

FEDERAL COURT OF AUSTRALIA

Schiff v Nine Network Australia Pty Ltd (No 7) [2023] FCA 1432

File number(s): NSD 1086 of 2021

Judgment of: **JACKMAN J**

Date of judgment: 21 November 2023

Catchwords: **PRACTICE AND PROCEDURE** – interlocutory application for leave to apply under 28 United States Code §1782 for the production of documents by the trustee of the Euro Pacific Bank in Puerto Rico – principles of case management – where the documents in question may shed light on the issues in dispute at the final hearing – where the grant of leave will occasion a substantial delay to the date of the final hearing – application dismissed

Legislation: *Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*, opened for signature 15 November 1965, 658 UNTS 163 (entered into force 10 February 1969)
Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, opened for signature 18 March 1970, 847 UNTS 231 (entered into force 7 October 1972)
28 United States Code §1782

Cases cited: *Jones v Treasury Wine Estates Limited* [2016] FCAFC 59; (2016) 241 FCR 111
Lavecky v Visa Inc [2017] FCA 454
White Oak Commercial Finance Europe (Non-Levered) Limited v Insurance Australia Limited [2022] FCA 1587

Division: General Division

Registry: New South Wales

National Practice Area: Other Federal Jurisdiction

Number of paragraphs: 16

Date of hearing: 16 November 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: **21 NOVEMBER 2023**

THE COURT ORDERS THAT:

1. The amended interlocutory application dated 9 November 2023 be dismissed.

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

REASONS FOR JUDGMENT

JACKMAN J:

- 1 This is an application by the respondents for leave to apply under §1782 of Title 28 of the United States Code in the United States District Court for the District of Puerto Rico for the production by Mr Mender, the Receiver and Trustee of the Euro Pacific International Bank, Inc. (the **Trustee**) of the classes of documents identified in the draft application exhibited to the affidavit of Mr Bartlett, the respondents' solicitor, dated 2 November 2023. The application was foreshadowed at a case management hearing on 30 June 2023 as a matter which may arise depending upon what the applicant was able to discover by way of documents under his control: T11.13-20. On that occasion, I fixed the matter for hearing with a five-day estimate commencing on 29 January 2024, and I also made orders for the giving of standard discovery and the preparation of evidence.
- 2 As a matter of the supervision by this Court of its own proceedings and pre-trial processes, a party wishing to make an application pursuant to §1782 should not do so without the prior knowledge and approval of this Court: *Jones v Treasury Wine Estates Limited* [2016] FCAFC 59; (2016) 241 FCR 111 at [48] (Gilmour, Foster and Beach JJ). In making such an application, the respondents are seeking permission from the Court to take a procedural step in the proceedings before it, having regard to the Court's role in just and efficient case management, although any approval by this Court does not speak to the ultimate outcome of the applications in the United States courts: *White Oak Commercial Finance Europe (Non-Levered) Limited v Insurance Australia Limited* [2022] FCA 1587 at [20] (Allsop CJ). In that case, Allsop CJ approved at [21] the list of non-exhaustive factors having a bearing on whether the Court ought to approve an application of this kind provided by Perram J in *Lavecky v Visa Inc* [2017] FCA 454 at [18]-[19], namely:
- (a) whether general case management principles favour the application;
 - (b) the importance of the material sought by the §1782 application. The more important, the more likely the application ought to be successful;
 - (c) whether there are alternative methods available for obtaining the material the subject of the §1782 application;

- (d) whether the materials sought by the §1782 application undermine the procedural limitation in this jurisdiction, for example the Court is generally unwilling to permit fishing expeditions or order depositions;
- (e) the likely cost to the parties;
- (f) the proportionality of the §1782 applications, namely what is at stake in the proceedings;
- (g) whether the proposed proceeding under §1782 is frivolous, or obviously doomed to fail;
- (h) the length of time the applications will take to resolve, and the likely impact on preparing the matter for trial; and
- (i) whether the imposition of conditions is necessary to address any issues arising from the above.

3 There were various delays by the applicant in giving discovery, but his affidavit of documents was ultimately provided on 28 September 2023. Part 3 of the applicant's list of documents referred to documents which Mr Schiff once had the power to obtain upon request in his capacity as director of Euro Pacific Bank but which he did not obtain prior to the bank being placed into receivership, and the documents are now stated to be in the control of the trustee of Euro Pacific Bank. That appears to be a reference to the Trustee, who was appointed on 30 June 2022 by the Office of the Commissioner of Financial Institutions of Puerto Rico, and who is based in Puerto Rico in the United States of America.

4 The documents which are proposed to be sought by way of order pursuant to §1782 are as follows:

- I. Copies of documents or images recording or evidencing the following parts of the Bank's website, including cached or historic webpages of those pages:
[there are then set out 14 URLs with the relevant dates]
- II. For the period 2011-present, marketing material issued by or on behalf of the Bank to referral agents, correspondent banks, corporate partners and/or prospective customers, including but not limited to flyers, brochures, slide shows and newsletters.
- III. For the period 2011-present, documents evidencing or recording the customer approval requirements of the Bank, including:
 - a. policy documents describing the types of customers that were acceptable to the Bank and the information and/or documents that must be provided by those prospective customers; and

- b. the nature and extent of any inquiries, checks or investigations required to be undertaken or ordinarily undertaken in respect of a prospective customer.
- IV. For the period 2011-present, board and management documents, correspondence with Peter Schiff, or any other documents evidencing or recording the sanctioning, adoption and/or approval of those requirements by Peter Schiff (either alone, as a member of the board of directors, or otherwise).
- V. For the period 2011-present, documents evidencing or recording the customer approval process, including:
 - a. pro forma application or registration forms to be completed by customers; and
 - b. documents identifying the information and/or documents that must accompany applications.
- VI. For the period 2011-present, board and management documents, correspondence with Peter Schiff, or any other documents evidencing or recording the sanctioning, adoption and/or approval of the process(es) by Peter Schiff (either alone, as a member of the board of directors, or otherwise).
- VII. For the period 2011-present, training manuals and memoranda provided to employees of the Bank responsible for the onboarding of customers, identifying the process to be adopted for the onboarding of new customers.
- VIII. For the period 2011-present, board and management documents, correspondence with Peter Schiff, or any other documents evidencing or recording the sanctioning, adoption and/or approval of those documents and processes by Peter Schiff (either alone, as a member of the board of directors, or otherwise).
- IX. For the period 2011-present, documents evidencing or recording the use of third-party referral agents in any aspect of customer vetting and onboarding, including policies, training manuals and memoranda.
- X. For the period 2011-present, board and management documents, correspondence with Peter Schiff, or any other documents evidencing or recording the sanctioning, adoption and/or approval of those documents and processes by Peter Schiff (either alone, as a member of the board of directors or otherwise).

5 Mr Bartlett gives evidence at [45]-[47] of his affidavit of 2 November 2023 that the applicant's discovery has only produced some, but not all, documents that shed light on the following issues which he regards as being in dispute for the final hearing:

- (a) whether between at least 2012 and 2017, the applicant sanctioned and approved the promotion of Euro Pacific Bank on its website and in marketing material as alleged in particular (3) of background facts in the further amended defence;
- (b) whether from 2017, the applicant sanctioned and approved the promotion of Euro Pacific Bank on its website and in a Financial Institution Presentation

dated 6 September 2020, as alleged in particular (4) of background facts in the Further Amended Defence;

- (c) whether the applicant sanctioned and approved inadequate customer vetting procedures at Euro Pacific Bank to make the bank as attractive as possible to prospective customers as alleged in particulars (5)-(7) of background facts in the Further Amended Defence; and
- (d) whether the applicant's hurt to feelings has been increased by the maintenance by the respondents of the particular of mitigation concerning "lax compliance with the bank, its promotion of privacy, and [Schiff's] control of the bank", as alleged in [2](k) in the Further Particulars.

6 By way of example of the limited production of documents by the applicant, Mr Bartlett gives evidence to the following effect:

- (a) limited screenshots of the Euro Pacific Bank's website have been produced, in that Mr Schiff has discovered one screenshot for September 2016 and one for October 2016. Other screenshots have been discovered of Euro Pacific Bank's website but the date is unclear on the face of the documents. No screenshots have been produced for the years 2012-2015 or 2017-2020, although other screenshots appear to be available from internet searches which Mr Bartlett has caused to be made;
- (b) apart from screenshots of Euro Pacific Bank's website listed as "captured on 10 August 2023", Mr Bartlett considers that only six discovered documents could be described as customer approval processes, of which one is dated 2012, one is dated 2016, one is dated 2019, two are dated 2021 and one is undated;
- (c) one document from 2016 has been produced in which the applicant sanctioned or approved a Euro Pacific Bank policy concerning Anti-Money Laundering and Counter Financing of Terrorism compliance, that document bearing the applicant's signature in his capacity as its chairman;
- (d) it appears as though the only marketing materials discovered by the applicant are screenshots of the Euro Pacific Bank's website, most of which are listed in the applicant's affidavit of documents as having been captured on 10 August 2023; and

- (e) aside from one document which could be described as a training manual, namely the EPB Onboarding Manual as at October 2019, the applicant has not produced any training manual concerning the Bank's onboarding processes.

7 Mr Bartlett believes that there are further documents that may be in the control of the Trustee that record or evidence the applicant authorising or sanctioning various documents that would be relevant to the respondents' further amended defence, and therefore the respondents seek to compel the Trustee to produce documents that should shed light on the disputed issues. However, senior counsel for the respondents did not put the argument as high as to suggest that the documents proposed to be sought pursuant to the §1782 application are essential to the respondents' case.

8 I accept that the documents which are sought from the Trustee would be relevant to the resolution of the issues between the parties. Further, I accept on the basis of Mr Bartlett's evidence, that some documents of the kind sought by way of the proposed §1782 application are in fact likely to exist in the hands of the Trustee, consistently with the statement in Part 3 of the applicant's list of documents. However, some of the force of the respondents' position has been removed by a concession by senior counsel for Mr Schiff (at T28.26-30.5) that objection will not be taken to the tender of documents which have been sourced from the "Wayback Machine", being a digital archive which enables the recovery of historical material which once appeared on the internet. It appears that the material sought by way of historic webpages from the Euro Pacific Bank's website will be obtainable through the "Wayback Machine", and thus there is no longer any need to establish the authenticity of such documents by more traditional means. Further, the reason for the respondents seeking the promotional material (item II in the draft application) was said to arise from their dilemma in proving the historical content of the Bank's website (T17.45-46), and that problem has now been resolved.

9 Mr Bartlett has considered whether there is another method by which the relevant documents could be obtained from the Trustee. He refers to the *Convention on the Taking of Evidence Abroad in Civil or Commercial Matters*, opened for signature 18 March 1970, 847 UNTS 231 (entered into force 7 October 1972) and the *Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*, opened for signature 15 November 1965, 658 UNTS 163 (entered into force 10 February 1969) to which both Australia and the United States are signatories. However, Mr Bartlett describes these alternative methods as facultative and not mandatory, and in his experience they are unreliable and associated with

delays. He has also received advice from the respondents' Puerto Rican counsel to the effect that the §1782 application is a superior method in the United States because it is more expeditious, efficient and economical.

10 As to the costs to be incurred in the proposed §1782 application, the respondents will bear the costs of that application themselves, and seek only that the costs be costs in the cause in this Court. The respondents recognise that it would be premature at this stage to make any order for costs of the application in the United States, and contend that those costs should be reserved.

11 That brings me to the issue of the impact of the §1782 application on the final hearing in these proceedings, a factor which arises in a starker way in the present application than might appear from the reference by Perram J in *Lavecky v Visa Inc* to the length of time the applications will take to resolve, and the likely impact on preparing the matter for trial. Mr Bartlett has been informed by Puerto Rican counsel for the respondents that in the event that the respondents file the §1782 application, it is estimated that obtaining the requested order authorising discovery could take between three to six months, although it may take less than eight weeks if circumstances are favourable. Once there is an order allowing the discovery, the Trustee would have 14 days (from the date of service) under the order to produce the documents. However, the granting of a request for an extension of time or an objection or a motion to quash the subpoena could further prolong the process. Senior counsel for the respondents accepts that the approval by this Court of the making of the §1782 application would have the inevitable consequence that any documents produced as a consequence would not be available prior to the hearing commencing on 29 January 2024, and therefore that hearing would need to be vacated if the Court considered it appropriate to approve the §1782 application. That concession appears to me to be properly made, given that, although there is a slight or theoretical possibility of the documents being produced by 29 January 2024, the overwhelming likelihood is that they would not be, and the parties and their witnesses need to plan their commitments for late January on a more secure basis than would be available if I approve the §1782 application. Accordingly, it is necessary for me to weigh the relative importance of the documents which may potentially be produced as a result of the §1782 application against the consequences of vacating the hearing scheduled for 29 January 2024. At the hearing before me there was extensive discussion about when any adjourned hearing would be able to be conducted, the ultimate outcome being that the earliest time when the parties, Mr Schiff and the Court itself would all be available for the trial on damages would be in the week

commencing 2 September 2024. Accordingly, vacating the hearing will result in a delay of a little over seven months in the hearing.

12 The proceedings were commenced on 15 October 2021. Ordinarily, in my view, a defamation proceeding should be heard and decided within 12 months of its commencement. If I were to vacate the hearing, it would lead to a position where the matter will not be resolved until almost three years from its commencement. In my view that would be an unjust imposition on the applicant, who has succeeded in establishing liability, and now awaits a hearing on the quantification of damages to compensate him for the wrongful conduct. I do not regard an award of pre-judgment interest as being sufficient to eliminate the consequences of that delay. In making those comments, I am not attributing the responsibility for the delay to either party and I note that about four months passed while the parties waited for the Court to reallocate the matter to me. While the matter may have been different if only a short period of delay were to be occasioned by vacating the trial date, in my opinion a further delay of about seven months is not justifiable, despite the significant (but uncertain) benefits which the §1782 application may yield to the respondents. As I have indicated above, the respondents do not pitch their argument as high as to suggest that those documents are essential to their case. Accordingly, in my view the application for approval to make the §1782 application should be dismissed.

13 For completeness, I note that the applicant also relied in his argument on a letter by the solicitors for the respondents dated 13 July 2023 in which they foreshadowed the §1782 application and said the following at para 4.4:

Without wishing to be exhaustive, the trustee is likely to be in possession of at least the following categories of documents:

- (a) documents concerning the promotion of the Bank, including promotional documents concerning the process for the opening of accounts by prospective customers;
- (b) board and management documents evidencing or referring to the adoption and approval of those promotional documents;
- (c) documents evidencing the customer approval requirements of the Bank, including policy documents describing the types of customers that were acceptable to the Bank and the information and/or documents that must be provided by those prospective customers;
- (d) board and management documents evidencing or referring to the adoption and approval of those policies and requirements;
- (e) documents evidencing the customer approval process, including pro forma application or registration forms to be completed by customers and documents identifying the information and/or documents that must accompany

applications;

- (f) board and management documents evidencing or referring to the adoption and approval of those documents;
- (g) training manuals and memoranda provided to employees of the Bank responsible for the onboarding of customers, identifying the process to be adopted for the onboarding of new customers; and
- (h) board and management documents evidencing or referring to the adoption and approval of those documents.

The solicitor for the applicant responded by email on 26 July 2023 saying the following:

Mr Schiff is in possession of some limited documents which may correspond with subparagraphs 4.4(c), (d), (e) and (g) of your letter. These documents will be included in Part 1 of his affidavit of discovery of documents.

Mr Schiff does not know whether any further documents are in the possession of the trustee of Euro Pacific Bank.

The solicitors for the respondents responded by letter on 4 August 2023, complaining about the inadequacy of that response and made a number of “urgent requests” relating to discovery by the applicant and asked whether the applicant would oppose the respondents seeking the Court’s approval for an application to seek relevant documents from the Trustee. The solicitors for the applicant responded by letter on 13 August 2023, noting that, at the case management hearing on 30 June 2023, senior counsel for the respondents had indicated to the Court that any application for approval to seek documents from the Trustee of Euro Pacific Bank would be made after discovery, and said that that was the appropriate course.

14 Accordingly, the respondents submit (at T12.41-42, T39.18-27), and I accept, that the parties were in agreement that the appropriate time at which the respondents should make any such application was after the applicant had given discovery, which did not occur until 28 September 2023. In light of those circumstances, I do not think that the respondents can be criticised for delay in bringing the present application.

15 Senior counsel for the applicant also made a number of strong criticisms of the conduct of the respondents in obtaining an interview with Mr Schiff in 2020 for the purpose of the publications which have given rise to these proceedings. Criticism was also made of the respondents by reference to their attempt to open an account at Euro Pacific Bank, which was unsuccessful. It is not necessary for me to make any findings concerning those matters, and I do not give them any weight in relation to the present application. I do not think it is desirable that I express any views in relation to those matters, particularly given that there appears to be a real prospect that those matters will resurface at the final hearing on damages.

16 Accordingly, I confirm that the hearing as to damages will proceed in the week commencing 29 January 2024. I dismiss the amended interlocutory application dated 9 November 2023.

I certify that the preceding sixteen (16) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Jackman.

Associate:

Dated: 21 November 2023

SCHEDULE OF PARTIES

NSD 1086 of 2021

Respondents

Fourth Respondent: CHARLOTTE GRIEVE

Fifth Respondent: JOEL TOZER