v Times Newspapers Ltd* [2001] 1 WLR 579 *Channel 7 Sydney Pty Ltd v Mahommed* [2010] NSWCA 335 *Dingle v Associated Newspapers Ltd* [1964] AC 371 *Duma v Fairfax Media Publications Pty Ltd (No 3)* [2023] FCA 47 *Edgington v Fitzmaurice* (1884) 29 Ch D 459 *Fairfax Digital Australia & New Zealand Pty Ltd v Kazal* [2018] NSWCA 77; (2018) 97 NSWLR 547 *Goody v Odhams Press Ltd* [1967] 1 QB 333 *Hayson v The Age Company Pty Ltd (No 2)* [2020] FCA 361 *Kumova v Davison (No 2)* [2023] FCA 1 *Pamplin v Express Newspapers Ltd* [1988] 1 WLR 116 *Rush v Nationwide News Pty Ltd (No 2)* [2018] FCA 550

	Schiff v Nine Network Australia Pty Ltd (No 2) [2022] FCA 1120 *Schiff v Nine Network Australia Pty Ltd (No 3)* [2023] FCA 336 *Scott v Sampson* (1882) 8 QBD 491 *Turner v News Group Newspapers Ltd* [2006] EWCA Civ 540; [2006] 1 WLR 3469 *Warren v The Random House Group Ltd* [2008] EWCA Civ 834; [2009] QB 600
Division:	General Division
Registry:	New South Wales
National Practice Area:	Other Federal Jurisdiction
Number of paragraphs:	40
Date of hearing:	19 June 2023
Counsel for the Applicant:	Ms S Chrysanthou SC and Mr N Olson
Solicitor for the Applicant:	Kennedys (Australasia) Partnership
Counsel for the Respondents:	Mr D Sibtain SC and Mr M Lewis
Solicitor for the Respondents:	Minter Ellison

ORDERS

NSD 1086 of 2021

BETWEEN:	**PETER DAVID SCHIFF** Applicant
AND:	**NINE NETWORK AUSTRALIA PTY LTD ACN 008 685 407** First Respondent
	THE AGE COMPANY PTY LTD Second Respondent
	NICHOLAS MCKENZIE (and others named in the Schedule) Third Respondent
ORDER MADE BY:	**JACKMAN J**
DATE OF ORDER:	**23 JUNE 2023**

THE COURT ORDERS THAT:

1. Leave be granted to the respondents to file a Further Amended Defence in accordance with these reasons.
2. The respondents pay the applicant's costs thrown away by the amendment to their Amended Defence, and the applicant's costs of the present application to file the Further Amended Defence.
3. The matter stand over to 9.30 am on 30 June 2023 for a case management hearing, including the allocation of a hearing date.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

JACKMAN J

Introduction

1 In *Schiff v Nine Network Australia Pty Ltd (No 2)* [2022] FCA 1120, Jagot J concluded that the television broadcast which is the subject of the proceedings conveys the following imputations:

> Imputation 8.1 (by permitting his bank, Euro Pacific, to be used as a vehicle for around one hundred Australian customers to commit tax evasion, Schiff facilitated the theft of millions of dollars from the Australian people).
>
> Imputation 8.2 (Schiff orchestrated an illegal tax evasion scheme).
>
> Imputation 8.3 (Schiff committed tax fraud).
>
> Imputation 8.4 (Schiff knowingly facilitates tax fraud, in that he established his bank, Euro Pacific, in Puerto Rico for the purpose of enabling his customers to illegally hide their money from tax authorities).
>
> Imputation 8.5 (Schiff knowingly assisted around one hundred Australians to illegally evade their tax obligations).
>
> Imputation 8.11 (through his bank Euro Pacific, Schiff poses a grave organised crime threat to Australia).
>
> Imputation 8.12 (Schiff is such an unscrupulous individual that he has no qualms about doing business with criminals and money launderers).

2 In *Schiff v Nine Network Australia Pty Ltd (No 3)* [2023] FCA 336, I refused leave to the respondents to file a proposed Further Amended Defence, but granted leave to the respondents to re-plead paragraph 13 and 14, dealing with the then defence of justification and mitigation of damages. In accordance with the orders which I made, the respondents served a re-pleaded proposed Further Amended Defence, which they now seek leave to file. The respondents have now abandoned their previous defence of justification. The respondents have also substantially re-pleaded the particulars relied on for mitigation of damages. The respondents have made other amendments, including the introduction of greater specificity concerning the employment of the third, fourth and fifth respondents, which are not opposed. The applicant opposes paragraph 14(d) of the proposed pleading and the new particulars concerning the mitigation of damages, with the exception of particulars (39) and (40), which are not opposed.

Proposed Particulars of Mitigation of Damages

3 Paragraph 14 of the proposed Further Amended Defence is as follows:

> Further and in the alternative, if (which is denied) the Applicant suffered any damage as a result of the publication of the Segment and/or any of the imputations pleaded in

paragraphs 8.1 – 8.5 or 8.11 – 8.12 of the Statement of Claim, then the Respondents will rely upon the following facts and matters in mitigation of such damage:

(c) the circumstances in which it is proved that the Segment was published; and

(d) the background context to the Segment, being the facts, matters and circumstances particularised below.

4 Under the subheading "Particulars of Background Facts", the following particulars are given:

(1) The applicant is a citizen of the United States of America (**US**) and is an economist and financial commentator in that jurisdiction. He has courted public and media attention through various media including by authoring and causing to be published several books on the topics of economics and finance, by creating financial related content that he has sought to publish to the world at large on each of his YouTube and Podcast channels entitled "The Peter Schiff Show" (**TPSS**), and through his use of Twitter under the handle of "@PeterSchiff".

(2) Between at least 2015 and 2022, the applicant has deliberately sought for himself a reputation as someone who has a strong opposition to both the payment of income tax and the invasion of financial privacy by publishing content on those topics through TPSS and on Twitter, and on other podcasts that have a wide audience. At trial, the respondents will rely on the content published by the applicant set out in **"Annexure A**". [Annexure A lists 35 publications.]

(3) On about 11 September 2021, the applicant published an episode of the TPSS entitled: "Episode 730: Government Is Consistent; It Always Lies". The sense and substance of that episode was that anti-privacy laws were used to enforce tax compliance and that those laws were unconstitutional. The applicant said in that episode that he: "*would rather a few people get away with cheating on their taxes than the entire country have to surrender their constitutional rights* (sic)". In the premises, it should be inferred that the applicant was, at all material times, so opposed to anti-privacy laws that he was, at least, indifferent to some persons escaping accountability for cheating the tax office out of revenue, including by illegal tax evasion means.

(4) On about 23 February 2011, the applicant founded the Euro Pacific Bank Ltd (the **bank**). The bank was incorporated, and initially domiciled, in St Vincent and the Grenadines (**SVG**).

(5) At all material times since the incorporation of the bank, the applicant was a director of the bank and a shareholder with a controlling interest in the bank.

(6) Since its incorporation, the applicant has represented to the world at large that he:

(a) founded the bank;

(b) owned the bank;

(c) held a controlling interest in the bank;

(d) controlled and "ran" the bank; and

(e) made decisions regarding the bank's operations.

Those representations were made during Episode 70 of TPSS entitled: "Frontline Perspective on the Government's War on Liberty", first published on 8 April 2015, and during Episode 542 of TPSS entitled: "Financial Conditions Are Rapidly Deteriorating", first published on 7 March 2020.

(7) Shortly after the bank was incorporated and, by no later than 2012, the applicant's name and image were used in the bank's promotional and marketing material. It is to be inferred from the foregoing that the applicant consented to the use of his name and image being used as the public face of the bank. It is to be further inferred that the applicant, at least, implicitly approved the content of the bank's promotional and marketing material.

(8) At the time of the bank's incorporation, SVG had a reputation as a tax haven because of its lenient financial regulation and strong privacy laws. Those laws relevantly included the *International Banks Act* 2004, and the *Exchange of Information Act* 2008. By reason of those laws, there was no obligation on a financial institution in SVG to report, amongst other things, tax evasion and money laundering.

(9) The applicant knew that SVG was a tax haven which had lenient financial regulation and strong privacy laws and, for that reason, incorporated the bank in that jurisdiction. The fact of the applicant's knowledge is evidenced by the statements that he made to the world at large (particulars of which are set out in Annexure A) that specifically include:

(a) on 8 April 2015 during episode 70 of TPSS entitled: "Frontline Perspective on the Government's War on Liberty";

(b) on 7 December 2019, during episode 518 of TPSS entitled: "Another Trumped up Jobs Report";

(c) on 7 March 2020, during episode 542 of TPSS entitled: "Financial Conditions Are Rapidly Deteriorating";

(d) on 6 September 2021, on the applicant's YouTube channel entitled: "Vlad TV" during an interview entitled "Peter Schiff on His Dad Dying in Prison Over Not Paying Taxes (Part 1)"; and

(e) in an interview conducted by Nick Giambruno published on a date presently unknown in "International Man" and republished on the 'Mike's Money Talks' website (**Giambruno Interview**).

(10) Further, it is to be concluded from the applicant's statements during the Giambruno Interview that the applicant founded and incorporated the bank in SVG with an objective to provide privacy for the bank's customers, and to avoid the imposition of onerous US rules and regulations for the vetting of, and the disclosure of information about, its customers. One of the ways the applicant achieved those objectives was by the bank enforcing a policy to reject US customers, which policy is addressed below at (11)(b).

(11) Between at least 2012 and 2017, the bank promoted on its website (www.europacbank.com), and in marketing material (including in electronic and/or print flyers), that it provided banking services to prospective customers, that it had been founded by the applicant, and that it provided a number of key benefits, including:

(a) that it was one of the most private and secure banks in the world for customers to do business and protect assets by reason of the favourable banking regulations and strong privacy laws in SVG;

(b) that the bank furthered the safety and security of customers by its policy to refuse any US citizen or resident as a customer (**US Citizen Policy**);

(c) the ease at which customers could open an account with the bank. Specifically, the bank promoted that prospective customers could an open an account by completing a registration form in under one minute and without sending physical copies of any supporting documents. Customers could expect the bank to open an account the same day of the application.

(12) It is to be inferred from the applicant's control of the bank, the public statements made by the applicant, and from the use of the applicant's name and image in the bank's promotional and marketing material (each of which has been set out above) that the applicant knew and approved of the promotion of the bank in the manner described in (11) above.

(13) Further in the premises of (12), it is to be inferred from the matters in (5) above that the applicant designed, or at least approved of the adoption by the bank of, the US Citizen Policy to ensure that the bank was able to provide the strictest privacy for its customers by avoiding the extra territorial obligations imposed by US legislation such as the *Hiring Incentives to Restore Employment Act* 2010, and the *Foreign Account Tax Compliance Act* and Regulations.

(14) By 15 July 2014, the Organisation for Economic Co-operation and Development had approved a "common reporting standard" which provided for the collection and exchange of financial account information concerning foreign tax residents (**CRS**). The objects of the CRS include to act as a deterrent of tax evasion, and to reduce international tax evasion. By 25 August 2016, SVG had subscribed to the CRS when it became a signatory to the Convention on Mutual Administrative Assistance in Tax Matters.

(15) About two months after SVG had subscribed to the CRS, and no later than October 2016, a subsidiary of the bank, Euro Pacific Intl. Bank, LLC, had been granted a licence by the Office of the Commissioner of Financial Institutions (**OCFI**) in Puerto Rico to operate as an international bank.

(16) Puerto Rico is as an unincorporated territory of the US and was, at all material times, notorious to regulators and those in the financial services community as a tax haven and as a territory with a relatively lenient framework of laws and regulations governing financial institutions by global standards. Puerto Rico is not, and has never been, subject to the disclosure requirements of the CRS. Whilst the US has signed the CRS, it has not ratified or enacted laws to bring the CRS into force. Since at least 2016, non-United States financial institutions based in Puerto Rico have been exempted from compliance with legislation in force in the United States of America requiring the collection and reporting of information, but only in respect of non-US citizens or residents and non-US transactions. By 13 February 2019, the Delegated Regulation of the European Commission had identified Puerto Rico as a high-risk third world country with strategic deficiencies. Further, between at least 2015 to the present, Puerto Rico has been consistently identified in news reporting as a tax haven.

(17) By about 20 December 2016, the CRS had been adopted into SVG domestic law. Around the time of its adoption, and by no later than January 2017, the bank requested the OCFI in Puerto Rico to transfer to it the licence granted to Euro Pacific Intl. Bank, LLC. At about the same time, the applicant applied to the OCFI for the bank to be converted to a Puerto Rico domestic corporation.

(18) By about 9 February 2017, the bank had become domiciled in Puerto Rico, had changed its name to "Euro Pacific Intl Bank", and had commenced operations as an international financial entity after it was authorised to do so by the OCFI. The applicant, at all material times, remained a director and controlling shareholder of the bank, but additionally became its Chairman.

(19) From February 2017, the bank continued to promote itself, on its website and in a Financial Institution Presentation dated 6 September 2020, as a bank that provided products and services to non-US citizens, residents and entities, and as a bank that did not report financial account information of its customers. On and from 20 October 2017, the bank represented on its website that it had redomiciled its operations from SVG to Puerto Rico and that customers of the bank would not be subjected to the reporting requirements under the CRS for the reason that Puerto Rico is a US territory and the United States had not implemented the CRS. From at least 7 March 2019, the bank promoted on its website that it used encryption software to protect client sensitive material and that customers could communicate with the bank using encrypted email and private internal virtual messaging.

(20) In fact, the bank rejected, and the applicant knew it rejected, US citizens, residents and entities as customers consistent with its US Citizen Policy. The applicant's knowledge arises from at least his participation in the business of the bank as its Chairman and as a controlling shareholder, and from statements that he made to the world at large in, at least, the Giambruno Interview.

(21) It is be inferred from the foregoing that the applicant was instrumental, or alternatively was involved, in causing the bank to be relocated to Puerto Rico and that a reason for that relocation, and for the continued enforcement of the US Citizen Policy, was to avoid the imposition of reporting obligations under the CRS, and to avoid the extra territorial obligations imposed by US legislation, in order to help customers maintain privacy over their financial account information.

(22) Since the establishment of the bank in SVG, and following its relocation to Puerto Rico, one of the ways in which a prospective customer could open an account with the bank was by the voluntary completion of the bank's registration form and the provision of basic supporting documentation. At all material times, the bank represented that this process took less than one minute as set out above at 11(c). Another way in which a customer could open an account was by using the services of a third party referral agent to open an account remotely.

(23) Whatever way was used by the prospective customer, the process by which an account could be opened with the bank was simple, quick and involved minimal vetting of the prospective customer. That process had been sanctioned by the applicant, given the matters referred to in (5) above, and sought to make the bank as attractive as possible to prospective customers. In particular, the bank did not seek to satisfy itself that prospective customers had complied with their domestic and/or international taxation obligations, including by failing to conduct enquiries with any relevant authorities.

(24) Given the promotion of secrecy and privacy as key attributes of the bank, it was inevitable that the bank, in fact, attracted customers who wished to maintain their privacy and avoid the disclosure of their account information to third parties. Those customers would have included legitimate and law-abiding customers who wanted to open an account and use the bank in good faith. However, those customers would also have included customers that sought to use the bank to evade paying their taxes unlawfully, engage in money laundering and/or fraud (**Bad Actors**).

(25) The bank's minimal vetting procedures were wholly inadequate to prevent those Bad Actors from opening accounts with the bank.

(26) It should be inferred from:

(a) the location of the bank in SVG, and later the domicile of the bank in Puerto Rico so as to avoid the operation of the CRS;

(b) the implementation of the US Citizen Policy and, in fact, the rejection of US citizens, residents and entities as customers of the bank, so as to avoid the extra territorial disclosure obligations imposed by US legislation;

(c) the inadequate customer vetting procedures adopted by the bank which were sanctioned by the applicant;

(d) the applicant's publicly expressed opinions on taxation; and

(e) the applicant's publicly expressed strong opposition to anti-privacy laws, that the applicant was, at least, indifferent to the prospect of Bad Actors becoming customers of the bank.

(27) On about 23 January 2020, the Global Joint Chiefs of Global Tax Enforcement from Australia, Canada, the Netherlands, the UK, and the US known as the "J5 Crime Group" (**J5**) commenced an unprecedented, coordinated global investigation called "Operation Atlantis". The apparent purpose of Operation Atlantis was to stop suspected facilitation of offshore tax evasion and money laundering by the bank. Operation Atlantis was the first major operational activity by the J5 anywhere in the world, and involved a coordinated global "day of action" concerning the bank. The day of action involved evidence, intelligence and information collection activities using search warrants, interviews and subpoenas in several jurisdictions. Over 100 Australian customers of the bank were targeted by the J5 as part of Operation Atlantis.

(28) One of the Australian customers targeted by the J5 as part of Operation Atlantis was Simon Paul Anquetil, an Australian citizen, and founder and Chief Executive Officer of a company, Plutus Payroll Australia Pty Ltd. Mr Anquetil was a customer of the bank between at least 25 May 2017 and 3 September 2021. By 24 February 2020, Mr Anquetil had pleaded guilty of being involved in a conspiracy to defraud the Australian Taxation Office with the intention of dishonestly causing a loss to the Commonwealth, between 1 March 2014 and about 18 May 2017, and having dealt with the proceeds of crime, in excess of $1,000,000. He was sentenced in July 2020 to a term of imprisonment of seven years and six months. On 3 September 2021, orders were made by the Supreme Court of New South Wales, pursuant to which various assets of Mr Anquetil were forfeited to the Commonwealth. Those assets included funds held by the bank in account number 19515052. The Plutus Payroll tax fraud conspiracy and the above proceedings were the subject of wide reporting during the period

between May 2017 and, at least, 18 October 2020.

(29) Another customer of the bank was Michael Wilson, a dual citizen of Canada and the United States. He was a customer of the bank by no later than 2017. On or about 18 July 2017, Mr Wilson pleaded guilty to wire fraud and Mr Wilson's various assets were ordered to be forfeited. Those assets included four accounts for approximately $950,000 held at the bank. Mr Wilson's proceedings, as well as Mr Wilson's arrests in Canada and Vietnam, were the subject of wide media reporting between 2010 and 2017. On or about 4 April 2018, Mr Wilson was sentenced to 108 months' imprisonment.

(30) Since 2017, the Australian Criminal Intelligence Commission has generated and maintained an Australian Priority Organisation Target (**APOT**) list for the purposes of identifying, assessing, designating and coordinating operational responses against transnational serious and organised crime targets that pose the greatest threat to Australia's interests. The strategic intent of the APOT list is to improve understanding and facilitate collaborative domestic and international disruption efforts.

(31) By no later than 18 October 2020, ACIC had placed the bank on the APOT list and had thereby designated it as a threat to Australia's interests through the facilitation of global tax evasion and money laundering and by the use of the bank by its customers, including Australian customers, to avoid tax obligations, launder funds and reduce law enforcement visibility.

(32) Between 19 October 2020 and 30 June 2021, the OCFI and the Commissioner of Financial Institutions in Puerto Rico (**Commissioner**) performed an examination into the operations of the bank to determine, amongst other things, the extent of compliance by the bank with Puerto Rican and federal laws. That examination found the bank was "critically deficient" in a number of respects, including:

(a) in its management performance;

(b) in its risk management practices;

(c) that the bank had deficient earnings and capital levels;

(d) that accounting records were inaccurate; and

(e) the bank's money laundering and customer due diligence program was inadequate and additionally failed to comply with the Bank Secrecy Act (**OCFI Findings**).

(33) On or around 1 November 2021, the bank (including the applicant as its director) and the OCFI consented to court orders purporting to address the OCFI Findings (**OCFI Consent Order**).

(34) By 30 June 2022, the OCFI had filed a complaint and suspended the bank's operations in Puerto Rico for non-compliance with the minimum capital requirements under law and the OCFI Consent Order.

(35) Further, by 30 June 2022, the ATO had scrutinised over 100 cases concerning Australian customers of the bank revealed by Operation Atlantis, had imposed tax penalties in some, but not all, of those 100 cases, had reported that further steps were necessary in at least 50 cases to ensure compliance with Australian tax obligations, and had referred some Australian customers of the bank for criminal investigation by other authorities including the Australian Federal

Police and the Australian Criminal Intelligence Commission, through the Serious Crime Taskforce.

(36) By no later than 8 August 2022, the bank and the OCFI had entered into an agreement whereby the bank agreed to its liquidation, to surrender its financial license, to cease all financial operations in Puerto Rico permanently and irrevocably, to pay fines for its infringements of legal and regulatory requirements and refund all client deposits. The Applicant entered into this agreement on behalf of the bank in his capacity as its director and sole shareholder. A formal consent order was subsequently filed by OCFI and the bank on 9 August 2022.

(37) By no later than 7 September 2022, HMRC publicly announced that hundreds of civil and criminal investigations involving the bank have been launched across the J5 jurisdictions of the UK, Canada, Australia, Netherlands and the United States. So far, at least one customer of the bank has been convicted and sentenced in the Netherlands. Further and better particulars of that conviction, and any others, will be provided in due course.

(38) At or about the time of first publication of the Segment, the New York Times also published an article about the bank and Operation Atlantis entitled "Chasing Illicit Money, Global Officials Circle a Puerto Rican Firm". The Respondents will rely at trial upon the content of that publication. The Applicant has not commenced proceedings against the publisher of the New York Times and has thereby refrained from complaining about any reputational damage in the United States.

(39) On 23 October 2020, the applicant posted a video to TPSS on YouTube entitled "60 Minutes Australia and The Age are Fake News" which in substance claimed that the applicant had been defamed in the Broadcast by the respondents. By 23 September 2022, the applicant had:

(a) amended the YouTube Post to include a statement that, in substance, stated an Australian judge had ruled the Broadcast defamatory (**Amended Post**). The Amended Post has been published widely, including to the applicant's 553,000 subscribers to TPPS on YouTube.

(b) published to his approximately 1 million followers on Twitter a "tweet" that republished the Amended Post and which, in substance, stated that he had won his defamation case against the respondents, and that he should be awarded substantial damages.

(c) published to his approximately 1 million followers on Twitter a "tweet" that, in substance, stated that he had won the first part of his defamation case and that the next phase of the litigation was to determine the quantum of damages to be awarded to him, which would be substantial.

It is to be inferred in the circumstances that the applicant published the tweets and the Amended Post for the purposes of vindicating his reputation.

(40) On 28 September 2022, the applicant authorised his U.S. lawyer, Mr. Larry Davis, to hold a press conference in Washington D.C that communicated to the media and other persons present that the Federal Court of Australia had

found the Broadcast to be defamatory, and that his reputation had, in fact, been vindicated in whole or in part.

Applicable Legal Principles

5 The respondents seek to invoke the principle recognised in *Burstein v Times Newspapers Ltd* [2001] 1 WLR 579 as to the "directly relevant background context" operating in mitigation of damages. At the outset, it is useful to place this principle within the framework of related principles in this area of the law of defamation.

6 The basic principle as to the admissibility of evidence in mitigation of damages is that evidence that the applicant had a bad reputation is admissible, but evidence of specific conduct is not admissible, and evidence of rumours or suspicions about the applicant is also not admissible: *Fairfax Digital Australia & New Zealand Pty Ltd v Kazal* [2018] NSWCA 77; (2018) 97 NSWLR 547 at [176]-[177] (Gleeson JA, with whom McColl and Meagher JJA agreed); *Rush v Nationwide News Pty Ltd (No 2)* [2018] FCA 550 at [35] (Wigney J); *Australian Broadcasting Corporation v Chau Chak Wing* [2019] FCAFC 125; (2019) 271 FCR 632 at [94] (Besanko, Bromwich and Wheelahan JJ).

7 The rationale for the principle limiting the admissibility of evidence in mitigation of damages is "to prevent trials from becoming roving inquiries into the plaintiff's reputation, character or disposition": *Burstein* at [35] (May LJ). This is a matter of fairness to an applicant because he or she cannot be expected to come to Court prepared to defend his or her entire life. It is also a matter of good case management, in that it prevents a respondent from introducing material which has only a tenuous connection to the real issues in dispute in the proceedings: *Kazal* at [177]; *Chau Chak Wing* at [94].

8 This general exclusionary rule is relevantly subject to three exceptions:

(a) evidence properly before the Court on a defence of justification, contextual truth or honest opinion can be taken into account in mitigation of damages: *Pamplin v Express Newspapers Ltd* [1988] 1 WLR 116 at 120 (Neill LJ). Since the respondents have withdrawn all such defences, this exception is no longer relevant to these proceedings;

(b) evidence of prior convictions or judicial findings against the applicant can be taken into account, provided that they affect the same sector of his reputation as is affected by the defamatory matter: *Goody v Odhams Press Ltd* [1967] 1 QB 333 at 340-341 (Lord Denning MR, Danckwerts and Salmon LJJ agreeing); *Channel 7 Sydney Pty Ltd v Mahommed* [2010] NSWCA 335 at [249]-[254] (McColl JA, with whom Spiegelman

CJ, McClellan CJ at CL and Bergin CJ in Eq agreed; and see Beazley JA at [3]-[10]); and

(c) evidence of specific conduct by the applicant is admissible in mitigation of damages if it is "directly relevant background context" to the publication of the defamatory matter: *Burstein* at [42] (May LJ, with whom Sir Christopher Slade and Aldous LJ agreed).

9 In *Rush (No 2)*, Wigney J conducted a thorough analysis of the UK and Australian authorities concerning the *Burstein* principle, for which I am indebted. His Honour distilled the essence of the concept of "directly relevant background context" in two key passages. At [42], Wigney J said, with specific reference to May LJ's reasons in *Burstein* at [42] and [47], that the expression is a reference to:

> evidence of misconduct on the part of the claimant which, while not sufficient to make out a defence of justification, nevertheless was conduct which was in the same sector of the claimant's life as the defamatory publication and was therefore directly relevant to his or her reputation.

His Honour expressly excluded rumours or mere allegations, consistently with a long history of case law stemming from *Scott v Sampson* (1882) 8 QBD 491 (see particularly Cave J's reference at 503-4 to evidence of rumours or suspicions).

10 To similar effect at [45], Wigney J referred to passages from *Turner v News Group Newspapers Ltd* [2006] EWCA Civ 540; [2006] 1 WLR 3469 at [56] (Keene LJ) and [87]-[90] (Moses LJ) and said that:

> the facts which are able to be pleaded and proved in the mitigation of damages pursuant to the *Burstein* principle must concern specific conduct that is directly relevant to either the subject matter of the alleged defamatory statement, or the claimant's reputation in the part of his or her life the subject of the defamatory publication.

That statement of principle by Wigney J was adopted by Lee J in *Kumova v Davison (No 2)* [2023] FCA 1 at [100].

11 The present application raises a number of issues which require some further analysis beyond those statements of principle, which were no doubt apt for the particular case with which Wigney J was dealing.

12 The *first* issue concerns the use of the word "misconduct" in the first of those formulations by Wigney J. The word was also used by Gleeson JA in *Kazal* at [179], also by reference to the reasons of May LJ in *Burstein* at [42]. The word was not actually used by May LJ at either [42] or [47] of his Lordship's reasons or, as far as I can ascertain, anywhere else in those reasons.

On the contrary, one of the matters which May LJ treated as directly relevant background context was that Mr Burstein had dissociated himself from The Hecklers' boorish tactics of shouting down the opposition in a letter published in *The Times*: see [41] and particular (5) set out at [10]. Taken in isolation, that was a matter which was favourable to Mr Burstein, and could not be described as "misconduct", although in context it may have conveyed a degree of hypocrisy on the part of Mr Burstein, and thus adversely impacted his reputation. May LJ expressed the principle as applicable to "facts" which are directly relevant to context at [28] (last sentence) and [47], and that term is neutral as to the legality or morality of the particular conduct. In *Turner*, Keene LJ at [50] did use the word "misconduct", but not in a way which manifests an intention to confine the principle to that concept. At [36], Keene LJ approved May LJ's use in *Burstein* at [28] of "particular facts directly relevant to the context", and the word "misconduct" was not used in Keene LJ's ultimate distillation of the principle at [56]. Similarly, Moses LJ at [88]-[91] and Pill LJ at [94] repeatedly used the word "facts".

13 The word "misconduct" generally connotes wrongful, improper or unlawful conduct, and in many legal contexts (such as professional disciplinary matters or the conduct of company directors), it tends to connote a serious degree of wrongdoing or impropriety (such as gross negligence, or deliberate departure from proper standards). The *Burstein* principle is not so confined, as the particulars allowed in *Burstein* itself demonstrate. I have already referred to one particular which (taken on its own) was favourable to Mr Burstein. Other particulars focused on boorish, insulting and disruptive conduct, but without any suggestion of unlawfulness. The particulars were directed to alleged shortcomings in what may be regarded as the morality of Mr Burstein's conduct, treating good manners as based on the moral precept of being thoughtful of others.

14 Accordingly, in my opinion the word "misconduct" should be avoided in any general expression of the *Burstein* principle, in favour of the term "facts". That is a matter of some significance here, given that the proposed particulars are largely concerned with lawful conduct on the part of Mr Schiff and the bank under the laws of the jurisdictions in which that bank operated.

15 The *second* issue concerns the exclusion of rumours, suspicions and allegations. As I have said above, those matters have been excluded since *Scott v Sampson*, 140 years ago, in which Cave J said at 503-4 that evidence of rumours and suspicions was inadmissible as only "indirectly tending to affect the plaintiff's reputation". May LJ in *Burstein* at [28] affirmed that principle.

In the present case, the respondents rely on various investigations and what they refer to as the conclusions of various regulators and law enforcement agencies in Australia and abroad. At most, these are opinions held by those regulators and agencies as to what they perceive to be the facts. The *Burstein* principle is confined to the underlying facts, not opinions drawn by people other than the claimant as to those facts. Such opinions could only be "indirectly" relevant, because one would have to ascertain the facts (if any) on which they were based before one could say that any such facts were directly relevant. One would also need to ascertain the quality of the evidence in support of any such facts, including questions of admissibility (for example, whether the opinion in question was based on no more than hearsay or conjecture). That would produce a trial or trials within a trial, and would be anathema to principles of efficient case management.

16 The *third* issue concerns the admissibility of evidence of the beliefs or opinions of the claimant personally, as distinct from evidence of actual conduct pursuant to those beliefs or opinions. Bowen LJ famously said in *Edgington v Fitzmaurice* (1884) 29 Ch D 459 at 483 that "the state of a man's mind is as much a fact as the state of his digestion". However, his Lordship was dealing with the law of misrepresentation, not the law of defamation. In the present context, distinctions must be drawn between various states of mind on the part of the claimant and the manner of their expression, to prevent the *Burstein* principle from spilling over the sides, and producing interminable disputes on matters of (at best) peripheral relevance. *Burstein* itself provides a clear illustration of the point. May LJ at [41] (with a high degree of confidence indicated by use of the word "certainly") excluded most of particular (2) and all of particular (3) concerning Mr Burstein's actively and publicly expressed opinions as to the lack of merit of atonal music in contrast to other music, including his own compositions. Those strongly held opinions were no doubt the driving force or motivation behind Mr Burstein's actual behaviour at public performances of atonal music, but evidence of those opinions fell outside the "directly relevant" context. (Unlike Monsieur Braulard and his horny-handed squad of *claqueurs,* known as "The Romans", in Balzac's *Lost Illusions,* Mr Burstein and The Hecklers held genuine aesthetic opinions, and their services were not for sale to the highest bidder.) However, "on balance", May LJ would have allowed evidence of the tone of Mr Burstein's publicly expressed attitude to The Hecklers and what they did. May LJ added that that particular attitude would have appeared sufficiently from an appropriately confined selection of the documents, thereby reflecting a focus on efficient case management.

17 Accordingly, evidence of opinions or beliefs held by the claimant personally is admissible if they were manifested publicly and related directly to the conduct referred to in the defamatory statement, rather than to more general issues, or matters of mere motivation, concerning the conduct which is the subject of the specific defamatory statement. However, the use of the words "on balance" by May LJ indicates that this kind of evidence is close to the borderline of inadmissibility, and must be closely scrutinised for its potential impact on efficient case management.

18 The *fourth* issue is whether the *Burstein* principle should take into account that damages in defamation are not concerned solely with injury to reputation, but are also intended to reflect other factors, including the degree of injury to the claimant's feelings. The extent of such injury may well depend on the degree of vulnerability of the individual claimant to such hurt: *Turner* at [49] (Keene LJ). The distillation of the principle by Keene LJ at [56] extended the expression of the *Burstein* principle beyond evidence relevant to the subject matter of the defamatory publication or to the claimant's reputation in the relevant part of his or her life, and included express reference to the claimant's "sensitivity". Senior Counsel for the respondents in the present case places particular emphasis on that aspect of the principle. Senior Counsel for the applicant submitted that the *Burstein* principle is solely concerned with damage to reputation, not injury to feelings, but I regard that as too restrictive a view for the reasons given by Keene LJ in *Turner*.

19 I note also that it was common ground before me that particulars given pursuant to the *Burstein* principle can include facts which occurred after the initial publication of the defamatory statement, consistently with the reasoning of Lee J in *Kumova (No 2)* at [102]. Particulars (32)-(37) fall into that category, and are not objectionable because of their timing (although, as I say below, they fail for other reasons).

20 In addition to those matters, I also note that judicial reasoning as to the scope of the *Burstein* principle is typically infused with a heavy dose of discretionary case management. One of the principal objectives of this area of the law is to prevent defamation trials from becoming "roving inquiries into the plaintiff's reputation, character or disposition": *Burstein* at [35] (May LJ). In *Scott v Sampson*, Cave J referred (at 505) to the spectre of "interminable issues which would have but a very remote bearing on the question in dispute". Accordingly, May LJ referred in *Burstein* at [39] to the overriding objective of enabling the Court to deal with cases justly, including saving expense, dealing with cases in ways which are proportionate and

ensuring that cases are dealt with expeditiously and fairly, and bearing in mind that case management includes confining issues. May LJ referred to the issues concerning such particulars as "essentially procedural case management questions": at [40]. That expression was criticised in *Warren v The Random House Group Ltd* [2008] EWCA Civ 834; [2009] QB 600 at [83] (Sir Anthony Clarke MR, May and Wilson LJJ), but in my opinion it is appropriate, and correctly conveys the discretionary element in the application of the principle in particular cases. Similarly, Keene LJ in *Turner* emphasised the element of practical trial management at [34], [36] and [50]. In this Court, Lee J in *Kumova (No 2)* made similar remarks at [86] and [101],with reference to the overarching purpose of the civil practice and procedure provisions expressed in s 37M of the *Federal Court of Australia Act 1976* (Cth) (**Federal Court Act**). That overarching purpose is to facilitate the just resolution of disputes according to law, and as quickly, inexpensively and efficiently as possible.

21 Accordingly, if a proposed particular invoking the *Burstein* principle is on the borderline of "directly relevant" background, the question whether the particular should be allowed may well depend on the impact it will have on the cost and duration of the trial, and how confined the evidence going to that particular will be. Relevance is often a matter of degree. Evidence which satisfies the threshold test of relevance in s 55 of the *Evidence Act 1995* (Cth) (that is, that it could rationally affect, directly or indirectly, the assessment of the probability of the existence of a fact in issue in the proceeding) may be centrally relevant, or peripherally relevant, or may correspond to some intermediate point on that spectrum. One of the exceptions to the general admissibility of relevant evidence under s 56 is the general discretion conferred by s 135(c) to exclude evidence if its probative value is substantially outweighed by the danger that the evidence might cause or result in undue waste of time. In conjunction with s 135(c), s 37M of the Federal Court Act ensures, among other things, that the evidence will be proportionate to its relative significance to the real issues in contest.

22 Drawing all these matters together, in my view, the *Burstein* principle can be distilled into the following propositions:

(1) Facts are able to be pleaded and proved in mitigation of damages if they are facts of specific conduct of the claimant that are directly relevant to the subject matter of the alleged defamatory statement or the claimant's reputation or sensitivity in the part of his or her life which is the subject of the defamatory statement.

(2) The facts need not involve unlawful conduct or other "misconduct".

(3) Those facts do not include the opinions or beliefs of people other than the claimant concerning the claimant's conduct.

(4) The facts can include closely confined evidence of the claimant's own attitude (manifested publicly) to the conduct referred to in the defamatory statement, but not evidence of other more general beliefs or opinions held by the claimant.

(5) These propositions are subject to the application of the overarching purpose expressed in s 37M of the Federal Court Act, such that they are to be applied so as to facilitate the just resolution of disputes according to law as quickly, inexpensively and efficiently as possible.

Application to the Proposed Particulars

Permitted particulars

23 I begin by dealing first with the particulars which, in my view, should be permitted, albeit with some modification. Particulars (22) and (23) deal with what the respondents contend were lax vetting procedures of the bank or inadequate screening processes adopted by the bank, when accepting customers. In substance, those particulars are directly relevant to at least two of the imputations found to have been conveyed by the television broadcast and to Mr Schiff's reputation in the relevant part of his life, namely imputation 8.11 (that through his bank Euro Pacific, Mr Schiff poses a grave organised crime threat to Australia) and imputation 8.12 (that Mr Schiff is such an unscrupulous individual that he has no qualms about doing business with criminals and money launderers). Particular (22) suffers from the lack of any pleaded link to Mr Schiff personally, but the respondents propose to add a further sentence at the end of that particular, namely: "The foregoing process was, by reason of the matters referred to in (5) and (6) above, sanctioned and approved by the applicant". Further, in (23), the respondents propose to add after the reference to the matters referred to in (5) the words "and (6)". In my view, those particulars, together with the proposed amendments, should be allowed.

24 It follows that the particulars set out in (5) and (6) should also be allowed, those particulars going to the question of the alleged control which Mr Schiff exercised over the bank, including making decisions regarding the bank's operations. Whether or not such knowledge and control over the bank's operations extended to the processes for accepting customers will be a matter for the trial.

25 Particular (11) concerns the marketing of the bank and particularly the way in which it promoted itself as safeguarding the privacy of its customers' details, and the ease with which customers could open accounts at the bank. In substance, that is also directly relevant to the imputations to which I have referred, and to the reputation of Mr Schiff in the relevant part of his life. However, particular (11) does not contain any pleaded link to Mr Schiff personally, and accordingly the respondents propose to amend particular (11) so that the opening words read: "Between at least 2012 and 2017, by reason of (5) and (6) above, the applicant sanctioned and approved the promotion of the bank", before then continuing with the words "on its website…" to the end of the paragraph. In my view, particular (11) with that amendment should be allowed. For the same reason, I would allow particular (19), with the opening words amended to read: "From February 2017, by reason of (5) and (6), the applicant sanctioned and approved the promotion of the bank", and then continuing with the words "on its website …" to the end of the paragraph.

26 As to particular (26), I would allow sub-paragraph (c) as reflective of those paragraphs which I have allowed. The drafting of the concluding words should be amended so that the defined term "Bad Actors" is replaced by the language used at the end of particular (24) by which that term is defined. Accordingly, particular (26) should be allowed in the following form:

> It should be inferred from the inadequate customer vetting procedures adopted by the bank which were sanctioned by the applicant, that the applicant was, at least, indifferent to the prospect of people that sought to use the bank to evade paying their taxes unlawfully, engage in money laundering and/or fraud becoming customers of the bank.

That particular does concern a state of mind alleged against the applicant personally, but one which is said to have been manifested publicly by the promotional activities referred to in particulars (11) and (19), and one which concerns the applicant's attitude towards an element of the specific conduct which was the subject matter of the defamatory statements. The question whether the inference actually arises, and whether and to what extent it may mitigate damages, are questions for the trial.

27 Accordingly, I will grant leave to the respondents to file a further amended defence which contains those particulars, together with particulars (39) and (40), being the two particulars to which no objection was taken by the applicant.

Particulars which are not permitted

28 I turn now to the particulars which I do not regard as proper particulars pursuant to the *Burstein* principle. As to particulars (1)-(3), in my view these particulars are akin to Mr Burstein's opinions concerning atonal music which were rejected in *Burstein*. Particular (2) refers to Mr Schiff's "strong opposition to both the payment of income tax and the invasion of financial privacy", and particular (3) refers to Mr Schiff's views as to the constitutionality of anti-privacy laws. These are matters of political opinion, which (at most) may provide some of the motivation for the actual specific conduct which is alleged against Mr Schiff. It would take many hours to listen to all thirty-five of the broadcasts which are referred to in Annexure A, as well as reading the "several books on the topics of economics and finance" which are referred to in particular (1). Senior counsel for the respondents sought in the course of oral argument to confine those particulars to certain statements apparently to the effect that taxes are illegal and enforced by corrupt courts, and certain US legislation required the applicant or the bank to spy on the bank's customers. Those statements are not identified in particulars (1)-(3), and in any event would not take matters beyond the expression of political opinions which, at most, may provide some motivation for the alleged specific conduct. In my view, these matters fall outside the *Burstein* principle, and could not be justified in terms of the overarching purpose under s 37M.

29 Particulars (4) and (7) were not sought to be cross-referenced in any of the particulars which I have allowed, and cannot have any independent operation pursuant to the *Burstein* principle.

30 Particular (8) does not involve any conduct of the applicant, and would require an extensive review of the legal system in SVG, particularly its laws pertaining to financial regulation and privacy. Particular (9) contains the same problem, but extends the allegation to the applicant's knowledge of SVG's legal system. That knowledge could not constitute particular facts as to the applicant's conduct so as to satisfy the *Burstein* principle. Particular (10) conveys that the applicant sought to comply with SVG law and to avoid the application of other countries' legal systems, such as that of the USA. I do not regard that as a particular of specific conduct of the applicant directly relevant to the subject matter of the defamatory statements or to the applicant's reputation in the relevant field.

31 Particular (12) has now been superseded by the amendments made to particular (11), in a way which does not suffer from the problem of cross-referencing all the applicant's public statements which had previously been referred to, including those in particulars (1)-(3).

Particular (13) goes to internal matters of design of a policy to ensure privacy so as not to infringe certain US legislation. I do not see how that is "directly relevant" in the sense required by *Burstein.*

32 Particular (14) alleges decision-making by the OECD, with no reference to the applicant. Its relevance appears to be by way of explanation for the re-domiciliation of the bank to Puerto Rico in particulars (15), (17) and (18). Those allegations convey that the applicant sought to ensure compliance with the laws of Puerto Rico. To the extent (if any) to which those particulars are intended to allege an intention of promoting the bank as protective of its customers' privacy, then that is captured by particular (19) which I have allowed. Particular (16) is a set of allegations concerning the legal system of Puerto Rico, with particular reference to its financial and privacy laws, which makes no reference to the applicant personally and would involve an extensive inquiry into the detailed operation of the legal system in that jurisdiction.

33 Particulars (20) and (21) refer to a policy at the bank of rejecting US citizens and residents as customers, which does not seem to me to be "directly relevant" in the requisite sense, except to the extent that it is already captured by particular (11)(b) as a matter of the bank's promotional activities.

34 Particular (24) alleges that, given the promotion of secrecy and privacy as key attributes of the bank, it was "inevitable" that the bank in fact attracted customers who wish to maintain their privacy and avoid the disclosure of their account information to third parties, and that those customers would have included customers that sought to use the bank to evade paying their taxes unlawfully, engage in money laundering and/or fraud. In their written submissions at [25], the respondents expressly stated that they:

> will not attempt to establish that it was inevitable that tax evaders would become customers of the bank. Rather, the Respondents will seek to establish that the Applicant did not care (was indifferent as to) whether or not criminals became customers of the bank (as some did), evidenced by the wholly inadequate screening processes adopted by the bank when onboarding customers.

Given the terms of that submission, it would be pointless to allow particular (24), which makes the very allegation that the respondents' written submissions disavow. What that paragraph of the written submissions refers to by way of the respondents' actual case is the subject matter of particulars (22), (23) and (26), which I have allowed. Particular (25) does not concern specific conduct of the applicant personally, and the only directly relevant matter is the

allegation as to the applicant's role in approving the vetting procedures and publicising them, which I have already allowed.

35 Particulars (27)-(37) concern various investigations, suspicions, beliefs and opinions of various regulators and law enforcement agencies in Australia and abroad. In my view, the state of mind of parties other than the claimant is irrelevant to the *Burstein* principle. What is relevant are the underlying facts concerning specific conduct of the claimant. Those facts may have been the basis for the views held by regulators and agencies, but what matters are the underlying facts themselves, not the views of those other parties. To allow the views of the regulators and agencies as particulars would invite an inquiry as to what facts (if any) those bodies acted on, and what evidence they held in support, none of which is stated in the particulars. It may well have been sufficient for the purposes of those regulators and agencies to have relied upon matters of hearsay or conjecture, as distinct from admissible evidence of the actual facts. These particulars strike me as giving rise to a highly expensive and ultimately fruitless line of inquiry.

36 A particular matter concerns particulars (28) and (29) involving allegations concerning Mr Anquetil and Mr Wilson. This is said by Senior Counsel for the respondents to be directly relevant to the defamatory statements, because Mr Anquetil (but not Mr Wilson) was mentioned in the broadcast, and they are said to be examples of customers of the bank engaged in criminal activities. However, Senior Counsel for the respondents concedes that he is not alleging that the criminal activities in question involved those customers' bank accounts with the bank, or that Mr Schiff had any knowledge of the criminal activities of those two customers. I cannot see how allegations concerning those two customers could fall within facts as to specific conduct of Mr Schiff which was directly relevant in the requisite sense. Further, as was submitted by Senior Counsel for the applicant, these facts are not rendered directly relevant merely by reason of reference being made to them in the publication the subject of the proceedings. The same conclusion applies to the one unidentified customer referred to in particular (37) as having been convicted and sentenced in the Netherlands.

37 Particular (38) refers to a publication in *The New York Times* to similar effect to the television broadcast which is the subject matter of these proceedings, and alleging that the applicant did not commence proceedings against the publisher of that newspaper. The fact that Mr Schiff's reputation may have been damaged by another publication to the same effect as the matter complained of in these proceedings is legally irrelevant and cannot be taken into account as a basis for reducing the damages awarded to him: *Dingle v Associated Newspapers Ltd* [1964]

AC 371 at 396 (Lord Radcliffe), 405-6 (Lord Cohen), 410-412 (Lord Denning); *Hayson v The Age Company Pty Ltd (No 2)* [2020] FCA 361 at [78]-[84] (Bromwich J); *Barilaro v Google LLC* [2022] FCA 650 at [285] (Rares J). Further, the fact that Mr Schiff has not sued a US publication does not mean that he has "refrained" from complaining about reputational damage suffered in the United States. He is entitled, in these proceedings, to recover damages in respect of all loss and damage which is causally attributable to the respondents' publication, wherever in the world that loss and damage occurred: *Duma v Fairfax Media Publications Pty Ltd (No 3)* [2023] FCA 47 at [469]-[489] (Katzmann J).

Conclusion

38 Accordingly, I grant leave to the respondents to file a Further Amended Defence, in accordance with the draft which was served pursuant to the order which I made on 14 April 2023, but limiting the particulars of background facts in paragraph 14 to the particulars which I have indicated above (as amended) should be permitted.

39 As to costs, the respondents are seeking to amend their pleadings, and must pay the costs thrown away by those amendments. As to the costs of the application to amend, the success enjoyed by the respondents concerns only seven of the thirty-eight contested particulars (two of them being uncontested). Five out of those seven particulars were further amended during the course of oral argument before me. In those circumstances, the applicant was justified in opposing leave to file the proposed Further Amended Defence, and has been substantially successful in its opposition. Accordingly, in my view, the respondents should pay the applicant's costs of the application to amend the Further Amended Defence.

40 I will list the matter at 9.30 am on 30 June 2023 for a further case management hearing to lay down a timetable for the preparation of the matter for hearing. I propose to fix a hearing date on that occasion.

I certify that the preceding forty (40) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Jackman.

Associate:

Dated: 23 June 2023

SCHEDULE OF PARTIES

NSD 1086 of 2021

Respondents

Fourth Respondent:	CHARLOTTE GRIEVE
Fifth Respondent:	JOEL TOZER